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## “Dina De'malchusa Dina”: Secular Law As a Religious Obligation

Normative Judaism is concerned not only with religious ritual; a major area of concern is the relationship of the individual to the society in which he lives, and to others in that polity. A familiar exemplification of this principle is evident in the Ten Commandments, wherein the first five speak of the man-G-d relationship, and the second tablet teach the proper attitudes in the man-man relationship.

When the Jewish people lived in their own political and social milieu, the laws of the Torah governed their environment. However, in the centuries of our Diaspora, one of the most difficult areas of adjustment has been in finding the proper mode of accommodating the rules of a secular or Christian society to a Torah *weltanschauung*. The Torah-true Jew does not lose sight of Torah ideals, even while subject to the discipline of another system. The topic which we will discuss herein, is to what extent the laws of the Torah are superseded or ignored or adapted—or perhaps *not* superseded or ignored—by the realities of existence in a non-Torah framework.

So, for example, we have to consider the committed Jew in his role as American citizen, tax-payer, businessman, profes-

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sional. To what extent does being a "good Jew" require a person also to be a "good American"? How about cutting corners on one's income tax—is it prohibited by the religion? Do American ceremonies of marriage and divorce have validity in the eyes of halacha? Should two Jews who enter a business partnership be guided by American law or by the Shulchan Aruch—or both? What if there is a conflict?

The basis of any accommodation of Torah principles to secular law lies in the Talmudic dictum, "Dina de'malchusa dina". In several places, the Gemara quotes<sup>1</sup> the principle of the teacher Shmuel, that the laws of the government are binding on Jews, even when they differ from the laws of the Torah. The main application of this principle is the collection of taxes. The government officials are permitted to collect taxes, and the cash or property they collect in taxes are considered as legally belonging to the government, and not considered as stolen property in their hands.

The right of the government to levy taxes is restricted only to a bona fide government, and does not apply to any pirate who decided on his own to rob the masses in an organized fashion.<sup>2</sup> Even when it is the official government levying the taxes, if the system of taxation is unjust, as for example—if one segment of the population is discriminated against and is taxed more than another—then, too, this principle does not apply. Shmuel formulated his principle by stating "*Dina de'malchusa dina*," "The law of the government is binding", but not "*Gazlanusa de'malchusa*," "The robbery of the government".<sup>3</sup>

Before proceeding with an analysis of the specifics of the principle "*Dina de'malchusa dina*," we ought to point out that

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1. Bava Kama 113a; Bava Bathra 54b; Nedarim 28a; Gittin 10b.

2. Rambam Hilchot G'zelo V'avedah, end of Chapter 5, section 18.

3. Ibid, section 14; Magid Mishnah to section 13; Choshen Mishpot 369, section 8 in Ramo.

this is a much more narrow concept than is often imagined. "Dina de'malchusa dina" cannot be interpreted to mean that the law of the land is the law, period. Were this so, it would mean that wherever the law of the land is different from the law of the Torah, it is the law of the land which we are to follow. This is absurd, for it would reduce Judaism to a practice of rituals alone, and would effectively nullify about half of the Shulchan Aruch.

Rather, we take the principle "Dina de'malchusa dina" to indicate that in certain *areas* and under certain, specific *circumstances*, the halacha requires that we be governed by the dictates of the sovereign state in which we live rather than by the teachings of the Torah alone. We will now consider some of those areas.

The Mishna in Nedarim<sup>4</sup> tells us that in order to avoid paying taxes, one may even swear what *might seem to be* a false oath, which under normal circumstances would not be allowed. In commenting on this Mishna, the Gemara asks, but why should we allow this even for the purpose of avoiding paying taxes, if the government is legally entitled to collect their taxes? Why consider this a case of "sha'as hadechak" and "oness", to permit what seems like a false oath? To this the Gemara answers that the Mishna is obviously referring to a case where "Dina de'malchusa" does not apply: a) either the tax-collector was not authorized by the government, but is merely collecting for a pirate; or b) the government sold the right to collect taxes to a private individual, who is unjustly holding up the public to pay much more than the government needs in order that he himself should gain a tremendous profit; in such a case we no longer are dealing with a "dina de'malchusa," but rather a "chamsonusa" or a "gazlanusa

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4. 28a.

de'malchusa," an unfair tax, which the government has no right to levy.

What is the halachically-binding force of the taxes levied by the government? Why isn't the money collected by the government—without the consent of the individual taxpayer—considered as stolen property? The Me'iri<sup>5</sup> and the Vilna Gaon<sup>6</sup> both maintain that this is based on the "Parshas Melech": In the Book of Shmuel I (Chap. 8), the prophet Shmuel warns the Jewish people against the evils of a King; among other things, Shmuel warns that he will tax the people heavily. In the Talmud<sup>7</sup> there is a dispute as to the understanding of "Parshas Melech", this chapter dealing with "the evils of the King". Was the prophet Shmuel warning the nation by exaggerating the limits of royal authority, and mentioning things that the King was not really legally authorized to do; or was Shmuel portraying accurately the rights and privileges of the King? The halacha has accepted the second understanding of that Parsha, that "Kol ho'omur beparshas melech", everything spoken of in that section of the Book of Shmuel, "melech mutar bo", the King is legally entitled to do. Since levying taxes is mentioned among the various warnings of Shmuel Ha'novi, we can clearly derive from this section in the Novi the right of the government to tax the people.

This suggestion of the Me'iri and the Vilna Gaon is, of course, assuming that the Parshas Melech applies to all kings, both Jewish kings in Eretz Yisroel, and non-Jewish governments ruling over other countries. Tosafot in their comments on that discussion in Gemara Sanhedrin<sup>8</sup> limit the Parshas

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5. Commentary to Nedarim.

6. Commentary, Choshen Mishpot 369, sub section 34.

7. Sanhedrin 20b.

8. Ibid, section beginning "Melech..."

Melech only to a *Jewish* king ruling over *all* of Eretz Israel. This is obviously in contradiction to the opinion of the Mei'ri and the Vilna Gaon. Other objections were raised against the suggestion of the Mei'ri and the Gaon by the D'var Avrohom.<sup>9</sup>

This dispute between Rabbinic authorities is not just a hair-splitting technicality. Upon the resolution hinges the major question of whether a Jew living under a non-Jewish government has to consider the laws of the land as legitimately binding upon him or not. For example, would the government of the United States, whether through the President or the Congress, have the status of a "King" (i.e., the legitimate ruler), or not; and if so, what are the limits of the ruler's power?

