

THE BAIS HAVAAD

# HALACHA JOURNAL

Family, Business, & Jewish Life Through the Prism of Halacha



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## MOB RULES:

*Does the Torah Sanction Vigilante Justice?*

PART II

Adapted from a shiur by Raz Yosef Greenwald

### JUSTICE AS DIVINE REPRESENTATION

Bais Din is called in the Torah by the Divine name Elokim (Shemos 22:7 et al.).

A monetary Bais Din of three judges is G-d-like in that it brings justice to this world. A minor Sanhedrin of twenty-three carries the additional Divine mantle of the power over life and death.

For this reason, Bais Din doesn't employ an executioner to carry out its verdict. Because the dayanim represent Hashem in administering justice in the world, they must themselves carry out that justice. It is not a task that can be assigned, like the sweeping of the Bais Din floor. Even the witnesses can't supply their testimony and walk away, they must participate in the execution along with the judges. And they go first (Devarim 17:7).

But capital punishment is almost never carried out in the Jewish justice system. There is a dispute in the Mishna (Makos 1:10) whether a Bais Din that performs an execution as frequently as once in seventy years is "destructive," or only one that does so once in seven. Rabbi Akiva and Rabbi Tarfon said that had they been in the Sanhedrin, no one would ever have been executed.

This is not only because of the dearth of crime in a Torah society, but because the Halachic conditions for execution are so onerous as to be almost impossible to meet: Two valid witnesses must view the criminal act, both from the same vantage point (Makos 5); the perpetrator must be warned; and he must acknowledge the warning and proceed anyway. This would almost never happen, espe-

cially considering that criminals don't generally enjoy the company of witnesses.

Clearly, deterrence is not the goal of the Torah's death penalty. A would-be murderer who desists because he's worried about being executed by the courts is suffering from irrational fears.

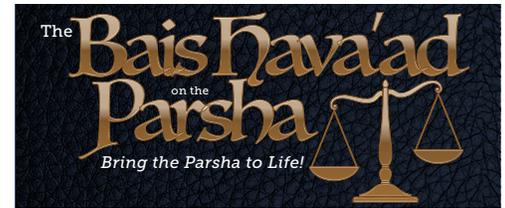
Nor is it to punish, because that is Hashem's exclusive domain: *Mine is vengeance and repayment* (Devarim 32:35).

Rather, explains R' Shmshon Rephael Hirsch, the purpose of the Torah's death penalty is to create a presence of G-dliness in the world by demonstrating publicly that a person who rebels against Hashem doesn't deserve to live. That the court exercises this power so infrequently is of no import. Were an innocent man to be put to death in Hashem's Name, that would constitute a dreadful *chillul Hashem*. Much of what passes for evidence in secular judicial systems—sufficiently so, to take a man's life—would be of no value in a Jewish court.

In the first installment of this series we spoke of the bright line dividing *dinei nefashos* from *dinei mamonos*. Unlike in the secular judiciary, a monetary Bais Din of three judges doesn't exist to punish financial crimes, because punishment, again, is outside the purview of Bais Din. Rather, payment is exacted from the thief or the arsonist precisely as it is from the borrower or the purchaser. Though theft is prohibited and borrowing is not, both create indebtedness. It is the brief of Bais Din to rectify this indebtedness by restoring monies to their rightful owners. (Nevertheless, one who damages property bears one additional burden: In the event that he lacks sufficient cash or personal property to satisfy his debt, and he is paying with real estate, he must surrender his best land.)

Although a thief who lacks the funds to

(continued on back)



Adapted from a shiur by Rav Yitzchak Grossman on Parshas Terumah

### Do Large Parks and Gardens Invalidate an Eruv for Shabbos?

אורך החצר מאה באמה ורחב חמישים בחמישים וקמה  
 חמש אמות שש משזר ואדניהם נחשת  
 (שמות כז:יח)

The Gemara (*Eruvin* 23a) sees this *pasuk* concerning the measurements of the *Mishkan* as an *asmachta* (allusion) to the rabbinic halacha of a *karpef*. An area 5000 square amos that is *lo hukaf l'dirah* (not walled for people to live) may not be included as part of an *eruv* to allow carrying on Shabbos.

It is based on the following points:

A *karpef* is similar to a *reshus harabim* (public domain where carrying is forbidden) in that it is open and not used for housing (Rashi).

It is derived from the Mishkan like other halachos of Shabbos (*Levush*).

Chazal only forbade a *karpef* larger than the *Mishkan's* dimensions (*Shulchan Aruch HaRav*).

The Gemara states that gardens with seeds (*zeraim*) planted in them are considered a *karpef*. If so, how can

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spotlight

Did you know that members of the Even Haezer Chabura rotate every week giving shiurim on different areas of practical issues related to Even Haezer?

