DINA DE-MALKHUTA DINA — A REVIEW *

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The Jews learned quite early in their experience of Exile that only a strong central temporal authority could insure their own self-preservation and survival. Scattered throughout the Diaspora, they instinctively recognized that any semblance of unity would be impossible if they were to be subject to the arbitrariness of the local officialdom of each community in which they lived. Furthermore, their very survival as Jews was predicated upon their ability to maintain communal autonomy, only possible by disassociating themselves from the endless shifting mercies of local officials. As a result, Jews were always in the forefront of the struggle to strengthen the power and authority of the king. Recognizing that, ultimately, their welfare depended on the state rather than city, on the empire rather than province, the Jews forged an alliance with the central figure in their respective countries and subjected themselves, directly and exclusively, to this authority [1].

1. S. Baron, "Some Medieval Jewish Attitudes to the Moslem State", *Ancient and Medieval Jewish History* (Rutgers, 1972), p. 83 stated:

> "Partly because of fear of retribution for adverse criticism, and partly because of the widespread fashion of epistolary flattery, but most decisively because of the age-old tradition, going back to Jeremiah, hat Jews pray for the welfare of the country (and its rulers) in which they reside, Jewish subjects rarely cast aspersions even on evil monarchs.

Similarly, S.D. Goitein, "The Muslim Government — as Seen by its Non-Muslim Subjects", *Journal of the Pakistan Historical Society*, Vol. XII (January, 1964), p. 13 wrote:

> "How is this (very positive) attitude towards the ruler of another religio-national community and even of another country to be explained? To some extent it might be due to sheer propaganda... Propaganda, however, cannot

* This essay is primarily a review of Shmuel Shilo, *Dina de-Malkhuta Dina* (Jerusalem: Academic Press, 1974), pp. 511. My thanks to Dr. Shilo for his encouragement and helpful comments.

This almost instinctive movement of the Jews towards the centralized authority was paralleled by a tendency on the part of the latter to establish close ties with the Jewish community. For a number of very practical considerations, the most important of which was financial, the kings found it in their best interest to preserve the Jews as a separate group under their personal protection. This relationship, which underlay their designation in the thirteenth century as *servi camerae nostri,* was welcomed by both the Jew and the king. Rabbi Bahya b. Asher, a fourteenth century Spanish Biblical exegete, aptly expressed this feeling:

> "The status of a servant of one of the king's officials is not as exalted as that of a servant of the king because the latter is feared even by the officials out of fear for the king since that servant is called by the name of the king, their master" [2].

have been of decisive and lasting importance. Nor should the reverence shown to the ruler be regarded solely as an expression of fear. Our letters rather evidence a genuine feeling which had its roots in religion. 'The kingdom on earth is comparable to the kingdom of heaven' — says a pre-Islamic Aramaic maxim. The ruler, even if he belongs to another faith or people, deserves obedience and veneration".

While these explanations are undoubtedly correct, the roots of this phenomenon lie in the fundamental awareness of the Jews, certainly by the medieval period, that their very survival depended upon such an alliance with the king. It was in their own self interest to develop and maintain such a close vertical relationship. See too A.A. Neuman, *The Jews in Spain* (Philadelphia, 1942), Chapters One and Two. In this context, see also G. Cohen's introduction to his edition of Abraham ibn Daud, *Sefer ha-Qabbalah* (Philadelphia, 1967), p. xx; E. Ashtor, *The Jews of Moslem Spain* (Philadelphia, 1973), Vol. I, p. 56, 100; R. Chazan, *Medieval Jewry in Northern France* (Baltimore, 1973), p. 11, 18, 36, 49; Y.H. Yerusbalmi, *From Spanish Court to Italian Ghetto* (New York, 1971), p. 443, n. 73. Most relevant in this connection are Professor Yerushalmi's remarks in *The Lisbon Massacre of* 1506 *and the Royal Image in the Shebet Yehudah* (HUCA Supplements §1: Cincinnati, 1976), p. xi-xii, 37-39.

It is equally clear that such an alliance, however necessary, did not always work to the Jews' advantage. For some examples, see Chazan, ibid., p. 12, 37; E. Zimmer, *Harmony and Discord* (New York, 1970), p. 143; Y. Baer, *A History of the Jews in Christian Spain* (Philadelphia, 1971), Vol. I, p. 89, 161, 179; R. Ehrenberg, *Capital and Finance in the Age of the Renaissance* (London, 1928), p. 49.

2. *Comentary to Deuteronomy* 28:10. See aso L Abarbanel, ibid., 28:29: ...ויהיו עבדים למלכים ולא עבדים ליתר העם וכן היו באמת היהודים כל ימי המשך גלותנו סגולת המלכים והשרים אדני הארץ ולא לעבדים ולשפחות ליתר העם. See too Baer, ibid., pp. 85-6.

For a study of this concept in Spain and other West European countries, see S. Baron, "Medieval Nationalism and Jewish Serfdom", *Studies and Essays in Honor of Abraham A. Neuman* (Philadelphia, 1962), pp. 17-48. See too, *idem.*, " 'Plenitude

Because this alliance between Jew and king was mutually beneficial, it maintained a dominant postion in Jewish life throughout the Middle Ages and was prominent even in the emerging nation-states at the beginning of the modern period [3].

