<u>שו"ת הרשב"א חלק ו סימן רנד</u>

1. שאלת:
2. מעשה היה בפירפיניייאן בראובן שהשיא את בתו לאה לשמעון והכניס לו עמה סך ממון בנידוניא וילדה לו בת ואח"כ מתה לאה ואחר זמן מתה ג"כ הבת שילדה לו ועכשיו עמד ראובן ותבע בדיני הגויים שיחזיר לו אותו ממון הנדוניא שהכניס לו עם לאה בתו.
3. ואעפ"י שהבעל יורש את אשתו **והאב את בתו בדיני ישראל**
4. טוען ואומר שאין לחוש לירושת הבעל כיון שהכל יודעי' שהם הולכים בדיני הגויים והרי כל הנושא אשה שם כאילו התנה כן.
5. וכמ"ש (כתובות ד' ס"ז) גמלי דערביא אשה גובה פורנא מהם לפי שאסמכתין עליהם **ואע"פ שאין כתובה נגבית מן המטלטלין.**
6. **ועוד סמכו הגאונים ז"ל ותקנו שיהא כל בע"ח גובה מטלטלין דיתמי.**
7. **ועל ירושת האב בנכסי הבת**
8. **טוען שהמלך חקק בנימוסיו שכל שימות הולד תוך זמן ידוע שיהא מה שיש לו מצד האם ליורשי האם ודינא דמלכותא דינא.**
9. תשובה:
10. כל דבר שבממון תנאו קיים
11. ובאמת אמרו שמתנין בכענין זה
12. וכדאמרי' בירושלמי הני דכתבין אין מיתת בלא בנים תהדיר מוהרא לבי נשא תנאי ממון וקיים.
13. **[ומוסיף אני על זה שבכ"מ שנהגו להתנות ולעשות כזה תנאי אפי' הנושאים שם סתם גובין מהם אם מתה בלא בנים שכל הנושא סתם ע"ד הנוהג שם בישראל נושא וזהו שקראוה בפ' המקבל דרישת הדיוט.]**
14. ומ"מ לנהוג כן מפני שהוא משפט גויים באמת נ"ל שאסור
15. לפי שהוא מחקה את הגויים
16. וזהו שהזהירה תורה לפניהם ולא לפני גויים,
17. ואע"פ ששניהם רוצים בכך והוא דבר שבממון,
18. שלא הניחה תורה את העם שהוא לנחלה לו על רצונם שייקרו את חקות הגויים ודיניהם
19. ולא עוד אלא אפי' לעמוד לפניהם לדין אפי' בדבר שדיניהם כדין ישראל.
20. **ע"כ אנו פה תמהים מקום המשפט בעירכם מקום תורה ויתרון דעת איך נתנו יד לכלל דברים אלו שאסרתן תורה שלמה שלנו, ומה ממון יתהנה לירש שלא כתורתנו?!**
21. והמביא ראיה בזה מגמלי דערביא טועה
22. דכתובה מן הדין היה לגבות ממטלטלין דמיניה אפי' מגלימא דעל כתפיה אלא ששמעו רבנן דברי ר"מ שאין סמיכת האשה חזקה עליהם משום שגבייתה לזמן מרובה. ובערביא שכל עסקיהם בגמלים סמיכתה עליהם **שאין קונין קרקע אדרבא ימכרו קרקע להתעסק בגמלים.**
23. **וכן הגאונים ז"ל שתקנו לגבות עכשיו ממטלטלין דיתמי לפי שראו חכמי ישראל שכן יפה להם לישראל לפתוח דלת בפני לוה וחכמי ישראל הם כאביהם של ישראל וחייב לשמוע להם.**
24. **וגדולה מזו אמרו שב"ד מתני' לעקור ד"ת וסמכו על מה שאמרה תורה "אשר יורוך", וכ"ש למגדר מילתא.]**
25. אבל ללמוד מזה לילך בדרכי הגויים ומשפטיהם ח"ו לעם קדוש לנהוג ככה.
26. וכ"ש אם עתה יוסיפו לחטא לעקור נחלת האב על הבנים
27. וסומך על משענת קנה הרצוץ הזה ועושה אלה מפיל חומות התורה ועוקר שרש וענף והתורה מידו תבקש **[ומרבה הונו בזה בפועל כפיו נוקש]**
28. ואומר אני שכל הסומך בזה לומר שמותר משום דינא דמלכותא טועה וגזלן הוא **[וגזלה ישיב וחס ליה]** דאפי' גזלה ישיב רשע מיקרי כדאיתא בפ' הכונס (דף ס' ע"ב).
29. **[ואם נאמר כן בטלה ירושת בנו הבכור דכל הנחלות ותירש הבת עם הבנים].**
30. ובכלל עוקר כל דיני התורה השלמה ומה לנו לספרי הקודש המקודשים שחברו לנו רבי ואחריו רבינא ורב אשי ילמדו את בניהם דיני הגויים ויבנו להם במות טלואות בבית מדרסי הגויים חלילה לא תהיה כזאת בישראל ח"ו שמא תחגור התורה עליה שק.

