YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**Before Sinai: Jewish Values and Jewish Law**

**By Rav Dr. Judah Goldberg**

**Shiur #37:**

**Pursuit of the Ethical Life (8)**

**Moral Intuition (3)**

**The Role of the Monarch, Part I**

**Introduction**

We ended the previous *shiur* with *Chazal*’s observation that in performing “*mishpat u-tzdaka*” (*II* *Shmuel* 8:15), King David was following in the path of Avraham, whom God predicted would command his progeny to engage in “*tzedaka u-mishpat*” (*Bereishit* 18:19). Inasmuch as these verses serve as the basis for arbitration in Jewish law, they specifically describe the pursuit of justice through moral intuition, rather than through formal adjudication.

In light of this comparison, we can further ask: Is the association of King David with Avraham’s ethical legacy of *tzedaka u-mishpat* coincidental, or is there possibly a deeper connection between Jewish monarchy and *berit Avot*?

Our analysis of Jewish monarchy will follow the pattern we have set with earlier topics. First, we will examine the king’s authority to pursue justice and possibly even legislate outside of the law as additional examples of moral intuition sanctioned by *Torah She-be’al Peh*. Subsequently, we will ask if this intuition may be specifically related to the ethical vision of *berit Avot*, as we did with arbitration.

Regarding a king, however, we will take this analysis one step further. We will widen our view to probe the king’s relationship with the entirety of *berit Avot*, and also, as in the past, reverse the direction of inference: At the same time that the “Laws of Kings” may help demonstrate the permanent relevance of *berit Avot*, *berit Avot* may in turn shed light on the particular place of political leadership within a Jewish theocracy.

Going forward, we will also ask what relevance this analysis of monarchy may have for contemporary Jewish life. Some scholars believe that the roles assigned by Jewish tradition to monarchy can be assumed by other forms of political leadership in its absence, in which case the rights and responsibilities of Jewish monarchy may be directly relevant to the modern political reality in Israel. In these *shiurim*, we will make use of two scholarly works in particular: Judge Gershon German’s *Melekh Yisrael: Ribbonut Le-dorot Be-re’i Ha-halakha U-ma’amadam shel Chukei Ha-Knesset Be-olamah shel Ha-halakha* (Bnei Brak: 2003) and R. Ido Reichnitz’s *Medina Ke-Halakha* (Jerusalem: 2018).

**King as Judge?**

Does the king possess any judicial powers according to Halakha? On the one hand, the Biblical passages that describe the king’s duties and privileges (*Devarim* 17:14-20; *I Shmuel* 8:11-18) do not refer outright to any involvement in law. On the contrary, the Torah’s outline of monarchy follows the commandment to appoint judges, who are directed to “judge the nation with righteous judgment” (*Devarim* 16:18), and the description of the Sanhedrin, which “will tell you the judgment” (17:9) in the most difficult of cases. At first glance, justice in Jewish law falls squarely within the purview of its best legal scholars, while the king’s responsibilities, ostensibly, lie elsewhere.

On the other hand, as R. Avraham Bornsztain of Sochaczew carefully documents, both *Torah She-bikhtav* and *Torah She-be’al Peh* repeatedly speak of the king as deeply engaged in activities of judgment (Responsa *Avnei Nezer*, *YD* 312:46). Most famously, King Shlomo presides over a case involving two women who both claim a baby, immediately after he asks God (*I Melakhim* 3:3-28) to “give to Your servant a discerning heart to judge Your nation… for who can judge this weighty nation of Yours?” King David, as we have repeatedly referenced, practices “*mishpat u-tzdaka*” (*II* *Shmuel* 8:15), and the people turn to him for judgment (ibid. 15:2-6). King Yotam, too, sits in judgment (*II Melakhim* 15:5).

With regard to Kings David and Shlomo, at least, one could counter that they only engaged in justice as outstanding Torah scholars, but not as kings. However, King David issues multiple death sentences, seemingly outside of any formal legal process (*II Shmuel* 1:15-16, 4:12, and 12:5-6).

