

HEMDAT YAMIM

PARASHAT **Mishpatim**

26 Shevet 5768

This week.....

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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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How to Mark a Free Person

Harav Yosef Carmel

This week's *parasha* regulates the practice of slavery, an institution that existed in the ancient world, including in parts of Jewish society.

If a master hits his slave so that he loses a tooth or an eye, the slave goes free (Shemot 21: 26-27). This sanction against an owner is extended further, as our Rabbis taught. Not only does the slave go free for those two body parts but actually for the loss of any of 24 limbs (Rashi, based on Kiddushin 24-25). The common denominator of these limbs is that they are not renewable and are visible (ibid.). On the other hand, if the slave was injured by the owner's animal, the normal compensation the owner is obligated to a victim does not exist (Bava Kama 49). The Chizkuni explains the latter halacha as being a result of the rule that whatever money a slave acquires goes to his master. What is the logic though of the distinctions of the first halacha?

The Ibn Ezra says that the idea is that a master should know not to be cruel to the extent that he hits his slave hard enough to cause serious damage. This applies only to the master's actions, not to those of his animal.

Let us explain these halachot a little differently. It is common for a person to mark his property to make it more difficult to steal. This certainly is useful in regard to a slave, who might consider running away. The marking of a slave with a sign of his owner was also a way of permanently identifying him as a member of that class. In order to prevent the removal of the sign, one of the systems that was used was the amputation of a part of the body so that it would be permanently evident that the person in question is really a slave. This was a cruel act not only because of the pain involved but also because of mutilation's affront to human dignity. The Torah not only forbade it but instituted an appropriate outcome. If one removes a body part in order to ensure that the slave would remain his, he specifically loses the slave in the process. This has little to do with payment for damages, which is prevalent regarding normal social interactions. Rather it is a specific consequence of harming a human being's dignity.

How is this forbidden form of mutilation different from the performance, *l'havdil*, of a *brit milah*? This too is placing a sign on the body that one is a slave, but in this case, a slave to Hashem. This does not turn him into a blemished person but into a more complete person. It is put in a covered area of the body in a manner that demonstrates that the person is free, as one who accepts upon himself the fear of Hashem is truly liberated. It symbolizes how one must strive to be free of the bonds of physical urges that control many a person.

Let us hope that just as so many Jew's fulfill the mitzva of circumcision so will they internalize the spiritual message that it teaches.

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Ask the Rabbi

Question: Please give me Talmudic and halachic sources on autopsy along with your opinion.

Answer: There is more literature on the topic and more variations of cases than we can deal with in this forum. For further source material and background, see Encyclopedia Hilchatit Refu'it (Steinberg) on *Nituach Hamet*.

A few Talmudic sources indicate that it is generally forbidden to perform autopsies yet may leave the door open for some forms of investigating the deceased's body in certain cases. The *gemara* (Bava Batra 154a-b) discusses an adolescent who sold inherited property and died, and a dispute arose as to whether he had the physical signs of maturity necessary to make the sale binding. The *gemara* says that the body check is *nivul* (degrading) and his relatives were forbidden to carry it out, but it might be justified for the buyers, whose purchase was challenged, to have it done. The *gemara* (Chulin 11b) in discussing whether we can rely on probabilities, discusses the fact that we kill a murderer even though it is conceivable that the victim previously was a *treifa* (had a mortal physical flaw). The *gemara* suggests that we would be able to check the corpse to save the murderer despite the *nivul* involved. A final source is a *gemara* in Arachin (7a) that when a woman dies in advanced labor, a post-mortem cesarean may be done to extract the baby.

Besides the problem of *nivul*, there are also Torah-level issues of pushing off burial or not burying (parts of) the body, but we leave those issues to other forums. (See Rav Yisraeli's thoughts in Amud Hay'mini, *siman* 34. [We have begun a series on it in this week's *Moreshet Shaul*.])

