

# THE CONTRIBUTION OF SPANISH JEWRY TO THE WORLD OF JEWISH LAW\*

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*Spanish Jewry's contribution to post-Talmudic halakhic literature may be explored in part in The Digest of the Responsa Literature of Spain and North Africa, a seven-volume compilation containing references to more than 10,000 Responsa — answers to questions posed to the authorities of the day. Another source of law stemming from Spanish Jewry may be found in the community legislation (Takanot HaKahal) enacted in all areas of civil, public-administrative, and criminal law. Among the major questions considered here are whether a majority decision binds a dissenting minority, the nature of a majority, and the appropriate procedures for governance. These earlier principles of Jewish public law have since found expression in decisions of the Supreme Court of the State of Israel.*

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## The Contribution of Spanish Jewry to the World of Jewish Law

The full significance of Spanish Jewry's powerful contribution to post-Talmudic *halakhic* literature demands a penetrating study. To appreciate the importance of Spanish Jewry's contribution to the *halakhic* world, one need only mention, in chronological order, various *halakhic* authorities, most who lived in Spain throughout their lives, some who emigrated to, and some who immigrated from, Spain. These include, among the most well known:

*Rabbi Isaac ben Jacob ha-Kohen Alfasi*, the *Rif*, who fled from Fez at the age of 75, reached Spain, and headed the Yeshiva of Lusina, then the spiritual center of Spanish Jewry;

*Rabbi Joseph ha-Levi ibn Migash*, the *Rif's* outstanding student who succeeded him at the head of the Yeshiva of Lusina;

*Rabbi Moses ben Maimon*, the *Rambam*, from Cordova, who emigrated to Fez in Morocco and from there to Eretz Israel and Egypt;

*Rabbi Meir ha-Levi Abulafia*, the *Ramah*, who was based in Toledo;

*Rabbi Moses ben Nahman*, the *Ramban*, who served in Gerona and, at the end of his life, lived in Eretz Israel;

*Rabbi Solomon ben Abraham Adret*, the *Rashba*, the leader of Spanish Jewry in the thirteenth century, who lived and served in Barcelona;

*Rabbi Asher ben Jehiel*, the *Rosh*, who fled at the age of 53 from Germany to Spain and headed the Beit Din and Yeshiva of Toledo, and his sons, *Rabbi Judah* and *Rabbi Jacob*, the author of the *Sefer ha-Turim*;

*Rabbi Isaac ben Sheshet Perfet*, the *Rivash* from Barcelona, who served in Saragossa and Valencia until the persecutions of 1391 which forced him, at the age of 65, to leave Spain and become the *halakhic* leader of Algiers; and

*Rabbi Shimon ben Zemah Duran*, *Tashbez* (or *Rashbez*), who emigrated from Majorca to Algiers and succeeded the *Rivash*.

These *halakhic* authorities retain a place in the pantheon of *halakhic* giants. Most occupy a significant position in at least one of the three branches of post-Talmudic *halakhic* literature; the novellae and commentaries, codes, and Responsa literature.

Included among them are the three pillars of instruction, "*Shloshet Amudei ha-Hora'ah*"<sup>1</sup> — the Rif, Rambam, and Rosh — upon whom Rabbi Joseph Karo based his *Shulhan Arukh*. Rabbi Joseph Karo was also born in Spain in 1488, and, at the age of four, was expelled from the country with his parents. After moving from place to place the family reached Safed in Eretz Israel by way of Egypt. A substantial portion of the *halakhic* output of these authorities is included in their answers to questions posed to them — the *Responsa*.<sup>2</sup>

### **The Digest of the Responsa Literature of Spain and North Africa**

*The Digest of the Responsa Literature of Spain and North Africa*, whose publication by the Institute for Research in Jewish Law of Hebrew University in Jerusalem was facilitated by the generous help of the Memorial Foundation for Jewish Culture, discusses the contribution of these and many other Spanish *halakhic* authorities. Obviously, in the framework of this essay, it is impossible to deal with the entirety of the Digest or even with a small portion of it. We have already discussed the three types of Digests — the Legal Digests, Historical Digests, and the Index of Sources — in a number of places.<sup>3</sup> The Digest consists of seven volumes. Five volumes have appeared to date,<sup>4</sup> a sixth volume is in publication, and a seventh is being prepared.

