



Responsa in a Moment

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The Proposed “Judicial Revolution” in Israel: What Can we Learn from our Sources?

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Question: Since the new Israeli government took office and especially since Justice Minister MK Yariv Levin and MK Simcha Rothman Chair of the Knesset Constitution, Law and Justice Committee announced their proposed new law on January 4th, there have been huge demonstrations in Israel every Saturday night and during the week of up to 200,000 people. Influential groups of 200 judges and law professors, 270 economists, seven Israeli Nobel laureates, military experts, foreign experts and government leaders have denounced this proposed judicial revolution and over 300,000 Israeli citizens have signed a petition opposing it. Major Israeli hi-tech companies such as Wiz, Verbit and Papaya have announced that they are pulling their money out of Israel and moving their operations abroad. President Isaac Herzog – backed recently by 70 prominent rabbis -- has called upon the government to halt or slow down its judicial blitz and meet with the opposition, thus far to no avail.

The new government claims that it has a clear mandate from the people for these far-reaching changes since the coalition consists of 64 MKs. This claim is doubtful because the difference in the popular vote between the pro-Netanyahu and anti-Netanyahu camps was only 30,000 votes and the judicial revolution was not emphasized in the election campaign in fall 2022. Furthermore, according to recent KAN and N12 surveys, only 24-28% of the general electorate are in favor of this revolution. Finally, according N12 and KAN surveys, respectively, only 45% of those who voted for any of the coalition parties and only 36% of Likud voters are in favor of continuing with this judicial overhaul unabated.

What can we learn from Jewish history and tradition about this proposed judicial revolution?

Responsum: The following is not a responsum in the technical sense of the word. A responsum looks for Biblical, rabbinic and halakhic sources and



precedents which can guide us regarding a specific contemporary problem. But Israeli parliamentary democracy is very different from the monarchies found in the Tanakh or Second Temple literature or from Jewish self-government from the year 70 CE until modern times. Therefore, I shall summarize the main trend of these new laws and then examine them in the light of our history and tradition – from the Biblical period until the end of the medieval period.

In the interest of full disclosure, I have never voted for any of the right-wing parties currently in the coalition, nor have I have ever voted for a left-wing party such as Labor or Meretz. I have always voted for a middle-of-the-road party, in keeping with my belief in the Middle Way in Judaism. (1)

Finally, I do not usually write about Israeli politics, but given the gravity of the situation and given the fact that I was asked, I have decided that this is “a time for speaking” (Kohelet 3:7).

I) A Brief Summary of the Proposed “Judicial Revolution”

The following is based on press reports and internet articles; I therefore assume that not all the details are accurate.

1. According to Levin’s proposed law, the Supreme Court will only be able to cancel a law if 80% of all 15 members vote in favor, but the Knesset can override that cancellation and reenact that law by a simple majority of 61 members of Knesset. In addition, a subsequent Knesset can override the Supreme Court and reenact a law even if the Supreme Court rejected that law **unanimously**. In other words, the Supreme Court will have almost no ability to override a law passed by the Knesset.
2. The Judicial Appointments Committee consisted until now of 9 members: 3 judges, 4 politicians, and 2 representatives of the Bar Association, and an appointee must be backed by seven out of nine.
According to the new law, it will consist of 11 members and an appointee must be backed by a simple majority of 6: 3 Ministers, 3 Chairs of Knesset committees (one from the opposition), 2 representatives of the public chosen by the Minister of Justice, and 3 Supreme Court Justices. In other words, since 7 out of 11 committee members will be appointed by the coalition, all of the Justices will be appointed by the coalition.



3. Until now, the Attorney General was appointed by a public committee consisting of five members. Henceforth, the Attorney General and the Legal Advisors of each Ministry will be appointed by the Government and the Ministers. Furthermore, their legal advice will be non-binding and the government can hire independent legal counsel when appearing in court. In other words, henceforth, Ministers will appoint the people who are supposed to ensure that they follow the law.

4. Until now, the Attorney General of Israel could declare that a Prime Minister [hereafter: PM] is “incapacitated”, i.e., no longer fit for office. According to a new law proposed by Ofir Katz of the Likkud, the only ones who can declare a PM as incapacitated are the PM himself or at least 75% of a government’s ministers. If the PM does not agree with the government’s decision, the Knesset can remove the PM by a vote of 90 vs. 30. In other words, it will be impossible to declare a PM as incapacitated.

The coalition claims that these new laws are similar to those found in Western democracies. Most legal experts in Israel and abroad have totally rejected this claim. Those countries all have entire systems of checks and balances such as: a Constitution or a Bill of Rights/Charter of Rights and Freedoms; two houses of Parliament; federal legislatures vs. state or provincial legislatures; or a President with veto power. Israel does not possess any of these checks and balances.