# GENERAL HALACHA

## A Defective Sheital and the Chasuna is Tomorrow!

By Rabbi Baruch Meir Levin



**Q:** My wife recently purchased a brand new sheital for my sister's wedding. Everything seemed perfect as she wore the sheital the past few weeks. To our great dismay, my wife just noticed that the sheital is missing some hair and is a defective product. My wife is adamant about returning this sheital but we are in a very uncomfortable bind. On the one hand, tomorrow night is the chasuna and this is the only appropriate sheital that she has for such an occasion. There is no time left to get a new sheital in time for the chasuna. On the other hand, she clearly wants to return this sheital as it has a defect. Is she allowed to wear this sheital once she has decided to return it and if she wears it can she still return the sheital for a full refund?

**A:** This is a classic example of a *mekach tausa* – a mistaken transaction. The *Shulchan Aruch* states that one who purchases an item and later realizes that it has a *mun* – a defect, may return the item even after many years<sup>1</sup>. However there are a few important conditions that must be met in order to be able to return this item:

**Knowledge and Usage:** As long as the consumer did not have knowledge of the defect

1 ועי' בשו"ת הגרעק"א (בתרא סי' ק"ו) דהא שנתבטל המקח היכא דיש בו מום, היינו משום דכל מקח הוי מכירה על תנאי שהמוכר יתן לו מקח שלם. ובמקרה שקיבל המקח עם מום, יש זכות ללוקח לטעון מקח טעות, ואז יש זכות למוכר להשלים התנאי ואינו משלימו, המקח בטל. והיינו, דבעצם המקח קיים אלא שאם טוען הלוקח מקח טעות, אז נתבטל המקח. אולם, עי' בשו"ת בית הלוי (ח"ג סי' ג') דפירוש אחר יש בדבר, דביטול מקח אינו מדיני תנאי אלא היכא דאיכא מום המקח בטל מפני שיש חסרון בעיקר המקח, והוי כאילו הלוקח קיבל מקח אחרת לגמרי ממה ששילם עליה.

at the time of the sale or at the time of the usage, he may return the item. If however, the consumer realized that there was a deficiency and still purchased the item, or the consumer only realized sometime after the purchase but continued to use the item, the usage indicates that the consumer is *mochel* – forgives the imperfection. The sale is therefore deemed valid as is. The consumer has forgiven his rights to return the object<sup>2</sup>.

**Express Dissatisfaction:** Once the consumer realizes that the item has a defect, he must express this dissatisfaction to the seller to let him know he would like to nullify the sale. If the consumer recognizes the defect but waits beyond a reasonable amount of time to let the seller know, this lack of action indicates that the buyer is *mochel* – forgives his rights to return the item<sup>3</sup>.

**Ability to Rectify:** Even in a circumstance that the buyer has the right to return an item, the buyer cannot necessarily cancel the transaction and demand a refund. If the product can be fixed to be like new, the seller must be given the opportunity to fix the item in a reasonable amount of time. Conversely, if the item cannot be fixed to perfection, the seller may not force the buyer to keep the item and refund only the difference between what the buyer paid and what the item is really worth; rather, he must issue a full refund.

### REPAIRABLE

Given the above set of conditions, it is important to analyze the details of our case. If the *sheital* can be fixed by adding some hair to the point that the *sheital* would be a perfect product, the buyer is not allowed to demand a refund and cannot just cancel the sale. This being the case, she should wear the *sheital* for the wedding and have it fixed afterwards.

If the *sheital* cannot be fully repaired to per-

fection, the buyer has the right to cancel the sale. However, this places the woman between a rock and a hard place; if she doesn't wear the *sheital*, she will be embarrassed at the *chasuna*. If she does wear the *sheital*, she forfeits her ability to return the item because she has now used the item and has effected a *מחילה* waiving her rights of returning the *sheital* (as above).

### DIRE CIRCUMSTANCES

There is, however, an exception to this rule. If the buyer is in a situation of an *אונס* – a dire condition, even if he is aware of the defect, he may use the item in the dire situation and still have the right to return the object. For example, if one rented a car and midway on his journey he realizes that the air conditioning is broken and he wants to demand compensation for this defect. He may continue using the car and demand compensation at the end of his journey. The same halacha would apply in our scenario. Since the woman is in a dire situation and would be left without a fitting *sheital* for the *chasuna*, she may use the *sheital* and may still demand a refund or a full repair after the *chasuna*.

### NOT AVAILABLE

Another exception is a case where the consumer would like to return the item immediately but the seller is not available. In this scenario, even if the item was used after the defect was noticed, the usage is not considered a *מחילה* – and the right to return the object still stands<sup>4</sup>.

