YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**HALAKHA: A WEEKLY SHIUR IN HALAKHIC TOPICS**

**The Mitzva of Burial**

**Based on a shiur by Harav Aharon Lichtenstein zt”l**

Summarized by Yitzchak Barth

Translated by David Silverberg

# THE SOURCE

The origin of the mitzva of kevura, to bury the dead, is found in Parashat Ki-Tetzte: "Do not let his corpse remain on the stake overnight, but you must rather bury him the same day" (Devarim 21:23). Rashi, commenting on this verse, notes several reasons for this obligation:

1. A hung person infringes upon the honor of divine kingship, since the human being is created in the image of God.
2. An unburied corpse defiles the sanctity of the land, as the verse continues, "you shall not defile your land."

We may add a third possible reason: concern for the dignity of the human being himself. The Torah does not mention this reason, perhaps because it does not apply to the immediate context at hand – the burial of harugei Beit-Din (sinners executed by the court). In the Gemara, however, we indeed find such a concept even with regard to harugei Beit-Din: "You shall love your fellow as yourself – choose for him a favorable death [when sentencing him to execution]" (Sanhedrin 45a). It thus emerges that the concept of "kevod ha-beriyot," concern for human dignity, applies even to executed sinners.

THE LEVEL OF OBLIGATION

The Sifrei (Devarim, ibid.) writes that kevura constitutes a positive mitzva, but it refers only to harugei Beit-Din. The extension of this obligation to all people appears in the mishna (Sanhedrin 46a):

"They untie him [from the tree] immediately, and if not – a prohibition has been violated… Moreover, they said that whoever leaves his deceased [relative] overnight [without burial] violates a prohibition."

The Gemara there derives the prohibition against leaving one's relative unburied overnight from the clause in the aforementioned verse, "ki kavor tikberenu" ("but you must rather bury him"). There exists, however, a different version of the text of the Gemara, according to which leaving one's deceased relative unburied overnight violates a positive mitzva as well. Later (46b), the Gemara says:

"Rabbi Yochanan said in the name of Rabbi Shimon Ben Yochai: Where is there an allusion to burial in the Torah? The verse says, 'But you must rather bury him' – here is the allusion to burial in the Torah."

It is unclear from the Gemara to what precisely it refers when it speaks of a "remez" (allusion). Does it mean an "asmakhta" (just an allusion in the text, rather than an actual Biblical source), or that we in fact derive from this source a Biblical obligation (as the Ramban claims, in his hasagot to the Rambam's Sefer Ha-mitzvot, shoresh 3)?

Rabbenu Chananel there understands the word "remez" to imply that burying the dead constitutes a Torah obligation, but later concludes, "We hold that this mitzva is de-rabbanan (rabbinic)." The Sedei Chemed brings a wide array of Acharonim who understood that burial is required mi-derabbanan, including those who attributed this view to the Rambam.

In truth, however, the Rambam's position in this regard is far from clear. In the caption to his Hilkhot Sanhedrin, he mentions the positive mitzva "to bury somebody killed on the day he is killed." The Rambam speaks of burying the "neherag" - person killed, without clarifying whether or not this refers to the remains of every dead person, or specifically harugei Beit-Din.

In Hilkhot Sanhedrin itself (15:8), the Rambam writes, "There is a positive mitzva to bury all harugei Beit-Din on the day of execution… and not only harugei Beit-Din, but whoever leaves his deceased [relative] overnight violates a prohibition." In his responsa, the Radbaz explains that in the Rambam's view, the positive mitzva of burial applies only to harugei Beit-Din, whereas the prohibition, which the Rambam mentions in the context of deceased relatives, applies to all people.

This approach, however, becomes difficult in light of other places where the Rambam indicates that kevura for all people involves a positive mitzva. For example, in Hilkhot Avel (12:1), the Rambam addresses the issue raised in the Gemara as to whether burial is performed for the honor of the deceased, or to atone for his sins. The practical ramification of this question arises in a situation of someone who specifically requested that he not be buried upon his death. The Rambam requires burial even for such a person, explaining that "burial is a mitzva." The Ramban writes this, as well, in his Torat Ha-adam. Additionally, in Sefer Ha-mitzvot (231), the Rambam writes:

"God commanded us to bury harugei Beit-Din on the day they are executed… This applies to other deceased people. We therefore refer to a dead person with no one to care for his burial as a 'met mitzva.'"

