

## SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

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The Editors of TRADITION are pleased to announce that Rabbi Jakobovits, who was recently elected Chief Rabbi of Great Britain, has agreed to continue with this department in spite of the heavy responsibilities thrust upon him by his new post.

After hoping every month to find some relevant halakhic material in the more frequently published rabbinical journals only to have this hope disappointed month after month, the semi-annual issue of *Ha-Darom* (published by the Rabbinical Council of America) usually comes to our rescue in sustaining this department. The latest number (Tishri 5727) is no exception.

### SABBATICAL ETROGIM

In what here literally appears as "Etrogim after Sukkot," a problem of widespread concern during the past festival is the subject of an extensive dissertation by Rabbi Judah Gershuni. The year 5726 having been observed as a Sabbatical Year in Israel, can its Etrogim be sold and used abroad, in view of the prohibitions on (a) trading in Sabbatical fruit, (b) exporting such fruit from Israel, and (c) benefiting from fruit which was "guarded," instead of being treated as "ownerless," during the Sabbatical Year? The length and complexity of Rabbi Gershuni's article compel us to limit our abstract

here to his principal arguments and conclusions.

Facing this problem in his day, the (sainted) Rabbi A. I. Kook (*Mishpat Kohen*, no. 87) had ruled that the restrictions were inapplicable for those who utilize "the well-known sanction" of formally selling the land to a non-Jew during the Sabbatical Year, since it could be assumed that the Etrogim would be purchased from orchards so sold. As a further safeguard, Rabbi Kook suggested stipulating with the seller in Israel that all payments be made only for the packing and handling, so that the actual fruits would be regarded technically as a gift "absorbed" in these payments as well as in those for the Lulavim.

Even without this sanction, one may fall back on the argument, first advanced by Rabbi Zvi Judah Oppenheim of Kelm (*Sepher Zvi Geon Ya'akov*), that (following Maimonides) the Sabbatical sanctity restricts the commercial use of a fruit only if it is plucked on the completion of its growth, whereas *Etrogim* are usually harvested well before they are entire-

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ly ripe, so that the Sabbatical restrictions are inapplicable.

For those who may still be troubled, a further allowance can be made on the grounds that the use of such *Etrogim* involves a double doubt: According to one opinion (RAVeD, *Hil. Ma'aser Sheni*, 1:5), the Sabbatical ban on *Etrogim* is determined by the time of blossoming, which occurred before the Sabbatical Year (i.e., in the sixth year); and also there is a doubt about the precise Sabbatical count (based on a dispute between Rashi and Asheri, who calculated one year earlier than we do, and R. Chananel, R. Yitzchak and Maimonides). Moreover, with Sabbatical legislation nowadays enjoying only rabbinical status, aiding the Land of Israel may militate against the prohibition on *Etrogim* exported during the Sabbatical Year (responsa *Bikkurei Shelomo*, *Orach Chayyim*, no. 37).

Finally, to overcome all hesitations, one may adopt the advice of R. Jacob David Vilowsky (*Bet RIDBaZ*) to treat such *Etrogim* as endowed with Sabbatical sanctity, purchasing them by "absorption" as explained above.

### ISRAELI CANTORS

May cantors residing in Israel and hired for a festival season abroad conduct services on the second days of *Yom Tov*? Rabbi Meir Blumenfeld, in a concise responsum featured in the same issue of *Ha-Darom*, answers this question in the affirmative.

Normally, anyone not obliged to recite a prayer for himself cannot do so for others either. And the

whole purpose of the institution of a public reader, who repeats the *Amidah* aloud, is of course to discharge the obligation of prayer on behalf of the congregation, even if the worshippers are themselves able to read the prayers (*Orach Chayyim*, 124:3). The question therefore revolves around the cantor's own obligation to recite the *Yom Tov* prayers while on a visit abroad, especially when he is officially engaged by a congregation to be their reader.

