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Saul J. Berman

### **The Boundaries of Loyalty: Testimony Against Fellow Jews in Non-Jewish Courts**

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**THE BOUNDARIES OF LOYALTY:  
TESTIMONY AGAINST FELLOW JEWS IN NON-JEWISH COURTS**

By Saul J. Berman\*

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## **Introduction**

I first became interested in the issue which is the subject of this paper in April 1975. At that time, the New York Special Prosecutor for Nursing Home Investigations, Mr. Charles Hynes, had empanelled a grand jury to hear evidence concerning Bernard Bergman, an owner and operator of nursing homes, who stood accused of various illegal acts. A woman employee of the Towers Nursing Home was subpoenaed to testify concerning allegations of financial improprieties affecting government reimbursement of nursing home expenses. She filed a petition to the court claiming that she should be exempt from the duty to testify on the grounds of her constitutional guarantee of freedom of religion. She claimed that under Jewish Law she was forbidden to testify against a fellow Jew in a non-Jewish court, that to do so would constitute a violation of the Jewish Law against Mesirah, "informing," and would subject her to effective excommunication from her Orthodox Jewish community. The court heard oral argument on the issue, including the testimony of experts in Jewish Law, and rejected the plea, ordering the witness to testify.<sup>1</sup>

Reading the reports of these events in the newspapers raised a set of questions in my mind. On one hand, the horror of informing against fellow Jews is a profoundly deep sensibility in Jewish life and literature. The central Jewish liturgical text of daily prayer, the Amidah, had been fixed containing eighteen blessings almost 2,500 years ago. Through that entire period of time, the only blessing added to it, making for nineteen blessings in the Amidah, was the special blessing requesting divine protection of the Jewish nation against informers.<sup>2</sup> Beyond that, Jewish Law seemed to provide for the summary execution of informers without the usual standards of evidentiary process and other judicial procedures mandated in the protection of the lives of criminals.<sup>3</sup> And a Midrashic text says it all. When the Israelite nation lost the war against the city of Ai, Joshua challenged God to explain why the assurance of Jewish conquest of the Land of

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<sup>1</sup> New York Times, April 30, 1975, p. 81, "Ex-Bergman Aide Declines To Talk."

<sup>2</sup> Berachot 28b, Rambam, Mishneh Torah, Tefillah 2:1; and end of Sefer Ahavah, Seder Tefillot Kol Hashana, Nusach Birchot Hatefillah Vesidduran, no. 12.

<sup>3</sup> Tosefta Bava Metzia 2:33. Rosh Hashana 17a. Abraham A. Rapaport, The Informer in Jewish Literature (Until the End of the Geonic Period), Unpublished Doctoral Thesis, May 1952, Bernard Revel Graduate School of Yeshiva University, NY, at pp. 120-126.

Canaan was not being fulfilled. God responded that a Jew had stolen from the proscribed booty of the city of Jericho. When Joshua, in the Midrash, asked God who had perpetrated the crime, God responds as in shock, “Am I then an informer?!”<sup>4</sup> Thus in this Midrash, God refuses to inform on a person whom He knows with certainty is criminal, even to Joshua, the duly constituted head of government of the Jewish People, appointed by God Himself.

On the other hand, I asked myself, is it really conceivable that according to Jewish Law actions by a citizen to bring a criminal to justice, or to prevent damage to another person, within a well ordered judicial system could itself be considered a criminal action? Is Jewish Law so viscerally opposed to the utilization of any system of law other than itself, that it would prefer to have criminals and perpetrators of economic wrongs roam free rather than have Jews cooperate with non-Jewish legal process? What in fact is the position of Jewish Law on the question of testimony by a Jew against a fellow Jew in a non-Jewish court?

## **I. The Use of Non-Jewish Courts: The Tannaitic Period**

### **A. Litigation in Non-Jewish Courts**

Jewish Law naturally favored Jewish Courts and Jewish substantive and procedural rules, because it operated out of the conviction that the Jewish legal system, based on the divinely revealed Biblical text, would bring the best possible Justice to the ordering of human affairs. There has always been a powerful sense of pride that Jews have taken in the distinctive nature of the ethical advances of Torah Law over ancient and modern legal systems – the application of the crime of homicide to all persons, the virtual elimination of vicarious liability, the exclusion of confession as a basis for criminal conviction, the early reduction of the evils of slavery, the high demand of disclosure in commercial relations, the affirmative duty of rescue of life, and so many other basic values embedded in Jewish Law. This conviction led to two distinctive operational values, which could potentially be in conflict with each other. On one hand stands the

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<sup>4</sup> The text is found in four separate locations in the Midrash and twice in the Talmud. Midrash Tanchuma, Warsaw, Vayeshev sec. 2; Yalkut Shimoni, Parshat Beshalach, Joshua ch.7, and Ezra ch.8. Sanhedrin 11a and 43b.

valuing of Jewish jurisdiction as an institutional interest, as the critical mechanism for achieving the valued aspiration. On the other hand stands the ultimate aspiration itself, the achievement of Justice. What would happen under circumstances in which Justice might best be actualized by the engagement of non-Jewish jurisdiction?

In consequence of the conviction of the distinctively just nature of Jewish Law, early Jewish Law deemed it impermissible for Jewish litigants to submit their conflict to non-Jewish courts. The Beraita<sup>5</sup> reports the teaching of Rabbi Tarfon in the mid-second century of the common era, who understood this proscription to be DeOraita Law, revealed law, based on an odd reading of Exodus 21:1:

1. "...it has been taught, Rabbi Tarfon used to say:
2. In any place where you find non-Jewish law courts,
3. even though their law is the same as the Jewish Law,
4. you must not resort to them, since it says,
5. 'These are the judgments which thou shalt set before them,'
6. that is to say, before them (Jewish judges)
7. and not before non-Jews.<sup>6</sup>
8. Another matter, before them (Jewish judges)
9. and not before (Jewish) laymen<sup>7</sup>

A reasonable assumption to make is that this intense expression of the value of safeguarding exclusive Jewish jurisdiction would apply to all three phases of the judicial process:

- (1) ascertaining the facts (fact-finding);
- (2) determining the rules applicable to those facts (judging); and
- (3) ordering the enforcement of the appropriate outcome or remedy (execution of judgment).

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<sup>5</sup> Gittin 88b.

<sup>6</sup> This interpretation is not found explicitly in the Halachic Midrashim, but is implied in Mechilta, Nezikin sec.1 (Horowitz-Rabin edition p. 246). The law is explicitly cited in Midrash Tanchuma, Mishpatim sec.3 (in Mantu edition, but not in Tanhuma Buber.)

<sup>7</sup> Gittin 88b.

Jewish Law has distinctive rules and values related to each of these phases, and ought, presumptively, to seek the application of its own jurisdiction in relation to each of them. Surprisingly, such was not the case.

### **1. As To Fact-Finding**

Firstly, in regard to the fact finding process, Talmudic Law was distinctively open to the use of non-Jewish legal instruments as a means of establishing facts for further adjudication in Jewish courts. This is manifest already in the clarity with which Tannaitic sources accept the use of documents from Roman Arkaot. The term Arkaot in Tannaitic sources has to do exclusively with the archival functions of the legal system, and not with either litigation or testimony in non-Jewish courts. The relevant Tannaitic discussions refer to the Hellenistic institution of archives, not courts, and relates solely to the enforceability in Jewish courts of documents executed and deposited in those archives.<sup>8</sup> The role of the archive was purely evidentiary as to the will of the parties expressed in the document. It provided a distinctive degree of certainty as to the "facts" of the agreement between the parties.

Instead of resistance to this incursion into the first stage of the judicial process, Jewish use of and participation in such "fact finding" process by a non-Jewish institution, was, strikingly, held to be not objectionable. But the opposing value of preserving Jewish jurisdiction was upheld in two ways:

- a. The substantive rules of law applied by the Jewish court in the course of litigation, would be exclusively those of Jewish Law.
- b. Documents such as those of divorce and manumission, which required execution in consonance with substantive rules of Jewish Law, execution not reflected on the face of the witnessed and archived documents, were excluded from recognition.

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<sup>8</sup> Despite intense debate for over a century as to the precise meaning and legal role of the Tannaitic Arkaot, I will demonstrate in a separate paper that the Arkaot of the Tannaitic period were neither governing bodies nor courts; they were archives. Every single Tannaitic text referring to the Arki, early and late Tannaitic, Halachic and Aggadic, Mishna, Tosefta and Beraita, without exception, deals with the preparation, execution or storage of legal documents. In not a single instance was the Arki the setting for adjudication, nor for any other legal or governmental function.



This set of rules is already manifest in Mishna Gittin 1:5:

1. All legal documents on deposit in non-Jewish Arkaot,
2. even if their signatories are non-Jews, are valid;
3. except writs of divorce and of manumission of slaves.
4. Rabbi Shimon says, these also are valid –
5. they are mentioned only when they are drafted by laymen.

An unstated premise of the law of this Mishna is the ineligibility of non-Jews as witnesses in Jewish Law. The precise basis for this disqualification, as well as its status, came to be subject of extensive debate amongst Rishonim.<sup>9</sup> Maimonides<sup>10</sup>

asserts explicitly that the ineligibility is Deoraita, a matter of revealed law, while Rashi<sup>11</sup> suggests that it is of Rabbinic origin. While the relevant Talmudic passages indeed leave room for this debate,<sup>12</sup> the fact of disqualification itself is incontrovertible. Tannaitic texts already explicitly indicate the ineligibility of non-Jews as witnesses, without any indication of dissent.<sup>13</sup>

Against this backdrop, our Mishna, by saying, “even if their signatories are non-Jews,” first implies that Jews might have been witnesses to the document, in which case the validity of the document would not be impaired by its having been executed and stored in the non-Jewish Archive. That is, the Arkaot are not negative legal instruments, but may merely be neutral. But then the Mishna raises the question of the status in Jewish Courts of legal documents found on deposit in the Arkaot, the signatories to which are non-Jews. Given the indicated ineligibility of non-Jews as witnesses, a general legal document signed by non-Jews, in the possession of one of the parties to litigation in a Jewish Court, would be held to be unenforceable. Yet our Mishna makes the radical assertion that were the very same document to have been executed and stored in the non-Jewish Arkaot, it would be held valid and subject to enforcement by a Jewish Court.

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<sup>9</sup> For a summary of the various positions on this matter, see *Encyclopedia Talmudit*, vol.5, pp. 337-339.

<sup>10</sup> Rambam, *Mishneh Torah*, Book of Judges, Laws of testimony 9:4.

<sup>11</sup> Rashi to Gittin 9b, s.v. Chutz. His position is so understood by the Baalei HaTosafot in Bava Kamma 88a, s.v. Yehei, even though they dissent from that position.

<sup>12</sup> See Gittin 9b, Yevamot 47a and Bava Kamma 14b-15a.

<sup>13</sup> Mishna Bava Kamma 1:3, Tosefta Bava Kamma 1:2.

The non-Jewish Arkaot serve to establish the validity of legal documents which would otherwise be considered invalid. The Arkaot then are not simply neutral, they are positive vehicles for the validation of documents. The Jewish court can place full faith and credit in a document on deposit in the Archive, as a truthful embodiment of the agreement that had been arrived at between the parties now in litigation in the Jewish court. The non-Jewish legal instrument can be a perfectly valid means of establishing facts upon which the Jewish Law litigation can then proceed.

As the Mishna then goes on to note, excluded from this openness to the use of the non-Jewish Archive as a means of establishing facts, are the instances of writs of divorce and manumission of slaves. In those instances, the contract is not merely the factual indication of the will of the parties, but is itself the legal means of causing change of legal status of the parties in Jewish Law. Jewish witnesses remained essential in those circumstances.<sup>14</sup>

## **2. As To Execution of Judgment**

Second, it is clear that Rabbinic insistence on litigation in Jewish

courts did not preclude Jewish use of non-Jewish courts for the third stage of the judicial process, the enforcement of judgments. Again, the competing value of preserving Jewish jurisdiction was upheld by insistence that such non-Jewish enforcement would be viewed as valid only in the implementation of a judgment already arrived at by a Jewish court in its usual application of Jewish Law. The use of non-Jewish procedure in the interest of effectuating the rule of Jewish Law was acceptable when Jewish procedures to achieve the same result were not available since, otherwise, justice could not be achieved.

This emerges clearly from the text of Mishnah Gittin 9:8 (88b):

1. A Get given under compulsion by a Jewish court is valid;
2. but by a non-Jewish court (the Get) is invalid.

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<sup>14</sup> The varied texts of the Vienna versus the Erfurt manuscripts of Tosefta Gittin 1:4, suggest that there was a substantial history of Tannaitic debate about the precise rules to be applied to status fixing Jewish documents executed and stored in the non-Jewish Arki. Comprehensive treatment of this issue is to be found in Saul Lieberman, Tosefta KiFeshutah, vol.8, Order Nashim, N.Y. 1973, at pp. 785-791.

3. A non-Jewish court, however, may flog a person and say to him
4. 'Do what the Jewish court has ordered you,' (and it is valid.)

The Rabbinic understanding of the description of the divorce procedure in Deuteronomy 24:1, "... and he shall write her a bill of divorcement and deliver it into her hand...." necessitated the husband's exercise of his free will in the issuance of a get to his wife.<sup>15</sup> Despite the clarity of that DeOraita requirement, our Mishna unequivocally supports the authority of a Jewish court to coerce a husband to issue the Get. The Mishna in Arachin 5:6 (21a) offers the reconciling theory of a legal fiction to explain the basis of the legitimacy of such coercion in divorce cases; "...they exercise force until he says 'I consent!'." The husband's verbal declaration of assent is the technical hook on which the validity of the Get is hung.<sup>16</sup> While the Talmudic Sages limited the situations in which such coercive methods would be used, they clearly recognized this as an essential tool in fairly terminating marriages which the wife justifiably sought to end, but to which the husband refused to consent.<sup>17</sup>

But what then is to be done when due to lack of jurisdiction, Rabbinic courts cannot actually coerce the husband to even grant his verbal assent? It is to this situation that our Mishna addressed itself by indicating that if a non-Jewish court on its own initiative were to coerce a Jewish man to issue a Get to his wife, the resultant Get would be deemed invalid by Jewish Law. However, if a Jewish court had ordered issuance of a Get, had been unable to enforce its judgment, and a non-Jewish court stood ready and available to order the husband to comply with the demand of the Jewish court, then, even in the face of the coercive action undertaken by the non-Jewish court, the resultant Get would be deemed perfectly valid according to Jewish Law. The Jewish court would not relegate a woman to the status of an Agunah, a woman chained to a dead marriage,

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<sup>15</sup> Yevamot 112b. Rambam, Mishneh Torah, Laws of Divorce 1:1-2.

<sup>16</sup> See Rambam, Mishneh Torah, Laws of Divorce 2:20 for his philosophical justification of this coercion by Beth Din as not contradictory to the free will requirement.

<sup>17</sup> For a detailed treatment of the circumstances under which a Rabbinic Court would order coercion against a husband for the achievement of the issuance of a Get, see Irving A. Breitowitz, *Between Civil and religious Law: The Plight of the Agunah in American Society*, Greenwood Press, Westport, CT, 1993, at pp. 5-40.

just because of their lack of jurisdiction – when they could utilize the services of a non-Jewish court for the enforcement of their judgment.

But here, as to execution of judgment, as in regard to the use of non-Jewish legal institutions for fact finding, the underlying value of the preservation of Jewish substantive law is clearly upheld. The only situations in which coercion as to issuance of a Get is acceptable is when a prior deliberation in a Jewish court has led to an order of issuance of a Get which lacks only enforcement tools to be effectuated.<sup>18</sup> Justice then demands the utilization of the value neutral tool of the non-Jewish legal enforcement.

Thus, Tannaitic defense of Jewish jurisdiction against the inroads of non-Jewish legal institutions was subservient to the interest of the achievement of justice, but the dialectic between the two values was always manifest in the detailed modes of approval of utilization of the non-Jewish institutions. The Sages allowed for a significant role to be played by non-Jewish legal institutions in the determination of facts and in the enforcement of judgment, the first and the last of the three essential phases of the judicial process.

### **3. As To Determining the Rules Applicable to the Facts (Judging)**

What then of the middle phase of these three, the direct application of the substantive rules of Jewish Law by a Jewish court? Was there room here as well for the operation of this fundamental dialectic between loyalty to Jewish Law and loyalty to justice? I will argue that the same pattern continues to manifest itself even in relation to this most central aspect of the Jewish judicial process. For example, where litigation in Jewish courts was not possible because one of the parties was a non-Jew, early Tannaitic law already recognized the need to participate, as either litigant or witness, in non-Jewish adjudication in order to achieve whatever justice could thereby be made available. The earliest explicit indication of the permissibility of the use of non-Jewish courts in such situations is to be found in Tosefta, Avodah Zara 1:8 :<sup>19</sup>

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<sup>18</sup> See again Rambam, Mishneh Torah, Laws of Divorce 2:20, closing sentences.

<sup>19</sup> The text of this law is also found with some variations in Tosefta, in Gemara of the Babylonian and Jerusalem Talmudim, and in the Midrash: Tosefta Moed Katta 2:1; and (in whole or in part) in Eruvin

1. One may go to a heathen fair... and buy from them<sup>20</sup>
2. houses, fields and vineyards, male and female slaves,
3. because it is like rescuing something from them;
4. and he may draw up contracts and deposit them in their Archives.
5. A Kohen may make himself ritually unclean for them
6. by testifying and adjudicating concerning them
7. outside the Land of Israel.

The first part of the Tosefta text quoted (lines 1-4), is a response to a general prohibition against engaging in business transactions with idolatrous non-Jews at a heathen fair.<sup>21</sup> Our text generates an exception to that constraint, allowing such transactions when there is an element of “rescue” in the purchase at that time; recognizing that the opportunity to restore Jewish ownership over land in Israel, and to purchase and liberate Jewish slaves from their idolatrous masters are interests of greater magnitude than the possibility of encouraging an idolator to worship his pagan deity.

The latter part of this Tosefta text (lines 5-8), makes an equivalent claim as to the power of these interests in “rescue” (restoring Jewish ownership over land in Israel and the liberation of Jewish slaves from their idolatrous masters) to override the Rabbinic restriction on a Kohen leaving the land of Israel which was the consequence of the Rabbinic declaration of the ritual uncleanness of all lands outside of Israel.<sup>22</sup> The overriding nature of these interests would allow the Kohen to become impure so as to be able to participate as a litigant, or as a witness, or in some versions of our text also as an attorney, in attempting to achieve this “rescue.”<sup>23</sup> Interestingly, neither this Tosefta nor any other Talmudic text raises the question of whether such participation in non-Jewish courts would constitute breach of the teaching of Rabbi Tarfon. The implication is that

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47a, Moed Kattan 11a, Avidah Zarah 13a, J. Berachot 3:1, J. Nazir 7:1, and Semachot 4:14 (Higger edition at p. 121.) It is also recorded in Genesis Rabbah 47:10.

<sup>20</sup> S. Lieberman in Tosefet Rishonim vol. 2, p. 186, and in vol. 1. p. 242, points out the scribal error in this text, adding the word “ain”, “may not”, thereby incorrectly reversing the entire meaning of the passage, contrary to its grammar and context, as well as contrary to every other record of this text.

<sup>21</sup> For a full treatment of this issue see Gerald Blidstein, Rabbinic Legislation on Idolatry, Unpublished Doctoral Thesis, Bernard Revel Graduate School, Yeshiva University, 1968, particularly at pp. 122-130.

<sup>22</sup> Mishna Taharot 4:5. For treatment of this general issue see G. Alon, Mehkarim Betoldot Yisrael, (Heb.), vol. 2, pp. 121-147, and particularly at pp. 144-145.

<sup>23</sup> Also evidenced in J. Berachot 3:1 (23 a,b), Semachot 4:14 (Higger edition p. 121), and J. Nazir 7:1.

barring the concern with the impurity of a Kohen, participation in litigation with a non-Jew in a non-Jewish court would not fall within the restrictive position of Rabbi Tarfon, would be entirely permissible according to Talmudic Law.<sup>24</sup>

This implication is further strengthened by the recognition that the power of the “rescue” interests dealt with by the Tosefta were only of sufficient strength to override the Rabbinic prohibition of impurity, not to override DeOraita, revealed, laws.<sup>25</sup> But Rabbi Tarfon had asserted that his constraint against litigating in non-Jewish courts was based on an explicit verse of the Torah. If then his position also precluded litigation between a Jew and a non-Jew, then the greater argument of the Tosefta would have been to contend that the power of the “rescue” interests could even override the DeOraita teaching of the prohibition against litigating in non-Jewish courts. The Tosefta would then not have had to introduce the issue of the Kohen at all, but could have taught us the even more extreme proposition that the “rescue” of land in Israel and of Jewish slaves from idolators was of sufficient power to even supersede the DeOraita prohibition against litigating in non-Jewish courts.

The combination then of the implication of the Tosefta, and the Talmudic silence as to a contrary ruling, suggests clearly that litigation between a Jew and a non-Jew may permissibly take place in a non-Jewish court. Why was this not a betrayal of the duty of allegiance to Jewish Law? Were Jewish Law to forbid such litigation, it would result in the general inability of Jews to achieve any justice in their economic relations with non-Jews. Non-Jews could then simply refuse to litigate in a Jewish court and would be assured immunity from legal process by the Jewish litigant, or be confident in victory in a hearing in the non-Jewish court in consequence of the non-appearance of the Jewish party. While the higher justice of Jewish Law might be preferable, not being able to pursue one’s legal rights and privileges at all is totally unacceptable – some justice is better than none.

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<sup>24</sup> In fact it is only in the early Gaonic period that the suggestion is first made that even in adjudication with a non-Jew, the Jewish party is obligated to attempt to convince the non-Jew to adjudicate in a Jewish court. See Tanhuma, Shoftim, sec. 1 (in Mantua edition and in Tanhuma Buber.)

<sup>25</sup> This limitation to overriding only Rabbinic uncleanness is emphasized by Rambam in Hilchot HaYerushalmi LehaRambam, Berachot ch.3, p. 27. See there the commentary of S. Lieberman at sec. 100.

Aside the issue of litigation, this Tosefta text provides us with the first indication of the position of Jewish Law as to testimony by a Jew in a non-Jewish court.

**B. Testimony in Non-Jewish Courts: Advantaging Testimony on Behalf of the Jewish Party**

Explicit in this Tosefta text is the ruling that testimony by a Jew in a non-Jewish court on behalf of a Jewish party, where the other party is a non-Jew, is permissible, and that in the interest of the two “rescue” transactions listed by the Tosefta, certain Rabbinic prohibitions will even be overridden . The further implication of the text is that when such litigation between Jew and non-Jew is permissibly before a non-Jewish court, there being no violation of the Law of Rabbi Tarfon, there is also no barrier to a Jew serving as a witness even on behalf of the non-Jewish party. However, the law will not supersede other Rabbinic prohibitions in order to effectuate such testimony by the Jewish witness - unless other vital Jewish interests are at stake, such as restoring Jewish ownership of land in Israel, or the freeing of Jewish slaves from non-Jewish ownership.

If our reading of the explicit and implicit rulings of this Tosefta text is correct, then we have before us a minor, but nevertheless distinctive, Tannaitic bias in favor of a Jewish party in his legal contest with a non-Jew before a non-Jewish court. It is minor in that its circumstances are limited to the following situation: where a Jew and a non-Jew are litigating in a non-Jewish court outside of Israel and a potential witness is a Kohen residing in Israel. Under those limited circumstances, if the success of the Jewish party in the adjudication would result in land in Israel being returned to Jewish ownership, or in the manumission of Jewish slaves from their non-Jewish owner,<sup>26</sup> then, the Kohen may leave Israel to testify on behalf of the Jewish party. The Kohen would not be permitted to violate the Rabbinic constraint against his leaving Israel to testify on behalf of the non-Jewish party whose victory in the litigation would not produce the desired “rescue” effects.

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<sup>26</sup> S. Lieberman in Tosefta Kifshuta, Moed, pp. 1241-1242 indicates that the Amoraim did not automatically apply this ruling to override any and all Rabbinic prohibitions, but only the ones made explicit in Tosefta Avoda Zara 1:8.

Since this Tosefta text is the sole Tannaitic passage which deals with the issue of testimony in a non-Jewish court, any attempt to define the reason for the existence of this minor bias must remain largely speculative. However, it is valuable for us to briefly explore the possible reasons, to serve as a conceptual framework within which to see the subsequent developments in Jewish legal discourse on this matter.

### **1. To Achieve “Religious Rescue”**

Firstly, it is possible that this bias is motivated by the magnitude of the religious imperatives to be achieved in these particular transactions – the settlement of the Land of Israel through the purchase from non-Jews of homes, fields and vineyards, and the rescue of Jews from submergence into idolatry through their purchase and manumission. Indeed each of these religious imperatives functions elsewhere in Jewish Law as legislative motive for the modification of other Rabbinic Laws.<sup>27</sup> It would be perfectly reasonable, therefore, to assume that the minor bias of the Tosefta was the byproduct of the intensity with which the Tannaim desired to achieve these two “religious rescue” goals. However, it appears that this very question may have been the basis of late Tannaitic and then Amoraic debate reflected in textual variants of our Tosefta text. In a singular instance, the Tosefta text quoted in Moed Kattan, adds to the list of transactions, the purchase of cattle.<sup>28</sup> On that basis, all Babylonian Amoraic citations of our Tosefta text include this third case as one in which the Kohen could leave Israel to testify on behalf of the Jewish litigant in the non-Jewish court.<sup>29</sup> The “religious rescue” motive is thereby weakened.

A further weakening of the “religious rescue” element is evidenced in Palestinian Amoraic sources, where a version of our Tosefta text is cited without reference to the situation of the Heathen Fair, and the exemption for the Kohen to leave Israel despite the presence of rabbinic impurity in other lands is broadened to include permissibility for all commercial purposes.<sup>30</sup> This broadening is further evidenced in the Babylonian

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<sup>27</sup> As to legislation to promote the settlement of the Land of Israel, see Gittin 8b, Bava Kamma 80b, Bava Metzia 101a, Menahot 44a and Tamid 29b. For an interesting instance of legislation to prevent submergence into idolatry, see Gittin 88b.

<sup>28</sup> Tosefta Moed Kattan 2:1.

<sup>29</sup> Eruvin 47a; Moed Kattan 11a; and Avodah Zarah 13a and b.

<sup>30</sup> J. Berachot 3:1; J. Nazir 7:1 and Semachot 4:14.



Gemara raising the possibility that even the purchase of non-Jewish slaves might be included in the exemption, a position which is confirmed in the citation of the position of the Palestinian Amora Rabbi Shimon ben Lakish who argued that even in the purchase of such slaves there is a religious motive, of converting the non-Jewish slaves to Judaism.<sup>31</sup>

No wonder then that toward the close of the Amoraic period, Rav Ashi was uncomfortable with the expansion of the list of circumstances in which the exemption was granted, and needed a new conceptualization to encompass them all – proposing that the underlying motive of this law was the desire to diminish the economic capacity of the non-Jewish community of Israel.<sup>32</sup> While the Amoraic treatment of this particular ruling then, involved a broadening of its application far beyond the original two situations, there is still present the sense of the religious imperative for the Jewish settlement of the land of Israel. While attenuated from its original clarity, we can certainly still seriously consider the possibility of this motive of “religious rescue” as the basis for the bias in the Tosefta, allowing the Kohen to leave Israel to testify on behalf of the Jewish litigant, but not on behalf of the non-Jewish litigant, in their contest in the non-Jewish court.

## **2. Limits on the Duty to Testify: The Duty to Testify as Loyalty to Fellow Jews**

A second possible basis for the preferential treatment of the Jewish party in this Tosefta text may lie in the Tannaitic limitation of the DeOraita obligation to testify, to testimony on behalf of a fellow Jew. The Biblical verse which serves as the basis of the positive obligation to testify as to one’s knowledge of the facts of a case says as follows: “When a person (“nefesh”) sins, as when, having heard the declared curse (of one who fails to testify), he is able to testify, having seen or known, but does not testify as to the

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<sup>31</sup> Avoda Zarah 13b.

<sup>32</sup> Avoda Zara 13a and b.

information he has, he is to bear guilt.”<sup>33</sup> The verse itself does not explicitly distinguish between need for testimony by a Jewish party as opposed to a non-Jewish party.<sup>34</sup>

Nevertheless, when the Tosefta in Shavuot records the law that one who violates this commandment and fails to testify is not financially liable for the indirect injury he caused, it does, at least by implication, address the question of exactly who would have been the beneficiary of the testimony which was not offered. The Tosefta says:<sup>35</sup>

1. One who knows of evidence in favor of his friend (chavero)
2. but does not testify on his behalf,
3. is not liable to pay by law,
4. but is not forgiven by Heaven until he pays.<sup>36</sup>

The choice of the term “Chavero,” “his friend” seems, on the basis of other Tannaitic usage to imply the restriction of the Biblical obligation to testify, to testimony on behalf of a fellow Jew.<sup>37</sup> This same limitation might be implied by the alternate source from which the obligation to testify is derived, the verse in Leviticus 19:16, “...you shall not stand idly by the blood of your neighbor (re’acha.)”<sup>38</sup> The term “re’acha,” “your

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<sup>33</sup> Leviticus 5:1.

<sup>34</sup> The Midrash Halacha does restrict applicability of this passage to Jews through interpretation of the word “nefesh,” at Sifra, Leviticus 1, Dibbura DeHova, Parshata 1. on Lev.4:1. Since Lev. 5:1 also uses the word “nefesh,” the Midrash concludes that it too, like Lev. 4:1, refers solely to Jews. However, this has to do with the question of who is obligated to testify, and therefore to bring a sin offering upon failure to fulfill the legal duty to testify. It bears no relationship to the question of the identity of the potential beneficiary of the testimony.

<sup>35</sup> Tosefta Shavuot 3:1-2; and as a Beraita in Bava Kamma 55b-56a.

<sup>36</sup> I.N. Epstein contends that this Tosefta text is a fragment of the Halachic Midrash of the School of Rabbi Ishmael to the Book of Leviticus, most of which was lost to us. “Fragments of Debei R. Ishmael to Leviticus,” (Heb.) in Festschrift for Samuel Krauss, Jerusalem, 1937, pp. 19-35, at p. 25.

<sup>37</sup> For explicit indication that “chaver” means only fellow Jew, and not a non-Jew, see Mechilta, Bo, Parasha 9 (Horowitz – Rabin edition, p. 30, lines 19-21.) The fact that both Mechilta and the text of Tosefta Shavuot 3:1-2 are from the School of Rabbi Ishmael (as in note 37 above), might suggest that this position was exclusive to that School. However, there are no explicit counter-indications to this position, and conversely there are later undisputed Amoraic indications of the same limited understanding of the term “chaver,” as in Hagiga 26a.

<sup>38</sup> While the use of this verse as a basis for the obligation to testify is not preserved in the Talmud, it is recorded in Sifra, Kedoshim, Perek 4, sec. 8; and in Pseudo-Jonathan to Leviticus 19:16. For a fuller treatment of this source, see Aaron Kirschenbaum, “The Good Samaritan and Jewish Law,” Dinei Israel, vol. 7, Tel Aviv, 1976, at pp. 10-12, particularly notes 15 and 16.

neighbor,” in Biblical usage, is almost universally understood solely as a reference to fellow Jews. Interestingly, while this limitation is not made explicit in Talmudic literature, the reference to “chavero” is preserved by the Sheiltot de R. Ahai Gaon,<sup>39</sup> and then by Rambam.<sup>40</sup> This was apparently sufficient to lead Rabbi Joshua Falk (Poland, circa 1555-1614) to make explicit the assertion that the DeOraita obligation to testify does not apply in the benefit a non-Jewish party.<sup>41</sup>

If this limitation on the obligation to testify was in fact Tannaitic law, then the slight bias of the Tosefta would simply be a logical consequence of the permissibility of violation of the Rabbinic uncleanness law for the sake of fulfillment of the “greater” DeOraita obligation to testify on behalf of a fellow Jew; an overriding obligation which would not be present when the party expecting testimony by the Kohen is a non-Jew.<sup>42</sup>

However, this approach requires one further assumption, that the legal obligation to testify on behalf of a fellow Jew would be fully applicable even if the adjudication takes place in a non-Jewish court; so long as the matter is permissibly before that court rather than before a Jewish court, thus not in violation of the Law of Rabbi Tarfon.<sup>43</sup> This would mean that the duty to aid a fellow Jew achieve justice through judicial process would be applicable whether the litigation was taking place in a Jewish court, or was taking place in a non-Jewish court as litigation against a non-Jew; or perhaps even as litigation against a fellow Jew under circumstances in which the litigation before the non-Jewish court was permissible even within the Law of Rabbi Tarfon. Indeed there are absolutely no Talmudic counter-indications to this assumption.<sup>44</sup>

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<sup>39</sup> She'iltot, sec. 69.

<sup>40</sup> Mishneh Torah, Laws of testimony 1:1. But Rambam neither uses the word “chavero,” nor does he otherwise indicate any exclusion of duty towards non-Jews in the relevant passage in Sefer HaMitzvot, Positive Precepts, no. 178. For an extraordinary exploration of the theory of the universality of the parallel Biblical term “Achicha”, see Adiel Schremer, *Brothers Estranged: Heresy, Christianity and Jewish Identity in Late Antiquity*, Oxford and New York, Oxford University Press, 2010, pp. 131 – 141.

<sup>41</sup> Rabbi Joshua Falk, *Sefer Meirat Einayim to Shulchan Aruch*, Choshen Mishpat, 28:2.

<sup>42</sup> I will address the issue of disparity in Jewish Law between duties to Jews and duties to non-Jews, more directly in Appendix B.

<sup>43</sup> Gittin 88b.

<sup>44</sup> However, Rambam, possibly sensitive to precisely this issue, added, with logic but without apparent textual precedent, the specification that the obligation to testify pertains to testimony before a “beth din.” Mishneh Torah, Book of Judges, Laws of testimony 1:1; and Sefer Hamitzvot, Positive Precepts no. 178.

### **3. Preferential Treatment of Fellow Jews**

One final deliberation relative to the minor bias manifest in this Tosefta. There are Tannaitic indications that even in a Jewish court, the law to be applied in a case where one party is a non-Jew, may vary from the law governing the same situation in which both parties are Jews.

There is also indication that choice of law, that is whether to apply Jewish Law or Noachide Law in such a case might, according to some authorities, be determined on the basis of which legal precepts would be more beneficial to the Jewish party.

One might be tempted to use these instances as an explanation of the Tosefta, suggesting a generalization of Rabbinic bias against non-Jews in adjudication with Jews.

However, I believe that such an approach lacks substance. Firstly, the instances are, in Tannaitic Law, very narrowly applied to the specific laws in which a limiting Biblical term is central to the discussion.

Secondly, because both observations above relate to adjudication in Jewish courts, and bear no necessary relationship to the situation of our Tosefta text which deals with adjudication in a non-Jewish court.

## **II. Legislative Constraint on Testimony: The Amoraic Period**

As in the period of the Tannaim, so in the literature of the Amoraim there is only a single legal passage which addresses the issue of testimony by a Jew in a non-Jewish court. That brief text generated a minor response in the period of the Gaonim, but a voluminous literature in responsa, codes and commentaries in the periods of the Rishonim and the Acharonim. Because of the centrality of this one text to later developments, we will, after presentation of the text itself, subject it to two separate, but vitally interrelated levels of analysis. Firstly, we will examine the terminology and literary structures of the passage, for the purpose of establishing the original language of the legislation, and the likely development of its current form. The second level of analysis will examine the possible underlying legal doctrines on which the Amoraic

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Did he mean thereby to preclude the existence of a duty to testify in a non-Jewish court, or was he simply describing the most common context in which testimony would be obligatory?

legislation might have been, or could not have been, based. These two layers of analysis should provide us with a vantage-point from which to examine the developments which later took place.

### **A. The Amoraic Legislation**

The Amoraic text is found in Bava Kamma 113b-114a,<sup>45</sup> and reads as follows:<sup>46</sup>

1. Raba, or others say R. Huna, proclaimed
2. to those who go up (to Israel) and those who come down (to Babylonia):<sup>47</sup>
3. If a Jew knows evidence for the benefit of a non-Jew,
4. but he did not summon him (to testify),
5. and he goes and testifies in a non-Jewish court against his fellow Jew,
6. he is to be excommunicated.<sup>48</sup>
7. What is the reason? Because they determine monetary liability on (the basis of) the testimony of a single witness.
8. We do not say this except when there is one (witness), but if there are two, it does not apply.
9. And even if there is one, we do not say this except in Magista courts,
10. but in Dawar courts, they too, if there is one (witness), impose an oath upon him (the defendant.)
11. R. Ashi said,
12. When we were at R. Huna's<sup>49</sup> academy,<sup>50</sup> we raised this question:

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<sup>45</sup> The text is neither repeated elsewhere in the Babylonian Talmud, nor does it have any parallel in the Jerusalem Gemara, nor in any other Talmudic era literature.

<sup>46</sup> The text as presented is that which appears in the published Vilna Talmud. The numbering of the lines is my own and is purely for the convenience of references in the text and footnotes of this paper. Footnotes to this text itself will not cover material which is dealt with later in the body of the paper.

