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Jewish Law and the State's Authority to Punish Crime

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Judaism regards its system of law as transnational and transgeographic in nature. All Jews, regardless of their place of domicile, are bound by the criminal and civil aspects of Jewish law no less than by those provisions of Jewish law that are entirely religious or ritual in nature.

Jewish law provides for the application of criminal sanctions only upon the testimony of two qualified eyewitnesses and a guilty verdict rendered by a court of competent jurisdiction composed of adherents to Judaism and established in conformity with the relevant provisions of the statutes governing judicial bodies. Prior admonition as well as a court composed of twenty-three "ordained" judges are necessary conditions for imposition of either capital or corporal punishment. The "ordination" required is a form of licensure originating in the designation of elders by Moses as recorded in *Numbers* 11:24. These elders, in turn, transmitted this authority to their successors. That authority was then passed on from generation to generation in an unbroken chain of transmission over a span of centuries until it was forcibly interrupted during the period of Roman oppression subsequent to the destruction of the Second Commonwealth. The result is that, at present, there are no individuals qualified to sit on such courts and hence, as a practical matter, Jewish penal law no longer regards existing rabbinic courts as competent to impose either capital or corporal punishment.

Capital punishment is regarded as having been abrogated for another reason as well. On the basis of a well-recognized principle of scriptural exegesis, the Babylonian Talmud, *Sanhedrin* 52b, establishes that capital punishment can be imposed only when the biblically prescribed sacrificial rituals continue to be performed in the Temple in Jerusalem. Hence lapse of the sacrificial order necessarily led to abrogation of capital punishment.

Jewish law also posits severe strictures against delivering either the person or property of a Jew to a gentile. Thus, *Shulhan Arukh* declares that the person and property of even a "wicked person" and

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a "transgressor" remain inviolate even if that individual is a source of "trouble" or "pain" to others.[1] There is, however, an inherent ambiguity in this proscription. There may be reason to assume that the prohibition is limited to turning over a person or his property to the custody of an "oppressor" who inflicts bodily or financial harm in a manner that is malevolent or entirely extralegal. Indeed, the terminology employed by the *Tur Shulhan Arukh* ("*Tur*")[2] in codifying this provision of Jewish law lends credence to such a restrictive interpretation since *Tur* incorporates the term "*anas*" or "oppressor" in recording the prohibition.[3] Nevertheless, it may be the case that employment of this term does not serve to limit the scope of the prohibition but serves simply as illustration. Such a view finds support in the omission of the term "*anas*" in the subsequent codification of this provision in the *Shulhan Arukh*.[4] The latter interpretation would, in the absence of other considerations, have the effect of banning physical delivery of a Jew to non-Jewish authorities as well as prohibiting conveyance of information that might be used against him in either a criminal or civil action. In accordance with that interpretation, such actions would not be countenanced even in situations involving a clear violation of a criminal statute and would apply even when the accused is assured the protection of due process of law.

I. THE KING'S JUSTICE

The crucial theoretical issue in determining the correct interpretation of this provision of Jewish law is the formulation of a legal principle that might provide for recognition of the jurisdiction of non-Jewish judicial authorities. Clearly, causing judicially cognizable harm to another person constitutes a tort in virtually every legal system unless justification for such action is recognized by the system itself. It is equally clear that punishment meted out in accordance with the penal provisions of any given legal system is not regarded by that system as tortious in nature. Accordingly, the question that must be addressed is whether Jewish law is prepared to recognize the authority and jurisdiction of another system of law in such matters.

Quite distinct from the corpus of law that it regards as incum-

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[1] J. Caro, Shulhan Arukh, Hoshen Mishpat 488:9 [hereinafter Hoshen Mishpat]. The *Shulhan Arukh* is the code of Jewish law authored by R. Joseph Caro (1488-1575). It relies significantly upon *Tur Shulhan Arukh* and is composed in a form not unlike that of a Restatement of Law and has acquired a somewhat analogous status.

[2] *Tur Shulhan Arukh* is the code of Jewish law compiled by R. Jacob ben Asher in the first part of the 14th century.

[3] Id.

[4] Hoshen Mishpat, supra note 1, 488:9.

bent upon its adherents, Judaism concurrently posits a parallel legal code that it regards as binding upon all of humanity, the "Seven Commandments of the Sons of Noah" or the Noahide Code. Standards of evidence and rules of procedure that form an integral part of the Noahide Code are far less restrictive in nature than those adhered to by Jewish courts. Under the provisions of the Noahide Code, inter alia, testimony of a single witness is sufficient for conviction; no prior admonition is required; and the court may be composed of a single judge. In the Jewish Commonwealth, separate judiciaries were established: one exercised jurisdiction over the Jewish populace and administered Jewish law while the other sat in judgment upon non-Jewish nationals and rendered justice in accordance with the provisions of the Noahide Code.[5] The jurisdiction of non-Jewish courts and their authority to administer the Noahide Code was limited to gentiles.[6] Although the jurisdiction and authority of Noahide courts is not limited by either geographic area or historical epoch, Jewish law contains no explicit statutory provision that might serve to grant non-Jewish courts jurisdiction over Jewish malfeasors.

The earlier cited provisions regarding rules of evidence and matters of judicial procedure apply only to the imposition of penal sanctions by Jewish courts as provided by statute. The monarch, however, was empowered to ignore the judiciary and its unique form of due process in imposing extrastatutory punishment when he deemed it necessary to do so to preserve law and order. Thus, Maimonides writes: "Each of these murderers and their like who are not subject to death by verdict of the *Bet Din* (Jewish Court of Law), if a king of Israel wishes to put them to death by virtue of the law of the monarchy and the perfection of the world, he has the right to do so."[7] It is not immediately clear whether the authority to impose "the King's justice" is limited to Jewish monarchs or whether it is the prerogative of every sovereign ruler.

A literal reading of 1 *Samuel* 8:5 would seem to indicate that this power is shared by the kings of all nations. The elders of Israel demand of Samuel: "[A]ppoint for us a king to judge us like all the nations," i.e., a monarch empowered to administer "the King's justice." In classic rabbinic sources, the phrase "to judge us" was certainly understood as having that connotation. Rabbenu Nissim of

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[5] See Maimonides, Mishneh Torah, Sefer Shoftim, Hilkhot Melakhim 10:11 [hereinafter Maimonides, Hilkhot Melakhim].

[6] See Maimonides, Hilkhot Melakhim, supra note 5, 9:14.

[7] Maimonides, Mishneh Torah, Sefer Nezikin, Hilkhot Rotzeah 2:4 [hereinafter Maimonides, Hilkhot Rotzeah].

Gerondi, seizes upon this phrase in explaining why the request for establishment of a monarchy aroused Samuel's ire.[8] Appointment of a monarch to serve as the head of the Jewish commonwealth constitutes one of the 613 biblical commandments and its fulfillment is regarded as having become incumbent upon the populace upon entry into the Promised Land.[9] Rabbenu Nissim explains that a monarch is required for two purposes: 1) to serve as commander-in-chief of the army; and 2) to serve as chief magistrate in administering extra-statutory punishment when necessary to do so to preserve the social fabric.[10] A request for appointment of a king could not, in and of itself, have been a matter for censure. Rabbenu Nissim asserts that Samuel became angry because the request was couched in a manner that gave voice to a perceived need for imposition of "the King's justice." A well-ordered, law-abiding society has no need for the imposition of emergency ad hoc measures by the monarch; the punishments provided by statute and their imposition in accordance with the rigorous standards of due process prescribed by Jewish law should suffice to protect societal concerns. The request presented to Samuel reflected a recognition by the petitioners that their society could not long endure on the basis of criminal procedure hobbled by a two-witness rule and a requirement for prior warning as well as a host of other impediments to actual imposition of penal sanctions. The anticipation by the petitioners of a breakdown of law and order, for which the sole remedy would have been imposition of "the King's justice," bespoke either an unacceptable lack of confidence in themselves or their peers or, even worse, a realistic assessment of moral degeneration.[11] Thus, explains Rabbenu Nissim, Samuel had ample cause for distress.[12]

Ostensibly, the phrase "like all the nations" indicates that this is a legitimate exercise of the royal prerogative among the nations of the world. It may however be the case that employment of the phrase does not reflect a recognition of a normative, legal power vested in gentile sovereigns, but constitutes only a de facto statement of socio-

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8 N. Gerondi (*Ran*), Derashot ha-Ran, no. 11.

9 See Deuteronomy 17:15; Babylonian Talmud, Sanhedrin 20b; Maimonides, Hilkhot Melakhim, supra note 5, 1:1.

10 *Ran*, supra note 8.

11 See A. B. Sofer, Ktav Sofer, Parshat Shoftim, s.v. od nireh li; Y.M. Epstein, Arukh ha-Shulhan he-Atid, Hilkhot Melakhim 71:6-7. The thesis herein presented incorporates elements elucidated by *Ktav Sofer* that are not explicitly formulated by Derashot ha-Ran.