As a rule, travelers from Israel are expected to observe the stringencies both of Israel and of the Diaspora (e.g., wearing *Yom Tov* clothes and yet reciting the weekday *Amidah* and laying *Tephillin* in private), and they should follow the Diaspora rules exclusively only if they intend to remain abroad, or if they travel together with their wives, i.e., "their homes" (see *Magen Avraham*, *Orach Chayyim*, 496:7; and *Shulchan Arukh Ha-Rav*, *Orach Chayyim*, 496:8, 10). However, some regard the enactment of the second *Yom Tov* day as applicable to all living in the Diaspora, whether permanently or temporarily (M. Landau, *Peri Ha'aretz*; and *Shulchan Arukh Ha-Rav*, *Maha-dura Tinyana*, *ib.*).

Hence, cantors leaving the Holy Land to serve some congregation in the Diaspora for *Yom Tov*, since they know they will thereby be compelled to observe the second day of *Yom Tov*, must be considered as if they had no intention to return, in the same way as one who travels with his wife (and "moves his home") abroad. This would apply in particular to un-

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married cantors who thus cannot be considered as "settled" in Israel. Notwithstanding one opinion to the contrary (responsa *Tzophnat pane'ach*, no. 100:4), such visiting cantors would also be free from the duty to wear *Tephillin* on these days, since—like the first *Yom Tov* days—the second days are also a "sign" obviating the need for the "sign" of the *Tephillin*.

### CAR GAS PAYMENT

A rather unusual responsum on a not so unusual question appears among Rabbi N. L. Rabinovitch's Halakhah-briefs in the same volume of *Ha-Darom*. A motorist, with his gas tank empty and the contents of his purse reduced to two dollars, asked at a station for two dollars' worth of gas. However, the station assistant filled up the tank at a cost of six dollars, arguing afterwards that he had misunderstood the motorist. The latter protested that he had only ordered two dollars' worth without mentioning any volume, so that he would either regard the whole tank-full as sold at a cheaper rate or else consider the excess as a gift. But since this was unacceptable to the assistant, the motorist told him: "Then take back the extra gas, and if you cannot remove it from the tank, that is your loss."

Relevant to the claim of the excess as a gift, the author cites the following ruling in the *Shulchan Arukh*: Anything erroneously sold by measure, weight or number must always be returned, for the law of (legitimate and limited)

overcharge or undercharge applies only to money (i.e., if the error amounted to less than one-sixth of the value of the purchase) but not to a mistake in the count (*Choshen Mishpat*: 232:1). Now, since gas is obviously sold by measure, as indicated on the meter, the request for two dollars' worth must be regarded as specifying the volume wanted, so that any excess delivered in error cannot be claimed as a gift by the buyer. Nor can the motorist's argument "Take back your gas, or else suffer the loss" be sustained. For "any person who renders his fellow a service or a favor may claim his due payment and cannot be told 'You rendered it free since I did not order you'" (*Choshen Mishpat*, 264:4, gloss). Also, "if one entered another's field and began planting or building there without permission, and the owner then completed the building or kept the plants indicating that he concurred with what had been done, the intruder has the upper hand [in claiming his due payment]" (*ib.*, 375:3; based on *Bava Metzi'a* 101a). Similarly, in this case, the fact that the motorist subsequently drove his car further and clearly benefited from the extra gas is a clear indication that he was satisfied with what he had received, so that he is obliged to pay for it at the fixed price.

### MOURNING LAWS FOR BABIES

Another Halakhah-brief concerns the death of a six-week-old child born weak and underdeveloped (though full-term, according to the mother). The doctors had considered it inviable from

birth and had preserved its life in an incubator and by artificial feeding. Must the mourning laws be observed in such a case?

As a general rule, any child that survives thirty days is no longer regarded as a premature or inviable birth (*Yevamot* 80a), and any subsequent death actuates all the laws of mourning, unless it was known to have been born in the eighth month (*Yoreh De'ah*, 374:8). Despite the mother's claim, such knowledge can be established with certainty only if the parents were separated throughout the pregnancy period.

Rabbi Rabinovitch further argues that this child, because of its insufficient development and the doctor's hopelessness, may be considered as *terephah* from birth, and for such the laws of mourning do not apply, on the basis of his interpretation of several rulings by Maimonides (*Hil. Evel*, 1:8; *Hil. Rotze'ach*, 2:8) and other authorities.

#### MEDICAL HALAKHAH

A comparative study by the present reviewer on the differences and similarities in the medical rulings of Maimonides and R. Joseph Karo is published in the Nisan-Iyar 5726 issue of *Sinai* to mark the four hundredth anniversary of the *Shulchan Arukh*.

