

גם מדברי בני חוגו, תלמידיו ובניו, שומעים הד לביקורת הרא"ש. תלמיד אחד, אולי אחד ממשפחתו, פנה בשאלה לרא"ש לגבי מינוי החזנים בספרד, אחת מהדוגמאות שהרא"ש הצביע עליהם בדרשתו. בתשובות הרא"ש (כלל ד, כב) נשתמרה רק הפרפרזה של דברי התלמיד. אולם גם כך נותרה תמונה זהה לזו שראינו בדברי הרב. ואלו דבריו:⁹⁶

ומה שכתבת שנהגו באלו המקומות למנות בזויי המשפחות לשליח
צבור ויש בדבר הזה⁹⁷ בזוי מצוה כאלו אינה ראויה⁹⁸ למיוחסים
שבישראל אלא כשאר אומניות בעלמא, וחלילה להיות מלאכת השם
אומנות אלא עטרה לראש!

כמו כן בהלכות ראש השנה הביא ר' יעקב את דברי אחיו ר' יחיאל על מצוות תקיעת שופר, וגם היא מן הדוגמאות שהצביע עליהם הרא"ש בדרשתו. יש לציין שר' יחיאל, עימת בדבריו בין התנהגות גדולי העיר באשכנז לגדולי ספרד. כמו כן מתבהרת גישתם של הספרדים, שראו במצוות הפומביות מלאכה המתאימה למעמד נחות, ומלאכה הראויה לתשלום. אלו דברי ר' יחיאל המצוטטים באורח חיים, סימן תקפה:

וכן עוד מנהג באשכנז שגדולי העיר מקדימין לתקוע כל מי שזרין בו
יותר מה שאין כן בספרד שבזרחין מן המצות עד שצריכים לשכור
אחד מן השוק לתקוע להם. ולא ידעתי מאין מצאו היתר זה כי נראה
לי שאסור כדתניא ... אלמא בהדיא (קתני)⁹⁹ שאסור ליטול שכר בשבת
אלא על ידי הבלעה... ועל זה נאמר עבירה גוררת עבירה עד כאן.

⁹⁶ לבירור הנוסח של הענף המקורי יותר השתמשו במחקר זה בכתבי היד הבאים: כ"י ורפ"ר ספרדיים, המשקפים את הנוסח הקרוב לנוסח המקור: מיינכן 255, דפוס אישאר; כ"י אשכנזיים: וינה 75, כ"י בית המדרש RAB689; כ"י האיטלקי; וטקן 555. וכבסיס לענף המפותח יותר השתמשו בכתבי היד הבאים: כ"י ורפ"ר ספרדיים: כ"י פאריס 425, דפוס אנונימי פרטוגלי; כ"י פאריס 426 כתיבה אשכנזית (שנכתב כנראה באיטליה); כ"י אשכנזיים: כ"י פאריס 424, כ"י פטרבורג 1209. על הסיבות שבוחרו בכתבי יד אלה, ראה לחלק בחלק ג נספח 1 העוסק בנוסח הספר.

⁹⁷ כ"י פאריס 420, במכון לתצלומי כ"י 31481, המוחזק לפי אי"א אורבך, "שו"ת הרא"ש בכתבי יד ובדפוסים", שנתון המשפט העברי ב (תשל"ח), עמ' 75-76, להיות "השלם והחשוב שבין כתבי היד המסודרים לפי כללים", חסרה מלה זו.

⁹⁸ כ"י פאריס 420 יכד"י.

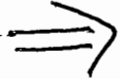
⁹⁹ כ"י פאריס 425 וכ"י פטרבורג 209 חסרה המלה "קתני" אבל מצויה בכ"י מיינכן. כ"י וטקן 555 הנוסח הוא "אלמא בהדיא אסור".

D. Asheri's Reaction

Criticism of Maimonides' codificatory methodology continued after the time of Rabad and his contemporaries. Some of it even came from halakhic authorities who esteemed Maimonides' work highly and made considerable use of it in their own writings.¹³¹

The severest reaction—and the one having the greatest consequence—came about a century later from one of the great halakhic codifiers and commentators, Asheri (Asher b. Jehiel, also known as Rosh), the outstanding disciple of Meir of Rothenburg (Maharam). After the death of Maharam, Asheri became the leader of Ashkenazic Jewry and later settled in Spain, where he became one of the foremost halakhic authorities and leaders in that Jewish center as well.¹³²