12 Cf. Babylonian Talmud, Sanhedrin 20b (declaring that the elders of the generation couched their petition in appropriate language) as well as Maimonides, Hilkhot Melakhim, supra note 5, 1:2 (indicating that censure was occasoned by a disdain for the leadership of Samuel).

political reality. In practice, in punishing evildoers, monarchs of antiquity certainly did not feel constrained by the limitations of the Noahide Code. Their customary practice may have been cited by the elders, not as an example of legitimate exercise of royal power, but simply as a paradigm for appointment of a monarch over the Jewish populace in whom such power would be legitimately vested. If administration of "the King's justice" is a power limited to the monarch of a Jewish state, that legal institution cannot serve as the legitimating basis for imposition of penal sanctions by a non-Jewish government.

II. "THE KING'S JUSTICE" AND NON-JEWISH SOVEREIGNS

The question of whether or not *Halakhah* regards non-Jewish sovereign authorities as endowed with the authority to impose "the King's justice" appears to be a matter of controversy among medieval authorities. The Gemara records the well-known dictum of Rabbi Samuel, one of the Amora'im of the Talmud, who declared: "*Dina de-malkhuta dina*—The law of the land is the law."[13] Justification of that principle is far from obvious. Numerous theories have been advanced in an attempt to explain why civil ordinances having no basis either in Scripture or in the Oral Law should be binding in *Halakhah*, the system of law regarded by Jewish teaching as binding upon Jews. Noteworthy are the remarks of Rabbi Samuel ben Meir (*Rashbam*) in his commentary on the Talmud, *Bava Batra* 54b:

> All the taxes, levies and customs of the kings that are customarily promulgated in their kingdoms are the law because all the members of the kingdom accept upon themselves the laws of the King and his statutes and therefore it is absolute law.[14]

Rashbam's comments are problematic. They might well be interpreted as limiting Samuel's dictum to monetary obligations such as payment of taxes and levies. On the surface, such an obligation might be explained on the basis of ordinary contract theory. Subjects who "accept upon themselves the laws of the King" voluntarily undertake to pay the taxes imposed by the monarch. A contractual obligation to pay an already announced levy is certainly enforceable. However, contract law, as posited by *Halakhah*, does not recognize the enforceability of an unspecified, open-ended obligation, the extent of which is to be unilaterally determined by another party. Yet it is clear that a subject does not have the right to reject a tax newly imposed by the king on a claim that it was never previously accepted by him. Moreover, *Halakhah* declines to recognize the validity of virtually any con-

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[13] Babylonian Talmud, Gittin 10b; Bava Kamma 113a; Bava Batra 54b; and Nedarim 28a.

[14] Samuel ben Meir (*Rashbam*), commenting on Babylonian Talmud, Bava Batra 54b.

tract unless recorded in a properly drafted instrument or entered into by means of a formal act of *kinyan*—for example, formal delivery of a kerchief or other artifact, which serves a function analogous to that of symbolic delivery of consideration in common law.[15] An oral undertaking not accompanied by a formal act of *kinyan* is regarded as "mere words" and may be renounced at will.

Rashbam's thesis becomes entirely cogent if the "acceptance" of which he speaks is understood, not as contractual acceptance of a monetary obligation, but as acceptance of the sovereignty of the monarch. If so, *Rashbam*'s comments serve to establish the principle that an obligation of obedience flows directly from voluntary acceptance of the authority of the monarch. The Talmud posits the actions of the king portended in 1 *Samuel* 8:5 as legitimate perquisites of his office.[16] *Rashbam*, then, in essence, does no more than spell out the prescribed manner in which a monarch is vested with those prerogatives. Unlike kings of a Jewish commonwealth who must be formally invested in office by the Great Sanhedrin and a prophet,[17] the authority of the monarch of a non-Jewish state is derived entirely from the consent of the governed, with such consent serving not only as a necessary condition, but also as the sufficient condition for exercise of royal powers. Accordingly, payment of taxes becomes a legitimate and legally binding obligation even in the absence of a specific undertaking with regard to such payment. The obligation is imposed by virtue of the authority of the sovereign, rather than freely assumed by the subject. It is only the sovereign's authority to act as sovereign that requires "acceptance" on the part of his subjects. Once such acceptance is forthcoming, no further legitimization is required for exercise of the prerogatives enumerated in 1 *Samuel* 8:5.

Of course, the premises implicitly assumed by such a theory include: (i) the existence of a biblically recognized institution of "monarchy" as a legal category;[18] (ii) extension of the *halakhic* institution of the monarchy to encompass non-Jewish sovereigns as well; and (iii) recognition of the authority of the non-Jewish sovereign as binding upon Jewish subjects as well as upon non-Jewish nationals. Since,

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15 The kerchief does not however represent a symbolic *quid pro quo* in a manner analogous to the peppercorn but serves either to generate both firm intention and reliance, i.e., a meeting of the minds, or as evidence thereof. See generally Y. Abramski, Dinei Mamonot 9-13 (2d ed. 1969) (arguing that the requirement of *kinyan* is not absolute).

16 Babylonian Talmud, Sanhedrin 20b.

17 Maimonides, Hilkhot Melakhim, supra note 5, 1:3.

18 The monarch's power need not be unlimited, nor must such power be vested in an individual rather than in a legislative or executive body. See Nahmanides, addenda to Maimonides' *Sefer ha-Mitzvot*, no. 17, who, in a different context, defines a monarch as "a king, a judge or whoever exercises jurisdiction over the populace."

according to *Rashbam*, a non-Jewish monarch is recognized as a "king" for purposes of *Halakhah* it may well be assumed that such a king enjoys all the perquisites of monarchy including the right to impose penal sanctions in administering "the King's justice."

This thesis is echoed in Maimonides' *Mishneh Torah, Hilkhot Gezeilah ve-Aveidah* 5:18. The preceding sections of chapter five are devoted to a full explication of Samuel's dictum "*Dina de-malkhuta dina*." In the concluding section of that chapter Maimonides writes:

> All of these matters are stated concerning a king whose coin circulates in those lands, for the inhabitants of that land have agreed upon him and rely that he is their master and they are his servants. But if his coin does not circulate he is [in the category] of a robber who uses force and like a group of armed bandits whose laws are not law. Similarly, such a king and all his servants are robbers in every respect.[19]

Maimonides clearly regards the *halakhic* status and authority of the king to be contingent upon the consent of the governed which, in turn, may be ascertained by a determination of whether or not his coin is accepted de facto as legal tender. The right of coinage is not only a jealously safeguarded monarchial prerogative but constitutes a hallmark, indeed, the litmus test, of sovereignty. Acceptance of the king's currency bespeaks tacit acceptance of his authority and reliance upon his protection and rule. Thus, it is only a king who rules by virtue of the acceptance or acquiescence of his subjects who may legitimately exercise the royal prerogatives enumerated in 1 *Samuel* 8.

Rashbam and Maimonides should be regarded as advancing an identical theory of *dina de-malkhuta dina* despite the fact that Maimonides speaks of acceptance of the king's authority while *Rashbam* focuses upon acceptance of "the king's laws and statutes." *Rashbam* should not be understood as predicating the binding authority of the laws and ordinances of the kingdom upon explicit acceptance of each law individually. Rather, he should be understood as asserting that investiture of an individual in royal office ipso facto constitutes conferral of lawmaking authority. Hence "acceptance" of the king as monarch is tantamount to acceptance of his laws. The notion that acceptance of a monarch is at one and the same time the acceptance of his legislative authority is explicitly formulated by Nahmanides who equates the two concepts in stating, "for since they accept his sovereignty and they accept his edicts."[20]

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19 Maimonides, Mishneh Torah, Hilkhot Gezeilah ve-Aveidah 5:18 [hereinafter Maimonides, Hilkhot Gezeilah ve-Aveidah].

