

Rabbi Nissim of Girona on the Constitutional Power of the Sovereign

Warren Zev Harvey*

Of all medieval Jewish philosophers after Maimonides, the one whose legal thinking is most constitutional was Rabbi Nissim ben Reuben of Girona, known by the acronym Ran (*Rabbenu Nissim*). He was born in about 1310 and died in 1376. He lived, taught, and judged in Barcelona, then part of the Crown of Aragon. A prolific writer, he authored a celebrated commentary on Rabbi Isaac Alfasi's *Sefer ha-Halakhot* and a commentary on the tractate of *Nedarim*, printed in standard editions of the Babylonian Talmud and customarily studied in the place of Rashi's commentary (which does not exist on that tractate). In addition, he wrote *novellae* on selected tractates of the Babylonian Talmud and scores of legal *responsa*. In the realm of philosophical thought, he composed an influential collection of philosophic homilies, known as *Derashot ha-Ran* ("The Homilies of Rabbi Nissim"); and he also wrote an unfinished commentary on the Pentateuch, ending with Gen 23:20. All of his works were written in Hebrew.¹

Ran was the leading authority of his day in rabbinic law and the most original Jewish political philosopher between Maimonides and Abrabanel. He was also, as already said, the most constitutionally minded of all medieval Jewish philosophers after Maimonides. It is because of the constitutional nature of his legal philosophy that I have entitled this paper, "Rabbi Nissim of

* This paper was originally delivered as the seventh annual Ivan Meyer Lecture in Jewish Law at the Center for Jewish Law and Contemporary Civilization, Benjamin N. Cardozo School of Law, Yeshiva University, October 21, 2010. I thank Professor Suzanne Last Stone, Director of the Center, for inviting me to serve as the Ivan Meyer Visiting Scholar in Comparative Jewish Law, Fall 2010.

1 *Derashot ha-Ran*, ed. Leon Aryeh Feldman (Jerusalem: Shalem, 1974); *Derashot ha-Ran*, 2nd ed., ed. Leon Aryeh Feldman (Jerusalem: Mosad ha-Rav Kook, 2003); *Perush ha-Ran `al ha-Torah*, ed. Leon Aryeh Feldman (Jerusalem: Shalem, 1968).

Girona on the Constitutional Power of the Sovereign,” and not simply: “Rabbi Nissim of Girona on the Power of the Sovereign.”

Ran sought to define the extent and the limits of the authority of the sovereign, and to clarify the origin of that authority. In an essay I wrote a decade ago, “Liberal Democratic Themes in Rabbi Nissim of Girona,”² I discussed some of the liberal democratic tendencies in his philosophy, and focused on three subjects: (1) pluralism as a social and political value, (2) the role of the judge to rule in accordance with “righteous judgment,” and (3) the theory of punishment as rehabilitation. We shall see that the same liberal democratic tendencies are found in Ran’s discussion of the powers of the sovereign.

The Limited Powers of the Sovereign

Ran was a monarchist. He believed the best form of government is the monarchy. However, his monarchy is a constitutional one, a limited one, not an absolute one. In his definition of the role of the king, he emphasized the separation of the branches of government, and strived to achieve checks and balances between the different branches.

In his famous discussion of the role of judges in his Homily on Justice (Homily 11), Ran distinguishes clearly between the authority of the judge and that of the king, and stresses the need to separate their respective functions. The authority of the judge is to judge with “righteous judgment,” as it is written: “Judges...shalt thou make thee in all thy gates...and they shall judge the people with righteous judgment [*mishpat̄ ṣedeq*]” (Deut 16:18). Ran interprets the term “righteous judgment” as referring to deontological justice as opposed to utilitarian or teleological justice. The judge is authorized to judge only in accordance with deontological justice, and must not take into consideration extraneous factors. In other words, Ran’s judge is a Kantian judge.³ The king, however, according to Ran, is authorized to take into consideration teleological and utilitarian factors. He is responsible for the public welfare, namely, for maintaining order and security, for defending the *polis*. The monarchy exists

2 Warren Zev Harvey, “Liberal Democratic Themes in Nissim of Girona,” in *Studies in Medieval Jewish History and Culture*, ed. Isadore Twersky and Jay M. Harris (Cambridge, MA: Harvard University Press, 2001), 3:197-211.

3 *Derashot ha-Ran*, 189-95 (2nd ed., 411-26).

as an institution for the sake of preserving political wellbeing (*tiqqun ha-seder ha-medini, tiqqun ha-qibbuş, yishshuvo shel `olam ve-tiqqun sidduro*).⁴

The judges must concern themselves with their deontological function, and the king must concern himself with his utilitarian function. These functions, insists Ran, must not be confused. This means that the king is not to involve himself with judging cases – unless there is a threat to the public welfare. In such states of emergency (*şorekh ha-sha`ah*), the king has a mandate to interfere in the decisions of the courts.⁵ However, he may interfere *only* in such cases.

