THE Sephardic HALACHA CENTER

The Sephardic Halacha Weekly

YOUR GATEWAY TO HALACHA IN BUSINESS, FAMILY AND COMMUNITY LIFE.

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Freedom of Religion

How far can a government or community go to limit what an individual does or practices in their private life?

Based on a Shiur by Rabbi Micha Cohen

Introduction

In secular law, there is an ongoing discussion about whether a government can or should limit an individual's private life choices. One example of this is the Supreme Court's 1923 decision in Meyer vs. Nebraska. The State of Nebraska enacted a law forbidding people to teach their children languages other than English. Robert T. Meyer violated the law and taught Bible in German, and was fined $25. The case made its way to the Supreme Court, which ruled that Mr. Meyer had the right to teach in the language of his choosing. Part of the explanation given for this decision was as follows:

"A person has a right to acquire useful knowledge, to marry, to establish a home, and bring up children, to worship G-d according to the dictates of his own conscience, and enjoy the privileges essential to the orderly pursuit of happiness by free men."

Essentially, the Court ruled that a person has the right to teach in a way that befits their conscience, and the government doesn't have a right to get involved. This ruling was applied and expanded upon in later Supreme Court case such as the famous case of Roe vs. Wade, in which this idea was applied to permit a woman to have an abortion, should she so choose. The Court argued that since a woman has the right to pursue happiness according to the dictates of her own conscience, the law cannot impose upon her a decision as to whether she may abort her fetus or not.

The Halachic Standpoint

While the stance of *Halacha* on matters of abortion is a discussion unto its own, and in no way resembles the secular discussion around this matter, in this article we will focus on some of the general concepts pertaining to an individual's freedom. Does a community or communal institution have the right to impose a certain Halachic position on a person who follows a different approach? Does Halacha agree with the perspective of secular law concerning the ability of an individual to take their own approach in this regard? When do we say that a community cannot establish certain rules and regulations that impact a person's personal practice due and when can a governing institution tell a person how to lead their lives?

This issue was quite relevant for hundreds of years, where Jewish communities had considerable self-rule, and passed many rules and *Takanot* (enactments). Although most communities today do not possess the degree of self-autonomy and government that was once prevalent, this issue may have some contemporary applications as well – such as with regard to members of a community, synagogue or Jewish organization that wishes to impose certain Halachic standards or behavior codes upon its members.

Breakaway Minyan

Ribbi Shemuel DiModena, the *Maharshdam*, who lived during the times of the Spanish Inquisition, was asked about some individuals who left the community shul in order to create their own shul in accordance with their own practices. The rest of the community was quite upset and refused to allow them to separate. In order to prevent this, they instituted many rules against them. Was it permitted for the community to force them to remain in the main shul? [1]

The *Maharshdam* in his *Teshuva* strongly supports the right of the individuals to separate. He asserts that one may not force others to pray in any specific shul that those individuals wish to avoid. The

reason for this, explains the *Maharshdam*, is that a person has a right to serve Hashem in the manner which he desires, similar to the *Gemara's* statement (*Avoda Zara* 19a) that a person will only successfully learn the topics of Torah that he desires to learn at that particular time. Here too, if a person feels they will pray better in a different environment, they cannot be forced to remain.

This appears to be a model example of our issue: Although the community may say, "We want you to be part of our shul, and it's to our and your benefit to do so," the person may respond: "My service of *Hashem* is personal, and I can decide for myself how to best serve *Hashem*." [2] Although we may feel that the person is in error and will not truly pray "better" elsewhere, or that the needs of the community outweigh those of the individual, nevertheless, the *Maharshdam* feels that since such factors are quite subjective, the individual has the right to decide for himself, and need not follow the will of the community.

The Secret Jews

Another interesting example in which similar subjective considerations may exist in evaluating an individual's personal practices is discussed in the responsa of Rabbi Shimon Bar Tzemah, known as the *Tashbatz*, who lived in the same era as the *Maharashdam*. He discusses Jews who had suffered through the Spanish Inquisition and decided to hide their identity as Jews, rather than attempt to leave the country. These Jews, who kept Judaism in secret, but publicly identified as Christians, were known as *Anoussim*. Although some of the *Anoussim* may have been capable of leaving Spain, many did not do so because they would likely lose all of their wealth, and would be separated from their family, as well as other reasons.

