Dissent: A Matter of Great Interest

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This paper was submitted to the CJLS as a dissent to Rabbi Ben Zion Bergman's responsum, "A Question of Great Interest: May Synagogues Issue Interest-Bearing Bonds?"

I am fundamentally in agreement with the thrust of Rabbi Bergman's paper to recognize a constructive היתר עיסקא on most standard loan transactions. My dissent lies in two areas that I feel should properly be solved differently than the solution proposed therein.

The first of these, my primary objection and the precipitating cause of this dissent, is that I believe it is insufficient to decree a constructive היתר עיסקא without setting out the nature of that היתר (or more properly, the nature of the עיסקא). To wit: עיסקא is a fundamental undertaking on the part of the parties to a loan to contract a business partnership parallel to the loan such that, by specific contract stipulations, the payment to the investing silent partner in the partnership (the lender) might mimic payment of interest on the loan while yet formally being recorded as a legitimate sharing in the proceeds of the partnership, with all its stipulations. In particular, should the active partner (the borrower) fail to realize a profit, the עיסקא needs to carry stipulations that will permit the silent partner (the lender) to receive payment despite the absence of any profits to share.

Over the years there have been numerous forms of היתר עיסקא with differing stipulations concerning the nature of the commitments of the contracting parties. It seems to me fundamentally improper to announce a constructive היתר עיסקא without a specific set of stipulations in mind. Should a case arise in our בית דין wherein the parties to a loan under our constructive היתר עיסקא seek to adjudicate the terms of their עיסקא we would find ourselves unable to specify to what undertakings we have committed the parties.

Rabbi Bergman's example of constructivity in the case of תנאי בית דין (a court enforced condition) in marriage precisely illustrates this point.

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

The rabbis required certain specific provisions to be part of any marriage contract constructively, that is, even should the parties deem it undesirable to include them in their contract. The specific provisions were known and would be enforced by the court. The very point of constructivity was to instruct the specific adjudication of any later case that might arise out of that contract. Rabbi Bergman's paper, however, seeks to put in force a fictitious legal arrangement which it leaves fully fanciful so that, in effect, it can never be adjudicated at all.

The charge against all היתר עיסקא arrangements has always been that one cannot wave a magic wand and thereby dispense with an איסור דאורייתא (a Biblical prohibition). Defense against that charge resides in having a specific legally justifiable עיסקא arrangement between the parties. The application of constructivity itself, here, strengthens the potential objections. Failing altogether to have an עיסקא arrangement in the mind of the decreeing בית דין seems to me to be a fatal flaw.

My second objection, less compelling insofar as moving this dissent, is that Rabbi Bergman reaches very far with his constructive היתר עיסקא. It must be remembered that היתר עיסקא is a subterfuge, albeit a legal one, aimed at circumventing the Torah's prohibition on taking interest. As a matter of principle I believe the Torah's dictates to be authoritative-subject to our interpretation, even limitation, but not outright abrogation. Classic rabbinic method has always been to delimit authoritative rulings where necessary, sometimes severely, but not to overturn them. Some area would be left under the aegis of the original rule. Rabbi Bergman and the committee, through the use of constructivity to apply to all loans of any kind (and that without even a specific עיסקא in mind) leave no hint of the original prohibition.

More importantly, but for the demands of our complicated economic system, run on the engine of transfers of capital and the banking system, I am in basic sympathy with what I read to be the intent of the Torah's provision – namely that if a Jew in need approaches another Jew for a loan, that Jew should address his fellow's need as an act of brotherhood, without deepening his burden and without seeking to profit. Most of us, I expect, do still give interest free loans to our family and friends when they are needed without much thought. Charging interest and formalizing such a loan as a business transaction is unacceptable to me except where no alternative is possible.

I would therefore propose that a general, constructive היתר עיסקא be limited to bona fide commercial loans between individuals or to loans involving corporations (banks, etc.), which are by their very nature commercial entities. That is the realm for which we seek the freedom of היתר עיסקא. Personal loans between individual Jews would thus remain, as they should, within the aegis of the Torah's directive, interest

forbidden. The option of a specific היתר עיסקא between individuals in the case of some specific need could then be considered on a case by case basis by a competent authority.

