



## **Bankruptcy - A Viable Halachic Option?**

*Steven H. Resnicoff*



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### **INTRODUCTION**

American bankruptcy law offers people the opportunity to avoid repaying their debts, even if they later become wealthy. This is accomplished by granting debtors a "discharge" of their debt, which permanently eliminates their legal responsibility to pay. Debtors are increasingly seizing this opportunity. In calendar year 1991, almost a million bankruptcy petitions were filed in the United States alone.

Obtaining a bankruptcy discharge raises serious halachic problems. First, halacha requires repayment of debt. Second, halacha generally prohibits litigation between Jews in secular courts. This Article explores whether, despite these obstacles, Jewish debtors may take advantage of a bankruptcy discharge.

I believe this is the first article in English devoted to the halachic validity of bankruptcy law.<sup>2</sup> Obviously, in this single article we cannot fully explore all of the issues which are raised, nor can we persuasively resolve the apparently contradictory authorities cited. The hope is to provide a halachic framework for further analysis.

### **PART I: HALACHIC IMPORTANCE OF PAYING ONE'S DEBT**

Halacha considers the repayment of debt to Jewish creditors

as a moral and religious imperative. Most authorities agree that the payment of one's debts is an affirmative biblical commandment.<sup>3</sup> Rabbi Yisroel Meir HaCohen (the "Chafetz Chaim")<sup>4</sup> states that if a debtor who can pay refuses to do so, he also violates a negative biblical commandment not to oppress ("lo sa'ashok") his neighbor.<sup>5</sup>

The Mishna declares someone in any of four categories is called an Evildoer ("Rasha").<sup>6</sup> Quoting David HaMelech,<sup>7</sup> it says that one of these is a person who borrows but, although financially able, does not repay. To such persons the sages apply the verse "[t]hose who acquire wealth in violation of halacha, in mid-life it(they) will leave them (it)" (Emphasis added). The phrase "it(they) will leave them (it)" has two meanings. Sometimes the wealth ("it") leaves the people ("them") - *i.e.*, the people become impoverished while still young. In other instances, the people ("they") leave the wealth ("it") - by dying prematurely.<sup>8</sup>

There is no halachic equivalent to a bankruptcy discharge.<sup>9</sup> Instead, if property collected from a debtor is not sufficiently valuable to pay off his debts, the debtor remains personally liable for any unpaid amounts. If and when the debtor acquires additional assets, he is obligated to pay, and this obligation is enforceable by rabbinic court ("bais din").

## **PART II: "YEUSH" AND THE BANKRUPTCY DISCHARGE**

First let's consider whether one's debts may be halachically discharged without reference to bankruptcy law. This might possibly occur through a creditor's despair ("yeush").

Where a person believes he will not recover his lost object, there is yeush. If the object is found after yeush, it belongs to the finder. Arguably, if a creditor believes that he will never be paid, there is yeush, and the debt "belongs" to the debtor, who is thereby freed from his obligation to pay.

There are three principal views as to whether a creditor's yeush cancels a borrower's debt. Rabbi Yosef Caro (the "Mechaber")<sup>10</sup> broadly declares that yeush does not

discharge a debt. Rabbi Yaakov Yeshaya Blau states that most poskim agree with the Mechaber that the mere fact that a debtor appears to have become impoverished does not discharge his debts.<sup>11</sup> Rabbi Moshe Isserles (the "Rema") explains that although lenders always know a debt may not be repaid, we do not say that all creditors despair of repayment.<sup>12</sup>

On the other hand, Rabbi Blau explains that many poskim conclude that where circumstances would lead any reasonable creditor to despair, such as where the debtor's fields are ruined by floods, there is yeush and the debt is discharged.<sup>13</sup> According to Rabbi Aryeh Leib HaKohen Heller (the "Kitzos HaChoshen")<sup>14</sup>, this is the view of Rabbi Yosef Colon (the "Maharik")<sup>15</sup> and the Rema.

The third view is offered by Rabbi Meir Auerbach ("Imrei Bina"). He states that a debt is generally discharged whenever the creditor despairs of repayment, even if this is because the debtor becomes impoverished. The only exception is that a debtor cannot extinguish his debt if his own purposeful, wrongful act caused the owner's yeush, such as where a debtor simply refuses to pay.<sup>16</sup>

According to the Kitzos, and even more so the Imrei Bina, a debtor's financial woes may cause debts to be discharged without resort to bankruptcy law. If so, the halachic impact of a bankruptcy discharge might be moot.

But assume for a moment that a bankruptcy discharge works as to non-Jewish or irreligious Jewish creditors, but not as to religious Jewish creditors.<sup>17</sup> Assume also that most of a debtor's obligations are to non-Jewish or irreligious Jewish creditors. If a bankruptcy discharge were halachically invalid, a religious Jewish creditor might despair of repayment, and, according to the Kitzos or Imrei Bina, the debtor's obligation to pay him might be discharged.

If, however, the debtor is entitled to discharge the debt owed to non-Jews or irreligious Jews, which constitutes

most of his indebtedness, there may be a meaningful chance for the debtor's financial recovery. If so, the religious Jewish creditor may not despair of ultimate payment, and bankruptcy discharge law could ironically prevent the halachic discharge of debts to religious Jews.

### **PART III: HOW ONE OBTAINS A BANKRUPTCY DISCHARGE**

Assuming that a debtor's impoverishment does not extinguish a debt through the creditor's yeush, it becomes necessary to examine whether a bankruptcy discharge is halachically valid. It is important to understand how a debtor obtains a secular bankruptcy discharge.

Bankruptcy law, in its current form, basically allows a debtor to be released from his financial obligations in either of two ways. Neither requires that all, or even a majority, of the debtor's creditors agree.<sup>18</sup>

First, a debtor may deliver to the court all of his property (except for certain "exempt" property which the debtor is allowed to keep) for distribution to creditors. In "exchange" for the surrender of such property, the debtor is relieved of personal liability for any unpaid debt.<sup>19</sup> This type of bankruptcy is called a "liquidation."

Alternatively, the debtor may propose a plan to make payments to creditors over a number of years. Various rules apply to determine the minimum amounts of such payments. Upon completion of the proposed payments, even though the creditors have not been paid in full, the debtor is discharged from any further liability. This type of bankruptcy is called a "reorganization."<sup>20</sup>

Under certain circumstances, a debtor's creditors may force him into a liquidation or reorganization bankruptcy against his will. A debtor in such an involuntary bankruptcy is still eligible for a discharge of his debt.<sup>21</sup>

### **PART IV: CUSTOM/IMPLIED AGREEMENT AND THE BANKRUPTCY DISCHARGE**

Although halacha prescribes certain rules regarding commercial transactions, halacha allows individuals to alter these rules by agreement or custom.<sup>22</sup> Therefore, bankruptcy discharge law may be halachically valid if it is found that, when the parties agreed to deal with each other, they did so on the understanding - even if implicit - that they would have the right, if they qualified, to seek bankruptcy relief.

## **A. General analysis**

There are at least two interrelated reasons for finding that debtors and creditors implicitly agree that a bankruptcy filing is a viable option. The first is based on commercial custom, "minhag HaSocharim." The second is based on the fact that the parties contracted in light of secular law.

### **1. Informally established commercial practices**

Halacha recognizes that commercial transactions are governed by custom. The first Mishna of "HaSocher es HaPoalim," Talmud Bavli, Bava Metzia 83a, states that

One who hires laborers and tells them to come early or stay late: in a place where the custom is not to come early or stay late, the employer is not allowed to force them [to do so]. . . All [such terms] are governed by local custom."

In fact, minhag prevails over what would otherwise be the halacha.<sup>23</sup>

Moreover, the majority view is that as to commercial matters, such customs need not have been established by halachic or communal authorities, nor even by Jews.<sup>24</sup> Parties are simply presumed to have implicitly made applicable customs part of their agreement. Rabbi Moshe Feinstein explains:

It is entirely obvious that all of these rules that depend on custom . . . do not have to be customs established by Torah scholars, and not even by Jews specifically. Even if these customs were

established by Gentiles, if they are the majority of the inhabitants of the city, the halacha is in accordance with the custom [unless the parties specify otherwise] because [it is deemed that] the parties conditioned their agreement in accordance with the custom of the city [unless they specify otherwise].<sup>25</sup>

There are many examples where custom prevails over what would otherwise be the halachic rule. For instance, where persons on a caravan hire a guide, halacha prescribes a formula for determining how much of the guide's fee each person should contribute. That formula takes into consideration both a per capita and a property component so that a person who brings more property pays more. If, however, there is a custom to determine payment based solely on the amount of property each person has with him, then the custom governs.<sup>26</sup>

Similarly, although halacha provides that one may become contractually liable only through certain formal procedures (kinyanim), the Gemara, Bava Metzia 74a, states that where people in business use a different method ("s'tumtah"), such as a handshake, this method is halachically valid.<sup>27</sup>

## **2. Custom established by secular law**

A custom is frequently based on the fact that secular law requires such action. Many poskim have stated that this fact does not detract from the custom's halachic status. For example, Rabbi Yosef Iggeres argues:

One cannot cast doubt upon the validity of this custom on the basis that it became established through a decree of the King that required people to so act. Since people always act this way, even though they do so only because of the King's decree, we still properly say that everyone who does business without specifying otherwise does business according to the custom.<sup>28</sup>

Similarly, Rabbi Blau states in the name of Chacham Yosef

Chaim Pealim ("Ben Ish Chai")<sup>29</sup> that even where the separate doctrine *dina d'malchusa dina*, to be discussed by us in Section IV, does not apply, if people act in accordance with the secular law, the custom has halachic validity as custom.<sup>30</sup>

Rabbi Moshe Feinstein has arguably gone further, suggesting that secular law may have the same effect as *minhag*, even if people do not always act in accordance with the secular law. Thus, in one case, Rabbi Feinstein was told that applicable landlord-tenant law prohibited the landlord from evicting a tenant at the end of the lease, even if the landlord wanted to use the property himself. Although Rabbi Feinstein was asked whether the law was halachically valid because of *dina d'malchusa dina*,<sup>31</sup> he chose not to rule on this ground. Instead, he declared that the landlord agreed to the secular law at the time of the lease:<sup>32</sup>

[C]ertainly the law of the land is no worse than *minhag* and unless the parties agree otherwise it is deemed as if they agreed according to the secular law, and a fortiori when the *minhag* is in accordance with the secular law.<sup>33</sup>

## **B. Application to bankruptcy law**

When people do business in the United States, a strong argument can be made that they implicitly agree that their transactions are subject to secular law, which includes bankruptcy discharge law. To evaluate the merits of this argument, we must examine halachic precedents. Unfortunately, there are relatively few relevant responsa.

### **1. Early poskim**

A number of poskim have discussed whether a creditor's rights against an impoverished debtor may be limited or annulled through *minhag*. Most of these poskim refer to *tshuvos* of Rabbi Moshe HaKohen ("Maharshach"), an authority in sixteenth century Salonika.<sup>34</sup>

The Maharshach was asked about a case in which a majority

of creditors agreed to give a debtor an extension of time to pay his debts.<sup>35</sup> One creditor objected and sought to enforce his halachic rights in *bais din*. Local custom entitled a majority of creditors to force minority creditors to a compromise with the debtor. Citing the Gemara which made *s'tumtah* a halachically valid form of *kinyan*, the Maharshach stated that custom controls financial transactions, even where custom is inconsistent with the usual halachic provision, and ruled against the dissenting creditor.

