

HEMDAT YAMIM

PARASHAT BESHALACH

13 SHEVAT 5769

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Do Not Be Overly Righteous

Harav Yosef Carmel

At the end of our *parasha*, we find the first war that Bnei Yisrael fought, against Amalek, which became the symbol of the enemy that tries in every generation to destroy us. The command given to Yehoshua to fight them (Shemot 17:9) does not necessarily look any different than that of any other mandatory war. However, there is an unclear declaration made at the battle's aftermath: "For the hand is on the seat of Hashem, a war for Hashem against Amalek in every generation" (ibid.:16).

More than 400 years later, King Shaul was commanded by Shmuel to destroy Amalek without mercy, from man to woman to child to animal of every type that belonged to them (Shmuel I, 15:3). This commandment shook Shaul, whose humanistic emotions held him back from fulfilling this task fully, causing his loss of the kingship. The *gemara* (Yoma 22b) says that Shaul had halachic/logical questions against the charge. He said that the Torah has a whole procedure (*egla arufa*) to deal with the death of a single individual, and one can only imagine what the level of concern should be regarding so many killed. Secondly, he asked, if the adult people had sinned, what could one say about the children and the animals? A voice from the heaven called out: "Do not be overly righteous!"

One can ask whether the command Shaul received, including killing even the animals, was part of the ongoing *mitzva* to erase the memory of Amalek or whether he was presented with a unique temporary obligation. The matter appears to depend on three opinions regarding the oath that Hashem made in regard to Amalek, as found in the *Mechilta D'Rabbi Yishmael* (Beshalach 2). Rav Yehoshua said that it is something that Hashem will see to when His Kingdom will be complete. Rav Elazar Hamodai said that he will not leave over anything, not a human descendant and not even a camel, that belonged to Amalek. Rabbi Eliezer says that Hashem said that one can accept a convert from any of the nations of the world except for Amalek. According to Rav Elazar Hamodai, Shaul's war had the normal parameters of a war against Amalek.

Which opinion do we accept? The one major decisor on this issue is the Rambam. He does not mention any instructions to destroy the animals, and he implies that Amalekites who want to convert are exempted from the destruction bound for their nation. According to him, Shaul's instructions went beyond the halachic norm, which can help us understand why he was so bothered by them. Even so, a prophetic command is fully binding, and Shaul was correctly criticized. As the *gemara* says, in the face of an explicit command, Shaul should not have allowed his humanism to make him "overly righteous."

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Question: I damaged someone's property in a manner that I should not have to pay. He does not know who caused the damage and how. I heard that he wants to know who did it and make him pay. Must I step forward and take the risk that he will give me a hard time (which is likely given his personality) by not believing what happened or not understanding that I do not have to pay?

Answer: Before we deal with your important dilemma, let us point out a few things. First of all, you should confirm, by giving the details to an expert on Choshen Mishpat (monetary halacha), that you are indeed clearly exempt. These halachot can be complex and the way you view the case may be subjective. Secondly, consider that although your acquaintance may not be aware now who caused the damage, the truth may come out, and the heartache you are trying to avoid now could boomerang back hard. We will now continue with your question, leaving you to confirm the above issues. We have not found an explicit source on the matter and so we will compare the matter to related concepts. Most of them point in one direction and the others can be easily explained.

The Shulchan Aruch (Choshen Mishpat 12:6) says that if Reuven is obligated to pay Shimon, he must not make it difficult to extract money in order to pressure Shimon to agree to a compromise. However, the Tumim (12:5) cites says that if Shimon owes Reuven a corresponding amount but Reuven cannot prove it, he may be difficult in order to get to the just result. Avoiding the need for an argument and possible *din Torah* is no worse than that. The Pitchei Teshuva (CM 12:8) cites a distinction between active obstruction, which is forbidden, and using a convenient non-action to gain advantage, which could be permitted. Here too, regarding a non-action taken to uphold one's true rights, it should certainly be permitted.

There is an important rule (although one that is hard and dangerous to apply) that one may, under certain circumstances, take the law into his own hands rather than having to go to the trouble of taking the matter to a *beit din* (see Bava Kama 27b and Shulchan Aruch, CM 4). Based on the guidelines found in that context (which are beyond our present scope), there should not be a problem to simply not volunteer information and thereby avoid having the matter arise with the associated hardship in assuring one's rights.