### NOTIFIED IN ADVANCE

There is a dispute in the Poskim if one can retain the right of return and repair by first notifying the seller of the defect before he uses the item. Some maintain that if advance notice is given to the seller, even if the object was used thereafter, the usage does not indicate a *מחילה* on behalf of the buyer, because the buyer expressly communicated his dissatisfaction with the item. In our scenario, if the woman would notify the *sheital mocher* that she intends to return the item but she needs to wear it for the *chasuna*, she would still retain the right of return or repair according to some Poskim<sup>5</sup>.

4 כן פסק הנהיבות (משה"א סק"א) והובא להלכה בפתחי תשובה שם סק"א.

5 המחנה אפרים פסק דלא חשיב מחילה, והגליא מסכת הוכיח דחשיב מחילה (והובא בפתחי תשובה שם).

2 שו"ע חושן משפט סי' רל"ב סעי' ג'.

3 מדברי הרמב"ם (הובא במקור המשפט) משמע דעד שמ" שתמש במקח לא חשיב מחילה. אבל הרדב"ז (סי' קל"ו - ח"ד סי' אלף ר"ו) מביא בשם רב האי גאון דהיבא דהוי הדין עם שמעון צריך לישבע שמעון שלא הרגיש במום זה עד עתה, עכ"ל. ודייק המחנה אפרים (הל' אונאה סעי' ד') דמיד כש" מרגיש הלוקח במום שצריך להחזירו, ואם אינו מחזירו מיד נחשב ההמתנה למחילה ושוב אינו יכול לטעון מקח טעות. וכן משמע ברי"ף בב"מ (דף ג) שכתב וז"ל והיכא דזבין איניש מידי ולאחר זמן איגלי ליה דאית ביה מומא דהוה ביה מעיק" רא מקמי דלזבניה, אית ליה לאהדורי למריה ולא אמרינן ביה הא, הא שהה ליה בכדי שיראה לתגר או לקרובו, דלא אמור רבנן הכי אלא גבי אונאה. אבל גבי מומין מקח טעות הוא, וכל אימת דמיגלי ליה מהדר ליה למריה, והכי כתב רבינו האי גאון זצ"ל, עכ"ל. ומלשון "וכל אימת דמיגלי ליה וכו'" משמע דצריך להחזירו מיד, דאם לא עשה כן נחשב מחילה.

# MATTERS OF INTEREST

*Avissar Family Ribbis Awareness Initiative:*

## USUAL AND UNUSUAL FAVORS

May a person do favors for someone he owes money to? For example, Reuven, who owes Shimon money, was in a sefarim store and saw a sefer Shimon always wanted. May he do him a favor and buy the sefer? What if they always exchange favors? What if they became friends through the loan process?

A teacher lent money to a student for a taxi ride home. May the student chip in to buy the teacher a Chanukah present while the loan is outstanding?

Many people will assume that these questions, or those that follow, do not apply to them since they don't owe any serious money



to anybody. However, this is a mistake.

As explained in the overview, aside from borrowing money or commodities, the status of a "borrower" in *halachah* can be achieved in many ways. Purchasing merchandise on credit falls into this category. Until the buyer pays his bill he is considered a "borrower," and the seller, a "lender." Similarly, after workers complete a project or a repair, the employer is considered a "borrower" and the employees "lenders," as the job has ended and the wage payment is outstanding. Owing money for tuition is also considered borrowing.

When such titles are conferred, the laws of

ribbis will apply in some form or another.

One important ribbis restriction is that the borrower may not benefit the lender in connection to the loan. Offering favors is viewed as overpayment, and therefore a form of ribbis. This is forbidden between friends just as between strangers, rich or poor.

However there are certain laws related to extending favors which are sometimes relaxed between friends, depending on the level of friendship. People may know each other, but are not necessarily considered friends. The parties must determine the level of friendship before extending or requesting favors.

# OU DAILY LIVING

*Weekly Questions*

*Laws related to Brachos*



**According to some opinions, the bracha for sugar is Ha'eitz or Ha'adama. What is the explanation for these views?**

The Tur writes that the *bracha* for sugar from sugarcane is *Ha'eitz*. The sugarcane is a woody perennial stalk which has the status of a tree. Ordinarily, when juices are extracted from a fruit the *bracha* changes to *Shehakol*. Nonetheless, in this case it remains *Ha'eitz*, since the main intent of growing the cane is for these juices. The Tur holds the *bracha* is *Ha'eitz*, not only if one sucks on the sugarcane, but even if one eats granulated sugar.

The Beir Halacha explains the rationale of the Baal Halachos Gedolos that the *bracha* on sugar is *Ha'adama*. Although sugarcane is a tree, it does not produce any actual fruit. Rather, the juices that are extracted are taken from the cane itself. Since there is no actual fruit, the *bracha* is downgraded to *Ha'adama*.

