YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**Halakha and Israeli History**

**Rav Aviad Tabory**

***Shiur* #35:**

**4 January 2023**

**Judicial Reform**

On the 4th of January 2023, a new bill was presented to the Knesset. The offer was delivered by the newly appointed minister of justice, Yariv Levin. The bill included a major reform in the Israeli judicial system. Among the suggested changes were:

1. Restricting the high court’s capacity to strike down laws and government decisions, by (1) requiring an enlarged panel of the court’s judges and a “special majority” to do so, and (2) including an “override clause” that would enable the Knesset to re-legislate such laws, unless all 15 justices unanimously ruled to strike them down.
2. Changing the process for choosing judges, to give the government of the day effective control of the selection panel.
3. Preventing the court from using a test of “reasonableness” against which to judge legislation and government decisions.
4. Allowing ministers to appoint their own legal advisers, instead of getting counsel from advisers operating under the Justice Ministry aegis.[[1]](#footnote-1)

The suggested reform was greatly debated and created a tremendous division among the Israeli people. Marches, protests, and even strikes took place all over the country.

Those who opposed the reforms saw this move as anti-democratic, dangerous, and illegitimate; in their view, this “revolution” threatened the independence of the Israeli courts. There was a strong feeling that the change was too quick and too aggressive.

On the other side, the claim was that this was a legitimate move that was decided upon by the majority of the people through democratic elections.

In past years, many politicians on both sides of the pollical spectrum, as well as lawmakers, have suggested changes in Israel’s legal system, arguing that the lack of a constitution creates an unbalance in the legal system. Many have argued that this gave judges too much authority and power over the government.

Professor Aaron Barak served as head of the Supreme Court from 1995 to 2006. During that period, he advanced an approach that said judges should be encouraged to make rulings based on their own views rather than on legal [precedent](https://en.wikipedia.org/wiki/Precedent).

Barak believed in a proactive judiciary, and he has interpreted Israel's [Basic Law](https://en.wikipedia.org/wiki/Basic_Laws_of_Israel) as its constitution.

The following paragraph describes his approach to law:

In my eyes, the world is filled with law. Every human behavior is subject to a legal norm. Even when a certain type of activity – such as friendship or subjective thoughts – is ruled by the autonomy of the individual will, this autonomy exists, because it is recognized by the law.... Wherever there are living human beings, law is there. There are no areas in life which are outside of law.[[2]](#footnote-2)

This philosophy and this approach gave the courts a tremendous amount of power, leading to situations in which Israeli courts rejected laws the government had attempted to pass, thus creating tension between the separate branches of power.

When changes were proposed at the beginning of 2023, thousands flocked to the streets, creating chaos and severe disturbance throughout the country. The tension reached levels that threatened relations between the right and left political parties, and many feared an outbreak of violence on both sides. Among those who opposed the reform, threats were even made to refuse fighting in future wars, and some voices called for refusing to report to the reserve service of the IDF.

With the outbreak of war on October 7th, 2023, both the judicial reform and the movement against it were paused.

**Democracy and Torah**

Do democratic values pose a challenge to the Torah and its values? Does the halakhic system recognize these principles? The State of Israel is defined legally as a Jewish State. In situations of conflict between Jewish values and democratic ones, which takes precedence?

Rav Aharon Lichtenstein addressed some of these questions. As expected, his answer is complex. For those in the religious community who accept the democratic system, there is room for conflict:

As people who believe in Torah, on the one hand, and in the human values of democracy, on the other, many challenges face us. We must grapple with these issues on the political and practical level, as well as within the beit midrash, in an effort to nurture and mold both Torah thinking and democratic thinking. In this task, we must constantly remain aware that, ultimately, the democracy within us is drawn from the world of Torah and seeks to fulfill the world of Torah.

However, he also states:

…we cannot assert that there is a perfect overlap between democracy in the broad, secular sense of the concept, and the world of Halakha. Let us not delude ourselves or our opponents by claiming that there are no gaps, no differences. But to the extent that we focus on the moral spirit, the human spirit, that should drive and characterize a society worthy of itself, a society that seeks to build a human world on a super-human foundation – here, the cloak of democracy certainly belongs to and suits the world of Torah.[[3]](#footnote-3)

The crucial difference, in his opinion, is the source of authority:

The most basic foundation of all political science is the question of the source of authority and its roots: from whence does it derive its values and draw its power, on the practical level, but also – more importantly – on the level of ideas? In this context, it is clear that if we compare our world view to that of western democracy, there is a contradiction. Democracy maintains that the source of authority, its root and basis, is the *vox populi* – the voice of the public. The public decides, for better or worse; the public determines what is desirable and what is not, both in legal and in moral terms.

We, on the other hand – and I refer also to those who cleave to universal religious values in general, and to our world-view in particular – highlight the idea that the source of authority is the Holy One and His will. “He is our God and there is no other.”[[4]](#footnote-4)

**Do the Torah and democracy share similar values?**

*Type of Government*

Much has been written about the Torah’s approach to monarchy and government. The sources are complex: on one hand, the Torah in *Devarim* 17 supports a monarchal system of government; on the other hand, many Biblical sources, such as I *Shmuel* chapter 8, express a negative view of this model.