This historical reality was reflected in Jewish law. The talmudic dictum *dina de-malkhuta dina,* the law of the state is law, first formulated by Samuel in the third century C.E. and thereafter accepted as part of Jewish law [4] was understood in the medieval period to be a legal ratification of this existing state of affairs [5]. By having granted internal legal legitimacy to this external authority, Jewish law reflected the overriding importance attached to this fundamental vertical relationship. However, this awareness was coupled with the knoweldge that excessive acceptance of the king's authority might jeopardize those very rights they were striving to insure: personal freedom and communal autonomy. The tension of this delicate, almost tightrope, policy is reflected in the development, applications and limitations of *dina de-malkhuta dina,* granting enough power to the king to insure these rights but not too much for fear of losing them. That this concept existed is understandable; it is the tension created by those areas wherein the Jews refused to surrender to the authority of the king and stubbornly insisted upon maintaining what they believed to be their basic rights and privileges, which provides the drama of the interaction between a morally just *halakhic* system and the historical arena within which it operated.

of Apostolic Powers' and Medieval 'Jewish Serfdom'" (Hebrew), *Sefer Yovel le-Yishak Baer* (Jerusalem, 1960), pp. 102-24. This latter article has recently appeared in English in the collection of essays by Professor Baron, *Ancient and Medieval Jewish History* (Rutgers, 1972), pp. 284-307.

3. It is this phenomenon which essentially underlies the presentation of H. Arendt, *The Origins of Totalitarianism* (New York, 1966), Chapter Two.

4. *Nedarim* 28a, *Gittin* 10b, *Baba Kamma* 113a, *Baba Bathra* 55a. See also Maimonides, *Mishneh Torah,* Hil. Gezelah wa-Abedah, Chapter V and Hil. Zekhiya u-Matanah, Chapter 1, end; *Tur* and *Shulhan Arukh,* Hoshen Mishpat §194, 369.

5. See the delightful article by Prof. J. Katz, "Yahassei Yehudim ve-Goyim bi-Yimmei ha-Benayyim", *Molad* XVIII (June-July, 1960), pp. 285-88. A slightly altered version with footnotes appeared as Chapter Five in his *Beyn Yehudim le-Goyim* (Jerusalem, 1960). For interpretations of its original meaning, see J. Neusner, *A History of the Jews in Babylonia* (Leiden, 1966), Vol. II, pp. 69-71.

This *halakhic* dictum, while rarely affecting the practical daily relationship between the Jews and their Gentile overlords, served the very important function of formulating a framework for behavior within the Jewish community and is central for an understanding of the dynamics of much of Jewish life throughout the Middle Ages [6]. Yet, it has only recently undergone scholarly investigation. Early attempts were hampered by the fact that full understanding of this principle necessitated a high degree of familiarity with the vast corpus of rabbinic literature (codes, commentaries and responsa) dealing both directly and indirectly with this issue, knowledge of medieval political theory and its almost infinite number of legal systems, as well as an accurate comprehension of the concrete historical data of medieval Jewish life [7].

Some Jewish writers, prompted by the stimuli of external historic events, subjected this principle to close scrutiny on two occasions in modern times. After their emancipation at the end of the eighteenth century in Europe, Jews, anxious to find favor in the eyes of the contemporary non-Jewish world, pointed to *dina de-malkhuta dina* as evidence of the respect which Jewish law accorded to the legal systems of the dominant non-Jewish societies in which they lived. Some even deduced from this dictum an obligation for Jews to become conversant with the prevailing legal systems as well

6. See S. Baron, *A Social and Religious History of the Jews*, Vol. V (Philadelphia, 1957), p. 78: "Clearly, under the then existing power relationships no king treated such rabbinic qualifications as serious obstacles in the enforcement of his decrees..." For an analysis of the essentially internal application of *dina de-malkhuta dina*, see the incisive article by G. Blidstein, "A Note on the Function of 'The Law of the Kingdom Is Law' in the Medieval Jewish Community", *Jewish Journal of Sociology*, Vol. XV (1973), pp. 213-19. L. Landman's response, "A Further Note on 'The Law of the Kingdom is Law'", *idem.*, Vol. XVII (1975), pp. 37-41, fails to alter Blidstein's basic thesis.

7. See, for example, D.M. Shohet, *The Jewish Court in the Middle Ages* (New York, 1931), Chapter Five ("The Law of the Land — Dina Demalkhuta"), and the sources cited below in n. 10, 11. T. Levovitz, "Dina de-Malkhuta Dina", *Ha-Praklit* IV (1947), pp. 230-38 is the first attempt to systematically present some of the extensive rabbinic literature on this subject. See also, S. Ben-Dov, "Dina de-Malkhuta Dina", *Talpiot* VII (1960), pp. 395-405; VIII (1961-63), pp. 79-84, 526-30; IX (1964), pp. 230-37.

as cultural and social patterns of behavior [8]. This principle was further extended by some leaders of the Jewish Reform movement in Germany to validate some of their deviations from normative *halakhic* Judaism, particularly the legitimization of civil marriages [9]. The establishment of the State of Israel in 1948 also evoked widespread interest in this principle, focusing particular attention on its relevance to the newly created state [10]. However, little, if any, material written on these two occasions sheds any light on the historical development of this *halakhic* principle. The former group generally tended to disregard the vast corpus of previous *halakhic* literature on the subject; the latter was unconcerned with viewing this principle within a proper historical perspective.

8. See M.D. Tama, *Transactions of the Parisian Sanhedrin* (London, 1807), p. 152: "In the eyes of every Israelite, without exception, submission to the prince is the first of duties. It is a principle generally acknowledged among them, that, in every thing relating to civil or political interests, the law of the state is the supreme law". See also H. Graetz, *Geschichte der Juden* (Berlin, 1853), Vol. IV, p. 322; N. Krochmal, "Toldot Shmuel Yarhinai", *Hehaluts* I (1852), p. 80; S. Funk, *Die Juden in Babylonien* (Berlin, 1902), p. 74. See too Y. Teplitzky, "Dina de-Malkhuta", *ha-Shiloah* XXVIII (1913), pp. 505-11, esp. p. 506.

