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Survey of Recent Halakhic Periodical Literature

THE INTIFADA AND THE GULF WAR

In its relatively short period of existence the State of Israel has faced a vast array of social, political and economic problems. Many of these problems are endemic to nascent or developing states; others are the product of idiosyncratic historical, sociological or demographic factors that might be replicated elsewhere as well. But the inhabitants of the State of Israel have also been forced to cope with a unique set of problems arising from the application of the provisions of Halakhah in a sovereign Jewish state. A series of military campaigns and the security needs of a beleaguered nation have given rise to numerous questions having no direct precedents in responsa literature. During recent years, those problems have been extensively analyzed and discussed by rabbinic scholars as they have arisen.

Not surprisingly, both the intifada, now in its fifth year, and the recent Persian Gulf war have spawned a series of previously unaddressed halakhic issues. Some of those issues are discussed in two recently published books. A slim volume, *She'elot u-Teshuvot Intifada,* by Rabbi Shlomoh Aviner, is devoted to matters relating to the intifada, as indeed its title indicates, but is largely limited to broad policy questions, including, for example, such intriguing issues as collective punishment, censorship of the press, population exchange, etc. The discussions presented by the author, who is a devotee of the late R. Zevi Yehudah Kook, are sparse and ideological but tantalizing nonetheless. Somewhat more substantial is Rabbi Yonah Metzger's work addressing questions that arose during the course of the Gulf war, *She'elot u-Teshuvot Sufah ba-Midbar.* The questions addressed in the latter work are primarily those of individuals confronting the danger of Scud missiles and the need to take shelter in sealed rooms during air raid alerts. The answers are rather brief and cursory. Both students and scholars will find this work a valuable aid in locating sources and precedents.

DEFYING GOVERNMENTAL EDICTS

One of the most intriguing questions raised by Rabbi Aviner is a question that we all pray will remain entirely hypothetical and speculative. In the event of the return of some portion of the liberated territories to Arab sovereignty it may become politically necessary to evacuate Jewish settlements that have been established in those areas. Would the settlers have a right to defy orders of the government and the Israeli Defense Forces and remain on their land? A similar problem did arise at the time of the dismantlement of Yamit upon the return of Sinai to Egypt in 1982. At that time, there were vigorous protests and actual civil disobedience. Ultimately, the Israeli army forcibly evacuated thousands of settlers and protesting squatters and used bulldozers to destroy homes and greenhouses. To this writer's knowledge, no discussion of the permissibility of civil disobedience appeared in rabbinic journals at that time.

The most obvious issue involved in adjudicating this question is the applicability of the talmudic principle "the law of the land is the law" *(dina de-malkhuta dina)* to the edicts of the Israeli government. Resolution of that issue requires explication of the scope and nature of *dina de-malkhuta dina* including, in particular, an analysis of whether the authority reflected in that principle is limited to non-Jewish states or whether the principle is operative in a Jewish commonwealth as well.[1] The ambit and application of *dina de-malkhuta dina* have been widely discussed in other contexts. The second issue is unique to this fact pattern: Does a country about to relinquish sovereignty over a particular area retain the authority of *dina de-malkhuta dina* over nationals who simply by remaining *in situ,* in effect, seek to place themselves outside the territorial jurisdiction of that country? Neither of these issues is raised, much less discussed, by Rabbi Aviner.

The sole consideration raised by the author is whether civil disobedience constitutes lèse majesté, an infraction punishable, at the monarch's discretion, with the death penalty. Rabbi Aviner readily concedes that the biblically ordained monarchy no longer exists and hence, there can be no crime of lèse majesté. He does, however, cite a very interesting comment of R. Naphtali Zevi Judah Berlin in arguing that disobedience of a governmental order is justifiably punishable by death.

