

# Rabbi Kook's Kabbalat HaRabim: A Study in Communal Consensus

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## **Introduction**

This thesis embarks on an exploration of the sources and implications of the concept of Kabbalat HaRabim, Communal Acceptance, as articulated in the writings of Rabbi Abraham Yitzchak HaCohen Kook.

Rabbi Kook described a novel approach to halakha that is deeply rooted within the Jewish Tradition and has broad implications for Jewish thought in general. Kabbalat Harabim, stated generally, is that while it is true that there was an original revelation of God's Will, that Will is subject to be altered or reinterpreted by the self-organization of the national entity. National acceptance of normative practice is ultimately what determines its legitimacy. This is not problematic but emblematic of the halakhic system.

Such an approach is useful for confronting various contemporary challenges to traditional Judaism. It has been used to explain issues of biblical criticism, historical questions about the Talmud, the basis of rabbinical authority, the process of canonicity, issues in mistaken transmissions, and contemporary practices that deviate from the text. It has also been used controversially to justify the introduction of liberal theologies into Orthodox Judaism.

More broadly, such a perspective aligns with many modern sensitivities of modernity that stress personal autonomy and democratic ideals.

The thesis unfolds across theological, philosophical, and pragmatic dimensions, attempting to dissect the justifications underpinning Rabbi Kook's perspective. I argue that while his ideas have far-reaching implications for Jewish thought, they do not constitute a radical

departure from halakhic tradition, nor do they warrant sweeping normative changes within the system.

The thesis first elucidates the foundational models within the Jewish halakhic tradition available to Rabbi Kook. We then explore the historical and intellectual milieu in which Rabbi Kook's thoughts took shape. Subsequently, the focus turns to Rabbi Kook's own writings on the subject, delving into the nuances of his ideas. The final section probes practical questions and applications arising from Rabbi Kook's idea.

Acknowledging the potential controversy surrounding the interpretations of many of these sources, this thesis adopts a stance of not seeking to conclusively prove the idea but rather to present where a compelling case can be made and elucidate the underlying assumptions.

In the realm of scholarly research, it is not uncommon to feel that every topic has been exhaustively explored. Nevertheless, this paper aspires to offer a fresh perspective, and hopes to be a valuable resource for those seeking a thorough understanding of Kabbalat HaRabim and its implications within Jewish thought.

## A Note on Methodology

Much of the critique on *Kabalat Harabim* is about its ostensible lack of support within the world of traditional halakha. Although there are many Aggadic sources that can be used to ground the idea of consensus as the basis for halakha, I would like to present the formal halakhic principles that R. Kook could have employed to ground this idea. R. Joseph B. Soloveitchik described what has been accepted as the modern orthodox approach to halakha.<sup>1</sup> To avoid grounding normative practice in subjective ideals or charismatic personalities, he proposed that halakha is based on a dialectical human encounter with the objective Divine word impervious to external influences. Like the mathematician, halakhists, with their limited human perspective, attempt to discern the divine will by employing the objective and formal internal logic of the halakhic system to discover its latent rules, principles, and even philosophy. The application and integration of those rules, however, is a human creative process. Such a conception confirms the divine objectivity and transcendence necessary for proper religious service while maintaining human autonomy and the onus of the creative act.<sup>2</sup>

I attempt to show that R. Kook developed his notion of *Kabalat Harabim* through the traditional halakhic sources so that *Kabalat Harabim* can work as another principle that is to be factored into the formalism of halakhic decision-making, but not necessarily the sole basis for the halakhic decision.

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<sup>1</sup> This distinction is made by Tamar Ross. See Ross, Tamar. 2004. *Expanding the Palace of Torah : Orthodoxy and Feminism*. 1st ed. Brandeis Series on Jewish Women. Brandeis University Press. Modern Orthodox is meant to contrast ultra-orthodox halakha which places more emphasis on *Daat Torah* and liberal halakha which is non-formal and telos-based.

<sup>2</sup> This notion is apparent in many of R. Soloveitchik's writings. See for example his *Mah Dodekh Midod*

## The Traditional Halakhic Sources<sup>3</sup>

To ground his idea of Kabbalat Harabim, R. Kook had two basic models to choose from amongst the traditional halakhic sources. Both models indicate that halakha becoming normative is dependent on the facilitation of some level of communal acceptance. The first model, which I associate most prominently with Ramban, is the Charismatic Community. The Charismatic Community Model justifies communal consensus as a self-organizational principle unmediated by direct top-down intervention. This model is based on Sugyot that deal with the legitimacy of extra-scriptural enactments either through a rabbinic authority or communal decree. These sugyot can be used to indicate that the binding nature of such legislation lies in the communal agreement to the laws themselves.

The second model, the Representative Model, I associate most prominently with Rambam. In this model, communal consensus authorizes top-down institutions to legislate. This model employs some of the sugyot that focus on the limits of institutional authority as a way to probe the nature of its legitimacy. These sugyot can lead to the conclusion that institutions function as representatives of the general will of the people.

If Kabbalat Harabim is the idea that mass consensus can obligate normative praxis, then understanding the authoritative source for all normative praxis is crucial to establish.

To a certain extent, the authority of the Torah as a governing system is grounded in its understood expression of Divine Will. It is authoritative because of its Divine source. However, there is mixed evidence as to why Jews are bound to its legislation. On one hand, God may forcefully coerce His people to adhere to its teachings. At the same time, there are also sources

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<sup>3</sup> This section is largely influenced by Kassierer, Shlomo, and Shlomo Glicksberg. 2007. *Mi-Sinai Le-Lishkat Ha-Gazit : Torah She-Be'al Peh Be-Mishnatam Shel Ha-Rambam V'ha-Ramban. ha-Makhon ha-gavoha le-Torah 'a. sh. Ludvig, zal, ye-Eriqah Yeselzon, Universitat Bar-Ilan and Erder, Mattan. Paradigms of Change in Orthodox Thought. [Electronic Resource]. 2010.*



that indicate that it was the nation that obligated itself to its legislation by entering into a volitional covenant with God that is obligatory even for future generations.

In addition to Biblical regulation, d'Orayta, which is more strongly grounded in the scriptural text, traditional halakha is based on the premise that there is a rabbinic law, d'rabanan, which is less dependent on direct correlation to the Scripture. By employing the proper procedures, rabbis can introduce new legislation and abrogate existing norms to cope with historical, social, or economic situations facing the community. Although both models that we will employ to grant legitimacy to a consensus-based halakha are based on the discussions surrounding the derbanan extra-scriptural law, they may serve more broadly as paradigms of the contractual nature of all Jewish law, even d'Orayta. Part of the issue is identifying what is considered under the category of d'Orayta.<sup>4</sup> Can we categorize human interpretation of the text as d'Orayta, and if so, can interpretation be decided by consensus? Moreover, as we will discuss, if we determine that there is a biblical obligation to adhere to rabbinic law, then practically, if we conclude that rabbinic law functions consensually, adhering to the consensus should also be considered a d'Orayta prerogative.

This premise of a rabbinic law also asserts that not every individual is entitled to their own interpretation of the halakha, or at least not one that conflicts with the rulings of the rabbis. The ultimate expression of this assumption is the institution of zaken mamreh, a scholar who is put to death for failing to comply with the ruling of the court out of deference to his personal convictions.

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<sup>4</sup> This is a complicated issue. See Kassierer and Glicksberg, *Misinai. Bazaq, Amnon. Nitshuni Banai, Fundamental Questions in the Study of Oral Law : She'elot Yesod Be-Limud Torah Shebe-'al Peh. Miiskal - Hotsa'ah la-or mi-yisudan shel Yedi'ot aharonot ve-Sifre Hemed*, 2020. Also see Halbertal, *Moshe People of the Book*, (Cambridge, Mass. 1997)

The question is, what is the nature of the *zaken mamreh*'s offense? If the Divine Will is the authority of the law, and a scholar truly believes that he has divined its message, should he not be obligated to follow it? One possibility is that the majority disagreement with his interpretation is, for whatever reason, evidence of his mistake. Another non-mutually exclusive possibility is that his offense is less about a mistaken deduction of Divine Will but more about a warped understanding of a halakhic system that encourages normative conformity and is open to human interpretation through the proper channels.

Deuteronomy 17, the passage of the *zaken mamreh*, is the source most commonly cited in rabbinic literature as the grounds for the authority of rabbinic legislation, with its famous invocation, "Thou Shalt Not Deviate (Lo Tassur)":

If there arise a matter too hard for thee in judgment, between blood and blood, between plea and plea, and between stroke and stroke, even matters of controversy within thy gates; then shalt thou arise, and get thee up unto the place which the LORD thy God shall choose. And thou shalt come unto the priests the Levites, and unto the judge that shall be in those days; and thou shalt inquire; and they shall declare unto thee the sentence of judgment. 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. 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 deviate (Lo Tassur) from the sentence which they shall declare unto thee, to the right hand, nor to the left. And the man that doeth presumptuously, in not hearkening unto the priest that standeth to minister there before the LORD thy God, or unto the judge, even that man shall die; and thou shalt exterminate the evil from Israel. And all the people shall hear, and fear, and do no more presumptuously. (Erder Translation)

According to one opinion in the Talmud, this passage serves as the basis of rabbinic authority to legislate new laws that are not found explicitly in the Torah:

And what blessing does one recite? He recites: Who has made us holy through His commandments and has commanded us to light the Hanukkah light. The Gemara asks: And where did He command us? The mitzva of Hanukkah is not mentioned in the Torah, so how is it possible to say that it was commanded to us by God? The Gemara answers that Rav Avya said: The obligation to recite this blessing is derived from the verse: "You shall not turn aside from the sentence which they shall declare unto you, to the right, nor to the left" (Deuteronomy 17:11). From this verse, the mitzva incumbent upon all of

Israel to heed the statements and decrees of the Sages is derived. Therefore, one who fulfills their directives fulfills a divine commandment. Rav Neḥemya said that the mitzva to heed the voice of the Elders of Israel is derived from the verse: “Ask your father, and he will declare unto you, your Elders, and they will tell you” (Deuteronomy 32:7). (Shabbat 23a (see also Sukkah 46a) with Sefaria explanation)”

In another discussion the Talmud invokes this Deuteronomic passage in the context of rabbinic authority as well:

Come and hear: Great is human dignity, as it overrides a prohibition in the Torah. The Gemara asks: Why? Let us also say here: “There is neither wisdom, nor understanding, nor counsel against the Lord.” Rav bar Shaba interpreted this prohibition, which is overridden by human dignity, before Rav Kahana as referring to the prohibition of: “According to the Torah taught to you and the ruling handed down to you, you shall do, you shall not deviate to the left or the right from that which they tell you” (Deuteronomy 17:11). The Yeshiva students laughed at him, as the prohibition of “you shall not deviate” is by Torah law, like all other Torah prohibitions. Why should human dignity override it any more than any other Torah prohibition? Rav Kahana replied to them: A great man has spoken, do not laugh at him. The Sages based (Asmichinhu) all rabbinic law on the prohibition of “you shall not deviate”; however, due to concern for human dignity, the Sages permitted suspension of rabbinic law in cases where the two collide. All rabbinic decrees are predicated on the mitzva in the Torah to heed the judges in each generation and to never stray from their words. Therefore, when the Sages suspend a decree in the interest of preserving human dignity, human dignity is overriding a Torah prohibition. In any case, it only overrides rabbinic decrees. (Berkhot 19b with Sefaria explanation)

Here, the Talmud acknowledges the role of the verse as the basis for rabbinic authority without mentioning an alternative option. However, at the conclusion, it seems that the verse is not a binding source to the furthest extent; it is only a rabbinical *asmachta*.<sup>5</sup>

For Rambam, the Deuteronomic passage is the source of rabbinic authority:

The Supreme Sanhedrin in Jerusalem are the essence of the Oral Law. They are the pillars of instruction from whom statutes and judgments issue forth for the entire Jewish people. Concerning them, the Torah promises Deuteronomy 17:11: "You shall do according to the laws which they shall instruct you...." This is a positive commandment.

Whoever believes in Moses and in his Torah is obligated to make all of his religious acts dependent on this court and to rely on them. Any person who does not carry out their directives transgresses a negative commandment, as the verse continues: "Do not deviate from any of the statements they relate to you, neither right nor left."

Lashes are not given for the violation of this prohibition, because it also serves as a warning for a transgression punishable by execution by the court. For when a sage rebels

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<sup>5</sup> For further discussion on *asmachta* see Bazak, Amnon, Nitṣhuni Banai,.

against the words of the court, he should be executed by strangulation, as the following verse states: "A person who will act deliberately...."

We are obligated to heed their words whether they:

a) learned them from the Oral Tradition, i.e., the Oral Law,  
b) derived them on the basis of their own knowledge through one of the attributes of Biblical exegesis and it appeared to them that this is the correct interpretation of the matter,

c) instituted the matter as a safeguard for the Torah, as was necessary at a specific time. These are the decrees, edicts, and customs instituted by the Sages.

It is a positive commandment to heed the court with regard to each of these three matters. A person who transgresses any of these types of directives transgresses a negative commandment. This is derived from the continuation of the above verse in the following manner: "According to the laws which they shall instruct you" - this refers to the edicts, decrees, and customs which they instruct people at large to observe to strengthen the faith and perfect the world. "According to the judgment which they relate" - this refers to the matters which they derive through logical analysis employing one of the methods of Biblical exegesis. "From all things that they will tell you" - This refers to the tradition which they received one person from another. (Mamrim 1:1-2 Sefaria Translation)

For everything that the Sages commanded us to do and everything they prohibited to us [would then have] already commanded by Moshe, peace be upon him, at Sinai when he commanded us to do so. And that is his saying (Deuteronomy 17:11), "According to the law that they instruct you, etc." And he prohibited us from violating anything that [the rabbis] ordained or decreed, by saying, "you shall not veer." (Sefer Hamitzvot 1 Sefaria Translation)

Rambam outlines what he thinks is under the scope of rabbinic authority and invokes the Deuteronomic verse as the source. He says that the rabbis have authority over everything, they are the transmitters of the tradition, whether the halakhot are derived from interpretation or through legislating new rules, takanot and gezerot. The Torah obligates everyone to listen to them because of the prohibition of Lo Tassur.

However, as many have noted there are many difficulties with this approach both on a textual level and on a conceptual level.

On a textual level, as Michael Berger in his *Rabbinic Authority*<sup>6</sup> points out, it is difficult to assume that this is the source for a broader rabbinic authority, the passage seems to be limited

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<sup>6</sup> Berger, Michael S. *Rabbinic Authority*. Oxford University Press, 1998.

to a specific institution that is centered in the Temple and includes the participation of priests. Moreover, it does not explain why earlier scholars would be more authoritative than later scholars, in fact, it seems to limit the authority to the judges “that will be in your time” and not imposed on the later generations. Finally, the passage seems to delineate the roles of rabbis as interpreters of ambiguous laws and judging particular cases, it does not seem to justify enacting new legislation or interpretation and law expansion outside of the judgment of these specific cases.

Conceptually, as Ramban asks, if this passage is truly the source of rabbinic authority then obeying the rabbis should be considered a Biblical Law and not subject to the leniencies that are traditionally granted to rabbinic ordinances.

Partly based on these problems, Ramban extensively disagrees with Rambam’s interpretation. He thinks that *Lo Tassur* only obligates the individual to accept the sage’s interpretation of the scripture, whether based on halakhic *lemoshe misinai*, *medrash halakha*, or tradition. But the verse does not obligate one to be bound to rabbinically initiated extra-scriptural legislation.

Ramban writes “*gezerot and takanot* that the rabbis enacted to protect the Torah are not included in this negative prohibition [*lo Tassur*] rather it is only a *semach*.”<sup>7</sup> By invoking its basis in *asmachta*, Ramban clearly understands the Gemara in *Berachot* to be undermining the Biblical verse as a strictly binding source of rabbinical authority.

Essentially, for Ramban, the passage is giving the rights of Scriptural interpretation to a certain institution, but that institution’s interpretive authority is limited to explicating Biblical laws. Nonetheless, their interpretation of the biblical laws is deemed authoritative.

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<sup>7</sup> Hasagot Ramban Shores 1

Ramban's force must have a different source for extra-scriptural rabbinic authority. He clearly agrees that the rabbis are authorized to expand and litigate laws, however, he is not clear as to what the source of that authority is.

In fact, Ramban writes that the entire purpose of the Deuteronomic passage is only to impose the prohibition on the *zakein mamre*. Thus, in his reading of the passage, the authoritative status of the rabbis institutionally is axiomatically presumed. The Torah does not bother to grant their authority to interpret but instead demonstrates the authority of rabbinic interpretation in that the rabbinic reading of Scripture becomes the normative reading. In his understanding, the *zakein mamre* is not a rebellion against the rabbis but against the authoritative interpretation of the Torah itself. Thus, unlike Rambam, for Ramban, a *zakein mamre* would not be put to death for failing to comply with a rabbinic decree. For Ramban then, the offense of the *zakein mamre* is less about an offense to the halakhic system but more about a mistaken understanding of a Divine Will that is best to be divined from the consensus of the rabbinic interpretation.

Thus, there seems to be a fundamental disagreement between Ramban and Rambam regarding the nature of halakhic law.

Berger, using a standard distinction of legal philosophers that is similarly developed by Avi Sagi,<sup>8</sup> differentiates between different models of authority. One type of authority, “deontological authority” or “in authority” is an authority that creates binding laws on their constituents by virtue of their institutional position or status. In halakhic Judaism, a person “in authority” wields power by occupying a position, like a Beit Din, which is divinely sanctioned to exercise legislative powers.

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<sup>8</sup> Avi Sagi, "Models of Authority and the Duty of Obedience," *AJS Review* 20, no. 1 (1995): 9–11.

This deontological position is associated with legal positivism, most famously developed by H. L. A. Hart.<sup>9</sup> In the positivist perspective, a law's origin lies in its formal establishment by a socially acknowledged legal authority. The evaluation of a law's quality stands as a distinct matter; even if it's deemed flawed based on certain criteria, if it was introduced into the legal system by a legitimate authority, it retains its status as a valid law.

Rambam seems to identify with this deontological institutional authority. Once he can determine that the institution is vested with the authority to legislate, he places much less emphasis on the nature of the legislative content of the formal, legal law.

The Rambam's position is unique in that he recognizes human input and creativity in halakha but maintains complete Divine backing to its authority. Alternative explanations chose to deny the human element of rabbinic law. For example, R. Yehuda Halevi in his *Kuzari* uses this Deuteronomic passage as the source of an ongoing revelation that guides the rabbis in their rulings. Their rulings are binding because they are Divinely inspired which he thinks is demonstrated in this passage. The Geonim<sup>10</sup> have also been understood to hold that rabbinic mitzvot and interpretations were all directly transmitted from Sinai with little human input.

Such an approach avoids Ramban's questions. Rabbinic rulings are governed with the same strictures as Biblical law because transgressions of rabbinic law are viewed as a challenge to the authority of the institutional basis of the law but not in the details of the law itself.<sup>11</sup>

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<sup>9</sup> H. L. A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593, 601–602. For a quick overview see Green, Leslie and Thomas Adams, "Legal Positivism", *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>>

<sup>10</sup> For example, the Behag who counts rabbinic mitzvot in his list of the 613 Biblical commandments

<sup>11</sup> See R. Meir Simcha HaCohen, *Meshech Chochma* Deuteronomy 17:11. For a creative approach to read Rambam's position back into the biblical text see Erder.

Ramban, however, seems to have a more naturalist view of the law. The Torah's laws are based on intrinsic values that can be deduced and applied independently of positive law. Ramban would not consider Ramban's read of the Deuteronomic passage because he cannot accept the notion that the Torah would authorize a law that may not intrinsically conform to Divine Will.<sup>12</sup>

Instead, the passage is a demonstration of the axiom that the interpretation of the rabbis is authoritative as the working understanding of the biblical law.

Such an understanding of the authority of the rabbis to interpret may be based on another model of authority developed by Berger. The second type of authority is "epistemic authority" or "an authority." Such an authority wields power because of their personal qualities, whether it be their expertise, wisdom, competence, or charisma. Independent of their institutional position, people listen to those with epistemic authority because they are likely to be right.

There are different ways to understand epistemic authority when it comes to the authority of rabbinical interpretation. Rabbis may be viewed as spiritual specialists, either due to their vast immersion in Torah or because of their spiritual sensitivity and are therefore considered able to

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<sup>12</sup> Ramban's emphasis on natural law is evident in his interpretation of the rule "hargu ein neheragin," where false witnesses, if discovered after successfully convicting someone of capital punishment, are not executed themselves, despite facing the same fate if their scheme had succeeded. He attributes the justice of the court's decisions to Divine amelioration: "Now, when two witnesses come and testify against Reuben that he killed a person and then another two come and "refute" [their claim of] having been witnesses, Scripture commanded that [the first pair] be killed for it was due to the merit of Reuben who was innocent and righteous that this affair [of "the refutation"] came to pass. Had Reuben been wicked, liable to a death-penalty, G-d would not have saved him from the hand of the court, as He said, for I will not justify the wicked. But if Reuben had already been killed we are to consider that whatever the first witnesses testified against him was true, for he died due to his iniquity. If he were righteous, G-d would not have left him in their hand, just as Scripture says, The Eternal will not leave him in his hand, nor suffer him to be condemned when he is judged. Moreover, G-d would not allow the righteous judges who stand before Him to spill innocent blood for the judgment is G-d's, and in the midst of 'elohim' (the judges) He judgeth. Now all this indicates the high degree of the judges in Israel and is a promise that the Holy One, blessed be He, agrees with them and He is with them pronouncing judgment. This is the sense of the verse, And both the men, between whom the controversy is, shall stand before the Eternal, for it is before G-d that they stand when coming before the priests and the judges and He will lead them in the right way. I have already mentioned this in the section And these are the ordinances." (Sefaria Translation) Ramban refers to his commentary on Lo Tassur, which we will discuss.



intuit God's Will. Additionally, many believe that God inserts special providence to guide the decision-making of the sages of each generation to ensure that the Jewish people will have a set of laws that reflect His will.<sup>13</sup>

This argument of Zakein Mamreh is therefore a paradigm for the differing legal philosophies of Rambam and Ramban that will be important when we consider the function of Kabbalat Harabim. As we will see, for Ramban, who cannot seem to consider a religious law that does not maintain intrinsic divine sanction, Kabbalat Harabim will have to function on a more fundamental level by aligning communal consensus of halakha with Divine Will.<sup>14</sup> Rambam, however, will only need to employ Kabbalat Harabim to the extent that it can uphold institutional authority.

Even if such a natural law approach guides the underpinnings of Ramban's framework and could explain why he grants unique authority to rabbinical interpretations of the scripture, it is still necessary to establish a formal basis for the authority of rabbinic legislation and expansion of the law that is not directly linked to scriptural interpretation (takkanot and gezerot). In fact, Ramban himself says in Deuteronomy 4:2 that obeying the extra-scriptural legislation of the rabbis is Biblical, "mitzvah min hatorah" but does not imply what the commandment may be.

