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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

and endorsed by R. Benyamin Silber, *Brit Olam* (Bnei Brak, 5724), in the section entitled *"Ha-Mekhabeh ve-ha-Ma'avir,"* no. 6.

Rabbi Frank does, however, advance a tentative distinction between making use of the illumination of a lamp kindled on the Sabbath and listening to a broadcast. The Mishnah, *Beitsah* 39a, distinguishes between a glowing coal and a flame which is detached from its source of fuel and declares that no punishment is associated with deriving benefit from an "unattached" ephemeral flame. *Har Tsevi* suggests that the sound emitted by a radio is similarly "unattached" and hence listening to the radio may not be forbidden. Nevertheless, *Har Tsevi* concludes that the matter requires further study.[7]

Listening to a radio, even if it is turned on before *Shabbat* or caused to play by means of an automatic timer, may involve transgressions other than that associated with derivation of benefit from proscribed forms of labor. *Shulhan Arukh, Orah Hayyim* 338:1, records the rabbinic decree forbidding the playing of any musical instrument on *Shabbat*. The underlying reason for this prohibition is the fear that the instrument may become defective with the result that the player, unmindful of the fact that correction of the defect on the Sabbath is improper, may be led to make the necessary repairs. In a gloss to that ruling, Rema makes it clear that the prohibition is not limited to playing a musical instrument but includes the use of any device designed to generate sound, e.g., a door-knocker. *Arukh ha- Shulhan, Orah Hayyim* 338:5, observes that, since the prohibition concerning playing an instrument is based upon a concern lest repairs be made on the *Shabbat* because music performed by a defective instrument is not esthetically pleasing, the prohibition applies with equal force to a person who performs an act before the onset of *Shabbat* which causes music to play on *Shabbat*.[8] R. Eliezer Waldenberg, *Tsits Eli'ezer,* VI, no. 16, chap. 3, cogently points out that *Arukh ha-Shulhan's* conclusion also applies to setting a timer before *Shabbat* so that the instrument will play on *Shabbat*. According to *Arukh ha-Shulhan,* since a radio is clearly an apparatus designed to produce sound, turning on a radio before *Shabbat* in order to listen to a broadcast on *Shabbat* is forbidden.

Rabbi Waldenberg, *Tsits Eli'ezer,* III, no. 16, chap. 12, sec. 4,[9] argues that, according to *Arukh ha-Shulhan,* the prohibition against "causing a sound to be heard" applies not only to the person who plays a musical instrument but to the person who listens to a broadcast or to an amplified voice as well. If setting an instrument in advance so that it will play of its own accord on *Shabbat* is forbidden because of the fear that the instrument may be repaired or adjusted on the *Shabbat* it is only logical that the prohibition should devolve upon anyone listening to the instrument since not only the person who originally set the instrument, but any listener, is likely to undertake such repair.[10] It is, however, apparent that not all authorities accept *Arukh ha-Shulhan's* line of reasoning. *Teshuvot Maharsham,* III, *Hashmatot* to vol. I, no. 44, and *Teshuvot Mahazeh Avraham,* I, no. 42, s.v. *ve-hineh,* apparently regard the rabbinic edict as limited to acts actually performed on *Shabbat*.[11]

There are also other authorities who clearly maintain that the edict forbidding the creation of sound does not apply to the approximation of the human voice by means of electric current. R. Judah Leib Zirelson, *Teshuvot Atsei Levanon,* no.10, in a responsum dealing with the permissibility of the use of the telephone on the Sabbath, lists a number of reasons prohibiting the use of this device. Enumerated among these are "giving birth" to an electric circuit, sparking and causing a bell

to ring on the other end of the line. Since consideration is given only to the sound produced by the bell, while the question of production of the voice itself is ignored, it may be assumed that this authority did not view the voice produced by electric current as being included in the prohibition against "causing a sound to be heard." Similarly, R. Shlomoh Zalman Auerbach, *Sinai,* II Adar 5723, maintains that the prohibition against creating a "voice" or sound is limited to sounds produced by direct human action and does not include sounds indirectly produced by the human voice.[12] A similar position is adopted by *Teshuvot Maharshag,* II, no. 118, and *Tslah he-Hadash, Kuntres Aharon,* no. 1.[13]