Responsa Rashba 6:254

1. Question:
2. The story happened in Pirphinain, regarding Reuven who married his daughter Leah to Shimon, and added a cash dowry of X, and Leah bore Shimon a daughter, and then the daughter she bore him also died, and now Reuven is suing *bedinei goyim* for Shimon to return to him the cash dowry.
3. Even though under Jewish law husbands are the heirs of their wives, **and fathers of daughters**, he pleads that it is improper to be concerned with the husband as heir because everyone knows that they go *bedinei goyim* and therefore anyone who marries is as if they have made this a condition,
4. as per Ketubot 67 that "The camels of Arabia – a woman can collect her dowry-payment from them, because they rely upon them (when agreeing to marry)", **even though generally the ketubah cannot be collected from the moveable property (of the estate),**
5. **and the geonim went further and established that all creditors could collect from the moveable property of the estate.**
6. **As for the father inheriting the daughter,**
7. **he pleads that the king decreed in his laws that whenever the child dies within a set time, whatever the child would have inherited from the mother belongs to the mother's heirs, and *dina d'malkhuta dina*.**
8. Response:
9. With regard to all monetary matters, conditions are valid,
10. and in fact the Sages said that one can make conditions like this,
11. **as we say in the Yerushalmi "Those who write 'If she dies without children the dowry returns to the wife's house', this is a monetary matter and is valid".**
12. **I add to this that in all places where the custom is to make such conditions, even those who marry without specifying can collect from them if she died without children, as all who marry without specifying have in mind the Jewish custom in their place, which is what the Sages called in Perek HaMekabel "derishat hedyot"**
13. Nonetheless, to make this the custom because it is the law of the gentiles in fact seems to me to be forbidden,
14. because he is imitating the gentiles,
15. and this what the Torah forbade by saying "'before them' – meaning (according to the midrash halakhah) not before Gentiles",
16. even though both parties wish this, and it is a monetary matter,
17. because the Torah did not leave the nation who are its portion free to do their will when that involved valuing the statutes of the gentiles and their regulations (above those of the Torah),
18. and forbade even standing before them for judgment, even in matters where there regulations are the same as those of Jewish law.
19. **Therefore we here are astonished – the place of justice in your city, which is a place of Torah and surpassing intellect – how could they have given support to these matters in general,**
20. **which our complete Torah forbade to us, and what benefit is there in inheriting money against our Torah.**
21. One who cites the "Arabian camels" as evidence for this is mistaken,
22. as the ketubah should as a matter of law been collectible from moveable property, as it includes the phrase "from me and from the cloak off my shoulders", except that the Rabbis heeded the opinion **of Rabbi Meir** that a woman does not strongly rely on them because her time of collection is a long time off, but in Arabia, where all their business involves camels, she does rely on them, **as they do not buy land – on the contrary, they will sell land so as to deal with camels.**
23. **Similarly, the geonim who decreed that nowadays one can collect from the estate's moveable property, that was because the Sages of Israel saw that this was proper for Israel so as to open doors for borrowers, and the Sages of Israel are in loco paternalis for Israel, and we are obligated to obey them,**

