



1. Examples of *Ha'arama* in Beitzah

- a. 11b – we allow salting multiple pieces of food to prevent spoilage
- b. 17b – we are even more strict with *ha'arama* than *mezid* by cooking without an Eruv Tavshilin
- c. 18a – we encourage the woman to purify her clothes by going to mikveh in them.
- d. 37a – there is a dispute, but *ha'arma* is presented as a proper solution

2. חידושי הרשב"א מסכת ביצה דף יא עמוד ב

רב אדא בר אהבה מערים ומלח גרמא גרמא. ואין אומרים בהערמות זו דומה לזו דלגבי עור התירו למלוח עליו לצלי ואמרי' בירושלמי מלח הכא ומלח הכא עד דמלח כוליה ואילו בפרקין דלקמן גבי מי שלא הניח עירובי תבשילין אסרי' ליה טפי ממזיד. ויש לי לומר דהערמות דהכא היינו דוקא בדברים שההפסד בא להן מחמת שמחת י"ט ושלא מחמת פשיעתו כמליחת העור ומליחת גרמא גרמא דא"א לו לחתיכות שהוא צריך ליי"ט בלא שחיטה ויפסדו עליו כל שאר החתיכות הילכך שרי ליה הערמה אבל גבי עירוב דפשיעתו גרמא לו שלא הניח עירובי תבשילין או שנאבד ונאכל בפשיעתו שלא נשמרו כראוי לפיכך אסרו עליו הערמה וכן כל כיוצא בזה.

3. *Ha'arama* in Halakha – The Facts, The Mechanism, and the Objective by Rav Mosheh Lichtenstein

This question is not new. It was already raised by the ancient sages, for the Mishna and Gemara sanction certain circumventions (*Ma'aser Sheni* 4:4, *Temura* 5:1, *Shevi'it* 10:3, *Beitzah* 11b, and elsewhere), while forbidding others. Already the Rambam writes that "a permitted stratagem is called a *ha'arama* (circumvention), whereas one that is forbidden is called *mirma* (deception)" (Commentary to the Mishna, *Temura* 5:1). The Rashba (*Beitzah* 11b, *s.v. Rav Ada*) writes that "regarding *ha'aramot*, we do not say that one is similar to the other." Later in the same passage, he formulates principles to distinguish between legitimate circumventions and those which are forbidden to be used.[1]

Before approaching the subject, let us note that the term *ha'arama* refers to two different halakhic situations. The first type is a case of halakhic circumvention, the legal validity of which is beyond doubt, so that he who employs the circumvention is exempt from his halakhic obligation. The only question that arises is that of the religious and/or moral legitimacy of utilizing such a circumvention. This category includes *ha'aramot* such as bringing produce into the house by way of the roof or a window in order to exempt it from *terumot* and *ma'asrot*, the sale of firstborn animals, and the like. The other type of *ha'arama* involves acting in a certain manner – different than usual – which causes the action to be permitted. In other words, it is not the act itself or its result that is forbidden, but rather a specific way of performing that act. Most of the *ha'aramot* mentioned in the various passages regarding work that is forbidden on *Shabbat* and *Yom Tov* fall into this category. The common denominator between these two categories is the use of a certain stratagem to permit an act that is otherwise forbidden. For this reason they are both designated as a *ha'arama*, even though we are dealing with two different phenomena. In the coming lines we shall deal with the legitimacy of utilizing a *ha'arama*, rather than with the efficacy of any particular *ha'arama*. We shall therefore focus on the examples taken from the first category.

The Difference Between Obligation and Opportunity in the Observance of Mitzvot

The observance of mitzvot rests on two foundations. The first is man's position as constantly subject to God's command, a situation that stems from his absolute obligation to the Master of the world. The prophet Yeshayahu proclaims: "I have formed you; you are My own servant" (Yeshayahu 44:21), and man's encounter with God from his very creation has been in the shadow of "And the Lord commanded the man, saying" (Bereishit 2:16). And let us not forget that Moshe Rabbenu's greatest praise was the fact that he was God's servant... Nevertheless, we are all familiar with the extensive literature regarding the reasons for the commandments in general... This is because observance of the *mitzvot* is not just a command and an assignment, but also a favor that God performs for His creatures. In other words, the *mitzvot* are an expression of God's love for His creations, and His desire to fill them with merit. If we examine the *mitzvot* from this perspective, then we should certainly search for their underlying reasons to the best of our abilities. This duality can be illustrated in many areas of the Bible and Halakha, too numerous to be presented here in detail. It is based upon the duality presented in Scripture regarding the nature of the relationship between Israel and God, one of lover and beloved, on the one hand, and one of master and slave, on the other...

