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State, Law, and *Halakhah* – Part Three

RELIGION AND STATE:
The Role of Halakhah

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1 Jewish Law and the Problem of Religion and State

Israeli society is struggling with complex and diverse questions regarding the relationship of religion and state: defining who is a Jew,[1] delineating the borders of the family unit,[2] shaping the character of the public realm,[3] engendering religious pluralism,[4] institutionalizing religion, and providing religious services.[5] The cumulative weight of the controversial issues that have appeared regularly on Israel's public agenda over the last fifty years have shaken the country's stability.

The serious, chronic nature of the tension between religion and state in Israel are manifestations of the basic difficulties arising from the encounter between traditional Judaism and a Western liberal state, and between Jewish Law (Halakhah) and state law. Among these difficulties are some fundamental issues: the question of the ideological and functional significance that Judaism and the state have for each other,[6] the binary sources of authority and the challenge of normative duality,[7] the demarcation of the limits of freedom of religion and freedom from religion, [8] and the place of a religious community in a civil society functioning within a liberal political framework.[9]

The discussion regarding issues of religion and state is conducted simultaneously on two levels: extra-religious and intra-religious. Participants in the extra-religious discourse are generally aware of the multifaceted nature of the subject. The complexity and the disciplinary diversity of this discourse finds expression in the fact that it includes jurists, philosophers, political scientists, politicians, sociologists, anthropologists, cultural studies scholars, and others. By contrast, the scope of the intra-religious discourse on religion and state is relatively narrow. The most commonly

heard religious voices are political and philosophical, and although other voices are occasionally heard as well, a systematic halakhic concern with questions of religion and state is glaringly absent.

The relationship between religion and state in Israel is fluid and varies over time alongside a host of demographic,[10] economic,[11] ideological,[12] geographic,[13] political,[14] and sociological [15] changes. Those who seek to respond to these changes, however, instinctively seek solutions and norms (legal, social, political, cultural or others) that will deal – either through accommodation or confrontation or alternatives in between – with the "halakhic response" to issues bearing on the relationship between religion and state. The basic initial assumption of the participants in the professional and public discussion is that almost all facets of the elusive mosaic that enter into the relationship of religion and state in Israel – facts, norms, and ideas – can be subject to substantive negotiation between the various segments of Israeli society, except for one: the Halakhah.

This attitude to Halakhah, in my view, encompasses a dual assumption about the very nature of Halakhah. The first is that Halakhah is a monistic normative system, which speaks with only one voice, harmonious and clear-cut. Every question has one and only one "correct" answer, and the halakhist's role is to uncover it. According to this line of thought, a halakhic dispute is an expression of a confrontation between a true and a false view.[16] The second is that Halakhah is a system whose commandments are fixed, such that it is not meant to react to transitory conditions and to changing human realities. This assumption ostensibly corresponds to the religious intuition expressed in the phrase "this Torah may not be altered".[17] From this perspective, the religious legal system,

to its last detail, is eternal and independent of temporal circumstances.[18]

For many, both religious and secular, Halakhah offers one clear-cut solution to each and every real-life problem, it is supra-historical, and it is oblivious to the dynamic qualities of all societal realities. So too, in the context of issues affecting the relationship between religion and state, the widespread outlook is that the accepted halakhic stance is both exclusive and independent of time, place, culture, or temporal social preferences.

There is, therefore, neither extra- nor intra-halakhic public demand to seek halakhic solutions to questions of religion and state. As such, when rabbinic voices are heard in public and professional discussions, it is largely in their capacity as social leaders or heads of political movements, but not as halakhists. All seem to agree that Halakhah is a basic given around which the web of conflicts of religion and state should be woven, but the Halakhah itself is untouchable. The result is ironic: although Halakhah sits squarely at the point of friction between religion and state, it is considered irrelevant to the discussion aimed at easing this friction.

In my view, this halakhic silence is not only unnecessary but, from a religious perspective, improper. The dual characterization of Halakhah noted above is unacceptable. First, a monistic perception of Halakhah is only one of the options recognized in the halakhic realm. An alternative long-standing tradition, both respected and entrenched, perceives Halakhah as a pluralistic system where many and varied voices resonate. According to this outlook, Halakhah does not offer one necessary answer to every question but rather a spectrum of halakhic reactions –

limited, obviously, by the bounds of halakhic legitimacy – which include a variety of legitimate solutions.[19] Second, and more importantly, the understanding of Halakhah as eternal and as operating outside history and unaffected by the dynamics of reality distorts its fundamental nature. Halakhah has always been a living, vital force, a characteristic that has enabled it to respond to changing realities, to influence and be influenced as a "Torah of life".[20]

The following discussion will analyze the silence of Halakhah and challenge the notion that halakhic discussion is irrelevant to the solution of questions concerning religion and state.

I will offer a basic analysis of the tension between halakhic conservatism (Chapter 2) and the new reality that Halakhah is supposed to regulate in our times (Chapter 3). In doing so, I shall delineate three central phenomena that the current intra-halakhic discourse, and certainly the general discussion of religion and state, should address. In my opinion, halakhic neglect of these three phenomena poses a real threat to the stability and cohesion of Israeli society on the one hand, and to the function of Halakhah as a "Torah of life" on the other. I do not share the view that Halakhah cannot, by its very nature, adapt to momentous changes in its surroundings. Despite the inherent conservatism of Halakhah, halakhic sages of earlier generations knew how to contend with similar situations when contemporary realities changed beyond recognition due to events outside their control (Chapter 4). A similar response, though not necessarily through the same means, is also required today. The gist of this paper is a systematic analysis of several possibilities for halakhic renewal in our time. Some of the proposed strategies are meta-halakhic (Chapter 5, Sections A and B), and some focus on the functioning of Halakhah itself at a normative level (Chapter

5, Sections C and D). Each of these strategies, admittedly, raises difficulties that will not be trivial for those who uphold Halakhah, but this does not exempt them from choosing one or some combination of these approaches. Halakhic resistance may prevent Halakhah's return to its rightful position in the regulation of Jewish life in Israel, hindering our society from contending with the structural tension between religion and state.

On Legal Conservatism

2

Legal systems, as such, tend to conservatism. Generally, law is not the force that changes reality but the means by which existing change can find expression. This is done through the formulation of a new social consensus in the shape of norms. Law is not revolutionary by nature. It does not produce a new sets of priorities; it refrains from leading social revolutions and is reticent to serve as the catalyst of cultural change. The law is driven by change and does not impel such change; it lags behind reality rather than creating it. The law reflects changes in the facts, preferences, tastes, and decisions of its reference group, but it is not the crucible of these changes.

Legal conservatism is easily discernible in two components of a legal system: the legislature, which is the source of legal norms, and the court, which is the setting for the interpretation and implementation of these norms.

Members of a legislature conduct political negotiations, whose results are formulated as law. Lawmakers try to use their political power so that the interests and the values of their constituency will be reflected in the emerging norm. As a result, the legislative outcome is usually an authentic expression of society's combined priorities and of the will of the electorate. The preservation of harmony between the public will and parliamentary legislation is guaranteed by the fact that members of parliament who fail to operate in this way will not survive the next election. Quite simply: if the agency creating the norms were not exposed to recurrent public election, the law might function in an independent mode that imposes the legislator's preferences on reality. However, since the legislative body is elected, it is clear that the legislation it produces will be conservative, giving expression to society's current preferences.

What about the judges? In some judicial systems, including the Israeli one, once judges are nominated they do not stand for public re-election. As such, from a perspective of political independence, they can use the authority invested in them in non-conservative ways, an approach that may be synonymous with creative legislation. Courts that regularly embrace such an approach in varying and widely controversial contexts will be correctly classified as social catalysts and as promoting changes in values, with all that this implies. Although some would describe the current Israeli Supreme Court in these terms, it must be stressed that this description does not as such point to the basic character and the general ethos of judicial activity. Judicial activity has inherent limitations: it is a secondary activity, ancillary to the primary legal one that takes place in parliament. [21] Judges have no direct authority to determine norms *ex nihilo*, but must rather follow the normative path paved by the legislature.[22] As we know, however, some judges tend to judicial passivity while others lean toward activism. The difference between these two conceptions of the judicial role, although relevant to the present discussion, does not change the general picture. An activist judicial tradition does not assume a mandate to instigate social and ideological revolutions. Judicial activism, even when allowing a judge to go beyond settling specific disputes in order to set general norms for society,[23] is, after all, a professional activity, wherein a judge considers a range of legitimate interpretations of a given law and chooses one that, more than others, will change current societal norms.[24] But activist judges, if they wish to preserve their legitimacy and society's trust, understand that their creative interpretation of the law must remain within a relatively limited spectrum of possibilities dictated by the source of the law as created in the legislature.[25]

This description of legal conservatism, which applies to all judicial systems, is all the more true with regard to the halakhic system, particularly in light of the significant and broad characteristics of Halakhah that I will discuss below. It is important to emphasize that these characteristics are not universally agreed upon, but are nevertheless generally accepted in contemporary discourse regarding Halakhah and hence central to our discussion. The characteristics that reinforce the judicial conservatism with which Halakhah is viewed may be enumerated as follows:

First, the source of Halakhah's authority is a singular and unique divine revelation at Sinai, a belief that distinguishes it axiomatically from the source of authority claimed by other legal systems. The divine is eternal, and its norms – unlike that which is human – cannot be affected by the vicissitudes of time. Since Halakhah was shaped by God, the singular character of revelation would necessarily mean that it applies to all human experiences – past, present, and future – until the end of days.[26]

Second, Halakhah is a religious system of law and hence, its purpose is twofold. Alongside the traditional role of ordinary legal systems – that is, creating social order – a religious legal system is also attuned to theological aims. Its declared purpose is not measured solely by temporal circumstances and needs, nor is it necessarily tailored to fit earthly dimensions. Thus, whereas an ordinary legal system deals with two normative spheres – one covering the relationship between individuals and another that between the individual and the collective – the halakhic system includes a third normative layer, namely the relationship between the individual and God.[27] The purpose and the aims of this aspect of the law, like the internal connection between this theology and halakhic observance, distinguish Halakhah from non-religious legal systems.[28]

Third, the halakhic legal system does not draw upon an authoritative normative source parallel to a legislature, which continuously creates new norms ex nihilo. After Halakhah's constitutive act, namely the revelation at Sinai, there exists no clear and sharp division separating legislative and judicial powers. Halakhah, to be sure, allows for the creation of new norms that supercede halakhic precedent or stand in contradiction to it in the form of an "enactment" [gzerah] or "regulation" [takkanah] issued by institutions or individuals with authority. Such enactments and regulations, however, do not constitute a continuous, fixed, and broad endeavor imbued with structural significance resembling that of the legislature in a modern legal system.[29] Reliance on precedent and its application to a given case through interpretation remains the mainstream pattern for halakhic development, while enactments and regulations are the exception.

So far, then, we have noted that the divine source of halakhic authority (divine rather than human), its content and aims (theological rather than merely social and ethical), and its patterns of development (generally hermeneutical rather than legislative) distinguish it from an ordinary legal system. These three distinctive aspects intensify the sense of conservatism that accompanies the halakhic endeavor. The singular divine source and the theological meanings of Halakhah appear to support the notion of the eternity of the norm and its detachment from human reasons and explanations, to assume its truth independently of facts, and to sever its link with real consequences and with transient human morality.

Let me be precise: the validity of these characteristics of Halakhah, as well as their specific details and implications, are not universally accepted, and halakhists themselves have

historically expressed diverse and opposing views with regard to them. In my view, every one of the general statements depicted above with broad brush strokes requires separate and rigorous analysis from a variety of perspectives – theological, legal, historical, and sociological. A critical analysis of this type will probably reveal an intra-halakhic picture far more complex than the one drawn above. Yet, for our purposes in the present context, it is precisely this broad and sketchy description of Halakhah's distinguishing characteristics that is current and even dominant in popular halakhic discourse and in the discourse regarding Halakhah. Whatever their substantive validity, these characteristics are the ones that determine the perception of Halakhah in our generation. This perception, in turn, underscores the relatively conservative nature of Halakhah *vis-à-vis* other legal systems which, in any event, tend naturally to conservatism. If the source of authority is a singular divine revelation, it cannot react to changes in reality; if Halakhah has a theological purpose as well, then those interested in normative changes consistent with the system find their hands tied; if Halakhah lacks a functioning legislature, its course of development precludes innovation by means of novel reformulations of its priorities in accordance with the demands of the time; if its development depends mainly on precedent, its ability to react to shifting realities depends on the availability and frequency of relevant precedents and on the judicial activism endorsed by halakhists.

The New Reality 3

Our surroundings are changing and dynamic, and our generation is experiencing a reality unimaginable to our ancestors. Alongside the consequences of scientific and technological development, we are undergoing an essential transformation concerning the individual (e.g., the central role of human rights), society (e.g., the disintegration of the family unit), the state (e.g., globalization and the waning of the nation-state in favor of multinational and international organizations), the economy (e.g., the redistribution of wealth due to the increased value of intellectual property at the expense of physical assets), and our perception of reality (e.g., the broad, if manipulative, accessibility of information). Modern legal systems are deeply invested in an ongoing struggle with the broad implications of these and many other changes. Halakhah too, despite its current conservative sensibility, is not exempt from this task, and only by embarking on it will we avoid turning it into a museum piece.[30]

The general difficulties faced by contemporary halakhic authorities in their attempt to deal with new phenomena are sharpened and rendered more onerous in the context of the tension between religion and state in Israel. The novel aspects of this reality, relative to that which prevailed in the formative period of Halakhah's development, are profound and far-reaching, almost to the point of an absolute dichotomy between them. Three of the major changes are detailed below.

A. Halakhic Law Loses Supremacy

Halakhah has functioned as a living legal system throughout all stages of Jewish history. There is, however, a clear and unidirectional process that, over the course of time, has

progressively restricted religious institutional authority over the Jews. Generally speaking, Jewish history may be divided in this regard into four periods.[31]

In the first period – which begins with the biblical era, extends through the period of the Mishnah and the Talmud, and also includes the geonic era – the Jewish people lived in one or two main centers, namely Eretz Israel and Babylon. Throughout this period, the Jewish community functioned within a centralized autonomous framework. The locus of authority in Jewish society was accepted by all Jews as well as the foreign ruler, where this was applicable. Throughout this period, the legal authority to enforce Halakhah rested simultaneously in two bodies – the religious leadership, that is the rabbinic establishment in its various forms (such as the Sanhedrin and the heads of yeshivot) and the political leadership (such as the king, the elders, the exilarch, the nasi).

The second period extends from the end of the geonic era through the period of the medieval and early modern scholars (the rishonim and aharonim) and up to the eighteenth century. In this period, centralization and hegemony in the Jewish world come to an end, replaced by the decentralization and atomization of political and administrative life in general, and of the legal-halakhic structures in particular. Jews were dispersed among various autonomous communities, each functioning as an independent "closed economy" that produced and consumed legal norms within the framework of Halakhah. Legal authority shifted from the center to the periphery, and each community perceived itself as a self-contained political entity with its own independent institutions of communal leadership (e.g., the head of the community, supra-regional structures such as the Council of the Four Lands) and of the rabbinate. Both the

communal institutions and the rabbinate developed Halakhah simultaneously, one alongside the other.

The third period, which begins in the eighteenth century, is characterized by the growing weakness of the Jewish community, whose general powers are diminished and legal autonomy restricted. This development follows from two decisive changes in the world beyond the Jewish communities. The first is the idea of the modern state, which develops at this time. The state's central authority strives to implement its sovereign powers directly over all the citizens and, therefore, seeks to weaken the autonomy of mediating elements such as the community, the church, the professional guild, and so forth. Second, a process of emancipation is set into motion in some parts of the Jewish diaspora, promising everyone, including the Jews, civic and social equality. Communal autonomy, including legal autonomy, is thus attacked from two flanks: the government curtails the community's power to coerce its accepted norms, and community members cease resorting to its institutions, including its legal institutions, because they place increasing trust in the general legal system. As a result, the legal autonomy of Jewish society is lost and Halakhah loses its exclusive, or at least central, role as the legal system regulating the life of Jews.[32]

The fourth period, in which we now live, begins with the establishment of the State of Israel. From the perspective of halakhic law, this period differs only slightly from the one preceding it, since, with the exception of specific issues of personal law, Halakhah does not function as the dominant legal system. Nevertheless, this period is crucially different from the previous one due to the existence of Jewish sovereignty. Despite the significant number of Jews who continue to live in diaspora communities without such autonomy, the creation of the Jewish

state has meant that a large segment of the Jewish people once again lives under centralized and sovereign Jewish rule.

This description points to something significantly new concerning the sources of halakhic authority in our time. During the first two periods, which were the formative periods of Halakhah with lasting impact upon Jewish history, Halakhah existed in conditions of institutional duality, nurtured by the judicial rulings of both the communal and religious establishments. The sources of authority were variegated: alongside the rabbis, who contributed their sophisticated understanding of its religious-spiritual basis, Halakhah was also created by the communal leadership, which had a sophisticated understanding of its extra-religious implications. During the third period, the intra-Jewish communal establishment dissolved and the power of the religious establishment was also considerably weakened. In the present period, for the first time in Jewish history, a weak religious establishment coexists with a strong political establishment that is not only autonomous but also sovereign.

This fact involves two relevant dimensions. First, the Jewish people are, for the first time, led by an independent government that does not contribute to the formation of Halakhah. As a result, Halakhah loses the inner checks and balances that were at its disposal in the past, when pragmatic public leaders had influenced its development in ways that strengthened its character as a "living Torah," one that regulated a dynamic human reality. Second, the Jewish people are, for the first time, led by an independent government that is neither interested – practically, ideologically, or symbolically – in the content of religious law and in the solutions it offers, [33] nor does it wish to take halakhic norms into account in its administration of public matters.[34]

Taken together, these two dimensions are a significant factor in the contemporary dilution of Halakhah. Since the state does not require halakhic solutions, these are not discussed and halakhic thinking on these matters declines. Since Halakhah is not influenced by people in positions of authority responsible for the actual functioning of the Jewish community, the balance vital to its preservation as a living Torah is unrealized.

