

Biblical Roots of Separation of Powers

Peter
Barenboim

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Peter Barenboim

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**For the design of the book was used a drawing by G.B.Tiepolo
“Head of a Beared Man”**

*(Red chalk washed with water on white antique laid paper, 285 x 205 mm.
Fogg Art Museum, Harvard University Art Museums,
Frances H. Burr Memorial Fund)*

***Dedicated to my dear friend,
New York lawyer,
Donald S. Rice***

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Deuteronomy, the Old Testament

And thou shalt come unto the priests the Levites, and unto the judge that shall be in those days, and enquire; and they shall shew thee the sentence of judgment: (17:9)

And thou shalt do according to the sentence, which they of that place which the Lord shall choose shall shew thee; and thou shalt observe to do according to all that they inform thee: (17:10)

According to the sentence of the law which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do: thou shalt not decline from the sentence which they shall shew thee, *to the right hand*, nor *to the left*: (17:11)

And the man that will do presumptuously, and will not hearken...unto the judge, even that man shall die: and thou shalt put away the evil from Israel: (17:12)

Thou shalt in any wise set *him* king over thee, whom the Lord thy God shall choose: *one* from among thy brethren shalt thou set king over thee: thou mayest not set a stranger over thee, which *is* not thy brother (17:15).

But he shall not multiply horses to himself... (17:16)

Neither shall he greatly multiply to himself silver and gold. (17:17)

That he may learn to fear the Lord his God, to keep all the words of this law and these statutes, to do them: (17:19)

That his heart be not lifted up above his brethren, and that he turn not aside from the commandment, *to the right hand*, or *to the left*: to the end that he may prolong *his* days in his kingdom, he, and his children, in the midst of Israel. (17:20)

The Declaration of Independence

The History of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States.

He has refused his Assent to Laws, the most wholesome and necessary for the public Good.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.

He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:

For depriving us, in many Cases, of the Benefits of Trial by Jury:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government...

We, therefore, the Representatives of the UNITED STATES OF AMERICA, in General Congress, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, Free and Independent States... And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

American Introduction

When I had a chance to participate in the Memorial Conference, "The Bible and Human Rights" dedicated to the memory of Father Alexander Men that took place in September, 1997, in Moscow the Russian National Library of Foreign Literature, I was very much impressed by the high level of theological analyses that was characteristic of the presentations at that conference organized by the Director of the Library Mrs. Ekaterina Genova in cooperation with a Moscow attorney Peter Barenboim.

I would like to specially mention the book by Peter Barenboim *The World First Constitution. Biblical Roots of the Independent Judiciary* distributed among the participants of the conference. That book contained two principal ideas about the Biblical roots of the separation of powers doctrine and about the first written Constitution that dated back to the Hebrew Bible called the Old Testament in the Christian world. It cogently argued that about 3000 years ago the constitution written by the Judge and Prophet Samuel, when the institute of monarchy was introduced in

Ancient Israel, already introduction limitations to the power of the executive ruler, namely the king.

This idea formulated by P. Barenboim also has linguistic reasoning behind it, because the word “constitution” conveys the meaning of the old Judaic word *mespat*, that was used to describe the Judge Samuel’s text and document, much better than the word “manner” (rights and duties) that is used in some of the English versions of the Bible. Of course, P. Barenboim’s concept requires a serious discussion, but it is plausible that Russia – even after such a lengthy break in biblical studies – can put forward fresh ideas in this field.

“A Dawn in the East” is important for modern evaluation of Biblical ideas that are sometimes misunderstood and misinterpreted in the West. In the West one can today come across a number of pseudo-scholastic studies that argue that the roots of racism and violence can be found in the Hebrew Bible, the Old Testament.

However the Hebrew Bible – Old Testament is the repository of the highest ethical ideals and legal standards of the ancient world. For almost 3000 years, it has undoubtedly been the most important and influential book for humankind. It has laid the basis for the world’s three greatest religions: Christianity, Judaism and Islam. The motto on the entrance wall of the United Nations Headquarters is taken from the Prophet Isaiah who declared so long ago that justice is above authority and God adjudicates among the nations so that “people shall beat their swords ploughs-

hares, their spears into pruning hooks. Nation shall not lift sword against nation; they will no longer learn the arts of war”.

Without the Hebrew Bible – Old Testament one cannot understand the history of Law and Political science, of Art and Literature, of Painting and Music. We live in the world where mass media proliferates books on sport, sex and celebrities’ lives. However the Bible still remains the most widely distributed and read, and studied book worldwide.

One cannot deny the influence of the Holy Scriptures on the formation of the fundamental principles of Law and Justice. The document for all times, the Bible was used to support the notion of the “divine right of a king”. But it was said “abusus non tolit usum” and the Bible speaks of eternal values that had inspired the modern ideas of human rights and of human dignity.

I warmly welcome the publication of Peter Barenboim’s book in English as the English speaking readers will find here quite interesting and new ideas.

Ephraim Isaac
Director of the Institute of Semitic Studies
Princeton University

Theological Introduction

It is not by chance the book by Peter Barenboim was written in Russia in this particular time. It is an example of the deep interest in Bible that has awoken in our country. There are few people in the West who know that the full version of the Old Testament was published in Russian only in 1879. Before that the Bible existed only in the Church Slavonic language and that language since the epoch of Peter the Great (early XVIII) was understood only by the highly educated people and clergy – that is – by very few people.

The Bible was such a rare book that when in 1812 during the Napoleon intervention, the Russian Tsar Alexander the First, wanted to read the Holy Script, there was not a single volume in the library of his St-Petersburg Palace. In the period between 1879 and 1917 the full text of the Bible that finally became available, was also issued rather seldom and in small prints. In the Soviet period the book was officially prohibited. Even under Gorbachev, when in 1988 I was returning from my first trip abroad a KGB of-

ficer on the border asked me if I was bringing a Bible with me – at the time it was still forbidden.

Only in the last decade of the 20-th century – and also thanks to the personal contribution of Peter Barenboim who came up with a proposal of providing a free copy of the Bible to all Russian prisons (as well as to libraries of major cities and universities) and carried out this project together with the Biblical Society of Russia – the Bible began to be spread all through the territory of Russia. Now the prints are big and the demand is big also. For the first time in its history Russia really started reading and – accordingly – analyzing the Bible. This book by Peter Barenboim is a good example of that.

Father George Chistyakov
Member of the Board of the Bible Society of Russia

Russian Introduction

It was not until the *perestroika* years, the latter half of the 1980's that many Soviet lawyers began to realize that a democratic form of state power is only possible when separated into the judicial, the legislative and executive branches.

The entire legal system of Russia needed a renovation, and the very backbone of that renovation was to turn the Soviet judicial branch – once no more than an extension of the executive branch – into a separate and independent judicial power. To achieve this goal, a substantially up-to-date legal framework was established in the 1990's. The independence of the judges was secured in the Constitution of the Russian Federation. The fundamental acts of the judicial reform, such as the laws on “The Status of Judges in the Russian Federation” and on “The Judicial System of the Russian Federation”, set up a legal basis to guarantee such kind of independence.

However, politicians, lawyers and security officials in Russia happened to be highly influential people, and found

the very nascent idea of an independent judiciary totally unacceptable. Former Russian Procurator-General went as far as to call the independence of judges a detrimental idea standing in the way of prosecuting criminals.

The appearance at the height of the above mentioned debate of Barenboim's study, "The Biblical Roots of the Independence of the Judiciary" was a convincing argument in favor of the practical implementation of the separation of powers doctrine. The strict logic of Peter Barenboim's work has exposed – and equally convincingly for both Christians and followers of any other confession, as well as for committed atheists – the historic pattern whereby a separated judicial power had evolved as an instrument to satisfy the public hunger for justice. And it was this branch of power that, according to the Bible, gave rise to the formation of the state power in general.

The selection by Moses of "men of truth, hating covetousness," into a separate category of people authorized to settle the disputes between their compatriots signified the birth of the judiciary as an independent institution. It would be appropriate to note that the moral criteria that Moses applied while selecting the first judges still retain their importance in our time. A brief introduction is not sufficient to discuss all the aspects of Barenboim's study. Nevertheless, it is noteworthy that he succeeded in proving, particularly while analyzing the dramatic relationship between Judge Samuel and Saul, the first King of the Israelites – long before Locke and Montesquieu – that the idea of an

independent judge as the guardian of the rule of law did exist and found practical implementation in the public consciousness.

I hope that Peter Barenboim as a scholar of law will continue his research into this vital issue of our time – the issue of a correlation between the biblical roots of law (both historical and moral ones) and the present day.

Vladimir Radchenko
First Vice Chairman,
Supreme Court of the Russian Federation,

Dutch Introduction

It was in the winter of 1991 that I met Dr. Peter Barenboim for the first time in Moscow. At the time I worked at the Leiden University, we had a number of projects in Russia together with the World Bank and IMF, and Dr. Barenboim was actively involved in many of them, for instance, in developing of bankruptcy and banking legislation for the first time after 80 years break.

I remember also disputes inside Russian academic community around his idea to work out a Commercial Code alongside with the traditional Civil Code for Russia. Dr. Barenboim (together with the Chairman of the High Arbitration Court of Russia Dr. Veniamin Yakovlev) even was appointed by a Decree of the Russian Government Co-Chairman of the Working Group that was engaged in preparing the draft of the Commercial Code of Russia. But it was decided to choose for a unitary model, i.e., uniting civil and commercial law provisions into one single Civil Code – following the Italian, Québec, and Dutch models.

So I knew him as business lawyer, litigator, Vice Pres-

ident of the Russian Bar Association and as a researcher in the field of constitutional and business law. But I was really surprised to learn that as from the middle of nineties he started to publish in Moscow articles and books with a constitutional analysis of the Old Testament.

The present book is his first publication in English in this field. (Banking experts knew his booklet on a different subject with a preface by the former Chairman of the Federal Reserve System Mr. Paul Volcker: “Problems of Banking Reform and Independence of the bank of Russia”).

Dr. Barenboim has already written several publications devoted to his favorite subject – the Bible as a source of inspiration for law and justice. Following his earlier publication in Russian on “3000 Years of the Doctrine of Separation of Powers. Souter Court” (Moscow 1996, 2003), he tries to elaborate this theme in the present publication. Dr. Barenboim seeks to demonstrate that the independence of the judiciary – and therefore, its separation from the administrative power – was already established by Moses following the advice of his father-in-law Jethro (Exodus 18). A further issue that Barenboim is eager to demonstrate is that – the Bible already knew something, which can be regarded as a precursor of a modern Constitution. However, the main difference, of course, is that law in the Bible is deemed to be of divine nature and that observing the law is considered obeying the will of God. Separation of state and church was non-existent and even unthinkable in biblical times.

When Barenboim is saying that the impeachment of Nixon was the first in history since King Saul he, probably, overlooked the importance of an earlier Dutch example of impeachment, when in 1581 the Spanish King was not recognized as a King with reference to the Biblical rights and duties. Particularly, the General States of the United Provinces of the Low Countries state the following in its Declaration:

“As it is apparent to all that a prince is constituted by God to be ruler of a people, to defend them from oppression and violence as the shepherd his sheep; and whereas God did not create the people slaves to their prince.” As Oliver Thatcher mentioned, this Declaration — the first in modern times — brings forward prominently the great idea that rulers are responsible to the people and can be deposed by them. The importance of this idea is the center of the development of constitutional and republican government. (Internet Modern History Sourcebook (harsall@murray.fordham.edu)).

In this regard, it is important mentioning the characteristics of the duties of a king towards its people in the biblical Constitution as contained in Psalm 72 from the Book of Psalms of the Old Testament. However, the difference with modern constitutions is that the old Hebrew Constitution addresses the rulers, whereas modern constitutions envisage to create independent rights for citizens, on which they can rely independently from the discretion of the rulers.

Apart from constitutional law – Peter could also have referred to Exodus 22, verse 28, which requires *inter alia*

respect for the monarch – other branches of law are also often described in detail but often without a certain level of abstraction.

Another most interesting subject for Dr. Barenboim's next book could undoubtedly be civil law in the Bible. The Tenth Commandment (Exodus 20, verse 17) sets the general rule of protection of ownership; this general rule has been elaborated in Exodus 22, where more extensive rules are provided for the protection of property, including rules of evidence. Another interesting example is about the purchase of land – apparently, at the time plots of land could already be owned by individuals rather than the community or clan. This can be found in the story about the purchase of a grave by Abraham for his wife Sarah, including the negotiations authentication by witnesses (see Genesis 23). As regards negotiations we already learnt from the story about Sodom and Gomorrah that Abraham was a skillful negotiator, even with God.

But most of all it would be worthwhile to examine the concept of justice, which is reflected in almost every part of the Bible. This concept occurs 243 times in the Old Testament, often in combination with the concept of law, and apparently giving it the meaning of justice in individual cases. It is important to mention that after the reign of the first Israeli King Saul, an implementation of those concepts has been turned from Judges to kings. In particular, this is well expressed in Chronicles, Book 1, Chapter 18, Verse 14: "When David became king over all of Israel, he main-

tained law and justice amongst his entire people.” In other words, one could say that King David established a *Rechtsstaat* (a law based state), and became a king who ruled in accordance with the requirements of Psalm 72.

May the author of this challenging book be inspired in his work by the Psalmist when the latter tells: “The mouth of the righteous speaks wisdom, his tongue speaks of law” (Ps. 37, verse 30).

Dr. Wim A. Timmermans
Leiden, The Netherlands

*We grew up through millenniums
and millenniums grew up through us*

Eugene Rashkovsky

I. Biblical Origins of Separation of Powers Doctrine

Separation of powers as a philosophical, political and – most important – constitutional doctrine has deep historical roots. Its authorship is usually ascribed to John Locke and Charles de Montesquieu. Other scholars go further back in time, referring to the wise men of antiquity, such as Aristotle, Plato, Epicurus and Polibius. We can confidently speak of separation of powers only in a situation where the judiciary is separated, fully or partially, from the executive and legislative branches of government and enjoys sufficient independence. Yet another criterion of separation of powers is whether the actions of a head of state or of the executive branch of government fall within the jurisdiction of the courts. The most important doctrine of the divine origin of the judiciary as a basis of its independence from the king is formulated in Exodus and in The

Book of Judges of the Old Testament. For many centuries, divine origin of the royal power was the most important doctrinal basis of monarchical power; it was therefore recollected hundred thousands of times more often than similar origin of the judiciary.

In ancient Israel the main role belonged to judges who had distinguished themselves thanks to their ability while the entire period was named the Epoch of Judges and described in the Book of Judges of the Old Testament. Separation of judgment from tribal chiefs, councils of elders and popular assemblies was the first prototype of separation of powers. As for the monarchy, it was not established until several centuries later, with limitations stipulated by Judge Samuel who used Judge Moses' ideas about the duties of kings to a people.

It is interesting to know that the movie "The Ten Commandments" (1956) overcame by number of admissions (131 million) and by profit in dollars (770 million) such films as "Titanic" and "The Godfather" (twice!) and keeps its position in the list of the five best movies of all times. (Encyclopedia Britannica Almanac 2004, London, 2003, p.875). After the Second World War, mankind again tried to find spiritual roots and basics of freedom in the history of creation of the first constitutional principles of biblical legal system.

The Hebrew Bible traditionally considers that the laws of the Bible are applicable to man through his own understanding and ability. A man subjects himself to the Judges as he might have submitted himself to the will and the laws

of God, not of the State – or of the King. The King himself is another subject, also bound by the same laws and same Covenant. The integrity and independence of a man – with his loyalty to God, not to the State, is a fundamental operating premise. The Biblical concept of independent judiciary is simply a derivative of the point above.

The Ten Commandments, brought by Moses to his people from Mount Sinai:

— The seventh day is the Sabbath of the Lord thy God: in it thou shalt not do any work.

— Honor thy father and thy mother.

— Thou shalt not kill.

— Thou shalt not steal.

— Thou shalt not bear false witness against thy neighbor.

— Thou shalt not covet thy neighbor's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maid servant, nor his ox, nor his ass, nor any thing that is thy neighbor's.

I have cited above just seven of the Ten Commandments, those that laid the foundations of labor, criminal, family, due process, and civil law (the remaining three are of purely religious nature). All Israeli kings or aristocrats were subject to these rules.

The Judges of the Epoch of Judges and, at least, of the time of early monarchy were not responsible to the tribe leaders and to the first king. The following kings could not dictate the laws.

The king had no “law making” authority. The laws were found in the Old Testament. The judges administered those

laws, and they were independent of course, from tribal chief or the king. For instance, later interpreting of the laws was vested in the judicial body called the Sanhedrin composed 71 judges. The Talmud, that extensive collection of customs, traditions and laws which fills over 50 volumes, represents the record of the "oral tradition" handed down from the time of Moses. It codified during the period 200-500 CE. Many volumes set forth the civil and criminal laws-to which Hebrew are subject from the Epoch of Judges.

"Indeed the Book of Judges, naive though it is in some ways, is in another an essay on constitutional development, for it shows how the Israelites were obliged by harsh facts to modify their democratic theocracy to the extent of establishing limited kingship".¹

The Bible does not offer an expanded theory of separation of powers; such a theory was formulated in sufficiently complete form in the 17th and 18th centuries and was largely practically implemented at the end of the 18th century in the United States. There are no references to this kind of separation of powers in the Bible. I believe, though, that the doctrine roots back to the moment when its basic doctrinal thesis was clearly recorded in a written form, and not just to the period when it was finally formulated.

The Judges described in The Book of Judges and sub-

¹ Johnson P. A History of the Jews. N.Y., 1988, p. 48-49.

sequent books of the Old Testament were engaged in the practice of justice. Some of them combined this activity with the functions of priest, prophet, tribe leader or, at a time of war, that of military leader. Nevertheless the chosen leader is designated by the civil term "judge" that, according to the opinion of those who wrote this part of the Old Testament, is reflecting a most important function of such leader. The functions of the judiciary are not in this sense clearly distinguished from the other above mentioned functions, and we do not see the modern separation of powers there. On the other hand, we see from the text of the Bible that the judiciary was set up by God prior to the power of kings, and was by itself divine in origin.

Furthermore, towards the end of the Epoch of the Judges and the emergence of the first biblical kings we observe a direct opposition and open conflict between the Judge Samuel and the king Saul, which confirms the independence of the judiciary from monarchical power. Besides, we find there Samuel's passionate homily against unlimited royal power as a state institution. This proves that the text of the Old Testament formulates the most important theses of the doctrine of separation of powers.

A researcher of the doctrine of separation of powers cannot fail to note that its history is fragmented, and that the various periods of its development are locked within the framework of given historical epochs. The doctrine developed as it were in spurts, often without a direct link between a given period and previous or subsequent ones.

Thus the independence of the courts and separation of the judiciary from royal power, recorded in the Bible, directly impacted the American concept of separation of powers – but it could also have influenced the situation in Athens BC, where we find all the necessary elements of separation of powers. In turn, the state models of ancient Greece directly affected the model of separation of powers in ancient republican Rome. Later, the example of the states of antiquity made an impact on both the republican city states of Europe of the Renaissance times and of course on the Americans at the time of writing the Constitution of the United States.

The history of the doctrine of separation of powers must be considered not only as the development of the idea but also as that of practical implementation of that idea in reality.

One must take into account the fact that separate periods or episodes of the development of the doctrine can be independent of each other. It is also important to bear in mind the non-Euclidean parallelism of the ancient Greek and biblical lines of development. Sometimes the doctrine developed in fact in line with practical state activity, as in ancient Athens or Rome, and sometimes purely theoretically, as in the works of Locke or Montesquieu. For the history of the doctrine, concrete everyday activity of the Florentine Signoria of the 15th century or of the modern United States Senate is no less important than an academician's article or book especially devoted to the subject. Progress

cannot be equated with continual linear movement ahead – it sometimes involves stops or lateral movements or retreats. It is sometimes better and much more progressive to return to the starting point than to continue stubborn movement along an erroneously chosen path. That was what happened, e.g., in America after the earth-shattering events of the 1974 Watergate scandal, when the Americans largely moved back from the nascent “imperial presidency” to the traditional sources of the American concept of separation of powers.

I would like to use a big quotation from the article of Professor of Columbia University Louis Henkin which gave a green light for development of this research. He said:

«The Torah (legal rules from first five Books of the Old Testament – P.B.) and the US Constitution are both legal documents. That is not true of all Holy Writ. It is not true of all constitutions, even of some that pretend to legal character. Many constitutions are not prescriptive but are manifestos, exhortations, descriptions of what is or, at best, programs or promises. Being legal instruments, both the Torah and the Constitution have developed a jurisprudence, both have been interpreted by lawyers, by men of law <...>.

Both the Bible and the Constitution were binding on political authorities and have served as restraints on power. The king was subject to the Torah <...> powerful Presidents and powerful Congresses, we know, are subject to the Constitution <...> For those who were never confident as

to how majority rule squares with the political theory underlying the United States Constitution, it is interesting to note that majority rule had antecedents, if not origins, in the biblical prescriptions of majority rule among judges».¹

A leading constitutional law scholar, Professor Henkin wrote in the above mentioned article that the separation of powers, just as the principle of checks and balances, are the basic principles of American constitutionalism that correlate, without any particular strain, with the biblical separation of the powers of the king from those of prophet or priest, which in the final analysis served as an important curb on earthly political power.

It is clear from my correspondence with Professor Henkin that he confines himself to the question of separation of religious and secular powers because the precise meaning of the term “judge” does not appear to him to be clear – owing perhaps to the antiquity and incompleteness of the biblical text and the commentators’ various approaches to the Old Testament.

For Russian people who have always lived under the Constitutions lacking legal character and instead being as Henkin said, programs or promises, it is dramatically important to understand roots of real constitutionalism, first of all, its biblical roots.

¹ Henkin L. The Constitution and Other Holy Writ: Human Rights and Divine Commands. The Judeo-Christian Tradition and the US Constitution: Proceedings of A Conference at Anneberg Research Institute, 1987, p. 61, 62.

«Unfortunately, the people who come to power are always not the best people» said Nobel Prize poet Joseph Brodsky a few days before his death (Izvestya, January 30, 1996). It is a hopeless task to wait for the most conscientious, decent, honest and bright people to come to power; this task is not likely to be achieved and it does not correspond to the essence of the state power. A good constitutional scheme should be designed for the average people, bearing in mind that such people swiftly lose real self-estimation and capacity for self-criticism.

Thus separation of powers is the most important constitutional doctrine invented by mankind, which envisages constitutional balance for the always unbalanced ambitions of governmental officials.

In Russia, where traditions of democratically elected representative power are not highly developed, the point is usually made on separation of legislative and executive power. But the corner-stone of the doctrine of separation of powers is a strong and independent judiciary, which enjoys rights equal with those of the legislative and executive branches of power.

For countries like Russia, where familiarity with the Bible was not historically supported, the notion of an independent judiciary is still remote, and the reliance on a Byzantine view of the state as prior to the rights of the people has only strengthened that unfortunate tendency.

This is a summary of ideas described in this book:

1. Some biblical passages implicitly contain a constitutional idea, in which the judiciary is created and placed on a footing equal to the legislative and executive or administrative functions.

2. The necessity for such an idea can be seen in the Exodus, which was a massive movement of people, and one that required a complex method of both administering and arbitrating disputes.