A number of halakhic sources also belie this suggestion. The Mishna states that the king must keep his personal Torah scroll with him at all times, such as when he “sits in judgment” (*Sanhedrin* 21b). The impression is that this is a regular part of his functioning and not an incidental activity.[[1]](#footnote-1) According to R. Eliezer ben Ya’akov, the term “your judges” (*Devarim* 21:2) includes the king, “as it says, ‘The king through justice stabilizes the land’ (*Mishlei* 29:4)” (*Sota* 45a; *Sanhedrin* 14b). Finally, the Rambam, quoting the Jewish people’s original request for a king, summarizes his mandate: “We do not crown a king from the outset other than to execute justice and warfare, as it says, ‘And our king will judge us, and he will go out before us and fight our battles’ (*I Shmuel* 8:20)” (*Hilkhot Melakhim* 4:10).[[2]](#footnote-2)

**Royal Justice**

Justice, then, appears to be a critical aspect of the monarch’s role. But what is his authority? The Rambam himself grants the king the ability to punish murderers whose cases do not meet the legal criteria for execution by the rabbinic court. In *Hilkhot Rotze’ach* *U-shemirat Nefesh*, he relates to cases in which a murder has been staged indirectly, such as through an assassin or exposure to a wild animal (2:4). In *Hilkhot Melakhim*, he adds cases in which the legal standard for evidence has not been met:

All those who have murdered without clear proof, or without prior warning (*hatra’a*), even by [the testimony of] one witness, or an enemy who killed by accident — the king has the right to execute them and to restore order according to the needs of the moment. (3:10)

Thus, the king is not beholden to the same legal criteria as judges. But what criteria, then, does he use? If he is not employing the established evidentiary rules of *din*, how indeed does he decide if the defendant is guilty and, therefore, punishable? It seems to me that we have no choice but to acknowledge the use of moral intuition, again with the imprimatur of Halakha.

**Justice or Order?**

However, this argument is subject to the same critique that we raised regarding arbitration. Perhaps the king is not pursuing an alternative track of justice at all. Rather, he is functioning pragmatically, motivated by the more mundane goal of *tikkun olam* (betterment of society), which the Rambam refers to in both places. Moreover, we can argue, it is exactly this distinct goal that justifies the king’s foray into the world of criminal justice in the first place. Authentic justice is achieved solely through *din*, which belongs exclusively to its most prominent scholars and in which this lay monarch has no business. Maintaining social order, on the other hand, is the purview of the king, and it is for the furtherance of this goal that he is empowered to intervene.

The practical, social element is even more pronounced if we note that the Rambam’s explicit authorization of the king is to adjudicate cases of murder. Elsewhere (*Hilkhot Rotze’ach* 4:9), the Rambam singles out murder as uniquely threatening to civilization:

Even though there are other sins that are more severe than murder, none is as destructive to social welfare as murder. Even idolatry and, it goes without saying, incest or desecration of Shabbat are not like murder.

The Rambam thus explains another unique law regarding murder: if a court must exonerate a murderer on technicality, it does not release the defendant to the public, as with other offenses, but detains him and brings about his demise indirectly (ibid. 8; also see 2:5). In other words, the response to murder, unlike other transgressions, is not just about justice for the perpetrator, but also about protecting society. The king’s unusual ability to punish a murderer can similarly be interpreted along utilitarian lines, in which case one can argue that it has little in common with other examples of intuitive justice.

And yet, as with arbitration, I think this critique risks oversimplifying the king’s role. Even if the king’s prosecution is practically motivated, could it be that it is devoid of due process? Even if he can settle for something less than “clear proof,” does he not owe the defendant any standard at all?

**Two Modes of Justice**

This problem bothers R. Meir Simcha Cohen of Dvinsk:

But here I am astonished at our Rebbe [=the Rambam], who wrote, “even by one witness.” Could we surrender his body to death based on a single witness?!

If we presume that halakhic jurisprudence is not mere decree, but establishes a standard of fairness, then how can we countenance punishment based on anything less?