B. The State of Israel

The establishment of the State of Israel dramatically alters the milieu within which Halakhah functions.

Any legal system, and certainly one such as Halakhah in which precedent serves as a central means of development, mirrors the reality of its users. Hence, it is especially important to acknowledge that due to the long and tragic circumstances of the Jewish diaspora, there has been no Jewish government since the destruction of the Second Temple.[35] For two thousand years, Halakhah functioned as the mechanism regulating the lives of individuals and autonomous communities without recourse to the framework of a state. This decisive historical fact shaped the contents of Halakhah in such a way that today, Halakhah is systematically lacking in legal solutions on issues arising from social existence within a sovereign political framework.[36]

The scope of the areas that Halakhah has neglected to address as a result of the lengthy exile, is broad. Obviously, a deep chasm separates political existence in the biblical period and during the kingdoms of Israel and Judah from that of the twenty-first century. Only a few general and vague norms concerning matters of government can be found in the vast sea of Halakhah, but they are insufficient to infuse any real content into "state laws"

relevant to our lives. Even the most well-known writing in this area – the section on the "Laws of Kings" in Maimonides' Mishneh Torah – cannot serve as an anchor for specific halakhic discussions today. Even at the time of their formulation, the "Laws of Kings" offered a theoretical code written for a people actually living in exile. Needless to say, they were never implemented in a historical reality, such that we are missing concrete legal precedents that can serve the process of adaptation and reduction of the ideal code to a living reality.

I will briefly outline this "black hole" in halakhic literature from which we must extract an approach (and, according to many, specific normative arrangements as well) for the modern sovereign Jewish state and its modes of functioning.[37]

What is Halakhah's view on the nature of the state? Is the state, as such, of halakhic value? Does the state have halakhic status? What are the state's sources of authority – is its authority inherent, or based on a social contract or international convention, or something else? What are the limits of state authority? Does Halakhah have a position regarding the most appropriate form of state government (for instance, a preference for monarchic, democratic, or republican rule)? Does Halakhah offer any perspective on specific aspects of state rule, such as the establishment of distinct branches of authority, or the separation and balance between them? What is the halakhic status of the various state institutions – the police, the army, the courts, the prime minister, the Knesset, and the executive branch power? What is the halakhic status of their respective institutional products – judicial rulings, laws, governmental decisions and contracts, military orders, or fines? Much, of course, could be added to this long list.[38]

On another level: Assume the director general of a government ministry is interested in using his/her executive power in order to implement "the halakhic position" on a certain matter. Has Halakhah ruled on (or even discussed) questions involved in the defense policy of a sovereign state? And what about the state's foreign policy? Has Halakhah formulated norms that can be applied to Israel's diplomatic relations with the rest of the world? What is Halakhah's social policy, not in the individual or communal context but in the distinct and separate context of the state? Are the laws pertaining to welfare and charity, developed in the context of small, discrete communities, easily translatable into a state welfare policy, social security, and transfer payments? What is the halakhic position regarding the proper economic regime? Can the study of Halakhah teach us anything about its preference for capitalism, socialism, communism, and any of their variations? How does Halakhah propose that the treasury deal with the required provision of such public products such as education, roads, internal security, or defense?

Although contemporary halakhic literature is not oblivious to some of these questions,[39] those who engage these issues do not do so on a broad analytical basis that includes an integrated halakhic world-view concerning its relation to the state. To the best of my knowledge, no one has produced a comprehensive halakhic treatise that offers a broad view of the relationship of Halakhah and the state, and implements it systematically in the various realms such as those detailed above. This lacuna is clearly unnecessary, and one can hope that the situation will change in the future. One must, of course, emphasize the practical difficulties that will confront those seeking to draw relevant precedents from the vast quantity of available halakhic material. Two questions, in this regard, should be noted. The first is question of principle: which area of Halakhah may be applied

to the State of Israel – the laws of kings, the laws of the nasi and the exilarch, or perhaps the laws instituted in the medieval communal context? Each of these halakhic realms developed in a different reality and thus differs from the others, and drawing inferences from one or the other will therefore lead to different results. The second question, on a practical level, is that most of the seemingly relevant precedents are rulings issued in the framework of the autonomous diaspora communities. Community life did evoke questions that today would usually be placed under the rubric of public law, and several thousand halakhic Responsa have accumulated in this area.[40] But to draw inferences from communal to sovereign existence is fraught with problems, since local communal leadership, living under and at the mercy of a foreign ruler, can hardly be compared to an independent sovereign government. The scope and the content of communal authority and responsibility, not to mention intra-communal relationships, are far from those of a state. Thus, for instance, the autonomous Jewish communities never included non-Jewish members, whereas close to a quarter of Israel's inhabitants are not Jewish. A problem arises, therefore, when addressing questions such as the responsibility of a Jewish government toward non-Jewish citizens, the rights that such non-Jews should be granted, and the consequences of their participation in the democratic processes of the Jewish state and its institutions.[41]

The restoration of the Jewish state, then, poses an enormous challenge to Halakhah: to develop a theoretical and practical stand on a very long list of political questions and practical issues bearing on daily life. The formulation of a halakhic viewpoint on these questions has a direct bearing on the very possibility of providing halakhic responses to questions of religion and state now on the agenda.

C. Secularism

For the last two centuries, Halakhah has faced a phenomenon unprecedented in its history: most Jews are not observant and have no personal commitment to the halakhic legal system. Most Jews, furthermore, have no familiarity with or awareness of Halakhah, and actually do not take a stand on it: they are simply indifferent.

Any legal system that becomes irrelevant to most of its potential consumers must react to this development if it wishes to survive. An ordinary legal system abandoned by the public would lead to the conclusion that the content of its norms is incompatible with the values and the needs of the public, and one would therefore expect its leaders to consider changing and adapting these norms. Empirical findings indeed show that when choice is available between alternative normative legal systems, there is competition between them in an attempt to shape the normative outcome that best fits the tastes of potential consumers.[42] Obviously, a religious legal system cannot respond in this manner. It does not view its norms as something replaceable, in the sense of being conditionally rendered. A religious legal system like Halakhah perceives itself as being coercive by nature, since it strives to attain defined ideological aims that are both social and theological. Nevertheless, one cannot conclude that the phenomenon of secularism does not require a reaction. The opposite is true. Halakhah has an obligation to contend with secularism in several conjoining realms.

First, since Halakhah strives to regulate the lives of all Jews, religious and secular, it cannot exempt itself from formulating a normative position toward the secular way of life. More precisely: the secular public's indifference to (or even explicit rejection of)

the halakhic view of its own way of life is not *per se* a justification for the halakhic disregard of this phenomenon. In principle, halakhic thought (though not necessarily its legal rulings) must concern itself with all aspects of human existence, including the inner realities of secular existence, those in which observant Jews do not participate. In practice, Halakhah is required to regulate the activity taking place in the interface between observant and secular Jews. These areas are all-encompassing and spread over a wide spectrum of human situations.

Second, since Israel is a democracy, the secular majority is the one holding key positions in the three branches of power. As a result, the state – the Jewish public realm – is shaped according to the norms endorsed by the secular majority, which is indifferent to Halakhah and its values. What is the halakhic view of this reality, unprecedented as it is in the history of Halakhah? Does it address the fact that the realization of the Jewish dream, a dream that extends back two thousand years, is unfolding along ideological lines alienated from Halakhah?

Third, the secular Jewish majority in the State of Israel takes upon itself a world of values that in public discourse is labeled "democratic values" and reflects the current views of liberal-Western civilization. These values, as for instance the value of equality, sometimes contradict the values reflected in halakhic norms. How does Halakhah deal with these contradictions? More fundamentally, is Halakhah prepared to allow – at both the private and public levels – religious toleration toward non-halakhic Jews and their values? Given the reality of a secular majority, would Halakhah be ready to soften, not to speak of changing, its traditional positions toward an intra-Jewish non-halakhic world of values? Is the responsibility that Halakhah imposes on the observant Jew in his or her relation to the other –

namely, the mutual responsibility manifest in the commandment "thou shalt certainly rebuke thy neighbor"[43] – fully valid and compelling today with regard to the secular majority? When a religious individual has access to power – such as a member of a religious party whose votes are required to form a coalition – can she, or perhaps should she, use this power to coerce religious values upon secular individuals, the secular public, and the secular public realm?

Over the last century, halakhists have dealt with some of these questions.[44] As is the halakhic wont, however, they used halakhic categories inherited from earlier times, applying these precedents to the modern phenomenon of mass secularism. But what was the provenance of these historical precedents? Jewish religion has long been familiar with secessionists, as for example the Sadducees, heretics, crypto-Jews, and various converts to Christianity. On this basis, the tradition developed halakhic categories referring to such secessionists as "wicked", "apostates", or "captive children". Each of these categories, in turn, was imbued with a specific halakhic attitude in connection to different issues, as for instance, the validity of their testimony,[45] drinking their wine,[46] their inclusion in a ritual quorum,[47] or calling them up to the Torah[48]. But even without deep analysis, the inadequacy of these categories with regard to contemporary secular individuals is evident. The latter do not support an anti-Jewish theological view, but rather, are indifferent to religion. Contrary to one who abandoned his religion at a time that this religion symbolized the fundamental social contract of the Jewish community, contemporary secularists are not social deviants. Unlike the apostate or one deemed "wicked", who sometimes posed a true danger to communal life and lived in ways that were hardly normative, the average contemporary secularist is a moral individual with good intentions, just like the average

observant Jew. Nor is the category of "captive child" an acceptable description of contemporary secularists, who are civilized individuals choosing religious indifference through the autonomous exercise of their free will.

In the past, Halakhah reacted in a normative manner toward those who rejected it, but one must carefully consider the possible application of this approach to a broad public, constituting the majority of the people, who choose to relegate Halakhah to the margins and disregard it.

D. Back to "Religion and State"

These three changes in contemporary reality decisively influence the halakhic silence on issues of religion and state. As the analysis points out, we are now living through a unique period in Jewish history. Until recently, Halakhah extended itself throughout the public sphere of Jewish life. As the public sphere shrank, so did Halakhah, but the connection between the two was not severed. A new model of Jewish existence has been founded in the State of Israel, whereby the ruling Jewish hegemony did not adopt Halakhah as its central legal system. Furthermore, the very fact of Jewish life in a sovereign political framework is a factual innovation that poses a multidimensional challenge to the halakhic legal system. Even if the state were interested in adopting Halakhah as its compelling legal system, in its present stage of development Halakhah could not provide a ready answer to most of the political and operational questions raised by the existence of the state. Furthermore, Halakhah also confronts the challenge of secularism, which represents the cultural values chosen by most Jews. Consequently, secularism also owns the public space of the Jewish state.

The silence of Halakhah on matters of religion and state, therefore, is a result of reality shock. Is there a way out? To this we turn in the next two chapters.

On the Possibility of Halakhic Adaptation

4

The discussion has so far outlined the great halakhic challenge facing our generation: to answer the needs of contemporary religious existence, caught as it is between the inherent conservatism of Halakhah presented in Chapter Two, and the vast changes in contemporary realities detailed in Chapter Three.

The dissonance between Halakhah's conservative ethos and the changes in contemporary realities is not new in the history of Halakhah. Indeed, the purpose of the Oral Law is to deal with this dissonance, as I have written elsewhere:

> The monumental achievement of the Oral law is to bridge between the eternal and the ephemeral, implementing the Written Law, which is a fixed, supra-historical Torah, in a changing, developing historical reality. This move, of enormous scope and yet subtle, is one of elaboration and creation while preserving the "unchanging Torah" so that it will function as a "Torah of life". A Torah simultaneously sensitive to the circumstances of individual and communal existence, which are exposed to factual and value transformations bound by time and place, while also influencing them and shaping in its own spirit the ways in which they contend with their experience of existence.[49]

The great vitality of Halakhah and the adaptive skills it displayed for generations are well known.[50] These features come to the fore in the elaboration of several areas of law from the biblical period – by means of the Mishnah, the Talmud, the writings of medieval and early-modern scholars, and the Responsa literature – all the

way up to the present. The work of many contemporary scholars who laid the foundation for the study of Jewish law present these unparalleled legal, cultural, and religious achievements in full.[51]

Moreover, Halakhah has not only dealt successfully with new realities that affected the essential content of various areas of Halakhah, but also with changes that affected its mode of functioning and the allocation of halakhic authority. Below is a review of two such historical changes that, in my view, were no less dramatic than the ones we experience today.

A. Without the Temple

The destruction of the Second Temple is a key traumatic event in Jewish history. Jews who lived at the time experienced a multidimensional catastrophe:[52] religious, political, economic, and social. The city of Jerusalem, the central polis of Jewish society in Eretz Israel, was physically destroyed; the entire country was conquered; the Jewish people ceased to exist as a political entity; an alien population settled in Eretz Israel in large numbers; Jews lost ownership of their land and became tenant farmers. In addition, the people's spiritual and religious center, the Temple, was destroyed. The latter event was perceived by contemporaries and by subsequent generations as even more catastrophic than all the previous ones because of the vast meaning – personal, public, and national – that had been attached to life "in the shadow of the Temple" since the beginning of national history, when the Tabernacle was erected for the desert generation that had left Egypt. Throughout this period, with the exception of the brief span between the two Temples, the people had experienced the proximity of the divine presence (the *Shekhinah*). The destruction of the Temple spelled the discontinuation of the divine presence, which thereby

undermined the roots of Jewish existence at that time. The central importance of this event is symbolized by the many prayers and practices associated with "remembering the destruction" and the fact that, until today, it provides the key for historical periodization: the First Temple era, the Second Temple era, and the era following the destruction.

As one might expect, people responded to this new reality in a variety of ways.[53] Some reacted with extended mourning and depression;[54] others escaped the new reality into hopes of an apocalyptic era awaiting in the future (the sects of the Judean desert and early Christianity); some, namely groups of zealots and members of the priestly class, fostered unrealistic hopes for the immediate restoration of the Temple; and finally, there was also "the way of Yavneh". This response, led by R. Johanan b. Zakkai, Rabban Gamaliel, and their disciples, acknowledged the Temple's destruction and the concomitant life of subjugation as a reality they would have to live with and adapt to in balanced and appropriate ways. They sought to reestablish Jewish religious life according to these new circumstances.

The religious task that faced the Sages of Yavneh was enormous. The loss of the Temple, involved spiritual-theological and halakhic-legal implications that can hardly be exaggerated.

Spiritually, the Temple had been the link between the people and their God. Through it, so they believed, the *Shekhinah* dwelt among them, and through it they obtained concrete evidence of God having chosen them from among the nations. The Temple was the paramount sign of the continuing covenant with the patriarchs and at Sinai. Its destruction, therefore, evoked fears of a breach in the covenant that so fundamentally defined Jewish existence.[55] In Yitzhak Baer's words, with the destruction of

the Temple "the instruments that had connected the terrestrial reality of the nation with the celestial world ceased to function. From now on, all the nation had left were broken remnants and memories of that vast metaphysical mechanism linking the world below and the world above".[56]

Halakhically, the destruction of the Temple meant that very large sections of the Jewish code of law would be temporarily irrelevant. At the time, a normative way of life was related to and conditioned by the existence of the sanctuary. Thus, for instance, the abolition of the Temple worship – including, *inter alia*, the abolition of mass pilgrimages three times a year, the abolition of public sacrificial offerings, and the abolition of commandments that applied to the collectivity, and other national ceremonies that had been performed at the Temple – threatened to erode the foundations of the nation's public life. Moreover, a constitutive ethos of Jewish existence is the abstention from sin. Until the destruction of the Temple, sensitivity to sin had been fostered mainly through the process of atonement performed in the Temple. Eliminating the possibility of ritual atonement left the people with an unbearable emotional void and impotent to act in the face of sin in personal and public life. Furthermore, Judaism demands adherence to what is categorically referred to as the laws of "purity", demanding the avoidance of "impurities" that are associated with human corpses, certain animals, non-Jews, uneducated Jews, idolatry, menstruating women, women in labor, semen, and various plagues.[57] The very existence of the Temple required the implementation of ritual purity laws, thereby serving as chief instrument for preserving the distinction between purity and impurity. In the absence of the Temple, how would ritual purity, that which distinguished the Jewish people from others, be preserved? Or another matter: the sanctity of the land, manifest in a long list of commandments bound up with the

land of Israel, was partly contingent on the operation of the Temple, as for example the primogeniture laws, first offerings, animal tithes (which were to be sanctified at the altar), and *kerem reva`i* [fruits of a vineyard productive for four years] and second tithes which were to be brought to Jerusalem. In the institutional context, the priesthood – an elite invested with authority for which Halakhah prescribed an entire system of specific laws – lost its source of power and the primary setting for its functions. The Sanhedrin, the supreme legislative and judicial religious institution, was banished from its location on the Temple Mount, a move that would impugn its authority. The Jewish calendar, furthermore, which was determined by certain procedures performed in the Temple, was also jeopardized. Central religious ceremonies associated with Jewish festivals, such as the order of worship on the Day of Atonement or the sacrificial offerings on Passover, were abolished. In brief, the destruction of the Temple threatened to turn large sections of the Torah and of the halakhic way of life into a dead letter.

