

Gezel Akum - Part I

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INTRODUCTION

The subject of *gezel akum* is a complex one in which we must not only determine the strict halacha of what is permitted and forbidden, but also what is ethically and morally right and wrong, even if the halacha may permit the action. In this overview, we will aim to provide the context for the various discussions and opinions on *Gezel Akum*, *ta'us akum*, and *hafka'as halva'a*.

THE TALMUDIC OPINIONS CONCERNING GEZEL AKUM

The Gemara (Bava Metzia 111b) indicates that the question of whether *gezel akum* is *mutar* or *assur* is a *machlokes tana'im*, without a definitive ruling. In Bava Kama (113a-b) the Gemara discusses the issue in more detail. There as well, the Gemara first analyzes a *baraisa* that appears to portray the permissibility of *gezel akum* as a *machlokes Tana'im*. However, the Gemara in Bava Kama concludes definitively that *gezel akum* is *assur* (though Acharonim discuss whether the *issur* is a biblical or rabbinic one).

What is the rationale to suggest it would be permitted to steal from an Akum? Do those opinions in the Gemara believe that it would be permitted to rob a bank or maliciously destroy the property of an Akum? In addition, it is interesting to note that the Gemara cites the source for forbidding *gezel akum* (according to the opinions that forbid) as being a *pasuk* concerning an *eved ivri* who is sold to an Akum. If the *eved ivri* wishes to stop his service in the middle, the Torah states "*v'chishav im koneihu*" (Vayikra 25:50), he must calculate how much money he owes to his owner for the work he does not do and

compensate the owner accordingly. The Gemara thus states that since the *eved ivri* may not simply leave, this indicates that *gezel akum* is *assur*. Why does the Gemara not employ the regular *pasuk* of *lo sigzol* as the source for *gezel akum*? Apparently, the nature of the prohibition of *gezel akum* is different from the standard prohibition of *geneivah* or *gezeilah*.

THE DIFFERENCE BETWEEN GENEIVAH AND GEZEILAH

In order to better understand the basis for the *machlokes*, let us analyze the Rambam's presentation of the categories of *gezeilah* and *geneivah* in Mishneh Torah and the slight nuances between them.

The Rambam (Geneivah 1:1) writes that one who is "*goneiv mamon mishaveh perutah v'maalah oveir al lo ta'aseh, shene'emar lo tignovu*," "One who steals money worth the value of a *perutah* or more thereby transgresses a negative prohibition, as it states, 'Do not steal.'" The Magid Mishneh explains that although the Rambam refers to a *shaveh perutah*, even one who steals a smaller amount has still violated the prohibition. This is similar to the concept of *chatzi shiur* regarding the consumption of a forbidden food, where even less than the minimum amount of a prohibition is still *assur*.

In contrast, the Rambam by Gezel (Gezeilah V'aveidah 1:1) writes that one who is "*gozeil es chaveiro shaveh perutah oveir b'lo ta'aseh shene'emar lo tizol*," "One who steals the value of a *perutah* from another transgresses a negative prohibition, as it states, 'Do not steal.'" In contrast to *Hilchos Geneivah*, where the Rambam mentions stealing a *shaveh perutah* "or more," the Rambam here simply mentions stealing a *shaveh perutah*.

Another difference between the Rambam's formulation concerning *gezeilah* and *geneivah* directly relates to our issue of stealing from an Akum. With regard to *gezel*, the Rambam states in a separate halacha (Gezeilah 1:2) that it is "*assur ligzol kol shehu din torah, afilu goy oveid avodah zarah, assur ligzol*," "It is forbidden to steal any amount according to the Torah; even from an Akum who worships idols, it is forbidden to steal." With regard to *geneivah*, though, the Rambam includes the prohibition of *geneivah* from an Akum in the original halacha, saying that the prohibition applies to an Akum as well. What is the reason for the difference in wording?