9. See, for example, A. Geiger, "Die Stellung des Weiblichen Geschlechtes in dem Judenthume unserer Zeit", *Wissenschaftliche Zeitschrift für Jüdische Theologie*, Vol. III, Part I, (Stuttgart, 1836), pp. 1-14. A more radical stand was taken by S. Holdheim, *Ueber die Autonomie der Rabbinen und das Princip der Jüdischen Ehe* (Schwerin, 1843), pp. 86f., 138. His position was attacked a year later by Z. Frankel in a review of his book in *Zeitschrift für die Religiösen Interessen des Judenthums*, Vol. I (1844), pp. 275f. See too L. Low, "Dina de-Malkhutha Dina", *Ben Chananja* V, (Szegeden, 1862), pp. 36-40, reprinted in his *Gesammelte Schriften* (Szegedin, 1893), ed. by I. Low, Vol. III, pp. 347-58; A.N.Z. Roth, "Dina de-Malkhuta Dina", *Ha-Soker* V (1937-38), pp. 110-25. It is succintly stated by L. Harrison, "Jewish View of Marriage and Divorce: The Modern Problem", *Yearbook of the Central Conference of American Rabbis*, Vol. XXIII (1913), p. 355: "There is only one valid divorce in America, the divorce that is issued by an American court of law. Indeed, the spirit of orthodox Judaism itself tacitly admits this fact in the well-known Talmudic maxim, 'Dino d'malchuso dino' (The Law of the land is the law)".

10. See the various articles on this topic in *Ha-Torah ve-Hamedina* by Rabbis Cohen, Tenbitsky, Kolodner, Friedman (Vol. I, 1949); Yisraeli (Vol. II, 1950); Ariel (Vol. IV, 1952), Uziel, Tchursh, Weingarten (Vol. V-VI, 1953-54); Segal, Zeslansky (Vol. VII-VIII, 1955-56) and Hadaya (Vol. IX-X, 1958-59). See also E. Waldenberg, *Hilkhot Medinah* (Jerusalem, 1952), Vol. I, pp. 180-93; I.H. Herzog, "Din ha-Melekh ve-Din ha-Torah", *Talpiot* VII (1957), pp. 4-32; S. Goren, "Dina de-Malkhuta bi-Yisrael", *Mahanayim* XXXIII (1958), pp. 9-14; *idem*, "Dinei de-Malchuta bi-Yisrael", *Or Hamizrah* Vol. I:3-4 (1954), pp. 27-33; S. Kook, "Dinei Malkhut, ha-Zibhur ve-ha-Medinah bi-Yisrael, *Shana Bi-Shana* 1972, pp. 210-31.

The first sustained scholarly analysis of *dina de-malkhuta dina* appeared in an article by Israel M. Horn in 1951 [11], which deals with this principle in medieval Ashkenaz. This was followed in 1964 by S. Albek's study of this dictum in its Spanish setting [12]. Both successfully placed the substantial amount of relevant rabbinic source material in a legal, political and historical framework. Similar intensive studies of other areas or time periods remain historical *desiderata*. As late as 1957, S. Baron wrote, "The ramified problems of the 'law of the kindgdom', so crucial for the entire history of Judeo-Gentile symbiosis in the dispersion, have not yet received their merited comprehensive juridical, historical and sociological treatment" [13].

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Two volumes have recently appeared which serve partially to fill this gap. The first book length study of *dina de-malkhuta dina*, spanning its development from its inception in the third century into the twentieth, was published in 1968 by Dr. Leo Landman, Professor of Jewish History at Yeshiva University [14]. While it is virtually impossible to do justice to any phenomenon which spans so long a period of time in a book of slightly more than two hundred pages, Landman's study is a contribution to the field by making available, in English, a substantial amount of otherwise inaccessable *halakhic* material. Although not explicitly the author's intention, this study is restricted to rabbinic sources, making use of a few communal

11. It was published posthumously in his *Mehkarim* (Tel-Aviv, 1951), pp. 64-105, 112-34.

12. S. Albek, "Dina de-Malkhuta Dina be-kehillot Sefarad", *Abraham Weiss Jubilee Volume* (New York, 1964), pp. 109-25.

13. S. Baron, *A Social and Religious History*, op. cit., p. 324, n. 93. See also *idem.*, *The Jewish Community* (Philadelphia, 1942), Vol. III, p. 52, n. 5: "There is great need of fuller investigation of medieval views concerning the "law of the kingdom". See also Y. Baer, *Toldot ha-Yehudim bi-Sefarad ha-Notsrit* (Tel Aviv, 1945), Vol. I, p. 347, n. 81 :חבל שלא נכתבה עדיין על כך מונוגראפיה מדעית" This is repeated in the second edition of that work (Tel-Aviv, 1959), p. 512, n. 81. In the English translation, *A History of the Jews in Christian Spain* (Philadelphia, 1961) Vol. I, p. 442, n. 36 reference is already made to Horn's article.

14. L. Landman, *Jewish Law in the Diaspora: Confrontation and Accomodation* (Philadelphia, 1968).

ordinances and relying solely on scant references to secondary historical literature.

