

This week.....

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This edition of Hemdat Yamim is dedicated to the memory of
R' Meir ben Yechezkel Shraga Brachfeld
o.b.m

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Do Not Do Iniquity in Judgment

Harav Yosef Carmel

Twice in our *parasha* (Vayikra 19:15; 19:35), the Torah stresses the commandment, “Do not do iniquity in judgment.” This is certainly a sign that having a just judicial system is a major part of the success of society. This is so basic to a society that Hashem chose having a judicial system as one of the seven Noachide laws. However, for those who have an intricate Torah upon which to base their rulings, the fairness of the process is all the more stressed. We are told that when we are sitting in justice, Hashem is among us (Tehillim 82:1) and, to a great extent, we are representing Him.

We will take a look this week at the concept of compromise (*p'shara*) and its place within the framework of a *din Torah* (a Jewish court case). According to Rabbi Eliezer, son of Rabbi Yossi Hagelili, a judge who renders a compromise ruling is a sinner, as he is required to arrive at the true judgment that the letter of the law mandates. The *gemara* (Bava Batra 133b) criticize judges of *chatzatzta* (of half, according to the Rashbam's interpretation), who don't know how to rule and, therefore, regularly award each side with half of their claim. Rabbi Yehoshua ben Korcha, though, praises the judge who rules based on compromise as one who combines the concepts of truth and peace (see Sanhedrin 6b). According to him, *beit din* should incorporate the need for peace and friendship into the goals of the judicial system. In practice, we accept the view that *beit din* is supposed to urge the sides to agree to a compromise before they start hearing the case. However, they are not allowed to impose compromise on the sides. Certainly there should not be judges who have no choice but to compromise because of their ignorance.

One should realize that the judicial process can be a long and tiring one, sometimes requiring outlays of time and spiritual and physical resources. It sometimes requires uncovering business secrets, including strategies and one's actual financial state, which may be different from what people on the outside think. Sometimes both sides have legitimate claims and the decision, thus, may not always be able to be black and white. Therefore, it is worthwhile for the litigants to consider strongly whether it pays for them to go through the entire process. Often, coming to a meeting of the minds that takes both one's own and his counterpart's interests and needs into account is wiser.

We pray that Hashem will grant our *beit din*, Mishpat V'Halacha B'Yisrael, which works hand-in-hand with Eretz Hemdah, His help so that we can succeed in “judging our counterpart with justice” and always avoiding violating, “Do not do iniquity in judgment.”

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Question: I am part of a group of around 10 Jewish prison inmates (some, like me, are studying for conversion). Our cells (5 ft. X 9 ft.) have a toilet in them and during the time for Shacharit and Ma'ariv, I am not able to get out. Can I put on my *tallit* and pray at that time, in a "dirty place," or is it an abomination to Hashem? Our rabbi died a few years ago, and we don't have anyone to answer our questions any more. Also, could you send us some texts to study from?

Answer: It is a problem to involve oneself in holy things in proximity of excrement, as we will briefly discuss. Those who are not Jewish yet are not bound by those requirements, which are not included in the seven Noahide laws. However, your letter [*shortened above*] makes it clear that you want to follow the laws like a Jew. Therefore, we will present the laws for your whole group under your difficult circumstances (and this will serve as one of the study materials we will send).

One may not pray or make blessings in or opposite bathrooms (Shulchan Aruch, Orach Chayim 83:1). However, not necessarily is every room with a toilet a bathroom. *Poskim* (halachic authorities) have discussed to what extent rooms with a toilet that are used also for things such as washing hands, shaving, etc. have the status of a bathroom. In your case, the room is as multi-purpose as it gets, which gives grounds for leniency.

The very presence of a toilet, even a cleaned one that is outside a bathroom, raises problems. One may not recite things of sanctity within approximately six feet of a waste receptacle or any distance when one is facing it. There is a distinction regarding whether it is made out of an absorbent material. Absorbent materials that are coated with a glaze, like most modern toilets, are also the subject of dispute (Shulchan Aruch, Orach Chayim 87:1 and commentaries). However, this is of limited help when the utensil is used only for the "dirty" purpose (ibid. 83:5). However, if one can cover the toilet all around or get a 30 inch partition in front of it and smell does not emanate from it, this problem is solved (ibid. 76:1).

There is another reason for leniency in modern bathrooms. The Talmud (Berachot 26a) says that Persian bathrooms do not have a status of a bathroom because the hole is built on an incline so that excrement rolls down and away. *Poskim* compare and contrast our modern toilets, which flush (as opposed to those in Talmudic times), to the Persian ones. On one hand, during most of the day, the toilet is (relatively) clean. On the other hand, the excrement stays put until one gets around to flushing. In general, under normal circumstances (hopefully when you and your friends will be out of prison), we would not allow one to make blessings or pray in such a room. However, under the circumstances, there is room for leniency, if there is not a bathroom smell where one is.

