

Ideological and Contextual: Legal Reasoning Deployments by Kook and Uziel: The Instrumentation of Halakháh leMa‘aséh in Ashkenazic and Sephardic Traditions

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INTRODUCTION

In the early 20th century, women’s suffrage was a hot topic. Countries began to give voting rights to women, while others resisted from doing so. In the old *Yishuv* (Jewish communities in the Land of Israel), then under the British Mandate, communities began to discuss on whether to permit women voting rights. In the religious communities it was a controversial topic, and the Committee of the Mizrahi Association addressed this question to the then influential Ashkenazic and Sephardic chief rabbis of the Yishuv: Rav Abraham Ha-Kohen Kook and Hakhám BenSión Uziel. The Committee represented the oriental Jews in the Yishuv, and they were divided down to the middle in this regard. The overall standing to this issue was that the Ashkenazic rabbis unanimously did not permit women to vote, while the vast majority of Sephardic rabbis permitted it. Kook and Uziel are two voices that display whence those positions proceed.

Professor and rabbi Zvi Zohar did the translations of Kook’s and Uziel’s responsa regarding this matter in his article “The Halakhic Debate over Women in Public Life: Two Public Letters of Rav Abraham Ha-Kohen Kook & The Responsum of Rav BenZion Uziel On Women’s Suffrage and Representation”¹ Zohar’s own halakhic analysis of these responsa can be read in “Traditional Flexibility and Modern Strictness: Two Halakhic Positions on Women’s Suffrage.”²

¹ Zohar, Zvi. “*The Halakhic Debate over Women in Public Life: Two Public Letters of Rav Abraham Ha-Kohen Kook & The Responsum of Rav BenZion Uziel On Women’s Suffrage and Representation.*” *The Edah Journal* 1:2 (New York: Edah, Inc., 2001), pp. 1-14.
<http://www.edah.org/backend/coldfusion/search/document.cfm?title=Two+Public+Letters+of+Rav+Abraham+Ha-Kohen+Kook+%26+The+Responsum+of+Rav+BenZion+Uziel+On+Women%C2%92s+Suffrage&hyperlink=1_2_debate.html&type=JournalArticle&category=Israel:+Zion%20>

² Zohar, Zvi. “Traditional Flexibility and Modern Strictness: Two Halakhic Positions on Women’s Suffrage.” *Sephardi and Middle Eastern Jewries*. Edited by Harvey E. Goldberg, (Indianapolis: Indiana University Press, 1996) pp. 119-133. <<https://dramirezg70.files.wordpress.com/2015/05/zohar-traditional-flexibility-and-modern-strictness-zohar2.pdf>>

Mentalities/Mentalités Volume 27, Number 2, 2015

ISSN- 0111-8854

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I. BREAKING DOWN THE RESPONSA

In Kook's letter and responsum, he appeals to the following:

1. As matter of *din* (legal rule), he addresses the haggadic statement "It is a man's manner to dominate and not a woman's manner to dominate" (*Yebamot* 65b), which from his point of view determines that the roles of public office are not in the woman's domain. Furthermore in Kook's logic, electing women to public office and the act of voting leads to mixing of the sexes in the public sphere, which for him it is a common theme forbidden in the whole Toráh.
2. To protect the good of Israel, it is imperative to exert a Jewish morality, in order to cement its Jewish reputation in the Holy Land. At that time he felt the nations were doubting the Jewish right to inhabit her ancient land given the distancing of Jews from tradition.
3. Being that the ideal is to have Israel unblemished by sin, the move to woman's suffrage would run contrary to this ideal.
4. The "spirit of the whole nation, in its essence and purity, opposes this modern innovation" in accordance to "one voice we hear from the Torah, from the Prophets, and from Scripture, from the *halakhah*, and from the *aggadah*."
5. The protection of the sacredness of the Jewish family, which forms the "happiness and dignity of the Woman of Israel."
6. "The Israelite woman bases her rights on the refined content of her unique spiritual value," which we cannot permit to "spoil with 'measured and limited laws, formed in a mechanical cast, which are for her iron horns, which do not suit at all her psychic refinement' and whom are 'not [mentally] strong enough to utilize.'" In other words, we Jewish men must protect our women's sanctity and mental-health fragility.
7. The realm of women's opinion is limited to the home, while for the man is the public space. To have a woman's opinion displayed in the public sphere would interrupt the peace in the home (*shalom bayit*).

In Uziel's responsa, he approaches woman's suffrage and holding office on four different points as follows:

A. Women's Right to Vote

1. "If anyone should tell us that women should be excluded from the voting public because 'their minds are flighty (*da'atan qalot*)' (*Shabbat* 33b and *Qiddushin* 80b) and they know not how to choose who is worthy of leading the people, we reply: Well, then, let us

Mentalities/Mentalités Volume 27, Number 2, 2015

ISSN- 0111-8854

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exclude from the electorate also those men who are ‘of flighty minds’ (and such are never lacking).” Furthermore, Uziel explains that the meaning of *da`atan qalot* in the Talmud “is only flowery wording intended to circumvent a question posed by a woman” (in singular!). Then Uziel clarifies that said woman posing the question “was a wise person, as it says: ‘A wise woman posed a question to Rabbi Eliezer.’ And our Rabbis expressly stated: ‘And God constructed the rib’—this teaches us, that more insight was granted to women” (*Niddah* 45b).”

2. If voting should be prohibited because of licentiousness (by mixing of the sexes in the public sphere), then all activities of men and women in the public sphere (walking on the street, entering shops, conducting commerce) ought to be prohibited too. However, Uziel continues, “Such ideas have never been suggested by anyone,” because “no creature would be able to survive!”
3. If it should be prohibited for the sake of preserving the peace at home (*shalom bayit*) for fear of diverging political views, the adult sons living at home should also be forbidden from voting, “For in all cases where our rabbis concerned themselves with ensuring tranquility, they gave equal treatment to the wife and to adult sons living at home (see *Bava Metsi`a* 12b).” And in any case, opposing opinions on matter of politics will surface in a family anyway, so there is no real reason to prohibit this on grounds of *shalom bayit*.
4. In regards to the matter that women are only to be confined at home, he brings the responsa of Rabbi Dr. Ritter, considered by Uziel to be an innovation—a definitive stab at the Orthodox motto “The new is prohibited by Torah (*hadash asur min ha-torah*)”—, where Ritter “advocates denying suffrage to women because they are not *qahal* or *edah*, and were not counted in the census of the people of Israel nor subsumed into the genealogical account of the families of Israel.” But Uziel dismisses Ritter’s assertions, being that women are too created “in the Divine Image and endowed with intelligence,” who also have concerns dealt by the assembly in regards to their property and home. In other words, Uziel considers women to be equal in intelligence as men, whose voices must also be heard.
5. In conclusion he does not agree voting for women is forbidden in Toráh. Uziel brings that even a minority opinion should be followed, “for his demand is legally right” (*Mishnah Pe`ah* 4:1); and on grounds that valuing women is important: “Women were allowed to lay hands [on their sacrifice] for the sake of giving them a feeling of gratification” (*Hagigah* 16b), even though such an act appeared to the public as prohibited; how much more so in our case, where there is no aspect of prohibition at all, and where preventing their participation will be for them insulting and deceitful.”

B. May Women be Elected?

1. On the matter of electing a woman to office, Uziel directly tackles the *halakhót* that men are only to be appointed kings (*Hilkhoh Melakhim* 1:5, *Sifre* on Deut. 29:16) and communal leaders as practiced by the *Geoním*, as evidenced in the *Genizáh* documents.

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In either case, Uziel concludes, this prohibition is meant to be the appointment by the *Beth Din* or the public unanimous vote, and not to an appointment by public majority vote. In other words, those *halakhót* do not apply when it comes to public elections because a *Beth Din* is not involved (“*dayyanim* are prohibited from electing her to public office”) and only a partial vote attaining a majority makes the appointment permissible.

2. Uziel goes even further by bringing the case of Deborah being appointed as judge on the strength of public demand, according to the need and the hour. On this rationale, he also concludes that a woman may be appointed a queen by public demand.
3. Uziel ends this section by refuting—on grammatical grounds—an analysis made by Rabbi Pinhas Estersohn, where Estersohn challenged Maimonides’ reading of the text of the *Sifre*, from which the rule to appoint a man a king derives. Estersohn wanted to point to a loophole, thus creating the permissibility for electing a woman to office, by stating that the text says “‘a queen (*malkah*)’ and not ‘a ruling woman (*molekhet*)’.” However, Uziel rejects this logic by pointing that *melekh/malkah* are nouns, while *molekhet* is present continuous. Uziel waxes apologetic for Estersohn’s mistake, “The author’s remarks to such effect are, no doubt, a slip of the pen.”

C. Appointment of Women to Positions of Political Power (‘*Serarah*’)

1. To avoid any further refutation to the previous, Uziel goes yet a step further and offers proof to his position that women may be elected to office, in case someone said that “the absence of proof is no proof (*Lo ra’inu aino re’ayah*).” He cites: “‘These are the judgments which thou shall set before them’ (Exod. 21:1) relates to the judges and also teaches that Scripture views women and men equally with respect to all Torah laws.”
2. He also explains why the injunction in the *Tosafot* on why women are not fit to be judges is actually a confirmation that they are able to fulfill certain functions as judges: “a woman’s ineligibility relates only to her not being authorized to hear pleas or take evidence, but she is eligible to judge in the sense of deciding law and legislating. Now, is this not deemed authoritative office? Both opinions presented by *Tosafot* prove, then, that the position advocated by the *Sifre* is not accepted as definitive *halakhah*.”
3. He reiterates the position that Deborah serving as judge was not through appointment by the *Beth Din*, but by acceptance of the public. He cites Rashbáh (Shlomo ben Aderet, 1235–1310) to affirm his opinion: “It should be explained [that Deborah] was not a judge in the usual sense but a leader, in the same sense as the other judges that judged Israel. And although we find in the *Sifre*, ‘Thou mayst appoint a king’—and not a queen,’ in the case of Deborah she was not appointed but rather they behaved towards her in the manner one would behave towards a queen, and followed her word” (Rashba on Shevu’ot, chapter 4). He reinforces that this opinion was shared by the Hida (R. Hayyim David Azulai) and R. Aharon Ha-Kohen Perahia (*Birkei Yosef* on *Hoshen Mishpat* 7:11).

D. Law and Morality

Mentalities/Mentalités Volume 27, Number 2, 2015

ISSN- 0111-8854

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This last section is an analysis of what entails licentiousness in the Toráh. Since this was an overall arc concern in Kook's opinion, Uziel minutely breaks apart the halakhic trepidations of mixing genders in the public space. In this, he points to the following:

1. The Mishnaic injunction "Do not engage in much conversation with a woman" (*Abót* 1:5) pertains to idle chatter, but does not assume this happens in a public debate over communal matters. Then he considers meeting for the sake of public service almost on the same footing as a service to the Divine (almost certainly referring to public prayer), which are not occasions to lead people to sin. He also dismisses the point of licentiousness on the general traditional assumption that the People of Israel are not given to violate the "conventions of modesty or morality."
2. The Rabbinic prohibition (*Megilláh* 23a) from allowing women, children and slaves to ascend to read the Toráh, although permitted by Law, is due to respect of the community on the account that they did not want to give the impression that there are men who cannot read from the scroll. Uziel underlines with this explanation that this ruling has nothing to do with preventing licentiousness.
3. Yet, pointing to *the Shulhan Arukh, Orach Hayyim*, 199:6-7, "A mixed group of women, slaves, and children should not recite grace [after meals] together on account of the licentiousness of slaves." Thus underlining the prohibition in this specific scenario when slaves are present, but not on others, such as commercial or communal gatherings or national affairs. Uziel then goes on to refute Rashí's and the Ran's interpretation of this *halakháh* to be expanded to even prohibit the inclusion of the women's husbands presence. He gives strength to his position by stating that none of the *Rishonim* ever ruled to prohibit mixing genders in public gatherings, and that Rashí's concern was never accepted as *halakháh* by Maimonides or Karo in their respective compendia of *halakhót*. (My brackets)
4. Last, Uziel takes issue with Kook's concern that a woman's voting in favor of the husband's candidate as a form of flattery, which from a Jewish ethical perspective is not well seen. He refutes this concern by pointing to the Ran's *Sefer Malki Ba-Qodesh*, where he explains a woman's suppressing her own will to favor her husband is not seen as a form of flattery but an expression of love. In which case, it is a positive attribute to increase peace at the home. Yet, in case the wife would recur to flattery for the sake of peace or fear of the husband, Uziel then interjects this would hold true for everyone voting to flatter someone to keep the peace or for fear. But even then he considers acting in such way is not "deceitful flattery" but comes under the halakhic principle "One may distort the truth for the sake of peace" (*Yebamot* 85a).

