

Weekly Internet Parsha Sheet
MISHPATIM 5783

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[This week's which came after pub. time of Hamelaket]

An Eye for an Eye? Really?

Why the Discrepancy Between the Written and Oral Traditions of Judaism?

By: Rabbi YY Jacobson

Abuse of Human Rights

In recent years, we have become shockingly aware of the atrocities and abuses of human rights in many Muslim countries. The beheadings, the floggings, the stoning, the burnings, crucifixions, and diverse forms of torture are practiced daily, not only by ISIS, but in scores of Muslim countries.

I saw a video of a child in Iran being punished for apparently stealing something. They laid him on the ground and a car ran over his arm, amputating it. These and similar scenes of horror taking place in the 21st century are common in many Muslim countries, while most University protests are directed against Israel.

A Harsh Religion?

One of the more popular old polemics against Judaism is that our faith is harsh; it is a religion of cold and cruel laws, devoid of love and compassion. Christians used to present Christianity as the religion of love, and Judaism as the religion of stern revenge. The founder of Christianity supposedly said, "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, 'If anyone strikes you on the right cheek, turn to him the other.'"

This is referring to a law in the book of Exodus and Leviticus, Mishpatim and Emor. The Torah states that if two men become engaged in a brawl and one of them shoves a pregnant woman, causing her to miscarry, the man responsible must pay compensation, the amount to be determined in court.

כב. וכי ינצו אנשים ונגפו אשה הרה ונצאו ילדיה ולא יהיה אסון עונשו יענש כפאשר ישית עליו בעל האשה ונתן בפללים:

22. And should men quarrel and hit a pregnant woman, and she miscarries, but there is no fatality, he shall surely be punished when the woman's husband makes demands of him, and he shall give [restitution] according to the judges' [orders].

כג. ויאם אסון יהיה ונתתה נפש תסת נפש:

23. But if there is a fatality, you shall give a life for a life,

כד. עין תסת עין שון תסת שון יד תסת יד רגל תסת רגל:

24. An eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot,

כה. כויה תסת כויה פצע תסת פצע חבורה תסת חבורה:

25. A burn for a burn, a wound for a wound, a bruise for a bruise.

Clearly, it seems, the law is that if one of the men kills the woman, he dies. If he maims her, he receives in return what he did to her. "An eye for an eye... a wound for a wound."

And yet, astonishingly, no Jewish court ever practiced this law, known in Latin as Lex Talionis, or the Law of Retaliation.[1]

The Proof of Maimonides

Maimonides, the 12th century sage, rabbi, physician, philosopher, leader, and the greatest codifier of Jewish law, writes:

רמב"ם הלכות חובל ומזיק א, ה: ומניין שזה שנאמר באברים "עין תחת עין . . ." (שמות כא, כד; ויקרא כד, כ), תשלומין הוא? נאמר "חבורה, תחת חבורה" (שמות כא, כה), ובפירוש נאמר "וכי יכה איש את ריעהו, באבן או באגרופ . . . רק שבתו ייתן, ורפוא ירפא" (ראה שמות כא, יח-יט). הא למדת ש"תחת" שנאמר בחבורה תשלומין, והוא הדין ל"תחת" הנאמר בעין ובשאר אברים.

He offers a wonderful proof:[2]

"An eye for an eye" covers two verses (Exodus 21:24-25), concluding a context of six verses (21:18-19, 22-25). If you view the verse in context, Maimonides argues, it is obvious that the Torah cannot be explained literally.

The chapter begins with a case of intentionally inflicted injury. It concludes with a case of accidental injury. The opening verses (18-19), on intentionally inflicted injury, read as follows:

יח. וכי יריבון אנשים והכה איש את רעהו באבן או באגרף ולא ימות: ונפל למשכב:

18. And if men quarrel, and one strikes the other with a stone or with a fist, and he does not die but is confined to [his] bed,

יט. אם יקום והתהלך בחוץ על משענתו ונקה המכה רק שבתו יתן: ורפא ירפא:

19. if he gets up and walks about outside on his support, the assailant shall be cleared; he shall give only [payment] for his [enforced] idleness, and he shall provide for his cure.

The closing verses (22-25), on accidentally inflicted injury, quoted above, reads as follows: "And if men shall fight and collide with a pregnant woman and she miscarries but does not herself die, he [the fighting man] shall surely be punished, in accord with the

assessment of [the value of the fetus]... But if there is a fatality, you shall give a life for a life; an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot; a burn for a burn, a wound for a wound..."

Asks the Rambam: We have a major contradiction. Here you tell me "a wound for a wound." If I wound the woman, I must be wounded as I wounded her. But just three verses earlier you told me that if I wound my friend with a stone or my fist all I need to do is to cover all medical expenses and pay his wage as a result of him being unable to work. There is a blatant contradiction here, which renders the text completely senseless.

Thus, the rabbis conclude, that what the verse meant with the words "a wound for a wound," or "an eye for an eye," "a tooth for a tooth," etc. is monetary compensation. If a person was hired to work for you for his entire life on all possible jobs, how much would the value decrease if he was missing an eye? That must be paid up, in addition to all of his or her medical expenses, and in addition to covering his or her wage during his illness, and in addition to paying for the pain and the humiliation. [3]

And then Rambam continues:

אף על פי שדברים אלו נראים מעניין תורה שבכתב, כולן מפורשין הן מפי משה מהר סיני, וכולן הלכה למעשה הן בידינו; וכזה ראו אבותינו דנין בבית דינו של יהושע, ובבית דינו של שמואל הרמתי, ובכל בית דין ובית דין שעמדו מימות משה ועד עכשיו.

Though this is obvious from the text itself, we have also heard this from Moses, who explained the text this way. So it was practiced in every Jewish court, in the court of Joshua, the court of Samuel, and in every Jewish court from the time of Moses to this very day.[4]

More Proofs

If we delve more into the text, we can see how convincing the argument is. The text says "And if men shall fight and collide with a pregnant woman and she miscarries but does not herself die, he [the fighting man] shall surely be punished, in accord with the assessment of [the value of the fetus]... But if there is a fatality, you shall give a life for a life; an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot; a burn for a burn, a wound for a wound..."

But what is the meaning of "life for life" if any harm follows? In this unintentional tragic mishap, can we seriously maintain that the Torah decrees the death penalty for the one who caused this accident? This is clearly an unfortunate circumstance for which the Torah set aside sites of refuge. Is the Torah

contradicting itself and saying here that if you kill someone by mistake, you get killed? Obviously, then, the Torah is referring to money.[5]

What is even more convincing is when we view the context. In the case of intentionally inflicted injury, the Torah does not introduce the punishment of "an eye for an eye." All that the Torah requires from the perpetrator is to pay for the time and medical expenses. This is contrary to the closing verse of an accidentally inflicted injury where the Torah introduces the phrase "an eye for an eye." Can we really assume that if I hurt you intentionally, my punishment is only monetary; and when I wound you by err, they punish me by amputation? Logically one is forced to interpret here the meaning of "eye for an eye" as the value of an eye, meaning financial compensation.

Furthermore, if the Torah meant, taking the eye of the injurer for the eye of the victim, the Torah would have said so. But the Torah never says, "take an eye for an eye." The Torah says, "and you shall give... an eye for an eye." Were the text's intention to extract an eye from the villain, the use of the word 'give' is inappropriate. The physical punishment of an "eye for an eye" is meant to take from the guilty, not to give to the victim. Giving implies something that is meant to reach the recipient. But if they take the eye of the perpetrator, what are they giving to the victim? Only monetary compensation fits that definition.

An Eye Beneath an Eye

The Gaon of Vilna offers a further brilliant insight. The Torah does not say, "an eye for an eye," It says, literally, "an eye beneath an eye." In correct Hebrew grammar, "an eye for an eye" should have been stated in these words: "ayin bead ayin," instead of "ayin tachat ayin," an eye beneath an eye. Why did the Torah not use the more appropriate "ayin bead (literally, for) ayin" instead of "ayin tachat" (literally, underneath)?

This hints to us that the punishment is beneath the eye. The three Hebrew letters for the Hebrew word ayin—"eye"—are ayin, yod, nun. If we take the letters that are directly "beneath" each of these letters, i.e., that follow them in the alphabet, we get the three letters pei, kaf, samech, which, when rearranged, yield the Hebrew word kesef, "money." [6]

[Those of you who question the method of interchanging letters to get kesef from ayin might consider the classic Stanley Kubrick film 2001. The

name of the computer in that film is HAL, which Kubrick derived from IBM, the letters that are immediately “beneath” the letters HAL in the English alphabet. This construct is called temurah.]

This truth is really expressed in the very word “tachat.” The word tachat connotes not identical substitution, but one item substituted for a different item. This strange phraseology of tachat is found in one other place in the Torah, in the Book of Genesis. After Abraham lifts his sword ready to sacrifice Isaac on Mount Moriah, he was suddenly told by the angel of G-d not to sacrifice Isaac, "Abraham went and took the ram and brought it up for a burnt offering instead of (tachat) his son." We see from here that tachat does not imply a duplicate substitution (retaliation), but rather implies monetary compensation.

The Talmud dedicates two pages in which nine of the greatest sages delve into the text and deduce that the meaning of the Torah is not physical punishment but monetary compensation. How, for example, could justice be served if the person who poked out his neighbor's eyes was himself blind? Or what if one of the parties had only one functioning eye before the incident? Clearly, there are many cases in which such a punishment would be neither equitable nor just.

In addition to this, how is it even possible to exactly duplicate bodily harm? Can you ever be sure it will be exactly an “eye for an eye”? [7]

Say What You Mean

Granted. But why doesn't the Torah simply say what it means? If the Torah never meant to mandate physical punishment in cases of personal injury, why wasn't the text more clearly written? A great deal of misunderstanding, misinterpretation, and trouble could have been avoided had the Torah simply stated, “The court shall levy the appropriate compensatory payment in cases of personal injury.”

Some even want to say that as society has become less barbaric, the rabbis reinterpreted the verse to mean one pays the damages for the eye, instead of actually taking out the eye of the perpetrator as it used to be done in the olden days. Yet this is simply untrue. Throughout all of Jewish history, we do not have a SINGLE RECORD of any Torah judge implementing “an eye for an eye!”