There is yet another reason cited by numerous authorities in forbidding the use of a radio on *Shabbat* and *Yom Tov.* Rema, *Orah Hayyim* 252:5, states that it is forbidden to place wheat in a water mill prior to the Sabbath in order that the wheat may be ground during the Sabbath. This is forbidden even though it is publicly known that the grain was placed therein prior to the Sabbath and that the grinding of the wheat takes place automatically. This activity is rabbinically forbidden despite the absence of human labor because *avsha milta* ("the thing grows loud"). The accompanying noise draws attention to the activity taking place, thereby degrading the Sabbath since passersby may believe that the sounds emanating from the mill signal the performance of acts forbidden on *Shabbat.* The prohibition of *avsha milta* is limited to activities accompanied by sound but encompasses all activities forbidden on *Shabbat* when accompanied by a significant level of sound even if the sound is not the result of any act performed on *Shabbat* itself. Rabbi Auerbach forbids a radio to be turned on before *Shabbat* or to be regulated by means of a time clock for the same reason even if it is well-known that all acts of labor were performed before *Shabbat.* Thus, Rabbi Auerbach rules that such devices may not be permitted to operate on *Shabbat* even if it be publicized that the radio or microphone is operated automatically.[14] The consideration of *avsha milta* applies to all amplification systems, even to those which cannot possibly be adjusted or repaired on the Sabbath.[15]

Rabbi Eliezer Waldenberg is the author of a detailed analysis of the halakhic issues associated with radio transmission as well as with listening to the radio on *Shabbat.* That study, published in *Tsits Eli'ezer,* III, no. 16, was undertaken in 1948 during the War of Independence. During that period the populace felt a similar need to keep abreast of information regarding the progress of hostilities. Rabbi Waldenberg rules that, under those circumstances, radios may be allowed to play over the course of *Shabbat.* However, in chap. 12, sec. 8, he advises that when such activity is permitted a label bearing the words *"Shabbat Kodesh"* be pasted over the knobs of the radio in order that the listener not tune the radio or adjust the volume unmindfully.[16] He further advises that a sign be affixed to the outside of the dwelling announcing that the radio has been left on from before *Shabbat* or that it is being operated by means of an automatic timer and that, if possible, individuals not listen to the radio singly but in groups of two or more in order that they may caution one another regarding unwitting *Shabbat* violations. Those recommendations, while reflecting wise counsel, do not appear to constitute normative provisions of *Halakhah.*[17]

The foregoing considerations obviously do not apply in situations involving a threat to human life. During the Gulf war the threat was real and constant. Under such circumstances, listening to the radio constituted a necessary means of preserving

life requiring only that Sabbath restrictions be suspended only to the extent necessary to cope with the danger. To their credit, the broadcasting authorities exhibited sensitivity to the scruples of observant citizens by limiting the extent of necessary infractions. During the Gulf war both *Kol Yisra'el* and the Israeli Armed Forces radio station arranged for a "silent band" *(gal shotek)* that broadcast only security bulletins on *Shabbat* but were otherwise silent. The broadcast of such bulletins under those circumstances was, of course, entirely permissible. Listeners had only to tune their radio to that frequency on Friday and allow the knob to remain on an "on" position. Rabbi Metzger reports that the armed forces station went a step further and arranged for its transmitter to remain open over the entire period of the Sabbath, thereby even further diminishing *Shabbat* infractions in broadcasting security bulletins. Accordingly, tuning the radio to that station was regarded as preferable to listening to *Kol Yisra'el* whose broadcasts entailed more serious *Shabbat* violations.

