







literature is not that of the evolution of medieval thought, such as the work of David Knowles that Grossman cites, but the study of the evolution of the scholastic technique of Martin Grabmann that appeared a century ago (1909–11).<sup>10</sup> Undoubtedly, it needs updating in many respects; however, it remains the fundamental study of the subject. It is no accident that it was republished in 1956, again in 1961, and yet again in 1986. A perusal of the first volume, which treats developments prior to the twelfth century, yields little that could have influenced eleventh-century Jewish scholars in Germany.<sup>11</sup>

*Argument and its Significance Today* (Aldershot, 2008). The most famous discussion of the past century is that of the great Swiss theologian Karl Barth, in his *Anselm: Fides Quaerens Intellectum* (Norfolk, 1960). This study, originally written in German, first appeared in 1930.

<sup>10</sup> *Die Geschichte der scholastischen Methode: Nach den gedruckten und ungedruckten Quellen*, 2 vols. (repr. Darmstadt, 1956). I neither mean to imply that Anselm did not invoke *auctores* in other writings, nor that he did not occasionally use the scholastic method to the extent that it existed in his time. I am simply stating that his fame in philosophy does not stem from such writings or from such usage, but from the opposite: from his attempt to prove Christian dogma by means of human reason alone. See Grabmann's remarks, i. 258–71, 311–21.

<sup>11</sup> *Ibid.* 234–46. It is bootless to detail why neither Bernold nor Ivo could have influenced 11th-century Jewish dialectics—be it the late date of their 'dialectical' writings or the non-dialectical character of those writings—seeing that no such mode of thinking existed among the talmudists of the Rhineland in the 11th century. On the question of the dialectical nature of these writings, see e.g. C. Rolker, *Canon Law and the Letters of Ivo of Chartres* (Cambridge, 2010), 165–71, and his summary (pp. 293–302). His introductory chapter (pp. 41–7) explicates the opposing views of Paul Fournier.

## CHAPTER THREE

# Minhag Ashkenaz ha-Kadmon: An Assessment

IN A LENGTHY and influential article Israel M. Ta-Shma has portrayed the unique significance and force that 'custom' (*minhag*) possessed in Ashkenaz, wholly unlike the subsidiary role that it played in other west European Jewish cultures of the Middle Ages.<sup>1</sup> In Early Ashkenaz (c.950–1096) religious life was conducted according to custom and custom alone. When a conflict was detected between the prescriptions of the Talmud and popular practice, the latter prevailed—not simply by force of habit, but out of the deep conviction that the law embodied in the traditional conduct of the people should override any formal, written dictate. In the course of the twelfth century the law inscribed in the Talmud came to predominate in Ashkenaz, but only after a bitter struggle with custom. Ta-Shma attributes this distinctive view of the power of established practice to the Palestinian origins of the Ashkenazic community. The Palestinian Talmud (Yerushalmi), in sharp contrast to the Babylonian (Bavli), was of the opinion that custom overruled the dictates of prescriptive law—*minhag mevattel halakhab*.



## I. Preliminary Observations

One of Ta-Shma's major sources—in one sense, *the* major source of his argument—is the *Ma'aseh ha-Géonim*, a collection of responsa, rulings, practices, and customs of Early Ashkenaz compiled at the turn of the eleventh and twelfth centuries by the Makirites, the four industrious sons of R. Makhir of Mainz.<sup>2</sup> Before evaluating his thesis, I would like to locate this singular collection—so pivotal to his argument—among the works of medieval Ashkenaz

<sup>1</sup> 'Halakhah, Minhag u-Masoret be-Yahadut Ashkenaz ba-Me'ot ha-Yod-Alef ve-ha-Yod-Bet', *Sidra*, 3 (1987), 85–161, repr. in id., *Minhag Ashkenaz ha-Kadmon; Heker ve-Iyyun* (Jerusalem, 1992), 13–105; references below are to the reprint.

<sup>2</sup> Ed. A. Epstein and J. Freimann (Berlin, 1910).

What happens when a received practice is discovered to contravene the halakhah? This question is made even more acute when the matter touches upon something enjoined by the halakhah (*issur ve-heter*), as consumption of non-kosher foods, in view of the unquestioned rule that neither custom nor habitual practice can allow that which the halakhah clearly forbids.<sup>2</sup> It is in its attitude towards habitual practice that Ashkenaz parts company with other Jewish cultures.



In my essay 'Can Halakhic Texts Talk History?' I dealt at length with the issue of *bitul le-bimasbekh*, which Rashi, and all commentators in his wake, interpreted as expressing a principle of separation,<sup>3</sup> namely that grape juice ceases to be simply 'grape juice' and becomes 'wine' and subject to *yein neseikh* when the process of separation of the liquid from the crushed grapes begins.