Two Perspectives

It is here that we come to discover the nuanced way in which Judaism has been presented. The biblical text is not a blueprint for practical law; the fact is that there is almost not a single mitzvah in the Torah that can be

fully understood when reading the biblical text. Not Tefilin, not Esrog, not Matzah, not Sukkah, not Mezuzah, not Mikvah, not Shabbos, and not Shofar.[8] Thus, Moses presented an oral explanation for the biblical text so that we can appreciate its full meaning.

What then is the purpose of the biblical text? It describes not so much practical law, but rather the full meaning of a person's actions from G-d's perspective. Its words, written often in code, capture the full scope and meaning of every single action of a person, on the most spiritual, abstract level, all the way down to the most concrete plane.[9]

Maimonides, here again, comes to the rescue. In a few brief words, he shares a very profound and moving idea.

רמב"ם הלכות חובל ומזיק א, ג: זה שנאמר בתורה "כאשר יתן מום באדם, כן יינתן בו" (אמור כד, כ), אינו לחבול בזה כמו שחבל בחברו, אלא שהוא ראוי לחסרו אבר או לחבול בו כמו שעשה; ולפיכך משלם נזקו. והרי הוא אומר "ולא תקחו כופר לנפש רוצח" (במדבר לה, לא), לרוצח בלבד הוא שאין כופר; אבל לחסרון אברים או לחבלות, יש כופר.

Rambam, Laws of Personal Injuries 1:3: “The Torah's statement ‘As a man shall inflict a wound upon a person, so shall be inflicted upon him’ does not mean that we should physically injure the perpetrator, but that the perpetrator is deserving of losing his limb and must therefore pay financial restitution.”

Apparently, the Rambam believes, as do many other scholars who echo the same sentiment, that the Torah confronts a serious dilemma as it moves to convey its deeply nuanced approach to cases of personal injury: using the tools at its disposal, how can Jewish law best reflect the discrepancy between the “deserved” and “actual” punishment?

An eye for an eye is the ultimate statement of human equality. Every person's eye is as precious as anyone else's. The eye of a prince is worth no more than the eye of a peasant. This was completely new in history, transforming the landscape of the moral language of civilization. (The Babylonian Code of Hammurabi, for example, legislated that the eye of a noble was of much greater value than the eye of a commoner.)

Had the Torah, however, mandated financial payment from the outset, the full gravity of the crime would not have been conveyed. The event would have been consigned to the realm of *dinei mamonot*, monetary crimes, and the precious nature of human life and limb would have been diminished.

The gravity of the crime is such that, on a theoretical level, on the level of “deserved punishment,” the case belongs squarely in the realm of *dinei nefashot*, capital law. The perpetrator may deserve the physical loss of a limb in return for the damage inflicted upon his victim. Torah law, however, will not consider physical mutilation as a possible punishment for a crime. The penalty must therefore be commuted into financial terms.

The Torah, therefore, proceeds to express, with delicate balance, both theory and practice within the law. First, the written text records the punishment for wounding your fellow, in terms of compensation. Then the Torah goes on to express the “deserved punishment” without any mitigation: “...an eye for an eye, a tooth for a tooth...” In this way, the severity of the crime is immediately made clear to all. The Oral Law serves as the vehicle of transmission, so we don’t err in practice.

Jewish law thus finds a way to memorialize both the “deserved” and the “actual” punishments within the halachic code.

No Atonement

Why is this so crucial? So that you never think that maiming someone’s body is merely a monetary issue, like breaking his watch. It is not! It is something you have no way of atoning for even if you pay him all the money in the world. Even if you did it by mistake, you can never compensate for it via finances alone.

It also teaches us the truth that there are no exceptions. An eye of a peasant child is no less of value than the eye of a powerful monarch. If I poke out that eye, I have done something for which there is no real way of atonement through money.

Maimonides more fully developed the idea that monetary restitution alone cannot atone for physical damages:

רמב"ם הלכות חובל ומזיק ה, ט: אינו דומה מזיק חברו בגופו, למזיק ממון, שהמזיק ממון חברו, כיון ששילם מה שהוא חייב לשלם, נתכפר לו. אבל חובל בחברו, אף על פי שנתן לו חמישה דברים, אין מתכפר לו; ואפילו הקריב כל אילי נביות, אין מתכפר לו, ולא נמחל עונו, עד שיבקש מן הנחבל וימחול לו.

"Causing bodily injury is not like causing monetary loss. One who causes monetary loss is exonerated as soon as he repays the damages. But if one injured his neighbor, even though he paid all five categories of monetary restitution — even if he offered to G-d all the rams of Nevayot [see Isaiah 60:7] — he is not exonerated until he has asked the injured party for

forgiveness, and he agrees to forgive him.” (Rambam, Personal Injuries, 5:9)

When Your Animal Kills

We have another fascinating example for this a few sentences further in Parshat Mishpatim, where an even more glaring example of the discrepancy between theory and practice in the realm of punishment emerges. In this case, both variables are bluntly recorded in the written text itself.

As the Torah discusses the laws of a habitually violent animal owned by a Jew, two conflicting consequences appear in the text for the very same crime.

The Torah states that, under normal circumstances, if an individual’s ox gores and kills another human being, the animal is put to death but the owner receives no further penalty. If, however, the animal has shown clear violent tendencies in the past — to the extent that the owner has been warned yet has failed to take appropriate precautions — the Torah emphatically proclaims, “...The ox shall be stoned and even its owner shall die.”

But in the very next verse, the text offers the condemned man an opportunity to escape his dire fate through the payment of a financial penalty assessed by the court.

כח. וכי יגח שור אֶת אִישׁ אוֹ אֶת אִשָּׁה וְנָתַתְּ סָקוֹל יִסְקַל הַשּׁוֹר וְלֹא יֵאָכַל אֶת בְּשָׂרוֹ וּבָעַל הַשּׁוֹר נָקִי:

28. And if a bull gores a man or a woman and [that one] dies, the bull shall surely be stoned, and its flesh shall not be eaten, and the owner of the bull is clear.

כט. וְאִם שׁוֹר נִגַּח הוּא מִתְמַלְּל שְׁלֹשָׁם וְהוֹעֵד בְּבָעָלָיו וְלֹא יִשְׁמְרֵנוּ וְהָמִית אִישׁ אוֹ אִשָּׁה הַשּׁוֹר יִסְקַל וְגַם בְּעָלָיו יוּמָת:

29. But if it is a [habitually] goring bull since yesterday and the day before yesterday, and its owner had been warned, but he did not guard it, and it puts to death a man or a woman, the bull shall be stoned, and also its owner shall be put to death,

ל. אִם כָּפַר יוֹשֵׁת עָלָיו וְנָתַן פְּדִיָּן נִפְשׁוֹ כָּל אֲשֶׁר יוֹשֵׁת עָלָיו:

30. Insofar as ransom shall be levied upon him, he shall give the redemption of his soul according to all that is levied upon him.

The written text itself seems bewilderingly contradictory. On the one hand, the Torah clearly states that the owner of a violent animal who killed another human being “shall also die.” Then, however, it says that he pays money to the heirs of the victim—the full “value” of the person as it were.

What is going on here? How can we take such a text seriously?

Once again, our question can be answered by considering the distinction between “deserved” and “actual” punishment.

The Torah wants us to understand that, on a theoretical level, the owner of the ox who killed a human deserves to die. His negligence has directly resulted in the loss of human life. On a practical level, however, this sentence cannot be carried out. Halacha only mandates capital or corporal punishment in cases of active crimes. Crimes of “un-involvement,” consisting of the failure to do something right, cannot carry such penalties in an earthly court. The owner who fails to guard his dangerous animal can only be fully punished through heavenly means.

Through carefully balancing the textual flow, the Torah manages to convey a complex, multilayered message of personal responsibility in a nuanced case of “un-involvement.”

Azar's Question

Yet it goes one step deeper.

During the years when Rabbi Avraham Yitzchak Kook (1865-1935) served as chief rabbi of Jaffa, before he became chief rabbi of Israel (then Palestine), he met and befriended many of the Hebrew writers and intellectuals of the time. His initial contact in that circle was the 'elder' of the Hebrew writers, Alexander Ziskind Rabinowitz, better known by the abbreviation Azar. Azar was one of the leaders of Po'alei Tzion, an anti-religious, Marxist party; but over the years, Azar developed strong ties with traditional Judaism. He met with Rabbi Kook many times, and they became friends.

Azar once asked Rabbi Kook: How can the Sages interpret the verse "an eye for an eye" as referring to monetary compensation? Does this explanation not contradict the peshat, the simple meaning of the verse?

True, as we recall, the Talmud brings a number of proofs that the phrase "eye for an eye" cannot be taken literally. But what bothered Azar was the blatant discrepancy between the simple reading of the verse and the Talmudic interpretation. After all is said and done, if an "eye for an eye" in fact means monetary compensation, why does the Torah not state that explicitly?

The Parable

Rabbi Kook responded by way of a parable. The Kabbalists, he explained, compared the Written Torah to a father and the Oral Torah to a mother. Just as the mother absorbs the seed of the father, and develops it

into an embryo, and ultimately a full fetus, so the oral tradition develops and explains the seminal, brief and cryptic text of the written Torah.[10] When parents discover their son has committed a grave offense, how do they react—at least back in the 1920s when Rabbi Kook had this conversation with Azar. (Today, we know, things have changed somewhat; yet the principle behind this remains the same).

The father immediately raises his hand to punish his son. But the mother, full of sensitivity and compassion, rushes to stop him. 'Please, not in anger!' she pleads, and she convinces the father to mete out a lighter punishment.

An onlooker might conclude that all this drama was superfluous. In the end, the boy did not receive corporal punishment. The mother was triumphant. Her husband knew he has to listen to her. Why make a big show of it?

In fact, the scene provided an important educational lesson for the errant son. Even though he was only lightly disciplined, the son was made to understand that his actions deserved a much more severe punishment.

A Fitting Punishment

This is exactly the case when one individual injures another. The offender needs to understand the gravity of his actions. That is why the written text, the “father,” declares: An eye for an eye. In practice, though, he only pays monetary restitution, as the Oral Law rules. For the Oral Law is like the mother.

But he should not think that with money alone he can repair the damage he inflicted. How will not he think so? Only if the “father”—the written Torah—states in uncompromising terms “an eye for an eye; a tooth for a tooth; a wound for a wound.”