The books contain references to more than 10,000 *Responsa*. Two volumes contain the Legal Digest — references to all the legal material of the *Responsa*, organized alphabetically according to legal categories and divided into sub-categories. Three additional volumes — the Historical Digests — contain the historical material, organized by topic and subtopic. As is the case with the legal decisions emerging from any legal system, the *Responsa* often contain material describing the social, spiritual, economic, and geographical reality of the period during which they were written. This background material adds to the case specific legal discussion describing the particular situation before the court. Two additional volumes contain the Index of Sources — a listing of all the biblical, Talmudic and Midrashic sources, as well as all post-Talmudic sources written prior to the

decision, and any other source used by the decisor in his response. These volumes allow the researcher to discover how a particular verse from *Tanakh*, or a certain passage, or a specific expression, mentioned in the Talmudic or post-Talmudic literature, was explained. Occasionally, the digests enable the research to discover sources that do not appear in any other *halakhic* source that we have but to which the Responsa refer.

### Takanot HaKahal: Community Legislation

Before demonstrating, briefly, the nature of the contribution of the Spanish *halakhic* authorities to the creation and development of *halakhah* by focusing on one branch of the law, let me mention another area of spiritual and social action which aided the creation of *halakhah* in this branch — community legislation — enacted by leaders known as *parnasim*, *tovei ha-kahal*, *ne'emanim*<sup>5</sup> (trustees), etc. The legislation is termed "*Takanot ha-Kahal*." In Spain, the accepted name is "*Haskamot ha-Kahal*."<sup>6</sup>

This legislation was enacted by the community in all areas of civil, public-administrative, and criminal law. In the area of monetary relations in family law, the legislation was jointly enacted by the community and the *halakhic* authorities; in the area of ritual, the legislation was enacted primarily by the *halakhic* authorities acting alone. Legislation by the public existed in all centers of the Jewish diaspora. Spanish Jewry contributed significantly to this phenomenon. Occasionally, the public enactments conflicted with a law of the *halakhic* code, but the *halakhic* authorities recognized the enactment as authoritative and binding nonetheless, provided that it did not clash with the fundamental principles of justice and equity of Jewish law. At first, specific communities promulgated decrees. For example, the enactments of Toledo and Molina — *Takanot Tolitula U' Molina*<sup>7</sup> — which included fundamental principles regarding restricting the inheritance right of a husband in his wife's property, granting a mother inheritance rights in certain circumstances, and equating the inheritance rights of male and female children in many cases.<sup>8</sup>

From the fourteenth century onward, when Spanish Jewry developed a national, communal organization, we hear of regional enactments. Examples of this phenomenon are the communal enactments of Aragon in 1354 and the Valladolid *Takanot* of the communities of Castile in 1432. These decrees included detailed legislation regarding the appointment of judges and other public officials, judicial jurisdiction, civil and criminal procedure, taxes, and specific enactments detailing the punishment of informers who were judged (by agreement of the sovereign) by the Jewish courts. One should also note the *takanot* repudiating luxuries of dress and food, which are found in many *takanot* of assorted diaspora centers.<sup>9</sup> The legislative activity of Spanish Jewry, whether executed by communities with the endorsement of an *Adam Hashuv*<sup>10</sup> — an important person who analyzed the *takanah* from the perspective of justice and equity and not from the vantage point of *halakhic* law — or by community leaders together with *halakhic* authorities, contributed mightily to the continued creation of *halakhah*, and, most significantly, in its development and responsiveness to the social needs of the time, all in accordance with the basic principles of Jewish law.

### **Jewish Public Administrative Law**

A brief analysis of one area of Jewish law — Jewish public administrative law — indicates the unique contribution of Spanish Jewry to the development of this essential branch of law, one of particular significance to the modern state and to all legal systems. This example illustrates a phenomenon found in many other areas of Jewish law. The creation and development of Jewish public administrative law is rooted to a large degree in the Responsa literature of the Spanish rabbinical authorities both before and after the Expulsion, and in the multi-faceted legislation of various *takanot hakahal*.

The qualifications and duties of public representatives are discussed in the Bible, the Talmud, and the *aggadic* literature. For example, much is written about the relationship of nation to leader and of citizen to governmental authority. The guiding principle for those appointed to rule over the community was, "In the past you acted only on your own behalf, from now on

[i.e., upon appointment] you are bound in the service of the public."<sup>11</sup> And similarly, "Do you think that I am giving you authority? I am giving you slavery!"<sup>12</sup> Rashi explains that, "Rule is slavery for the individual, because the burden of the public is upon him."<sup>13</sup> And the Sages reserved harsh words for those "who assume authority in order to benefit from it,"<sup>14</sup> and those rulers who "domineer over the public."<sup>15</sup>