20 Nahmanides, commenting on Babylonian Talmud, Yevamot 46a.

It is quite evident that both Maimonides and *Rashbam* regard *dina de-malkhuta dina* to be binding by virtue of fact that promulgation of "the law of the kingdom" is a legitimate exercise of royal authority by the sovereign. Since the principle *dina de-malkhuta dina* is enunciated with regard to the laws of gentile nations it is clear that, for both Maimonides and *Rashbam*, a non-Jewish ruler must enjoy the *halakhic* status of a monarch. Since even a gentile monarch is entitled to exercise the prerogatives enumerated in 1 *Samuel* it may well be argued that such a monarch may legitimately punish disobedience of his decrees.[21]

That conclusion is reflected in the comment of Rabbi Yom Tov ben Abraham Ishbili (*Ritva*), who declares that a gentile king may apprehend and execute thieves and that, accordingly, a Jew is permitted to turn over thieves to the king's officers.[22] The talmudic discussion that serves as the basis for *Ritva*'s comment is of seminal importance:

> R. Eleazar, son of R. Simeon, met an officer who was engaged in arresting thieves. [R. Eleazar] said to him, "How can you detect them. . .? Perhaps you take the innocent and leave behind the wicked." [The officer said,] "And what shall I do? It is the king's command." [R. Eleazar] said to him, "Come, I will teach you what to do. Go into a tavern at the fourth hour of the day. If you see a man drinking wine, holding a cup in his hand and dozing, ask who he is. If he is a scholar, he has risen early to pursue his studies; if he is a laborer he has risen early to do his work; if his work is at night he may have been rolling thin metal. If he is none of these, he is a thief; arrest him." A report was heard in the royal court. They said, "Let the reader of the letter become the messenger." R. Eleazar, son of R. Simeon, was brought and he proceeded to apprehend thieves. R. Joshua, son of Karhah, sent word to him, "Vinegar, son of wine! How long will you deliver the people of our God for slaughter?" [R. Eleazar] sent the reply, "I eradicate thorns from the vineyard." [R. Joshua] responded, "Let the owner of the vineyard come and eradicate his thorns." One day a laundryman

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21 There are, of course, other theories of *dina de-malkhuta dina* that not only fail to provide a basis for penal authority but also seem to negate the view that non-Jewish sovereigns enjoy the prerogatives enumerated in 1 *Samuel* 8. For example, Rabbenu Nissim, in his commentary on Babylonian Talmud, *Nedarim* 28a, declares that the principle of *dina de-malkhuta dina* is limited to a gentile ruler "because the land is his and he can say to [his Jewish subjects] 'If you do not fulfill my commands I will banish you from the land.' " According to Rabbenu Nissim's analysis, *dina de-malkhuta dina* serves only to establish the monarch's right to collect feudal dues or to collect "rent" in the form of taxes levied upon those granted a right of domicile.

22 B. Ashkenazi, Shitah Mekubetzet, citing Y. T. Ishbili (*Ritva*), commenting on Babylonian Talmud, Bava Metzi'a 83b.

> met [R. Eleazar and] called him "Vinegar, son of wine." Said [R. Eleazar] to himself, "Since he is so insolent, he is certainly a wicked man." He exclaimed, "Seize him! Seize him!"[23]

Ritva questions how it was possible for Rabbi Eleazar ben Simeon to pass judgment without testimony of witnesses or prior warning and how it was possible for him to do so in a historical epoch in which the Sanhedrin no longer existed. *Ritva* explains that Rabbi Eleazar ben Simeon was the agent of the King and that the King may rightfully execute evildoers even in the absence of prior admonition and without the benefit of the testimony of two eyewitnesses. *Ritva* further points to the extrajudicial execution of the Amalekite proselyte by King David, recorded in 2 *Samuel* 1:15, as an example of punishment on the basis of administration of "the King's justice."[24] Thus *Ritva* explicitly states that, according to Rabbi Eleazar ben Simeon, even non-Jewish monarchs are authorized to administer extrastatutory punishment in accordance with "the King's justice."

Nevertheless, examination of the talmudic discussion reveals that the matter is the subject of significant controversy. Rabbi Joshua ben Karhah remonstrated with Rabbi Eleazar ben Simeon in exclaiming "How long will you deliver the people of our God for slaughter?"[25] Moreover, the discussion concludes with a report that, when Rabbi Ishmael ben Yosi acted in a similar manner, the prophet Elijah appeared to him and voiced the identical complaint. When Rabbi Ishmael offered the same defense, "What shall I do? It is the King's command," Elijah responded, "Your father fled to Asia, you flee to Laodicea!"[26] Since the opposing position of Rabbi Joshua ben Karhah is endorsed by none other than the prophet Elijah there is strong reason to assume that Rabbi Eleazar ben Simeon's position is to be rejected as a normative legal position.

There is, however, a parallel narrative involving Elijah that may shed light upon this exchange as well. The Palestinian Talmud, *Terumot* 8:4, reports that a fugitive, a certain Ula bar Kushav, took refuge in Lod. The civil authorities surrounded the city and demanded that he be surrendered to them, threatening that the entire populace would be annihilated if the townspeople failed to acquiesce. Rabbi Simeon ben Lakesh convinced the fugitive to allow himself to be turned over to the authorities. The Palestinian Talmud records that the prophet Elijah had been wont to reveal himself to Rabbi Si-

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23 Babylonian Talmud, Bava Metzi'a 83b.

24 Shitah Mekubetzet, supra note 22.

25 Babylonian Talmud, supra note 23.

26 Id.

meon ben Lakesh on a regular basis but that subsequent to that event he failed to do so. Rabbi Simeon ben Lakesh fasted repeatedly until Elijah again revealed himself. However, Elijah remonstrated that he was being forced to appear to an individual who had delivered a Jew to gentile authorities. Rabbi Simeon ben Lakesh defended his actions, arguing that they were entirely in accordance with Jewish law. To this Elijah retorted, "Is this then the law of the pious?"[27] The incident recounted in the Palestinian Talmud similarly involved deliverance of a fugitive to the hands of civil authorities for punishment in accordance with the law of the land, albeit in a situation in which the surrender of the individual in question was demanded by the authorities upon pain of death of all concerned, including the fugitive. Elijah did not protest that such action is not sanctioned by Jewish law. Rather, he argued that, although entirely legitimate, such action does not behoove the pious. Similarly, the controversy between Rabbi Eleazar ben Simeon and Rabbi Joshua ben Karhah[28] may be understood, not as regarding a matter of normative law, but as pertaining to proper formulation of "the law of the pious." Both agree that the king is empowered to execute those who flout his laws. Rabbi Joshua ben Karhah, however, maintains that a pious person should not act in such a manner, while Rabbi Eleazar ben Simeon maintains that, on the contrary, since the individual is clearly a wicked person, even "piety" demands that he be surrendered for punishment as a means of "eradicating the thorns from the vineyard."[29]

Support for this analysis of the exchange between Rabbi Eleazar ben Simeon and Rabbi Joshua ben Karhah may be found in the commentary of *Ritva* as recorded in his own novellae on that talmudic discussion. In stating the normative rule, *Ritva* offers the following comment: "Nevertheless, in a situation in which the King, in accordance with the laws of the kingdom, may not act in such a manner, his officer is similarly not permitted [to do so]; and if the King orders him to do so he must suffer death and not transgress."[30] The novel legal principle enunciated by *Ritva* is that the monarch may not act in an arbitrary and capricious manner, but must himself conform to the laws promulgated in his kingdom. Concomitantly, illicit orders of the monarch must be resisted, even if such resistance entails martyrdom.

Ritva does, however, affirm that punishment may be imposed by the monarch when such punishment is in conformity with the laws of

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27 Id.

28 Id.

29 Id.

30 Shitah Mekubetzet, supra note 22.

the kingdom.[31] *Ritva*'s conclusion in this regard is remarkable in light of the fact that the prophet Elijah endorsed the view of Rabbi Joshua ben Karhah who maintains that a monarch may not legitimately impose "the King's justice" even under such circumstances. If so, whether the king's action is in accordance with the "laws of the kingdom" or is entirely capricious should be entirely irrelevant. *Ritva*'s comments are cogent only if Rabbi Joshua ben Karhah's position, and Elijah's endorsement of that view, are regarded as based upon considerations of pious conduct rather than upon normative *halakhic* principles. Understood in that manner, *Ritva* asserts that, strictly as a matter of law, the king may order execution only in accordance with the laws of the land, but should he order execution in violation of established law one must suffer martyrdom rather than carry out an illicit directive. It nevertheless remains an act of piety to disregard the king's command to execute punishment in circumstances in which Jewish law does not provide for punishment to be imposed even though such punishment is in accordance with the law of the land.

Nevertheless, *Ritva*'s caveat remains problematic. If the authority of a gentile sovereign to impose "the King's justice" is derived from 1 *Samuel* 8, it is difficult to fathom why his actions are legitimate only if they are predicated upon "the laws of the kingdom." As has been shown earlier, acceptance of the authority of a monarch is not limited to contractual acceptance of already established legal norms. Indeed, acceptance of capital punishment cannot be made a matter of contractual stipulation. Accordingly, acceptance can only mean acceptance of the authority of the king. Pursuant to such acceptance on the part of his subjects, exercise by the monarch of the prerogatives recorded in 1 *Samuel* 8 becomes legitimate. There is no explicit statement in 1 *Samuel* requiring that the monarch act in accordance with a formally promulgated code of law rather than in accordance with his perception, on a case-by-case basis, of the need for punishment as a deterrent to antisocial behavior.

This limitation upon the king's power, denying him the right to punish transgressors other than in accordance with a formally promulgated code of law, can be explained upon the position of Rabbi Simeon ben Tzemach Duran (*Tashbatz*)[32] While *Ritva*'s statement is limited to criminal matters, *Tashbatz* makes a much broader assertion in declaring:

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[31] Babylonian Talmud, supra note 23.

