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WHAT MAKES TAXATION HALAKHICALLY LEGITIMATE? WEEK TWO SUMMARY OF SBM 2020

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The Talmudic ruling, cited in the name of Shmuel, that “the law of the kingdom is law” (= *Dina Demalkhuta Dina*) requires us to ask: according to Judaism, how much power do governments have over their citizens? The Talmud itself provides several possible specific limits to Shmuel’s rule, and later commentators develop these into broader conceptions of the source, extent, and enforceability of “the law of the kingdom.” In shiur this week we focused on Rav Asher Weiss’s presentation of several rishonim’s positions in an essay distributed for Parshat Chukat 2010.

We’ll start with the Terumat haDeshen #341 (Rabbi Yisroel Isserlin, 1390-1460). His approach makes ethical demands on both the government and its citizens and is grounded in sophisticated political theory.

Terumat haDeshen presents his approach as an answer to a specific real-world question. An official-in-authority (= *sar*) imposed annual tax assessments on two Jewish communities. Between tax years, four wealthy citizens moved from one community to the other, and paid part of their new community’s assessment. Their previous community asked the *sar* to lower its assessment to account for this, but the ruler instead gave them the right to dun the four expatriates. When they in turn pleaded their case to the *sar*, he maintained the assessments on both communities, but gave the four individuals the right to sue in *beit din* to determine whether the original community could dun them.

Terumat haDeshen formulates the central issue as whether rulers have the right to allocate individuals among communities for tax purposes. The implicit alternative is that the communities have fixed political identities that they control autonomously, and the “law of the kingdom” applies to the communities rather than to their constituent individuals. Furthermore, he suggests that the principle of *dina demalkhuta* does not allow the kingdom to arbitrarily change the annual assessment for a community.

The primary evidence Terumat haDeshen cites is a series of apparently inconsistent rulings in the responsa of Maharam (= Rabbi Meir of) Rothenburg (1215-1293).

The first cited responsum states that after a communal tax assessment has been negotiated, individuals may not reach private agreements with the government to disproportionately limit the share they must pay. Rather, any abatement must be shared by the community. Terumat haDeshen explains that “Since the way of officers is to impose a heavier burden on others when they lighten it for an individual, and since each individual is obligated to bear the yoke with his friends,” causing others’ burdens to increase by obtaining a personal exemption is considered stealing, as well as an abdication of one’s communal responsibility. Moreover, any attempt by the government to alter the community’s assessments on individuals is treated by halakhah as the illegitimate “robbery of the kingdom” rather than as the legitimate “law of the kingdom.”

However, another responsum clarifies that this is true only once the communal assessment has been fixed. Before that point, when no collective liability has been imposed, a government decision to exempt individuals from taxation must be recognized by the Jewish community.

Finally, in a third responsum, Maharam declares that ALL government taxes in his time and place were robbery and illegitimate. Terumat haDeshen asks: If this is so, then there can be no legal communal liabilities, so why should individuals be constrained from negotiating private deals with a government of bandits? His final explanation is that the tax assessments are nonetheless binding because “it is with this expectation (that illegitimate/arbitrary assessments will be imposed) that we establish residence under them and accept upon ourselves their yoke and their burden.”

Rav Asher Weiss reads this last line of Terumat haDeshen as providing an underlying source for Shmuel’s principle. He argues that according to Terumat haDeshen, the basis for *Dina Demalkhuta Dina* is that the act of living in a certain place implicitly declares that one consents to the government.

Rabbi Klapper argued that this understanding of Terumat haDeshen produces a theory that is very difficult to accept. Individuals often have little choice as to where they live, let

alone as to which form of government to live under. People may find themselves in a particular polity because of war, hunger, or just that their parents decided to live there. It seems difficult to say that this would constitute a strong enough consent to bind the people to its government's laws.