As opposed to the Radbaz's claim regarding the Rambam's view of the prohibition, the Rambam writes in Sefer Ha-mitzvot (prohibition 66) that one may not "leave the person hung overnight on the tree." He mentions nothing about the application of this prohibition to all deceased people. It thus emerges that in Sefer Ha-mitzvot, the Rambam indicates that the prohibition applies only to harugei Beit-Din, whereas the positive mitzva includes all deceased people.

The Sha'agat Aryeh (She'elot U-teshuvot Chadashot, 6:1) distinguishes between the Rambam's purpose in Sefer Ha-mitzvot and that in his Mishneh Torah. In the latter, he seeks to present the details of the halakhot, and he thus naturally discusses in Mishneh Torah the obligation of burying all deceased people. In Sefer Ha-mitzvot, by contrast, his purpose is to briefly mention each mitzva, and he therefore mentions in this context the obligation of burial only with regard to harugei Beit-Din. Needless to say, this approach does not explain why in Sefer Ha-mitzvot the Rambam includes all the dead under the positive mitzva of kevura.

Regarding the apparent contradiction between the Rambam's comments in Hilkhot Sanhedrin, where he applies only the prohibition to other deceased people, and Hilkhot Avel, where he speaks of a "mitzva" to bury the dead generally, we may adopt a different approach. Perhaps in Hilkhot Sanhedrin the Rambam addresses specifically the obligation of burial on the same day as the death – a requirement that applies only to harugei Beit-Din. In Hilkhot Avel, by contrast, he refers to the general obligation to bury – an obligation that applies to everyone. (That the mitzva of kevura applies even later than the day of death is clear from the halakha requiring burying a met mitzva even if he is found several days after death.)

BURIAL AS "GEMILUT CHASADIM"

The Gemara in Masekhet Sota (14a) discusses the origin of the obligation of gemilut chasadim (performing acts of kindness), and writes:

"What does it mean, 'You shall follow the Lord your God'? Can a person really follow the Shekhina? Rather, [it refers to] following His conduct… Just as the Almighty buries the dead, so must you bury the dead."

The Rambam brings this passage in Hilkhot Avel (14:1):

"There is a positive mitzva mi-divreihem [by force of rabbinic enactment] to visit the sick, comfort the mourners… and to concern oneself with all burial needs. These constitute bodily [as opposed to monetary] gemilut chasadim, which have no set amount. Although all these mitzvot are 'mi-divreihem,' they are included under 'You shall love your fellow as yourself.'"

This means that, according to the Rambam, these mitzvot exist on two different levels: the general level of the Torah obligation of gemilut chasadim, which has no set parameters or exact definitions, and a more specific level of rabbinic enactment, which specifies particular obligations and requirements.

In the first "shoresh" (principle) of his Sefer Ha-mitzvot, the Rambam writes that we should not count as part of the six hundred and thirteen mitzvot laws enacted by Chazal, as does the Behag, and he cites burial as an example. The Ramban, in his "hasagot," objects to the Rambam's citing of this obligation as an example of a mitzva de-rabbanan, noting that kevura constitutes a Torah obligation – "ki kavor tikberenu." What's more, the Rambam himself lists the mitzva of kevura as one of the two hundred and forty-eight positive mitzvot! Clearly, the Ramban understood the Rambam as including all people under the positive mitzva of kevura, as opposed to the Radbaz, who interpreted the Rambam as limiting the positive mitzva to harugei Beit-Din.

THE RELATIONSHIP BETWEEN THE TWO SOURCES OF OBLIGATION

We have thus encountered two levels of the obligation of kevura: the independent mitzva to bury the dead, and the general mitzva of gemilut chasadim which includes the obligation of burial. In assessing the relationship between these two sources of obligation, we may raise several possibilities.

1. In truth, no independent mitzva of burial exists.
2. We have two separate, unrelated obligations, which one fulfills simultaneously when burying a deceased relative.
3. There exists a connection between the two mitzvot. The Yerei'im (mitzva 153, 154) mentions the mitzva "to clothe the naked and bury the dead," and cites as the source for both these mitzvot the verse, "You shall follow the Lord your God." This would imply that burying the dead is one type of gemilut chasadim, rather than a separate mitzva.