The fundamental characteristics demanded of the public figure are loyalty and trustworthiness, traits ascribed to Moshe, the great leader of Israel. The Midrash applies the verse in Proverbs,<sup>16</sup> "The faithful man, many blessings" to Moshe: "That all things for which he was responsible were blessed, because he was trustworthy."<sup>17</sup> The example given of his trustworthiness was his insistence that two other people check the expenses for the building of the *Mishkan* that he paid for out of the people's donations.<sup>18</sup>

The scholars described in various ways the mutual interdependence between the citizen and the public authority: "A leader shall not be imposed on the public unless the latter is first consulted,"<sup>19</sup> but once appointed, "even the most ordinary...is like the mightiest of the mighty" to whom the public owes obedience and honor.<sup>20</sup> This interdependence is illustrated in the difference of opinion between Judah Nesi'ah (grandson of Judah ha-Nasi) and other scholars as to whether the stature of a leader follows that of his generation — *parnas le-fi doro* — or whether the generation is influenced by its leaders — *dor le-fi parnas*.<sup>21</sup>

These, and other similar concepts scattered in *halakhic* and *aggadic* literature, guided the *halakhic* authorities in their determination of the principles of Jewish administrative law. Here I would like to emphasize a fundamental point. Despite the general rule that one does not rely on *aggadic* literature in order to decide a *halakhic* question, the *halakhic* authorities often injected *aggada* into the world of *halakhah*. Just like a court, in any legal system, occasionally cites legal philosophy, particularly when the system lacks clear legal norms to respond to a specific problem, the *halakhic* scholars often inferred legal norms from the *aggadic* world, which was regarded as the philosophy of *halakhah*.<sup>22</sup> However, these ideas which we have already mentioned, and those like them, were insufficient for a complete administrative law system. The need for such a system arose

with the growing strength of the Jewish community from the tenth century onward, spurred by the dramatic changes that befell Jewish society near the end of the Geonic period. While certain fundamentals of community life had already been established in the earlier Tanaitic period, specifically in connection with the "townspeople" (*bnei ha'ir*), the Jewish community only reached the height of its political and legal development after the tenth century.<sup>23</sup>

Until the end of the tenth century, the Jews always had one center exerting spiritual hegemony over the diaspora. The diaspora was subject, from a cultural-spiritual perspective, to one center. At first the center was Eretz Israel, then Babylon. The kings and subsequently the *Nasi* headed the community in Eretz Israel, while the Exilarch (*Rosh Ha-Golah*) led the Babylonian community. Torah spread to all of Israel, including the diaspora, from these two centers.

Historical events occurring within the Jewish community, as well as in the European community at large, led to a fundamental change at the end of the tenth century. A number of centers arose and existed concurrently, without any one exerting authority over another. Alongside the centers of North Africa, communities arose in Germany, Spain, France, Italy, Eretz Israel, Turkey, the Balkan countries, Poland, Lithuania, and others.

The historical change forced a shift in the form and standing of the Jewish community. The community became a social unit, including within its ambit and control all spheres of action connected with its social and spiritual character. Each community retained a measurable degree of autonomy. It had leadership institutions, headed by both appointed and elected leaders; it provided for the educational and social needs of the society; it had a court system with jurisdiction over civil and administrative matters, and to a certain degree even over criminal affairs; and it imposed and collected taxes to pay the government taxes and to support its own social service system.

A number of communities often joined together to form larger associations which assumed many of the responsibilities elaborated earlier, such as the maintenance of leadership institutions and the imposition and collection of taxes. Various internal and external factors allowed for the maintenance of

Jewish autonomy in the different diaspora communities, a point that I have discussed in a number of different places.<sup>24</sup>

The change found expression not only in the enhanced standing and authority of the community, but also in the nature of the internal government structure. Internal authority was no longer wielded by an individual — as it had been earlier by the King, *Nasi*, or *Rosh Ha-Golah* — but by the community, either by the public directly or by representatives, be they elected or appointed. Of course, a society which recognized the supreme value and the guiding authority of Torah and *halakhah* needed to ground the form of government, as well as the constitutional and legal problems that emerged because of the wide-ranging functions of the public organizations, in the *halakhic* system. The question was obvious: what is the *halakhic* response to all this? We will discuss a number of these issues briefly.

The first question that arose was whether a majority decision authoritatively bound a dissenting minority. This is not a simple question; it was debated in other legal systems of the time. The question lacked a Talmudic answer. Although the Torah says: "Follow the majority,"<sup>25</sup> the Talmudic sages interpreted that verse as referring either to the resolution of a *halakhic* dispute or legal judgment or to [majority as] a legal presumption — *Praesumptio Juris*. But, according to the Talmud, 10, 20, 50, or even 100 Jews living together are partners, and, in a partnership situation, as in all of private law, no authority to compel action exists; everything must be decided by consensus.