How did the sages of Yavneh respond to this challenge? They succeeded in remodeling Jewish life in a way that uprooted Halakhah from its dependence upon external conditions, namely those of place, time, personality, or cult.[58] They displaced the spiritual center from the destroyed city of Jerusalem to that of Yavneh. They fostered the institution of the synagogue, which they viewed as a scaled-down or "small temple" replacing the original, as a religious center serving each and every Jewish settlement. They perfected and institutionalized the idea of prayer, "the worship of the heart" that replaced worship by means of sacrifices, rendering it incumbent on both individuals and the collective. They developed and innovated alternatives to the atonement practices in the Temple by internalizing and deepening the idea of repentance, by giving new meaning to

the Day of Atonement, and so forth.[59] With regard to purity and impurity, commandments regarding the preservation of ritual purity were displaced to the personal life of every Jew. Thus, for instance, the sages of Yavneh developed laws concerning the washing of hands before meals, prayer, and Torah study. They also expanded and deepened the laws concerning family purity, clearly aiming to imbue the Jewish home with this holiness. They set strict rules concerning the use of wine prepared or served by Gentiles [yein nesekh] as a defensive reaction against the increasing encroachment of the Gentile world. Thus, every Jewish man and woman became personally responsible for preserving holiness in their lives and in the life of the people.[60] The Sages of Yavneh also adopted measures regarding the commandments concerning the land: they strengthened the importance of commandments that at the time of the Temple had been considered less significant because they could be observed outside the Temple and outside Jerusalem. The loss of the holiness of the Temple Mount did not annul the holiness of the land, but enhanced it instead. The Temple's holiness, in other words, was extended to Eretz Israel as a whole.[61] All these examples indicate that the sages of Yavneh reacted to the catastrophe by stressing the religious character of Jewish life wherever it was practiced, even in the absence of the Temple.

What were the legal means through which the sages of Yavneh actually implemented the innovative halakhic ideas developed in their academy? One of the most important ways was legislation, manifest in the famed regulations of R. Johanan b. Zakkai and R. Gamaliel.[62] Two trends were central to these regulations. The first was concerned with norms set in "remembrance of the Temple", which sought to enable continued adherence to norms that had been observed in the Temple even after its destruction (e.g., the sanctification of the new moon, the intercalation of the year,

taking hold of the lulav all seven days of the Sukkot festival, the priestly blessing). The second trend was concerned with the creation, or at least elaboration, of norms that would regulate Jewish life in the absence of a Temple (such as the Passover seder, prayer, and *kerem reva`i*) and in light of the harsh economic and national circumstances affecting Jews at the time (such as a ban on the sale of land and houses to Gentiles and on the breeding of small cattle in Eretz Israel).

The astonishing result of the move endorsed by the Sages of Yavneh is that the post-Temple period emerged as the most fruitful for normative Jewry. It was at this time that the Midrash and the Aggadah crystallized, the Mishnah was canonized, and the Talmud was written. Out of the far-reaching catastrophe, religious and halakhic creativity embarked on a *tour de force* that reached historic heights. Zeev Yavets describes these events as follows:

> A horrendous calamity was inflicted upon the nation on the day the Temple was destroyed… Almost no one would imagine, however, that this was also a day of unprecedented victory, because an endless life spring was then discovered, preserving unmeasurable and unfathomable powers… All our efforts were riveted on the hidden victory, on displaying the formidable force that would not let Israel come to an end and die, even after their fall.[63]

In our generation, that of the establishment of the State of Israel, we have restored to their days of old some of the glories lost in the catastrophe. We do indeed live without a Temple, but we enjoy independent sovereignty in Eretz Israel, most of whose inhabitants are Jews. The concern of this paper is to examine the task incumbent on today's sages, those whose task is parallel to

that of R. Johanan b. Zakkai with regard to the renewal of Jewish sovereignty and the secular character of the state. What is the "way of Yavneh" in contemporary Halakhah?

Yeshayahu Leibowitz excelled in defining the religious task confronting us:

> It is one of the greatest paradoxes of Jewish history that two antithetical events, centuries apart, should have had the same effect on Judaism. The reestablishment of Jewish independence and the ingathering of exiles have proven as catastrophic for the Jewish religion as were, in their day, the destruction of the Jewish state and the dispersion of the people. After the Roman conquest of 70 c.e., the generation of Johanan ben Zakkai was confronted with the fateful question: can a valid Judaism survive the loss of the sacrificial system? The revolutionary turn of events that has now produced the state of Israel confronts our own generation with an equally fateful question: can a valid Judaism survive the emergence from the conditions of Diaspora and political subservience in which it has subsisted for so long?[64]

B. Exile and Dispersion

Toward the end of the geonic era, the Jewish people underwent a process of physical decentralization, which was accompanied by the decentralization of the political and halakhic sources of authority. The centers in Eretz Israel and in Babylon were replaced by Jewish communities in the Spanish and Ashkenazi diaspora.[65]

There were a number of salient changes: First, individual leadership in the form of a king, nasi, or exilarch was replaced,

for the first time, by the government of the people or its representatives, and this change took place in each and every community. Until this point, Halakhah had never recognized majority rule, and hence had not allowed the group ("the public") to impose its will on the individual. Under these conditions, the community could simply not function as a social unit. Second, legislation had been a marginal activity until then and halakhic development had originated mainly in rulings issued by the central rabbinic or political authority. With the widespread dispersion, the central authority was lost and a creative solution was required for the establishment of an alternative halakhic institution, which could serve as a local normative source answering real needs on an ongoing basis. Third, dispersion *per se* confronted the realm of Jewish law, the Halakhah, with a much more variegated reality than the preceding one. Halakhah was forced to put forth normative solutions that enabled Jews to function under different regimes, in many geographical areas, and in varied social and cultural realities.

As Menachem Elon has shown,[66] the cumulative significance of simultaneous change in all three dimensions was far-reaching. Halakhah was required to develop public law in unprecedented ways: to establish the legitimacy of local rabbinic authority so that it might function independently of any overarching rabbinic body; to develop the legislative aspect of halakhic creativity far beyond what had been acceptable; and to grapple with a long series of factual circumstances in private and public law that were unknown to earlier Jewish societies.

Halakhic vitality did not prove disappointing, and contemporary sages provided impressive answers to these new realities. Their innovation was to render the power of the public (in any given community) equal to that of the court, and although the public

was not invested with spiritual advantage, its decisions were deemed binding on the individual. [67] They also created a new set of "community regulations", enabling each and every community to regulate a broad range of issues internally. Through these regulations, the actual arrangements adopted in the community – namely custom – were translated into a halakhic norm set into place by an authorized body.[68] These daring and innovative means enabled the public in any given community, whether large or small, from Ashkenaz to Spain, to react to ongoing needs within a halakhic framework, even if this required changes in halakhic precedents that had prevailed up to this point.

As we see, then, such developments have taken place earlier.

Openings for Halakhic Renewal 5

Let us return to the present: Is there room for proposing concrete solutions that will enable Halakhah to renew itself from within so that it might again assume its natural role in the shaping of contemporary Jewish life, even in the context of sovereignty, without betraying its tradition and inner values? How might Halakhah ease for all of us – religious and secular Jews alike – the difficulties in the relationship of religion and state prevailing at this time? Obviously, it is not my intention to consider the content of possible halakhic solutions to specific questions, a task that is incumbent upon competent halakhic authorities. My contribution is merely to present, from a broad perspective, optional paradigms for a strategic and structural halakhic response to the questions arising on matters of religion and state.[69] Four models are described below.

A. Deliberate Silence — Lack of Halakhic Jurisdiction

Halakhah's current silence *vis-à-vis* the new realities would appear to suggest that the existing normative fabric of Halakhah – the one shaped in exile and in the pre-eighteenth-century framework – should continue to apply today without change. The hopelessness of this silence was described above at length. It is, however, possible to construe this normative halakhic silence in a different way, namely, as a silence that conceals a positive and relevant approach to contemporary change. I am referring to the possibility that the sages of our generation, exercising their halakhic discretion, may decide that specific areas of contemporary life – areas that they will carefully define – are simply not regulated by Halakhah but are under the legal purview of other authorities, such as state law.

The notion of a lack of halakhic jurisdiction can be arrived at with two different approaches. The first claims that Halakhah does not deign to regulate certain realms of contemporary reality which fall outside its purview. According to this view, Halakhah is not all-encompassing, but rather, contains certain 'gaps' or 'open spaces'. The second and more moderate approach claims that although *ab initio* and in principle the scope of Halakhah is unlimited, in practice and as part of contemporary halakhic policy, halakhic sages refrain from implementing Halakhah in prescribed areas.

I have described elsewhere at length the differences between these two approaches:[70] the former approach deals with "conceptual inaccessibility", meaning that actual reality is substantially broader than legal reality and includes human realms of activity that are essentially non-justiciable. By contrast, the latter approach argues that the inaccessibility of Halakhah to the regulation of certain realms of activity is due to "institutional inaccessibility", that is, the product of a deliberate decision to abstain from implementing its conceptual accessibility. The practical difference between the two approaches is clear: whereas conceptual inaccessibility precludes any option of halakhic rulings in the area of the "halakhic vacuum", institutional inaccessibility is reversible and hinges upon policy considerations on a given subject at a particular moment in time. An activist legal halakhic policy can expand the scope of the halakhic applicability only if the halakhic vacuum is a result of institutional inaccessibility, but not, of course, if it follows from conceptual inaccessibility. Let us consider the application of each approach.

1. Conceptual Non-Justiciability

The possibility of a halakhic recognition of conceptual inaccessibility concerning broad areas of human endeavor would

entail considerable halakhic boldness, since it clashes with the widespread perception that God, "by His very nature", can regulate all aspects of life.

There is, however, no clear theological impediment to preclude, in principle, the religious notion that God, the source of all authority, chose to restrict the scope of Halakhah and leave areas of societal endeavor to autonomous human decision. In truth, few thinkers seem to have adopted such an approach. Thus, for instance, Leibowitz holds that Halakhah is essentially personal and, therefore, does not regulate activity in an actual political framework.[71]

In practice, the perception of Halakhah as being all-inclusive is very common. The religious ethos indicating that all reality is considered in halakhic categories and that there is no realm untouched by it has become entrenched in all Orthodox communities, both traditional and modern. To be precise: one should not infer from this an actual attempt to base every aspect of life on halakhic categories. Rather, such an attitude reflects a deep internalization of a principled world-view affirming that Halakhah is all-inclusive.

The view of Halakhah as being all-inclusive has a strong symbolic foundation: it proclaims to the believer that traditional Jewish civilization has a compelling position concerning all aspects of life, and this position is what endows human existence with meaning. Hence, the strategy stating that Halakhah lacks justiciability in principle, particularly concerning the large issues that influence and are influenced by the relationships between religion and state, appears to hold little promise as a solution for these problems.

2. Institutional Non-Justiciability

There is greater and more realistic potential in an halakhic strategy of abstention from halakhic rulings on specific issues (although maintaining that such rulings are possible in principle), a strategy that emanates from a substantive decision of halakhic leaders concerning the desirable halakhic policy on such issues.

Some have adopted this interpretation to explain Halakhah's normative silence on broad spheres of Israeli public life since the creation of Israel. In their view, halakhists have refrained from deciding on such issues as Israel's foreign policy, or on the character of political rule, not because they cannot react in principle, nor because Halakhah lacks satisfactory judicial precedents to these questions, but because of a positive decision stating that at this time, silence is the most fitting halakhic view on these matters.[72]

The most prominent example of this approach is the attitude of some halakhists to the question of land that came under Israeli rule during the Six-Day War. Alongside the large majority of halakhists who have expressed a halakhic stance on both sides of this question,[73] are those who argue that Halakhah must deliberately refrain from establishing norms on such issues. The arguments adduced for this policy vary: some argue that the nature of these questions are such that they are subject to constant change and, therefore, Halakhah respects the changing will of the people over time.[74] Others argue that since these questions touch upon issues of life and death, their importance justifies a democratic decision[75] or recourse to experts.[76] In general, some halakhists view a political reality that derives from a collage of defense, political, social, economic, and other considerations as an area of policy unsuited to the narrow, *a priori* confines of halakhic normativity, and as such, decisions on

these issues should therefore be left to the general public through its elected representatives.

3. The Difficulties

How far can the implementation of this strategy be extended with regard to broad areas of friction between religion and state?

First, a policy of halakhic non-intervention is possible when no relevant halakhic precedent is available on the issue under consideration. However, many of the questions affecting the relationship of religion and state stand at the very core of the historical halakhic endeavor, and contemporary halakhisits would therefore find it difficult to implement this strategy in such areas. On the other hand, most of the existing halakhic precedents are taken from what we would today categorize as "private law", and as such, the application of such precendents to issues of religion and state – clearly in the realm of "public law" – would appear to be greatly problematic. This would therefore appear to reinforce a deliberate policy of halakhic silence.

Second, one needs to be cognizant of the fact that as the realm of non-justiciability expands, the scope of religious influence will contract. Thus, for instance, a halakhic policy that chooses to restrict the scope of Halakhah only to the private sphere will certainly ease the friction between religion and state. The price, however, is that the public sphere of Jewish existence, including sovereignty itself, will not be shaped by Halakhah, the central expression of Jewish civilization. A full-fledged implementation of a non-interventionist halakhic policy would relegate Halakhah to a marginal role, excluded from the normal discourse of a sovereign state.

What is the proper policy for future halakhists? Is it preferable to endorse an all-encompassing, engaged halakhic strategy which – even if it deals in original ways with the new realities of sovereignty – will certainly strain the already difficult quest for harmonious existence in a Jewish and democratic state? Or is it perhaps preferable to endorse a halakhic response that is restricted and minimalistic – that of a by-stander – thus effectively lowering the intensity of the conflict but at the cost of a potential trivialization of the meaning of Jewish existence in a Jewish and democratic state? Both are difficult options, but halakhists must contend with them fully consciously and choose the proper balance between them.[77]

B. Creating a Common Denominator — Halakhic Recognition of the State and of State Norms

An elegant way of contending with the tension between religion and state is to create the widest possible common denominator between them. Theoretically, the state could attain this result if it were to adopt Halakhah as the law of the land, with religion and state sharing a common language. However, since the focus of our present concern is on halakhic alternatives, we must consider the feasibility of the contrary option: is there room for halakhic development that would give halakhic, intra-religious meaning to the state, its institutions, its agencies, and its legislated norms?

It appears to me that halakhists could find pegs on which to hang this strategy. It also fits what we know about earlier halakhic approaches (henceforth, the historical-factual argument), as well as mainstream trends of halakhic thought concerning the sources of authority for halakhic development (henceforth, the theoretical-ideological argument). As we will see, however, the

current implementation of this halakhic strategy is also fraught with considerable problems.

1. The Historical-Factual Argument

With regard to the formulation of Halakhah, history points to cooperation between the religious rabbinic leadership and the ruling communal leadership (see Chapter 3, Section 1 above). This was true for the centers of Jewish life in Eretz Israel and Babylonia, where sages operated alongside the king, the Sanhedrin, the nasi, the heads of yeshivot, and the exilarch. Later, with the further dispersion of the Jews, communal rabbis and leaders jointly shaped the halakhic way of life known to us today. The communal leadership left its mark on the halakhic corpus both through the judicial system and through the regulations that it administered. For our purposes here, it is important to emphasize that the halakhic legitimacy of the communal leadership's normative regulations did not suffer from the fact that the leadership was not appointed on the basis of religious criteria, nor did it function in a religious capacity. Furthermore, Halakhah was also successful in ascribing religious meaning to laws promulgated by gentile rulers, laws that under certain conditions were recognized within the conceptual language of Halakhah. Halakhah adopted an interesting legal technique: it granted internal halakhic meaning to the discretion of the non-rabbinic (or even non-Jewish) institution that created the norms.[78]

As noted, this model of institutional duality in the creation and implementation of Halakhah ceased to operate in the wake of the historical circumstances of the eighteenth century, which led to a decline in the influence of the Jewish community and its institutions. Until that point, however, the Jewish communal leadership enjoyed the status of being a normative source of

authority within the halakhic legal system. In the practice of Jewish life, then, halakhic legitimation was granted to civil sovereignty, even when it had no religious basis. Hence, the question arises as to whether we can revive this earlier model by granting halakhic recognition to the current public leadership that is manifest in the State of Israel and its institutions? Ostensibly, this is an *a fortiori* case: if leadership appointed by a non-Jewish government (such as the exilarch) or of local character (such as the heads of the communities), or even non-Jewish leadership ("the law of the land") can influence the content of Halakhah, then surely the norms of the Knesset and of the Israeli judiciary, which emanate from a sovereign and independent Jewish leadership, should attain this result.[79]

Some contemporary halakhists have indeed considered this idea. R. Shaul Israeli raised the possibility of identifying state law with the "king's law" [mishpat ha-melekh];[80] R. Eliezer Waldenberg proposed granting the state a status similar to that of the "community notables" [tovei ha-ir],[81] whereas R. Ovadyah Hadaya pondered whether the State of Israel should not be equated with the "law of the kingdom" [din ha-malkhut].[82] Although the three ideas proposed are not identical, they do share a common dimension: all of them explore the possibility of reviving the historical model of institutional duality in Halakhah *vis-à-vis* the administrative and legislative institutions of the State of Israel. We must admit, however, that this halakhic strategy regarding the state and its laws has not made a serious impression on the halakhic consciousness of the religious public, and has remained, at least so far, an unfulfilled promise.

2. The Theoretical-Ideological Argument

Given that Israel is a democratic state, the source of its authority and that of its institutions rests upon the willingness of citizens

to accede to this authority. Is this fact relevant in the conceptual world of Halakhah? Does Halakhah identify the democratic process, which is the basis of the state's governance and law, as something significant that imbues this governance and Israeli law with intra-halakhic validity?