3. The notion of an independent judiciary, fulfilling a divinely ordained function, can be seen in Moses' appointment of judges, and can be traced through Samuel.

4. The equal standing of the judiciary as a separate power is evident from the fact that the Judge Samuel did not give out an administration of justice to the first king, though in subsequent years, Israeli kings preempted the "constitutional" powers of the judges.

5. One can clearly see these themes in the Bible if, following Spinoza's view, the Biblical text is allowed to speak for itself and is not treated as something lacking consistency or completeness.

II. Exodus

Let us now turn to Biblical history. We will have to review briefly some of the biblical facts pertaining to the birth of an independent judiciary in the Old Testament.

According to the Book of Exodus, Moses was an Israelite born in Egypt. The Pharaoh had ordered that all Israelite males should be put to death at their birth but infant Moses was rescued by the pharaoh's daughter. He grew up as the Prince of Egypt until he killed an Egyptian officer who had murdered a Hebrew.

The history of Israelite courts begins with Exodus 2: 13-14. Young Moses tries to arbitrate in a conflict between two Jews on his own initiative, and hears one of them ask: "Who made thee a prince and a judge over us?" As we see, this question implies a traditional view within the local Israelite community in Egypt that the right to judge was associated with the right to rule. We can also learn from this passage that a power of the Prince of Egypt was probably not enough to judge disputes inside the slaves' community.

The same chapter narrates that Moses who ran from Egypt to Median married Zipporah, a daughter of Jethro (other name is Reuel), a priest of Midian, land located on the Arabian Peninsula – the same Jethro who later advised his son-in-law to set up judges as a separate nomines-estate. We must remember that at that time the biblical people were enslaved in Egypt, and according to the Bi-

ble God called upon Moses to tell his people that He had, “come down to deliver them out of the hand of the Egyptians, and to bring them up out of that land unto a good land and a large, unto a land flowing with milk and honey” (Exodus 3: 8).

After a series of events the Jews, and probably some other Egyptian slaves (Exodus 12: 48, 49) staged an uprising and left Egypt for the Sinai Peninsula. They left armed or, in the words of King James Bible, “harnessed” (Exodus 13: 18). Pursued by Pharaoh’s elite troops (Exodus 6, 7, 14), the Jews managed to beat them back and escape into the desert. Probably, they left for the Midian territory on the North-West border area of the Arabian Peninsula where the genuine Mount Sinai – the mountain Jabal al Lawz, – 8,465 feet – can be located.

What is now called the Mount Sinai is the fruit of imagination of the Roman Emperor Constantine the Great, who ruled in the fourth century CE. He was the first Christian emperor and moved the capital of the Empire from Rome to Constantinople. He had prophetic visions and considered himself the “New Moses”. In his night dreams he saw the “exact” location of Mount Sinai.

When he woke up in the morning he immediately sent his mother, Hellena, to find the mountain that he had seen in his dreams and after the exhaustive trip to wilderness the pampered mother-empress “found the mount Sinai” – in other words she just named the Mount Sinai the first good looking mountain that she came across. This is the story

of the sacred place discovery. Later, the peninsula was named after the name of the mountain¹.

The Book of Exodus never mentioned any other destination promised to Israelites but Israel itself. Probably at the times of uprising nobody asked about the particular route to “rivers of milk and honey” of the Promised Land.

The idea of an armed uprising may not seem too paradoxical, if we will consider the meaning of the crucial phrase “the children of Israel went up harnessed out of the land of Egypt” (Exodus 13: 18). Under what circumstances could the Jews arm considerable numbers of people? The pharaoh could not have voluntarily supplied them with weapons. They could not have made the weapons themselves: the bronze weapons of those times (spearheads and arrowheads, axes, daggers, swords) were forged by blacksmiths controlled by temples or state institutions; the latter also controlled the raw materials². In the Egyptian army weapons were issued to soldiers, but their names and the type of weapons they received were instantly recorded³. A soldier without arms could not be accepted back into army ranks, as witnessed by the story of an Egyptian warrior who was taken prisoner of war and then escaped, cited from ancient manuscripts by Leonard Cottrell⁴. The same author points

¹ Blum H. *The Gold of Exodus*. New York, 1999, p.119-120.

² Scheel B. *Egyptian Metalworking and Tools*. Aylesbury, UK, 1989, p. 59.

³ Montet P. *Everyday Life in Egypt in the Days of Ramesses the Great*. Philadelphia, 1981, pp. 231, 232.

⁴ Cottrell L. *Life under the Pharaohs*. London, 1957, p. 99.

out the important role played in the army by the scribe distributing weapons and ammunition¹. To put it simply, ancient Egypt was in this respect not unlike many modern states².

It is clear from the above that weapons could not be forged or bought, and that meant that the only way to get them was by seizing the arsenals. Such a seizure, even if it did not involve heavy bloodshed, was in itself an act of uprising. Besides, even if the pharaoh allowed the slaves to leave, his consent in a situation of confrontation with great numbers of armed people cannot be regarded as completely voluntary. Only if the rebels had the whip hand, be it just near the Egyptian border, could they have "commandeered" the Egyptians' "jewels of silver, and jewels of gold, and raiment" (Exodus 12: 35, 36).

Several hundred years later the Egyptians filed the claim to Alexander the Great. They insisted that the Jews must return the gold and silver that their ancestors had taken out of Egypt. A lawyer for Israelites, a man by the name of Gebiha, argued that the Jews had been slaves in Egypt and the wages due for the toil of 600,000 men for more than four centuries in total would have been much higher. Alexander ruled in the Jews' favor³.

¹ Cottrell L. Op. cit., p. 94.

² It should be noted that several centuries later Philistines, Israel's sworn enemies, forged weapons out of iron themselves but did everything to hinder the development of the art among neighboring biblical tribes.

³ Blum H. Op. cit., p. 147.

The words "went up harnessed (=armed) out of the land of Egypt" may also prove decisive in evaluating the various hypotheses of the causes and nature of the Jews' Exodus from Egypt. The biblical people could hardly have been cast out by the Egyptians out of the superstitious suspicion that their presence was the cause of famine and plague and leprosy epidemics. Such a hypothesis does not fit in with a picture of columns of people marching away, weapons in hand, with all their possessions and livestock (Exodus 10: 24-26) and even seizing Egyptians' valuables as they left.

If the slaves leaving Egypt had not been well armed, they would stand no chance of surviving among the nomads of the desert, where they were attacked a mere couple of months after the Exodus and had to fight hard to prevail over Amalek in a battle to the last man (Exodus 17).

The fact that the exiles were armed also fits in with another hypothesis, namely, that the Egyptians drove out of the country a sect of followers of the reformer Pharaoh Akhenaton, also known as the husband of the illustrious Nefertiti. In his 17-year rule that pharaoh abolished all the religious rituals then observed, did away with the worship of the numerous Egyptian gods, and destroyed their temples. He replaced all this with a monotheistic religion, the worship of Aton the Sun God, thus effecting the first radical religious reformation known to history. Immediately after his death the old cult was restored, all the new temples were destroyed, and the name Akhenaton itself was

removed from all historical records, only to be discovered at the end of the 19th century.

"It may well be that the ideas of the reformist pharaoh were not simply divinely inspired but had their origin in the monotheistic ideas brought to Egypt by the descendants of the first biblical prophets. No reasonable person whose thinking is rooted in history can doubt the momentous influence of rich Egyptian culture on the development of all, including religious, ideas of the biblical people. In their turn, the Jews could have assimilated the pharaoh's ideas from his secret followers in the times of bondage. This appears much more natural than the influence of the correspondence between two heads of state, Akhenaton and the King of the city of Tyre adjacent to future Israel, cited by Jan Assman in his capital monograph on Moses as the possible channel of distributing of monotheist ideas of Pharaoh Akhenaton"

Interestingly, Assman notes that as early as the 3rd millennium B.C. religious ideas had legal substance as well. Treaties between ancient states were sealed with oaths referring to the contracting parties' gods. Recognition of the gods of other peoples was thus an important element of international law, while the first words translated into foreign languages were precisely the names of gods.

¹ Assman J. *Moses the Egyptian: The Memory of Egypt in Western Monotheism*. Harvard University Press, 1997.

In itself, the suggestion that the secret adherents of Pharaoh Akhenaton's religious ideas could have united with Jewish slaves who also practiced monotheism is not at all absurd. May be the Exodus was an act in defense of monotheistic believe. In his book *The Bible As History*, of which ten million copies were printed in 24 languages, Werner Keller demonstrates the affinity between the Ten Commandments and the injunctions of chapter 125 of the Egyptian Book of the Dead dating from before Moses' ascent of Mount Sinai.

There can be little doubt that the legal and religious culture of the biblical people assimilated quite a lot from the neighboring peoples. The Egyptian influence, either direct or indirect, through the Egyptians that might have joined the Exodus, must have been at that period predominant and quite significant.

Personally, I do not see much sense in the controversy as to whether Moses was a Jew assimilated in Egyptian culture, or an Egyptian who professed to be a Jew. Much more important is the fact that, according to the Book of Exodus, he was brought up as an adopted son of the pharaoh's daughter and, as noted in the New Testament, "was learned in all the wisdom of the Egyptians, and was mighty in words and in deeds" (Acts 7:22). The origin of leaders of biblical clans from mixed marriages in times before Moses, Moses' own mixed marriage, and those of many biblical leaders in later times, show that ethnic origin was a minor matter in that period, while adherence to definite religious beliefs was paramount.

The religious and legal beliefs of the biblical people led by Moses were indubitably partially assimilated from the spiritual and intellectual treasure-trove of the highly developed Egyptian civilization. However, they underwent a transformation that had important consequences for the development of future generations' ideas on constitutional law. In founding his new, monotheistic religion, Pharaoh Akhenaton nevertheless followed the ancient Egyptian tradition of reserving for himself, or any other pharaoh, the position of the "God's anointed," the only receiver of divine grace ("and also for Queen Nefertiti whom he loves," to quote the concluding lines of Akhenaton's Great Hymn). Moses, however, declared equality of all before God and the duty of any king to observe established laws.

The columns of slaves carried from Egypt not only the weapons and gold they had seized but also numerous ideas and knowledge which were transformed by their indomitable desire for freedom and hatred for extreme forms of royal tyranny. In a sense Moses can be viewed as a successful Spartacus, with that all-important difference that Moses headed the people united not only by their longing for freedom and rejection of monarchic tyranny, but also by a unifying religious idea.

These events occurred, roughly speaking, in the 15th—13th centuries B.C. The nearly two century's difference in the dating of the Exodus is due to the remoteness of the events. Here is what the Italian scholars Enrico Galbiati and Alessandro Piazza wrote on this score:

“Our efforts to establish from biblical data the chronology of the epoch preceding David will be in vain. These efforts will, as it were, elicit a good-natured and mysterious smile in all those multiples of 40 apparently scanning age after age in human generation rhythm, while these venerable pages are filled with long lists of unknown names salvaged from millennia-long oblivion. We are thus faced with history passing through the prism of a worldview completely different from ours. This prism reveals some things and conceals others. The more remote are the events reaching us... the more fragmentary and scant their reflection, so that it becomes impossible to establish just how remote in time they really are. We can even ask the question whether these remote events are not deliberately conveyed through the mist of symbolism and poetry, which both obscures and reveals the ultimate fate of human history”

Similar difficulties are encountered in determining the number of slaves who fought their way from Egypt into the desert. The Bible mentioned 600 thousand men, capable to fight. Thus with women, elders and children, they must have been far in excess of a million. Many commentators believe that the number mentioned in the Bible must refer to the whole of the people, not just the warriors. It is important for our analysis, however, that even if the figure six

¹ Galbiati E., Piazza A. *Pagine Difficili della Biblia* / Translated from the Russian edition: *Trudnye stranitsy Biblii* (Difficult Pages of the Bible). Moscow, 1995, p. 16.

hundred thousand is ten times too high, Moses had under his command in the desert a considerable number of freedom-loving and independent people and to control them, certain rules of conduct had to be established. It should also be borne in mind that these people wandered in the desert for forty years, since Moses wanted to bring to the Promised Land a generation of people who had not known Egyptian bondage, and since the biblical people was not yet militarily prepared to fight a grueling war for Palestine.

So, how did Moses keep in check and direct this mass of people? What was he to them? Without a doubt, he was a prophet speaking on behalf of God and confirming his words with various signs; but he was also – and that is very important for us – a lawmaker and a judge. The biblical people were divided into twelve tribes, which went back to the traditions of Israelite patriarchs before what is known as Egyptian bondage. Most likely the Egyptians (if any) who took part in the escape from Egypt joined the various Jewish clans, so that the overall number of the tribes did not change. The division into twelve clans was retained for some three or four centuries after Moses.

III. Separate Judiciary

The rulers of these clans ran them by dint of seniority but, as we will shortly see, did not perform judiciary functions. Soon after the Exodus from Egypt, Moses father-in-law visited him. What followed is best cited from the Old Testament.

13. And it came to pass on the morrow, that Moses sat to judge the people: and the people stood by Moses from the morning unto the evening.

14. And when Moses' father in law saw all that he did to the people, he said, What is this thing that thou doest to the people? why sittest thou thyself alone, and all the people stand by thee from morning unto even?

15. And Moses said unto his father-in-law, Because the people come unto me to enquire of God:

16. When they have a matter, they come unto me; and I judge between one and another, and I do make them know the statutes of God, and his laws.

17. And Moses' father-in-law said unto him, The thing that thou doest is not good.

18. Thou wilt surely wear away, both thou, and this people that is with thee: for this thing is too heavy for thee; thou art not able to perform it thyself alone.

19. Hearken now unto my voice, I will give thee counsel, and God shall be with thee: Be thou for the people to God-ward, that thou mayest bring the causes unto God:

20. And thou shalt teach them ordinances and laws, and shalt shew them the way wherein they must walk, and the work that they must do.

21. Moreover thou shalt provide out of all the people able men, such as fear God, men of truth, hating covetousness; and place such over them, to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens:

22. And let them judge the people at all seasons: and it shall be, that every great matter they shall bring unto thee, but every small matter they shall judge: so shall it be easier for thyself, and they shall bear the burden with thee.

23. If thou shalt do this thing, and God command thee so, then thou shalt be able to endure, and all this people shall also go to their place in peace.

24. So Moses hearkened to the voice of his father in law, and did all that he had said.

25. And Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens.

26. And they judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged themselves.

27. And Moses let his father in law depart; and he went his way into his own land.

Although we find here the words “rulers of thousands, and rulers of hundreds,” etc., the text either before or after this phrase does not imply that their functions were purely administrative. Nor is there any mention made to the appointed judges’ age, background or wealth.

Let us now turn to interpretations of this event by commentators of authority. A famous Anglo-American commentary states that Moses’ father-in-law advised him to delegate his judiciary powers, which led to the establishment of a hierarchical structure for conflict resolution¹.

¹ Carson D.A., France R.T., Motyer J.A., Wenham G.J. (eds.) *New Bible Commentary: 21st Century Edition*. Downers Grove, Illinois: Intervarsity Press, 1994, p. 107.

They also mentioned that in a situation of decentralization in the country only the judges saved the tribes both through participation in military actions and by maintaining a unified legislation. Archbishop of Canterbury George Carey wrote that this comment permitted a deeper understanding of the Bible.

The American writer Chaim Potok writes that the Sumerian civilization, which existed some 3000 years ago, made a considerable impact on Israelite patriarchs, who may have accepted the tradition of some Sumerian cities of appointing judges for a year to deal with court cases in a certain quarter of the city or the entire city¹. Moses thus did not simply follow his father-in-law's advice but reproduced an ancient Sumerian tradition absorbed by the patriarchs of the pre-Egyptian period.

As E. Galbiati and A. Piazza pointed out, Israeli patriarchs' behavior, "in legal matters suggested, as far as one could judge, unquestionable points of contact not so much with the Code of Hammurabi as with legal documents of settled tribes that, in the first half of the second millennium BC, inhabited the northern areas of Mesopotamia"².

The British author Donald Sommerville writes that Moses acted on his father-in-law's advice when he gave junior judges the job of dealing with the less complicated cases³.

¹ Potok Ch. *Wanderings*. Chaim Potok's History of the Jews. Fawcett Crest, N.Y., 1990, p. 24.

² Galbiati E. and Piazza A. *Op. cit.*, p.203.

³ Sommerville D. *Who's Who in the Old Testament*. N.Y. , 1995, p. 99.

The prominent American commentator Mortimer Cohen described the advice of his father-in-law to Moses as a suggestion to appoint men for overseeing various groups (of a thousand, a hundred, etc. people) in order to try common cases arising within those groups. It was only the hard cases that were to be submitted for Moses' personal consideration¹.

American author Paul Johnson comments on Moses' responsiveness to sensible advice as evidenced by his creation of permanent and specially trained judiciary on his father-in-law's recommendation².

We learn from the Old Testament of Moses' parting wishes to the judges:

"And I charged your judges at that time, saying, hear *the* causes between your brethren, and judge righteously between *every* man and his brother, and the stranger *that is* with him. Ye shall not respect persons in judgment; *but* ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment *is* God's: and the cause that is too hard for you, bring *it* unto me, and I will hear it" (Deuteronomy 1: 16, 17).

And further on in Chapter 19:

15. One witness shall not rise up against a man for any iniquity, or for any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.

¹ Cohen M. Pathways Through the Bible. Philadelphia, 1987, p. 85.

² Johnson P. Op. cit., p. 28.

16. If a false witness rise up against any man to testify against him that which is wrong;

17. Then both the men, between whom the controversy is, shall stand before the Lord, before the priests and the judges, which shall be in those days;

18. And the judges shall make diligent inquisition: and behold, if the witness be a false witness, and hath testified falsely against his brother;

19. Then shall ye do unto him, as he had thought to have done unto his brother; so shalt thou put the evil away from among you.

20. And those which remain shall hear, and fear, and shall henceforth commit no more any such evil among you.

21. And thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.

Jerold Auerbach considers the Deuteronomic code «an instruction to Israelite judges (*mispat* derives from the verb *shafat*, meaning judging): admonished to “judge righteously”, they were obligated to respect both rich and poor disputant, and large and small matters, equally in their «judgement» (*mispat*)¹.

Mendell Lewittes in his book «Religious Foundations of the Jewish State» said that the Torah commanded to establish two organs independent from each other. One was the judiciary whose major function was to ensure domestic morality and tranquility by means of just laws. The second organ was the king whose chief function was to lead the people in battle. But the Torah, which is the first five books of the Bible, just once mentioned the king as an or-

¹ Auerbach J. *Rabbis and Lawyers: the Journey from Torah to Constitution*. Indianapolis, 1993, p. 59.

gan for future. At the time of the Torah the judiciary was independent from leaders of the tribe.

Also new judicial appointees did not mix with elders who were mentioned before in 18:12 and appeared again in Exodus 19:7.

Professor John Priest, apparently nonplussed by the fact that the father-in-law's advice mentions rulers and judges together, writes that the actual meaning of this delegation of authority is not explained in the Bible. At the same time he examines the different English translations of this and other passages in the Old Testament, writing that the conclusion could be that, somehow, judicial decision came from God, even, "even if they were implemented by human instruments (judges, priests, etc.)". He goes on to say, «Various officials are mentioned, but how they were selected and related is not clear. Sometimes priests and judges share authority (as in Deut. 17:9 and 19:17). In other instances (Deut. 21:5), the priests are the sole arbiters, in others only judges are mentioned (Deut. 21:5), and in still others the elders stand alone (Deut. 22:13-21)¹.

James Sanders makes the point that ancient Israel could not possibly survive between the Exodus and King Solomon's times on the Ten Commandments alone. It means that there must have existed some law of precedents, which could only have been created by professional judges since the wanderings across deserts and mountains. He points out

¹ Priest J. *What the Bible Really Says*. San Francisco, 1993, p. 54-55.

that following the advice of Moses' father-in-law who "urged Moses to institute a legal profession of elders whereby the various cases arising out of the daily life of the people could be decided, and whereby Moses, who had apparently been making all such judgements up to that time, might be revived of some of the burden of whatever jurisprudence was practiced at that early moment"¹. Before going over to the next author we shall note Sanders' not very felicitous use of «elders» in reference to men who were selected not for the age but for their ability and moral qualities.

Mendell Lewittes wrote that Moses laid the foundation for conferring to individuals the authority to administer justice and to deal with legal issues subject to their having specific abilities and moral qualities². In another book the author notes that having delegated the right to examine common cases Moses, in effect, exercised the powers of the superior judicial body. The criteria, that according to Moses' father-in-law were to be abided by when selecting judges, were incorporated in Jewish law, though it was not always possible to find men of such high moral integrity³.

Finally, historian Max Diamont whose book sold in 1.5 million copies wrote a much quotable phrase: "Moses also laid the foundation for another separation, which has since

¹ Sanders *J. Torah and Canon*. Philadelphia, 1972, p. 32.

² Mendell Lewittes. *Jewish Law: An Introduction*. New Jersey, 1994, pp. 58-59.

³ Mendell Lewittes. *Religious Foundations of the Jewish State*. New Jersey, 1994, p. 8.

become indispensable for any democracy. He created an independent judiciary”²¹.

In connection with the appointment of a special group of people as judges, Moses laid the foundations of yet another division, which has since become a necessity in any democracy. He created an independent judiciary authority. The division is the separation of powers. It is independent judiciary that is the cornerstone of the doctrine of separation of the legislative, executive, and judiciary authorities. The Old Testament laid the basis of the separation of church and state, as well as separation of powers, which nearly three thousand years later, in the 18th century, again moved into the foreground of history.

²¹ Diamont M. *Jews, God and History*. New York, 1994, p. 45.

IV. Book of Judges in Old Testament

The Exodus route finished in 40 years on the Land of Canaan, which was conquered by Hebrew tribes. They lived separately with no single executive, who would have power to manage several tribes. Persons with the title of “Judge” were the most important ones in the whole nation.

One can read in the Old Testament that the first king received power from the hands of a judge, albeit with God’s full approval, that until the first king appeared, it had been the judges, appointed and inspired by God, who were in charge of the biblical tribes for over 150-200 years. Therefore, one encounters for the first time a clearly formulated doctrinal justification of the judicial authority’s divinity and therefore sacredness, of its independence and even primacy with regard to royal authority. Moreover, those were not divine judges, as in Assyria, but human judges; real historical personages whose life stories are given in the Bible, with an inevitable sprinkling of legend. However, before stating the doctrinal origin of the separation of powers whose basic and key element is the independent and equal significance of the judiciary next to executive and legislative authorities, we will have to reread the relevant parts of the Bible, and also consider the views of their learned interpreters.

A. Graeme Auld, a well known commentator, points out that the precise periods given for the activity of the Judges mentioned in the Old Testament – Tola, Jair, Ibzan, Elon,

and Abdon – indicate that the data about them goes back to the early sources of the material, that is to say, to the most ancient biblical texts rather than those that were revised several centuries later. He then writes that we can make yet another step and contrast the chapters about the above-mentioned Judges with the rest of the Book of Judges, noting that the term “judge” is appropriate there. Based on two passages relating to Judge Deborah and Judge Samuel, the commentator draws the conclusion that they performed purely judicial functions. In the absence of any other information, Graeme Auld notes, we can assume that such judges mostly played a peaceful role, and that respect for their wisdom in settling disputes made them a natural focus for the aspirations of all Israelites¹.

