

Can the Politically Powerful Truly Be Governed by Law? The Case of an Israelite King - סנהדרין יט.-: מלך לא דן ולא דנין אותו

The function of a judicial system is to hold people accountable to the law. But can the courts accomplish this even when those who need to be held accountable have tremendous political power? The example raised in the Gemara is the king, but truly the question could be asked about the possibility of the court bowing to anyone with power...In this shiur, we will examine whether מלך לא דן ולא דנין אותו represents an ideal separation of powers or whether it is merely a capitulation to the impossibility of holding kings accountable for their actions.

Questions? Comments? Email dinanddaf@gmail.com

1. משנה סנהדרין ב:ב

המלך לא דן ולא דנין אותו, לא מעיד ולא מעידין אותו, לא חולץ ולא חולצין לאשתו. לא מיבם ולא מיבמין לאשתו. רבי יהודה אומר, אם רצה לחלץ או ליבם, זכור לטוב. אמרו לו, אין שומעין לו. ואין נושאין אלמנתו. רבי יהודה אומר, נושא המלך אלמנתו של מלך, שכן מצונו בדין שנשא אלמנתו של שאול, שנאמר (שמואל ב יב) ואתנה לך את בית אדניך ואת נשי אדניך בחיקך:

The mishna continues, enumerating the *halakhot* pertaining to the king in similar matters: The king does not judge others as a member of a court and others do not judge him, he does not testify and others do not testify concerning him, he does not perform *halitza* with his brother's widow and his brother does not perform *halitza* with his wife, and he does not consummate levirate marriage with his brother's widow and his brother does not consummate levirate marriage with his wife, as all these actions are not fitting to the honor of his office. Rabbi Yehuda says: These are not restrictions, but his prerogative: If he desired to perform *halitza* or to consummate levirate marriage, he is remembered for good, as this is to the benefit of his brother's widow. The Sages said to him: They do not listen to him if he desires to do so, as this affects not only his own honor but that of the kingdom. And no one may marry a king's widow, due to his honor. Rabbi Yehuda says: Another king may marry the widow of a king, as we found that King David married the widow of King Saul, as it is stated: "And I have given you the house of your master and the wives of your master in your bosom" (II Samuel 12:8).

2. שמואל א' ח:ה-ו

ויאמרו אליו הנה אתה זקנת ובניך לא הלכו בדרכיך עתה שימה לנו מלך לשפטנו ככל הגוים: and they said to him, "You have grown old, and your sons have not followed your ways. Therefore appoint a king for us, to govern us like all other nations."

וירע הדבר בעיני שמואל כאשר אמרו תנה לנו מלך לשפטנו ויתפלל שמואל אל-ה': {פ} Samuel was displeased that they said "Give us a king to govern us." Samuel prayed to the LORD,

3. דברים יז:ח-ט

כי יפלא ממך דבר למשפט בין-ידם | לידם בין-ידיו וגו' וגע לגע דברי ריבת בשעריך וקמת ועלית אל-המקום אשר יבחר ה' אלהיך בו:

If a case is too baffling for you to decide, be it a controversy over homicide, civil law, or assault—matters of dispute in your courts—you shall promptly repair to the place that your God יהוה will have chosen,

ובאת אל הכהנים הלויים ואל השופט אשר יהיה בימים ההם ודרשת והגידו לך את דבר המשפט:
and appear before the levitical priests, or the magistrate in charge at the time, and present your problem. When they have announced to you the verdict in the case,

4. דברי הימים ב כו: ט"ז-כא

וכחזקתו גבה לבו עד להשחית וימעל בה' אלהיו ויבא אל היכל ה' להקטיר על-מזבח הקטרת:
When he was strong, he grew so arrogant he acted corruptly: he trespassed against his God by entering the Temple of the LORD to offer incense on the incense altar.

ויבא אחרי עזריהו הכהן ועמלו כהנים לה' שמונים בני-חיל:
The priest Azariah, with eighty other brave priests of the LORD, followed him in

ויעמדו על-עזריהו המלך ויאמרו לו לא-לך עזיהו להקטיר ליהוה כי לכהנים בני-אהרן המקדשים להקטיר צא מן-המקדש כי מעלת ולא-לך לכבוד מה' אלהים:
and, confronting King Uzziah, said to him, "It is not for you, Uzziah, to offer incense to the LORD, but for the Aaronite priests, who have been consecrated, to offer incense. Get out of the Sanctuary, for you have trespassed; there will be no glory in it for you from the LORD God."

