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POSITION PAPER

State, Law, and *Halakha*

Part One: Civil Leadership as Halakhic Authority

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המכון הישראלי לדמוקרטיה
THE ISRAEL DEMOCRACY INSTITUTE

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1 INTRODUCTION

Law and legal systems play a central role in two of Israel's leading cultures—Western-liberal culture and Jewish traditional culture.

At the forefront is Israeli secular law, blazing a trail to shape the state and society according to the Western-liberal spirit. The Knesset in its legislation, and even more so the Supreme Court in its implementation of the law and in its creative judicial activism serve as the cultural engine pulling the diverse, antagonistic carriages of Israeli society into normative territory located at the heart of liberalism. Although harnessing the judicial system and the centrality of its role in the service of this task was not easily discernible in the past, it is open and exposed today.[1] In a mirror image, Jewish-traditional culture views *Halakha* (Jewish law) as its central representation today. Rabbis and halakhists are the leaders of the religious camp, and their political, spiritual, and social influence are expressed mainly through their normative decisions and by virtue of their halakhic authority.

Both cultures, deficient in mechanisms for criticism, deploy themselves behind "their" legal systems. Both have separately construed the same agreed myth regarding the supreme value of the law in the shaping of each of their cultures and the crucial mission of the law in validating and instilling their own set of values into Israeli reality. Each one ascribes to the law "of" the other culture constitutive value, which defines the culture's identity. As a result, the **cultural duality** of Israeli society is also manifest in an oppressive **normative duality**: on the one hand—state law, and on the other—halakhic law.

Both normative systems entertain the idea of the totality of their scope in the regulation of reality, and both—at least on the rhetorical level—hold themselves to be exclusive in this regard.[2] The result is that the lives of Israelis are regulated by two nonsynchronous legal systems that are perceived by their adherents as mutually hostile. Normative duality, as one expression of cultural duality, brings into sharp focus

the confrontation over Israel's cultural profile and over the identity of Jewish society in Israel.

Coping with normative duality is one of the most urgent and difficult tasks facing Israeli society. A rough mapping of the options available for contending with this problem indicates that Israeli society must launch a three-pronged effort:

First, **the rules of the game**. Normative tension in Israeli society must be reduced. Recourse to the law (state law and halakhic law) is imperative when settling disputes between litigating parties but is not an optimal tool for settling cultural differences and deciding on an ethical set of priorities for society in general.[3] Political, social, and cultural tools are available for this purpose. A marketplace of ideas should replace both state and religious courts.

Second, **the liberal discourse**. Perceptions prevalent in the liberal worldview demand "making room" for the "other" and the other's culture.[4] The biting edge of cultural duality will be blunted when the search for and definition of our identity (or identities) is conducted in a context of tolerance (acknowledging the other's right to a different view even if we consider it erroneous), pluralism (acknowledging that the other's view is not only legitimate but intrinsically valuable, although one's own view is different) and even multiculturalism (which does not judge one culture through the over-arching criterion of any hegemonic culture, and thus defends the right of each culture to its full self-realization in the political-social arena).[5] The sting of normative duality might also be alleviated by utilizing notions found at the core of the world of liberal ideas. Thus, for instance, it is worth examining the advantages and disadvantages of replacing the legal monism currently prevailing in Israel (represented by the Supreme Court as the sole conductor of a harmonious normative orchestra) with a model of legal pluralism. In this model, diverse normative expressions will function concurrently, aided by agreed rules of mediation. It will also enable interpretive choices that substantively reflect the complexity characterizing contemporary Israeli society.

Third, **the religious discourse**. At present, this discourse takes place between the ultra-Orthodox—who are alienated from the state, its institutions, and its laws—on one side, and national-religious factions—who view the State of Israel as the harbinger of messianic redemption and therefore assign it religious significance—on the other. As for the halakhic status of Israeli state courts, the prevailing view among contemporary rabbis is to deny permission to turn to state courts, which are viewed as "Gentile courts."[6] This explicit prohibition, however, has not deterred the majority of the religious public from resorting to state courts, prompting a leading halakhist to state that "even where it was customary to turn to Gentile courts, this is a satanic practice never to be trusted."[7] The continued reliance of the observant public on the legal system has not blunted rabbinic resistance to it. Is this far-reaching opposition a necessary, self-evident, or, at the very least, legitimate course required by religious discourse? Or is the opposite perhaps correct, namely that state law has intrinsic religious value and represents sources of authority acknowledged by Halakha?

In this position paper, I do not deal with the potential of the first two items—the rules of the game and the use of liberal discourse—to alleviate normative duality. I intend to embark upon this task in the future. Nor do I pretend to deal here with the kaleidoscopic spectrum of legitimate strategies of action inspired by Jewish sources (halakhic and philosophical) that might be deployed toward this duality. This is another undertaking I intend for later times. **This position paper will focus on the intra-religious discourse from a factual-historical perspective**. The greater part of the discussion will be devoted to the description and characterization of the **institutional duality** that provided the context for the development of Halakha.

Throughout its history, the Jewish people has been led by two establishments, one religious and one civil. Each had normative aspirations of its own and functioned, in a variety of meanings and contexts, as a legislative and/or judicial authority. Given that Jews enjoyed considerable judicial autonomy even in exile, the religious and

civil leaderships were invariably involved in negotiations—at times cooperative and at times confrontational—over the scope and the content of their respective contributions to the existence of the Jewish community at the legal-normative level. In this position paper, I will map out the relationships between the religious and civil legal systems that were active in Jewish society in the course of history. The meaning of this endeavor can be translated into various terms:

In **political science** terms, I will ask what was the real status of non-religious sources of authority that legislated rules of behavior for Jews in the course of history and applied them through judicial systems. Does the practice of Jewish life indicate that civil sovereignty lacking a religious basis was denied legitimacy?

In **legal** terms, I will examine the technique that led to the creation of a system of Jewish law. Did Halakha rely exclusively on norms created by an establishment whose declared source of authority was anchored in religion, or did it internalize norms originating in non-religious institutions? Did Halakha grant any legal halakhic significance to the judgements of external, non-religious institutions?

In **religious** terms, the discussion will allude to the possibility of granting religious significance to civil sovereignty. A question will then arise: is Halakha solely a divine creation applied through religious mediators, or does it also have a rational, moral, and purposeful aspect, which is essentially human, originating in human creativity and consciousness?

In **cultural** terms, I will deal with the ability of a system of behavioral rules—Halakha—to react to a changing reality although, on the surface, the central halakhic ethos is fundamentally conservative, religious-spiritual in its essence and ostensibly upholds the eternity and uniqueness of its source. Is Halakha a pure, closed autarchic system, shaping itself from within? Is Halakha the product of the sages' inner discourse, or does it convey an ongoing, intergenerational dialogue where individuals, organizations, and communities function in various contexts of meaning? If Halakha is a product of intercultural discourse, how does a given culture, with its changing tastes, ways, and values, percolate

into a lifestyle dictated by a Torah given at Sinai, with the law described in minute detail?

A factual-historical description may contribute to the discussion on the conflict between law and Halakha in every one of these realms. This description will provide a wider context of meaning to the discussion presently being conducted in the Israeli media, educational systems, and political arena concerning **the relationship between Torah law and state law**. The emerging picture is at odds with the seemingly natural acceptance of the argument made by many of the halakhically observant concerning the lack of religious legitimacy of broad aspects of state law.

The argument developed here is aimed at both target audiences—observant and secular Jews. For the religious public, the argument offers a new approach to state law from a religious perspective. It has the potential for easing the lasting tension affecting this public as a result of the gap between Halakha (the rabbinic ruling forbidding recourse to state courts, viewed as Gentile courts) and praxis (full recourse, with generally satisfactory results). For the secular public, the argument may reveal Jewish tradition as richer and more complex than its current image. Halakha will be shown as sensitive to life's needs and as acknowledging its responsibility to adapt itself to a changing reality; to this end, it allows a ceaseless trickle of norms from non-rabbinic leadership institutions into the halakhic corpus.

The course of the discussion will be as follows: In Chapter Two, I present the main argument about the joint contribution of Torah law and state law to the creation of Halakha as presently constituted. In this context, I discuss briefly the **function** that state law has fulfilled within the halakhic world and the **technique** for adopting its normative product. In Chapter Three, I offer evidence for my argument. I engage in a historical review, tracing the multigenerational contours of alternative institutions to the rabbinate known in the history of Halakha to have possessed legal authority. In Chapter Four, I draw the general picture of the significant and continuous role of the civic leadership in

the legislation and adjudication of Halakha. In the concluding chapter, I stress the importance of future research in this area from a theoretical perspective, in order to attain a better understanding of the development of Halakha and of the relationship between religion and the ruling authority in Judaism. I also include an applied perspective, in order to draw lessons from the past and to provide a potential key for creating a model of Halakha's relationship with the normative product of the legal system current in Israel. In doing so, I will consider the limitations affecting the application of a uniform historical model to present reality, in which most officials in state institutions have no religious commitment.

2 THE ARGUMENT

1. Torah Law and Government Law as Complementary Tracks

Tradition tells us that the Written Law was given to the entire people of Israel at Sinai. In contrast, the Oral Law was given to specific, chosen individuals: "Moses received the Torah from Sinai and transmitted it to Joshua; Joshua to the elders; the elders to the prophets; and the prophets handed it down to the men of the Great Assembly."[8]

The monumental work of the Oral Law bridges the eternal and the transient; it is the implementation of the Written Law, a set law of supra-historical dimensions, in a changing reality developing within real history. This is an endeavor of huge scope and subtle expression, interpreting and creating but also preserving the "everlasting Torah," so that it can function as a "Torah for life": a Torah sensitive to reality in both individual and communal life—which are exposed to factual and normative transformations bound by time and place—while simultaneously influencing the individual and the community and shaping, in its own spirit, their ways of coping with their existential experience.

How do the chosen "recipients" of the Oral Law, from Sinai until the present, adapt the Torah while preserving it? In principle, this is an ongoing hermeneutical undertaking: a sacred task of discovery, exposure, and compilation of word of mouth reports, explanations, interpretations, and laws transmitted from previous generations, alongside negotiations concerning their understanding, application, and innovation (through such legal tools as edicts, customs, enactments, and homilies).[9] The normative product of the men in charge of the Oral Law is manifest in the rulings and the legislation henceforth referred to as "**Torah law**" [*din Torah*].[10]

Who actually functioned as the "recipients" of the Oral Law in the course of history, enforcing judicial and legislative authority to enact Torah law? Can we identify a set pattern of association-membership in specific establishments characterizing these halakhists and legislators in the course of Jewish history?

Those responsible for the enactment and innovation of Torah law are the central rabbinic figures on the stage of Jewish history—"sages" who owe allegiance, in cognitive and institutional terms, to the religious and spiritual leadership of the people. Indeed, these figures are perceived as the natural human mediators between the Torah, "as given at Sinai," and concrete reality.

Yet, we are not to conclude on these grounds that the sages wielded exclusive legal authority in Jewish society, nor that Torah law was the only component of the system of norms incumbent on observant Jews. Indeed, the legal system that regulated the lives of Jews in the course of history implemented Torah law, but it also resorted to the civil leadership of the Jewish community, which activated judicial and legislative systems whose product will henceforth be referred to as "**government law**."

Halakha, as perceived by its users throughout history and as known to us today, is a joint product of norms originating in both establishments and in both normative tracks—Torah law and government law. Both establishments coexisted chronologically and geographically, displaying varying levels of mutual recognition and mutual control over each other's normative product. Overall, their joint endeavor resulted in the grant of bilateral legitimacy, both religious and civil, to the halakhic system of norms.

The central argument of this position paper is that **the implementation of Halakha in a civil leadership track, parallel to the Torah track, is a permanent feature of halakhic history**. Cumulative historical evidence indicates that this is not a theory-bound move, dependent upon a theory or a need that surfaced at a specific time or place, but rather an **imperative of the process of halakhic development**.

Furthermore, in the course of exposing the role of civil leadership in the implementation of Halakha, we also discover the fascinating cultural phenomenon of a continuous and ongoing intergenerational dialogue between the leaders of the religious system and the self-government system, both resorting to the normative language of Halakha. This development deserves the attention of anyone interested in the relationship between religion and state in Jewish tradition.

Findings point to a recurring paradigm involving a normative channel that complements Torah law and operates through an extra-rabbinic establishment. The persistence of this paradigm down the ages, despite variations in specific details, can be explained by the consistent functional **aim** fulfilled by the extra-rabbinical establishment throughout the history of Halakha, and in light of the fixed **technique** adopted by Halakha in order to attain this goal.

2. The Aim

In the development process of every legal system, it is necessary to mediate between ever-changing reality and the binding normative setup of the system. In legal systems without religious features, this mediating function is usually performed by civil leadership. Thus, for instance, in Western democracies, legal systems are created and developed through state organs—the legislative and judicial powers. These powers are the modern expressions of civil leadership. The advantage of civil leadership (relative to other elite groups) in establishing norms compatible with reality is multifaceted, intuitively understood, and self-evident.

Obviously, in a religious legal system the picture is more complex: the religious normative system may also include spiritual objectives in addition to mechanisms of social regulation that strive to prevent the implications of *homo homini lupus*. Thus, for instance, the halakhic legal branch dealing with the relationship between human beings and

God distinguishes Halakha from a non-religious judicial system. It is clear, then, that the study and implementation of a religious legal system must be entrusted to authority figures whose sources of inspiration—in terms of their consciousness, education, and life experience—are intimately connected with the religious-spiritual world. Halakha, however, does not separate religion from life and strives to function as a way of life that regulates dynamic human reality. Hence, it cannot renounce the vast contribution of civil leadership as a normative source.

Historical evidence shows that alongside the rabbis and the spiritual leaders, who wielded a relative advantage through their understanding of the religious foundation of Halakha, there was always another halakhic source emanating from the civic leaders, who had the relative advantage of understanding Halakha's extra-religious implications. The wondrous preservation of Halakha's relevance throughout history is a result of the joint effort and the mutual controls exerted by the two streams filling the "sea of Halakha": the sages, who develop Halakha in reference to its theological principles,[11] and the civil leaders, who take upon themselves the real aspects of the mediating task between Halakha and changing reality.[12]

A different and interesting question is whether my explanation of the institutional duality of Halakha is acceptable to the rabbinic "recipients" of the Oral Law: did the sages relate to the normative government system as an inevitable imposition, or did they view it as a vital complement, balancing the halakhic endeavor?[13] The attitudes of leading halakhic figures faced with institutional duality in Halakha will surface in the critical analysis of the intellectual justifications adduced by the sages to explain these circumstances. I will deal with this topic in the near future.