As R. Elhanan Wasserman<sup>15</sup> points out, this is a difficult task. We would ostensibly require a Scriptural source for such a commandment to be binding. Yet, any scriptural source that we come up with must not be plagued by the Ramban's own critique of Rambam's opinion and

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<sup>13</sup> See Erder, *ibid*.

<sup>14</sup> Although this will not affect the conclusion that Ramban believes in communal acceptance as a source of law, the assumption I am making is that zaken mamreh serves as a general paradigm of Ramban's legal philosophy and he would therefore seek to have even rabbinic law intrinsically align with Divine Will. The fact that Ramban does not apply Lo Tassur to rabbinic takkanot and gezerot may indicate that they are only positively binding. However, it could just be that he does not apply Lo Tassur to them because they are in fact based on a different principle as we will discuss.

<sup>15</sup> Kuntres Divrei Sofrim 1:14

explain why rabbinic law is treated differently than Biblical law. R. Wasserman even goes so far as to claim that if we were to find a rational explanation (a sevara) for binding us to rabbinic authority then that itself would also attain Biblical status.<sup>16</sup> Therefore, whatever source we come up with must find a way to be binding but still account for the change in the legal status of the law.

It is at this point that the concept of Kabbalat Harabim could be useful and can be located within the writings of the Ramban elsewhere.

### **Kabbalat HaRabim for Ramban: Charismatic Community<sup>17</sup>**

In certain contexts, Ramban develops the idea that certain laws can become obligatory based on their status as a defining feature of a community. Any individual's organic participation within the community necessitates his submission to its guidelines. Refusal would result in a cherem, excommunication, because as someone who has divorced himself from the community he is no longer privileged to participate within it. Ramban applies this idea both in contexts of local communities and regarding the national community. This idea introduces the notion of law as a necessary feature of identification within a community.

Jewish law acknowledges the authority of public legislation. The Mishna explicitly states that the people of a city (be'nei ha'ir) are authorized to establish policies that bind all residents of their town, including setting prices and wages, and the ability to fines those who violate these regulations.<sup>18</sup> The Tosefta extends authority to particular groups, such as craftsmen's and traders' guilds in the town, allowing them to enforce rules unique to their own associations.<sup>19</sup>

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<sup>16</sup> For more on Sevara see Wiederblank, Netanel. 2014. How Are We to Determine What God Wants?: Reason, Revelation, or Both. Vol. 18

<sup>17</sup> These categories are based on Gerald Blidstein's excellent article, "Individual and Community in the Middle Ages: Halakhic Theory," in D. Elazar, ed., Kinship and Consent (Ramat Gan, 215-256)

<sup>18</sup> Tosef. bm 11:23; bb 8b

<sup>19</sup> Tosef. bm 11:24-26

Scholars have observed a shift in halakhic attitudes towards communal legislation in the Middle Ages that began in late tenth-century Ashkenaz but climaxed in Spain during the times of Ramban.<sup>20</sup>

During the Gaonic era, Gaonim such as Samuel ben Hophni and Rav Hananiah Gaon stressed the authority of elders in legislation.<sup>21</sup> Shalom Albeck has argued that rabbis Alfasi, Ibn Migash, and Abulafia believed the community was not a separate legal entity from its members but a partnership of individuals, challenging the idea of the community's precedence over the individual. For instance, R. Joseph Ibn Migash denied the community the privilege of imposing punishments beyond normative halakhah, stating that it could not be equated with an established judge in such cases. Blidstein observes that the rhetoric in Sephardic documents of that era downplayed theories that suggested a notion of communal legislation with leadership consent,

Lorberbaum even makes the case that Rambam followed in this tradition and attempted to minimize the legislative role of the community. He argues that such a conception of the law is consistent with Rambam's political ideology. In his opinion, Rambam in the Guide to the Perplexed outlines a political doctrine that highlights the passivity of people and their teleological need to be governed, and therefore seems consistent.<sup>22</sup>

In Christian Europe, the situation differed significantly. Feudal kingdoms did not function as centralized states; instead, they operated as corporate entities consisting of self-governing

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<sup>20</sup> Albeck, Shalom. "Foundations of the kehillah in Spain up to the Ramah" (Hebrew). MJC. Baer, Yizhak "The Origins of Medieval Communal Organization" (Hebrew). MJC. Blidstein, Gerald. "Individual and Community in the Middle Ages: Halakhic Theory," in D. Elazar, ed., *Kinship and Consent* (Ramat Gan, 215-256), Lorberbaum, Menachem. *Politics and the Limits of Law: Secularizing the Political in Medieval Jewish Thought*. Stanford University Press, 2001, Chapters 1 and 5.

<sup>21</sup> Blidstein Individual n. 37- points out that this was not the only view held by the gaonim.

<sup>22</sup> However, see Gerald Blidstein, *Authority and Dissent in Maimonidean Law*, Hebrew. (Tel Aviv Kibbutz Me-uhad, 2002) pg 145. Regardless of the approach taken to interpret Rambam, the thirteenth century witnessed a large expansion of the notion of community as a political entity.

localities. These local courts, driven by practical considerations, often granted individual rulers a significant degree of autonomy.

The decentralized nature of authority vested substantial power in the kahal, encompassing both executive and legislative duties. The takkanot enacted by these communities extended to a wide range of matters, including fiscal affairs, zoning regulations, welfare, education, taxation, marriage and various other areas.

Finkelstein describes:

The term “Self-Government” may properly be applied to the Jewish institutions of the Middle Ages, because whether de jure or de facto, the communities were autonomous entities. The decrees of the synods were obeyed, often with far greater rigor than those of the state government. The judiciary was organized to such an extent that courts of appeal were differentiated carefully from courts of original jurisdiction. The rights of the members of the communities as such against the communities were defined with precision. Such an arrangement can hardly be called anything less than a system of “self-government.”<sup>23</sup>

Lorberbaum traces the developments of the creation of the kahal as a distinct legal persona through various monetary laws as they are discussed by the medieval scholars of the time. He points out that in the early Middle Ages, we find a preference for the term kahal or ha-kahal ha-kaddosh, holy community. The biblical term, defined as a congregation of worship, infused both religious and political meaning, that helped form a unique sense of identity for medieval Jewish communities. He quotes Yitzhak Baer who viewed the term as an expression of the “metaphysical feeling of the local kehillah [community] unifying all its populace, young and old, and connecting the local kehillah with the whole of Israel [kelal yisrael].”<sup>24</sup> This new identity was instilled to the extent that scholars have noticed that many of the Tosafists seem

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<sup>23</sup> Finkelstein, L. (1924). Jewish self-government in the Middle Ages / by Louis Finkelstein; with a foreword by Alexander Marx. Jewish Theological Seminary of America., quoted by Lorberbaum.

<sup>24</sup> Baer, Yizhak “The Origins of Medieval Communal Organization” (Hebrew). Translation Lorberbaum.

have gone out of their way to employ creative means to justify communal practices, considering the actions of the community authoritative legal material that must be reckoned with.<sup>25</sup>

Lorberbaum explains that the granting of communal legislative and judicial authority was perceived as a necessary measure undertaken to preserve the community. The contemporary rabbinical authorities in France and Germany and later in Spain realized that promoting communal autonomy would prevent Jews from appealing to the local Gentile courts and assimilating into the surrounding culture.

The political reality and broad identity led to the expansive use of Takanot at the time. Lorberbaum notes that the Takanot were significant because they were considered fully binding legal norms even without prior consent of the individual. They were not considered simply matters of tradition or morals and at times were able to override primary halakhic. Jewish scholars attempted, therefore, to ground the notion of takkanot within principles of public law and developed fundamental principles that produced extensive legal innovations.

Blidstein introduces two models that were initially used to grant a community the authority to enact a Takkanah: the vow model and the court-enactment model. A Takkanah comprises two essential elements: First, there is the Takkanah itself, which prescribes or prohibits certain actions. Second, there is a curse (*shamta*<sup>26</sup>) imposed on those who fail to adhere to the Takkanah's provisions. This connection between rules and curses is subtly suggested in the

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<sup>25</sup> There is a lot of literature on this. For example, see Jacob Katz's *Goy Shel Shabbat*, Israel Tashma's *Creativity and Tradition: Studies in Medieval Rabbinic Scholarship, Literature and Thought*, "Halakhah and Reality: The Tosafist Experience" and "Halakha, Reality, and the Concept of Historical Change," 2006 and Haym Soloveitchik, "Religious Law and Change", in *Collected Essays I*, pp. 246-247: "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 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..."

<sup>26</sup> See Ramban *Mishpat Hacherem* based on *Moed Katan* 17a

Talmud's discussion of takanot in Avodah Zarah 36, where a verse from Malachi (Malachi 3:9) is invoked: "You are cursed with the curse, yet you rob Me, even this whole nation," which Rashi interprets as connecting rules with curses.

Normally, an oath is seen as a voluntary action, requiring individual consent. In this context, however, the community places an oath on individuals who might not have been willing or present at the time of enactment. In fact, Rambam rules that a community-imposed ban cannot apply to non-accepting individuals.<sup>27</sup>

Blidstein follows the evolution of the Takkanah in Ashkenaz through various sources including R. Judah ha-Kohen's responsum, Rashi's writings, R. Eliezer ben Joel ha-Levi's responsum, and the writings of Ramban.

In early Ashkenazic thought, the Takkanah-as-oath concept was axiomatic; the community's imposition of Takanot on itself served as proof that an individual cannot detach from the community. Administering oaths was a primary right of a community which in turn granted it secondary rights as a communal entity. However, these discussions did not delve into the distinctions between general oaths and takanot.

In later centuries, there was a more explicit discussion regarding the community's authority to bind individuals through takkanot and oaths. R. Judah ha-Kohen emphasized this authority and cited biblical examples such as Joshua's oath regarding the rebuilding of Jericho and Saul's oath even in Jonathan's absence, as precedents that are already mentioned by the Talmud in Shavuot 36a. Later, Rabiah continued this discussion and questioned the ability to

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<sup>27</sup> Blidstein points out that although the Talmud does grant the court the authority to compel an excommunicated individual to take an oath, and Rambam agrees, there are two key distinctions. Rambam's ruling refers to an oath imposed on someone already found guilty of an offense, and it involves a court-initiated oath. These conditions are absent in the Middle Ages, where rabbis used the ban differently, applying it to an innocent community as a guarantee for compliance with a takkanah.

impose a Takkanah on an entire community, recognizing that a Takkanah's laws are akin to those of an oath. His conclusions, although important, remained technical.

The oath element of the Takkanah was often invoked within the context of the halakhic concept of Cherem. Cherem Hatzibbur, a communal ban, is the decision of a community to accept obligations or norms upon themselves that are accompanied by punishment. A Cherem could be applied against the will of individuals, without their formal acceptance and in the absence of their presence. At the outset of its usage, there was no clear distinction between Cherem, and similar halakhic methods of obligating extra-legal norms like Shevuot (oaths) and Nedarim (promises). Ramban wrote *Mishpat Hacherem* a short treatise outlining the details and laws of Cherem in contrast to those of Shevuot and Nedarim.

Ramban attempted to explain how a court can impose a Takkanah on an individual by fully explicating the crucial distinctions between different categories of oaths found in halakhic literature. For Ramban, a Cherem is considered the act of a court that derives its authority from the community and can therefore be revoked by that same communal institution.

Ramban describes how a court can declare, "Whoever performs a certain deed, or 'breaches the fence' concerning a certain matter, shall be under a ban." This Cherem, "although it is not found in the Torah of Moses our teacher, but is known from tradition", is binding on the individuals to whom it is addressed."

He continues:

But in the case of a ban, even if he did not accept it... [it is binding] because the bet din has the right to impose a ban.

Unlike Shevuot that are binding only if an individual willingly levies them on himself, the Cherem is a binding even when enacted by an external body. This made cherem a useful tool for the courts to issue its takanot.

Blidstein highlights that Ramban's main point was likely that the authority of a town's citizens to impose a ban becomes meaningless if it hinges on the consent of the person being banned. This argument, he points out, seems to be extended by Ramban to a broader context, suggesting that the matter should be considered within the framework of general oath laws. There are instances in which a court or individual in its presence can impose an oath on a witness even if the witness refuses, implying that someone obligated to take an oath cannot avoid it, whether in the case of a ban or an oath. Ramban acknowledges that a communal ban is distinct from a regular oath, yet the principle stands.<sup>28</sup> For Ramban this will have to do with the fundamental nature of the institutional authority of the court.

Ramban derives the court's authority from the biblical example of Nehemiah's actions against mixed marriages in Nehemiah 13:25. Nehemiah, the political leader of Judea, enforced the law and meted out punishment, with this authority eventually transferring to the courts. Ramban emphasizes that the origin of this authority is in the townspeople, indicating that they, not just the courts, have the power to impose a Cherem:

This too is the law concerning the townspeople, if they agreed, unanimously or by majority, in the presence of the good men of the city and imposed a ban. Because “they are authorized to enforce their decree” (Tosefta, Bava Metzia) and to impose a ban, their ban binds all those obligated to follow their enactments. Therefore, any townsman who transgresses their rules also transgresses a ban, and is like one who transgresses an oath, which penetrates his 248 limbs and “destroys his trees and stones,” and he is excommunicated from his townspeople...

As we have noted above, the community ban contains two elements, the actual action or prohibition enacted and the excommunicative curse. Ramban's rhetoric here highlights the

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<sup>28</sup> Blidstein notes that Ramban shares the view (as found in Novellae to Shevu'ot 31b) that a person summoned to testify is held accountable by the oath, even if they decline to respond with "Amen." Ramban's stance appears to be in line with Rambam (Shevu'ot 9:1,10), who seems to follow the perspective of R. Joseph ibn Megas (in Novellae to Shevu'ot 32a and 35b.) This can also be inferred from some of Ramban's statements in Mishpat HaHerem.



deterrence factor that the curse adds. The kahal imparts religious significance to its decrees by invoking the potent influence of an oath, using it to penetrate and eradicate the transgressor.

Ramban interprets the Tosefta as endorsing the authority to enact bans. He sees this authority as arising from the fundamental right of a community to enforce its regulations. As Lorberbaum points out, while the Tosefta permits legislative actions within an established community, the establishment of a community as a political entity requires a distinct sanction. The concept of excommunication, which involves the risk of losing citizenship upon breaching the established norms of the community, serves as a powerful tool to establish binding authority, especially during foundational moments or for specific decrees. Violating the community's rules leads to one being outside the community, and community-led excommunication finalizes the process initiated by the transgressor.

The sole requirement for imposing such a ban is that it must be executed by a religious assembly consisting of a minimum of ten males.<sup>29</sup>

because [less] is not considered a tzibbur [a public], nor are they considered a court that acts in place of the tzibbur. Such a group has no power to impose a ban. (Lorberbaum translation)

Lorberbaum emphasizes that the stipulation of requiring a quorum emphasizes the religious essence of the Cherem. It further solidifies the perception of the kahal as a local charismatic entity that is deeply connected to the broader community of Israel as a whole. This is likely because the ban signifies the threat of excluding the offender from the community, and

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<sup>29</sup> As Blidstein points out, the necessity for a quorum can be traced back to Tanhuma Va-Yeshev, 2. This idea is in line with the Mishnah's reference to oaths being taken "in the bet ha-kneset" (Shevu'ot 4,10). Similarly, Ramban stipulates that a king must be appointed "in the presence of the people" (Commentary to Numbers 27:19), drawing from sources like Sifra, Millu'im 1, 4 (40d), and Midrash HaGadol, to Leviticus 8:3. However, Ramban's understanding of this requirement may differ from his Talmudic sources.

therefore, only the community has the right to enact such a ban. Even the court's authority to impose a ban is described as derived from that of the public. The court "stands for a public."

Ramban even goes as far as to require that the entire community should be subject to the ban. This means that an individual is only bound by the ban if they are part of the community that imposes the ban on itself collectively. The community cannot use the ban selectively against specific individuals. All of this suggests that what obligates the individual is the reality that they are a member of the community that enforces the ban collectively upon itself.

Ramban continues:

And if the ban was imposed by a king of Israel or the Sanhedrin, in the presence of the majority of Israel, the transgressor is liable to the death penalty.

Ramban goes on to say that this is the justification for Joshua judging Achan with death, because he violated the cherem by taking the spoils, as well as for Saul seeking to kill Jonathan who violated the public oath not to eat that day.<sup>30</sup>

As Lorberbaum points out, Ramban's qualification that the ban must be imposed "in the presence of the majority of Israel" indicates that neither the king nor the Sanhedrin is automatically presumed to act for the people, the source of the authority of the ban. This reading is buttressed by Ramban's previous statement that implies that the court's authority is derived from the people. The fact that the ban derives its strength through the consensus of the people can be seen through Ramban's rhetoric when describing the Biblical source of his understanding.

Apart from the verses that were cited by Rabbi Judah ha-Kohen, Ramban provides additional Biblical support to sanction the death penalty on transgressors of community will. In the opinion of Ramban, this is the simple understanding of the scripture (Leviticus 27:29) "Any

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<sup>30</sup> As noted above, the use of Jonathan and Saul as paradigms was already found in the writings of R. Judah HaKohen.

Cherem that has been placed in Cherem from a person shall not be redeemed, he shall surely die”:

That is to say, what they have all agreed upon and put in cherem shall not be redeemed, but is liable to death.

This interpretation is interesting as there is no known Rabbinic work that uses the verse this way; in fact, the verse is used for different exegesis. Ramban still thinks this is the simple reading of the verse (peshat) and that peshat always retains its truth.<sup>31</sup> Rambam never interprets the verse this way. Either way, as the language of Ramban indicates, the basis of the Cherem is the consensus of the people.

Blidstein even suggests that the death penalty given to someone who breaks a national ban might symbolize the individual’s complete separation from the nation to the extent of their physical annihilation.

In essence, the ban is imposed on an individual who refuses to accept it not only based on the legal authority of the community and its institutions, but also due to the individual's organic participation within the community. Blidstein connects this concept with organic theories in which individuals submit to the general will. He suggests that paradoxically, by rejecting inclusion in the ban, an individual might actually separate themselves from the community, inviting the full force of the ban upon them. It is likely that Ramban would consider even those absent when the ban was decreed as subject to it, given their ongoing membership in the community.<sup>32</sup>

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<sup>31</sup> See also Ha’amek She’alah 142, 9: and R. Moses Sofer, Resp. Hatam Sofer, O.H. no. 208 for further discussion.

<sup>32</sup> Blidstein suggests that it's plausible to infer that unintentionally violating the ban may not result in guilt, drawing on the Ramban's story of Jonathan being spared from death despite unknowingly breaking his father's ban. According to the Ramban, the community "rescued" Jonathan from death, contending that he had consumed honey without awareness. These arguments not only provide insight into the concept of the ban but also outline community legislative processes and the dynamics between its leaders and members.

For Ramban, this type of regulation is binding on future generations in the same way that Joshua's oath on the building of Jericho was:

“And with regard to the fact that it applies to them and their descendants, it seems that this is even true regarding nedarim; in all cases of Kabbalah of the Rabbim, as we find regarding the Kabbalah of the Torah as well as regarding the Megillah, as well as fasts.”

Ramban here is implicitly invoking the following passage of the Talmud:

From the phrase: “But with he who stands here with us this day” (Deuteronomy 29:14), I have derived only that those who stood at Mount Sinai were included in this covenant. From where do I derive that the subsequent generations, and the converts who will convert in the future, were also included? The verse states: “And also with he who is not here with us this day” (Deuteronomy 29:14). And I have derived only that the mitzvot that the Jewish people accepted upon themselves at Mount Sinai were included in the oath. From where is it derived that mitzvot that were to be initiated in the future, for example, the reading of the Megilla, the Scroll of Esther, on Purim, were also included? The verse states: “The Jews ordained and took upon themselves...that they would keep these two days” (Esther 9:27), which is homiletically interpreted to mean: They ordained, in the generation of Esther, mitzvot that they had already accepted upon themselves by oath in the plains of Moab. (Shavuot 39a Sefaria Translation)

The Talmud, based on the scripture's account of the covenant, assumes that a mechanism of communal acceptance is binding for future generations. Such a mechanism seems to be able to be invoked at any time, like during the times of the Megilla, to accept new commandments.

Although not invoked directly by the Talmud, by mentioning the acceptance of fast days, the Ramban is likely referencing the verse in Esther 9:31: " These days of Purim shall be observed at their proper time, as Mordecai the Jew—and now Queen Esther—has obligated them to do, and just as they have assumed for themselves and their descendants the obligation of the fasts with their lamentations."

Accordingly, this verse is to be understood as referencing the four fasts of destruction which the Jews had voluntarily obligated themselves.<sup>33</sup> As Ramban writes elsewhere regarding the obligatory nature of communal fast days:

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<sup>33</sup> See also the commentary of the Ibn Ezra on the verse.

If they wanted they fasted, if they wanted, they ... didn't fast and now they wanted and got used to fasting and accepted them" (Torat HaAdam of Ramban, pg. 243)

Ramban thus introduces the notion that there is a Biblical principle that grants the community the authority to obligate its other members in extra-scriptural legislation both on a local and national level. Although Ramban does not say so explicitly, if we were correct in our analysis that Ramban believed that religious law should intrinsically align with Divine Will, then he likely held that at least regarding national laws, there was a relationship with the self-identifying laws of the national community and the Divine Will.

Correspondingly, it has been posited that for Ramban, the authority of rabbinical decrees and perhaps rabbinical institutional authority itself is based on *Kabalat Harabim*, communal acceptance. Nonetheless, the rabbinical decrees were accepted without the legal strictures of a full Biblical commandment.<sup>34</sup>

One way to understand this binding nature on future generations is to establish the concept of the organic community as a transhistorical corporate entity that can obligate itself at any moment. Future members are only considered to be joining a preexisting charismatic corporation with all the strictures it has already imposed.

R. Baruch Simon<sup>35</sup> points out that this idea of *Kabalat Harabim* as the source of rabbinic authority for Ramban can be gleaned from his commentary to Rambam's *Sefer Hamitzvot* where he quotes the Talmud in *Shavuot 39a* as the source for the binding nature of rabbinic directives.

As we find by Moshe Rabbeinu when he took an oath on Israel and said to them, know that not on your own knowledge I am taking an oath on you but on the knowledge of God and my knowledge. As the verse states (Deuteronomy 29:13) "and not you alone (Deuteronomy 29:13) but those that are here"...the generations that come and converts of

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<sup>34</sup> See Fischer, Shlomo. *Derashot Beit Yishai*. Fischer Family, 1999. A similar understanding can be understood from the responsum of Hasam Sofer YD 107 and OC 145

<sup>35</sup> Simon B. *Sefer Imre Barukh : Sove Ve-Holekh Be-'inyene "Minhag" Uve-Hukotehem Lo Telkhu, Tokef Ha-Minhag Ba-Halakhah, Kolel : 'inyene Lo Titgodedu, Kelale Minhagim Ha-Nohagim Be-Seder Ha-Yom Uva-Mo'adim*. Barukh Hayim Saimon; 2014. 4: pg 65

the future whence do I know? On this the verse states, (Deuteronomy 29:14) “and those that are not here”, and I only know commandments that they accepted upon themselves and Mount Sinai, commandments that the future will invent like the reading of Megilla, whence do I know? On this the verse states, (Esther 9:27) “they established what they accepted earlier. (Hasagot Shorashim 1:3)

Strikingly, in *Mishpat Hacherem*, Ramban continues to conflate the Cherem, which derives its strength from consensus, and the legal enactments of a Beit Din. He writes:

And similarly, if that generation [that imposed the cherem] dies, those that take their place can permit the ban, provided that they be greater than the previous generation in wisdom and number, like the rules of ex-communication (Nidui).