(I note in this regard that Rabbi Moshe Feinstein[1] proposes a "חידוש" (a norum) that corporations that carry only corporate liability and not the personal liability of their owners and officers should thereby be exempt from the prohibition of ריבית (interest) when they function as the borrower, on which basis he permits bank deposits in a Jewish bank. This is a radical suggestion. Jewish law has never protected individuals from liability for their actions nor recognized the "corporate person," and here this new distinction which has not been received in Jewish law is being utilized to release the corporation from Torah law. Nonetheless, this position has received a hearing in the Orthodox community given its author. The committee was unwilling to consider a proposal along those lines, which would yield a much narrower solution to the question at hand, neither do I propose that we go that route. A constructive היתר עיסקא is a broader but more conservative solution that can be equally effective. The new distinction between persons and corporations here serves only as a guiding distinction in a rabbinic enactment, which distinction serves to maintain the integrity of the Torah's ruling rather than to challenge it.)

I append here the text of a עיסקא (היתר) שטר. It should be clear that it does not represent the specifics of the constructive היתר עיסקא decreed by this committee. Such a specific עיסקא (היתר) שטר was proposed by Rabbi Howard Handler at the end of 1986 or beginning of 1987, before my term, and voted down. Nor was my insistence on the need for such a text received. Nevertheless, I append here the text of a עיסקא (היתר) שטר crafted as a constructively applicable text, rather than one to be signed by the parties at contract. This text also differs minutely from other such עיסקא documents in order to solve certain technical problems that I felt worthy of attention.[2]

I append this text for purposes of completion and to serve as an available model for those who seek to understand the terms of a עיסקא (היתר) שטר or to adjudicate an unspecified עיסקא in the future.

Shtar (היתר) עיסקא

1. Parties A and B, respectively the silent partner (lender) and active partner (borrower) in this partnership, stipulate that that sum of money transferred from A to B for the designated period, as recorded in the records of their transaction, was transferred and received one half (1/2) as a loan and one half (1/2) as an investment.

2. The active partner (B) has agreed to invest said funds prudently, with all profits accruing therefrom and all losses divided equally between the partners, save for a fee of $1 per year or part thereof which shall be paid to the active partner (B) from the share of the silent partner (A) at the termination of this partnership as compensation for his/her efforts.
3a. The partners have further agreed that the assets of this partnership will be scrupulously guarded by the active partner (B).
b. The active partner (B) shall be obligated to make good to the silent partner (A) any loss sustained as a result of his/her failure personally to oversee the disposition of the assets of this partnership at all times.
c. He/she shall be released from said obligation only upon the testimony of two witnesses valid under Jewish law that he/she fulfilled the terms of par. 3a as further elucidated in par. 3b.
4a. This partnership anticipates a return equal to twice the sum of the active partner's fee, above par. 2, and the settlement figure, below par. 5.
b. In the event that the partnership fails to achieve the anticipated return, the burden of proof of that fact lies upon the active partner (B).
c. He/she agrees to permit the silent partner (A) to designate the accounting procedures to be used in recording the partnership's income and to allow the silent partner (A) and/or his/her designees to audit the books of the partnership.
d. He/she further agrees to verify his records and claims in a solemn oath to be sworn before a בית דין of three sitting members of the Committee of Jewish Law and Standards of the Rabbinical Assembly.
5. Should the active partner (B) be unable to provide proof of the partnership's return or should he/she choose not to fulfill the other stipulations of par. 4, the active partner (B) agrees to pay, and the silent partner (A) agrees to receive as satisfaction in full, a settlement of X% per year, as set forth in the records of the transaction, along with the return of the capital in full.
6. In the event of any continuing dispute regarding the provisions of this document, said dispute shall be referred for adjudication to a בית דין of three sitting members of the Committee of Jewish Law and Standards of the Rabbinical Assembly to be appointed by the sitting chairman of said committee.
7. The provisions of this document apply to all commercial loans between Jewish individuals and all commercial and personal loans between an individual Jew and a corporation of Jewish ownership. It shall not apply to personal loan contracts between individual Jews, which contracts shall require a specific עיסקא contract undertaken in advance of or in tandem with the loan agreement.

NOTES

1. *Iggrot Moshe* Vol. 5, *Yoreh Deah* (Y.D. 2), no. 63.
2. See David Bleich's discussion in *Contemporary Halakhic Problems*, Vol. II, PP 376-396 and his proposed *shtar*, and the discussion by Aaron Levine in *Economics and Jewish Law*, pp 188-191. See also a *shtar* for a bank in Moshe Feinstein, *Iggrot Moshe*, Vol. 6, *Yoreh Deah* (Y.D. 3), no. 41. It is not material to go into those further here.