TEACHER'S CLAIM FOR LOST WAGES

Due to unsettled conditions during the period of the Gulf war and the constant threat of missile attacks many parents of young children chose to keep their children at home in order to be able to supervise them during air raids. As a result a number of private kindergartens and nursery schools suspended operations until the cessation of hostilities. The question then arose with regard to whether or not the kindergarten or nursery teacher is entitled to be paid his or her usual salary for the period that no children were in attendance. A closely related question is whether parents are obligated to pay tuition fees for periods during which their children are ill. Provisions regarding payment of tuition fees during the absence of a child due to illness are recorded by Rema, *Hoshen Mishpat* 334:4. Rema rules that the parent is not obligated to pay the teacher's wages in full unless the child is chronically prone to illness and the teacher (or school) was not aware of that fact at the time that the agreement was made. Accordingly, it would appear that there is no liability for tuition payment, and hence no claim on the part of the teacher, during the period in which children were not sent to school because of concern for their safety arising from unanticipated circumstances. However, Rema, *Hoshen Mishpat* 321:1, distinguishes between situations that disrupt the studies of an individual student and ones which disrupt the entire community. Rema rules that in the latter case the teacher is entitled to his usual compensation. Thus, Rema declares that if "the ruler decrees that the teacher shall not teach" the teacher is to be paid in full because the "affliction" is that of the entire community. Since the fear for the safety of the students during times of unrest is not limited to some individual situations but is general in nature it would then follow that the teachers must be paid when classes are suspended because of hostilities.

Although Rema's ruling regarding payment of tuition fees during the period in which study is prohibited by decree of the government is accepted by Shakh, *Hoshen Mishpat* 321:1, that ruling is disputed by Sema, *Hoshen Mishpat* 321:6. Sema argues that the unanticipated illness of a student is the "misfortune" of the teacher, i.e., since the student is not at fault and has not received the benefit of instruction, insofar as compensation is concerned, the teacher's loss of the opportunity to provide his services is the result of his "bad luck," and, therefore, the teacher has no claim

for compensation. However, reasons Sema, since the edict described by Rema banning teaching of Torah was directed against the teacher as well as against the pupil, the situation must be attributed to the "bad luck" of both. Accordingly, Sema rules that the loss should be apportioned equally, i.e., the teacher may claim half of his stipulated fee. Taz, *Hoshen Mishpat* 321:1 and 334:1, and most later authorities rule in accordance with Rema.

A national emergency such as the Persian Gulf war is certainly a situation which is attributable equally to the "bad luck" of the teacher and students. Hence, according to Sema, the loss should be shared equally with the result that the kindergarten teacher would be entitled to half her wages. However, according to Rema, since the emergency was communal rather than personal in nature and since the teacher was not prevented from appearing in class because of concern for her own safety, it would seem that she is entitled to full remuneration.

However, *Netivot ha-Mishpat* 334:1 notes a contradiction in Rema's own rulings. Rema, *Hoshen Mishpat* 334:1, rules that if students are forced to flee because of "a change in the air," i.e., because of pollution or a disturbance in the climate, the loss of income must be borne by the teacher. *Netivot ha-Mishpat* notes that a "change in the air" affects the entire community and hence, according to Rema's own position, it would be logical to conclude, contrary to Rema 344:1, that the teacher's wages should be paid in full.

It should be noted that Shakh, *Hoshen Mishpat* 334:3, explains that in a situation in which the majority of the population feels it necessary to evacuate the city because of pollution of the air or a change in climate Rema agrees that the teacher must be compensated in full. Shakh understands Rema's ruling indicating that the loss must be assumed by the teacher as being limited to situations in which only a minority of the populace finds it necessary to flee. R. Shlomoh Kluger, *Hokhmat Shlomoh, Hoshen Mishpat* 321:1, resolves the contradiction by asserting that Rema's ruling with regard to a communal misfortune is limited to situations in which the teacher is willing and able to continue to provide his services. *Hokhmat Shlomoh* understands Rema's ruling extinguishing the obligation toward the teacher because of "a change in the air" as applying only in a situation in which the teacher is also forced to flee and hence is no longer capable of discharging his duties.