Azar was astounded. He was impressed how one can clarify legal concepts in Jewish Law by way of Kabbalistic metaphors. Azar remarked: “I once heard the Rabbi say that the boundaries between Halacha and Kabbalah, the exoteric and the esoteric areas of Torah, are not rigid. For some people, Torah with Rashi's commentary is an esoteric study; while for others, even a chapter in the Kabbalistic work Eitz Chayim belongs to the revealed part of Torah.”[11]

Here we have one example of how one verse in Torah, far from expressing the harshness of Judaism, actually served a blueprint to teach our people the infinite dignity of the human body carved in G-d's image.

This we must teach the world.

Footnotes:

[1] It is interesting to note that The Code of Hammurabi is a well-preserved Babylonian law code of ancient Mesopotamia, dating back to about 1754 BCE. It is one of the oldest deciphered writings of significant length in the world. The sixth Babylonian king, Hammurabi, enacted the code, and partial copies exist on a human-sized stone stele and various clay tablets. The Code consists of 282 laws, one of them is: "an eye for an eye, a tooth for a tooth" (lex talionis). We do not know if the Lex Talionis of Hammurabi's Code was carried out literally in ancient times. There are scholars who believe that the Code itself was not the law code by which the society operated, but rather the fulfillment of a so-called "divine mandate" by the gods to the king: a law code to prove he was divinely ordained to rule, but not one which was operative in ancient Babylon. Regardless, in Judaism "an eye for an eye..." was never understood literally.

[2] Many wondered why the Rambam came up with his own proof, not stated in the Talmud exploring this matter. The truth is that the source of the Rambam's proof is in Mechilta Derashbi Parshas Mishpatim.

[3] See the details in Rambam Hilchos Chovel Umazik ch. 1.

[4] Question: How then can Rabbi Eliezer, in Talmud Bava Kama p. 83 interpret the verse literally? Many say that what Rabbi Eliezer means is that the perpetrator pays "demei mazik," the worth of the limbs of the perpetrator, rather than the victim, thus conveying that in essence, it was his limb that had to be punished. See at length Torah Shlaimah to Mishpatim and Meluim to Mishpatim, in the chapter dedicated to this discussion.

[5] We can explain that this is the case where one man intended to kill his fellow, and then killed the woman by error. See Rashi to this verse for the two opinions on the matter. According to the Halacha, if one has the intention to kill someone and kills someone else, he is not killed.

[6] Gaon of Vilna in Torah Gems, volume 2, p. 151

[7] Talmud Bava Kama pp. 83-84. Here is just one excerpt from there: It was taught in a baraita: Reb Shimon b. Yochai says: "Eye for eye" means pecuniary compensation. You say pecuniary compensation, but perhaps it is not so, and actual retaliation by putting out an eye is meant? What then will you say where a blind man put out the eye of another man, or where a cripple cut off the hand of another, or where a lame person broke the leg of another? How can I carry out, in this case, the

principle of retaliation of "eye for eye" seeing that the Torah says, "You shall have one manner of law," implying that the manner of law should be the same in all cases? (Baba Kamma 84a).

[8] See at length Tanya Igeres Hakodesh ch. 29.

[9] The great 14th-century kabbalist Rabbi Menachem Rikanti in his commentary on Mishpatim explains, amazingly, the mystical meaning of this verse. A human body and all of its limbs reflect the Divine metaphysical "body," known as "Adam Haelyon." The body embodies the Divine attributes correlating to the various parts of one's body. When one knocks out the tooth of another, he, so to speak, removes the spiritual "tooth" within the Divine source, and indeed loses the spiritual source of his tooth. If we can appreciate the Torah text also as a spiritual manual for the spiritual limbs of a person, then the verse actually also has a literal meaning.

[10] Tanya Igeres Hakodesh ibid.

[11] This story is recorded in Sapphire from the Land of Israel. Adapted from "Malachim Kivnei Adam" by R. Simcha Raz, pp. 351, 360.

Doing and Hearing MISHPATIM

Rabbi Jonathan Sacks

One of the most famous phrases in the Torah makes its appearance in this week's parsha. It has often been used to characterise Jewish faith as a whole. It consists of just two words: na'aseh venishma, literally, "we will do and we will hear" (Ex. 24:7). What does this mean and why does it matter?

There are two famous interpretations, one ancient, the other modern. The first appears in the Babylonian Talmud,[1] where it is taken to describe the enthusiasm and whole-heartedness with which the Israelites accepted the covenant with God at Mount Sinai. When they said to Moses, "All that the Lord has spoken we will do and we will hear," they were saying, in effect: Whatever God asks of us, we will do – and they said this before they had heard any of the commandments. The words, "We will hear," imply that they had not yet heard – neither the Ten Commandments, nor the detailed laws that followed as set out in our parsha. So keen were they to signal their assent to God that they agreed to His demands before knowing what they were.[2]

This reading, adopted also by Rashi in his commentary to the Torah, is difficult because it depends on reading the narrative out of chronological sequence (using the principle that “there is no before and after in the Torah”). The events of chapter 24, according to this interpretation, happened before chapter 20, the account of the revelation at Mount Sinai and the Ten Commandments. Ibn Ezra, Rashbam, and Nachmanides all disagree and read the chapters in chronological sequence. For them, the words *na’aseh venishma* mean not, “we will do and we will hear,” but simply, “we will do and we will obey.”

The second interpretation – not the plain sense of the text but important nonetheless – has been given often in modern Jewish thought. On this view *na’aseh venishma* means, “We will do and we will understand.”[3] From this they derive the conclusion that we can only understand Judaism by doing it, by performing the commands and living a Jewish life. In the beginning is the deed.[4] Only then comes the grasp, the insight, the comprehension.

This is a signal and substantive point. The modern Western mind tends to put things in the opposite order. We seek to understand what we are committing ourselves to before making the commitment. That is fine when what is at stake is signing a contract, buying a new mobile phone, or purchasing a subscription, but not when making a deep existential commitment. The only way to understand leadership is to lead. The only way to understand marriage is to get married. The only way to understand whether a certain career path is right for you is to actually try it for an extended period. Those who hover on the edge of a commitment, reluctant to make a decision until all the facts are in, will eventually find that life has passed them by.[5] The only way to understand a way of life is to take the risk of living it.[6] So: *Na’aseh venishma*, “We will do and eventually, through extended practice and long exposure, we will understand.”

In my Introduction to this year’s Covenant and Conversation series, I suggested a quite different, third interpretation, based on the fact that the Israelites are described by the Torah as ratifying the covenant three times: once before they heard the commandments and twice afterward. There is a fascinating difference between the way the Torah describes the first two of these responses and the third:

The people all responded together, “We will do [*na’aseh*] everything the Lord has said.” (Ex. 19:8)

When Moses went and told the people all the Lord’s words and laws, they responded with one voice, “Everything the Lord has said we will do [*na’aseh*].” (Ex. 24:3)

Then he took the Book of the Covenant and read it to the people. They responded, “We will do and hear [*na’aseh venishma*] everything the Lord has said.” (Ex. 24:7)

The first two responses, which refer only to action (*na’aseh*), are given unanimously. The people respond “together.” They do so “with one voice.” The third, which refers not only to doing but also to hearing (*nishma*), involves no unanimity. “Hearing” here means many things: listening, paying attention, understanding, absorbing, internalising, responding, and obeying. It refers, in other words, to the spiritual, inward dimension of Judaism.

From this, an important consequence follows. Judaism is a community of doing rather than of “hearing.” There is an authoritative code of Jewish law. When it comes to *halachah*, the way of Jewish doing, we seek consensus.

By contrast, though there are undoubtedly principles of Jewish faith, when it comes to spirituality there is no single normative Jewish approach. Judaism has had its priests and prophets, its rationalists and mystics, its philosophers and poets. Tanach, the Hebrew Bible, speaks in a multiplicity of voices. Isaiah was not Ezekiel. The book of Proverbs comes from a different mindset than the books of Amos and Hosea. The Torah contains law and narrative, history and mystic vision, ritual and prayer. There are norms about how to act as Jews. But there are few about how to think and feel as Jews.

We experience God in different ways. Some find Him in nature, in what Wordsworth called “a sense sublime / Of something far more deeply interfused, / Whose dwelling is the light of setting suns, / And the round ocean and the living air.”[7] Others find Him in interpersonal emotion, in the experience of loving and being loved – what Rabbi Akiva meant when he said that in a true marriage, “the Divine Presence is between” husband and wife.

Some find God in the prophetic call: “Let justice roll down like a river, and righteousness like a never-failing stream” (Amos 5:24). Others find Him in study, “rejoicing in the words of Your Torah...for they are our life and the length of our days; on them

we will meditate day and night.”[8] Yet others find Him in prayer, discovering that God is close to all who call on Him in truth.

There are those who find God in joy, dancing and singing as did King David when he brought the Holy Ark into Jerusalem. Others – or the same people at different points in their life – find Him in the depths, in tears and remorse, and a broken heart. Einstein found God in the “fearful symmetry” and ordered complexity of the universe. Rav Kook found Him in the harmony of diversity. Rav Soloveitchik found Him in the loneliness of being as it reaches out to the soul of Being itself.

There is a normative way of performing the holy deed, but there are many ways of hearing the holy voice, encountering the sacred presence, feeling at one and the same time how small we are yet how great the universe we inhabit, how insignificant we must seem when set against the vastness of space and the myriads of stars, yet how momentarily significant we are, knowing that God has set His image and likeness upon us and placed us here, in this place, at this time, with these gifts, in these circumstances, with a task to perform if we are able to discern it. We can find God on the heights and in the depths, in loneliness and togetherness, in love and fear, in gratitude and need, in dazzling light and in the midst of deep darkness. We can find God by seeking Him, but sometimes He finds us when we least expect it.

That is the difference between na’aseh and nishma. We do the Godly deed “together.” We respond to His commands “with one voice.” But we hear God’s presence in many ways, for though God is one, we are all different, and we encounter Him each in our own way.

[1] Shabbat 88a–b.

[2] There are, of course, quite different interpretations of the Israelites’ assent. According to one, God “suspended the mountain over them,” giving them no choice but to agree or die (Shabbat 88a).

[3] The word already carries this meaning in biblical Hebrew as in the story of the Tower of Babel, where God says, “Come let us confuse their language so that people will not be able to understand their neighbour.”

[4] This is the famous phrase from Goethe’s Faust.

