

# **HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY**

## **SERIES 2: 40 - HA'ARAMA, THE SPIRIT OF THE LAW AND REASONS FOR MITZVOT** **OU ISRAEL CENTER - SUMMER 2022**

- In the previous shiur we looked some of the technical examples of ha'arama and tried to track some of the themes determining when it is permitted in halacha and when not.
- We came up with the following rough conclusions:
  - (i) Many of the cases are different, with their own unique parameters. The Rosh points out that ha'arama is sometimes forbidden, sometime permitted, sometime subject to a machloket and sometimes permitted only for a talmid chacham.
  - (ii) There is no obvious correlation between Torah and Rabbinic mitzvot/prohibitions and ha'arama being permitted or prohibited.
  - (iii) In cases where a person was negligent or could easily have avoided the problem, the halacha seemed less likely to permit. A good example is the case of Eruv where the halacha is very on someone who neglected to make an Eruv or lost it.
  - (iv) In cases where there is significant halachic counterpressure to permit a case, ha'arama is more likely to be permitted eg to avoid significant loss, pain, possible prohibition (eg. misuse of Bechor or Ma'aser Sheni) or to enable a mitzva (eg. Simchat Yom Tov).
  - (v) The halacha is stricter where there is a concern that other people may learn negative behavior from a ha'arama.
  - (vi) There seem to be no cases of ha'arama which allow a Bein Adam Lechavero offence which is 'technically' permitted. We will look at the cases of Prozbol and Heter Iska below.

### **A] DEFINING TERMS**

#### **A1] "LOOPHOLES"**

- People often call ha'aramot 'loopholes', which normally has a negative connotation. What is a loophole?

1. **LOOPHOLE** - an omission or ambiguity in a legal document that allows the intent of the document to be evaded.  
Loopholes come into being through the passage of statutes, the enactment of regulations, the drafting of contracts or the decisions of courts. A loophole allows an individual or group to use some gap in the restrictions or requirements of the law or contract for personal advantage without technically breaking the law or contract. In response, lawmakers and regulators work to pass reforms that will close the loophole ..... Loopholes exist because it is impossible to foresee every circumstance or course of conduct that will arise under, or in response to, the law. Loopholes often endure for a time because they can be difficult to close.

<https://legal-dictionary.thefreedictionary.com/Loophole>

2. A loophole in the law is a small mistake which allows people to do something that would otherwise be illegal.

<https://www.collinsdictionary.com/dictionary/english/loophole>

- Clearly, a loophole, by definition, is a mistake in a flawed legal system. Due to human fallibility in drafting the relevant legislation/ruling/contract, the letter of the law fails to anticipate a specific circumstance which clearly goes against the spirit of the law, but which is technically legal. People can then, for personal advantage, defeat the spirit of the law until the loophole is closed.
- The classic examples are in tax law. Tax evasion - violating tax legislation - is illegal. Tax avoidance - taking advantage of tax structures which are technically permitted - is legal.
- Looking at halachic examples of ha'arama, can we define these as 'loopholes' which were accidentally left open by a flawed system?
  - In the case of Torah laws, we would certainly not say that the system is 'flawed'. However, it does need to be interpreted through Oral Law to keep it fresh and eternally relevant. We will address this below.
  - In the case of Rabbinic laws, the structure of the halachic system is created and adapted by the Rabbis - Chazal and later commentators. If, within the context of halacha, they consciously create a ha'arama, how can that be a 'loophole'?
- In some cases, the legal system purposely leaves certain 'avoidance' mechanisms open to achieve another goal. These are not 'loopholes'.

3. I live in Alexandria, Virginia. Near the Supreme Court chambers is a toll bridge across the Potomac. When in a rush, I pay the dollar toll and get home early. However, I usually drive outside the downtown section of the city and cross the Potomac on a free bridge. This bridge was placed outside the downtown Washington, DC area to serve a useful social service, getting drivers to drive the extra mile and help alleviate congestion during the rush hour. If I went over the toll bridge and through the barrier without paying the toll, I would be committing tax evasion ... If, however, I drive the extra mile and drive outside the city of Washington to the free bridge, I am using a legitimate, logical and suitable method of tax avoidance, and am performing a useful social service by doing so. For my tax evasion, I should be punished. For my tax avoidance, I should be commended. The tragedy of life today is that so few people know that the free bridge even exists.

Louis Brandeis (1856-1941) - Thoughts on Legitimate Tax Avoidance

In this quote from Louis Brandeis, he points out that payment of taxes is only one societal objective. Another is the alleviation of traffic congestion so a 'tax break' is legitimately available for people who help with this second objective.

- What are the 'goals' of the halachic system? They certainly extend beyond the specific enforcement of one particular mitzva? When a ha'arama is permitted by the Rabbis, that is not a case of individuals abusing the law for personal advantage, but is more akin to the judges or legislators purposely creating an alternative, which avoids a certain liability, but achieves another broader goal.

## A2] "LACUNAE"

4. LACUNA - a gap, a case not provided for by a statute or in a document.

<https://definitions.uslegal.com/l/lacuna/>

- Lacunae are different to loopholes. A lacuna exists where no law exists to deal with a specific case. Other principles will therefore need to be applied to work out what the law would require in this situation.
- There ARE many lacunae in the detail of halacha. However, the Torah includes broader meta-mitzvot to address these.

5. וְעֲשִׂיתָ הַיָּשָׁר וְהַטוֹב בְּעֵינֵי ה' לְמַעַן יִיטֵב לְךָ וּבָאֲתָה וְיִרְשָׁתָהּ אֶת הָאָרֶץ הַטֹּבָה אֲשֶׁר נִשְׁבַּע ה' לַאֲבֹתֶיךָ.

דברים ו:יח

One of these meta-mitzvot is to do what is 'straight and good'. But how are we to judge whether our idea of what is straight and good is in accordance with God's intention?

