Re-examining progressive halakhah

Jacob, Walter

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"The Law of the Land and Jewish Law"

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Chapter 2

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"The Law of the Land and Jewish Law"

Opposition or Concurrence?

Walter Jacob

The principle dina demalkhuta dina has and continues to define the major boundary of the halakhah, Orthodox, Reform, or Conservative, even though it is not often cited and rarely fully discussed. The modern implications of this statement need to be placed into a historic framework, which is one task of this paper. In addition it will seek to define the limits of this principle for us as Reform Jews or, for that matter, for all contemporary Jews outside the Land of Israel.[1] Within Israel the concern may be mishpat hamelekh, an ancient concept that must be rethought.

The struggle between Jewish and alien law is as old as the first occupation of the Land of Israel by a foreign conqueror in 586 B.C.E. We know virtually nothing about the relationship between the inhabitants and the occupying forces then. The law of the conqueror was the ultimate law and the ruler appointed the supreme governor whether Jewish or an outsider. It seems

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Notes for this section begin on page 87.

that conquerors permitted local autonomy to the native population, so that through Ezra, Nehemiah and their followers, Jewish leadership controlled their internal affairs and governed. This policy was continued by Egyptian, Persian, Seleudic, Ptolemaic, and Roman rulers. The only major exception came through Antiochus Epiphanes and led to the Maccabean revolt. Unrest under the Romans was caused by a harsh taxation policy and occasional insensitivity to Jewish feelings about the images of the Roman legions and not through a clash of legal systems. We know little till Roman times about the extent of outside domination aside from the payment of taxes and the restraint on wishes for independence. We have no record of any struggle between the Jewish legal system and that of the occupiers. The New Testament statement attributed to Jesus "Give unto Caesar what belongs to Caesar and to God what belongs to God" [2] was the earliest Jewish source that dealt with this issue. There was no similar statement in the rabbinic literature even later in the time of the Mishnah.

Jewish life in the Diaspora should have raised the question of competing legal systems and jurisdictions. Even if we concede that the Pharisaic system was not developed until late in this period, Jews seems to have expressed more than superficial loyalty to their Mesopotamian or Roman rulers. Even after the Pharisaic system was fully developed, no clashes between the legal system have been recorded. Although there were substantial Jewish settlements outside the Land of Israel from 586 B.C.E. onward, we hear nothing of a clash of jurisdictions in Babylonia, among the Egyptian Jewish mercenaries of Elephantine, or in the Hellenistic and Roman world. There were rebellions in Alexandria of those who wished to define the citizenship status of the Jewish group, but they sought to settle the question by force rather than legal debate. From 586 B.C.E. the majority of the Jewish population lived outside the land of Israel and any problems that arose through a clash of legal systems led to solutions which have not been recorded.

The Talmudic Sources

Samuel's famous statement dina demalkhuta dina—"The law of the land is the law"—came rather late (165-267 C.E.).[3] The four

citations in the Talmud were incidental and indicated that this was not a major issue. Each citation dealt with the authority of the governmental tax or customs collectors, or the authority of governmental documents issued by a non-Jewish court or witnessed by Gentiles. Alternatives were presented in every instance and dina demalkhuta dina was never fully discussed and played virtually no role in the enormous mass of talmudic legal material. The primary expression of the ruler's power and this principle lay in his appointment of the exilarch, the head of the Jewish community; he was often appointed through consultation with the head of one of the talmudic academies, but this was a courtesy or a wise political gesture, not mandatory and the appointment itself lay outside the jurisdiction of the rabbinic authorities.

We do not know the reason for Samuel's statement or why he had to make explicit what had been implicit and de facto for many centuries. We may speculate that he sought to ingratiate himself with the ruler through this effort. Perhaps with the border tensions between the Parthian and Romans he felt the need for a declaration of loyalty. He might have sought to make the implicit more a part of the Jewish legal system, so that it could be discussed internally as Bial[4] has suggested. None of the contemporary or later decissors provided a reason for Samuel's enactment and merely stated that he was particularly close to the Persian ruler. Although this was correct, it has little bearing on a rationale for his statement.[5] As neither the Talmud nor Parthian documents shed light on this matter, speculation is futile.[6]

The statement in Gittin came from Samuel himself, while the others quoted him. In Gittin, the problem discussed was a mishnaic statement that validated documents issued by a Gentile court and witnessed by Gentiles. The only exceptions were documents of divorce and manumission of slaves. Samuel's statement agreed with this while others felt that some documents were also excluded. Samuel's statement also meant that earlier mishnaic statements that permitted the evasion of the king's taxes, were now rejected;[7] this had also troubled rabbinic authorities of the Talmud and they concluded that the Mishnah referred only to an unauthorized tax collector[8] or one who did not proceed in a legal fashion.[9] Rabba reported three rules that were given to him by Ukbas ben Nehemia, the exilarch, in which he further clarified the meaning of Samuel's rule as applying to documents that recognized the transfer of property, but not

those that actually made the transfer and to various situations of taxation or royal confiscation.[10] It applied to the ruler and his agents in matters of civil law mainly in matters of property exchange, taxation and eminent domain. There was disagreement from talmudic times onward about whether the statement applied to documents that actually transferred property or that only validated such a transfer through a Gentile court, and were witnessed by Gentiles.[11] The question was settled to include only the latter.