Subsequently, R. Meir Simcha justifies the reliance on one witness by the precedent of Noahide law, in which a violator can similarly be punished by the testimony of a lone witness. (He similarly explains *Hilkhot Rotze’ach* 6:5, regarding one who avenges his relative’s spilled blood.) He summarizes:

Only for judgment by the rabbinic court according to Torah laws — for the obligation falls upon them to judge — did the Torah command that two witnesses are necessary. However, regarding a blood avenger and a Jewish king, for whom permission was granted [to kill] for the sake of the civil order, their justice is the same as in the civil law (*ha-torah ha-nimusit*) that was given to Noahides. (*Or Same’ach*, *Hilkhot* *Melakhim* 3:10)

In other words, R. Meir Simcha is proposing two modes of judgment. The first is classic, principled justice, practiced by the rabbinic courts and adjudicated by the meticulous rules of Halakha. The second is a more natural justice, which is aimed primarily at maintaining the social order. This latter form existed prior to Halakha and continues to operate for non-Jews, whom the rules of Halakha do not govern; but it also persists in the post-Sinai Jewish world, under the jurisdiction of the king.[[3]](#footnote-3)

R. Meir Dan Plotzki reaches a similar conclusion:

It is known that there are two systems of conduct in the world: a natural system of conduct (*hanhaga ha-tiviyyit*), which is the Noahide system of conduct, and the holy Torah’s system of conduct, which was given to the Jewish people when they accepted the holy Torah…

The concept of the king is the natural system of conduct, as is evident from the text: “And you will say, ‘I will appoint for myself a king **like all the nations around me**’” (*Devarim* 17:14). (*Chemdat Yisrael*, Vol. 1, p. 75)[[4]](#footnote-4)

According to R. Plotzki, the king purposely embodies universal, natural justice, which Torah law only overrides but does not replace. When Halakha leaves a gap, the king may fill it by recourse to the universal Noahide code. Thus, R. Plotzki expands the scope of transgressions which the king can prosecute. While R. Meir Simcha understands the Rambam as restricting the king’s jurisdiction to murder,[[5]](#footnote-5) R. Plotzki contends that the king may prosecute any violation of the Noahide laws.[[6]](#footnote-6)

From anchoring the king’s ability to prosecute in an extant system of justice, two points emerge. First, as R. Meir Simcha stresses, the king is not acting arbitrarily, but is engaging in a form of justice. Second, R. Meir Simcha and R. Plotzki both see Noahide law as a legitimate, parallel system of justice — *“ha-torah ha-nimusit*,” according to R. Meir Simcha; or “*hanhaga ha-tiviyyit*,” according to R. Plotzki — which is independent of Halakha yet validated by it, for Jews and non-Jews alike.[[7]](#footnote-7) This lends further credence to the possibility of values outside of Halakha.

Still, R. Meir Simcha’s original question is, in some sense, more important than the answer. His very need to find a precedent and legal parallel underscores his presumption that the king must be practicing some form of justice and not merely executing alleged criminals, with even the best of intentions, by whim.[[8]](#footnote-8) Furthermore, even if the Noahide system underlies the king’s justice, it is too rudimentary to obviate the broad need for personal judgment.[[9]](#footnote-9) As for the Rambam’s other case of a murder “without clear proof” — possibly even more problematic than reliance on a single witness![[10]](#footnote-10) — I similarly assume that the king must cautiously weigh the available evidence and employ his best reasoning. Inevitably, the king must make careful use of his moral intuition, and he does so with the encouragement of Halakha.

**Punishment “Not According to the Torah”**

What is true for the king can also be true for the more mainstream rabbinic legal system. In an oft-quoted *baraita*, R. Eliezer ben Yaakov gives the rabbinic court wide license to step outside of the formal rules of Torah jurisprudence when “the hour require[s] it”:

I heard that the court may beat and punish not according to the Torah, not in defiance of Torah law, but rather to create a fence around the Torah. It happened that an individual rode a horse on Shabbat during the Hellenist period, and they brought him to the court and stoned him, not because he was deserving of it [by law] but because the hour required it. (*Sanhedrin* 46a)

The *baraita*, which also recounts a similar story about public lewdness, is quoted by the Rambam (*Hilkhot Sanhedrin* 24:4) and the *Shulchan Arukh* (*CM* 2) and has been repeatedly invoked at different times in history.

