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## HALAKHA AND DEMOCRACY

### I

**T**he topic requires that I describe a possible *modus vivendi* between halakha and democracy, or at least outline the structure of such a venture. It is understood, therefore, that neither component in this equation—neither halakha nor democracy—will be totally rejected. I shall attempt to describe the resources available in both the democratic and halakhic traditions which can be enlisted in making such a *modus vivendi* possible.

My discussion can take two rather different points of departure. One can assume that halakha and democracy are both inescapable facts of our life in the 20th century and consequently strive to accommodate them both, much as one might discuss how to prepare the community for living with an epidemic or a war. Or one can believe that both phenomena are profoundly positive and that one would wish to live in a world constituted by both. Naturally, tensions will arise even between two positive phenomena—occurrences of which the Talmud itself is full—and priorities will have to be established. There will be painful choices to make and we can expect to encounter unsolveable dilemmas.

My point of departure is that democracy is a value. We abide by it not only as the law of the land which we must accept willy-nilly; we are faithful to it as something we have internalized and in which we believe. Nonetheless, I do not intend to commit myself to the proposition that democracy is the inevitable conclusion of Jewish political thought, nor do I wish to argue that it has historically developed out of Jewish thinking and behavior. I would say, though, that democracy is profoundly coherent with much of the basic structure of the Jewish world-view, and that we find in our commitment to democracy a concrete, specific expression of ideals that are central to our view of ourselves as Jews. In certain readings, moreover, democratic institutions and processes would have halakhic value. All in all, I think that the halakhic community has

more than enough reason to enthusiastically embrace democracy as a fulfillment of its own basic commitment to human dignity.

In a word, if R. Soloveitchik understood Adam I as a model for the technological control of one's physical environment, we may also understand Adam I as implying the human control of one's political environment. True, the Rav himself identified Adam I with the faceless collective and found true community only in the covenantal reality engendered by Adam II. But if the "image of God" in man implies human dignity, as the Rav argued, then this is to be found in politics as well as in technology—perhaps even more in the former than in the latter. For the former, in our day, speaks to the assertion of human rights, grounded in the basic identity of the person as created in God's image. Thus, the political community may be located somewhere between the faceless collective and the covenantal community, with its metaphysical characteristics and yearnings.

It is indeed most important at this juncture that halakhic Judaism communicate its wholehearted and principled embrace of democracy, especially in Israel. It would seem, as I read the signals, that the term "democracy" has become a code-word for both the extreme secular left and the extreme right, non-Zionist as well as Zionist. As is common, all agree in their fundamentalistic abuse of the concept. For some elements in the left, it has become a term which can be used to preach a total universalism, familiar to us since the Enlightenment at least, as a denial of all specifically Jewish characteristics on both the social and personal levels. For certain elements on the religious right, it has become a term of derision by which Zionism and the idea of a Jewish state in the modern world may be fought. In certain variations, more common in groups which attempt to fuse the religious and the political right, it is a term through which the decision-making process of the Jewish state (and the decisions it has made) can be denied legitimacy. It is crucial, therefore, that while embracing democracy, we reject its identification with an assimilatory universalism. And it is all the more crucial that we embrace democracy as implying, in our concrete reality, the basic legitimacy of the Jewish state, its political processes, and the Jewish and human vision by which it is nourished. Needless to say, I do not think we should share the rejection of universal human concerns so endemic in certain religious circles, nor adopt a position which sacralizes the state.

My willingness to embrace democracy while not asserting its purely Jewish pedigree needs some clarification, I think. Overall, this commitment strikes me as similar to a number of other commitments we

hold.<sup>1</sup> We are committed to the monogamous ideal, for example; we both expect and idealize fidelity in marriage and condemn equally either partner who betrays. Now, we know full well that both biblical and talmudic traditions differentiate, on the halakhic level, between husband and wife in this matter, and so do not share this commitment. We also realize that the emotional depth of our commitment is not truly generated by the communal *takkana* of Rabbeinu Gershom which banned polygamy. On the positive side, we do feel that monogamy is strikingly coherent with the basic vision of marriage and the human person described in the tradition from First Man and Woman on. Our commitment to monogamy fulfills that vision, even if it may have been achieved through the impact of patterns found in other cultures.