Ha'arama as a Halakhic Solution

Let us return now to the matter of *ha'arama*. *Ha'arama* is a halakhic mechanism intended to circumvent the formal aspect of a prohibition. In other words, it is a stratagem that provides the possibility of evading the obligating imperative, by creating conditions in which the details of the *mitzva* do not apply. However, all that this can do is provide an exemption from the letter of the law, but it is incapable of providing an answer to the fact that the spirit of the law is not fulfilled and is not achieved, and that the person who utilizes the circumvention fails in that way. Formally, he does not violate any prohibition, but spiritually, his course is flawed. *Ha'arama* is, therefore, regarded as a negative phenomenon, and despite its efficacy, there is no justification to use it.

All this is true in a case where there is no great gap between the *mitzva* and its objective. To the extent that the reason for the *mitzva* and the details of its laws no longer go hand in hand, the situation changes. If the reason for the *mitzva* is no longer meaningful to us and our entire obligation to the *mitzva* stems from the absolute imperative of master of the universe, then creating a mechanism that evades the formal prohibition is no longer problematic, for the reason is no longer a factor. In all such cases, *ha'arama* becomes legitimate, and perhaps even desirable.

There is no need to emphasize the danger lying in the attempt to examine each and every *mitzva* in light of its reason, for the reasons for the *mitzvot* are concealed from us and how can we know the mind of the Almighty. Many reasons have been offered by many commentators; who can say which are more correct or less correct, and what are the esoteric that are hidden from us, and how can we rely on such a distinction. Indeed, the concern about error is real and sets a great warning sign before us. This notwithstanding, there are certain cases and defined situations regarding which we can say that the Torah did not mean for the command to apply to them. Let us take as an example the *mitzva* of releasing debts in the seventh year. The Torah inserts it next to the *mitzva* of giving charity, and relates in its context to the social dimension of helping one's neighbor. Releasing debts was intended to provide a poor person who had been forced to take a loan with the opportunity to open a new page once every seven years, without the burden of past debts preventing him from ever rehabilitating himself. The classic borrower in the Torah is a poor person who needs a longer economic breathing space ("If you lend money to my people, to the poor man among you..."), and if he fails to rid himself of the burden of debt that is oppressing him, the *mitzva* of charity requires that the debt be released. It is clear as day that the Torah never meant that every seven years this *mitzva* should give a windfall profit to large economic concerns like banks or insurance companies. However, even though the Torah never intended to make the banks richer on the backs of the simple saver, the *mitzva* is defined as a release of debt, and as such it formally applies to all loans. A situation is created of a great gap between the purpose of the *mitzva* and its practical application. Paraphrasing the prophet, this is a case of "that which I commanded, but never entered My mind."

Desirable *ha'arama* entered the world to resolve such a problem. *Ha'arama* resolves the technical halakhic problem without effecting a parallel change in the reason for the *mitzva*. Therefore, if the original reason is still valid and a person extends a private loan to his poor neighbor, or to a pauper who came to his door, the writing of a *prozbul* will provide him with the legal authority to collect his loan, but all of his actions and goals will stand in contradiction to the will of the Creator with respect to this *mitzva*. It is important to emphasize that even today such conduct is expected from one who lends money to a neighbor or relative. However, with respect to a financial institution, the relations with which are of a business nature, the goal of helping the poor is never fulfilled, and the only thing that prevents a person from collecting his debt is the legal reality in itself. With the writing of the *prozbul*, that problem altogether disappears, and there is no moral complaint or religious criticism of his actions, and whoever writes a *prozbul* in such a situation is to be praised.

Hillel's considerations when he enacted the *prozbul* were based on this principle, though his enactment related to "domestic loans" and not to savings accounts or business loans. Hillel saw that people were hesitating to extend loans, and thus they were in violation of a biblical prohibition, that the poor were left without a source of financing their basic needs, and that the objective of the *mitzva* was not being fulfilled whatsoever. In such a situation, Hillel decided that the Torah's objective would better be reached through the writing of a *prozbul*, through the waiving of the lofty social vision of the Torah...Disagreements may arise at times as to what should be preferred in given circumstances.

4. Restoring Challenging Halakhah (May 11, 2015), Rabbi Aryeh Klapper

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... In other cases, the rabbis or common practice have developed workarounds that in practice prevent the application of certain laws... 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 24 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.... [see below] 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.