<sup>47</sup> The full form of lines 1-2 appears only three times in the Talmud, in our text (B.K. 113b), in Bava Kamma 23b and Bava batra 45a. In each case two Amoraim are referred to as the possible originators of the law, and in each the manuscripts offer alternate names (Viz. Rabbinovicz, Dikdukei Soferim to each of the passages.) The common elements are: a. In each instance the proclamation is ascribed to heads of Academies in different locations, Pumbedita and mehoza, or mehoza and Sura. B. The only Amora common to all three texts is Rava. C. The common legal issue may be that of liability for indirect injury. It may have been the attempt to insist on a common legal issue which led Rambam in Nizkei mammon 5:1 to offer a reading of bava Kama 23b to which most other Rishonim objected.(see commentaries to Rambam ad loc.)

<sup>48</sup> For a full treatment of the issue of excommunication in the Amoraic period, see Gideon Leibson, *Determining Factors in Herem and Nidui During the Tannaitic and Amoraic Periods*, Shenaton HaMishpat HaIvri, Jerusalem, 1975, pp. 292-342, (Heb.) A brief treatment of our passage, B.K. 113b-114a appears on page 324. His identification of this passage as anonymous is clearly incorrect.

<sup>49</sup> All of the manuscripts and many of the Rishonim read here, "R. Kahana" in place of R. Huna. Dikdukei Soferim to BK 114a, at p. 281, n. 20. This reading seems logical since R. Ashi was a student of R. Kahana and often reported on discussions which took place at his academy in Pum Nahara. A listing of such instances appears in A. Hyman, *Toldot Tannaim VeAmoraim*, Jerusalem, 1964, vol.3, at p. 847.

13. A prominent man (Adam Chashuv)<sup>51</sup> upon whom they would rely as two (witnesses),
14. since they will determine monetary liability on the basis of his testimony (alone), ought he not to testify -
15. or perhaps, since he is a prominent man
16. he cannot escape, and may testify?
17. The question remained undecided (Teiku.)

### **1. The Authority of the Teaching – The term מכריז (Machriz)**

The Aramaic root “karaz”, meaning to proclaim, is found twice in the Biblical Book of Daniel in describing royal proclamations by the Babylonian King.<sup>52</sup> In an analogous usage, the Aramaic Targumim of the Torah use the word in relation to a public proclamation by Moses.<sup>53</sup> In Tannaitic literature, the word “machriz” – “proclaimed”, is used most frequently in relation to general public announcements, as for example in regard to the required announcement of lost property.<sup>54</sup> It is also twice used to describe a Bat Kol, a heavenly voice.<sup>55</sup>

The most significant Tannaitic usage of the term Machriz, is as a description of a pronouncement of a Rabbinic Court. Tannaitic literature refers to only two such pronouncements; one, of the Court’s intent to sell property belonging to orphans;<sup>56</sup> and second, when a court officer would invite additional evidence in regard to a criminal trial involving capital or corporal punishment.<sup>57</sup> This usage of Machriz as a reference to

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<sup>50</sup> The classic treatment of the term “bei Rav,” is that of David M. Goodblatt, *Rabbinic Instruction in Sasanian Babylonia*, Leiden, E.J. Brill, 1975. The resultant controversy between Goodblatt and Yeshayahu Gafni as to the existence of academies during the Amoraic period was recently revisited in a reconciling manner by Jeffrey L. Rubenstein, *The Rise of the Babylonian Rabbinic Academy: A Reexamination of the Talmudic Evidence*, JSIJ 1 (2002), pp. 55-68.

<sup>51</sup> See my article, Saul J. Berman, *Adam Hashub: New Light on the History of Babylonian Amoraic Academies*. *Dine Israel*, vol 13-14, Tel Aviv, 1988, pp.

<sup>52</sup> Daniel 3:4 and 5:29

<sup>53</sup> As to Exodus 36:6, see Onkeles, ed. By A. Berliner, Berlin, 1884; and Pseudo Jonathan, ed. By M. Ginsburger, Berlin, 1903.

<sup>54</sup> In relation to lost property, see Mishnah Bava Metzia 2:1-8; Tosefta Bava Metzia 2:1-7, Mechilta to exodus 23:4, Mishpatim parasha 20 (Horowitz-Rabin edition pp. 324-325). In relation to announcements by charity collectors, see Tosefta Demai 3:15-16. In regard to announcement of the sale of a cow for slaughter, to avoid its offspring being slaughtered on the same day, see Sifra to Emor, Perek 8, sec. 9 (Sifra de bei Rav, Jerusalem, 1959, p. 104a.)

<sup>55</sup> Mishna Avot 6:2, and Sifrei to Deuteronomy Piska 357 (Finkelstein edition, p. 428.)

<sup>56</sup> Mishna Arachin 6:1; and Tosefta Arachin 4:1.

<sup>57</sup> Mishna Sanhedrin 6:1; Sifrei Numbers Piska 137 (Horovitz edition p. 184) (echoed in Kiddushin 81a.).

Court pronouncements of facts was expanded in Amoraic literature to include announcements of the sale of land by a widow<sup>58</sup>, the declaration of a woman as a rebellious wife,<sup>59</sup> announcement of persons Rabbinically disqualified from testimony,<sup>60</sup> and a few other situations<sup>61</sup> – all involving pronouncements of facts to the public.

A crucial Amoraic development was the expansion of the term *Machriz* to a new context – the pronouncement of new Laws. The Babylonian Gemara refers to eight instances of Amoraic legislation introduced by the word *Machriz*. Two of the instances appear to be the pronouncement of a binding final resolution of matters previously in debate.<sup>62</sup> The other six cases are new laws, without apparent precedent, responding to novel situations.<sup>63</sup> Each of these eight legislative acts are ascribed to one or more Heads of Yeshivot,<sup>64</sup> and it was, impliedly, by virtue of that position that they were the appropriate persons to “proclaim” the new legislation adopted by the Academy.

There are by contrast eight additional Amoraic instances of the use of the term “*Machriz*” to introduce a distinctively different set of teachings which clearly relate to ethical or health matters of a non-legal character in which the moral authority of leading scholars, primarily also heads of Academies, was called to bear to shape the moral fiber of the people.<sup>65</sup>

But clearly, in regard to our passage constraining testimony against a fellow Jew in a non-Jewish court under certain circumstances, the usage of the term “*Machriz*” suggests

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<sup>58</sup> Ketuboth 98a.

<sup>59</sup> Ketuboth 63b. According to S. Lieberman, the original Tannaitic legislation found in Tosefta Ketuboth 5:7, involved only repeated private warnings by the court to the rebellious wife. This practice was continued in Israel during the Amoraic period, but the Babylonian Amoraim legislated a new practice, of public declarations. Tosefta Kifshuto, Ketuboth, pp. 266-268.

<sup>60</sup> Sanhedrin 26b.

<sup>61</sup> See Yevamot 36a, and parallels at 41b and 119b. Also Bechorot 53a.

<sup>62</sup> (1) Shabbat 139a, and (2) 146b.

<sup>63</sup> (3) Rosh Hashana 21a; (4) Bava Kamma 23b; (5) Bava Kamma 113b; (6) Bava Metzia 107b; (7) Bava Batra 45a; and (8) Sanhedrin 26a. It is interesting that the latter four of these texts involve problems as to the ritual or financial obligations of Jews caused by either the intervention of non-Jews or the relationship to the non-Jewish society.

<sup>64</sup> (1) Rav of Sura; (2) Rav of Sura; (3) R. Jochana of Tiberias; (4) Rav Joseph of Pumbedita, or Rabbah of Pumbedita, or Rava of Mehoza; (5) Rava of Mehoza, or R. Huna of Sura, or R. Joseph of Pumbedita; (6) R. Ami of Tiberias; (7) Rava of Mehoza or R. Papa of Naresh; (8) R. Yannai of Akhbara.

<sup>65</sup> Berachot 28a and Shabbat 31a-b, relate to ethical guidance. Shabbat 129a and Ketubot 77b, relate to health advice. Beitza 16b, Kiddushin 70b and 81a are factual announcements. Avodah Zarah 19b is a call to repentance.

that we are not merely dealing with ethical counsel, but with a legislative act adopted in one or more of the Babylonia Academies, and “pronounced” by the Head of the Academy. And so indeed this passage has been treated, as a legislative act, throughout the rest of the history of Jewish Law.

## **2. The Legal Constraint on Testimony**

What appears then to be the bottom line in this teaching is as follows:

- (1) A Jew is subject to excommunication if he testifies in a non-Jewish court when ALL of the following conditions pertain:
- (a) his testimony is against a fellow Jew,
  - (b) in the benefit of a non-Jewish litigant,
  - (c) the witness has not been subpoenaed,
  - (d) he is the sole witness, and
  - (e) the litigation takes place in a “Magista” court.

By contrast:

- (2) This constraint would NOT apply if ANY of the following conditions were present:
- (a) his testimony is in the benefit of a fellow Jew
  - (b) the other litigant is also a Jew
  - (c) the witness has been subpoenaed
  - (d) there are two witnesses (even in a “Magista” court)
  - (e) the litigation is in a “Dawar” court (even as a single witness.)

The inapplicability of the Amoraic constraint on testimony when one of the first two conditions apply, that is where his testimony is in the benefit of the Jewish litigant, or where the other litigant is also a Jew, is self-evident based on the Tannaitic texts which we have previously seen. No early teaching in Jewish Law would prevent a Jew from being a witness in a non-Jewish court when a fellow Jew was the beneficiary of such testimony. What however is the role of subpoena in this deliberation? What is the difference between a “Magista” court and a “Dawar” court? And what is the critical



nature of the number of witnesses in determining the permissibility of testimony? We need to turn to these issues to further clarify the foundations of the Amoraic legislation.

### **3. The Role of Subpoena**

The presence of the fourth line in the above cited legislation of Rava, “...but he did not summon him (to testify)....”<sup>66</sup> introduces a vital exemption from the general restriction. According to this language, were the non-Jewish party, or the non-Jewish court itself, to summon a Jew to testify against his fellow Jew in the non-Jewish court, he would be permitted to testify. Only voluntary testimony is constrained.

However, all manuscripts and printed editions of the Talmud prior to the middle of the sixteenth century, lack this entire phrase.<sup>67</sup> Likewise, every quotation of this Gemara passage by Gaonim<sup>68</sup> and Rishonim<sup>69</sup> lack this exempting language, up to and including the response of Rabbi Moshe Isserlis.<sup>70</sup> The first appearance of the phrase “but he did not summon him” as an integral part of this text is in the Tractate Bava Kamma published in Basle in the month of Tammuz of 1578.<sup>71</sup> That printed edition of the Talmud was heavily censored by Cardinal Marco Marini,<sup>72</sup> which led R. Rabbinovicz to propose that the addition of this phrase was made by the Christian censor<sup>73</sup> in order to

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<sup>66</sup> The use of term ‘tava’ in the sense of a summons to testify, already appears in Sifra, Vayikra, Dibura DiHova, Perek 16, sec. 5. The Gemara in Shavuot 31b does not preserve the term in its indication of the requirement of issuance of a summons as a basis for liability for refusal to testify. However, Rambam, Laws of Testimony 1:1, revives the use of the term from the Sifra for this purpose.

<sup>67</sup> Rabbinovicz, *Dikdukei Soferim*, Bava Kamma 113b, at p. 281.

<sup>68</sup> The passage is cited only three times in extant Gaonic literature and the phrase is absent in all of them. *Sefer Halachot Pesukot* by Rav Yehudai Gaon, Codex Sassoon 263, ed. by S. Abramson, Jerusalem 1971, at p. 82. *Sefer Halachot Gedolot*, Tel Aviv, 1962, sec. 43, at p. 177. And B.M. Lewin, *Otzar HaGeonim to Bava Kamma*, at p. 100, Jerusalem, 1943.

<sup>69</sup> There are two apparent exceptions to this, but both are actually subsequent revisions of the text of a Rishon to make it conform to a later reading of the Gemara. 1. Rabbenu Asher to Bava Kamma 113b includes the phrase; but Rabbinovicz, *op. cit.* at note 8, indicates that the phrase is absent in the earlier manuscripts and printed editions. 2. *Responsa of Rashba (Aderet)* vol. 7, no. 160 contains the phrase in the Warsaw edition of 1868 (actually published in 1908.) However, in the Rome edition of circa 1480 (reprinted Jerusalem, 1977) the phrase is absent. Also later in the text of that very responsum, Rashba explicitly rejects the possibility of an exemption based on summons by the non-Jew (as does Meiri to Bava Kamma 113b.)

<sup>70</sup> *Responsa of RaMA*, no. 88, ed. by Asher Siev, Jerusalem, 1971, at p. 381.

<sup>71</sup> Rabbinovicz, *op. cit.* and in *Dikdukei Soferim to Berachot*, Introduction, p. 101.

<sup>72</sup> Rabbinovicz, *Dikdukei Soferim to Berachot*, Introduction, pp. 104-105.

<sup>73</sup> Rabbinovicz, *Dikdukei Soferim to Bava Kamma 113b*, at p. 281, note 8.

subvert Jewish Law and to deceive Jews into more active participation as witnesses in non-Jewish courts even against the interests of fellow Jews.

We will later explore other possible theories for the entry of this phrase into the Talmudic text, but whatever motivated its inclusion, it was certainly not an original element of the Amoraic legislation.

#### 4. דיני דמגיסתא -בי דאור “Magista” Courts and “Dawar” Courts

These two terms, describing apparently distinct judiciaries in Sassanian Iran in the fifth century of the common era, are shrouded in both historical and linguistic difficulties.<sup>74</sup> The primary historical problem is the fact that extant Babylonia records never use either of these terms to describe courts of any kind.<sup>75</sup> Thus lacking any external sources for verification of the true nature of these institutions, we are thrown onto the Talmudic material itself, which is quite scant, and philological analysis which is only of limited aid.

Firstly, as to the term **בי דאור**, Dawar court. Spicehandler agrees with and defends Kohut's identification of the word Dawar as derived from the Persian word meaning judge. Despite the absence of the word in Persian materials in any construct referring to a court, they contend the Bei Dawar is the courthouse over which the Dawar, the judge, presides.<sup>76</sup>

The three Talmudic instances of use of the term Bei Dawar provide us with some limited information. The implication is present that this was an official government institution, where the need to appear on time in response to a summons was perceived by non-Jews as of sufficient urgency as to justify the refusal to help a person in dire need.<sup>77</sup> Further, it

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<sup>74</sup> Ezra Spicehandler, *Bei Dawar and Dina D'Magista: Notes on Gentile Courts in Talmudic Babylonia*, HUCA vol. 26, 1955, pp. 333-354. (Hereinafter “Spicehandler”).

<sup>75</sup> Spicehandler, at pp. 344 and 351.

<sup>76</sup> Spicehandler at pp. 341-344. Kohut, *Aruch Completum*, vol. 3, pp. 31-32.

<sup>77</sup> *Avodah Zara* 26a. The official character of this court is also reflected in *Tanhuma*, *Ekev*, sec. 11, where the judge is the bearer of official government documents.

was a court in which a Jew could fairly expect to recover even from a non-Jewish litigant, so that his failure to pursue a claim in the Bei Dawar is presumptive evidence of his abandonment of the property.<sup>78</sup> And, in our passage, the Bei Dawar is a court in which it is permissible for a Jew to testify against a fellow Jew in favor of the non-Jewish party, even if he is the only witness.<sup>79</sup> Certainly, a very positive attitude is reflected in these Talmudic passages.<sup>80</sup>

Can we date this usage? Other common Talmudic terms for non-Jewish courts are attested to specific Amoraim and therefore are subject to relatively precise dating and identification with specific Amoraic schools. So, for example, the term “Beit Din shel Ovdei Kochavim” (“Courts of Idolators”) was apparently a school usage in Pumbedita by the students of R. Judah b. Ezekiel.<sup>81</sup> The term ‘Dina DeParsa’i,” (“Persian Courts”) was apparently a school usage in Mehoza by the students of Rava.<sup>82</sup> However, the term “Bei Dawar” appears only in what are, judging by their language and structure, apparently anonymous Stammaitic explanatory passages which are indeterminate as to date.<sup>83</sup>

Thus lacking both external evidence and precise dating for the Talmudic texts, it is not really possible to determine whether this positive attitude towards the Bei Dawar was a function of the general quality and integrity of those particular non-Jewish courts, or was reflective of a more positive attitude towards general non-Jewish courts in a particular Rabbinic school at a particular point in time.

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<sup>78</sup> Gittin 58b.

<sup>79</sup> Bava Kamma 114a.

<sup>80</sup> We might add that a further suggestion of this positive attitude might be the very use of the term “Bei” which is otherwise reserved for the Rabbinic Academy itself. Cf. A.S. Amir, *Institutions and Titles in Talmudic Literature* (Heb.), Jerusalem, 1977, pp. 18-37. Also, Goodblatt, *op. cit.*, at n. 41.

<sup>81</sup> Gittin 28b and 29a; Kiddushin 14a.

<sup>82</sup> Shavuot 34b; Bava Kamma 58b; Bava Metzia 108a; Bava Batra 55a and 173b; Avodah Zara 71a. In all of these instances, except that in Bava Batra 173b, the translation could either be Persian Law, or Law of the Persian Courts.

<sup>83</sup> For indications of the late character of the Bei Dawar passages, note the following: As to Shabbat 19a, the sudden shift from Hebrew to Aramaic, and comments on that phenomenon by Shamma Friedman, *Perek HaIsha Rabba*, in *Mechkarim U'Mekorot*, at pp. 301-302, New York, 1977; and B. DeFrize, *Mechkarim Besafut HaTalmud*, Jerusalem, 1968, at pp. 195-196. As to Gittin 58b, the passage begins with the phrase “Mai Ta’ama,” as does our passage in Bava Kamma 114a. Again, S. Friedman, *op. cit.* at pp. 303-304, 346 and 378 is inclined to see in that usage a late Stammaitic character. As to Avodah Zara 26a, the usage appears as an alternate answer in the form of “Iy namei,” also seen as a late addition by E.Z. Melammed, *An Introduction to Talmudic Literature* (Heb.), Jerusalem, 1973, at pp. 435-436.

In marked contrast to the attitude towards the Dawar court, the two Talmudic passages referring to Magista Courts are both very negative. In our passage, the Gemara insists that Rava's restriction on testimony against a fellow Jew is distinctively and exclusively applicable in the Magista courts.<sup>84</sup> In the other instance, the Gemara, in a rhetorical question, contrasts the law of Magista courts with the law of Torah in a distinctly disparaging tone.<sup>85</sup>

Attempts to identify the actual historical legal institution which is described in Talmudic terminology as Magista courts, have foundered until now on lack of sufficient data. Suggestions that the term describes either the people's assembly, or magistrates courts, or a travelling justice of the peace, are all rejected by Spicehandler on either philological or historical grounds.<sup>86</sup> He does, however, make one additional suggestion of an orthographic change which would allow the word Magista to be related to the Persian Magi, who are elsewhere in the Talmud identified both as low echelon officers of the Iranian government, and as crude and boorish people.<sup>87</sup>

The Gaonim did not appear to be concerned with the historical nature of the Magista courts, but they were clearly interested in understanding why the Amoraim had such a dismal view of those courts. While we will later address the way in which the Gaonim relate to the question of testimony in non-Jewish courts, we can take a moment now to note their understanding of the term Dine D'Magista. The picture which emerges under the prism of the Gaonic authorities is of a court which was at best inexpert,<sup>88</sup> probably corrupt<sup>89</sup> and possibly violent.<sup>90</sup> While the philological derivations they proposed as the

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<sup>84</sup> Bava Kamma 114a.

<sup>85</sup> Bava Metzia 30b.

<sup>86</sup> Spicehandler, at pp. 345-351. Spicehandler does not cite an article by M. Wohlman, *Bet Mishpat Magista*, in *Hamishpat*, vol 4 (1930-1931), pp. 114-116 arguing for Magista as a travelling justice of the Peace. But the elements of Wohlman's position are indirectly dealt with and rejected in Spicehandler's treatment of other positions.

<sup>87</sup> Spicehandler, at pp. 353-354, citing Shabbat 139a and Sotah 22a.

<sup>88</sup> Rabbenu Hananel, in *Commentary to Bava Kamma 114a*, in Lewin, *Otzar HaGeonim*, Bava Kamma, part 2, p. 105. (Echoed in Rashi, Bava Kamma 114a, s.v, D'Magista.)

<sup>89</sup> Hai Gaon, in Lewin, *Otzar HaGeonim*, Bava Kamma, Responsa p. 100. Kohut, in *Aruch Completum*, vol. 5, pp. 78-79, suggests two separate derivations from Persian words which would substantiate this meaning. Spicehandler rejects them both, at pp. 349-350.

bases of these theories were usually strained,<sup>91</sup> the criteria which emerged as tests of whether any court should be considered to be like a Magista court or not, were quite unequivocal.

The contrast which emerges from the limited information available, then, is that the Dawar court is an established governmental institution which is trustworthy in its legal process, while the Magista court is inexperienced and probably corrupt. Whether it is this contrast of general characteristics, or the specific difference in evidentiary law, which served as the basis for distinction in our passage as to permissibility of a single Jewish witness to testify against a fellow Jew to the benefit of a non-Jew in a Dawar court, contrasted with impermissibility of his doing so in a Magista court, is an issue that we will explore in another section.

### **5. Literary Structure of the Passage**

Analysis of the literary history of this passage is vital for an understanding of its legal content. The central question is: what precisely was the legislative language of Rava? We have already established that line 4, “velo t’va’o minei,” “but he did not summon him (to testify)”, was a very late medieval addition. But what now of lines 7 through 10, containing the rationale of the law (line 7) and the two limitations on its scope (lines 8-10, limited to a single witness, in a Magista court)? Were these integral elements of the original decree, or were they later additions to and modifications of the initial legislation?

The clearest element of response to this question is in regard to the two limitations of lines 8 through 10. The form in which those restrictive clauses appear, “velo amaran elah...aval....,” “ they did not proclaim this except...but....,” is a relatively common Amoraic usage for limiting the applicability of a stated law to particular fact situations,

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<sup>90</sup> Hai Gaon in Sefer Hamekach Vehamemkar, ch. 32, par. R, p. 67a. here too, Kohut’s attempted derivation in Aruch Completum, vol. 3, p. 386b, is rejected by Spicehandler at p. 347. Spicehandler at p. 351, likewise rejects a suggestion by Ginzburg of a Persian derivation to support this explanation. (Rashi echoes this suggestion that violence is the dominant characteristic of the Magista courts, in Bava Kamma 114a, s.v. Chad amumsa shadu lei.)

<sup>91</sup> See Spicehandler, pp. 345-351.

while precluding its applicability to other circumstances.<sup>92</sup> The form is already attributed to the earliest Babylonian Amoraim, such as Samuel,<sup>93</sup> and continues in use through the Amoraic period. Indeed, Rava himself, the author of our law, is reported to have used this formula to limit an earlier law, some sixteen times.<sup>94</sup>

However, there is not a single attestation of the use of this form by the author of a law in relation to his own law. The grammatical structure itself indicates that it is someone other than the original legislator who adds the limitation. The word “amaran,” “we say,” is first person plural<sup>95</sup> and clearly does not identify the authors of the limitation with the author of the initial law being so limited. Thus we would be led to conclude that lines 8 through 10, limiting Rava’s Law to testimony by a single witness, and even that, only within a Magista court, are not part of the original legislation, but are subsequent additions.

What however of line 7, which posits as rationale of the restrictive legislation, the injury that would result to the Jewish party. If that was that the reason offered by Rava himself, then our exploration of the legal basis of the legislation has an unequivocal starting point. But, if it too was a subsequent Amoraic or even later addition, then we would need to explore whether Rava himself might have had some other motive in restricting testimony in non-Jewish courts.<sup>96</sup>

The language of the passage itself might be indicative, but is far from conclusive. The phrase which opens line 7, “mai ta’ama,” “what is the reason?” is such a commonplace in the Talmud as to defy precise dating.<sup>97</sup> Nevertheless it is worth noting that the words

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<sup>92</sup> The form is used in the Talmud over 200 times. Cf. Kosowski, *Thesauris Talmudis*, vol. 1, pp. 121-125.

<sup>93</sup> E.g. *Eruvin* 29a, and *Sukkah* 28a.

<sup>94</sup> *Berachot* 50b; *Shabbat* 12a, 23a, 62b, 129a; *Eruvin* 79a; *Pesachim* 6a, 76a; *Succah* 32a; *Megillah* 19a; *Ketubot* 61a, 96a; *Kiddushin* 42b; *Bava Metzia* 74a; *Menachot* 35a; *Hullin* 50a.

<sup>95</sup> J.N. Epstein, *A Grammar of Babylonian Aramaic*, (Heb.), Magnes Press, Jerusalem, 1960, at pp. 61 and 63.

<sup>96</sup> There is a substantial literature on this pattern of separating between the initial law and its subsequent explanation. See Ch. Albeck, *Tarbiz*, vol. 9 (1938), pp. 163-178, and his *Mavo LaTalmudim*, ch.7, pp. 504-522. Further development of Albeck’s thesis is found in a series of articles by Hyman Klein, in *J.Q.R.* vol. 38 (1947), pp. 67-91; vol. 43(1953), pp. 341-363; vol. 50 (1959), pp. 124-146; in *Journal of semitic Studies*, vol. 3 (1958), pp. 363-372; and in *Tarbiz*, vol. 31 (1962), pp. 23-42. A fine summation of the state of the art is found in Shama Friedman, *Perek HaIsha Rabba*, op. cit., pp. 283-321.

<sup>97</sup> The phrase is used some 1700 times in the Talmud. Cf. Kasowski, *Thesaurus Talmudis*, vol. 15, pp. 228-251.

would be unnecessary if the rationale which followed were part of the original legislation.<sup>98</sup> Rava could quite smoothly have continued from the law to its rationale without the intervening question.<sup>99</sup> Similarly suggestive is the fact that the word “apumah,” literally “by the mouth of,” appears in the sense of testimony only in passages which apparently post-date Rava himself.<sup>100</sup>

More significant than the terminology in this instance is the evidence of the logic of the passage itself. Line 7, as rationale for the law of Rava is deeply deficient. Firstly, the initial formulation of the legislation does not specify its exclusive applicability to only one witness. Indeed, it is precisely that limitation which line 8 first propounds, without which we would have assumed that Rava forbade testimony in a non-Jewish court even for two or more Jewish witnesses. Why then should a rationale of the initial legislation be offered which does not adequately explain the full scope of the law? Secondly, if the rationale of line 7 is intended as the sole basis for restriction of testimony, then further justification of that as the criterion would certainly be expected, but is absent in the text, and is difficult to construct even as a pure matter of legal logic. If, on the other hand, the intent of the rationale in line 7 is intended simply as an illustration of an evidentiary rule which would produce a result different from that which would be produced by Jewish Law, then why is not the latter made explicit – that is, why does the Gemara not directly state that the rationale of Rava’s restrictive legislation is that the Jewish party would then be subjected to a legal outcome which varies from that which would result from an application of Jewish Law?

As inappropriate as line 7 is as a rationale for the initial law of Rava (lines 3, 5 and 6), it is conversely perfectly appropriate as a rationale for line 8, the limitation of the law to a single witness. As to the question of why Rava’s Law should apply solely to a single

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<sup>98</sup> Cf. S. Friedman, *op. cit.* at pp. 303-304.

<sup>99</sup> S. Friedman, *op. cit.*, does in fact at two points assign passages including the phrase “mai ta’ama” to the later Stama DiGemara rather than to the original Ikkar haGemara, at pp. 346 and 378. However, in neither case does he indicate that the term itself was the determinative factor in his dating.

<sup>100</sup> It appears once ascribed to R. Papa in Ketubot 23b. In all other instances the word is part of an anonymous explanation of prior laws, including one other instance of explicating a statement of Rava, in Gittin 15a,b. See Kasowski, *Thesaurus talmudis*, vol. 31, pp. 57-60.

witness (line 8), the response that it is because non-Jewish courts will reach their decision based on the testimony of a single witness (line 7), is a perfect answer.

While still speculative, the legal and terminological elements in this passage could yield the following conclusions as to the development of the text before us:

Stage 1: The initial legislation of Rava, restricting any testimony against a fellow Jew in a non-Jewish court, under threat of excommunication (lines 3, 5 and 6) –

3. If a Jew knows evidence for the benefit of a non-Jew,
5. and he goes and testifies in a non-Jewish court against his fellow Jew,
6. he is to be excommunicated.<sup>101</sup>

Stage 2: The limitation of Rava's Law to where there is only a single witness and the rationale of that limitation based on the fact that non-Jewish courts reach decisions based on the testimony of a single witness (lines 8 and 7) –

8. We do not say this except when there is one (witness), but if there are two, it does not apply.
7. What is the reason? Because they determine monetary liability on (the basis of) the testimony of a single witness.

Stage 3: The concretization of the rationale by indication that only Magista courts actually reach judgment based on a single witness, while Dawar courts do not; and therefore, testimony in Dawar courts is permissible even for a single witness (lines 9 and 10) –

9. And even if there is one, we do not say this except in Magista courts,
10. but in Dawar courts, they too, if there is one (witness), impose an oath upon him (the defendant.)

Stage 4: The inversion of the sequence of lines 8 and 7 to connect the legislation with the rationale (albeit imperfectly), and to make for clearer continuity in the sequence of the two limitations which are built upon one another.<sup>102</sup>

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<sup>101</sup> I omit line 4 from the original legislation of Rava due to the late medieval origin of that line into the Talmudic text, as above in text related to notes 67-73.



## **B. Later Amoraic / Stammatitic Limitations on the Constraint**

### **1. The Original Legislation of Rava**

Given these assumptions about the unfolding of the Talmudic text before us, Rava's original legislation consisted of the following (identified earlier as lines 3, 5, and 6):

If a Jew knows evidence for the benefit of a non-Jew, and he goes and testifies in a non-Jewish court against his fellow Jew, he is to be excommunicated.

This being the case, a number of additional issues require explication. First and foremost is the question of why Rava should have introduced such a broad constraint on testimony and what is the legal theory behind it. This original text of Rava's law provides no clue to its motive. While I leave for a later section a fuller exploration of this issue,<sup>102</sup> we need here to examine the tension between the legislation of Rava and the Tosefta text in Avodah Zara 1:8, which we introduced earlier. Our prior analysis of that text left us with the clear impression that early Jewish Law interposed no objection to the testimony of a Jew in a non-Jewish court when the litigation itself was justifiably before that court, as, for example, when one of the parties was a non-Jew. The underlying assumption of that analysis was that in a situation in which justice cannot be achieved through the medium of a Jewish court adjudicating by the substantive laws and procedures of Jewish Law, then one is to go with the best possible alternative, and not simply abandon the hope for justice because the matter will be litigated in a non-Jewish court.

However, we need now to note that the explicit text of that Tosefta relates to testimony on behalf of the Jewish party, in opposition to the non-Jewish party. The testimony thus served to achieve one of the "rescue" purposes that would justify overriding the Rabbinic prohibitions against business transactions with idolaters during their festivals, or the Kohen leaving Israel subjecting himself to the Rabbinic "impurity" of foreign lands. The implication of the Tosefta was that in the absence of the possible violation of some Rabbinic law, there would be no constraint at all on testimony, whether it was in favor of

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<sup>102</sup> For a perfectly analogous instance of this literary development see Gittin 77b, and its treatment by A. Weiss, *Mehkarim Betalmud* (Heb.), Jerusalem, 1975, pp. 225-226.

<sup>103</sup> See section III below.

the Jewish party, or in favor of the non-Jewish party. Such would certainly be the case in regard to testimony of a Jewish witness in litigation before a Jewish court in which one of the parties was a non-Jew. There has never been a suggestion in the literature of Jewish law that a Jew ought not to testify in a Jewish court in favor of a non-Jewish litigant. Nevertheless, the legislation of Rava is thus not in explicit contradiction to the Tosefta. It created a constraint within a lacuna in Tannaitic law, which had, theretofore, never explicitly confirmed the permissibility of testimony by a Jew in a non-Jewish court in opposition to the interests of the Jewish party to the litigation.

The following two segments of the text which were added to the original legislation of Rava, served to limit the breadth of the applicability of the constraint, and also may introduce us to what those later anonymous Amoraim, (or Saboraim, or Stammiim) thought about the motivation of Rava in this legislation.

## **2. The First Limitation and the Rationale of Rava:**

### **Economic Injury Not in Accordance with Jewish Law (1)**

The first limitation attached by the Gemara text to the legislation of Rava (identified earlier as lines 7 and 8) was:

We do not say this except when there is one (witness), but if there are two, it does not apply.

What is the reason? Because they determine monetary liability on (the basis of) the testimony of a single witness.

This limiting interpretation of the legislation of Rava would allow the testimony of a Jewish witness in a non-Jewish court against the Jewish defendant where there were two witnesses. It leaves intact the constraint where the Jew was a sole witness. What is the meaning of this distinction? The text itself asks the question and seems to provide an answer. If there are two witnesses in favor of the non-Jewish plaintiff, then whether the litigation takes place in the non-Jewish court, or were to have taken place in a Jewish court, the outcome would be the same – judgment in favor of the non-Jewish party, whose position is supported by two witnesses. On the other hand, if the Jewish witness is the sole witness on behalf of the non-Jewish plaintiff, then while the non-Jewish court would still find in favor of the non-Jewish party, a Jewish court could not

base its judgment solely on such testimony, and would therefore find in favor of the Jewish defendant.

According to this approach, the single Jewish witness testifying against the Jewish party in the non-Jewish court would be causing that party a loss which he would not have suffered according to Jewish Law. This disparity of outcome could well be the motivation of the Legislation of Rava – that is, to prevent a Jew from causing economic injury to a fellow Jew through the medium of a non-Jewish court, which is not justified in the application of Jewish Law. In fact, Rashi directly explains the restriction on such testimony by a single witness in exactly that manner, saying “with the result that he causes him loss not in accordance with the (Jewish) Law.”<sup>104</sup>

The Talmud does not explore this position any further, leaving open to later Rishonim the opportunity to deal with the issue of substantive differences in the legal systems which would result in divergent outcomes even if there were two witnesses.<sup>105</sup> Nor does the Talmud here explain why - if the theory of Rava is the injury that would result to the Jewish litigant - was separate legislation necessary. Why not just rely on normal Jewish law of financial injury and allow the injured Jewish litigant to sue and recover from the single Jewish witness who had testified against him in the non-Jewish court, and thus caused him to suffer financial injury? We will examine these and other questions about this theory of what underlies the position of Rava when we discuss the Rishonim in detail.

### **3. The Second Limitation and the Rationale of Rava:**

#### **Disparate Outcomes (1)**

A further limitation on the legislation of Rava is the continuation of the Talmudic passage (previously identified as lines 9 and 10):

And even if there is one (witness), we do not say this except in Magista courts, but in Dawar courts, they too, if there is one (witness), impose an oath upon him (the defendant.)

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<sup>104</sup> Rashi to Bava Kamma 114a, s.v. Apuma dechad.

<sup>105</sup> See for example Tosafot to Bava Kamma 114a, s.v. Velo amaran elah chad.

By virtue of this addition, even the limitation on testimony by a single Jewish witness against a fellow Jew in a non-Jewish court would pertain only in the context of “Magista” courts; while being perfectly permissible in “Dawar” courts. Given the lack of internal Talmudic evidence as to the nature of the courts here referred to as “Magista” and “Dawar,” one logical approach would be to interpret the passage in consonance with the suggested rationale in the earlier passage, and in terms of its final observation – that these two forms of courts differ in regard to their rules in instances where plaintiff is able to produce only a single witness. Since the Magista court would then still find in favor of the non-Jewish plaintiff, the single Jewish witness would have caused loss to the Jewish defendant which he would not have suffered under the rules of Jewish Law, and the witness is therefore subject to penalty. On the other hand, the rules of the Dawar court, were apparently similar to those of Jewish Law, providing that if the plaintiff can only provide a single witness, the court will exact an oath of the defendant that he is not liable, and will then dismiss the charges against him.<sup>106</sup> The outcome in the non-Jewish Dawar court could be identical to that which would have been arrived at in the Jewish court. The single Jewish witness would then have caused no loss to the Jewish defendant, and is therefore not subject to penalty under the terms of this second limitation on the legislation of Rava.

This approach would have us see perfect consistency between the first and second limitations on the position of Rava, reflecting a common assumption that Rava’s initial legislation was motivated by the disparity of legal outcome as between a Jewish and a non-Jewish court, with Rava intending to penalize Jews who would cause economic loss (by standards of Jewish Law) to fellow Jews through their testimony in non-Jewish courts.

#### **4. The Rationale of Procedural Injustice (2)**

However, a number of factors suggest the possibility of another understanding of how this latter passage views the rationale for, and therefore the application of, restrictions on testimony in non-Jewish courts. Two factors leap out at us in regard to this passage. Firstly, if the presumed determinant of penalty intended by Rava is non-conformity of

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<sup>106</sup> See Rambam, Mishneh Torah, Edut 5:1; and To’en velit’an 1:2.

outcome, then it is very strange that the passage focuses on a single evidentiary rule, rather than the more impactful substantive rules of law which could differentiate Jewish and non-Jewish courts, and which would result more directly in divergent outcomes of litigation. Certainly the Amoraim and later Babylonian Sages were aware of the fact that the substantive rules of Jewish Law were different from those of Persian Law. Why then focus on a single procedural rule related to how the system deals with the burden of proof in cases where there is only one witness?

