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Center for Modern Torah Leadership



חירות ואחריות

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"Taking Responsibility for Torah"

DOES HALAKHAH PERMIT TAXATION WITHOUT REPRESENTATION?

WEEK THREE SUMMARY OF SBM 2020

Adena Morgan and Eliana Yashgur, SBM Fellows

In four *sugyot*, the Babylonian Talmud cites the *amora* Shmuel as stating that that *dina demalkhuta dina* (DMD) = "the law of the kingdom is law." Neither Shmuel nor the Talmud provides a source, or even rationale, for Shmuel's far-reaching statement. Leaving the "why" of Shmuel's statement unstated makes it very hard to determine the "what" – which laws, of which sorts of government, under what circumstances, and in what relationship to halakhah.

Various Geonim and Rishonim fill the breach. Their answers can be understood as ranging philosophically from Divine right of kings, to a Hobbesian contention that the state must in principle be all-powerful to prevent the war of all against all, to various modes of constructing consent, to a "social contract," to a claim that the Noahide mitzvah of "dinnim" provides a Biblical basis for legitimating governmental authority. Each of these opinions can also be understood as making narrower or shallower claims.

SBM focused this week on an essay by Rav Asher Weiss about Shmuel's principle. Rav Weiss begins by citing, and sometimes modifying or rejecting, versions of the five positions above. Rav Weiss then presents an apparently original position articulated by Chatam Sofer in two of his responsa (OC 208 and CM 44). Chatam Sofer seems to identify the source of Shmuel's principle in a *drashah* attributed to him on Talmud Shavuot 35b:

אמר שמואל:

מלכותא דקטלא חד משיתא בעלמא - לא מיענשא,

שנאמר:

כרמי שלי לפני

האלף לך שלמה - למלכותא דרקינא;

ומאתים לנוטרים את פרוי - למלכותא דארעא.

Said Shmuel:

*A kingdom which kills one sixth of the world – is not punished,
as Scriptures says (Shir HaShirim 8:12):*

My vineyard is before me –

a thousand are for you Shlomo – *meaning for the kingdom of Heaven;*
two hundred are for those who guard his garden – *meaning for the
kingdom of the earth.*

Chatam Sofer understands this statement of Shmuel as authorizing taxation or the draft (=the law of the government is law) as necessary for government, so long as the percentage is no more than one sixth of the total.

Rav Weiss contends that this *drasha* cannot be the source for the entire concept of DMD, for two reasons: It is addressing a specifically Jewish king, and has no necessary application to Gentile governments, and teaches only that a king may appropriate funds for his own use, but not about his right to levy for the sake of running the country. Rav Weiss concludes that this *drasha* is really only a "hint" as to **how much** a government may tax its citizens, rather than a fundamental basis for governmental authority.

Neither of Rav Weiss's challenges are compelling. Shmuel's line is classically interpreted to mean that a king may draft one sixth of his population for their labor (Rashi) or into the army (Tosfot, Maharsha). This is not just a reminder of how much a king is allowed to tax. (This *drasha* has even been used by Rabbi J. David Bleich as theoretical justification for launching a nuclear war that would kill one sixth of the world's population). Moreover, the Talmud understands Shmuel as interpreting the "*Shlomo*" of the verse as a reference to G-d, rather than to the Jewish king Solomon,

In fact, Chatam Sofer understands this *drasha* as encompassing a government's authority to use one sixth of the country's resources for public works and improvements, or just for maintaining what already exists. He even argues that this *drasha* combined with the principle of *darchei shalom* permits the government to use the death penalty on criminals who disturb the public peace, though only up to one sixth of the population of course.

Rav Weiss's summary and analysis of the Chatam Sofer allow him to dismiss this specific construction and conception of DMD. Yet, we are left puzzled by how such a great talmid chakham can offer such inadequate evidence. Is this merely an exercise in rhetoric to assure his audience he is familiar with the Chatam Sofer, or is this actually what Rav Weiss thinks?

