

# Hasagath Gvul

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In Western societies, competition in business is looked upon as economically desirable. Competition leads to equalization of prices, better products, more accessible items for the consumer, a whole array of benefits to the consuming public.

Rabbinic opinion (*Chazal*), too, seem to encourage competition. Specifically, they consider that it creates a benefit to the public at large. An example of this positive attitude is reflected in the Mishnah:

מתני' רבי יהודה אומר לא יחלק החנוני קליות ואגוזין לתינוקות  
מפני שהוא מרגילן לבא אצלו וחכמים מתירין

R. Yehuda said: A store owner should not distribute parched corn or nuts to children, because he accustoms them to come to him [rather than to others]; *Chachamim* say it is permitted.<sup>1</sup>

The Gemara explains the reasoning of *Chachamim*, the other rabbis:

גמ' מא' טעמיהו דרבנן דאמר ליה אנא מפליגא אמגוזי ואת פלינ  
שיסקי:

Because he [the store owner] can tell the other [store owner]: "I will give them nuts; you may give them plums."<sup>2</sup>

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1. *Bava Metzia* 60a.

2. *Ibid.*

Here is an example where competition benefits the consumer.

The same mishnah further states that while Rabbi Yehuda holds that the store owner "may not reduce the price", the *Chachamim* say that the store owner who reduces the price is "to be remembered for good".

Hence, competition where the "playing field" is level, is encouraged.

On the other hand, competition often leads to one person's loss. One of the competing parties may even lose his livelihood. Can there be a balance between competition that is good, healthy, and economically desirable, and the need to make a living, which is a social and economic necessity?

In this paper we will investigate the nature of the balance which Judaism seeks to establish between these two legitimate but sometimes conflicting desiderata.

In halachic literature, the limits to competition, the balance between laissez-faire free and untrammelled market forces, and the needs of the individual to be protected in his livelihood are discussed. Various terms such as *Hasagath Gvul* and *Yored L'Toch Umenato Shel Chavero* are used – at times interchangeably – in counterbalancing the competitive urge. Let us analyze the terms and see how these halachot affect the issues under discussion.

No term is more popular in defending the right of the entrenched store owner, for example, than "*Hasagath Gvul*." Yet even a brief analysis of the term will show that *technically* the use of *Hasagath Gvul* in this instance is problematic.

It is best to begin with the verse in Torah:

לא חסיג גבול רעך אשר גבלו ראשנים בנחלתך אשר תנחל בארץ  
אשר ה' אלהיך נתן לך לרשתה:

You shall not remove thy fellow person's landmark, which they of old have set in your inheritance, which you shall inherit in the land thy G-d giveth thee to possess.<sup>3</sup>

From the simple translation, we see that the prohibition of *Hasagath Gvul* technically applies only in Eretz Yisrael.<sup>4</sup> In any case, it is halacha related to land; specifically, to the stealing of land by removing a border. Indeed, *Sifre* says so openly:<sup>5</sup>

והלא כבר נאמר לא תגזול ומה ת"ל לא תסיג מלמד שכל העוקר תחומן של חבריו עובר ב' לאווין. יכול אף בחו"ל ת"ל בנחלתך אשר תנחל, בא"י עובר ב' לאווין בחו"ל אינו עובר אלא על לאו אחד.

It is already written "do not steal." Why must it state "do not remove the boundaries?" To teach us that one who uproots the border of his friend transgresses two negative commandments. Does this apply outside of Eretz Yisrael? It is written "in the land that you inherit." In Eretz Yisrael you transgress two negative commandments, outside of Eretz Yisrael you transgress only one negative commandment.

Rambam in *Mishneh Torah*<sup>6</sup> and in *Sefer Hamitzvot*<sup>7</sup> and the *Chinuch*<sup>8</sup> also understand this mitzvah as related to "stealing" land in Eretz Yisrael.

3. Deuteronomy 19:14.

4. Or, as *Minchat Chinuch* notes, "to that land that has *Kedushat Eretz Yisrael*." Mitzvah 522.

5. *Sifre, Devarim Piskah* 188.

6. *Hilchot Geneiva*, 7:11.

7. Negative Mitzvah 246.

8. Mitzvah 522.

However, there is another *Pasuk* where *Hasagath Gvul* is mentioned.<sup>9</sup>

ארור מסיג גבול רעהו

“Cursed be he who removes his neighbor’s landmark.”

According to *Chazal*, this verse has many interpretations. First, Rashi states that it refers to moving boundaries between fields. Second, *Sifre*<sup>10</sup> interprets the phrase to mean that one may not change boundaries, in Eretz Yisrael, from those set by the division of Yehoshua. In other words, *the land*, that was divided amongst the tribes, may not be redivided with different boundaries. Yet another meaning of *Hasagath Gvul* is the prohibition to plant a tree near a bordering field. The tree in my field will “steal” its nutrition from the adjacent field, thus weakening my neighbor’s land.<sup>11</sup> The prohibition against planting *Kelaim*, mixed seeds, is also hinted at in this verse.<sup>12</sup>

Thus far *Hasagath Gvul* relates to “stealing” land, in one form or another. Our rabbis however, use *Hasagath Gvul* also to denote another kind of stealing *i.e.* stealing the words of another. For example, *Sifre*<sup>13</sup> derives from the verse the prohibition to misquote scholars, attributing the words of R. Eliezer to R. Yehoshua, or vice versa. Indeed, R. Yehuda Hechacid<sup>14</sup> writes that it is important for authors of manuscripts to put their names on their books, lest someone else claim title to their work.