Secondly, the introduction in this latter passage of the reference to different kinds of non-Jewish courts suggests that more was at stake here than just commonality of outcome. While neither Talmudic nor Middle Persian studies have been able as yet to resolve the historical question of what real life Persian institutions were being referred to by the terms *Magista* and *Dawar* courts, it is not unreasonable to think that what is at stake here is the intimation that the use of a particular procedural rule is an indication of the more general commitment of certain courts to levels of procedural justice that warrant their utilization by Jews as a reasonable means of achieving justice; and that Jewish witnesses should not be penalized for participating in litigation in those kinds of courts, even though the outcome might differ from what might have been arrived at in a Jewish court.

This alternative approach is directly suggested and elaborated in a singularly significant Gaonic responsum dealing with the question of testimony in non-Jewish courts. Since this responsum relates not only to this issue, but to others which we will later address, it is valuable to introduce the entire text at this point. The responsum is variously ascribed to Rabbi Sherira Gaon and/ or to Rabbi Hai Gaon,<sup>107</sup> and it reads as follows:<sup>i</sup>

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<sup>107</sup> Levin, *Otzar HaGeonim to Bava Kamma*, sec. 291, at p. 100. The division of the text into numbered sentences is my own, purely for the convenience of referencing elements of the responsum. For a full history of the text of this responsum, see endnote i. Tsvi Groner contends that all such responsa attributed to both R. Sherira Gaon and R. Hai Gaon, were actually authored by R. Hai Gaon and need to be viewed as part of his corpus of responsa. Tsvi Groner, *The Legal Methodology of Hai Gaon*, Scholars Press, Chico, California, 1985, at pp. 118-119.

1. As to your question.
2. In a place where there is no official Judge and there is a Jew who has on deposit with his friend a loan, or a security deposit, or an inheritance, and (the latter) was brought before the Elders, the Students<sup>108</sup> and the Lay Leaders of the town, who found him liable to repay what he owed him according to the (Jewish) Law.
3. But he was unwilling (to pay) and he rebelled.
4. And they are unable to extract from him what he is liable for according to the Law.
5. There is in that location a non-Jewish Dawar court, which does not accept bribes, nor does it practice favoritism, and it accepts the testimony of a Jew against a fellow Jew.<sup>ii</sup>
6. Ought those Elders and Students and those witnesses, to appear before the non-Jewish Judge, to testify against the guilty party, and to say that this one is liable to the other the following amount – so as to achieve the return of the money to its owner, and to rescue stolen property from a robber, and so that lawless people should not be taught to act with violence – lest thieves and robbers increase?
7. Or do they not have permission (to appear)?<sup>109</sup>
8. This is how we see it: that they have permission, and it is a Mitzvah<sup>110</sup> to do so.
9. Even were the victim of the theft to have been a non-Jew,<sup>111</sup> and the thief a Jew, we would be permitted to testify against the Jew to non-Jews, at (the court of) a Judge who is not a violent robber.
10. Thus we say, (Bava Kamma 113b) Rava proclaimed, others say it was Rav Huna, (Let it be known to) those who go up to Israel, and those who descend

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<sup>108</sup> L. Ginzberg, *op. cit.* at p. 124, note to line 15, +claims that the term “Talmidim”, “students”, in Gaonic response is equivalent to “Talmidei Chachamim”, “scholars.” But see A. Harkavy, *Teshuvot HaGeonim*, Berlin 1887, no. 233 (p. 111) where the term Talmidei Chachamim is used in contrast to “Zekenim,” “Elders.” Also see below at endnote iii.

<sup>109</sup> The bias of the questioner could not be more clear than in this formulation of the alternative possible responses – expansively as to the first and with great brevity as to the second. The second posed alternative is even more de-emphasized in the Adret version, *op. cit.*, which here simply reads “Oh lo?”, “or not?” In the *Sefer HaIttur* synopsis, *op. cit.*, this quality is lost by the recasting of the entire responsum into declarative form and elimination of the separate presentation of the question in favor of integrating the preferred alternative directly into the response.

<sup>110</sup> Much of the force of the response is made evident in the Gaon’s use of this phrase “and it is a Mitzvah to do so!” For a careful analysis of the multivocal term “Mitzvah,” see Benjamin DeVries, *Halachic Categories* (Heb.), Bar Ilan Annual, vol. 2, 1965, pp. 77-83.

<sup>111</sup> The word non-Jew is absent in the Adret version and in the equivalent passage in the Genizah fragments found in Ginzei Schechter, *op. cit.* L. Ginzberg notes this and correctly insists that it is a pure scribal error, *ibid.*, vol.2, at p. 118. The obviously erroneous nature of this omission is not only because the word is present in every other version of the responsum, including the synopses. It is also because the responsum goes on to quote in support of his position in this hypothetical case, the legislation of rava in Bava Kamma 114a. That law is exclusively relevant to testimony in a situation in which one party is a non-Jew..

to Babylonia, that if a Jew knows evidence in the benefit of a non-Jew, against his fellow Jew, and he goes and testifies in a non-Jewish court, he is to be excommunicated.

11. However, this was not taught except as to a single witness, but as to two witnesses, it was not taught.
12. And even as to a single witness, this was not taught except as to a “Magista court,” but as to a “Dawar court,” they impose an oath (on the defendant when there is a single witness against him.)
13. The meaning of “Magista court” is “court of the platter,” as similarly the phrase “ka’arat keseph” (Numbers 7:13) is (translated by Onkeles as ) “magista dich’saf,” (a silver platter.)
14. That is, they issue judgment based on their momentary thoughts, and they are not (concerned with) details, and they accept bribes, so that whoever brings a “platter,” they decide in his favor.
15. We also regularly order the Judges to do exactly this in regard to a person who rebels against the (Jewish) Law, and does not dread the Rabbinic excommunication.<sup>112</sup>
16. However, it is necessary to warn him first in a public warning, and then if he does not accept (the Jewish Law judgment), we testify against him (in the non-Jewish court) and (thus) collect from him.
17. As for the Rabbinic teaching (Gittin 88b), “We were taught, Rabbi Tarfon said, In whatever place one finds the courts of non-Jews, even if their laws are the same as Jewish Law, you are not permitted to have recourse to them, as it says, (Exodus 21:1) “(These adjudications) you shall place before them (Jewish Judges),” not before non-Jews, for they are to be treated as “hedyotot,” non-ordained (non-expert adjudicators.)
18. Thus in a place where you can collect the debt through Jews (adjudicating,) do not resort to them (non-Jews.)
19. And likewise, in a place where the (official Jewish) Judge is able to collect, to not resort to non-ordained (adjudicators), as the Rabbis taught, “before them” and not before non-ordained adjudicators.
20. But in a place where there is no official (Jewish, ordained) Judge, one should collect through non-ordained Jewish adjudicators, in accordance with the Law – and do not cause financial loss!
21. And in a place where the thief has no fear of Jewish scholars, the debt is to be collected through non-Jews – and do not cause financial loss!

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<sup>112</sup> On the basis of this passage, David E. Sklare, Samuel Ben Hofni Gaon and his Cultural World, EJ Brill, Leiden, 1996, at p. 74, n. 24, makes a broad generalization that Rav Hai Gaon “...had knowledge of the contemporary Muslim judicial system in Baghdad and approved of its trustworthy witnesses and justice.” Perhaps a tad too broad.

This responsum contains many elements of significance to the legal analysis of the legislation of Rava. Most important, is the way in which the Gaon understands the implications of the use of the terms *Magista* and *Dawar*. As we noted earlier, The Gaon understands these terms to refer alternatively to corrupt as opposed to honest courts. The responsum minimizes the significance of the evidentiary rule that in the presence of a single witness the court would require the defendant to take an oath. Rather than this single rule being the litmus test for the permissibility of testimony, it is no more than an indication of the integrity of that court. The ultimate determination as to permissibility to testify is not a single procedural rule, but the broad character of the particular non-Jewish court, is it honest, does it have standard procedures, does it treat Jews fairly? If the answers to those questions are positive, then according to the Gaonim, it is permissible even for a single Jewish witness to testify in such a non-Jewish court in favor of a non-Jewish plaintiff, against the interests of the Jewish defendant.

The determinative test is not the particular outcome and its comparability to the outcome that would have been produced in a Jewish court. The crucial test is whether justice can be served in that court. Indications of a just court are its integrity (avoidance of bribery), the regularity of its procedures and its fairness to all litigants (including Jews.) The reverse qualities in the judiciary are indications of the presence of Injustice<sup>113</sup> which would necessitate avoiding participation so as not to become complicit with inflicting injustice on the Jewish litigant.

### **III. Further Possible Rationales of Testimonial Restriction: The Gaonic Period into the Period of the Rishonim**

The product of all of this is the text which we have before us in the Gemara Bava Kamma 113b – 114a. However, we are no further enlightened as to the motive of the legislation of Rava. Indeed, the question is now sharpened, since we have established, with a reasonable degree of probability, that the original legislation was even broader than we might have thought, providing no exemption for persons subpoenaed, no distinction between a single witness or multiple witnesses, and no distinction related to the kind of

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<sup>113</sup> See Edmond Kahn, *The Sense of Injustice*,



court in which the testimony would take place. The restriction appears to have been severe and unequivocal, consisting of the three lines (3, 5 and 6) cited above:

3. If a Jew knows evidence for the benefit of a non-Jew,
5. and he goes and testifies in a non-Jewish court against his fellow Jew,
6. he is to be excommunicated.

What precisely was the legal foundation for this intense prohibition? Over the course of the succeeding centuries, since the time of Rava, distinct approaches to this question have been considered. We will examine each of the possible approaches through the lens of the legal literature of the Gaonim and Rishonim

### **A. As Extension of the Ban on Litigation - “Lifneihem....” (3)**

The simplest way to understand the legislation of Rava would have been to view it as an extension of the law of Rabbi Tarfon, prohibiting recourse by Jews to non-Jewish courts.<sup>114</sup> However, as we have demonstrated earlier, that law relates only to adjudication between two Jews. Indeed, the sole Tannaitic text which relates to testimony in a non-Jewish court, the Tosefta in Avodah Zarah,<sup>115</sup> seems clearly to indicate the inapplicability of this restriction to the circumstances of adjudication between a Jew and a non-Jew, and certainly indicates its inapplicability to potential witnesses in such instances.

#### **1. Rejection of this Theory by Rabbenu Nissim**

Was Rava consciously reversing the law of the Tosefta by extending the applicability of the Law of Rabbi Tarfon even to testimony in a case where one party was a non-Jew? While this proposition sounds feasible, it finds almost no echo in all of Rabbinic literature and is expressly rejected by R. Nissim b. Reuven of Gerondi (c. 1310-c. 1375) in a brief Responsum.<sup>116</sup> The inquiry related to adjudication between two Jews in a non-Jewish court, which the questioner attempted to justify on the grounds that the Jewish parties had consented to that non-Jewish forum, and that therefore, the law of Rabbi

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<sup>114</sup> Gittin 88b. See text and related footnotes, numbers 6 to 26, above.

<sup>115</sup> Tosefta Avodah Zarah 1:8. See above, *ibid*.

<sup>116</sup> Responsa of R. Nissim b. Reuven Gerondi (RaN), no. 73, Koenigsberg, 1831, final paragraph. (Earlier in that section, the reference to Rashba is an obvious typographical error for Rashbam, and is so corrected in the later edition of Ran's Responsa published in Warsaw in 1882.)

Tarfon would not constrain them.. The questioner further attempted to argue that since the law of Rabbi Tarfon was not applicable, the further Law of Rava restricting testimony against a fellow Jew in a non-Jewish court, would also be inapplicable – thus reading the law of Rava as an extension of Lifneihem, the law of Rabbi Tarfon. Rabbi Nissim, in a curt response, dismisses the latter contention and indicates that Lifneihem is unrelated to the issue of testimony. He says,

- i. I don't understand your contention.
- ii. There (in the case of Rava), the Jewish friend testifies in favor of a non-Jew,
- iii. when that non-Jew (the plaintiff), sued the Jew (the defendant) in his own (non-Jewish) court.
- iv. Then, even if the Jew does testify,
- v. he does not thereby violate "Thou shalt not place",
- vi. for the Torah thereby (Lifneihem) prohibits only placement (of cases by litigants in non-Jewish courts)
- vii. While this (testimony) is not related to Lifneihem.
- viii. This is simple.

Why indeed was it so "simple" and clear to R. Nissim that the Biblical prohibition of Lifneihem bears no relevance whatsoever to the situation of testimony in a non-Jewish court as raised in the law of Rava? Why was this so self evident that in all subsequent Rabbinic discussion of the legislation of Rava, through the entire periods of the Gaonim and the Rishonim, the possibility of its being based on Lifneihem is not even mentioned? The following factors were apparently determinative in excluding Lifneihem as the basis of the legislation of Rava.

## **2. Basis of the Inapplicability of Lifneihem**

### **a. Permissibility of Litigation Between Jew and Non-Jew in Non-Jewish Courts**

Firstly, until well into the Gaonic period there is not the slightest hint of any hesitation as to adjudication in a non-Jewish court when one party is a non-Jew. As we had seen earlier, the Tosefta, Avodah Zarah 1:8 had clearly indicated that where litigation in Jewish courts was not possible because one of the parties was a non-Jew, early Jewish law had already recognized the need to participate, as either litigant or witness, in non-Jewish adjudication in order to achieve whatever justice could thereby be made

available.<sup>117</sup> Interestingly, neither this Tosefta nor any other Talmudic text raises the question of whether such participation in non-Jewish courts would constitute breach of the teaching of Rabbi Tarfon. The implication is that barring the concern with the impurity of a Kohen, participation in litigation with a non-Jew in a non-Jewish court would not fall within the restrictive position of Rabbi Tarfon, would be entirely permissible according to Talmudic Law.

When the issue is eventually raised in the early ninth century in a Midrashic text,<sup>118</sup> the hesitation is merely advisory, suggesting that the Jewish party should attempt to have the matter adjudicated in a Jewish court. The passage in Midrash Tanhuma<sup>119</sup> reads as follows:

1. How do you derive
2. that if a Jew and a non-Jew have some matter (of litigation) between them,
3. that it is forbidden for the Jew to say to the non-Jew
4. 'Go with me to your courts (arka'ot).'<sup>120</sup>
5. And that he would (thereby) violate a prohibition – as it says,
6. 'He hath not dealt so with any nation, and as for His laws, they have not known them. Halleluyah.' (Psalms 147:20)

The legal form of the passage and its firm language might almost lead one to think that the Midrash is in fact positing the existence of a Biblical prohibition against the behavior described. However, it is vital to note that the Midrash does not suggest the involvement of the prohibition of Lifneihem, of which it is clearly aware.<sup>121</sup> Rather, the Midrash cites a passage in Psalms which suggests the inferiority of non-Jewish law to Divinely revealed law. Indeed, the behavior which the Midrash finds objectionable is not the actual adjudication in non-Jewish courts, which is the subject of Lifneihem, but rather is

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<sup>117</sup> See above text at notes 20-25.

<sup>118</sup> Midrash Tanhuma is dated by Zunz in the first half of the ninth century. Zunz, *Haderashot BeYisrael* (Heb.), edited by H. Albeck, Jerusalem, 1947, at p. 111. S. Buber does not disagree with that dating, *Tanhuma Buber*, Vilna, 1885, at pp. 9-10.

<sup>119</sup> *Tanhuma*, Shoftim, sec. 1, Stettin, 1865, P. 324a. The text is virtually identical in *Tanhuma Buber*, Shoftim, sec. 1, Vilna, 1885, p. 14a; and in the Mantua manuscript of *Tanhuma*.

<sup>120</sup> Dating in the early 800s would make this the earliest attested Gaonic usage of the term *Arka'ot* as referring to non-Jewish courts.

<sup>121</sup> *Vis. Tanhuma*, op. cit., *Mishpatim*, sec. 3, at p. 124b. (However, in *Tanhuma Buber*, op. cit., this *Mishpatim* passage is absent.)

the encouragement offered by the Jew to adjudicate in that venue. It appears that the Midrash is suggesting the moral impropriety of a Jew who might have the possibility of litigating with his non-Jewish opponent in a Jewish court – leaping at the opportunity to adjudicate in the non-Jewish court.<sup>122</sup> He has thus abandoned the wisdom and goodness of the Divine law in favor of the inferior non-Jewish law.

But this moral urging of the Midrash in defense of the dignity and honor of the Divinely revealed Jewish Law, never matures into a substantive restriction regarding litigation between a Jew and a non-Jew. Thus, Rava, dealing with the question of testimony in litigation between Jew and non-Jew in a non-Jewish court, is clearly outside the framework of the law of Rabbi Tarfon. The idea that Lifneihem might apply to a witness under circumstances where it is clearly not applicable to the litigants, has neither logic nor Rabbinic source to substantiate it. This is clearly one element in the thinking of RaN in excluding the applicability of Rabbi Tarfon's law to the situation of witnesses in a non-Jewish court.

#### **b. Permissibility to Testify in Honest Non-Jewish Courts**

Secondly, we have previously introduced a significant Gaonic responsum, variously ascribed to Rabbi Sherira Gaon and or to Rav Hai Gaon, dealing with the question of testimony in non-Jewish courts. That responsum does incorporate discussion of the Law of Rabbi Tarfon – Lifneihem. In regard to our current concern, whether the legislation of Rava was simply an extension of the prior teaching of R. Tarfon, we should note the sharp differentiation that was made by Rav Hai Gaon between the legislation of Rava and the law of R. Tarfon. The former is introduced into the responsum not in relation to the query which was actually submitted, but rather in response to the hypothetical case of theft by a Jew from a non-Jew. R. Hai attempts to use that hypothetical case as the foundation for an a fortiori argument which will reinforce his conclusion as to the permissibility of going to the non-Jewish court in adjudication between two Jews, one of

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<sup>122</sup> A. Gulak, *Leheker*, op. cit., at p. 58 suggests that this passage in Tanhuma is a reflection of Rabbinic opposition to the use of the non-Jewish archive for the deposit of documents when the Romans did not require such deposit. However, the passage clearly is unrelated to deposit of documents, the issue at stake is adjudication – the application of one or the other legal system for the resolution of conflict between the parties.

whom refuses to submit to the jurisdiction of the unofficial judges of the Jewish community. Thus, sentences 9 through 14 of the responsum relate to the application of the law of Rava to the hypothetical case propounded by R. Hai himself. Then, at sentence 15, R. Hai reverts to treatment of the question submitted to him, the focus of which is not on testimony per se, but on the question of whether the entire matter may be permissibly brought before a non-Jewish court. It is within this latter context that R. Hai treats the law of R. Tarfon – indicating the existence of an exception in dealing with a party who refuses to submit to the authority of the local Jewish tribunal.<sup>123</sup>

In an even less complicated context, another Gaonic responsum, probably also penned by R. Hai Gaon, affirms unequivocally that in a situation in which one party refuses to submit to the judgment of a Jewish court, and the resultant trial in a non-Jewish court is therefore authorized by Jewish Law- that in such a situation there is absolutely no objection to the original Jewish witnesses proceeding to testify in that non-Jewish court. This much is taken as obvious, while the responsum needed to proceed further because the non-Jewish court would not accept the testimony of the Jewish witnesses, but would accept testimony from outstanding members of the Jewish community.<sup>124</sup>

The Gaon proceeds to deliberate on the question of whether the judges of the original Jewish adjudication would be permitted to represent themselves as witnesses in the non-Jewish court since they heard the original testimony of the witnesses. The Gaon does not allow such misrepresentation, but expresses no hesitancy whatsoever as to the

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<sup>123</sup> The earliest reference to such an exemption is in a responsum ascribed to Rav Paltai Gaon (Pumbedita c. 842) recorded by Rabbenu Asher to Bava Kamma 92b. The responsum is quoted in Levin, *Otzar HaGeonim* to Bava Kamma 92b, at p. 69; and see notes 5 and 6 there. In the final event it is unclear whether Rav Paltai was the author only of the legal principle, or also of the striking figurative interpretation of the Talmudic passage.

<sup>124</sup> J. Schacht, *op. cit.* at pp. 192-195, and S. D. Goitein, *op. cit.* vol.2, at pp. 86 and 367-368, discuss the Muslim legal procedure of the “*udul*,” the use of “officially certified witnesses of good reputation.” This practice restricted the acceptance of testimony unless the persons were certified to be reliable and of good character. Our responsum suggests, albeit neither Schacht nor Goitein refer to it, that a similar procedure was applied by the Muslim courts to the qualification of *Dhimmi* (non-Muslim) witnesses. It could be for that reason that the questioner indicated that the non-Jewish court, not willing to accept the testimony of the witnesses who had appeared in the Jewish litigation, would be willing to accept testimony from the Jewish judges and other outstanding members of the Jewish community – who would thereby be recognized as equivalent to “*udul*” witnesses. Was this procedure itself an indication to the Gaonim of the integrity of those non-Jewish courts? But see Goitein, *op. cit.*, p. 607, n.25, for indications of accusations of false testimony even by “*udul*.”

full participation of the Jewish judges to testify in the non-Jewish court as to the outcome of the original Jewish adjudication.<sup>125</sup> iii

Again, in all of this, there is not the slightest consideration given to the possibility that the witnesses might be constrained from testifying in litigation which is permissibly before the non-Jewish court, on grounds of violation of the Law of Rabbi Tarfon, the law of “Lifneihem.”

### **c. Absence of Challenge from the Tosefta Text**

Thirdly, what might have served for Rabbi Nissim as the most decisive element of evidence to establish that Rava did not base his prohibition on Lifneihem, and did not intend to reverse the clear implication of the Tosefta, is the very fact that the Tosefta text is not placed in conjunction with Rava’s legislation in the Talmudic passage itself. Had Rava himself, or the later Amoraim or Saboraim, or Stammaim understood the restrictive legislation that way, we would certainly expect some Talmudic indication and resolution of the conflict between the new legislation and the older Tosefta law.

However, aside the intrinsic weakness of such an argument *ex silentio*, there are further weaknesses in the evidence in this particular situation. Without entering into the substantial scholarly debate as to whether our entire Tosefta text was even known, or to what degree it was known, by Babylonian Amoraim, there is in fact no evidence to indicate that Rava (or Rav Huna for that matter) was aware of this particular Tosefta Law. While his contemporary Abbaye does at one point seem to respond to the last part of this Tosefta text, even there it is possible that he is not responding to the text itself but rather to the report of a comment by Rabbi Jochanan as to what the accepted position is. Indeed, Prof. Saul Lieberman goes so far as to suggest that the bulk of this Tosefta text was not known at all to the Babylonian Amoraim. This element of the understanding of the foundation for the clarity in the position of Rabbi Nissim remains inconclusive.

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<sup>125</sup> The Gaon makes short shrift of this possibility and simply indicates that it prohibited because it is lying.

Nevertheless, taken together, the clarity of the implications of the Tosefta text, the explicit Gaonic refusal to ascribe any relevance to the law of Rabbi Tarfon in regard to testimony – all serve as strong foundation for the unequivocal assertion by Rabbi Nissim that the legislation of Rava is not founded on the Law of Lifneihem. We must look elsewhere then for the legal basis of the prohibition legislated by Rava against testimony in a non-Jewish court against a fellow Jew.

### **B. The Law of Mesira (Handing Over / Collaboration) (4)**

Is it possible that the underlying legal basis of the Law of Rava is that such testimony against a fellow Jew would be viewed as a form of Mesirah – a form of “handing over” or collaboration with oppressors? To understand the foundation of the uniformly negative response to this question in the period of the Rishonim and early Acharonim, we must first explore the law of Mesirah itself.

#### **1. Mesirah in Biblical Narratives**

There is no explicit discussion of a law of Mesirah in the Torah itself. However, in the Prophetic books there are three narratives in which a Jew or Jews hand over a fellow Jew for apparent summary execution.

##### **a. The Case of Samson**

The first instance is in Judges chapter 15 where Samson, furious over the fact that his wife had been given by her father to another man, burnt out the fields of the Philistines. They retaliated by executing the wife and her father, to which Samson responded by killing many Philistines. The Philistine army then pursued Samson into the territory of the tribe of Judah, at which point the narrative continues as follows:

**9** Then the Philistines went up, and pitched in Judah, and spread themselves against Lehi. **10** And the men of Judah said: 'Why are ye come up against us?' And they said: 'To bind Samson are we come up, to do to him as he hath done to us.' **11** Then three thousand men of Judah went down to the cleft of the rock of Etam, and said to Samson: 'Knowest thou not that the Philistines are rulers over us? what then is this that thou hast done unto us?' And he said unto them: 'As they did unto me, so have I done unto them.' **12** And they said unto him: 'We are come down to bind thee, that we may deliver thee into the hand of the Philistines.' And Samson said unto them: 'Swear unto me, that ye will not fall upon me yourselves.' **13** And they spoke unto him, saying: 'No; but we will bind

thee fast, and deliver thee into their hand; but surely we will not kill thee.' And they bound him with two new ropes, and brought him up from the rock.<sup>126</sup>

The prophet offers no condemnation of the men of Judah for having handed over Samson for apparent execution by the Philistines. On the other hand, Samson himself consented to the collaboration, and, of course, in the continuation of the narrative Samson is not killed, but rather kills two thousand Philistines with the jaw bone of an ass. Of course the men of Judah did not know in advance that Samson was capable of rescuing himself, so was their handing him over to an oppressive force for execution an illicit act of collaboration in murder, or was it justified by the apparent concern that the failure to do so would result in war with the Philistines at the expense of many other lives? Or did they view his likely execution by the Philistines as legally justifiable? The Prophet remains silent about these questions.

#### **b. The case of Sheva ben Bichri**

The second such narrative is found in II Samuel, chapter 20. A rebellion against the authority of King David is initiated by Sheva son of Bichri of the tribe of Benjamin, and all of the tribes other than Judah are drawn into support of Sheva. King David sends his army under the leadership of Joab to pursue Sheva. After an eventful pursuit, they discover that Sheva was hiding in the town of Abel, and the army besieges the town. The narrative continues as follows:

**15** And they came and besieged him in Abel of Beth-maacah, and they cast up a mound against the city, and it stood in the moat; and all the people that were with Joab battered the wall, to throw it down. **16** Then cried a wise woman out of the city: 'Hear, hear; say, I pray you, unto Joab: Come near hither, that I may speak with thee.' **17** And he came near unto her; and the woman said: 'Art thou Joab?' And he answered: 'I am.' Then she said unto him: 'Hear the words of thy handmaid.' And he answered: 'I do hear.' **18** Then she spoke, saying: 'They were wont to speak in old time, saying: They shall surely ask counsel at Abel; and so they ended the matter. **19** We are of them that are peaceable and faithful in Israel; seekest thou to destroy a city and a mother in Israel? why wilt thou swallow up the inheritance of the LORD?'

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<sup>126</sup> Judges 15:9-13. JPS 1917 translation.



**20** And Joab answered and said: 'Far be it, far be it from me, that I should swallow up or destroy. **21** The matter is not so; but a man of the hill-country of Ephraim, Sheba the son of Bichri by name, hath lifted up his hand against the king, even against David; deliver him only, and I will depart from the city.' And the woman said unto Joab: 'Behold, his head shall be thrown to thee over the wall.' **22** Then the woman went unto all the people in her wisdom. And they cut off the head of Sheba the son of Bichri, and threw it out to Joab. And he blew the horn, and they were dispersed from the city, every man to his tent. And Joab returned to Jerusalem unto the king.<sup>127</sup>

Here too the Prophet remains silent as to the justification of the conduct of the “Wise Woman of Abel.” By contrast to the case of Samson, Sheva is being “handed over” to Joab, the duly constituted authority appointed by the rightful King of Israel. But is it the expectation that Sheva will receive a just trial pursuant to which he will be punished, or will Joab simply summarily execute him? If the latter action by Joab is expected and is unjustified, is the wise woman’s conduct justified by her fear that the entire town of Abel will be destroyed if they resist? Why does she not just hand over Sheva rather than decapitate him and throw his head over the wall? Is she simply afraid that even opening the gates to transfer Sheva alive would result in an attack on the town? Is she fearful of handing over Sheva alive lest he reveal who in the town had collaborated to hide him, who might then also be executed as co-conspirators with Sheva himself? None of this is explored in the Biblical narrative, the prophet, here too, remained silent about the handing over of Sheva.<sup>128</sup>

### **c. The case of the seven sons of Saul & the Gibeonites**

The most extreme Biblical narrative of a Jew handing over other Jews for summary execution is the account of the conduct of King David in II Samuel chapter 21. The text speaks best for itself:

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<sup>127</sup> II Samuel 20:15-22. JPS 1917 translation.

<sup>128</sup> The extreme oddity of this case becoming in Rabbinic literature, as we shall see, the paradigm instance for the laws of Mesirah despite the fact that the “handing over” is to a duly constituted Jewish authority, is compounded by the absence of any Rabbinic reference in this context to the singular parallel instance in the Torah itself where the Jewish people, having come upon a fellow Jew violating the Sabbath, “bring him” to Moses and Aaron and the Elders. Numbers 15: 32-33.

**1** And there was a famine in the days of David three years, year after year; and David sought the face of the LORD. And the LORD said: 'It is for Saul, and for his bloody house, because he put to death the Gibeonites.' **2** And the king called the Gibeonites, and said unto them--now the Gibeonites were not of the children of Israel, but of the remnant of the Amorites; and the children of Israel had sworn unto them; and Saul sought to slay them in his zeal for the children of Israel and Judah-- **3** and David said unto the Gibeonites: 'What shall I do for you? and wherewith shall I make atonement, that ye may bless the inheritance of the LORD?' **4** And the Gibeonites said unto him: 'It is no matter of silver or gold between us and Saul, or his house; neither is it for us to put any man to death in Israel.' And he said: 'What say ye that I should do for you?' **5** And they said unto the king: 'The man that consumed us, and that devised against us, so that we have been destroyed from remaining in any of the borders of Israel, **6** let seven men of his sons be delivered unto us, and we will hang them up unto the LORD in Gibeah of Saul, the chosen of the LORD.'

And the king said: 'I will deliver them.' **7** But the king spared Mephibosheth, the son of Jonathan the son of Saul, because of the LORD'S oath that was between them, between David and Jonathan the son of Saul. **8** But the king took the two sons of Rizpah the daughter of Aiah, whom she bore unto Saul, Armoni and Mephibosheth; and the five sons of Michal the daughter of Saul, whom she bore to Adriel the son of Barzillai the Meholathite; **9** and he delivered them into the hands of the Gibeonites, and they hanged them in the mountain before the LORD, and they fell all seven together; and they were put to death in the days of harvest, in the first days, at the beginning of barley harvest. ...**14** And they buried the bones of Saul and Jonathan his son in the country of Benjamin in Zela, in the sepulchre of Kish his father; and they performed all that the king commanded. And after that God was entreated for the land.<sup>129</sup>

In this narrative the prophet is extremely careful not to ascribe to God the counsel of putting Saul's two sons and five grandsons to death. God only indicates that the nation is suffering a famine due to the slaughter of the Gibeonites by King Saul; He does not indicate how national atonement for this cruelty can be achieved. David takes the initiative in consulting with the Gibeonites about how their forgiveness can be gained, and, shockingly, he agrees fully to their terms despite its involving handing over seven

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<sup>129</sup> II Samuel 21: 1-14. JPS 1917 translation.

innocent persons to summary execution. The prophet withholds any comment on the conduct of David. (Where was the prophet Nathan when he was so needed?)<sup>130</sup>

What in fact could David have been thinking? Did he consider it to be the case that the danger to the entire Israelite nation was so great that the national interest demanded the sacrifice of admittedly innocent persons for the greater national good? Did he think that God was hinting to him that this course of action was justifiable in the light of the wrong to the Gibeonites? Is it clear that he was not motivated also by the opportunity to eliminate a potential threat to his own heirs to the throne that might eventually have derived from the descendants of his predecessor, Saul? Yet the passage ends with the indication that Divine atonement had been achieved – was that because of or despite the conduct of David?

These three narratives reflect elements that are strikingly common, and other elements that are quite diverse. Note the following five elements:

One. In all three instances the handing over of one or more persons is apparently motivated by the desire to rescue a larger group that is in danger – a tribe, a town or the entire Israelite nation.

Two. In all three instances it is clear that the fate of the person handed over is to be death.

Three. However, while in two of the cases the person demanded is identified as an individual by name (Samson and Sheva), in the third, the persons are identified only by class (offspring of King Saul), and the number demanded, seven, is less than the entire class. This is emphasized in the text by the indication that David himself made the selection and specifically did not include the offspring of Jonathan amongst those to be handed over.<sup>131</sup>

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<sup>130</sup> Cf. II Samuel 12:7-12.

<sup>131</sup> II Samuel 21:7.

Four. Further, in one instance (Sheva), the person handed over had in fact committed a capital crime according to Biblical Law, the crime of rebellion against the authority of an anointed king.<sup>132</sup> In the case of Samson, he had unquestionably committed an initial crime, that of destruction of the Philistine fields, which might well have been a capital crime according to their law, but was certainly not a capital crime according to the Bible which never utilizes capital punishment as penalty for a crime against property.<sup>133</sup> In the final case, the offspring of Saul had committed no crime at all – it was rather to be punished for the crime of their father or grandfather for which they were now to be put to death, a form of conduct which the Bible had explicitly denied to the Israelite judiciary,<sup>134</sup> albeit had been left conscionable in direct divine action.<sup>135</sup>

Five. Finally, Sheva was being handed over to the duly empowered military general of the Israelite monarchy to be punished according to Israelite Law. By contrast, Samson was essentially being extradited to a foreign government, the Philistine authorities, for the commission of a crime on their territory, for which they desired to punish him, possibly in accord with their law. In the case of the offspring of Saul, they are handed over to the Gibeonites, a tribe with which the Israelites under Joshua had entered into a pact allowing them to continue to reside in the land of Israel,<sup>136</sup> but whose plan to execute the seven offspring of Saul is not even presented by themselves as in pursuit of any just law, but is purely a matter of tribal revenge for the wrong done to them in the past.<sup>137</sup>

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<sup>132</sup> Rambam, Hilchot Melachim 3:8.

<sup>133</sup> The Rabbis went to great lengths to demonstrate that the single instance which appears to involve justification of taking life to protect property, Exodus 22:1-3, is in reality a situation of presumed threat to life in which case the householder is acting in justifiable self-defense. Viz. Sanhedrin 72. Even in that Biblical statute death is not a judicially imposed penalty, and would not be if the criminal is later apprehended for his crime of robbery by breaking and entering.

<sup>134</sup> Deuteronomy 24:16. "Parents shall not be put to death for (crimes of their) children, nor (shall) children be put to death for (the crimes of their) parents, a person shall be put to death only for his (/her) own crime."

<sup>135</sup> Exodus 34:7. "...yet He does not remit all punishment, but visits the iniquity of parents upon children and children's children, upon the third and fourth generations." JPS Tanakh translation, 1985.

<sup>136</sup> Joshua Ch. 9, particularly at 9:15.

<sup>137</sup> II Samuel 21:4-6.

These three Biblical narratives and the problematic of the five elements we have identified, serve as the backdrop to virtually all later rabbinic discourse on the issue of Mesirah, even when they are not explicitly referenced.<sup>138</sup>

## **2. Mesirah in the Talmudic Era**

### **a. Mishna and Tosephta**

The essential Mesirah texts in the early Talmudic period are a related set, a pair of teachings in Mishnah,<sup>139</sup> and another in a Tosephta, and they were probably originally a single text.<sup>140</sup> The Mishna texts have to do with the questions of whether a Jew confronted by oppressors is permitted to hand over a single loaf of Terumah for ritual defilement in order to rescue the rest of the loaves, or is whether a group of Jewish women are permitted to hand over one woman to be raped by the oppressors in order to rescue the rest of the group from a like fate. The following is the Mishnah text:

IF ONE WAS PASSING FROM PLACE TO PLACE WITH LOAVES OF  
TERUMAH IN HIS HAND AND A GENTILE SAID TO HIM:  
'GIVE ME ONE OF THESE AND I WILL MAKE IT UNCLEAR; FOR IF NOT, I  
WILL DEFILE THEM ALL',  
LET HIM DEFILE THEM ALL, AND NOT GIVE HIM DELIBERATELY ONE TO  
DEFILE.  
BUT R. JOSHUA SAYS: HE SHOULD PLACE ONE OF THEM ON A ROCK."  
"SIMILARLY, IF GENTILES SAY TO WOMEN:  
'GIVE US ONE OF YOU THAT WE MAY DEFILE HER,  
AND IF NOT, WE WILL DEFILE YOU ALL',  
THEN LET THEM ALL BE DEFILED  
RATHER THAN HAND OVER TO THEM ONE SOUL FROM ISRAEL.

The Tosephta text carries the issue a critical step further by raising the question of whether it is ever permissible to hand over a single person to oppressors for summary

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<sup>138</sup> See Abraham A. Rapaport, *The Informer in Jewish Literature (Until the End of the Geonic Period)*, Unpublished Doctoral Thesis at Bernard Revel Graduate School, Yeshiva University, May 1952.

<sup>139</sup> Mishnah Terumoth 8:11-12.

<sup>140</sup> See David Daube, *Collaboration with Tyranny in Jewish Law*, Oxford University Press, London, 1965, at pp. 18-27 and 69-83. (I had the honor and privilege of studying under Professor Daube at the University of California at Berkeley, Department of Political Science, at the time of publication of this short but extraordinary volume.)

execution in order to rescue the rest of the group of which he is a part. The Tosephta text reads as follows:<sup>141</sup>

- a. A caravan of persons to whom non-Jews said, 'hand over to us one of you to be killed, and if not we will kill you all': let them all be killed, but they should not hand over to them one soul from Israel.
- b. But if they had designated him to them, as they had designated Sheva son of Bichri, they should deliver him to them and they should not all be killed.
- c. Rabbi Judah said, 'When is this taught, when he is within and they are outside, but when he and they are inside, since he will be killed and they will be killed, they should hand him over to them and should not all be killed. And such is said, 'And the woman came before the entire people in her wisdom...', she said to them, 'since (if we resist) he will be killed and you will all be killed, hand him over to them and do not all be killed.'
- d. Rabbi Shimon says, this is what she said to them, 'Anyone who is a rebel against the monarchy of the house of David is capitally liable.

