

This week.....

- **A Change of Heart** - A Glimpse from the Parasha
- **Passing Over Tefillin to Put on the Shel Yad First** - Ask the Rabbi
- **Non-Jewish Ownership of Eretz Yisrael – part I**
 - from the works of Rav Yisraeli zt"l
- **The Termination of a Contractor's Work Due to Mutual Complaints**
 - from the world of Jewish Jurisprudence

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on the occasion of his
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and members of his family
who perished in the shoah
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A Change of Heart

Harav Yosef Carmel

In this week's *haftara*, Yirmiya contrasts between two *gevarim* (men). "Blessed is the man who relies on Hashem and Hashem is his source of trust" (Yirmiya 17:7). "Cursed is the man who relies on a man and makes flesh his forearm and from Hashem does his heart stray" (ibid.:5).

The difference between the two appears clear. One is the ultimate G-d-fearer, who believes and depends on Him. The other relies on human power and ignores Hashem. Certainly, meeting the two on the street, we would know who is who. Yet, a few *p'sukim* later, the *navi* stresses that Hashem is able to discern between the different people by investigating the heart and kidneys (ibid.:9-10). For commentators like the the Pesikta, who understand that the cursed person is an idolater or the like, what is special about Hashem that He can uncover his shortcomings? The Tanchuma claims that the blessed clings to the craft of his forefathers and prays to Hashem, whereas the cursed does not. Whether or not one prays honestly to Hashem is already something that only Hashem knows. However, it is unclear where this approach is hinted to in the *p'sukim*.

Let us move on to the Yerushalmi's (Pe'ah 8:8) explanation. "Whoever needs *tzedaka* and does not accept it will not die of old-age before he will support others." The Yerushalmi cites our *pasuk* as support for this idea.

Many *mitzvot* depend on the intention in one's heart. In these cases the Torah often concludes, "I am Hashem," meaning that He is the One who knows a person's intention. People do not know how much money a person gives or receives. *Ma'aser kesafim* formulas are not a give-away as to how much one should give, as how much to subtract for necessary household expenses depends on the elusive estimation that only the family can determine. Whether or not one needs to receive charity depends on the standard of living a family needs, which again is a secret, private matter.

We can say that the two men Yirmiya contrasts are externally identical. Each is Torah-observant. They may attend the same *shiurim*. They differ in the intention of the heart. One tries to attain things naturally, but with proper "*hishtadlus*." He realizes there is "a Leader to the palace" and will not bypass halachic barriers. The second one compromises principles upon encountering difficulty. He relies on the strength of a man's forearm, including his own. He thinks that his power will secure for him his desires. He forgets Who rules the world and centers his existence around his wishes.

These matters are indeed matters of the heart, hidden deep in a person's psyche, from where it is very hard to access them. Therefore, the prophet stresses the heart three times in the *pasuk*. Let us pray that we will soon have fulfilled in us the *pasuk*, "A pure heart create within me, Hashem, and a correct spirit renew within me."

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Ask the Rabbi

Question: Is it true that if one picks up his *tefillin shel rosh* before his *shel yad* that he should put the *shel rosh* on first? How does this affect the order of *berachot*?

Answer: What you apparently heard is not correct according to the consensus of opinions. Let us examine the issues and see where the concept you have heard of does apply.

The *gemara* (Yoma 33a) explains some of the order of service in the *Beit Hamikdash* based on a rule called *ein ma'avirin al hamitzvot* (we do not pass over *mitzvot*). In other words, if one plans to do two *mitzvot* and one presents itself to him before the other, he should do the immediate *mitzva* before the other one. Rashi (ad loc.) says that this is derived from the *pasuk* that one should guard the *matzot* from waiting around and becoming *chametz*, which can also be read as teaching that no *mitzva* should be "passed over" and thus "put on hold." There is a dispute whether this concept is from the Torah or is rabbinic, but either way, it plays a role in various cases.

The *gemara* (ibid. 33b) says approximately as follows: because of *ein ma'avirin*, "passing over the *tefillin shel yad* for the *tefillin shel rosh* is forbidden." Rashi explains that since one comes to his arm before his head, he should lay the *shel yad* first. Based on this, one might suggest that if someone picked up the *tefillin shel rosh* first, he should put it on before the *shel yad*. However, several *Rishonim* posit that the *gemara* cannot be understood this way for the following reason.