[5] This is similar to the point made by Bernard Williams in his famous essay, “Moral Luck,” that there are certain decisions – his example is Gauguin’s decision to leave his career and family and go to Tahiti to paint – about which we cannot know whether they are the right decision until after we have taken them and seen how they work out. All such existential decisions involve risk.

[6] This, incidentally, is the Verstehen approach to sociology and anthropology; namely that cultures cannot be fully understood from the outside. They need to be experienced from within. That is one of the key differences between the social sciences and the natural sciences.

[7] William Wordsworth, “Lines Composed a Few Miles Above Tintern Abbey, on Revisiting the Banks of the Wye during a Tour, July 13, 1798.”

[8] From the blessing before Shema said in the evening prayer.

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Rabbi Yaakov Asher Sinclair -

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Parshat Mishpatim

The Thing is Not a Play

“And these are the ordinances that you should place before them:” (21:01)

An actor-manager was a leading actor who set up his own permanent theatrical company and managed the business, sometimes taking over a theater to perform select plays in which he usually starred. It was a method of theatrical production used consistently since the 16th century, particularly common in 19th-century Britain and the United States. One of the last great actor-managers was Sir Donald Wolfitt. There’s an apocryphal story about Sir Donald, that in one particular classical play he had to read a long excerpt from a scroll that was presented to him by a page boy. Wolfitt never bothered to actually learn the speech, instead reading it out every night. One night, someone persuaded the page boy to bring to the stage a blank scroll. With great gravitas, Wolfitt unwound the scroll, saw that it was blank, handed it back to the page boy, saying, “Here. You read it.”

An audience would never guess the shenanigans and cover-ups that actors perpetrate to keep the show going. As the saying goes, “The show must go on!”

How would an actor feel if every member in the audience had a script and a little flashlight to monitor every line he said? Well, that’s exactly what a ba’al koreh – someone who reads the Torah for the congregation – must feel. Everyone in “the audience” is following his every line, listening carefully to make sure there is not even the slightest deviation.

Of course, the difference is that the Torah is reality. The Zohar HaKadosh says that “The Holy One looked into the Torah and created the world.” Just as the world is immutable, so is the Torah. It’s not as Hamlet said, “The play’s the thing.” Rather, “The thing (i.e. the Torah) is not a play.”

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Chief Rabbi Ephraim Mirvis

Mishpatim: The best way to give financial help

14 February 2023

What is the best way in which we can give financial help to another?

The Shulchan Aruch in Chosen Mishpat tells us that when one gives a loan to a needy person, of course the Torah tells us we may not receive interest, but when giving that loan, one should have a contract, and there should be witnesses. This is in order that the receiver should not claim at a later time, that he wasn't given the money. You need to have proof in order to protect yourself.

However, the Shulchan Aruch also tells us in Yoreh Deah that if you're giving charity to a poor person, the finest way to do it is in secret. In fact, the ultimate form of charity is when the receiver doesn't even know who the giver is.

So how is that possible? On the one hand, we need witnesses, and on the other hand, it needs to be done in secret.

The Chida derives an answer from a verse in Parshat Mishpatim. It is a seemingly clumsy verse. The Torah says, "Im kesef tarveh et ami, et heani imach," translated literally as, "If you give a loan of money to someone within the people, the poor are in your midst."

What sense can we make of these words?

The Chida tells us to read it as follows:

"Im kesef tarveh," – If you are giving a loan,

"Et ami," – if you would like to receive that money back, and you want to have proof, it must be done 'et ami', in the presence of other people within the nation, in order that you should be protected. However,

"Et he'ani," – "if you're giving money to a poor person, as an outright gift or perhaps even as a loan just to save his dignity, so that the person feels better but you don't ever expect to get it back, then

"Imach," – it should be just with your knowledge only. No announcement, no contract and no witnesses.

So therefore in our rich, God-given heritage we can see how within Jewish tradition, the rights of those who give are always protected and at the same time, we should go the extra mile in order to preserve the dignity of those who are receiving.

Shabbat shalom.

Rabbi Mirvis is the Chief Rabbi of the United Kingdom. He was formerly Chief Rabbi of Ireland.

Blessings over Enjoyment and Gratitude

Revivim

Rabbi Eliezer Melamed

Birkot ha-nehenin (blessings recited over enjoyment) determines the moral value of gratitude a person has, and from this, learns to appreciate those around him, and to thank the Creator of the world * A person full of gratitude is a happy person whose gaze is focused on the good in his life; on contrary to him, one who is ungrateful is never

happy because he always feels he has not been served properly * Our Sages enacted a separate blessing for fruits of the tree and fruits of the ground in order to increase the praise of God * The determining factor regarding the blessing of the fruit of a tree or a vegetable, is the withering of the stem from year to year

The Value of Gratitude between a Person and His Friend

Above all, brachot (blessings) express the important moral value of hakarat ha-tov (gratitude). To understand this value properly, we will first express the importance of hakarat ha-tov between a person and his friend. A person who knows how to be thankful is one who is able to exit his egoistic bubble and connect to his surrounding world, and see it positively. As a result, he is able to relate to those around him with humility, and appreciate them for all the good they grant him. He does not think that everyone must serve him, and therefore, recognizes the value of all the favors and gifts his family members and friends provide him.

However, it is not enough for one to be grateful in his heart; he must also express it with words of thanks, thereby making those around him happy. The love between them will strengthen, the desire of both to perform good deeds will intensify, and kindness will spread from them to all those around them.

On the other hand, one who is ungrateful sins in pride, thinking that everyone else must serve him, and therefore, does not feel the need to thank anyone for the good they have done for him. He will not be happy either, because he will always feel that he was not served properly, and was not treated adequately. He is also harmful to those around him, by causing his family members and friends to be disappointed in their good deeds.

Gratitude to God, and the Gifts It Contains

The greatest thanks is due to the Creator of the world, who created the entire world with His goodness, grace, kindness and mercy. 'Praise the LORD; for He is good, His steadfast love is eternal'. Indeed, God, blessed be He, does not need our praises. Rather, the Almighty wanted to bestow good upon us, and gave us the opportunity to thank Him, and bless Him, as it is written: "When you have eaten your fill, give thanks to your God" (Deuteronomy 8:10). By way of this, the natural emunah (faith) that exists in the hearts of man is expressed, and from this, a person becomes accustomed to seeing the Divine grace that accompanies him at all times, and to rejoice in it. How many special gifts are hidden in this!

The first gift: a deep joy of life. One of man's difficult problems is that he tends to take all the good things in his life for granted. His thoughts are focused on what he lacks, and thus, his life is full of sorrow and frustration. However, if one pays attention to all the good things in his life, he will merit to enjoy and rejoice in it. The brachot focus a person's gaze on the goodness and joy in his life. Even when one does not have the proper kavana (intention)

while saying the blessings, in a gradual process, the brachot deepen the view of all the good in life, and the more kavana one has – the stronger one’s ability to see the good becomes, and with it, the joy of life.

The second gift: spiritual value. By means of the brachot we merit perceiving the Divine spark that invigorates each and every food, and thus, our enjoyment of the food gains depth and meaning. “To teach you that man does not live on bread alone but on every word that comes from the mouth of the Lord.” In other words, the food itself nourishes the body, and paying attention to God who created the world and invigorates the food, nourishes the mind, spirit, and soul. In this way, eating also takes on a meaning of value, by which man merits to connect with his Creator, and give thanks to Him.

The third gift: out of observing and thanking God for the goodness He has given man, he strengthens his desire to cleave to God and follow His ways, and obtains from the food he eats strength and vitality to add good and blessing to the world, and to work for its perfection, with righteousness and justice, kindness and mercy.

It is likely that saying blessings with kavana will also benefit those who wish to diet but find it difficult. The more kavana one has in saying the blessing, the deeper the pleasure he will get from his eating, thus tempering his desire to overeat.

The Divine Blessing that is drawn by the Brachot Moreover, by way of the blessings life is added to the world, because life depends on the world’s connection to the Creator, the Source of life. Accordingly, with every bracha we recite, a conduit of abundance is created through which ‘dews of blessing’ and life, descend into the world. This is the meaning of the word ‘bracha’ – to increase, and multiplicity, as written: “You shall serve your God, who will bless your bread and your water” (Exodus 23:25) – i.e., God will increase and multiply bread and water. Similarly, it is written: “God will favor you and bless you and multiply you—blessing your issue from the womb and your produce from the soil, your new grain and wine and oil, the calving of your herd and the lambing of your flock, in the land sworn to your fathers to be assigned to you” (Deuteronomy 7:13), and the meaning is that God will multiply and add to the fruit of our womb and our land. God Himself is complete and infinite, and does not need any addition. The bracha is that by our acknowledgment of the good that He has showered upon us, God will multiply and add more abundance, so that we will be able to adhere to His ways, and add more good and blessing to the world.

Everything Good Requires Effort

In order to acquire anything that has real value, one must make an effort and be diligent, as Rabbi Yitzchak said: “If a person says to you: I have labored and not found success, do not believe him. Similarly, if he says to you: I have not labored but nevertheless I have found success, do not

believe him. If, however, he says to you: I have labored and I have found success, believe him” (Megillah 6b).

The same goes for becoming accustomed to seeing the good in the world and the ability to be thankful for it, and as a result, experiencing a feeling of deep satisfaction that motivates a person to add good and blessings to all those around him. For this purpose, one must study thoroughly the subject of brachot and their halachot, become accustomed fulfilling them, and thus, merit all the goodness and blessing in them.

Because of the great value of saying brachot, our Sages said that one who wishes to be a hasid (a pious person), should be diligent in matters of brachot (Baba Kamma 30a), because by way of his brachot, he adds kindness and blessing to the world.

Good toward Heaven, and Good toward People

By becoming accustomed to thanking God for all the good things He has given us, a person learns to pay attention to all the good things in his life. He does not take them for granted, and as a result, is able to thank people from whom he benefits in a deeper way.

And so throughout the Torah – the mitzvot between man and God, and the interpersonal mitzvot are connected to each other, and reinforce one another. The better it is towards Heaven, the better it is for humanity; and the better it is for humanity, the better it will be for Heaven. Thus our Sages said, that a good righteous man is “good for Heaven, and mankind” (Kiddushin 40a).

Between Fruits of the Ground and Fruits of Trees

Q: Why did the Sages make a distinction between a bracha for fruits of the ground and for fruits of the tree, and not determine one blessing for both?