It is not necessary at this point to follow through to the end of the technical dispute; suffice it to record that practical halacha generally accepts that the ruler does have certain legitimate powers over the individuals under his control, and that to some extent, as part of keeping the Torah, Jews must accept these restrictions or guidelines. We will now proceed to examine the nature of that power.

According to the Ramban,<sup>10</sup> the rights of the government to tax are very limited. Only such taxes that had already existed in the past may be continued. The king has no right to institute any *new* taxes, even if they are just and fair. The Ramban seems to have understood the basis of "Dina de'malchusa" for the purposes of taxation as being based on the principle of "hischaivus mi'daas," one's own personal acceptance of an obligation. The fact that the people have been paying taxes in the past is taken as an indication of their willingness and their

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9. Volume I, page 14, in footnote.

10. Quoted by Magid Mishnah, Hilchot G'zelah, Chapter 5, section 13.

agreement to continue to pay them; and anyone who accepts upon himself any monetary obligation, is obliged to pay that debt.<sup>11</sup>

This view of the Ramban was not shared by the majority of the Rishonim. In their view, the king may even institute new taxes, and they too will be legally binding, provided they are fair and just and do not discriminate. Where then is the Biblical source for the principle of "Dina de'malchusa dina"? If one

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11. Whatever is commonly practiced (*minhag ha'medinah*) is considered as if all the people had expressly accepted upon themselves to follow. In the Talmud we find this principle regarding cases where all that is needed is a *T'nai* (condition) to regulate an already existing legally-binding agreement. (Yerushalmi, *Bava Metziah*, beginning with Chapter 7). The *Ramo*, *Choshen Mishpat* (Chapter 46, section 4) quoting the *Terumas Hadeshen*, has extended this principle to apply even to cases where no previous binding agreement (*hischaivut*) had been enacted, and this understood and assumed agreement to follow the *minhag ha'medinah* is what actually serves to create the obligation.

Usually, a monetary obligation does not become legally binding until an act of *Kinyan* is done. (For example: a *shtar*—a document—is handed over to the one who is acquiring the obligation; or a *Kinyan suddar* is made.) This is required only where the obligation is towards a private individual. If, however, one is obligating himself to the public, or to the government, no formal "act of acquisition" (*maaseh Kinyan*) is needed. See *Hadorom*, *Nisson 5740*, pp. 29-30, *Chazon Ish*, *Orlah*, (I,15) *Comments of Rabbi Akiva Eiger to Choshen Mishpat*, Chapter 333, section 2.

Therefore, according to the view of the Ramban, all that is needed is that the *minhag ha'medinah* should establish the individual's implicit agreement to pay his taxes to the government; and although there is no formal *maaseh Kinyan*, the obligation in this case would be legally binding.

See *D'var Avrohom* (Vol. I, p. 13a), and *Chazon Ish*, end of volume on *Choshen Mishpat*, collection of essays on miscellaneous topics (16,9), who gave different interpretations to the view of the Ramban.

does not accept the opinion of the Vilna Gaon, should this lead us to assume that this principle of "Dina de'malchusa" is only of Rabbinic origin?

That was indeed the view of the Bais Shmuel,<sup>12</sup> one of the major commentaries on the Shulchan Aruch, that "Dina de'malchusa dina", is only "Miderabanan," (of Rabbinic origin). However, most Poskim following him have not accepted his view, and have assumed that the principle of Shmuel is of Biblical origin—Midoraisa.<sup>13</sup>

At first, it may seem to matter little whether the authority of the ruler to make regulations rests upon a Biblical or Rabbinic basis; in either case, the regulations would be binding upon the Jew. Actually, however, the resolution could have quite far-reaching consequences. For example, if the *Torah* accepts government regulation as binding, then transactions conducted in accordance with the law of the land would have the same force as those executed in accordance with Torah stipulations. Thus, the sale of chometz before Pesach could be effected by a simple bill of sale, which would be legal under secular law; there would be no need for the various forms of kinyan and transferral of property which the Rabbis undertake.

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A new approach to the issue of the halachic legitimacy of secular law was developed by the last Rabbi of Kovno, Rabbi

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12. Commentary to Even Haezer, Chapter 28, sub-section 3.

13. Avnei Miluim, Even Haezer; Tshuvot Chasam Sofer, Yoreh Deah responsum 314, D'var Avrohom, Volume I, p. 9.

Avraham Dov Ber Cahana Shapiro, in his classic work, *Dvar Avrohom*:<sup>14</sup> The Talmud shows<sup>15</sup> from various verses that "hefker Bes Din hefker", that the Rabbinic Court has the authority to take away someone's property, and to declare it ownerless (hefker); and even to declare that it should be considered as if that property belongs from now on to someone else, despite the fact that the other person made no "kinyan" or formal "act of acquisition."<sup>16</sup> This ability of the Bes Din to declare as hefker someone else's property, is not due to the "authority of Torah" they possess, for here they are *not* following the laws of the Torah, but rather due to "governmental authority" possessed by the Bes Din. Therefore, the Biblical passages which indicate to us the power of the Bes Din to make something hefker apply also to non-Jewish jurisdiction, and

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14. Volume I, p. 12a.

15. Gittin 36b.

16. Rashba, Gittin. There is a major dispute between the Kzos Hachoshen and the Nesivos to Choshen Mishpot, Chapter 235, section 7, regarding this principle of Hefker Bes Din. Do the Psukim indicate that Min Hatorah (Biblically) Bes Din only has the ability to declare someone's property as Hefker, and their authority to declare that it belongs to somebody else is not Mid'oraitho; or should we assume that even the ability of the Bes Din to declare that someone's property should belong to another person is also Biblical in origin? The major difference in this issue would be whether something acquired through a Kinyan D'rabonon belongs to the person only Mid'rabonon or even Mid'oraitho. Could one use a Lulav and Esrog which he acquired merely by having picked it up (Hagboho) without having paid for it (payment constituting the Kinyon Mid'oraitho, and Hagboho being only a Kinyan Mid'rabonon) on the first day of Succos, where the mitzvoh d'oraitho requires that it must belong to me? See Divrei Yichezkiel by Rabbi Yechezkiel Burstein, Chapter 56, where he shows that this Machlokes between the Kzos and the Nesivos is rooted in a much earlier disagreement amongst the Rishonim.

are actually the source of the principle of "dina de'malchusa".<sup>17</sup> It is interesting to note that the famous Chassidic Rebbe of Sochochov, Rabbi Avrohom Friedman, in his classic work "Avnei Nezer," a contemporary of the "Dvar Avrohom," developed a very similar notion in his fascinating responsum<sup>18</sup> dealing with the case of a son-in-law interested in inheriting his father-in-law's rabbinical position.

