



## JEWISH POLITICAL THEORY: HILKHOT MELAKHIM

SHIUR - Lecture #9:

### ***Legitimacy of a Non-Religious Government***

By:

Rabbi Mosheh Lichtenstein

Last week, we concluded that the ideal Jewish government has two functions: practical and spiritual. This week, we will examine how these two functions operate within the context of a non-ideal government, i.e. one which is not guided by the values of the Torah. First we will turn our attention to the authority of a non-religious government regarding practical matters.

The task of organizing society and providing for basic public needs (such as garbage collection, bridge and highway construction, personal security, military protection, etc.) is a primary function of government. The government derives its authority from the people due to its fulfillment of this capacity (if not for other reasons as well). The authority to take the necessary steps to exercise these functions is granted to the government in power based upon the famous Talmudic principle of "dina de-malkhuta dina" (the law of the land is the law). This principle grants legal recognition to the acts and decrees of the sovereign power, even if it a non-Jewish government whose aims and ideals are far removed from the Torah's values.

#### THE LAW OF THE LAND

Actually, the primary concept of dina de-malkhuta dina directly relates to the exercise of authority in matters of state or administration, and not to the ability to mandate civil legislation regarding commercial law or other matters not directly related to governmental activity. Thus, after recording Shemuel's dictum that dina de-malkhuta dina, the gemara (Bava Kama 113b) quotes Rava's observation that this is



correct since the government has the legal authority to appropriate timber for bridge construction. The continuation of the sugya, also based upon this premise, discusses issues of taxation.

A second sugya (Gittin 10b) expands the concept of *dina de-malkhuta dina* to regulation of commercial law as well, a point which is not contained in the concept of *dina de-malkhuta dina* as presented in the gemara in Bava Kama, and which is certainly quite an expansion of this rule. However, the gemara in Gittin then offers an alternate explanation for the same ruling without making reference to *dina de-malkhuta dina*. This second explanation would seem to deny the validity of applying *dina de-malkhuta dina* in a civil case. Therefore, certain Rishonim conclude that although all agree that *dina de-malkhuta dina* applies in cases of governmental responsibilities, there is disagreement as to whether it applies regarding civil issues. This opinion actually underscores the authority of the sovereign in respect to matters relating to the public weal. It recognizes governmental decisions and the necessary actions required to implement these policies as binding upon the entire body of citizens. Others reject this line of interpretation of the gemara in Gittin, claiming that both forms of *dina de-malkhuta dina* are universally recognized (see the Rashba *ad loc.* as well as a relevant teshuva of his [2:134, s.v. Aval]). Either way, all recognize the authority of the government to act in matters of public policy, even though it is not necessarily a government whose goals are consistent with the Torah's worldview.

[Note: I am not attempting here a complete analysis of *dina de-malkhuta dina*, which would have required presenting the varying approaches in Rishonim as to the legal justification of this rule and the ramifications of these explanations for our topic. The interested reader can get an overview of the issues in the Encyclopedia Talmudit or other surveys which deal with this issue. I have chosen a particular approach here, since it seems to me quite convincing that the authority regarding action on behalf of the public is clearly mandated by Halakha. Therefore, I have sought out the sources in which this point is most evident. Even if we interpret the rule of *dina de-malkhuta dina* differently, it still seems to me that authority must be granted to the government



to fulfill its obligations to govern. This point is made by the Rashba in the above-mentioned teshuva, although other Rishonim may not agree with him (see Ran, Nedarim 28a s.v. Be-moches, and Or Zarua, Bava Kama 447).]

## THE GOVERNMENT'S LEGITIMACY

It is time now to return to the question which we raised last week as to the legitimacy of a government, such as current Israeli governments, which have been elected by an electorate whose values are not necessarily consistent with those of the Torah, even if we do accept the premise that the democratic system is halakhically valid. Based upon our above discussion, we must draw a distinction between the two functions of government. Clearly, if we are talking about furthering educational or spiritual aims, we cannot legitimize a government elected to express the wishes of a secular, non-observant electorate and as such the government's authority is, indeed, not binding. An obvious case in point would be the educational policy of the Mapai governments in the early Fifties regarding immigrants. However, the very same government would have full halakhic legitimacy regarding all matters concerning public security, road building, sanitation, snow removal and all other such matters. It, and only it, would be granted the power to act as the executive arm in all of these issues, and since the interests and needs of the God-fearing Torah-observant Jew and his fellow secular Jew in these instances are the same, there would be no problem of the government's acting on behalf of a misguided electorate. Therefore, in all matters relating to public safety, etc., the government has full legitimacy and coercive power to achieve its goals.