Confronting the tragic moral dilemma of whether to collaborate with an oppressor in the achievement of his evil intent, in order to avoid an evil of even greater quantitative magnitude, the laws of the opening statements of all three cases, possibly the original majority opinions, represent a common approach of total resistance. In the first Mishnah, the case of the loaves of Terumah, the majority position would disallow any collaboration despite the resultant desecration of all of the loaves. In the second case, of threatened rape of a group of women, the Mishnah is equally unequivocal that a single Jewish person may not be handed over for rape despite the dire consequences to the entire group. And finally, the opening statement of the Tosephta is identically unequivocal as to the impermissibility of handing over a single person for execution despite the presumed resultant death of the entire group. Yet in each of the three cases, the drive towards the preference of limited collaboration in the interest of partial rescue manifested itself in varying degrees.

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<sup>141</sup> Tosefta, Seder Zeraim, Terumot 7:20. Lieberman edition. (The division into four sub-paragraphs is my own.)

In the first Mishnah, Rabbi Joshua proposed a moderate step, not directly handing the loaf to the pagan since that would constitute directly causing the loaf to become impure, but depositing the loaf on a rock, allowing the pagan to fulfill his evil intention without its actually being done by the Jew. In the second Mishnah there is no Tannaitic record of equivocation, but the Palestinian Amoraim, without elaboration, suggest that, “this is not reasonable if she/it was already impure; this is not reasonable if one was a slave,”<sup>142</sup> suggesting that such a woman might be given up in order to spare the rest of the group. However this text itself and its meaning are unclear, and became the subject of extensive debate amongst the Rishonim as to whether such an allowance of collaboration actually existed according to Jewish law. Rambam recorded no such exemption from the duty of resistance in the case of threatened rape.<sup>143</sup> Rashba denied entirely that this was the intent of the Jerusalem Talmud, and insists that a woman’s prior conduct or personal status have no impact on the duty of protection owed to her.<sup>144</sup> Meiri considers the possibility, albeit he does not clearly so conclude, that if there is a prostitute amongst the women, that she could be handed over in order to rescue the rest of the group.<sup>145</sup>

The most complex development of a partially accommodating position is to be found in regard to the third case, that presented in the Tosephta text, related to threat to the lives of an entire group of persons if they fail to hand over a single victim. To return then to the Tosephta in Terumot, the opening statement, (sub-paragraph a., above) is an unequivocal position of resistance to the oppressor. The following anonymous statement (sub-paragraph b.), provides an opening for rescue of the group through handing over an individual who was specifically named by the oppressor, as Sheva ben Bichri had been named by Yoav. Interestingly, the case of Samson might have served in this

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<sup>142</sup> JT Terumot 8:10, at 46b.

<sup>143</sup> Rambam, Mishnah Torah, Hilchot Yesodei HaTorah 5:5, records the law of the Mishna in this regard, mandating no collaboration, and makes no reference whatsoever to the apparently exclusionary language of the Gemara Yerushalmi.

<sup>144</sup> Rashba, Responsa, cited in Keseph Mishnah to Rambam *ibid.* he read the first clause of the Gemara teaching as a reference to a loaf of Terumah, not to a woman having been “impure.” The meaning in fact hinges on whether the word in the text is “kevar”, or “kikar,” i.e. whether the middle letter of the word is a Bet or a Cof; Rashba insists on the latter reading. Early manuscripts of this passage are in fact unclear. But Rashba insists that a woman’s prior conduct, even as an unrepentant professional prostitute does not justify subjecting her to rape, even in order to spare other women from that same fate.

<sup>145</sup> Meiri to Sanhedrin 72b (at page 271.) His reluctance to conclude permissibly in the situation of the prostitute is that “perhaps she engaged in repentance in her heart.” *Ibid.*

Tosephta as an even better model for the permissibility of handing over a designated person since there it involved clearly handing him over to an oppressive regime – the Philistines. However, the case of Sheva is a richer instance which could serve as textual basis for each of the three accommodationist positions (subparagraphs b, c and d.) Other than the Biblical precedent of Sheva ben Bichri, this text offers no rationale as to why the victim's being named by the oppressor should lessen the community's duty to protect him. There is room for much speculation on this issue, and it may very well be the case that the following two limitations on this general exemption are actually reflective of two alternative approaches to precisely this question.

The following two positions in the Tosephta text, those of Rabbi Judah and Rabbi Shimon, are presented as limitations on the fore-stated accommodation, however, the position of Rabbi Judah is particularly opaque.<sup>146</sup> The clearest reading is that Rabbi Judah takes the following position: There could be a full duty of resistance even when a single person has been named.<sup>147</sup> When would that be the case? When that person is “within” – meaning that he is definitely trapped and will probably be killed, but the rest of the group is “outside” – meaning that they could still have the opportunity of escape. Then, the group should resist as much as it can until the hopelessness of the situation is clear and then as many as possible of the group should escape while the named person is captured and killed by the oppressor. However, Rabbi Judah continues to assert, in this approach, that if to begin with it is clear that both the designated victim and the rest of the group are all “within”- meaning that in resistance there is no possible escape for anyone, then the group should hand over the named individual, as was done by the Wise Woman of Avel – better that one named person should be handed over than that all should meet definite death.

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<sup>146</sup> Extensive treatment of this issue is found in Daube, *op cit.*, and in S. Lieberman, *Tosefta Zeraim*, *Terumot* 7:20, at pp. 148-149, and *Tosefta Kifshuta*, *Seder Zeraim*, *Terumot* 7:20, at pp. 420-421, Jewish Theological Seminary of America, New York, 1955.

<sup>147</sup> The weakness of this approach is that this is not the stated position of either the Tanna Kamma, or the anonymous author of the exemption in the case of the designated victim, but is some odd combination of the two.



Thus, according to Rabbi Judah, the reduction of duty to protect the named individual has nothing to do with his personal conduct, but may have to do purely with the fact that his fate is knowable. If it is clear that he cannot be saved and that the attempt to rescue him will simply result in the additional massacre of the rest of the community, then he is to be handed over to at least protect those whose lives can still be saved. On the other hand, if there is a possibility that he could escape, there would be no justification in handing him over to be killed in order to save the lives of any other person or even of the entire group.

But an alternative possible reading of Rabbi Judah is that he was originally actually responding to the Tanna Kamma of the Tosephta (sub-section a), and in fact is positing the most lenient possible position – that even without designation, if all would otherwise be killed, the group should select a single person to be handed over.<sup>148</sup> There is no comment on how that selection might be done.

This harder line taken by Rabbi Judah is further intensified by the subsequently cited position of Rabbi Shimon (sub-section d), who maintains that in any case, even when resistance would be hopeless for all involved, it is not permissible to hand over even a designated individual unless that person is, like Sheva ben Bichri, “Chayav mita” – capitally liable. (Or, even more narrowly, Rabbi Shimon might maintain that the named individual can only be handed over if he was capitally liable on a charge of treason against the Jewish government, as was Sheva ben Bichri.) For Rabbi Shimon it is clear that the only possible justification for reduction of the duty of protection owed to any single individual is that such an individual is in any case someone whose life is forfeit (an outlaw) due to his own conduct – either according to the law of the government seeking his death, or possibly only according to Jewish Law. If his life is not forfeit, then the group is never justified in handing him over according to Rabbi Shimon, even if the consequence will be that they will all be killed, including the person named and sought.

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<sup>148</sup> Such is the approach preferred by Professor Leiberman in Tosefta Kifshuta, op cit. For a fascinating historical elaboration of this possibility see David Daube, op cit, at pp. 28-39.

## **b. Palestinian Gemara**

The four positions expressed in the Tosephta (sub-sections a, b, c and d) are replicated in a Beraita in the Palestinian Gemara,<sup>149</sup> albeit with the latter two positions cited not in the names of the Tannaim referred to in the Tosephta itself, but rather in the names of the two leading Palestinian Amoraim of the second half of the third century.

We were taught:

- a. A caravan of persons who were traveling on the road, whom non-Jews came across and said, 'hand over to us one of you and we will kill him, and if not we will kill you all': even if they will all be killed, they should not hand over one soul from Israel.
- b. But if they had designated one to them, like Sheva son of Bichri, they should deliver him and should not all be killed.
- c. Rabbi Shimon ben Lakish said, 'That is only if he is capitally liable like Sheva ben Bichri.'
- d. and Rabbi Yochanan said, 'Even if he is not capitally liable like Sheva ben Bichri'.

Each of the positions expressed, except for the first, seems to particularly reflect one of the Biblical narratives which we have previously explored. This Beraita begins with the position of the Tanna Kamma of the Tosephta (sub-section a), requiring complete resistance to the demand of the oppressor, even at the price of the entire group being killed. Interestingly, this position is not embodied in a single Biblical narrative. The Beraita then records the anonymous position allowing handing over if the victim is specifically named (sub-section b), this is parallel to the story of the men of Judah handing over Samson to the Philistines. The third position reported is that of Rabbi Shimon in the Tosephta (sub-section d), who allows the handing over only if the named person was capitally liable. Albeit in the Beraita this is reported as the position of Rabbi Shimon ben Lakish. This position is parallel to the story of Sheva ben Bichri.<sup>150</sup> The fourth position reflected is that of Rabbi Judah in the Tosephta (sub-section c), but here in the Beraita it is reported as the position of Rabbi Yochanan, and comes closest to offering justification for the behavior of King David in handing over the sons and

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<sup>149</sup> JT Terumot 8:10, at 47a.

<sup>150</sup> It is also reflected in I Samuel 23:12, where God indicated to David that the people of the town of Keilah would hand him over to King Saul if the latter were to attack the city demanding that they hand over David.

grandsons of Saul to the Gibeonites – that is, the group to be handed over had been designated, had committed no crime, but David believed that it was only by handing them over that the rest of the nation could be saved from the famine.<sup>151</sup>

There are then two disparate ways of understanding the debate between Rabbi Shimon ben Lakish and Rabbi Yochanan. In both approaches, they each utilize the case of Sheva ben Bichri as the model for when a single person can be handed over to rescue a group. In the more rigorous approach, Resh Lakish requires that the designated person be capitally liable according to Jewish Law (like Sheva ben Bichri was); while Rabbi Yochanan requires only that he be viewed as capitally liable according to those who are making the demand (as Samson was.) In the more accommodationist approach, Resh Lakish maintains that the person designated must have been viewed as capitally liable by those making the demand (like both Samson and Sheva ben Bichri); while Rabbi Yochanan requires only that the individual have been specifically identified by those making the demand (as were the offspring of Saul), even if they were guilty of no crime whatsoever.

The Beraita cited in the Palestinian Talmud offers no explicit resolution as to which of these understandings of the debate between Rabbi Shimon ben Lakish and Rabbi Yochanan is intended. Nor does it offer an explicit indication as to how the Law is ultimately to be decided as between these two authorities. However, the immediately following narrative in that Gemara provides an instance of the actual application of these legal principles in Talmudic times, which might be the Gemara's way of offering its resolution. It tells as follows:<sup>152</sup>

Ulla bar Koshev was sought by the (Roman) government.  
He fled and went to Lod to Rabbi Joshua ben Levi.  
They (the Romans) came, surrounded the city and told them,  
'If you do not hand him over to us, we will destroy the city.'  
Rabbi Joshua ben Levi went to him (to Ulla), persuaded him, and handed him over.

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<sup>151</sup> This is clearly the understanding of this position offered by Rabbi Joseph Karo, in *Keseph Mishnah* to Rambam, *Hilchot Yesodei HaTorah* 5:5, at s.v. *Vechen im amru lahem*. He quotes the position of Rabbi Yochanan without its closing words, simply as, "Even if he is not capitally liable."

<sup>152</sup> JT *Terumot* 8:10, at 47a.

Elijah, may his memory be a blessing, was wont to reveal himself to him,  
but he no longer revealed himself –  
so he (Rabbi Joshua) fasted some fasts, so he (Elijah) revealed himself to him.  
He (Elijah) said to him, (explaining his absence),  
'am I to reveal myself to ones who hand others over (Moserot)?!'  
Said he to him, 'Did I not act according to the Law (Mishnah)?'  
Said he (Elijah) to him,  
'Is this then the Law for the Righteous (Mishnat HaChassidim)?!!'

Without our having any further information about Ulla, we can only say that Rabbi Joshua ben Levi appears to have handed over to the Romans a person whom the Romans considered to be deserving of death, but who may not have committed any crime according to Jewish Law. The prophet Elijah clearly objects to his having done so, but Rabbi Joshua defends himself by asserting that he had in fact acted precisely according to the teaching of the Mishnah. Elijah does not dispute Rabbi Joshua's consonance with the law, but nevertheless objects to his conduct on grounds of supra-legal standards of righteousness. Strikingly, while Rabbi Joshua could be understood as having acted in accordance with either Resh Lakish, in the more accomodationist paradigm of the debate, or with Rabbi Yochanan in the more restrictive paradigm of their debate, he cannot be understood as having acted in consonance with the most lenient position of Rabbi Judah who allowed handing over purely on the basis of the individual having been designated. That is, both Resh Lakish and Rabbi Yochanan are construed by this narrative as having decided in accordance with the Tanna Rabbi Shimon, against the Tanna Rabbi Judah. The open models are Shimshon and Sheva ben Bichri, but not the offspring of Saul.

It is in this manner that Rabbi Joshua ben Levi could lay claim to having acted in accordance with the Mishnah, that is with the rigorous position of the Tanna Rabbi Shimon in the Tosephta, albeit without its requiring that Ulla be guilty of a capital crime according to Jewish Law. The response of Elijah is that there is an even more rigorous position available which demands even greater protection of Jewish life and which a Chassid like Rabbi Joshua should have maintained.

### **3. Approach of Rambam: Distinction between Religious Oppressor, Violent Criminal and Government: Whose Interest is Being Served**

This explains why Rambam, while clearly deciding the law in consonance with the position of the Tanna Rabbi Shimon, against the Tanna Rabbi Judah, apparently leaves open the question of whether the proper understanding of the position of Rabbi Shimon requires that the designated individual be guilty of a capital crime according to Jewish Law, “like Sheva ben Bichri,” or just be guilty of a capital crime according to those who are demanding that he be handed over, more similar to Samson, but also subject of being described as “like Sheva ben Bichri” in his being a criminal who was designated by name. Thus, Rambam’s closing phrase, “But if he is not capitally liable, let them all be killed but should not hand over to them a single Jewish soul.” Here he omits the emphasis which Resh Lakish placed on “capitally liable like Sheva ben Bichri.”<sup>153</sup> Rambam goes on to indicate that the position of the prophet Elijah must also be taken into account as a timing constraint – that is, the people should not immediately be told that the person demanded can be permissibly handed over. Thus, Elijah’s position continues to resonate as a Midat Chassidut, an especially righteous standard of conduct, while still confirming that in the final event the Halacha remains in conformity with the conduct of Rabbi Joshua ben Levi.

#### **a. Mesirah and Kiddush Hashem**

Rambam codified the laws of Mesirah in two separate locations, first in Hilchot Yesodei HaTorah.<sup>154</sup> There Rambam codifies the law of Kiddush Hashem, Sanctification of the Divine name, which requires resistance to religious oppression as a manifestation of loyalty to God and His commandments.<sup>155</sup> However, this requirement is balanced against the Biblical duty of preservation of one’s own life.<sup>156</sup> Thus, if an oppressor of the Jewish religion demands of a Jew that he violate a commandment of the Torah, or be

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<sup>153</sup> Rambam, Hilchot Yesodei Hatorah 5:5 This is one possible response to the question posed by Hagahot Maimuniot ad loc., as to why Rambam apparently decides against the position of Rabbi Yochanan, contrary to the usual canons of Pesak halacha. See, by contrast, Nahum Rakover, *Mesirut Nefesh* (Sacrificing Life: Giving Up One to Save the Many), (Heb.) The Library of Jewish Law, Jerusalem, 2000, at p.25.

<sup>154</sup> Ibid, 5:1-5.

<sup>155</sup> Based on Leviticus 22:32, “Venikdashti betoch Benei Yisrael.” Vis. Rambam, *Sefer Hamitzvot*, Positive Commandments, No. 9.

<sup>156</sup> Based on Leviticus 18:5, “vechay bahem.”

put to death, the Jew would be obligated to violate the commandment in order to preserve his life. However, there are two circumstances in which a Jew would not be permitted to violate the law, but would be required to resist to the point of death.<sup>157</sup>

1.The first circumstance relates to the nature of the demanded action; if the oppressor demanded that the Jew violate one of three “cardinal” crimes: idolatry, homicide or adultery/incest, then the law of Kiddush Hashem would override the duty to safeguard his own life.

2.The second circumstance relates to the intent of the oppressor plus the context: if the oppressor was motivated specifically by the desire to coerce Jews to violate divine law (rather than his own personal benefit or pleasure), and the violation would be done in the presence of ten other Jews, then the Jew would be obligated to resist the violation of any law of the Torah in fulfillment of his duty of Public Sanctification of the Divine Name. The failure to resist when such was his duty, would constitute violation of the prohibition against the Desecration of the Divine name; or if done in the presence of ten other Jews, violation of the even more severe Public desecration of the Divine Name.

An essential element then of this treatment by Rambam is the indication of the general principle that the law against homicide may not be violated even in the attempt to rescue one’s own life. However, if one were to directly kill an innocent person in order to save his own life from a threatening oppressor, he would not be culpable for the act of homicide since he had acted under duress. The failure to resist to the point of losing his own life, but instead actually taking the life of an innocent person, would not constitute violation of the crime of homicide, but would be violation of Chillul Hashem, the desecration of the Divine Name.<sup>158</sup>

What then if the oppressor does not demand that the Jew directly take the life of an innocent victim, but only demands that the Jew hand over another person whom the oppressor will slay? Or if the oppressor does not demand that the Jew actually rape a

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<sup>157</sup> This particular formulation in terms of the requirement of resistance, rather than the usual expression of the requirement of giving up one’s own life, follows the analysis by Rabbi Abraham Isaac Hakohen Cook, in Responsa Mishpetei Kohen, Responsum no. 144, sec. 15-16, at pp. 336-340.

<sup>158</sup> Ibid at 5:4.

married woman, but only demands that he hand over a married woman to be raped by the oppressor? These situations, which are the fact patterns of the Mishnah and Tosefta in Terumot, are integrated by Rambam into this section of the code, indicating that given the coercive nature of the circumstances, that is that the Jew was not acting volitionally, there would be no criminal liability even for aiding and abetting in the commission of the resultant crimes of homicide or rape. However, Rambam is informing us, that to be Moser, to directly hand over to an oppressor, someone who is then killed as a consequence of that handing over, would be in violation of the law of Chillul Hashem if the occasion was such that the person was under a duty to give up his life rather than allow the life of the other to be taken. But we had previously indicated that there were only two circumstances under which a duty to resist to the point of death was present; into which do these cases fall? They cannot fall into the first circumstance, because they do not actually call upon the Jew to commit an act of homicide or adultery. They must then fall only into the second circumstance where the intent of the oppressor is specifically to undermine the observance of God's laws, and the breach would be done in the presence of ten or more persons. That would explain for Rambam why the Mishnah in Terumot co-joined the case of the demand for a woman to be handed over for rape with the case of the demand to hand over loaves of Terumah so that they would be made Tameh. This latter case is one in which clearly the intent of the oppressor is not his own pleasure or benefit, but simply to coerce a Jew to violate the Divine Law. That is also why the case of rape is situated not in the context of private conduct, but in the situation of a group. And that is why the case of a demand for a single person to be handed over for summary execution is described by the Tosefta as being also not in a private confrontation between two Jews and an oppressor, but in the situation of a caravan.

Thus, for Rambam, the two cases of demand for the handing over of persons for rape or to be killed are part of his second exception, not of the first. That is, they are situations in which the demand being made is for violation of Biblical Law, but not of the three cardinal crimes – rather of the crime of aiding and abetting the commission of a crime by another. However, since the circumstances are such that the oppressor is motivated by the desire to get Jews to violate the Divine law, and it is a public situation, there is a

duty resting upon the Jews to resist even such lesser violation of Torah, even to the point of death, based on the law of Kiddush Hashem.

### **b. Mesirah and the Law of Damages**

The other context in which Rambam treats this law is in Laws of Assault and Personal Injury.<sup>159</sup> There, in regard to the handing over of property, Rambam indicates two fundamental conditions for violation of the law of Moser, first that the action is response to a violent criminal (an annas), be he non-Jew or even Jew. Second, that if the action of the Moser was under duress, he would not be liable to the injured party unless he personally took the property of his fellow Jew, not under the direct supervision of the violent criminal, and delivered it directly into the possession of the annas. In that latter situation, Rambam implies, the Moser is actually personally performing the act of theft from the other Jew, in order to rescue himself or his own property from an eventual threat, and is therefore liable.<sup>160</sup> But, if the element of duress is present and immediate, then in fact the Moser is not liable, since he is, in effect, merely acting as the instrument of the annas, clearly not of his own will.<sup>161</sup>

As Rambam then moves from the constraint of handing over property, to that of handing a person over, he strikingly does not postpone that element of the law to the next section of his code which deals with homicide. In regard to the entire subsequent passage in the Mishnah Torah, Rambam seems to be primarily basing his analysis upon a lengthy narrative passage in Babylonian Gemara.<sup>162</sup> In that passage, we are told of Rabbi Eleazar the son of Rabbi Shimon (bar Yochai), who due to his brilliant practical logic in the matter of singling out criminals, was appointed by the Roman court as a police officer, and in that capacity he arrested Jewish thieves who were then tried, and if convicted were punished in the Roman courts. The passage continues:

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<sup>159</sup> Hilchot Chovel Umazik 8:1-11.

<sup>160</sup> Vis Bava Kamma 117b.

<sup>161</sup> Compare the different analysis but identical conclusion arrived at by Rabbenu Asher ben Yechiel in Asheri to Bava Kamma, chapter 10, paragraphs 27-28, based partly on his reconciliation of the Bavli with the Gemara Yerushalmi on this point.

<sup>162</sup> Bava Metzia 83b.



Thereupon, Rabbi Joshua son of Karcha<sup>163</sup> sent word to him,  
'Vinegar, son of Wine! How long will you deliver up the people of our God for slaughter!'  
Back came the reply (from Rabbi Eleazar): 'I weed out thorns from the vineyard.'  
Whereupon Rabbi Joshua retorted: 'Let the owner of the vineyard Himself (God) come and weed out the thorns.'

The sharp response of Rabbi Joshua to the accommodating conduct of Rabbi Eleazar, is deeply reminiscent of the Jerusalem Gemara's record of the response of the prophet Elijah to the accommodationist position of Rabbi Joshua ben Levi which we discussed above. In fact the Babylonia Gemara itself makes the association in a subsequent passage by ascribing the precise words of Rabbi Joshua to the prophet Elijah in a parallel case, as follows:<sup>164</sup>

A similar occurrence befell Rabbi Ishmael ben Yossi (that he was designated by the Roman government to arrest Jewish criminals). Elijah met him and said to him, 'How long will you deliver up the people of our God for slaughter?!'<sup>165</sup>  
He replied, 'What can I do, it is the royal decree.'  
Said he (Elijah) to him, 'Your father fled to Asia, you can flee to Laodicea'.<sup>166</sup>

But, whereas in the Jerusalem Gemara, the prophet Elijah has the last word, here in the Babylonian Gemara, the challenge by Rabbi Joshua is followed by a story which vindicates the behavior of Rabbi Eleazar ben Shimon. The story is as follows:<sup>167</sup>

One day a Fuller met him (Rabbi Eleazar) and referred to him as 'Vinegar son of Wine.' Said the Rabbi to himself, 'Since he is so insolent, he is certainly a criminal.' So he gave the order to his attendant: 'Arrest him! Arrest him!' When his anger cooled, he went after him to secure his release, but did not succeed. Thereupon, he applied to him (the Fuller) the verse, 'He who watches his mouth and his tongue, saves himself from many troubles.' (Proverbs 21:23). Then they

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<sup>163</sup> An older colleague, and friend of Rabbi Eleazar's father, Rabbi Shimon bar Yochai – thus the reference to the latter as "wine," as it were, the sins of the son not to be imputed to the father.

<sup>164</sup> Bava Metziah 83b-84a.

<sup>165</sup> The precise words spoken by Rabbi Joshua to Rabbi Eleazar.

<sup>166</sup> As in the preceding narrative, here too Elijah offers a comparison to the more righteous conduct of the father.

<sup>167</sup> Bava Metziah 117b

(the Romans) hanged him, and he (Rabbi Eleazar) stood under the gallows and wept. They (his disciples) said to him, 'Master, do not grieve; for he and his son seduced a betrothed maiden on the Day of Atonement.' (On hearing this) he laid his hand upon his heart and exclaimed: 'Rejoice my innards, rejoice! If matters on which you are doubtful are thus (accurate), how much more so on those which you are certain!'"

This narrative served multiple purposes in enabling Rambam to arrive at an understanding of the final position of the Talmud. Why does Rambam in reference to the case of Rabbi Joshua ben Levi, give the final word to the prophet Elijah, urging restraint in collaboration even when the person demanded is designated as was Sheva ben Bichri;<sup>168</sup> while in the matter of Rabbi Eleazar ben Shimon (and Rabbi Ishmael ben Yossi) Rambam makes no reference to the restraining words of Rabbi Joshua ben Karcha (and those of Elijah to Rabbi Ishmael)?<sup>169</sup> The distinction is clearly based on the identity and purpose of the "oppressor." The series of cases dealt with in the Tosephta and the Jerusalem Talmud, are codified by Rambam in Mishneh Torah, Sefer Madda, Hilchot Yesodei HaTorah in the course of his treatment of the laws of Kiddush Hashem, for they deal exclusively with the relationship to violent oppressors (annasim) who are presumptively intent on destroying the Jewish people and their obedience to Torah. It is precisely for that reason that resistance to their orders, sometimes even to the point of giving up one's very life, is deemed to be an act of Sanctification of the Divine Name. Conversely, the failure to resist, or the collaboration with the oppressor, could constitute the Desecration of the Divine Name, a criminal offense according to Jewish Law even when it is in the service of the protection of one's life, and even when there is present a level of coercion which would exempt the collaborator from criminal punishment. The virtue of resistance under such circumstances is manifested in the support of the position of the prophet Elijah, calling for procrastination in cooperating with the violent religious oppressor, even when the technical conclusion of the Law would allow some degree of collaboration. This is the law of criminal collaboration with

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<sup>168</sup> Rambam, Hilchot Yesodei HaTorah 5:5

<sup>169</sup> Rambam, Hilchot Chovel Umazzik 8:11.

anti-Jewish oppressors which threatens the very survival of the Jewish People, and the Dignity of God which we are duty bound to uphold.

By contrast, the majority of discussions in the Babylonian Talmud related to Mesirah deal not with religious oppressors, but with violent criminals (annasim) who are simply after the property of Jews, but who will even take the lives of their victims in order to gain their monetary end purpose. Such criminals are not out to coerce Jews to violate the Torah or to act in a manner which would threaten the survival of the Covenantal relationship between God and the Jewish people. They may specifically target Jews, but that is only because the Jews are defenseless, they are easy targets. Under such circumstances, a Jew who cooperates with such violent criminals, verbally by informing against them, or behaviorally by collaborating in the taking of the property, is not only endangering the property of fellow Jews, but is putting their very lives at risk.<sup>170</sup> The relationship to such criminals is therefore codified separately by Rambam, in Sefer Nezikin, Hilchot Chovel Umazzik.<sup>171</sup> These laws have nothing to do with the principles of Sanctification of the Divine Name, and therefore also are not distinguished by whether the action takes place publicly or privately. These laws have to do with property damages, and the possibility of creating a risk to life through an act of collaboration with or informing to criminals who would not refrain from taking life in order to get the property that they want.

Rambam carefully codifies the laws applicable to such informers to or collaborators with violent criminals, with appropriate legal nuances related to the intent of the perpetrator, the precise action that he performs and the degree of coercion used against him by the criminals. He offers a dual conclusion to this discussion: firstly, given the indirectness of the criminal behavior of the collaborator, he offers a spiritual threat to deter such conduct, “Anyone who hands over the person of a Jew or his property to an idolator, has no portion in the world to come.”<sup>172</sup> But then, in recognition of the possible threat to the life of the Jew whose property is being pointed out to the violent criminal, Rambam

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<sup>170</sup> Rambam recognizes the distinct character of this group of oppressors even in Hilchot Yesodei HaTorah 5:2.

<sup>171</sup> Chapter 8, Laws 1-10.

<sup>172</sup> Ibid, 8:9.

adds that the informer in such a case is forfeiting his life by creating that threat to life, and his own life may therefore be taken to prevent him from executing his threatened act of informing to violent criminals.<sup>173</sup> The concluding law in this sequence, Chapter 8, Law 11, is of critical importance; it consists of four clauses, and reads as follows:<sup>174</sup>

(a) If the *moseir* carried out his threat and informed on a fellow Jew, it appears to me that it is forbidden to kill him, unless he has made it an established pattern to inform. In such an instance, he should be killed, lest he inform on others.

(b) In the cities of the west, the common practice is to kill the *mosrim* who have made an established pattern of informing with regard to people's property, and to hand the *mosrim* over to gentiles to punish them, beat them and imprison them, according to their wicked ways.

(c) Similarly, one who causes difficulty and irritation to the community may be handed over to the gentiles to be beaten, imprisoned and fined. It is, however, forbidden to hand over to gentiles a person for causing irritation to one individual.

(d) It is forbidden to destroy property belonging to a *moseir*, although it is permitted to destroy his life. The reason is that his money is given to his heirs.

The first clause of Law 11, clause (a) above, is a logical continuation of Law 10. If the Moser had already committed his crime, then the deterrent purpose for killing him is no longer applicable – unless he is a habitual informer, in which case he can still be killed in defense of his certain future victims, despite the fact that the next victim is currently unknown. The second clause, clause (b) above, starts by simply confirming that the authority to take the life of the habitual Moser was in fact the common practice of Jewish communities of North Africa. However the concluding phrases of that clause are deeply confusing and disconcerting. Who exactly are these “gentiles” (“Goyim”) to whom a Jewish criminal informer may be handed over to be beaten, punished or imprisoned as penalty for his crimes? Rambam had previously introduced us to Goyim who were religious oppressors.<sup>175</sup> He had introduced us to Goyim who were violent

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<sup>173</sup> Ibid 8:10.

<sup>174</sup> Ibid 8:11. Translation by Eliyahu Touger.

<sup>175</sup> Hilchot Yesodei HaTorah 5:5, based on the precise language of the Tosephta Terumot 8:20.

criminals.<sup>176</sup> But who are Goyim who would be acting in the interest of protecting the Jewish community itself to deter habitual informers by punishing those informers?

This question becomes even more intense as we pass into the third clause of Law 11, clause (c) above. Beyond the permissibility of handing over the Moser to non-Jews for criminal punishment, this clause provides that the Jewish community may itself use the non-Jewish criminal legal system to enforce order amongst Jews by handing over to Goyim, Jews who threaten the good order of the Jewish community itself. In this clause Rambam is clearly basing himself on the passages from the Babylonian Gemara which we have viewed above, the narratives related to the conduct of Rabbi Eleazar ben Shimon, and of Rabbi Ishmael ben Yossi , both of whom served the non-Jewish government in a policing capacity – handing over Jewish criminals for punishment by the non-Jewish authority. It is precisely the “Fuller case” involving Rabbi Eleazar ben Shimon which enables Rambam to then indicate that the authority to hand over Jewish suspects to a non-Jewish authority is not justified by the fact that the suspect personally offended an individual, but only if his offense rose to the level of offending, or creating some threat to the community. Thus, Rabbi Eleazar was correct in regretting his having ordered the arrest of the Fuller on the grounds of the personal offense, but was vindicated by the discovery that the Fuller had in fact committed a crime which warranted capital punishment according to Jewish Law. The fact that that same punishment could not have been administered by a Jewish court at that time, did not make its implementation by the Roman courts unjust, or impermissible for Rabbi Eleazar to have caused. The act of Mesirah, of handing over a fellow Jew to non-Jews for punishment, as performed by Rabbis Eleazar and Ishmael were not criminal acts because the non-Jews involved were neither religious oppressors, nor violent criminals, they were an ordered non-Jewish government which shared with Jews the responsibility for maintaining the good order and communal values of the Jewish population subject to non-Jewish governance.

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<sup>176</sup> Hilchot Chovel Umazzik 8:9 as in Rome edition and in Frankel edition.

#### **4. Is the Prohibition Against Mesirah Based on The Duty of Rescue? (The Limits of Loyalty to the Lives of Fellow Jews)**

We had earlier in this section explored three Tannaitic texts: the Mishnah of demand made to hand over a woman, the Tosephta of demand made of a caravan to hand over a person, and the Gemara Yerushalmi's case related to Rabbi Joshua ben Levi being commanded to hand over Ulla bar Koshev. Through all of those texts, even when brought together in the Mishnah and Gemara Yerushalmi, there was no explicit indication of the legal basis of the constraint against handing over. In fact the question of the legal basis of the prohibition was raised and not clearly resolved in the Talmud, and remained a problem into the period of the Rishonim. But actually, that lacuna may be filled by the narrative in the Palestinian Gemara which immediately follows upon the story of Rabbi Joshua ben Levi and the comment of the prophet Elijah.<sup>177</sup> That passage reads as follows:

Rabbi Immi was taken captive in a dangerous place.  
Rabbi Yochanan<sup>178</sup> said, 'Prepare to wrap his body in shrouds.'  
Rabbi Shimon ben Lakish said, 'I would rather kill or be killed. I will go and rescue him by force.' He went and persuaded them, and they handed him over.

This particular Palestinian Amoraic debate between Rabbi Yochanan and Rabbi Shimon ben Lakish did not attract much Rabbinic attention until the 20<sup>th</sup> century, when it became the central textual source for the discussion of the permissibility of a person being a live organ donor. In that context, the recognition emerged that central to this Amoraic debate was the question of the legal extent of the duty of rescue incumbent upon Jews in their relationships to fellow Jews based on the Biblical verse in Leviticus 19:16, "... you shall not stand idly by the blood of your neighbor."

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<sup>177</sup> Jerusalem Talmud, Terumot, Venice edition 8:10, at 46b; Vilna edition, 8:4 at 47a, lines 16-19.

<sup>178</sup> Both Venice and Vilna editions read here, "Rabbi Yonatan", but both editions, in the continuation of the narrative, have Rabbi Shimon ben Lakish return to Rabbi Yochanan. Since the entire sequence of narratives in this section deal with a common debate between Rabbi Shimon ben Lakish and Rabbi Yochanan, it appears as if this is just a copyist's slip. Rabbi Moshe Margalit in his commentary, Mareh Hapanim, ad loc, s.v. Tani..., recognizes the uncertainty of the identification of the named parties in this passage as a way of dealing with the unusual phenomenon of Rambam deciding the Halacha in accordance with Rabbi Shimon ben Lakish against Rabbi Yochanan.

The background to this issue is found in the famous passage in the Babylonian Gemara related to the situation in which two travelers in the desert find themselves still distant from a new source of water.<sup>179</sup> One of the travelers has sufficient water in enable him to survive until he would arrive at the next well. The other could not survive on the water remaining to him alone. Nor could either of them survive if the first traveler shared his water with the second. What is the first traveler to do? Ben Petura maintained that, "It is right that they both should drink and die, and that one should not see (be complicit in) the death of his friend." The implication of the position of Ben Petura is that the legal duty of rescue, which cannot allow even the omission of action resulting in loss of life of another, is applicable even if the consequence would be loss of the life of the rescuer. At any moment in which the other's life is at risk, standing by, failing to act to rescue, as by failing to share his water, would place the potential rescuer into the position of having breached his duty to rescue the life of his fellow. However, Rabbi Akiva subsequently taught that the duty of rescue is limited by the duty to preserve one's own life, based on exegesis of Leviticus 25:36, "... that thy brother may live with you." The words "with you" served for Rabbi Akiva as indication that you have no duty, or that it is impermissible, to rescue another at the expense of your own life. In this passage, it is, strikingly, Rabbi Yochanan who reports that the Halacha remains in accordance with Rabbi Akiva.

Reverting now to the debate between Rabbi Yochanan and Rabbi Shimon ben Lakish in the Palestinian Gemara, we can understand how two divergent approaches to their debate could emerge. In one approach, Rabbi Yochanan informs his students that it is not permissible for them to risk their lives in order to rescue Rav Immi. Resh Lakish on the other hand says, there is simply no duty to do so, but he is entitled to choose to do so of his own volition – that is, such action is not mandatory, but it is permissible/discretionary.<sup>180</sup> An alternative approach is that Rabbi Yochanan told his students to prepare shrouds because he maintained that there was no duty to put

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<sup>179</sup> Bava Metziah 62a.