[32] Simeon ben Tzemah Duran (*Tashbatz*), 1 Teshuvot Tashbatz, no. 158; Solomon ben Abraham Adret (*Rashba*), 3 Teshuvot ha-Rashba, Responsum no. 29.

> [T]he king may not enact new laws other than those already enacted . . . for the laws of the monarchy are known to all and are already set down. Just as we have laws of the kingdom as declared by Samuel to Israel . . . similarly other nations have laws known to the kings and it is with regard to [those laws] that [the Sages] declared *dina de-malkhuta dina* . . . .[33]

Rabbi Solomon ben Abraham Adret (*Rashba*) similarly states:

> [J]ust as we have laws of the kingdom as declared by Samuel to Israel similarly gentile kingdoms possess known laws and it is with regard to such laws that the Sages declared that their laws are valid; but the laws on the basis of which the courts judge are not the law of the kingdom, rather the courts judge unto themselves on the basis of what they find in the works of [earlier] judges . . . [34]

Thus *Rashba* explicitly excludes "judge-made law" from the ambit of *dina de-malkhuta dina*.

These authorities apparently understand the phrase "like all the nations" that occurs in 1 *Samuel* 8:5 as indicating that the peoples of antiquity shared a common corpus of law firmly established and known to all. That corpus of law bestowed certain powers upon the monarch, but not necessarily those powers announced by Samuel as the prerogatives of the rulers of the Jewish commonwealth. Nevertheless, according to both *Rashba* and *Tashbatz*, gentile kings are limited to enforcement of statutes incorporated in that corpus of law just as Jewish kings could not exceed the authority vested in them by virtue of Samuel's declaration.

Ritva seems to adhere to this position in part and to deviate in part. *Ritva* presumably did not understand the phrase "like all the nations" as limiting the power of gentile kings to enforcement of the specific provisions of already enacted legislation handed down from antiquity; rather, he understood the phrase as curtailing a monarch's authority to criminalize an act *post factum* and restricting his penal authority to enforcement of the provisions of a previously announced system of law. According to *Ritva*, this is the salient point of the reference to the practice of the monarchs of "all the nations" whose penal system merited endorsement and legitimization. The effect of incorporation of that phrase in the canon of Scripture is to deny non-Jewish monarchs the authority to act in an arbitrary or capricious manner. Thus Samuel's pronouncement serves to limit the authority of gentile sovereigns in a manner somewhat analogous, but not en-

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[33] *Tashbatz*, supra note 32.

[34] *Rashba*, supra note 32; J. Caro, Bet Yosef, Tur Shulhan Arukh, Hoshen Mishpat 26 (end).

tirely parallel, to the manner in which the power of Jewish monarchs was limited. The power of Jewish kings was limited to the exercise of the prerogatives specifically delineated by Samuel whereas non-Jewish kings were denied absolute dictatorial power on an ad hoc basis but were charged only with ruling and meting out justice in accordance with a formal system of law, the content of which was left to their discretion.

Support for this analysis of *Ritva*'s position that the talmudic controversy is limited to "the law of the pious," but that all agree that non-Jewish sovereigns may legitimately administer "the King's justice," is found in another medieval source. *Rashba* explicitly states that the controversy between Rabbi Eleazar ben Simeon and Rabbi Joshua ben Karhah is solely with regard to how the pious should comport themselves but that, as a matter of law, both agree that it is permissible to assist the king in apprehending criminals.[35] *Rashba* writes:

> R. Eleazar ben Simeon apprehended theives at the king's command and punished them as did R. Ishmael ben Yose even though R. Joshua ben Karhah called him "Vinegar, son of wine" . . . as did Elijah of R. Ishmael ben Yose. Nevertheless, we should not deem them to be totally in error with regard to explicit legal provisions. Rather, because of their piety, they should have refrained from administering punishment not mandated by the Torah. That they were called "Vinegar, son of wine" was because they did not conduct themselves with piety as did their fathers. . . . For anyone who is appointed by the king for this purpose may judge and act according to the sovereign decrees, for the king preserves the land by means of such judgments.[36]

However, the position that even a non-Jewish sovereign may legitimately impose "the King's justice" is contradicted by Maimonides in his *Mishneh Torah* in his statement that "each of these murderers and their like who are not subject to death by verdict of the *Bet Din*, if a king of Israel wishes to put them to death by royal decree for the benefit of society he has the right to do so."[37] In ascribing such au-

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35 J. Caro, Bet Yosef, Tur Shulhan Arukh, Hoshen Mishpat 388.

36 This analysis of the position espoused by *Ritva* and *Rashba* is reflected in a responsum of M. Schick (*Maharam Shik*), Teshuvot Maharam Shik, Hoshen Mishpat, Responsum no. 50. The case involved a woman suspected of poisoning her husband. The question posed to *Maharam Shik* was whether or not she should be turned over to civil authorities in order to stand trial. After citing both *Ritva* and *Rashba*, *Maharam Shik* concludes that "sages of Israel" should not become actively involved, but should maintain a passive stance in the matter. Reflected in that position is the view that, although such acts would not be illicit, piety demands that "sages of Israel" not deliver the culprit for possible execution.

37 Maimonides, Hilkhot Rotzeah, supra note 7.

thority only to "a king of Israel," Maimonides appears to reject explicitly the notion that a gentile monarch is authorized to impose "the King's justice" and implies that even non-Jewish subjects must be judged solely in accordance with the provisions of the Noahide Code.[38] Maimonides' position is all the more remarkable in light of the fact that, as noted earlier, in another section of his *Mishneh Torah*,[39] Maimonides limits the application of the principle of *dina de-malkhuta dina* to the edicts of a monarch whose sovereignty has been accepted by the populace. In doing so, Maimonides implies that the authority of *dina de-malkhuta dina* is based upon the legitimate exercise of royal power, the monarchial prerogatives recorded in 1 *Samuel* 8. If so, Maimonides' position is self-contradictory. If Maimonides does indeed predicate *dina de-malkhuta dina* upon 1 *Samuel* 8,[40] he must necessarily regard non-Jewish monarchs as vested with the prerogatives conferred by Scripture upon incumbents in royal office. If so, then, *mutatis mutandis*, a gentile king must also be vested with the authority to impose "the King's justice."

Maimonides' position may be understood on the basis of a responsum authored by Rabbi Moses Sofer (*Hatam Sofer*).[41] The primary question addressed by *Hatam Sofer* in that responsum is whether a non-Jewish judge may accept a bribe. His response is that although the biblical injunction "Thou shalt not take a bribe"[42] is addressed to Jews and not to Noahides, nevertheless, a Noahide is commanded to render a true and just verdict and hence he dare not accept a bribe for purposes of subverting justice.[43] A judge who knowingly renders an unjust judgement, opines *Hatam Sofer*, is guilty of a capital crime under the Noahide Code. Accordingly, he rules that a Jew who presents a bribe to a non-Jewish judge, not only wrongs his adversary, but is also guilty of "placing a stumbling-block before the blind" in causing the judge to issue an unjust decision.[44] *Hatam Sofer* then proceeds to distinguish between civil actions and criminal pro-

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38 Cf. *Maharam Shik*, supra note 36 (disputing the interpretation of Maimonides's position); Bleich, Hasgarat Poshe'a Yehudi she-Barah Le-Eretz Yisra'el, Or Ha-Mizrah Nisan-Tammuz 254 (1987) (discussing *Maharam Shik*).

39 Maimonides, Hilkhot Gezeilah ve-Aveidah, supra note 19.

40 Id.

41 M. Sofer, Teshuvot Hatam Sofer, Likkutim, Responsum no. 14.

42 Deuteronomy 16:19.

43 For further discussion of bribery under the Noahide Code see Nahmanides, Commentary on the Bible, commenting on Genesis 34:13; J. S. Nathanson, 1 Teshuvot Sho'el um-Meshiv, Mahadura Kamma, Responsum no. 230; 3 Encyclopedia Talmudit 355 n.256; B. Chavel, 1 Peirush Ramban al ha-Torah 192, s.v. u-be-Yerushalmi; J. Eibeschutz, Urim ve-Te'umim 9:1; J. L. Diskin, 2 Teshuvot Maharil Diskin, Kuntres Aharon, Responsum no. 5, § 223.