Some Ashkenazic *halakhic* authorities, headed by Rabbeinu Tam, one of the great *tosafists* of Germany and France in the twelfth century, maintained that the majority cannot obligate the minority unless the minority consents.<sup>26</sup> But most of the *halakhic* scholars, maintaining that the majority can compel minority adherence to a decree or decision, solved this problem by creating a new *halakhic* norm — revolutionary both in its nature and the manner of its creation. They analogized the community's authority to that of a court (*Beit Din*), whose very nature implies an authority and ability to obligate, by its decision, all community members. In this way, the issue of majority decision-making was transferred from the realm of private partnership law to the arena of public law. To understand the nature of the analogy, one must remember that in the world of

*halakhah* the *Beit Din* possessed administrative and legislative authority in addition to judicial authority, much like the scope of the Sanhedrin's activities. The outcome of the analogy regarding the administrative and legislative functions is understood, but the equation itself is an innovation, lacking any backing in Talmudic law.

This analogy is found in the opinions of various *halakhic* authorities in assorted locales at the beginning of this period, but it was clearly defined in the *Responsa* of the Rashba, in Barcelona, one of the *halakhic* scholars in Spain at the end of the thirteenth and beginning of the fourteenth century, and one of the "founders" of Jewish administrative law:

In every community, the minority are subject to the will of the majority; they must conduct all their affairs under the majority's rules. The relations of the minority to the general population of their town is the same as that of all Israel to the High Court or to the King.<sup>27</sup>

Elsewhere, he wrote:

No one can free himself from [the obligations imposed by] communal legislation, because individuals are subject to the community; just as all the communities are subject to the High Court or the patriarch, so too is each and every individual subject to his local community."<sup>28</sup>

And in this way, the biblical verse "Follow the majority" was interpreted to include not only a judicial majority or a legal presumption, but also, in the words of the Rosh, a colleague of the Rashba, "Know that as to *matters involving the public*, the Torah states: 'Follow the majority.' The majority governs on all matters of public enactment; and the minority must abide by all that is agreed by the majority."<sup>29</sup> And what is the impetus behind this broad interpretation? The Rosh addressed that question, stating: "...because otherwise, if a few individuals could veto the enactment, the community would never be able to legislate. Therefore, the Torah declared: 'Follow the majority' with reference to all communal enactments."<sup>30</sup> Similarly, the Rosh stated elsewhere: "For if you do not say this, there could never be a

communal enactment, for when would a community ever agree unanimously on anything?"<sup>31</sup> This innovation of majority rule in public law entered the world of Jewish law through two of Jewish law's creative legal sources: analogy and legal reasoning (*Sevarah*).<sup>32</sup>

### The Definition of a "Majority" in Jewish Law

What was the nature of this majority, and who comprised it? Seemingly, one answer predominated at the beginning of Jewish administrative law. Until the fifteenth century, "majority" referred to a majority of the men of means and education. The rationale given was that the wealthy bore the burden of communal expenses and financed the assorted communal functions. Over time, this stance changed, as seen in hundreds and thousands of Responsa of the *halakhic* sages active at the time of the expulsion from Spain and afterwards, who emigrated to North Africa and, primarily, to the Ottoman Empire, which included the Balkan countries, Asia Minor, Eretz Israel, and Egypt, which was conquered by the Ottomans in the years 1516-1517. The Ottoman Empire welcomed the refugees with open arms; it saw the Jewish immigration as an opportunity to improve the economic standing of its lands. The government refrained from interfering in the internal workings of the Jewish community, and the Jewish inhabitants of the Ottoman lands expended great effort in materially supporting their Jewish brothers.<sup>33</sup>

But, over time, tensions developed between the "veterans" and the newcomers. On the one hand, the immigrants arrived poverty-stricken and depressed, a factor contributing to a measure of superiority on the part of the old inhabitants, who saw themselves as supporting and benefiting the poor immigrants and granting them the opportunity to strike roots in a new society. On the other hand, when the immigrants began to strike roots — something which did not take long because of their abilities — they started asserting superiority over the old inhabitants because of their education and culture, which at one point exceeded that of the local inhabitants.<sup>34</sup> The immigrants adhered to their old customs and to the ways of life brought with them from the Iberian peninsula, whether in the realm of *halakhah* or

culture. They often took over, as it were, the communities that welcomed them or established their own communities next to already existing societies, based on their place of origin in Spain.