<sup>180</sup> This is the approach of Rabbi Aryeh Grossnass in Responsa Lev Aryeh, vol 1, no. . In consequence of this understanding, Rabbi Grossnass, in accord with the view of Rabbi Yochanan, views being a voluntary organ donor as an impermissible act – the act of a Chassid shoteh.

themselves at risk under the duty of rescue; while Resh Lakish differed and maintained that given his belief that he might be able to rescue Rav Immi, that he was in fact duty bound to do so, so long as the result was not certain death for him.<sup>181</sup> We could chart the possible positions in the following manner:

Assur: Forbidden	Reshut: Discretionary	Chiyuv: Duty
Analysis 1	R. Yochanan	Resh Lakish
Analysis 2	R. Yochanan	Resh Lakish

Pursuant to this recognition, deciding the Halacha in accordance with Rabbi Yochanan could mean that one is forbidden to put his own life at risk in order to rescue another person; or it could mean that one is not duty bound to do so, but that such possibly self-sacrificial action is permissible. On the other hand, deciding the Halacha in consonance with the position of Resh Lakish could mean that such possibly self-sacrificial action is permissible; or it could mean that one is in fact duty bound to act in this manner. What exactly would be the source of the duty which Rabbi Yochanan precludes while Resh Lakish might well support? Clearly, that duty could only be the legal Duty of Rescue generated by the verse, "...thou shalt not stand idly by the blood of your neighbor." (Leviticus 19: 16.) This distinctive Biblical legislation which criminalizes the failure to rescue the life of a person at risk, does not detail the extent to which the potential rescuer must endanger himself in order to achieve the rescue which he is duty bound to perform. The earlier debate which we discussed, between ben Petura and Rabbi Akiva pertained only to the limited issue of whether the putative rescuer was obligated to rescue even when the result would certainly be the loss of his own life. Ben Petura contended that even then the law required rescue of a fellow Jew. Rabbi Akiva maintained that the Duty of Rescue leaves intact the overriding duty of an individual to safeguard his own life.

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<sup>181</sup> This approach to the debate is taken by Rabbi Eliezer Waldenberg in Responsa Tzitz Eliezer, vol. . In consequence of his understanding, the halacha remaining in accordance with Rabbi Yochanan, while there is no duty to do so, it is permissible for one to be a voluntary organ donor despite the existence of some risk to the life of the donor.



However, the acceptance of the position of Rabbi Akiva within that debate fails to clarify the more subtle further question of what degree of risk the rescuer might or must undertake short of certain death to himself. It is this issue which may very well be the heart of the debate between Rabbi Yochanan and Resh Lakish. In our analysis charted above, Rabbi Yochanan maintains either that taking any risk is forbidden, or that taking some risk might be permissible, but is certainly not mandated by the legal Duty of Rescue. On the other hand Resh Lakish may be expressing the position that minimally some risk is permissible, but that it might very well be the case that significant risk, up to but not including certain death (in consonance with the position of Rabbi Akiva), is actually mandatory under the law of Duty of Rescue.<sup>182</sup>

Why did the Gemara Yerushalmi report this fascinating case and debate between Rabbi Yochanan and Resh Lakish, immediately following the record of the Tosephta of the caravan case, and the related case of Rabbi Joshua ben Levi, both of which have to do with the question of handing over a person to save a group or a community? It is possible that the Gemara Yerushalmi is here attempting to provide the answer to an obvious question raised by the former two cases – what is the legal basis of there being a constraint against handing someone over to an oppressive force in order to save himself. After all, the degree of criminal offense in handing someone over for possible execution by an oppressive force is rather minor, it is abetting a crime, no more than a Gerama, an indirect cause, but not commission of the crime of homicide. In which case, the duty of protecting one's own life should certainly have priority since it does not actually involve the commission of any of the three cardinal crimes. The response of the story of Rabbi Immi, and the debate between Rabbi Yochanan and Resh Lakish is that the issue at stake is not the crime of homicide at all, but is rather the existence of an affirmative legal duty of rescue and the need to define the parameters of that duty.

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<sup>182</sup> For a fuller discussion of the Halachic issues involved in the question of risk of life in order to save another, albeit making no reference to this particular text in the Gemara Yerushalmi, see Aaron Kirschenbaum, *The Good Samaritan and Jewish Law*, Dine Israel, vol. VII, Tel Aviv University, Faculty of Law, 1976, pp. 7-85, particularly at pp. 28-59.

To put the matter differently, the Gemara may be suggesting that the entire discussion of Mesirah and the constraint against handing over a person to relatively certain death is not premised on the assertion that in doing so the Moser would be in violation of some form of the crime of homicide. Rather it is suggesting that in being Moser, the one handing over would stand in violation of his duty to rescue his fellow Jew, that is, in violation of his special duty of loyalty to the life of his fellow Jew. It is on that basis that we could well understand the position of Rabbi Judah in the Tosephta arguing that the critical issue is not designation but rather the practical question of whether the other person could realistically be saved anyway. We could also then understand why in the final event the prophet Elijah does not disagree with the legal judgment of Rabbi Joshua ben Levi in handing over Ulla bar Koshev, but only pleads for more procrastination, or for having the act of handing over being done by others rather than by Rabbi Joshua ben Levi himself. The underlying assumption of these positions is that the act of handing over, in the final event, does partake of the criminal offense of homicide, albeit only as a non-punishable Gerama, but it is a justifiable action when the special loyalty to fellow Jews demanded by the Duty of Rescue has been exhausted because that duty does not require the giving up of one's own life.

This approach provides us with a further way of understanding why Rambam supported the position of Resh Lakish in preference to that of Rabbi Yochanan in regard to the caravan case, holding that handing over the designated person is only permissible when the designated person was "capitally liable like Sheva ben Bichri."<sup>183</sup> If the essential duty of not handing over even at some risk your own life is based on the affirmative Duty of Rescue, as is implied by the position of Resh Lakish in the Rabbi Immi case, then it is reasonable for Rambam to maintain that such a duty may be suspended when the individual involved, like Sheva ben Bichri, has become capitally liable, that is he has become an outlaw – has forfeited his entitlement to the protection of the community through his debased behavior.

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<sup>183</sup> Rambam, Hilchot Yesodei HaTorah 5:5.

Thus, in the position of Rambam, in any given situation, in order to determine whether there is a constraint against Mesirah, it is vital to examine both the standing of the non-Jewish authority to whom the person would be handed over – i.e. to which category of “Goyim” that particular person or group belongs - and the status of the person to be handed over – to determine whether the Duty of Rescue owed to him is intact, or whether by virtue of his conduct he has forfeited that privilege.

### **5. On The Inapplicability of the Law of Mesirah to Testimony in Non-Jewish Courts (Rashba and Rambam)**

While infrequent in the long history of the literature related to testimony in non-Jewish courts, there are occasions in the literature of the Rishonim when scholars seemed to suggest that such testimony might constitute breach of the Jewish Law related to Mesirah. A primary instance of such apparent mingling of the two concerns appears in a responsum penned by Rabbi Solomon ben Abraham Adret, the Rashba (c. 1235-1310 Barcelona.) The text is as follows:<sup>184</sup>

You additionally ask about Reuven who informed concerning Shimon that he had been paid by a non-Jew twice.  
He then testified to this effect and caused him financial loss.  
Is his law like that of a Moser, to pay him the loss that he had caused him, and to excommunicate him, or what is the (applicable) judgment ?

He answered, and this is his language:  
God forbid, Jews should not be suspected of such (actions).  
But, if he did so, he should be excommunicated.  
It is simple that he is subject at least to excommunication,  
for even had the non-Jew subpoenaed him -  
there are not two witnesses, and according to our Law  
a party cannot be ordered to pay unless there are two witnesses,  
while non-Jewish courts coerce and imprison in matters such as this  
even based on a single witness –  
and the Jew will then have to redeem himself from prison.  
Thus this one through his testimony causes financial loss to the other.

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<sup>184</sup> Rabbi Solomon ben Abraham Adret, *Teshuvot She'elot LeHaRashba*, first edition, Rome, circa 1470, Introduction by Shlomo Zalman Havlin, Responsum no. 160, Jewish National and University Press, Jerusalem, 1976

This is not less than that which was taught in Hagozel Batra,<sup>185</sup>  
 “Rava, or others say R. Huna, proclaimed  
 to those who go up (to Israel) and those who come down (to Babylonia):  
 If a Jew knows evidence for the benefit of a non-Jew,<sup>186</sup>  
 Against his fellow Jew,  
 and he goes and testifies in a non-Jewish court,  
 he is to be excommunicated.  
 What is the reason? Because the non-Jews determine monetary liability  
 on (the basis of) the testimony of a single witness.”  
 Therefore, he is to be excommunicated.

But beyond that, I say that this one is actually a Moser,  
 and he is not less (criminal) than one who insists that he will inform,<sup>187</sup>  
 for this one reported entirely of his own free will.  
 Thus he “pointed out” (endangered) the person and property of the  
 other, For in their courts he would be held liable for this crime  
 in both body and property.

Beyond even that, he made himself subject to the death penalty,  
 for a Jew once having fallen into the hands of a non-Jew  
 is like an antelope trapped in a net,<sup>188</sup>  
 as is explicated in Hagozel Batra (Bava Kamma 117a.)

In his response, Rashba clearly distinguishes between two separate actions on the part of the accused, and the penalty which attaches to each of those actions. Firstly he deals with the fact that the accused testified against a fellow Jew, in favor of the non-Jewish plaintiff, in a non-Jewish court, to the effect that the defendant had collected a debt twice from the non-Jewish plaintiff. In regard to that action, Rashba holds the witness to be liable to excommunication based directly on the legislation of Rava recorded in Bava Kamma 113a-114b. Rashba points out, without explicitly using the term “Dina

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<sup>185</sup> Bava Kamma 113b-114a.

<sup>186</sup> Note here the absence of the phrase “and he did not subpoena him.” But not only is the phrase absent, but this is the first time that one finds, as Rashba states a few lines above, the explicit converse of the phrase which was later inserted into the text. That is, Rashba explicitly indicates that even if the non-Jew had summoned the Jewish witness to testify, the same restrictions would apply to him according to the legislation of Rava. See above at section II.A.3.

<sup>187</sup> See Bava Kamma 117a.

<sup>188</sup> The image is based on Isaiah 51:20, and is explicated thusly in the Gemara, Bava Kamma 117a: Just as when an antelope falls into a net, no one has mercy on it; so with an Israelite, as soon as even his property falls into the hands of heathen oppressors, no mercy is shown towards him.

de'Magista" that this was a non-Jewish court in which the testimony of a single witness would be sufficient to lead the court to order payment on the part of the Jewish defendant. It is precisely this action which the Gemara identifies as that which warrants excommunication according to Rava. Strikingly, however, Rashba does not suggest that the loss to the Jewish defendant which warrants the excommunication of the witness is the determination of his liability to the non-Jewish plaintiff to repay the doubly collected debt. In fact it appears as if the Rashba accepts that the witness was testifying truthfully and that the Jewish defendant was liable to repay his non-Jewish debtor.<sup>189</sup> Rather, here echoing the suggestion of the Gaonim, Rashba contends that the critical issue is that the court itself is corrupt, that beyond coercing him to pay that which he properly owes the plaintiff, it will imprison the defendant and then demand payment for his redemption from his imprisonment. While such testimony in a corrupt court is punishable under the Legislation of Rava by excommunication, Rashba is careful not to use the term Moser to describe any aspect of the wrongfulness of this testimonial conduct by the accused.

By contrast, in the last paragraphs of the responsum, Rashba addresses the allegation that the Jewish accused had actually caused the initiation of the action against the Jewish defendant by informing against him concerning the alleged double collection of the debt. It is this allegation which raises the question of whether the accused should be deemed a Moser. Rashba identifies three factors which lead him to the conclusion that such informing does result in the accused being liable as a Moser. Firstly, the accused had informed purely voluntarily. Rashba is clearly setting this up in contrast to the explicit point that he had made in regard to the testimony element, where, even had the witness been subpoenaed, he insisted that it would not have been permissible for him to testify in a Magista court in a manner that would result in unjust economic loss to the

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<sup>189</sup> This impression is supported by the fact that Rashba, in his Commentary to Bava Kamma 113a,s.v. Ha d'amrinan bebar Israel, quotes the full text of the commentary on this passage by Raavad (which we will deal with in the next chapter), in which the certainty of the accuracy of the testimony of a witness even in a Magista court would relieve him of any liability to repay the Jew who suffered no actual loss – was only required to repay what he had attempted to take by fraud. Here, in the case of Rashba, the loss is created by the corruption of the court in its demand for payment to release the defendant from wrongful imprisonment.

Jewish defendant.<sup>190</sup> By contrast, in regard to the act of Mesira, the law had clearly established, and Rambam had codified, that coercion which was not accompanied by direct action of the informer would exempt the informer from liability.<sup>191</sup> Therefore, Rashba here needs to assert that the accused had in fact informed of his own free will.

The second element which Rashba emphasizes is that the “pointing out” of the property of the fellow Jew results not only in potential monetary liability, which the Jewish defendant might well be liable for even by the standards of Jewish Law, but result in the endangerment of his “body and property.” This assertion is vital to Rashba because the avoidance of rampant bodily mutilation was an essential reason that the Jewish communities in Spain at his time struggled to gain autonomy in criminal law matters from the Spanish courts. Rashba himself authorized Jewish courts to utilize forms of corporal punishment which had never previously been used in Jewish Law. He states, for example:

Therefore if these chosen judges, seeing the need and the requirement of the period, sentence one either to corporal punishment or to pay a fine in order to reform society, it is in accord with the law of the Torah. This is certainly true should they have authority from the King as was the case of Rabbi Eleazar the son of Rabbi Shimon...,<sup>192</sup>

But his successor, Rabbi Asher ben Yechiel (Rosh) clearly indicated that the use of such punishments by Jewish courts was intended to demonstrate to the Spanish government that Jewish courts were not “easy” on Jews who committed crimes. “Also the community judges with intent to save, as much more blood would be spilled if they were to be judged by the Arabs.”<sup>193</sup> The disparity of penalties would not be sufficient in and of itself to classify as Moser a Jew who cooperates with the non-Jewish criminal legal system, as is indicated by the reference made by Rashba to the Talmudic case of Rabbi Eleazar son of Rabbi Shimon, whose role as police officer for the Roman government

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<sup>190</sup> See above at note 187.

<sup>191</sup> Rambam, *Mishneh Torah*, *Hilchot Chovel U'Mazzik* 8:2.

<sup>192</sup> As cited by Rabbi Joseph Karo in *Beit Yosef* to *Tur*, *Choshen Mishpat*, *Laws of Judges*, sec. 2.

<sup>193</sup> Zev Farber, *Extra-Legal Punishments in Medieval Jewish Courts*, in *Mishpetei Shalom*, A jubilee Volume in Honor of Rabbi Saul (Shalom) Berman, ed. By Yamin Levy, Yeshivat Chovevei Torah Rabbinical School, with Ktav Publishing House, New York, 2010, pp. 191-232, at pp. 216-217.

was approved by the Talmud,<sup>194</sup> and by Rambam,<sup>195</sup> despite unequivocal disparities in the penal system. However, when that disparity is combined with a third factor, namely hatred and antagonism to Jews which eliminates all justice and mercy and allows unlimited violence to be utilized towards them – then the handing over of a Jew even over a monetary matter results in direct threat to life, and would constitute the informer as a Moser. It is for this reason that Rashba moves immediately from the danger to “body and property” to the citation of the Gemara which asserts that a Moser would himself be capitally liable if he informs to violent persons who view Jews as “an antelope trapped in a net,” whose lives are therefore virtually certain to be taken.

Having already established that the accused in the case before him was subject to excommunication because of his testimony in the “Magista” court, what need did Rashba have to carry the matter further to denominate the accused also as a Moser?

To clarify this matter we need to examine an approach of a contemporary of Rashba, Rabbi Meir ben Isaac (Rambi) of Carcassonne,<sup>196</sup> a student of Ra’avad, whose position we will have occasion to examine further in dealing with the role of Chillul Hashem in the permissibility of testimony in non-Jewish courts. According to Rambi, testimony against a fellow Jew in a “Magista” court, a corrupt court, bears the penalty not only of excommunication, but also of monetary liability for any possible damage caused to the Jewish party through his singular testimony asserted to be false. On what basis does he assert the presence of monetary liability?

Rambi refers to testimony in corrupt courts to be “like unto Mesirah.” He clearly understands that the parameters of the law of Mesirah would not allow its actual application in such a situation, as we had seen above, and in particular as has been explicated in the position of Rashba; which is why the term ‘Moser’ rarely appears in the entire literature on the question of testimony in non-Jewish courts. But given the unique position of Rambi who maintains that there is a moral constraint even against testimony in an honest non-Jewish court, his use of figurative language staining a witness who

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<sup>194</sup> Bava Metziah 83b.

<sup>195</sup> Rambam, Hilchot Chovel UMazzik 8:11.

<sup>196</sup> Cited in Shita Mekubetzet to Bava Kamma 113b, s.v. VehaRam za”l Misarkesta....

breaches Rabbinic counsel, if not Rabbinic Law, with the accusation of being “like a Moser,”<sup>197</sup> when he testifies in a corrupt non-Jewish court, is quite shocking.

But even for Rambi, the analogy to Moser is used only as a basis for his argument that the single witness in a corrupt court is not only subject to excommunication, but can actually be held monetarily liable for injury which he caused to the Jewish defendant by his allegedly false testimony. In this regard, Rambi’s position is not significantly different from that of Mordecai ben Hillel who likewise used the analogy to Moser to establish the possibility of financial liability on the part of a single witness in a Magista court, based on a subsequent finding by a Jewish court, founded on the testimony of two witnesses, that the Jewish defendant in the non-Jewish court had been damaged unjustly through the testimony of his co-religionist. For both Mordecai ben Hillel and Rambi there is intense opposition to testimony by a single Jewish witness in a corrupt court when a fellow Jew could be unjustly fiscally injured as a consequence of the proceeding. Such untoward action could, according to them, result in a subsequent lawsuit in a Jewish court in which the Jewish witness could be held liable despite the indirectness of the injury which he caused. The analogy to Moser simply empowered the Jewish court to impose liability for such indirect injury – it did not constitute a declaration that the witness was in fact by Jewish Law a Moser.<sup>198</sup> While some other Rishonim also struggled to preserve some limited possibility of monetary liability for the single witness in a corrupt court,<sup>199</sup> for the vast majority, such liability was not possible due to the indirect nature of the injury and the absence of specific Talmudic provision which might have moved this instance over from Gerama, indirect injury for which there is no liability, to Garmi, for which standards of strict liability pertain despite the indirectness of the causation.<sup>200</sup>

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<sup>197</sup> He uses the term twice in this passage, once in the form of “Umikra masur,” and then in the form, “kemoser dami.” The latter usage is one illustration of a general Rabbinic pattern of the use of analogy to intensify the negative attitude towards actions which are otherwise not particularly serious violations. The broader Talmudic usage of this sort is the term “ke’ilu.”

<sup>198</sup> See above Chapter III, B.

<sup>199</sup> Ramah, Maharam Mintz and Rama.

<sup>200</sup> Rashba, Ri, and R. Yosef Karo.



Rashba was apparently utilizing the Moser designation for the same purpose, to assert the presence of monetary liability for the accused in the case before him. But by contrast to Rambam, and to Mordechai ben Hillel, Rashba clearly did not want to muddy the waters of the Legislation of Rava with the designation of even “being like a Moser.” For Rashba, the Legislation of Rava restricting some testimony in corrupt non-Jewish courts would only be punished by excommunication. It would only be in a case in which the accused could independently be charged with other action sufficient to establish him as a Moser, that monetary or other liability for that separate crime could be imposed. Thus in the case before him quoted above, Rashba found sufficient grounds to deem the accused to be a Moser, not on the basis of his testimony, but due to the conjunction of the three factors which he considered to be essential for a change of Mesirah to be upheld – a voluntary informing to a corrupt and violent court in which hatred of Jews could result in the summary execution of the Jew who came under their jurisdiction due to the charge against him on an economic matter made by a fellow Jew.

## **6. Summary of the Elements of the Crime of Mesirah**

Within the framework of the position of these and other Rishonim, as they understand the central relevant Talmudic passages, we need to be clear as to why testimony against a fellow Jew in a non-Jewish court could not be considered to be an act of Mesirah. There are multiple elements necessary to constitute the crime of Mesirah, each of them contains essential terms or conditions which are subject of diverse understanding, and therefore of divergent legal standards and communal practice. The definition of the crime is that: If a Jew (1) acted (2) voluntarily in such a manner as to (3) cause a fellow Jew to be subjected to the jurisdiction or power of (4) an oppressive authority which would act in a disproportionately violent manner against the person or property of the victim, (5) including the likelihood of escalation of violence to death of the victim; then he has violated the crime of Mesirah.

There is certainly room for debate about the precise nature of what would satisfy the very first definitional condition, “action”; is speech sufficient, or is a physical act necessary such as pointing, or does it actually require taking into possession and handing over in order for this condition to be satisfied. It is obvious that there would be

debate about the nature and degree of voluntariness, and the degree of coercion that would exempt an actor from liability for his conduct; is it only physical coercion, or also threat of injury, or implied threat to property, or threat of future injury. The third element, that the voluntary action had to cause the fellow Jew to be made subject to the oppressive authority or power, also leaves room for much debate; for example, what if the oppressor will definitely capture and execute the accused no matter what resistance is offered by others. The fourth element is in some ways the most complex – how does one define an oppressive authority or power? It was clear to the Rishonim that this was not just a simplistic matter of Jew versus non-Jew. A Jewish group might be criminal in nature, and a non-Jewish group might be just. What then is the measure of “oppressive”? Is it that the violence they would utilize does not conform with the violence utilized in the Jewish penal or civil system, or is there some more general concept of justice which would yield the conclusion that the measures taken are indeed unjust? What if, for example, the non-Jewish Authority is a government which is acting in the common interest of all of its citizens, both non-Jewish and Jewish, but it utilizes forms of criminal penalty, such as imprisonment, which are not present in the Jewish criminal law system? Would that government, for that reason, be considered “oppressive”, or would the shared interest be determinative despite the disparate nature of the penalties? Would discriminatory policies specifically against Jews be a more likely basis for considering a non-Jewish government to be “oppressive” than the general degree of violence in its policies addressed equally to all citizens? Despite all of this room for refinement and debate, the essential elements of the crime of Mesirah are clearly established.

As Rashba points out in the responsum studied above, informing against a fellow Jew could constitute Mesirah if it meets the test of voluntariness, and if it meets the other conditions. But, if the fellow Jew is already subject to the jurisdiction or power of the non-Jewish, or Jewish, oppressive authority, whether for trial or for summary judgment, then testimony by another Jew in that matter cannot constitute Mesirah because then a primary element which constitutes the crime, element (3) above, would be absent. The action of testimony might be wrongful, as Rava legislated, but it could not be Mesirah. This position of Rashba, maintaining a sharp distinction between the

act of testimony, and the act of Mesirah – informing or handing over – formed the basis for the next 750 years of Rabbinic discourse.

#### **IV. The Creation of A Duty to Testify Against Fellow Jews in Non-Jewish Courts: The Period of the Rishonim**

By the end of the period of the Gaonim, and the entry into the early period of the Rishonim, the issue of the juridical foundation of the Law of Rava had certainly not been resolved. On the other hand, the practical rules resulting from that early legislation were reasonably clear. The broad general constraint on testimony against a fellow Jew in a non-Jewish court had been whittled down to the situation in which a single Jewish witness would be testifying against a fellow Jew, in favor of a non-Jew, in a fundamentally dishonest non-Jewish court. Only in that situation would there be application of the penalty of excommunication. The issue of whether the excommunication would be accompanied by any form of monetary liability had not yet been raised since the explicit statutory language of Rava had made no direct reference to the possibility of monetary liability to an injured party.

However, the resistance to the Law of Rava had not yet fully played itself out. Over the course of the following centuries in the period of the Rishonim in each of the major centers of Jewish legal scholarship, the narrowed applicability of the restraint on testimony was affirmed, while a newly emerging notion grew – that there might be circumstances under which it would actually be mandatory according to Jewish Law for a witness to testify in a non-Jewish court against a fellow Jew in favor of the non-Jewish litigant. We will examine six different approaches taught in the period of the Rishonim to demonstrate that such a legal duty could actually exist.

##### **A. To Avoid Chillul Hashem (Desecration of God's Name)**

Rabbi Abraham ben David of Posquieres (Ravad) (1125-1198) presents one such approach in his commentary to Bava Kamma 113b.<sup>201</sup>

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<sup>201</sup> Sefer Chiddushe HaRaavad al Masechet Bava Kamma, ed. By Shmuel Atlas, 2<sup>nd</sup> edition, at p. 313, Feldheim, 1963.

1. That which we say concerning a Jew who knew evidence in favor of a non-Jew against his fellow Jew, and went and testified against him (in a Magista court), that we excommunicate him.
2. It appears to me (that this would apply only) where the Jewish defendant had a valid legal argument (for his position) according to Our Law [as a result of which he would be held not liable,] while by Their Law he would be ordered to pay.
3. But if the testimony of the witness was such that the Jewish defendant would have no valid legal argument – for example, if the defendant confessed directly to the witness and invited him to testify on his behalf, and said to him,
4. ‘I intend to deny my liability and (if you support me) we can divide the money between us; or (at least) you should remain silent, because of your love for me, and I will keep the debt for myself.’
5. And the witness did not leave the company of the defendant, so that the defendant could not claim that he had paid the plaintiff after that time.
6. So that the witness is certain that the (subsequent) denial of liability by the defendant is a claim which has no truth to it.
7. I say that this is a Chillul Hashem,<sup>202</sup> a desecration of God’s name, and the witness has a legal duty (to testify in order) to prevent him from executing the crime.
8. And even were this a case of Hafka’at Halva’ato, (a denial of liability to a loan for which he might in fact be found not liable according to Jewish Law), in an instance where there is a Chillul Hashem, it is forbidden.
9. And most certainly in a court in which they would require him<sup>203</sup> to take an oath (the witness has a duty to testify), lest he come to make a false oath.

The most striking element in this passage by the Ravad is the move from the discussion of Rava’s Law of prohibited (Assur) testimony, through the circumstances where such testimony would be permitted (Muttar), all the way across the legal spectrum to the discovery of a circumstance in which the testimony would actually be a legal duty (Chayyav.) Ravad, if he was aware of the position of Rav Hai, was not satisfied with the situation in which the testimony would be advisable, albeit still discretionary. Ravad uncovered two separate legal instruments which enabled him to construct a case for the

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<sup>202</sup> Vis. Rambam, Mishneh Torah, Hilchot Yesodei HaTorah 5:10. See Encyclopedia Talmudit, vol. 17, entry Chillul Hashem, columns 340-360,

<sup>203</sup> See below for exploration of the question of who is the subject of “him,” is it the defendant, or the witness.

existence of a duty to testify against a fellow Jew in favor of a non-Jew in a non-Jewish court. Let's examine these in turn.

### **1. The Biblical Texts of Chillul Hashem**

A full explication of the law and concept of Chillul Hashem, the desecration of the Divine name, is beyond the parameters of this work. However, certain essential elements of both the concept and its function in Jewish Law are necessary in order to understand the nature of the position of Raavad and others on the matter of when testimony in a non-Jewish court would be mandatory.

In a short series of five chapters in the middle of the Book of Leviticus, chapters 18-22, there is a codex of six verses recording the prohibition against desecrating the Holy name of God. One of them, the last in the series, Leviticus 22:32 is the most general of the statements:

You shall not profane my Holy name,  
that I may be sanctified in the midst of the Israelite people –  
I am the Lord who sanctifies you.

The balance between the first clause of the verse forbidding profanation of the Divine name, and the second clause, mandating sanctification of the Lord, led the Sages to the understanding that in any situation in which sanctification was mandated, the failure to perform it constituted profanation of God's name. Thus the Talmud reasonably concludes that in a situation where giving up one's life to resist the evil order of an oppressor is mandated as sanctification of the Divine name, the failure to do so would constitute Profaning God's Name.<sup>204</sup> While this specific association of desecration of the Divine Name with failure to sanctify His name is strong in the verse itself, it is worth noting that the immediately preceding verse, Lev. 22:31, mandates the observance of all of God's laws: "You shall faithfully observe My commandments, I am the Lord."

The other five verses all describe the profanation of the Divine name as being in consequence of the violation of a specific law. Two of them are specific to idolatry. Thus,

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<sup>204</sup> Sanhedrin 74a-b.

Leviticus 18:21: “Do not allow any of your children to be offered up to Molech, and do not profane the name of your God, I am the Lord.”

Interestingly, the bulk of chapter 18 deals with sexual crimes, as in verses 6 through 20 and then again in verses 22 and 23. Verse 21 seems to interpolate the crime of idolatry, and its attendant desecration of the Divine name, into the midst of the prohibitions against all forms of sexual crimes. This association of idolatry with sexual crimes is particularly significant given the power of the Rabbinic association of the two of them as fundamental laws for which one would have to give up life rather than submit to coerced violation. It is further worth noting that the conclusion of the passage, verse 26, commands the Jewish people to observe all of God’s laws, “But you must keep My laws and My rules, and you must not do any of those abhorrent things, neither the citizen nor the stranger who resides amongst you.”

Leviticus 20:3 is the second verse which specifically refers to an idolatrous act, again the worship of Molech, as constituting desecration of the Divine name: “And I will set My face against that man and will cut him off from among his people, because he gave of his offspring to Molech and so defiled My sanctuary and profaned My holy name.”

Here too, the paragraph discusses idolatry in verses 2 through 7, then sexual crimes in verses 8 through 21. And again, the passage concludes in verse 22 with a general demand for the observance of all of God’s laws: “You shall faithfully observe all My laws and all My regulations, lest the land to which I bring you to settle in spew you out.”

A third verse in which the desecration of the Divine name is associated with a specific criminal act is Leviticus 19:12; “You shall not swear falsely by My name, profaning the name of your God, I am the Lord.”

While this prohibition against false oaths in the name of God is itself presumed to be an element in the third commandment, the powerful addition here of the implicit desecration of the Divine name, clearly magnifies the significance of the prohibition. Again, looking at the passage in its entirety, we note that verses 2 and 31 of the passage deal with the prohibition against idolatry, verses 20 and 29 deal with sexual crimes, and again the passage concludes in verse 37 with an admonition to observe all of God’s

commandments: “You shall faithfully observe all My laws and all My rules, I am the Lord.”

We have seen thus far seen a single verse entailing a general prohibition against the profanation of the Divine name; and three separate verses implicating this same prohibition in the performance of specific crimes, those of idolatry and false oath. In the passages in which all four of these verses are contained, there is special emphasis on the duty of the entire Jewish people to be obedient to all of the Divine commandments; and in the latter three passages there is special emphasis on the horror of the crimes of idolatry and sexual wrongdoing.

The remaining two verses which identify actions constituting profanation of the Divine name, are addressed only to the Kohanim, rather than to the entire Jewish people.

The beginning of Leviticus chapter 21 records the special prohibition against Kohanim coming into contact with dead bodies except those of his seven close relatives in whose burial he may participate. Leviticus 21:6 then informs us that becoming ritually impure would constitute a violation of the holiness of the Kohen, and a profanation of the Divine name: “They shall be holy to their God and not profane the name of their God; For they offer the Lord’s offerings by fire, the food of their God, and so must be holy.”

It seems striking that even here, the profanation of the Divine name is surrounded by references to idolatry - pagan mourning rituals - in verse 5; and to sexual restrictions – constraints against marriage of a Kohen to a divorcee, a prostitute or to one born of an illicit marriage – in verse 7.

The further verse which is addressed distinctively to Kohanim is Leviticus 22:2 which says: “Instruct Aaron and his sons to be scrupulous about the sacred donations which the Israelite people consecrate to Me, lest they profane My holy name, I am the Lord.”

The continuation of the passage makes clear that the scrupulous behavior demanded of the Kohanim is that they not handle or eat of sanctified foods when they are in a state of

ritual impurity through any cause.<sup>205</sup> Indeed this restriction was implied already in the previous verse cited, Leviticus 21:6, where the motive clause which explained why the Kohanim were not permitted to become ritually impure through contact with dead bodies was precisely this fact – that they eat the Lord's offerings.

## **2. Rambam on Chillul Hashem**

We can now understand the way in which Rambam, both in the Sefer HaMitzvot<sup>206</sup> and in the Mishneh Torah,<sup>207</sup> divides the prohibition of Chillul Hashem into three separate sets of actions. The first set, applicable to all Jews, says Rambam in Sefer Hamitzvot, is:

Anyone of whom a demand is made (by an oppressor) during a period of persecution (against the Jewish religion), to violate any law of the Torah . . . or, even not at a time of persecution, one of whom it is demanded that he violate the commands against idolatry, sexual crimes or homicide - is duty bound to give up his life to be killed rather than violate the law. And if he violated the law to save his life, he has profaned the Divine name, in violation of this prohibition.

This element of the crime of Chillul Hashem is based on the verse in Leviticus 22:23, which is the most general of the verses we saw. The power of this special application of Chillul Hashem resides precisely in the balance of the verse. "You shall not profane my Holy name, that I may be sanctified in the midst of the Israelite people...." Since in these situations one is duty bound to risk life in order to sanctify the Divine name, the failure to do so constitutes its opposite, an act of profaning the Divine name.

We should note that the special application of this principle of Chillul Hashem to the instances of idolatry and sexual crimes is already intimated in the Torah itself in the fact that in four of the six instances of the appearance of the prohibition, the broader passage seems to be focused particularly on those two kinds of crimes. In fact, the Talmud itself seems to recognize the absence of any Biblical connection between Chillul Hashem and homicide, and so argues that homicide belongs in the set because of its explicit

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<sup>205</sup> Doing so involves a double profanation, that of the Divine name, as in Lev. 22:2; and that of the sanctified food itself, as in the later verses, Lev. 22:9 and 15.

<sup>206</sup> Rambam, Sefer Hamitzvot, negative Commandment no. 64.

<sup>207</sup> Rambam, Mishneh Torah, Yesodei HaTorah 5:1, 10 and 11.



association with the sexual crime of rape,<sup>208</sup> where the Torah authorizes killing of an attempting rapist in third party self-defense by comparison to the existence of that right in the case of a threatened homicide.<sup>209</sup>

Analytically, we could describe the situation in the following manner:

- C.** There is a legal duty not to violate any Torah law.
- D.** There is a legal duty to protect one's own life.
- E.** How is one to act when these two principles are in conflict?
- F.** Rescue of one's own life has priority over other duties, including the duty to not violate Torah Law
- G.** Except for: a. the legal duty to not perform acts of idolatry, incest or homicide; and  
b. the duty not to submit to systematic religious persecution against Judaism expressed in a demand to violate any Divine Law (even privately); and  
c. the duty not to submit to an individual who, even motivated by personal benefit or pleasure, demands violation of any Divine Law in public (i.e. in the presence of ten other Jews)
- H.** In these 3 instances, there is a legal duty to Sanctify the Divine name by risking death (through resistance of the oppressor) to avoid violation.
- I.** Failing to undertake the risk, violating one of these laws to rescue one's own life without resistance is violation of Chillul Hashem.

Thus, in this first set of actions, the law of Chillul Hashem is an additional prohibition , added as a secondary crime to intensify the severity of the already criminal behavior which the actor is being coerced to perform.

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<sup>208</sup> Sanhedrin 74a.

<sup>209</sup> Deuteronomy 22:26.

The second set of actions which is general in nature, that is, when performed by any Jew involves violation of the prohibition of Chillul Hashem, Rambam says, is:

Also, when a person violates a prohibition in which there is neither sexual pleasure nor any benefit, but rather he shows through his action disdain (towards) and not being bound (by God's Laws) – he thereby profanes the Divine name and warrants lashes. This is why the verse says, "You shall not swear falsely by My name, profaning the name of your God..." (Lev. 19:12).

Here, Rambam is apparently basing himself on the proposition that the frequent use of the Biblical injunction against profaning God's name suggests that the individual instances, such as false oath, are no more than illustrative of a global principle which is actually applicable to all laws of the Torah. This awareness is intensely suggested in the text of Torah itself through the fact that in five of the six instances of reference to this prohibition in Torah, as we noted above, the broader passage makes specific reference to the duty to observe all of God's commandments. This approach is already suggested in the Midrash Halacha to Chapter 19 in Leviticus, in its application of the law of Chillul Hashem to the content of a later verse in the same chapter, Lev. 19:15.<sup>210</sup> The Sifra argues that a judge who falsifies a judicial outcome, and a merchant who falsifies his weights, are both in violation of the law of Chillul Hashem, as propounded in the earlier verse, Lev. 19:12.

In this second set of actions through which the law of Chillul Hashem is violated, as in the first set, the action itself is forbidden, be it the false oath, the judicial falsification of judgment, or the merchant utilizing fraudulent weights and measures. The crime of Chillul Hashem constitutes an additional criminal charge to the charge related to the action being intentionally performed. This additional charge can be leveled, according to Rambam, only in a situation in which the behavior of the criminal manifested distinctive elements of rebelliousness against the authority of God.; where the criminal act was not motivated by personal pleasure or profit, but rather by elements which reflect an especially negative attitude towards the Law and the Legislator. In Sefer HaMitzvot those elements are "disdain" and "rejection of Divine authority"; in Mishneh Torah the

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<sup>210</sup> Sifra Kedoshim, parsha 2, perek 4; and parsha 3 perek 8.

elements are identified as “a spirit of derision, to arouse Divine anger.”<sup>211</sup> By contrast, in the first set, the additional element was simply the behavior- the refusal to act in a manner reflective of Kiddush Hashem (sanctification of the Divine name.) There, it was the behavioral negative reflection on God’s identity which justified the additional criminal charge, not the subjective motivation of the action. However, in both sets, the underlying action to which the additional criminal charge of Chillul Hashem was added, was clearly a violation of a legal duty to refrain from certain behavior.