This view of the Maharshach has been cited favorably by many halachic authorities.<sup>36</sup> Moreover, a question sent to the Maharashdam made the Maharshach's argument, and the Maharashdam commented on it approvingly.<sup>37</sup>

Although some of the poskim citing the Maharshach dealt with compromises which merely extended the debtor's time to pay or altered the creditors' respective rights regarding the distribution of the debtor's current assets,<sup>38</sup> none of these poskim conclude that the Maharshach's logic was limited to such cases.<sup>39</sup> Most poskim explicitly or implicitly addressing this issue apply the Maharshach broadly, ruling that, if consistent with local custom,<sup>40</sup> a majority of creditors may force a minority to a compromise.<sup>41</sup>

In discharging part of the debtor's debt, these compromises operated substantially as secular bankruptcy discharges. Indeed, for a number of years, in order for a debtor to obtain a discharge of debt in a "liquidation bankruptcy"<sup>42</sup> under various federal bankruptcy laws, a debtor had to obtain the consent, or at least avoid the dissent, of a majority of his creditors.<sup>43</sup> In "reorganization bankruptcies," the consent of some creditors is still required.<sup>44</sup>

As noted in Part III, above, current bankruptcy discharge law differs from the compromises discussed in the *tshuvos* citing the Maharshach (the "Maharshach *Tshuvos*") in two ways: (1) where the debtor's nonexempt assets are insufficient, a discharge may be obtained even where

creditors receive no distribution; and (2) the discharge may be obtained without the consent of the debtor's creditors. Nonetheless, it is unclear whether these factors make any halachic difference so long as the current minhag is to provide a discharge wherever the debtor otherwise qualifies under secular bankruptcy law.

## 2. Modern authorities

Rabbi Blau and Professor Shmuel Shilo seem to be the only modern authorities who explicitly discuss one or more of the Maharshach Tshuvos in connection with bankruptcy discharge law.

Professor Shilo addresses this question briefly in his comprehensive work on *dina d'malchusa dina*. He describes most of the Maharshach Tshuvos as based on minhag HaSocharim and states that they support secular bankruptcy law.<sup>45</sup>

Rabbi Blau mentions that minhag HaSocharim may justify bankruptcy discharge law. He does not mention all of the Maharshach Tshuvos. Instead, he notes that Rabbi Akiva Eger cites the tshuva of Rabbi Moshe Yisroel, which, referring to the Maharshach, concludes that a discharge of debt obtained through an agreement with a majority of creditors is valid even as to creditors who objected. Although Rabbi Blau himself rules that bankruptcy law should be effective as to corporate<sup>46</sup> debt, his position regarding individual bankruptcies is less clear.<sup>47</sup>

Rabbi Ezra Basri relies on the Maharshach Tshuvos in ruling that a discharge pursuant to an agreement with a majority of creditors is binding on objecting creditors.<sup>48</sup> Nevertheless, although Rabbi Basri comments on various halachic ramifications of bankruptcy law,<sup>49</sup> he does not specifically opine as to whether someone who is poor may seek or rely on a secular bankruptcy discharge.

However, in denouncing those who exploit bankruptcy law despite the fact that they are wealthy, Rabbi Basri arguably approves bankruptcy relief for those who are genuinely

impoverished:

Those who go bankrupt while their homes are full of valuables and do not pay their creditors, even if they do so through secular courts, have stolen merchandise in their hands. They will ultimately have to give an accounting. There is not enough space to expound upon the enormity of their guilt, especially if they do so with respect to non-Jewish creditors, because they profane G-d's name and cause non-Jews to say "This is what Jews do." One cannot describe the extent of their punishment.<sup>50</sup>

The prohibition against profaning G-d's name, applies to those who are really rich and, therefore, renders their assets "stolen goods."<sup>51</sup> By contrast, the poor may be entitled to file bankruptcy without their relatively insignificant exempt property being considered stolen.

Rabbi Moshe Heinemann, in an interview on March 13, 1992, stated that the central question is whether people, when they enter into transactions, have in mind that they are negotiating subject to the bankruptcy law.<sup>52</sup> If they do, then the bankruptcy discharge would be halachically valid. He stated that he believed that bankruptcy law would be valid as to corporate debtors, but that he was uncertain ("mesupak"), as to whether or not individual Jews, when they enter into transactions, have in mind secular bankruptcy law.

It may be that the circumstances surrounding a transaction can indicate whether parties expect to be bound by secular law. For instance, where parties to a commercial transaction consult non-Jewish or non-observant attorneys, they may intend secular law to apply.<sup>53</sup> Indeed, whenever a party applies for a business loan, he may expect secular law to apply. On the other hand, when one obtains a consumer loan, the parties may expect the loan to be governed by halacha.<sup>54</sup>

As discussed in Part IV, below, at least one relatively recent

posek, Rabbi Mordechai Yaakov Breish ("Chelkas Yaakov"),<sup>55</sup> explicitly ruled that secular bankruptcy law is not halachically effective to discharge debts between Jewish debtors and creditors. Among other things, it is noteworthy that he did not discuss the Maharshach Tshuvos.

## **PART V: DINA D'MALCHUSA DINA AND THE BANKRUPTCY DISCHARGE**

The principle dina d'malchusa dina (the law of the land is the law) provides that the law of the secular state is halachically binding.<sup>56</sup> The principle, where applicable, supersedes the results halacha would otherwise prescribe. If applicable to all of bankruptcy law, dina d'malchusa dina would allow religious Jewish debtors to enjoy the advantages of a bankruptcy discharge.

### **A. Principal views of dina d'malchusa dina**

We will refer to the three principal versions of dina d'malchusa dina as the Mechaber's view, the Rema's view and the Shach's view. These approaches broadly agree, based on dicta of the Babylonian Amora Shmuel, that dina d'malchusa dina halachically legitimizes taxes, currency regulation and other secular laws which relate directly to the government's financial interests.<sup>57</sup> The Mechaber's view is that these are the only areas to which dina d'malchusa dina applies. The Rema views dina d'malchusa more comprehensively. The Shach, in turn, imposes a restriction on the Rema's approach.

This controversy reflects a difference of opinion among Rishonim regarding a passage in *Misechta Gittin*.<sup>58</sup> The Mishna, in relevant part, says the following:

All documents accepted in non-Jewish courts, even if the witnesses who signed them are non-Jews, are halachically valid, except writs of divorce and emancipation. Rav Shimon says that even these are valid; they were only declared invalid when prepared by unauthorized persons.

The Gemara asks why the Mishna does not

differentiate between documents of only evidentiary value and documents which actually effectuate legal changes, such as those purporting to transfer property. The Gemara questions how the latter types of documents could be halachically valid. Two answers are given. The first answer is because of *dina d'malchusa dina*. Then the Talmud says, "If you like, I could say that the phrase 'except writs of divorce and emancipation' means 'except documents like writs of divorce,' i.e., except documents which themselves change legal status."

Some early Talmudists ("Rishonim") interpret these two answers as exclusive alternatives, the second answer acknowledging that *dina d'malchusa dina* is limited to matters directly affecting the government's financial interests.<sup>59</sup> Secular documents pertaining to other matters could be considered for evidentiary purposes, but could not themselves effect legal changes. The Mechaber adopts this view.<sup>60</sup>

Other Rishonim construe the two Talmudic answers as supplementary, not exclusive.<sup>61</sup> According to this approach, the first answer, that *dina d'malchusa dina* broadly applies to all types of civil law, remains valid. The Rema so rules, adding the restriction, mentioned by many Rishonim, that

We only apply *dina d'malchusa dina* where [the secular law] benefits the king [government] or where it is for the benefit of the people of the land. . . (Emphasis added).<sup>62</sup>

The Shach argues that even the Rishonim who apply *dina d'malchusa dina* broadly do not apply it to contradict an explicit halachic rule.<sup>63</sup> The Rema agrees as to halachic rules, such as inheritance laws, which cannot be altered by the parties or by custom,<sup>64</sup> but disagrees as to most monetary rules, which halacha allows to be so changed.<sup>65</sup>

## **B. Application of *dina d'malchusa dina* to bankruptcy**

## **discharge law**

Each of the three views states that whether dina d'malchusa dina validates a bankruptcy discharge depends, in part, on the purpose of the discharge law. Yet none of the poskim who have written about this subject have identified or discussed bankruptcy law policies. Therefore, it is important to survey such policies.

### **1. Purpose(s) of bankruptcy discharge**

The federal bankruptcy code does not expressly declare the purpose of the bankruptcy discharge. Indeed, the many rules regulating and limiting the availability of a discharge, suggest the operation of various, sometimes conflicting and ever evolving, purposes and assumptions.<sup>66</sup> Explanations suggested in Congressional hearings, academic literature and judicial decisions include the following:

- a. By offering a discharge to a debtor who honestly identifies and surrenders his property in accordance with bankruptcy law requirements, the discharge, at least in part, encourages such cooperation and promotes the goal of equitably distributing the debtor's assets.<sup>67</sup>
- b. The discharge serves a social welfare purpose<sup>68</sup> by freeing the debtor from the "weight of the oppressive indebtedness"<sup>69</sup> and allowing the debtor "a new opportunity in life . . . , unhampered by the pressure and discouragement of preexisting debt."<sup>70</sup>
- c. Similarly, the discharge minimizes the likelihood that a debtor denied a discharge will resort to immoral conduct in order to survive financially.<sup>71</sup>
- d. The discharge also helps prevent a distraught debtor from committing antisocial or criminal acts which have adverse practical, as opposed to purely moral, consequences.<sup>72</sup>
- e. The discharge inspires the debtor to become economically productive, benefitting the national

economy<sup>73</sup> and reducing the likelihood that the debtor, or his dependents, will have to be supported through government welfare programs.<sup>74</sup>

f. The law allows debtors and creditors to know from the outset, while the debtor is financially sound, that should the debtor fail, his debts may be discharged. By placing the risk of bankruptcy upon creditors, it is argued that credit will be extended in a more economically efficient manner, and that the national economy will benefit.<sup>75</sup>

g. Finally, the availability of the discharge may be required to encourage people to undertake entrepreneurial activity or to personally guarantee corporate debt. The prospect of unlimited and nondischargeable debt could harm the national economy by severely deterring private enterprise.<sup>76</sup>

The government obviously believes that the policy of providing a discharge is of great importance because even some debts to the government are discharged. Moreover, bankruptcy law makes it impossible for someone to waive his right to discharge at the time a debt is incurred.<sup>77</sup> Although a debtor may "waive" the discharge of particular debts after they are incurred, the ability to do so is extremely restricted.<sup>78</sup> Even where the proper procedures are followed, the court may veto the "waiver" if it finds that the agreement conflicts with the best interests of the debtor or the debtor's dependents.<sup>79</sup> Once a discharge is obtained, there can be no waiver.<sup>80</sup>

The right to enjoy the discharge is also protected by rules which prohibit creditors to take any collection actions as to discharged debts<sup>81</sup> and prevent certain discrimination against persons based on their having participated in the bankruptcy process.<sup>82</sup> Nonetheless, a debtor is permitted, even after a discharge is granted, to voluntarily pay the discharged debt. Bankruptcy law merely prevents the debtor from obligating himself to pay the debt.