II. 'DON'T SAY *HILKHÓT* (WAYS) BUT *HALAKHÓT* (LAWS)'

A most casual reader of these responsa should be able to immediately notice the lack of either direct sources or even the allusion of such sources in Kook's responsum if compared with that of

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Uziel's. Kook only cites one haggadic statement from the Talmud, whereas Uziel cites six *halakhót* from the same. Uziel's deployment not only identifies the Talmudic sources (six of them) from which Kook was probably taking his sweeping and foregone conclusions, but also he goes at length to explain in detail the context of those sources and their actual meaning and application, all found to be not in harmony with Kook's primeval ideas. Furthermore, Uziel brings additional post-Rabbinic supporting material from an extra Talmudic source (*Sifré*), Ashkenazic (*Tosafot*, one) and Sephardic authored legal compendia (*Mishnéh Toráh* and *Shulchán Arukh*, one for each) and even one from the *Zohar*, extant material from the Geonim (one), and post-Rabbinic responsa from both traditions (five Ashkenazic, four Sephardic) to either give more strength to his reasoning or to weaken that of Kook's or other rabbis who were in Kook's line of reasoning; making a total of 21 sources.

Throughout Kook's letter and responsum, one reads his circling appeal to "spirit/spiritual" (20 times), "purity/purified" (5 times), "moral/morality" (13 times), "ideal" (8 times), "holy/holiness" (12 times); whereas Uziel makes no mention of any of these lofty bywords.

Uziel on the other hand concerns himself on minutely displaying on what is and what is not permitted in Jewish Law, and from there analyze whether there is a justification to prohibit women from voting or holding public office.

Kook approaches the logic differently in the letter and in the responsum. In the letter he subdivides the query as an issue of (a) *din* (law), of (b) what is good for Israel, of (c) the moral ideal. As we have observed, he is weak on point A, and strong on points C and D. In the responsum, Kook ties everything into the subject of morality, and from there he cascades his logic that *a priori* has a negative attitude towards women exercising their own right to decision making. It appears to me that their underlying aim is to create an argument for the protection of the moral ideal which Israel is supposed to represent, and should we not aim at such ideal, then impending doom will await us, in Kook's opinion.

Based on all the foregoing, we can comfortably characterize Kook's deployment as rhetorical, while Uziel's as descriptive. So our follow up question is, if we should assume all belong to a single uninterrupted tradition, whence come these dissimilar approaches?

III. ON THE PATH OF THE SAGES OR THE 'LITTLE FOXES'?

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In our article “On Halakháh leMa‘aséh and the Role of the Mishnéh Toráh”³ it was explained that the post-rabbinic private courts—as those of our day since the closing of the Talmud—, making legal decisions to be applied in a community (*halakháh leMa‘aséh*),

1. Have “no authority either to transmit the oral tradition, or to interpret and define scriptural law.”⁴
2. “[C]ould promulgate new laws for their communities provided that those laws did not contradict the Talmud and that they were accepted by the members of the communities.”⁵
3. “[O]nly expounds and formulates the decisions and opinions of the public courts as recorded in the Talmud.”⁶
4. They need to show “the conceptual gist”, or the “path of the law” with “proper conceptualization and proficiency.”⁷
5. Cannot make decisions based on past analogous cases.⁸

These are in short the major principles of post-rabbinic judicial exegesis as found in the major classic sources of *halakháh*.

It should go without saying that Uziel perfectly behaves as described above on every point, where he layers his conceptualization using core and peripheral sources, particularly on point four where he carefully walks us through the reasoning and concepts of the material at hand.

Kook and Uziel never assume they were defining scriptural law, and neither one felt they were going outside the bounds of the Talmud. However, it is clear that Kook does not bother to expound from the sources themselves, and for him the whole issue is a foregone conclusion that merits no further investigation—which would make his opinion one based on a past analogous case—, and this is where both rabbis diverge.

³ Ramirez, David. “On Halakhah leMa‘aséh and the Role of the Mishnéh Toráh.” *Dramirezg70.wordpress.com*. March 22 2015. Web. November 16 2015. <<https://dramirezg70.wordpress.com/2015/03/22/on-halakhah-lemaaseh-and-the-role-of-the-mishneh-torah/>>

⁴ MT *Mamrim* 1:2. Sifré Deut. 17:8, 10, 11, p. 81b (162). Cited in José Faur’s “The Fundamental Principles of Jewish Jurisprudence,” *NYU Journal of International Law and Politics* vol. 12; p. 233

⁵ *Ibidem*.

⁶ *Ibidem*.

⁷ *Teshubót R. Abraham b. ha-Rambam*, #98. Cited in José Faur’s *The Horizontal Society: Understanding the Covenant and Alphabetic Judaism* vol. II (Brighton: Academic Studies Press, 2010), Appendix 69 “Relying on Legal Sources and Authorities,” pp. 163, 164.

⁸ MT *Sanhedrín* 23:9. TB *Sanhedrín* 6a, b, 7a; TB *Shabbat* 10a. Also see *Baba Batra* 130b-131a; see Appendix 48 [in *The Horizontal Society* vol. II]. The source of Raba is *Tosefta Sanhedrin* 3:8, p. 419. *Baba Batra* et al cited in Faur’s *The Horizontal Society* vol. I, p. 414, note 323.

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One should inquire why Kook would consider a judicial or kingship appointment by the *Beth Din* on a par with a public office chosen by popular vote where women would be involved in the decision making, which for him was the point that could not be violated because in his own assessment it was against the Toráh. If he would have offered a substantiated reasoning on that regard, then it would have created a challenging counterpoint to Uziel's decision.

But beyond probing the logic for Kook's reasoning, we should attempt to research from where comes his divergent exegesis deployment.

In perusing the origins of the Ashkenazic tradition on the Internet or major Library catalogues, one cannot find a single key academic peer-reviewed book or body of work that provides a clear and all-inclusive historical, cultural or intellectual genesis of Ashkenazim.⁹ This is quite puzzling given the enormous influence and input Ashkenazim have had on academia and Jewish religious circles since the late 19th century. Instead, what we get from Jewish historians, most of whom are Ashkenazim, as foundational departing points can be only be described as hearsay. In fact, their origins are generally described as "obscure."¹⁰ And although all ethnic groups may depend on their own understanding and traditions to their origins, in my humble opinion I do not think hearsay alone can make a good case for historical objectivity without solid supporting evidence.

The sudden explosion of Ashkenazi legal and esoteric literature during the 11th century onward already represents a strong developed variance from the standards of Geonim and communities through the Levant, North Africa, Spain and Provence where the vast majority of Jews resided at the time; so much so that they were criticized by the rabbis outside Ashkenaz for their lack of

⁹ David Malkiel's *Reconstructing Ashkenaz* (cited below) is perhaps a first all-inclusive attempt, but his work concentrates on demystifying the Ashkenazim as a holy and steadfast observant community based on non-Ashkenazi contemporary accounts. Nonetheless, it is certainly a valuable one given the range of sources and scholarship he provides.

¹⁰ Cecil Roth (1966). Cecil Roth; I. H. Levine, eds. *The World History of the Jewish People: The Dark Ages, Jews in Christian Europe, 711–1096* 11. Jewish historical publications. pp. 302–303. "Was the great Eastern European Jewry of the 19th century preponderantly descended (as is normally believed) from immigrants from the Germanic lands further west who arrived as refugees in the later Middle Ages, bearing with them their culture? Or did these new immigrants find already on their arrival a numerically strong Jewish life, on whom they were able to impose their superior culture, including even their tongue (a phenomenon not unknown at other times and places – as for example in the 16th century, after the arrival of the highly cultured Spanish exiles in the Turkish Empire?) Does the line of descent of Ashkenazi Jewry of today go back to a quasi autochthonous Jewry already established in these lands, perhaps even earlier than the time of the earliest Franco-German settlement in the Dark Ages? This is one of the mysteries of Jewish history, which will probably never be solved." Cited in "Ashkenazi Jews." *Wikipedia.org*. May 16 2015. Web. May 18 2016. <https://en.wikipedia.org/wiki/Ashkenazi_Jews>

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expertise in Rabbinic jurisprudence and literature, as well as Hebrew linguistics.¹¹ Ashkenazim seem not to have been either conscious or acceptant of this criticism.

(To date, I am yet to see a single record from a contemporary Ashkenazi rabbi or communal leader complaining about the criticism being launched elsewhere; either the non-Ashkenazi rabbis were very private and demure about their misgivings, and kept this information in private circles, or Ashkenazi rabbis did not care what was being said about them; on the other hand, specially during the anti-Maimonidean controversy, we hear from plenty of pro-Maimonides rabbis complaining about being attacked by the followers of the so-called “French Rabbis.”¹²).

Take for example the apocryphal letter of Maimonides to his son Abraham,¹³ which reflects the concerns normative Jews of his time were having in regards to the developments in central Europe:

Beware especially of the many books authored by the people of France who seem to think that an awareness of God’s presence may be inspired only by the intake of animal meat dipped in vinegar and garlic which they call *Salsola*. When the vapors of the vinegar and the smoke of garlic penetrate the brain, they maintain, they become divinely intoxicated and begin to sense his abiding presence in their prayers, in their petitions in their Talmudic studies, as well as in the other writings of the heads of the Yeshivot. In addition, they destroy the divine image with their

¹¹ Malkiel, David. *Reconstructing Ashkenaz: The Human Face of Franco-German Jewry, 1000–1250* (Stanford University Press, 2008), pp. 2–5, 16–18.

¹² See Faur, José. “Anti-Maimonidean Demons.” *Review of Rabbinic Judaism* 6 (2003), pp. 3-52.
<http://moreshetsepharad.org/media/Anti-Maimonidean_Demons.pdf>

¹³ Drazin, Israel. *Maimonides: Reason Above All* (Jerusalem; New York: Gefen, 2009), Chapter 8. Drazin argues that the letter could not have been written by Maimonides, because there are variances of outlooks if compared with this other works. However, we must point out that in typical Ashkenazi dystopian projection of Jewish history, the author goes onto explain, “Since the letter describes Maimonides encouraging his son to study the writings of Abraham ibn Ezra, a rational thinker like Maimonides who was rejected by many Jews.” The words ‘by many Jews’ is code word for ‘Ashkenazim’ and Jews living in the north of Spain, who were most vocal against the Andalusian traditions of Ibn Ezra and Maimonides, rooted in the Babylonian Academies. In fact, the medieval Jews then living in northern Spain and central Europe were not in fact “many,” but actually a minority among his contemporaries living through Southern Spain, the Levant and North Africa. Even still in the 1500s, Hakham Joseph Karo—the author of the *Shulchan Arukh*—went on to say, “The RaMBaM, is the greatest of all the Toráh authorities, and all the communities of the Land of Israel and the Arab-controlled lands and the West [North Africa] practice according to his word, and accepted him upon themselves as their Chief Rabbi. Whoever practices according to him [the RaMBaM] with his leniencies and his stringencies, why coerce them to budge from him? And all the more so if also their fathers and forefathers practiced accordingly: for their children are not to turn right or left from the RaMBaM of blessed memory.” *Abqáth Rokhél*, Chapter 32. Translation: r. M.S. Bar Ron. Cited in *Chayas.com*. Web. May 25 2015. <<http://www.chayas.com/>>. Ibn Ezra, let alone Maimonides, are in fact two of the most quoted *hakhamim* in Sephardic tradition until relatively recent times! One is to wonder how a minority becomes “many.”

