



HEMDAT YAMIM

Parashat Hashavua Mishpatim, 27 Shevat 5783

Harav Shaul Israeli zt"l
Founder and President

Parashat Mishpatim and the Basic Law of a Person's Dignity and Freedom – part I

Harav Yosef Carmel

The Basic Law of a Person's Dignity and Freedom was passed by the Knesset in Adar II 5752 (1992) with a majority of 32-21 (less than half the MPs voted). Ostensibly, this law came to ensure basic rights that are based on the lofty values of the sanctity of life, freedom, personal liberty, human dignity, right to ownership, and privacy. One would think that all religious people would rejoice that these basic Jewish values, which are based on the Torah of Moshe, primarily in our *parasha*, were being adopted formally.

The happiness turned quickly into sadness, because of two unfortunate developments:

A. Under the leadership of the Supreme Court President, this law was misused to begin what became known as the Constitutional Revolution, which gave the court unreasonable power in comparison with the Knesset. A strong Supreme Court is an interest of everyone who objects to dictatorship and its horrible ills. However, democracy at its best maintains a balance between the three branches of government and promises appropriate brakes on its elements. Significant portions of the populace of Israel see in the court's great power a deadly blow to the proper order of government. Former Justice Minister Ayelet Shaked should be thanked for her major efforts to balance the panel of judges in this highest tribunal of our beloved state's judicial branch.

B. Under the leadership of the Supreme Court President, this law, which is based on the Torah, turned into a "spade with which to dig," in order to rebel against important basic principles of Jewish belief, in which most of Israeli citizenry believes and wants to respect. This is despite the fact that the Knesset introduced it with the following words: "The purpose of this basic law is to protect a person's dignity and freedom, in order to anchor with a basic law the values of the State of Israel as a **Jewish** and democratic state."

Looking at our *parasha*, we can see how such protections were the concern of the Torah, as presented at Sinai some 3,500 years ago. These are some of the ideas on the matter that we find, as presented in the Torah in the following order: 1. The nation is commanded to establish organized judicial institutions which will give a timely response to those seeking relief from civil disputes (Yitro's recommendation, Shemot 18:1-26). 2. The giving of the Torah at Sinai (ibid. 19-20). 3. The compendium of specific monetary law as well as the rules of the ethics of jurisprudence (ibid. 21:1-23:9). 4. A second description of the revelation at Sinai.

This special structure of presentation stresses how important a Jewish judicial system is; it is at the very heart of the Torah. It is indeed the basis of the Rabbis phrase "... Who gave us a Torah of truth and eternal life He embedded in our midst."

The opening topics of the compendium on jurisprudence are the Jewish servant, both the male and the female ones, each with its own nuances. While this seems irrelevant today, we will see in future weeks how principles that are learned from those laws are relevant to many areas of modern employment law.

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Ask the Rabbi

by Rav Daniel Mann

Making Up a Tefilla Missed to Help the Sick

Question: I spent all afternoon in the emergency room with my mother and did not *daven Mincha*. Can/should I *daven* a second *Ma'ariv* as *tashlumin* (makeup prayer)?

Answer: The *gemara* (Berachot 26a) introduces the idea of *tashlumin* for *tefillot* missed “by mistake.” Those who missed intentionally are excluded. *Rishonim* posit that there is *tashlumin* for one prevented from *davening* (see Shulchan Aruch, Orach Chayim 108:1). However, the Rosh (*Shut* 27:1, codified in Shulchan Aruch, Yoreh Deah 341:2) rules that an *onen* (one between the death and burial of a close relative, who is exempt from positive *mitzvot*) who missed a *tefilla* does not make it up at the next *tefilla*. He explains that the *onen* did not forget but was not obligated in the missed *tefilla*.