The *gemara* (Menachot 36a) says that the *tefillin shel yad* should be put on before the *shel rosh* because the Torah mentions the two *tefillin* in that order. The *shel rosh* should even be taken off first so that it not remain on the body alone. Tosafot (ad loc.) is bothered by the above *gemara* (Yoma 33a). Why does it need the rule of *ein ma'avirin* to explain why the *shel yad* should not be passed over if it is anyway supposed to be put on first? The first answer is that the *gemara* is instructing not to put the *shel yad* deeper into the *tefillin* bag than the *shel rosh*. This is because it would force him to pass over the *shel rosh* to put on the *shel yad*, which compromises the issue of passing over *mitzvot*. Tosafot's premise, which is accepted as halacha (Shulchan Aruch, Orach Chayim 25:6), is that *ein ma'avirin* does not justify putting the *shel rosh* on before the *shel yad* (against what you heard). The question about *berachot* should thus not arise in this context. If an Ashkenazi mistakenly puts on the *shel rosh* (presumably with the *beracha* of "*al mitzvat tefillin*,") he would make the *beracha* of *l'hani'ach tefillin* when putting on the *shel yad*.

A similar application, where *ein ma'avirin* does apply, is in regard to the order of *tallit* and *tefillin*. Our practice is to put on a *tallit* before *tefillin* (see Beit Yosef, OC 25 who cites reasons for this, including that *tzitzit*, which is worn everyday, is more common (*tadir*) and therefore comes first). However, if when one reached into his *tallit/tefillin* bag he grasped the *tefillin*, he would have to put the *tefillin* on first because of *ein ma'avirin*. (The level of contact with the *tefillin* that gives it precedence over the *tallit* is a matter of dispute—see Magen Avraham 25:1; Mishna Berura 25:3). Why does *ein ma'avirin* takes preference regarding *tallit* and *tefillin* and not regarding *tefillin shel yad* and *shel rosh*? *Tallit* and *tefillin* is an example of two independent *mitzvot* (even though they often overlap), in which case *ein ma'avirin* is unimpeded from setting precedence. However, regarding *tefillin*, where the Torah instructs the way the two are to be preformed in tandem, a general rule of precedence, such as *ein ma'avirin*, does not alter the proper performance.

Other applications of *ein ma'avirin* are beyond our present scope.

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Moreshet Shaul

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

Non-Jewish Ownership of Eretz Yisrael – part I
(from Eretz Hemdah I, 5)

The *mishna* (D'mai 5:8) states that one can take *ma'aser* from a Jew's produce to exempt a non-Jew's produce or from a non-Jew's produce to exempt a Jew's. This indicates that the *mishna* understands that a non-Jew's produce is *chayav* in *terumot* and *ma'asrot* on the Torah level. This is because if it were only rabbinic, it would be considered, from the perspective of Torah law, taking off from the *chayav* on the *patur* or vice versa, which does not work. The Yerushalmi explains that the above *mishna* follows the opinion of R. Meir, who holds that a non-Jew does not have a *kinyan* (ability to fully acquire) to undo the obligation of *ma'asrot*. R. Shimon, on the other hand, holds that a non-Jew has such a *kinyan*, and, therefore, he does not allow taking *ma'aser* from one on that of the other. R. Meir's opinion is based on the following analysis. Since the *pasuk* compares the ownership of a slave to that of the Land (see Vayikra 25:46), R. Meir learns that just as a non-Jew does not have a full *kinyan* over a slave, so he does not have a *kinyan* over land in *Eretz Yisrael*. R. Elazar B. R. Yossi supports R. Meir's opinion from the *pasuk* (in regard to *yovel*), "The land shall not be sold for eternity" (ibid.:23), which means that it cannot be sold in an absolute manner. The Yerushalmi points out that R. Shimon can counter that this *pasuk*, which prohibits selling land in *Eretz Yisrael*, in an absolute manner, implies that it can be accomplished (improperly).

