

HEMDAT YAMIM

PARASHAT Emor

5 Iyar 5768

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This edition of Hemdat Yamim is dedicated in loving memory of
R' Meir ben Yechezkel Shraga Brachfeld

o.b.m

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An Improper Chumra

Harav Yosef Carmel

Parashat Emor and its *haftara* deal, among other things, with the laws of *kohanim*. *Kohanim* observe *halachot* that are from the Torah, others that are from the Rabbis, and even matters that they accepted upon themselves as stringencies appropriate for their lofty station (see Kiddushin 78b).

We will take a look at some factors that help one make balanced decisions when the question of stringencies arises. Let us first point out that the desire to sanctify ourselves (including by refraining from that which is permitted) in order to advance our service of Hashem is positive and should be encouraged. With that, we must be wary of the related obstacles. Our words are based on the ideas of the great *kohen*, Rav Avraham Yitzchak Kook, the first Chief Rabbi of Israel.

Chazal concluded: "Just as it is forbidden to rule that the impure is pure, so is it forbidden to rule that the pure is impure" (Yerushalmi, Terumot 5:3). *Poskim* apply this idea generally to forbidding the permitted, (see Beit Yosef, YD 115; Aruch Hashulchan, YD 242:66). It is better to have 10 *tefachim* that stand than 100 that fall. Therefore, in creating walls of halacha, we mustn't build so high that it threatens the structure. Rav Kook learns from this as follows. "One should not look to be stringent without a tradition from our teachers in a matter that is itself a distancing from sin. A stringency should not be built onto a stringency unless we have found it explicitly or we have clear proofs" (Orach Mishpat, OC 112).

Kabbalah teachings also indicate that one should be careful not to be stringent without a source. Rav Kook quotes Rav Chaim Vital as saying: "About such people it says: 'They are wise to do bad [forbid] and they do not know how to do good [permit].' Because they scorn the tree of life, Hashem does not help them, and they err in the details of the tree of life and the tree of knowing good and bad and turn it into bad, and they make impure that which is pure and forbid that which is permitted."

Rav Kook learns from the concept that one must use his teachers' language that one should not call a *minhag* a halacha or a prohibition. He should distinguish between different levels of prohibition, and if there needs to be a one-time prohibition, he should acknowledge this. When one lumps things together, people are liable to take real *halachot* less seriously. Knowing his generation, Rav Kook said that when they see that the rabbis permit whatever they can, they learn that that which is not permitted cannot be permitted. This increases observance. When people find out that things are forbidden without need and the rabbis did not care about the toil of Israel, this causes a great *chillul Hashem*.

While we await the return of all the applications of the laws and stringencies of the *kohanim*, let us strengthen our resolve to improve our service of Hashem based on halacha's guidelines.

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Ask the Rabbi

Question: Someone bought the home next to mine and not only wants to build a stone wall between our yards but expects me to share the expenses. Is his claim that I am halachically required to do so correct?

Answer: The *mishna* (Bava Batra 2a) discusses the type of wall that is to be built between people who share property that is to be divided between them. The *gemara* (ad loc. 2a-3a) discusses whether the two have to agree to make a wall or that once they agree to divide the property, each can demand of the other to erect one between the sections. The *gemara* says that it depends on whether we consider the fact that one neighbor can see what the other is doing on his property a damaging situation. We accept the opinion that intrusion on privacy is damaging and thus one neighbor has a right to the wall (Shulchan Aruch, Choshen Mishpat 157:1).

