Non-Jewish Courts in the Jewish State

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Supervised by Yedidia Z. Stern

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Abstract

The religious public's attitude toward the legal system in Israel is strained and at times confrontational. This tension and conflict stem from the normative gap between secular law and *halakha* (religious law), as well as the ideological divide between religious and secular-liberal values.

The sense of estrangement from the legal system is growing in the face of court rulings on matters of religion and state. The judges – who for the most part hold secular-liberal views – form their positions and rulings on these issues in accordance with their worldview. The religious public considers these aggregate rulings to be an organized campaign by the legal system against the Torah.

This conflict is intensified by the negative attitude toward "foreign" legal systems reflected in *halakha*. Although *halakha* recognizes non-Jewish law, it designates courts that base their rulings on this law as illegitimate institutions and, therefore, it is strictly forbidden to appear before them. Similarly, *halakha* has difficulty recognizing the courts of the State of Israel, which base their rulings on laws that are not those of the Torah. The fact that Israeli court judges are Jews does not mitigate the conflict. On the contrary, some *halakhic* judges maintain that a legal

* Translated by Karen Gold.

system whose judges are Jewish, but whose laws are not based on Jewish law, is reprehensible and worse than a judicial system whose judges and laws are non-Jewish.

This policy paper seeks to present current trends in the *halakhic* sphere with regard to a legal system based on foreign law and not on Jewish law. Friction, or outright conflict, between Jews who observe *halakha*, on one hand, and secular legal systems, on the other, is a very common reality. In fact, it is a daily occurrence, which *halakhic* scholars have recognized since the inception of the Oral Law: The *Tanna'im* (sages of the Mishna, c. 30-200 CE) addressed the Jewish attitude toward the Roman legal system in *Eretz Yisrael*; the Babylonian *Amora'im* (the sages of the Gemara, c. 200-500 CE) implemented various measures to cope with petitions submitted by Jews to courts that based their deliberations on local law, in this case, Persian; and their successors, the *Ge'onim* of Babylonia (the presidents of the two great rabbinical academies in Babylonia, c. 589-1048), dealt with the Islamic courts. Subsequent generations – the *Rishonim* ("the first ones" were the leading Rabbis and *halakhic judges* who lived approximately during the 11th to 15th centuries, before the writing of the *Shulkhan Arukh,* a codification of *halakha* by Rabbi Yosef Karo in the 16th century, and following the *Ge'onim)* in Spain and Ashkenaz (Eastern and Western European countries) and the *Achronim* ("the latter ones" were the Rabbinic scholars who lived in the period following the writing of the *Shulkhan Arukh*) – also frequently confronted this issue. Thus, a wealth of knowledge and experience has been accumulated over the generations from which it is possible to derive a variety of rulings that also apply to the current confrontation between the religious public and the legal system of the State of Israel. All of these are discussed in the first section of the study.

Beginning in the third Chapter, we examine the positions of present-day *halakhic* adjudicators regarding the status of the courts in the State of Israel. These scholars bring a complex, sophisticated body of knowledge and material, considerations, and values to their work, which includes addressing religious rulings that condemn in the harshest of terms litigation in courts that do not render judgments on the basis of Jewish

law. Intertwined with these rulings, however, is a more lenient tradition, which took note of the vast numbers of people who were turning to the secular courts (referred to in *halakhic* literature as *erka'ot shel goyim*). The response to this procession of the masses was not to turn a blind eye nor raise a voice in protest or despair (though the latter did occur). Many *halakhic* judges, each in their own time and place, invested considerable effort in finding exceptions that would make it possible to maintain the shameful practice of appearing before non-Jewish courts. In terms of *halakha* and principles, these scholars' opinions of the courts in question were resoundingly negative. Nonetheless, their responsibility to the Jewish people spurred them to pursue *halakhic* solutions that would permit a Jew to turn to a gentile judge and foreign law.

Yet apart from the stringent rulings and the tradition of more lenient judgments, there is also a grand vision of restoring the judges of Israel and the laws of the Torah to their former status. Unlike in previous generations, this vision is grounded in the reality of a reemergent Jewish state. This complex "baggage" confronts contemporary scholars, in particular the Zionists among them, with a difficult decision. In practice, most of them choose the path of rejection: The courts of the State of Israel are considered "gentile courts." It is forbidden to appear before them, and an individual who does so is viewed as someone who insults, blasphemes, and rebels against the Torah. This resolute stance is faithful to the vision of a state based on Torah. Accordingly, the rejection of the State's courts is not rejection for the sake of rejection; rather, its purpose is to hasten the development of *halakha* and to enhance the glory of the Torah.

But does this rejection indeed achieve these goals? In the early, formative years of the State, this vision was realistic and its goal was attainable. With the passage of time, however, the continued opposition to the State's legal system is not bringing honor to the laws of the Torah. Realistically and politically, *halakha* is not a genuine alternative to the secular legal system of the State. A decisive majority of the public and of those who hold office in the government or judicial system do not even consider it a possibility. Indeed, such an eventuality is unrealistic. In order to serve as the legal system of a modern state, *halakha* would

have to undergo numerous processes and modifications of various kinds. In the meanwhile, sixty years of rejecting the State's legal system has not strengthened *halakha* or brought it closer to this goal.

At the same time, rejection of the State's courts has exacted a heavy toll on the "clientele" of *halakha* – religiously, educationally, and in the social-national sphere. The religious cost stems from the gap between the pronouncements of the *halakhic* adjudicators and the behavior of the masses. The latter continue to flock to the State's secular courts, thereby showing their utter disregard for the admonition against doing so. Thus, an attitude of alienation and apathy is emerging with respect to the *halakhic* position on secular courts. True, we are talking about a specific *halakha* and a circumscribed reaction. Yet taken together with the response to other problematic rulings, a lasting, all-encompassing attitude of rejection or indifference toward *halakha* and its adjudicators is liable to develop.

An additional toll in the realm of education is combined with the religious cost. Religious-Zionist youth today are receiving a double message: One voice – that of values – expresses support and admiration for the courts and their judges who defend justice and are charged with upholding the ideals of honesty and democracy. Another voice – the *halakhic* – rebukes those who make use of the secular courts, and denounces the judicial branch for deviating from Torah law and for being *erka'ot shel goyim*. These contradictory messages create uncertainty and confusion with regard to both the *halakhic* and the value-based messages.

This leads to an additional cost on the social-national level: It is hard to expect a negative attitude toward the courts to remain limited to a particular area. The rejection of a branch of government as central as the judiciary creates an oppositionist attitude toward the State and its institutions. According to the traditional philosophy of religious Zionism, such a position is ostensibly undesirable. Moreover, it is liable to engender rifts and polarization between religious and mainstream Zionists. The last toll – the social-national one – has taken on particular significance in recent years in light of the upheaval and confusion in the religious Zionist camp regarding its attitude toward the State and its agencies.

Repudiation of the courts and their dismissal as *erka'ot shel goyim*

is, thus, a harsh choice that entails many heavy costs. Such a course, as strategy or tactic, may have borne fruit during the first years of the State's existence; but that window of opportunity is closed, or more precisely, hermetically sealed. It may reopen, but in the meantime, this persistently negative approach is taking its toll and, therefore, a different course – a positive one – is in order. The legacy of more lenient *halakhic* rulings permitted the legitimization of the courts of the State of Israel. **A *halakhic* tradition that sought and found ways in the past to permit Jews to petition the foreign courts of non-Jews in the Diaspora must now approve the courts of Jews in Israel.**