## 2. The three views

According to the Mechaber, a bankruptcy discharge would be valid under *dina d'malchusa dina* only if the discharge were regarded as directly benefitting the government. The policies discussed above suggest only indirect or speculative benefits. In fact, as already mentioned, the discharge may do immediate financial harm to the government through the discharge of debts owed to the government. According to the Shach, *dina d'malchusa dina* does not validate the bankruptcy discharge, because discharge law violates the explicit halachic obligations surveyed in Part I.<sup>83</sup>

The Rema's view, which some authorities declare is the majority view,<sup>84</sup> is much more hospitable to bankruptcy law. Two of the most prominent American halachic authorities, Rabbi Moshe Feinstein and Rabbi Yosef Eliyahu Henkin, seem to have endorsed the Rema's view in print.<sup>85</sup> Still other authorities concede that one may rely on the Rema's view, as opposed to the Shach's view, in certain circumstances.<sup>86</sup>

Furthermore, some of the authorities who have endorsed the Shach's view have done so as to matters arising in Israel, which may be a "special" case. There are particular reasons why, according to some commentators, *dina d'malchusa dina* may not apply to laws enacted by a secular Israeli government.<sup>87</sup> Consequently, it has been questioned whether the opinions applying the Shach's view to issues in Israel are relevant to *dina d'malchusa dina* questions out of Israel.<sup>88</sup>

Assuming the halacha is in accordance with the Rema, two problems<sup>89</sup> arise in determining whether the bankruptcy discharge in fact is "for the benefit of the people of the land." First, it is necessary to clarify what the phrase "for the benefit of the people of the land" means. It appears this language applies to general government regulations to promote the economy or to control anti-social conduct. At least some of the possible discharge policies we identified would seem to satisfy this standard.<sup>90</sup>

The second problem is whether, in determining if bankruptcy discharge law is for the public good, we examine the government's subjective purpose for the statute and/or we evaluate how the statute actually operates. Because there seems to be no discussion of this issue in responsa, we will consider the difficulties in ascertaining subjective intent and objective effect.<sup>91</sup>

Evaluation of the government's subjective intent in enacting the statute is problematic. The American legislative process involves the participation of many individual legislators, who may vote for a law for entirely different reasons. Some legislators may be motivated by the narrow interests of a particular constituent or lobbyist, rather than by a more expansive public policy ground. Others may merely trade their votes on a given statute in exchange for the votes of their colleagues on another matter. Still others may vote without even properly understanding the statute at all. Perhaps there should be a presumption that a majority of the legislators supported the statute for the policy reasons cited in Congressional hearings, academic literature and judicial decisions. If so, as already discussed, the bankruptcy discharge law seems to have been enacted for the public good.

On the other hand, evaluating a law's objective effect is not easy either.<sup>92</sup> Because of the complexities of the national economy, it seems impractical, if not impossible, to design or conduct an effective study to determine whether various policies are in fact being satisfied. When secular law is presented with similar questions, such as whether particular statutes comply with constitutional constraints, courts in some instances approve the statutes if they are "rationally related" to a legitimate legislative objective.<sup>93</sup> Perhaps this type of test would be appropriate regarding dina d'malchusa dina.

### **3. Miscellaneous minority views**

Unlike secular law,<sup>94</sup> halacha attributes formal importance to minority views among poskim. Several minority views can be used together to form an authoritative conclusion in

particular cases. Moreover, under certain circumstances, one may directly rely on minority views.<sup>95</sup> For these reasons, we will briefly review two, of many, minority perspectives.

Rabbi Yosef Eliyahu Henkin limited the Shach's view to organized Jewish communities with leaders possessing both authority and power to govern. Because such communities did not exist in the United States, Rabbi Henkin held that the Rema's view applied and that *dina d'malchusa dina* broadly governed commercial transactions between Jews, at least where the secular law was for the benefit of the people of the land.<sup>96</sup> Pursuant to this view, *dina d'malchusa dina* may halachically validate the bankruptcy discharge.

Rabbi Yosef Yehuda Bloch, Rosh Yeshiva of Telz, argued that the Rema's view was generally correct. Nevertheless, he agreed with the Shach in one respect. He argued that a secular rule could not totally uproot an express halachic principle. For example, a secular government could, for the public good, reduce the amount a debtor had to pay his creditor, but it could not totally eliminate the debt.<sup>97</sup> If all debtors were forced to pay something to their creditors in order to obtain a bankruptcy discharge, Rabbi Bloch's analysis may validate bankruptcy discharge law.<sup>98</sup>

### **C. Specific statements by poskim**

Relatively few tshuvos ask whether *dina d'malchusa dina* applies to discharge debt. Most of the authorities discussed in Section IV, above, citing the Maharshach, rely essentially on custom. *Dina d'malchusa dina* is usually referred to in describing how the minhag was established.

#### **1. Views arguably "favorable" to discharge law**

Rabbi David Chazan and Rabbi Avraham Yisroel Alter Landau dealt with compromises, agreed to by at least a majority of creditors, which required the debtor to make partial payments to creditors and discharged the remaining debt. One authority interprets Rabbi Chazan's tshuva as holding that such an agreement was enforceable because of

dina d'malchusa dina.<sup>99</sup> A close reading of the tshuva suggests that this interpretation may be wrong. At the very least, Rabbi Chazan surely did not apply traditional dina d'malchusa dina reasoning.<sup>100</sup>

Rabbi Chazan dealt with a historical oddity, in which the "bankruptcies" of French citizens in Turkey were ruled by French law, not by Turkish law. One of the questions Rabbi Chazan wrestled with was whose customs were halachically valid. He concluded that the custom of non-Jews generally had halachic significance only where the custom did not specifically contradict halacha. Enforcement of the debtor's discharge would contradict halacha.

On the other hand, he held that the customs of non-Jews whose legal authority applied to Jews were halachically binding, even where they contradicted halacha. Although in articulating his holding, Rabbi Chazan refers a few times to dina d'malchusa dina, he also repeatedly refers to minhag. Moreover, he cites Rabbi Iggeres, cited above,<sup>101</sup> and other poskim who rely on minhag, not dina d'malchusa dina. Rabbi Chazan explains that if the debtor is French and the discharge is part of French custom, the discharge is enforceable, even if the Jewish creditor is Turkish. The reason he gives is that if the Jewish creditor takes property from the Frenchman in violation of the French minhag, the French authorities in Turkey will repossess the property. Consequently, he says:

If so, how can one say that the [Jewish] creditor can claim payment from the debtor in accordance with din Torah [halacha] given that this is the custom and it is with this custom in mind that they he [the Jewish creditor] did business with the debtor?

As explained in Part III, above, the argument that "it is with this custom in mind the parties transacted business" is the rationale for minhag HaSocharim.<sup>102</sup> In any event, Rabbi Chazan's tshuva is support for the validity of the bankruptcy discharge minhag in America which

is backed by secular law.

In his tshuva, Rabbi Landau announced that:

Since secular court decreed that creditors should only receive 40% [of their respective claims], they are required to accept this secular judgment because, from the outset when they gave the debtor firm merchandise, they gave the merchandise on the understanding that the minhag would apply. They [the creditors] knew that if the debtor firm would become insolvent they could be forced to accept only 40% according to the minhag, because all lenders lend according to the minhag. It is appropriate to apply dina d'malchusa dina, because in Jewish law the same rule applies. Even if the debtor firm had not gone to court, but the creditors had gone together to bais din, and bais din would have verified that the debtor firm really could not pay all of its debts to them, and the debtor asked the creditors for a reduction in debt, and a majority of the creditors agreed to reduce the debt by 60% and a minority of creditors disagreed, bais din could overrule the minority and enforce the compromise of the majority . . . as the Divrei Gaonim [Rabbi Kahane] says in the name of the Birkei Yosef [Rabbi Chaim Azulai] and the Maharshach.<sup>103</sup>

The fact, however, is that the Maharshach never said that a compromise reached by a majority of creditors is always halachically enforceable against dissenting minority creditors. The Maharshach held that such a compromise was enforceable because such agreements were enforceable according to the prevailing local custom. When citing the Birkei Yosef and the Maharshach, the Divrei Gaonim fails to mention this requirement.<sup>104</sup> This seems to have caused Rabbi Landau to believe that such an agreement is halachically enforceable independent of custom.

According to Rabbi Landau's belief, dina d'malchusa dina would apply even according to the Shach. Thus, Rabbi

Landau's tshuva is of no significant help in choosing between the Rema and the Shach.<sup>105</sup> Nevertheless, even the Rema requires that for dina d'malchusa dina to apply, the law must be "for the benefit of the people of the land." Thus, to the extent Rabbi Landau purports to rely on dina d'malchusa dina, he supports the proposition that a discharge law could be characterized as "for the benefit of the people of the land."

Rabbi Moshe Feinstein was asked whether dina d'malchusa dina applied to Swiss bankruptcy law.<sup>106</sup> The debtor was a corporation. Around the time it filed bankruptcy, the debtor's directors paid \$36,000 to a Jewish creditor who was owed \$62,000. Under Swiss law, as Rabbi Moshe explains it, once a bankruptcy petition is filed, creditors are forbidden to take any of the debtor's assets. Instead, a three-person panel is appointed to distribute the debtor's assets to creditors on a pro rata basis in accord with the amount of the creditors' respective claims.

While acknowledging that the scope of dina d'malchusa dina is very complicated, Rabbi Feinstein declares that, pursuant to the Rema's view, dina d'malchusa dina applies to make these Swiss bankruptcy laws halachically valid. He states that dina d'malchusa dina applies a fortiori to a corporate debtor with many shareholders, because the debtor's affairs could affect non-Jews as well. He states that halacha has a similar rule where a bais din knows that a particular debtor has insufficient money to pay his debts. In such a case, bais din does not allow creditors to seize the debtor's assets. Instead, it distributes the debtor's assets to the creditors on a pro rata basis. Finally, he ruled that if the Jewish creditor had been given the \$36,000 after the bankruptcy filing, the creditor was halachically obligated to deliver the \$36,000 to the three-person panel responsible for distributing the debtor's assets.

Whether or not Rabbi Feinstein provides direct guidance as to the halachic validity of a discharge,<sup>107</sup> his tshuva does rule in accordance with the Rema, not the Shach. The secular distribution formula differs from that of halacha. By nonetheless validating the law, Rabbi Feinstein demonstrates that dina d'malchusa dina can contradict what

would otherwise be the halachic rule and that at least some bankruptcy law rules are "for the benefit of the people of the land."

Rabbi Sternbuch<sup>108</sup> addressed the type of compromise discussed in the Maharshach Tshuvos. The creditor contended that the compromise was economically coerced, and that he did not actually have any intention of forgiving any part of the original debt. Rabbi Sternbuch stated that if the debtor had deceived the creditor about his financial ability to pay as of the time of the compromise, the creditor would prevail. If the debtor had been forthright, however, a *bais din* could not require him to pay.

Rabbi Sternbuch stated that the halachic principle of "migo" supported the notion that the debtor was truthful at the time of the compromise. Rabbi Sternbuch argued that if the debtor had wanted to, he could have filed a secular bankruptcy and had his financial obligation discharged "entirely."

Rabbi Sternbuch's purpose in referring to this "migo" is not entirely clear.<sup>109</sup> Ordinarily a "migo" exists if the debtor, had he acted dishonestly, could have accomplished his purpose in an easier or more effective way than he did. It seems that Rabbi Sternbuch assumed that had the debtor been dishonest, he could have accomplished better results for himself by filing bankruptcy than by consummating the compromise.<sup>110</sup> By foregoing the bankruptcy option, the debtor therefore had a "migo" that it honestly negotiated the compromise.

Rabbi Sternbuch's reference to a "migo" implicitly assumes that a secular bankruptcy discharge would be halachically valid. Otherwise, there is no "migo" in not filing the bankruptcy. Consummation of a compromise, whereby the debtor appeared to be acting in a halachically valid manner, not the halachically improper filing of a bankruptcy petition, would have appeared the more attractive course.

## **2. Rabbi Heinemann's view**

Rabbi Moshe Heinemann has stated that the halacha is like

the Rema's view, and that if bankruptcy discharge law was enacted and operates for the benefit of the residents of the land, dina d'malchusa dina would apply to make the discharge halachically effective. Nonetheless, he is mesupak whether bankruptcy discharge law meets this standard. He does believe that the bankruptcy rules regarding distribution of a debtor's assets are for the public good and that dina d'malchusa dina does apply to them.<sup>111</sup>

### 3. Views hostile to bankruptcy discharge law

Rabbis Breish, Blau, Weiss and Auerbach have arguably held that dina d'malchusa dina does not validate bankruptcy discharge law. Rabbis Breish<sup>112</sup> and Shlomo Zalman Auerbach<sup>113</sup> agree with the Shach, unlike the American poskim we have cited. The others, who seem to agree with the Rema, have identified or discussed why the specific policies behind bankruptcy law are not "for the benefit of the people of the land."