Netivot ha-Mishpat, however, understands Rema in a completely different manner. According to *Netivot ha-Mishpat,* Rema's ruling regarding continued payment of the teacher in face of a governmental decree prohibiting the teaching of Torah is not based upon the concept of a distinction between a private versus a communal misfortune. Rather, it is based upon the consideration that, since it is forbidden to accept compensation for the teaching of Torah, a teacher of Torah is not paid for his services as an instructor but for monitoring the conduct of his pupils. In prohibiting the teaching of Torah, the despot has no interest in curtailing other activities. Hence, in that situation, the teacher remains willing and able to provide the services for which he is entitled to compensation, i.e., baby-sitting or its equivalent. It is the parent who does not wish to avail himself of such services unless they are accompanied by teaching services as well. Hence, since the parent voluntarily declines the services for which he has contracted to pay, he remains liable for payment.

Rabbi Metzger assumes that, under the prevailing circumstances, the kindergarten teacher was incapable of providing for the safety and security of the

children and that hence, according to *Netivot ha-Mishpat's* understanding of Rema, there is no obligation to pay her salary. That, of course, would depend upon the circumstances. It is quite conceivable that a school might have arranged for a "sealed room" to accommodate its students but that the parents, because of their own disquiet and nervousness, preferred to keep their children at their side. Assuming that the teacher was prepared to provide all possible care, the conclusion would be quite different.

Orhot Mishpat 7:10 cites a ruling of *Hatam Sofer* with regard to a similar occurrence in his day. *Hatam Sofer* describes a situation in which both teachers and students were unable to continue their usual activities because of the outbreak of war. *Hatam Sofer* reports that he paid the tuition for his own children in full. However, with regard to the community he records that, despite the fact that the misfortune was communal in nature and hence the normative ruling should be in accordance with Rema who maintains that the loss must be sustained by the parents, he nevertheless opined that "it is difficult to exact money" and therefore he issued a compromise ruling obligating the parents to pay half of the usual fees.

The most obvious explanation of Hatam Sofer's ruling is that, in monetary matters, the defendant may claim to rely upon even a minority view and that hence "it is difficult to exact money" in light of Sema's position that, under such circumstances, the parents are liable to only fifty percent of the usual compensation. Rabbi Metzger, however, assumes that Hatam Sofer's compromise was to pay the teacher the wages of a *po'el batel,* i.e., the amount a laborer would ordinarily be willing to accept as compensation were he to be relieved of his duties. Taz, *Hoshen Mishpat* 333:1, assesses that compensation as being equal to fifty percent of the laborer's usual wage.

CATERER'S CLAIM FOR CANCELLATION OF WEDDING

Life for Israelis continued more or less as normal during the Gulf war. Marriages were celebrated with the usual festivities and if air raids occurred during the festivities guests presumably sought shelter in a "sealed room." One aspect of the economy, however, was totally disrupted. Tourism came to a virtual standstill and trips to Israel planned for other reasons were cancelled. In at least one case a wedding was postponed because one of the celebrants was a national of a foreign country and his family declined to travel to the wedding. The services of a catering establishment had been engaged for the occasion and were cancelled at a late date. Since the caterer was no longer able to secure another booking for the day of the scheduled wedding he demanded compensation for expenses and lost profits. The agreement between the parties apparently contained no provision for a penalty in the event of cancellation. The actionability of a penalty clause would require analysis in light of the halakhic provisions governing *asmakhta,* i.e., obligations not entered into with the requisite seriousness of intent. The proprietor of the catering establishment apparently sought payment, not on the basis of a contractual undertaking, but on the basis of tort liability, i.e., as restitution for damages sustained as the result of a harm caused by the other party.

