LIVING WITH NORMATIVE DUALITY: THE VALUES AT THE END OF THE TUNNEL

Yedidia Z. Stern

Israeli society draws its values primarily from two civilizations: traditional Jewish culture and Western liberal culture. Therefore, many Israelis live in a cultural duality that sometimes expresses itself in a normative duality: halakhah *and Israeli law are part of the primary and unconditional commitment of many Israelis.*

Unfortunately, both halakhic *law and Israeli law employ rhetoric that proclaims imperialism and exclusivity concerning their application in regulating daily life. Therefore, a hard choice emerges between militant preferences, prelude to a* Kulturkampf *without victors. This essay discusses this problem and suggests several solutions: Retreat of the two legal systems and adoption of a judicial pluralism by both. A model is outlined by which each of the normative systems will use its internal discourse in order to acknowledge the existence of the other, its legitimacy, its substantive importance, and the limitations within which it operates.*

Introduction

Israeli society draws its values primarily from two civilizations: traditional Jewish culture and Western liberal culture. Both these civilizations also come to the fore in separate, autonomous

Jewish Political Studies Review 12:3-4 (Fall 2000)

normative systems, respectively *halakhah* and the law of the land (henceforth Israeli law). Large groups within Israeli society perceive each of these two cultures as defining their identity a priori and, consequently, their members experience life as an immanent cultural duality.

Some of those who experience themselves living within cultural duality also experience normative duality. On the one hand, they accept the rule of law and the rules of the democratic game, both in a thin and thick sense, and they live to the full the experience of Israeli sovereignty. On the other hand, they also recognize the symbolic as well as the practical significance of *halakhah* in their lives. Thus, they acknowledge *halakhic* sources of authority, the decisions of human agents involved in the implementation of *halakhah*, and the norms that *halakhah* applies to actions, views, and beliefs. Both systems are part of their primary and unconditional commitment.

The way in which these two normative systems — *halakhah* and Israeli law — are currently perceived in Israeli society does not lighten the burden of the duality entailed by this commitment. Note that no stand is taken regarding the actual functioning of these systems; rather, the focus is on their images as perceived by their consumers.

The analysis of the two systems in this essay will focus on their attitudes to their constitutive values. It will point to the link between the conflict of values dividing the two cultures, and the recent escalation of their mutual struggle over the regulation of everyday life. It will be argued that the "*halakhization*" and "legalization" of our reality hinder the chances of developing a complex "Jewish and democratic" culture. Finally, we will suggest some basic proposals for easing this tension.

A caveat is in place: attempts to draw an analogy between *halakhah* and Israeli law may seem artificial. Most basic assumptions in these two legal systems concerning such matters as their sources of authority, their course of development, their meaning, and their goals are completely different. Moreover, each has its unique history, sociology, philosophy, and logic. Nonetheless, we can identify a clear analogy between Israeli law and *halakhah* as currently interpreted, as is explained below.

Norms and Values

Every normative decision expresses a value preference. Thus, for instance, a law that requires the police to speed up proceed-

ings when bringing suspects before a judge raises the value of human rights at the expense of other values. Planning and zoning laws outline a choice between aesthetic values and values of efficient land utilization. A tax law reform changes the allocation of resources between various sectors of the population, thereby reflecting a new orientation in values affecting social policy.

The same is true of *halakhic* normative decisions. Take, for instance, the controversy between *halakhists* concerning the role that the protection of human life, as a *halakhic* consideration, should play in deciding the fate of areas in Judea and Samaria. The legalistic debate — including the method of argumentation, the evidence adduced, the language, and so forth — is merely a veneer screening a substantive conflict of values, which is the heart of the controversy.

This simple truth is not always self-evident to everyone. Israeli law used to approach law as an objective "science" implemented by "professional" judges, whose role was restricted to carrying out the legislators' will and intention through formal rules of interpretation and ruling. The judicial process unfolding in the courts was construed as an inexhaustible source, generating answers from within itself in a technical process devoid of value choices.

