# Journal of Halacha and Contemporary Society

Number XXVIII

Published by
Rabbi Jacob Joseph School

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Number XXVIII
Fall 1994 / Succoth 5755

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**Rabbi Jacob Joseph School**

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It is the purpose of this Journal to study the major questions facing us as Jews in the twentieth century, through the prism of Torah values. We will explore the relevant Biblical and Talmudic passages and survey the halachic literature including the most recent Responsa. The Journal of Halacha and Contemporary Society does not in any way seek to present itself as the halachic authority on any question, but hopes rather to inform the Jewish public of the positions taken by rabbinic leaders over the generations.

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# The Journal of Halacha and Contemporary Society

Succoth 5755
Number XXVIII Fall 1994

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# The Use Of A Videoteleconference For A Get Procedure

*Rabbi Howard Jachter*

## Introduction

In a conventional situation, a *Get* procedure involves a husband and wife both appearing before a *Beth Din* to execute a *Get*. Even if both parties live a great distance from each other, they may both appear in Rabbinic Courts in their respective areas and the *Get* is executed through the use of an agent. It is especially important for the husband to present himself to the *Beth Din* since he must directly issue orders to a scribe and two witnesses to respectively write and sign the *Get*.

Sometimes, though, either the husband or the wife is situated a great distance from a *Beth Din* that is competent and recognized to supervise a *Get* proceeding. Halachic authorities have been grappling with the problem for centuries, and various proposals have been suggested and sometimes implemented. In this century, it has been suggested that the husband appoint a scribe and witnesses by speaking to them on the telephone. No consensus, however, has emerged concerning this question. This author seeks to demonstrate that almost all decisors would agree that a *Get* may be executed through the means of a videoteleconference, in which the husband, the scribe, and

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witnesses may speak to each other simultaneously.

This article will first survey rabbinic opinion regarding the older questions of whether a husband may appoint a scribe and witnesses in writing instead of making a verbal appointment, and whether the husband may make a verbal appointment without the scribe and witnesses being present. Subsequently, the newer question of appointing a scribe and witnesses by speaking on the telephone will be discussed. Then we will suggest evidence that in case of urgent need halacha permits a husband to issue orders to a scribe and witnesses via a videoteleconference.

## I. Appointing A Scribe And Witnesses In Writing

The Mishnah *(Gittin* 67b) teaches that a husband who cannot verbally appoint a scribe and witnesses because he cannot speak, but seeks to divorce his wife, is asked whether he wishes a *Get* to be written on his behalf. If he responds by nodding his head in the affirmative, then a scribe may write a *Get* on his behalf. This mishnah yields the important insight that halacha does not require the husband to make a verbal appointment. Tosafot *(Gittin* 72a *s.v. kolo)* explain "since we know that the husband wishes to have the *Get* written on his behalf, we do not require that the husband's voice be heard [by the scribe]."

The question is whether a husband's appointment of a scribe and witnesses, made in writing and not articulated verbally, is halachically acceptable. The Talmud *(Gittin* 71a) cites the statement of Rav Kahane in the name of Rav that a deaf mute who is able to communicate through writing may appoint a scribe and witnesses in writing. The Talmud, though, subsequently cites a *Braita* which conclusively rejects the opinion of Rav Kahane in the name of Rav.

Some *Rishonim* interpret the Talmud's conclusion as a rejection of the option of the husband's appointing a scribe

and witness in writing. Other *Rishonim* assert that the Talmud's rejection of Rav Kahane's opinion pertains exclusively to a deaf mute, whose appointment of a scribe and witnesses is not recognized as valid due to his status as a mentally incompetent individual.[1] Rambam[2] adopts the second approach and rules that one who is unable to talk but is capable of hearing may issue a written appointment of a scribe and witnesses.[3] Many other *Rishonim* adopt the first approach and rule that a husband may not appoint a scribe and witnesses in writing.[4] These authorities include Rosh,[5] Rashba,[6] Ran,[7] Mordechai,[8] and *Hagahot*

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1. See Rabbi J. David Bleich, *Contemporary Halachic Problems, II:* 368-375, for a discussion of this topic and its current applicability.

2. *Hilchot Gerushin* 2:16.

3. It is unclear whether Rambam's ruling applies to everyone or only to one who is unable to speak. Rabbi Joseph Karo in his work *Beth Yoseph* (chapter 120) is inclined to interpret the Rambam's position as pertaining to any man. However, in the *Shulchan Aruch* (120:5), Rabbi Karo appears to present Rambam's ruling to be limited to a man who cannot speak.

4. The obvious question on this approach is that the Mishnah's ruling permitting a mute husband to appoint a scribe and witnesses by nodding indicates that halacha does not require the husband to issue a verbal appointment. Accordingly, why should a written appointment differ from appointing by nodding one's head? Rosh *(Gittin* 7:19) explains, the difference is that nodding the head is a bodily act and is therefore analogous to speech. One may still ask, though, if writing is not also a bodily act. Rabbi Zalman Nechemia Goldberg, *dayan* in the *Beth Din* of Jerusalem, explained to this author that although writing is a bodily act, one cannot discern the writer's intention from the *act* of writing itself. Nodding the head is analogous to speech, on the other hand, because one can discern the intent of the husband from his bodily action *alone.*

5. *Gittin* 7:19.

6. Ibid. 72a *s.v. kolo.*

*Maimoniyot*.[9] These authorities cite as proof the *Tosefta*[10] which states:

> Even if [the husband] instructs the scribe in writing to write a *Get*, and similarly instructs witnesses to sign a *Get*, even though they wrote, signed, and delivered the *Get* to the wife, the *Get* is invalid until they hear verbal instructions from the husband to write and sign the *Get*.

*Shulchan Aruch* (120:5) rules in accordance with the many *Rishonim* who rule that a written appointment is not valid.[11] *Ba'er Heitev* (120:10), however, cites *Maharadach* 23 and *Haram Mitrani* (2:155) as ruling that the lenient opinions may be relied upon in a situation of extremely urgent need. This is also the view of *Get Pashut* (120:26), an authorative work on the laws of *Gittin*.

## II. A Verbal Appointment Not Issued In The Presence Of A Scribe And Witnesses

In *Gittin* 72a, the Talmud cites a *Braita* which strongly implies that a husband may not issue appointments by telling a third party to appoint a scribe and witnesses. *Rishonim*, in

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7. 33a in the pages of the Rif *s.v. heresh sheyachol*.
8. *Gittin* 417.
9. *Hilchot Geṛushin* 2:16:200.
10. *Gittin* 2:10.
11. The stricter opinion is presented in *Shulchan Aruch* as the first opinion without attribution or comment, and the lenient opinion is presented second, as "there are those who validate" a *Get* authorized by the husband in writing. Commentaries to the *Shulchan Aruch* agree that when Rabbi Karo presents two differing opinions in this manner, he is indicating that he regards the first opinion to be normative. See *Pri Megadim*, introduction to *Yoreh Deah*, rule no. 1.

turn, disagree whether the appointments may be issued in a slightly different manner: the husband designates a scribe and witnesses, not in their presence, and requests a third party to inform the scribe and witness of the appointment. Ra'ah and Ran[12] believe that such appointment is valid since the husband appoints the scribe and witnesses, and not an agent. Ramban[13] disagrees and rules that even this manner of appointment is invalid. He explains that "the scribe and witnesses cannot act as agents of the husband unless they hear [the authorization] from his mouth." It is important to note, though, that even Ramban concedes that this law applies only to divorce actions *(Gittin),* as otherwise an agent is not required to be present at the time of his appointment.

The major commentaries on *Shulchan Aruch – Bet Shmuel* (120:7), *Chelkat Mechokek* (120:12), and *Pri Chadash* (120:6) – cite both opinions without stating which opinion is regarded as authoritative. Instead, by presenting both opinions without comment, these decisors are indicating that the issue is not resolved – a *"s'feika d'dina."* Maharshal[14] rules that one may rely on the lenient rulings of Ra'ah and Ran.

*Pitchei Teshuva* (120:18) cites Maharim Mi'Brisk who also ruled leniently in a case of very urgent need and developed a novel solution to this problem. He suggested that a husband situated very far from a *Beth Din* appoint scribe and witnesses both verbally and in writing. This approach utilizes the halachic mechanism of "double doubt" – *s'feik s'feika* – in which one may rule leniently (in certain instances) if there exist two reasonable but questionable arguments which are

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12. *Gittin s.v. ve'hiksha Ha'Ramban.*
13. Ibid. 66b *s.v. amar Rav Chisda.*
14. *Yam Shel Shlomo, Gittin* 6:15.

combined into a compelling argument. In our case, this mechanism functions as follows: a verbal appointment is made to satisfy the opinions of Ra'ah and Ran, and a written appointment is made to satisfy the opinion of those authorities who rule that a written authorization is valid. Indeed, this may even satisfy the opinion of Ramban, which might rule that only a verbal appointment is invalid when issued without the scribe and witnesses being present, but might accept a written appointment executed without the presence of the scribe and witnesses.

Almost all great halachic authorities of the past two centuries have ruled leniently in cases where it would otherwise be impossible to obtain a *Get* on behalf of the wife. These authorities, generally speaking, either adopted the approach of the Maharim Mi'Brisk or ruled that a written appointment is valid if no viable alternative exists.[15]

A small minority of decisors do not accept the use of this procedure even in the most dire circumstances. These include *Pri Chadash (Even Haezer* 120:6) and *Chazon Ish (Even Haezer* 85). However, Rabbi Eliezer Waldenburg *(Tzitz*

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15. These authorities include *Beit Ephraim (Even Haezer* 80), *Keter Kehuna* (no 76), *Divrei Chaim (Even Haezer* 2:86), *Sho'eil U'Meishiv* (1:1:49), *Tzemach Tzedek He'Chadash (Even Haezer* 267), *Ein Yitzchak (Even Haezer* 2:6), *Aruch Hashulchan (Even Haezer* 120:64), *Maharsham* (3:352 and 5:44), *Ridbaz* (no. 2), *Avnei Neizer (Even Haezer* 2:156), *Chelkat Yoav (Even Haezer* 30), *Shaarei Deah* (1:141 and 2:120), *Even Yekara (Even Haezer* 1:40 and 1:42), *Zekan Aharon* (2:114), *Heichal Yitzchak (Even Haezer* 2:35), *Iggerot Moshe (Even Haezer* 1:116 and 1:119), *Minchat Shlomo* (no. 78), and *Tzitz Eliezer* (10:47).

Rabbi Moshe Feinstein in his responsum posits a somewht different solution to the problem, and presents a step-by-step guide on how to execute his suggested approach. Some Rabbinic Courts have adopted Rabbi Feinstein's suggestion in practice.

*Eliezer* 10:47) of the Supreme Rabbinic court in Jerusalem notes that "virtually all" Rabbinic Courts in Israel permit an authorization in writing in case of very urgent need. Rabbi Gedalia Schwartz, the head of both the *Beth Din* of the Rabbinical Council of America and the *Beth Din* of Chicago, reports that this is also, generally speaking, the practice of Rabbinic Courts in North America.

## III. Appointing A Scribe And Witnesses By Telephone

A telephone can be useful in executing a *Get* in a situation where a written appointment of a scribe and witnesses cannot be performed. Examples of this situation include: (1) A *Get* must be performed in short order and there is no time for three observant Jews to go to the husband and obtain from him a written appointment of a scribe and witnesses. (2) A husband is located in a remote or dangerous area where three observant Jews would be unable to enter. (3) A husband is situated in a country which would not permit three observant Jews to enter. (4) A husband refuses to sign a document authorizing a scribe and witnesses to write and sign a *Get* but will issue a verbal appointment.

Rabbinic authorities have vigorously debated this issue for many years,[16] but no consensus has emerged.[17] Some

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16. For discussions of this issue see *Beit Yitzchak (Even Haezer* 2:53), *Shaarei Deah* (1:194), *Maharshag* (2:250), *Tzitz Eliezer* (10:47), *Beit Avi* (1:155), *Pri Yehoshua* (no. 22), Rabbi Yosef Teumim *(Ha'Pardes* 5704), Rabbi Gedalia Felder *(Nachlat Tzvi* pp. 213-216, and Rabbi Moshe Steinberg *(Ha'Darom,* Nissan 5727). Rabbi Elimelech Schachter, in *Sefer Kevod Ha'Rav* pp. 268-272, writes that both Rabbi Joseph B. Soloveitchik and Rabbi Moshe Feinstein told him that a husband may appoint a scribe and witnesses on the telephone. In an essay entitled *"Kabalat Eidut*

Rabbinic Courts rule leniently if there is no alternative, and some do not. The debate is focused primarily on two issues: First, does an appointment of a scribe and witnesses on the telephone satisfy Ramban's requirement that the husband appoint a scribe and witnesses directly? Second, can the husband speaking on the telephone be properly identified?

Rabbi Yitzchak Schmelkes *(Beit Yitzchak, Even Haezer* (2:53) rules that an appointment issued over the telephone is invalid since the scribe and witnesses have not heard the actual voice of the husband (most authorities agree that halacha does not recognize an electronically-transmitted voice as the equivalent of the actual voice of the speaker).

Most authorities, on the other hand, do not believe that Ramban requires the scribe and witnesses to hear the actual voice of the husband. Rather, they believe that Ramban requires direct communication between the husband and the scribe and witnesses, which is accomplished when an appointment is issued over the telephone. Those authorities who do not permit an authorization to be executed over the telephone, generally speaking, have not accepted Rabbi Schmelkes' agrument. Instead, they rule stringently because an individual cannot be properly identified over the telephone and because a fraud is relatively easy to perpetrate over the telephone.

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*Al Iska She'nestah Be'teliphon"* (*Techumin* 12:300-306) Rabbi Chaim David Halevi discusses whether hearing a telephone conversation constitutes admissable evidence in a *Beth Din* proceeding concerning a monetary dispute.

Rabbi Ezra Basri of the Jerusalem Beth Din informed this author that his *Beth Din* occasionally executes a *Get* where the husband issues his appointments both by telephone and in writing.

17. For discussion of this topic see *Minchat Shlomo,* no. 9; *Yechave Daat* 3:54; and Rabbi J. David Bleich, *Contemporary Halachic Problems,* p. 231.

The authorities who rule leniently believe that the husband may be identified by means of voice recognition. They note that the Talmud *(Gittin* 23a and *Chulin* 96a) recognizes the viability of voice recognition. They also cite the halacha which states that in case of very urgent need a *Get* may be written even if the parties have not been identified.[18]

## IV. Appointing A Scribe And Witnesses By Videoteleconference

Although no consensus has emerged regarding issuing an appointment over the telephone, this author believes that it is possible that a consensus of rabbinic opinion will emerge to permit the issuance of appointments of a scribe and witnesses by videoteleconference. Interestingly, Rabbi Schmelkes *(Beit Yitzchak, Even Haezer* 2:53) anticipated the invention of the videoteleconference and indicated[19] that if such an invention arose, it could *not* be used for a husband's appointment of a scribe and witnesses. Rabbi Schmelkes believes Ramban requires hearing the actual voice of the husband and not an electronically-transmitted voice. When Rabbi Schmelkes' responsum was mentioned to Rabbi Zalman Nechemia Goldberg of the Jerusalem *Beth Din,* he

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18. *Shulchan Aruch* 120:3, *Taz* 120:13, *Pitchei Teshuva* 120:26, but see *Noda Be'Yehuda* II: *Even Haezer* 123 and Rabbi Melech Schachter, *Sefer Kevod Ha'Rav* pp. 268-272.

19. He writes that a videoteleconference may possibly be used for a wife to appoint an agent to accept a *Get* on her behalf. The clear implication, as noted by Rabbi Waldenburg *(Tzitz Eliezer* 10:47), is that a husband would not be permitted to do so. Ramban's stringent ruling applies only to the husband's appointment of a scribe and witnesses and not to the wife's appointment of an agent. A wife may appoint an agent even not in the latter's presence.

pointed out that Tosafot, in *Gittin* 72a (mentioned earlier), explain why a husband who is unable to speak is able to appoint a scribe and witnesses by nodding his head: Since we know what the husband wishes, we do not require the scribe and witnesses to hear his voice. Tosafot's comments appear clearly to disprove Rabbi Schmelkes' contention that the scribe and witnesses must hear the actual voice of the husband.

Rabbi Goldberg also pointed out that the Chazon Ish and Rabbi Moshe Feinstein interpret Ramban's position very differently than does Rabbi Schmelkes. Chazon Ish *(Even Haezer* 85) writes that Ramban requires "that the will of the husband and the will of the scribe and witnesses should be unified in one moment, and that the husband should be aware of the will of the scribe and the scribe should be aware of the will of the husband, and it all should occur simultaneously." This requirement is certainly fulfilled if a husband appoints the scribe and witnesses by videoteleconference.

Rabbi Moshe Feinstein *(Iggerot Moshe, Even Haezer* 1:116) asserts that Ramban essentially does not require the scribe and witnesses to be present when the husband issues the order, but rather, that they be absolutely convinced that it is truly the husband who has issued them the order to write and sign the *Get.* Since a scribe and witnesses would see and hear the husband speaking to them on a videoteleconference call, a *Get* executed thereby might be valid even according to Ramban.

Rabbi Goldberg offered the following analogy to illustrate that the scribe and witnesses are not required to hear the actual voice of the husband.[20] A husband is standing a great

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20. It is worthwhile to note that utilizing this type of analogy

distance from the scribe and witnesses so that when he issues his orders, they only see his lips moving but do not hear his voice. If the scribe and witnesses are able to read the lips of the husband, they may write and sign a *Get*, since they are certain of the husband's will. The *Get* is valid since the husband communicated his wishes by an action of his body. Similarly, when a husband appoints a scribe and witnesses by videoteleconference, they are aware that he appointed them by an action of his body, and the *Get* may be written and signed even though they have not heard the actual voice of the husband.[21]

Rabbi Waldenburg[22] describes how rabbinic decisors have rejected Rabbi Schmelkes' contention, in the following interesting manner. According to Rabbi Schmelkes, an individual who uses a hearing-aid to hear would not be fit to serve as a scribe to write a *Get*, since he cannot hear the actual voice of the husband. However, Rabbi Waldenburg relates that in Israel recently there was a scribe who wore a hearing aid and wrote *Gittin* for many years in various Rabbinic Courts, without encountering any objection from

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as a component of a halachic analysis is characteristic of the halachic approach of Rabbi Goldberg's eminent father-in-law, Rabbi Shlomo Zalman Auerbach; for example, see *Minchat Shlomo* p. 61, p. 95, and p. 110.

21. One should also note that a careful examination of Ramban's words (and the words of *Beit Shmuel* 120:7 and *Chelkat Mechokeik* 120:12, who cite Ramban) reveals that Ramban does not specifically require the husband to be *physically* present before the scribe and witnesses. Rather, he specifically requires that there be direct contact between the husband and the scribe and witnesses. In addition, it is clear from the words of Chazon Ish and Rabbi Feinstein, that they do not believe that Ramban requires the husband to be physically present before the scribe and witnesses when he issues his orders to them.

22. *Tzitz Eliezer* 10:47

any rabbinic judge.

The opinions of Ra'ah and Ran, who rule that the husband may make an appointment without the presence of the scribe and witnesses, should also be considered as a factor to accept an appointment made through the use of a videoteleconference. Although halachic authorities do not accept Ra'ah and Ran's opinions as normative, their view is not rejected and undoubtedly may serve as a *"snif l'hakel"* – a consideration for a lenient ruling.

The main focus of concern of those who do not accept the use of a telephone for the purpose of a *Get* is fear of fraud. This concern is obviated, though, with the use of a videoteleconference. One can see (on more sophisticated models) displayed on the screen, any pieces of identification that a *Beth Din* normally requests from people who appear before them.

If one would counter that a fraud is still possible to be perpetrated in the use of a videoteleconference, one could reply that documents such as passports and drivers' licenses, which can be forged, are routinely accepted as identification in Rabbinic Courts in Israel and in the United States. Apparently, Rabbinic Courts accept documents that cannot be forged easily and are not concerned with the possibility of professional forgery (although a skillful *Beth Din* is required to check carefully in order to prevent incidence of fraud).

Similarly, it is not easy to perpetrate a fraud on a videoteleconference and would require a professional to do so; therefore it should be acceptable for use in a *Get* proceeding. However, since this technology is still in relative infancy, no clear halachic consensus has as yet emerged.

# Pruzbul

*Rabbi Alfred S. Cohen*

## Sources And Reasons

In the Torah, we find the command to observe a Sabbatical Year, the *shemita* (*Devarim* 15:1–11). There are two aspects of this mitzvah: the land is not to be worked and all debts are cancelled. The latter feature is not as well known as the imperative to let the fields lie fallow. Moreover, unlike the agricultural aspect of *shemita*, the directive cancelling all debts between Jews applies not only in Eretz Yisrael, but all over the world.[1] Wherever a Jew owes another Jew money,

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1. "*Nohaig bechol makom uvechol zeman.*" This means that when it is in force, the directive applies in all places and for all times. However, the imperative to cancel debts (*shemitat kesafim*) is in effect only when the Jubilee (*yovel*—the fiftieth year) is also observed. Since the Jubilee is no longer applicable today, there is no biblical imperative to observe *shemita*. (Tosafot to *Gittin* 36b indicate that the rabbis did not institute that *yovel* should be observed, on a rabbinic level, because of the hardship involved in not farming the land for two consecutive years.)

However, according to most rabbinic authorities, there is still a mitzvah *derabbanan*— to keep the *shemita* with all its requirements because the rabbis have decreed that we should continue the biblical practice, although there are some who consider that there is not even a rabbinic requirement to cancel debts. See Ramo, *Choshen Mishpat* 67:1 and *Aruch HaShulchan*, ibid, note 1.

Even though only a minority of authorities consider that *shemitat kesafim* is no longer in practice, that minority opinion has been

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and the debt is due, that debt is cancelled by the *shemita* year (except under specific conditions which will be explicated later).[2] Thus, this aspect of *shemita* directly affects many more people than do the agricultural laws; additionally, in modern society where so many undertakings are financed by loans which extend for a number of years, the biblical fiat cancelling all debts has far–reaching consequences.