ויזעף עזיהו ובידו מקטרת להקטיר ובזעפו עם הכהנים והצרעת זרחה במצחו לפני הכהנים בבית ה' מעל למזבח הקטרת:
Uzziah, holding the censer and ready to burn incense, got angry; but as he got angry with the priests, leprosy broke out on his forehead in front of the priests in the House of the LORD beside the incense altar.

ויפן אליו עזריהו כהן הראש וכל הכהנים והנה הוא מצרע במצחו ויבהליוהו משם וגם הוא נדחף לצאת כי נגעו ה':
When the chief priest Azariah and all the other priests looked at him, his forehead was leprosy, so they rushed him out of there; he too made haste to get out, for the LORD had struck him with a plague.

ויהי עזריהו המלך מצרע עד-יום מותו וישב בית (החפשות) [החפשית] מצרע כי נגזר מבית ה' וינתם בנו על-בית המלך שופט את-עם הארץ:
King Uzziah was a leper until the day of his death. He lived in isolated quarters^b as a leper, for he was cut off from the House of the LORD—while Jotham his son was in charge of the king's house and governed the people of the land.

5. Dr. David Flatto, *The Crown and the Courts* 3

In grappling with the vital relationship between law and power, early Jewish writings confront a core tension familiar to modern jurisprudence—especially manifest in the bedrock constitutional

concepts of separation of powers, an independent judiciary, and the rule of law. Here is where a distinctive strand of early Jewish jurisprudence proves most fascinating from a comparative perspective. In many societies, controlling law is a way of wielding substantial power. For this reason, the most powerful have historically sought to preside over the legal enterprise. Especially in antiquity, laws emanated from the sovereign body, and justice was administered by the politically powerful. Absolute kings, emperors, and rulers left little room for a discrete sphere of justice... an important strand in early Jewish jurisprudential writings sharply diverges from ancient legal traditions in this respect... Jewish tradition breaks new ground by envisioning the construction of independent institutions for administering justice, and articulating different versions of an ideal of separation.

6. תוספתא סנהדרין ד:ב

מלך ישראל...ועובר על מצות עשה ועל מצות לא תעשה ושאר כל המצות והרי הוא כהדיוט לכל דבר
A King of Israel...and when he violates a positive or negative commandment or any other commandment, he is considered like a commoner in all respects.

7. משנה סנהדרין ב:ז

...יושב בדין, היא עמו...

...He sits in judgement, and the Torah (he wrote) is with him...

8. ירושלמי סנהדרין ב:ג

ולא דנין אותו. על שם מלפניך משפטי יצא.

One may not judge him." Because *from You my judgment will come* *Psalms.17.2

9. סנהדרין יט:ז

מלך לא דן כו'. אמר רב יוסף: לא שנו אלא מלכי ישראל, אבל מלכי בית דוד דן ודנין אותו, דכתיב: "בית דוד כה אמר ה' דינו לבקר משפט". ואי לא דיינינן ליה, אינהו היכי דייני? והכתיב: "התקוששו וקושיו", ואמר ריש לקיש: קשט עצמך ואחר כך קשט אחרים.

§ The mishna teaches: A king does not judge and is not judged. Rav Yosef says: They taught this *halakha* only with regard to the kings of Israel, who were violent and disobedient of Torah laws, but with regard to the kings of the house of David, the king judges and is judged, as it is written: "O house of David, so says the Lord: Execute justice in the morning" (Jeremiah 21:12). If they do not judge him, how can he judge? But isn't it written: "Gather yourselves together, yea, gather together [*hitkosheshu vakoshu*]" (Zephaniah 2:1), and Reish Lakish says: This verse teaches a moral principle: Adorn [*kashef*] yourself first, and then adorn others, i.e., one who is not subject to judgment may not judge others. Since it is understood from the verse in Jeremiah that kings from the Davidic dynasty can judge others, it is implicit that they can also be judged.

אלא מלכי ישראל מאי טעמא לא? משום מעשה שהיה, דעבדיה דינאי מלכא קטל נפשא. אמר להו שמעון בן שטח לחכמים: תנו עיניכם בו ונדוננו. שלחו ליה: עבדך קטל נפשא. שדריה להו. שלחו ליה: תא אנת נמי להכא, "והועד בבבלי" אמרה תורה – יבא בעל השור ויעמוד על שורו.

