

Judicial Revolution in Israel

Introduction - Context

Legal systems background notes

Basic-Law: The Judiciary (1984)

Passed on February 28, 1984, by the Tenth Knesset.

The law establishes the authority of the courts in criminal and disciplinary proceedings, as well as the independence of the judiciary and the openness of judicial proceedings. It also determines the procedures for the appointment of judges. The law includes an instruction regarding its permanence and protection from changes by means of emergency regulations.

13 Basic Laws of Israel (חוקי היסוד, quasi-constitutional laws some of which can only be changed by a supermajority vote in the Knesset.)

Many of these are based on the individual liberties in the Israeli Declaration of Independence.

The Basic Laws deal with the formation and role of the principal institutions of the state, and with the relations between the state's authorities. They also protect the country's civil rights.

The Basic Law: Human Dignity and Liberty enjoys super-legal status, giving the Supreme Court the authority to disqualify any law contradicting it, as well as protection from Emergency Regulations.

The Basic Laws were intended to be draft chapters of a future Israeli constitution & they act as a *de facto* constitution. Israel is one of six countries (along with New Zealand, San Marino, Saudi Arabia, Canada, and the United Kingdom) that operate entirely or in part according to an uncodified constitution consisting of both material constitutional law (based upon cases and precedents), common law, and the provisions of these formal statutes.

The Supreme Court consists of 15 judges appointed by the President of Israel, upon nomination by the Judicial Selection Committee. Once appointed, Judges serve until retirement at the age of 70 unless they resign or are removed from office.

In 1953, the Knesset passed the Judges Law. It created a nine-member Judicial Selection Committee, which still exists today".

Committee structure today

The committee has nine members, as follows

- Justice Minister – Chairman
- Cabinet Minister, chosen by the Cabinet.
- Two Knesset Members, chosen by the Knesset (since 1992 they usually appoint one member from the coalition and one from the opposition).
- Two members of the Israel Bar Association (usually selected by the two largest factions in the bureau).
- The Chief Justice, and two other judges of the Supreme Court (replaced every three years by the panel of judges, the selection is usually by seniority).

During the existence of the Judicial Committee the influence of the Supreme Court committee members was almost absolute: although they constituted just one-third of the nine-member committee, they formed the most cohesive and relatively stable bloc.

Furthermore, until a reform in 2008, a simple majority was sufficient to elect all judges, including judges to the Supreme Court. Until the reform, the judges dominated the Committee through an alliance forged with the like-minded representatives of the Bar Association. These two factions could determine which justices would be selected.

Since the reform, a majority of seven justices is required to appoint judges to the Supreme Court and the bloc of justices is balanced by the three members of the governing coalition on the committee. Either side is large enough to veto any nominee.

Despite these changes, some critics maintain that the selection process does not properly represent public opinion, and that since the Supreme Court inevitably discusses politically disputed matters, the process impairs the principles of democracy. This is the explanation of coalition leaders including Justice Minister Yariv Levin and Knesset Law Committee Chairman Simcha Rothman for the judicial "overhaul" they are trying to implement, which includes the composition of the Judicial Selection Committee.

Specifically, Levin's "overhaul" includes replacing the two members of the Israel Bar with representatives of the public to be appointed by the Minister of Justice.

Opponents of the government on this issue warn that these changes would lead to the politicization of the committee based on the political views and affiliations of its members rather than professional skills. At the time of Levin's attempted judicial overhaul, the court was thought to be evenly balanced with conservative and liberal judges split almost down the middle. Thus, in a 2023 vote on a key coalition bill to significantly reduce the power of the Supreme Court, the justices voted to reject the legislation by a narrow majority of 8-7.

Opponents of the government's plans to change the judicial selection committee point to the fact that an independent judiciary with the ability to restrain the power of the government is particularly necessary in Israel.