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tongues when they consistently invoke God in anthropomorphic terms, when in reality the Creator transcends without measure any of the attributes ascribed to him in their works. In vain do they take out the scrolls of the Law for their congregants to pronounce a blessing over them.

[. . .]

This, however, is not the way nor the motivations that draws one night unto the Blessed One! Worship their God and observe their Torah but stay at a distance from them and have no association with them! As a matter of fact do not befriend intimately any group except our own loving brethren of Spain who are known as Andalusians, for they possess wisdom, understanding and lucid minds.¹⁴

It is beyond doubt that medieval Ashkenazi authors writing the major works used for their tradition's legal exegesis to this day (e.g. the *Tosafot*¹⁵ and Rashi's commentary on the Bible and Talmud)¹⁶ were convinced of the legitimacy of their own processes. Most medieval authors in Europe did not write from a historical vantage point or with such things as critical thinking; they wrote based on what they knew and what they thought was correct and legitimate, generally within the constraints of their own traditions.¹⁷ Unlike us in the age of fast speed internet and

¹⁴ Stitskin, Leon D. (Translator). "Letter of Instructions to his Son Abraham." *Letters of Maimonides* (New York: Yeshiva University Press, 1982), pp. 157, 158.

¹⁵ The major works on the law and custom of the Franco-German tradition were produced by German scholars, such as R. Eliezer ben Natan (c. 1090 – c. 1170), *'Eben Ha-Ezer*, 2 vols. (New York: 1957 – 58); R. Eliezer ben Yo'el ha-Levi (1140 – 1235), *Sefer Rabiya* (Jerusalem: Mekize Nirdamim, 1938); R. Issac ben Moses of Vienna (c. 1180 – c. 1250), *'Or Zarua* (Zitmir: 5622); R. Mordekhai ben Hillel 'Ashkenazi (c. 1240 – 1298), *Sefer Mordekhai* (Riva di Trento: 5319); R. 'Asher 'Ashkenazi, *Pisque Ha-Rosh* (Venice: 5312), etc. Likewise the major works of responsa from this tradition were also produced by German scholars. The most prominent among them are R. Meir of Rottenburg (c. 1215 – 1293), *Teshubot, Pesaquim u-Minhagim* (Jerusalem: Mosad haRav Kook, 5717); R. 'Asher 'Ashkenazi, *Teshubot Ha-Rosh* (Constantinople: 5282); R. 'Isserlein (1390 – 1460), *Terumat Ha-Deshen* (Venice: 5279). Cited in Faur's "The Legal Thinking of the Tosafot," note 5 of Sec. I. See below.

¹⁶ The major commentaries on the Bible and the Talmud of this tradition were produced by French scholars. On the biblical commentaries there are two excellent monographs, one by Abraham Geiger, *Parschadatha* (Leipzig: 1855); the other is by Samuel Poznanski, "Abhandlung über die nordfranzösischen Bibelexegeten eingeleitet" (in Hebrew), in *Kommentar zu Ezechiel und den XII kleinen Propheten, von Eliezer aus Beaugency* (Warsaw: Mekize Nirdamim, 1913). The talmudic commentaries of this tradition are all French. The most prominent were written by R. Shelomo Yarhi, known as Rashi (1040 – 1105), and his grandsons R. Shemuel ben Me'ir (c. 1080 – c. 1174), and his grandsons R. Shemuel ben Me'ir (c. 1080 – c. 1174) and R. Ya'aqob Tam (c. 1100 – 1171). It is worth noting that R. Gereshom (c. 960 – 1028), who produced a commentary to the Talmud in Germany, was taught by a French scholar, R. Yehuda ben Me'ir ha-Kohen (tenth century), known as Leontin. [On the life and works of Leontin, see Israel Lévi, "Un commentaire biblique de Léontin" REJ, XLIX (1904), pp. 231 – 243]. *Ibidem*, note 6. See below.

¹⁷ Patristic tradition dominated the world of ideas in all aspects of life for much of the Middle Ages, and it was resistant to change. Europe was not necessarily without any change during this period, however; change took place by reformulating or re-idealizing parts of such tradition, conversant only with itself, which often was met with native opposition. For a range of controversies see Gerhart B Ladner's *Images and ideas in the Middle Ages: selected studies in history and art*. Storia e letteratura (Edizioni di storia e letteratura) 156 (Roma: Edizioni di storia e letteratura, 1983), Chp. 23.

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ISSN- 0111-8854

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worldwide academic networks, and in their own time separated from the connections afforded through the *Ummah*, they had limited access to works and resources necessary to be in sync with the rest of the Jewish world. So it would be unfair to measure them based on our modern expectations of critical research and learning, or even those of their own time available in the age of Islamic enlightenment and Babylonian Jewish scholarship. We, however, do not count with such excuses other than our ignorance, unwillingness to pursue a more ample seeking criteria, or just plain laziness or ideological reluctance that would prevent us from widening our horizons.

In the absence of direct evidence, historians have had to recur to the social and political environment from which to ascertain clues that could explain a given group's historical development. This environment may include, but not limited to, things such as geography, trade, economic conditions; folkish, philosophical or religious ideas and practices; events such as wars, government changes, famines or years of plenty; etc. So when a given group's presence—lacking a preceding, tangible and solid historical record—suddenly and fully appears on the recorded historic stage, we could approximate an explanation to this group's cultural and psychological background. This methodology, of course, could be entirely subjective, dependent on the choice of sources and interpretation thereof. (Even when having a solid record, the interpretation of the record still lies on the eye of the beholder). However, due to the lack of direct sources, there is no better option until someone can invent a time machine.

To my knowledge, the only scholar who has ever attempted to come up with a complete sketch to the cultural origins of the Ashkenazic tradition, particularly as it pertains to religious mentality, exegetical and hermeneutical processes, has been professor José Faur in his article “The Legal Thinking of the Tosafot: A Historical Approach”¹⁸ (from hereon referred to as “LTT”). The following description will be a parsing of his text, citing the sources he makes use of, so the reader can directly verify this research further and offer an alternative opinion if he or she desires.

Accordingly, the geographic space from which Ashkenazic tradition emerged during the Middle Ages was central Europe, in what are today northern Italy, Germany and France north of the Pyrenees. This region was dominated by the Carolingian empire, whose main cultural and spiritual influence lied in Byzantium.¹⁹ Naturally, the Jewish communities of central Europe

¹⁸ Faur, José. “The Legal Thinking of the Tosafot: A Historical Approach.” *Dine Yisrael*, Volume VI (1975), pp. xliii-lxxii. <http://moreshetsepharad.org/media/-The_Legal_Thinking_of_the_Tosafot_A_Historical_Approach_by_Jose_Faur.pdf>

¹⁹ On the relation between the Carolingian Empire and Byzantium, see O. Harnack, *Das karolingische und das byzantinische Reich in ihren politischen Beziehungen*, Ph.D. dissertation, Göttingen, 1880; Amedié L. U. Gasquet, *L'Empire byzantine et la monarchie franque* (Paris; Hachette, 1888); Franz Dölger, *Byzanz und die europäische Staatenwelt* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1964). On the theological views current in the Carolingian Empire, see G. Haendler, *Epochen karolingischer Theologie* (Berlin: Evangelische Verlagsanstalt, 1958);

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ISSN- 0111-8854

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under Carolingian rule²⁰ would become culturally dominated by the Jewish communities of Byzantium.²¹ Ashkenazic Talmudic²² and Biblical²³ exegesis would be greatly influenced by the traditions of Byzantine Jews. Being that Byzantium and the Carolingian empire were part of

and Adolf Harnack, *History of Dogma*, vol. 5 (New York; Dover Publications, 1961), pp. 275 – 331. On the influence of Byzantium on Visigothic Spain, see Paul Goubert, “L’administration de l’Espagne Byzantine,” *Etudes Byzantines*, III (1945), pp. 127 – 142; IV (1946), pp. 71 – 133. On the political and religious influence of Byzantium on Spain, see *ibid.* pp. 111 – 133. This point is of fundamental importance to grasp the character of the Iberian Jewry prior to the conquest of Islam. It also sheds significant light on the similarities between the Jews of Northern Spain, where the effects of Oriental Jewry were limited, and Franco-German Jewry; cf. above note 1, *in fine*. Cited in LTT, note 7 of Sec. I.

²⁰ On the history of Carolingian Jewry, see Solomon Katz, “Pope Gregory the Great and the Jews”, *JQR*, XXIV (1933), pp. 113 – 136, and *The Jews in the Visigothic and Frankish Kingdoms of Spain and Gaul* (Cambridge, Mass: The Medieval Academy of America, 1937); Robert Anchel, *Le Juifs de France* (Paris: J. B. Janin, 1946); Baron, *Social and Religious History*, volume 4 and 5; Cecil Roth “European Jewry in the Dark Ages: A Revised Picture,” *IUCA*, XXIII (1950 - 51), part II, pp. 151-169; S. Schwarzfuchs, “France and Germany under the Carolingians,” *The World History of the Jewish People* vol. 11, The Dark Ages pp. 122 – 142. Cited in LTT, note 3 of Sec. I.

²¹ On the Jew of Byzantium see Samuel Krauss, *Studie zur Byzantinisch Jüdischen Geschichte*, (Leipzi.: 1914); Joshua Starr, *The Jews in the Byzantine Empire*, (New York: Burt Franklin, 1933); Andrew Sharf, *Byzantine Jewry* (New York: Schocken Books, 1971). On their intellectual activities, see H. J. Zimmels, “Scholars and Scholarship in Byzantium and Italy,” *The World History of the Jewish People*, vol. 11, The Dark Ages (Tel Aviv: Jewish History Publication, 1966), pp. 175-188. Jewish merchants traveled from France to Byzantium, see Ibn Khordabeh. *Le livre des routes et des Provinces*, *Journal Asiatique* (1865), pp. 512-513. On the economic ties between Franco-German Jews and Byzantium, see Salo W. Baron, *A Social and Religious History of the Jews*, IV (Philadelphia: Jewish Publication Society, 1965), pp. 175-176. On the relations between Byzantine Jews and the Khazars, see the document published by S. Schechter, “An unknown Khazar Document,” *JQR*, III (1912-13. p. 206, 1. 37. On the relations between the Khazars and Byzantium, see D. M. Dunlop, *The Jewish Chazars* (Princeton, N.J.: Princeton University Press, 1954), pp. 171-221. On the Karaite in Byzantium, see Zvi Ankori, *Karaites in Byzantium* (New York: Columbia University Press, 1959). Invaluable information on the economic life of Byzantines and their relations to other Jewish communities is found in S. D. Goitein, *A Mediterranean Society*, 2 vlns. (Berkeley: University of California, 1967-1971). On their impact on other Jewries, see below notes 8 – 15, and Section III notes 4 – 5. Cited in LTT, note 2 of Sec. I.

²² Professor Saul Liberman, *Tosefet Rishonim*, vol. 4 (Jerusalem: 1939), Introduction, pp. 18 – 21, and *Tosefta Ki-Fshuta, Zera'im*, vol. 1 (New York: Jewish Theological Seminary of America, 1955), p. 18, note 26, was the first one to point out the influence of R. Yishaq ben Malki Sedeq (c. 1090 – 1160) of Southern Italy (referred to by R. David Posquiers as the “Greek”) on the school of the *Tosafot*; cf. Krauss, *Studien*, pp. 136 – 137. Cited in LTT, note 12 of Sec. I.

²³ One of the most important works produced in Byzantium was by R. Tobiya ben Eli‘ezer from Castoril, Bulgaria (eleventh century), *Leqah Tob* (Vilna: 1884). It is a compilation of rabbinic homilies on the Pentateuch and the five Megillot. This method of biblical exegesis was also used by Franco-German Jews, such as R. Moshe ha-Darshan (eleventh century), *Bereshit Rabati* (Jerusalem: Mekize Nirdamim, 1940); Rashi’s commentary to the Bible; R. Shim‘on of Frankfort (thirteenth century), *Yalqut Shim‘oni* (Salonica: 5286). Accordingly, R. ‘Abraham ibn Ezra in his introduction to the Pentateuch, s.v. *Ha-Derekh Ha-Rebi’it*, counts the school of biblical exegesis of Byzantium and of Christian Europe as one, cf. Wilhelm Bacher, Abraham ibn Esra’s *Einleitung zu Seinem Pentateuch-Commentar* (Vienna: 1876), pp. 72ff; Krauss, *Studien*, pp. 134 – 135. Cited in LTT, note 13 of Sec. I.