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 Shataḥ 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.

אָתָא וַיְתִיב. אָמַר לִיה שְׁמַעוֹן בֶּן שִׁטְח: יֵנְאִי הַמֶּלֶךְ, עֲמִיד עַל רַגְלִיךָ וַיַּעֲדֵדוּ בֵּה. וְלֹא לִפְנֵינוּ אֵתָה עוֹמֵד, אֲלֵא לִפְנֵי מִי שְׁאָמַר וְהָיָה הָעוֹלָם אֵתָה עוֹמֵד, שְׁנֵאָמַר: "וַעֲמַדְדוּ שְׁנֵי הָאֲנָשִׁים אֲשֶׁר לָהֶם הָרִיב וְגו'". אָמַר לוֹ: לֹא כִשְׁתָּאמַר אֵתָה, אֲלֵא כְמָה שְׁיֵאמְרוּ חֲבֵרֵיךָ.

The Gemara continues to narrate the incident: Yannai came and sat down. Shimon ben Shataḥ 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 honor, 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.

נִפְנָה לִימִינוּ – כָּבְשׁוּ פְּנֵיהֶם בְּקֶרְקַע. נִפְנָה לְשִׁמְאֵלוֹ – וְכָבְשׁוּ פְּנֵיהֶם בְּקֶרְקַע. אָמַר לָהֶן שְׁמַעוֹן בֶּן שִׁטְח: בְּעֵלִי מִחֻשְׁבוֹת אֲתָם, יָבֵא בַעַל מִחֻשְׁבוֹת וַיִּפְרַע מִכֶּם! מִיָּד בָּא גַבְרִיאֵל וַחֲבָטָן בְּקֶרְקַע, וּמָתוּ. בְּאוֹתָהּ שָׁעָה אָמְרוּ: מָלֶךְ לֹא דָן וְלֹא דָנִין אוֹתוֹ, לֹא מַעֲיֵד וְלֹא מַעֲדִין אוֹתוֹ.

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.

10. רמב"ם הל' סנהדרין ב:ה

מַלְכֵי בֵּית דָּוִד אֵף עַל פִּי שְׂאִין מוֹשִׁיבִין אוֹתָם בְּסִנְהֶדְרִין יוֹשְׁבִין וְדָנִים הֵם אֶת הָעָם. וְדָנִים אוֹתָם אִם יֵשׁ עֲלֵיהֶן דִּין. אֲבָל מַלְכֵי יִשְׂרָאֵל אֵין דָּנִין וְאֵין דָּנִין אוֹתָם לְפִי שְׂאִין נִכְנָעִים לְדַבְּרֵי תוֹרָה שְׁמָא תְּבוֹא מִהֶן תִּקְלָה: Kings from the House of David, though we do not put them in the Sanhedrin, they sit and judge the nation. And we just them if there is a judgment to be made against them. But Israelite Kings - they do not judge, and we do not judge them because they refuse to submit to Torah, so lest a tragedy emerge from them.

11. מדרש תנחומא שופטים טז:א

מַעֲשֶׂה בְּאַחַד שְׁהָיָה לוֹ דִּין עִם מָלֶךְ מִמְּלֶכֶת בֵּית חֲשִׁמוֹנִאי, וַעֲמַד לִפְנֵי שְׁמַעוֹן בֶּן שִׁטְח. אָמַר לִיה: דִּין יֵשׁ לִי אֲצִל הַמֶּלֶךְ. אָמַר שְׁמַעוֹן בֶּן שִׁטְח לָהֶם לְאוֹתָן דִּינִין שְׁדִינִין עִמּוֹ, אִם מִשְׁגֵּר אֲנִי בְּשִׁבְלֵי הַמֶּלֶךְ, אֲתָם מוֹכִיחִים אוֹתוֹ. אָמְרוּ לוֹ: הֵן. שְׁגֵר בְּשִׁבְלֵי. בָּא, וְנָתַנּוּ אֶת כֶּסֶף אֶת וְיֵשֵׁב בְּצֵד שְׁמַעוֹן. אָמַר לוֹ שְׁמַעוֹן בֶּן שִׁטְח, עֲמַד עַל רַגְלִיךָ וְתֵן אֶת הַדִּין. אָמַר לוֹ: וְכִי דָנִין אֶת הַמֶּלֶךְ. פָּנָה לִימִינוּ, כָּבְשׁוּ הַדִּינִין אֶת פְּנֵיהֶם בְּקֶרְקַע. לְשִׁמְאֵלוֹ, כָּבְשׁוּ פְּנֵיהֶם בְּקֶרְקַע. בָּא הַמֶּלֶךְ וַחֲבָטָן בְּקֶרְקַע עַד שְׁיֵצְאָה נִשְׁמָתָן. מִיָּד נִדְדַעְזַע הַמֶּלֶךְ. מִיָּד אָמַר לִיה שְׁמַעוֹן בֶּן שִׁטְח, עֲמַד עַל רַגְלִיךָ וְתֵן

