

# SEPHARDIC INSTITUTE

511 Ave. R Brooklyn, NY 11223-2093  
Rabbi Moshe Shamah, Director

718 998 8171 Fax: 718 375 3263  
Rabbi Ronald Barry, Administrator

בס"ד

חלב ישראל

## Concerning Halab Yisrael

The Mishna states: "Milk milked by a non-Jew without a Jew watching is prohibited" (BT A.Z. 35b). The background to this *halakha* is that milk from non-kosher animals is prohibited and in the Mishna's days such milk was available and used. The relevant question with which we are here concerned is, Is this Mishna statement a type of absolute *gezera*, an across-the-board "fence around the law," regardless of the circumstances of any particular case, even when there is no fear that the milk might not be kosher? Or is it a prohibition based on the suspicion that existed regarding milk in the circumstances obtaining in the Mishna's time and place and therefore in circumstances where there is no suspicion of any *halakhic* problem there is no prohibition, בטל טעמא בטל איסורא ?

The Talmud asked: Why was a specific Mishna prohibition necessary considering that non-kosher milk is of a different hue of white than kosher milk and one cannot be mistaken for the other? If the fear is that non-kosher milk might be mixed into the kosher milk and thus be undetectable by color, the Talmud points out that milk can be checked by allowing it to curdle (curdling being a feature unique to kosher milk)! The Talmud responded with a qualification: If the Mishna was referring to milk intended for cheese that would be correct, but it is referring to milk that is not intended for cheese. But even so, the Talmud retorted, it would still be possible to test a small quantity of the milk to determine if it curdles. The response: Since even in kosher milk there is the whey (watery liquid that separates in the coagulation process) that does not curdle, the test would not be conclusive.

It has been suggested that the willingness of the Talmud to consider the idea of testing the milk is a strong indication that it did not view the Mishna as an across-the-board *gezera*. Although it seems supportive of such

a view, perhaps by itself it is not absolutely decisive; at that point the Talmud could have been probing the original need for a prohibition, whether it be a broad *gezera* or a limited prohibition. But further evidence may be adduced from the fact that in the above explication the Talmud held that milk intended for cheese would not be included in the prohibition. This seems to indicate that it understood the Mishna as not being an across-the-board *gezera*, for in such a *gezera* it would be difficult to imagine permitting the milk when intended for cheese and forbidding it in all other cases, even in those cases where it is clear there is no suspicion of non-kosher milk.

The Talmud followed with an alternate explication of the Mishna. Although non-kosher milk does not curdle, even milk for cheese would be prohibited as the cavities in the cheese contain drops of whey and it cannot be determined that there is not some non-kosher milk mixed with the whey in those cavities. Although according to accepted Talmudic exegetical guidelines the alternate explication may be preferred, in this case it does not appear that the latter is in disagreement with the former on the matter of whether in its underlying assumption we are or are not dealing with an across-the-board *gezera*. The second explication merely considers the possibility of non-kosher milk being mixed into the whey as worthy of concern. By refuting the permissibility of milk that was milked for cheese by raising a specific problem, the second explication appears to silently agree that the Mishna is not an across-the-board *gezera*.

In the Talmud text of the Rif, instead of two explications the whole passage is one continuous unit: "now that you mention whey, its possible to apply the Mishna prohibition even to milk for cheese." This seems to strengthen the indication that the Talmud all

the way through understood the Mishna not to be an across-the-board *gezera*.

Despite the fact that the non-kosher milk that may be mixed into the whey is a minor amount, it is not annulled because it cannot be separated (by normal means). Some commentators assume that in prohibitions involving foods of *`obde kokhabim*, although not explicitly mentioned in the Talmud, doubts are not annulled by the standard rules in order to prevent fraternization and intermarriage.

Further in the Mishna: “Milk that was milked by a non-Jew who was being watched by a Jew is permitted” (ibid. 39b). (Although this permissibility can surely be deduced from the preceding prohibiting formula, it was explicitly stated to maintain a consistent style, as the case of milk is one of various items that in the first Mishna are prohibited because of certain circumstances and in the second Mishna are permitted because of a changed circumstance.)