44 Teshuvot Hatam Sofer, Likkutim, supra note 41.

ceedings. Since bribery of a gentile is forbidden only if the bribe is designed to assure a favorable judgment without regard to the merits of the case, a gift designed to assure only impartial deliberation and expeditious disposition of the case is not prohibited.[45] Accordingly, rules *Hatam Sofer*, a bribe designed to assure acquittal in a criminal proceeding cannot be forbidden since

> certainly there is no way that a Jew may [*halakhically*] incur the death penalty by operation of their laws [since they impose the death penalty] without witnesses, prior admonition and a court composed of 23 qualified Jewish judges and, accordingly, such execution is always contrary to the law of the Torah.[46]

Hatam Sofer's rejection of the authority of non-Jewish courts to impose the death penalty upon Jewish defendants would appear to apply with equal force to corporal punishment as well as to incarceration.[47]

Elsewhere,[48] however, *Hatam Sofer* appears to espouse an entirely different view. In another responsum, *Hatam Sofer* poses a fundamental question. Granting that enumeration of specific prospective actions in 1 *Samuel* 8 constitutes conferral of authority upon the monarch to engage in such practices, an examination of those verses reveals that they refer entirely to property rights and matters of personal service; no mention whatsoever is made of either corporal or capital punishment. Where, then, is the source of authority for even a Jewish king to impose such sanctions other than in accordance with statute?

Hatam Sofer finds a source for the exercise of such power in Nahmanides' comments on *Leviticus* 27:29, "*Kol herem asher yeheram min ha-adam lo yipadeh, mot yamut.*" The standard translation of the verse, "None devoted, that may be devoted of men, shall be ransomed; he shall surely be put to death," renders its meaning utterly incomprehensible. Little wonder, then, that medieval rabbinic exegetes and commentaries struggled to arrive at a proper interpretation of the verse. Nahmanides understands the term "*herem*" as used in this context as connoting societal proscription of certain acts upon pain of death.[49] Understood in this manner, the verse, by inference, serves to confer legislative power upon society for the purpose of

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45 In contradistinction to the law governing Noahide judges, a Jew may not accept a gift from a litigant even if it is only of trivial value, even if any attempt to influence the verdict is expressly disavowed, and even if gifts of equal value are presented by both parties. See Maimonides, Mishneh Torah, Sefer Shoftim, Hilkhot Sanhedrin 23:1 & 23:5.

46 Supra note 41.

47 See David ben Samuel haLevi (*Taz*), Shulhan Arukh, Yoreh De'ah 157:8.

48 M. Sofer, Teshuvot Hatam Sofer, *Orah Hayyim*, Responsum no. 208.

49 Nahmanides, supra note 20.

achieving socially desirable goals and also to confer penal authority to enforce such decrees. According to Nahmanides, the verse must be understood as an elliptical reference to the violation of a *herem* pronounced by society and serves to forbid substitution of a financial penalty for capital punishment incurred in violation of a communal edict. The verse then should be rendered as "No [violation] of a *herem*, pronounced as a *herem* by man, shall be ransomed; he [the violator of the *herem*] shall surely be put to death." The biblical narrative, 1 *Samuel* 14:24-45, recounting the actions of Jonathan and his incurrence of capital liability is explained by Nahmanides as predicated upon this scriptural provision. In eating honey Jonathan violated the communal edict pronounced by King Saul against partaking of food on the day of battle against the Philistines; hence Jonathan was subject to the death penalty. The verse "So the people rescued Jonathan, that he died not"[50] is understood by Nahmanides as meaning that the community retroactively nullified its edict and, pursuant to that nullification, Jonathan was exonerated. Such edicts may be promulgated, asserts *Hatam Sofer*, either by the community as a whole or by the sovereign as the executive authority of the community.[51] It is quite apparently *Hatam Sofer*'s opinion that such authority is vested only in the Jewish community and hence only in a Jewish monarch. To be sure, the Jewish community in any country, utilizing its power of *cherem*, could promulgate an edict making *lèse majesté* against the gentile sovereign a culpable offense as a violation of Jewish law. However, no such edict was ever promulgated. Accordingly, only the sovereign of a Jewish state may legitimately impose penal sanctions upon violators of his decrees.

Nevertheless, *Hatam Sofer* finds alternative grounds for asserting that non-Jewish monarchs may legitimately impose extra-statutory punishment. That authority, as well as authority for the principal of *dina de-malkhuta dina*, *Hatam Sofer* regards as being based, not upon 1 *Samuel* 8, but upon *Song of Songs* 8:12. The verse "My vineyard, which is mine, is before me; thou, O Solomon shalt have the thousand, and those that keep the fruit thereof two hundred" is cited by the Talmud[52] in support of a statement to the effect that a king who causes the death of one sixth of the world's population is not subject to punishment. The authors of the *Tosafot*[53] understand that verse as granting Solomon dispensation to cause the death of two hundred in-

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50 1 Samuel 14:45.

51 Teshuvot Hatam Sofer, Likkutim, supra note 41.

52 Babylonian Talmud, Shevu'ot 35b.

53 Id.

dividuals to conquer and preserve the thousand. "Those that keep the fruit" may sacrifice two hundred so that Solomon shall "have the thousand," the king is granted authority to go to war for reasons of state even though casualties necessarily result, provided that casualties are limited to a ratio no greater than two hundred in twelve hundred, leaving a remainder of one thousand (a casualty ratio no greater than one sixth).[54] That dispensation, argues *Hatam Sofer*, is not limited to casualties incurred as a result of warfare but extends as well to infliction of loss of life among the king's own subjects in the course of actions designed to benefit the nation or to enhance the grandeur and honor of the sovereign.[55] The king, as "keeper of the fruit," may compromise the lives and welfare of some of his subjects to preserve the integrity of his "vineyard." *Tosafot*'s statement indicating that the king is empowered to sacrifice lives for national purposes is understood by *Hatam Sofer* as not limiting such authority to casualties incurred in the course of war but as empowering the king to execute citizens for any legitimate purpose involving "preservation of the vineyard" with warfare simply serving as a paradigm. *Hatam Sofer* draws a further inference in stating that the verse "and those that keep the fruit thereof two hundred" serves to establish not only the right of the monarch to take the lives of subjects in order to safeguard the State, but also authorizes him to take lesser measures, including expropriation of property, to provide for the needs of society. Accordingly, concludes *Hatam Sofer*, *dina de-malkhuta dina*, as a principle of jurisprudence expressive of the State's authority to disturb the rights of its citizens to lawful enjoyment of property, is predicated upon *Song of Songs* 8:12.[56]

In presenting the novel thesis that *Song of Songs* 8:12 serves as validation of the principle *dina de-malkhuta dina*, *Hatam Sofer* underscores the point that gentile monarchs are also vested with the power to impose penal sanctions upon miscreants. *Dina de-malkhuta dina*, as a normative principle of Jewish law, applies to the laws of non-Jewish states. If it is derived from *Song of Songs* 8:12 it follows that the verse must be regarded as delineating the authority of all monarchs, gentile as well as Jew. Accordingly, penal authority derived from that verse must also be vested in non-Jewish monarchs. There emerges, however, a contradiction between the position recorded in *Teshuvot Hatam Sofer, Orah Hayyim*,[57] and his statement

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54 Id.

55 See also M. Sofer, Teshuvot Hatam Sofer, Hoshen Mishpat, Responsum no. 44 (reiterating same principle).

56 Teshuvot Hatam Sofer, Orah Hayyim, supra note 48.

57 Id. See also supra note 55 (reiterating same principle).

in *Teshuvot Hatam Sofer, Likkutim*,[58] denying the authority of a gentile king to impose capital punishment upon his Jewish subjects. Resolution of that problem requires a careful reading of the language employed in the latter responsum. *Hatam Sofer* declares such execution to be "*she-lo me-din Torah*," literally, that is "not *from* the law of the Torah"; he does not employ language categorizing capital punishment as imposed by civil authorities to be in violation of, or contradictory to, the law of the Torah. It would seem that in his careful choice of nomenclature *Hatam Sofer* seeks to draw attention to the fundamental distinction between capital punishment as imposed by the *Bet Din* and capital punishment imposed by the king: the latter is viewed as entirely discretionary whereas the former is mandatory. In his enumeration of the 613 commandments recorded in Scripture, Maimonides declares that implementation of capital punishment by the *Bet Din* when required by law constitutes fulfillment of a mandatory biblical commandment. In fact, the *Bet Din* was required to impose four different forms of capital punishment in punishment of various transgressions of biblical law and Maimonides posits a separate commandment mandating administration of each of those four modes of execution.[59] When the requirements of law pertaining to evidence and judicial procedure have been satisfied, the *Bet Din* has no choice but to pronounce its verdict and to impose the appropriate punishment; the *Bet Din* does not enjoy discretion to suspend the sentence or to impose a lesser punishment. Not so with regard to "the King's justice." The king's power is ad hoc in nature and is intended to be exercised only in accordance with the needs of the hour. Hence the king may ignore the infraction, grant a pardon, commute or suspend a sentence. Thus, imposition of capital punishment by the king is categorized by *Hatam Sofer* as "not from the law of the Torah" in the sense that, since it is discretionary in nature, it is not mandated by Torah law. Since gentile courts may impose the death penalty upon Jews or incarcerate criminals only by virtue of their power to impose "the King's justice" and since, according to Jewish law, imposition of such sanctions by the sovereign cannot be mandatory, *Hatam Sofer* finds no impropriety in any attempt to avoid imposition of such a penalty.[60]

Acceptance of *Hatam Sofer*'s thesis provides a basis for resolving the apparent contradiction in Maimonides' codification. As earlier noted, 1 *Samuel* 8:5 does not contain any reference to either capital or

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58 Teshuvot Hatam Sofer, Likkutim, supra note 41.