Rabbi Blau states:

It seems that if the secular law is l'to'ellis bnei HaMedina [for the benefit of the people of the land], such as price controls or commercial matters between one person and another, the opinion of most poskim is that dina d'malchusa dina applies, apparently even between one Jew and another. Thus we find in many, many halachos, such as in hilchos schiros [employment law], etc., that poskim judge according to dina d'malchusa dina or minhag HaMedina.<sup>114</sup>

Thus, Rabbi Blau seems to acknowledge that the Rema's view is the majority opinion. Yet, when specifically addressing bankruptcy law, Rabbi Blau comments:

[T]here is some doubt in our times whether secular bankruptcy law is enforceable because of dina d'malchusa dina. It appears from the words of poskim that in such a case where there is no "inyan l'malchus," dina d'malchusa dina is

inapplicable.<sup>115</sup>

The expression "inyan l'malchus" is ambiguous. Based on the fact that Rabbi Blau acknowledged that the Rema's approach is the majority opinion, it seems that his point here is that bankruptcy law is not for the benefit of the people of the land. If so, his conclusion is unsupported by any explicit evaluation of the various alleged purposes of bankruptcy law.

Only one of the poskim Rabbi Blau names, Rabbi Weiss,<sup>116</sup> dealt with a bankruptcy scenario. In a very brief responsa, Rabbi Weiss considered a case in which a debtor filed bankruptcy, and the court ordered that each creditor be paid 30% of its claim with the rest discharged. In stating the question, the tshuva specifically indicates that the court order could be entered only if no creditor objected ("v'im ayn m'cha'ah"). The creditor in the case had not objected. The creditor contended that its failure to object was irrelevant because: (1) it did not know that its particular loan would be affected by the bankruptcy order; and (2) the reason it did not object was that it did not wish to interfere with the debtor's ability to obtain bankruptcy relief, if halachically permissible, from its other creditors.

Rabbi Weiss did not rule whether a bankruptcy discharge is per se invalid.<sup>117</sup> Rather, he announced that the court's ruling was halachically invalid because of a procedural ground - that a court may not rule against someone simply because he does not appear to assert his claims.<sup>118</sup>

That this interpretation of Rabbi Weiss' tshuva is more reasonable than the one implicitly suggested by Rabbi Blau is suggested by another of Rabbi Weiss' tshuvos. In the other tshuva, Rabbi Weiss seems to have held that the Rema's view of *dina d'malchusa dina* was correct.<sup>119</sup> Consequently, it would have been odd for Rabbi Weiss, in the tshuva cited by Rabbi Blau, to have held a bankruptcy discharge halachically ineffective without mentioning the Rema or the Shach or stating that the law was not for the benefit of the people of the land.

Rabbi Auerbach, Rabbi Weiss and Rabbi Blau made their statements while residing in Israel. As mentioned above, there are special reasons for not applying dina d'malchusa dina in Israel, and it has been suggested that opinions issued by Israeli poskim regarding dina d'malchusa dina may not be persuasive authority outside of Israel.<sup>120</sup> In fact, it is not certain whether Rabbi Auerbach - or Rabbi Weiss, assuming he meant to rule on dina d'malchusa dina - even intended their views to apply outside of Israel.

#### **4. Reliance on "Kim Li"**

In Jewish civil law, where a plaintiff is attempting to collect money from another, the plaintiff ordinarily bears the burden of proof, and the party from whom an asset is sought to be extracted is considered the "muchzach."<sup>121</sup> Thus, a Jewish creditor who goes to a bais din to collect from a debtor who has received a bankruptcy discharge, may bear the burden of proving his halachic right to collect. The defendant will presumably raise dina d'malchusa dina, based on the Rema's view as a defense.<sup>122</sup> If the bais din is composed of members who agree with the defendant, the defendant should prevail. But what if the members of the bais din, while agreeing that dina d'malchusa dina applies to bankruptcy discharge law according to the Rema, feel that the majority rule among halachic authorities is in accordance with the Shach? Does this mean that the defendant necessarily loses? Not necessarily.

Where there is a significant dispute among halachic authorities on a particular issue, under certain circumstances a defendant may assert that he believes ("kim li") that the halacha is in accordance with one side of the debate, even if the side he selects is the minority view.<sup>123</sup> If the defendant is indeed entitled in a particular case to make this assertion, the plaintiff can only win if he proves his case according to the view chosen by the defendant.<sup>124</sup>

As already discussed, the Rema's view may well be the majority view, especially in the United States. Nonetheless, according to poskim who disagree, it may be crucial to determine whether one may say "kim li" with respect to

whether dina d'malchusa dina applies to a bankruptcy discharge. Rabbi Chaim iben Israel Benveniste, a seventeenth century authority, ruled that wherever there is a dispute among halachic authorities as to whether dina d'malchusa dina applies, the party who is muchzach can say kim li that dina d'malchusa dina applies. Most poskim, especially Ashkenazi poskim, who have addressed this issue seem to agree.<sup>125</sup> Consequently, if it can be established that dina d'malchusa dina in fact validates bankruptcy discharges according to the Rema,<sup>126</sup> a debtor who obtains a bankruptcy discharge should be able to say kim li to avoid paying discharged debts.<sup>127</sup>

Of course, where kim li is asserted, it is essential in specific instances, to determine who, halachically, is considered the party who is muchzach. In many cases both the facts and their halachic significance may be uncertain.<sup>128</sup>

Although a kim li defense prevents a bais din from forcing the defendant to pay, there is some question as to whether the defendant is obligated on some religious level ("lotzes yedei shomayim") to nonetheless pay the plaintiff. Where, as in a bankruptcy discharge context, there is no doubt that a liability was originally created, but the defendant uses kim li to "establish" that the liability was extinguished, the answer is unclear.<sup>129</sup>

## **PART VI: SPECIAL FACTORS - COMPARISON AND CONTRAST OF DINA D'MALCHUSA DINA AND CUSTOM**

It may be that some poskim will conclude that minhag HaSocharim validates a bankruptcy discharge, but that dina d'malchusa dina does not, while other poskim reach the opposite conclusion. Because minhag HaSocharim and dina d'malchusa dina do not apply equally to all situations, whether a bankruptcy discharge will be halachically valid according to particular poskim may depend upon the context in which the question arises. Let's consider just a few examples.

### **1. Changes in the bankruptcy law.**

Assume a particular debtor is entitled to a discharge only because of a change in the bankruptcy statute which was enacted after the parties entered into their transaction. In such a case, one could hardly argue that the debtor and creditor had agreed to the statute.<sup>130</sup> Dina d'malchusa dina, however, does not presuppose the parties' agreement to the secular law. Thus, even a bankruptcy discharge based on a subsequent amendment to the bankruptcy law may be effective.

## **2. Nonconsensual creditors**

Many creditors have claims against a debtor which do not arise out of consensual agreements. Tort victims, for instance, never enter into any contract with the debtor. Custom, because it is based on the assumption that parties implicitly agreed to make the custom part of their contract, is inapplicable to such nonconsensual transactions. In contrast, dina d'malchusa dina, not being based on any assumed agreement, could render a bankruptcy discharge halachically valid even as to nonconsensual creditors.<sup>131</sup>

## **3. Halachically non-waivable debts**

Halacha may not always allow parties to avoid, by agreement, creation of a debt. Thus, even if the parties had attempted to agree explicitly that the debtor would not be liable, the agreement would be ineffective, and the debtor would be liable. The implicit agreement which arises from custom can be no more effective than an express agreement. Therefore, where halacha would not allow parties to avoid creation of a debt by agreement, minhag should not operate to discharge the liability.<sup>132</sup> For reasons already mentioned, dina d'malchusa dina could apply.

## **4. International transactions**

A variety of explanations are given for the dina d'malchusa dina principle.<sup>133</sup> Whether dina d'malchusa dina applies in a particular situation may depend on which theory is correct.<sup>134</sup> Some, if not all, of these justifications break down if the creditor is not a resident of the United States.

Suppose, for instance, the debtor, an American citizen, borrows money from a French creditor, in France. Subsequently, the debtor obtains a bankruptcy discharge in America. Under *dina d'malchusa dina*, the United States government may have no authority to deprive the French creditor of his right to collect on the debt. Nevertheless, *minhag HaSocharim* may make such a discharge halachically valid.

## 5. Choice of law clauses

Contracts often contain clauses identifying which law governs the transaction between the parties. In an international transaction, the contract may specify which country's laws will control. In interstate commerce, the agreement may designate which state's laws apply.

Where a contract specifies that United States law governs, the parties seem to be agreeing to United States bankruptcy law as well. But even where the choice of law clause specifies the law of a different country, or the law of a state, by using such a clause, the parties seem at least to demonstrate that they intend secular law, not halacha, to apply. In such cases, a bankruptcy discharge may be effective.

## **PART VII: JEWISH OR NON-JEWISH IDENTITY OF THE PARTIES**

Where a debtor or creditor is a corporation, or is a partnership consisting of religious Jews, irreligious Jews and non-Jews, there are especially solid reasons why a secular bankruptcy discharge may be halachically effective. For example, Rabbi Blau argues that because a corporation is a fictional "entity" created by secular law, people doing business with it are assumed to do so in accordance with all of the rules of secular law.<sup>135</sup> Similarly, Rabbi Feinstein states that there is even more of a reason to apply *dina d'malchusa dina* to a corporation than to an individual because of the presence of non-Jewish shareholders.<sup>136</sup>

Nonetheless, instead of discussing these cases in depth, we will consider situations involving parties who are

individuals.

Our analysis thus far is sufficient if both the debtor and creditor are religious Jews. Let's briefly consider three other cases, where: (1) the debtor and creditor are both non-Jews; (2) either the debtor or creditor, but not both, is Jewish; and (3) the debtor is a religious Jew, while the creditor is an irreligious Jew.

### **1. Non-Jewish debtor and creditor**

Important consequences for Jews may arise out of the way halacha views transactions between non-Jews. Consider a simple example. Assume there are two non-Jews, A and B, and A sells B a sewing machine on credit. B obtains a bankruptcy discharge and refuses to pay A. A repossesses the sewing machine and tries to sell it to a Jew, who is aware of the dealings between A and B. If the bankruptcy discharge is valid, the sewing machine is stolen property, and the Jew may be halachically prohibited from buying it.

Both the argument based on custom and the argument based on the validity of secular law apply even more strongly to transactions between non-Jews than they do between Jews. Indeed, when American non-Jews transact business with each, it is undoubtedly their expectation that the transaction will be governed by secular law and not by halacha.

Moreover, one of the seven Noachide commandments obligates non-Jews to establish a system of law which, among other things, regulates their commercial transactions. According to most halachic authorities, this commandment infuses laws so established with halachic authority at least between non-Jews, even where the rules differ from those prescribed for use between Jews.<sup>137</sup> Thus, secular law is said to be especially valid between non-Jews.

### **2. Jew and non-Jew**

A bankruptcy discharge should release a debtor from any obligation to pay debts to non-Jews. Bankruptcy law prohibits a creditor from trying to collect the debt under secular law. Of course, a non-Jewish creditor could sue a

Jewish debtor in *bais din*. The Gemara, Talmud Bavli, Bava Kama 113a, explains that in such a case, if the creditor would lose according to secular law, the *bais din* tells him "Such and such is the result according to your law, and we adjudicate your claim accordingly." The Rambam interprets the Gemara as stating that in litigation between Jewish and non-Jewish litigants, secular law generally applies, irrespective of whether the secular law favors or disfavors the Jewish litigant.<sup>138</sup> Although commentators disagree as to possible exceptions to this rule, none of the proposed exceptions would prevent a Jewish debtor from obtaining a discharge.<sup>139</sup>

Moreover, in America, when a Jew transacts business with a non-Jew, the Jew undoubtedly must assume that in the event of a dispute, the non-Jew would insist on enforcement in secular court in accordance with secular law. Thus, unless the parties specify otherwise, both parties surely expect secular law to apply. Consequently, the custom/implied agreement argument would also support the halachic efficacy of a bankruptcy discharge.