In order to dating the separation of powers back to biblical times, we must clarify the reading of biblical terms. The chronology of the doctrine of separation of powers calls for an exact definition of the words “judge” and “judges” as used in the Old Testament.

One ought to be careful in using biblical terms. French historian Marc Bloch wrote of the terms’ ambiguity and apparent precision:

“The commonest of the terms are always approximate. Even religion terms readily assumed to possess an exact

¹ Joshua, Judges, and Ruth (Commentary by A. Graeme Auld). Philadelphia: Westminster Press, 1984, pp. 192, 193.

meaning in all cases... No term of importance, no characteristic turn of phrase will become a genuine element of our consciousness until they have been correlated with their environment and brought again into the context of their time, milieu or author... Terms forced on the past inevitably distort it”¹.

It is this extremely important observation that the term “Judge” used in the Old Testament, in particular in The Book of Judges and several others, has as its main meaning the one attributed to it in modern languages.

A judge is a person who, by special vocation or moral authority, settled disputes between people and made decisions that were then implemented.

The fact that in ancient biblical history some of the Judges were at the same time army leaders by no means presupposes that the biblical term, “judge” also implied being a military leader. Similarly, the fact that some of the Judges were also prophets does not imply that “judge” meant “performer of prophetic functions” in the Old Testament. Even the fact that occasionally a judge could have administrative authority in wartime does not imply that “judge” meant “ruler” in those days. In short, if one reads the Bible literally, the term “judge” means precisely what it means nowadays.

¹ Bloch M. *Apologia of History*. Moscow, 1973, pp.90-91, 94. (In Russian).

Such an authoritative interpreter of the Bible as former Israeli President Haim Herzog points out that Deborah was a judge and it is her administration of justice that is described in the Bible. The Book says that Deborah administered justice while seating under a tree, and she did it publicly in open process, which, according to Herzog, was one “of the first instances of genuinely democratic justice known to history”¹. According to President Herzog, Deborah enjoyed a reputation of a fair Judge and carried a lot of authority, and that was why she was asked to organize a war of liberation.

The Old Testament is in effect the only source that exists nowadays, and only its analysis is capable of providing a true criterion in this discussion. The first mention of Judges in The Book of Judges occurs in Judges 2:16 and is immediately followed by verse 17, which states, “the children of Israel would not hearken unto their judges.” This means that the Judge was not a ruler or a tribal chieftain in the usual sense of the word. He did not have any coercion apparatus. From verse 19 it follows that on the death of a Judge the functioning of that institution was suspended, as judicial powers were not passed down as heredity.

The first Judge, Othniel, was “raised up” by God, won the war, and subsequently continued to act as judge in peacetime (Judges 3: 9-11). As Josephus Flavius writes, he

¹ Haim Herzog. *The Heroes of Israel*. St. Petersburg 1992, p. 21. (In Russian).

“was given the distinguished post of public judge... and for 40 years fulfilled this duty”¹. Next come Ehud and Shamgar, deliverers from foreigners. The term “judge” was not applied to either of them. The next judge mentioned in the Bible is Deborah who dwelt in Mount Ephraim “and the children of Israel came up to her for judgment” (Judges 4: 4, 5). She turned to army leader Barak and worked out a war tactic and strategy for him. Further on one reads about Gideon the “savior” who is not referred to as a judge at all; Abimelech – a self-styled king, no less, who usurped power and reigned for three years (Judges 9: 6). Then Tola, who dwelt on the same mountain as Deborah before him, administered justice for 23 years to be succeeded by Jair who judged Israel for 22 years (Judges 10: 2-5). Not a word is said about their military or administrative exploits, nor yet of any disturbances. Apparently all was quiet then. Next comes Jephthah whom the elders invited to be their “head and captain.” After the descriptions of his various acts of heroism on the battlefield it is mentioned that he remained a judge for six years until his death. Since there is no chronology of all the wars, it is not entirely clear whether he became judge after committing those military exploits or combined the office of a judge and a military leader. The text admits of both interpretations (Judges 12: 7).

After him, Ibzan, Elon, Zebulonite, and Abdon are all

²⁵ Josephus Flavius. *Jewish Antiquities*. Vol. 1. M., 2003, p. 121-125. (In Russian).

mentioned as judges serving seven, ten, and eight years respectively. Nothing is said about any military exploits they might have performed (Judges 12: 8–15). Lower down, after the descriptions of well known deeds by Samson, it is said that he judged Israel for 20 years (Judges 15: 20; 16: 31). Chapters 17 – 21, that is, to the end of The Book of Judges, describe times of troubles without any mention of judges or kings, concluding sadly that “every man did *that which* was right in his own eyes” (Judges 21: 25).

Already in the Old Testament’s First Book of the Kings we find the Judge Eli who “judged Israel forty years” (Samuel 4: 18). There is no mention of any military exploits. The next Judge was the famous Samuel. Thus the Bible directly regards 13 persons to be Judges, eight of them bear no direct relation, according to the text of the Scripture, to any military activity, while two more, the most renowned of them all – Deborah and Samuel – became Judges before the military actions mentioned by the Bible even started. The fact that several of the Judges also performed military or prophetic duties, or both, does not mean that administering justice was not their principal function.

Some protagonists of The Book of Judges combined the positions of military leader, prophet and judge; others were prophets and judges; still others, military leaders and judges; but most were judges and nothing else. Samson, for instance, was clearly no prophet, especially as far as the Philistinian women were concerned. And the very title of The Book of Judges suggests unequivocally that the people who

wrote the Old Testament considered administration of justice to be the most important of these activities and viewed judges as the foremost custodians of the nation's spiritual and legal values who were also instrumental in uniting the people in that period in history. A judge would ensure uniformity in the application of laws among the biblical tribes, disunited at the time, and in that sense was certainly a "savior."

One can agree with a Russian author N. Nikolsky¹ who interprets the word "judged" strictly in the sense of administration of justice. Moreover, Nikolsky rightly observes that "some" of the successful military leaders continued to enjoy enormous respect after the hostilities were over and exercised justice, i.e., they "judged"².

Yakov Bogorodsky is equally convincing when he writes that we "know very little about the troubled times of the Judges"³. He also rightly considers that biblical stories should be described on the basis of the "text of the canonical books of the Holy Writ, for it contains the indisputable truth"⁴, and that the text should be interpreted above all on the strength of its content. From this point of view we can argue that the biblical word "Judge" does not differ from the commonly accepted meaning of the word, either in antiquity or today.

¹ Nikolsky N. *Ancient Israel*. Moscow: Mir Publishers, 1913, p. 64. (In Russian).

² *Ibid.*, p. 63.

³ Bogorodsky Ya. F. *Kings of the Jews*. Kazan, 1884, p. 11. (In Russian).

⁴ *Ibid.*, p. 5.

Let us turn to four respected interpreters of the Bible. Thus, American researcher Ruth Samuele points out that one of the most difficult problems the Judges had to tackle was maintaining the unity of the 12 biblical tribes. She further writes that in the absence of an efficient judge the isolated tribes would give up observing common laws¹. Here our views obviously coincide, except that it is not entirely clear why Ruth Samuele should insist that Judges were tribal leaders and managed the daily life of their fellow tribesmen as well as judged, maintaining the common principles of established laws. This provides a graphic example of the most prominent commentators being misled by the brevity of the biblical text and apparently also by the fact that the Epoch of the Judges is yet to be adequately explored. Thus, R. Samuele states that the Judge Jair repelled an attack by the children of Ammon², but the text of the Bible states that the attack occurred after Jair's death, while his battle activity, if any, is passed over in silence (Judges 10: 3-9)³.

The striking book *Wanderings* by Chaim Potok likewise merits a separate examination in the context of this prob-

¹ Samuele R. *The Paths of Jewish History*. Israel, 1991, pp. 20-21. (In Russian).

² *Ibid.*, p. 24.

³ Similar inaccuracies are unexpectedly found in the writings of the legendary ancient historian Josephus Flavius who, while commenting on this section of the Bible, overlooked Jair's predecessor the Judge Tola, and as a result commentators on Flavius pointed out that he deviated from the biblical text in his description of that period.

lem. This author established with considerable clarity that both the transition to the Epoch of the Judges and a number of episodes of that period are in the nature of puzzles¹. Pointing out that the devastating eruption of the Santorini volcano occurred in the year 1200 B.C. and not earlier, as experts used to believe in connection with the destruction of mythical Atlantis, Chaim Potok puts forward a theory that the Philistines appeared in Palestine following the destruction of coastal cities and the civilization of Crete, and therefore presented a permanent threat to the disunited Israelite tribes. Jews were protected against enemies by God-sent saviors all of whom were judges in the usual sense of the word – people who administered justice; but not all judges were saviors. Potok then goes on to say that the word “shopheth” used in the Bible to refer to a judge also means “one who helps”².

Judges differed in disposition, moral qualities and origin. In those times there was neither a regular army nor any other coercion mechanisms, including those that would ensure execution of judgments. He wonders why, in the case of many judges, specific actions aimed at rescuing their country are not mentioned³.

Chaim Potok observes that nothing is known of Judges during the bitter civil war between the biblical tribes in the Epoch of the Judges. Here the esteemed author seems

¹ Potok Ch. Op. cit., p. 130.

² Ibid., p. 131.

³ Ibid., p. 135.

to have slipped into the groove of popular assumptions, trying to discover evidence of military or administrative achievements in every Judge, in addition to the job of exercising justice. But the thing is that the salvation of the biblical people in those days lay precisely in observing common laws previously passed on by the Lord through Moses. To put it simply, it was the uniformity of the application of laws, ensured by judges, that held together and saved the Israelite nation.

On the whole Chaim Potok came close to understanding the problem, but what he apparently lacked was a legalistic approach, as well as a strict adherence to the literal text of the Old Testament rather than the commentaries. Let us also note the clearly accidental inaccuracy – his referring, twice, to the first king Saul as a “judge”¹.

Max Dimont, American researcher who was already mentioned above, followed the legal approach in his analysis of the biblical text and accurately defines both the meaning of the word “judge” and the connection between the biblical text and the doctrine of separation of powers.

¹ Potok Ch. Op. cit., p. 138.

V. A judge as the Judge

It is best to walk the biblical hills along the wide and broad footpath of literal reading leaning only lightly on the staff of commentaries on the text. If, on the other hand, one turns at every step to commentaries, which are often contradictory, inarticulate, or extremely categorical, the path leading toward the biblical text becomes an impassable thicket. Reading the Bible is in the nature of direct dialogue in which mediators are not absolutely necessary, especially in the case of the Old Testament, “which is conceptually based through and through on dialogue.”³⁷

In Exodus 18, Moses’ father-in-law, on seeing that Moses was settling all disputes among people on his own, advised him to “provide out of all the people able men, such as fear God, men of truth, hating covetousness” (Exodus 18: 21). Following that advice, Moses selected able men, “and they judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged themselves” (Exodus 18: 26). After that, apart from the judges, Moses appointed priests. Thereupon Moses announced on behalf of God the famous Ten Commandments, a great number of legal norms stipulating punishment for various criminal offences, as well as regulations concerning the settlement of property and family dis-

³⁷ Veynberg I.P. *The Birth of History*. Moscow: Nauka Publishers, 1993, p. 314. (In Russian).

putes. This Old Testament code directly refers matters of dispute to the judges. We also find that the “due process” norms addressed there, on behalf of God again, to the judges themselves: “Thou shalt not follow a multitude to *do* evil; neither shalt thou speak in a cause to decline after many to wrest *judgment*: Neither shalt thou countenance a poor man in his cause... Thou shalt not wrest the judgment of thy poor in his cause. Keep thee far from a false matter; and the innocent and righteous slay thou not: for I will not justify the wicked. And thou shalt take no gift: for the gift blindeth the wise, and perverteth the words of the righteous” (Exodus 23: 2, 3, 6, 7).

We could continue in the same vein, but it would perhaps be more fitting to dwell more on the commandment not to accept gifts, so pertinent these days. In doing so I will stress, following the Orthodox Christian priest Alexander Men’ and the American historian Max Dimont, that the Old Testament code differed from the famous Hammurabi Code in that it contained the ideas of fairness and equal access to justice, so that its norms can well be regarded as the first Declaration of Human Rights known to history. More democratic than the Hammurabi Code, the Old Testament code, dating from the 15-13 cent. B.C., predates the first written code of Egyptian laws (300 B.C.) and the first written code of Roman laws (2nd century B.C.) by more than a thousand years. The Old Testament was also the first statute book in history to be translated into foreign languages.

I agree with Professor F. Alting von Geusau of Leiden University in his insistence that the legal norms of the Old Testament are critically important for the development of present-day legal thinking, and that a transition to a law-based state cannot be accomplished without the application and interpretation of the fundamental biblical legal principles¹.

As can be seen from the subsequent books of the Old Testament, after Moses' death the biblical people retained the division into 12 tribes each of which had its own territory and tribal leadership. The only things that held them together were their common past and adherence to the laws handed down to them by Moses on behalf of God. Ceasing to adhere to those laws would have led to a prompt and inevitable assimilation of the people and disappearance of biblical ideas.

The persons who saved the people during those two to four centuries were called judges, and the relevant book of the Old Testament is called *The Book of Judges*. According to a centuries old tradition, the Judge Samuel is believed to be the author of that book.

Bible commentators often endeavor to correct the author of *The Book of Judges*, insisting that it had better be called the book of saviors, heroes, and even leaders – because some of the judges headed military campaigns against enemies, performed administrative functions in peace times, and were prophets or priests.

¹ Russian idea (*Russkaya mysl*). 1966, No. 41 (In Russian).

Arguing against this approach is both wearisome and fruitless. The Book of Judges has been handed down to us with this particular title, which has survived millennia. When translated into various languages the word *shopheth* means first of all “judge”. The main function of “saving” the biblical people from disappearance was maintaining their common laws in effect among all the tribes.

As indicated in the beginning of The Book of Judges, one of the principal dangers for these tribes was deviation from the laws of God and worshipping local alien gods, i.e., a tendency toward assimilation by and dissolving among the neighboring peoples. The struggles of the Judges were above all directed against this danger. That is why the judiciary function, even if it was combined with temporary military leadership or performance of religious rites, was undoubtedly the overriding one. Eight out of the thirteen Old Testament protagonists referred to as judges took no part in military action. And we have already emphasized that their administrative activities in times of peace were not specifically mentioned either.

It appears that we must not go too deep into the thicket of contradictory commentaries but rather direct our path toward the biblical hills of the serene and clear text of the Old Testament. The life of Samuel the Judge and prophet was described in detail right from his birth. No commentators therefore argue against the fact that Samuel was not a military leader but performed the functions of a judge, and in different cities. Samuel’s prophetic talent and judi-

ciary functions organically complemented one another when legal oracles and of religious rites being interwoven with legal processes. Even if his administrative functions were lost between the lines of the biblical text, after the election and anointment of the first biblical king those functions passed on to the latter. We also know that one of the origins of the idea of electing a king was the fact that Samuel's sons, to whom he entrusted the settlement of legal disputes in his advanced age, took bribes and "judged perversely" (Kings 1 Ch. 8).

Samuel tried to talk the people out of electing a king by describing the negative aspects of monarchy, which were obvious from the example set by the neighboring states, but the popular assembly insisted on its decision. Modern historians believe that the military threat was then considerable and the judge's authority was therefore not sufficient to unite the forces of all the tribes. After all, during the previous wars described in The Book of Judges only the Judge Deborah succeeded in uniting six out of the twelve tribes to repulse an external enemy, while in other cases only a couple of tribes became united. Thus, there were obvious military-administrative as well as financial-economic reasons (like collecting a tenth of all property, including cattle and grain harvest, of which Samuel warned in his speech to the popular assembly) for choosing monarchy.

A simple reading of The Book of Judges offers no grounds for the supposition that all the Judges performed administrative functions in peace time. That is why Ivan

Skvortsov-Stepanov's analysis of the biblical text concerning the events of the 11th century B.C. is clear and simple: "Apparently there were no tribal chieftains in the proper sense of the word," while the principal task of the *shopheth* (an Old Hebrew word that went into the title of The Book of Judges) was, he believes, "to judge and to organize public hearings of court cases".

The meanings of the words "judgment" and "to judge" in the Old Testament are not always identical with those of the New Testament, because in the latter the words frequently refer to God's judgment in the next world unknown to the Old Testament. In the Old Testament God's judgment is therefore justice dispensed by a human judge on behalf of God, or with references to Divine Law; this is a trial that is invariably effected in this life, i.e. chiefly through the mediation of a human judge. Divine justice, however, may entail punishment in the shape of an earthquake, a flood, or an epidemic, and not merely a formal verdict or decision announced by an earthly judge at God's will.

Still, the legal norms of the Old Testament that regulate both the kind treatment of animals and fairly severe penal and legal sanctions of the law of retribution ("He who spills human blood shall have his blood spilt at the hands of man") were chiefly carried out by earthly judges. Let me at this point quote extensively the prominent Italian commentators of the Old Testament, Enrico Galbati and Alessandro Piazza:

“Here we see a very primitive and yet fair version of criminal law; it allowed the innocent to be protected against attack and the guilty to be severely punished, while the punishment was meted out strictly in accordance with the gravity of the offense. The law of retribution was normally administered by judges specifically appointed for the purpose in every town, but that was not their exclusive right. Primitive society, which is what ancient Israel largely remained throughout its history, had no police; the work of the judges was done by elders, who were not uncommonly biased or venal, central power was never strong enough to repress crime, and the law of retribution was applied by whoever was in a position to do so. That was not an illegal act if no other means of administering justice were available... Revenge and justice under such circumstances necessarily become synonymous”¹.

Carrying this idea further, one might say that equally synonymous were the words “judge” – a person who administered justice as an arbiter for citizens of various towns and tribes and thus maintained uniformity of laws and the unity of the Biblical nation (Samuel); and “warrior-liberator” – an avenger who smote the enemy thanks to his personal strength (as did Samson) or military talent (as Gideon) and secured his people’s freedom and life. Moreover, the authority gained in battle entitled the person to perform the duties of a judge in peacetime, just as successful arbi-

⁴⁰ Galbiati E., Piazza A. Op. cit., p. 257.

tration of disputes between citizens of various towns and tribes entitled the judge to leadership of the tribes assembled to rebuff an external enemy (Deborah).

As it was mentioned above the judges were prophets, and therefore the main thing was not the post of judge but the gift of prophesy. Admittedly, in those days justice administered on behalf of Divine Law may have required a deal of prophetic talent. However, as Galbiati and Piazza rightly point out, Old Testament prophets were “rarely venerated and far more often despised”¹. This is a far cry from the attitude to judges from the Epoch of Judges to Samuel, the last independent Judge, when Judges were held in high esteem and carried a lot of authority.

The Italian commentators make yet another extremely important observation relevant to the present subject:

*“In the Old Testament the tension in the God-man relationship is tragically refracted. God appeals to man as though He needs humans and demands cooperation in carrying out grandiose plans, expecting some response. Man does not respond, but rebels or deviates from the straight and narrow path; instead of great and beautiful deeds, man indulges in abomination or pettiness. And then he gets his retribution. Such is the theme of biblical prehistory, of the journey to the Promised Land, of Moses’ hymn, of the Book of Judges, of the life story of Saul...”*²

¹ Galbiati E., Piazza A. Op. cit., p. 309.

² Ibid., p. 228.

The first king, Saul, had his punishment announced by Judge Samuel. There had been judges before the kings appeared; moreover, the work of judges who continually executed uniform justice for the various tribes while some of them occasionally also performed military exploits to punish invading enemies, delayed by several centuries the introduction of monarchy in Israel, which was then the common form of executive power in most parts of the world. Hence the primacy of judicial authority, its independence and significance alongside the power of monarchs or popular assemblies and councils of elders.

For thousands of years divine anointment of kings and potentates was the ideological basis of any autocratic tyranny. The sense of superiority inherent in the modern, perfectly secular executive authority obviously has the same origin. This mystical narcissism of monarchs, presidents and governments, and occasionally also parliaments and conventions, can and should be dispelled by the simple expedient of looking up the primary source and reading it literally.

This is how Alexander Yakovlev, a one-time secretary of the Soviet Communist Party's Central Committee formulated his position regarding the religious foundation of the Russian state:

“As an historian I consider – and I know many people will disagree – that the source of Russia's misfortunes is the Old Russian choice of the Byzantine version of Christianity

where man is nothing; he is forever on his knees, while the State and the Church are above him. Hence the despotic regimes, totalitarianism, panishment of dissenters...¹

The view is valid, given that not entirely indisputable, as many denominations of Christianity, as well as Judaism, for centuries were somewhat reserved on the Bible's anti-tyranny slant and support for independent courts.

Whereas the classic of the separation of powers doctrine, Charles-Louis de Montesquieu, described, in his book *On the Spirit of Laws*, the judicial authority as "invisible," the Old Testament treats it as distinctly visible and highly significant. The fact that numerous Bible commentators habitually looked on judges as ordinary military leaders stems from the traditional mistake most commentators are prone make to when they try to be more clever than the text they analyze. The Italian authors I have already quoted here were quite straightforward on the matter:

"The mistake consists in rejecting the literal meaning in favor of the so-called symbolic and spiritual sense which some believe to be a panacea for any problem passages in the Holy Writ and in particular the Old Testament. However tempting the method may seem in terms of apologia and ministry, it can result in complete loss of trust in the sacred Biblical text, for rather than trying to find and ex-

¹ Moscow News (Moskovskiye novosti). February 2, 1997. (In Russian).

amine the genuine divine idea in it, commentators tend to treat it as a kind of testing ground for an exercise in unrestrained subjectivism

Interpreting the Bible is not a privilege of professionals. There are no professors of the Bible in the world, only students who differ in seniority depending on how deeply they have studied the Book. There can be no amateurs or professionals when it comes to understanding the Bible. The reason these ancient texts have been preserved over the centuries is precisely the fact that everyone so willing will find in them something meant specifically for him or her. Not all biblical truths have been discovered, comprehended and definitively explained. That is the source not only of the religious consciousness *per se*, but also of any person's need to partake of the sacred biblical wisdom. Every new age, every new generation can find in the religious texts a new meaning, a new source of inspiration, including for research and even practical action.

The Bible not only opens our eyes – it opens itself to the eager eye. The main character of a novel by Herman Hesse “fully divined this phenomenon of Christianity which had so often over the centuries fallen behind modernity, grown obsolete, ossified, and yet remembered its sources again and again, using them to renew itself, and

¹ Galbiati E., Piazza A. Op. cit., p. 9.

once more leaving behind all that was modern...”¹ Naturally, the same can be said of other major religions, including Judaism.

One more important issue is the principle of Bible interpretation. Personally I would suggest the simplest and oldest method of text reading: take as primary what is written there, and offer all kinds of commentators relevant references to the text. Particularly when the text in question is that of the Old Testament.

If one proceeds from the contents of The Book of Judges and other Old Testament books, the word “judge” must imply at the very least participation in the execution of justice, and so must the word “judged.” In Exodus (18: 15-16) Moses explained to his father-in-law: “Because the people come unto me to inquire of God: When they have a matter, they come unto me; and I judge between one and another, and I do make *them* know the status of God, and his laws.” Then, acting on the advice of his father-in-law, Moses delegated the right to judge minor cases to others (“And Moses chose able men out of all Israel...”) but reserved settlement of serious matters for himself. The chief problems that the biblical tribes of the Epoch of Judges encountered were disunity, the corrupting influence of their neighbors’ religious cults, and armed invasions by those neighbors.