In many areas of rights between neighbors, there is a concept of *chazaka*: if one side took control of a certain type of usage without his neighbor protesting, he can continue doing so. (The logic, parameters, and opinions on the matter are beyond our scope.) However, the Rambam (Shutfin 2:14) said that regarding walls, even if the distinct properties lacked a wall for years, there is no *chazaka*, and either neighbor can demand the erection of a wall. There are two explanations for this halacha. Usually *chazaka* occurs when one side takes a positive step which would trigger a protest if it had not been agreed upon or was not agreeable. In this case, the lack of a fence is a passive situation. The fact that nobody raised the issue of erecting one is not proof that it was meant to remain that way (Maggid Mishne, ad loc.). Furthermore, in the standard case of *chazaka*, one side does something from which he benefits and the other stands to lose. Then if the potential loser from the situation is quiet, we reason that he must have gone along with the steps for some reason. However, in this case, where each neighbor is the potential gainer and the potential loser, we take seriously the possibility that he did not feel a need to initiate steps to put up the wall, and he retains the rights to protest in the future (Tur, Choshen Mishpat 157 in the name of the Rosh).

Either way, in your case, you would have to demonstrate that there was an outright agreement by your neighbor or one of his predecessors to waive the right to demand a wall that prevents potential invasions of privacy. Even an oral relinquishing of rights would suffice (S'ma 157:4; see Pitchei Choshen, Nezikin 14:(53)). The Rama (CM 157:1) accepts the opinion in the *Rishonim* that one's right to a wall exists even in a place where the practice is to not have such walls.

Both sides normally have to take equal part in the expenses and the relinquishing of space from the property upon which the wall will sit (Shulchan Aruch, *ibid.*). However, the matter becomes more complicated when there is disagreement as to the quality of the wall and its accompanying price. In general, the wall between residential yards should be four *amot* (approximately six feet) high so that it effectively obstructs the view. Similarly the density must obstruct the view. However, one can force his neighbor to pay only for the level of building that local practice or, in its absence, a *beit din* or an expert, considers a standard wall (Shulchan Aruch and Rama, *ibid.*:4).

There are more details that might come up in adjudication over this point of contention, which could effect the halacha in a major or a minor way. However, we hope that the general information we have provided gives you the basic legal and related philosophical Torah perspective toward the demand for privacy. Hopefully, this will help you work out an amicable resolution with your neighbor that takes into consideration the desires and concerns of each of you.

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Have a question?..... e-mail us at info@eretzhemdah.org

Moreshet Shaul

(from the works of Hagaon Harav Shaul Yisraeli zt"l)

The Torah and the Land – part I

(from Harabbanut V'Hamedinah, pp. 310-312)

A *midrash* says: “Had Moshe entered *Eretz Yisrael* (=EY), the *Beit Hamikdash* would not have been destroyed and no nation would have had dominion over Israel.” The Parashat Derachim inquired about the connection between Moshe and the destruction. Since the three cardinal sins caused the destruction, how would Moshe’s entry into the Land have atoned for these crimes? Let us start by viewing the behavior of Yehoshua, Moshe’s successor, who conquered EY, which will indicate what went wrong in addition to what went right.

The conquest of Yericho, the first in EY, was unique in two ways: 1) It was accomplished in a super-natural manner; 2) There was a ban on the spoils and a prohibition on building the city. Why were these steps necessary?

The entry into EY after 40 years in the desert marked a sharp change in lifestyle, going from constant miracles to a lifestyle that appeared natural. The main means of sustenance in the desert was *mann*. The *mann* experience included daily revelation of Divine Presence in several aspects: The daily falling of the *mann* enabled a great nation to survive in desert conditions. The manner in which everyone collected a fixed amount that he needed to consume was miraculous as was the double portion that fell on Friday and the lack of *mann* on Shabbat. All of these showed clearly the Hand of G-d watched over them on an individual basis according to the needs of each and that He was the Creator who finished His work on the seventh day.

Then they entered an inhabited land and the *mann* stopped. The need to tend to daily subsistence for whole families arose. The first priority was to remove the inhabitants from the Land and to settle it. Natural living had begun, like the surrounding nations, struggling to secure the Land and to extract bread from the earth with hard work and sweat. However, the Divine Will was not for the House of Israel to be like all the nations. Rather, within the, ostensibly natural, conditions of life one must recognize that Hashem is the cause behind all causes. On one hand, one must remember it is Hashem who gives him the strength to attainments. All is in Divine Hands, whether success or failure. On the other hand, everything is an outcome of the extent of fear of Heaven and acceptance of Divine Dominion in all of a person’s actions and behavior.