5. שו"ת עשה לך רב חלק א סימן ס

טעם מצות התורה באיסור הרבית הוא פשוט, ונרמז בשמו "נשך" כידוע. והנה שני מקרים הם שבהם נזקק אדם ללוות כסף מחבירו בשעת דחקו. איש עני מעיקרו שכל חייו הסדירים הם חיי מחסור ועוני, אך לעתים נזקק הוא לסכום כסף גדול יותר מהמצוי בהישג ידו להוצאה בלתי - רגילה יחסית. לזה חובה להלוותו ללא רבית כלל, שהרי מהכנסתו השוטפת הזעומה עתיד הוא לשלם טפין טפין, ואם יקחו ממנו רבית, כל חייו ישלם אך את הרבית בלבד. לעני"ד לזה רמזה תורה במצות הרבית שבפרשת משפטים: אם כסף תלוה את עמי את העני עמך לא תהיה לו כנושה לא תשימון עליו נשך, ר"ל לאדם שהוא עני מעיקרו.

ויש אדם שאינו עני מעיקרו, אלא שמטה ידו במסחרו מסבה איזו שהיא, וזקוק הוא לתמיכה רבה כדי להתאושש שנית, אדם זה מצווים כל ידידיו להלוות לו סכומי כסף הדרושים לו לשיקומו.

ולזה כיונה תורה במצות הרבית שבפרשת בהר: וכי ימוד אחיך וגו' והחזקת בו וגו' וחי עמך, אל תקח מאתו נשך ותרבות ויראת מאלקיך. אם במקרים הנ"ל ישתמש המלוה בהיתר שטר - עיסקא, הרי הוא מסלף את כל עיקר כונת המצוה וכונת ההיתר של העיסקא (וכמו שיתבאר), ולכן, ברור שהבא לבקש הלוואה בסכום סביר לשם גמילות חסד בשעת דוחקו, חובה להלוותו ללא כל רבית, והיא מצות התורה כפשוטה. אבל כאשר בא אדם ומבקש הלוואה בסכומים גדולים כדי לפתח עסקים מכניסי רווחים, הרי לא מצאנו שום חיוב בתורה להלוות לאדם זה, שאין הוא עני, ואף לא אדם שמטה ידו, אך כיון שאסרה תורה את עצם הרבית, הרי שאדם זה אינו יכול ללוות כלל כי איש לא יסכים לתת לו סכומים גדולים שיתעסק בהם לרווחתו הוא, כשהמלוה עצמו יכול להתעסק בהם. מכאן צמח הרעיון הפשוט של העיסקא, שהוא למעשה שותפות עפ"י התנאים המבוארים בהלכה.

מכל האמור יוצא הלכה למעשה:

עני שבא ללוות סכום כסף סביר למטרה מסויימת בשעת דוחקו, וכ"ש אם צריך הוא לכך לקיום ממש, וכן אדם שהתמוטטו עסקיו ופונה בבקשת גמילות - חסד לידידיו ומכיריו לשם שיקומו, לאלה חובה להלוות כפשט מצות התורה ללא כל רבית, ושום שטר - עיסקא אינו מועיל ואינו מציל מאיסור.

אך אדם הרוצה לפתח עסקים גדולים, אין שום חובה להלוות לו כלל, ואם ירצה לשתף את המלוה בעסק אז מותר להלוות לו לפי היתר שטר - עיסקא, ואין בזה שום פקפוק אף לא ממדת חסידות שאין אדם חייב לתת מעותיו לאחרים שיתעשרו מהם.

7. Elana Stein-Hain: Rabbinic Legal Loopholes: Formalism, Equity and Subjectivity

Before offering a contextual explanation for BT's discomfort with intention *ha'arama* and attendant interest in how things look, what an agent's true interest is, etc., we detour into the realm of modern moral philosophy to understand what underlying philosophy such discomfort indicates... University of Pennsylvania Law professor Leo Katz points out that use and acceptance of loopholes generally betrays a deontological perspective on morality, from the Greek root *deon*, meaning obligation or duty. As opposed to consequentialists (e.g., utilitarians) who will go to any lengths to maximize the good, deontologists yield to constraints even when trying to achieve the best outcomes. In his words: "Simple consequentialism holds that good determines the right – the amount of goodness produced by an action is the sole determinant of its rightness – whereas the deontologist denies this, holding that other considerations are relevant."

The classic scenario which exemplifies their debate is that of a terminally ill patient on a respirator. If there is only one respirator available, and a terminally ill patient is connected to it, should the hospital administrator demand that the respirator be disconnected and given to a more promising patient? According to consequentialists, the answer is yes: in save a person whose changes for survival are great (or simply superior to other patients), one may actively remove the necessary life sustaining resources from someone who shows little or no hope of recovery. For deontologists, however, there is a constraint: maximizing the good cannot come at the expense of moral behavior. Deontologists instead offer the following scheme. Ordering respirators that must be disconnected for servicing and repair every few weeks may solve the problem. When the respirator connected to the terminally ill patient is disconnected for servicing, the hospital staff would simply not reconnect it to that patient, but would

connect it to a more promising patient. For deontologists, the passive process is more acceptable than the active removal of care, and so this may be done in order to maximize positive results.

