

## Survey of Recent Halakhic Literature

# Above-Ground Burial (Part II)

### V. Modes of Burial

In addition to the requirement for subterranean burial, above-ground burial presents a number of additional problems some of which arose earlier in connection with mausoleum burial:

#### 1. *Talush u-le-va-sof Hibbero* – Severed and Ultimately Reattached

As noted earlier, the Gemara, *Sanhedrin* 46b, makes it clear that “burial” in a coffin, i.e., enclosing the corpse within an unattached, movable utensil, is unsatisfactory. However, assuming, as do Ramban, *Yad Ramah*, Rosh and numerous other early-day authorities, that the requirement that burial must be only in the ground leads to a further fundamental problem. Burial requires interment in the earth, not in a movable entity detached from the earth. Hence, if soil dug from the ground is regarded as a movable object even when returned to the ground, it should follow that burial may not take place in soil that has been excavated and removed to a different location. That would be the case even if concrete is regarded as earth and burial is in a concrete crypt,<sup>1</sup> and would also be the case even if the crypt is subsequently attached to the ground and filled with transplanted soil that comes into contact with the ground.<sup>2</sup>

There is a general talmudic controversy with regard to whether something detached from the ground and subsequently reattached (*talush u-le-va-sof hibbero*) is considered “attached” to the ground or not.

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- 1 See *infra*, subsection 5, “Concrete Vaults and Coffins.”
- 2 *Teshuvot Bet Yitzhak, Yoreh De’ah*, no. 160, sec. 3, rules that burial in transplanted earth is acceptable. See also R. Moshe Feinstein, *Iggerot Mosheh, Yoreh De’ah*, III, no. 141, sec. 5. Cf., however, R. Ya’akov Yitzchak Weisz, *Teshuvot Minhat Yitzhak*, X, no. 122 as well as R. Joseph Saul Nathanson, *Yosef Da’at, Yoreh De’ah* 364:1 and R. Gedaliah Axelrod, *Kevurat Komot*, pp. 6–24.

For example, movable items venerated as objects of idolatrous worship constitute *issurei hana'ah*, i.e., objects from which no benefit may be derived. However, *karka*, or the *Erdkugel*, and anything that is naturally attached to it that has been made the object of such veneration are not included in that prohibition. Stones taken from the ground and used for constructing a wall that is firmly planted in the ground and subsequently deified is the subject of a talmudic controversy regarding the status of *talush u-le-va-sof ḥibbero*.<sup>3</sup> The issue is whether something severed from the ground and later reattached is regarded as *karka*, i.e., as having been returned to its original status as an integral part of the earth, or whether it retains its later status as a movable object. Also, a sharp stone embedded in the ground cannot be used to effect ritual slaughter. But a stone removed from the ground, fashioned into a slaughtering knife and reattached to the ground may be used for that purpose if *talush u-le-va-sof ḥibbero* is not halakhically deemed to be attached.<sup>4</sup>

Those decisors who seek to justify above-ground burial in a grave dug in soil that has been removed from its original natural location and placed within an above-ground structure point to sources that discuss regulations governing *Shabbat* restrictions, *ma'aser*, *bikkurim* and the like. Produce grown in a pot or container filled with soil having an opening above the ground is the subject of a controversy between R. Shimon and the Sages recorded in the Mishnah, *Shabbat* 95a, pertaining to culpability for severing vegetation from a container on *Shabbat*. The halakhic principle is that vegetation planted in that manner draws nutrients from the soil directly below provided that there is no obstructing interposition between the opening in the utensil and the ground below. The controversy recorded in *Shabbat* 95a is whether a plant or vegetable grown in such a container may be removed on *Shabbat* from the soil in which it has been nurtured. Although R. Shimon disagrees, the Sages maintain that produce cultivated in that manner is regarded as having grown in the ground. Rema, *Hoshen Mishpat*, 95:1, cites two opinions with regard to whether *talush u-le-va-sof ḥibbero* is or is not considered to be "attached" to the ground.<sup>5</sup> As has been noted, above-ground burial vaults can readily be constructed to satisfy that requirement.

Similarly, it might be argued that the propriety of burial in an edifice constructed from material removed from the ground that is then reattached to the ground, e.g., burial in a mausoleum, is dependent upon

3 See *Avodah Zarah* 54b. Rashi, *Sanhedrin* 47b, states explicitly that the discussion concerning a *kever binyan* is predicated upon the premise that *talush u-le-va-sof ḥibbero* is deemed to be "attached" to the ground.

4 See *Hullin* 15b.

5 See also *Shulḥan Arukh*, *Yoreh De'ah* 6:2 and commentaries thereto.

resolution of the controversy regarding *talush u-le-va-sof ḥibbero*. Brick, stone and wood originate in the earth. An edifice constructed from those materials becomes *talush u-le-va-sof ḥibbero* by virtue of being firmly implanted in the ground. And even if burial in soil is a *sine qua non* of fulfillment of the commandment, above-ground burial vaults can readily be constructed to satisfy that requirement.

However, as Rabbi Woszner, *Shevet ha-Levi*, VIII, no. 232, explains, analysis of the question in terms of the controversy concerning *talush u-le-va-sof ḥibbero* may be incorrect.<sup>6</sup> The relevant issue with regard to agricultural questions is identified by *Teshuvot ha-Rosh*, *klal* 2, sec. 4. Scripture defines and limits produce subject to separation of *ma'aser* and *bikkurim* to “the produce of your sowing” (Deuteronomy 14:22). Rosh explains that there is no stipulation requiring that produce actually be grown in the ground; the biblical requirement is “*tevu'at zarekha*” – “produce of your seed” or “produce of your sowing.” The stipulation is that the produce be the product of a normal and usual mode of agriculture. The most common mode of cultivation consists of planting seeds in the ground. The normal and usual form of agricultural production involves growth in an immobile position; the growing plant remains *in situ* until it is harvested. Cultivation in a utensil is unusual, even if the soil enclosed within the utensil is in direct contact with the ground, because a utensil is not stationary but is readily movable.

*Teshuvot ha-Rosh* argues that a roof garden is quite different in this regard. A roof garden is not movable and, consequently, cultivation of produce in a roof garden is comparable to growing produce in the ground. Accordingly, Rosh asserts that even R. Shimon would concede that produce grown in a roof garden, i.e., soil spread out on a roof as distinct from soil enclosed within a container, is subject to *ma'aserot* and *bikkurim* even though the floor of the roof is interposed between that soil and the ground.<sup>7</sup>

Burial, on the other hand, may not take place in a utensil even if the material of which the utensil is fashioned is *ḥeres*, or earthenware. Burial,

6 *Teshuvot Minhat Yizḥak*, X, no. 122, states simply that, even if *talush u-le-va-sof ḥibbero* is considered to be attached, burial must be in primordial ground. Cf., *supra*, note 2.

7 *Shevet ha-Levi* observes that it is also the case that a *mikveh* need not necessarily be attached to the ground. A utensil is indeed disqualified from use as a *mikveh*. However, *Shulḥan Arukh*, *Yoreh De'ah* 201:7, rules that, if a utensil is pierced and a sufficiently large hole is made, the pierced container no longer has the halakhic status of a “utensil” and, consequently, if a sealant is applied to prevent leakage, the utensil may be attached to the ground and used as a *mikveh*. Again, unlike burial, provided that the water of the *mikveh* is not contained within a “utensil,” there is no requirement that a *mikveh* must be situated in the ground or within a structure attached to the ground.

contends *Shevet ha-Levi*, cannot be above ground level even if the body is entirely enveloped in soil.<sup>8</sup> Accordingly, concludes *Shevet ha-Levi*, a “cemetery” formed of a huge quantity of earth placed on a roof within which graves are dug does not satisfy the requirements of “burial.” That argument reflects the view of Ramban and others who maintain that burial must be, not simply in “soil,” but that it must be in “*karka*,” i.e., in the ground. Consequently, concludes *Shevet ha-Levi*, even if *talush u-le-va-sof ḥibbero* is considered to be “attached” for other purposes of Halakhah, burial must take place in virgin ground.

