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Dina Demalkhuta Dina:

A Liberal Jewish Approach

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Thesis submitted in partial fulfillment of the

requirements for Ordination

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This thesis has eight chapters.

The goal of the thesis is to shed light on the principle *dina demalkhuta dina* and to show its relevance to 21st century Liberal Judaism.

The contribution of this thesis is to analyze the use of *dina demalkhuta dina* in Liberal Jewish legal thought and to work through the application of the principle in four modern-day challenges.

This thesis is divided chronologically. It begins with an examination of power dynamics between Jewish religious and secular authority in the pre-Talmudic period and goes on to look at *dina demalkhuta dina*'s evolution from the Talmud through the modern period. Finally, the thesis examines four cases from the modern-day United States and analyzes them from liberal perspective according to the principles laid out earlier.

This thesis used a wide range of materials, from biblical, Talmudic and other traditional Jewish texts to CCAR responsa and secondary literature.

1) Introduction

As a diasporic religion and legal system, Judaism has struggled against two challenges. On the one hand, Jewish leaders sought to protect and to bolster Jewish traditions and laws against the competing laws and customs that governed the non-Jewish society around them. On the other, because of the strength of non-Jewish society, there was a need to accommodate certain non-Jewish norms so that Jewish society did not flaunt broader society's rules too blatantly, thus bringing destruction on the Jewish community

One of the principles devised by the Talmudic rabbis to address this tension was *dina demalkhuta dina*. This principle, which translates literally as "the law of the kingdom is the law," first appears in the Talmud and serves to obligate Jews to follow non-Jewish law promulgated in the country in which they live. While pre-Talmudic Jewish texts reveal discussions and scenarios between religious and secular authority,[1] the Talmudic articulation of *dina demalkhuta dina* is the first enunciation of a broad Jewish principle to address the challenges on a wider scale.

Over the medieval and into the modern period, Jewish thinkers constructed and invoked exceptions to *dina demalkhuta dina*, thus ruling that certain secular regulations were not valid and binding from a Jewish perspective.

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[1] To be sure, the terms "secular" and "religious" are somewhat anachronistic when used in a pre-modern context. However, for the purposes of this thesis, the word "religious" used in a pre-modern context will describe those matters that have a clear and direct Jewish link to the divine or that derive from Jewish law. "Secular" will describe those matters that govern society more broadly and have no clear Jewish religious meaning. Along the same lines, "political" will refer to governmental matters that address society as a whole.

However, during the early modern period, the scope of these exceptions became a source of contention between Orthodox and Reform Jews, with the early Reformers arguing for a broader application of *dina demalkhuta dina* that required expanded recognition of secular governmental laws and action. While this dispute centered on differing approaches to marriage and divorce, its consequences can be seen in other realms today as well.

In modern-day North America, the Central Conference of American Rabbis Responsa Committee has articulated a Liberal Jewish vision of *dina demalkhuta dina* that closely aligns with modern liberal principles of democracy, religious freedom and equal rights. When applied to actual political scenarios, this approach is grounded solidly in traditional Jewish sources and maintains the balance between upholding Jewish principles and respecting secular governance that the early rabbis sought to maintain.

2) Pre-Talmudic Relationships between Religious and Secular Authority

The principle *dina demalkhuta dina* does not appear explicitly at any point prior to its articulation in the Talmud.[2] At the same time, there are a number of biblical and pre-Talmudic sources that demonstrate a respect for secular, in particular non-Jewish secular, authority. As with *dina demalkhuta dina*, there are also examples of limitations imposed on secular authorities that limit their actions when they conflict with Jewish law. It is worth looking at a handful of examples in greater detail to understand some of the early approaches to the tensions between secular and religious authority.[3]

This section is not intended to be a complete and all-inclusive discussion of pre-Talmudic texts that address conflict between religious and secular authority. Rather, its purpose is to provide a survey of some examples of the early interaction between these two sources of authority and power.

a) Early Biblical Examples

The biblical storylines of Genesis and Exodus abound with examples of religious figures confronting non-Jewish political authority. One particularly prominent example is the face-off between Moses and Pharaoh on Moses' return

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[2] As Landsman states, "this concept is found nowhere in any form whatsoever prior to Samuel," who is given credit for articulating the principle *dina demalkhuta dina* in the Babylonian Talmud. Leo Landsman, *Jewish Law in the Diaspora: Confrontation and Accommodation* (Philadelphia: Dropsie College for Hebrew & Cognate Learning, 1968), 22.

[3] In addition to the examples set forth *infra*, there are numerous additional illustrations. In *t. Terumot* 7:23, the discussion over handing over one individual for punishment to save the entire group is intertwined with the question of the Roman authority to punish. A similar story is discussed in *y. Terumot* 8:4, 56b. This is representative of the widespread sense in the tannaitic period that the secular authorities were permitted to issue punishments for violations of the secular law and that Jews were required to comply. Shmuel Shilo, *Dina Demalkhuta Dina* (Jerusalem: Academic Publishing of Jerusalem, 1974), 41.

to Egypt. The plotline of Moses' actions upon his return to Egypt is sufficiently familiar that it is not worth quoting or analyzing at length. His repeated iterations of שַׁלַּח אֶת-עַמִּי, "Let My people go," coupled with the explanation that the Israelites will engage in worship upon departing,[4] confront one of the world's strongest political figures of the time with a powerful religious message. At the story's climax, Moses even has the audacity to announce the impending arrival of the Angel of Death to kill each Egyptian firstborn and to invoke divine wrath to drown the Egyptian forces at the Red Sea.

The religious nature of Moses' message is undeniable. Of particular interest is the fact that Pharaoh clearly recognizes and confronts the religious nature of Moses' challenge. His magicians' comments and his own responses to Moses often mention the divine name, thereby acknowledging the sacred aspect of what is transpiring.[5]

This example does not provide us with specific rules for mediating between Jewish religious and non-Jewish political power in a practical, modern sense. However, it shows the prominent and central place that standing up to political authority has in the Jewish narrative.

b) *Parashat Hamelekh*

Even before the Israelites' entry into the Land of Canaan and the establishment of a secular authority, one finds an extensive warning and a

[4] Ex 5:1, 8:16, 9:13, 7:26, 8:16, 9:1, 9:13, 10:3

[5] *E.g.*, Ex 8:4, 8:14, 8:21, 8:24, 9:28, 10:7-8, 10:16-17, 10:24.

substantial enumeration of what kings must and may not do. This passage, known as *Parashat Hamelekh*, reads as follows:

יד כִּי-תָבֹא אֶל-הָאָרֶץ אֲשֶׁר יְקֹוָק אֱלֹקֶיךָ נֹתֵן לָךְ וִירִשְׁתָּהּ
וְיָשַׁבְתָּה בָּהּ וְאָמַרְתָּ אָשִׂימָה עָלַי מֶלֶךְ כְּכָל-הַגּוֹיִם אֲשֶׁר סְבִיבֹתָי:
טו שׂוֹם תָּשִׂים עָלֶיךָ מֶלֶךְ אֲשֶׁר יִבְחַר יְהוָה אֱלֹהֶיךָ בּוֹ מִקֶּרֶב אַחֶיךָ
תָּשִׂים עָלֶיךָ מֶלֶךְ לֹא תוּכַל לָתֵת עָלֶיךָ אִישׁ נָכְרִי אֲשֶׁר לֹא-אָחִיךָ
הוּא: טז רַק לֹא-יַרְבֶּה-לּוֹ סוּסִים וְלֹא-יָשִׁיב אֶת-הָעָם מִצְרַיְמָה
לְמַעַן הַרְבּוֹת סוּס וַיקֹוָק אָמַר לָכֶם לֹא תֹסִפוּן לָשׁוּב בַּדֶּרֶךְ הַזֶּה
עוֹד: יז וְלֹא יַרְבֶּה-לּוֹ נָשִׁים וְלֹא יָסוּר לְבָבוֹ וְכֶסֶף וְזָהָב לֹא יַרְבֶּה-
לּוֹ מְאֹד: יח וְהָיָה כְשִׁבְתּוֹ עַל כִּסֵּא מַמְלַכְתּוֹ וְכָתַב לוֹ אֶת-מִשְׁנֵה
הַתּוֹרָה הַזֹּאת עַל-סֵפֶר מִלִּפְנֵי הַכֹּהֲנִים הַלְוִיִּם: יט וְהָיְתָה עִמּוֹ
וְקָרָא בוֹ כָּל-יְמֵי חַיָּיו לְמַעַן יִלְמַד לְיִרְאָה אֶת-יְקֹוָק אֱלֹקָיו לִשְׁמֹר
אֶת-כָּל-דִּבְרֵי הַתּוֹרָה הַזֹּאת וְאֶת-הַחֻקִּים הָאֵלֶּה לַעֲשֹׂתָם:
כ לְבִלְתִּי רוּם-לְבָבוֹ מֵאֶחָיו וּלְבִלְתִּי סוּר מִן-הַמִּצְוָה יָמִין וּשְׂמֹאול
לְמַעַן יַאֲרִיךְ יָמִים עַל-מַמְלַכְתּוֹ הוּא וּבָנָיו בְּקֶרֶב יִשְׂרָאֵל:

14 If, after you have entered the land that the Lord your God has assigned to you, and taken possession of it and settled in it, you decide, "I will set a king over me, as do all the nations about me," 15 you shall be free to set a king over yourself, one chosen by the Lord your God. Be sure to set as king over yourself one of your own people; you must not set a foreigner over you, one who is not your kinsman. 16 Moreover, he shall not keep many horses or send people back to Egypt to add to his horses, since the Lord has warned you, "You must not go back that way again." 17 And he shall not have many wives, lest his heart go astray; nor shall he amass silver and gold to excess. 18 When he is seated on his royal throne, he shall have a copy of this Teaching written for him on a scroll by the levitical priests. 19 Let it remain with him and let him read in it all his life, so that he may learn to revere the Lord his God, to observe faithfully every word of this Teaching as well as these laws. 20 Thus he will not act haughtily toward his fellows or deviate from the Instruction to the right or to the left, to the end that he and his descendants may reign long in the midst of Israel.[6]

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[6] Deut 17:14-20. There is a great deal of development on this particular passage in rabbinic and medieval literature. However, because much of it has little direct connection to the principle of *dina demalkhuta dina*, there will be little discussion of *parashat hamelekh* in this paper.

All English quotations of Biblical passages are taken from the *JPS Hebrew-English Tanakh: The Traditional Hebrew Text and the New JPS* Translation, 2nd ed. (Philadelphia: Jewish Publication Society, 1985).

Here we have the first explicit instance of generalized limitations imposed on secular Israelite political authority. It is not only that the king, if one should arise, is placed in a position subordinate to the Torah; the king is obligated to keep with him a reminder of subservience in the form of a Torah scroll.

The particular limitations imposed are also noteworthy. Many of the restrictions relate to the hyperaccumulation of wealth, while the entire last portion of the passage specifically addresses the king's obligation to adhere to divinely ordained religious prescriptions. It is not enough that the king follow those regulations that apply specifically to royalty; the king is bound by the religious obligations in the Torah in their entirety. In essence, religious law does not merely constrain the pinnacle of secular political authority in his position as king; it also binds him to "every word" of the same Torah that binds his subjects.

The last phrase is also of interest. The king is given an incentive to follow Jewish religious laws with the guarantee of his progeny continuing their political control over the kingdom. Thus, the reward for adhering to what the Torah commands extends not merely to the king, but into the future as well.

c) Naboth's Vineyard

The story of Naboth's vineyard is a particularly poignant example of how religious censure can serve as a check on secular political power. After King Ahab of Israel expresses a desire to acquire Naboth's vineyard and is rebuffed, Ahab's wife Jezebel has Naboth falsely accused and put to death. At divine insistence, the prophet Elijah confronts Ahab:

וַיֹּאמֶר אַחְאָב אֶל-אֵלִיָּהוּ הֲמְצָאתַנִי אֹיְבִי וַיֹּאמֶר מָצָאתִי יַעַן
הִתְמַכֶּרְךָ לַעֲשׂוֹת הָרַע בְּעֵינֵי יְקֹוָק׃ הִנְנִי מֵבִי [מֵבִיא] אֵלֶיךָ רָעָה

וּבִעַרְתִּי אַחֲרֶיךָ וְהִכְרַתִּי לְאַחְאָב מַשְׁתִּין בְּקִיר וְעָצוּר וְעָזוּב
בְּיִשְׂרָאֵל׃ וְנָתַתִּי אֶת-בֵּיתְךָ כְּבֵית יָרָבְעָם בֶּן-נְבָט וּכְבֵית בַּעְשָׁא
בֶּן-אֲחִיָּה אֶל-הַכַּעַס אֲשֶׁר הִכְעַסְתָּ וַתַּחֲטִא אֶת-יִשְׂרָאֵל׃ . . . הַמֵּת
לְאַחְאָב בָּעִיר יֹאכְלוּ הַכְּלָבִים וְהַמֵּת בַּשָּׂדֶה יֹאכְלוּ עוֹף הַשָּׁמָיִם׃ .
. .וַיְהִי כִשְׁמֹעַ אַחְאָב אֶת-הַדְּבָרִים הָאֵלֶּה וַיִּקְרַע בְּגָדָיו וַיָּשֶׂם-
שַׂק עַל-בְּשָׂרוֹ וַיָּצוֹם וַיִּשְׁכַּב בַּשָּׂק וַיְהַלֵּךְ אָט׃ וַיְהִי דְּבַר-יְקֹוָק אֶל-
אֵלִיָּהוּ הַתִּשְׁבִּי לֵאמֹר׃ הֲרָאִיתָ כִּי-נִכְנַע אַחְאָב מִלְּפָנָי יַעַן כִּי-נִכְנַע
מִפָּנַי לֹא-אָבִי [אָבִיא] הָרָעָה בְּיָמָיו בִּימֵי בְנוֹ אָבִיא הָרָעָה עַל-
בֵּיתוֹ׃

20 Ahab said to Elijah, "So you have found me, my enemy?" "Yes, I have found you," he replied. "Because you have committed yourself to doing what is evil in the sight of the Lord, 21 I will bring disaster upon you. I will make a clean sweep of you, I will cut off from Israel every male belonging to Ahab, bond and free. 22 And I will make your house like the House of Jeroboam son of Nebat and like the House of Baasha son of Ahijah, because of the provocation you have caused by leading Israel to sin. . . . 24 All of Ahab's line who die in the town shall be devoured by dogs, and all who die in the open country shall be devoured by the birds of the sky." . . . 27 When Ahab heard these words, he rent his clothes and put sackcloth on his body. He fasted and lay in sackcloth and walked about subdued. 28 Then the word of the Lord came to Elijah the Tishbite: 29 "Have you seen how Ahab has humbled himself before Me? Because he has humbled himself before Me, I will not bring the disaster in his lifetime; I will bring the disaster upon his house in his son's time."[7]

In this example, we see Elijah, serving as a Yahwistic religious presence, taking Ahab to task for his behavior. While context indicates that Elijah is reacting to Ahab's execution of Naboth and the seizure of his vineyard,[8] Elijah's speech does not spell this out. Instead, the tack Elijah takes when he encounters Ahab is to strongly emphasize the consequences of Ahab's actions, not to explicate exactly what Ahab has done wrong. This adds to the force and

[7] 1 Kgs 21:20-22, 24, 27-29.

[8] In 1 Kings 21:17-19, G-d specifically tells Elijah to confront Ahab about his conduct vis-à-vis Naboth.

effrontery of Elijah's conduct, making his behavior even more of a slap in the face to the secular authority that rules the land.

It is not merely Elijah's willingness to confront Ahab that is instructive. Ahab's reaction and immediate repentance is similarly illuminating, especially given that there is no break in the storyline between him hearing Elijah's words and engaging in demonstrations of repentance. Based on this text, we can infer that a prophetic, religious rebuke carried with it significant weight, even when employed against the most powerful secular leader of the time.

Moreover, G-d's immediate partial forgiveness of Ahab is somewhat surprising. The text of 1 Kings 21:25-26 explains Ahab's true evil in a parenthetical aside:

> כה רַק לֹא-הָיָה כְּאַחְאָב אֲשֶׁר הִתְמַכֵּר לַעֲשׂוֹת הָרַע בְּעֵינֵי יְקֹוָק אֲשֶׁר-הֱסִתָּה אֹתוֹ אִיזֶבֶל אִשְׁתּוֹ׃ כו וַיִּתְעֵב מְאֹד לָלֶכֶת אַחֲרֵי הַגִּלֻּלִים כְּכֹל אֲשֶׁר עָשׂוּ הָאֱמֹרִי אֲשֶׁר הוֹרִישׁ יְקֹוָק מִפְּנֵי בְּנֵי יִשְׂרָאֵל׃
>
> . . . 25 (Indeed, there never was anyone like Ahab, who committed himself to doing what was displeasing to the Lord, at the instigation of his wife Jezebel. 26 He acted most abominably, straying after the fetishes just like the Amorites, whom the Lord had dispossessed before the Israelites.) . . .[9]

Curiously, the passage does not address Ahab's unpleasantness by comparing him to other kings alone; rather, it states that "there *never* was *anyone*" who engaged in the type of conduct that Ahab did. This differs from some descriptions of other Israelite kings, who are contrasted with other kings alone

[9] 1 Kgs 21:25-26.

and are not included in a general comparison like the one we see for Ahab.[10] This could be read to indicate that Ahab's conduct was particularly egregious and warranted a specific and particularly harsh prophetic censure from Elijah.

d) Ezra and Nechemiah

It is not until the destruction of the First Temple and the Babylonian Exile that we have illustrations of tensions between subordinate Jewish religious authority and non-Jewish secular authority. These cases demonstrate the precarious political situation in which Jews found themselves and the ways in which they adjusted to their loss of autonomy.

Our first example involves the harmonization of secular authority with Jewish authority. The primary illustration of pre-Talmudic Jewish reliance on non-Jewish secular authority is the series of events that flow from the reestablishment of limited Jewish sovereignty in the Land of Israel. The opening passages of the Book of Ezra tell of Cyrus's decree that empowers the exiled Jews to return to Judea.[11] Similarly, Nechemiah's authority to return to and reside in the Land of Israel flows from the letters he receives from the King of Persia.[12] Throughout both books, there are repeated references to and reliances on the secular, non-Jewish king's sanction as a way of permitting and substantiating Ezra and Nechemiah's actions.[13]

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[10] For example, the language of 2 Kings 18:5 says of King Hezekiah וְאַחֲרָיו לֹא-הָיָה כָמֹהוּ בְּכֹל מַלְכֵי יְהוּדָה וַאֲשֶׁר הָיוּ לְפָנָיו, "there was none like him among all the kings of Judah after him, nor among those before him.

[11] Ezra 1:1-3.

[12] Nech. 1:7-8.

[13] Ezra 3:7; 4:3; 6:3; 7:12-13; 7:21.

Three excerpts from Ezra and Nechemiah are of particular interest. The first is Artaxerxes's command to stop the reconstruction of Jerusalem and the Temple. In spite of the fact that this directive comes from a secular, non-Jewish source, the Jews who have returned nevertheless follow it and cease their work.[14] This demonstrates the respect given to a king's directive.