9. *Devarim* 27:17.

10. *Sifre, Shoftim, Piska* 188.

11. *Shabbat* 85b - Rashi, *D.H. Gvul Reacha*.

12. *Tosafot, Ibid, D.H. Lo Tasig*.

13. *Loc. cit.*

14. *Sefer Chasidim* 586.

So far, we have seen the concept of *Hasagath Gvul* expanded from stealing land in Eretz Yisrael by removing borders to perhaps “stealing” ideas. The application of *Hasagath Gvul* as a technical term to uphold one’s rights against economic intrusion and competition by another has not yet been introduced.<sup>15</sup>

In fact, however, *Acharonim* do apply it that way, albeit in a limited sense only.

For example, Maharshal presents the following case: A person leased from a feudal lord the right to collect taxes, and for many years he held that lease unchallenged. Now someone else paid a higher price to the feudal lord and thus usurped his right to collect taxes, causing the first lessee loss of money and loss of financial security.

Maharshal rules in favor of the first lessee for the following reason:<sup>16</sup>

על כן באתי לפרש שיכלה עסקו וחייב ואפילו הוא גרמא לחוד, והיינו טעמא מאחר שמצד הדין אינו כראוי לותר להם מה שקנאו המכס, וקפחו מחייתם של חבריהם שדינא הוא דמעכב עליו, מדינא נמי הוא בכלל רשע כמו המהפך בחררה ובא אחר ונטלה, ואפשר שהוא נמי בכלל ארור כמ”ש הרוקח כל המקפח מחייתו של חברו הוא בכלל ארור מסיג גבול רעהו, ורבים תמהו על דבר זה הלא הלאו דלא תסיג גבול כו’ איירי בגזול תחומו ובא בא”י ועובר אף על לא תגזול, וכמו שהביא הסמ”ג ויש מפרשים שלאזהרה בעלמא בא החרם, והסמיכו על המקרא דהשגת גבול ומכל מקום קשה לפי זה ה”ל לומר הרי הוא עובר בלא תשיג גבול... אלא נראה בעיני שכך הוא מקובל מרבתי דארור משיג גבול רעהו בא להרבות השגת גבול של משא ומתן, ודומה לזה מצינו שאשת חמיו הוא בכלל

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15. For a fuller and more exhaustive discussion, see *Hasagath Gvul* in *Encyclopedia Talmudit* Vol. IX.

16. *Shealot Utshuvot Maharshal* #89.

ארור שוכב עם חותנתו כראיתא בירושלמי, ואף שאינה תורה להיות נידון בה משום חמותו שהרי דוד נשא רצפה בת איה כמו שהביא הסמ"ג מפי רבותינו בעלי תוספות, הכי נמי אף שאינה תורה להיות משיג גבול ממש, מכל מקום מרבינן לאיסור מארור משיג גבול ממש.

It is included in the case of the poor person who "casts about a piece of cake" and *perhaps* he is included in being cursed, as Rokeach says, that whoever encroaches on his friend's livelihood is included in "cursed be he who removes the border of his friend." Many have asked, isn't this prohibition limited to "stealing" the border [of land] in Eretz Yisrael?... but thus it seems in my eyes that thus it was transmitted to him [the Rokeach] by his teachers, that "cursed be he who removes the border of his friend" also includes removing of borders of business activities.

Maharshah has difficulty in using the technical term *Hasagath Gvul* as a rationale for limiting sharp business practices. He says "perhaps" he, Rokeach, must have received the tradition from his *Rebbeim*, extending "stealing borders" to include breaking barriers which protect business ventures.

However, the regulation of economic competition, limiting activity that interferes with another's livelihood, need not be "squeezed" into the reading of a verse. There is virtually an entire unit in Tractate *Bava Batra* whence one can derive norms and guidelines regarding business competition and interfering with another's source of livelihood.

The Gemara quotes a *Braita* as follows:

כי עושה אדם חנות בצד חנותו של הבירו ומרחץ בצד מרחצו של חבירו ואינו יכול למחות בידו מפני שיכול לומר לו אתה עושה בתוך שלך ואני עושה בתוך שלי.

A person may set up a store adjacent to the store of his

friend and a bathhouse adjacent to the bathhouse of his friend and he [the friend] cannot object, because he can say "I do what I want on my property and you do what you want on yours."<sup>17</sup>

The Gemara then goes on to state that this principle is not universally accepted. There exists a disagreement between R. Shimon ben Gamliel and the other Sages whether the owner of a store may stop a second one from opening the same kind of store adjacent to him. Indeed, on the same page in the Talmud, R. Huna says that a person who opened a mill may stop another from opening and competing with him because the second will "interfere with my livelihood" (יורד לתוך אומנותו).