This ruling caused R. Yitshak of Dampierre, the famed Ri, considerable soul-searching. He was bothered by the fact that all too often in the course of the exhausting treading—easily the most arduous process in wine production, in which women and children were never to be employed, only able-bodied men—the treader took a drink by dipping a cup into the vat (*cuvée*) and filling it with juice. Should this cupful be reckoned as the 'onset of separation'? On the one hand, some of the wine in the tub has been strained off. On the other hand, this is not the onset of the *process* that will separate the rest of the juice from the crushed grape. That will occur when a strainer is put over large bowls placed under the spigot, the spigot is opened, and strained wine flows into these receptacles.<sup>4</sup>

This was not a theoretical question. The French community, it will be remembered, had allowed Gentiles to be involved in the transportation and handling of the open *cuvée*—which inevitably involved some contact with the wine it contained—until the moment the spigot was opened.<sup>5</sup> If cup-dipping constituted *hamshakbah*, Gentiles regularly touched Jewish wine well after the onset of that process, and most 'kosher wine' was not at all kosher. Nevertheless, Ri wrote:

<sup>2</sup> As to the oft-cited remarks of R. Eizik Tirna (Yitshak mi-Tirna) in his *Sefer ha-Minhagim*, ed. S. Y. Spitzer (Jerusalem, 1979), 2, about the permissibility of eating the fat of the rumen (*belev ha-keres*), they refer to custom, to its right to adjudicate between two different views in all areas of the halakhah, including that of *issur ve-heter*. On the controversy over the permissibility of eating the fat of the rumen, see Y. E. Zimmer, 'Olam ke-Minhago Nohag' (Jerusalem, 1996), 250–61.

<sup>3</sup> Above, pp. 180, 185, 211.

<sup>4</sup> *Teshuvot Maharsh"l Or Zarua'*, ed. M. Avitan (Jerusalem, 2002), #174, p. 165, s. v. *u-khe-divrei*.

<sup>5</sup> 'Can Halakhic Texts Talk History?' (Chapter 7 above).

## CHAPTER TEN

# 'Religious Law and Change' Revisited

FROM QUERIES RECEIVED over the years about 'Religious Law and Change', it is clear that I should have prefaced that article with a distinction that Jacob Katz used to make between two terms: *minhag* and *nohag*. These may be roughly translated as 'custom' and 'customary practice'; better yet, 'custom' and 'habitual practice'. The exact terminology isn't significant; the different concepts conveyed by these two words are. Custom (*minhag*) has a recognized threefold place in halakhah. It may adjudicate between two halakhic views, as in 'The custom of Ashkenaz is to follow *Tosafot*; that of Sefarad to follow Maimonides'. It may tilt the balance of an issue in which the law is unclear (*be-makom she-ha-halakhah rofefet*).<sup>1</sup> Finally, it may determine conduct in the interstices of the halakhah, there being no directives in the normative literature on the subject. Much of our daily prayer is custom, and such phrases as 'in Poland it is customary not to recite *av ha-rahamim* on this Sabbath' or 'at this point in prayer the Sefardim add . . . ' abound in the literature. What characterizes *minhag*, custom, in all these three instances is that the practices described are both legitimate and recognized by their practitioners as part of the religious inheritance of the community. When it comes to local *minhag*, all Jewish communities are remarkably tenacious in defending their customs and vindicating their religious traditions, and little distinction can be drawn among different Jewish cultures of the Middle Ages, or of the modern period for that matter. *Nohag*, 'habitual practice', on the other hand, refers to conduct that is not viewed as custom, not perceived as part of a conscious religious tradition, but simply the way people of a community have traditionally acted on the *assumption* that these practices are legitimate, are in accord with the halakhah.

The subject of both this essay and 'Religious Law and Change' is *nohag*.

<sup>1</sup> *Sefer ha-Minhagim*, ed. S. Y. Spitzer, vol. 1, p. 20c, in the Venice edition; col. 108 in the edition of the Academy of Hebrew Language (Jerusalem, 2001).

The answer again is no. And so a similar process of reinterpretation began—of justifying the past in light of, and by means of, the intellectual tools of the present.

The process I have described is, of course, a schematic one and has been used primarily as an expositional device. Self-images are seldom the product of simple linear thinking. But what we unquestionably have before us is the way in which a community's self-image can change the course of its legal thought. The Franco-German community was permeated by a profound sense of its own religiosity, of the rightness of its traditions, and could not imagine any sharp difference between its practices and the law that its [211] members studied and observed with such devotion.<sup>9</sup> The Provençal Jewish community and the Spanish communities, on the other hand, wrestling as they were with, or with what they perceived to be, widespread religious laxity,<sup>10</sup> had no such self-image, and it never occurred to the scholars of these communities, many of whom were in every sense the intellectual heirs of the French Tosafists, to seek to align their people's practices with the written word. Or, more accurately, they never imagined that contemporary conduct was informative of talmudic law, that the deeds of the common folk were revelatory of the Divine intent. The Franco-German community, in its state of intense religiosity, saw the word of God as being, as it were, incarnated in two forms: first, in the canonized literature (i.e. the Talmud); second, in the life of its people. If the new dialectical method, with its sweeping collation of the most varied sources, with its constant juxtaposition of contradictory passages, discovered that among the contradictions uncovered was one not simply