The main task of a judge, as clearly follows from the text of the Bible, was “obeying the commandments of the

¹ Hesse H. The Glass Bead Game. Moscow, 1992, p.164 (In Russian).

Lord,” which included observing the laws received from Moses. That is to say, judges saved the biblical nation not so much from armed attacks as from worship of alien deities and noncompliance with the laws set for the people.

The Lord raised up judges, which delivered them out of the hand of those that spoiled them.

And yet they would not hearken unto their judges, but they went a whoring after other gods, and bowed themselves unto them: they turned quickly out of the way which their fathers walked in, obeying the commandments of the Lord...

And it came to pass, when the judge was dead, that they returned, and corrupted themselves more than their fathers, in following other gods to serve them, and to bow down unto them (Judges 2: 16, 17, 19).

“Bowing themselves unto other gods,” the people naturally did not abide by the biblical laws applied in the name of God. Therefore, the execution of laws, as well as the uniformity of their application, was an extremely important prerequisite for the biblical people’s survival. Thus the word *shofet* used as an appellation of the judge also had the meaning of “savior” at the time.

Nevertheless, The Book of Judges in the biblical tradition has always been translated into all languages as now, and not as “The Book of Saviors,” for instance. Because justice was administered on behalf of God and on the basis of the laws received from God, judges in those days must have possessed, to a greater or lesser degree, some gift of foresight and officiated at religious ceremonies. A

judge could also be a prophet or a priest, but he still was a judge in the modern sense of the word. Several of the judges mentioned in the Bible, five or six, were also military leaders. The Bible does not describe the part played by the six judges in military action. Apropos of that, serious commentators, some of whom call them "minor judges," argue that they performed none but judicial duties.

Skvortsov-Stepanov, in particular, believes that "apparently there were no tribal chieftains in the proper sense of the word," and the main task of the *shofets* (judges) "was to judge and organize public hearings of court cases"¹.

Samuel and so-called "minor judges" were not military leaders of their tribes, nor were they rulers in peacetime, which can be clearly seen in the detailed description of what Samuel himself did, for instance. The Bible makes no mention of any peacetime government activity by any judge named in the Book of Judges. To assert the opposite amounts to imposing one's interpretation of the Bible (albeit traditional), and perhaps even distorting its meaning, which is something Spinoza warned against. How can one view judges as peacetime chieftains if the Bible says that people did not "hearken" to them, and that means that they did not have a mechanism of coercion that any government function would incorporate.

¹ Skvortsov-Stepanov I.I. Critique of the Judaic Religion. Moscow, 1962, p.90. (In Russian).

More than that, Moses left instructions describing the future framework of the state of Israel under which the biblical nation, that slept rough under tents in the desert at the time of receiving those instructions, would have cities and by the gates of those cities court would be held. Well then, in the event of there arising “a matter too hard for thee in judgment, between blood and blood, between plea and plea, between stroke and stroke, *being* matters of controversy within thy gates (i.e. within the local court. – *P.B.*), then shalt thou arise, and get thee up into the place which the Lord thy God shall choose”(Deuteronomy 17: 8).

Moses specifically points out that the place may change depending on the person who has authority enough among the twelve tribes, won by prophetic gifts or whatever, in order to be a generally recognized judge capable of settling a dispute with finality. Moreover, the arbiter’s verdict must be complied with on pain of death (Deuteronomy 17: 12), an injunction which, according to some comments in The Book of Judges (Judges 2: 17), was not always complied with; this led to the setting up of the monarchy, just as Moses had prophesied (Deuteronomy 17: 14).

As far as the verdicts of biblical judges are concerned, these were complied with because of their high moral authority, while the court itself was in the nature of arbitration, that is to say, it was voluntarily chosen by the contending parties.

Of course, the power of the judiciary and the separation of powers in the modern sense did not yet exist in biblical

times. But the following doctrinal premises of it were then established:

- *Divine origin of the power of the judiciary.*
- *The primacy of the judiciary in the sense of its emergence prior to royal power.*
- *Judge Samuel's opposition against unlimited royal power.*
- *The Moses—Samuel Constitution.*
- *Anointment of the first king, Saul, and of the second king, David, by the judge Samuel.*
- *The conflict between Judge Samuel and King Saul that proved pernicious to the king's heirs.*

Some commentators insist that Samuel acted in his dealings with the kings as a prophet rather than a judge, but it is hardly seriously: the Bible itself does not draw this distinction with regard to Samuel. Quite understandably, adherents of the traditional approach to the Bible, of which the essence is encapsulated in the formula “God save the king (or any active authority),” will not be too pleased with our attempt to place “some judge” on a par with the traditional “anointed.” This, however, will have to be recognized. It was Francis Bacon who said already, “The court is a sacred place.” The divine origin of the court, clearly recorded in the Bible, put it on an equal footing with the monarch, and that created a most important doctrinal basis for the subsequent development of the theory and practice of separation of powers.

Let us quote an interesting passage from the great Dante Alighieri's treatise on *The Monarchy*:

*“Everywhere where discord arises, there must be courts, otherwise the imperfect would exist without that which lends it perfection, and that is impossible, inasmuch as God and nature always provide that which is necessary. Contention may arise... between any two rulers... The court must therefore arbitrate between them. And since the one does not know the other, since the one does not obey the other (for an equal is not subject to an equal), there must be some third party with wider authority, superior to both by dint of his authority... the first and higher judge must therefore be reached whose judgment puts an end to all contention either indirectly or directly, and that will be a monarch or the emperor. It follows that monarchy is necessary to the world”*⁴⁷.

Dante’s medieval logic does not coincide with that of the Bible, in which The Book of Judges does not directly identify the court with the position of ruler or monarch.

⁴⁷ Dante Alighieri. *Minor Works*. Moscow: Nauka Publishers, 1968, p. 312. (In Russian).

VI. Jephthah as the Judge

There would hardly be many characters mentioned in The Book of Judges to whom a fiction book would be dedicated. Jephthah, the Judge, would be a one of major exception. Lion Feuchtwanger, a famous writer, entitled his last historical novel, published in Berlin in 1957, "Jephthah and his Daughter". It is noteworthy that for the first time in his old age the novelist based his book on a story from the Bible. Feuchtwanger himself writes in the afterword to the novel that the events narrated in The Book of Judges took place between 1300 and 1000 B.C. But later on – he mentions, – the "forefathers' distant legends" were recorded and reproduced in the 9th and 8th centuries B.C. and re-edited right up to the 6th century B.C.

According to Feuchtwanger:

"The world to which the ancient texts belonged had already become alien to the latest reproducers... Hence The Book of Judges in its present form is quite confusing and full of contradictions. Still it includes texts that may be counted among the most powerful and impressive texts of the Old Testament: the magnificent battle song of Deborah, folk legends devoted to Gideon, the "brawler" and "slasher" stories about Samson and, most importantly, the legends of Jephthah. The forty-seven sentences that recount the life of Jephthah, the fifth Great Judge of Israel, incorporate four very ancient texts that appeared at different times and initially had nothing to do with each other. Ob-

viously these four sources are based on authentic historic material. Shakespeare, who rarely mentions biblical names, speaks three times, including once in "Hamlet", of Jephthah, his daughter and his bloody oath. George Friedrich Hendel, who became blind in his old age, composed at this most tragic period of his life the great oratorio about Jephthah and his pledge. Ever since my childhood, when I had to make a lot of effort to translate The Book of Judges from Judaic to German, I could not release myself from the frightful story of Jephthah's pledge...", which, according to the Bible, he gave to the God.

The Book of Judges described, that Jephthah promised the Lord: "If you give me victory over the Ammonites, I will burn as an offering the first person that comes out of my house to meet me, when I come back with the victory. I will offer that person to you as a sacrifice". ... And the Lord gave him victory. When Jephthah went back home to Mizpeh, there was his daughter coming out to meet him, dancing and playing tambourine... He did what he had promised the Lord, and she died...

Feuchwanger puts it as follows:

"Later I started to study the Bible, thoroughly and methodically. And what archaeologists, historians and philologists excavated from the soil and found in the great many ancient papers, and how they used all that to reconstruct the events of the bygone history of the nations in the Vale of Jordan seemed to me much more interesting than any de-

pective story. Thus the biblical images of my childhood gradually merged in my imagination with the people that history has let me discover. An author who would undertake today to embody in words and images the actual circumstances of the lives of the biblical characters should be ready for being misunderstood. He shall certainly face fanatical prejudice of those who view the Bible as nothing but "the Word of God", prejudice which has been harshly implanted for over seventy generations. And even if the author encounters an open-minded reader, his goal will still be quite difficult to accomplish. The matter is that the authors of the historical Books of the Bible had a much better sense of history than any other authors of the pre-Christian era. They sought to include their characters into the historical context, moreover, they recreated them in view of that purpose. This bond was purely speculative, and some of the characters of the biblical history were far from being a success of their authors. But many images of the Bible do bear that historical aura that the characters of other ancient literary monuments definitely lack. No doubt that the Hebrew authors were confined by the prejudice of their time, but unlike the great poets of the Ancient Greece they realized that their own epoch was but a link of an endless chain, just a bridge between the past and the future. They were trying to impart to the events of the past certain order, interdependence, direction and meaning aimed at the future. Even biased researchers admit that the biblical authors were the first of all others to show under-

*standing of the historical philosophy, to demonstrate feeling for history and realize the unsteady, dynamic and dialectic nature of existence. Their characters do not just live their lives, they personify history*¹.

Feuchtwanger continues:

“Of the richest ancient Hebrew and Aramaic literature that developed within a millennium only the few pieces included into the final Old Testament Canon have survived until the present. This Canon itself was formed step by step. Many things were certainly subject to distortion in order to conform to political and religious tendencies of the Collegiums that worked out the Canon as well as the result of some more ancient editors' and compilers' work who sometimes merged different texts quite unsuccessfully. The final choice was made according to the personal taste of individual Collegiums members, and though the entire Canon represents a collection of excellent works, including historical books from the times immemorial, nobody may state with certainty that other equally brilliant works had not been buried in oblivion exactly due to canonizing. Since we have quite an accurate account of the Synod of Jabne that took place in 90 B.C. that defined the final composition of the Canon, we know that the splendid love songs of the Bible, that is the Canticle of Canticles,

¹ Feuchtwanger L. Jephthah and his Daughter, Collected Works, Vol. 18. Moscow, 2002, pp. 249, 250, 251, 252, 254, 255.

and the astonishing, deeply pessimistic book of Ecclesiastes had only been included after prolonged debates with a minimal margin, which means that namely these books owe their existence to a pure chance»¹.

I consciously quote Feuchtwanger because according to my knowledge his book has not yet been translated into English.

Now let us see how the famous author interprets the responsibility of a judge in the Epoch of Judges in the novel “Jephthah and his Daughter”.

In the very beginning of the novel Feuchtwanger speaks about two different positions of judges: the Judge in the Gilead tribe and the Chief Judge of Israel, though the latter title was not universally recognized. The Judge was responsible for defense, for construction works, and he also would advise to elders when they considered disputes. Speaking about Jephthah's father, Feuchtwanger says that he had been a good judge and a great tribe leader – in other words Feuchtwanger distinguished between these two positions. At the same time he mentions that another person hold the position of the Chief Priest. The Chief Priest was responsible for anointing of the judge. There was a throne of stone for the Judge. The word “shopheth” meant the High Judge. One of Jephthah's step-brothers by the name of Sameghar, was offered the position of the Judge, but the ceremony of anointing was postponed by the Chief Priest

¹ Feuchtwanger L. Op. cit., pp. 375, 376.

until Samegar proved that he met the requirements, necessary for the implementation of Judge's duties.

Feuchtwanger also distinguishes between the position of the Chief defense leader of the tribe and that of the judge. When Jephthah was nominated to be the judge, the Chief Priest also gave him the staff of the judge, but again, as in the previous case, the ceremony of anointing (that is, of pouring the holy oil on his head) was postponed. The staff was handed in the concourse of a great number of people of the Gilead tribe during the ceremony that included his mounting on the stone throne.

Feuchtwanger mentions that "the Israeli have always been proud of the fact that their tribes were ruled by the elders and judges, but not by kings. They despised peoples who had to cringe to kings». This quotation along with other things is interesting because it shows the distinction between the elder and the judges.

Here the author also quotes the famous abstract from the Book of Judges: "Once upon a time the trees got together to choose a king for themselves. They said to the olive-tree, "Be our king". The olive-tree answered, "In order to govern you, I would have to stop producing my oil, which is used to honor gods and men". Then the trees said to the fig-tree, "You come and be our king". But the fig-tree answered, "In order to govern you, I would have to stop producing my good sweet fruit". So the trees then said to the grapevine, "You come and be our king". But the vine answered, "In order to govern you, I would have to stop

producing my wine, that makes gods and men happy". So then all the trees said to the thorn-bush, "You come and be our king." The thorn-bush answered, "If you really want to make me your king, then come and take shelter in my shade. If you don't, fire will blaze out of my thorny branches and burn up the cedars of Lebanon". (Judges, 9:8-15).

According to Alexander Men' this is a metaphoric expression of the idea that only "good-for-nothing and arrogant people come to power and their reign would give as much of a positive effect as the thorn-bush would give shadow and shelter in a sunny afternoon"¹.

According to Feuchtwanger, the Chief Judge of Israel, recognized by all tribes did not necessarily have to be from some particular place, but could come from various tribes. He describes how the representatives of all tribes got together in the city of Massifa in the East of the country and the Chief Priest – not which of the Gilead, but another one, who was native of the Ephraim tribe, that lived to their West, anointed his forehead with the sacred oil made of lavender and other herbs.

Thus, Feuchtwanger distinguished between the positions of the defense leaders and judges as well as between the positions of a judge of a tribe and that of the position of the Judge that he defined as the Chief Judge of and who was recognized by at least a few tribes².

¹ Men A. *The Magic and Monotheism*. Moscow, 2001, p. 384.

² Feuchtwanger L. *Op. cit.*, pp. 9, 13, 91, 111, 143, 155, 184, 243, 244-247.

VII. Samson as the Judge

At this point I would like to quote at some length the analysis made by Vladimir Zhabotinsky (1880-1940), one of the contributors to the Modern Hebrew language, founder of the Jerusalem University, lawyer and writer. In his novel *Samson the Nazirite*, written in Russian but published in Russia for the first time only in 2000, Zhabotinsky conveyed his vision of the way justice was administered in the epoch of the Judges. He believed that an arbiter was needed above all in those disputes, which an elder or elders of a village, even the smallest one, could not or would not settle.

In other words, even within the single Dan tribe, to which Samson belonged, it was hard to find justice by appealing, in accordance with the tradition, to the elders only.

Firstly, in their small village they were certain to be blood relatives or in-laws of one of the two sides. Secondly, arbitrating in some cases was not quite safe. Let us quote an example – a trial in which only Samson the strongman was equal to the task. Strife over land between herdsmen and plowmen led to a killing. The rest I will quote from the novel:

This murderer was led to Samson. As the people gathered, the herdsmen crowded round Samson on one side and the plowmen on the other, like two camps. Samson looked at them and said:

"If you start a fight, I'll knock off all of you, indiscriminately. Call in the witnesses."

Samson offered the family of the murdered man a choice – either stone the guilty man to death or accept redemption money...

"I will not pay redemption money," the murderer said stubbornly.

Samson took the man by his right hand and crushed it in his own. The follower of Cain writhed several minutes, swearing and yelling with pain, before giving in at last and groaning:

"I'll pay the redemption fee, damn you and your judge, too!"¹

On another occasion Samson skillfully settled civil disputes as he made the rounds of the villages.

Samson listened to these complaints but did not respond to them, saying:

"I have little time. You called me in to judge. Do you have disputes?"

It turned out that no herdsmen of that village wished to be judged by him, except for two brothers...

Later, when the village elder saw the way Samson ar-

¹ Zhabotinsky V. Samson the Nazirite. Moscow, 2000, pp. 129-130. (In Russian).

bitrated in some dispute involving harvest, he told two other villagers to come to Samson to be judged¹.

We see that, in the view of a major biblical scholar, administration of justice was in the nature of arbitration and it covered any type of dispute, if the parties involved wished it or if local elders found it inconvenient to become involved in the trial. In disputes between dwellers of different villages or members of different tribes the role of arbiters grew even more important. It was also important that the judge should be feared, and that his verdicts should be carried out implicitly. Samson's strength was the pledge of his rulings being complied with.

The natives, having heard of the wise judge, began to come to him. At first he sent them back, for, according to their custom, their squabbles first had to be judged by their own elders. It turned out, however, that they had no elders even... When he finished his rounds, influential people were on the whole everywhere displeased with him... He heard of this displeasure, and said this on his return to Zorah (the capital of the tribe of Dan. – *P.B.*):

"I will not go to them any more; if they need me, let them bring their thieves and squabblers here to the gates of Zorah.

¹ Zhabotinsky V. *Op. cit.*, pp. 132-133.

*Some time later, not immediately, that was the way it was. Not a month passed without a shackled criminal being brought from afar or a plaintiff and defendant arriving along with a crowd of dust-covered witnesses...*¹

Zhabotinsky' authoritative view gave us an understanding of old biblical events.

¹ Zhabotinsky V. Op. cit., p. 140.

VIII. Josephus Flavius

Special significance amongst the commentators of the Old Testament could be given to works of Josephus Flavius (37 CE – 100 CE). Alongside with the same Biblical Scripture that we use, Josephus was likely to refer to other sources that were available at his time but were lost later. Some of lost now sources were based on oral epics. The author of the foreword to the Russian edition of the “Jewish Antiquities” is sure enough that Josephus had additional written and oral sources for his interpretation of the biblical events¹.

The prominent historian Evald still admitted that “we can only be grateful to him for the information from the manuscripts lost by now, the information that he would from time to time introduce into different parts of his history of the ancient period”².

Josephus himself was just (!) 1,000 years away from the events described in the Book of Samuel. Unfortunately some of his works have not survived up to the present.

Lion Feuchtwanger wrote that it was only by pure chance that some of the works of Josephus had survived. He also wrote that, for instance, unless one of the later Roman emperors had taken measures for mass reproduction

¹ Josephus Flavius. *Jewish Antiquities*. Vol. 1, Moscow, 2003, p. 19. (In Russian).

² *Ibid.*, p. 21.

of the historical writings of Tacit, who was a distant relative of his, the works of the famous Roman historian would not have survived¹.

It is quite remarkable how Josephus considered a content of the advice of the father-in-law of Moses to appoint military rulers as well as judges. He suggested that the number of warriors should be accurately counted, following which Moses was supposed to appoint the rulers of units. At the same time according to Josephus, the father-in-law recommended Moses separately to appoint judges out of persons who enjoyed among the people the reputation of being righteous and just².

It is fairly obvious that the interpretation provided by Josephus contradicts the literal meaning of the Old Testament's text which is available to us. Presumably he possessed a wider selection of sources and a more detailed narration of events some 2,000 years ago. In any case the additional materials used by Josephus make it easier to understand the meaning of the Chapter 18 of the Book of Exodus.

The Book of Exodus speaks about the *appointment* of the rulers to judge the disputes within the groups of 1000, 100, 50, 10 people, while Josephus speaks about the rulers of groups numbering 10 000 and 1000 as *nominated*, and 500, 100, 30, 20, 10 as *elected* by units themselves.

¹ Feuchtwanger L. Op. cit., p. 377.

² Josephus Flavius. Op. cit., pp. 145-146.

His interpretation that distinguishes between the appointments of rulers of military units and separately judges cannot be explained by simple accident. It took Josephus 13 years to write the «Jewish Antiquities» and thus he could not have made a mistake interpreting the Book of Exodus that in his opinion had been written by Moses himself. The differences in the texts of the “Exodus” and Josephus Flavius’ interpretation are not accidental and based on unknown and lost oral or written sources that had been available to Josephus himself.

The text of Exodus, available now, probably mixed separate nomination of judges with nomination and elections of commanders of military units. For instance, the Good News Bible Version includes this part of Exodus with subtitle ‘The Appointments of Judges’. In its text the translators use the word “leaders’ but purely relate it only to positions of judges who are working on the permanent basis to settle disputes between people...

The same may explain his mentioning that Moses did not attribute the father-in-law’s innovation to himself but instead was keen to let his people know the name of its author is also interesting to note¹. According to Josephus this is another proof of Moses’ nobleness. .

Josephus displays a reasonably correct understanding of the fact, that the Judges of the Book of Judges primarily administered justice, which was their chief purpose. Thus he

¹ Josephus Flavius. Op. cit., p. 146.

says that the ruler at the time of Deborah's administration of justice was military leader Barak who ruled for 40 years and died almost at the same time as Deborah.

As for another famous Judge, Samuel, Josephus Flavius wrote that Samuel used to visit various towns twice a year and "held court there thus strengthening for a long time to come the judicial system therein"¹. Besides, the list of towns where Samuel judged suggests that he administered justice on the territories of various Israelite tribes, which emphasizes the judge's function of "salvation" aimed at maintaining uniformity in law application and, in the context of that age, also the unity of the biblical nation.

The first judge, Othniel, was "raised up" by God, won the war, and subsequently continued to act as Judge in peacetime (Judges 3: 9-11). According to Josephus, he "was given the distinguished post of public judge... and for 40 years fulfilled this duty."

An extremely important addition to the Old Testament's text is Josephus' information that the scroll written by Samuel and containing the code of rights and duties of the king — was read aloud to the new king. The book by all probability was composed of the earlier constitutional norms for kings of Moses and the new norms added by Samuel was placed into the Arc of Covenant. The Bible lacks the latter detail. The Arc of Covenant that was situated in a special room, the content of which was

¹ Josephus Flavius. *Op. cit.*, p. 299.

regulated in detail, and would not contain a casual manuscript.

The Bible mentions that Moses, having written a number of laws – including regulation of rights and duties of the future monarchs – put the book into the Arc of Covenant. (Deuteronomy. 31: 24). It means that Samuel made additions to the Book, which was previously written by Moses.

It is important to mention the Josephus' additions to the biblical list of duties and limitations of monarchs' authority (Deuteronomy. 17: 16-20), as follows:

“Aristocracy, and the way of living under it, is the best constitution; and may you never have any inclination to any other form of government; and may you always love that form, and have the laws of your governors, and govern all your actions according to them: for you need no supreme governor but God. But if you shall desire a king, let him be one of your own nation: let him be always careful of justice, and other virtues, perpetually; let him submit to the laws, and esteem God’s commands to be his highest wisdom; but let him do nothing without the highest priest, and the votes of the senators: let him not have a great number of wives, nor pursue abundance of riches, nor a multitude of horses, whereby he may grow too proud to submit to the laws”¹.

¹ Josephus Flavius. Op. cit., p. 115.

Expounding the document Josephus adds – as compared with the Old Testament – the following very important constitutional provision about the king's responsibility:

“And if he affect any such things, let him be restrained...”¹. This very important regulation given by Moses to the people was not preserved in the text of the Bible and is based on the sources of Josephus that we miss.