It is difficult to find grounds on which the contracting party would be liable in tort since, according to the provisions of Jewish law, tort liability is generally

limited to damages directly sustained. Indirect losses or consequential damages, including loss of profits, are usually not actionable. Rabbi Metzger adduces an interesting source that would serve, at least under some circumstances, to allow for recovery of necessary expenses involved in the maintenance of a business. *Teshuvot Shevut Ya'akov,* no. 178, discusses a situation in which a person was found to be liable for damages sustained by an animal in an accident. There is a dispute among early authorities with regard to whether a tortfeasor is liable for the "lost wages" *(shevet)* of an animal, i.e., whether he must compensate the owner for the profit that the animal would have earned for him as a beast of burden or the like. However, *Shevut Ya'akov* rules that, in addition to compensation for any diminution in the value of the animal, the tortfeasor, according to all authorities, is liable for the cost of the animal's food during its recuperation. *Shevut Ya'akov* regards expenses incurred for the upkeep of an animal during its incapacitation to be a direct rather than an indirect result of the tortfeasor's act. Accordingly, it would follow that expenses incurred in the maintenance of income-producing property, such as property taxes, wages of security guards and the like, can be charged against an arsonist, for example, during the period that the property cannot produce revenue for its owner.

It does not, however, necessarily follow that a person who cancels a wedding reception or the like incurs similar liability. In general, Halakhah recognizes tort liability only when damages result from an overt act. Nonfeasance or refraining from an act which results in monetary loss is, in general, not actionable.

Some authorities recognize an exception to that rule in the case of a person who deprives another individual of the opportunity of utilizing his property or funds *(mevatel kiso shel haveiro).* Mordekhai, *Baba Kamma,* no. 125, rules that a person who denies another person access to the latter's funds is liable for lost profits if that person was wont to use such funds as income-producing capital. Similarly, Rema, *Hoshen Mishpat* 292:7, rules that a bailor who demands the return of bailed funds so that he may engage in commercial activity may recover lost profits from the bailee if the latter does not heed his demand. It is arguable that, according to those authorities, the proprietor of the catering hall may claim that failure of the customer to cancel in a timely manner effectively precluded him from renting his premises to another customer. Presumably, it would be necessary for the owner of the catering hall to demonstrate that other customers were indeed available to rent his premises.

This position is, however, by no means universally accepted. *Yam shel Shlomoh, Baba Kamma* 9:30, followed by Shakh, *Hoshen Mishpat* 92:15,[18] maintains that even when loss of profit can be demonstrated beyond cavil there is no liability for such damages because the loss is indirect. That position is reflected in the comments of *Nimukei Yosef, Baba Metsi'a* 104b, who rules that a sharecropper is not liable for failing to engage in agricultural activity upon land that has been entrusted to him.

As Rabbi Metzger observes, in light of conflicting authority of this nature, a *Bet Din* could not intervene either on behalf of the plaintiff or on behalf of the defendant since the party in possession can plead that the claimant must adduce positive proof of the actionability of his claim. Thus, the caterer would not be able to recover his lost profits. However, if he received a deposit or advance payment to cover a portion of the cost of the wedding, the *Bet Din* could not order him to return such funds to the customer provided the sum received by him is not

greater than his claimed foregone profits. Under such circumstances, the burden of proof is transferred to the person seeking to recover his deposit and can be satisfied only by positive proof that he is entitled to such recovery.

The situation would be entirely different if the parties had entered into a contract explicitly providing for payment in the event of cancellation. Sema, *Hoshen Mishpat* 61:12, and Shakh, *Hoshen Mishpat* 61:10, rule that an agreement to indemnify against actual loss does not constitute a non-actionable penalty or *asmakhta,* provided that the expenses incurred are usual and reasonable. *Arukh ha-Shulhan, Hoshen Mishpat* 61:11, states that an agreement to compensate for lost profits is also enforceable provided that the profits for which compensation is sought are in the nature of profits derived from an enterprise from which the plaintiff customarily earns his livelihood.

