

The Realm of Tòrah and the Realm of Politics

Royal Law Complements Tòrah Law

16. Nissim Gerondi (Ran), *Derashot* 11

We have benefited from Leon A. Feldman's edition of the *Derashot* (Jerusalem: Shalem Institute, 1973).

Here is the most interesting medieval exposition of a theory of separation of powers. In this sermon Gerondi carries forward the mishnaic dictum that "the king neither judges, nor is he subject to judgment." He provides a justification for royal autonomy vis-à-vis the halakhah based on an argument s concerning the authority but also the limitations of divine law. The sermon may be read as an attempt to develop systematically the consequences of the legislative autonomy of the kahal (see §8). Gerondi was a leader of the Barcelona community. His views may also reflect the separation between royal and canon law in Christian Spain.

"You shall appoint magistrates and officers . . . and they shall judge the people by just law" (Deut. 16:18). . . . The plain meaning of the text is as follows. It is known that the human species needs magistrates to adjudicate among individuals, for otherwise "men would eat each other alive" (Avot 3:2), and humanity would be destroyed. Every nation needs some sort of political organization [*yishuv medini*] for this purpose, since — as the wise man put it — even "a gang of thieves will subscribe to justice among themselves."²⁰ Israel, like any other nation, needs this as well. Moreover, Israel needs it for another reason: to uphold the laws of the Torah and punish those who deserve flogging or capital punishment for disobeying these laws, even if their transgression in no way undermines political order. Clearly, these [purposes] give rise to two possible issues: first, the need to punish in keeping with true law; second, the need to punish so as to enhance political order [*tikkun seder medini*] and in accordance with the needs of the hour, even if the punishment is undeserved according to truly just law. God, may He be blessed, set these two issues apart, delegating them each to a separate agency:

[1] He commanded that magistrates be appointed to judge accord-

20. See Plato, *Republic*, 351c; and Halevi, *Kuzari* 2:48 (§2, §3).

ing to the truly just law, as it is written, “And they shall judge the people by just law.” In other words, the verse tells us that He set forth the purpose of their appointment and the scope of their authority: they were appointed to judge the people according to a law that was in itself truly just and their jurisdiction is not to exceed that.

[2] But since political order cannot be fully established by these means alone, God provided further for its establishment by commanding [the appointment of] a king.

We may clarify this by considering one of the above-mentioned purposes. We read in the fifth chapter of tractate Sanhedrin: “Our Rabbis taught [The following questions are asked of a witness in a capital case]: Do you know him? . . . Did you warn him? Did he confirm your warning? Did he accept his liability to death? Did he commit the murder immediately?” etc. (BT Sanhedrin 40b). There can be no doubt that this is required by just law, for why should a man be put to death unless he was aware that he was committing a capital offence and [nevertheless] transgressed? Therefore it is requisite that he confirm and accept a warning, along with the other requirements mentioned there. This is the law, intrinsically and truly just, that is entrusted to the judges. However, punishing criminals in this way alone would completely undermine political order: murderers would multiply, having no fear of punishment.²¹ That is why God ordered the appointment of a king for the sake of civilization. Thus, we read . . . , “When you come to the land . . . you may indeed set as a king over you . . .” (Deut. 17:14–15), which, according to the Rabbis’ tradition, is the commandment to appoint a king. The king may impose a sentence as he deems necessary for political association [*ha-kibbutz ha-medini*], even when no warning has been given. The appointment of a king is equally essential for Israel and all nations requiring political order, but the appointment of magistrates is of particular importance in the case of Israel. So the text emphasizes: “And they shall judge the people by just law”—i.e., the appointment and jurisdiction of magistrates pertain to judging the people according to laws intrinsically truly just.

