

THE LAW OF THE KING

Daniel JH Greenwood

I. The Law of God

1. Babylonian Talmud, Sanhedrin 17a

Rav Kahana said: [In a] Sanhedrin where all of them saw for condemnation, we acquit him. What is the reason? Since we have learned that we suspend the verdict overnight in order to produce for him a merit, and these no longer see [any merit -- so they won't provide any further arguments in his favor overnight.]

Rabbi Yohanon said: We do not seat in the Sanhedrin unless they are possessed of stature and possessed of wisdom and possessed of appearance and possessed of maturity in years, and possessed of sorcery and knowledgeable in seventy languages, so that the Sanhedrin will not hear from the mouth of an interpreter.

Rav Yehuda said in the name of Rav: We do not seat in the Sanhedrin unless he is one who knows how to render a creeping creature pure from the Torah. [I.e., he is able prove that an impure creature is pure, by argument from the Torah, which states the contrary in Lev. 11:29-37]. We only place on the Sanhedrin one who is able prove that an impure creature is pure, by use of the Torah.

2. Rambam, Mishneh Torah, Sefer Shoftim, Hilkhoh Sanhedrin 12:1-2, 16:4 (see also Tosefta Sanhedrin 10:11-11:15 (warnings))

Whether he is an expert student or an ignoramus, he must be warned. A warning must be given to distinguish between *shogag* (a violation by mistake, e.g., of law) and *mazid* (an intentional violation), lest the violation have been committed by *shogag* (mistake). And how do you warn him? Say to him "This is a commandment — Thou shalt not — and to do what you are about to do is a violation of it, and you will be liable for the death penalty in a court or flogging." If he explains, he is released. Similarly, if he is silent or he inclines his head, he is released. And even if he said "I know" he is released. Until he sends himself to execution and says "For that reason I do it" and afterwards kills. And he must go and do it immediately after the warning, during the conversation, but if after the conversation, another warning is necessary.

3. Maimonides, Mishneh Torah, Sanhedrin 20:1 (Dorff trans.; see also 16:4) (No circumstantial evidence)

The court does not impose the death penalty on the basis of conjecture but only on the testimony of witnesses who have seen the matter clearly. Even if the witnesses saw him chasing the other, gave him warning and then lost sight of him, or the assailant followed the victim into a ruin and the followed after him and found the victim writhing in death agony, while the sword dripping with blood was in the hands of the slayer, since they did not see him at the time of the slaying, the court cannot impose capital punishment on the basis of this testimony. *Concerning this and similar cases, Scripture says "Do not bring death on the innocent and the righteous." (Ex 23:7).*

4. Mishnah Makkot 1.11

A Sanhedrin that condemns a person to death once a week is called "reckless." R. Eleazar ben Azariah says, "once in seventy years." R. Tarfon and R. Akiva say, "if we had been on the Sanhedrin, there would never have been a person sentenced to death." R. Shimon ben Gamliel says, "they would have increased murders in Israel."

5. Babylonian Talmud, Bava Metzia 83b (miracles needed to enforce criminal law)

Rav Eleazar, son of R. Simeon, met an officer who was engaged in arresting thieves. He said to him, How can you detect them? Are they not compared to beasts, as it is written, "Wherein all the beasts of the forest creep forth" (Ps 104:20 -- the rest of the verse suggests the comparison is that they both come out only at night). There are some who say that he said the following verse to him: "He lies in wait secretly like a lion in his cave" (Ps 10:9). Perhaps you take the innocent and leave behind the wicked? He said, and what shall I do? It is the king's command. He said to him, Come, I will teach you what to do. Go to a tavern at the fourth hour of the day [about 10:00 AM]. If you see a man drinking wine, holding a cup in his hand and dozing, ask who he is. If he is a scholar, he has risen early to pursue his studies; if he is a laborer he has risen early to do his work; if his work is at night he may have been rolling thin metal [which doesn't make noise, so no one would have heard him working at night]. If he is none of these, he is a thief; arrest him.

A report was heard in the royal court. They said, let the reader of the letter become the messenger.

R. Eleazar son of R. Simeon was brought and he proceeded to arrest thieves.

R. Joshua, son of Karhah, send word to him, "Vinegar son of wine! How long will you deliver the people of our God for execution?" [R. Eleazar] sent the reply: "I eradicate thorns from the vineyard." [R. Joshua] responded: "Let the owner of the vineyard come and eradicate his thorns."