In accepting Joshua's charge to perform their military duties, the tribes of Reuben and Gad declared, "Whosoever shall rebel against your command and shall not hearken unto your word in all that you shall command him shall be put to death; only be strong and of good courage" (Joshua 1:18). R. Naphtali Zevi Judah Berlin, *Ha'amek She'elah, She'ilta* 142:9, observes that Joshua enjoyed the status of a judge, but not of a king. Hence, he queries, on what grounds was he empowered to punish disobedience with the death penalty? Despite the comments of the Gemara, *Sanhedrin* 49a, which appear to define the infraction as indeed constituting *lèse majesté, Ha'amek She'elah* declares that the answer is to be found in the final phrase of the verse, "be strong and of good courage." Although not a monarch, Joshua was the military commander about to embark upon a military campaign for the conquest of the Promised Land. A military leader must be courageous and confident. Those qualities depend, in part, upon a sense of authority and assurance that orders will be carried out without demur. Disobedience and breach of discipline, even if they do not directly affect military operations, are bound to have a demoralizing effect upon the leader responsible for waging war and will diminish his courage and determination. Any challenge to his authority is likely to weaken his self-confidence. That, in turn, would have a disastrous effect upon the course of the armed conflict and result in avoidable loss of life. Hence, argues *Ha'amek She'elah,* any person defying Joshua would, in effect, have been an aggressor *(rodef)* whose disobedience would have endangered the entire nation. Sanctions imposed upon the miscreant were designed to restore Joshua's courage and confidence by eliminating any challenge to his authority.

Similarly, argues Rabbi Aviner, disobedience of modern-day military authorities is a punishable offense. However, that conclusion cannot be regarded as unequivocal. It must be noted that *Ha'amek She'elah* does not conclude that disobedience of Joshua constituted the capital crime of *lèse majesté* but rather that, had it occurred, it would, at least indirectly, have endangered the populace. "The law of pursuit" is designed to eliminate a threat to life rather than as a punishment of the perpetrator. As such, its invocation in any particular set of circumstances depends entirely upon

the realia of the situation. *Ha'amek She'elah,* in his own remarks, stresses that the commander's authority to impose the death penalty is limited to periods of ongoing military hostility.

DECLINING TO CARRY WITHIN AN *EIRUV*

Rabbi Metzger's *She'elot u-Teshuvot Sufah ba-Midbar* includes questions regarding numerous issues likely to arise in other contexts as well and is of value particularly because of the array of sources cited, many of which are obscure in the sense that even the informed reader is not likely to be familiar with them.

During the duration of hostilities in the Persian Gulf, Israelis were admonished to carry gas masks with them at all times because of the danger of aerial bombardment by Iraqi missiles armed with chemical warheads. Rabbi Metzger reports that many people were reluctant to carry gas masks on *Shabbat* even in areas surrounded by an *eiruv.* Most settled areas in Israel are surrounded by an *eiruv* constructed with poles and wire and designed to create an enclosure in which carrying on the Sabbath is permissible.

The reason for the reluctance on the part of the interlocutors to carry within an *eiruv* is itself a matter of interest. Rabbi Metzger correctly cites *Ma'aseh Rav,* no. 150 (no. 151 in the editions now in print), a compendium of the practices of R. Elijah of Vilna, as the basis of the practice of many scholars who decline to carry on *Shabbat* even in locales in which there is a properly supervised *eiruv.* Rabbi Metzger is under the impression that R. Elijah of Vilna was concerned lest a person carrying an object in such an *eiruv* transgress Sabbath laws by inadvertently carrying beyond the boundary of the *eiruv.* However, the text of *Ma'aseh Rav* does not indicate that this was necessarily the nature of the concern and is not how that reference was understood by R. Naphtali Hertz ha-Levi as reflected in his *"Likkutei Devarim u-Bi'urim"* appended to the edition of *Siddur ha-Gra* (New York, 5714) which he edited and annotated. That commentator is of the opinion that R. Elijah of Vilna had reservations regarding the reliability and validity of *eiruvin* as they were established in actual practice. In addition to the considerations enumerated by R. Naphtali Hertz ha-Levi it should be noted that virtually no *eiruv* presently constructed conforms with the requirements set down by Rambam. Rambam, *Hilkhot Shabbat* 16:16, maintains that, unless a structural wall exists extending along more than fifty percent of a side of the area to be bounded by the *eiruv,* an *eiruv* consisting of poles and wire is of no avail in bridging a gap larger than ten cubits in width (i.e., fifteen or twenty feet, depending upon various opinions regarding the measurement of a cubit). Rambam's position is cited by *Shulhan Arukh, Hilkhot Shabbat* 262:10. *Mishnah Berurah* 362:59 notes that since Rambam's view is also accepted by Semag and Semak "it is proper" *(nakhon)* not to carry in areas in which the *eiruv* is not valid according to the opinion of Rambam.