The Rama (Ashkenazic counterpart of the Shulchan Aruch, ibid. 62:4) says that when one is in a place that is not fully clean, he can and should contemplate the words of the Shema (and other holy texts), rather than to recite them. Although it is generally forbidden even to think of such things in an unclean place (Beit Yosef, OC 25), this is a good solution for borderline places.

Therefore, we suggest the following. When you have to recite a prayer or blessing while in your cell, try to get out of a six foot radius of the toilet (probably possible with the diagonal), face the other way and read the texts without uttering them with your lips. Your *tallit* is not a matter of holiness, although it is an important thing since it is used for prayer. Therefore, in your cell, which does not have a full status of a bathroom, you may wear it without making a blessing, or as mentioned, by contemplating the blessing.

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A Tzaddik Not Being Influenced by a Rasha

(based on Ein Ayah, Berachot 1:149)

Gemara: [The Shunamit said about Elisha:] "... he is holy" (Melachim II, 4:9) [from which we can infer that] his attendant [Geichazi] is not holy.

Ein Ayah: As long as one is not powerful in his *shleimut* (completeness), he is liable to be influenced by negative things that occur around him. Therefore, the companionship of a destructive person can damage him and take away from his level of *shleimut*. However, Elisha's level was lofty and strong, to the extent that he did not sense at all Geichazi's moral shortcomings, even though Geichazi was close to him and served him on an ongoing manner. This continued until the time that Hashem put a stumbling block before Geichazi, regarding the story with Na'aman, in order to reveal his disgrace and separate him from the *tzaddik*.

This gives a wonderful view of the power of Elisha's righteousness and *shleimut*. For if he could have been lowered even slightly in his level by being close to the *rasha*, he certainly would have felt it and separated himself from Geichazi. However, his great level caused that he could not have any light or sanctity taken away from him due to the association, and so he did not feel Geichazi's flaws. Another possibility is that he knew of his shortcomings but thought that he could bring Geichazi to repent, in which case, his talents, which were apparently good, would be a blessing. In any case, the fact that Elisha was not affected by Geichazi is a testament to his extremely high level.

A Tzaddik Not Noticing Wicked Actions

(based on Ein Ayah, Berachot 1:150)

Gemara: "[Geichazi] came forward to push her away" (Melachim II, 4:27). Rabbi Yossi, the son of Rabbi Chanina, said: this teaches that he grabbed on to the grandeur of her beauty (based on a play of the Hebrew words for pushing, grandeur, and beauty).

Ein Ayah: Through the negative behavior of the *rasha* we can see the praise of the *tzaddik* and the power of the sanctity of his spirit and his lofty clinging to deliberation about the Divine, without turning even for a moment to other things. Only in this way can we explain that Geichazi, the *rasha*, would be confident that he could get away with doing an indecent, promiscuous act in Elisha's presence. It must be that, through his familiarity with Elisha by experience, he knew that because his lofty spirit was involved only in higher things, Elisha would be unaware of the unsightly things that were going on in his presence. This is because his eyes and heart were focused on important intellectual thoughts to which his generous spirit was connected.

[It is interesting what Rav Kook would have responded to what respectful critics of his connection to Jews who did not keep all the Torah and mitzvot had to say about him. They said that Rav Kook was such a great *tzaddik* that he was unable to pick up on the problematic nature of some of his acquaintances. Interestingly, this is similar to what Rav Kook had to say about Elisha, for whom Rav Kook saw the matter as a compliment. Presumably, Rav Kook would have said that he was not on Elisha's level and that he was aware of the problems with some of the people that the times made it necessary and fruitful to interact with.]

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Mechila As Part of a Broken Agreement

(based on Halacha Psuka 56- A Condensation of Mishp'tei Shaul 28)

Case: A separated husband (=def) and wife (=pl) drew up a divorce agreement, including monetary arrangements. Pl was *mochelet* (relinquished rights to) her *ketuba* and related rights. Subsequently pl decided not to accept divorce and is suing for spousal support (*mezonot*) in *beit din*. She says that her *mechila* applies only when the agreement is intact. Def says that the *mechila* on the *ketuba* stands and includes the related obligation of support.

Ruling: Does *mechila* on a *ketuba* impact *mezonot*? The Shulchan Aruch (Even Ha'ezer 93:9) brings one opinion that a woman's *mechila* of her *ketuba* erases *mezonot* after his death, but not during his lifetime, and another opinion that it applies even during his lifetime. The Beit Shmuel says that the first opinion holds that *mezonot* is an independent obligation, irrespective of the *ketuba*. The Nachal Yitzchak (EH I, 77:2) says that *mezonot* stems from two things: part of the *ketuba* obligation; because the husband makes it impossible for her to marry someone else who could support her. When the wife both was *mochelet* her *ketuba* and she is the one who backed out of the divorce, neither reason applies. The Shulchan Aruch's second opinion (Rambam) holds that although a wife who sells her *ketuba* maintains *mezonot* during his lifetime, one who is *mochelet* is assumed to lose it. The difference is that one who sells probably does so due to financial need, in which case, she probably gives up only what she needs to. In contrast, one who is *mochelet* of her own free will, presumably does so broadly. In this case, since she was *mochelet* as part of negotiations, it is like one who sold, and there is no reason to assume she was *mochelet* support, which was not specified in the agreement.