Gaonic Period

There was also no full discussion of the principle in the Gaonic period (650-1050 C.E.) which marked the change from Sassanian to Arab rule. The ultimate Jewish authority was the exilarch, appointed by the non-Jewish ruler; he was respected and feared by the Gaonim.[12] For many centuries the exilarch appointed the Gaonim, though this was reversed by the tenth century.[13] The exilarchs through most of this period held a high position at court, were all powerful within the Jewish community and were extremely wealthy.[14] They did not need to discuss the basis of Samuel's principle. They were royal appointees who executed the mandates of the government which provided internal autonomy for the Jewish community.

During the later portion of Arab rule the Gaonim became powerful and because of the nature of the Gentile rulers dina demalkhuta dina was largely limited to matters of taxation. They excommunicated those Jews who used non-Jewish courts and made only rare exceptions.[15] In some instances they were stricter than the talmudic statement of the principle and refused to permit a transfer of property made through a non-Jewish court, witnessed by non-Jews.[16]

The limited Gaonic discussions of the statement provided some philosophical basis for it. The scholars defended it through the theory of the divine right of kings; as the Jewish or non-Jewish ruler was appointed by God, his laws had the same force as divine laws.[17] Those who held the theory of social contract felt that the popular acceptance of the ruler and his coinage meant that his laws also had to be accepted.[18]

The Sephardic Expansion of the Principle

In Islamic and Christian Spain the principle soon went beyond the authority of tax collectors and documents issued by a non-Jewish court, but was broadened to include a series of other matters. Jews often preferred to use non-Jewish courts to settle their affairs and quarrels with other Jews and with Gentiles. We should remember the Talmudic and Gaonic objections to this,[19] but the later ruling of R. Tam was generally accepted. He opposed a Jew forcing another into the secular courts, but if both agreed to use them, then it was permissible. A further development in the early Middle Ages led to dina demalkhuta dina becoming part of Jewish law and not merely law for the Jewish population. Rabbenu Tam did this by utilizing the principle of hefker bet din hefker.[20] Slightly earlier the same effect was brought to the principle through inclusion in the code of Maimonides.[21]

In twelfth-century Spain the transfer of any property (sale, gift, will, etc.) through a Gentile court was recognized. [22] This was so despite the fact that other authorities considered wills and ketubot outside the realm of Gentile courts[23] and excluded them from dina demalkhuta dina. Later others also considered such documents within the power of the ruler, and valid if written in the language of the land[24]; and even when the marriage was done under Gentile auspices, the document was not considered invalid.[25] So we see a case in which Isaac b. Sheshet (Barfat) invalidated a Gentile marriage, but upheld the ketubah issued with it;[26] sometimes Gentile practices were accepted into the Jewish court system.

In Aragon we have the curious example of a ruler demanding that his court decide an issue between two Jews in accordance with Jewish law, as the bet din had been unable to reach a timely decision.[27] Still later Joseph Caro provided an interesting twist by making a distinction between a ketubah issued in a Christian land where the king made no such demands, and a Moslem land where such documents were subject to royal decrees.[28] Concerns were also expressed about the fairness of the courts and whether they were influenced by bribes.[29]

The most bitterly debated issue was the appointment of communal leaders through royal decree. Did dina demalkhuta dina permit this? As we have seen, this had occurred without question throughout the talmudic period in Persia. The Exilarch

was a royal appointee; this had continued to be accepted without question through the entire Gaonic period. As mentioned earlier, the rabbinic academies vied with each other over the right to propose candidates and for a long time Pumpedita was dominant; however, the ruler had the power to ignore such nominations and proceed on his own.[30] The appointment of Isaac b. Sheshet as the leader of the Algerian community without consultation led to a bitter struggle, which was only resolved after his appointment was modified by the king.[31]

The Sephardic community until modern times, as far as one can ascertain through a brief review of the responsa, continued along this path and accepted a rather wide-ranging interpretation of dina demalkhuta dina. This comported with the reality that Jews preferred to settle their fiscal affairs in the general courts and usually trusted them. Appointments made by the ruler with consultation were accepted even if reluctantly. One may well say that dina demalkhuta dina became customary and so was accepted into the halakhah as occurred with other customs, too, despite its lack of any biblical authority.[32]

The Ashkenazic Application of the Principle

The smaller and more compact Ashkenazic communities of early Central Europe were unwilling to go so far and saw all but the most necessary compliance with royal decree as a violation of Jewish law. If a choice between Jewish law and the king's law existed, then Jewish law was to be followed. Although they agreed with the Tosafists—who considered that the king's power stemmed from his ownership of the land he ruled,[33] and recognized the principle that any litigants could decide whether to use the non-Jewish or Jewish courts—it was strongly discouraged[34] but continued to be reported frequently.