Ramban seems to be referencing the Talmud in Moed Katan 17a. However, the Sugya there does not explicitly mention this phrase of “greater in wisdom and in number,” a phrase more associated with the Mishna in Eduyot regarding the annulment of enactments of the court. In fact, the Sugya only implies that the Sage who removes the excommunication must be greater than the sage who put it in place, not that there is a requirement for there to be a multitude. At the very least, Ramban’s language is suggestive of overlapping themes.

This phenomenon repeats itself when Ramban discusses the permissibility of pardoning the transgressor of the Cherem:

And if **all of them** want to forgive him they can forgive him and permit it...and this can be compared to what is stated regarding the Zaken Mamre that the court can forgive him from death

Here, again, the forgiveness is granted by “all of them,” not a certain legal body. Moreover, the transgressor of the Cherem is compared to the Zaken Mamre, the sage who rebels against the court. Correspondingly, the collective unit of the community is compared to the Beit Din, and their Cherem to its legislative acts.

Ramban goes so far with the parallel of the collective and the sage as to say:

And the same way that they can pardon the transgressor of the Cherem they can also absolve the cherem itself even without requiring the council of a sage in the same manner that sage is entitled to excommunicate himself and also release himself.

Although the parallel here is not of the collective to the court, the equivalence of the collective and the authoritative figure is clear.

Thus, the Ramban supports the notion of a charismatic community that is able to impose enactments outside the realm of strict halakha that hold religious weight simply through its reflection of the will of the community. The local community is seen as a corporate entity that is paralleled to the broader national entity of Israel and whose estrangement from can result in even physical annihilation. That this notion can be applied broadly as the basis of rabbinic law on a larger scale is an easy step to take.

Although not exactly parallel to communal acceptance, it is also interesting to note that when outlining what would be considered a legitimate law regarding dina de-malkhuta (authority of non-Jewish law), Ramban requires public knowledge and universal application which may also indicate that he views law in general to be of contractual nature:

We say Dina DeMalkhuta Dina only when the law is known to the king throughout the kingdom that he and all the kings before him acted according to the matter and codified it in their books... we say Dina DeMalkhuta Dina (the law of the kingdom is the law) but not Dina DeMalka Dina (the law of the king is the law)... and I found a proof...some of the French sages ruled that in a case where Jews were going from one kingdom to the next and in the [previous] kingdom, the king owned all the land, and a Jew bought land [from the new kindom]...that is not Dina DeMalkhuta Dina but Chamnusa Demalka, since it was known that the Jews followed the rules of the Parashim and lived wherever they wanted, and so if the king comes to change the rules then that is not Dina DeMalkhuta.” (Ramban Hiddushim Baba Batra 55b)

Moreover, it is also interesting that Ramban seems to emphasize conservatism, conformity, and epistemic authority to justify the legitimacy of the court:

Now the need for this commandment is very great, for the Torah was given to us in written form and it is known that not all opinions concur on newly arising matters. Disagreements would thus increase and the one Torah would become many Torahs.

Scripture, therefore, defined the law that we are to obey the Great Court that stands before G-d in the place that He chose in whatever they tell us with respect to the interpretation of the Torah, whether they received its interpretation by means of witness from witness until Moses [who heard it] from the mouth of the Almighty, or whether they said so based on the implication [of the written words] of the Torah or its intent. For it was subject to their judgment that He gave them the Torah even if it [the judgment] appears to you to exchange right for left. And surely you are obligated to think that they say “right” what is truly right, because G-d’s spirit is upon the ministers of His Sanctuary, and He forsaketh not His saints; they are preserved forever from error and stumbling. In the language of the Sifre: “Even if they show you before your own eyes that right is left and that left is right — obey them!” (Ramban Devarim 17:11)

Ramban seems to emphasize conformity over strict halakhic truth. It would not be a stretch to apply a similar emphasis to norms accepted by the community. An emphasis on uniformity can likely be motivated by a conception of an organic community as there is a need for the community to remain together. Significantly, Ramban assumes that at least within the Sanctuary, majority acceptance conforms to God’s Will because God’s Spirit is upon them. As we discussed regarding the *zaken mamreh*, Ramban views religious law as conforming to Divine Will and this is an appeal to epistemic authority as the basis for its legitimacy.

Modern scholarship on Ramban’s halakhic jurisprudence has found that such an approach is consistent with his philosophy of halakha in general and much of his literary efforts.

In his recently completed dissertation, R. Itamar Rosensweig<sup>36</sup> argues that a central aspect of Ramban’s halakhic jurisprudence was to maintain consistency and uniformity of a law that adhered to legal precedent. Thus, unlike most of his predecessors who did not feel bound to the post Talmudic Geonim, he devoted much effort to defending Geonic precedents to the extent that “Ramban himself conceived of his defense of the Geonim and Rif as a unified project spanning the arch of his career.”

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<sup>36</sup> Rosensweig I. *The Legal Philosophy and Jurisprudence of Rabbi Moshe Ben Nahman (Ramban)*. Yeshiva University; 2022.



Rosensweig points out that Ramban lived at a time and place of many converging schools and traditions and attempted to systematize the differences. Catalonia, where Ramban was situated, had no previous halakhic cultural associations or traditions. It was neither Andalusian nor Provençal. It would not be audacious to find parallel predicaments between his time and the early modern era where many differing traditions converged, raising questions about the nature of authentic halakhic practice and legitimate innovations. Rosensweig quotes Halbertal who explains:

Each of the twelfth-century halakhists... worked in his own little world, a world in which geocultural borders oftentimes defined the boundaries of discourse and debate. In Nahmanides's halakhic writings, these regional barriers are systematically broken down in a manner unprecedented for the Middle Ages. His Talmudic novellae are the supraregional halakhic text par excellence in terms of range--the distinct creative streams of the long twelfth century all drain into his novellae from as far away as northern France and North Africa, Provence and Andalusia. The full gamut of that great burst of creativity, with all its diversity, was at Nahmanides's fingertips." (, Nahmanides: Law and Mysticism (New Haven and London, 2020), pp. 101-102 )

Ramban was the first great halakhist to draw extensively from both Franco-German and Spanish halakhic cultures in a systematic attempt to collect and compare the various rulings and teachings of the different halakhic traditions. Rosensweig explains:

Ramban's unique position as the great synthesizer of these disparate traditions would immediately bring to the fore the question of how to unify the various streams of halakhic thought into a stable and coherent system of law. One important tool for managing the traffic flowing in from all directions is to give the right of way to the established (geonic) legal precedent, whose tradition appeared to present the last unified halakhic tradition before it had splintered into the disparate cultures of Europe (Ashkenaz, Zarfaz, Italy, Provence, Christian Spain), Andalusia and North Africa.

Rosensweig suggests that Ramban's project of restoring geonic precedent should be understood against the historical backdrop of the twelfth century- "a century of halakhic revolution whose force had the potential to shatter the cohesion and stability of Jewish law."

Rosensweig states:

The twelfth century was a century of halakhic revolution. In northern France, the tosafists refined a sophisticated method of dialectic, which they systematically applied to reinterpret the written page of the Talmud. Rabbenu Tam and Ri articulated and applied new principles that reverberated throughout the entire system of Jewish law. In Provence a newfound sense of independence and self-confidence led Rabad to break from the Geonim and their traditions. Likewise, Rambam's comprehensive restatement of Jewish law not only divorced halakhic rulings from the Talmud's enigmatic give and take, but fundamentally restructured the conceptual principles that underlie Jewish law. Not since the redaction of the Mishnah had Jewish law been so fundamentally and so thoroughly reconstituted... The wave of new concepts and novel interpretations also threatened the stability of the law, its transmission and legitimacy. If Rabbenu Tam and Rabad could reinterpret the significance of the talmudic discussion and cast aside hundreds of years of geonic precedent, then Jewish law was just a matter of interpretation, a malleable tool at the mercy of a creative jurist.

Locally, these novel halakhic approaches could be contained. However, universally absorbed, Ramban, the inheritor of these watershed innovations, had to find a way to stabilize and even legitimize the system before it ran off course.

In addition to the historical backdrop, Rosensweig highlights a few of the axioms underlying Ramban's philosophy of halakha that motivated his animated defense of the Geonim.

As we have already noted, unlike Rambam, Ramban is more vested in epistemic authority than institutional authority. As an heir to the legacy of the Amoraim and the Savoraim, the Ramban seemed to believe that the Geonim were privy to legal insight and intuition of God's Will.

This epistemic assumption was even more fundamental because as Rosensweig shows, Ramban conceived of the Talmud as a closed text which was difficult to interpret without a guide steeped in the tradition. For Ramban, normative conclusions from the Talmud are nigh impossible without tradition, as evidence can easily be framed in many directions. As a book of tradition, the Talmud needs to be understood in the context of its previous interpretations.

Similarly, Rosensweig argues that Ramban may have held a normative view of kevar horah zaken<sup>37</sup> that halakhic rulings should follow chronological priority over later halakhic cultures.

These assumptions about the philosophy of halakha help provide the underlying conceptions of an idea of Kabbalat Harabim. As we will discuss, Kabbalat Harabim assumes, to varying degrees, a source of authority that is independent of, and even skeptical of, a mathematics-like interpretation of the text. Instead, it emphasizes normative uniformity, tradition likely maintains an identification with communal acceptance and Divine Will.

Intriguingly, in his introduction to *Milhamot haShem*, Ramban both alludes to the principle of *Lo Tasur* and explicitly appeals to a normative halakhic principle that requires a scholar to yield to the rulings and precedents of a greater court as well as to the precedent set by an earlier court.

It is evident from my treatise [*Milhamot*] that the majority of disagreements [between Rif and R. Zerahyah] are to be resolved in favor of our master [Rif]. And even when the evidence is in equipoise [favoring neither] we are nevertheless obligated by the law [of *Lo Tasur*] not to deviate at all from his [Rif's] rulings (*beli le-hattot mi-devarav yamin u-semol*). As we are taught: “[if there is a dispute about the law] follow the scholar who possesses greater wisdom and whose rulings enjoy greater support.” All the more so [we are bound to follow Rif] for he came first, and [the later scholars] had no right to argue [with him], for they should have said “an elder scholar has already ruled” (*kevar horah zaken*).” (Rosensweig Translation)

As Rosensweig highlights, it's not necessary to conclude that Ramban's interpretation of *Lo Tasur*, a halakhic rule regarding the authority of the high court, would directly apply to deciding disputes between the Rif and his later opponents. Rosensweig proposes that the combination of Ramban's reference to *Lo Tasur* (*beli le-hattot mi-devarav yamin u-semol*) and his appeal to a normative obligation to respect the precedent set by earlier scholars offers strong

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<sup>37</sup> “The Elder has already ruled” See *Shabbat 51a* which relates a story in which R. Yehuda HaNasi retracted his halakhic ruling after being informed that his “Elder”. R. Yosi “had already ruled” differently on the matter.

evidence that Ramban's defense of the rulings of Rif and the Geonim aimed at establishing stability and promoting legal uniformity through binding precedent, as he mentions in his interpretation of Lo Tasur.<sup>38</sup>

If this is correct, it clarifies how Lo Tassur can act as the *asmachta* for an idea of *Kabbalat Harabim*. For Ramban, the broader implication of the rule is to ensure uniformity; praxis that is accepted as normative by the community can therefore become incorporated into the canon of tradition and is likely of Divine sanction.

### **Kabbalat HaRabim for Rambam: Representative**

Although he may disagree about the source of rabbinic authority, even Rambam agrees that communal consensus plays a role in creating binding law. Rambam focuses on the laws of court enactments (*Takanot*) as presented by the Talmud that seem to be constrained by public interaction with the decree. As we will discuss, a compelling way to understand Rambam's presentation of these laws is to explain them based on a concept of Representation where the court is viewed as the representative of the general will of the public and therefore the public's response to its decrees plays a role in the legitimacy of the law. This idea will have to be evaluated in light of our aforementioned assertion that for Rambam all law positively maintains its legitimacy through deontological institutional authority.

The basic rule regarding the annulment of enactments is based on the Mishna in *Eduyot* 1:5 that an enactment remains eternally binding unless annulled by a later *Beit Din* is greater in number and in wisdom. The Mishna does not explain why a *Beit Din*'s enactment would be

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<sup>38</sup> Rosensweig is not sure if Ramban would apply his idea of precedent beyond the Geonic period. However, he brings evidence suggesting that the Ramban would. Additionally, despite all that we have been saying, it is interesting to note that Haym Soloveitchik singles out the Ramban for not attempting to justify communal practices, unlike the Tosafists. Rosensweig, however, appears very skeptical of this broad conclusion.

binding on later generations, but the prerequisite for its annulment seems to indicate that the reason is epistemic: a wiser, larger consensus likely had a good reason for the enactment.

However, the basis for the notion that communal acceptance is a factor in the legitimacy of a decree is the Talmudic passage in Avodah Zara that seems to indicate that there is an additional justification for a decree's annulment. The Sugya discusses annulling the prohibition placed on gentile oil that was instituted by generations prior and makes it dependent on the community's ability to abide by the decree:

Rav Mesharshiyya said: What is the reason that none of the eighteen decrees can be voided? Since the prohibition spread among the majority of the Jewish people, it cannot be voided. (Avodah Zara 36a with Sefaria explanation)

The Gemara brings the example of 18 Takanot that can never be voided since they have achieved communal acceptance. The nature of these 18 enactments is unclear. Most commentators do not understand that the communal acceptance is the sole reason for their inability to be voided. The basic understanding is that these 18 enactments are eternal either because they are preventative decrees (seyag) or because they were accepted with the risk of life. Either way, the Gemara assumes that despite those factors, only because of their acceptance did they achieve their legitimacy, and therefore an enactment that did not have acceptance can be voided:

But with regard to oil, its prohibition did not spread among the majority of the Jewish people, and therefore it can be voided. As Rabbi Shmuel bar Abba says that Rabbi Yoḥanan says: Our Sages sat and inspected the matter of gentiles' oil and determined that its prohibition had not spread among the majority of the Jewish people, and our Sages relied upon the statement of Rabban Shimon ben Gamliel and upon the statement of Rabbi Elazar bar Tzadok, who would say: The Sages issue a decree upon the community only if most of the community is able to abide by it. As Rav Adda bar Ahava said: What is the verse from which it is derived? It is the verse: "You are cursed with the curse, yet you rob Me, even this whole nation" (Malachi 3:9). This teaches that if there is the acceptance of the whole nation, yes, an ordinance may be instituted, but if not, no, the ordinance may not be instituted. (Avodah Zara 36a-36b with Sefaria explanation)

The Sugya deals with a basic question: Can a later Beit Din (presumed to be inferior to the earlier one) annul the legislation of a previous one? The answer given is that they may only do so if they ensure that the legislation did not take universal hold, because the rule is that enactments may not be legislated if the community cannot uphold them. There is no mention that communal acceptance of legislation is sufficient to create a binding Takkanah nor does it raise the possibility of communal self-legislation of a Takkanah. It is also unclear as to when the lack of communal acceptance voids the Takkanah: is it only at the outset of the enactment, or is it subject to later revision even if initially accepted? Also subject to interpretation is the nature of the communal acceptance discussed as defined by the phrase “Not able to uphold (Ein Yachol Laamod).” Does it include situations when the community simply refuses to adhere to the legislation or is it only a result of the community’s physical or mental incapability to maintain the Takkanah?

In Hilkhhot Mamrim, Rambam takes a stance on some these questions:

The following rules apply when a court issued a decree, instituted an edict, or established a custom and this practice spread throughout the Jewish people and another court arose and sought to nullify the original order and eliminate the original edict, decree, or custom. The later court does not have this authority unless it surpasses the original court in wisdom and in its number of adherents. If it surpasses the original court in wisdom, but not in the number of adherents, or in the number of adherents, but not in wisdom, it cannot nullify its statements. Even if the rationale for which the original court instituted the decree or the edict is nullified, the later court does not have the authority to negate their statements unless they are greater. How is it possible that the later court will surpass the original court in number- for every Supreme Sanhedrin consists of 71 judges? The intent is the number of sages in the generation who consent and accept the matter stated by the Supreme Sanhedrin without opposing it.

When does the above apply? With regard to matters that were not forbidden to create a safeguard for the words of the Torah, but rather resemble other Torah laws. A different principle applies, by contrast, with regard to matters which the court sought necessary to issue a decree and create a prohibition as a safeguard. If the prohibition spread throughout the Jewish people, another Supreme Sanhedrin does not have the authority to uproot the decree and grant license even if it was of greater stature than the original court. (Mamrim 2:2-3 Sefaria translation)

Rambam outlines clear distinctions in his legal framework: biblically derived rulings (horaot), enactments (takanot), and preventative decrees (seyag). According to him, revising biblically derived rulings is the easiest, while changing enactments is more challenging, and annulling preventative decrees is almost impossible. Rambam seems to interpret Scripture as a truth-based process, making it easier to revise based on new understanding. In contrast, he views rabbinically established norms as matters of political judgment, allowing later courts to question earlier decisions but not to declare them false. Revisions may only be made under certain conditions, including communal acceptance, that avoid political disruption.<sup>39</sup>

Rambam bases the strength of rabbinic legislation on the level of communal acceptance. Moreover, even the initial ability of the court to legislate is dependent on communal acceptance:

When a court sees it necessary to issue a decree, institute an edict, or establish a custom, they must first contemplate the matter and see whether or not the majority of the community can uphold the practice. We never issue a decree on the community unless the majority of the community can uphold the practice.

If a court issued a decree, thinking that the majority of the community could uphold it and after the decree was issued, the majority of the community raised contentions and the practice did not spread throughout the majority of the community, the decree is nullified. The court cannot compel the people to accept it.

If the Sages issued a decree and thought that it spread among the entire Jewish people and the situation remained unchanged for many years. After a long duration of time, another court arose and checked throughout the Jewish community and saw that the observance of this decree had not spread throughout the Jewish community, it has the authority to negate the decree even if it is of lesser stature than the original court in wisdom and in number of adherents. (Mamrim 2:5-7)

In these laws, Rambam goes into detail about the case discussed in laws 1-3. There he had emphasized that norms must be widely adopted by all of Israel before they can be overturned or become irreversible. The court assesses if the community can bear the norm as its widespread

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<sup>39</sup> This interpretation is based on Brafman, Yonatan Y. "Philosophy, Interpreter of Halakha." *Studies in Judaism, Humanities, and the Social Sciences* 2.1 (2018): 69–82. Web. This relates to our previous discussion of Rambam's position that Rabbinic law is positive. More on this below.

acceptance is crucial. Rambam now presents two scenarios. In the first, the court believes the norm can be borne, but the people do not take it seriously, rendering it void and unenforceable. The second scenario involves different courts and the passage of time, allowing the later court to cancel the norm if it has not spread, even without surpassing the original court's wisdom and size.

This ruling seems to be based on the Talmudic passage in Avodah Zara discussing the ability of the court to annul rabbinic legislation. Based on this Sugya, R. Yosef Karo, famed commentator of the Rambam raises the possibility that even for Rambam communal acceptance can be normatively binding:

If this is true, then why should an Amora not be allowed to argue against a Tanna? Yet, we always ask questions on Amoraim by forcing them to reckon with Tannaitic material?... However, it is possible that after the Hatimat Hatalmud the later generations accepted upon themselves not to argue against the earlier generations... (Kessef Mishna, Mamrim 2:1 s.v Beit Din)

Similarly, this Sugya is likely where Rambam supports his idea of consensus playing a crucial role in grounding the universal authority of the Talmud:

Thus, Ravina, Rav Ashi, and their colleagues represent the final era of the great Sages of Israel who transmitted the Oral Law. They passed decrees, ordained practices, and put into effect customs. These decrees, ordinances, and customs spread out among the entire Jewish people in all the places where they lived... Every court that was established after the conclusion of the Talmud, regardless of the country in which it was established, issued decrees, enacted ordinances, and established customs for the people of that country - or those of several countries. These practices, however, were not accepted throughout the Jewish people, because of the distance between [their different] settlements and the disruption of communication [between them]. Since each of these courts were considered to be individuals - and the High Court of 71 judges had been defunct for many years before the composition of the Talmud - people in one country could not be compelled to follow the practices of another country, nor is one court required to sanction decrees which another court had declared in its locale. Similarly, if one of the Geonim interpreted the path of judgment in a certain way, while the court which arose afterward interpreted the proper approach to the matter in a different way, the [opinion of the] first [need] not be adhered to [absolutely]. Rather, whichever [position] appears to be correct - whether the first or the last - is accepted. These [principles apply regarding] the judgments, decrees, ordinances, and customs which were established after the conclusion of the



Talmud. However, all the matters mentioned by the Babylonian Talmud are incumbent on the entire Jewish people to follow. We must compel each and every city and each country to accept all the customs that were put into practice by the Sages of the Talmud, to pass decrees paralleling their decrees, and to observe their ordinances, since all the matters in the Babylonian Talmud were accepted by the entire Jewish people. And the [Talmudic] Sages who established ordinances and decrees, put customs into practice, arrived at legal decisions, and taught [the people] concerning certain judgments represented the totality of the Sages of Israel or, at least, the majority of them. They received the tradition regarding the fundamental aspects of the Torah in its entirety, generation after generation, [in a chain beginning with] Moses, our teacher. (Introduction to Mishneh Torah Sefaria Translation).<sup>40</sup>

In the introduction to his commentary on the Mishna when discussing the different categories of rabbinic law Rambam explains why this may be:

[When discussing the fourth category of laws] And when there occurs agreement about one of the ordinances, none can disagree with it on any account. And when its prohibition spreads to all of Israel, we may not disagree with that ordinance – even the prophets, themselves, were not permitted to abrogate it. And so, they said in the Talmud (Avodah Zarah 36a) that Eliyahu, his memory should be for the good, was not able to abrogate one of the eighteen things that the House of Shammai and the House of Hillel decreed. And they brought a reason for this – that it is since their prohibitions spread to all of Israel

The fifth division are the laws that are made by way of investigation and consensus about things that occur among people – that do not have in them an addition to a commandment, nor a subtraction – or about things that are of benefit to people in matter of the Torah. And the sages called them decrees (takanot) and practices (minhagim). And it is forbidden to transgress them; and Shlomo, peace be upon him, already said (Ecclesiastes 10:8), "one who breaches a fence will be bitten by a snake." And these decrees are very numerous and are mentioned in the Talmud and in the Mishnah – some of them about what is prohibited and forbidden, and some of them about monetary issues. (Introduction to the Commentary on the Mishna Sefaria translation)<sup>41</sup>

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<sup>40</sup> There do seem to be two reasons given for the Talmud's authority. 1. It was universally accepted i.e consensus. 2. Its ideas a direct transmission from Sinai. These two aspects will be important later when we read R. Kook. It does seem that, for Rambam at least, there are limits to the authoritative purview of communal acceptance.