The powers of the king, thus, are limited. The judicial branch is independent of the executive branch, and the king may not interfere in it except in exceptional cases. According to Ran, the great sin of the Children of Israel in the days of Samuel the Prophet was *not* that they demanded a king. After all, there was an explicit biblical commandment: “Thou shalt set a king over thee” (Deut 17:15). Their sin was that they wanted a king to be in charge of the judicial branch. They did not simply say, in accordance with Deuteronomy, “Set a king over us.” But they said: “Set a king over us *to judge us* like all the nations!” (1 Sam 8:5).⁶ The Israelites sinned grievously in that they wanted an absolute monarchy, “like all the nations.” They wanted their king to be also their judge. They rejected the separation of powers mandated by the divine Law, which had allotted judgment to the judges, that is, to the Sanhedrin, and which gave the king only a secondary judicial role. In Ran’s words, “the matter of judgment is assigned in its greater and main part [*rubbo ve-`iqqaro*] to the Sanhedrin, and in its lesser part [*mi`uřo*] to the king.”⁷

The division of powers between the executive branch and the judicial branch is thus a fundamental principle for Ran. In this connection, he stresses the checks and balances in the political system. These checks and balances limit the power of the king, as they also limit the power of the judges and other political functionaries. The king has the power to cancel the ruling of the judges – but only on the grounds of “political welfare.” He can execute an uncommonly dangerous serial murderer whom the courts were unable to execute because of the rules of “righteous judgment”; for example, two witnesses were not present

4 Ibid.

5 Ibid., 192 (2nd ed., 418).

6 Ibid., 192-94 (2nd ed., 419-22).

7 Ibid., 192 (2nd ed., 419).

or no warning (*hatra'ah*) was given.⁸ However, if the king limits the province of the judges, the prophet limits that of the king. The king is commanded in Deuteronomy “that he not go aside from the commandment right or left” (Deut 17:20), and Ran endorses Rashi’s explanation: “even a minor command given by a prophet” (*aflu `al mišvah qalah shel navi*).⁹ The king can override the judge, but the prophet overrides the king. However, if the prophets limit the king, the judges limit the prophets. The judges determine the legal framework in which the prophets work, and rule who is a true prophet and who a false one. Moreover, “the judges are not subjugated to the prophets regarding the judgment of the Law” (*eyn ha-shofetim meshu `badim la-nevi'im be-mishpat ha-torah*).¹⁰ The prophets can command the king, but cannot command the judges. The king is required to obey the prophets, but the judges are not. Thus, there are checks on the prophets, as there are on the king and the judges. Each branch checks and is checked: the king checks the judges and is checked by the prophets; the judges check the prophets and are checked by the king; and the prophets check the king and are checked by the judges.

These constitutional checks and balances envisioned by Ran are not precisely equal or symmetrical, for he holds that the balance of government should be tipped in favor of the judges. Thus, in describing the sin of the people of Israel in demanding a king from Samuel, Ran does not only say that they wanted “the main part of the judgment” (*iqqar ha-mishpat*) to be in the hands of the king, but also that they wanted “the main part of government” (*iqqar hanagatam*) to be in his hands.¹¹ He thus affirms the primacy of the judicial branch over the executive branch in the governmental system as a whole.

The Sovereign as Servant of the People

In any case, the sovereign, according to Ran, is limited. He is not involved in the work of the legal courts, except in times of emergency; and he is not free to command what he wills, but must heed the commandments of the Torah, even the minor injunctions of a prophet. The reduced nature of the sovereign’s constitutional authority, according to Ran, is spelled out vividly

8 Ibid., 190 (2nd ed., 414).

9 Ibid., 202-203 (2nd ed., 444). The prophet also anoints the king (ibid., 201; 2nd ed., 441).

10 Ibid., 203 (2nd ed., 444).

11 Ibid., 193, 201 (2nd ed., 419, 441).

in his interpretation of Deut 17:20: “that his [= the king’s] heart not be lifted up above his brethren.”¹² This commandment concerning pride is stated with explicit reference to the king, but Ran, following Nahmanides (*Commentary on Pentateuch*, ad loc.), rules that it is in fact binding on everyone. Now, if it is binding on everyone, asks Ran, why is it formulated with particular regard to the king? He answers as follows:

In my opinion, the king has a distinctive feature because of which it is more pertinent for him not to lift up his heart on account of his kingship than it is for other human beings not to lift up their hearts on account of their respective virtues. It is known that kingship is not an essential quality of the king, but something given to him by God or by the people for the sake of the welfare of the people [*le-šorekh tiqqun ha-`am*], not for the sake of his own welfare [*lo’ le-šorekh tiqqun `aşmo*]. This is what [King] Solomon said in his wisdom: “Better is a poor and wise child than an old and foolish king...” [Ecc 4:13]. This means that kingship is not an essential quality of the king, but an attribute granted to him for the sake of the general welfare [*le-šorekh tiqqun ha-kelal*]. Therefore, it not proper for the king to see himself as a ruler or governor over the people, but as their servant, serving them for the sake of their welfare [*lo yir’eh aşmo ke-moshel ve-shaliṭ `al ha-`am, aval ke-`eved elehem, le-šorekh tiqqunam*]. In this regard it is said in *b. Hor.* [10a]: “You think I have given you rulership? I

12 Ibid., 202 (2nd ed., 442). The entire passage (beginning with “*lefi da`ati*” and ending with “*lo’ tiqquno*”) is lacking in early printed editions of *Derashot ha-Ran* (Venice 1596 and others), but found in the manuscripts. According to Feldman (ibid., 202 n. 114), it was deleted “apparently by the censor.” If he is right, this would be a striking case in which a Hebrew book was censored in Europe not for religious reasons (i.e., for a perceived anti-Christian sentiment) but for political ones (i.e., for a bold democratic idea). However, it is possible that the passage was omitted by a copyist’s error. The first word after the omitted passage is “*u-lefikhakh*,” which is similar to the beginning of the omitted passage, a fact that suggests omission due to homoioteleuton.

The quotation from Rabbi Jonah Girondi’s lost *Megillat Setarim* is known only from this passage. It is unclear where the quotation stops (e.g., it may stop after the first sentence); and it is also unclear if it is verbatim or paraphrastic. Another quotation from *Megillat Setarim* is found in Ran’s *Commentary on b. Ned.* 81a, s.v. *davar zeh*.

have given you servitude! – as it is said, ‘And [the old men] spoke unto [King Rehoboam] saying, If thou wilt be a servant unto this people’ [1 Kgs 12:7]!”

This is what [King] David, peace be upon him, intended when he said: “Lift up your heads, O ye gates, yea, lift them up ye everlasting doors, that the King of glory may come in! Who then is the King of glory? The Lord of hosts, He is the King of glory” [Ps 24:9-10]. On these verses wrote Rabbi Jonah [ben Abraham Girondi], may his memory be a blessing, in his book *Megillat Setarim* [“Scroll of Secrets”]: “All mortal kings do not rule over their glory but it rules over them. For according to how much glory the multitude wants [*mah she-yirṣeh he-hamon*] to give them, such is the extent of their kingship; and if the multitude wants to remove all glory from them, their kingship is removed from them entirely. Thus, they do not rule over their glory, but it rules over them” ...

Now, since the glory of the king and his kingship are not for the sake of his own welfare [*eyn...le-tiqqun `ašmo*] but only for that of the welfare of the people [*raq le-tiqqun ha-`am*], it is more pertinent for him not to lift up his heart on account of his kingship than it is for the sage not to lift up his heart on account of the wisdom he has acquired... Moreover, it is more pertinent for him not to lift up his heart on account of his kingship than it is for one of the multitude not to lift up his heart on account of the wealth and possessions he has amassed... This is because what is primarily intended in kingship is first and essentially the welfare of the people [*tiqqun ha-`am*], not the welfare of the king [*lo’ tiqquno*].

Ran’s egalitarian or democratic views about the monarchy are unequivocal. The king receives his kingship from God or *from the people*, and receives it not for his own benefit but for that of *the people*. A poor child who is wise is better than a foolish king, because wisdom is better than foolishness, and whether one is poor or a king is irrelevant to one’s essence as a human being. The king is nothing but an individual fulfilling a public function. He is a functionary, a servant – the servant of the people. The source of his kingship and his glory is not in himself but in the people. If they will it, he is king; if they do not, he is not. This is, in effect, “democracy” – the rule of the people (*ha-`am*). The sovereign’s rule is dependent on the will of the people (*mah she-yirṣeh he-hamon*).

They can vote him out – or run him out! Thus wrote Ran in the middle of the fourteenth century – not many meters away from the palace of the King of Aragon in Barcelona.