Mentalities/Mentalités Volume 27, Number 2, 2015

ISSN- 0111-8854

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Christian civilization, one should consider closely how their intellectual environment influenced Ashkenazim.²⁴

For example, both Christian and Franco-German Jews favored the use of the interplay of the letters' numerical values (*Gematriya*) for Biblical mystical exegesis.²⁵ Both European Christians and Franco-German Jews were swept by pietistic movements.²⁶ “The main elements of German *Hasidism* were: a) renunciation of pleasure, humbleness, preaching and repentance,”²⁷ which were common with the pietistic ideals of medieval Christians.²⁸

The Jews of Palestine were too under the influence of Byzantine rule since the year 390,²⁹ whom were criticized by Pirqoi b. Baboi (9th c.) because their tradition had been fatally compromised due to Christian persecution:

Our earliest direct evidence of conflict between the Palestinian and Babylonian centers in the post-talmudic period is provided by perhaps the most piquant literary work of the Geonic era: an open letter addressed by one Pirqoy b. Baboy to the Jewish communities of North Africa and Spain. The author identifies himself as a disciple of a disciple of Yehudai Gaon, head of the Sura academy about 760, and on this basis is assumed to have written his pamphlet at about the turn of the ninth century... In the author's view, the continuity of Palestinian tradition was fatally compromised as a result of Christian persecutions about 500 years before his time. By the time the situation of Palestinian Jewry improved, after the Muslim conquest in 634, the links of living tradition had been irreparably lost, and attempts to restore it on the basis of fragmentary written sources were doomed to failure. Palestinian practice in his time thus represented for Pirqoy an amalgamation of customs adopted as emergency measures during times of persecution with

²⁴ See C. W. Previt -Orton, *The Shorter Cambridge Medieval History*, vol. 1 (Cambridge: University Press, 1952), pp. 418ff; pp. 616ff. On the influence of the Church in economic matters, see J. Gilchrist, *The Church and Economic Activities in the Middle Ages* (New York: Macmillan Co., 1969). Cited in LTT, note 17.

²⁵ See Israel L vi, “Un commentarie biblique de L ontin” REJ, XLIX (1904), pp. 231 – 24, and especially note 4. Cited in LTT, note 20 of Sec. I.

²⁶ See R. Yehuda he-Hasid, *Sefer Ha-Hasidim* (Jerusalem: Mossad Harav Kook, 5724), ¶ 10, 15, 84, etc. Cited in LTT, note 23 of Sec. I.

²⁷ LTT, SHU edition, p. 4.

²⁸ See Harnack, *History of Dogma*, vol. 6, pp. 84 – 117, and F. W. Bussell, *Religious Thought and Heresy in the Middle Ages* (London: Robert Scott Roxburghe House, 1918), pp. 784 ff. Cited in LTT, notes 22 and 27 of Sec. I.

²⁹ Lehmann, Clayton Miles (Summer 1998). “Palestine: History: 135–337: Syria Palaestina and the Tetrarchy”. *The On-line Encyclopedia of the Roman Provinces*. University of South Dakota. Archived from the original on 2009-08-11. Retrieved 2014-08-24. Cited in Wikipedia. “History of the Jews in the Byzantine Empire.” *Wikipedia.com*. May 5 2015. Web. 15 May 2015. <https://en.wikipedia.org/wiki/History_of_the_Jews_in_the_Byzantine_Empire>

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ISSN- 0111-8854

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others resulting from ignorance and a break in tradition. Only in Babylonia had the living tradition been preserved without interruption.³⁰

As it shall be later discussed with Ashkenazic Jewry, Palestinian Jews under Byzantine influence also had a preference for local custom over halakhic normativity,³¹ which, as it will be shown, relates to the legal practices of the reigning non-Jewish environment of the former Roman empire, particularly those developed by French jurists in their analysis and application.

To keep things into perspective moving forward, the focus of the following has less to do with how to “rationalize the content of the faith,” a battle of the rational vs. the anti-rational, or anything of the sort repeated *ad nauseam* in regards to differences between Ashkenazim and Sephardim; and more with how the community’s judicial representatives chose to make their decisions in absence or contrary to a current or defunct legal tradition.

Faur’s analysis concentrates on the *pilpul*³² methodology of the *Tosafot*.³³ *Pilpul* is a term that is generally translated as “casuistry.” According to Faur,

The impasse from which the *Tosafot* took its departure was: How to maintain the Talmudic tradition in a different social and historical context. The *Tosafot* analyzed the Talmud in a manner that it would reflect the mores, ideology, economics and social situation of the Jewish communities in France and Teutonic lands. Seen from this perspective, the *Tosafot* school appears deeply concerned, on the other hand, with the preservation and maintenance of rabbinic authority, and well aware, on the other, of the historical, changes that had taken place in Judaism since the compilation of the Talmud.

The *pilpul* methodology of the *Tosafot* presupposes that there is no objective *Halakha*. In its final analysis, law is grounded on the discretionary judgment of the rabbi, and it is formulated through *pilpul*. The rabbi molds the law to fit the specifics of any situation. The *pilpul* reflects the

³⁰ Brody, Robert. *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture*. Yale University Press; First Printing edition (1998), pp. 113, 114). For a summary of Geonic practices as explained by Brody, check my article by the same name at dramirez70.wordpress.com. <<https://dramirez70.wordpress.com/2014/09/21/the-geonim-of-babylonia-and-the-shaping-of-medieval-jewish-culture/>>

³¹ *Ibidem*, p. 116.

³² The *pilpul* method is one of the many valid forms of judicial exegesis practiced by the Supreme Court of Israel to interpret and define scriptural law. As such, this practice was no longer continued by the post-Talmudic courts of the Geonim, some of whom criticised the use of *pilpul*. Somehow, the *Tosafists* arrogated themselves to continue its use, and in my opinion, ignorantly mimicked the Sages of the Talmud without having any intellectual or historical foreground of its use. See “*Pilpul*.” *Jewishencyclopedia.com*. 2011. Web. 25 May 2015. <<http://www.jewishencyclopedia.com/articles/12153-pilpul>>

³³ On the school of the *Tosafot*, see E. E. Urbach, *Baale ha-Tosafot* (Jerusalem: The Bialik Institute, 1955). Cited in LTT, note 2 of Sec. II.

specifics of the situation as seen by the rabbi, and projects to the community the pronouncement of the law made in a hallowed text—as interpreted and recast by the rabbi.³⁴

This is in contrast with the Babylonian Academies administered by the Geonim, where the *talmidé hakhamím* (heb. students of the Sages) were trained to reach the objectivity of the halakháh as directed by the head of the Academy, as Rabbi Nathan's (the Babylonian) reports:

And when the head of the Academy wants to examine them concerning their study texts (*girsá*), they gather around him in the four Sabbaths (i.e. weeks) of the month of Adar, and he sits and the first row recites before him, and the other rows sit silently. And when they reach a point which is obscure to them, they discuss it between themselves and the head of the academy listens to them and understands their words. Then he reads (*qore*) and they are silent, and they know that he had understood their dispute. And when he finishes his reading, he recites and expounds the tractate which each of them recited at home during the winter and explains in the course of his exposition the point which the students have debated. And sometimes he asks them the explanation of laws... and expatiates to them on the meaning of each law, until all are clear to them... Thus they did all the days of the month.³⁵

Failure to comprehend the *girsá* was dealt with harshly:

And in the fourth Sabbath, they call all the Sanhedrin and all the students, and the head of the academy examines each of them and investigates them until he sees which one is of quicker intelligence than his fellow. And when he sees one of them whose Talmud is not well ordered in his mouth, he deals harshly with him and reduces his stipend and rebukes and reprimands him, and informs him of the places where he has been lazy and negligent and warns him that if he does so again and fails to pay attention to his Talmud, he will be given nothing.³⁶

In comparison, as observed by Brody:

These [Franco-German] scholars, who received the Talmud as a written text, had no such sublime faith in its textual accuracy and were wont to emend the received text rather freely—one might even say cavalierly—when they encountered difficulties in its interpretation.³⁷

As with the non-Jewish practice of *auctoritas* in Europe until relatively modern times, the form of legal procedure and practice that Ashkenazic scholars were to develop did not depend on an objective study and critical analysis of Rabbinic texts inherited by the Babylonian academies, but on the said “authority” of a preferred rabbi or group of rabbis.

³⁴ LTT, SHU Edition, p. 6.

³⁵ See Neubauer, *Mediaeval Jewish Chronicles*, 2:87-88. Cited in Brody's *The Geonim of Babylonia*, p. 46, note 47.

³⁶ *Ibidem*.

³⁷ Brody's *The Geonim of Babylonia*, pp. 158, 159. My brackets.

Along with the following development, it is important to keep in mind that central and western Europe became dominated by the Germanic tribes, who in combination had been hired as garrisons to control what was left of the debilitated Roman Empire, or were directly responsible for the conquest, fall and disintegration of Rome.³⁸ The Roman school of jurisprudence did not survive this catastrophe, so European laws in the medieval ages became a combination of local pagan tribal customs and improvised interpretations of whatever Roman law had remained, the latter of which Germanic jurists had very little knowledge of from a living tradition.³⁹ Professor H. F. Jolowicz brought attention to this fact,

When the *Glossators* revived the study of Justinian's books in the eleventh century, they had very little in the way of tradition to help them. Such Roman law as had survived the Dark Ages was too debased, too greatly over-simplified to explain its complexities, and light on one passage could be sought from other passages in the books themselves. What the original meaning had been thus often remained unknown.⁴⁰

This improvisation on a legal text, whence jurists were operating in a vacuum due to the absence of a living Roman jurisprudential tradition, was primarily obtained through casuistry. According to *The Catholic Encyclopedia*, this had been a practice in patristic tradition since the 1st century, however it does admit that “there are no works treating of casuistry in a formal and scientific way” prior to the 13th century.⁴¹

Adding to the process of casuistry, the reverence for local custom was deeply entrenched in medieval European culture, especially among the Germanic peoples.⁴² The judges among the Franks were called *rachimburgs*, who, according to Rouche, were “Living libraries, they were

³⁸ More recent academic work from the likes of Peter Heather supports this argument. (See: Heather, Peter. (2012) *Empires and Barbarians: The Fall of Rome and the Birth of Europe*). Conversely, historian Bryan Ward-Perkins paints a different picture altogether. Ward-Perkins states that, “The invaders were not guilty of murder, but they had committed manslaughter.” (See: Ward-Perkins, (2005) *The Fall of Rome: And the End of Civilization*, p. 134). The two titles alone speak to their divergent positions. Cited in “Germanic peoples.” *Wikipedia.org*. April 27 2015. Web. May 18 2015. <https://en.wikipedia.org/wiki/Germanic_peoples>

³⁹ A continuous tradition of Roman law is yet to be proven. See Kunkel, W. (translated by J.M. Kelly) *An Introduction to Roman Legal and Constitutional History*. Oxford, Clarendon Press, 1966; 168-69. Cited in “*Corpus Juris Civilis*.” *Wikipedia.org*. April 4 2015. Web. May 18 2015. <https://en.wikipedia.org/wiki/Corpus_Juris_Civilis>

⁴⁰ H. F. Jolowicz, “The Stone That the Builders Rejected: Adventures of Some Civil Law Texts”, *Seminar*, XII (1954), p. 39. Cited in LTT, note 13 of Sec. II.

⁴¹ Brosnahan, Timothy. "Casuistry." *The Catholic Encyclopedia*. Vol. 3. New York: Robert Appleton Company, 1908. 18 May 2015 <<http://www.newadvent.org/cathen/03415d.htm>>.