The Halachic authorities of that time grappled with the question of whether the *Anoussim* violated the prohibition against idol worship and classified as heretics. The *Rambam* had written many years earlier about people that may have the ability to leave but choose not to, and regarded them to be intentional transgressors, "because they have the ability to [flee], even if it means leaving their family, if they choose not to, they is as though they have intentionally given up the Torah."

Nevertheless, the *Tashbatz* disagrees with the opinion of the *Rambam*, and maintains that a person who outwardly gave up his religion because he didn't want to leave his family or his livelihood, but still tried to keep whatever he could, may still have the status of '*Oness* – one who is compelled to violate a prohibition against his will. Although the right thing would have been for them to be more courageous and attempt to leave, yet, we will still consider the situation to be as one that is beyond their control. He even suggests that the *Rambam*, who appears to disagree, may have written his opinion simply "to encourage people to leave". Thus, the *Tashbatz* concludes, such a person cannot be held accountable for wrongdoing, as "we can't judge the person in his situation".

As in the *Maharshdam's* case, the case brought before the *Tashbatz* appears to be an ambiguous one where various subjective factors are relevant to the situation. In his conclusion, the *Tashbatz* supports the notion of giving the *Anoussim* the right to decide for themselves as to the correct mode of action. Therefore, he writes, one may not impose other Halachic or communal enactments or sanctions against them.

In Conclusion

In conclusion, it seems from these *Teshuvot*, that in a case where the individual is acting within the Halachic confines, he is entitled to pursue these rights and not be sanctioned by the communal institution. As we explained, each issue can depend on many different variables and thus a Bet Din should be consulted in each situation.

Footnotes:

[1] The issue of separation from an existing shul and creating a new one is actually quite a complex one in Halachic literature (despite the clear ruling of the Maharshdam in this particular case), with a range of opinions and factors to consider. For a summary of this question in English, see Steven Oppenheimer, "The Breakaway Minyan," Journal of Halacha and Contemporary Society, Spring 2003.

[2] This rule may not apply if the person chooses to participate in an act that is forbidden. In that case, it is possible that the community has the obligation of tochacha, rebuke, that would allow them to impose certain rules to prevent this. However, the rules of contemporary tochacha are somewhat complex and subjective, and are beyond the scope of this article.

Reaping the Reward, Part 2: "Free" Download

By Dayan Shlomo Cohen, Badatz Ahavat Shalom, Yerushalayim

Previously…

In our previous article, we identified four levels of benefitting from the efforts of another:

1. Grabbing a unique find before the person who spotted it is not immoral according to all opinions.

2. Acquiring a unique item before another prospective buyer is immoral according to *Rashi* but not according *Rabbenu Tam.*

3. Acquiring a non-unique item before another prospective buyer is immoral according to both *Rashi* and *Rabbenu Tam.*

4. Acquiring a unique item before another prospective buyer, where the latter had exerted much effort and created the opportunity for the third party is immoral even according to *Rabbeinu Tam* – despite the fact that the item is unique.

In this article, we will examine two further levels.

The Fifth Level

The Mishna discusses a case of a poor person, who saw an ownerless (Hefker) olive tree growing on ownerless land, climbed on it and started shaking it, causing the olives to fall to the ground. His intention was to collect them, and sell them in the market. If another person would collect the olives before the poor man could climb down the tree, that person would be regarded as a thief. Even though the olives do not belong to the poor man who shook the tree – as he has made no valid act of acquisition – nevertheless, our Sages consider him as a 'thief'. This means that only on a rabbinical level is he a thief while, according to the strict letter of Torah law, he is not.

Therefore, if the poor man were to take this 'thief' to Bet Din, he would lose, as Bet Din do not have the authority to make the collector return what he took, because he is not actually a thief.

From here we see that to take property which is ownerless, but was created by the efforts of another is theft (albeit rabbinically).

The difference between this case and the previous cases, where such actions are considered to be immoral, but not akin to theft, is that in the olive-tree case even more effort was expended. Thus, we have a fifth level to add to our scale of benefitting from the effort of another.

Fishing Rights

The Gemara (Bava Batra 21b) discusses the following case: Reuven goes fishing, and, when he gets to the river, he finds that Shimon is already there. Reuven starts setting up his fishing equipment next to Shimon, but Shimon objects, claiming that Reuven must keep away from the area where he is fishing.

Let's examine this claim of Shimon: The river is ownerless and so are the fish. What right does Shimon have to prevent Reuven from setting up his rod right next to him, and catching the fish that he was attracted with his bait?

The answer is that Shimon has exerted much effort in causing the fish to gather around him, and it is inevitable that – if no one interferes – he will catch them.