Public or communal assent is a clear and decisive parameter in the judicial tradition of Halakhah.[83] Such agreement is significant both *ex post facto* and *ab initio: ex post facto*, because a halakhic ruling that is not accepted by the public is invalid,[84] and *ab initio*, because the public can determine the content of Halakhah through its actual behavior. As we know, custom is one of the legal sources of Halakhah.[85] Furthermore, and central to our concern, the public is a source for establishing Halakhah. It can do so directly, when it functions as a legal instance, as a court, or indirectly, through the representative power it grants others, namely, the changing institutions of communal leadership detailed above. The community has legislative powers that rest on the same principles as those that serve as the basis for legislation issued by halakhic sages.[86] Whether directly or through its leadership, the community is not only authorized to issue rulings according to halakhic precedent, but also to deviate from prevalent halakhic norms in areas such as civil law, penal law, and some aspects of public law.[87]

Communal regulations are the chief historical instance of an intra-halakhic legal creation that conveys the will of the community through representatives in the communal leadership. It is widely known that halakhists reinforced the power of the norms set in communal regulations by equating them with Torah law. R. Solomon b. Abraham Adret (known as Rashba) stated this clearly: "It is clear that the community is allowed to issue and enact regulations and make agreements as they think fit,

and this will be as valid as Torah law, and they can impose fines and punish transgressors in any way they agree among themselves".[88]

As such, we have found a theoretical-ideological basis for anchoring the halakhic validity of public consent in our time, as manifest in state law.[89] On this basis, it is possible for state law, the product of Israel's legislature and courts, to be recognized by Halakhah. The recognition could be *ex-post facto*, in that it reflects custom. But this recognition could also be *ab initio* and principled, because it is created through the exercise of the representative powers that the public grants to the state and its institutions, from which they draw their power and their source of authority. Granting religious meaning and validity to state law might play a significant role in easing the tension between religion and state.

3. The Difficulties

Although the notion of granting halakhic recognition to the state and its law is anchored in the factual and ideological world of Halakhah, it raises considerable difficulties in its implementation with regard to present-day realities. I consider below three challenges that halakhists must answer before endorsing this move:

- **Identity**

Contrary to all the historical examples, contemporary Halakhah is forced to compete for the support of its potential consumers against a legal system that is also Jewish in the sense that most of its creators and users are Jews, but one that views itself as standing outside of Halakhah. More precisely: contrary to the law of a foreign ruler, which was generally not even considered an alternative for the Jewish community, and contrary to the

law created by Jewish leadership throughout history (which the community viewed as an integral part of the religious legal system, even though it was not created by figures whose power rested on their religious status), the laws of the State of Israel are perceived by all as a real and viable alternative to Halakhah. The "otherness" of state law is clear by virtue of the norms included in it (which are not significantly affected by halakhic norms but by comparative law or original Israeli legal thought[90]), by virtue of the historical fact that the country's leaders made a conscious choice to prefer law over Halakhah when the state was established,[91] and by virtue of declarations by leaders and experts from all circles – rabbis, jurists, politicians, and others – that point, whether in joy or sorrow, to the law's alienation from Halakhah.

The contemporary indifference towards Halakhah hinders the application of the historical precedent of institutional duality in Halakhah to state law. Even if communal leaders in previous generations were not religious figures, there is no doubt that they had a religious awareness and acted both objectively and subjectively on behalf of, within, and for a community wherein religion and its system of halakhic norms served as the basic common denominator. By contrast, most creators of the state law system, although they are Jews, are not driven by the religious aspect of their Jewishness. If asked, or when a decision is required, most of them will prefer norms reflecting cultural attachment to the values of Western liberal civilization over norms whose foundational affinity is with traditional Jewish civilization.

This is also true of the users of state law: in the past, the communal and religious leaderships addressed their rulings to one and the same group. Today, when secularism is widespread,

the majority in Israeli society is exclusively committed to the norms issued by the state.

Prima facie, religious politicians who strive for religious influence on state law have had some success. They have placed the phrase "the values of a Jewish and democratic state" at the apex of Israeli law's normative pyramid.[92] They have also succeeded in including in the Israeli code the Foundations of the Law statute[93] that directs the jurist to rely, *inter alia*, on the principles of Israel's heritage when required to fill a legal lacuna. Paradoxically, however, this success has not served its purpose of reducing the estrangement between law and Halakhah, but rather the contrary: it has strengthened the sense of alienation between the two legal systems. The struggle between religious and secular citizens, which occupies the public agenda so intensely, has also pervaded the legal interpretation of the concepts of "Judaism" and "Israel's heritage". Religious citizens are interested in imbuing these concepts with concrete substance, taken partly from the realm of Halakhah,[94] whereas secularists hold they should be substantively imbued with general Zionist and religious-halakhic character, with a preference for "Jewish concepts" of "a high level of abstraction".[95] This struggle, and the dominance of the latter interpretive stance in judicial rulings, has emphasized even further the characterization of state law as "other" *vis-à-vis* Halakhah.

- **Contents**

Another difficulty in the strategy that incorporates Israeli norms into the halakhic corpus is obviously the question of contents. How will Halakhah contend with situations of patent contradiction between the norms of state law and those of Halakhah? Everyone understands that Halakhah has fundamental legal principles and values that make up its inner identity. This identity could be

blurred into extinction if the halakhic legal system dared to endorse, *a priori* and unconditionally, the entire range of value preferences and decisions of Israeli law. In other words, even advocates of Halakhah's recognition of state law must qualify its scope if they wish to preserve halakhic integrity. What is required is a conceptual development, one that includes institutional aspects, enabling halakhists to supervise state law through a process resembling judicial review. The purpose of this process is to enable Halakhah to sift the whole corpus of Israeli law though halakhic filters, which will exclude from Halakhah whatever is unsuited to its spirit, while enabling absorption of those sections of Israeli law involving practices and values coherent with the basic halakhic spirit.

The history of Halakhah shows that this type of judicial review should adhere to a fixed principle whereby state law should be absorbed, as long as no contradiction is evident between it and Halakhah. Furthermore, a large corpus of halakhic rulings shows that not every contradiction between halakhic precedent and state law requires the latter's rejection. Custom, [96] or state law in non-rabbinic courts,[97] have at times changed halakhic precedent. In other words, the review process is supposed to affect the incorporation of state law only if absorbing Israeli norms were to contradict halakhic principles.

The mutual relationships between Halakhah and Israeli law are one facet, local and temporal, of an ongoing dialogue that Jewish culture conducts in every generation with the surrounding culture. Just as this dialogue takes place in the realm of ideas, so it takes place in the legal realm. This is the appropriate context for understanding and evaluating the tension between the halakhic aspiration to preserve an independent and unique character that is "faithful to the source", and the cultural and social imperative

to adopt and assimilate foreign legal norms and values into the halakhic realm. Due to the centrality of the legal realm in the molding of a Jewish environment, it is not surprising that halakhic history abounds with extensive discussions and precedents offering models for struggling with this tension. For instance, there is a halakhic tendency to restrict the scope of foreign – that is non-Jewish – law by limiting its incorporation to specific branches of the Halakhah.[98] Another means of dealing with the tension, one accepted by many sages, is to make the halakhic validity of the foreign law contingent on the ratification of its contents by a "notable", who functions as a quasi-institution implementing judicial review.[99] A third way of restraining foreign influences without precluding their very existence is to establish essential halakhic principles (rather than specific norms) to which foreign law must conform as a criterion vital for its acceptance.[100]

One can ascertain that Halakhah, as a system that absorbs foreign elements, knows how to operate various controls on this process. The system of filters works by restricting the branches of law engaging in absorption, by implementing judicial review through an expert institution, or by a substantive examination of the compatibility of the foreign law with the fundamental principles of Halakhah.

Contemporary sages are allowed to consider the adoption of a similar strategy *vis-à-vis* Israeli law: to recognize it as possessing both theoretical and practical halakhic significance, while limiting its substantive influence on Halakhah according to known halakhic models developed for this purpose and adjusted to the present reality. Such a step could be highly significant in the context of relations of religion and state and with regard to other issues. It would clarify that, from a religious perspective, these

are not two mutually hostile legal systems, and that the rabbinic establishment does not seek exclusivity in regulating the lives of Israeli citizens. If the state's legal product has halakhic meaning, it cannot be perceived as creating a cultural alternative entirely separate from Jewish tradition. Obviously, a parallel flexibility on the part of state law, showing sensitivity and refraining from adopting norms directly contradicting the principles of the halakhic system, is required for a fuller realization of the proposed vision. Although this strategy will not abolish the very fact of normative duality, wise use of it by both sides could soften its practical and symbolic implications.

- **Heterogeneity**

Israeli law serves a society that is nationally and religiously heterogeneous. It is created by a legislature and interpreted by courts that include, albeit as a minority, non-Jewish citizens of the state. This fact may be problematic from a halakhic perspective, in the adoption of state norms into Halakhah.[101]

Without delving deeply into this question, I will confine myself to two points addressing the problem of heterogeneity. First, in essential terms: even though the norms of the State of Israel are not formulated exclusively by the Jewish public, they certainly reflect the way of life that the Jewish majority in the country is interested in adopting. With regard to its contents, in other words, state law is an authentic expression of the preferences of Israel's Jewish citizens. Second, in formal terms: Halakhah had readily assimilated norms from an entirely non-Jewish source – "the law of the kingdom is law" [*dina de-malkhuta dina*]. From this perspective, the norms of the State of Israel are certainly preferable to the norms of a foreign government.

C. Judicial Activism

Judicial activism is at the crux of a public and professional dispute concerning Israeli law. The dispute hinges on the place of the courts in shaping contemporary realities, as against other institutions charged with the same task, though obviously through other means. Supporters of judicial activism prefer to entrust the court with greater responsibility for deciding on our ways of life, even beyond the classic judicial task of solving specific conflicts between litigating parties. By contrast, supporters of judicial restraint argue that political or social institutions are more appropriate for the clarification of the basic conflicts dividing society.

In the world of Halakhah, the dispute about the place for and the justification of judicial activism takes an interesting turn. Since Halakhah has never had an ongoing, functioning legislature, the halakhic legal system necessarily relies on precedent.

It has been forced to make creative use of precedent and of existing halakhic categories on a regular basis in order to provide new answers to the challenges of changing realities. This result, which had always been appropriate, is even more necessary today. In the past, the ruling establishment, such as the king or the community leaders, functioned alongside the religious establishment and competed with it for the regulation of what was essentially religious society. Today, the state's ruling establishment is considered irrelevant from a religious perspective. As such, Halakhah as formulated by rabbis has an almost complete monopoly in shaping the religious way of life from an intra-religious perspective. In the absence of any other religious institution available to regulate society, and since the religious market of ideas is controlled by iron-willed halakhists, Halakhah

is generally the exclusive expression of Jewish civilization in our generation. Therefore, whether or not this is proper, religious renewal with regard to changing realities must resort to judicial activism. Indeed, judicial activism is the main path for halakhic adaptation.

One can conceive of at least two levels of halakhic activism, separated, *inter alia*, by their level of restraint. The first and more restrained utilizes a creative hermeneutic within an extant halakhic category; the second, more daring, adopts a hermeneutical approach designed to establish a new halakhic category. Both options are known in the realm of Halakhah, and both offer an evolutionary (rather than revolutionary) move, adapting Halakhah to regulate and deal with contemporary reality.

1. Interpreting the Halakhic Category

When the contemporary halakhist is forced to rule on an issue that brings him into confrontation with a new reality, the familiar and reflexive response will be to identify an extant halakhic category that can be applied to the facts before him. In fact, this is the classic mode of every judge in all precedent-based systems. The use of existing categories can obviously assume several forms:

One can use an existing category directly, in the sense of applying the judgment of earlier halakhists from whom one must not deviate. Such rulings are characterized by judicial passivity, and such passivity is liable to sever Halakhah from real life altogether. Unfortunately, too many contemporary halakhic rulings use categories from halakhic precedent without adapting their inner essence to the situation at hand. Thus, for instance, the Israeli court system is categorized as a "Gentile court", contemporary

secular Jews are classified as "wicked" or "captive children", all without examining the source of these halakhic categories and their relevance to modern realities.

It is possible to utilize extant categories in another way, one that offers a creative interpretive approach by attempting to elaborate the halakhic category so as to apply its original essence and its initial rationale to new needs.

Judicial activism enables the halakhist to embark on an interpretative voyage that re-delineates the halakhic principle, that is, the category. The existence of a principle does not dictate a necessary answer to the question at hand; instead, it serves the interpreter as a guideline in the clarification of the proper legal result in the regulation of a specific case, while applying the principles and purpose of the rule according to the halakhist's discretion. Thus, for instance, one could state that Halakhah must consider the State of Israel and its institutions through the halakhic category of "king" or of "communal leadership". The details of the arrangements derived from this application, however, must be adapted to fit the actual State of Israel, which is characterized by such features as sovereignty, democratic rule, a nationally and religiously heterogeneous population, and so forth. The halakhic category of "captive child" may also support a suitable halakhic discussion of contemporary secular Jews, as long as the halakhic jurist succeeds in drawing a distinction between the original captive child, who was socially 'deviant' and actually coerced, and the educated and involved contemporary secularist, who makes full use of his/her personal autonomy. The activist halakhist does not view the choice of proper halakhic categories as the end of the adjudication process, but rather, as the beginning. He focuses his efforts on understanding the relevant parameters of contemporary reality, which will influence

the formulation of a halakhic response in light of the extant halakhic category.

Recourse to this activism is the most natural and accessible strategy for contemporary halakhists. The judicial passivity that is characteristic of Halakhah today is an exception in the history of Halakhah, whereas activist halakhic adjudication in the style proposed here continues along a well-trodden and stable path in halakhic history. The application of extant halakhic categories, hand in hand with their elaboration, fine-tuning, and adaptation to changing realities is an authentic halakhic move that is as widespread as it is imperative.

2. Determining the Halakhic Category

Alongside the advantage of such judicial activism – namely, its loyalty to the halakhic hermeneutical tradition – there lies an essential flaw: as long as the exegete is required to take relatively small hermeneutical steps, these can be performed through the fine tuning of an extant halakhic category. Yet, the longer that Halakhah neglects a specific issue – whether due to a lack of contemporary need or to halakhic paralysis resulting from judicial passivity – the wider the gap between existing norms (that is, the interpretation of an halakhic category in the form of a precedent) and reality. The gap could sometimes be so wide that the activist halakhist finds it difficult to interpret the halakhic category in a way that responds to the needs of the hour. Thus, for instance, as I showed above,[102] two thousand years without Jewish political sovereignty created a legal "black hole", to which Halakhah can hardly react through ordinary judicial activism. The extension of existing halakhic norms regarding sovereignty – in disuse since the Second Temple – in the regulation of political sovereignty in the twenty-first century, will be accompanied by unease and tainted by a lack of intellectual integrity.[103]

When the required normative leap is too great for the judicial activism that focuses on the interpretation of the category, another and more radical interpretive move is needed. In this case, halakhists must reach a decision through a two-staged effort. The first step is inductive: they must conceptualize the norm found in the precedent or the extant halakhic category into a halakhic principle. The second stage is deductive: they must apply the halakhic principle to the issue before them. The purpose of this move is to derive from the vast corpus of precedents (norms and categories) their central and most important trend, one that successfully grasps the root of the halakhic position on the issue at hand. At the stage of legal conceptualization, the halakhist detaches himself from earlier concrete manifestations of the halakhic principle that were shaped under conditions currently irrelevant, and distills from it the fundamental halakhic principle that applies in this case. At the second stage, the halakhist uses this halakhic principle by applying it to the present-day reality. The entire move enables the halakhist to reach a relevant response according to the fundamental underpinnings of the halakhic system, while stripping it from previous legal results no longer relevant here and now.

For instance, the development of a halakhic position concerning the state and its institutions may be attained through a penetrating analysis of Halakhah's relation to similar phenomena in the past. The halakhist will not attempt to deal with contemporary realities by creatively applying the laws of kings as implemented during the Second Temple, or as formulated by Maimonides who drew directly on biblical sources. Rather, he will extract from this earlier literature and precedents the fundamental principles of Jewish political existence according to Halakhah. These principles will serve him and future generations of halakhists

living in a modern state as a yardstick for the regulation of contemporary sovereign life according to Halakhah. The same is true of secularism: a creative interpretation of the halakhic categories of "wicked" or "captive child" may prove insufficient as a response to the phenomenon of contemporary secularism. Halakhists will then resort to the more radical move. They will have to abandon the use of these categories in reference to secular Jews and propose a new category, one anchored in a deeper level of halakhic thought and halakhic principles.

Since this process raises a range of theological, ethical, legal, and intellectual difficulties, it should only be adopted when an ordinary activist hermeneutic cannot attain suitable results. Even then, its use should be reserved for the most prominent group of leaders among contemporary halakhists. There is no doubt that this poses a considerable hermeneutical challenge, endeavoring to disclose the quasi-constitutional principles of halakhic law, and care should therefore be taken not to use it irresponsibly. Nevertheless, it is important to note that we are not speaking of a revolutionary proposition unknown to the halakhic world.[104]

D. An Institutional Solution

Alongside the possibility of halakhic adaptation through recourse to hermeneutical moves, we should also consider the possibility of a halakhic response to new realities through legislation. For this purpose, contemporary halakhists would need to establish an institution that would be authorized, according to halakhic principles, to create new norms that will be added to the halakhic corpus. In halakhic language and tradition, this is a well-known strategy of action. We are familiar with the vast contribution of the Sanhedrin as a legislative institution to the development of Halakhah,[105] and with the process of creating new norms

through regulations issued by institutions and individuals. How, if at all, can this halakhic strategy be implemented today?