Similarly, a son of the Hafets Hayyim, R. Aryeh Leib Kagan, in a monograph entitled *Derakhav, Nimukav ve-Sihotav shel ha-Rav Hafets Hayyim Zatsal* 63:14, and appended to *Kitvei Hafets Hayyim,* reports that Hafets Hayyim refused to carry outside of his own home on *Shabbat* despite the fact that he scrupulously supervised the *eiruv* in Radun. Hafets Hayyim's concern, as that of R. Elijah of Vilna before him, was that, according to the opinion of many early authorities, it is pragmatically impossible to construct a valid *eiruv* even in villages and hamlets. One of the principles

governing construction of an *eiruv* is that it may be utilized only in enclosing an area in which carrying is forbidden by virtue of rabbinic edict, but not in an area biblically defined as a public domain. Many early authorities maintain that any thoroughfare sixteen cubits in width constitutes such a public domain regardless of how small the number of people traversing the area each day. Hafets Hayyim's personal practice with regard to this matter is consistent with his ruling recorded in *Bi'ur Halakhah* 364:2. In that work Hafets Hayyim declares "although one should not protest against the populace who have accustomed themselves to leniency [in this matter] nevertheless, a pious person *(ba'al nefesh)* should be stringent for himself." In a letter addressed to R. Menasheh Klein and published in that author's *Mishneh Halakhot,* vol. VIII, no. 90, R. Ya'akov Kanievski, known as "the Steipler," presents a lengthy list of halakhic considerations militating against reliance upon *eiruvin* as they are generally constructed in our day. Earlier, a list of such considerations was formulated by R. Shlomoh Yehudah Tabak, *Teshuvot Teshurat Shai* (Maramarossziget, 5665), no. 357.

The late Rabbi Abraham I. Kook apparently also refused to sanction an *eiruv* that encompassed a public thoroughfare.[2] In his autobiography, *Seder Eliyahu* (Jerusalem, 5744) pp. 67-68, Rabbi Eliyahu David Rabinowitz-Teumim (known as the *Aderet*), the father-in-law of Rav Kook, describes in detail events associated with Rav Kook's assumption of his first rabbinical position in Zheymel (Ziemielis). Rabbi Rabinowitz-Teumim reports that the hamlet had no *eiruv* and that he exhorted his son-in-law to make the construction of an *eiruv* a matter of high priority. Rav Kook refused to do so and pointed to the position of *Teshuvot Mishkenot Ya'akov, Orah Hayyim* nos. 120-122, who rules that no *eiruv* can be constructed by means of poles and wire or string because a "wall" constructed in that manner is nullified by the existence of a public right of way.[3]

Hazon Ish, *Emunah u-Bitahon* 4:18, also comments negatively upon those who carry on *Shabbat* in reliance upon the fact that an *eiruv* has been constructed around the city "since in the majority of cases this involves stumbling-blocks." Apparently, Hazon Ish's concern was that most *eiruvin* are improperly constructed. Thus, in a recently published volume describing the practices of Hazon Ish, *Dinim ve-Hanhagot me-Maran ha-Hazon Ish* (Bnei Brak, 5748), chapter 14, sec. 1, Rabbi Meir Greineman writes:

