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 #38**

**Pursuit of the Ethical Life (9)**

**Moral Intuition (4)**

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

In the [previous *shiur*](https://etzion.org.il/en/shiur-37-pursuit-ethical-life-8-moral-intuition-3-role-monarch-part-i), we examined the Torah’s authorization to punish outside of the framework of formal legal proceedings. According to the Rambam, the king has broad latitude to do so regarding murder, and possibly other offenses as well; our Sages recognize a similar right for the judges of a rabbinic court, though only in exceptional circumstances. As there are few rules to guide judgment that is by definition outside of an established framework, these cases constitute further examples of the halakhically endorsed use of moral intuition.

In contrast to the view of the Rambam, a celebrated passage in *Derashot Ha-Ran* (#11) expands the king’s legislative and judicial powers much further.[[1]](#footnote-2) According to the Rambam, the king’s judicial powers stem from his responsibility to maintain the social order, but they are no more than a plug for when a criminal case falls through the cracks of the rabbinic court system. According to the Ran, however, this same mandate empowers the king to legislate and oversee a fully independent legal system that complements Torah law. The king is not a stopgap for justice, but a partner with the judges in regulating a civil society. This *shiur* will analyze his position and its implications for moral intuition within the halakhic system.

**Royal System of Justice?**

The Ran’s underlying assumption is that Halakha was never meant to be a comprehensive, self-sufficient equivalent of or substitution for civil law. Halakha reflects a Heavenly, pure truth that infuses terrestrial life with echoes of the Divine, but it may not, in all its pristineness, address every regulatory need of a functioning society. To illustrate his point, the Ran draws upon the same loopholes in Jewish criminal law that the Rambam addresses, such as a lack of prior warning (*hatra’a*) for a perpetrator. It very well may be that absolute, transcendent truth cannot countenance capital punishment for anything less than explicit defiance of two witnesses who prewarn a potential offender of the consequence he or she will incur (see *Sanhedrin* 40b). At the same time, it is inconceivable that Jewish society has no other way to rein in its criminals. Rather, a supplementary civil code — parallel to those of other nations — was always going to be necessary.

The Ran explains that these two legal systems — the halakhic and the civil — are entrusted to two different governing bodies:

God, may He be blessed, designated each one of these areas for a specific group. He commanded that judges should be appointed to adjudicate true, righteous justice, and that is what He said, “And they shall judge the nation with righteous judgment (*mishpat-tzedek)*” (*Devarim* 16:18). That is, He came to explain over what domain are the judges appointed, and for what are they empowered; and He said that the purpose of their appointment is to judge the nation with judgment that is genuinely and fundamentally righteous [= Halakha]; but their abilities do not extend beyond this. But because societal functioning will not suffice with this alone, God supplemented its maintenance through the king’s justice.

Thus, the king is a universal figure, as all societies require regulation, while the judges are a distinctly Jewish construct who oversee the laws of our religious tradition: “It emerges that the appointment of a king is the same for Jews and for other nations, who all require societal functioning, but the appointment of judges is unique.”

In empowering the king, the Ran, on the one hand, contracts the reach of Halakha and its adjudicators; but, on the other, he protects its authentic character, as he understands it. To insist that Halakha answers all societal needs is to reduce parts of it to mere practicality. Rather, out of his deep respect for Halakha’s transcendent nature, the Ran prefers to delegate practical affairs to another authority — namely, the monarch. He adds:

It is possible that that which is better for the maintenance of societal functioning will be found in some of the laws of other nations more than in Torah law. But we lack nothing as a result, for whatever is lacking regarding this maintenance, the king would make up for. But we have an advantage over them, that because they are fundamentally righteous — I mean, the laws of the Torah — as Scripture says, “And they shall judge the nation with *mishpat-tzedek*,” it will follow that the Divine overflow will attach to and settle upon us.

Thus, the Ran unflinchingly liberates Torah law from having to compete with other legal codes. Halakha’s strength lies squarely in its spiritual qualities, and it self-consciously calls for a civilian political leader to make up for its omissions.

**Implications of *Derashot Ha-Ran***

The Ran’s theory of royal justice, in contrast to the Rambam’s more conservative notion, is original, bold, and far-reaching, and later authorities do not universally embrace it. For example, R. Yitzhak Abarbanel (*Devarim* 17:14 and Introduction to *Shofetim*) and R. Yeshaya Horowitz (*Shela*, *Shofetim*, 3) both restrict the king’s intervention to exceptional cases, as the Rambam does.[[2]](#footnote-3)