So too, I think, as regards our horror at slavery. The tradition is, on the whole, tolerant of the institution—we are not. I say “tolerant”—not uncritical, for we know well that Biblical texts find slavery unpalatable, and rabbinic traditions are positively critical. True, Biblical legislation which limited enslavement of Jews to six years weakened the institution; and the provision of the death penalty for killing even a non-Jewish slave in certain circumstances undermined the essential perspective which saw the slave as non-human, property alone. But all this having been said, halakha lives with human bondage. Here too, our complete rejection of slavery fulfills the biblical vision of man created in the image of God and the Edenic ideal of two free individuals—even if, historically, we do not owe the abolition of slavery or even our present understanding of the content and problematics of freedom to the Jewish historical or intellectual experience alone.

Now, I know well that both these examples are not fully congruent—especially on the halakhic level—with the matter at hand. Bible and halakha hardly command either polygamy or slavery, but they might—to choose a striking example—mandate monarchy. To be honest, though, we would still have to admit that our rejection of polygamy and slavery, especially on the emotional and ideological levels, goes far beyond the value-neutrality of the halakha. This revulsion is simply not produced by the flexibility halakha allows alone; indeed, a consciousness rooted in halakha, taken narrowly (and deaf to a wide range of biblical and aggadic passages), might not find slavery or philandering so intolerable. But we are not, in these matters, the creatures of halakha (or of Jewish texts) alone. The acknowledgment of how complex, yet delicate the historical formation of an authentic Jewish consciousness can—legitimately—be, is profoundly relevant to our understanding of how our identity is shaped.

The previous discussion led to a frank exposure of this writer's attitude towards democracy; it is no less important, I believe, to clarify one's attitude towards the State of Israel. Israel, as Eliezer Goldman has pointed out, is not simply a "fact" to which halakha must respond. The halakhic response will be different, we can be sure, if Israel is seen as a regrettable fact or as a welcome one, a situation which is met with neutrality or one which is embraced. This essay is written from a perspective which sees the restoration of Jewish self-government as a partial fulfillment of millennial hopes. This restoration, as the broader physical, social, and spiritual reality that has been created in Israel, engages the emotions as well as the intellect. In less euphoric terms, the Israeli situation forces the interaction of "religious" and "secular" populations to an extent unknown in diaspora conditions, one of the positive and promising aspects of Israeli life—for both populations. Put into terms familiar to us from the writings of R. Soloveitchik z"l, *berit goral* ("the covenant of destiny") is palpably real in Israel; it underlies our perilous existence and provides much of the satisfaction to be experienced in Israeli society. Unfortunately, both halakha and democracy are now divisive terms and concepts. For good or ill, democratic procedures and ideals do not only enable a meeting of the camps; their rejection by us would signal a clear rejection of those Jews for whom democracy is a basic value. The religionist is often feared as one denying the fundamental human/Jewish integrity of those who do not share his way of life; the rejection of democracy, which is taken as the crystallization of the commitment to human rights and the basic dignity of each person, would be a major confirmation of that fear.

## II

I shall begin by taking democracy, with Schumpeter and Dahl, at its most minimal and least ideological—as a system in which citizens choose their government, a government which possesses both administrative and legislative functions. Now, it has been maintained, even by some who would be satisfied with this minimal and uncritical definition of what "democracy" requires, that halakha and even such democracy are in principle opposed, thus making it impossible for halakha and any form of democracy to co-exist.<sup>2</sup> A similar position is implied in the writings of some religionists. This basic claim derives from the democratic belief in the sovereignty of the people and the idea that authoritative legislation is rooted in that sovereignty. For a religionist, on the other

hand, the sovereign is God, the ultimate author of authoritative norms; for him or her to accept popular sovereignty as expressed in a legislative body would be to betray a basic principle. The contrast is total and devastating to any possible rapprochement of halakha (or any normative religious order, for that matter) and democracy.