A diametrically opposite view is expressed by R. Nisan Yablonsky, *Nizanei Nisan*, no. 4. *Nizanei Nisan* suggests that even if *talush u-le-va-sof ḥibbero* is considered to be *karka*, i.e., as having the status of the ground itself, burial in the wall of a building is not acceptable. *Nizanei Nisan* points out that the biblical verse commanding burial does not at all refer to “earth” or to “ground.” Instead, read literally, the verse states: “for bury shall you bury him on that day” (Deuteronomy 21:23). The double expression “for bury shall you bury,” asserts *Nizanei Nisan*, is for emphasis (hence the usual translation, “you shall surely bury”) and commands more than simple burial. The verse admonishes, not only that the corpse be covered, but that it be “well buried” or “hidden and secreted.” Thus, the commandment mandating burial does not specifically demand that the corpse be placed below ground but effectively requires burial in that manner by virtue of the fact that subterranean interment is deemed to be the only type of burial that assures that the corpse is fully “hidden and secreted.” Hence, earth removed and transported to another location for use as landfill or the like, even though technically detached from the ground, may be used for burial purposes because the corpse can be securely secreted and safeguarded in such soil. Even if *talush u-le-va-sof ḥibbero* is not technically considered as having returned to its earlier status as *karka*, or natural earth, burial in dislodged soil that has been reattached at another site is satisfactory because such burial provides protection identical to that provided by burial in virgin ground.

*Nizanei Nisan* regards the matter as analogous to the regulations governing bailment of money. The Gemara, *Bava Mezi'a* 42a, declares in the name of Samuel that a bailee of money is remiss unless he “buries” the money that he is charged with safekeeping under the ground, not because secreting the money in *karka*, or “ground,” is necessary *per se*, but because exposed coins can never be fully safeguarded. Consequently, they must be concealed by means of underground burial. Nevertheless, the Gemara states that Samuel would agree that bailed money may be

8 Cf., *infra*, note 13 and accompanying text.

secreted in a wall. The degree of safety provided by secreting money in a wall is sufficient to satisfy the duty undertaken by a bailee. The pleonasm “for bury shall you bury him on that day” is designed to teach that burial of a corpse requires an extraordinary degree of concealment and safety. The highest degree of security and protection is provided by subterranean burial. But burial in virgin ground, rather than transplanted soil, adds nothing to the protection of a corpse and hence, contends *Nizanei Nisan*, is not part of the mandated procedure.

If so, burial in a mausoleum might well be considered burial in the “earth” since the edifice is firmly attached to the ground. However, argues *Nizanei Nisan*, burial in a mausoleum may be unacceptable, not because *talush u-le-va-sof hibbero* has irrevocably lost its status as part of the “earth” from which it was severed, but because of an entirely different consideration. Crypts embedded in the wall of a mausoleum, contends *Nizanei Nisan*, may not be used for burial because they are not permanently sealed. Since such crypts may be readily opened, the body cannot be regarded as adequately “hidden” and hence crypts, while yet attached to the ground, do not satisfy the criterion of burial.<sup>9</sup>

Rabbi Abraham Aaron Yudelovitz, *Av be-Hokhmah*, p. 63a, advances a novel analysis of the concept of *talush u-le-va-sof hibbero*. According to Rabbi Yudelovitz, the principle *talush u-le-va-sof hibbero* is not to be understood as meaning that the reattached object is regarded as having returned to its earlier status. Consequently, it is of no avail in determining suitability at a burial site. In any context in which *talush u-le-va-sof hibbero* is considered attached to the ground, it is not because the object in question is regarded as “reattached” but because, upon reattachment to the ground, the object becomes immobile. All cases in which the principle *talush u-le-va-sof hibbero* is invoked by the Gemara are in a context in which *karka* is excluded from a particular provision of Halakhah. In those contexts, argues Rabbi Yudelovitz, the Torah does not exclude “ground” *per se* but, on the basis of a hermeneutical principle (*klal u-prat u-klal*), it excludes anything that is not *mitaltel*, i.e., anything that is immobile.<sup>10</sup> With regard to burial in the ground, the Torah insists upon burial in *terra firma*; burial in a mausoleum or a crypt may constitute burial in an immobile

9 Cf., “Above-Ground Burial,” Part 1, pp. 87–88, Rabbi Yudelovitz, *Av be-Hokhmah*, p. 62b, advances the same argument without resorting to the argument that an enhanced degree of protection is required because of a pleonasm. *Av be-Hokhmah* argues simply that every building requires attention to assure that it does not deteriorate and ultimately, with the passage of time, it will disintegrate. Cf., Rashi, *Bava Mezi'a* 108b, s.v. *marei battei*, who, in an entirely different context, observes that with the passage of time every building must be abandoned.

10 Cf., *Bi'ur ha-Gra*, *Hoshen Mishpat* 95:10–11. See also “Above-Ground Burial,” Part 1, pp. 87–88.

structure but that factor is entirely irrelevant since “burial” is not to be defined as confinement within an immobile structure but as burial in the ground. Again, that analysis reflects the view that “burial,” by definition, requires burial in *karka*.

Nevertheless, *Tur Shulḥan Arukh, Yoreh De’ah* 364, cites Rabbenu Yeshayah of Trani who rules that even soil removed in digging a grave and subsequently returned to its original location by filling in the grave over the corpse is subject to the prohibition against deriving benefit from objects dedicated to use on behalf of the deceased. According to Rabbenu Yeshayah, excavated earth subsequently returned to its original site is not regarded as primordial earth, i.e., earth that has never been disturbed. Only virgin soil that has never been disturbed is excluded from the prohibition against deriving benefit from objects dedicated to use on behalf of the deceased.<sup>11</sup> *Tur* concurs with Rosh who maintains that soil returned to its original location, i.e., its natural place, is not subject to that prohibition. *Iggerot Mosheh, Yoreh De’ah*, III, no. 142, goes beyond that position in maintaining that even supplemental earth removed from its natural site and used to fashion a mound over a grave in a different location is not subject to that prohibition. In any event, it is evident that Rabbenu Yeshayah maintains that, even if *talush u-le-va-sof ḥibbero* is not tantamount to return to a primordial state, such earth may be used for purposes of burial.

*Iggerot Mosheh, Yoreh De’ah*, III, no. 142, rules explicitly that, although above-ground interment in an earthenware utensil does not constitute “burial,” nevertheless, placing the body upon the surface of the ground<sup>12</sup>

11 *Teshuvot R. Akiva Eger*, no. 45, maintains that it is only the thin layer of earth that is directly in contact with the coffin from which it is forbidden to derive benefit. *Iggerot Mosheh, Yoreh De’ah*, III, no. 233, s.v. *ve-hineh*, comments that this is true according to *Shulḥan Arukh* and *Sefer Ḥasidim* but that the majority of early-day authorities maintain that it is forbidden to derive benefit from all soil up to the height of three *tefaḥim* above the coffin. *Teshuvot Levushei Mordekhai, Yoreh De’ah*, I, no. 216, suggests that in the case of burial of one coffin on top of another, transfer of the entire complement of soil comprising the six *tefaḥim* separation between the graves is forbidden. See also R. Yechiel Ya’akov Weinberg, *Teshuvot Seridei Esh*, IV, no. 100. Cf., *Teshuvot Ketav Sofer, Yoreh De’ah*, no. 184 and R. Chaim Ozer Grodzinski, *Teshuvot Aḥi’ezer*, III, no. 79, sec. 4. *Ḥazon Ish, Toharot*, I, *Ohalot* 22:38, and *Iggerot Mosheh, Yoreh De’ah*, III, no. 233, maintain that the entire covering of soil serves to “protect” the corpse and hence that soil, regardless of height, is *assur be-hana’ah* in its entirety. Cf., *Teshuvot Shevet ha-Levi*, V, no. 176, sec. 1.