The third set identified by Rambam is radically different from the first two sets in two ways. Firstly, the concern does not relate to all Jews, but only to a special class of Jews. Secondly, the underlying behavior may even be actually permissible, but would be made forbidden by the attachment to it of the crime of Chillul Hashem. Rambam describes this set as follows in Sefer Hamitzvot:

The segment related to special persons is: A person reputed to be especially righteous and of great integrity who does some act which appears to the populace to be sinful and to be an act of a nature that a righteous person such as he should not perform it – even though the act is actually permissible – has profaned the Name.

In Mishneh Torah, Rambam draws on the Talmudic exposition<sup>212</sup> of this set to provide the following concrete examples of situations in which “a person of great Torah stature who is renowned for his piety” would be in violation of Chillul Hashem even though the act itself is permissible according to Jewish Law:

For example, a person who purchases [merchandise] and does not pay for it immediately, although he possesses the money, and when the sellers demand payment he pushes them off; a person who jests immoderately; or who eats and drinks near or among the common people; or whose conduct with other people is not gentle and he does not receive them with a favorable countenance, but rather contests with them and vents his anger; and the like. Everything depends on the stature of the sage; he must be careful with himself and go beyond the measure of the law.<sup>213</sup>

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<sup>211</sup> Sefer Hamitzvot, Negative Commandments, no. 63. Mishneh Torah, Yesodei HaTorah 5:10.

<sup>212</sup> Yoma 86a, and other sources cited by Kesef Mishna to Yesodei Hatorah 5:11..

<sup>213</sup> Rambam, Mishneh Torah, Yesodei Hatorah 5:11, translation by Eliyahu Touger.

The Talmudic material never clarifies precisely how this category is derived from the Biblical laws which refer to Chillul Hashem. We should consider the possibility that this set is derived by analogy from the two instances in which the Torah forbids to Kohanim actions which are permissible to the rest of the Jewish people. As is indicated explicitly in Leviticus 21:6, the motive of the special restriction against a Kohen becoming ritually impure, resides in his special relationship to God (he offers the food of the Lord), and the distinctive demand that he be Holy. Therefore, if the Kohen performs an act permissible to the rest of the Jewish people, becoming ritually impure, then he will have profaned the Divine name. Of course, once the Torah forbids this act to all Kohanim, the analytic model shifts, and this instance becomes just like the prior elements in which a forbidden act becomes doubly criminal by the addition of the sin of Chillul Hashem.

However, based on this model, it appears that the sages constructed a form of Chillul Hashem which was applicable beyond the Kohanim, to persons whose distinctive holiness, righteousness, integrity and scholarship made them embodiments of the honor of God Himself. Therefore, for such persons to act in a manner which reflected badly upon themselves, even if the action itself was perfectly permissible, would result in disgrace to God Himself – therefore, Chillul Hashem. This would be further analogous to the Rabbinic position that in regard to the duty of honor owed to scholars and elders, there is a basic level which can not be waived by the scholar or elder, because that level of honor due to him is in reality the honor due through him to Torah, or to God Himself. The waiver of that honor consequently would result in disgrace to Torah or to God, which would not be tolerable.<sup>214</sup>

What is it then that constitutes Chillul Hashem according to Rambam? It is the failure to recognize that there are values which transcend the value of one's own life, and instead, acting to protect one's life by directly breaching those superior values. What are those breaches which necessitate resistance to the point of death?

1. The primary breach is the repudiation of the Covenant between God and the Jewish people, in order to rescue his own life. This repudiation can take three forms:

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<sup>214</sup> See Rambam, Mishneh Torah, Talmud Torah, end of 7:13 and comment of Keseph Mishna ad loc.

- a. An act of idolatry, in which the very Nature of God is repudiated.
  - b. In times of religious persecution, encouraging the enemy to believe that he can use the primacy of life to defeat the preservation of Judaism, thus enabling the repudiation of God's very Presence through the Covenant.
  - c. Demoralization of a Jewish community (an Edah) by submission to an individual oppressor who is an antagonist of God, thereby repudiating God's Authority over the Jewish people within the Covenant.
2. The second form of Chillul Hashem is the breach of the sexual boundaries of the Covenant of Family in order to save his own life. The breach of those boundaries within one's own family would be manifest through an act of incest; or the breach of the boundaries of other families would be through an act of adultery.
3. The third form of Chillul Hashem according to Rambam would be the breach of the Covenant formed by God between all human beings by their being common bearers of the Image of God (Tzelem Elokim.) This breach, repudiating God as Creator, and thus denying the essential equality of all human beings, would be manifest in an individual choosing to directly take the life of another innocent person in order to protect his own life.

The way Rambam constructs his presentation of the law of Chillul Hashem both in the Sefer Hamitzvot and in the Mishneh Torah, the essential forms of Covenantal breach are fully spelled out in the context of the situations of the duty to resist evil demands at threat to one's own life. The next two sets of instances of Chillul Hashem echo the earlier ones in non-life threatening situations. Thus the second set which involves the intentional violation of any law of the Torah, requires that the intention be specifically to deny Divine Authority. As noted above, in Sefer HaMitzvot those elements are "disdain" and "rejection of Divine authority"; in Mishneh Torah the elements are identified as "a spirit of derision, to arouse Divine anger."<sup>215</sup> This means that the second

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<sup>215</sup> Sefer Hamitzvot, Negative Commandments, no. 63. Mishneh Torah, Yesodei HaTorah 5:10.

set is just a less dramatic instance of an individual acting in a manner which reflects the repudiation of Divine Authority.

The third set of actions which constitute Chillul Hashem are of particular importance to us. They reflect the greater demands placed on Kohanim because of their special holiness, that is, because they are the executors of the Divine worship in the sanctuary. It is striking that the two areas of special demand placed on them in the Biblical passage relate to idolatry and marital conduct. They, in their special covenantal relationship to God, are not to engage in actions which could create even a suggestion of idolatry, or of idolatrous death cults. Therefore, they cannot even be present with a dead body other than with immediate family members; and may not engage in mourning practices which are imitative of pagan cults. As for their formation of covenant of marriage and family, they may not marry in a manner which might create even a distant suspicion of either impropriety or of their condoning impermissible marriages by others. The parallel to Kohanim constructed by the Sages as the third set of situations in which there is a special concern for Chillul Hashem, is as to other persons who, while not Kohanim, are living models of righteous behavior, whose actions are therefore associated directly with the Divine Will and the Divine nature. Therefore, if such a righteous person acts in a debased manner, it constitutes a repudiation of the Nature of God, in a manner parallel to breach of the Covenant by engaging in idolatry.

### **3. Ra'avad's use of Chillul Hashem**

We can now return to the way in which the Raavad used the law of Chillul Hashem as grounds for overcoming the law of Rava. According to Rava, as limited by later Sages, it was forbidden for a Jew to testify as a single witness against a fellow Jew in a non-Jewish "Magista" (corrupt) court. However, according to Raavad, in a situation where the failure to testify would result in Chillul Hashem, as would be the case if the Jewish defendant was known to the witness to be lying, and would then escape his just liability to the non-Jewish plaintiff – then the single Jewish witness was obligated to testify even in a Magista court, in order to attempt to avoid the Chillul Hashem. In all prior discussion of the law of Chillul Hashem, the law operated to either intensify a prohibition by adding the charge of Chillul Hashem to the already criminal behavior; or to prohibit an act which was otherwise permissible, on the grounds that while

permissible its performance would result in a Chillul Hashem and therefore needed to be forbidden. By contrast, in the Raavad's presentation, an act which was forbidden according to Jewish Law would be made not only permissible, but mandatory, in consequence of the application of the law of Chillul Hashem. What precedent is there for this extreme power resulting from application of the law of Chillul Hashem?

I have been able to discover only a single instance in the literature of the Talmudic era in which this particular power of the principle of Chillul Hashem might be reflected.

The ninth chapter of the Book of Joshua describes the deceptive behavior of the Gibeonites, a tribe resident in the land of Canaan. The Gibeonites, fearing utter destruction at the hands of the Israelite army entering Canaan, disguised themselves as exhausted travelers, told Joshua and the Israelite Elders that they had heard of the wonders of the Israelite people and had travelled from a distant place to enter into a treaty with the Israelite people. Joshua and the tribal heads, taken in by the deception, publicly, by oath, entered into a treaty with the Gibeonites.<sup>216</sup> A few days later, when the deception was uncovered, and the local Gibeonite cities were discovered, the people demanded war against the local Gibeonites, but Joshua and the tribal leaders insisted on abiding by the treaty,<sup>217</sup> "The Israelites did not strike them, since the chieftains of the community had sworn to them by the Lord, the God of Israel."<sup>218</sup> In fact, when other local tribes heard of the betrayal of the Canaanite cause by the Gibeonites, they attacked Gibeon, and Joshua and the Israelite army rushed to their defense to uphold the treaty.<sup>219</sup>

This narrative is used by the Talmud to provide the supportive evidence for the position of Rabbi Judah who maintains that any oath which is publically made is not subject to annulment.<sup>220</sup> It is for that reason, according to Rabbi Judah, that Joshua and the Elders did not simply annul their vow, thereby annulling the treaty, freeing them to fulfill their Biblical duties to destroy the Gibeonite cities and kill the population (Deut.

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<sup>216</sup> Joshua 9:3-15.

<sup>217</sup> Joshua 9:16-27.

<sup>218</sup> Joshua 9:18

<sup>219</sup> Joshua 10:1-15.

<sup>220</sup> Gittin 46a.

20:12-18) or to drive them from the land (Ex.23:29-33). It was, according to Rabbi Judah, the distinctive power of the public oath in the name of God that constrained Joshua and the Israelite people from executing what would otherwise have been their clear Biblical duties of war against and even extermination of the Gibeonites.<sup>221</sup>

By contrast, the position of the Sages was that even a publicly made oath was subject to annulment, particularly when the oath (and treaty) involved fraud in the inception, as in this case where the Gibeonites directly lied about an essential element of the facts – denying their local origins. That being the case, why did Joshua not simply declare the oath and the treaty to be null and void, and pursue his responsibilities to war against the Gibeonites? To which the Sages respond, “the reason the Israelites did not slay them was (M’shum Kedushat Hashem,) because [this would have impaired] the sanctity of God’s name.” Thus, according to the Sages it was not the legal force of the oath in the Divine name which constrained the Israelites from the fulfillment of their Biblical duties, but rather the force of the Chillul Hashem, the desecration of the Divine Name which would result from the appearance that the Israelite nation was in breach of its oath.<sup>222</sup>

We have before us then, according to the majority and thus accepted position of the Sages, the following situation:

1. The Israelites have an affirmative duty to war against those Canaanite nations who do not accept the terms of a peace offer which would require them to accept the seven Noahite commandments and become fully subject to the political authority of the Israelite State and government.<sup>223</sup>

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<sup>221</sup> The Tosafists, ad loc, s.v. keivan d’amru, resist the direct implication of the Talmudic discussion that according to Rabbi Judah the public oath itself has sufficient power to override the Deoraita obligations. They argue instead that the Biblical duties to war or drive them out would still have pertained because the oath itself would have been null in the face of its being contrary to these Divine commands. Their conclusion is that even according to Rabbi Judah, the real force which required Israelite violation of other Divine commandments was the operation of Chillul Hashem. The identical conclusion was arrived at by Rashba, Commentary to Gittin 46a, albeit via a different logical path.

<sup>222</sup> Thus language of Rambam, Mishneh Torah, Hilchot Melachim 6:5 is explicit that the reason for upholding the otherwise null oath was the concern with Chillul Hashem.

<sup>223</sup> Deut. 20:11-12. Rambam, Sefer Hamitzvot, Positive Commandments, No. 187. Rambam Mishneh Torah, Laws of Kings 6:1.



2. The Israelites have a duty to not allow residence in the land of Israel to non-Jews who have not accepted upon themselves the duty to adhere to the seven Noahite commandments.<sup>224</sup>

3. The Israelites were deceived into making an oath by the name of God, entering a peace treaty with the Gibeonites which did not require the latter to adhere to the seven Noahite commandments, since they had represented themselves as a non-Canaanite nation which did not, and had no intention to, reside in the land of Canaan/Israel.

4. This oath and resultant treaty was not binding upon the Israelites due to the fraud in the inception of the agreement.

5. However, not adhering to the oath and the resultant treaty would result in violation of the Prohibition against Chillul Hashem – of profanation of the Divine Name – since there was public knowledge of the oath and treaty, and the Israelites would be perceived as acting in breach of their oath by God's name.

6. But, honoring the oath and the treaty, which the Israelites are not obligated by law to do, would result in the failure to perform the Positive Divine Commandment of war against the Canaanite nations; and violation of the Negative Divine Commandment of not allowing residence in the Land of Israel to non-Jews who have not formally accepted upon themselves the seven Noahite commandments.

7. In the face of these conflicting alternatives, the power of the prohibition against Chillul Hashem is, according to the Sages, of sufficient magnitude that it required the Israelites to honor their oath and treaty, despite the consequent non-performance of a positive duty; and violation of a prohibition.

8. That is, the avoidance of Chillul Hashem required the Jews in the time of Joshua to perform an otherwise prohibited act.

This is, I believe, the only Talmudic instance in which a prohibited act is made not only permissible/discretionary, but actually mandatory by the concern that failure to

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<sup>224</sup> Exodus 23:33. Rambam Sefer Hamitzvot, Negative Commandments, No. 51. Rambam, Mishneh Torah, Laws of Idolatry 10:6.

perform it will result in violation of the prohibition against Chillul Hashem. It is this precedent which could serve as the legal foundation for the position of Raavad. Of course, there are significant distinctions between the case of the Gibeonites and the case of testimony in non-Jewish courts. In the former case the concern with Chillul Hashem justifies direct overriding of DeOraita (revealed) Laws, whereas in the testimony case the prohibition being overridden is of Rabbinic origin. On the other hand, in the Gibeonite case the laws overridden are violated through inaction, whereas in the testimony case the law is overridden by an affirmative act of testimony. Most confounding in comparing the two cases is that in the Gibeonite case the oath was actually made by the tribal leaders in a manner which implies that the nation as a whole is bound. Therefore, when the nation has a duty to prevent Chillul Hashem, it is the appearance of breach of a national oath which yields the duty resting on the nation as a whole to prevent the Chillul Hashem. By contrast in the testimony case it is the Jewish defendant whose action would be causing the Chillul Hashem, while, according to Raavad, it is the witness upon whom the duty to prevent such a Chillul Hashem rests with a degree of gravity sufficient to cause him to violate a Rabbinic prohibition.

These distinctions appear less significant in the light of another Talmudic passage which treats a later event related to the Gibeonites. II Samuel, Chapter 21 describes an extraordinary series of events in which King David consults with God about the cause of a famine in Israel. God informs David that the famine is national punishment “for Saul and for his bloody house, because he put to death the Gibeonites.”<sup>225</sup> David attempts to gain reconciliation with the Gibeonites, who demand that seven descendents of Saul be delivered to them to be killed by hanging, to which David consents. After the seven are killed by the Gibeonites, Rizpah, concubine of Saul, mother of two of the slaughtered men, did not allow the bodies of her two sons to be buried. Then David brought the bones of Saul and Jonathan to be buried together with the bodies of Saul’s two newly killed two sons and five grandsons, in the burial cave of Kish, the father of Saul, in the territory of the tribe of Benjamin. With this, the famine ended.<sup>226</sup>

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<sup>225</sup> II Samuel 21:1.

<sup>226</sup> II Samuel 21:2-14.

The Talmud<sup>227</sup> raises two legal objections to the conduct described in this passage. Firstly, how could David have handed over the innocent sons and grandsons of Saul to be killed in the face of the explicit Divine command, “Parents shall not be executed for their children, nor shall children be executed for their parents, a person shall be executed for his own crime” (Deut. 24:16.)? The Talmud responds, “R. Hiyya b. Abba replied in the name of R. Johanan: It is better that one letter (law) be rooted out of the Torah than that the Divine name shall be publicly profaned.” The clearest meaning of this teaching of Rabbi Johanan is that if the breach of the national Jewish oath / treaty with the Gibeonites would not be punished, it would constitute a desecration of the Divine name. The need to prevent such desecration would warrant overriding the Biblical law which forbade vicarious liability.

The second legal objection raised by this Talmudic passage is to the delay in burial of the sons of Rizpah, contrary to the explicit Biblical command, “Do not allow his body to remain hung on the tree overnight, rather you should bury him the same day, for the hung body is a disgrace to God .... (Deut. 21:23.) To this question, the Talmud offers a parallel response:

R. Johanan replied in the name of R. Simeon b. Jehozadak: It is proper that one letter (law) be rooted out of the Torah so that thereby the heavenly name shall be publicly hallowed. For passers-by were enquiring, 'What kind of men are these?' — 'These are royal princes' — 'And what have they done?' — 'They laid their hands upon unattached strangers' — Then they exclaimed: 'There is no nation in existence which one ought to join as much as this one. If [the punishment of] royal princes was so great. how much more that of common people; and if such [was the justice done for] unattached proselytes, how much more so for Israelites<sup>228</sup>

Again, the most direct understanding of this passage is that the Kiddush Hashem achieved in the public display of the bodies of the princes of the House of Saul, was to demonstrate that an oath taken, a treaty entered into, even with the lowest socio-economic class of persons in the nation, would be honored; and that the violation of

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<sup>227</sup> Yevamot 79a.

<sup>228</sup> Yevamot 79a. The composite nature of this passage is self evident. The later comment explains the teaching of Rabbi Johanan in a manner which emphasizes the ethical component of the treatment of unattached strangers, rather than the severity of the Chillul Hashem engendered by the breach of the oath specifically to the Gibeonites.

such an oath and its resultant disgrace of God would be punished with the greatest severity.

The upshot of this passage is unequivocal – the duty to sanctify the Divine name, and its correlative, the duty to avoid the desecration of the Divine name, are of sufficient power to justify overriding express Biblical commandments, even ones as powerful as the ban against vicarious punishment, and the duty of immediate burial. Therefore, despite the potential significance of the distinctions explored above, it appears as if the Raavad could in fact be relying on the power of the duty to prevent Chillul Hashem as reflected in the case of the Gibeonites, as the basis for the shift from Rabbinically forbidden action to Rabbinically required action in the testimony case. This impression is intensified by the closing element in the Raavad's presentation on this matter, where he says, "And most certainly in a court in which they would require him<sup>229</sup> to take an oath (the witness has a duty to testify), lest he come to make a false oath." The most logical reading of this sentence is that it has to do with an oath to be taken by the defendant – that in the face of the possibility that the defendant would actually lie even under oath, the witness has a special duty to prevent his fellow Jew from proceeding with his planned fraud. This would have special relevance for the duty to prevent Chillul Hashem since the critical Biblical text in which the general formulation of the crime of Chillul Hashem for intentional violation of law is found, is the text related to false oaths (Lev. 19:12). By contrast in regard to the witness the issue at stake is whether he ought to testify. There had been no consideration whatsoever of his testifying falsely, with or without an oath. The introduction of this element by Raavad is at least suggestive that he is building off the Biblical and Talmudic discussion of the Gibeonites as the basis for his contention that the duty of avoiding Chillul Hashem could result in the radical reordering of the legal duties for the witness.

It is worth noting that Raavad considers the behavior of the Jewish defendant to be a Chillul Hashem in the case which he described, despite the fact that it is possible that the only other person besides the defendant and the witness who actually knows that a

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<sup>229</sup> The question of who is the subject of "him," is it the defendant, or the witness, was left open above at note 128.

criminal fraud is taking place, is the non-Jewish victim, that is the plaintiff himself. Nevertheless, for Raavad, that knowledge by a single non-Jew, that a Jew is intentionally committing a wrong in violation of God's Torah, is sufficient to have this considered a Chillul Hashem. By contrast, while it is possible that greater notoriety as to the criminal behavior of the Jewish defendant might actually result from the testimony against him offered by the Jewish witness, he is viewed as duty bound to offer his testimony. The important implication is that support of Jewish criminal behavior is Chillul Hashem, a disgrace to God; but knowledge of Jewish efforts to produce justice against Jewish wrongdoers is Kiddush Hashem, a sanctification of God's name, even if in the process Jewish wrongdoing is revealed.

#### **4. Chillul Hashem as a Factor for the Rishonim of Ashkenaz**

The relevance of the issue of Chillul Hashem to the action of the potential witness himself, was a matter addressed directly by the Rishonim of Ashkenaz. First to address the issue was Raavan, Rabbi Eliezer ben Natan of Mainz, c. 1090-1170, in his commentary to the Talmudic passage in Bava Kamma 113b-114a.<sup>230</sup> Raavan cites the legislation of Rava,<sup>231</sup> and when the passage asserts as the basis for excommunication the fact that the non-Jewish court will order payment by the defendant based on the testimony of a single witness, Raavan adds the precise words of Rashi, "with the result that he causes him loss not in accordance with the (Jewish) law."<sup>232</sup> Thus clearly for Raavan, the theory which underlies the restriction on the witness is that he would, through his testimony in the non-Jewish court, be causing indirect damages to the Jewish defendant which he would not have to suffer under the applicable Jewish Law.

Raavan then adds the following:

1. It appears to me that in a location where the custom (in transactions) between a Jew and a non-Jew, is
2. that they appoint a Jew and a non-Jew to be the witnesses between them,
3. then it is permissible for the Jewish witness to testify,
4. since from the outset they were accepted for that purpose.

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<sup>230</sup> Sefer Raavan, Part 2, end of Tractate Bava Kamma, at p. 194b.

<sup>231</sup> With the expected omission of the words "velo teva'o."

<sup>232</sup> Rashi Bava Kamma 114a, s.v. Apuma dechad.

5. For here it is said, 'they only said this (restriction) in regard to a single witness
6. but in a case of two witnesses, they are not excommunicated;'
7. and that is because the defendant is then found liable based on 'complete testimony' ('edut gemurah', that is, testimony by a full set of two witnesses).
8. Here too, since he is ordered to pay in accordance with the law –
9. we do not excommunicate (the Jewish witness.)
10. Additionally, it would be a Chillul Hashem
11. if he (the designated Jewish witness) were not to testify,
12. since the non-Jewish party had relied on him –
13. he would say, 'they are not trustworthy people!'
14. And even more, for it is the law of the land,
15. and 'the law of the land is law.'

In this striking passage, Raavan offers three separate reasons why a single Jewish witness, having been designated together with a non-Jewish witness at the inception of the transaction, would be permitted, or even obligated to testify against a Jewish defendant in favor of a non-Jew in a non-Jewish court. The first reason, presented in lines 4 through 9 above, argues that the Jewish witness would be permitted to testify because according to the Talmudic passage itself, such testimony would be permissible when there are two witnesses. Raavan uses the phrase “edut gemurah” (testimony by a full set of witnesses) to describe this situation – despite the fact that he is specifically referring to a case in which only one of the witnesses is a Jew while the other is a non-Jew. Such a position could certainly not have been taken by Rambam and the majority of Rishonim of Sefarad, according to whom the disqualification of non-Jewish witnesses is a matter of DeOraita Law.<sup>233</sup> On the other hand, Raavan, emerging from the school of Rashi, apparently held like him and the majority of Rishonim of Ashkenaz, that non-Jews were eligible to serve as witnesses in Jewish courts by DeOraita Law, but that they were disqualified by Rabbinic Law.<sup>234</sup> We will return to the logic of this position in conjunction with the third justification for testimony, the binding nature of the Law of the Land. It is important to note that this rationale relieves the Jewish witness from the

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<sup>233</sup> Rambam, *Mishneh Torah*, Laws of Witnesses (Evidence) 9:4. The source of this position of Rambam is challenged, *ad loc*, by *Kesef Mishnah* and *Radbaz*, but more extensively by *Lechem Mishnah*.

<sup>234</sup> *Viz* Rashi to *Gittin* 88a.

threat of excommunication and allows him to testify, but it generates no duty on his part to do so.

(Still, how does this work? Is it based on Kabbalah by the parties as for Dayanim? Or on the general rule of *masnin al mah shekatuv batorah bedinei mamonus*? Or is it analogous to Rambam Sanhedrin 24 – authority of Dayan to use his own understanding?)

The middle, and indeed central element of the position of Raavan is that the failure of the designated Jewish witness to testify would constitute *Chillul Hashem*, a desecration of the Divine Name, and the avoidance of that outcome necessitates the violation of the Rabbinic prohibition against testifying. As is the case for Raavad, so here for Raavan, the factor of *Chillul Hashem* has the capacity to shift prohibition to legal duty. But, by contrast to the position of Raavad where the threatened *Chillul Hashem* would be that of the false testimony of the defendant, that is, his violation of Jewish Law; in the case of Raavan the threat of *Chillul Hashem* would be created by the witness himself in his observance of Jewish Law's restriction against his testifying. Thus for Raavan, the witness is required to violate Rabbinic Law in order to avoid the *Chillul Hashem* which would be created by his own observance of the Law.

There is a further significant contrast between the two positions. For Raavad the *Chillul Hashem* resides in the knowledge of the plaintiff that a Jew, an adherent of the Jewish Deity, is willing to lie for his own financial gain, implying that his Deity condones such action. In the case of Raavan the *Chillul Hashem*, more subtly, resides in the inaction of the witness, implying that his Deity does not require of him to act even against the economic interest of a fellow Jew, in the greater interest of justice. This is the meaning of the sentence in the Raavan, "it would be a *Chillul Hashem* if he (the designated Jewish witness) were not to testify, since the non-Jewish party had relied on him – he would say, 'they are not trustworthy people!'" The inaction of the Jewish witness would constitute an apparently justifiable indication to the non-Jewish plaintiff that the Jewish Deity does not demand of His adherents that they act justly.

We must again take note of the fact that there is no suggestion in Raavan, as there had been none in Raavad, that the consequence of the testimony in bringing to light the illegal conduct of the Jewish defendant, might itself constitute a wrongful act of Chillul Hashem. That could be explained in the following manner. If a non-Jewish plaintiff knows that the Jewish defendant is attempting to defraud him, and that a Jewish witness remains silent, thus enabling the commission of the fraud, then his reasonable conclusion might well be that “Jews and the Jewish Deity” condone criminal fraud – thus Chillul Hashem. On the other hand, if the plaintiff sees the witness, another Jew, join him in the attempt to prevent the execution of the fraud, then he cannot reasonably conclude that “Jews and the Jewish Deity” condone criminal fraud. Even if he loses the case, what the non-Jewish plaintiff would then hopefully conclude is that while one Jew attempted to defraud him, another Jew acted in a manner which represented the demand for justice taught by the Jewish Deity. Even if the latter Kiddush Hashem, the sanctification of the Divine Name, is not achieved; at least the Chillul Hashem will have been avoided.

There are of course no guarantees as to exactly what the non-Jewish plaintiff will think, and beyond him, certainly no assurances as to what others in the society will know or think about the situation. Nevertheless, the duty to prevent even a possible desecration of the Divine Name, entailed in the conclusion by even a single non-Jewish person that the Jewish Deity condones crime or does not require acting on behalf of justice, is of sufficient gravity not only to overcome the Rabbinic constraint on testimony in dishonest non-Jewish courts, but to actually require that such testimony be offered in the attempt to prevent the success of Jewish criminals. Loyalty to a fellow Jew is clearly set aside in favor of loyalty to God, and to His reputation in the broader world.

The Raaviah, Rabbi Eliezer ben Joel HaLevi (c. 1160-1235), grandson of Raavan, is cited by Rabbi Isaac ben Moses of Vienna (c. 1180-1250) in his *Or Zarua* as having preserved this particular element of Raavan’s teaching in regard to the permissibility of testimony in Magista courts under such circumstances: “If at the outset of the transaction he was designated as a witness, then it is Chillul Hashem (for him not to testify), and he can



(“yachol”) testify on his (the non-Jew’s) behalf, if there is no danger to (the) life (of the Jewish defendant.)”<sup>235</sup>

The closing note in this passage of the Raaviah is of great importance on both a theoretical and a practical level. As we had seen in our earlier discussion of the law of Chillul Hashem there are only three specific instances in which Jewish Law imposes a duty to risk one’s life rather than violate the law. In those three instances, putting oneself at risk is identified as acting ‘Al Kiddush Hashem,” in sanctification of the Divine Name; while failure to accept the risk would constitute Chillul Hashem, the desecration of the Divine Name. By contrast, in all other instances, one would have a duty to violate the law in order to avert the threat to life. This would include even the situation of false oaths, despite the fact that the Torah itself identified such conduct as desecration of the Divine Name. Thus, in general, the avoidance of desecration of the Divine name, other than in the situations of idolatry, adultery and homicide, does not require that the individual put his life at risk. On the contrary, the duty created by Jewish Law to protect one’s own life would necessitate even the desecration of the Divine Name in self defense.

It is this proposition which underlies the closing comment of the Raaviah in the passage above. While the power of the duty to avoid Chillul Hashem is sufficiently strong to override the Rabbinic constraint on testimony as a single witness in a dishonest, non-Jewish court; if the consequence of such testimony would be a threat to the life of a Jewish litigant, then the Chillul Hashem would have to be tolerated in preference to the risk to life. The foundation of this position is found in the Mishna in Nedarim: “One may vow (falsely) to murderers, robbers and tax farmers That it (the produce which they demand) is terumah, even if it is not, Or that it belongs to the royal house, even if it does not.”<sup>236</sup>

As explained by the Gemara in the following passage, this Mishna allows a false oath to be made in defense of ones life or property, against a violent murderer or robber since the oath itself is viewed as coerced.<sup>237</sup> The case of the tax farmer is challenged by the

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<sup>235</sup> Or Zarua, Piskei Bava Kamma, chapter 10, sec. 450, s.v. Katav Mori.

<sup>236</sup> Mishna Nedarim 3: , at 27b.

<sup>237</sup> Nedarim 28a.

Gemara on the grounds that he is acting legally as agent of the King and the Law of the Land is the Law, as taught by Samuel. The response confirms that if the tax collector is acting within the authority of the King, then he is not a robber and a false oath to him would not be permitted – as it is forbidden to avoid tax obligations legally imposed by either Jewish or non-Jewish governments. The case of the Mishna allowing the false oath refers solely to the situation of an unauthorized collector, or one who exploits his position by extorting funds beyond the authority granted to him by the ruler.<sup>238</sup> This proposition is repeatedly applied by Rambam in his Code<sup>239</sup> and in his responsa<sup>240</sup> in dealing with issues of false oaths made to threatening individuals who are violent robbers, acting outside the law.

Analytically what the Raaviah is suggesting is as follows. There exists a Rabbinic ban against testifying against a fellow Jew in favor of a non-Jew in a dishonest non-Jewish court. That ban would be overcome, and the testimony would be allowed, if the consequence of failure to testify would be *Chillul Hashem*. But, if the testimony by the Jewish witness could result in threat to the life of the Jewish litigant, then *Chillul Hashem* itself would be overridden by the duty of defense of life. Thus, the initial constraint against testimony would be restored.

It is interesting that while Raavad explicitly indicates that the factor of *Chillul Hashem* creates a duty to testify,<sup>241</sup> and Raavan clearly implies the same,<sup>242</sup> Raaviah, while basing

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<sup>238</sup> Nedarim 28a. Rambam, Code, Laws of Robbery and Lost Property 5:10-14.

<sup>239</sup> Rambam, *Hilchot Shavuot* 3:1-4.

<sup>240</sup> Rambam, *Responsa*, ed. By Blau, vol. 1, no. 210, at pp. 371-373. In another responsum, No. 299, at p. 687, Rambam seems to take an astonishingly broader view which allows a false oath to be taken in a non-Jewish court to prevent his imprisonment. Blau, in his comments to that Responsum, note 5, reports the extensive literature of Gaonim and Rishonim in complete disagreement with Rambam's position. Rambam himself makes no reference to such an allowance in his Code. In his brief response, Rambam insists that the defendant making the false oath needs to have in mind the grounds on which he is in fact not liable to the plaintiff – parallel to Rambam's language and position in the context of false oaths made to individual violent murderers or robbers, H. Shavuot 3:2. Since the plaintiff in this case is a Jew who brought the case to the non-Jewish court because Jewish Law would not allow him to recover, it is possible that Rambam views the plaintiff in this case as an Anas – a violent person, against whom a false oath made with mental reservations is not a criminal offense.

<sup>241</sup> Raavad to Bava Kamma 114a. "I say that this is a *Chillul Hashem*, and the witness has a legal duty (to testify) to prevent him from executing the crime."

<sup>242</sup> Raavan cited in Or Zarua, *Piskei Bava Kamma* Chapter 10, Sec. 450. "Additionally, it would be a *Chillul Hashem* if he were not to testify, while the non-Jewish party had relied upon him – he would say, 'they are not trustworthy people.'"

himself on his grandfather the Raavan, restrains himself from using language of duty in regard to the testimony in a non-Jewish court even though the logic of his position would necessitate that conclusion.<sup>243</sup> On one hand Raaviah says, as did Raavan, "...then it is Chillul Hashem (for him not to testify)..." suggesting that it is an affirmative duty for the witness to testify in order to avoid the Chillul Hashem. But then in the next phrase he chooses to say, "veyachol leha'id lo," "...and he can testify on his (the non-Jew's) behalf..." suggesting only the permissibility of testimony, not the existence of a duty to do so. Is this ambivalence in the Raaviah an indication of his sense of discomfort at directly expressing the existence of a duty to testify which prefers the economic well being of the non-Jew over that of the witness's fellow Jew? As a matter of Jewish law it is unequivocally the case that the avoidance of Chillul Hashem, and thus the defense of the good reputation of God, does have priority over the enhancement of the economic well being of fellow Jews. But, saying so explicitly may have been felt by Raaviah as a manifestation of disloyalty to fellow Jews which, while actually the Law, should not be emphasized.

Similar thinking to this is apparent in an extraordinary passage in the Jerusalem Talmud, at the close of chapter 8 of Terumot.

This ambivalence might explain why, on one hand, the precise language of Raaviah as cited by Or Zarua is quoted also by his student, Rabbi Meir ben Baruch of Rothenberg (c. 1215-1293).<sup>244</sup> But, on the other hand, in the paraphrase of the position of Raaviah in the Sefer HaAgudah by Rabbi Alexander Zussel HaCohen (died c. 1349), he says, "And in Sefer Raaviah: where he (the Jewish witness) was designated, as it is customary to designate a Jew and a non-Jew, he is required to testify because of Chillul Hashem; but he should warn the Jew (beforehand) and tell him that he will testify."<sup>245</sup> Sefer HaAgudah clearly recognizes the legal force of the Chillul Hashem situation as not only allowing testimony, but requiring the Jewish witness to testify in order to avert the Chillul Hashem, despite the negative consequences to the Jewish litigant. The apparent

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<sup>243</sup> Or Zarua, *Piskei Bava Kamma*, chapter 10, sec. 450, s.v. Katav Mori.

<sup>244</sup> Responsa of Maharam MiRottenberg, vol. 1, ed. Bloch, (Parma manuscript), no. 58; and vol.2, ed. Rabinowitz (Levov edition) no. 58.

<sup>245</sup> Sefer HaAgudah, to Bava Kamma, sec. 137, edition of Elazar Brissel, Jerusalem, 1970.

disloyalty to his fellow Jew could at least, according to Sefer HaAgudah, be ameliorated by his novel suggestion that the witness should give prior notice to the Jewish litigant so that he can decide how he wants to proceed in the litigation.

The force of the Chillul Hashem argument introduced by Raavan and Raavad, requiring testimony against fellow Jews in non-Jewish courts, went unrefuted through the rest of the history of Jewish Law. Not all authorities utilized the argument, and the tension evident in the Raaviah resulted in some wavering between indications of duty to testify in such situations, or just permissibility of testifying when an element of Chillul Hashem was present. But through the balance of the period of the Rishonim and the whole of the period of the Acharonim, this position is powerfully present in the hands of virtually all of the major authorities of Jewish Law.

Thus, for Rosh<sup>246</sup>, Tur<sup>247</sup>, Bach<sup>248</sup> and eventually the Aruch Hashulchan<sup>249</sup>, the operation of Chillul Hashem always results in a duty to testify against a fellow Jew in a non-Jewish court. For Shulchan Aruch<sup>250</sup> and Chatam Sofer<sup>251</sup>, Chillul Hashem operates to make testimony only permissible, not mandatory.

Rabbi Meir ben Isaac (Rambi) of Carcassonne,<sup>252</sup> a student of Ra'avad, offers a fascinating minority stance on the impact of Chillul Hashem. While he clearly recognizes the force of the Chillul Hashem argument on the permissibility of testimony, he struggles to preserve some force for the legislation of Rava even as against the possibility of desecration of the Divine Name. He offers the following novel interpretation of the original Talmudic passage. A single Jewish witness is not permitted to testify against a fellow Jew in a Magista court, a corrupt court, under threat of excommunication, and with the possibility of financial liability if the Jewish defendant

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<sup>246</sup> R. Asher ben Yechiel, Commentary of Rosh to Bava Kamma, chapter 10, sec. 14.

<sup>247</sup> Jacob ben Asher, Tur Choshen Mishpat, 28.

<sup>248</sup> R. Yoel Sirkes, Bayit Chadash to Tur, Choshen Mishpat 28, note 2.