The *gemara* (Shavuot 31a) prohibits acting in a deceptive manner in *beit din* in order to win a deserved case because it is a violation of "distance yourself from matters of falsehood" (Shemot 23:6). It appears that in the absence of deception, if one can gain what he deserves by not coming forward with an admission, it should be permitted (see also Chut Hameshulash I, 15).

One source that seems to contradict our thesis is the severe steps (including *cherem*) that are taken against one who refuses to submit to adjudication when so requested (see Shulchan Aruch, CM 11 and 14). How could we punish someone if he claims, and for all we know is correct, that he owes nothing? The answer, though, is simple. It is not that the defendant has refused to fulfill an obligation in relation to the plaintiff and present himself for adjudication. Rather, since a Torah society (or any society for that matter) must have an effective court system, once the courts determine that he is to submit to adjudication, he must be prevented from snubbing the system and rendering it toothless. Indeed, only if *beit din* has made their credentials clear do the sanctions apply (see *ibid.* 11:2 and Rama 14:3).

Thus, dependent on the caveats presented above, you would not have to volunteer that you damaged your acquaintance's property to avoid unjustified difficulties that would ensue.

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Ein Ayah

(from the writings of Harav Avraham Yitzchak Hakohen Kook, z.t.l.)

One Who Forgot Torah

(based on Berachot 1:104)

Gemara: Be careful with a scholar who unwillingly forgot his Torah knowledge, for the *luchot* (tablets given to Moshe) and the broken *luchot* are [both] placed in the *aron* (ark).

Ein Ayah: This teaches us that since the goal of wisdom is doing good deeds, a scholar who was involved in Torah study and acquired knowledge all his life has acquisitions of justice and straightness. Although he forgot his Torah scholarship, only the details have been lost. The all-inclusive pure concepts that filled his spirit from the great knowledge and study is not forgotten. This resembles something that a person cannot capture in words, yet the inner spirit recognizes the truth of the straight pleasantness according to its value in Torah and fear of Hashem.

Far-reaching Steps to Avoid Danger to the Community

(based on Berachot 1:107)

Gemara: Do not sit on an Aramite's couch. ...some say that it is literally on an Aramite's bed, as is illustrated by the story of Rav Pappa. Rav Pappa went to an Aramite's house. They took out a couch to sit on, and the woman said to him, "Sit." He responded: "I will not sit until you lift the couch." She lifted it, and they found a dead baby underneath. From here the Rabbis said that it is forbidden to sit on an Aramite's couch.

Ein Ayah: Although it is not usually good to be worried about far-fetched dangers, each danger must be estimated according to its context. A libel against Rav Pappa would not have ended with him but, Heaven forbid, would have caused fury against the whole community. Therefore, this story should serve as a reminder for generations so that every Jew knows to realize his great obligation to avoid damage to the community in the way he lives. He should consider non-Jews' hatred and plots and distance himself from anything that resembles the unseemly in his interaction with gentiles, so as not to aid those who want to devise evil plots. It should be all the more clear that he should not actually be guilty of wronging gentiles. In addition to the intrinsic prohibition to do so, he damages the lives of the community, who may be blamed for an individual's sin, which can unfortunately happen until Hashem will have mercy on us [and bring *mashiach*].

Not Distancing Oneself From the Community

(based on Berachot 1:108)

Gemara: Do not pass behind a synagogue at a time that the congregation is praying.

Ein Ayah: This is because separating oneself from the ways of the congregation destroys, Heaven forbid, the nation's foundations. It is thus proper that those who separate themselves from the community are among those who lose their place in the world to come. The matter of separation is especially prominent in the realm of service of Hashem. When one is disjoint from the community's service, the spirit of sanctity that enters the hearts of Hashem's nation as a whole will not enter his heart. Slowly but surely his heart and soul become distant from the Jewish holy qualities, causing bad for him and his offspring by separating them from the nation. When the number of people who do this multiplies, a "bald patch" develops in Israel, and the House of Israel becomes fractured and broken into splinters. Therefore, it is worthwhile to stay far away from anything that displays that he does not care to be part of the community regarding service of Hashem, even if that is not his intention. This is because the seriousness of the matter and the negative outcomes that can result are severe enough to distance oneself from it. That is why one must not pass behind a synagogue at the time the congregation is praying.