12 It must be noted that, unlike Rabbis Eliashiv and Israeli, *Iggerot Mosheh* does not understand Rashi, *Sanhedrin* 47b, as maintaining that expiation of sin requires lowering the body into the earth. Moreover, a mound placed over a single coffin is distinguishable from adding an entire layer of earth over an extended area. In the latter case, the body is lowered onto a newly created lower surface; that is not the case if earth is piled on and around a coffin placed on the ground.

and then “burying” it by pouring earth on all sides<sup>13</sup> is satisfactory.<sup>14</sup> Hence, although *Iggerot Mosheh* maintains that concrete cannot be regarded as “earth” for purposes of burial, it would seem that he would regard placing concrete around the mound of earth to prevent collapse or erosion of the mound as acceptable.<sup>15</sup>

Rabbi Axelrod, *Kevurat Komot*, p. 8, forcefully argues that, to the contrary, even according to the view of those who maintain that objects removed from, and then returned to, the ground are restored to their original status, soil that is removed to a different location remains “detached” and is not regarded as primordial earth. Hence, a body “buried” in such soil is not considered to be buried in the “ground.” It then follows that constructing an artificial level of ground and excavating graves in soil used in such construction does not qualify those sites as “graves” for purposes of fulfilling the requirement established by the verse “From earth were you created, to earth shall you return” (Genesis 3:19). The earth of which Adam was formed was virgin soil. The earth to which he must return is undisturbed earth, not earth that has been removed and is no longer *in situ*.<sup>16</sup>

## 2. Direct Contact with Earth

*Hiddushei ha-Ran*, *Sanhedrin* 46b, states that burial in a coffin surrounded by earth without direct contact between the body and the surrounding earth is sufficient. Nevertheless, burial in a manner that allows for direct contact between the body and the ground underneath has always been the customary practice. The Palestinian Talmud, *Ketubot* 12:3, reports that R. Judah the Prince directed that an opening be made in his coffin so that his body come into direct contact with the ground in which he was to be buried. Ramban, *Torat ha-Adam*, *Sha'ar ha-Meiḥush*, *Inyan ha-Kevurah*,<sup>17</sup> understands R. Judah's directive as requiring that the entire floor of the coffin be removed.<sup>18</sup> According to *Hiddushei ha-Ran*, direct contact with

13 See *supra*, note 8 and accompanying text.

14 Cf., however, Part 1, note 65 and accompanying text. It would seem that burial above ground within a mound of earth would not afford adequate protection against animals.

15 Rabbi Kutkes, *Moriah* (Shevat 5777), p. 270, suggests that a single grave might be fashioned in such a manner but that it might not be acceptable to place a second grave over the first. Unlike a layer of earth covering the entire area which then becomes the new ground level, the first body, although buried because it is surrounded by earth, nevertheless serves as an interposition between the second body and the ground.

16 This is apparently the position of *Minḥat Yizḥak* as well. See *supra*, note 6.

17 See *Kitvei Ramban*, R. Chaim Dov Chavel, ed., (Jerusalem, 5724), II, 117.

18 See also *Bi'ur ha-Gra*, *Yoreh De'ah* 362:3.



the ground is not a normative requirement but was regarded by R. Judah as preferable, presumably in order to hasten decomposition of the body, which is a condition of expiation of sin. *Kol Bo*, no. 114, and *Orḥot Ḥayyim*, *Evel*, no. 31, rule that boring a hole in the coffin is sufficient. *Tur Shulḥan Arukh*, *Yoreh De'ah* 362, clearly prefers direct contact with the ground but allows use of a completely sealed coffin in locales in which such is the practice.<sup>19</sup>

From the comments of *Perishah*, *Yoreh De'ah* 362:8, and *Shakh*, *Yoreh De'ah* 362:1, it is clear that, in addition to subterranean interment, those authorities maintain that it is necessary for the body to come into contact, at least partially, with the earth. That is the purpose of an opening in the bottom of the coffin and, according to *Perishah* and *Shakh*, placement of pottery shards upon the eyes and face of the corpse. Rambam, *Hilkhot Evel* 4:4, states explicitly that, when burial was in crypts within a cave, soil was also spread over the entire body. R. Jacob Emden, *Bikkurei Ittim*, 5584, p. 237, explains that interment in crypts within a cave, as was the practice during the talmudic period, allowed for visitors subsequently to assure that their relative was indeed deceased because, unlike the circumstances governing ordinary burial, the layer of earth covering the deceased interred in the crypt could readily be removed in order to allow for examination of the body.

Accordingly, it follows that that there are two separate aspects to burial:

1. Burial in the ground in fulfillment of the commandment “for bury shall you bury him on that day” (Deuteronomy 21:23). At issue is whether the term “bury” connotes solely burial below ground level or whether it includes burial in an edifice attached to the ground and/or above-ground burial within a mound of earth. Although *Iggerot Mosheh*, *Yoreh De'ah*, III, no. 142, rules that placing the coffin under a mound of earth at ground level also constitutes burial,<sup>20</sup> he nevertheless declares that neither shards of pottery nor, presumably, even stones may be used to create a mound at

19 R. David Sperber, *Teshuvot Afarkasta de-Anya*, no. 198, observes that, although burial must be directly upon the earth, a wooden coffin is permitted because it does not constitute an interposition by virtue of the fact that man is referred to as the “tree of the field” (Deuteronomy 20:19). That verse figuratively depicts man as a tree. The rule governing interposition is that material of the selfsame species does not constitute an interposition. Cf., *infra*, note 34.

20 See *supra*, note 14 and accompanying text. Cf., *Iggerot Mosheh*, *Yoreh De'ah*, I, no. 78, in which he implies that burial should be below ground level since he rules that a grave need be excavated only to the extent that the coffin be covered by three *te-fajim* of soil in addition to the mound that is made above the grave. See also *supra*, note 2 and accompanying text.



ground level.<sup>21</sup> Burial of the body, stresses *Iggerot Mosheh*, may not take place in any utensil placed above ground even if the utensil is made of “actual” earth.

Rabbi Kutkes, *Kovez Bet Aharon ve-Yisra'el*, vol. 33, no. 4 (Nisan-Iyar 5778), pp. 158–159, reports that, in at least some of the newly-constructed crypts, no earth is placed upon the corpse; rather, a single closed bag of sand is placed near the head and a second bag is placed at the feet of the corpse. With the passage of time, the bags disintegrate and the sand spills out. If concrete is not “actual” earth, it would seem that the cement roof of the crypt does not satisfy the requirement of underground burial even according to *Iggerot Mosheh*.<sup>22</sup>

2. Direct contact with earth in fulfillment of the requirement “for you are earth and unto earth shall you return” (Genesis 3:19). Actual earth, declares *Iggerot Mosheh*, is not necessary for fulfillment of that requirement. An opening or crack between the planks of the coffin or placement of a quantity of earth directly over the body is sufficient for that purpose. Many authorities state explicitly that even shards of pottery, or concrete, may be utilized for that purpose provided that burial itself is below ground.

### 3. Mausoleums

In a series of introductory footnotes to his article in *Moriah*, vol. 34, no. 10–12 (Nisan 5776), p. 354, Rabbi Licht presents a long list of responsa authored by European, American, and Israeli authorities authored over the course of almost two centuries banning above-ground interment in a mausoleum.<sup>23</sup> R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, III, no. 143, in a responsum dated 17 Av 5732, initially opposed burial in a mausoleum for two reasons: 1) burial must be below ground; and 2) interment in

21 Although *Iggerot Mosheh* explicitly recognizes that burial may take place in a hole carved into a stone, he does not directly address burial in a gravel pit or use of stone to fill the grave. See *infra*, note 33.

