

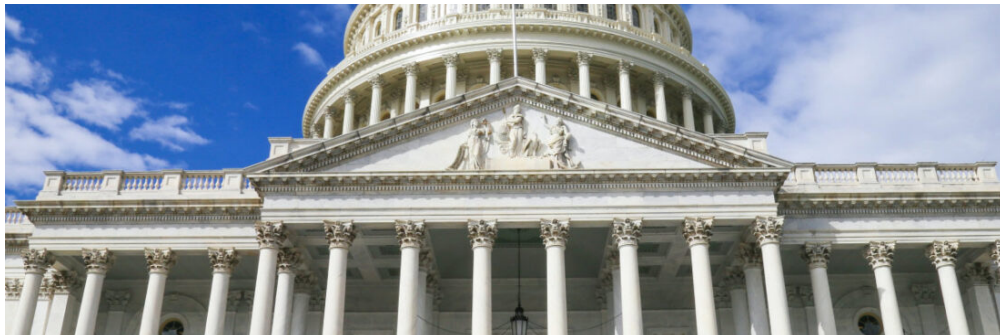
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ALL HAIL SEIZURE: MAY GOVERNMENT EXPROPRIATE PROPERTY?

Adapted from the writings of Dayan Yitzhak Grossman

Federal authorities recently seized seventeen items, including “funeral scrolls, prayers for the dead, rules governing how a community member should behave in society, and other records,” from Kestenbaum & Company, a Brooklyn auction house specializing in Judaica, on the grounds that they were illegally confiscated during the Holocaust and thus properly belong to “the descendants of families that lived and flourished in Jewish communities before the Holocaust.”¹ This article considers the halachic validity of such claims.

There is nothing new under the sun; this scenario was already considered more than eight centuries ago by the Rambam. Someone had purchased sefarim that had been plundered from synagogues in another city; may he keep them,

or was he required to return them to the original owners? The Rambam rules that if the plunder had been “by decree of the king,” the purchaser may keep them, but if they were stolen without government sanction, he must return them (but he is entitled to recoup the price he paid).²

In the same vein, the Radvaz discusses the case of certain governmental banking privileges that Reuven held under the jurisdiction of a certain king. The Jews were expelled from the city in question; the expellers were then expelled from the city via its conquest by the pope; and a certain duke then conquered the city, allowed the Jews to return, and eventually granted the banking privileges in question to Shimon. Reuven demanded the return of his privileges, but the Radvaz ruled in favor of Shimon, based on the principle of *dina demalchusa dina* (the law of the government is recognized as valid by halacha), since “the law of kings is that when they conquer a country by military

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² Pe'er Hador siman 131. Cf. *Hilchos Avadim* 9:4.

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PARSHAS SHOFTIM

HOLDING COURT

Excerpted and adapted from a shiur by
Dayan Yosef Greenwald

You shall place judges and law enforcement officials for yourself in all your cities that Hashem, your G-d, is giving you, for your tribes...

Devarim 16:18

The Torah here commands us to build a justice system by establishing a network of batei din. Although the system cannot be implemented fully today because our *dayanim* lack *smicha* (ordination in an unbroken chain from Moshe), the Gemara (Gittin 88a) says that *dayanim* today represent the *dayanim* of old in Eretz Yisrael and serve as their emissaries.

But the Gemara distinguishes in this context among different areas of law. Any judgments that are about punishment—e.g., *dinei nefashos* (capital cases)—are not adjudicated today, nor are payments that are punitive and assessed as fines (*knasos*). For example, a burglar may not be compelled to pay *keifel* (double) today, because this payment exceeds the actual loss.

On the other hand, many cases that are about compensation (continued on page 2)

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Forbidden Fruit?

Q I purchased a small blueberry bush with small clusters of berries to plant in my yard. Does this present an *orlah* problem?

A The Mishnah (Kidushin 37a) states that unlike other agricultural mitzvos, *orlah* (the prohibition to eat the fruits of a tree in its first three years) applies even in *chutz la'aretz* (the Diaspora), regardless of whether a Jew or a non-Jew planted the tree (Shulchan Aruch Y.D. 294:8). But *orlah*, as we shall soon see, is subject to certain leniencies in *chutz la'aretz*.
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force, all the houses and fields and vineyards are [the king's], and the people as well are his as indentured laborers." As the Rambam rules:

Similarly, if a king becomes angered with a servant or an attendant who is one of his subjects and confiscates his field or his courtyard, it is not considered to be robbery, and one is permitted to benefit from it. If a person purchases it from the king, it becomes his and the original owners cannot expropriate it from him. For this is the law exercised by all kings: to confiscate all the property of their attendants if they become angered by them.

Thus, it is the king who annulled the ownership over this courtyard or field, making it ownerless. Therefore, the person buying it from the king legally acquires it.³

Further, the Radvaz adds, the very lives of the conquered people are forfeit to the crown, and the Talmud declares that "Those executed by the king, their property [belongs] to the king."⁴ There is, however, a crucial limitation on the sovereign power to seize property, as the Rambam himself, in the discussion cited by the Radvaz, proceeds to articulate:

If, however, a king confiscates a courtyard or a field from one of the subjects of his country in a manner that is not in accordance with the laws that he enacted, he is considered to be a thief, and the owners may expropriate the property from the person who purchased it from the king.