The Rambam (Mechira 11:4) says that *mechila* is not governed by the laws of *asmachta* (an obligation whose conditions one does not expect to occur). Yet, the Rambam spells out, in a formula to obviate the problems of *asmachta* (ibid.:18), that *mechila* should take hold *mei'achshav* (effective immediately), implying that without this, *asmachta* would be a problem. The Machane Ephrayim (Asmachta 6) explains that *mei'achshav* is needed only to prevent someone from backing out before the condition is completed.

The agreement says pl is *mochelet* "*bazeh* (hereby)." This could mean as of the time of signing (like *mei'achshav*) or as part of the agreement, in which case, *mechila* depends on the agreement's completion. Regarding a doubt of *mechila* of a *ketuba*, the Radvaz (I, 364) says that the woman can extract money because the obligation was once certain. Accordingly, pl should not lose *mezonot*. Another *dayan* felt that, anyway, there is a clear assumption that no part of a divorce agreement is binding if the divorce itself, which is at its heart, does not go through. Thus, pl receives *mezonot*.

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Baba Kama 119- Baba Metzia 7

Why does one who admits to part of the claim have to swear?

The Gemara in the beginning of Baba Metzia deals with the laws of 'Shevuat Modeh Bemiktzat'- the obligation of one who admits to part of the claim to swear. When one sues another person for a certain amount of money, and the defendant admits that he indeed owes part of the amount claimed, the Torah requires the defendant to swear that he does not owe the full amount claimed. For example, if the plaintiff claims that the defendant owes him \$100, and the defendant admits to owing \$50, he must pay \$50 and swear that he does not owe the other \$50. The Gemara (3a) brings the following explanation for this:

"Rabbah said: Why did the Torah require one who admits to part of the claim to swear? A person is not able to be so brazen, as to lie to his creditor." Meaning, we are suspicious that the defendant really owes the entire amount, but wanted to deny the entire claim, however since he was not able to lie to the face of his creditor, he admitted to part of the claim, and if we would require him to swear, then he would admit to the entire claim.

The Rishonim tried to explain what exactly is Rabbah's question- "Why did the Torah require one who admits to part of the claim to swear?" According to Tosfot (ibid d"h Mipnei) Rabbah is asking why do we not believe him 'Migo' that he could have denied the entire claim. 'Migo' is a concept that states that if a person can make a certain claim that would have caused the court to rule in his favor, then even if he makes a different claim, he is believed as if he made the other claim. Therefore, according to Tosfot, the question is that this person who admitted to part of the claim could have denied the entire claim and would not have been required to swear, so why do we now require him to swear. Why do we not say that 'Migo' that if he denied the entire claim he would have been exempt from swearing, so too now that he admitted to part of the claim he should be exempt? To this Rabbah answers that this person was not able to deny the entire claim, because he could not lie in the face of his creditor and deny the entire claim.

According to this explanation of Rabbah's question, Rabbah's answer becomes problematic. The Rishonim (Tosfot Baba Kama 107a, Ran Shevuot 26b in the pages of the Rif, and more) proved from a few places in the Gemara that the concept of 'Migo' is applied even when the claim that the defendant could have claimed is one which involves lying in the face of his creditor. There are a few resolutions to this contradiction, but the resolution that the Shach (Choshen Mishpat end of siman 82 Dinei Migo seif 6) accepted is that there is a difference between when the 'Migo' is being applied to exempt the defendant from paying, and when it is applied to exempt the defendant from swearing. Since the threshold for obligating payment is higher than the threshold for obligating an oath, even a problematic 'Migo,' such as one based on a claim involving brazenness is sufficient to exempt from payment. However, a problematic 'Migo' is not sufficient to exempt the defendant from swearing,.

The explanation of the Tosfot to Rabbah's question is in contradiction to the opinion of the R"l Migash and the Rambam. According to the R"l Migash (Shevuot 45b) and the Rambam (Malveh Veloveh 13, 3), a 'Migo' is never applied to exempt the defendant from swearing. It is only applied to exempt from payment. Therefore, the question of why we do not exempt one who admitted to part of the claim from swearing, 'Migo' that he could have denied the entire claim, never begins. According to them, it appears that Rabbah is simply asking why the Torah required the defendant to swear in this specific case.

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