Beyond the Janus Face of Zionist Legalism: The Theo-Political Conditions of the Jewish Law Project

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Abstract. What are the assumptions that underline the Jewish Law Project? To what extent is this project relates to Zionism as a political program and national vision? Does the secular version of this project and the religious one have anything in common? I argue that aside from the ideological lines that guide the Jewish Law Project, within it rests a reductionist and utopianist stance vis-à-vis halakhah which are considered to be obvious. I shall attempt to claim that reductionism and utopianism as tacit assumptions, which are neither explicit nor declared by the carriers of the Jewish Law Project, are definitely not trivial. Then, by detrivializing these two assumptions I will suggest viewing the halakhic-legal relations defined by the Jewish Law Project through these same parameters—the reductionism of the halakhah and its utopian approach.

The main purpose of the Jewish Law Project1 (henceforth: JLP), i.e., to turn the legacy of halakhah into the main source for Israeli law, is strongly associated with Zionism as a political program. The theo-political problem that is at the basis of this project—the relationship between the halakhic legacy and Israeli law—has accompanied the Zionist enterprise from its inception and continues to do so.

Indeed, an overview of the JLP in the context of the Zionist movement demonstrates that this idea was identified as the mission for opposing

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1 By the expression “Jewish Law Project” I refer to the nationalist agenda motivated by ideological interests distinct from the theoretical discipline generally driven by pure academic interest. Most of the Jewish law scholars out of Israel belong to the latter group while most Israelis, either in academic or nonacademic institutions, are identified with the former. This distinction is also applicable to the conclusion of this paper referring to the historians of halakhah.
Zionist ideologies—religious Zionism on the one hand, and secular Zionism on the other. For the religious wing, the purpose of the JLP was to dispel some of the tension between halakhah and state law, to bridge the gaps between them through the adoption of traditional halakhic norms, in whole or in part, and to have them internalized into the legal system. On the other hand, for secular Zionist ideology, the JLP represents the path to the secularization of halakhah and expropriation of its religious meaning by turning it into the law of the secular state. Thus, under the Zionist ideological framework, the JLP can be viewed as an attempt, driven by contradictory motives, to obscure the distance between halakhah and State law.

The fundamental principle on which the entire project in all its versions is based is the assumption of systemic similarity between halakhah and law. This means acknowledging the possibility of presenting halakhah as a legal system in the modern sense, that is, as a comprehensive array of legal norms spanning all realms of life regulated by common law—criminal, civil, contract, property and so on. On this basis the relation between halakhah and the law is viewed as a relation between two normative systems that are parallel, competing, and therefore potentially interchangeable.

The representation of halakhah in such a manner, namely, as a system parallel to ancient legal systems (Roman, Provincial and Islamic law) or contemporary ones (mainly Anglo-American and Continental Law), underlies the academic literature of Jewish law scholars, and is increasingly reflected in public discourse regarding the relationship between halakhah and the law.

In the following, I question the presentation of halakhah as a legal system, as it not only obscures the ideological motives of its proponents, but also

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2 The adoption of halakhic norms, whether entirely or partially, relates to the question of the relationship between the JLP and the vision of the halakhic state. Those who seek to differentiate between the two and to understand the JLP as an aspiration for partial and not complete application of halakhah must make an intra-halakhic distinction between the various halakhic norms. For an example of such a maneuver, which seeks to distinguish between these two visions based on the distinction between “religious halakhic norms” and “legal halakhic norms” see Elon 1994, 122–41. In fact this distinction can hardly be applied to many halakhic norms, which carry indistinguishably religious and social meanings. Even so, the suggestion to raise that distinction as an attempt to establish a counter theo-political goal that secularizes the political arena has been put forward by medieval halakhic figures like Solomon b. Adert (Rashba) and Nissim Gerondi. On that see Lorberbaum 2001 and the following discussion referring to Rashba’s sayings.

3 For a comprehensive survey of this program from a legal and religious point-of-view, see Elon 1994, chaps. 41–4. For a social-historic analysis of the attempts of national legal experts to establish secular Jewish law in Mandatory Palestine, see Shamir 2000.

4 Of late, the question of law and halakhah has been raised from a slightly different angle, in which it is formulated not as a project that brings two systems closer, but as an existential dilemma that sharpens the tension between halakhah and law as two distinct cultural systems, raising the question of normative dualism and dual loyalty. However, this type of analysis of the relationship between halakhah and law offers no innovation, since this approach, in the spirit of the JLP, also assumes a similarity between halakhah and law, necessarily leading to conclusions that compromise or mingle the two systems.
ignores other essential peculiarities of halakhah and avoids giving an account of its redefinition as a modern legal system. Accordingly, the significance of the reduction of halakhah to law extends far beyond the question of similarity between halakhah and the law, since it also reshapes the perception of halakhah itself. In other words, the JLP must be viewed not only as an attempt, driven by the two Zionist ideologies, to infuse the Israeli law with halakhic norms (the halakhization of law) or to nullify its religious meaning (the secularization of the halakhah), but first of all as an attempt to reshape halakhah as a modern legal system (the legalization of halakhah).

An additional implicit position of the JLP is that halakhah includes ideals of social and political justice, in that its comprehensive application as state law should enable the construction of an ideal and properly functioning society. The question of the sociopolitical goals and the utopian dimension of halakhah as a plan for constructing a perfect society arises in a number of contexts in the history of halakhah and is not unique to modern considerations of the relationship between halakhah and law. However, the formulation of the JLP as attempting to turn halakhah into state law brings the question of the sociopolitical goals of halakhah to the surface, and also brings into focus the question of its utopian dimension: Will a general application of halakhah create a more just society? A more perfect one?

The gist of my claim, then, is that aside from the ideological lines that guide the JLP, within it rests a reductionist and utopianist stance vis-à-vis halakhah that are considered to be obvious. I shall attempt to argue that reductionism and utopianism as tacit assumptions, that are neither explicit nor declared by the advocates of the JLP, are definitely not trivial. Then, by detrivializing these two assumptions, I will suggest viewing the relations between halakhah and the law defined by the JLP with these same parameters—the reductionism of the halakhah and its utopian approach.

This paper will focus not on conceptual and factual difficulties in presenting halakhah as a legal system and the religious meanings of this

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5 The reconception of halakhah as a legal system ignores the significant dimensions of halakhah as a pedagogical method, a ritual and religious structure, an ethical way of life, and other possibilities.

6 For the main objection which emphasizes the lack of overlap between the term “Jewish law” (mishpat Ivri) and halakhah see Englard 1976 (in Hebrew; henceforth indicated by “H”). Another conceptual problem is whether halakhah can be related to as a unified system. On this matter, see the discussion of Bernard Jackson 1989. It should be noted as well that legislation has not employed the term “mishpat Ivri,” but rather “din Torah” (Torah’s law) (par. 2 of the Rabbinic Courts Law [Marriage and Divorce], 1953), or “moreshet Yisrael” (Israel’s legacy) (par. 1 to the Foundations of Law Act, 1980). As can be learned from the proposed law, the choice of the term “moreshet Yisrael” is intended to avoid creating a binding relationship to Jewish law: “[The justice’s reference] to the basic values and ethics of moreshet Yisrael, without forcing upon it all the provisions of Jewish law” (legislation proposals, 1978, 307–8). Yet interpretation of this term in the ruling and among scholars reopened the possibility of identifying it with Jewish law. On this matter, see the main points of argument between justices Elon 1987 (H), and Barak 1987 (H).
move,\(^7\) and not even on a comprehensive description of relevant sources that construct the utopian dimensions of halakhah. Rather, it will present the reductionist and utopian aspects as two implicit positions underlying the JLP. I will therefore attempt to cast light on the various manifestations of the project, identifying the utopian logic that underlies them, and the way halakhah is reduced in order for it to become state law.

Halakhah and Law—The Theo-Political Problem

As stated above, the fundamental theo-political question underlying the JLP is the relation between halakhah and the law. The attempt to extricate answers to this question from the extensive historical literature of halakhah points not only to a variety of responses, but also to different understandings and formulations of the problem.

One way of formulating the problem in an awareness of the need for social and governmental provisions, together with loyalty and obedience to halakhah, presents the problem as the relationship between halakhic and extra-halakhic norms. This relationship therefore represents the two spheres of life regulated by the norms that characterize them—the halakhic sphere, subject to the laws of Torah (Torah law), and the extra-halakhic, in which social provisions are based on patterns of government practiced in society at large (the King’s Law). Accordingly the focus of the theo-political problem is mostly on the relationships between the halakhic and extra-halakhic realms.\(^8\)

Another way to formulate the problem shifts the main weight of the theo-political problem from halakhic and extra-halakhic relationships to the nature of halakhic utilities and goals. In other words, the question of halakhah and the law according to this approach no longer focuses on the internal and external aspects of halakhah, but rather on the reflection on halakhah itself—its image and its essence—and its applicability to modern political reality.