The Josephus' works are important for better interpretations of the Bible texts that have reached us incomplete.

¹ Josephus Flavius. Op. cit. Vol. 4, p. 17.

IX. Baruch Spinoza

I would like to quote, as confirmation of the subject of his book, some ideas of the great philosopher Baruch Spinoza (1632-1677), whom Soviet Marxist philosophy, for some reason, used to count among “the fathers of atheism”. In his *Tractatus Theologico-Politicus* Spinoza writes:

And since at present, so far as I know, we have no prophets at all, there is nothing left for us to do except open the sacred scrolls that the prophets left to us, open them, naturally, with sufficient caution so as not to assert matters of this kind, nor ascribe to the prophets something that they did not clearly state themselves¹.

Further on Spinoza gives an apt definition of the purpose of a state's existence: “The aim of society as a whole, and of the state consists ... in a peaceful and comfortable life”². This striking formula emphasizes, as it were, the gap between human values known since biblical times and that dearth of peace and comfort that, as often as not, the modern state offers its citizens.

The wise and ironical Spinoza then comments on the marked difference between most people and legislators:

¹ Spinoza B. *Tractatus Theologico-Politicus*. Minsk, 1998, pp. 46-47 (In Russian).

² *Ibid.*, p. 94.

And because the true object of laws is commonly clear to very few, while most of the people are unable to comprehend it ... law-makers tried to contain the crowd, as one might rein in a horse, as far as it was possible¹.

Law-making was the job of Levite priests, and the function of legislation was separated from that of the royal executive. Spinoza points out that it was “from state law that religion received the power of law among Jews”².

At the same time he observes that “kings, like their subjects, were bound by the laws and had no right to cancel them or issue new ones with equal authority...”³ Spinoza writes that contradictions between high priests (legislators) and kings arose all the time and implied “separate rule”⁴. Because, as the Dutch philosopher points out, those who run a state “always try to disguise with a semblance of law any unseemly act that they might commit; this they easily achieve when it depends on none but themselves how the law will be construed,” and then “the kings receive the greatest liberty to do as they please.” According to Spinoza, they loose a good deal of leeway for arbitrariness “if the right to interpret laws stays with another”⁵.

¹ Spinoza B. Op.cit., p. 110.

² Ibid., p. 376.

³ Ibid., p. 358.

⁴ Ibid., p. 383.

⁵ Ibid., p. 346.

Analyzing the Old Testament, Spinoza comes to the important conclusion that, in the case of the biblical monarchs:

*"...the main cause of wrong-doing was removed by the fact that the whole right of law interpretation had been passed to the Levites (Deuteronomy 21: 5), who took no part in state governance and had no share with the others whose whole fortune and honors depended on correct interpretation of laws"*¹

However, it was the duty of every individual to study the content of the laws by reading and rereading them, which incidentally points to universal literacy in ancient Israel (Deuteronomy 31: 19). Spinoza makes a subtle observation to the effect that, in accordance with the laws, "the people were no more obliged to come to the high priest than to the high judge (see Deuteronomy 17: 9)." The function of judgment, according to Spinoza, was separated from the function of passing laws (although Moses, and later Samuel, did both).

In the notes to the text of his *Tractatus theologico-politicus*, Spinoza gives the following conception of the judge-legislator interaction. Moses, he believes, ordered each of the 12 tribes to appoint "in towns given them by the Lord judges who would settle disputes according to the laws handed down by God, and should it happen that the judg-

¹ Spinoza B. Op. cit., p. 347.

es themselves started to have doubts as to the law, then they must go to the high priest (who was the principal law interpreter) or to the judge to whom they were subordinate at the time (for he had the right to confer with the high priest), and judge the controversy in accordance with the high priest's explanation"¹. Such is the reading of the Bible by one of the most authoritative commentators.

As one can see, he repeatedly stresses that separating the functions of government, legislation and judgment was a boon for the ancient Israel "for nowhere else did the citizens own their property with more right than the subjects of that state, who together with their prince possessed an equal share in land and ploughed field, and where each was eternal master of his share..."²

All of that refers to the years preceding the reign of Solomon and subsequent kings who appropriated the functions of high judge and did not observe the restrictions imposed on them by the Moses-Samuel constitution as formulated in Deuteronomy (17: 14-20) and The First Book of the Kings (86: 9-17; 10: 25).

Specifically, Spinoza wrote this:

"And there is none in the Old Testament who would talk of the Lord with greater reason than did Solomon, a man far superior to his contemporaries in natural light; and so

¹ Spinoza B. Op. cit., pp. 424-425.

² Ibid., p. 352.

he regarded himself above the law... and all laws that concerned the king and consisted mostly of three parts (Deuteronomy: 17: 16, 17) he little respected and even altogether violated them...¹

Solomon's great-great-grandson, King Josaphat, had to effect judicial reform and tried to return to the kind of an organization of judiciary prescribed by Moses (The Second Book of the Chronicles 19: 5-11). Spinoza singles out that judicial reform in his notes to *Tractatus theologico-politicus*².

As Spinoza correctly noted, the Bible's unambiguous passages must not be ascribed senses that are the opposite of clearly expressed ones. Here is what he wrote in his *Tractatus theologico-politicus*:

"If it is additionally permitted to contrive that the Holy Writ thought differently, but for some unknown reason wished to write the way it did, then what will come out will be nothing more than a complete distortion of the Holy Writ"³.

The support of that greatest ever expert of the Bible, Baruch Spinoza is critical to the idea of the biblical origin of independent judicial authority and the doctrine of separation of powers.

¹ Spinoza B. Op. cit., pp. 83-84.

² Ibid., p. 425.

³ Quoted from Critique of the Judaic Religion. Moscow, 1962, p. 289.

X. Alexander Men

Alexander Men is gradually being recognized as one of the outstanding clerics of the twentieth century. For thirty years he was a priest in an atheistic country, where the church was tightly constrained and persecuted. The problem Alexander Men faced as a theologian was how to bridge the gap between the inquiring, historically aware, scientifically trained minds of the intelligentsia and the message of the gospels.⁷⁵

Passages of law in the Old Testament bear considerable resemblance to the law books and codes of the Ancient East. In his works, Alexander Men, compared similar passages in the Code of Hammurabi and the laws of the Old Testament, and notes the differences: he remarks that the notion of crime as sin, as violation of the foundations of the moral order, was alien to the Code of Hammurabi. Other old Oriental codes treated criminal offences from the point of view of material damage and danger to the state and society. Therefore the Bible can rightly be named the world's oldest "declaration of human rights"; this means that, whatever a lawyer's personal feelings about religion, they must give the Book their closest attention, for the absence of a moral core leads to a lack of real professional-

¹ Christianity for the Twenty-First Century // The Life and Work of Alexander Men / Elizabeth Roberts and Ann Shukman (eds.). SCM Press Ltd., p. XI.

ism, and thus the work of a judge, investigator or lawyer becomes mere routine.

The Bible's interdiction on "unfair trial," Moses' separation of the performance of judicial functions, and the selection of the "most able" persons for exercising them, are the first and most important historical foundations of judicial authority, which must never be overlooked. It is hardly an accident that the court is held in the highest esteem in those countries where, in contrast to Russia, the Bible has for centuries been an integral part of the average citizen's intellectual background.

The legal component of religious consciousness that goes back to the oldest biblical sources, as well as the religious-moral element of legal consciousness, is ultimately part of the whole that might be defined as an awareness law-governed state or rule of law. To present-day Russia, which is desperately trying to pull itself out of the quagmire of traditional legal nihilism, it is essential to see that reverting to the Bible is an absolute must. Should some member of the legal profession, owing to the Soviet tradition of atheism, fail to discover a source of moral inspiration in the Bible, that person must at least be aware of the historical roots of basic legal values. For, without such knowledge of the legal framework established in the Bible, it is simply impossible to either understand or apply them. Alexander Men succeeded in grasping these truth years earlier than most, and this is borne out by the notes from his archives. However, it is not only the lawyers who

are guilty of ignorance; even the Russian clergy are not uniformly familiar with these ideas of Al. Men archpriest. The process of filling the gaps in the religious-moral knowledge of lawyers, and in the legal knowledge of priests, ought to be simultaneous and reciprocal¹.

Besides, Alexander Men has also repeatedly emphasized the importance of the biblical idea of rejecting absolutism, dogmatism, and unlimited monarchic power.

Dominant in the Bible is a negative attitude to the power of kings [he writes in a manuscript]. The entire Bible is imbued with the spirit of protest against autocracy. In this respect the Bible contrasts sharply with almost all the books of the Ancient East... A reader of the Bible is amazed to see such vehement censure of kings... By rejecting deification of the monarch, Christianity also challenged the trend in religious psychology that was a blend of submission and fear, ecstasy and desire for strong rule.

Alexander Men argues that any cult of personality is necessarily the state's self-deification, and so should be countered by genuine religious and moral consciousness: not administrative manipulations, nor yet viewing authority as something divine, but moral improvement of the people is the decisive factor in every sphere of life.

In any serious research work an insight, albeit intuitive, frequently makes for more rapid progress than painstaking

¹ Hamant Y. Alexandre Men, un témoin pour la Russie de ce temps. Paris: Editions Mame, 1993, p. 126.

study of particulars. Similarly a lightning flash may better clarify a major phenomenon than a meticulously moving spotlight. This is especially true of the interrelation between the history of biblical truths and the issues of every generation's contemporary life.

"The Bible is controversial and full of drama, as is life itself. People of many generations perceived the revelation, while the Word of God was invariably given in accordance with the level of the given epoch... The Old Testament is more than a record of the Word of God being revealed. It also describes man's response to the Word..." wrote Alexander Men in his notes, preserved in the priest's archives.

He goes on to say: "Only fully comprehending the difficulty of the gradual revelation of the Truth and man's transformation through it can we perceive the Bible as a single whole." I would like to stress the word "gradual" because it appears to refer to the tremendously important issue of each generation perceiving the meaning of the Bible individually. It also refers to the unvarying incompleteness of the understanding of biblical truths, and thus the possibility of each new generation discovering something new in them.

The great numbers of authors and copyists and the gradualness of creating the text of the Bible made an indelible imprint on the perception of the Bible, which has apparently always been, and always will be, inevitably gradual.

The stamp of individuality [Alexander Men remarks], at times striking and unorthodox, marks many of the bib-

lical writings. The formal austere style of the legislative sections bears little resemblance to the emotional dramatic descriptions of the life of David or of the prophets' fiery speeches. The Bible thus is both the Word of God and the word of man.

The multiplicity and "gradualness" of translations is also important. Father Alexander Men stated that the Old Testament was the first book on record to have been translated into a foreign language. The Greek monks Cyril and Methodius created the Cyrillic alphabet in the late 9th century expressly in order to translate the Bible. The czarist government in Russia continued to block any attempts to retranslate the full version of the Bible into Russian till the mid-1800s, and the Synodal translation currently in use did not appear until 1876. In the United State the English translation of the Bible is still being improved. Similar work is now under way in Russia as well.

Alexander Men points out that the presentation of laws in the Bible, whether in the form of religious and moral instruction or legal norms, is marked by a solemn aphoristic style. The rules of civil and criminal law are interspersed with moral injunctions, which were meant to enhance the authority of legal instructions. Compliance with law was not a mechanical formality but man's supreme spiritual act.

Let us quote the words of Archpriest Alexander Men to the effect that a "person reading the Bible is struck by the vehemence with which it speaks of the kings of Israel."

This is what he writes:

“How is one to explain this attitude of the prophets, wise men and historians of the Old Testament toward the “anointed ones”? That assessment of the kings followed from the special biblical understanding of history”¹.

Continuing this trend of thought, we might say that the specifically biblical understanding of history consists in opposing the idea of the monarch’s unlimited powers, thus stressing the nascent elements of the principle of independent judicial authority.

“The World religions are a part of World culture. They grow alongside with the urge of the human spirit towards eternity, towards values that are unchanging... What are these works of the law? They are a system of religious rites and regulations. They were instituted by people as a means of education, sometimes with great insight, sometimes simply on the strength of tradition, sometimes of error. The works of the law ... sometimes these laws come from divine revelation, as in the Old Testament; but at particular stage of intellectual and spiritual development².

The ideas of Archpriest Alexander Men are extremely

¹ Men A. The History of Religion. Vol. 5. Moscow, 1992, p. 29. (In Russian).

² Christianity for the Twenty-First Century, p. 188-189.

important both as part of a course in constitutional law and as material for any lawyer's self-instruction. Alexander Men's approach to the treatment of executive authority in the Bible enabled him to formulate and prove a concept that is rooted in the Old Testament, namely the concept of the divine origin and therefore primacy of judicial power. This in fact clarifies the origin of the principal constitutional idea that forms the basis of the doctrine of the separation of powers.

XI. Ten Commandments and Adultery as a Constitutional Fault

It may, perhaps, be easier to understand the roots of the impeachment movement initiated against President Clinton if we consider the situation, bearing in mind one of the Ten Commandments “Thou shalt not commit adultery”.

In his books *The Bible Code I, II* Michael Droskin formulated the hypothesis that encoded in the first five books of the Old Testament are predictions of events that have already occurred or will occur – such as the coming of Hitler, invention of electricity and aviation, or President John Kennedy assassination. I am not going to evaluate this hypothesis here, but it does seem that the Bible predicted rather clearly the 1974 Watergate case in which the President Richard Nixon of the United States had to give up his office as he faced inevitable impeachment after the Supreme Court decision.

Remarkably, the history of mankind has not known any other precedent of the Watergate scope since the removal from power of the King Saul dynasty by the biblical judge Samuel. As far back as 1884, that is, 90 years before the Watergate affair, the Russian author Yakov Bogorodsky commented on the prognostic nature of that biblical story, pointing out that the Samuel vs. Saul episode could be repeated in the United States given the country's Constitution. It is also a well-known fact that the ideas of the Old Testament influenced greatly constitutional development of the United States in the 18th century.

The Watergate affair started in June 1972 with the capture of several persons who broke into the Democratic National Committee headquarters – Room 723 in the Watergate apartment and office building complex in Washington, D.C. The break-in and electronic bugging of the Democrats headquarters' premises had been initiated by President Nixon's top aides. Investigation into this affair led to Nixon's resignation in August 1974.

In 1997, as America marked the 25th anniversary of Watergate, Judge Roy Moore hung up at the Alabama Court Building in Montgomery, the state's capital, two wooden tablets inscribed with the Ten Commandments.

After Judge Moore pasted the Ten Commandments, various public organizations immediately started a protest movement against putting up a religious text in a state office. Despite the fact that everybody in the US courts is supposed to swear on the Bible (as does the president on assuming office), the Supreme Court of the state of Alabama ruled that the walls of the court house were not the proper place for the Ten Commandments. Still, Judge Moore refused to remove them, and the Governor of Alabama gave orders to the National Guard to resist by force any attempt of their removal. Far from doing Roy Moore harm, this row helped him to become, four years later, Chief Justice of the Supreme Court of the state of Alabama. He was only voted out of office in November 2003.

Incidentally, the Ten Commandments assume a clearly constitutional character when applied to some eastern mon-

archs of the biblical, and even later, times. The famous hero King David was deprived of the right to build a temple in Jerusalem precisely because of coveting his neighbor's wife.

The rights of man to life, property, protection against false witness, a dignified old age, and weekly respite from work, are all clearly constitutional in character. But, until the Watergate crisis ended in the summer of 1974, during the lifetime of my generation, it had been hard for Bible commentators to fully appreciate the significance of the biblical roots of the doctrine of separation of powers and of independent judiciary.

In Russia, for seven decades, biblical texts were not available. As a result, every law student there knows something of the Hammurabi Code but is totally unfamiliar with biblical values, including those that refer to the legal system. Unfortunately, very few traditional theological comments on the Bible both in Russia and abroad contain genuine juridical analysis, particularly as it applies to constitutional law. Consequently, no attention has been given to the constitution written by Samuel, either.

The absence from the curricula of theological academies of any constitutional- themes negatively impacts the standards of legal knowledge among clerics. Unaware that the constitutional principles of freedom, human rights, restrictions on autocracy, independence of the judiciary, and separation of powers have the Bible as their direct source, a modern lawyer, apart from having these gaps in his knowledge of history, will simply be unable to comprehend the very essence of the abovementioned

tioned and many other constitutional principles of democracy. Usually this knowledge lacks in textbooks on constitutional law. Only a brief outline of some of these approaches is at present available in a posthumously published textbook by Professor Avgust Mishin of Moscow University¹.

Niccolo Machiavelli in his book «The Prince» ranked Moses among the world's greatest rulers alongside Caesar and others, categorizing him as an «unarmed prophet». Indeed, Moses had neither police, nor taxes, nor guards, nor any other attribute of power. His old age excluded the possibility of ruling by his personal physical force. Therefore, his ability to try most complicated judicial disputes had a major bearing upon the strengthening of his authority with the biblical people.

Moses was one of the most powerful figures in human history and, according to ancient authors, influenced Homer and Plato². The latter was even called “a Greek-speaking Moses”. As P. Johnson says, in Moses' thinking and ideas the religious content was interwoven with a legal approach. His conceptions of an independent professional court and an executive power restricted by law were the constitutional corner-stones of democracy.

From the constitutional point of view, another Old Testament personality comparable to Moses was Judge Samuel, the author of the first Biblical Constitution. Its text can

¹ Mishin A.A. Constitutional (State) Law of Foreign Countries. Moscow: Yustitsinform Publishers, 2004. (In Russian).

² Johnson P. Op. cit., p. 28-29.

be reconstructed, if imperfectly, from the different portions of the Old Testament.

It was Lawgiver and Judge Moses who formulated the constitutional idea of restriction of monarchic power by law, something that Judge Samuel was to try to implement some three centuries later. Records of Moses' and Samuel's words, laying the foundation of the ideas of a rule-of-law state, separation of powers, and democracy itself.

As J.A. Thomson wrote, the picture in Exodus depicts Moses as the highest judicial authority, with a body of judges to assist him in less weighty matters¹.

«There is no reason why Moses should not have been aware of the extremes to which human monarchs could go in the exercise of their autocratic rule, for he had the example of kings in Egypt and Canaan before him <...> By drawing a picture of Canaanite kings Moses sought to warn Israel about the nature of a monarchy which would assume wide civil powers. There is no reason to think Moses was less aware of the dangers of secular kingship than Samuel was”².

In Deuteronomy (17:14-20) Moses describes for the first time in the history a number of legal limitations of the

¹ Deuteronomy. An Introduction and Commentary by J.A. Thomson. Inter-Varsity Press, Illinois, 1996, p. 202.

² Ibid., p. 204-205.

standard ancient monarchy. Such restrictions were framed for future, but had the same legal nature as other legal rules of Mosaic Law described in Deuteronomy.

«Hence it is suggested that the present passage may be regarded as originated basically from Moses himself. This is the only passage in the Pentateuch which deals with the idea of monarchy. No formal law about a king, whether casuistic or apodictic, is quoted anywhere else in the Pentateuch <... >. These verses assert that Moses had envisaged the monarchy and had declared it to be a possible form of government»¹.

As the Lawgiver and the Judge Moses pinned the obligation on the future king to write «a copy of this law in a book» and to read this book “all the days of his life” and «to keep all the words of this law and these statutes, to do them» (Deuteronomy 17:18-19). By the way, it is interesting that an incorrect translation of the words “a copy of this law” as “this second law”, was given to this Book of the Bible the English name Deuteronomy.

Undoubtedly King James Version of Deuteronomy 17:18 stating that king “shall write” is more accurate than the Revised Standard Version (“a copy of this law should be written for king on a scroll by the levitical priests”). Compare, for instance, with king «is to write himself» of the translation of Everett Fox².

J.A. Thomson wrote that Moses may well have indicat-

¹ Thomson J.A., *Op. cit.*, p. 205.

² Everett Fox. *The Five Books of Moses*. New York, 1995, p. 454.

ed that, when in due course Israel had a monarch, it would be obligatory for the latter to have a copy of the law. The author believes, it was Deuteronomy which «itself represented the Law». But it is not improbable that Moses did not consider that a king's will would work as a simple scribe for re-writing the whole Mosaic Law. Perhaps, he imposed on a king only an obligation to re-write particular verses ("this law") which directly related to the obligations of the king himself. One can say that Moses was primarily concerned with the king's obligation «to fear the Lord his God» and his other particular obligations described in Deuteronomy (17:14-20). The possibility of using during the coronation ceremony the document which was only symbolic and in abbreviated form represents the whole Mosaic Law was also mentioned by J.A. Thomson¹.

Two-three centuries later the Judge Samuel, who certainly knew Moses' approach to the manner of kingdom, wrote additional description of «the manner of the king that shall reign over them» (1 Sam. 8:9). In his speech to the people he described the rights of the king as well as some limitations. For instance, the king may take no more than tenth of the seed, vineyards and sheep (8:15, 17). Some days or months later Samuel once again told the people the manner of kingdom, and wrote it in a book (10:25), which immediately reminds us «a book» of Deuteronomy (17:18).

The figure of Samuel could remind us of the promise of

¹ Thomson J.A. Op. cit., p. 206.

Moses, that «God will raise up for you a prophet like me» (Deuteronomy 18:15-22). When Samuel was writing his «book» he could be considered as a small scale Lawgiver and, for sure as the Judge. When King Saul began to reign, executive and judicial functions certainly were divided. Authors of prominent commentary mentioned above said that Samuel was the judge in the ordinary English sense of the word, «a role which he retained after Saul became king»¹.

And the next very important quotation: «Verses 25 refers to a document, deposited at the shrine, where no doubt the priests looked after it. It has been described as the royal «constitution». We are given no details of its content, but it was probably an expanded version of Deuteronomy 17:18-20. The regulations no doubts included both «rights and duties». In other words, it was document which told the king what he had a right to expect from citizens, and what his duties were, under God «towards them»².

¹ New Bible Commentary. 21st Century Edition, p. 303.

² Ibid., p. 307.

XII. Judges and Monarchy. Biblical Watergate.

Former Jesuit Jack Miles, who won the Pulitzer Prize for his book «*God. A Biography*», observed that Moses was cautiously neutral about the institution of monarchy¹. He accepted the introduction of monarchy strictly through the election of the king, ruling out the election of an alien as an Israelite monarch. There we see a reference to the Biblical Constitution that would be written several centuries later by Judge Samuel:

18. And it shall be, when he sitteth upon the throne of his kingdom, that he shall write him a copy of this law in a book out of that which is before the priests the Levites;

19. And it shall be with him, and he shall read therein all the days of his life: that he may learn to fear the Lord his God, to keep all the words of this law and these statutes, to do them;

20. That his heart be not lifted up above his brethren, and that he turn not aside from the commandment, to the right hand, or to the left; to the end that he may prolong his days in his kingdom, he, and his children, in the midst of Israel (Deuteronomy 17).

In other words, the passage points to an excerpt from the Holy Script that describes the monarch's rights and obligations. The excerpt, moreover, must be in the form of a separate book (scroll). At this point I would like to support

¹ Miles J. *God. A Biography*. N.Y., 1996, pp. 1, 167.

the idea of the Biblical Constitution as a single document in its own right developed under Judge Samuel with his adds to Moses' norms for king.