The Gemara objects to Rav Huna's position based on our mishnah in *Bava Metzia* 60a which states that Rav Yehuda forbids a store owner from distributing nuts because he attracts the children, but *Chachamim* permit. Apparently, argues the Gemara, the *Chachamim* would also disagree with Rav Huna. However, the Gemara makes a distinction. The store owner may distribute nuts because the other store owner has the option of using another type of promotion, such as distributing plums. But opening up a new store adjacent to an existing one would be forbidden, argues Rav Huna, even according to *Chachamim*, because "it interferes with my livelihood".

The Gemara then proceeds to state the position of Rav Huna brei d'R. Yehoshua, who states:

אמר רב הונא בריה דרב יהושע פשיטא לי בר מתא אבר מתא  
אחריתי מצי מעכב ואי שייך בכרגא דהכא לא מצי מעכב בר  
מבואה אבר מבואה דנפשיה לא מצי מעכב בעי רב הונא בריה

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17. Much of the second chapter in *Bava Batra* is relevant to our discussion. We will concentrate on the discussion on 21b.

דרב יהושע בר מבואה אבר מבואה אחרינא מאי תיקו.

It is certain that the resident of one town can prevent the resident of another town [from setting up a competing store] – but not if the [outsider] pays local taxes – and the resident of an alley *cannot* prevent another resident of the same alley [from opening up a competing store]. R. Huna the son of R. Yehoshua asked: Can the resident of one alley prevent the resident of another alley [from opening a competing store]? This is unresolved.

In other words, R. Huna brei d'R. Yehoshua states with certainty that he disagrees with Rav Huna. He maintains that when both protagonists are on equal footing – they both pay taxes to the polity – the *Braita* stating that “a person may open a store adjacent to another” is indeed normative halacha. That is also in conformity with *Chachamim*, as against Rabbi Shimon ben Gamliel, that a person may not stop another from opening a shop in one's own neighborhood.

In fact Tosafot point out this equation.<sup>18</sup>

Rav Huna the son of R. Yehuda holds like the rabbis.....

And so we rule against Rav Huna.... [Like Rav Huna, the son of R. Yehoshua] against Rav Huna.

Rav Huna the son of R. Yehuda advocates freedom of economic activity for people of the town. His position seems to be the dominant one.

Rambam,<sup>19</sup> too, decides the halacha according to Rav Huna the son of R. Yehoshua, as does the Rosh, who states:

18. *D.H. Peshita*.

19. *Shecheinim* 6:1, Rambam interprets the Gemara somewhat differently. But the point regarding competition is unchanged.

וליתא לדר"ה חרא דקם לי כי יחידאי ועוד דר"ה בדרב יהושע סבר  
כרבנן.

*We do not hold like Rav Huna.... because his position follows an individual opinion... and also because Rav Huna, the son of R. Yehoshua maintains as do the Rabbis*<sup>20</sup> [i.e., the majority].

At this stage, it seems to be clear that competition, *laissez faire*, the free market rule. The words of *Braita*, "A person may open a store adjacent to that of his friend..." are accepted as the halacha. The Gemara stating that a mill may not be opened near another mill because the second "interferes with my livelihood", follows Rav Huna's position, but is not the law. Those who reject this and do not follow Rav Huna, obviously adopt the principle "I do what I like on my property and you do what you like on yours".

The sharpest formulation of this position sanctioning free competition is that of *Chavot Yair*, who states:

יורד לתוך אומנות חבירו ק"ל דמותר לכתחל' אם לא בבר מתא  
אחרית' וכמבואר סי' קנ"ו ואף דהוי מלתא דתוהו בי' אינשי בודאי  
הכי הוא ודכי נהוג בכל תפוצות ישראל.

It is permitted to enter [to compete] the trade of your friend except if you are a member of another town [and hence do not pay taxes to the local authorities]... so is the custom all over Israel.<sup>21</sup>

His proof is from the following text in *Makkot*.<sup>22</sup>

בא דוד והעמידן על אחת עשרה דכתיב מומור לדוד "ה' מי יגור  
באהלך . . . הולך תמים ופועל צדק לא עשה לרעהו רעה" שלא

20. *Bava Batra* 21, #12.

21. *Responsa Chavot Yair, Siman* #42.

22. 24a.

ירד לאומנות חבריו.

David came and reduced [righteousness] to eleven principles... "nor doth evil to his fellow" that is one who does not set up in opposition to his fellow craftsmen.

What David praises in *Tehillim*, argues *Chavot Yair*, is the *Midat Chasidut*, the exceptional piety exhibited by not "setting up in opposition to one's friend," that is, by not entering into the same craft as his friend and competing with him. There is, however, no halachic prohibition, and it is permitted, even לכתחילה, ab initio. According to *Chavot Yair*, then, avoidance of competition is a display of sensitivity and piety, but is not required by Jewish law.

At this stage, we might assume that the opening of a new bakery, a new pizza shop or a new restaurant on Main Street, U.S.A., where such stores already exist, is totally permissible. In each of these cases the argument "I do what I want in my property and you do what you like in yours" is the operative halachic principle.