In many senses one may say that these two formulations reflect the difference between the medieval and the early modern theo-political foci.\(^9\) In

\(^7\) The central claim from a religious perspective against the presentation of halakhah as a candidate for state law is secularization, according to which one cannot ignore the religious foundation of halakhah. Thus by placing halakhic content in the hands of authorities who are not religious and do not operate out of religious belief, the religious meaning of halakhah is appropriated. See Leibowitz 1957–1958, and Englard 1968. For that reason Zeev Falk objected to the common usage of “mishpat ivri” including the secular and pre-halakhic term ivri (= Hebraic) and instead proposed the term “dinei Israel” based on the traditional term for halakhic norm—din. See Falk 1980, 18, n. 15 (H).

\(^8\) Ravitzky sets forth four types of relationship between religion and the state in medieval theo-political philosophy—unity, division, collision and subordination. See Ravitzky 2002.

\(^9\) A profound and extensive treatment of the two main streams in medieval Jewish political thought can be found in Lorberbaum 2001.
Jewish thought, as in thought in general, the intensification of urbanization in the early modern age that gave rise to the modern state created the need to give a new account of the cultural and legal heritage of the traditional world. In the Jewish context, this was prominent in the revisionist stance towards halakhah itself. While in medieval thought halakhic and extra-halakhic relationships were examined without needing to define what is halakhic, the reformulation of the problem, following the challenges of modernity, brought forth the need for a redefinition of the essence and character of halakhah.

In the light of such a formulation of the theo-political problem, the discussion of the nature of Jewish political ideals is called upon, at the same time, to consider halakhah itself—the meta-halakhic structure, the nature of halakhic norms, and the like. It is therefore possible to characterize the kind of theo-political discourses that derive from this formulation as discourses in which halakhic theory become a necessary component for the definition of theo-political ideals.10

**Halakhic Utopia—Two Prototypes**

The theo-political ideals embodied in halakhah raise questions of the political utility of halakhah, its teleological goals and halakhic utopianism in general. In this context, it would be useful to distinguish between two prototypes of utopian conceptions, and the tension between them that is the main characterizing feature of Jewish theo-political thought, that is significant in the shaping of the JLP.

The original meaning of the word “utopia” is a land that exists nowhere (Greek: οὐ—not, τόπος—place), but with an ideal sociopolitical system. This definition includes, then, two foundations—unrealistic imagination on the one hand, and regulative ideals on the other. These two foundations also represent the dual significance attributed to utopia, and the two functions of utopia as a consciousness determining action. According to one meaning, the significance of utopia lies in the fantastic power of imagination, fashioned by it as a yearning for the absolute good, a kind of waking dream that cannot be fulfilled, since it lies beyond the realm of possible reality—in “no place.” According to another meaning, utopia is a symbol and a landmark on the way to “a better place,” a guiding ideal to which one should aspire.11

10 Reflective thought on the essence of halakhah is of course not lacking in medieval thinking, and actually forms the center of theological discussions of the metaphysics of halakhah and its basic reasons and logic. However, the matter of the reasons for the mitzvot and other meta-halakhic questions were not issues dependent on political considerations or on the attempt to define the religio-political ideal. Posing the question of the essence of halakhah as a key question for political philosophy is therefore a prominent signifier of modern theo-political thought.

11 There is proximity between this distinction and Karl Mannheim’s delineation between “absolute utopias” and “relative utopias,” distinguished from one another by the potential of each for implementation. See Mannheim 1955, 173–236.
The gap between these two meanings is the distance between the ability to create a better reality, and the reality of the “absolute good.” The secret charm of the utopian picture, therefore, lies inextricably in its preservation of the dual significance, and the non-committal attitude towards whether the expectation of another reality can be attained or is beyond the realm of the realistic.

This tension, between a utopia of “no place” and that of “a better place,” also represents the emotive dimension of utopian thinking. The vision of utopia as “a better place” fuels and accelerates changes from the existing situation towards a realizable ideal, while a utopia of “no place” neutralizes the actual dimension of that same ideal, and transfers it beyond the bounds of the possible. The choice between the two meanings—whether to leave the utopian picture in the framework of what is realistically possible, or beyond it—is a matter of interpretation, a second-order activity in relation to the utopian picture itself.

Does the religious aspiration to behave in keeping with halakhic norms reflect a utopian consciousness?

Undoubtedly not all ideal-driven behavior should be viewed as based on utopian consciousness. Utopian consciousness is at its core political consciousness, which describes social life in the idealistic terms of perfection. A religious or moral worldview that critiques the existing situation and points to behavior leading to a better world is utopian only to the extent that it is not satisfied with the improvement of the individual’s world, but rather expresses an aspiration towards the collective perfection of society.

Given the context of Christian anthropology, which views humans as sinful, the medieval European consciousness was overflowing with millenary views regarding the redemption of the world by God, and not by man. Redemption of society and the establishment of the perfect city as a mission reserved for God is apparently based on the prophetic conception of the new creation that God will bring in at the end of time. It was manifested in the early Christian view\(^\text{12}\) and in post-Temple Judaism (see Flusser 1998, 258–75), as the program of the rebuilding of Jerusalem by God. In the early Middle Ages, this viewpoint found expression in the R. Sa’adia Gaon’s *Kaddish d-Hadta*: “Who will in the future time renew the world, and resurrect the dead, and build the city of Jerusalem, and set its palace in order, and uproot idolatry, and bring the heavenly ritual to His place and to reign His kingdom.”\(^\text{13}\) In any case, the establishment of the perfect society and the perfect city—the City of God—was not perceived as a utopian aim of

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\(^{12}\) See *Revelation* 21:9–22:5, particularly 21:10: “Then he carried me away in the spirit to a great and high mountain, and showed me that great city, the holy Jerusalem, descending out of Heaven from God [. . .].” A more detailed description of that conception is of course found in St. Augustine’s *De Civitate Dei*.

\(^{13}\) *Siddur Sa’adia Gaon* (*kitab gami’ al-salawat wal-tasabih*); see Asaf, Davidson and Yoel 1963, 350: 1–5 (H).
halakhah, but as heavenly redemption. Only in the Renaissance, with the growth of the idea of the self-constitution and centrality of man, did the ideal of the perfect city and good government arise as a humanitarian project.

As noted above, the tension between the utopia of “a better place” and the utopia of “no place” is typical of halakhic reasoning and appears on many occasions when halakhic ideals confront reality. A good example of such a confrontation could be founded in the position of R. Shlomo ben Aderet (1235–1310, henceforth: Rashba), which maintains that in reality there is no absolute obligation to apply the law of Torah, even in places where it is permitted by the authorities. The principle formulated in this position is that in matters concerning the social order, the laws of Torah should not be adhered to, and can be deviated from in keeping with practical considerations determined by local halakhic authorities—“One who is in charge of regulating public order is not required to base [his decision] on laws actually written in the Torah, but according to what should be done at the time and is permitted by the government.”

The position of Rashba is interesting on a number of levels. At the practical level, his position casts doubt on the efficiency of Torah laws in running a “proper state,” and as such, expresses a skeptical position regarding the utility of halakhic norms. However, it appears that he also points to a theoretical position regarding the nature of halakhic utopianism. In this statement, Rashba seeks to dissociate what might be viewed as a causal relationship between “the laws written in the Torah” and “state laws,” thus refuting the perception of halakhah as a collection of guidelines for the realization of a religious utopia. His words negate the intuition according to which it is “the laws written in Torah” that provide the definition for a perfect state, and a proper political situation. The political idea of rectification of the state in his eyes is not identical to the political aspiration for full implementation of Torah laws, and does not derive from them. Halakhic utopianism according to this position is therefore the utopianism of “no place,” and unworthy of implementation in reality.

Based on this position, Rashba accepted relatives, women and minors as legal witnesses, even though this constituted a deviation from the Talmudic law of testimony. In this matter, he ruled that the determining criterion regarding the reliability of witnesses is the trustworthiness of the impression they give the local judges (berurim), and not the fixed halakhic standards:

14 Rashba—Responsa: see Jerusalem Institute 1998, 4: par. 311 (H). In a parallel response, the formulation of this principle is based on criminal, not juridical reasoning—“But one who disobeys the state laws should be penalized on the basis of the need at the time . . .” (Rashba Responsa attributed to Nachmanides, Tel-Aviv: Eshel, 1959, par. 279 (Photo Reprint Edition, Warsaw 1884 [H]).

15 The institution of the “berurim” developed in thirteenth-century Catalonia, and was defined by a royal order in 1272 as an authority granted to the Jewish community to appoint for itself a number of people who will “exert themselves, investigate and discover all obnoxious persons
Since if the witnesses are reliable according to the berurim, they have the authority to impose a monetary fine or corporal punishment, all according to what they determine, and this is what upholds the world. Since if you base everything on the laws set forth in the Torah, and punish only as did the Torah: By bodily injury and the like, the world will be destroyed, since there is a need for witnesses and warning, and as our [Sages], may their memory be for a blessing, would say: Jerusalem was destroyed because they based their words on Torah law.\textsuperscript{16}

It should be noted that Rashba interprets the amoraic statement, “Jerusalem was destroyed because they based their words on Torah law,”\textsuperscript{17} differently from its original meaning. According to his reading, this amoraic statement does not express a critical strand opposing a halakhic formalism that refrains from stipulating rulings that are not in strict accordance with the halakhah,\textsuperscript{18} but rather is a critique of the fastidious adherence to the law of Torah in a context where it would be appropriate to deviate from it and invoke other standards. In his opinion loyalty to halakhah does not require a view of halakhic norms as reflecting a proper socioreligious ideal. There is therefore in his opinion no obligation to apply halakhic norms in a sweeping manner when their application does not lead to the improvement of the state, and may even bring about its demise.