The second excerpt, taken from Nechemiah 2:18-20, concerns the use of the king's directive in rousing support among the Jews and confronting local adversaries:

יח וָאַגִּיד לָהֶם אֶת-יַד אֱלֹקַי אֲשֶׁר-הִיא טוֹבָה עָלַי וְאַף-דִּבְרֵי
הַמֶּלֶךְ אֲשֶׁר אָמַר-לִי וַיֹּאמְרוּ נָקוּם וּבָנִינוּ וַיְחַזְּקוּ יְדֵיהֶם לַטּוֹבָה׃
יט וַיִּשְׁמַע סַנְבַלַּט הַחֹרֹנִי וְטֹבִיָּה | הָעֶבֶד הָעַמּוֹנִי וְגֶשֶׁם הָעַרְבִי
וַיַּלְעִגוּ לָנוּ וַיִּבְזוּ עָלֵינוּ וַיֹּאמְרוּ מָה-הַדָּבָר הַזֶּה אֲשֶׁר אַתֶּם עֹשִׂים
הַעַל הַמֶּלֶךְ אַתֶּם מֹרְדִים׃ כ וָאָשִׁיב אוֹתָם דָּבָר וָאוֹמַר לָהֶם
אֱלֹקֵי הַשָּׁמַיִם הוּא יַצְלִיחַ לָנוּ וַאֲנַחְנוּ עֲבָדָיו נָקוּם וּבָנִינוּ וְלָכֶם
אֵין-חֵלֶק וּצְדָקָה וְזִכָּרוֹן בִּירוּשָׁלִָם׃

> 18 I told them of my God's benevolent care for me, also of the things that the king had said to me, and they said, "Let us start building!" They were encouraged by His benevolence. 19 When Sanballat the Horonite and Tobiah the Ammonite servant and Geshem the Arab heard, they mocked us and held us in contempt and said, "What is this that you are doing? Are you rebelling against the king?" 20 I said to them in reply, "The God of Heaven will grant us success, and we, His servants, will start building. But you have no share or claim or stake in Jerusalem!"

From this passage we can glean a number of important conclusions. First, when he is attempting to convince Jews to join him in his efforts, Nechemiah highlights not only his connection with the divine, but also the authorization he has received from the Persian king. Although it is impossible to

[14] Ezra 4:23-24.

know precisely what impact the king's endorsement had on his audience, it is reasonable to conclude that its mention is not superfluous.

This use of the king's permission in an intra-Jewish setting is contrasted with Nechemiah's interaction with the non-Jews around his party. When his adversaries mock and accuse him, they do so by accusing him of violating the king's wishes. All the same, Nechemiah's response does not challenge these non-Jews in secular terms, but rather asserts solely a religious response to their allegations. In this way, Nechemiah takes a secular political decision and reframes it as divinely motivated and ordained. Thus, we see evidence of an acknowledgement of secular authority when the audience is the Jewish community, contrasting sharply with the image of exclusive religious authority that is presented to the outside world.[15]

Finally, we have Nechemiah's explicit instruction to the people in Nechemiah 9:37 as to how they are supposed to interact with their secular Persian ruler:

> וּתְבוּאָתָהּ מַרְבָּה לַמְּלָכִים אֲשֶׁר-נָתַתָּה עָלֵינוּ בְּחַטֹּאותֵינוּ וְעַל גְּוִיֹּתֵינוּ מֹשְׁלִים וּבִבְהֶמְתֵּנוּ כִּרְצוֹנָם וּבְצָרָה גְדוֹלָה אֲנָחְנוּ׃
>
> On account of our sins it yields its abundant crops to kings whom You have set over us. They rule over our bodies and our beasts as they please, and we are in great distress.

In this passage, obedience to Persian domination is given a particular theological spin. Although there is a somewhat grudging recognition of the

[15] It is also worth mentioning that the examples of Ezra and Nechemiah play a role in the Rama's view of *dina demalkhuta dina* centuries later. In discussing whether a community's rabbi may be appointed by the secular authority, the Rama cites the appointment of Ezra and Nechemiah as evidence that such appointments may be valid. Moshe Isserles, *Sheelot Uteshuvot Harama* (Jerusalem, 1971) 123.

practical legitimacy of foreign control, even the rightful features of Persian rule flow from divine control, and not from the foreign leaders themselves. Thus, the message to the people is one of divine and religious authority's superiority over political authority.

e) Apocrypha

Two books of the Apocrypha are particularly replete with depictions of political-religious conflict. In the Book of Judith, we are presented with the relationship between Jewish piety, embodied in Judith herself, Jewish secular leadership, denoted by her town's leaders, and foreign military power, as represented by the Assyrian general Holofernes. In contrast, certain passages in 1 Maccabees describe a more plausibly historical relationship between Jewish religious and secular power.

Judith does not appear until the eighth chapter of the book bearing her name, as the first seven chapters set the scene of an Assyrian siege of her home town of Bethulia. She is portrayed as a virtuous widow who challenges the secular Jewish authorities' willingness to surrender by seducing and beheading Holofernes. If one takes each of the characters as representing a particular element of society, the story depicts the triumph of grassroots religious authority over both Jewish and foreign political powers.

In Maccabees, we find the intertwining of Jewish secular and religious authority. After a number of military victors and his conquest of Jerusalem, Judah, the Jews' military and political leader, selects those who serve as

priests.[16] Subsequently, however, there is a blending of military-political roles with the office of high priest. In 1 Maccabees 10:20, King Alexander appoints his brother Jonathan high priest and "Friend of the King."[17] Simon Maccabee takes a similarly titled dual position.[18] Eventually, the two positions are combined, as can be seen in Antiochus's letter addressed to "Simon, high priest and ethnarch."[19] Thus, the Maccabean period saw the conflation of Jewish religious and political authority under one leader.

f) Josephus

It was not only in the time of Ezra and Nechemiah that outside, non-Jewish rulers had the authority to determine the inner workings of Jewish religious development. During the period chronicled by Josephus, there are numerous illustrations of the Roman secular government intervening in Jewish religious affairs.

As one example, Josephus writes that, during her nine-year reign, Queen Alexandra appointed her elder son Hyrcanus to the high priesthood.[20] Hyrcanus's younger brother, Aristobulus, challenged Hyrcanus and seized control of the kingdom, setting off a civil war.[21] Ultimately, the Roman general Pompey heard the dispute between the two and "restored the high priesthood to

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[16] 1 Macc 4:42.

[17] Young Antiochus also acknowledges Jonathan, the military leader of the Jewish forces, as high priest. 1 Macc 11:57.

[18] 1 Macc 14:38.

[19] 1 Macc 15:2.

[20] Flavius Josephus, *Jewish Antiquities* (Translated by William Whiston; Peabody, Mass.: Hendrickson Pub., 1987) 13.16.2. Interestingly, Josephus writes that Hyrcanus owed his appointment to the fact that he "cared not to meddle in politics." *Ibid.*

[21] *Ant.* 14.1.2.

Hyrcanus, both because he had been useful to him in other respects, and because he hindered the Jews in the country from giving Aristobulus any assistance in his war against him."[22]

g) Dead Sea Scrolls

The potential conflict between political and religious authority surfaces in the Dead Sea Scrolls as well. It is clear that the messianism of the Qumran sect included an expectation of two separate Messiahs. For example, The Rule of the Congregation refers to משיחי אהרון וישראל "the Messiahs of Aaron and Israel."[23] The belief that these are two separate persons is reinforced elsewhere as well:

> [ה]וא בל[מו]שב אנשי השם [קוראי]מועד לעצת ביחד אם יוליד [אל] א[ת] במשיח אתם יבוא[הכוהן]רואש כול עדת ישראל וכול א[חיו בני] אהרון הכוהנים [קוראי] מועד אנושי השם וישבו ל[פניו איש]לפי כבודו ואחר י[בוא מש]יח ישראל . . . ו[אם לשול]חן יחד יועד[ו או לשתות הת]ירוש וערוך השולחן היחד [ומסוך ה]תירוש לשתות[אל ישלח] איש את ידו ברשת בלחם ו[התירוש] לפני בכוהן כיא[הוא מ]ברך את רשית הלחם והתירו[ש ושלח]ידו בלחם לפנים ואח[ר יש]לח משיח ישראל ידיו בלחם [ואחר יבר]כו כול עדת היחד א[יש לפי] כבודו . . .
>
> At [a ses]sion of the men of renown, [those summoned to] the gathering of the community council, where [God] begets the Messiah with them: [the] chief [priest] of all the congregation of Israel shall enter, and all [his] br[others, the sons] of Aaron, the priests [summoned] to the assembly, the men of renown, and they shall sit be[fore him, each one] according to his dignity. After, [the Mess]iah of Israel shall [enter] . . . And [when] they gather [at the tab]le of community [or to drink the n]ew wine, and the table of the community is prepared [and the] new wine [is mixed] for drinking, [no-one should stretch out] his hand to the first-fruit of the bread

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[22] *Ant.* 14.4.4.

[23] 1QS IX, 11. English translations of Dead Sea scrolls material taken from Florentino Garcia Martínez & Eibert J. C. Tigchelaar, *The Dead Sea Scrolls Study Edition* (Leiden: Brill, 2000). Similar indications of a distinction between a נביא and a Messiah of Israel can be found in However, at other times, the term משיח אהרון ודוד appears in the singular. See, e.g., CD-A XII-XIII, XIV, XIX.

> and of [the new wine] before the priest, for [he is the one who bl[esses the bread before them. Afterwar[ds,] the Messiah of Israel [shall str]etch out his hands towards the bread. [And afterwards they shall ble]ss all the congregation of the community, each [one according to] his dignity.[24]

Thus, the Dead Sea Scrolls hint at a Messiah of Aaron, also known as the priest, and a Messiah of Israel, indicating a separation between the political and the religious in the end of days in the Qumran worldview.

It is difficult to discern the difference and the relationship between the two Messiahs. We can be certain that the Messiah of Israel is a military leader, as he is portrayed as leading the people in battle, while the Messiah of Aaron is a religious figure. Beyond that, there is little material to work with. One could treat the excerpt set forth above as indicating, by dint of his priority in taking bread, that the priestly Messiah is in a position superior to the Davidic Messiah.

h) New Testament

While the entire New Testament can be read as a clash between Jewish religious authority and secular authority, one particularly well-known passage captures an attempt to resolve the tension between the two:

> Then the Pharisees went out and laid plans to trap him in his words. They sent their disciples to him along with the Herodians. "Teacher," they said, "we know you are a man of integrity and that you teach the way of God in accordance with the truth. You aren't swayed by men, because you pay no attention to who they are. Tell us then, what is your opinion? Is it right to pay taxes to Caesar or not?" But Jesus, knowing their evil intent, said, "You hypocrites, why are you trying to trap me? Show me the coin used for paying the tax." They brought him a denarius, and he asked them, "Whose portrait is this? And whose inscription?" "Caesar's," they replied. Then he said to them, "Give to Caesar what is Caesar's, and to

[24] 1Q28a II.

> God what is God's." When they heard this, they were amazed. So they left him and went away.[25]

In this way, Jesus speaks about taxation and divides the world into two spheres: the religious sphere, in which one owes obedience to G-d, and the secular sphere, in which one owes obedience to the Roman authorities.

A later New Testament passage gives even greater legitimacy to secular authority:

> Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience. This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing. Give everyone what you owe him: If you owe taxes, pay taxes; if revenue, then revenue; if respect, then respect; if honor, then honor. Let no debt remain outstanding, except the continuing debt to love one another, for he who loves his fellowman has fulfilled the law.[26]

This passage goes beyond merely legitimating secular authority; it ties secular rule to religious obligation, placing the government (even when hostile) squarely in a chain between the individual and G-d. In essence, defiance of secular law becomes equivalent to religious transgression, fusing the two in a way that

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[25] Matt 22:15-22 NIV.

[26] Rom 13:1-8 NIV.

strongly resembles what we will see in the plain meaning of *dina demalkhuta dina*.

i) ***m. Git.* 1:5**

Numerous scholars have cited *mishnah Gittin* 1:5 as an embryonic statement of *dina demalkhuta dina*:[27]

כָּל גֵּט שֶׁיֵּשׁ עָלָיו עֵד כּוּתִי, פָּסוּל, חוּץ מִגִּטֵּי נָשִׁים וְשִׁחְרוּרֵי עֲבָדִים. מַעֲשֶׂה שֶׁהֵבִיאוּ לִפְנֵי רַבָּן גַּמְלִיאֵל לְכְפַר עוֹתְנַאי גֵּט אִשָּׁה וְהָיוּ עֵדָיו עֵדֵי כּוּתִים, וְהִכְשִׁיר. כָּל הַשְּׁטָרוֹת הָעוֹלִים בְּעַרְכָּאוֹת שֶׁל גּוֹיִם, אַף עַל פִּי שֶׁחוֹתְמֵיהֶם גּוֹיִם, כְּשֵׁרִים, חוּץ מִגִּטֵּי נָשִׁים וְשִׁחְרוּרֵי עֲבָדִים. רַבִּי שִׁמְעוֹן אוֹמֵר, אַף אֵלּוּ כְּשֵׁרִין, לֹא הֻזְכְּרוּ אֶלָּא בִּזְמַן שֶׁנַּעֲשׂוּ בַּהֶדְיוֹט:

> Every *get* that is witnessed by a Cuthite is invalid except for bills of divorce and bills of manumission. There is a case that they brought a bill of divorce whose witnesses were Cuthite witnesses to Rabban Gamliel in the town of Othnai, and he declared it valid. All bills that are drawn up in non-Jewish courts, even those signed by Gentiles, are valid, except for bills of divorce and bills of manumission. Rabbi Shimon says, even these are valid, but only in cases when they were written by uneducated persons.[28]

In this mishnah, we have two separate sets of actions that ordinarily would be questionable under Jewish law, but are declared to be valid because of the legitimacy they carry in the non-Jewish world. First, certain bills witnessed by Cuthites are held to be binding, even though most documents require two Jewish witnesses.[29] Second, and more significantly, the bills issued by non-Jewish courts are held to be binding in a Jewish context, in spite of the fact that they do not meet the requirements of Jewish law. Thus, we find that certain actions by

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[27] Indeed, one of the four times that *dina demalkhuta dina* appears in the Talmud is in response to this particular mishnah.

[28] *m. Git.* 1:5. The English translation is my own.

[29] See, *e.g.*, Deut 19:15; *b. Sanh.* 30a; Yosef Caro, *Shulchan Arukh* (Jerusalem, 1993), *Choshen Mishpat* 46:7–8.

secular governmental authorities can have an effect and secure recognition under Jewish law.

3) *Dina Demalkhuta Dina* in the Talmud

Considering the conceptual importance of *dina demalkhuta dina* to Jewish law in the Diaspora, it is surprising that the phrase appears in only four places in the Talmud, and only in the Babylonian Talmud at that. Only these four that cite the principle expressly, but additional passages include an implicit reliance on *dina demalkhuta dina*, in which it is assumed that secular law binds the rabbis' hands.

As with the pre-Talmudic texts, there are numerous additional passages in the Talmud that reflect the broader power dynamics between religious Jewish authority and secular non-Jewish authority. In fact, some of the articulations of the principle *dina demalkhuta dina* are embedded in far more extensive debates over conflicts between secular and Jewish law. However, because this thesis is focusing on the more limited topic of *dina demalkhuta dina*, not the expansive question of power dynamics, such debates will be referenced only when they have a direct bearing on the development of *dina demalkhuta dina*.

a) Who was Shmuel?

Before turning to the four appearances of *dina demalkhuta dina* in the Talmud, it is worth taking a moment to consider Shmuel, in whose name these words are spoken. Shmuel, also known as Mar or Shmuel Hayarchina'ah, was a first generation Babylonian amora who lived from the end of the second century

through the middle of the third century.[30] His father, Abba bar Abba, participated in his education and bequeathed a sizeable estate to him.[31]

During his lifetime, Shmuel developed a strong reputation in civil law, and his legal opinions became the settled law of Nehardea and the surrounding communities.[32] Many of his statements and actions demonstrate sympathy for the plight of the poor and upholding the highest of ethical standards.[33] Although they did not always see eye to eye, Shmuel developed a close relationship with Rav, who served as the religious leader of the Jews of Sura.[34] After Rav's death, Shmuel's interpretations became accepted among all Babylonian Jewry.[35]

Various passages in the Talmud indicate that Shmuel had regular contact with non-Jews. Passages in Tractates Avodah Zarah and Shabbat of the Babylonian Talmud describe Shmuel sitting down with Avlat, a non-Jew.[36] It could be reasoned that these contacts led him to the opinion that lying to non-Jews was prohibited and that one could enter Christian meeting places to save holy books from a fire.[37]

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[30] Mordekhai Margaliot, ed., *Entziklopedia Lechokhmei Hatalmud Vehage'onim* (Tel Aviv: Yavneh Publishing House, Ltd, 2000) 327. The precise year of his death is given as 254 C.E.

[31] *b. Zev.* 26a; *b. Hul.* 105a.

[32] *b. Ket.* 54a.

[33] Among the examples in which Shmuel advocated for the poor are his consent to allowing orphans to loan money with interest and his threat against merchants who sold religious supplies at inflated prices. *b. B. Metz.* 70a, *b. Pes.* 30a, *b. Suk.* 34b. To avoid the appearance of impropriety, he refused to sit as a judge on a case where one of the parties had helped him to cross a river. *b. Ket.* 105b.

[34] *b. Hul.* 59a

[35] *b. Ket.* 54a

[36] *b. Av. Zar.* 30a; *b. Shab.* 156b

[37] *b. Hul.* 94a; *b. Shab.* 116a.

Shmuel's status as a well-respected Jewish leader allowed him to play a significant role in a turbulent time. Prior to the Sassanian invasion of Babylonia in 226 C.E., the Jews enjoyed considerable autonomy, religious independence and influence in Parthian governmental affairs.[38] The Sassanians, however, were far less cosmopolitan and far more centralized than the Parthians, causing Jews to be concerned for their own welfare.[39] The situation improved with the rise of Shapur I in 242, who sought to appease the Jewish community prior to his campaign against Rome.[40]

Shmuel pursued a policy of appeasement with regard to the Sassanian government. He developed a close relationship with Shapur himself and earned back a certain degree of cultural and religious autonomy for the Jewish community.[41] This understanding is reflected in a passage in Tractate Mo'ed Qatan of the Babylonian Talmud, which tells of the siege of Mezigat Keisari, where the Sassanians killed 12,000 Jews. Upon hearing the news, Shmuel did not tear his garments, as one might have thought he would have upon hearing such news.[42]

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[38] Jacob Neusner, *A History of the Jews of Babylonia* (Atlanta, GA: Scholars Press, 1999), vol. 2 16, 27.

[39] As an illustration of the end of Parthian-Jewish cooperation, Rav, upon hearing of the fall of the Parthian Empire said, "נתפרדה החבילה," "the connection is cut apart." *b. Av. Zar.* 10b. Other examples of difficulties between Jews and the new Sassanian Empire can be found throughout the Talmud, see *b. Yev.* 63b, *b. B. Qam.* 117a, *b. Shab.* 45a, *b. Yoma* 10a, *b. Shab.* 11a

[40] Neusner 118-120.

[41] Shilo 4.

[42] *b. M. Qat.* 26a. The passage also presents a cleansed image of Shapur I, who states that he never killed a Jew and that the Jews of Mezigat Caesaria brought their deaths on themselves.

b) *b. Bava Batra* 54b-55a

Our first text is taken from Tractate Bava Batra of the Babylonian Talmud and addresses the question of property rights and ownership:

אמר רב יהודה אמר שמואל: נכסי עובד כוכבים הרי הן כמדבר, כל המחזיק בהן זכה בהן. מ"ט? עובד כוכבים מכי מטו זוזי לידיה אסתלק ליה, ישראל לא קני עד דמטי שטרא לידיה, הלכך הרי הן כמדבר, וכל המחזיק בהן זכה בהן. א"ל אביי לרב יוסף: מי אמר שמואל הכי? והאמר שמואל: דינא דמלכותא דינא, ומלכא אמר: לא ליקני ארעא אלא באיגרתא אמר ליה: אנא לא ידענא, עובדא הוה בדורא דרעותא, בישראל דזבן ארעא מעובד כוכבים, ואתא ישראל אחרינא רפיק בה פורתא, אתא לקמיה דרב יהודה, אוקמה בידא דשני. א"ל: דורא דרעותא קאמרת? התם באגי מטמרי הוו, דאינהו גופייהו לא הוו יהבי טסקא למלכא, ומלכא אמר: מאן דיהיב טסקא ליכול ארעא. . . .

אמר רבה, הני תלת מילי אישתעי לי עוקבן בר נחמיה ריש גלותא משמיה דשמואל: דינא דמלכותא דינא, ואריסותא דפרסאי עד מ' שנין, והני זהרורי דזבין ארעא לטסקא - זבינהו זביני. והי"מ לטסקא, אבל לכרגא לא מ"ט? כרגא אקרקף דגברי מנח.