The interpretation of Ps 24:9-10 that Ran quotes from a lost work of Rabbi Jonah Girondi is highly suggestive, and raises the question of the precise extent of the influence of Jonah on Ran's views about monarchy. Since we do not possess Jonah's book, the question cannot be easily answered. The word "glory" in Jonah's interpretation is manifestly used in the sense explained by Aristotle in his *Nicomachean Ethics*, V, 6, 1134b: that is, glory is the monarch's recompense or reward that, in turn, reflects his popular support.¹³

Nobody should be proud, argues Ran, but if a student does well on a difficult test, he or she has more right to be proud than does a king, president, or prime minister; the student succeeded on the test because of his or her own intellectual prowess, while the sovereign is in office not by virtue of his or her own accomplishments but by virtue of the will of the people he or she serves. Even a successful businessperson, who has not studied the sciences, has more right to be proud than does a sovereign, since he or she has succeeded because of his or her own skill, while the sovereign's success is contingent on the popular will, a will that could change tomorrow. Since, then, the king has less right to be proud than do the sages, the wealthy, and most everyone else, the command concerning pride is appropriately formulated regarding him.

Ran's premise that kingship is not an essential quality of the individual is borrowed from Maimonides, *Guide of the Perplexed*, III, 54. Maimonides teaches there that kingship, unlike wisdom, is not essential to the human being qua human being; and, unlike physical strength, it is not essential to the human being qua animal. It is merely an external "relationship."¹⁴ Ran adds:

13 Cf. Thomas Aquinas, *On Kingship: To the King of Cyprus*, trans. G.B. Phelan and I.T. Eschmann (Toronto: The Pontifical Institute, 1949), 30-31 (translation modified): "Since...it is the king's duty to seek the good of the multitude,...it is fitting...to consider wherein a suitable reward for a good king is to be found. By some this reward was considered to be nothing other than honor and glory... [But] nothing... is more perishable among human beings than the glory and honor of human favor, since it depends upon the report of human beings and their opinions, than which nothing in human life is more fickle. This is why the prophet Isaiah calls such glory 'the flower of the grass' [Isa 40:6]" (I, 7).

14 Maimonides, *The Guide of the Perplexed*, trans. S. Pines (Chicago: University of Chicago Press, 1963), 634-36. Maimonides, unlike Ran, does not distinguish between the wealthy individual and the king.

this external relationship is for the sake of the people, not for the sake of the king – not for the sake of the king’s career, but for that of the people’s welfare. A poor and wise child is better than an old and foolish king, for wisdom is an essential quality of a human being, while kingship is not. The glory of the politician is not intrinsic but contingent.

Let us sum up Ran’s distinctive position: The sovereign should not see himself as “ruler” or “governor” but as servant. The king is king in order to serve the people, and his service is to maintain the public welfare, order, and security. He serves by virtue of the will of the people, and if their will changes, he is no longer king.

Plato, Aristotle, and Ezekiel

The contrast made in Ran’s comments between a king who is the servant of the people (“welfare of the people”) and the people who are servants of the king (“welfare of the king”) recalls the distinction made by Plato in his *Republic* between a genuine *arché*, which aims at the benefit of the people, and a “tyranny,” which aims at the benefit of the tyrant (I, 338e, 345d-e; VIII, 562c-e, 565a-566d; cf. *Statesman* 302e). Illustrating this distinction, Plato contrasts shepherds who seek the benefit of the sheep and those who seek their own benefit (*ibid.*, I, 343b, 345c-e).¹⁵ This metaphor is found already in Ezek 34:2: “Son of man, prophesy against the shepherds of Israel, prophesy, and say unto them, even to the shepherds: ‘Thus saith the Lord God: Woe unto the shepherds of Israel that have fed *themselves*! Should not the shepherds feed *the sheep*?!’” (cf. Jer 23:1-6).

Aristotle, in his *Politics*, III, 7, 1279a-b (cf. *Nicomachean Ethics*, I, 2, 1094b, and *Rhetoric*, I, 8, 1365b-1366a), distinguishes between correct governments, which work for the common good, and deviant ones, which work for the good of the rulers.

15 Thrasymachus, who argues in Plato’s dialogue that “justice is the advantage of the stronger,” holds that shepherds justly seek their own benefit, not that of their flock. Cf. Rabbi Abraham Ibn Daud, *Emunah Ramah* (“The Exalted Faith”), Hebrew trans., Rabbi Solomon Ibn Labi, ed. S. Weil (Frankfurt am Main: Typografische Anstalt, 1852), II, 4, 2, p. 61: “Although the king in a certain sense serves the people and goes to war for them, and the shepherd serves the flock, it is for the benefit of the king and the shepherd.”