Rashba’s argument that complete application of the law of Torah might lead to disaster—“If you make everything contingent upon laws stipulated who, by day or night, within the Jewish community or without, speak or act maliciously against men of good repute; to correct through proper punishment and eliminate malfeasance and impropriety and all else that is contrary to Jewish law and proper custom; and generally to take measures to promote the welfare and prestige of the community.” See Baer 1992, 225.

Regarding Rashba’s legal education, his expert knowledge of Latin, local law and the Roman law, see ibid., 281–9.

\textsuperscript{16} Rashba—Responsa: see Jerusalem Institute 1998, 3: par. 393 (H).

\textsuperscript{17} This amoraic statement is attributed to R. Yohanan (first generation of Palestinian Amoraim): “R. Yohanan said, ‘Jerusalem was destroyed only because it was ruled by Torah law,’” (bBM. 30b). Apparently the anonymous redactor of the Talmud interprets the saying of R. Yohanan as a critique of the inflexible adherence to the existing law, and rejects the possibility of understanding it as a critique of the reluctance to consult with non-Jewish law: “But did they discuss the laws of Mgista? No, which means that they based their words on the law of Torah, and were not lenient.” The expression “laws of Mgista” is based on a Persian term (\textit{mkst}): see \textit{Arukh Completum}, Vienna: Menorah publication, 1926, s.v. \textit{mgista}, vol. 5:78. (H), which, in Talmudic and Gaonic literature, is usually a derogatory reference to the laws of the Gentiles, or the unfair law. See \textit{Geonic Responsa, Sha’arey Tzedeq}, ed. H. Moda’i, (Salonika, 1792 and subsequent editions), Vol. 4, Gate 7, par. 4 (H). In this sense, the meaning that Rashba attributes to R. Yohanan’s saying as a reference to a foreign legal standard for Torah law approves the meaning that was rejected by the Talmudic redactor.

\textsuperscript{18} The distinction between “the strict law” (\textit{shurat hadin}) and “beyond the strict letter of the law” (\textit{lifnim mishurat hadin}) parallels the known distinction between \textit{ius quiritum} and \textit{aequitas} in the Roman law or the \textit{common law} and \textit{equity} in the Anglo-American legal tradition. Within the halakhic literature this distinction appears beginning in the mid-second century B.C.E. (\textit{Mekhillta De-R. Yishmael}, Horowitz edition, Masshekhta de-’Amalek, Yitro, 2, 198 [H]). The appearances of this category in Talmudic halakhah do not state a juridical norm, but rather private, voluntary behavior. Silberg 1964, 97–138 (H) viewed it as a personal norm of renouncing an exemption that exists within the framework of halakhah, while Urbach 1975, 330–3 viewed it simply as an act of pietism.
in the Torah... the world will be destroyed”—is indeed a radical statement that, as stated, contradicts the intuition according to which halakhah, insofar as it is God’s commandment, provides the ultimate guidance for societal perfection. His call to suspend the law of Torah in instances when it may lead to social disaster stems from pragmatic considerations, and it would be superfluous to state in what situation it is appropriate to apply halakhic witness laws. In this sense, rejection of the causal relationship between the application of halakhic norms and “perfection of the state,” together with a refusal to satisfy the demand for instant and constant application of the law of Torah, both reflect a realist approach to the application of halakhic norms.

This sort of Halakhic realism is based on the acknowledgment of the inefficacy of halakhah in organizing a suitable and just social order and the absence of an aspiration for a sweeping and unrestrained application of halakhah. In fact, such realism merges with the “nowhere” type of utopianism, and abolishes the seeming contradiction between the realistic and the utopian approach. This realistic-utopian position paves the way for recognition of the possibility of favoring extra-halakhic norms over laws of Torah without undermining their significance.

It appears that this approach also reflects a Provincial-Catalonian tradition, the early signs of which are to be found in the writings of Nahmanides (1194–1270), achieving a comprehensive theoretical formulation in the political teachings of R. Nissim Gerondi (1320–1380). It is also likely that this realist tendency is firmly rooted in the character of medieval philosophy as an interpretive philosophy of religious history, the objects of which are not an example of ideal perfection, but rather the low points and crises in the history of Biblical Israel.

Reductionism and Utopianism in Mendelssohn’s Theo-Political Thought

The relationship between halakhic utopianism and the reduction of halakhah into parallel legal systems figures prominently in the theo-political thought of Moses Mendelssohn (1729–1786). Mendelssohn’s philosophical greatness along with his historical location at the turning point of the early modern period and the crossroads of traditional Judaism yielded one of the most profound philosophical reflections on the halakhah-law relationship in the history of Jewish thought.

The change in the status of Western European Jews with widespread emancipation and the annulment of legal autonomy imposed great hardship on Jewish communities, placing them in a terribly difficult position. It thrust the communities into a profound crisis that undermined the power of tradition to organize community life, and threatened their ability to survive

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19 A comprehensive overview of this tradition making a comparison with the Maimonidean tradition can be found in Lorberbaum 2001.
and preserve their identity. At the same time, and in the light of this, among both rabbinic and enlightened leaders, a vehement debate was initiated regarding the extent to which emancipation was beneficial for Jewish life. The debate about the appropriate response to emancipation, and the possibility of returning to the model of the autonomous community, raised the question of whether halakhah might still serve as a unifying factor in the organization of the community, in a manner parallel to the role of law in the modern state. In this way the question of halakhah and law focused on the question of halakhah’s ability to serve as an alternate system for state law, and to encompass the variety of spheres of life to which it applies (civil, economic, public, etc.).

This question is indicative of the rise in the internal demand for self-reflection and for a theoretical treatment of halakhah compared to earlier generations. Both positions—the one which supported acceptance of emancipatory policy, and the one which opposed it and demanded a renewed recognition of halakhah as the autonomous law of the Jews—were expressions of an identical internal need, namely, to devise a theo-political program based on a renewed evaluation of halakhah.

As a staunch opponent of the reinstatement of legal autonomy, Mendelssohn called for complete involvement in civic life and general culture.21 Mendelssohn’s phenomenal composition, “Jerusalem” (Mendelssohn 1983), is devoted to the philosophical substantiation of the need for a practical division between religious and political life, based on the enormous gap between halakhah and state law as two distinct phenomena that cannot be conflated. The structure of Mendelssohn’s claim in “Jerusalem” even reflects a pioneering attempt to develop a reflective view of halakhah that requires a clarification of the nature of halakhic anthropology as underlying assumptions of the theo-political program.

His central argument is based on a phenomenology that views halakhah as a normative system that is essentially different from modern state law. Such a distinction obviates the possibility of reducing halakhah to state law in the modern sense, and thus rejects the idea that halakhah is capable of serving as the autonomous law for contemporary Jews.

20 The research of A. Ravitzky on patterns of political thought in the Middle Ages characterizes Jewish political philosophy as an interpretation of the memories and trauma created as a result of the clash between theology and politics. Thus he claims that “most of the chronicles of Jewish political thought can later be presented as commentaries on these memories and traumas. In this sense, political thought wove itself around realistic models of crises and compromise, rather than around harmonious, ideal or utopian models”: Ravitzky 2000, 16.

21 As noted by Ya’akov Katz (“Rabbi Raphael Cohen, Moses Mendelssohn’s Opponent,” in Katz 1998, 191–215) Mendelssohn’s position not only was part of the apologetic maneuvers in response to anti-Semitic claims regarding the subversive nature of the Jewish religion, but also assumed a position in the internal Jewish debate regarding the appropriate Jewish response to emancipation and the undermining of the status of the halakhic authorities in the communities.
The distinction between halakhah and law, with its corollary that halakhah cannot be reduced to modern state law, is rooted in the fact that halakhah essentially lacks the means to enforce halakhic norms. In Mendelssohn’s view, this fact is inherent to halakhah as religious law, and therefore leaves no choice but to adopt the idea of the separation of religion and state. In the light of political thought in the tradition of Hobbes, Locke and others, Mendelssohn adopted the understanding that the state’s ability to coerce and exert its power is a necessary and central condition for the concept of law. Therefore any normative system that is incapable of coercion is disqualified from serving as law.

As we shall see below, the anti-reductionist position of Mendelssohn is in keeping with his position that identifies halakhah as the reflection of a utopian ideal of the “no place” type, or, more specifically, “a place that no longer exists.” In this sense, his position is located on a continuum with the position of Rashba, who not only recognizes the legitimacy of the extra-halakhic law alongside Torah law, but also the fact that the application of halakhah in a general and sweeping manner is unnecessary.