These Ashkenazic as well as some Sephardic authorities sought to place restrictions on the effect of Samuel's law and to limit the king's law, but that was a procedure of doubtful value and seemed intended more for internal consumption.[35] An effort was also made to restrict impositions and taxes of the king to those placed on all citizens, not Jews alone; although this was a nice thought, it could often not be carried into practice.[36] Some sought to limit dina demalkhuta dina to new ordinances which

were in the spirit of earlier ones; others were considered invalid.[37] Of course even these authorities understood the royal need for additional revenue.[38]

The Ashkenazic community faced the same problem as the Sephardim as royal appointees to positions of communal leadership or to the communal rabbinate, but they fought it with partial success through takanot.[39] The smaller size of the community and their compact nature made this possible. The appointee might not be removed and his power of taxation remained, but otherwise, no one paid any attention to him. In fact unfit individuals regularly applied to the king for such positions and then had to be accepted by the communities. The practice of recognizing the power of the government to appoint continued and we find individuals from Isserles to the nineteenth century Hatam Sofer accepting it, albeit reluctantly.[40] On the other hand, in the German lands communal autonomy nevertheless prevailed.[41]

In Poland, Lithuania, as well as some other lands, the communities began to cooperate by the middle of the sixteenth century; they formed national tribunals, organized synods and governing councils. This was encouraged by the rulers as it simplified the collection of taxes. In turn they provided a higher degree of autonomy for the Jewish community and so dina demalkhuta dina played a smaller role than elsewhere for several centuries.[42]

In the main, Samuel's principle was limited to civil law outside the realm of family law as it had been codified by Maimonides.[43] The boundaries became vaguer from the seventeenth century onward, so we find purely Gentile witnesses to a death, or the state's declaration of death in the case of a soldier accepted for purposes of releasing an agunah; similarly dina demalkhuta dina was also invoked in the commercial aspects of the redemption of the first born, the sale of leavened items, Gentile wine, etc.[44]

The Gentile governments were often not trusted, so we find contradicting decisions and interpretations of dina demalkhuta dina: it was possible for a scholar to decide that it was not permitted to hide a Jew sought by the government, but one could advise him and presumably not turn him in when one knew where he was.[45]

The parameters provided by earlier times were interpreted restrictively and this succeeded in the Ashkenazic lands until the nature of the state changed. The ancient stability began to disap-

pear by the middle of the eighteenth century. Jews along with others became restless and sought to eliminate old disabilities, but this also meant taking on new responsibilities which came with such privileges. The boundaries of dina demalkhuta dina would need to be altered. Jewish corporate existence in the Ashkenazic lands had meant that Jews governed themselves and the areas of possible friction existed only on the periphery in dealings with Gentiles, disputes among "Court Jews," and those who sought to use Gentile courts. All of this was about to change.

Emancipation

The late-eighteenth and early-nineteenth centuries saw the emergence of larger, more powerful, national entities in central Europe. This meant a change in the status of various classes and groups in society. For Jews this brought a glimmer of hope for more rights. In the lands of Eastern Europe all of this was to take longer and the unified character of Ashkenazic Jewry was about to change. This meant that questions from the West addressed by rabbinic authorities in Eastern European lands rarely dealt with the realities of life of the questioner, but with the facts as seen from a distance and in totally different circumstances. The western rabbis eventually had to face the onrush of modernity: they were challenged by the new merchant class and its large enterprises, the financial transactions of corporations, a much larger involvement with the non-Jewish world, and the demands of the state in matters of marriage, divorce, as well as compulsory school attendance. The world had changed drastically and dina demalkhuta dina, whose scope the Ashkenazic community had limited, now had to be considered anew.

The governments sought broader national authority through curbing the power of the cities, the clergy, and guilds. None of this was easy; it was simpler to limit the autonomy of the Jewish community and its leaders. Various privileges often had a long history, but they could be abrogated by the ruler.[46] The new charter given by Frederick II of Prussia in 1750 reflected this change and limited rabbinic jurisdiction to ritual and synagogal matters.[47] Moses Mendelssohn placed all of this into a philosophical context through his division of Judaism into "eternal truths," available to all human beings and "revealed law," which was

particular to Jews.[48] As significant for our purposes, he understood that the modern state derived its authority from all of its inhabitants including Jews. Furthermore, only the state had the right to coerce, which in Judaism had been accomplished through the herem; it was now eliminated and with it the chief power of the rabbinic court. The major effect of this charter would take a while to be felt; it was seen as progress by the Jewish communities as a number of restrictions were lifted.

A more difficult situation arose through Joseph II of Austria's Ehepatent (1783) which provided state regulation for marriages.[49] The rabbinic authorities needed to deal with this immediately. The best way to face this new demand was through a takanah which obligated the communities involved to observe the secular law. Dina demalkhuta dina was not mentioned as this was a matter of marriage. The process of Emancipation went further in France even under the old regime; a commission to look into the status of Jews was established in 1788 by Louis XVI; in 1791 the National Assembly provided equal rights to Jews, but contemporary political events made that meaningless.