22 That problem might perhaps be remedied by placing a layer of soil above the concrete part of the edifice.

23 Rabbi Shloush, *Barka'i*, no. 4, p. 144, argues that a corpse need not be buried underground; rather, it is sufficient to place the coffin on the ground and to cover it with one *amah* (approximately 18 or 24 inches) of soil. Rabbi Shloush accepts the view that the *kever binyan* (constructed grave) discussed by Rashi, *Sanhedrin* 47b, is a type of mausoleum. Rabbi Shloush further asserts that only a wooden coffin that will eventually disintegrate must be covered by earth but that a stone or concrete coffin does not require such covering. Consistent with that view, Rabbi Shloush espouses the position that a coffin made of stone or concrete need not be interred below ground.

a mausoleum interferes with decomposition of the body. Going beyond other authorities, *Iggerot Mosheh* further asserts that it is forbidden to inter an individual in a cemetery in which mausoleums have been constructed because such burial is an indignity that may not be imposed upon the deceased. In a somewhat later responsum, dated less than a month later, 14 Elul 5732, *Iggerot Mosheh*, *Yoreh De'ah*, III, no. 144, ruled that, if mausoleum burial cannot be prevented, a fence should be erected completely surrounding that area of the cemetery. *Iggerot Mosheh* further required that, in addition, access to the mausoleum be solely by means of a dedicated entrance and path constructed for that use exclusively.

However, in this latter, immediately following responsum, Rabbi Feinstein expressed an entirely different view. In that responsum, *Iggerot Mosheh* also states unequivocally that burial must be below ground but does not find that consideration reason for banning mausoleum burial. Quite to the contrary, unlike the many other authorities who forbid burial in a mausoleum, *Iggerot Mosheh* considers that form of above-ground burial to be fulfillment of the biblical commandment requiring burial by reason of the fact that such edifices are constructed by use of "stone, bricks and cement," all of which are types of "earth." *Iggerot Mosheh* further writes that Rashi, *Sanhedrin* 47b, understood the term "*kever binyan*" literally as meaning "a constructed grave," i.e., a building. Moreover, although Rosh offers a different linguistic interpretation of the term "*kever binyan*," *Iggerot Mosheh* asserts that the varying comments of those authorities reflect only a matter of nomenclature and hence finds no reason to posit a halakhic controversy between Rashi and Rosh. According to *Iggerot Mosheh*, both authorities agree that burial need not necessarily be below ground.

Although in this latter responsum *Iggerot Mosheh* found above-ground burial in a mausoleum to be tantamount to burial in the "ground" because stones and bricks are "earth," he nevertheless found the practice to be forbidden for a number of other reasons: 1) With the passage of time, the edifice is likely to be demolished or to collapse.<sup>24</sup> 2) Such burial is a gross deviation from the "customs of Israel."<sup>3</sup> 3) The burial constitutes emulation of the practices of gentiles.<sup>25</sup> 4) The crypts in which the bodies

24 Cf., however, *supra*, note 9 and accompanying text. *Av be-Hokhmah* maintains that for that reason alone, i.e., potential demolition or collapse of the building as the result of which the remains will no longer be protected, it is forbidden to inter in a mausoleum.

25 *Minhat Yizhak*, X, no. 122; *Teshuvot Bet Avi*, III, no. 110; and R. Yekutiel Yehudah Grunwald, *Kol Bo al Avelut*, II, chap. 2, no. 1, also prohibit burial in a mausoleum, *inter alia*, because such burial represents emulation of a gentile practice. *Kevurat komot* is comparable in nature to burial in a mausoleum. Rabbi Licht, *Moriah*, Nisan 5776, p. 364, however, points out that, although such a conclusion may well be consistent

are interred are designed and intended to be opened. 5) Finally, such interment impedes decomposition of the body.

It is quite apparent that, apart from deviation from hallowed Jewish custom and emulation of non-Jewish practices, the other concerns expressed by *Iggerot Mosheh* might be overcome by robust reinforced construction,<sup>26</sup> sealing the crypts, and taking measures to ensure

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with the position of *Shakh*, *Yoreh De'ah* 178:4. Nevertheless, *Bah*, *Yoreh De'ah* 178, disagrees with that view. See also *Av be-Hokhmah*, p. 62b. Cf., *Hiddushei Hatam Sofer*, *Hullin* 105b, s.v. *mayyim*, who substantiates *Shakh's* position. *Bah* maintains that the prohibition grounded upon the verse "and you shall not go in their ways" (Leviticus 18:3) reflects the concern that emulation of non-Jews and adoption of their idiosyncratic practices signifies acknowledgment of the legitimacy of their pagan cults. Accordingly, rules *Bah*, a practice designed to accomplish some practical, non-cultic purpose carries with it no such implication and hence is not prohibited. Cf., *Duda'ei ha-Sadeh*, no. 30. *Bah's* position is actually based upon R. Joseph Colon, *Teshuvot Maharik*, no. 88, whose view is reflected in the ruling of Rema, *Yoreh De'ah* 178:1. *Maharik* rules that the prohibition is limited to practices having no discernible purpose and hence presumed to be adopted by Jews solely to blur distinctions between Jews and gentiles, practices associated with immoral conduct, or reflective of hubris. See also *Zikhron Me'ir*, pp. 14–16.

There is a controversy among latter-day authorities regarding whether, in addition to practices designed to honor or aggrandize objects of pagan adoration, adoption of any established gentile practice is encompassed in that prohibition or whether the prohibition is limited to practices having no practical purpose and hence presumed to be pagan in origin. If the latter, it is quite likely that a mausoleum does serve a "purpose" as illustrated by a delightful anecdote concerning a poor Jew who visited the Willesden Jewish Cemetery in London. Standing in awe outside the magnificent mausoleum of the Rothschild family, he was heard to exclaim, "Dos heist gelebt!" ("Now, that's what I call living!"). See Louis J. Rabinowitz, *Light and Salvation* (New York, 1965), p. 327. The same reaction could have been evoked in the Jewish cemetery in Frankfurt am Main as confirmed by personal observation and, probably, in any one of the cities in which the various branches of the Rothschild family amassed and exhibited their fortunes. Ostentation is hardly a Jewish value or a laudable trait. Yet, no one has claimed that residing in an opulent mansion is prohibited as emulation of "the customs of the gentile." Post-mortem ostentation, frivolous as it may be, does not seem to be without mundane purpose. Cf., *Badei ha-Shulhan* 362:2, *Bi'urim*.

Rabbi Licht, *Moriah*, Nisan 5776, p. 364, cites R. Shraga Zevi Tennenbaum, *Neta Sorek*, *Orah Hayyim*, no. 2, and R. Alter Elyahu Rubenstein, *Teshuvot Migdanot Eliyahu*, I, no. 18, who rule that gentile practices may not be emulated in fulfilling a *mizvah* even when such practices are adopted for a practical reason. The underlying purpose of the prohibition, they assert, is that the Torah seeks to forestall transposing pagan practices to the service of God. Burial constitutes fulfillment of a *mizvah* and hence, according to those authorities, gentile practices may not be adopted even when the motive is entirely practical.

26 Rabbi Kutkes, *Bet Aharon ve-Yisra'el*, pp. 152–153, suggests that reinforced concrete, i.e., concrete in which strips of metal are inserted in order to make the material stronger, may not have the status of *heres*. See the ruling of the Chief Rabbinat Council as reported in *Menuhah Lo Nekhonah* (Elul 5772), p. 12. That issue has been widely discussed with regard to construction of a *mikveh*. See R. Jacob Blau, *Pithei Mikva'ot*, chap. 1, note 70.

that decomposition is not impeded. The proposals adopted by the Israeli burial societies were designed to overcome those, and other, objections.

However, in yet a third responsum dated some eight years later, 3 Nisan 5740, but published as the first of the three responsa, *Iggerot Mosheh, Yoreh De'ah*, III, no. 142, goes beyond his position in *Iggerot Mosheh, Yoreh De'ah*, III, no. 144, in declaring above-ground burial to be entirely antithetical to fulfillment of the commandment concerning burial.