The Brisker Rav related in the name of his father R' Chaim Soloveitchik that these differences can be explained based upon an underlying distinction between *geneivah* and *gezeilah*. On the surface, the main difference is what Rashi writes in Parshas Mishpatim, that *gezel* is defined as stealing publicly, while *geneivah* is defined as stealing secretly. However, the Rambam is giving a deeper insight. The Gemara (Bava Metzia 60b) indicates clearly that *gezel* is a general term referring to any financial wrongdoing that the Torah does not condone. For example, withholding wages from an employee, although it is not actively stealing from him, is still referred to there as *Gezel*. Likewise, not returning interest that was received in a forbidden manner is also referred to as a form of *gezel*, as well as avoidably defaulting on a loan (though if one hired or borrowed initially with intent not to pay, it may qualify as actual *geneivah*). Thus, the term *gezel* appears to be used to define any case of financial wrongdoing that involves **withholding the possessions of another**, even if there was no specific act of theft.

Another example of *gezeilah* that does not necessarily constitute an act of stealing can be found in a Gemara in Bava Metzia (26). The Gemara discusses a case where Reuven sees Shimon drop an item (e.g. a bag of groceries) that has a *siman* and Shimon has not yet realized that he dropped it, so *ye'ush* (despair of the owner that he will retrieve it, rendering it ownerless) has not yet occurred. If Reuven picks up the item in order to acquire it for himself, he is considered a *gazlan*, since it still belongs to the original owner. But if Reuven picked up the item with intent to return it, but then decided to keep it for some reason (e.g., his *yetzer hara* convinced him to take it or it was too difficult to return) he violates the mitzva of *hashavas aveida* but not the *issur* of *gezel* since his initial intention was to return it. Thus, *gezel* would be defined as having an item in a financially inappropriate manner (such as picking up the lost object with intent to keep it), even

if one does not steal directly from the owner.

Yet another example of this definition of *gezeilah* can be seen from the case of a *mazik*, one who damages. Although the obligation of compensation for causing damage is discussed in Bava Kama numerous times, it never directly discusses a specific prohibition against causing damage (such as causing a car accident through negligence). Rishonim offer numerous approaches for the basis of the prohibition to damage, one of which is that it is subsumed under the *issur gezel* (Rabbeinu Yonah). The reason for this is the same principle as above; any act that causes a financial loss, even if not actually defined as stealing, is considered *gezel*.

Geneivah, on the other hand, would be defined as actually removing an item from the possession of another without permission.

Support for this definition of *geneivah* can be found in a different passage in the Gemara (Bava Kama 27a), which cites a tremendous *chiddush* in the name of Ben Bag Bag. According to Ben Bag Bag, one who secretly trespasses into the property of another at night to retake one's own items that were stolen from him, violates the prohibition of *geneivah*. Why, though, would one be considered stealing when simply retrieving an object that belongs to him? The answer is that any act of thievery (such as entering someone else's property to appropriate an object) is inherently defined as a *ma'aseh issur*, even if one is taking back his own possessions or money. Although the halacha may not be in accordance with Ben Bag Bag, his *chiddush* illustrates the point that *geneivah* can be defined as any act of thievery, irrespective of the loss to the victim.

Based upon these definitions, R' Chaim explains that the Rambam writes that the *issur geneivah* applies to stealing "*shaveh perutah v'malah*" because the focus is on the act of thievery. Regardless of how much is stolen, it is defined as one act of theft. In contrast, the Rambam formulates the *issur gezeilah* as stealing a "*shaveh perutah*" because the focus is upon the loss -- every *shaveh perutah* that one steals is considered a separate *aveirah*, since it causes an additional loss to the owner.

GENEIVAS AKUM VS. GEZEL AKUM

This principle also explains the difference between the Rambam's depiction of *gezel akum* and *geneivas akum*. Chazal never entertained the notion that an act of thievery, i.e., *geneivah*, is permitted, even from an Akum. It is always

forbidden to rob a bank or similar act of theft, regardless of the identity of the victim. For this reason, the Rambam includes the prohibition of *geneivas akum* together with standard *geneivah*, since the *issur* is identical. However, the discussion in the Gemara and Rishonim with regard to *gezel akum* concerns whether the Torah is as sensitive to the financial loss of an Akum as it is to that of a Jew. Those who would permit *gezel akum* understand that the Torah is specifically concerned with preventing financial loss to a Jew, but we are not obligated to be as sensitive to the financial loss of an Akum.

