**Selling *Chametz* and Circumventing *Mitzvot***

Based on a *shiur* by Rav Binyamin Tabory

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The sale of *chametz* is a relevant issue every year. Because it involves many halakhic considerations, it is often used as a springboard for investigating other matters, such as what mode of acquisition is valid in the case of a transaction with a non-Jew. In this *shiur*,we will address the effectiveness of selling *chametz* in overcoming the prohibition of *bal yera'eh* and *bal yimatze* (owning *chametz* on Pesach). We will also address the more general question of *ha'arama*, using a mechanism the sole purpose of which is circumventing a biblical law. The issue of *ha'arama* is too broad to exhaust in this framework, and we will therefore focus on *ha'arama* in cases of sale.

**Selling *Chametz* to a Non-Jew**

The idea of ​​selling *chametz* to a non-Jew before Pesach is not novel. The *mishna* states (*Pesachim* 21a):

The entire time that one is permitted to eat [*chametz*], one may feed it to cattle, beasts, and birds, and one may sell it to a non-Jew.

The gemara (ad loc.) discusses the matter:

And one may sell it to a non-Jew – This is obvious. This comes to reject the view of this *Tanna*. For it was taught: Beit Shammai maintain: A man must not sell his *chametz* to a non-Jew unless he knows that it will be consumed before Pesach. But Beit Hillel say: As long as he [the Jew] may eat it, he may sell it.

Beit Shammai maintain that one is prohibited to sell *chametz* before Pesach unless one knows that it will be consumed before the start of the holiday. This seems to indicate that ideally, there should be no *chametz* at all in the world on Pesach, but we simply do not have control over all the *chametz* in the world. At any rate, regarding all the *chametz* that is in one's possession, one must make sure that it will no longer exist on Pesach.

However, the *halakha* follows the view of Beit Hillel, and there is therefore no problem with the actual sale of *chametz.* That does not mean, however, that there is no problem with the way that we sell *chametz* today.

**A Full-Fledged Gift**

The Tosefta(*Pesachim* 2) states:

If a Jew and a non-Jew were on a boat and the Jew had *chametz* in his possession, he may sell it to the non-Jew or give it to him as a gift, and then take it back from him after Pesach, provided that he give it to him as a full-fledged gift.

Two main questions may be raised regarding this law. First, what is the reason for the Tosefta’s reservation that the Jew must give the *chametz* to the non-Jew as a full-fledged gift? Second, does this law apply only in an exceptional case, like the one mentioned in the Tosefta, or does it apply in all situations?

Several explanations may be offered for the Tosefta’s statement that the *chametz* must be transferred as a full-fledged gift.

The Tosefta may mean that a gift that is given on condition that it will be returned is not a valid gift with respect to the prohibition of owning *chametz.* In general, a gift given on condition that it will be returned is considered a valid gift. Thus, for example, the *gemara* in *Kiddushin* states that one may fulfill his obligation with an *etrog* that was given to him on condition that it will be returned. Why, then, should such a gift not be valid with respect to *chametz*?

The Radbaz cites the *Hagahot Maimuniyot* (*Hilkhot Shabbat*, chap. 2), who writes that one who gives away *chametz* on condition that it will be returned transgresses the prohibition of owning *chametz* on Pesach because of the special stringency found in the laws of *chametz*. Elsewhere, the Radbaz explains that if a person gifts *chametz* to a non-Jew on condition that it will be returned, he cannot know what the non-Jew will in the end do with it. Will he return the *chametz* after Pesach, in which case the gift will be retroactively valid and the Jew will not transgress the prohibition against owning *chametz*? Or will he not return the *chametz* after Pesach, in which case the gift will be void from the beginning, so that it will turn out that the Jew transgressed the prohibition?

It may even be argued that even if the non-Jew does return the *chametz*, the Jew still violates the prohibition because over the entire Pesach, he was in doubt regarding the status of the *chametz*. He therefore had a clear connection to the *chametz*, and because of that connection, he violates the prohibition.

According to this explanation, when the Tosefta speaks of a full-fledged gift, it means a gift with no conditions whatsoever. This is necessary so that there will be no concern about non-fulfillment of a condition that would invalidate the gift, in which case the Jew would violate the prohibition against owning *chametz* on Pesach.