The second support to R. Meir requires elucidation. After all, we are discussing the impact of a sale to a non-Jew in regard to the laws of *ma'aser*, not the matter of permanent sale. The Megillat Esther (to Sefer Hamitzvot, Lo Ta'aseh 227) explains based on the Rambam's understanding that the prohibition of selling permanently applies also to a Jew's sale of land to another Jew, if done on the condition that the law of return of land during *yovel* will not apply. This is not R. Meir's source, but it is a hint at his approach that the Torah was concerned that the *kedusha* of the Land not be undone by being sold to a non-Jew. The problem is that at least during the time it is in a non-Jew's possession, it is like a permanent sale, in that it is considered like land in *chutz la'aretz*. Rav Chayim Halevi explains that since we learn that one cannot sell land on a permanent basis, it is not possible that such an acquisition would be able to undo the *kedusha* in regard to *ma'asrot*.

The Yerushalmi's deflection of the application of the idea of no permanent sales is that it is only wrong *l'chatchila* to sell the land permanently but that it would work *b'di'eved*. This seems to contradict the Rambam's (Shemitta V'yovel 11:1) opinion that if one made a condition that the land should not return in *yovel*, it would return anyway. The matter can be resolved based on the Ramban's suggestion that whether or not the sale remains permanently depends on the general *machloket* between Abaye and Rava whether something forbidden that is done takes hold *b'di'eved* (Temurah 4b). The "proof-bringer" and the deflector in the Yerushalmi argue about this point, and the Rambam *paskens* like Rava that a prohibited act does not take effect.

The Ramban himself understands that the prohibition refers to selling land to a non-Jew, so that it would not be returned in *yovel*. According to this approach, the proof is that if a non-Jew were able to remove *kedusha* of the land in regard to *terumot* and *ma'asrot*, it would likewise be possible to make the sale permanent, each of which is not possible according to R. Meir. The Yerushalmi counters that indeed the Torah does not want either change in the Land's status but that either of them could be accomplished, and this is what the Torah warns about.

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P'ninat Mishpat

The Termination of a Contractor's Work Due to Mutual Complaints.

(based on Halacha Psuka, vol. 43 - a condensation of a *p'sak* of Beit Hadin Mishpat V'Halacha B'Yisrael)

Case: The plaintiff (=pl) is a contractor hired by the defendant (=def) to renovate her house under a detailed contract with a payment schedule. After def became dissatisfied with pl's work and halted payment, pl, after a warning, stopped working, prompting def to hire another contractor to finish the job in a manner that raised the total project cost. Pl demands payment for the value of his work, irrespective of the second contractor's charges. Def says that since pl's poor work forced the situation, he should be treated as one who backed out.

Ruling: Estimating the compensation due a worker who did not complete his job depends on different factors. If a *sachir* (worker paid by time) initiates the stoppage, he is paid for what he did. If a *kablan* (paid by the job) does so, he is paid the lesser of: the percentage of the work done times the contract and the amount promised minus the amount necessary to finish the job (Shulchan Aruch, CM 333:4).

Regarding an employer who backed out, the Shulchan Aruch (ibid.:1) implies that the worker is paid as a *poel batel* (a discounted rate that takes consideration that people prefer having time off) even on what he did not do. Yet the Tur and Rama (ibid.:4) imply that he is paid only for what he did, just that we calculate its value in a manner that favors the *kablan* when the employer backs out. *Acharonim* ask why he is not paid as a *poel batel* for everything. The Perisha explains that a *kablan* receives such wages only when he is unable to find other work. The Netivot Hamishpat distinguishes as follows. A *sachir* doesn't receive payment on what he did not do if he could have gotten another job. A *kablan* receives as a *poel batel* anyway because he is not tied down to specific times and he can thus theoretically hold two jobs simultaneously. Therefore, the possibility of a second job does not preclude his being paid as a *poel batel* for the first job he was hired for. The Tur spoke about a case where the employer found the worker alternative employment and he chose not to accept it. The Rama (CM 333:5) says that when work is stopped by no one's fault, the *kablan* has the upper hand, meaning that the cost to the employer to complete the job done is not reduced and the *kablan* receives his proportionate due.

The *dayanim* had different views as to who was responsible for terminating pl's work. One felt that since def refused to pay, pl was right to cease working. A second felt that since pl did not accept the need to compensate for deficiencies, neither side could be specifically blamed and the work should be evaluated normally. The third *dayan* saw the matter as a *safek* as to who was responsible. The ruling was that def should pay for the work done without considering what she paid the second contractor.

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