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DOES DINA DEMALKHUTA DINA APPLY IN DEMOCRACIES? WEEK FIVE SUMMARY OF SBM 2020

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The very wording of the Halakhic principle of **דינא דמלכותא** – **דינא** – “the law of the kingdom is the law” – might lead one to wonder whether this principle, which (in certain circumstances) grants secular law Halakhic force, applies to systems of government which can’t reasonably be defined as “kingdoms,” and in particular to democratic states. The two major legal theories offered in the Rishonim to explain the principle of **דינא דמלכותא**, namely Rashbam’s theory that validity of secular law derives from the consent of the governed and Ran’s theory that the king’s law is the law of the land because, very simply, the king owns the land, would at first glance come out on opposite sides of the question: Rashbam’s proto-contractarian understanding applies even more so to a state in which the citizens choose their lawmakers, whereas Ran’s feudalism-derived construction of **דינא דמלכותא** seems to fall apart when faced with any kind of state in which the sovereign is not a single individual holding allodial title to all the land under his or her jurisdiction.

Modern and contemporary decisors faced with the problem of applying **דינא דמלכותא** in democracies, however, often did not content themselves with this naïve analysis. In last week’s summary, we discussed the opinions of two of the judges on the Ashdod rabbinical court in a labor-law case involving secular Israeli law (Case 1323-35-1), R. Mordechai Ralbag and R. Mikhael Tzadok. Briefly, while R. Tzadok simply ruled that Rashbam’s position is binding and hence **דינא דמלכותא** applies in the State of Israel, R. Ralbag held that with regard to a democracy, Ran would accept Rashbam’s position that societal consent suffices to legitimate secular law. Below, we discuss the opinion of the third judge in that labor-law case, R. Yekutiel Cohen, and also the opinion of R. Yosef Eliyahu Henkin, one of the leading Torah scholars in mid-20th century America (*Teshuvot Ivra* §96).

R. Cohen stakes out the opposite position to that of R. Ralbag. He holds that even the “contractarian” theory of **דינא דמלכותא** would not apply to a democracy. Why? Surprisingly, because the social consent necessary for **דינא דמלכותא** to apply is available only in an absolutist state! In Rabbi Cohen’s understanding of the contractarians, the only relevant kind of consent is complete submission to any laws the sovereign promulgates. In a democracy, it’s clear that voters don’t accept the laws passed by their rulers absolutely – after all, they often vote them out in favor of new rulers who will change those laws.

Among R. Cohen’s proofs for consent-as-submission is the language of Rambam in *Hilkhot Gezeilah* 5:18, discussing the applicability of **דינא דמלכותא**:

במה דברים אמורים?
במלך שמטבעו יוצא באותן הארצות,
שהרי הסכימו עליו בני אותה הארץ, וסמכה דעתן שהוא
אדונייהם והם לו עבדים.

*To which [rulers] does the preceding apply?
To a king whose currency is legal tender in those lands,
since the inhabitants of that territory have accepted him, and their
minds rely that he is their lord and they are his slaves.*

Rambam here seems to rule that inhabitants of a certain territory must consent to be slaves (**עבדים**) of the king in order for **דינא דמלכותא** to take effect. R. Tzadok however argued that Rambam here is using **עבדים** to mean ‘subjects’ rather than ‘slaves’; all he requires is that the inhabitants accept the king’s political authority.

But leaving aside the textual debate, there’s a conceptual weakness in R. Cohen’s notion of consent, as R. Klapper pointed out: according to R. Cohen, ‘true’ consent cannot be attained in a democracy because there’s always a minority which supports replacing the current government and fights against it at the ballot box. But R. Cohen fails to take into account that (in the ordinary course of things) the minority nonetheless follows the laws passed by the

government they're unhappy with, which shows that they do consent to them on some level. In other words, R. Cohen fails to distinguish between support of a particular leader and acceptance of the democratic process, which means accepting its outcomes even if one's preferences are not aligned with the party in power. The fundamental underpinning of a functional democracy is that the citizens consider themselves to be bound by the framework even if one is unhappy with a specific government and its laws. Certainly this should suffice for the consent theorists of **דינא דמלכותא** to apply the principle to a democratic government.

We move on to R. Henkin, who laid out his very different understanding of **דינא דמלכותא** in a 1956 discussion of the Halakhic validity of the New York City rent control law. His theory not only leads to an enthusiastic acceptance of **דינא דמלכותא** in democracies, but radically revises our conception of the Halakhic civil law as a whole.

According to R. Henkin, because society changes all the time, no community can function with a static legal system. In the past, Jewish communities were legally autonomous, and they met the need for legal change with binding Halakhic enactments (**תקנות**) made by the rabbinic and communal leadership. In such a situation there was no need for **דינא דמלכותא**. However, when Jews live in a society with no permanent *batei din* or communal leadership with enforcement authority – as in R. Henkin's time and our own – Halakha looks to the secular legal system, which continually adapts in order to promote public welfare, and obligates Jews to follow its provisions via the principle of **דינא דמלכותא**.

Moreover, R. Henkin argues that in a constitutional democracy, the Jews are a part of the citizen body which (indirectly) makes the laws, and hence the secular law is also "Jewish." Thus R. Henkin breaks down the dichotomy between the Jews' law and the law imposed upon the Jews which has animated Halakhic discussion of **דינא דמלכותא** for two millennia: in a democracy, Jews are part of the government which imposes the law. Thus, of all the theories of **דינא דמלכותא** we've seen, R. Henkin's theory proves uniquely able to integrate fidelity to Halakha with a conception of democratic citizenship.

Of course, R. Henkin's wholesale adoption of secular law into Halakha must have limits: it can apply only to areas of Halakha which are meant to change with the times. So there is of course no question of secular law overriding areas of Halakha like *keashrut* or *Shabbat*. But R. Henkin sees all of Halakhic civil law as open to revision, and hence superseded by secular law, with one prominent exception – inheritance law, which cannot be changed either by **דינא דמלכותא** or by internal **תקנות**. (It is understood as well that secular law cannot permit Jews to charge or pay interest to each other.)

R. Henkin's theory of **דינא דמלכותא** can fairly easily be read into the Rishonim who adopt the consent theory of **דינא דמלכותא**, but seems impossible to reconcile with Ran and others' "feudal" theory of **דינא דמלכותא** as deriving from the king's ownership of the land under his rule, which Ran formulates as an implied threat: if one does not observe the king's laws, the king has a right to expel them from the land. To resolve this problem, R. Henkin argues that Ran doesn't mean to say that **דינא דמלכותא** only applies when the sovereign has deportation power, but rather whenever the government provides any services to the population in its territory, such as public works, security, and artificially depressed prices (!). Yet despite the attractiveness of R. Henkin's theory of **דינא דמלכותא**, it must be said that his is not the simple reading of Ran.

We conclude this summary by opening a can of worms we discussed on several occasions in *shi'ur*: modern democratic societies generally see civil disobedience as a legitimate form of protest against governmental injustice. Yet an expansive theory of **דינא דמלכותא** in democracies which applies it to secular law *tout court* (or close to it) would seem to make violation of secular law prohibited by Halakha as well – and Halakha may have no provision for principled disobedience. Can a theory of **דינא דמלכותא** which gives the laws of a democracy Halakhic force also make room for Halakhically-committed Jews to disobey those laws when conscience requires it?