6. ולרבותינו ז"ל מדרש יפה - אמרו זו פשרה ולפנים משורת הדין. והכוונה ז"ל, כי מתחלה אמר שתשמור חקותיו ועדותיו אשר לך, ועתה יאמר גם כאשר לא לך תן דעתך לעשות הטוב והישר בעיניו, כי הוא אוהב הטוב והישר. וזה ענין גדול. לפי שאי אפשר להזכיר בתורה כל הנהגות האדם עם שכניו ורעיו וכל משאו ומתנו ותקוני הישוב והמדינות כלם. אבל אחרי שהזכיר מהם הרבה, כגון לא תלך רכיל, לא תקום ולא תטור, ולא תעמוד על דם רעך, לא תקלל חרש, מפני שיצא תקום וכיוצא בזה, חזר לומר בדרך כלל שיעשה הטוב והישר בכל דבר. עד שיכנס ז"ל הפשרה ולפנים משורת הדין.

רמב"ן שם

The Ramban explains that, although the Torah includes hundreds of mitzvot and thousands of details, it cannot possibly legislate specifically for every case in every time and place. It therefore includes this general mitzva bein adam lechavero which requires us to be fair and honest, and use our moral and ethical judgement in all circumstances.

7. דִּבֶּר אֵל כָּל עַדְת בְּנֵי יִשְׂרָאֵל וְאָמַרְתָּ אֲלֵהֶם קְדוּשִׁים תִּהְיוּ כִּי קְדוֹשׁ אֲנִי ה' אֱלֹהֵיכֶם.

ויקרא יט:ב

8. והענין כי התורה הזכירה בעריות ובמאכלים האסורים, והתירה בהיחל איש באשתו ואכילת הבשר והיין. א"כ ימלא בעל התאווה מקום להיות שטוף בזמנו אשתו או נשיו הרבות ולהיות בסובאי יין בזוללי בשר למו. וידבר כרצונו בכל הנצלות שלא הזכיר איסור זה בתורה. והנה יביא נצל ברשות התורה. לפיכך בא הכתוב, אחרי שפרט האיסורים שאסר אותם לגמרי, ואז בדבר כללי שנהיה פרושים מן המותרות ..... וזה דרך התורה לפרוט ולכלול כיוצא בזה. כי אחרי אזהרת פרטי הדינין .... אמר בכלל ועשית הישר והטוב .... וכן בענין השבת - אסר המלאכות בלואו והטרחים בעשה כללי שנאמר 'תשבות'.

רמב"ן ויקרא יט:ב

The methodology of the Torah is to supplement the details of mitzvot with Torah 'meta-principles' which provide the context and backdrop to our practice of mitzvot generally and set the 'spirit' of the law.<sup>1</sup>

1. Consider also the Ramban's understanding of 'Shabbaton' (Vayikra 23:24) as a positive 'meta-mitzva' which defines the broader concept of rest and renewal on Shabbat and Chag, beyond the more technical negative definition of the melachot.

## A3] "LEGAL FICTIONS"

9. **LEGAL FICTION** - An assumption that something occurred or someone or something exists which, in fact, is not the case, but that is made in the law to enable a court to equitably resolve a matter before it. A presumption of fact assumed by a court for convenience, consistency, or to achieve justice.

<https://legal-dictionary.thefreedictionary.com/legal-fiction>

10. **LEGAL FICTION** - .... a fiction is often used to get around the provisions of constitutions and legal codes that legislators are hesitant to change or to encumber with specific limitations ..... Almost any legal fiction can be stated in terms of fact. Thus, the fiction that a corporation is, for many purposes, a person separate from its members is equivalent to saying that, for those purposes, the law deals with the group as a unit, disregarding for the moment the group's individual members as such.

<https://www.britannica.com/topic/legal-fiction>

- Legal fictions are an essential part of a legal system since they enable a law to operate fairly in one area, without having to make wholesale changes in other areas of law which would cause other problems<sup>2</sup>.
- There are legal fictions in halacha, such as regarding a *tzurat hapesach* (a basic doorway structure of two posts and a minimal wire as a lintel) as an enclosed space.
- Mechirat Chametz is NOT a legal fiction but a real halachic sale and buy-back. Similarly, Prozbul and Heter Iska are not legal fictions

## B] HA'ARAMA AND THE 'SPIRIT OF THE LAW'

## B1] HA'ARAMA IS LEGITIMATE WHERE IT UPHOLDS THE 'SPIRIT' OF THE LAW

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

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

**R. Mosheh Lichtenstein - The Facts, The Mechanism, and the Objective Ha'arama in Halakha<sup>3</sup>**

*R. Lichtenstein proposes that the test of legitimacy for ha'arama is whether it supports the spirit of the law. If it does, it is not only legitimate but desirable. Consider the following cases:*

## (a) PROZBUL

- The Torah clearly states that the purpose of Shemitat Kesafim is help the poor - it appears in the context of the mitzvot of tzedaka. So Hillel's enactment of Prozbul reflected the changed reality in his time, where people were not lending at all. Prozbul was designed to help the poor by encouraging lending. As such, it UPHOLDS the spirit of Shemita.
- The Shemita release could potentially grant large economic concerns - such as banks and insurance companies - with windfall profits. It could potentially release home-owners from having to repay their mortgages. It could potentially release employers from having to pay overdue wages and purchasers from having to pay for goods bought or services rendered. None of these were the intention of the mitzva of Shemitat Kesafim.
- Prozbul avoids those undesirable outcomes, so is in line with the spirit of the law.

2. As a recent example, the 2019 UK prorogation controversy was resolved through the use of a legal fiction. Although the United Kingdom Supreme Court found that Prime Minister Boris Johnson's prorogation of parliament had been unlawful, it lacked the authority to order the recall of Parliament. Instead, the legal fiction was maintained that Parliament had never been prorogued; any references to prorogation were expunged from the record, and Parliament was instead recorded as having been adjourned, enabling it to reassemble on the next day. See [https://en.wikipedia.org/wiki/Legal\\_fiction](https://en.wikipedia.org/wiki/Legal_fiction)

3. <https://torah.etzion.org.il/en/haarama-halakha-%D6%A0the-facts-mechanism-and-objective>

**(b) HETER ISKA**

- The Torah prohibits payment of interest to prevent poor people becoming trapped in a cycle of borrowing, and loan-sharks making immoral profits off the back of the needy.
- However, this mitzva does not address financial partnerships where payment of interest is needed to incentivise investment. If interest were banned on mortgages, banks would not lend and most people would be unable to buy property. This could prevent them from escaping poverty.
- The Heter Iska, which permits interest payments when structured as an investment, UPHOLDS the spirit of the law.