A: In general, it is preferable to say a special blessing for each type of food, because each type of food gives a person a unique benefit and pleasure, and if he were to bless all types uniformly and indifferently, he would not give expression to the abundance of the blessing that God has given to the world. On the other hand, if he were to recite his own blessing on a peach, and his own blessing on an orange, and so forth on each and every species, he would not comprehend the overall objective of God in His world, but would sink into the minute details of the cumbersome world. By way of fixing blessings for the different types of foods, on the one hand, there is an expression of the classification of the Divine blessing, and on the other hand, an expression of the overall objective.

Therefore, the division is between the fruits of the ground, and the fruits of the tree. Pri ha-adamah (fruits of the ground) grow rapidly. Within a few months from the time of its sowing or planting, it bears fruit, and the simple power of the ground is more evident in it. In contrast, pri ha-etz (fruit of the tree) goes through a complex process: in the first years, the tree needs to grow and take shape, and afterwards, in a relatively long process, it absorbs food from the soil, digests it, and gives off its fruits. It can be

said that pri adamah expresses centrality and simplicity, while pri ha-etz expresses refinement and complexity, and usually also has a deeper and richer taste.

Banana – A Fruit of the Ground without the Prohibition of Orlah

The definition of a tree is also important for the mitzvah of orlah, according to which the fruits are forbidden to eat or receive enjoyment for the first three years, because the law of orlah exists only in the fruits of the tree.

The main difference between a tree and an annual vegetable is that the trunk of an annual plant withers every year, and grows back the next year from its roots, while the trunk of a tree, with its roots, remains and strengthens year after year, from which branches and fruits continue to grow each year. According to this, the bracha for eating the fruit, “etz” or “adamah” is also determined. That’s why the bracha made on a banana is “adamah” – even though it grows to a height of about four meters and looks like a tree, since every year its trunk and roots wither and it returns and grows from its pseudostem, it is considered a vegetable (Peninei Halakha: Berachot 8:2; Kashrut 2:8).

Eggplants

A question arose about eggplants, since their root remains from year to year. The author of the Chida (Birkei Yosef, YD 294: 4) in the name of his grandfather, Mahara Azulai, wrote that there were tzaddikim who were customary to act stringently and not to eat it, lest there be a prohibition of orlah. However, in practice, eggplants do not have the law of orlah, because they are completely different from a tree, for they bear fruit already in the first year, and in the second year their fruits decrease in quantity and quality, and they do not bear fruit for more than three years. And as we have learned in the Torah, a tree bears fruit for at least five years, and its fruit multiplies and improves in the fifth year (Leviticus 19:23-25). Furthermore, if we say that eggplants are considered a fruit of a tree, there will forever be a prohibition of orlah on them, since after three years they no longer bear fruit, and it is impossible for the Torah to prohibit a certain fruit entirely (Penei Moshe YD 294, 4; Igrot Haraya 468).

Papaya and Passion Fruit

According to this, there is also no law of orlah in papaya and passion fruit, since they bear fruit already in the first year, and by the fifth year their fruits dwindle, and many of them do not even last five years. True, some poskim are machmir (rule stringently) about this, but the primary opinion goes according to the opinion of the matirim (poskim who rule leniently) (Peninei Halakha: Kashrut 2, 8).

Rav Kook Torah

Rav Kook on Mishpatim: Slavery in the Torah

Rabbi Chanan Morrison

“If a man strikes his male or female slave with a rod, and the slave dies under his hand, the death must be avenged

[the master is punished by death]. However, if the slave survives for a day or two, his death shall not be avenged, since he is his master’s property.” (Exodus 21:20-21)

The Torah portion of Mishpatim deals primarily with laws governing society - personal damages, lending money and articles, manslaughter, kidnapping, and so on. Overall, they fit in well with a modern sense of justice. The laws dealing with slaves, however, are difficult for us to digest.

- Why does the Torah distinguish between a mortally wounded slave who dies immediately, and one who lingers for a day or two?
- Is a slave truly “his master’s property”?
- In general, does the Torah look favorably on the institution of slavery?

His Master’s Property

Slavery, Rav Kook explained, is like any other natural phenomenon. It can be used properly and responsibly, or it can be abused. As long as some people are wealthy and powerful, while others are poor and weak, the wealthy will hire out the poor to do their labor and will control them. This is the basis of natural servitude, which exists even if slavery as a formal institution is outlawed.

For example, coal miners are de facto slaves to their employer, and in some ways worse off than legal slaves. The mine owner often cares more about his profits than his workers. He allows his miners to work without proper light and ventilation, in poorly built mines. The owner is not perturbed that his workers’ lives are shortened due to their abysmal working conditions. He is not overly troubled that the mine may collapse, burying alive thousands of miners - he can always hire more.

Yet, if these miners were his legal slaves for whom he paid good money, then the owner would look out for their lives and welfare just as he watches over his machines, animals, and the rest of his property. For this reason, the Torah emphasizes that a slave is his master’s property. When it is in the master’s self-interest to look after his slave’s welfare, the servant can expect a better, more secure future. Why does the Torah distinguish between a slave who dies immediately after being struck by his master, and one who lingers for a day? The verse specifically mentions that the master struck with a rod, an indication that his intention was not to harm the slave, but to discipline him. If the slave dies due to mistreatment at the hands of his master, we take into account the natural concern that all people have for their possessions. The Torah rules that no death penalty is incurred, “since he is his master’s property.” In these circumstances, intentional murder becomes improbable, and the Torah looks for an additional factor - a non-immediate death - to indicate that the death was accidental. The Torah stresses that the goal is to serve justice, not to avenge. Thus the unusual phrasing, “his death shall not be avenged.”

The Institution of Slavery

The legalized slavery of the Torah only comes to correct certain potential pitfalls of the natural phenomenon of slavery. As long as slavery exists, the Torah legislated laws to protect slaves from abuse and mistreatment. If an owner knocked out his slave's tooth, or caused the loss of any other limb, the slave went free. An owner who killed his slave was executed, like any other murderer.

Since the destruction of the Temple, however, the Torah's positive influence upon general society has greatly weakened. The darkness of the Middle Ages severely corrupted natural forms of life, transforming slavery into a monstrous institution. Instead of protecting the weak by giving them the security of property, slavery became such a horror that humanity decided it needed to be permanently outlawed.

The Torah's form of servitude must be set aside, until the era when, once again, "Torah will go forth from Zion." At that time, servitude will provide not only financial security, but also moral and spiritual mentorship.

When the heart has once again become a sensitive vessel of integrity and compassion, it is fitting that the morally deficient should be taken under the wings of those righteous and wise.

(*Gold from the Land of Israel*, pp. 139-141. Adapted from *Igrot HaRe'iyah* vol. I, Letter 89, pp. 95-98)

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Peninim on the Torah - Parashas Mishpatim

פרשת משפטים תשפ"ג

ואלה המשפטים אשר תשים לפניכם

And these are the judgments that you shall place before them. (21:1)

The previous *parshah* (*Yisro*) concluded with the laws of the *Mizbayach*, Altar. *Rashi* asks why the law of judicial cases are juxtaposed upon the laws of the *Mizbayach*. He explains this teaches that the *Sanhedrin*, supreme court, should have its place near to the *Bais Hamikdash*. [Commentators posit that the reference to the *Mikdash*, Temple, is an error. *Rashi* actually means *Mizbayach*. In any event, the message is clear: The Temple environs are where the *Sanhedrin* is to be placed. *Mizbayach* symbolizes sacrifice, which was a primary function of the Sanctuary.]

The *Mizbayach* represents *mesiras nefesh*, self-sacrifice. *Horav Nosson Gestetner, zl*, derives a powerful principle for this juxtaposition. The *Sanhedrin*, the judge, the *halachic* arbiter [and, I will add, the spiritual leader] should judge and rule with *mesiras nefesh*. In other words, he must be willing, at times, to take an unpopular position, one for which he will be criticized, in order to rule leniently (of course, *halachically*), even if it means that some detractors will stop at nothing to argue their position. They express their demand for stringency to the point that

they impugn the spiritual integrity of the *halachic* arbiter who had the temerity to disagree with them.

A distinguished *Rav* and *posek* was confronted with a question regarding an *agunah* (loosely translated as an abandoned wife. The term, however, applies to any woman who may not remarry, either because her husband is recalcitrant and holding her captive, or her husband disappeared and his death has yet to be confirmed.) He was able to cite a lenient ruling vis-à-vis this woman's predicament. Obviously, those who disagreed with him, who had themselves issued a stringent ruling, were unhappy with his ruling. This stance demonstrates his *mesiras nefesh*.

Horav Ovadia Yosef, zl, was a preeminent Torah scholar whose encyclopedic knowledge of *halachah* was matched only by his brilliant mind. As a *posek* without peer for over seven decades, he consistently championed the idea that *Chazal's* precept of *koach d'heteira adif*, the power of permitting (allowing for a dispensation), was greater. This concept, as explained by *Rav Ovadia* (quoting *Rashi Beitzah* 2b), is that anyone can rule *l'chumra*, stringently, but only a *Rav* who is certain concerning the rulings transmitted to him by his mentors has the right to rule leniently. This rule came into play numerous times when *Rav Ovadia* was asked to sort out and rule concerning the various questions regarding the *agunos* (in this case, probably widows), who were left in limbo in the aftermath of the *Yom Kippur* war, when the IDF suffered 2,500 soldiers killed in action, of which 1,000 had not been clearly identified. It was up to *Rav Ovadia* to study each case and look for any *halachic* dispensation to allow the wife, who in many instances was a young woman, to have closure and go on with her life.

Each evening, he would sit down with his two *dayanim* to find ways to be *matir*, permit, the wife to remarry. He dealt with these cases both from a technical, *halachic* perspective and from an emotional level, personally feeling the pain of each widow.

One night, after finally finding a *heter* for a certain widow, he immediately summoned his son and asked him to locate the woman's phone number. He did not want to wait all night to deliver his verdict in the morning at the *bais din*. His son said, "But it is late. You might wake her up." "I am sure that she is awake, concerned about what my ruling will be."

By law, *Rav Ovadia* had to issue the ruling at the *bais din*. Yet, he could not bear to have this woman suffer unnecessarily for another night. He called, but did not tell her the exact ruling, only that she could rest assured that it would all work out. She began to weep. So did *Rav Ovadia*.