A second book on this subject appeared at the end of 1974 by Dr. Shmuel Shilo, Senior Lecturer in Jewish Law at the Hebrew University Law School[15]. This book contains a comprehensive treatment of the substantial amount of primary and secondary rabbinic material dealing with *dina de-malkhuta dina*. Its scope is remarkable, including matters both directly and indirectly related to this principle. The "standard" issues generally raised in connection with *dina de-malkhuta dina* are exhaustively treated and precisely analyzed: the *halakhic* status of new laws promulgated by the monarch, legislation which does not directly involve or personally interest the king, laws imposed by local authorities, the binding force of customary law or usage, the relationship between the source of authority of a Jewish and Gentile king, between religious law and civil law, the difference (if any) between the application of this principle in the land of Israel and the Diaspora and the full spectrum of issues connected with taxation (imposition, collection, expropriation of property due to the failure to meet tax obligations, various government recognized tax exemptions, etc.). In addition, there is a long chapter analyzing the *halakhic* status of a wide variety of legal documents validated in non-Jewish courts, including marriage contracts, divorces, promissory notes, deeds of sale, warrantees and wills. The general question of the extent of trustworthiness afforded Gentile courts is also discussed (*e.g.*, Is the ruling of the court sufficiently acceptable to permit in *agunah* to remarry?). Wide ranging documentation is also provided in connection with the problems of currency devaluation, Jewish settlement in new areas, various sanctioned monopolies, governmental appointments of Jewish religious and communal authorities, and the state's right of punishment — monetary fines or

15. S. Shilo, *Dina de-Malkhuta Dina* (Jerusalem, 1974). The book is an expansion of his doctoral thesis on the topic submitted to the Law Faculty of Hebrew University in 1969. Part of Chapter Three appeared in *Mishpatim* II (June, 1970), pp. 329-44. Shilo published his conclusions in De'ot XL (Winter, 1970), pp. 308-12. See also *Encyclopedia Judaica* (1971), Vol. 6, pp. 51-5.

death. Other matters only tangentially bordering on *dina de-malkhuta dina* are also included: specific problems with Passover's *Shtar Mekhirah, Shemitta, Bekhor Behema, Erubin* and *Nedarim*. The amount of material carefully collected by the author and presented here is staggering; the book is truly wide-ranging and encyclopedic in its scope. This vast body of information is made easily accessible by two very helpful indices, painstakingly prepared by the author and Mr. Ronnie Warburg.

Following the methodology of *Mishpat Ivri* deveolped by two of his predecessors in the field, A. Freiman and M. Elon, Shilo limits the scope of his investigation to the *legal* implications of this principle [16]. His emphasis is clearly on rabbinic material, the sources of the law, and not on the historical or sociological considerations which underlie it. While the historian may question the ultimate value of an endeavor which traces an almost two millenium old phenomenon without sufficient regard for its vastly different historical settings [17], he will undoubtedly benefit from the great collection and incisive analysis of the rabbinic source material conveniently placed at his disposal in this one volume. Furthermore, all the opinions on the various issues discussed throughout the book are presented chronologically (divided into *rishonim* and *ahronim)* and often geographically (France, Germany, Provence, Spain, North Africa, etc.). It is the task of the historian of any given period to take this vast storehouse of information presented here by Dr. Shilo and place it in its proper perspective. Given Dr. Shilo's stated objective, his book is an extraordinary and remarkably successful achievement.

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Various parts of his presentation require further analysis. The almost exclusive focus on *rishonim* in the following comments should not obscure the fact that a significant portion of the book deals

16. *Ibid.*, p. 1.

17. Shilod himself criticized N. Rakover for ignoring any extra-halakhic considerations in his book *Ha-Shlihut Ve-Harsha'ah Bi'Mishpat Ha-Ivri* (Jerusalem, 1972). See S. Shilo, "Al Shlihut Ve-Harsha'ah Bi'Mishpat Ha-Ivri", *Shnaton Ha-Mishpat Ha-Ivri*", (Jerusalem, 1974), Vol. I, p. 326.

with the opinions of *ahronim,* including much relevant material from our own century.

P. 35, n. 149 — See Likkutei Perush Rabbenu Hananel, printed in M. Levin, ed., *Ozar ha-Geonim* (Jerusalem, 1941), Gittin 10b, p. 7 and J. Anatoli, *Malmad ha-Talmidim* (1866), p. 72a (cited by Shilo, p. 60, n. 4). Both maintained that Shmuel did not personally apply this principle in that context.

P. 42 — By concluding that the principle of *dina de-malkhuta dina* went unchallenged, Shilo apparently rejects his third suggestion regarding the opinion of Rav Huna presented earlier (p. 17). See A. Kaplan, *Dibrei Talmud* (Jerusalem, 1958), p. 171, who why maintains that Rab argues with Shmuel on this matter [18].

P. 59 — Shilo wonders why the reason suggested by Rashi (Gittin 9b) had no resonance throughout the Middle Ages. A close examination of the text yields the conclusion that Rashi did not offer an explanation for *dina de-malkhuta dina.* He simply stated that the reason why Gentiles are legally prohibited from taking part in bills of divorce or manumission of slaves, *i.e.,* they are not *b'nei keritut,* is not applicable elsewhere, where they are included in the obligation to maintain a legal system [19]. Moreover, from Rabbenu Nissim (Commentary on Rif, Gittin ibid.), whose text is almost identical with that of Rashi, it is evident that the phrase *lav b'nei keritut* applies to the witnesses and not the judges. This may be equally true regarding Rashi as well. Tosafot Rid, *ibid.,* whose identical comment to Rashi was already noticed by Shilo (n. 4) is then equally irrelevant here. Shilo also does not specify which later *rishonim,* besides R. Anatoli, were aware of Rashi's position.