<sup>41</sup> Rambam here only invokes the Sugya in Avodah Zara when referencing Gezerot. His reference to the eighteen prohibitions seems to imply that he is discussing Gezerot that were instituted as preventative decrees (seyag) (which was likely his understanding of the prohibitions' inability to be reversed as he writes in Mishneh Torah that preventative decrees are irreversible.) This read is further buttressed by the continuation where he writes that they are irreversible even by later prophets; if he was not discussing preventative decrees then a later prophet (in a court that is greater in size and wisdom) would be able to reverse it as Rambam codifies in Mamrim 2:3. See Raavad Mamrim 2:2 s.v Beit Din. Nonetheless, the language of Rambam in Mishneh Torah indicates that he still derived the source of the binding nature of established communal custom from the Sugya in Avodah Zara ("pashat issuran bichol yisrael"), although most versions of the text do not invoke the verse in Micha in context of the fifth category. It is worth noting that, like in Mishnah Torah, the fifth category only discusses rabbinically initiated legislation; he does not raise the possibility of communally initiated, grassroots legislation.

In sum, it would seem that unlike Ramban who grants *Kabalat Harabim* authoritative status to determine the law in its own right, for Rambam, while it is not what gives the law its authority, it would at least be a necessary component of the establishment of legislation.<sup>42</sup> To understand the relationship between communal consensus and legislation it will be useful to consider how Rambam interpreted his source, the *Sugya* in *Avodah Zara*.

Because the *Sugya* indicates that an enactment is only binding if a community can uphold it, Rambam derives a normative rule that before issuing an enactment, a *Beit Din* is required to formally investigate if the community will be able to uphold the pending legislation. His presentation seems to indicate that this is not merely practical advice but a normative requirement.

If the *Kesef Mishna* is correct, then Rambam is taking an extra step by applying the regulations of legitimate legislation positively. The enactments in question were initiated by the court and subsequently determined to have taken a universal hold. It does not have to follow that because enactments may not be bindingly legislated if the community cannot uphold them then legislation that is self-upheld by the community must be considered binding. Moreover, Rambam is seemingly allowing for legislation to be initiated by the community without the involvement of the *Beit Din*.<sup>43</sup>

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<sup>42</sup> We may be able to distinguish between different types of legislation and its sources. For example, *Lo Tassur* may only apply to laws enacted by the *Beit Din Hagadol* in Jerusalem and that there is a different mechanism that binds Talmudic Law. See Berger, *Rabbinic Authority* Chapter 3. I am only attempting to build the case that for Rambam, communal acceptance plays a role in making legislation binding. If Rambam strictly holds that the Talmud is binding only in terms of its law as a *Takkanah* and not simply because it is the words of the sages, we may be able to make a distinction between Talmudic Law and the authority of the Talmud's method of derivation. Indeed, in his letter to his student R. Yosef, he seems to say that the give and take (*shakla vetarya*) of the Talmud is less important. See *Iggeres HaRambam*, R. Sheilat edition pp. 257–259. We will discuss this more below.

<sup>43</sup> Rambam does not discuss whether there must be involvement of *Beit Din* for legislation to pass. It could be that the *Kesef Mishna* is innovating that although there was no formal court enactment to accept the Talmud, the consensus of the nation can decide to obligate themselves to the court-initiated laws that are to be found within the Talmud. The requirement for some level of rabbinic initiation may explain the two reasons in Rambam's

Despite not explicitly mentioned as a possibility in the Sugya in the Bavli, Rambam seems to allow for even the annulment of legislation to happen organically from the community without the formal involvement of Beit Din.<sup>44</sup> Moreover, although the Sugya in the Bavli only seems to speak of the communal evaluation at the time of the decree, Rambam seems to allow annulment through the determination of its communal acceptance even at a later stage in history years after the formal enactment.<sup>45</sup> In fact, it seems that he would only require formal annulment by the Beit Din in a situation where there was initially a thought to be universal acceptance that changed over time.<sup>46</sup>

What is even more striking is that Rambam seems to broadly interpret “Not able to uphold (Ein Yachol Laamod)” to even include situations when the community simply refuses to adhere to the legislation despite being technically capable.<sup>47</sup> Rambam can even uphold this interpretation while maintaining that there is a general prohibition to flout the legislation of the Beit Din (Lo Tassur).

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Introduction to Mishneh Torah (consensus and tradition). Moreover, this may mean that the “Talmud” that was accepted was not the body of the text, but the laws contained within it. This may mean that the argumentation found within cannot be binding. Rambam in a letter says this explicitly see above n. 46.

<sup>44</sup> See R. Joseph B. Soloveitchik, “Shnei Sugei Mesorah,” in Shiurim Le-Zekher Avi Mori, 228-231, who explicitly reads like this. See Kessef Mishna Kriat Shema 4:8. At most, formal annulment by the Beit Din is only required if the community could technically adhere to the enactment and it was once universally accepted but chooses not to.

<sup>45</sup> This is complicated. See Kessef Mishna Mamrim 2:7. This relates to the general debate of whether the ability to spread universally is an indication of the community’s ability to adhere to the enactment or if those are independent factors. See further Tosfot Avodah Zarah 36a s.v. vaha-tenan

<sup>46</sup> Kessef Mishna Kriat Shema 4:8. It is also worth noting that the requirement for formal annulment does not necessarily indicate that the original legislation had any legal standing. This might be ascribed to a technical requirement motivated by the intention to maintain the prestige of the original court; see Ritba on BT 'Avodah Zarah 35b, s.v. mikhlal, regarding the permitting of bread baked by non-Jews (which had originally been prohibited by Rabbinic decree). See Berger, p. 192

<sup>47</sup> As he says “the majority of the community raised contentions (pikpeik)” see Kessef Mishna Kriat Shema 4:8, also R. Meir Dan Plotsky, Kli Hemda, Haazinu 337:1, 340:1

One way to address these points is to say that Rambam took a broader and more holistic approach to the role and authority of the Beit Din, that perhaps stemmed from his understanding of the Sugya in Avodah Zara and the verse quoted there from Micha.<sup>48</sup>

As Blidstein points out, Rambam's understanding of the court in this context can be formulated in two different ways.

One approach is establishing the authority of the court independent of the community but to explain that legally, lack of public compliance is a procedural deficiency in the legislation that would undermine the legitimacy of the court's legislation.

Another approach is the idea of representation. Berger calls such an approach, Authority Transformed.<sup>49</sup> In this perspective, the nation can legislate for itself and the people's acceptance of enactment of the sages indicates that they view those sages as their representatives. The court may be considered nothing more than the legislative representatives of the community so that if the public rejects what is legislated in its name the law has no standing.

Such an approach can be found in a responsum of the R. Elijah Mizrahi:

And the reason is because all the people of the generation rely on their actions and their enactments whether they be spiritual or material, and even if they are not explicit about this, we are witnesses that they rely on them for everything and it is as if they have clarified and confirmed in them that all that they do and enact will be established... This was the power which was granted to the High Court in Jerusalem and to every court in every generation. . . because the high court in every generation is recognized by all members of that generation. . . and it is for this reason that they were granted the power to issue decrees and ordinances. And although it was not explicitly chosen and no specific conditions were agreed upon, it is a fact that everyone recognized it . . . and although

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<sup>48</sup> Blidstein examines Rambam's sources for incorporating communal practice into his discussion of canceling Rabbinically established norms. He explores whether the Islamic legal concept of 'ijma' influenced Rambam. Blidstein finds that while there are differences between the two, both seek to determine correct rulings, with 'ijma' focusing on scholars' consensus and Rambam on the community's practice. Furthermore, 'ijma' serves as an epistemological tool, whereas Rambam appears to have political considerations. Blidstein suggests that Rambam's primary concern was preventing community division, which made it challenging to cancel deeply entrenched practices due to the potential for social strife. See further in Blidstein, Authority

<sup>49</sup> See further in Berger Chapter 7

someone may object, it is as if he explicitly gave his consent and then changed his mind" (Responsa of R. Elijah Mizrahi no. 57, Blidstein translation).<sup>50</sup>

Such an approach is consistent with the ideas of positive law that we have explored earlier in Rambam's philosophy of halakha. If the law derives its authority simply through its institutional source, then the way to undermine the law is to undermine the force of the institution.

Understanding the Beit Din as representatives of the nation could explain how Rambam would allow for the refusal to adhere to the enactment of the Beit Din despite the prohibition of Lo Tassur. One option, as we have pointed out earlier, is to say that for Rambam, the prohibition of Lo Tassur is to destabilize the institution of the Beit Din but that disagreement with specific enactments would not fall under the prohibition. Applying the representative model, opposition by the majority can indicate that the Beit Din that issued the enactment was not acting as the institution that falls under the prohibition. Alternatively, communal adherence acts as the litmus test to prove that this disobedience is a challenge only to the specifics of their enactment but not the institution itself. The apparent tautology would be indicative of the very nature of the relationship.

Rambam may also need to conceive of a corporate charismatic community so that institutions can maintain authoritative power over later generations. It could be that the representative nature of the court is not for a temporal community but for the broader transhistorical, corporate community, in the spirit of Chesterton's "democracy of the dead." The community is viewed as a cohesive entity, maintaining its continuity over time, even as its

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<sup>50</sup> See Blidstein's discussion, in "Individual and Community," p. 226. Mizrahi employs identical reasoning to assert the authority of both the High Court in Jerusalem and the contemporary local court. Scholars from this Turkish period appear to possess a robust grasp of democratic and consensus-driven governance principles. See 'Azriel Shohat's "'Inyanei misim ve-hanhagot sibbur be-qehillot yavvan be- me'ah ha-16," in *Sefunot* 11 (1971-78): 311-39.

members evolve from one generation to the next. Berger even suggests that the requirement for the annulment of a later court to be greater in wisdom and number is because the later annulment is an “imaginary ‘face-to-face’ deliberation” of the legislation which will then only succeed if they are more convincing (greater in wisdom and the majority (greater in number)).

R. Joseph B. Soloveitchik famously finds these ideas of representation and the dyadic relationship between the people and the court in Rambam’s presentation of the role of Beit Din in Hilkhhot Mamrin and in the Halakhot of Kiddush Hachodesh.

Based on the paragraphs of Mishneh Torah we have just examined, R. Soloveitchik makes the broader claim that:

There are two types of tradition (Mesorah): (A) One tradition is entirely related to the tradition of learning, argument, give-and-take, and intellectual instruction, this one says so and the other says so, this one gives a reason for his opinion and the other one gives a reason for his opinion, and they take a vote. . . . (B) A practical tradition of the behavior of the all of Israel in the fulfillment of the commandments. . . .(Brafman Translation)<sup>51</sup>

R. Soloveitchik differentiates between the intellectual authority of the rabbinate and the practical authority of the Jewish community. Rabbinate norms depend on intellectual justification and can evolve over generations, while communal practices are firmly established and no longer need justification. Once a rabbinical norm is accepted by the Jewish community, it can only be overturned by a higher rabbinic court and even becomes permanent for preventative decrees.

Brafman highlights two significant points in R. Soloveitchik’s read. First, according to R. Soloveitchik, once the Jewish community "accepts" a norm, their decision becomes irreversible, and their current wishes cannot change it. Second, even when the community immediately

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<sup>51</sup> Shnei Sugei Mesorah. For a different less conceptually innovative but recent perspective of Rambam’s position see Eliezer Berkovitz Not in Heaven: The Nature and Function of Jewish Law. An interesting sociological perspective of this concept was made famous by Haym Soloveitchik who analyzed the contemporaneous shift in Judaism from the “mimetic tradition” to a text-based religion. See Soloveitchik, Haym. 2021. Rupture and Reconstruction : The Transformation of Contemporary Orthodoxy. Littman Library of Jewish Civilization (Series). Littman Library of Jewish Civilization, in association with Liverpool University Press.

rejects an enactment there is still a requirement for the court to formally annul it. This underscores that ultimate authority still rests with the court, despite acknowledging the authority of the Jewish people. In his essay on Kiddush Hachodesh, R. Soloveitchik explicitly connects this notion to an understanding of Representation.<sup>52</sup>

Rambam writes in Hilkhos Kiddush Ha-chodesh (5:1):

Everything that we have said regarding establishing Rosh Chodesh based on re'iyah and a leap year...is done only by a Sanhedrin in the Land of Israel, or a court of ordained scholars who were authorized by the Sanhedrin.

He learns this from the verse in Parashat Bo, where God tells Moshe and Aharon, "This month is for you the head of the months."

Rambam cites a tradition that interprets the verse to be saying that the commandment of designating the months is entrusted "to you" – to people of a stature and level of authority similar to that of Moshe and Aharon.

Rambam understands that this implies the need for the Sanhedrin. In the absence of a Sanhedrin, the re'iyah procedure is to be replaced by the cheshbon (calendar) system.

A similar rule is mentioned in the Mekhilta on this verse, "A leap-year is established only by the High Court in Jerusalem." Rambam seems to have understood that this applies not only to designating leap-years, but to the designation of months, as well.

Rambam, however, disagrees, because as Rambam himself writes, the re'iyah system remained in use years after the Sanhedrin had dissolved, through the generation of Abaye and Rava.

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<sup>52</sup> R. Soloveitchik may understand Rambam's requirement for a formal enactment of the Beit Din because that is the only legal process to annul legislation despite their function as representatives reflective of communal will. Alternatively, formal enactment may be the way that Beit Din reaffirms their representational position.

To defend Rambam, R. Soloveitchik<sup>53</sup> posited that the Beit Din functioned not simply as the supreme legal authority, but rather as the nation's legal and halakhic representative.

R. Soloveitchik shows that this idea appears elsewhere in Rambam's thought. For example, in Hilkhhot Terumot 1:2 Rambam rules that for territory to gain the legal standing of Eretz Yisrael it must be conquered by a Jewish king or prophet "with the consent of the majority of Israel." However, when describing the actual process of the conquest (Hilkhhot Melakhim 5:6), he requires the consent of the Beit Din. Apparently, the Sanhedrin can serve as the nation's representative body, speaking and deciding on their behalf.

R. Soloveitchik references multiple sources (Masekhet Berakhot 49a; Shemot Rabba 15:3, 24, 30) that emphasize the involvement of "Israel" as a whole, not solely the Court, in proclaiming the new month. The Gemara famously explains that due to this reason, the blessing recited during kiddush and prayers on Yom Tov concludes with the phrase "He who sanctifies Israel and the hallowed occasions" ("Mekadesh Yisrael ve-ha-zemanim"). We mention the sanctification of Israel before that of the festivals because the sanctity of a given day as Yom Tov is established only through the sanctity of Israel, who possess the authority to declare the start of a new month.

This implies that the responsibility of maintaining the calendar rests with the entire nation, not solely with the Sanhedrin. R. Soloveitchik also brings other proofs to bolster this idea. For example, Rambam does not list the responsibility of declaring the months when listing the procedures that require the Sanhedrin (Sanhedrin 5:1). Apparently, for kiddush ha-chodesh, the Sanhedrin operates as the representative body of the entire nation.

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<sup>53</sup> R. Joseph B. and R. Moshe Soloveitchik, *Kovetz Chidushei Torah* (pp. 47-65). Jerusalem: Machon Yerushalayim, 1984.



R. Ohad Fiksler<sup>54</sup> points out this function of Sanhedrin regarding the commandment of circumcision. The Talmud (Kedushin 29a) states that if a father fails to circumcise his son then the Beit Din is responsible to have the circumcision completed. Rambam in Peirush Hamishna (Shabbat 19:6) states that this is really an obligation of each individual. In fact, in Milah 1:1, Rambam does not even mention the Talmud's obligation of the Beit Din to ensure the Milah completed. It seems that Rambam viewed the role of the Beit Din as being the representative body that can fulfill the obligations of individuals.<sup>55</sup>

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<sup>54</sup> R. Ohad Fiksler. Consent of the Public in Halakhah, Tsohar : Ktav Et Torani 43 (2019) 125-146

<sup>55</sup> A similar discussion of the Beit Din acting as representatives for Klal Yisrael can be seen from the discussion of the requirements of Eretz Yisrael for Semicha, the convention that allows for a Sanhedrin to be reinstated. In Sanhedrin 4:6 Rambam says that the boundaries for ordination in Israel are those outlined for the generation that left Egypt. This is difficult because in Terumot 1:5 and Beit Haba'chirah 6:16 Rambam holds that the holiness maintained within those borders was lost and never regained after the exile.

R. Michael Rosensweig explains that it seems clear that the Rambam held that there were two elements regarding the holiness of the land. Even though the sanctity for mitzvot that depends on the land is determined by the later borders, that doesn't render the first sanctity of the initial borders irrelevant. Eretz Israel also serves as the preeminent place of the Shekinah and the headquarters of corporate Klal Israel (which lives on from first holiness). The requirement for Semicha to be within Eretz Yisrael is based on its function as a collective interest of the nation and therefore it follows the holiness of the land which represents the notion of the collective headquarters. Although there are technical aspects of semichah (it allows for someone to be a judge of capital cases), it also represents the mesorah (tradition) of oral Torah, as Rambam describes in the Mamrim 1:1 the Great Court in Jerusalem is manifestation of the body of oral Torah. Ordaining future sages of the Mesorah requires Eretz Yisrael because it is the embodiment of passing on the Mesorah, which certainly represents the collective interests of Klal Yisrael. The Or Sameach (Sanhedrin 4:6) suggests that the Rambam's source for the earlier boundaries comes from the Talmud Horiot 3 regarding Par Helem Davar Shel Tzibbur, a clear national interest, which requires "Kahal Yisrael" which is defined by Eretz Yisrael.

R. Rosensweig pointed out that this explains why there is no necessary source for the requirement of Eretz Yisrael for semicha. It is obvious that the convention of Semicha is limited to the Land of Israel, because that is the headquarters of Klal Yisrael.

In Sanhedrin 4:11 and Peirush Hamishna Sanhedrin 1:3/Bechorot 4:3 Rambam controversially rules that Semicha can be reinstated with the consent of the sages of Israel. R. Rosensweig explained that rabbinic leadership is about embodying the message. One way to do that is through the ordination of one rabbi from another, but another way to do this is through the consensus of the sages of Israel.

This idea also explains why it is that the very first ordination (from Moshe to Yehoshua) took place outside of Israel. Although it can be technically explained that before entering the Land there was no requirement for it to be instituted in the Land of Israel. R. Rosensweig suggested that, perhaps it is more fundamental to the convention of Semicha. No one has ever embodied the collective interests of the nation more than its leader Moshe. Perhaps that is why the original Semichah didn't require Eretz Yisrael.

This is highlighted by the language of Rambam in Sanhedrin 4:11. There he describes the ordination through transmission and traces it back "to the Beit Din of Joshua to the Beit Din of Moses". Why did he feel the need to mention both Moses and Yehoshua? R. Rosensweig suggests that Rambam's intention is to stress that Moshe had a unique status and stature as the representation of the collective interests of the nation. I am grateful to Aaron Brooks for sharing his unpublished notes on this.

Based on this theory of representation, Rabbi Soloveitchik proposed a potential solution to the persistence of re'iyah system even after the disbandment of the Sanhedrin shortly before the destruction of the Temple. As the practice of the re'iyah system is the responsibility of the entire nation, rather than being directly designated to the Sanhedrin, it becomes conceivable for another representative entity to assume this role. Despite the dissolution of the Sanhedrin, scholars with authoritative knowledge of halakha continued to exist in Eretz Yisrael, serving as the representative voice of the Jewish people. Consequently, they possessed the authorization to uphold the re'iyah system. Only in the later stages of the Amoraic period, specifically during the era of Abaye and Rava, when Eretz Yisrael lacked such a recognized authoritative body, did the use of the re'iyah system fade away.

R. Soloveitchik's innovation here is twofold. One is of course his discovery the court is acting as the representative of the nation. But more significantly, the Rav is also introducing the possibility that there can be a legal body that functions in this representative role even after the abolishment of the formal Sanhedrin.

This has important implications for our discussion. Rambam seems to imply that whatever role Kabbalat Harabim has, for a law to be legitimate, it must be formally legislated.<sup>56</sup> However, as already noted by the Kessef Mishna, his justification for the authority of the Talmud does not indicate that any formal institution first legislated the Talmud before it was granted authority through universal acceptance.

Some scholars, like R. Wasserman assume therefore that there must have been a formal conclave of all or most of the Sages at the time of Ravina and Rav Ashi and that a gathering of all or most of the sages is considered to maintain the legal status of a Beit Din (and part the

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<sup>56</sup> He never raises the possibility of grassroots legislation. He only discusses rabbinically initiated legislation.

project of R. Issac Halevi's Dorot Harishonim was to prove this historically). Nonetheless, as R. Shlomo Fischer<sup>57</sup> and others point out, there is no real evidence of this ever occurring or that Rambam even believed that there was. All Rambam does emphasize is that the rabbis that comprise the teachings of the Talmud upheld the stature of the Sages of Israel who had obtained the transmitted tradition.

It seems that Rambam recognized the role of Kabbalat Harabim in legislation as validating not praxis but institutional authority. Interestingly, as noted by R. Soloveitchik, Rambam believes that the public can also confer authority to bodies that did not maintain all the formal features of the Sanhedrin. Perhaps, this could explain how the public can confer absolute authority to the Talmud despite it not being a formal Sanhedrin. According to Rambam, it appears that text<sup>58</sup> could be considered a binding authority when accepted as the collective voice of the people.

Such an idea is likely based on the Deuteronomic verse, consensus is what determines who or even what is the "The Judge in Charge at the Time."<sup>59</sup>

This distinction of Rambam between universally accepted praxis and universally accepted institutions could potentially be used as a fundamental distinction between halakha and minhag.

This understanding of Rambam is also important for examining the nature of textual authority and how it relates to Kabbalat Harabim. Unlike regular institutional authority, textual

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<sup>57</sup> See Derashot Beit Yishai 15 where he quips, "Who revealed this secret to Rabeinu?!"

<sup>58</sup> It seems like Rambam thought that the accepted Talmud was written and not in oral form. This may depend on which recension of the epistle of Sherira Gaon was available to him, he likely had the Spanish version. Either way, acceptance of legislation does not need to be based on text, but it would provide a more formalized structure to act as an institution of authority. It is also not clear at exactly what point Rambam thought this acceptance happened, and there may have been a textualized Talmud at the time of its acceptance. For an overview of the Epistle see. <https://thegemara.com/article/the-epistle-of-sherira-gaon-a-point-of-departure-for-the-academic-study-of-the-mishnah/>

<sup>59</sup> See Kuntres Divrei Sofrim 2:4

authority is more fluid, and understanding Rambam in this way may greatly expand the nature of legitimate law.