Rav Weiss also addresses the Chatam Sofer in his dissection of the position of RAN (Rabbeinu Nissim), who claims that *dina demalkhuta dina* is justified by the fact that the government has the power to expel residents. However, RAN says, this power does not extend to a Jewish king ruling over Jews in Israel, because all Jews are partners in the Land. RAN seems to be implying that DMD does not apply to Jewish kings at all. This troubles Rav Weiss, whose underlying position is that government is a necessity of human society.

Chatam Sofer, however, offers a radical reinterpretation of RAN. He contends that RAN agrees with RASHBAM that DMD depends on the (constructed) consent of the governed, and on this basis argues that RAN does not eliminate DMD with regard to Jews in the Land of Israel – he merely limits it.

Outside Israel, in Chatam Sofer's account, RAN contends that the government's right of expulsion means that residents implicitly consent to the government's authority to tax and draft. In Israel, where that authority does not (in principle) exist, a Jewish government requires specific popular consent to tax and draft. However, even in Israel, we can presume that the population consents to governmental authority to regulate interpersonal and commercial relations etc., and in those areas the law of the government is law even without specific popular consent. (Chatam Sofer understands RASHBAM as saying that the people can be constructed as consenting to all powers of government, including taxation and the draft up to one sixth, even without the factor that the king can expel them should they disobey.)

All of this comes to mean that Chatam Sofer fundamentally believes in autonomy, since he interprets even RAN as rooting government authority in the consent of the governed. Where that consent cannot be presumed or constructed, Chatam Sofer contends that authority requires actual consent.

This is in contrast to Rav Weiss himself. Rav Weiss challenges Chatam Sofer's account by arguing that government must be allowed to tax or draft regardless. Consent, he contends, may determine **who** governs, or the **form** of government, but it is not necessary for the **fact** of government. Where there is no consent, government remains necessary, and the Torah will allow other justifications. Rabbi Weiss argues that according to RAN, in a halakhic state in the Land of Israel the **king** does not have the authority of DMD, but the **government** still does, because the Sanhedrin is authorized to make laws by virtue of its authority derived directly from Torah. (Rabbi Klapper however notes that the Sanhedrin's Torah authority can itself be understood as deriving from the consent of the Jewish people at Sinai.)

Rav Weiss himself ends up taking a position that can be described as Hobbesian or anti-Enlightenment. (This explanation may differ sharply from the presentation of Rav Weiss' position offered by Professor Chaim Saiman at <http://www.jdaily.com/LmJs>). He believes that the Torah understands anarchy to be the worst of all worlds, and therefore government is necessary; there is no idyllic state of nature in which all human beings are free. Chatam Sofer, by contrast, can be understood as understanding RAN at least as imagining a society in which government is the product of a voluntary social contract. However, Rabbi Weiss follows Chatam Sofer in seeing consent as the basis for legitimating any **specific** claimant to government authority. This appears to be a very modern position.

However, it is important to understand that requiring "consent" is not the same as endorsing democracy. As noted above, RAN validates constructive consent granted under the threat of expulsion. Even RASHBAM nowhere suggests that governments are legitimate only if they have been democratically elected. Similarly, RAMBAM seems to agree with RASHBAM that government authority is rooted in consent. He seems, however, to assert that when a people in practice accepts a government's currency, it consents to that government's authority as well.

An offshoot of this discussion then is, what are the limits of presumed consent? Can it apply to a conquered population? Can it apply to people who were not alive when the government was formed (i.e. descendants of those whose originally consented)?

Rishonim such as RAMBAN and ROSH struggle with this question when they discuss the authority of halakhah as a whole, or of the authority halakhah grants for Jewish communities to make enforceable *takkanot*. We can analogize this issue to the halakhic concept of *zakhin adam shelo b'fanav*, where we make an assumption of what is good and what a person might want even when they are not present. Typically, whenever this principle is used, the context involves an individual (with respect to conversion, for example). There isn't a strong precedent for applying it to communal or social questions, let alone an entire polity. This remains as further territory for exploration.