Things are not so simple however. A hint of the complexity of this issue is found in *Mordechai*.<sup>23</sup>

*Mordechai*, seconded by *Hagahot Maimoniot*,<sup>24</sup> states in the name of *Aviasaf* (Ravan) as follows:

מבוי הסתום מג' צדין רק בצד אחד יכנסו לו ודר ראובן אצל סופו  
הסתום ובא שמעון לדור כנגד הצד הפתוח שאין העובר כוכבים  
יכול לילך אם לא ילך תחלה לפני פתח שמעון נראה דיכול לעכב  
עליו כדרך הונא.

If there is an alley closed on three sides and the one remaining side is the entrance, Reuven lives at the end

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23. *Bava Batra*.

24. *Shecheinim* 6.

and he has a store in his house – and Shimon comes to live at the open end, in such a manner that an outsider cannot go to Reuven without passing Shimon, it seems to me that Reuven may stop Shimon from opening [a store] as Rav Huna ruled.

In opposition to most *Rishonim*, *Mordechai*<sup>25</sup> rules like Rav Huna. Indeed, that is the way *Beit Yosef* explains the *Mordechai* although he adds that since we *do not* follow Rav Huna, but rather Rav Huna brei d' R. Yehoshua, this halacha is incorrect – Shimon *does* have a right to establish his shop at the entrance of the closed alley.

Ramo, too, seems to follow the opinion of *Beit Yosef*.<sup>26</sup>

דבעל האומן אינו יכול למחות ולומר אתה פוסק חיי

A tradesman may not prevent another's coming in by saying "you interfere with my livelihood."

Again, Ramo indicates that "interfering with my livelihood" is no obstacle to opening a shop adjacent to another.

The problem, however, begins with Ramo himself. In his *Responsa*, he himself takes the position of *Mordechai*, contradicting his own statement in the Law Code.

In his responsum, Ramo discusses the case of R. Meir of Padua who, together with Aloizi Brogodin of Venice, published a corrected edition of Rambam's *Mishneh Torah* in 1551. A third Venetian publisher, Marcos Antonio Ostinian, angered that R. Meir of Padua did not include him as a partner in the venture, went ahead and published his own edition of *Mishneh Torah* and, adding insult to

25. *Mordechai*, *ibid*.

26. *Shulchan Aruch*, C.M. 156.

injury, sold it at a lower price. The question discussed by Ramo was whether the latter has a right to do so. Is it not a case of *Yored L'toch Umenato Shel Chavero*, destroying someone's livelihood by direct competition?<sup>27</sup>

Ramo rules that indeed it is. Furthermore, he explains that this is because *we rule according to Rav Huna*, and, therefore, the second publisher had no right to publish his edition of *Mishneh Torah*. He urges the public not to buy the Ostinian edition.

But now Ramo goes further. He states that although Rosh and others follow Rav Huna brei d' R. Yehoshua, *Mordechai* says in the case of the "closed alley" that the halacha follows Rav Huna. Ramo then both expands and restricts his original position by proposing that under certain circumstances *everyone* follows Rav Huna. The case of the closed alley is decided according to Rav Huna because "ברי היוקא", there is certainty of damage. Whoever passes the first store, at the opening of the alley, will not even think of going to the original store situated at the end of the alley. In such a case where there is "definite damage" for the first owner, Rav Huna's position prevails.

In the case of Maharam of Padua whose competitor announced that he would lower his price, the issue of ברי היוקא did exist. Maharam of Padua would lose his entire investment and, therefore, says Ramo, all are enjoined from buying the second edition of *Mishneh Torah* until all of Maharam of Padua's copies are sold out.

Chatam Sofer<sup>28</sup> expands on this position and goes on to show that indeed the Gemara does follow Rav Huna.

27. Ramo, *Responsa* 10.

28. Chatam Sofer, *Responsa Choshen Mishpat* 71.

The Gemara says:<sup>29</sup>

אמר ר' יוסף ומודה ר"ה במקרי דרדקי דלא מצי מעכב

R. Yosef said, Rav Huna agrees that a teacher of children cannot stop [another teacher] from entering.

Chatam Sofer (as well as others) asks, why is it important to know that Rav Huna agrees? After all, isn't Rav Huna's position rejected? Apparently, argues Chatam Sofer, Rav Huna's position is *not* rejected. Indeed it is Rav Huna's position, strongly limiting competition, that sets the standard for normative halacha!

Does it not seem from the whole talmudic debate that Rav Huna and R. Huna brei d' R. Yehoshua disagree? Not really, says Chatam Sofer. Rav Huna with his stringency regarding *Yored L'Toch Umenato Shel Chavero*, that it is not permitted to set up a mill where another one already exists, deals with a case of *פסקו לחיותיה* – when the livelihood of the first mill owner is totally destroyed by the existence of the competing mill. Likewise, *Mordechai*, in name of *Aviasaf*, presents the case of the *Mavui Satum*, the closed alley. In that case, someone who opens a store at the entrance of the alley totally destroys the business of the first owner who is in the back of the alley.

Rav Huna brei d' R. Yehoshua, who is more permissive towards setting up a competitive business, speaks in a case of *ממעט לחיותיה*, i.e. the new store will cause the first store owner some loss of income but will not totally destroy his livelihood.