Rav Naftali Tzvi Yehuda Berlin explains that although one might conclude that the Torah is commanding the people to create a monarchy, it is also adamant that the people appoint their leaders and agree to this type of government, similar to the democratic system. He points out that the Torah precedes the commandment to appoint a king with the words: “When you will come into the land… and you will say, ‘I will appoint a king over me’” (*Devarim* 17:14):

The reason seems to be that states are governed in different ways, either by a king or by the people and their representatives. Some states cannot tolerate a monarchy, while others, without a king, would be like a ship without a captain. This matter cannot be mandated by a positive commandment, for issues of government involve dangers to human life that would set aside any positive commandment. For this reason, it is impossible to issue an absolute imperative to appoint a king, as long as the people have not, after seeing that the countries around them are governed with greater order, agreed to bear the yoke of a king themselves. Then [once they have expressed such willingness] there is a positive commandment upon the Sanhedrin to appoint a king.[[5]](#footnote-5)

The mitzva of appointing a king can only come into effect once the people have expressed a desire and willingness to be led by such a government.

In *Shoftim* chapter 8, the people of Israel approach Gidon, who has proved himself a popular and effective leader, and offer him the potion of kingship.

Then the men of Israel said to Gidon, "Rule over us, both you, and your son, also your son's son; for you have saved us from the hand of Midian." (*Shoftim* 8:22)

Surprisingly, his response suggests that the notion of a monarchy contradicts God Himself:

And Gidon said to them, "I shall not rule over you, and my son will not rule over you; the Lord will rule over you." (Ibid. v. 23)

What is the meaning of such a claim? Rav Yehuda Shaviv explains:

In any type or form of government there is a threat, if not a rebellion, against Gods’ absolute rule. Thus, we arrive at a paradox, that the more we restrict government authority, the more we separate the branches of government, the more democratic we are… the more we lessen the rebellion against God’s kingship.[[6]](#footnote-6)

*Separation of Powers*

The Rambam teaches us that the return of sovereignty to the Jewish people during the rebellion of the Maccabees is one of the reasons for the celebration of Chanuka:

They appointed a king from the priests, and sovereignty returned to Israel for more than 200 years, until the destruction of the Second Temple.[[7]](#footnote-7)

However, the Ramban regards the kingship and ruling of the sons of Matityahu more negatively. He suggests that the kingship was promised to the tribe of Yehuda and any attempt by Israeli “foreigners” to rule is against the Torah. Furthermore, he suggests that the Maccabees’ sin was greater in that not only were they not from the tribe of Yehuda, but they were priests:

The descendants of the righteous Matityahu the Chashmonai sinned only in this, that they ruled but were not from Yehuda… And it is also possible that there was a sin in their rulership on account of their being priests, who have been commanded: “You shall keep your priesthood in all matters concerning the altar, and concerning what is within the dividing screen; and you shall serve; I have given the service as a gift…” (*Bamidbar* 18:7). Thus, it was not for them to rule, but only to perform the service of God.[[8]](#footnote-8)

This opinion of the Ramban is reminiscent of one of the fundamental democratic principles of separation between religion and state: the kings and the priests perform different roles and must not overlap. Although there is no explicit rule in our sources for this matter, one could derive inspiration from the Ramban’s words.

*Secular Courts*

The Torah prohibits appearing before non-Jewish judges and courts that are based on secular law. This rule stems from the statement: “And these are the statutes which you shall place before them” (*Shemot* 21:1). The Gemara explains:

“Before them” – not before non-Jews; “before them” – not before simpletons. (*Gittin* 88b)

The *Shulchan Arukh* rules:

It is forbidden to appear for trial before heathen judges and in their courts of law, (meaning, permanent judicial sessions in which [civil] magistrates issue rulings), even regarding a lawsuit that they [the heathen judges] adjudicate according to the Israelite law. Even if the two litigants agreed to be tried before them, it is forbidden. (*Choshen Mishpat* 26:1)

Truth be told, this law is so elementary that one hardly needs to look for a source. Entire tractates of the Talmud deal with the Torah’s civil law. The laws of damages, sales, wills, and loans are just some of the many legal matters that are discussed in the sea of Talmud. Surely, these are not theoretical laws! The Torah instructs us to live by its laws and rules, and obeying a secular court system could well interfere with that. Thus, Rav Yosef Karo’s warning at the end of the paragraph is logical:

And anyone who appears for trial before them is considered a wicked person and is as though he blasphemed, reproached, and rebelled against the Law of Moshe.

On the other hand, many halakhic *teshuvot* and Torah articles have been written about situations and circumstances in which Jews *are* permitted to appear before non-Jewish judges.[[9]](#footnote-9)

However, the situation in the State of Israel may be different.

The above source prohibits appearing before non-Jewish judges. Would it matter if the judges who rule on secular law would be Jewish? In other words, is the prohibition focusing on the judges not being Jewish or on the fact that they make their rulings based on secular law?[[10]](#footnote-10)

It is important to note that in these matters, there is a difference between criminal law and civil law. The conflict between secular law and the Torah is mostly in civic and monetary disputes.