⁴² See H. J. Jolowicz, *Lectures on Jurisprudence* (London: Oxford University Press, 1963), pp. 193 – 199; cf. C. K. Allen, *Law in the Making* (Oxford: Clarendon Press), pp. 87 – 89. See

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ISSN- 0111-8854

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law incarnate, unpredictable and terrifying.”⁴³ In mimicking approach, the saintly R. Asher—student of the Tosafist Rabbi Meir of Rothenburg—was Torah incarnate himself: “As long as I am alive,”—said R. Asher—“there is Torah in Israel.”⁴⁴

The objective of the casuist method was to adapt the law to the local circumstances, whose jurists felt free to amend, interpolate and delete from the legal texts they were using. This attitude is first found among Byzantine scholars who went to amend secular⁴⁵ and sacred⁴⁶ texts based on personal whims. This attitude is also found in the Byzantine Jewish scholar R. Yisshaq ben Malki Sedeq (c. 1090-1160), who had the habit to change the text of the Talmud according to his opinion.⁴⁷

The Franco-German Jewish position explained that because the text of the Talmud was not put in writing until after the post-talmudic times, they believed the received text was prone to errors⁴⁸ and thereby gave them the “freedom” to emend the text to eliminate difficulties. This was the exact attitude Catholic theologians had in regards to Christian sacred writings, as Faur shows,

French canonist corrected the writings of the Church Fathers on the grounds that the sacred writings were subject to corruption and errors from the copyists.⁴⁹ Abelard excellently developed this point. In the introduction to *Sic et Non*, Abelard formulated the principle that contradictions found in the sacred writings may be the result of corruptions in the text and errors of the copyists.⁵⁰

As we have stated above via Brody, although for most part of the Geonic period the (6th to 11th c.) transmission of the Talmud was passed down orally, the Geonim did not consider that errors

⁴³ Rouche, "Private life conquers state and society", in Paul Veyne, ed. *A History of Private Life: I. From Pagan Rome to Byzantium* (Harvard University Press) 1987:421ff. This paragraph follows Rouche. Cited in “Ancient Germanic law.” *Wikipedia.org*. May 16 2015. Web. May 20 2015.<https://en.wikipedia.org/wiki/Ancient_Germanic_law>

⁴⁴ *Teshubot ha-Rosh* 55:9. Cited in Faur’s “Anti-Maimonidean Demons,” note 118.

⁴⁵ See Robert Devreesse, *Introduction a l'étude des Manuscrits grecs* (Paris; Librairie C. Klincksieck, 1954), pp. 73 – 77; cf. 81, 86. Cited in LTT, note 3 of Sec. III.

⁴⁶ *Ibidem*. Cf. pp. 123 – 124, 137 – 139.

⁴⁷ See S. Liberman, *Tosefet Rishonim*, vol. 4, Introduction, pp. 20 – 21. On his influence on the school of the Tosafot, see above, Introduction, note 13. Cited in LTT, note 4 of Sec. III.

⁴⁸ See Rashi, *Baba Mesi'a*, 33a, s.v. *ve-ena midda*. For a further discussion of this point, see R. Yossef Hazzan, *Hiqre Leb, Orah Hayyim*, (Salonica, 5614), fol. 12b; cf. Lewin in his *Introduction to Iggeret Rab Sherira Ga'on*, p. LXVII. Cited in LTT, note 10 in Sec. III.

⁴⁹ See *Le mouvement théologique de douzième siècle*, p. 332 ff.; and “Sic et Non,” *Ouvrages Inédits D'Abélard*, (Paris: Collection de Documents Inédits, 1836), pp. 5 – 6. Cited in LTT, notes 6 and 7 of Sec. III.

⁵⁰ LTT, SHU Edition, p. 10.

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ISSN- 0111-8854

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have crept in the “text,” although they sometimes admitted the possibility that some of the oral versions *could* be mistaken. And given the high and compartmentalized discipline exercised for its oral transmission during the Kallah months, it is hard press that they would have.⁵¹

Since Franco-German Jewries received the Babylonian Talmud redacted already as a text, and because there is no evidence that their Franco-German *talmidé hakhamím* participated in the strict and disciplined learning process at the Babylonian academies, which took place year after year until achieving mastery of Jewish tradition, it is doubtful they would have acquired respectability for the fidelity of the text. Even for Byzantine Jewry, evidence for their connection with the Geonim is sparse,

With regard to Christian Europe, the evidence at our disposal is extremely restricted. In the time of Sherira and Hayya we learn of students from Constantinople attending the academy of Pumbedita, and of responsa addressed to R. Meshullam b. Qalonymus of ‘Lucca in the land of Frangah’ (that is, of the Franks). Aside from these specific instances, there are a number of vague references to the land of Frangah or Afranghah in Geonic responsa of varying date; it is difficult to say precisely which parts of Christian Europe are included in this designation.⁵²

This helps to explain why Franco-German Jewries did not feel bound by Talmudic law as the rest of Rabbinic Jewry, and why decisions of a particular rabbi—and above all, the status of the rabbi *who* said it—became more authoritatively important than the boundaries set by the Oral Traditions determined by the majority decisions of the Supreme Court of Israel as encoded in the Talmud.

R. Yom Tob of Seville (c. 1250-1330), who learned rabbinics in the north of Spain—which was strongly influenced by Franco-German Jewish scholars—and became the rabbi of Saragossa (Aragon), permits us to see how this free-wheeling practice of halakhic decision making was accomplished:

The French rabbis, of blessed memory, asked: How could both of them be ‘the words of the living God,’ when one is prohibiting and the other is permitting? They answered that when Moses went up to heaven to receive the Tora they showed him on every matter and matter, forty-nine grounds to prohibit and forty-nine grounds to permit. And he asked God about this. And He told

⁵¹ See Brody’s *The Geonim of Babylonia*, pp. 43,45, 46.

⁵² *Ibidem*, p. 133. According to R. Judah al-Bargeloni’s *Sefer ha-’Ittim* (11th-12th centuries; Catalonia: Ed. Cracow, 5660/1990), there were fully enrolled students from Christian Europe at the Gaonic Babylonian Academies—although it does not state from where—, p. 110. Cited in Faur’s *The Horizontal Society*, vol. I (Brighton: Academic Studies Press, 2010), p. 319, note 33.

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ISSN- 0111-8854

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him that this is given to the Sages of Israel of every generation to determine [what the law should be] according to what they [decide].⁵³

To understand this passage well, it is crucial to know what is meant by what “is given to the Sages of Israel of every generation to determine [what the law should be] according to what they [decide].” This actually is a reiteration of a Rabbinic doctrine of jurisprudence based on a Scriptural precept (Deut. 17:9-11), which reads:

9[...] and unto the judge (שפוט) that shall be in those days; and thou shalt inquire; and they shall declare unto thee the sentence of judgment. 10 And thou shalt do according to the tenor of the sentence, which they shall declare unto thee from that place which the LORD shall choose; and thou shalt observe to do according to all that they shall teach thee. 11 According to the law which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do; thou shalt not turn aside from the sentence which they shall declare unto thee, to the right hand, nor to the left.⁵⁴

The Rabbis of the Talmud parsed this doctrine in *Sifre* on Deuteronomy,⁵⁵ p. 81b (162), from which Maimonides and the Geonim derived the rule,

The Supreme Court in Jerusalem is the foundation (עיקר) of the Oral Law. It is the pillar of judicial decision and from it comes forth legislation and judgments [binding] on all Israel.⁵⁶

The components of this doctrine were pronounced by R. Yannai (ca. 200), member of the Supreme Court that published the Mishnah, the core text of the Oral Law from which the Talmud expounds:

⁵³ R. Shemu'el 'Alqal'i, *Mishpete Shemuel* (Venice: 5354), Responsum ¶ 9, fol. 6d cites in the same name of Rabenu Yehi'el (of Paris, died c. 1265) a similar doctrine with one important addition: the law is to be determined according to “the sages of the time, if the majority agree that it is forbidden, it will be forbidden; and if the majority agree to permit it, it will be permitted.” This passage from *Mishpete Shemu'el* is quoted by R. Shelomo 'Algazi, *Halikhot Olam* (Venice: 5399), fol. 88b. The text is faulty. Instead of “Yehi'el” it was misprinted “Hanan'el.” R. Hayim Yosef David 'Azulai, *Rosh David* (Mantua: 5539), fol. 14c. did not notice the misprint and quotes the above doctrine in name of “Hanan'el.” It is important to observe that this doctrine has nothing to do with the talmudic passage quoted above. The meaning of that passage is that since there no longer is a supreme court, conflicts between lower court or jurisconsults may not be denied authoritatively; therefore all opinions are equally valid. Expresses judicially, this means that (since there no longer is a supreme court) Jewish law is horizontal with no vertical dimension. That is to say, that it may not be decided on the principle of authority, but rather on the principle of mutual equality and reciprocity. Cited in LTT, note 6 of Sec. II.

⁵⁴ The Hebrew Bible in English according to the JPS 1917 Edition. Accessed via [mechon-mamre.org](http://www.mechon-mamre.org). 2002. Web. May 16 2015. <<http://www.mechon-mamre.org/e/et/et0.htm>>.

⁵⁵ Ed. Finn and Rosenkranz, Vilna (1866). Cited in Maimonides' *The Book of Judges*. Trans. Abraham M Hershman (New Haven: Yale University Press, 1949), p. 285.

⁵⁶ MT *Mamrim* 1:1. Cited in Faur's *The Horizontal Society* vol. I, p. 73, note 98.

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ISSN- 0111-8854

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R. Yannai said: If the Tora would have been delivered (by God of Israel) categorically [that is without ambiguity] not a single leg could stand [i.e., its continuity would be impossible]. What is the source for this? “And God spoke to Moses *to say* (לאמור)!⁵⁷

— He (Moses) said to Him:

— “Lord of the Universe, teach me what the *halakha* is!”

— He (God) replied: “You must follow the majority (opinion)! If the majority (issues a verdict of) innocence, they have absolved [the accused]! If the majority (issues a verdict of) guilt, [the accused] is guilty! In this fashion the Tora may be expounded in forty-nine modes (concluding the matter is) impure, and in forty-nine modes (concluding the matter is) pure.”⁵⁸

What the Rabbis of the Talmud, the Geonim and Maimonides maintained was that halakhic decisions binding on all Israel were to be decided by member judges of the Supreme Court (Sanhedrín), whose majority vote could only cast the decision for the halakháh. The legal niceties and intricacies for becoming a judge for the Supreme Court were orderly written by Maimonides in his MT *Sanhedrín*. Special attention ought to be placed on chapters II and IV, which contains qualifications no medieval rabbi in central Europe could possibly muster.

What rabbis like R. Yom Tob of Seville did was to switch the word “judge” (שפט) with “sage” (חכם) in his reiteration of the Scriptural precept, which gave them the liberty to use *anyone* whom they considered a sage. So the system the Ashkenazic tradition developed was one akin to the scholastics, where one were to pay attention on *who* said anything about a given text,⁵⁹ and not *what* the text itself said (see Section IV below). According to Faur,

⁵⁷ That is, to *say*, i.e. to further develop and *communicate* to others; see R. Samuel Yafe Ashkenazi, *Yafe Mar'e* (Berlin, 5485/1725), 186c. *Ibidem*, p. 74, note 103.

⁵⁸ *Yerushalmi Sanhedrin* IV, 2, 22a. See *Masekhet Soferim* XVI, 5; pp. 287-289; and cf. *Rosh ha-Shana* 21a; *Sanhedrin* 36a; and the bibliographic note in *Ekha Rabbati*, p. 20, n. 28. Cf. below Section IV, n. 194 and Appendix 52. The reason why forty-nine faces are revealed is because rabbinic tradition reckons fifty grades of intelligence. Grade number fifty represents absolute wisdom which excludes both interpretation and variation. Cf. the text published by Moses Zucker, “*Iyyunim*,” *Proceedings of the American Academy for Jewish Research* 49 (1982), pp. 101-102. This doctrine may be related to the thesis that the Tora was first published as *megillot* and only later acquired the status of “Tora *התורה*”; see *Gittin* 60a. For further analyses, see R. Hanan'el on *Sanhedrin* 36a'R. Nissim Gaon, *Sefer ha-Mafteah* on 'Erubin 13b s.v. *vediglo*, 56b. On the position of the Geonim on this matter, see *Rav Saadya Ga'on's translation of the Torah*, p. 109 n 461; cf. Maimonides, *Perush ha-Mishnayot, Terumot* 6:3, vol. 1, pp. 294-295. Cited *ibidem*, p. 74 and 75, note 104.