Not all *poskim* agree with Chatam Sofer that competition should be limited. There are many *Acharonim*<sup>30</sup> who uphold

29. *Bava Batra*, *ibid.*

30. Quoted by Chatam Sofer himself, *ibid.*

the simple reading of the text in *Bava Batra* 21b. They rule that in a “level playing field”, where the second store owner does not physically interfere with the first, the argument, “I do what I like on my property and you do what you like on yours” prevails – against Rav Huna.

Earlier we mentioned the position of *Chavot Yair*, that *Yored L'Toch Umenato Shel Chavero* is permitted. That position, in a different context and with an eye to the changes in today's society, where people do not open stores or shops in “alleys” but in the public streets, is also echoed by *Divrei Chayim*.<sup>31</sup>

בזמנינו ליתא אצלינו מבוי קנוי לבעלין וכל העיר ומבואותיה אחד  
ורשות כולן שוה בודאי מי שנותן כרגא יכול לעשות מלאכתו בכל  
מקום שירצה.

In our days there is no alley reserved for its owner, [and] the entire city and its alleys are one and everyone is equal. Certainly one who pays taxes may do his work wherever he pleases.

In truth the Gemara<sup>32</sup> in *Bava Batra* hints at this possibility:

הנהו דיקולאי דאייתו דיקלאי לבבל אתו בני מתא קא מעכבי  
עליהו אתו לקמיה דרבינא אמר להו מעלמא אתו ולעלמא ליזבנו.

Certain basket makers brought baskets to Babylonia to sell. The townspeople stopped them. So they came to Ravina. Said he, “They have come from the outside and they sell to outsiders.”

31. *Shealot Utshuvot Divrei Chayim, Choshen Mishpat Siman* #35.

32. 22a. The Ri MiGash explains that implicitly, one is saying to the other, “you receive what Heaven allocates to you, I receive what Heaven allocates to me.”

Rashi explains: "People come to buy from the market," and all agree the market is free for all.

*Beit Ephraim*<sup>33</sup> also takes strong exception to Chatam Sofer. His position is that there is no difference between פסקו לחיותיה and ממעט לחיותיה. Competition (*Yored L'Toch Umenato Shel Chavero*) is always permitted. He says that since the halacha is according to Rav Huna brei d' R. Yehoshua, there is no prohibition of *Yored L'Toch Umenato Shel Chavero*, setting up a rival business.

*Beit Ephraim* introduces another factor in favor of full laissez faire:

His view is that essentially there is no rabbinic dispute. In the issue of whether a person may or may not open a store adjacent to another, the disagreement arises only when the second store offers no tangible benefit to the consumer. But, when the consumer would benefit from the second store, by lower prices for example, argues *Beit Ephraim*, then all agree that the concern for the first owner's livelihood, *Yored L'Toch Umenato Shel Chavero*, does not apply.

Indeed, Ri Migash<sup>34</sup> states as follows:

אלא מיהו מסתברא לך דהני מילי כלהו היכא דליכא פסידא על הלוקחים הוא כגון דשוו דמים אהרדי ושויין עסקי נמי אהרדי דלא מרווחי לוקחים מידי עבדו רבנן תקנתא לבני מתא כי היכי דלא לשהיין עסקייהו ולא תפסיק להו לחיותייהו. . . הלכך כיון דאיכא הרווחה ללוקחים לאו כל כמינייהו דמוכרים דמתקני לנפשייהו ומפסדי לאחרני וכן נמי הא דאמרינן (בסמוך) עושה אדם חנות בצד חנותו של חבירו.

All these restrictions exist only when the buyers will not have any loss, as when the prices are equal... then

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33. Responsa *Beit Ephraim Choshen Mishpat, Simanim* כ"ו, כ"ז.

34. *Chidushei Ha'Ri Migash, Bava Batra* ad locum.

the Rabbi's made *Takkanot* [regulations] so that their businesses not suffer... But if the prices are unequal... it is logical [to say] *that to make a Takkana for the sellers at the expense of the buyers we have no right...* and likewise in the case of a person opening a store adjacent to another store.

Thus far we have tried to show that Jewish law is not restrictive in cases of competition – *Yored L'Toch Umenato Shel Chavero*. However, there are, two exceptions. The first is a case of *Yored L'Toch Umenato Shel Chavero* as it relates to the establishment of Shuls where one already exists in a community; the second is for *Maarufia*.

Rav Moshe Feinstein strenuously objects to a breakaway Shul that opened in competition to the local *Shtiebel*.<sup>35</sup> The *Rebbe* of the original *Shtiebel* argued that his livelihood had been diminished and his own Shul building had lost most of its value. Rav Feinstein writes that it is absolutely prohibited and totally wrong for the “breakaway” to open another Shul in the area. He bases his ruling on the following:

First, he follows Chatam Sofer's argument that when an area cannot sustain two stores, or two synagogues, the prohibition of *Yored L'Toch Umenato Shel Chavero* is applicable.