<sup>249</sup> R. Moshe Sofer, Responsa Chatam Sofer to Choshen Mishpat, No. 23.

<sup>250</sup> Shulchan Aruch, Choshen Mishpat, 28:3.

<sup>251</sup> R. Yechiel Michel Epstein, Aruch Hashulchan, Choshen Mishpat 28:8.

<sup>252</sup> Cited in Shita Mekubetzet to Bava Kamma 113b, s.v. VehaRam za"l Misarkesta....

later testifies in a Jewish court that the witness had lied in the non-Jewish court<sup>253</sup>. A single witness testifying against a fellow Jew in a Dawar court, an honest court, is not subject to excommunication, nor to monetary liability, but, says Rambi, “Ein ruach Chachamim nocheh heimeno,” “the spirit of the Sages is not pleased with him.”<sup>254</sup> While this additional moral constraint proposed by Rambi has no legal force or enforceability attached to it, it could well serve as a source of reluctance in competition with the desire for the achievement of justice which would otherwise move the single Jewish witness to testify. However, Rambi argues, in this latter situation, the presence of the motive of Kiddush Hashem would be sufficient to overcome the “displeasure of the Sages,” to allow him to testify.<sup>255</sup>

According to Rambi, the force of the value of sanctification of the Divine Name would be sufficient to allow, albeit not to require, testimony against a fellow Jew in a fundamentally honest non-Jewish court. By contrast, the power of the constraint against testimony in a corrupt court, with its accompanying threat of excommunication and financial liability for losses so caused to a fellow Jew, is of a magnitude which even exceeds the duty to prevent Chillul Hashem or to perform Kiddush Hashem. While Rambi offered no accompanying commentary as to how he weighed these competing factors to arrive at his conclusion, the outcome itself bespeaks a sense of abject horror at the very thought of a Jew, even just through his participation as a witness, collaborating in an essentially corrupt judicial process. His position represents a powerful perception of testimony in an unjust court, as a form of profound disloyalty to fellow Jews, as a form of illicit participation in causing the unjust outcome.

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<sup>253</sup> Id. “”And it is reasonable to say that he (the witness) is liable to pay (or “oh” – but preferably read “iy”) if this one (the defendant) swears in Jewish court that he (the witness) had sworn falsely against him.”

<sup>254</sup> This is one of a broad set of Rabbinic terms intended to reflect extra legal guidance and persuasion in regard to actions which are discretionary - denominated as “Reshut,” or “Pattur U’Muttar” - according to the law itself.

<sup>255</sup> Rambi offers no parameters for the nature of the Kiddush Hashem which would motivate the witness to testify.

## **B. To Prevent a Fellow Jew from Perpetrating a Crime (Chiyuv Lehafrisho min Halssur)**

The Raavad's presentation of his contention that a single witness might be obligated to testify even in a corrupt non-Jewish court against a fellow Jew when the Jewish defendant's claim has no truth to it, is based on the legal proposition that "the witness has a legal duty (to testify in order) to prevent him (the defendant) from executing the crime."<sup>256</sup> This teaching of Raavad was cited by Meiri (Rabbi Menachem ben Shlomo L'beit Meir, c. 1249-1316) in the following manner:

But (in a case in which) a (Jewish defendant) lacks a defense valid by Jewish Law – then he (the witness) should testify (ve'tavo alav beracha) and may Blessing be visited upon him. And this is the Law and what is fit, so that his friend may be prevented from executing his forbidden act.<sup>257</sup>

There are two distinct differences between the teachings of Raavad and Meiri on this matter. Firstly, Meiri completely omits the issue of Chillul Hashem, leaving the duty to testify as a responsibility of the witness not to prevent the desecration of the Divine Name, but simply to prevent a fellow Jew from executing the crime which he is intending to perform.<sup>258</sup> Secondly, the Meiri avoids the explicit use of the Raavad's word "ve'tzarich", "and he is required to," replacing it with the slightly softer "ve'chen hadin ve'hara'ui," "and this is the law and what is fit." Meiri leaves no doubt about the responsibility of the Jewish witness to testify in such a circumstance – but he eases the blow to the duty of loyalty to fellow Jews by implying a somewhat regretful tone to the language of the requirement – as if it needed to be done by legal and moral coercion not by free choice. Despite these differences, the underlying principle of Jewish Law to which both Raavad and Meiri subscribe is that the Jewish witness would be duty-bound to testify against a fellow Jew in order to prevent his fellow from executing the crime

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<sup>256</sup> Raavad, Commentary to Bava Kamma 113b. Op. cit. at note 127.

<sup>257</sup> Meiri, Beit Habechira to Bava Kamma, last comment to 113a, s.v. Gedolei Hamepharshim.

<sup>258</sup> It is difficult to know whether this variation in the quotation of the Raavad by Meiri is because he had a different text of Raavad before him, that is one other than the British Museum manuscript utilized by Professor Atlas. This possibility is intensified by the fact that Rashba also quoted this position of Raavad with significant omissions from the text that is before us, including the reference to Chillul Hashem, but omitting the discussion of Duty to prevent a fellow Jew from sinning.

which he is apparently intent on performing. What precisely is the foundation for this position in Jewish Law?

A distinctive element of Biblical legislation is the crime of enabling another to commit any violation of law. The source of this prohibition is the middle section of the verse, Leviticus 19:14: "...you shall not place a stumbling block before the blind...." The Talmudic era Sages denied that this passage refers to a literal act of causing injury to a blind person – since that would be covered by the normal law of tort liability. To what then does this refer? The Midrash Halacha responds: "Before a person who is blind in some matter, you should not give advice which is not appropriate for him...."<sup>259</sup> The Midrash illustrates this by offering a case in which A encourages B to sell his property, without revealing to B that A himself intends to acquire the property because of its great hidden value. The Talmud offers two further illustrations of the violation of this law:

Rabbi Nathan said: How do we know that a person should not extend a cup of wine to a Nazir, nor a limb torn from a living animal to a Noahite? We are so taught by 'You shall not place a stumbling block before the blind.'<sup>260</sup>

The continuation of that Talmudic passage as it appears before us insists that the prohibition pertains only in a situation in which the potential sinner would not otherwise have had easy access to the material necessary for the commission of his crime, for example if the Nazir was on the other side of a river where no wine was located, and you row the wine across to offer it to him.

Based on this and other Talmudic passages, the Tosafists define the elements necessary for the commission of this crime of "aiding" in the commission of a crime by reference to the three elements in the verse itself.

1. The "blind person" (the "iver") is a Jew or non-Jew who is inclined and likely to violate a law by which he is bound.

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<sup>259</sup> Sifra to Leviticus 19:14. Cited by Rashi to that verse.

<sup>260</sup> Avodah Zarah 6a-b.

2. The “stumbling block” (the “michshol”) is the material goods or emotional / psychological encouragement which the blind person lacks, thereby restraining him from committing the crime.

3. The “forbidden placing” (“lo titen”) is the act of delivering the stumbling block to the blind person when you know that he does not otherwise have access to it – thereby making probable his commission of the crime.<sup>261</sup>

Rambam differs from the Tosafists in one essential element. He makes no reference to the requirement that the “stumbling block” (the “michshol,”) the material or the counsel being offered to the potential criminal, be otherwise out of his reach.<sup>262</sup> The far reaching impact of this omission is that, according to Rambam, even if the potential criminal has other easily accessible sources for the same goods or counsel, one is still forbidden to provide them. This is in contrast to the Tosafists for whom the violation of Lifnei Iver is restricted to the situation where there is a more direct causal connection between the act, and the crime then committed (for example, by providing weapons to a terrorist or a criminal regime which does not have other easy access to weapon,). For Rambam, no matter whether the criminal does or does not have such easy access, providing him with a weapon makes you complicit in the subsequent crime under the law of Lifnei Iver.<sup>263</sup> Despite the causal connection being so attenuated, for Rambam there is strict liability for providing wrongful counsel or just the implicit encouragement or approval of his behavior by providing the potential sinner with the materials necessary for the commission of his crime. This is why Rambam can directly include as violation of Lifnei Iver situations in which the actor does not “make the crime possible,” but does no more than “strengthen the hands of the sinner.”<sup>264</sup>

Thus far, the Law of Lifnei Iver generates only a duty to refrain from behavior which would injure another party by contributing to the likelihood of his committing a sinful

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<sup>261</sup> Tosafot Avodah Zarah 6b, s.v. Minayin shelo yoshit.

<sup>262</sup> Rambam, Mishneh Torah, Laws of Idolatry 9:8-9. Laws of Homicide and Guarding of Life 12:12-15.

<sup>263</sup> For extensive exposition of this position of Rambam, see Rabbi Nachum Rabinovitz in his commentary to Rambam's Mishneh Torah.... And in his article in the Orthodox Forum series.

<sup>264</sup> Rambam uses the latter phrase twice in Laws of Homicide and Guarding of Life 12:14. See also Rambam, Laws of Robbery and Lost property 5:1, in regard to the purchase of stolen property.



act. It does not, thus far, yield a duty to prevent the other from effectuating his sinful intent.<sup>265</sup> That is, Lifnei Iver criminalizes speech or action which makes a sin more probable, but it does not criminalize the inaction of failing to prevent the sinner from acting, nor does it make its correlative, the action of preventing the criminal from executing his sin, a legal duty. While the Talmud itself makes reference to the value of “L’afrushei me’issurah,” of preventing a person from committing a sin, it never explicitly connects that value to the law of Lifnei Iver.<sup>266</sup> The explicit connection between the two principles is made by the Tosafists who maintain that preventing a fellow Jew from sinning is a Rabbinically imposed duty, as an extension of the law of Lifnei Iver.<sup>267</sup>

Rambam clearly agrees that there exists a legal duty of preventing a person from committing a sin. Thus, for example, based on an explicit Talmudic source, he maintains that if one sees a person wearing a garment of Shatnez (consisting of wool and linen woven together), he is duty bound to tear the garment off the person, even if the consequence will be public embarrassment to the “sinner,” indeed even if the “sinner” is his own teacher.<sup>268</sup> Rambam limits the application of this duty to situations in which a DeOraita Law (Revealed Law) is being violated, since as to a Rabbinic Law, the principle of Kevod Habriyot, defense of human dignity, would prevent the observer from stripping the garment off the sinner in public.<sup>269</sup> But Rambam in that passage does not indicate the source of the duty. Nor, in the passages in which he treats the Law of Lifnei Iver, does Rambam indicate the existence of a related duty to prevent the sinner from executing his sinful intent.<sup>270</sup> What then is the source of this duty according to Rambam and to which layer of the law does it pertain, Revealed Law or Rabbinic Law?

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<sup>265</sup> The critical nature of this distinction for Jewish Law is explored further in Appendix A.

<sup>266</sup> See e.g. Shabbat 40b.

<sup>267</sup> Tosafot to Shabbat 3a, s.v. Bava DeRaisha.

<sup>268</sup> Rambam, Mishneh Torah, Hilchot Kela'im 10:29; based on Berachot 19b. Both Keseph Mishneh and Radbaz comment on that passage in Rambam and attempt with some difficulty to explain how he derives the law from that text in the Talmud.

<sup>269</sup> Rambam, *ibid.*

<sup>270</sup> See e.g. citations to Rambam above in notes 192 and 193.

It would appear to be the case that Rambam considers the duty to prevent a fellow Jew from committing a sin to be one element of the DeOraita Law of Rebuke. The following is his language in Mishneh Torah:<sup>271</sup>

It is a mitzvah for a person who sees that his fellow Jew has sinned or is following an improper path [to attempt] to correct his behavior and to inform him that he is causing himself a loss by his evil deeds as [Leviticus 19:17] states: "You shall surely admonish your colleague." A person who rebukes a colleague - whether because of a [wrong committed] against him or because of a matter between his colleague and God - should rebuke him privately. He should speak to him patiently and gently, informing him that he is only making these statements for his colleague's own welfare, to allow him to merit the life of the world to come. If he accepts [the rebuke], it is good; if not, he should rebuke him a second and third time. Indeed, one is obligated to rebuke a colleague who does wrong until the latter strikes him and tells him: "I will not listen." Whoever has the possibility of rebuking [sinners] and fails to do so is considered responsible for that sin, for he had the opportunity to rebuke the [sinners].

The primary Talmudic source from which Rambam draws the laws of rebuke refers only to words, speech, as the medium of fulfillment of this Mitzvah. "How do we know that one who sees in his friend some debased quality, that he is obligated to chastise him...."<sup>272</sup> Following that approach, in his Sefer Hamitzvot, Rambam says specifically, "We are commanded to rebuke the sinner or one who intends to sin, and to prevent him from doing so with words of rebuke...."<sup>273</sup> Yet when he records this law in Mishneh Torah, as we saw above, Rambam places primary emphasis on action and only secondarily on speech, as he says:

It is a mitzvah for a person who sees that his fellow Jew has sinned or is following an improper path [to attempt] to correct his behavior and to inform him that he is causing himself a loss by his evil deeds as [Leviticus 19:17] states: 'You shall surely admonish your colleague.'

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<sup>271</sup> Rambam Mishneh Torah, Hilchot Deot 6:7, translation of Rabbi Eliyahu Touger, Moznayim Press. Available online at

[http://www.chabad.org/library/article\\_cdo/aid/910346/jewish/Chapter-Six.htm](http://www.chabad.org/library/article_cdo/aid/910346/jewish/Chapter-Six.htm).

<sup>272</sup> Arachin 16b.

<sup>273</sup> Ramabam, Sefer Hamitzvot, Positive Commandments, no. 205.

He thereby encompasses the action of attempting to correct the sinner within the Revealed Law of rebuke. That is, for Rambam, the very essence of the duty of Rebuke is in reality the legal duty to prevent a fellow Jew from committing a sinful act. If that can be achieved through words alone, then that minimal speech is required, but if words will not suffice, then action to achieve the restraining purpose is mandated by the verse in the Torah itself.

The central source for the position of Rambam in encompassing action in the duty to prevent sinful conduct is the Talmudic passage in Shevuot where the Sages explore the question of Jewish covenantal mutual responsibility for one another. Says the Talmud:

As to all of the sins of the Torah, is there not communal responsibility (for the actions of individuals)? Does it not say (Leviticus 26:37) ‘...they shall stumble over one another....’, meaning over the sins of their brothers – for all Jews are responsible for one another!!? That is only when it was within their power to prevent (the sinful conduct) and they failed to do so.<sup>274</sup>

The Talmud here clearly assumes that there is mutual responsibility amongst Jews to prevent sinful conduct, without any limitation to words as the medium of such prevention. Similar passages in both the Babylonian Talmud<sup>275</sup> and the Jerusalem Talmud<sup>276</sup> imply the lack of distinction between speech and action in regard to the duty to prevent fellow Jews from sinning. It is particularly in a passage in the Jerusalem Talmud that a more direct connection is made between the general duty to prevent another Jew from sinning and the Torah Law of rebuke.<sup>277</sup> In that passage, the general rule of preventing sinful conduct is directly associated with the ruling which is a hallmark of the law of rebuke, that “as one is obligated to speak that which can be heard (by the sinner), so is one obligated to refrain from saying that which cannot be heard.”

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<sup>274</sup> Shevuot 39a,b. Parallel in Sanhedrin 27b-28a.

<sup>275</sup> See e.g. Berachot 20a, the case of Rabbi Adda bar Ahavah.

<sup>276</sup> See e.g. J.Beitzah 2: , and J. Sotah 1: .

<sup>277</sup> J. Sotah 8: 2

In sharp contrast to the position of Rambam, the Tosafists seem totally un-persuaded, based on the relevant passages in the Babylonian Talmud, that the Commandment of Rebuke contain elements other than speech. If then, the Talmud requires action to restrain a Jew from committing a sin, that requirement could not, for the Tosafists, be derived from the Commandment of rebuke. Rather, as they in fact argue, it must constitute a Rabbinic extension of the Law of Lifnei Iver. The Law of Lifnei Iver indeed regulates not only speech, but behavior as well. However, the Deoraita Law of Lifnei Iver only limits being a causal party to the sinful act – that is, it forbids causing another to sin through your speech or action. It does not, on the Deoraita level create a duty of rescue – it does not affirmatively mandate preventive behavior and criminalize the omission, the failure to prevent the other from committing the sin. According to the Tosafists it is precisely this second layer of duty of rescue which is by Rabbinic Law added to the Law of Lifnei Iver. That is why, according to the Tosafists, while it is clear that the Deoraita Law of Lifnei Iver prohibits causing either a Jew or a non-Jew to violate any law by which he or she is bound; this Rabbinical layer of Lifnei Iver, imposing a duty to rescue from sin, and criminalizing the failure to do so, pertains only to fellow Jews.

This explains in turn an interesting discrepancy between the writings of Ashkenaz Rishonim, and the Rishonim of other schools. For the Rishonim of Sepharad and of Provence, as we have seen, the force of the duty to prevent a fellow Jew from executing his intended crime is of sufficient power to result in at least permissibility, if not the duty, to testify against the fellow Jew even in a dishonest non-Jewish Court. By contrast, this argument is rarely, if ever, raised by any Ashkenaz Rishon. For the former group of Rishonim, the duty to prevent performance of the crime is itself a Deoraita legal duty, an element of the Law of Rebuke, which clearly has the capacity to override the Rabbinic constraint against testimony in a corrupt non-Jewish court. By contrast, for the Ashkenazic heirs to the position of the Tosafists, the duty to prevent execution of a crime by another Jew is itself only a Rabbinic extension of the Law of Lifnei Iver, and when it conflicts with another Rabbinic law which constrains testimony, there is no inherent reason to grant priority to the latter over the former.

If we look now at the underlying competing values, we can gain another level of understanding of the nature of this debate. The rabbinic prohibition against testimony against a fellow Jew in a corrupt non-Jewish court, was motivated by the Loyalty responsibility a Jew was duty bound to express for the economic well-being of fellow Jews. It is this Loyalty responsibility which led Rashi, and the vast majority of early and late Rabbinic scholars to assert that the underlying basis of the excommunication to which a violator of this law would be subjected, was that he would have caused economic liability to a Fellow Jew which was not warranted according to Jewish Law; i.e. economic injury. It is only because such injury was indirect that Jewish law could not simply hold the perpetrator liable for the injury, but instead had to use excommunication either as the threatened punishment or as the instrument of generating economic compensation to the victim.

The struggle we have observing thus far in the writings of the Gaonim and Rishonim is, what happens when this Loyalty responsibility comes into direct conflict with another area of Loyalty responsibility imposed by Jewish Law. In the Gaonic literature, the competing Loyalty responsibility was the Loyalty to principles of Justice in the relationship between litigants – whether the litigants were both Jews, or even if one was a non-Jew. In the first approach of Raavad, the competing Loyalty was the Loyalty to the Reputation of God Himself – the avoidance of Chillul Hashem. In this third set, dealing with the duty of lehafrisho min ha'issur, the competing Loyalties both relate to duties of the witness towards the Jewish litigant. The first duty is to protect the economic well-being of the fellow Jew – Loyalty to his economic security. But, in this instance, the second, competing duty is to the spiritual condition of the very same fellow Jew – generated by the legal duty to actively prevent him from committing a sin, by which the sinner would injure both the intended victim of his crime, and himself through his breach of his covenant with God. What happens then when the competing Loyalty responsibilities both inhere in the protection of one person; one duty mandating the protection of his economic well being, the other mandating the protection of his spiritual well being?

For Rambam and apparently Raavad, and with them the Rishonim of both Sepharad and Provence, the answer to this question is crystal clear. The Deoraita Duty of Rebuke mandates granting priority to the spiritual well being of the perpetrator, rather than granting priority to his economic well being in regard to an indirect injury which is itself only granted protection by Rabbinic Law. Therefore, for Rambam and his school of thought, the witness would be obligated to testify against his fellow Jew in a corrupt non-Jewish court despite the resultant risk of indirect economic injury to the fellow Jew, in order to achieve the higher magnitude Loyalty to the spiritual well being of that very Jewish defendant.<sup>1</sup> A parallel application of this same principle is evident in the assertion by R. Yosef Caro that while an outstanding scholar would be exempt from the obligation to testify in an inferior (possibly untrustworthy) Jewish court, he would be obligated to testify if there were an element present of “lefrushei meissura,” of an opportunity to prevent the defendant from actually achieving the execution of his criminal intent.<sup>278</sup>

By contrast, for the Tosafists, the Jewish legal Duty to engage in action which would deter a fellow Jew from committing a sin, is itself only a Rabbinic extension of the Law of Lifnei Iver, in which case, it is not simple to compute its capacity to override another Rabbinic duty – to protect a fellow Jew from indirect economic injury which might result from your testimony against him in a corrupt non-Jewish court. The competing Loyalties in this instance, for the Tosafists, produce a standoff in which it is not possible to declare that the witness has a legal duty to prevent the Jewish defendant from executing his sin, at the expense of his actively risking economic injury, albeit indirectly, to his fellow Jew. That is, his Rabbinically imposed duty to protect a fellow Jew from indirect economic injury, is not obviously overridden by his Rabbinically imposed duty to protect the spiritual well being of his fellow Jew. The outcome, therefore according to the Tosafists is simply, first do no harm – the prevention of wrongdoing is not, by itself, a sufficient grounds to warrant the indirect injury which could result from testimony. Of course, as we have seen for Raavan, and will see according to other Rishonim of Ashkenaz, the absence of this particular grounds for justifying or mandating testimony

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<sup>278</sup> Shulchan Aruch, Choshen Mishpat 28:5.

against a fellow Jew, even in a corrupt non-Jewish court, did not prevent the identical conclusion from being arrived at based on other legal principles.

**C. When Required to Testify by Non-Jewish Law**

We have already seen the introduction by Raavan of the notion that when the non-Jewish legal system requires a Jew to testify, he is bound to do so under Jewish Law. Thus, in the case in which at the outset of a transaction between a Jew and a non-Jew, each of the parties had designated a co-religionist as his witness for the transaction, then Raavan contends, aside other reasons that the Jewish witness might be bound to testify, there is also the element of the Jewish Law principle, the Law of the Land is the Law, “Dina Demalchuta Dina.” The relevant passage reads as follows:<sup>279</sup>

It appears to me that in a location where the custom (in transactions) between a Jew and a non-Jew, is that they appoint a Jew and a non-Jew to be the witnesses between them, then it is permissible for the Jewish witness to testify, since from the outset they were accepted for that purpose..... since he is ordered to pay in accordance with the law –we do not excommunicate (the Jewish witness.) Additionally, it would be a Chillul Hashem if he (the designated Jewish witness) were not to testify, since the non-Jewish party had relied on him – he would say, ‘they are not trustworthy people!’ And even more, for it is the law of the land, and ‘the law of the land is law.’

Like others, Raavan equivocates in his terminology, speaking at the outset only about the permissibility of testimony by the Jewish witness, but then introducing two grounds which could serve as a basis for a legal duty to testify – Chillul Hashem and Dina DeMalchuta Dina – without so denominating them.

A fascinating utilization of the same principle, without even using the legal terminology of Dina DeMalchuta Dina, is to be found in the writings of Rambam.

Rambam codifies the state of Jewish Law in regard to the use of non-Jewish courts, on the basis of the Talmudic and Gaonic teachings, as follows:

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<sup>279</sup> Op cit at note 156.

Any person who adjudicates through gentile judges and their courts, even if their laws are the same as the Jewish laws, is considered a Rasha (a wicked person.). It is as if he disgraced, blasphemed, and lifted up his hand against the Torah of Moses our teacher. As the Torah says, (Exodus 21:1): "These are the judgments that you shall place before them;" (and the Rabbis taught) "Before them" and not before gentiles, "before them" and not before inexperienced people. "If the gentiles have greater power, and the opposing litigant is a powerful person from whom one cannot recover property through the Jewish judicial system; one should summon him before the Jewish judges first. If he did not desire to come, one may receive authorization from the court and rescue one's property from the litigant by litigating in a gentile court."<sup>280</sup>

Rambam is clearly, in this passage, dealing with a situation in which two Jewish litigants are involved, parallel to the Talmudic passage on which his position is based.<sup>281</sup>

Elsewhere in his Code, Rambam deals with the situation of litigation in a Jewish court between a Jew and a non Jew.<sup>282</sup> According to the Talmudic passage on which Rambam is based,<sup>283</sup> such litigation in a Jewish court raises complex questions of Conflicts of Law. Should Jewish Law apply, as it is the law of the Jewish party; or ought Noahite Law be applied, since that is the law which Jewish society views as appropriately pertaining to gentiles? Rambam understands the Talmud to resolve the question based on the distinction between the treatment of idolatrous (Aku"m), versus non- idolatrous (Ger Toshav) non-Jews. The category which Rambam calls Ger Toshav, encompasses two groups of persons. First, the non-Jewish legally confirmed resident alien in the land of Israel who has accepted upon himself the civic responsibilities of the Seven Noahite Commandments as the law regulating his conduct. In its technical form, this category existed only during the period of the First Temple, until its destruction in 586 B.C.E., when the institution of the Jubilee Year was discontinued.<sup>284</sup> The second group, is a broader one which is applicable at all times and in all places, referring to all non-

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<sup>280</sup> Rambam , Mishneh Torah, Laws of Sanhedrin 26:7, translation by Eliyahu Touger, modified for greater clarity.

<sup>281</sup> Gittin 88b.

<sup>282</sup> Rambam, Laws of Kings 10:12.

<sup>283</sup> Bava Kamma 113a-b.

<sup>284</sup> Rambam, Laws of Idolators end of 10:6.



idolatrous non-Jews who adhere to the Seven Noahite commandments.<sup>285</sup> The relationship to the Ger Toshav, Rambam contends, is to be conducted, “with graciousness and kindness, as one would with a fellow Jew. For we are commanded to rescue him, as it says (Deut. 14:21) ‘...unto the stranger in your gates you shall give it to be eaten....’”

One additional factor needs here to be introduced. According to Rambam, the mutual relationship between fellow Jews is always governed by their common state of being bound by Jewish Law.<sup>286</sup> But the relationship of Jews to non-Jews is primarily governed by their common state of being bound by Noahite Law.<sup>287</sup> There are instances in which Jewish Law elevates the duties incumbent upon Jews toward non-Jews beyond the reciprocal duties embedded in Noahite Law. We have seen precisely such an instance in the application of the Biblical Law of *lifnei Iver* to create a duty upon Jews to not cause a non-Jew to violate the Noahite Laws by which he is bound, despite the absence of reciprocity of that duty within the Noahite Laws themselves. However, the norms which generally govern the relationships between Jews and non-Jews are the Noahite Laws. Therefore, in litigation between a Jew and a Ger Toshav non-Jew in a Jewish court, the court is bound to apply the legal system which is the common basis of the relationship between the parties, that is Noahite Law.

What, however, is the basis of the governance of the relationship between a Jew and an Idolatrous non-Jew? By definition, the Idolatrous non-Jew is not an adherent of the Noahite Laws, and therefore there cannot be reciprocity between the parties which would be recognized by the application of Noahite Law to their litigation. The choice of Law which then confronts the court is either the application of the Jewish legal system which binds the Jewish litigant, or the Noahite Law which also binds the Jewish litigant in his general relationship to non-Jews, despite the fact that this particular non-Jew is not a consenting party to the binding authority of Noahite Law. That is, either choice

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<sup>285</sup> Rambam, Laws of Idolatry 10:2. Also see comments of Raavad and of Keseph Mishneh to Rambam, Laws of Idolatry, at end of 10:6.

<sup>286</sup> We will see further explication of this shortly in regard to the testimony issue.

<sup>287</sup> Dov Frimer,

would be based on the binding authority of that particular legal system on just one of the litigants – the Jewish party. One further factor then enters.

As to an idolator, in sharp contrast to the Ger Toshav, the Torah commands (Deut. 7:2), “Lo techanem”, “you shall not be gracious unto them.” The Talmud understands this to mean that a Jew is not to grant any economic advantage to idolators.<sup>288</sup> The result according to the Talmud,<sup>289</sup> and as codified by Rambam,<sup>290</sup> is that in litigation between a Jew and an idolator in a Jewish court, since either the application of Jewish law or the application of Noahite Law would be based on the fact that the Jewish party is committed to both of them, the court ought to resolve its conflicts of laws problem in the manner which is most advantageous to the Jewish party. Thus, like an act of jurisdiction shopping by the court itself, that legal system should be applied that would result in the most advantageous outcome to the Jewish party.

Thus, while Rambam’s treatment of civil law issues in the Mishneh Torah deals primarily with the way in which the relationship between two Jews would be litigated in a Jewish court, he has dealt also in his Code with the situation of two Jews litigating in a non-Jewish court, and with the situation of a Jew and a non-Jew litigating in a Jewish court. Strikingly, in the entire Mishneh Torah, Rambam does not deal with the issue of litigation between a Jew and a non-Jew in a non-Jewish court. Of course, given what we had seen earlier in the Tosefta,<sup>291</sup> this omission by Rambam is simply further confirmation of the Talmudic position that there was no objection to litigation between a Jew and a non-Jew in a non-Jewish court. This was why early and late authorities, struggling with the question of the rationale of the Law of Rava restricting testimony against a fellow Jew in his litigation with a non-Jew in non-Jewish courts, rejected the possibility that that Rabbinic legislation was an extension of the DeOraita ban on litigation between Jews in non-Jewish courts.<sup>292</sup> How could the Law of “Lifneihem” ban testimony in cases in which it permitted the litigation itself ?!

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<sup>288</sup> Avodah Zarah 20a.

<sup>289</sup> Bava Kamma 113b.

<sup>290</sup> Laws of Kings 10:12.

<sup>291</sup> See above section III. A. 2.c.

<sup>292</sup> See above section III.A.

Where then in his Code would Rambam record the Legislation of Rava? Certainly not in the Laws of Sanhedrin where he codifies the prohibition against litigating with a fellow Jew in a non-Jewish court. Perhaps it would make sense to record this law in the Laws of testimony, which deal with issues of testimony in Jewish courts. In a surprising move, the only place where Rambam refers to the Legislation of Rava is in *Sefer Mada*, in the Laws of the Study of the Torah.<sup>293</sup> There, in Chapter six, Rambam performs one of his masterful consolidations by bringing together all twenty-four instances in which the Talmud had specifically recorded that someone would be subject to the penalty of excommunication.<sup>294</sup> It would appear that the location of the laws of excommunication in Laws of Study of the Torah, rather than in one of the sections of the Code devoted to criminal law or the penal system is due to the fact that the grant of authority for excommunication was not to the judiciary alone, but to any recognized community scholar. Since the Law of Study of the Torah encompasses the Duties of respect of scholars and the authorities which devolve upon them in consequence, it serves as the appropriate location in which to codify the circumstances under which scholars as well as courts are entitled to issue discretionary writs of excommunication.

Rambam there codifies the Legislation of Rava as the ninth instance in which excommunication can be ordered, in the following manner: “One who testifies against a Jew in the courts (*Arka’ot*) of idolators, and through his testimony caused monetary loss to him (the Jewish litigant), not in accordance with Jewish Law, is to be excommunicated until he pays.”<sup>295</sup>

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<sup>293</sup> Rambam, *Laws of Study of the Torah* 6:14 (9).

<sup>294</sup> Gideon Leibson (Libson), *Determining Factors in Herem and Nidui (Ban and Excommunication) During the Tannaitic and Amoraic Periods* (Hebrew), *Shenaton Ha-Mishpat Ha-Ivri*, vol. 2, pp. 292-342, Jerusalem, The Institute for Research in Jewish Law, 1975. At the start and at the end of the article Libson argues persuasively that the number 24 in the original Talmudic passage was a round number, not a closed list, despite the Rambam’s insistence on counting exactly 24 such instances; at pp. 293-298 and particularly the reference to Shraga Abramson at p. 296, in footnote 19.

<sup>295</sup> Leibson, *op cit.*, at p. 324 inexplicably asserts that the Legislation of Rava is quoted in the Talmud as an anonymous statement and is associated with Rava because it appears in a sequence of teachings by Rava. While the latter point is correct, there is no printed or manuscript version of this passage in *Bava Kamma* 113b in which the attribution to Rava is not present.

This is a very bizarre codification of the Legislation of Rava. The problems are numerous.

1. Rambam does not even mention that Rava's case in the Gemara relates specifically to a situation in which the other litigant, in whose favor the Jewish witness testifies, is a non-Jew. In Rambam's version, the other litigant might well be another Jew, and the penalty of excommunication would still apply.
2. Rambam does not record the permissibility of such testimony when there are two witnesses. Is that also forbidden according to him?
3. Nor does Rambam record the critical distinction between the Magista court, where, according to the Gemara, even a single witness may testify, as opposed to the Dawar court where testimony by a single witness could result in excommunication. Rambam uses the generic term Arka'ot, which by his time was a commonly used term to describe all non-Jewish courts. Is the distinction between honest and corrupt courts of no significance to Rambam?
4. Rambam makes no reference to the procedural similarities between the Jewish court and the Dawar court in requiring an oath when there is only a single witness. But doesn't that serve as a fair predictor of a common outcome, or at least, of procedural fairness in the non-Jewish court?
5. Rambam adds an element which is completely absent in the Talmudic text of the Legislation of Rava, that the excommunication would be terminated upon payment by the witness to the Jewish litigant of the sum that the latter had been required to pay in consequence of the testimony. Does this represent a shift in the purpose of the excommunication from penalty for wrongdoing, to coercive measure for requiring compensation for loss?

In all, what exactly is the intent of Rambam in this passage? Why does his treatment of the Legislation of Rava differ so radically from the treatment of this law in any of the preceding Gaonic literature, or for that matter, from its treatment by any of the other Rishonim?

The Rambam's position becomes clarified through an understanding of his position on a number of related matters. First, Rambam systematically distinguishes between the

duties of a Jew towards fellow Jews under Jewish Law, and the duties that same Jew might have under non-Jewish law which could be binding under the principle of *Dina Demalchuta Dina*, the Law of the Land is the Law. Shmuel Shilo has established that the position of Rambam in regard to *Dina DeMalchuta Dina* is very extensive.<sup>296</sup> Shilo calls particular attention to the breadth of the language of Rambam, as he declares, "...where the law of the State is an established law, ...we follow the law of the State because in all monetary matters we abide by the law of the State."<sup>297</sup> While Rambam requires that the government be strong and authoritative in its jurisdiction;<sup>298</sup> and that it apply laws equally to all residents of the State<sup>299</sup> as preconditions of Jewish legal recognition of the authority of its laws, he clearly views the government's authority as extending to all forms of economic, civil matters, to the exclusion of religious or ritual observances.<sup>300</sup>

Second, Rambam would be quite justified in pointing out that the language of the Legislation of Rava does not assert, nor does it create, an *ab initio* prohibition against testimony of any sort in non-Jewish courts. As we have noted above, no such proscription existed before the Legislation of Rava, and according to Rambam, no such proscription exists in consequence of the Legislation of Rava. After all, the Talmudic Sages knew how to declare behavior to be proscribed. They had many terms to describe the varying degrees of prohibition, those that they uncovered in their interpretations of prior Biblical or Rabbinic texts, and those which they created anew in their own legislation. But Rava does not declare that testimony is forbidden. What Rava does decree is that if in consequence of a Jew testifying against a fellow Jew in a non-Jewish court, the Jewish litigant suffers loss not in accordance with Jewish Law, that there is potential liability of the witness to the injured litigant which can be pursued in a Jewish court. The act of testifying itself remains, even according to Rava, as understood by Rambam, a discretionary act within the framework of Jewish Law. If the Jewish witness prefers to testify, or understands his responsibility to be to testify, or if it be the case that

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<sup>296</sup> Shmuel Shilo, *Maimonides on Dina Demalkhuta Dina (The Law of the State is Law)*, Jewish Law Annual, vol. 1, pp. 146-167. See particularly pp. 150-154, and note 25 on p. 151.

<sup>297</sup> Rambam, *Hilchot Zechiya Umattanah* 1:15; cited by Shilo, *ibid*, at pp. 150 and 151.

<sup>298</sup> Shilo, *id*, at p. 148, based on Rambam, *Hilchot Gezeilah* 5:18.

<sup>299</sup> Shilo, *id*, at 150, based on Rambam, *Hilchot Gezeilah* 5:14.

<sup>300</sup> *Id*, based on Rambam, *Hilchot Zechiya Umattanah* 1:15.

the Law of the Land requires him to testify, he is not barred by Jewish Law from doing so.

However, the legal responsibility which the Jewish witness has to his fellow Jew, to avoid any form of economic injury to him, is determined not by the Law of the Land, nor by his own preference or conscience, but is determined by Jewish Law. Therefore, whatever decision the Jewish witness makes in regard to the discretionary activity of testifying against a fellow Jew in a non-Jewish court, he cannot relieve himself of the responsibility that he bears to that fellow Jew within the framework of Jewish Law. Until the time of Rava, whatever choice the witness made, he could not be subject to any negative consequences since his conduct would never be the direct cause of injury to the Jewish party to the litigation in the non-Jewish court. While the primary level of legal duty which each Jew bears towards the economic well being of all persons is to do no harm – the definition of liability for harm extends only to the direct consequences of the behavior. Any indirect consequences would be classified by Jewish Law as “Gerama” – indirectly caused injury- for which there would be no monetary liability.<sup>301</sup> In the case of testimony in a non-Jewish court, the decision of the court itself is the instrument of potential harm to a litigant; the testimony of the witness is an element for deliberation by the judges, but does not rise to the level of direct cause of the injurious outcome.