Fourteen years prior to his *petirah*, passing, *Rav Ovadia* had a heart attack and was rushed to the hospital. The doctors determined that he had a blockage that could be opened with a stent. They wanted to do the procedure immediately. He asked for a three-hour reprieve, during

which he would go home. They could not understand the reason for his request. He explained, “I am in the middle of writing a *teshuvah*, *halachic* responsa, to free an *agunah*. If I do not survive the procedure, who will take pity on this *agunah* and free her from her loneliness?” He went home, wrote the *teshuvah* and returned to the hospital. This is the meaning of *mesiras nefesh* for *ruchniyos*.

כי תקנה עבד עברי

If you buy a Jewish bondsman. (21:2)

The Torah begins *Parashas Mishpatim* presenting the many *mitzvos* that cover the gamut from social/welfare relationships to the appropriate manner of service to Hashem, including the laws of the *eved Ivri*, Jewish bondsman. One would think a number of other *mitzvos* would also serve as an appropriate opening to *Parashas Mishpatim*. The various commentators address this question by offering explanations for what seems to be an anomaly, but we know that no anomalies exist in the Torah. Everything is sorted out and presented by Heavenly design.

Horav Yosef Shalom Eliyashiv, zl, comments that the very foundation of the laws concerning the *eved Ivri* beg elucidation. In any civilized country in which laws play a dominant role, the punishment not only fits the crime (to some extent), but it is also meant to serve as a powerful deterrent from repeating the same offense. One who steals pays not only what he stole, but is subject to incarceration for a hefty period of time – often on the word of only one witness. At times, a judge may rule against a thief, even if the evidence is circumstantial. If the punishment would not be stringent, the world would capitulate to lawlessness.

Our Torah’s laws are considerably different. The thief pays only after his act of stealing has been verified by two witnesses. If he confesses to his misdeed prior to the arrival of the witnesses, his fine (*keifel*, double principal plus fine) is nullified. If he does not have the funds to repay the victim, he is sold into servitude, where incidentally, he is treated like a king. The owner must outfit him, feed him and provide for his every need. The glaring question is: How will such “punishment” serve as a deterrent? On the contrary, an unscrupulous person might take advantage of the laws, steal and take a six-year hiatus, compliments of the Torah’s judicial system!

Rav Eliyashiv derives from here a lesson concerning the Torah’s profundity and penetrating understanding of the human psyche. Punishment does not deter sin. As long as a person is treated like a *ganiv*, thief, he will continue acting his role. People do bad things because they lack self-esteem. They look in the mirror and see a crook – so they act the part. The Torah wants the thief to know that he is a valuable member of *Klal Yisrael*. He is a child of the Patriarchs, not unlike any other Jew. If he views himself in a positive light – he will act positively. He sees himself as someone who could aspire to be a

contributing member of *Klal Yisrael*. The classic example that teaches *middos tovos*, positive character traits, is the *eved Ivri*. Thus, it serves as the preface to *Parashas Mishpatim*, which ushers in the social justice laws.

Horav Yechezkel Abramsky, zl, treated his *ozeres*, maid, like royalty. If he sensed that she was working too hard, he would suggest that she rest a bit – even though this would cost him more money. (She was paid by the hour.) Unquestionably, this woman developed a greater respect for *frum*, observant Jews.

The *Alter, zl, m’Kelm*, embellishes this idea. He wonders why the laws of *eved Ivri* follow after the Giving of the Torah amid a Revelation unprecedented and never again duplicated. Surely, there must be a more “appropriate” venue for recording the laws of the Jewish thief who is sold into slavery to repay his debt. The *Alter* explains that the *parshah* of *avadim*, Jewish bondsmen, follows immediately after the law that enjoins the *Kohanim* to walk up a ramp to the *Mizbayach*, rather than use the steps, which allow the *kohen* to spread his legs in a manner which suggests immodesty. *Chazal* derive from here a profound lesson in sensitivity. The *Altar* is an inanimate object which would not be conscious of any immodesty on the part of the *kohen*. Yet, the Torah enjoins us to refrain from “embarrassing” them. Surely a person should take extreme care not to infringe upon his fellow’s sensitivities.

The *Alter* questions *Chazal’s kal v’chomer, a’fortiori* (lenient and strict) argument. True, the *Mizbayach* was comprised of inanimate stones, but these stones are considered *kli shareis*, vessels used for serving in the Sanctuary. As such, they are considered holy. This is why one must show them respect. The person, on the other hand, is not a *kli shareis*. Thus, there is no longer a lenient (stone) and strict (person), since the lenient is not that lenient.

We must say (deduced the *Alter*) that every Jew is a *kli shareis*; every *Yid* is *kodesh kodoshim*, holy of holies. Otherwise, we have no way to compare a *Yid* to the stones of the *Mizbayach*. As a result, each and every Jew, prior to commencing his *avodas hakodesh*, service to Hashem, should focus on his distinction and holiness. If he ignores his enormous eminence before Hashem, he will quite possibly fall to a level of disgrace and shamefulness. After all, what is holding him back? Spiritual esteem and self-awareness are possibly the greatest deterrents from sin. Rather than concentrate on the negative – punishment, we turn our heads toward the positive – spiritual esteem. Positive always trumps negative.

כל אלמנה ויתום לא תענוך

You shall not cause pain to any widow or orphan. (22:21)

What kind of person would mistreat a widow or an orphan? The mere fact that the Torah admonishes us against being so cruel indicates that there are people who will do anything to anyone to take advantage – be it for

money, or just because they want to show their power. Some people simply do not use their *seichel*, common-sense. To them, a rule is a rule, and it should apply to the weak as well. Thus, a widow and orphan do not receive preferred treatment. They are no different than anyone else. No leniency exists for them. This is just another method of justifying cruelty on the part of the oppressor. In this manner, the Torah teaches us that the rules change when it involves those who are unusually vulnerable.

Horav Yitzchak Zilberstein, Shlita (L'Kayeim) cites a powerful story concerning the *Chida*, who lived during the eighteenth century. A widow had an only child, a young boy whom she supported with whatever she could scrape together. When the boy reached an age when young men enter the work force in order to support their families [*yeshivos* were at a premium and enrollment, for a number of reasons, was limited], the young orphan was prepared to go to work, but, due to his weakened physical state, would-be employers felt he was too fragile to perform any meaningful labor. The boy was frustrated, but equally adamant. He was going to find a job, despite his scrawny physique. He had the willpower to work, and he felt that was all one needed. He presented himself at the office of a large factory and asked to meet with the owner. The owner met with the boy and did his best to dissuade him, because he was certain that the physical demands of the job were too much for the boy to handle. The boy was unbudging. He wanted to work and was prepared to do whatever it took to secure a job. The owner came up with a daring – but diabolical – idea. If the boy would enter the river at dusk and remain in the water until dawn, he would give him ten thousand silver coins – more than he would earn in a lifetime.

The boy knew that the water at night was frigid, and he might contract hypothermia, but this was his only chance. His mother cried and pleaded with him not to take the proposition. He was obstinate and, despite her pleas, and the clear danger notwithstanding, he was going to spend the night in the river. He responded affirmatively to the man, with one precondition; he wanted a legal written contract to stipulate that if he survived the night in the cold water, he would be paid. [This gives us a window into the level of poverty to which people were subjected. It also demonstrated the miscreant character of a man who would take such advantage of an orphan.]

The boy entered the river exactly at dusk and settled in for a long night. As the night went on, the water became colder, reaching the freezing point. The man stopped by a couple of times to see if the boy was still there. He could not believe the boy's determination. He was getting nervous that he might have to put up a small fortune in silver coins.

The widowed mother knew that while she could not change her son's mind, she might succeed in giving him hope. She took wood and started a fire a distance from

the water line. She knew that the heat of the fire would not reach her child, but the mere thought that a warm welcome awaited him would strengthen his resolve and give him the message: "Someone cares about you."

As soon as dawn broke out in the sky, the near-frozen boy ran to his mother who was waiting by the fire with warm clothes. After warming up, they promptly went to the owner of the factory and demanded that he adhere to his promise. The man had the audacity to renege on his word, claiming that the mother had heated up the water with her fire. The widow and her son summoned this man to the *Chida* to rule on their dispute.

The *Chida* was a *halachic* authority without peer. This dispute, however, did not require a *halachic* authority. A clever person who saw what was taking place could easily cut through the ambiguity and rule. The *Chida* placed a raw egg in a saucer opposite a pot of hot water. He turned to the man and said, "Eat the egg." "*Rebbe*, the egg is raw. How can I eat it?" "It is opposite a pot of hot water." "Yes, but 'opposite' does not cook the egg. The egg must be in the water!"

"Now, you see," said the *Chida*, "that the mother's fire on the banks of the river did nothing to heat up the water. You must immediately hold up your end of the deal."

Rav Zilberstein derives an important lesson from this story. When someone is in a bind, when he is going through a difficult time, regardless of the challenges that he may face, it is possible to strengthen him and give him hope. How? A few well-placed words such as, "I care; I am thinking of you; I am always here for you," intimate to the person that, regardless of his situation, he is not alone. The widow could not warm the water, but she sent a message to her son: "I am waiting for you with a warm fire. You are not alone."

Sometimes, all we can do for a person in need is to make him aware that someone cares; he is not alone. This, too, is a critical act of *chesed*, lovingkindness.

ואנשי קדש תהיון לי

People of holiness shall you be to Me. (22:30)

It is not enough for a Jew to be good and upright. While these are noble, enviable attributes for anyone else, we answer to a Higher Authority and a Higher calling. We must strive to attain *kedushah*, holiness. Our *neshamos*, souls, are pure, and it is incumbent upon us to do everything within our ability to sustain the soul's pristine nature. It is due to this Heavenly mandate to achieve *kedushah* that the dynamic concerning what we may do, where we may go, what we may eat and how we should live comes into play. For a Jew, everything comes under the rubric of *kedushah*.

Horav Nachman Breslover, zl, teaches that *kedushah* is *simchah*, happiness. One who is filled with positivity, whose outlook on life is joyful, views every juncture in life, regardless of the challenges that must be

overcome, as an opportunity through which he may come closer to Hashem. This is unlike the misguided concept equating *kedushah* with asceticism. One who is holy does not run from the world. He is not depressed. A *kadosh* infuses his holiness to become a vehicle of joy and inclusiveness – not gloom and isolation.