**(c) MECHIRAT CHAMETZ**

- The Torah instructs us not to eat chametz on Pesach. This is the core prohibition regarding chametz and carries a penalty of *karet* if a person willfully eats chametz on Pesach. The Torah also includes secondary mitzvot of 'tashbitu' - to remove chametz, and bal yira'e/bal yimatze - as fences by the Torah itself to prevent the more serious prohibition of eating.
- The wording 'tashbitu' - from 'shabbat' - also implies that physical destruction of the chametz may not be necessary. The goal is 'deactivation' of the chametz to remove it from our daily life so that we won't come to eat it.
- As such, legally nullifying the chametz may achieve this goal, at least partially<sup>4</sup>. So too, selling the chametz to a non-Jew and removing it physically from daily life may achieve this goal.
- The Torah never intended commercial concerns and individual traders to lose their entire livelihoods on Pesach by having to destroy their entire stock.
- Selling chametz properly and removing it physically to a store room which is not accessed on Pesach therefore UPHOLDS the spirit of the law.

**(d) HETER MECHIRA & OTZAR BEIT DIN**

- The Torah prohibits farmers from working the land on Shemita and from harvesting the crops. It also requires that the produce is not personally owned but is available to be shared with others.
- The Heter Mechira, whereby fields in Israel are sold to a non-Jew for the Shemita year, was introduced to prevent the destruction of the fragile New Yishuv in the late 19th century.
- Many people argue that the Heter Mechira goes AGAINST the spirit of the law, which is to prevent agricultural work and personal ownership of produce during the Shemita year. The Heter Mechira results in precisely the opposite! Others argue that the spirit of Shemita is to protect the long-term success of the Jewish people in settling Eretz Yisrael. As such, the Heter Mechira UPHOLDS the spirit of the law.
- Similar arguments can be made concerning the Otzar Beit Din arrangement, whereby the farmer becomes an 'agent' of the Beit Din and collects and distributes the produce on their behalf. This solution results in less potential violation of the prohibitions of working the land, but the argument concerning ha'arama and the spirit of Shemita is still germane.

**(e) BECHOR**

- The purpose of the mitzva of Bechor is to provide food for the Cohanim and to increase the bringing of offerings in the Beit Hamikdash.
- However, there is no Mikdash today, no ability to eat kodashim and almost no Cohen who could prove their priestly status.
- As such, allowing the proliferation of Bechorot today would damage the sanctity of kodashim. So the ha'arama of selling part of the pregnant mother animal to a non-Jew to prevent Bechor status UPHOLDS the spirit of the law.

12. Jewish law is quite familiar with arrangements designed to avoid the onus of applying the full force of the law. In rabbinic literature there is a term for such an arrangement; it is known as a "ha'aramah," a term that probably may best be translated literally as "a cleverness." The term "device" probably best captures the flavor of the term without connotation of a moral judgment. Such devices fall into three distinct categories: (a) those that are disdained as inconsistent with the spirit of the law; (b) those that, for one reason or another, are regarded as commendable and actively encouraged; and (c) those with regard to which there is an attitude of complete neutrality.

**R. J. David Bleich, Contemporary Halakhic Problems Vol VI 6, Chapter 4 - The Hetter Iska and American Courts<sup>5</sup>**  
*R. J. David Bleich understands that there are three ways that halacha treats ha'arama - positive (such as Bechor), negative (such as Eruv) and neutral (such as the sale of chametz). He also focuses on whether the reasons for the ha'arama is legitimate and desirable or not.*

4. Famously, the Targum Unkelos (Shemot 12:15) translates 'tashbitu' as 'tevatlun' - nullification.

5. Available at [https://www.sefaria.org.il/Contemporary\\_Halakhic\\_Problems%2C\\_Vol\\_VI%2C\\_Chapter\\_4\\_The\\_Hetter\\_Iska\\_and\\_American\\_Courts.10?lang=he](https://www.sefaria.org.il/Contemporary_Halakhic_Problems%2C_Vol_VI%2C_Chapter_4_The_Hetter_Iska_and_American_Courts.10?lang=he)

## B2] HOW DO WE 'KNOW' THE SPIRIT OF THE LAW AND THE REASON FOR THE MITZVA?

13. There is no need to emphasize the danger lying in the attempt to examine each and every mitzva in light of its reason, for the reasons for the mitzvot are concealed from us and how can we know the mind of the Almighty. Many reasons have been offered by many commentators; who can say which are more correct or less correct, and what are the esoteric that are hidden from us, and how can we rely on such a distinction. Indeed, the concern about error is real and sets a great warning sign before us.

R. Mosheh Lichtenstein - The Facts, The Mechanism, and the Objective Ha'arama in Halakha

14. אמר רבי יצחק - למה תוקעין בראש השנה? למה תוקעין? רחמנא אמר תקעו! אלא: למה מריעין? מריעין!! רחמנא אמר זכרון תרועה! אלא: למה תוקעין ומריעין כשהן יושבין, ותוקעין ומריעין כשהן עומדין? כדי לערבב השטן.

ראש השנה טז.

*The Gemara asks why we blow tekia and terua on Rosh Hashana. It answers because the Torah said so!*

- And yet, R. Saadia Gaon gives 10 reasons for why we blow the Shofar on Rosh Hashana<sup>6</sup>!