The Torah was not oblivious to the difficulties attendant upon not being able to collect monies owed, and therefore specifically warns about trying to avoid getting "stuck" with an unpaid loan by the simple expedient of not lending money close to *shemita* time, for fear that it will not get paid back in time:

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relied upon by many, who therefore took no steps to assure that debts were not automatically cancelled (by writing a *pruzbul*). The Rosh (14th century) writes in strong protest of what apparently was the practice in his society, that people did continue collecting their loans, but he does not seem to have been successful in stopping the practice. However, the Ramo and the author of *Shulchan Aruch HaRav* do state that although one may rely on the lenient opinions, a truly pious person should write a *pruzbul* to cover his loans.

The prevailing and accepted position today among rabbinic authorities is that *shemitat kesafim*, cancellation of debts, does apply today on a rabbinic level. Therefore, if one does not want his loans to be cancelled, he must write a *pruzbul*.

2. The majority of *poskim* consider that the debts are cancelled automatically —*hafka'ata demalka akarkafta degavra*. This means that if a person does collect his debt, he is a thief (*Minchat Chinuch* 477:4). But the *Yereim* 164 maintains that the borrower has to take the lender to *beth din*, which forces the lender to declare that the loan is forgiven. But the *Minchat Chinuch* 84 disagrees, pointing out that if the *Yereim* is right, the mitzvah would not apply to women, who are exempt from all positive mitzvot which are time bound.

> Be very careful lest there be in your heart an evil thing, saying,"The seventh year is approaching, the Sabbatical Year," [lest] your eye be bad towards your brother [who is] poor, and you will not lend to him—and this will be a sin for you. (*Devarim* 15:9)

The *Sefer HaChinuch*, 477, explains the underlying motivation of the Torah in positing this mitzvah:

> And we should establish in our hearts great trust and confidence in the Lord, Blessed be He. Furthermore, from this [trust] there will arise a strong fence and a barrier of iron, to make [us] be distanced from theft and from avarice for that which belongs to one's fellow man, because in our hearts we will understand, by a logical reasoning [*kal vechomer*], that if even in a case where a person has loaned his own money, the Torah tells him he must leave it in the hands of the borrower when the *shemita* year comes, how much more so must one not steal or covet that which belongs to someone else.

In *Gittin* 37, the Talmud rules that loans of all types are annulled by *shemita*, even those written with a contract or secured by property.[3]

## The Pruzbul Is Instituted

Despite the important moral and religious lessons to be learned from the mitzvah of *shemitat kesafim* (cancellation of debts), and despite the fact that observance of this practice is a specific Torah directive, covered by both a positive command—to cancel—and a negative one—not to forego

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3. In the commentary of *Torah Temimah* to *Devarim* 15:11, there is discussion of the possibility that if a person did collect his debts after *shemita* despite the biblical prohibition, the Jewish court might force him to return it to the borrower.

lending in order to avoid losing the loan—the reality is that when economic circumstances became difficult, not all people were able to live up to these high ideals. The rich simply refused to lend money to the poor as the Sabbatical Year approached. Consequently, some two thousand years ago, Hillel the Elder came to the conclusion that drastic action had to be taken. Thus, he instituted the *pruzbul.*

Rabbis do not have the authority to cancel a Torah imperative nor to override that which the Torah forbids. However, Hillel realized that, in effect, observance of the law mandating cancellation of all debts—part of whose rationale is to prevent the poor from being saddled with a crushing burden of debts—resulted in the poor being deprived of the ability to borrow, so that they were actually worse off than they might have been without the protection of *shemitat kesafim.* Furthermore, by not lending, the rich were committing a severe transgression, ignoring the Torah's command to help out the poor. Under the circumstance, Hillel devised a system—the *pruzbul*— which would permit a debt to be collected even after the Sabbatical Year, yet without violating the Torah's command. In this way, he would actually be *helping* all Jews—the rich would not shirk their responsibility to help the poor, and the poor would benefit by being able to borrow money to tide them over a rough spot.

The *pruzbul* is a legal device which, in effect, transfers a private debt to the *beth din,* the Jewish court. *Shemitat kesafim* cancels only debts between people, not monies owed to the court. Therefore, the court is able to collect the debt whenever it desires, even after the Sabbatical Year. Moreover, Jewish courts have the power to transfer assets as they see fit (*hefker beth din hefker*), and they are able to transfer the court's lien—the loan—to the original lender and make him the "agent of the court" in collecting it; then the court can transfer these monies to him. In this way, through use of halachic

technicalities which are perfectly legal, Hillel in effect devised a system for avoiding the consequences of *shemitat kesafim.*[4]

Despite the technicalities, the Gemara wonders how Hillel could undertake to nullify a practice mandated by the Torah.[5] Two answers are offered: First of all, *shemitat kesafim* applies (biblically) only when the laws of *shemita* apply to land and agricultural produce. Since nowadays the biblical law of *shemita* is not in effect, neither is the law for cancelling debts, which nowadays is only a rabbinic institution. Since it is only a rabbinic law, the rabbis are empowered to cancel their own law by implementing the device of the *pruzbul.* The second answer given is that even if *shemitat kesafim* is still viable as a *Torah law*, nevertheless, Jewish courts have the power to confiscate property. It was this power which Hillel employed to have the courts take possession of private debts and collect them as they wished.

In any event, the "bottom line" is that if there is cancellation of debts today, it is due to rabbinic fiat, and the rabbinic device of *pruzbul* enables the lender to collect his debts even after *shemita.*

## Practical Implementation

*Poskim* discuss whether the *pruzbul* must be written and

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4. The Mishnah in *Shevi'it* explains how this is done, with a simple formula. A much longer version of the *pruzbul* can be found in *Melechet Shlomo,* chapter 10, mishnah 4, *Shevi'it.* A facsimile of the *pruzbul* used by the Chazon Ish is printed in his biography, *Pe'er Hador,* Vol. II, p. 245. Other versions of the *pruzbul* are recorded in *Iggerot Moshe, Choshen Mishpat* 19, and *Minchat Yitzchak* 6:160. The standard text is printed in the *Luach* of Ezras Torah.

5. *Gittin* 36a. Rashi, Tosafot, and the Meiri discuss whether *yovel* was in effect in the days of Hillel.

executed in front of *beth din* or whether an individual can simply fill out a *pruzbul* and sign it in the presence of two witnesses. The question arises due to an ambiguity in the *Yerushalmi* (the Palestinian Talmud),commenting on the Mishnah which teaches about the *pruzbul*: "and even if they are in Rome." Does this mean that the lender doesn't have to be physically in the presence of the judges —*they* could be in Rome, while he is here[6] — or does the phrase indicate that even if the *debts* are in Rome, the lender must execute the *pruzbul* before the judges?[7]

The *Shulchan Aruch Harav*[8] writes that the lender should write a *pruzbul* and then have two witnesses sign to the effect that he transferred his debts to a *beth din*. If the judges of the *beth din* are the ones who sign, so much the better. Rav Ovadia Yosef, in *Yechave Da'at*,[9] rules that it is sufficient to sign it in the presence of witnesses, without a *beth din*. Ramo is even more lenient, declaring that if the lender merely declares orally that such is his intention, he does not have to execute a *pruzbul* in writing.[10]

By somewhat circuitous logic, the *Aruch Hashulchan* concludes that there is no need for a *pruzbul* at all: Since nowadays, the *beth din* no longer has the power to collect debts, the *pruzbul* is actually meaningless. Therefore, rather than have the lender violate either the biblical prohibition of pressuring the borrower to pay back (before *shemita*) or

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6. Mordechai, *Gittin* 379.

7. Ramban, *Gittin* 36b; Rashba, 2, 313.

8. *Choshen Mishpat* 67:21.

9. 4:63.

10. *Choshen Mishpat* 67:20. This is a leniency which may be relied upon if it is very late on *Erev Rosh Hashanah*, and there is no time to write out a *pruzbul*.

the biblical command to be sure to lend to the poor, we rule that the rabbinic law cancelling debts is void. Thus, there is no need for a *pruzbul.*[11]

A further question raised by the Gemara in *Gittin 36a* is whether the *takkana* (regulation) was instituted by Hillel for all times or only for the generation in which he lived, which was wracked by great political and financial woes. Determining Hillel's intent is crucial. If he ruled only for his own generation but thereafter people continued the practice of their own volition, then any later *beth din* may alter or suspend his *takkana* as it sees fit. However, if his regulation was instituted as a permanent one, it would require a *beth din* which is "greater in number and in wisdom" than the one which ordained the rule in the first place, to cancel it. It goes without saying that no *beth din* in later generations is greater than the one over which Hillel the Elder presided. Consequently, the *pruzbul* must be considered a permanent regulation, *even if the reason for instituting the regulation in the first place no longer applies.*[12]

The Gemara concludes that Hillel instituted the *pruzbul* for all future generations, but that it is valid only if executed by a Jewish court of experts, all of whom are well versed in the laws of *shemita* and who have been appointed as judges by the people of their city.[13] The Meiri[14] opines that since we no longer have judges of this caliber, we should not rely on a *pruzbul.* Ramo, however, rules that any *beth din* is qualified to write a *pruzbul,* because it is a rabbinic law.[15]

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11. Ibid. 67:10. *Minchat Yitzchak* 10: 140.
12. Meiri, *Gittin* 36a.
13. *Shulchan Aruch, Choshen Mishpat* 67:18.
14. *Gittin* 36b.
15. *Shulchan Aruch,* ibid.

The Rif and the *Tur* have also adopted this position.[16] But the *Shach*[17] challenges the Ramo, citing the Mabit, who wrote:

> And in the last Sabbatical Year, we [the court] annulled a number of *pruzbuls* which were not made by an "illustrious" [*chashuv*] *beth din* of the city and others *[pruzbuls]* were written in their stead, by an "illustrious" *beth din*.

## When Are Debts Cancelled?

The Torah says, "At the end (*miketz*) of seven years, you shall make *shemita," Devarim* 15:1. In his commentary, Ramban notes that there is some question as to which end of the *shemita* year cancels debts—the onset of the year or its conclusion, since the word *miketz* tolerates either interpretation. Indeed, there is a striking lack of consistency among halachic decisors as to the proper time for executing a *pruzbul*.[18]

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16. *Shevet Halevi* 4:193 discusses whether the *pruzbul* is proof that one's IOU's were given to *beth din* for collection or whether the document simply allows the lender to collect his debts.

17. Ibid., note 5. See *Minchat Yitzchak* 10:140 about writing a *pruzbul* at night, and whether the judges may be related to one another.

18. If a person did make a *pruzbul* at the beginning of the Sabbatical Year, he would have to make another one at the end, to cover loans transacted in the course of the year; *Chelkat Yaakov* 3:143. This opinion creates a difficulty when we consider the opinion of the *Shulchan Aruch Harav,* who said to make the *pruzbul* at the end of the sixth year, and if not, to make one at the end of the seventh. But even if a *pruzbul* were written at the end of the sixth year, there would still be a need to write another one at the end of the year, to cover the loans made during the year. See *Yechave Daat* 4:62 for the case of a person who makes a *pruzbul* during the year and thereafter makes a loan.

According to the Rambam, a person may collect monies owed him throughout the seventh year, and it is only at the conclusion of that year that the cancellation goes into effect. According to the Rosh,[19] however, even during the seventh year, it is forbidden to ask for repayment, although the debt is not actually cancelled until the end of the year. In other words, if the borrower offers to repay, it is permitted to accept.

The *Shulchan Aruch Harav* writes that it is proper (*lechatchila*) to execute the *pruzbul* at the end of the sixth year..."but if he didn't do it at the end of the sixth year, he should do it in the seventh."[20] Rav Ovadia Yosef brings the *Chatam Sofer* who reports that his teacher, Rav Natan Adler, "made a *pruzbul* at the end of the seventh year...but I do not know for sure that he did not write a *pruzbul* at the end of the sixth year..."[21]

According to the strict reading of the law, in order for a *pruzbul* to be effective, the borrower must own real estate, for the property is considered as "set aside" for the collection of the debt. Thus, in a sense, the debt has already been collected prior to the seventh year. If the borrower does not own land, the lender can give him a present of land —even

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19. *Gittin* 4:20. However, note the Radvaz 1:5, who distinguishes between a loan made during the seventh year and one made before the year.

20. No. 36. The difficulty with this ruling is that a *pruzbul* written at the end of the sixth or the beginning of the seventh year does not cover loans made during the whole of the seventh year.

In his *Shearim Metzuyanim Behalacha*, part 3, 128:25, Rav Braun cites the Chazon Ish who reasoned that since the Gemara wrote that a *pruzbul* can even be written on *chol hamoed*, of necessity it must have meant during the sixth year.

21. *Yechave Daat* 4:62.

a flower pot with a hole in the bottom, set on ground, is sufficient, for the dirt in the pot is considered as receiving its nourishment from the ground. The "gift" of land can be effected even without the knowledge or approval of the borrower, based on the assumption that he implicitly agrees to all conditions which make it possible for him to borrow money. However, if the borrower specifically refuses the acquisition of "land", it cannot be transferred to him against his express will.[22] Halachic decisors note various leniencies on this point, such as permitting a spouse's land to serve as security for the debts of the other spouse. This leniency is possible since the law of *shemitat kesafim* today is only rabbinic in nature.[23]

## Exemptions

There are various types of debts which do not require a *pruzbul* and can be collected after *shemita*, regardless. In this category are included debts which arise as a penalty or fine—such as the money a man must pay his victim for rape or seduction, or a woman's *ketubah* (marriage contract). Also, a loan secured with a pawn or some other security can always be collected, as can money owed for goods taken on credit.[24] An exemption is granted for money owed to an orphan, for "the *beth din* is [considered to be] the father of

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22. *Choshen Mishpat* 67:22. *Aruch Hashulchan* considers that a further reason that *pruzbul* was not done was due to the lack of land ownership by either the lender or borrower.

23. In view of the fact that there is virtually no one who does not own or borrow or rent land, the *Pitchei Teshuva*, note 4 on No. 67, questions when it is that a *pruzbul* cannot be written?!

24. See *Mishnat Aharon* II 75; also Tosafot to *Ketubot* 55, *s.v. Shevi'it*; also 272 and *Shevi'it* 1.

orphans."[25] Rashba writes that someone who has pledged to a charity fund must pay even with the passage of the seventh year," for the *beth din* is in a sense responsible for the charity fund...and it is as if the pledges had been handed over to *beth din."*[26] An exemption is likewise granted to a "loan for ten years", i.e., a long-term loan which has a specific collection time, after *shemita.* The thinking is that since the lender cannot request payment during *shemita,* he cannot transgress the commandment "do not dun" (*lo yigoss, Devarim 15:2),* and *shemitat kesafim* applies only to those loans where payment can be demanded during *shemita.* Finally, if a person hands his loans over to a Jewish court and says to them, "You collect the debt for me," the debt is not affected by *shemita.*[27]

The Mishnah in *Shevi'it* 10:5 indicates that if one borrowed money from five persons, he must write a *pruzbul* for each person. However, Rav Ovadia Yosef explains that this is true only if each of the five is using his own money. But if money is borrowed from a group of people, lending money as a consortium or as a bank, it is enough for one of them to execute the *pruzbul* on behalf of the group.[28]

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25. Rashi rules that this regards a debt inherited from their parents, but Ran rules that it applies even to debts that they have incurred themselves.

26. *Chidushei HaRashba, Bava Kama* 36b. However, Rav Yosef, *Yechave Daat,* IV, 63, instructs the administrator of a charitable fund to write a *pruzbul* for all outstanding pledges.

27. The question arises, then, why there was a need to institute the *pruzbul,* since there are so many other ways to avoid one's loans being nullified? See the *Mishnah Rishonah* to *Shevi'it 10:3;* also, the Ritva to *Makkot* 3b, and *Shevet HaLevi* IV, 193.

28. *Yechave Daat* 64. Rav Yosef also discusses whether one of the group can be an agent for the others.

## Producing The Pruzbul

Human psychology, as understood by the Gemara, led the rabbis to accept the principle that a person does not sin when there is no reason or for no benefit: In the words of the Gemara, if kosher food is readily available, no Jew would ignore the kosher food and deliberately eat non-kosher food. By the same token, our Sages believed that since it is a simple matter for a person to write a *pruzbul*, why would anyone not take advantage of this simple device and save himself a lot of trouble? Thus, they said, if someone maintains that he did write a *pruzbul* but has misplaced it, we believe the claim and do not require him to bring proof that he did execute the document.[29] Moreover, if a person produces an IOU to show that he is owed money, we inform him that if he wrote a *pruzbul* he is allowed to collect the debt (and we do not fear that thereby we are inducing him to lie about having done it).

That was the trusting attitude which prevailed some fifteen hundred years ago. But already some six hundred years ago, we see that the rabbis were not so sure they could rely on common knowledge about the *pruzbul*. The *Tur*,[30] citing the Rosh, remarks that the understanding of common behavior expressed in the Gemara might have been true to life then, but already in his time, he doubted that knowledge of the *pruzbul* was all that widespread, nor did he believe that most people were aware of how to execute one. Therefore, the Rosh wrote,

> When someone comes to me and claims that "I had a *pruzbul* but it got lost," I ask him, "What is a *pruzbul*, and why did you write it, and for whom did you

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29. *Gittin 36b*. Tosafot write that no oath is required either.
30. *Choshen Mishpat* 67.

> write it?" until he is caught in his lie. Never did anybody in Germany merit [to get away ] with this claim before me.

Despite the citation of the *Tur*, the *Shulchan Aruch*[31] rules that a person who claims that he did write a *pruzbul* is believed. The only exception is in a case where a trial was held, and no *pruzbul* was mentioned, and only thereafter did the person advance the claim that he had had a *pruzbul.*

A *pruzbul* which is pre-dated is valid,[32] since the document is valid anyway only for loans made prior to its execution. However, a post–dated *pruzbul* is not valid, since it may cover debts not yet incurred at the time the document was written.

A *pruzbul* is a fairly straightforward legal document, which nevertheless requires a modicum of expertise to be executed properly. Since the need arises only once in seven years, many people are either unaware of the requierement or intimidated by their lack of familiarity with the provision. Hopefully, the present study will help to allay these negative sentiments, so that the mitzvah of *shemita* may be observed more properly.

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31. Ibid , 33. See the Mishnah *Ketubot* 9:9 and Rambam, *Hilchot Shemita VeYovel* 9:24.

32. *Shevi'it*, chapter 10, mishnah 5. *Tosafot Yom Tov* explains why the document is not rendered invalid by virtue of the false statement about its date.

# Eruv Tavshilin

*Rabbi Elli Leibenstein*

## Introduction

A person may not prepare on Yom Tov for Shabbat (*"Hachana"*).[1] For example, a person may not cook or bake food on Yom Tov in order for it to be eaten on Shabbat. To permit a person to prepare for Shabbat when Yom Tov falls on a Friday, the rabbis instituted the *Eruv Tavshilin.* This consists of two foods, one cooked and one baked, that a person sets aside the day before Yom Tov and over which he recites a specific rabbinic formula to the end that setting aside these prepared foods permit the preparation of food on Yom Tov for Shabbat. Once a person has made an *Eruv Tavshilin,* he may prepare on Yom Tov for Shabbat.

While seemingly simple, the *Eruv Tavshilin* has spawned many questions which are pertinent to today's society. For example, may a person prepare *cholent* on Yom Tov for Shabbat even though the *cholent* will not be edible on Yom Tov? May a person wind a watch, wash dishes, roll a *Sefer Torah,* make beds or fold clothes on Yom Tov for Shabbat if he did make an *Eruv Tavshilin;* and if he did not, are these preparations for Shabbat prohibited? Or does even an *Eruv Tavshilin* not permit a person to perform these

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1. Likewise, a person is not allowed to prepare from one day of Yom Tov for the next day of Yom Tov or for a regular weekday.

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activities because they do not involve the preparation of food?

## I. Talmudic Sources Regarding Eruv Tavshilin

### *A. Biblical Restrictions*

The *Eruv Tavshilin* is a rabbinic mechanism allowing a person to prepare on Yom Tov for Shabbat. Rabbis, however, do not have the power to permit something which the Torah prohibits. Generally they are permitted only to allow an activity that otherwise would be prohibited only rabbinically. Thus, it must be only the rabbis and not the Torah which prohibit preparation on Yom Tov for Shabbat (and thus the rabbis can authorize an *Eruv Tavshilin*). The question is why it is not prohibited biblically, since *hachana* – preparation – is usually understood as biblically forbidding preparation on Yom Tov for the next day.

This question forms the basis of a dispute in the Talmud.[2] Rabbah holds that biblically a person may cook on Yom Tov for Shabbat because of the principle of *Ho'il*,[3] which allows a person to cook food on Yom Tov for Shabbat because theoretically the food could be used on Yom Tov in case guests were to arrive on Yom Tov. Thus, since the food could be used on Yom Tov, it may be cooked on Yom Tov, and this is not considered *hachana* (at least, not biblically). Rav Chisdah offers another explanation: He holds that *hachana* is a biblical prohibition only against preparing on Yom Tov for *a weekday*, but not for Shabbat.

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2. *Pesachim* 46b.

3. Literally the word *Ho'il* means "because." It is the first word of a phrase that translates into "because the food could be used if guests were to arrive (on Yom Tov), it is also permitted (on Shabbat)."

Under either explanation, biblically a person may prepare on Yom Tov for Shabbat. This is only prohibited rabbinically.[4] Accordingly, the rabbis had the power to develop a mechanism, *i.e.,* the *Eruv Tavshilin,* to permit preparation on Yom Tov for Shabbat even though otherwise it would be rabbinically prohibited.

Many *Poskim* state that Rabbah and Rav Chisdah disagree if a person may cook for Shabbat immediately before the end of Yom Tov. In that situation, the person would not be able to serve the food to guests because the food would not be edible on Yom Tov.

According to Rabbah, the principle of *Ho'il* does not apply in such a situation because the food could not be served on Yom Tov. Accordingly, in such a situation a person is biblically prohibited from cooking on Yom Tov for Shabbat. Therefore, an *Eruv Tavshilin* does not allow a person to begin cooking immediately before the end of Yom Tov for Shabbat because an *Eruv Tavshilin* cannot permit an activity that is biblically prohibited.[5]

According to Rav Chisdah, on the other hand, biblically a person may always cook on Yom Tov for Shabbat. Thus, an *Eruv Tavshilin* would allow a person to start cooking even immediately before the end of Yom Tov.[6]

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4. See the next section regarding the reason the Rabbis prohibited a person from preparing on Yom Tov for Shabbat.