In modern times, the question of the authority of political leadership resurfaced in anticipation of the founding of a Jewish state. In a bold 1922 essay, R. Reuven Margolies argues in favor of broad powers for a king and his appointees from a combination of history and logic, though with only passing reference to *Derashot Ha-Ran*.[[3]](#footnote-4) R. Chaim Ozer Grodzinski, in a 1938 letter to Chief Rabbi Yitzhak Isaac Ha-Levi Herzog, invokes *Derashot Ha-Ran* as a basis for non-halakhic policies in a new state, though he couples it to the principle of “punishment not according to Torah” (*Techuka Le-Yisrael al pi Ha-Torah*, Vol. 2, 75n); R. Shlomo Goren, in a 1948 newspaper article, does the same.[[4]](#footnote-5)

R. Herzog, on the other hand, raises several concerns about the Ran’s model and strongly opposes relying upon it (*Techuka Le-Yisrael*, Vol. 1, 166-169 and Vol. 2, 75-83). He concludes, “The bottom line is that it is very difficult to erect a stable structure on these words of the Ran” (Vol. 1, 167).[[5]](#footnote-6)

Whether or not we implement the Ran’s theory in practice, his voice is certainly a part of the conversation, and thus I think we can learn several points from him for our purposes. First, the Ran teaches us that we need not be embarrassed to admit that Halakha does not provide a concrete solution for every scenario. By the most conservative assessments, its reach is wide and its impact deep, and it permeates and animates so many different pockets of Jewish life. Still, that doesn’t mean that Halakha will necessarily regulate every dimension of Jewish society for us, or that any domain that it overlooks will not be morally laden. According to the Ran, if we understand the role of Halakha properly, we will not be surprised to discover significant expanses that require original, creative, and thoughtful legislation.

The exact balance imagined by the Ran between Halakha and civil/ royal law is not clear. After explaining the finite scope of Halakha, the Ran reiterates that it still provides the majority of necessary regulation for Jewish society:

It follows from this that the judges were appointed to judge the nation with *mishpat-tzedek*, and two benefits ensue: The first is totally complete, and that is that the Divine overflow will settle upon them and attach to them. The second is to maintain their functioning; and if there is some deficiency in a particular context, the king will make up for it. It emerges that the bulk of justice is given to the Sanhedrin and a lesser part to the king.

According to this formulation, the king is not really an equal partner to the judges but works at the edges and supplements legislation as necessary. Seeking to upend this balance, the Ran argues, is the Jews’ error when they ask Shmuel the Prophet for “a king to judge us**”** (*I Shmuel* 8:5-6).

Even this attenuated presentation may be too radical for others. R. Herzog, for instance, would rather assume that Halakha, in an ideal context, is indeed totally comprehensive for Jewish life, and that the king (or the rabbinic court) only steps in when the moral fiber of society has eroded (*Techuka Le-Yisrael,* Vol. 1, 169). Still, the anticipation that the classic halakhic system, in different circumstances, may not always address all moral needs and therefore creates a space for other modalities remains in place. Thus, although I suspect that *mori ve-rabbi* HaRav Aharon Lichtenstein’s own admiration for Halakha might draw him closer to R. Herzog than to the Ran,[[6]](#footnote-7) he can still write: “If we mean that everything can be looked up, every moral dilemma resolved by reference to code or canon, the notion is both palpably naïve and patently false” (“Does Judaism Recognize an Ethic Independent of Halakhah?” *Leaves of Faith*, Vol. 2, 38). Elsewhere, he is frank that “the Halakhah has left many issues — possibly, even entire tracts — largely open” (“Communal Governance,” 65).

Second, to the extent that the Ran proposes an entire realm of extra-halakhic legislation anticipated by the Torah, he is simultaneously affirming God’s confidence in mere mortals to fill it with content. The allure of halakhic formalism lies not only in its absolute allegiance to Halakha, but also in its humble skepticism that human intuition has anything to add. Nevertheless, the Ran (and even the Rambam, to a lesser extent) charges the king with just that: to be keenly attentive to needs of society that are unmet by the halakhic system and to proactively respond.

For the Ran, too, as R. Bornsztain notes, the king’s legislation primarily serves the goal of achieving social harmony, rather than pristine justice (*Responsa* *Avnei Nezer*, *YD*, 312:50). As we stressed earlier, however, labeling an agenda as pragmatic neither renders it ethically neutral nor exempts its architect from sensitive moral reflection. If the Ran grants the king wider legislative latitude, then the need for a reliable moral compass grows proportionately.

Third, as much as the king functions independently of Torah law, the Ran stresses that he is still subservient to its overall program:

Because the king’s power is great, and he is not beholden to the laws of the Torah as the judge is, and if he is not complete in the fear of his God, he will cross boundaries beyond what is necessary for societal functioning; [therefore] the Torah commanded that a Torah scroll should accompany him always (*Devarim* 17:19).

Precisely because of the king’s autonomy does he need to attach himself to a Torah scroll, literally and figuratively. According to the Ran, Torah defines both his primary motivation and his ultimate aspiration, and it checks whatever pride might result along the way from his independence (see *Devarim* 17:20): “In whatever he adds or takes away, he should intend that the laws of the Torah and its commandments be better observed.” With the judges, on the other hand, there is less concern for either overreach or arrogance, as their work is directly bounded by the laws of the Torah themselves.