את הדין, שלא לפני אֶתָּה עומד, אֶלָּא לִפְנֵי מִי שְׁאָמַר וְהִיָּה הָעוֹלָם, שְׁנֵאֲמַר: וְעָמְדוּ שְׁנֵי הָאֲנָשִׁים אֲשֶׁר לָהֶם הָרִיב לִפְנֵי ה' (דברים יט, יז). מִיָּד עָמַד עַל רַגְלָיו וְנָתַן אֶת הַדִּין. לִכְךָ צָרִיךְ שִׁיְהִי בַּעֲלֵי דִינִין נוֹהֲגִין אִימָה בְּעַצְמָן, וְהַדִּינִין יְהִי נוֹהֲגִין אִימָה בְּעַצְמָן, כְּבִיכּוֹל לְהַקְדוֹשׁ בְּרוּךְ הוּא הֵן דִּין. שִׁכְךָ אָמַר יְהוֹשֻׁפָט לַדִּינִין, כִּי לֹא לָאָדָם תִּשְׁפֹּטוּ כִּי לַה' (דה"ב יט, ו). אָמַר רַבִּי חֲמַא בַּר חֲנִינָא, בָּא וִרְאָה אֶלְמָלָא מְקַרָּא כְּתוּב, אִי אֶפְשָׁר לְאֹמְרוּ. בְּשָׁר וְדָם דֵּן לְבוֹרָאוּ. אֶלָּא אָמַר הַקְדוֹשׁ בְּרוּךְ הוּא לַדִּינִין, הֵיוּ נוֹהֲגִים אִימָה בְּעַצְמָכֶם, כְּאֵלּוּ אוֹתִי אַתֶּם דִּנִּין. כִּיצַד, אָדָם עוֹשֶׂה מַצָּה אַחַת לִפְנֵי, גָּזַרְתִּי עָלָיו לִתֵּן לוֹ מָאָה שְׁדוֹת. אִם אַתָּה מַעְבִּיר עָלָיו אֶת הַדִּין בְּאַחַת מֵה שְׁגָזַרְתִּי עָלָיו, אֲנִי נוֹתֵן לוֹ מִשְׁלִי, וּמַעֲלִי עָלֶיךָ כְּאֵלּוּ מִמֶּנִּי נִטְלָתָּ.