NOTES

1. See, for example, articles by Rabbis Joseph Dov Cohen, Shlomoh Tenbitzki and Israel Kolonder in the first issue of *Ha-Torah ve-ha-Medinah,* Nisan 5709, and the articles on related topics in the same issue by Rabbis Nathan Zevi Friedman, Moshe Zevi Neriah and Sha'ul Israeli; R. Saul Israeli, *ibid.,* no. 2, Iyar 5710; R. Samuel Weingarten, *Ibid.,* no. 5-6, 5713-14, pp. 316-322; R. Ovadiah Hedaya, *Ibid.,* no. 9-10, 5718-5719; R. Shlomoh Goren, *Or ha-Mizrah,* Elul 5714; *idem, Mahanayim,* no. 33 (Erev Rosh ha-Shanah 5718; R. Saul Israeli, *Amud ha-Yemini* (Tel Aviv, 5726), no. 8; *idem, Shevilin,* no. 25-26 (Elul 5730); and R. Shlomoh Kook, *Shanah ba-Shanah,* 5732, pp 217-218.
2. In 1923, the locale in question, Zeimielis, had a total population of 1,209 persons. See *Encyclopedia Lituanica* (Boston, 1978), VI, 305.
3. Rabbi Kook is also quoted in *Seder Eliyahu* as asserting that, as a matter of policy, *eiruvin* should not be constructed lest the prohibition against carrying be "forgotten." Contrary statements found in rabbinic sources categorizing construction of an *eiruv* as a *mitsvah* and encouraging the practice he dismissed as referring only to "large cities" in which *eiruvin* were necessary in order to minimize transgression on the part of Sabbath desecrators.
4. See, for example, *Pnei Yehoshu'a, Shabbat* 21a, s.v. *mihu.* For a survey of conflicting opinions regarding this principle see R. Mordecai Brisk, *Teshuvot Maharam Brisk,* I, no. 23.
5. See *Teshuvot Kol Eliyahu,* II, *Orah Hayyim,* no. 23, who asserts that, according to Rambam, the prohibition is limited to benefit derived from consecrated property. Cf., however, the differing opinions regarding Rambam's position cited by R. Ovadiah Yosef, *Yabi'a Omer,* III, *Orah Hayyim,* no. 20, sec. 11, and VI, no. 34, sec. 3.
6. See also the discussion of R. Abraham Dov Ber Reiner, *Teshuvot Bat Ayin, Orah Hayyim,* no. 64.
7. It should be noted that *Har Tsevi* would readily concede that listening to a musical instrument would be forbidden if the musical rendition were to involve a forbidden form of labor on the grounds that the sound of the music is regarded as "attached" to the instrument. This is evident in the coupling of "voice" and "sight" in the dictum concerning benefit derived from consecrated property through "voice, sight and smell." See R. Joseph Cohen's annotations appended to *Teshuvot Har Tsevi, Harari be-Sadeh, loc. cit. Har Tsevi* apparently entertains the notion that transmission of a human voice, via the radio does not render it as being "attached" to the radio. However, if it is recognized that the sound emitted by the radio is not that of the human voice but an electronic simulation of the human voice, the halakhic status of that sound should logically be identical to that produced by a musical instrument. Cf., R. Zevi Pesah Frank, *Mikra'ei Kodesh, Hanukkah-Purim,* no. 11. In that work Rabbi Frank expresses doubt with regard to whether or not a voice amplified by a microphone or broadcast over the radio is to be regarded as a human voice for purposes of Jewish law. Strangely, Rabbi Frank seems to be of the opinion that, both in the case of a radio and in the case of a microphone, there is an admixture of a human and an artificial voice. This apparently contradicts the thrust of his comments in *Teshuvot Har Tsevi* since, if the radio is regarded as producing any independent sound, that sound should be regarded as "attached" to the radio. Rabbi Frank may have assumed that, if there is an admixture of a natural human voice as well, the "benefit" derived is the result of two separate causes and since one of the causes involves no infraction the benefit is permitted on the basis of the principle of *zeh ve-zeh gorem.*