Those who argue that Jewish judges who rule by secular law are legitimate (according to Jewish law) rely on precedents like the following rulings quoted by Rav Moshe Isserles:

[In] towns where there are no scholars [available] who are fit to be judges, or where all of them are unlearned people and they require judges to adjudicate [cases] among them so that they go not before heathen courts – [the law is that] they may appoint [as judges] the best and the wisest of them, with the consent of the townspeople, although they are not fit [to be] judges. (*Choshen Mishpat* 8:1)

Furthermore, the Rema adds:

Likewise, [the members of] any community can accept a court of law upon them [that consists of judges] who are not Biblically fit [to judge].

However, those who oppose argue that the Rema was offering a leniency that can be applied only in dire situations when there are no alternatives.

Chief Rabbi Yitzchak Herzog was very invested in these questions. He also rejects the positions that suggest that a secular court nowadays is legitimate:

Creating *le-chatchila* courts of law (whose judges are simpletons) in a place where *talmidei chachamim* exist, even if they (the judges) are clever and knowledgeable, would be an embarrassment to the Torah.[[11]](#footnote-11)

In a lengthy article on our question, Professor Eliav Shochetman concludes:

The common opinion amongst the halakhic authorities of our generation is that the State of Israel courts, although they are operated by Jewish judges, (they) do not rule by Jewish law, rather by secular law which is foreign to the Torah…thus, not only does the prohibition “before them and not before simpletons” apply to them, but also the prohibition “before them and not before non-Jews.”[[12]](#footnote-12)

Rav Ovadya Yosef, like many other *poskim*, prohibits one from appearing before an Israeli court. This, of course, applies to both lawyers and judges. In fact, he uses very strong words to discourage ascribing any legitimacy the Israeli courts.[[13]](#footnote-13)

However, Professor Shochetman questions the conclusion of these opinions:

Since there is a clear prohibition against turning to the Israeli courts, is the meaning of this a total delegitimization of the entire legal system of the state?[[14]](#footnote-14)

His answer:

It is my humble opinion that the answer to this question is negative… In a private case, a Torah-fearing Jew must turn to a Torah court of law, but that doesn’t necessary mean that Jewish law does not recognize any legitimacy of the courts.

Furthermore, he argues that one must take into consideration that the majority of people in the state are not interested in Torah law. Total rejection of the system would lead to anarchy.

1. This list is quoted from the Times of Israel and can be found at: <https://www.timesofisrael.com/justice-minister-unveils-plan-to-shackle-the-high-court-overhaul-israels-judiciary/>. [↑](#footnote-ref-1)
2. As quoted and translated by Hillel Neuer in “Aharon Barak's Revolution,” available at <https://www.daat.ac.il/daat/EZRACHUT/english/hillel.htm>. [↑](#footnote-ref-2)
3. Rav Aharon Lichtenstein, “Judaism and Democracy” (part 2), available at <https://etzion.org.il/en/halakha/studies-halakha/laws-state-and-society/judaism-and-democracy-part-2-2>. [↑](#footnote-ref-3)
4. Rav Aharon Lichtenstein, “Judaism and Democracy” (part 1), available at <https://www.etzion.org.il/en/halakha/studies-halakha/laws-state-and-society/judaism-and-democracy-part-1-2>. [↑](#footnote-ref-4)
5. Netziv*, Ha'amek Davar*, [*Devarim* 17:14](https://www.sefaria.org/Deuteronomy.17.14?lang=he-en&utm_source=etzion.org.il&utm_medium=sefaria_linker). [↑](#footnote-ref-5)
6. Rav Yehuda Shaviv, “*Demokratya Ve-Yahadut*,”in *Mamlechet Kohanin Ve-Goy Kadosh*, 291- 292. [↑](#footnote-ref-6)
7. *Hilkhot Megilla Ve-Chanuka* 3:1. [↑](#footnote-ref-7)
8. Ramban, *Bereishit* 49:10. [↑](#footnote-ref-8)
9. For a summary, see Rabbi Yaacov Feit, “The Prohibition Against Going to Secular Courts,” available at <https://bethdin.org/wp-content/uploads/2019/07/The-Prohibition-Against-Going-to-Secular-Courts-by-Rabbi-Yaacov-Feit.pdf>. [↑](#footnote-ref-9)
10. For a positive opinion, see Yakov Bazak*,* “*Batei Mishpat Be-Yisrael – Ha’omnam ‘Arkhaot Shel Goyim’?*” *Techumin* 2, 523-527. [↑](#footnote-ref-10)
11. Rav Yitzchak Herzog, *Techuka Le-Yisrael Al Pi Ha-Torah,* Jerusalem, 1989, vol. 1:199. [↑](#footnote-ref-11)
12. Eliav Shochetman, “*Ma’amadam Ha-Hilkhati Shel Batei Ha-Mishpat Be-Medinat Yisrael,” Techumin* 13, 346. [↑](#footnote-ref-12)
13. *Yechaveh Da’at*, 4, footnote on page 312. [↑](#footnote-ref-13)
14. Shochetman, 354. [↑](#footnote-ref-14)