These different views as to the ultimate source of norms (and values?) might indeed lead, systemically, to ongoing conflict over specifics, and we would have to contend with that possibility in its proper place. But I do not think that the contrast described above should, in itself, and as a matter of principle, rule out the mutual accommodation of halakha and democracy. One ought recall that halakhists have, from talmudic times on, allowed and encouraged popular participation in governmental spheres, as we shall see; and that legislators, even of non-religious commitment, will frequently adopt laws based on what are for them ultimate, transcendent, non-relativistic values. In truth, then, neither side is quite as doctrinally pure as one might imagine.

But no less significant, in our context at least, is that our prime concern is whether the two systems can work together—not whether they can fully harmonize their respective ultimate truths. Now, I do not intend to retreat completely into pragmatism, but it would be wise not to brandish the potential fundamentalisms of both democracy<sup>3</sup> and halakha, or to reject any possibility of mutual interaction by staking out metaphysical positions.

### III

It cannot be denied, though, that even the minimalistic definition of democracy broached above—that the people periodically elects its government, and that such government has both executive and legislative authority—does not necessarily dovetail with halakhic structures of governance. The *Mishna* assumes that the people Israel is ruled (or co-ruled) by a king, recording no dissenting view, and Maimonides codifies the command to appoint a king, making it the norm. There is no honest way, I believe, to reduce a hereditary monarch who possesses great, if not absolute, power, to a symbolic figurehead, or to convert Maimonides' monarchy into a West-European constitutional democracy. It will clearly not do, either, to argue that the people may 'democratically' elect to be ruled by a monarch; that is simply a formalistic abuse of the concept. Nor, I think, can one take refuge in the pragmatics of the situation, claiming that halakhic communities have existed over the centuries on a

completely different, non-monarchic footing. (We shall, indeed, come back to this precedent, but only after a painful detour.) For we are dealing with a matter of concrete and unambiguous halakhic—not philosophic—principle, one which requires a principled answer. It will not do merely to concede that the monarchic ideal is not, in truth, a live option for many of us sitting in this room.

Thus, there is no way of avoiding the question of whether Judaism is inevitably wed to a monarchic ideal. We all know of the prophet Samuel's strong opposition to the appointment of a king, despite the ostensibly clear Deuteronomic command to do so. (On the surface, this opposition reflected Samuel's resentment at the monarchic infringement on the Kingdom of God, not his concern for social liberty; but as Buber pointed out, the rule of the Judges, which a hereditary monarchy would supplant, had some profoundly proto-democratic elements.) Actually, of course, that command is somewhat ambivalent, and this ambivalence probably led to the tannaitic discussion of whether the people Israel were in fact unambiguously commanded to have a king, a discussion which continues in later *midrashim*. Some *ge'onim*, in fact, decided the question in the negative, as did R. Sa'adya and Ibn Ezra in their commentaries. Maimonides, of course, decided with a thunderous positive. Let us note, however, as a distinctly minor counterpoint, that even Maimonides adopts the consensual view of political legitimacy, a view which sits uneasily with the monarchic ideal.<sup>4</sup>

Certainly, one cannot point to many dissenting voices, but they are there and have possibly become more audible in modern times. Abarbanel is well-known for his anti-monarchic posture. Netsiv—who, incidentally, is no milquetoast in matters political—takes *Deuteronomy* 17 to mean that if the people so desire, one is commanded to appoint a king, but that the people are not obliged to so desire to begin with. R. Yeruham Perlow mounts a frontal attack on the Maimonidean decision, claiming that according to standard rules of adjudication (*kelalei pesak*), there should be no monarchic imperative at all.<sup>5</sup> R. Kook argues that monarchic authority derives from the people, so that when the monarchy lapses, such authority returns to the people. Taken literally, this analysis says nothing about the non-desirability of monarchy *per se*; but it may be read as a way of providing the theoretical basis of a non-monarchic polity, as it were, as well as a way of providing the modern Jewish community with political legitimacy.<sup>6</sup> R. Hayyim David HaLevi has claimed that Maimonides' monarchism is not really representative. And R. Aharon Lichtenstein has outlined the halakhic notion of the "civil sovereign—initially a chief judge or monarch but conceivably an

oligarchic or democratic entity as well.”<sup>7</sup> It may be said, of course, that this and similar comments reinterpret (rather than reform) the monarchic structure, understanding it as merely one mode (among many) of providing necessary governance. But the methodological issue, which would be of great interest in another context, is not our concern here—which is to report on conclusions reached. Nor do I intend to urge that these flexible positions dominate halakhic discussion, either now or in the past. We are simply interested in seeing what resources the Judaic/halakhic tradition possesses.