As noted the accepted *halacha* is to follow the opinion of the Rambam and recite *Shehakol* on sugar.

**What bracha does one recite on granulated cane sugar?**

The Shulchan Aruch (OC 202:15) follows the opinion of the Rambam that the *bracha* for sugar is *Shehakol*. However, the Mishna Berura writes that since there are varying opinions in the *Rishonim* as to the *bracha* for cane sugar, *bidieved* (after the fact), if one recited *Ha'eitz* (opinion of the Tur) or *Ha'odama* (opinion of the Baal Halachos Gedolos), one does not repeat the *bracha*.

The accepted ruling is that on all forms of sugar, whether extracted from a cane or a sugar beet, we recite *Shehakol*. The Beir Halacha writes that even if one were to suck on the sugarcane itself, one should recite *Shehakol*.

## OF INTEREST AT THE BAIS HAVAAD

The bold words: A Place to Turn introduced the recent comprehensive article featuring The Bais HaVaad Medical Halacha Center in the AMI magazine special medical issue. The in depth coverage was the result of interviews with the MHC Poskim, Rabbi Yosef Fund, Rabbi Eliezer Gewirtzman, Rabbi Moshe Zev Feldman and Rabbi Yosef Jacobowitz, shlit"a, conducted by AMI reporter, Yosi Krausze, as well as background and an overview discussion with Medical Center Director, Rabbi Yehoshua Greenspan.

In the few short months since the Center has gone public, multiple media outlets have expressed interest in interviewing this groundbreaking initiative, the first of its kind in North America.

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make restitution is sold into servitude in satisfaction of his debt, this is a program to rehabilitate him for his own benefit rather than a punishment.

Ultimate justice is not in human hands. As we find in Bava Kama 56 and elsewhere, one who causes damage indirectly, *grama b'nizakin*, is liable under the laws of Heaven but exempt under the laws of man. A driver who deliberately causes another to swerve and crash must pay for the damage, but the earthly court has no power to enforce that obligation. This is because indirect causation is not a *ma'aseh mazik*, an act of damage. The perpetrator is certainly at fault, but fault is not the purview of the Bais Din, only actions are. Hashem will hold the guilty liable.

Man is accountable for his actions in the earthly court from age 13, but in the Heavenly one only at 20. Theoretically at least, a thirteen-year-old murderer could be executed by Bais Din, because at 13, his actions are his and would remove the Divine Presence, so Bais Din must perform *mishpat* to restore it. In terms of responsibility and fault, one's deeds are not fully his fault until age 20. But Bais Din doesn't punish fault, it addresses actions in the physical world. In this world, a 13-year-old's *ma'aseh kinyan* is his, and so are his *ma'aseh mazik* and his *ma'aseh retzicha*. So Bais Din must act.

*In the next segment, we will address particular cases where an individual is permitted to intervene extrajudicially.*

(continued from front pg.)



municipal *eruvim* include parks and gardens? Many reasons for leniency have been suggested:

Parks planted for recreation are considered essential for living and are different than the Gemara's case (Meiri, Maharsham, *Nezirus Shimshon*).

*Karpef* is only when the wall (or *eruv*) was constructed first and then the seeds were planted (*Divrei Malkiel, Sefer Poras Yosef*).

Seeds that grew by themselves (weeds) are permitted.

*Zeraim* planted by non-Jews are permitted and cannot invalidate our *eruv*, plus it is no worse than if they grew by themselves

(R.Shlomo Kluger, *Divrei Malkiel*).

Does not apply to a city where the majority is urban and a small part has planted seeds (*Dvar Shmuel, Chacham Tzvi*). Moreover, it is part of the city planning and enhances it, so it wouldn't be *mevatel* the *dira* aspect (*Dvar Shmuel*).

These leniencies are all subject to dispute, but over time the custom in many cities has been to be lenient based on some/all of them when better options (e.g., enclosing the area) are unavailable.

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### This Week's Topics

**RABBI AHARON KAHN**

POSEK AT THE BAIS HAVAAD

**RAV YOSEF GREENWALD**

DAYAN, BAIS HAVAAD YERUSHALAYIM

**RAV YEHOASHUA GRUNWALD**

DAYAN, BAIS HAVAAD LAKEWOOD

- דף ע"ג LONG NAILS & CHATZITZA
- דף ע"ד THE MILK OF A BAS PEKUA
- דף ע"ה "HOW "SHECHTED" IS A BEN PEKUA?"
- דף ע"ו LEG INJURY: THE TREIFAH OF TZOMES HAGIDIM
- דף ע"ז "WAYWARD WAYS: DARCHEI HAE-MORI"
- דף ע"ח THE HALACHOS OF KISUI HADAM
- דף ע"ט "WITH CHILD: UNDERSTANDING THE MOTHER:FETUS RELATIONSHIP"



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