Adding to the Ran, we can perhaps suggest that the king’s Torah scroll provides not only inspiration, but also direction. The scroll is not a symbol — in contrast, for instance, to *tefillin* (see *Shemot* 13:9, 16 and *Devarim* 6:8, 11:18); rather, the king should “read from it all his days” (*Devarim* 17:19; see Rambam, *Hilkhot Melakhim* 3:5). His intuition should be paradoxically informed by Torah and its spirit, even as he operates, by definition, outside of its boundaries.[[7]](#footnote-8)

**“A Kingdom of Priests”**

Furthermore, the freer the king’s rein and the greater the need for sophisticated moral sensibility, the more the king ought to turn to Torah to help him develop and nurture his own. Torah is his point of departure, his final destination, and his guide throughout, even as he consciously exercises his own judgment; and the implications for us are clear: If, from the “Laws of Kings,” we glean a rabbinic endorsement of extra-halakhic moral intuition, then we must make equal note of the king’s simultaneous attachment to and rootedness in his beloved Torah scroll.

The deeper the king’s involvement in the law, the richer and more genuinely “Jewish” will be his legislation and policymaking, and the same is true for our own ethical responses at both the macro and micro levels. Applying the lessons of monarchy to the everyday lives of commoners is not a stretch. The Midrash beautifully notes that each Jew is a member of royalty and thus shares something of the king’s mission for justice:

“The king through justice stabilizes the land” (*Mishlei* 29:4) — this is the Jews, as it says, “And you shall be for Me a kingdom of priests” (*Shemot* 19:6). (*Shemot Rabba* 30:13)

If so, then even if we do not bear the king’s technical requirement to wear a Torah scroll on his arm, we are similarly charged by the verse which dictates this practice, especially as we navigate the less legislated parts of our lives:

He fashions [the scroll] into an amulet and hangs it on his arm, as it says, “I have placed God before me, always” (*Tehillim* 16:8). (*Sanhedrin* 22a)

Out of contemplation of the law sprouts spontaneous intuition; from its minutiae can we discern guiding values for ourselves. Standing before God and his Torah with humility “fit for a king,” we want to be bold and assertive with our best moral intuition, but never, Heaven forbid, in ways that negate or compete with the law. To the contrary, we seek to be its proud champions, ambitiously infusing its spirit into every realm we touch.

**Conclusion**

In the following shiur, we will return to our original question and explore if there is a specific connection between the king’s mandate to employ moral intuition and the *berit Avot* value of *tzedaka u-mishpat*.

**Questions or Comments?**

Please email me directly with your feedback at judahlgoldberg@gmail.com!

1. On the authorship of *Derashot Ha-Ran*, see Prof. Leon A. Feldman’s introduction to the Mossad HaRav Kook edition (Jerusalem: 2003). [↑](#footnote-ref-2)
2. The *Shela*, however, references *Derashot Ha-Ran* in this regard. On the king’s authority, also see *Responsa* *Avnei Nezer*, *YD*, 312:47-52 and *Tumim*, *CM*, 7:1. [↑](#footnote-ref-3)
3. “*Batei Ha-mishpat Be-Eretz Yisrael*,” in *Tal Techiyya* (*Be’er Sheva*: 2008), 4-18. R. Margolies interprets the Rambam along similar lines (9). [↑](#footnote-ref-4)
4. “*Chuka Toranit Keitzad* (2)?” *Ha-Tzofe*, 3 Adar 5708 (13 February 1948), 4; reprinted in *Techuka Le-Yisrael*, Vol. 1, 151-152. Also see R. Goren’s *Torat Ha-philosophiya* (Jerusalem: 1998), 61 and *Torat Ha-mikra* (Jerusalem: 1996), 293-295. [↑](#footnote-ref-5)
5. For further discussion of this debate, see Prof. Alexander Kaye, “The Legal Philosophies of Religious Zionism 1937-1967” (doctoral dissertation, Columbia University, 2013), available [here](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjls4uj9_bfAhVL_aQKHSEbBAoQFjABegQICRAC&url=https%3A%2F%2Facademiccommons.columbia.edu%2Fdoi%2F10.7916%2FD893119P%2Fdownload&usg=AOvVaw0RxWDvMmetJnZ4dQDUYVi2). [↑](#footnote-ref-6)
6. On this issue, see his “Communal Governance, Lay and Rabbinic: An Overview,” *Varieties of Jewish Experience* (Jersey City: 2011), 69-70. [↑](#footnote-ref-7)
7. On the nature of the king’s relationship to Torah, also see R. Ido Reichnitz, *Medina Ke-halakha,* 44-47. [↑](#footnote-ref-8)