3. The Technique

The legal model allowing Halakha to draw on the normative product of the institutions of civil leadership has fixed characteristics. The legal system adopted by Jewish communities acknowledged the existence of categories receptive to the import of norms originating in non-rabbinic sources. It conferred normative, intra-halakhic meaning on the product of the discretion exercised by the institutions of civil leadership.[14]

Note that I do not claim that every decision of the political institutions would be absorbed by Halakha. Any legal system striving for an identity must ensure congruence between imported norms and its own fundamental principles. At the rim of the importing channel, therefore, is a sieve whose crucial function is to restrict foreign influences according to the principles of the system. The diameter of the holes in the halakhic sieve, however, deserves examination: has Halakha tended to hinder normative imports or has it been open to outside influences? This is a critically important point[15] and deserves separate inquiry.[16]

The feature discussed here is that Halakha begins by assuming that residual norms originating in non-rabbinic legal institutions will be accepted. Only a norm sifted out due to its incompatibility with the system will be rejected. When a norm is rejected, however, the reason could be some flaw in its specific content rather than a consideration on principle suggesting that Halakha rules out[17] the very capability of the non-rabbinic creator of the norm to function within the halakhic legal system.[18] Obviously, not every extra-rabbinic legal institution will be entrusted with this authority. As noted below, the legal institutions on which Halakha is willing to rely for its own development are all, without exception, ruling bodies expressing the choices of civil leadership (national, local, or communal).

Throughout its history, then, one can detect in Halakha a **permanent need** for normative completion and adjustment in order to meet the challenges of changing reality. A **uniform technique** was consistently

adopted over time to meet this need (recognizing the other's rulings), and implemented through **identical means** (an institution that expresses the discretion of civil leadership, rather than that of another elite, such as the priesthood or the prophets).

DESCRIBING THE PHENOMENON

1. Between Fact and Norm

This position paper, as noted, does not deal with the place of civil leadership in the creation and implementation of norms from the perspective of positive Torah law. I will therefore skip the substantive halakhic discussion of whether Torah law creates a norm whereby judicial or legislative authority is entrusted on a particular issue (or in general) to a given body that includes only individuals with specific qualifications.[19]

Instead, I will seek to establish who wielded legislative and judicial powers within Jewish communities in the course of history, **as an empirical issue**. Is there historic evidence indicating that, besides the religious leadership, the civil leadership also functioned as a permanent forum for the development of Halakha?

True, the existence of a "fact" ("is") need not lead to conclusions concerning the existence of a "norm" ("ought").[20] Analytically, a fact could be present in the absence of a norm, or even contrary to a norm. Hence, even if there is empirical proof of the significant role of civil leadership in implementing Halakha, no normative importance should be ascribed to this fact, nor should conclusions be drawn concerning its validity *ab initio*. In my view, however, factual evidence of the consistent and continued allocation of legislative and judicial powers to a given institution denotes a **need** emerging from long-standing experience in allocating this authority.

Furthermore, facts attesting to the systematic exercise of powers by clearly defined institutions—each in its own time, place, and specific circumstances—also symbolize a continued acknowledgement of these institutions' intrinsic value and the historical **legitimation** of this

allocation of legal powers. In this sense, the functioning mode characteristic of these institutions has normative implications as well.[21] Hence the importance of the argument.

2. On Institutional Duality in Halakha

Scholars have already noted the institutional plurality characterizing the implementation of judicial and legislative authority in Halakha.

In *Toldot Ha-Halakha*, Chaim Tchernowitz describes three primary sources of Halakha:

> Since the commandments were accepted in Israel due to their intrinsic validity rather than to some written sanction, we must necessarily assume the existence of some "supreme edict" propelling the wheel of law. These are the legislators or, in rabbinic language, the "recipients," who issued edicts and created *halakhot* according to some ruling power, whether moral or material, whose orders became a law not to be transgressed, and who relied on their strength and power to create *halakhot*, institute enactments, and issue edicts.
>
> *The leaders of the kingdom, the priesthood, and prophecy were the legislators and recipients, and these institutions served as the cradle of Halakha.*[22]

In his view, Halakha inherited its political-legal foundation from the kingdom;[23] its religious-theological component was derived from the priesthood, while from prophecy, Halakha inherited the moral-social component. When the kingdom, the priesthood, and prophecy disappeared as independent institutions, the various components coalesced into Halakha in the form known to us. But the distinction between these three sources of Halakha remains even after the extinction of the original institutions: the kingdom was bequeathed to

the *nesi'im*, the heads of the Sanhedrin and of the various courts; the priesthood was inherited by the exegetes, the sages, the teachers, and the religious judges; the heirs of prophecy were the scribes and original recipients of the Oral Law.

Tchernowitz emphasizes that this view does not accord with the conventional perception:

> In recent studies, biblical scholars are strongly committed to the view that the entire Torah rests on one sole foundation, namely, the priesthood, because of their belief that the Torah is mainly concerned with ritual. They thereby favor the Torah's religious-theological elements over its legal dimension, and generally emphasize the influence of the priesthood in the Torah, and minimize the influence of prophecy and of the kingdom. This entire approach ... is untenable when considered in light of the Torah spirit, and its deeper hope and intent. The general character of the commandments of the Torah is that of royal edicts, positive and negative injunctions. The decisive strength of the Torah is its legislative power, seeking to attain political and social aims, and this is also true of the Oral Law, heir to its legacy....

This work includes an extensive description of the king's central role in the emergence of Halakha during the biblical period.[24]

On the eve of the creation of the State of Israel, several rabbis and thinkers understood the need for contending with the challenge of modern Jewish existence in the context of a sovereign democracy ruled by a non-observant Jewish majority. Their concern was the religious meaning that should be assigned to the normative product of the Israeli legal system, namely, to the laws passed by the Knesset and to the judicial rulings by the courts.

One of the proposed models for legitimizing "state law" from a religious perspective was based on an acknowledgement of the institutional duality inherent in Jewish law. The main emphasis was on the duality

represented by the "king's law" and "Torah law," as formulated by Simon Federbusch:

> In fact, from the very beginning, state law and Torah law branched into two distinct divisions. This separation was expressed both substantively and organizationally. Two separate institutions existed in the Israelite nation, a state judiciary and a religious judiciary, with fundamental differences between them. Clarifying these differences is particularly important for those striving to renew political life in Israel in the spirit of Torah law.
>
> The king or the political regime had full authorization to legislate and adjudicate in disputes between individuals and between the citizen and the state. Although this state legislation was also meant to be imbued with the spirit of the Torah and the morality of Judaism, the leadership of the kingdom was allowed to legislate its own laws in civil and criminal matters, according to the needs of the time and the place, and to enforce penalties even where the Torah had been lenient. The separation between the Torah and the state is dictated by the Torah itself....[25]

Yitzhak Herzog, Israel's late chief rabbi, wrote an article two months after the establishment of the State of Israel, *Toward a Jewish State*. In this article, he shows awareness of the potential latent in the recognition of Halakha's institutional duality for alleviating the tensions between Torah law and law created by a sovereign Israel. Yet he is unwilling to endorse this approach because a legal system with two parallel sources of authority appears to him nonviable:

> While attempting to contend with the compatibility between Torah law and the democratic regime of the Jewish state, I can already envision the puzzled looks: Why take the trouble? One of the early medieval authorities, R. Nissim [of Gerona—the RaN (Y.S.)], has already provided a ready-made solution. In his eleventh homily, R. Nissim assumes that there are two types of Jewish law, the law of the Torah and the law of the state, or the 'king's law'.... Accepting his view would certainly be extremely

> convenient, but I can foresee serious difficulties.... Were there indeed such an arrangement in the statutes of the Torah, it would enable a new approach to several of the problems we have discussed and will discuss in the future, but we are not interested in historical research nor do we find it helpful here. From a halakhic perspective, we can take into account only the authorized sources of Torah law, which do not support this assumption of a dual or parallel legal system with two authorities.[26]

Contrary to the RaN, then, for whom state law is part of Halakha, Rabbi Herzog holds that Halakha includes only Torah law.

Menachem Elon also points to the duality of Jewish law (which, in his view, is part of Halakha):

> The halakhic authorities and the Jewish courts played the central role in the development of the Jewish legal system; but another factor—namely, the duly constituted leadership of the people—also operated throughout the history of Jewish law to promote creativity and development. This leadership took various forms in the course of Jewish history, ranging from individual leaders, such as the king, the *nasi*, and the exilarch, to the collective authority of the public in the form of organized communities or groups of communities, acting through their appointed or elected representatives.[27]

The traces left by these rabbis and scholars, as well as others, in researching institutional duality in halakhic law now serve as landmarks for scholars embarked on as yet unconquered paths. This is uncharted territory, and many questions await answering. Furthermore, the full scope of the phenomenon and the detailed factual picture have yet to be clarified. This is our task below.

3. King and Elders: The Biblical Era

Incipient signs of institutional duality in the implementation of Halakha are already found in the Pentateuch.

Jacob blesses Judah: "The staff shall not depart from Judah, nor the scepter from between his feet" (*Genesis* 49:10), and Moses blesses Levi: "And of Levi he said ... they shall teach Jacob thy judgments and Israel thy Torah" (*Deuteronomy* 33:8, 10). These two sources, when combined, point to a division of roles: the political leadership is handed over to Judah, and the religious leadership is entrusted to Levi. A literal reading of these verses suggests that both have legal authority.

In *Deuteronomy* 17:8-9, the duality is formulated as follows:

> If there arise a matter too hard for thee in judgment, between blood and blood, between plea and plea, and between plague and plague, matters of controversy within thy gates: then shalt thou arise, and go up to the place which the Lord thy God shall choose; and thou shalt come to the priests, the Levites, and to the judge that shall be in those days, and inquire; and they shall tell thee the sentence of judgment.

Beside "the priest, the Levite," another authority functions in the legal system—"the judge." Some identify him as the king of Israel.[28]

How is the duality intimated in the Bible actually realized in alternative institutions to the rabbinate?

At first, the two leadership functions within the Jewish people—the spiritual leadership and the political leadership—were concretized in one individual. Thus in Moses, and thus in Joshua,[29] and thus, apparently, until the end of the period of the judges. Both prophet and judge, who functioned as charismatic messengers, are simultaneously spiritual leaders and political rulers, insofar as political authority existed at all. Thereby, they were also clearly the bearers of judicial authority.[30] Only later, as the people settle in the land, do these

two functions become increasingly separated, along with their parallel judicial powers, thus revealing the institutional duality of halakhic law.

The constitutive event—the "king's law"—takes place in Samuel's time, when the people ask, and God agrees, to appoint Saul as the first king of Israel. In modern terms, this is a constitutional revolution: executive powers are transferred from the spiritual leadership to a new branch of government—the king.

What forces urge a split in the leadership functions at this particular time? One reasonable presumption focuses on the military-operational aspect:[31] "in the days when the judges ruled," the Jewish people was a federation of tribes not subject to a central power. They were under the charismatic rule of judges and prophets, but this was occasional, random leadership. The lack of governmental continuity thwarted possibilities of long-term collective organization. In contrast, their surrounding enemies, and particularly the Philistines, excelled at stable political organization. The continuity of government among the Philistines was generally preserved through the inheritance of family dynasties. Centralization and continuity enabled the Philistines to engage in the long-range development of their public assets—a standing army and a chariot corps. Differences in governmental structure between the Jewish people and its neighbors/foes led to military inferiority, which threatened its very chances of survival. This is the background to the request the elders of Israel submitted to Samuel: "Make us a king to judge us like all the nations" (*I Samuel* 8:5). The demand addressed to the charismatic leader was meant to create a new power focus, a continuous centralistic government. According to this analysis, the demand for a king originates basically in the need for an executive leader.

Whatever the interpretation of the events described in the Book of Samuel, the wording indicates that the authority requested for the king included not only executive but also legal powers. This is clear from both the context of the demand put forth by the elders[32] and the explicit language of their address to Samuel.[33] The institutional duality

of Jewish legal tradition, therefore, dates back to its onset as an orderly regime with a centralized civil leadership. Indeed, the Bible then proceeds to present the king, in several instances, as the supreme judicial authority.[34]

The civil leadership of the Jewish people during the biblical period relied not only on the model of an exclusive leader, but also on an alternative model of collective leadership. Beside the individual national leader—Moses, Joshua, the judge, the king—an additional institution of leadership prevailed throughout this period—the elders.[35] As we see in the sources, the elders fulfilled leadership roles at the sub-tribal and local levels (settlement, city). They functioned as a collective institution,[36] lower in the hierarchy relative to the national leader and even to the tribal leader (the head or *nasi*).[37] Generally, the elders did not fulfill a national role (despite being known as "elders of Israel," "elders of the people," or "elders of the land"), but the overall picture of the way they functioned indicates broad public powers that granted them a defined status in the social leadership.[38]

The sources show that just as the individual leader possessed judicial powers, so did the collective leadership of the elders. In fact, a significant part of the direct information about their functioning centers on the implementation of their judicial powers. The elders dealt mainly with various aspects of family law (inheritance, landholdings, intra-familial relationships),[39] and with issues involving blood feuds.[40] They collected evidence, corroborated facts, and, obviously, also made rulings. At their seat, the city gate, they carried on a local court that dealt with the topics within their jurisdiction.

During the biblical period, then, two legal systems coexisted: a national leadership entrusted to individuals and a local collective leadership entrusted to the elders. Both legal institutions functioned without undue strife, and the Bible supplies no evidence of any royal attempts to supplant the traditional legal system of the elders,[41] despite the independence they typically evinced. These facts support the claim concerning an institutional duality of legal systems dating back to biblical times (although I have no evidence for a separate classification of the

two systems on the basis of a distinction between a spiritual and a civil leadership).

King Jehoshaphat ben Asa of Judah is purported to have initiated a comprehensive legal reform. Besides renovating the local judicial system, he also established, apparently for the first time, a court of appeals in Jerusalem.[42] Duality emerges here as well: Jehoshaphat appointed two kinds of judges to this court of appeals—Levites and priests, led by the "chief priest" and responsible for "matters of the Lord" and heads of the clans, led by the "ruler of the House of Judah" and responsible for "all the king's matters." The heads of the clans, who became part of the royal legal system, may have been a selected group of elders.[43] In any event, both these parallel systems—the one dealing with "matters of the Lord" and emerging as the spiritual leadership, and the one concerned with "all the king's matters" and emerging as the civil leadership—deal with "matters of law."[44]

4. *Nasi* and Exilarch: The Era of the Mishnah and the Talmud

In the era of the Mishnah and the Talmud, Jews lived mainly in two locales: Eretz Yisrael [as the Land of Israel is traditionally known] and Babylon. In both places, a diarchy prevailed: in Eretz Yisrael, the *nasi* and the Great Assembly functioned side by side; in Babylon—the heads of the *yeshivot* (the academies of Sura and Pumbedita) and the exilarch. In general terms, a division of roles is evident in both these pairs—the *nasi* and the exilarch functioned chiefly as the civil leaders of their communities,[45] whereas the Great Assembly and the heads of the *yeshivot* served mainly as the religious, rabbinic leadership.[46]

For the purpose of the present discussion, the key issue is that in the mishnaic and talmudic era as well, legal power in Eretz Yisrael and in Babylon was not the exclusive preserve of the rabbinic establishment. The civil leaders of the time, the exilarch and the *nasi*, wielded significant

legal authority through the independent courts they headed, each in his own locale.[47] Thus, for instance, evidence points to the broad judicial powers of the exilarch's court, which dealt mainly with civil claims and specialized in civil law.[48] We also have evidence of hearings in this court concerning corporal and capital punishment and questions of ritual fitness.[49] The *nasi* and his court also ruled on civil law[50] and convened to rule *halakhot* for the whole of Israel when the Great Assembly was not in session. Some scholars hold that the *nasi*'s court served as a court of appeals.[51] All agree that *nesi'im* engaged in extensive legislation in various realms.[52]

From various instances cited in the Talmud, we learn about the complex relationship between these two establishments. At times, the rabbinic establishment acknowledges,[53] and even defers to,[54] the exilarch's court, and at times we see a power struggle, each one attempting to encroach upon the other's territory.[55] The *nasi* and the Great Assembly were also sometimes involved in struggles.[56]

What is the source of the judicial authority of the civil leadership?[57] Certainly not their outstanding Torah scholarship. The conventional wisdom is that some of them, at least among the Babylonian leadership, were not particularly erudite, and some had never studied.[58] A better understanding of the general sources of this leadership's authority will help clarify the background of their judicial powers. The institutions of the exilarchy and the *nesiut* rested simultaneously on two parallel sources: religious authority and political authority.