According to Yaniv Roznai, Associate Professor and Vice-Dean at the Harry Radzyner Law School, and Prof. Amichai Cohen at the Faculty of Law at [Ono Academic College](#), there is a lack of mechanisms for the separation of powers and the establishment of checks and balances in the Israeli governance system. They maintain that in other countries there are six distinct institutional mechanisms that can help distribute political power and prevent it from being concentrated in one institution. These include two legislative chambers (bicameralism), a presidential system, federalism, regional electoral systems, supra-national organizations and supra-national courts. These mechanisms facilitate the representation of different voices, improve decision-making processes and help balance the relationship between majority and minority interests.

The authors conducted a study of 66 countries categorized as "free states" by Freedom House, a USA-based organization that monitors and supports democratic progress around the world. They found that among these countries, "Israel stands out as the only country with no structural, internal or external political restriction on the legislature."

Role of High Court of Justice

When ruling as the **High Court of Justice** (Hebrew: **בֵּית מִשְׁפָּט גְבוּהָ לְצֶדֶק**, **Beit Mishpat Gavo'ah LeTzedek**; also known as its acronym **Bagatz**, בג"ץ), the court rules on the legality of decisions of State authorities: government decisions, those of local authorities and other bodies and persons performing public functions under the law, and direct challenges to the constitutionality of laws enacted by the Knesset. The court may review actions by state authorities outside of Israel.

By the principle of binding precedent (*stare decisis*), Supreme Court rulings are binding upon every other court, except itself. Over the years, it has ruled on numerous sensitive issues, some of which relate to the Israeli–Palestinian conflict, the rights of Arab citizens, and discrimination between Jewish groups in Israel.

On 24 July 2023, the Knesset passed a bill to prevent the Supreme Court from 'consider[ing] the reasonableness of a decision of the government, the prime minister, or any other minister', which would diminish the power of the Supreme Court to check future actions of the government. On 1 January 2024 the Supreme Court overturned the bill in an 8-7 decision.

The reasonableness doctrine is not unique to Israel's judiciary. The principle is used in a number of countries, including the United Kingdom, Canada and Australia.

The standard is commonly used by courts there to determine the constitutionality or lawfulness of a given legislation, and allows judges to make sure that decisions made by public officials are “reasonable.”

The standard was used this year when Israel Prime Minister Benjamin Netanyahu dismissed key ally Aryeh Deri from all ministerial posts, in compliance with an Israeli High Court ruling that it was unreasonable to appoint him to positions in government due to his criminal convictions and because he had said in court last year that he would retire from public life.

What else is in the package?: The reasonableness bill is just one part of a broader package of reforms to Israel's judicial system.

Other parts are aiming to give the hard-right coalition government more control of the appointment of judges, and would remove independent legal advisers from government ministries.

Responsa in a Moment
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The Proposed “Judicial Revolution” in Israel: What Can we Learn from our Sources?
By Rabbi David Golinkin

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 surveys by Israeli media outlets KAN and N12, only 24-28% of the general electorate are in favour 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 favour 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 Likud, 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.