8. A similar view is expressed by R. Ben-Zion Uziel, *Mishpetei Uzi'el, Orah Hayyim,* II, no. 52. *Mishpetei Uzi'el* further opines that there is an additional prohibition of *Shema Yateh,* i.e., a prohibition similar to reading by candelight or by the light of a lamp burning liquid fuel. That action is forbidden "lest he incline the lamp" and thereby increase the rate of combustion. That prohibition clearly devolves upon one who reads by the light of the lamp on *Shabbat,* not upon the person who kindles the lamp in advance. *Mishpetei Uzi'el* maintains that listening to the radio is forbidden for a similar reason. This line of reasoning finds no parallel in any other source. The rabbinic prohibition to which he refers is limited in scope and does not extend to encompass the possibility of extinguishing the fire. Merely moving or inclining a radio at an angle does not necessarily involve a biblical transgression. Cf., R. Shlomoh Zalman Auerbach. *Kovets Ma'amarim be-Inyanei Hashmal be-Shabbat* (Jerusalem, 5738), p. 45.
9. See also *Tsits Eli'ezer,* IX, no. 21; cf., *Yabi'a Omer,* I, *Orah Hayyim,* no. 20, sec. 14, and III, *Orah Hayyim,* no. 29.
10. See also R. Chizkiyahu Shabbetai Yashe, *Teshuvot Divrei Hizkiyahu* (Jerusalem, 5702), II, *Orah Hayyim,* no. 4, p. 88.
11. See also R. Joshua Hirschhorn, *Ha-Pardes,* Adar 5713.
12. Rabbi Auerbach's article, *"Mikrofon, Telefon ve-Ramkol,"* is reprinted in his *Kovets Ma'amarim be-Inyanei Hashmal be-Shabbat* (Jerusalem, 5738).
13. See also *Teshuvot Sha'arei De'ah,* no. 194 cited in *Kaf ha-Hayyim, Orah Hayyim* 338:27; R. Ya'akov Mosheh Toledano, *Teshuvot Yam ha-Gadol,* no. 26; R. Simchah Levy, *Ha-Pardes,* Iyar 5712; R. Menachem Poliakov, *Ha-Darom,* Nisan 5718; and R. Shlomoh Goren, *Mahanayim,* 26 Iyar 5718.
14. See also R. Yitzchak Weisz, *Teshuvot Minhat Yitshak,* I, no. 107. Other writers who cite this reason in ruling against the use of microphones include *Yabi'a Omer,* I, no. 20, sec. 12; *Tsits Eli'ezer,* III, no. 16, chap. 12, sec. 7, and IV, no. 26; *Minhat Yitshak,* II, no. 38; R. Yisachar Dov Bergman, *Ha-Pardes,* Kislev 5712; and R. Moshe Stern, *Be'er Mosheh,* VI, *Kuntres Elektrik,* no. 16.
15. Rabbi Auerbach advances other considerations as well. R. Ezekiel Landau, *Noda bi-Yehudah,* II, *Orah Hayyim,* no. 30, writes that a parasol opened before the Sabbath may not be used on the Sabbath because the beholder has no way of knowing that the parasol has not been opened on the Sabbath. Rabbi Auerbach argues that the same line of reasoning may be applied to the use of amplification systems since most individuals are not scholars and will not understand the technical differences between a microphone and other electrical appliances and hence may easily be led to biblical transgressions.
16. See also R. Nachum Rabinovitch, *Ha-Darom,* no. 15 (Nisan 5722).
17. For additional sources and references to material dealing with other ramifications of the issues involved see *Ha-Hashmal be-Halakhah,* a bibliographical compilation published by the Institute for Science and Halacha (Jerusalem, 5791), II, 268-281.
18. See also Shakh, *Hoshen Mishpat* 61:10.