5. *Magen Avraham, Introduction to OC* Section 527, in the name of *Tosafot, Pesachim* 46b, *s.v. Rabbah.* See also *Beit Yosef OC* Section 527, in the name of *Tosafot* and *Hagahot Maimuniyot, Hilchot Yom Tov,* 6:1, in the name of *Tosafot.* But see *Beit Yosef OC* Section 527, where he states that the Rambam (*Hilchot Yom Tov* 6:1) holds that Rabbah agrees with Rav Chisdah that biblically a person may always cook on Yom Tov for Shabbat.

6. *Magen Avraham,* ibid.

This dispute arises frequently regarding whether a person may start cooking *Cholent* on Yom Tov for Shabbat immediately before the end of Yom Tov.[7] According to Rabbah, because it must be possible to serve the food to guests on Yom Tov, the *Cholent* must be edible on Yom Tov and therefore one could not start cooking it immediately before the end of Yom Tov. According to Rav Chisdah, an *Eruv Tavshilin* does allow a person to start cooking *Cholent* even immediately before the end of Yom Tov. This dispute will be discussed further at the end of the next section.

*B. Why The Rabbis Required an Eruv Tavshilin*

Given that preparing on Yom Tov for Shabbat is not biblically prohibited, why did the rabbis prohibit it? Why did they permit it if he made an *Eruv Tavshilin?*

Rava and Rav Ashi dispute the reason for the rabbis' prohibition to prepare on Yom Tov for Shabbat.[8] Rava explains that they were concerned lest a person use all his good food on Yom Tov, leaving no good food for Shabbat. Accordingly, the rabbis required a person to make an *Eruv Tavshilin* to remind him to leave some of his good food for Shabbat. Rav Ashi holds that the rabbis were concerned that, if a person were allowed to prepare on Yom Tov for Shabbat without making an *Eruv Tavshilin,* he might think he may also prepare on Yom Tov for weekdays. Therefore, they required an *Eruv Tavshilin* to remind a person that he may prepare on Yom Tov only for Shabbat and not for weekdays.

Many *Poskim* opine that Rav Ashi must agree with Rav Chisdah that *Hachana* only biblically prohibits a person from preparing on Yom Tov for weekdays, but not for Shabbat.

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7. See *Mishbetzot Zahav OC,* Section 259:3.

8. *Beitzah* 15:

Accordingly, the rabbis required a person to make an *Eruv Tavshilin* to allow him to prepare on Yom Tov for Shabbat (which is permitted biblically) in order to remind him that he may not prepare on Yom Tov for weekdays (which is prohibited biblically). Rav Ashi cannot hold like Rabbah that *hachana* limits a person from preparing on Yom Tov for Shabbat as well as for weekdays and that it is only the concept of *Ho'il* which biblically permits preparation on Yom Tov for either Shabbat or weekdays. According to Rabbah, it makes no sense to prohibit rabbinically preparation on Yom Tov for Shabbat (which *Ho'il* biblically permits) simply to remind him that he may not prepare on Yom Tov for weekdays (which *Ho'il* also biblically permits)![9]

There is a general rule of halacha that a dispute in the Talmud is decided according to the *Amora* (talmudic rabbi) who lived later. Thus, in a dispute between Rabbah and Rav Ashi, the halacha is according to Rav Ashi since he lived later than Rabbah.[10] As a consequence, some *Poskim* also hold that the halacha is according to Rav Chisdah, because, as explained above, these *Poskim* hold that logically Rav Ashi must agree with Rav Chisdah.

As detailed in the previous section, a major difference between Rabbah and Rav Chisdah is whether an *Eruv Tavshilin* allows a person to cook on Yom Tov for Shabbat immediately before the end of Yom Tov (and the food would

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9. *Beit Meir OC* Section 527 mentioned in the *Biur Halacha* Ibid *s.v. V'al Yidei.* (But see the Ramban in *Milchemot, Pesachim* 46b, who explains that Rav Ashi can also hold according to Rabbah.)

10. Ibid. See also *Shaar HaTzion* 527:66, where the *Mishnah Berurah* also holds that the halacha is according to Rav Ashi. But see *Taz OC*, Section 527.13 where he holds it is unclear whether the halacha is according to Rav Ashi or Rava.

not be cooked sufficiently to serve to guests arriving on Yom Tov). While according to Rabbah an *Eruv Tavshilin* would not allow a person to cook *Cholent* immediately before the end of Yom Tov, according to Rav Ashi who holds like Rav Chisdah, an *Eruv Tavshilin* would allow it.[11]

The *Mishnah Berurah* states that in time of need[12] a person who made an *Eruv Tavshilin* may rely on these *Poskim* and cook on Yom Tov for Shabbat even though the food would not be sufficiently cooked to serve on Yom Tov.

## II. Concerning An Activity Not Specified In The Eruv Tavshilin

The primary purpose of the *Eruv Tavshilin* is to allow a person to cook and bake food on Yom Tov for Shabbat. The language of the *Eruv Tavshilin* is as follows:

> Through this *Eruv* may we be permitted to bake, cook, insulate [food], light candles, prepare, and do anything needed on Yom Tov for Shabbat.

The question is whether a person may perform activities other than cooking or baking on Yom Tov that are necessary

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11. *Beit Meir*, ibid. But see the *Magen Avraham, Introduction*, who states that Tosafot hold the halacha is according to Rabbah and not Rav Chisdah. However, Tosafot do not refer to the interaction between the dispute of Rabbah and Rav Chisdah and the dispute between Rav Ashi and Rava.

12. The *Mishnah Berurah* holds that an *Eruv Tavshilin* permits a person to cook immediately before the end of Yom Tov only in a time of need because some *Poskim* hold that the halacha is according to Rabbah (see, for example, Tosafot mentioned in note 11) and some *Poskim* (such as the Ramban mentioned in note 9) explain that Rav Ashi can also hold according to Rava.

to prepare food for Shabbat.[13]

For example, may a person slaughter an animal on Yom Tov in order to eat from its meat on Shabbat? While it is permitted to slaughter on Yom Tov in order to eat meat on that day,[14] the question is whether a person may slaughter on Yom Tov even though the meat will not be eaten until Shabbat.[15] Likewise, may a person carry food on Yom Tov in a public domain in order to eat that food in his home on Shabbat?[16]

There are three approaches to this question. One approach is to permit these activities even if a person did not make an *Eruv Tavshilin.* Another is to prohibit these activities even if a person made an *Eruv Tavshilin.* The third approach is to treat these activities in the same manner as cooking and baking, *i.e.,* to permit them only if a person made an *Eruv Tavshilin.*

The Rashba discusses a *Posek* who rules that a person may perform an activity not mentioned in the language of the *Eruv Tavshilin,* even if he did not make an *Eruv Tavshilin.*[17] Presumably, the reasoning is that since the rabbis

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13. This section will address only an activity that a person may not perform on Shabbat, such as carrying in a public domain and slaughtering an animal. The next section will address an activity that is permissible on Shabbat.

14. See generally *Shulchan Aruch* and commentators, *OC* Section 498.

15. See Maharshal, Responsum No. 78, mentioned in *Magen Avraham OC* Section 527.21.

16. See Rashba in *Avodat HaKodesh, Beit Moed, Sha'ar* 4(2).

17. Ibid, cited in *Shaar HaTzion OC* Section 527.78. Indeed, the opinion cited in Rashba appears to allow a person to perform an activity such as carrying in a public domain without making an *Eruv Tavshilin* even if the activity is not for food preparation.

did not mention that activity specifically in the language of *Eruv Tavshilin,* they never intended to include it within the original prohibition of preparing on Yom Tov for Shabbat. They did not include such an activity in the original prohibition because they did not believe that requiring a person to make an *Eruv Tavshilin* for that activity would remind a person to have good food for Shabbat (according to Rava) or not to prepare on Yom Tov for weekdays (according to Rav Ashi).[18]

The Maharshal offers another approach.[19] He holds that a person may not perform these activities even if he did make an *Eruv Tavshilin,* reasoning that an *Eruv Tavshilin* only permits an activity specifically enumerated in the language of the *Eruv Tavshilin.* If an activity is not specified, then an *Eruv Tavshilin* does not permit it, and it remains prohibited under the original rabbinic prohibition of preparing on Yom Tov for Shabbat. Accordingly, a person may not slaughter an animal on Yom Tov for Shabbat unless he specifies slaughtering in the recitation of the *Eruv Tavshilin.*

However, this approach gives rise to an obvious question: if so, the clause in the *Eruv Tavshilin* which allows a person to "do anything on Yom Tov for Shabbat" does not apply to *any* activity!? If an activity is specified, then even without that clause one may perform that activity.[20] If the activity is not specified, the Maharshal says an *Eruv Tavshilin* does not permit it.

Accordingly, most *Poskim* reject this approach and

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18. See above, Section I.

19. Maharshal, Responsum No. 78, mentioned in *Magen Avraham, loc. cit.*

20. *Taz, OC,* Section 527.11.

consider that an *Eruv Tavshilin* permits a person to slaughter on Yom Tov for Shabbat, or do similar things even if he does not specify that activity in the language of the *Eruv Tavshilin.*[21]

The *Magen Avraham*[22] offers a third approach: He holds that a person may perform an activity not specified in the language of the *Eruv Tavshilin* only if he made an *Eruv Tavshilin.* It appears that the *Mishnah Berurah* also agrees with this. Thus, in sum, a person may carry food in a public domain and slaughter an animal on Yom Tov in order to eat that food on Shabbat only if he made an *Eruv Tavshilin.* However, contrary to the Maharshal's opinion, the person need not specifically enumerate those activities in the language of the *Eruv Tavshilin.*[23]

## III. An activity which a person may not perform on Shabbat

*A. Introduction*

An *Eruv Tavshilin* permits a person to perform certain types of activities on Yom Tov for Shabbat.

First, it includes those activities enumerated in the language of the *Eruv Tavshilin.* For example, the *Eruv Tavshilin* specifically mentions cooking and baking; it certainly permits a person to perform these activities on Yom Tov for Shabbat.

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21. *Magen Avraham OC* Section 527.21. See also *Mishnah Berurah OC* Sections 527.37 and 38.

22. Ibid, 527:18.

23. *Mishnah Berurah, loc. cit.* However, the *Mishnah Berurah* also states that it is better to actually include those activities when reciting the *Eruv Tavshilin* (presumably if the person knows he must carry or slaughter on Yom Tov for Shabbat).

The second type includes activities that are not specified in the language of the *Eruv Tavshilin* and which may not be performed on Shabbat. For example, slaughtering an animal and carrying in a public domain are not specified in the language of the *Eruv Tavshilin* nor may a person do them on Shabbat. The previous section discussed whether a person may perform these activities on Yom Tov for Shabbat and, if so whether an *Eruv Tavshilin* is needed. The conclusion was that *Mishnah Berurah* allows these activities only if one made an *Eruv Tavshilin.*

In the third category are those activities which are not specified in the language of the *Eruv Tavshilin* but which a person may perform on Shabbat. Does one have to make an *Eruv Tavshilin* to perform this type of activity on Yom Tov for Shabbat?[24] In other words, does the rabbinic prohibition against a person's performing an activity on Yom Tov for Shabbat (without an *Eruv Tavshilin*) apply even to an activity that is permissible on Shabbat?

*B. Examples*

Let us cite three examples in which the issue arises:[25] (1) rolling a *Sefer Torah* on Yom Tov to its proper place for

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24. Of course, according to the *Posek* mentioned in the Rashba, (footnote 17), who holds that even without an *Eruv Tavshilin* a person may perform on Yom Tov for Shabbat an activity that he may not do on Shabbat, there is certainly no problem.

25. It should be noted that nearly all the activities discussed in this section are not for food preparation. The halacha regarding these activities has an added complexity because, as discussed in the next section, there is a question whether a person may perform on Yom Tov for Shabbat a non-food preparation activity even if he made an *Eruv Tavshilin.* However, for the purposes of this section, the assumption will be that there is no difference if the activity is for food preparation or for non-food preparation.

Shabbat; (2) folding clothes (in a manner that would be permissible on Shabbat)) on Yom Tov for Shabbat; and (3) making beds on Yom Tov for Shabbat.[26]

Rabbi Akiva Eiger discusses whether a person may roll a *Sefer Torah* on Yom Tov to its proper place for Shabbat and concludes that he may do so only if he made an *Eruv Tavshilin.*[27]

The Maharshal discusses whether a person may fold clothes on Yom Tov for Shabbat, and also concludes that he may do so only if he made an *Eruv Tavshilin.*[28] If he did not make an *Eruv Tavshilin,* he may not fold clothes on Yom Tov for Shabbat.[29] The *Mishnah Berurah* appears to agree with Maharshal.[30] Rabbi Akiva Eiger disagrees and

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26. Rabbi Akiva Eiger, *Commentary* to *Magen Avraham OC* Section 302.6.

27. Ibid, section 667.3. Indeed, Rabbi Akiva Eiger notes that, (for reasons to be discussed in the next section) some *Poskim* hold a person may not roll a *Sefer Torah* on Yom Tov for Shabbat even if he made an *Eruv Tavshilin.*

28. Maharshal noted in *Eliyahu Rabba OC* Section 302. The *Machatzit HaShekel, Commentary* to *Magen Avraham, OC,* Section 302.6, adds that according to Maharshal a person may also make beds on Yom Tov for Shabbat if he made an *Eruv Tavshilin.*

29. This appears to contradict the Maharshal's position mentioned in the previous section that, if an activity is not specified in the language of the *Eruv Tavshilin,* one may not do it even if he made an *Eruv Tavshilin.* Thus, because the language of the *Eruv Tavshilin* does not specify folding clothes, it is unclear why the Maharshal holds a person may perform this activity if he made an *Eruv Tavshilin.*

30. *Mishnah Berurah OC* Section 302.17. The next section will discuss the apparent contradiction between this text and the *Mishnah Berurah* in *OC,* Section 528.3, where he holds a person may not perform a non-food preparation activity on Yom Tov for

holds a person may fold clothes and make beds on Yom Tov for Shabbat even if he did not make an *Eruv Tavshilin.*[31]

*C. Distinctions*

Rabbi Eiger bases this opinion on a Mishnah in *Shabbat,*[32] which brings a dispute regarding whether one may make beds and fold clothes on Yom Kippur for Shabbat. From the very fact of the debate, Rabbi Akiva Eiger deduces that everyone agrees a person may perform these activities on Yom Tov (which has a lower level of holiness than Yom Kippur). Furthermore, because the Mishnah does not state a person must make an *Eruv Tavshilin,* Rabbi Akiva Eiger deduces that a person may perform these activities on Yom Tov for Shabbat even if he did not make an *Eruv Tavshilin.*[33]

The Mishnah in *Shabbat* does not explain the reason a person may make beds and fold clothes on Yom Tov for Shabbat even if he did not make an *Eruv Tavshilin.* But *Yerushalmi*[34] explains the Mishnah:

The *Yerushalmi* distinguishes between an activity that a person may *not* do on Shabbat (in which case, he can perform that activity on Yom Tov for Shabbat only if he made an *Eruv Tavshilin*) and an activity that a person *may* perform on Shabbat (in which case no *Eruv Tavshilin* is needed). The *Yerushalmi* begins by asking why the Mishnah allows a person to make beds and fold clothes on Yom Tov for Shabbat

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Shabbat even if he made an *Eruv Tavshilin.*

31. Rabbi Akiva Eiger, ibid; *Mishnah Berurah,* ibid, and in *Shaar HaTzion OC,* Section *302.23,* also mentions Rabbi Akiva Eiger's opinion.

32. *Shabbat* 113.

33. Rabbi Akiva Eiger, ibid.

34. *Beitzah* 2:1.

even if he did not make an *Eruv Tavshilin,* but allows cooking and baking only with an *Eruv Tavshilin*? The *Yerushalmi's* answer is that a person may make beds and fold clothes on Shabbat for Shabbat, and accordingly, may do these things on Yom Tov for Shabbat even if he did not make an *Eruv Tavshilin.* However, a person may *not* cook or bake on Shabbat for Shabbat and, therefore, needs an *Eruv Tavshilin* to do so on Yom Tov for Shabbat.[35]

In sum, Rabbi Akiva Eiger in *OC* Section 667.3 allows a person to roll a *Sefer Torah* on Yom Tov for Shabbat only if he made an *Eruv Tavshilin.* Likewise, the Maharshal[36] allows a person to fold clothes on Yom Tov for Shabbat only if he made an *Eruv Tavshilin.* However, in *OC* Section 302.6 Rabbi Eiger allows a person to fold clothes and make beds on Yom Tov for Shabbat even if he did *not* make an *Eruv Tavshilin,* which appears to be contradiction.[37]

## IV. Non-Food Preparation

*A. Introduction*

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35. The *Yerushalmi* is noted in *Da'at Torah,* Commentary to Ramo *OC* Section 528.2 and *Kehilat Ya'akov, Beitzah,* Chapter 12.

36. Maharshal, cited in *Eliyahu Rabbah OC* Section 302.8.

37. The answer might be that Rabbi Akiva Eiger holds that the Mishnah in *Shabbat* allows a person only to make beds and fold clothes on Yom Tov for Shabbat even if he did not make an *Eruv Tavshilin,* but does not allow any other activity on Yom Tov for Shabbat, even if a person may perform that activity on Shabbat, if he did not make an *Eruv Tavshilin.* Accordingly, a person may roll a *Sefer Torah* on Yom Tov for Shabbat only if he made an *Eruv Tavshilin.* This, of course, is unlike the *Yerushalmi,* that states the Mishnah allows a person to perform on Yom Tov for Shabbat any activity that a person may perform on Shabbat, even if he did not make an *Eruv Tavshilin.*

The primary purpose of the *Eruv Tavshilin* is to permit food preparation on Yom Tov for Shabbat, such as cooking and baking. Until this point, we have discussed activities that were for food preparation,[38] but the question remains whether an *Eruv Tavshilin* permits a person to perform non-food preparation activities on Yom Tov for Shabbat.

*B. Sources of Dispute*

1. Making an *Eruv Chatzeirot*

The Ramo prohibits making an *Eruv Chatzeirot* (a device that permits people to carry on Shabbat in premises that are owned by a group, such as a co-op apartment house) on Yom Tov for Shabbat even if the person made an *Eruv Tavshilin*.[39] Commentaries dispute why he ruled this way. The *Magen Avraham*, in the name of the Ran, explains that because making an *Eruv Chatzeirot* is not a food preparation activity, an *Eruv Tavshilin* cannot affect it.[40]

Rabbi Akiva Eiger offers another explanation.[41] As explained in the first section,[42] an *Eruv Tavshilin* only permits an activity that is permitted biblically because of *Ho'il* (which permits an activity on Yom Tov for Shabbat because the activity could theoretically serve a useful purpose on Yom Tov). Thus, a person may cook on Yom Tov for

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38. While in the previous section we discussed whether a person may fold clothes, make beds, and roll a *Sefer Torah*, these activities were discussed only under the assumption that there is no difference between a food preparation activity and a non-food preparation activity.

39. Ramo, *OC*, Section 528.2.

40. *Magen Avraham*, ibid.

41. Rabbi Akiva Eiger, ibid.

42. See Section I.

Shabbat because the food may be needed on Yom Tov if guests were to arrive.[43] Consequently, an *Eruv Tavshilin* permits only activities that could serve a useful purpose on Yom Tov. However, to extend the distance a person may walk on Yom Tov, a person must prepare an *Eruv Chatzeirot* before Yom Tov. Accordingly, preparing an *Eruv Chatzeirot* on Yom Tov serves no useful purpose *for Yom Tov.* Therefore, an *Eruv Tavshilin* does not permit a person to make an *Eruv Chatzeirot* on Yom Tov for Shabbat.[44]

2. Rolling a Sefer Torah

Rabbi Akiva Eiger explains that his dispute with the *Magen Avraham* has practical ramifications.[45] According to the *Magen Avraham* in the name of the Ran, an *Eruv Tavshilin* does not permit a person to roll a *Sefer Torah* on Yom Tov for Shabbat because it is not a food-preparation activity. However, Rabbi Akiva Eiger states that, under his

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43. Rabbi Akiva Eiger in Section 528 does not refer explicitly to the concept of *Ho'il.* Rather, he states simply that an *Eruv Tavshilin* does not permit a person to perform an activity on Yom Tov whose sole purpose is clearly only for Shabbat. Perhaps he does not rely specifically on the concept of *Ho'il* because he holds that even Rav Chisdah, (who holds that biblically a person may perform any activity on Yom Tov for Shabbat even without the concept of *Ho'il*) holds an *Eruv Tavshilin* does not permit an activity whose sole purpose is clearly only for Shabbat. However, in his *Commentary,* Section 667.3, Rabbi Akiva Eiger explicitly relies on the concept of *Ho'il.* In any event, Rabbi Akiva Eiger holds an *Eruv Tavshilin* does not permit a person to perform an activity whose sole purpose is only for Shabbat.

44. It should be noted that there are *Poskim* who rule that in fact a person *may* make an *Eruv Chatzeirot* on Yom Tov for Shabbat. See *Hagahot Ashri* cited in *Darkei Moshe, OC,* Section 528.1.

45. Rabbi Akiva Eiger, *op. cit.* Section 667.3.

own reasoning, an *Eruv Tavshilin* does allow rolling a *Sefer Torah* on Yom Tov for Shabbat because this may serve a useful purpose on Yom Tov (for example, if a person desires for whatever reason to read on Yom Tov the Shabbat portion of the Torah).

3. Folding Clothes

As we have explained, the Maharshal says that *Eruv Tavshilin* permits a person to fold clothes on Yom Tov for Shabbat, even though it is not a food-preparation activity.[46] The Maharshal's opinion here coincides with that of Rabbi Akiva Eiger.[47]

*C. The Mishnah Berurah's Opinion*

There is an apparent contradiction in the *Mishnah Berurah*. In one place,[48] he holds that according to Maharshal an *Eruv Tavshilin* permits a person to fold clothes on Yom Tov for Shabbat, even though it is not a food preparation activity.[49] But elsewhere[50] the *Mishnah Berurah* rules

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46. Maharshal, mentioned in *Eliyahu Rabbah, OC* Section 302.8.

47. Indeed, Rabbi Akiva Eiger, ibid, states that a person may make beds or fold clothes on Yom Tov for Shabbat based on the Mishnah in *Shabbat* even if he did not make an *Eruv Tavshilin*. This apparently contradicts his opinion in his *Commentary*, Section 667.3 where he states a person may roll a *Sefer Torah* on Yom Tov for Shabbat only if he made an *Eruv Tavshilin*. See Section III, note 37, regarding this apparent contradiction and a possible reconciliation.