Religious authority rests on the prevalent (although not universally accepted) rabbinic tradition claiming that exilarchs and *nesi'im* are scions of the House of King David. If the civil leadership is a mythical reincarnation of King David's dynasty, one should attribute to it religious authority and powers resembling those ascribed to the king. Religious authority, then, is dynastically preserved.[59]

In contrast, political authority follows from the actual status of the Jewish civil leadership in light of the regime prevailing at the time.[60] *Nesi'im* and exilarchs were the political and administrative

representatives of the Jews vis-à-vis the authorities.[61] Incumbent on the exilarch, as on leaders of other communities in the Persian Empire, were administrative roles assigned by the ruling powers, such as collecting taxes and supervising trade. *Nesi'im* also functioned as heads of the public administration (for communities inside and outside Eretz Yisrael); *inter alia*, they appointed and supervised religious and civic officers for these communities, they collected monies to finance the activities of the administration, appointed market inspectors, set prices, and so forth.[62]

The civil leadership's two general sources of authority are mutually complementary: whereas the religious source draws its power from an intra-Jewish context, the political source draws its power from an extra-Jewish context as well. This plurality of sources of authority, as well as the various meanings ascribed to each of them, tends to blur any sharp characterization of the civil leadership and its institutions as altogether "secular" or "religious." Nevertheless, and vis-à-vis the rabbinic establishment of the period, the main essence of the civil leadership, and certainly that of the exilarch, is definitely not religious, although it also had religious meaning at the time.

Similarly, the judicial authority invested in the civil leadership could also be explained as the obvious consequence of two general sources of authority. In religious terms, if the leaders are perceived as descendants of the House of David, the executive powers of royal authorities are also transferred to them, including the implementation of the "king's law."[63] In political terms, if it is incumbent on them to mediate between the central authorities and the Jewish community, they must be given the actual capacity to rule, including the ability to set and enforce norms, for which judicial authority is required.

In actual fact, the exilarch and the *nasi* relied on the executive powers of the authorities to enforce the decisions of their courts.[64] They thereby enjoyed an advantage over rabbinic courts, which lacked similar enforcement powers. This difference is highly significant to the litigating parties *ab initio*, when choosing the judicial setting to which they will

resort. Not surprisingly then, consumers concerned with civil matters usually chose to turn to the civil court rather than to the rabbinic court. As a result, the exilarch's court developed expertise in these questions, which comes to the fore in various talmudic sayings hinting at the advantage of the exilarchs' courts over rabbinic courts.[65]

5. The Exilarch: The Geonic Era

After the destruction of the Jewish settlement in Eretz Yisrael, the largest Jewish community resided in Babylon. Its autonomy was not hindered by the Arab Moslem conquest of Babylon. Organized Jewish life proceeded, as it had before, along two axes: the civil leadership of the exilarch and, beside it, a religious leadership in its new incarnation—the institution of *geonut.*

In this period too, general sources of authority for the exilarch's civil leadership were both internal—the Jews' agreement to accept his authority—and external—letters of appointment issued by the Moslem Caliphate.[66] The exilarch's powers during the geonic period, up to the end of the twelfth century, were broad and varied. They included judicial authority, parallel to that wielded by the *geonim*. The exilarch had his own court, he hired and fired *geonim*, he had penal powers vis-à-vis the entire community, including rabbis, and so forth.[67]

In sum, the institution of the exilarchy prevailed for over a thousand years in the most important Jewish diaspora of the times and was the means for preserving Jewish autonomy under various regimes. The exilarchs were perceived as scions of the House of David and symbolized the hope for Jewish political independence. Generally, they enjoyed a high level of legitimacy among their brethren and constituted the authentic public leadership of the Babylonian diaspora.[68] At the same time, they acted as the political arm of the Persian, and later the Moslem, empire. Their roles and their influence—outward and inward—underwent periodic changes due to internal power struggles between

the exilarchs and the religious and economic leaders of the Jewish community, and due to changes in the host political system. Among their functions was the regulation of an autonomous legal system through independent mechanisms of adjudication and enforcement. At times, they also directed their political as well as their professional superiority against the rabbinic judicial system and its leaders, the heads of the *yeshivot* and the *geonim*. Both judicial systems functioned concurrently—at times in harmony and at times competing—mutually acknowledging each other in principle.[69] Generally, then, the large Jewish community in Babylon, from the period of the Mishnah and the Talmud until (at least) the end of the twelfth century, was characterized by the institutional duality of its legal system.

6. Community Organs: The Era of the Early and Later Authorities

The end of the geonic era marks the end of centralized government led by political and spiritual leaders for Jews in the Diaspora.[70] Instead of the centralistic, hegemonic institutional leadership of the East, be it in Eretz Yisrael or in Babylon, the era of diffuse, atomized administration begins, including a spectrum of ruling systems in various communities of the Jewish diaspora. The communities developed autonomously, in different directions, each in its own locale. A central aspect of communal autonomy, perhaps even a defining one,[71] concerned the independent judicial organization of the community: communities were organized, generally,[72] as "autarchic" producers and consumers of legal norms in the halakhic context. This reality was compatible with the accepted norms of the host surroundings at the time.[73]

Within its local, secluded framework, each community perceived itself as a full-scale political entity. Hence, each community tried to function as a continuation and a replacement of the previous, all-encompassing leading institutions—the *nasi*/exilarch and the *geonut*.[74] Yet, the

decentralization of Jewish leadership brought with it changes in the model of the community's internal rule: the individual leader (modeled on the king, the exilarch, or the *nasi*) was replaced by a collective leadership representing the public and functioning as a community organ.

Communal rabbinic institutions[75] staffed by professional rabbis worked alongside communal institutions staffed by lay leaders. Since, theoretically, the norms of Jewish society derived from talmudic law,[76] it is only natural to find that this law was developed and implemented by both institutions simultaneously: the rabbinate (together with the heads of the *yeshivot*, where the two were distinct), and the civil leadership within the geographical domain that accepted its authority (a city, a region, and so forth).

The background for the presence of two powers implementing Halakha during this period can be understood in both sociological and legal terms. During the second half of the fourteenth century, rabbinic ordination was renewed in Ashkenaz as an institutional procedure bestowing on the ordained individual a title ("our teacher the rabbi"), authority, and rabbinic status. One of the implications of institutionalizing the rabbinate was that, contrary to the accepted pattern until then, it seldom relied on the personal rabbi-disciple relationship and shifted to a behavioral construct of rabbi-community relationships. The rabbinate thereby expanded the scope of its influence beyond the house of study.[77] In the course of the fifteenth century, the rabbinate evolved from an institution of experts and scholars, fulfilling mainly an intellectual and educational role and affecting mainly their students, into a rabbinate of professionals in public office who functioned as religious leaders of the entire community, including its lay leaders.[78]

Yet this institutionalization of the communal rabbinate also led to dependence on the community.[79] Contrary to the spontaneous rabbinate, the community rabbi is formally appointed from among various candidates at a meeting of lay leaders or their representatives. The community, which also finances the rabbinate, retains power

vis-à-vis the rabbi insofar as it is the community that will renew his appointment, determine his salary, preserve his monopoly against challengers and against competing rabbinates, and so forth. It is thus only natural to assume that the community and its leaders—as a by-product of the power they wielded vis-à-vis the rabbinate—developed independent power centers, including a legal system.

Let us now proceed from the sociological explanation to a legal analysis. As noted, with the declining influence of the Babylonian leadership center, a collective model of communal leadership takes shape. But no significant precedents for a model acknowledging the political authority of the community or its organs were available in the history of Halakha, as the dominant leadership model until then had been that of the individual leader.[80] As a result, an acute problem emerged due to the lack of halakhic authority to enforce the public will as it is conveyed through the decisions of communal organs or of the communal majority.[81] Furthermore, halakhic legislative authority had been until then in the hands of a central leadership recognized by the entire nation, and this leadership had now disappeared from public Jewish life. In sum, a halakhic reaction conferring practical validity on the new form of leadership that had struck root in the communities was now required.[82]

The solution devised by medieval halakhists in Ashkenaz, Spain, and North Africa involved recognition of the public and its organs as substitutes for the previous institutions of leadership, such as the *nasi* and the king.[83] Furthermore, an innovation developed at this time that equated the power of the community with the power of the rabbinic court.[84] As Elon explains,[85] drawing this parallel with the court is essential so as to empower the public to legislate even contrary to contemporary Halakha. The court's expropriatory powers were now extended also to the communal leadership. Some scholars claim that the justification for granting authority to a community organ is that it represents the public and draws its authority from the civil authority *per se*.[86] The historic importance of this discussion for the development

of public law in Halakha and political thought in Judaism can hardly be exaggerated. The give and take engaging the sages of the time hinged, in a narrow sense, on the proper rules for communal decision-making; in a broad sense, it dealt with the connotations of managing public affairs and with the relations between minority and majority. It appears that these ways of thinking—which may have originated in the desire to enable community organs to rule—helped open the way for these organs to function in the legal sphere as well.

In any event, rendering talmudic law into communal terms encounters difficulties engendered by temporal and circumstantial changes. Interpretive flexibility may suffice to allow for the application of talmudic civil law, but communal issues in the area of public law—involving public affairs, the community's representation before the sovereign powers, and so forth—could not rely on the few halakhic precedents appearing in the Talmud. Communities were thus forced to resort to another important legal source—the *minhag* [custom]. Communal provisions, whether formally registered or known through empirical testimony even if not incorporated into a codex, became halakhically binding "customs." In Ashkenazic communities, customs were annotated and formulated in normative terms through a system of ordinances known as *takkanot ha-tsibbur* [public enactments]. Decisions taken at meetings of property owners or their representatives were also formulated by the communities and became "enactments."[87] It is important to note that enactments were not designed to revoke the applicable Torah laws in the matters at issue, but were perceived rather as an addition to Halakha.[88]

Communities in Ashkenaz continued to grow, and by the seventeenth and eighteenth centuries, the larger ones numbered thousands of Jews. These communities required functional institutions and hierarchies of responsibility for public affairs. A whole array of organizations emerged, which included *parnassim* and *rashei kahal* [community leaders], *memunim* [administrators], *gabbaim* [community officers], *tovim* [notables], *shtadlanim* [intercessors], and so forth. All acted within the framework of the written enactments devised by the civil leaders, which

were also interpreted and applied by them over the course of time. The civil leaders also acted as judges in quasi-criminal as well as civil matters.[89] Consider: civil leaders without any rabbinic authority, and at times not even learned in Torah,[90] functioned not only as the executive power, but also as legislative and judiciary powers.

The functional duality of the rabbinate and the civil leadership in Ashkenaz survived for a long time: scholars disagree concerning the balance of power prevailing between these two institutions during the fourteenth and fifteenth centuries. Some argue that the community leadership shifted to the rabbis at this time,[91] while others hold a different view:

> There were some fifteenth century communities, including some long-established and important ones, where lay leaders displaced the rabbis, or where the community managed public affairs mainly according to the dictates of the lay leadership. Lay leaders, rather than rabbis, ruled in most communities in all issues concerning tax rates and tax collection; in the reality of the period, this was the most crucial of all public issues.[92]

Jacob Katz describes the situation between the sixteenth and eighteenth centuries as follows: "Thus, the two forms of communal leadership—that of the *parnassim* and that of the rabbis—were closely linked and dependent upon each other, and neither could exist or function without the aid of the other."[93]

As for Spain, Spanish Jewry enjoyed a spiritual blossoming in many areas during the eleventh and twelfth centuries. But how did the study of Torah fare during the "Golden Age"? Contrary to the prevalent view, expert Torah scholars in the Spanish-Jewish society of the time were a surprisingly small group, and certainly much less significant than their contemporary Ashkenazic counterparts.[94] Nevertheless, evidence indicates that Jewish law played a prominent role in the lives of Spanish Jews. The religious lifestyle of these communities did not allow them to resort to Gentile courts. They preferred to abide by the decisions and guidance of rabbinic courts.

But how did Jewish law actually function in a society with few halakhists and scholars? Tashma, who presents this dilemma, answers:

> Beside local halakhists, other bodies, made up of a grass-roots leadership chosen by the community, also played an active role in communal government. With the community's agreement, these bodies were granted varied legal powers, with the explicit encouragement of halakhic scholars. As a result, an exceptional development in Jewish history unfolds in Spain—living, active Jewish law is implemented in a society with only a meager complement of expert Torah scholars.[95]

These agreed communal bodies—variously designated, for instance, *berurim* [notables], *ziknei ha-kahal* [community elders], *rov ha-kahal* [communal majority]—were aided by an efficient and updated system of public enactments encompassing all areas of law. They interpreted and applied these enactments, hardly ever seeking the opinion of Torah sages, who were seldom available. Arising not only from the need for decisions in the absence of an available halakhic authority, this development can be ascribed as well to the preference of local people for making their own decisions regarding their affairs, thereby exploiting the advantage of local representatives who best knew their own communities, including their unique conditions and circumstances.

In Spain too, enactments formulated by the public majority in consultation with the community elders became "custom" as soon as adopted in practice. The validity of these enactments, therefore, was not necessarily made contingent on their compatibility with the Torah law pertinent until then.[96]

In Christian Spain, as community mechanisms developed in the thirteenth and fourteenth centuries, Jews enjoyed wide autonomy and were responsible for their own internal organization, including their legal system. A religious leadership made up of judges and rabbis and, alongside them, organs constituting the civil leadership—known as elders or *adelantados* (in Castile), *ne'emanim* (in Catalonia) or *gedolei kahal* [notables] (in Toledo)—functioned in the various communities.

