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ARE ISRAELI LABOR LAWS BINDING ON CHAREDI SCHOOLS? WEEK FOUR SUMMARY OF SBM 2020

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In a 2008 case before the Beit Din of Ashdod, the undisputed background facts were as follows:

1. Israeli labor law guarantees all employees rights such as paid sick leave.
2. Teachers in government-run (*mamlakhti*) schools work under a collectively bargained contract that includes a wage scale and a severance package. Licensed non-government schools receive government subsidies that pay their teachers' salaries. The Ministry of Education's licensing process requires schools to affirm that their teachers will be paid the same salary and benefits mandated by the government contract.
3. Haredi school systems sign this affirmation every year.
4. Haredi school systems pay their teachers less than they would receive under the government contract, and do not provide all the benefits required by the general labor law.
5. The Ministry of Education licenses Haredi school systems despite being fully aware of this, and has done so for many years.

In the specific case, a former teacher sued the El HaMaayan school system for backpay and paid sick leave. The teacher states that in the hiring conversation, he asked to be paid according to the government contract scale plus an additional stipend to compensate for not receiving the legally standard benefits. The principal responded noncommittally, and he started work without receiving a clear answer. The principal contends that he explains to all teachers that the school cannot afford to pay at scale or provide full benefits. If they didn't want to work under those terms, he said, then they didn't have to accept the job.

Each of the three dayyanim on the beit din panel wrote a full separate opinion. These opinions offer wide-ranging and creative treatments of the halakhic principle that *dina demalkhuta dina* and express and reflect fundamentally different political philosophies. We'll discuss the first opinion and part of the second below, and look forward to covering the third next week.

Dayyan Mordekhai Ralbag begins from a halakhic principle (perhaps parallel to "freedom of contract") that "*kol tenai shebemamon kayyam*" = "any stipulation relating to money is valid." The Talmud (Bava Metzia 76a) uses this principle to validate contracts in which workers accept less than the prevailing wage, even though workers with no explicit contract receive the prevailing wage. If we construct the principal's refusal to commit as a *tenai*, and the teacher as accepting that *tenai* by coming to work, then the teacher should lose the case. Does coming to work imply acceptance of the principal's stipulation?

Shulchan Arukh Choshen Mishpat 221:1 discusses a case in which a seller asks for 200 and a buyer offers 100. They separate, and later complete the transaction without discussing price. The ruling is that whoever initiated the second conversation is presumed to have accepted the other's price. In our case, one might argue that the teacher's showing up for work is equivalent to initiating the second conversation.

Dayyan Ralbag rejects this parallel. He explains that in our case the parties never "separated," and the principal never outright refused the teacher's demands. Therefore we have no basis for presuming that either side accepted the other's price.

A second consideration is that, according to the beit din's legal advisor, the general Israeli labor law invalidates any stipulation that lowers or eliminates mandated benefits. If so, then even if we construct the teacher as accepting the principal's stipulation, and even though halakhah internally permits such stipulations, perhaps halakhah recognizes the right of the government to invalidate them! The school would therefore owe the teacher those benefits. (The school might also be vulnerable to similar lawsuits from all its present and former teachers, even if they explicitly waived those benefits in their employment contracts.) Does *dina demalkhuta dina* govern the relationship between the Israeli state and the Haredi school system? If it does, can *dina demalkhuta dina* override *kol tenai shebemammon kayyam*?

Dayyan Ralbag begins his analysis with standard citations of RASHBAM as grounding *dina demalkhuta dina* in the people's consent to the government (*mekablim al atzmam*), and RAN as grounding it in the government's ownership of the land, and consequent power to expel anyone who rejects its authority. RAN excludes Jewish kings in the Land of Israel from this principle on the ground that all Jews are partners in the land (and therefore cannot be expelled at will).

However, Chatam Sofer (Teshuvot OC 44) contends that RAN's exclusion applies only to taxes, which are presumptively against the will of the people, and not to practices and laws categorized as "*tovat hamedinah*" (for the welfare of the state). If RAN sees the authority of law as grounded in the power to expel, how can *dina demalkhuta dina* apply to any government that lacks such power?

Dayyan Ralbag suggests that RAN agrees with RASHBAM that popular acceptance is **sufficient** for *dina demalkhuta dina* to apply. However, he felt that *dina demalkhuta dina* must apply (outside of Israel) even where such acceptance is lacking (perhaps he felt that RASHBAM incorrectly viewed popular obedience to totalitarian

regimes as sufficient "acceptance"). Under this explanation, one can argue even more broadly than Chatam Sofer and say that RAN would apply *dina demalkhuta dina* even to taxes instituted by a **democratic** government in the Land of Israel.