48. *Mishnah Berurah, OC, Section 302.17.*

49. Ibid. *Shaar HaTzion OC,* Section 302.23, also mentions the opinion of Rabbi Akiva Eiger that a person may fold clothes and make beds on Yom Tov for Shabbat even if he did not make an *Eruv Tavshilin.*

50. Ibid, Section 528.3

according to the *Magen Avraham,* that an *Eruv Tavshilin* does *not* permit a person to make an *Eruv Chatzeirot* on Yom Tov for Shabbat because it is not a food preparation activity. Likewise, *Poskim* note that apparently the Maharshal also contradicts himself, in that he[51] does not permit a person to make an *Eruv Chatzeirot* on Yom Tov for Shabbat because it is not a food-preparation activity, yet he holds[52] that an *Eruv Tavshilin* does allow a person to fold clothes on Yom Tov for Shabbat.[53]

One explanation given is that the *Mishnah Berurah* distinguishes between an activity that a person may perform on Shabbat and one that he may not.[54] We have seen that many *Poskim* hold that, even without an *Eruv Tavshilin,* one may do things on Yom Tov for Shabbat if he may perform that activity on Shabbat. The *Mishnah Berurah* must be relying on that opinion together with the opinion that an *Eruv Tavshilin* permits a person to perform even a non-food preparation activity, and therefore he holds that an *Eruv Tavshilin* permits a person to perform a non-food preparation activity provided that the activity may be performed on Shabbat.[55]

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51. Maharshal in *Yam Shel Shlomo, Beitzah* 2.11.

52. Idem, mentioned in *Eliyahu Rabbah, OC, Section 302.8.*

53. *Beer Moshe* Volume IV, Responsum No. 45 and *Da'at Torah, Commentary to Ramo OC* Section 528.2, and Section 527.20 where he asks a similar question.

54. Based on *Da'at Torah, OC* Section 527.20.

55. Therefore, in Section 302, the *Mishnah Berurah* holds that an *Eruv Tavshilin* permits a person to fold clothes on Yom Tov for Shabbat even though it is a non-food preparation activity, but in Section 628, he does not let an *Eruv Tavshilin* permit a person to make an *Eruv Chatzeirot* on Yom Tov for Shabbat because it is a non-food preparation activity which may not be done on Shabbat.

In his Responsa *Be'er Moshe,* Rabbi Moshe Stern offers another answer to the apparent contradiction.[56] He states that the Maharshal's opinion and the *Mishnah Berurah's* opinion are the same as Rabbi Akiva Eiger's: the only reason a person may not prepare an *Eruv Chatzeirot* on Yom Tov for Shabbat is because it serves no useful purpose for Yom Tov.[57] Thus, in Section 528, the *Mishnah Berurah* holds that an *Eruv Tavshilin* does not permit a person to make an *Eruv Chatzeirot* on Yom Tov for Shabbat because it serves no useful purpose for Yom Tov. On the other hand, in Section 302, the *Mishnah Berurah* holds that an *Eruv Tavshilin* allows a person to fold clothes on Yom Tov for Shabbat even though it is a non-food preparation activity, because it may serve a useful purpose on Yom Tov.

The *Beer Moshe*'s answer to the contradiction reveals a great leniency. According to the *Beer Moshe*, an *Eruv Tavshilin* permits a person on Yom Tov to perform not only a non-food preparation activity that may be performed on Shabbat, but also permits a person to perform on Yom Tov for Shabbat a *non-food preparation* activity that *may not* be performed on Shabbat.

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56. *Beer Moshe* Volume IV, Responsum No. 45. While the *Beer Moshe* refers only to the Maharshal, his question and his answer regarding the Maharshal's opinion apply with equal force to the *Mishnah Berurah's* opinion.

57. *Beer Moshe* also states that the *Magen Avraham* (in the name of the Ran) agrees with Rabbi Akiva Eiger that the reason an *Eruv Tavshilin* does not permit making an *Eruv Chatzeirot* on Yom Tov is because it serves no useful purpose on Yom Tov, and *not* because an *Eruv Tavshilin* does not permit a person to perform a non-food preparation activity. Rabbi Stern's opinion conflicts with Rabbi Akiva Eiger's opinion in his *Commentary,* Section 528.2, where he states that his approach differs from the *Magen Avraham's* approach.

*D. Other Opinions*

Thus far we have noted two interpretations of the *Mishnah Berurah* regarding whether an *Eruv Tavshilin* permits a person to perform a non-food preparation activity. The Chida, and the *Badei HaShulchan* based on his interpretation of the Chida, arrive at two other conclusions regarding this issue.

The *Badei HaShulchan* sets forth one approach. First, he[58] discusses the *Noda BiYehudah*[59] who holds that an *Eruv Tavshilin* permits a person to cook water to heat a Mikvah on Yom Tov in order to allow someone to immerse in the Mikvah on Shabbat. *Badei HaShulchan* questions this ruling. How, he asks, does an *Eruv Tavshilin* allow a person to heat the water, given that heating the water for a Mikvah is a non-food preparation activity?[60]

*Badei HaShulchan* does not specifically answer his question. Instead, he states his own approach. He[61] holds that the halacha is according to the Chida.[62] According to *Badei HaShulchan,* the Chida offers a compromise position, i.e., that an *Eruv Tavshilin* permits a non-food preparation activity only if the language of the *Eruv Tavshilin* specifically

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58. *Badei HaShulchan, Biurim, YD,* Section 199.6, *s.v. V'Afilu.*

59. *Noda BiYehudah,* Volume II, *OC,* Responsum No. 25.

60. In support of his question, *Badei HaShulchan* cites the *Mishnah Berurah OC,* Section 528, that an *Eruv Tavshilin* does not permit a person to make an *Eruv Chatzeirot* on Yom Tov because it is a non-food preparation activity. However, *Badei HaShulchan* does not refer to the *Mishnah Berurah* in Section 302, where he holds that an *Eruv Tavshilin* permits a person to perform a non-food preparation activity such as folding clothes.

61. *Badei HaShulchan, loc. cit.*

62. *Machazik Bracha, OC,* Section 667.

incorporates that activity. However, if the activity is not mentioned specifically in the language of the *Eruv Tavshilin,* it does not permit a person to perform that activity for non-food preparation.

Based on this compromise, the *Badei Hashulchan* holds that an *Eruv Tavshilin* permits a person to cook water on Yom Tov to heat the Mikvah for Shabbat because cooking is specifically enumerated in the language of the *Eruv Tavshilin.* Furthermore, based on this compromise, the *Badei HaShulchan* should hold that an *Eruv Tavshilin* does not permit a person to roll a *Sefer Torah,* make beds, or fold clothes on Yom Tov for Shabbat because these activities are not specified in the language of the *Eruv Tavshilin.* This is true even though a person may perform these activities on Shabbat.

The Chida may be interpreted differently. Under this interpretation, the Chida is not offering a compromise. Rather, the Chida holds an *Eruv Tavshilin* does not permit a person to roll a *Sefer Torah* on Yom Tov for Shabbat because of two separate and independent reasons. First, because rolling a *Sefer Torah* is not specified in the language of *Eruv Tavshilin.* This interpretation is more consistent with the flow of the Chida's language. In addition, it is more consistent with the fact that the Chida states there are commentators who agree with these opinions. Because there is no commentator who offers the *Badei HaShulchan's* compromise, the Chida must mean there are commentators who agree with his positions that (1) an *Eruv Tavshilin* does not permit a person to perform a non-food preparation activity and (2) an *Eruv Tavshilin* does not permit a person to perform an activity that is not specified in the language

of the *Eruv Tavshilin.*[63]

*E. Differences Among the Various Approaches*

In sum, there are four approaches with respect to whether an *Eruv Tavshilin* permits a person to perform a non-food preparation activity:

First, the *Mishnah Berurah,* according to one interpretation, holds that an *Eruv Tavshilin* permits a person to perform a non-food preparation activity if that activity may be done on Shabbat. But if that activity is not permitted on Shabbat, an *Eruv Tavshilin* does not help.

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63. It should be noted that until this point the assumption has been that the *Poskim* who say that an *Eruv Tavshilin* permits a non-food preparation activity hold that a person may perform that activity even if it has absolutely no connection with food preparation.

The *Avnei Miluim,* Responsum No. 10, appears to disagree with this assumption. He seems to hold that every *Posek* agrees that an *Eruv Tavshilin* does not permit an activity that has no connection to food preparation. Rather, they concede that the activity must in some way be food related. On the other hand, the *Poskim* who hold that an *Eruv Tavshilin* does not permit a non-food preparation activity hold that even under such circumstances an *Eruv Tavshilin* does not permit a person to perform that activity. But everyone agrees that if an activity is completely unrelated to food preparation, an *Eruv Tavshilin* does not permit that activity.

However, all other *Acharonim* state that the *Poskim* who hold that an *Eruv Tavshilin* permits a person to perform a non-food preparation activity also hold that a person may perform an activity that is completely unrelated to food preparation. For example, the Maharshal holds an *Eruv Tavshilin* permits a person to fold clothes on Yom Tov for Shabbat even though folding clothes is completely unrelated to food preparation. Likewise, Rabbi Akiva Eiger holds an *Eruv Tavshilin* permits a person to roll a *Sefer Torah* on Yom Tov for Shabbat even though it is completely unrelated to food preparation.

Second, the *Mishnah Berurah,* according to the *Beer Moshe's* interpretation, holds that an *Eruv Tavshilin* permits a person to perform even a non-food preparation activity on Yom Tov for Shabbat unless it serves no useful purpose on Yom Tov, such as an *Eruv Chatzeirot* made on Yom Tov.

Third, the *Badei HaShulchan,* based on his interpretation of the Chida, holds an *Eruv Tavshilin* permits a person to perform a non-food preparation activity if that activity is specified in the language of the *Eruv Tavshilin, but not otherwise.*

Finally, another way to understand the Chida is that he holds a person may not perform a non-food preparation activity on Yom Tov for Shabbat.

Let us now consider some concrete examples.

First, does an *Eruv Tavshilin* permit a person to heat water for a Mikvah on Yom Tov for Shabbat?[64] In other words, does an *Eruv Tavshilin* permit a person to perform a non-food preparation activity that is specified in the language of the *Eruv Tavshilin* and is an activity that may not be performed on Shabbat? According to one interpretation of the *Mishnah Berurah,* an *Eruv Tavshilin* does not permit it because a person may not cook on Shabbat. According to the *Beer Moshe's* interpretation, an *Eruv Tavshilin* permits a person to heat water for a Mikvah on Yom Tov for Shabbat because heated water may serve a useful purpose on Yom Tov also. According to the *Badei HaShulchan's* interpretation of the Chida, an *Eruv Tavshilin* permits a person to heat water for a Mikvah on Yom Tov for Shabbat because cooking is specified within the language of the *Eruv Tavshilin.*

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64. *Noda BiYehudah,* Volume II, *OC,* Responsum No. 25.

However, according to the alternate understanding of the Chida, a person may not heat water for a Mikvah on Yom Tov for Shabbat because he holds that an *Eruv Tavshilin* does not permit a non-food preparation activity.

Second, does an *Eruv Tavshilin* permit a person to carry a *Tallit* in a public domain on Yom Tov from a synagogue in order for him to have the *Tallit* in his home on Shabbat?[65] Put another way, does an *Eruv Tavshilin* permit a person to perform a non-food preparation activity that is not specified in the language of the *Eruv Tavshilin* and is an activity that may not be performed on Shabbat? According to one interpretation of the *Mishnah Berurah,* it does not because a person may not carry in a public domain on Shabbat. According to the *Beer Moshe's* interpretation of the *Mishnah Berurah,* an *Eruv Tavshilin* permits a person to carry a *Tallit* on Yom Tov for Shabbat because it may serve a useful purpose for the person to have a *Tallit* in his home if he would like to wear it on Yom Tov afternoon. According to the *Badei HaShulchan* and the Chida, an *Eruv Tavshilin* certainly does not permit carrying a *Tallit* on Yom Tov for Shabbat because carrying is not specified in the language of the *Eruv Tavshilin.*[66]

Finally, does an *Eruv Tavshilin* permit a person to wash dishes,[67] roll a *Sefer Torah,*[68] fold clothes,[69] make beds,[70]

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65. Rashba in *Avodat HaKodesh, Beit Moed, Sha'ar* 4(2).

66. According to the *Badei HaShulchan,* an *Eruv Tavshilin* may permit a person to carry in a public domain on Yom Tov for Shabbat if that person specifies carrying in the language of his *Eruv Tavshilin.*

67. *Be'er Moshe,* Volume IV, Responsum No. 45.

68. Rabbi Akiva Eiger, Commentary to *Magen Avraham, OC,* Section 667.3

69. Ibid, Section 302.6.

or wind a watch[71] on Yom Tov for Shabbat? These examples present the issue of whether an *Eruv Tavshilin* permits a person to perform a non-food preparation activity that is not specified in the language of the *Eruv Tavshilin* but that may be performed on Shabbat. According to both interpretations of the *Mishnah Berurah,* an *Eruv Tavshilin* permits these activities, either because a person may perform these activities on Shabbat (according to the one interpretation) or because these activities could serve a useful purpose on Yom Tov (according to the *Beer Moshe's* interpretation). According to the *Badei HaShulchan,* an *Eruv Tavshilin* does not permit these activities because they are not specified in the language of the *Eruv Tavshilin.* Our understanding is that the Chida also holds an *Eruv Tavshilin* does not permit these activities because an *Eruv Tavshilin* does not permit a non-food preparation activity.

## Conclusion

The purpose of this article is to demonstrate that an *Eruv Tavshilin* does not automatically permit a person to perform all activity on Yom Tov for Shabbat.There are a number of factors which may lead *Poskim* to variant conclusions.

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70. Ibid.

71. *Da'at Torah, OC,* Section 527.20.

# Siyum: Celebrating the Completion of a Mitzvah

*Rabbi Shlomo Borenstein*

With the great popularity of daily learning classes[1] (*daf yomi, mishnah yomit, halacha yomit,* etc.) and as more and more Jews find their way back into the fold of Judaism, Torah learning is undergoing a resurgence which is vital to the existence of our people. Perhaps primarily due to the *yomi* sessions and to the availability of *sefarim* with translations and explanations understandable to the masses, people are studying and completing entire rabbinic works which until recently were accessible only to rabbis and the relatively few individuals in the yeshivas.

As a person or a group nears the end of a *sefer,* talk begins and excitement grows over the coming *siyum* – the celebration attendant upon completion of study of a Torah work. Anyone who has experienced his own *siyum* knows the great joy and feeling of accomplishment upon finishing study of an entire work of Torah. It is truly a memory for a lifetime.

The purpose of this article is to discuss the source for *siyumim* and practical *halachot* as to when one makes a *siyum.*

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1. *Daf Yomi* was instituted by Rav Meir Shapiro in 1923. The idea was to have all Jews around the world learning the same text every day. Starting from the beginning of *Shas,* one *daf* (folio page) of the Gemara is studied daily until the entire Talmud is completed.

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It is not to be used for *p'sak* on any question, for which a competent rav should be consulted on all issues.

## Source:

The Gemara in *Shabbat*[2] reads as follows:

אמר אביי תיתי לי דכי חזינא צורבא מרבנן דשלים מסכתיה עבידנא יומא טבא לרבנן.

Abaye said, "I am deserving of reward for when I see a group of students who have finished a tractate, I make a *yom tov* for the students."

Abaye, the great *Rosh Yeshiva,* felt it necessary to make a special celebration specifically over the completion of the tractate. The *Anaf Yosef*[3] explains that there is no *simcha* (happiness) in anything unless it is complete. Learning a part of something is certainly commendable, but the joy from learning that would justify making a separate festive meal comes only when an entire work has been started and finished.

The Ramo[4] writes that when a person finishes a tractate it is a mitzvah to be happy and to make a meal, which falls into the category of a *seudat mitzvah,* a meal that takes place at the time of a mitzvah. The *Yam Shel Shlomo*[5] adds that

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2. קיח:.

3. מדרש שה"ש א סוף (ט). The *Anaf Yosef* says from here the custom has spread through all the yeshivot to make a *seudah* at the end of every Gemara to show thanks to Hashem for allowing them to begin and end the Gemara.

4. יורה דעה רמ"ו ס"ק כו.

5. סוף פרק מרובה.

there is no greater mitzvah than to finish learning a *sefer*.[6] Therefore, everyone would agree that it is considered a *seudat mitzvah*.[7] He explains that the purpose of the meal is to publicize the mitzvah that has been performed.[8]

Another source is brought by the *poskim* for making a *siyum*. The word *siyum* literally means "completion." The Mishnah in *Taanit*[9] states that one of the happiest days of the year is the 15th of Av. The Gemara explains that on that day the Jews would cease to cut wood for the *Beit HaMikdash* for the offerings. The Rashbam[10] comments that since they completed such a great mitzvah, they were very happy. Although when we think of a *siyum*, we normally envision completing learning something, from this Gemara we see that the completion of any great mitzvah may qualify for making a *siyum* and the meal that accompanies it. We will

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6. The *Yam Shel Shlomo* says this is specifically when he has intent to start another *sefer* afterwards.

7. פרק מרובה סימן ל״ז. He explains that any *seudah* that a person makes not just to have a good time but rather to give praise to Hashem or to publicize a mitzvah or miracle is called a *seudat mitzvah*.

Interestingly, the *Yam Shel Shlomo* held that a *siyum* was such a great *simcha* that he once gave a *p'sak* that the *bracha* שהשמחה במעונו (a *bracha* recited at weddings) should be made. After a great upheaval occurred at the *siyum*, however, he took this as a sign that the blessing should not be made. (See ערוך השלחן יו״ד סוף רמ״ו for an interesting explanation of the blessing השמחה במעונו).

8. Rav Nosson Kaminetsky שליט״א relates that his father, Rav Yaakov, זצ״ל, once served as the rav of a city that had a custom not to say תחנון on a day the congregation made a *siyum*. Although Rav Yaakov did not approve, he allowed the custom to prevail.

9. כו:.

10. ב״ב קכא: ד״ה מניסן.

try to clarify further which mitzvot fall into this category.[11]

## For what do we make a *siyum*?

In truth, a person or group of people could make a meal thanking Hashem and showing their happiness for anything that they have completed. However, in regard to exempting oneself from a fast (most commonly *Ta'anit Bechorot* on the day before Pesach)[12] and in regard to eating meat from Rosh Chodesh Av until after Tisha B'Av,[13] the criteria as to what is considered a *seudat mitzvah* are much more stringent.

According to all opinions, completing any one tractate of Gemara (whether it is the longest or the shortest) is a great enough *simcha* to make a *siyum*. However, in recent

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11. חוות יאיר. The בית יוסף (תרס"ט) brings a source for making a *siyum* from the *medrash* at the beginning of *Shir Hashirim* on the verse "ויבא ירושלים ויעמוד לפני ארון ברית". Rav Elazar says from here we see one should make a *seudah* at the completion of the Torah.

The חוות יאיר (ס' ע) learns from this *medrash* that a person may make a *siyum* even a day after the completion. Since *Shlomo HaMelech* celebrated the completion of the building of the *Beit Mikdash* for seven days, we see the celebration doesn't have to be on the exact day itself. חוות יאיר even raises the possibility that it might be permissible two days later.

The מנחת יצחק ח"ח סי' מה argues on this point of the חוות יאיר and says no proof can be brought from the *Beit Mikdash* to have a *siyum* the next day. There, every day was a Yom Tov by itself. See גר"א יו"ד רמ"ו אות עו and סוף סוכה הגהות אשרי, who bring sources for a *siyum* from the fact we make a *seudah* when we finish the Torah every year.

12. *Ta'anit Bechorot* is a fast that first-born males observe *Erev Pesach*.

13. It is our custom not to eat meat during this period because of our mourning for the destruction of the two Temples.

years, many new devices to help people learn have come into existence, which raise interesting questions. Can a person go through an English translation of the Gemara and make a *siyum?* Is "learning" from a translation considered learning the Gemara itself, which would qualify for a *siyum?* Hagaon Rav Chaim Pinchas Sheinberg, שליט"א,[14] says that as long as the person who is using the English is actually working at understanding the Gemara and not just reading the words like a book, and as long as the translation is one which is regarded by rabbinic scholars as accurate, the person may indeed make a *siyum.* For a person who needs the English, working through the entire Gemara in English is a very big *simcha.*

What about *daf yomi* tapes? Can a person drive to and from work every day listening to the tapes and make a *siyum* at the end? Or, could a person call "dial-a-daf"[15] every day and make a *siyum* just from listening to the telephone? In these cases, Rav Sheinberg says that a person could not make a *siyum.* Besides the fact that a person probably won't remember anything that he hears, this is not called learning. Learning is opening the text and to the best of a person's ability trying to understand what is written. If a person needs to hear further explanations, that's fine. But there must be some working at the text itself.

In regard to learning a Gemara not in the order that it is written, the *Minchat Yitzchak*[16] finds no problem. A person could begin a Gemara, skip toward the end, and then return to where he left off, and still make a *siyum.*

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14. Private conversation.

15. Dial-a-daf allows one to call on the telephone and hear that day's *daf yomi* explained.

16. Dayan Yitzchak Weiss, חלק ב סימן צג.

Rav Moshe Feinstein[17] was asked if a group of people who learned *Chumash* with a rav could make a *siyum.* Rav Feinstein answers that in truth one can make a *siyum* on any *sefer* of *Torah SheBiketav* (Scripture).[18] Rav Moshe brings proof from the Gemara in *Ta'anit* that apparently a person may make a *siyum* on any mitzvah which takes an extended period of time. Certainly, then, completion of a *Chumash* is worthy of a *siyum.* Rav Moshe cautions, however, that this applies only when the use of accepted commentators, such as the *Rishonim,* are used. A competent rav should be consulted on any questions.

In *Yabia Omer,*[19] Hagaon Rav Ovadia Yosef, שליט"א, discusses making a *siyum* over *mishnayot.* In *Responsa Pri HaSadeh,* the author holds that since it is a very big leniency to allow a person to eat on a fast day based on his making a *siyum,* nothing less than finishing an entire tractate of

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17. אגרות משה או"ח א סימן קנו.