Over the last two decades, however, the Israeli law court has changed its approach. As Menachem Mautner has shown, the court has exposed the value-oriented meaning of its rulings.[1] It replaced the professional jargon that had served it in the past with a language, concepts, and modes of expression intelligible to the general public, revealing its awareness that judicial rulings reflect a balance between different values. In other words, the court presumes a pluralistic approach, leaving the judge significant latitude for value-oriented decisions. Generally speaking, courts in Israel no longer hide the value-laden character of the judicial endeavor; they flaunt it instead, thereby externalizing the fact that the court does not merely apply the law but also creates it.

The opposite process is now taking place in regard to *halakhah*. Avi Sagi points out that, throughout the history of *halakhah*, monistic and pluralistic schools of thought have prevailed side by side.[2] The monistic approach assumes there is only one solution for every dilemma of values, and the role of the *halakhist* is to disclose it. Judicial discretion is thus minimized almost into non-existence. In contrast, the pluralistic approach, which is quite pervasive in rabbinic tradition, presumes more than one answer to a dilemma of values: "these and these are the words of the living God," when every "these" favors another legitimate value. The

role of the *halakhist* is to make a decision concerning the dilemma, thus carving *halakhah* from within himself.

In our times, the monistic conception of *halakhah* has gained much ground. Many have come to perceive *halakhic* rulings as formal and objective, requiring the *halakhist* to disclose the contents of the truth that is hidden and latent in *halakhah* without, as it were, "human interference." The *halakhist* does not uphold an independent position, and is thus not a party to the dispute. The *halakhist* makes a declaration — "this is the *halakhah*" — but does not create the norm. His personal discretion, which is dictated by his personal values, is perceived as irrelevant to the judicial process.

As noted, both legal systems necessarily rest on value-oriented decisions. Both, however, choose contrary strategies when relating to this fact here and now. *Halakhic* law takes on the technical-formal overtones that Israeli law is busy removing. Whereas *halakhah* masks the value-oriented foundation of its rulings and clears its discourse from the language of values, Israeli law exposes this infrastructure and externalizes its values.

Values and Judicial Imperialism

The Similarities

Together with their differences, these two legal systems reveal a similar pattern of operation. Both *halakhic* law and Israeli law proclaim (even if they do not necessarily implement) their imperialistic intentions concerning the scope of their application in the regulation of reality.

First, both systems hold that, in principle, their scope is all-inclusive and leaves no gap between factual and judicial reality. Chief Justice Barak holds that, in principle, "the whole earth is full of law,"[3] and states that "there is no 'legal lacuna' in which actions are performed without the law having a stance on them."[4] A similar view prevails among *halakhists*. Their approach relies on such sayings (originally meant as philosophical rather than as legal statements) as "nothing exists that was not hinted in the Torah";[5] "The Holy One, blessed be He, looked at the Torah and created the world,"[6] and the like. It seems they all hold, "turn it and turn it, for all is in it."[7]

Second, the philosophical view that both the law and *halakhah* pervade "everything" need not affect reality. That is, one could argue that, even if every aspect of reality *can* be adjudicated through a legal ruling, it is not always *proper* to do so. Here too, however, the rhetoric of both systems is maximalistic. Chief Justice Barak maintains that abstentions from judicial rulings must be few, as a matter of policy, for "if there is no judge, there is no law."[8] Similarly, *halakhah* has exercised no restraint in the use of its authority in recent times. Whereas the *Shulhan Arukh* deals with the regulation of defined and fairly small segments of reality, today's rabbis are asked to give responses on a much wider range of subjects. The springboard for expanding the scope of *halakhah* is the notion of *da'at Torah*, referring to the special powers ascribed to the rabbis consulted. The gap between the meaning of *da'at Torah* and the meaning of a normative decision has become increasingly blurred. In the past, *da'at Torah* would refer to the opinion of a wise man, today it is divine inspiration, and tomorrow — a *halakhic* ruling.[9]

Third, both legal systems externalize a quasi-exclusive notion of regulating reality. They are perceived by the public as preferable to other methods for settling disputes (such as social mechanisms). First and foremost, however, both systems claim priority over one another. Each regards the status of its counterpart as questionable, including its formal grounds of legitimation.

As will be explained, the imperialism typical of both systems is thoroughly linked to their (diametrically opposed) attitudes to the accepted values of Israeli society.

Israeli Law

The stress on the value-oriented role of the court enables Israeli law to strip its professional attire and don, as it were, a socio-cultural garb. Although law is a specialized field, it encompasses the whole spectrum of social values. Its concern is not only the settling of disputes and the allocation of resources, but the shaping of culture.