59 Maimonides, Sefer ha-Mitzvot, Mitzvot Aseh, nos. 226-29.

60 Teshuvot Hatam Sofer, Likkutim, supra note 41.

corporal punishment. Maimonides may well agree with *Hatam Sofer* in regarding that power as being derived from *Leviticus* 27:29. In any event, since it is not derived from 1 *Samuel* it is not among the royal prerogatives enjoyed by "all the nations that surround us" and hence Maimonides maintains that such power is limited to the ruler of a Jewish commonwealth.[61] In adopting that view Maimonides is nevertheless at variance with *Hatam Sofer* in maintaining that gentile kings are not authorized to impose capital punishment in administrating "the King's justice." Presumably, Maimonides understood the talmudic declaration exonerating a king who causes the death of one sixth of the population as limited to casualties inflicted in the course of licitly undertaken warfare. Such a position is entirely compatible with a literal reading of the *Tosafot*'s analysis of that dictum.

Accordingly, Maimonides may be understood as maintaining that *dina de-malkhuta dina* is a derivative of royal authority conferred upon all monarchs on the basis of 1 *Samuel* and as maintaining that any sovereign "accepted" by the populace may exercise that authority. However, maintains Maimonides, since penal sanctions are not enumerated in 1 *Samuel*, the sovereign has no authority to impose such sanctions other than in accordance with the statutory provisions of the Noahide Code. It therefore follows that, according to Maimonides, it is forbidden to deliver a Jew to civil authorities for punishment; rather, the normative law, according to Maimonides, is in accordance with the pronouncement of Rabbi Joshua ben Karhah: "Let the owner of the vineyard come and eradicate his thorns."[62]

According to this analysis, Maimonides regards Rabbi Joshua ben Karhah as asserting a normative *halakhic* position rather than as asserting a standard of pious conduct as has earlier been shown is evidently the position of *Ritva* and *Rashba*. There then emerges somewhat of a problem with regard to the nature of the controversy between Rabbi Joshua ben Karhah and Rabbi Eleazar ben Simeon. If it is accepted that Rabbi Eleazar ben Simeon bases his position upon *Song of Songs* 8:12, as is the view of *Hatam Sofer*, it is extremely unlikely that Rabbi Joshua ben Karhah would reject the *halakhic* principle derived from that verse without making it clear that the exegetical basis of the principle is in dispute. It is similarly unlikely that Rabbi Eleazar ben Simeon regards the authority of a monarch derived from that verse to be limited to infliction of casualties in the course of warfare, as may well be assumed on the basis of the comments of *Tosafot*, since that, too, should have been made clear in the words of

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61 Maimonides, Hilkhot Rotzeah, supra note 7.

62 Babylonian Talmud, supra note 23.

the talmudic protagonists themselves.[63]

It should also be pointed out that *Ritva*'s analysis of the controversy between Rabbi Joshua ben Karhah and Rabbi Eleazar ben Simeon is rejected by a number of early authorities and hence, even ignoring the difficulties with regard to that controversy posed by *Hatam Sofer*'s thesis, an alternate analysis of that controversy must be sought that will accommodate the position of the early authorities who do not accept *Ritva*'s justification of Rabbi Joshua ben Karhah's action. *Ritva*'s contention that the monarchial prerogatives specified in 1 *Samuel* may be exercised by gentile rulers is clearly disputed by the *Tosafot* in their comments upon another talmudic discussion.[64] *Tosafot* are understandably troubled by the divine censure of the conduct of King Ahab as is recorded in 1 *Kings* 21. Nabot refused to sell his vineyard to Ahab and, consequently, Ahab had him put to death and seized the vineyard.[65] However, if 1 *Samuel* serves as a declaration of royal prerogatives, Ahab acted in an entirely illicit manner in expropriating Nabot's land and, since Nabot was culpable in not acceding to the King's demand, Ahab's action in punishing Nabot did not at all warrant censure. *Tosafot* resolve the problem by declaring that the royal prerogatives described in 1 *Samuel* may legitimately be exercised only by a king who rules "over all of Israel and Judea by virtue of divine appointment."[66] Since Ahab neither ruled over "all of Israel and Judea" nor ruled by virtue of divine appointment, he had no right to exercise the powers delineated in 1 *Samuel*. Since, according to the *Tosafot*, even a Jewish king who does not rule by virtue of divine right as announced by a prophet or whose sovereignty is limited to only a portion of the Jewish populace enjoys none of the *halakhic* prerogatives of a monarch, it follows *a fortiori* that such powers are not recognized by Jewish law as being vested in a gentile king whose reign cannot be described as satisfying those two necessary conditions. Thus, unlike *Ritva*, the *Tosafot* certainly regard 1 *Samuel* as inapplicable to a non-Jewish sovereign.[67]

Accordingly, it may be suggested that Rabbi Eleazar ben Si-

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[63] If, as is the position of both *Ritva* and *Rashba*, both R. Joshua ben Karhah and R. Eleazar ben Shimon agree that the king enjoys the power to execute evildoers, there is no reason for them to present any further explanation of their conflicting views regarding the standard to be applied to the pious. That is the case even if such authority is derived from *Song of Songs* rather than 1 *Samuel* 8, as is the view of *Hatam Sofer*. Presumably, the exegetical reference was omitted since it was well known and not at all a matter of controversy.

[64] Babylonian Talmud, Sanhedrin 20b.

[65] 1 Kings 21.

[66] Babylonian Talmud, supra note 64.

[67] See A. Kahama-Shapiro, 1 Teshuvot Dvar Avraham, Responsum no. 1, note appended to *anaf* 2.

meon's dictum "I am eradicating thorns from the vineyard"[68] can be understood in a manner other than as reliance upon the prerogatives associated with royal office.

Rabbi Moses Isserles (*Rema*)[69]rules that, in an age of collective punishment, a person who engages in counterfeiting or the like may be turned over to civil authorities for punishment. As justification for that ruling, *Rema* cites the law of the "pursuer" (*rodef*), the provision of Jewish law that not merely permits, but mandates, that a bystander come to the rescue of a putative victim whose life is threatened and that, if there is no other way of preserving the life of the intended victim, rescue be effected by taking the life of the aggressor.[70] In the talmudic narrative that serves as the focus of the dispute between Rabbi Eleazar ben Simeon and Rabbi Joshua ben Karhah, the criminals sought by the king were not only breaking the law but were, in actuality, jeopardizing the lives of innocent parties. Rabbi Eleazar ben Simeon came upon an official of the king who was apprehending individuals and delivering them for execution without at all endeavoring to distinguish between the innocent and the guilty.[71] Indeed, Rabbi Eleazar ben Simeon demonstrates that the thieves were avoiding detention because "they hide themselves as animals who secrete themselves by day" and hence only the innocent were being apprehended. The officer's response was "What shall I do? It is the command of the King!" The officer clearly recognized that his actions were unjust but pleaded *force majeure*. In all probability, the King was well aware of the fact that arrests were being made indiscriminately but pursued such a policy because of a desire to instill fear in the hearts of thieves in an effort to cause them to desist from their nefarious conduct. Execution of the innocent was designed either to create a feeling of apprehension in those who were indeed criminals and had reason to fear that they too would be apprehended or to secure the cooperation of the citizenry, who as a result of the institution of that policy had reason to fear for their own lives, and bring pressure to bear upon the thieves to desist from their criminal activities. In any event, it is clear that the King was, in fact, executing the innocent because of the acts of some few malfeasors among the populace. It is, of course, possible that the King genuinely desired that only the guilty be apprehended but that the officer acted with misplaced zeal because he feared that were he to fail to report success in bringing the

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68 Babylonian Talmud, supra note 23.

69 *Rema*, Hoshen Mishpat 388:12 & 425:1.

70 See also Maimonides, Hilkhot Rotzeah, supra note 7, 1:7 (codifying this rule).

71 Babylonian Talmud, supra note 23.

guilty to justice his own life would be forfeit. Either way, de facto, innocent persons were being put to death because of the activities of thieves. Thus, thieves were "pursuers" of the innocent no less so than the counterfeiters described by *Rema* on whose account the authorities were prepared to engage in collective punishment. Since the thieves refused to abandon their criminal activities, they were branded as "pursuers" by Rabbi Eleazar ben Simeon who declared that "I am eradicating thorns from the vineyard." The import of that statement may be taken to mean that the criminals were a threat to the innocent just as thorns are a threat to the grapes that would otherwise flourish in the vineyard. If so, Rabbi Eleazar ben Simeon was not merely defending his activities as not being in violation of Jewish law, as must be understood as having been the case according to *Ritva*'s interpretation, but was declaring his actions to be obligatory. In branding the thieves as "thorns" Rabbi Eleazar ben Simeon colorfully depicts them as persons engaged in destruction of the entire "vineyard" with the result that it was incumbent upon him to eliminate them to preserve innocent persons endangered by their activities.