The Derisha (YD 341:3) extends this exclusion from *tashlumin* to exemptions from *tefilla* due to pressing involvement in a *mitzva* (*osek b'mitzva*). Caring for a mother with acute medical needs certainly qualifies (see Sukka 26a and Mishna Berura 640:7). The Taz (YD 341:5 & OC 108:1) takes issue with the Derisha, arguing that an *onen's* exemption is qualitatively different from that of one involved in a *mitzva*. The Derisha and Taz may disagree on whether *mitzvot* erase obligations, like *aninut* does (see nuances in Kehilot Yaakov, Berachot 15; Atvan D'orayta 13). Alternatively, they may argue on the breadth of the institution of *tashlumin*.

Given that the Rosh regarding *onen* appears to be based more on logic than Talmudic precedent, it makes sense to distinguish between the cases. During *aninut*, one may not use windows of free time to do *mitzvot*. In contrast, our entire day should be filled with various *mitzvot*, yet we seem to almost always fit in *davening* with a (set) *minyan* (see *Ishei Yisrael* 22:9, who advises doctors and nurses to look for opportunities to *daven*). Therefore, it makes a lot of sense that even if a certain *mitzva* could not be interrupted, *osek b'mitzva* does not make it considered that the obligation of *tefilla* at that time did not exist. Nevertheless, the majority of *Acharonim*, including some of the most authoritative ones (Shach in *Nekudot Hakesef*, YD 341, Magen Avraham 93:5; Eliya Rabba 93:4; Mishna Berura 93:8), rule that one does not need to do *tashlumin* in a case of *mitzva* involvement.

That being said, it might be good to do *tashlumin* voluntarily, an idea we find even in the following cases when *tashlumin* is not prescribed: 1. He purposely did not *daven*; 2. More than one *tefilla* has gone by since he missed. *Poskim* encourage doing *tashlumin* as a *nedava* (voluntary *tefilla*). The possible proviso is that when the case is further away from warranted *tashlumin*, the *nedava* must be done with a *chiddush*, i.e., additions to his regular *Shemoneh Esrei*. The Shulchan Aruch requires *chiddush* regarding #2 (OC 108:5), but not regarding #1 (*ibid.* 7). Since the requirements of *chiddush* are not trivial and perhaps difficult (see Shulchan Aruch and Rama, OC 107:2), we would not recommend it for the average person.

Regarding an *osek b'mitzva*, the Pri Megadim (MZ 108:1) says it depends whether the Taz's opinion is strong enough to create a reasonable doubt whether *tashlumin* is needed; his inclination is not fully clear. It is an open question (see Yabia Omer IX, OC 90.6) whether there is an indication from the Rivash (140) like the Taz, and the Shevel Halevi (I:205) claims the Zohar supports the Taz. On the other hand, the Mishna Berura (108:2) rules that it requires a *chiddush*.

In your case, there could be reasons to require *tashlumin*. If your *mitzva* involvement began after the earliest time for *Mincha*, then according to almost all *poskim*, the subsequent exemption does not preclude *tashlumin* (Mishna Berura 71:4; the Birkei Yosef, YD 341:17 is equivocal). Also, while you had a right to err on the side of medical/*kibbud eim* caution and while one may use short breaks for ensuring his ability to continue the *mitzva* rather than *tefilla* (see Mishna Berura 71:13), if, in hindsight, you could have *davened* without compromising your mother's care, *tashlumin* is called for.

“Behind the Scenes” Zoom shiur

Eretz Hemdah is offering the readership to join in Rabbi Mann's weekly Zoom sessions, analyzing with him the sources and thought process behind past and future responses. Email us at info@erezhemdah.org to sign up (free) or for more information on joining the group.

Do not hesitate to ask any question about Jewish life, Jewish tradition or Jewish law.

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Igrot HaRe'aya - Letters of Rav Kook

Who Should Get Rabbinic Position? – #141

Date and Place: 28 Iyar 5668 (1908), Yafo

Recipient: Rav Tzvi Pesach Frank (1873-1960), then a young member of the Jerusalem rabbinical court; later, the longtime Chief Rabbi of Jerusalem.