18. The Gemara in *Berachot* 17a, states that Rabbi Yochanon made a *siyum* on *Sefer Iyov* (Job). The *Pnei Yehoshua* explains that Rabbi Yochanan would also make a *seudah,* as would Abaye, (mentioned in the Gemara in *Shabbat).* Perhaps because of this Gemara and the *Pnei Yehoshùa,* Rav Shlomo Kluger rules that a person can make a *siyum* on any of the Prophets. He stipulates, however, that this applies only when he is learning the Prophets and happens to finish at that specific time. If, however, he is learning specifically in order to make a *siyum* for a special day, then he must learn a tractate of Gemara and not just one of the Prophets.

Although Rav Feinstein allows celebrating a *siyum* on Scripture, he writes, אגרות משה או"ח ח"ב סימן יב, that one cannot bring any proof from Rabbi Yochanon, who learned in much greater depth and with a much greater understanding than we do. He analyzed every word to try and grasp the deepest meanings behind them. We can not begin to compare our learning to his.

19. חלק א סימן כו.

Gemara may be allowed for a *siyum*. The *Sefer Chassidim* seems also to be of this opinion, by maintaining that since we do not normally learn *mishnayot* with very much effort, the Gemara accompanying the *mishnayot* must also be learned for a *siyum*.[20] *Pri HaSadeh*, however, does say that a certain rav told him that learning *mishnayot* with the classic commentators, *Bartenura* and *Tosafot Yom Tov*, would be sufficient for a *siyum*. This, however, would be accepted only if the person learning was a *talmid chacham* who was already familiar with the Gemara text commenting on the *mishnayot* he was learning.

Rav Ovadia Yosef does find opinions, however, that allow making a *siyum* over *mishnayot*. The *Pnei Mavin* sanctions a *siyum* on *mishnayot*, but only on the condition that at least one entire *seder* (*Zeraim, Moed*, etc.) is completed. *Responsa Binyan Shlomo* and Rav Azriel Hildesheimer in his responsa are even more lenient. They feel that the completion of even one tractate of Mishnah is sufficient for making a *seudat mitzvah*. Rav Yosef concludes that a person may follow these lenient opinions as long as he understands the *mishnayot* with the use of the *Bartenura*. And he adds that this leniency should be used only for oneself and not to exempt other people from their obligation to fast.

Rav Ovadia Yosef also writes that there are those who have a custom to make a *siyum* on *Zohar*, even without commentators and without total comprehension of what they have learned. Once again, a competent rav should be consulted.[21]

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20. See הקדמת תוס' יו"ט על משניות as to the importance of also learning the Gemara.

21. See שערים מצויינים בהלכה ח"ג סי' קכב אות ח who writes that it is permissible to make a *siyum* on short tractates such as סופרים, כלה, and אבות דר' נתן. However, the פרי מגדים and ב"ח rule that a *siyum*

The natural question that needs to be asked is, are there any boundaries as to which *sefarim* qualify for a *siyum?* Could a *siyum* be made on *Shulchan Aruch?* What about *Mesilat Yesharim?*[22]

Rav Sheinberg maintains that a *siyum* may not be made on any of these because they are not called "completed". Our rabbis *(Chazal)* could declare that Tractate *Berachot* is "a complete entity". We might write commentaries on it, but when one has read it all, he has read a complete work. There is nothing more to be added. This cannot be said of anything written since the time of the Gemara. We cannot call any *sefer* a "complete" work, regardless of how great the author was or how accepted the work is. Only *Chazal* had that authority. Therefore, since these *sefarim* are not "completed", one could not make a real *siyum* on them.

As mentioned earlier, Rav Moshe Feinstein learned from the Gemara in *Ta'anit* (about the celebration upon finishing bringing wood for the sacrifices) that a *siyum* could be made on any mitzvah which took time to complete.[23] If a person writes a *Sefer Torah*, he makes a *siyum* at its completion. Rav Sheinberg argues this point and says that no proof can be brought from that Gemara. Only *Chazal* could decide over which mitzvot it is fitting to make a *simcha.* They decided that the completion of bringing the wood for the offerings was a tremendous *simcha.* We, today, do not have the right to declare a meal a *seudat mitzvah* on any mitzvah we want to. Therefore, according to Rav Sheinberg, a *siyum* can be made only over learning.

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cannot be made on מסכת דרך ארץ.

22. A classical work by Rav Chaim Moshe Luzzato, dealing with improving one's service to Hashem and behavior towards his fellow man.

23. See מגן אברהם תקא ס"ק לג בשם הר"א.

**Who can make a siyum?**

*Women* – Hagaon Rav Shlomo Wahrman, שליט"א,[24] was asked if a woman who finished a tractate of Gemara could make a *siyum* during the first nine days of Av, when eating meat is proscribed, and thereby allow herself and her family to eat meat. The reasoning against it is that since she has no mitzvah to learn Torah, perhaps this would not be called a *seudat mitzvah*. After a lengthy discussion on the subject of women learning Torah, Rav Wahrman concludes:

> When a woman learned with dedication and diligence and merited to finish a tractate, she has at least fulfilled the mitzvah of learning Torah on the level of "one who is not commanded and does", and she receives reward for her learning ... and since she did a mitzvah that took time [see Responsa *Iggerot Moshe* brought in regard to a *siyum* on mitzvot other than learning], who can measure how great is the happiness in her heart? And it is clear that there is an obligation for a *seudah* according to the Rashbam and the *Nemukei Yosef*, and it is considered a *seudat mitzvah*.

Rav Wahrman adds that the woman's family or a group of her friends could also partake of the *seudah* as with any other *seudat mitzvah*.

When faced with the same question, Rav Sheinberg answered that a *siyum* should not be made. Although it is certainly important for women to learn what they need to learn, nevertheless, since they have no obligation in the mitzvah of learning Torah, the *seudah* would be lacking the degree of importance which is required for a *siyum*. Therefore, according to him neither the woman, nor any of her family,

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24. שארית יוסף חלק ב סימן ד.

would be able to eat meat during Av or exempt themselves from *Ta'anit Bechorot.*

*Children* – According to the opinions that a *siyum* is conditional on the obligation of the person learning, a child would not be able to make a *siyum* either, nor allow those participating with him to eat meat or be exempted from fasting. It certainly would be a source of great pride and happiness for his parents. But it would be lacking the degree of importance for a *siyum.*

There is room, however, to differentiate between a child and someone else who has no obligation to learn. The Gemara mentions that the performance of a mitzvah by a child can sometimes be viewed differently. Since one day he will be obligated in the mitzvah, even now it has a greater importance than the mitzvah of someone who will never be obligated. Therefore, it may be, that since one day the child will be obligated to learn Torah, although now he is exempt, the mitzvah and the *simcha* are much greater. A competent rav should be consulted.

## Who may join in the *siyum*?

*Mourner* – The *Yam Shel Shlomo*[25] writes that it is a big mitzvah to rejoice with the one making the *siyum* even if one did not participate in the learning.[26] The question is, who, specifically, can join in the *simcha?*

As we know, a mourner is required to minimize his or

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25. מרובה סימן לו.

26. The *Shach,* יו"ד רמ"ו ס"ק כז, writes that it was the custom in his time for the men of the community to come to the yeshiva at the beginning and end of the Gemara that was being learned in order to participate in the *siyum.*

her enjoyment during the mourning period. Therefore, the *RavYa*[27] and the *Beit Lechem Yehuda*[28] both decide that if a mourner is himself making a *siyum,* he may make a *seudah* and invite others.[29] If, however, someone other than the mourner is making a *siyum,* the mourner should refrain from attending during the entire period of mourning. This is a *simcha* whose participation by a mourner could be avoided.[30]

The *Shach* quotes the MaHaRil that it is forbidden for a person to eat at a *siyum* on his *yahrzeit* even if he does not observe the custom to fast on his *yahrzeit.* At the least, the day should be one of minimizing one's pleasures.[31] The *Aruch HaShulchan*[32] states that the custom today is to eat at a *siyum.*[33] A rav should be consulted if a person is uncertain what to do.

*Others* – The Ramo[34] writes that only those people who have a connection to the *simcha* should partake of the meal.

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27. מ"ק ה' אבל עמוד תקנד.

28. יו"ד שצא.

29. See שו"ת התעוררות תשובה ס' קד who also writes that it is forbidden for a person to eat at a *siyum* on his *yahrzeit.*

30. גשר החיים פ' כא ס' ח אות ו.

31. See שו"ת התעוררות תשובה ס' קד who also writes that it is forbidden for a person to eat at a *siyum* on his *yahrzeit.*

32. יו"ד סוף רמ"ו.

33. גשר החיים לב אות ז seems to be lenient in regard to a *yahrzeit.* It could be he is referring only to a person who himself has *yahrzeit* wanting to make a *siyum,* as he learns from the בית לחם יהודה. It is interesting that our version of בית לחם יהודה seems to be speaking only about a mourner after the thirty-day period. Perhaps the גשר החיים had a different version in his בית לחם יהודה.

34. או"ח סי' תקנא ס' י.

The *Shaarey Teshuva*[35] explains that if a person has no connection to the *simcha,* it is not a *mitzvah* for him. He is just coming to eat and not to join in the *simcha.*

Rav Yaakov Emden[36] clarifies the Ramo's position:

> Those who financially support the learners and also the *gabbaim* who watch over them and assist them in their needs, are all permitted [to eat on a fast day] even if they are many. But to invite others just out of respect or love or any other reason is a transgression. However, if those who come assist in making the meal, it is permitted...

It is clear from Rav Emden that only those people directly related to the learning of the one making the *siyum* may attend and eat at a time when eating is forbidden. Respected guests and family members[37] would not be allowed to participate.

The *Mishnah Berurah*[38] brings the opinion of the *Taz* (quoting the MaHaRal) which is a bit more lenient. The *Mishnah Berurah* classifies those that have a connection as "Anyone who would attend a meal on a different occasion either because of being a relation or because of being close to the one making the *siyum.* And women who have a connection to the meal, in a place where it is customary to invite women, are also permitted." The *Mishnah Berurah* adds (from *Chayei Adam)* that the wife and children are

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35. תקנא ס"ק לג.

36. סידור בית יעקב, לחודש אב אשנב ב' אות י"ד.

37. Although Rav Emden does not speak about wives, perhaps they come under the category of those who support him in his making the *siyum.*

38. תקנא ס"ק עה.

permitted to attend.[39]

The source of our custom to make a *siyum* on *Erev Pesach* so that the first-borns may eat, is still unclear. Often the first-borns who come to the shul for the *siyum* do not know the one making the *siyum.* What right do they have to eat on a day they are supposed to fast (the Fast of the First-Born)? However, Rav Moshe Feinstein ruled[40] said that if a *siyum* is being made at an institution such as a yeshiva or a camp, all the members of that institution may attend the *siyum.* Maybe being a member of a shul affords one the right to join in a *siyum* being made at the shul. Further investigation of this matter needs to be made.

Rav Yosef writes that it is not appropriate to invite to a *siyum* on a fast day people who are totally devoid of learning and who do not support Torah learning. To invite such a person and thus exempt him from fasting is akin to performing a mitzvah through doing a transgression. Certainly exempting a person from fasting requires a minimal amount of understanding of what is being said at the *siyum.* Rav Yosef concludes that if these types of people are going to attend the *siyum,* it is appropriate to choose to learn a tractate that ends with words of *aggada* (homiletics) which the participants will understand and learn from, in order to bring the people closer to Hashem and learning Torah.

The *Minchat Yitzchak*[41] raises an interesting question. If

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39. It should be noted that the Ramo writes that a person should minimize the people he invites during the Nine Days. And during the week that Tisha b'Av falls, only a *minyan* should be invited, besides immediate relatives and those directly related to the *siyum.*

40. Quoted by Rav Shimon Eider in הלכות בין המצרים.

41. חלק ט סי' מה.

a person attended a *siyum* on *Erev Pesach* but did not eat, may he eat later after leaving the *siyum?* Does his attending the *siyum* create enough of a *simcha* so that the fast is totally cancelled for him, or is it conditional upon his participation by eating at the *siyum?*

Dayan Weiss (author of *Minchat Yitzchak)* brings the *Eretz Tzvi,*[42] who asks a very fundamental question. Why is it that a person can eat at a *siyum* on *Erev Pesach* and that allows him to eat the rest of the day, but during the "Nine Days", once he finishes the meal he can no longer continue to eat meat? *Eretz Tzvi* answers that regarding a fast, there are actually two different aspects involved. There is a requirement for the person to fast and also a prohibition to eat. On *Erev Pesach,* however, there is only the aspect of fasting.[43] Once a person "breaks" the fast, there is no longer anything keeping him from eating. This is not the case during the "Nine Days". During that time there is a constant prohibition to eat meat because of the sadness of that period. Even if a *simcha* arises which temporarily overrides the sadness and allows him to eat meat, with the passing of the *simcha,* the prohibition of eating meat returns.[44]

From here, Dayan Weiss maintains that if a person did not actually break his fast at the *siyum* on *Erev Pesach,* he would not be allowed to eat later.[45]

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42. סימן עט.

43. The fast is in order to publicize the miracle of being saved during the last of the plagues, when all Egyptian first borns perished.

44. See the responsum itself for Dayan Weiss' question on the *Eretz Tzvi.*

45. See מגן אברהם סי' תקס"ח ס"ק י who may be a proof for Dayan Weiss. Dayan Weiss also cautions that a person should be careful to eat a proper amount so that he will be required to make a

## When to make a *siyum*?

*From Rosh Chodesh Av through Tisha B'Av* – The *Shulchan Aruch*[46] states that there is a custom not to eat meat or drink wine from the first day of Av until after Tisha B'Av (the "Nine Days"). The Ramo[47] adds that for a *seudat mitzvah,* such as a *siyum,* all those connected to the meal may partake of meat and wine.

The *Shach*[48] cites MaHaRam Mintz who says that a person may leave a bit of the Gemara as yet unlearned, in order to wait for the appropriate time to make the *siyum.* The *Eliyahu Raba,*[49] however writes, that a person should not speed up or slow down in order to make a *siyum* during that time. *Aryeh D'Bei Ilai*[50] explains that the *Eliyahu Raba* is talking about totally rearranging one's learning in order to finish on a specific day, but that he is not essentially disagreeing with MaHaRam Mintz. Dayan Weiss[51] explains that when a person rearranges his learning in order to finish on a specific day, it is obvious he is not doing it for the sake of the mitzvah but rather just to satisfy his stomach with food he could not otherwise have.[52] This is not a mitzvah at all. However, if

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closing blessing. If he doesn't, it is possible that we don't consider him as having broken his fast, and he must continue fasting.

The *Mishnah Berurah* adds that if food from the *siyum* was sent to someone, it is forbidden for him to eat it if he didn't eat at the *siyum.*

46. או"ח תקנא ס' ט

47. שם ס' י.

48. See #27.

49. Brought in באר היטב תקנא ס"ק לג.

50. Brought in אבני זכרון לאו"ח סי' יא.

51. מנחת יצחק חלק ב סי' צג.

52. נשאל לדוד או"ח סי' כב has a similar opinion.

he just speeds up or slows down a little bit, then *Eliyahu Raba* would agree that a *siyum* could be made.[53] Dayan Weiss concludes that the world relies on Rav Yaakov Emden,[54] who writes that a person may speed up as long as his understanding of the learning is not greatly impaired.

*Ta'anit Bechorot* – The Fast of the First-borns, on *Erev Pesach*. Today the world seems to follow the opinion of the *Mishnah Berurah*[55] that it is acceptable for the first borns to join in a *siyum* in order to allow them to break their fast. This opinion, however, has been widely debated:

The *Teshuva M'Ahava*[56] holds that only participation in a *brit* would allow a first born to eat. When the MaHaRam Mintz wrote that a *siyum* could be pushed off to an appropriate time, he was not referring to *Ta'anit Bechorot*. That is a day on which a person should fast, not join in *siyumim*. He writes that he asked the *Noda BiYehuda*[57] and Hagaon Rav M. Fishelis, who both said that it is forbidden to join in the *siyum*. Rav Shlomo Kluger[58] and the *Responsa HaRaMaZ* concur with these *poskim*.[59]

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53. The שערי תשובה תקנא ס"ק לג and the משנה ברורה both write that a person should not speed up or slow down.

54. See #36.

55. תע ס"ק י.

56. חלק ב סי' רסא, חלק ג סי' שעו.

57. תנינא דף ו טעיף בקונטרוס אחריו.

58. שו"ת האלף לך שלמה סי' שיז.

59. The שו"ת התעוררות תשובה (See #31) also writes that it is forbidden for a person to eat at a *siyum* on his *yahrzeit*. He learns that the prohibition to fast during the month of Nissan is more important than a *yahrzeit*, because if a person has a *yahrzeit* during Nissan, he is forbidden to fast. We also see that despite the prohibition to fast, we still observe *Ta'anit Bechorot*. Therefore, it must be that *Ta'anit Bechorot* is more important than a *yahrzeit*.

The *Mishnah Berurah,* however, is not alone in his opinion. *Responsa Arugat HaBosem*[60] writes that although the *Magen Avraham* is stringent in regard to a first-born's breaking his fast at a *brit,* the custom in the *Arugat Habosem's* vicinity was to be lenient regarding a *siyum.*[61] The *Yosef Da'at*[62] (author of *Shoel U Meishiv)* says that he exempted himself from fasting by making a *siyum. Beit Yisroel*[63] also writes that the Belzer Rebbe use to make a *siyum* for first-borns even though he himself was not a first-born.[64] R. Ovadia Yosef[65] concludes that a person may be lenient to speed up or slow down his learning in order to finish on *Erev Pesach.* However a person should not leave over the end of the Gemara and wait for *Ta'anit Bechorot* to make his *siyum.*[66]

Rav Menashe Klein[67] deals with the question of when

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If so it is obvious that a person could not eat at a *siyum* on *Ta'anit Bechorot.*

60. סי' קלט.

61. The *Arugat HaBosem* gives a possible explanation. Perhaps the *siyum* itself is a rememberance of the miracle of the killing of the first borns because it is coming to break the fast. That is the main point of the *siyum's* taking place on that day specifically. This cannot be said about the *brit.*

62. יו"ד סי' שצט דף ע"ו ע"ב.

63. שו"ת בית ישראל סי' כו.

64. See ספר החיים סי' תקפא, שו"ת מקור חיים סי' לו, and שו"ת שנות חיים, סי' נב, who are also lenient.

65. See #20.

66. The שו"ת רמ"ץ, אליהו רבה, and משנה ברורה all write that it may be improper for one who does not normally make a *siyum* when he finishes a *sefer* to make a *siyum* for *Ta'anit Bechorot.* Rav Ovadia Yosef maintains that if the reason he doesn't normally make a *siyum* is because he can't afford it, and now he can afford it, it would be permissible.

67. משנה הלכות חלק ו' סי' סה.

to make a *siyum* if *Erev Pesach* falls on Shabbat. The *Shulchan Aruch*[68] says that some hold the first-borns must fast on the preceding Thursday, while others hold there does not need to be a fast at all. Ramo holds that we follow the first opinion. If this is so, then it would seem that the *siyum* should be made on Thursday, the day upon which one is obliged to fast.

Rav Klein brings an opinion, however, that in a place where there is no set custom, a community that has pressing circumstances may call for *Ta'anit Bechorot* for Friday with the *siyum* on Friday instead of Thursday.[69] Rav Klein also adds another option of making a *siyum* on both Thursday and *Erev Shabbat.* This would solve all problems.[70]

*Erev Shabbat* – The *Shulchan Aruch*[71] writes that it is forbidden to have a *seudah* and feast on *Erev Shabbat;* this is so that one will have an appetite for the Sabbath meal. But the Ramo says that a *seudah* whose date is on *Erev Shabbat,* such as a *brit* or a *pidyon haben,* is allowed. The *Biur Halacha* adds that a *siyum* is also permitted.[72]

The *K'tzot HaShulchan* in the *Bedek HaShulchan*[73] argues

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68. או"ח תע ס' ב.

69. See further in regards to making a *siyum* on *Erev Shabbat.*

70. The שו"ת הלל אומר סי' רמז dealt with this question in his city. He decided to hold the *siyum* on *Erev Shabbat* for two reasons. Firstly, in his town the market day was on Thursday and, therefore, no one came to Shul. Secondly, according to the חוות יאיר that a *siyum* could be held for two days, the holiness of the *siyum* would extend until Shabbat, which is the real *Erev Pesach.*

71. או"ח רמט ס' ב.

72. The מטה אפרים תקפא ס"ק עז speaks about making a *seudah Erev Rosh HaShana.* Perhaps he would hold the same here.

73. סי' סט אות ז. Rav Avraham Chaim Noeh says that any

with the *Biur Halacha*. Even in respect to a *pidyon haben*, the *Magen Avraham* and others say it should be postponed until after Shabbat. How much more so, a *siyum!* And, even according to the *Nishmat Adam*, that we don't push off the *pidyon haben*, that is because we don't delay mitzvot. But, regarding a *siyum*, a person could learn something else and no mitzvah would be lost; thus we need not rely on the rule not to delay mitzvot. Furthermore, we know the opinion of the MaHaRam Mintz that any *siyum* could be pushed off until an appropriate time. Certainly a *siyum* on *Erev Shabbat* should be postponed. Thus, the *Biur Halacha* is difficult, although Rav Ovadia Yosef brings support for his position.

## Conclusion

The *simcha* of a *siyum* is certainly a very great one and one which every person should strive to achieve. In regard to the "Nine Days" and to *Ta'anit Bechorot*, however, great care should be taken to ensure proper respect for the day. Which learning qualifies for a *siyum*, who may make it, and who may partake of it, are questions which must be answered in order to ensure that the *simcha* is truly one of mitzvah and not just a social gathering.

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*seudah* made on *Erev Pesach* should not be a large one but rather small and simple.

# The Mamzer And The Shifcha

*Rabbi David Katz*

## Introduction

The decline in religious observance among many Jewish people is unfortunately one of the characteristic features of modern Jewish history. Recent times, it is true, have witnessed a limited movement of return to Torah Judaism; but in one area of Jewish law, the damage that has been done seems well-nigh irreversible. This is the area of *arayot*, forbidden sexual relationships whose offspring are *mamzerim*. Due to a variety of historical circumstances, many women have married in a halachically-valid ceremony and subsequently been divorced and remarried without the benefit of a *get*, a Jewish divorce. The result has been an unprecedented frequency of *mamzerim*. In this paper we will examine certain aspects of this problem, especially the possibility of a solution whereby the *mamzer's* offspring may be freed of this legal status.