Second, Rav Feinstein uses a novel argument. The Gemara says that one may open store adjacent to an existing one because the second owner is entitled to claim, “You do what you like in your property and I do what I like in my property.” This claim, argues *Iggerot Moshe*, cuts two ways. First, as we worry about the livelihood of the first store

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35. *Iggerot Moshe, Choshen Mishpat* #38.

owner, we also worry about the livelihood of the second (competing) store owner. And, indeed, the first has no right to exert a veto power on the second owner's source of livelihood. If the second store owner finds that he can make a living in this particular place, the first store owner has no right to stop him.

But in the case where a second Shul opens and thereby diminishes the livelihood of the original rabbi, states *Iggerot Moshe*, the argument does not hold. Why? Because the second Shul opens not as a business venture. No one, at this point in time, is making a living out of the Shul. As we should say, the Shul is non-profit and the original rabbi loses his source of income. In such a case, everyone would agree that the original rabbi has a right to stop the other Shul from opening.

The second exception to the general permissiveness of competition is the case of *Maarufia*. The term itself is difficult.<sup>36</sup> Some commentators relate it to the verse יֵרַף כַּמֶּטֶר לְקוֹדֵי, "My doctrine shall flow as rain." (Deut. 32:2). In medieval times, in certain cases a person bought from his feudal lord the rights to sell whiskey, collect taxes, lend monies, etc. The "flow" of the business belonged to him – i.e. he had the monopoly (*Maarufia*). In such a case, Ramo rules:<sup>37</sup>

אדם שיש לו עבודת כוכבים מערופיא יש מקומות שדנין שאסור  
לאחרים לירד לאומנתו ולעסוק עם העכו"ם ההוא ויש מקומות  
שאינן דנין.

A person who has a non-Jew as *Maarufia*, there are

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36. Some scholars see it as Arabic, others as a Syrian term denoting friend or acquaintance.

37. *Choshen Mishpat, Siman* 156.

places where we hold that it is forbidden to go into his livelihood and other places where we don't [forbid it]. And others permit a Jew to go to the non-Jew and do business with him... and bribe him... and others forbid.

The concept of *Maarufia* is not mentioned, to my knowledge, in Gemara, but appears first in *Rishonim*.<sup>38</sup> *Maarufia* is a unique concept. The "owner" or possessor of the *Maarufia*, in general, bought or bribed the feudal lords for his rights to sell certain items. The question is now whether another Jew may go and, by offering a higher price, disposes the original "owner" of the *Maarufia*. In such a situation Rabbenu Gershom<sup>39</sup> says that it depends on the custom of the place. Somewhat later, *Or Zarua* writes<sup>40</sup>

ואותן הלואות שמלוים לעבום ויש לו לישראל גוי מערופיא שלו  
 שרגיל תמיד ללות ממנו, אסור לו לישראל אחר להרגילו אצלו  
 ולסלקו מישראל הרגיל אצלו

And those lenders who loan to non-Jews – if a Jew has a non-Jew as a *Maarufia*, who constantly borrows from him, it is prohibited for another Jew to go to him and to take him away from the first [who is his regular customer].

*Or Zarua* goes even further. He states that even according to Rabbenu Tam's position זכה הקודם וכל כהפקר ה"ה כהפקר וכה "The possessions of a non-Jew are considered *Hefker* (ownerless) and anyone may obtain them" – it is still forbidden to dispossess someone from his *Maarufia*.

We should spell out, more clearly, how the law of *Maarufia* differs from previous cases of *Yored L'Toch Umenato Shel Chavero*. In the cases discussed above, a store owner

38. *Shealot Utshuvot R. Gershom Meor Hagolah, Siman #8.*

39. *Ibid.*

40. *Bava Metzia, Siman #28.*

opened beside another existing store, or an artisan opened his shop beside an existing shop. In such cases we can say that the deciding factor is that each person can say, "I do what I want on my property and you do what you want on your property".

In the case of *Maarufia*, however, the facts change. By upping the price or the bribe to the non-Jew, the second person literally snatches from the first owner the "flow" of his livelihood. There is a direct snatching or taking away that which "flows" to the person. It is, after all, one thing to "set up a store adjacent" to another. It is something else to go to another's store and take it away. In such cases the issue of *Yored L'Toch Umenato Shel Chavero* is at its sharpest.

This may be compared to the following dictum in *Bava Bathra*:<sup>41</sup>

מרחיקין מצודת הדג מן הדג כמלא ריצת הדג וכמה אמר רבה בר רב הונא עד פרסה

Fishing nets must be kept away from the hiding place of the fish [which was sighted by another fisherman] the full length of the fish's swim.

The Gemara says this is different from the case where one is permitted to set up a mill next to another because "Fish are different, they look for their food."

Rashi adds:

נותנים עין בהבטם להיות נוהגין [רגילין] לרוץ למקום שבאו שם מוונות הלכך כיון שהכיר זה חורו ונתן מוונות בתוך מלא רציתו בטוח הוא שילכדנו דה"ל כמאן דמטא לידיה ונמצא חבירו מויקו אבל הכא מי שבא אצלי יבוא ומי שבא אצלך יבוא.

Fish... generally run toward their source of food... Hence...

since he put his bait there... he is certain that he will catch it and it is considered as if it came to him and is in his possession. Therefore, his friend [who comes to put his own bait] truly damages him. But here, whoever comes to me, comes to me, and whoever comes to you, shall come.