The status of the Jewish community was forcefully raised by Napoleon through the Assembly of Jewish Notables (the Assembly) and the Sanhedrin which he called. Napoleon had imposed restrictions on both the Catholic and Protestant churches and made them subservient through regulating the appointment of religious leaders, the system of education, and church governance;[50] he wanted to proceed similarly with the Jewish community; the process began through the Assembly which gathered on 10 July, 1806. Napoleon provided twelve questions which the assembled delegates were to answer. He insisted that the group begin its deliberations on a shabbat, an initial challenge. The delegates understood that they needed to please Napoleon and to achieve the rights which the Jews of France desired. On the other hand they did not wish to violate tradition or to anger the rabbinic authorities in the East European lands untouched by modernity. The general principle was to indicate the validity of dina demalkhuta dina in all matters where it did not specifically contradict Jewish obligations. In the area of marriage and divorce, dina demalkhuta dina was carefully cited and extended into the field of family law. Other citations were also used to create the necessary compliance. As a get was not considered valid if any bond between husband and wife remained and as the lack

of a civil divorce created such a bond, a get was not valid until a civil divorce had been given .[51] Civil marriage and civil divorce were added to the Jewish requirements in the Western lands. Various rabbinic authorities added their voice to this decision.[52]

Dina demalkhuta dina was also cited in connection with military service (Napolean's question 6). The questions and answers to 7, 8, and 9 dealt with the authority of the rabbinate, and clearly signalled that the Jewish corporate entity had vanished. Dina demalkhuta dina had been used to reconcile Jewish law and the demands of the state; it had now been used to incorporate the state's legal system into Jewish law[53] and to allow it to dominate Jewish law.

The decisions of the Assembly were to be carried out through a Sanhedrin established by Napoleon; it began to meet on 4 February, 1807. The group worded its decisions with care, so that they would avoid violations of Jewish law whenever possible; however, the very fact that this body and its predecessor was called into being through Napoleon indicated clearly where power lay. Judaism was now a religious confession rather than a corporate identity. After Napoleon's defeat, the discussions diminished everywhere except in Germany where the new nationalism came into conflict with traditional corporate Judaism.

The Reform Movement

The new Jewish scholarship, which included many reformers, sought a historic understanding of every facet of Judaism, including dina demalkhuta dina. Abraham Geiger (1810-1874), Zacharias Frankel (1801-1875), Samuel Holdheim (1806-1860) and others participated in this effort. Geiger and Frankel understood it to be used principally with criminal and civil law, and not family and ritual law. Holdheim went a step further and suggested that the ketubah was primarily an economic document, so it applied there too.[54] This became controversial and most rabbis rejected his view. Another area of potential conflict was military service. Jews wished to participate in the defense of the lands in which they lived; many were very patriotic. Not as clear were the obligations in an offensive war or peace time military service but Tiktin, Rabbi of Breslau, and Weil of Berlin, among others, insisted that those obligations stood also.[55] These scholarly

excursions were interesting, but in reality the people had already decided that the borders were looser. Civil marriage and civil divorce followed by appropriate Jewish rites rapidly became the norm as did acceptance of Gentile witnesses to the death of an individual, particularly in wartime. The rabbis could exercise some authority there, but nothing akin to what they had possessed as long as the Jewish community was an autonomous unit. Now Jews could simply walk away from a decision which they did not like.

Despite some semblance of centralization, the Jewish communities were independent, as was clearly indicated by the numerous local prayer book editions which appeared during the nineteenth century throughout Central Europe. The Jewish citizen may have paid his religious taxes to the Jewish community, supported it and tacitly acknowledged its existence, but he did not need to follow its dictates. Communal pressure existed and was a factor, but not for those who truly wished to rebel. For those who were more traditional, the Jewish communities and the rabbinate of the lands of Eastern Europe in which Emancipation did not take place or only to a limited degree, remained a pressure point. Yet the Eastern European rabbinate was less effective as the rabbinic pronouncements usually appeared in Hebrew and in closely argued legalistic writings neither seen nor understood by the general Jewish public.

The Reform movement took dina demalkhuta dina into a new sphere mainly through Abraham Geiger's efforts to deal with the issues raised by divorce. Compliance with the state's regulations had already been agreed since the Austrian Ehepatent of 1782, now Geiger carried matters further and stated that civil divorce alone should be recognized.[56] Abraham Geiger understood divorce as a purely civil act without any moral content; in Judaism it was not accompanied by any religious ceremony, so it had no religious standing.[57] In America a decision was reached at the Philadelphia Conference of the American Rabbis in 1869 [58] whereas in Germany a religious divorce which acknowledged the equality of men and women and prevented the man from withholding the divorce, was adopted in 1912 at a conference in Posen.[59] Family law was now included in dina demalkhuta dina, as were some ritual laws, so Jewish children were permitted to attend school on Saturday.