As a result of this approach, Israeli law has undergone radical changes over the last two decades, including:

(1) *The Expansion of Standing*. No longer does the court meticulously consider the connection between the plaintiff petitioning for remedy and the subject matter. When the court undertakes the general task of placing ethical restraints on society and on the government, the context of the occasion for raising an issue is not

overly important. What matters is the value-oriented answer to be given to the problem rather than the personal circumstances of the petitioner concerning the dispute in question.

(2) *Judicial Activism.*[10] Activist judges are those who, out of all available possibilities, opt for the one that changes the existing law more than any other. Activism is obviously not a goal in itself. Judges resort to it when they deem that the law must be accommodated to the changing needs of society and its code of values. A legal system with an open code of values, functioning in a society experiencing value upheavals, must react to changes in the value preferences of society's members. It appears that the judicial activism of the Israeli court indicates its dissatisfaction with the speed (and, in extreme cases, also with the manner) of the Knesset's response to the dynamic change of values that characterizes Israeli society.

(3) *General Formulations.* Although the court is entrusted to settle a specific dispute, the externalization of the values involved in the judicial process and the raising of public consciousness in this regard end up affecting the shape of the judicial product. When issuing a specific verdict, judges sometimes expound a systematic normative doctrine as a social philosophical thesis.[11]

The phrase "the whole earth is full of law" is not merely an academic declaration about jurisprudence. A legal system that explicitly and blatantly takes upon itself a major role in contending with the question of society's value priorities must be global, since it is supposed to meet general social needs. In other words, the externalized value dimension of Israeli law may explain diverse aspects of its imperialism.

Halakhic Law

What of the imperialism of *halakhic* law? Here as well, the answer seems to rely on the value dimension although, as noted, it proceeds in the opposite direction.

If the value infrastructure of *halakhah* were exposed, *halakhah* would have to compete in an arena where modern values inherent in Western liberal civilization, or at least renewed and emphasized by it, play a leading role. These values, though consciously rejected by the ultra-Orthodox, have been accepted, whether tacitly or openly, by a significant majority of all other observant Jews. Both these sectors are variously exposed to these values, which are dominant in Israeli society, assimilate them, and internalize them.

A value-laden *halakhah* would have to consider the change in values and provide a spiritual and intellectual response, which would purportedly come to the fore in normative adjustments. A pluralistic conception of *halakhah* would allow modern *halakhists* to exercise their discretion in this spirit. Throughout its history, as we know, *halakhah* has shown itself capable of self-renewal by resorting to the classic tools of judicial creativity meant for this very purpose: exegesis, Midrash, ordinances, and decrees.[12] These tools have allowed *halakhah's* survival as a relevant normative system.

Unfortunately, however, the process of renewal is no longer as vital. Some *halakhists* have withdrawn into a world of their own, refusing to make full use of the creative forces that *halakhah* and rabbinic thought place at their disposal. For reasons both sad and fascinating, which cannot be considered here, some of these *halakhists* lack any intimate and experiential understanding of broad aspects of reality. As a result, an increasing gap is emerging between the reality of values surrounding the consumers of these norms and the *halakhic* legal system meant to regulate it. This gap clearly threatens *halakhists*, forcing them to adopt a two-pronged defense strategy: outwardly, they proclaim, "all innovation is forbidden by the Torah." Inwardly, however, their claim is "turn it and turn it, for all is in it," literally and in a formal sense. The value dimension of *halakhah* is thereby concealed, and the monistic approach to *halakhah* is hallowed as the exclusive option. When *halakhah* is unresponsive to the rhythm of the times, it must protect itself through normative imperialism and by proclaiming exclusivity in the understanding and regulation of reality.

The Overall Picture

An overall picture emerges concerning the link between the approach to values and legal imperialism: Israeli law emphasizes the role of values from a position of strength. The language of values is the means for expanding the scope of law and the bridge enabling the normative system to access new territories. In contrast, *halakhic* law in our times conceals and hides the values underlying its rulings, from a position of weakness. Basic values accepted in society (including religious society) are perceived by some *halakhists* as hindering the course of traditional Judaism. In response, they endorse a strategy of *halakhic* imperialism. The *halakhization* of reality, when combined with a monistic approach to

halakhah, circumvents and obviates the need for coming to grips with the "new."