Rav Yehuda said in the name of Shmuel: "The property of an idol worshipper is like a desert: whoever takes control of it is entitled to ownership over it." How is this so? As soon as the purchase money reaches the hands of an idol worshipper, the property is no longer his, while a Jew does not acquire property until the document of transfer reaches his hands. For this reason, the idol worshipper's property is like a desert, and whoever takes control of it is entitled to ownership over it.

Abaye said to Rav Yosef: "Did Shmuel say this? Did Shmuel not say: 'The law of the kingdom is the law,' and the king has said, 'You may acquire land only through a deed'?" Rav Yosef said to him, "I do not know, but there was a case in Dura Dire'uta of a Jew who bought land from an idol worshipper, and another Jew came and dug a hole in the land. The matter came before Rav Nachman, and he awarded the land to the second Jew." Abaye said, "Are you speaking of Dura Dire'uta? In that case, the people in the town would hide themselves so that they would not have to pay the land

> tax to the king, so the king said, 'Whoever pays the land tax will own the land.'". . .
>
> Rabba said, "There are three things that Ukba bar Nechemiah the Exilarch told me in Shmuel's name: the law of the kingdom is the law; and it takes forty years to acquire land by possession according to Persian law; and when a rich landowner who purchases land by paying the unpaid land tax, the purchase stands." This rule applies only to a land tax, not to a head tax. What is the reasoning for this? A head tax applies to an individual.[43]

As is obvious, the essence of the passage is the validation of Persian law as it applies to land transactions. According to the secular rule, payment of the land tax entitles the payer to the benefit of the land in question. Ultimately, the rule, and Jewish recognition of it, benefits the royal secular authorities, as it grants them greater leeway to collect land taxes and to facilitate the recognized transfer of property.

This is not to say that the passage grants free rein to the governmental authorities. Shilo comments that this excerpt indicates the limitations of *dina demalkhuta dina*. As evidence of this, he highlights the fact that the rabbis restricted tax sale purchase rights to land taxes.[44]

There are number of features of this excerpt that are striking. The opening statement brought by Rav Yehuda in Shmuel's name is a tad unexpected. As discussed above, Shmuel is known for his interactions with and relatively open attitude toward non-Jews. It is no wonder, then, that Abaye expressed such surprise that the opening statement was attributed to Shmuel.

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[43] *b. Bava Batra* 54b-55a.

[44] Shilo 10.

The closing statement is unusual as well, as it is the only definitive statement of halakhah in the entire Talmud that is brought in the name of the Exilarch Ukba bar Nechemiah.[45] This fact alone ratchets up the importance of the statement and bolsters the sense that it conveys a particularly significant legal principle.

Rabba's declaration is also slightly vague, although the English masks the ambiguity. He credits Ukba with teaching him three things, which are understandably enumerated as (1) the law of the kingdom is the law; (2) the length of time for possession under Persian law; and (3) land acquisition through the purchase of unpaid taxes. However, some texts read not "the law of the kingdom is the law; and it takes forty years. . . ", but rather "the law of the kingdom is the law **that** it takes forty years. . . ."[46] If we follow this logic, the three teachings are (1) the law of the kingdom is the law that possession takes forty years; (2) land may be acquired through the payment of outstanding taxes; and (3) this rule applies to a land tax, not a head tax.

Between these two options, the first seems more logical. As we will see later, the simple statement "the law of the kingdom is the law" is attributed to Shmuel in multiple places in the Babylonian Talmud. Nowhere else does it appear in connection to a statement on land acquisition by possession. Accordingly, the articulation of *dina demalkhuta dina* here in Bava Batra is likely a statement of a general principle, not a limited one.

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[45] Shilo 6.

[46] Raphael Nathan Nata Rabbinovicz, *Sefer Diqduqei Sofrim* (Jerusalem: Or Hachokhmah, 2002) 169.

We can also draw from this passage that the principle *dina demalkhuta dina* applies not only to public sector transactions involving the king directly. Indeed, the discussion of the transfer of land between two private individuals seems to support the conclusion that *dina demalkhuta dina* may be implicated in both interactions with the government and private dealings.[47]

c) *b. Bava Qamma* 113b

According to Shilo, the following passage in Bava Qamma of the Babylonian Talmud can be seen, in part, as a continuation of the statement in Bava Batra:[48]

> מתני׳. אין פורטין לא מתיבת המוכסין ולא מכיס של גבאין, ואין נוטלין מהם צדקה, אבל נוטל הוא מתוך ביתו או מן השוק.
> . . .
> ומוכסין. והאמר שמואל: דינא דמלכותא דינא! אמר רב חנינא בר כהנא אמר שמואל: במוכס שאין לו קצבה; דבי ר׳ ינאי אמרי: במוכס העומד מאליו. . . .
> אלא להבריח בו את המכס מי שרי? והאמר שמואל: דינא דמלכותא דינא! א״ר חנינא בר כהנא אמר שמואל: במוכס שאין לו קצבה; דבי ר׳ ינאי אמרי: במוכס העומד מאליו. ואיכא דמתני אהא: נודרין להרגין ולחרמין ולמוכסין - שהיא של תרומה, שהיא של בית מלך, אע״פ שאינה של תרומה, אע״פ שאינה של מלך; ולמוכסין, והאמר שמואל: דינא דמלכותא דינא! א״ר חנינא בר כהנא אמר שמואל: במוכס שאין לו קצבה; דבי ר׳ ינאי אמרי: במוכס העומד מאליו. . . .
> גופא, אמר שמואל: דינא דמלכותא דינא. אמר רבא: תדע, דקטלי דיקלי וגשרי גישרי ועברינן עלייהו. א״ל אביי: ודלמא משום דאייאוש להו מינייהו מרייהו! אמר ליה: אי לא דינא דמלכותא דינא היכי מייאשי? והא לא קא עבדי כדאמר מלכא, מלכא אמר: זילו וקטלו מכל באגי, ואינהו אזלו וקטלו מחד

[47] As Shilo notes, there is some disagreement among the commentators on this point, with some holding that this is evidence of private sector application and others positing that the government has an interest in the relevant land transfer tax. Shilo 16.

[48] Shilo 11.

באגא! שלוחא דמלכא כמלכא, ולא טרח, ואינהו אפסיד אנפשייהו, דאיבעי להו דאינקוט מכוליה באגי ומשקל דמי.

MISHNAH: It is forbidden to take money from the custom collector's change purse or from the tax collector's pocket. It is also forbidden to take charity from them, but one may take charity from them at home or in the marketplace.

GEMARA: . . . And [with regard to] "customs collectors." Did Shmuel not say, "The law of the kingdom is the law?" Rav Chanina bar Kahana said in Shmuel's name, "The ban on taking charity from a customs collector is with regard to a customs collector who has no pre-specified rate of collection," whereas the School of Rabbi Yannai said, "With regard to a customs collector who is self-appointed." . . .

But is it permitted to chase off the customs collector? Didn't Shmuel say, "The law of the kingdom is the law?" Rabbi Chanina bar Kahana said in Shmuel's name, "This is with regard to a customs collector who has no pre-specified rate of collection," whereas the School of Rabbi Yannai said, "With regard to a customs collector who is self-appointed."

At the same time, there are others who exempt from vows those who swear vows to murderers, robbers and customs collectors, whether with regard to a particular product being *terumah* or belonging to the king's household, even though it is not *terumah* or does not belong to the king's household. But with regard to customs collectors, did not Shmuel say, "The law of the kingdom is the law?" Rabbi Chanina bar Kahana said in Shmuel's name, "This is with regard to a customs collector who has no pre-specified rate of collection," whereas the School of Rabbi Yannai said, "With regard to a customs collector who is self-appointed."

. . .

In the text above, Shmuel stated: "The law of the kingdom is the law." Rava said, "You know this from the fact that they would cut down palm trees and build bridges and cross on them." Abaye said to him, "Perhaps this is because the owners had abandoned the property." Rava answered, "If this is not because the law of the kingdom is the law, how could it be that they have abandoned their property?" Behold, the tree cutters do not do exactly as the king said, for the king said, "Go and cut down the trees in each rural community," and they went and cut them down in one community only! The emissary of the king is like the king, and cannot be bothered with such matters. It is the responsibility of those who have suffered the loss themselves, and they need to collect funds from all the owners in the community and apportion the money.[49]

[49] *b. B. Qam.* 113a-113b.

This passage is remarkable in that it expands royal decision-making authority to include the decisions of a king's emissaries. In the first discussion, the invocation of *dina demalkhuta dina* serves to limit the prohibition on financial dealings with a tax collector. More artfully put, *dina demalkhuta dina* and the discussion that follows increases the customs collectors' legitimacy.

Even the debate between Rabbi Chanina[50] and the School of Rabbi Yannai does not question the right of the king to appoint an emissary with independent authority. Both lines of thought curtail the Mishnah's blanket statement and grant further legitimacy to the actions of the governmental customs collectors.

That is not to say that the passage grants governmental officials free rein to conduct themselves as they see fit. On the contrary, Rabbi Chanina and the School of Rabbi Yannai both assert a limitation on what a particular customs collector may do. Nevertheless, the trajectory from the Mishnah is in the direction of greater deference to the secular powers of the time.

The final exchange between Rava and Abaye involves Rava introducing actual conduct to establish *dina demalkhuta dina*. As Shilo points out, Rava is not certain of the origins of *dina demalkhuta dina*. Nevertheless, he points out that, with regard to abandoned property seized by the king, the public conducts itself according to the principle and uses their actual conduct as proof of *dina demalkhuta dina*'s legitimacy as a halakhic rule.[51]

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[50] Interestingly, some versions of this passage exclude Shmuel's name entirely. Shilo 23,

[51] Shilo 11.

d) *b. Nedarim* 28a

The following passage from Tractate Nedarim turns our attention once again to interactions with customs collectors and closely resembles the excerpt from Bava Qamma:

> מתני׳. נודרין להרגין ולחרמין ולמוכסין, שהיא תרומה - אע״פ שאינו תרומה, שהן של בית המלך - אע״פ שאינן של בית המלך
> . . .
> גמ׳. והאמר שמואל: דינא דמלכותא דינא! אמר רב חיננא אי״ר כהנא אמר שמואל: במוכס שאין לו קצבה. דבי ר׳ ינאי אמר: במוכס העומד מאליו.
>
> MISHNAH: Those who swear vows to murderers, robbers and customs collectors, whether with regard to a particular product being *terumah* or belonging to the king's household, even though it is not *terumah* or does not belong to the king's household are exempt from the vow in question. . . .
> GEMARA: Did Shmuel not say: "The law of the kingdom is the law?" Rav Chanina said in the name of Rav Kahana who said in the name of Shmuel: , "This is with regard to a customs collector who has no pre-specified rate of collection," whereas the School of Rabbi Yannai said, "With regard to a customs collector who is self-appointed." . . .[52]

Much of the analysis given above regarding Bava Qamma is similarly applicable here. Shmuel's law serves to bring the Mishnah into line with heightened respect for secular governmental authority. While Rav Chanina invokes Shmuel, indirectly in this passage, to bolster the underlying Mishnah's religious defiance, the excerpt's overall effect is to push Jewish law toward greater acknowledgement of non-Jewish control.

[52] *b. Ned.* 27b-28a.

e) ***b. Gittin* 10b**

The final explicit mention of *dina demalkhuta dina* is in Tractate Gittin and addresses the recognition afforded documents issued by non-Jewish courts:

> מתני׳. כל השטרות העולים בערכאות של עובדי כוכבים, אע״פ שחותמיהם עובדי כוכבים - כשירים, חוץ מגיטי נשים ושחרורי עבדים; ר׳ שמעון אומר: אף אלו כשירין לא הוזכרו אלא בזמן שנעשו בהדיוט.
> גמ׳. קא פסיק ותני, לא שנא מכר לשם מתנה; בשלמא מכר, מכי יהיב זוזי קמייהו הוא דקנה, ושטרא ראיה בעלמא הוא, דאי לא יהיב זוזי קמייהו, לא הוו מרעי נפשייהו וכתבין ליה שטרא, אלא מתנה במאי קא קני? לאו בהאי שטרא, והאי שטרא חספא בעלמא הוא! אמר שמואל: דינא דמלכותא דינא. ואב״א, תני: חוץ מכגיטי נשים.
>
> MISHNAH: All bills that are drawn up in non-Jewish courts, even those that are signed by gentiles, are valid, except for bills of divorce and bills of manumission. Rabbi Shimon says, even these are valid, but only in cases when they are written by uneducated persons.
> GEMARA: The editor of the Mishnah decided and taught that it made no difference if it was a sale or a gift. The statement applies to a sale because, as soon as the purchaser gives the money to the seller, the purchase is complete, with the bill being only proof of the transaction. If the purchaser had not given the seller the money, he would not have troubled himself in writing up a bill of sale. However, with regard to a gift, how do we know that there has been an exchange? Not through the bill, which is like a piece of clay! Shmuel said, "The law of the kingdom is the law." Or if you prefer to say it this way, I say: "Except with regard to things that are like bills of divorce."[53]

Of particular interest in this passage is that the implicit criticism of and limitation on *dina demalkhuta dina* is done anonymously. Immediately after *dina demalkhuta dina* is mentioned, a citation-less statement refers back to the Mishnah and attempts to harmonize it with Shmuel's general statement. The result is broad acceptance of what transpires in governmental non-Jewish courts.

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[53] *b. Git.* 10b.

However, the final comment essentially ignores Shmuel's statement and shows less respect for non-Jewish courts than the original Mishnaic rule. In the original Mishnah, the exception to recognizing non-Jewish court documents is limited to bills of divorce and bills of manumission. The concluding statement of the excerpt, however, extends the exception to those things that are "*like*" bills of divorce. The result is a more limited recognition of non-Jewish courts, which runs counter to a broad articulation and application of *dina demalkhuta dina*.

f) Implicit Reliance on *Dina Demalkhuta Dina* in Other Sugyot

In addition to the four explicit references to *dina demalkhuta dina* set forth above, numerous other Talmudic passages address the conflict between Jewish and secular authority. Two of these passages bear a particular connection to *dina demalkhuta dina* and appear to rely implicitly on its recognition.

i) *b. Yevamot* 46a

Our first excerpt with an implicit recognition of *dina demalkhuta dina* is found in *b. Yevamot* and can be tied directly into the discussion on Bava Batra 55a:

> אמר לו רב פפא לרבא: חזי מר, הני דבי פפא בר אבא, דיהבי זוזי לאינשי לכרגייהו ומשעבדי בהו, כי נפקי צריכי גיטא דחירותא או לאו? א"ל: איכו שכיבי, לא אמרי לכו הא מילתא, הכי א"ר ששת: מוהרקייהו דהני בטפסא דמלכא מנח, ומלכא אמר: מאן דלא יהיב כרגא משתעבד למאן דיהיב כרגא.
>
> Rav Papa said to Rava: "The gentleman has seen those at the house of Papa bar Abba who give money to people for their head taxes and thereby enslave them. Do they require a bill of manumission to secure their freedom or not?" Rava said to him, "If I were dead now, I could not have told you this, but Rav Sheshet said, 'The surety for these people lies in the king's treasury, and the

king has said: "Whoever does not pay the head tax will be enslaved to the person who pays his head tax."'"

As discussed above, the discussion on *b. Bava Batra* 54b-55a presents two types of taxes. The first is a land tax, payment of which may entitle the payer to the property taxed, while the second is a head tax, payment of which could potentially entitle the payer to ownership of the individual who owed the tax as a slave. Here, the Talmud presents a situation where the later case came to be, and the individuals who did not pay their own head taxes became slaves to those who advanced the requisite payments. As a secondary connection between the two texts, both have Rava as a principal figure.

The king's law plays a pivotal role in this dialogue; the conclusion drawn by Rav Sheshet cites the king's decree as the basis for justifying the action in question and requiring a bill of manumission. Thus, *dina demalkhuta dina* implicitly underlies this passage.

g) *b. Bava Metzia* 108a

A second passage in which the reference to *dina demalkhuta dina* is unspoken is found in *b. Bava Metzia* 108a:

אמר שמואל: האי מאן דאחזיק ברקתא דנהרא - חציפא הוי, סלוקי לא מסלקינן ליה. והאידנא דקא כתבי פרסאי קני לך עד מלי צוארי סוסיא מיא - סלוקי נמי מסלקינן ליה.

Shmuel said: "A person who seizes the banks of a river is impudent, but we do not drive him away." However, now that the Persians issue written documents that say, "Acquire for yourself the property as far out as where the water reaches a horse's neck in depth," we drive this person away as well.

Like the selection from *b. Yevamot*, this excerpt dovetails neatly with the passage we saw above in *b. Bava Batra* 54b-55a. First, it relates to the

acquisition and possession of property and includes a supposition based exclusively on the application of Persian law. As an additional matter, the initial quotation is attributed to Shmuel, in whose name *dina demalkhuta dina* is brought. This leads us, as readers of the text, to infer that Shmuel certainly would have tempered the words presented here with his well-known maxim that allows Persian law to trump rules governing the acquisition of real property. For these reasons, it is reasonable to conclude that the instant excerpt implicitly endorses and relies on *dina demalkhuta dina*.

h) Reflections on Talmudic Passages

Dina demalkhuta dina is consistently invoked to expand the recognition of secular governmental authority beyond the boundaries placed by the Mishnah. While the text does not always adhere to the new boundaries the principle implies and often scales back the expansion, allusions to it serve as a bulwark for cooperation and subservience to non-Jewish public authorities.

Given the political climate of the time, perhaps this is not surprising. According to Jacob Neusner, Shmuel attempted to convince the Jewish public of the new Sassanian Empire's legitimacy and civilized nature in exchange for the new government's broad recognition of Jewish autonomy.[54] In keeping with this goal, *dina demalkhuta dina* presents a legal basis for acknowledging non-Jewish governmental control.

Landsman plays down Shmuel's personal connection to Shapur I or the Sassanians. According to Landsman, Shmuel's aim was "not to be loyal to a

[54] Neusner, vol. 2 69, 95.

particular government of a particular time, but to propose a modus vivendi for the Jew."[55] He also asserts that *dina demalkhuta dina* "is based upon Samuel's knowledge and understanding of the difficulties encountered in Diaspora life,"[56] a statement that is no less relevant today.

Landsman's assertions aside, one cannot help but sense that Shmuel's interactions with non-Jewish society led him to more open attitudes and that *dina demalkhuta dina* reflects Shmuel's conduct vis-à-vis non-Jews in general. As mentioned above, Shmuel is mentioned in the Talmud has having personal relationships with non-Jews and often issues declarations bolstering positive interactions with non-Jews. *Dina demalkhuta dina*, which further advances Jewish/non-Jewish relations, is in keeping with the way in which Shmuel is portrayed in the Talmud as a whole.

The manner in which *dina demalkhuta dina* is invoked is also interesting. The fact that the statement itself is never challenged as legitimate leads to Shilo concluding that it was accepted as halakhah without question.[57] This is so even though the statement appears to be a minority opinion that conflicts with the teachings of other sages. Given Shmuel's reputation in civil matters, perhaps this broad acceptance should not come as a surprise, but it nevertheless points to *dina demalkhuta dina* being a bedrock principle of Jewish law.

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[55] Landsman 24.

[56] Landsman 22.

[57] Shilo 42.

Additionally, the principle applies to a wide variety of contexts. *Dina demalkhuta dina* is mentioned in connection with both private transactions and public confiscations. In addition, its application extends to documents that would otherwise be void under Jewish law and to vows that would be valid if they were not made to delegitimized governmental lackeys. One particularly notable absence from the subjects addressed is matters that relate exclusively to individual Jewish religious practice; while *dina demalkhuta dina* is mentioned in the context of divorce, even this has legal implications. Thus, aside from the uncertainty as to its relevance in purely religious settings, *dina demalkhuta dina* cannot be relegated to a narrow set of situations, but rather extends into nearly all aspects of Jewish public life.