Blidstein also notes that an understanding of Representation may lead to different conclusions. We can question whether under the rubric of Representation, the people retain the ultimate decision-making power or if the "representative" leaders can act independently because they are seen as the embodiment of the collective identity. In the Roman legal model where citizens chose their emperor, the monarchic belief was that the king embodies the will of the people, leading to absolute rule. As president Nixon famously said in his post-resignation interviews with journalist David Frost ““If the president does it, it’s not illegal!””<sup>60</sup>

### **Complementary Sources:**

Another source that could be employed to support the idea of Kabbalat HaRabim is the Talmudic passage in Pesahim:

[The sons Beteira] said to Hillel: Our teacher, if one forgot and did not bring a knife on the eve of Shabbat and cannot slaughter his Paschal lamb, what is the law? Since he could have brought the knife before Shabbat, he cannot bring it on Shabbat; but what should he do in this situation? He said to them: I once heard this halakha from my teachers but I have forgotten it. But leave it to the Jewish people; if they are not prophets to whom God has revealed His secrets, they are the sons of prophets, and will certainly do the right thing on their own. The next day, on Shabbat that was the eve of Passover, one whose Paschal offering was a lamb took the knife and stuck it in its wool; and one whose Paschal offering was a goat, which does not have wool, stuck it between its horns. Hillel saw the incident and remembered the halakha that he had once learned and said: This is the tradition I received from the mouths of Shemaya and Avtalyon, meaning that this is in fact the proper course of action. (Pesahim 66a with Sefaria explanation)

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<sup>60</sup> See further Blidstein, Individual, footnotes 65-69. Also <https://hedgehogreview.com/issues/monsters/articles/richard-nixon-modular-man>

Similar to that passage, multiple times<sup>61</sup> when the Talmud is unsure about the normative halakha it states “Puk Chazi Mai Ama Dvar, go out and observe what the people are doing”<sup>62</sup> to determine normative practice.

Additionally, although importantly never appearing in the Bavli, the Jerusalem Talmud<sup>63</sup> provides a fascinating principle that Minhag Mevatel Halakhic, that communal custom can override halakha. In fact, the Maharik (Shoresh 9) interprets this rule not only for monetary matters (which may be more fluid) but also within the realm of strict halakha (Issur Veheter).<sup>64</sup> The minhag that is referred to there is likely not that of tradition (father to son) but the minhag established through communal acceptance.<sup>65</sup> Communal acceptance creates binding legislation and therefore may even work with standard halakha on the same legal plane.<sup>66</sup> The prominent status of Minhag features prominently in standardized codes of law of the Shulchan Aruch and Rama.<sup>67</sup>

There are also mystical sources that indicate this idea as well. Many mystical and kabbalistic sources associate the Oral Law and Knesset Yisrael and such an idea can be found in the writings of R. Yehuda Halevi<sup>68</sup> and R. Tzaddok HaCohen as well.<sup>69</sup>

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<sup>61</sup> Berachot 45a, Eruvin 14b,

<sup>62</sup> Blidstein points out that Rambam does not ever invoke this rule. This rule may not be reflection of the creation of halakha but may be more of a testimony to a preexisting halakha that was forgotten., a way of establishing what was probably the correct ruling, (a way of hachraah). See ramban who has such an idea regarding minhag

<sup>63</sup> Bava Metzia 7:1:2, Yevamot 12:1:9

<sup>64</sup> See further in Fiksler, Consent pg. 135

<sup>65</sup> For further discussion see Shulkan Arukh Yoreh Deah 214 with Pri Chadash

<sup>66</sup> However, it is possible that minhag mevateil halakha really means not that the existing practice overturns an established law, but that it may prevent a Takkanah, from being established in the first place as universally normative halakha. See Josh Yuter, Popular Practice And The Process Of Pesak <https://joshyuter.com/2005/06/06/judaism/jewish-law-halakha/popular-practice-and-the-process-of-pesak/>

<sup>67</sup> See Fiksler ibid. Also, Maharitz Chajes 1 Darkei Horaha 4

<sup>68</sup> See [https://www.daat.ac.il/he-il/kitveyet/shana\\_beshana/mehabrim/arieli-rihal.htm](https://www.daat.ac.il/he-il/kitveyet/shana_beshana/mehabrim/arieli-rihal.htm) Also Erder, 72-73

<sup>69</sup> See Machshevet Harutz, 6a-6b. Many of these sources are found in Yaakov Elman: Progressive Derash and Retrospective Peshat: Non-halakhic Considerations in Talmud Torah, Modern Scholarship in the Study of Torah ed, Shalom Carmy (Jason Aronson: Northvale, 1996), p. 229. R. Zadok Hakohen on History of the Halakha, Tradition

In later generations, these discussions featured prominently regarding the authoritative nature of R. Yosef Karo's Shulkhan Aruch.<sup>70</sup>

### **Covenantal Theology:**

It is important to note that besides for all the halakhic sources we have pointed to, the Bible itself is replete with the covenant motif. The idea of the covenant seems to be a tradition that originated at the inception of the Jewish people and has consistently shaped Jewish political and communal life throughout its history. The notion of a covenant is valuable for explaining the relationship between Divine Will and human initiative.

Many scholars<sup>71</sup> have pointed out that besides for the multiple appearance of covenants that appear in the Torah the Bible itself can be interpreted to be of contractual nature. Covenantal theology is therefore a major point of discussion for both Christian and Jewish thinkers and ideas that R. Kook certainly was familiar with.

The basic idea of the covenant is that through a covenant with humanity, God voluntarily imposes a constraint on His all-encompassing power, thus bestowing upon mankind the gift of freedom. Yet, this liberty is accompanied by the requirement of the other party to accept internal and external responsibilities. This covenant serves as the bedrock for reciprocal duties and establishes the groundwork for novel legal and political frameworks, both within and outside the

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21:4 1985, pp. 1-26 and Reb Zadok Hakohen of Lublin on Prophecy in the Halakhic Process, Jewish Law Association Studies 1 1985, pp. 1-16.

On R. Kook's kabbalistic understanding of Knesset Yisrael see Avivi, Joseph. *Kabalat Ha-Re'iyah*. Yad Yitshak Ben-Tsevi, 2018, Knesset Yisrael. See also, Erder, 70-97

<sup>70</sup> For some examples see *Shenei luhot ha-berit* (Warsaw, 1878), I, 54a-b (Sha 'ar ha-'otiyot, "qedushah"), MahaRam Galanti in responsum ch. 6 and 124, Chaim Yosef David Azulai in *Machazik Braccha* sec. Yoreh-Deah 53, *Responsa Mateh Yosef* sec. Yoreh-Deah 2.

<sup>71</sup> For a great overview on this see Elazar, Daniel Judah. 1997. *Kinship & Consent : The Jewish Political Tradition and Its Contemporary Uses*. Also see Berman, Joshua Ani Ma'amin: *Orthodoxy and Biblical Criticism*. Israel : Maggid, 2019. See also Faur, Jose *Understanding the Covenant*, "Tradition 9 (1968), 33-55, "One-Dimensional Jew, Zero-Dimensional Judaism," *Annual of Rabbinic Judaism*, II (1999), pp. 31–50, and his theological expansion in *The Horizontal Society: Understanding the Covenant and Alphabetic Judaism* (2 vol.), Boston: Academic Studies Press (June 15, 2008)

community. Consequently, the covenant and the principles extrapolated from it contribute to the development of a novel tradition. This national covenant is also extended to the personal covenant between man and God.

Elazar's work delves into the concept of covenant within the Jewish tradition demonstrating how the covenant can be viewed as the embodiment of a dialogic relationship. Dialogue directed towards God elevates humans to a state of sanctity, and with fellow humans, it underscores shared humanity. This notion is underscored in the Bible, which distinguishes covenantal bonds from what many other religions perceive as mystical unions that may involve the self-abnegation of one or each party. Instead, the Jewish covenant creates genuine connections that enable life, including political life, to thrive in the complex and tangible world we inhabit.

Political entities, during their formation and existence, grapple with fundamental tensions that originate from their founding or emerge naturally from the complexities of their composite. Each generation must manage these tensions to prevent them from causing the entity's dissolution. These tensions persist throughout the entity's existence and are intrinsic to its dynamics, often with the only complete resolution to be the cessation of the entity. Thus, the interplay of these tensions shapes a political entity's identity.

In the case of the Jewish polity, these tensions are closely tied to the concept of the covenant. One significant tension revolves around reconciling Divine and popular authority. On one hand, God is the ultimate sovereign of the Jewish people, possessing unquestionable authority. On the other hand, for everyday matters and the interpretation of Jewish law, authority is delegated to humans and often determined by majority rule. The covenant serves as a bridge between these two sources of authority, as it is through the covenant that God empowers human

institutions with authoritative roles. Furthermore, subsidiary covenants play a pivotal role in enable the effective organization of these human institutions to exercise their roles.

Elazar describes how the complexity of the covenant concept within Jewish political thought becomes apparent when considering the interaction between "brit" and "hesed." "Brit" represents the structural framework of the covenant, while "hesed" serves as its dynamic counterpart. Although "hesed" is often translated as "loving-kindness" or "grace," these English terms do not fully capture its essence. Essentially, "hesed" signifies the commitment of covenant partners to transcend mere contractual obligations, with the goal of fostering a genuinely viable relationship. It addresses the issue of "narrow legalism," a common problem in contractual arrangements where individuals tend to narrowly define their own obligations while broadly interpreting the obligations of others. "Hesed" introduces a more expansive dimension into the relationship, encouraging a broader interpretation of one's responsibilities. This concept finds expression in various "hassidic" movements throughout Jewish history, all of which shared a common belief in accepting broader obligations than those typically dictated by the covenant. These movements sought to embody the notion that "going beyond the law is the law" in their daily lives.

Elazar notes how in the context of Jewish political culture, this contractual behavior is evident in the partnerships that form the Jewish community. These partnerships harmonize individual autonomy with negotiated relationships. This unique context also has a significant impact on leadership, necessitating a distinct approach, and decision-making processes that are primarily characterized by negotiations among equals.



While the covenant concept is apparent in the Bible, rabbinic literature expanded its ideas and implications. Gordon<sup>72</sup> points out that the rabbinic contribution towards the covenant was rejecting the Christian notion of grace as the reason for God's interaction with imperfect humanity and replacing it with the notion of reciprocity. God understood that his authoritative position depended on being recognized and accepted and was compelled to actively serve the community and continually demonstrate their competence to govern.

In R. Kook's concept of *Kabalat Harabim* similar themes emerge so that the people's expansion of the Divine word is taken to be a cultural expansion of their covenantal relationship.

In the context of *Kabalat Harabim* Rabbi Shlomo Fischer is most explicit about this:

The Torah of Israel maintains a character of law. The basis for this is the matter of the covenants in the Torah, a matter that the great Rabbis of the early Rabbis have already grappled with: What is the need for G-d to make a covenant with Israel so that they will accept the mitzvot for them, without it do they not have to obey His voice? Either way, if you say that they are not obligated, what is the use of a covenant, because who obligates them to observe their acceptance? But that was God's desire- to give the Torah the character of law. And law, as is known, is based on a covenant, that is, the acceptance of the public...the obligation is rooted in its acceptance. (*Derashot Beit Yishai* 15)

R. Soloveitchik similarly expresses this theme:

The element of togetherness of God and man is indispensable for the covenantal community for the very validity of the covenant rests upon the juridic-Halakhic principle of free negotiation, mutual assumption of duties, and full recognition of the equal rights of both parties concerned with the covenant. [Footnote: the giving of the law on Mt. Sinai was a result of free negotiation between Moses and the people who consented to submit themselves to the Divine Will. The Halakhah treats the Sinai and Moab covenants in categories and terms governing any civil agreement.] Both parties entering a covenantal relationship possess inalienable rights which may only be surrendered by mutual consent. The paradoxical experience of freedom, reciprocity, and "equality" in one's personal confrontation with God is basic for the understanding of the covenantal faith community. We meet God in the covenantal community as a comrade and fellow member. Of course, even within the framework of this community, God appears as the leader, teacher, and shepherd. Yet the leader is an integral part of the community, the teacher is inseparable from his pupils, and the shepherd never leaves his flock. They all belong to one group. The covenant draws God into the society of men of faith. "The God before whom my

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<sup>72</sup> Freeman, Gordon M, "The Rabbinic Understanding of the Covenant" in D. Elazar, ed., *Kinship and Consent*

fathers did walk — the God who has been my shepherd all my life." God was Jacob's shepherd and companion. The covenantal faith community manifests itself in a three-fold personal union: I, thou and He.<sup>73</sup>

The notion of the covenant provides a strong basis for the almost interdependent nature of the relationship between the Jewish nation and God's Will and may contain significant implications for understanding the nature of halakha.

### **Intellectual History**

R. Kook's conception of Kabbalat Harabim did not emerge in a vacuum. It was a product of the intellectual and cultural shifts of his era, shaped by the profound influence of modernity on Jewish culture as it grappled with its identity in a changing world. In addition to delving into the halakhic sources of Kabbalat Harabim, it is essential to comprehend its roots in the intellectual history of modernity and its effects on Judaism. While this period encompasses a wide range of developments, we will focus on the key thinkers and ideas that directly contributed to the formation of Kabbalat Harabim.<sup>74</sup>

Orthodox Judaism is wary of destabilizing any sense of the Divine objectivity of the Oral Tradition. Of the most concerning elements of a conception of Kabbalat Harabim is its potential to dismiss the rigid transmission aspect of the Oral Law and reduce it to a mere product of human imagination. As we will see, however, the prominence of Kabbalat Harabim emerged to maintain divine objectivity within a halakhic system that had begun to recognize the flexibility of its

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<sup>73</sup> Soloveitchik, Joseph Dov, and David Shatz. 2006. *The Lonely Man of Faith*. 1st Three Leaves Press ed. Doubleday, a division of Random House

<sup>74</sup> There is much literature on the history and issues of these periods. The following analysis is based primarily on Noah Rosenbloom's *Tradition in an Age of Reform*, The Religious Philosophy of Samson Raphael Hirsch, Jay Harris' *How Do We Know This? Midrash and the Fragmentation of Modern Judaism*, and his *Nachman Krochmal: Guiding the Perplexed of the Modern Age*, Bruriah David's *The Dual Role Of Rabbi Zvi Hirsch Chajes: Traditionalist And Maskil*, and Ari Bergmann's' *The Formation of the Talmud: Scholarship and Politics in Yitzhak Isaac Halevy's Dorot Harishonim*.

arrangement. It was only through a revamping of the spiritual import of the national nature of halakha could its Divine imprint be maintained.

Perhaps the most famous and earliest attacks against the Oral Tradition were delivered by the Karaites who entirely rejected the Oral Tradition as a source of law, arguing that the law was adaptable and that all people were free to interpret the Torah using their own methods.

In his fight with the Karaites, R. Saadia, Gaon of Sura (882-942), revolutionized the discussion by denying almost all creative processes in the formation of Rabbinic law. However, R. Saadia had to find a way to ground rabbinical law that seemed to be rooted in human interpretation of the Biblical text while also differentiating it from the Karaite's exegesis. To do so, R. Saadia held that the Oral Tradition existed independently and did not directly derive from the text of the Torah. In fact, R. Saadia argued that only when the practical demands of the Torah are rooted in tradition can its adherents be assured of its objectivity.

An effective approach for the battle with the Karaites, his theory remained popular for centuries, continued by important figures like R. Yehuda Halevi and R. Abraham Ibn Ezra. As Harris points out, what made this position so paradoxical is that to "save" the Talmud, its defenders ended up undermining what seemed like a significant portion of the Talmud's efforts in grounding the sources for normative practice.

Despite these polemical disputes, a study of Jewish sources reveals an evolving awareness of the human influence on sacred texts and the subjectivity involved in interpreting divine messages. Challenges from rationalism, such as Aristotelian ideas, raised questions about apparent imperfections in certain rabbinic passages and Biblical texts. This led to theological and philosophical issues like understanding anthropomorphic descriptions of God and the possibility of miracles within the fixed laws of nature.

Attempting to qualify the strict rigidity of this concept, scholars like Rambam and Ramban granted space for creative human contribution to halakha and interpretation in addition to matters of tradition. Nonetheless, despite these qualifications, similar challenges to rabbinic Judaism later in Jewish history, and the Karaites' relative success in creating a rival community that survived centuries, the prevailing rabbinic attitude was that direct Sinaiic transmission was the main source of normative practice.

The late eighteenth and nineteenth centuries, however, marked a turning point for the discussion. Late eighteenth-century Europe was a time of widespread change on every front. Centuries-old traditions were overthrown as governmental power was transferred from absolute monarchies to the people. Ideals of equality reshaped society's political, social, and cultural models into new democratic forms.

The revolutionary spirit also impacted Jewish communities. Prior to the French Revolution, Jews lived in the self-sustained and insular religious-ethnic Jewish world of the ghetto, isolated and surrounded by persecution and hostility. While there was some work to attain Jewish Emancipation, the French Revolution was ultimately what caused a sudden and unexpected dissolution of their way of life. Without any time to digest and integrate into the world around them, Jews were abruptly exposed to a world that seemed both intellectually and culturally advanced than their own, and for which they were woefully unprepared. Suddenly they were ashamed of the very religious and intellectual achievement of which they were once so proud, embarrassed over their "inferiority."

Exposed to a new society that was working to eradicate the economic and social barriers that had long separated them from the rest of society, many Jews aspired to be recognized and accepted by the wider world outside their traditional communities.

During this period, as political and social goals were still evolving, the cultural aspects of Jewish life underwent significant changes. Life and law began to diverge. Halakha, which had previously regulated all aspects of Jewish life, began to distinguish itself from the demands of daily life due to the influence of capitalism, expanding commerce, urbanization, and the secular trends of the time. A generation of Jews seeking to integrate into the wider society was less inclined to adhere to less relevant, ancient Jewish laws.

Many individuals in this era called for a reevaluation of Jewish life and its practices in response to the changing circumstances. To facilitate social integration, some Jews adopted beliefs like agnosticism, latitudinarianism, deism, or even converted to Christianity. Others chose to reform Judaism itself, modifying its customs and the appearance of synagogues to align with the prevailing cultural norms. Jewish reformist synagogues were modeled after Protestant churches, featuring elements like organ music, German prayer books, and rabbis who adopted the attire and speaking style of Protestant pastors. These changes reflected a broader trend of adaptation and transformation within the Jewish community in response to the evolving modern world.

The rapid and somewhat chaotic push for change within the Jewish Reform movement presented a challenge to the established authority of Jewish customs found in the traditional halakha. As Reformers continued to introduce revisions, they faced conflicts between these traditional decrees and the values of the modern era. While they were hesitant to openly admit that Jewish jurisprudence had been influenced by temporal and situational factors and could be subject to revision, they aimed to balance preserving fundamental Jewish principles with their innovative approach.

Their strategy involved pragmatically setting aside certain biblical precepts that clashed with the prevailing cultural norms while upholding those with ethical significance. Over time, even some components of the Decalogue, such as observing the Sabbath, began to appear inconsequential and cumbersome.

This expedient approach suited Jews who wanted to maintain a basic connection to their heritage while adapting to the changing world. Traditionalist rabbis, disapproving of the Reformers' actions, initially tried conventional polemical tactics but found them ineffective. They failed to grasp the true essence of this cultural struggle. After a series of minor conflicts, they eventually withdrew into spiritual seclusion as a response. However, many of those Jews who embraced Western influences but who had taken notice of the erosion of traditional Judaism, began to look for a more secure framework for their practice of Judaism in the shifting times.

Some Jews sought solace in the works of Moses Mendelssohn, a prominent figure of the previous generation often referred to as the Jewish Luther. Nonetheless, they soon came to realize that the world had experienced such profound upheavals that even Mendelssohn's positions had lost their relevancy. However, they acknowledged that Mendelssohn had raised crucial questions that resonated with the evolving times.

Mendelssohn's seminal work, "Jerusalem," was primarily aimed at justifying a specific political philosophy. However, this endeavor led him to grapple with the ramifications of this philosophy on his own Jewish faith, ultimately leading to the development of a distinctive understanding of Judaism. At the heart of Mendelssohn's philosophical framework, a central concern of the modern era emerged: the interplay between autonomy and autocracy. This tension, influenced by his personal involvement in the Lavater Affair, supported his argument for Jewish emancipation.

In "Jerusalem," Mendelssohn contends that neither the state nor religion can legitimately coerce the human conscience. He further asserts that his argument against "religious power" is substantiated by Judaism itself. Within "Jerusalem," Mendelssohn argued that Judaism, at its core, is a natural religion devoid of any revealed truths that cannot be attained through unassisted reason. Nevertheless, he combined this rationalist approach with a concept of revelation that emphasizes the uniqueness of Judaism and affirms the destiny of Jewish believers as God's chosen people. While the revelation at Sinai does not entail supernatural truths, through the halakha, it does prescribe a way of life that benefits all humanity. Mendelssohn's interpretation of revelation as legislation, without adding metaphysical truths, likely drew inspiration from Spinoza.

While Mendelssohn shared Spinoza's perspective that Judaism encompassed legal aspects, he diverged from Spinoza's conclusion that these laws were only pertinent within the Jewish Commonwealth and not in the diaspora. According to Mendelssohn, Jewish law, due to its divine origin, remains immutable and mandatory.

Essentially, Mendelssohn's political theory advocated for the acceptance of Jews within a Christian-dominated state. Consequently, as Rosenbloom points out, Judaism was minimized to the point where it became inconsequential, if not practically non-existent. Jews living later in the 19th century were not compelled by the apologetic tone and secondary role assigned to Judaism.

While they acknowledged the notion of Judaism's universal ethics, they struggled to justify the normative halakhic aspects of Judaism that Mendelssohn claimed provided the religion with its uniqueness. Furthermore, as part of his political theory or conception of God, Mendelssohn removed the concept of reward and punishment from Judaism, which made the practice of normative Judaism seem absurd.

For Mendelssohn, Judaism did not reveal a truth unknown to others, nor did it promise salvation exclusive to its adherents. Jews in the post-Emancipation era no longer found significance in this type of Judaism and failed to understand why they were duty-bound to observe such ceremonial practices.

Mendelssohn himself argued that the normative aspects of Judaism were binding due to their divine origin. However, Judaism was not perceived as a revealed truth but rather as a revealed law. Rosenbloom explains that while it may have been seen as a rational philosophy or good politics, it was considered lacking in Jewish theology. Jews were now seen as a chosen people blindly following a set of meaningless laws. The law became a burden for Jews, forcing them to comply with a yoke of meaningless regulations. Paradoxically, these immutable and fixed laws contradicted Mendelssohn's assertion that they could not be enforced, which troubled post-Emancipation Jews who sought justification for the upkeep of the traditional law.

Mendelssohn's philosophy encountered additional hurdles due to the profound shift in Germany's intellectual landscape in the late 18th century. His overarching perspective, grounded in the prevailing Leibnizian-Wolffian philosophical framework that held sway over German intellectual discourse during that era, faced opposition from several neo-Spinozist thinkers and, most prominently, Immanuel Kant.