Body: Regarding Rav Y.Y. Halevi, whom my distinguished colleague proposes for the role of Rabbi of Ekron, I rely on you. You know him very well, and your testimony, that he is fit and suitable for the post, is trustworthy in my eyes.

However, some time ago, Rav Z. Braverman recommended to me Rav David Tiktin for the post, and I do not know why that idea was apparently forgotten. If Rav Tiktin removed his candidacy, for whatever reason, I have no reservation [about Rav Halevi], and I hope to help to my full ability. I am very saddened that there is no longer a rabbi in Ekron, after there had been one. Maybe Hashem will have mercy, and we could establish rabbinates in the other settlements as well, so that we could fully be able to call them the cities of Israel, the holy nation.

The rest of the letter is a halachic discourse.

Willingness to Help with Agricultural Supervision – #142

Date and Place: 5 Sivan 5668 (1908), Yafo

Recipient: Rav Shmuel Salant (the aged Rabbi of Jerusalem), Rav Chaim Berlin (Rav Salant's assistant, son of the Netziv), and Rav Eliyahu Moshe Panigel (newly appointed Rishon L'tzion, Chief Sephardic Rabbi)

Body: My home was filled with light when I received your holy letter. For some time, I have awaited your light and salvation, oh giants of purity who are connected to the special beauty of the Holy City, may it soon be rebuilt. You have come to strengthen my hand in restoring the holy religion to its place, regarding the New Yishuv generally and the holy city of Yafo and the surrounding settlements specifically.

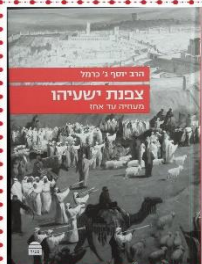
I hope we will build on this and will have affectionate communication on a regular basis, so that we can establish the Torah and Hashem's statutes among the members of Hashem's nation who are settling the Holy Land. This is the beginning of their path, to expand the activity to great matters that have a place among the lofty matters of the world. Thereby, the root of Yaakov, which is starting to take hold in the holy soil, through plants and fruits, will be a fulfillment of the prophecy of "Those who come will establish the root of Yaakov, and Israel will sprout and flower" (Yeshayahu 27:6).

Let us deal with what is now before us. Concerning establishing a good system for the taking of tithes from the produce with the supervision of committees, I lend my hand to your efforts. In anything that my weak abilities can accomplish, I will stand by your side. I am ready to transcribe your holy message and add my approbation to what you, giants, have written and present it to the councils of the agricultural settlements. We will see what they answer me.

I also hope to be in the settlements soon to inspect matters concerning *orla* and *kilei hakerem* (two of the agricultural prohibitions), as I do every year, with Hashem's help. It is especially important this year, as we need to find special inspectors for this in all of the settlements because it is almost impossible to find a man as diligent, broad minded, and expert as the departed Rav Z. Shneur, z"l. I have already begun to assign individual inspectors to each settlement with vineyards. However, we still need to reinforce these matters; Hashem should save us by providing us with strength. Due to my visit, we will know clearly how to act in the new situation and improve matters. I hope to let you know everything [I have learned].

I end off with a blessing and a major request. May your holy hands always be with me, to elevate with a holy splendor of Hashem on the "holy mountains" of the New Yishuv, for the sake of Hashem's Name, His nation, and His lot.

P.S. – What to do specifically with those who refuse [to cooperate], if such people will be found, we still need to decide on the matter with wise counsel.



Tzofnat Yeshayahu - Rabbi Yosef Carmel

The Prophet Yeshayahu performed in one of the most stormy and dramatic periods of the Israeli nation's life, a period of anticipation for the Messiah that was broken by a terrible earthquake, and also caused a spiritual and political upheaval. The light at the end of the tunnel shone again only in the days of Chizkiyah.