That is why the conquest of Yericho was done miraculously. They circled the city for seven days with the Ark containing the Tablets. On the seventh day the wall tumbled before blowing shofars, without weapons or military tactics. This was to impress deep in the nation’s heart the belief that even in EY the Divine Hand would continue to lead the nation, that the laws of nature are subservient to the Divine Will, which in turn depends on the degree of one’s dedication to his Maker. “If you listen...” then “you will gather your grain.” “If you refuse and rebel,” then “there will not be rain and the land will not give its produce.” Nature is also the making of Hashem, and therefore only Torah observance promises a peace and blessing in the Land.

In order to see if nation absorbed the lesson of Yericho and to engrain the practical outlook that all comes from Above, Yehoshua declared a ban on Yericho. Heaven forbid that the plentiful spoils would impact on those who experienced 40 years of rationing in the desert, wearing the same clothes as when they left Egypt and having the same menu every day. Now they had access to beautiful clothes, foods, and jewelry, but so that they not get carried away by them, Yehoshua made them off limits. This was a guide to future behavior: overcome the world’s enticements and pleasantries and enjoy a life of straightness and justice, hard work, and charity. Stand up to the challenges of Shabbat and the *Shemitta* year even when it seems to cause losses and sanctify the first fruit of one’s toil to Hashem with happiness.

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P'ninat Mishpat

Unintended Clause in a Contract (based on Halacha Psuka 42, condensation of a *p'sak* from Mishpatecha L'Yaakov I, pp. 15-30)

Case: The plaintiff (=p) is a contractor who sold a two-story building to two families. The contract states that if the building will be expanded, it will be for both floors, and the owners will share the expenses equally. The defendant (=def) bought the bottom floor; p gave his daughter the top floor. The bottom floor's extension is only 60% of the top one. However, the contract's language, which p says was intentional, implies that def pay 50% of the expenses. Def says that he had not intended to pay half if he received less and that he trusted the lawyer who drew up the contract, who, it turns out, often worked for p.

Ruling: The *gemara* (Bava Batra 64a) says that we assume that additional, seemingly unnecessary language in a document comes to add something that was not included. The Shulchan Aruch (CM 61:15) understands this to be the case even if the document was not written by an expert. This teaches a general rule that when we lack clear knowledge of the writer's intention, we employ halachic analysis even without certainty that it was his intention. However, when we know that the writer's intention differed from the document's standard reading, *Rishonim* say that we prefer the intention. Based on this, the Shulchan Aruch (ibid.:16, see also Gra ad loc.:39) rules that if one makes a condition with his friend, we do not follow the written word but the intention. In our case, def clearly did not intend to pay equally for work that was mostly done for someone else's benefit.

Does it matter that def did not write the document but agreed to one that someone else prepared? The Shulchan Aruch (ibid.:13) who says that ignorance does not exempt one who accepted a document he did not understand seems to indicate that one accepts responsibility for a document's content without intention. Nevertheless, *beit din* established that our case is different. Normally, one who signs a contract is not believed that he did not understand the conditions, as the sides entrusted the one who wrote it to commit to writing that which was agreed, which we assume he did accurately. When def hired an attorney it was so that he would faithfully arrive at a contract that serves def's interests. When it can be demonstrated that he failed to do so, the client's signature is not significant. Rav Tena (Birkat Shlomo, CM 21) reasoned similarly regarding a contracting company that signed a contract that was prepared by one of its employees who was trusted to summarize the matter correctly. The idea of obligating oneself in whatever is included in the contract applies when the drafter was given the right to do as he felt. Here too, def felt that he could rely on his lawyer.

Therefore *beit din* estimated the portion that def was to pay as a proportion of the relative size of the extension of his property.

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