Assuming that the government has the legal right to levy taxes, and that the citizens are obligated to pay these taxes, like any other debt that any individual owes to someone else, the question now arises, what would be the status of one who does not pay his taxes; or does not pay the full amount that he should legally be paying? If an individual owes money to someone else and fails to pay, he violates the aveirah of "lo

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17. According to the view of the Nesivos (in note 16), that Biblically the Bes Din only has the ability to declare someone's property as ownerless, Rabbi David Rappaport explains in his work *Zemach Dovid* (pp. 110-111) that the basis of this principle runs as follows: the Bes Din (and hence, the government as well) has the authority to act as if they were the true owners of the property. Therefore, just as the owner himself could declare his property as Hefker (ownerless) without any need for any additional action (*maaseh Kinyan*), so too the Bes Din can declare it as ownerless without the need for any act of *Kinyan*. But regarding declaring someone else as the owner, just as the true owner himself was unable to transfer ownership of his property to someone else without a formal act of *Kinyan*, so too the ability of the Bes Din to declare someone else as the owner would only be *Mid'rabonon* in nature, and not *Min Hatorah*.

With respect to accepting upon oneself a monetary obligation towards the government, just as the individual could have accomplished this without the need for any formal act of *Kinyan* (see above note 11), so too the government has the ability—*Min Hatorah*—to levy taxes upon individuals, and the obligation to pay those taxes would be the same as in the case where the person himself had accepted that debt.

18. *Yoreh Deah*, Responsum 312, sections 46-52.

sa'ashok" and possibly also the aveirah of "lo sigzol".<sup>19</sup> If someone should refrain from paying the taxes due to a Jewish government, these two violations will apply.

[This raises an interesting incidental question—is there any *religious* restriction against changing American dollars into Israeli currency on the famous black market in Israel? Since this is a Jewish government, would it be a violation of these two prohibitions? It would seem that technically these particular issurim would not apply; in changing money for a higher rate, one is not actually stealing anything, nor is he failing to pay the government a legitimate tax. I do not mean to imply that other issurim might not be applicable.<sup>20</sup> ]

If however it is a non-Jewish government to which one owes taxes, the following question arises: The Talmud clearly forbids "gezel akum" stealing from a nochri, but "hafka'as halva'oso" is allowed.<sup>20a</sup> That is to say that although theft from a nochri is forbidden, *not paying back* a debt which one owes to a nochri is not considered an act of gezel (theft). If this be the case, then the non-Jewish government has all the legal right to

19. According to the Talmud (Bava Metziah 61a and 111a) one who fails to pay his debts violates both the Laws of "Lo Sigzol" and "Lo Saashok". The Rambam (at the very beginning of Hilchot G'zeloh V'avedah) clearly distinguishes between these two violations; Lo Sigzol only applies when a person takes away someone else's property. If someone fails to pay his debts, he violates only Lo Saashok. The commentary Maggid Mishnah attempts to discover a source in the Talmud for the Rambam's view.

20. Any government regulations imposed for the purpose of protecting the consumers or for enhancing the economy, etc., are halchically binding based on another aspect of the principle of "Dina de'malchusa". One of the major functions of any king (or government) is to keep law and order in his country. "The king preserves his country by insisting on mishpot" (Proverbs 29,4). See Avnei Nezer in note 18. This aspect of "Dina de'malchusa" will be covered later in our discussion of "makin ve'onshin shelo min hadin".

20a. Bava Kamma 113b.

levy just and fair taxes; still, what is to forbid the individual from failure to pay his taxes on the grounds that "hafka'as halva'oso" (non-payment of a debt) of a nochri is allowed?

If one fills out a tax form with false information in such a way that he pays less than he really owes the government, this involves a violation of "sheker," dealing falsely with others.<sup>21</sup> The question remains however, is it ossur if one simply never fills out any tax form at all, or does not pay sales tax, where there is no problem of "sheker", but is merely a situation of one's not paying his debts to a nochri? This question has practical immediacy, with the proliferation of myriads of little business enterprises which are not registered with the government. The private basement businesses neither collect nor pay sales tax. Is it "muttar" for an observant Jew to maintain such a store? Furthermore, may one *buy* from such a store? And would it even be permissible to report to the pertinent government agencies the existence of this illegal business? Does the principle of "Dina de'malchusa dina" apply in such a case?

To the question of whether it is permissible to operate a store and not collect or not pay sales tax, we find a mixed response. In the view of the Vilna Gaon<sup>22</sup> and other Poskim,<sup>23</sup> not paying the secular government that which it is owed is permitted. But if one might possibly create a situation of "chilul hashem" by not paying his taxes, there is no doubt that the

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21. See Vayikro 19-11, that one is forbidden to falsify in money matters.

If one signs a false oath, according to many Poskim this is a violation of Shvuas Sheker. (See Teshuvos Rabbi Akiva Eiger 30-32.) Even if one has not violated either of these injunctions, the Talmud (Kiddushin 45b) points to the Biblical passage in the book of Tzefaniah that the Jewish people must be especially outstanding in the area of honesty and truthfulness, and must never lie or falsify, even when there is no monetary issue involved.

22. Choshen Mishpot 369, sub-section 23.

23. Kesef Mishneh to Hilchot G'zelo V'avedah, Chapter 5, section 11.

“heter” of “hafka’as halva’ah” of akum does not apply. In the *rare instance* where (a) there is no question of signing a false statement, and (b) there is no possibility of causing a chilul hashem, this group of poskim does not consider it forbidden.

However, the Ramo<sup>24</sup> in his comments to the Shu’chan Aruch, as well as the Baal HaTanya (R. Schneuer Zalman of Liady), have both rejected this view. They feel that although “hafka’as halva’ah” of a private individual and nochri may be permissible, this principle has no application with respect to paying of one’s taxes to the government. The reasoning for this distinction is as follows: The government not only imposes the tax, but in this instance also requires that the individual send the taxes to it.<sup>25</sup> The principle “Dina de’malchusa dina” cannot only create an obligation of a debt, but it can also obligate one to do specific actions—such as paying the debt. Therefore, although considering the Biblical law alone, one would not be required to pay one’s debts to the non-Jewish government (following the principle that hafka’as halva’ah of a nochri is muttar), yet, based on the rule “Dina de’malchusa dina”, he would

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24. Choshen Mishpot 369, section 6, in Ramo.