As we look at the development of Reform Judaism through its pronouncements as various European assemblies and later in America, we see that dina demalkhuta dina was rarely mentioned, however, it was tacitly accepted. So at the Braunschweig Conference of 1844, they declared that "They acted in the sense of the Talmud, making the civil law supreme in all circumstances." The Conference then dealt with mixed marriage and stated that it would be considered valid only if the ensuing children were "educated in the Jewish faith." This was followed by a rather vague statement that "Judaism will never yield up the right of independence, within its specific compass and emphatically declines to tolerate all further interference on the part of the state in its inner development and its own religious affairs."[60] "Jews must observe those civil laws regarding marriage in the respective states to which they are subject. ... The Jew is obligated to regard as his native country the one to which he belongs by birth and through civic conditions. He must defend and obey all its laws."[61] "The Rabbi has no ecclesiastical powers, he has only such rights as the State and the congregation / invests in him."[62]

The meeting in Frankfurt of 1845 declared: "We know but one fatherland, the one in which we live and aim to strike root deeper and deeper."[63] Breslau in 1846 brought no new resolutions. The Cleveland Conference of 1855 which included all groups of Judaism declared: "Statutes and ordinances contrary to the laws of the land are invalid."[64]

The meetings in Leipzig of 1869 stated: "Judaism is in harmony with the principle of the unity of the human race; of the equality of all before the law; of the equality of all in duties and rights to the country and to the State; and with the principle of full liberty of the individual in his religious convictions and in the confession of the same."[65] As soon as a court of law had declared a person dead, such declaration holds good and is considered legal in ritual cases. A woman without a get may marry after a year.[66] Civil marriage was fully recognized though the religious ceremony was to be encouraged; it was not considered indispensable. Despite all of these statements, the assembly also passed a resolution which said: "The autonomy, independence and self-government of Judaism in all religious matters must be most sacredly preserved."[67] In this much narrowed sphere, they sought to retain some autonomy.

In Augsburg in 1871 those assembled reiterated that civil marriage would be accepted, but an additional religious ceremony was encouraged. The assembly in Philadelphia in 1869 declared that only civil divorce was necessary as is purely civil matter. The law of the land prevailed in cases of doubtful death.[68] Pittsburgh in 1885, Columbus in 1935, and Pittsburgh in 1999 added nothing on the subject and did not mention dina demalkhuta dina. In an effort to add a religious element to divorce and to be egalitarian, various suggestions were made in the nineteenth and twentieth century. This led to the Seder Peridah, now observed by some Reform congregations.[69]

As we look at the development of Reform halakhah in the twentieth century, we find dina demalkuta dina was implied frequently, but rarely cited directly.[70] In the Solomon B. Freehof volumes, Reform Jewish Practice, and the parallel but less widely known volume by David Polish and Jacob Doppelt "A Guide for Reform Jews, " no need was felt to cite dina demlakhuta dina as both dealt with the practices of the synagogue and home. Even when it could have been discussed, it was avoided and other issues connected with the matter at hand were emphasized. In the question of the remarriage of a Jew and a non-Jew after a civil ceremony, Freehof might have discussed it. Instead the brief discussion focused on whether it was possible to conduct a religious ceremony after the couple had already cohabited.[71] If we examine the responsa written under the auspices of the Responsa Committee, the five hundred written by Solomon B. Freehof, five hundred by me, and those of Gunther Plaut and Mark Washofsky, we see dina demalkhuta dina appears only peripherally with rare exceptions. The role of the state was taken for granted and not discussed. So marriages performed by lay people or cantors were discussed without reference to the state. Only when a very specific issue was at stake, did this change, as in the question of whether a wedding might take place without a license, addressed to Freehof in 1974.[72] In a question about defective material used in construction dina demalhuta dina was mentioned,[73] as in a responsum on the garnishing of wages.[74] Julius Rappaport in his responsum on the use of wine for ritual purposes during the Prohibition dealt with all the ceremonies in which wine is used, but did not mention dina demalkhuta dina.[75]

It was taken for granted that the civil government and courts have the power, are just, and must be obeyed. This is true whether the discussion was about some one lost at sea,[76] collecting pledges made to the synagogue,[77] or dealing honestly with the Social Security.[78] During previous ages of mistrust of the secular government, the responses might have been different, or at least somewhat guarded. Different times zones and their implication for Jewish observances were accepted without hesitation.[79] When questions dealt with an area about which the state had not made up its mind, as, for example, the marriage of transsexuals,[80] the responsas stated that they would ultimately depend upon the state's position.

In the case of Jews testifying against fellow Jews in a civil suit, dina demalkhuta dina was actually cited and discussed. In this responsum, which summarized the instances in which dina demalkhuta dina applied, Freehof stated that "it certainly is incontrovertible that the laws of Medicare, of income tax, and of Social Security are the decisions of a just government applying equally to all citizens. Therefore it is our religious duty to obey those laws. Those who violate these laws violate a mandate of Jewish law thereby and are not to be protected."[81] Freehof then goes further and stated that the witnesses were not merely invited to testify, but ordered to do, so they are moser b'ones and must testify to protect themselves. In addition these individuals pose a danger to the Jewish community and one should testify against them on those grounds (Shulhan Arukh, Hoshen Mishpat, 388.11).[82] A similar line of reasoning was followed in questions about Social Security, Alzheimer's care,[83] and other government programs such as support for homes for the aged.[84] The sancta of the civil authorities were recognized so that Jews would participate in national celebrations.[85]

In matters of marriage and divorce, the power of the state's laws was acknowledged [86] as in the discussion of consanguinity in 1978. Concubinage, which existed in Judaism in various periods, could only be discussed in a historical and theoretical context as it is illegal in North America. When the Responsa Committee was asked about the morality of bringing a suit in a civil court, the issue was the morality of the action, not whether it was sanctioned by halakhah and should, perhaps be taken to a bet din.[87]

In the period since the Emancipation all groups within Judaism have acknowledged the state's interest in matters related to marriage. It meant, as previously cited, that a Jewish marriage would not be performed if it were prohibited by the state. Similarly no get would be issued unless it had been preceded by civil divorce. Through these acts, the principle of dina demalkhuta dina was extended beyond civil law. Reform Judaism, particularly in Germany and America, has gone one step further by recognizing civil divorce without an accompanying get and by ceasing any pretense that Jewish civil or criminal law is to be followed. Its adherents may choose arbitration by a bet din, but this continues to be rare.