Then GOD spoke to Samuel: "I'm sorry I ever made Saul king. He's turned his back on me. He refuses to do what I tell him." [11-12] Samuel was angry when he heard this. He prayed his anger and disappointment all through the night. He got up early in the morning to confront Saul but was told, "Saul's gone. He went to Carmel to set up a victory monument in his own honor, and then was headed for Gilgal." By the time Samuel caught up with him, Saul had just finished an act of worship, having used Amalekite plunder for the burnt offerings sacrificed to GOD. [13] As Samuel came close, Saul called out, "GOD's blessings on you! I accomplished GOD's plan to the letter!" [14] Samuel said, "So what's this I'm hearing-this bleating of sheep, this mooing of cattle?" [15] "Only some Amalekite loot," said Saul. "The soldiers saved back a few of the choice cattle and sheep to offer up in sacrifice to GOD. But everything else we destroyed under the holy ban." [16] "Enough!" interrupted Samuel. "Let me tell you what GOD told me last night." Saul said, "Go ahead. Tell me." [17-19] And Samuel told him. "When you started out in this, you were nothing-and you knew it. Then GOD put you at the head of Israel-made you king over Israel. Then GOD sent you off to do a job for him, ordering you, 'Go and put those sinners, the Amalekites, under a holy ban. Go to war against them until you have totally wiped them out.' So why did you not obey GOD? Why did you grab all this loot? Why, with GOD's eyes on you all the time, did you brazenly carry out this evil?" [20-21] Saul defended himself. "What are you talking about? I did obey GOD. I did the job GOD set for me. I brought in King Agag and destroyed the Amalekites under the terms of the holy ban. So the soldiers saved back a few choice sheep and cattle from the holy ban for sacrifice to GOD at Gilgal-what's wrong with that?" [22-23] Then Samuel said, Do you think all GOD wants are sacrifices- empty rituals just for show? He wants you to listen to him! Plain listening is the thing, not staging a lavish religious production. Not doing what GOD tells you is far worse than fooling around in the occult. Getting self-important around GOD is far worse than making deals with your dead ancestors. Because you said No to GOD's command, he says No to your kingship. [24-25] Saul gave in and confessed, "I've sinned. I've trampled roughshod over GOD's Word and your instructions. I cared more about pleasing the people. I let them tell me what to do. Oh, absolve me of my sin! Take my hand and lead me to the altar so I can worship GOD!" [26] But Samuel refused: "No, I can't come alongside you in this. You rejected GOD's command. Now GOD has rejected you as king over Israel." [27-29] As Samuel turned to leave, Saul grabbed at his priestly robe and a piece tore off. Samuel said, "GOD has just now torn the kingdom from you, and handed it over to your neighbor, a better man than you are. Israel's God-of-Glory doesn't deceive and he doesn't dither. He says what he means and means what he says." [30] Saul tried again, "I have sinned. But don't abandon me! Support me with your presence before the leaders and the people.

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.

Nathan said to him, "There were two men in the same city-one rich, the other poor. The rich man had huge flocks of sheep, herds of cattle. The poor man had nothing but one little female lamb, which he had bought and raised. It grew up with him and his children as a member of

the family. It ate off his plate and drank from his cup and slept on his bed. It was like a daughter to him. [4] "One day a traveler dropped in on the rich man. He was too stingy to take an animal from his own herds or flocks to make a meal for his visitor, so he took the poor man's lamb and prepared a meal to set before his guest." [5-6] David exploded in anger. "As surely as GOD lives," he said to Nathan, "the man who did this ought to be lynched! He must repay for the lamb four times over for his crime and his stinginess!" [7-12] "You're the man!" said Nathan. "And here's what GOD, the God of Israel, has to say to you: I made you king over Israel. I freed you from the fist of Saul. I gave you your master's daughter and other wives to have and to hold. I gave you both Israel and Judah. And if that hadn't been enough, I'd have gladly thrown in much more. So why have you treated the word of GOD with brazen contempt, doing this great evil? You murdered Uriah the Hittite, then took his wife as your wife. Worse, you killed him with an Ammonite sword! And now, because you treated God with such contempt and took Uriah the Hittite's wife as your wife, killing and murder will continually plague your family. This is GOD speaking, remember! I'll make trouble for you out of your own family. I'll take your wives from right out in front of you. I'll give them to some neighbor, and he'll go to bed with them openly. You did your deed in secret; I'm doing mine with the whole country watching!" [13-14] Then David confessed to Nathan, "I've sinned against GOD."

The Prophet Ahiyah 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.

During that time Jeroboam went out of Jerusalem and the prophet Ahijah of Shiloh met him on the way. He had put on a new robe; and when the two were alone in the open country, Ahijah took hold of the new robe he was wearing and tore it into twelve pieces.

"Take ten pieces," he said to Jeroboam. "For thus said the ETERNAL, the God of Israel: I am about to tear the kingdom out of Solomon's hands, and I will give you ten tribes.