#### 4. Tunnels

On *Har ha-Menuhot*, concrete crypts have been constructed in the walls of a tunnel dug under existing graves. Rabbi Kutkes, *Bet Aharon ve-Yisra'el*, pp. 161–163, questions whether that practice violates the property rights of those who had long ago purchased ground-level graves above the tunnel. If the deceased is vested with a property interest in his burial site that extends *ad coelum*, use of an area beneath his grave by others is actual theft. *Teshuvot Rema me-Panu*, no. 56, rules that such is indeed the case.<sup>27</sup>

R. Eliyahu Klatzkin, both in *Hibbat ha-Kodesh*, no. 23 and *Milu'ei Even*, no. 8, asserts that, since it has never been the practice to place one grave over another, custom has established that the deceased acquires property rights above the ground *ad astra*.<sup>28</sup> R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, VI, no. 226, s.v. *ve-khen*, also maintains that a person who purchases a grave has acquired absolute title *ad coelum et ad astra*. The regulations regarding layered burial recorded in *Shulhan Arukh*, he explains, are applicable only to situations in which “air rights” above the grave were not acquired by the original purchaser. The practice in earlier times of the European communities that involved fashioning stacked layers of vertical graves, explains Rabbi Sternbuch, was justified because necessity for such practices arose with sufficient frequency as to make the right to create additional layers of graves an implied condition in the assignment of all graves.<sup>29</sup> *Teshuvot Rema me-Panu* offers a somewhat different justification. *Rema me-Panu* states that there is a presumption that, in case of need, the deceased “grants permission to the community” to utilize the air space above his grave for burial of another deceased individual. Rabbi

27 For sources discussing whether the deceased can continue to be vested with a property interest in his estate to the extent necessary to provide for his burial needs, see Part 1, note 35.

28 *Hibbat ha-Kodesh* does permit temporary burial above an existing grave.

29 Rabbi Sternbuch's explanation seems to presume that, as evidenced by subsequent historical events, such future need was presciently anticipated at the time of the earliest burials.

Sternbuch states simply that the deceased is unconcerned with use of his air space for an additional grave.<sup>30</sup>

Rabbi Kutkes, *Bet Aharon ve-Yisra'el*, p. 163, asserts that there is a significant discrepancy between the rationale of *Rema me-Panu* and that of Rabbi Sternbuch. Rabbi Kutkes asserts that *Rema me-Panu* may have maintained that a person grants permission to the community *inter vivos* only with regard to a practice of which he is aware. Burial in above ground layers of graves, at least in emergency circumstances, was a known and practiced expedient. Below-ground burial in layered catacomb-like tunnels, argues Rabbi Kutkes, was entirely unknown and unanticipated. That was certainly true in recent centuries and the catacombs of earlier times were all entirely below ground, not subterranean crypts added subsequent to burial in ground level graves. Rabbi Sternbuch, on the other hand, states simply that layered burial is not a matter of concern to the deceased.<sup>31</sup> Nevertheless, Rabbi Sternbuch, *Teshuvot ve-Hanhagot*, IV, p. 309 and VI, no. 223, s.v. *amnam*, cites kabbalistic sources indicating that the repose of the deceased is marred if another body is interred above him.

## 5. Concrete Vaults and Coffins

The question of use of a concrete vault to line graves in which there is water seepage is addressed by *Iggerot Mosheh* in two separate responsa. The problem as presented in *Iggerot Mosheh*, *Yoreh De'ah*, II, no. 78, is whether the corpse may be buried in a container, i.e., a coffin, or whether it must be placed in direct contact with the ground. In a brief paragraph at the end of that responsum, Rabbi Feinstein dismisses the problem by declaring simply that concrete is "earth" and hence the act of enclosing the

30 It is unclear whether *Rema me-Panu* implies that the deceased actually becomes aware of the need and there is a presumption that he grants permission or whether he means that there is constructive permission to place a second grave on top of the occupant of the first grave because, were the deceased to be apprised of the circumstances, he would readily grant consent. The latter explanation is problematic because there is significant controversy regarding whether a constructive license is sufficient to overcome the problem of appropriation of property belonging to another. See R. Jacob Blau, *Pithei Hoshen*, IV, *Hilkhot Geneivah* 1:15. Rabbi Sternbuch may construe the deceased's lack of concern as comparable to a person's lack of concern with regard to another person's appropriation of a splinter from a log or a wooden plank owned by him. See *Shulhan Arukh*, *Hoshen Mishpat* 359:1.

31 Rabbi Sternbuch's position seems incongruent with the many discussions of whether layered burial is permitted only as an emergency measure. If the matter is of no concern to the deceased, it should be permitted under all conditions. Furthermore, the terminology employed by *Tur*, *Yoreh De'ah* 363, in his citation of R. Ha'i Ga'on, seems to imply that individual burial is an enhanced dignity to the deceased. If so, presumably, that mode of burial would indeed be a matter of concern to the deceased.

coffin within concrete, in and of itself, constitutes burial.<sup>32</sup> The interlocutor questioned *Iggerot Mosheh* only with regard to the propriety of the use of a below-ground vault. *Iggerot Mosheh* was not asked whether interment in a concrete vault placed at or above-ground level would be satisfactory and hence had no need to address that question in this responsum.

As has been stated, in order to satisfy the requirement for actual contact with the earth, the generally accepted practice is either to remove or to pierce the bottom of the coffin or to rely upon the fact that there are openings between the planks of the coffin through which soil penetrates the coffin and, in addition, to place shards of pottery upon the face of the corpse. Burial below ground, if necessary, is a separate requirement and interposition of a wooden coffin does not mar fulfillment of that requirement. If so, placing the coffin within a concrete vault and filling the space between the coffin and the sides of the concrete wall as well as the space between the coffin and the ceiling of the vault would avoid the issue, provided that earth is placed on the floor of the concrete vault as well. That is the principle upon which some forms of the Israeli practice of *kevurat komot* are based. In his first responsum, *Iggerot Mosheh* makes no such stipulation because in this responsum he asserts that enclosure within a concrete wall is tantamount to burial in soil. More difficult to understand is that, since, in the question addressed to him, burial was below ground in a wooden coffin that came into direct contact with the soil and the proposed use of concrete was to be limited to lining the walls of the excavated grave, his statement that concrete is a form of earth would seem to be superfluous. It would seem that *Iggerot Mosheh* maintains that burial must be within the ground, i.e., with earth on all sides of the corpse; nevertheless, *Iggerot Mosheh* does not seem to require that soil be placed between the coffin and the walls of a concrete vault since he did not raise that objection with regard to use of a *kever binyan* or a mausoleum.

In a second, lengthier responsum, *Yoreh De'ah*, III, no. 142, *Iggerot Mosheh* reiterates his view that concrete is no different from pottery or earthenware. Pottery is earth fired in a kiln while concrete consists of earth and stone mixed with cold water. Nevertheless, *Iggerot Mosheh* asserts that, in disallowing "burial" above ground in the form of enclosure in a coffin and requiring interment "within the ground," the Gemara, *Sanhedrin* 46b, excludes burial solely in a coffin, including one made of wood or even earthenware. Yet, rules *Iggerot Mosheh*, when the coffin is placed below ground, contact with concrete is tantamount to contact

32 Addressing the same problem, Rabbi Grunwald, *Kol Bo al Avelut*, II (New York, 5733), p. 48, also decries use of a concrete vault. Rabbi Grunwald somewhat strangely compares the concrete vault to a mausoleum and states that the actual purpose of both vaults and mausoleums is to retard decomposition of the body.



with the earth.<sup>33</sup> Again, provided that the body is placed below ground, *Iggerot Mosheh* does not seem to be troubled by the fact that there is empty space between the body and the sides of the concrete vault.