The extensive Responsa literature emerging from the assorted Jewish centers in the Ottoman empire during the years following the expulsion reflected this state of affairs. The new social reality could not be reconciled, according to many communal leaders and *halakhic* authorities, with the determination that a majority consisted only of the rich and educated, as was the earlier approach. The decisive majority of *halakhic* decisors broadened the range of topics regarding which the majority had to be drawn from all of the community members, be they rich or poor, educated or unschooled, and restricted the notion of the "majority of the rich" to very few cases. Six different approaches to this issue emerge from an analysis of the Responsa, but this is not the place for a full elaboration.<sup>35</sup>

### **Rabbi Elijah Mizrahi's (ha-Re'em) Approach**

A most fundamental and instructive approach was the one adopted by Rabbi Elijah Mizrahi, who served as head of the rabbis in Turkey immediately following the Expulsion, after the death of his predecessor, Rabbi Moshe Kapsali in 1495. Rabbi Elijah Mizrahi reinforced the view equating the community with the *Beit Din*. In his opinion, "It makes no difference whether the majority consists of the wealthy, the poor, the scholarly, or the unlettered, because the entire community is denominated a court in dealing with matters of communal interest."<sup>36</sup> According to Rabbi Eliyahu Mizrahi the community itself functions in community matters as a *Beit Din*, and *every member* is a judge. And just like the authority of a judge derives from his function and not from his monetary or intellectual status, so too regarding all members of the community, whose views and opinions are given equal weight.

Rabbi Elijah Mizrahi, called the Re'em, add another fundamental explanation to the very analogy of community to *Beit Din*. He explained this equation by pointing out that judges and community leaders draw their respective authority from the *same source* — the *public*. The court's jurisdiction stems from the

fact that the community accepted the court's authority upon itself. Similarly, a communal leader's authority does not flow from his wealth or his knowledge, but from the power granted by each individual member of the society. Consequently, the distinction between rich and poor, educated and unschooled, evaporates.<sup>37</sup>

The Re'em issued another daring statement. Many *halakhic* discussions revolve around the issue of the qualifications demanded of a communal leader. Rabbi Mizrahi expressed his opinion as follows:

The term *tovei ha-ir*, wherever used, does not mean the wisest, oldest, or wealthiest persons but rather those who are most active in communal affairs, who deal with all the needs of the community, and upon whom the community depends to take care of its requirements....They are therefore denominated as the leaders of the community because they make all the decisions with regard to communal needs....It is more fitting to give the title "communal leader" to one who, although not a scholar, is active in communal affairs, than to a scholar who is not at all active in communal affairs but devotes himself exclusively to his studies. The needy of the community — indeed the whole community — depend exclusively on those who occupy themselves with communal needs and not on those who engage only in scholarly pursuits.<sup>38</sup>

Rabbi Elijah Mizrahi completed the transformation of community affairs from the realm of private law to the arena of public law. In partnership law, the weight of an individual partner's opinion is determined by the *amount* that the partner invested in the enterprise. In contrast, organizing and controlling communal affairs falls in the area of public law, where the majority's decision obligates the minority, and decisions are determined by a majority of people, not a majority of wealth.

Although the democratic principle that equal weight must be accorded all opinions emerged only after the Expulsion because of specific social circumstances, most of the other constitutional problems that arise in public-administrative law were resolved in Responsa written in Spain itself. The communal leaders

possessed extensive legislative authority in all legal areas, except for ritual, as mentioned earlier. Decrees were promulgated to respond to the needs of the moment, and they were fully valid even if they contradicted a *halakhic* rule.

Just like a *Beit Din* could enact a decree inconsistent with a law based on the principle "*Hefker Bet Din Hefker*" — "The Court may impose a punishment not prescribed by the Torah, not [for the purpose of transgressing] the laws of the Torah, but in order to make a fence around the Torah,"<sup>40</sup> so too one finds in the *Responsa* expressions of "*Hefker Tzibur Hefker*" — that the *community* can punish not in consonance with the law, when the hour demands it.<sup>41</sup> Together with this, the authorities declared null any edict which contradicted the principles of justice and equity of Jewish law. For example, a particular community maintained a governmental position known as "*Meva'er Averot*,"<sup>42</sup> analogous to a town or city comptroller, or ombudsman today. The majority decided to eliminate the position — perhaps they had some interest in this elimination — and the minority dissented. The issue was brought to the *Rashba*, who overturned the decision to abolish the position. His explanation is both original and instructive:

Although it was enacted by those who administer the bulk of communal affairs, they are empowered to adopt only enactments that tend to improve, but not enactments that constitute breaches.<sup>43</sup>

And the elimination of this position damages and does not correct.

