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The Use of Non-Jewish Courts: The *Tannaitic* Period

1.1 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 the one hand stands the 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*[1] reports the teaching of Rabbi Tarfon in the mid-second century of the Common

[1] *Gittin* 88b.

Era, who understood this proscription to be *DeOraita* law, revealed law, based on an odd reading of Exodus 21:1:

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

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).

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.

1.1.1 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 relate solely to the enforceability in Jewish courts of documents executed and deposited in those archives.[4] The role of the archive

[2] 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).

[3] *Gittin* 88b.

[4] Despite intense debate for over a century as to the precise meaning and legal role of the *Tannaitic Arkaot*, I will argue in a separate paper that the *Arkaot* of the *Tannaitic* period

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.

This set of rules is already manifested in *Mishnah Gittin* 1:5:

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

An unstated premise of the law of this *Mishnah* 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 the subject of extensive debate amongst *Rishonim*.[5] Maimonides[6] asserts explicitly that the ineligibility is *DeOraita*, a matter of revealed law, while Rashi[7] suggests that it is of Rabbinic origin. While the relevant Talmudic passages indeed leave room for this debate,[8] the fact of disqualification itself is incontrovertible. *Tannaitic* texts already explicitly indicate the ineligibility of non-Jews as witnesses, without any indication of dissent.[9]

were neither governing bodies nor courts; they were archives. Every single *Tannaitic* text referring to the Arki, early and late *Tannaitic*, *Halachic* and *Aggadic*, *Mishnah*, *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.

[5] For a summary of the various positions on this matter, see Rabbi Shlomo Josef Zevin, *Encyclopedia Talmudit*, vol. V, pp. 337–339.

[6] Rambam, *Mishneh Torah*, Book of Judges, Laws of testimony 9:4.

[7] 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.

[8] See *Gittin* 9b, *Yevamot* 47a and *Bava Kamma* 14b–15a.

[9] *Mishnah Bava Kamma* 1:3, *Tosefta Bava Kamma* 1:2.

Against this backdrop, our *Mishnah*, 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 *Mishnah* 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 *Mishnah* makes the radical assertion that was 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.

The non-Jewish *Arkaot* serve to establish the validity of legal documents that 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 *Mishnah* 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.[10]

1.1.2 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

[10] 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. VIII, Order Nashim, NY, 1973, at pp. 785–791.

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):

> A *Get* given under compulsion by a Jewish court is valid;
> but by a non-Jewish court (the *Get*) is invalid.
> A non-Jewish court, however, may flog a person and say to him
> "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.[11] Despite the clarity of that *DeOraita* requirement, our *Mishnah* unequivocally supports the authority of a Jewish court to coerce a husband to issue the *Get*. The *Mishnah* in *Arakin* 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.[12] While the Talmudic Sages limited the situations in which such coercive methods would be used, they clearly recognized this as an essential tool in terminating marriages that the wife justifiably sought to end, but to which the husband refused to consent.[13]

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 *Mishnah* 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

[11] *Yevamot* 112b. Rambam, *Mishneh Torah*, *Hilchot Gerushin* (Laws of Divorce) 1:1–2.

[12] See Rambam, *Mishneh Torah*, *Hilchot Gerushin* 2:20 for his philosophical justification of this coercion by *Beth Din*, including the use of physical force, as not contradictory to the free-will requirement.

[13] 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*, Westport, CT, Greenwood Press, 1993, at pp. 5–40.

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, just because of its 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.[14] 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.

1.1.3 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

[14] See again *Rambam, Mishneh Torah*, *Hilchot Gerushin* 2:20, closing sentences.

the permissibility of the use of non-Jewish courts in such situations is to be found in *Tosefta, Avodah Zarah* 1:8:[15]

1. One may go to a heathen fair … and buy from them[16]
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* [priest] 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.[17] 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 5–7), 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 Israel.[18] 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."[19]

[15] 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 Kattan* 2:1; and (in whole or in part) in *Eruvin* 47a, *Moed Kattan* 11a, *Avodah 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.

[16] S. Lieberman in *Tosefet Rishonim* vol. II, p. 186, and in vol. I, 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.

[17] 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.

[18] *Mishnah Taharot* 4:5. For treatment of this general issue see G. Alon, *Mehkarim Betoldot Yisrael*, (Heb.), HaKibutz Hameuchad Pub. House, 1958, vol. II, pp. 121–147, and particularly at pp. 144–145.

[19] Also evidenced in J. *Berachot* 3:1 (23 a,b), *Semahot* 4:14 (Higger edition p. 121), and J. *Nazir* 7:1.

Interestingly, neither this *Tosefta* nor any other Talmudic text raises the question of whether such participation in non-Jewish courts would constitute a 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 and would be entirely permissible according to Talmudic Law.[20]

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.[21] 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, 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

[20] In fact it is only in the early Gaonic period (seventh to ninth centuries C.E.) 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*.)

[21] 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.

legal rights and privileges at all is totally unacceptable – some justice is better than none.

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.

1.2. TESTIMONY IN NON-JEWISH COURTS: ADVANTAGING TESTIMONY ON BEHALF OF THE JEWISH PARTY

Explicit in the *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 interests 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 permissible 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 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,[22] 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.

[22] S. Lieberman in *Tosefta Kifeshutah*, *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 Avodah Zarah* 1:8.

Since this *Tosefta* text is the sole *Tannaitic* passage that 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.

1.2.1 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.[23] 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.[24] 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.[25] 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.[26] This broadening is further evidenced in the Babylonian *Gemara*, raising the possibility that even the purchase of non-Jewish slaves might

[23] 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.
[24] *Tosefta Moed Kattan* 2:1.
[25] *Eruvin* 47a; *Moed Kattan* 11a; and *Avodah Zarah* 13a and b.
[26] J. *Berachot* 3:1; J. *Nazir* 7:1 and *Semachot* 4:14.