

## Separate and Unequal: Is Discrimination Acceptable?

Adapted from the writings of Dayan Yitzhak Grossman

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Arutz Sheva reports:

New York State Assemblyman Simcha Eichenstein, who represents New York's 48th State Assembly district, published a video in which he urged car wash operators not to overcharge their Jewish customers before the holiday of Passover.

"Last year, it was brought to my attention that some local car wash operators, throughout our neighborhoods, have been increasing their prices in a discriminatory manner for their Jewish customers before Pesach," he said.

Eichenstein noted that he is "specifically addressing car wash operators because of the bias and discrimination in deliberately charging their Jewish customers more for the same service that they provide to non-Jewish customers, because they know that we are obligated to clean our cars before Pesach.

"It is illegal to raise the price for a particular service solely for one religious community at a specific time of year, while the prices remain reduced for everyone else. This is wrong. It is unethical and, above all, it is illegal," he stated.[1]

If the behavior in question is indeed illegal, it is certainly wrong. The halacha, however, is rather more tolerant of discrimination based on religion, including economic discrimination against Jews, than the modern liberal consensus. Following is a (slightly edited and expanded) discussion of this topic originally written a decade ago.[2]

### Discriminatory taxation

The halacha is unequivocal that bills of attainder that arbitrarily impose taxation or confiscation are illegitimate; what is less clear, however, is the definition of "arbitrary." [3] Perhaps surprisingly, the general consensus apparently is that enactments that discriminate against Jews in particular are entirely legitimate, as religion is a perfectly valid basis for discrimination. Taxes that are assessed upon Jews at higher rates than non-Jews, [4] or even those that are assessed upon Jews exclusively, [5] are valid exercises of governmental authority, as are taxes against shechitah [6] and the printing of sfarim. [7] (The latter two have the additional justification that they do not technically discriminate against Jews, as they theoretically apply even to non-Jews, should they decide to shecht or print sfarim. [8]) Indeed, R' Tam ibn Yachya (c. 1475-1542, one of the *gedolei haposkim* of Turkey in his era) responded to a report that "some *lomdim*" were justifying tax evasion by pointing to discrimination among different ethnic groups by calling the *lomdim* "errant," insisting that the tax regime is valid as long as it treats all members of each ethnic group consistently, discrepancies among ethnic groups notwithstanding. [9]

R' Yosef Eliyahu Henkin, however, explains that the legitimacy of assessing higher taxes on Jews than on non-Jews is limited to where Jews have not yet achieved the status of citizens, and noncitizens are being taxed at a higher rate than citizens, but simple oppression of a particular group is illegitimate.[10]

#### The Ancona tragedy

Perhaps the most sensational case of discriminatory legislation whose validity is discussed by the *poskim* arose in the aftermath of the terrible tragedy that befell the Jews of Ancona, Italy in the sixteenth century, and is still commemorated by Sphardim today. From the end of the fifteenth through the first half of the sixteenth centuries, Jewish refugees from the Iberian peninsula, fleeing Catholic persecution, had settled in Ancona. They had permission (apparently motivated by mercantile considerations) from Popes Paul III and Julius III, who allowed them to revert to Judaism, acknowledging that their earlier conversions to Catholicism were not valid because they were compelled. Unfortunately, however, “there arose a new king”—Pope Paul IV—who in 1555 began to persecute the Jews of Ancona and the conversos in particular, culminating in an auto-da-fé in which about two dozen Jews who refused to accept baptism were hanged or burned at the stake in sanctification of Hashem’s Name—may He avenge their blood.[11]

Many Jews managed to escape, however, and two of these eventually became embroiled in a financial dispute: During the persecutions, the pope had decreed that all of Shimon’s assets in anyone’s possession must be turned over to “the judges of the land,” under penalty of death and forfeiture of property. Reuven, who owed a debt to Shimon, had followed the edict and turned over the amount of the debt to the authorities. Reuven and Shimon were both fortunate to have subsequently escaped with their lives. Shimon sued Reuven for the repayment of his debt, and the latter responded that he had had no choice in turning over the funds to the authorities, as evasion was impractical, and “nothing stands in the way of *piku’ach nefesh*.”