As Baer indicates, "the council of elders, composed of representatives of the aristocratic families, directed the affairs of the community, including the administration of taxes and the law, with no clear demarcation existing between their authority and the prerogatives of the rabbinic judges."[97] At times, lay leaders wielded extremely broad judiciary powers, which even extended to capital offenses.[98]

Dealing with the place of "community rule" in the legal system, Assaf ties together the experience of several diasporas:

> An important role was also fulfilled by community leaders. Communal leaders in many countries, such as Spain, Moravia, Poland, and Lithuania were greatly empowered and had authority to impose fines and, at times, deal with capital offenses. Indeed, most of these cases were not tried in rabbinic courts but by *parnassim*, communal leaders, and notables, who relied on the laws of the country or on accepted customs, and some would ask the rabbi how to decide according to Torah law. Even in places where permanent rabbinic courts were available, their activity was limited mainly to civil cases, while other cases were tried by communal leaders. Hence, in most Jewish communities there were two legal instances: the rabbinic court and communal rule.[99]

As the medieval period drew to a close, Jewish communities joined together in larger frameworks. Various communities within the same realm strove to maintain organizational contacts in order to solve some of the problems arising from their atomistic existence.[100] It is interesting that the development reviewed here—the allocation of judicial authority to both rabbis and lay leaders—recurs in these new, supra-communal organizations.

Thus, for instance, from the end of the sixteenth century and for about two hundred years, a body known as the *Va-ad Arba ha-Aratsot* [Council of the Four Lands] functioned as the centralized leadership of Polish communities. The Council included both rabbis and lay leaders and can illustrate the compromise between the main forces then active

in the leadership of Jewish communities. The Council was headed by an elected lay leader, usually not a rabbi. Beside the Council's functions as a representative body and as the central government of the communities in charge of various tasks such as tax collection, it also served as the Supreme Court of Polish Jewry. Legal disputes that had not been settled in the communities were brought before it. The Council also ratified enactments—including on issues of ritual prohibitions (probably formulated by the rabbis)—which were proclaimed in the name of the entire Council, including its lay and rabbinic members.[101] Evidence also shows that bans were imposed by lay members of the Council without consulting with the halakhists.[102] The following description, by a Polish Jew, paints an idyllic picture:

> They would be in session during every fair in Lublin between Purim and Passover and during every fair at Jaroslaw in the month of Ab or Elul. The leaders of the Four Lands were like the Sanhedrin in the Chamber of Hewn Stones. They had the authority to judge all Israel in the Kingdom of Poland, to establish safeguards, to institute ordinances, and to punish each man as they saw fit. Every difficult matter was brought before them and they judged it.[103]

Similar councils set up in Lithuania[104] and Moravia also functioned as the supreme ruling instances in those countries.[105]

A decisive historic transformation becomes apparent in the eighteenth century, marking a turning point in the story unfolding here. The Jewish community was weakened—its general mandate was restricted, and the judicial autonomy it had enjoyed until then was constrained. The reasons for this process can be ascribed to two events beyond the communities' control: the development of the idea of the modern state and the strengthening and intensification of Emancipation.

The modern state was characterized by a centralistic leader who aspired to maintain direct bureaucratic relationships with the citizens. The Jewish community, like the Church, the aristocracy, the guild, and other specialized corporations, was perceived by the state as an obstacle

to administrative management and to the homogenous and unmediated execution of the state's sovereign powers. A conflict also emerged between the modern state, which is secular in character, and the Jewish community, whose organizing principle is its religious identity and praxis. New circumstances were thus created, hostile to the very functioning of the Jewish community as such.[106]

Emancipation brought civic and social deliverance to Jews, insofar as its harbingers upheld the banner of equal rights for all citizens, including the Jews. Yet, at the same time, Emancipation deprived Halakha of its institutional vitality. It cast aside the basis for the autonomous existence of Jewish communities and weakened the legal autonomy they had enjoyed thus far. As rabbinic courts lost their coercive authority, turning to them became futile. At the same time, inhibitions blocking the access of Jews to Gentile courts were largely removed, due to the growing trust in the function of these courts within relatively tolerant regimes and to the influence of the Enlightenment on the Jews. As a result, recourse to rabbinic courts became increasingly rare, and the established legal power of the civil leadership in the Jewish community, as well as that of the rabbinate, was lost.[107]

4 THE GENERAL PICTURE

The history of Halakha shows that parallel to its creation and implementation by rabbis and rabbinic institutions relying on Torah law, Halakha also drew on a complementary normative system of legislative and judicial character. This normative system was developed by the ruling bodies governing the Jewish people throughout its history. As I showed, the earliest emerging political structure—at the time of the prophet Samuel—functioned as a normative authority as well. The various mutations of Jewish public government from that time until the eighteenth century retained this mode of functioning. Indeed, it is actually hard to point to any manifestation of public leadership devoid of legal authority.

During the era of Jewish sovereignty, which was organized within a monarchic regime, Jewish law was developed by the civil leadership of the time—"**the king's law.**"[108] At the same time, a local system of law was administered by the local civil leadership—the **elders**. Although Jews lost their sovereignty, both in their own land and in their places of exile, the need for continued development of legal norms in a non-rabbinic context persisted. At first, it was manifest in quasi-governmental Jewish institutions that were recognized by the conquering empire and authorized to function as internal judicial institutions. These are the ***nesi'ut*** in Eretz Yisrael and the **exilarchy** in Babylon, under the Persian government and the Moslem Caliphate. Although subject to foreign rulers, the Jewish people preserved its ability to organize as an autonomous community in several ways, including in the legal sense. Organized communities, therefore, although living under alien sovereignty, used the features of public leadership they had preserved in order to continue developing the extra-rabbinical dimension of halakhic law. This is the institution known as "**communal enactments.**"[109]

Simultaneously, at various times and places, the notion that "**the law of the kingdom is binding**" developed, through which Halakha acknowledged the validity of norms set by the civil leadership of others, and even internalized them.[110] The analysis of this important institution is beyond the scope of the present discussion, insofar as my focus is on the normative contribution of the intra-Jewish civil leadership to Halakha. Nevertheless, the substantial link between these two phenomena is worth noting: the halakhic ruling that "the law of the kingdom is binding" states that halakhists must—under given conditions—resort to norms originating in the civil leadership ("the kingdom"). The importance of normative development through the political system was so obvious that even the fact that the norm issued from non-Jewish civil leadership, and that the norm aimed to regulate universal and not necessarily Jewish existence, did not preclude its use by Halakha.

These institutions—the king's law, the elders, the *nesi'ut*, the exilarchy, the communal enactments, as well as the law of the kingdom—are not identical. They differ considerably in a number of ways, depending on their functional procedures, the scope of their substantive authority, the awareness on their own part and that of their surroundings concerning the essence of their functions, and so forth. Neither is the attitude of the sages toward them uniform. Differences are probably a consequence of the social, political, and religious reality that provided the context for the development of these institutions. The attitude toward the king of Israel differs from the attitude to the exilarch, who is appointed by a foreign government; the attitude to the exilarch, who is perceived as a descendant of King David, differs from the attitude to a foreign king. At another level, the authority of the king differs from the authority of local government. These and other differences also lead to variations in the normative and philosophical meaning assigned in intra-Jewish discourse to the norms created by each of these institutions.

A separate discussion of each of these institutions is both necessary and desirable.[111] A rigorous historical and sociological consideration

of the specific background within which and from which Halakha was developed by the civil leadership in various periods, regimes, and geographical areas would be extremely valuable. Nevertheless, I have taken the liberty of muting these differences, choosing to focus on their overall objective in an attempt to stress the basic characteristics that all these institutions share.

Furthermore, I assumed at the start that everything the Jewish community accepted as binding law should be defined as "Halakha." Obviously, this is not a necessary assumption from an analytical perspective. The living space of Halakha could also be confined to the perimeters of Torah law, thus addressing the normative activity of the civil leadership as an extra-halakhic product (be it one absorbed by Halakha, or one that Halakha is willing to acknowledge as a product alternative to its own, or even as an extra-halakhic product that regulated Jewish life in practice without any halakhic recognition whatsoever). The identification of Halakha with Torah law can be defined in formal[112] or substantive[113] terms.

In the future, I intend to examine the meaning that the sages assigned, within the context of Torah law, to the existence of legal systems parallel to the one they controlled and to the law of the government. For the purpose of the present discussion, however, I did not draw a distinction between the various options nor did I consider the level of formal or substantive recognition ascribed to the political systems. As noted, I preferred to stress the decisive fact that whatever the case, in the view of the entire community, including its rabbis, the normative product of the civil leadership actually dictated the terms of Jewish life, not only *ex post facto* but even *ab initio*.[114] Furthermore, even assuming that these norms, when set by the political rulers, could have been catalogued as extra-halakhic products (due to their non-Torah source), it is highly plausible that over time, they percolated into the Torah corpus through their internalization by halakhists, who experienced the practical validity of these norms in the reality of their lives.[115] Finally, the very assumption that Jews and their spiritual leaders drew a distinction between Halakha and other norms that are produced by an intra-Jewish instance but are

not Halakha remains unproven. On all these grounds, I hold that there is substantive justification for relating to the judicial and legislative functions of the civil leadership as an implementation of halakhic authority.

SUMMARY

Establishing the status of the civil leadership as a creative source of halakhic law is vital. First, it serves to clarify the course of Halakha's development and the array of influences that contributed to its shaping. Second, it promotes understanding of the balance of power between the religious and the political authorities concerning the shaping of the main activating factor throughout the course of Jewish history—the Halakha. This topic holds true potential for a multifaceted lesson in the history of Halakha and in the history of the relationship between religion and state in Jewish reality.

Besides the theoretical connotations of this discussion, its practical significance should also be emphasized. The application of the general picture outlined above to present Israeli reality involves concrete potential for the easing of tensions between religion and state.

Exposing the ongoing activity of institutions of civil leadership as complements to the normative reality, each in its own time and circumstances, makes the expectation of their continued influence on contemporary halakhic law highly plausible. We could even adduce an *a fortiori* argument: if in the Diaspora (or in Eretz Yisrael under foreign occupation) Halakha could develop through a central Jewish authority or even through a local system of Jewish administration,[116] *a fortiori* today, when we have a sovereign Jewish government—the realization of the hopes of many generations.[117]

Obviously, great caution is required: **the sovereign government of the State of Israel has unique characteristics**, virtually without precedent in Jewish history. The civil leadership of the Jewish community almost invariably took pride in its religious commitment. Even when it numbered among its ranks individuals lacking a Torah education, and even if some were less than rigorously observant, their religious consciousness was self-evident. This basic situation is no longer the case for most of the Israeli leadership. Additionally, Israeli civil

leadership is chosen by a citizenry that includes non-Jews, who also hold positions as legislators and judges in a democratic Israel. Furthermore, at present, contrary to historical precedent, the groups comprising the civil leadership and those that make up the religious leadership do not overlap.

These and other differences require a separate discussion of the following question: to what extent and under what conditions can the Israeli legislative and judicial powers be considered authentic heirs of the civil leadership institutions mentioned above?[118] This is a critical question that requires, *inter alia*, a halakhic and philosophical discussion of secularism, which is beyond the scope of this paper. Nevertheless, whatever the answer, it cannot dismiss the significance of the very existence of the phenomenon reviewed here to the relationship between religion and state in Israel. In general terms, one could argue that Jewish history has shaped a model and we are bound to apply it, *mutatis mutandis*, to current reality in Israel.

Given the theoretical and practical importance of revealing the political sources of Halakha, the relative paucity of scholarly concern with this topic is worth noting. The limited theoretization of the institutional duality of Halakha, be it from a theological, sociological, or legal perspective, is particularly striking, and can be attributed to at least two factors.

The first is objective-scientific. It is hard to assess the full scope of the civil leadership's influence on the development of Halakha because for most of this period, the historical narrative purported to be the raw material of the scholar's work was written by sages. Probably then, the reality outlined in this paper, which relies mainly on rabbinic sources, denotes the minimal threshold of the civil leadership's actual involvement in the creation of Halakha.

The second is subjective-ideological: the vast practical implications of institutional duality in Halakha could actually deter those scholars aware of the significant differences between the civil leadership throughout Jewish history and the present Israeli leadership.

I believe that recent developments in Israel seem to demand renewed involvement in this realm for both theoretical and practical reasons.

First, the growing alienation now prevalent within segments of the observant population from the state and the government in general, and from the Israeli judicial system in particular, compel this involvement. Second, the self-abasing deference of some observant politicians—an important element of the civil leadership—to the discretion of the rabbis originates in their views about the scope of Halakha's application[119] and the establishments allowed to implement it. Exposing the importance of Jewish civil leadership in shaping the legal system of the Jewish people could help contemporary observant leaders to re-evaluate, in a broader perspective and with due consideration of the needed changes, the legitimacy of and necessity for their functional autonomy.

Third, and most important, the prevalent sense over the last decades is that Halakha is somewhat frozen, ideologically conservative, and strategically on the defensive. These feelings, if they are an accurate description of the situation, indicate the relative failure of those presently charged with the task incumbent on the Oral Law of preserving and interpreting the Scriptures as a law for life that remains forever relevant. One of the plausible explanations for this is the perilous combination of two developments: on the one hand, the vastly increased pace of change in the actual and ethical reality of the society in which Halakha functions and on the other hand, the restriction of the community's ability to organize its political structure following the revocation of Jewish communal autonomy during Emancipation. As a result, the civil leadership no longer had any influence on the development of Halakha. This break in the chain of the civil leadership's role as an agent mediating Halakha and reality impaired the capability of Halakha for self-renewal and affected its relevance. Together with an increasing need to contend with reality, therefore, Halakha was deprived of the balancing element charged with this task.

A fundamental clarification of several aspects of the developments exposed here concerning the place of civil leadership in the creation of Halakha is thus required. Possibly, a modern yet authentically halakhic relationship toward civil leadership setting the accepted normative code in Israel will emerge. It could strengthen, through an understanding of the Halakha's dynamics of development and in concert with it, a set of halakhic meanings relevant to the product issued by legislative and judicial authorities in contemporary Israel.

NOTES

1. See Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* [Hebrew] (Tel-Aviv: Ma'agalei Da'at, 1993), chs. 4-5. His claim is that in the past, when a gap had prevailed between prevalent collectivistic culture in Israel and the liberal sub-culture of the Court, the Court played a pioneering albeit problematic role in promoting liberal values and therefore chose to hide behind legal formalism. From the 1980s onward, the Court places itself openly at the center of the forces shaping Israel as a liberal state (pp. 120, 122-123).

2. See Yedidia Z. Stern, *Rabbincal Rulings on Policy Questions* [Hebrew], Position Paper No.18 (Jerusalem: The Israel Democracy Institute, 1999), pp. 7-13.

3. See Yedidia Z. Stern, *Law, Halakha, and Pluralism: Living with Normative Duality* [Hebrew] (Ramat Gan: Bar-Ilan University Chair on Society and Judaism-Avi Hai Foundation, 2000), ch. 8.

4. See the argument of Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989). Jeremy Waldron objects to this argument and claims that according to Kymlicka, the right to culture does not compel protection of a particular culture. See Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative," in Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1997), p. 106. Avishai Margalit and Moshe Halbertal also disagree with Kymlicka. In their view, the protection of the other's culture does not follow from the principle of freedom but from the value of the culture to the community bearing it. See Avishai Margalit and Moshe Halbertal, "Liberalism and the Right to Culture," *Social Research* 61 (1994), p. 491. For an additional angle see Avi Sagi, "Identity and Commitment in a Multicultural World," *Democratic Culture* 3 (2000), p. 167.

