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MIPNEI TAKANAT HA-SHAVIM – מפני תקנת השבים OUTREACH CONSIDERATIONS IN *PESAK HALAKHAH*¹ Rabbi Barry Gelman

Recently, I met with a couple who were slowly but surely adopting an observant lifestyle. During the course of our conversation this couple mentioned that they had a set of china dishes that were a family heirloom. The dishes were given to them by a family member who did not keep kosher and were most probably used with either *treif* food or interchangeably for both dairy and meat. They then told me that they were under the impression that the dishes could not be “koshered.” They told me as well that the dishes had important sentimental value to them, and that they were saddened by the notion of not being able to use them.

After seeing how difficult this decision was for them, I shared with them the view of Rabbi Moshe Feinstein who allowed *kashering* china in circumstances very similar to theirs and told them that I thought that they, too, could *kasher* their dishes.² At that moment, the wife turned to her husband and said with a gleam in her eye, “See, I told you we could do it.” She went on to explain that they had been bombarded with so many strict interpretations of Orthodox Judaism that her husband began to doubt whether or not they could pull off a total assimilation into Orthodoxy.

In hindsight, I could have tried to convince the couple that their attachment to the dishes should not serve as a barrier for further religious growth and counsel them how to best integrate themselves into orthodoxy—just without the dishes!—but instead, I simply removed the barrier. Removing barriers to religious growth can be a very effective tool towards increasing religious observance, and we see that this method has, in fact, been used by great *poskim*.

In the response in which Rabbi Feinstein records his permissive ruling about china, he invokes the idea of “*takanat ha-shavim*,” regulations or enactments made in order to help those who wish to repent (literally: return). Rabbi Feinstein understood that the use of permissive rulings in cases such as this would make the road to observance easier to navigate for those who wish to embrace an Orthodox style of religious observance.

One primary source for the concept of *takanat ha-shavim* is a mishnah in

¹ I am grateful to David Wolkenfeld for his assistance in bringing this article to publication.

² Responsa, *Igerot Moshe*, *Yoreh De'ah* 2: #46

Gitin (5:5):

R. Johanan b. Gudgada testified: ‘... and on the beam which was stolen and which he [who stole it and already used it and] built it into a palace, restitution for [the beam] may be made in money, *so as not to put obstacles in the way of penitents...*’³

To grasp the import of the mishnah, one must understand that the primary obligation regarding a stolen object is to return the item to its original owner. Only if the object no longer exists is repayment an acceptable option. In this case, the large beam, though it still exists, has already been built into a building, yet the Rabbis allow the thief to repay the value of the beam instead of returning the beam itself, which would require the destruction of the building in order to retrieve it. Understanding that the thief would not go to the trouble of destroying the building in order to return the beam, an allowance was made to make restitution and repentance feasible.

There is another pitfall inherent when not taking this approach and that is the lost opportunity to help make a halakhic and permissible style of living accessible to as many Jews as possible. When discussing leniencies and stringencies, we should not focus on the spectrum of less stringent or more stringent, but rather on the strategic use of leniency to *encourage greater observance*. Put differently, when rendering halakhic decisions, rabbis should not focus on whether or not a decision is in line with the most stringent approach or is in accord with as many opinions as possible, but rather on the long term affects the particular decision will have on an individual’s level of observance.

The case of our mishnah and its application by Rabbi Feinstein are examples of the use of halakhic leniencies to make the road easier for *ba’alei teshuvah*. Other *poskim* throughout the generations have also used leniencies in order to limit sin in situations that are not ideal. Maimonides, for example, regarding a case involving an improper union between a Jewish man and his non-Jewish maid, used the notion of *takanat ha-shavim* in such a fashion and openly stated that even though he was contradicting an explicit Talmudic ruling by allowing her to convert and be married, ruled accordingly because of *takanat ha-shavim*—in order to facilitate repentance.⁴

³ Also quoted in *Eduyot* 7:9. Actual translation reads “on account of the ‘decree of the penitents.’” See Rashi, *Gitin* 55a, s.v. *takanat ha-shavim*. Also Rambam, *Peirush Ha-Mishnayot Gitin*, ad loc (emphasis added).

