

CENTER FOR MODERN TORAH LEADERSHIP

Center for Modern Torah Leadership



חירות ואחריות

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"Taking Responsibility for Torah"

WEEK SIX SUMMARY OF SBM 2020: THE SH'EILAH

Rabbi Aryeh Klapper, Dean

We've just finished an amazing summer of learning at SBM with outstanding draft teshuvah presentations! The 2020 SBM Sh'eilah deals with the intersection of Halakhab and U.S. immigration law and policy. Fellows addressed broad questions such as the scope of dina demalkhuta dina generally, and specifically in a democracy; (whether there are) other halakhic mechanisms that better or additionally delimit the right of governments and/or the duties of citizens; and whether Torah and Halakhab are committed to underlying political theories such as those of Hobbes or Locke, or theories of justice such as that of Rawls. We discussed whether/how the concept found in rishonim that law must be equally applied can be extended to modern antidiscrimination law; how citizens should respond to a case in which a generally reasonable law yields an unreasonable and unjust outcome; whether a law can be binding on those it disenfranchises; whether halakhab grants legitimacy and authority to unjust government laws; and much more.

I can't wait to share the final teshuvot with you (they're due motz'ei Yom Kippur)! Meanwhile, here is an excerpt from the draft I shared with the Fellows yesterday, followed by the sh'eilah. Your comments are very welcome as always.

RAN to Nedarim 38a appears to ground *dina demalkhuta dina* (DMD) in power. The king owns all the land, and therefore has the right to tell anyone: "Obey my rules, or I will expel you." Therefore, RAN adds, DMD does not apply in the Land of Israel, since "All Jews are partners in the Land."

RAN's addition at first glance seems incoherent. The partnership of all Jews in Israel is a theoretical construct; in practice, the Roman Empire, or whichever empire held sway in the Land in RAN's time, had the same power of expulsion there as it did elsewhere. So if power is the basis of DMD, why shouldn't it apply in Israel as elsewhere?

The plain answer is that RAN is not based in power per se, but rather in **legitimate** power. Because the sovereign has the **right** to expel, therefore the sovereign has the **right** to set conditions for non-expulsion.

This generates three new questions. First, what gives the sovereign the right to expel? Second, is that right unlimited and arbitrary, or bounded? Third, does the right to set conditions create a duty of obedience to those conditions?

Astonishingly, there seems to be little if any discussion in our tradition of the first question. Rabbi Yekutiel Cohen, Av Beit Din of Ashdod, suggested that RAN constructs the governed as consenting, even if it is consent under threat of exile. But this proposal seems to founder on the Israel exception as well – Jews in Israel would proffer their "consent" under the same threat.

Therefore, RAN must believe that property rights in Israel precede the establishment of government authority, whereas property rights elsewhere are subsequent to that establishment. He adopts a quasi-Hobbesian approach in which all rights are conceded to the Leviathan state at its formation. I say quasi because I don't yet have evidence that he believes that one concedes rights other than ownership of real property to the state (leaving aside issues of conscience, which are obligations to a higher Sovereign).

An alternative read of RAN is that he is explaining only why DMD applies to Jews as an autonomous community of voluntary noncitizen residents, as they were in medieval Europe. He believes that **citizens** generally have property rights parallel to those of Jews in Israel. RAN's comment therefore provides no guidance for Jews in the United States, where our community does not have legal autonomy, and we are individually full citizens.

Dear ... ,

You may not remember me, but I was a student in your 11th grade Talmud class in Rabbi D.Z. Hoffman High School in 2012. Some of the things we learned in that class have stayed with me throughout, and I'm turning to you because of them, and because I know that you have a reputation as deeply learned, profoundly sensitive, and unswervingly ethical.

I remember your telling me about your grandfather, a German Holocaust survivor, overpaying his taxes each year to express his gratitude to America. You argued that *dina demalkhuta dina* was more than a grudging accommodation to the reality of exile; in America at least, it was an expression of our responsibility to be the best of citizens. We spent several periods researching and then discussing whether speeding was a halakhic violation, and I argued very strongly that it was, which led to pretty serious family conflicts on the way up to the Catskills on Friday afternoons.

