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CENTER FOR MODERN TORAH LEADERSHIP

RESTORING CHALLENGING HALAKHAH

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The default setting of Orthodox theology is that all biblical commands have eternal relevance. Now a default is not an absolute, and the halakhic tradition recognizes explicitly that some Torah commands were intended only for the Exodus generation. Many have suggested further that the laws of slavery are irrelevant wherever complete abolition is socially practicable. The question is how far and how often we can move off the default.

Some argue that when a Talmudic rabbi declares that a law "never was and never will be," he is actually signaling a moral shift in which a Torah law is quietly put out to pasture.

I am not convinced by this argument. It is true that the laws that "never were and never will be" include the ethically challenging cases of the "rebellious son," in which a 13-year-old boy is executed for gluttonous disobedience, and the "idolatrous city," which involves mass executions. Each of these properly causes moral discomfort. But they also include the relatively innocuous law of the leprous house, which suggests the operation of an exegetical principle other than moral discomfort.

In other cases, the rabbis or common practice have developed workarounds that in practice prevent the application of certain laws. The *prozbul* document, for example, largely eliminates the rule of *shemitat kesafim* (loan-forgiveness every Sabbatical year) by formally assigning loans to rabbinic courts, which are allowed to collect loans eternally. The courts then hire the original loaner as their collection agency, at a 100% commission.

Modern Orthodox Jews often express ambivalence about these workarounds. On the one hand, the rabbis' "judicial activism" is celebrated. On the other hand, there is a perception that such activism comes at the cost of integrity, that this is not really what the Torah wanted.

Moreover, if rabbis refuse to admit that they are free to legislate as they will, and insist that they are heteronomously bound by their most authentic understanding of Torah, they are critiqued as lacking ethical sensitivity. The implicit subtext is that if rabbis have the authority to do so, they should find ways to sideline all areas of *Halakhah* that are in moral tension with the values of their laities.

I suggest a different perspective on these workarounds. Perhaps they are best seen as attempts to shore fragments against ruins, as efforts to salvage some remnant of a law from a failure of interpretation.

Let us take *prozbul* as an example. *Shemitat kesafim* seems intended to prevent the accumulation of debt, and loan forgiveness has been a tactic for relieving the poor, and preventing revolution, from ancient times until today; consider the ongoing conversations between the European Union and Portugal. The Torah is unique in scheduling such forgiveness in advance rather than doing so reactively.

Halakhah permits explicitly negotiating loans with terms longer than seven years, so enforcing *shemitat kesafim* would not shut down the mortgage markets. But the standard halakhic loan comes due in thirty days, and thus is subject to mandatory forgiveness. The Torah warns us against using this as an excuse not to give out loans, but Hillel discovered that the poor were nonetheless being denied access to credit, and so developed the *prozbul*.

The result is that *shemitat kesafim* can be avoided for all loans, of whatever term. The only consequence of the law is the requirement to write a *prozbul*. In some cultures even that requirement fell away, and Rav Moshe Feinstein suggests that where there are secular legal barriers to the effective use of a *prozbul*, the requirement is waived. In other words, the *prozbul* is not a substantive requirement, but rather a mnemonic, a reminder that such a law existed even though it no longer has meaning.

The process of *chok*-ification, of relating to a *halakhah* as lacking any humanly discernible purpose, often leads to that *halakhah* having its application narrowed to the point of nonexistence. But I submit it would be better, if possible, to find a way to restore meaning to the law.

What would that entail? My favorite example is from the laws of *ribbit* and *neshekh*, the prohibitions against charging interest to fellow Jews. The Torah sets these out in *Shemot* 24:34, *Vayikra* 25:35-38, and *Devarim* 23:20-21. Like *shemitat kesafim*, enforcing these rules freezes credit, and so the rabbis developed the *heter iska*, a document that formally converts interest payments into a distributions of investment profits. This again serves a purely mnemonic function, and Israeli banks write one such document to generically cover in advance of all their otherwise forbidden activities.

Rabbi Chayyim Dovid HaLevi, the late Sefardi Chief Rabbi of Tel Aviv, suggested boldly that it was simply wrong to use a *heter iska* indiscriminately. Here is my translation of his words as found in the first volume of his response *Aseh Lekha Rav*, p. 182:

It seems worth a slightly extended discussion, not of the ground of the permission, which is straightforward, but rather of the circumstances in which it is possible and permitted to make use of it, because in that regard, in my humble opinion, there are practical halakhic implications.

The rationale for the Torah's prohibition of ribbit *is straightforward, and is hinted at in the term "*neshekh*"=biting, as is known. There are two circumstances in which a person is compelled to borrow money from his fellow, under duress.*

1) A person poor from the start whose regular life is one of want and poverty, but occasionally needs a sum of money greater than he can earn for a relatively unusual expenditure. To such a person there is an obligation to lend with no interest at all, as he will be compelled to repay the loan from his paltry stream of income, and if they take interest from him, he will pay only the interest for the rest of his life (and never pay down the principal). In my humble opinion this is hinted by the Torah in the prohibition of ribbit *in* Parashat Mishpatim: *"With money you must lend my nation, the poor among you . . ."*

2) A person not poor from the start, but rather has been brought low by a commercial loss of whatever cause, and he needs much support in order to recover. This person's friends are commanded to lend him the amounts of money he needs to reestablish himself. This is the intent of the Torah in the prohibition of ribbit *in* Parashat Behar*: "Should your brother sink . . . "*

In such circumstances, if the lender uses a heter iska*, he is distorting the intent of the original* mitzvah *and the intent of the* iska*-permission. Therefore, it is clear that if someone comes seeking to borrow a reasonable sum as an act of* chessed *(lovingkindness) in his time of duress, there is an obligation to lend to him interest-free, which is the Torah's straightforward commandment.*

But if a person comes and seeks to borrow great sums in order to initiate profitable new businesses, we find no obligation in the Torah to lend to such a person, who is not poor, nor brought low. However, since the Torah banned interest per se, such a person would be unable to borrow at all, as no one would lend him great sums so that he can use them for his own profit, since the lender could enter the same business himself. This generated the straightforward idea of the iska*, which is in practice a partnership on the conditions made clear by* halakhah.

Rabbi Halevi here restores the prohibition of *ribbit* as rational and morally powerful in the most capitalist of societies. In his understanding, the *heter iska* is a mechanism for protecting the genuine purpose of the eternally relevant law, rather than an effort to preserve the form of law whose purpose is defunct.

I submit that Modern Orthodoxy would be wise to adopt Rabbi Halevi's approach as a model for dealing with apparent cases of biblical law and rabbinic evasion. *Shabbat Shalom*!