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GEZEL PART 3

Gambling and Other Forms of Gezel Derabbanan, Returning Stolen Objects

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Gezel Derabbanan

In the previous two segments, we discussed various aspects of the *issur de'oraisa* of stealing and some practical applications. In this segment, we will begin by examining two cases of *gezel derabbanan*, where Chazal forbade specific actions as constituting theft.

GAMBLING

On a Torah level, gambling with others or betting is considered legitimate. However, the Gemara in Sanhedrin disqualifies a *mesacheik b'kuvya* (a gambler) from giving testimony in Bais Din. Two reasons are given by Chazal for this disqualification:

1. Perhaps the money given was not truly consensual, and the recipient is thus guilty of *gezel miderabbanan*. This reasoning is cited by the Shulchan Aruch (C.M. 370), which states clearly that gambling is considered *gezel miderabbanan*.
2. Such a person is not "*oseik b'yishuvo shel olam*" (engaged in trying to improve the world). His habit of gambling indicates that his attitude towards money is carefree, and such a person cannot be trusted to be precise in his testimony. This appears to be the opinion of the Rema (ad loc.).

THE PARAMETERS OF MESACHEIK B'KUVYA

Rishonim disagree regarding the exact designation of a *mesacheik b'kuvya*. According to the Rambam, anyone who supports himself even partially from his gambling is included, while other Rishonim conclude that if he has another job, he is still being *oseik b'yishuvo shel olam* and would not be defined as a *mesacheik b'kuvya*. Conversely, one whose primary support is from an inheritance and gambles on the side would not be considered a *mesacheik b'kuvya* according to the Rambam, since his livelihood is not earned from his gambling, while the other Rishonim would hold that he is still defined as *mesacheik b'kuvya* since he has no other constructive job and is not being *oseik b'yishuvo shel olam*.

The Mishnah Berurah (O.C. 323) writes that one should not gamble with another Jew in any situation. Doing so is considered *avak gezel derabanan*, since the loser was not truly committed to giving the money. The Mishnah Berurah continues that even if a *ba'al habayis* and his family wish to gamble together, it should still not be done (despite the lack of violation of *gezel*) since one might come to do so with others .

Gezel from a Katan

THE BASIC TAKANAH

The Mishnah (Gittin 59b) states that it is not *Gezel min Hatorah* to take away a lost object that was found by a *cheireish* (deafmute), *shoteh*, or *katan*, but it is still *assur derabbanan* to do so due to *darkei shalom* (maintaining the peace).

WHO OWNS A CHILD'S MONEY HALACHICALLY?

Who owns a child's money? For example, if one's daughter babysits and owns a bank account jointly with her parents, who actually owns the money? Do the parents have the right to decide to take the child's money and invest it or keep it on her behalf for a later time, or may she use it if she wishes?

THE DIFFERENT CATEGORIES OF CASES

In order to answer this question, let us look carefully at the ruling of the Shulchan Aruch regarding a child supported by his parents (C.M. 270) where it is divided into three distinct cases:

1. **Metzia**- Any lost object that he finds belongs to the father, even if the child is over the age of bar or bas mitzvah.
2. **Wages earned by the child** – According to many *poskim*, this money also belongs to the supporting father (Rema, Sema). Although R' Akiva Eiger (ad loc.) cites a dissenting view, still, if the father has a joint account with the child, the father is permitted to use or save the money as he wishes, using the claim of *"kim li."*
3. **A gift given directly to the child** – In this case, the Rema holds that if the child is under bar mitzva, the present belongs to the father, while if the child is over bar mitzvah, it belongs to the child. The Sma explains that the reason a present is different than wages is because a present depends upon the *da'as* (intent) of the giver. If the child is under bar mitzvah, then the giver intends for the father to own it since the father must guard it to ensure it does not get lost or misused. But if the child is over bar mitzvah, since he is already responsible, and the giver likely intended for the child to take possession of it.

PRESENTS GIVEN TO A BAR MITZVAH BOY

Based on this, it would seem that if a bar mitzvah boy receives sefarim as a gift, they would belong to him halachically, since the giver likely intends for the boy to use them at some point. If he receives money as a gift, it would depend upon the intent of the giver. If his intent is for the boy to have savings when he gets older or to use it then to buy something, it would belong to the child. If, however, the intent is for the parents to use it to help fund the bar mitzvah celebration, then it would belong to the parents. In such cases, a parent must exercise intellectual honesty to evaluate whom the money belongs to and who may decide how to use it. It should be noted that here too R 'Akiva Eiger cites a dissenting view that a present given to a *katan* always belongs to the father, while a present given to a *gadol* over bar mitzvah always belongs to the child.