How did Mendelssohn relate the claim of separation between halakhah and law, to the utopianism of “nowhere”? In order to understand the structure of Mendelssohn’s claim, one must consider the styles of separatist claims prevalent in his day in Christian and European political thought. The central claims favoring the separation of religion and state on Christian theological grounds were notable for the way in which they were based on identifying long-extant fundamental distinctions at the heart of the theological tradition itself. For example, according to one version of the separatist school, the theological distinction between faith and opinion on the one hand, and deeds on the other, predefines the role of the Church as prevailing over all that pertains to epistemology and ethics (intellectual, ethical and spiritual perfection) and on the other hand, political authority as prevailing over the application of norms and dogmas in practice. This distinction, as is well known, was deeply rooted in medieval Christian theology, and was even fundamental to the ancient “double sword” doctrine. Another version of the separatist claim was based on the distinction between momentary earthly life (the temporary) and eternal spiritual life (the eternal). The structure of this separatist claim was therefore that religion promises human

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22 The religious community, in Mendelssohn’s eyes, must rid itself of any sign and reminder of the authority to enforce, whether in realms of sustaining the world through taxation (Mendelssohn 1983, 59–61), or the spiritual realms through banning and ostracism (Mendelssohn 1983, 72–5).

23 Based on this distinction between “deed” and “thought of the heart,” Spinoza also claimed that deeds are the business of government, while thoughts must be left to the conscience of the individual (Spinoza 1955, 1:257–66). Mendelssohn responded that “actions and convictions belong to the perfection of man, and society should, as far as possible, take care of both by collective efforts [. . .] Society should therefore establish both through public institutions in such a way that they will be in accord with the common good” (Mendelssohn 1983, 40).
beings spiritual and future rewards, while the state is responsible for making provisions for the earthly life of human society. An additional version emphasized the distinction between the private sphere and the public sphere of life, which is rooted in ancient Roman law in that religion as faith redeems the individual’s personal life, whereas politics is concerned with public life.

Mendelssohn was well aware that these distinctions were alien to the perspective of traditional Judaism, and therefore turned to another conceptual source for grounding the separatist idea. He was assisted by the thinking of Hobbes, who brings into focus the meaning of political society by distinguishing between two different levels of human existence. This maneuver enabled Mendelssohn to avoid reducing the value of religion as being responsible only for a partial aspect of life, and instead, to base the separatist doctrine on the distinction between social life governed by laws of religion (halakhah) and social life that is subject to the rules of state (law).

It is well known that Hobbes sought to justify political life and to understand it based on the consensual transition from the natural state to the political state (the social contract), which entails relinquishing the use of individual power and placing it in the hands of the sovereign (the Leviathan). In a similar manner, Mendelssohn suggested viewing the transition from a pre-political to a political society not as a transition from a chaotic lifestyle entirely devoid of ethics and normative obligation, but as a transition from an idealist-utopian society, a religious-traditional society (in Mendelssohn’s words, this society is like “an ethical personality”), in which social life is organized around religious precepts, to a realist society, administered by the power of state laws.

Hobbes viewed the acceptance of the social contract as the pinnacle of human achievement, from which point society starts to become not only a political society, but also an ethical society in which the mutual relinquishing of the use of force is a social convention. Mendelssohn, in contrast, viewed the entrance into civil society not as an act of progress, but as a regression rooted in giving up the idea of basing social life on voluntary reli-

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24 This, in fact, was the position of Locke, who claimed that the purpose of the state was to increase human happiness on earth, and as a result, it must not interfere with religions, whose realm was to show the correct path for the attainment of eternal happiness. See Locke 1991, 12–56. Mendelssohn deals with this distinction and wonders if indeed there is a conceptual difference between the temporal and the eternal. Is not the eternal nothing more than “incessant temporality?” Similarly, Mendelssohn opposes viewing the temporal as a dimension of life that is less important than the eternal (Mendelssohn 1983, 37–40).

25 The third-century Roman jurist Domitius Ulpianus viewed Roman law as having two main branches: public law (ius publicum), directed towards the Roman state, and private law (ius privatum), relating to the benefit of the individual (Institutiones, 1.1.4).

26 Mendelssohn believed that due to Hobbes’ “love of paradox” and due to confusion between different notions (“power” with “right”, and “obligation” with “fear”), he preferred overly extreme descriptions of human nature. For this reason he even arrived at an extreme and totalitarian perspective regarding political authority (Mendelssohn 1983, 35–7).
gies. Accepting the contract, in Mendelssohn’s view, was tantamount to accepting a retreat from the ideal of a voluntary religious society, and accepting the state’s authority to impose norms by force.

Religious, pre-political society, according to this view, is an ideal society with utopian potential, since social order is attained through the complete faithfulness to religious precepts of believers. Such an ideal structure, however, is conditional upon the existence of a strong identification with the norms themselves, which is unfeasible in the modern political framework. In the opinion of Mendelssohn, due to the fact that modern political society encompasses large populations containing various and conflicting life systems, it is unable to rely on voluntarism and the identification of citizens with state laws. As a result, the state is forced to ensure conformity to its laws through the application of force, intimidation and subjugation:

But if the character of a nation, the level of culture to which it has ascended, the increase in population which has accompanied the nation’s prosperity, the greater complexity of relations and connections, excessive luxury, and other causes make it impossible to govern the nation by convictions alone, the state will have to resort to public measures, coercive laws, punishments of crime, and rewards of merit. (Mendelssohn 1983, 43)

The transition to a modern civil society and relinquishment of the religious ethical social idea is, in his opinion, a necessary development. In contrast with the position of Rashba, Mendelssohn does not rely on the limited ability of existing halakhah to ensure the proper functioning of society, but rather on the tremendous gap between modern and traditional society. Mendelssohn’s profound insight was that the birth of the modern state forces an irreversible retreat from traditional life, and the relinquishment of shaping a social order only on the basis of religion and ethics.27

His acceptance of this retreat and abandonment of the ideal of religious society thus reflects his utopian approach that attributes ideal perfection to the pre-political, which in some ways is also sub-political.28 Mendelssohn’s utopian claim, then, is not one of utopia as a “better place,” and also not as “no place,” but as a “place that is no longer.”29 Mendelssohn is aware that

27 In fact, Mendelssohn identifies the political state with modern society, and the pre-political state with traditional religious-ethical society. His call to accept modern reality based on the understanding of the loss resulting from separation from traditional reality thus presents him not only as a herald of modernity, but perhaps also as its first critic!

28 Therein is reflected the anti-political basis in Mendelssohn’s theo-political thought, since society based on halakhah is utopian to the point that there is no reason to yearn for it in reality. For more on this topic, see Harvey 1998.

29 In the typology of the question of utopia, there is an accepted distinction between “utopia of the garden,” which looks towards the primal, pastoral golden age, the ancient Arcadia or the mythological Garden of Eden, in which man lived in simplicity and harmony, and in contrast, the “utopia of the city,” which expresses the longing for rational organization and Divine order, and is related to the myth of the End of Days and the “City of God.” In this sense, a utopia of “a place that is no longer” is of the first type.
a rejection of the implementation of halakhah as law requires clarification of the circumstances in which this implementation is necessary, and he therefore distances this vision of the past. In other words, he turns the ideal of political implementation of halakhah into utopia, and marginalizes it to the pre-modern age.

In this context, the ultra-Orthodox ideology that first appeared at the same time is a response, or a kind of counter-reformation, to Mendelssohn’s relocation of the political implementation of the halakhah to a utopia in the “place that is no longer” category. Such a response can be seen in the position of R. Raphael Cohen, the rabbi of Hamburg and Altuna (1723–1804), who vehemently rejected Mendelssohn’s conclusion opposing the political implementation of halakhah, and instead maintained the need to aspire to its implementation in current reality. He demanded the return of legal autonomy to the rabbinic courts, to broaden their authority and enforce the laws of halakhah to an extent identical to the extent to which the state enforces the law on its citizens. Instead of the utopianism of “a place that is no longer,” he advocated the full subordination of reality to halakhic norms. In light of this, later came the development of the ultra-Orthodox ideal of the “totality of Torah” (Breuer 1990, 37–44 [H]), which expressed the religious demand for complete and comprehensive implementation of halakhah in all realms of life.

The limitation of the reduction of halakhah is therefore, in Mendelssohn’s view, the basis for his utopian stand, which views a general application of halakhah as possible only in the pre-modern age. In a similar way, then, to Rashba, who utopianized the halakhic requirements of laws pertaining to witnesses and evidence, Mendelssohn sought to utopianize the application of halakhah as a semi-legal norm. But in contrast to Rashba, Mendelssohn anchored his position in a rich and sophisticated deployment of claims that were applied to all of halakhah in a sweeping manner. In addition, Mendelssohn’s position placed the relationship between the utopian and the real on a historical temporal axis, thereby lending even more validity to his

30 J. Katz termed this response “papal” or “the paradox of orthodoxy in its inception,” and defined it as follows: “the papal response” is to attribute “complete validity to all details of the halakhah as a response to the criticism and abandonment of its subjects according to its view”. Katz 1992, 18 (H).


32 It should be noted that sociologists of ultra-Orthodoxy have observed that despite the growth of the ideal of the “totality of Torah,” ultra-Orthodox life followed Mendelssohn’s vision of splitting spheres of life: Religion was reduced to ritual mitzvot and most areas of social life were determined by the standards of the general culture. In this connection the words of Max Weiner are relevant: “The organization [of ultra-Orthodoxy] was not focused even in the slightest on the creation of an outstanding, small-scale Jewish society, in which it would be possible to live a full life in a religious sense, and sought only to ensure the preservation of all that remained of the mitzvot binding on the individual”: Weiner 1974, 51 (H).
position that society guided by halakhic norms is an ideal of the past that is no longer viable.