⁴ Maimonides, Responsa “*Pe’er Ha-Dor*”, 132. The case involved a Jewish man who had relations with a non-Jewish woman he had hired to be his maid. Maimonides states that Jewish law requires that the woman be immediately expelled, yet Maimonides realized that the situation was not ideal and that if the woman cannot be expelled she should be converted so that the couple can marry in accordance with Jewish law. Maimonides based his opinion on the *mishnaic* ruling that such a couple, though forbidden to marry, if they did so, need not separate. Maimonides also invoked the halakhic nuance of “*Et La’asot La-Hashem*.” [For a detailed and descriptive analysis of this case and the use of the halakhic idiom “*Et La’asot La-Hashem*” see

Basing himself on this ruling by Maimonides, in a responsum addressed to Rabbi Raphael Chaim Sabban, Chief Rabbi of Istanbul, Rabbi Benzion Uziel ruled in favor of conversion performed for the sake of marriage.⁵ While conversion for the sake of marriage is generally frowned upon, Rabbi Uziel argued that when the non-Jewish partner in an intermarriage wishes to convert, rabbis *should perform* such conversions. Doing so, he claims, frees the couple from the sin of intermarriage and saves the couple and their children from being estranged from Judaism entirely.

Rabbi Uziel also notes that, by approaching the rabbi for conversion, the couple has expressed a desire to be part of the Jewish people. He urges rabbis to allow such conversions in order to make Jewish living accessible to these couples. He also addresses and rejects the conceptual notion of “*hal’iteihu la-rasha va-yimot*”—literally “let the wicked stuff themselves with it until they die”—that teaches that sinners should be left to sin and suffer the consequences.⁶ Instead, Rabbi Uziel prefers the following Talmudic teaching (*Shabbat* 31b):

Rav Ulla expounded: “Why is it written, ‘Be not much wicked’? Must one not be much wicked, yet he may be a little wicked? Rather, if one has eaten garlic and his breath smells, should he [continue to] eat more garlic, so that his breath should [continue to] smell?”

From this passage, Rabbi Uziel deduces that it is a commandment to prevent people from sinning.⁷ It is this approach, one of using halakha to bring people closer to observance, that Rabbi Uziel applies to the question of conversion for the sake of marriage.⁸

These rulings by Maimonides, Rabbi Uziel, and Rabbi Feinstein share a willingness to use rabbinic creativity and precedent to make entrance into the halakhic way of life easier. Using *takanat ha-shavim* in matters pertaining to Zecharya Goldman’s article “Emergency Halakha in the Rabbinic Tradition” in this volume. —Editor’s Note]

⁵ Responsa *Mishpetei Uzi’el*, Vol. 2, *Yoreh De’ah* 48.

⁶ *Bava Kama* 69a. The gemara there discusses the procedures for adequately marking one’s field during the year of *shemittah* to allow passersby to know which fields, orchards, and vineyards are permissible to eat from, without concern for either the biblical prohibition of *orlah* or *kerem rev’ay*, for in the seventh year of the Septennate cycle, the land is rendered ownerless and all may partake of its yield. Regarding the rest of the years in the *shemittah* cycle however, the gemara, in explanation of Rabbi Shimon ben Gamliel, states that there is no rabbinic requirement to mark one’s field appropriately to warn of any inherent prohibitions when taking fruit because to do so would be stealing and counsels to, “let the wicked stuff themselves with it till they die.” For a full treatment of “*Hal’iteihu la-rasha va-yimot*” see *Techumin*, Vol. 9, 156 – 170, and *Encyclopedia Talmudit*, Volume 9, columns 444-448.

⁷ Responsa *Mishpetei Uziy’el*, Vol. 2, *Yoreh De’ah* 48.

⁸ For a more detailed discussion on the topic of conversion for the sake of marriage, see Rabbi Mark D. Angel’s recent publication on this subject, *Choosing to Be Jewish: the Orthodox Road to Conversion*, (Hoboken, NJ: Ktav, 2005).

personal status represents a bold willingness to use halakha to pry open the doors of Jewish living to assist people in their attempts to enter.