This, of course, is a very narrow base upon which to establish the legitimacy of a Jewish government in the State of Israel, since the logic behind it applies to any government, including a non-Jewish government in other countries, independent of Jewish historical destiny. Therefore, the following point must be added. The same principle (i.e., as long as there is an identity of purpose regarding basic issues, there is legitimacy in all that relates to these issues) is valid even if we are not talking about



the utilitarian element of government. Thus, if we view Zionism, the establishment of a Jewish historical-political entity and the renewal of Jewish culture in the land of Israel, as a positive goal from a spiritual perspective, then the will of the electorate to further Zionist goals lends legitimacy to the government's policies designed to implement this. Up to the point in which a Torah perspective diverges from that of the electorate, a democratically elected government has halakhic legitimacy; beyond that point, it loses its claim for halakhic recognition.

All of the above sounds very neat in theory, yet is much more difficult in practice, due to the fact that most issues are not so readily divided into these two categories, and that more often than not, a mixture of both is involved in policy-making. Therefore, I would like to conclude with a concrete example from our political agenda. Let me emphasize at the outset that I am not attempting to express an opinion as to the issues themselves, and I am certainly not attempting to cloak my own opinions on the substantive element of these issues under the guise of a shiur in Hilkhhot Melakhim. All that I shall be doing in this example is to illustrate a conceptual model as to the method of the decision making process.

All of the above apologies have probably made it clear already that the chosen example is the issue of land for peace (hachzarat shtachim). Basing ourselves upon the above analysis, we must approach the issue by analyzing what sort of a decision are we required to make in this instance. Is it a decision as to matters of collective security based upon knowledgeable military assessment, or is a question of realizing or not realizing Jewish historical destiny?

Thus, if one is of the opinion that the Torah required the possession of all parts of the land, regardless of the military, diplomatic, economic and social consequences involved in such a policy, he clearly perceives the Torah's basic premise to be at odds with the position of many members of the electorate. Therefore, he cannot accept that a government elected upon a platform at odds with Divine truth has any legitimacy regarding its actions on this issue.



However, one can also believe that the Torah mandates sacrificing land in return for lasting peace in a given historical reality, yet one can doubt the wisdom of the government's position, based upon one's particular viewpoint of the political situation. Such a person must grant the government halakhic legitimacy, and accept its policies as having the full authority of the state supporting them. For if he considers the underlying assumption of the government and the electorate to be in agreement with the Torah, all of his disagreement with the government revolves around diplomatic and geo-political calculations. These, however, as well as taxation etc., are the prerogative of the government. As an elected government, its opinion, which represents the majority, must be accepted as the binding opinion. This is the principle of democratic rule which seems to be recognized by Halakha in absence of a monarchical system, as was demonstrated in previous shiurim. Its application here means that the elected government and its experts have the final say on issues of public policy. This argument, cutting both ways, does not support or oppose either the Right or the Left. If the government in power is leftist, this argument legitimizes it against its right wing opposition and, conversely, if the ruling party is right of center, its position is thereby recognized as binding.

In practice, therefore, the question which must be asked is what is the Torah's position, assuming we would be able to fathom the historical reality, and how does this affect our appraisal of the differing positions on both sides of the spectrum, as explained above. Moreover, we must ask a similar question as to the position of those advocating return of land from a non-believing perspective. Is their position the result of a sincere desire to further Jewish historical destiny as expressed in the Zionist movement, based upon the assessment that under current historical circumstances this is the best course of action, or is their stance simply the result of fatigue and lack of commitment to historical destiny? If it is the former, then the argument is one relating to tactics, while if it is the latter, then the point of contention relates to primary assumptions, and must be treated as such.



It should be re-emphasized that this discussion has not entered upon the crucial question of what price to pay for the sake of unity in the face of disagreement upon basic axioms, since that is an issue of content and not of the parameters of the decision making process as such.

Thus, to conclude this example, refusal to accept the legitimacy of a government's policy on this issue can be arrived at only if one understands that the government's position is predicated upon misguided first principles which are opposed to the Torah's values. One can adopt such a position either because one holds that land must be held on to regardless of price, or due to an assessment that a government's policy reflects the abandonment of the endeavor to further Jewish historical destiny. However, if one rejects these two points, he must accept the democratic decision reflected in government policy as being the legitimate position recognized by Halakha.

(c) Yeshivat Har Etzion, 2005  
Reprinted with permission from Yeshivat Har Etzion's Israel Koschitzky Virtual Beit Midrash  
<http://www.vbm-torah.org>