15. אף על פי שתקיעת שופר בראש השנה גזרת הכתוב רמז יש בו כלומר עורו ישנים משנתכם ונרדמים הקיצו מתרדמתכם וחפשו במעשיכם וחזרו בתשובה וזכרו בוראכם. אלו השולחים את האמת בהבלי הזמן ושוגים כל שנתם בהבל וריק אשר לא יועיל ולא יציל, הביטו לנפשותיכם והיטיבו דרכיכם ומעלליכם ויעזב כל אחד מהם דרכו הרעה ומחשבתו אשר לא טובה.

רמב"ם הלכות תשובה פרק ג הלכה ד

*The Rambam begins by stating that the blowing of the shofar is a 'gezeirat hakatuv' but then goes on to give a reason.*

16. משנה. האומר על קן צפור יגיעו רחמין... משתקין אותו. גמרא ..... על קן צפור יגיעו רחמין - מאי טעמא? פליגי בה תרי אמוראי במערבא - רבי יוסי בר אבין ורבי יוסי בר זבדא. חד אמר: מפני שמטיל קנאה במעשה בראשית, וחד אמר: מפני שעושה מדותיו של הקדוש ברוך הוא רחמים, ואין אלא גזרות

ברכות לג:

*The Mishna states that a Chazan may not pray that God should have mercy on us as he does on the mother bird. The Gemara gives two reasons for this: (i) it is incorrect to suggest that God has specific mercy on birds as opposed to other creatures<sup>7</sup>; (ii) that we never know the reasons for mitzvot, which are ultimately inscrutable degrees from God.*

17. ואם אלו הצערים הנפשיים חסה תורה עליהם בבהמות ובעופות כל שכן בבני אדם. ולא תקשה עלי באמרם על קן צפור יגיעו רחמין וגו', כי הוא לפי אחת משתי הדעות אשר זכרנום. ר"ל דעת מי שחושב שאין טעם לתורה אלא הרצון לבד. ואנחנו נמשכנו אחר הדעת השני ....

ספר מורה הנבוכים חלק ג פרק מח

*In the Moreh Nevuchim, the Rambam takes a clear line that we CAN know reasons for mitzvot. Although he agrees that we cannot translate this into a practical halachic psak, he nevertheless insists that an understanding of such reasons must inform our hashkafic outlook.*

18. ואמר רבי יצחק: מפני מה לא נתגלו טעמי תורה? שהרי שתי מקראות נתגלו טעמן נכשל בהן גדול העולם. כתיב (דברים י"ז) וְלֹא יִרְבֶּה לֶן נָשִׁים. אמר שלמה: אני ארבה ולא אסור, וכתיב (מלכים א' י"ד) וַיְהִי לַעֲתָה זִקְנָתָהּ שְׁלֹמֹה נָשָׂא אֶת-לִבָּהּ. וכתיב (דברים י"ט) לֹא-יִרְבֶּה לֶן סוּסִים. ואמר שלמה: אני ארבה ולא אשיב, וכתיב (מלכים א' י"ב) וַתֵּצֵא מִרְכָּבָהּ מִמִּצְרַיִם בְּנֵשׁ [מֵאוֹת] לָסָף וגו'.

סנהדרין כא:

*The Gemara includes a severe warning of the dangers inherent in applying reasons to the mitzvot. As we see in the case of Shlomo, people are likely to rationalize away mitzvot and end up breaking the Torah!*

- There is therefore a difference between giving reasons in order to understand a mitzvah and making halachic rulings based on those reasons. Many of the classic commentaries (such as the Rambam and the Sefer HaChinuch) discuss possible reasons for the mitzvot but do not rule in halacha based on those reasons<sup>8</sup>.

6. 1. Rosh Hashana is the day of the Creation of the universe. On this day, God declared His kingship over all. The commencement of a new reign of any king would bring with it the blowing of trumpets; the same applies to God. 2. Rosh Hashana is the first of the Ten Days of Repentance. We blow the shofar to announce to all this important opportunity. 3. The shofar reminds us of the Divine Revelation at Sinai which involved the sound of the shofar. 4. We blow the shofar to remind us of the words of the prophets. Their messages are compared to the blowing of the shofar. 5. The shofar reminds us of the destruction of the Temple and the sound of the shofar is reminiscent of the war cries of our enemies. 6. The shofar alludes to Akeidat Yitzchak and Yitzchak's attitude of self-sacrifice. 7. When we hear the sound of the shofar, we are filled with a sense of fear and trepidation. 8. To represent the great Day of Judgment in times of the Mashiach. 9. To represent the returning of those in exile to Israel. 10. To represent the resurrection of the dead.

7. Some mefarshim understand this to relate to a discussion about God's hashgacha pratit and hashgacha klalit and how they relate to mankind as opposed to other creatures.

8. See Sanhedrin 21a and Rambam Hilchot Malve 3:1 and Hagaot Maimoniot ibid on the issue of *darshin ta'ama dekra*.

19. .... ואף המצוות שיראה מפשוטי הטעמים שנתנה צהם התורה, שהטעמים בהם הם תכלית, הכונה צהם אינה תכלית. אלא הטעם  
ההוא אמת אך הוא כנקודה מתועלתית ומכוננית. והדברים הנעלמים הרמוזים צתוכה לאשר חנגם השם יתצרך אין להם תכלה.  
והוא שאמר דוד (תהלים קיט:טו) לְכָל תְּכִלָּה רָאִיתִי קֶץ רַחֲמֶיךָ מֵאֵת מֶלֶךְ ..... וכן צמלות הסוכה וכן מקלת מן המלות, כל שכן את  
אשר לא נחפרש טעמם צתורה. ודע כי לכל אלו יש לצעלי סודות התורה טעמים נכצדים מאד. .... ואמנם דע כי אי אפשר לגלות  
טעמה שיש צה לצעלי הקצלה כי אם יחיד שצדור ...

ש"ת הרשב"א חלק א סימן צד

*The Rashbam adds that the mystical depth of mitzvot is immense and we cannot definitively demarcate reasons for them.*

- Generally, the more mystical hashkafic thinkers are much more likely to see Torah mitzvot and halacha as unknowable 'chukim' which are binding simply by virtue of their being given by God. The more rationalist thinkers are more likely to look for underlying reasons for mitzvot and to seek a background ethical and moral framework for Torah thought.