1. Past Experience

Toward the end of the nineteenth century, and under the influence of the First Zionist Congress, a young rabbi from Latvia, Abraham Ha-Cohen Kook, proposed renewing the institution of the Sanhedrin. In his vision, the national renaissance advocated by Zionism would be accompanied by a religious revival headed by the Great Sanhedrin. The Sanhedrin "will examine everything, every regulation and every custom, and will rule according to the Torah".[106] Yet, when he eventually came to Eretz Israel, R. Kook retreated from the hope of implementing this idea. He recognized the limitations hindering its application within the *Yishuv* (the organized Jewish community in Palestine during the British Mandate). On the one hand, there was the difficulty of consolidating a united front of contemporary halakhists, while on the other hand there was the opposition of the secular majority to the creation of a center of religious power and authority.[107]

R. Kook founded the Chief Rabbinate in 1921 and was the first Ashkenazi Chief Rabbi. He may have regarded the establishment of this institution as a first step leading hopefully toward the revival of the Sanhedrin.[108] After the State of Israel was established and the Rabbinate became a state institution, one could have expected it to function as the supreme halakhic institution that would assume responsibility for answering the challenges of the new reality. This did not happen, apparently for reasons similar to those that had prevented R. Kook from trying to promote his original vision. The Chief Rabbinate, although purported to be the religious and spiritual authority of all Jews in Israel, both religious and secular, failed to attain a fitting role. The causes of this failure have been discussed by others.[109]

It will suffice to indicate that, since its inception, the Chief Rabbinate has suffered from a lack of legitimacy as a spiritual and halakhic authority with regard to two significant groups: the ultra-Orthodox, including their "*gedolei ha-dor*", their spiritual leaders, and the secular public, including the government institutions it controls. The Chief Rabbinate finds itself in straits because it is not ready to act in any significant way without the backing of the "*gedolei ha-dor*", who are not among its ranks. It also assumes, correctly it appears, that innovative halakhic rulings will not satisfy the wishes of the country's secular majority, with the result that it refrains from action. The practical outcome is that the Chief Rabbinate, including its institutions and its leaders, does not assume responsibility for functioning as "the greatest court of its time".[110]

Despite the sense of a missed opportunity regarding the limited function of the Chief Rabbinate, many still remained willing to realize the potential for halakhic renewal through an authorized institution modeled on the Sanhedrin.

Before the creation of the state, when independence turned from a distant vision into an actual possibility, and certainly immediately after 1948, some religious Zionism leaders called for the renewal of the Sanhedrin.[111] They sensed the need for a suitable religious and halakhic response to the national revival and to Israeli sovereignty, and thought that they could attain this goal through the creation of a new halakhic institution. The most vocal supporter of this view was R. Judah Leib Maimon (Fishman), who was then Minister of Religions and a leader of the Mizrahi movement.[112] His claim was based on a historical analogy: during a previous national revival, namely the return from Babylon and the Second Temple, Ezra and Nehemiah created a new religious authority – the Great Assembly – charged

with solving new problems. By the same token, he argued, the religious response to the challenges raised by the establishment of the state of Israel should be the renewal of the Sanhedrin.

This idea failed, defeated by a broad coalition of opponents that included not only the ultra-Orthodox and the secular public, but also many leaders of religious Zionism. R. Yitzhak Herzog, who was then the Chief Ashkenazi Rabbi, had apprehensions about establishing a mechanism of democratic elections for the Sanhedrin, a move that might lead to its domination by inappropriate representatives. From the opposite direction, fears were raised of a takeover by ultra-Orthodox non-Zionist elements, thus defeating the very purpose of the Sanhedrin's creation. A Sanhedrin established by the religious Zionist camp might not have made any difference because the secular public was not ready to accept even an "abridged Halakhah", and because the ultra-Orthodox "*gedolei ha-dor*" would not have acknowledged the institution's authority. There were those who claimed that the Sanhedrin could not succeed where the Chief Rabbinate had failed and that the attempt, if it were to fail, would mar the image of an institution sacred to the Jewish tradition.[113] In the end, opponents of the Sanhedrin's renewal got the upper hand, and by 1953 the conflict was already over.

2. Looking at the Future

From the perspective of more than fifty years of sovereign existence, and in light of the tension between religion and Halakhah in Israel, is there room for reconsideration on this issue? Have the parallel social, political, and cultural forces that led to the abandonment of the idea in R. Kook's time, and again, at the time of the establishment of the state, undergone any changes?

At first glance, the obvious answer is negative. The secular public is more alienated than ever from religious norms. Fear of a halakhic state and of religious coercion and calls for a separation of religion and state are more frequently expressed than ever. The fervent hope of the religious public before the establishment of the state for a civic life with links to Jewish tradition has long been lost, except perhaps at the utopian level. At the same time, the impact of the ultra-Orthodox in Israeli society in general, and their influence upon religious Zionism in particular, has only increased. Now as then, the term "*gedolei Torah*", and the concomitant spiritual authority it represents, is reserved for ultra-Orthodox figures that are not committed to the Zionist idea. Nor has there been any improvement in the status of the Chief Rabbinate relative to its status at the time Israel was established, neither among the Orthodox and ultra-Orthodox nor among secularists. *Prima facie*, then, the present chances of success for a strategy seeking an institutional solution to halakhic conservatism remain just as small.

Nevertheless, further exploration is worth considering. The pincer of ultra-Orthodox and secular resistance might be avoided by remodeling their desired halakhic institution and articulating its vision in different light.

The definition of the institution's purpose may have to be formulated in more rigorous terms. For the young R. Kook, the revival of the Sanhedrin was, in a way, a realization of messianic expectations.[114] From his place in exile, he yearned for an overall spiritual revival based on a redemptive agenda, and he viewed the Sanhedrin as a religious instrument in this direction. He withdrew from implementing the idea, however, once he grasped the conditions in Eretz Israel. The messianic perception of the Sanhedrin's role continued to permeate the thought of later

supporters of its renewal. [115] Through the Sanhedrin, they thought to actualize the vision of a "Torah state", and expand the public weight of a religious way of life in Israel's marketplace of ideas. In other words, although the Sanhedrin was not presented as an institution with general legislative powers (as a counterweight to the Knesset) or as part of the state's ruling system,[116] it was still perceived as an ideological instrument that would infuse religious content into the Zionist idea.[117] This ideological foundation is what turned it into a target of secular and ultra-Orthodox opposition. Secularists feared an institution that would be a preliminary expression of the yearning to turn Israel into a theocracy. The ultra-Orthodox feared a religious internalization of national ideas.[118]

One can, however, suggest an entirely different ideological basis for establishing a halakhic institution that would ease the possibility of renewal by means of intra-halakhic legislative initiatives. For this purpose, the institution – which for obvious reasons should be referred to as something other than Sanhedrin – should refrain from becoming a state institution. Such a body would not be financed by the state, nor elected by it or by its citizens, nor compelled to report to it. In this way, it would be severed from ordinary political discourse regarding religious issues and also from involvement in intra-religious politics and political parties. It would, thereby, be differentiated from the Chief Rabbinate, from the rabbinic courts currently functioning in Israel, and from the councils of sages presently attached to some religious parties. The private institution would work professionally to clarify important halakhic issues, particularly those bearing on the friction points between religion and state. The norms adopted in this institution would be valuable only by virtue of its members' halakhic authority and by virtue of its rulings being accepted by the religiously observant public.

The institution might function as a judicial system that would implement halakhic judicial activism. Yet, in my view, its main importance would be measured by its ability to issue regulations, namely, to shape contemporary realities through halakhic legislation. This institution would thereby follow in the footsteps of Hillel the Elder,[119] Rabbenu Gershom *Ma'or ha-Golah* [The Light of Exile],[120] and various communal leaders in Ashkenaz and Spain.[121] Just as they had not acted in order to promote a national or messianic agenda but to realize the potential of Halakhah as a "Torah of life" confronting reality, so too the proposed modern institution.

This approach to the character and goals of the proposed halakhic institution poses no threat whatsoever to the secular public. As a private endeavor, it does not impinge on the state's character, nor does it promote or hinder any specific views about its character. It does not serve as an alternative to the Knesset, and its normative output is not presented to the secular public. Quite the contrary. Enabling, or even empowering a religious, ethnic, or cultural minority to shape its own way of life within the communal framework is highly compatible with a liberal vision of a multicultural society.[122] In any event, it is clear that the secular public cannot and should not have any influence on the functioning of the institution.

What about the ultra-Orthodox? It is evident that, if prominent ultra-Orthodox authorities were to boycott the institution, the value of its rulings would be largely meaningless as far as their acceptance in both the Orthodox and ultra-Orthodox communities is concerned. Hence, it would be of particular importance to clarify to the ultra-Orthodox the difference between this institution and the Chief Rabbinate and other state institutions. The fact that the institution is private should preclude

the widespread ultra-Orthodox fears of introducing national notions into the halakhic-religious system. In this structure, the institution does not pour religious contents into the state because it is external to it. The religious Zionist group, which is interested in endowing the state with religious meaning, might oppose the institution because of its private character. On the other hand, if the halakhic solutions that the institution would propose were to lower the tensions between religion and state, this would be an important achievement from the perspective of religious Zionists, a group interested in harmonizing its religious life with an unqualified embrace of the state.

The success of the institution obviously depends on the ability of halakhic leaders, including ultra-Orthodox ones, to use Halakhah in order to provide concrete solutions to real problems. Might the gathering of the generation's great rabbis – in a communal institution outside the political and governmental establishment, and of critical spiritual weight – change the dynamics of contemporary rabbinic adjudication? Might the empowerment of the rabbis through institutional means help them, in the long run, to consider halakhic innovations out of responsibility for the future of Halakhah, and out of their wish to adjust its implementation to a sovereign state in which most citizens are secular? Note that the expected outcome of the regulations issued by the institution should not be examined in terms of "leniency" or "strictness". On certain issues, the collective wisdom of the institution might support halakhic entrenchment and reject external influences,[123] and on others it might opt for a certain openness aiming to gain from the surroundings. In practice, the institution will probably fluctuate between these two trends, leading to some long-term balance between openness and isolation. The crucial issue is the very act of halakhic struggle with the challenges of contemporary realities through an

independent center of halakhic authority, which functions as "the high court of the generation" and can therefore formulate halakhic solutions by resorting, *inter alia*, to halakhic legislation. For some, the institution would operate as an *ab initio* arrangement – a continuation of historical Halakhah that rejects the halakhic deviation embodied in the phrase "all innovation is forbidden by the Torah". For others, it would operate as an *ex post facto* compromise – a modern expression of halakhic pragmatism. Whatever the case, its successful operation should return Halakhah to its natural place, as an expression of a culture relevant to modern life and as a legal system dealing with the tension between religion and state.

Is the time ripe for this development? The question lies at the door of contemporary halakhic leaders.

Summary

6

Halakhah is by nature adaptive. Its continued existence – through changing eras, places, and cultural influences – is an amazing phenomenon from many angles: historical, cultural, theological, philosophical, and legal. As in the past, a dynamic reality compels Halakhah's contemporary bearers to engage in intra-halakhic renovation. This general truth is particularly valid concerning issues at the center of the discord between religion and state. Unfortunately, at least three cumulative facts hinder halakhic creativity in these areas. The first is the tragic fact of the absence of Jewish sovereignty for a prolonged period. As a result, halakhic readiness for the real possibility of religious existence within a political framework was impaired. The second fact is that the renewal of Jewish sovereignty did not entail a commitment to religion, and most Israeli citizens are indifferent to it and prefer a non-halakhic judicial system. Third, the fact that for several centuries, the jurisdiction of halakhic law has been restricted so that Halakhah's contemporary bearers have lost some of the instincts that had characterized their ancestors and had enabled them to cope with the "outside" in vital and creative ways, both intellectually and spiritually.

In this paper, I offered four types of intra-halakhic strategies for religious renewal to replace the intellectual barrenness and the legal passivity characterizing the halakhic response to issues of religion and state. Each one offers a different type of solution, and each one is hindered by serious difficulties.

The first strategy proposes deliberate silence. This is an easy solution to implement, but involves anarchic elements from a religious perspective, since it exempts Halakhah from responsibility for important and crucial segments of modern

human existence. By contrast, the second strategy suggests that Halakhah should assimilate and internalize suitable elements from the outside culture. This behavioral model has broad and solid support in halakhic tradition but is currently hard to implement, *inter alia* because a majority of Jews are alienated from Halakhah in both their identity and their consciousness.

The common denominator of these two options is that they offer an overarching meta-halakhic solution to Halakhah's difficulties in coping with contemporary realities: the tension between religion and state will lessen if Halakhah contracts (by proclaiming lack of conceptual or institutional jurisdiction), or if religion assimilates the state's prevalent norms (obviously, depending on various conditions). By contrast, the two latter options contend with reality by establishing specific arrangements.

The third strategy focuses on offering a judicial response, activist in nature, to the questions that arise. This has consistently been the prevalent way of developing Halakhah, but it may not suffice when the gap between halakhic precedent and contemporary reality is wide. In such circumstances, it is worth considering a judicial activism that aims not only to interpret extant halakhic categories but also to formulate new ones, relying on Halakhah's basic principles and trends.

The final strategy focuses on the implementation of halakhic authority and proposes to revive what has been lost in Jewish life: a supreme institution for setting halakhic arrangements on central issues in the public agenda. The road will thereby be paved not only for activist adjudication, but also for halakhic legislation whose purpose and mission is to regulate contemporary realities in the spirit of Halakhah.

All four strategies of action suffer from clear limitations. Only one option is worse than them: the persistence of halakhic silence and the entrenchment behind the atrophying rule, "all innovation is forbidden by the Torah".

Notes

1. The definition of who is a Jew has normative implications for citizenship, conversion, registration, and the Israeli Law of Return.
2. The content of laws of marriage, divorce, children's custody, human rights for women, and so forth.
3. Arrangements concerning the Sabbath and festivals, *kashrut* in public institutions, the symbols of the state, the operation of state-owned companies, state institutions, and so forth.
4. The issue of pluralism touches on inter-religious and intra-religious tensions between various movements within Judaism.
5. Questions bearing on religious councils, state-sponsored rabbinic institutions (the Chief Rabbinate, local rabbis, and military chaplains), the Ministry of Religious Affairs, the financing of *yeshivot*, and so forth.
6. Such as: the role of religion in the definition of the state, the shaping of its identity, and the direction of its activities on the one hand, and the implications of the state's existence for the shaping of normative, philosophical, and religious's religious significance on the other hand. See for instance, Charles S. Liebman, *Religion, Democracy, and Israeli Society* (Amsterdam: Harwood, 1997), ch. 1. For a general description see Samuel N. Eisenstadt, "Cultural Traditions and Political Dynamics", *British Journal of Sociology* 32 (1981), 151–181; Yeshayahu Leibowitz, "Religion in the State and the State in Religion" [Hebrew], *in Judaism, Jewish People and the State of Israel* (Tel-Aviv: Schocken, 1975), 121–145. An abridged English translation, entitled "The Crisis of Religion in the State of Israel" appears in Yeshayahu Leibowitz, *Judaism, Human Values, and the Jewish State*, ed. Eliezer Goldman (Cambridge, Ma.: Harvard University Press, 1992), 158–173.
7. For a description of the tension between state law and Halakhah, see Yedidia Z. Stern, "Living with Normative Duality: The Values at the End of the Tunnel", *Jewish Political Studies Review* 12 (2001), 95.
8. See, for instance, Ruth Gavison, "Religion and State: Separation

and Privatization" [Hebrew], *Mishpat u-Mimshal*: *Law and Government in Israel* 2 (1994), 55; Moshe Negbi, "The Principle of Freedom from Religion" [Hebrew], in *Freedom of Conscience, Religion, and Culture in Israel: The Legal Dimension* (Jerusalem: Hemdat - Council for Freedom of Religion in Israel, 1998); Gideon Sapir, "Religion and State: A Fresh Theoretical Start", *Notre Dame Law Review* 75 (1999), 579.

9. For an anthology dealing with many aspects of multiculturalism see Menachem Mautner, Avi Sagi and Ronen Shamir, eds., *Multiculturalism in a Democratic and Jewish State: Memorial Volume for Ariel Rosen-Zvi* [Hebrew] (Tel-Aviv: Ramot, 1998).
10. For instance, increasing numbers of Israelis who are not Jews, mainly due to the massive immigration from the former Soviet Union. In the future, dissension on religion and state issues will probably no longer be an intra-Jewish matter as it has been so far.
11. A rise in private living standards, increased economic competition, higher unemployment, exposure to various aspects of globalization, and so forth.
12. Prominent changes include: liberal values that have struck roots within the secular public, and the adoption of an ultra-Orthodox or quasi-ultra-Orthodox *Weltanschauung* among many religious-Zionists.
13. Thus, for instance, the move of ultra-Orthodox residents from their traditional concentrations in Bnei-Berak and Jerusalem to mixed cities widens friction at the local level. On the other hand, the ongoing process of drawing away religious residents to settlements beyond the Green Line creates homogeneous communities. For a description and analysis of the phenomenon of ultra-Orthodox segregation see Yosef Shilhav, *A "Shtetel" (Small Town) Within a Modern City: A Geography of Segregation and Acceptance* [Hebrew] (Jerusalem: The Jerusalem Institute for Israel Studies, 1991).
14. Ultra-Orthodox empowerment in the Knesset through the

mobilization of many traditionalist votes and of communities that seek to express their ethnic identity on the one hand, and the secular reaction that comes to the fore, for instance, in the prominent place of religion and state issues in the platform of the Shinui party, on the other hand.