The Twentieth Century

In practice, the idea of turning halakhah into state law appeared at the beginning of the twentieth century, in the context of the national revival, when the longing for the establishment of a Jewish state was turned from an ancient dream into an actual prospect. The question of the relationship between halakhah and law in this context was significant in practical terms in the debate about the type of law suitable for the new state. In terms of halakhic utopianism, it could be said that the urgent need to choose a system of Israeli law brought the question of the nature of halakhic utopianism into even sharper focus: Is the full and comprehensive implementation of halakhah a vision reserved for the reality of “no place,” or rather a goal that should be aspired to in reality?

The Mendelssohonian line in this connection—marginalization of the political implementation of halakhah and its commutation to a non-actual reality—was carried on by Yeshayahu Leibowitz. It is well known that Leibowitz’s early thought was influenced by the vision of the ultra-Orthodox German leader, R. Yitzhak Breuer, and his call for a complete political application of halakhah in the state in light of the ideal of “the Torah state.” In contrast, the later Leibowitz was characterized by the sharp turnaround from this viewpoint and the attempt to develop an extreme perspective of halakhic utopianism of the “no place” type:

The entire corpus of Torah law [All the halakhic legislation] that deals with state and society—organization of, provisions for and satisfaction of their needs—was never intended for actualization in historical reality, but was an ideal picture of messianic days, a picture to which the lack of fulfillment in the actual present is immanent. From the earliest times of the mishnah, to the last of the poskim, the halakhah did not deal with Israeli political-social reality as a phenomenon in the natural-real world and did not solve its problems, based on the fundamental assumption that such a reality does not exist, and was not intended to exist—in “the present time.” It legislated ideal rules of kingship based on the assumption that the only king of Israel is the messianic king, it legislated ideal laws of war based on the assumption that the people of Israel at “the present time” is not at war, it legislated ideal criminal laws based on the assumption that the practical responsibility for legal decisions of life and death rests in other hands. The crisis of religious Judaism in the State [of Israel] has nothing but halakhah, which is based on the assumption of exile and foreign

33 In 1952, Leibowitz raised the claim that it was possible to extract or derive authentic political principles from Torah (“The Crisis of Religion in the State,” B’Terem, 7 [148]; 8 [149], reprinted in Leibowitz 1954, 101–30 [H]). According to this view, the fact that halakhah does not relate to actual political independence is merely a contingency, and it can be realized and developed methodically from within existing halakhah. On the vision of R. Yitzhak Breuer see Levinger 1973, 57–76 (H).
rule as a norm for Israeli reality, while this Judaism requires the political-governmental independence of the people of Israel, and at the same time views itself as tied to the exilic manifestations of halakhah.34

While it is indeed appropriate to view Leibowitz as the ideological successor of Mendelssohn in his rejection of the political implementation of halakhah, they are distinguished from one another in terms of the structure of their claims. The halakhic utopianism of Leibowitz does not rely on any temporal structure, and therefore does not limit the claim that the political implementation of halakhah is irrelevant to the modern age, but rather sees it as a reality that transcends the historical.

An additional aspect through which the different forms of halakhic utopianism can be traced relates to the connection between the claim of the non-reducible nature of halakhah and the utopian position. For Mendelssohn, as stated, the utopianization of halakhah arose as the conclusion of the phenomenology of halakhah and law, and from the claim that reduction of halakhah into law is impossible. Leibowitz’s view, on the other hand, originates from an extreme utopianism that leaves no room for the possibility of the reduction of halakhah.

Reductionism and Utopianism in the JLP

In contrast to Leibowitz’s “no place” version of halakhic utopianism, those who advocate the JLP have maintained that even though historically halakhah was “based on the assumption of exile and foreign rule” it can be implemented as the basis for a political program in the new reality of political independence. Otherwise stated, they do not perceive as problematic halakhic coercion and the insufficiency of halakhah in instituting provisions of government, nor do they see its religious meaning as an obstacle to rendering it into binding state law.

Halakhic utopianism as a realizable goal and as an aspiration for the realization of a “better place” is therefore an appropriate characterization of the JLP. Within the rubric of this characterization, one can point to at least four different versions of the idea of the political implementation of halakhah as a legal system, distinct from one another in their perception of its utopian goals and of how to reduce halakhah as the basis for state law.

The practical aspects of this vision require applicable legal theories for this project to be devised. The legal theories that serve this purpose can indeed be easily identified. The various versions of the JLP can thus be characterized according to their final goals and their underlying legal theories.

In what follows, I will point to three of the four versions of the JLP that appeared during the twentieth century.35 Their presentation in this frame-
work will be neither historical nor sociological, but rather viewed through the prism of ideas with the focus on utopianism and reductionism. All three versions will be described in relation to the jurisprudential view that reshaped the representations of halakhah as a candidate for state law, which enabled its reduction. The third version differs from the other two in that, though projecting a jurisprudential view on to halakhah, it is indifferent to the utopian goals of the JLP and its reductionism is at a low level.\(^{36}\)

The Historicist Position—“Zion Shall Be Redeemed through Law”

Boldly representing the historicist perception of the JLP are two national movements in the secular Zionist camp, that were active between the second and fifth decades of the twentieth century—the Jewish Law of Peace movement, founded in 1909–10 in Jaffa by jurists who were resident in the new Yishuv (Palestine Jewish community). Mention should also be made of the Jewish Law Society, founded in 1918 in Moscow, by a group of Zionist scholars with a European legal education.\(^{37}\)

The ideological roots of these movements can be traced back to the cultural Zionism of Ahad HaAm and H. N. Bialik, who advocated a cultural revival as Zionism’s main aim, placing less emphasis on political independence. In fact, a clear ideological line can be traced from the revitalization of halakhah by Ahad HaAm and Bialik, and the JLP. The JLP attempted to find a channel to implement the Zionist vision in a manner that integrated both its cultural and political aspects. In their view revitalization of halakhic sources as a foundation for the law of the future state provided the leverage to achieve political independence, and they therefore adopted the words of the prophet Isaiah—“Zion through law shall be redeemed”: Isaiah 1:27\(^{38}\)—interpreted as signifying the path of revitalization of the law.

as an accelerator for the national and cultural renaissance of the Jewish people; (2) the Positivist conception that seeks to assimilate the traditional halakhic norms and institutions in the Israeli Law; (3) the Critical conception, which is unconditionally inspired by halakhah. The fourth conception is (4) the Mystical-Messianic (Rav Kook, the Lubavitcher Rebbe, and Rabbi Ginsburg), which is widespread these days among radical right circles. Since this version is not represented as an applicable program but as an ideological vision, it should be analyzed with different tools and concepts and I intend to address it separately.

\(^{36}\) A preceding discussion on the development of JLP in relation to the Zionists ideologies and social movements see Shamir 2000 and Likhovski 1998.

\(^{37}\) Despite the distinct origins of both movements, and although the Jewish Law Society devoted most of its energy to academic study while the Jewish Law of Peace movement focused on the development of a legal system, it is appropriate to view them as different aspects of the same ideological perception. Indeed, when the Jewish Law Society moved to Palestine at the end of the 1920s, both movements worked together on behalf of the same program. A comprehensive survey of their activity can be found, as stated, in Shamir 2000.

\(^{38}\) The term Isaiah uses in the Bible (mishpat) is equivocal and usually denotes judicial ruling, privilege and customary norms. However, in the context of Isaiah’s prophecies it exclusively carries the meaning of “justice” (see, for example, Isaiah 5:7; 28:17). The intention of this quotation is to make the hope for redemption contingent on the rendering of justice instead of on Temple worship.

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As stated, in the ideological background of these movements is Ahad HaAm’s call to revive the culture through the halakhic corpus and Bialik’s plan to secularize halakhah and to turn it into a cultural source as part of the aggadic tradition. Ahad HaAm, who objected to the removal of halakhic literature from the Jewish curriculum, suggested developing a new interpretation of the halakhic tradition in place of the selective version of halakhah that had lost its relevance. Such an interpretation, he believed, could trace the roots of halakhah implanted in the metaphysical origins of the Jewish people:

Some day perhaps we may feel the need for a new approach to ancestor legacy: we may want to understand the natural process of its evolution. We may then have a new Maimonides, who will codify the law from the historical point of view, not on the principles of an artificial logic, but on the basis of the order in which the various laws emerged in the course of an age-long development. Instead of critics who declare that the Shulhan Aruch is not our Torah, we may have a new type of exegetes, whose aim will be to discover the source of its prescriptions in the psychology of our people. (Ahad Ha-Am 1946, 70)

Ahad HaAm, in the above excerpt, concisely elucidates the basic principles of the program for halakhic revitalization. One principle deals with the reorganization of halakhah based on standards of historical development rather than artificial (legal) logic. The second represents the program’s intellectual challenge: to identify the internal relationship between the practical norms represented in halakhic literature—the articles of the Shulhan Arukh—and their metaphysical source—“the soul of the people.”