P. 61 — Rabbenu Tam's application of *hefker bet-din hefker* in this connection appears here as another opinion of the basis for *dina de-malkhuta dina, i.e.,* although *halakhah* does not recognize any extra-legal laws, the rabbis granted them acceptability by use

18. See also J. Neusner, op. cit., cited by Shilo, p. 5.
19. See, already, N. Rakover, " 'Dina de-Malkhuta Dina' U'Gedarav", *Sinai* LXIX (1971) p. 247, n. 4.

of the principle of *hefker bet-din*. However, this fails to answer the underlying question — why did the rabbis indeed validate such legislation? Unlike Rashbam and R. Eliezer of Metz, all Rabbenu Tam offered here is the mechanics of the *halakhah*, not the underlying rationale for it. The method utilized in implementing the *halakhah, i.e., hefker bet-din,* is vastly different from any underlying reason suggested for it [20]. This is equally true of the opinions of Rabbenu Yonah (n. 9 and pp. 64-5), R. Isaac b. Mordekhai (p. 68) and most of the *ahronim* cited on pp. 81-2. Given this assertion, a number of problems raised and left unanswered by Shilo are resolved (see p. 76, n. 63; p. 82; n. 96; p. 114). This would also challenge Shilo's conclusion regarding Rabbenu Tam's position in connection with a Gentile king in the Land of Israel (pp. 99-100).

Moreover, Shilo repeatedly insists (p. 60, 61, 62) that the reasons suggested by Rashbam and R. Eliezer, unlike that of Rabbenu Tam, are outside the framework of *halakhah*. It is, however, incorrect to compare two positions which are addressed to entirely different questions — Rashbam and R. Eliezer explained *why dina de-malkhuta* is legally recognized as *dina* in Jewish law; Rabbenu Tam *how* it operates within the *halakhic* system. In fact, a number of suggestions have been offered to explain how the *halakhah* operates according to Rashbam and R. Eliezer as well. 1) Shilo himself cites a number of *ahronim* who suggest the reasoning of *t'nai she-bi-mammon* (n. 8; p. 76, n. 68, 69; p. 86) [21]. 2) Hatam Sofer states that, for the implementation of this principle, Rashbam applies the legal concept of *mehilla* [22].

20. This distinction has already been drawn by L. Landman, op. cit., pp. 37-8.

21. It is no wonder that Shilo (p. 76) finds no hint of *t'nai she-bi-mammon* in R. Eliezer. After all, he addresses his comments to an entirely different aspect of *dina de-malkhuta dina*. For another source which mentions this explicitly, see Proflat (Efodi), *Ma'ase Efod* (Vienna, 1865), p. 2 :Duran ,,ולפי שהמלך שהוא הראש ש" העמדת וקיום אלה המשפטים ואפשר לו מצד הכח והיכולת המלכיי להחליפם ולשנותם באפון מה וכמש"כ דינא דמלכותא דינא וכי הוא דבר שדממון והמתנה בו על מה שכתב בתורה תנאו קיים".

22. *Responsa* Hoshen Mishpat §44: ...והנה בהא דדינא דמלכותא דינא כ' רשב"ם מ"מ כל נימוסיו וחקיו מקבלי' עליהם ברצונם ומחילה גומרה היא".
I do not know why R. Eliezer Waldenberg, cited by Shilo, p. 76, n. 68 and p. 86 n. 124, requires both of these explanations.

P. 62 — The reader is left unclear whether Shilo maintains that the various references in *rishonim* to the power of a Jewish king are presented as an actual reason for the *halakhic* acceptance of *dina de-malkhuta* (p. 62, Ri; p. 65, R. Meir ha-Kohen; p. 66, Rashba, where Shilo uses the term *basis)* or simply as a similar, parallel case (p. 67, Rashba; p. 71, Ran; p. 72, Meiri; p. 73, Tashbetz, where the term *hashva'ah* is employed). This very important point is only clarified in favor of the latter in the section of the chapter on *ahronim* (p. 78). It is undoubtedly correct that the reference to the powers of the Jewish king in Ri (p. 61-2), Ramban (p. 65-6) and Rashba (pp. 66-8) can only be understood as a parallel to *dina de-malkhuta*. The sole opinion which comes closest to suggesting this as an actual reason for the legitimacy of a Gentile king's legislation is that of R. Meir ha-Kohen of Saragossa (p. 65).

Remaining problematic is the following: Shilo (p. 62) develops Ri's opinion on this matter solely from his statement cited in Ritba. However, it is hard to determine at which exact point in the text the quote of Ri ends and Ritba's own comments begin. This question is especially relevant in light of Shilo's difficulty in finding confirmation in Ramban's own writings of that which Ritba states in his name (p. 66). Perhaps, in both cases, more should be ascribed to Ritba himself.

P. 67 — Shilo suggests that Rashba required two underlying justifications for *dina de-malkhuta dina*. The reason of R. Eliezer of Metz, cited by Rashba, applied only to those areas under direct ownership of the king; elsewhere, another basis must be sought [23]. While I agree with this premise, I do not think that the answer lies with the powers of a Jewish king (see above). At least as

23. Rashba himself reflects this state of affairs. In a number of responsa he refers to "the land of the king". In addition to IV:111 and VI:149 (cited by Shilo, p. 67, n. 30, 31), see I:1132; II:134, 292; III:165, 176; IV:35 and V:6. In other cases, Rashba discusses land owned by local authorities. See I:626, 637, 664; III:421, 440; V:4, 6, 168, 186; *Responsa of Rashba Attributed to Ramban* §218. It may also be possible that the opposite of מדינות שהארץ כולו שלו (Ibid., §22) is countries other than Spain and not various provinces within it.