Takanat Ha-Shavim Concerns Regarding Taharat Ha-Mishpahah

Takanat ha-shavim has also been used to make the burden of ritual observance easier for individuals who find certain aspects of an orthodox, halakhic way of life unbearable. In his collection of responsa entitled *Reshut Ha-Yahid*, Rabbi Yuval Sherlow, Rosh Yeshiva of Yeshivat Hesder Petah Tikvah, addresses the issue of applying leniencies regarding the laws of *Taharat Ha-Mishpahah*—the laws concerning *nidah*, or menstrual impurity—for newly observant women. The question posed to Rabbi Sherlow came in the context of a general concern on the part of newly observant women that the full compliment of the laws of *Taharat Ha-Mishpahah* may be too much to bear. Rabbi Sherlow permitted a woman who was beginning to observe the laws of *Taharat Ha-Mishpahah* to only observe the biblical laws of *nidah*—without the added rabbinic stringencies—so long as she was on a “path” towards full observance of the laws of menstrual purity.⁹ He issued his permissive ruling recognizing that it may be the very stringencies that are imposed on newly observant women that cause them not to observe more important *halakhot*.

Rabbi Sherlow further addressed the issue of women who were uncomfortable with the mikvah attendant doing a full body check before immersion.¹⁰ The question stated that women refrained from immersion in the mikvah due to what they perceived as a breach of privacy on the part of the mikvah attendant. The questioner (rightly) states that since immersion is only disqualified by the presence of a foreign substance that covers most of a woman’s body, or by a small amount of foreign substance about which the woman cares, there is no real reason for the mikvah attendant to do a full body check for such substances.

Rabbi Sherlow quotes Rabbi Yaakov Ariel, Chief Rabbi of Ramat Gan, who allows the attendant to only view the woman while immersing in the mikvah, to make sure that all of her hair has gone below the surface, and states that he was willing, for the sake of making it more comfortable for women to use the mikvah, to do away with the full body check that is prevalent in most mikvahs. In this case, the attendant would only enter the mikvah chamber once the woman has already descended into the water. Once again we see a *posek* who is willing to recognize that issuing lenient rulings can lead to further observance.

Though Rabbi Sherlow, as we have seen, was willing to allow minimal participation on the part of the mikvah attendant in order to make mikvah use more pleasant for women uncomfortable with an inspection by the mikvah attendant, there are still women who feel uncomfortable with the presence of

⁹ Responsa, *Reshut Ha-Yahid*, pp. 209-210

¹⁰ *Ibid.* pp. 211-213

anyone witnessing immersion. In his *Shulhan Arukh*, Rabbi Yosef Karo rules that if there is no mikvah attendant available, the woman immersing should bundle her hair in a loose-fitting net in order to make sure that all of her hair goes beneath the surface of the water.¹¹ In the spirit of the lenient rulings of Rabbis Sherlow and Ariel, perhaps this position could also be offered as an option to women hesitant to go to the mikvah with an attendant.

But perhaps even more can be done to raise the comfort level of women in order that they be more inclined to use the mikvah. Rabbi Yosef Karo elsewhere quotes a number of authorities who allow a woman's husband to serve as her own mikvah attendant.¹² In his responsum *Nodah Be-Yehuda*, Rabbi Ezekiel Landau also allows a woman's husband to serve as her own mikvah attendant when there is no one else around to do so.¹³ He dispenses with the concern that the couple might have forbidden sexual relations before the woman immerses by arguing that the couple will not violate halakha in this case since within a very short period of time they will be permitted to one another.¹⁴ I have personally counseled a woman, who found the idea of her husband acting as the mikvah attendant very appealing to her, to do so, which then helped her move toward greater mikvah use.

Though neither of these ideas serve as the *best* option to make sure that all of a woman's hair goes under the water during immersion, they certainly are better than the alternative, which is, for many women, not using the mikvah at all. It is reasonable to suggest that if a woman is able to get comfortable using the mikvah in general, then she may also be able to overcome the specific hesitancy or discomfort of using the mikvah attendant. Even if this is not the case, nevertheless, if the woman continues to use the mikvah her entire life using one of the two alternative methods outlined above, it would still be a great accomplishment.