Subsequent events are highly important for deriving the basis for the doctrine of separation of powers from the biblical text. On behalf of God, Samuel anointed Saul to be king. This fact alone, which emphasizes not just equality but rather the primacy of the Judge vis-a-vis the monarch, of judiciary authority vis-a-vis executive authority, would be enough to prove the biblical origin of the doctrine of separation of powers. However, the events that followed confirm this in even stronger terms. After Saul's ascent to power, Samuel did not "retire". Moreover: when King Saul broke the commandment and performed a religious rite on his own, and then disobeyed direct instructions from Samuel, the latter, on behalf of God, secretly anointed David to be the king and prophesied to Saul that his descendants would not inherit the throne. To put it simply, Judge Samuel directly influenced the fate of the head of the executive.

It is possible to call this a "biblical Watergate," comparing it with the situation when, in 1974 the U.S. Supreme Court decided the fate of President Richard Nixon, who was forced to resign. The comparison is surprisingly fitting. In a book published 90 years before the Watergate events a 19th-century author wrote:

“Should North Americans, for example, be compelled for some reason to turn their president into a constitutional monarch, it is easy to imagine the public outcry that their new monarch would cause if he was in some way tempted to encroach on a single article of the constitution. Would he not then be told, as was Samuel: Off the throne with you! The severity of Samuel’s judgment will become even more apparent to us if we look at some particulars of Saul’s action... Saul dared to personally make sacrifices (i.e. perform a religious rite. – P.B.), which he had no right to do. That was a case of totally unjustified arbitrariness”¹.

I quoted a book by Yakov Bogorodsky, published in Kazan in 1884, in which the conflict between Samuel and Saul was also compared with gross violations of the Constitution of the United States by the executive power. The policy of curbing a monarch’s absolute power through judiciary authority became precisely one of those “power lines of enormous importance” which, in the words of the French historian Marc Bloch, run through millennia from ancient to modern times, a chain of similar phenomena of human history falling along that line. The biblical origin of the doctrine of separation of powers, coinciding with the times of Samuel, Saul and David, may be said to date from the year of Saul’s death, after which David became king and Samuel’s ruling was thus carried out.

¹ Bogorodsky Ya.A. Op. cit., p. 47-48.

I would like to stress again the need for historical approach to the study of the doctrine of separation of powers, citing as an example the ancient Greek line in the formulation and practical development of this doctrine in ancient Athens and, several centuries later, in Rome.

Plato distinguished between legislation, administration, and justice as the forms of state activity. Aristotle made a distinction between such elements of political structure as legislative body, administrative magistrate, and the courts. Importantly, both these great ancient Greek thinkers referred to an ideal, perfect state; that is to say, they offered a doctrinal interpretation of the problem¹.

Undoubtedly, that Plato and Aristotle knew the abstraction of the political state and that the separation of powers in ancient Greece was an obvious reality. Even Hegel, the generalissimo of abstraction, regarded it as the sensation of a millennium, in terms of constitutional law, that the tyrant Peisistratus of Athens acknowledged that his actions could be adjudicated by the Athens court, the Areopagus. The “abstraction of the political state and the abstraction of the power of the political state” can also be found in the biblical debate between Judge Samuel and the elders

¹ Barnashov A.M. *The Theory of Separation of Powers: Origin, Development, Application*. Tomsk, 1988. (In Russian). Abashmadze V.V. *The Doctrine of Separation of State Power and Critique Thereof*. Tbilisi, 1972, p. 4 (In Russian). This fully warrants V.V. Abashmadze's conclusion that “the doctrine of separation of powers is just as old as the state and law themselves.”

of the biblical tribes, in the course of which Samuel explained them that the power of the king, which they had asked to be introduced, would mean requisitioning of land and property, obligatory military service, and loss of personal freedoms (1 Samuel 8).

Charles de Montesquieu aptly formulated many propositions of the doctrine, but he was not its pioneer. The "class compromise between various social groups" was a more meaningful reflection of the system of separation of powers and of checks and balances in the state structure of the Florentine Republic of the 14th and 15th centuries, as described by Machiavelli, than the works of Montesquieu written in the middle of the 18th century. The loss of historicism in the study of the development of the doctrine of separation of powers signifies a failure to understand its universally human and all-embracing character.

In biblical times, the divine origin of monarchs was sometimes confirmed by references to the Judges/Gods of contemporary epics. Thus, apart from enumeration of the thousands of noses, ears and wrists cut off to instil fear, the annals of the Assyrian king Assurnasirpal II contain the following lines: "Shamash the judge extended his fine canopy over me, and I majestically ascended the throne, while he handed me the scepter that shepherds men"¹. In terms of specialization among the numerous Assyrian gods, Shamash

¹ I Will Reveal to You the Secret Word. Literature of Babylon and Assyria. Moscow, 1981, p. 281. (In Russian).

was the Judge. This nuance does not extend the framework of the doctrinal substantiation of the divine origin of monarchical power, as that power was received from God.

Comparison with Egypt is also important; here, the pantheon included the goddess Maat that personified law and order. The judges of ancient Egypt carried round their necks an image of that goddess – a woman with an ostrich feather in her hair¹. Under one of the pharaohs of the 18th dynasty (16-13 centuries B.C.), in ancient Egypt judiciary oracles appeared that administered justice only in the name of gods, including the supreme god Amon. Unlike the oracles, people in the official courts swore by the name of Amon as well as that of the current pharaoh². It cannot be ruled out that Moses, who had been the adopted Prince of the Egyptian court, brought the Jews, who had continuously lived for 400 years in Egypt, tablets with the Ten Commandments most likely written in the Egyptian language, which they could understand.

The Founding Fathers and authors of the Constitution of the United States read the Old Testament many times from their childhood, and for this reason, as Max Dimont points out, a number of scholars hold the view that the American Constitution was copied not so much from Greek democracy as from the state of the Epoch of the Judges².

¹ Korostovtsev M.A. Religion of Ancient Egypt. Moscow: Nauka Publishers, 1976, p. 142-145. (In Russian).

² Ibid., p. 179.

³ Diamont M. Op. cit., p. 51.

At the same time Greek and Roman precedents were no less important to the Founding Fathers of the United States than the works of Locke or Montesquieu. Thomas Jefferson particularly noted the importance of “precedent in the history of Rome,” to which references were made in those times. Biblical injunctions were no less, and most likely much more, important to the Founding Fathers and their own Puritan fathers, usually called the Pilgrim Fathers.

It is interesting that the Pilgrim Fathers, who were the pioneers of the Massachusetts colony, have taken with them to America not the King James Bible but the Geneva Bible Version. Latter uses the word “tyrant” over 400 times which is not to be found in the King James Bible. The Geneva Bible made by Calvinist Englishmen had a number of explanatory notes, “many of them explicitly anti-royalist”¹.

From the very beginning anti-royalist spirit of the Old Testament was a cornerstone of the American constitutionalism. Spirituality of any real constitution was first mentioned by Hegel. In his research of old constitutions Hegel made a point that, it was not any spirituality in constitutional structure of Athens and Rome. He, probably, overlooked the existence and the Spirit of the Biblical Constitution.

But he was very close to it – he wrote, for instance:

¹ Nicolson A., *God's Secretaries. The Making of the King James Bible.* New-York: Harper Collins Publishers, 2003, pp. 58, 75.

*“The constitution should at least be so framed that the citizens have to obey as little as possible and the authorities are allowed to command as little as possible... The problem, in such collisions, therefore, is to determine the best constitution, namely, that institution, organization, or mechanism of government which most securely guarantees the purpose of the state. This goal can of course be considered in various ways, for example, as the quiet enjoiment of life, universal happiness... The particular powers must become distinct, each one completing itself, but at the same time they must freely cooperate... The State is the idea of Spirit in the externality of human will and its freedom”*⁹⁶.

Hegel was not familiar with origins of the American constitutional ideas and perhaps this was the reason why he overlooked its biblical spirituality. Modern constitutional law, in its turn, is overlooking, first, Hegel's ideas of spirituality of any real constitution and, second, the Biblical Constitution itself.

I will dare say that not all the members of the 1787 Constitutional Convention who signed the United States Constitution even read the books of Locke and Montesquieu, but I am sure that they all had a sound knowledge of the Old Testament. They took from the Bible its constitutional spirit.

One of the proofs of the Americans' ability for aptly

⁹⁶ Hegel, Reason in History. Indianapolis, 1953, pp. 58, 60, 61.

synthesizing and assimilating any ideas, including the constitutional ideas, is the famous phrase “We the people...” which the Founding Fathers of the United States almost literally borrowed from a treaty of Iroquois tribes – a fact that not many experts are aware of.

The doctrine of separation of powers came into being when judicial authority was recognized as divine, when the executive power was considered equal to the judiciary – and in the biblical version it was actually given priority over the monarch’s authority. It was not mentioned in the Book of Judges usurper Abimelech, a self-appointed king, but Saul, anointed at God’s bidding by Judge Samuel, who became the first king of Israel. Nowadays, when the President of the United States is sworn in and assumes office in the presence of the U.S. Supreme Court Chief Justice, biblical history comes alive, as it were, with the head of the judiciary installing the new head of the executive.

Independence and at times primacy enjoyed by the judicial authority over the executive branch together make up the key element of the doctrine of separation of powers. Its second important constituent, the separation and roughly equal status of the king and the popular assembly or council of elders (i.e. of the executive and the legislative), was known to history long before the times of Judge Samuel and King Saul. But it is precisely, that this section of the Bible is the starting point of the doctrinal life of separation of powers for the equality and divine origin of judicial authority were established.

XIII. First Constitution of the World

Inside the main cathedral of Warsaw there is a monument to the Constitution. During the Warsaw uprising of 1944, the building housed the Polish headquarters, and the Germans were particularly persistent in attacking the cathedral. They managed to blow up the wall precisely where the Constitution monument was, smashing it to bits. The Polish leaders mounted machine-guns on the altar and from there returned the fire till the last of their men fell dead; they lost the fight, but they upheld their honor, freedom and the very Constitution, which Polish guides in the rebuilt cathedral now describe as the world's oldest written constitution, being nearly 500 years old. The freedom-loving Irish, it appears, claim to have an even older one.

I regret to say that all of them are in for a disappointment: the oldest of all known written constitutions was drawn up by Judge Samuel 3000 years ago, which is unequivocally recorded in the Old Testament: "Then Samuel told the people the manner of the kingdom, and wrote it in a book, and laid it up before the Lord" (1 Samuel 10: 25). In the canonical English version this verse is found in the First Book of Samuel, while in the Judaic version, it is in the Book of Samuel. In some of the English versions the word "book" is occasionally replaced by "scroll," which is in keeping with the method of writing and practice of the time, because even the more recent books of the Bible were written on scrolls of skin. The text of the Con-

stitution drawn up by Samuel has not survived, nor have several more of the books mentioned in the Bible (or else they are still to be found), e.g., the Book of the Acts of King Solomon that has vanished without a trace. The contents of the first ever written constitution can be recreated to a large extent from other parts of the biblical text that clearly refer to the text of that first Fundamental Law that is truly priceless to all students of constitutionalism.

The Old Hebrew word *mispat* was translated as, “the manner of the kingdom” though Moses is talking about only the King’s obligation (Deuteronomy 17: 16-20). There is no doubt that Samuel had to use the Moses text when writing his book. It would therefore be more accurate to translate *mispat* as “rights and obligations.” In his fundamental work *Samuel and the Deuteronomist* Robert M. Polzin argues that the text of the book written by Samuel itself, to which he unaccountably fails to apply Moses’ preceding outline of the king’s obligations, cannot be comprehended without preserving the checks of monarchic authority that follow from the activity of Samuel as prophet and judge¹. Also, Polzin translates *mispat* as “custom and manner of action” of the monarchy in what he believes to be the legal sense².

At the same time Polzin is mildly critical of Baruch Halpern, the author of *The Constitution of the Monarchy*

¹ Polzin R.M. *Samuel and the Deuteronomist. A Literary Study of the Deuteronomistic History. Part 2: 1 Samuel.* Indianapolis, 1993, p. 86-89.

² *Ibid.*, p. 86.

in Israel, for his dogged use of the strictly legal translation of *mispat*¹. In Polzin's view, Halpern never explained why the text of the book presumably written by Samuel omitted any mention of restrictions on king's power². As noted above, Polzin simply overlooked the fact that restrictions on the monarch's authority laid down by Moses three centuries before Samuel were common knowledge, so Samuel did not bother to specify them while addressing his people; but he certainly included them in the book I call the World's First Written Constitution.

Here I would like refer to the opinion that is very dear to me, voiced by a major expert in biblical texts, Professor Ephraim Isaac, director of the Princeton University Institute of Semitic Studies, who provided the linguistic backing for the idea that *mispat* ought to be translated into modern languages precisely as "constitution"³.

Given that we find a primary source of such a significant power line as the doctrine of separation of powers in the history of our civilization, we could be satisfied with a reference to the period between the 13th and the 11th centuries B.C., as this corresponds to the Epoch of Judges and the reign of the first biblical king.

¹ Halpern B. The Constitution of the Monarchy in Israel. Decatur, G.A., 1981, p. 224.

² Polzin R. Op. cit., p. 243.

³ The Bible and Constitution. Moscow, 1998, p. 125-126.

“Human time, according to a French historian Marc Bloch, will always resist strict uniformity and division into segments of the kind that clocks have... In short, we merely pretend that we can distribute bits of reality according to a rigid but arbitrarily selected rhythm, while this kind of regularity is utterly alien to reality... However, do not let us worship the idol of imaginary precision. The most precise period of time is not necessarily one to which we apply the smallest unit of measure ... but one which better corresponds to the nature of the thing. Because every type of phenomena has its own, as it were, specific, system of calculation. Transformation of social structure, economy, beliefs, and mindset cannot possibly be fitted without distortions into the far too narrow limits of chronology”¹.

In this book I view the Bible as a historical document whose authenticity is largely confirmed by historical, including archeological, research. Just a few months ago archeologists discovered in Jerusalem ancient texts that provide evidence of the reign of the King David.

In Moses' mind, as Paul Johnson points out, religious content was intertwined with a juristic approach². The idea of independent professional courts and of executive authority restricted by law, which he developed, laid the consti-

¹ The Bible and Constitution, pp. 98-99, 101.

² Johnson P. Op. cit., p. 29

tutional foundation of democracy. In terms of the constitutional approach, the only Old Testament character comparable to Moses is that of Judge Samuel, the co-author of the first biblical Constitution.

It is necessary to quote aphoristic words of Paul Johnson on Moses:

He was a prophet and a leader; a man of decisive actions and electric presence, capable of huge wrath and ruthless resolve; but also a man of intense spirituality, loving solitary communion with himself and God in the remote countryside, seeing visions and epiphanies and apocalypses; and yet not a hermit or anchorite but an active spiritual force in the world, hating injustice, fervently seeking to create a Utopia, a man who not only acted as intermediary between God and man but sought to translate the most intense idealism into practical statesmanship, and noble concepts into details of everyday life. Above all, he was a lawmaker and judge, the engineer of a mighty framework to enclose in a structure of rectitude every aspect of public and private conduct – a totalitarian of the spirit¹.

It was precisely the Judge Moses who was the first person in human history to formulate the constitutional idea of limiting monarchic power by law, which some

¹⁰⁴ Johnson P. Op. cit., p. 27

three centuries later Judge Samuel tried to implement. Let me remind the reader that we are talking here of the 13th and 10th centuries B.C. The words of Moses and Samuel were recorded in writing at about the same time, which provided the foundation for the ideas of a law-governed state, separation of powers and democracy itself.

Moreover it is not absolutely correct that some of them try to consider the whole biblical law of Old Testament as “the Divine Constitution” as for instance Mendell Lewittes did in his remarkable book “Religious Foundations of the Jewish State. The Concept and Practice of Jewish Statehood from Biblical Times to the Modern State of Israel”¹. The Constitution is a specific set of rules that includes regulations for top governmental institutions, major rights and duties of citizens as well as general constitutional principles and ideas. It will be wrong to mix “a constitution” and “a code”. The first ancient set of legal rules known before the Bible could be named only as «the Code» for instance, Hammurabi Code. In these codes there were no specific rules for powerful governmental institutions or any limitations of a power of king. The Torah could be considered a Code but not a Constitution. The Torah (first five books of the Bible) includes many detailed regulations, which are appropriate for the traditional ancient Code, or cor-

¹ Mendell Lewittes, *Op. cit.*, p. 1-16.

respond to Civil Code, Code of Judicial Procedure, Criminal Code, and Family Code.

Joyce Baldwin mentioned that when Saul was accepted and publicly acclaimed as king this ceremony had one important additional feature: the monarchy Israel had embraced was not like that of the other nations, for it was circumscribed with rights and duties, which were designed to prevent the oppressive style of rule and to ensure «a constitutional monarchy» ... «the rights and duties of kingship were written in the book»¹.

The scope of Samuel's book should be narrower than the set of all legal rules described in first five books of the Old Testament (the Torah). Also Samuel's book cannot be a simple repetition of some rules from the Torah because Samuel's description of king's powers and tax limitations (not more than 10 %) is original and appears only in 1 Samuel. Robert Polzin correctly wrote that it would be a one sided approach to consider the royal practices listed by Samuel as abusive; rather Samuel is reported as concentrating on monarchic rights and practices without which no king could effectively govern².

If the Torah provisions were enough, it would not have been necessary for Judge Samuel to describe the framework of the king's competence "the manner of the king" (1 Samuel, 8:11-17) and write a special book that de-

¹ 1 and 2 Samuel. An Introduction and Commentary. Illinois, 1988, p. 94.

² Polzin R.M. Op. cit., p. 85.

scribes the manner of the kingdom (1 Samuel. 10:25). This book of Samuel should be regarded as the First Constitution in the History of the World, as the real Biblical Constitution or as we will call it later, the Moses-Samuel Constitution. This book is directly related to «the book» which a king «shall read therein all days of his life» (Deuteronomy, 17:18-19) likely, on conditions and limitations of king's power described by Moses (Deuteronomy 17:15-17). The book from Chapter 10 of the I Samuel (Samuel Constitution) shall include at least Moses' and Samuel's direct words on «the manner of kingdom».

The book of Samuel was lost long time ago as was the case with some other books mentioned in the Bible, such as: "The Book of the acts of Solomon" (1 Kings, 11:41); "The Book of Jashar" (Joshua 10:13, 2 Samuel 1:18); "The Book of the Wars of the Lord" (Numbers 21:14).

Professor James Sanders thinks that we now actually possess only ten percent of the books available under First Temple auspices in the high period of pre-exilic royal theology¹. It seems the missing book written by Samuel was found in the Temple in the days of King Josiah because its reading gave the king an opportunity to say that past kings did not keep their duties prescribed in the Temple book. (Kings 2, 22:11, 13; 23:5, 11, 12, 19). Perhaps this book was partly repeated by prophet Jeremiah and burned

¹ Sandberg J. Op. cit., p. XIX.

by other King Jehoiakim some years later (Jeremiah. 36:23)¹.

First of all I should mention that to the time of the Book of Judges, Jewish law was quite complicated and needed some kind of professionalism. «The Torah was a bold leap into future, a giant stride ahead of anything existing at that time. Its concept of equality before the law, a law based on a written code, seems to be Semitic innovation. The Sumerians, whose written code of laws dated back to 2500 B.C., were probably the first people on earth to have a written code, but it lacked the passion for justice of the Mosaic laws. Five hundred years later, the Sumerian code was augmented and incorporated by the Babilonians into the Code of Hammurabi, but again this body of laws did not have the democratic spirit of the Torah. A written judicial code applicable to all without favoritism was totally un-

¹ Harvard University President Samuel Langden was right when at the end of XVIII century he recalled the development of Israelite government as movement to a well regulated nation under the rule of law and, lacking only a «permanent constitution». (Jerold Auerbach. Rabbis and Lawyers. Indianapolis, 1993, p. 9). His judgment is correct because the book of Samuel was lost in a darkness of centuries and it was never used by the most of kings of Israel. Some authors called Samuel a great statesman who had undertaken a codification of ancient divine law and had also prepared fresh legislation of a civil nature (Roberts E. The Old Testament Problem, 1950, quoted from J.A. Thompson; Deuteronomy. An Introduction and Commentary. Illinois, 1974, p. 56). I can not agree with E. Roberts that Samuel was an author of the Deuteronomy but he is absolutely right emphasizing the importance of the missing Samuel Constitution.

known to the Egyptians until 300 B.C. We know of no written Roman laws until the second century B.C. The Mosaic Code, then, was the first truly judicial...»¹.

The respectable 19th century commentator Alfred Edersheim wrote that this was the establishment of a constitutional monarchy. He said: “Samuel explains to the people, this time not «the right of king» (1 Samuel, 8:9, 11) but «the right of kingdom» (1 Samuel, 10:25) as it should exist in Israel in accordance with principles laid down in Deuteronomy (17:14-20)”².

In the Russian canonical text the words were translated as «the right of kingdom» but, it seems to me, English canonical King James Bible’s translation was more correct. English definition «the manner» probably included a definition «the rights» as well as a definition «the restrictions». Some centuries before Samuel, Moses expressed in Deuteronomy the clear restrictions on the future kingdom as it should exist in Israel. For instance: the restriction not to set a stranger as the king (17:15), not to multiply horses, nor to cause the people to return to Egypt (17: 16), not to multiply wives of the king (17: 17), not to greatly multiply silver and gold belonging to the king (17:17).

The main obligation of the king was to read the book which includes «all the words of this law «all the days of

¹ Diamont M. Op. cit., p. 44.

² Edersheim A. Bible History. Old Testament. First published 1876, Massachusetts, 1995, p. 442.

his life» to keep all the words of this law and these statutes» (17: 19). This condition of the manner of kingdom given by Moses was very important. He said: «That his (king's) heart be not lifted up above his brethren, and that he turn not aside from the commandment, to the right hand, or to the left: to the end that he may prolong his days in his kingdom, he, and his children, in the midst of Israel» (Deuteronomy, 17:20).

In the Chapter 8 of 1 Samuel we can see the definition of «the manner of kingdom», not «the right of king» as Alfred Edersheim used in his book, because Samuel told the people not only the rights of king but also some restrictions. King can take not more than the tenth of «your seed», «your vineyards» (8:15), «your sheep» (8:17). These restrictions of Samuel clearly correspond to the restrictions early done by Moses to future king not «greatly multiply to himself silver and gold».

Also the book, written by Samuel on the manner of kingdom (1 Samuel, 10:25), clearly corresponds to Moses' instruction to the future king to «write him a copy of this law in a book» (Deuteronomy, 17:18-19). I hope that the USA Constitution or the latest Russian Constitution were not only man-made but even in part were God-given.

Everett Fox wrote new translation of the first five books of the Old Testament. His translation «restores the Bible's original rhetoric and poetry – its rhythms, nuances, and stylistic devices, the echoes, allusions, alliterations»¹.

¹ Everett Fox. The Five Books of Moses. New York, 1995.

The author said in his comment: «Deuteronomy here introduces a new note into the Torah, one which becomes familiar from 1 and 2 Samuel on ancient Israel had an interesting and at times ambivalent attitude towards monarchy <...>. Our passage clearly demonstrates the controls on the institution desired by the biblical writers: limits of wealth and the stipulation that the king study God's Instruction»¹. It was «new note» not only to the Torah but to the whole history of development of the ancient monarchy. Before Samuel the history of the mankind did not know any written legal document describing «the manner of the kingdom» with some restrictions and limitations of the powers of the king. Here we shall speak not about «a Code» but about the Constitution².