Nowhere does Rashba mention Rashbam's reason. Landman, op. cit., p. 45 is incorrect in stating, "Ibn Adret still wavers between the two theories (R. Eliezer and Rashbam)". He misunderstood the sources he cites, p. 158, n. 4.

plausible, although admittedly almost as equally unsatisfying, is Rashba's reference to a conqueror's personal ownership over his subjects in his *Novellae,* Yebamot 46a[24]. See too, in this connection, R. Abraham D. Schapiro, *Sefer Devar Avraham* (Tel-Aviv, 1961), Vol. I, 31:2, cited by Shilo, p. 82, n. 96 (Cf. p. 81, n. 93; p. 91, n. 23).

P. 71 — Shilo cites the opinion of R. Nissim Gerondi without recognizing that he offers a totally new explanation for the basis of *dina de-malkhuta dina, i.e.,* the importance of maintaining communal order. Shilo does consider this a legitime basis, but cites it only later (pp. 83-4) in the name of Maharshal. (See also Rambam, Hil. Rozeah II:4 and Melakhim III:end, in connection with a Jewish king).

P. 72, n. 51 — Even assuming that Shilo correctly interprets Meiri (cf. Rakover, op. cit., p. 248, n. 20), there remains a basic difference between this application of a *halakhic* principle based primarily on the Jewish awareness of their need for the royal alliance and the theory of religious tolerance discussed by Prof. J. Katz in his *Exclusiveness and Tolerance* (Oxford, 1961), Chapter X and in *Zion* XVIII (1953), pp. 15-30.

P. 80 — Shilo cites a disagreement between Rabbis Ben Zion Uziel and Joseph Henkin regarding whether R. Eliezer's reason is based on the power of the king to expel anyone from his land or on his ownership of it. The latter opinion seems to be more correct. Never did Jewish Law officially recognize the power of the king to expel Jews (nor, conversely, to limit their freedom of movement). This was one matter which they consistently refused to accept[25]. It is, therefore, highly unlikely that this power would be legally recognized as the fundamental *halakhic* justification for *dina de-malkhuta dina*[26].

24. „ופשט ליה דמוהדקינהו דהני בספטא דמלכא מנת דעל דעת כן הן באים לדור בארצו וכאלו לקחם במלחמה שיש לו בהן קניין הגוף דכתיב וישב ממנו שבי..."

25. See Shilo, p. 192, 282. In addition to the sources mentioned there (n. 602-03), see R. Meir of Rothenberg, *Responsa* (Prague, 1895), §661; F. Baer, *Die Juden im Christlichen Spanien* (Berlin 1929-36), Vol. 1, pp. 314-16; E. Urbach, *Ba'alei ha-Tosafot,* op. cit., pp. 203-04; R. Chazan, op. cit., p. 77; *idem,* "Jewish Settlement in Northern France, 1096-1306", *REJ* 128 (1969), p. 51.

26. See also Rashba, *Responsa* VI:149.

P. 88 — It is incorrect to simply assume that the right to mint coins was limited only to the king. The city of Barcelona, for example, enjoyed this power in the thirteenth century. See C.E. Chapman, *A History of Spain* (New York, 1918), p. 99[27].

P. 89, n. 10 — The text of *Knesset ha-Gedolah* is clearly correct. See also *Or Zaru'a*, Baba Kamma, §447 (cited p. 63, n. 13).

P. 91 — In attempting to define Rashba's position, Shilo, basing himself on *Responsa* I:612, chooses the opinion of *Knesset ha-Gedolah* (rather than that shared by *Maharik, Responsa R. Binyamin Ze'ev* and *Shiltei Gibborim).* He could also have cited II:356. However, in neither instance, did Rashba state how the local ruler received his power. It is entirely possible, in both cases, that it came from the king.

This is an example of a case where historical insight can be utilized in determining a *halakhic* position. A basic reason for the fundamental importance of the royal alliance, outlined above, was the firm desire of the Jews to avoid even the slightest degree of legal responsibility towards any other group. Having already shown that the principle of *dina de-malkhuta dina* is a reflection of the historical reality, we can conclude that Rashba would probably not have applied it to local authorities. Not only can *halakhah* be better understood from the perspective of the surroundings in which it functioned, but that very reality can be brought to bear to determine an unclear *halakhic* position.

P. 99 — The first authority who seems to have addressed this question is Rashi, not Rabbenu Tam. See Rashi, Gittin 10b (cited, in fact, p. 83, n. 103).

PP. 99-100 — Shilo places too much emphasis on R. Eliezer's limitation of *dina de-malkhuta dina* to matters relating only to the land as the basis for his exclusion of a Jewish king from this principle. R. Eliezer's opinion here is based exclusively on his underlying justification for it, *i.e.*, the king's personal ownership of the

27. See also Harry A. Miskimin, *The Economy of Early Renaissance Europe*, 1300—1460 (Prentice-Hall, 1969), p. 6 for a similar right enjoyed by various nobles in early fourteenth century France and G. Barraclough, *The Origins of Modern Germany* (New York, 1963), p. 317 for fourteenth century Germany.

land. See the explicit statement in Rashba, *Novellae*, Nedarim 28a, who, incidentally, disagreed with R. Eliezer's limitation of this principle to affairs of the land.