Almost all agree that an autopsy may be performed if needed for *pikuach nefesh* (to save a life). However, it is questionable what constitutes *pikuach nefesh*, something that both *poskim* and the general medical ethics community have debated. The first responsum on the topic, the Noda B'Yehuda (II, Yoreh Deah 210), deals with doing an autopsy to learn from possible mistakes made during an operation to prevent their repeat in the future. He says that this is permitted if there is a sick person before us who can benefit from the information. A general hope that the information might someday be useful is insufficient. The Chazon Ish (Yoreh Deah 208:7) stresses the element of the chances the information will save lives in the short-term, as if one considers any theoretical future need as *pikuach nefesh*, countless perceived needs would regularly push off Shabbat.

Other justifications of autopsies are controversial from a fundamental perspective. The aforementioned *gemara* in Bava Batra implies that one can cause some level of *nivul* in order to safeguard the monetary rights of non-relatives of the deceased. The Tzitz Eliezer (XIV, 83) uses this idea to allow a hospital that lent a costly pacemaker to a patient to posthumously cut his skin and remove it. However, this would be possible only because the deceased may have had an unfulfilled obligation (Binyan Tziyon 170). It may also be crucial if the deceased agreed in his lifetime to allow himself to be disgraced after death for a certain reason (*ibid.*). Consequently some rule that if the deceased acquired life insurance that will be paid only if an autopsy is performed, this can be done (see discussion in Encyclopedia Hilchatit Refu'it (Hebrew) vol. V, p. 623). Finding information for criminal investigations is another issue which is not clear-cut and depends on the case's particulars (see *ibid.* p. 629)

We have not discussed all the issues or given clear practical guidelines. The general rule is that religious Jews do not allow autopsies and when a specific issue arises, "rabbis with broad shoulders" should be consulted. We do not want this abbreviated survey to change that reality.

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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)

Autopsies – part I

(condensed from Amud Hay'mimi, *siman* 34)

[There are three issues that need to be discussed in regard to the permissibility of autopsies: *halanat hamet* (delaying a burial); leaving certain body parts out of burial; *nivul hamet* (disgracing the deceased). We will start with *halanat hamet*.]

The *gemara* (Sanhedrin 46b) was unsure if we should follow one's instructions not to bury him after his death. The Rambam (Avel 12:1) rules not to listen because of the *mitzva* of "you shall certainly bury him." Therefore, one's agreement to "donate his body to science" in a manner that he will never be buried is invalid unless there was a need of *pikuach nefesh* (to save a life), a topic we will not discuss in this treatment. We just note that it is rare for there to be a real need to use the body for *pikuach nefesh* on an ongoing manner that precludes eventual burial.

The question is whether one can give his permission to delay his burial for a few days, thereby impinging on the prohibition of *halanat hamet* (see Sanhedrin 46b; Rambam, Sanhedrin 15:8; Shulchan Aruch, Yoreh Deah 357:1). We have not found explicitly in the Talmud that the deceased's permission does not work in regard to delay. To the contrary, one may delay burial for the deceased's honor (*gemara* and Rambam, *ibid.*). However, that is not a proof, because since *halanat hamet* is a problem of disgrace, there is no issue when it is for his honor, but it is likely to apply when there is disgrace that the deceased agreed to allow. Even regarding burial, Tosafot (Sanhedrin 46b) says that if it were only a matter of his own disgrace, we would follow the deceased's request, and the problem is the disgrace of the family.

At first glance, the *gemara* equates between no burial and *halanat hamet*. [While skipping much of the textual analysis], the Rambam seems to distinguish between the two. Regarding *halanat hamet*, the main prohibition applies to one who was executed and is hanging from a tree, whereas the *mitzva* to bury him applies in any case. Regarding regular people, *halanat hamet* applies in any case. It is likely that regarding the executed, only the problem of disgracing Hashem exists, whereas regarding other people there is also a problem of any type of disgrace, including to the deceased himself. Actually the fact that the *gemara* discusses regarding burial disgrace to the family implies that non-burial is not a problem of disgracing Hashem.

It seems [again, omitting the textual analysis] that Tosafot holds that the disgrace involved in non-burial is predicated on the fact that there is a *mitzva* to bury, in which case to refrain from doing so is a disgraceful change from protocol. It is indeed not clear to the *gemara* whether the general law of burial is because of atonement or because of disgrace, but after it exists, unusual *halanat hamet* is certainly a matter of disgracing the deceased. If so, while one may not refuse to forgo burial, he can allow *halanat hamet*, which applies to him.