In other words, by buying the right to the "flow of the services", the original owner has acquired the rights and he may not be dispossessed.<sup>42</sup>

Even those who are lenient in such an instance do so because of another consideration. They argue that the grantor of the *Maarufia*, the non-Jew, can be approached by another non-Jew not bound by considerations of *Yored L'Toch Umenato Shel Chavero*. Therefore they would not restrict a Jew either.

### Practical Applications

Broadly speaking what we have seen thus far are two kinds of considerations.

The first is for example, opening a pizza parlor, bakery, etc. next to an existing one. Assuming all things are equal (they are both equally accessible, they both pay their taxes, etc.) the argument, "I do what I want in my property and you do what you want in yours" is operative, and opening the second store is permitted. Where it can be reasonably predicted that opening the second store will totally destroy the first store's business, there are some who prohibit (*Chatam Sofer*) while others permit it even then (*Chavot Yair, Beit Ephraim*).

The other consideration, *Maarufia*, presents us with a novel problem. The second person does not really compete.

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42. See also *Hagahot Maimoniot*, *ibid*.

Rather, the second party “snatches” or “steals” the flow, the monopoly, that the first party established for himself. In such a case those who forbid the second party from “stealing” the monopoly of the first do so because of the first party’s expectations. The certitude that the “flow” of benefits will continue is so strong, that the owner has a claim on these benefits. Interrupting these benefits is like going *into* his store and taking away his livelihood.

This leads us to discuss, albeit briefly, the concept of *Chazaka* or tenure for a particular position.

In *Iggerot Moshe*,<sup>43</sup> Rav Moshe Feinstein z”l discusses the following situation: A group of rabbis have been supervising a particular slaughterhouse for a long time. Now, another Kashruth certification agency approaches the owners of the slaughterhouse and asks that they be given the supervision. They threaten that if they will not be given the *Hashgacha* they will not allow their customers to use the products of this slaughterhouse.

Rav Moshe first discusses issues of *Rechilut* and *Lashon Hara* (slander, tale-bearing) and then says:<sup>44</sup>

והרי הוא דבר פשוט וברור שאיכא איסור הסגת גבול אף בדברים  
שלא קנו ממש אלא בהבטחה וכדומה.

It is certain and quite simple that the prohibition of *Hasagath Gvul* exists even when there was no formal *Kinyan* [acquisition], just a promise.

Consequently, *Iggerot Moshe* forbids the other group from seeking the Kashruth supervision because the promise was made to the first group of rabbis and they have the *Chazaka*, the “tenured right.”

43. *Choshen Mishpat*, II, *Siman* #40.

44. *Ibid.*

In a similar case, *Iggerot Moshe* ruled that the *Chazaka* rights of one group which has its slaughtering done in a particular slaughterhouse may not be revoked by fiat without good reason. Here again we see that when a person or a group have certain rights which, all things being equal, they expect to continue, one may not "steal" these rights.

I believe this explains why *Chazakot* in public positions, e.g. the rabbinate, have such strong backing among *Poskim*.

It is interesting that the laws relating to *Hasagath Gvul* and *Yored L'Toch Umenato Shel Chavero* are relaxed when it is related to *Talmud Torah*.<sup>45</sup> Still, it is prohibited for a rabbi to come to a congregation which has a functioning rabbi and offer his services. The first rabbi has the *Chazaka*, and no one may interfere with his services. This is true, asserts Rivash, even when the second rabbi is greater in learning than the first.<sup>46</sup> Later this principle was extended to other public positions. In addition to rabbis, the laws of *Chazaka* apply to *Chazanim* and *Shochtim* as well.<sup>47</sup>

Contemporary *Poskim*, too, have backed the *Chazaka* for *Rabbanim*. *Iggerot Moshe*<sup>48</sup> states as follows:

It is quite simple and certain that whoever was elected as rabbi in any synagogue... *cannot ever* be removed from his position ...*even if the contract stipulates a specific time period.* [italics added]

45. *Hasagath Gvul* as it relates to *Talmud Torah* is beyond the scope of this paper. The discussion in *BB 21b*, and note 30 will be a good beginning for anyone interested in pursuing this matter.

46. *Shealot Uteshuvot Rivash* #272.

47. *Mabit*, II #2.

48. *Choshen Mishpat*, #34.

In another responsum, Rabbi Isaac Liebes,<sup>49</sup> goes further and states that none of the "honors" that the rabbi had may be revoked.