25. See Mishneh Lemelech, end of Chapter 5, Hilchot Gezelah Veavedah. According to the view of the Kzos (mentioned above in note 16), the Bes Din (and therefore also the government) has the authority both to declare ownership and non-ownership, but does not necessarily have the power to otherwise act as if they themselves were the Baalim. Following the opinion of the Nesivos, however, (mentioned above in notes 16 and 17) that the Bes Din acts as if they were the Baalim, we can understand quite well how they are able to impose upon an individual an obligation to do a specific action (as, for example, to fill out his tax form and pay his taxes) and not just to create the Chiuв Momon (the debt). Just as the individual could have accepted upon himself as a Poel (a worker) the obligation to do a specific job, so too the Bes Din (or the government) can impose such an obligation upon him, as if he himself had agreed to it.

still be required to pay his taxes just as if he had accepted the obligation of payment willingly by himself.<sup>26</sup>

If we accept the latter argument prohibiting maintaining a business without paying sales tax for the merchandise sold, what is the status of a prospective customer? May he buy in such an establishment? Rabbi J.B. Soloveitchik has said that it is forbidden to buy there, because of the Biblical prohibition "lifnei ivair" (one may not tempt or make it attractive for someone else to commit a transgression). However, as far as reporting the illegal shopkeeper to the authorities, this would be forbidden, as we will show later in our discussion.

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The first area of "Dina de'malchusa dina", as we have seen, is in the taxation function of government. A second area is minting coins and establishing the value of the currency. According to the Shach in his commentary on the Shulchan

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26. There is yet another significant view amongst the Rishonim regarding the right of the government to levy taxes. According to the opinion of some Baalei Tosafot, (see Ran to Nedarim 28a beginning B'Muchas), just as a landlord is entitled to charge rent for the use of his apartment, so too the government owns the land of its country and is entitled to charge rent (in the form of taxes) for the individual's right to stay in that country. Following this view, the Israeli government would not have the power to levy any taxes upon Jewish people living in that country, for all Jews are entitled to live there rent-free. Although some claim in the name of the Chazon Ish that he felt one could rely on this opinion, it would seem to me that this view was not shared by the majority of the Poskim.

In addition it should be noted that even to this opinion, only the first aspect of "Dina d'malchusa" would be excluded in Eretz Yisroel, namely, regarding the government's right to levy taxes. With respect to the other three areas of "Dina D'malchusa Dina", all Rishonim would agree that they apply even in Eretz Yisroel.

In this essay I have followed the D'var Avrohom (Vol. I, p. 14, in note) in dividing the topic into four parts: (1) taxation; (2) minting of currency; (3) keeping law and order and punishing criminals; and (4) introducing a legal system.

Aruch,<sup>27</sup> this is a specific function of government. If the government should suddenly change the monetary system, and declare new coins as legal tender, even if the new coins are intrinsically of much lesser value than the older ones, the principle of "Dina de'malchusa" definitely will apply.<sup>28</sup>

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27. Yoreh Deah 165, sub-section 8.

28. This point is most relevant with respect to two areas of Halacha: (1) the law is that Maaser Sheini (the second tithe on vegetation grown in Eretz Yisroel) may only be eaten if it is first redeemed into cash. Although one may redeem Hekdesh, or redeem a first-born son using "Shoveh Kesef" (commodities), the pidyon or redemption of Maaser Sheini requires "Kesef sh'yesh olov Zurah". (Talmud B'choros 51a). This would imply that in America, one who happens to have some Maaser Sheini could only redeem it in American coins; and one in France could only redeem his Maaser Sheini into French currency. Those groups who do not recognize the present Israeli government, and consider the Zionists as pirates who took over Palestine from the Arabs illegally, would not be able to redeem their Maaser Sheini in Israel using Israeli currency.

(2) Regarding the prohibition against collection of interest on debts: If a loan of English money were made in the United States, and at the time the debt were due the American currency had gone down due to inflation, one would not be permitted to repay the full amount of English money he had borrowed but only the amount it was worth in American money at the time of the loan. (See Bris Yehuda, end of Chapter 18.) If however one had borrowed cash of the local currency, and the value of the money had increased by the time the debt was due, he would be permitted, and indeed obligated to pay in full the entire amount of money he had borrowed. The Halacha declares that cash always retains the same value, and only commodities fluctuate in their value. See Igrot Moshe, Yoreh Deah, Volume II, Responsum 114.

Some view money as an evil of society, and feel that a more perfect society would prevail if it were eliminated. The Chazon Ish has pointed out (Yoreh Deah 72:2) that in his opinion this can not be true. Since the Torah requires that for the redemption of Maaser Sheini only cash may be used and not commodities, apparently currency is an essential component of the ideal Torah-oriented government. Wherever Jews are in control of a government, it would be proper for them to see that their country should have a system of currency.

A third, and most significant area of application of "Dina de'malchusa" is the right of any government, Jewish or non-Jewish, to punish criminals as they see fit, for the purpose of keeping law and order.<sup>29</sup> The Gemara states<sup>30</sup> that there was a tradition that "the Bes Din may issue corporal punishment or monetary fines even when not warranted by the Torah". The Ran commenting on that Gemara points out that this permission not only applies to a Jewish religious Bes Din, but even to a secular or non-Jewish government. Proof to this is shown by Ritva from the Talmudic story<sup>31</sup> of Rabbi Eliezer ben Rabbi Shimon who was by profession a policeman for the Roman government, and would arrest Jewish criminals and have them punished based on circumstantial evidence. His contemporary Rabbi Yehoshua ben Korcha was angry at him for "giving over" fellow-Jews to the Roman government to be punished by death. Rabbi Eliezer answered that he was "cleaning out the Jewish vineyard of its thorns," whereupon Rabbi Yehoshua ben Korcha replied, "let the master of the vineyard ( G-d ) clean out his own vineyard."