P. 100, n. 104 — The appelation "kadosh" is applicable to any saintly person who died, not exclusively to a martyr. See the sources cited by I. Twersky, *Rabad of Posquières* (Cambridge, 1962), p. 27, n. 34. See also E. Urbach, *Ba'alei ha-Tosafot* (Jerusalem, 1955), pp. 210-11, 279, 361; J. Mueller, ed. *Teshubot Hakhmei Zarefat V'Lothir* §21; R. Jacob Weil, *Responsa* §72.

P. 101 — A basically similar text in *Mishneh Torah,* Hil. Gezelah wa-Abedah V:11 is helpful in resolving, in favor of the second possibility, the problem raised by Shilo regarding the *Commentary on the Mishna.* (Cf. Rozeah II:4 and Melakhim III:end for powers granted the Jewish king beyond those mentioned in I Samuel 8:11-17).

P. 149 — R. Shabtai Kohen was not the first to make such a statement. See R. Anatoli, *Malmad ha-Talmidim, op. cit.,* p. 72a (cited by Shilo, p. 60, n. 4; p. 109, n. 53; p. 115, n. 196).

P. 153 — Shilo fails to consult the relevant responsa of Rashba to determine if Rabbi I. Meltzer's interpretation of III:109 is consistent with Rashba's other statements on this matter. It may be questioned from II:134 (closely analyzed by A. Neumann, *The Jews in Spain, op. cit.,* p. 7f), III:165 and *Responsa of Rashba Attributed to Ramban* §22. See also R. Isaac Bekhar David, *She'elot U'Teshubot Dibrei Emet* (New York, 1963), §12.

P. 191-98 — While the author, to be sure, generally differentiates between tyrannical, discriminatory, arbitrary edicts and legitimate acceptable legislation, a distinction fundamental to any understanding of the dynamics of *dina de-malkhuta dina,* his failure to do so within this context is a major oversight. The application of this basic distinction here would provide the key to solving many of the problems raised and left unanswered in these few pages.

a) *pp. 191-92* — Shilo maintains that Ritba rejected all new laws. However, his proof is from a statement in which a clearly tyrannical edict is voided solely for its content, not originality (see my n. 22,

above). Shilo's own belated recognition of this fact (p. 195, n. 624) serves then, to reject this proof.

b) *pp. 192-93* — Shilo cites two statements of the Ri (in *Mordekhai* and *Sefer Agudah)* side by side without recognizing that they are contradictory. From the first quote it would seem that only changes in specific details are tolerated; the second citation leads one to permit the introduction of entirely new laws as long as the principle of equality is not violated (see Shilo above, pp. 109-10). The answer must be sought in the distinction outlined above. While, admittedly, it is often difficult to determine whether a specific law is to be considered tyrannical or acceptable, it is along these lines that a solution to the problem must be attempted.

c) *p. 193* — Shilo's acceptance of *Maggid Mishneh's* claim that Rambam validated even new laws is problematic for a number of reasons. Firstly, it is difficult to determine *Maggid Mishneh's* source. Shilo's suggestion (*"Every* law promulgated by the king...", *Halakha* 14) can be questioned. Since *Maggid Mishneh* himself agreed that Rambam does place limitations on the authority of the king (Hil. Milvah ve-Loveh XXVII:1), the latter could not possibly have intended his statement to be understood as sweepingly as Shilo maintains. Also, Rambam's legitimization of the king's expropriations of his servant's property on the grounds that "this is the law of all kings" indicates that he considered this act valid only because it is in keeping with the accepted pattern of kingly behavior. Furthermore, Rashba stated on two occasions that "all *mehabrim* and *meforshim* agree" that *dina de-malkhuta dina* applies only to old accepted laws of the king (see *Novellae,* Baba Bathra 55a, cited by Shilo, p. 194, and Responsa VI:254). Given that Rashba shared the general aversion to the use of the title *Mishneh Torah* in *halakhic* contexts [28] and used the term *hibbur* to designate that work *(Res-*

28. See I. Twersky, *Rabad of Posquieres,* op. cit., p. 131, n. 2; *idem.,* "Beginnings of Mishneh Torah Criticism", *Biblical and Other Studies,* ed. by A. Altmann (Cambridge, 1963), p. 173, n. 55; *idem.,* "Al Hasagot ha-Rabad le-Mishneh Torah", *Sefer ha-Yovel Likhevod Zvi Wolfson* (Jerusalem, 1965), p. 184, n. 86; and, most fully, in "R. Yosef Ashkenazi vi-Sefer Mishneh Torah la-Rambam", *Salo W. Baron Jubilee Volume* (Jerusalem, 1975), Vol. III, pp. 185-91.

ponsa I:47. 253, 325, 1161)[29], and assuming, I think correctly, that Rashba was familiar with Rambam's position on this matter[30], it can be inferred that Rashba understood Rambam as being of the opinion that the king has a legal right to promulgate new laws. Finally, it is inconceivable that Rambam accepted the validity of any new tyrannical edict. Hence, it is even possible to accept *Maggid Mishneh's* interpretation of Rambam and not maintain, as he does, that Rambam and Ramban disagreed. While both would clearly reject any discriminatory laws, new legislation, in keeping within the bounds of accepted governmental policy, would be unanimously accepted.

d) This explanation allows for a simple answer to Shilo's claim (p. 195, n. 624) that Ramban's proof from Hakhmei Zarfat is imprecise. On the contrary, it is very precise indeed, because Ramban himself only permits legitimate new laws, a position bolstered by a convincing proof from the French scholars.

e) This is also the interpretation of *Sefer ha-Terumot* (pp. 193-94), *Nimmukei Yosef* (p. 194) and *Meiri* (p. 196). Given the qualification mentioned earlier in this paper (p. 115), it may be suggested that they reject only discriminatory tyrannical legislation.

f) This line of reasoning also suggests a re-examination of the author's treatment of Rashbam's position on this matter. According to Shilo, (p. 62, 69-70), Rashbam accepted the validity of new laws as well on the assumption that they are granted implicit recognition by the populace. However, this is true only in the case of legitimate, accepted legislation (see again, text of Rashbam,

29. There are also references to "Hilkhot ha-Rambam" and "Sefer Rebbe Moshe ben Maimon" (*Responsa* I:200, 840) and directly to the immediate section of the code under discussion, *e.g.*, "chapter two of Hilkhot Kelim" (*Responsa* I:195, 390, 392, 427). I owe these references in the Rashba to my friend Michael Shmidman.