We may perhaps suggest an additional model, which combines the models already presented. The essence of the mitzva of keri'at shema is "kabbalat ol malkhut Shamayim" – accepting upon oneself the yoke of divine kingship. The Rambam mentions in mitzva 2 of his Sefer Ha-mitzvot the mitzva to accept upon oneself the yoke of divine kingship – whereas in mitzva 10 he lists the mitzva to recite the shema. It would appear that the Rambam does not speak here of two entirely unrelated mitzvot. Rather, one mitzva – keri'at shema – serves as a means of fulfilling the other – the mitzva of kabbalat ol malkhut Shamayim. We may apply this same model to our context, the mitzva of kevura: one who buries his dead fulfills both mitzvot, though these mitzvot are not distinct and unrelated, but rather very much connected to each other.

THOSE OBLIGATED TO BURY

Let us now turn our attention to the question of who bears the obligation to bury. The Rambam implies in Hilkhot Sanhedrin (15) that the obligation of burial falls upon the Beit-Din, just as it is their obligation to hang the executed sinner. Regarding other people, however, the Rambam does not specify upon whom the obligation rests.

In his hasagot to Sefer Ha-mitzvot (shoresh 1), the Ramban writes that the obligation of kevura falls upon every person with respect to every dead body – just as all other mitzvot of gemilut chasadim apply to all people. The Ramban proceeds to point out that, undoubtedly, the deceased's relatives are required to bury him. If, however, he has no relatives, then the mitzva falls upon every person and even overrides conflicting obligations, as we find in many halakhot concerning a met mitzva.

Clearly, if we view the mitzva of kevura as an independent mitzva, then it would seem that, unlike the mitzva of gemilut chasadim, it is cast only upon the deceased relatives.

In his work "Gesher Ha-chayim" (vol. 2, pp. 110-116), Rav Yechiel Michel Tuketchinsky dismisses the view that the Torah obligation of burial applies only to relatives, whereas a rabbinic obligation extends the mitzva to others. He writes that even other people are included under the Torah obligation, but relatives have a separate requirement derived from the obligation for kohanim to become impure while tending to the burial needs of relatives. Rav Tuketchinsky works off the assumption that it is the burial that allows kohanim to become impure; we do not cast the obligation of burial on anyone else because of the special obligation to bury one's relative.

As for practical halakha, he concludes that since the obligation for one of the seven relatives (parents, children, siblings, and spouse) to bury the deceased evolves from the obligation for kohanim to become impure, the mitzva of burial applies only in those circumstances where a kohen must become impure for a relative. Therefore, if the dead body is not whole, in which case a kohen has no obligation to become impure, the mitzva for a relative to bury does not apply, either. The second level of obligation, Rav Tuketchinsky writes, applies to all Jews and originates from the verse, "ki kavor tikberenu." There then exists a third level, mi-derabbanan, which kevura shares with all gemilut chasadim, such as rejoicing with the bride and groom, visiting the sick, etc.

On the basis of his understanding of the Rambam's position, Rav Soloveitchik disputed this approach of Rav Tuketchinsky. The Rambam maintains that the first day of mourning constitutes a Torah obligation which we derive from the laws of aninut (the period in between the death and burial – see Hilkhot Avel chapter 1). In Sefer Ha-mitzvot (mitzva 37), however, he learns the mitzva of mourning from the mitzva for kohanim to become impure for their relatives' funerals. In this same passage, the Rambam writes that female kohanim have no obligation to become impure for their relatives, since the prohibition against a kohen becoming impure generally applies to only the males.

Rav Soloveitchik explained that according to the Rambam, aveilut means the disruption of one's routine, conducting oneself in an opposite manner than usual. Therefore, a female kohen, who may always become impure, bears no obligation to become impure upon the death of a relative as an expression of aveilut. According to this approach, the obligation of tum'a clearly does not evolve from the obligation of kevura, as Rav Tuketchinsky claimed, but rather from the obligation of aveilut. Hence, we cannot draw any parallel between the obligation of kohanim to become impure for their relative's burial and the obligation of burial itself.

The obligation of kevura, Rav Soloveitchik maintained, differs from the mitzva of circumcision, for example, which is essentially charged upon the father, but falls upon Beit-Din should the father fail to ensure his son's berit mila. Kevura, by contrast, is cast from the outset upon all of Am Yisrael. The mitzva to bury "one's dead" indeed applies mainly to relatives, but only because he is considered "their dead" more so than anyone else's. If they cannot perform the burial, then the obligation falls upon the rest of the nation, for the deceased is "their dead," as well. We should note that the primacy of relatives with regard to this obligation also involves the obligation of "mi-besarkha al tit'alem" ("Do not overlook your own flesh"), which requires one to pay particular attention to the needs of his own kin.