Similarly, Rabbi Yishmael ben Rabbi Yosi was also appointed by the government as a policeman for the purpose of identifying Jewish criminals who were to get the death penalty. The prophet Eliyahu appeared to him, and recommended that he give up his position. And the if the Roman government would not allow him to resign, Eliyahu urged him that if need be, he should leave the country, just in order not to have to hand over the Jewish criminals. The Ritva points out that neither Rabbi Yehoshua ben Korcha nor Eliyahu ha'Novi said it was *forbidden* to be in such a position. They merely argued that it was *not proper* for these prominent rabbis to do that type of work.

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29. See Avnei Nezer in note 18, and note 20.

30. Sanhedrin 46a.

31. Bava Metziah 83b-84a.

## ☞ Mesirah

The above case is unrelated to the prohibition against "mesirah". A "mossur" is one who aids a pirate, or a crooked government official, or a tyrant-king to obtain money illegally from his fellow Jew. Even if the Jew has actually done something wrong, but if the secular government or the ruler would exact a punishment far beyond that which the crime should require, then it is likewise forbidden to report him. If, however, the government is entitled to its taxes, or is permitted to punish criminals as offenders, there is no problem of "mesirah" in informing government officials of the information needed for them to collect their taxes or to apprehend their man.

One critical point should however be added: There is no problem of "mesirah" in informing the government of a Jewish criminal, even if they penalize the criminal with a punishment more severe than the Torah requires, because even a non-Jewish government is authorized to punish and penalize above and beyond the law, "shelo min hadin", for the purpose of maintaining law and order. However, this only applies in the situation when the Jewish offender or criminal has at least violated *some* Torah law. But if he did absolutely nothing wrong in the eyes of the Torah, then giving him over to the government would constitute a violation of "mesirah."

The Shulchan Aruch points out, however, that in most cases, "mesirah" is still not allowed, for a different reason: This is the rule regarding "aveidas akum", property lost by a nochri. "Aveidas akum" may only be returned in a case of chilul hashem. Under ordinary circumstances, a Jew should not return something lost. Now, in our case, the non-Jewish

government is searching, so to speak, for its missing man or its missing money, and one is not permitted to help them.<sup>32</sup> If, however, it is known that the only ones who can testify on the government case against a Jewish criminal are Jewish people, and by not testifying it will become clear and evident that Jews are covering up for other Jews who are guilty of crimes, then "Mishum Chilul Hashem", the Shulchan Aruch explicitly requires<sup>33</sup> the Jews to testify in the non-Jewish court of law even though this will lead to the prosecution of his fellow-Jew.

How could Rabbi Eliezer ben Rabbi Shimon and Rabbi Yishmael ben Rabbi Yosi have undertaken to act as policemen? Doesn't the Shulchan Aruch indicate that it is forbidden to hand over a criminal unless there is a possibility of desecration, chilul hashem, involved? But these two were salaried officials acting in the line of duty! Their informing on fellow-Jews was not done merely as a favor to the Roman government (which would be forbidden as "aveidas akum"). Rather, they were being paid to hand over the criminals; they were not returning the lost "article" to the government but were rather engaging in actions for which they were being paid. If a non-Jew hires a Jew and pays him as a worker, and his job is to look for lost articles, this will not fall under the category of "aveidas akum". The Jew who is returning the lost article is doing so as a "job" and not as an act of hashovas aveidah. The same is true of the Jewish investigator for the non-Jewish government. But even in this job, which is permitted, there is a limitation as we have noted previously—if the Jew did absolutely nothing wrong in the eyes of the Torah, then it is forbidden to hand him over.

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32. Sanhedrin 76b.

33. Choshen Mishpot, Chapter 28, section 3.

## ☞ § Harboring a Criminal

A problem related to this situation is that of harboring a criminal. The Talmud<sup>34</sup> tells about such a situation which proved a vexing dilemma for the Rabbis: There were some people from Galilee who were accused of murder, and were running away from the government to avoid prosecution. They came to Rabbi Tarfon and asked if he would hide them in his house. Whereupon the Rabbi told them: "If I will not hide you, the government officials will apprehend you and punish you. But on the other hand, if I should choose to hide you—maybe I am not allowed to! Our Rabbis have said that although one may not *believe* "loshon horah" (slander) told about others, still one *must be cautious* and act as if the story might be true. In that case, I am not allowed to hide you. Therefore, I recommend that you go and hide on your own."

What does this anecdote teach about the actual halacha of abetting an alleged criminal? Rashi comments that if it were true that the fugitives had really killed, it would not be permissible to hide them, for one may not help a murderer hide from the police. Tosafot, however, quotes the Sheiltot, who had a different way to understand Rabbi Tarfon's comment: "If it is true that you are guilty, and I hide you, then I too will be punished by the government for harboring a criminal. Therefore, for the sake of protecting myself, I do not want to hide you." From this Tosafot we might infer that they disagree with Rashi—i.e., that Tosafot feels that one *may* hide a criminal from the hands of a non-Jewish court, and that the only reason Rabbi Tarfon was reluctant was that he was fearful that then the government would punish him.

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34. Nidah 61a.

But the Maharshal in his commentary<sup>35</sup> points out that we would be incorrect in making such an inference from the Tosafot. Tosafot agrees wholly with Rashi that one may not obstruct justice by actively hiding a criminal from the hands of the court. Just as this applies to the Jewish court, so too it applies to a non-Jewish court. And although the Temple does not stand, and the Jewish court may not administer the death penalty today,<sup>36</sup> the non-Jewish courts are not so restricted, and one *may not* assist the criminal in escaping from the law. There is a specific sin in harboring a criminal, even from the secular courts. This is the commandment of "u-beerto horo mikirbecho",<sup>37</sup> to eradicate the evil from our midst. According to Rashi, this is what Rabbi Tarfon was afraid of neglecting, and therefore was loathe to hide them. The reason why Tosafot and the Sheiltot did not interpret Rabbi Tarfon's comment the same way Rashi did, is because of another factor: Rabbi Tarfon had not yet ascertained the guilt of the people who had come to him, and he should have assumed that they were innocent and therefore aided them in hiding from the police, were it not for the fact that (according to Tosafot) if he were caught, he himself might be punished for harboring the criminals.

This discussion leads us to another very perplexing modern problem—how can an observant Jewish lawyer act in good conscience to help a defendant escape the consequences of his misdeeds? Although this is not the context in which to discuss the full implications of the principle, we may state briefly that if a lawyer knows that his client has committed a crime, it is *forbidden* for him to help the criminal escape the consequences of his act, by relying on some technical legal

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35. Ibid.