¹ Everett Fox. Op. cit, p. 928.

² Some versions of the English translation use the word «scroll» which agrees with the writing technique and practice of the times since even in times closer to our own the books which constitute the Bible used to be written on parchment or leather scrolls. As Chaim Potok brilliantly wrote his vision of the author of the First Samuel: «That Israelite, unknown, as are the most writers and scribes of the ancient Near East, used the script of the Canaanites, which had been in existence for about three hundred years before the conquest and which the Israelites adopted soon after they settled in the land, along with Canaanites, Mesopotamian, and Egyptian literary forms – poetry, psalms, proverbs, annals. He wrote on wood, leather, or papyrus, with A stylus or A feather pen and colored ink. He wrote in his own Language, Hebrew, a mixture of the language of the land and the language, possibly a relative of Aramic, which the generation of the conquest had brought in from the wilderness – thereby making Hebrew a dialect of Canaanite <...>. This account of Saul that we have in the

The text of Samuel's Constitution has not survived, which may be true of some other books mentioned in the Bible as «The Book of the Wars of the Lord» (Numbers 21:24), «the Book of Jashar» (Joshua 10:13; 2 Samuel, 1:18), «the Book of the acts of Solomon» (I King 11:41).

On the other hand, I regard Moses-Samuel Constitution as the first known constitutional text to curtail the state's authority over society and the individual, certainly not as a modern text written by the rules of the commonly accepted constitutional technique which has only been known to the world since the adoption of the US Constitution of 1787.

I will now attempt to reconstruct the Book of Samuel, the world's first written Constitution, strictly following the biblical text.

At the very conclusion of the piece, I set forth my reconstruction of the Book of Samuel insofar as it sets forth a "constitution". As I explicate, this has been missing from history, and the reconstruction of it here is certainly ambitious.

I would like to set forth the basis for the selection. Obviously, I was able to find material on the Book of Samuel, pre-

Bible was written during or soon after his reign; there is about it relentless mirroring of truth, an almost cruel beat of authenticity, as if the writer himself had witnessed the battles and the rages, seen javelin hurled in jealousy, sensed the silent melancholy of defeated greatness <...>. This is the first portrait in the history of our species of the humanity of a king – the qualities of his character that make him not of the gods of mankind» (Potok Ch. Op. cit., p. 140).

sumably almost the entirety of the information in the Book of Samuel about his constitution. However, with respect to the quotes from the Bible, I have been somewhat selective. There are 613 laws (by way of affirmative and negative commandments) throughout the five books of the Hebrew Book of Moses – the first five books of the Bible (which Jews call the Torah). These 613 laws/prohibitions/directives have been subject of considerable learning and debate over the last 3000 years. So, I have selected a portion of those 613 laws and commandments in the reconstruction of Samuel's constitution. What was the basis of my selection?

It is necessary to keep in mind that a fundamental principle of Judaism is that adding or subtracting from these 613 laws is prohibited. In any event, if someone is to selectively incorporate a portion of these 613 in Samuel's constitution, the criteria for that selection should be set forth clearly.

I considered the legal rules of the first five books of the Old Testament as a "code", and contrast that with the "Moses-Samuel Constitution" which I set forth as "a constitution". I describe a constitution as a specific set of rules including conditions of activity of top state governmental institutions, major rights and duties of citizens as well as general constitutional principles and ideas. Other norms of Torah belong to the Civil Code, the Criminal Code, the Family Code, even Moral Code.

At the very least, the Moses-Samuel Constitution contained the following articles, provided below in the form of quotations from the Old Testament.

1. Then Samuel told the people the manner of the kingdom, and wrote it in a book, and laid it up before the Lord (1 Samuel 12: 25).

2. Now therefore, behold the king whom ye have chosen, and whom ye have desired! and, behold, the Lord hath set a king over you (1 Samuel 12: 13).

3. If ye will fear the Lord, and serve him, and obey his voice, and not rebel against the commandment of the Lord; then shall both ye and also the king that reigneth over you continue following the Lord your God (1 Samuel 12: 14).

4. But if ye shall still do wickedly, ye shall be consumed, both ye and your king (1 Samuel 12: 25).

5. This will be the manner of the king that shall reign over you: He will take your sons, and appoint them for himself, for his chariots, and to be his horsemen; and some shall run before his chariots (1 Samuel 8: 11).

6. And he will appoint him captains over thousands, and captains over fifties; and will set them to ear his ground, and to reap his harvest, and to make his instruments of war, and instruments of his chariots.

And he will take your daughters to be confectionaries, and to be cooks, and to be bakers.

And he will take your fields, and your vineyards, and your oliveyards, even the best of them, and give them to his servants (1 Samuel 8: 12-14).

7. And he will take the tenth of your seed, and of your vineyards, and give to his officers, and to his servants (1 Samuel 8: 15).

8. And he will take your menservants, and your maidservants, and your goodliest young men, and your asses, and put them to his work (1 Samuel 8: 16).

9. He will take the tenth of your sheep: and ye shall be his servants (1 Samuel 8: 17).

10. Thou shalt in any wise set him king over thee, whom the Lord thy God shall choose: one from among thy brethren shalt thou set king over thee: thou mayest not set a stranger over thee, which is not thy brother (Deuteronomy 17: 15).

11. But he shall not multiply horses to himself, nor cause the people to return to Egypt, to the end that he should multiply horses: forasmuch as the Lord hath said unto you, Ye shall henceforth return no more that way (Deuteronomy 17: 16).

12. Neither shall he multiply wives to himself, that his heart turn not away: neither shall he greatly multiply to himself silver and gold (Deuteronomy 17: 16).

13. And it shall be, when he sitteth upon the throne of his kingdom, that he shall write him a copy of this law in a book out of that which is before the priests the Levites:

and it shall be with him, and he shall read therein all the days of his life; that he may learn to fear the Lord his God, to keep all the words of this law and these statutes, to do them:

that his heart be not lifted up above his brethren, and that he turn not aside from the commandment, to the right hand, or to the left: to the end that he may prolong his days in his kingdom, he, and his children, in the midst of Israel (Deuteronomy 18: 20).

Such must be the minimal set of constitutional prescriptions set out in the scroll written by Judge Samuel. However, based on legislation that had already existed in generalized, written form at the time when judge Samuel compiled the text of the Constitution, other norms could also be included in its text – first of all, of course, those that in modern constitutional language could be called The Biblical Bill of Rights.

1. Thou shalt therefore keep the commandments, and the statutes, and the judgments, which I command thee this day, to do them (Deuteronomy 7: 11).

2. And ye shall teach them your children, speaking of them when thou sittest in thine house, and when thou walkest by the way, when thou liest down, and when thou risest up.

And thou shalt write them upon the door posts of thine house, and upon thy gates (Deuteronomy 11: 19, 20).

3. Thou shalt not revile the gods, nor curse the ruler of thy people (Exodus 22: 28).

4. And I charged your judges at that time, saying, Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.

Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's: and the cause that is too hard for you, bring it unto me, and I will hear it (Deuteronomy 1: 16, 27).

5. If there be a controversy between men, and they come unto judgment, that the judges may judge them; then they shall justify the righteous, and condemn the wicked.

And it shall be, if the wicked man be worthy to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to his fault, by a certain number.

Forty stripes he may give him, and not exceed: lest, if he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee (Deuteronomy 25: 1-3).

6. Judges and officers shalt thou make thee in all thy gates, which the Lord thy God giveth thee, throughout thy tribes: and they shall judge the people with just judgment.

Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift: for a gift doth blind the eyes of the wise, and pervert the words of the righteous (Deuteronomy 16: 18, 19).

7. Thou shalt not kill (Exodus 20: 13).

8. He that smiteth a man, so that he die, shall be surely put to death.

And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place whither he shall flee.

But if a man come presumptuously upon his neighbor, to slay him with guile; thou shalt take him from mine altar, that he may die (Exodus 21: 12-14).

9. At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death.

The hands of the witnesses shall be first upon him to put him to death, and afterward the hands of all the people. So thou shalt put the evil away from among you (Deuteronomy 17: 6,7).

10. If there arise a matter too hard for thee in judgment, between blood and blood, between plea and plea, and between stroke and stroke, being matters of controversy within thy gates: then shalt thou arise, and get thee up into the place which the Lord thy God shall choose;

and thou shalt come unto the priests the Levites, and unto the judge that shall be in those days, and inquire; and they shall show thee the sentence of judgment:

and thou shalt do according to the sentence, which they of that place which the Lord shall choose shall show thee; and thou shalt observe to do according to all that they inform thee (Deuteronomy 17: 8-10).

11. According to the sentence of the law which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do: thou shalt not decline from the sentence which they shall show thee, to the right hand, nor to the left.

And the man that will do presumptuously, and will not hearken unto the priest that standeth to minister there before the Lord thy God, or unto the judge, even that man shall die: and thou shalt put away the evil from Israel.

And all the people shall hear, and fear, and do no more presumptuously (Deuteronomy 17: 11-13).

12. thou shalt separate three cities for thee in the midst of thy land, which the Lord thy God giveth thee to possess it.

And this is the case of the slayer, which shall flee thither, that he may live: Whoso killeth his neighbor ignorantly, whom he hated not in time past;

as when a man goeth into the wood with his neighbor to hew wood, and his hand fetcheth a stroke with the axe to cut down the tree, and the head slippeth from the helve, and

lighteth upon his neighbor, that he die; he shall flee unto one of those cities, and live (Deuteronomy 19: 2, 4, 5).

13. That innocent blood be not shed in thy land, which the Lord thy God giveth thee for an inheritance, and so blood be upon thee.

14. But if any man hate his neighbor, and lie in wait for him, and rise up against him, and smite him mortally that he die, and fleeth into one of these cities;

then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die.

Thine eye shall not pity him, but thou shalt put away the guilt of innocent blood from Israel, that it may go well with thee (Deuteronomy 19: 10-13).

15. Honor thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee (Exodus 20: 12).

And he that smiteth his father, or his mother, shall be surely put to death.

And he that curseth his father, or his mother, shall surely be put to death (Exodus 21: 15, 17).

16. Thou shalt not covet thy neighbor's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maid-servant, nor his ox, nor his ass, nor any thing that is thy neighbor's (Exodus 20: 17).

17. Thou shalt not commit adultery (Exodus 20: 14).

and seest among the captives a beautiful woman, and hast a desire unto her, that thou wouldest have her to thy wife;

then thou shalt bring her home to thine house; and she shall shave her head, and pare her nails;

and she shall put the raiment of her captivity from off her, and shall remain in thine house, and bewail her father and her mother a full month: and after that thou shalt go in unto her, and be her husband, and she shall be thy wife.

And it shall be, if thou have no delight in her, then thou shalt let her go whither she will; but thou shalt not sell her at all for money, thou shalt not make merchandise of her, because thou hast humbled her (Deuteronomy 21: 11-14).

18. And if a man smite his servant, or his maid, with a rod, and he die under his hand; he shall be surely punished.

And if a man smite the eye of his servant, or the eye of his maid, that it perish; he shall let him go free for his eye's sake.

And if he smite out his manservant's tooth, or his maidservant's tooth; he shall let him go free for his tooth's sake (Exodus 21: 20, 26, 27).

19. Thou shalt not steal (Exodus 20: 15).

If a man shall deliver unto his neighbor money or stuff to keep, and it be stolen out of the man's house; if the thief be found, let him pay double.

If the thief be not found, then the master of the house shall be brought unto the judges, to see whether he have put his hand unto his neighbor's goods.

For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbor (Exodus 22: 7-9).

20. Thou shalt not bear false witness against thy neighbor (Exodus 20: 16).

One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.

If a false witness rise up against any man to testify against him that which is wrong;

then both the men, between whom the controversy is, shall stand before the Lord, before the priests and the judges, which shall be in those days;

and the judges shall make diligent inquisition: and, behold, if the witness be a false witness, and hath testified falsely against his brother;

then shall ye do unto him, as he had thought to have done unto his brother: so shalt thou put the evil away from among you (Deuteronomy 19: 15-19).

21. And the Levites shall speak, and say unto all the men of Israel with a loud voice: Cursed be he that confirmeth not all the words of this law to do them: and the people shall say, Amen! (Deuteronomy 27: 14, 26).

Fully or in part, we have thus succeeded in compiling from the books of the Old Testament the content of Judge Samuel's scroll, the World's First Constitution – no one can say with what accuracy. This scroll may yet be found, as quite recently the Dead Sea Scrolls containing biblical texts were found. Still, we can say even now that Samuel's text has not perished in the world conflagrations of the last three millennia, and that it is still part of present-day debate.

Russian writer Mikhail Bulgakov once said, "Manuscripts do not burn."

Russian poet Joseph Brodsky has put it even better when he said, that God would save the fire, as well as every page of a burnt text. Also he said that the words, saved by God, would be better heard from mortal lips, than out of "ethereal cotton wool".

Serbian writer and poet Milorad Pavich wrote in his world bestseller "Dictionary of the Khazar", that we will find the God's wisdom not the only in the black letters of the text but, first of all, in the white parts of pages between those letters¹.

¹ Pavich M. Dictionary of the Khazar. Saint-Petersburg, 2002, p. 310. (In Russian).

Epilogue: The Spirit of the Russian Constitution and the Eastern Origin of the "Western" Doctrine of Separation of Powers

*Fascinated by the lights of sparkling swamps...
Dead-ends appeared to us as real ways.
But even during these hopeless days
Our doubts were the words of God.*

Eugene Rashkovsky

Once I heard a Serbian writer (unfortunately, I do not remember his name) say in his interview to Russian TV that one day of life in modern Serbia by its intensity was equal to 10 years of life in Switzerland. In this connection I would dare say that a year of life in Russia is as intensive and, accordingly, distractive for people as five years in Switzerland.

At least the constitutional drama which is development right now in Russia brings back the bitterest constitutional fights in USA of late 18th century.

Orange color of scarfs and caps worn by young protestors on the streets of Ukraine now in December 2004 are not likely to be seen on the streets of Russia in the near future. Acting Russian political leaders just dream of changing the Russian Constitution and staying in power for another decade or two until their retirement age.

Religion and constitutional spirituality still has not developed in the country. Maybe it all happens because Russia is still not the Bible territory.

Prominent judge and law scholar, Richard Posner, introduced the term “philistinism” as a definition for a situation when even highly educated lawyers are captured in the slogan “what I do not know is not knowledge”¹. The word came from the Bible, which, as it seems to me, was not accidental. Many lawyers show no interest in the biblical roots of modern law. Such attitude creates some misunderstanding, especially in regard to the nature of the constitutional law, and especially in Russia. This was the reason for me to publish this book.

We frequently employ the words “Spirit” and “Letter” when discussing the texts of legislation, yet it rarely occurs to us that, with regard to the Constitution of Russia, the word Spirit can be stripped of quotation marks and capitalization. Moreover, awareness of this fact is crucial for the development of spirituality in Russia and therefore for its future.

If Russia proves unable to develop and maintain its constitutional values, given its increasing backwardness in various other areas, it will lose the basis for its revival.

In 2004, Russia has squeezed past El Salvador to crack the ranks of the 100 richest countries as No. 99 on the World Bank’s Rich List.

¹ Posner R. *Overcoming Law*. Cambridge: Harvard University Press, 2002, p. 97.

Even a cursory glance at the Encyclopedia Britannica Almanac 2004 gives little cause for optimism. Life expectancy of Russian men born in 2001 (!) will be just 59 years, six years less than in El Salvador, Latvia, Kirgizia, Romania and Uzbekistan; 10 years less than in Peru, Ecuador, the Philippines, Poland, North Korea, Lithuania and Turkey; 13 years less than in Canada, the U.S.A., Norway, Spain, and Great Britain; and a whole 20 years less than in Serbia (!). The men-to-women ratio in Russia's population will be roughly 37:63, while the population itself will shrink from 147 million to some 100 million people.

In 2060 there will be less than 150 million Russian speakers in the world, instead of the current 320 million.

Education spending is a major index of a country's outlook for spiritual and intellectual progress. In absolute terms, Russia spends on education ten times less than Great Britain, 1.2 times less than Iran, 2.5 times less than Poland, just half of what Finland spends, six times less than Mexico, eight times less than Brazil, and 80 times less than the United States.

Education intensity ensures advancement of science, and of intellectual and spiritual values, which together determine both the economic development and the very future of the country. In the United States, Japan and most of Europe, any student or employee can use the Internet, which vastly improves these countries' production and educational opportunities. Besides, the Internet ensures one's right to information, which is an important constitutional value in this coun-

try. Communist China is actively promoting the Internet and has launched a state program under which 100 million Chinese will have mastered English by 2008.

Russia's emphatic lack of ambition in its expenditure on education, the Internet, and teaching English is impossible to justify. For instance, a relatively small and poor country like Peru has for decades been ravaged by armed conflicts, yet it spends four times more than Russia on education in per capita terms, and has three times more Internet users (likewise in per capita terms).

I expect many people will be put out or puzzled by my statistical digression, given the subject of this paper. So I would like to cite a simple example, related to judiciary and law reform. Against the backdrop of the general "degradation statistics", our legal community ought to put more energy and resource into the fight for preserving, maintaining and developing constitutional values and the 1993 Constitution itself.

One of the key issues of establishing democracy in Russia is giving constitutional-legal substance to the principles and the articles of the Russian Constitution.

Nevertheless, the Constitution, whose tenth anniversary the authorities modestly marked on December 12, 2003, while the public failed to notice it at all, is on the whole a good piece of work – primarily because it incorporates the main achievements of constitutional thinking in the world. Especially noteworthy is Article 10 that proclaims the separation of powers. Now it is important and imperative to

have the proclaimed constitutional principle of separation of powers consolidated and filled with actual Russian legal content. We can and should rely on other countries' experience, but we must also search for and formulate our own approaches.

In this context, the biblical roots, both legal and spiritual, of the doctrine of separation of powers appear to be of more than just historical interest. Constitutionalists like to repeat that one must proceed not only from the letter but also from the spirit of the Fundamental Law. In this sense the interpretation of any constitution is not unlike the interpretation of the Bible. I will venture to say that in a way the Constitution is a kind of Bible.

The "Spirit," or with the quotation marks removed – the spirituality of the Constitution is determined not only by its underlying principles and ideas, but also by the axiomatic and *a priori* respect that the authorities and society develop for this written document.

The Spirit of the Constitution is created by the spirituality of the people who apply it. The Spirit of the Constitution molds the constitutional spirituality of the population and is, in its turn, molded and continually nourished by that same spirituality. Constitutional patriotism is the basis of any patriotism. The 1993 Russian Constitution in this sense gives Russia a unique chance of spiritual development in the 21st century. Where constitutions have taken root, it is because their principles become the "habits of the heart" of ordinary citizens as well as elites.

As Nobel Prize winner James Buchanan wrote:

"...the ethic of constitutional citizenship is not directly comparable to ethical behavior in interaction with other persons within the constraints imposed by the rules of an existing regime. An individual may be fully responsible, in the standard ethical sense, and yet fail to meet the ethical requirement of constitutional citizenship." The individual may be truthful, honest, respectful, and tolerant in all dealings with others; yet, at the same time, the same individual may not bother at all with the maintenance and improvement of constitutional structure"¹

The Constitution is indeed more than just a set of declarations, which is what all Soviet constitutions were taken to be. This psychological barrier between the society and the Constitution could only be removed through persistent continual effort, above all on the part of constitutional law experts, the Russian Constitutional Court, and all of Russia's courts. At least, so far as the Constitution is concerned.

As far as the society and government institutions go, they also need to exert prodigious efforts to counter the three major negative tendencies – constitutional nihilism left over from the Soviet era; constitutional infantilism typ-

¹ Buchanan J. *The Logical Foundations of Constitutional Liberty*. Vol. 1. Indianapolis, 1999, p. 371.

ical of right-of-center economists and politicians; and constitutional cynicism which is a recent development. The latter is a particularly serious threat to the development of Russian constitutionalism and stability of the Constitution now in effect, because – from sheer political utilitarianism – some people are tempted to toy with a variety of ideas (so far only theoretically): to merge the higher courts, to move the capital from Moscow, to lift restrictions on re-election of the President for an extra term, to lump together regions wholesale, and so on.

The constitutional principle of separation of powers is enormously important, indeed vital, to Russia. The need for strong presidential authority, on the one hand, reflects Russian reality, but on the other, owing to the above-mentioned constitutional cynicism inherent in Russian politics, continues to offer the temptation of a regime based on personal power – for the next few decades at least. Oddly enough, the only available antidote to this tendency seems to be the cultivation of the constitutional principle of separation of powers. However, the vast majority of the population has a very vague notion of what this is all about.

It is only to be expected. For instance, when the needs of American politics, in the early 1970s, demanded that the separation of powers principle be used in practice, the U.S. Senate set up, within its Judiciary Committee, a Subcommittee for Separation of Powers under Senator Sam Erwin. An American scholar wrote that Erwin had been spearheading one of the most intriguing and novel spheres of activi-

ty in Congress. So even in the United States – a country believed to be based on separation of powers – the meaning and essence of this constitutional principle was quite recently an object of careful study.

Something similar would be most beneficial to Russia as well, including a subcommittee on the separation of powers in the Russian State Duma.

This would not make us appear either amateurish or ignorant, because the doctrine of the separation of powers has its source, both mental and geographical, in the East rather than the West. Even the laconic precision of English dubbed, “the language of lawyers”, cannot quite convey all the shades, convolutions and vagueness of the “spirit”, of the doctrine of powers separation. You will recall that we have discussed the issue of, “letter” and, “spirit” earlier on.

When a prominent scholar and Justice of the Constitutional Court of Russia G. Gadjeiev, writes about the “mystery of the content of constitutional principles”¹, his words should primarily be taken to refer to the constitutional principle of separation of powers.

There is a curious affinity between the views of Justice Gadjeiev and of American constitutional expert, R. Berger, who says that deriving from a simple fact a three-branches power system is not unlike resorting to the magic of numbers.

¹ Gadjeiev G.A. Constitutional Principles of Market Economy. Moscow: Yurist Publishers, 2002, p. 11 (In Russian).

It is not only the biblical roots of the doctrine that are important here, but also the absence of some universally accepted cast-iron form of practical implementation of the separation of powers principle, which varies considerably from country to country. To comprehend the idea of the separation of powers one has to grasp its spirit, for want of the letter in the usual normative sense of the word. It is hardly an accident that Charles Montesquieu's book, erroneously believed by many to be the primary source of the doctrine, is named *De l'Esprit des lois* (On the Spirit of Laws).

When I, too, like Gajiev, talk of the mysticism and mystique of the constitutional principle of separation of powers, I would like to offer a perfectly simple and practical conclusion: We can and should find and introduce our own Russian model of separation of powers and checks and balances system suited to the emerging system of power bodies, as well as the system of legislation and practice of its enforcement.

Filling content of the principle of separation of powers introduced by the 1993 Constitution is a task, a challenge and a riddle whose outcome is crucial to the very future of Russian constitutionalism. Once, I told Moscow University students: "Separation of powers is like the Ghost of Hamlet's father – no one can see it, but without it the entire play is pointless." The Spirit of the Russian Constitution determines not only the effectiveness of the letter of our Fundamental Law, but also its content, and the efficacy of Russian constitutionalism as a whole.