If this analysis of the position of Rabbi Eleazar ben Simeon is correct, Rabbi Joshua ben Karhah's response, "Let the owner of the vineyard come and destroy his thorns," becomes problematic. The retort does not seem to involve a denial of the facts of the case. If the facts were as described, Rabbi Eleazar ben Simeon's *halakhic* analysis is beyond cavil.

The controversy between Rabbi Eleazar ben Simeon and Rabbi Joshua ben Karhah may well reflect disagreement regarding the level of certainty of impending loss of life that is required to trigger the law of pursuit. Even if Rabbi Joshua ben Karhah did not himself appreciate the fact that the thieves were in actuality "pursuers" as well, once he heard Rabbi Eleazar ben Simeon declare "I am destroying thorns in the vineyard" Rabbi Joshua ben Karhah's retort "Let the Master of the vineyard come and eradicate his thorns" is entirely inappropriate. Rabbi Joshua ben Karhah acquiesces in the assignment of the appellation "thorns" to the evildoers. If so, to refrain from taking action against them would constitute a violation of the biblical command: "And you shall cut off her hand, your eye shall not have pity."[72]

The Talmud,[73] employing biblical exegesis, develops the principle that a burglar must also be presumed to be intent upon taking the life of the householder whose home he enters. It is to be presumed

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[72] Deuteronomy 25:12. See also Maimonides, Hilkhot Rotzeah, supra note 7, 1:7 (codifying the law of "*rodef*" as based upon this verse).

[73] Babylonian Talmud, Sanhedrin 72a.

that if the householder discovers the intruder he will instinctively resist with all means at his disposal in order to preserve hearth and home. The burglar, in turn, recognizes the likelihood that lethal force will be used against him, and hence it must be presumed that, if discovered by the householder in the course of breaking into his home, the burglar, fearing for his own life, will endeavor to strike first. Since the burglar is not only engaged in felonious activity but is also responsible for creating the danger to the householder, he is adjudged a "pursuer." The Talmud declares that an exception to this rule occurs in the case of a father engaged in burgling his son's home. In that case, the talmudic presumption is that a father will not attempt to kill his own son and, since this is known to the son as well, the son, if he should kill his burgling father, cannot seek exoneration by pleading that he was entitled to invoke the law of pursuit. In other cases, however, there exists a legal presumption that the burglar is a "pursuer."[74] In their commentaries upon that discussion both *Rashi* and *Tosafot* indicate that, in the absence of a presumption of law, the "pursuer" may not be killed unless murderous intent on his part is known with certainty; the "law of the pursuer" cannot be invoked on the basis of mere suspicion or in a case of doubt.[75]

A contemporary authority, the late Rabbi Moses Feinstein,[76] declares that the law of pursuit applies only in situations in which the murderous intent of the aggressor is known on the basis of an assessment "approaching certainty." However, a leading authority of the previous generation, Rabbi Hayyim Ozer Grodzinski (*Ahi'ezer*)[77] adopts a somewhat looser standard. In discussing the propriety of a therapeutic abortion which, according to some, may be performed only when the life of the mother is threatened by the fetus as "pursuer," *Ahi'ezer* is prepared to rely upon the "assessment" of medical practitioners but does not indicate that their prognosis must be couched in terms indicating that, absent intervention, the likelihood that the mother will die "approaches certainty." The most elastic standard is apparently that of Rabbi Elijah of Vilna (*Gra*)[78] who understands *Rema* as permitting summary execution of counterfeiters even when the danger to the community is not known with certainty but is only "feared" (*heshasha*). In support of his view, *Gra* comments that the principle is derived from the biblical provisions con-

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74 Id.

75 See S. Yitzchaki (*Rashi*) and *Tosafot*, commenting on Babylonian Talmud, Sanhedrin 72a. See also I. Schorr, Teshuvot Koach Shor, Responsum no. 20, s.v. gedolah me-zu.

76 M. Feinstein, Iggerot Mosheh, 2 Hoshen Mishpat, Responsum no. 69, § 2.

77 H. O. Grodzinski, I Teshuvot Achi'ezer, Responsum no. 23, § 2.

78 Bi'ur ha-Gra, Hoshen Mishpat 388:74.

cerning a burglar and indicates that he regards the danger to the life of the householder in such a situation to be less than certain.

It may be the case that *Ritva*, in explaining the conduct of Rabbi Eleazar ben Simeon as based upon implementation of "the King's justice," declined to explain the matter on the basis of the "law of the pursuer" because he did not regard it as being clear that the King would continue to apprehend and execute the innocent together with the guilty. Particularly with the King's appointment of Rabbi Eleazar ben Simeon as the official charged with bringing evildoers to justice pursuant to his becoming impressed with that scholar's wisdom and sagacity, there may well have been reason to assume that the King's wrath was assuaged and that he would no longer pursue the matter so assiduously or that Rabbi Eleazar ben Simeon would be in a position to dissuade the King from imposing punishment indiscriminately upon the innocent as well as upon the guilty.

Tosafot and Maimonides, however, certainly understood the talmudic narrative as reflecting a conviction on the part of all concerned that such practices would continue. Nevertheless, it may be postulated that Rabbi Eleazar ben Simeon did not know with certainty, or even in a manner "approaching certainty," that this would occur. The essence of the controversy between Rabbi Eleazar ben Simeon and Rabbi Joshua ben Karhah may then have been with regard to whether or not the "law of the pursuer" may be invoked when the danger to the victim cannot be established with certainty or in a manner "approaching certainty." Accordingly, Rabbi Joshua ben Karhah maintained that the "law of the pursuer" is applicable only in cases of virtual certainty while Rabbi Eleazar ben Simeon maintained that a significantly lesser degree of certainty is sufficient.

III. NATURAL LAW AND THE PENAL AUTHORITY OF THE STATE

Yet another theory explaining the principle *dina de-malkhuta dina* is advanced by *Rashi* in his commentary on *Gittin* 9b. The Mishnah declares that all civil instruments executed by non-Jewish courts are valid for purposes of Jewish law even though the attesting witnesses are gentiles. Included in that category are deeds to real property that serve to give legal effect to the transfer and which, ostensively, must be signed by competent Jewish witnesses to do so. Bills of divorce similarly executed are explicitly declared by the Mishnah to be invalid, presumably because of the absence of qualified attesting witnesses. *Rashi* endeavors to resolve the problem by indicating that, although gentiles are not subject to the provisions of biblical law concerning divorce, they are bound by the Noahide Code

which includes a commandment concerning "*dinin*." Maimonides defines *dinin* as an obligation to enforce the other provisions of the Noahide Code by appointing judges and other law enforcement officials[79] while Nahmanides defines "*dinin*" as commanding the establishment of an ordered system of jurisprudence for the governance of financial, commercial and interpersonal relationships.[80]

Rashi's comments are remarkable because the Gemara itself, *Gittin* 10b, provides a different explanation for the validity of instruments drafted by gentile courts as posited by the Mishnah. The Gemara explains simply that the rule stipulated in the Mishnah is predicated upon the principle *dina de-malkhuta dina*. Accordingly, such instruments are regarded as valid in Jewish law because they are recognized as valid by "the law of the kingdom." *Rashi*'s comment must then be understood, not simply as justification of the provision recorded in the Mishnah, but as an explication of the talmudic analysis of that position. Thus, in offering this comment *Rashi* formulates a novel theory in justification of the principle *dina de-malkhuta dina*.

Rashi's thesis is compatible with Nahmanides' definition of *dinin* as understood by Rabbi Naphtali Zvi Judah Berlin.[81] Although Nahmanides clearly states that the commandment regarding *dinin* serves to mandate establishment of a fully developed system of jurisprudence, he is silent with regard to the nature of the contents of that corpus of law. Rabbi Moses Isserles[82] and Rabbi Moses Sofer[83] assert that gentiles must govern their affairs by means of the applicable provisions of Jewish law as they pertain to civil matters and are not at liberty to reject or modify those provisions. According to this analysis of Nahmanides' position, *dinin* is simply the incorporation by reference into the Noahide Code of the jurisprudence of the Sinaitic Code. Rabbi Naphtali Zvi Berlin expresses an opposing view in asserting that, according to Nahmanides, the Noahide Code is silent with regard to specific provisions of law pertaining to matters of jurisprudence. The commandment mandates only that laws be propagated to preserve the social order; the content of those laws is left to be determined in accordance with the need and discretion of each society.[84] According to that thesis, *Rashi* may be understood as declaring that *dina de-malkhuta dina* represents the exercise of the legislative authority sanctioned by the commandment concerning

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79 Maimonides, Hilkhot Melakhim, supra note 5, 9:14.