<sup>9</sup> See above, n. 4, and J. Katz, *Ma'ariv bi-Zemano ve-Shelo bi-Zemano: Dugma le-Zikah bein Minhag, Halakhah ve-Hevrah*, *Zion*, 35 (1971), 35–60; and now A. Mintz, *Hurban: Responses to Catastrophe in Hebrew Literature* (New York, 1984), 84–108. [Katz's study was reprinted in his collection of essays entitled *Halakhah ve-Kabbalah: Mefkharim be-Toledot Dat Yisra'el 'al Medoreiha ve-Zikatah be-Hevratit* (Jerusalem, 1984), 175–200. English translation in J. Katz, *Divine Law in Human Hands: Case Studies in Halakhic Flexibility* (Jerusalem, 1998), 88–110.]

I do not perceive a similar attitude reflected in the responsum of R. Hai Ga'on, *Otsar ha-Ge'onim, Rosh ha-Shanah*, ed. B. M. Levin (Jerusalem, 1938), 60–8. First, the thrust there is polemical, a defense of rabbinic traditions about shofar-blowing against Karaite criticism. More significantly, I have not discovered any systematic reworking of areas in the halakhah of *issur ve-heter* in the writings of the Ge'onim so as to align them with communal practice. Intellectual history is the study of the actual intellectual work of a period, not of occasional proclamations. This point cannot be overemphasized. The Ge'onim did revise commercial law extensively. This area, however, creates no legal or religious problems, for *be'fetter bet din be'fetter*. No such rule obtains in the area of ritual law, and *minhag* can never cancel out an unquestionable *issur*. It is in this area that the communal self-image must arise, systematically raising common practice to the level of a quasi-text, and thus allowing its integration into the halakhic process.

<sup>10</sup> Y. Baer, *A History of the Jews in Christian Spain*, i (Philadelphia, 1966), 236–61 and *passim*.

between a passage in the first volume of the Talmud and another passage in the last, but between a passage in the Talmud and the practice of a God-fearing community, to the Tosafists the problem was one and the same. The resolutional tool of dialectic was and is distinction, and whether the conflict was between two passages in the law or between life and law, to the Tosafists the solution to both was a radical interpretation of the halakhah.)

This self-image was unique to the Ashkenazic community and was not shared by other European Jewish communities in the medieval world. But [212] its origins elude us. The Crusade experience, while strongly reinforcing this image, did not in itself create it. It is already reflected in the earliest writings issuing from the Rhineland, those of Rabbenu Gershom Me'or ha-Golah.<sup>11</sup> Coeval with its literary remains, the source of this self-image performe lies beyond the realm of documentation and decipherment. But that which sustained this image falls within this realm, and now demands our attention.

Clearly, so large a topic exceeds the format of a lecture, and it would be a bold man indeed who would claim to know in full what nurtures and sustains a collective psyche. I would simply like to draw attention to four factors that were possibly conducive to this Ashkenazic mentality.

First, the simplicity of religious beliefs. The Ashkenazic community never developed, possibly never wrote, a line of religious philosophy. This is bad for philosophy, but good for religiosity, if we define religiosity, as Geertz once did, as 'being held by religious ideas rather than holding them'. For religious philosophy is an act of justification. It seeks to make the beliefs and practices of a religion comprehensible in the terms of another system. Implicit in the act of translation is the assumption that the categories of the other system are the dominant ones. They are the notions that yield comprehension and bestow value. Otherwise why translate? The surrounding civilization had made few cultural inroads. And even at the point of direct encounter, that of Christian-Jewish polemics, the issues were exegetical, not philosophical.<sup>12</sup> One problem

<sup>11</sup> H. Soloveitchik, 'Pawmbroking: A Study in *Ribbit* and of the Halakhah in Exile', *Proceedings of the American Academy for Jewish Research*, 38–9 (1972), 235–9, esp. 239. (The passages are found in the expanded version of the article in this volume, Chapter 6 above, esp. pp. 112, 138. I offer a suggestion as to the origin of this self-image in "The Third Yeshivah of Bavel" and the Cultural Origins of Ashkenaz: A Proposal', which will appear in the second volume of this series.)

<sup>12</sup> Note the absence of Ashkenazic writers in D. Lasker, *Jewish Philosophical Polemics Against Christianity in the Middle Ages* (New York, 1977). Contrast this with D. Berger, *The Jewish-Christian Debate in the High Middle Ages* (Philadelphia, 1979). Whether philosophy played the major corrosive role in Spain that Y'itshak Baer attributed to it is an open question. Certainly it did not help. For bibliography on this issue, see B. Seprimus, 'Narboni and Shem Tov on Martyrdom', in I. Twersky, ed.,