"Tzofnat Yeshayahu – from Uziya to Ahaz" introduces us to three kings who stood at this crossroad in our nation's history: Uziya, a king who sought God but was stricken with leprosy because of his sin; Yotam, the most righteous king in the history of our people; And Ahaz, the king who knew God but did not believe in His providence.

In his commentary on the prophecies of Yeshayahu, Rabbi Yosef Carmel, Head of the Eretz Hemdah-Gazit rabbinical court and a disciple of Rabbi Shaul Israeli zt"l, clings to the words of Hazal, our sages, and to the commentaries of the Rishonim, the great Jewish scholars of the middle ages, and offers a fascinating way to study Tanach. This reading attempts to explain the Divine Plan in this difficult period and to clarify fundamental issues in faith. Tzofnat Yeshayahu reveals to the reader the meaning of the prophecies in the context of the prophet's generation and their relevance to our generation.

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P'ninat Mishpat

Who and How to Fix?

(based on ruling 81095 of the Eretz Hemdah-Gazit Rabbinical Courts)

Case: The defendants (=def) rented an apartment from the plaintiff (=pl). The contract states that def may not make changes to the apartment and has to fix damage that occurs to it. Def left the apartment with some repairs undone and some with which pl was unhappy, including holes in the balcony's floor tiles. Def wants to bring repairmen to do what is left, whereas pl wants money so he can hire workers he trusts. Pl wants to switch all of the tiles, whereas def are willing to switch some of them; pl has been warned that trying to fix only some tiles could cause leakage.

Ruling: The language of the contract indicates that def are to fix. According to one of the *dayanim*, that clause refers only to repairs that def are obligated in due to the contract and not without it, whereas the repairs in this case were primarily from intentional changes def made, which they are anyway required to do. The other *dayanim* believe the clause is general.

There is a concept of *shuma* (estimating value) for damages (Bava Kama 11a), i.e., we see how much the damaged object depreciated (Shulchan Aruch, Choshen Mishpat 387:1). However, the Shach (ad loc. 1) says that this is when it is not possible to fix the object. The Chazon Ish (Bava Kama 6:3) posits that if the object is up for sale, it is appraised, but if not, the damager is obligated to fix it. Rav Y. Blass (Techumin XIII, p. 389) explains that restricting payment to depreciation when the object could be fixed results in no payment in many cases, which is illogical. Therefore, in this case, def must facilitate repairs.

How should he do this – by doing/arranging repairs or paying for pl to do so? The Shach (CM 95:18) does not resolve the question whether a damager must fix the object or may pay instead. Our question is whether def may arrange the repairs or whether they must pay for pl to do so, as pl prefers. The Tumim (95:7) and the Netivot Hamishpat (95:6) say that when repairs can be made, the damager has the right to do that rather than pay. The Chazon Ish (ibid.) argues, allowing the damaged to demand money. The matter depends how one learns the *gemara* (Bava Kama 85a, regarding physical damage to a person), which discusses how healing should be done. It says that the injured can refuse the damager trying to heal him out of lack of trust and rejects the injured's demand for money and trying to heal himself because if he does not do a good job, people will blame the damager.

We learn from this *gemara* that neither side has an exclusive right to determine how to remedy the situation, and *beit din* should evaluate the reasons for the objections. In this case, while neither side wants to physically fix the problems, pl is correct that when given the chance, def did not handle the repairs well. Therefore, pl now has the right to choose, with care, the repairmen.

Regarding the tiles, since pl has the right for it to come out aesthetically reasonable, pl can demand that the tiles that were damaged (not the others) be replaced with a similar looking tile. If pl is afraid to change only some, he can take the money and use it (and keep leftover) to instead fill the holes that were made.

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Ori Leah bat Chaya Temima

Arye Yitzchak ben Geula Miriam
Yerachmiel ben Zlotta Rivka

Neta bat Malka
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