4) Medieval and Early Modern Sources

Over the course of the medieval and late pre-modern period, the principle *dina demalkhuta dina* undergoes extensive examination and development. While the rule lay dormant for much of the Geonic period, the rabbis of later pre-Emancipation times promoted a series of exceptions to *dina demalkhuta dina* that were intended to protect Jewish law from being totally subsumed by the non-Jewish law of the Diaspora. While some of these exceptions survived the period, many foundered and were largely obsolete by the beginning of the modern era.

a) Geonic Sources

Because of the autonomy granted to the Jewish community during the Geonic period, the geonim "were almost never in need" of *dina demalkhuta dina*, and few Geonic sources even reference *dina demalkhuta dina*.[58] Even when their writings touch on *dina demalkhuta dina*, they often add little to the discourse in the Talmud.[59]

As Shilo points out, the only issue that arises with any degree of regularity is the treatment of documents drawn up by non-Jewish courts, as discussed in *b. Git.* 10b.[60] Much of the Geonic debate, to the extent such debate took place, focused on the distinction between the Talmud and Shmuel's more permissive stance, which excluded only bills of divorce and manumission from recognition,

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[58] Landsman 32.

[59] See, *e.g.*, *Teshuvot Hageonim Hachadashot* (Jerusalem: Mekhon Ofeq, 1995), App. No. 7.

[60] Shilo 47.

and the restatement which more broadly excluded bills "*like* bills of divorce," a phrase undefined until later times.

Generally, the geonim tended to follow the latter approach.[61] As Shilo states, this follows the trend among geonim to follow that which is stated in אי בעית אימא clauses in the Talmud.[62] In most responsa and writings, this led to the conclusion that non-Jewish documents evidencing gifts would not be recognized by Jewish authorities.[63]

One prominent exception to the trend in Geonic times is Rav Chaninai Gaon, who accepted all non-Jewish documents except for divorce and manumission bills.[64] In addition, halakhic decisors during the Geonic period were far more likely to recognize documents from Muslim courts than from non-Muslim courts.[65] However, on the whole, the Geonic period witnessed the contraction of the scope of Shmuel's rule and more limited recognition of the non-Jewish law of the land.

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[61] See, *e.g.*, Benjamin. M. Lewin, ed., *Otzar Hegeonim* (Haifa: Chamul, 1943), 13, 222.

[62] Shilo 48.

[63] Shilo 49. See, *e.g.*, *Teshuvot Hageonim* (Berlin: Harkavy, 1887), 72.

[64] Nissim ben Chayim Modai, ed., *Shaarei Tzedeq* (Salonika, 1792), 3:6:24. In its entirely, the quotation reads:

> מר רב חנינאי גאון ז״ל. והילכתא: כל השטרות העולין ערכאות של נכרים אף על פי שחותמיהן גויים כשרים, חוץ מגיטי נשים ושחרורי עבדים.
>
> Master Rav Chaninai Gaon, may his memory be a blessing. And the law: all bills that are drawn up in non-Jewish courts, even those that are signed by gentiles, are valid, except for bills of divorce and bills of manumission.

[65] Shilo 50-51.

The lack of a foundation for *dina demalkhuta dina* through the Geonic period is also striking. We find a semblance of a basis for the principle in only one place in all of Geonic literature:

> ראשון אמר שמואל דינא דמלכותא דינא . . . . כן היתה מאמר שמואל כי כאשר השליט הקב"ה את המלכויות בעולמו כך השליטן על ממון בני אדם לשלוט בו כרצונם.
>
> Shmuel first said, "The law of the kingdom is the law" . . . Shmuel surely would have said this because, when the Blessed Holy One gave power to various kingdoms throughout the world, the Blessed Holy One gave them power over the weal of people to rule over them according to their will.[66]

While this is a powerful articulation of the divine right of kings, it can hardly be stated that this represents the mainstream approach taken by the Geonim. Instead, the general thrust of the Geonic approach to *dina demalkhuta dina* is to ignore the principle and focus almost exclusively on internal matters addressing the Jewish community alone.[67]

b) Bases for *Dina Demalkhuta Dina*

There is a certain irony to the fact that, with the exception set forth above, it is not until several centuries after the principle *dina demalkhuta dina* was set forth in the Babylonian Talmud that there is any attempt to justify, explain or ground the principle.[68] Consequently, the reasonings behind *dina demalkhuta dina* that are eventually spelled out are quite varied and diverse, albeit terse. Moreover, there are significant implications arising from which line of reasoning

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[66] Simcha Asaf, *Teshuvot Hageonim* (Jerusalem: Makor, 1971), no. 702.

[67] Landsman 30-34.

[68] Shilo notes that, in the exchange on *b. Bava Qamma* 113b, Rabbah seems uncertain as to the origins of and reasoning behind *dina demalkhuta dina*.

one accepts, as the differing explanations for *dina demalkhuta dina* lead to divergent views on which actions are governed by the principle and which are not.

i) Noachide Commandment to Establish Courts of Law

One rationale for *dina demalkhuta dina* is articulated by Rashi in the 11th century on *b. Gittin* 9a-9b. The underlying Talmud passage is drawn from the Mishnah set forth on *b. Gittin* 10b and states that, except for bills of divorce and bills of manumission, non-Jewish court bills are valid even if they are signed by gentiles. Rashi comments on the text as follows:

> **חוץ מגיטי נשים** - דלאו בני כריתות נינהו הואיל ולא שייכי בתורת גיטין וקידושין אבל על הדינין נצטוו בני נח וכן שיחרורי עבדים דבכל פסולא דאורייתא שוה שחרור לגט אשה דגמרינן לה לה.
>
> **Other than bills of divorce**: For they are not capable of writing a divorce decree because they are not governed by our rules of divorce and marriage. But the children of Noah (*i.e.*, humanity other than Jews) were commanded to establish systems of laws. With regard to bills of manumission, since in each disqualification that arises from the Torah, manumission is the same as a divorce, so we learn one from the other.

Thus, according to Rashi, there is good reason for a non-Jewish legal system; by establishing laws, non-Jewish rulers are following a divine command recorded in Jewish scripture. This roots non-Jewish laws squarely within the framework of the Jewish narrative, legitimates their enactment and militates in favor of obedience to them.

Rashi's explanation also provides a solid reason why bills of divorce issued by non-Jewish courts would not be treated as valid. While the Noachide commandments extend to establishing a legal system, they do not specifically

require the institution of divorce codes. For this reason, there is no compelling reason to recognize bills of divorce that fail to comport with Jewish law.

ii) Contractual Relationship between King and Subjects

Two medieval Jewish scholars adopt an approach that grounds *dina demalkhuta dina* in the contractual relationship between a king and his subjects. First, the Rashbam articulates this view in his commentary on *b. Bava Batra* 54b:

> **והאמר שמואל דינא דמלכותא דינא** - כל מסים וארנוניות ומנהגות של משפטי מלכים שרגילים להנהיג במלכותם דינא הוא שכל בני המלכות מקבלים עליהם מרצונם חוקי המלך ומשפטיו והלכך דין גמור הוא. . . .
>
> **Did Shmuel not say, "The law of the kingdom is the law?"** All general taxes, crop taxes and customs following the judgments of kings who ordinarily reign over their kingdom are the law, because the inhabitants of the kingdom accept the laws and judgments of the king as binding on them of their own free will. Therefore, it is a settled law. . . .

In the Mishnah Torah, Rambam justifies the rule *dina demalkhuta dina* along similar lines:

> מלך שכרת אילנות של בעלי בתים ועשה מהן גשר מותר לעבור עליו וכן אם הרס בתים ועשה אותן דרך או חומה מותר ליהנות בה וכן כל כיוצא בזה שדין המלך דין.
> במה דברים אמורים במלך שמטבעו יוצא באותן הארצות שהרי הסכימו עליו בני אותה הארץ וסמכה דעתן שהוא אדוניהם והם לו עבדים אבל אם אין מטבעו יוצא הרי הוא כגזלן בעל זרוע וכמו חבורת ליסטים המזויינין שאין דיניהן דין וכן מלך זה וכל עבדיו כגזלן לכל דבר.
>
> If a king who cuts down the trees of a property owner and makes a bridge with them, one may cross it. The same is true of one who destroys houses and makes a road or a wall on the land; one is permitted to derive benefit from it. The same is true of all other similar examples because the law of the king is the law.
> What do these words refer to? A king whose coinage is used in that very land because it indicates that the inhabitants of that land have agreed and concluded that he is their lord and they are his

> servants. However, if his coinage is not used, he is like a violent robber, and those who bear arms like a group of armed thieves whose laws are not the law are like a group of armed marauders. In this way, this king and all his servants are like a robber in all matters.[69]

It is obvious from Rambam's articulation that the use of particular king's currency indicates consent to that king's rule. The text appears to indicate that the people are passive in this determination: whichever currency they happen to be using, that gives the king the right to impose laws on them. However, as a side note, one must wonder if the people could play a more active role in defining whose land governs; the implication of this line of reasoning regarding *dina demalkhuta dina* is that, in theory, the inhabitants may actively seek to alter the governing laws by using different currency. It is not clear from Rashbam's commentary how such a change of heart would evidence itself, but the Mishneh Torah implies that residents could change their allegiance, and thus the law of the land, by exchanging the currency they use. This seems to indicate that there must be *a* king in charge of the territory, but that substituting the coinage in circulation would effect a change in the relevant king and thus in the relevant law.

It is interesting that both Rambam and Rashbam make a small, yet significant emendation to Shmuel's principle. In both the Mishneh Torah and Rashbam's commentary, the text puts the focus on the law of the *king*, and not the law of the *kingdom*; Rashbam refers to "the judgments of the king," while Rambam uses the phrase "the law of the king is the law." In doing so, both rabbis grant the specific king a greater degree of authority than other

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[69] *Mishneh Torah Gezelah Veaveidah* 5:17-18.

commentators. While this may seem like a fine distinction, it has implications for certain exceptions to *dina demalkhuta dina*, as will be seen below.

iii) Hefker Beit Din Hefker

A fourth approach was adopted by Rabbenu Tam, among others, in the 12th century and is based on the halakhic principle of הפקר בית דין הפקר, that which is declared confiscated property by a court is considered legally confiscated. Under this principle, as originally enunciated, a Jewish court may declare an individual's property forfeit and assign ownership of the property to another individual. This right of courts to confiscate property has its origins in a passage from Ezra,[70] and is anchored in both the Jerusalem and Babylonian Talmuds.[71]

Rabbenu Tam takes this principle and extends it to property seized by non-Jewish authorities:

> וידהפקיעו חכמים ממון במנהג המלכות כדרך שהפקיעו מפני תקנת השבים ומפני תיקון העולם ומפני דרכי שלום. . . .
>
> And the sages expropriated money in the custom of the kingdom in the same way that they expropriated for the sake of making whole those who repent and for the sake of repairing the world and for the sake of the ways of peace. . . .[72]

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[70] Ezra 10:8 reads as follows: וכל אשר לא יבוא לשלשת הימים כעצת השרים והזקנים יחרם כל רכושו והוא יבדל מקהל הגולה: ". . . anyone who did not come in three days would, by decision of the officers and elders, have his property confiscated and himself excluded from the congregation of the returning exiles."

[71] *y. Sheq.* 1:2, 46a, *y. Peah* 5:1, 8d, *b. Yev.* 89b.

[72] Irving, A. Agus, ed., *Sheelot Uteshuvot Baalei Hatosafot* (New York: Yeshiva University, 1954), 12.

This approach utilizes a pre-existing Jewish legal principle. It also limits the rights of the non-Jewish authorities to those already possessed by Jewish courts of law. This line of thinking did not enjoy much success, and by the 13th century, the reasoning of Rabbenu Tam on *dina demalkhuta dina* had been lost or forgotten.[73]

iv) The Land Belongs to the King

Both the 11th century Ran and the 13th century Or Zarua base their understanding of *dina demalkhuta dina* on the king's ownership of the land constituting the kingdom. While also addressing the king's ownership of the land, the Or Zarua uses Tractate *Bava Qamma* as his jumping off point:

> . . . באומות העולם כן דינם שכל הארץ למלך והוא הדין בכל ההדיוטות שהם קצבו שלא יהנה אדם מארצם אלא בקצבתם שדיניהם דין ושמואל הא קא משמע לן.

> . . . Among the nations of the world, such is their law that the entire land belongs to the king, and such is the law for all common persons, for they have decreed that no person will enjoy their land without binding themselves and agreeing that their law is the law. This is exactly what Shmuel taught us, that the whole land belongs to the king. . . .[74]

Writing a century later, the Ran ties the king's ownership of land to the customs collection authorized in Nedarim:

> **במוכס העומד מאליו** - שלא במצות המלך וכתבו בתוספות דדוקא במלכי עובדי כוכבים אמר דדינא דמלכותא דינא מפני שהארץ שלו ויכול לומר להם אם לא תעשו מצותי אגרש אתכם מן הארץ.

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[73] Shilo 64.

[74] Yitzchaq ben Moshe of Viena, *Or Zarua* (Zhitomir,1862), *B. Qam.* 744.

> **With regard to a customs collector who is self-appointed:** Not by the king's command. As they wrote in Tosafot that the phrase *dina demalkhuta dina* specifically applies to non-Jewish kings because the land is his (*i.e.*, the king's) and he can say to them (*i.e.*, the inhabitants), "If you do not follow my command, I will expel you from the land." . . .[75]

These two rabbis reach a similar conclusion. The king is the owner of the land he rules, with the implicit understanding that he possesses the property rights that any property owner does. It naturally flows from this that, because they live on land that the king owns, the inhabitants must follow the king's laws.

While these two statements have similarities, there is a slight difference. In his commentary, the Ran advances a statement of pure practical force; if the inhabitants fail to observe the king's laws, they will justifiably face expulsion. The Or Zarua takes a different tack. There is no mention of expulsion, and the text instead highlights the benefits that come from accepting the king's law. Thus, even these two related analyses are distinguishable.

v) Analogy to Power Granted to Kings of Israel

As a final basis for *dina demalkhuta dina*, we can look at the Ritba's commentary on our selection from *b. Bava Batra*, written in the late 13th or early 14th century:

> ולהכי לא אמר שמואל דינא דמלכא דינא אלא דינא דמלכותא, ומצינו בדשמואל שפירש לנו חוקי המלך שדותיהם יקח (שמואל א' ח'), והוא האמור בסנהדרין (כ' ב') כל האמור בפרשת מלך מלך מותר בו. . . .
>
> Shmuel did not say "The law of the king is the law," but rather "the law of the kingdom," and we have found that when Samuel

[75] Nissim ben Reuven of Gerona, *b. Ned.* 28a. For similar thoughts, see Shelomo ben Avraham ibn Adret, *Chidushei Harashba* (Warsaw, 1883), *b. Ned.* 28a.

> explicated the laws of the kings, he said that he will take their fields from them. It is similarly said in Sanhedrin, "Everything that a king is permitted to do according to *Parashat Melekh* is permitted. . . ."[76]

Interestingly, this commentary links the use of *dina demalkhuta dina* back to Jewish law and Jewish tradition. By doing so, the Ritba kept Jewish kings on an equal footing, in terms of divine authority, with their non-Jewish counterparts.

c) Applications, Limitations and Nuances

Unlike the Geonic period, when the extensive autonomy Jewish communities enjoyed obviated the need to employ the principle, the later medieval period witnessed an elaboration of *dina demalkhuta dina.* This was in large part because of the increased interaction between Jews and non-Jews in financial areas. In order to prevent encroachment of non-Jewish law on the Jewish communities, rabbis drew up exceptions to *dina demalkhuta dina* that afforded Jewish law a certain protection against external influences.[77]

These exceptions were not invoked consistently or without controversy. Indeed, the legitimacy of some exceptions was the cause of great debate among the rabbis. The following serves as a sample of these exceptions and the discussions that they provoked.

i) Type of Government

One of the more intriguing exceptions raised addressed the question of which types of governments were granted deference under *dina demalkhuta*

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[76] Yom Tov ben Avraham Ishbili, *Chidushei Haritva* (Jerusalem: Am Olam, 1966), *b. B. Batra* 55a. Interestingly, the Rashba uses the same passage, but states that the intention was for the declaration to attest to the behavior of non-Jewish kings, not what is permitted for kings of Israel. *Chidushei Harashba b. Ned.* 28a.

[77] Landsman 46-47.

dina. According to one 16th century rabbi in particular, this level of respect did not extend to democratic regimes:

> ועוד אני אומר לרווחא דמלתא שדעתי נוטה דארגוזה לא שייך בה דינים אלו דלא עדיפי מכנופיא דארמאי שהם אומה שפלה ומלך אין לארבה ולא עוד אלא כפי מה מיותרת ששמעתי אין להם דבר קבוע אלא שבכל חדש מעמידים מנהיג אחד ומאן לימא לן דבכל כי ה"ג מיירו רבנן כפי הנראה מן התלמוד לא דברו אלא במקום מלך.
>
> I also say to simplify matters that my feelings lean toward saying that for Ragusa[, a state with a republican form of government], these rules [of *dina demalkhuta dina*] do not apply since they are no better than an assembly of non-Jews, as they are a base people, just like locusts have no king. There is nothing else except for the additional item that I heard: they have no set matters, but rather enact and enforce new laws in all matters. Whoever says to us that our rabbis dealt with matters of this sort, according to what is written in the Talmud, they spoke only with regards to a king.[78]

It goes without saying that this approach faded as time moved forward. Although few other rabbis question Maharshdam's words directly, the changing face of government left no room for ignoring the will of democratically elected rulers. In the words of Shilo, בפני המציאות גישה כזו לא יכלה לעמוד, "a method like this could not stand against reality."[79]

ii) The Land of Israel and Jewish Rulers

Another debate that raged was whether the principle of *dina demalkhuta dina* would apply to Jewish rulers both in and out of the Land of Israel. According to the Rashba, who lived in 13th and 14th century Spain, Jewish kings in Israel could not invoke *dina demalkhuta dina*:

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[78] Shmuel ben Moshe of Modena, *Sheelot Uteshuvot Maharshdam* (Lemberg, 1862), *Choshen Mishpat* 350.

[79] Shilo 95.

> אבל במלכי ישראל לאו דינא דאינו יכול ליטול מהם משלהם כלום לפי שאייי כל ישראל שותפין בה ואין בה למלך יותר מלאיש אחר.
>
> But with regard to kings of Israel, it [the king's law] is not the law because he may not take from them that which is theirs. This is because, with regard to the Land of Israel, all of the people Israel are partners in owning it, and the king has no more right to it than any other person. [80]

The Rashba was not alone among medieval thinkers in this thinking. The Or Zarua, Rabbenu Tam and the Ran also held that *dina demalkhuta dina* was intended to apply only to non-Jewish leaders.[81]

In the case of the Or Zarua, this is entirely consistent with his basis for *dina demalkhuta dina*. As we noted earlier, the Or Zarua grounded *dina demalkhuta dina* in the idea that the land belonged to the king. In the case of Israel, where the land belongs to the people and not the ruler in question, it is logical to deduce that the ruler would have no power to expel and no right to coerce the inhabitants to follow his laws. For this reason, the Or Zarua joined with his early Ashkenazi compatriots in holding that *dina demalkhuta dina* did not apply to the Land of Israel.

At the same time, later rabbis tended to hold to the contrary. Moshe Isserles relied on the example of Ezra and Nechemiah to write that *dina demalkhuta dina* applied to Jewish rulers in the Land of Israel.[82] Shilo lists Joseph Caro and Moshe ben Yosef of Trani as extending *dina demalkhuta dina*

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[80] *Chidushei Harashba b. Ned.* 28a.

[81] *Teshuvot Baalei Hatosafot* 12; Ran *b. Ned.* 28a; *Or Zarua B. Qam.* 447.