But I also remember that you brought in Rabbi Saul Berman on Martin Luther King Day to tell us about his experience being jailed in Selma, and that you introduced him as a halakhic hero. So you must think that there are times when disobeying American law is ok, or even necessary. It actually wouldn't surprise me to learn that you were among those trying to form a barrier between police and Black Lives Matters protesters, even though that technically involves standing in places that have been made legally off-limits.

Here's the thing – you may not know that I was adopted from abroad (Colombia) and converted as an infant. I didn't know this at the time, but until 2001, adopted children of U.S. citizens did not automatically receive citizenship, and my parents never arranged for me to become a citizen, so I am in fact “undocumented.” This means that unless I buy fake ids, it will be hard for me to get hired, to get a driver's license, to get on airplanes, and certainly to leave the country and come back. Do you think maybe that I'm allowed to buy these fake IDs davka because I'm not a citizen? Or do I have to leave as soon as I can, and apply for citizenship from abroad (which I'm unlikely to get), because it's illegal for me to be here? I intend to pay all the taxes I owe, at least as long as the US maintains its rule that the IRS can't share its records with immigration agencies. I think that in a rational world everyone would realize that I should have citizenship; this is the only home I've known, and my parents are citizens, and the law has even been changed so that people never face my situation. But the controversy about Dreamers and DACA makes clear to me that I'm not living in a rational world.

Please tell me what I must do. Please also note that my mom's lawyers told her that If anything positive is to happen, I need both my parents' support and cooperation. We had a long conversation and we all agreed to follow your psak. I'm enclosing their letters. Please respond to all of us together.

Your student,

Yonatan Yaakov Rose

Dear ... ,

I am Y.Y. Rose's adoptive mother. I know that he has reached out to you about his immigration status, and I wanted to make sure that you know where I stand. You should know that Yosef's father and I have divorced, and I have since remarried. Yosef's father may write to you separately.

In the young, affluent Modern Orthodox community that I live in, almost everybody hires undocumented workers. The nannies, the construction workers, and so forth – all undocumented, and everybody knows it. I think most people pay cash and don't withhold FICA taxes, but of course I can't know that for sure. But it seems ridiculous to me to say that our community holds that immigration law is halakhically binding, especially when the law is immoral. We certainly didn't think that about British Mandate law in Palestine!

So please just tell Yonatan that he can do whatever he needs to do to live a normal life here while my husband and I hire lawyers to straighten this out, which I'm sure we can do. Please tell him that he needs to cooperate with whatever the lawyers advise. This is still the United States of America, and I'm sure everything will work out just fine if we have a little time and don't do anything precipitous.

Sincerely, ...

Dear ... ,

I am Y. Y. Rose's adoptive father. Let me tell you a little bit about myself. I was born to secular parents, and became frum through Chabad. I was deeply influenced by the Rebbe's commitment to educating non-Jews to follow the *sheva mitzvos*, but over time I started to feel that this was too narrow, in two ways: first, that we need to encourage morality and not just legalism, and second, we need to understand that in a democracy in which we have full citizenship, it's not just about education – it's about building a society together in which each of us fulfill our moral responsibilities. Because of this I am a regular participant in demonstrations for causes as disparate as preventing abortions and preventing police violence, and I've been arrested several times in those connections.

My son's case, sadly, is not one of these big moral issues. It's just one of those things that inevitably happen because law is a blunt instrument. Civil disobedience loses all meaning, and becomes dangerous, when people start disobeying the law out of self-interest, even when the law is wrong. Think of the people cutting chains to parks in Brooklyn so their kids can play during a pandemic!

So I can't see how I could countenance supporting any illegal activities by my son or on his behalf, although I will do all I can to support him wherever his journey takes him. I hope you will tell him the same.

Sincerely, ...