These characteristics are remarkably similar (if not identical) to the characteristics of law according to the view of the historicist legal school popular in Germany in the second half of the nineteenth century. According to this

39 E. Schweid claimed that despite the affinity of the student for the teacher, Bialik emphasizes the ideational significance of the revitalization of halakhah, whereas Ahad HaAm emphasizes the ideological: Schweid 1981 (H).

40 Bialik’s famous essay “Halakhah and Aggadah” concludes with his call to establish a renewed Hebrew culture on the basis of practical obligations: “What we need is to have duties imposed on us! . . . We long for something concrete. Let us learn to demand more action than speech in the business of life, more Halakhah than Aggadah in the field of literature. We bend our backs. Where is the iron yoke? Why comes not the strong hand, the outstretched arm?” (Bialik 1944, 28). Bialik’s position should also be considered against the backdrop of the intellectual discussions on assimilation at the beginning of the century. One of the expressions of the debate regarding the ability of the halakhah to continue serving as a cultural anchor against the tide of assimilation is evidenced in a debate that took place between M. Buber and F. Rosenzweig on this point. Rosenzweig’s essay “The Builders” was published approximately five years after “Halakhah and Aggadah,” and common to both is the challenge to the Buber’s idea of a Judaism of aggadah. See Rosenzweig 1965.

41 This essay was first published under the tittle “Nachalat Avot” (= “ancestor legacy”) in: HaShiloah, vol. 2, book 4 (1897).

42 This school also influenced the composition of new codes in Germany in the late nineteenth century. In the light of the legal philosophy of Friedrich Carl von Savigny, the composition of the German code constituted a hybrid between traditional Roman law and particularist German
theory of law, inspired by Hegel and German romanticism, the source of the law is in the spirit of the people (Volksegeist). Law is therefore not merely the result of the accumulation of legal norms from the past, but derives directly from the “natural spirit of the people”\(^{43}\) and its national culture.\(^{44}\) In exactly the same manner, the declarations of the representatives of the national Zionist movements emphasized their identification with the legal historicism of Hegel and their debt to him.

In light of this worldview, the law was identified with nationalism, and its universal nature\(^ {45}\) as a form of political and social organization homologous in all societies and nations was denied. Indeed, the legal ideology of the Jewish law revival movements saw this as another expression of particularism, and identified the Jewish law as an exclusive means for establishing true justice:

For this reason [the proximity of Jewish law to moral sentiment], Jewish law, even after it was deprived of the power of external coercion, continued to be preserved in effect in the life of the people, and to exist within it not only as a “legacy of the forefathers,”\(^ {46}\) which passes from generation to generation by force of habit and historical persistence alone, but was considered as truth doctrine and just law—as the only law, whose foundation, as recognized by the people, is truth and justice. (Yehoshafat 1927, 5)

The nationalist tendency towards the historicist perspective gave rise to a view of halakhah as a system of true moral values that the nation carried over from one generation to the next—“the only law, whose foundation

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\(^{43}\) This metaphysics, which is based on the “spirit of the people,” views the relationship between that notion and the contents of national law as a not necessarily conscious relationship: “The national spirit, whose existence so many deny and ignore, will show itself in the legal realm of life, in the forms and creations of the wise jurists of the people. I recognize that there are many educated people in Israel who have never seen a page of Talmud, yet in their thinking and speaking one recognizes undoubtedly the heritage that they received from their forefathers, that they themselves do not even notice”: Dickstein 1957–1958, 467.

\(^{44}\) Therefore, in the case of a legal lacuna, it is incumbent to consider the cultural history of the people, what has been referred to as “the organic, total meaning of the law.”

\(^{45}\) “In relationships of the war for life and the changing flow of legal forms, the nation occupies the position as main bearer of the power of production, and grows stronger in its manners not only due to persistence and habit alone, but also from an awakened heart, a watchful eye and an industrious hand. In the course of this creation […] its main role is to discover its own strengths, which is a necessary condition for the existence of all life in the constant motion of the life’s flow, and in the eternal passing of renewing forms […] [The Jewish law] for its most part, develops from its own powers and preserves within itself the purity of national creation”: Yehoshafat 1927, 2–3 (H).

\(^{46}\) Here, of course, is an allusion to the perception of Ahad HaAm in the above excerpt (Ahad Ha-Am 1946), in which the term “ancestor legacy” (nahalat avot) denotes the rendering of the halakhic literature into a renewed cultural source.
[. . .] is truth and justice.” As such, it also led to a negative attitude towards other legal systems and to other academic approaches to the halakhic legacy that emphasized the similarity and parallelism between halakhah and other traditions (such as the Hokhmat Israel movement).

In the same manner, national-legal particularism determined the direction of inquiry taken by researchers and scholars associated with the Israel Law Society. Most of their academic work can be characterized as a research effort to locate the essential differences between Roman law, which served as the basis for most of the European systems, and Jewish law. According to their worldview, exposing the differences between the various legal systems is helpful in identifying “the essential and Jewish foundations of our national law.”

The plan to secularize halakhah and to turn it into state law relied on the analogy between language and law, and drew its inspiration from the Hebrew language revival project. At the basis of this historicist perspective, the law is perceived as a phenomenon whose characteristics resemble the phenomenon of language, that also derives from the metaphysical roots of the culture and history of the members of a specific nation. In the light of this analogy, the revival of the Hebrew language was perceived as a paradigm for the secularization of halakhah and its reduction to state law. Just as the language revival project aimed to renew the ancient heritage through the secularization of a religious or a holy language, and just as the revival of Hebrew was a springboard for a more comprehensive cultural, national and secular revival, so, they believed, the revival of Jewish law was capable of advancing a cultural, national and secular revival and bringing about the redemption of Zion in a renewed national, secular home.

The Positivist Position—“I Will Restore Your Judges as at the First, and Your Counselors as at the Beginning”

An additional legal worldview of the JLP can be identified in the positions that emerged from religious Zionism and other religious branches that sup-

47 Paltiel Dickstein terms the reliance on the British Law observed during the Mandate period as “legal assimilation” and Shmuel Eisenstadt cautioned that the enthusiasm over British Law is “political and legal assimilation” that recalls “ancient Hellenization.”
48 Among them the salient works are Gulak 1922 (H); Gulak 1927; Cohen 1966; Eisenstadt 1967 (H).
49 Among members of the historicist school of law, the language-law analogy was formulated as follows: “The organic relationship between law and the nature of the people is evident in the changing of times—analogous to the spoken language: neither law nor language know lack of motion for even a moment; both are in constant motion”: Cohen 1996, 52 (H).
50 This analogy between the secularization of the Hebrew language and the secularization of the halakhah was also pronounced in the perspective of H. Cohen, who was more-or-less faithful to this perception of the JLP, although not based on the adoption of organic metaphysics: “I thought, in my naivety, that just as language moved beyond the realm of the sacred, so was it possible that Jewish law would leave the realm of its sacredness, and would become the
ported the Zionist enterprise and viewed cooperation with secular Zionism as an opportunity to influence the role of religion in the future state. Those who supported the Zionist movement in its secular format therefore did not necessarily accept the secular nature of the Jewish state; in truth, the secular Jewish revival was in their opinion a catastrophe in the unfolding of the religious history of Israel. They assumed, however, that there was value in a non-religious national revival as a transitional phase along the way to the implementation of the halakhic utopia in the form of the “Halakhic State” or the “Torah State.”

The main characteristic of their perspective on the Jewish law vision is the holistic perception of halakhah as a system the content, values and authority structure of which cannot be isolated from one another, since they are part of a single totality. For this reason, the adoption of halakhah as state law could not be partial, but what is needed is the comprehensive adoption of the corpus of traditional halakhic values and its authoritative structure.

One of the most prominent representatives of this legal perspective was R. Yitzhak Isaac Herzog who served as the *ashkenazi* Chief Rabbi in Israel between 1937 and 1959. Herzog’s cultural background was in Britain, where he received his education and in particular his legal education. After migrating to Israel to serve as Chief Rabbi, he began working in earnest to promote the vision of applying Torah law as the law of the future state, through research and lobbying.

Herzog’s point of departure was the recognition that the source of Jewish law (which he termed “*tehuqah*”) is identified in terms of revelation, in the sense of the transcendent, the Divine, the supernatural and super-human.

inheritance of the entire people […] the language, when used for sacred matters only, became frozen and fossilized, like those ‘classical’ languages that no longer number among the ‘living’ languages […] our new language is the very language of the Bible, and the holy language of the middle ages: [Y]et it beats with the pulse of new life, and was taken out of the darkness of a museum to the great light of the blazing sun. Our law also needs the rays of the sun”: Cohen 1957–1958, 477–8 (H).

51 This includes, of course, the positions of Yitzhak Breuer, who was the first to demand the ideal of the “Torah State.” See Levinger 1973.

52 Schwartz stresses that this is a wider characteristic of religious-Zionist ideology: “Adoption of the general Zionist ideal on the part of religious Zionism was not always sincere and real […] outwardly—in terms of the practical decision—the formulation of the general Zionist goal was accepted. Into this formulation, however, the real religious idea was molded: the renewal of the worship of God in the framework of a theocratic society at the general level of society, and utilization of the spiritual-religious advantages of Eretz-Israel on the personal level”: Schwartz 1996, 195–6 (H).