### **3. Religious Jewish debtor and Jewish creditor**

Even if a bankruptcy discharge were not valid between two religious Jews, there are strong reasons to believe it would be valid to discharge debt of a religious Jewish to an "irreligious" Jew. First, just as in the case of a Jew and non-Jew, when a religious Jew and an irreligious Jew do business in America, it seems clear that they expect non-Jewish law to apply and it is as if they so specified.

In addition, according to some authorities, irreligious Jews are not entitled to any special financial rights conferred by halacha.<sup>140</sup> Thus, if secular bankruptcy law discharges a debt, the irreligious Jew is not allowed to collect it from a religious Jew. Of course, it is far from clear which Jews, if any, would in our times be considered "irreligious" for these purposes.<sup>141</sup> A full discussion of this issue is beyond our scope.

## **PART VIII: HALACHIC PERMISSIBILITY OF**

## FILING FOR BANKRUPTCY

The Torah says "These are the laws that you shall place before them."<sup>142</sup> Based on a braitha in Talmud Bavli, Gittin 78b, Rabbi Shlomo ben Yitzchaki<sup>143</sup> explains that this verse prohibits people from bringing their disputes before non-Jewish courts, even if secular law is identical to halacha.<sup>144</sup> Pursuing such litigation is considered an improper glorification of secular laws and an insult to the halacha and to HaShem who gave us the halachic system.<sup>145</sup> Consequently, even where dina d'malchusa dina applies, the general rule is that one must seek relief in a bais din, which would apply the dina d'malchusa.<sup>146</sup>

Most poskim, however, would allow a Jew to sue a non-Jew in secular court.<sup>147</sup> Therefore, if the debtor has only non-Jewish creditors, he should be allowed to file in bankruptcy court. Moreover, there are several reasons why filing a bankruptcy petition may not violate the ban ("issur") on litigating in non-Jewish courts even if the debtor has Jewish creditors. First, a bankruptcy is technically an "in rem" proceeding, i.e., the debtor does not affirmatively sue anyone in court. Instead, the debtor merely appears before the court and seeks its relief. At least where there is no dispute as to the debtor's eligibility for a discharge, the secular court arguably does not adjudicate legal issues between "parties." In such cases, by filing for bankruptcy relief, the debtor is essentially applying to a government office for a special permit or benefit, not submitting to a "court" for the resolution of a dispute.<sup>148</sup>

There are situations, however, in which the bankruptcy filing will lead to actual adjudication in the bankruptcy court. In order to be at least partially paid when the debtor's non-exempt assets are distributed to creditors in the bankruptcy case, a Jewish creditor may be forced to litigate his claim against the debtor in the bankruptcy court. Bankruptcy law prohibits any collection action, even in a rabbinic court, once the bankruptcy petition is filed.<sup>149</sup> Although a court might make an exception and allow the creditor to have the amount of its claim determined by a

rabbinic court,<sup>150</sup> it also might not. Similarly, the bankruptcy court may be called upon to adjudicate issues between the parties if the creditor argues that the debtor should not receive a discharge. These possibilities raise the question as to whether the creditor pursuing such actions, or the debtor whose filing indirectly caused such creditor action, violate the *issur archaos*.

If the debtor has non-Jewish creditors, or at least mostly non-Jewish creditors, an argument could be made that the *issur archaos* is not thereby violated. The debtor is entitled to relief against non-Jewish creditors and, according to our assumptions, the only way to get the relief is to file in a secular bankruptcy court and follow its procedures. Doing so therefore seems neither a slight to halacha nor praise of the secular system.

## CONCLUSIONS

The ramifications of a creditor's *yeush* based on the debtor's impoverishment is uncertain. According to some *poskim*, the facts giving rise to a bankruptcy filing may cause *yeush* discharging a debt, even if a secular bankruptcy discharge is never obtained.

Application of the *minhag HaSocharim* and *dina d'malchusa dina* doctrines to bankruptcy discharge law involves many intricate factual and legal inquiries. While there is substantial halachic authority enforcing customs canceling some portion of one's debts, these customs are not factually identical to current American bankruptcy laws. It is uncertain, however, whether these factual distinctions should make any difference as a matter of halacha.

According to the Rema's view, there seems to be a strong case for recognizing bankruptcy discharge law as a valid exercise of authority for the benefit of the residents of the land. Nevertheless, at least one *posek* who agrees with the Rema still finds that *dina d'malchusa dina* does not apply to bankruptcy law.<sup>151</sup> Central to the apparent debate among the various authorities cited, is a failure to identify the purposes of bankruptcy law and to explain why these policies are, or are not, for the benefit of the people of the

land.

We all hope that, with G-d's help, economic conditions will so improve that the halachic validity of a bankruptcy discharge will become a merely theoretical question. Meanwhile, we look forward to additional guidance from poskim.

### Footnotes

\*. **NOTE:** This is only a *slightly* revised version of my article, *Bankruptcy - A Viable Halachic Option?*, published at XXIV Journal of Halacha & Contemporary Society 5 (Fall 1992), in which both I and the Journal of Halacha & Contemporary Society assert copyright interests, 1998 all rights reserved by Steven H. Resnicoff. Were I to write a new article today, I would make substantial changes. Stylistically, for example, I would replace the transliterations employed with those typically used by academicians. Analytically, I would both intensify the discussion of certain concepts and explore additional issues. Not presently having the luxury to more fully develop this article, however, I have for the most part just left it as is..

1. J.D., 1978 Yale Law School; Rabbinic Ordination, 1983, Bais Medrash Govoha. I gratefully thank Professor Michael Broyde for his generous assistance. I also thank Rabbis Eli Meir Cohen, Binyomin Fox, Yitzchak Landman, and Tzvi Rotberg as well as the libraries of Bais Medrash Govoha (Lakewood) and Hebrew Theological College (Skokie), for providing copies of various responsa cited herein.

2. This assertion was made in 1992. At the present time, however, I am aware of a few relatively brief English discussions of halacha and bankruptcy law.

3. I.e., a "mitzvas a'seh." See Rabbi Shlomo Yitzchaki ("Rashi," 1040-1105), Talmud Bavli, Ketuboth 86a (citing Vayikra 19:36). See Rabbi Yaakov Yeshaya Blau (contemporary), Pischei Choshen, Dinei Halva'ah, chapter 2, halacha 1, note 1 (citing various views).

4. (1838-1933), Ahavas Chessed, part 2, chapter 24.

5. I.e., "mitzvas lo sa'aseh." Id.
6. Avos, chapter 2.
7. Tehillim 37:21.
8. Ahavas Chessed, supra note 4, citing Mesechta Derech Eretz Zutra.
9. The general cancellation of debt ("shmittas kesafim") associated with the Jubilee ("Yovel") year differs from a bankruptcy discharge in two important ways. First, shmittas kesafim cancels debts owed by the rich as well as those owed by the poor. Second, shmittas kesafim only applies to liabilities which are totally unsecured and which are treated as "debt." See, e.g., Moses ben Maimon ("Rambam," 1135-1204), Hilchos Shmittah and Yovel, chapter 9, halachos 11-14. See, generally, Steven H. Resnicoff, *Viewpoint: A Jewish Law Perspective on the Propriety of Discharging Personal Debts*, in *Bankruptcy Court Decisions: Weekly News and Comment* (February 3, 1998), pp. A3-A4.
10. (1488-1575), Shulchan Aruch, Choshen Mishpat 98:1.
11. Pischei Choshen, Hilchos Halva'ah, chapter 2, halacha 29, note 73. See also Rabbi Zvi Hirsch b. Yaakov Ashkenazi ("Chacham Tzvi," 1660-1718), Responsa no. 144.
12. (1530-1572), Shulchan Aruch, Choshen Mishpat 262:5.
13. Blau, Pischei Choshen, Hilchos Halva'ah, chapter 2, halacha 29, note 73. See also Rabbi Moshe Sternbuch (contemporary), Tshuvos V'Hanhagos, volume 2, no. 701 (relying partly on this view).
14. (1745-1813), on Shulchan Aruch, Choshen Mishpat 163:3.
15. (1420-1480), in "Shoresh" 3.
16. (19th century), volume 2, Hilchos G'viyas Chov, no. 4.
17. See Part VII, infra.

18. See, generally, Robert E. Ginsberg et al., *Bankruptcy: Text, Statutes, Rules* (Prentice-Hall 2d ed. 1989).

19. See, generally, Title 11, United States Code ("11 U.S.C."), 701 et seq. Individual debtors, however, may not obtain a discharge of certain types of debts, see 11 U.S.C. 523, and, in some cases, may be denied a discharge of any type of debt, see 11 U.S.C. 727.

20. There are three types of reorganization proceedings, governed, respectively, by chapters 11, 12 and 13 of the bankruptcy code. See, generally, 11 U.S.C. 1101 et seq., 1201, and 1301 et seq.

21. See, generally, 11 U.S.C. 303. A debtor may only be involuntarily forced into a chapter 11 reorganization - and not into reorganizations governed by chapters 12 or 13.

22. See, e.g., Rabbi Dr. Isaac Herzog (1888-1959), *The Main Institutions of Jewish Law* (Soncino Press, London 1965); Menachem Elon, *The Principles of Jewish Law* (Keter Publishing House Jerusalem Ltd., Jerusalem 1975), column 97 (hereafter "PRINCIPLES"). Halacha may require that such agreements be phrased in certain ways so as to avoid direct contradiction of Torah law. See, e.g., *Shulchan Aruch*, Choshen Mishpat 67:9, 227:21.

23. See Talmud Yerushalmi, Bava Metzia 27b, statement of Rav Hoshea, "Minhag supersedes halacha." See also, e.g., PRINCIPLES, supra note 22, columns 97-98.

24. Maharik, Responsa no. 102; Rabbi Shmuel di Medina ("Maharashdam," 1506-1589), Responsa, no. 108 (the questioner makes this argument, and Maharashdam comments approvingly); Rabbi David Chazan (19th century), Nidiv Lev, no. 12; Rabbi Yisroel Avraham Alter Landau (20th century), Bais Yisroel, no. 172; Rabbi Moshe Feinstein (1895-1986), *Iggeros Moshe*, Choshen Mishpat, part 1, no. 72.

25. *Iggeros Moshe*, Choshen Mishpat, part 1, no. 72. See also Rabbi Yosef Iggeres ("Divrei Yosef," 18th century) no. 21 (stating that this is the view of the Rambam and the Rashba); Rabbi Yechezkel Michael HaLevi Epstein (end of

19th century - beginning of 20th century), Aruch HaShulchan, Choshen Mishpat, no. 73, note 20 (citing sefer Urim V'Tumim of Rabbi Yonathan Eybeschuetz (17th -18th centuries)).

26. PRINCIPLES, supra note 22, column 103, citing Ba'alei Tosafos (various scholars)(12th century), Talmud Bavli, Bava Metzia 7:13-14, Bava Kama 116b and Talmud Yerushalmi, Bava Kama 6:4, 11a.

27. See also Shulchan Aruch, Choshen Mishpat 201:1. For other examples, see, e.g., Rabbi Moshe Margolios ("Pnei Moshe," 1710-1781), Talmud Yerushalmi, Bava Metzia 27b; Rabbi Asher b. Yechiel ("Rosh," 1250-1327), Responsa, no. 64:4.

28. Iggeres, Divrei Yosef, no. 21; See also David Chazan, Nidiv Lev, no. 12; Rabbi Eliyahu Chazan (19th century), Nidiv Lev, no. 13; Rabbi Yitzchak Aaron Ettinger (1827-1891), Maharia Halevi, volume 2, no. 111; Rabbi Avraham Duber Kahane (20th century), Devar Avraham, volume 1, no. 1; Bais Yisroel, no. 172. Shmuel Shilo, Dine De'malchusa Dina (Hebrew University Press 1974) (hereafter "SHILO,") p. 163, states that Rabbi Iggeres bases his conclusion not only on minhag but also on dina d'malchusa dina. Nevertheless, this does not seem to be a correct construction of Rabbi Iggeres' responsum.