Ironically, Kant embraced Mendelssohn's conception of Judaism and expanded on his arguments, asserting that Judaism's normative structure lacked any legal or ethical elements. Kant's claim was based on his strict understanding of ethics, which held that ethical actions must be motivated solely by the absolute autonomy of the will (categorical imperative). Any action influenced or conditioned by any other factor, including God, could not be considered ethical. Thus, at best, Judaism could be portrayed as a historical juridical and political system.



Jews of that era could not easily dismiss an opponent as formidable as Kant. The fact that Kant's critique was rooted in Mendelssohn's own conceptual framework further eroded Mendelssohn's credibility. According to Kant, Judaism was not only inferior to Christianity but even less ethical than paganism and idolatry. Judaism and its God were deemed immoral, fostering separation and justifiable hatred. Kant held such prestige among Jews at the time that they did not dare to directly confront Kantian philosophy with Judaism, instead, Jewish intellectuals attempted to redefine Judaism in a way that would not contradict Kant's philosophical outlook. By accentuating the ethical dimensions of Judaism while attenuating its external regulations and rituals, they indirectly engaged with Kant's critique.

Thus, the period marked a shift from Mendelssohn's and Spinoza's focus on legality to a Kantian emphasis on morality within Judaism. Rather than Judaism's uniqueness stemming from a legal norm, it was now repositioned around its religious and ethical message. However, this proved to be a complex undertaking. Kant also posited that the noumenal realm, including metaphysical claims, cannot be accessed by human reason and empirical means. This undermined the ability to argue for Jewish particularity, posing a significant challenge.

In response to Kant's criticism, Jewish Reform theologians chose not to directly confront it but instead acknowledged the statutory aspects of Judaism that required reconsideration. Unlike Kant and even Mendelssohn, who emphasized the centrality of Law in Judaism, the Reform theologians saw it as accidental, contingent, and thus adaptable. They aligned themselves more closely with Spinoza's perspective that law was bound to the historical and temporal existence of a Jewish state.

Jewish thinkers influenced by Kantian critiques such as Abraham Geiger, Samuel Holdheim, David Einhorn, Ludwig Philippson, Leopold Stein, Samuel Hirsh, Abraham Adler,

Joseph Aub, and many more, expressed anti-rabbinic and antinomian perspectives that blamed rabbinic Judaism for creating a statutory Judaism that ignored its biblical, ethical core. Their intention was to attribute the excessive legalism of Judaism to the rabbis, aiming to vindicate Mosaism as a universal and ethical force. They dedicated their efforts to imbuing Judaism with ethical principles in line with Kantian ideas.

The rise and popularity of the historical and evolutionary study of Judaism provided further support for these agendas, revealing that Judaism had always encompassed ethical and moral qualities. This validation of the reform theologians' antinomian tendencies was bolstered by the understanding that throughout history, Judaism had always undergone legal developments and transformations. This demonstrated that the legal aspects of Judaism were merely external trappings, while its ethical essence remained intact. According to this viewpoint, as humanity progressed, Judaism could completely divest itself of its legal externals and embody its ethical purity. Mendelssohn's ideas were qualified, and Kant's misconceptions were exposed. The statutory element of Judaism was seen as just one stage in its historical and transient evolution. As Holdheim expressed, "The Talmud speaks with the ideology of its own time, and for that time it was right. I speak from the higher ideology of my time, and for this age, I am right."<sup>75</sup>

However, the reform theologians did concur with Mendelssohn that Judaism did not possess a monopoly on universal truths. Yet, as they challenged his understanding of Jewish specificity, namely, the law, they faced a theological dilemma. What, then, was the purpose of maintaining a Jewish identity?

It is at this point that we begin to see the formation of the ideas that will construct the underlying basis for *Kabalat Harabim*. Reformers found themselves compelled to defend their

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<sup>75</sup> Rosenbloom, *Tradition* pg. 18

distinctiveness, as it became increasingly easier to define themselves by what they were not rather than what they were. Reform Judaism began to bear a striking resemblance to liberal Christianity, blurring the boundaries between the two.

To navigate this challenge, a new approach emerged that sought to infuse the concept of revelation with fresh meaning. This reimagined understanding of revelation became the cornerstone of Judaism's uniqueness and superiority over other religions, including Christianity.

Influenced by Friedrich Schleiermacher, the reformers proposed that revelation should not be seen as a metaphysical process or the apprehension of the noumenal (unknowable), which would invite Kant's criticisms. Instead, they emphasized a natural and fundamental awareness, a human-level comprehension of religion or the divine.

Now, the pressing question was: Why was this revelation exclusively bestowed upon the Jewish people? Traditionally, the answer lay in some form of covenantal theory. However, the reformers sought a different and in their minds, more rational explanation, than the conventional understanding.

The reform theologians turned to the philosophy of Johann Gottfried Herder to address this issue. Herder, associated with the Romantic Sturm und Drang era, offered ideas that did not need to meet the standards of rationalism, empiricism, or historical evidence. His philosophy embraced a monistic worldview that nonetheless recognized the significance of distinctiveness and individuality. Nature and history were seen as integral parts of a unified whole, displaying both order and diversity. In nature, this was evident through the various forms of flora and fauna, while in history, it manifested in the diverse talents and creative expressions of humanity. Each culture, arising at a specific moment in history, represented a unique aspect of mankind's ultimate purpose.

This concept of national uniqueness and its mission to embody it was not limited to Herder or any specific philosophical school. It was a widespread idea that often crossed boundaries between different schools of thought. The uniqueness attributed to every national culture defied rational explanation and was ascribed to a kind of “genius”. While the notion of “genius” was nebulous and vague, it was embraced by the romantic generation that sentimentalized it.

Reform theologians adopted this mystical concept of genius to explain why revelation and prophecy appeared specifically among the Jewish people and not among other nations. They posited that, for unknown reasons, the people of Israel possessed a predisposition to divine communication. They exhibited a genius for religion, just as the Greeks demonstrated a genius for art and the Romans a genius for law. These extraordinary phenomena of national genius could not be rationalized or explained by historical or psychological factors, yet their existence had to be acknowledged.

Abraham Geiger, a prominent reform rabbi, delved into the concept of genius, distinguishing it from “talent”. He saw genius as an innate and unlearnable gift, distinct from skills acquired through effort. Geiger believed that various nations displayed this mysterious phenomenon of genius, and he argued that the Jewish people possessed a unique and remarkable genius, particularly in the realm of religion.

Geiger's view of genius was closely linked to the idea of a biological entity or "volk." He contended that each nation, including the Jews, had a specific genius in particular areas. Just as the Greeks excelled in art and science, the Jews had a distinctive genius for religion. While not all Jews demonstrated this religious genius, there was an enigmatic connection that made

revelation an inherent quality of the Jewish people. This recognition of a natural inclination for religion among Jews inspired reform theologians to propose a unique Jewish mission.

Influenced by thinkers such as Moser, Burke, Savigny, and Grimm, the Reform theologians were strongly taken by the romantic notion of *Volksgeist*, which referred to the authentic and pristine culture of a people prior to being influenced by foreign elements. As a people endowed with unique genius, it was the Jews' duty to preserve their ethnic identity and spiritual distinctions. Rosenbloom notes that unlike Mendelssohn who focused on social and political rights, the Reform theologians emphasized the religious and cultural survival of Judaism. They believed that Judaism's eternal truths were inherently connected to the Jewish people, and their absence would deprive humanity of religious insight and creativity.

For the Jewish reform theologians, the concept of revelation surpassed a one-time divine manifestation and was an ongoing process that began in Sinai up until the present. Although this understanding of revelation as a continuous and dynamic process was not their invention, they firmly implanted the traditional Jewish term within the context of the prevailing spirit of the time.

Importantly for our discussion, this theological conception provided a new perspective for an approach to a halakhic system that works as an evolving expression of a national predisposition. Considering revelation as a dynamic process, a viewpoint already advocated by Lessing, a contemporary of Mendelssohn, and in contrast to Mendelssohn's static personal perspective, Reform theologians maintained a notion of divine inspiration that did not necessitate any fixed norms. They differentiated between the intrinsic essence of divine revelation and the extrinsic manifestations shaped by the historical evolution of the religion. They argued that these manifestations, referred to as tradition and halakha, continually evolve due to their dynamic

nature. Reform theologians further asserted a correlation between progress and time that justified the righteousness of their reforms.

Geiger asserted that in addition to the eras of revelation and tradition, the Jewish religion experienced a period of legalism that consolidated the older transmitted traditions. The Talmudic era, he asserted, had been only one phase in the evolution of Judaism. As a result of various constraining forces, the unrestricted internal creativity of revelation and the external shaping of tradition became rigidified.

Based on this understanding, Jewish reformers proposed a new phase in the history of Judaism. Geiger described it as an era of critical study that would reopen the channel of revelation, allowing it to flow through time and rejuvenate the Jewish religion as it had in the past. Through historical examination, legalism and rabbinism would be purged, leaving behind an authentic, monotheistic Judaism.

Another major influence on the time and on Jewish thought was the philosophy of Georg Wilhelm Friedrich Hegel. Hegel considered Judaism an archaic early stage of the dialectical progression of history up to Protestant Christianity. Despite Hegel's critical understanding of Judaism, many Jewish intellectuals were impressed by his methodology, and with the new emphasis on the indigenous spirit of Judaism, hoped to also discover the fundamental essence of their religion. By applying the scientific study of Judaism, they hoped to discover its essence and thereby harmonize its manifestations with the spirit of their times. Only when Judaism was treated as a whole would its seemingly incomprehensible parts make sense. The fact that Judaism was a distinct whole idea explained its ability to survive the course of time; external influences may have been absorbed but they were integrated into the fundamental idea of Judaism. In the dialectic of history, the spirit of Judaism was the thesis counterbalanced by the antithesis of the

state which was eventually resolved in the synthesis of the second Jewish Commonwealth. Rabbinic law could then be viewed as the fence guarding the intrinsic spirit of religion post the collapse of the Jewish state. Reformists hoped that understanding the spirit of Judaism could allow them to implement changes that preserve its essence but that adapt to the society around them. This conception gave rise to the establishment of the *Wissenschaft des Judentums*, which aimed to critically explore Judaism as a whole in order to uncover its essence, its spiritual and ethical core, while shedding the external aspects of legalism.

Thus, there was a growing awareness of the flexibility of halakha combined with an increasing understanding that the ultimate Divine Will was not intrinsically rooted in the nitty gritty of halakha but in the Divine Nation and its modes of expression which were subject to modification.

Some scholars, however, while embracing the evolutionary and modern historical approach to Jewish history and religion, pushed back on the reformist implications of such a perspective, arguing that these ideas should actually contest suggestions of halakhic change.

Zecharias Frankel,<sup>76</sup> considered the father of Conservative Judaism, was a brilliant and passionate individual who sought to establish a form of Judaism that could thrive in the modern world while maintaining its integrity and continuity. He viewed the Jewish reformers as lacking reverence and knowledge, aiming to discard traditional elements that obstructed their rational enlightenment. Frankel advocated for "Selbständigkeit," a pursuit of equality founded on self-respect that did not undermine authentic Judaism.

Despite perceiving Judaism as rooted in divine Revelation, Frankel acknowledged its adaptability to changing circumstances. He adopted a positivist perspective on law, considering

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<sup>76</sup> This is largely adapted from Schorsch, Ismar. 1981. "Zacharias Frankel and the European Origins of Conservative Judaism." *Judaism* 30 (3): 344–54

legal rigidity as a product of the dispersion that necessitated codification through the Mishna and Talmud.

Frankel also regarded history, alongside halakha, as a normative source within Judaism. He proposed that loyalty to Judaism should be grounded in historical consciousness, which he considered a crucial aspect of maintaining the religion's integrity. Schorsch shows how he famously withdrew from the Reform-led Frankfurt Conference not due to halakhic disputes but because of historical concerns. The continuous practice and sanctification of ancient customs, intertwined with history, held great significance for Frankel.

To bridge the realms of halakha and history, Frankel introduced the innovative concept of the "Volk" (people) as an influential agent in defining Jewish practices. He believed that the elaborate rituals of Jewish life held a deep purpose beyond mere protection in hostile environments. So long as the Volk maintained a robust religious awareness, it served as an indirect source of revelation. Frankel elevated the concept of Volk, presenting it not only as a source of Judaism's distinctiveness but also as the foundation of its legal system.

Frankel's philosophy of Judaism was likely influenced by the work of Friedrich Carl von Savigny, a notable legal scholar who introduced historical jurisprudence in Germany in 1814. Savigny rejected the notion of achieving German unification through a single law code, believing it would disregard the organic development of legal traditions within societies. He emphasized the Volk, or people, as the historical source of a society's legal system, comparing law to language in its spontaneous, unwritten, and progressive nature. Savigny's view, in a nod to Kant, was that law was a form of self-legislation, rooted in the collective will of a people. Authentic expression of the collective will was achievable only by jurists and statesmen firmly embedded



within their society. Effective legislation was often a formalization of existing customs, whereas systematic codification frequently indicated societal fragmentation.

Frankel adapted Savigny's ideas to the study of Jewish law to address challenges from both Reform Judaism and anti-Judaism in academia. He found that Savigny's theories legitimized norms that evolved over time, shaped by customary practices and preserved orally before being subjected to legal scholarship. Savigny cautioned against abrupt changes in legal systems for solely rational reasons.

Frankel extended Savigny's influence to his understanding of rabbinic documents. He asserted that none of these documents functioned as a definitive legal code; instead, they drew from living Jewish communities' norms, applying legal expertise retrospectively to determine what was authoritative. The texts retained their openness for interpretation and adjustment, all the while maintaining reverence for previous legal developments. Frankel expanded the sources of Jewish law to include the Apocrypha, New Testament, Josephus, and the Septuagint, arguing that these exemplified a living legal tradition. He minimized the role of midrash in his perspective, as creative midrash could suggest law derived from text, rather than customary practices.

Frankel rejected the notion that Mosaic law was forcibly imposed by a supreme lawgiver, instead asserting that it possessed its own inner necessity, finding its basis in the human spirit. He presented the divinely revealed Mosaic legal system not as an imposed obligation, but as a divine response to human needs that evolved over time, shaping within human consciousness. This was part of Frankel's endeavor to establish a historical Judaism that held academic respectability while displaying ongoing vitality.

As Schorsch documents, over time, Frankel's perspectives underwent refinement. The shift in his historical thinking seemed to be driven by the major Reform conferences in Germany (1844-46) and the political events of 1848. These events prompted Frankel to reconsider his romantic portrayal of Jewish legal history. While he remained committed to its ancient origins, he now emphasized a more substantial and creative role for religious and juristic leaders, which included a new appreciation for the historical significance of rabbinic midrash.

Initially envisioning a legal system largely emerging from grassroots efforts, Frankel's viewpoint shifted to one primarily influenced from the top down. He no longer subscribed to the romantic theories of Savigny, recognizing that scholars rather than the "people" shaped Jewish practice. Frankel's reasons for this shift could include the disillusionment following the events of 1848, challenges from Reform movements, and conversations with other scholars like Graetz.

In his later writings, Frankel highlighted, differently than Savigny, the Volk's role in maintaining the legal system. He acknowledged the liberal potential of this theory, allowing for adaptation if the Volk changed practices. However, he believed it was the rabbi's responsibility to elevate the religious awareness of the Volk. The dynamic relationship between rabbinic leadership and the community determined the direction of Judaism.

Frankel could not forgive the reformers for caving to external criticisms of Judaism by non-Jews, rather than working to revitalize the essence of Judaism itself. He aimed to restore pride in the Volk through the study of Jewish history. He believed that focusing on the culture and written works, rather than the history of persecution, would unveil the true spirit of the Jewish people.

Similar to Savigny's historical jurisprudence, Frankel established the historical school of halakha. He emphasized tracing legal concepts and institutions back to their origins

chronologically, as a means to understand and reform the legal system. Lacking an understanding of the past, any legal reform would be premature. This was the fundamental objective behind his work, *Darkhei Hamishnah*.

Frankel's project thus countered the reform implications of a nationally grounded halakha and instead converted the concept into a reason for conservatism. However, despite his piety and respect for the subject matter, and his recognition that the Volk could serve as indirect source of revelation, Frankel transformed the transcendent halakhic system into a human production. Lacking was a more theological framework to counterbalance the implications of this developmental approach.

Nachman Krochmal (1785- 1840), a Jewish Galician theologian and historian, employed both Hegel and Savigny's ideas to provide the theological framework missing from Frankel's attempt at conservatism.

Importantly, Savigny had challenged Hegel's idea of the dialectic progression of history and instead focused on the romantic idea that a people be uniquely developed to its full character instead of progressing forward to another iteration.

Krochmal, influenced by Savigny, argued that legal systems must undergo an organic process, including the preservation of oral tradition. He emphasized the necessity of oral tradition, especially in religious systems, and contended that the distinctions between written and oral systems lose significance once it's acknowledged that all legal systems inherently involve an oral aspect.

Krochmal argued that the nation (Volk) is the highest form of social grouping, and serves as the wellspring of cultural and spiritual innovation. Within a nation, various cultural

expressions represent the embodiment of its unique spirit, (Volksgeist/ ruah ha-umah<sup>77</sup>).

Krochmal asserted that Jewish culture's vitality depended on recognizing themselves as carriers of an absolute spirit which for Judaism means a distinctive perception of reality that emphasizes the unity of all within God. He therefore rejected the idea that Judaism could be solely a religious identity detached from its national form since the loss of the national culture would mean the loss of its motivating spirit.

He countered Hegelian critiques by maintaining that Jews possessed a unique and unchanging spiritual understanding of God, with merely its external expressions evolving. The rabbinic tradition, according to Krochmal, embodied pure religious consciousness, and Jewish culture continuously actualized Torah teachings. He emphasized that spiritual creativity originates from the nation and that religious culture only thrives within the nation. According to Harris, Krochmal's commitment to religious observance and the importance of religious commandments is evident in his work, highlighting the role of halakha in strengthening faith, ensuring survival, maintaining spiritual and historical destinies, and fostering a connection with God and the pursuit of absolute knowledge.

He believed that the Oral Torah derived its religious value from being the creation of a spiritually charged human community that reflected on the divine message. Despite critical historical studies showing external influences on rabbinic law, Krochmal used models from Savigny to establish the authenticity of this legal system. He saw the transition from biblical to

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<sup>77</sup> This term was explicitly used by R. Kook throughout his works. Krochmal had direct influence on R. Kook see Mirsky, Yehudah. 2021. *Towards the Mystical Experience of Modernity : The Making of Rav Kook, 1865-1904*. Boston, MA: Academic Studies pg. 4, 286.

Rabbinic religion as a continuous unfolding of a unified cultural demonstration aimed at renewing dedication to this religious foundation.<sup>78</sup>

As the historical-evolutionary school of thought spread in Western Europe and began to raise awareness of the developmental nature of halakha, there were other more traditional responses that stressed the centrality of the nation in the establishment of Jewish law.

Maoz Kahana shows how R. Moshe Sofer (Hatam Sofer, 1762–1839) a fierce opponent of the Jewish reformers, ironically like Frankel, based his opposition on a notion of communal consensus, which he considered to maintain the severity of a Biblical vow (Neder Medorysa). He argued that Kabbalat Harabim was the basis of the Ashkenazic halakha. Kahana connects R. Sofer's mystical invocation of the "Essence of Israel (Atzmut Yisrael)" to romantic ideas of the time.<sup>79</sup>

Another important figure to adopt a stance of Kabbalat Harabim was one of the forerunners of religious Zionism, R. Tzvi Hirsh Kalischer (1795-1874), who also had an influence on R. Kook.<sup>80</sup> Assaf Yedidya shows how Kalischer's approach to establishing the source of authority of public acceptance in contemporary times went beyond being a mere tactical maneuver to counter the influence of liberal rabbis but was founded on a meta-halakhic infrastructure that drew from precedents found in the Bible and halakhic literature. Kalischer's ideas took a different angle and based their validity on the laws of extra rabbinic authoritative institutions like the monarchy.<sup>81</sup>

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<sup>78</sup> This idea is very similar to Ahad Ha-Am's cultural Zionism, albeit with some metaphysical differences, see Mirsky, 235. Ha-Am also raised similar questions about the nature of halakha, see Mirsky, 241. R. Kook was aware of Ahad Ha-Am's writings and seemed to endorse aspects of his thought. See Mirsky 20, 148, 194, 244.

<sup>79</sup> See Kahana, Maoz. *Meha-Noda' Bi-Yehuda La-Hatam Sofer: Halakhah Ve-Hagut Le-Nokhaḥ Etgare Ha-Zeman*. 2015. Also see, Yedidya, Assaf. Principle of 'public consent' in the Modern Age: from the re-establishment of the Halakhic authority to the renewal of the Halakha (Hebrew). *Moreshet Yisrael*, 20, 2 (2022), 284-253

<sup>80</sup> Mirsky, 235.

<sup>81</sup> See Yedidya, *ibid*.

One much more expansive defender of Orthodoxy who employed these ideas was Rabbi Zvi Hirsch Chajes (1805–1855). Chajes' defense of the Talmud and halakha is primarily found in his strictly scholarly works, such as *Torath Nevi'im*, *Mishpat ha-Hora 'ah* and *Darkei horaa 'ah*. In these treatises, he discusses in detail the questions of whether and to what extent Talmudic law admits of change and whether post-Talmudic rabbinical courts have the authority to overrule Talmudic legislation. He also examines the concept of *hatimath ha-Talmud* with a view to determining whether the "completion" of the Talmud has rendered its enactments absolutely irrevocable. Chajes, furious at the reformers' denial of the authoritative nature of the oral law, attempted to vindicate the Oral Law while addressing their complex questions.

Chajes was much younger than Krochmal and there was certainly much influence of Krochmal's thought on his. David compares the work of Chajes to Krochmal. Krochmal did not specifically spend time discussing the theological significance of *hatimat hatalmud* while Chajes made it his prime subject matter. He was also less willing than Krochmal to admit to the later emergence of many *halakhot*.

Chajes raises a few possibilities for the authority of the Talmud but is ultimately dissatisfied with them, instead admitting that the authority of the Talmud today is simply based on the lack of a contemporary court with the power to overturn Talmudic Law. Technically, it can be changed. As David points out, there are difficulties with this approach. Chajes, in a manner that echoes ideas of *Kabalat Harabim*, does raise the possibility that the laws of the Talmud are binding and are not subject to modification due to their being accepted by the Jewish people and by virtue of their "minhag" status. Chajes does not explicitly raise issues with this approach but instead just moves on to his next suggestion. Ultimately, Chajes did recognize plenty of room for halakhic development and devoted much of his work to delineating the principles of doing so.

A similar approach to these figures but with more forceful implications was that of two important figures of the early twentieth century, both of whom had maintained ties with R. Kook: Rabbi Elhanan B. Wasserman (1874–1941) and Rabbi Yitzchak Issac Halevi Rabinowitz (1847 – 1914). Wasserman, who had read Kant and who was well aware of the social and intellectual issues of his time, attempted to account for the role of rabbinic authority.