Thus for Rambam, the entire purpose of the Legislation of Rava was to create a potential for accountability of the Jewish witness for any harm which he might cause to the Jewish party in litigation in a non-Jewish court. For Rambam, one of the underlying purposes of excommunication is precisely the creation of such a level of accountability in situations in which no actual crime or tort was committed, but injury might be sustained by an innocent party. Thus, for example, later on the same Talmudic page as the Legislation of Rava, the Talmud reports the following parallel situation. If an owner of land sells his property to a violent person thus creating risk to his neighboring Jewish property owner, then the Jewish vendor can be ordered into excommunication until he undertakes liability for any damages which might in the future occur to his neighbor.<sup>302</sup>

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<sup>301</sup> See Encyclopedia Talmudit, entry Gerama b'Nezikin, vol. \_\_, columns 485- .

<sup>302</sup> Bava Kamma 114a.

The Jewish vendor has committed no crime, and were his neighbor to eventually suffer some loss by damage caused by the new violent property owner, the vendor would bear no legal liability since he would not have been the direct cause of the damages. The role then of the legislation which threatens the vendor with excommunication is clearly an equitable remedy designed to assure that he does undertake responsibility for the security of his neighbor in a manner that goes beyond the initial requirement of the law. The remedy is not to make him monetarily liable, but to threaten excommunication if he fails to make good the damage to his neighbor which he set in motion.

For Rambam, the case of the Jewish witness in the non-Jewish court is perfectly parallel to the case of the vendor to a violent purchaser. The Legislation of Rava did not create a new crime, nor did it generate a new layer of financial liability in cases of indirect injury. It created a new equitable remedy for a Jewish litigant who claims to have suffered monetary loss in consequence of testimony against him by a fellow Jew in a non-Jewish court. The remedy is, essentially, a hearing before a Jewish court in which the Jewish court would have the discretionary authority to order the witness to be excommunicated until he compensated the Jewish litigant for the loss which he caused but for which he could not be held directly liable under Jewish Law due to its being a form of *Gerama* – of indirect injury. Of the essence in this situation is the recognition that excommunication, by its very nature, is a discretionary power which a court or an individual scholar in a community could exercise in the greater interest of safeguarding Jewish communal values. A plaintiff is not “entitled” to the remedy of excommunication, and a court is never duty bound to order anyone to be excommunicated, as a court would be duty bound to find in favor of one or another party to a civil litigation in the presence of two eye-witnesses who testify to criminal or to tortuous behavior.

Given this analysis, it would appear that in fact according to Rambam there is, even after the Legislation of Rava, no a priori criminality, no violation of a Rabbinic prohibition, in testifying against a fellow Jew in a non-Jewish court, even when the other party is a non-Jew, even when the witness is the sole witness, and even if the court is dishonest. This is why Rambam omits all of those factors from his codification of the

law of Rava. All the law of Rava did was to vest in Jewish courts the authority to conduct a secondary, post facto, hearing in the relationship between the Jewish witness and a Jewish party who claims that the former had caused him unconscionable injury through his testimony in a non-Jewish court. The Jewish court would then have the discretion, if they concluded that the Jewish litigant in fact suffered an unjust loss, to threaten the Jewish witness with excommunication unless he would compensate the litigant for the loss he had suffered.<sup>303</sup> It is striking though that Rambam provides no indication whatsoever as to what criteria the Jewish court is to use in this situation other than the broad guideline of the litigant having been caused to suffer “loss not in accordance with Jewish Law.”<sup>304</sup>

This analysis of the position of Rambam would leave the potential witness in a conflicted position. On one hand, he is free to exercise his discretion as to whether to testify - Jewish Law will not instruct him to refrain and might even indicate that he is duty bound to testify if the non-Jewish civil law requires him to do so. On the other hand, his testimony might subject him to a subsequent law suit by the Jewish litigant, in a Jewish court, in which he might be subject to excommunication for the consequences which he had brought about through his testimony, unless he agrees to compensate the Jewish litigant. On top of which, the liability he might be subject to in the Jewish court is extremely unpredictable since it is a matter of equitable discretion on the part of the judges, based partially on the unknown outcome of the litigation in the non-Jewish court, and not subject to the usually knowable standards of financial liability within Jewish Law.

It may very well be the case that this conflicted position, according to Rambam, is the unavoidable consequence of exilic Jewish life in which the Jew is subject of two masters, the Jewish Law as administered by Jewish courts to govern the relationship between fellow Jews, and the Law of the Land which regulates the conduct of the Jew in his interaction with the non-Jewish legal system administered by non-Jewish courts in all civil matters in which they claim jurisdiction. Rather than attempting to reconcile the

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<sup>303</sup> Leibson, op cit, at p. 342.

<sup>304</sup> Leibson, id, does not explicate the criteria for the exercise of this discretionary authority.



two systems in all matters that affect Jews, Rambam is willing to allow the tension to stand, as if emphasizing the ambivalence, the uncertainty and insecurity of exilic Jewish life. What remains certain according to Rambam is that if the Law of the Land mandates testimony in the non-Jewish court, even against a fellow Jew in favor of a non-Jew, even as a single witness in a dishonest court, that the Jew is bound to testify. But it is equally certain according to Rambam that the legal governance of the relationship between the Jewish witness and the injured Jewish litigant is not exhausted by their interaction in the non-Jewish court, but that equitable remedies are available through Jewish courts which have the final word on their legal and moral responsibilities toward each other.

Rambam, having raised for the first time, the possibility that the witness might be monetarily liable to the Jewish litigant, set off an 800 year long debate which is still not fully resolved.

#### **D. To Avoid Monetary or Bodily Penalty for Refusal to Testify**

The legislation of Rava had created the possibility that a potential witness against a fellow Jew in a non-Jewish court, whose testimony would be in benefit of a non-Jewish litigant, might be subject to excommunication if his testimony would result in monetary loss to the Jewish party not in accordance with Jewish Law. As we have seen, according to some authorities, that witness might even be subject to being required to make monetary compensation to the Jewish party to whom he had indirectly caused such loss.

But what if, on the other hand, the potential witness himself could be punished by the non-Jewish authorities, either by monetary fine or even by imprisonment, for his failure to testify? Would his duty to defend himself against such penalty justify his testimony against the interest of his fellow Jew?

In order to understand the deliberation of the Rishonim around this next issue, it is necessary for us to return to the latter part of the Gemara Bava Kamma 114a, to the teaching of Rav Ashi which follows upon the teaching of the legislation of Rava, as cited above:<sup>305</sup>

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<sup>305</sup> See pages 25-26, lines 11-17 of the quoted text, and footnotes there.

11. R. Ashi said,
12.       When we were at R. Huna's academy, we raised this question:
13.       A prominent man (Adam Chashuv) upon whom they would rely as two (witnesses),
14.       since they will determine monetary liability on the basis of his testimony (alone), ought he not to testify -
15.       or perhaps, since he is a prominent man
16.       he cannot escape, and may testify?
17.       The question remained undecided (Teiku.)

In our previous exploration of the earlier part of this text, lines 1-10,<sup>306</sup> we had noted the distinction between what was apparently the original Legislation of Rava and what was later Amoraic or Saboraic addition of explanation and limitation of the new law.<sup>307</sup> A similar scan of the latter part of the passage, lines 11-17 yields important information that will help us understand the Talmudic teaching of Rav Ashi.

Three indications lead us to a literary division of our passage into an initial statement by Rav Ashi and a subsequent explanatory addition to it. Firstly, many scholars have noted that questions raised in the academy in the form of "Ibayah," "we raised this question," as in our text on line 12, were uniformly brief texts consisting only of a question and an answer, to which later generations added extensive explanatory comments such as the logical or textual argument for each side of the question.<sup>308</sup>

Secondly, most manuscripts insert the word "mahu," or "mai", meaning "what is the law" after the first two words of line 13 – thus reading, "Adam Chashuv mahu?"<sup>309</sup> ("what is the law related to an Adam Chashuv?") These words, "mahu" and "mai" are classical Amoraic forms of closing a question,<sup>310</sup> to be followed solely by the answer.<sup>311</sup>

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<sup>306</sup> See above, at p. 25.

<sup>307</sup> See above, section II, A, 5, at pp. 36-41, "Literary Structure of the Passage."

<sup>308</sup> Binyamin DeFrize, *Mechkarim BeSafrut HaTalmud*, Jerusalem, 1968, pp. 188-193. Chanoch Albeck, *Mavo LaTalmudim*, Tel Aviv, 1969, pp. 508-511. Avraham Weiss, *Mechkarim BeTalmud*, pp. 231-237.

<sup>309</sup> Rabinowitz, *Dikdukei Soferim*, op cit., to Bava Kamma, 114a.

<sup>310</sup> For another instance of "mahu" followed by an explanatory addition see H. Klein, *Gemara and Sebara*, J.Q.R. , vol. 38, (1947-48), at p. 73.

<sup>311</sup> For instances of "mahu" followed by "teiku," as in our passage, see J. Fraenkel, *Rashi's Methodology in his Exegesis of the Babylonian Talmud* (Heb.), Jerusalem, 1975, at p. 195.

The outcome we are led to is that the initial question reported by Rav Ashi had to do with only one specific element of the law of Rava, namely, the identity of the Jewish witness: “If he is a prominent man, (Adam Chashuv) what is the law?” It is to this question that the initial Talmudic response is, “Teiku” – the question remained undecided. We need to explore who this Adam Chashuv was, and why Rav Ashi and his colleagues thought that the Law of Rava might not apply to him.

I have elsewhere dealt extensively with the term Adam Chashuv, and the following passages are excerpted or summarized from that longer treatment in order to serve the needs of this particular application of the term.<sup>312</sup> The term itself, Adam Chashuv, does not appear in Tannaitic literature.<sup>313</sup> However, the idea that a person’s “importance” could impact on the way in which specific laws apply to him, is found expressly once in Mishna,<sup>314</sup> and three times in Tosefta.<sup>315</sup> In each case, an otherwise legally permissible activity was prohibited to a prominent person described as a “mitschashev,” a prominent person.”<sup>316</sup> While these specific cases provided no special clue to the identity of the “prominent person,” and indeed were only of minor impact in the Amoraic discussions,<sup>317</sup> they may have provided the ideational seed out of which the later usage of Adam Chashuv developed.

The term Adam Chashuv appears in thirty distinct sugyot in the Babylonian Gemara<sup>318</sup> and not at all in the Palestinian Gemara.<sup>319</sup> In sixteen of those instances the Gemara resolves a conflict between the stated law and the contrary behavior of an individual

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<sup>312</sup> Saul J. Berman,

<sup>313</sup> The word “Chashuv” does appear once in relation to persons, in Mechilta, Bo, sec. 1 (Horowitz Rabin edition p. 1, line 16), in an initial attempt to establish that the Biblical order of listing of the forefathers is an indication also of their relative importance. The Midrash then rejects the suggestion.

<sup>314</sup> Mishnah Sheviit 8:11.

<sup>315</sup> Once in Tosefta Avoda Zara 1:2, and twice in Tosefta Avoda Zara 2:7. It is odd that the article on Adam Chashuv in Encyclopedia Talmudit, vol. 1, pp.175-180, omits this Tosefta material altogether.

<sup>316</sup> In Mishnah Sheviit 8:11 the prominent person is prohibited from bathing in a public bath which was heated with inedible vegetation produced in the Sabbatical year. In Tosefta A.Z. 1:2 he is prohibited from greeting an idolator on the day of his pagan festival. In Tosefta A.Z. 2:7 he is prohibited from attending a pagan theater or stadium.

<sup>317</sup> Mishnah Sheviit 8:11 and Tosefta A.Z. 1:2 are never cited in the Babylonian Gemara. The text of Tosefta A.Z. 2:7 is quoted in Babylonian Gemara, but due to an orthographic change was understood in a manner which made it irrelevant to our concerns. See Berman, op. cit. footnote 119.

<sup>318</sup> Kasowski, Thesaurus Talmudis, vol. 1, pp.207-208.

<sup>319</sup> Dov Revel, Adam Chashuv (Heb.), Ner Maaravi, vol. 1, pp. 7-21, New York, 1924, at pp. 12-13.

scholar by asserting that a distinctive standard of behavior is expected of an Adam Chashuv.<sup>320</sup> In eight instances the conflict between two legal teachings is resolved by the assertion that one of them reflects the distinctive standard of the Adam Chashuv.<sup>321</sup>

In the remaining six cases the Gemara simply asserts the existence of a distinctive standard of conduct applicable to an Adam Chashuv.<sup>322</sup> In five additional instances, an Aramaic parallel term is used in place of Adam Chashuv, namely, “gavra dechashiv,” or simply, “dechashiv.”<sup>323</sup>

In this total of thirty-five passages, there are nineteen Amoraim who are identified as the Adam Chashuv, or the Gavra Dechashiv. Strikingly, seventeen of them lived in the first four generations of Amoraim, in the period between 220 and 375 CE, and every one of them was the Head of an Academy.<sup>324</sup> Similarly, the Palestinian scholars referred to as Adam Chashuv in the Babylonian Gemara, were also Heads of Academies in Israel in that same period of time.<sup>325</sup>

The conclusion that is inescapable is that the term Adam Chashuv was not simply an honorific description related to persons who were bearers of particular personality traits, or who had achieved some distinctive spiritual stature, but that for approximately a century and a half, from 220 till 375 C.E., in Babylon/Persia it was the technical term which served as the title of the Head of a Babylonian or Palestinian Rabbinic Academy.<sup>326</sup> The Talmudic texts which deal with the Adam Chashuv thus portray for us the distinctive status of the Head of the Academy as someone who occupied a position of

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<sup>320</sup> Berachot 19a; Shabbat 12b,51a,142b;Megillah 22b; Moed Kattan 11b, 12a, 12b (twice); Ketubot 52b,86a;Bava Metzia 73a; Avoda Zarah 8b,28a,48b; Hullin 134b.

<sup>321</sup> Berachot 53a; Pesachim 110a; Ketubot 75a; Kiddushin 7a; Bava Batra 9a; Avoda Zara 29a; Hullin 107b; Arakhin 19a.

<sup>322</sup> Shabbat 21b, 151a;Ta'anit 14b; Moed Kattan 28a; Bava Kamma 114a; Bava metzia 9b.

<sup>323</sup> Berachot 18b; Megillah 22a; Moed Kattan 17a; Gittin 59b; Bava Batra 10b. Vis. Kasowsky, *Thesaurus talmudis*, vol. 14, pp.771-772. Also see Berman, *op.cit.* footnote 126.

<sup>324</sup> See Berman *op. cit.*, text and related foot notes 128-140.

<sup>325</sup> See berman, *op. cit.* text and related foot notes 144-151.

<sup>326</sup> Note the possibly related usage in Codex Theodosian, XVI, 8, 15, of the term “spectabilis,” “the respectable,” in reference to the Patriarch. Cited by Hugo Mantel, *Studies in the History of the Sanhedrin*, Harvard University Press, 1961, at p. 239.

special religious leadership, who exercised a significant role in communal governance, and who had a special relationship to the non-Jewish authorities.<sup>327</sup>

We are now in a position to return to the question which motivates our current analysis of the term Adam Chashuv. In our passage of Bava Kamma 114a, Rav Ashi reported a question raised in the academy of his teacher R. Kahana<sup>328</sup> as to the applicability to an Adam Chashuv, of Rava's legislation restricting testimony by a Jew, against a fellow Jew, in a non-Jewish court. Rav Kahana, who died before 375 C.E.<sup>329</sup> was clearly using the term in its exclusive sense of Head of an Academy. Therefore, in our continuing analysis of the question reported by Rav Ashi we have to assume that his original intent was that it is the distinctive religious, social and political role of the Head of an Academy which would make it impossible for him to evade his responsibility to testify in a non-Jewish court. To this straightforward question the Talmud declares, "Teiku," "the matter remains unresolved."

This simple exchange became more complicated with the advent of the second stage in the presentation of the Law of Rava. As indicated previously, the original broad general restriction against a Jew testifying against a fellow Jew in favor of a non-Jew, in a non-Jewish court, was limited by the contention that such restriction applied only when the Jewish witness was the sole witness in a Magista court – which would issue judgment based on that testimony alone. By contrast, were the testimony to be offered by two witnesses, even in a Magista court, it would be permissible for the Jew to testify. Or, even if there was only a single witness, were the testimony to be offered in a Dawar court, such testimony would be permissible since the Dawar court, like a Jewish court, does not rely solely on the evidence of a single witness, but would then require the defendant to take an oath. Thus limiting the original Law of Rava, in the position of this second stage of the law, even a single Jewish witness would be permitted to testify against a fellow Jew, in favor of a non-Jewish plaintiff in a Dawar court.

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<sup>327</sup> See Berman, *op. cit.* text and related footnotes 174 and 183.

<sup>328</sup> All of the manuscripts and many of the Rishonim read here "R. Kahana," in place of "R. Huna." Rabinovich, *Dikdukei Soferim*, Bava Kamma, at p. 281, note 20. This reading seems most reasonable since Rav Ashi was in fact a student of R. Kahana and often reported on discussions which took place at his academy in Pum Nahara. See Hyman, *op. cit.*, at vol. 3, p. 847 for a listing of such instances.

<sup>329</sup> Hyman, *op. cit.*, vol. 1, p. 247.

This development in the Law of Rava required some modification of the understanding of the question of Rav Ashi. Now, the particular identity or status of the Jewish witness should be irrelevant since any single witness, even an Adam Chashuv, is permitted to testify in a Dawar (fundamentally honest) court, as any single Jewish witness would be forbidden to testify in a Magista (fundamentally corrupt) court. Why then should Rav Ashi be raising the question of the status of the Jewish witness – that should be irrelevant to the ruling of Rava as understood in the second stage? The Adam Chashuv, like any other Jew would be permitted to testify in a Dawar court, and forbidden to make an appearance as a witness in a Magista court.

It is at this point that a new rationale for the problem of Rav Ashi was introduced into our text, consisting of mid-line 13 through line 16. The new rationale suggests that the problem is that if an Adam Chashuv testifies as a single witness, even in a Dawar court, his social and religious status is such that the court will assign credibility to his testimony beyond what it would assign to the testimony of any other single witness, and would issue judgment in favor of the non-Jewish plaintiff based purely on the sole testimony of the Adam Chashuv. The Talmud then spells out a new dilemma which arises under these circumstances. If the Adam Chashuv then proceeds to testify in the Dawar court as a single witness, would he be subject to excommunication because he would have caused a loss to a fellow Jew not in accordance with Jewish Law, violating the protective intent of the Law of Rava? Or should he be exempt from such punishment due to the fact that as an Adam Chashuv, as a public figure of such stature, he would not have the capacity to avoid testifying? To this newly reconfigured question of Rav Ashi the Talmud still appends the original response, “Teiku” – the matter remained legally unresolved.

But the new understanding of the question of Rav Ashi raises one essential problem which did not exist in the original form of his question. The distinctive position of the Adam Chashuv which, in this newly configured question, is asserted to be the grounds which might justify his exemption from the penalty under the Law of Rava, resides in the fact that “lo matzi mishtamit lehu,” “he cannot escape.” The implication of the contrast between the Adam Chashuv and any other Jewish witness is that an average person would be justifiably punished by excommunication for his testimony as a single

witness against a fellow Jew in a Magista (corrupt) court, because he would have had the capacity to evade any duty to testify. It is therefore the voluntary nature of his testimony, his willingness to betray the covenantal responsibility that he has, to protect the material well-being of a fellow Jew from the unjust action of a corrupt court, that is then the legal basis for the penalty of excommunication.

It is for that reason that there might be an essential difference between the average person and the exceptional Adam Chashuv. The latter, precisely because of his distinctive status in the eyes of the non-Jewish as well as of the Jewish community, simply cannot avoid offering the testimony which he has, even in a Dawar court. Thus the question Rav Ashi is now understood to be raising is, should the Adam Chashuv be immune from penalty under the Law of Rava because his testimony is not truly voluntary – his position demands that it be offered despite his presumed reluctance to monetarily injure the Jewish defendant. Or should even the Adam Chashuv be fully subject to excommunication under the Law of Rava because, whether voluntary or not, in the final event he is causing harm to a fellow Jew beyond what is just according to Jewish Law.

The early Rishonim of Ashkenaz uniformly held that the circumstances of the Adam Chashuv constituted a basis for exemption from excommunication due to his inability to evade the responsibility to testify, and that the same principle would then be applicable to any single Jewish witness who was unable to avoid offering testimony. Thus, for example, Raavan (Rabbi Eliezer ben Natan of Mainz, c. 1090-1170) concludes that in the face of the Talmudic “teiku,” the lack of resolution of the question, there would be no excommunication of an Adam Chashuv were he to testify.<sup>330</sup> His rationale is that the failure to testify “would constitute a desecration of the name of God; that they (the gentiles) should not say ‘The best of them is as a brier...’ (Micah 7:4).”<sup>331</sup> His use of the Chillul Hashem argument as the basis for permissibility of testifying is, however, not a distinctive element applicable to the Adam Chashuv. Raavan himself, as we had seen,

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<sup>330</sup> Sefer Raavan, Vol. 2, end of Tractate Bava Kamma, at pp.194-195.

<sup>331</sup> Id.

specifically maintains that for any Jew, the presence of Chillul Hashem would justify testimony even as a single witness in a Magista court.<sup>332</sup>

Similarly, Rabbenu Tam (c.110-1171), as cited by Mordecai b. Hillel (1240-1298), maintained explicitly that the inability to avoid testifying, “lo matzi le’ishtamuti,” served as a basis for exemption from excommunication for any single Jewish witness even in a Magista court.<sup>333</sup> The intent of Rabbenu Tam in this matter is even more clearly expressed in the version of his teaching reported in the Hagahot Mordecai of Samuel ben Aaron of Schlettstadt, where the penalty of excommunication is explicitly applicable “only to a single witness who was able to avoid” testifying, but did not do so.<sup>334</sup>

Scholars of both Provence and Spain also subscribed to this significant limitation on the applicability of the Law of Rava, on the strength of the exemption universally recognized as having been granted to the Adam Chashuv who was unable to avoid testifying. Thus, Rabbi Isaac ben Abba Mari of Marseilles (c. 1120-1190), in Sefer HaIttur, seamlessly integrated the law of the Adam Chashuv with that of any single witness in a non-Jewish court, and asserts that “if he can avoid testifying, he should avoid it, but if he cannot, then it is permissible.”<sup>335</sup>

Likewise RaMaH, Rabbi Meir Halevy Abulafia (1170-1244, Toledo), supports the exemption from excommunication when avoiding testimony is not possible. He, however, introduces a significantly different condition which makes the testimony unavoidable. He says:

Even as to excommunication, that is only when he ought to have avoided testifying, but did so (testified). But where he could not have avoided testifying, for example if they (the non-Jewish court) would obligate him to take an oath that he did not know any evidence, and if he refused to take the oath they would

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<sup>332</sup> See above at p. .

<sup>333</sup> Mordecai to Bava Kamma, at sec. 157.

<sup>334</sup> Hagahot Mordecai to Bava Kamma, at sec. 212.

<sup>335</sup> Sefer HaIttur, end of section on Kabbalat Ha’edut, Warsaw edition, p. 62b. Note should be taken however of the imprecision of his language in this passage in his failure to make explicit that he is referring to testimony in Magista courts as opposed to Dawar courts where by the Talmudic passage itself there is no objection to testimony of a single Jewish witness.



compel him either bodily or monetarily, then he may go and testify and we do not excommunicate him.<sup>336</sup>

In this passage it is self-evident to RaMaH that it would not be permissible for the Jewish witness to take a false oath in order to avoid testifying against his fellow Jew. The only question is whether his loyalty duty to protect the economic well-being of his fellow Jew would require him to personally submit to physical torture or to economic loss<sup>337</sup> in consequence of his attempt to protect the Jewish litigant by refusing to testify and being unwilling to make a false oath. Abulafia's answer to that question is unequivocal – he should not suffer either bodily injury or economic loss in order to avoid offering truthful testimony despite its negative impact on his fellow Jew.

Further conformity with this position is evidenced in Piskei Ri'az of Rabbenu Isaiah ben Elijah of Trani (Rabbenu Isaiah Acharon, 1235-1300), who spells out what the alternative might be if the Adam Chashuv were legally constrained from testifying. In that situation, says Riaz, “if he were not permitted to testify, he would have to save himself by expenditure of his own money so as not to have to go and testify.”<sup>338</sup>

He does not inform us whether he has in mind the need to bribe the court to relieve him of the duty to testify, or to simply pay the plaintiff the value of his claim against the Jewish defendant, out of his own funds. In either case, R. Isaiah maintains that the witness would not stand under any such duty, but would be permitted to testify.

However, Riaz has now enabled us to reformulate the question raised by the modification of the initial question of Rav Ashi. Given the duty of loyalty which a Jew has to protect the property of a fellow Jew, which led to the Law of Rava, threatening excommunication if a Jew does testify in a non-Jewish court against his fellow Jew in the benefit of a non-Jew - is a potential Jewish witness obligated to suffer personal financial loss in order to fulfill his loyalty obligation? Further yet, would his failure to act

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<sup>336</sup> Cited in Shitta Mekubetzet to Bava Kamma, 113b-114a, s.v. Aval HaRamah zal.

<sup>337</sup> This association between monetary loss and bodily injury is powerfully made in the Talmudic insistence that the Biblical mandate, to return lost property, “and you shall return it unto him” (Deut. 22:2), also serves as an independent foundation for the duty of rescue of life or prevention of bodily injury. Bava Kamma 81b and Sanhedrin 73a.

<sup>338</sup> Piskei Riaz, to Bava Kamma chapter 10, Law 2, paragraph 19, at p. 189.

in that manner constitute an impermissible instance of his being a “Matzil atzmo be’mamon chavero,” that is, engaging in “the rescue of his personal property at the expense of the property of his fellow Jew”?!

Certainly, by operation of the usual laws of personal injury, the witness could not be held liable for the untoward consequences suffered by the Jewish defendant as a result of the testimony of the Jewish witness. As we had previously seen, the effect of the testimony on the Jewish defendant is dependent upon the independent action of the non-Jewish court and is therefore not the direct cause of the loss to the Jewish party. That was the entire reason that the special legislation of Rava was necessary to begin with. Such is the case even in the extreme instance of the law of Moser, where one who is coerced to reveal the whereabouts of the property of a fellow Jew in order to protect his own property, is still not liable for the loss to his “victim,” so long as he does not actually physically deliver the property into the hands of the oppressor.<sup>339</sup> This is why, even though the Moser benefits from having revealed the property of the “victim” to the oppressor, he is not liable to pay for the loss since he is subject to the general exemption from liability of a coerced party, “Ones, Rachmana patrei.”<sup>340</sup> It is only when a person acts directly, personally, to hand over a property to an oppressor which the latter would otherwise not have access to, that he could be held liable even though he acted to defend himself or his own property. Thus, Rambam maintains that a person being pursued, fearful of being killed, who protects himself by directly damaging the property of an innocent, uninvolved, third party, would be held liable for the damage caused, since he has directly damaged the property of another person.<sup>341</sup>

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<sup>339</sup> Rambam, *Mishneh Torah*, Hilchot Chovel U’Mazzik 8:2. And see above text and footnotes 161 and 162. See also *Encyclopedia Talmudit*, vol. 6, s.v. Gerama B’nezikin: Garmi, at columns 495-497.

<sup>340</sup> See *Encyclopedia Talmudit*, s.v. Ones, vol. 2, p. 162. For the particular application of this principle to coercion through monetary matters, as opposed to through threat of death, see *ibid* at p. 166. A fascinating application of this principle is reflected in an early Ashkenazic Takanah related to a person who had been defamed (informed upon) and thereby risked punishment by the ruler. He in turn defended himself, in the course of which he caused loss to another innocent fellow Jew. The Takanah holds him not liable, and asserts that only the original informer is subject to penalty. *Responsa of Maharam of Rottenberg*, Prague edition, Sec. 1022, par. No. 81, cited in *Encyclopedia Talmudit*, supplement to article s.v. Cherem deRabbenu Gershom, at p. 772.

<sup>341</sup> Rambam, *Mishneh Torah*, Hilchot Chovel U’Mazzik 8:13. It is only a third party rescuer who would not be held liable for such damages to an innocent bystander, *ibid* 8:14, as special Rabbinic legislation enacted in order not to deter rescue of life by third parties.

The distinctive issue raised by Rav Ashi clearly presumed the awareness of the general exemption of a party who caused indirect injury. The question that had been raised in the academy of Rav Kahane was whether the special penalty introduced by Rava which went beyond the parameters of the regular law, to impose excommunication upon a person causing indirect injury through testimony in a non-Jewish court, would also be inapplicable in the face of the element of coercion. It is that question which the Talmud refuses to resolve, and leaves standing with the response of Teiku. And it is to this issue which the Rishonim had been responding as they consistently maintained that not only the Adam Chashuv, but that any Jew who was effectively coerced to testify by threat of personal injury or injury to his property, would not be subject to excommunication under the Legislation of Rava.

Rabbenu Asher ben Yechiel (c. 1250-1327) cut through the entire discussion of the special case of the Adam Chashuv by proposing that the unresolved question, the Teiku, was to be viewed as leaving the case outside the applicable range of the Legislation as Rava, and that, therefore, Rosh said, “azil u’mas’hid” the Adam Chashuv “may proceed and testify.”<sup>342</sup> This equated the Adam Chashuv to any other single Jewish potential witness who would be permitted to testify in a Dawar court.<sup>343</sup>

This eliding of the Adam Chashuv case was followed by Rabbi Jacob ben Asher and by Rabbi Joseph Caro to the point that the Adam Chashuv exception warranted no mention whatsoever in their respective codes, but in both instances their silence was understood to be in confirmation of the position of Rosh that for any Jewish single witness, the inability to avoid testifying would exempt him from liability to excommunication under the Legislation of Rava.<sup>344</sup> (Further comments made by Rabbenu Asher’s on this matter in this very same passage will be dealt with in the following chapter.)

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<sup>342</sup> Rosh to Bava Kamma, chapter 10, sec. 14.

<sup>343</sup> Rabbi Joseph Karo, in Beit Yoseph to Tur Choshen Mishpat, Chapter 28, s.v. bameh devarim amurim, suggests that the technical reasoning of Rosh was that the unresolved Talmudic question was to be viewed as a matter of doubt in regard to a monetary matter (Teiku d’mamon), which is to be determined leniently.

<sup>344</sup> Tur Choshen Mishpat, chapter 28; and see Rabbi Joel Sirkus, Bayit Chadash, ad loc., s.v. Bameh devarim amurim. Also see Shulchan Aruch, Choshen Mishpat 28:3 where reference to Adam Chashuv

## ENDNOTES

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<sup>i</sup> The text of this responsum appears in full in Sha'are Zedek, ed. By Hayyim Modai, Salonika 1792, at p. 846, no. 4 (Part IV, Sha'ar 7, no. 4.) Levin reproduces this text in Otzar HaGeonim to Bava Kamma, sec. 291, at p. 100. The text appears again in Responsa of Adret (Rashba) of Rome 1470 (1473?), no. 137, reprinted in Jerusalem, 1976. (The table of contents incorrectly identifies this as no. 138.) The Adret version of this responsum is ascribed to Hai Gaon, while the Sha'arei Zedek version has no ascription of authorship. The Adret version is substantially identical to the Sha'are Zedek version in sentences 1 through mid-17 (except for three slight variations which I will note later on.) However, beginning with mid sentence 17 till the close of the responsum, the Adret version appears to be an intentionally abbreviated presentation of the Sha'are Zedek text.

Both halves of the Adret version have been discovered in Genizah fragments and have been published. The first half, sentences 1 through 13, appears in Genizah Studies in Memory of Dr. Solomon Schechter (Ginzei Schechter), by Louis Ginzberg, J.T.S., NY, 1929, vol. 2, pp. 127-128, item no. 137. The second half of the Adret text, starting with the very next word after the Ginzei Schechter fragment, was published even earlier by D. Max Weisz in Seridim Min HaGenizah, Budapest, 1924, p. 29. Ginzberg takes Weisz to task, op. cit. at p. 123, for failing to recognize that the fragment he had published was in fact from the Adret 1470 Responsa collection, and chides him for publishing, unawares, as if it were first now seeing the light of day, a text which had already been printed some 300 years earlier.

Ginzberg, *ibid* at p. 118, suggests that in fact the combined pages which he and Weisz published were the manuscript on which the Adret 1470 printing were based. He cites the three textual variations which his fragment and the Adret text have in common, as the basis for his assertion. His case is substantially strengthened by the absence of an entire word, "lehatrot," in mid sentence 16 in both the Weisz fragment and the Adret version. Whatever the text history relationship is between the Adret 1470 version and the geniza fragments, the overriding oddity remains the substantial identity of the Adret text with the Sha'are Zedek text in sentences 1 through mid 17, and then the sudden shift to an apparent synopsis in the last part of the Adret text.

Levin, in Otzar HaGeonim, op. cit., publishes at the side of this responsum a text quoted by Sefer HaIttur of Isaac b. Abba Mari of Marseilles (c. 1120-1190), Warsaw, end of Part I, sec. 8, at pp. 32b-33a, which is apparently an abbreviation of the Sha'arei Zedek text. It is however, distinct from the abbreviation in the second half of the Adret text, and in contrast to that text, ascribes the responsum to Sherirah Gaon. It is in all likelihood this text in Sefer HaIttur which served as the basis for a subsequent synopsis which appears in Sefer HaTerumot of Samuel b. Isaac Sardi (c. 1185-1256), Sha'ar 62, part I, at p. 342a.

I am indebted to Dr. Neil Danzig for calling to my attention an article by Esriel Erich Hildesheimer, entitled "Die Komposition der Sammlungen von Responsen der Gaonen," in Judische Studien, ed. By Joseph Wohlgemuth, Frankfurt am Main, 1928, pp. 177-269. Hildesheimer, in a chart at p. 196, reports a parallel manuscript text to Sha'are Zedek IV, 7, 4, in Montefiore Manuscript (Jews College) 98a, at 24 r.v., no. 134. Responsum 134 in that manuscript is largely identical to the Sha'are Zedek text, except for minor orthographic variations and a single instance of homoiolenton (hashmata al pi hadomot) resulting in the omission of an entire line (sentence 3.) In two details the text of Adret 1470 bears greater similarity to the Montefiore manuscript than to the Sha'are Zedek version. After the last word in sentence 13, the Montefiore manuscript adds the word "tirgum," which is preserved in Adret 1470; and in sentence 14, the word "mi'sevarah" (or "a'sevara") is absent in the Montefiore manuscript as well as in Adret 1470.

<sup>ii</sup> A definitive historical study has not yet been done to establish the extent to which non-Jewish courts in the Gaonic period did accept jurisdiction over conflicts between Jews. While there is a substantial body of

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would have been expected, but is absent. See Caro's explanation of his position, based on his understanding of the Tur, in his Beit Yosef to Tur Choshebn Mishpat 2\*, at s.v. Bameh devarim amurim.

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Gaonic responsa indicating recourse to such courts by Jews, our responsum of Rav Hai reflects almost a sense of exceptionality at the fact that this particular local Dawar court does accept such jurisdiction. The Genizah material is likewise filled with mixed indications as to the nature of the cooperation between Muslim courts and the Jewish community. Vis. S.D. Goitein, *A Mediterranean Society*, vol. II, *The Community*, University of California Press, Berkeley, 1971, at pp. 395-402. Cf. Joseph Schacht, *An Introduction to Islamic Law*, Oxford, Clarendon Press, 1964, p. 132. Schacht indicates the acceptability in Muslim courts of testimony by non-Muslims, "Dhimmis," exclusively in matters concerning other Dhimmis. Nevertheless, our responsum, as well as the one in Harkavi, *Teshuvot HaGeonim*, op. cit., no. 213, p. 111, cast some doubt on Schacht's assertion. Indeed, the latter responsum refers explicitly to a situation in which the non-Jewish court refuses to accept the testimony of the Jewish witnesses – although it would accept testimony from the Elders of the Community who had served as unofficial judges (arbitrators) in the initial Jewish adjudication of the case. Thus the non-Jewish court would accept jurisdiction, but not necessarily accept as witnesses, persons who would qualify to act as witnesses in the Jewish court.

<sup>iii</sup> There is however a single note of hesitancy sounded at the very end of the responsum when the Gaon limits the right of participation in the non-Jewish court to when the Jewish adjudication had taken place in an established Jewish court or before scholars (Talmidei Chachamim.) By contrast, if the initial Jewish trial had taken place before unlearned judges, though they be "worthy elders" of the community, then only the original witnesses should testify in the non-Jewish court. That is because there is the possibility that the Jewish "judges" had erred in their conclusions, and it would be inappropriate to represent to the non-Jewish court that the prior outcome is in fact what Jewish Law requires. The use of the term Talmidei Chachamim in this concluding passage of the responsum, in conjunction solely with the reference to the Bei Dina, the established Jewish court – in contrast to the term Zekenim Chashuvim ("worthy elders"), casts doubt on the suggestion by Ginzberg, cited above at n. 111, that the term Talmidim in the responsum discussed above is in fact equivalent to Talmidei Chachamim. If in fact, as seems likely, both of these responsa were authored by Hai Gaon, then we may in fact be observing a systematic usage in distinguishing between the Talmidei Chachamim as scholars capable of adjudication in consonance with Jewish Law, as opposed to Talmidim as students, uninitiates, who may join in courts of Hedyotot with elders of the community, but whose judgments are not to be invested with a presumption of true consonance with Jewish Law.