[82] *Sheelot Uteshuvot Harama* 123.

to Jewish kings as well.[83] This essentially ended the debate and required Jews to uphold the law of political authorities in the Land of Israel, as well as the laws promulgated by Jewish leaders in the Diaspora.

iii) Principle of Equality

The principle of equality first appears in the 12th century in Yosef Halevi ibn Migash's commentary on Bava Batra[84] and is articulated in various ways. The Or Zarua quotes Rabbenu Tam as stating that the principle *dina demalkhuta dina* applies under limited conditions:

> אלא כשהמלך משוה מדותיו על כל בני מלכותו אבל אם משנה למדינה אחת לא הוי דיניה דינא. . . .
>
> [O]nly when the acts with equal measure as to all of the inhabitants of his kingdom, but if he changes his actions with regard to one province, his law is not the law."[85]

This exception is codified by Rambam in the Misheh Torah:

> כללו של דבר כל דין שיחקוק אותו המלך לכל ולא יהיה לאדם אחד בפני עצמו אינו גזל וכל שיקח מאיש זה בלבד שלא כדת הידועה לכל אלא חמס את זה הרי זה גזל.
>
> The general principle is that any law that the king enacts for everyone and not for one particular, specific person, is not robbery. However, anyone who takes from only one person in a way that does not comport with a law known and applicable to everyone, but rather that targets this one person, this is robbery.[86]

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[83] Shilo 104.

[84] Yosef ben Meir Halevi Ibn Migash, *Chidushei Harav Yosef Migash* (Jerusalem, 1959), *B. Bat.* 54b.

[85] *Or Zarua Bava Batra* 447.

[86] Moshe ben Maimon, *Mishneh Torah* (Benei Braq, 1982), *Hilkhot Aveidah Ugezeilah* 5:14

Likewise, the Shulchan Arukh adopts an approach that prohibits laws that do not have general application:

> וכן מלך שכעס על אחד מעבדיו ושמשיו מבני המדינה ולקח שדהו או חצירו, אינו גזל, ומותר ליהנות בה; והלוקחה מהמלך הרי היא שלו, ואין הבעלים מוציאין אותה מידו. אבל מלך שלקח שדה או חצר של אחד מבני המדינה שלא בדינים שחקק, הרי זה גזלן, והלוקח ממנו מוציאין הבעלים מידו. כללו של דבר, כל דין שיחקוק אותו המלך לכל ולא יהיה לאדם אחד בפני עצמו, אינו גזל; וכל שיקח מאיש זה בלבד, שלא כדת הידוע לכל, אלא חמס את זה, הרי זה גזל
>
> Therefore, a king who is angry at one of his servants and officials from among the inhabitants of his realm and takes his field or his house, it is not robbery, and one is permitted to make use of it, it belongs to the person who takes it from the king, and the original owners may not take it from him. But a king who takes a field or a house from one of the inhabitants of his realm in a way that does not comport with the laws he has enacted, this is robbery, and the person who takes the property from the king may be evicted by the owner. The general principle is that any law that that particular king enacts for everyone and not for one particular person is not robbery. However, anything that takes from one particular person and that is not according to the law known to everyone and destroys only him, this is robbery.[87]

As with other exceptions, the boundaries of the requirement of equal application of the laws are somewhat blurry. As two examples, the 16th century *Chokhmat Shlomo* states that laws that are directed specifically at strangers who live in a country are acceptable,[88] while the 15th century Mahariq rejects laws that are applied to one trade in particular to the exclusion of all others.[89] Others

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[87] *Shulchan Arukh Choshen Mishpat* 369:8. See also *Tur Choshen Mishpat* 369.

[88] Shelomo ben Yechiel Luria, *Chokhmat Shlomo* (Viena, 1812) 369;8.

[89] Yosef ben Shelomo Colon, *Sheelot Uteshuvot Hamahariq* (Warsaw, 1884), 66.

attempt to legitimate laws that single out Jews in particular.[90] Nevertheless, the general concept of accepting only those laws that apply to everyone gained universal acceptance in Jewish law.

iv) Conflicts with the Torah and Ritual and Religious Laws

As one might assume, the non-Jewish laws of a kingdom apply only to civil matters and cannot govern Jewish ritual and religious matters. Shilo posits that this exception is rarely articulated in any Jewish community, and appears nowhere explicitly in France or Germany, but is still a universal principle in discussions of *dina demalkhuta dina*.[91]

Landsman argues that the exclusion of religious law is apparent from the wording of various rabbis' writings. He points to various statements that highlight non-Jewish authority over ממון, financial matters, as evidence of their intention to exclude religious actions from the scope of *dina demalkhuta dina*.[92]

That said, there is often some blurring of the line between civil and religious matters.[93] For example, where the land was held according to the law of the kingdom, the *etrogim* produced on it could legally be used for the celebration of Sukkot, even if the land had originally been stolen.[94] However,

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[90] As a case in point, the Maharshal found that onerous laws that applied to Jews specifically could be appropriate if they were based in the custom of the land. *Yam Shel Shelomo B. Qam.* 10:18. Similarly, the Mahariq hypothesizes that the taxes permitted in the Talmud were taxes imposed primarily on Jews, thus legitimizing medieval discriminatory financial measures. *Sheelot Uteshuvot Hamahariq* 195.

[91] Shilo 115.

[92] Landsman 124-125.

[93] Landsman 126.

[94] Landsman 127.

when non-Jewish laws were seen to infringe on the matters of Jewish ritual, whether of rabbinic origin or otherwise, such laws were not binding.

v) Jewish Communal Appointments

Rabbis also imposed limitations on the right of non-Jewish authorities to appoint Jewish community leaders. Rabbi Yitzchaq ben Sheshet Barfat promulgated two conditions under which a king's appointment would be respected:

> ואיברא שאין לאדם ליטול רשות מן המלך שלא ברצון הקהלות ומי שעושה כן הוא מצער את הציבור ועתיד ליתן את הדין וכ"ש אם אינו ראוי לדון מפני שאינו יודע או מפני שאונו הגון שזה אין רשות מועלת לו כלום. . . .
>
> To be sure, a person may not accept authority from the king against the will of the congregation, and whoever does such a thing causes pain to the public and they will eventually have to submit to the law. It is even more so if he is not worthy of judging because he is not knowledgeable or because he is not capable. . . .[95]

Resistance to government appointments was even more pronounced in Germany. In confronting an attempt by a local duke to appoint a cantor, Rabbi Meir of Rothenberg unequivocally held that the intervention was unacceptable and inappropriate:

> וששאלת על חזן שהיו רוב הקהל חפצים בו ומקצתם אינם חפצים בו ולא נתרצו לו [ונעשה] עפ"י הדוכוס שבקש הממאנים להתרצות לא טוב עשית להימנות עפ"י השר ובארצנו הי' מקפידי' על כיו"ב. . . .
>
> You have asked about a cantor whose appointment most of the community desires and a minority does not desire and were not amenable to him. He was appointed by the duke, who asked those

[95] Yitzchaq ben Sheshet Barfat, *Sheelot Uteshuvot Yitzhaq ben Sheshet Barfat* (Lemberg, 1805) 271. See Shelomo Duran, *Sheelot Uteshuvot Harashbash* (Jerusalem: Jerusalem Institute, 1998), 533.

> who opposed his appointment to be accepting. It is not appropriate to be appointed by the governmental minister, and in our land, we are strict about matters like this. . . .[96]

As Landsman confirms,[97] this indicates that the Ashkenazi tradition was even more unwilling to accept outside interference than the Sefardi approach; in this responsum, the willingness of the majority of the community to accept the cantor's appointment is irrelevant.

It is interesting to note that this strong resistance to outside non-Jewish manipulations stands in stark contrast to what we saw during the Hasmonean era. Then, competitors for Jewish authority, both religious and political, actively sought the support of foreign non-Jewish temporal leaders, with greater or lesser benefit for the Jewish people as a whole. By medieval times, this is no longer the case, and the appointment of religious and communal leaders is seen as an exclusively internal Jewish matter.

vi) King's Interest

Another limitation that some impose on the principle *dina demalkhuta dina* is restricting its application to matters in which the king had a direct interest and receives a clear benefit. Shmuel ben Yitzchaq Sardi, the 13th century author of Sefer Haterumot, stated in the name of "the Frenchmen" "שלא נאמר דינא דמלכותא דינא כי אם בדברים שהם עסקי המלך", "that the law of the

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[96] Meir ben Barukh of Rothenberg, *Sheelot Uteshuvot Maharam Merotenberg* (Budapest, 1895), 4:137 . The responsum goes on to relate a story about governmental intervention in an appointment battle in Cologne that ended poorly.

[97] Landsman 61-73.

kingdom is the law only with regard to this that are business of the king."[98] In the 14th century Maggid Mishneh, Rabbi Vidal of Toulouse interprets the Rambam as follows:

> ויש לפרש לפי דעתם ז"ל דאע"ג דקיימא לן דדינא דמלכותא דינא כמבואר פ"ה מהלכות גזילה ואבידה הני מילי במה שהוא תועלת למלך בעניני המסין שלו ומה שהוא מחקיו אבל בדברים שבין אדם לחבירו אין דינו בהם דין.

> We should interpret this according to their [the geonim's] opinion, that although the principle *dina demalkhuta dina* has been established for us, as explained in Chapter Five of the Laws of Robbery and Loss, these words apply only to those matters that serve to the benefit of the king in matters of his taxes and similar laws of his. In contrast, for those matters between a person and another private citizen, his law is not the law.[99]

This ends up as a very limited, minority view that is rejected by the majority of halakhic decisors.[100] Shilo points out that the Ramban, the Rashba, the Ran and Rabbenu Yonah all reject the idea that *dina demalkhuta dina* is limited to matters in which the king has a direct interest.[101] As the Maharshal spells out, "דאם לא כן, לא תעמוד הארץ, ותהרס, if this is not the case, the land will not stand and will be destroyed."[102] In each of these cases, the rabbi relies on the phrase on *b. Bava Batra* 55a that Persian law requires occupation of law for forty years in order to claim title to it.

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[98] Shmuel ben Yitzchaq Sardi, *Sefer Haterumot* (Jerusalem: Chamul, 1966), 46, 8, 5.

[99] Vidal of Toulouse, *Maggid Mishneh* (Warsaw, 1880), *Hilkhot Malveh Veloveh* 27:1.

[100] Shilo 134.

[101] Shilo 142.

[102] Shelomo ben Yechiel Luria, *Yam shel Shelomo* (Jerusalem, 1996), *B. Qam.* 6:14.

vii)"New Laws"

The medieval rabbis also displayed a remarkable resistance to "new laws," namely those laws that were seen as having no basis in the customary law of the land. Rabbenu Tam articulated his belief as follows:

> כללו של דבר, אין דינא דכל מלך ומלך העומד ומשנה דינא. אלא דינא דמלכותא בדברים שהנהיגו קדמוניהם.
>
> The general principle of the matter is that there is no law as issued by any particular king, nor from a king who issues and changes the law. There is only the law of the kingdom with regard to the matters that those who preceded them practiced.[103]

The Ritba took a similar stance on this matter:

> והסכים הר"י ובעלי התוספות והרמב"ן שאין אומרים דינא דמלכותא אלא בדברים שהם מחוקי המלכות הקבועים וידועים, אבל אם המלך קובע ועשה דין חדש לאו דינא הוא עד שיסכימו עליו כל אנשי מלכותו, ולהכי לא אמר שמואל דינא דמלכא דינא אלא דינא דמלכותא.
>
> And Rabbi Yonah and the Tosafists and the Ramban agreed that we do not hold that the law of the kingdom is the law except with regard to things that are among the established and known laws of the kingdom. However, if the king sets and enacts a new law, it is not the law until all the inhabitants of the kingdom agree to it. This is why Shmuel did not say, "The law of the king is the law," but rather, "The law of the kingdom."[104]

This line of thinking is entirely in keeping with both the Ritba's and Rabbenu Tam's logical basis for *dina demalkhuta dina*. As already mentioned, the Ritba saw *dina demalkhuta dina* as grounded in the similarity to the discretion afforded Israelite kings, who were still kept in check by certain norms and the

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[103] *Sheelot Uteshuvot Baalei Hatosefot* 12.

[104] *Chidushei Haritba B. Bat.* 55a. See also *Chidushei Harashba B. Bat.* 55a.

particular relationship between the Jewish community and its leaders.[105] Coming from a different direction, Rabbenu Tam analogized *dina demalkhuta dina* to the authority of rabbinic authorities to seize private property according to customary law. Among the rabbis of the early and medieval period, this point of view dominated.[106]

It is unclear exactly how the Rambam felt about new laws, but from the language of the Mishneh Torah, which refers to the "law of the king," not the kingdom, Shilo concluded that he would have disagreed with Rabbenu Tam and the Ritba.[107] Similarly, the Tur indicates that Rabbenu Asher rejected the "new laws" limitation.[108] By the time the Shulchan Arukh was assembled, there was not even a reference to the question of whether the new laws of the particular king were valid. From this, we can see that the restriction on "new laws" had largely fallen by the wayside by the end of the medieval period.

viii) Documents from Non-Jewish Courts

In spite of the permissive attitude toward non-Jewish courts taken in *b. Gittin* 10b, many of the medieval rabbis were not particularly enthusiastic about relying on documents from non-Jewish courts. As an initial matter, both Maimonides and Rabbenu Tam came out strongly against going outside the

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[105] Shilo 195.

[106] See also, *e.g.*, *Chidushei Harashba B. Bat* 55a; Moshe ben Nachman, *Chidushei Haramban* (Zikhron Yaakov, 1994) *B. Bat* 55a; Menachem ben Shelomo Meiri, *Beit Habechirah* (Zikhron Yaakov, 1974), *B. Qam.* 113b.

[107] Shilo 193.

[108] *Tur Choshen Mishpat* 369. The Rosh's original language is found at Rosh *B. Bat.* 3:66. See also *Yam Shel Shelomo B. Qam.* 10:18.

Jewish community for relief; Rabbenu Tam issued a strong decree barring Jews from haling their coreligionists before non-Jewish courts,[109] while the Rambam strictly limited the conditions under which a document that failed to conform to Jewish legal requirements could be recognized:

> שטר שכתוב בכל לשון ובכל כתב אם היה עשוי כתיקון שטרי ישראל שאינן יכולין להזדייף ולא להוסיף ולא לגרוע והיו עדיו ישראל ויודעין לקרותו הרי הוא כשר . . . , אבל כל השטרות שחותמיהן עכו״ם הרי אלו פסולין חוץ משטרי מקח וממכר ושטרי חוב והוא שיתן המעות בפניהם ויכתבו בשטר לפנינו מנה פלוני לפלוני כך וכך דמי המכר או מעות החוב, והוא שיהיו עשויין בערכאות שלהם, אבל במקום קבוץ פליליהן בלא קיום השופט שלהם לא יועילו כלום, וכן צריכין עדי ישראל שיעידו על אלו העכו״ם שהן עדי שטר ועל זה השופט שלהן שקיים עדותן שאינן ידועין בקבלנות שוחד, ואם חסרו שטרי העכו״ם דבר מכל אלו הרי הן כחרס, וכן שטרי חוב והודאות ומתנות ופשרות ומחילות שהן בעדים שלהן אע״פ שיש בהן כל הדברים שמנינו הרי הן כחרסים
>
> With regard to a document that is written in any language and any writing, if it is done according to the laws governing Jewish documents (i.e., it cannot be forged or added to or taken from, the witnesses were Jewish and know how to read), it is legitimate. . . . However, all documents whose signatories are non-Jews are invalid, except for documents of sale and debt instruments, in which cases one person must give the money before the ones issuing the document, who in turn write the document in front of us naming the persons involved in the transaction and the terms of sale or the amount of the debt. This must be done in a non-Jewish court, and not where they gather to engage in their criminal activities without a judge (in this latter case, the document is worth nothing.) Also, there must be Jewish witnesses to bear witness that these non-Jews are witnesses to the document and the presiding judge is not known to take bribes. If a document from a non-Jew is lacking any one of these things, it is like a piece of clay. This also is true for all documents regarding admissions, gifts, settlement and forgiveness; all such documents having non-Jewish witnesses are like pieces of clay even when they meet the aforementioned requirements.[110]

[109] Landsman 87.

[110] *Mishneh Torah Malveh Veloveh* 27:1.

Later in the medieval period, the rabbis relaxed the restriction on documents from non-Jewish courts. The Ramban linked respect for non-Jewish court documents to royal control over the courts:

> ומכאן נראה לי שכל השטרות העולות בערכאות של גוים בנוטרין של מלכים כשרים בין בשטרי מתנות בין בשטרי הלואות וכ״ש שטרי מקח וממכר, ואפילו בשטרי הודאות אי כתיב בהו ואמר לסהדי אתם עדים . . . . ואי איכא הורמנא דמלכא דבלאו הכי נמי ליקני בלאו הכי קנה, ואי ליכא הורמנא דמלכא איכא שטרי דכשרין ואיכא דפסילי, ואין זה מקומן.
>
> And because of this, I am of the opinion that all documents drawn up in non-Jewish courts by the judges of the king are valid, whether they are gift or loan documents. This is all the more true with regard to documents of sale and purchase, and even documents of admission if one writes on them, "And he said to the witnesses, 'You are witnesses.'" . . . And if the king's authority exists, without that condition, it is acquired and without it, he acquires it, and if the king's authority does not exist, some of the documents are valid and some are invalid, but this is not the place to explain it.[111]

In the same vein, the Rosh removed the requirement that witnesses attest to the judge's reputation for not taking bribes,[112] while the Ramban extended the court authority to other administrative officers like judges.[113] As with some of the other exceptions to *dina demalkhuta dina* examined above, most of the restrictions on documents from non-Jewish courts evanesced by the end of the medieval period.

ix) Summary of Exceptions to *Dina Demalkhuta Dina*

Over the course of the later pre-modern period, we see the articulation of a significant number of exceptions to *dina demalkhuta dina*. From "new laws" to

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[111] *Chidushei Haramban b. B. Bat.* 55a. See also *Chidushei Harashba b. Git.* 10b.

[112] Asher ben Yechiel, *Pisqei Harosh* (Vilna, 1892), *Git.* 1:10, 11.

[113] Moshe ben Nachman, *Teshuvot Haramban* (Jerusalem, 1958-1961), 46.

documents issued by non-Jewish courts, the rabbis present numerous bases for rejecting non-Jewish (and even Jewish) governmental interference. In this way, this period witnesses the encumbering of Shmuel's rule far beyond the limitations stated explicitly in the Talmud.

At the same time, few of these exceptions had widespread support as the modern period began. Aside from the principle of equality and laws that conflict with the Torah and Jewish ritual law, the limitations urged by various Geonic, medieval and pre-modern sources fail to take hold. The result is that *dina demalkhuta dina* is on quite solid footing as Jews begin to emerge from the ghetto and make their way into the wider world.

5) Post-Emancipation: Civil Marriage and Divorce

With the advent of the early modern period, one finds rumblings of reform within the Jewish community. Many Jews, enticed by a more welcoming non-Jewish society, undertook restructurings of how they dressed, prayed, conducted business and socialized. The result was a broader continuum of Jewish practice, belief and stance toward the outside world.

This changing dynamic toward the non-Jewish society is reflected in how elements in the Jewish leadership utilized *dina demalkhuta dina* in their writings. Early Reform rabbis began to break down the remaining limitations on *dina demalkhuta dina* and became increasingly accepting of non-Jewish governmental rules. In contrast, more traditional Jewish elements made certain adjustments, but stood fast in their rejection of most encroachments on Jewish authority.

This debate was exemplified by the attitudes of Jewish religious figures to civil marriage and divorce. As one might expect, liberal rabbis were far more willing to accept marriages and divorces undertaken in a purely civil sphere, while traditional rabbis ranged from pragmatic to strongly resistant. As we will see below, how the argument over effecting and dissolving marriages played out and the reliance on *dina demalkhuta dina* helps set the stage for how the principle is relevant in modern day North America.