Additionally, the *halakhic* authorities established that the decree must be such that most of the community can live up to it, that it applies equally to all, and that it not have retroactive effect. The *halakhic* scholars also annulled any decree which negated freedom of association or forbade leaving the community, despite the rabbi's displeasure with the splitting up of communities.<sup>44</sup>

Various passages in the *Responsa* literature assert that the majority cannot arbitrarily limit fundamental rights of the minority, and that the law cannot restrict certain fundamental rights. For example, a tax may not be imposed on a person too

poor to pay, nor may a person's property be double-taxed, once by the person's town of residence and once by the site of the possession. Regarding the unjust deprivation of this fundamental right, the scholars said: "Does the fact that they are many give them a license to be robbers?"<sup>45</sup> In other words, does a majority have the right to rescind, simply because it is the majority, a fundamental right of a poor person who cannot pay the tax or of a rich person not to have to pay twice for the same property?<sup>46</sup>

It is worth mentioning another instructive principle of Jewish administrative law. Generally, Jewish law requires an act of *kinyan* (a formal juristic act of acquisition) to make a legal transaction binding. From the thirteenth century on, we find the legal doctrine that any legal transaction undertaken by the community is valid, even absent a *kinyan*: "Whatever is done by the public does not require a *kinyan* even if it is something for which a *kinyan* is necessary in the case of an individual."<sup>47</sup> In the words of the Rosh: "It is generally accepted that what the communal leaders agree to is completely valid, without a *kinyan*."<sup>48</sup> The status of the community differs regarding certain other fundamental requirements of Jewish property law as well. For example, the scholars determined that a community can acquire and transfer something which does not yet exist and that the general rule of Jewish law that an agreement affected by an *asmakhta* is not valid does not apply to communal business dealings.<sup>49</sup>

Furthermore, the *halakhic* authorities demanded from the public authority a larger measure of seriousness, honesty and fairness in fulfilling its obligations than is demanded of the individual. For that reason, when the representative of a communal body admits that a particular citizen is free from a particular payment, that admission is obligatory and has legal validity. An individual's admission lacks force unless given before two designated witnesses. We assume that an admission issued in the presence of the litigants only does not contain the necessary seriousness, so that the person can later say "I was jesting with you." This is not the case with an admission issued by a public authority. Why? The Rivash said the following:

If we say this regarding an individual who admits, we won't say it about a community which admits, because a public authority does not jest with people."<sup>50</sup>

And the Rashbash, son of the Tashbetz, points out:

Go and see in all the holy communities how they act in such a matter; they never go back upon their undertakings, neither because the thing is not in existence nor because of overreaching...for it is beneath the dignity of a community to say: we were in error.<sup>51</sup>

This topic of the development of public administrative law in Jewish law represents an outstanding example of *halakhic*-legal creativity, which injected into Jewish law an entirely new field, one considered among the most important in jurisprudential and political thought. Jewish public law emerged because of a need arising from a new historical phenomenon — the governing of a *public body* as opposed to the rule of an *individual*. The *halakhic* scholars established fundamental principles of democracy and appropriate governmental procedures because of the challenge of awesome social problems. These solutions were arrived at by far-reaching, daring interpretations of existing law to respond to a new reality. In this way, Jewish law continued to develop, connected and intertwined with practical circumstances and problems that it regulated and by which, in turn, it was shaped. Facing the *halakhic* authorities and the communal leaders was a twofold mission: On the one hand, they had a constant concern for the continued creativity and development of Jewish law; on the other hand, they felt a great responsibility to preserve the spirit, objectives, and continuity of that law. In fact, during the same period of time the scholars of Ashkenaz dealt with these same issues. But the most extensive creation was in Spain and those centers to which Spanish Jewry fled.

## Decisions of the Supreme Court of the State of Israel

The structure of Jewish administrative law has found expression in the legal system of the modern State of Israel. In a considerable number of landmark cases of the Supreme Court, the opinions, principles, and sources of Jewish administrative law are cited, whether as a basis for decision or as a source for comparison and inspiration. The framework of this talk does not allow me to even begin to discuss this topic — Jewish Law Sources in Supreme Court Opinions — and it is sufficient to mention two basic public law decisions, recently handed down, in which I based my conclusion on Jewish law principles. The first is the *Dekel* case,<sup>52</sup> which forbids, except for specific positions, baldly political appointments in the public service sector, and mandates trustworthiness; political considerations alone cannot be decisive in appointments. The second is the *Zehrzevski* case,<sup>53</sup> which establishes the legal validity of political agreements based on the principles of Jewish public law, some of which I discussed earlier. These decisions of the Supreme Court of the State of Israel were decided under the rubric of section 1 of the Foundations of Law Statute, 5740-1980, which says:

If the Court sees a legal problem which requires a decision, and an answer is not found in legislation, case law, or by way of analogy, it should be decided in light of the principles of freedom, justice, equity, and peace of the Jewish heritage.