*Iggerot Mosheh* then proceeds to offer an additional, entirely different, justification for use of a concrete vault. Burial in a “utensil,” including a stone coffin or a coffin made of earthenware, declares *Iggerot Mosheh*, are entirely unsatisfactory under all circumstances simply because the Gemara, *Sanhedrin* 46b, states that burial in a coffin, or in a “utensil,” is not regarded as interment. However, the Mishnah, *Kelim* 11:2, declares that utensils designed to be used as appurtenances of the ground<sup>34</sup> are not susceptible to ritual defilement because they are not endowed with halakhic status as “utensils.” *Iggerot Mosheh* finds that the rationale for that provision is either 1) that the fashioning of a utensil of that nature is not considered to have been completed until it is actually attached to the ground,<sup>35</sup> at which time it is considered to be part of the ground and, as

33 It might be inferred that *Iggerot Mosheh* would regard stone to be a form of soil and hence covering the corpse with stones or pebbles would be tantamount to covering it with earth. Indeed, Rambam, *Hilkhot Evel* 4:4, speaks of burial in a crypt in the side of a cave and “returning the soil and stones” that had been excavated in creating the burial site in order to cover the corpse. Rambam fails to indicate that there must be earth, rather than stone, underneath the body. Cf., however, R. Gedaliah Axelrod, *Teshuvot Migdal Zofim*, XVI, *Yoreh De'ah*, no. 74, p. 208. Rabbi Axelrod cites the ruling of *Shulhan Arukh*, *Yoreh De'ah* 14:11, to the effect that covering the blood of a fowl with stones after slaughter is sufficient “because the verse speaks of ‘soil.’” Rabbi Axelrod asserts that “it is certain that stones are not earth also with regard to burial.” *Iggerot Mosheh* acknowledges that above-ground burial in a “mound of broken potshards” is not tantamount to burial in a “mound of soil” and presumably would say the same with regard to a mound of loose stones. See *supra*, note 21. Nevertheless, asserts *Iggerot Mosheh*, when burial is below ground, the concrete floor of the vault serves to fulfil the requirement that “there be earth close to the body.” It would then stand to reason that the same is true with regard to stone as well.

34 It would seem that, according to *Iggerot Mosheh*, if the reason that burial in a vessel is not acceptable is because the vessel constitutes an interposition between the corpse and the ground, rather than because it constitutes a separate domain, it should further be the case that, since *Iggerot Mosheh* also regards concrete as a form of earth, the fact that a concrete vault or crypt is a vessel should be irrelevant. Since concrete is “earth,” it can hardly be an interposition even if it is a vessel. Consequently, if a concrete vault is nevertheless unacceptable, it can only be because such a utensil, *ipso facto*, is a separate domain. But if an underground vault is not a separate domain because it is attached to the ground, the same should be the case if it is attached to the side of a mountain as an artificial cliff. Cf., *supra*, note 19 and *infra*, note 37.

Rabbi Kutkes, *Bet Aharon ve-Yisra'el*, pp. 153–156, enters into a lengthy analysis of conflicting opinions regarding the definition, and hence applicability of, the concept “designed to be used with the ground.” See also R. Moshe Feinstein, *Dibberot Mosheh*, *Bava Kamma*, no. 44, *anaf* 2.

35 According to this rationale, burial in a mausoleum would be tantamount to burial in a utensil because, since the coffin is readily removable, it would not become an appurtenance of the ground.



such, is not subject to defilement<sup>36</sup> or 2) because any object utilized as an appurtenance to land, even if it is otherwise a utensil in all respects, is, for that reason alone, not regarded as a “*keli*”<sup>37</sup> because the object becomes an integral part of land and cannot become defiled just as land itself cannot be defiled. A vault, argues *Iggerot Mosheh*, is neither a container for the corpse nor for the coffin; it is designed solely to reinforce the walls of the grave so that they do not collapse “or perhaps to prevent water seepage.” As such, the vault is not a utensil and, moreover, it is an appendage of the ground and hence its use poses no problem.<sup>38</sup>

- 36 R. Abraham Aaron Burstein, *Ner Aharon*, no. 5, also published in R. Nathan Baruch Ginsburg, *Mekor Barukh*, I, no. 33, points out that a pipe or cylinder that has been fashioned and subsequently attached to the ground is a utensil and cannot be used to collect water for a *mikveh*. Rabbi Burstein questions why such a construct should be considered a utensil susceptible to defilement since the pipe is fashioned specifically for attachment to the ground. *Ner Aharon* responds that only metal utensils fashioned for attachment to the ground cannot become defiled, but there is no principle of that nature with regard to wooden utensils. That distinction is contradicted by *Shiyurei Taharah*, *Yoreh De'ah* 198:63; *Mekor Barukh*, I, no. 34; and R. Moshe Feinstein, *Dibberot Mosheh*, *Bava Kamma*, no. 44, *anaf* 2.

*Ner Aharon*, no. 5, further cites the statement of the Gemara, *Hullin* 125b, indicating that the shrouds of a deceased do not constitute an interposition because they are deemed to be a permanent attachment to the corpse (*mevatel leih*) and hence part of the body. *Ner Aharon* argues that the coffin is also designed to remain both “attached” to the corpse and hence no different from shrouds. *Ner Aharon* also argues that a utensil designed for a use that renders it an object prohibited for all beneficial use loses its status as a utensil for purposes of defilement. Cf., *Mekor Barukh*, I, no. 34. Rabbi Kutkes suggests that holes made in the tubes used in constructing above-ground crypts destroy their status as a utensil. The size of the opening that can effect that end is a matter of controversy. See Rambam and Ra'avad, *Hilkhot Kelim* 6:3 and *Hazon Ish*, *Kelim* 23:1. Moreover, points out Rabbi Kutkes, *Teshuvot Hatam Sofer*, *Yoreh De'ah*, no. 198, sec. 13, maintains that an earthenware utensil designed to be used as an appurtenance of the ground no longer has the halakhic status of a utensil but nevertheless is not treated as soil. See *Bet Aharon ve-Yisra'el*, p. 154, note 14.

- 37 Rabbi Kutkes expresses doubt regarding the thrust of *Iggerot Mosheh's* second explanation of why only a cement vault is acceptable. In his second explanation, *Iggerot Mosheh* assumes that a concrete vault functions as the empirical equivalent of a utensil and hence, ostensibly, would be inappropriate for use in burial but that for a technical reason, i.e., its adjunctive use as an appurtenance of land. There is an underlying question, asserts Rabbi Kutkes, that is not addressed by *Iggerot Mosheh*, viz., why is a utensil not suitable for burial of a body? There are two possibilities: 1) a utensil may be a domain unto itself with the result that the corpse does not lie in the ground but in a utensil; or 2) a utensil constitutes an interposition (*hefsek*) between the body and the ground. If the reason is that a utensil constitutes an interposition between the body and the ground, it is understandable that an accouterment of land is not an interposition but if a utensil is a domain unto itself, such attachment, asserts Rabbi Kutkes, is, arguably, irrelevant because it should remain a domain unto itself even if it is not subject to defilement.
- 38 If a concrete vault of such nature is not a container it should follow that, according to *Iggerot Mosheh*, a metal vault inserted to support the walls of the grave and to prevent water seepage should also be acceptable provided that there is direct contact with soil within the vault.

According to *Iggerot Mosheh's* second explanation, above-ground crypts, and even crypts attached to the side of a mountain or to the slope of a valley, are certainly not designed to prevent collapse of a surrounding wall. Since concrete crypts do not serve the ground in any way, they are not designed to be appurtenances of the ground and hence they should not have the status of a utensil. Accordingly, *kevurat komot* would be precluded from use for purposes of burial. Since those crypts are not appurtenances of the ground, they should have the status of a utensil, and hence would be precluded from use for purposes of burial. According to *Iggerot Mosheh's* first rationale, in *kevurat komot* the crypt's designation as a utensil to receive a corpse does not occur until it is attached to the ground at which point it cannot become a utensil that would preclude its use for purposes of burial because it is already attached to the ground.

*Iggerot Mosheh* also infers from the earlier-cited comments of *Shakh* and *Perishah* regarding placement of pottery shards on the body of the deceased that *heres* or "pottery" may be employed in fashioning a coffin and consequently concludes that a coffin made of concrete is acceptable.