29. (1832-1909).

30. See Blau, Piskei Choshen, Dinei Halva'ah, chapter 2, halacha 29, note 82. In Piskei Choshen, Hilchos Geneiva, chapter 1, note 4, p. 13, Rabbi Blau explains that, according to the Ben Ish Chai, all disputes between Jews which are adjudged based on secular law are really done so because of minhag, not dina d'malchusa dina.

31. Iggeros Moshe, Choshen Mishpat, part 1, no. 72.

32. Although the lease specified a duration, Rabbi Feinstein found that this was not inconsistent with the creditor's having agreed to the secular law. The duration provision in the lease was not thereby rendered superfluous. This provision obligated the tenant to perform under the lease for

at least the duration of the lease.

33. Iggeros Moshe, Choshen Mishpat, part 1, no. 72.

34. (1530-1602), Responsa, volume 2, no. 113; volume 3, no. 8. In his classic work, the Shem HaGedolim, Rabbi Chaim Yosef Azulei ("Chida," 19th century) quotes Rabbi Yaakov Alfandari as saying: "To us, Mahari ibn Lev [Rabbi Yosef ibn Lev], Maharashdam [Rabbi Shmuel de Medina] and Maharshach are to be considered like Rif, Rambam and Rosh."

35. Responsa, volume 2, no. 113.

36. Rabbis Yehuda Lirme ("Pleitas Bais Yehuda," 17th century), nos. 21 and 22; Chasdei HaCohen Prachya ("Toras Chessed," 17th century), no. 225; Moshe Yisroel ("Mases Moshe," 18th century), Choshen Mishpat, no. 62; Akiva Eger (1761-1837), Shulchan Aruch, Choshen Mishpat 12:13; Iggeres, Divrei Yosef, no. 21; Avraham Tzvi Hirsch Eisenstadt ("Piskei Tshuva," 1813-1868), commentary to Shulchan Aruch, Choshen Mishpat 12:19; Yitzchak b. Yosef HaCohen ("Ohel Yitzchak," 19th century), no. 33; David Chazan, Nidiv Lev, no. 12; Eliyahu Chazan, Nidiv Lev, no. 13; Chaim Aryeh Kahane ("Divrei Gaonim," 19th century), Klal 14, no. 18; Chaim Azulai ("Birkei Yosef," 19th century), no. 12, note 14; Chaim Eshel ("Som Chaye," 18th century), no. 33; Landau, Bais Yisroel, no. 172; and Ezra Basri (contemporary), Dine Mamanos, volume 1, p. 71.

Other authorities are also cited as to the halachic power of custom. Rabbi Iggeres, Divrei Yosef, No. 21, for instance, cites a tshuva of Rabbi Shlomo Aderes ("Rashba," 1235-1310), stating that "[e]veryone who does business does so, absent specific agreement to the contrary, based on local custom, and it is as if they so explicitly agreed . . . even if the custom contradicts the halacha." Responsa HaRashba, volume 2, no. 268.

37. Maharashdam, Choshen Mishpat, no. 108.

38. See, e.g., Lirme, Pleitas Bais Yehuda, nos. 21 and 22; Prachya, Toras Chessed, no. 25; Eshel, Som Chaye, no. 33.

39. Rabbi David Chazan, Nidiv Lev, no. 12, and his father, Rabbi Rafael Chazan (quoted by his son) dealt with compromises discharging part of a debtor's debt and criticized the poskim that assumed that the Maharshach applied to such cases. Nevertheless, although the view of Rabbis Rafael and David Chazan are somewhat confusing, they, too, support the notion that where the minhag is of non-Jews to whose law Jews are subjugated, the minhag is binding because it is as though the parties agreed thereto. See Part VC1, *infra*. But see also Eshel, Som Chaye, no. 33 (language suggesting that the rule enforcing the compromise is based on the expectation that the debtor will ultimately pay the debt).

40. Actually, Kahane, Divrei Gaonim, klal 14, halacha 18, fails to mention the requirement that there be a preexisting minhag. See text associated with notes 102-104, *infra*.

41. See, e.g., Moshe Yisroel, Mases Moshe, no. 62 (compromise involving discharge of debt); Yitzchak HaCohen, Ohel Yitzchak, no. 33 (same); Azulei, Birkei Yosef, 12:14 (broad statement); Kahane, Divrei Gaonim, klal 14, halacha 18(broad statement); Eliyahu Chazan, Nidiv Lev, no. 13 (compromise involving discharge of debt); Avraham Yisroel Alter Landau, Bais Yisroel, no. 172 (same). See also SHILO, *supra* note 28, pp. 163-164; Basri, Dinei Mamanos, vol. 1, p. 71.

42. See Part III, *supra*, for the difference between a liquidation bankruptcy, where all the debtor's non-exempt assets are sold and the proceeds distributed to creditors, and a reorganization bankruptcy, where a plan is proposed through which the debtor keeps his property but pays off his debt with future income.

43. See, e.g., American Bankruptcy Act of 1800, ch. 19, 36, 2 Stat. 19, 31, 36 (1800)(repealed 1983)(discharge only with consent of 2/3 of creditors in number and in amount of debt; only creditors owed at least \$50 counted); Bankruptcy Act of 1841, ch. 9, 4, 5 Stat. 443-44 (repealed 1843)(need majority of creditors in number and in amount of debt to be non-dissenting); Bankruptcy Act of 1867, ch. 176, 33, 14 Stat. 51, 533 (one who voluntarily files for bankruptcy more than 1 year from effective date of Act must pay creditors at

least 50% and need consent of creditors holding 50% of debt in order to obtain a discharge)(amended in 1874). Either some minimum payment or consent of some minimum percentage of creditors was required in liquidation bankruptcies until the Bankruptcy Act of 1898, ch. 541, 30 Stat. 548.

44. The confirmation requirements regarding creditor consent are too extensive to discuss here.

45. SHILO, *supra* note 28, at pp. 163-164.

46. For a general discussion of the way halacha perceives and treats a corporation, see Steven H. Resnicoff and Michael J. Broyde, *Jewish Law and Modern Business Structures: The*

*Corporate Paradigm*, \_\_ *Wayne Law Review* \_\_ (to be published in 1998).

47. Among other things, Rabbi Blau points out that corporations are creatures of secular law and, as such, it is reasonable to rule that they are properly regulated by such law. As to individual debtors, Rabbi Blau states that rare "customs" are not halachically valid - apparently suggesting that individuals seldom obtain bankruptcy relief. Yet this remark seems inapt, because, at least in America, bankruptcies are everyday occurrences. Rabbi Blau parenthetically refers to Rabbi Shabse HaKohen ("Shach," 1621- 1662) and Rabbi Rafael Chazan, who Rabbi Blau believes, limit the halachic validity of the customs of non-Jews. But, as we have already seen, many authorities, including Rabbi Feinstein, argue that such customs are halachically valid. See the text associated with notes 24 and 25, *supra*. Moreover, Rabbi David Chazan, *Nidiv Lev*, no. 12, explains the view of Rabbi Raphael Chazan, his father, as allowing a halachically binding custom to be derived from non-Jews where the custom would be enforceable against Jews under secular law. See text associated with notes 99-102, *infra*.

48. Basri, *Dinei Mamanos*, vol. 1, p. 71.

49. See, e.g., Basri, *Dine Mamanos*, volume 1, pp. 68, 71,

72, 87; volume 2, pp. 82, 87, 254, 282, 302; volume 3, pp. 252, 308; volume 4, p. 68.

50. Basri, Dine Mamanos, volume 1, p. 68, n. 4. Rabbi Basri, however, does not specifically discuss whether one who subsequently becomes wealthy may rely on bankruptcy discharge law.

Other poskim emphasize that fraudulent use of secular bankruptcy law will surely not be halachically effective. See, e.g., Blau, Pischei Choshen, Dinei Halva'ah, chapter 2, note 63; Klein, Mishne Halachos, volume 6, no. 277 (corporate officers personally liable if assets wrongfully diverted from corporate debtor prior to bankruptcy). See also Sternbuch, Responsa Tshuvos V'hanhagos, vol. 2, no. 701 (settlement fraudulently obtained is ineffective).

51. Rabbi Basri's reference to those whose homes are "full of valuables" is somewhat vague and fails to provide precise guidance as to whom he means to criticize. For example, there may be many persons whose limited assets exceed those which halacha would allow a debtor to keep, but who are nonetheless suffering financially.

American bankruptcy law, as applied in many jurisdictions, allows such abuse. Persons who file bankruptcy may exempt certain properties and keep them, while obtaining a discharge of their debts. 11 U.S.C. 522. The types of properties one may keep depends on the law of the state in which he legally resides. Some states allow debtors to exempt properties, such as their homes or ranches, worth enormous amounts of money. See, e.g., Tex. Prop. Code Ann, chapter 41, 41.001 (exempts a debtors "homestead"), 41.002 (defines a "homestead" used as a rural home for a family as consisting of "not more than 200 acres").

52. It seems irrelevant whether the particular parties involved actually had such matters in mind. There is no hint in the poskim that someone can avoid the effect of minhag merely by proving his own ignorance of the minhag. Rather, the question is whether the average person would be aware of the minhag at the time of the transaction.

53. This factor was suggested by Professor Michael Broyde.

54. This distinction was suggested by Rabbi Shmuel Fuerst (Dayan, Agudath Israel of Chicago).

55. Responsa, volume 3, no. 160.

56. See, generally, SHILO, supra note 28; Dayan I. Grunfeld, *The Jewish Law of Inheritance* (Targum Press 1987)(hereafter "GRUNFELD") pp. 17-46; R. Hershel Schacter, "'Dina De'malchusa Dina': Secular Law As a Religious Obligation," *JH&CS*, Vol. 1, No. 1, p. 103 (1981); *Encyclopedia Talmudis*, "dina d'malchusa dina;" *Responsa Rabbi Ovadia Yosef* (contemporary), *Yichave Da'as*, vol. 4, no. 65; *Responsa Rabbi Eliezer Waldenburg* ("Tzitz Eliezer")(contemporary), vol. 16, no 49; *Maharik*, no. 66, 187; *Responsa Rabbi Moses Teitelbaum* ("Heshiv Moshe")(1769-1841), no. 90.

For modern academic theories of how dina d'malchusa dina operates, see, e.g., Professor Aaron Kirschenbaum and Jon Trafimow, "The Sovereign Power of the State: A Proposed Theory of Accommodation in Jewish Law," *12 CARDOZO L.REV.* 925 (1991); Professor Chaim Povarsky, "Jewish Law v. the Law of the State: Theories of Accommodation," *12 CARDOZO L.REV.* 941 (1991).

57. See Talmud Bavli, Bava Kama 113a; Nedarim 28a.

58. Talmud Bavli, Gittin 10b.

59. Rishonim so ruling include, without limitation, Rabbi Yitzchak Alfasi ("Rif," 1013-1103), reported by Rashba, commentary on this passage; the majority of the Gaonim (various authorities from 6th through early 11th centuries), reported by Rabbi Vidal Yom Tov of Tolosa ("Maggid Mishna," 14th century), commentary on Mishna Torah, *Hilchos Malveh V'loveh*, chapter 27, halacha 1; the Ba'alei HaTosafos (various scholars in 12th and 13th centuries), reported by Maggid Mishna; Rabbi Yehoshua Soaz ben Shimon Baruch ("Shiltei Giborim," 16th century), commentary on Talmud Bavli, Bava Basra, end of chapter 3; Rabbi Samuel Harsani ("Ba'al HaTrumos," 1190-1256), "Sha'ar" 46, part 8, no. 5; Rav Mordechai Hillel (1240-1298), reported by Maharik, supra, and the Maharik. This is also the view of the Rambam, according to the Maggid

Mishna's interpretation of the Rambam. Others construe the Rambam's words differently. See, e.g., Rabbi Avraham ben Moshe of Boton ("Lechem Mishna," 16th century), commentary on Mishna Torah, Hilchos Malveh V'loveh, chapter 27, halacha 1.