Horav S.R. Hirsch, zl, posits that *kedushah* in man represents the highest degree of moral freedom in which the moral will is no longer engaged in a struggle, but is absolutely ready to do the will of Hashem. Furthermore, he adds, in Judaism, the entire concept of holiness is especially connected with sanctifying. Holiness is not to be concentrated. It should not be the exclusive domain of a mere few. The purpose of holiness is to sanctify others. Holiness is not a private enterprise.

In order to maintain the pristine nature of our *neshamah*, it is essential that we exert much care to establish safeguards that will prevent any unwanted, mundane “particles” from breaching the perimeter of holiness. While holiness is about sanctifying, it is different when we go out to “them” than when “they” come in to us. Our *machaneh*, camp, must remain unsullied by outside influences. This concept is easily understood when it involves the mundane. Unfortunately, when we address issues of the spirit, we confront an element of resistance. The following story highlights this disparity.

Horav Yitzchak David Grossman, Shlita, Rav of Migdal Emek, accompanied Ezer Weizman (at the time he was President of Israel, prior to that he had been head of their airforce) on a tour of a factory that made computer chips to be used in industry, but also in navigating the fighter jets flown by the pilots of their airforce. Thus, Weizman had a special interest in touring the “chip” section of the factory. The manager welcomed his interest and said he would be happy to take him on a tour of this restricted area, but (he apologized) the President would have to don protective clothing, with a face mask and protective glasses. Since *Rav Grossman* was a guest of the President, he, too, agreed to wear what appeared to be something akin to spacesuits. Indeed (*Rav Grossman* quipped), they looked like two astronauts. At the end of the tour, *Rav Grossman* was honored with saying a few words in recognition of the critical work being performed at the factory and its contribution to the welfare of the pilots. He also tendered his personal gratitude for being asked to join them on the tour.

He said, “I thank you for availing me the opportunity to learn an important lesson concerning our *avodas Hashem*, service to the Almighty.” When he said this, the President turned to him incredulously and asked, “what lesson concerning your service to G-d could you have possibly derived as a result of the tour?”

“People wonder, why is it that it is only the Jews who have dietary laws prohibiting them from consuming certain foods? Why are there so many stringencies with

regard to what we ingest? Gentiles may eat anything they want; in contrast, we have a very selective diet. Today I realized the reason for this. When we were about to walk into the room where the chips are produced, we were asked to don special clothes. Why? The slightest foreign speck of dust that comes in contact with a chip can alter its accuracy. When one of our pilots is flying hundreds of miles an hour, when he is on a mission, the slightest deviation can have the most tragic consequences. The chip must be pristine.

“We, too, have *neshamos tehoros*, pure souls, which, if exposed to the wrong foods, become contaminated and blemished. Only, we, *am Yisrael*, have a *neshamah* that is a *chelek miMaal*, part of Hashem Above. It is perfect – if we keep it perfect. Thus, we are enjoined against consuming any food that would taint our *neshamos*.

לעילוי נשמת האשה החשובה

מרת ליבא ברוין בת ר' צבי לאקס ע"ה

כ"ח שבט תשס"ב ת.ג.צ.ב.ה.

Perl and Harry M. Brown

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prepared and edited by Rabbi L. Scheinbaum

Insights Parshas Mishpatim

Yeshiva Beis Moshe Chaim/Talmudic University

Parshas Mishpatim..... Shevat 5783

Based on the Torah of our Rosh HaYeshiva HaRav Yochanan Zweig

This week’s Insights is dedicated in loving memory of Malka bas Rav Kalman.

Sponsored by the Finkel Family. “May her Neshama have an Aliya!”

Kindness Optional?

When you will lend money to My people, to the poor person who is with you, do not act towards him as a creditor; do not burden him with interest (22:24).

In this week’s parsha, the Torah discusses a few laws relating to lending money to another Jew; you cannot press him for repayment if you know he hasn’t the wherewithal to pay you back; it is also prohibited to charge interest, etc.

The word the Torah uses in the possuk is “im – when.” Rashi (ad loc) cites an enigmatic teaching from the Tanna R’ Yishmael: “Every use of the word ‘im’ in the Torah implies a voluntary act (the word ‘im’ always means ‘if’), except for three places in the Torah – this being one of those places.”

That is to say that while the word “im” usually means “if” which implies that it is an optional act, here instead the word “im” means “when” because lending money is actually obligatory (see Rashi at the end of Parshas Yisro, 20:22 where Rashi shows that the Torah actually commands one to lend money). Obviously, this teaching begs the question; if the Torah actually meant “when” and not “if,” then why not simply use the word “when”? Why

should the Torah use a word that almost universally means “if”?

There is a fascinating discussion among the codifiers of Jewish law as to why certain opportunities to do mitzvos require a blessing (e.g. blowing a shofar or putting on tefillin, etc.) while other opportunities do not require a blessing (e.g. honoring one’s parents, acts of charity, etc). According to Rashba (responsa 1:18) there are no blessings made when there is another person involved because the completion of the act depends on another person. In other words, if one were to make a blessing recognizing Hashem’s mandate to give charity, what happens when the intended recipient refuses or is unable to accept the gift? There is no certainty in completing the act when its completion is also dependent on another individual.

Another explanation given is that there is no bracha where it is a moral imperative and it is therefore done by both Jews and non-Jews. This is because in such a situation one is unable to say the words “Asher Kideshanu – that He sanctified us,” which is a key component of blessings (Aruch Hashulchan YD 240:2). Maimonides (Hilchos Brachos 11:2) seems to say that we only make brachos on mitzvos that are between man and Hashem (Bein Adom Lamokom), thus exempting situations that included another person.

Perhaps we can explain this to mean that the reason we don’t make a bracha when another person is involved is that we don’t want to appear to be objectifying another person as an opportunity to fulfill a mitzvah. Imagine if someone is in a desperate situation and they approach you for help; how would that person feel if your first response was to make a blessing thanking Hashem for the opportunity to fulfill one of his commandments? The whole purpose of honoring one’s parents, for example, is to show them appreciation for all that they have done. By making a blessing, one is introducing the element that the reason for honoring them is due to an obligation, not a personal desire to display gratitude. This would seriously impact the effectiveness of one’s act as the parents would have a hard time sensing the appreciation behind the act.

The same is true when someone really needs one’s help. A major component of the mitzvos of Gemilus Chassadim (acts of kindness) is to be God-like (Sotah 5a). A fundamental principal of Jewish philosophy is that our world, and system of reward and punishment, was built on a system that would not embarrass the recipients of Hashem’s kindness (Nahama Dekisufa). By using the word that usually means “if,” the Torah is teaching us a fundamental principal of helping others: Of course we have to lend money, but we should do it in a way that the recipient feels as if it is optional, and that helping them is something we want to do. Not something we have to do.

One and the Same

If he shall come alone, he shall go out alone. If he is a husband of a (free) woman, his wife shall go out with him (21:3).

The Torah here is discussing the laws of a Jewish servant - “Eved Ivri”; that is, one who is sold into servitude to settle debts he incurred when he stole from others. During the years of servitude his wife is supported by his master; when he is freed from service, the financial responsibility for his wife now leaves the master and once again is upon him.

Rashi (ad loc) points out that the Torah uses a very unusual word for describing someone as unmarried – “begapo.” Rashi goes on to explain; “the word ‘begapo’ literally means coattail – that he came in as he is; single and unmarried, in his clothing, within the edge of his garment.” This is a rather unusual way of saying “bachelor,” what is the significance of using this word?

The word bachelor was first used in the 1300’s to describe young men (squires) that were beginning the path to knighthood. The word therefore implies someone young and without experience. In fact, even today it has some of the same implication; the first degree one achieves in college is referred to as a bachelor’s degree. But the Torah uses a very specific term; what is the meaning of using the word coattails for bachelorhood?

At first glance, one might think that it simply refers to something that is also similar to the English language expression “he came with nothing but the shirt on his back.” But Rashi is very specific that it is referring to the “edge” of the garment. What does this really mean?

In many Sephardic communities the custom when getting married is that under the chuppah the groom wraps himself and his new wife in a tallis. The intended message is that they are now bonded as one and that his tallis wraps the two of them together as if they were now a single entity.

The Torah here, by using the word which means the edge of a garment, is describing what a marriage is. In a marriage, the edge of my garment no longer covers just me; it is covering my wife as well because we are now a single entity. If the edge of my garment only covers me then by definition I am unmarried. Therefore if the Jewish servant comes in with only himself at the edge of his garment – “begapo” – he must be unmarried.

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How Does a Heter Iska Work?

Rabbi Yirmiyohu Kaganoff

Andy Gross, a businessman who is proud that he is now observing mitzvos, is on time for his appointment. After a brief greeting, I ask him what brings him to my office on this beautiful morning.

“I recently learned that even though the Torah prohibits paying or receiving interest, there is something called a

heter iska that legalizes it. How can we legitimize something that the Torah expressly prohibits?”

Indeed, Andy’s question is both insightful and important, and deserves a thorough explanation. Why don’t you join us!

I note that this week’s parsha discusses the prohibition of interest:

Do not collect interest from him, for you shall fear Hashem and allow your brother to live. Therefore, do not provide him money with interest (Chapter 25:36-37).

This verse teaches three different mitzvos:

1. Do not collect interest from him. This entails a prohibition on the lender against collecting interest (Bava Metzia 75b).

2. Allow your brother to live. From the words allow your brother to live we derive a positive commandment that one who did collect interest is required to return it (Bava Metzia 62a).

3. Do not provide him money with interest. This prohibits creating a loan that involves interest, even if the lender never collects it (Bava Metzia 62a). A lender who later collects the interest also violates the first prohibition, and if he subsequently does not return it, he violates the positive commandment.

Not only does the lender violate the prohibition against ribbis, but also the borrower, the witnesses, the broker, the co-signer, the scribe who writes up the loan document (Mishnah Bava Metzia 75b), the notary public who notarizes it, and possibly even the attorney who drafts a document that includes provisions for ribbis, all violate the laws of ribbis (Bris Yehudah 1:6). Thus, anyone causing the loan to be either finalized or collected violates the Torah’s law.

“The halachos of ribbis are quite complex,” I told Andy. “From my experience, even seasoned Torah scholars sometimes mistakenly violate the prohibition of ribbis. For example, having a margin account at a Jewish-owned brokerage, charging a Jewish customer for late payment, or borrowing off someone else’s credit line usually entail violations of ribbis. I even know of Torah institutions that ‘borrow’ the use of someone’s credit card in order to meet their payroll, intending to gradually pay back the interest charges.”