15. In this context, it is important to emphasize the transition of Israeli society from one of consensus to one of crisis, a fact with implications for Israeli politics and for the relationship of religion and state. See, for instance, Asher Cohen and Bernard Susser, "Changes in the Relationship between Religion and State: Between Consociationalism and Resolution" [Hebrew], in Mautner et. al., *Multiculturalism in a Democratic and Jewish State*, 675.
16. For a description and analysis of the monistic approach to Halakhah see Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse*, tr. Batya Stein (forthcoming).
17. The ninth principle of Maimonides' Thirteen Principles of the Faith, in its popular version, states: "I believe with perfect faith that this Torah will not be changed, and that there will never be any other law from the Creator, blessed be His name" (see the Daily Prayer Book after the Morning Service, and Maimonides, *Commentary on the Mishnah*, introduction to Sanhedrin, ch. 10). In halakhic rulings, this theological principle assumes concrete normative meaning (see note 19 below).
18. Thus, for instance, R. Yitzhak Yaakov Weiss (Chief Judge of the *Edah Haredit* court, who died in 1989), writes as follows in his book *Responsa Minhat Yitzhak* (Part 3, #38), under the title "Lecture on Contemporary Practical Halakhic Problems at a Rabbis' Conference":

    I wish to stress one thing concerning the issues mentioned, and even though it is redundant to refer to it I must emphasize this matter because of the outrageousness of the times: despite progress and despite the constant new inventions, we do believe with perfect faith that the Torah we received at Sinai will not be changed and

there will never be any other law from the Creator, blessed be His name. There is no question of us comparing and adjusting the Holy Torah to the circumstances of our life, but only of us adjusting ourselves and the circumstances of our lives to our Holy Torah, since only then will the Torah live. The opposite, God forbid, is a transgression of the Torah, as the *Ktav Sofer*, of blessed memory (in his responsa on *Orah Hayyim*, #20), commented on the verse: "It is time to act for the Lord; they have made void thy Torah" [Psalms 119:126], saying it speaks of those who think abominable thoughts unwanted by God, of which there are now many, just as there are many who think themselves wise and know the times in order to set times for the Torah, holding that "it is time to act for the Lord" means not all times are the same. Thereby, "they have made void thy Torah" for they are wrong, mislead the many, have caused many losses and, by setting times for the Torah, have hurt many souls, may God save them, for the Torah is eternal in every place and at all times. Hence, whenever a question or a new problem is brought before us regarding some new invention, we must solve it only according to the Holy Torah and, with God's help, find the proper source in the Talmud and the responsa to issue a true ruling.

19. More precisely: each halakhist proposes his preferred solution. Pluralism is evident in the very legitimization of dispute and in the internalization of the option that "these and these are words of the living God". R. Yom Tov b. Abraham Ishbili (known as Ritba) comments on the meaning of this statement (*Hiddushei ha-Ritba le-Masekhet Eruvin*, [Jerusalem: Mosad Harav Kook, 1974]), 13b:

    The French rabbis, of blessed memory, asked how can both be the words of the living God when one allows and the other forbids? And they explained that, when Moses ascended to Heaven to receive the Torah he was shown, concerning every matter, forty-nine reasons for forbidding and forty-nine reasons for allowing. And he asked the Holy One, blessed be He, about this matter,

and he was told that it would be for the sages of Israel in each generation to decide, and the ruling would follow them.

Nissim Gerondi also supports this view in his commentary: "He allowed the sages in each generation to decide on rabbinical disputes according to their view… since we have been commanded to follow the sages in each generation, whether they agree on the truth or its opposite" (R. Nissim Gerondi, *Derashot Ha-Ran*, ed. Aryeh Leib Feldman [Jerusalem: Shalem Institute, 1977]), #5. These and other sources are quoted and analyzed in Shimshon Ettinger, "Controversy and Truth: On Truth in the Halakhic Context" [Hebrew], *Shenaton ha-Mishpat ha-Ivri: Annual of the Institute for Research in Jewish Law*, 21 (1998–2000), 37.

20. For a general description of the dynamic character of Halakhah and its development in response to changing historical reality, see Menachem Elon, *Jewish Law: History, Sources, Principles*, tr. Bernard Auerbach and Melvin J. Sykes (Philadelphia and Jerusalem: Jewish Publication Society, 1994), chs. 1 and 2.
21. Aharon Barak, Chief Justice of the Israeli Supreme Court, states at the opening of a book dealing with statutory interpretation: "Legislation by the political authorities (the legislative and the executive) is essentially different from legislation by the judiciary. The former (by the political authorities) is directly concerned with the creation of legal norms. The latter (by the court) emerges in the course of the judicial activity and as its by-product". Aharon Barak, *Interpretation in Law* [Hebrew] (Jerusalem: Nevo, 1994), vol. 2, *Statutory Interpretation*, 41–42. Judicial review as well, which is the paramount expression of independence in the court's activity, is exclusively focused on examining the validity of a norm enacted by the legislature (in light of another norm, higher in the constitutional ranking, which was also issued by the legislature). The court does not replace the legislature in determining the content of the normative arrangement, but only determines the legitimate limits of the legislature's use of its authority.

22. This in no way contradicts the fact that, in practice, some situations do call for judicial creativity. For a judge's perspective concerning suitable criteria when applying judicial creativity and concerning the authority and formal legitimacy of each type of creativity, see Aharon Barak, "The Varieties of Judicial Creativity: Interpretation, Filling Lacunae, and Developing the Law" [Hebrew], *Ha-Praklit*, 39 (1990), 267.
23. Thus, according to Ruth Gavison, for instance, the High Court of Justice has changed its perception of the judicial role: it currently assumes responsibility not only for fair adjudication between litigating parties but also for leading society in "the right moral direction". See Ruth Gavison, Mordechai Kremnitzer, and Yoav Dotan, *Judicial Activism For and Against: The Role of the High Court of Justice in Israeli Society* [Hebrew] (Jerusalem: Magnes Press, 2000), 75.
24. See Aharon Barak, "Judicial Philosophy and Judicial Activism" [Hebrew], *Tel-Aviv University Law Review* 17 (1992), 475–501.
25. For a broad definition of the court's role, see Mordechai Kremnitzer's stance in Gavison et. al., *Judicial Activism For and Against*, 177–179.
26. Maimonides states in Laws of the Foundations of the Torah 9:1 (Maimonides, *Mishneh Torah, The Book of Knowledge,* tr. and ed. Moses Hyamson [Jerusalem: Jerusalem Boys Town, 1962]):

    It is clearly and explicitly set forth in the Torah that its ordinances will endure for ever without variation, diminution or addition; as it is said, "All this word which I command you, that shall ye observe to do; thou shalt not add to it, nor take away from it" (Deuteronomy 13:11) and further it is said, "but the things that are revealed belong unto us and to our children for ever, that we may do all the words of this Law" (Deuteronomy 29:28). Hence the inference that to fulfill all the behests of the Torah is an obligation incumbent upon us for ever, as it is said, "It is an everlasting statute throughout your generations" (Leviticus 23:14; Numbers 18:23).

It is also said, "It is not in heaven". Hence the inference that a prophet is forbidden to make innovations in the Torah… for the Lord enjoined Moses that this Commandment shall be unto us and to our children after us for ever. And God is not a man that he should lie.

For a broad discussion of this question by various thinkers, see Hermann Cohen, *Religion of Reason Out of the Sources of Judaism*, tr. Simon Kaplan (New York: Frederick Ungar, 1972), 338–370; Zeev Falk, *Religious Law between Eternity and Change: On the Dynamism of Jewish Law in Jewish Thought and on Jewish, Christian and Muslim Attitudes towards Legal Change* [Hebrew] (Jerusalem: Mesharim, 1986), 10–67; Paul Tillich, *Theology of Culture* (Oxford: Oxford University Press, 1959), 7.

27. The conflict over the very possibility of distinguishing between "legal" and "religious" sections in Halakhah is well known. On this issue, Elon holds: "The term *mishpat ivri*, in its currently accepted meaning, includes only those parts of the Halakhah corresponding to what generally is included in the *corpus juris* of other contemporary legal systems, namely, laws that govern relationships in human society, and not the precepts that deal with the relationship between people and God" (Elon, *Jewish Law* 105). By contrast, Yitzhak Englard considers this distinction artificial. His analysis leads to conclusions that "undermine the assumption whereby the parts of Halakhah can be isolated and severed from the religious meaning attached to all its sources". See Yitzhak Englard, "The Study of Jewish Law: Its Essence and Aims" [Hebrew], *Mishpatim* 7 (1976), 36.
28. The religious element specific to the relationship between human beings and God is clear. Thus, for instance, in the context of the laws of repentance, M. Yoma 8:9 states various ways of atoning for a-normative acts that were performed in each one of these relationships: the holiness of the Day of Atonement suffices to atone for a wrongful act that is essentially religious ("between man and

God"), but cannot atone for a wrong that is essentially social-human ("between man and man"). The latter type of offense is atoned only when the sinner assumes the initiative for approaching the injured party, thus overtly gesturing the existence of a personal commitment to mend his/her ways ("regains the good will of his friend"). Similarly, R. Ovadyiah Yosef rules that a minor is not responsible for acts s/he performed at the level of the relationship between man and God, but bears responsibility for all the activities s/he performed at the level of the relationship with another human being. See R. Ovadyiah Yosef, *Responsa Yabi`a Omer*, Part 8, *Hoshen Mishpat*, #6.

29. Elon classifies the Written Law as supreme legislation, and the enactments and regulations issued over time as subordinate legislation. He also emphasizes that, contrary to other legal systems, supreme and subordinate legislation in Jewish law do not operate beside one another since, as noted, the supreme legislation is a single event set for all times. Elon, *Jewish Law*, vol. 2, 478–481.
30. In the picturesque metaphor of Haim Cohen, "Concern for Tomorrow" [Hebrew], *Ha-Praklit* 3 (1946), 38, 43.
31. For a more detailed description of the historical sequence and for further references see Yedidia Z. Stern, "Public Leadership as Halakhic Authority", in *Judaism: A Dialogue Between Cultures* [Hebrew], ed. Avi Sagi, Dudi Schwartz, and Yedidia Z. Stern (Jerusalem: Magnes Press, 1999), 235.
32. On this matter, see the following passage from Eliezer Goldman, "Halakhah and the State" [Hebrew], in *Expositions and Inquiries: Jewish Thought in Past and Present*, ed. Avi Sagi and Daniel Statman (Jerusalem: Magnes Press, 1996), 408:

    Emancipation and the abolition of Jewish autonomy were the kiss of death to the tradition of practical halakhic rulings on issues bearing on public life. In the course of only a few decades, large sections of Halakhah were transformed from central, daily concerns into arcane lore. In these circumstances, the learning atmosphere at

the larger study centers became academic. Typical of the reality of Torah study at the end of the nineteenth and during the twentieth centuries is the large proportion of *yeshivah* heads within the circles of prominent Torah figures and the relatively small proportion of halakhists distinctively focusing on judicial rulings. In previous generations, the very separation between the rabbinate and the leadership of a *yeshivah* would have been quite exceptional.

33. Note that this is not the necessary state of affairs. A state could be possible where the leadership and most of the citizens are secular but its legal system draws on halakhic sources to a smaller or larger extent. Recourse to religious law need not be a product of commitment to a religious ideology; its sources could be national sentiment, historical attachment, and a yearning for Jewish identity, tradition, or culture. Furthermore, in long forgotten times, Halakhah was perceived as a stabilizing and cohesive foundation for people with different world views. In Zionism's early days, some of the secular leaders of the Hovevei Zion movement sought to refrain as far as possible from a head-on confrontation with Orthodox Jewry, even at the cost of imposing Halakhah on the Jewish community in Eretz Israel. Ehud Luz describes this phenomenon in *Parallels Meet: Religion and Nationalism in the Early Zionist Movement*, tr. Len J. Schramm (Philadelphia: Jewish Publication Society, 1988) as "religiosity from love" (33). Thus, for instance, Eliezer Ben-Yehuda, a Hebrew *maskil* [scholar] with a distinctive national-secular orientation, held that religious laws are "the laws of our state", and "our desire is not to transgress the commandments of the Torah and Talmud. We want to make Halakhah the cornerstone of all our efforts" (34). Ben-Yehuda and others supported these views because they thought they would thereby promote the national revival. Ultimately, these attempts failed, both due to the strong opposition of reformers within Hovevei Zion who refused to "surrender to clericalism", and because the settlers chose to rebel, covertly as well as openly, against the religious way of life coerced

upon them from outside.

34. Parenthetically, note that the implications of this reality for the shaping of Israel's Jewish identity cannot be ignored. Most of the Jewish canon, which is the documentation of our heritage, involves variations on "halakhic literature." Traditionally, the leadership of the Jewish people was largely in the hands of halakhic jurists. At least in the perception of some observant Jews, the alienation of the Jewish state in all its three branches of power from this dominant aspect of Jewish tradition drops a crucial aspect of the state's Jewishness.
35. Furthermore, it is highly questionable whether, in previous eras of Jewish sovereignty, political functioning relied on Halakhah.
36. For a description of a normative lacuna in this area, see Yedidia Z. Stern, "The Halakhic Approach on Political Affairs" [Hebrew], *Mishpat u-Mimshal* 4 (1997), 215, 237.
37. For various ways of contending with this question, see Goldman, Expositions and Inquiries, 396–423. Goldman states:
    Whoever holds that the formulation of Halakhah can remain as is, awaiting until questions arise and consulting a sage on each specific question separately, shows minimal understanding of a state's legal requirements. A modern society and a modern economy demand the possibility of prior evaluation concerning the legality of various acts. This is true even of private law, and certainly of public law… It is imperative to formulate clear and detailed rules of forbidden and allowed, in code form if possible, concerning the actions of the state." (402)
38. Islam too, as an all-inclusive doctrine in its religious world view, faces similar challenges. See Shuki Friedman, "Egypt: Between Liberalism and Islam", in *The Conflict: Religion and State in Israel,* ed. Nahum Langental and Shuki Friedman [Hebrew](Tel-Aviv: Yediot Aharonot, 2002), 319–328.
39. The more prominent examples are Eliezer Yehuda Waldenberg, *The Book of State Laws* [Hebrew], 3 vols. (Jerusalem: Yitah, 1952);

Yehuda Shaviv, ed., *At the Crossroads of the Torah and the State* [Hebrew] (Alon Shevut: Tsomet, 1991); Yitzhak Halevy Herzog, *Constitution and Law in a Jewish State According to the Halakhah* [Hebrew], ed. Itamar Warhaftig, 3 vols. (Jerusalem: Mosad Harav Kook and Yad Harav Herzog, 1989); Shaul Israeli, *The Right Pillar* [Hebrew] (Tel-Aviv: Moreshet, 1966); Shlomo Goren, *The Torah of the State* [Hebrew] (Jerusalem: Idra Rabba, 1996); Shlomo Goren, *The Mishnah of the State* [Hebrew] (Jerusalem: Idra Rabba, 1999), and the halakhic journal *Tehumin* (Tsomet, Alon Shevut), which regularly carries sections on such subjects as "society and law", "society and the economy", and "the army and defense".

40. See Elon, *Jewish Law*, 9–10, 77–78.
41. For an initial discussion of these questions see Yitzhak Halevy Herzog, "Minority Rights According to Halakhah" [Hebrew], *Tehumin* 2 (1981), 169; Yehuda Gershoni, "Minorities and Their Rights in the State of Israel In Light of Halakhah" [Hebrew], Tehumin 2 (1981), 180; Elisha Aviner, "The Status of Moslems in the State of Israel" [Hebrew], *Tehumin* 8 (1987), 337.
42. Competition can be international or intra-national. Thus, for instance, at the international level, the commercial law enacted in Israel competes with parallel systems in foreign countries. Competition follows from the fact that the cost of moving businesses from one country to another is relatively low, and managers can therefore choose the venue of their incorporation and the place from which they will run their businesses according to the normative package most convenient for them. The same is true at the national level: American states compete with one another when enacting state corporate law, seeking to make the most attractive offer to the managers of large corporations. Some refer to this race, in line with their perception of its efficiency, as "the race to the bottom".
43. Maimonides states in Laws Relating to Ethical Dispositions and Moral Conduct 6:7 (*The Book of Knowledge, Mishneh Torah*), "If one sees that a person has committed a sin or gone on a wrong

path, it is a duty to bring the erring man back to the right path and point out to him that he is wronging himself by his evil course, as it is said 'Thou shalt surely rebuke thy neighbor' (Leviticus 19:17). See, for instance, Abraham Sherman, "The Approach of Halakhah toward Our Brethren who have Left the Path of Torah Observance" [Hebrew], *Tehumin* 1 (1980), 311; Simha Kook, "The Obligation to Rebuke" [Hebrew], *Tehumin* 7 (1986), 121.

44. For sources and references see, for instance, Yosef Ahituv, *On the Verge of Change* [Hebrew] (Jerusalem: Ministry of Education, 1995), chs. 16–17, 19; Nahum Rakower, *A Bibliography of Jewish Law* [Hebrew] (Jerusalem: Harry Fischel Institute, 1975), ch. 6.
45. See *Shulkhan Arukh, Hoshen Mishpat*, #34a: "A wicked person is an invalid witness, and if a valid witness knows that someone is evil, even though the judges are not aware of it, he is forbidden to testify with him, even if the testimony is true". The definition of "wicked" in this context is extremely broad. Thus, for instance, Maimonides states that "wicked" is a category including all those guilty of a transgression punished by flogging in the Bible or by the sages (Maimonides, Laws of Witnesses, ch. 10). This law was applied to secular Jews. See, for instance, M. Silberberg, "The Testimony of a Captive Child", *Divrei Mishpat* 2 , 236.
46. For an analysis and for sources on the ban on the wine of secular Jews see Zvi Zohar and Avi Sagi, *Circles of Jewish Identity: A Study in Halakhic Literature* [Hebrew] (Tel Aviv: Hakibbutz Hameuhad, 2000), and also R. Ovadyiah Yosef, *Responsa Yabi`a Omer*, Part 1, Yoreh De`ah, #11: "On the law concerning wine touched by an apostate who publicly breaks the Sabbath, whether it should be permitted so as not to shame him or whether it should be forbidden as the wine of Gentiles…"
47. Thus, for instance, R. Ovadyiah Yosef rules (*Responsa Yabi`a Omer,* Part 7, *Orah Hayyim*, #15: 6): "The author aptly notes in *Responsa Melamed Leho`il* (*Orah Hayyim* #29), dealing with the inclusion of a public Sabbath breaker in a ritual quorum, and writes

that the practice in Ashkenaz and Hungary is to show leniency on this question, since many are unaware of the gravity of this prohibition and are to be considered as children captive among the Gentiles. We also find this in the new *Responsa Biniyan Zion* (#23). The author of *Sho'el u-Meshiv* also used to say that, in America, public Sabbath breakers should not be disqualified from inclusion in a ritual quorum, because they are as children captive among the Gentiles".