Naturally, a moment’s reflection reminds us that the messianic hope is intimately tied up with an expected monarchic restoration. How can the messianic ideal, the belief in the coming of a Davidic scion, be squared with a willingness to forego that institution entirely? It does not seem possible, then, to divorce political ideology from other areas of substantive belief, which do seem committed to a specific view of Jewish governance. Perhaps this problem did not prove decisive for those many who denied the monarchic imperative; this, while true, is somewhat cold comfort. Some, such as R. Shlomo Goren, have worked with a concept of a ‘messianic era,’ no mean re-interpretation in its own right. Perhaps it is wiser to leave the messianic monarchy of the end of days in the realm of that future whose structure and content is known only to God, all the while wondering whether the belief in redemption, so rich in both in its personal, national, and universal aspects, ought be so powerfully focused on the person of the redeemer in any case. Indeed, there are some aggadic indications of the downplaying of the messianic element in that redemption in the interest of the kingship of God.<sup>8</sup>

#### IV

But if personal, hereditary monarchy can contribute little to a democratic halakhic society, the institution is most relevant in a structural sense. Basically, its existence demonstrates the legitimacy and desirability of political governance, that is to say: governance which is by definition not in the hands of religious leadership. From that perspective, one can speak of the ‘civil sovereign’ in a broad sense, so that it can be manifested in a variety of institutions: *melekh*, of course, but also *takkanat ha-kahal*, *dina de-malkhuta dina*, and so on. Most discussions do, it is true, consider these distinct, stressing those aspects in which they differ (e.g., the centralized *malkhut* as over against the local *kahal*; does *dina de-malkhuta dina* apply to a Jewish government in the Land of Israel?);

but there is much sense in considering them as points along a common continuum. We speak, in brief, of those institutions which are devoted to *tikkun olam*. Furthermore, the norms of "civil sovereignty" have often required a considerable degree of self-government. This has been the case especially in the case of the medieval community (*kehilla*) founded on the type of partnership adumbrated in the talmudic model of *benei ha-ir*. Indeed, it is possible that the poverty of physical power which characterized that community encouraged greater participation by the populace, as sanctions (for example) were of necessity social and consensual, rather than physically coercive. Naturally, medieval historical reality and normative requirements were often far from modern democratic expectations (even keeping in mind that these too exhibit considerable variety!), but the basic thrust is there.

Such governance co-exists with the *Sanhedrin* in the ideal Mishnaic-Maimonidean presentation, requiring both a separation of powers, and very likely, a separation of areas of authority. The monarch, to return to R. Lichtenstein's phrase, is the 'civil sovereign,' while the *Sanhedrin*, clearly, institutionalizes the religious leadership. These are distinctly different institutions in their competencies and personnel. Generally speaking, such differentiation is possible and coherent only if it is also accompanied by a functional differentiation, such that each institution is authoritative in distinct spheres. In the ideal halakhic polity, the civil sovereign and the *Sanhedrin* would recognize each other's role and function, meshing with no more friction than exists in any other system predicated on a division of powers.