As an example of the stringency relating to community-held *Chazakot*, we cite a letter written by Harav Yitzchak HaKohen Kuk z"l. In it he decries with concrete and palpable pain the effort to pressure a Rav to resign his long-held position.<sup>50</sup>

... על עצם הענין נענית השבוע ולולא דחוינא הדברים יוצאים מפורש מפי גברא רב' דכוותי' לא הייתי מאמין לשמועה, אשר לא נראה ולא נשמע דבר כזה וכיוצא בזה במחנה ישרא' גם בנוגע לאיזו משרה קטנה שבצבור, וכ"ש בעטרת הרבנות בעדה קדושה וגדולה בישרא', והרי הלכה רווחת היא, שכל השררות שבישראל ובפרט בענין קדושה יש להם אפילו תורת ירושה, וזהו גם לאחר אריכות ימו"ש של המחזיק בשררות כמבואר בדברי הרמב"ם בפ"ד מה' כלי המקדש הלכה כ' המיוסדים ע"פ ברייתא וספרי דכל פרנסי ישראל דין ירושה נוהג בגדולתם, ואפילו ליורשיהם הרחוקים אמרי' כל הקודם בנחלה קודם לשררה, ומה דמות נערך בשערורי' כזאת, לפחות ח"ו בשררות רב גדול בישראל המורה ודאין ומובהק לרבים ומנהל עדת ה' ע"פ התורה והמצוה זה עשרות שנים. בעודו בחיים עמנו לאויו"ש, להדפו מכסא כבודו על ידי איזה לחץ וכפי' שבועולם. ופשיטא שכל הדברים שנעשו בענין זה לכופ' ע"י איזה צל של איום את כ"ג שיסכים לדבר נורא כזה אין בהם ממש וכלא חשיבי, ואם אין אדם מוחל על ראשי אברים כדקיי"ל ב"ק צ"ג, א', וכ"כ הרמב"ם....

ואפילו אם היה מקבל מהם איזו טובה או שכר בעד המחילה אינם כלום ולא דמיא כלל בזה לזבינא, וכד' ההגה בשו"ע אה"ע סי' קל"ד ס"ח דאפילו קבל מעות על נתינת הגט לא אמרי' משום זה נתרצה שזה שייך לומר רק בזביני דיודעין להעריך את הדבר בדמים משא"כ בגיטין כשאינו רוצה לגרש, ופשיטא דה"ה במחילת שררה

49. *Shealot Uteshuvot Beth Avi*, Vol. I #156 and Vol. II #149.

50. *Techumin*, Vol. V, pp. 285-6.

של קדושה שאין לה כלל הערכה בדברים גשמיים כמו פרס וכיו"ב. ובפרט שהפרס המובטח הוא היה ראוי הוא לקבל יחד עם השררות המוחזקות ופשוט הוא שאין בזה שום אחיזה לומר שתהיה המחילה דבר שיש לתלות עליו שום צד להיתר הסגת גבול הרבנות.

ודבר ידוע שהצער הזה שיראה אדם את גדולתו ניטלת ממנו לעיניו ונתנת לאחרים, שהוא גדול ועצום מאד, עד שחז"ל במד"ר ס"פ וילך אמרו על משה לגבי יהושע ואמר מאה מיתות ולא קנאה אחת, וזהו אפילו בתלמידו שאין אדם מתקנא בו, וק"ו שיראה אדם שלוקחין את כבודו ומעמד הדרו ונותנים לאחר לעיניו בלא צדק ומשפט שהצער הוא נורא מאד, ואין לנו חומת אנך גדולה מזו שהמחילה המפוקפקת של הדבור שיצא מפני ההכרה לית בה ממשא ונמצא שכל זמן שלא הברר הענין הזה ע"פ בד"צ בדין תוה"ק ודאי ברור הדבר כשמלה שאסור לשום רב לכא בגבולו.

ובטוח אני כי הרב הזה יחוש לנפשו ויעצור ברוחו שלא להשתמש בשום דבר של רבנות והוראה, בלא הסכמת כ"ג הברורה או אחר שתצא החלטה מבוררת מב"ד גדול הראוי להוראה גדולה וכללית כזאת לתווך בדברי רבות שבשערי בית ישראל להביא שלו' בעולם לרבנן ולכל ישראל.

...On the basic issue...had I not seen these words uttered...I would not have believed ... it has not been seen nor heard in the Jewish community even in relation to a minor position, and certainly not as it relates to the crown jewel of the rabbinate in a great and holy congregation in Israel. It is, of course, a widely held halacha that all publicly-appointed officers, and certainly in matters of sanctity, carry within themselves the aspect of inheritance even after the life of the office holder...and how can we allow such travesty to diminish, G-d forbid, the position of a great Rav in Israel who leads his community in the path of Torah and mitzvot for decades...to remove him from his post through pressure.

It is certain that all things that are being done to pressure you to agree and submit to this awful step

have absolutely no validity and are considered like naught ... And even if you receive some favor or compensation for giving up your rights it is meaningless...

For it is well known that the pain of a person to see his honor and dignity taken away and given to others... is a terrible thing to behold... And the pain certainly is great when one's dignity is taken away without any cause...

And I am certain that the rabbi [who is trying to usurp] will withdraw.

## Conclusion

Let us sum up briefly the main points of this paper:

1. *Hasagath Gvul* relates, most basically, to land in Eretz Israel.
2. In an economic sense, *Hasagath Gvul* or *Yored L'Toch Umenato Shel Chavero* does not apply when we can argue "I work in my property, you work in yours."
3. *Hasagath Gvul* does not apply to "Main Street, U.S.A." except, perhaps, according to Chatam Sofer, when it can be *predicted* that the new store will totally destroy the original store's business.
4. Where there are existing *Chazakot*, *poskim* are very stringent with *Hasagath Gvul*.