Conservative and Reconstructionist Judaism

The way in which Conservative Judaism has treated dina demalkhuta dina may be seen through the actions of its Committee On Law and Standards as well as the writing of its scholars. The Conservative movement has followed the same process as the Reform movement by issuing responsa through its Committee on Law and Standards. The published proceedings of the Committee on Jewish Law And Standards contains references to dina demalkhuta dina, but no detailed discussion. This has been equally true of some of its leading scholars who have written widely on many aspects of the halakhah.[88] As with the Reform movement, dina demalkhuta dina has been taken for granted as the background in a large number of debates. Elliot Dorff and Arthur Rosett have presented a full discussion of dina demalkhuta dina along with its historical background. They indicated that the movement recognizes civil marriage although not happily. Civil divorce, on the other hand, has not been recognized. The problems of the woman who may become an agunah are then fully discussed and various possible solutions presented.[89] In other words, it exists in the background and has been taken for granted.

The Reconstructionist movement has followed the pattern of the Reform movement and understood dina demalkhuta dina broadly. Mordecai Kaplan dealt with it only peripherally in an attack on modern orthodoxy.[90]

Orthodox Judaism

As the Ashkenazic tradition was dominant in the countries of the West, its attitude of resistance rather than accommodation was the path chosen by the Orthodox community. The statements limiting dina demalkhuta dina of previous ages were quoted with little added to them. This naturally led to a clash between rabbinic pronouncements and the realities of communal life. Accommodations were made by some, as for example David Hoffmann, especially in matters relating to the laws on public school attendance on shabbat.[90] Many other issues also had to be faced especially those connected with business relationships with non-Jews.[91] In a sense Samson Raphael Hirsch accepted some accomodation through his philosophy of torah im derekh ereetz, but its practical application was limited. Although Orthodox rabbis lamented the general use of secular courts and the many other areas in which they were no longer consulted, they rarely tried to place dina demlakhuta dina into a new framework and did their best to enforce an acceptance of early limits.

Conclusion

If we take a retrospective view of dina demalkhuta dina we must see it as the natural result of living as a minority, large or small, in many lands and civilizations. Without it we would not have survived or been able to function. As long as the Jewish corporate existence was recognized alongside other corporate bodies, there were large areas in which the secular authorities did not wish to enter. This changed with the advent of the modern state and Judaism changed, without a murmur. Except in the matter of divorce we have not moved further than the rest of Judaism.

The Orthodox community has also almost totally abandoned the codes of civil law, considered divine. A bet din may arbitrate and the civil authorities, naturally, do not care if a dispute is settled amicably through other means, but it is rarely used. In fact it is so rare that it makes the newspaper headlines when utilized outside the tight-knit New York traditional communities.

It is ironic that Judaism, which is so free and far removed from persecution and even prejudice, finds itself almost completely subject to the state. Although free, it is more controlled

than in virtually any previous generation. That is one way of viewing this situation. On the other hand we may well claim that we now have the ideal situation in which Jews can subject themselves completely to Jewish law (halakhah) as long as they do so voluntarily and add this observance to that claimed by the state.

Is our modern expansion of dina demalkhuta dina permanent or only a temporary accomodation? The long history of the adjustment of this principle should teach us that nothing is permanent. Our view of it and the way in which Judaism uses it will surely change Modern times have taken it further than ever before.

Notes

1. The law of the Land of Israel is an amalgam of Turkish, British, American, and Jewish law; this and the division of legal authority between secular and rabbinic courts would make this an interesting topic for an additional paper. As the State of Israel is esentially a secular state, in some ways the conflict of dina demalkhuta dina exists there too though theoretically this should not be so. The general problem of dina demalkhuta dina has been treated from a different point of view by Leo Landman, Jewish Law in the Diaspora: Confrontation and Accommodation (Dropsie College Press), Philadelphia, 1968; and by Samuel Shilo, Dina d'Malkhuta Dina, Jerusalem, 1974.
2. Matthew 22.21; Mark 12.17; the New Testament also contains various statements of loyalty to Caesar (John 19.15; Acts 17.7; 25.8, etc.). The meaning of these statements in their context is not entirely clear. The topic has been discussed both in its New Testament setting as well as its later ramifications, especially after Martin Luther.
3. Gittin 10b; Nedarim 28a; Baba Kama 113a; Baba Batra 54b.
4. Biale, Power and Powerlessness in Jewish History, (Schocken), New York, 1986, pp. 54 ff.
5. An example of closeness was provided through the citation that Samuel did not order mourning for Jews fighting on the Roman side against the Parthians in their siege of Caesarea as this did not involve the majority of Jews. It simply indicated that he would not mourn for those who allied themselves with the enemy forces (Moed Katan 26a).
6. Bial, op. cit., pp. 54ff.; Jacob Neusner, A History of the Jews in Babylonia, II The Early Sassanian Period, (E.J. Brill, Leiden), 1966.
7. M. Nedarim 3.3.
8. Nedarim 28a.