Asheri expressed his opposition to the *Mishneh Torah* in a case referred to him for review after it had been decided by another judge.¹³³ A judge named Mazli'ah had rendered a decision on a certain issue on the basis of the *Mishneh Torah*. Asheri ruled that the decision was erroneous. By a close study of the Talmudic source for Maimonides' statement, Asheri established that Mazli'ah had misunderstood Maimonides' meaning. Mazli'ah's failure to consult the Talmudic source moved Asheri to conclude his responsum with the following highly significant comment:



Anyone who decides cases on the basis of the law set forth by Maimonides, of blessed memory, errs if he is not sufficiently expert in *Gemara* to be aware of Maimonides' sources. Such a judge renders decisions permitting what is forbidden and forbidding what is permitted. For he [Maimonides] did not follow the lead of other authors who adduced proofs for their opinions and provided source references to the *Gemara* that enable him [the reader] to grasp the underlying principle and arrive at the truth of the matter. Instead, he [Maimonides] wrote his book like one delivering a prophetic message from the Almighty,¹³⁴ providing neither reason nor proof. Thus, anyone read-

Joseph Caro in his commentary on the *Mishneh Torah*, entitled *Kesef Mishneh* (see *infra* p. 1233). Remakh's glosses on the Books of *Madda*, *Ahavah*, and *Zemanim* were published with notes and explanations by S. Atlas, *HUCA*, 1956 and 1963 (facsimile ed., Jerusalem, 1969); and his glosses on the Books of *Madda*, *Ahavah*, *Zemanim*, *Nashim*, *Kedushah*, and *Shofetim* with notes by D.M. Schmiedl were published by J. Cohen, Jerusalem, 1970.

131. See, e.g., *Sefer Mizvot Gadol* by Moses of Coucy; see also *infra* p. 1262 n. 112 and accompanying text.

132. For further details concerning Asheri, see *infra* pp. 1251–1252.

133. *Resp. Asheri* 31:9.

134. See Rema's similar observation regarding the *Shulhan Arukh*, *infra* p. 1362. The observation there is with reference to Caro's method of decision making; here, it is with reference to stating the law without giving reasons or adducing proofs.

ing it [the *Mishneh Torah*] imagines that he understands it, but he really does not. For if he is not expert in *Gemara*, he cannot really and truly understand the subject, and he will err in the decisions he renders and the legal pronouncements he makes. Let no one, therefore, rely upon his reading of his [Maimonides'] book to give judgment or make legal pronouncements unless he [also] finds support in the *Gemara* [for the law as stated by Maimonides].

Asheri added:

I have heard an outstanding individual in Barcelona, who is an expert in three [Talmudic] Orders [*Mo'ed*, *Nashim*, and *Nezikin*], say: "I am amazed at people who have not learned *Gemara* but who read the books of Maimonides, of blessed memory, and on that basis adjudicate cases and give legal instruction, thinking that they understand what they have read. For I know from my experience that in [regard to] the three Orders that I have studied, I understand what I read in his books; but in his books on the laws of *Kodashim* and *Zera'im* I do not understand a thing, and I am convinced that for those people this is the case with regard to all his books."

Asheri thus categorically rejected Maimonides' main objective. According to Asheri, the function of a halakhic code is not, as Maimonides thought, to be the sole work that needs to be consulted in determining the law and in rendering decisions; relying solely on such a book for these purposes is likely to lead to misunderstanding of what has been written in categorical and monolithic form.¹³⁵ According to Asheri, the aim of a codificatory work is not to be a self-sufficient source; it is rather to be used in connection with the Talmudic sources of the laws it seeks to summarize. Only by keeping close to the sources of a legal rule can one arrive at the true meaning of the rule stated in the code.¹³⁶

135. See also *Resp. Asheri* 43:12 regarding decision making on the basis of the book *Sefer Mizvot Katan* (see *infra* pp. 1263–1265):

Woe unto those who undertake to render decisions on the basis of books and compendia of great scholars without themselves knowing either Mishnah or *Gemara*! For sometimes the scribe may erroneously write "liability" when he means "exemption" or write "prohibited" when he means "permitted," or because of their deficient knowledge they fail to understand fully what the authors have written and so they fall into error.

Asheri here added another argument: that the scribe or copyist may have made a mistake. The same concern had previously been expressed by those who asked Ri Migash about decision making on the basis of the books of the *geonim*, but Ri Migash did not address the point in his reply; see *supra* p. 1181 n. 3.