(Deut. 16:19:) “You shall not turn aside justice; you shall not show partiality.” [Here is] a warning for the prince not to place one suited to be low, high; and one suited to be high, low. Another interpretation (of Deut. 16:19), “You shall not turn aside justice,” because of wealth; “you shall not show partiality,” because of honor, so that a poor person does not stand while a wealthy one sits. Another interpretation (of Deut. 16:19), “You shall not turn aside justice.” It is a warning to the sage not to seat someone beside him who is unfit for jurisdiction. Moreover, if he should so seat someone [like this], it is as though he had planted an *asherah*. So near [this verse] is [the following] (in Deut. 16:21), “You shall not plant for yourselves [any tree as] an *asherah* [beside an altar of the Lord your God...].” (Deut. 16:19) “You shall not turn aside justice.” Let the judges always feel as if the Divine Presence is among them, as stated (in Ps. 82:1), “[God stands in the divine congregation;] he pronounces judgment in the midst of powers.” From here it follows for litigants that they conduct themselves in awe. There is a story about a certain person who had a lawsuit with a king, one of the kings of the Hasmonean dynasty. He came and stood before Simeon ben Shetah. He said to him, “I have a lawsuit with the king.” Simeon ben Shetah said to those judges who were judging along with him, “If I send for the king, will you reprimand him?” They told him, “Yes.” He sent for him. He came and put his throne beside Simeon ben Shetah. Simeon ben Shetah said to him, “Stand on your feet and give satisfaction.” He said to him, “Do we judge a king?” [Simeon ben Shetah] turned to the right, and the judges [on the right] pressed their faces on the ground (to hide them). He turned to the left, and [those on the left] pressed their faces on the ground. The angel came and beat them on the ground, until their souls left them. Immediately the king trembled. Simeon ben Shetah said to him, “Stand on your feet and give satisfaction, since you are not standing before me, but before the One who spoke and the world came into being, as stated (in Deut. 19:17), ‘The two parties to the dispute shall stand before the Lord.’” He immediately stood on his feet and gave satisfaction. Hence the litigants need to conduct themselves in awe and the judges need to conduct themselves in awe; as they are rendering judgment, as it were, for the Holy One, blessed be He. Therefore Jehoshaphat said to the judges (in II Chron. 19:6), “[Consider what you are doing], since you are not rendering judgment for humans but for the Lord.” R. Hama bar Hanina said, “Come and see! If there were no scriptural text written, it is not possible for him to say that flesh and blood judges its Creator. The Holy One, blessed be He, said to the judges, ‘Let them conduct themselves in awe, as if you were judging Me. How? One fulfills a commandment before Me. [So] I have decreed over him to give him a hundred fields. If you pass judgment against him on one thing that I have decreed over him, I will give him other [fields] from what I possess; and I will credit it against you as though you had gotten it from Me.’”

12. Josephus, Jewish Antiquities 14.165-167

But the chief Jews were in great fear when they saw how powerful and reckless Herod was and how much he desired to be dictator. These Jews came to Hyrcanus and asked in disbelief, "Do you not see that Antipater and his sons have girded themselves with royal power, while you have only the name of king given you? But do not let these things go unnoticed, nor consider yourself free of danger because you are careless of yourself and the kingdom. For no longer are Antipater and his sons merely your stewards in the government, and do not deceive yourself with the belief that they are; they are openly acknowledged to be masters.

Thus Herod, his son, has killed Ezekias and many of his men in violation of our law which forbids us to slay a man, even an evildoer, unless he has first been condemned by the Sanhedrin to suffer this fate. He however has dared to do this without authority from you [Hyrcanus].

13. Josephus, *The Jewish War*, 1.209

If he [Herod] is not king but still a commoner, he ought to appear in court and answer for his conduct to his king and to his country's laws, which do not permit anyone to be put to death without trial.

14. Josephus, *Jewish Antiquities* 14.169,171-6

But when Herod stood in the Sanhedrin with his troops, he overawed them all, and no one of those who had denounced him before his arrival dared to accuse him thereafter; instead there was silence and doubt about what was to be done.

When affairs stood thus, one whose name was Sameas, a righteous man he was, and for that reason above all fear, rose up, and said, Fellow councilors and king, I do not myself know of, nor do I suppose that you can name, anyone who when summoned before you for trial has ever presented such an appearance. For no matter who it was that came before this Sanhedrin for trial, he has shown himself humble and has assumed the manner of one who is fearful and seeks mercy from you by letting his hair grow long and wearing a sack garment. But this fine fellow Herod, who is accused of murder and has been summoned on no less grave a charge than this, stands here clothed in purple, with the hair of his head carefully arranged and with his soldiers round him, in order to kill us if we condemn him as the law prescribed, and to save himself by outraging justice...

Yet do not I make this complaint against Herod himself; he is to be sure more concerned for himself than for the laws; but my complaint is against yourselves, and your king, who gave him a license so to do. However, take you notice, that God is great, and that this very man, whom you are going to absolve and dismiss, for the sake of Hyrcanus, will one day punish both you and your king himself also."

Nor did Sameas mistake in any part of this prediction; for when Herod had received the kingdom, he slew all the members of this Sanhedrin, and Hyrcanus himself also, excepting Sameas, for he had a great honor for him on account of his righteousness, and because, when the city was afterward besieged by Herod and Sosius, he persuaded the people to admit Herod into it; and told them that for their sins they would not be able to escape his hands:—which things will be related by us in their proper places.