24. **and they said a greater thing, that a rabbinic court can require the uprooting of words of Torah, in reliance on the Torah's statement "which they will direct you", all the more so when it meets a need.**
25. But to learn from this to walk in the paths of the gentiles and their laws – Heaven forfend that the holy nation act thus,
26. all the more so if they now sin additionally by uprooting a father's inheritance of his sons,
27. and one who relies for support on this thin reed and does these things overturns the wall of the Torah and uproots it root and branch, and the Torah will demand compensation from his hand, **and one who increases his wealth by such means is a wicked man who will be tripped up by the work of his hands.**
28. And I say that anyone who relies in this matter on the saying "the law of the land is law" is in error and a robber, **and must return his stolen goods, and he should take to heart that** even a thief who returns a stolen object is still called "rasha", as per Perek haKones (60b).
29. **If you were to say thus you will nullify the inheritance of the firstborn in all estates**, **and daughters will inherit with sons**,
30. and in general he uproots all the regulations of our complete Torah. What need will we have for the holy books, the sanctified, which Rebbe, and after him Ravina and Rav Ashi, composed for us? Let the people teach their children gentile regulations, and let them build for themselves striped altars in the Houses of Trampling (Batei Midras = madrasa?) of the gentiles! Heaven forbid that such a thing could be in Israel Heaven forfend, lest the Torah gird itself with sackcloth . . .

31. **<u>בית יוסף חושן משפט סימן כו אות א (ב) ד"ה ישראל שהוליך</u>**

כתב הרשב"א (ח"ו סי' רנד) שנשאל:
על אחד שמתה בתו ותבע את חתנו בערכאות הגוים שיחזיר לו כל הנדוניא
בטענה שאף על פי שבדיני ישראל הבעל יורש את אשתו (ב"ב קח.)
כיון שהכל יודעים שהם הולכים בדיני הגוים הרי כל הנושא אשה שם כאלו התנה כן
וכמו שאמרו (כתובות סז.) גמלי דערביא אשה גובה פורנא מהן לפי שסומכת עליהם
והשיב:
כל דבר שבממון תנאו קיים (כתובות נו.)
ובאמת אמרו (ירושלמי כתובות פ"ט ה"א) שמתנין בכענין זה
אבל לנהוג כן מפני שהוא משפט הגוים באמת נראה לי דאסור
לפי שהוא מחקה את הגוים וזהו שהזהירה התורה לפניהם ולא לפני גוים
ואף על פי ששניהם רוצים בכך והוא דבר שבממון
שלא הניחה תורה את העם שהוא לנחלה לו על רצונם שייקרו חוקות הגוים ודיניהם
ולא אפילו לעמוד לפניהם לדין אפילו בדבר שדיניהם כדיני ישראל
והמביא ראיה לזה מגמלי דערביא טועה דכתובה מן הדין היה לגבות ממטלטלי
דמיניה ואפילו מגלימא דאכתפיה
אלא ששמעו רבנן שאין סמיכת האשה עליהם משום שגבייתה לזמן מרובה
ובערביא שכל עסקיהם בגמלים סמיכתה עליהם
אבל ללמוד מזה לילך בדרכי הגוים ומשפטיהם חס ושלום לעם קדוש לנהוג ככה
וכל שכן אם עתה יוסיפו לחטוא לעקור נחלה
הסומך על משענת קנה הרצוץ הזה ועושה אלה מפיל חומות התורה ועוקר שרש וענף והתורה מידו תבקש
ואומר אני שכל הסומך בזה לומר שמותר משום דינא דמלכותא טועה וגזלן הוא
ואפילו גזלה ישיב רשע מקרי כדאיתא בפרק הכונס (ב"ק ס:)
ובכלל עוקר כל דיני התורה השלימה
ומה לנו לספרי הקודש המקודשים שחברו לנו רבי ואחריו רבינא ורב אשי
ילמדו את בניהם דיני הגוים ויבנו להם במות טלואות בבית מדרסי הגוים חלילה לא תהא כזאת בישראל חס
ושלום שמא תחגור התורה שק עליהם עכ"ל
ועיין בתשובות מהרי"ק שורש (קפ"ח) [קפ"ז] ושורש א' ושורש (ט') [ח'] ובהריב"ש סימן קע"ט:

כתב הרשב"א בתשובה (ח"ג סי' קט) לענין דינא דמלכותא דינא דע שלא אמרו אלא במאי דאיכא הורמנא
דמלכא ובדברים שהם מדיני המלכות כי כמו שיש לנו משפטי מלוכה כמו שאמר שמואל לישראל (שמואל א'
ח' י - יא) כך בשאר האומות דינים ידועים יש למלכות ועליהם אמרו דדיניהם דין אבל דינים שדנים בערכאות
אין אלו ממשפטי המלוכה אלא הערכאות דנין לעצמם כמו שימצאו בספרי הדיינים שאם אי אתה אומר כן
בטלת חס ושלום דיני ישראל עכ"ל. עיין במהרי"ק סימן ס"ו וקפ"א וקצ"ד בענין דינא דמלכותא ועיין בדברי
רבינו סימן שס"ט (ס"ח):

"And these are the rules-of-justice that you must place before them" –

Halakhah generally treats both objects in the verse above as significant – **these** rules-of-justice, and **them**. The former apparently bans treating the content of other legal systems as superior to Halakhah, while the latter bans treating their administrative apparatus as superior.

Two principles within Halakhah itself seem in severe tension with the above prohibitions: "Any condition/stipulation with regard to money is valid" suggests that with regard to financial matters halakhah has no strong attachment to its own content, while "dina d'malkhuta dina" suggests that halakhah recognizes the legitimacy of the nonhalakhic state's legal bureaucracy.

There are several strategies for managing these tensions. With regard to the second, one can limit the scope of dina d'malkhuta dina, in various ways: for example, by limiting it to matters of significance for social order, or government necessity, or to matters on which the Torah is silent, or even by suggesting that the principle confers upon the government a right to collect taxes without creating a corresponding individual obligation to pay them. (For this reason, I tend to think that attempts to generate the religious obligation for lawfulness out of dina d'malkhuta dina are unconvincing, and we would do better to construct it on the basis of social contract, especially in a democracy).

In practice, however, when Jewish courts have no coercive power, under many circumstances it will be necessary for Jews to resort to secular court for justice, especially when, as in America, batei din often lack even significant social suasive power. For this purpose Halakhah developed the "heter arkaot", a formal permission from a beit din certifying that a party's resort to the secular courts is necessary and therefore halakhically licit. I don't know the history of that heter and would be glad to receive references to god treatments of the same.

With regard to the first tension, I was taught in the Yadin Yadin program at YU that we distinguish between conditions that accept the future judgments of a nonhalakhic system, and those that simply incorporate past decisions by reference. Thus in the halakhic prenuptial agreement couples should agree to arbitrate financial claims in beit din in accordance with the law of their state as of the day of agreement, rather than in accordance with whatever the state law will be when a case is actually brought.

The practical upshot of this is that batei din rarely are asked to decide financial cases in accordance with halakhah per se. Moreover, this is generally seen as a good thing even by halakhists, as batei din generally ask litigants without prompting to authorize them to decide on the basis of equity and peace rather than on the basis of strict precedent.

The suggestion I want to raise here is that the cumulative impact of these strategies, each perfectly legitimate in its own right, essentially eviscerates not the form but the content of the verse "And these are the rules-of-justice that you must place before them". At the same time, it should be clear that halakah is simply not ready to handle – administratively, substantively, and politically – the breadth and depth of contemporary civil law. Perhaps the clearest indication of this is in R. Herzog's planned halakhic constitution for the State of Israel, which set forth the numerous takkanot, new legislation, that would be necessary to make halakhic civil law viable.

Many of the takkanot R. Herzog suggested were needed to bring halakhah into consonance not just with the practical realities of contemporary finance, such as corporations and credit cards, but with modern values, such as egalitarianism in inheritance and the rights of minorities. There was legitimate controversy as to whether making such takkanot was wrong, to the point that it would be better to stay out of power than to make such concessions. Likely a point at issue was that much of the religious community did not see these as concessions, but rather as long overdue improvements that halakhah had been able to avoid, as the community's failure to utilize the beit din system also relieved the system of most adaptive pressure.