53 In addition to his two-volume work devoted to obligations and property law from the perspective of Jewish law (Herzog 1936–1939; 1965–1967), Rabbi Herzog established a scholarly institute devoted to clarification of halakhic questions and their translation into modern legal language, with the goal of creating a modern legal-halakhic codex. In addition, he initiated a series of regulations aimed at bridging gaps between *Ashkenazic* and *Sephardic* halakhic traditions, with the goal of uniting them in preparation for serving as the foundation of state law. An account of his attempt to modernize the inheritance laws and to make them more acceptable to secularists is to be found in Greenberger 1991.

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Hegelian metaphysics and the nationalistic view seemed to him as a move towards a secularization of halakhah that was fundamentally unsubstantiated.54

Through his writings he emphasized the point that the religious essence of halakhah cannot be separated from its juridical content, and it is therefore impossible to deny the fact that Jewish law is first of all religious law. In his view the adoption of halakhah as a source of state law requires the adoption of the theological framework and acceptance of the traditional ethos of halakhah.

The view that halakhah is a complete entirety whose components cannot be separated also characterizes Herzog’s halakhic utopianism. In his vision the JLP is not limited to making the wide application of halakhic norms possible, but also aims to reconstitute its authoritative structures and institutions as understood in the halakhic imagination across the generations. Halakhic utopianism in this perspective does not distinguish between the application of “Torah law” and the vision of the “Torah State”; adoption of “Torah law” is tantamount, in this perspective, to the adoption of a theocratic structure of Divine rule55 in which God is identified as the sole political sovereign of the state, and halakhah as His commandment.

The denial of the separation of the contents of the halakhah from its theology and from its authoritative structure therefore gives rise to the identification of the demand for recognition of halakhah as the source of state law, with the aspiration to establish a Jewish theocracy. Indeed, aware of this identification, Herzog stated quite explicitly that the most suitable type of government for the modern Jewish state is theocracy.56 Later, prompted by a sober comprehension that the call for a Jewish theocracy would not be well received by the international community and by most Jewish people, and that it could endanger diaspora Jews, he tactically retreated from this idea and instead coined the term “nomocratic monarchy”—“the government of

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54 It is likely that for this reason, and in order to preserve the context of the religious language, Herzog avoided using the term mishpat ivri (lit. “Hebrew law” but commonly translated as “Jewish law”) and instead spoke of mishpat haTorah (lit. “Torah law”) and “tehuqat haTorah” (lit. the Torah’s constitution).

55 It is fitting to compare the theoretical utopianism of Rabbi Herzog with that of Martin Buber’s theo-political concept as expressed in his book Kingship of God (Buber 1967). Both were captivated by the magic of the idea of the modern actualization of the Kingdom of Heaven. In the eyes of Buber, the establishment of the Kingship of God meant a return to the pre-halakhic and pre-monarchical consciousness, that is, anti-political religious consciousness that makes possible a direct, unmediated theocracy of religious institutions and authorities. Rabbi Herzog’s vision for the establishment of the Kingship of God, on the other hand, derived entirely from the religious imagination of the age-old rabbinical tradition.

56 “From this perspective, must the Jewish state, which recognizes the absolute sovereignty of the Torah, be a theocracy? The clear and simple answer is ye! ye! Is this not a foundation in the faith of Israel, that the written Torah is from the mouth of God by the hand of Moses, and the same applies regarding the transmitted Torah [. . .] and this double Torah includes the most basic foundations. That is, the principles of the ‘tehuqah,’ [constitution], the principles of the law and its the details”: Herzog 1989, 3 (H).
Divine law, where the king rules by power of the Torah, and the main power is vested in the Great Sanhedrin.” However, even this expedient did not conceal his theoretical intentions to bequeath to the future state the material content of traditional halakhah replete with its institutions, powers, values and theological assumptions.

Herzog’s vision of the establishment of the “Torah state,” the law of which is the “law of Torah,” is also an expression of the utopianism of a restorative nature known as “utopia of the Garden.” This utopian view was accompanied by strong feelings about the tangibility of the opportunity to reconstitute a lost state of affairs in which the status of halakhah as a superior and binding norm was unchallenged.

Herzog’s ideologically subversive nature was mitigated by a sound dose of naiveté, and for this reason he believed that the leadership of the Yishuv should have accepted his plan. In fact, until the moment when independence was declared, Herzog tried to convince the members of the people’s council that by means of a declaration Torah law could be consolidated into state law. However, after his suggestion was rejected, he tried in every way to persuade the relevant people that the future constitution should include an article providing that “the law of the State of Israel will be based on laws of the Torah of Israel, as determined by the Chief Rabbinate of Israel.” The force of Herzog’s naivety should be viewed as stemming from his enchantment with the magic of the “Torah state” utopia for which he longed and in which he believed:

This matter was simple, in our eyes, absolutely simple: Immediately when the State of Israel is established, surely a giant historical step would be taken in the direction of fulfillment of the word of God by the hand of his prophet: “I will restore your judges as at the first, and your counselors as at the beginning.” At the moment the State was created, we were as dreamers, we saw, in our dream—our vision, the contemporary government of Israel meet with the Chief Rabbinate of Israel, the supreme Torah authority in the State, and say to it: “Rabbis, instill in us good counsel according to the Torah, regarding the law which is one of the pillars of every State deserving of its name [. . .] we wish to receive inspiration from our source of life, the source of Israel, but we face difficult problems as regards the reconstitution of the law according to the Torah of Israel. Please study, discuss, instruct.”

Thus did we imagine the great historical turning point. But what happened, how did matters develop? The Torah was forgotten. The upholders of Torah were, as the dead, forgotten from the heart. They did not consult with us, we were not asked, we

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57 From a phenomenological perspective, religious utopian thought is distinct from religious restorative thought. While the latter aspires to reconstitute the glory of the past, the utopian approach yearns for a better and more perfect future than the splendid past.

58 See note 29 above.

59 Isaiah, 1:27.

60 The expression “the Torah was forgotten” reflects in the halakhic literature the idea of political catastrophe that radiates out onto the vitality of halakhah.
were not summoned, neither to study nor to instruct, neither to clarify halakhot nor to legislate ordinances; even to give advice we were not asked. The slave-girl has supplanted her mistress \(^{61}\) (R. Herzog 1989, 222 [H])

From an historical perspective, one might say that Herzog’s disappointment about the failure of his plan also had a constructive role as he bequeathed to his successors the idea that the path to the halakhic state does traverse the constitutional process, but through legislation when the opportunity arises. And so, by an evolutionary process, partial sections of halakhah were to penetrate into Israeli law and affect it.

In jurisprudential terms, this attitude corresponds to the legal positivism that was prevalent from the beginning of the twentieth century mainly in Anglo-American legal systems. As an outcome of the positivist view on the question of the validity of the law \(^{62}\) it held that what bestows on a legal norm its validity is not its internal or moral logic as a norm, but rather the general structure of the law. The value of a legal norm that is dissociated from the general legal structure therefore lacks meaning. It is thus impossible to separate a given legal norm from a systemic structure that establishes its meaning and validity.

The Kelsenian model of “the pure theory of justice” largely suited the orthodox perception of halakhah, and for that reason its adoption as a theory for halakhah was tempting. The notion of the basic norm (Grundnorm) that has no legal source within the system (in the sense that it is not the result of any particular legislation, but a kind of basic dogmatic belief that states the duty to obey the commands of those in authority) was a perfect correspondent for the transcendental aspect of halakhah that gives rise to a duty to obey it.

As far as we know, Herzog did not identify himself explicitly with legal positivism, and did not allude to any awareness of the similarity between

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\(^{61}\) An expression of a “snatching away” and a reversal of the original hierarchical order based on the verses: “The earth shudders at three things, at four which it cannot bear: A slave who becomes king; a scoundrel sated with food; a loathsome woman who gets married; a slave-girl who supplants her mistress” (Proverbs 30:21–3). It should be noted that this feeling regarding the binding nature of state law as opposed to the halakhah is common to other halakhic authorities at the time. See, for example, similar statements by R. Eliezer Yehudah Waldenberg: “We see how the doorposts have trembled, [those] of the books of our Rabbis the great poskim, may their memories be for a blessing, who reached the pure stones of marble of a single law of the inherited laws; how much more so does the heart leap in the case of legislation of a system of general and fundamental laws in all areas of laws of inheritance and it is as clear as the light of day that we must not consider at all that we can or have the authority to accept this proposed constitution as it is laid before us, in which almost every one of its articles oozes with the trend to imitate laws from foreign legal systems to appoint the slave-girl to rule over her mistress”: Tzitz Eliezer—Responsa (Jerusalem, 1961), part 6, chap. 42:293.

\(^{62}\) Legal positivism sees the question of the validity of the law by virtue of its own power alone, and not by virtue of its content or the truth it represents. Therefore, as legal theory it negated the possibility that consideration external to the law (e.g., natural law, ethical considerations, relevance, etc.) would impact the degree of its validity.
his conception of halakhah and the positivist view. However, signs of the positivist view are readily visible in his view of halakhah as the basis for Israeli law and in that of those who followed in his footsteps.63

The Critical-Realist Position

The third legal perspective of the JLP is wary of the metaphysics of nationality and of the holistic view of halakhah, and formulates the project of the integration of Jewish law on the basis of decisions of choice and critique. Halakhah’s candidacy as the basis for state law, according to this position, does not derive from its systemic perspective, but from its relevance as a reservoir of practical solutions to common legal problems.