> [Hazon Ish] was wont to say that it is forbidden to carry a burden on *Shabbat* even in cities that have been perfected by an *eiruv* for in the majority of cases this involves stumbling-blocks. . . . and he regarded this as a definite rabbinic transgression. He repeatedly stated that every time he went to inspect *eiruvin* he always found them to be invalid. Once he remarked that seeing people profane the *Shabbat* by carrying made it difficult for him to walk in the street on *Shabbat.*

The practice of not relying upon an *eiruv* is also recorded in *Tosafot Hayyim* (a commentary on *Hayyei Adam*), *Hilkhot Shabbat* 71:1 and in *Minhat Shabbat* 82:6 as well as by R. Chaim Biberfeld, *Menuhah Nekhonah* (Jerusalem, 5738), p. 70.

The concern of the various authorities who decry reliance upon present-day *eiruvin* is in no way negated by the Gemara's assertion, *Eiruvin* 68b, that refusal to accept an *eiruv* is a Sadducean tenet. The Sadducees, in their renunciation of the Oral Law, rejected the concept of an *eiruv* in principle; the concern of the aforementioned authorities is solely that the details of the regulations concerning

construction of an *eiruv* are misapplied in practice. Their position is similarly not negated by the many statements found in the writings of early authorities to the effect that construction of an *eiruv* constitutes a great *mitsvah* because it obviates infraction of Sabbath laws. Those statements obviously apply only to the construction of an *eiruv* that can be accepted as halakhically valid.

Rabbi Metzger offers practical advice to those who do not carry within the *eiruv* on the Sabbath. He suggests that they walk at a fast pace until they reach and enter the private domain they seek to reach taking care not to stop in the thoroughfare on the way. His reasoning is that traversing a public thoroughfare without coming to a stop constitutes a rabbinic infraction rather than a biblical transgression and that carrying in the thoroughfare, even in the absence of an *eiruv*, is itself merely a rabbinic infraction. Accordingly, he relies upon the authorities who rule that an act that is forbidden only as the product of the confluence of two separate rabbinic ordinances *(trei de-rabbanan)* is permissible in cases of grave need *(be-sha'at ha-dehak)*.[4] That advice is cogent if the concern is that the *eiruv* may not be properly constructed, as is indeed reflected in the statements of the Hazon Ish and Rabbi Kanievski. However, if the concern is that raised by Hafets Hayyim, the reasoning upon which the advice is predicated is invalid. Hafets Hayyim's consideration, which is by far the most serious concern in relying upon an *eiruv*, is that no *eiruv* encompassing a thoroughfare sixteen cubits wide can be valid because the area constitutes a public domain in *biblical* law. Hence the principle of *trei de-rabbanan* is not at all applicable.

LISTENING TO A RADIO ON *SHABBAT*

During the course of the Gulf war, Israelis were under constant threat of Scud attacks and in fear that the Iraqis might arm at least some missiles with chemical warheads. Despite anti-missile defenses, a total of thirty-nine Scud missiles bearing conventional warheads struck Israel during the war causing extensive property damage but, fortunately, relatively few casualties. The populace was admonished that each family should prepare one room in its dwelling as a shelter. The room was sealed in order to prevent gas from entering and stocked with food, water and other necessities so that the family could take refuge in the "sealed room" *(ha-heder he-atum)* during the course of the alert. During the entire period of hostilities people remained glued to their radios, not simply to keep abreast of the progress of the war, but to learn of impending air raids and the need to take refuge in a "sealed room." Quite naturally, many were concerned with regard to whether or not they should allow their radios to remain on over *Shabbat*.

The issues are two-fold in nature. The first and most obvious question is of importance to Jews the world over, *viz.*, whether merely listening to a radio, or watching television, without turning the radio or television on or off or regulating the volume, involves any infraction of *Shabbat* laws. The second question arises primarily in Israel by virtue of the fact that the announcers, technicians and other personnel involved in broadcasting operations are themselves Jews. *Shulhan Arukh, Orah Hayyim* 31:8:1, records a provision of Jewish law forbidding a Jew to derive benefit during the entire Sabbath day from any prohibited labor performed by a fellow Jew. Broadcasting on *Shabbat*, as distinct from merely listening to the broadcast,

is fraught with violations of *Shabbat* laws. Hence there arises the question of whether listening to a radio program that is the product of such violations constitutes a forbidden form of benefit.