This is certainly not to say that *dina demalkhuta dina* did not come into play in responsa addressing other subjects. In the example of *Shabbat* observance, traditional rabbis demonstrated a willingness to require military

service, even when doing so would interfere with restrictions on work.[114] In the same sphere, one particular Reform responsum employed *dina demalkhuta dina* to authorize attendance at secular school classes on Saturday.[115] As interesting as these other subjects may be, the way in which the debate over marriage and, more specifically, divorce plays out is of particular significance and will be the focus of this section.

a) Aspects of Marriage under Traditional Jewish Law

Assumedly, the reader is already generally familiar with the rituals involving Jewish marriage and divorce. Of key importance is the fact that a Jewish betrothal is said to take place "כדת משה וישראל," "according to the law of Moses and Israel." Relying on this phrase, the early rabbis held themselves to be "the ultimate determinants of the validity of the *kiddushin,*"[116] leading to the adoption of a separate principle: "כל דמקדש אדעתא דרבנן מקדש," "all who marry according to the opinions of the rabbis are married."[117] By dint of this principle, rabbis could rule that a marriage entered into against rabbinic law was void.

Later authorities held differing opinions on the ongoing weight of this statement. Writing in the 15th century, Rabbi Shimon ben Tzemach Duran

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[114] See, *e.g.*, Ishmael ben Avraham, *Sheelot Uteshuvot Zera Emet* (Leghorn, 1815), 3:32; Moshe Sofer, *Sheelot Uteshuvot Chatam Sofer* (Pressburg, 1865), vol. 6 (*liqqutim*), 29.

[115] Landsman 145.

[116] Gil Graff, *Separation of Church and State: Dina de-Malkhuta Dina in Jewish Law, 1750-1848* (University of Alabama Press, 1985), 41.

[117] *b. Git.* 33a, *b. Ket.* 3a. For the sake of simplicity, this principle will be referred to henceforth as "*kol demiqaddesh.*"

maintained that rabbis no longer had the authority to invalidate marriages after they had taken place.[118] In contrast, both the Rashba and the Rosh held that Jewish communities were permitted to establish rules governing marriage such that marriages entered into in violation of the rules were not valid.[119]

One can point to certain citations in Jewish sources that approach marriage with a more generous eye toward secular governmental involvement. There were certain, albeit few, cases in which the line between the secular and the religious was more permeable. For example, Barfat is quoted as allowing a marriage contract written in non-Jewish court to be enforced:

> עוד אני אומר דשטרי כתובות הנעשים בערכאות של גויים היו כשטרי מכר והלוואה שהם כשרים לכולי עלמא דכיון שעיקר השטר של כתובה שכותבים בפניהם הוא כמו שטר חוב או הלוואה שמודה שהכניסה לו סך מעות. . . .
>
> I also say that marriage contracts that are drawn up in non-Jewish courts are like bills of sale and loan documents in that they are valid for everyone because the essence of a marriage contract that one writes before them [the couple in question] is like a debt instrument or a loan document in which one admits to having received a certain amount of money. . . .[120]

While it is important to recognize the existence of these opinions, they are scarce and are subsumed in a sea of tradition that treats Jewish marriage as an exclusively religious matter not subject to non-Jewish governmental authority.

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[118] Shimon ben Tzemach Duran, *Sheelot Uteshuvot Tashbetz* (Lemberg, 1891), 2:5.

[119] Asher ben Yechiel, *Sheelot Uteshuvot Harosh* (Vilna, 1885), 25.1; *Sheelot Uteshuvot Rashba* (Benei Braq, 1958), 1:1206.

[120] Yosef Caro, *Avqat Rokhel* (Leipzig, 1859), 80. In *Avqat Rokhel* 81, Caro indicates his disagreement with Barfat in this regard.

b) Paris Sanhedrin: An Attempt at Harmonization

When Napoleon summoned the Paris Sanhedrin in 1806, marriage and divorce were two of the top issues on the agenda. Among the twelve questions posed to the Sanhedrin was the following: "Does the Jewish faith permit divorce? And is an ecclesiastical divorce valid without the sanction of civil court or valid in the face of the French code?"[121]

The Sanhedrin answered in the following way:

> Repudiation is allowed by the law of Moses; but it is not valid if not previously pronounced by the French code.
> In the eyes of every Israelite, without exception, submission to the prince is the first of duties. It is a principle generally acknowledged among them, that, in every thing relating to civil or political interests the law of the state is the supreme. . . .
> . . .
> [I]n like manner as . . . the Rabbis could not impart the matrimonial benediction till it appeared to them that the civil contract had been performed before the civil officer, in like manner they cannot pronounce repudiation, until it appears to them that it has already been pronounced by a sentence which gives it validity. . . . [A]ccording to the Rabbis who have written on the civil code of the Jews, such as Joseph Carro in the Abeneser, repudiation is valid only, [sic] in case there should be no opposition of any kind. And as the law of the state would form an opposition, in point of civil interests . . . it necessarily follows that, under the influence of the civil code, rabbinical repudiation cannot be valid. Consequently . . . no one, attached to religious practices, can repudiate his wife but by a double divorce – that pronounced by the law of the state, and that prescribed by the law of Moses; so that under this point of view, it may be justly affirmed that the Jewish religion agrees on this subject with the civil code.[122]

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[121] "Resolutions of Past Conferences," *Central Conference of American Rabbis Yearbook* 1 (1890): 80-125, 80.

[122] Diogène Tama, *Transactions of the Parisian Sanhedrin; or, Acts of the Assembly of Israelitish Deputies of France and Italy, convoked at Paris by an Imperial and Royal Decree, dated May 30, 1806* (Lanham, Md.: University Press of America, 1985), 11.

The essence of this statement is twofold. First, it attempts to harmonize civil and religious law by pairing them together; no Jewish marriage may be terminated without a civil divorce followed by a religious divorce. Anything short of that leaves the parties with a marital tie still intact, to some degree or another. Second, the Sanhedrin's comment bases its authority squarely in traditional Jewish analysis.

While the statement preserves a strong degree of Jewish religious authority in the sphere of marriage and divorce and uses traditional Jewish law to reach its conclusion, Graff draws attention to the Sanhedrin's opening declaration, which reads as follows:

> [I]n the name of all Frenchmen professing the religion of Moses . . . their religion makes it their duty to consider the law of the prince as the supreme law in civil and political matters, that, consequently, should their religious code, or its various interpretations, contain civil or political commands, at variance with those of the French Code, those commands would, of course, cease to influence and govern them, since they must, above all, acknowledge and obey the laws of the prince.[123]

While affirming that the statement is fully rooted in Jewish law, Graff goes on to highlight the slight difference between this statement and *dina demalkhuta dina* as it had been generally accepted:

> A careful reading . . . reveals that its scope is not limited to monetary matters (*mamona*). The broad statement that the Jewish religious code is subordinate to the state's civil and political laws makes no distinction between monetary and ritual matters (*mamona-issura*).[124]

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[123] Tama 149.

[124] Graff 79-80.

Thus, the Sanhedrin endorsed the traditional principle of *dina demalkhuta dina*, but at the same time, extended it ever so slightly beyond the scope of its historical bounds.

c) Abraham Geiger: Reviving the Talmudic Principle

The question of divorce was addressed by the German Reform leader Abraham Geiger in 1837. Turning to the principle of *kol demeqaddesh*, Geiger reasserted the ancient right of rabbis to declare a marriage void, even after the marriage had taken place. This, he asserted, justified invalidating the marriage, even if it had been intact for years, and averted the need to get a religious divorce in the event the governmental courts put an end to the relationship.[125]

As Graff indicates, Geiger's position served as a dramatic departure from earlier Jewish law. As it had been used in the past, *kol demeqaddesh* governed and nullified only those relationships that flew in the face of constraints imposed at the time the marriage was entered into. Instead of addressing solely those marriages that were prohibited *ab initio*, Geiger would retroactively force "the termination of marriages that might have been legitimate for years prior to dissolution."[126] This would take *kol demeqaddesh* to an entirely new level and go beyond the scope of the Paris Sanherdrin's conclusions. In part for this reason, Geiger's article articulating his views had little impact in the Jewish world.[127]

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[125] Graff 118.

[126] Graff 118.

[127] Graff 119.

In large part, there was little direct reaction to Geiger's opinion on civil marriage. More traditional authorities had already come to disregard the Reform leadership, and saw no serious additional threat in Geiger's words.[128]

d) Samuel Holdheim: Marriage as an Acquisition

Of far greater significance and consequence was the position enunciated by Samuel Holdheim in 1847. Among the most radical reformers of his day, Holdheim acknowledged that non-Jewish governmental laws did not apply to Jewish ritual matters. Nevertheless, Holdheim argued, marriage was a financial matter of purchase, not a religious one, as summarized by Landsman:

> The state has not the power to set aside religious law or the religious principles of the Jews. However, the laws of the state must be permitted to govern marriages, because marriage is not a religious but purely a civil matter. That is to say, the state of matrimony is a religious institution. However, the acquisition of, and the separation from a wife is achieved by a purely civil process. The Torah and rabbinic law regarding matrimony are rejected. The process is claimed entirely for the modern state. . . .
>
> That the consent of the woman was required before her acquisition could take place does not alter the situation. The woman plays a passive role. Once her consent is given she renounces her own will and becomes, in effect, as a thing without an owner, then to be swallowed up by the groom's power of acquisition.
>
> This opinion then concludes that love, sanctity, etc., play no role in marriage at all. It is a civil matter. The acquisition of a wife takes place as a consequence of a man purchasing a woman upon the payment of at least one *Perutah* regardless of the feelings and emotions involved. Even cohabitation, physical possession of a woman, is devoid of emotional emphasis. . . . In fact, marriage was forbidden to take place on the Sabbath or holidays because the acquisition of *any* commodity was forbidden on these days.[129]

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[128] Graff 119.

[129] Landsman 139-141 (footnotes omitted).

In his conclusion, Holdheim was not content to merely address marriage. Instead, he set forth a breathtakingly broad formula for distinguishing between religious matters governed by Jewish tradition and non-religious matters regulated by the government:

> That which is of an absolutely religious character and of a purely religious content in the Mosaic legislation and in the later historical development of Judaism . . . and which refers to the relationship of man to God, his Heavenly Father, that has been commanded to the Jew by God for eternity. But whatever has reference to interhuman relationships of a political, legal, and civil character . . . must be totally deprived of its applicability, everywhere and forever, when Jews enter into relationships with other states, or, at any rate, when they live outside the conditions of the state for which that law was originally given.[130]

In this way, Holdheim preserves the original distinction between ritual and financial matters. At the same time, his definition of the two categories is slightly different. On the one hand are ritual matters, which are defined as those between a person and the divine (בין אדם למקום). On the other are civil matters, which are defined as those between two human beings (בין אדם לחברו). In his view, the former had ongoing legitimacy, while the latter did not.

There are a number of challenges posed by Holdheim's position. As an initial matter, Holdheim's classification of marriage as a simple Jewish acquisition is difficult to accept. Even under traditional Judaism, the "acquisition" of a wife was quite unlike other acquisitions, particularly with regard to the possibility of *biah* (acquisition by cohabitation).

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[130] Jakob Petuchowski, "Abraham Geiger and Samuel Holdheim: Their Differences in Germany and Repercussions in America," *Leo Baeck Institute Yearbook* 22 (1977), 139-159, 143.

Moreover, even if we are to contain our nausea and analogize marriage to the acquisition of property, Holdheim's logic remains flawed. Unlike with other "possessions," the manner in which a wife, as "property," could be disposed of was severely restricted. Ordinarily, a bill of sale is required for a transaction, while the simple relinquishment of property rights demands no document to validate the event. Divorce would clearly fall in the second category, *i.e.*, the abandonment of property rights in favor of no specific purchaser, since a man may not "gift" his wife to another. If we are to place divorce in the second category, the obligation to provide a document indicating the abandonment (indeed, one that is far more complicated than an ordinary legal document of sale) makes the event unique. Graff also points out that, in the event of adultery, Jewish law originally required that the wife be put to death, with no right on the part of the husband to choose the fate of his "property."[131] Thus, even if we were to accept Holdheim's premise, *i.e.* that a wife is no more than mere property, we would still find gaps in the reasonableness of Holdheim's stance.

As any reader of the previous paragraph can attest, Holdheim's position also conflicts with notions of equality between men and women and crosses the line into the realm of the offensive. Even back in Holdheim's day, the Reform movement was taking steps to advance the cause of women's rights and involvement with the Jewish community.[132] It is even more difficult from today's

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[131] Graff 124.

[132] Michael A. Meyer, *Response to Modernity: A History of the Reform Movement in Judaism* (Detroit: Wayne State University Press, 1995), 139-140. *Cf. CCAR Yearbook* 1, 93 (reflecting a motion by S. Adler at the 1845 Frankfort Rabbinical Convention "to declare the female portion of Israel's communion equal with the male sex in all respects of religious obligation and privilege).

vantage point to base a rejection of Jewish divorce requirements on marriage being a man's acquisition of a woman. Only if we accept Holdheim's broader notion that government laws govern relationships between people can we adopt his conclusion that civil divorce can dissolve a legal Jewish marriage.

e) Early North American Reform and Kauffman Kohler: Rabbinic Validation of a Civil Divorce

In its early stages, North American Reform Judaism held a civil divorce in high regard. While not necessarily adopting Holdheim's extreme reasoning, early North American Reform rabbis accepted the idea that civil divorce could stand in stead of a religious divorce. At the Philadelphia Conference of 1869, the rabbis issued the following statement:

> 6. From the Mosaic and rabbinical standpoint divorce is a purely civil act, which never received religious consecration; it is therefore valid only when it proceeds from the civil court. The so-called ritual *Get* is invalid in all cases.
>
> 7. A divorce given by the civil court is valid in the eyes of Judaism, if it appears from the judicial documents that both parties have consented to the divorce, but when the court has decreed a divorce against the wish of one or the other of the couple, Judaism for its part can consider the divorce valid only when the judicial reason for granting the divorce has been investigated and found of sufficient weight in the spirit of Judaism. . . .
>
> 8. The decision of the question as to whether, in doubtful cases, the husband or wife is to be declared dead after lengthy disappearances, is to be left to the law of the land.[133]

Interestingly, the statement grounds itself in Jewish law. Although they do not spell out the precise reasoning in the statement, Paragraphs Six and Seven

[133] *CCAR Yearbook* 1, 119.

purport to convey "the Mosaic and rabbinical standpoint" and to express the view of "the eyes" and "the spirit of Judaism."

In a 1915 article, Kauffman Kohler dissented from the Philadelphia statement to a certain degree. Although he agreed that "there is nothing religious in the divorce,"[134] he also found that rabbis could not abdicate their responsibilities entirely in the case of a marriage's termination:

> Instead of merely recommending an investigation of the court proceedings and its bill of divorce to the rabbi who is to remarry one of the parties, leaving it optional with him to do so at a rather late time . . . it ought, in the interest of the two parties, to have the divorce bill issued by the court at once ratified from the Jewish point of view by a body of rabbis, at a time when full insight into the court proceedings can be easily obtained. . . In this sense, in my opinion, should the motion . . . that "rabbis should countersign divorce papers issued by the courts", be adopted by the Conference and preferably in the following form: "A body of three rabbis should attest the correctness of the findings of the court in the matter of divorce from the religious point of view of Judaism and attach their signature to the bill of divorce issued by the court."[135]

In his closing recommendations, Kohler summarizes his position as follows:

> Inasmuch as the civil courts in many States often grant a divorce in cases where, from the religious view of Judaism, objections might be raised, a body of three rabbis should attest to the correctness, from the Jewish point of view, of the findings of the court in matters of divorce, and attach their signatures to the bill of divorce issued by the court.[136]

In his statements, Kohler did not completely obviate the need for religious involvement in the divorce process. While he felt that deferring to civil courts was generally justified and stressed the legitimacy of civil divorce, he felt that a

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[134] "The Harmonization of the Jewish and Civil Laws of Marriage," *Central Conference of American Rabbis Yearbook* 25 (1915): 335-378, 354.

[135] *CCAR Yearbook* 25, 355-356.

[136] *CCAR Yearbook* 25, 377.

certain degree of religious oversight was warranted to ensure that civil divorces met Jewish standards. To this end, his entire argument is aimed at articulating an ongoing process through which civil and religious divorces could be harmonized.

f) Orthodox Reaction: Sharp and Strong

Needless to say, the Reform embrace of civil divorce was not well received in the Orthodox community. Rabbi Naphtali Tzvi Judah Berlin wrote an angry response to the Reformers, taking a dim view of their characterization of marriage as nothing more than a commercial transaction:

> ומזה אנו למדים שקנין אשת ישראל לבעלה אינו כקנין שאר חפצים שב״ד יכולים להפקיר ולהפקיע שלא ברצון בעלים אלא כהקדש וכמו שא״א לב״ד הגדול להקדיש בהמת האדם בלי רצונו ודיבורו שיאמר רוצה אני להקדיש כך א״א לב״ד הגדול להפקיע קדושת אשה לאיש

> And from this [set of sources], we learn that the acquisition of a Jewish woman by her husband is not like the acquisition of other objects, in that Jewish courts can ordinarily declare abandoned and expropriate property against the will of the owners. However, for objects dedicated as sacred, just as we do not allow the High Court to declare a man's beast sacred without his volition and statement, "I want to dedicate this as sacred," so too do we not say that the High Court may invalidate a man's sanctification of his wife.[137]

Instead, Berlin stated that a Jewish religious divorce is required, although one may be granted only when a civil divorce is permitted.[138]

Other Orthodox rabbis were similarly disapproving. Rabbi Pinchas Heilpern stated that "'[a]ccording to the law of Moses and Israel' we have heard,

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[137] Naftali Tzevi Yehudah Berlin, *Sheelot Uteshuvot Meshiv Davar* (Warsaw, 1894), 4:49.

[138] *Sheelot Uteshuvot Meshiv Davar* 4:8.

in connection with *kiddushin* – never have we heard 'according to the law of the King and the manners of the nations!'"[139] Citing *Torat Haqenaot*, a collection of various Orthodox responses to the Reformer's efforts, Graff summarizes as follows:

> If the reformers wished to invoke *dina de-malkhuta dina* in support of their actions, let them recall that this principle was not applicable to matters of *issur ve-hetter*. If they claimed to act by *hora'at sha'ah*, let them remember that this principle permitted the imposition of stringencies by the sages to guard against sin; it did not allow the abolition of existing legal requirements. Let it be known that "their officiation at a *kiddushin* is null and their supervision of a *get* is void, for they do not believe in the words of the sages of Israel who ordered for us laws of marriage and divorce; and one must suspect that they are not in the category 'Israel.'"[140]

Given these strong feelings, it is perhaps no wonder that Graff states that "in the application and extension of *dina demalkhuta dina*, the limits of traditionalist flexibility had been drawn by the Paris Sanhedrin," and that "an irreparable breach separated Jewish religious reformers and traditionalists."[141]

This "irreparable breach" between Liberal and Orthodox Judaism remains as chasmic in the present as it did in the 19th century, at least in the realm of *dina demalkhuta dina*. To touch briefly on the modern period, modern Orthodox responsa generally address monetary matters that are outside the scope of what Liberal Judaism considers religiously applicable or binding. For example, 20th century Israeli Chief Sephardic Rabbi Ovadia Yosef rejected the application of

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[139] Pinchas Heilpern, *Teshuvot Beanshei Aven* (Frankfort, 1845), 71 (quoted at Graff 131).

[140] Graff 129-130 (citing *Torat HaQenaot* (Amsterdam, D. Propos, 1845), 6b, 7a, 2b, 21a and 13b).