Judicial Imperialism and the *Kulturkampf*

These perceptions create a climate of determined struggle, of belligerence, and of chaotic reality demanding resolution. The two legal systems represent two of the major voices in the Israeli discourse. Both are perceived as mutually patronizing, and as ascribing absolute truth to their own view while largely de-legitimizing the other.

Although imperialism and exclusivity are not often translated into action, the rhetoric frequently employed by the leaders of these two legal systems is highly relevant to their nature. As a result of this rhetoric, a fierce sense concerning the need for a choice between reference groups has spread, requiring us to side either with those who accept the rule of law, as embodied in the Supreme Court, or with those who assume the yoke of the Heavenly Kingdom, as embodied in the rulings of leading rabbinical figures, the "Council of Sages," and the like.

Unfortunately, the extent to which leaders of both these legal systems have internalized the values of the other is limited. Rabbis, and not only ultra-Orthodox ones, do not accept, *de jure*, the doctrine presently called "democratic," and appear to be threatened by it.[13] The Supreme Court endorses a relatively rigid facet of liberalism, and has trouble internalizing the possibilities latent in Judaism — including Jewish thought and the norms shaped within it — as capable of contributing to the modern development of Israeli society.[14] The shared language of values is thereby impoverished, and a hard choice emerges between militant preferences, prelude to a *Kulturkampf* without victors.

Solutions

How can the tension and the friction between these two cultures and legal systems be eased? The situation calls for several ideological moves entailing practical implications, which are detailed below.

Retreat

Whatever our substantive position concerning the totalistic perception of the law, it is worth reducing the rhetorical tension surrounding the scope of both *halakhah* and Israeli law. The perception of these systems as unlimited in their scope and surpassing each other in their competence to rule on all conflicts arising in a culturally divided society results in the attachment of a threatening image to both.

Settling value clashes between two dominant cultures is a complex task in any society. Intensive use of the law for this purpose is a bad idea. A judicial ruling — whether religious or secular — has inherent limitations: it is accidental and unplanned (in accordance with the limitations of the issue at stake), artificial (because it is sometimes unable to weigh macro considerations), and unprofessional (since those making the ruling lack relevant training).

This description, certainly accurate concerning the secular domain, is even more correct in reference to *halakhic* rulings: suffice to mention the gap between the rabbis' training and the range of issues subject to the authority of rabbinic rulings. Moreover, a judicial ruling inevitably intensifies differences. Its guillotine effect encourages zero sum discourse. Judicial proceedings sometimes lead to the demonization of the other because of his/her view. Generally, the judicial decision may lead to the banalization of the controversy and to a disregard of reality's complexity. These cultures, then, must change the venue of their discourse.

Mutual Recognition: Judicial Pluralism

Accepting the policy of retreat outlined above exempts neither the secular nor the religious systems from their practical responsibility for settling disputes, including those of public significance. It is proper, then, to relate not only to what they should not do, but also to what is incumbent on them to implement.

The tension between the two dominant cultures in our society could be eased if each of the normative systems in question were to acknowledge the existence of the other, its legitimacy, its substantive importance, and the limitations within which it operates. Mutual recognition could take different forms — conceding, respecting, and even internalizing some of the values of the other.

Headlines for a model of mutual recognition from the perspective of each of these legal systems follow:

Recognition of Religious Law in Israeli Law

When the Basic Laws of the State of Israel were drafted, politicians concocted a formula that speaks about the values of a "Jewish and democratic" state, reflecting a willingness to compromise. The value systems of both civilizations were presented as standing on a par, and value assets deriving from both were projected as a source of inspiration for the normative product of Israel's legal system.

But how will this formula help Israeli law? Undoubtedly, the interpretation of the terms "Jewish and democratic" has considerable implications for the present discussion. The value-normative junction where individuals stand when choosing their personal interpretation of this constitutional guideline is crucial to our life as a society. Radical interpretations in either direction will thwart the potential for easing the tension.