⁵⁹ In the footsteps of the scholastics, the anti-Maimonidean concern is on *who* said this or that about the text, thus degenerating into a hierarchical system of *auctores majores ad minores*. Concerning the value of the *pilpul* methodology of these Yeshives, see Ludwig Blau, “Methods of Teaching Talmud,” in *Jewish Quarterly Review* 15 (1903), pp. 121-134. Cf., José Faur, “The Legal Thinking of Tosafot,” in *Dine Israel* 6 (1975), pp. 43-72. Concerning the *pilpul* in modern Yeshives, see William B. Helmreich, *The World of the Yeshiva* (Hoboken, 2000), pp. 108-113. Cited in Faur's “Anti-Maimonidean Demons,” note 25. Also see R. Josh Yuter's “Do You Practice

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ISSN- 0111-8854

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The doctrine ascertaining that a rabbi who is not a member of the judiciary has Scriptural authority, is the result of combining Ramban's view, that after the destruction of the Temple the authority of rabbis is a function of their superior knowledge (and not of their judicial office), with Rashi's view at B. Hul. 52a, s.v. *ella*, that even in post-Talmudic times a judge (that is, a member of the community's bet din) has Scriptural mandate.⁶⁰

A "sage" is not the same thing as a "judge" in Rabbinic parlance. As discussed in TB *Sanhedrin* 14a, not all sages during Talmudic times were ordained as judges. In fact, the early Sages of the Talmud avoided at all cost to be appointed as judges, as Maimonides derived the following formulation from the same passage:

It was the habit of the early Sages to shun appointment to the position of judge. They exerted their utmost endeavors to avoid sitting in judgment unless they were convinced that there were no others so fit for the office as they, and that were they to persist in their refusal, the cause of justice would suffer. Even then they would not act in the capacity of judges until the people and the elders brought pressure on them to do so.⁶¹

Contrary to the Rabbinic etiquette and procedure, the Byzantine and Franco-German Jewries transformed the halakhic decision process from the highly regimented halakhic group process of the Babylonian officially ordained courts, and reduced it to the mandate of an individual unordained rabbi, which combined with the use of *pilpul*, allowed for innovations that adapted, diverted or changed the halakháh to conform to local, temporal and even personal concerns. Faur's lists several of these innovations in his "The Legal Thinking of the Tosafot" (SHU Edition), from page 15 and forward.

This did not go unnoticed by the Geonim.

Sherira Gaon (906-1006) described how in his time the authority of the Babylonian Academies was being challenged by whom he called "little foxes" (שׂוֹעֲלִים קְטַנִּים):

There are among us students—'little foxes' having no substance—that challenge (us) and call into question (the authority) of the Geonim, pillars of the world. Asking: 'how do they know that matter?' [In support for their challenge] they [i] take out their books (ספריהם). [ii] But they understand not the deeds of God and the making of His hands [i.e., the text that they are quoting];

'Gadolatry'?" *TheJewishPress.com*. 31 January 2013. Web. 28 September 2014.

<<http://www.jewishpress.com/indepth/opinions/do-you-practice-gadolatry/2013/01/31/>>

⁶⁰ *Ibidem*, note 111.

⁶¹ Maimonides, Moses. "Sanhedrin." *The Book of Judges*, p. 12.

and do not comprehend even a small fraction of what a minor student of a student of the least important of the Geonim comprehends.⁶²

According to Faur, these challengers could not possibly have been Qarites, as they were challenging the Geonim on the basis of Talmudic texts, an *oeuvre* that Qarites did not acknowledge given that they denied Rabbinic tradition altogether.⁶³

Challengers of this sort had been reported by R. Pirqoi b. Baboi (8th and 9th centuries):

Some of them found volumes of the Mishna, and of some (tractates of the) Talmud that were unpublished (גנוזות), and everyone occupied himself in (learning from) from books and explained (the text) by conjecture (ופירש לדעתו מה שעלה בלבו) because they did not previously have sages that could instruct them how to apply the law.⁶⁴

In Faur's opinion, these challengers were not regularly enrolled students. He derives this from the words of Sherira "take out *their books*," implying that they did not learn the Talmud orally, as it was the discipline of the Academy's enrolled students who gathered every year during the Kallah months.⁶⁵ In addition to this, as shown in Baboi's report, the earlier challengers were basing their conjectures on *unpublished* (גנוזות) copies of the Mishnah and the Talmud, meaning that they were unauthorized.⁶⁶

As it had been explained by Brody,

For the Geonim and the members of their academies, up to the very end of the Geonic period, the Talmud remained literally in the category of Oral Torah. The act of oral study or recitation and the oral "text" were described by forms of the verb GRS (literally 'to chew'), the act of copying or the physical copy by forms of the verb NSH (originally 'to pluck out', the 'to transfer, copy'). By the end of the Geonic period there were certainly written copies of the Talmud—the earlier clear is evidence for the existence of such texts takes us back approximately to the middle of the eighth century—and the Geonim were not averse to making use of these on occasion.

⁶² In *Iyye ha-Yam* (= *Sha'are Teshuba*), #187, 75b-76a. Cited in Faur's *The Horizontal Society* vol. I, note 26, p. 316.

⁶³ *Ibidem*, p. 319.

⁶⁴ Edited by Professor Shalom Spiegel, "LeFarashat ha-Polmos...", *Jubilee Volume in Honor of Professor Harry A. Wolfson* (Jerusalem: American Academy for Jewish Studies, 1965), Hebrew Section, p. 245. *Ibidem*, p. 317, note 28. For clarity, I've omitted some added brackets.

⁶⁵ *Ibidem*, p. 316. See above for the discipline of Talmudic Academies.

⁶⁶ On the meaning of this term (גנוזות), see José Faur's *Golden doves with silver dots: semiotics and textuality in rabbinic tradition* (Bloomington: Indiana University Press, 1986), pp. 109-110; cf. *ibid.*, p. 102-103. Cited in *The Horizontal Society*, note 33, p. 319.

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ISSN- 0111-8854

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Nevertheless, within the academies the dominant model of transmission—ideologically, and apparently also in practice—remained an oral one[.]⁶⁷

It is very possible that these unenrolled students got hold of such copies meant for personal use of the Geonim, but never possessed the halakhic status of “published” copies. Faur speculates that these unenrolled students might have been “informal students, merchants, and travelers who acquired a modicum of rabbinic learning at home,” which he derives from the Geonic report that states, “some of them reside (שכני) in the land of Israel.” He goes on to explain that in Hebrew ‘to reside’ (שכני) is not the same as one who ‘dwells’ (יושב). The first refers to someone who has dealings with people in the area, but not necessarily living in that vicinity.⁶⁸

Judging from the chronology when these events were developing (8th-10th centuries), it is possible these “informal students” came from Byzantium via Palestine. As far as them being merchants, the extant Genizah documents cannot support that theory, as Sholomo Dov Goitein explains:

To all intents and purposes, the Arabic-speaking Jewish merchants of the Mediterranean area were confined to the realm of Islam. They were connected to their coreligionists in Europe by bonds of general culture, religion, and philanthropy (extended by the former to the latter), but not by business relations of any significance. The Europeans traders with whom the Genizah merchants dealt were exclusively Christians, Italians and Byzantine [non-Jews].⁶⁹

The likelihood of them coming from mainland Christian Europe is almost null. A Genizah merchant had to say the following about European Jews:

Let me know if your son has decided to take the risk and travel to a land whose people and customs he does not know. With the best of luck, he will not arrive in less than three years. Then, by God, he will reach people who are cruel by nature... If a strange Jew comes to them they will not greet him but most reluctantly. Then, when he stays a month in their town, they will tell him: Leave, because they have laws that a stranger shall not stay with them longer than a month. He will find himself—by the life of God—with nothing and God forbid that he will have

⁶⁷ See Robert Brody’s *The Geonim of Babylonia*, p. 156.

⁶⁸ See Faur’s *The Horizontal Society* vol. I, pp. 318 and 319, and note 33.

⁶⁹ Goitein [*A Mediterranean society; the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*], 1967: 211, and Ben-Sasson, 1984: 37, whose conclusions I have to some extent paraphrased in this paragraph. In contrast, Abulafia, 1987: 424, sees the absence of the Genizah merchants from Christian regions merely as a result of their specialization, whereas “the Babylonian Jews... may have been much more active in trade in Morocco, the Spanish Levant, southern France and Byzantium.” Sadly, there is no documentation for “Babylonian Jews active in trade” in these regions. Cited in Michael Toch’s *The Economic History of European Jews: Late Antiquity and Early Middle Ages* (Leiden; Boston: Brill, 2013), p. 199, note 63. My brackets.

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merchandise to make a living from. Also, what happens here in a month will not happen there in a year. I do not know any reason for his decision except folly.⁷⁰

Which is then followed by Professor Michael Toch's commentary:

The hazy allusion to the Ashkenazic ordinance of *Herem ha-yishuv* (*settlement clause*) regulating admittance of newcomers (above, Part I, Ch. 3, and next sub-chapter) hints to a European location. It is the only Genizah document to do so, but this Europe—barely known to the writer—is a backward, forbidding, inhospitable and unprofitable place. Arabic-speaking merchants traded through Muslim lands and all the way to India. They did not do so in Christian Europe (with the enigmatic exception of the Radhanites) and definitely not with co-religionists from Christian Europe. Both parties kept to their own parts; they did not connect to create an international network.⁷¹

So far this consolidates the thesis that Ashkenaz was culturally isolated from the rest of Jewish civilization, and their dependence on subpar Byzantine Jewish scholarship. This was to proof the historic soil for the watershed events that were going follow from the 11th c. onward.

R. Samuel ha-Nagid (993-1056), an Andalusian Jew born in Mérida and probably educated in Cordoba (then heir to, preserving and advancing the best of Geonic scholarship), in his poem *Hilkheta Geburata* reported that 'apostates/sectarians' (מינייט)⁷² from Catalonia (northern Spain) were spreading bogus instructions in the name of the Geonim.⁷³ Probably these bogus instructions were introduced via France and Germany,⁷⁴ which—if we follow all the foregoing—were most likely obtained or inspired via Byzantium.

⁷⁰ Gil [*Palestine during the first Muslim period, (634-1099)*], 1983: III, 329-30, no. 530. I owe this reference to Dr. Miriam Frenkel of The Hebrew University of Jerusalem. *Ibidem*, note 64, p. 200. My brackets.

⁷¹ *Ibidem*.

⁷² Generally the Hebrew word "*min/miním*" is translated as 'heretic/heretics;' however, semantically they have no relation to each other. The Greek *hairesis* "a taking or choosing, a choice," was used in Latin as "*hæresis*, "school of thought, philosophical sect." *Hairesis* more closely corresponds to the Hebrew word *meshumad/meshumadím* (lit. 'destroyed one'), which in Maimonides' description (MT *Teshubáh* Chp. 3, 18), is when a Jew decides (by his own voluntary choice) to violate one or all precepts of the Toráh. Whereas an 'apostate', from the Latin *apostata*, from Greek *apostasia* 'defection, desertion, rebellion,' is semantically closer to *min* (lit. 'kind, species'), as *being a species of his own*, which Maimonides describes as someone who denies the Creator in five specific ways. See MT *Teshubáh*, Chp. 3, 15. Using *Min* in Rabbinic parlance is the strongest word there is among the categories of Jewish rebels, and to whom there is no recourse for repentance (*teshubáh*) on this Earth.

⁷³ *Diwan Shemuel ha-Nagid, Ben Tehillim*, #27, p. 91 (II, 29-37). Cited in Faur's *The Horizontal Society* vol. I, p. 319, note 34.