On this latter Mishna the Talmud cites a *Baraita*: “A Jew may sit by the side of the flock of a non-Jew while the non-Jew milks for him (out of his sight) and brings it to him and he does not have to worry.” The Talmud asks: In what circumstance is this *Baraita* talking? If there are not any non-kosher animals in that flock, the *Baraita*’s law is simple [and unnecessary to be stated]; if there is a non-kosher animal in the flock, why is the milk permitted, (presumably considering that the Jew is merely sitting by the side, waiting, not supervising)? The Talmud answers that the *Baraita* is talking when the non-Jew has non-kosher animals around and it is teaching that although the Jew is not able to see the milking while sitting, if he stands he would be able to see. So even if he didn’t stand he could assume that the non-Jew would not milk a non-kosher animal and mix non-kosher milk into the kosher milk as he would be afraid the Jew might see him.

This Talmudic passage demonstrates that actual “seeing” is unnecessary. Had there been an across-the-board *gezera* it was not that the Jew must see the milking but that he must be able to see, casting fear on the non-Jew that if he did indeed milk a non-kosher animal he might be observed. However, the passage indicates much more as it surely is inconsistent with understanding the Mishna as an across-the-board

*gezera*. For while considering the possibility that there were not any non-kosher animals present, the Talmud declared the *Baraita*’s law to be simple, unneeded. But why would it be simple and unneeded if there was an across-the-board *gezera* that milk of a non-Jew is always prohibited unless a Jew sees the milking - it would be needed to teach the important halakha that “seeing” is not literal but can be fulfilled by being in the vicinity and capable of seeing? It rather appears that the Mishna prohibition is understood to be applicable only to the extent that there is a suspicion of non-kosher milk and if one knows that there are not any non-kosher animals present in the relevant vicinity there is no prohibition.

The question then arises: At the point in its analysis of this *Baraita* when the Talmud hypothesized that if there is not any non-kosher animal in the flock the case is “simple,” what could it have thought was the purpose of the person sitting besides the flock? *Tosafot* answered that the Talmud assumed he would have been there to prevent any problem of “*giluy*,” that is, to promptly receive the milk the non-Jew brings out to make sure it is not left uncovered and susceptible to dangerous creatures drinking from it and depositing their toxins in it. But in our days (in our places) that we do not commonly have these creatures amongst us and therefore do not have the problem of *giluy* (as codified in *Shulhan Arukh YD* 116:1), according to *Tosafot* the milk from a non-Jewish dairy farmer who doesn’t have any non-kosher animals in his flock would be straightaway allowed without somebody sitting there while he milks.

Others explained the Talmud’s view of the Jew sitting there in the scenario that it is talking when there are not any non-kosher animals present is that the Talmud really deemed his presence unnecessary and that this consideration is part of the question of “it is simple,” the case would not be needed and the presence of the man in the case would also be unneeded. Some old Talmud manuscripts apparently even had several words to that effect (cf. *Encyclopedia Talmudit* vol. 15, column 177, note 84). Or perhaps, some say, the person sitting by would have been explained as a matter-of-fact statement: he came to purchase and he is waiting for the non-Jew to milk his animal and we are told that he doesn’t have to worry about anything.

Another view of the Jew sitting by even though not seeing the milking being done for him, is that he assures that the dairy farmer will not bring in or allow to be brought in a non-kosher animal from elsewhere. The *Pri Hadash* maintained and demonstrated that the *Rishonim* who interpreted the Talmud thus were speaking where and when milk from non-kosher animals was available and being used and there was a fear that non-kosher milk might be mixed into the kosher.

Others, however, basing themselves on a variant of this latter interpretation, have insisted that a Jew always be present for the milking, even when the non-Jew hasn't any non-kosher animals, even in times and places when non-kosher animals were not being milked and even when there were no non-kosher animals in the vicinity - understanding the halakha as an across-the-board *gezera*.

Significantly, the Jerusalem Talmud (Shabbat Ch. 1) cites the reason for the prohibition of non-Jewish milk to be because of "*giluy*," as we saw *Tosafot* interpreted it and others concluded as well.

Taking everything into account, it does appear that the Talmudic discussions are much more consistent with there not being an across-the-board *gezera*.