“Why does the last case involve ribbis?” inquired an inquisitive Andy.

“Let me present a case where I was involved. A Torah institution was behind on payroll, and had no one available from whom to borrow. The director asked a backer if the institution could borrow money through his bank credit line.” “I still do not see any ribbis problem here” replied Andy, “just a chesed that costs him nothing.”

“To whom did the bank lend money?” I asked Andy.

“As far as they are concerned, they are lending money to the backer, since it was his credit line.”

“So from whom did the institution borrow? The bank did not lend to them. Doesn’t this mean that really two loans have taken place: one from the bank to Mr. Chesed, and another from him to the institution? The loan from the bank incurs interest charges that Mr. Chesed is obligated to pay. Who is paying those charges?”

“It would only be fair for the institution to pay them,” responded Andy.

“However, if the institution pays those charges, they are in effect paying more money to Mr. Chesed than they borrowed from him, since they are also paying his debt to the bank. This violates ribbis. The fact that the institution pays the bank directly does not mitigate the problem (see Bava Metzia 71b).”

Andy was noticeably stunned. “I have always thought of interest as a prohibition against usury – or taking advantage of a desperate borrower. Here the ‘usurer’ did not even lend any money, and thought he was doing a tremendous chesed for tzedakah; he did not realize that his assistance caused both of them to violate a serious prohibition!”

“What is even more unfortunate,” I continued, “is that one can convert most of these prohibited transactions into a heter iska that is perfectly permitted.

WHAT IS A HETER ISKA?

“A heter iska is a halachically approved way of restructuring a loan or debt so that it becomes an investment instead of a loan. This presumes that the investor assumes some element of risk should the business fail, which is one basic difference between an investment and a loan. An investor could potentially lose money, whereas a lender does not lose because the borrower always remains responsible to pay.

“One is permitted to create a heter iska even when the goal of both parties is only to find a kosher way of creating a transaction that is very similar to an interest-bearing loan (Terumas Ha’deshen #302). The words heter iska mean exactly that: performing an allowable business deal that is similar to a prohibited transaction. As we will see, the structure must still allow for an element of risk and loss as accepted by halacha, otherwise it fails the test of being an investment.

“There are several ways of structuring a heter iska, and, indeed, different situations may call for different types of heter iska. In order to explain how a basic heter iska operates, I must first explain an investment that involve no ribbis, so that we can understand how a heter iska was developed. For the balance of this article, we will no longer refer to “borrowers” and “lenders.” Instead, I will refer to a “managing partner” or “manager” and an “investor.”

Andy interrupts my monologue. “Was heter iska used in earlier generations?”

THE EARLIEST HETER ISKA

“The concept of heter iska is many hundreds of years old. The earliest heter iska of which I am aware is suggested by the Terumas Ha’deshen (1390-1460). His case involves

Reuven, who wishes to invest in interest-bearing loans to gentile customers, but does not want to take any risk. Shimon, who is an experienced broker of such loans, is willing to take the risk in return for some of the profit on Reuven's money.

"Reuven wants a guarantee that he will receive back all his capital regardless of what actually happens in the business venture. Essentially, this means that Shimon is borrowing money from Reuven and lending it to gentiles; this would result in a straightforward Torah prohibition of ribbis, since Shimon is paying Reuven a return on the loan. Is there any way that Reuven and Shimon can structure the deal without violating the Torah's prohibitions against paying and receiving interest?"

At this point, Andy exclaims: "Either this is a loan, and Reuven's money is protected, or it is an investment, and it is not. How can Reuven have his cake and eat it too!"

"Actually, all the attempts at creating heter iska are attempts to find a balance whereby the investor is fairly secure that his assets are safe, and yet can generate profit. In your words, to try to have his cake and eat it.

PIKADON – INVESTING

"Let me explain how a heter iska accomplishes both these goals, by developing a case: Mr. Sweat has a business idea, but he lacks the capital to implement it. He approaches Mr. Bucks for investment capital. If Bucks has sufficient confidence in Sweat's acumen to build a business, he might decide to invest even without knowing any details about it, since Sweat knows how to provide handsome profits. None of this involves any ribbis issues since there is no loan and no one is paying to use the other person's capital. This business venture is called a pikadon.

GUARANTEEING THE INVESTMENT

"Your model is highly theoretical," Andy points out, "since it assumes that Mr. Bucks invests without much assurance. Few people I know would entrust someone with their money without some type of guarantee."

"You have hit on a key point – let us see how halacha deals with this. Whenever an investor entrusts someone with funds, the Torah permits him to demand an oath afterwards that the manager was not negligent. Therefore, Bucks may insist that Sweat swears an oath that he was not negligent with the money, and also that he reported accurately how much profit Bucks receives. An agreement may even require that Sweat swears this oath by using G-d's name and while holding a Sefer Torah in front of the entire congregation."

"That should certainly get Sweat to sweat," quipped Andy. "But then again, assuming Mr. Sweat is a frum Jew, is he going to want to swear any oath at all?"

"That is exactly the point that secures Bucks' bucks, since observant people would pay a substantial sum of money to avoid swearing an oath. The heter iska specifies that the manager has the option of swearing the oath and paying only what the investor is entitled. However, the manager

also has the option of substituting an agreed-upon payment for the oath. Since observant Jews would rather pay the fixed return rather than swear an oath, we accomplish that the investor is reasonably secure, although no loan and no ribbis transpired. The result is not a loan, but a cleverly structured investment."

After waiting a few seconds and absorbing what he just learned, Andy continued:

"Is there anything else I need to know about a heter iska before I use one?"

"I need to explain one other very important detail that, unfortunately, people often overlook. Most forms of heter iska state that the investor paid the manager a specific sum of money, say one dollar, for his time involved in the business venture. It is vitally important that this dollar be actually paid; otherwise there is a ribbis prohibition involved. Yet I know that many people overlook this requirement and do not understand its importance."

"Why is this important?"

STANDARD ISKA – A SILENT PARTNERSHIP

"The standard heter iska assumes that the arrangement is half loan and half pikadon. This means that if Mr. Bucks invests \$100,000 with Mr. Sweat to open a business, Mr. Bucks and Mr. Sweat become partners in the business because half of the amount is a \$50,000 loan that Mr. Sweat must eventually repay, and the other half is a \$50,000 outlay that Mr. Bucks has invested in a business that Mr. Sweat owns or intends to open. Bucks may receive no profit on the \$50,000 loan he extended -- if he does, it is prohibited ribbis. However, he may receive as much profit on the investment part of the portfolio as is generated by half the business. As a result, Mr. Bucks and Mr. Sweat are both 50% partners in the business.

RECEIVING PROFIT FROM THE LOAN

"However, there is an interesting problem that we must resolve. Bucks invested a sum with Sweat, for which he received a profit, and he also loaned Sweat money, for which he may not receive any profit. However, the return on the investment was realized only because Mr. Sweat is investing his know-how and labor to generate profit for the partnership – know-how and labor for which Bucks did not pay. Why is this not payment for Mr. Bucks' loan, and therefore ribbis?"

"This concern is raised by the Gemara, which presents two methods to resolve the problem.

"One approach is that the investor pays the manager a certain amount for his expertise and effort. As long as both parties agree in advance, we are unconcerned how little (or much) this amount is (Bava Metzia 68b). However, there must be an amount, and it must actually be paid. Even if they agree to a sum as paltry as one dollar, this is an acceptable arrangement, similar to Michael Bloomberg's accepting one dollar as salary to be mayor of New York."

"I now understand," interjected Andy, "why it is so important that this amount be actually paid. If Mr. Sweat

receives no compensation for his hard work on behalf of Mr. Bucks' investment, it demonstrates that he was working because he received a loan, which is prohibited ribbis."

"Precisely. However, there is another way to structure the heter iska to avoid the problem; have the profit and loss percentages vary. This means that if the business profits, the managing partner makes a larger part of the profit than he loses if there is a loss. For example, our silent and managing partners divide the profits evenly, but in case of loss, our manager is responsible to pay only 30% of the loss, which means that he owns only 30% of the business. The extra 20% of the profits he receives is his salary for managing the business. He is therefore being paid a percentage of Bucks' profits for his efforts, similar to the way a money manager or financial consultant is often compensated by receiving a percentage of the profits on the funds he manages. Personally, I prefer this type of heter iska, but the type I described previously is perfectly acceptable as long as Mr. Sweat receives some compensation for his effort and know-how.

"The heter iska I have seen used by the Jewish owned banks in Israel includes this method. The bank invests 45% in a "business" managed by the mortgage borrower, but the borrower is entitled to 50% of the profits. Thus, he is 'paid' five per cent of the profits to manage the investment."

"Can you explain to me how the Terumas Ha'deshen's money lender would use a heter iska?" inquired Andy.

"Actually, his heter iska varied slightly from what we use today. Using today's accepted heter iska, Shimon, the manager, accepts the money with the understanding that he

is borrowing part and managing the balance for Reuven. He is compensated for his efforts according to one of the approaches mentioned above, and agrees in advance to divide the profits. He also agrees that he will swear an oath guaranteeing that he was not negligent in his responsibilities, and the two parties agree that if he subsequently chooses to pay Reuven a certain amount he is absolved of swearing the oath. Thus, Reuven's return is not interest on a loan, but the amount Shimon had agreed to pay rather than swear how much he actually owes Reuven.

"This approach has been accepted by thousands of halachic authorities as a valid method of receiving a return on one's investment that looks like interest but is not. The Chofetz Chayim notes that if someone can lend money without compensation, he should certainly do so and not utilize a heter iska, because he is performing chesed (Ahavas Chesed 2:15). Heter iska is meant for investment situations, and should ideally be limited to them.

"I would like to close by sharing with you a thought from Rav Samson Raphael Hirsch about the reason why the Torah prohibited interest. He notes that if the Torah considered charging interest to be inherently immoral, it would have banned charging interest from non-Jews, and also would have prohibited only the lender and not the borrower. Rather, Rav Hirsch notes, the Torah's prohibition is so that the capital we receive from Hashem is used for tzedakah and loans, thereby building and maintaining a Torah community. The Torah's goal in banning the use of capital for interest-paying loans is to direct excess funds to chesed and tzedakah."

לע"נ

□ שרה משא בת ר' יעקב אליעזר ע"ה
ביילא בת (אריה) לייב ע"ה
אנא מלכה בת ישראל ע"ה