The general principle is: Any law that a king decrees to be universally applicable, and not merely applying to one person, is not considered robbery. But whenever he takes from one person alone in a manner that does not conform to a known law, but rather seizes the property from the person arbitrarily, it is considered to be robbery.

³ Hilchos Gezeilah Va'aveidah 5:13.

⁴ Sanhedrin 48b. The Radvaz's application of this rule is quite puzzling, since (as Rashi explains) the rule would seem to be referring to criminals or traitors, not civilian populations conquered in war! Moreover, Rashi specifies that the rule is referring to those guilty of a capital offense against a Jewish king.

⁵ Shu"t Radvaz cheilek 3 siman 968 (533).

Similarly, Tosafos declares that certain governmental actions in their era that violated established precedent were not valid under the principle of *dina demalchusa dina*, because they were "completely unfair," and thus not *dina demalchusa* but mere theft.⁶ As the Ramban puts it, Chazal endorsed *dina demalchusa* (of the government—i.e., laws that are in accordance with established precedent and tradition), but not *dina demalka* (of the king—i.e., arbitrary dicta of the sovereign). (Our tradition here anticipates American Revolutionary thought by half a millennium: John Adams famously explained that a republic is "a government of laws, and not of men," as opposed to an empire, where "the maxim is *quod principi placuit legis habet rigorem* (what pleases the prince has the force of law)."⁷)

Some *Rishonim* go so far as to limit the principle of *dina demalchusa dina* to existing, traditional laws, and maintain that a king has no right to institute new laws.⁸ Others disagree with this position,⁹ and some *Acharonim* explain that even according to the first view, a king is certainly allowed to enact new legislation in general, and he is only restricted from enactments which are perceived by the upright as unjust,¹⁰ or that exceed the scope of the mandate granted to the original government (from which the current one derives its authority) by the people.¹¹ (In modern terms, the power of the government is limited by some notion of constitutionality.)

In light of the above, although the traditional halachic concept of fairness does not preclude discrimination against particular groups, including Jews,¹² perhaps governmental actions motivated by an ideology as monstrous as Nazism

⁶ Tosafos Bava Kama 58a s.v. *I nami*.

⁷ Excerpted from: The Revolutionary Writings of John Adams, Selected and with a Foreword by C. Bradley Thompson, "Novanglus; or, A History of the Dispute with America, from Its Origin, in 1754, to the Present Time" (Indianapolis: Liberty Fund, 2000) (excerpt title added by Dr. Tierney) (italics in original).

⁸ Chidushei HaRamban Bava Basra 55a; Remah, cited in Tur C.M. siman 369 (see Bais Yosef there).

⁹ Rosh, cited in Tur ibid.; Sefer Hatrumos *sha'ar* 46 *cheilek* 8 os 5. Cf. Magid Mishneh *Gezeilah* 5:13-14; Shu"t Maharik *shoresh* 66; Shu"t Radvaz ibid.; Shu"t Lechem Rav *siman* 157 s.v. *Nimtze'u*.

¹⁰ Chazon Ish C.M. *Likutim siman* 16 os 9 s.v. *Vehinei kasvu Rishonim z"*.

¹¹ Amud Hayemini *siman* 9 os 10 p. 53.

¹² Shu"t Maharik *shoresh* 194 (codified by Rama C.M. 369:6); Shu"t Tumas Yesharim *siman* 16 (cited in Divrei Geonim *klal* 25 os 9); Shu"t Maharsham *cheilek* 7 *siman* 34.

common, and perhaps car theft or pickpocketing would not be included.

² Here, too, the Rama (1:2) cites opinions that *sheves* and *ripui* are not

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are adjudicated today. The Shulchan Aruch (C.M. 1:1) writes that this includes common cases of theft and unintentional property damage (though not uncommon cases).¹ This stands in contrast to secular

¹ According to the Rama (1:3), not all cases of theft are considered

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Orlah applies only to the fruits of an *eitz* ("tree"). An *eitz* is defined as a plant whose branches survive the winter and continue producing fruit the next season (see Shulehan Aruch O.C. 203:1 and Mishnah Brurah).



RAV ARYEH FINKEL

A blueberry bush meets this definition, so it is subject to *orlah*.

Blueberries, like most berries, are usually cultivated by propagating small shoots cut from a mature bush. Although these cuttings are taken from fully grown plants, they are considered new trees and are subject to a new *orlah* count (Y.D. ibid. 16). Some cultivators propagate cuttings up to 36 inches long; such shoots can produce fruit within their first three years. Still, one may assume that many of the bushes are not sold until they mature for a few years. Because you don't know the age of your bush, it is only *safek* (questionable) *orlah*, which is permitted in *chutz la'aretz* (see Shulehan Aruch ibid. 9 and Igros Moshe Y.D. 1:186).

And although you replanted the tree, that doesn't restart its three-year count if the root ball remained buried in its soil, which is usually the case (Y.D. ibid. 19).

would be considered illegitimate according to all opinions. Indeed, R' Yehudah Silman considers it self-evident that *dina demalchusa dina* does not apply to the nationalization of property by the Nazis.¹³

(A further consideration in our case is *yeiush*, the giving up of hope by the original owners of ever retrieving their property. A discussion of this issue is beyond the scope of this article.)

¹³ Darchei Choshen (second edition-5762) p. 362.

and questions of inheritance.

adjudicated either, because those obligations stem from bodily injury, which he holds to be uncommon.

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