In codifying the *halakha* of non-Jewish milk, the *Rambam* did not explicitly express his position as to whether or not there was a broad *gezera*, but it can clearly be seen from his formulation that he did not consider it so. He states:

Based on this [that only kosher milk curdles] it follows that all milk in a non-Jew's possession is prohibited because perhaps he mixed into it non-kosher milk, but his cheese would be permitted because non-kosher milk does not become cheese. But the Mishna sages decreed against cheese of non-Jews, prohibiting it because they "make it stand" by use of the stomach skin of a *nevela* (a dead animal not slaughtered through proper *shehita*)... and although the stomach skin is a small amount it is not annulled because it makes the cheese "stand." (M.T. *Ma'akhalot Asurot* 3:13).

The *Rambam* codified the prohibition of non-Jewish milk as specifically linked to the suspicion that non-kosher milk was mixed in. When there is no suspicion there would be no prohibition. As to cheese, on the other hand, there is a *gezera* and therefore it is prohibited even when there is no suspicion of a non-kosher ingredient.

Interestingly, some commentators of the *Rambam* argue whether according to him it is allowed to purchase milk from a non-Jew to make cheese (and wash off any whey droplets). The *Magid Mishneh* was lenient. The *Kesef Mishneh* vehemently opposed his position and used forceful language against him, such as "the rabbis did not differentiate in their *gezera*" whether one purchases the milk for drinking or to make cheese. However, these words written in a polemic context should not be taken as if he interpreted the *Rambam* as holding there is an actual across-the-board "*gezera*" on the milk such as on cheese, contrary to the manifest indication within the *Rambam's* formulation. It appears the *Kesef Mishneh* means that to the extent it is prohibited to purchase milk from a non-Jew it is prohibited even if the Jew's intention is to make cheese. In *Shulhan Arukh*, written after *Kesef Mishneh*, *Maran* did not formulate the case of milk from a non-Jew as a *gezera* similar to cheese (YD 115:1-2).

Rabbi Shimon ben Semah Duran, a younger colleague of and member of the same *Bet Din* as the *Ribash* (in Algiers) and one of the leading *posqim* of the early 15th Century, and his son Rabbi Shelomo ben Shimon, also recognized as an outstanding *poseq*, analyzed our question separately. They both unequivocally concluded that there never was an across-the-board *gezera*. They permitted the milk of non-Jews without a Jew present at the milking when it was known in a particular region that non-kosher animals were not being milked (Responsa of *Rashbash* #554). As the *Rashbash's* responsa (as was the case with most of his father's, termed the *Rashbas* or *Tashbas*) remained in manuscript form for well over two centuries, their position was not widely known for a period of time.

The *Radbaz*, a leading 16th Century *poseq* (Egypt), also unequivocally stated that the Mishna prohibition is strictly a case of fear that milk of non-kosher animals may be present, not an across-the-board decree. When

there is no such fear he permitted milk from non-Jews (Responsa vol. 4 #1147).

The *Pri Hadash*, one of the leading 17th Century *posqim* (Jerusalem), wrote a thorough analysis of this subject. He stated that when it is presumed that the milk being sold by the non-Jews is from kosher animals, based on the fact that non-kosher animals were not being commercially milked in that region and, in any event, if some non-kosher milk was around it was more expensive than kosher milk (as is normally the case when non-kosher animals are not commercially milked), one may partake of such milk and rely on the presumption that the non-Jews would not conduct in an unbusiness-like manner and use non-kosher milk. He compares milk to the Talmudic case of non-Jewish “*muryas*” (a pickled concoction containing fish oil which was known to generally be kosher but into which wine was sometimes added, which would render it forbidden). The Talmud permitted the *muryas* of non-Jews when wine was more expensive than fish oil (BT A.Z. 34b; *Shulhan Arukh YD* 114:11).

He carefully shows that the Mordekhi and other *Rishonim* who posited the need for a Jew present at the milking even when the non-Jew did not have any non-kosher animals was strictly because of the fear of bringing in a non-kosher animal or non-kosher milk. While visiting in Amsterdam, where the Jewish community’s custom was to partake of milk from non-Jews - only a few individuals there were stringent on this matter - he himself drank such milk (Commentary to YD 115:6). Many great rabbis through the centuries relied on the *Radbaz* and *Pri Hadash* in this matter in the first instance.