This case was analyzed by three of the greatest contemporary Salonikan *poskim*, and the central issue was whether the confiscation of the assets of recidivist, relapsing conversos by the church is a valid exercise of governmental power. Remarkably (at least to our modern, Western sensibilities), all three agreed that at least in principle, such confiscation could be valid under the principle of *dina demalchusa dina*. R' Shmuel di Medina (the Maharashdam) actually ruled that it is,[12] and while R' Yosef (Mahari) ibn Lev and R' Yitzchak (Mahari) Adarbi argued that it is not,[13] this is not necessarily because they viewed such a policy as intrinsically unfair. They cited a variety of other reasons, including the historical novelty of the policy (“we have not heard...of such an edict...neither in the time of his honor the current pope, nor in the times of the others”); its uniqueness to Ancona, as opposed to the rest of the papal dominions; and the perfidy of the pope in reneging on the previously signed, sealed, and delivered

permission for the conversos' return to Judaism:

And according to what we have heard, these righteous ones that were burned *al kedushas Hashem* in Ancona had had permission from the previous pope, who had written in a book and signed with his seal that they may observe Judaism there in Ancona, for the apostasy that had been decreed upon them in Portugal was forced on them. And since this is so, it is obvious that we do not say here *dina demalchusa dina*.<sup>[14]</sup>

[1]NYS Assemblyman Eichenstein: Illegal for car wash operators to overcharge Jewish customers. Israel National News/Arutz Sheva.

<https://www.israelnationalnews.com/news/368953>. Cf. here and here.

[2]*Dina Demalchusa Dina* and Discrimination, Invidious and Otherwise. Bais HaVaad Halacha Journal. Circa Dec. 2013/Jan. 2014. (I do not know the title under which the article was published or the precise date of publication.)

Cf. Pis'chei Choshen, Hilchos *Geneivah Ve'ona'ah*, perek 1 n. 4 s.v. HaBais Yosef *besiman* 369, pp. 12-13.

[3]Regarding discrimination among provinces within a country, see Ran Nedarim 28a; Rosh *ibid.* perek 4 *siman* 11; Or Zarua Bava Kama perek 10 *siman* 447; Shu"t Lechem Rav *siman* 157. Regarding discrimination among professions, see Shu"t Maharik end of *shoresh* 66, cited by Rama C.M. 369:8 (as "*yeish omrim*"), and cf. Biur HaGra *ibid.* os 33; Shu"t Maharam Brisk *siman* 108 os 3.

[4]Shu"t Maharik *shoresh* 194, codified by Rama *ibid.* 369:6. Cf. Shu"t Shem Aryeh C.M. *siman* 20 os 9.

[5]Shu"t Tumas Yesharim (Ahalei Tam) *siman* 16, cited in Divrei Geonim *klal* 25 os 9.

[6]Shu"t Maharsham *cheilek* 7 *siman* 34.

[7]Shem Aryeh *ibid.*

[8]Maharsham and Shem Aryeh *ibid.*

[9]Tumas Yesharim *ibid.*

[10]Teshuvos Ivra *siman* 96 section 2 os 5, in Kisvei Hagaon R' Yosef Eliyahu Henkin, Vol. 2 p. 176.

[11]See the Jewish Encyclopedia, entry for Ancona; Encyclopaedia Judaica, entry for Ancona; Rivka and Ben-Zion Dorfman, The Jewish Community of Ancona, Italy.

[12]Shu"t Maharashdam C.M. *siman* 55.

[13]Shu"t Mahari ibn Lev *cheilek* 2 *siman* 54; Shu"t Divrei Rivos *siman* 83.

[14]Mahari ibn Lev *ibid.*