80 Nahmanides, Commentary on the Bible, commenting on Genesis 34:13.

81 N. Berlin, He'emek She'elah, She'ilta 2, § 3.

82 M. Isserles, Teshuvot Rema, Responsum no. 10.

83 See Teshuvot Hatam Sofer, Likkutim, supra note 41.

84 This is also the position of I. Meltzer, Even he-Azel, Hilkhot Malveh ve-Loveh 27:1.

dinin. Hence, according to *Rashi*, the ultimate authority that renders "the law of the kingdom" binding upon the populace is the commandment concerning *dinin*.

However, one problem remains with regard to this analysis of *Rashi*'s comment. Jews are bound by the 613 precepts of the Sinaitic Code rather than by the Noahide Code. Accordingly, the commandment concerning *dinin* is not part of the corpus of law binding upon Jews. Hence any novel aspect of law predicated upon the principle of *dinin* should apply only to non-Jews but not to Jews. Moreover, although *dinin* may confer authority upon gentiles to enact legislation as they see fit, as is the opinion of Rabbi Naphtali Zvi Judah Berlin, the jurisprudential aspects of Jewish law are established by biblical statute and are not subject to modification by society. Jews certainly do not have the right, for example, to abrogate the biblical obligation requiring an employer to pay a day-laborer's hire immediately and to permit a 30-day grace period for payment. Similarly, Jews cannot vary the provisions governing qualifications of attesting witnesses. *Rashi*'s comment might adequately serve to explain why instruments drafted by gentile courts may be recognized and enforced among Noahides but completely fails to address the question of why they may properly be accepted and enforced by a *Bet Din* against a Jewish litigant.

Rashi's comment may be understood on the basis of a remarkable provision recorded by Maimonides in the final section of his *Mishneh Torah*.[85] Subsequent to a detailed codification of the provisions of the Noahide Code in general and of *dinin* in particular as well as of the provisions of law pertaining to the resident alien domiciled in the Jewish commonwealth who formally agrees to be bound by the Noahide Code, Maimonides writes:

> The *Bet Din* of Israel is obligated to establish judges for these resident aliens to judge them in accordance with these laws in order that the world not be destroyed. If the *Bet Din* sees fit to appoint judges from among them, they may do so; and if they see fit to appoint Jewish judges for them, they may do so.

However, Maimonides himself, in an earlier ruling,[86] states that establishment of a judiciary for this purpose is an obligation incumbent upon gentiles. In keeping with the fact that *dinin* is a commandment addressed to Noahides rather than to Jews, there seems to be no basis in talmudic sources for positing the establishment of a Noahide judiciary as an obligation binding upon Jews as well as upon non-Jews. The

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[85] Maimonides, Hilkhot Melakhim, supra note 5, 10:11.

[86] Id. 9:14.

Noahide Code requires gentiles to manage their own affairs without establishing a concomitant obligation in Jewish law requiring Jews to fill any lacunae resulting from nonfeasance on the part of Noahides. Maimonides' justification of this ruling, "so that the world not be destroyed," is not culled from any prior rabbinic source and is not rooted in any particular commandment. It would appear that the obligation recorded by Maimonides is not predicated upon any dogmatic precept but is entirely the product of reason; the mandate is in the nature of what may be termed an obligation of natural law. Society cannot exist long in a state of anarchy. Preservation of society—and of the world—is mandated by reason; hence reason dictates that the *Bet Din* must guarantee preservation of law and order by establishing a judicial system to administer the provisions of the Noahide Code.

Rashi's comment may be explained on the basis of a similar consideration. Although gentiles are explicitly commanded with regard to *dinin*, the need to establish a system of jurisprudence is dictated by reason as well. Even if the Noahide Code were to be silent concerning such matters, reason dictates that laws governing matters of jurisprudence be established and enforced. Normative principles discovered by reason are binding upon Jews and gentiles alike. Accordingly, it may be postulated that *Rashi* concludes that Jews living in societies in which they lack legal autonomy are bound to obey the law of the host country. Although, as a commandment, *dinin* is addressed only to Noahides, reason requires that Jews be bound by legislation authorized by that commandment.[87]

Rashi's comments elsewhere serve to indicate that reason further mandates that evildoers be punished in as a severe a manner as necessary to deter others. The Talmud, *Niddah* 61a, records the following narrative:

> It was rumored concerning certain Galileans that they killed a person. They came to Rabbi Tarfon and said to him, "Sir, hide us!" [Rabbi Tarfon] replied, "What shall I do? If I do not hide you, you will be seen. Should I hide you? The Sages have said that rumors, even though they may not be accepted, nevertheless, should not be dismissed. Go and hide yourselves."

Tosafot comment that Rabbi Tarfon was concerned that the rumors might be true, the fugitives may indeed have committed an act of murder, and that, if so, Rabbi Tarfon's own life would be "forfeit to the King" as punishment for having harbored fugitives. *Rashi*, how-

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87 For a fuller discussion of reflections of natural law theory in rabbinic sources as well as of the positions of Maimonides and *Rashi* see Bleich, Judaism and Natural Law, 7 The Jewish Law Annual 5-42 (1988).

ever, comments simply, "[p]erhaps you have committed murder and it is forbidden to save you" without at all suggesting that Rabbi Tarfon was motivated by fear of punishment at the hands of the civil authorities. On the contrary, *Rashi* indicates that Rabbi Tarfon's concern was founded upon the illicit nature of the contemplated act rather than fear of retribution.[88] *Rashi* clearly assumes that, in terms of Jewish law, harboring a guilty fugitive constitutes an illicit act even though the guilty person is a fugitive from the justice of the civil state. That position is cogent only if it is antecedently granted that the prosecuting authorities may legitimately impose penal sanctions upon evildoers. Hence *Rashi* may readily be numbered among the authorities who maintain that a non-Jewish sovereign may legitimately impose penal sanctions in accordance with "the King's justice."

Nevertheless, one point requires clarification. Punishment of malfeasors may be a royal prerogative. That, however, does not establish an obligation to assist the king in exercising that prerogative. Surely this is true of the other royal prerogatives enunciated in 1 *Samuel* 8 and is equally true if the authority of the sovereign is derived from *Song of Songs* 8:12. Scripture merely grants licence to the monarch to expropriate property, to exact personal services or to endanger the lives of the populace and also to punish those who disobey his edicts. However, Scripture does not require him to impose such punishment or demand that others assist him in doing so. By the same token, although the king may administer punishment on an ad hoc basis, there is no apparent statutory provision indicating that a person may not conceal an individual sought by the king. *Rashi*, then, must be understood as positing an obligation not to do so based solely upon the dictates of reason. Reason demands that a murderer be brought to justice and punished. Reason similarly demands that punishment be carried out only in accordance with legal procedures and only by duly constituted authorities because the alternative would similarly lead to a breakdown of the social order. Just as reason forbids a person to take the law into his own hands, it also mandates that there be no interference with the administration of justice by properly constituted authorities. Hence *Rashi* concludes that it is forbidden to shield a murderer and that Rabbi Tarfon could not allow himself to be in the position of doing so. A similar position attributed to *Rashba* is cited by Rabbi Joseph Caro in his commentary on the *Tur Shulhan*

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[88] Id. This is certainly how *Rashi* was understood by Rabbenu Asher ben Yechi'el (*Rosh*), commenting on Babylonian Talmud, Niddah 61a. But cf., J. Ettlinger, Arukh la-Ner, commenting on Niddah 61a (understanding *Rashi*'s comment as referring to applicable secular law).

Arukh.[89] Rabbi Joseph Caro quotes that authority as declaring "for if everything is left to stand on the law of the Torah, as when the Sanhedrin imposes judgment, the world would be desolate." *Rashba*'s comment is expressed in the context of a justification of the imposition of penal sanctions by civil authorities upon Jewish nationals and similarly reflects the position that such authority is derived on the basis of reason alone.[90]

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[89] Bet Yosef, supra note 35.

[90] A similar theory is propounded by the 19th-century rabbinic scholar, Rabbi Zvi Hirsch Chayes (*Maharatz Hayes*), in Torat Nevi'im, chap. 7, published in 1 Kol Sifrei Maharatz Hayes (1958) 48. *Maharatz Hayes* observes that disobedience of law leads to anarchy, but instead of asserting that there exists a natural law basis for enforcement of a criminal code, he argues that the sovereign is empowered to punish transgressors by virtue of the "law of the pursuer." For a discussion of the difficulties inherent in *Maharatz Hayes'* position, see Bleich, supra note 38, at 268-269.