## The Problem And The Solution

מעות לא יוכל לתקון, *Something that is crooked which cannot be made straight (Kohelet* 1:15). That is how *Chazal* refer to the *mamzer*, the offspring of an incestuous or an adulterous union. Although the *mamzer* himself did not do anything

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לז"נ עלקא בת סנדר הלוי, לז"נ מייטא מינדל בת ליב

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wrong, his status as a *mamzer* is permanent and irreversible. To the end of his life he remains subject to the legal disabilities the Torah imposes upon him. These involve primarily restrictions upon whom the *mamzer* is permitted to marry: He may not marry any Jewish woman except a *mamzeret* (female *mamzer*) or a *giyoret* (convert). If he breaks the law and marries any other Jewess, the couple is required to divorce immediately.[1]

There is another major irrevocable disability: the status of the *mamzer's* offspring. *Mamzerut* is hereditary. Regardless of whether the *mamzer* marries a *mamzeret* or a *giyoret*, or whether he marries another Jewess in violation of Torah law, the result is the same as far as his offspring are concerned: They are *mamzerim* because their father is a *mamzer*.[2] There is no way they can change their status. In turn, they pass this status to *their* children, who will likewise be *mamzerim*, and the process will continue down the generations, so that all descendants of the child of the incestuous or adulterous union will be *mamzerim*.[3] The consequences of the forbidden sexual relationship are catastrophic!

However, what happens to those of his offspring who are *not* recognized in halacha as his children? If a Jew fathers a child by a non-Jewish woman, Torah law does not consider the child as his at all. The child is considered solely the offspring of the non-Jewish mother; in the eyes of halacha, the child has no father.[4] Thus, the child is not Jewish due

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1. *Devarim* 23:3. *Shulchan Aruch Even Haezer* 4:18, 22:24; 154:20.

2. *Ibid.*

3. See note 1.

4. Rambam *Issurei Biah* 15:4.
Interestingly, although the fact that the *mamzer* is the child's

to the fact that the child's sole parent is not Jewish. In fact, were that child subsequently to convert to Judaism, the Jew who fathered the child is technically permitted by Torah law, to marry that child since they are not at all related! (Although the Sages have forbidden it).[5] Were he to father

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biological father does not automatically make him its father in Jewish law, nevertheless, that biological connection is not completely void of halachic significance, at least according to the view of R. Avraham Yitzchak Hakohen Kook. In 1918 R. Kook was asked by R. Yaakov David Luria of Glasgow, Scotland, whether it was proper to convert the newborn child of a Jewish father and a non-Jewish mother. The mother was not interested in converting to Judaism but was agreeable that the child should be.

R. Kook ruled that the child may be converted (provided he receives an Orthodox Jewish upbringing). He based his ruling on the dictum of the Gemara in *Ketubot* 11a, which states that a non-Jewish father may convert himself and his entire family along with him, including his minor children, because even though the minors are not in a position to legally express their interest in conversion, there is nevertheless a presumption that they are agreeable to doing what their father wants. Since their father wants them to convert to Judaism, they agree to do so. R. Kook points out that if the father converts first, he is no longer their halachic father, because as a *ger,* he technically has no relations at all. In such a case, it would seem that it is impossible to say that the children wish to follow the desires of their father; after all, they have no father! The fact that the Gemara nevertheless asserts that in all cases the rule is that the conversion of the small children is valid based on the concept of ניחא להו במאי דעביד אבוהון proves, according to R. Kook, that whatever the exact halachic status of the relationship between father and child, the fact that the child is the biological offspring of the father makes that child desire to please the father. Thus, halacha recognizes the significance of the biological connection between father and child even when that child is not considered his in the eyes of halacha *(Da'at Kohen* 147-8; see, however, R. Zevin's critique in *Ishim veShitot* p. 259).

5. *Yoreh Deah* 269:1.

a child by a non-Jewish woman, the child would not be a *mamzer,* but rather a gentile. Were that child subsequently to convert to Judaism, the child would be a *ger,* a convert, subject to the restrictions of the convert (a *ger* may marry any Jewess; a *giyoret* may marry any Jew other than a *kohen).* Thus, although the child is biologically the *mamzer's* child, it is not his child in the eyes of Jewish law.

When rabbinic literature speaks about a *mamzer* "purifying" his offspring from the status of *mamzerut* (see below), it refers to his biological, not his halachic, offspring. Indeed, as we shall see, the very basis of the "purification" is the principle that the children he fathers by a non-Jewish women or a *"shifcha"* (see below) are not legally his at all.

It therefore seems that there is a "way out," a way for a *mamzer* to father children who will not be *mamzerim.* However, this is not exactly true. A *mamzer* is not allowed to engage in sexual relations with any gentile, just as any other Jew is so forbidden. While the exact nature of this prohibition is controversial and the subject of much discussion in rabbinic literature,[6] the bottom line is that no Jew, including a *mamzer,* is permitted to engage in such relations, whether they involve a "marriage-like" relationship or not. Thus, a *mamzer* is halachically denied the option of fathering a child by a gentile. However, were the *mamzer* to break the law and father such a child, that child would not halachically be his child, and that child could subsequently convert to Judaism and be a *ger,* not a *mamzer.* In other words, though he may not legally father such a child, nevertheless, were he to do so illegally, it would "work," i.e. his biological children would escape the taint of

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6. See Rabbi J.D. Bleich's article, "The Prohibition Against Intermarriage" in the first volume of *The Journal of Halacha and Contemporary Society.*

*mamzerut*. However, no *mamzer*, and certainly no rabbi, could in good conscience entertain such an option, which involves violating Torah law.

There is, however, another possibility, which *does* enjoy legal sanction: fathering a child by a "slave girl," a *shifcha*. As is well known, Torah law recognizes two types of servitude, the *eved ivri* and the *eved kna'ani*. The *eved ivri* is a Jew who has become an indentured servant for a limited period of time (up to six years, or possibly until the Jubilee year). He is not really a slave, but rather a Jew subject to involuntarily servitude. On the other hand, the *eved kna'ani* is an actual slave, i.e. he is actually owned by his Jewish master. An *eved kna'ani* is a gentile who was acquired by a Jew in a halachically-recognized procedure; either he was purchased or else he sold himself. The Jew who purchases him owns him, although he does not have absolute power over the slave to do as he sees fit. The owner may not abuse him, and should he kill the slave, he could be liable to the death penalty *(Exodus* 21:20). Moreover, should he destroy one of the slave's limbs, the slave goes free *(ibid.* 21:23). These limitations notwithstanding, the master does own the slave.

When a Jew purchases an *eved kna'ani*, it is proper, though not required, to convert the slave.[7] The conversion, however, is not the usual type, which results in the convert's becoming a full Jew. It is a unique, more limited type of conversion (יצאו מכלל הגוים ולכלל ישראל לא באו". רמב"ם איסורי ביאה פי"ב הלכה י"א) by which the slave becomes obligated to observe whatever positive commandments a Jewish woman is bound to observe, as well as all the negative commandments. Should the master free such a slave-

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7. Ramo, *YorehDeah* 267:4.

convert, that slave would automatically attain the status of a *ger*, a free convert, who is a full Jew. The laws of a female slave, a *shifcha kna'anit*, are the same as for an *eved kna'ani;* of course, as a *giyoret* she could not marry a *kohen*.[8]

Because neither the *eved kna'ani* nor the *shifcha kna'anit* is a full Jew even when the master converts them, they are not legally marriageable (אין קדושין תופסין בהם).[9] This does *not* mean that they are prohibited from all sexual relations with anyone. The *eved kna'ani* and the *shifcha kna'anit* may engage in such relations with each other, and the *shifcha* is permitted such relations with an *eved ivri.* In both cases, any child that results from such relations is halachically the child of the mother alone; in the eyes of the Torah the child has no father (עבד אין לו חיים). As the child of a *shifcha,* the children inherit her legal status; they are the slaves of her owner, who has the right to sell them to another Jew if he wishes.[10]

What about relations between the *shifcha kna'anit* and her owner, or between her and any other free Jew? According to Rambam, such relations are permitted *(mid'oraita)* by the Torah but prohibited rabbinically *(mid'rabanan).*[11] Other *rishonim* disagree with Rambam and maintain that relations between a *shifcha* and a free Jew are prohibitied *mid'oraita.* These *rishonim* are of the opinion that a man's engaging in sexual relations with any woman who is not only forbidden to marry him, but whose marriage to him would not be legally recognized, renders him a *kadesh,* a sexually immoral person.[12]

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8. *Chagiga* 4a and *Nazir* 61a.
9. *Kiddushin* 66b.
10. Rambam *Avadim 3:3; Even Haezer 8:5.*
11. Rambam *Issurei Biah* 12:11.
12. *Targum Onkelos* translates *Deuteronomy* 23:18 לא יהיה קדש

It would seem, then, that a *mamzer,* too, is prohibited from any relationship with a *shifcha,* for a *mamzer,* as a Jew, is subject to the same prohibitions to which any other Jew is subject. In fact, however, this is not the case. The Mishnah in *Kiddushin* 69a states:

> רבי טרפון אומר יכולין ממזרין לטהר. כיצד? ממזר שנשא שפחה הולד עבד: שחררו, נמצא הבן בן חורין.
>
> *Mamzerim* can be purified. How? [If] a *mamzer* married a slave, the offspring is a slave; [if] he [subsequently] freed him the son becomes a freeman.

In other words, R. Tarfon sanctions the union of a *mamzer* and a *shifcha.* The Gemara goes on to relate that R. Simlai told a friend of his who happened to be a *mamzer* and who had married either a *mamzeret* or a *giyoret,* that had he asked him in the first place, R. Simlai would have advised him not to marry any full Jewess, but rather to unite with a

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מבני ישראל as follows: לא יסב גברא מבני ישראל אתתא אמה *No Jewish male shall marry a female slave.* Rashi explains: שאף הוא נעשה קדש על ידה שכל בעילותיו בעילות זנות שאין קדושין תופסין לו בה, *for he [the Jew] will become a harlot through [his sexual relations with] her, since all sexual intercourse with her is [by its very nature] illicit, for she is not legally marriageable.* See, also, Rashi to *Kiddushin 69a D"H Lechatchila.* Ramban here and in *Sefer Hamitzvot,* Negative Commandment 355, likewise sees in this verse a Scriptural prohibition against any relations with a *shifcha kna'anit.* The *Chinuch,* interestingly, says that he is certain that such a Scriptural prohibition exists, although he does not agree that it is from *Deuteronomy* 23:18. As a result he actually makes a search to find such a source in the Pentateuch; see Mitzvah 209.

Rambam is consistent in his view that there is no Scriptural reference or prohibition of relations with a *shifcha,* for he understands *Deuteronomy* 23:18 as prohibiting sexual relations between two Jewish males; see *Sefer Hamitzvot* Negative Commandment 350. Accordingly, the verse makes no reference to any relationship between master and slave girl.

*shifcha,* father children by her, and subsequently arrange for their legal emancipation. In that way his biological offspring would end up as full Jews, that is, as free converts to Judaism. Neither they nor their progeny would be *mamzerim.*

The Gemara goes so far as to suggest that R. Simlai was prepared, were it necessary, to advise the *mamzer* to commit theft in order to be apprehended and sold by the court as an *eved ivri (Exodus* 22:2). As an *eved ivri* he would be permitted to engage in sexual relations with a *shifcha kna'anit (ibid.* 21:4).[13]

In the end the Gemara concludes that even a free *mamzer* is permitted to unite with a *shifcha,* and any children born of their union may be emancipated and will be free of the taint of *mamzerut.* Such, too, is the ruling of the *Shulchan Aruch (Even Haezer* 4:20 and 8:5).

The Ran asks, how is this permitted, isn't the *mamzer*

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13. This passage in the Gemara raises a number of problems. First of all, The Torah prohibits voluntarily freeing any *eved kna'ani (Leviticus* 25:46), so how may an owner free the offspring? In fact, however, halacha does sanction exceptions to this rule. As the *Shulchan Aruch Yoreh Deah* 367:79 states, המשחרר את עבדו עובר בעשה ד"לעולם בהם תעבודו." ומותר לשחררו לדבר מצוה אפילו הוא מדבריהם כגון שלא היו בבית הכנסת עשרה הרי זה משחרר עבדו ומשלים בו מנין עשרה וכן כל כיוצא בזה.

"Whoever emancipates his slave violates "You must make them serve you forever" (Leviticus 25:46). However, one may emancipate one's slave in order to perform a mitzvah, even a rabbinic mitzvah. For example, if there was a situation where the tenth person was lacking to make a *minyan,* one may free one's slave to supply the tenth person [i.e. the emancipated slave himself]. This rule applies for all similar situations." Thus, as long as there is a legitimate reason for freeing one's slave there is no halachic problem. Obviously, R. Simlai considered the purification of the *mamzer's* children to be a legitimate reason.

subject to the same restrictions as any other free Jew? If other Jews may not engage in relations with a *shifcha,* how is it that a *mamzer* may? To answer this question Ran quotes Rabbenu Tam:

> לאו דשפחה שאני, דלא אמר רחמנא "לא יהיה שפחה". ומדאפקיה רחמנא בלשון "לא יהיה קדש" משמע שאין הממזר בכלל, שכיון שיצירתו בעבירה קדש ועומד הוא.

Rabbenu Tam is of the opinion that the prohibition involved here *(Deuteronomy* 23:18) is different from other prohibitions. The Torah does not explicitly prohibit any specific act, as it does elsewhere; for example the prohibition of incest, which clearly involves a specific act. Instead, the Torah here says that no Jew should become a *kadesh,* that is, every Jew must avoid anything that would make him a *kadesh.* As we have seen, relations with certain women would make the Jew a *kadesh. Kedeshut* is conceived to be a state resulting from certain acts. To Rabbenu Tam, *mamzerut* is at least equal to *kedeshut.* Therefore, Rabbenu Tam reasons, one who is already a *mamzer* is not going to "descend" to the level of a *kadesh;* he is already there. Nothing he can do can free him from this taint. On the other hand, nothing he can do will render him a *kadesh* – he already is one. Since he is already a *kadesh,* though not of his own volition, his situation is unique. He is not bound by the strictures of the Torah to avoid doing anything that would make him a *kadesh.* Since he cannot rid himself of this status, a status he did nothing to achieve, he need not avoid those acts that would make a non-*kadesh* into a *kadesh.* Accordingly, Torah law does not forbid a *mamzer* to engage in sexual relations with *shifcha.*

What about the view of the Rambam that even when relations between a *shifcha* and a free Jew are permitted *mid'oraita,* they are nevertheless prohibited *mid'rabanan?* Would such a rabbinic prohibition apply to relations between

a *mamzer* and a *shifcha?* The answer is no, for Rambam explicitly states that the rabbis expressly permitted such relations for the purpose of fathering children who would not be *mamzerim:*[14]

> דבר זה התירו לממזר לישא שפחה כדי לטהר את בניו שהרי הוא משחרר אותם ונמצאו בני חורין. ולא גזרו על השפחה לממזר מפני תקנת הבנים.

As *Beit Shmuel* explains, since Rambam holds that it was the rabbis who promulgated the prohibition of relations between a *shifcha* and a free Jew, the rabbis had the prerogative to exempt certain cases from their decree (הם אמרו והם אמרו).

To conclude, it is "perfectly legal" for a *mamzer* to take advantage of the loophole in the law and father children by a *shifcha kna'anit* with the intention of seeing that they are subsequently emancipated. There is nothing devious or discreditable in his efforts to ensure that he will have biological descendants who are not *mamzerim.*

In fact, a review of the relevant responsa literature shows that *mamzerim* did just that with the sanction of leading *poskim.* Most of these responsa date from sixteenth and seventeenth century Turkey. In certain parts of the Ottoman Empire, Jews were at that time legally permitted to own and purchase slaves. R. Yaakov Castro (1525-1610), the leading *posek* in Egypt along with his *rebbe* the Radvaz, writes that in his time the marriage[15] of a *mamzer* to a *shifcha* was an "everyday occurence." ומעשים בכל יום שממזר נושא שפחה שטבלה לשם עבדות לטהר זרעו לבא בקהל (שו"ת אהלי יעקב סס יי"א).

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14. Rambam, *Issurei Biah* 15:4.

15. The term "marriage" is of course used loosely throughout this article and throughout the literature, since in point of fact a *mamzer* cannot marry a *shifcha;* no Jew can, because, as previously stated, she is not legally marriageable (אין קדושין תופסין בה).

Similarly, R. Chaim Shabtai (1557-1647), who was *Av Beit Din* of Salonica and one of the leading Sephardic *poskim* of his era, relates (שו"ת מהרח"ש ח"ג ס'מ"ה) that his predecessor, the famous Maharashdam (1506-1590) sanctioned such a marriage for the nephew of a rabbi who was a *mamzer:* וכן עשה מעשה בממזר בן אחותו של החכם כה"ר חיים קרישינטי.

Maharashdam insisted, however, that the slave girl be acquired in a halachically recognized fashion:

> לא היה מתיר השפחה הקנויה לנו לממזר, אלא שהממזר יקנה גויה שתמכור היא את עצמה ויטבילנה לשם עבדות.

We shall soon discuss the ramifications of the Maharashdam's ruling.

One final example can be found in *Knesset Hagedolah (Even Haezer 4:34)* where the author cites a manuscript responsum from R. Yitzchak Ashkenazi, who was present at a "wedding" in Constantinople between a Torah scholar who happened to be a *mamzer* and a *shifcha*. The eyewitness relates that the wedding was attended by the Torah elite of the city!

> וכן מצאתי בתשובה כ"י למהר"ר יצחק אשכנזי ז"ל והעיד שראה מעשה בקושטא שממזר ת"ח נשא שפחה ונתקבצו שם חכמי קושטא באותן נישואין לכבוד הת"ח.

From these examples it is evident that *mamzerim* did in fact "marry" *shefachot*, father children, and subsequently emancipate those children, all with the sanction of contemporary *poskim*.

However, these examples occurred centuries ago, when slavery was a legally recognized institution. Today, there is no country in the world where slavery is legal; no human being has the legal ability to enslave another human being, and even were he to do so by physical force, no law would recognize the validity of the enslavement. In fact, even were

a person to voluntarily sell himself or herself to another person, no law would recognize the sale. It would therefore seem that the whole issue of a *mamzer's* marrying a *shifcha* belongs to the realm of history, not to that of "halacha and contemporary society."

And yet, this is not necessarily true. A number of modern *poskim* have addressed this issue *halacha lema'aseh.* Volume V of *Minchat Yitzchak* and Volume III of *Chelkat Yaakov* contain a lengthy exchange of correspondence concerning this very issue, that is, whether a *mamzer* in the twentieth century could actually purify his children through marriage to a *shifcha.* The question is not whether a *mamzer* may do so, for as we have seen, he may. The question is rather whether there is such a thing as a *shifcha* nowadays.

To give a scenario, suppose a man and woman meet and wish to marry. He is a *mamzer,* while she is a prospective convert to Judaism, that is, she sincerely wishes to convert to Judaism and intended to do so even before she met the man she now intends to marry. If they marry after she converts (a *mamzer* may marry a *giyoret),* their children will be *mamzerim.* She wishes to marry the man she loves, yet she does not want her children to be *mamzerim.* Anxious for a way out of her dilemma, she declares that she is willing to convert to Judaism as a *shifcha kna'anit.* That is, in accordance with *Yoreh Deah 267:9;17,* she is willing to sell herself to a Jew (in this case, the *mamzer)* and subsequently immerse in a mikvah as an act of conversion as a slave, thereby becoming a *shifcha kna'anit.* Of course, there is no question of the Jew's actually enslaving her in the sense of compelling her to do anything against her will, for he has no legal right or power to do so in the United States or anywhere else. The conversion is thus pro forma to a degree, the point being that in the eyes of Jewish law, she is a *shifcha kna'anit.* If she agrees to this, then if they subsequently marry their children will be *avadim kna'anim* and when they are

subsequently emancipated, they will be *gerim*, normal converts to Judaism, not *mamzerim*, as explained above.

While this scenario will seem far fetched and even bizarre to the modern reader, it is precisely the *(theoretical)* option the author of *Chelkat Yaakov*, R. Yaakov Breisch, recommended in a tragic case. The particulars of the case are given in *Minchat Yitzchak* V 47:

In the aftermath of the Holocaust, many displaced persons were unaware of the fate of their spouses and loved ones. Families had become separated, and in the period immediately following the end of World War II, there were cases where survivors believed that their families had perished when in reality they had survived. It thus happened a number of times that a woman, believing herself to be a widow, married another man after the war, had children by him, and subsequently discovered to her horror that her first husband had never died! The chaotic conditions prevailing in those years, especially in the DP camps and Eastern Europe, led many people to marry without consulting a rav or *Bet Din*, so many people were not even aware of the ramifications of their status.

R. Yitzchak Weiss, author of *Minchat Yitzchak*, was consulted about such a case. R. Tzvi Elimelech Kalish, Rabbi in Munkatch and subsequently in Bnei Brak, was faced with the situation of an entire group of young men who were the children of mothers who had remarried after the war, only to find out later that their first husbands were still alive. As the offspring of second "marriages" which in the eyes of Jewish law were adulterous, these young men were *mamzerim*. Two decades after the war, these young men, who had grown up in Hungary, wished to marry. R. Kalish therefore asked whether it was actually possible to convert gentile woman as *shefachot kna'aniyot* in the twentieth century. He phrased his question in general terms, without

stating the obvious, namely, that these women would have to convert of their own volition and with complete sincerity. Still, was it possible?

## Dina Demalchuta Dina

The fundamental halachic question to be addressed was whether a person who sells herself as a slave in accordance with the rules laid down in the *Shulchan Aruch Yoreh Deah 267* does in fact become a slave in the eyes of halacha – or does the refusal of the law of the land to recognize the validity of such an act render that act null and void even from the standpoint of halacha? If the latter is true, her "sale" of herself and her immersion in a mikvah are completely meaningless.

This brings us to the consideration of the scope of the halachic rule known as: the *law of the land is recognized by halacha as a valid law*, דינא דמלכותא דינא.