This line of thought has been developed programmatically by R. Nahum Rabinovitch.<sup>9</sup> Rabinovitch, too, sees the monarchy as a manifestation of political governance, a governance which continued in different form in the organized community of the middle ages, when lay leadership was halakhically endowed with civil authority contingent on the consent of the populace. Major aspects of democratic theory are, thus, integrated into the halakhic world-view: civic authority is held by lay persons, not by sacral, or even halakhic, figures; and political authority is wielded by virtue of popular consent. Indeed, on a more basic level, the community *per se* seems to have been endowed with legislative rights.<sup>10</sup> All this assumes a civil authority which legislates as well as administers—much as the medieval community did in its *takkanot ha-kahal*, a position staked out in its most thoroughgoing form by R. Nissim of Gerona.<sup>11</sup> R. Rabinovitch also posits a firm and apparently easily discerned distinction between the areas governed by civil authority and those governed by halakhic authority. Thus, R. Rabinovitch provides a proposal which dis-



arms the major conflict in which halakha and political democracy are apparently embroiled. Civil legislation, which is the proper bailiwick of government, is not the realm of halakhic authority. This is more easily claimed where one can assume a lacuna in the halakha; but the examples of communal *takkanot*, which legislated even in areas where halakhic regulations already existed, produces a broader precedent. Thus, adequate halakhic room is created for popular, democratic authority.

Now, Rabinovitch is most vulnerable precisely on his assertion that the realm of “civil sovereignty” is firmly separated from that of religious authority. He has adapted R. Nissim in a way which locates him in the realm of the ideal rather than in the realm of the real. It has long been maintained, after all, that the organic unity of ethics and religion is one of the jewels in the crown of Judaism, and Jesus’ “Render unto God what is God’s and unto Caesar what is Caesar’s” has been condemned as a fundamental denial of that unity. Halakha, after all, legislates both *bein adam la-havero* and *bein adam laMakom*. And so, as R. Aharon Lichtenstein has written,

Judaism has consistently regarded the sacral and mundane as distinct but not disjunct. Pervasive halakhic norms relate to all areas of personal and communal existence . . . . The ideal polity, then, is one in which religion and state interact . . . . The halakhic state is thus ruled jointly. . . . Given the broad latitude of halakhah . . . large tracts of personal and communal life—virtually the whole social and economic sphere, for instance—are, in effect, independently ruled by two powers whose wills may . . . conflict.

Martin Golding put it more pithily: “Is there a role for secular politics within the Jewish tradition?” Furthermore, “In the area in which halakha, or the tradition taken broadly, is not controlling, how do Jews participate as Jews?”<sup>12</sup> Thus, it might be thought a sorry situation if Jews, *qua* Jews, had nothing to contribute to the social and economic discussion. And from a different perspective, “monarchic” authority did historically involve itself, as it was expected to do, in issues of religious observance, especially on the levels of sanctions.<sup>13</sup>

But these considerations and dilemmas do not rule R. Rabinovitch’s fundamental assertion out of court, even if they may be expected to lead to occasional (and legitimate) jurisdictional conflict between religious and civil authority as well as to the quest for a broad Jewish ethos in areas that are not determined by halakha. Thus, and frustratingly, neither the Talmud nor Maimonides provides any key by which

one could distinguish between the functions of *Sanhedrin* and king, even though this differentiation is a clear fact.

On a theoretical level, the overlap described above does exist, of course. *Bein adam la-havero* is as normative as *bein adam laMakom*, deriving from the same divine source and elaborated by the same halakhic method and personnel. Yet, to begin with, both spheres have their non-halakhic components; or to be more precise, areas where halakha provides a broad umbrella but no detailed guidance. Certainly, the realm of piety leaves much to individual spirituality: one Jew will say *Tehillim* and another will contemplate the heavens (a third will do both). Similarly with *tikkun olam*: while a halakhically mandated goal, the precise avenues and modalities for its achievement leave much for non-halakhic discretion. Pushing a bit further, the idea of halakhic lacunae—a problem discussed much of late in the philosophy of law—is already found in *rishonim*, with Ra'abad approving of the idea (in the context of his discussion of *dina de-malkhuta dina*).<sup>14</sup>