Preference should be given to an interpretation that views this constitutional guideline as the inspiration for creating a local model of soft "legal pluralism."[15]

Legal pluralism prevails when more than one normative system in a given society is simultaneously granted validity. If this definition is interpreted in broad terms, we will find that, in fact, we always live in a situation of legal pluralism. All of us are simultaneously bound by several normative systems affecting different spheres of our life: a workplace, a professional association, a communal organization, a condominium, a political party, and so forth. Moreover, we are bound not only by written normative arrangements (such as statutes, collective contracts, private contracts), but also by unwritten norms, usually originating in customs and binding us in additional spheres of life: the family, the ethnic community, the social circle, and the like.

Legal pluralism raises no problems in our daily functioning as long as the various normative systems regulating our life are fully coordinated within a well-defined hierarchy. Barring such coordination, however, legal pluralism could emerge as a prescription for normative chaos. Just as traffic will not run smoothly if regulated through an uncoordinated system of traffic lights, just as the movement of an object will not be controlled if various forces pull it in different directions, just as the sound of an orchestra will not be sharp and precise if players simultaneously obey the uncoordinated instructions of several conductors, so too, the existence of several independent normative systems originating in different sources of authority and operating through different institutions is likely to result in normative chaos.

It thus appears, then, that ranking by importance the various normative systems operating within a given reality is both necessary and advantageous. A norm originating in a lower ranking system within the hierarchy will not be legally binding if it contradicts a norm originating in a higher-ranking system. Thus, for instance, an agreement contradicting safety laws at the workplace is invalid because the law of the state ranks higher in the normative system than bylaws at a place of work. A family custom whereby parents beat their child is void if state law forbids this. A norm in the bylaws of a commercial company allowing its managers to breach their fiduciary duty is invalid if corporate law makes this duty binding. When the relative importance of contradictory norms is in dispute, we must resort to an institution authorized to act as a normative clearinghouse, so to speak, whose decisions must be accepted by all. In the Israeli legal system, state courts wield this power.

Yet, the very creation of a hierarchy of normative systems imposes limits on the intrinsic contents of legal pluralism, which actually ceases to exist when its components are mutually contradictory. Furthermore, and more precisely, the existence of a binding hierarchy of normative systems implies monism rather than pluralism. Although a preference for one normative system over another does preserve overall coherence, it necessarily works against those members of the community whose values and norms were rejected by the dominant normative system.

In addition, the broader, more blatant, and more aggressive the preference for a particular normative system, the higher the chances that the identification of community members with the dominant systems of governance and law will be eroded even further, since they might feel rejected by them.

The choice between legal monism and legal pluralism thus involves a complex dilemma: although the costs of pluralism are not trivial, its benefits to society are also highly significant.

Awareness of the complexity entailed by this dilemma must find concrete expression in the ways in which Israeli society, and above all the Supreme Court, interpret the "values of a Jewish and democratic state." This phrase should be viewed as a kind of valve, releasing pressures created by the normative duality experienced by large communities within Israeli society. This constitutional guideline is vague enough to enable our Supreme Court to steer a prudent course for Israeli legal reality within the bounds set by the advantages and disadvantages of legal monism and legal pluralism.

Given that interpretive authority is reserved to the Supreme Court, its functioning will continue to be monistic — the Supreme Court will function as the sole conductor of a symphonic orchestra. A balanced interpretation of the constitutional guideline, however, will enable all of us to function more peacefully in an environment of legal pluralism. Thus, an interpretive choice that grants proper weight to the social benefit of substantive pluralism is compatible with the formal priority of state law.

Recognition of Israeli Law in Religious Law[16]

Can religious law acknowledge and grant meaning to Israeli law while resorting to intra-religious conceptual structures? Several historical precedents point to a positive answer to this question. Parallel to the creation and implementation of *halakhah* by sages and rabbinical institutions in the course of Jewish history, we also find that a complementary normative system, both legislative and judicial, was developed by the governmental structure that organized Jewish communal life down the ages.

Normative duality has actually accompanied Jewish law from time immemorial. The various mutations of the governmental branch of Jewish public life, from the prophet Samuel and up to the eighteenth century, always wielded judicial authority.