[Unlike] the *nomoi* of the nations of the world, the laws and com-

21. Alluding to Mishnah Makkot 1:10 (C23).

mandments of our Torah . . . include commandments that are ultimately not concerned with political order. Rather, their effect is to induce the appearance of the divine effluence within our nation and [to make it] cleave unto us. This may be either by means that are clear to us, such as sacrifices and other Temple activities, or by means unclear to us, such as the laws whose purpose has not been revealed [*hukkim*]. In any case, there can be no doubt that these laws, although far from rational comprehension, induced the divine effluence to cleave unto us. The causes of many natural phenomena are incomprehensible to us, yet their existence is verifiable, so it is certainly not strange that the causes of the divine effluence . . . should be incomprehensible. Our Holy Torah is unique among the *nomoi* of the nations, which reflect no such considerations and are instead concerned solely with enhancing the affairs of their society.

Therefore I maintain—and so one ought to believe—that while the *hukkim* are not relevant at all to the establishment of the political association . . . , the *mishpatim* are in fact crucial to it, and it is as if they serve both to bring down the divine effluence and to perfect our public affairs. But perhaps these [latter] laws are [also] addressed primarily to the more sublime matters rather than to the perfection of society, since our appointed king [has that task]. The purpose of the magistrates and the Sanhedrin, by contrast [to the king], was to judge the people in accordance with true and intrinsically just law, which will effect the cleaving of the Divine [*inyan elohi*] unto us, whether or not the ordering of the multitude's affairs has been perfected. That is why some of the laws and procedures of the [gentile] nations may be more effective in enhancing political order than some of the Torah's laws. This, however, does not leave us deficient, since any deficiency regarding political order was corrected by the king. Indeed, we have a great advantage over the nations: because the laws of the Torah are inherently just . . . , the divine effluence will be induced to cleave unto us. That is why the supreme magistrates were located in that place where the presence of the divine effluence was evident: I mean the assembly of the Sanhedrin²² in the Chamber of Hewn Stones. . . .

22. Literally, "the Men of the Great Assembly"; Gerondi alludes to Mishnah Sanhedrin 11:2 (C7, §9).

In the same vein, the Rabbis said in the first chapter of tractate Shabbat: “A magistrate who judges truly, a judgement of truth, even one hour per day, is regarded as a partner in creation with God” (BT Shabbat 10a). . . . Just as, in creation, the divine effluence appeared at the mundane level—since it was the source of all being—so too a magistrate who judges truly draws down that effluence, whether or not his judgment perfects the order of the polity. Just as it is drawn down by the sacrificial rites . . . so too does it flow because of the Torah laws. Admittedly, for the sake of political order further enhancement is required, which is [the task of the king]. Thus, the judges were appointed to judge only according to the laws of the Torah, which are inherently just, . . . and the king was appointed to perfect the political order and [to meet] the needs of the hour.

Do not cite against my argument the passage in tractate Sanhedrin: “It has been taught: Rabbi Eli’ezer b. Jacob says: I have a tradition that a court may impose flagellation and [other] punishments not [warranted] by the Torah; not to transgress against the words of the Torah, but rather to make a hedge for the Torah” (BT Sanhedrin 46a).²³ This seems to imply that the court was appointed to render judgements as the times require. However, this is not the case: at a time when Israel had both Sanhedrin and king, the Sanhedrin’s role was to judge the people according to just law only and not to order their affairs in any way beyond this, unless the king delegated his powers to them. However, when Israel has no monarchy, the magistrate holds both kinds of power, that of the judge and that of the king. . . .