But the basic claim of the model here described is not merely that the civil sovereign operates in the narrow interstices left unfilled by halakha, the “lacunae” within which Ra'abad legitimated *dina de-malkhuta dina*. The claim would be, rather, that much of the legal activity of the state may be non-determined halakhically, that much of the administrative/executive (and even legislative) activity of the state may be halakhically indifferent—and it is this sphere with which R. Rabinovitch is largely concerned. The opposing claim would be that halakha is all-encompassing, that there is a halakhic answer—existent or potential—to all significant problems. This, then, is the basic issue to which the paradigms of *malkhut* and *takkanot ha-tsibbur* are relevant. Naturally, the issue is made more complex by modern reality, which adds at least two complications. First, it is difficult if not impossible to guarantee that the contemporary Jewish state will not legislate (or attempt to legislate) on matters which are within the halakhic bailiwick. Second, halakhists have long been sensitive to Jewish lay activity which not only encroaches on their prerogatives, but, more profoundly, incorporates “alien systems” into the halakhic lacunae. This issue has indeed been raised in discussions of the legitimacy of the Israeli legislative and judicial systems.<sup>15</sup>

Other perspectives should also be brought into play. The organic unity of Torah notwithstanding, we also rule that in financial matters—*dinei mamon*—one may draw up agreements in violation of Torah-law so long as the parties involved give their consent.<sup>16</sup> This license, which provoked a major tannaitic disagreement, is no simple matter, on either

theoretical or operative levels. This is not the place to enter into a discussion of this complex topic; suffice it to say that the great medieval authorities had difficulties, I think, in setting the limits of this license, especially when the arrangement adopted was similar to the gentile law of the time.<sup>17</sup> One imagines, moreover, that the structures given by the Torah are considered the superior and probative modes of behavior, so that individual departures are allowed, not applauded. The fundamental point, though, is that this flexibility exists, much as the distinction between *Sanhedrin* and king exists. The question is, rather, how deep this flexibility goes (for example, does it apply to public legislation, or to agreements between individuals only?) and how powerful a role it should play in our theory.

The problem exists in the other direction as well, of course. Let us imagine a proposal to legalize assisted suicide. May the halakhically committed oppose such a proposal on philosophical or utilitarian grounds, but not on halakhic ones? May he or she not vote on his or her halakhic conviction? The topic of legitimate motivation in democratic society has been much discussed; yet most of us would feel it perverse to limit the halakhist's freedom in this matter.<sup>18</sup> But isn't he urging the use of the coercive power of the state to promote a religious value? Is this legitimate only because the issue chosen can be argued on the basis of its societal ramifications as well as its purely religious ones? Perhaps. Clearly, though, there are other similar issues where the modern state cannot but take a stand, and where the religionist's contribution would be problematical in a world of firm distinctions. A clear by-product of R. Rabinovitch's proposal, I believe, is a minimalization of state activity and the shifting of many areas of its activity to more homogeneous communal groupings. Though this stance may be attractive in theory, it would be hard to implement in the modern world. I also wonder whether this strategy is powerful enough to engage all the problems raised.

R. Rabinovitch also argues that there is a basic reluctance on the part of halakhic institutions to use physical, coercive power. Fundamental to this tendency is the talmudic construal of laws of evidence so as to minimize greatly the possibility of actually imposing punishment; R. Rabinovitch also points to various instances where talmudic law preferred to disavow itself of the capacity to inflict punishment. All this produces a sacral halakhic institution which is fundamentally a teaching/legislating authority. Undergirding this entire thrust is a belief that the trajectory of divinely guided human history is one which maximizes individual human freedom as essential to the reality of free choice, which in

turn is essential to doing the good and holy. Thus the modernist perspective, R. Rabinovitch urges, is adumbrated by the development of the halakha itself and, indeed, lies at the heart of the halakhic vision.

The concrete implications of this trajectory obviously function to undermine the use of coercive force as motivation for halakhic behavior. This is quite different, incidentally, than the forswearing of force commonly found in modern halakhists such as Hazon Ish. These approaches are predicated, in one way or another, on modern man's loss of faith, that is, on his decline. Hazon Ish, moreover, is interested in justifying the historic abandonment of brute force in dealing with the classic *apikoros* and the like—this, in a sense, deals with an issue that is no longer actual in the Jewish community. R. Rabinovitch is interested in the status of religious legislation, a much more subtle form of coercion—which means dealing with the present.

