



BANKRUPTCY: HALACHA, MORALITY, AND THE TORAH'S IDEAL ECONOMIC SYSTEM

Just as Jews are obligated to let the land rest during the seventh year, we are similarly enjoined to let our money “rest” by erasing outstanding loans at the conclusion of the seventh year. While at first glance this policy may appear to resemble a nascent bankruptcy law, there are several critical differences between *hashmatat kesafim* and contemporary bankruptcy policy (e.g. debt and asset limitations, fixed term of seven years, etc.). This indicates that the central theme of the mitzvah is to underscore that our assets belong to Hashem (just like the land). As such, we must turn to other legal paradigms to determine how halacha relates to bankruptcy.

Can a Jew Declare Bankruptcy?

There is no biblical term for bankruptcy. *Hashmatat kesafim*

notwithstanding, there is an obligation for a Jew to repay any money that is borrowed. There are, however, two halachic mechanisms that may recognize the secular institution of bankruptcy.

Minhag Sochrim is a principle that makes industry standards and customs legally binding within halacha. The rationale for this principle is that merchants who work in a particular industry implicitly accept those standards, constituting a halachically valid corollary to a transaction (“*tnai*”). Thus, Rav Moshe Feinstein, *Igros Moshe* (CM 1:72) argues, government regulations should also constitute a *minhag sochrim* for the same reason. With this rule, it would be reasonable to assume that bankruptcy too should be recognized by halacha as a *minhag sochrim*. However, there are those who assert that because a minhag’s bindingness

is predicated on the merchant’s knowledge and acceptance of the custom/law, one could potentially differentiate between corporate, formal loans and ad hoc personal ones; two individuals informally lending money to one another might not be assumed to tacitly intend to abide by federal bankruptcy policy.

A second mechanism that might recognize bankruptcy is the principle of *dina demalchusa dina*, that secular law is binding on a country’s Jewish citizens if the law is beneficial for the government or society (which according to many economists and public perception, bankruptcy is). While there is some debate (see Rama, CM 369:8 and *Shach*, CM 73:39) regarding the scope of this principal and whether bankruptcy would thus be recognized, the principle of *kim li* (the current owner of assets may elect to follow a

recognized minority halachic opinion in their favor) could allow many bankruptcy claims to be recognized under Jewish law.

Should a Jew Declare Bankruptcy?

Even if bankruptcy would be halachically permissible under the aforementioned principles, we still may be morally obligated to repay our debt when we acquire the means to do so. Indeed, King David proclaimed (Tehillim 37:21): "One who borrows and does not repay is wicked." However, according to authorities who hold that corporations as entities are not obligated to fulfill mitzvot, perhaps they would also not be bound to the concurrent moral imperatives.

Would a Contemporary Torah-Based Economy Have Bankruptcy Law?

This is perhaps the most difficult question to answer. While the Torah is clear that we must always repay loans, the vast majority of loans mentioned in the Torah are need-based, charity loans, whereas our modern economy is fueled by business venture, capital loans. Debt (and the ability to borrow money) is an intrinsic ingredient to a burgeoning economy. It is the veritable yeast that catalyzes exponential economic growth and development for individuals, nations, and the world. Yet perhaps the Torah did not believe that such an economy was optimal; the financial and moral implications that loan default has on society (higher interest rates, risky business ventures, etc.) may simply

be too great a cost to be offset by the benefits that bankruptcy law affords. Alternatively, perhaps just as the Sages created the halachic mechanism of *pruzbol* to address needs in their society, a new financial instrument may be proposed when a Torah-based economy will be formed. Indeed, it is possible that the Torah's halachos of *tzedakah* (charity) and related communal ordinances are designed to prevent people from reaching the point of no return, in which bankruptcy is the only option. Therefore, a Torah-driven economy would not need or want bankruptcy laws, instead developing policies operating at an earlier stage of financial deterioration. Not only would this reduce the overall societal cost of bankruptcy, but would be in greater consonance with the Torah's values of loan repayment.

SOURCES FOR FURTHER STUDY

Source #1: Rav Moshe Feinstein, Igros Moshe, CM 1:72

והגג עצמך דהא ברור ופשוט שכל אלו הדינים התלויין במנהג המדינה ... א"צ שיעשה המנהג ע"פ חכמי תורה וגם אף לא ע"פ יהודים דוקא דאף שהנהיגו זה הנכרים כגון שהם רוב תושבי העיר נמי הוא מדין התורה בסתמא כפי המנהג דאדעתא דמנהג העיר נחשב כהתנו בסתמא. וכן הוא בעניני מכירה מה הוא בכלל המכר
Think about it, it is clear and obvious that all of the laws that are contingent on local custom ... don't have to be instituted by rabbis or even Jews. If the non-Jews make up the majority of the city follow a certain business practice, that becomes Torah law because all transactions are done with that in mind. The same applies to determining what is a valid transaction.

Source #2: Rama, Choshen Mishpat 369:8

ל"א דלא אמרינן דינא דמלכותא דינא אלא במסות ומכסות התלויים בקרקע כי המלך גזר שלא יודרו בארצו כי אם בדרך זה אבל בשאר דברים לא (הרא"ש פ"ד דנדריים בשם הר"מ ומרדכי פ' הגזול בתרא) וי"ח וסבירא להו דאמרי' בכל דבר דינא דמלכותא דינא (מרדכי שם

בשם התוס' ות"ה סי' ש"ט) ולכן המלוה על המשכון יכול למכרו אחר שנה הואיל וכן דינא דמלכותא (שם בשם ר"י בר פרץ) וכן הוא עיקר.
There are some that hold that the law of the land is law only with respect to taxes ... Others disagree and hold that the land of the land is binding on all [interpersonal] matters.

Source #3: Shach, Choshen Mishpat 73:39

היאך נלמוד מדיני גוים לבטל דין תורה, ח"ו לא תהא כזאת בישראל. ולא מיבעיא לאותן הפוסקים שסוברים דלא אמרינן דינא דמלכותא רק בדברים שהם להנאת המלך, ולא בין איש לחבירו ... אלא אפילו לשאר פוסקים דסוברים דאמרינן דינא דמלכותא בכל דבר, היינו דוקא מה שאינו נגד דין תורתנו אלא שאינו מפורש אצלינו, אבל לדון בדיני הגוים בכל דבר נגד תורתנו, חלילה, ודאי לא יעשה כן בישראל.
How can we follow secular law and cancel Torah law? ... Certainly according to the opinions that the law of the land only applies to matters that the king benefits from not other interpersonal matters ... but even according to the other opinions that is only when there is nothing explicit in our Torah. However, to follows secular law that is against our Torah, Heaven forbid that something like this should happen in Israel!