20. This duality can be illustrated in many areas of the Bible and Halakha, too numerous to be presented here in detail. It is based upon the duality presented in Scripture regarding the nature of the relationship between Israel and God, one of lover and beloved, on the one hand, and one of master and slave, on the other. So too the two-fold description of the revelation and the giving of the Torah at Sinai, both in the book of Shemot (chapters 19-20 vs. chapter 24) as well as in the book of Devarim (chapter 4 and 5), despite the many differences between them, reflect this idea. The first narration of the story presents God as the giver of the Torah, by arching the mountain over Israel like a tub, whereas the second time the Torah states that "the Lord talked with you face to face." ....
- .... our fundamental assumption is that the two elements exist in every mitzva and prohibition. Thus, it is fitting to refrain from eating forbidden foods not only because of the imperative, but also because they dull the heart, and to take the lulav, because it gives expression to the joy of nature, and the like, according to the reason of each and every mitzva. Situations may arise in which there is a gap between the reason for a mitzva as we understand it and the command that falls upon us to fulfill. In other words, there may be tension or incompatibility between the letter of the law and the spirit of the law.

R. Mosheh Lichtenstein - The Facts, The Mechanism, and the Objective Ha'arama in Halakha

- Note also the different focuses of mefarshim on the mitzva of Ahavat Hashem. Rambam<sup>9</sup> describes it as the love between a man and a woman. Other mefarshim<sup>10</sup> understand this as the love of a slave for his master.

21. .... observance of the mitzvot is not just a command and an assignment, but also a favor that God performs for His creatures. In other words, the mitzvot are an expression of God's love for His creations, and His desire to fill them with merit. If we examine the mitzvot from this perspective, then we should certainly search for their underlying reasons to the best of our abilities.

ibid

## C] HA'ARAMA - POSITIVE vs NEGATIVE MIZTVOT

- Rav Herschel Schachter<sup>11</sup> suggests that the halacha rejects ha'arama if it is created to avoid observing a positive mitzva. However, it is supportive of ha'arama if it is created to avoid violating a prohibition. Consider the following cases:
- **Terumot U'Ma'aserot:** Where people are trying to evade the positive mitzva of Terumot U'Ma'aserot by bringing in produce through the roof, ha'arama is prohibited.
- **Bechor:** But where people are trying to avoid the negative prohibition of misusing a Bechor, ha'arama is permitted. The positive mitzva of bringing the bechor cannot be fulfilled today.
- **Mechirat Chametz:** Rav Schachter understands that this NOT being done to avoid a positive mitzva since one should leave over some chametz and destroy/nullify it.<sup>12</sup>
- **Heter Iska:** Avoids the negative prohibition of lending on interest. But does it avoid the positive mitzva to give interest free loans?

9. Hilchot Teshuva 10:3.

10. See Rabbeinu Yona Avot 1:3 and Rashi on Devarim 6:5.

11. B'Ikvei Hatzon 16. See R. Jonathan Muskat's analysis on

<https://www.yutorah.org/lectures/lecture.cfm/1001539/rabbi-jonathan-muskat/why-do-rabbis-create-halachic-loopholes-to-solve-some-problems-and-not-others-/and-on>

<https://blogs.timesofisrael.com/why-do-rabbis-create-halachic-loopholes-to-solve-some-problems-and-not-others/>

12. Nevertheless, R. Yosef B. Soloveitchik was not in favor of widespread use of mechirat chametz by regular householders, as opposed to large commercial concerns.

22. אֶל־תִּקַּח מֵאִתּוֹ נֶשֶׁךְ וְתִרְבִּית וְיִרְאַת מַאֲלֵהֶיךָ וְחֵי אַחִיךָ עִמָּךְ.

ויקרא כה:לו

*The prohibition of interest appears in the verse which includes the positive mitzva to support our fellow Jews.*

23. קצב) .... והנה דבר ידוע הוא, שצדורות האחרונים המליאו היתר הלואה ברצית צדיתר עיסקא שנצאר ענינו צסמוך. ולכאורה דבר פלא הוא שלא מלינו כל רמז קל צתורה להמלאת היתר לאיסור זה! ולא נצצאר היסוד והצבים על מה ראו חז"ל לצנות עמודי ההיתר. ונראה צזה שראו חכמינו יסוד וגם הכרה להיתר ענין זה צכלל משום דחקרו וצאו עד תכונת האיסור הזה ציסודו ועיקרו שצתורה הצנוי ומיוסד על הענין וחי אחיך עמך. שאז צימי נתינת התורה היו עיקרי יסוד חייתם ועסקם של ישראל – עבודת האדמה, והוא היה היסוד והעמוד לעשרם ולמצצם. כי מי שהיה לו תצואות צהמון היה נחשצ לעשיר, והכסף לא היה נחשצ להם לעיקר ויסוד החיים. וכשהיו לויס כסף לא היה למען עשות מסחר וקנין, רק למען השג על ידו לחס וצגד למי שחסר לו כזה משדכו ועבודתו. ולפי"ז ממילא מוצן כי להעני הלואה הזה לא היה כל חשצון לשלם רצית וגם להמלוה העשיר לא היה חסרון ניכר צהלואת כספו צלא רצית, אחרי כי צכלל לא היה להם עסק כספים ולא שייך צשניהם צזה וחי אחיך עמך. אצל צימי הצניס שצצדה לישראל חלק ונחלה צעבודת האדמה, ונשארו גוי החי רק על המסחר לצדו, לא יכלו עוד להחזיק צאיסור רצית. כי הכסף נעשה ליסוד עיקרו לאמצעית החיים והמסחר, ונעשה עסק הרצית עסק שוב גם להלוה גם להמלוה, ושייך צשניהם צזה וחי אחיך עמך. ולכן ראו חכמים למלוא היתר לאיסור זה, וחשצו שעל דעת כן לא אסרה התורה ענין זה צכולה, כך צ"ל.