***Ha’arama***

Some of the *Rishonim* cite the Tosefta in a manner that reflects their understanding of its statement. For example, when the Ritva (*Pesachim* 21b) cites the Tosefta, he adds at the end the words: "And provided that he does not engage in *ha’arama* (circumvention)." The *Rishonim* disagree regarding whether this is an alternative reading of the Tosefta or an interpretation of the standard text. The Ritva (p. 21a) explains:

But if he circumvents the prohibition and regularly sells [his *chametz*] every year to a non-Jew before Pesach and takes it back after Pesach, we penalize him, and [the *chametz*] is forbidden to him and to all of Israel after Pesach.

If a person gives *chametz* to a non-Jew as a full-fledged gift, there is no problem, and if one year he gives him the *chametz* merely to circumvent the prohibition, but he takes it back after Pesach, that too is all right. However, if he does this every year, the Sages penalize him and forbid his *chametz* after Pesach.

Other *Rishonim* suggest that the proviso that the person must not engage in *ha’arama* means that he must give the *chametz* to the non-Jew with no conditions attached. Accordingly, this is merely an explanation of the words "full-fledged gift" in the standard version of the Tosefta.

A third explanation can also be suggested for the forbidden *ha’arama* – that the seller not sell the *chametz* without really having in mind to sell it.

What is the law if a person goes ahead and sells his *chametz* by way of *ha’arama*? It would seem from the Ritva that he does not violate any prohibition of Torah law, but by Rabbinic decree he is guilty of a transgression. However, if we say that there is a problem with the sale itself, it turns out that the person violates the Torah prohibition against owning *chametz*.

It could be argued that even if we follow the Ritva’s view, what he says is only *lekhatchila*, the proper mode of conduct from the outset. If a person indeed engaged in circumvention, he does not violate even a Rabbinic prohibition.

**The Problem with *Ha’arama***

What is the problem with circumvention?

First of all, the person lies; he gives a person a gift without really intending to give it to him. But is there a halakhic problem regarding the validity of the sale or gift?

The Ran maintains that regarding *chametz*,we require *bedika* (checking the house for *chametz* and burning the *chametz* that was found) in addition to *bittul* (nullifying the *chametz*) because we do not know whether or not the person really means to nullify the *chametz*. R. Akiva Eiger asks: What difference does it make whether or not he really means to nullify the *chametz*? What a person thinks in his mind is irrelevant! He is bound by what he says with his mouth!

The answer to R. Akiva Eiger's question depends on how *bittul* works. If *bittul* is a type of *hefker* (renouncement of ownership), this is indeed a good question. But if *bittul* is considered destruction of the *chametz* in the person's heart, as argued by Rashi, it is not a transfer of ownership that depends exclusively on what the person says. Rather, the effectiveness of the *bittul* depends exclusively on what he thinks in his mind.

There is, however, a situation of *umdena demukhach*, where there is a clear indication of what a person is thinking, which can void a transaction even if we say that the validity of a transaction depends on what the person says, and not on what he thinks. In the case of the sale of *chametz*, is there an *umdena demukhach* that the person does not really intend to sell the *chametz*? While it can plausibly be argued that in today's circumstances, people do not really wish to sell their *chametz*, it can also be argued that there is an *umdena demukhach* that a person does not want to transgress the prohibition against owning *chametz* on Pesach.

The *Yerusahlmi* (*Pesachim*, chap. 2) also deals with the issue of *ha'arama*:

If one renounced ownership of his *chametz* on the thirteenth of Nisan, what is the law? R. Yochanan said: It is forbidden. R. Shimon ben Lakish said: It is permitted… Rather, R. Yochanan was concerned about *ha’arama*. And R. Shimon ben Lakish was not concerned about *ha’arama*.

The *Yerushalmi* is dealing with a case in which a person renounced ownership of *chametz* on condition that he would re-acquire it after Pesach, and in this way the *chametz* is not forbidden after Pesach. The disagreement is about whether or not we are concerned about *ha’arama*. What does this mean?

Among the *Rishonim* and the commentators to the *Yerushalmi* we find two explanations:

1. The concern is that a person does not really renounce ownership of his *chametz.*
2. The concern is that a person does not renounce ownership of his *chametz* at all, but rather he does a "trick" and plans to retake possession of the *chametz* after the festival is over.