5. On this characterization of the three conceptual systems that constitute the relationships between cultural groups, see Avi Sagi, "Tolerance and the Possibility of Pluralism in Judaism" [Hebrew], *Iyyun* 44 (1995), p. 175. See also Avi Sagi, "Society and Law in Israel: Between a Rights Discourse and an Identity Discourse" [Hebrew], in *Israeli Law: The Next Fifty Years*, edited by Yedidia Z. Stern and Yafa Zilberschatz (Ramat Gan: Bar Ilan University Press, forthcoming).

6. Eliav Shochetman, who dealt extensively with this issue, concludes:

> The prevalent view among contemporary halakhists is that Israeli courts, although controlled by Jews, do not judge according to the law of the Torah but according to a legal system that Torah law considers alien. Since this thwarts the inclination of the Torah to solve all legal questions according to Jewish law, recourse to them [state courts] is forbidden not only on grounds of "before them and not before laymen" but also on grounds of "before them and not before idolaters."

See Eliav Shochetman, "The Halakhic Status of Israeli Courts" [Hebrew], *Techumin* 13 (1992-1993), pp. 337, 346. In his view, this ban does not rule out the legitimacy of the state judicial system in general. There are exceptions to the ban in circumstances when Torah rulings are not possible because the parties do not agree to abide by Jewish law or because Israeli law does not allow it as, for instance, concerning penal law (pp. 354-360).

7. Ovadia Yosef, *Responsa Yahaveh Da'at*, Part 4, # 65. In his injunction, Yosef notes that the Hebrew word *minhag* (practice) is made up of the same letters as the word *gehinom* (hell).

8. *Mishnah Avot* 1:1. Maimonides, in his introduction to the *Code*, cites the names of forty selected individuals, each in his time, who received and delivered the Oral Law, from Moses and up to Rav Ashi and Ravina, who completed the codification of the Talmud. He includes in his list several well known figures of priests, prophets, kings, *nesi'im*, and so forth. Maimonides sums up as follows: "All the sages here mentioned were the great men of the successive generations; some of them were heads of *yeshivot*, some were exilarchs, and some were members of the Great Sanhedrin." Obviously, "beside them were thousands and myriads of disciples and fellow-students." In rabbinic tradition, some interpret this *mishnah* as conferring authenticity upon the Oral Law, and some suggest it bestows legitimacy upon the men mentioned in it. See Gerald J. Blidstein, "Mishnah Avot 1:1 and the Nature of Rabbinic Authority," in *Judaism and Education: Essays in Honor of Walter I. Ackerman*, edited by Haim Marantz (Beer-Sheva: Ben Gurion University Press, 1998), p. 55.

9. Maimonides, *ibid.*, describes the process as follows:

> As for the two Talmuds: they expound the text of the Mishnah and elucidate its depth and comment on the additions of every

single court from the days of our saintly teacher and until the compilation of the Talmud ... as they had each learned from their predecessors up to the teachings of Moses at Sinai. We also learn from these sources about the decrees, instituted by the sages and prophets in every generation, to make a protecting fence about the Law, in accordance with Moses's express injunction. And we also learn from these sources about the customs and ordinances enacted in every generation as the courts of the time saw fit, as well as other judgments and rules that were not received from Moses, but deduced by the court of the time by applying the hermeneutical principles for the interpretation of the Torah, and ruled by these elders to be the law.

See Joseph Albo, *Sefer Ha-Ikkarim* (Philadelphia: The Jewish Publication Society of America, 1930), 3:23:

The law of God cannot be perfect so as to be adequate for all times, because the ever new details of human relations, their customs and their acts, are too numerous to be embraced in a book. Therefore, Moses was orally given certain general principles, only briefly alluded to in the Torah, by means of which the wise men in every generation may work out the details as they appear.

10. Yeshayahu Leibowitz's remarks on this matter are worth noting:

The Oral Law ... was not defined materially but functionally: it was the institutionalized concern with the Torah for the purpose of its interpretation, comprehension and explanation, deepening and expansion, and even its innovation if necessary, according to whatever was required from its understanding. What the sages meant by the *mishnah*, "Moses received the Torah in Sinai and delivered it to..." was not the Oral Law in the sense of a particular meaning but the Oral Law in the sense of the authority—and even the obligation—to rule and legislate according to the Torah. The chain of "recipients" and "deliverers" is merely the chain of those bearing the authority and complying with the obligation of legislating and ruling for the whole of Israel.

See Yeshayahu Leibowitz, *Talks on the Ethics of the Fathers and on Maimonides* [Hebrew] (Tel-Aviv: Schocken, 1979), p. 16.

11. To be precise, I am not arguing that the sages ceased to engage in the dynamic adaptation of Halakha to reality through recourse to Torah law. The study of responsa literature refutes this argument. Nevertheless, the evidence suggests that the sages' endeavor, however important, is not an adequate substitute for normative regulation in a real society through an appropriate structure of government tailored for this specific purpose.

12. According to Halakha, the situation whereby the civil leadership and the religious leadership exert mutual control is unsatisfactory. It is important for the public in general (as opposed to its representative leadership) to have control over norms detached from reality. Hence, legislation in Halakha—including legislation promulgated by the sages—is always affected by the views of the public, who are the norm's consumers. Their agreement to the legislation is required both *ab initio* and *ex post facto*. See *infra* note 19.

13. Zeev Safrai points to the existence of two parallel legal systems—one implemented by the sages and the other by the town's leadership—functioning concurrently during the era of the Mishnah and the Talmud. Wondering why the sages refrained from directly attacking other judicial systems that were sometimes staffed by uneducated and untrained individuals, he answers:

> [I]n antiquity, judiciary powers were inherent in government and leadership. Generally, the rabbis supported community activity and sought to encourage it. The community was a vital tool in the implementation and realization of rabbinic values. The community, for instance, organized educational and welfare systems, and was the framework, if not the condition, for the Jewish collective. Opposing the council's right to judge would necessarily be interpreted as a struggle against the community leaders and their authority, and would no doubt develop into one.... Separation of powers had not yet become a political idea and, in these circumstances, the rabbis had to choose between anarchy or a socially impotent council on the one hand, and a de facto recognition of the council's right to judge and the legitimacy of limited municipal legislation, as part of the power of the community and its institutions, on the other. The sages were also perhaps unable to oust the community leaders from their positions of power.

See Zeev Safrai, "The Sages and the Legal System at the Time of the Mishnah and the Talmud," in *Judaism: A Dialogue Between Cultures*, edited by Avi Sagi, Dudi Schwartz and Yedidia Z. Stern (Jerusalem: Magnes Press, 1999), pp. 219, 232.

14. Thus, for instance, as will be clarified below, Halakha grants legal significance to decisions made through such institutions as the king's law, the exilarch's court, or communal enactments. Nor does the injunction "the law of the kingdom is binding" [*dinah de-malkhuta dinah*] recognize a specific normative setup, but rather the existence of a channel funneling norms from the outside inwards, thereby allowing normative renewal vis-à-vis a changing reality.

15. Theoretically, if we could demonstrate that Halakha relies on a highly rigid mechanism to control normative imports, so that every norm that does not fit a Torah ruling enacted by the sages is rejected, the non-rabbinic legal system as a factor shaping Halakha would be made void. Yet, this hypothesis seems implausible due to the very fact that the non-rabbinic system, although usually staffed by individuals without a Torah education (see, for instance, *infra* note 58) and thus unable to rule as the rabbis did, survived throughout this era.

16. An interesting position on this question (in the context of public issues bearing on the state and society) was formulated by the late Hayyim David Halevi, chief Sephardic rabbi of Tel-Aviv. See Yedidia Z. Stern, "Unchanging Halakha in a Changing World: Policy and Society in the Work of R. Hayyim David Halevi" [Hebrew] (to appear in a book in memory of R. Halevi, edited by Zvi Zohar and Avi Sagi).

17. Did these two establishments function side by side and independently, or was one hierarchically subordinate to the other and thus in need of its "recognition"? Was rabbinic approval a condition for the validity of normative decisions of the civil leadership? Rabbinic sources provide various answers to these questions, including contradictory ones, as examples appearing in the following chapter will demonstrate. The recurrent friction between these two establishments regarding this issue resurfaces in the question of whether the community was bound to consult with an "important person" [a rabbinic authority] regarding its enactments. See references in *infra* note 87.

18. An intermediate option is also possible, whereby Halakha limits the scope of the authority granted to all or some of the establishments that

create it (but see *infra* note 19, concerning the very question of allocating "authority" in Halakha). Did the rabbinate and the civil leadership serve as parallel and overlapping authorities, or did they parcel out legal authority between them? Thus, for instance, Israeli contemporary law creates a substantive division of authority between rabbinic and state courts. The former are in charge of certain aspects of personal law, whereas the latter are in charge of all other legal realms. Are there any instances, within a halakhic context, whereby substantive authority is exclusively allocated to the rabbis on certain subjects, while all other issues are exclusively allocated to the civil leadership? For example, does the evidence indicate that issues of ritual fitness were entrusted to rabbinic legislation and judgment, whereas civil issues were assigned to the non-rabbinic authorities? Are theological issues beyond the authority of the non-rabbinic court, whereas issues concerning relationships between the individual and the community are beyond the authority of the rabbinic court? The discussion in the next chapter refers several times to this possibility, but I have not undertaken to settle these questions.

19. The very use of the term "authority" in the context of positive Torah law, and even in the wider context of positive halakhic law, needs further clarification. In modern law, authority rules are considered imperative. The assumption is that when the parties to a dispute are willing to accept someone's authority in order to settle it, the law has no reason to interfere regarding the arbiter's authority. But in other cases—such as when the parties do not agree, or when one party suspects that the other may refuse to accept the decision when issued, or when the decision could have implications for third parties who have not accepted the authority of the arbiter chosen by the parties—the legal system demands recourse to authority rules. According to these rules, a decision in a dispute becomes legally binding only if the ruling body is authorized by positive law to decide in this dispute. The legal system sets rules for allocating authority to decide in different disputes between various institutions. Every dispute can then be catalogued according to various criteria (such as the character of the dispute, the parties to the dispute, the economic or public importance of the conflict, or the place of its occurrence) and channeled to the institution authorized to decide on it. Deviations from these rules of authority result in a flawed decision, either in its validity or in its chances of enforcement.

Does halakhic law (including Torah law) recognize the notion of "authority" in this sense? Does Halakha include rules allocating judicial authority according to any criteria between institutions or individuals, so that only those authorized have the power to make and enforce rulings, while failure to abide by these rules nullifies the decision's validity and the possibility of applying it and enforcing it?

This vital question will not be considered here, nor will I make any assumptions with regard to it. Beside the obvious option—of a halakhic system for allocating authority resembling the one customary in modern law—an antithetical one is also possible, which refuses to acknowledge the very existence of authority in Halakha. According to this view, Halakha is entrusted to all, both in theoretical (to interpret) and practical terms (to rule). Whoever wishes to assume authority is allowed to do so. Thus, for instance, Shalom Albeck states:

> At the time of the *tannaim* and the *amoraim*, no appointed, permanent courts existed as a mandatory instance for litigation, requiring people to appear before them rather than before other judges not appointed for this purpose. Nor is it the case that other people, who are not appointed judges, were not allowed to judge and enforce their rulings. Not only was this not the case but, moreover, there is no halakhic foundation for the notion of investing power in appointed, permanent judges, and most of the laws concerning permanent appointed judges do not apply only to them but rather to every Jew. This power is equally shared by all members of the nation.

See Shalom Albeck, *Law Courts in Talmudic Times* [Hebrew] (Ramat Gan: Bar Ilan University Press, 1980), p. 15.

A third, intermediate option is also possible whereby, besides primary rules for allocating authority, Halakha imposes limitations on this authority and entrusts the implementation of these rules to another (namely, veto power). These limitations could be substantive, to the point of raising anew the question of the body or person possessing authority. Thus, for instance, halakhic tradition stresses the importance of overall public consent for establishing the norm's validity. The public influences legislation *ab initio* ("We make no decree upon the community unless the majority are able to abide by it," *TB Avodah Zarah* 36a) and *ex post facto* ("A court decree that is not accepted by a majority of the community, is not a decree," *PT Avodah Zarah* 2:8). Maimonides also

states in his *Laws of Rebels*, with regard to the authority of the Supreme Court to institute a decree or enact an ordinance that "the court should calmly deliberate [the matter] and make sure that the majority of the community can live up to it" (2:5). Even after they have ruled, if *ex post facto*, be it immediately (2:6) or after a lapse of a long period (2:7), it is clear that the norm has not been accepted by a majority of the community, the norm is either void (if it was rejected soon after its promulgation) or voidable (if it was accepted at first and then rejected). It is thus clear that even if strict positive rules were available concerning the allocation of authority, the validity of a decision is not exclusively dependent on the legitimacy of its source but rather on an external criterion that both precedes and follows the decision—the public's agreement. In other words, the positive authority of the one (for instance, the authorized court) is contingent on the non-implementation of the negative authority of the other (the public). Who, then, has the authority?

20. Although some facts are themselves normative (institutional facts).

21. A halakhic legal model, indicating that the existence of facts might be an indication of their intrinsic value and of the legitimacy that should be ascribed to them, is illustrated in the attitude of Halakha to the *minhag* [custom]. The question is what the status is of the custom (or practice) in the halakhic hierarchy. For a discussion including many references, some of them quoted below, see Israel M. Tashma, *Early Franco-German Ritual and Custom* [Hebrew] (Jerusalem: Magnes Press, 1992). Besides the view that the custom is subject to normative Halakha and, therefore, if it counters Halakha it is a "bad custom," various sources in the Palestinian Talmud present the custom in a different normative light: "As you impose fines for [breaching] a law, so do you impose fines for [breaching] a custom" (*PT Pesahim* 4:2); "Law is not enacted before it becomes a custom" (*Sofrim* 14:16), and even, "a custom overrides a law" (*PT Bava Metsiah* 7:1, 11a, and *PT Yevamoth* 12:1, 12c). The latter source has attracted scholarly attention: the ceremony of *halitsah*, releasing the bond between the levir and the widow, must be performed with a shoe. In practice, a sandal was used. The Palestinian Talmud says on this: "If Elijah were to come and say that *halitsah* is performed with a shoe, he is to be heeded, and if he were to come and say that *halitsah* is not performed with a sandal, he is not to be heeded, since the custom of the majority was to perform *halitsah* with a sandal, and custom overrides law." One approach will read this text as arguing that the normative value of the custom exceeds that of the law, finding

proof in the claim that the prophet Elijah, who could change Halakha, is not allowed to detract from the binding normative validity of the custom. (Tashma, *ibid.*, p. 66). Others have suggested alternative interpretations. See Menahem Elon, *Jewish Law: History, Sources, Principles*, translated from the Hebrew by Bernard Auerbach and Melvin J. Sykes (Philadelphia-Jerusalem: The Jewish Publication Society, 1994), p. 909, note 48; Berachyahu Lifshitz "Custom Overrides Law," *Sinai* 86 (1980) (custom overrides law in the sense that it leads us to forget it); Ephraim E. Urbach, *The Halakha: Its Sources and Development*, translated from the Hebrew by Raphael Posner (Tel-Aviv: Massada, 1986), pp. 31-41; David Henschke, "Custom Abrogates Law? (Corroborating a Theory)" [Hebrew], *Diné Israel* 17 (1993-1994), p. 135 (concerning civil matters, conditions may be set on Torah injunctions; therefore, on this question, the custom factually abrogates the implementation of the law. On ritual matters, however, the law cannot be superseded by custom, although no new ordinances should be enacted disclaiming a custom accepted by most of the public). For additional sources conveying the idea of the normative superiority of the custom over Halakha see, for instance, *PT Bava Metsiah* 7:1, 11b. As for the normative consequences of breaching a custom, the two Talmuds disagree: the Palestinian Talmud, as noted, holds that as fines are imposed for breaching a law, so are fines imposed for breaching a custom (*Pesahim* 4:2, 30d), whereas the Babylonian Talmud holds that neither fines nor punishments are imposed for breaching a custom (Tashma, *ibid.*, pp. 61-62).