תורה תמימה הערות ויקרא פרק כה הערה קצב

*The Torah Temima (who was a banker/bookkeeper) suggests that, when the Torah was given, wealth was measured in land ownership not money. Lending money was needed only for the destitute to enable them to survive. Charging interest on such a loan would have been immoral, especially since interest on loans was not something that the rich expected or needed. So charging interest on a loan was a failure to fulfill the mitzva of 'vechai achicha imach'. However, by the Middle Ages, Jews had no land ownership and money-lending was essential for personal finance. Many needed monetary loans as part of their regular finances and the rich needed to charge interest. The Heter Iska enabled commercial loans to be made if structured as investment partnerships, and interest to be charged in a permitted manner. This was so essential to commerce for all that it became a FULFILLMENT of the mitzva of 'vechai achicha imach'!*

- Heter Iska therefore enables people to save money in banks and receive mortgages from banks, through which the positive mitzva of 'vechai achicha' can be fulfilled and the negative mitzva can be avoided.
- Nevertheless, R. Chaim David HaLevi ruled that if a person lent money to a poor person in real need, and used a Heter Iska to enable interest to be charged, this would be a gross breach of the mitzva.
- **Prozbul:** Similarly, Prozbul avoids the negative mitzva of enforcing a loan after Shemita and, through encourage lending, supports the positive mitzva of helping the poor through giving tzedaka.

## D] HA'ARAMA TO UPHOLD THE INTEGRITY OF THE HALACHIC SYSTEM

- The halachic system is fundamentally rooted in Torah miSinai. This may be the Written Law - which is directly from God, or rabbinic interpretation/legislation - which is part of a system based on pesukim in Tanach (nevua) and statements of Chazal (ruach hakodesh).
- The halachic system itself has a sanctity and must be supported as the legitimate expression of connection to God through mitzvot and law, rather than simply a means to an end in trying to work out the correct way to behave.
- As such, ha'arama may be seen as a tool to uphold and support the integrity of the halachic system itself. Consider the following:

### Ha'arama in a Torah Law

- Where Chazal felt that the application of a Torah law would be counter-productive to its spirit - such as in the case of Bechor or Prozbul - they did not simply cancel or repeal the Torah mitzva. They have no authority to do so and wish to uphold the primacy of Torah law over Rabbinic Law. So instead, they allowed, or even encouraged, use of a technical detail<sup>13</sup> within the Torah law itself which prevented its operation. While in other situations the Rabbis often prohibited or discouraged use of such technical exemptions, such as using a shinui in a prohibited melacha on Shabbat, in ha'arama situations they allowed the Torah law to follow its natural course in order to achieve a more equitable solution.
- For example, with Bechor, the Torah law itself permits de/resanctification of the animal through an action before it is halachically born - declaring it to be a different korban, making a blemish, or selling part of the mother to a non-Jew.

13. Of course, the technical exemption may itself be the product of a Rabbinic interpretive process - using halachic drash to delineate the contours of the Torah mitzva. But, in this capacity, the Rabbis are not acting as legislators of rabbinic law but interpreters of Torah law.

In 'normal' situations where the Bechor should be a gift to the Cohen, use of such a ha'arama would be wrong. But where there is no possibility of gift to the Cohen, the ha'arama uses the Torah law itself to achieve a preferable outcome.<sup>14</sup>

### Ha'arama in a Rabbinic Law

- Many of the cases of permitted ha'arama are in Rabbinic law - such as the case of salting meat on Yom Tov, or lifting the mother and child animal out of a pit on Yom Tov. In these cases, the Rabbis themselves CREATED the prohibitions (salting large quantities of food, muktze). They had the authority to simply release the prohibition where they feel it would be unhelpful - eg to relieve tzar, or to enhance Simchat Yom Tov. Indeed, sometimes they did! But, in other cases, they were concerned that to permit an action outright may desensitize people to other important halachic concepts and weaken their observance.
- For instance, one opinion permits outright salting large quantities of the meat on Yom Tov, but the other opinion is concerned that this could desensitize people to the seriousness of *hachana* - the prohibition of preparing for after Shabbat/Yom Tov and *tircha* - the prohibition of tiring labor on Shabbat/Yom Tov. So they introduce a ha'arama - an usual way of permitting the activity - so that we remember that is only permitted due to exceptional circumstances. The down-side of using ha'arama for this purpose is that it could feel like we are 'playing games' and thereby cheapen the halachic process! So it's a balance. Where the dangers of ha'arama outweigh the benefits, the Rabbis either prohibited the activity outright (as in the case of Eruv) or permitted it (as with medication on Shabbat for a *choleh she'ein bo sakana*).

24. אנכי עשו בכורך - אנכי המציא לך, ועשו הוא בכורך

רש"י בראשית כ"ט

When Ya'akov tells Yitzchak that he is his first born, Esav, Rashi famously explains that he paused slightly in the middle of the phrase, as if he were saying Esav was the firstborn.

- This is highly problematic since the laws of Emet/Sheker determine that the key issue is what one communicates and not the technical meaning of the words<sup>15</sup>.
- In fact, according to some mefarshim, Ya'akov was totally justified in lying to prevent Esav from receiving the berachot since Esav had lied and cheated Yitzchak in to thinking that he was righteous. Also, Rivka had been given a clear message from God that Ya'akov should receive the berachot. So what is Rashi telling us?

25. ובכל אלו שהיתירו חכמים לשנות, אם יוכל לעשות שלא לשקר הוא טוב יותר ממה שישקר. כגון אם שאולים לו: יודע אתה מסכתא פלונית? ישיב: וכי אתה סובר שאני יודע? ואם יוכל לסלק השואל בענין שלא ישקר הוא טוב יותר.

אורחות צדיקים סוף שער כב

The Orchot Tzadikim explains that, even if one have a heter to lie, one should always try to avoid false statements insofar as possible. Thus Rashi is explaining that Ya'akov tried to make his words technically true NOT as a heter to allow him to lie (as this would not work anyway), but purely for himself to avoid falling into the habit of telling lies, even where it is permitted to do so.