In order to evaluate properly the classic codes of Jewish law in relation to their time, it must be remembered that even Karo's definitive work represents essentially a codification of Talmudic law. The examples given in the *Shulchan Arukh*, including most of the terms for diseases, medications and treat-

ments, are usually drawn directly from the Talmud, even when they were no longer known or understood in Karo's time. In only two instances does the *Shulchan Arukh* contradict medical rulings found in the Talmud: it permits the drinking of uncovered liquids despite the prohibition in the Talmud (*Avodah Zarah* 30b), since the danger of poisoning by snakes no longer existed (*Yoreh De'ah*, 116:1), and to dispute the Talmudic assertion (*Niddah* 38b) that a viable child requires a full nine months' term (*Even Ha-Ezer*, 156:4, gloss). In fact, the *Shulchan Arukh*, following R. Amram Gaon and other early authorities, frequently asserts that regarding certain Talmudic tests and operations "we are no longer competent" (e.g., *Orach Chayyim*, 350:5, gloss; *Even Ha-Ezer*, 145:9, gloss; and 172:6, gloss). But in general the codes uncritically embody Talmudic data and illustrations, even when these were completely unknown by the 16th century, including some long-forgotten occult cures.

Despite the common basis, therefore, for the codes of both Maimonides and Karo, they often reveal important differences as well as similarities in medical matters. For instance, by way of adding to Talmudic regulations they agree, in identical wordings, that one may whisper an incantation over a scorpion's bite even on the Sabbath "although this is of no avail whatever; but this was permitted to a patient in danger so as not to distract his mind (i.e., as a suggestive remedy)" (*Hil. Avoda Zarah*,

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11:11; *Yoreh De'ah*, 179:6). Similarly, Karo (*Even Ha-Ezer*, 5:10) adopts the view of Maimonides (*Hil. Issurei Bi'ah*, 16:9) that included in genital defectives "by the hand of Heaven" who are free to marry are persons whose defect is caused by illness. Both authorities also explain the law on sucking the circumcision wound ("*met-zitzah*") as serving "to extract the blood from the [more] remote places, so as to prevent any danger" (*Hil. Milah*, 2:2; *Yoreh De'ah*, 264:3).

The two codes also share certain omissions, such as the lack of any references to the ban on desecrating the dead and on contraception by tampon, notwithstanding their mention in the Talmud (*Chullin* 11b; and *Yevamot* 12b).

On the other hand, there are notable differences, especially in regard to health rules. For example, while the *Shulchan Arukh* completely omits the lists of healthful and harmful items which occupy an entire chapter in Maimonides' code (*Hil. De'ot*, 4), several Talmudic rules enacted to avoid health hazards are mentioned only in the *Shulchan Arukh* and not by Maimonides, such as the law on washing hands between, and not eating together, meat and fish (*Orach Chayyim*, 173:2; *Yoreh De'ah*, 116:3), the practice of burying the placenta (*Orach Chayyim*, 330:7) and the custom to refrain from cupping (or venesection) on certain days (*ib.*, 468:10, gloss). Maimonides, again in contrast to the *Shulchan Arukh*, also omits all references to demons found in the Talmud.

Even more significant is the divergence of the attitude to physicians and the treatment of the sick. While both codes regard the practice of medicine as a religious act, Maimonides bases this ruling on the Biblical injunction to restore one's neighbor's lost property, i.e., including his lost health (*Hil. Nedarim*, 6:8; see *Mishnah Commentary on Nedarim* 4:4), whereas Karo uses the Talmudic teaching on "He shall surely cause him to be healed" (Ex. 21:19): "This teaches that permission was given to the physician to heal" (*Yoreh De'ah*, 336:1), though he adds "and this is a religious precept" (*ib.*). But details on professional regulations — the physician's licence, liabilities and fees — appear only in the *Shulchan Arukh* (*ib.*).