Averroes, in his *Commentary on Plato's Republic*, VIII, 562c-e, distinguishes between the intention of "the virtuous royal arts," which is for "the benefit of the citizens" (*to'elet ha-anashim ha-medini'im*) and their "happiness" (*hašlahah*), and the intention of the tyrant, which is for his own personal benefit. The true king works for the sake of the happiness of the people, the tyrant works to satisfy his own lusts.¹⁶

Aristotle's distinction between good and bad governments is developed by Thomas Aquinas in his *De Regno*, I, 1. He explicitly interprets Aristotle in terms of Ezekiel's contrast between the good and bad shepherds.¹⁷ Aristotle's distinction is developed also by William of Ockham in *The Dialogues*, Part 3, Tract 1, Book 2, Chapter 6.¹⁸

Two generations before Averroes and four generations before Aquinas, Rashi had already understood Ezek 34:2 to mean: "Is not the law of the shepherds to provide for the sheep, not for themselves!" (*ha-lo' mishpat ha-ro'im lir'ot et ha-son, ve-lo' lir'ot et ašmam*).

Plato, Aristotle, Rashi, Averroes, Aquinas, and Ockham wrote what they wrote, and at least some of them directly influenced Ran. However, Ran goes beyond them in his repeated insistence that the king should not fancy himself a ruler, but "the servant of the people."

"The Law of the Kingdom is Law"

It may be remarked parenthetically that Ran's well-known interpretation of the Rabbinic principle "the law of the kingdom is law" (*dina de-malkhuta dina*) can be at least partially understood in the light of his democratizing views on the constitutional powers of the sovereign.

The principle "the law of the kingdom is law," recorded in the name of the amora Samuel (*b. Ned. 28a, Giṭ 10b, B. Qam. 113a-b, B. Bat. 54b-55a*), means that the law of the land is in general binding, even when it differs from Jewish law or

16 *Averroes' on Plato's "Republic,"* trans. Ralph Lerner (Ithaca: Cornell University Press, 1974), 113-15. Hebrew text: *Averroes' Commentary on Plato's "Republic,"* ed. E.I.J. Rosenthal (Cambridge: Cambridge University Press, 1956), 85-86. The Arabic original of Averroes' Commentary is lost.

17 Aquinas, *On Kingship*, 6-9. Cf. his *Summa Theologiae*, I, 81, 3.

18 William of Ockham, *The Dialogue*, trans. John Kilcullen, Part 3, Tract 1, Book 2, Chapter 6, in *Medieval Political Philosophy: A Sourcebook*, ed. J. Porens and J.C. Macfarland, 2d ed. (Ithaca: Cornell University Press, 2011), 412-13.

in some cases contradicts it. However, it is not explicit in the rabbinic sources whether this principle applies only to Gentile kings or also to Jewish sovereigns in the land of Israel. In his commentary on *b. Ned. 28a, s.v. be-mokhes ha-omed me-elav*, Ran rules in favor of the restrictive interpretation. He explains: “It is written in the glosses of the Tosafists that he [= the amora Samuel] affirmed that ‘the law of the kingdom is the law’ only with regard to pagan kings because the land is his and he can say to them, ‘if you do not fulfill my commandments I will expel you from the land’; but not with regard to the kings of Israel, for all Israelites are partners in the Land of Israel [*kol Yisra’el shuttafin bah*].”¹⁹

According to Ran, therefore, the principle “the law of the kingdom is law” presupposes an undemocratic situation, and thus is not valid in the Jewish polity, where all citizens are equal partners and the king is not master but servant.

Conclusion

Ran’s sovereign was constitutionally limited in his powers. He was responsible for the peace and security of the *polis*, but had no role in the judicial process – except when urgent considerations of peace and security warranted his intervention. He was required to observe carefully the commandments of the Law, including sundry orders given him by prophets. His rule was contingent, dependent on the will of the people. Indeed, he was enjoined to see himself not as the ruler or governor of the people, but as their servant. These positions of Rabbi Nissim of Girona cohere with his various liberal democratic tendencies.

19 The gloss cited by Ran is not found in our editions of *Tosafot*. Rabbi Joseph Habiba, who studied under Ran and under Ran’s student Rabbi Hasdai Crescas, argues further that the subjects in a pagan kingdom are the property of the king, who acquired them in war, and have the status of slaves; but the kings of Israel, whose power is limited by the Torah, are prohibited to act in accordance with the despotic vices recounted by Samuel the Prophet in 1 Sam 8:9-18 (*Nimmuqe Yosef* on Alfasi, *Yev. 16a, s.v. garsinan*, and *Ned. 10a, s.v. ve-ha’ amar*).