48. R. Moses Feinstein, *Responsa Iggrot Moshe, Orah Hayyim*, Part 3, #22: "On the question of calling up to the Torah someone who publicly breaks the Sabbath and those who are heretics and so forth, the wicked should obviously not be honored even when it is necessary to extend them holy honors in the synagogue… Yet, a distinction is required: if the need is very great, and concerning honors that do not involve a blessing, leniency is in place even for heretics. Sabbath breakers, when it is known they do not do so maliciously, can even be called up to the Torah. Heretics, however, should not be called up to the Torah even when the need is very great".
49. Stern, "The Halakhic Approach", 235.
50. For a description of this phenomenon see, for instance, Ephraim E. Urbach, *On Zionism and Judaism: Essays* [Hebrew] (Jerusalem: WZO: 1985), 311–345; Yeshayahu Leibowitz, *The Torah and the Commandments Today: Lectures and Articles* 1943–1954 [Hebrew] (Tel Aviv: Massada, 1954); Yitzhak D. Gilat, *Studies in the Development of the Halakhah* [Hebrew] (Ramat Gan: Bar-Ilan University Press, 1992); Goldman, *Expositions and Inquiries*, 316-325. Halakhists themselves are aware of, and even admit to, a need to react to changes in reality. See, for instance, Joseph Albo, *Sefer Ha-Ikkarim* (Philadelphia: The Jewish Publication Society of America, 1930) 3:13; Nahman Krokhmal, *Guide of the Perplexed of Our Time* [Hebrew], ed. Yom Tov Lipman Zunz (Lemberg: Scheider, 1851), ch. 13. In the sixteenth century, R. Joseph b.

David Ibn Lev (known as Mahari ben Lev, d. Turkey 1580), in his *Responsa*, Part 4, #4, states: "One generation passes away and another generation comes, and they allow as they see fit or according to the changing times". In the twentieth century, R. Ben Zion Meir Hai Uziel (the first Sephardi Chief Rabbi in Eretz Israel, d. 1953), *Responsa Mishpetei Uziel*, vol. 4, *Hoshen Mishpat*, #28, concludes: "We therefore learn that the law changes according to the changing times".

51. These works—the first fruits in the area—build, one after another, the backbone of the scientific study of Halakhah. The area is undergoing an impressive scientific renaissance, (though not free of crises), which has so far focused on laying the foundations and building an infrastructure. It exceeds the confines of this paper to mention the dozens of monographs written over the last two generations, at a pace increasing from decade to decade, which aim to use the best scientific methods and even aim to develop their own in order to trace the development of Halakhah's legal institutions. From a historical point of view, the group of scholars in this realm is the "desert generation", plowing the first furrow in a hard, neglected, and fallow, though potentially lush, soil. The scientific creativity of this pioneering group, which sows in tears, will eventually be acknowledged as a national endeavor resembling that of Eliezer Ben-Yehudah, who revived the Hebrew language. A great future lies ahead of this discipline, not only because the vast scope of the current endeavor barely touches the margins of its potential, and not only because basic research by nature creates follow-up studies that expand it but also, and mainly, because the study of the halakhic legal development provides wide room for the creation of a national, cultural, social, and religious Jewish identity. If the historical memory of Jewish identity relies largely on the Jewish canon, and if halakhic literature is a vital element within it, the importance of this discipline is obvious. Additionally, the scientific study of the development of Halakhah and its legal

institutions is also important as a leverage energizing a new halakhic creativity, both updated and authentic, for future generations. A detailed understanding of Halakhah's modes of functioning in the past paves the way (in the essential, subject-matter sense) and "straightens the crooked" (in the sociological sense of "facilitating" the process) for anyone wishing to go on developing Halakhah in the future.

52. See, for instance, Gedaliah Alon, *The Jews in Their Land in the Talmudic Age* (70-640 c.e.), tr. and ed. Gershon Levi, vol. 1 (Jerusalem: Magnes Press, 1980), 41–55.

53. The discussion below relies heavily on the comprehensive book by Avraham Aderet, *From Destruction to Restoration: The Mode of Yavneh in the Reestablishment of the Jewish People* [Hebrew] (Jerusalem: Magnes, 1970), and the references he cites. The gist of the book is a detailed analysis of the modes of halakhic reaction to the destruction of the Temple in three main realms: sin and atonement, purity and impurity, and land-bound commandments.

54. A touching expression of this feeling emerges in the passage from Tosefta Sotah, 15:11 (*The Tosefta*, tr. Jacob Neusner [New York, Ktav, 1979]):

    After the last Temple was destroyed, abstainers became many in Israel, who would not eat meat or drink wine. R. Joshua engaged them in discourse, saying to them, "My children, on what account do you not eat meat?" They said to him, "Shall we eat meat, for every day a continual burnt offering [of meat] was offered on the altar, and now it is no more?" He said to them, "Then let us not eat it. And why are you not drinking wine?" They said to him, "Shall we drink wine, for every day wine was poured out as a drink-offering on the altar, and now it is no more". He said to them, "Then let us not drink it". He said to them, "But if so, we also should not eat bread, for from it did they bring the Two Loaves and the Show-Bread. We also should not eat figs and grapes, for they would bring them as first fruits on the festival of Atseret (*Shavu`ot*). They fell silent.

55. "Since the day the Temple was destroyed, an iron wall separates Israel from their Father in Heaven". TB Berakhot, 32b.
56. Yitzhak F. Baer, *Israel among the Nations: An Essay on the History of the Period of the Second Temple and the Mishnah and on the Foundations of the Halakhah and Jewish Religion* [Hebrew] (Jerusalem: Bialik Institute, 1955), 19.
57. See Gedaliah Alon, "The Sphere of the Laws of Purity" [Hebrew], Tarbiz 9 (1937), 1–10. The article also appears in *Jews and Judaism and the Classical World: Studies in Jewish History in the Times of the Second Temple and Talmud*, tr. Israel Abrahams, vol. 1 (Jerusalem: Magnes Press, 1977), 190–234.
58. According to Aderet, *From Destruction to Restoration*, 5, these are the conclusions of Robert Travers Herford, *The Effect of the Fall of Jerusalem upon the Character of the Pharisees* (London: Society for Hebraic Studies, 1917).
59. According to Aderet, *From Destruction to Restoration*, Part 1.
60. Ibid., Part 2.
61. Ibid., Part 3. These commandments concerning holiness, known as "borderline" [*kodshei gevul*] or "light" [*ha-kodashim ha-kalim*], were equated after the destruction of the Temple with the "holy of holies".
62. For a discussion of these enactments, see Alon, *Jews and Judaism and the Classical World*, 65–88, 205–234. See also Aderet, From Destruction to Restoration, 28–33.
63. Zeev Yavets, *The History of the Jewish People* [Hebrew], (Tel-Aviv: Ahiever, 1928), vol. 6, vii.
64. Leibowitz, "The Crisis of Religion in the State of Israel", 158.
65. On the transition from the first to the second period, see ch. 3, section 1 above. Moshe Silberg describes this transition as follows in "The Law in the Hebrew State" [Hebrew], *Ha-Praklit Jubilee Book* (1993), 150-151:

    At the end of the tenth and beginning of the eleventh centuries, the autonomous Jewish center in Babylon crumbled, and national

hegemony shifted to countries in Northern Africa and Western Europe. After a thousand years of national, legal-cultural autonomy in the countries of pagan Rome, Christian Byzantium, Sassanid Persia, and the Arab Caliphate (in Baghdad), the national center wandered into an alien, hostile environment that does not accord any "legal status" to the remnants of the people in exile. From then onward, there is no more Jewish rule in the Jewish public arena throughout the countries of their exile, except for a few paltry, limited, negligible concessions occasionally granted by a local ruler.

66. 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*, ed. Daniel Elazar (New Brunswick: Transaction Publishers, 1997), 183–213.
67. See, for instance, Gerald Blidstein, "Individual and Community in the Middle Ages", in Elazar, *Kinship and Consent*, 217–258; Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (New York: Jewish Theological Seminary of America, 1924).
68. Custom and regulations both serve as a legal instrument in the creation of a new halakhic norm. The difference between them follows from their source of authority: the enactment is issued by a recognized authority whereas custom is determined by an undefined group within the public. On these grounds, some sages hold that the power of custom to abolish Halakhah is limited, as long as it has not been formulated as a regulation. Others hold that custom too can be a source for the creation of new laws. See Elon, *Jewish Law*, 880–885.
69. Indeed, the halakhic strategies of action that will be presented here are not exclusive to the solution of religion and state questions. They can also be used to provide halakhic responses to a new reality in all areas. In the following discussion, however, I will stress the religion and state aspect that is at the focus of the present

discussion both in the analysis of the options and in the examples.

70. Stern, "The Halakhic Approach on Political Affairs", sections 2 and 3. My discussion here relies on this analysis.
71. Leibowitz, "Religion in the State and the State in Religion", 195-196.
72. This appears to have been the view of the Sephardi Chief Rabbi of Tel Aviv, the late R. Hayyim David Halevi, regarding the proper "political or economic regime" according to Halakhah: "In a certain area, the formulations of the Torah are deliberately cryptic and vague. No clear political or economic regime can be found in the Torah… and this is also true concerning several areas of social and political life. In my view, this is the power and greatness of the Torah, which does not sustain a clear and defined regime, neither political nor economic". See Hayyim David Halevi, *Aseh Lekha Rav* (Tel-Aviv: ha-Va`ad le-Hotsa'at Kitvei ha-Gaon ha-Rav Hayyim David Halevi, 1981), part 4. For an analysis of this position and its illustration in various areas of R. Halevi's thought, see Yedidia Z. Stern, *Fixed Halakhah in a Changing World: Policy and Society in the Work of Hayyim David Halevi* [Hebrew], (in press).
73. Halakhists banning the transfer of territories include, *inter alia*, Shalom Dov Wolpo, *Da`at Torah: On the Situation in the Holy Land* [Hebrew] (Kiryiat Gat: n. p., 1981); Moshe Zvi Neria, *The Land of our Heritage* [Hebrew](Kfar ha-Ro`eh: n. p., 1994), 23–27; Shlomo Hayyim Hacohen Aviner, *A People and Their Land* [Hebrew](Beth-El: Sifriat Havah, 1999), 26–49, 219–222; Bezalel Zolty, "Keeping the Liberated Territories" [Hebrew], *Torah she-be-al Peh* 11 (1969), 43–54; Shlomo Yosef Zawin, "The Defense of Areas in Eretz Israel: A Religious War" [Hebrew], T*orah she-be-al Peh* 11 (1969), 31–47; Avraham Elkana Shapira, "Returning Areas of Eretz Israel" [Hebrew], *Morashah* 9 (1975), 15–21; Ya`akov Ariel (Stiglitz), "Halakhic Aspects of the Problem of Withdrawing from Eretz Israel" [Hebrew], *Morashah* 9 (1975), 31–47; Zvi Yehudah ha-Cohen Kook, "On the Validity of the

Decision to Abandon Part of the Land of Israel" [Hebrew], *Tehumin* 13 (1992–1993), 192; Shlomo Goren, "The Holy Lands and the Concern for Human Life" [Hebrew], *Tehumin* 15 (1995), 11–22; Eliav Schochetman, "Land for Peace?" (Rejoinder) [Hebrew], *Tehumin* 17 (1997), 107–120. Halakhists who do allow the return of areas of Eretz Israel include Ovadyiah Yosef, "Returning Areas of Eretz Israel and Protecting Life" [Hebrew], *Torah she-be-al Peh* 21 (1980), 12–20; Hayyim David Halevi, in *Not an Inch: A Torah Commandment?* [Hebrew] (Jerusalem: Oz ve-Shalom, 1978), 7–9; Mordechai Breuer, "Notes on Returning Areas of Eretz Israel and Protecting Life" [Hebrew] in *Not an Inch: A Torah Commandment?*, 10-16; Amnon Bezek, *"And Live by Them": A Test of Values* [Hebrew] (Jerusalem: Temurot, 4th edition, 2000); Shlomo Riskin, "Land for Peace" [Hebrew], *Tehumin* 16 (1996), 233–242.

74. Halevi, *Not an Inch*.
75. Naphtali Zvi Judah Berlin (Ha-Netsiv), in his commentary on the Torah, *Ha`amek Davar*, on Deuteronomy 17:14.
76. R. Joseph Dov Soloveitchik advocates this view. See Aaron Rakefet-Rothkoff, "A Biography of R. Joseph Dov Halevi Soloveitchik" [Hebrew], in *Faith in Changing Times: On the Doctrine of R. Joseph Dov Soloveitchik*, ed. Avi Sagi (Jerusalem: WZO, 1996), 17.
77. Obviously, none of these choices is final, and all merely indicate the halakhist's view of the proper balance in a given reality.
78. For a full presentation of the argument, see Stern, "The Halakhic Approach on Political Affairs".
79. The view of R. Abraham Yitzhak Kook on the authority of the Jewish government in Eretz Israel (*Responsa Mishpat Cohen*[Hebrew] [Jerusalem: Mosad Harav Kook, 1966] 337, #144), is well known: It appears that, when there is no king, and since the laws of kings have a bearing on the general state of the nation, these rights devolve to the nation as a whole. In particular, it seems

that every judge in Israel should be seen as a king, regarding parts of the laws of kings and particularly in all that concerns the people's leadership… As far as the people's leadership is concerned, whoever leads the nation implements the laws of kings, which deal with the needs of the nation as required by the time and the circumstances of the world.

And in any event, it is logical that regarding the laws of kings, which deal with the leadership of the people, authorized judges and general leaders certainly stand in the king's place…

R. Kook makes an *a fortiori* inference from the past to his times. If the Babylonian exilarchs wielded authority equivalent to that of kings, *a fortiori* that leaders agreed by the nation when living in its own land and under its own rule, at whatever level, placed there to lead the nation and not only to teach Torah… but they have the power of a court. Yet, those who *ab initio* were placed in their position to be the general and worldly leaders of the nation, like the kings of the Hasmonean house and their leaders, are obviously no less than the Babylonian exilarchs…When a leader of the nation is appointed to deal with all its needs, in royal style, with the people's and the court's consent, he certainly stands in the place of a king in regard to the laws of kings, which deal with public leadership.

80. Israeli, *The Right Pillar*, 59.
81. Waldenberg, *The Book of State Laws*, Part 3, 89–96 (responsum on a referendum on special issues).
82. Ovadyiah Hadaya, "Does the 'Law of the Kingdom is Law' Apply to the State of Israel?" [Hebrew], in Shaviv, *At the Crossroads of the Torah and the State*, 25, 32.
83. The compelling power of public consent is evident, for instance, in a ruling in *Shulhan Arukh, Yoreh De`ah*, # 228: 33, whereby "he who takes an oath stating he will not abide by a public regulation, is as if he swore in vain". R. Eliyahu (the Gaon of Vilna) explains the reason for this ruling: "since it is as if he had taken an oath to cancel a commandment". For extensive discussions on this issue

see Chaim Tchernowitz (Rav Tsa`ir), *Toledot Ha-Posekim*, Part 1 (New York: The Jubilee Committee, 1947), 137, 142; *Ze'ev Falk*, "The Halakhic Authority of the Spiritual Leadership" [Hebrew], in *Man in the Community: Proceedings of the Thirteenth Conference on Jewish Thought*, ed. Yitzhak Eisner (Jerusalem: Ministry of Education, 1973), 121–134; Ze'ev Falk, "Halakhah and Public Opinion" [Hebrew], *Hagut* 4 (1980), 131–135; Eliezer Berkowitz, *Halakhah: Its Power and Role* [Hebrew] (Jerusalem: Mosad Harav Kook, 1981), 166 ff.; Avraham Sherman, "Democracy and Communal Rule in Halakhic Sources" [Hebrew], *Year by Year* (1998), 215–222; Shmuel Safrai, "The Public as a Factor in Determining Halakhah" [Hebrew], in *Between Authority and Autonomy in Jewish Tradition*, ed. Avi Sagi and Zeev Safrai (Tel-Aviv: Hakibbutz Hameuhad, 1997), 493–500; Elon, *Jewish Law*, vol. 1, 54–59, and large sections of ch. 19 and the many references therein. Of particular interest is the stance proposed by R. Shlomo Fischer, who holds that the Torah has the character of a law, and the law draws its power from the people's consent (the covenant). Hence, the various rules on the enactment of Halakhah—including, for instance, the authority of the Sanhedrin, its coercive powers, the hierarchical system of norms along a time line (whereby later authorities cannot contest the ruling of previous ones), and so forth—all are based on public consent (rather than on some objective "truth" concerning the qualities or the merits of the halakhists). See Shlomo Fischer, *Sefer Beth Yishai* (Jerusalem: n. p., 2000), #15, 108–115.

84. "We make no decree upon the community unless the majority are able to abide by it" (TB Avodah Zarah 36a); "Any decree a court should issue, and which the majority of the community should not accept upon itself, is no decree" (PT Avodah Zarah 2:8).
85. On custom as a legal source see Elon, *Jewish Law*, ch. 21; Ephraim E. Urbach, *The Halakhah: Its Sources and Development*, tr. Raphael Posner (Tel-Aviv: Massada, 1986), ch. 3.