One day a laundryman met him and called him "Vinegar son of wine." Said he to himself, "since he is so insolent, infer from this that he is certainly a wicked man". He exclaimed, "Arrest him." They arrested him.

After his mind calmed, he [R. Eleazar] went after him to redeem him, but he was unable to do so. He said of him, "He who guards his mouth and his tongue guards his soul from troubles (Proverbs 21:23)". They hanged him [the laundryman]. He stood under the gallows and wept.

They said to him, "Master let it not be grievous in your sight, for he and his son had intercourse with a betrothed maiden on the Day of Atonement" [violating at least three different commandments each of which warrants a death penalty]. He laid his hand on his belly/intestines and said "Rejoice my belly, rejoice. If matters about which you have doubts are thus, how much more so something about which you are certain. I am assured that no worm of any kind will have power over you [because Providence must be giving him special powers]."

But even so, he was not at rest. They gave him a sleeping potion to drink and brought him into a house of marble and tore open his abdomen. They removed from him basketfuls of fat and placed them in the sun in the months of Tammuz and Av [i.e., the summer], but it did not decay.

But no fat decays!

True, no fat decays, but red streaks decay. Here even though there were red streaks, it did not decay.

He said of himself, “My flesh too will dwell in safety” (Ps 16:9).

And also to R. Yishmael son of R. Yose such a thing occurred. Elijah met him and said to him, “How long will you deliver the people of our God for slaughter?” He said to him, “what can I do? It is an order of the king.” He said to him, “Your father fled to Asia; you can flee to Lodicea.”

II. The Law of Kings (for more, see Walzer)

1. Judges 8:22-23

Then the men of Israel said to Gideon, “Rule over us – you, your son, and your grandson as well; for you have saved us from the Mideonites.” But Gideon replied, “I will not rule over you myself, nor shall my son rule over you; the Lord alone shall rule over you.”

2. Judges 17:6, 21:25

In those days, there was no king in Israel and each man did what was right (*yashar*) in his eyes.

3. The Curse of Samuel: I Samuel 8

When Samuel was old, he placed his sons as judges for Israel. ... And his sons did not walk in his ways but twisted after gain; they accepted bribes and they twisted justice. Then all the elders of Israel assembled and came to Samuel at Ramah, and said to him, “You have aged, and your sons do not walk in your ways. Now give us a king to judge us like all the peoples.”

Their words were evil in Samuel’s eyes, when they said give us a king to judge us, and Samuel prayed to Adonai. And Adonia said to Samuel, “Listen to the voice of the people, to everything that they say to you, for they have not rejected you, but rather it is I that they have rejected as their king. ... Warn them solemnly and tell them “*mishpat ha-melekh*” (the law/practices of the king) who will rule over them.

Samuel reported the words of the Lord to the people who were asking him for a king. He said, “This will be the *mishpat* of the king who will rule over you. He will take your sons and appoint them as his charioteers and horsemen ... He will appoint them as his chiefs of thousands and of fifties; or they will have to plow his fields, reap his harvest, and make his weapons and the equipment for his chariots. He will take your daughters as perfumers, cooks, and bakers. He will seize your choice fields, vineyards, and olive groves, and give them to his eunuchs and courtiers. He will take your male and female slaves, your choice young men, and your asses, and put them to work for him. He will take a tenth part of your

flocks, and you shall become his slaves. The day will come when you cry out because of the king whom you yourselves have chosen; and the Lord will not answer you on that day.”

But the people would not listen to Samuel’s warning. “No” they said. “We must have a king over us, that we may be like all the other nations. Let our king rule over us and go out at our head and fight our battles.”

4. Mishnah Avot 3:2

Pray for the *malchut* [i.e., the kingdom/sovereignty/government, probably referring to the foreign government], for were it not for fear of it, men would eat each other alive.

5. Babylonian Talmud, Bava Kamma 113a, Bava Batra 54b, Nedarim 28

Did not [the Amora] Samuel say, “*Dina’ d’ malchuta dina*: The law of the kingdom is the law.”

6. Babylonian Talmud, Sanhedrin 20b (good or bad?)

Shmuel taught: "All that is said in 'Section on Kings,' a king is permitted to do." Rav disagreed saying, "the section on kings was taught to threaten Israel." For it is written, "you shall set a king over yourselves." (Deut. 17.15) His fear should be upon you.