In Israel, in theory there are three entities which hold power: the PM and the government; the Knesset; and the Supreme Court. However, since PM Netanyahu has been in power for over 15 years and since he has removed all opponents from his party, there are no longer three entities with power but only two: the PM/government/Knesset vs. the Supreme Court. If the proposed legislation passes, the Supreme Court will lose all of its power to oversee the PM/government/Knesset. A simple majority of 61 MKs will be able to do whatever it wants without any checks and balances: the Supreme Court will not be able to disqualify a law; the Supreme Court justices will be appointed by politicians; the legal advisors will be appointed by politicians; and a Prime Minister will not be able to be removed from office even if his/her behavior is illegal or unethical.



This is why most legal experts are warning that Israeli democracy will no longer be a liberal democracy but rather an illiberal democracy such as Hungary, Poland or Turkey.

II) What can we learn about checks and balances from Jewish history and tradition?

1. The Biblical Period (2)

From the days of King Saul (d. ca. 1010 BCE) until the Destruction of the First Temple in 586 BCE the Israelites or, beginning ca. 921 BCE, the split kingdoms of Judah and Israel were ruled by Kings or Queens who served more or less as absolute monarchs. Even so, the Prophets served as checks and balances on the King and Queen, berating them and punishing them for immoral behavior or idol worship. We see this very clearly in the following stories:

The Prophet Samuel ended the reign of King Saul (I Samuel 15) because Saul and his troops spared Agag the King of Amalek and the best of the sheep and the oxen.

The Prophet Nathan punished King David (II Samuel 11-12) because David committed adultery with Bat Sheva and arranged for her husband Uriah the Hittite to die in battle.

The Prophet Ahijah Hashiloni declared that King Solomon would lose control of ten of the twelve tribes (I Kings 11:29-39) because Solomon married many foreign women and worshipped their gods.

The Prophet Elijah punished King Ahab and Queen Jezebel (I Kings 21; and cf. II Kings 9) because they arranged the execution of Navot the Jezreelite in order to possess his vineyard.

In each case, the king worshipped idols or did something which was against God's will or immoral and the Prophet told the king that he would be punished and he was punished. Thus, even in an absolute monarchy, there were checks and balances. When the king disobeyed God or did something immoral, he was disciplined by the Prophet and punished by God.

2. The Second Temple Period: The Case of King Alexander Yannai



As a result of the Maccabean Revolt in 167 BCE, the Hasmonean dynasty ruled from 140-37 BCE. For our purposes, let us focus on the reign King Alexander Yannai (103-76 BCE). According to rabbinic literature and Josephus, he was in conflict with the Pharisees led by Shimon ben Shetah. Here are two well-known examples:

According to one story, Alexander Yannai and Shimon ben Shetah engaged in a power struggle related to 300 Nazarites. (3)

The second story is more relevant to our current dilemma in Israel. According to a very dramatic story in *Sanhedrin* 19a-b (cf. Josephus, *Wars* 1, 10, 5-7, paragraphs 204-211 and *Antiquities* 14, 9, 3-4, paragraphs 163-177), when Yannai's servant killed someone, Shimon ben Shetah summoned Yannai to trial before the Sanhedrin with tragic results. It's very difficult to separate fact from fiction in these stories, but the bottom line is that according to the Babylonian Talmud, Shimon ben Shetah and the Pharisees served as a check and balance against King Alexander Yannai, even though he was an absolute monarch.

3. The Talmudic and Medieval Periods: Majority Rule vs. “a Distinguished Person”

There is a famous Baraita [teaching of the Tannaim] in *Bava Batra* 8b (and cf. *Tosefta Bava Metzia* 11:23, ed. Lieberman, pp. 25-26) which says that townspeople have the right “*l’hasia al kitzatan*, to inflict penalties for the infringement of their rules”. However, on the very next page (fol. 9a), we find a contradictory source: The butchers in the town of Mahoza made an agreement that if Reuven slaughtered animals on the day designated for Shimon, they could tear up the skin of Reuven's animals. Reuven ignored the agreement and they tore up his skins. They went to Rava who made them pay. Rav Yemar then challenged that ruling by quoting the Baraita. Rava did not reply, but Rav Papa replied that the Baraita applies when there is no *adam hashuv*, “distinguished person” in town, but if there is an *adam hashuv*, they do not have the power to make such decisions. In other words, even though the majority of the townspeople or the majority of the butchers made a decision, they needed the approval of the leading rabbi and he has the right to overrule them. Once again, we see that a great rabbi serves as a check and balance who can overrule the majority. This debate continued throughout the Middle Ages (see the Bibliography).



4. The Rosh Hagolah (Exilarch) vs. the Babylonian Amoraim and the Geonim

The Rosh Hagolah or Exilarch was the civic leader of the Jewish community in Babylonia from the second until the thirteenth century. During the Talmudic period (until ca. 500) they ruled alongside the Amoraim. In the period of the Geonim (ca. 500-1000), they ruled alongside the Geonim in Sura and Pumbedita.