During the period of Jewish sovereignty, which was organized around a monarchic regime, Jewish law was developed by the contemporary public leadership — the "king's law" (Samuel I, 8). A local legal system existed at the same time, administered by the elders, who were the local public leadership. When the Jewish people lost its sovereignty, both in its own land and in the diaspora, the need for the continuous development of legal norms outside the rabbinical focus did not abate. At first, it found expression in quasi-governmental Jewish institutions, which the conquering empire recognized and authorized to function as intra-Jewish judicial institutions. These were the *nasi* during the Second Temple period, and the Babylonian Exilarchy established under the Persian rule and the Moslem caliphate. Foreign rulers did not prevent Jews from organizing as an autonomous community in diverse ways, including legal ones. These organized communities, then, although under foreign domination, used certain features of public leadership still under their control to go on developing the ruling dimension of *halakhic* law. This is the institution known as *takkanot ha-kahal* (communal ordinances).

At various times and places, the idea of *dina de-malkhuta dina* [the law of the kingdom is the law] was also developing. By invoking this notion, *halakhah* recognized the validity of norms established by the public leadership of others, non-Jews, and even internalized them. The importance of normative development through the ruling power was so clear that even the fact that the norm had originated in a non-Jewish public leadership and that it was meant to regulate universal rather than Jewish existence, failed to prevent its use by *halakhah*.

The institutions noted — the king's law, the elders, the *nasi*, the exilarch, the communal ordinances, and the law of the land — are not of one piece. They differ considerably in their operating procedures, the scope of their substantive authority, their own perception and that of their surroundings concerning the nature of their functioning, and so forth. Nor did the rabbis display a uniform approach toward them. The differences probably reflect the social, political, and religious reality that was the context for the development of these institutions. The attitude toward the king of Israel was different from the attitude toward the exilarch, who was appointed by a foreign ruler, and the attitude toward the exilarch, who was perceived as a scion of the House of David, was different from the attitude toward a foreign king. At another level, the authority of the sovereign was not as that of the local government. These differences, and others deriving from them, affected variations in the normative and conceptual significance that internal Jewish discourse attaches to the norms created by each institution.

A separate discussion of each of the institutions noted is indeed desirable and necessary. Nevertheless, we have chosen to downplay the differences between them and focus on the overall purpose of their activity, in an attempt to emphasize the basic features common to all.

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

First, the goal.

The process of developing a legal system requires an act of mediation between the changing reality and the system's binding normative setup. In legal systems lacking religious features, this

mediating function is usually performed by the public leadership. The advantage of public leadership groups (relative to other elite groups) in establishing norms compatible with reality is multifaceted, intuitively understood, and self-evident.

Concerning religious legal systems, the picture is more complex: the religious normative system may also include spiritual objectives, besides the mechanisms of social regulation striving to prevent the implications of *homo homini lupus*. Thus, for instance, the *halakhic* legal branch dealing with the relationships between human beings and God distinguishes *halakhah* from a non-religious judicial system. It is clear, then, that the study and implementation of a religious legal system must be entrusted to authority figures whose sources of inspiration — in terms of their consciousness, education, and life experience — are intimately connected with the religious-spiritual world. As a religious legal system, however, *halakhah* does not separate religion from life and strives to function as a *torat hayyim* (life doctrine), which regulates a dynamic human reality and probably cannot renounce the vast contribution of public leadership as a normative source.

This explains the picture that has emerged so far. Beside the rabbis, intellectuals holding a relative advantage in their understanding of the religious foundation of *halakhah*, there was always another *halakhic* source, originating in the public leaders holding a relative advantage in their understanding of *halakhah's* extra-religious implications. The wondrous preservation of *halakhah's* relevance throughout history is a result of the joint effort and the mutual control of the two streams filling the "sea of *halakhah*": the sages, who develop *halakhah* in reference to its theological principles, and the public leaders, who assume the task of mediating between *halakhah* and the changing reality.

Second, the technique.

The legal model that had always allowed *halakhah* to draw on the normative product of the institutions of public leadership has fixed characteristics. *Halakhah* acknowledges the existence of categories that are receptive to the import of norms originating in non-rabbinical sources. It bestows normative, intra-*halakhic* meaning on the product of the discretion exercised by the institutions of public leadership.

Thus, for instance, *halakhah* confers legal meaning on the legal discretion exercised by leaders of such institutions as the "king's law," or the exilarch's court, or communal ordinances. The acknowledgement that "the law of the land is the law" does not refer to a specific normative setup, but to the channel funnel-

ing norms inwards from the outside, thereby enabling normative renewal vis-à-vis a new reality.