The formation of a Russian system of checks and balances may be spontaneous, but it would be better if it were controlled by the Constitutional Court of Russia, within the framework of its constitutional policies.

An independent court as a basis of separation of powers had been known even before the Old Testament, but only the Old Testament gave it “a theoretical substantiation.” Interestingly, the person who advised Moses to have a separate “caste” of judges selected for their ability (instead of age and social status, as was the custom at the time) was his father-in-law the priest of Midian, a pre-Arab of the Arabian Peninsula, and his counsel was to “provide out of all the people able men, such as fear God, men of truth, hating covetousness” (Exodus 18, 21), which still remains the best summary of qualification standards for judges.

Moses himself, even if he was not of Egyptian origin, was at least raised and educated in Egypt at the court of the pharaoh, as a “prince of Egypt.” His father-in-law apparently based his advice on the practice of pre-Arabian tribes, while Moses, accepting the advice, took into consideration Egyptian experience. But that advice was finally translated into practice among the Israelites – the first known instance of acting on the principle of separating the right to judge from seniority or family background. From that moment (the 15th-13th cent. B.C.), there has been a judicial authority in its own right, and the roots of the idea were of Hebrew -Ancient pre-Arab Egyptian origin.

The Eastern sources of the doctrine of separation of

powers put Russia on a par with the West, where that doctrine was developed through the efforts of Niccolo Machiavelli, John Locke, Charles Montesquieu, and the American Founding Fathers.

Russia can make a significant contribution to the practice and theory of advancing the doctrine of separation of powers, since in Russia, as has been said above, this is a crucial task, while in the better developed legal systems of the West the problem has been more or less solved.

Relying on this advantage, we can take the lead in the development of the doctrine of separation of powers. To do that, however, we must thoroughly study its spiritual sources. Naturally, we speak of the Bible as an historical document, quite apart from anyone's religious or atheistic feelings or convictions.

The idea of the Constitution as the Fundamental Commandments governing the life of a state has also come down to us from the Bible. For this reason, an excursus from the harsh realities of twentieth-century Russia to the equally harsh realities of the biblical text can have quite a practical significance for the understanding and shaping of the Russian Constitution. Consider the Book of Deuteronomy as a source of spiritual and legal sources of present-day constitutionalism. The book mostly consists of legal norms and thus is, in the words of a well-known theologian Jay Thompson, a "normative and legal faith."

Even being atheists or followers of whatever faith at all, we still must recognize the Constitution as the country's

highest spiritual value. However considerations of common sense and state expediency will be immediately brought to bear on the issue, no doubt.

In this connection I would like to quote here the question asked in 1912 by Vladimir Nabokov, a prominent Russian constitutionalist and the father of a world famous writer:

“Expressing respect for legality while trampling it in actual fact is an exercise in futility. In Russian life, this trampling is the worst of all plagues. It infects the entire state organism, revealing itself every minute and corrupting both the rulers and the ruled... The most general results of this situation are disrespect for law while singing its glory, a disrespect that the whole administration is permeated with. Precisely the last few years have been characterized by the raising of this disrespect to a principle – people flaunt it, openly stressing that laws and legality must always, and without question, bow to the demands of ‘State expediency’¹ This evil could be counterbalanced by the work of the courts that would restore the effectiveness of law in all cases of its violation, courts that are independent and impartial, free from politics, ignoring everything except the injunctions of law, and seeing the triumph of law as their first and principal task. Do we have such courts?”

¹ Russian Constitutionalism at the Time of the Duma Monarchy. Moscow, 2003, pp. 103, 107, 108. (In Russian).

Of course, no one will openly subordinate the status of courts to “state expediency,” of which Vladimir Nabokov wrote 90 years ago; but apparently many may think of it.

So the question is: Is it really inadequate and impossible to have separation of powers and independence of courts in Russia? Is it true that those who insist on these principles are mere academic romantics or Utopists? Vladimir Lafitsky’s unusual and striking book *The Poetry of Law: Chapters of Legal Creativity from Antiquity to the Present* (Moscow, 2003) attempts to prove that the poetry of law can from time to time emerge victorious over state prose, subjugating the latter.

Vladimir Lafitsky describes the “law of the poetic age,” when many legal norms were simply presented in poetic form and claims that is clearly Biblical tradition. He expresses concern that technocratic tendencies and the increasingly fragmentary character of legal acts, just as their bureaucratic, dry style, may lead to the loss of centuries-old constitutional values.

According to Lafitsky, in recent years “there has been a tendency to reject the enshrining of constitutional principles...”¹ The reason is as follows: It can only be “enshrined” by a departure from the traditional state psychology, which puts “state expediency” above all. This can only be possible if the Russian courts, and first of all – the Con-

¹ Lafitsky V.I. *The Poetry of Law: Chapters of Legal Creativity from Antiquity to the Present*. Moscow, 2003, p. 216.

stitutional Court, abide by a firm and consistent “constitutional policy” of detailing the content of the main constitutional principles and propositions and defending them against the encroachments, above all, of the organs of the executive branch of government.

The words “court” and “politics” are regarded as incompatible, but the simple question then arises: who will implement the constitutional policy?

A correct constitutional policy, being an optimal combination of the governmental goal-directed activity and of constitutional norms, is implemented by the courts, including in the process of constitutional supervision. It is based on the supremacy of constitutional principles, rights and freedoms over the transitory needs of state life. Voluntary constitutional self-restrictions imposed on themselves by the executive and legislative branches are not covered by this formula: Only the courts must be in the foreground. It is precisely the court – the Constitutional Court in our case – that formulates constitutional policy, and only here is the combination of the words “court” and “policy” justified, although the word “policy” is not taken here in its ordinary sense.

James Buchanan, a famous American economist, writes that constitutional anarchy is a modern policy that may best be described as actions undertaken without understanding or taking into account, of the rules which define constitutional order. This policy is justified by references to strategic tasks formulated on the basis of com-

peting interests regardless of their subsequent impact on political structure¹. At the same time Buchanan introduces the concept of “constitutional citizenship,” which he designates as the citizens’ compliance with their constitutional rights and obligations, and which could be regarded as a constituent part of constitutional policy. He also stresses the importance of reminders about, and protection of, the moral principles underlying constitutional norms.

The last point I would like to make in this connections is as follows: I believe that if, following Buchanan, we propose that the cynical nakedness of “state expediency” be covered, in the interests of constitutional wisdom with constitutional garments (cut as a straight jacket), we can achieve more than by simply ignoring its existence.

Eugene Huskey, Professor at Stetson University, mentioned in his letter to me that the linkages between the Old Testament doctrines and the contemporary practice of Russian judiciary could be of great value for the defense of independent judiciary and separation of powers in Russia but will not provide the solution of the key problem – how to attract to the Bench the best and brightest. He wrote: “Remember when the tsar introduced the 1864 Reform, judges and jurors came from the best families and the best educated elements of the society. One cannot say that today. Much of this has to do with the continuing “perezhitki”

¹ Buchanan, J. Op. cit., p. 372.

(stereotypes) from the Soviet era, but it may also be due to the way in which judges are selected and the role of court chairmen as authoritarian figures in certain regions. There are too many veto points, or what we call checkpoints, in the selection of judges, in my view. Police and security police and even customs officials, as far as I know, can return a negative review on a prospective judge which amounts to an unexplained rejection (pre-emptory challenge). Then in the presidential administration, there is a review commission that passes the names to the president, and this commission is overloaded with people from conservative legal institutions. Judges and independent legal scholars make up only a minority of the commission. So, it seems to me there are both psychological and institutional barriers to the separation of powers, because without a strong court system you can't have a true separation of powers. Whether one can really make the courts the final arbiter on these matters, though, is another question. I have my doubts that courts can be given that much power." It is essential for the destiny of Russia that the Constitution becomes the "Bible" and the Epoch of Judges starts in the country in the 21 century.

American Afterword

Juan Linz, a widely recognized specialist on transitions from authoritarian systems, has warned that democracies “cannot be considered fully established” until they abide by a constitutional rule of law to limit and allot a government’s powers, and to define and establish the protection of citizens’ rights. The rule of law depends, Dr. Baremboin’s book reminds us depends on its protection by judges and courts. They, in turn, depend for their independence and authority on a real separation of powers. That achieved, independent and authoritative judiciary can serve as one of three more or less co-equal branches of government and a check on arbitrary and corrupt government.

Biblical Roots of Separation of Powers has both scholarly and political implications. It makes a compelling case for the biblical origins of the separation of powers some three millennia ago, especially for judges’ authority as a check on kings and other leaders. Also, though, the book is significant politically, as one the bases of support for beleaguered advocates of judicial reforms. Those reforms

may one day actually live up to the constitutionally stipulated, but politically ignored separation of powers and independence of judges in Russia. In that event, the Constitutional Court and other courts could at last fulfill their constitutional mission of defenders of the rule of law among citizens and government alike. Dr. Barenboim's point about the Eastern rather than Western first origins of the separation of powers should win support among persons discontented with present weak-state authoritarianism and corruption, who remain comfortable with Slavophil and uneasy with Westernizer currents in Russian thought.

That said, I wonder whether either the martyred liberal cleric, Alexander Men's related thinking, or Barenboim's thesis, generally will appeal to the Moscow Patriarchate of the Russian Orthodox Church, barring substantial re-thinking in its conservative leadership. All in all, though, I emerge from immersion in this book hopeful that its case for the separation of powers and independent judiciary will indeed catch on in law schools and colleagues of the eminent jurists endorsing this book. Also judicial reform might gain support from a now weak, but prospectively stronger civil society. If and when that is the case, then the vision of checks and balances will have served as both motivators and outcomes of reform.

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Russian Afterword

This afterword is based on my review of the book by Petr Barenboim, *3000 Years of the Separation of Powers Doctrine. The Souter Court*, Moscow, Rosspen Publishers, 2003, that was published in the Moscow News on October 15, 2003. It is not often that a book with a title including the name of a U.S. Justice is published in Russia. So I would like to draw your attention to the second part of the title of the book by Petr Barenboim, Vice President of the Russian Bar Association. David H. Souter, U.S. Supreme Court Justice, in a 1995 letter to the author pointed out that an independent judiciary is the cornerstone of separation of powers. In his book, Peter Barenboim writes that prior to that moment he studied the doctrine of separation of powers, but saw it mainly as separation and balancing-out of the executive and the legislative branches of government. Justice Souter's idea and its contemplation by the author coincided with his reading of the Bible, specifically The Book of Judges from the Old Testament. According to the Bible, first an independent judiciary was formed and only

after that, several centuries later, did Judge Samuel bring about the installation of the first biblical king. It is noteworthy that when this first king, Saul, violated the judge's commands, Samuel promoted the overthrow of Saul's descendants and transfer the royal powers to David.

The divine origins and primacy of the judiciary with respect to the king's powers come directly from the text of the Bible. And it was also in the Bible that the historical principles of separation of powers were formulated. Old Testament judges were separated from popular assemblies – the legislatures of the time, as well as, at the initial stage, from the royal powers. It has been proven conclusively that a part of the biblical text of The Book of Judges was written in the *12th* century B.C.

Recently, historical evidence has been found in Jerusalem showing that David reigned in the *10th* century B.C. The doctrine begins its history with the formulation of its central thesis, that is, the primacy and independence of the judiciary.

I will make no secret of the fact that the new thesis, discovered by Peter Barenboim on Justice David H. Souter's comment, appealed to all judges, including the present reviewer. Barenboim's book since 1995 has passed a severe test by both theologians and legal experts. There is good reason to say that as of the moment of the book's publication, the idea has stood the test of time and found its place in both the legal science and biblical studies. In particular, his idea received support from Ephraim Isaac, Director of the Institute of Semitic Studies, Princeton University.

Not surprisingly, the chairmen of all of Russia's three supreme courts have commented on the biblical roots of the principle of the independence of the judiciary:

Vyacheslav Lebedev, Chief Justice of the RF Supreme Court, wrote: "The idea of the biblical roots of the independence of the courts of justice offers a fresh insight into the nature of the judiciary and prospects for its evolution."

Valery Zorkin, Chairman of the RF Constitutional Court: "The independence of the judiciary, as Peter Barenboim rightly points out, is the fundamental principle of the separation of powers. It is noteworthy that in tracing the history of the doctrine of separation of powers, the author stresses the contribution made by Niccolo Machiavelli. The book gives interesting examples showing the historical roots of such a promising area of study as 'constitutional economics' that is also being developed with P. Barenboim's active participation."

Veniamin Yakovlev, Chairman of the RF Supreme Arbitration Court: "The concept of the biblical origin of the doctrine of the separation of powers and the independence of the judiciary, put forward by Peter D. Barenboim, is important not only in and of itself but also as evidence of the importance that a strong and effective judiciary is taking root in present-day Russia."

According to Barenboim, the analysis of the Old Testament shows that after Moses' death the biblical people preserved their division into 12 tribes, each with its own territory and tribal leadership, all consolidated through the

observance of common laws. Failure to observe the laws would have resulted in a quick and inevitable assimilation of the people and the disappearance of biblical ideas. Persons who had held the people together for several centuries were known as judges while a book in the Old Testament is called *The Book of Judges*.

A separate chapter is devoted to what the author describes as a constitutional Utopia that materialized in Florence, in the 15th century. Florence as a city-republic of the 15th century made a substantial impact on Thomas More, who had never been to Italy himself, which made his perception even more idealistic. Barenboim shows that More's *Utopia* originated under the influence of the ideas of the Plato Academy in Florence.

For two years, the Republic of Florence, and Cosimo Medici in person, financed and thoroughly supported the holding, in 1439-41, of the Florence Assembly, which presupposed intensive and wide-ranging negotiations between the Catholic and the Orthodox Church on their unification as a condition for substantial military assistance by Byzantium against the Turks. As a result, in the course of those negotiations and following the subsequent bloody demise of Byzantium, Florence became home to some unique scholars — philosophers and theologians, as well as Plato manuscripts with his dream about an ideal republican constitution-based system and a new view of ancient Greek art that theretofore had been known in Italy mainly through Roman copies.

It is only at first glance that a combination of the contemporary concept of the state with the ancient and Renaissance-era cities-republics makes no political or legal sense in the 21st century. On the face of it, the scale of modern states with their multi-million populations rule out the principles of representation and of the expression of will that were possible in the context of thousands-strong popular assemblies in ancient Athens or Rome or, say, in the Florence of the 15th century.

The author of the book highlights aspects that confirm the similarity between present-day phenomena and voting practices observed (in small town communities) in the past. The outcome of the latest presidential election in the United States hinged on a recounting of votes in small constituencies in Florida, with a margin of hundreds (and even dozens) of votes — virtually like in ancient cities. In a few years the Internet can make it possible for whole populations of even big countries to vote simultaneously.

Barenboim's observation concerning the difference in the meaning of the term "constitution" in Russian and in English is highly relevant.

Petr Barenboim analyzes the Watergate scandal that forced U.S. President Richard Nixon to resign in 1974. He stresses that creation of the Subcommittee on Separation of Powers in the U.S. Senate marked the legislators' aspiration to provide their own interpretation of the constitutional principle of separation of powers. The academic character of the subcommittee's title emphasized the fun-

damental nature of its recommendations. "There, erudition is a pass, hearings are seminars, consultants are scholars while philosophers of law are kings." The Subcommittee on Separation of Powers laid the legal groundwork for Congress's drive to limit presidential powers.

"Imperial presidency" espoused by Richard Nixon collapsed under the impact of the traditional values of separation of powers and checks and balances, restraining the excessive ambitions of any one branch of government.

The Russian Constitution clearly enshrines both the principle of the independence of the judiciary and separation of powers. Still, it is not the author's impression that they are duly accepted and understood.

The words "court" and "politics" are regarded as incompatible, but then, the author argues, the simple question arises: Who will pursue a constitutional policy (without quotation marks)? According to Barenboim, a sensible constitutional policy, as an optimal combination of expediency in the activity of state power agencies with norms of the constitutional law, is ensured by the courts, including by way of constitutional oversight, and is based on the supremacy of constitutional principles, rights and freedoms over the transient needs of state governance. This may not be an ideal definition, but it is crucial. Policy conduit is one that has the powers to formulate it and the right to prohibit actions that are at variance with this policy. This excludes the voluntary constitutional self-restraint by the executive or the legislative branch, for the benefit of the judiciary.

Only the court — in our case, the Constitutional Court of the Russian Federation, in Barenboim's view, formulates constitutional policy, and here the combination of the words "court" and "politics" is entirely justified. This view is of course open to debate.

In the United States, the Supreme Court clearly pursues a vigorous constitutional policy that, at different periods of its activity, usually called after the Supreme Court Chief Justice, can vary considerably.

Concerning the book's subtitle, Barenboim writes that in conversation with him, Librarian of Congress James Billington asked: Why the Souter Court? After all, he was just an associate justice of the U.S. Supreme Court while the Court is usually named after its Chief Justice. For example, the Warren Court refers to a period when Earl Warren was Chief Justice, and so forth. At the time Barenboim said that such symbolic subtitle was his vision, especially given that it was David Souter who started him pondering the idea of the origins of separation of powers since biblical times, stressing that the independence of the judiciary is the cornerstone of separation of powers.

Today, when conservatives are waging a campaign against Justice Souter, the author points to new objective reasons why the U.S. Supreme Court, in the period of the 1990 through December 2000, can and should be symbolically named after Souter. Suffice it to mention two notable events. In the Fall of 1990, U.S. President George Bush appointed David Souter as Justice of the U.S. Supreme Court. In December 2000,

Justice Souter refused to support the son of his “benefactor” — George W. Bush — in a high-profile Bush vs. Gore case. In a most critical and delicate situation, David Souter maintained the independence of his position and in this respect became a symbol of the independence of the judiciary. This is why Souter Court is quite an appropriate and well-substantiated subtitle. Mr. Barenboim showed to me a letter of the Executive Vice President of the National Committee on American Foreign Policy Mr. William Rudolf addressed to him; Mr. Rudolf wrote to the author of the book:

“Your concept of the “Souter” court is most interesting, and, I believe, insightful. Over the years Justice Souter has become, what many believe, a jurist of special stature. The danger we face is not only the erosion of judicial independence, but also the increased injection of ideology over jurisprudence.” This thought of Mr. Rudolf is really important, first of all for Russia, where for centuries the monarchy and then for many decades of the Soviet period, the ideology overwhelmed the jurisprudence, which resulted in millions of victims. Now Russia tries to understand the biblical thesis “To do justice and judgement is more acceptable to the Lord than sacrifice” (Proverbs 23:11).

On the whole, Peter Barenboim’s book has become an event, possibly not only for the legal community in Russia but also in other countries.

*Yuij Danilov,
The Justice and Secretary of the Constitutional Court
of the Russian Federation*

Aknowlegments

The leading American theologian and Professor at the University of California, San Diego, David Freedman asks me in his letter to tell a little more about myself. It caused me to recognize that despite the publishing of several of my books in Russia, I have no works in English to introduce my ideas about a constitutional context of certain passages of the Old Testament. It was a reason to start preparation of this book in English.

Another leading American theologian and Director of the Institute of Semitic Studies of Princeton University, Professor Ephraim Isaac supported some of my constitutional ideas from 1997 which finally give me strength and courage to write this book. I am happy that between the Dead Sea Scrolls Conference in Jerusalem and his performance as the Conductor for Handel's Messiah in Addis Ababa City Hall in Ethiopia he found time to write an introduction for this book.

Director of the Library of Foreign Literature Mrs. Ekaterina Geneva, who organized in her library the first depart-

ment of religious literature in Russian history, supported my biblical research from 1996. She also made a great contribution to preparation of the chapter about Alexander Men who was her spiritual father.

Father George Chistyakov was so kind to write an introduction and also, with his brilliant knowledge of ancient Greek language, helped with a correct approach to reconcile differences in the Russian and English translation of the very important passage from the work of Josephus Flavius.

First Vice Chairman of the Supreme Court of Russia Vladimir Radchenko wrote an introduction and also encouraged me by telling about a discussion that once took place at the Presidium of the Supreme Court in which judges made reference to content of the Bible which they read only in my book.

The Justice and Secretary of the Constitutional Court of Russia Yuri Danilov wrote in 2003 a review on my book "Three Thousand Years of the Separation of Powers Doctrine. The Souter Court," which he rewrote later as the afterward to this book.

The Justice of the Supreme Court of the USA David Souter made a decisive contribution to my research in just a few words from his letter to me where he mentioned that the separation of powers is the same as the independence of the judiciary. This book became possible only a year after receiving his letter as I understood his idea.

Professor of Columbia University Peter Juviler was so kind to write the afterward. Several years ago Professor of

Columbia University Louis Henkin gave me direction with this research. Professor of Stetson University Eugene Huskey offered some very useful comments on my manuscript, as well as Professor of Hofstra University James Hickey, Jr., Professor of Fordham University Constantine Katsoris applied his knowledge of Greek language to help me with differences in the Russian and English translation of Josephus Flavius.

Well-known Dutch lawyer Wim Timmermans kindly wrote an introduction and gave me very useful comments on the manuscript.

Executive Vice President of the National Committee on American Foreign Policy William Rudolf supported an idea conceived by Russian Justice Yuri Danilov that American Justice David Souter has become a symbol of the independence of the judiciary and, as many believe, a jurist of special stature because of his independent position in the Gore-Bush case in 2000.

Well-known investment banker Steven Halliwell, who is fluent in Russian language and first introduced the word “securitization” into the Russian language, has read several versions of the manuscript and gave me very valuable suggestions.

My special thanks to my colleagues – foreign business lawyers. New York lawyer Harriet Tamen, together with her father and her brother a Deputy District Attorney in Miami, Florida, challenged so resolutely my idea of seized weapons in Egypt, that, following my discussion in their

nice summer house in up-state New York, I was forced to read a lot about metalworking and weapon production in Egypt during the time of the Exodus before I returned to this idea.

Well-known corporate lawyer in the Washington D.C. law firm Arnold & Porter Jeffrey Burt read my manuscript twice and his comments gave me the opportunity to improve several passages of the book. London attorney Katie Aldridge and the best American lawyer in Moscow Holly Nielsen both generously read the text and made many helpful suggestions and corrections.

I am also much indebted to Debbie Wissel and to Natalya Merkulova, who both worked on the text, and especially to my publisher Olga Fadina, who has rendered incomparable services for my book.

Of course I should mention Donald Rice to whom this book is dedicated, and his wife Genie Rice as well as their small wooden church in Mattapoisett, Massachusetts, and their Church of Heavenly Rest on Fifth Avenue, New York, featuring a strong depiction of Moses on the façade, in the block next to the Guggenheim Museum.

I am indebted to the magic of biblical names within my family as, for instance, my father David and my grandfather Samuel, who died many years before my birth, and grandmother Rachel, and grandfather Saul, who first told me in my childhood the stories about biblical David and Samson.

And of course I can do nothing without the support of

my lovely wife Natasha and my daughter Sophia, a student at Carnegie-Mellon University in Pittsburgh. Actually, my daughter promised to read and correct the entire text but never did. She is still promising to read this book after the printing. The latter probably encourages me to finish this book more than anything else.