But one tribe shall remain his—for the sake of My servant David and for the sake of Jerusalem, the city that I have chosen out of all the tribes of Israel.

For they have forsaken Me; they have worshiped Ashtoreth the goddess of the Phoenicians, Chemosh the god of Moab, and Milcom the god of the Ammonites; they have not walked in My ways, or done what is pleasing to Me, or [kept] My laws and rules, as his father David did.

However, I will not take the entire kingdom away from him, but will keep him as ruler as long as he lives for the sake of My servant David whom I chose, and who kept My commandments and My laws.

But I will take the kingship out of the hands of his son and give it to you—the ten tribes.

To his son I will give one tribe, so that there may be a lamp for My servant David forever before Me in Jerusalem—the city where I have chosen to establish My name.

But you have been chosen by Me; reign wherever you wish, and you shall be king over Israel.

If you heed all that I command you, and walk in My ways, and do what is right in My sight, keeping My laws and commandments as My servant David did, then I will be with you and I will build for you a lasting dynasty as I did for David. I hereby give Israel to you; and I will chastise David's descendants for that [sin], though not forever."

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 of King Alexander Yannai (103-76 BCE). According to rabbinic literature and Josephus, he was in conflict with the Pharisees led by Shimon ben Shetah.

The story is 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.

אֵלָא מַלְכֵי יִשְׂרָאֵל מַאי טַעְמָא לָא? מִשּׁוּם מַעֲשֵׂה שְׁהִיָּה, דְּעַבְדֵּיהּ דְּיַנַּאי מִלְכָּא קָטַל נַפְשָׁא. אָמַר לְהוּ שְׁמַעוּן בְּן שְׁטַח לְחַכְמִים: תְּגוּ עֵינֵיכֶם בּוּ וּגְדוּגְנוּ. שְׁלַחוּ לִיה: עַבְדְּךָ קָטַל נַפְשָׁא. שְׁדַרְיָה לְהוּ. שְׁלַחוּ לִיה: תָּא אַנְתָּ נְמִי לְהַכָּא, "וְהוֹעֵד בְּבִעְלָיו" אָמְרָה תוֹרָה – יָבֵא בַעַל הַשּׁוֹר וְיַעֲמֹד עַל שׁוֹרוֹ

The Gemara asks: **But what is the reason that others do not judge the kings of Israel? It is because of an incident that happened, as the slave of Yannai the king killed a person. Shimon ben Shatah said to the Sages: Put your eyes on him and let us judge him. They sent word to Yannai: Your slave killed a person. Yannai sent the slave to them. They sent word to Yannai: You also come here, as the verse states with regard to an ox that gored a person to death: "He should be testified against with his owner" (Exodus 21:29). The Torah stated: The owner of the ox should come and stand over his ox.**

אָתָּא וַיְתִיב. אָמַר לִיה שְׁמַעוּן בְּן שְׁטַח: יַנַּאי הַמֶּלֶךְ, עֲמוּד עַל רַגְלֵיהּ וְיַעֲדוּ בָּהּ. וְלֹא לְפָנֵינוּ אַתָּה עוֹמֵד, אֵלָא לְפָנֵי מִי שְׁאָמַר וְהָיָה הָעוֹלָם אַתָּה עוֹמֵד, שְׁנַאֲמַר: "וְיַעֲמְדוּ שְׁנֵי הָאֲנָשִׁים אֲשֶׁר לָהֶם הָרִיב וְגו'". אָמַר לוֹ: לֹא כְּשִׁתְּאֵמַר אַתָּה, אֵלָא כְּמָה שְׂאִיאֲמְרוּ חֲבֵרָיךָ