[141] Graff 131.

dina demalkhuta dina in matters governing a daughter's inheritance rights over her brothers.[142] Similarly, Mordechai Yaakov Breisch and Moshe Feinstein confronted questions regarding the relevance and applicability of secular bankruptcy law.[143] When compared with the Liberal responsa discussed below, it becomes clear that the Orthodox and Liberal responsa on *dina demalkhuta dina* address an entirely different set of issues and use an entirely different framework in doing so.

g) Summary of *Dina Demalkhuta Dina* for Divorce in the Post-Emancipation Period

The differing stances on how much government involvement should be permitted in divorce are a manifestation of differing approaches to the non-Jewish world. On the one hand, Reform leaders were willing to sanction a broad approach to *dina demalkhuta dina*, with the result that government laws on civil divorce were permitted to subsume what until then had been considered a Jewish ritual matters. On the other hand, Orthodox rabbis were willing to concede their total monopoly on divorce, but maintained that there was an ongoing obligation to secure a religious termination to the marriage. In this way, the Reform world was far more open to outside influence and dialogue, while the Orthodox world kept a certain degree of aloofness.

It is interesting that many of the early Reform thinkers attempted to keep their arguments within the bounds of halakhic logic to a large degree. Geiger's

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[142] Ovadiah Yosef, *Yechaveh Daat* (Jerusalem, 1977-1980), 4:65. See also Eliezer Yehudah Waldenberg, *Tzitz Eliezer* (Jerusalem, 1945-1996), 16:52.

[143] Mordechai Yaakov Breisch, *Chelqat Yaakov* (Tel Aviv, 1992), *Choshen Mishpat* 32; Moshe Feinstein, *Igrot Moshe* (New York, 1960), *Choshen Mishpat* 2:62.

reasoning relied primarily on a Talmud-endorsed principle that had laid dormant and that he revived. At no point did Holdheim argue that civil laws applied to exclusively religious matters. Instead, Holdheim merely revised the definition of "religious," confining it merely to obligations between a person and the divine. The fact that their reconfigurations fly in the face of the Mishnah itself is of no consequence; there is still an attempt to keep the discussion within the confines of Jewish legal discourse.

6) CCAR Responsa Committee

The phrase *dina demalkhuta dina* surfaces sixteen times in official CCAR responsa.[144] While many of these responsa address the issue only as an aside, they shed light on how North American Reform Judaism has found a certain balance between religious doctrine and secular law.

a) Loyalty to One's Country

The primary CCAR responsum that addresses *dina demalkhuta dina* is titled "Loyalty to One's Company Versus Love for Israel."[145] The responsum addresses a congregant's question as to whether he may inform the Israeli government about his employer's business, which includes developing military technology systems for Arab countries still officially at war with Israel. The congregant expresses concern about his obligations to his company and his duty to support his family financially should he endanger his job.

Of primary concern to the Responsa Committee is the congregant's obligation to comply with secular United States law. After laying out four of the bases for *dina demalkhuta dina*,[146] the responsum picks up on and endorses the Rashbam's position that citizens of a country implicitly accept the laws of the government:

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[144] In theory, it would have been interesting to be able to include Conservative responsa on *dina demalkhuta dina* as well. However, the index of the Conservative movement's Committee on Jewish Law and Standards responsa reveals no responsa that address the principle.

[145] CCAR Responsa Committee, "Loyalty to One's Company Versus Love for Israel," n.p. [cited Nov. 3, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=1&year=5757.

[146] The responsum reiterates Rashi's argument regarding the Noachide laws, the land being the king's property, analogies to kings of kings, and the Rashbam's position that residing in a country indicates acceptance of the country's laws.

> Those of us who live in democratic states in the Diaspora regard ourselves as *citizens*, as fully participating members of the political community. We, together with our fellow citizens, constitute the state; the government is our agent, put in place to give effect to our political will. The law of the state is therefore a law of our own making, because in contracting together with our fellow citizens we imply our acceptance of that law and its binding authority. This does not mean, of course, that we are in agreement with every decision made by our governments or that we believe that every law enacted is a good one. It means rather that the *malkhut* itself is legitimate and its law is law, not because these have been imposed upon us against our will but because we ourselves, the citizens of the state, are the *malkhut* and the legislators who make our political decisions through a process upon which we have agreed beforehand. Our consent to the outcome of this process – that is, to the laws duly enacted by the state – is thereby implied in advance.[147]

On this basis, the responsum concludes that the congregant, a U.S. citizen, may not undertake any action that conflicts with United States law.

Recognizing that *dina demalkhuta dina* does not come without limitations, the responsum sets forth cases in which the principle may be disregarded:

> In order to count as legitimate under the halakhah, the "law" must be a legitimate one: that is, it must apply equally to all, drawing no unfair distinctions among the residents of that political community, and it must be accepted as flowing from the established, previously recognized powers of the regime. In addition, Jewish law traditionally limits the application of this principle to monetary law and does not accept as valid state legislation touching upon the realm of ritual practice (*issur veheter*).[148]

After careful consideration, the responsum concludes that none of these exceptions applies here and that the congregant in question is bound not to pass on to the Israeli authorities any information he learns at his place of employment.

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[147] "Loyalty" (footnotes omitted).

[148] *Ibid.* (footnotes omitted).

In a footnote, the responsum also confronts the question of civil disobedience:

> [T]he subject of civil disobedience in general is worthy of careful consideration. In this context we would note simply that, based on the theory that a Jew is a citizen like all others, there can be no distinctions between Jews and Gentiles in this regard. That is, if civil disobedience is ever justified, it is justified for all citizens. The principle *dina demalkhuta dina* cannot be interpreted so as to discriminate against the Jewish citizens of the state, denying to them any right, such as that of civil disobedience, that is enjoyed by all other citizens.[149]

The clear take of the responsum is that the Rashbam's basis for *dina demalkhuta dina*, which emphasized the relationship between the government and the people governed, has ongoing legitimacy and is the most reasonable basis for *dina demalkhuta dina* in modern North American society. Also embedded in the responsum is a ringing endorsement of the democratic process. While the responsum does not make such a statement, the implication of the reasoning is that one would have no obligation to follow laws that were enacted in contravention of the democratic process we have established. This can be seen in the responsum's reliance on the words of a medieval commentator:

> The point is not that the act of legislation itself must be old or that the legislator is forbidden to enact new statutes. Rather, the enactment must be generally accepted as a legitimate exercise of powers that already enjoy "constitutional" recognition (as measured by *din kedumim*) in that political community.[150]

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[149] "Loyalty."

[150] *Ibid.*

This backing of the democratic process as a basis for *dina demalkhuta dina* reverberates in a later responsum as well, which refers back to "Loyalty to One's Company Versus Love for Israel":

> We argue that the validity of *dina demalkhuta* rests upon the fact that those who dwell in the "kingdom," by virtue of their residence there, imply their willingness to accept the kingdom's laws. This is especially true for those of us who are citizens of democratic political systems, who enjoy political rights and equality with all other citizens. Since the citizens of such a state make its laws, they accept in advance the validity of all legislation that falls into the purview of the state's legitimate legislative power. While some laws, such as those that unfairly discriminate among citizens or that impede the free exercise of their civil and political rights, would not be accepted as "legitimate" under this doctrine, regulations concerning the legal obligations between parents and children are widely accepted as a valid exercise of the community's power and jurisdiction.[151]

"Loyalty to One's Company Versus Love for Israel" also gives strong backing of the principle of equality and the idea that a law must be applied evenly to all persons. At the same time, it is unclear how this principle comes into play in a practical sense; the responsum states explicitly that discrimination between Jews and non-Jews would invalidate a law in the eyes of the responsum's authors. However, there is no articulation as to whether other types of discrimination, such as discrimination based on sex or race, would render a law unacceptable.

The principle of equality rears its head again in a slightly different manner in "Selling Ritual Objects to Jews for Jesus."[152] In enumerating the reasons for

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[151] CCAR Responsa Committee, "Withholding Paternity Information from a Father," n.p. [cited Nov. 12, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=8&year=5760.

[152] CCAR Responsa Committee, "Selling Ritual Objects to Jews for Jesus," n.p. [cited Nov. 12, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=1&year=5754.

permitting the type of sale set forth in the responsum's title, the authors state that "there is the factor of *dina demalkhuta, dina*, the law of the land. Civil rights laws may prohibit us from refusing to sell to customers on religious grounds." This excerpt demonstrates that the equality demanded between Jew and non-Jews cuts both ways; laws that level discrimination against Jews are not binding, just as laws that require equal treatment of ostensible non-Jews are valid.

b) Marriage and Divorce

Two Reform responsa confront the question of civil marriage and divorce. In "Divorce of an Incapacitated Spouse,"[153] the Committee cited *dina demalkhuta dina* as the basis, in part, for Holdheim's view that divorce was a civil matter, not a religious one. The responsum goes on to express its ambivalence over the authority of religious and civil law in this matter. On the one hand, "the Reform movement in North America recognizes civil divorce as a valid dissolution of marriage and does not require a get. . . ." At the same time, "[d]ivorce, then, has never ceased to be a matter of *religious* concern to Reform Judaism," and "we as a religious body retain the power of supervision over divorce." Thus, the position of the Responsa Committee is that civil divorce is a legitimate manner in which to terminate a marriage, but religious oversight is warranted and demanded.[154]

The question of civil divorce arose in again a footnote in a 1999 responsum addressing same-sex marriage:

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[153] CCAR Responsa Committee, "Divorce of an Incapacitated Spouse," n.p. [cited Nov. 12, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=15&year=5756.

[154] This reasoning echoes the logic set forth in CCAR Responsa, "Divorce and Legal Separation," n.p. [cited Nov. 12, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=13&year=5758.

> While the Reform movement in the United States accepts the validity of civil divorce, the preponderant majority of our colleagues elsewhere require a get before remarriage. In addition, the American movement has explained its acceptance of civil divorce in traditional halakhic terminology: since divorce in Jewish law is regarded as a matter of monetary law (itself a controversial assumption), a divorce decree emanating from a civil court is valid at Jewish law under the doctrine of *dina demalkhuta dina*. In this sense, we continue to practice "Jewish divorce," since the secular courts act as our designated agents. Moreover, the introduction of the Ritual of Release suggests that the movement is beginning to reconsider the necessity of some Jewish ritual procedure to mark the dissolution of a marriage.[155]

The Committee hewed to the same path, but tried to cast its stance in a more traditional tack in a footnote in "Loyalty to One's Company Versus Love for Israel":

> For this reason, traditional halakhic authorities have not applied the principle *dina demalkhuta dina* to the area of marital law (one of *issur veheter*) in order to accept the validity of civil divorce. The Reform movement in the United States has indeed accepted civil divorce, but precisely on the grounds that divorce has always been regarded in the halakhah as a matter of monetary, rather than ritual law. This argument can be contested, but it does show that Reform thinking on the subject of divorce has followed the lines of the traditional halakhic structure.[156]

This responsum is accurate in its statement. As seen above, the responsa of the Emancipation saw an attempt by early Reform rabbis to preserve the distinction between religious and civil matters as part of the effort to recognize civil divorce. At the same time, the reasons for finding marriage and divorce to be civil and financial matters are rather abhorrent in today's climate; holding that a marriage is nothing more than an acquisition is repugnant to our religious and societal

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[155] CCAR Responsa Committee, "On Homosexual Marriage," n.p. [cited Nov. 12, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=8&year=5756.

[156] "Loyalty".

concepts of the relationship, to say nothing of the problems it highlights for same-sex marriage. Thus, one can imagine that reliance on this line of thinking may stir up problems in the future.

c) Other Responsa

Other CCAR Responsa include mentions of *dina demalkhuta dina*, although few address the principle in as thorough or direct a manner as the responsa presented above.

A common pattern in these responsa is an initial push for the inquirer to obey civil law on the issue, followed by an analysis of what Jewish law would state on the matter. For example, when confronted with whether a woman has a duty to inform the father of her child of the existence of his son, the Responsa Committee first emphasizes her legal obligations under the law of the state and urges her to consult an attorney.[157] A similar case in point is "Reproving a Congregation for Violations of Tax Law," in which the inquirer asked whether there was an obligation on a congregational rabbi to report tax malfeasance going on at the congregation. Before analyzing the Jewish sources on this topic, the responsum first affirms the following:

> [L]egal responsibility in this matter is determined by the tax laws of the United States and of your local jurisdiction. Jewish law also recognizes this fact, under the principle *dina demalkhuta dina* (the law of the state is valid and binding upon us). It is therefore vital that you consult with an attorney as to your legal obligation.[158]

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[157] "Withholding Paternity."

[158] CCAR Responsa Committee, "Reproving a Congregation for Violations of Tax Law," n.p. [cited Nov. 12, 2006] (citations omitted). Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=4&year=5758.

To drive the point home, the responsum ends with the same "caveat stated at the outset of this *teshuvah*: you should consult an attorney as to your obligations under civil law (*dina demalkhuta*)."[159]

Likewise, in "Confidentiality and Threatened Suicide,"[160] a counselor's client brought what the counselor considered to be a lawsuit of dubious substance against a physician. The counselor asked whether she could break her duty of confidentiality to her client by disclosing information to the client's attorney about the client's mental state, thus putting the lawsuit's continuation in doubt. The responsa held that *dina demalkhuta dina* required the counselor's conduct to conform to the law of the state in which she practiced.

The Responsa Committee considered the question of legal responsibility from a different side in "Unknown Defect in Building Material,"[161] where the question addressed the morality of bringing an asbestos lawsuit against "a manufacturer who was unaware of the potential health hazard of his product when it was installed." While the Committee concluded that "traditional Jewish law would not hold the seller responsible for defects of damages after a long period of time has elapsed, especially as the defect was latent and unknown to

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[159] See also CCAR Responsa Committee, "Copyright and the Internet," n.p. [cited Nov. 12, 2006] (citations omitted). Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=1&year=5761; CCAR Responsa, "Demands of a Will," n.p. [cited Nov. 12, 2006] (citations omitted). Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=9&year=carr.

[160] CCAR Responsa Committee, "Confidentiality and Threatened Suicide," n.p. [cited Nov. 12, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=3&year=5750.

[161] CCAR Responsa Committee, "Unknown Defect in Building Material," n.p. [cited Nov. 12, 2006] (citations omitted). Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=11&year=carr.

both buyer and seller at the time of the transaction," the final paragraph potentially contravenes this. It states:

> The entire matter may also be considered under the general classification *dina demalkhuta dina*, and as the courts of the United States have decided that the seller is responsible in this matter and that it is for the public good, it would be permissible for the congregation on those grounds alone to bring a liability suit.

In this way, the responsum appears to employ *dina demalkhuta dina* to expand the manufacturer's liability beyond that which Jewish law would traditionally hold. Thus, the Committee adopts an approach under which civil law preempts and supercedes Jewish principles.

The Responsa Committee addressed the ongoing question of involvement with non-Jewish courts in "Collection of Debts to the Congregation."[162] The question at hand was whether the congregation could use collection agencies and civil suits to collect monies owed by congregants. The responsum repeats the discrepancy between Shmuel's acceptance of court documents as reflections of the law of the land and the anonymous statement that documents "like bills of divorce," *i.e.*, "a document processed by a Gentile court is in itself the instrument through which a legal transaction is effected," are to be rejected. The responsum also notes "the 'widespread custom' (*minhag pashut*) for Jews to resort to non-Jewish courts even without the prior permission of a *beit din*, 'especially because under the law of the land (*dina demalkhuta*), Jewish courts are unable to enforce their decisions.'"

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[162] CCAR Responsa Committee, "Collection of Debts to the Congregation," n.p. [cited Nov. 12, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=1&year=5764.

In a footnote, the Responsa Committee also addressed the role of community consent in the appointment of Jewish community leaders. After stating that "[t]he authority of a rabbi's rulings, in this day and age, is based solely upon the willingness of the community to abide by them," the responsum notes the historical fact that that "[e]ven should a Gentile king appoint a chief rabbi, which he is entitled to do under the rubric *dina demalkhuta dina*, that rabbi's rulings are null and void in the absence of community acceptance (*haskamat hakahal*)."

The only CCAR responsum in which the authors express a limitation on *dina demalkhuta dina* in any practical way is "Conversion of an Illegal Immigrant."[163] As the title suggests, a rabbi was approached by an undocumented immigrant who sought to convert to Judaism. Although the responsum cautions that the woman's status may be an "important factor in the rabbi's inquiry into a candidate's readiness to take the fateful step of joining the Jewish people," it is not grounds for dismissing the woman:

> True, this individual has violated the laws of the United States by residing in the country without the proper legal permit. The government of the United States is entitled to prosecute or deport her, both according to its own law and according to Jewish law: under the principle *dina demalkhuta dina*, Jewish law accepts the validity of all legislation that pertains to the legitimate rights and powers of the civil government, and it is clear that a state enjoys the right to control its borders and to regulate matters of immigration and citizenship. Yet while a government may set and enforce such laws (provided that it do so in a fair and equitable manner), this enforcement is a matter for the state and not for religious communities. On the contrary, we have always held that *dina demalkhuta dina* applies only to the area of monetary law

[163] CCAR Responsa Committee, "Conversion of an Illegal Immigrant," n.p. [cited Nov. 12, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=4&year=5763.

> (*dinei mamonot*) and that it has no bearing upon matters of ritual practice (*isur vehetter*). Conversion to Judaism is just such a "ritual" matter, properly the concern of the Jewish people and not of the United States government. Obviously, the rabbi and the congregation will want to consult with an attorney knowledgeable in the area of immigration law in order to determine their legal responsibilities in this case. But from the standpoint of Jewish law and tradition, this woman's immigration status does not bar her from entering our community. When we look at her, we do not see an "illegal immigrant"; we see a stranger, a reflection of our own history. She has every right to seek to join us and to take refuge "under the wings of the Shekhinah."[164]

This responsum presents a number of interesting issues and lays out two reasons for not reporting the undocumented immigrant to the authorities. First, the responsum bolsters the distinction between ritual and monetary law and reiterates the irrelevance of governmental regulations to ritual matters. This theme, which runs through the Reform responsa on marriage and divorce as well, is to a certain degree in line with the thinking in more traditional circles, even if the definition of ritual and monetary law diverges between the two.

Second, the responsum draws a distinction between the obligation to *follow* the law, which falls on the potential convert, and the obligation to *enforce* the law, which would potentially fall on the rabbi's head. According to the responsum, Jews must abide by governmental strictures, but are not responsible for policing the conduct of others. There is no specific citation given for this distinction.

By differentiating in this way, the responsum is somewhat problematic. There is no doubt that the government is not seeking to regulate ritual or religious behavior and that the woman's immigration status itself is not a matter of

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[164] *Ibid.* (footnotes omitted).

religious law. Rather, the appropriate question would be whether one may impose religious or ritual consequences on a person who has flouted secular law. By avoiding this question, the responsum's authors decline to address the true effect of governmental law on religious practice and the way in which secular and religious law may become entangled.

7) A Liberal Articulation of *Dina Demalkhuta Dina*: Four Case Studies

As a rule, Jewish law is casuistic in nature and does not deal in principles and generalities. Instead, the focus is on actual, practical cases and examples that arise in the course of reality. Even the famous Jewish codes, like the Shulchan Arukh, are predicated on underlying facts and events.

To this end, this chapter will examine four case studies drawn from the present-day United States: (a) prohibitions on same-sex marriage; (b) breakdowns in the election process; (c) restrictions on a woman's right to terminate a pregnancy; and (d) reliance on religious law in legal decision making. These examples highlight the bounds of *dina demalkhuta dina* and show that the "law of the kingdom" is not always "the law."

a) Prohibitions on Same-Sex Marriage

In February 2004, New Paltz Mayor Jason West officiated at a series of same-sex marriages for which no marriage licenses had been issued.[165] A New York State Supreme Court judge issued a restraining order barring further ceremonies and charged West with two dozen misdemeanor charges for his role in the ceremonies.[166] In addition, local prosecutors charged two Unitarian ministers for "solemnizing unlicensed marriages."[167]

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[165] "The Marriages in New Paltz," *Poughkeepsie Record*, Mar. 2, 2004. Online: http://archive.recordonline.com/archive/2004/03/02/02edit.htm.

[166] John Davis, "New Paltz Vows Go On: Unitarians Marry 13 Couples," *Poughkeepsie Journal*, Mar. 7, 2004. Online: http://www.poughkeepsiejournal.com/projects/gay_weddings/po030704s2.shtml.