However, Rabbi Klapper argued, a close reading of the Terumat haDeshen suggests that he did not actually view implicit consent as the basis for *Dina Demalkhuta Dina*. The context of the aforementioned line which gives that impression is his attempt to justify the contradictory statements of Maharam, that on the one hand all taxes in his time were theft, and on the other hand they create a legal communal liability. Terumat haDeshen understood Maharam to be arguing that the taxes were theft under the ordinary rules of government, and not legitimated by Shmuel's principle. He therefore suggested that perhaps the taxes could nonetheless be justified by a kind of constructive consent. In other words, this kind of constructive consent is NOT the ground of Shmuel's principle.

Moreover, Terumat haDeshen's constructive consent was not that of individuals. Rather, Rabbi Klapper argued, he was referring to the consent of the Jewish community. Jews were not defined as members of the nation they lived in, but rather as making communal decisions to live or not live within specific nations. The decision of a Jewish community to live within a specific nation could be constructed as consent to the tax assessments of that nation, EVEN THOUGH such assessments would not be legitimated by Shmuel's principle that "the law of the kingdom is law."

Furthermore, Terumat haDeshen's tone offering this explanation is that of low confidence, not that of someone laying out his own commitments. He introduces his solution to the contradiction among Maharam's positions with the words, "וְנִרְאָה קִצְתַּת טַעַם לְדָבָר," a phrase which as a whole is difficult to translate, but *ketzat ta'am* means a slight or partial reason rather than a compelling ground.

On this reading, Terumat haDeshen offers a complex approach to halakhah and government. In principle, halakhah recognizes only governments that follow established rules. Governments that follow such rules create collective obligations, so that it becomes theft for an individual to evade a personal obligation when that simply shifts the burden to everyone else. Governments that do not follow established rules (more work is necessary to define those rules and how they are established) are not legitimate unless – perhaps – they nonetheless can be constructed as having been consented to by those over whom they have authority.

Rav Weiss next presents the positions of Ran and Rashba in their commentaries to Nedarim 28a. Each of them quotes a

Tosafist position that Shmuel's ruling does not apply to Jewish kings in the land of Israel. The reason is that the entire Jewish people are *shutafim*, partners, in owning the land of Israel, and therefore their king does not own the land. By contrast, non-Jewish kings own all the lands of their nations. They state that Shmuel's principle is grounded in that ownership, which gives them the right to charge people for residing in or benefiting from the land, and generally to make all laws associated with the land in some way.

Rabbi Klapper argued, however, that Rashba presents his position differently in a responsum (Meyuchasot laRamban 22). Rashbam there states that a kingdom has the right to make regulations that improve the regulation of the state, even to the extent of transferring property that belongs to one person to another. (But when done for reasons other than improving the regulation of the state, such transfers constitute robbery.) He then states that this right applies ALL THE MORE SO in states where the king owns all the land, and makes acceptance of this right a condition of land ownership. This suggests that the primary ground of government authority is not the king's ownership, although the king's ownership may provide an alternate or additional ground for some forms of governmental authority. Moreover, Rashba here offers a formulation similar to that of Terumat haDeshen above, which ultimately depends on consent rather than power. He therefore adds that this argument is more compelling if the kingdom publicizes its rules before distributing land.

A more radical formulation of the Tosafist's political view may emerge from the She'eilot u'Teshuvot Maharich Or Zarua #110 (1200-1270). When delineating how the secular government has authority due to its ownership over the land, he makes an attention-grabbing comparison: "When it comes to the nations of the world this is the law, because all of the land is his, and this too is the law for ordinary people that if they were to gather and declare that no one may benefit from their land without paying their assessment – their law is law." Maharich presents the authority of the government and of groups of individuals as fundamentally the same. This seemingly limits the weight given to the central authority of the secular government and gives it back to the people.

Moreover, the position that the Jewish people in their ideal sovereign state are not per se subject to government regulations may have far reaching implications. It suggests a strong bias toward very limited government. However, any such claim must account for the capacity of the Sanhedrin to legislate, and also that Jewish kings may have powers derived from a different source than those given to other kings by Shmuel's principle.