136. In several places, Asheri added that not only ought one not render decisions on the basis of a code because it may mislead the reader, but an opinion stated without attribution of source or supporting Talmudic citations is entitled to less weight than an opinion based on proofs adduced from the Talmud. See, e.g., *Resp. Asheri* 94:5:

It seems to me that since Rabbenu Isaac Alfasi, the Tosafist Rabbenu Isaac the Elder, and Rabad, of blessed memory, all cited clear and well-known authority for their

ועשה פסקים לכל התלמוד בדרך הרי"ף עם מה שהוסיף מפלפל ר"י
בעל התוספות שכתב עליו בשאלות כלל פ"ט דין אחד שכתב רי"ף
ור"י הזקן בעל התוספות והרי אברהם ז"ל ... ולנו יש לסמוך עליהם
יותר מעל דברי הרמב"ם שכתב לנו דברי נבואה בלא ראיה, ועוד שהיו
מפלפלים יותר בחכמה ובמוין, ולא שיש לי כח להכריע בין גדולתם
אלא לפי השמועה ששמענו וקבלנו ע"כ.

אולם בנוסף לכל האמור אין לשכוח גם את עדותו של ר' מנחם ב"ר זרח, שסיפר בהקדמת ספרו, שהטקסט הנלמד בישיבת טולדו, קודם שהגיע הרא"ש לספרד, היה הלכות הרי"ף ולא החיבור של הרמב"ם.⁸⁷ לפי זה סביר להניח, שהחלטת הרא"ש לכתוב "בדרך הרי"ף" נבעה גם מרצונו להחליף טקסט זה בפסקים שלו.⁸⁸

ביקורת חברתית ודתית על מכובדי ספרד

זכרונותיו של מהגר מארץ מולדתו בעבר, יכולה לפתח אצלו חוש ביקורת מוגבר על הקורה בסביבתו בהווה, מתוך ההשוואה שביניהם. וכך אנו מוצאים כמה התבטאויות חריפות של הרא"ש נגד הנהוג בספרד, ומן הראוי לעיין בהם.

בראש ובראשונה צרם לרא"ש מה שנראה בעיניו כהתנהגות מתנשאת של בני המעמד הגבוה. מיוחסים אלה, שעבדו בשירות המלכות,⁸⁹ הרגישו שמצוות הנעשות לשירות הכלל, בבית הכנסת,

⁸⁴ ניתן לשמוע מאת הרא"ש דברים דומים בהתייחסו להוראה של הרשב"א, שניתנה בלי נימוק ומקור, וכך הוא כתב (כלל לה, א): "יכתבת שהרב ר' שלמה אדרת לא הורה הדבר הזה, פליאה נשגבה היא ולא יכולתי למצוא טעם וראיה לדבריו ... והאומר דברים תמוהין כאלו ראוי לו ליתן סעד לדבריו אולי יודו או יוכיחו לו שלא יפה כיון, כי אין אלו אלא דברי נבואות האין לשמוע לו עד שיביא ראיות נכוחות למבין". אולם אין זה אומר שהרא"ש התעלם לגמרי בפסקיו מדברי הרמב"ם. יש מסכתות שהוא עסק ברמב"ם הרבה. לפי רשימותיו של ד' זפרני (לעיל הע' 79) מסכת ברכות מובא הרמב"ם 12 פעמים, בזוכה 16 פעמים, בבבא מציעא 11 פעמים, בבבא מציעא 11 פעמים ובחולין 30 פעמים (4). כאמור, ברוב המסכתות התמונה שונה לחלוטין. על שימוש הרא"ש ברמב"ם בתשובותיו ראה להלן בחלק ב, פרק ב, הע' 66.

⁸⁵ ניתן להניח, שהחלטתו נובעת גם מכך, שספר הלימוד העיקרי בישיבות ספרד באותה עת היה ההלכות של האלפס, וכפי שנבחר בסמוך.

⁸⁶ ספר היוחסין השלם, לנדון ועדינבורג 1857, עמ' 223ב.

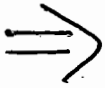
⁸⁷ ראה לעיל עמ' 22-23.

⁸⁸ ראה ח"מ תא-שמע, 'רשימי-רי"ף-ורשימי-רא"ש', רשימי - עיון ביצירתו, רמת גן תשנ"ג, עמ' 209-220 ועיד שבט (לעיל הע' 20), 'מחקרי מבוא במפרשי הרי"ף', עמ' 11-12 המסכם את הנושא.