60. This ruling is implicit in the fact that the Mechaber only cites *dina d'malchusa dina* in connection with matters which directly affect the government. Shulchan Aruch, Choshen Mishpat, no. 369, subparts 6 - 11. The Rema refers to the view of the other Rishonim as a contrast to the halacha stated by the Mechaber. Shulchan Aruch, Choshen Mishpat, no. 369, subpart 8.

61. For a more complete interpretation of the Gemara based on this second approach, see GRUNFELD, *supra* note 56. Although differing on certain issues, Rishonim interpreting *dina d'malchusa dina* as comprehensively applying to such subjects include, without limitation, Rashi and Rabbi Mordechai b. Hillel HaKohen (1240-1298), reported in Amudei HaYimini, no. 8); Rabbi Shmuel b. Meir ("Rashbam," 1080-1158), Talmud Bavli, Bava Basra 54a; Meiri (commentary to Talmud Bavli, Gittin 10b), Rabbi Nissim b. Reuven of Gerondi ("Ran," 14th century), supercommentary to commentary of Rif, Talmud Bavli, Gittin 10b; Rabbi Shimon Duran ("Tashbatz," 13th century), Responsa, part 1, no. 158; Rabbi Yitzchak b. Sheshes ("Rivash," 1326-1407), Responsa, numbers 142, 203; Rabbi Shlomo b. Luria ("Maharshal," 1510-1573), "Yam Shel Shlomo," chapter 1, no. 22). The Rashba also seems to have shared this view. See, e.g., Rashba's commentary to Talmud Bavli, Gittin 10b and Responsa, part 3, no. 63:5, 198. But see Yichave Da'as, volume 4, no. 65, for a discussion of an apparently conflicting view expressed by the Rashba in Responsa, part 3, no. 2.

Rabbi Moshe b. Nachman ("Ramban," 1194-1270) believed that *dina d'malchusa dina* applied even more broadly to all types of secular law, even if they were not enacted for the "public good." Nevertheless, he applied *dina d'malchusa dina* only to laws of ancient origin. See discussion in Rabbi Chaim b. Israel Benveniste (17th century), Kenesses HaGedolah, Choshen Mishpat, second printing, no. 169:58.

Bankruptcy discharge law, in one form or another, has been the law in the United States for over 100 years.

62. Shulchan Aruch, Choshen Mishpat 369:11. Actually, there are arguably two variations of the Rema's view. At an earlier point in the Shulchan Aruch, the Rema seems to say that *dina d'malchusa dina* simply applies to all areas of law. He states:

Some believe that *dina d'malchusa dina* applies only to taxes and charges on real estate . . . Others disagree and believe that *dina d'malchusa dina* applies to all areas of law . . . and this is the correct view.

Nevertheless, most poskim consider the more restrictive language cited in the text as more accurately representing the Rema's view.

63. See Shach, comment No. 39 to Shulchan Aruch, Choshen Mishpat 73:14.

64. See, generally, GRUNFELD, *supra* note 56.

65. Proponents of the Rema's view cite examples where *dina d'malchusa dina* changes express halacha regarding financial matters. Halacha prescribes, for instance, that a person who rescues another's property from a lion, a bear, a tidal wave, or a flood may keep the saved property himself. Even if the original owner is standing by and shouting that he does not despair of getting the property back, the halacha says that his disclaimer is meaningless. Shulchan Aruch, Choshen Mishpat, number 259:7. Nonetheless, the Rema specifically states that if the king decrees that a person must return such property, then the person must do so because of *dina d'malchusa dina*. *Id.*

The Shach's adherents argue that these examples are not inconsistent with the Shach's view because they require conduct - return of the lost or stolen object - which is anyway approved, albeit not required, by halacha. See, e.g., Maharik, no. 187; Breish, Chelkas Yaakov, volume 3, number 160. Other examples are either disputed or distinguished. See, e.g., *id.* (certain secular methods to effectuate a transfer of property ownership are valid

because, in light of the *dina d'malchusa*, when Jews use such methods their intent to fully effectuate the transfer is evident).

66. See Charles G. Hallinan, "The 'Fresh Start' Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretation," 21 U.RICH.L.REV. 49, 96 (1986) ("... the idea of the 'fresh start' has long incorporated and been shaped by a complex multiplicity of policy concerns, which have been founded in turn upon equally complex and often shifting combinations of assumptions about creditors, debtors, credit markets, and the social function of bankruptcy.")

67. J. MacLachlan, *Bankruptcy* 20-21, 88 (1956), quoted in *United States v. Kras*, 409 U.S. 434, 447 (1973).

68. See, e.g., Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 785-786 (1983).

69. *Williams v. Fidelity*, 236 U.S. 549, 554-555 (1914).

70. *Local Loan Co. v. Hunt*, 292 U.S. 235, 244 (1934).

71. Frank R. Kennedy, "Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start," 76 W. VA. L.REV. 427, 441 (1974).

72. Margaret Howard, "A Theory of Discharge in Consumer Bankruptcy," 48 OHIO L.J. 999, 1061 n. 99 (1987), citing Joslin, "The Philosophy of Bankruptcy - A Reexamination," 17 U.FLA.L.REV. 189, 191 (1964).

73. See, e.g., Luthor Zeigler, Note, "The Fraud Exception to Discharge in Bankruptcy: A Reappraisal," 38 STAN.L.REV. 891, 910 (hereafter "ZEIGLER") n. 81, citing Weistart, "The Costs of Bankruptcy," 41 LAW & CONTEMP. PROBS., Autumn 1977, at 107, 111.

74. *Id.*, at 910, n. 82 (1986), citing *Discussions of the Economics of Bankruptcy Reform*, 41 LAW & CONTEMP. PROBS., Autumn 1977, at 142 (comment of D. Logue).

75. For a thorough discussion of this argument, see, e.g.,

Howard, note 72, *supra*, pp. 1063-1068.

76. In a phone interview on March 13, 1992, Rabbi Moshe Heinemann mentioned this possible argument as one which "might" establish that the discharge law was intended for the general benefit of citizens, allowing *dina d'malchusa* to apply. Rabbi Heinemann concluded by telling me that he was uncertain ("mesupak") as to whether to accept this policy reason. I have not seen this point precisely expressed in print by secular bankruptcy scholars.

77. 11 U.S.C. 524(a).

78. 11 U.S.C. 524(c). The bankruptcy code refers to this as a "reaffirmation" of a debt.

79. 11 U.S.C. 524.

80. Prior to adoption of 524(c) of the bankruptcy code, if a debtor renewed, in writing, its promise to repay discharged debt, state law often made such promise enforceable. Although the obligee provided no new consideration in exchange for the debtor's promise, these states found that the debtor was morally obligated to pay and that this moral obligation constituted "consideration."

81. 11 U.S.C. 524(a)(2), (3).

82. 11 U.S.C. 525(a), (b).

83. Interestingly, at least one halachic authority has suggested that a discharge based on a settlement agreed to by a majority of creditors may in fact be entirely consistent with halacha, which would allow *dina d'malchusa* to apply even according to the Shach. Nevertheless, as discussed below in Part IVC, this opinion seems incorrect.

84. See, e.g., Rabbi Dov Berish Weidenfeld ("Dovev Mesharim," 1880-1965), Responsa, no. 76 (states that virtually all poskim agree that *dina d'malchusa* applies to a secular law enacted for the general good); SHILO, note 28, *supra*, p. 157 (stating that the Rema's view is the majority view and providing a list of poskim ruling in accordance with the Rema).

85. See, e.g., Iggeros Moshe, Choshen Mishpat, part 2, no. 62; Tshuvos Ivra, volume 2, p. 176. Each of these sources are discussed later in the text.

86. See discussion regarding "kim li," below, in Part VD.

87. See Rabbi Ovadia Yosef (contemporary), Yichave Da'as, volume 4, no. 65, and Yabia Omer, volume 6, no. 1, note 8. See, also, Schachter, supra note 56, at p. 115 n. 26.

88. SHILO, supra note 28, p. 157. Similarly, see Henkin, Tshuvos Ivra, p. 176 (limiting Shach's view to context in which there are organized Jewish communities with their own communal leaders, a situation which may exist in parts of Israel).

89. Additional objections might be raised, but most are easily answered. For instance, the majority of halachic authorities conclude that the fact that dina d'malchusa dina applies to any legitimate form of government and not merely to a monarchy. See, e.g., Schachter, supra note 56, citing Rabbi Avraham Sachatchover ("Avnei Nezer")(1839-1910) and Avraham Duber Kahane-Shapiro ("Devar Avraham")(1871-1943).

90. Although a question might be raised regarding the second policy, the government's social welfare concern for the debtor's emotional well-being, there is little reason to distinguish between a government's concern for its residents' economic well-being and its concern for their emotional well-being. Each such factor, if not improved, could lead to anti-social conduct.

91. In a phone interview with me on March 13, 1992, Rabbi Moshe Heinemann told me that both the government's intent and the law's effect are critical.

92. Incidentally, assuming dina d'malchusa dina would not halachically legitimize the discharge of all debts, one would presumably have to ensure that the arguably valid part of the law was still capable of objectively fulfilling the law's proper public purpose.

93. In certain contexts, secular courts apply more

demanding standards.

94. In American law, such minority views among jurors or judges in a particular case may be aligned together to reach binding conclusions of law. On the other hand, a court considering a legal question will not ordinarily group its conclusion upon a coalition of divergent, conflicting minority opinions in other cases.

95. See Part VC4.

96. He argued that *dina d'malchusa dina* applied a fortiori to a constitutional government such as that of the United States.

97. SHILO, *supra* note 28, at p. 155-156, describing the position of Rabbi Bloch (19th and early 20th century), as that position is expressed in *Shiurei Halacha*, volume 1, page 57.

98. A possible problem arises because of the fact that in many cases, a debtor's nonexempt assets, if any, may be totally consumed by bankruptcy administrative expenses, and the debtor's general creditors may receive no payment at all. This fact could arguably affect application of Rabbi Bloch's view in at least three ways. First, the possibility of payment may validate all bankruptcy discharges, even where no general creditor is paid. Second, the mere possibility of non-payment may render all bankruptcy discharges invalid, even where creditors are paid. Finally, perhaps whether a particular discharge is valid would depend upon whether payments to creditors were or were not made in the particular bankruptcy proceeding.

99. SHILO, *supra* note 28, at p. 163.

100. See Part IV, *infra*.

101. See note 25 and text associated with note 28, *supra*.

102. Rabbi Chazan's view seems similar to that of the Ben Ish Chai, discussed in text associated with notes 29 and 30, *supra*.

103. Landau, Bais Yisroel, no. 172.

104. Kahane, Divrei Gaonim, klal 14, halacha 18.

105. Although SHILO, supra note 28, at p. 164 states that Rabbi Landau's tshuva favored the Shach's view, the tshuva is ambiguous.

106. Feinstein, Iggeros Moshe, Choshen Mishpat, Part 2, number 62.

107. Professor Michael Broyde, in his article, "On the Practice of Law According to Halacha," JH&CS XX:5, 14-15 (1990), initially suggested that Rabbi Feinstein's ruling, by denying creditors access to the debtor's assets unless they obtain bankruptcy court approval, implicitly upheld the halachic validity of bankruptcy discharge law. His reasoning was that

(1) once a bankruptcy discharge was granted, secular law would never give creditors permission to pursue the debtor's assets; and (2) without such permission, according to Rabbi Feinstein, creditors could not halachically go after such assets. Because of certain specifics of Swiss bankruptcy law, Professor Broyde subsequently questioned the implications of Rabbi Feinstein's opinion as to bankruptcy discharges. *Id.*, at its note 19.