7. Responsum of the Geonim #66 (I Walzer 436)(divine right)

This was the meaning behind the teaching of Shmuel: When the Holy Blessed One granted power to the kingdoms, he also granted them power over people's property to do as they saw fit. This applies even to Jews. For it is taught, "They rule over our bodies and our beasts as they please, and we are in great distress." (Nehemiah 9.37)

8. Samuel b. Meir (Rashbam) on BT Bava Batra 54b (from I Walzer 438) (human assent)

All taxes, rates and rules of kings’ law commonly established in their kingdoms are law, for all subjects of a kingdom *willingly accept* the king’s laws and statutes. Therefore they are perfectly valid law.

9. Maimonides, Mishneh Torah, Laws of Theft and Loss 5.18

To what sort of ruler does the rule of "the law of the kingdom is the law" apply? To one whose coins are dispersed (used) throughout the land. The people accepted the sovereignty of the king and the laws of the state and they are the king's subjects. But if the sovereign's coin is not dispersed throughout the land, then he is like a thief . . . and his law is not the law.

III. Exigency Jurisdiction

1. Mishnah Avot 3:2

Pray for the *malchut* [kingdom/sovereignty/government, probably referring to the foreign government], for were it not for fear of it, men would eat each other alive.

2. T. Sanhedrin 46a (exigency jurisdiction: the times demand it)

Rabbi Eliezer ben Yaakov said "I have heard that the court may pronounce sentences even where not [warranted] by the Torah; yet not with the intention of disregarding the Torah but [on the contrary] *in order to safeguard it*."

3. T. Yevamot 90b (internet translation – follows a repeat of T. Sanhedrin 46a))

And it once happened that a man rode on horseback on the Sabbath in the days of the Greeks, and he was brought before *Beth din* and was stoned; not because he deserved this penalty, but because the *exigencies of the hour demanded* it. And another incident occurred with a man who had intercourse with his wife under a fig tree, and he was brought before *Beth din* and flogged; not because he deserved such a penalty, but because the exigencies of the hour demanded it!

4. Maimonides, Mishneh Torah Sanhedrin 24:4. (See also, id at 18:6)

The court can flog him who is not liable for flogging and can execute him who is not liable for capital punishment, not in order to transgress the words of Torah but rather to build a hedge around it. If the court sees that the people disregard a law, it can protect and strengthen the law in whatever way seems *fitting* to them. All such measures are the instruction of the hour, and the court should not fix the law in this way for generations to come.

5. Rashba (R. Solomon Ibn Adret), Responsum 393 (partially trans in Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 *Cardozo L. Rev.* 1157, 1201 (1991))

If the witnesses are believed by the investigators, they are authorized to impose a monetary fine or corporal punishment, all according to what seems appropriate to them, and this *preserves the world*. For if you issue decisions based exclusively on the procedure as given in the Torah, not punishing except as the Torah punishes, and rule in questions of torts and such only in accordance with this law, why then society would be destroyed, for we would need witnesses and forewarning. As the Talmud says (Baba Metzia 30b), "Jerusalem was destroyed because they established their decisions only in accordance with Biblical law."

6. Maimonides, Mishneh Torah, Kings 3:10 (from Walzer et al)

If a person kills another and there is no clear evidence, or if no warning has been given him, or there is only one witness, or if one kills accidentally a person whom he hated, the king may, *if the exigency of the hour demands it*, put him to death in order to insure the stability of the social order. He may put to death many offenders in one day, hang them, and suffer them to be hanging for a long time so as to put fear in the hearts of others and break the power of the wicked.

7. Isaac Abravanel, Commentary to Deuteronomy (from Walzer et al) (part of a longer argument that kings are unnecessary and generally not a good thing).

Nor is a king required in Israel to punish [criminals...] in accordance with the needs of the hour, because God gave that authority to the Great Court, the Sanhedrin, as I explained in [my commentary above].¹ Furthermore, God has informed us that if a judge who acts in accordance with [...] just law should acquit a wrongdoer, God Himself will punish the wicked person with His great judgement, as it is written "Keep far from a false charge; do not charge death on those who are innocent and in the right, for I will not acquit the wrongdoer" (Ex. 23:7). This means, "I will punish him for anything for which you are unable to punish him legally."

Thus, it has been explained that these three things, i.e. delivering them through war, laying down laws and commandments, and occasional punishment outside the law, are all performed by God for His people. Therefore, God is their king, and they have no need for a [human] king for anything.