Sometimes the difference between the two codes may be explained by the fact that Maimonides himself was a physician. Thus, the Talmudic law not to visit a patient in the first and the last three hours of the day (*Nedarim* 40a) is codified by Karo with the reason given in the Talmud that the illness in the morning is deceptively mild and in the evening deceptively grave, so that the visitor may either neglect or despair of praying for the patient (*Yoreh De'ah*, 335:4), whereas Maimonides simply explains the same law as intended to avoid disturbing the attendants in looking after the patient's needs during those hours (*Hil. Evel*, 14:5). The laws against male nurses attending women suffering from intestinal complaints (*Yoreh De'ah*, 335:10), and

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against a physician attending his own wife during her menstrual period (*ib.*, 195:16-17) except in grave circumstances (*ib.*, gloss) are also omitted by Maimonides. Conversely, only Maimonides records the Talmudic ban on settling in a place which has no doctor (*Hil. De'ot*, 4:23; *Hil. Sanhedrin*, 1:10).

On the violation of the Sabbath for patients in danger the *Shulchan Arukh* itself reflects an important difference of opinion. Karo, following Maimonides (*Hil. Shabbat*, 2:3), advises that such services should preferably be rendered by adult and responsible Jews (*Orach Chayyim*, 328:12), while R. Mosheh Isserles prefers asking non-Jews instead unless this would involve any delay (*ib.*, gloss). In this view, the latter is consistent with his general principle that all essential violations of the law in the face of danger to life should always be reduced to a minimum (*Yoreh De'ah*, 155:3, gloss). Maimonides, however, maintains his preference for Jews as demonstrating the sanctity of the Sabbath in other cases.

Of special interest are various rulings in the two codes bearing on the subject of euthanasia. Maimonides, whose code covers the whole gamut of Jewish law, including its criminal legislation, defines murder as embracing even the killing of a patient approaching death; only if the victim had reached that condition by a previous attack "through the hand of man" or had suffered from an incurable affliction is the killer free from capital culpability before a human court, though he is

still liable for murder before the Heavenly tribunal (*Hil. Rotze'ach*, 2:7-8). The *Shulchan Arukh*, dealing only with laws applicable after Jewish capital jurisdiction had lapsed, omits all this. But it features another law of some relevance, not mentioned by Maimonides. Based on the *Sepher Chasidim*, it warns against hastening death by any movement of the patient in his final moments, but it does permit the removal of an impediment, such as a hammering noise or salt on the tongue, which does not allow the patient to expire peacefully (*Yoreh De'ah*, 339:1, gloss).

On abortion, Maimonides and Karo rule in identical terms: in cases of a hazard to the mother's life an embryotomy may be performed; but once the child's head has emerged, it may not be destroyed to save the mother "since one does not sacrifice one life to save another" (*Hil. Rotze'ach*, 1:6; *Choshen Mishpat*, 425:2). The latter reasoning agrees with the source of this law in the Mishnah (*Oholot*, 7:6); but regarding the first case both codes base the sanction of embryotomy on the law of the "pursuer" who may be struck down to save his victim, whilst the Mishnah justifies the sanction on the ground that the mother's life has priority over the fetus' life since the child before birth is not yet a "*nephesh*" with the same title to life as the mother (Rashi, *Sanhedrin* 72b).

Finally, to the item on circumcision mentioned above we may add some other elaborations of Talmudic law in the codes. Both Maimonides (*Hil. Milah*, 2:2) and

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Karo (*Yoreh De'ah*, 264:3) insist that the slitting of the membrane to expose the corona (*peri'ah*) be performed "with the fingernail." Of special historical interest is the Talmudic law (*Yevamot* 64b) exempting a mother or two sisters who lost two sons through the operation from the duty to have the third son circumcised — evidently by far the first recognition in medical history of haemophilia and its transmission by matrilinear consanguinity. According to Maimonides (*Hil. Milah*, 1:18) and the *Shulchan Arukh* (*Yoreh De'ah*, 263:2), the exemption applies whether the brothers have a common father or not, but Karo (*ib.*) extends it even to brothers

who have only a father, not a mother, in common, a view for which there is no Talmudic warrant and which is therefore disputed in principle by Isserles (*ib.*, gloss). Also without Talmudic precedent is the ruling by Maimonides, followed by Karo, that the exemption is only temporary and that such a male should be circumcised "when he has grown up and become strong." Karo, but not Maimonides, codifies the practice (first mentioned in geonic sources) to excise the foreskin of a child that died before its eighth day and to give it a name, "so that it will receive compassion from Heaven and live at the time of the resurrection of the dead" (*ib.*, 5).