

Arkaos

PART 2

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

SWITCHING FROM ARKAOS TO DIN TORAH:

The Rema [C.M. 26] speaks about a case where someone flouts halacha and pursues a claim in a secular court. After the man loses in court, he has a change of heart and wants his case heard in Bais Din. The Rema cites two opinions on whether or not Bais Din will accept this case and give the party the opportunity to have his case heard again. He rules according to the opinion that Bais Din will not accept this case.

There are two explanations offered by the Acharonim as to why Bais Din won't accept such a case. The first explanation is based on a Gemara that if a litigant agrees to allow an invalid judge, such as a close relative, to serve on his *din Torah*, the Bais Din's ruling is valid and the party cannot invalidate it by claiming that this judge should not have been allowed to be a *dayan*. There is a *machlokes* if the same halacha applies if the litigants agree to allow a non-Jew to serve as a *dayan* on a Bais Din. According to this explanation, going to a secular court has the same status as agreeing to allow a non-Jew to sit on a Bais Din, and because the litigant consented to this judge's adjudication, the decision is binding. The Tumim rejects this explanation, as it seems that normative halacha does not follow the view that one can accept a non-Jew as a *dayan* in order to make his ruling binding. Therefore, he prefers the second explanation, which is that the reason Bais Din will not hear this man's case is to punish him for going to secular court. Since he did the wrong thing and pursued his case in a non-Jewish venue, Bais Din will penalize him by not permitting him the potential benefit of having it reheard by them.

The Poskim say that this *p'sak* of the Rema only applies after the non-Jewish court delivered its verdict. If the litigant wants to do *teshuvah* while the proceedings are still pending and the case is still in the middle of being heard – really, anytime before a ruling has been issued - and wishes to transfer the case to Bais Din, then Bais Din will accept the case.

It should be noted that there is a cryptic line in the Divrei Chaim that seems to indicate a caveat to this ruling. He says that Bais Din will not accept a case that is ongoing in a non-Jewish court unless the errant party is willing to pay all of the expenses and court fees. He seems to be referring to this sort of case that is pending and a ruling has yet to be issued by the secular court,

because if the case had already had a verdict, Bais Din wouldn't accept it whether the party agrees to pay the court fees or not. Thus, the implication is that even if the litigant transfers the case to Bais Din in the middle of the court proceedings, Bais Din will still only hear it if he agrees to pay all of the accrued court fees. Teshuvos Vehanhagos writes this explicitly, that Bais Din will only accept such a case if the plaintiff who brought the case to a secular court agrees to pay the defendant's legal fees that arose because he was forced to go to non-Jewish court.

Having said this, in my experience contemporary Batei Din do not seem to follow this custom, and they will accept a case that is still pending in secular court without requiring him to pay the defendant's legal fees. Of course, the Acharonim do clearly say that Bais Din should not accept the case until the party that brought the case to secular court officially drops his claim in court.

CONTRACTS THAT RECOGNIZE SECULAR LAW:

There is an unfortunately common practice of people writing into contracts that any disputes will be decided under the jurisdiction of secular courts. We recently came across a contract that says that any dispute will be arbitrated by the American Arbitration Association. This association works with a system that is, *l'havdil*, somewhat similar to the concept of "*zablah*". Each party chooses one licensed arbiter, and these two choose a third. Together, this secular board issues a ruling on a dispute.

This leads to the question of whether or not one is permitted to sign such a contract. Furthermore, if this contract is signed and a dispute subsequently ends up in Bais Din, is the Bais Din obligated to adjudicate the case according to secular law?

The Tur quotes the Baal Haterumos as saying that if the two parties sign a contract that says that all disputes will be heard in a secular court, and they make a *kinyan* to this effect, if this court would rule in a similar way to a Bais Din, which means that neither party has an advantage by going to court, it is forbidden to go to the secular court because this would be granting that judicial body more prominence than a Bais Din, which is prohibited by halacha. If, however, the court will rule differently than Bais Din, which means that one party will have

an advantage by going to the secular court, the agreement is binding because it was made with a *kinyan* that granted the party this financial advantage, and the other party has no right to take this advantage away from him. Thus, even though granting this advantage involves going to a non-Jewish court, the parties can be forced to do that.

The Tur then cites the Rosh as an opposing view to the Baal Haterumos. In the case of the Rosh, he writes that the verbiage of the contract was that “any dispute can be litigated in Jewish court or secular court”. The Rosh interprets that this does not mean that either party can be compelled to go to a secular court; rather, it means that if it is not possible to pursue the claim in a Jewish court, there will be an option to go to secular court. However, if one side is willing to go to a Jewish court, he cannot be compelled to accept the option of going to a secular court. The Rosh says that not only are the parties not bound by the agreement to go to the secular court, they are in fact forbidden from doing so.

It should be noted that the Bais Yosef argues on the Tur’s interpretation of the Baal Haterumos and says that it is not clear that even the Baal Haterumos actually permits going to secular court in the way the Tur quotes him.

Regarding the Rosh’s opinion, the Sema posits that he only seems to be saying that when the wording is written in the vague way that he describes, then no one can be compelled to go to secular court. If, however, the contract states unequivocally that all disputes will be heard in a secular court, the Rosh would agree that if one side has an advantage in non-Jewish court, he can force the other party to have the case heard there.

The Shach disagrees with the Sema and says that the Rosh’s opinion is that one can never be compelled to accept the authority of a secular court over a Bais Din, as this would be against the Torah and one cannot be forced to do something that is contrary to halacha. He does agree, however, that if the contract explicitly says that any dispute will be heard by one specific non-Jewish judge, then the parties can be compelled to go to that judge, as they both clearly agreed to accept his arbitration.

The Taz also disagrees with the Sema and says that it is impossible to say that a commitment to go to a secular case is ever binding. He explains that the Rosh mentioned the

ambiguity of the wording of the contract not because a more explicit wording would require going to secular court, but rather because he was addressing a different issue entirely. The Rosh was explaining how it would be permitted to sign this contract in the first place, as it contains a clause that is seemingly against halacha. He answers that because the clause is vague, it can be interpreted in a way that it is not a commitment to do an *aveirah* of going to a secular court, and, therefore, it is not forbidden to sign. If, however, a contract would explicitly say that all disputes will be adjudicated in a secular court, it would be forbidden to sign it altogether.

If one did sign a contract that says that disputes will be heard in a secular court, the halacha seems to follow the view that any dispute still must be brought to Bais Din. Still, numerous Acharonim, including the Nesivos Hamishpat, Tumim, and Bais Shlomo, say that in such a scenario, the Bais Din will be compelled to rule according to secular law, rather than according to halacha, as this is the arrangement the litigants committed to. The Aruch Hashulchan disagrees and says that secular law is not recognized by halacha at all and Bais Din never should use it to rule on any case.

In the case mentioned above, where the parties committed to bringing any disputes to the American Arbitration Association, it could be argued that they would be permitted to go to this body, as it is not clear that it is considered a secular court. Since the panel could be made up of any three licensed arbiters, the parties can specifically ask for religious Jews to sit on the case, which could be classified as a viable Bais Din that halacha would allow to rule on their dispute. Therefore, it may be possible to allow this commitment to stand, although it would be forbidden to appoint non-Jews to the arbitration panel.

When I asked Rav Shlomo Miller about this, he said that it is not forbidden to have a dispute heard by such a panel but it is not advisable because it is unclear if this “Bais Din” is permitted to rule according to secular law (like the opinion of the Nesivos, Tumim and Bais Shlomo), or if they must rule according to Torah law (like the opinion of the Aruch Hashulchan). Therefore, he would not advise using this board for arbitration.

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