9. Baba Kama 113b.
10. Baba Batra 55a.
11. Gittin 10b.
12. Erubin 11b.
13. Letter of Sherira Gaon (ed.) N.D. Rabinowich, (Jacob Joseph Press), Jerusalem, 1988.
14. Salo W. Baron, The Jewish Community, (Jewish Publication Society), Philadelphia, 1945, Vol. 1, pp. 175 ff.
15. Lewin, Baba Kama, p. 99; Harkavy, Teshuvot Hagaonim, p. 440.
16. Simcha Asaf, Teshuvat Hagaonim, p. 75.
17. Simcha Asaf, ibid., vol. 2, p. 75.
18. amuel b. Meir (Rashbam), Baba Batra 54b; Hayim ben Isaac, Or Zarua 34; Solomon Ibn Adret, Responsa Vol. 6 # 149; Shulhan Arukh, Hoshen Mishpat, 369.2. The effect of new coinage issued by the king on a debt previously incurred raised the question of royal prerogative (Solomon ibn Adret, Responsa, III 34, 40, V 198).
19. Gittin 88b; Harkavy, Teshuvot Hagaonim 278.
20. I. Agus, Teshuvot Baalei Tosfot.
21. Hil. Gezelah 5.12-18; Hil. Sekhiyah Umatan 1.15.
22. Asher, 18.2; Solomon b. Adret, Responsa III 15, 16, 79; VII1 48; Barfat, Responsa 51.
23. R. Yerucham, Sefer Mesharim; Samuel de Medine, Hoshen Mishpat, 350; Barfat, Responsa 51;Caro, Bet Joseph to Tur, Hoshen Mishpat, 26.
24. For the text and a discussion of its meaning see Louis Finkelstein, Jewish Self-Government in the Middle Ages, (Philipp Feldheim), New York, 1964, pp. 350 ff.
25. Barfat, Responsa, 5 and 6; though Joseph Caro disagreed with this decision (Abkat Rachel, 81); he made a distinction between Islamic lands where such documents were part of the royal prerogative and Christian lands where they were not.
26. Isaac b. Sheshet (Barfat), Responsa 5 and 6.
27. Isaac b. Sheshet (Barfat), Responsa, 305.
28. Joseph Caro, Abkat Rachel 81.
29. Solomon ibn Adret, Responsa, II, 244, V 287; Asher, Responsa, 89.8; Mishneh Torah, Hil, Malveh velaveh 27.1; etc.
30. Appointments occurred often without consultation and aroused storms of protest. See Salo W. Baron, The Jewish Community, vol. 1, pp. 285 ff.
31. Isaac b. Sheshet (Barfat), Responsa 271; Samuel b. Simon of Duran, Responsa, I, 158; 533; Solomon ibn Adret, Responsa I, 475; A Neuman, Jews in Spain, Jewish Publication Society, Philadelphia, 1946, p. 114.
32. An interesting modern Israeli discussion of the place of custom and dina demalkhuta dina may be found in Nahum Rakover, Modern Applications of Jewish Law, Jewish Heritage Society, Jerusalem 1992, pp. 103 ff.
33. See Note 21.
34. This principle stated that every person had the right to decide how to dispose of his financial affairs. However, the authorities understood the use of non-Jewish courts to be destructive to communal cohesion.
35. In the eighteenth century Moses Sofer tried to keep the financial issues of ketubot outside the range of the king's law by stating that, after all, they were

intended for women only and so of no significance. (Hatam Sofer, commentary to Even Haezer 126).