For R. Wasserman, consensus played an important role in the development of halakha as well. However, for R. Wasserman, consensus meant the consensus of all the recognized Jewish scholars of the time. While R. Wasserman agreed to a concept of development in halakha, he argued that the canonicity and authority of the Mishnah and Talmud rested upon the fact that they were promulgated by a central, authoritative body. He equates this central body to the authority of the Great Sanhedrin in Jerusalem. R. Wasserman wrote that the Sanhedrin had to be located at the Temple because, if its 71 rabbis were going to represent all of Israel, they needed special divine inspiration that only that physical place could provide. However, a central, universally recognized, council of rabbis would maintain the same authority as the Sanhedrin no matter where it was located.

R. Wasserman used this idea of halakhic authority to embrace a romantic and subjective view known as *Daat Torah*. Those in seat of halakahic authority were privy to interpret “*Ratzon Hashem*” (God’s Will) in all areas of life. Rabbinic law as well as Rabbinic advice is then binding as it is the manifestation of the will of God. R. Wasserman himself wrote prophetically on the matters of the day, specifically pointing at Zionism as the root cause of the difficulties facing the Jewish people.

R. Halevy sought to uphold the enduring importance and authority of halakhic practice. In his vigorous critique against the conclusions of the *Wissenschaft des Judentums* (Jewish

Studies) school, his work "Dorot Harishonim," endeavored to demonstrate that a cohesive and organized representative body known as the "beit hava'ad" existed throughout Jewish history. He argued that the Talmud's authority was grounded in its dissemination by a centralized and universal beit hava'ad.

Ari Bergmann observes that R. Halevy repeatedly presents his theory about the beit hava'ad in "Dorot harishonim" without providing sufficient evidence for its existence. Bergmann suggests that Halevy's concept of the beit hava'ad served to validate his apologetic and political agenda, supporting his aim to establish a unified international organization for Orthodox Jewry, such as Agudath Israel and its Mo'etses Gedolei Hatorah. The emergence of Mo'etses Gedolei Hatorah propelled the novel concept of Da'as Torah, which involves the traditional community accepting the consensus of these rabbis on communal matters beyond halakha. This notion silenced dissenting views from local rabbis and, unlike historical halakhic decisions, Da'as Torah did not require reasoned documentation and was immune to debate, reflecting the rabbinic leaders' role as quasi-prophetic authorities.

It is worth contrasting Wasserman's position with that of Rabbi Avraham Yehoshua Karelitz, the Hazon Ish,<sup>82</sup> who was nervous about the liberal and antinomian implications of even this qualified approach to a developing halakhic system and instead argued against the role of consensus while maintaining the authority of halakhic practice by pushing back on the modern assumption of progressiveness over time. For the Hazon Ish, "we are like donkeys and they are like the sons of angels," the earlier generations had a deeper command of the Divine Will than the later generations could access. The idea of Yeridat Hadorot was a countercultural idea that stood in the face of modern values and outlooks. While the development of halakha was

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<sup>82</sup> See Kuntres Divrei Sofrim 2:4 Hasagot Hazon Ish 129



technically possible, doing so without being audacious would need to be extremely cautiously measured.

Thus, the 19<sup>th</sup> century and its emphasis on the flexibility and developmental nature of the halakhic system germinated the notion of halakha as a national or consensual expression both in liberal and conservative circles. It is in light of these historical and intellectual developments that R. Kook's idea of *Kabalat Harabim* emerged. As we will see R. Kook was a product of his time and confronted these issues by employing many of these ideas in his own writings on the topic. As is clear, these ideas have far-ranging implications which R. Kook must deal with.

### **Kabalat HaRabim for Rav Kook: Vox Populi, Vox Dei**

Addressing the intellectual climate of his time, R. Kook took the ideas from traditional Jewish thought and combined them to provide comprehensive notion of national identity. R. Kook's arguments employ the biblical notions of the covenant, the halakhic concepts of *Takkanah*, the political-cultural ideas of national identity, and the metaphysical notions of divine chosenness, ultimately to form the idea that the acceptance of the nation is to be considered the authentic expression of God's Will.

Although the structures of the autonomous Jewish *kehilot* continued for many years, the rise of the modern nation-state and the decline of feudalism, gradually led to its demise.<sup>83</sup> Jews began to be recognized as citizens of their politic without having to forgo their Jewish identity (although many did). Instead of communities within the nations, there were now individuals amongst the nations.

Aside from the draw of individuals towards modernity, the *kehilot* faced internal struggles. Many *kehilot* were run by corrupt oligarchies and faced much internal tension and

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<sup>83</sup> The following historical analysis is based on Elazar, Daniel "The Kehillah" in D. Elazar, ed., *Kinship and Consent*

communal debt. In Eastern Europe, the fight between Hassidim and Mitnagdim led to further splintering as each kehillah was forced to deal with the same ideological battle. Moreover, as Jews spread out among Europe, old communities were weakened, and the new kehilot, formed amid nineteenth-century urbanization, had to cope with the new cosmopolitan influence towards the once parochial kehila. The rise of Reform and liberal Jewish movements further fragmented the autonomous Jewish community. As local communities were taken over by Reform Jews, Orthodox Jews sought to form their own separate communal institutions within the same locality.

In far Eastern Europe, where R. Kook grew up, the idea of the kehila was basically nonexistent. Of all the major European powers, the Russians did the most to limit Jewish autonomy, not allowing the Jews to create more than very localized institutions. The Russian government formally abolished the kahal in 1844, although it unofficially functioned throughout the nineteenth century. Russian policy was to destroy Jewish life and realized that targeting the Jewish communal organization was the most efficient way to do so. The Jewish community was put under the domain of the police and local non-Jewish government, but the local kehillot were responsible to collect taxes, which placed them in a bad light in the eyes of the average Jew.

Moreover, in the shtetl, the educational, social, and religious functions of the kehillot were divided among many different associations (hevrot) which become highly privatized replacing their historically communal nature. Finally, the rise of many different “isms” offered alternative forms of self-identity to compete with the kehila.

With these converging historical circumstances, the collapse of the autonomous Kahal, and the intellectual climate, we can understand that a vexing issue of the time was the nature of halakha, its purpose, and its obligation in a world where it was ostensibly not necessary for self-identity. More specifically, as public law is secularized, halakha becomes more specialized and

the limits of psak must become more clearly defined. We find R. Kook dealing with these issues in his earliest writings. In fact, delving into the issues of halakha within modernity was one of the topics that stirred his interest in Zionism.<sup>84</sup>

Rav Kook writes about the concept of *Kabalat Harabim* in a halakhic context in a few places.<sup>85</sup>

In his work, *Beer Eliyahu*, in *Hilchot Dayanim*, *Hoshen Mishpat* 25:4-7 a commentary on the writings of the Vilna Gaon (Elijah ben Solomon Zalman 1720-97) on *Shulchan Aruch* that was composed in his earlier years, R. Kook deals with a ruling of Rema (R. Moshe Isserless 1520-72) that if a judge thinks that the halakha does not accord with earlier poskim (halakhic decisors) he can dispute their rulings so long as he is not arguing with statements in the Talmud.

Rema adds that a judge should not rule leniently when the books that have spread throughout Israel are stringent unless the judge has a direct tradition from his teachers not to follow that stringency. The Vilna Gaon comments that the source of this halakha is the Sugya in *Avodah Zara* 36.

R. Kook questions the comparison of this ruling of Rema to the Sugya in *Avodah Zara* since that Gemara is referring to Rabbinic enactments (*takanot*) but not actual intellectual Torah rulings (*hora'ot*) of which Rambam rules that even a smaller Beit Din may debate a greater court.

R. Kook explains that the establishment of all normative halakhic based on reasoning and exegesis (*hora'a*) is entirely up to the discretion of the rabbinic leaders of each generation. The only area out of their complete control is the rabbinic enactments, *Gezerot* and *Takanot*, which

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<sup>84</sup> See Mirsky, 240

<sup>85</sup> Discussion of R. Kook's halakhic views on *Kabalat Harabim* can be found in Havlin, Shlomo Zalmen, "On the Sealing of Literature as the Foundation of Periodization in Halakha" in *Mechkarim Bisafrut HaTalmud Jerusalem* 1983 and Koren, Zalman Menahem, "Tannaim, Amoraim, Geonim Verishonim: Samkhut Harishonim Kelapei Ha'aharonim," in *Berurim Behilkhot Hareiyah*, ed. Moshe Zevi Neria, Aryeh Shtern, and Neriya Gotel ([Israel]: Bet Harav, 1991), 423-50

can only be uprooted following the laws learned from the Sugya of Avodah Zara. However, a ruling that has been accepted and spread throughout Israel maintains the status of a Takkanah. He derives this from a statement of the Maharik (Joseph Colon ben Solomon Trabotto 1420-80) who writes that the principles of pesak (halakhic decision) themselves are a Takkanah.

Therefore, books that have spread throughout Israel may be considered to have the status of a Takkanah and should not be argued against. However, because the Takkanah was not as universal as the Talmud's acceptance, a judge can be more stringent. Importantly, R. Kook also adds that this idea of Takkanah is also the source of authority for Minhag.

A more detailed explanation of this Maharik can be found in R. Kook's *Rihata DiHaklai* printed in the *Sdei Chemed*.<sup>86</sup> Explaining the Maharik's ruling, R. Kook writes that the purpose of having klalei hapsak (principles of halakhic decision) was only to maintain unity amongst the halakhic practice, and therefore the principles were accepted by the entirety of the Jewish people in the same manner that Rambam describes the acceptance of the Talmud. Technically, because R. Kook has differentiated between takanot and horaat, there should be no obligation for a posek to follow any previous decision as they are just hora'a, but now that klalei psak were accepted as takanot to ensure the unity of halakhic practice they cannot be ignored.

Interestingly, in these pieces, a lot of his analysis is based on Rambam's commentary. R. Kook's halakhic understanding seems to be more in line with Rambam; he does not even mention Ramban's opinion. He does not stress the cherem/oath factor but instead stresses that it is considered a Takkanah that was initiated by a rabbinic authority. R. Kook also does not mention any metaphysical explanations for this idea; he is completely sourced in legalistic

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<sup>86</sup> For a history of this work, see Harel, Cohen "History and Development of the essay "Rihata DiHaklai" Regarding the Methods of Psak Halakha" (Hebrew) in *M'avnei Hamakom* 13 2001 (Beit El)

halakha. Additionally, he does not mention the limits of this idea, although it is implied throughout the piece that rabbinic initiation is a requirement.

This is an important point when reading R. Kook on this topic. R. Kook can build on *Kabalat Harabim* as a halakhic principle that factors into the formal halakhic process of halakhic decisions. However, as we will see, he can also use the idea as a religious framework that can be used to categorize the religious experience even if its practical application will not always be appropriate.

In *Hadran Al Hashas*,<sup>87</sup> after a lengthy exposition on the opinions of Rambam and Ramban about the legal status of rabbinic commandments, R. Kook concludes that adhering to laws that are universally accepted is a Biblical demand (*d'Orayta*)<sup>88</sup> and that consensus is the Ramban's basis for the authority of rabbinical commandments (*derabanan*). He also discusses the halakhic aspects of his own approach, which he clearly states is based on his perspective of the disagreement between Rambam and Ramban, in some of his letters.<sup>89</sup>

In *L'Nevukhei Hador*, a long-unpublished treatise from that early time,<sup>90</sup> we see R. Kook developing this as an idea in Jewish thought with implications that transcend the realm of

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<sup>87</sup> This was not written by R. Kook but quoted by his son R. Tzvi Yehuda Kook and published in *Nitzani Eretz* 12 1998 *Merkaz Harav*

<sup>88</sup> See *Hadran Al Hashas* pg. 20. Interestingly, his reasoning is based on *Rash MISanz* based on *Yerushalmi Demai* 3:4 that *Klal Yisrael* can accept *Kedushat Yisrael* on the land to make it obligated in *Mitzvot Hateluyot Baaretz* even today.

<sup>89</sup> See for example, 1:42. 2:690.

<sup>90</sup> In May 2010, a work started circulating online and was later published that year in a censored version in *Pinqasei Ha-Re'ayah*, vol. 2 (Jerusalem: Ha-Makhon 'al-shem Ha-Ratzya'). In 2014, *Shahar Rahmani* published the fully annotated manuscript under the title "*Li-Nevukhei Ha-Dor*" (For the Perplexed of the Generation), drawing inspiration from *Maimonides's Guide of the Perplexed* and *Nahman Krochmal's* influential work *Moreh-Nevukhei Ha-Zman* (Guide of the Perplexed of the Age). See *Mirsky*, 287. It was likely chosen to remain unpublished at least partly because of the potential implications of these halakhic ideas. See further in *Chamiel, Ephraim. The Dual Truth, Volumes I & II : Studies on Nineteenth-Century Modern Religious Thought and Its Influence on Twentieth-Century Jewish Philosophy.* Brighton, MA: Academic Studies Press, 2019. Chapter 12

legalistic halakha. He addresses this in response to the heretics of his day. Clearly, these issues were amongst the pressing challenges to faith.

However, even according to their [the heretics] reasoning, we cannot separate ourselves from anything that has been accepted by the nation, **for that is the foundation for nationalist existence.** (L’Nevukhei Hador 6a)

R. Kook is introducing the notion that national existence is dependent on shared norms. Anything that has been accepted by the nation becomes basic to its existence. As Mirsky notes, for R. Kook, the essentialist idea of nationalism becomes the answer to many theological questions:

A key feature of the secularized dispensation of modernity is the distinction between religion and politics, not merely as discrete functions or as, in Augustine’s doctrine of the “two cities,” two parallel moral realms, but as different ontological realms: one—namely, politics—necessary; the other—religion—ontologically unnecessary, contingent, safely nestled, or, depending on your preference, walled in from the monopoly of legitimate violence claimed by the modern state. As a result, moderns can meaningfully question the existence or nonexistence of God in the abstract, while questioning the existence of politics and society is literally inconceivable. Nationalist religion undoes that distinction, giving religion and its transworldly claims the ontological necessity of politics. Rav Kook married the ontological necessity of the nation to the ontological necessities of God and the world—and to the ontological necessity of the universally minded ethical teachings of God’s Torah.

This conflation of politics and religion, which R. Kook felt was a positive value of nationalism became particularly important when dealing with questions about the legitimacy and necessity of contemporary halakhic practice.

R. Kook continues:

The Torah has entrusted all uncertainties to the Beit Din, and the **very appointment of the Beit Din is dependent on the national acceptance.**

Thus, all of the Oral Torah was either from Moshe Rabbenu and accepted in all its detail at Sinai or developed over thousands of years through the explanations and enactments of the courts. National acceptance is the foundation of its obligation, and someone who excludes himself from the nation is a blasphemer (Kafar Biakkar).

The faith that we have in the oral law being transmitted from God to Moshe Rabenu is a true faith that has been transmitted from our parents and is true in its own right.

Nonetheless, that is not the only basis for the upkeep of the oral law in Israel, as we know

we are obligated even in commandments that are entirely rabbinic. Rabbinic law cannot be based on the biblical imperative of Lo Tassur, as many of our sages hold that that verse is merely an *asmachta*. And if that is so, whence the obligation?

Rather the simple understanding **is that a nation follow its elders and sages, and the obligation of these individuals of a nation (the leaders) is to act according to the basic central generality.**

And this must be an actual biblical imperative, which is actually higher than general obligations, to the extent that it is fitting to be the foundation for all holy obligations. (L'Nevukhei Hador 6a)

R. Kook is attempting to describe the obligatory nature of rabbinic law. At this point he seems to be assuming that for law to be legitimate it must be sourced in rabbinic leadership. However, he says that the Beit Din is based on national acceptance. He does not explain yet what he means and how that works. First, R. Kook seems to be employing a political theory in which a nation is understood to follow its rulers and that it is simply logical to consider rabbinic enactments to be binding.<sup>91</sup> However, he continues by adding another point:

For even when it comes to keeping the Torah itself (as opposed to rabbinic decrees), albeit it being the literal divine word, **hazal understood that there be an obligation based upon willing acceptance, which is the willing acceptance of the national consensus.** And in the Torah this acceptance is explicit in the statement “*Naseh Vinishma*”. (L'Nevukhei Hador 6a)

Here he is adding that national acceptance is the deciding factor of law because law must be accepted willingly. A norm that is accepted willingly then become part of the existence of the nation. This could be the beginning of some sort of covenantal or metaphysical theory, but it also can be a legal theory about the nature of legitimate law.

R. Kook continues:

Therefore, although there may be legalistic conceptual distinctions, [on a practical level,] we make no distinction between their materials, whether they be transmissions of *halachot lemoshe mi Sinai* or through the evaluations of some accepted Beit din. For once

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<sup>91</sup> See R. Shimon Shkop, quoted in R. Elhanan Wasserman's *Kovetz Biurim*, *Biur on Shev Shmateta*, 9, in *Kovetz Shiurim* who espouses such a view. Also see R. Shkop's *Shaarei Yoser* 2, pg. 4 and Avi Sagi. 1995. "Religious Command Vrs. Legal System — a Chapter in the Thought of Rabbi Shim'on Shkop" in *Daat: A Journal of Jewish Philosophy & Kabbalah*, no. 35 (July): 99–114.

a ruling (hora'a) has spread throughout the nation it is now fully obligatory in complete obligation.

Therefore, even if one claims that all the halakhot in the oral law were only the explanations of a later Beit Din over time, their obligation is still completely normative. And even rabbinic law, certainly its foundation is through the acceptance of the national consensus.

Therefore, those that wish to pierce the hearts and raise a grudge and claim that the oral law was a product of many years and many sages and Batei Din, and therefore want to weaken the hearts and hands in the upkeep of the oral law -- their deception will not help. For the obligation is only established through the acceptance of the national consensus. For even those Halakhot Lemoshe MiSinai, if they were to be forgotten. we would bring them back through exegesis. And so it happened with the 300 or 3000 halachot that were forgotten during the times of mourning of Moshe and were reestablished by Otniel Ben Kenaz. And yet there is no distinction in their obligation whether they were known through us through tradition or through the ruling of Beit Din. (L'Nevukhei Hador 6a)

Throughout the piece R. Kook is clear that all the laws that have been established through national consensus were initiated by rabbinic leadership; he does not acknowledge the legitimacy of complete grassroot and bottom-up law. However, he adds that their institutional authority is not epistemic:

And from this, we can understand as well, that many of pure heart are mistaken when they claim that our belief in the greatness of hazal is based upon the statement “ if the first ones were like angels we are like people..”<sup>92</sup> that this is the source of our obligation to the rulings of the Talmud. For based on this, many brazen souls stood up and attempted to evaluate the greatness of hazal in comparison to men like them and thought that through this they would be able to distance the world from being careful of rabbinic obligations.

However, this is a result of a misunderstanding in the foundation of the Torah and its obligation. For even if the constructors of the Talmud were of a low level- which is not what they actually were- nonetheless, since they merited centrality within the nation to understand and rule according to the laws of the Torah and the nation accepted it and it spread within the nation, then anyone who breaches its teachings **destroys the existence and splendor of the national entity.**

All that we say about the greatness of the earlier generations is only because they were, it is true, but not because without them that it would be impossible to upkeep the Torah. Nor would it be possible to say that if they were just regular people like us that we would be permitted to argue with them, heaven forbid! The inability to argue is not dependent on the greatness of the one who said it. As we know that at times a later smaller decisor will argue against a great of the earlier generation and the truth will be with the later one. (L'Nevukhei Hador 6a)

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<sup>92</sup> Note the Hazon Ish supra 82



R. Kook's explanation for institutional authority is new. It is not representational in an individual sense as a pact made by individuals who agree to a governing polity. Instead, it gains its stature as a nationalist institution.

R. Kook continues to explicate this idea but still stresses the top-down initiation of the phenomenon he is describing:

Rather because all the time that the greats of Israel saw, at a time where there was a central establishment to the nation who were able to seal the Torah, to prevent dispute, they established that one should not argue in practice on statements of the earlier generations but should rather rule from within their opinions.

And they established this to upkeep the nation so that it turned into an obligation that cannot be turned away from. And someone who does exclude himself from these rules has left the ways of the congregation and has removed himself from the totality.

Therefore, when the mishna was sealed, they established the ruling not to argue against something that was stated in the halakha by the earlier generations and only permitted to work within them, and they also established rules of psak that made sense.

And afterward, when the centrality of the Talmud merited to be spread in Israel, the nation accepted not to argue against anything within it, rather only to rule about a situation that has not been [previously] ruled. Therefore, only national consensus and acceptance is what is the deciding factor.

And someone who is brazen enough to uproot something from the Talmud is **rejecting the national entity**. And brazen people like this reek evil to no end. And with a full understanding of this, we can distance ourselves from their suggestions to strengthen the existence of the nation to be a nation of God forever." (L'Nevukhei Hador 6a)

For R. Kook, thus far, it seems that public acceptance is what grants legitimacy to a top-down rabbinic decree. Its legitimacy stems from it forming a part of the national identity, not as a social or even fully representational contract. In almost purely secular terms, if one wants to be a participating member of the Jewish nation then its accepted laws become binding, and denial of them becomes offensive. In this context, it is important to recognize that R. Kook's audience was the Jewish intellectuals. He is targeting people who are proud of their Jewish identity but are looking for an approach towards modernity that does not seem archaic. His tactic is to posit that Jewish identity and halakha are inseparable, even on a secular level.

This idea is further developed in other chapters of the book. In Chapter 45, R. Kook discusses how to manage heresy. He claims that the way to approach heresy is first and foremost to practically adhere to the mitzvot despite possible intellectual or moral misgivings. R. Kook's approach is to make an equation between the halakha and national identity. To be Jewish means to keep halakha regardless of its historical source. That itself is the binding nature of the halakha.

R. Kook establishes that there are really two approaches to the upkeep of halakha, including Biblical law (d'Orayta). On the one hand, there is the "secular" upkeep of halakha which is borne out of love and identification with the nation. This means to adhere to the nation's cultural heritage, including halakhic norms that were accepted by the nation:

The true basis is the oral law, is founded on the acceptance of the nation, for on this there can be no doubt. There is no need for abstract exegetics but only to ask- "are you one of us or one of our enemies?" (L'Nevukhei Hador 45)

Thus, for R. Kook, the basic level of halakhic observance is a result of national identification. This is true even for the Biblical Law (d'Orayta):

Therefore, even the written law is consecrated with the holiness of the oral law, and this happened in the days of Achashveirosh, "They established it, and accepted it" (Kiymu Vekiblu). When there was a general agreement to keep the Torah for eternal generations, through the inner recognition that it is the foundation of our life.