⁸⁹ על המעמדות בספרד ראה דברי הסיכום של יוס טוב עסיס בספרו, *The Golden Age of Aragonese Jewry*, London and Portland, 1997 pp.237-241, ובתוצאותיו. כמו כן ראה ח' ביינארט, "ידמותה של החצרות היהודית בספרד הנוצרית", קבוצת עילית ושכבות מנהיגות בתולדות ישראל ובתולדות העמים, ירושלים תשכ"ז, עמ' 55-67.

himself. Even the arrangement of *Piskei ha-Rosh*, which follows the order of the tractates of the Talmud, and its statement of the law in conjunction with discussion of the relevant Talmudic passages, made it difficult for a student or judge to find what he was looking for.¹⁷³ All these factors intensified the need for a code that would meet the yet unfulfilled requirements.

In his introductions to the various parts of the *Turim*, Jacob b. Asher explained the factors that motivated him to compose this code. The Introduction to one of the four *turim*, *Yoreh De'ah* (which is similar to the Introduction to another of the *turim*, *Orah Hayyim*), states:



Since we are already a long time in exile, legal analysis has deteriorated, opinions have proliferated, and conflicts of authority abound. There is no longer any clear and undisputed law, so that many wander about to seek the word of the Lord but cannot find it.¹⁷⁴ Therefore, my ideas and thoughts stirred me to consider the statements . . . and understand the books and the words of their authors . . . and I determined to compose a work on the subject of religious law and all the other matters needed at this time.¹⁷⁵

Although Jacob b. Asher described the halakhic and historical background of his work in his introductions to the parts dealing with ritual law and the laws of benedictions, prayer, and festivals, his description was much more thorough in the parts of his work covering the field of *mishpat ivri*,

173. Jacob b. Asher, perhaps out of respect for his father, did not mention this factor as a reason for writing his book, but it is stated in Falk's Introduction to *Sema*, *supra* n. 170. Falk, pointing out that Asheri followed the sequence of the Talmud and discussed the meaning of the Talmudic passages, stated:

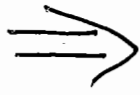
[Not everybody] can be an expert in the entire Talmud . . . and can locate where the various legal rules may be found. In order to correct that state of affairs, his son arose . . . and saw that Asheri's words were pleasing . . . to enlighten [his readers], but that for the reason above stated, they needed a better form if this generation was to benefit from them. . . . He [Jacob b. Asher] wrote in it [*Sefer ha-Turim*] all the laws in the order of the *halakhot* [*i.e.*, logically arranged by subject] . . . in the fashion of Maimonides . . . in clear and concise language. He began each chapter with a quotation from the source [of the law] in the *Gemara*, and followed with a brief explanation so that the reader might easily understand it. He also included references to the conflicting opinions with regard to the law in question.

174. After Amos 8:12 ("Men shall wander from sea to sea and from north to east to seek the word of the Lord, but they shall not find it"). Cf. *Tosefta* Eduyyot 1:1; and see *supra* p. 1067.

175. The Introduction continues:

Then, I reflected: "Behold, is it not experience that tells and years which give wisdom? You are young and have neither knowledge nor skill. . . . Therefore, give up your ideas lest you be embarrassed in your latter days by what you did in your youth!" But I answered and said, "I will arise and do it no matter what, because the work is for [the sake of] Heaven. I will seek help from Him and He will be my eyes; He will open my ears to hear and my mouth to speak clearly, and He will bring my ideas to fruition, and I will rejoice with all my heart."

particularly the area of civil law. Thus, his Introduction to *Tur Hoshen Mishpat* (which deals with civil law) states:



Blessed be the Lord, God of Israel, who has chosen us from among all peoples and given us the true Torah and just and perfect laws. . . . He commanded us in the matter of [civil] law: "If a case is too baffling for you to decide . . .,"¹⁷⁶ [which means] that if one person disagrees with others, they must go to the judge at the time and he will declare the law to them, so that the Torah will not become like two Torahs, one saying one thing and the other saying the opposite, but rather one Torah and one law for all of us. . . .