An interesting incident related to this issue occurred. The uncle of a bar mitzvah boy gave him a bottle of schnapps and told him, "this is for you, don't tell your father about it." So the boy hid the bottle in his drawer, where it remained until he was eighteen years old. At that time, he was learning Hilchos Pesach and suddenly realized that the schnapps sitting in his drawer was chametz gamur. Now, if the father was considered the owner, it may have been included each year in his sale of all chametz in the house to a non-Jew and would remain permissible. But if it belonged to the child, then it would be classified as chametz she'avar alav hapesach (chametz in the possession of a Jew over Pesach), which is forbidden to be consumed or benefitted from. Since in this case, the formulation of the uncle appeared to indicate that he intended for the bottle to be owned exclusively by the boy, it would seem to be a serious issue of chametz she'avar alav hapesach and it could not be used.

The Mitzvah of Returning Stolen Objects (Hashavas Gezeilah)

If one did steal, the Torah prescribes a positive mitzvah of returning the stolen object. From the wording of the *pasuk "v'heishiv es hagezeilah asher gazal,"* "he must return the stolen object that he stole" (Vayikra 5:23), Chazal derive two important halachos:

1. The *gazlan* returns the item in its current form only if it is unchanged from the state it was in at the time of theft. If the object has substantially changed, then he must pay the owner the value of the object instead.
2. In the event the *gazlan* pays the value, he must compensate the owner for the value of the object at the time of the theft. This is known as *"kol hagazlanin meshalmin k'sha'as hagezeilah."*

Thus, if the item stolen is still essentially the same as it was at the time it was stolen, the thief must return the item. If a significant change occurred to the item or it was lost or destroyed, then the *gazlan* has acquired the item and must return its value to the original owner. Note: what constitutes a Halachic change is a complex topic in

Halacha, and beyond the scope of this discussion.

WHO IS THE OWNER OF THE STOLEN OBJECT?

There is an interesting dichotomy in halacha regarding ownership of the object while it is in the possession of the *gazlan*. On one hand, the *gazlan* must pay the value of the object based on the value at the time of the *gezeilah*, which seems to imply that the object is considered to be in the property and ownership of the thief (the same way that one who purchases an object pays the value at the time of purchase and acquisition). However, many halachos illustrate that the stolen object still, in fact, belongs to the owner. For example, if the thief sold the item before the owner despaired of getting it back (*ye'ush*), on a *de'oraisa* level, the owner may obtain the item back from whoever has acquired it from the *gazlan* (we will discuss the rabbinic enactment of *takanas hashuk* below), regardless of whether the *gazlan* granted that person the right to use it or not. This is because so long as there was no *ye'ush*, it still belongs to the original owner.

On the other hand, if the item gets lost, we do not say that it belonged to the owner to exempt the *gazlan* from reimbursing him. Moreover, if the *gazlan* uses the item, he does not need to pay rent to the owner. So, it seems that in certain respects, the object belongs to the owner, while in other respects, it is deemed as belonging to the *gazlan*.

Takanas HaShuk: Reimbursing the Purchaser of Stolen Goods

UNDERSTANDING THE TAKANAH

On a *de'oraisa* level a victim of theft is entitled to retrieve his stolen object from whoever the *gazlan* may have sold or given it to if he has not yet expressed *ye'ush*. However, Chazal instituted a *takana derabanan* known as *takanas hashuk* (see C.M. 356:2). According to this institution, if the stolen object was sold to an unsuspecting buyer, the victim must first reimburse the buyer in order to retrieve his property. The victim can then reclaim that money from the *gazlan* who stole the item. The reasoning for the takana was for the benefit of the open marketplace. If every object being purchased has the potential of being stolen goods and carries the risk that the true owner may simply show up and take it away, this would negatively affect regular commerce since potential buyers may decide not to buy in many cases.

If the gazlan is a known thief, but the purchaser was not aware that these particular items in question were stolen, it is a machlokes between the Shulchan Aruch and Rema whether takanas hashuk applies or not.

IF THE OWNER ALREADY EXPRESSED YE'USH AND SECULAR LAW

A questionable application of *takanas hashuk* relates to where the owner already expressed *ye'ush* on the item. In this case, the Rema rules that the buyer is *koneh* the item altogether through the combination of *ye'ush* and *shinui reshus* (changing possession) and need not return the item to the owner at all. Consequently, the victim's only recourse would be to take the *gazlan* to a din Torah in order to be reimbursed for his loss.