36. Sanhedrin 52b.

37. See comments of Ramban to Sefer Hamitzvot, end of Shoresh 14; and Megillat Esther there, note 3.

points or other devices. The lawyer, just as any Jew, is directed by the Torah to "eradicate the evil from our midst", and may not actively assist someone to avoid his punishment.<sup>38</sup>

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A major issue with respect to "Dina de'malchusa" is, to what extent do we follow the secular law of the land, as opposed to the laws of the Torah.

In the area of *issur ve'heter* (religious laws) there is no doubt at all that "Dina de'malchusa" has no application.<sup>39</sup> Just because the American law does not forbid working on Shabbos, or remarrying without a religious "get" (divorce), we cannot say that "Dina de'malchusa dina". This principle is certainly only to be applied in the area of *dinei momonot* (money matters). The reason for this is simple enough to understand. The basis of "Dina de'malchusa" is identical with the principle of "hefker Bes Din", which only has application in that area.

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38. Mishna Halochos by Rabbi Menashe Klein, Volume 7, p. 366b.

39. See *S'dei Chemed* (Grossman edition, N.Y.) Vol. II, p. 70. Reform groups have erroneously distinguished between marriage and divorce requiring a religious marriage ceremony, while not requiring a religious Get. Their reason for this distinction is that while we recite Brochos (blessings) at the Jewish marriage, no Brochos are recited at the time of a Get. This would seem to indicate that having a Jewish marriage is a Mitzvah whereas obtaining a Jewish Get is not a Mitzvah but merely a Jewish law. The government's laws are able to substitute for the Jewish laws, but not for the Jewish Mitzvos.

It is questionable as to whether this is the true reason for the lack of a Brocha at the time of a Get. (See essay of Rabbi Yosef Ibn Palat on the topic of reciting blessings on various Mitzvos, printed in the beginning of the sefer *Avudraham*.)

But even if this point were to be accepted, that giving of a Jewish Get does not constitute a Mitzvah, the conclusion that the secular law of the land may be followed in the area of divorce is definitely an error. Anything outside of the area of *Dinei Momonot*, cannot be covered by the principle of "Dina d'malchusa dina".

In addition, Rabbenu Yona notes<sup>40</sup> that even within the area of *dinei momonot*, the laws of the secular courts only apply when the case in question involves a Jew and a non-Jew, or when both parties are non-Jews. Any case between two parties both of whom are Jewish, is only subject to the Torah laws of jurisprudence as set forth in the *Shulchan Aruch Choshen Mishpat*. The *Chazon Ish* wrote in his essay<sup>41</sup> on "Dina de'malchusa", that in his opinion none of the *Rishonim* (earlier commentaries) disagreed with this view of Rabbi Yona.

The *Shach*, however, points out<sup>42</sup> two exceptions to this rule: 1) Whenever the *halacha* is such that if a *t'nai* (a condition) were stipulated, then the Torah laws would be altered, then we assume that although the laws of the secular courts do not apply where both litigants in the case are Jewish, still we say that the fact that the common practice in that area (where non-Jews are involved) is in accordance with the laws of the secular courts, there is an understood agreement of a *t'nai* (condition), that secular law be followed.<sup>43</sup> For example: If someone

40. Quoted by *Rashba*, *Gittin* 10b.

If, however, the secular government enacts laws of price control or rent control, it would seem that even if both the landlord and the tenant were Jewish, these laws would apply to them as well. The only area *Rabbenu Yona* applied his principle (that "Dina d'malchusa" only applies when only one Jew is involved) is this fourth area of introducing a legal system. Establishing price controls is a function of government (*Bava Bathra* 89a) belonging to the third area of keeping law and order. It should therefore apply even in a situation where no non-Jews are involved at all. (See "Dina D'malchusa Dina," *Shmuel Shiloh*, pp. 175-176.)

41. End of volume on *Choshen Mishpot*, essay 16 on miscellaneous topics, section 1.

42. *Choshen Mishpot*, Chapter 73, sub-section 39.

43. In this type of case, we are not really following "Dina de'malchusa", but rather our own law, *Dina D'Dan* (see *Chazon Ish* mentioned above in note 41), which does allow one to alter the laws by adding on a *Tnai*. See *Bava Metziah* 94a.

leaves his watch with a jeweler to be repaired, according to the law of Torah as explained by the Talmud,<sup>44</sup> that jeweler would be responsible for the watch, even in the event of a burglary in the jewelery shop, where the jeweler was not at fault, and suffered a great loss himself. If, however, the jeweler would have stipulated a condition at the very outset, and specified that he does not accept any responsibility for any burglary, then he would not have to pay. If the *secular law* relieves the jeweler of any responsibility in such a case, then even if both the jeweler and the customer are Jewish, and no explicit stipulation of such a condition were made, nevertheless we would assume that established secular law would be considered like the "minhag ha'medina" (the local custom), and therefore we would also assume that this condition was obvious and understood, although it was never formally verbalized.<sup>45</sup>

2) A second exception would be where the halacha has no explicit law pertaining to the case at hand, so that the secular law of the courts is not in *contradiction* to the Torah-law. In this case, according to the opinion of the Shach, the "Dina de'malchusa" is binding even in cases where both parties involved are Jewish. For example: in any case involving corporations, or buying futures, where the Talmud and the Shulchan Aruch have nothing to say on the matter, the secular laws would be binding even between two Jews.

The Chazon Ish<sup>46</sup> took strong issue with this second point of the Shach—he said there are no blank areas where the halacha has nothing to say. Of course, the Talmud has no discussions of corporate law or futures, but *based* on the Talmudic

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44. Bava Metziah 80b.

45. See above note 11.

46. Mentioned above, in note 41.

law we can figure out what the halacha should be in any given area. Therefore, there is no area of secular law outside the purview of the halacha, and secular law may not be followed.