Dayyan Ralbag argues that by signing the affirmation required for licensure, the principal (acting as agent of the school) automatically accepted the laws and regulations that come with it. This acceptance means, he contends, that according to both RASHBAM and RAN, those laws and regulations become binding on the principal (and school) as *dina demalkhuta dina*. (According to Chatam Sofer, this is especially true If we view those laws and regulations as "for the welfare of the state.")

This argument seems to imply that individual consent is needed for every single law. That would be very odd. Adena Morgan suggested in shiur that consent applies on a group level. Groups who accept the laws are bound by them, while those who don't. By signing the affirmation required for licensure, the principal included himself in the group of people who do accept the laws. Therefore he becomes bound by them. (Rabbi Klapper thinks this still seems very odd.)

Assuming that *dina demalkhuta* applies, does it invalidate the principal's *tenai*? Dayyan Ralbag answers that it does with regard to the benefits directly guaranteed by the general labor law. Since the law is that one cannot stipulate against these regulations, *dina demalkhuta* invalidates the *tenai*.

However, this may not be so regarding the salary and benefits arising out of the principal's commitment to pay according to the contract with government teachers. There is no law stating directly that such salary and benefits cannot be waived.

Dayyan Ralbag contends that the issue depends on whether the licensing process creates a direct obligation to the teacher. If it does, then the teacher can sue the school to fulfill that legal obligation, regardless of any waiver. However, if the process only creates an obligation toward the Ministry, a private *tenai* would be valid and the teacher would not be entitled to his benefits. Does the commitment made by the school during the licensing process create a right for the teacher?

Dayyan Ralbag here introduces a Beit Din HaGadol opinion written by Dayyan Avraham Sheeman in a similar case. Dayyan Sherman notes that the licensing process doesn't say that if a school breaches its obligations. its license **will** be revoked; it says only that a breach gives the state the **right** to revoke its license. This right is never invoked, even though the Ministry is perfectly aware that Haredi schools pay less than they commit to paying. If the state understood the process as deputizing the schools as its agents to pay teachers, then the schools would be stealing government money intended for teachers, and in that case the license would certainly be revoked. However, if the schools don't become government agents, then the money can be used in any way they see fit. (Moreover, the state's consistent failure to enforce the schools' commitment to the Ministry means that it is not regarded by halakhah as *dina demalkhuta*.)

Dayyan Ralbag derives from Dayyan Sherman's exclusive focus on the state's failure to enforce that the process does not create a direct obligation from the school to the teacher. Consequently, a *tenai* made between them would be valid. He concludes that there is at least a *safek*/doubt as to whether a stipulation made against the contract is valid. Therefore, he falls back on the rule of המוציא מחברו עליו הראיה – a halakhic tie favors the defendant. Hence the teacher is only entitled to the sick pay and convalescence pay demanded by the general labor law, but not to the severance and salary required by the teachers' contract.

Dayyan Ralbag then provides Haredi schools with a mechanism that he believes would validate even stipulations against the general labor laws. If the principal made a *tenai* that explicitly overrode rights provided by *dina demalkhuta dina*, that would be effective even if the *dina demalkhuta* prohibits such stipulations. We questioned whether this would actually work. since this can be viewed not as stipulating regarding money, but rather as stipulating against an halakhic obligation to obey the *dina demalkhuta* (assuming such an obligation). Rabbi Klapper argued that since the *dina demalkhuta* would ban Rabbi Ralbag's *tenai* as well, this is a case of infinite regress. It was also not clear to us why Dayyan Ralbag offered this suggestion.

Dayyan Mikhael Tzadok's opinion begins from completely different premises. He declares that since Rambam and Shulchan Arukh each rule explicitly against RAN that *dina demalkhuta* applies to Jewish kings in the Land of Israel, and Rav Ovadiah Yosef writes that defendants cannot rely on any position which is against Rambam and Shulchan Arukh, we can follow the "acceptance" theory and wholly disregard RAN. However, once the majority of a society accepts a government law, it becomes binding as *dina demalkhuta* on everyone without exception; this includes Haredim and Haredi schools, whether or not they sign individual commitments.

Dayyan Tzadok next contends that Rabbi Ralbag is fundamentally mistaken in seeing labor laws as giving privileges to individuals; rather, they are for the benefit of all of society, both employers and employees. If one employee waived these rights, all employees would be pressured to do so, and the entire labor market would be affected. Employers would suffer as well because they could be outcompeted by others more willing to abuse their workers. Social stability would be negatively affected by increased inequality, and the government would have to spend more to support the working impoverished. Therefore, the principle *kol tenai shebemamon kayyam* is irrelevant to the rights granted by labor law, since those rights are collective rather than individual.

Over the next several days we'll be discussing the opinion of the Av Beit Din, Dayyan Yekutiel Cohen, who contends that *dina demalkhuta* cannot apply in a democracy, and Rabbi Tzadok's response.

Shabbat shalom!

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