⁷⁴ Another factor that ought to be considered are the paraphrases and pseudo-geonic works that circulated in France and in Teutonic lands. Some of these works were of inferior quality and may have been instrumental in undermining the prestige and the authority of the Ge'onim, (cf. E. E. Urbach, "The Participation of German and French Scholars in the Controversy about Maimonides," (Hebrew) in *Zion*, XII (1947/48), pp. 151 – 152). Finally, it is important to

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ISSN- 0111-8854

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Being aware of these developments in Spain, Maimonides would go onto formulate the following precept, which forbids students who have not completed their studies from issuing legal opinions:

These are the minimal students that never had developed their (knowledge of) Tora suitably, and see to aggrandize themselves among the ignoramuses and people of their own. They jump and sit ahead, to judge and instruct in Israel. They are the ones that increase discord, tear down the world, dim the light of Tora, and destroy (מהבלים) the 'Vineyard of the Lord of Hosts.' About them, said Solomon in his wisdom, 'We were overtaken by foxes—little foxes destroying (מהבלים) vineyards' (*Songs* 2:15).⁷⁵

Faur indicates that Maimonides (ca. 1135-1204) uses the term “little foxes” in the same sense utilized by R. Sherira Gaon (906-1006),⁷⁶ which will be then again used by his son Abraham (1186–1237) to describe the Anti-Maimonideans wreaking havoc in Spain.⁷⁷

Unbeknown to them, the Anti-Maimonideans were not attacking Maimonides per se, but the whole chain of judicial transmission as preserved by the Geonim. Maimonides perhaps became a prime target due to the prominence he obtained among the Jews of Spain and Provence, and whose ideas provoked great consternation among Jewish “conservatives” in central Europe. Being distant from Geonic scholarship, and ignorant of the Arabic language to be conversant with the same,⁷⁸ little did they know Maimonides actually represented the norm for the vast majority of Jews of his time.

As we have been discussing until now, the problem of the “little foxes” had been one developing since the times of R. Pirqoi b. Baboi in the 8th c., perhaps via Byzantium, but did not become full

remember that in Western Europe the title “Ga’on” was applied to any scholar; and it was not considered the exclusive title of the heads of the academies in Babel, cf. Gerson Cohen, *Sefer Ha-Qabbalah*, (Philadelphia; The Jewish Publication society, 1963), p. 88 and note 469. Therefore some of the “Geonic” material in Franco-German literature comes from local rabbis, e.g. the statute attributed to the “Ge’onim” that meat that was not salted within three days from the time of slaughtering may no longer be cooked (see *Tur Yore De’a*, ¶ 69 and *Bet Yosef*, ad loc.) did not originate from the heads of the academies in the orient (accordingly Maimonides and all previous authorities do not mention it) but from Germany. Cited in LTT, note 14 of Sec. II.

⁷⁵ MT *Talmud Tora* 5:4; cf. *Guide* II, 43, at the end. Cited in Faur’s *The Horizontal Society* vol. I, p. 324, note 49.

⁷⁶ *Ibidem*, p. 324.

⁷⁷ *Milhamot ha-Shem*, pp. 56, 76 (=Teshubot, #7, p. 93). Also see Sforno [*Be’ur ‘al-ha-Tora*(?), Warsaw, 5617/1857] on *Songs* 2:15, and Appendix 54 in *The Horizontal Society* vol. II. *Ibidem*.

⁷⁸ It is worth noting that significant portions of the Ge’onic literature were written in Arabic, and thus it was inaccessible to Franco-German Jewry. The Ge’onic literature in Hebrew was limited in volume and scope. In addition it did not enjoy wide circulation, cf. B Lewin in his Introduction to “*Iggeret*” *Rab Sherira Ga’on*, (heb.), (Haifa: 1921), p. LI ff. Cited in LTT, note 14 of Sec. II.

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ISSN- 0111-8854

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blown until the 13th and 14th centuries in northern Spain with the so-called Anti-Maimonidean controversy.

The Jewish People have not been a strangers to sectarian movements. However, sectarians generally characterized themselves by openly denying Rabbinic (or for that matter, Pharisaic) tradition altogether. What made the “little foxes” particularly and dangerously effective is that they were using the veneer of respectability of Rabbinic tradition, pace unauthorized texts, to introduce their own doctrines and opinions: A Trojan Horse *à la* Israelite.

In the ongoing analysis of this period, one must keep in mind that the *little foxes*’ rise to prominence was in part achieved thanks to the destruction of Andalusian Jewries by the Almoravids and Almohads during the 12th c., Muslim extremists from Berber North Africa who replaced the Umayyad dynasty in southern Spain after being invited to defend them from the Christian Spanish Reconquista, and with it the cultural and intellectual progressiveness of Islamic enlightenment came to an end, of which Andalusian Jews were part. Maimonides and his family were direct victims of this destruction.

The dispersing Andalusian Jews to friendlier Christian and Muslims lands would never recover, and put them in a weaker position vis-à-vis their contemporaries in northern Spain. The famous library of Lucena (Andalusia), containing valuable Rabbinic works and collections of Talmud which dated back to the Geonic period, disappeared entirely after being transported to Toledo (Castile), perhaps during the 12th c.⁷⁹ The last scholar to have had access to it was R. Meir Abulafya (c. 1170-1244), chief rabbi of Toledo, who remained an opponent of Maimonides throughout his life.⁸⁰

The prominence and fame that Spain obtained via its Andalusian scholars, which carried respectability and authority throughout most of the Jewish world, would serve as stage to introduce and cement the new ideologies imported from central Europe, which otherwise would have had remained the backwater of Jewish civilization.

Sephardic rabbis of the “old guard” would eventually learn to adapt to the new circumstances. Pro-Maimonidean rabbis would express their contempt or demure criticism to the “little foxes” via their responsa or polemical works for centuries to come, as perfectly displayed by Hakham

⁷⁹ See R. Abraham Zacuto, *Yohasin ha-Shalem*, eds. Herschell Filipowski and A.H. Freimann (Jerusalem, 1963), pp. 214 a-b. On Abul’afya’s ancient manuscripts of the Talmud, cf., Mordechai Sabato, *A Yemenite Manuscript of Tractate Sanhedrin* (Heb.) (Jerusalem, 1998), p. 217.

⁸⁰ Geiger, *Jüd. Zeit.* ix. 282 et seq.; Grätz, *Gesch. d. Juden*, vii. 39 et seq. Cited in *jewishencyclopedia.com*.2011. Web. 25 May 2015. <<http://www.jewishencyclopedia.com/articles/699-abulafia-abraham-ben-samuel>>

Mentalities/Mentalités Volume 27, Number 2, 2015

ISSN- 0111-8854

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Uziel. Sometimes, they would openly protest against the aggressive advances of the “little foxes,” as Hakham Joseph Karo once did in the 1500s:

Who is he whose heart conspires to approach forcing congregations who practice according to the RaMBám of blessed memory, to go by any one of the early or latter-day Torah authorities?! ...

Is it not a case of *a fortiori*, that regarding the School of Shammai—that the halakháh does not go according to them—they [the Talmudic Sages] said “if [one practices] like the School of Shammai [he may do so, but] according to their leniencies and their stringencies.”

The RaMBám, is the greatest of all the Toráh authorities, and all the communities of the Land of Israel and the Arab-controlled lands and the West [North Africa] practice according to his word, and accepted him upon themselves as their Chief Rabbi.

Whoever practices according to him [the RaMBám] with his leniencies and his stringencies, why coerce them to budge from him? And all the more so if also their fathers and forefathers practiced accordingly: for their children are not to turn right or left from the RaMBám of blessed memory.

And even if communities that practice according to the Rosh or other authorities like him became the majority, they cannot coerce the minority of congregations practicing according to the RaMBám of blessed memory, to practice like they do. And there is no issue here concerning the prohibition against having two courts in the same city [*‘lo tithgodedu’*], since every congregation should practice according to its original custom...⁸¹

All the foregoing does not mean that *everything* the “little foxes” have written is contrary to tradition. After all, traditional Sephardic rabbis—of all rabbis—have continuously quoted Ashkenazic rabbis favorably when their opinions are in harmony with the Talmud and Jewish principles—and gallantly, sensitively or strongly disagreed with them when not; Uziel being a clear example of this practice. And for that matter, Sephardic rabbis quote non-Jewish sages for the same reasons, when they feel their ideas stand or advance Jewish principles and their vision of Universal Humanism towards the knowledge of the One God.⁸² However, it does take a critical and discerning eye to separate the seed from the chaff.

⁸¹ See note 12 above.

⁸² See Solomon Gaon’s *The Influence of the Catholic Theologian Alfonso Tostado on the Pentateuch Commentary of Isaac Abravanel* (Hoboken, NJ: Ktav Pub. House ; New York, N.Y. : Sephardic House, 1993); Alessandro Guetta discusses in his “Kabbalah in the Age of Reason: Elijah Benamozegh” how the works of Giambattista Vico were utilized by Elijah Benamozegh. This talk was presented at the symposium “Humanism and the Rabbinic Tradition in Italy and Beyond” organized by Centro Primo Levi and held in New York in 2005. *Primolevicenter.com*. 25 June 2014. Web. 25 May 2015. <<http://primolevicenter.org/printed-matter/elijah-benamozegh/>>; and my “Rabbi Moyses Aegyptius in Holland.” *Dramirezg70.wordpress.com*. 26 April 2015. Web. 25 May 2015.

Mentalities/Mentalités Volume 27, Number 2, 2015

ISSN- 0111-8854

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Whether these innovative idealists (i.e. “little foxes”) were acting through sheer ignorance or malice is for anyone to decide, and up for plenty of speculation. But I personally think that sheer ignorance may beget sheer malice, even when having good intentions. As the Algerian-French Nobel Prize winning author, journalist and philosopher Albert Camus once said,

The evil that is in the world almost always comes of ignorance, and good intentions may do as much harm as malevolence if they lack understanding.⁸³

I could not agree more!!

IV. IN REGARDS TO ZOHAR’S ANALYSIS

It is generally held that what mainly differentiates Ashkenazic and Sephardic traditions is that the first is rigidly traditional, reluctant to change; whereas the second tries to keep apace with the changes in society, culture and politics. This is the way that Professor Zohar tries to explain it:

Rabbi Kook’s case takes for granted the identity of past praxis and mores with current halakhic norms; what has been done and said in the past is definitive of what should be done in the present. Thus, when one has identified what past custom and attitudes were, guidelines for the present ipso facto are set... [I]t appears that Kook advocates a model of halakha which is ideally closed and eternal, independent of historic reality.⁸⁴

Therefore, anything that falls outside those norms must be rejected:

For rabbis identified with Orthodoxy, ‘innovation’ became a negative appellation (with regard to halakha), and adopted the slogan ‘He-hadash asur min ha-Torah’... R. Kook adhered to a staunch, even right-wing, Orthodox orientation.⁸⁵

<<https://dramirezg70.wordpress.com/2015/04/26/rabbi-moyses-aegyptius-in-holland/>>. The most controversial example of said Sephardic heterodoxy repeated *ad nauseam* by Jewish historians and philosophers is Maimonides’ purported uncritical support for Aristotle’s philosophies in his *The Guide of the Perplexed*. Faur dispels many of these myths in his *Homo Mysticus: A Guide to Maimonides’s Guide for the Perplexed* (Syracuse, N.Y.: Syracuse University Press, 1998). While there has never been in history as many learning institutions and resources as in the 20th and 21st century, I still wonder about the ability of Academia to teach *critical thinking* reading literacy to their students, specially in Jewish institutions.

⁸³ Camus, Albert. *The Plague*, trans. Stuart Gilbert (New York, NY: Vintage), p. 131. Cited in Luciano Floridi’s *The Ethics of Information* (Oxford: Oxford University Press, 2013), p. 107.

⁸⁴ Zohar, Zvi. “Traditional Flexibility and Modern Strictness,” pp. 126, 129.

⁸⁵ *Ibidem*, p. 130.

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@2015 Mentalities/Mentalités

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Zohar appropriately identifies the Orthodox approach being one of ideology. However, I disagree it being a case of taking “for granted past praxis and mores with current halakhic norms” as the impediment to innovate.