Of course, when it comes to the administration of lenient rulings there is always the fear of the "slippery slope"—that perhaps lenient rulings in these and other areas will lead people to seek out ways to cut corners and not conform with Halakha in general. Rabbi Uziel deals with this concern in his ruling regarding conversion for the sake of marriage, positing that perhaps people will believe, based on his permissive ruling, that intermarriage is permissible. Rabbi Uziel declares that such a concern is baseless, for after all:

Who does not know [of] the prohibition against intermarriage? Precisely because people will see that we [the rabbis] only perform these weddings after a proper conversion, they will understand the prohibition against intermarriage.¹⁵

¹¹ Karo, *Shulhan Arukh*, *Yoreh De'ah* 198:40

¹² *Beit Yosef*, *Yoreh De'ah* 198:40, s.v. *katvu ha-kol bo*

¹³ Responsa, *Noda Be-Yehudah Mahadurah Tanina*, *Yoreh De'ah* 122

¹⁴ *Ibid.*

¹⁵ Responsa *Mishpetei Uzi'el*, Vol. 2, *Yoreh De'ah* 48.

Furthermore, Rabbi Uziel asserts, rabbis have no right to add stringencies in matters where clear halakhic permission exists.¹⁶

As we have seen in the mishnah dealing with *takanat ha-shavim* and the writings of Rabbi Feinstein and Rabbi Sherlow, the application of halakhic leniencies is the very tool used by rabbis to increase observance. This is especially so when dealing with individuals who have expressed an interest in coming closer to a traditional lifestyle. Regarding penitents, then, it seems that our great rabbis did not necessarily share the fear of the slippery slope.

Notwithstanding the well documented use of leniency as a tool to build greater observance, there will still be rabbis who, based on their own understanding of Halakha, will refrain from offering lenient rulings. Yet, although a rabbi may not alter his understanding of Halakha and rule in a fashion that he thinks is incorrect, he does have the right to refrain from issuing a ruling and may even direct the questioner to a rabbi who he knows will rule differently or more leniently.¹⁷

As noted by Rabbi Abraham Isaac Kook:

If rabbis were to permit what was permitted in accordance with Halakha, then people would likewise accept that which the rabbis prohibit as really prohibited by the Torah. On the other hand, when it is revealed that rabbis are ruling stringently on matters that may be deemed permissible, without concern for the hardship that such rulings may cause an individual, a great desecration of God's Name (*hilul Hashem*) will result.¹⁸

Rabbi Kook realized that permissive rulings, when appropriate, increase the public's trust in rabbinic leadership, and with increased trust will come increased levels of observance from a trusting public. Conversely, needless, stringent rulings can lead to distrust, less observance, and a breakdown in rabbinic authority. While Rabbi Kook issued these warnings regarding Passover stringencies, his words can easily and appropriately be applied to other areas of Halakha as well.

To sum up, rabbis should not be afraid of lenient rulings. When used properly, permissive precedent recorded in Halakha can be a very effective tool in demonstrating that living in accordance with halakha is possible. Such a realization can empower an individual or family and bolster them to even further levels of observance of Jewish law.

Rabbis should use Jewish law to make living in accordance with Halakha more accessible. Sometimes there is a general fear to use lenient opinions found

¹⁶ *Ibid.*

¹⁷ See *Hulin* 99b and Rabbi J. David Bleich, "*Sidur hupah le-kohen*," *Techumin*, Vol. 9, pg. 45.

¹⁸ *Mishpat Kohen*, Responsum #76; Responsum *Orah Mishpat*, *Orah Hayim* 112.

in classical halakhic works, but rabbis can and *should* use such rulings as a tool to encourage those on the path to observance to take on more *mitzvo*t. There is great value in demonstrating to the newly observant, via the use of lenient rulings, that they too can live a halakhic lifestyle. Once people are shown that halakhic living need not be comprised of the most difficult rulings, further steps towards observance may follow. While we are familiar with the contemporary tendency to use Halakha in ways that makes living in accordance with Jewish law seem unbearable, the trend can, and should, be reversed. I have seen the benefits of such an approach with my own eyes, and the results never cease to amaze me.