Even in a case between a Jew and a non-Jew, the halacha is not all that clear that secular law should be followed. The Mishna in Gittin<sup>47</sup> states that all deeds completed by the secular non-Jewish courts are valid and acceptable, except for a "get" (a religious bill of divorce), which must be written "lishma", and signed by religious Jews. The Talmud questions the scope of the statement of the Mishna, that all documents and deeds in the area of *dinei momonot* (monetary matters, as opposed to religious matters) are valid. The Talmud seeks to determine whether the document is a "shtar rayah" (a proof), indicating that one party owes another party money, or that one party has already sold his property to another party; or whether the document of the non-Jewish court is a "shtar kinyan", (a bill of sale), namely, that it serves as the vehicle for the *transfer* of the property, or as the vehicle *to create* the indebtedness. In the first instance, where the document serves merely the purpose of "rayah" (proof), we can understand why the deed of the non-Jewish court should be accepted, because we know that the courts are reliable and would not issue a false document. Hence, we consider it as acceptable evidence that the one party really owes the money to the other, or that the one party really transferred ownership of his property to the other party. But in the case of a "shtar kinyan", where the document is serving as the vehicle whereby the legal transaction *should take effect*, or with which the indebtedness *is initiated*, how can we say that the deed of the non-Jewish court is to be accepted; the transaction never took place in a legal fashion (according to Jewish law) and the indebtedness never was effected in a halachically legal manner.

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47. 10b.

In response to this question the Talmud offers two suggestions: a) Based on the principle of "Dina de'malchusa dina", the secular non-Jewish courts are empowered to effect and create a "kinyan" (a transfer of property) or a "hitchayvut" (an indebtedness), according to the laws that they themselves set down.

b) Perhaps the Mishna only declares as acceptable documents of "rayah", but not those serving the purpose of "kinyan", which the Mishna would declare as invalid.

The Rishonim are puzzled with the need for the second suggestion of the Gemara. Isn't the principle of "Dina de'malchusa dina" universally accepted? Why shouldn't a transaction between a Jew and a non-Jew, effected according to the laws of the secular courts, be legally binding?

Because of this difficulty, some Baalei Tosafot<sup>48</sup> were led to understand that the second suggestion of the Gemara, (which is accepted as the final decision and the more authoritative view among the Amoraim), is of the opinion that "Dina de'malchusa dina" is limited to the government's right to collect taxes and the like, where the law is *for the benefit of the government*. This they take to mean is the *literal* translation of "Dina de'malchusa"—the laws *on behalf* of the government—such as laws of taxation and the like. But the legal system enacted by the government would not be included in the scope of "Dina de'malchusa dina".

The Ramban<sup>49</sup> attacks this view as totally unacceptable. Although the Ramoh in his additions to the Shulchan Aruch quotes the above Tosafot in one place<sup>50</sup>, he himself makes it clear in another place<sup>51</sup> that this is *not* the accepted view.

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48. Quoted by Magid Mishnah Hilchot Malveh Veloveh, beginning of Chapter 27, and by Shach, Yoreh Deah, Chapter 165, sub-section 8.

49. Quoted by Shach, loc. cit.

50. Choshen Mishpot, end of Chapter 74 and end of Chapter 369.

51. See Shach in note 48, and Shach to Choshen Mishpot, end of Chapter 74.

As to the difficulty in the Gemara—why there was a need at all for the second suggestion, since “Dina de'malchusa dina” is universally accepted even in this type of case—the other Rishonim explain<sup>52</sup> that the Talmud wanted to cover even a case where the court was a private institution and was not authorized by the government. But the legal system of a court of law, which is under the auspices of the government, *would be binding* in cases involving a Jew and a non-Jew, even though that legal system does not correspond to the Torah law.

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The Chazon Ish pointed out the Gemara<sup>53</sup> which states that when a Jew and a non-Jew appear before a Jewish Bes Din, in a case where there is a discrepancy between Jewish law and the secular law, then if the Bes Din can acquit the Jew based on the secular law, they should do so, and tell the litigants that they have followed the secular law; but if by following the Jewish law, rather than secular law, the Jew will be acquitted, then they should render their decision based on Jewish law, and tell the parties that they have followed Jewish law. The Chazon Ish writes that one could have understood the Talmud to be saying that this is really the law—that the Jew is entitled to whatever benefits he can possibly get from following *either* system of law, since both systems apply to his case against the non-Jew, as far as he is concerned. However, we see that the Rambam<sup>54</sup> did not understand the Gemara in this fashion. Basically, whenever a non-Jew is involved in the case, *only* the secular laws are binding—to the exclusion of the Torah laws. And if the Jew's opponent in the case is a “Ger Toshav” (a non-Jew who has formally accepted upon himself the seven

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52. See commentaries of Rashba and Ran to Gittin.

53. Bava Kamma 113a.

54. Hilchot Melochim, end of Chapter 10.

Noachite mitzvot, and is therefore assumed to be a decent religious and observant person), then only the secular law must be followed. Only if the Jew's opponent in the case presented to the Bes Din is a non-Jew of the lower class, then the Rabbis *penalize* the heathen to have the judges favor the Jew by following either Talmudic law or the secular law, depending upon which is better for the Jew.

It is still unclear from the Talmud, as well as from the Rambam, as to the exact nature of this penalty. Does this mean that if the case between the Jew and the heathen were brought up to a Bes Din, then they should issue such a decision? Or does it mean that even *before* the case comes up, as soon as the *situation presents itself*, this penalty is already in effect; and even if the non-Jew converts to Judaism (or becomes a Ger Toshav) before coming to the Bes Din, the judges must apply this Talmudic penalty? The Chazon Ish dwells at length upon the exact details of this point in his essay on "Dina de'malchusa".<sup>55</sup>

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We have noted previously that the principle "Dina de'malchusa dina" is generally operative in the area of monetary matters. Thus, it would be logical to assume that if a Jew dies, leaving only a secular will, it would be considered valid. However, this is not the case, for two reasons: a) if the din-Torah is between the rightful heirs, and other Jews or Jewish organizations designated in the will, then "Dina de'malchusa" does not apply. This principle applies only when

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55. Mentioned above, in note 41, section 8.

at least one of the litigants is not Jewish; b) according to Rambam,<sup>56</sup> issues of inheritance are not only labeled as monetary matters (*dinei momonot*), but also, at the same time, as a matter of religious law (*issur veheter*). The Torah refers to the laws of inheritance as "*chukas mishpat*". Although "*mishpat*" has the meaning of "a monetary law", "*chok*" has the connotation of "a religious law." Since the will, then, can be considered a religious instrument and not only a financial transaction, it must conform to the requirements of Torah law.

