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The Beauty of Legal Loopholes:
Rabbinic fictions make for good reading
and better memory

Many Jews who practice and respect Jewish law have complained that the use of legal fictions impugns the integrity of that law. If a law cannot cope with a new situation, it should be changed, annulled, even dismissed as obsolete. The resort to fictions makes one feel that one is being evasive, even dishonest - not a pleasant feeling about a God-given law.

For example, if we are forbidden to engage in loan transactions that involve the payment of interest, we should either respect the prohibition or repeal it without seeking a way to avoid its application.

Jews once observed the law meticulously. Then for many centuries, under the pressure of capitalistic economic systems, they became money lenders on a grand scale. And when Jews dealt with fellow Jews, they resorted to a legal fiction. The money loaned was deemed a guaranteed investment on which the borrower paid a fixed profit. The document is used even now by many Jews.

Now, one asks, should the prohibition against interest have been made obsolete? For Jews who hold that the prohibition is from God, as are the prohibitions in the Ten Commandments, such a thing is unthinkable. But is it not wiser to help Jews survive economically in a capitalistic world, and at the time remember the fact that in a better day the law may be observed as it was first intended?

The Torah addressed itself to the Jewish people, all of whom are brothers, members of the same family. They ought to relate to each other as such. And when a brother needs financial assistance, should one come to the rescue, then seek a profit for having done so? Isn't that immoral?

To avoid this, Jews developed the free-loan societies as few others did, and the concept is still among the most highly rated in the Jewish hierarchy of mitzvot.

I cannot be sure that the great philosopher Plato ever saw our Bible. Yet in one of his dialogues he proposes laws for the ideal state of Athens, and one contains the prohibition against the giving or taking of interest. With each other, Athenians were to act as brothers. To foreigners one could give interest and one could take it from them. But within the extended family no such exploitation would be moral.

Thus the position of Jewish law is found elsewhere centuries later. And should not the memory of such a good law be kept alive? And even if it is presently subverted, in fact is this not a fringe benefit of the legal fiction?

This rationale is actually suggested in connection with another very beautiful law, the law of the sabbatical year. Unfortunately, economic conditions did not allow Jewish farmers the luxury of a seventh-year vacation. Certainly the Romans were not going to relieve the tax burden on Jews for the year in which there was no agricultural enterprise. And that was also the year for the cancellation of all debts. What a boon for the poor - a national bankruptcy relief act!

Alas, the rabbis mercifully had to resort to legal fictions to suspend the law of the sabbatical year. But is it not better to keep the memory of that law alive even if it involves a legal fiction than to let the law be forgotten, and with it perish the thought that in a better day the magnificent law will bless not only academicians but all people?

I must make it clear that the term "legal fiction" suggests nothing pejorative to a student of the law. I was surprised that a rabbi, translating a great work by one Rabbi S. Y. Zevin, deplored the characterization of the document of sale which many Jews use to get rid of *chometz* before Passover as a legal fiction, which it is. He held that the sale was real, not fictitious.

So are all legal fictions real? They create very real legal relationships. Yet they are called legal fictions because they are designed to alter legal relationships or consequences that otherwise might have been. The Jew wants to retain his *chometz* until after

Passover and usually does, though this is forbidden by Jewish law. So he sells it. True, it is a real, valid sale, but who is unaware of what the purpose is and what the net result will be?

There was a time when Jews were careful to rid themselves of all chometz in their possession. It was as if they programmed their eating of bread for weeks in advance of the holiday so that all was consumed before Passover.

But then came the time when Jews owned granaries or had liquor concessions. Could they destroy their stocks before the holiday without sustaining very heavy losses? So the rabbis created the instrument of sale. It is a very real sale, by law, but in fact it was known what would be the fate of those stocks after the holiday.

I do hope that those who feel negatively about legal fictions in Jewish law will alter their attitude. If anyone thinks legal fictions do not exist in Jewish law, they are simply mistaken. Instead of denying it, they ought to help Jews appreciate how Jewish law uses legal fictions to keep the past as part of our collective memory, even as the law copes with the needs of the present and future.