

DARCHAI NOAM - דרכי נועם

“Its ways are ways of pleasantness”

(Mishlei 3:17)

Behar/Bechukotai, May 2017

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How can the Parsha help us grow this week?

Behar/Bechukotai – loopholes in halacha

This week we read the double Parsha of Behar/Bechukotai. The Parsha of Behar contains two prohibitions, the effect of which are both overridden by Rabbinic loopholes.

Shemittah year

"For six years you may sow your field and for six years you may prune your vineyard; and you may gather in its crop. But the seventh year shall be a complete rest for the land, a Shabbat for Hashem. You shall not sow your field and you shall not prune your vineyard."

(Vayikra 25:3-4)

The seventh day of the week is Shabbat, when no melacha (categories of creative work) may be performed. Similarly, the seventh year is a Shabbat for the land of Israel, a whole year when agricultural work is forbidden.¹ Furthermore, any fruit or vegetables that do grow in this year are holy and cannot be bought or sold.

However, the Rabbis employ a number of legal mechanisms which allow the residents of Israel to obtain fruit and vegetables during the shemittah year.² One of these mechanisms is called 'heter mechira'. This mechanism relies on the principle that the prohibitions of the shemittah year only apply to land in Israel that is owned by Jews. Thus, Jewish owned farms in Israel that are sold to a non-Jew for the duration of the shemittah year are not subject to the prohibitions of the shemittah year. By relying on this principle, farmers are able to work the land and sell their produce. (Note that not all authorities agree with this leniency. However, the Chief Rabbinate of Israel does allow heter mechira and it is widely relied upon.)

One may suggest that the sale to the non-Jew is just a sham; a legal loophole simply devised in order to avoid the prohibitions of the shemittah year.

Charging interest

"You shall not take from him [your fellow Jew] interest or increase, and you shall fear your G-d, and let your brother live with you. You shall not give him your money with interest, nor shall you give your food with increase" (Vayikra 25:36-37)

We are encouraged to lend money to a fellow Jew as an act of charity. However, these pasukim teach us that we are prohibited from charging interest. (Those of us who have taken out a loan understand the pain that interest can cause.³) This prohibition applies even if the borrower is willing to pay interest and it even extends to non-financial benefits that are provided to the lender.

Yet, the fact is that frum Jewish people regularly charge interest to other Jews. This is particularly prevalent in Israel since the majority of the participants in the economy are Jewish. For instance, Jewish owned banks that give mortgages to Jewish home owners and provide loans to Jewish businesses. Indeed, it is difficult to imagine how the modern economy in Israel could function without interest. How can we explain this behaviour in light of the explicit prohibition in the Torah?

The Rabbis created a legal mechanism known as a 'heter iska'. This is a legal document which treats part of the loan as an investment. As an investor, the 'lender' should theoretically be entitled to the profits of the business,

¹ The last observance of the Shemittah year took place in Israel in the year 5775 (2014-2015).

² These include: growing produce hydroponically (i.e. not in the "land"); distributing produce for free (only the expenses are paid for, not the produce itself); produce grown on land owned by non-Jews; and of course importing produce from other countries.

³ As a fun exercise, try adding up all of your mortgage payments over the life of the loan and comparing it to the amount that you actually borrowed. You will be shocked!

and he would also have to bear any losses. However, in practice, the borrower agrees to pay a fixed amount in lieu of the profits (being an equivalent amount to what the 'interest' would have been).⁴

One might suggest that this heter iska is a loophole which is exploited simply to circumvent the Torah's clear prohibition against charging interest.

Other cases in halacha where the Rabbis invented loopholes to avoid a clear prohibition include the prohibition against owning chametz on Pesach. The Rabbis allow us to sell our chametz to a non-Jew before Pesach and buy it back again afterwards.

How can we understand these halachic loopholes?⁵

There is a very common phenomenon that occurs in legal systems throughout the world. Whenever a government passes a law, it is effectively an invitation to creative lawyers to find loopholes.⁶ This is particularly evident in tax law. Many wealthy individuals pay good money to clever lawyers to find a way to minimise their tax. If a loophole is found, the government will often amend the legislation to close the loophole. Then the lawyers will inevitably try to find another loophole in the newly amended law. And the government will subsequently amend the law again to try to close that loophole.⁷ And so the cycle continues. If the government had been able to foresee all of the loopholes in the beginning, they would not have passed the law in the form that they did. Rather, they would have firstly re-written the law, and waited until it was perfect before passing it.

This is where government law and Divine law diverge. When the All-Knowing and All-Powerful Creator prepared His laws, He obviously could foresee all possible loopholes that the Rabbis may devise in the future. It is ludicrous to suggest that a clever Rabbi could outsmart Hashem and discover a loophole in Hashem's Divine law. Therefore, Hashem must have deliberately included 'wiggle room' in His commandments. The wiggle room is not an oversight, but rather a sign of an All-Perfect, All-Compassionate G-d authoring laws for fallible, non-perfect humans. In His infinite wisdom, Hashem left it up to the Rabbis to decide when it was appropriate to rely on these 'loopholes'.

For example: in the past, when people lived in small one-room houses and baked their bread fresh every day, it may not have been relevant or necessary to devise a legal mechanism to allow Jews to keep chametz in their house over Pesach. However, when people live in large modern houses with cupboards and freezers full of food (and large whisky collections!) such legal loopholes are needed. In a simple agrarian society, it might be possible to run an economy without interest. However in a modern, sophisticated economy, it is almost unimaginable. In days of old, people may have had the emunah required to stop all agricultural work during the shemittah year and calmly rely on the Torah's guarantee of a bumper crop to meet their needs. However, these days unfortunately most of us do not have such a high level of faith.

We see that Hashem, in His wisdom, knows in advance the future level that we will be on and the conditions that we will face. Thus He deliberately, and mercifully, builds in some flexibility into the system! Thank G-d for that!

Let's try something this week:

If we examine the laws closely we will see that Hashem has written them in a compassionate and flexible way. So too, we can emulate Hashem and relate to others in a compassionate, empathetic and flexible manner.

Shabbat Shalom, Rabbi Ledder.

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⁴ This is a very over-simplified explanation of a complex topic. If one needs a heter iska, it is important to consult with a qualified Rabbi **before** entering into the transaction. Every situation needs to be assessed on its merits and it is often insufficient to just rely on a template document.

⁵ The following answer is based on a shiur by Rabbi Yosef Zvi Rimon.

⁶ I am not trying to denigrate lawyers. Some of my best friends are lawyers!

⁷ This often involves inserting new sections into the legislation. This can play havoc with the section numbering. For example, a section in the Australian Income Tax Assessment Act 1936 is numbered 159GZZZZH!

About Darchai Noam

The pasuk in Mishlei (3:17) describes the Torah as follows: "Its ways are ways of pleasantness (Darchai Noam) and all its paths are peace". The Torah is our guidebook for life. It is packed full of good advice as to how we should live our lives.

The aim of the Darchai Noam weekly email is to examine an idea from the weekly parashah relating to good middot (character traits). It will focus particularly on treating each other with respect and how to interact with each other in a more peaceful and pleasant manner. It will also suggest some practical tips for implementing these ideas in our daily lives.

By learning together each week, and making an effort to regularly put the ideas into practice, with Hashem's help we can all gradually improve our character traits and our observance of 'v'ahavta l're'echa kamocho' – loving one's fellow as oneself.

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