However, the Rema adds that if the local secular law demands the purchaser to return the stolen item even after *ye'ush* and *shinui reshus* have taken place, then we apply the principle of *dina d'malchusa dina*, and the local custom should be followed. [According to some opinions, (see Ketzos HaChoshen), this practice is classified only as a *midas chasidus*, but is not obligatory if one does not have the funds to return it.] It would seem from the Rema (though it is not explicit) that in cases where one must return the stolen goods based upon *dina d'malchusa dina*, we would not apply *takanas hashuk* and one must do so even without receiving any compensation. However, the Shulchan Aruch HaRav states clearly that even in this case, the buyer is only required to return it after he receives the amount of money he paid for it.

Additional Details of Returning Stolen Objects

THE GAZLAN IS EMBARRASSED TO ADMIT HE STOLE IT

If the *gazlan* is embarrassed to admit to the owner that he stole the item, he is permitted to return it without informing the owner, provided the latter recognizes that the item has been returned or the money has been reimbursed. The Pischei Choshen (Geneivah, ch.4) also suggests that the *gazlan* may employ the technique known as *havla'ah* and give the owner additional money as part of a business deal, or give the money to someone else to return anonymously on his behalf, or place the

money in the wallet of the owner. The *gazlan* would still be responsible if anything happens to the money until the owner is aware that the money is in his possession (even if he does not know where it came from).

MUST THE GAZLAN RETURN IT TO THE HOUSE OF THE OWNER?

According to the Shulchan Aruch, the *gazlan* is not required to bring the stolen object to the home of the owner. Rather, he may tell the owner that he has the item, and request from him to pick it up when he passes by the house of the *gazlan*. In other words, the effort needed to return the item is imposed upon the owner, rather than the *gazlan*. The Sema explains that this is part of *takanas hashavin* to enable the *gazlan* to return the item more easily. The Shach, on the other hand, holds that even according to the *ikar hadin*, the owner is tasked with retrieving his item..

STEALING FROM MANY PEOPLE

If one stole from many people and does not know from whom, it is difficult for him to fulfill the mitzvah of returning the stolen objects (or money). This is reflected in the statement of the Shulchan Aruch (C.M. 366) that shepherds and tax collectors (who pilfered or collected more than they were supposed to) are "*teshuvasan kasheh*" since they stole from multiple individuals and do not know to whom to return the money.

In such a case, the suggested method of doing *teshuvah* is to give the money to a communal cause (*tzarchei rabim)*, where many people can benefit from the item or its value. The Aruch HaShulchan adds that one who sincerely wishes to do *teshuva* will receive *siyata dishmaya* from Hashem that all those from whom he stole will be able to benefit according to the value of their loss from the community donation, and they will forgive the *gazlan* for his actions.

What type of institution qualifies as a communal cause? In Talmudic times, one of the examples mentioned is funding the water ditches used for drawing drinking water. Rav Moshe Feinstein suggested that nowadays, one should donate to a *mikveh*, since that is a community institution used by many people, and the *nigzal* or his inheritors will certainly benefit from it at some point.

The Aruch HaShulchan also adds that Bais Din may not force a *gazlan* to return money in this manner, as their authorization to compel the *gazlan* to return a stolen object or its value is limited to when they are being returned directly to the true owner.

BENEFITING FROM STOLEN GOODS

Shulchan Aruch (C.M. 356:1) rules that it is *assur* to benefit from stolen goods. Thus, one may not even enter a stolen property, and one may not walk on a bridge with a wooden plank that was stolen. In fact, the Sefer Toldos Chafetz Chaim relates that for this reason, the Chafetz Chaim never walked on the wooden boards placed on top of the snow in the unpaved streets of Radin.

It is even more problematic to purchase stolen goods. As the Gemara comments (Gittin 45a), "the mouse is not the thief, but rather the hole (i.e., the logistics for how to stow the item) is the thief." Meaning, if the thief had no ability to pass on his stolen goods he will likely not steal them initially. Therefore, any help given to a *gazlan* to buy or hide these goods is considered "a weighty sin" because he is aiding and abetting theft.

Aruch HaShulchan (who elaborates extensively on this issue in 356:1) also mentions that Rabbeinu Gershom instituted a *cheirem* never to accept stolen goods from *goyim*. This is because when doing so, one places the entire vicinity at risk, since the *goyim* will blame all of the Jews, thereby prompting the government to collectively punish the Jewish population. Rabbeinu Gershom notes that indeed, many innocent people were caused great pain and stress due to this practice. Therefore, Bais Din may use any method necessary to force individuals to avoid purchasing stolen goods from *goyim*.