According to the above, we can now understand the context of the discussion around *Gezel Akum*. No opinion is suggesting one may commit acts of thievery or aggression against the person or property of an Akum. The entire conversation of the Gemara in Bava Kama is referring to kinds of financial loss that does not involve direct stealing, which is included in the category of *gezeilah*. Even there, the Gemara concludes that it is prohibited. This *issur*, though, may not be on the same level of severity as the standard *issur* of *geneivah* or *gezeilah*, as evidenced from the Gemara's source for forbidding *gezel akum* as being from *eved ivri*. This is why the Rambam in *Hilchos Gezeilah* adds a separate halacha (1:2) stating that *gezeilah* from an Akum is forbidden, because this prohibition, which applies to causing financial loss to an Akum, is distinct from the standard one of *gezeilah*, and have a less severe status. Indeed, the Shach (C.M. 359) cites the Yam shel Shlomo that *gezel akum* is altogether a *derabbanan* prohibition.

GEZEL AKUM VS. HAFKA'AS HALVA'ASO

Another point that is more readily understandable based on this explanation is the distinction between *gezel akum* and *hafka'as halva'aso*. The Gemara in the same *sugya* in Bava Kama states that even if *gezel akum* is *assur*, *hafka'as halva'aso*, defaulting on a financial commitment to an Akum (e.g. not repaying a loan), is *mutar*. Likewise, the *aveidah* of an Akum need not be returned, as well as money he gave away in error. However, even this leniency is limited according to many Rishonim, who distinguish between a case where one actively tricked an Akum (*Mateh Akum*) as opposed to where one simply capitalized on a mistake that an Akum made (*Ta'os Akum*). In the former case, known as "*hit'ahu*," benefiting financially from the action is *assur* and is defined as an act of *gezel* according to many opinions. For example, creating an online scheme where customers order and pay for an item with a credit card but never actually receive the item is included in this category and is forbidden. It is

only when there is no act of impropriety on the part of the Jew, what is known as *ta'os akum*, benefiting from his mistake, that would be permitted, as recorded in the Rema (C.M. 348:2). Thus, if the Akum erred and a Jew was not charged the amount of money that he should have paid, it is permitted for the Jew to keep the money since the mistake was made by the Akum alone.

CHILUL HASHEM AND THE MORAL IMPERATIVE

The Gemara makes another important point concerning the relevance of *chilul Hashem* to our discussion. The Gemara declares that although *gezel akum* is forbidden, it is permitted to keep the lost object of an Akum. The exception would be in a scenario where a *chilul Hashem* is created, in which case it is still *assur*. The formulation of the Gemara seems to indicate that the consideration of *chilul Hashem* transforms a permitted action into one of actual *gezel*. The Rambam also implies this when he states (*Gezeilah* 11:3) that it is permitted to keep the lost object of an Akum unless a *chilul Hashem* is involved, in which case it is *assur*.

What is defined as a case of *chilul Hashem*? Generally, if others are aware of one's deception and techniques of duplicity, it is considered a case of *chilul Hashem*. In contrast, the cases in the Gemara where *chilul Hashem* is not present refer to where no one realizes that trickery is being utilized. In these cases, it is permitted.

Although as we have discussed, *hafka'as halva'aso* and benefiting from *ta'os akum* are permitted in cases where no *chilul Hashem* exists, one still needs to address whether it is morally and ethically appropriate to engage in such behavior. Clearly, the guidelines developed here are not black and white, and even when a particular action could be permitted, it may still be recommended to avoid it. The Be'er HaGolah (C.M. 348) famously comments that many of the people who made their fortunes due to the financial mistakes of an Akum [even though they were technically permitted] did not merit to maintain their wealth. For these reasons, one must ask specific *shailos* when situations arise.