## **E] HA'ARAMA - SOME ACADEMIC PERSPECTIVES**

Dr. Elana Stein Hain undertook a detailed and comprehensive analysis of the Talmudic treatment of ha'arama in her PhD thesis: *Rabbinic Legal Loopholes: Formalism, Equity and Subjectivity*.<sup>16</sup> In that paper she examines ha'arama in light of a number of other concepts in classic and contemporary legal theory.

14. See an analysis by R. Nathan Lopez Cordozo at <https://www.cardozaacademy.org/thoughtstoponder/deliberately-flawed-divine-torah/> where R. Cordozo presents this type of ha'arama as an essential tool in the halachic system to ensure that the Torah is kept relevant and contemporary. He states: "Instead of God constantly upgrading the text to higher standards according to human capabilities, and giving the Torah over and over again, God left it in the hands of the Sages. After laying the foundations, God asks the Sages to become partners in the creation of the Torah, in the sense that humans would now be able to develop it to even higher levels. Just as in the creation chapter (Gen 1), God provides the main ingredients and then asks humanity to fashion the world and improve it, the Torah is presented as the main ingredient that the Sages must engage with and improve. The text was meant as a point of departure, not as an arrival, and the Sages are the ones required to adapt the text. ... The Rabbis' divine mandate to update Judaism and keep its moral development on target was not to be accomplished by changing the "underdeveloped", compromised, and flawed divine wording itself but by their interpretation of the Torah text, or by advancing ideas and even laws that sometimes required drastic changes, which violated the literal meaning of the verses. That they were willing to do so is now obvious. They felt obligated to do so, since this was the very intention of the text. The divine but flawed text asked of humans to go beyond it and sometimes even ignore it. The text demanded its own fundamental renovation. .... The Sages didn't see any of these interventions as trickery but as a way of achieving the higher objective of the Torah. They believed that the Torah was completely divine but also flawed and that it was their task to refine it and to bring it to the level that God had intended. This, I believe, is the secret behind the halachic loophole and the divinity of the Torah." In my opinion, use of the expressions 'flawed' and 'compromised' to refer to the Chumash are infelicitous, but the point R. Cordozo is making is relevant. The Written Torah is kept morally relevant in all times through the interpretive mandate of the Rabbis.

15. For a detailed shiur see <https://rabbimanning.com/wp-content/uploads/2012/05/Emet-VeSheker.pdf> and <http://rabbimanning.com/wp-content/uploads/2012/05/Emet-VeSheker.mp3>

16. <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjh87CF89jwAhWLC98KHRwVDW0QFjAGegQIDBAD&url=https%3A%2F%2Facademiccommons.columbia.edu%2Fdoi%2F10.7916%2FD8GT5VKH%2Fdownload&usq=A0Vaw1W3sMrERD7vzbz-LAGkdN>

## E1] FORMALISM vs REALISM

- Legal Realism sees the law as fundamentally instrumental. It is designed and intended to achieve a certain purpose. So it can and should be interpreted and, where relevant, overridden by other equitable principles<sup>17</sup> - "On the Realistic model – sometimes called a jurisprudence of ends, the desirability of outcome, what is best for communal policy, what is most just, etc. determines what the law should be."<sup>18</sup>
- Legal Formalism, by contrast, views the existing law as complete and argues that one must make decisions on the basis of the actual legislation (even where this is limiting) rather than other external variables. Even where rules may lead to unjust consequences, there is a crucial importance to upholding the letter of the law, which brings stability to the administration of justice. "The formalist's concern is not with whether a given exercise of state power is desirable, either in its own terms or in terms of the larger ends that it serves, but with whether it is intelligible as part of a coherent structure of justification. The rationale for interpreting the law this way or that must come from within the law itself rather than on the basis of external politics or desiderata."<sup>19</sup>
- Stein Hain posits that ha'arama displays elements of both realism and formalism and suggest that halacha finds a balance in that, "it takes into account the significance of the laws themselves; they are not to be abandoned simply in the face of other needs. On the other hand, .... the laws themselves, rather than being viewed in a vacuum, must be viewed as a system, which purports to serve moral ends".<sup>20</sup>

## E2] CONSEQUENTIALISM vs DEONTOLOGY

26. Consequentialists only are concerned with what is right and equitable, whereas deontologists value the law itself and are constrained by the law. Deontologists may not change the law even if they feel that it is equitable to do so. Therefore, in order to create a legal loophole, we need both a legal mechanism plus desirable goals that doing so is equitable. [Stein Hain] provides an example to explain the difference between deontologists and consequentialists. "If there is only one respirator available and a terminally ill patient is connected to it, should the hospital administrator demand that the respirator be disconnected and given to a more promising patient? According to consequentialists, the answer is yes: in order to save a person whose chances for survival are great (or simply superior to other patients), one may actively remove the necessary life sustaining resources from someone who shows little or no hope of recovery. For deontologists, however, there is a constraint: maximizing the good cannot come at the expense of moral behavior. Deontologists instead offer the following scheme. Ordering respirators that must be disconnected for servicing and repair every few weeks may solve the problem. When the respirator connected to the terminally ill patient is disconnected for servicing, the hospital staff would simply not reconnect it to that patient, but would connect it to a more promising patient. For deontologists, the passive process is more acceptable than the active removal of care, and so this may be done in order to maximize positive results."
- In applying this analysis to halachic loopholes, it is important for us to realize that halachic authorities are deontologists. Even when halachic authorities desire certain end goals, sometimes they feel constrained by the legal mechanism necessary to create the loophole.

R. Jonathan Muskat, Why Do Rabbis Create Halachic Loopholes To Solve Some Problems and not Others?<sup>21</sup>

## E3] REALISM vs NOMINALISM

27. Realism/Nominalism debate ..... ask[s] whether legal reality or actions are to be determined based on the physical world as it is or based on the mind, whether human or Divine.