There are varying opinions amongst the commentators as to the exact scenario of the Gemara. Rashi explains that the first fisherman has been tracking a large fish and has found its nook, underwater. He placed the bait at the entrance of the nook where the fish is hiding and it's just a matter of time before the fish emerges, takes the bait, and is caught. In such a situation, the second fisherman may not interfere and catch the fish for himself. Others explain that the first fisherman's net is in the water, and the fish are inside the boundaries of the net. An actual act of acquisition

will only be made when the net is lifted out of the water. Still, it is forbidden for the second fisherman to take these fish.

The common factor between all these explanations is that the first fisherman has exerted much effort, and catching the fish is inevitable, even though it has not yet been carried out.

The Sixth Level

The Hattam Sofer rules that in this case, it is actual theft for another to take the fish. He claims that it is not 'just' forbidden rabbinically, but actual theft according to the Torah. Despite the fact that all agree that the fish do not currently belong to the first fisherman, it is theft on behalf of the second, to take these fish which he is inevitable going to catch.

The Hattam Sofer explains that this logic would also apply to copyrights. Once a book has been published, all who desire that book must buy it from the publisher. Were another publisher to publish the book he is stealing from the first publisher who has expended much time and money on the project.

This approach of the Hattam Sofer does not consider the fact that in our times copyright is an asset which, while being intangible and abstract, can be and is bought and sold like any other asset. Accordingly, publishing the book of another would certainly be theft for this reason alone.

The case of the fisherman would be a sixth level of benefitting from the effort of another, and taking something which another 'almost' owns, which would be considered actual theft.

"Free" Download

Let's now examine the case of an individual who downloads a song from the internet so that he can listen to it in his car whilst driving. Despite the fact that copyright is recognized today in Jewish monetary law as an asset, as explained above, once a song is freely available on the internet, it cannot be considered as property which has an owner.

The reason is, that the Gemara states that where someone's property is washed out to sea, it can be presumed they give up all hope of retrieval – even though they may declare that they do not. So too, with a song that can be downloaded freely, the artist knows it is lost.

Nevertheless, we have seen from the Hattam Sofer, that even where property is ownerless, it is either immoral, theft on a rabbinical level, or even theft on a Torah level, for another to benefit from it.

Certainly, in the case of a song, where much time, effort and expense was involved in its production, even though it is considered 'ownerless', it would be at the very least immoral, and if not, theft, either rabbinically or from the Torah, to download and benefit from it for free. I think that all would agree that it is certainly not similar to the case we discussed in our previous article, of the two guys walking down the sidewalk, where one of them spots a hundred-dollar bill. In that case there are no Halachic repercussions if the other takes the money for himself, as the effort that was exerted by the first guy was minimal.

There is, however, one big difference between downloading and all the above cases. In the case of the olives, the fish and the land bought from a gentile; when another takes them, they have caused a loss to the party who exerted the effort. Every olive collected is one less for the guy who shook the tree.

In the case of downloading a song, this is not necessarily the case.

Only if the downloader will now not buy the disc, is a loss caused to the artist. If he would never have bought the disc anyway, no loss has been caused at all, and therefore he cannot be considered either as a thief, or as having acted immorally.

Concerned Artists

It must be pointed out that today there are ways by which an artist can protect his song from being downloaded. Where the artist has not bothered to do so, it could be argued that he has shown that he is quite happy for people to download his songs to advertise himself, and intends on earning his living from live performances and therefore all can freely download without being accused of being either immoral or stealing.

Where he has employed such a technique, a skilled downloader who has the technical knowhow to break the protection would certainly be considered as a thief, as the artist has not given up on his song, and remains the Halachic owner as explained above.

In Summary

To summarize, we have seen six different levels of benefitting from the efforts of another, the first one being permissible and the rest being treated like the owner of property you do not actually own with varying degrees of prohibition.

In my opinion, downloading a song from the internet is certainly comparable to the case of the olive tree, where the second guy takes an object which while being ownerless was 'created' by extreme effort on behalf of the shaker of the tree (the composer) and would therefore be considered as a thief (rabbinically). If the artist took measures to protect his song, it may even be considered theft on a Torah-level. [And, perhaps, if he willingly forwent protecting his song, it could be argued that he is not bothered by free downloaders.]

However, as explained above, this will only apply if the downloader would have bought the disc. If he would not, he cannot be considered as a thief, as he has caused no loss to the artist by his actions.