22. Emphasis in the original. Chaim Tchernowitz (Rav Tsa'ir), *Toldot Ha-Halakah* (The History of Hebrew Law), vol. 1 (New York: Author's Edition, 1936), p. 8.

23. According to Rav Tsa'ir, the halakhic issues included in the political-legal foundation inherited from the kingdom are

> courts and their procedures; halakhot on the Sanhedrin and judges; rulings on fines, penalties, and capital punishments and all laws within the jurisdiction of the state; the title deeds of tribes and clans, landholdings and assets; torts, as well as setting up a state order; laws of war, converts, aliens, slaves, and international relations (*ibid.*, p. 2).

24. *Ibid.*, pp. 11-55, 108-122. The necessary distinction between a historical review and a philosophical analysis of the halakhic sources, which need not rely on historical research, is somewhat blurred in this

work. The difference between them is particularly prominent in the "king's law," which was developed as a philosophical issue only after the era of the kingdom had ended. See *infra* note 100.

25. See Simon Federbusch, *The King's Law in Israel* [Hebrew] (Jerusalem: Mossad Harav Kook, 1973), pp. 44, 46.

26. The article was printed in several places. See, recently, Yitzhak Halevi Herzog "Towards a Jewish State" [Hebrew], in *At the Crossroads: Torah and the State*, vol. 1, edited by Yehuda Shaviv (Alon Shvut, Israel: Tsomet, 1991), pp. 3, 7, 8; Yitzhak Halevi Herzog, "Clemency to Felons Convicted under the King's Law" [Hebrew], in *ibid.*, pp. 90, 94: "Yet, according to the Torah, the possibility of dual authority is inconceivable."

27. See Elon, *supra* note 21, p. 55.

28. Even Ezra, *ad locum*. Besides a dual authority, there is also an inherent duality in the law: "according to the instruction of the Torah which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do" (*Deuteronomy* 17:11).

29. Regarding Joshua, it is explicitly stated that his rabbinical authority stems from his ordination by Moses: "And Joshua ben Nun was full of the spirit of wisdom; for Moses had laid his hands upon him; and the children of Israel hearkened to him, and did as the Lord commanded Moses" (*Deuteronomy* 34:9). Moreover, Joshua also has authority to rule, resting on the people's agreement to accept his authority: "And they answered Joshua saying, All that thou commandest us we will do....Whoever rebels against thy commandment, and will not hearken to thy words in all that thou commandest him, he shall be put to death...." (*Joshua* 1:16-18). Rabbi Moses Sofer (known as Hatam Sofer) emphasizes the sovereign implications of Joshua's authority (*Orah Hayyim*, #208). He wonders about Joshua's authority to impose capital punishment and answers that his authority derives from the powers Joshua was granted by the people (although he is not from the tribe of Judah and does not have the status of a "king" but of a "judge"). On this issue, see also Shlomo Goren, *Theory of the State* [Hebrew] (Jerusalem: Ha-Iddra Rabbah, 1996), pp. 24-27. According to both Talmuds, Joshua's legal authority also included legislative powers. They ascribe to him the enactment of new norms ("Joshua laid down ten conditions"—*TB Bava Kamma* 80b; *Eruvin* 17a; *PT Bava Bathra* 85a), which were required so as to regulate the new reality created after the conquest of Eretz Yisrael and its division among the tribes. Nahmanides, relating to what

is said about Moses ("there He made for them a statute and an ordinance" [*Exodus* 15:25]), and later echoed in the verse on Joshua ("So Joshua made a covenant with the people that day, and set them a statue and an ordinance in Shekhem" [*Joshua* 24:25]), explains: "Here too the expression ['a statute and an ordinance'] does not refer to the statutes and ordinances of the Torah, but rather to the customs and ways of civilized society, such as 'the conditions which Joshua made [upon entering the Land],' which the Rabbis have mentioned, and other similar regulations," *Commentary on the Torah*, translated by Charles B. Chavel (New York: Shiloh Publishing House, 1971-1976), *Exodus* 16:25.

30. They are not the only ones bearing responsibility for leadership and for judicial functions. Concerning the leadership, Moses demurs, "I am not able to bear all this people alone, because it is too heavy for me. And the Lord said to Moses, Gather to me seventy men of the elders of Israel...and I will take of the spirit which is upon thee and will put it upon them; and they shall bear the burden of the people with thee that thou bear it not thyself alone" (*Numbers* 11:14-16). As for judicial duties, Moses heeded Jethro's advice and developed a wide judiciary, whose role is defined as follows: "And they judged the people at all times: the hard cases they brought to Moses, but every small matter they judged themselves" (*Exodus* 18:26).

31. See Shemaryahu Talmon, "The King's Law" [Hebrew], in *Sefer Biram* (Jerusalem: Kiryat Sefer, 1956), pp. 45-56.

32. The immediate historical circumstances surrounding the proclamation of the king's law indicate that the very demand for a king was also a consequence of the corruption tainting the judicial system of the time—Samuel's sons ("turned aside after unjust gain, and took bribes, and perverted justice" [*I Samuel* 8:3]). The elders explicitly link this corruption to the demand for a king: "And said to him, Behold, thou art old, and thy sons walk not in thy ways: now make us a king to judge us like all the nations" (*I Samuel* 8:5).

33. Following Samuel's response, the elders once again explain the tasks they intend for the king, clarifying the two dimensions of his responsibility—executive and judicial: "Nevertheless the people refused to obey the voice of Samuel and they said, No: but we will have a king over us; that we also may be like all the nations; and that our king may judge us, and go out before us, and fight our battles" (*I Samuel* 8:19-20).

34. See, for instance, the judicial functions fulfilled by David (*II Samuel*:14ff); by Absalom: "and when any man that had a controversy came to the king for judgment..." (*II Samuel* 15:2); by Solomon (*I Kings* 3:16), and by Ahab (*I Kings* 20:39ff). There are many other mentions ascribing judicial powers to the king, such as *Psalms* 72:1-2: "For Solomon, Give the king thy judgments, O God, and thy righteousness to the king's son. That he may judge thy people with righteousness."

35. The institution of the elders appears mainly in four of the five books of the Pentateuch (except for Genesis), and in Joshua, Judges, Samuel, Kings, and Chronicles. Scholarly interest in this institution has been relatively limited. See Tchernowitz, *supra* note 15, pp. 32-33; Hanoch Reviv, *The Elders in Ancient Israel: A Study of a Biblical Institution* (Jerusalem: Magnes Press, 1989). Reviv states that the elders were a collective leadership composed mainly of representatives of the various households [*batei ha'av*] composing the clan, which is the most basic sub-tribal unit. This institution originates in a semi-nomadic society, sustaining a tribal, patriarchal regime, and continued to exist after the settlement of Canaan due to the persistence of tribalism and the patriarchy at times without a link between them (pp. 9-12).

36. Limited evidence is available regarding the functioning of the collective, its decision-making mechanisms, the balance of power among its members, and so forth. Even the number of the elders is not clear (except for the schematic number—70). It is interesting that the Bible persistently conceals the personal identity of the elders (except, perhaps, for *II Chronicles* 28:12), probably in an attempt to emphasize their collective identity.

37. With the progressive crumbling of the tribal framework, the status of the tribal leader was weakened whereas the leadership of the elders was strengthened, and they sometimes became the actual heads of the tribe. See Reviv, *supra* note 35, pp. 41-43.

38. Some examples: The elders had a unique status in public gatherings that were mainly ritual (for instance, the handing over of the Torah from Moses to Joshua—*Deuteronomy* 31:9; the ceremony Joshua conducted in Shekhem, involving the building of an altar, the writing of the Torah, and the blessing and the curse—*Joshua* 8:30-35; the coronation of David—*II Samuel* 5:3, which became a paradigm for the coronation of kings by the elders; David bringing up the Ark to Jerusalem—*I Chronicles* 15:3; Solomon's inauguration of the Temple in Jerusalem—*I Kings* 8:1). They acted in various capacities as leaders

of geographic regions (for instance, the elders of Yavesh Gil'ad contending with Nahash the Ammonite—*I Samuel* 11); they were involved in military and political problems (for instance, the Ai war—*Joshua* 8:10; the election of Yiftah—*Judges* 10; coping with defeat in the battle against the Philistines in Even ha-Ezer—*I Samuel* 4:2-3; returning the captives that the kingdom of Israel had taken from the kingdom of Judah during the reign of Ahaz—*II Chronicles* 28:12-15). Occasionally, during a time gap in the change of leadership, the elders also fulfilled a national function, as leaders of the people (*Joshua* 24:31; *Judges* 2:7; *II Kings* 10:1-7). The elders were also those who turned to Samuel to establish a kingdom (*I Samuel* 8:4-5).

39. Slander against a virgin girl—*Deuteronomy* 22:13-19; levirate and *halitsah*—*Deuteronomy* 25:5-10; inheritance and redemption—*Ruth* 4:1-11; the stubborn and rebellious son—*Deuteronomy* 21:18-21.

40. The broken-necked heifer—*Deuteronomy* 21:1-9; cities of refuge and blood avengers—*Deuteronomy* 19:11-13; *Joshua* 20:1-9.

41. Reviv claims that Absalom, during his revolt, tried to gain the loyalty of the elders by stoking their resentment against the king's law as implemented by King David (Reviv, *supra* note 35, 94-97). It is interesting that Absalom did not question other royal actions or any despotic measures, except for his claims against the king's law:

> And when any man that had a controversy came to the king for judgment, then Absalom called to him, and said, Of what city art thou? And he would say, Thy servant is of such a one of the tribes of Israel. And Absalom would say to him, See, thy pleas are good and right; but there is no man deputed of the king to hear thee.... And in this manner did Absalom to all Israel that came to the king for judgment; so Absalom stole the hearts of the men of Israel. (*II Samuel* 15:2-6)

42. See verses cited in *supra* note 37.

43. On this option see Reviv, *supra* note 35, pp. 102-109. According to this interpretation, judges abiding by traditional law join, for the first time, judges in the royal court.

44. See *II Chronicles* 19:5-11:

> And he set judges in the land throughout all the fortified cities of Judah, city by city, and he said to the judges, "Take heed what you do for you do not judge for man but for the Lord, who is with you in the judgment.... Moreover, in Jerusalem

did Jehoshaphat set certain Levites, and priests, and heads of the households of Israel, for the judgment of the Lord, and for controversies. And they returned to Jerusalem.... And, behold, Amaryahu the chief priest is over you in all matters of the Lord; and Zevadyahu the son of Ishmael, the ruler of the house of Judah, for all the king's matters.... Deal courageously, and the Lord shall be with the good."

For an analysis of this passage see Noam Zohar, "Rabbinic Authority and Civic Authority" [Hebrew], in Safrai and Sagi, *supra* note 13, pp. 253, 256.

45. *TB Hulin* 92a: "'For thou hast striven with God and with men and hast prevailed' (*Genesis* 32:29). Said Rabbah, He intimated to him that two princes were destined to come from him: the exilarch in Babylon and the *nasi* in Eretz Yisrael." On the role of the *nasi* as one that combines political and religious authority ("preeminent both in Torah and in worldly affairs," *Gittin* 59a), see Lee I. Levine, "The Jewish Patriarch (*nasi*) in Third Century Palestine," in *Aufstieg Und Niedergang Der Römischen Welt*, edited by Wolfgang Haase (Berlin-New York: Walter de Gruyter, 1979), pp. 649, 681.

46. By definition, functional divisions between these institutions is not clear-cut: thus, for instance, there is evidence that the exilarch and the *nasi* fulfilled religious functions (such as the intercalation of the year [*TB Rosh Hashanah* 19b] and the proclamation of public fasts [*TB Ta'anit* 24a]). These quasi-religious roles, however, are the exception rather than the rule in an overall view of the public leadership's authority. See Moshe Beer, *The Babylonian Exilarchate in the Arsacid and Sassanian Periods* [Hebrew] (Tel-Aviv: Dvir, 1966), ch. 8. Evidence also points to political-governmental roles fulfilled by the heads of *yeshivot*, who were also close to "influential circles."

47. Additional legal systems coexisted in Eretz Yisrael at certain times. Some of these systems were private and temporary, and others were permanent and authorized by the local leadership. Some were made up of laymen and some were made up of experts. For a description and explanation of the causes of this development see Gedalyah Alon, *The Jews in Their Land in the Talmudic Age*, vol. 1, translated and edited by Gershon Levi (Jerusalem: Magnes Press, 1980), pp.217-230.

48. A caveat is in order here. The expertise of the exilarch's court in *dinei mamonot* is conveyed here as civil law, even if *dinei mamonot* are more inclusive than civil law in certain aspects and less inclusive in

others. Despite some of the prevailing incongruences between traditional and modern legal categories, this comparison is generally accepted as valid (see Elon, note 21, p. 109). The Talmud cites a conversation between Rav Huna, head of the *yeshiva* at Sura, and Rabbi Nahman: "Rabbi Nahman said to Rav Huna: 'Does the law follow our opinion or yours?' He replied: 'The law follows your view, since you have close access to the exilarch's gate, where the judges are in session'," *TB Bava Bathra* 65a.

In other words, we must accept Rabbi Nahman's halakhic position because he is close to the exilarch's court. Judges in this court became experts in civil law, since they were the ones who tried most cases in this area. According to Rabbi Samuel ben Meir: "R. Nahman was the exilarch's son-in-law, and used to sit in the court when the judges were in session. And he saw them sitting in judgment every day, or did so himself." Note that the talmudic passage indicates that the head of the *yeshiva* himself mentions the halakhic advantage of the exilarch's court. See also Isaiah M. Gafni, *The Jews of Babylonia in the Talmudic Era: A Social and Cultural History* [Hebrew] (Jerusalem: The Zalman Shazar Center for Jewish History, 1990), p. 100.

49. On the scope of the exilarch's judicial authority see Beer, *supra* note 46, ch. 5, and also Gafni, *ibid.*, p. 100.

50. See also Hugo Mantel, *Studies in the History of the Sanhedrin* (Cambridge: Harvard University Press, 1961), p. 224.

51. See I. S. Zuri, *The Reign of the Exilarchate and the Legislative Academies: The Period of R. Nachman bar Yitzhak (320-355)* [Hebrew] (Tel-Aviv: Mizpah, 1938), pp. 62-65

52. For instance, see the list of legislative enactments issued by the *nasi* in the first half of the third century (Levine, *supra* note 45, pp. 674-676). Tradition suggests that the first dispute involving Palestinian sages was the controversy between the *nasi* and the chief judges of the courts on a halakhic question: ordaining on holidays. *M. Hagigah* (2:2, and see Rashi, *s.v.* "*Yossi ben Yoezer omer*") describes a controversy extending over five generations between these two foremost legal instances. Note that the Mishnah identifies the parties not only by their name but also by their function: *nasi* v. head of the court.