During the Talmudic period, their relationship was particularly complicated if the Exilarch was also a scholar. The classic example is that of Mar Ukba the Exilarch who reigned alongside of Rav and Samuel. Mar Ukba considered Samuel his teacher, but Samuel deferred to Mar Ukba when the latter sat as *Av Bet Din* (see *Moed Kattan* 16b and Beer, pp. 69 ff.).

During the period of the Geonim, there were a quite a few instances of tension between the Exilarch and the Geonim, since the Exilarch was involved in the appointment of the Geonim and the Geonim needed to approve the rulings of the Bet Din of the Exilarch. The most famous “war” which lasted for seven years was that between the Exilarch David ben Zakkai and Rav Saadia Gaon (ca. 930). David ben Zakkai appointed Saadia as Gaon of Sura in the year 928. Two years later, Rav Saadia refused to confirm a judicial decision issued by the Exilarch. David then appointed a lesser scholar as Gaon of Sura and Rav Saadia appointed David’s brother as Exilarch (see Assaf and Brody for the details). Indeed, Prof. Robert Brody states in his seminal work *The Geonim of Babylonia* (p. 77): “The interlocking relationships between the Geonate and the Exilarchate are perhaps nowhere more evident than in the role played by each institution in selecting or deposing the head of the other – **what might be described as a primitive version of the system of checks and balances** [emphasis added – DG]”.

III) Summary and Conclusions

Thus, we see that throughout Jewish history there were always checks and balances between civil and religious/legal authorities:

King vs. Prophet;

King vs. Sage and Sanhedrin;

The Townspeople vs. a Distinguished Person or Rabbi;

Exilarch vs. the Geonim.



All societies need checks and balances. If one authority or legal entity has all the power, even if they are democratically elected, it leads to what John Stuart Mill called “the tyranny of the majority”. I hope and pray that the coalition and opposition will sit down with each other, debate the issues with mutual respect and reach compromises under the auspices of President Herzog or on their own. As I have written elsewhere, the Jewish people and the State of Israel very much need unity without uniformity; disunity leads to tragedy, destruction and exile; and unity leads to redemption. (4)

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Notes

My thanks to Professors Ed Greenstein and David Frankel for referring me to Lorberbaum and Marcus cited below.

1. See my article “The Middle Way in Israel Today” in *Responsa in a Moment*, Vol. 3, Jerusalem, 2014, pp. 16-26; also available at www.schechter.edu
2. Medieval Jewish philosophers such as Maimonides, Rabbeinu Nissim of Gerona and Abarbanel discussed the relative powers of judges and kings in their writings, but their discussions were theoretical in nature. I am interested in what actually happened in the Biblical period.
3. *Yerushalmi Berakhot* 7:2, fol. 11b = *ibid.*, *Nazir* 5:4, fol. 54b; *Bereishit Rabbah* 91:3, ed. Theodor-Albeck, pp. 1114-1118; *Kohelet Rabbah* 7:12, ed. Kiperwasser, pp. 72-75; *Bavli Berakhot* 48a.
4. See my article “Is Judaism Really in Favor of Pluralism and Tolerance?”, in *Responsa in a Moment*, Vol. 4, Jerusalem, 2017, pp. 251-265; also available at www.schechter.edu



Bibliography

The Biblical Period

Yair Lorberbaum, *Melekh Evyon: Hamelukhah Basifrut Hayehudit Haklassit*, Ramat Gan, 2008

David Marcus, “Civil Liberties under Israelite and Mesopotamian Kings”, *JANES* 10 (1978), pp. 53-60

Shalom Spiegel, *Amos vs. Amaziah*, New York, ca. 1957

S. Szikszai, in: *The Interpreter's Dictionary of the Bible*, Vol. 3, 1962, p. 13, s.v. King

Benjamin Uffenheimer, in: *Entziklopedia Mikra'it*, Vol. 5, cols. 698-701, s.v. *Nevuah*

The Second Temple Period – King Alexander Yannai

Yehoshua Efron, *Hikrei Hatekufah Hahashmona'it*, Tel Aviv, 1980, pp. 131-194 and the extensive literature in the notes

Yair Lorberbaum, *op. cit.*, pp. 107-113 and the literature in note 9

The Talmudic and Medieval Periods – the Townspeople vs. a Distinguished Person

Ephraim Kanarfogel, “Unanimity, Majority and Communal Government in Ashkenaz during the High Middle Ages”, *PAAJR* 58 (1992), pp. 79-106

Entziklopedia Talmudit, Vol. 19, cols. 97-99, s.v. *Tuvei Ha'ir*

Yisrael Schepansky, *Hatakkannot B'yisrael*, Vol. 4, Jerusalem, 1993, pp. 43-50

The Rosh Hagolah (Exilarch) vs. the Babylonian Amoraim and the Geonim

Simcha Assaf, *Tekufat Hageonim Vesifrutah*, Jerusalem, 1955, pp. 33-35

Moshe Beer, *Rashut Hagolah B'vavel Biyemei Hamishnah Vehatalmud*, Tel Aviv, 1976, pp. 57-93

Robert Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture*, New Haven and London, 1998, pp. 75-79, 238

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