[167] Thomas Crampton, "Two Ministers Are Charged In Gay Nuptials," *New York Times*, March 16, 2004, Page B1.

Although the charges against the ministers were later dismissed by the presiding judge,[168] this incident raises an important question: are Jewish clergypersons bound by state and federal laws that forbid same-sex marriage. This question takes on added importance given the overwhelming number of jurisdictions that have "defense of marriage" acts or constitutional provisions that prohibit the legal recognition of same-sex marriages and/or relationships.[169]

There are two lines of analysis that can be brought to bear on this issue. First, government legislation in this area may constitute an intrusion into the area of religious and ritual law. The Responsa Committee stated explicitly in "Conversion of an Illegal Immigrant" that matters of ritual practice are beyond the scope of what Judaism permits governmental regulations to address; even if a person is a law-breaker, such status has no direct bearing on a person's religious position or activities. As laid out above, this principle dates back to the Talmudic period and is an integral part of any line of Jewish thinking and law. This forces us to examine whether marriage is a matter of ritual practice.

While there has been and remains disagreement in liberal Judaism over the religious nature of divorce, it is unlikely that anyone backs the view that Jewish marriage is exclusively a religious matter. If the Responsa Committee

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[168] Larry Fisher-Hertz, "Charges Dismissed against 2 Ministers," *Poughkeepsie Journal*, July 13, 2004, n.p. [cited Nov. 22, 2006]. Online: http://www.poughkeepsiejournal.com/projects/gay_weddings/po071404s2.shtml.

[169] As a case in point, 17 Pennsylvania Consolidated Statutes s. 1704 reads as follows:

> It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.

has stated that even divorce is not without religious implications, then surely marriage cannot be free of religious overtones.

At the same time, some of the early Reform rabbis were willing to accede to certain limitations imposed by secular law. In his examination of the laws of various states, Kohler concluded that state law must be obeyed inasmuch as it prohibited marriages that Jewish law permitted; his primary question was whether rabbis could preside at ceremonies permitted by state law, but prohibited by traditional Jewish law.[170] However, from Kohler's own language, it is unclear if they saw themselves bound by the secular legal restrictions or whether they molded Jewish law to conform to the laws of the state:

> The list of prohibited marriages should be augmented in the direction of blood-relationship, and include the marriage of cousins and of the niece, in consonance with the laws of a large number of our States and the general trend of public opinion in these days which regard consanguineous marriages in many respects as obnoxious and injurious.[171]

If state law trumped Jewish law automatically, there would be no need whatsoever to "augment" the list of types of marriage prohibited by Jewish law; such relationships would already be impermissible regardless of the response in the Jewish community. Instead, specifying that there is even a need to alter Jewish law implies a certain degree of acquiescence from the Jewish establishment before secular laws in this sphere needed to be adhered to. Combined with the denial in "Divorce of an Incapacitated Spouse" that Reform religious authorities ceded all religious power in divorce to governmental laws,

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[170] Kohler 361-362.

[171] Kohler 377.

one must conclude that the Reform leadership added to the list of prohibited relationships and did not merely give license to governmental determinations of marital legitimacy.

While this difference may be merely semantic, it has more practical implications for our modern question. The North American Reform rabbinate as a group has shown little desire to limit its involvement with same-sex marriage. If the religious effectiveness of limitations on the right to marry come only with their acknowledgement by clergy, laws promulgated to "defend" marriage will have no impact from a liberal Jewish point of view without explicit acceptance. Because adoption appears to be required from Kohler's writing, one may conclude that laws prohibiting same-sex marriage constitute an inappropriate infringement on Jewish ritual law and need not be followed.

As a second matter, there is the distinct possibility that laws prohibiting same-sex marriage violate the principle of equality. This matter was explored above, in the context of the medieval period, but has clear and direct implications for our period as well. Indeed, as noted above, two CCAR responsa specifically articulate the principle of equality, albeit in different contexts. In "Loyalty to One's Company Versus Love for Israel," the Committee justified laws regulating confidential information as "not inherently unfair or discriminatory," but stated that "[i]n order to count as legitimate under the halakhah, the 'law' must be a legitimate one: that is, it must apply equally to all, drawing no unfair distinctions among the residents of that political community. . . ."[172] Similarly, the text of

[172] "Loyalty."

"Withholding Paternity Information from a Father" states that laws "that unfairly discriminate among citizens . . . would not be accepted as 'legitimate.'"[173] The upshot is that unfair or discriminatory laws serve as an exception to *dina demalkhuta dina* and are not binding.

Using the language of the CCAR Responsa, the seminal question here is *what type* of inequality is necessarily "unfair" or "discriminatory," thus disqualifying a law from application, and what type does not. More specifically for this particular issue, we must determine whether inequalities based on sexual orientation rise to the level of being "unfair" or "discriminatory."

There is little doubt that sexual orientation discrimination rises to the level of being "unfair" and "discriminatory." As early as 1977, the CCAR called for an end to discrimination based against homosexuals,[174] while in 1993, the URJ resolved "[n]ot to discriminate on the basis of sexual orientation in matters relating to . . . employment. . . ."[175] Similarly, in "On Homosexual Marriage," the Responsa Committee acknowledged that "[i]t no longer makes sense to single out homosexuals for distinctive treatment," even as the Committee refused to endorse same-sex religious ceremonies.[176] On the basis of these and other documents, one can easily conclude that discrimination against same-sex

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[173] "Withholding Paternity."

[174] Union for Reform Judaism, "Rights of Homosexuals" [cited Nov. 20, 2006]. Online: http://data.ccarnet.org/cgi-bin/resodisp.pl?file=rights&year=1977.

[175] Union for Reform Judaism, "Promoting Equal Employment and Leadership Opportunities for Lesbians and Gays in the Reform Movement" [cited Nov. 20, 2006]. Online: http://urj.org/Articles/index.cfm?id=7242&pge_prg_id=29601&pge_id=4590.

[176] CCAR Responsa Committee, "On Homosexual Marriage" [cited Nov. 20, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=8&year=5756.

marriage is both "unfair" and "discriminatory" and that the restrictions imposed by governmental laws therefore are not binding.

It goes without saying that none of this has any certain impact on the legal effect of any same-sex marriage celebrated in a religious setting. Although two persons may be bound together religiously, governmental regulations on how such relationships are treated will determine the practical consequences of any Jewish ceremony. With this caveat, we may conclude that restrictions on the performance of same-sex ceremonies are not binding under *dina demalkhuta dina*.

b) Breakdown in the Election Process

For those of us who lived through the 2000 Presidential election, it is easy to recall the post-election period of confusion. Debates over hanging chads and butterfly ballots threw the vote counting into chaos and left the country in political limbo. It was not until the Supreme Court intervened twice that the race for the presidency was resolved, nearly a month and a half after the election had taken place.

However, one need not reach back six years to find an illustration of the threat to the democratic process posed by inaccurate and fallible voting procedures. As one example, in Florida's 13th Congressional District, the certified results of the election declared Republican Vern Buchanan the winner, even though strongly Democratic parts of the district had a suspiciously large number of undervotes for the race.[177] With the increased use of electronic voting,

[177] "Counting the Votes Badly," *N.Y. Times*, Nov. 16, 2006. Online: http://www.nytimes.com/2006/11/16/opinion/16thur1.html; Bob Mahlberg, "Election Day Trouble

there is often no paper trail to confirm the final results, causing many to lose faith in the electoral process.

As discussed above, the approach of Liberal Judaism is to put a great deal of emphasis on the Rashbam's reasoning for following the laws of the land. As we recall, the Rashbam argued that there is an implicit agreement between the land's inhabitants and its rulers under which the inhabitants accept the country's laws of their own free will. According to the Rambam, this agreement is indicated by the people's use of the governmental currency.

It is on the Rashbam's reasoning that Liberal Judaism has come to rely. To reiterate the Responsa Committee's own words articulated in discussing our relationship and obligation to the state and its laws:

> Those of us who live in democratic states in the Diaspora regard ourselves as *citizens*, as fully participating members of the political community. We, together with our fellow citizens, constitute the state; the government is our agent, put in place to give effect to our political will. The law of the state is therefore a law of our own making, because in contracting together with our fellow citizens we imply our acceptance of that law and its binding authority. This does not mean, of course, that we are in agreement with every decision made by our governments or that we believe that every law enacted is a good one. It means rather that the *malkhut* itself is legitimate and its law *is* law, not because these have been imposed upon us against our will but because we ourselves, the citizens of the state, are the *malkhut* and the legislators who make our political decisions through a process upon which we have agreed beforehand. Our consent to the outcome of this process--that is, to the laws duly enacted by the state--is thereby implied in advance.[178]

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was Widespread," *Herald-Tribune*, Nov. 14, 2006. Online: http://heraldtribune.com/apps/pbcs.dll/article?AID=/20061114/NEWS/611140661/-1/NEWS0521

[178] "Loyalty" (footnote omitted).

The responsum goes on to state that the "exercise of legitimate (i.e., recognized and accepted) state power" eliminates the people's right to engage in civil disobedience.[179]

In our modern era, the Rambam's tie to mercantile and economic hegemony has far-reaching implications. For example, both the Euro and the United States dollar are used as currency far beyond the borders and legal jurisdictions of the entities whose authority they represent. One would be hard-pressed to argue that using either currency indicates an acceptance of United States or European law. This militates in favor of abandoning the currency test of the medieval period and turning toward the citizenship and democracy test posited by the Responsa Committee. More specifically, the laws of a government are operative and binding over a geographic area and population where the people have agreed to a set of regulations that enable and facilitate general participation in the decision-making process.

To return to our question, what are the consequences when the electoral process fails to conform to the "process upon which we have agreed beforehand?" If, in fact, our willingness to adhere to governmental policy, regulations and law is conditioned on a democratic process, a violation of that process should excuse us from following the laws that flow from the specific violation. More specifically, any action taken by the government that fails to live

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[179] *Ibid.*

up to democratic standards is the equivalent of the upstart medieval king: in the words of the Rambam cited earlier, he is "like a violent robber."[180]

To a certain extent, court intervention could serve to correct a breakdown in the electoral process and would be both appropriate and welcome. However, to the extent that judicial involvement merely gives an official imprimatur to what clearly is an anti-democratic action, such intervention would be insufficient to sustain the implicit agreement between citizens and their government. In this case, the Rambam's characterization would apply to the government as a whole, not merely election officials, and obedience would not be required.

The question is more challenging in the context of one particular Congressperson. Given the few governmental decisions impacted by one particular Representative, an undemocratic election that violates the previously agreed to norms is unlikely to affect any one vote or national policies as a whole. Under this approach, an individual would be required to adhere to laws passed because the electoral defect had a negligible actual causative effect on the system on a larger scale.

At the same time, one could argue, in the extreme, that a failure of the electoral process in one particular context calls into question the legitimacy of the system as a whole. A breakdown in a single election undermines our faith in democracy as a whole and serves to hamper participation the decision-making process. In an age when the percentage of eligible voting persons who partake

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[180] *Mishneh Torah Gezelah Veaveidah* 5:17.

in elections is so small,[181] any hint of impropriety in the election process merely serves to further suppress voter turnout.

It seems that a middle ground between these two extremes is most appropriate. It would be unreasonable to assert that the slightest electoral flaw contaminates every action a government undertakes. Conversely, setting the standard at a level that requires a change in the balance of power on a broader scale ignores the potential for the effects of an electoral breakdown to snowball and to discourage voting.

Instead, a more suitable rule would be one that requires adherence to a process upon which we have agreed beforehand and that allows a person to disregard laws only if violations of that process practically preclude meaningful political participation. Under this rule, a single, minor violation would be insufficient to trigger non-obedience to governmental laws. However, the focus would be on the individual's participation, not on the broader effect of the violation; regardless of how a person's involvement would have affected governmental decision making, that person's exclusion from society in contravention of the agreed-upon process is suitably destructive that it should permit actions of the type discussed elsewhere.

In our more specific examples, a person whose ballot is disqualified in violation of the agreed-upon electoral process would be entitled to disregard the

[181] Of course, this raises the question of whether a horrifically low election participation rate indicates a lack of agreement to the process in place. In addition, one could argue that excessive gerrymandering of congressional districts corrupts the voting process. At the same time, it could be said that neither of these constitutes violations of the agreed-upon rules and therefore does not permit non-compliance with governmental regulations.

laws enacted as a consequence of that election. This strikes a balance between blind obedience to a system that excludes electors from participation and anarchy. To be clear, a person would be perfectly free to adhere to such laws, and as a practical matter, an individual may choose to follow to them as a result of the practical consequences of not doing so. This, however, would not render the laws valid or legitimate from a liberal Jewish perspective.

c) Restrictions on Abortion

On March 22, 2005, Governor Mike Rounds of South Dakota signed into law[182] a bill that included the following language:

> Any person who administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion, unless there is appropriate and reasonable medical judgment that performance of an abortion is necessary to preserve the life of the pregnant female, is guilty of a Class 6 felony.[183]

In short, the law banned all abortions in South Dakota except to save the life of the mother.

Without going into Jewish views on abortion in excessive detail, this bill flies directly in the face of Jewish tradition, both progressive and conservative. As the Responsa Committee stated, "since the fetus possesses a legal status inferior to that of the mother, a number of halakhic authorities permit abortions in situations where the mother's life is not endangered by the birth of the child but

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[182] House Bill 1249, 2005 Session (S. Dak. 2005), n.p. [cited Nov. 22, 2006]. Online: http://legis.state.sd.us/sessions/2005/1249.htm.

[183] "An Act to prohibit the performance of abortions, except to save the life of the mother, and to provide a penalty therefor and to provide for a delayed effective date." House Bill 1249, 2005 Session (S. Dak. 2005), n.p. [cited Nov. 22, 2006]. Online: http://legis.state.sd.us/sessions/2005/bills/HB1249enr.htm.

where the abortion is necessary for her physical or mental health."[184] Among the rabbis who adhere to this view are Rashi,[185] Rabbi Joseph Trani[186] and Rabbi Eliezer Waldenberg,[187] with a wide breadth concluding that a pregnancy that would cause the mother "great pain" may be terminated. This approach is more lenient than the risk to a mother's life exception that the South Dakota law permits.

All the same time, there appears to be no exception to *dina demalkhuta dina* that would apply here. Abortion is not a matter of ritual law, so the challenge raised in the case of same-sex marriage is inapplicable here. Furthermore, the principle of equality remains unviolated[188] and the democratic process appears to have been followed precisely. If the law provided no exception for saving the mother's life, one could raise a *pikuach nefesh* argument, but with the absence of such a term, it is difficult to see how one could use Liberal Jewish law as a basis for avoiding compliance with the South Dakota law's terms.

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[184] CCAR Responsa Committee, "Human Stem Cell Research" [cited Nov. 22, 2006]. Online: http://data.ccarnet.org/cgi-bin/respdisp.pl?file=7&year=5761.

[185] Rashi *b. San.* 72b.

[186] Yosef ben Moshe Trani, *Teshuvot Maharit* (Lemberg, 1861), 1:97 and 1:99.

[187] *Tzitz Eliezer* 13:102.

[188] If the law were to apply only to the mother and not to "any person" assisting in the termination of a pregnancy, one could argue that the law applied solely to women and was therefore violative of the principle of equality. However, the law's language makes such an argument difficult, at best.

d) Constitution Restoration Act of 2005

During the course of the 109th Congress's First Session, the Constitution Restoration Act of 2005 was introduced in both the House of Representatives and the Senate.[189] The proposed bill sought to amend the United States Code by inserting the following:

> Notwithstanding any other provision of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter to the extent that relief is sought against an entity of Federal, State, or local government, or against an officer or agent of Federal, State, or local government (whether or not acting in official or personal capacity), concerning that entity's, officer's, or agent's acknowledgment of God as the sovereign source of law, liberty, or government.
>
> Notwithstanding any other provision of law, the district courts shall not have jurisdiction of a matter if the Supreme Court does not have jurisdiction to review that matter . . . .[190]

In essence, this bill would reduce the necessity of invoking the principle *dina demalkhuta dina*. Instead of having to find a balance between secular law and Jewish religious law, a government official acting on his or her religious beliefs would theoretically be free to cite divine authority for any Jewish principle and to conduct oneself in accordance with that principle, even if it conflicted with secular law. To the extent that such conflict existed, an aggrieved party would be unable to seek redress in the federal courts.

On its surface, there is, perhaps, little objectionable in this bill from a Jewish legal perspective. If a secular government seeks to grant a greater role

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[189] H.R. 1070, 109th Cong. (2005), n.p. [cited Nov. 23, 2006]. Online: http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.01070:; http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00520:

[190] Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005), n.p. [cited Nov. 23, 2006]. Online: http://thomas.loc.gov/cgi-bin/query/z?c109:S.520:.

to religion in public life, nothing in our examination of *dina demalkhuta dina* would lead us to believe that this would be anathema to Jewish law.

At the same time, one must wonder about the practical effect of the Constitution Restoration Act of 2005. In practice, it is difficult to expect that all divinely-based religious beliefs would receive equal regard or treatment, and there may be certain actions that non-Jewish governmental officials would undertake that would be at odds with fundamental Jewish principles. Moreover, it is clear that atheists and agnostics would derive no benefit from this law and would be at a clear disadvantage in their governmental involvement. To the extent that the actual consequences of the law conflict with the principle of equality, this particular law would be at odds with Liberal Judaism's approach to *dina demalkhuta dina*.

In addition, it is possible that the Constitution Restoration Act of 2005 contravenes certain existing rules of the democratic process. Through this act, each individual government official obtains the right to nullify laws that have been debated, enacted and promulgated through accepted channels and methods. Essentially, any government actor could become a legislature of one, repealing and enacting laws based on an "acknowledgment of God as the sovereign source of law, liberty, or government." At the same time, the act, if it became law, would have gone through the agreed-upon process of congressional approval and either presidential recognition or a veto override. In short, if a legal change carried out through the previously agreed-upon legal methods permits

what could be construed as an undemocratic act, does it conform to how Liberal Judaism understands *dina demalkhuta dina*?

With regard to this second objection, one may reason that, so long as the changes to the agreed-upon process leave the process sufficiently democratic, the changes are valid and legitimate. To the extent that they do not, they unduly interfere with the mutually obligating relationship between the democratic state and its citizenry. In this case, the laws cannot be subjected to the principle *dina demalkhuta dina*.

As discussed above, changes that give such a degree of discretion to any single government employee effectively undercut the democratic process and afford an inordinate measure of authority to too wide a range of individuals. For this reason, the Constitution Restoration Act fails to comport with the democratic ideals enumerated above and would be at odds with Jewish law.

8) Conclusion

While the principle *dina demalkhuta dina* has its roots in pre-Talmudic times, it first appears in its current form in the Talmud, with further significant development during the medieval and modern periods. That exceptions to the principle emerged and constrained the principle's application indicates the historical desire for Jews to find a balance between their fealty to non-Jewish rulers and their loyalty to Jewish legal values.

Dina demalkhuta dina's transformations reflect the eternally unfolding nature of Jewish law in the context of broader Jewish life. The dearth of discussion about the principle in Geonic literature reflects the legal autonomy of that period's Jewish community, while the medieval exceptions to *dina demalkhuta dina* must be seen in the broader of defending Jewish law against encroachments from non-Jewish intrusions and confiscations. In more recent centuries, the break between Reform and Orthodox Judaism stemmed from differing interpretations of what the law of the kingdom should govern.

In our day and age, the overarching rule and many of the exceptions to it are vitally important not only to traditional Jews, but to Liberal Jews as well. It is particularly noteworthy that the principle and its exceptions jibe well with Liberal Jewish values. The principle of equality and the concept of consent to an agreed-upon democratic process, both of which are of great importance in 21st century North America, emerge from traditional texts and can guide us as we strive to find our Jewish way in a broader non-Jewish world. Indeed, by turning to traditional and liberal approaches to *dina demalkhuta dina*, we can determine

the appropriate way for us to conduct ourselves vis-à-vis secular laws and can bolster our sense of duty to democracy, equality and religious freedom.

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