**When is *Ha’arama* Permitted?**

We find many cases of *ha'arama* throughout the Talmud; some are forbidden, while others are permitted. The Rambam distinguishes between these cases of circumvention that are permitted and those that are forbidden. The Rosh does not make such a distinction; rather, he distinguishes between circumventions that the Sages permitted and those that they prohibited, but the question remains as to what the criteria are for deciding whether a particular circumvention is permitted or forbidden.

The first criterion is the desire of the Torah. We have Torah laws and Rabbinic laws, but there is also an idea of the Torah's desire – in other words, the goal that the Torah wished to achieve with these laws.

The main question, of course, is how we can know what the Torah wants. In our case, is the objective of the prohibition against owning *chametz* that there should be no *chametz* in a person's possession, lest he come to eat it or for some other reason? Or is it that there should be no *chametz* in the world at all? This brings to mind the disagreement between Beit Shammai and Beit Hillel that was mentioned earlier in the *shiur*.

An additional criterion is based on the *gemara* in *Bekhorot* (3b):

R. Mari bar Rachel possessed a herd of animals. He used to transfer [to a non-Jew] possession of the ears [of the firstlings while still in the womb]. He [nevertheless] forbade the shearing and the working of the animals and gave them to the priests. The herd of R. Mari bar Rachel died… Why did the herd of R. Mari die? Because he deprived them of their holiness.

In this case, we find *ha’arama* that deprives the firstling of its sanctity, and punishment was imposed for this on R. Mari bar Rachel. The *Tosafot* (ad loc., s.v. *deka mafka*) note:

The reason that we are not careful about this today, even though R. Mari was punished for it… Alternatively, in the days of R. Mari, when they were experts in casting a blemish in a firstling before it emerged into the world, it was forbidden to do this by way of circumvention. But we, who are not experts in this, it is better to sell [the firstling] to a non-Jew, before he comes to sin.

  An important principle emerges from the words of the *Tosafot*. A distinction must be made between a circumvention done in order to overcome a prohibition and a circumvention performed in order to avoid performing a *mitzva*. If one performs a *ha’arama* in order to avoid performing a *mitzva*, this is forbidden circumvention. But if he does it in order to avoid transgressing a prohibition, this is permitted circumvention. The Torah wants people to avoid prohibitions, but it does not want them to refrain from performing *mitzvot*.

Another layer should be added to this distinction. In the case of a prohibition, if a circumvention will do away with the entire goal of the prohibition (e.g., a circumvention allowing one to lend money at interest), such a circumvention is forbidden, even though it is not intended to cause a person to refrain from performing a *mitzva.*

**The Goal of Selling *Chametz***

Let us return to the sale of *chametz*. Should *ha’arama* work in such a case? It may be suggested that this depends on whether the goal is to make sure that the person does not violate a prohibition or if the goal is to exempt oneself from a *mitzva.*

This is connected to the question of whether there is a *mitzva* of *tashbitu*, destroying *chametz*. *Tosafot* maintain that the commandment of *tashbitu* is only *bedi'eved*. In the case in which a person owns *chametz* on Erev Pesach, he is commanded to destroy it, but this is a *mitzva* that was not meant to happen. However, according to those *Rishonim* who maintain that there is a *mitzva* of *tashbitu* on Erev Pesach, it is possible that the sale of *chametz* will clash with this *mitzva*.

One must, however, examine what exactly is the relationship between the sale of *chametz* and the nullification that we do, for even one who sells his *chametz* does soto the exclusion of the *chametz* that he will burn, in which case he fulfills the *mitzva* of *tashbitu* despite the sale. It may further be suggested that the sale itself is a fulfillment of the *mitzva* of *tashbitu*, because the goal of the action is to rid oneself of the *chametz* that a person has on Erev Pesach.

The *Bekhor Shor* writes that the sale of *chametz* does not work for something that is *chametz* by Torah law. However, since we ordinarily nullify our *chametz*, our *chametz* is forbidden only by Rabbinic decree, and therefore one can sell it*.*

The *Acharonim* reject the position of the *Bekhor Shor* and argued that the sale of *chametz* works even for *chametz* by Torah law. However, there is a severe stringency that contemporary authorities have introduced – that is, not to sell actual *chametz*, but only a mixture containing *chametz.* This stringency is reminiscent of the *Bekhor Shor's* distinction, for while all agree that actual *chametz* is subject to the prohibition of *bal yera'eh* and *bal yimatze*, the *Rishonim* disagree regarding whether a mixture containing *chametz* is subject to the same prohibition.