In spite of the voluminious literature dealing with this subject, the famous observation of the *Heishiv Moshe* (1769-1841) still applies:

> יש מבוכה רבה בין הפוסקים בענין זה וסתירות רבות... ולא ראיתי שום אחד מן המחברים שיאמר בזה דבר ברור.
>
> In this area of halacha there is great confusion and many contradictions among the *poskim*, and I know of no author who presents the matter clearly (*Heishiv Moshe* 90).

Without getting into an extended discussion of the various opinions concerning the nature and the scope of this unique halachic principle, the final ruling of the Ramo in *Choshen Mishpat 369:8* is that halacha does recognize the validity of a just and equitable law passed by a legitimate governmental authority in all areas of civil law. But this ruling is challenged by the *Shach (Choshen Mishpat 73:39)*, who maintains that a civil law passed by a gentile government is accepted as binding by halacha *only* when it does not

contradict an explicit Torah law; i.e., the secular law concerns a case that is not covered in halacha.[16] According to the *Shach,* once the *Shulchan Aruch* rules that a gentile *can* sell himself or herself as a slave to a Jew, the validity of such a transaction is not affected by the fact that the secular law does not recognize such a sale. Thus, according to the *Shach* a gentile can "sell" herself to be a *shifcha;* but if we accept the *Ramo,* the sale is problematic.

The author of *Chelkat Yaakov* was willing to rely upon the view of the *Shach* to regard such a sale as valid in the eyes of Jewish law, and therefore permit a *mamzer* and this woman to have a child together, that child being not a *mamzer,* but an *eved,* as explained. To further buttress his ruling, *Chelkat Yaakov* pointed out that at least according to a few authorities,[17] the acceptance of any secular law at all is only *mid'rabanan; mid'oraita,* there is no such rule as *dina demalchuta dina.* Thus no secular law can affect a sale recognized by the Torah. Although the *Chatam Sofer (Yoreh Deah 314)* and the *Avnei Miluim (ad loc.)* strongly disagree with this view, R. Breisch was willing to follow other more lenient rulings.

Forcefully arguing his view, R. Breisch pointed out that the *mamzer* has no decent alternative but to marry a *shifcha,* as can be deduced from *Tosafot.* In *Gittin 41a* the Mishnah rules (see also *Yoreh Deah 267:62)* that an *eved kna'ani* who

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16. As is well known, the Chazon Ish strongly disagreed with this view of the *Shach.* The fact that there has been no published halachic discussion of a legal topic does not mean that halacha has nothing to say on the subject. As the Chazon Ish puts it: לשון הש"ך ז"ל קשה לכוין. שאין חילוק בין דין מפורש לאינו מפורש. אין כלל דין שאינו מפורש, שהכל מפורש בתורה (חזון איש חשון משפט ליקוטים סימן ט"ז ).

17. *Beit Shmuel* 28:3; *Binyan Tziyon Hachadashot* based on *Knesset Yechezkel* 14 and *Teshuvot Ramo* 87.

was originally owned by two Jews and was subsequently emancipated by one of his two owners, must be freed by the other owner. The reason is that the slave is in an impossible position. Having been freed by one of his owners, he is legally half-slave and half-free. As such, he is not permitted to marry a free Jewess (because he is half slave), nor may he be united with a *shifcha* (because he is half free, and a free Jew may not engage in relations with a *shifcha,* as explained above). To require him to be celibate, the Mishnah says, is unacceptable. Therefore, he must be freed by his remaining owner; as a free Jew he may marry any Jewess. *Tosafot* ask, why is it necessary to free him, could he not marry a *mamzeret?* After all, whether his status is that of a slave or of a freeman he is permitted to marry a *mamzeret* (see *Kiddushin 69a).* Why should we violate the Torah's injunction against freeing slaves (see above) if it is not necessary to do so? Rabbenu Tam answers that we do not consider this an acceptable option, since any children he has by the *mamzeret* will be *mamzerim,* following the mother. Any marriage that would not result in *mamzerim* is preferable to one resulting in more *mamzerim,* no matter how perfectly legal the marriage ואומר רבינו תם דאין זו תקנה להרבות ממזרים בישראל.

By the same token, argued R. Breisch, if it is at all possible to arrange matters so that the *mamzer* will be able to marry a *shifcha* and thus avoid his offspring's being *mamzerim,* one cannot simply maintain that since he does have other (less desirable) options, it is not necessary to do so. To leave him no option but to father *mamzerim* is unacceptable.

The view that *dina demalchuta dina* does not affect the sale of a slave is highly controversial. In fact, it was an intense halachic controversy in sixteenth century Turkey, as the author of *Atzmot Yosef,* R. Yosef ben Yitzchak ibn Ezra (1540-1602) states: ובאמת שנפל מחלוקת גדולה בזה כפי מה ששמעתי בימי בחורותי ושנעשו בזה פסקים ארוכים רבו מני ים. A number of the greatest halachic authorities took the position that if the law of the

land prohibits a Jew from purchasing a slave, then that slave is not considered the Jew's property even if the Jew goes ahead and purchases him anyway. The Mahari ben Lev (I 12) explicitly stated this in the case of a slave girl who followed her mistress to the mikvah and begged to be permitted to immerse herself and thereby become a *shifcha kna'anit*. In spite of the fact that the girl of her own free will yearned to be a *shifcha*, said Mahari ben Lev (1500-1580), she did not become one because the laws of Turkey did not allow it, and she may therefore not marry a *mamzer*.

A similar conclusion was reached by his colleague, the Maharashdam. In a number of cases (*Yoreh Deah 194-6; 214)* the Maharashdam ruled that purchasing and converting a slave girl did not make her a *shifcha kna'anit* and she could not marry a *mamzer*.

במלכות שלנו ראה ראינו שאינם מנחים ליהודים להיות אצלם עבדים ושפחות אלא בכל מיני שכירות לקצת שנים... ושייך בהאי דינא דמלכותא... שבענין העבדים אין לנו אלא דינא דמלכותא.

The Maharashdam states that this is because the laws of Turkey do not allow a Jew to purchase any slaves:

לפי דעתי כפי מה ששמעתי ונראה אמת שבמלכות הזה מלכות תוגרמה יר"ה אין שום אדם חוץ מדתם יכול להשתעבד בשפחה ועבד אם כן דין זה לא היה צריך להשיב עליו דשפחה אין כאן.

When the question concerning the slave girl who begged to be allowed to convert was sent to the Mahari ben Lev's contemporary in Eretz Yisrael, the Mabit (1500-1580), the latter ruled that the girl was considered a *shifcha* because according to his understanding of the situation, the laws of Turkey did indeed permit Jews to acquire and own slaves. Whether the Mahari ben Lev or whether the Mabit was correct as to the Turkish law is a question for historians. What is halachically salient is that all agreed that if Turkish law did prohibit Jewish ownership of slaves, that law would have

halachic consequences and would render it impossible for a Jew to acquire a *shifcha,* and would effectively preclude the possibility of a *mamzer's* taking advantage of the "loophole" to father children with her and subsequently arrange for their emancipation.

Interestingly, these rulings of the Mahari ben Lev and Maharashdam are quoted by the *Magen Avraham* and subsequently by the *Mishnah Berurah* in the context of contemporary halacha, namely, the laws of Shabbat. Chapter 304 of *Shulchan Aruch Orach Chaim* is devoted to the rules of what a slave or servant of a Jew may or may not do on the Sabbath. The law differentiates between three types of slave: (1) a full *eved kna'ani,* that is, one who was acquired by a Jew and subsequently converted as an *eved* in accordance with the rules laid down in *Yoreh Deah* 267; (2) a gentile who was legally acquired by a Jew, accepted upon himself the seven Noahide laws, but was not converted to Judaism as an *eved;* (3) a gentile who was legally acquired by a Jew, but who neither converted to Judaism as an *eved* nor accepted upon himself the Noahide laws. Note that all three were acquired by the Jew, that is, the Jew actually owns the slave (קנין גוף).

In paragraph 1, the *Shulchan Aruch* states that both type (1) and type (2) may not do any work for their master on the Sabbath, who is required by *Exodus* 23:12 to see to it that his slaves refrain from work on the Sabbath. In Paragraph 3, the *Shulchan Aruch* states that a Jew is *not* required to see to it that his gentile *employees* who are not his slaves refrain from work on the Sabbath. Commenting on this last rule, *Mishnah Berurah* states:

> במקום שהמלך גזר שאין שום אדם חוץ מדתם יכולין לקנות עבד ואמה העבדים והשפחות יכולין להעביר אש בשבת דהויין כשכיר בעלמא. אבל יש חולקים וסבירא להו דאף עתה גופן קנוי לישראל. ועכשיו שפורעים כרגא בעד עבדים והשפחות לכולי עלמא גופן קנוי

ואסורים במלאכה. וכן לקולא דהיינו שיכול ממזר לישא שפחה.

> In a locality where the king decreed that anyone not of the official faith cannot acquire a manservant or a maidservant, one's servants may kindle a fire on the Sabbath [for their masters], for they are considered mere employees. However, other authorities disagree and maintain that even so their bodies belong to the Jew and they are considered slaves, not employees. Nowadays, when one pays a head tax for his male and female servants and is thereby entitled to own them, their bodies belong to their Jewish masters according to all opinions and they are forbidden to do work on the Sabbath. They are also regarded as servants where this would involve leniency, so that a *mamzer* may marry such a maidservant.

The first opinion cited by *Mishnah Berurah* is the opinion of the Mahari ben Lev and the Maharashdam. According to this view, a gentile acquired in a country which did not recognize Jewish purchases of slaves would indeed not be a slave but a free employee. The second opinion cited here is that of the *Knesset Hagedolah,* mentioned previously. The *Knesset Hagedolah* does not speak about the laws of Sabbath but about a *mamzer's* marrying a *shifcha.* The *Magen Avraham,* followed by the *Mishnah Berurah,* draws the conclusion that if a *mamzer* may marry a *shifcha* regardless of the law of the land, it means that *dina demalchuta dina* does not affect the acquisition of an *eved* or a *shifcha* carried out in accordance with the rules of the *Shulchan Aruch.*

In point of fact, however, a perusal of the source reveals that the *Knesset Hagedolah* did not at all maintain that the acquisition of a gentile slave was not affected by the law of the land. He merely stated that the law restricting Jewish acquisition of gentile slaves was not a *dina demalchuta* (a law of the kingdom) but a *dina demalka* (a law of the king). That is, one of the views restricting the scope of the rule of

*dina demalchuta dina* is that of the Ramban, cited in *Maharik* 66:

> כי אמרינן דינא דמלכותא דינא הני מילי הדינים הקבועים בכל מלכותו שהוא וכל המלכים שהיו לפניו הנהיגו הדברים וכן כתובים בדברי הימים. אבל מה שהמלך עושה לפי שעה או חק חדש שהוא עושה לפי שעה... אין אנו דנין אותו דין.

In other words, only old, long-established laws are recognized by halacha. New decrees of a king, especially those decrees which are not entered into the official law codes of the land, but rather remain royal decrees, are not recognized by halacha. The decree forbidding Jews to acquire slaves, says the *Knesset Hagedolah*, was such a new decree. For that reason, the validity of the purchase of the slaves was not affected by the royal decree.

It is evident, then, that contrary to the seeming interpretation of the *Magen Avraham,* the *Knesset Hagedolah* did *not* maintain that the purchase of gentile slaves was recognized by halacha regardless of the law of the land, but maintained only that in the present case there was no such law but merely a personal decree of the king. Had there been such a law of the land, the gentile could not have been acquired as a *shifcha* and the *mamzer* would not have been permitted by Jewish law to unite with her.

There is one more opinion cited here by the *Magen Avraham* and the *Mishnah Berurah,* the opinion of R. Yitzchak Aboab (1433-93):

> וכתב בית יוסף שהמהרי"א נסתפק באותן עבדים ושפחות עובדי אלילים שאם רצו להמיר דתם ולכנס לדת ישמעאל יוצאים לחירות. אפשר שאף על פי שהם עתה קנויות קנין עולם, מחמת זה הם חשובים רק כשכיר בעלמא. וצריך עיון. ודעת האחרונים להחמיר בזה מפני שיש בזה חשש אסור תורה.

R. Yitzchak Aboab, who lived in fifteenth-century Spain, where Jews were permitted to acquire Moslem, but not

Christian, slaves, suggested that gentile slaves might be permitted to perform work on the Sabbath on the grounds that they were not really slaves at all, but simply employees. Even though they had been acquired in accordance with the rules of halacha and with the consent of the law of the land, nevertheless, the fact remained that if any slave announced to the Spanish authorities that he or she wished to convert to Christianity,[18] their application would be accepted and they would immediately go free. In such circumstances, their halachic status as slaves was questionable, inasmuch as the essence of slavery is the inability to free oneself whenever one desires. Since these slaves could free themselves whenever they wished, they might not be regarded as slaves by Jewish law. If they were not slaves, then they were employees of a sort. As employees they could perform certain types of work for a Jew on the Sabbath. This lenient view was discounted by the *Knesset Hagedolah* and others, who held that as long as the slave was legally acquired in the eyes of halacha and with the consent of the law of the land, they were halachically slaves and as such could not perform work for their owners on the Sabbath.

The same dispute, it seems to this writer, would obtain in the case cited in the *Minchat Yitzchak* and *Chelkat Yaakov.* That is, even were a gentile woman to agree to convert as a *shifcha* today in the United States, she could "free" herself anytime she wished inasmuch as slavery is illegal. As stated above, her status as a slave would be strictly pro forma. The

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18. The actual quote printed in the *Magen Avraham* and the *Mishnah Berurah* reads: להמיר דתם ולהכנס לדת ישמעאל, that is, to convert to Islam. However, in point of fact, the actual responsum, which is quoted in *Beit Yosef* at the end of chapter 304, makes it clear that R. Yitzchak Aboab was referring to Moslem slaves converting to Christianity.

fact that she could free herself whenever she wished would seem, following the thinking of R. Yitzchak Aboab, to preclude her being regarded halachically as a *shifcha*.

As we have seen, the Mahari ben Lev, the Maharashdam, the Mabit, the *Knesset Hagedolah,* all accepted that if the law of the land did not recognize Jewish acquisition of slaves, any "slave" purchased in violation of the law was not considered an *eved* or a *shifcha,* and a *mamzer* could not halachically unite with them. Further, it is evident from a review of opposing responsa that the cause of disagreement between the *poskim* was the unclarity of the Turkish laws, leaving some under the impression that the laws allowed Jews to purchase Christian slaves. But where the law was clear forbidding Jews' acquiring slaves, all agreed that *dina demalchuta dina* applied, and that in such a situation a *mamzer* would not be able to marry a *shifcha.*

Despite all this, *Chelkat Yaakov* still felt that a woman could become a *shifcha* nowadays, regardless of the law of the land. He advanced two arguments:

Becoming a *shifcha* involves two stages: a) The gentile sells herself to a Jew through a *kinyan,* a halachically recognized mode of acquisition. Like all sales, this is a matter of civil law (ממונא) and as such subject to the law of the land. b) Once she is purchased, she then converts to Judaism as a *shifcha* by immersing in a mikvah and formally accepting upon herself the laws of the Torah, including her obligation to perform those mitzvot which are now incumbent upon her. Conversion is strictly a matter of religious law, and as such is not subject to the law of the land. In our case, the woman wishes to convert; there is no problem as far as stage b) is concerned. The problem is that in order to get to stage b) she has to be able to sell herself, which is not allowed by the law of the land. In such a case as ours, argues *Chelkat Yaakov,* we are entitled to view stage a) as a religious matter

and as such not subject to the law of the land. After all, there is no intention of actually enslaving her in the conventional sense of denying her her freedom. Such is not his intention at all even were it legal. Rather, the *mamzer's* sole intention is to convert her for the purpose of "purifying" his offspring in accordance with the law. Such a "purchase" is not a purchase in the conventional sense of acquiring something because someone wishes to own that thing (or person). The purchase is for religious reasons alone and is therefore valid.

This subtle argument is *Chelkat Yaakov's* first basis for allowing purchase, conversion, and marriage to a *mamzer.*

The second argument is located in a broader framework, the actual scope of *dina demalchuta dina*. As we have seen, the *Shach* did not concede much scope to the law of the land vis-a-vis halacha.[19]

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19. In truth, the question of whether a halachic *kinyan* is valid when it is not recognized by the law of the land is the subject of some controvery that extends beyond the question of slavery. The ruling adduced by *Chelkat Yaakov,* one of the best known examples of such a question, involves the sale of *chametz* before Passover. Traditionally, such sales of Jewish foodstuffs to a gentile were carried out in accordance with halachic norms, that is to say, the *chametz* was legally conveyed to the gentile through a *kinyan.* Such a *kinyan* was often not recognized by the law of the land. Did such non-recognition of the sale affect the sale's validity? If it did, it meant that the *chametz* had not really been sold and that the Jews had possessed *chametz* on Passover in violation of בל יראה ובל ימצא, and that *chametz* could not be used by them even after Passover. In other words, the consequences of the sale not being valid could be economically catastrophic for the Jews. The *Chatam Sofer (Orach Chaim* 113) reports:

When the Gaon R. Baruch Frankel, the Rabbi of Leipnik (the author of *Baruch Taam*), was still alive, it once happened that

slanderers put it into the ear of the government officials that the Jews were selling their *chametz* using bills of sale that did not bear the stamp of His Majesty the Emperor (as required by law). When the matter was brought before the Emperor, he declared that it was common knowledge that this was not a real commercial transaction but rather a religious one, and therefore did not require the official stamp. This gave rise to a certain amount of doubt (ועל זה נולד קצת ספק) in the mind of [R. Baruch Frankel], since it implied that in the eyes of the law of the land the document of sale had no legal validity.

But to my my mind it does not seem that there is any problem, for the document is a valid one, both by Jewish law, since if the gentile purchaser goes to a Jewish court to claim the merchandise it will be awarded to him, as well as by the law of the land; except if the purchaser were to turn to the civil courts, he would first have to have the contract legally stamped. It is only that in his generosity and honesty the Emperor has declared that he does not wish to impose the yoke of the tax on this kind of transaction since the sole purpose of both buyer and seller is to avoid the prohibition of *chametz*.

The *Baruch Taam*, then, was concerned that the law of the land might not recognize the document *selling* the *chametz* and that in that case the sale might be invalid. The Chatam Sofer, too, did not take the attitude that the validity of a halachically valid bill of sale could not be affected by the law of the land. The Chatam Sofer rather argued that the bill of sale was indeed recognized by the law of the land and for that reason there was no question of its ultimate validity. It would seem, then, that according to these authorities any sale not recognized by the law of the land would be halachically problematical.

On the other hand, the *Baruch Taam*'s son-in-law, the Sanzer Rav, forcefully argued that the law of the land has no effect upon the validity of a halachically recognized *kinyan*. R. Chaim Sanzer, who was expert in the civil laws of Austria-Hungry, noted that, unlike the Chatam Sofer's contention, the deeds of sale of *chametz* were in fact not recognized by the law of the land:

We go according to our own law, whether this results in stringency or leniency (בין להחמיר בין להקל). This must be so, for no document

The *Divrei Chaim's* position was that once a *kinyan* is recognized by Jewish law, it cannot be invalidated by the law of the land. *Chelkat Yaakov* bases his permission that a gentile could sell herself as a *shifcha* on this ruling of the *Divrei Chaim*. *Chelkat Yaakov* concludes by pointing out the great lengths *poskim* down the ages were prepared to go to aid an *agunah* where possible. Aiding a *mamzer* in "purifying" his offspring was an endeavor that called for equal effort. Realizing, however, that such a ruling was radically innovative in modern times, *Chelkat Yaakov* would not issue an actual ruling unless other *poskim* agreed with him.

Such agreement was not forthcoming. The *Minchat Yitzchak,* who devoted no less than seven responsa to this matter, would not agree to the subtle argument of the *Chelkat Yaakov,* that the purchase of the *shifcha* in this case was different since the Jew did not intend to acquire her in order to enslave her. Jewish law knows of no such distinctions, says *Minchat Yitzchak;* one either makes a full purchase or no purchase at all. As to the question concerning the scope of *dina demalchuta dina,* it is evident that in spite of what *Shach* and *Divrei Chaim* had stated, the Mahari ben Lev, the Maharashdam, and others cited above *did* hold that where the law of the land did not recognize it, a *mamzer* could not

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of any kind written according to their law can be of any use in this matter [of selling *chametz* before Passover], for it is a clearly established law among them that a sale of this type, performed for the sake of satisfying a religious requirement, is no sale at all; therefore, no official stamp of theirs is needed [to make the transaction valid], and all the procedures of the civil court cannot strengthen this sale. This being the case, what is our sale if it has no validity by their law? Rather, we must certainly say that we have only the law determined for us by the Torah. Therefore it makes no difference whether we write [the bill of sale] in German or in the Holy Tongue (*Divrei Chaim* II37).

marry a gentile who had been acquired as a *shifcha* because she was not in fact halachically a *shifcha*.

Moved by compassion to seek some legal remedy for the *mamzerim*, *Minchat Yitzchak* proposed an ingenious solution of his own: let the gentile woman in question undergo *two* ceremonies, that is, let her first sell herself to the Jew and then convert as a *shifcha*, in accordance with *Yoreh Deah* 267. Next, let her undergo a formal conversion to Judaism as a *giyoret*, a full convert. Such a woman may marry a *mamzer*, whatever her actual status. She is either a *shifcha* or, if the law of the land prevented her from becoming one, a *giyoret*, either of whom may marry a *mamzer*. Any offspring of the union will be children whose status is doubtful, that is, they will be either *avadim* – if the mother was a *shifcha* – or *mamzerim* – if the mother was a *giyoret*. When these offspring grow up and wish to marry, a *Beit Din* will have to decide on their status. In such a case, *Minchat Yitzchak* argued, the *Beit Din* will rule that they are *avadim* who can be emancipated and thereafter be free to marry whomever they wish, since they will not be *mamzerim*.

Why will the *Beit Din* rule that they are *avadim* and not *mamzerim*? Because when a *Beit Din* is faced with an after-the-fact situation (בדיעבד) where it is necessary to rule on the status of a person who may or may not be a *mamzer*, the *Beit Din* is supposed to rely on those bona fide halachic opinions which would allow them to rule that the person is not a *mamzer*. In our case, since there are valid opinions that the woman is a *shifcha*, a future *Beit Din* will undoubtedly rule that the offspring are not *mamzerim* but rather *avadim*, who may be emancipated and then marry whomever they please.