86. See Elon, *Jewish Law*, 685–714.
87. Thus, for instance: "Examination of the halakhic sources, and especially the responsa literature, reveals a very broad range of substantive rules in Jewish law that have been prescribed and adopted in communal enactments but are in substance diametrically opposite to the provisions of the Halakhah covering the same subject" (ibid., 736).
88. R. Solomon b. Abraham Adret, *Responsa Rashba*, Part 4, #185.
89. As noted in ch. 2 above, state law reflects rather than creates public preferences.
90. See, for instance, Aharon Barak, "The Legal System in Israel: Its Tradition and Culture" [Hebrew], Ha-Praklit 40 (1992), 197.
91. On the eve of the establishment of the State of Israel, Moshe Silberg made a passionate plea to have state law rest on the principles of Jewish law rather than choose "adoption from outside – of a European, modern, ready-made code – in the fashion of Kemal Ataturk, the Turkish dictator". The article ends as follows:

    The eternal Jew has wandered through the lands of the world for nineteen hundred years – one hand holds the wanderer's staff and the other clasps the book of laws. The wandering days are coming to an end, the fog is lifting, and the sight he has yearned for appears before the weary drifter. The staff slips from his hand – will the book slip as well?

    See Silberg, "The Law in the Hebrew State", 153, 154. This plea was rejected by the Israeli public, which strongly suspected that ancient Jewish law, in all its details, could not be adapted to the needs of a modern state in the making. Haim Cohen, although a leading supporter of incorporating the spirit of Jewish law (after changing and adapting its details) into state law, conveyed the widespread suspicion in these words:

    Is it possible that by complementing and adapting laws and halakhot enforced in medieval ghettoes, meant for an oppressed and impoverished public that lived separated and segregated

from its surroundings within high and glooming walls, and were entrenched in the religious faith that united and sustained them, we might create the ideal law of our state?

Cohen, "Concern for Tomorrow", 42. Cohen had hoped that the religious public would seize the chance and adapt Jewish law to the surrounding reality. When his expectations were dashed, he supported with all his rhetorical (and practical) powers the severance of state law from Jewish law. See Haim Cohen, "Hebrew Law: A Dead Issue?" [Hebrew], Sura 3 (1957–1958), 475–491.

92. Justice Elon states (CA 506/88 *Yael Shefer v. the State of Israel*, PD 48 [1] 87):

Given the constitutional status and importance of the Basic Law: Human Dignity and Liberty, the provisions of this law are not only the basic values of Israel's legal system, but they constitute the foundation of Israel's system of law, so that the laws of this system are to be interpreted according to the said purpose of this Basic Law, namely, according to the values of a Jewish and democratic state.

Yehudit Karp, who analyzes the political struggle behind this Basic Law, states:

The wording of this section points to a broader aim, namely, "to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state". The protection of human dignity and liberty – as the legislator himself admits – is a means for a broader end rather than the ultimate end *per se*. The end, as the legislator declared, is not merely "to protect human dignity and liberty", but to protect them in order to anchor the values of the state in a Basic Law. Not just values of human dignity and liberty, but the values of the state as a Jewish and democratic state. All its values… Section 1 of the Basic Law has, so it seems, a life of its own and extends, by virtue of the legislator's explicit declaration, even beyond the protection of human dignity and liberty and beyond the Basic Law: Human Dignity and Liberty to the entire realm of the state's democratic and Jewish values, whether their source is in the said

Basic Law or outside it.

Yehudit Karp, "Basic Law: Human Dignity and Liberty – Biography of a Power Struggle" [Hebrew], *Mishpat u-Mimshal* 1 (1993), 323, 347. By contrast, Aharon Barak seeks to restrict. In his view, the purpose of the Basic Laws is to protect the right stipulated in the Basic Law (Freedom of Occupation or Human Dignity and Liberty), whereas the values of the State of Israel as a Jewish and democratic state are only the effect. See Barak, *Interpretation in Law*, vol. 3, *Constitutional Interpretation*, 323–327.

93. Foundations of the Law Statute, 1980.

94. Thus, for instance, on the Foundations of the Law Statute see Aaron Kirschenbaum, "The Foundations of Law, 1980: Today and Tomorrow" [Hebrew], *Tel-Aviv University Law Review* 11 (1985), 117; Menachem Elon, "More about the Foundations of Law Act", *Shenaton ha-Mishpat ha-Ivri* 13 (1987), 227; Hanina ben-Menachem, "The Foundations of Law Act: How Much of a Duty?", *ibid*., 257; Eliav Schochetman, "On Analogy in Decision Making in Jewish Law and the Foundations of Law Act", *ibid*., 307; Shmuel Shiloh, "Comments and Some New Light on the Foundations of the Law Act", *ibid*., 351. On the Basic Laws, see Menachem Elon, "The Values of a Jewish Democratic State in Light of the Basic Law: Human Dignity and Liberty" [Hebrew], *Tel-Aviv University Law Review* 17 (1993), 659.

95. On the interpretation of the Foundations of the Law statute see Aharon Barak, "The Foundations of Law Act and the Heritage of Israel" [Hebrew], *Shenaton ha-Mishpat ha-Ivri* 13 (1987), 265. On the Basic Laws, see Aharon Barak, "The Constitutional Revolution: Protected Human Rights" [Hebrew], *Mishpat u-Mimshal* 1 (1992–1993), 9, 30; Idem, *Constitutional Interpretation*, 331–334. At a later stage, Barak assumed a closer link between the phrase "the values of a Jewish state" and Halakhah:

A "Jewish state" is a state whose values draw also on its religious

tradition, of which the Bible is its most basic book, and the Jewish prophets the foundation of its morality. A "Jewish state" is a state where Jewish law plays an important role. A "Jewish state" is a state where the values of the Torah, the values of the Jewish heritage, and the values of Halakhah are part of its basic values… Let us begin with the values of the State of Israel as a Jewish state from the perspective of its heritage, which also includes Halakhah. "The world of Halakhah". We learn about these values from the world of Halakhah itself. This is an inexhaustible source. They include the values of the State of Israel as a Jewish state at various levels of abstraction, from a specific law on a given matter, and up to abstract values such as "love thy neighbor as thyself" and "you shall do that which is right and good"; among them are particularistic and universal values; they include values that developed throughout the entire history of the Jewish people, including mutually complementary values and mutually contradictory values. It is a whole wide world.

(Aharon Barak, "The State of Israel as a Jewish and Democratic State" [Hebrew], *Tel Aviv University Law Review* 24 (2000–2001), 9–10).

96. See the references in note 85 above.
97. See, for instance, Yo'ezer Ariel, "Traffic Laws and Accident Compensation" [Hebrew], *Tehumin* 19 (1999), 258, which incorporates a secular law into the halakhic realm.
98. See Shmuel Shiloh, *Dina de-Malkhuta Dina: The Law of the State is Law* [Hebrew] (Jerusalem: Jerusalem Academic Press, 1974), 96–99, 131–191.
99. On this question, see Eliav Schochetman, "The Halakhah's Recognition of the Laws of the State of Israel", *Shenaton ha-Mishpat ha-Ivri* 16–17 (1991), 417, 476.
100. Menachem Elon includes among these criteria the halakhic aspiration "'to build fences and tend to improve' (and not 'breach fences and spoil what is good')" and the demand that the foreign

law, the regulation, must be one that a majority of the public can abide by, a regulation equally incumbent on all members of the community, and that applies prospectively and not retroactively. Elon, *Jewish Law*, ch. 19.

101. For a discussion of various aspects of this problem, see the sources in note 44 above.
102. See ch. 3, section 2 above.
103. More precisely: the diameter and depth of the "black hole" are particularly large for halakhists who refuse to extrapolate from halakhic categories that were used to regulate public rule in Jewish communities in exile (the various community leaders) to the proper halakhic regulation of the state of Israel. Their view, which stresses the significant differences between these two phenomena, forces them into a judicial activism aimed at establishing a halakhic category (as opposed to interpreting an extant one).
104. The more prominent halakhists have tended to use general, meta-halakhic principles with the aim of developing Halakhah in new directions, both to attain a desirable result in a given case (*ad hoc* rulings) and for renewed creativity in entire legal areas. Thus, for instance, the general principle of "promoting the public welfare [*tikkun olam*]" served sages as a tool for renewed creativity in a series of concrete, *ad hoc* questions. As we know, many people were deterred from lending money in Hillel's times for fear of losing their debt in the sabbatical year. Hillel solved the practical problem by resorting to a technique known as *prosbol*, whose actual effect is to dismiss the Torah law concerning release of all debts in the sabbatical year. The religious justification adduced for this daring halakhic innovation was *tikkun olam* (M. Shevi`it 10:3). The principle is sufficiently broad to serve sages for varied purposes, unrelated to each other, such as a basis for exempting a doctor and a court emissary from liability for damages they may have caused in the course of fulfilling their

duty (Tosefta [Lieberman], Gittin, 3:7), for the demand requiring witnesses' signatures in a bill of divorce (M. Gittin 4:3; M. Gittin 9:4), or to impose a duty to bring first fruits from a field that was sold to a Gentile. Another general principle is that of *imago Dei*, stating every human being is created in God's image. Relying on this principle, the sages formulated a series of laws concerning capital offenses in Halakhah, restricted the use of capital punishment, and regulated the administration of corporal punishment against transgressors. The principle of *imago Dei* was also the basis for developing the commandment of procreation and for additional halakhic needs. See Yair Lorberbaum, "Murder, Capital Punishment, and Imago Dei (Man as the Image of God) in Early Rabbinic Literature" [Hebrew], *Plilim: Israel Journal of Criminal Justice* 7(1998), 223–272; Idem, "The Image of God and the Commandment to Be Fruitful and Multiply: Early Rabbinic Literature and Maimonides" [Hebrew], *Tel Aviv University Law Review* 24 (2001), 695–754. The sages' use of the phrase "you shall do that which is right and good" (Deuteronomy 6:18) is a third instance of a general principle. In his exegesis *ad locum*, Nahmanides reads it as the basis for enacting particular laws, as well as the foundation of a general standard of social behavior. Thus, for instance, a ruling was issued stating that, when selling a property, the neighbor (*bar-matsra*) has a right of first refusal before other potential buyers because of the principle of doing "that which is right and good". See TB Bava Metsiah 108a; Elon, *Jewish Law*, 623; Itamar Warhaftig, *Undertaking in Jewish Law: Its Validity*, Character, and Types [Hebrew] (Jerusalem: The Jewish Legal Heritage Society, 2001), 225–228. This principle has served as a halakhic source throughout history. For instance, in the seventeenth century, R. Yom Tov b. Moshe Tsahalon (active in Safed, d. 1638) imposed a duty on the rich to help the poor bear the burden of a royal tax on the basis of this principle (*Responsa Maharits*, Part 1, #239).

In the twentieth century, R. Yitzhak Ya`akov Weiss (d. Jerusalem 1989) imposed a duty of severance payments on the basis of the general principle of "you shall do that which is right and good" (*Responsa Minhat Yitzhak*, Part 6, #167). These few examples point to the potential for halakhic flexibility in creating halakhic innovations by relying on general principles.

105. See Hugo Mantel, *Studies in the History of the Sanhedrin* (Cambridge: Harvard University Press, 1961); Alon, *The Jews in their Land in the Talmudic Age*.

106. See Abraham Kook, "On Zionism" [Hebrew], *Ha-Devir*, 7–12 (1921), 36 (an offset printing of this article appears in Moshe Tsuriel, "The Sanhedrin Now", *Tehumin* 18 [1998]), 457–459). Kook writes:

    The gist of the reformers' complaint has always been that regulations and halakhot issued hundreds and thousands of years ago should change according to the spirit of the times. Lo and behold, when God brings us back from exile, the Sanhedrin will sit in the Chamber of Hewed Stones. And they will examine everything, every regulation and every custom, and will rule according to the Torah… so that everyone will know there is a time for every purpose, and on the regulations and edicts, new and old, they will rule how should the generation handle them…The Sanhedrin will necessarily have to clarify, according to majority rule, many questions now pending. Many customs now divide people from different countries due to the dispersion, since these followed one and these followed another of the great halakhists. All will necessarily return to one custom, if the Great Sanhedrin for the whole of Israel will so rule. No license will be granted to challenge or question the Great Sanhedrin, whether to support the challengers rejecting the harsher limitations and restrictions it will see fit to impose, or whether they are God-fearing and will oppose the Great Court because they will find it hard to depart from the strict rules and custom or Halakhah of

their country… and the rebel will be punished.

107. For a description of R. Kook's attitude to the renewal of the Sanhedrin as part of his outlook on national renewal and as part of his messianic expectation, see Aviezer Ravitzky, *Messianism, Zionism, and Jewish Religious Radicalism* [Hebrew] (Tel-Aviv: Am Oved, 1993), 119–129.
108. Ibid., 127.
109. See Menachem Friedman, "The Chief Rabbinate: A Dilemma without Solution" [Hebrew], *State and Government* 1 (1972), 118.
110. Symptomatic in this regard is that R. Uziel, the Sephardi Chief Rabbi, did call for the establishment of the Sanhedrin. He thereby explicitly admitted that the Chief Rabbinate is inadequate to play this role. See Ben Zion Meir Hai Uziel, "The Torah and the State (High Court Sanhedrin)" [Hebrew] *Yavneh: Religious Academic Journa*l 3 (1949), 14–16.
111. For an extensive review and an analysis of the dispute surrounding the Sanhedrin's renewal, see Asher Cohen, *The Talit and the Flag: Religious Zionism and the Concept of a Torah State*, 1947–1953 [Hebrew](Jerusalem: Yad Yitzhak Ben Zvi, 1998), ch. 3.
112. Judah Leib Hacohen Maimon, *Renewing the Sanhedrin in our Renewed State* [Hebrew] (Jerusalem: Mosad Harav Kook, 1967).
113. For a description and references see Cohen, *The Talit and the Flag*, 62–64.
114. Ravitzky, *Messianism, Zionism, and Jewish Religious Radicalism*, 124–125. R. Kook was preceded by R. Yaakov Beirav, one of the foremost halakhists in Eretz Israel at the end of the sixteenth century, who sought to renew rabbinic ordination so as to pave the way for the renewal of the Sanhedrin. According to Yaakov Katz, R. Beirav and his friends were motivated by the belief that the renewal of rabbinic ordination was the first link in a chain of events that would culminate in the coming of the Messiah.

They relied on the verse "And I will restore thy judges as at first…afterwards thou shalt be called the city of righteousness, a faithful city" (Isaiah 1:26). See Yaakov Katz, "Is the Renewal of the Sanhedrin a Solution?" [Hebrew], *De`ot* 8 (1959), 23.

115. Cohen, *The Talit and the Flag*, 65.

116. Itamar Warhaftig and Yaakov Shatz, "A Torah State" [Hebrew], *Year by Year*, 1996 *Annual*, 347.

117. Thus, for instance, R. Uziel states: "And after God has released us from subjugation to foreign kingdoms, and with the renaissance of an independent and sovereign Israeli government, [the right] is incumbent on us to establish beside it the court of the nation, which will judge according to Torah laws". See Ben Zion Meir Hai Uziel, *Hegyionei Uziel* (Jerusalem: Ha-Va`ad Le-Hotsa'at Kitvei Ha-Rav, 1992–1993), Part 1, 177. Katz holds that the proposition to renew the Sanhedrin with the creation of the state "emerged against the romantic background of nationalism to restore past glories to their days of old by establishing the institutions and the symbols of the great past. As R. Beirav had sought to renew ordination as a means of bringing redemption, so did they seek to revive through it the national spirit". Katz, "Is the Renewal of the Sanhedrin a Solution", 25.

118. On the adoption of the nationalist idea by religious-Zionism see Dov Schwartz, *Faith at the Crossroads: A Theological Profile of Religious-Zionism*, tr. Batya Stein (Leiden: Brill, 2002), ch. 5.

119. M. Shevi`it, 10:3: "A prosbol is not cancelled by the sabbatical year. This is one of the things ordained by Hillel the Elder. When he saw that people refrained from lending one another money and thereby transgressed that which is written in the Torah (Deuteronomy 15:9) 'Beware that there not be an unworthy thought in thy heart…,' Hillel ordained the prosbol". M. Arakhin 9:4: "If the last day of the twelve months has come and it has not been redeemed it becomes his permanently. All are the same – the one who purchases and the one to whom it was

given as a gift, since it says 'in perpetuity.' At first, one hid on the day in which the twelve months were completed, so that it would become his permanently. Hillel the Elder then ordained that one should deposit his money in the Chamber, and he could come and break down the door [of the house] and take possession. Whenever the other wants, he may come and take his money".

120. R. Meir b Baruch from Rothenburg (known as Maharam of Rothenburg, d. Ensisheim, Germany, 1293) details the content of the regulations:

    The bans in the community regulations issued by Rabbenu Gershom *Ma'or ha-Golah*:

    It is forbidden to marry two women… if there is no ritual quorum at the synagogue and the cantor has begun prayers, no one is allowed to leave until he has finished… A ban – no one will officiate as a cantor when someone else is held to be the cantor until told do so by the town's notables. A ban – no man should leave his wife for more than eighteen months without her permission…. A regulation: a woman should not be divorced against her will, and such a divorce is invalid…. A ban – penitents should not be shamed to their face. A ban – not to see letters his friend is sending to someone without his friend's knowledge…" *Responsa Maharam of Rothenburg*, Part 4 (Prague: Moshe b. Yosef Bezalel, 1608), #22a.

121. See Elon, *Jewish Law*, 783–824.

122. For various claims concerning the right to culture and its protection, see various articles in Mautner et. al. , *Multiculturalism in a Democratic and Jewish State*; Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989); Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative", in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1997), 106; Avishai Margalit and Moshe Halbertal, "Liberalism and the Right to Culture", *Social Research* 61 (1994), 491–510; Avi Sagi, "Identity and

Commitment in a Multi-Cultural World", *Democratic Culture* 3 (2000), 167–186.

123. Katz assumes the following: "Possibly, interpretations of the law will be proposed at rabbinical assemblies that will include actual solutions to contemporary problems, but we have no grounds for assuming that a majority will support any of these proposals if they are incompatible with the stringent disposition of the later authorities. We have learned from the experience of the last century that proposals suggested by individual halakhists in order to contend with ongoing problems were dismissed by their stringent opponents. An official union of elected halakhists would undoubtedly strengthen this trend". Katz, "Is the Renewal of the Sanhedrin a Solution?", 27.

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