*Rab Hida*, a leading 18th Century *poseq*, states that where the general custom is to partake of non-Jewish milk one may continue to do so; where there was not the lenient custom one should be strict (*Shiyure Berakha YD* 115). Of course he wrote where and when non-kosher milk was still permitted to be sold.

Several leading 20th Century *posqim* addressed this issue.

The Hazon Ish wrote that where the government mandates and oversees that all milk sold be from

animals that happen to be kosher, it is logical that milk of non-Jews is permitted (Commentary to YD 115).

Rabbi Moshe Feinstein’s position was that where the government mandates that all milk sold be from animals that happen to be kosher, and a company found violating this regulation would be fined (and if continually in non-compliance subject to legal action), we can surely presume the milk being sold derives from kosher animals (cows in the U.S.). As the assumption that commercial milk in the United States derives only from kosher animals is thus so strong he considered it a case of we “know” it is so and halakhically considered equal to actually “seeing” the milking. He points out that this principle of אגן סהדי (we are the witnesses with our knowledge) is used in the Talmud even in certain cases where witnesses are required for establishing aspects of Torah law and not merely in monetary matters, even in cases involving status of marriage and divorce and in certain circumstances concerning capital punishment. Thus, he maintains, even without the *Pri Hadash*’s reasoning all commercial milk in the United States is kosher. Even if there had been a broad *gezera* for a Jew to see the milking, our milk meets its requirements. (Nevertheless, he advises *yeshivot* and *Bene Torah* where possible to be strict, for he felt there was some gain with a *mashgiah*, perhaps partly educational.) (*Igrot Moshe, YD* vol. 1 #47-49; v. 2 #35).

Rabbi Yom Tov Halevy Schwarz critiqued Rabbi Feinstein’s response, pointing out that some later authorities including the *Rama*, *Shakh* and *Taz* are of the opinion that even when there is clear-cut knowledge that the non-Jew’s milk is kosher there is need for a Jew’s presence at the milking. He also cites examples showing that the Talmud and *posqim* did not always consider clear-cut knowledge equal to actual seeing, so in cases that the sages did not indicate it to be so we should not presume it to be so (*Ma’aneh Le’Igrot* #102-103).

But it must be kept in mind that the Talmud never required “seeing” the milking but only the possibility to see, such that it is assumed to be a deterrent to deceit, which is basically “knowing” that the milk is kosher. And it should be borne in mind that the milk question is invariably one of rabbinical status where most doubts would be resolved leniently, as from the Torah there surely would be annulment. That a number of great

Ashkenazic *aharonim* were stringent is an important fact but it must be weighed against all the other considerations.

The custom of the Jewish community-at-large in the United States has been to partake of the regular commercial milk. The major *hashgahot* organizations upon which the overwhelming majority of kosher Jews rely have been certifying dairy products kosher without concern for a Jew being present at the milking.

In conclusion, the following may be said. The great Sephardic *posqim*, buttressed by many strong Talmudic indications, make a powerful case that there is no *gezera* beyond the actual fear of non-kosher milk being present. Independently of the benefit of government regulation, commercial milk of non-Jews in the United States and in many countries in the world today is permitted. For those whose tradition is to follow the great Sephardic *posqim* of century after century cited above there is no need whatsoever for stringency in those regions where it is clear that the milk being sold

derives from kosher animals. With government regulation we know even more certainly that the amount of milk from non-kosher animals being mixed into the commercial milk stream is practically nil, surely *halakhically* insignificant and as decided by the leading 20<sup>th</sup> century *posqim* cited above, all may be lenient. Where “actual” halab Yisrael is readily available it may be appropriate to give it preference. But where there are issues, such as inferior quality (higher bacteria count, spoiling more readily), significant price differential, freshness dates incorrectly marked, varieties not available, etc., one surely may partake of the standard commercial milk and dairy products in the first instance.

Non-Jewish cheese without supervision, however, is a different story.

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