A more significant halakhic challenge to “religious legislation” *per se* is raised by the question of the worth of halakhic behavior under compulsion. Now, it is patent that from the Bible on, halakhic performance can (or even: should) be coerced and that punishment will be meted out to the miscreant. But much recent analysis, deriving largely from the work of R. Me'ir Simha of Dvinsk, has concluded that such coercion is valid only when it brings about an internal change in the mind and heart of the person coerced, so that he or she assents to do what he or she was ostensibly forced to do.<sup>19</sup> Such a change of heart could be posited in ancient times; it is hardly a legitimate assumption in our time. If so, coercion—and state legislation would seem to fall under this rubric, in spirit and possibly in letter—is both valueless and even illegitimate. It may be claimed,<sup>20</sup> of course, that this entire body of thought is simply a recent accommodation to (or internalization of) modernity, when even committed religionists do not insist on a full measure of coercion and where modern concepts of toleration have made their mark even on authentic rabbinic greats.<sup>21</sup> But whatever the merits of this sociological analysis, the halakhic view I have summarized—a view which has both conceptual depth as well as practical implications—does have significant support among contemporary halakhists. Yet this application of *Or Same'ah* to modern conditions is also based on a theory of deterioration; the Jew, it is claimed, has lost his bedrock identification with Torah.

R. Rabinovitch, on the contrary, speaks of modern man's development towards a higher spirituality, and is here closer to certain idealistic (and naive?) strains in the thought of R. Kook. Another interesting precursor is R. Yosef Eliyahu Henkin, who daringly suggested that the cessa-

tion of *semikha* was providentially brought about so as to make physical punishment impossible, thus preparing Jewish society for the Messianic age.<sup>22</sup>

In a sense, R. Rabinovitch implies that the halakhic differentiation between *Sanhedrin* and monarch dovetails with both the familiar Western distinction between church and state (at least insofar as the nature of the authority held by each institution is concerned) and with some of the major premises of liberal political thought. Consequently, he has no qualms with one further concrete implication of the proposal: there is in principle—and not merely as a matter of tactics—no halakhic validity to “religious legislation.” For halakha grants political authority to non-halakhic figures in the area of civic governance alone. That, by definition, rules out the use of the political process to legislate in topics that are matters of religious significance—that is, *bein adam laMakom*. *Malkhut*, the state with its coercive powers, is concerned with *yishuv ha-olam* alone.

For the halakhic legitimation of a “civil sovereign” to be relevant in the present, we must be prepared to acknowledge the authority of lay institutions in a polity which does not grant authority to religious leadership *per se*, aside from a strictly restricted Chief Rabbinate. No *Sanhedrin* will exist in tandem with *malkhut* unless the religious community itself produces one; nor will the talmudic-medieval review by the local Torah-sage check the “civil sovereign.” Certainly, many—but not all—a medieval Jewish community functioned under precisely those conditions, but it (or at least the rabbinic estate) never made its peace with that situation. On the other hand, we should also do well to realize that, contrary to many voices heard nowadays, “rabbinic review” was not intended to check on the halakhic validity of communal legislation in the narrow sense, but rather on its coherence with broader norms of justice and fair play. Would that the contemporary rabbinate in fact reasserted this role, a role there to be taken! Issues for such guidance abound.<sup>23</sup>

## V

The halakhic (!) model described above carried with it no small surprise. Put bluntly, its bottom line is that little halakhic content should be legislated into a Jewish state, since the use of coercive political power is what most characterizes the state. What, then, becomes of the very phrase, “the Jewish state?” Indeed, it is relevant to remind ourselves