Surely, the things discussed here are among the principles of freedom, justice, equity, and peace of the Jewish heritage.

### In Conclusion

The topic chosen here as an example, which in some aspects is truly exceptional, can teach us about the outstanding *halakhic* creativity of Spanish Jewry in the whole system of Jewish law — a creativity which maintained the connection between the present and the past. As mentioned earlier, the *halakhic* authorities active in Spain are numbered among the greatest authorities of

the post-Talmudic period, and their abundant scholarship is studied today by thousands and thousands of Jews, young and old, in Israel and throughout the diaspora. One cannot imagine learning a page of Talmud without the novellae and commentaries of the Ramban, Rashba, and Ritva. The heart of *halakhic* codifiers, until today, are the works of the Rif, Rambam, Rosh, Tur, and *Shulkhan Arukh*, and the Responsa literature of Spanish authorities, before and after the Expulsion, is among the most important of the whole Responsa literature. I have had the occasion to attend a number of conferences marking the 500th year since the Expulsion from Spain, and many important and interesting things were said. But, in all of them the *halakhic* creativity of Spanish Jewry has not received the appropriate appraisal and appreciation. If I were asked which part of the entirety of Spanish Jewry's creative output — which includes *halakhah*, philosophy, biblical exegesis, music, poetry, liturgy, science, and on and on — is still living and breathing, and is still studied by thousands and thousands of Jews all over the world until today — my answer would be: the extensive production of commentaries and novellae, legal codes and Responsa and other works of *halakhah*. There is no need to say that certain specific works of Jewish philosophy, ethics, and biblical exegesis — like *The Kuzari*, by Rabbi Yehuda HaLevi; the *Moreh Nevukhim* by the Rambam; the *Hovot Halevavot* of Rabbi Bahya Ibn Pakuda; *Sha'arei Teshuvah* of Rabbi Yonah Gerondi; the *Akeidat Yitzhak* of Rabbi Yitzhak Arama; and the biblical commentaries of Ibn Ezra, R. David Kimchi, R. Levy ben Gershon, Don Yitzhak Abarbanel, and many other works — are well known and studied by many people at present. However, I believe that the *halakhic* output of Spanish scholars, both before and after the Expulsion, occupies the prime position in this great heritage. Primarily because of that body of work, our nation lives from day to day and hour to hour, that same beautiful Judaism of Spain, which was persecuted and expelled, but not destroyed. From the works of the Rashba and Rosh, Rif and Rambam, Ramban and Ran, we hear today, every day, their thoughts and opinions, we talk to them and they discuss with us, and, through that, the heritage and beauty of Spanish Jewry lives with us today.

## Notes

1. "שלושת עמודי ההוראה"
2. For a detailed discussion of these *halakhic* scholars and many of Spanish Jewry's other leading *halakhic* authorities, and their works, see Menachem Elon, *Jewish Law: History, Sources, Principles (Ha-Mishpat Ha-Ivri)*, Vol. III, Part Three, Chapter 30-40. English translation by the Jewish Publication Society, 1993.
3. See, *inter alia*, the Introduction to *Digest of the Responsa Literature of Spain and North Africa*, Legal Digest, M. Elon, ed. (Jerusalem: Magnes Press, 1986), Volume II, pp. VII-LI (English).
4. In the years 1981-1987. Published by the Institute for Research in Jewish Law and the Magnes Press, the Hebrew University.
5. "פרנסים, טובי הקהל, נאמנים"
6. "תקנות הקהל", "הסכמת הקהל"
7. "תקנות טוליטולא ומולינא"
8. M. Elon, *Jewish Law*, J.P.S., p. 792 *et al*, pp. 834-842.
9. M. Elon, *Jewish Law*, J.P.S., pp. 792-805, 810, 816.
10. "אדם חשוב"
11. "לשעבר הייתם ברשות עצמכם, מכאן ואילך הרי אתם משועבדים לציבור" *Sifrei*, Deuteronomy, 1, Piska 17, p. 26 [L. Finkelstein — H.S. Horowitz, Berlin, 1940 (reprint, New York)].
12. "כמדומין אתם ששררה אני נותן לכם? עבדות אני נותן לכם!"  
Horayot, 10a-b.
13. "שהשררה עבדות היא לו לאלם, לפי שמוטל עליו עול הרבים"  
Horayot, 10a-b.
14. "שמקובל עליו שררה בשביל להנות ממנה"  
*Pesikta Rabbati*, 22, p. 111. (M. Ish-Shalom, ed., Vienna, 1880).
15. "פרנס המתגאה על הציבור" Hagiga 5b.
16. "איש אמונות רב ברכות" Proverbs 28:2.
17. *Shemot Rabbah*, Pekudei, Parsha 51.
18. *Ibid.*
19. "אין מעמידין פרנס על הציבור אלא אם כן נמלכין בציבור" Berachot 55a.
20. "אפילו קל שבקלין ונתמנה פרנס על הציבור, הרי הוא כאביר שבאבירים"  
Rosh Hashana 25b.
21. Arakin 17a.
22. M. Elon, *Jewish Law*, J.P.S., p. 94 *et al.*