But even aside from the particulars of Swiss law, one could argue that Rabbi Feinstein's opinion does not support the validity of discharge law. Rather, one could interpret Rabbi Feinstein's tshuva as focusing only on assets which under the secular system are supposed to be distributed by the three-person panel. Any effort to interfere with this secular distribution procedure would be halachically prohibited. Rabbi Feinstein does not specifically offer guidance as to situations in which a debtor has, or subsequently acquires, assets not subject to any secular distribution system. It is possible that Rabbi Feinstein would allow creditors to pursue such assets.

108. Sternbuch, Responsa Tshuvos V'Hanhagos, Choshen Mishpat, volume 2, number 701.

109. Because a person is ordinarily entitled to a presumption of trustworthiness, in the absence of at least an unqualified charge that the debtor acted fraudulently, the debtor would not need a "migo."

110. It is far from clear why Rabbi Sternbuch would have held this belief. A debtor filing a liquidation bankruptcy also has to give up his assets in order to obtain a discharge. Therefore, the debtor in bankruptcy is no more "entirely" discharged than the debtor who entered into the compromise Rabbi Sternbuch discusses. In addition, either liquidation or reorganization bankruptcy might have other negative ramifications. For instance, there may be greater adverse publicity and possible harm to the debtor's reputation as a result of a public bankruptcy filing than through private agreement with one's creditors. Moreover, the secular officials who would have been involved in bankruptcy might have thoroughly examined the debtor and his affairs and might have discovered the debtor's deceitfulness and the debtor might not have been granted a bankruptcy discharge. Interestingly, Rabbi Sternbuch also does not explain why, if the debtor could have obtained better results for itself by filing bankruptcy, the debtor did not choose to do so.

111. Phone interview with author on March 13, 1992.

112. Breish, Chelkas Yaakov, volume 3, number 160. Nonetheless, without discussing the purposes of bankruptcy law, and although he holds like the Shach, Rabbi Breish simply declares that there is no basis on which the bankruptcy law could be considered "for the benefit of the people of the land."

113. At a seminar for lawyers sponsored by Agudath Israel of America, Rabbi Feivel Cohen reported the unwritten view of Rabbi Auerbach that a bankruptcy discharge is not halachically valid. The program, "The Legal Profession Today," was held in New York City on November 5, 1989. Audio tapes of Rabbi Cohen's lecture are available for sale from Agudath Israel of America. SHILO, supra note 28, at p. 157, cites Rabbi Auerbach's written view that the halacha is as the Shach, not the Rema.

114. Blau, Pischei Choshen, Hilchos Geneiva, chapter 1,

note 4, p. 13.

115. Blau, Pischei Choshen, Dinei Halva'ah, chapter 2, note 63, p. 27.

116. Weiss ("Minchas Yitzchak," 1902-1989), vol. 3, no. 134.

117. Had the creditor's silence been construed as consent to the court order, there would have been an issue as to whether or not such consent was the product of economic duress. Consideration of this issue might have led to discussion of dina d'malchusa dina. Nevertheless, Rabbi Weiss did not discuss the merits of the economic duress argument, because the creditor had not satisfied the formal preconditions necessary to have raised the issue.

118. Of course, if a creditor could block a secular bankruptcy discharge by objecting but failed to object, according to Rabbi Weiss, any resultant discharge would apparently be invalid.

119. Rabbi Weiss at least he ruled that a litigant was entitled to assert the Rema's view was correct and to rely thereon successfully against an adversary invoking the Shach's view. Minchas Yitzchak, volume 2, no. 86:3.

120. See note 88, supra.

121. According to some authorities, there may be situations in which a creditor may be considered halachically to be in "possession" of a debt, even before the debt is collected. In such instances, the burden of proof would be borne by the debtor. A discussion of these various views is beyond the scope of this Article.

122. Of course, the facts can be reversed. A creditor may have collected from a discharged debtor's assets, and the debtor may go to rabbinical court to recover the property. In this case, the defendant will argue that dina d'malchusa dina does not apply.

123. See, generally, Benveniste, Kenesses HaGedolah, second printing, no. 25, "Principles of Kim Li"); Azulei,

Birkei Yosef, Choshen Mishpat, no. 25; Rabbi Yaakov Reisha, Shevus Yaakov, Choshen Mishpat, no. 25, "Principles of Kim Li."

124. Of course, sometimes the two litigants need something from each the other. In such a case, a negotiated settlement may be achieved.

125. See SHILO, supra note 28, at p. 158, who cites the views of numerous poskim. Rabbi Moshe Shreiber ("Chasam Sofer")(1762-1839), Responsa, Choshen Mishpat, no. 65, for instance, specifically states that kim li can be used with respect to the argument that dina d'malchusa dina applies to any rule for the benefit of the people of the land. See also Orchos HaMishpat, additional note to Principal 25 (one may say kim li that the halacha is like the Rema's view and not the Shach's view); Weiss, Minchas Yitzchak, volume 2, no. 86:3 (one may successfully rely on Rema's view against his adversary's assertion of the Shach's view).

Some Sephardic poskim go to the other extreme and argue that not only is the Mechaber's view correct, but one cannot use kim li to rely on the Rema's or Shach's view. See, e.g., Rabbi Ovadia Yosef, Yabia Omer, volume 5, no. 1:6; Chacham Yosef Chaim Pealim, volume 2, Choshen Mishpat no. 15 (cited by SHILO, supra note 28, at p. 158).

126. This will turn on whether bankruptcy law is for the benefit of the people of the land.

127. Whether someone may file bankruptcy in order to say kim li is a complex question which goes somewhat beyond our scope. It should be at least noted, however, that this issue may not always arise. For instance, a debtor may obtain a discharge after having been involuntarily forced into bankruptcy. See also note 21 and associated text, supra.

128. Ironically, this question itself may involve on dina d'malchusa dina issues. See, e.g., Feinstein, Iggeros Moshe, Choshen Mishpat, part 2, no. 62 (states that ownership of land is not transferred unless secular law standards are fulfilled); But see Rabbi Shlomo Zalman Auerbach (contemporary), Ma'adanei Eretz, no. 18.

129. See, e.g., Blau, *Piskei Choshen, Hilchos Halva'ah*, chapter 2, no. 34, note 83 (cites Rabbi Chaim ben Israel Benveniste as saying the *kim li* would allow the *muchzach* to succeed in court, but that one may have to voluntarily pay "to fulfill one's duty toward heaven;" cites the *Shevus Yaakov* as saying that *kim li* works even with regard to one's "duty toward heaven").

130. One might argue that the amendment process was part of preexisting bankruptcy law to which the parties could be deemed to have agreed, and that, thereby, the parties agreed indirectly to the amended law. In the context of secular law, the Supreme Court has questioned the validity of a similar argument raised as a defense against an alleged constitutional violation of the "takings" clause. See *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

131. It should be noted, however, that even some *poskim* who follow the *Rema's* view of *dina d'malchusa dina*, may believe that it is inapplicable to certain areas of law. See, e.g., Feinstein, *Iggeros Moshe, Choshen Mishpat*, no. 72 (*dina d'malchusa dina* does not apply to damages by one's animals or to responsibilities of bailees, neighbors or agents).

132. See, e.g., Herzog, *supra* note 22, vol. 1, pp. 21-24.

133. Some argue, for instance, argues that the residents of a land are bound to follow the commands of the government, because the government could deprive them of their right to remain on the land. See, e.g., Rabbi Schachter, *supra* note 68, p.115, n. 26, discussing among other things, the *Ran*, *Talmud Bavli, Nedarim 28a*. Others maintain that any government has inherent authority to enact regulations, based, for instance, on the Biblical discussion regarding authority of kings. See, e.g., Meiri, *Talmud Bavli, Bava Kama 113a*; Rabbi Yom Tov b. Avraham Ishbili ("*Ritva*," 1250-1330), commentary to *Talmud Bavli, Bava Basra 5a*. Others contend that the authority of a non-Jewish government to promulgate regulations arises out of the *Noachide mitzva* to establish a system of laws. See, generally, Nahum Rakover, "Jewish Law and the *Noachide Obligation to Preserve Social Order*," 12 *CARDOZO L.R.* 1073 (1991). Still others declare the authority emanates

from the power of a government to declare one's property ownerless ("hefker bais din hefker"). See, generally, Encyclopedia Talmudis, entry "dina d'malchusa dina;" Menachem Elon (contemporary), HaMishpat HaIvri, vol. 1, pp. 51-59.

134. For example, at least one posek has informally suggested to me that dina d'malchusa dina, to the extent it is based on the secular government's ability to expel Jewish residents, would not apply to Jewish citizens in the United States. Because of its form of government, the United States could not, he argued, expel such citizens. Professor Broyde, however, has argued that the issue is not whether the United States government, under its present rules, could exile its citizens. Rather, the issue is whether the United States government has the right, halachically, to change its rules to allow for such expulsion. So long as it has this halachic right, he argues, Jewish citizens must comply with secular law, pursuant to dina d'malchusa dina.

135. Blau, Pischei Choshen, Hilchos Halva'ah, chapter 2, note 63. See also Klein, Mishne Halachos, volume 6, no. 277.

136. Feinstein, Iggeros Moshe, Choshen Mishpat, part 2, no. 62.

137. See, e.g., Rabbi Yechiel Michael Epstein (1829-1908), Aruch HaShulchan HaAsid, Hilchos Melachim 79:15; Rabbi Yeshaya Karelitz ("Chazon Ish," 1878-1953), commentary on Rambam, Hilchos Melachim 10:10. Rema, in his Responsa, no. 10, interprets Ramban, commentary on Genesis 34:13, as asserting a contrary, minority view. According to this view, the Noachide commandment actually requires non-Jews to observe the monetary rules halacha applies to Jews. See, generally, Rackover, "Jewish Law and the Noahide Obligation to Preserve Social Order," 12 CARDOZO L.R. 1073 (1991).

138. Hilchos Melachim, perek 10, halacha 12.

139. See, generally, Schacter, supra note 28, at pp. 127-128; Sternbuch, Tshuvos V'Hanhagos, volume 1, no. 795.

140. Kahane, Divrei Gaonim, Klal 77, halacha 9; Sternbuch, Tshuvos V'Hanhagos, volume 1, no. 795.

141. See, e.g., Ovadia Yosef, Yabia Omer, volume 2, Yoreh Deah no. 11 (comprehensive listing of rabbinic views regarding halachic status of irreligious Jews). Cf. Feinstein, Iggeros Moshe, Choshen Mishpat, part 2, no. 50:3.

142. Shemos 21:1.

143. Rashi, commentary on Torah.

144. See, generally, Rabbi Simcha Krauss, "Litigation in Secular Courts," 2 JH&CS 35 (1982).

145. See, e.g., Rashi; Shulchan Aruch, Choshen Mishpat 26:1.

146. See, e.g., Weidenfeld, Dovev Mesharim, no. 76. It is always preferable to consult with a posek prior to filing a suit against another Jew or, if one has Jewish creditors, a bankruptcy petition.

147. But see Klein, Mishne Halacha vol. 7, no. 255, and vol. 3, no. 214; Rabbi Shimon ben Tzemach ("Tashbatz")(1361-1444), vol. 2, no. 290. See, generally, Professor Broyde, "On the Practice of Law According to Halacha, JH&CS XX:5 (Fall 1990), pp. 6-16.

148. Even if a debtor with religious Jewish creditors were halachically allowed to file bankruptcy, this does not mean that any discharge would be halachically valid against such creditors.

149. 11 U.S.C. 362(a).

150. 11 U.S.C. 362(d)(1).

151. Blau, Pischei Choshen, Dinei Halva'ah, chapter 2, note 63, p. 27.