30. Rashba's wide ranging knowledge of the *Mishneh Torah* was acknowledged by R. Vidal de Tolosa, *Maggid Mishneh*, introduction to Sefer Zemanim, end: בקי בספריו (in spite of the lapse to which he explicitly refers there). Compare this to R. Levi ibn Habib, *Responsa* §138: והרב הגדול הרשב"א לרוב בקיאותו בתלמוד ואותם הדברים שכתב היו פשוטי בעיניו כפי פירושיו בדברי הגמר' לא .רצה להטריח עצמו לראות כל לשונות הרב רבינו משה בר מיימון זכרונו לברכה וקרה לו בזה כמו שקרה לו במקו' אחר על דברי הרב רבינו משה בר מיימון..."

Baba Bathra 54b); in cases where the new law is clearly discriminatory, there is undoubtedly no such automatic implicit recognition. (For a similar distinction, see *Knesset ha-Gedolah,* cited p. 74).

g) Finally, this is the basis from which any attempts to resolve the contradiction Shilo finds in the Rosh (pp. 196-98) must proceed. After all, even in his statement cited in *Tur,* Hoshen Mishpat, §369, Rosh qualified his acceptance of new laws by adding that they are valid "as long as he does not subject him to the work of a slave".

P. 195 — Shilo's third suggestion for the basis of this limitation opens up the very important question of the relationship, if any, between the underlying reason for *dina de-malkhuta dina* and its specific applications. In some cases, a limitation on this principle is explained by reference to the reason why it exists. For example, Rashba, following R. Eliezer of Metz, stated that no Jewish king in Israel can base his authority on the principle of *dina de-malkhuta dina* because its basic reason is not applicable; there the king does not own the land (*Novellae,* Nedarim 28a); in any other country, however, it would apply to a Jewish king (Responsa I:637, Shilo, p. 102. See also *Hatam Sofer,* Hoshen Mishpat §44, cited by Shilo, p. 105).

Shilo is inconsistent with regard to this issue. On a few occasions he does attempt to correlate various limitations on *dina de-malkhuta dina* with its underlying basis (pp. 91, 96, 195). Yet, on most occasions, Shilo does not operate with this line of reasoning. For example, he does not attempt to draw a parallel between the power of an agent of a Gentile king and his counterpart in the service of a Jewish monarch, nor does he suggest that whether or not this principle applies in that connection according to R. Eliezer depends on who is the owner of the land.

The one authority who constantly referred to the underlying basis of *dina de-malkhuta dina* in order to explain its various limitations was R. Malkiel Z. Tanenbaum, *She'elot U'Teshubot Dibrei Malkhiel*

(Jerusalem, 1970), Vol. VI, §65, 17 (p. 94). He applied this corollary to the question of whether or not new legislation enjoys legal validity. If the king derives his power from the consent of the governed (Rashbam), he has no legal authority to impose new legislation, where such consent would not be forthcoming. If, however, his authority stems from his ownership of the land (R. Eliezer), he may impose new laws as well. (See Shilo, p. 201). R. Tanenbaum also referred to this reasoning to explain the disagreement between Jewish authorities as to what percentage of the total population must be affected by a law in order for it to be considered non-discriminatory. Some required that it be directed towards the entire population of the kingdom; for others a province or even city was enough (see Shilo, pp. 109-13). R. Tanenbaum explains: according to Rashbam, the law must be applicable to the total population; for R. Eliezer a smaller amount is also acceptable (see Shilo, p. 114).

In both cases, Shilo rejects this explanation for a technical reason. He claims, correctly, that the opinions of some authorities are not consistent with the corrollary drawn by R. Tanenbaum, *i.e.* they rule in each of these two cases differently than would be expected considering the reasons they offer for *dina de-malkhuta dina* (Shilo, p. 114, 201).

Shilo's dismissal, while undoubtedly correct, is incomplete. R. Tanenbaum's reasoning cannot be followed through to its logical conclusion. While his explanation may apply to new laws, what about those that are clearly discriminatory? No Jewish authority recognized such legislation as valid. Yet, if the underlying reason for *dina de-malkhuta dina* is the king's ownership of the land, what legal right is there to limit his authority? Similarly, while this reasoning may explain why, according to R. Eliezer, a king may promulgate a law which applies to only one province or city, what is to stop him from passing a law which affects only one individual? Yet, no one recognizes the validity of such a law (see Shilo, p. 112, n. 175).

Clearly, then, while this corollary may explain some restrictions on *dina de-malkhuta dina,* it cannot serve as a general guideline for all cases. Each limitation must be individually examined, from an external historical as well as an internal halakhic perspective.

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These few comments detract in no way from the great value of this book. Distinguished by its depth of analysis and clarity of presentation, by its breadth of content and richness in detail, Dr. Shilo's study is a major contribution to this field and will undoubtedly prove to be helpful to students of law, history and the Talmud.

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