23. The late Professor Baer, the outstanding historian of Spanish Jewry, has discussed this phenomenon. For more details see M. Elon, *Jewish Law*, p. 662 *et al*, p. 674 *et al*.
24. M. Elon, *Jewish Law*, p. 7 *et al*, p. 36 *et al*.
25. Exodus 23:2.
26. Mordekhai, Bava-Kamma, #179, Bava Batra #480. See M. Elon, *Jewish Law*, p. 711 *et al*.
27. *Resp. Rashba*, III, #411.
28. *Resp. Rashba*, III, #417.
29. *Resp. Asheri*, 6:5.
30. *Ibid*.
31. *Resp. Asheri*, 6:7.
32. For a discussion of the various creative sources in Jewish Law, see M. Elon, *Jewish Law*, p. 228 *et al*, p. 474 *et al*. The concept of *sevarah* in Jewish law is as follows: "An important creative source of Jewish Law is the legal reasoning (*sevarah*) employed by the *halakhic* authorities. Legal reasoning as a creative source of *halakhic* rules involves a deep and discerning probe into the essence of *halakhic* and legal principles, an appreciation of the characteristics of human beings in their social relationships, and a careful study of the real world and its manifestations." (See, M. Elon, *Jewish Law*, p. 983).
33. See J. Baer, *The History of the Jews in Christian Spain*, 2nd Edition (Hebrew), p. 471; and Haim Hillel Ben Sasson, *History of the Jews in the Middle Ages*, Vol. II, pp. 180-181, 234-236 (Hebrew); see also M. Elon, *Jewish Law*, pp. 1482-1483.
34. See Ben Sasson, *ibid*.
35. See M. Elon, *Jewish Law*, pp. 719-723.
36. *Resp. Elijah Mizrahi* #57; see also M. Elon, *Jewish Law*, pp. 696-698.
37. *Ibid*.
38. *Resp. Elijah Mizrahi*, #53; see also M. Elon, *Jewish Law*, pp. 723-726.
39. "הפקר בית דין הפקר" *Yevamot*, 89b.
40. "בית דין מכין ועונשין שלא מן התורה, ולא לעבור דרכי תורה אלא כדי לעשות סייג לתורה" *Sanhedrin*, 46a, *Yevamot* 90b.
41. *Resp. Rashba*, IV, #142; V, #126.
42. "מבער עבירות"
43. "תקנות העיר נעשות על ידיהם ולא פירצותיהן" *Resp. Rashba*, II, #379.
44. M. Elon, *Jewish Law*, p. 758 *et al*.

45. “אטו רבים נולנים נינהר?” The Gemara notes that the public is forbidden to use the property of an individual for its own use, and to steal an individual’s property from him. The Rashba applies this principle to a completely different issue: namely, that the majority may not exploit its authority to infringe upon the basic rights of the minority.
46. *Resp. Rashba*, V, #178. See also, M. Elon, *Jewish Law*, p. 759 *et al.*
47. Responsum of Maharam of Rothenburg, quoted in *Mordekhai*, Bava Mezi’a #457-458.
48. *Resp. Asheri*, 6:19, 6:21.
49. M. Elon, *Jewish Law*, p. 700 *et al.*
50. *Resp. Rivash*, #476.
51. *Resp. Rashbash*, #566.
52. *Dekel v. The Minister of the Treasury, et al* 45 (i) P.D. 28 (1990). [HCJ 4566/90].
53. *Zehrzevski v. The Prime Minister, et al* 45 (i) P.D. 749 (1990). [HCJ 1635/90].