As we have discussed in the previous section, Ashkenazic tradition did develop the capacity to innovate, however, not precisely in a traditional Talmudic manner. As we have stated above, Hakhám Uziel pointed out Ritter’s innovation, which definitely contraries the Orthodox motto “The new is prohibited by Torah.”

Rather, as Faur has analyzed more convincingly in regards to the approach of Tosafists, decisions are made according to the discretionary judgment of the rabbi. “Toráh,” “Talmud,” “the Sages of Israel,” “spiritual,” “purity,” “holy,” and other surreptitious lofty bywords are just smokescreens to cover the rabbi’s fancy, offering a lot fluff and literally little or no substance. Contrary to Zohar’s analysis, Kook’s deployment has nothing to do with having “no real room for a critique of past praxis,”⁸⁶ because simply there is no *past praxis* to speak of in his discourse for anybody to critique, if by “praxis” Zohar actually means Talmudic law—unless he was referring to Kook’s own cultural praxis.

Rather than it being a model that advocates a halakháh that is “closed and eternal, independent of historic reality,” Kook’s deployment belongs more to the realm of *personal opinion* that is “closed and eternal, independent of historic reality,” where halakháh is not really a component in the decision making process. Vico would identify it as *barbarie della riflessione*,⁸⁷ the barbarism of reflection.

According to Grassi,

[B]arbarism always reappears when the original ingenious and fantastic contact is lost from reality. This is when human beings escape to pure rational considerations.⁸⁸

Idealism [be this scientific or not] has a reason to search the origin of ideas in man, but it errs when it tries to derive the ideas from isolated beings, of beings unto themselves, of an I without a You provided by the senses.⁸⁹

⁸⁶ *Ibidem*, p. 129.

⁸⁷ The concept first appears in Gimabattista Vico’s *Scienza Nuova* (ed. 1730). Cited in *Et si omnes: scritti in onore di Francesco Mercadante* (Edited by Fulco Lanchester, Teresa Serra; Milano: Giuffrè, 2008.), p. 9.

⁸⁸ Grassi, Ernesto. *Vico y el humanismo: ensayos sobre Vico, Heidegger y la retórica* (Barcelona: Anthropos, 1999), p. 34. Translations from Spanish are mine.

⁸⁹ *Ibidem*, p. 50. My brackets.

As I argue in my “A Short Introduction to Vico’s Humanist Thought,”

Once created, ideas and concepts become mechanisms onto themselves, separated from historic and natural reality. For Hegel, philosophy ought to avoid empirical methods—the experience of the senses—and instead proceed purely with dialectical speculations in its most complete totalitarian-universal manner. “Knowledge” then becomes an independent object divorced from time and space, whose intention is not to convince through argument, but through its own self-sufficient “objective truth.” Mystics apply the same mechanism to “mystical truth.”⁹⁰

As we have discussed in “Halakháh leMa‘aséh and the Role of the Mishnéh Toráh,”⁹¹ in the traditional stance of the halakhic decision-making process, the *poseq* (halakhic decisor) must view each case anew. Raba, the head of the Talmudic Academy in the 3rd c., instructed to his students:

When you find an objection against a judicial decision (פִּיטְקָא דְדִינָא) of mine brought before you, do not declare it ‘invalid’ until you have consulted with me. If I could offer the rationale (טַעמָא), I would present it to you, and if not I would retract it. After (my) death you should neither tear it nor should you rely on it: do not tear it, since if I would have been present I might have been able to give the rationale (טַעמָא), but do not rely on it, since the judge must follow what his eyes show him.⁹²

Traditionally, Jewish judicial hermeneutics is deeply preoccupied with the meaning of terms as set by tradition and the Supreme Court. This is why a whole Jewish scholarship of lexicons and grammars sprung as a result around this very concern. Therefore, the understanding of Jewish tradition is to be Alphabetical; there is a level of literacy that has to be mastered in order to be competent to handle it.

What Zohar calls “traditional flexibility” is precisely this tradition-bound learned ability to reassess current circumstances using the “terms and conditions” of the *Berit*. It requires *interpretation* of its themes, which are not locked into an *ideal*, but are part of the *verisimilar* (i.e., the *probable*) of circumstance of daily living. As Faur explains:

⁹⁰ Ramirez, David. “A Short Introduction to Vico’s Humanist Thought.” *Dramirezg70.wordpress.com*. January 12 2014. Web. May 25 2015. <<https://dramirezg70.wordpress.com/2014/01/12/a-short-introduction-to-vicos-humanist-thought/>>

⁹¹ Ramirez, David. “Halakháh leMa‘aséh and the Role of the Mishnéh Toráh.” *Dramirezg70.wordpress.com*. March 22 2014. Web. May 25 2015. <<https://dramirezg70.wordpress.com/2015/03/22/on-halakhah-lemaaseh-and-the-role-of-the-mishneh-torah/>>

⁹² *Baba Batra* 130b-131a . See note 7 above.

Mentalities/Mentalités Volume 27, Number 2, 2015

ISSN- 0111-8854

@2015 Mentalities/Mentalités

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In effect, the teachers of the Talmudic Academies in Israel and Babylonia (3rd – 4th c.) are called *Amora'im* (singular of *'amora*), of the root 'MR “to speak,” “to articulate,” “to expose.” The 'amora is the orator, or master of eloquence who develops the topics of the ancient masters of the Mishná, key work for rabbinic tradition compiled circa at the end of the 2nd century. The Mishná contains (depending of how it is counted) sixty or seventy treatises, divided in six sedarim, “orders.”⁹³ This is not a legal code (analogous to Roman codes), as some modern researchers think it is.⁹⁴ Better yet, its treatises contain the *common loci*—what Vico calls legal “oratory themes.”⁹⁵—that will be developed in the Academies by the masters of eloquence or *'amora'im*.⁹⁶

The intellectual space of the teachers of the Mishná and the Talmud moves within the ambit of the verisimilar. The Talmud does not recognize any specific metaphysical system. One will not find in the Talmud formal and analytical proofs, proceeding as in scholastics, of syllogisms accompanied by axioms, premises and conclusions. Its proofs are not “demonstrative,” structured from formal deductions and inductions.⁹⁷ The objects of Talmudic dialectics are equiprobable and inequiprobable alternatives, inferences and analog constructs, undetermined and statistical knowledge, variables and quantitative differences.⁹⁸ In the Talmudic lexicon the word “rational” (*muskal*) does not appear. Its dialectic is expository: It proposes the “reasonable” (*sebara*), not the “rational” (*muskal*). The divergent and contradictory opinions that the *'amora'im* study and propose are not classified into “true” (*emet*) and “false” (*sheqer*).⁹⁹

⁹³ *Sedarim* is usually translated as “divisions.” Without a doubt, Imanuel Aboab’s translation “orders” or “classes” is more correct, *Nomologías*, 5389- 1649, p. 250; in other words, “the organization” of subjects that should need to be elaborated by the masters of eloquence. The root of this term, SDR appears in SiDduR or the “ordering” of liturgical themes that will be developed by the *precedentor* at the Synagogue; in SeDeR as “ordering” the themes celebrating the Exodus from Egypt that the participants will develop. SiDRa indicates the portion of the Hebrew Bible that will be paraphrased into Aramean or the one that the class teacher intends to develop in the classroom, but never the Hebrew text by itself. In this manner, one will not find the root of this term accompanied by the verb “to read”

(*qara*). Cited in Faur’s “Retórica y Hermenéutica.” *Pensar para el nuevo siglo: Giambattista Vico y la cultura europea*; vol. III (La Città del Sole, 2001), note 40, p. 926. My translation. <http://moreshetsepharad.org/media/-Rhetoric_and_Hermeneutics_Vico_and_Rabbinic_Tradition_by_Jose_Faur.pdf>

⁹⁴ See Faur’s *Golden Doves*, cit., p. 99. *Ibidem*, note 41, p. 927.

⁹⁵ *Della istituzione oratoria*, cit., p. 20. Cfr. Ch. Perelman and L. Olbrechts-Tyteca, *New Rhetoric*, Notre Dame, Notre Dame Press, 1971, pp. 84-85; y cfr. E. Grassi, *Vico y el humanismo*, cit., pp. 9-16. It is important to note that the loci of the Mishná are not classified metaphysically, in accidents, properties, etc., as in Aristotelian Rhetoric. About topics on the Mishná and its organization, see Jacob Neusner, *The Philosophical Mishnah*, Atlanta. Georgia, Scholars Press, 1988, vol. 1. *Ibidem*, note 42.

⁹⁶ *Ibidem*, pp. 926-927.

⁹⁷ There is an excellent analysis of Talmudic dialectics in [Jacob Neusner’s] *Jerusalem and Athens* [Leiden, The Netherlands; New York: E.J. Brill, 1997], cit., chapter 4. *Ibidem*, note 47, p. 928.

⁹⁸ See *Homo Mysticus*, cit., p. 112; cfr. *ibidem*, pp. 102, 113-115, 118- One should note that Maimónides rejects Aristotle’s concept of “need,” cfr. *ibidem*, pp. 113. Cited in “Retórica y Hermenéutica,” note 48.

⁹⁹ *Ibidem*, p. 928.

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Furthermore, Vico makes a difference between the *loci* of certainty and the *loci* of reasoning, as Catalina González explains:

The former, says Vico, contain apodictic and demonstrative arguments, namely syllogisms. Their conclusions are thus, either true or false. The latter, on the other hand, contain enthymemic arguments, which lead to ‘probable verisimilar conclusions.’ Logicians deal with the *loci* of certainty, while dialecticians and orators deal with the *loci* of reasoning (Art of Rhetoric 27).¹⁰⁰

The ability of the Greco-Roman civilization to deal with the *verisimilar* (once practiced by pre-Socratic thinkers) was lost with Plato, who preferred the *ideal*, and would go on to dominate Western thinking to this very day. Professor Ernesto Grassi would call attention to this fact:

The point of departure of Vico’s speculative thought is not the traditional problem of the rational identification of entities, be they subjects or objects, but the problem of the word, specially the question of the ingenious and fantastic word. German tradition, with its tendency for aprioric thinking, was incapable to completely comprehend and appreciate Vico’s humanist speculative thought.¹⁰¹

Likewise, Ashkenazic tradition as a whole (including all of its modern mutually contending variants) has not been able to understand the ability of Sephardim to collectively adapt to the historical pace based on the *verisimilar* application of Jewish norms, without violating/changing/altering halakhic principles overall. The root cause of this, as far as the known historical record permit us to coalesce, is the very cultural landscape where Ashkenazic tradition developed, tied to Byzantine civilization, and distant or disconnected from the organic development of the rest of world Jewry. In such vacuum created by the geopolitical landscape, Byzantine Jewry had to improvise, turning away their epistemological compass from Babel, to then point it to Christian Rome.

Moving forward, all ongoing argumentation about the different and mutually contending political, cultural and ideological currents in Ashkenazic tradition—past and present— are merely cosmetic, superficial, creating the noise from precisely the same string.

Reformulating Zohar’s reexamination, Kook’s purported modern stance in regards to Zionism, while at the same time allegedly maintaining steadfast to “past praxis” in regards to tradition and halakháh, comes from one and the same ideological *modus operandi*.

¹⁰⁰ González, Catalina. “Vico’s *Institutiones Oratorie*: Acumen, Memory and the Imaginative Universals.” *Rhetorical Agendas: Political, Ethical, Spiritual* (Ed. Patricia Bizzell; Rhetoric Society of America. Conference; Mahwah, N.J.: Lawrence Erlbaum Associates, 2006), p. 80.

¹⁰¹ Grassi, Ernesto. *Vico y el humanismo*, p. 174.

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ISSN- 0111-8854

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After all, isn't modern political Zionism also a violation or a completely unexamined view of halakháh when it comes to the Jewish traditional principles of the Messianic age?

At the end of the day, Professor Zvi Zohar confided in me in an email where we discussed his translations, that Kook went on to instruct his religious followers to have his women go to the voting booths, because otherwise the Orthodox political interest would have suffered. No follow-up *responsa* was ever issued justifying his sudden change of mind.

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ISSN- 0111-8854

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