The court’s latitude is both wider and narrower than the king’s. On the one hand, the rabbinic court is charged with protecting all of Torah law and thus also has jurisdiction over ritual matters such as Shabbat observance, while the king’s mandate is only to protect the social order. On the other hand, punishment “not according to the Torah” is a clear aberration from the court’s usual functioning, while for the king it is his modus operandi, even if he employs it selectively.[[11]](#footnote-11)

What they share is the moral need to carefully navigate territory that is, by definition, uncharted and for which Halakha is of limited help. While the formalist might be relieved by an absence of rules, my own feeling is that this raises the stakes, rather than lowering them. It is hard for me to imagine that a system so committed to truth and fairness, and so meticulous about their pursuit, might suddenly be blasé when its formal rules are suspended. If judges and kings are sometimes given a freer hand, it comes with greater responsibility and calls for even greater discretion, for which strong moral intuition is indispensable.

**Conclusion**

In the following shiur, we will contrast the Rambam’s position regarding a king’s judicial role with that which appears in *Derashot Ha-Ran*.

**Questions or Comments?**

Please email me directly with your feedback at [judahlgoldberg@gmail.com](mailto:judahlgoldberg@gmail.com)!

1. See Meiri, in contrast to Rabbeinu Yona and *Chiddushei Ha-Ran*. [↑](#footnote-ref-1)
2. Also see the people’s earlier request of Shmuel the Prophet: “‘Behold, you have grown old, and your sons have not followed in your path. Now, appoint for us a king **to judge us** like all nations.’ The matter was grave in Shmuel’s eyes, when they said, ‘Give us a king **to judge us’”** (8:5-6). [↑](#footnote-ref-2)
3. Also see Responsa *Chatam Sofer*, *OC* 208, regarding justice before and after Sinai. [↑](#footnote-ref-3)
4. Also see *Keli Chemda*, *Shemot* 4 and *Shofetim* 6. [↑](#footnote-ref-4)
5. Also see *Avnei Nezer*, *YD* 312:49. [↑](#footnote-ref-5)
6. Also see R. Yitzchak Isaac Herzog, *Techuka Le-Yisrael al pi Ha-Torah*, Vol. 2, 78-79. Also see *Hilkhot Sanhedrin* 18:6 and *Sefer Ha-likkutim* in the Frenkel edition, as well as *Keli Chemda*, *Vayelekh* 1 and *Chemdat Yisrael*, Appendix to Vol. 1, p. 28. Parenthetically, R. Plotzki mentions in the latter source that he presented his theory in a lecture at Yeshivat Rabbeinu Yitzchak Elchanan (RIETS) in New York, to which he traveled in the 1920s. [↑](#footnote-ref-6)
7. Also see *mori ve-rabbi* HaRav Aharon Lichtenstein’s discussion in *By His Light,* available [here](https://etzion.org.il/en/cultivate-and-guard-universal-duties-mankind). [↑](#footnote-ref-7)
8. Here, we might distinguish between the king’s prosecution of criminals and a separate right to execute one who disobeys or defies him (*moreid be-malkhut*; see *Sanhedrin* 48b-49a). As the king is not representing justice in the latter case but is simply protecting his authority, his entire orientation might be different. However, whether defiance of the monarchy is indeed prosecuted by the king or by a rabbinic court is itself a matter of dispute. See Rambam, *Hilkhot Melakhim* 3:8; Tosafot and Meiri, *Shabbat* 56a; and Judge German’s extensive discussion in *Melekh Yisrael*, 275-296. [↑](#footnote-ref-8)
9. Regarding R. Meir Simcha’s understanding of Noahide justice, also see *shiur* #36, “For Further Thought” #1. [↑](#footnote-ref-9)
10. Also see *Hilkhot Sanhedrin* 18:6, where the Rambam authorizes self-incrimination. [↑](#footnote-ref-10)
11. See *Techuka Le-Yisrael*, Vol. 1, 172-173; and R. Reuven Margolies, “*Batei Ha-mishpat Be-Eretz Yisrael*,” in *Tal Techiyya* (Beersheba: 2008), 9-12. R. Yehuda Gershuni further distinguishes between the Rambam’s formulations in *Hilkhot Rotze’ach* *U-shemirat Nefesh* and *Hilkhot Melakhim* regarding a king himself. Perhaps the king has full jurisdiction over imperfect cases of murder, but he should prosecute murderers with substandard evidence only when the circumstances require it (*Mishpat Ha-melukha* 3:10). [↑](#footnote-ref-11)