The Gemara continues to narrate the incident: **Yannai came and sat down. Shimon ben Shatah said to him: Yannai the king, stand on your feet and witnesses will testify against you. And it is not before us that you are standing, to give us honour, but it is before the One Who spoke and the world came into being that you are standing, as it is stated: "Then both the people, between whom the controversy is, shall stand before the Lord, before the priests and the judges that shall be in those days" (Deuteronomy 19:17). Yannai the king said to him: I will not stand when you alone say this to me, but according to what your colleagues say, and if the whole court tells me, I will stand.**

נפנה לימינו – כבשו פניהם בקרקע. נפנה לשמאלו – וכבשו פניהם בקרקע. אמר להן שמעון בן שטח: בעלי מחשבות אתם, יבא בעל מחשבות ויפרע מכם! מיד בא גבריאל וכתב בקרקע, ומתו. באותה שעה אמרו: מלך לא דן ולא דנין אותו, לא מעיד ולא מעידין אותו.

Shimon ben Shataḥ **turned to his right**. The judges **forced their faces to the ground** out of fear and said nothing. **He turned to his left, and they forced their faces to the ground** and said nothing. **Shimon ben Shataḥ said to them: You are masters of thoughts, enjoying your private thoughts, and not speaking. May the Master of thoughts, God, come and punish you. Immediately, the angel Gabriel came and struck those judges to the ground, and they died. At that moment, when they saw that the Sanhedrin does not have power to force the king to heed its instructions, the Sages said: A king does not judge others and others do not judge him, and he does not testify and others do not testify concerning him, due to the danger of the matter.**

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 which says that townspeople have the right “*l’hasia al kitzatan*, to inflict penalties for the infringement of their rules”.

ורשאינו בני העיר להתנות על המדות, ועל השערים, ועל שכר פועלים; ולהסיע על קיצתו.

Similarly, **it is permitted for the residents of the city to set the measures** used in that city, **the prices** set for products sold there, **and the wages paid to its workers, and to fine people for violating their** specifications, in order to enforce observance of these *halakhot*. This marks the end of the *baraita*, the details of which the Gemara proceeds to analyze.

However, on the very next page (fol. 9a), we find a contradictory source:

הנהו בי תרי טבחי דעבדי עננינא בהדי הדדי, דכל מאן דעביד ביומא דחבריה – נקרעוה למשפיה. אזל חד מנייהו עבד ביומא דחבריה, קרעו למשפיה. אתו לקמיה דרבא, סיביניהו רבא לשלומי.

The Gemara relates: There were **these two butchers who made an agreement with each other that whichever one of them worked on the day assigned to the other** according to their mutually agreed-upon schedule **would tear up the hide** of the animal that he slaughtered that day. **One of them went and worked on the other’s day, and the other butcher tore up the hide** of the animal that he slaughtered. **They came before Rava** for judgment, and **Rava obligated him to pay** the butcher who slaughtered that animal.

איתיביה רב יימר בר שלמנא לרבא: “ולהסיע על קיצתם!” לא אהדר ליה רבא. אמר רב פפא: שפיר עבד דלא אהדר ליה מידי; הגי מילי היכא דליכא אדם חשוב, אבל היכא דאיכא אדם חשוב – לאו פל כמינייהו דמתגו.

Rav Yeimar bar Shelamya raised an objection to Rava: Isn’t it stated among actions that the residents of a city may take: **And to fine people for violating their** specifications, i.e., those ordinances that the residents passed? **Rava did not respond to him. Rav Pappa said: He did well that he did not respond to him, as this matter applies only where there is no important person** in the city, in which case it is permitted for the residents of the city to draw up ordinances on their own. **But where there is an important person, it is not in the**

residents' **power to make stipulations**, i.e., regulations; rather, they are required to obtain the approval of the city's leading authority to give force to their regulations.

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.

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 *Mo'ed Kattan* 16b).

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 Saadiah refused to confirm a judicial decision issued by the Exilarch. David then appointed a lesser scholar as Gaon of Sura and Rav Saadiah 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; while 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*, 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*, 4, Jerusalem, 2017, pp. 251-265; also available at www.schechter.edu