Not every decision of a government institution will be automatically absorbed by *halakhah*, since any legal system striving for an identity must ensure congruence between imported norms and its own fundamental principles. At the rim of the importing channel, therefore, is a sieve whose crucial function is to restrict foreign influences according to the principles of the system. The diameter of the holes in this *halakhic* sieve, however, deserves examination: has *halakhah* tended to hinder normative imports or was it open to outside influences? This is a critically important point and deserves separate inquiry.

In any event, the feature discussed here is that *halakhah* begins by assuming that residual norms originating in non-rabbinic legal institutions will be accepted. Only a norm sifted outwards because it is not compatible with the system will be rejected. A norm may be rejected due to some flaw in its specific content; it will not be rejected because *halakhah* rules out, in principle, the very capability of the non-rabbinic legislator or judge to function within the confines of *halakhah*. Obviously, not every extra-rabbinical legal institution will be entrusted with this authority. As noted, the legal institutions on which *halakhah* is willing to rely for its own development are all, without exception, government bodies conveying the choices of the public leadership (whether national, local, or communal).

Throughout its history, then, one can detect in *halakhah* a *permanent need* for its normative completion and adjustment in order to meet the challenges posed by a changing reality. A *uniform technique* was consistently used to meet this need (recognition of the other's rulings), and implemented through *identical means* (a government institution articulating the public leadership rather than an establishment reflecting the preferences of another elite, such as the priesthood or the prophets).

The paradigm presented here, then, pointing to the involvement of the public leadership in the shaping of *halakhah*, is not contingent on a theory or a need that developed at a specific time or place. Rather, it is inherent in the very endeavor of the Oral Law and necessarily imprinted in the process of its development.

The application of the overall picture outlined here to the reality of life in Israel bears a true potential for easing the tension between religion and state in Israeli society.

Having exposed the continued influence of all institutions of public leadership, each in its own time and circumstances, on the endeavor to supplement Torah reality, it appears highly plausible

that this leadership will also influence the shaping of our present normative reality. This is a case of *a fortiori*: If in exile (or in the land of Israel, under foreign rule) the development of *halakhah* was made possible via a central, or even a local, Jewish government, all the more so nowadays, when sovereign Jewish rule fulfills the yearnings of so many generations. Indeed, some contemporary *halakhists* have raised the possibility of according *halakhic* status to Israeli institutions of government and to state laws, since they replace and preserve the institution of monarchy,[17] or the institution of *tovei ha'ir* (the city elders),[18] or constitute *dina de-malkhuta*.[19] It seems to me that the implications of these standpoints have not trickled down sufficiently into *halakhic* rulings and *halakhic* consciousness.

Conclusions

We do not share the view that normative duality must be resolved. On the one hand, Israeli culture is still searching for its uniqueness vis-à-vis global standardization trends. On the other hand, traditional Jewish culture is in need of a renaissance that will enable it to cope with phenomena hitherto unknown, such as Jewish sovereignty and secular Judaism. These overarching trends point to a shared interest in finding ways allowing for the coexistence of the two basic cultures shaping Jewish society in Israel.

Against everyone's best interests, the legal elements mediating these two cultures are currently entrenched in declarative positions that do not leave sufficient room for the "other." As was shown, however, built into both legal systems are legitimate possibilities for recognizing the other from its own intrinsic vantage point.

Each system is capable of tolerance toward its counterpart (recognizing the other's legitimacy while certain that the other is wrong), or of treating it pluralistically (not only is the other's position legitimate but it is also intrinsically valuable, although one may disagree with it), and perhaps even of identifying with it. Individuals who identify with more than one culture mold themselves as multicultural "entities." If that is what they wish, they must be given the opportunity of expressing their complex network of commitments by opening up the legal system toward legal pluralism.

Good will is required in order to fulfill this potential for mutual recognition and for creating legal pluralism. Hopefully, good will will emerge as the mutual threat presently emphasized in the

public discourse recedes, and as the relevant social elements reach maturity.

Notes

* The author is thankful to Batya Stein and Ruth Bar-Ilan.

1. Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel Aviv: Maglei Da'at, 1993).
2. Avi Sagi, *Elu va-Elu: A Study on the Meaning of Halakhic Discourse* (Tel Aviv: Hakibbutz Hameuchad, 1996).
3. Aharon Barak, "On Perceptions of Law, Judgment, and Judicial Activism," 17 *Tel Aviv Univ. L. Rev.* (1992):475, 477.
4. 910/86 *Resler et al. v. the Minister of Defense*, 42 (2) *Piskei Din* 441, 477.
5. This saying cannot be attributed to any source. It is probably a distortion of the Talmudic saying "Is there anything written in the Hagiographa to which allusion cannot be found in the Torah?" (TB Ta'anit 9a), whose meaning is completely different.
6. *Genesis Rabbah* 1 (Vilna).
7. M. Avot, 5:22.
8. 1635/90 *Zerzevski v. the Prime Minister et al.*, 45(1) *Piskei Din* 749, 856.
9. On *da'at Torah,* see Gershon Bacon, "Da'at Torah veChevley Mashiach," *Tarbiz* 52 (1983):497; Menachem Friedman, *The Haredi (Ultra-Orthodox) Society: Sources, Trends and Processes* (Jerusalem: Jerusalem Institute for Israel Studies, 1991), pp. 104-114; Jacob Katz, *Halacha in Straits* (Jerusalem: Hebrew University, Magnes Press, 1992), pp. 18-20.
10. For an extensive discussion of various aspects of this term, see *Judicial Activism*, Ariel Porat, ed. (Tel Aviv: Tel-Aviv University Press, 1993).
11. For a discussion of the judicial text of Chief Justice Barak, see Roei Amit, "Position(ing) of a Canon," 21 *Tel Aviv Univ. L. Rev* (1997):81
12. For an extensive review, see Menachem Elon, *Jewish Law: History, Sources, Principles* (Jerusalem: Hebrew University Magnes Press, 3rd ed., 1992), vol. 2.
13. See Yosef Ahituv, "On the Conditions for Internalizing Democratic Values among Religious Zionist Halakhists," *Judaism: A Dialogue between Cultures*, Avi Sagi, Dudi Schwartz and Yedidia Zvi Stern, eds. (Jerusalem: Hebrew University, Magnes Press, 1999), p. 90.
14. Thus, for instance, the Law of the Foundations of the Law, 1980, directs judges to fill lacunae in the law through recourse to the "principles of Jewish heritage." The interpretation of this directive adopted by the Supreme Court, however, has voided this option of any content. See Menachem Elon, "The Values of a Jewish Democratic State in Light of the Basic Law: Human Liberty and Dignity," 17 *Tel Aviv Univ. L. Rev.* (1993):659, 663-688.
15. This term was originally designed to regulate the clash between normative systems in postcolonial societies. For a description and explanation, see, e.g., Sally Engle Merry, "Legal Pluralism," 22 *Law & Society* (1988):869;

Rene R. Gadacz, "Folk Law and Legal Pluralism: Issues and Directions in the Anthropology of Law in Modernizing Societies," 11 *Legal Studies Journal* (1987):125; Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," 13 *Cardozo Law Rev.* (1992):1443. Legal pluralism in Israel was discussed in Ruth Halperin-Kaddari, "Rethinking Legal Pluralism in Israel: The Interaction between the High Court of Justice and Rabbinical Courts," 20 *Tel Aviv Univ. L. Rev.* (1997):683; Menachem Mautner, "Contract, Standard Contract, By-Laws of a Cooperative Association and the Issue of Legal Pluralism," 44 *Ha-Praklit* (1999):293.

16. This argument was suggested in a previous article in a historical context. See Yedidia Zvi Stern, "Public Leadership as Halakhic Authority," *Judaism: A Dialogue between Cultures, supra*, note 13, 235. The present essay offers only the core of the argument, without the extensive bibliography.
17. Shaul Yisraeli, *Responsa Amud ha-Yemini* (Jerusalem, 1966), p. 59.
18. Eliezer Waldenberg, *Hilchot Medinah*, vol. 3 (Jerusalem, 1955), pp. 89-96.
19. Ovadia Hadaya, "Does 'Dina de-Malkhuta Dinah' apply in the State of Israel?" *B'Tsomet ha-torah ve-ha-Medinah.*