36. Mishneh Torah, Hil. Gezelah 5.14; Solomon b. Adret, Responsa, 5.198.
37. Solomon Ibn Adret, Responsa 6.254; Asher ben Yehiel, Responsa 86.9; Solomon ben Simon of Duran, Responsa 212; etc.
38. Shulhan Arukh, Hoshen Mishpat 369.
39. Finkelstein, op. Cit., pp. 357 f.
40. Isserles, Responsa, 123; also Hatam Sofer.
41. L. Finkelstein, op. cit., p. 154.
42. Baron, op. cit., pp. 323 ff.
43. Mishneh Torah, Hil. Zekhiya umatanah 1.15; Hil. Gezelah 5.12-18; Solomon ibn Adret, Torat Habayit III
44. Hatam Sofer, Even Haezer 43;Joseph Saul Nathanson, Shoel Emeshiv, etc.
45. air Hayyim Bachrach , Havat Yair, 176.
46. Jacob Katz, Tradition and Crisis,(Schocken Books), New York, 1993.
47. J. R. Marcus, The Jew in the Medieval World, (ebrew Union CollegePress), Cincinnati, 1938, p. 96.
48. M. Mendelssohn, Jerusalem and Other Jewish Writings, (Bloch Publishing), New York, 1969, pp. 102ff.
49. Freiman, Seder Kiduishin Venisuin, (Mosad Harav Kook), Jerusalem, 1964, pp. 312f.
50. Gil Graff, Separation of Church and State, pp. 73ff.
51. Tama, Transactions of the Parisian Sanhedrin, (tr. F. D. Kirwan), (Charles Taylor), London, 1807; Shulhan Arukh, Even Haezer 137, 143.
52. Ibid.; Jacob Reischer, Shevut Yaakov, Orah Hayyim 1.20.
53. Ibid., p. 197.
54. Samuel Holdheim, Ueber die Autonomie der Rabbinen, (Kurschner), Schwerin, 1843, pp. 59 ff., 137-165 and L. Loew, Gesammelte Schriften, (Alexander Baba), Szegedin, pp. 348-352.
55. Mishneh Torah, Hil. Shabbat 2.23; etc.; A. J. Frankel, Literaturblatt des Orients, 1842 in which he quoted Abraham Tiktin and Meyer Weil.
56. Wissenschaftliche Zeitschrift fur judische Theologie Vol. 1 (1837) pp. 1–14.
57. Abraham Geiger, Zeitschrift fur Wissenschaft und Leben, Vol. VIII.
58. W. Gunther Plaut, The Rise of Reform Judaism, (WUPJ), New York, 1963, pp. 222 f.; W. Gunther Plaut, The Growth of Reform Judaism, (WUPJ), New York, 1965, pp. 259 f.
59. W. Gunther Plaut, The Growth of Reform Judaism, New York, 1965, pp. 69
60. "Prottokolle," CCAR Yearbook I, (Bloch Publishing), Cincinnati, 1891, p. 82
61. Ibid., p. 82.
62. Ibid., p. 83.
63. Ibid., p. 88.
64. Ibid., p. 124.
65. Ibid., p. 101.
66. Ibid., p. 106.
67. Ibid., p. 108.
68. Ibid., p. 119.
69. Rabbi's Manual, Central Conference of American Rabbis, (CCAR Press), New York, 1988, pp. 97ff.

70. A responsum by Kaufmann Kohler issued in 1914 dealt with a marriage problem and concluded that the Conference had to debate the issue of the extent of the State's dominance in this matter (Walter Jacob, American Reform Responsa, Central Conference of American Rabbis, New York, 1983, p. 436). Another by Gotthard Deutsch on "Divorce of an Insane Husband" provided a lengthy discussion of various Jewish legal principles involved in this question, but not dina demalkhuta dina, although he mentioned national civil law at the conclusion of the responsum. (Ibid., 514 ff).
71. Solomon B. Freehof, Reform Jewish Practice, (UAHC), New York, 1944, Vol. 2, pp. 83 ff.
72. Solomon B. Freehof, Contemporary Reform Responsa,(Hebrew Union College Press), Cincinnati, 1974, pp. 98 ff.
73. Contemporary American Reform Responsa, (Central Conference of American Rabbis), New York, 1987, p. 16.
74. Ibid., 263.
75. Walter Jacob, American Reform Responsa, pp. 123 ff.
76. Solomon B. Freehof, Recent Reform Responsa, (Hebrew Union College Press), Cincinnati, 1963, no. 22.
77. Ibid. no. 44.
78. Solomon B. Freehof, Current Reform Responsa, (Hebrew Union College Press), Cincinnati, 1969, no. 52.
79. Solomon B. Freehof, Modern Reform Responsa,(Hebrew Union College Press), Cincinnati, 1971, no. 43.
80. Solomon B. Freehof, Responsa for Our Time, (Hebrew Union College Press), Cincinnati, 1977, no. 42.
81. Solomon B. Freehof, Ibid., no. 54.
82. Walter Jacob, Contemporary American Reform Responsa, (CCAR Press), New York, 1987, no. 6.
83. Walter Jacob, Contemporary American Reform Responsa, no. 86.
84. Walter Jacob, Questions and Reform Jewish Answers, (CCAR Press), New York, 1992, no. 91.
85. W. Gunther Plaut and Mark Washofsky, Teshuvot for the Nineties, (CCAR Press), New York, 1997, pp. 159.
86. Walter Jacob, American Reform Responsa, no. 129.
87. Walter Jacob, Contemporary American Reform Responsa, no. 11.
88. David Golinkin,ed., Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927-1970, (Rabbinbical Assembly), Jerusalem, 1997, 3 vols. Similarly Joel Roth's The Halakhic Process, A Systemic Analysis, (Jewish Theological Seminary), New York, 1986 did not deal with this question; David Golinkin (ed.), The Responsa of Professor Louis Ginzberg, (Jewish Theological Seminary), New York, 1996.
89. Elliot N. Dorff and Arthur Rosett, A Living Tree, the Roots and Growth of Jewish Law, (State University of New York), Albany, 1988, 515 ff.
90. Mordecai Kaplan, Judaism as a Civilization, (MacMillan), New York, 1934, p. 158.
91. David Hoffmann, Melamed Lehoil, (Hermon Verlag), Frankfurt a M., 1926, 1927, 1932, vol. 1, p. 65-67, 75.
92. Ibid.,vol. 1, pp. 49 ff, 108 ff., vol. 3 pp. 22 ff, 32 f.