This was Israel’s sin in asking for a monarchy, which many earlier [scholars] have found problematic—since the people had been commanded to appoint a king. . . . I believe their sin consisted in wanting adjudication between persons to be mainly the charge of the monarch. We read: “All the elders of Israel assembled and came to Samuel at Ramah, and they said to him, ‘You have grown old, and your sons have not followed your ways. Therefore appoint a king for us, to judge us like all other nations’” (1 Sam 8:4–5). . . . Israel was more interested in enhancing its political association. If they had asked for a king by saying simply “Appoint for us a king,” or if they had sought a king for the sake of their military affairs, they would

23. See C24.

have committed no sin. In fact, it would have been a [virtuous act]. Their sin lay in saying “Appoint for us a king to *judge* us like all the nations.” They wanted adjudication to be the charge of the monarchy, rather than of Torah judges. . . . That is why God told Samuel: “It is not you that they have rejected; it is Me they have rejected as their king” (8:7)—which is to say, they preferred to enhance their natural affairs rather than to bring the divine effluence down upon themselves. . . . For this Samuel reproved them afterwards, saying: “Now stand by and see the marvelous thing that the Lord will do before your eyes. It is the season of the wheat harvest. I will pray to the Lord and He will send thunder and rain” (12:16–17). This means: Know that you have erred in choosing something which, although it appears to you to be correct, [namely] the ordering of natural things, is not truly so. For one who cleaves to the Divine [*inyan elohi*] can alter natural things at will. “It is the season of the wheat harvest,” which by way of natural things is not the right time for rain. Yet, by virtue of the Divine that cleaves unto me, I will call upon the Lord and change this, “and He will send thunder and rain.”

Therefore, [Samuel continues,] it is more fitting for you to prefer that which induces the divine effluence amongst you—namely, [to prefer] adjudication by the magistrates, of whom it is written, “And they shall judge the people by just law”—over adjudication by the monarch wherein he decides according to his own will. For this is the difference between magistrate and king: the magistrate is more bound to the Torah’s laws than is the king. That is why the king was admonished and commanded to keep a copy of the Torah by his side. . . . Since the king sees that he is not bound to Torah law as the judge is, he must be strongly admonished not to deviate from its commandments “to the right or to the left” [nor to] “act haughtily toward his fellows,” in view of the great power God has given him. The magistrate, however, requires no such admonition, since his power is restricted by the scope of Torah law alone, as it is written, “And they shall judge the people by just law.” He is admonished, . . . “You shall not deviate from justice.”

. . . [Now] if the king annuls any commandment for the sake of addressing [the needs of] his time, he should have no intention of transgressing against the words of the Torah nor in any way removing the yoke of the fear of God. Rather, his intention should be “to observe faithfully every word of

this Teaching as well as these laws.” Anything he adds or takes away²⁴ must be done with the intention of furthering the observance of the Torah and its commandments. For example, in the case we have cited concerning the execution of a murderer without witnesses or warning, the king’s intention must not be to demonstrate his power to the people by showing them that this too is under his domain. Rather, his intention should be to advance the realization of the commandment “You shall not murder” (Exod. 20:13) and prevent its disregard.

Since his power is mighty and induces arrogance, God admonishes [the king] not to “act haughtily toward his fellows” (Deut. 17:20). . . . It is well known that kingship is not a quality inherent in the king. It is rather granted to him by God, blessed be He, or by the people, for the purpose of perfecting the people, [not]²⁵ for his personal enhancement. . . . Kingship is not inherent in the king, but an attribute conferred upon him for the strengthening of the whole. Therefore, the king should not see himself as the governor and lord of the people, but as a servant unto them for their benefit.

Commentary. The Price of Politics

Gerondi’s statement on politics brings to a climax a long tradition that places politics alongside, indeed outside, divine law. This tradition can be traced from the biblical distinction between “matters of the Lord” and “matters of the king” (2 Chron. 19:11), through the mishnaic statement that “the king neither judges, nor is . . . subject to judgment” (Sanhedrin 2:3 [57]), down to the broad range of legislative and executive powers allotted to the good men of the city by medieval halakhic authorities (C8).

Writers in this tradition identify politics as a distinct realm of human activity separate from halakhic decision making. Whatever the finer details of the constitutional directives in this chapter, they are all predicated

24. An ironic allusion is intended here to the very commandment which is overridden: “Neither add to it nor take away from it” (Deut. 13:1).

25. The text reads “or,” evidently an error.