This proposal was withdrawn, however, in the face of criticism by the *Chelkat Yaakov*, who pointed out that this proposal would actually make matters worse. For if the gentile

went ahead and became a *shifcha,* the only questions would be the efficacy of the acquisition and her status as a *shifcha.* If the *mamzer* relied upon those who say that she is a *shifcha* and fathered children by her, he committed no great sin, for there are valid halachic opinions to this effect, as we have seen. In any case, there is absolutely no question that his offspring will ultimately be legitimate Jews because they are either *avadim* or else gentiles, depending on the status of the mother. In either case, they are not *mamzerim* and may become full Jews. In other words, the proper procedure for the father would be to emancipate them on the assumption that they are *avadim.* They would then become legitimate Jews at the moment of emancipation. In addition, just to "make sure," the father should arrange for their formal conversion to Judaism as *gerim.* Thus, whatever they were, the offspring are finally and unquestionably full legitimate Jews. However, according to the proposal of *Minchat Yitzchak,* the status of the children will be in real doubt because if *dina demalchuta dina* applies, then the mother's conversion as a *giyoret* would be valid and the offspring would be *mamzerim,* since the offspring of a *mamzer* and a *giyoret* is a *mamzer,* as explained at the beginning of this article.

## Ha'aramah

Another problem raised by *Minchat Yitzchak* is that "purchase" of a *shifcha* nowadays when there is no slavery is a legal fiction, known as *ha'aramah. Minchat Yitzchak* cites the famous opinion of *Tevuot Shor* (in *Bechor Shor* to *Pesachim* 21a) that a *ha'aramah* cannot effect circumvention of a biblical prohibition.

Our case, argues *Minchat Yitzchak,* involves an attempt to circumvent a biblical prohibition by resort to a *ha'aramah.* Despite the fact that the *Chatam Sofer (OC* 62) and *Chayei Adam (Nishmat Adam* to *Hilchot Pesach* 8) comprehensively

refuted the opinion of *Tevuot Shor,* by citing all the cases in the Talmud where *ha'aramah was* permitted and was regarded as effective in circumventing even biblical prohibitions, *Minchat Yitzchak* nevertheless felt that here we have to be conservative and not initiate a *ha'aramah* for which there exists no precedent. Even the *Chatam Sofer* and the *Chayei Adam* admitted that there were times when a *ha'aramah* could not affect a biblical prohibition (that is, we cannot conclude that because certain *ha'aramot* are effective, all are). On these grounds, *Minchat Yitzchak* felt that the *"shifcha* option" was not a valid one nowadays.

*Chelkat Yaakov* forcefully rebutted these arguments. First of all, the *Chatam Sofer* and the *Chayei Adam* were leading *poskim* who could be relied upon as precedents for sanctioning such a *ha'aramah.* But more importantly, *Chelkat Yaakov* took strong exception to the charge that there was any *ha'aramah* involved at all. What, after all, were the facts of the case? A *mamzer* wished that his offspring not be *mamzerim,* a halachically laudable goal, as we have seen. There is only one possible legal way to accomplish this, marriage to the *shifcha,* as provided for in *Shulchan Aruch.* The woman involved desires the same thing. Although she could convert as a full Jewess and then marry the man she desires, she, too, realizes that her children will be *mamzerim,* something she is as anxious to avoid as he. Realizing that this means that she must become a *shifcha,* she is prepared to take that step in good faith, fully conscious of the unusual status that will be hers, a status that is admittedly quite bizarre in the twentieth century. Nevertheless, for the best of reasons, she is prepared to swallow her pride for the sake of the man she wants to marry and for the sake of her children. Where is the *ha'aramah?* She knows what being a *shifcha* means in halacha, and she makes this choice with open eyes. There may be an element of tragedy here, but not of farce or trickery.

Furthermore, argues *Chelkat Yaakov,* the fact that we

cannot legally enslave anyone nowadays does not automatically mean that there can be no status of *shifcha*, for halacha does provide for a scenario where a woman is a *shifcha* even though she does not have to actually serve anybody, as in *Yoreh Deah* 267:77:

> מי שצוה בשעת מיתתו "פלונית שפחתי אל ישתעבדו בה יורשים" הרי זו שפחה כמו שהיתה ואסור ליורשים להשתעבד בה

> If one who was dying commanded, "I do not want my heirs to compel my *shifcha* to do any work at all," then although she does remain a *shifcha*, the heirs may not compel her to work.

Thus, there is such a thing as a *shifcha* who, if her owner agrees or legally binds himself, is not halachically compelled to do anything. In spite of the fact that she need not actually serve anybody, she is a *shifcha*, and her children by a *mamzer* would not be *mamzerim*. Therefore, concludes *Chelkat Yaakov*, there is no problem of *ha'aramah*. At the same time, *Chelkat Yaakov* reject the fears of *Minchat Yitzchak* that the entire procedure might open a Pandora's box of insincere converts who might try to take advantage of certain leniencies in the *shifcha* process that do not apply to the normal process of conversion. It is up to the *Beit Din*, said *Chelkat Yaakov*, to formulate procedures and arrange matters in such a way as to prevent such mishaps.

In the end, however, in spite of these forceful refutations, *Chelkat Yaakov* was moved by the negative stand of *Minchat Yitzchak* to reiterate that he was not prepared to act upon his own suggestion without the approval of other *poskim*. This approval, we have pointed out, was not forthcoming.

The effect of this ultimate reluctance to actually rule, *Halacha lema'aseh*, that a woman could become a *shifcha* nowadays is reflected in a more recent responsum which deals with the same problem. In *Teshuvot Vehanhagot* I

764, R. Moshe Sternbuch describes how he was faced with a situation in South Africa of a woman who had had an Orthodox marriage, but had remarried without benefit of a *get*, a halachic divorce. Her husband had been relucant to give her a *get*, so she remarried in a Reform ceremony. Obviously, the children from her "second marriage" were *mamzerim* because in the eyes of Jewish law she was still married to her first husband at the time she had children by another man. Some years later, the woman became a *ba'alat teshuvah* (repentant), sought and obtained a *get* from her first husband, and even sent her children to Orthodox day-schools. She was nevertheless faced with the consequences of her second marriage: her children were *mamzerim*.

In seeking a solution to this tragedy, R. Sternbuch likewise reasoned that it ought to be possible for a gentile woman to become a *shifcha* even in modern-day South Africa inasmuch as the entire process would be a legal fiction to which the state would not take exception. In the end, however, R. Sternbuch concluded that if such great authorities as the *Minchat Yitzchak* and *Chelkat Yaakov* were unable to sanction such a procedure, in the one case on account of halachic objections and in the other on account of a reluctance to rule absent support from other *poskim*, then such an option was not practicable nowadays. R. Sternbuch had no choice but to advise the *mamzerim* to marry converts, knowing, however, that their children would also be *mamzerim* down to the end of time. As he put it:

> ועל כל פנים אין לנו לפרוץ גדרים בייחוס שלא שמענו מאביתינו כן מעולם אף שהיה יכול להציל פסול זרעו לעולם
>
> In any event, we ought not to "break fences" [i.e. make radical innovations] in matters involving family relations. We have never heard of our ancestors [resorting to such a procedure] even though [the *mamzer*] would be able to save his progeny [from the taint of *mamzerut*] forever.

## Conclusion

There is no question that even nowadays the ruling of *Kiddushin* 69a, codified in *Even Haezer* 4:20, stands, and a *mamzer* could legally unite with a *shifcha.* Any children of their union would be *avadim kna'anim,* who could be emancipated, whereupon they would be legitimate Jews. The problem, however, is the technical one of the difficulty if not impossibility of anyone's becoming a *shifcha* in the modern world.[20] The fact that the law of the land does not recognize any form of slavery presents what seems to *Minchat Yitzchak* insuperable obstacles.[21] Although *Chelkat Yaakov*

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20. "It is probable that slavery no longer exists as a legal phenomenon recognized by a political authority or government any place in the world." *Encyclopedia Britannica* (1990) Volume 27, p. 290. See, also, M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law,* (Martinus Nijhoff 1992).

Actually, this is not a simple matter at all. While it is true that slavery is illegal around the world and hence no longer exists *de jure,* slavery does exist *de facto* in a number of Third World countries in a variety of economic guises, such as the system of "guest workers" in Saudi Arabic and the Gulf States, and debt-bondage in India, Pakistan, and parts of the Carribean (*Newsweek* May 4, 1992, p. 30). In other words, legal chattel slavery no longer exists, but the the essence of slavery, namely, the exploitation of millions of human beings who are unable to escape forced labor, does exist. In the words of *Newsweek* magazine, "Instead of freeing slaves, governments simply pass laws they don't enforce."

In such a context, the question arises, which has greater halachic valence – the official laws of the country, which do generally prevail within its territory – or the *de facto* reality that does exist in certain of its regions? As we have seen, a similar state of confusion likewise characterized the law in the Ottoman Empire in the sixteenth century; see Assaf in *Zion,* no. 4, pp. 110-114.

21. Interestingly, no one seems to have considered the possibility of marrying a *shifcha* in modern-day Israel (although *Chelkat*

maintained that it *is* possible to become a *shifcha* nowadays and for a *mamzer* to purify his offspring through his union with her, in the end he was not willing to advise people to act upon his theoretical ruling.

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I would like to express my thanks to Jonathan Adler and especially Binny Friedman, two *talmidim-chaverim,* for their help in the preparation of this article. I would also like to thank Mr. Eugene Hettleman for his insightful comments and suggestions.

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*Yaakov* makes a very brief, cryptic, reference to this possibility, but makes no attempt to pursue it; *Chelkat Yaakov* III no. 91). Do the secular laws of the State of Israel affect the validity of a halachically valid *kinyan?* As is well known, the Ran in *Nedarim* 28a quotes Tosafot to the effect that *dina demalchuta dina* does not apply to a Jewish king in the Land of Israel. Ran, of course, refers to a legitimate king whose authority is recognized by halacha. Other *Rishonim,* such as Meiri, *ad loc,* and Rashbam to *Bava Batra* 54b disagree.

This controversy concerns Davidic kings. Does anyone contend that the Meiri and Rashbam would recognize the secular state of Israel as possessing the same powers as a Davidic king based upon Torah law? Indeed there are; however, even they do not contend that the law of the State could outweigh or nullify a law of the *Shulchan Aruch.* See, for example, R. Shilo Raphael (*Torah She B'al Peh* no. 16, p. 127), who, although he argues that the laws of the Knesset have halachic recognition, nevertheless, clearly stipulates that such laws must not come into conflict with halacha: אלא שהגבלה חמורה יש בדבר כל האמור אינו אלא בשהחקיקה איננה בניגוד לדין תורה. אם מדובר בחוק או תקנה המתנגדת לדיני תורה או אפילו למצות חכמים היא בטלה ומבוטלת.

This is the opinion of someone who views the State of Israel in a positive light, halachically speaking. The views of such *poskim* as R. Yaakov Breisch, author of *Chelkat Yaakov,* a leading *charedi,* and of Rav Yitchak Yaakov Weiss, author of *Minchat Yitzchak,* who was *Av Beit Din* of the *Eida Hacharedis* in Jerusalem, obviously grant less recognition or none at all to the laws of the Knesset! Accordingly, it would seem that the scenario discussed above would be much less problematic if carried out in the State of Israel today.

# Letters To The Editors

Dear Rabbi Cohen:

Rabbi Chaim Malinowitz's article in the Pesach issue of your excellent publication, in which he criticized the 1992 New York State *Get* Law, left me greatly troubled. For if the adjudication of financial obligations and rights between a married couple by a secular court at the behest of one party can so easily result in a form of coercion that invalidates a subsequent *get*, then, it seems to me, many *gittin* which were written throughout America for many years may be tainted.

A simple example: A woman with children wants a *get* and a divorce from a recalcitrant husband. When he refuses support, she asks the court for temporary support for the children and herself. She may have gone to a *bet din* first, but the husband did not rush to appear and she could not wait to get its permission to turn to the secular court. The amount adjudicated by the court could easily be more than she is entitled to receive halachically. After paying the amount for a few months, the husband agrees to a *get*.

Although at this point the court has not even considered a divorce and the *Get* Law is not yet in the picture, we face the quandary so ably stated by Rabbi Malinowitz. If according to halacha the husband did not have to pay any support or if the amount of support she was entitled to under halacha would have been substantially less than what the court prescribed, then the husband would quite likely never have given a *get*. At least that possibility cannot be ruled out. The same danger that makes the *Get* Law unacceptable – the coercion of the husband's free will as a result of the court's decision that he must suffer a financial loss not sanctioned by halacha – is present in our situation. What is the difference if the *get* is given to escape improper support or improper

equitable distribution? The fact is that in both cases the husband has been forced by a non-halachic court to give the wife more than halacha requires, and that factor may have moved him to give the *get*. Even if he declares that it played no part in his decision, we do not believe him, as we would not believe a husband even if he did not object to the sum set by the court as equitable distribution under the *Get* Law.

In sum: It seems to me that if Rabbi Malinowitz is correct, a *bet din* may not write a *get* after the wife has applied to a civil court for support for herself and her children without first obtaining the permission of a *bet din*.

Something tells me that the practice is otherwise.

Sincerely yours,

MEYER KRAMER

Rabbi Malinowitz responds:

I must begin by thanking you for reading my article and discussing its points in a reasoned, rational fashion. וכך היא דרכה של תורה. Your points are well-taken. Allow me to address them, mainly by addressing your "example".

There is no halachic question that if a person gives a *Get* under financial duress, the *Get* is invalid. What must always be determined, though, is if the financial pressure is of a sufficient nature to constitute "coercion" (the "pressure" for example, of $100 would probably *not* constitute "coercion"). Another fact to be determined is the "link" between the pressure and the *Get* – the link has to be (halachically) clear-cut; it must also include, by definition, the removal of the duress if and when the *Get* is given. Another issue is the justification of the financial duress itself – as mentioned in my article, if the financial duress is in and of itself halachically justifiable, then it would not constitute coercion even if it does produce a *Get*.

With these points in mind, let me address your example.

If a woman merely requests (or even demands) a *Get* (but doesn't, for example, leave the household), and the husband subsequently cuts off support and refuses to appear at a *Bet Din* to determine if his refusal is justified, this is tantamount to refusal to support. The likelihood, therefore, is that the support awarded to her would be for her needs and would *not* constitute unjustified monetary pressure. (She should, of course, apply for *Bet Din* permission to go to the courts, and in the scenario you describe it would be easily and quickly granted.) The burden of proof in your case is on the husband to prove he does *not* owe support. (In my personal opinion, this would perhaps be a case where *kofin* – coercion by a *Bet Din* – would be permitted, but this is not the place to elaborate on that).

In your example, it is not clear how there is a link between the *Get* and the court-ordered support. Was it stated that it was done for a *Get?* Is it the case that the support obligation will cease if and when there is a *Get?*

It is also unlikely, in your scenario, that there were prior threats to use the civil courts to obtain a *Get* – you describe going to the courts as a last step in a chain of events precipitated by the husband's refusal to support or to go to a *Bet Din.*

To sum up, certainly a *Bet Din* must deal with each situation as it arises, on a case-by-case basis. In your example, logic dictates that the woman is going to the civil courts for money she is probably entitled to (the husband is preventing the determination!), and not to pressure for a *Get.*

The *Get* Bill, on the other hand, is a tragic piece of legislation for the following reason:

– It makes *no* distinction as to who is refusing to go to a *Bet Din* – indeed it urges a woman to ignore *Bet Din* and go

to the courts.

– It explicitly links the financial questions to the *Get*.

– It institutionalizes going to secular courts – making the *threat* of coercion likely.

– It can – and will – be used even if the woman is a *moredet* (halachic term for a rebellious wife) and not entitled to *any* support.

– All of this is besides the total outrageousness of part of the Jewish community supporting a bill which calls for outright transgression of major prohibitions – going to the civil courts, possible theft, and *Get*-on-demand (even if valid!).

With respect and affection,

CHAIM MALINOWITZ

To the Editor,

I am writing to you in response to one particular point raised by Rabbi Malinowitz in his article on the New York State "*Get*" Law in your most recent issue. Rabbi Malinowitz, in discussing the issue of halachic basis for the concept of equitable distribution being recognized by a *Beth Din*, states that the "chances of equitable distribution" being covered by the rule of *Dina D'malchuta Dina* are almost nil. He bases this assertion on a number of points.

1. *Dina D'malchuta Dina* was never meant to blindly follow their rules, for if so, that would mean the end of Torah Law.

2. Many *Poskim* limit *Dina D'malchuta Dina* to matters concerning monetary relations between the authorities and the public.

3. The equitable distribution process is arbitrary – involving 13 factors which are subjective and up to the individual judge.

4. Equitable distribution is not a law, but rather "merely the state's distribution of property in the absence of any other arrangement."

I believe that Rabbi Malinowitz's assertion can be questioned for the following reasons:

1. Point 4 – Equitable distribution is indeed a law – it is Domestic Relations Law 236 Part B Subdivision 1 (C).

2. Point 3 – While there is a certain subjectivity on the part of the judge involved in his decision, he must justify in his decision to which points he is giving greater weight, and for what reason. It is not simply caprice on the part of the judge. Obviously, there are different circumstances to every divorce, but this hardly classifies this law as not being שוה לכל בני המדינה (equal for all).

3. Points 1 and 2 – It is not possible for me now to extensively analyze the concept of *Dina D'malchuta Dina*, (there have been other articles in previous issues of this Journal that have analyzed the issue in detail), but very briefly let me say that the restrictions of the *Poskim* do not necessarily apply in this case. *Dina D'malchuta Dina* can operate in a number of different ways. One manner in which it plays a role in our *internal* halachic system is by establishing for us certain different "realities" than may have heretofore existed. Thus, for example, *Dina D'malchuta* can mandate new *Kinyanim*; not because *Dina D'malchuta* is "changing" the halacha, but simply because these *Kinyanim* then fall under the rubric of *situmta*. Similarly in other areas of *mamonot*, where the state of mind of the individuals involved is important, the fact that the secular law rules in a certain manner would indicate to us their state of mind. It

is therefore their *state of mind* which may differ as a result of *Dina D'malchuta,* and the halacha will merely acknowledge their different state of mind. I cite for you three examples of this:

1. Ramo to *Choshen Mishpat* 207:15 – Even though "*asmachta lo kania,*" if the government has different rules, it can be valid. *Dina D'malchuta* is not changing the halacha; it is merely indicating that since in that particular society, this type of transaction is viewed as valid, there is truly *semichut da'at*.

2. *Tshuvot Chatam Sofer Choshen Mishpat* 142 – In explaining the *shita* of the Rivash, Chatam Sofer elaborates upon a cryptic statement of the *Sma* 349:2 and states that *Dina D'malchuta* can clarify for us a person's thinking when he made a certain financial commitment.

3. *Iggerot Moshe Choshen Mishpat* Sec. 2 #62 – Since today we engage in real estate transactions according to secular law, the concept of שעבוד קרקעות, of halachic "liens" on the land (i.e. that even after the land is sold to another party, creditors of the original owner have the right to seize the land in payments of debts) no longer exists, for שעבוד קרקעות, depends upon סמיכת דעת (relying upon the ability to collect) which no one will have if the government won't enforce it. Furthermore, the established halachic *Kinyanim* (methods of acquisition) for real estate will not work today, for without government approval of the transaction no one has סמיכת דעת.

The Equitable Distribution Law is based upon the theory that marriage is an economic partnership, that upon its dissolution the marital property should be equitably divided between the parties. I submit that *batei din* today ought to consider very carefully not that *Dina D'malchuta* should change our halacha regarding distribution of marital assets, but rather they should consider whether the reality of what

men and women have in mind when they enter a marriage has changed. Perhaps the different expectation today ought to play a halachic role in how property ought to be distributed.

RABBI KENNETH AUMAN

Rabbi Malinowitz responds:

R. Auman *Sh'lita* is quite correct in stating that the proper forum for a full airing of the "*Dina D'Malchhuta Dina*" concept is not as a side point when discussing the *Get* Bill. However, as he does take issue with some of my points, I will respond to his comments.

The strongest argument *against* the applicability of "*Dina D'Malchuta*" to the Equitable Distribution Law is R. Auman's statement: "The E.D. Law is based upon the theory that marriage is an economic partnership: that, upon its dissolution, the marital property should be equally [sic] divided between the parties." Precisely. And that concept is halachically confiscatory in nature. Marriage is *not* an economic partnership – this "theory" is the halachic equivalent of a law which states that every congregrant in R. Auman's Synagogue owns part of his house. In other words, because this law has an underlying theme, which stands in direct opposition to Torah Law, "*Dina D'Malchuta*" clearly does not apply (see *Shach Ch.M.* 73:39; *L'vush*, ibid, 369. Ramo, ibid 369:11)

R. Auman states, "E.D. is indeed a law." I am well aware of that – in fact, that is why a problem exists. I'm afraid R. Auman missed my whole point: When the "*Dina D'Malchuta*" allows for the *Din Torah* to function, certainly the parties are obligated to be governed by Torah Law. The point made was that E.D. is not a government imperative – the government is perfectly willing to have the parties settle matters between themselves. This does not represent "*Dina*

*D'Malchuta*" – see sources in דיני ממנות ח"ד פ"ט סעיף ט'.

R. Auman also states that the E.D. law should be considered equitable to all. I reiterate that a law which takes as its premise that there is an "economic partnership" and then proceeds to divide its "assets" based upon factors as varied as "the age and health of both parties" (#2) and "the tax consequences to each party" (#10), as irrelevant as "the probable future financial circumstances of each party (#8); as vague as "the wasteful dissipation of assets by either spouse"; and then you top it all of with a catch-all factor (#13) "any other factor which the court shall expressly find to be just and proper" – such a law can hardly be seen as objective in nature. In addition, the judge decides how much weight to give to each factor, and each judge in each case can rule differently regarding this – in fact, the same judge himself can rule differently in similar case – there is no need to show consistency with a previous ruling. I leave it to the reader to decide if this is objective law.

Regarding R. Auman's claim of "*Dina D'Malchuta*" creating a "state of mind" – if his point is that there is a clear understanding on the part of everyone who marries (in N.Y. State?) that, in the case of a divorce, they wish to be governed by N.Y. State Law, I'm afraid the reality belies his theory – just ask any about-to-be married, or just-married, couple.