

Compromised, Immune: Are Rulers Exempt from Prosecution?

Adapted from the writings of Dayan Yitzhak Grossman

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The Associated Press reports:

The Supreme Court on Wednesday agreed to decide whether former President Donald Trump can be prosecuted on charges he interfered with the 2020 election...

The court said in an unsigned statement that it will consider “whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.”

The Supreme Court has previously held that presidents are immune from civil liability for official acts, and Trump’s lawyers have for months argued that that protection should be extended to criminal prosecution as well.[1] In this article, we discuss the topic of civil and criminal immunity for a head of state or head of government from a Torah perspective. Our treatment will not be thorough, but it will consider various perspectives on the question.[2]

The Mishnah states:

A king may neither judge nor be judged. He may neither testify nor be testified against.[3]

The Gemara qualifies:

Rav Yosef said: They taught this only with regard to kings of Yisrael, but kings of the House of Dovid may judge and be judged.

The Gemara then proceeds to make clear that ideally, all kings should be subject to the judgment of the court, and the reason *malchei* Yisrael are not is the disastrous consequences that may ensue from attempting to compel such arrogant and unpious sovereigns to defer to the court, citing just such an incident that occurred when Yanai Hamelech was summoned to the Sanhedrin by Shimon ben Shetach.[4]

The Rambam codifies these rules as follows:

Malchei Bais Dovid, though they may not be seated in the Sanhedrin, they may sit and judge the people. And they may be judged if there is a case against them. But *malchei* Yisrael may not judge nor may we judge them, because they do not humble themselves to the words of the Torah, and peril may result.[5]

R’ Dovid ibn Zimra (the Radvaz) was asked whether a king in Eretz Yisrael who killed inadvertently (*retzichah beshogeig*) is exiled to an *ir miklat* (City of Refuge). He responds that the question is not applicable to *malchei* Yisrael; because they may not be judged, there can be no judgment of their guilt that would require them to be exiled. With regard to *malchei* Bais Dovid, he concludes that although they may be judged, they nevertheless would not be exiled: The Gemara says that when a *rebbe* is exiled, his yeshiva is exiled with him, and when a *talmid* is exiled, his *rebbe* is exiled with him,

as it is stated, “and he shall live,”[6] which implies: Provide him with

arrangements that will enable him to live.[7] (As the Rambam explains: The life of those who possess wisdom and those who seek it, without the study of Torah, is considered like death.[8])

Based on this, the Radvaz argues that exiling a king is impossible:

If we would say that the king is exiled, we would need to exile along with him all his servants, horsemen, and horses, and all his chariots, and all Yisrael, because they are all his servants, in order to fulfill for him “and he shall live.” Since this is impossible, we do not exile him.[9]

R’ Yosef Babad (the Minchas Chinuch) disputes the Radvaz’s contention that a king of Bais Dovid cannot be exiled on a number of grounds, including that a king who commits murder is immediately deposed, and he would certainly be subject to exile as a civilian.[10]

One might be tempted to make the opposite argument, that a king cannot be exiled because the people need him, but it is actually explicit in the Mishnah that a need of the people is not sufficient grounds for exempting a murderer from exile:

And he does not leave the *ir miklat*...even if the Jewish People needs him, even if he is the head of the Jewish army like Yo’av ben Tzruyah (“upon whom the salvation of the entire Jewish people may depend”—Rambam[11]) he does not ever leave.[12]

In any event, the Radvaz concludes his discussion by noting that it is entirely theoretical and without practical ramification, “for no one of Bais Dovid will reign until *Mashiach Tzidkeinu* will come, may he be revealed swiftly in our days, amen.” He is either categorically ruling out any possibility of Jewish monarchy before the coming of *Mashiach* or assuming that any such monarchy, if it will not be of Bais Dovid, will automatically fall under Chazal’s enactment regarding *malchei* Yisrael.

In another context, the Rambam rules:

We never remove a person from a position of authority within the Jewish People unless he became corrupt (*sarach*).[13]

He does not explicitly extend this to kings, but R’ Refael Yosef Chazan (the Chikrei Leiv) takes for granted that even a king is to be dethroned if he becomes corrupt, and he assumes that the only reason the idolatrous *malchei* Yisrael and *malchei* Bais Dovid were not removed is because the good people of the time did not have the power to do so. He does not describe the process by which a king may be found guilty of corruption, and it is unclear whether subjecting a *melech* Yisrael to this process would be possible subsequent to the Chachamim’s enactment that *malchei* Yisrael are not judged. (The idolatrous kings he is discussing reigned during the *Bayis Rishon* era. The incident of Yanai and Shimon ben Shetach occurred later, during the period of *Bayis Sheini*).[14]

[1]Mark Sherman. Supreme Court sets April arguments over whether Trump can be prosecuted for election interference. AP News. <https://apnews.com/article/supreme-court-trump-immunity-election-interference-trial-ff4b251967b4f1ae85bd01a0db24931f>.

[2]For an extensive discussion, see R’ Yehudah Zoldan, *Malchus* Yehudah

VeYisrael: *Hadachas Manhig Shehursha*.

[3]Sanhedrin 18a.

[4]Ibid. 19a.

[5]Hilchos Sanhedrin 2:5.

[6]Dvarim 4:42.

[7]Makos 10a. The Gemara and the Rambam invoke this principle with respect to the *talmid* who is exiled, but the Radvaz apparently assumes that it underpins the rule governing the case of the exiled *rebbe* as well.

[8]Hilchos *Rotzeiach* 7:1. Cf. R' Asher Weiss, *Chayei Ba'alei Hachochmah*, Mas'ei.

[9]Shu"t Radvaz *cheilek 2 siman* 772. This argument of the Radvaz, that the entire nation must be available to serve the king's interests, is rooted in the traditional political conception of individuals as subjects, as opposed to the modern one of citizens, a distinction made by American Revolutionary War historian David Ramsay: "A citizen of the United States means a member of this new nation. The principle of government being radically changed by the Revolution, the political character of the people was also changed from subjects to citizens. The difference is immense. Subject is derived from the Latin words *sub* and *jacio* and means one who is under the power of another; but a citizen is a unit of a mass of free people, who, collectively, possess sovereignty." (A Dissertation on the Manners of Acquiring the Character and Privileges of a Citizen)

[10]Kometz *Lamincha* 410.

[11]Hilchos *Rotzeiach* 7:8. Cf. Meshech Chochmah *ibid.*; R' Asher Weiss, *Histaknus Lehatzalas Chaveiro Uvedin Chayei Sha'ah Behatzalas Nefashos*.

[12]Makos 11b.

[13]Hilchos *Klei HaMikdash* 4:21.

[14]Chikrei Leiv O.C. *cheilek 1 siman* 124 s.v. *Ve'od kasheh bedivrei haRambam*.