Rabbi Kutkes, *Moriah* (Shevat 5777), p. 267, points out that *Iggerot Mosheh* does not explicitly address the status of concrete with regard to burial solely within concrete, i.e., whether placing the coffin on the ground and encasing it in concrete that has not been fashioned into a utensil satisfies the requirements of burial. The issue is, since concrete is a mixture of earth and water that has not been fired in a kiln, is its status that of soil or of pottery. It would certainly seem that if shards of pottery cannot be used fill the grave it should follow that encasing the body in cement above ground would not be acceptable. Moreover, as has been noted, *Iggerot Mosheh*, *Yoreh De'ah*, III, no. 142, explicitly rules that above-ground burial in any utensil, including an earthenware coffin, is excluded.

*Iggerot Mosheh's* opinion to the effect that concrete is to be categorized as "earth" for purposes of satisfying the requirement that the corpse must come into direct contact with earth is contradicted by *Teshuvot Hatam Sofer*, *Yoreh De'ah*, no. 350. *Hatam Sofer* states that *heres* is not a form of "earth" for purposes of burial because "it does not rapidly become dust and the commandment is . . . 'For from earth you were taken and to earth shall you return.'" R. Joshua Ehrenberg, *Teshuvot Devar Yehoshu'a*, I, no. 1, explains *Hatam Sofer's* position in stating that *heres* is certainly "earth" for other halakhic purposes, e.g., covering the blood of a slaughtered fowl,<sup>39</sup> but not for purposes of burial. Burial requires that the body turn to dust and that phenomenon occurs because of moisture that is present in soil. *Heres* is fired and, as a result, is left with no residual moisture. *Devar*

39 See *Hullin* 88a.

*Yehoshu'a* notes that *Shakh* and *Perishah* who require covering the eyes and mouth with shards of pottery presumably disagree with *Ḥatam Sofer*.

## 6. *Likkut Azamot* – Gathering of Bones

Reports have appeared in the Israeli press of the decision of the rabbi of Yavneh, a religious kibbutz located between Gedera and Ashdod, to resolve the “problem” posed by the shortage of burial sites by reinstating the ancient practice of *likkut azamot*, i.e., reburial of bones in ossuaries.<sup>40</sup> An earlier proposal to that effect formulated by R. Rafi Ostroff was published in *Tehumin*, XXXII (5772), 387-392.

In the process of *likkut azamot* the bones of the deceased were disinterred subsequent to total decomposition of the soft tissues of the corpse, placed in an ossuary and reburied. *Shulḥan Arukh, Yoreh De'ah* 363:1, records a prohibition against exhumation of the bones as well as of the body of the deceased. Nevertheless, from the rulings of *Shulḥan Arukh* regarding mourning practices on the day of reinterment of bones it would appear that there is no transgression involved, provided that the soft tissues and internal organs have completely disintegrated.

However, *Tur Shulḥan Arukh, Yoreh De'ah* 363:3, states that if “it is the custom to bury without a coffin until the flesh disintegrates and the bones are placed in a coffin” the practice is permissible. *Tur* seems to permit the practice only in locales in which it was an established custom. *Tur Shulḥan Arukh, Yoreh De'ah* 363:3, further states that *likkut azamot* is not permitted in order to use the space for some other purpose, including burial of another body. Ramban, *Shabbat* 139b, cites Ra'avad as stating that “it is not the practice to remove [the corpse] from his grave” and that if the bones are removed the deceased is “dishonored thereby.”<sup>41</sup> Ramban himself indicates<sup>42</sup> that the practice is permitted only in order to transfer the body to the land of Israel or for reinterment with forebears unless such practice was the established custom or it was stipulated at the time of the original burial that bones would be transferred upon decomposition of the flesh. Delay until decomposition of the flesh was required because the deceased are not punished beyond that period and hence they no

40 See Shlomo M. Brody, “Israel Needs New Burial Solutions – What Does Judaism Say?” *Jerusalem Post*, October 22, 2022.

41 R. Yechiel Michel Tucatzinsky, *Gesher ha-Ḥayyim*, I, chap. 23, sec. 1, explains that *likkut azamot* is generally prohibited, not because the practice is ignominious (*nivul*), but because it is a dishonor (*bizayon*). See also *Gesher ha-Ḥayyim*, II, chap. 21, sec. 2:6. Consequently, *likkut azamot* is a dishonor only if it is not the customary practice. Cf., however, R. Samuel Landau, *Teshuvot Shivat Zion*, no. 63, who maintains that *likkut azamot* is forbidden because of *nivul*. See also R. Eliezer Yehudah Waldenberg, *Teshuvot Ziz Eli'ezer*, V, no. 20, secs. 12 and 16.

42 *Torat ha-Adam*, II, 120.

longer experience “fear of judgment” when moved. Indeed, some sources indicate that the practice was introduced in order to commemorate and celebrate the fact that the deceased was finally at peace.<sup>43</sup>

Among more recent authorities R. Yechiel Ya'akov Weinberg, *Seridei Esh* (Jerusalem: Va'ad le-Hoza'at Kitvei Rav Weinberg, 5772), II, *Yoreh De'ah*, no. 100, sec. 25, concludes that *likkut aẓamot* was practiced only for the purpose of reburial with ancestors of the deceased. Accordingly, he concludes, “on the basis of this there is no ground for permitting removal of bones in our day since the matter of *kever mishpaḥah* has lapsed.” *Seridei Esh* cites R. Meir Eisenstadt, *Imrei Esh*, I, no. 121, in explaining that *kever mishpaḥah* connotes only a burial site reserved exclusively for an extended family rather than a family plot in a communal cemetery.<sup>44</sup> Nevertheless, *Seridei Esh*, *ibid*, sec. 26, recognizes that, since *Teshuvot Ḥatam Sofer*, *Yoreh De'ah*, no. 333, followed by his disciple, R. Moshe Schick, *Teshuvot Maharam Shik*, *Yoreh De'ah*, no. 355, defined *kever mishpaḥah* in the conventional manner, that opinion may be relied upon in practice.

The custom of *likkut aẓamot* has clearly fallen into disuse and has not been practiced for hundreds of years, as evidenced by the introduction of layered burial rather than *likkut aẓamot* in European communities in which additional cemetery space was not available. Thus, it is not surprising that such a procedure was not even entertained by the Chief Rabbinate Council.

Moreover, were there an actual problem, such an expedient would hardly be a solution. Although *Teshuvot Ḥatam Sofer*, *Yoreh De'ah*, no. 353, permits reinterment of the bones of multiple individuals in a single coffin provided that there are internal separations between the bones of different individuals<sup>45</sup> so that the identity of the each of the deceased remain distinct,<sup>46</sup> the bones of individual corpses may not be comingled but must be interred separately. The dimensions of extant ossuaries indicate that an ossuary would occupy a space of sixteen to twenty-eight inches in length and twelve to twenty inches in width.<sup>47</sup> The resultant reduced land requirement would, at least in the short term, certainly not have a significant effect.

43 See *Encyclopedia Judaica*, XII (Jerusalem, 1974), 1506.

44 See Ramban, *Commentary on the Bible*, Genesis 23:4, who states that even prior to Sinai it was the practice for each family to have its own private burial ground in which generations of family members were interred.

45 See also *Duda'ei ha-Sadeh*, no. 71; cf., however, R. David ibn Zimra, *Teshuvot Radvaz*, II, no. 611.

46 See also *Teshuvot Shivat Zion*, no. 63; R. Yekutiel Yehudah Teitelbaum, *Teshuvot Avnei Zedek*, *Yoreh De'ah*, no. 146; and R. Mordecai Brisk, *Teshuvot Maharam Brisk*, III, no. 34.

47 See *Encyclopedia Judaica*, XII (Jerusalem, 1974), 1506.

Most significantly, in light of consideration of the property rights of the deceased and his or her heirs it would seem that compelling *likkut azamot* with regard to existing graves owned by the families of those buried in such graves would constitute outright theft in order to use those graves for others. R. David Friedman of Karlin, *She'eilat David, Kuntres ha-ḥiddushim*, p. 78a, states explicitly that misappropriation of a burial site that had been purchased by the deceased or his relatives is naked theft.<sup>48</sup> Consistent with that view, *She'eilat David* ruled that a person who had exhumed a body and built a residence upon that site must tear down the structure and return the bones to their proper place.