that the definition of Israel as a “Jewish and democratic state” has twice been recently legislated into Israeli law, in both Basic Law: Human Rights, and Basic Law: Freedom of Profession. There can be no denying, either, that both the millennial hope and historical reality made the restoration of a State crucial for Religious Zionists (and even for Jews who do not so define themselves), and that meant that it was the State, specifically, which was to embody and concretize the religious renewal of the people as well, a renewal which it seemed natural to anticipate in statist terms and political arrangements. This was the Jewish dream. Are we now to contemplate an Israel *sans* all Jewish content, a spiritual Uganda, as it were? It certainly seems perverse to understand the halakha in so narrow a way that it virtually reads itself out of social existence, denying what seems to be axiomatic for any self-respecting traditional Jew. Thus, so sensitive an observer as Pinhas Shiffman (himself no advocate of religious legislation in matters of personal status) suggests that if Israel were to completely legalize civil marriage, much of the religious population would reconsider its basic identification with the State. Isaiah Leibowitz’s assertion that Zionism could be satisfied by a State in which Jews were not subject to political domination by non-Jews may not accurately reflect the temper of the religious public.

But we would do well to remember that the situation is not all that bleak or one-sided. Even a most extreme formulation speaks of the abandonment of coercive political power as a device for ensuring religious behavior. It says nothing about the content of Jewish society, the possibility of constructing a meaningful “Jewish street” through educational, voluntary, non-coercive structures. Indeed, the palpable retreat of substantive Jewishness in the current Israeli “public square,” an accomplishment, largely, of mass communication and its messages, has been accomplished under the aegis of a “Jewish state” in which “religious legislation” is a growing norm.<sup>24</sup> Thus, it is worth pondering whether the character and content of mass communication, a factor of inordinate significance in the creation of popular culture, is fundamentally related to the state *per se*. This query is true, to be sure, of many other components of modern culture. The religious option must compete with very powerful and attractive secular alternatives; “the unfortunate fact is that religion sometimes fails to persuade.” Broadly, it is time to realize that the association of religion with coercion—on many levels—has produced a gross distortion of the content of Judaism; certainly, a gross distortion in the way Judaism is perceived.

Nor is it clear that the American model of a complete separation of church and state is the only form of democracy. Must the democratic state completely disengage from all matters religious? Few Israelis, for

example, reject the idea of state support for religious schools (both Jewish and non-Jewish, of course). The state does see itself as responsible for educating/socializing its young—as have democratic states for awhile now, conceding the matter only for fringe groups such as Quakers—and the choice by parents of the education to be given their children seems fully congruent with democratic rights. There is some coercion here, on the level of taxation and disbursement, but it is indirect and tolerable. Other such examples could be given, ranging from support of neighborhood rabbis to purchase of *mezuzot* for government offices. Whether religion is itself better off supported by the state is not our present concern; most religious Israelis clearly think it is.<sup>25</sup>

More significantly, much of the “Jewish” content of Israel is not halakhic in nature at all. This content in fact offends contemporary liberal democracy no less than the halakhic characteristics of the country, but is defended by a clear majority of citizens. The problematics of a state which is both Jewish and democratic involve more than halakhic issues. There is, after all, a wide range of phenomena by which the State of Israel defines itself as Jewish. These range from the Law of Return to the use of the *menora* as the official symbol of the State, and much in between. (A basic and much-cited instance is the denial of political legitimacy to parties which urge the end of the country’s Jewish or democratic character—which is itself, possibly, a non-democratic rule.) These are, on the one hand, not halakhic in nature, as halakha mandates neither the Law of Return nor the *menora*. On the other hand, they are both prime components of the Judaic character of Israel, in two senses. First, they are drawn from the repertoire of Jewish civilization or posit a special relationship between Jews and the State.<sup>26</sup> Second, and this is merely the obverse of the above, they are not available to non-Jews, for whom the *menora* is a meaningless symbol and to whom the Law of Return does not apply.

Now, a person committed to halakha can feel free to urge the repeal of the Law of Return, for example, as a violation of *darkhei shalom*. Or he can defend it as either consonant with the nature of ethnic democracy or as similar to the restrictive immigration policies of some well-known democracies. He can similarly oppose some of the discriminatory practices embedded in Israeli life (in the name of either democracy or halakha!) or he can applaud them. The issue, then, is not halakhic; it goes to the root of the national/ethnic character of the State as a whole.

It is generally thought that Judaism coheres well with the republican democratic emphasis on self-government, but less well with the lib-