53. The Talmud describes the relationship between the exilarch, Mar Ukba, and his teacher, Samuel. When they studied Talmud, Mar Ukba sat at the feet of his rabbi. In contrast, when Mar Ukba acted in his capacity

of head of the exilarch's court, they exchanged places and Samuel sat at Mar Ukba's feet. When they finished studying, Mar Ukba accompanied Samuel to his home, but when they finished a day in court, it was Samuel who accompanied the exilarch. See *TB Moed Katan* 16b. The story indicates that Samuel, who was the foremost rabbinic authority of his generation, ascribed great importance to the institution of the exilarch and to its judicial authority. The story also indicates that the exilarch's Torah erudition is irrelevant although, parenthetically, it is worth noting that Mar Ukba is the exilarch most frequently mentioned in the Talmud. Could this be because, among exilarchs, he was exceptional in his knowledge of Torah?

54. In *TB Sanhedrin* 5a, we are told about a ruling by Rav and Shmuel, whereby a judge who made a mistaken judgment and wishes to be exempted from paying compensation must "ask permission" from the exilarch. This indicates that, on this issue, rabbinic judges were subject to the judicial authority of the exilarch.

55. An extreme case, cited in *TB Avodah Zarah* 38b, describes the execution of Rabbi Zveid, head of the Pumbedita *yeshiva*, following a decision of the exilarch's court, because Rabbi Zveid had issued too stringent a ruling concerning Gentile cooking.

56. Thus, for instance, the appointment of sages involved a struggle: Is it the privilege of the *nasi* or of the Sanhedrin? A compromise was finally declared:

> Rabbi Ba said: At first, each would appoint his own students.... Then they bestowed honor on this house [the house of the *nasi*] saying: If a court makes an appointment without the consent of the *nasi*, the appointment is invalid, but if the *nasi* makes an appointment without the consent of the court, the appointment is valid. They then decreed that the court can only make an appointment with the consent of the *nasi*, and the *nasi* only with the consent of the court. (*PT Sanhedrin* 1:2, 19a).

For an analysis of this passage see Levine, *supra* note 45, pp. 665-669. The *nasi* (with his court) and the Sanhedrin were also concerned with the division of authority between them on such subjects as the sanctification of the month (*M. Rosh Hashanah* 2:8-9), the intercalation of the year (*M. Eduyot* 7:7), or deciding on the ritual fitness of firstlings (*TB Bekhorot* 31a). There are mentions of halakhic disputes between the *nasi* and the Sanhedrin where both institutions appear evenly

balanced in the struggle over the right to make rulings on halakhic issues (see, for instance, *Tosefta Berakhot* 4:15). The most prominent instance of a frontal confrontation between the *nasi* and the sages deals with the Sanhedrin's temporary removal of Rabbi Gamaliel from his office as *nasi* due to a halakhic controversy on whether the evening prayer is compulsory, and to Rabbi Gamaliel's humiliation of Rabbi Joshua (*TB Bekhorot* 27b-28a). For a description of the complex relationship between the *nasi* and the sages, see Levine, *supra* note 45, pp. 678-680; Alon, *supra* note 47, ch. 7. Mantel accepts the possibility that the *nasi* and his court may have been at odds with the Sanhedrin, but rejects Alon's interpretation of an ongoing conflict between the two institutions (*supra* note 50, pp. 244-253). The tension between the sages and the institution of the *nasi*, as well as the shared interests and the cooperation between them vis-à-vis the pressure exerted by the Roman rulers, come to the fore in Rabbi Johanan's attempts to promote sages as administrative employees and expand their authority. See Reuven Kimmelman, "Rabbi Johanan and the Professionalization of the Rabbinate," *Shenaton Ha-Mishpat Ha-Ivri* (Annual of the Institute for Research in Jewish Law) 9-10 (1982-1983), p. 329.

57. Due to the generalized character of my argument here, I do not distinguish between the institution of the Palestinian *nesi'im* and the institution of the Babylonian exilarch. A more rigorous discussion must draw this distinction, outlining judicial privileges separately for each of them. Rabbinic sources cite evidence of the competition at times prevalent between these two institutions, which tried to override each other (see, for instance, *TB Sanhedrin* 5a). Differences in the political and legal contexts of these institutions will probably also come to the fore in differences in their respective powers. Thus, for instance, the Jewish leadership in Babylon enjoyed wider autonomy than its counterpart in Eretz Yisrael, due to geographical, political, and administrative reasons. See Beer, *supra* note 46, pp. 127-128. The superior power of the Babylonian leadership is also reflected in the (obviously Babylonian) tradition claiming that the exilarch was descended from the House of David through the male line, whereas the *nasi* claimed this ancestry through the female line (*TB Sanhedrin* 5a, *Tosefot s.v.* "*hakha*"). These differences probably came to the fore in the functional reality of each one of them.

For my purposes, it is important to specify the differences in principle between the *nasi* and the exilarch. Whereas the exilarch was mainly a

social leader, the *nasi*, besides his general leadership role, was also head of the Sanhedrin and responsible for various religious issues, such as prayers, proclaiming fasts, and so forth (see Mantel, *supra* note 50, pp. 176-179, 187). Specific questions thus emerge concerning the judicial powers of the *nasi*: does he wield these powers because he is a public leader or because he is the head of the Sanhedrin, namely, part of the religious establishment? See Alon, *supra* note 47, pp. 315-317. The present discussion, then, examining the judicial authority of the public leadership as such, must rely mainly on an analysis of the institution of the exilarchy, which isolates this question.

58. Hyman holds that of all the exilarchs mentioned in the Talmud, only four were the foremost Torah scholars of their generation. See Aaron Hyman, *Toldot Tannaim Va'Amoraim* (Jerusalem: Boys Town, 1964), under "*Rav Hunna, brei de-Rav Nathan*," p. 355. In contrast, the *nasi* was usually one of the more prominent sages of his time. Only from the fourth century onward, is the appointed *nasi* someone whose accomplishments as a Torah scholar are not beyond dispute (*ibid.*, 320).

59. Or perhaps the opposite is the case: ancestry does not confer religious authority, but the fact of one's religious authority implies special ancestry. In other words, the powers actually wielded by the exilarch and the *nasi* resemble royal functions, and contributed to the belief in this ancestry. In any event, *Seder Olam Zuta* ascribes the dynasty of the exilarchs to King Yehoyakhin and his descendants Shaltiel and Zerubavel. See A. Neubauer, *Medieval Jewish Chronicles and Chronological Notes* [Hebrew] (Oxford: Clarendon Press, 1895), pp. 73-75. This tradition is intimated in *Leviticus Rabba* 10:5, and in *TB Sanhedrin* 37b. Sherira Gaon states: "and they had exilarchs from the House of David," *Iggeret Rav Sherira Gaon*, edited by Binyamin M. Levin (Haifa: Ha-Hevra le-Sifrut Yehudit, 1921), p. 73. Other sources, which also make the authority of the exilarch and the *nasi* contingent on ancestry, link the public leadership at the time of the Mishnah and the Talmud to Jacob, expounding on the verse addressed to Jacob "for thou hast contended with God and with men and hast prevailed" (*Genesis* 32:29). See also *supra* note 45.

60. Thus, for instance, Rav Sherira Gaon states: "... exilarchs had ruling powers at the time of the Persian domination. With the onset of Arab domination, they also bought these powers from the Arab sovereign," *Iggeret Rav Sherira Gaon*, *ibid.*, p. 92. On the political status of the

nesi'im and their relationships with the Roman emperors and the provincial governors see Mantel, *supra* note 50, pp. 235-244.

61. The *nasi* was "close to the ruling powers," and was therefore allowed privileges denied to others, such as the study of Greek, or a haircut in the style then prevalent, and so forth. See, for instance, *Tosefta Sotah* 15:8, and Saul Lieberman, *Hellenism in Jewish Palestine* (New York: Jewish Theological Seminary of America, 1962), pp. 101-102. Concerning the exilarchs, it was also stated that they have influence with the government (*TB Gittin* 14b). For a compilation of references describing close contacts between several exilarchs and the Persian king see Beer, *supra* note 46, ch. 4.

62. See, at length, Mantel, *supra* note 50, pp. 195-206.

63. Maimonides states: "The exilarchs of Babylon stand in the place of the king. They exercise authority over Israel everywhere ... any competent judge, who has been authorized by the exilarch to exercise judicial functions, may act as judge everywhere, in or outside Palestine...." *The Code of Maimonides: The Book of Judges*, translated from the Hebrew by Abraham M. Hershman (New Haven: Yale University Press, 1949), Laws of Sanhedrin 4:13-14. But see also, obviously, my question (*supra* note 59).

64. For a list of references see Mantel, *supra* note 50, p. 218, note 305.

65. See *supra* note 48, and Beer, *supra* note 46, pp.77-78.

66. No letters of appointment of an exilarch in the geonic period have been preserved. Scholars assume, however, that letters of appointment issued by the Moslem rulers to leaders of the different communities were similar and did not change often in the course of the centuries. Hence, some of them have extrapolated from the letter of appointment issued to the head of the Christian Nestorian community to those issued to exilarchs. This letter mentions control over the community's religious life, administration of religious monies, control of the community's judiciary, and punitive measures against rebels. See Avraham Grossman, *The Babylonian Exilarchate in the Geonic Period* [Hebrew] (Jerusalem: The Zalman Shazar Center and the Historical Society of Israel, 1984), ch. 2.

67. For a description of these powers and the variety of sources corroborating it, see *ibid.* There were attempts to qualify the judicial power of the exilarch and make it contingent on his Torah scholarship. Thus, for

instance, Maimonides's son, Rabbi Abraham, rules in a *responsum*:

> [S]ince his appointment is not contingent on his wisdom, he is not appointed to be a judge in Israel, and let him not sit in judgment. Let only the sages versed in the wisdom of the Torah, who meet all the requirements, as per Scripture—"Take wise men ... and I will make them rulers over you" [*Deuteronomy* 1:13]—sit in judgment ... and if he is not versed in the wisdom of the Torah, or if he is wise but lacks one of the conditions required from judges, he should not sit in judgment, nor should he coerce Israel to accept his rulings.

Abraham Maimuni, *Responsa*, edited by A. H. Freiman (Jerusalem: Mekize Nirdamim, 1937), pp. 20-21. According to this approach, the judicial authority of the exilarch does not follow from his status but from his personal fitness for the role. It is hard to find support for this view in other available sources. As noted, many of the exilarchs were not accomplished Torah scholars (see *supra* note 58), yet the sources do not indicate that this detracts in any way from their judicial authority. Robert Brody, in his book on the geonic period, describes the responsibility and judicial authority of the exilarchs as follows:

> Furthermore, the Exilarch, like the Geonim, also headed his own court; in fact, there may well have been two separate courts associated with his academy. The ultimate sanctions available to the Exilarch and his judges seem to have been those which commonly figure in Geonic responsa as well, namely, lashes and the ban; Rabbi Nathan also speaks of monetary fines imposed on tax evaders.

Robert Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture* (New Haven: Yale University Press, 1998), p. 73.

68. See Grossman, *supra* note 66, p. 78.

69. Note that in the literature of this entire period, no evidence appears of any attempt of the rabbinic establishment to revoke the authority of the exilarch on an institutional basis (as opposed to attempts to challenge the status of a specific exilarch on a personal basis). Apparently, the first such attempt occurs toward the end of this period, in the late 12th century, by the *gaon* Rabbi Samuel ben Eli. In his view, halakhic authority is exclusively invested in the *yeshiva*, in its capacity as "the place designed to study Torah and transmit Halakha generation after generation, going back to Moses." A king was required in Saul's time only to wage war. Now, in days of exile, "they have no king and no war and nothing

requiring a king, and all they need is someone to guide them and teach them the commandments of their religion, judge in their disputes and make halakhic rulings," which is obviously the *gaon* and his *yeshiva*. Rabbi Samuel ben Eli then targets his attack directly against the exilarchy of his time: "And how can we accept the judgments of someone claiming he is from his family [King David's, namely, the exilarch—Y.S.] when the entire world knows that he has not read and has not studied and has not served, but has merely increased his wealth and enhanced his power, and his contemporary does not approve of him...." Cited in Simha Assaf, "Letters of Rabbi Samuel ben Eli and his Contemporaries" [Hebrew], *Tarbiz* 1: 2 (1930), pp. 43, 64-68. Grossman holds that this struggle should be viewed as a continuation of the historical struggle between the prophets and the kings (*supra* note 66, p. 109). For a description of the relationship between the exilarchs and the *geonim* see Brody, *supra* note 67, pp. 75-79:

> [T]he balance of power shifted in the course of the Geonic period in favor of the scholars, now represented by their own well-defined institution, the Geonate; but there were ups and downs in the relationship, depending both on external factors and on the personalities involved (p. 75).

According to Brody, when conflicts did emerge between these two offices, they can usually be ascribed to a blurring of borders in their respective spheres of influence, either geographically or in the scope of their judicial authority (p. 76).

70. The decentralization process was gradual. It began as early as the geonic period, and from the eleventh century onwards, the influence and the central judicial authority of Babylonian *geonim* over the Diaspora shifts to local forces, first in the outer periphery and then in the rest of the Diaspora. A fine illustration of the decentralization process affecting the religious authority is the legend cited in the kabbalistic work of Rabbi Abraham ben David of Posquieres. According to this legend, at the end of the tenth century, the captain of the Cordovan fleet captured a boat in which four of the passengers were sages from a Babylonian *yeshiva*. He sold them to various countries, where they all became prominent judges and developed new Torah centers.

71. "Judicial autonomy is what truly made the Jewish nation in exile 'a state within a state'." Yehezkel Kaufmann, *Golah Ve-Neikhar* (A Historical-Sociological Study on the Fate of the Jewish People from Antiquity until Today), vol. 1 (Tel-Aviv: Dvir, 1929), p. 518.

72. Exceptionally, an outstanding Torah scholar might become influential beyond the natural borders of his center of activity, as is true of Rabbi Gershom or of Rashi. Generally, however, judicial institutions functioned independently, without any center exerting any special influence over another.

73. Governments in host societies were generally not opposed to the existence of the community as an autonomous framework with broad authority.

> The organization of the Jewish community and its modes of action were appropriate to the structure of the society and the political regime of contemporaneous Christians and Moslems, since the Jewish community was one of the many corporations that made up medieval society, and fulfilled economic functions similar to those of other corporations.