Rabbi Ostroff, *Tehumin*, XXXII, 390, note 12, fails to reference the earlier-cited ruling of Ramban in his *Torat ha-Adam* but concludes that *likkut azamot* may be practiced only in a cemetery in which it is the established custom or at the express *inter vivos* request of the deceased.

In the limited attention it has received, the practice of *likkut azamot* has been heralded with an aura of triumphalism as reestablishment of an ancient and hallowed tradition harnessed to solve a compelling social and civic need. In reality, the proposal is a dubious non-solution to a non-problem.

## VI. The Chief Rabbinate Council

In response to proposals to ameliorate the scarcity of graves, in 5747 the Chief Rabbinate Council appointed a committee to address the matter. The recommendations of that committee were endorsed by the Chief Rabbinate Council and formally approved on 21 Av 5747. Those resolutions were reaffirmed on 28 Sivan 5752.

The Chief Rabbinate Council agreed to permit layered graves on new burial sites in the form of crypts to be fashioned in advance of need for imminent burial and to permit introducing the bodies into those crypts through horizontal openings.<sup>49</sup> However, the Chief Rabbinate Council

48 See also *Teshuvot Tuv Ta'am va-Da'at, Mahadura Gimmel*, II, no. 234 and *Teshuvot Ziz Eli'ezer*, V, no. 20, sec. 28.

49 Rabbi Be'eri, *Tehumin*, XXXVI, 255, note 35, is careful to note that those who disagree with the ruling of the Chief Rabbinate Council will perforce regard *kevurat sadeh*, i.e. customary burial, as a normative obligation requiring expenditure of financial resources at least to the extent required for fulfillment of other *mizvot*. He also recognizes that *kevurat sadeh* represents an aesthetic *hiddur*, or enhancement, of the *mizvah*. Rabbi Be'eri, *ibid*, p. 254, further points out that the Sages limited additional expenditure for enhancement of a *mizvah* to one third – but fails to point out that, since a basic grave is provided by *Bituah Le'umi* free of charge, it might reasonably be argued that any expenditure represents a sum greater than the permitted amount. A third of zero added to zero equals zero. The counter-argument would be that a grave provided by *Bituah Le'umi* free of charge is not “free.” *Bituah Le'umi* is not even a third-party payer. *Bituah Le'umi* simply utilizes

conditioned their approval upon adherence to certain significant stipulations. The salient requirements may be summarized as follows:

1. The burial site must be fashioned of soil in the form of an artificial hill or valley and be clearly perceived as an elevation of the ground. The Chief Rabbinate Council obviously agreed to excavation of earth from another site in order to construct the artificial hill.<sup>50</sup>
2. Concrete dividers must be used to separate graves, but only un-enforced concrete may be employed for that purpose.
3. Sacks filled with soil or sand must be placed in the opening of each crypt. The sacks must be filled with a sufficient quantity of earth to assure that upon disintegration of the sack there will be at least 60 centimeters (six *tefaḥim*)<sup>51</sup> of earth between graves.
4. Subsequent to interment of the body, the opening of the crypt must be sealed with cement.
5. Burial in that manner may be carried out only with prior approval of the family of the deceased.

Rabbi Israeli was most emphatic in insisting that such burial take place only with acquiescence of the family. Rabbi Israeli also insisted that

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funds provided collectively by insured participants or taxpayers who enjoy the equivalent of a partnership interest in public funds. Nevertheless, a person who pays personally for *kevurat sadeh* foregoes reimbursement for the unused grave to which he is entitled. The result is tantamount to expenditure of an amount equal to the value of the grave that would have been provided. It is further arguable that, for example, a person who receives an *etrog* as a gift and has the option of adding one third of its market value in order to exchange that *etrog* for one of a higher quality would be obligated to do so.

Rabbi Be'eri, *ibid*, pp. 254–255, further makes the much stronger assertion that, when less expensive modes are available, *kevurat sadeh* constitutes a violation of Rabban Gamliel's edict, recorded by the Gemara, *Mo'ed Katan* 27b, forbidding more than minimal burial accoutrements lest the impoverished be embarrassed and abandon their dead. See *Tur Shulḥan Arukh, Yoreh De'ah* 352:1; Rema, *Yoreh De'ah* 368:1; and *Shakh, Yoreh De'ah* 352:1. However, that consideration does not pertain when the less expensive mode of burial is perceived as failure to accord customary dignity to the deceased. Thus, for example, wooden pegs, rather than metal nails, are customarily employed in construction of a coffin despite the fact that such is not halakhically required and adds significantly to the cost of an otherwise inexpensive plain pine box.

- 50 Rabbi Axelrod, *Kevurat Komot*, p. 2, quotes from a directive of the Chief Rabbinate Council addressed to two architects in which they state, "... burial in stories should be carried out within, or in the wall of, a natural or artificial sloping valley."
- 51 Rabbi Jacob Roza, *Hama'yan*, vol. 54, no. 4 (Tammuz 5774), reports that one such burial arrangement provided for a cement wall and a distance of three *tefaḥim* between layers of graves.

such burial be limited to edifices having the appearance of below-ground crypts.<sup>52</sup> His views were unanimously endorsed by his colleagues and incorporated in the resolutions of the Chief Rabbinic Council.

In addition to the published resolutions, the minutes of the various sessions of the committee as well as the writings of the deliberants make it clear that each of the members of the committee was prepared to support only an accommodation in which the bodies were to be fully enclosed in soil and the artificially created hill be perceived as a natural elevation. Such was also the position of both Chief Rabbis.

According to available reports, those requirements have been honored in the breach. No innovative arrangement that has been implemented is in full compliance with the decision of the Chief Rabbinate Council.<sup>53</sup>

The situation is even more dire than described in the heretofore-cited discussions. In addition to payment for a burial site by *Bittuah Le'umi*,<sup>54</sup> the Ministry of Religious Affairs provides a further payment of NIS 2,000 to the *Chevra Kaddisha* as additional compensation for providing the burial site. The latter payment is conditioned upon a contractual undertaking by the individual *Chevra Kaddisha* to establish burial practices permitting 1,500 burials per dunam in place of the 250 or 270 burials per dunam which is the maximum possible for *kevurat sadeh*. Sale of graves by the *Chevra Kaddisha* for traditional burial at a price set by the *Chevra Kaddisha* remains permitted. However, the undertaking provides that a maximum of 25% of burials in the nature of *kevurat sadeh* will be permitted by the *Chevra Kaddisha* in existing cemeteries. In addition, *kevurat sadeh* must be limited to designated areas of the cemetery. Furthermore, in new cemeteries, *kevurat sadeh* may not total more than 10% of unoccupied burial sites.<sup>55</sup> The latter requirement, in particular, guarantees that permissible sites for *kevurat sadeh* will be rapidly exhausted.

52 This represents a departure from Rabbi Israeli's position as published in *Barka'i*, no. 2, p. 49. In that earlier article Rabbi Israeli concludes that burial must be below ground and finds burial elevated above ground level, even if "sealed (*atum*) [by soil]," to be unacceptable.

53 See R. Moshe Kutkes, *Madrikh le-Kever ke-Halakhah* (Jerusalem, 5782), pp. 51–52, who also presents a detailed list of deviations from that ruling.

54 See paragraphs 266–268 of *Hok ha-Bittuah Le'umi* 5755-1995 and paragraphs 2–3 of *Takkanot ha-Bittuah Le'umi* 5736-1976.

55 See *Va'adat Sarim le-Inyanei Kevurah, Haḥlatah*, no. 4499, *kever* 16 and *Haḥlatah* 2217, *kever* 9. See also *Menuḥah Lo Nekhonah*, p. 14.



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