Based on an inference made by the Ohr Sameiach, we should distinguish between two levels of urgency to bury. The Torah talks about burying "on that day" (Devarim 21:23), apparently both in regard to the *mitzva* to bury and the *aveira* to leave unburied. However, when the burial was already delayed for the deceased's honor, the explicit *mitzva* no longer applies, but he still must be buried when appropriate. We may claim that the inability to refuse burial applies only to long-term non-burial, which is a general matter. In contrast, the *mitzva* that normally mandates burial to be done immediately would be governed by the same rule as the prohibition to delay, which is up to the honor of the deceased and may be waived. However, the language of the Rambam does not seem to indicate this to be the case. Rather, he says that all elements of improperly refraining from burial are governed by the rule that the deceased's instructions do not remove the obligations.

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P'ninat Mishpat

The Option to Indefinitely Extend a Lease (based on Halacha Psuka, vol. 38, condensation of Darchei Hora'ah VIII, pp. 222-229)

Case: The defendant (=def) rented an apartment to the plaintiff (=pl). The contract stated that the rental is not governed by the Law to Protect the Tenant. Yet, the contract includes a clause that gives pl "the option" to extend the rental, "each time for a year," in which case, def would be allowed to raise the rent by no more than 10%. After a year, pl wanted to continue the rental but def wanted to make that conditional on a 35% increase in the rent due to high inflation, seemingly in contradiction to the clause mentioned above. Def says that he did not understand the clause, which, taken literally, would allow pl to rent indefinitely.

Ruling: *Beit din* established that the word "option" traditionally gives the renter the exclusive right to extend the rental. The contract, which mentions the relevant laws, demonstrates sensitivity to local practice. The claim of *asmachta* (an obligation one did not think he would have to honor) does not apply when local practice supports the obligation (Tosafot, Bava Metzia 66a; Chatam Sofer, Choshen Mishpat 66).

The Shulchan Aruch (CM 45:3) sets down a fundamental rule that one may not claim that one who signed a contract did not understand its content even if he does not speak the contract's language. Thus, def's claim in that regard is rejected.

The Imrei Yosher (I, 150:2) learns from the *gemara* (Bava Metzia 103a) regarding a loan of an object for as long as it is usable, that even an open-ended commitment to let someone use his object is binding even without a *kinyan* to uphold the commitment. However, regarding the Imrei Yosher's (and our) case, where the matter is not definite but depends on the decision of the other party, an open-ended commitment is not binding without a *kinyan*. The *kinyan* of *chazaka* (acting as an owner/occupier of the property) does not work because the commitment is to take effect only after a year, at which time the original *chazaka*'s imprint is lost (Imrei Yosher *ibid.*; see Shulchan Aruch, CM 191:4). The money given was also for the first year, not for the agreement to subsequently freeze the price; it too is lost as a *kinyan*.

The Imrei Yosher's assumption that the open-ended obligation is binding is questionable for a few reasons [beyond our scope]. *Beit din* agrees with the Imrei Yosher that the *kinyanim* that exist in this case are not valid. *Situmta* (use of procedures that are accepted as binding in a local society) is not valid here because, given that the contract precludes invoking the relevant law, there is no further local practice.

Given that the maximalist interpretation of the contract is invalid and that there certainly was an intent to include some rights of extension, we will accept the contract so that it allows one year's extension and assume that the words "each time" were a mistake (see Rama, CM 49:2).

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Tel: (02) 538-2710 beitdin@eretzhemdah.org Fax: (02) 537-9626

Founder and President: Harav Shaul Israeli zt"l Deans: Harav Yosef Carmel, Harav Moshe Ehrenreich
ERETZ HEMDAH 5 Ha-Mem Gimmel St. P.O.B 36236 Jerusalem 91360
Tel: 972-2-537-1485 Fax: 972-2-537-9626

Email: info@eretzhemdah.org **Web:** <http://www.eretzhemdah.org>