The paradigm of a forbidden benefit, as presented both in the Gemara and by *Shulhan Arukh,* is partaking of food that has been cooked on *Shabbat.* In that case the benefit is both tangible and sensual. The issue with regard to listening to the radio or watching television, as formulated by Rabbi Metzger, is that the Gemara, *Erukhin* 6a, declares that benefit derived from Temple property through "voice, sight and smell" does not entail the penalty prescribed for such an infraction. However, the Gemara, *Pesahim* 26a, declares that, although no punishment is incurred, the act is nevertheless forbidden.[5]

There are, however, two fundamental issues that are not raised by Rabbi Metzger. First, the "benefit" derived from the "voice" of the radio or the "sight" of the television is not necessarily acoustic, visual or esthetic in nature. In the case of news programs, the "voice" or "sight" provides no pleasure or benefit; rather, it is the knowledge or information, itself innocuous in nature, that is of benefit. There is a long-standing dispute with regard to whether the prohibition against deriving benefit from a human corpse extends to deriving medical or scientific information by merely observing a post-mortem dissection of a cadaver. In that case as well, the benefit is intellectual rather than sensual. That material was reviewed in an earlier edition of this column, *Tradition,* vol. 24, no. 4 (Summer, 1988). A second question that merits further analysis is whether the parameters of the prohibition against deriving benefit from Sabbath transgressions are the same as those pertaining to deriving benefit from items or materials designated as objects of *issurei hana'ah* in biblical law. In the latter instances, the objects in question acquire a certain ontological status with attendant prohibitions flowing therefrom. Insofar as Sabbath restrictions are concerned, the source of the prohibition is rabbinic and is perhaps personal in nature. Hence the categories of proscribed benefit are not necessarily coextensive. Conceivably, the definition of "benefit" insofar as *Shabbat* prohibitions are concerned may be broader or narrower than the definition of "benefit" for other purposes of Jewish law. Nevertheless, R. Zevi Pesach Frank, *Teshuvot Har Tsevi, Orah Hayyim,* I, no. 183, explicitly maintains that these prohibitions are essentially identical.[6]

This is apparently also the position of a number of authorities including *Mateh Mosheh,* no. 361; R. Aryeh Zevi Fromer, *Teshuvot Erets Tsevi,* no. 64; R. Abraham Dov Ber Reiner, *Teshuvot Bat Ayin, Orah Hayyim,* no. 8; R. Mordecai Winkler, *Teshuvot Livushei Mordecai,* III, *Orah Hayyim,* no. 29 and IV, no. 34; R. Yitzchak Weisz, *Teshuvot Minhat Yizhak,* I, no. 107; and R. Ovadiah Yosef, *Or Torah,* Sivan 5729, *Halikhot,* Nisan 5731, and *Yabi'a Omer,* III, *Orah Hayyim,* no. 20, sec. 11, and VI, *Orah Hayyim,* no. 35, as well as the earlier-cited *Teshuvot Har Tsevi* prohibit listening to the radio on *Shabbat* and the like as being comparable to partaking of food cooked on *Shabbat.* That position is based, in part, upon a statement of *Pri Megadim, Orah Hayyim, Mishbetsot Zahav* 276:5, in which that authority explicitly equates kindling a lamp to cooking food. R. Chaim Biberfeld, *Menuhah Nekhonah,* p. 62, also reports that Hazon Ish, who adamantly opposed use of electricity on *Shabbat* because of Sabbath desecration in generating plants in Israel, forbade listening to the radio for that reason as well as because of Sabbath violations involved in broadcasting on *Shabbat.* Rabbi Biberfeld's report of Hazon Ish's ruling is cited