The parallel to rabbinic legal loopholes is clear: while, occasionally, there are reasons to break the law, or even to change it, the rabbis basically feel constrained by legal process. Even in pursuit of the good, of values the rabbis (and, in their view, Jewish law) themselves cherish, one must be bound by technical statute. On this view, there is something inherently valuable and moral about following the law. Thus, it is, indeed, in their estimation, more acceptable to reach the same ends by legal means than by illegal means. This fits neatly within other rabbinic requirements for the significance of process and mode in defining and constraining outcomes, *inter alia*, not accomplishing a commandment by violating another one, the distinction between passive transgression and active transgression, etc. A number of other core principles of ancient rabbinic which are likewise compatible with deontology: e.g., preferential treatment of certain relationships over others (as in the case of saving one's teacher's lost item before saving that of one's parent, the ruling of saving oneself before others, offering charity to co-religionists before others), the concept of supererogation (*lifnim mi-shurat ha-din*). While these examples have yet to be analyzed through this lens in detail (including chronological and geographical stratification), as GEM Anscombe points out, it is quite natural for religious systems to sway toward the deontological, as they posit law as divine.

One must be wary to conclude though that a deontological emphasis suggests that any technically licit path is legitimate, regardless of the end goal. After all, deontologists are themselves interested in achieving positive consequences (and even maximizing the good) though they are distinguished from consequentialists by rule-constraint. The end goal itself must be considered good in order for the discussion of constraints even to begin...

Indeed, based on what we have seen in our study of rabbinic loopholes throughout the tannaitic and amoraic periods, the rabbis do not focus on process alone. After all, we have seen more examples of rejected loopholes than of accepted loopholes. True, some reasons offered for loopholes being rejected relate to constraints on the effectiveness or eligibility of loopholes in certain situations,⁸¹⁸ but the most obvious limitations on *ha'arama* is where the end goals are not desirable. Had the rabbis subscribed to a Brandeisian perspective, all would have been fair game. But, in truth, the consequences do become quite significant in determining whether even a completely licit process should be outlawed or not. This perspective is still cleanly within the rubric of deontological thinking; deontologists do not ignore the consequences of actions, but instead merely constrain one to achieve those consequences licitly.

In what we have seen in BT, however, there is something more than simply deontology at play. There are indications of Virtue Ethics being applied to *ha'arama*.⁸¹⁹ Re-popularized by G.E.M. Anscombe⁸²⁰ and MacIntyre in the mid/late-twentieth century, virtue ethics was first articulated by Aristotle and is more concerned with *agent* morality than with *act* morality. Succinctly stated: "Moral philosophy should focus more...on what kind of person it is best to be, rather than on what principles we should invoke to solve artificially constructed moral dilemmas."⁸²¹

However, though the rabbis are unwilling or see themselves as unable to change the law, whether as a result of their interaction with Roman legal culture, internal forces or probably both, they did indeed recognize the shortcomings of the positive law. They recognized that sometimes the values of the law itself cannot be upheld by conventional legal interpretation. Sometimes such interpretation might cause terrible financial loss or even sinful behavior. However, rather than simply accepting this reality, they are willing to use an age-old method of evasion not to buttress what they see as the values of the law. This is reflective of their commitment to law in its current technical iteration as well as their determination to square *halakha's* rules with its perceived morality. Despite the slippery slope invited by the use of legal dodges, the rabbis do their best to curtail the abuse of *ha'arama*. This too indicates either an extreme emphasis on the values they seek to uphold, and/or an understanding that people will not accept anything less.

Another question raised by *ha'arama* is that of trust in Jewish practitioners not to misuse these dispensations. On the one hand, the rabbis explicitly outlaw certain *ha'aramot*, yet they are willing to allow others, thus putting great faith in the individual. This, however, may begin to yield to cynicism and/or realism in amoraic times.

In BT, however, the focus of weeding out *ha'arama* is on those cases which involve the legal actor's intention. It seems that the methodology of stipulating intention is under examination rather than the fact of circumvention generally. .. Thus, in BT, we observe a move towards integrity, the inclusion of human being not only as object but as subject, a being who interacts dynamically with the law. This is evident in several ways. First, externally constructed intention becomes very circumscribed and limited in application: a person's actual subjective self matters: the distinction between obvious and inconspicuous *ha'arama* becomes a litmus test. Moreover, there is a concern with the impact of using loopholes on the individual him or herself. Will it lead him/her to be more lax with the law in the future? Also lurking in the background is the question of how the use of *ha'arama* may impact onlookers....