Shmuel Ettinger, "The History of the Tension between Priesthood and Kingdom in Jewish History: An Outline" [Hebrew], in *Priesthood and Monarchy: Studies in the Historical Relationships of Religion and State*, edited by Isaiah Gafni and Gabriel Motzkin (Jerusalem: The Zalman Shazar Center for Jewish History, 1987), pp. 9, 14-15. For a different view, see Kenneth Stow, "The Medieval Jewish Community Was Not a Corporation" [Hebrew], in *ibid.*, p. 141. Thus, for instance, in Egypt, where the Jews were under the patronage of Moslem rulers, they were granted the right of self-government and the Islamic kingdom did not interfere in any way with their private and community life. The head of the Jews was a *nagid* (*ra'is al-yahud*), who was recognized by the authorities and was officially appointed. His authority extended not only to the community monies and to payments to the ruling authorities, but also included—and this is my main concern—control over law and order and over the community's own judiciary. It is uncertain whether the appointment was made by the Jews with the government's approval, or whether an appointment by the government was forced upon the Jews. In any event, the appointee was usually a doctor or a financier who had gained the caliph's trust. The *nagid*, and not the *gaon* in Eretz Yisrael, was the one in direct contact with the Moslem authorities. The beginning of this institution is in dispute. Some scholars claim it begins with the Fatimid dynasty (tenth century), in order to release the Jews from their dependence upon the exilarch residing in the Abbasid sphere of influence. Others argue it only began at the end of the eleventh century, after the authority of the Palestinian *gaon* had finally eroded.

For a review and additional references see Elinoar Bareket, "*Rais Al-Yahud* in Egypt under the Fatimids: A Reconsideration," *Zmanim: A Historical Quarterly Review* 16 (1998) [Hebrew], p. 34.

74. See H. H. Ben-Sasson, *On Jewish History in the Middle Ages* [Hebrew] (Tel-Aviv, Am Oved, 1969), pp. 86-87.

75. See, for instance, Israel Jacob Yuval, *Scholars in Their Time: The Religious Leadership of German Jewry in the Late Middle Ages* [Hebrew] (Jerusalem: Magnes Press, 1988), ch. 1, dealing with the underpinnings of the community rabbinate.

76. Jacob Katz, *Tradition and Crisis: Jewish Society at the End of the Middle Ages* (New York: New York University Press, 1993), p. 65.

77. See Mordechai Breuer, "The Ashkenazi Semikha" [Hebrew], *Zion*, 33 (1968), p. 15.

78. See Yuval, *supra* note 75, ch. 6.

79. See Mordechai Breuer, *The Rabbinate in Ashkenaz during the Middle Ages* [Hebrew] (Jerusalem: The Zalman Shazar Center for Jewish History, 1976), pp. 18-19.

80. Ostensibly, the solution to this problem could have drawn inspiration from the institution of the elders. Yet, I hold that they chose not to do so because the elders had operated as a secondary leadership institution that functioned alongside a dominant individual figure. The institutions of communal leadership created a unique model of a collective leadership heretofore unprecedented that cannot rely on an external individual leadership.

81. "...the majority imposing its will on the minority, although it lacks special spiritual merit, raises a serious question. Why should the minority obey?" Ben-Sasson, *supra* note 74, p. 111.

82. For a description of the problem and its solutions see Menachem Elon, "On Power and Authority: Halakhic Stance of the Traditional Community and Its Contemporary Implications," in *Kinship and Consent: The Jewish Political Tradition and its Contemporary Uses*, edited by Daniel J. Elazar (Washington D.C.: University Press of America, 1983), pp. 183-184, 188-191.

83. In the formulation of Rabbi Simon ben Zemah Duran: "...the power of the community over the individuals is as the power of the *nasi* over the whole of Israel" (*Tashbez*, Part 1, 133) [Hebrew].

84. Rabbi Solomon ben Abraham Adret states: "... as all communities are bound by the authority of the Great Court or the *nasi*, so each individual is bound by the community in his city" (*Responsa Rashba*, Part 3, #417; Part 7, #490).

85. Elon, *supra* note 82, pp. 190-191.

86. See Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (New York: Philip Feldheim, 1920), pp. 9-10, 33-44; Gerald Blidstein, "Individual and Community in the Middle Ages," in *Kinship and Consent*, *supra* note 82, pp. 215-216, 222-223.

87. In some places, the communal regulations had to be approved by the community rabbi. See Yitzhak Baer, "The Origins of the Organization of the Jewish Community of the Middle Ages" [Hebrew], *Zion* 15 (1950), p. 39. For a list of sources and a discussion of this issue, see Eliav Shochetman, "The Halakha's Recognition of the Laws of the State of Israel," *Shenaton Ha-Mishpat Ha-Ivri* (Annual of the Institute for Research in Jewish Law) 16-17 (1991), 1, pp. 60-79.

88. As Katz indicates (*supra* note 76, p. 67), even when halakhists "decided not to decide" on public issues, this does not imply that community life no longer abided by halakhic norms; in its broadest sense, the term "Halakha" also came to include the local customs accepted by the communities.

89. *Ibid.*, pp. 80-82.

90. Moshe Frank, *Communities in Ashkenaz and Their Courts* [Hebrew] (Tel-Aviv: Dvir, 1937), pp. 9-10.

91. See Ben-Sasson, *supra* note 74, p. 121; Frank, *supra* note 90, pp. 13, 17-18.

92. Mordechai Breuer, "The Position of the Rabbinate in the Leadership of the German Communities in the 15th Century" [Hebrew], *Zion* 41 (1976), pp. 47, 61.

93. Katz, *supra* note 76, pp. 74-75.

94. As Tashma indicates, we know hundreds of Torah scholars who were active in Ashkenaz and in France between the tenth and twelfth centuries. In contrast, in the same period in Spain, we know of no more than fifty halakhists. See Israel M. Tashma, *Ritual, Custom and Reality in Franco-Germany, 1000-1350* [Hebrew] (Jerusalem: Magnes Press, 1996), p. 36; published also as "Jewish Judiciary and Law in the Eleventh and Twelfth Centuries in Spain," *Shenaton Ha-Mishpat Ha-Ivri* (Annual of the Institute for Research in Jewish Law) 1 (1974), pp. 353-372.

95. *Ibid.*, p. 38.

96. *Ibid.*

97. Yitzhak Baer, *A History of the Jews in Christian Spain*, vol.1, translated from the Hebrew by Louis Schoffman (Philadelphia: Jewish Publication Society, 1966), p. 213.

98. *Ibid.*, pp. 231-232.

99. Simha Assaf, *Courts and their Proceedings after the Closure of the Talmud* [Hebrew] (Jerusalem: n.p., 1924), p. 86. Furthermore, Assaf states that in small communities without a permanent court or rabbi, lay leaders would also decide on civil matters.

100. For a description of supra-communal organizations see Katz, *supra* note 76, ch. 13.

101. *Ibid.*, p. 106, note 10, cites an agreement between the leaders of the Poznan community and the court's presiding judge [*av bet din*]:

> that he did not have the right to speak [against] or protest *takkanot* established by a majority of the *parnassim*, *tovim* and the community... [This applied] both to prior rulings and to those passed after [his appointment]. On the contrary, the *av bet din* was obliged to implement and support them. Similarly, in all areas of communal concern, the *av bet din* was not entitled to protest anything agreed upon by the majority of the *parnassim*, *tovim* and the community.

102. *Ibid.*, pp. 106-107.

103. Ben-Sasson, *supra* note 74, pp. 126-127, cites this passage from the book by Nathan Nata Hannover, *Yeven Metsula* (appeared in English as *Abyss of Despair*, translated by Abraham J. Mesch [New Brunswick: Transaction Books, 1983], pp. 119-120) and cautions the reader about the likely possibility that this description is an idealization.

104. The Council in Lithuania stipulates in the *Pinkas ha-Medinah* of 1639, section 364, an explicit division of powers between the rabbinic courts and the courts of the public leadership: "The communal leaders will consider issues of brawls and fights ... and fines and punishments, and the rabbis will deal with civil issues. The leaders should not interfere in civil issues, and the rabbis should not interfere in issues that do not concern them, as noted."

105. The authority of the Councils varied in different countries: the Council in Moravia, as a first instance, also discussed conflicts between individuals

as long as the lawsuit involved substantial sums. In contrast, an analysis of decisions by the Councils in Poland and Lithuania shows that they refrained from serving as a regular instance in disputes between individuals. The decisions deal almost exclusively with cases to which the public was party, namely, conflicts between two communities or conflicts between an individual and the community.

106. Ettinger, *supra* note 73, p. 17.

107. Assaf (*supra* note 99, pp. 5-6), describes the situation as follows:

> From the eighteenth century onward, the political and legal situation of our people changes for the better.... Yet no such fate awaited the rabbinic court. Quite the contrary: the elimination of the ghetto and the eradication of longstanding injunctions resulted in the decline of the rabbinic court and its utter obliteration. In exchange for the civic rights granted to us, our national rights were denied, including the right validating our court, whose proceedings abide by Jewish law. Almost all governments denied our court its powers, and progressively restricted its jurisdiction.... All the limitations imposed on Jews to prevent their access to Gentile courts were dismissed. Barriers erected over centuries fell away. In Western countries, our court is almost extinct. In Eastern Europe, it still continues its pitiable existence but even there, unfortunately, there is no hope for its future rise from this humiliating status and for a return to its previous glory.

108. Most of the halakhic discussion concerning this institution takes place at a later period, when the institution was no longer extant due to the loss of sovereignty. In other words, this is a halakhic academic discussion. See Zeev Safrai and Avi Sagi, "Introduction: Authority and Autonomy in Jewish Tradition," in *Between Authority and Autonomy*, *supra* note 13, pp. 9, 20.

109. Do the communal enactments convey the authority of the communal or of the rabbinic leadership? Elon argues that even if halakhists differ on this question, communal enactments should be viewed, in a historical perspective, as a reincarnation of Jewish sovereignty. See Elon, *supra* note 21, p. 714, note 145, and references therein.

110. The principle that "the law of the kingdom is binding" influenced Halakha by introducing alien norms, both through their recognition as alien but binding norms, and through their incorporation. See *ibid.*, pp. 62-74.

111. Thus, for instance, Shochetman discusses the possibility of halakhic recognition of Israeli laws relying on a separate analysis of three of these institutions. See Shochetman, *supra* note 87.

112. The formal definition accepts the rabbinic stand as the exclusive criterion for the "halakhic character" of any legal norm and, accordingly, classifies laws of the regime as Halakha or as an extra-halakhic norm. Thus, for instance, when considering the validity of communal enactments, Elon discusses whether the sages ascribed to the laws derived from these enactments the validity of Torah laws. See Elon, *supra* note 21, pp. 713-714.

113. According to the substantive definition, the further the content of the public norm departed from the accepted precedent of Torah law—at times even contradicting it—the greater the independence of the normative procedure instituted by the public leadership, thus allowing its classification as an extra-halakhic procedure (which Halakha may or may not acknowledge). For an example of a substantive analysis see Menachem Lorberbaum, "Maimonides's Conception of *Tikkun Olam* and the Theology of Halakha" [Hebrew], *Tarbiz* 64 (1995), pp. 65, 67.

114. See the discussion *supra*, ch. 3.1. A question deserving further consideration is: What is the meaning accorded in Torah law to the reality involving an intergenerational exchange of ideas between the rabbis and the public leadership about normative issues, which invariably culminates in the practical and declarative validation of the rulings and legislation of the public leadership?

115. Indeed, it is impossible to know which of the norms in the *Shulkhan Arukh* originate in rulings that are solely rabbinic and which in public norms endorsed by the rabbis (at times resorting to a rhetoric of relying on previous rabbinic sources, adapting it to the required results through hermeneutical devices).

116. Furthermore, according to the halakhic rule that "the law of the kingdom is binding," Halakha is willing to develop by recourse to non-Jewish normative products, as long as these authentically represent the leadership relevant to the consumers of the halakhic norm.

117. Some contemporary halakhists have suggested that Israeli government institutions and Israeli state laws be considered, for halakhic purposes, as a replacement and expansion of the institution of the kingdom. See, for instance, Shaul Israeli, *Amud Ha-Yemini* (Jerusalem: Eretz Hemdah,

1966), p. 59. Another proposal is to view them as successors of the institution of "notables" [*tovei ha-ir*]. See, for instance, Eliezer Waldinberg, *Hilkhot Medinah* (Jerusalem: Itiah, 1952), part 3, pp. 89-96, in a *responsum* regarding a plebiscite on special issues. For another perspective on whether Israeli state law is included in the injunction "the law of the kingdom is binding" see, for instance, Ovadyah Hadaya, "Does the Injunction 'The Law of the Kingdom is Binding' Apply in the State of Israel?" [Hebrew], in *At the Crossroads: Torah and the State*, *supra* note 26, pp. 25, 32. In my view, the latent implications of these various approaches have not percolated down to halakhic rulings.

118. As secular courts were instituted in Palestine, at a time when religious thinkers were hoping for a renaissance of religious Jewish law as part of the Zionist endeavor, views were voiced denying this comparison. The focus of resistance to the comparison was the purported difference in the religious commitment of the historic public leadership as opposed to the secular legal system in Palestine:

> In the Middle Ages, our secular courts were not guided by a trend opposing the ancient legal tradition. In fact, they always tried to draw close to it, and would often ask advice from the rabbi or from expert judges. True, their rulings did not always conform to Torah rulings, but this was not a systematic trend. They did not seek to create a new law and abolish the established courts of expert judges. Their activity was mainly limited to places where no orderly courts or Torah scholars were available. Supporters of the peace courts [non-religious courts in Palestine—Y.S.] have developed, parallel to the creation of this system, a theory regarding the renewal of Jewish law, which in their view is inappropriate to modern life and views. This "renewal" will be deliberately and premeditatedly conducted by individuals who will review the *Hoshen Mishpat*, choose what is appropriate in their eyes and say: this law is appropriate and this law is not. This group also includes people who will go even further and believe that we must forsake ancient Jewish law and start everything anew; ... according to its founders and supporters, then, the peace court is not meant to fill a lacuna in the rabbinic court and complement it, but rather replace it and inherit its place. It is not meant to help our accepted court but to provide an alternative. In previous

centuries, no Jew ever considered this. (Assaf, *supra* note 99, pp. 7-8)

Many will probably agree that the attitude of secular courts toward Jewish law in Assaf's time was no different from the attitude of Israeli courts today. Yet, I hold that Assaf's claim concerning "our secular courts," whereby these courts acted mainly in the absence of rabbinic courts and only as an auxiliary mechanism, is inaccurate. His approach toward medieval secular courts as an exception is incorrect, insofar as it is oblivious to the fact that this is a historical phenomenon that transcends time. Contrary to his claim, the legal activity of the civil leadership is not an auxiliary but rather a central endeavor, of incontrovertible legitimacy, fulfilling an important mission as a balancing factor in the development of Halakha.

Obviously, the lack of religious commitment at practical and ideological levels in the Knesset and the courts is a serious issue. Should we rule out, then, the possibility that the functioning of these institutions continues the chain of civil leadership within the tradition of halakhic law? The answer to this question can be derived from the intellectual arguments advanced throughout history for the legal authority of the civil leadership. What is required, then, is an analysis of whether the strength of these arguments is drawn from or, at the very least, is conditioned by the religious commitment of the civil leadership.

119. See Stern, *supra* note 2, pp. 10-13.

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