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## THE HALAKHAH OF EQUAL PROTECTION

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The 14<sup>th</sup> Amendment to the United States Constitution declares that the relevant government authorities may not “deny to any person within its jurisdiction the equal protection of the laws.” The commitment stated in this post-Civil War amendment is now seen as a restatement of the fundamental American ethic. Unequal laws are unjust per se. They also undermine democracy by entrenching power in those the law privileges and denying it to those the law disfavors.

The Torah seems to state a similar ethic in at least four places:

Shemot 12:49

תּוֹרַה אַחַת יְהוָה לְאֶזְרַח וְלִגֵּר הֵגֵר בְּתוֹכְכֶם:

*There must be one torah for the ezrach, and for the ger, who is gar in your midst*

Vayikra 24:22

מִשְׁפַּט אֶחָד יְהוָה לָכֶם כַּגֵּר כְּאֶזְרַח יְהוָה כִּי אֲנִי יְקוּן אֶל-הֵיכֶם:

*There much one mishpat for you – the ger and the ezrach alike*

Bamidbar 9:14

... חֻקָּה אַחַת יְהוָה לָכֶם וְלִגֵּר וְלְאֶזְרַח הָאָרֶץ:

*... there must be one chukah for you and for the ger and for the ezrach of the land*

Bamidbar 15:15-16

הַקֶּהֶל חֻקָּה אַחַת לָכֶם וְלִגֵּר הֵגֵר חֻקַּת עוֹלָם לְדֹרֹתֵיכֶם כַּכֶּם כַּגֵּר יְהוָה:

לִפְנֵי יְקוּן:

תּוֹרַה אַחַת וּמִשְׁפַּט אֶחָד יְהוָה לָכֶם וְלִגֵּר הֵגֵר אֶתְכֶם:

*The kahal – there must be one chukah for you and for the ger who is gar;*

*It is an eternal chukah for all your generations;*

*you and the ger must be alike before G-d.*

*There must be one torah and one chukah for you and for the ger who is gar with you.*

At least two mid-20<sup>th</sup> century scholars connected these verses to the promise of equal protection in a formally halakhic context, analysis of the principle that “*dina demalkhuta dina*” = “the law of the government is the law.”

[Rav Chaim Regensburg](#), Rosh Yeshiva of HTC and Av Beit Din of Chicago, wrote in his article “Iyyunim al Zekhuyot Ezrachiyot” that

*From all this we have proven that a great principle of the chukim and mishpatim of a state is*

*that there must be absolute equality among all the toshavim and ezrachim.*

*“there must be one chukah for you and for the ger and for the ezrach of the land”*

*is one of the essential characteristics of every chok and mishpat, and a chok which lacks this characteristic is not a just chok.*

[Rav Efraim Fischel Weinberger](#) of Tel Aviv wrote in his article “*Samkhub Hatzibbur Bivchirat Ansbei Hamemshal L’Or Habalakhal*” that

The *chok* of the Torah

*is against the creation of boundaries, discriminations, and classes with greater privileges.*

*The general principle of Torah is: “there must be one chukah for you” ...*

*It therefore emerges that the chukim of the government and of the state obligate the citizens and have force*

*only if they are democratic chukim with no distinction at all among citizens*

...

The claim that Halakhah mandates equal protection in the context of *dina demalkhuta* can be challenged in at least three ways. First, the halakhah of *dina demalkhuta* was articulated and maintained for a millennium in environments where the civil law discriminated against Jews. Second, Halakhah itself discriminates in various contexts between citizens (Jews) and resident aliens who are not Jewish, and even imposes some restrictions on naturalized citizens (converts). Third, Halakhah discriminates even among citizens in various contexts, for example on grounds of gender or lineage.

My focus here is on the first challenge. I’ll briefly sketch two responses to the last two challenges, and a difficulty with each. But my focus is on the first challenge, and on a response to it that may be useful overall.

**Response #1** - Equal protection applies specifically in the realm of *dina demalkhuta*, meaning laws developed via human reason. Divine laws need not meet the same standard.

The problem here is that the relevant Biblical verses relate to halakhah itself, and the diverse terminology (*torah, chok, mishpat*) suggests that they apply across all types of halakhah.

**Response #2** - “Equal” does not mean “identical.” According to

<https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/702>,

“most laws are assessed under so-called ‘rational basis scrutiny.’ Here, any plausible and legitimate reason for the discrimination is sufficient to render it constitutional.” However, “laws that rely on so-called ‘suspect classifications’ are assessed under heightened scrutiny. Here, the government must have important or compelling reasons to justify the discrimination, and the discrimination must be carefully tailored to serve those reasons.” Within halakhah, we need to determine what constitutes a “rational basis” for discrimination; and whether halakhah has the equivalent of “suspect classifications.”

The problem here is figuring out what to do if existing laws seem not to meet the equal protection standard.