A distinguished representative of the critical pragmatic approach to the JLP was Supreme Court Justice Moshe Silberg (1900–1975). In the years prior to the establishment of the State of Israel, Silberg was among the supporters of turning to halakhic legacy for the development of Israeli law, and in his tenure as Supreme Court justice he expressed his opinions on this manner in his verdicts and in his writings.

His support for the adoption of halakhah as a legal source for the new State stemmed from his insistence on the pragmatic advantages of halakhah as a source for the construction of a new legal system, compared to other legal systems. The European systems (British, German or Swiss) appeared to him unsuitable, since they were outdated and not appropriate for the developing civilian mentality in Israel. Jewish law, on the other hand, due to its historical, linguistic and cultural dimensions, seemed to be a much more suitable candidate. In order to turn the halakhic legacy into a source of state law, Silberg emphasized the need for a recodification of the halakhic corpus. During the course of this recodification any irrelevant halakhic precepts would be sifted out or adjusted to modern reality.

Indeed, the recognition that the material state of halakhah is an impediment to its use as a source for state law, and the recognition of the need for a new codification, are not unique to the critical pragmatic position. However, a distinguishing feature of this position is that codification should

63 Thus, in this manner, did Elon seek to identify Kelsen’s structure in Jewish law and within it, the idea of a basic norm such as that which stipulates “that everything stated in the written Torah is binding upon the system of Jewish law” (Elon 1994, 228–39). A similar phrasing of the basic norm can be found in Roth 1986, 9. Regarding biblical law see Schwartz 1998–2000 (H); see also Jackson 2002, at http://www.biu.ac.il/JS/JSIJ/1-2002/Jackson.pdf. Jackson carries out an in-depth analysis of the reliance of Elon on positivism, or more precisely on the theory of “legal sources,” as an appropriate jurisprudence. Jackson’s paper criticizes, from a different point of view, Elon’s reductionism of the halakhah to positivist notions of legal systems. His analysis provides a thorough and extensive account of the conceptual problems and the limitations of using positivism as jurisprudence for halakhah. Interestingly, there are some parallel remarks he made regarding the similarity between Herzog’s and Elon’s motivations (Jackson 2002, 70), and the connection between the nationalist agenda and the tendency to appeal to positivist legal theories (ibid., 83).
not be based on the consolidation and reorganization of halakhah, but first of all on an examination of the relevance and efficiency of each halakhic provision, while ignoring any religious or national considerations. The critical pragmatic view highlights the relevance of the halakhic legacy as a legal resource that could support the formulation of state law but cannot be viewed as a system that stands on its own:

There is no doubt that Jewish law, in its current form, is incapable of serving as an official codex to which all of our life necessities will be subject [. . .] for none other than the simple reason, that we hold no key for the many rooms and inner chambers of this giant edifice [. . .].

It is therefore clear, that even if we accept upon ourselves the authority of all of the material content of Jewish law, we will have to arrange the new codification of the law; an uncomplicated, brief and summarized codification.

Our approach is to arrange this codification or these codifications; surely we will encounter, in no small number of provisions, legal concepts or institutions, that will not have a place in the general framework of the law, and this very codification will also serve as the criterion for determining the right to exist of these provisions, concepts and institutions. Stated otherwise: the system will determine and clarify the material, and the material, for its part, will stabilize and determine the future framework into which it will enter. (Silberg, “The Law in the Jewish State,” Ha’aretz 17 Feb. 1938–13 April 1938, in Silberg 1982 [H])

An additional aspect of this legal pragmatism is to be identified in the manner in which halakhah is described according to this perspective. In this view, reference to halakhah as a source for Israeli law derives from its basic feature as a pluralistic discourse. The halakhic literature is, in fact, a rich source of positions on legal questions that sometimes present different solutions to the same problem, and sometimes even contradictory and opposing solutions. The wealth of opinions and the large number of positions offer advantages over other legal systems in which the extent of the law’s unequivocal nature is much greater. In other words, the relative advantage of halakhah as a source for a legal system lies in the pluralistic nature of the halakhic discourse which offers a range of legitimate solutions to a given legal question:

The legal-scientific material is so rich and full of contradictions, that in effect one can find grounds for any desired opinion. This does not make the judge’s decision easier in a given case. But for the legislator-codifier it facilitates the choice of the abstract principle. Since the role of the codifier and the role of the judge is not the same. The former who must find the acceptable opinion, while the latter is free to choose the desired opinion. (“The Renewal of the Jewish Law,” HaBoqer, 14 September 1947, in Silberg 1982, 202 [H])

According to this jurisprudential view, the suitable legal source is not a coherent array of accepted norms, but a range of legitimate solutions that the legislator and the judge are authorized and empowered to clarify among themselves according to their judgment. For this reason, the preferability of
the halakhah on this matter arises not out of an obligation to religious faith or the metaphysical merit of halakhah, but as it provides useful raw material for legislators and judges.

Such a perspective, which understands legal activity as an activity of discretion and selection between legitimate choices, and in turn, the sources of law as raw material for jurists, has elements in common with other jurisprudential views such as the “free law” perspective in its earlier German version, and the legal realist or the CLS movement in its later Anglo-American manifestation. These views, appearing in different cultural contexts, are all based on similar foundations, namely the rejection of the value of positivist legal theory, proposing in its place the idea the judge does not locate the exiting law, but rather exercises a great deal of creativity in choosing or creating the norm. According to this line of thought, the judge “establishes” or “constitutes” the law rather than “discovering” it.

Consistent with this view of Silberg’s is that halakhah as a source for Israeli law is only the “raw material” from which the appropriate norm can be chosen or developed from a range of possibilities that it embodies.

This position distances itself from the reductionist position and from any utopian concept. According to this position, the halakhic material is not considered to be a comprehensive legal system but a huge reservoir of possible legal solutions. Therefore this position differs from the previous two in terms of the primacy it gives to the current legal system over its sources, i.e., the halakhic legacy. Thus it could be said that by modifying the relation between the legal system and its source, viewing the system as a means for selecting the relevant material from halakhah, the critical pragmatic position neutralizes the reductionism and utopianism associated with the JLP.

**Conclusion or When the “Way” Becomes a “Law”**

The term halakhah denotes the religious norm in rabbinical Judaism dating back to the first centuries. Its usual meaning as “something that came from ancient days and [will last] to the end [of time] or [alternatively] something according to which Israel goes”\(^\text{64}\) derives from the verb of motion *halakh*, which literally means: going, walking, following and so on.\(^\text{65}\) This meaning, although not reflecting its etymological origins,\(^\text{66}\) is also common in Islam where the terms *Sira* and *Shari’a*, which means the path or the way to go, are used to signify religious norms.

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\(^{64}\) This definition was given by the eleventh-century scholar Natan b. Jehiel from Rome in Jehiel 1926, s.v. *halakh*, 3:207 (H).

\(^{65}\) It should be noted that terms for religious norms derived from verbs of motion are used also to signify religious norms such as: *minhag* (derived from *nahag* = to lead or to guide).

\(^{66}\) Scholars pointed out the Akkadian roots of the term halakhah. S. Liberman sought the Akkadian term *ilku* (= tax) as the origin for the Hebrew and Aramic words, see (Liberman 1962), 83–4. On the other hand I. T. Abush tried to show that it was borrowed from the Akkadian term *alaktu* (= oracular decision or divine revelation), see Abush 1987.
As I have tried to argue, beyond a multifaceted JLP rests the shared assumption that “halakhah” can be reduced to “law” and that as such it carries utopian hopes. Thus the Janus face of that project, guided by secular or religious motivations, is driven by a projection of the European legal and jurisprudential lexicon onto the halakhic corpus.

Taking halakhah as law is a phenomenon that should be located in the more recent past and specifically with the emergence of the modern state. Hence the fundamental principles of the modern state, i.e., basing political organization on a centralized, bureaucratic and hierarchical order, have played a pivotal role in the development of the view of halakhah as law or a legal system.

The assumption of an essential similarity between halakhah and law has become dominant not only among ideological jurists but also scholars and historians of halakhah. Consequently, the adoption of this similarity has had several corollaries, influencing the general perspective on the entire history of Judaism as a religion. First, it has anachronistically placed the law at the center of Jewish life almost ab initio. Second, it has defined the Jewish faith as “nomothetic,” in the sense that all aspects of the Jewish way of life should be explained by reference to the law, while mysticism, theology, ritual, moral values and other aspects of Judaism are shifted to the periphery. Third, Judaism viewed as a law-centered religion has provided new definitions for orthodoxy and heterodoxy according to the degree of obedience to the law.

As I have tried to show, reductionism and halakhic utopianism are both rooted in European political processes and jurisprudential developments, and may be seen as deriving from modern nationalism. In other words, Zionism as the Jewish national movement is the agent by which the halakhic legacy has been redefined as law with utopian goals.67

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67 For a parallel analysis of such reduction of the Shari‘a in the Islamic world, where colonialism served as the agent of that change, see Kozlowsky 1989. The topic of this conclusion is of course borrowed from this paper.


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