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P'ninat Mishpat

Paying an Agent For a Deal That Did Not Go Through

(based on Halacha Psuka, vol. 52 - A Condensation of a P'sak from Mahalchei Mishpat I, pp. 208-217)

Case: The plaintiff (=p/), is a lawyer who served as a real estate agent for a potential sale involving the defendant (=def) and a buyer. After two long meetings between def and the buyer in p/s office, def told p/ to prepare a contract. In it, p/s fee for his services was set at .5% of the sale, dependant on the signing of the contract. Subsequently, def changed one of the conditions and the deal fell through. P/ demands half of the proposed fee for his services, as the preparation of the contract deserves pay even when the transaction did not occur.

Ruling: The Rosh (Shut 105:1) discusses a similar case of a go-between for a transaction that almost was completed, who asked to be paid for his significant efforts. The Rosh says that such an agent is not paid unless the deal is completed, provided the parties did not trick him and were not negligent regarding the deal. His source is the *gemara* (Bava Kama 115b) that says that if one asked another to do something on his behalf, which he was unable to complete, the agent is reimbursed only for expenses and his toil.

In this case, the deal did not go through because of a fundamental disagreement between def and the buyer and not due to negligence. Therefore, he is not paid in full, as an agent. However, perhaps he should be paid for his work as a lawyer, in preparing the contract. *Beit din* determined that common practice is that a lawyer is not paid for drawing up a contract, unless stipulated otherwise, if the deal is not completed. Furthermore, it has become commonplace recently for lawyers to serve as real estate agents, and their legal work becomes incorporated into the service. Customarily, he is treated as an agent until the contract is signed, only after which legal-related work is considered to be performed as a lawyer. Furthermore, the contract was a standard one, which required minimal work by p/. Therefore, whether from the perspective of classical halacha or that of common practice, def does not have to pay p/.

Beit din looked into four secular court rulings on similar matters. There are indications that in this case, at least some courts would obligate def to pay. However, this is based on the court's perception that legal services in the midst of real estate negotiations fall under the category of a lawyer's job. However, the nature of this involvement, as is commonly practiced today, is that of an agent, for which one is entitled only after a signing takes place. Although halacha gives significance to legal precedent, it is only to the extent that it reflects the standard practice of society. In this case, it does not, and payment is not necessary.

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Hemdat HaDaf HaYomi

Studies in Choshen Mishpat Related to the Daily Daf

Baba Kama 35-41

Stadium Bull

We learned this week in the Daf Hayomi (Mishnah 39a) that usually a bull that butted a person, and killed him, is killed. However, a stadium bull, which is a bull that was trained to participate in a bull fight in a stadium, that killed a person during the fight, is not killed. The reason for this Halacha is that the bull did not kill the person out of his own initiative, but only after he was instigated purposely to attack.

The Rishonim were troubled by this halacha as it appears to contradict a previous Gemarah (24b), which states that if a person instigated a dog to bite, the owner is liable for the damages. From this Gemarah, it appears that one is liable for damages even though the animal did not initiate the attack but was instigated to do so.

The Tosafot (24b "Hamesashe") distinguish between the two cases, claiming that the instigation of the dog is not similar to that of the stadium bull, since there "the person is fighting with him for the purpose of killing him." According to the Tosafot, the instigation of the stadium bull is much more violent and there is thus no liability for the actions of the bull, whereas the dog was instigated in a lighter fashion and the owner is therefore held liable. The Nimukei Yosef (11a in the pages of the Rif) in the name of the Ra'ah made a similar distinction; that the stadium bull was specifically trained to react to a certain signal, and is thus completely controlled by the instigator, whereas, for the dog, the reaction is not automatic.

However, from the Rambam, it is clear that he made a different distinction, as the Rambam on the one hand ruled (Nizkei Mamon 2, 18) that if a dog was instigated to attack, and caused **damage**, then the owner must pay for the damages, and on the other hand, he ruled (Nizkei Mamon 10, 8) that a dog that was incited to attack and **killed** a person, is not killed.

The Nachlat David (Baba Kama 24b) explains that according to the Rambam, there is a fundamental distinction between the rule that an animal that killed must be killed, and the obligation to pay for the damages that one's animal did. The killing of the animal is a sanction against the animal, whereas the obligation to pay is a sanction against the owner for not preventing his animal from doing damage. Thus a stadium bull or a dog that was provoked and killed a person is not killed, since it didn't kill on its own initiative but rather was incited to do so. On the other hand, since the owner of the animal knows that it is possible that his animal might be instigated, causing it to attack, he is required to guard his animal from such instigation. Therefore, if he did not guard against this situation, he is liable for the damages.

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