Moving back to the first challenge: A medieval halakhic consensus, beginning at least from Rabbi Yosef Ibn Migash among

Sefardim (see his commentary to Bava Batra 55a) and perhaps from Rabbeinu Tam among Ashkenazim (see e.g. Talmidei Rabbeinu Peretz Nedarim 28a), held that *dina demalkhuta dina* applied only to laws that are כְּלָלִיִּים/general rather than aimed at specific individuals, and that the government must be מְשֹׁה מְדוּתֵי /relate to all equally. Rabbeinu Tam in some versions even bans laws that treat one מְדִינָה /state within an empire differently from its peers. On this basis, Dr. Shmuel Shiloh in his excellent book [Dina D'Malkhuta Dina](#), p. 110, asserts that

*It is clear that when speaking of a chok that applies equally to all souls, that the intent is that it applies in an equal manner even to Jews.*

Dr. Shiloh's statement is in conscious opposition to the late 15th century [Rabbi Yosef Kolon](#), who wrote (Responsa Maharik 194):

*One cannot say that dina demalkhuta does not apply here because the Jew pays more than the nonJew, because the Mordekhai wrote there that "we say it only when the king relates to all equally," because it's obvious that "relates to all equally" is met when all Jews pay an equal fixed amount.*

Dr. Shiloh concedes that despite the many places that teach about the fundamental principle of equality, (that Jews and nonJews must be treated equally) is stated explicitly in only one place.

*At the end of one of his responsa (#53), Ritva writes: "the consensus of the king's judges in this matter is of no avail unless it is a chok established by the government over the entire kingdom, even on the Jews, because we hold dina demalkhuta dina."*

Dr. Shiloh understands this as a statement that *dina demalkhuta dina* applies only to laws that apply equally to Jews and nonJews. In my humble opinion, this is incorrect. The clause preceding Dr. Shiloh's quote is

*we have learned from this that in these matters (the law) follows the practice.*

Therefore, Ritva contends, the practice of non-Jewish courts is irrelevant to Jewish courts, unless the government has established this as a law that is binding even on Jews. The point is not that the law must apply equally to Jews – it's that there must be a law that applies to Jews, and not merely a convention of the state non-Jewish judicial system. Otherwise rabbinic courts are free to follow their own conventions.

Maharik's position is brought by Rav Yosef Caro in Beit Yosef (Choshen Mishpat 369), but not in his Shulchan Arukh, while Rav Moshe Isserles cites it in a gloss. So this issue may be a dispute between them as well.

What interests me is that Maharik and Dr. Shiloh each see their opposing positions as obvious despite a lack of explicit textual precedent. And I think they are both obviously correct! Maharik seems to me obviously correct historically that the Jewish community enforced taxes on themselves that were levied unequally. Dr. Shiloh seems to me obviously correct that this violates the fundamental consensus principle that law must be applied equally.

Rav Yekutiel Cohen, Av Beit Din of Ashdod, explains Maharik via Rav Shlomo Kluger's comment (Chokhmat Shlomo to Choshen Mishpat 369:8, available on Al HaTorah) that the equality standard applies only to citizens, not to resident aliens. Maharik

assumed that Jews would always be considered aliens rather than citizens in non-Jewish polities. (Dr. Shiloh presumably rejects that assumption.)

According to Rav Kluger, we must say that the *ger* referred to in our equality verses is the convert, not the resident alien. But is it consistent with the spirit of these verses to discriminate against resident aliens without a rational basis for doing so?

Rabbi Cohen argues that there is a rational basis for such discrimination: alien minorities are often hated by the natives and require additional government services. Similarly, Ramban to Shemot 1:10 records that Pharaoh began his campaign against the Jews by imposing a labor levy on us, "because it is the way of *gerim* in the land to offer a labor levy to the king." Not coincidentally, Ramban limits the authority of *dina demalkhuta dina* to regulations that fall within the conventional practice of kings.

However, [Responsa Ateret Paz](#) (1:3 CM 4) puts Ramban's explanation in a different context. After imposing the labor levy, Pharaoh escalates by asking the midwives to kill all Jewish male infants at birth. When they refuse, Pharaoh cites Maharik's position that *dina demalkhuta* applies even to discriminatory laws! The midwives reply that it applies only to laws that meet the equality standard.

In other words, the legitimization of discrimination (sometimes? often? always?) leads to its expansion. But protests are more often effective when they reflect a moral consensus than when they oppose it. Perhaps the Jews could have successfully refused the labor levy, as the midwives refused the order to murder. Or perhaps disobeying what was seen as a legitimate tax would have turned all Egypt against them faster – in fact, Ramban suggests that popular outrage forced Pharaoh to cancel his general decree against male Jewish infants after only three months.

It seems to me that the equality standard functions in halakhah as an aspirational ideal. It is implemented only when doing so will not destabilize the rule of law, or alternatively, when it is violated so grossly that revolution is both justified and very likely to succeed.

Jews in the United States are blessed with full citizenship in a country that shares our moral aspiration of having the law provide equal protection to all human beings. The meaning of equal protection is not always clear, and reasonable people can disagree about the risks of various kinds of protest. But there should be no doubt of our Torah obligation to work toward the realization of this Torah aspiration.

*My thanks to all those who participated in this week's MLK Day Yom Iyyun, who helped me sharpen several of the ideas in this essay, although the work is far from complete.*

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