The Sanhedrin sat, and from it went forth Torah and law for all Israel; for it is by the merit of doing justice according to the law of the Torah that the Divine Presence rests on Israel. In addition [to the Sanhedrin], there were two courts of twenty-three members each in the Temple—one at the entrance to the [Temple] courtyard and the other at the entrance to the Temple Mount; and there were 481 other courts in Jerusalem, in addition to innumerable courts in all the other towns.¹⁷⁷

I, Jacob, son of Rabbi Asher, of blessed memory, saw that because of our manifold sins, the Temple was destroyed and all these [courts] disappeared . . . and there is no just judge and no longer anyone to assure that necessary corrections are made. . . . Every man does as he deems fit. . . . Therefore, the law has become distorted. There are those who seek the law on a matter but receive no illumination because their intelligence is inadequate [*i.e.*, they have difficulty in finding and understanding the law]. There are others on whom the light of the law does shine, but who deliberately darken it because they fear that the weight of the law is against them. These say, "I will select the law in the matter from one of the writers on the *Halakhah*, which I will pronounce [as the correct position] and it will be good for me. 'My rod' (*makli*) will tell me the law."¹⁷⁸ Therefore, I bestirred myself and decided to compose a book on the civil law.

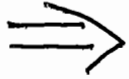
Jacob b. Asher thus indicated how the lack of a binding code of Jewish law was a much more acute problem in the "legal" parts of the *Halakhah*,

176. Deuteronomy 17:8. For discussion of the significance of this verse in halakhic jurisprudence, see *supra* pp. 266–267.

177. See TB Sanhedrin 88b, and cf. *Tosefta Hagigah* 2:9 and S. Lieberman, *Tosefta ki-Feshutah*, pp. 1297ff. See also *supra* p. 1063. Identification of the source for the author's enumeration of 481 courts in Jerusalem requires further study.

178. The allusion is to Hosea 4:12, "My people . . . consults its stick,/Its rod (*maklo*) directs it," and a play on words is intended: *makel* means "rod," and *mekel* means "one who is lenient in his ruling." The same phraseology appeared earlier in *Resp. Rashba*, I, #253 ("And he who relies upon one who rules leniently (*ha-mekel*) in matters of Torah commits a transgression and is one of those of whom it is said . . . , 'His rod directs him'"). Similar statements appear in *Resp. Asheri* 108:11 ("Know that the French in our land have relaxed their practice in regard to usury, and their rod directs them") and *Resp. Zikhron Yehudah* #49 ("He wanted to accept [the law] from those who permit and not from those who forbid, for his rod directs him").

In his introductions, Jacob b. Asher tells how he set about to achieve these two goals. One passage states:



I decided to write a book of laws after the fashion of *Piskei ha-Rosh*, by my father, of blessed memory, which are based on the foundation laid by the great Rabbi Isaac Alfasi, of blessed memory, who minutely examined and sifted the Talmud and revealed all its mysteries. In the few places where his opinion does not agree with that of other authors such as Maimonides, I present their opinions and that of my father Asheri, together with his [Asheri's] ruling, so that the reader may quickly find [lit. "run through it"] and act in accordance with what is to be found there, not deviating from it to the right or to the left.¹⁸¹

Another passage adds:¹⁸²

I do not intend to include protracted proofs, but to set down¹⁸³ the law as it has been authoritatively declared; when there are differing opinions, I will set them forth and then state my father's conclusion.

Jacob b. Asher thus took the rulings of Alfasi as his basis for determining the law; and when Maimonides or others—who include an array of important German, French, and Spanish authorities—disagreed with Alfasi, the *Turim* discusses the varying opinions and generally follows the decision of the author's father.¹⁸⁴ This is not just an expression of filial piety, but an expression of the principle of *hilkheta ke-vatra'ei*, i.e., that the law is in accordance with the views of the later authorities.¹⁸⁵ As far as Jacob b. Asher was concerned, his father was the latest authority, whose decision was therefore definitive and binding. The adoption of the principle of *hilkheta ke-vatra'ei* with regard to Asheri was particularly appropriate in that he, as the leader of Ashkenazic Jewry and, later, one of the leading authorities in Spain, had considered a substantial portion of the opinions of the halakhic

181. Continuation of Introduction to *Tur* ḤM; an allusion to Deuteronomy 17:11 regarding rulings of the Sanhedrin ("You must not deviate from the verdict that they announce to you either to the right or to the left").

182. Introductions to *Tur* YD and OḤ.

183. Introduction to *Tur* OḤ reads: *lehavi*, "to bring."

184. There are exceptional cases in which he explicitly disagreed with his father; see *infra* n. 192.

185. For detailed discussion of this principle, see *supra* pp. 267–271, 983–986. See also *Resp. Elijah Mizraḥi* #66 (ed. Jerusalem, p. 223b):

R. Asher's [Asheri's] rulings are most important in all matters because he came last and saw all the rulings of the *geonim*, sifted them well, and then ruled as he did. This most certainly applies when the [author of the] *Turim*, who was the most recent authority, agrees with him. Thus, it is fitting to follow such rulings.