Although the topic requires a great deal of discussion and explanation, which is not possible here, it would be correct to state that, in many circumstances, a secular will executed by a Jew is *not* valid.<sup>57</sup>

In the Torah,<sup>58</sup> the laws of inheritance are noted. And although the Torah does give a person the right to make a will,<sup>59</sup> it is only under the following two conditions: (1) The will is only valid if it is instructed when the testator is sick, and in the state of a "*schechiv mira*".<sup>60</sup> (2) The will can only choose from among the relatives who are directly in line to inherit,<sup>61</sup> to change the amounts of their respective *yerusha* (inheritance). For example, if a man dies leaving sons, daughters, and a wife, strictly speaking according to the halacha, only the sons get the

56. Hilchot Ishut, Chapter 12, section 9; Hilchot Nachalot, beginning of Chapter 6. The Rambam's view is shared also by Tosafot, Ktubot 50b, beginning Umai Aliyah.

See also Rabbi Yosef Rosen, Tzofnas Paaneach, (Tshuvot, New York,) no. 313.

57. See essay by Rabbi Mordechai Willig on the "Halacha of Wills" in "Chavrusa," (publication of Rabbinic Alumni of Yeshiva University,) Kislev, 5740.

58. Bamidbar, Chapter 27.

59. Bava Bathra 130a.

60. Choshen Mishpot, Chapter 281, section I.

61. As above, in note 59.

yerusha, which they divide evenly among themselves. If the father makes a tzavaah (will) when he is sick, he can see to it that not all the sons get an even share. He cannot, however, accomplish, even with a will, that his wife or his daughters should get any yerusha. He also cannot accomplish, even with leaving a will, that the first-born son should not get his "pi shnayim" (double share).<sup>62</sup>

For that purpose, one of two methods is required: a) the halacha has a principle of "mitzvah lekayeim divrei hames".<sup>63</sup> Rabbinically, the desires of the deceased person must be honored, at least with respect to where his money should go.<sup>64</sup> This principle applies only in the case where the person has handed over that amount of money to someone else during his lifetime specifically for the purpose of seeing to it, after his death, that it reaches the hands of the desired recipients.<sup>65</sup> Rabbi Chaim Ozer Grodzenski of Vilna<sup>66</sup> entertained the thought that handing over a will to a lawyer might possibly substitute for the handing over of the amount of money itself, but he later rejected that notion. Only in the case of a will to leave the

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62. Bava Bathra 126b.

63. Gittin 14b.

64. See Torah Shleima (by Rabbi Mendel Kasher) to Breishis, Parshas Vayechi, (47-30), note 126, regarding the applicability of this principle to other wishes of the deceased, outside of the area of distributing his wealth.

65. Tosafot, Gittin 13a, beginning V'ho; Choshen Mishpot, Chapter 252, section 2.

66. Teshuvot Achiezer, Vol. III, responsum 34.

Rabbi Yaakov Ettlinger in his responsa work "Binyan Zion", Vol. II, 24, maintains that the Shulchan Aruch has not really accepted the view of the Tosafot that Hushlash Mitchila Lekach is needed. His argument is not that convincing, and obviously was not accepted by Rabbi Chaim Ozer, who often quoted and relied on decisions of the Binyan Zion; in this instance he did not even quote his view.

money to charity did he feel that the will should be binding Rabbinically, despite the lack of "hushlash mitchillah lekach" (having been handed over specifically for that purpose). b) The Ramo in Shulchan Aruch<sup>67</sup> refers to a second method of apportioning one's inheritance, which would not require having the money put away in escrow. For example, if a man feels that at the time he will die, he will leave over *less* than a hundred thousand dollars, and he would like to leave half of his inheritance to his wife, he should legally obligate himself as of today to his wife (by having someone else give him a "suddar", a handkerchief, or any other k'li, representing the wife,<sup>68</sup>) to the amount of fifty thousand dollars, collectible only on the day he dies,<sup>69</sup> on the condition that his rightful heirs have the option of invalidating his debt by paying off his widow with half of their inheritance. Or, if he would like to leave *all* of his money to his wife, he should obligate himself towards his wife in a debt (by someone giving over a handkerchief or any other useful object,

67. Choshen Mishpot, Chapter 281, section 7.

68. See Tosafot, Kiddushin 26b, beginning Hochi Garsinon.

69. If the obligation would take effect immediately, the recipient of the grant could insist on collecting right away. The testator was not interested in giving away all his money yet. If the obligation were made in such a way that it could not be collected until after death, the entire Kinyan would not be legally binding at all. One cannot enact obligations set to take effect only after his death. If the Kinyan Sudar were to be made now, and it would be stipulated that no obligation at all should take effect until the day before he dies, it would also not be legally valid for two reasons: 1) since at the time the obligation is supposed to begin to go into effect, the action of the Kinyan Sudar is completed already, and this would constitute a case of Kolsa Kinyono. (Only according to the Rambam is there no problem of Kolsa Kinyono with a Kinyan Sudar done now to take effect at a later time. See Ran to Nedarim 27b, beginning V'ho, and Kesef Mishnah to Hilchot Mechira, Chapter 11, end of section 13.)

2) If something is to take effect at a time which cannot be determined until later, we are not able to declare that we have determined retroactively (huvrar hadovor lemafrea) that the matter took effect at the earlier

for that purpose) in an amount in excess of the amount of money he expects to leave over at the time of his death. The debt should be said to take effect immediately, and should be collectible on the day of his death.

To cover the possibility of divorce, in which case he would *not* be interested in leaving his present wife any or all of his inheritance, he can make this "kinyan suddar" for the purpose of creating the hischayvus (indebtedness) towards his wife on the condition ("all hatnai") that "he does not change his mind before he dies." In this way, he has left himself the possibility to change his will, if that turns out to be necessary.

The topics discussed herein are but a brief summation of the principle "Dina de'malchusa dina". As indicated, this is a principle having ramifications in a broad range of Jewish law and thought, and is particularly relevant in the context of the Diaspora.

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time. This is the meaning of the principle Ain Breira regarding issues which are d'oraitho.

It is because of all of these above considerations that it must be specified that the Kinyan Sudar is to effect the actual obligation of the debt immediately, and only the right of the recipient to collect is delayed till the later time.

We still seem, however, to be faced with a problem of Breira. Regarding the actual date that the recipient acquires the rights of collection of the debt, this can only be determined retroactively after the death of the testator. Shouldn't this still pose a problem of using Breira? An answer to this point can be found in the commentary of the Ran to Nedarim 45b.

Whenever the key part of the Chalos (that which is being effected) is not involved in any problems of retroactive determination, even though regarding some of the minor details of the case we must rely on Breira, this does not bother us.