Stein Hain p 271

28. In defining Nominalism and Realism ..... Silman suggests a distinction between, "a view of the commandments as orders resultant from the will of the commanding God, on the one hand, and, on the other hand, a view of the commandments as guidelines based in independently existing situations." In other words, is an action wrong only because God commanded so, or has God commanded so because it is intrinsically, ontologically wrong? .....

17. Stein Hain deals at length with the question of how the halachic system compares with the contrasting legal frameworks of Law and Equity.

18. Stein Hain p. 142

19. ibid p. 145

20. ibid p 150

21. <https://blogs.timesofisrael.com/why-do-rabbis-create-halachic-loopholes-to-solve-some-problems-and-not-others/>

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It is important to note that the argument between Realism and Nominalism is not just about the origins and existence of universals, but it is likewise about epistemology, how the content of law is known or determined – whether solely by empirical knowledge of “the way things really are,” as Realists would argue, or perhaps not. Realists and the Nominalists each gave different weight to the “role of epistemological certainty in determining the content of the law.” For Realists, perceiving nature, “the way things really are,” confirms or denies the existence of universals. For Nominalists, however, universals both exist in the specific acts or entities that they characterize and, as universals, are “qualities attributed to entities by the mind.” Therefore, empirical knowledge plays a more limited role, and the universals may be revised independent of “the way things are.” And rabbinic law certainly contains examples of both Realism and Nominalism in this regard ....

Stein Hain pp 268, 269

- This raises the ‘Euthyphro dilemma’<sup>22</sup> - is halacha good because it was the word of God or was it the word of God because it is good?
- In other words - does halacha define what is right and correct, irrespective of any external moral imperative, or is there an external objective concept of ethics and morality to which halacha conforms since it is the right and correct way to behave?
- Does ‘ethics’ exist outside of halacha?

29.

Plato’s dilemma is elegant because it forces us to make a choice between two invidious possibilities: religion is either opposed to ethics or superfluous to it. In fact, however, Plato’s dilemma belongs to a particular time and place, Athens in the fourth century BCE. The culture of Plato’s day was mythic and polytheistic. The gods fought and committed appalling crimes. Kronos castrates his father Uranus, only to be murdered by his son Zeus in turn. Greek myth is amoral or pre-moral, and what Plato represents is one of the earliest attempts to think morally by breaking free from the mythological past. Looking back with the hindsight of history, we can see that for Plato, to be moral was to liberate yourself from the world of myth – much as Abraham, in Jewish tradition, could only arrive at truth by breaking his father’s idols. In their different ways, Abraham and Plato were both iconoclasts.

In Judaism, the Euthyphro dilemma does not exist.<sup>23</sup> God commands the good because it is good. Without this assumption, Abraham’s challenge over the fate of Sodom – ‘Shall not the Judge of all the earth do justice?’ – would be incomprehensible. God and humans are equally answerable to the claims of justice. But the good is what God commands because God-the-lawgiver is also God-the-creator-and-redeemer. Morality mirrors the deep structure of the universe that God made and called good. Plato’s challenge arises because the Greek gods were not creators. Matter was eternal. The gods had no special authority except for the fact that they were held to be powerful. Plato was therefore correct to challenge the popular cults of his day by, in effect, drawing a principled distinction between might and right. The gods may be strong, but that is no reason to invest them with moral authority. For the Bible, however, God who teaches us how to act in the world is also the maker of the world in which we act. This means that in monotheism, morality means going with, not against, the grain of the cosmos and history. God himself empowers his prophets to challenge kings – even himself – in the name of justice or mercy. To be sure, there are occasions – most famously, the binding of Isaac – in which God seems to demand pure obedience; but this itself suggests that the story may be more subtle than it seems.<sup>24</sup> Taken as a whole, Judaism embodies divine faith in the moral capacity and literary of humankind.

To Heal a Fractured World, Rabbi Jonathan Sacks p164-5

#### E4] TALMUDIC EVOLUTION IN THE TREATMENT OF HA'ARAMA

30. In this work, we have used our study of the changes in the use of *ha'arama* terminology to paint a portrait of evolving legal thought: progressing from an emphasis on formalism to an interest in equity, and ultimately to a concern for the subjective individual actor. Simultaneously, the material indicates a move from the more externalized notion of the ritual self to the more evolved notion of the sincere self. To be sure, these are not completely linear evolutions, and they do admit inconsistencies. But they are indeed broadly descriptive of the development of rabbinic law in this area. These developments are likely the result of a combination of factors which are both innate to rabbinic thought - a natural progression from earlier stages - as well as environmental or external factors. .... the two Talmuds inherit the tradition of *ha'arama* and add their own respective flourishes .....

There are, however, two fundamental differences between how PT [Palestinian Talmud] and BT [Babylonian Talmud] speak about *ha'arama*. First, in PT, *ha'arama* is a pervasive concept, touching on so many areas of Jewish law; in BT, *ha'arama* basically becomes relegated to the Sabbath and Festival law. Thus, the presence of *ha'arama* in BT is both quantitatively more rare and also much less diversified. Second, PT and BT examine *ha'arama* from radically different angles. When PT seeks out *ha'arama* to prevent it, there is a sense that it is not necessarily the methodology which bothers the *amoraim* or the editors, but the fact of circumvention itself. Thus, suspicion of *ha'arama* is often about the equity of the situation. This stage of rabbinic thinking, indicative mostly in the Palestinian material, while it emphasizes the importance of the human agent, still views the practitioner as a mere subject which is impacted by the law. .... Agents may fake their intentions, creating legal or ritual reality that differs from their internal subjective selves. .... In BT, however, the focus of weeding out *ha'arama* is on those cases which involve the legal actor’s intention. .... Thus, in BT, we observe a move towards integrity, the inclusion of human being not only as object but as subject, a being who interacts dynamically with the law.

Stein Hain pp 262, 265

22. As set out in Plato’s dialogue Euthyphro (10a), in which Socrates asks Euthyphro, “Is the pious loved by the gods because it is pious, or is it pious because it is loved by the gods?”