So baldly – is it a violation of "in front of **them"** to see secular law as superior to halakhah in a particular area of civil law, and seek to have halakhah change in the direction of secular law? It seems to me that the responsum of Rashba above is a good starting point for that discussion. As this dvar Torah is already quite extensive, however, I will limit my exposition in this context, and hopefully find occasion for a fuller treatment in the near future.

One point up front – the condensed version of the teshuvah cited by Beit Yosef differs very significantly from the fuller version found in the current Teshuvot HoRashba. I represent the differences above by **bolding** the sections found in the latter but not in the former. Beit Yosef's version has of course been more influential in the history of Halakhah, and thus where his version seems to be mislead as to Rashba's intent, a broad set of questions about the intersection of law and history apply. It should be clear that the summarizer elided critical facts – from the summary, one would think that the woman in question had died childless, and that the issue was solely spousal inheritance, whereas in fact she had a daughter, which made the case subject to a particular royal decree.

Here's how I understand the realia – medieval historians are encouraged to send in corrections.

In the town where the question arose, standard Jewish practice was to take financial cases to the royal courts. The law in those courts was that dowries reverted to the wife's parents if she died childless, whereas halakhah assigned it to the husband, Furthermore, a royal decree extended that law to cases in which the wife had a child who only survived her for a short time, whereas halakhah made the father the heir of the child.

The bereaved grand/father, accordingly, followed communal norms when he sued his son in-law for return of the dowry. He was genuinely surprised when the son in-law countersued in beit din, although he did not resist the summons. Likely he believed that the son in-law resorted to beit din because he saw halakhah as favoring him rather than out of religious conviction, and likely he was correct. His arguments in beit din were that

a) At the time of the marriage, all parties assumed that any ensuing legal issues would be adjudicated by the state. Accordingly, the marriage contracts should be interpreted in accordance with the intent of the parties, which incorporated the state's laws.
b) Once the wife died, and the daughter came into possession of the wife's inheritance (according to both halakhah and the state), one might argue that the intent of the original contracting parties is irrelevant. But once the daughter died, there was an explicit state law assigning the money to the maternal grandfather, and beit din should decide the case in accordance with that state law on the ground of dina demalkhuta dina.

Rashba's reply is carefully nuanced.

With regard to a), he never says that the father in-law is wrong as a matter of law, and I suspect that under the facts cited by Beit Yosef, Rashba would have awarded the father in-law the money. What he does say, however, is that he is astonished to learn that in a significant and learned Jewish community it has become presumptive practice to go to secular court, and that he thinks this is very wrong, and as a result that it is very wrong for parties to make agreements on that presumption. Nonetheless, so long as that wicked presumption is empirically correct, it is legally valid. Furthermore, if the parties were to make the same legal stipulations explicitly because they seemed preferable, rather than simply presuming that state law would apply, Rashba would have no objection.

With regard to b), however, Rashba accuses the son in-law of theft for relying on it. Here the son in-law's suggestion is that halakhah has no capacity to resists state legislation in financial matters, that even a Jewish community which wished to maintain halakhic autonomy would be halakhically unable to do so. This, he argues with obvious emotion, would make the study of Nezikin utterly irrelevant in practice – we would do better to send our children to secular law school.

In our day, Rashba's fear has come to fruition. This, however, is the fault of the rabbinate as well as the laity, as we have not maintained a live legal tradition in the area of civil law, and on the whole yeshivot never ask their students to consider whether what they learn in shiur could or should function in practice. There is some issue about whether takkanot are possible to remedy this situation - almost certainly, they would require a rabbinic consensus, and the potential for filibuster is very high. But it seems to me reasonable – and from what I understand, the Beit Din of America functions this way – to say that in many areas, the standard presumption of the parties is in accordance with state law not because of the presumption that any case will end up there, but rather because they genuinely believe that daughters should inherit equally with sons, for example. Under those circumstances, perhaps batei din are entitled to decide cases on the basis of state law even without takkanot, although it would certainly be much, much preferable for direct civil halakhah to be sufficiently practical and in tune with the values of the frum community to make following it a live option.

Shabbat Shalom

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