Therefore, all the details [of halakha] follow and are drawn according to the love of the nation and one who loves the nation is more cherished by his creator, and one who guards all the things that are the acquisitions of Knesset Israel with meticulous care will be separated from the calculations of the deceptions of heresy that pierce at the heart, as matters of history do not need witness or philosophy. This is the lowest foundation. (L'Nevukhei Hador 45)

R. Kook interprets the Talmudic passage in Shavuot (39a) to establish that the acceptance of all Torah laws, both biblical and rabbinical, during the Purim story, became the foundation for halakhic observance. He argues that Torah's authority, rooted in national acceptance, demonstrates that communal norms become intrinsic to the national character and need no external justification for enforcement. While this acceptance and its part of the national character of the nation serves

as the basic reason for observing halakha, R. Kook also believes in a deeper, spiritual understanding of the nation's communal mitzvot.

For R. Kook, there is also a higher level of halakhic observance that is based on the recognition that metaphysically the Jews are the chosen nation, and that its accepted praxis is naturally holy. Once the cultural level of halakhic observance is achieved, there is a more profound identification with the halakhic lifestyle that is a result of acknowledging the unique nature of the nation:

Afterwards, it goes from there to the higher foundation, which is to recognize the value of Knesset Israel and its holiness, its distinction from the other nations, **and how it is more wondrous than all the families of the land, with its divine Chosenness wondrously revealed.** Give strength and splendor to deepen and explore, to rise and levels of holiness and faith, to come to the foundation of the written Torah, that despite all the length and time all the divine truth and faithful testimony is revealed to all... (L'Nevukhei Hador 45)

Here R. Kook is adding that God accepted the Jewish nation's communally accepted matters as Torah because of its unique divine character. However, recognition of this is only the second, more profound approach to the upkeep of the Torah.

This is consistent with R. Kook's views of nationalism at this time, influenced by many of the nineteenth-century ideas that we have discussed in which national culture is seen as the expression of an inner spirit. In Chapter 46, R. Kook outlines his vision for the world that is marked by nations adapted to their unique particulars. R. Kook prescribes the ambitions of the Jewish collective and all the nations towards "freedom". Mirsky<sup>93</sup> notes that his understanding of freedom "clearly is that which Isaiah Berlin famously characterized as "positive freedom," the ability most fully to realize oneself, as part of some larger whole, as distinct from "negative freedom," the absence of restraint, and hallmark of the liberal state." The Jewish people maintain

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<sup>93</sup> Mirsky, 326

a proclivity towards Divine understanding. Therefore, “the Oral Torah is the foundation of Torah, is the very foundation of national self-rule, and whoever would undo it is calling for slavery in the name of illusory freedom. It is precisely adherence to the Oral Torah arising from the divinely Written Torah’s interaction with Israel—that will enable the Jewish people to fulfill its universalist mission of bringing to fruition the best that is in the other families of humanity, as all religions, in purified form, will come to see their shared truth, however variously they live it.”

In fact, this was the mistake of the Karaites “who forgot the independent worth of the nation and did not know how to recognize the power of the minhagim but only relied on the letters of Torah, and even more so the Christians who took their foundations from the Torah itself without looking at its connection to the recognition of the inner life of the nation.” The purpose and role of Zionism is also understood as a means to excavate this inner Jewish national will.

Continuing in the Chapter 45:

And anyone that has the greatness of the nation more engraved on his soul, will respect its traditions (minhagim) and it's Torah and all the false conceptions of heresy will automatically go away...

Importantly, he mentions minhagim, which may be considered bottom-up grassroots innovations, although it does not have to be.

R. Kook notes how these two approaches were historically developed as well. This is typical of R. Kook who sees a progression of history in general:

Behold, until the days of Achashverosh, the Torah was only kept because of kafa aleihem har kigigit,<sup>94</sup> and the nation, in general, had the opposite desire, it was entranced with the desire of idolatry because it did not recognize the general nation, **how, even to naturally endure, it is not possible at all without Torah.** And to reach the highest level that there is a higher need for the Torah to upkeep the world, only a few special individuals were able to reach.... And at that time there was a need to continue the strength of acceptance of the Torah specifically through Har Sinai (L’Nevukhei Hador 45)

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<sup>94</sup> A reference to the Talmudic passage in Shabbat 88 which it describes God compelling the Jewish people to accept the Torah by holding Mount Sinai over their heads and threatening to drop it if they refuse.

Here, R. Kook is speaking more metaphysically. If in the first approach, the importance of the Torah was its being the creation of the Jewish people and its national manifestation, in the second approach, the Jewish people are the creation of the Torah and its manifestation. The second approach to the upkeep of the Torah based on Divine Chosenness is equated to a recognition that the Torah is the divine energy maintaining the survival of the nation. This is paralleled to the ultimate realization, only attainable by select individuals, that the entire world only survives through the inflow of the Torah which is the divine energy. However, because Jews failed to achieve this realization, they required another force to bind them to the law, which was the Kafa Aleihem Har Kigigit. R. Kook does not explain how that worked but based on his continuation it seems that it was the involuntary result of living in a reality where the authoritative nature of God and His law could not be challenged. However, that psychological reality lost its effect over time and was replaced with a new relationship to the law:

And behold any impact no matter how big, eventually diminishes over time, so that with all the deep impact that the revelation at Sinai had, and the great actions of God of the redemption of the Jews and on the world, nonetheless, over time, it is diminished. This is what Haman said, “their God has become old” so that strength is not within them and it is possible to destroy their entity.

But this was part of God's plan. That after a long period, while the nation is weak in its connection to the Torah out of an inner connection, that they recognize, during the days of Achashveirosh, that the foundation of their existence is specifically the Torah, and that they therefore accept it freely and willingly. That from now on, we do not need to continue the upkeep of the praxis of the Torah by being forced, but out of the willing acceptance of Israel. (L'Nevukhei Hador 45)

Once again, R. Kook adds the idea about the importance of free and willing acceptance in the halakhic system.

In Chapter 46 R. Kook adds another dimension:

This is not true of the house of Israel “Who have been carried since birth, Supported since leaving the womb” we feel the Torah in our life in its fullness and in our existence, in our ambitions, in our feelings, and in our historical sense. Even if all the

Torah were to be oral and not written, when combined with the convergence of our lives we would know the hand of God and his covenant.

Here, R. Kook argues that the Torah's obligatory nature is based on its truth as divine will. However, its truth is not dependent on the verification of the moment of revelation but on its consilience with the nation's historical sense and subjective understanding of its goals. Mirsky speaks of R. Kook's ethics as serving the purpose of self-cultivation. He associates aspects of R. Kook's ethics with the subjective ethics of Michel Foucault who "sought to shift the ground of ethical discussion away from Kant and towards Aristotle, not, as did MacIntyre, to recapture the Aristotelian ethos as such, but to draw attention to ethics as a set of actions in and through which one creates the self; or, to be more precisely Foucauldian, view the creation of the self as a negotiation with the dominant discourses of a time and place," and notes how R. Kook changes his discourse from the "subjective self" to the "subjective nation."<sup>95</sup> This perspective is demonstrated here as well; halakha serves as the actions through which the subjective nation creates itself.

Continuing in Chapter 45, R. Kook then explains why the agreement of one generation should be eternally binding:

And a general recognition was established that the nation will not withdraw from this agreement for this is the power of Israel that they are "sons that do not lie" that since they willingly accepted and recognized, this recognition will stand forever.

The character of the Jewish nation is that they will keep this agreement. Once again, the argument is based not on halakha or political theory, but on this abstract nationalistic notion of the character of the nation. R. Kook continues:

And even if words of hot air and vivid thoughts like the sand of the sea were to amount, that doubt the moment of the writing of the Torah and the order of the total portions, this does not unsettle even one strand of hair from our complete faith that our Torah is true forever. Because we all recognize in general recognition and natural innerness to add on

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<sup>95</sup> Mirsky, 29

to the testimony that was transmitted from our fathers about the revelations, and that this is how we want to live, to be a nation for God, and we recognize that there is no other existence in the world, for it becomes clear to us that the concept of the divine is implanted in the nature of man, and that is impossible to be a complete nation and live and endure without knowledge of the concept of the divine and matters of service to God... (L'Nevukhei Hador 45)

At the end of the piece R. Kook irons out the equation between the two approaches to the obligation of halakha: the law is binding because of its acceptance by the nation as its way to live and it chooses its way to live out of a recognition that it wants to live a life that embodies the recognition of the Divine in all things. Elsewhere, R. Kook details how rabbinic innovations like Eruvin and Netilat Yadayim were in fact specifically designed to promote a larger culture of God-awareness.<sup>96</sup>

What emerges from R. Kook is a multipronged system obligating halakhic practice. Halakha is technically obligatory simply based on its Divine revelation and enforced mandate (*kafa aleihem har kigit*). Nonetheless, R. Kook acknowledges the lack of appeal for such an approach in today's age especially, and its lack of political power without the willing acceptance of its constituents. He suggests, therefore, that halakha, first and foremost, must be seen as the cultural identity of the nation and that connection to the nation can only exist with the upkeep of halakha. However, he asks us to consider why halakha was accepted by the nation as its cultural identity. He claims that the Jewish people willingly accepted halakha because of their recognition that they only exist as a nation because of the Torah and the desire to live a life that manifests that acknowledgment. This desire to form a culture that is based on the Divine recognition is part of the nation's particular natural proclivity towards Divine acknowledgment that resulted in their becoming the Chosen Nation. As a result, in the spirit of *vox populi, vox dei*, the nation's actions naturally accord to Divine Will.

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<sup>96</sup> See Eyn Ayah Shabbat 1:73

These two dimensions of Jewish identity can be subsumed under the distinctions of Judaism as nation and religion, expressed eloquently by R. Lichtenstein:

The interrelationship of the spiritual and the material as constituent elements of Jewry is thus thrown into bolder relief. Knesset Yisrael is a material corpus. The formal criterion for membership is ordinarily biological, and it is Jewish parentage that confers the halakhic status of Jewry. This is only the formal side, however, an important side, no doubt, and one to which Halakha, as a legal system concerned with form (halakha is far more than this, but surely it is this too), must pay attention. The substantive essence of Knesset Yisrael, though, is spiritual. Membership in the nation confers a religious status, but only because the nation itself is, in its definitive essence, a spiritual community. Conversely, participation in the religion is limited to members of the nation. For form and substance, matter and spirit, cannot - much as our Platonic inclinations may desire it - be wholly divorced. That is the metaphysical condition of human life, and it is the condition of our national existence. They can be separated logically, and the distinction is of paramount importance. In practice, however, they are intertwined, as they exert a mutual influence upon each other. Collectively, therefore, we are both religion and nation. The begetting of alien children - i.e., uprooting oneself from Jewry so completely that one's children don't even know they are Jewish - is itself an apostasy which causes the loss of Jewish status.<sup>97</sup>

The most quoted piece from R. Kook on this topic is in his “Eder Hayakar”, his first work published after his move to Israel but very much based on the writings and thought of his younger years in Europe. Scholars have noticed that his piece in Eder Hayakar seems to have derived from the passages we just saw in L’Nevukhei Hador.<sup>98</sup> Like in L’Nevukhei Hador, R. Kook develops this point of Kabbalat Harabim as part of the discussion of the roots of apostasy in the Oral Torah. In his opinion, this apostasy stems from a fundamental mistake in understanding the nature of the Oral Torah.

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<sup>97</sup> Lichtenstein, Aharon “Brother Daniel and the Jewish Fraternity.” 2003. In *Leaves of Faith : The World of Jewish Learning*. v.2 Ktav Pub. House. There he applies the R. Soloveitchik’s famous distinction between Shem Eretz Yisrael and Kedushat Eretz Yisrael to Jewish identity: There is Shem Yisrael and Shem Kedushat Yisrael

<sup>98</sup> Henkin, Eltam Li-Nevukhei Ha-Dor shel Ha-Re’ayah Kook: Mavo le-Hibur she-lo Hushlam.” *Aqdamot* 25 (2010): 171-188.



Rabbi Kook reiterates that the validity and authority of the halakha do not necessarily rest on the epistemic greatness of the Sages, even though their greatness should not be doubted.

Instead, the validity authority of halakha lies in its "acceptance of the nation."

You should know that we lovingly observe the customs (minhagim) of Israel which we know we are not commanded to follow according to any prophecy, all because of the love of our nation, its love and honor which is dear to us, with the love of the highest divine holiness. Likewise, all the mitzvot of the sages that we observe, the fundamental basis of which is the acceptance of "the entire nation" (verse in Malachi quoted by the Talmud in Avodah Zara 36), which is the honor of the nation and its beloved and victorious historical influence, which is the beloved divine. For the more that a thing is copied (mitateket), the more it is beloved and the more the will and the general character of the nation as a whole is revealed, and even though the sages associated it (asmichinhu) with [the verse of] Lo Tassur, the clear foundation is the acceptance of the nation, as is well known, because it is said that "the entire nation" was specifically when the matter spread to the majority of Israel and the Ramban's opinion is known that Lo Tassur does not really belong to Rabbinic institutions, and yet they are beloved to Israel and are upheld in love. (Eder Hayakar 4)

Importantly, he mentions minhagim, which may be considered bottom-up grassroots innovations, although it does not have to be. By quoting the verse in Malachi he is explicitly indicating that the halakhic source of his idea is rooted in the Sugya in Avodah Zara, indicating, like he writes explicitly in Be'er Eliyahu that he views public acceptance as a type of Takkanah.

As we saw in L'Nevukhei Hador, he then uses this idea to underscore the importance of praxis in solving issues of heresy:

And those that recognize this intense love with all their hearts<sup>99</sup>, they are the foundation of the nation forever even if they are a minority, "the survivors that call out to hashem." Therefore, the foundation of practical action is essential, independent of the lofty records (Torah Shebksav) that require explanations and abstractions that are beyond the realm of the intense love and respect of Knesset Yisrael in the hearts of her children.

The misunderstandings of the centrality of communal acceptance has caused numerous mishaps, for many believe that that the foundation of keeping the Oral Law is only based on what was accepted by the nation out of the greatness and holiness of hazal, therefore

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<sup>99</sup> Shalom Rosenberg writes that this indicates that R. Kook is limiting the idea of Kabalat Harabim here to rabbinic initiation. See Shalom Rosenberg, "'Ha-Hitgalut Ha-Matmedet': Shlosha Kivunim" [The continual revelation: Three approaches], in Hitgalut, Emuna, Tevuna [Revelation, faith, understanding], ed. Moshe Hallamish and Moshe Schwarcz (Ramat Gan: Bar Ilan University, 1976), 131-143.

out of their acknowledged desire, they attempted to brazenly make evaluations about the leaders of the generations, which is, as is understood, a chutzpa and full of heresy, they thought that through this they would diminish the obligatory status of obligations. But these people did not know that [although] the great stature of hazal and their exalted divine stature, is true in its own right and also able to provide a spice, to make pleasant and incentivize adherence to their word. Nonetheless, the ultimate foundation for its eternal upkeep is only due to the national acceptance for generations as its way of life. (Eder Hayakar 4)

In this piece he adds historical precedent:<sup>100</sup>

For example, we see the Cherem of Rabeinu Gershom, which, once it was spread and established, is as strong in the heart of the nation like all biblical prohibitions. This is despite the fact that he was neither a tanna, amora, but because it was established with the agreement of the nation over many generations, and anyone who takes himself out of the klal is a blasphemer (Kafar Biikkar).

Up until now we see the almost identical ideas to what we have seen in L’Nevukhei

Hador. Although, here, there is less emphasis on the need for rabbinic top-down initiation.<sup>101</sup>

However, R. Kook adds another important element to the discussion:

Certainly, the obligation to practically adhere to the written torah is binding no less, in regard to it being a national foundation, than that of the Oral Torah and Rabbinic rulings, for on them it was stated, “God only established the covenant with the nation of Israel because of the Oral matters”<sup>102</sup> **which is based on the divine respect (Chashivut Elokit) that is contained within the nation, its uniqueness and exceptionality from the other nations**, and included in this is also the Oral aspect which is in the Text, which is the communal acceptance in general and its divine advantage which protrudes from all its appendages which is apparent to everyone. And this should shut the mouth of any heretic and destroyer...

This last paragraph is more pronounced than the claims of the first chapter that we saw in L’Nevukhei Hador and aligns with the second approach to the acceptance of the torah in Chapter 45. Here R. Kook is adding that God accepted the Jewish nation’s communally accepted matters as Torah because of its unique divine character. This is R. Kook’s covenantal theology, different

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<sup>100</sup> He also discusses this precedent and another example in one of his letters see Iggerot hare’iyah 1:149

<sup>101</sup> Although this was not written much later than L’Nevukhei Hador, it is worth pointing out that Mirsky notes a shift in R. Kook’s general worldview over time from top-down orientation to a more organic, bottom up one. See Mirsky, 335

<sup>102</sup> Gitin 60a

than traditional covenantal theology which develops some sort of pact that is made between the people and God, R. Kook sees a natural identification between the Jewish people and the Divine Will. He interprets the Talmud's statement that God only made the covenant with the Jews because of the oral matters to mean that because of their oral matters, which R. Kook takes to mean is their nationally accepted way of life, God chose to make the covenant. The Jewish people were chosen because their nation's way of life maintained a divine character. The Jewish people are not negotiating a contract with God but are attempting to fully realize their natural selves by conducting lives replete with God awareness, and God approves of those actions.

In sum, R. Kook is making a legal claim based on Rambam, Ramban, and the Gemara in Avodah Zara that halakha follows the acceptance of the nation. However, he is also making a metaphysical claim that acceptance of the nation is to be considered the authentic expression of the chosen nation and therefore under divine approval.

In some of his other writings, R. Kook is even more explicit about the direct connection between the Jewish nation and divine will. For example, in Eyn Ayah Shabbat 1:73 he writes about the Jews taking upon themselves a culture that ensures the recognition of the divine idea. He quotes God:

Nonetheless, the wisdom of your heart is aligned, in the measure of its attitude, to my heart, and to my exalted mission in the Torah and its commandments.

Importantly, despite the close connection and Divine sanction of the nation's culture, R. Kook is careful not to equate human law with Divine law:

[God:] This is despite the fact that my thoughts are higher than your thoughts and my ways [higher than] yours.

Elsewhere R. Kook further stresses the equation:

Anything that is the result of a foundation of the sages of the Torah, through pure knowledge of the Torah, whether revealed through decision-making, rationality, logic, or

any inclination founded in the Torah, is the appearance of the light of God, the spirit of God, the voice of God, which is present in Knesset Israel even when it seems hidden from that matter.<sup>103</sup>

It is worth noting that R. Kook stresses his perspective of *Kabalat Harabim* in a letter to R. Issac Halevy, who as we have seen, took a different approach to these issues:

The reason motivating the world-destroyers to cut down the saplings and turn everything upside down by rejecting tradition, in a deeper sense, is the simple fact that the world has grown progressively dark with the absence of any inner light [ . . . ] For instance, in the same way that it does not matter for our observance whether the Torah's *shi'urim* [halakhic measurements] are Mosaic traditions from Sinai, as concluded in the Babylonian Talmud (Yoma 80), or actually decrees of the rabbinical court in Jabez [see 1 Chronicles 4:9], according to the simple reading of the *Yerushalmi* at the beginning of tractate *Pe'ah*, [ . . . ] because the determining factor is acceptance by the nation [ . . . ], so, too, it does not matter for our sacred belief in the Oral Torah whether the Mishnah was sealed in earlier or later generations, and similarly for the Talmud.”  
(Bergmann translation. See Rav Kook's letter to Halevy in *Kook, Iggerot hare'iyah*, 1:193–194 (letter 149))

In principle, it would seem that R. Kook would grant legitimacy to grassroots innovations without rabbinic initiation. However, overall, the notion of *Kabalat Harabim* was developed as a tool to fight halakhic progressivism and to assert the primacy of Jewish halakhic praxis.

It is noteworthy, that R. Kook seems wary of employing this theory in his practical halakhic decision-making. As chief rabbi, R. Kook was forced to adjudicate various halakhic issues, however, as far as I am aware, we do not find him overtly reliant on this approach.

Even in his philosophical explications, as we saw, R. Kook strongly stresses the role of the Beit Din in the process of the legislation. It seems that the Jewish people's acceptance plays a more decisive role in a more complex relationship, serving only to affirm and legitimate rabbinic enactments but not necessarily to initiate legislation.

In fact, R. Kook describes a metaphysical connection between the religious value of the nation and its leaders. He depicts the *Ruach Hakodesh*, which he frequently associates with an

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<sup>103</sup> *Shemona Kevatzim* 5:271

inherent characteristic of the Jewish nation that injects the love necessary for the nation's created halakha to be of value, to be an outflow from the tzaddik in the generation.<sup>104</sup> Interestingly, he notes that at times, this resulting love is so strong that it results in misguided minhagim and customs and that we should be wary of this.<sup>105</sup>

Former Israeli Minister of Religion Zerah Warhaftig quotes R. Kook as saying that Takanot will be greatly needed in the new state of Israel and that "so long as they are accepted from most of the **Chachmei Yisrael** they have the power of a Din Torah."<sup>106</sup> Again, indicating the need for at least a minimal rabbinic overview.

It is also worthy to note that even in L'Nevukhei Hador, in chapters 13 and 14, R. Kook resolutely stresses the importance of halakhic conservatism. R. Kook there discusses ethical conflicts that may arise between halakha and modern sensitivities. He acknowledges that in an ideal world, the Beit Din would be able to align a malleable halakha to accord to ethics.

However, he states that without a Beit Din, change should not be made:

I know, however, that this lofty knowledge can be a detriment to those of weak knowledge that want to push the end of time and pursue the far away future at the wrong time. They are the foxes that kick, that even though their feeling is an exalted feeling, but their spirit is not a still spirit that is fitting for any upright man who knows what is in front of him. For a person of settled mind, burdens of the soul from matters of the future will not sway him from continuing to guard the certificate (Torah) and to keep the mitzvot of the Torah as established by the sages of the Talmud, and recognize the inner recognition, how it fulfills the true ethical obligations of the life of the nation and that its future- and that to the utmost truth- it is the will of God who wants righteousness and judgement. .... For a sick man in his illness will be confined by things that a healthy person is not confined by, and if he is a person of character (baal nefesh), he will not be repelled by them, but fulfill them with love and patience, and with this hope to reach his healthy natural state. That is also the way of our nation, with its religious path as sealed by the Talmud, which is the big bandage for the plague of the exile...but how great will the damage be if we are able to say that we are healthy and that we do not need the regimented confinement of the medicines while our sickness is so great...Moreover, it has not been clear to us that the ethical portions of the Talmud are even fit to be

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<sup>104</sup> See Shemona Kevatzim 3:13, Also see Shemona Kevatzim 5:271

<sup>105</sup> See Shemona Kevatzim 3:13

<sup>106</sup> See Fiksler Consent, 140

considered a burden for a nation that wants to go in the ways of life and physical and ethical success with holiness...It is more worthwhile to think that when we reach our natural state, we will return to the love the ways of the God's Torah...until we naturally incline towards purity... (L'Nevukhei Hador 13)

Despite acknowledging legitimate modern discomforts with contemporary halakhic Judaism, R. Kook lists a few reasons to engage in conservatism. Firstly, it is the will of God to do so, as it is apparent that it is the current life force of the nation, and God only wills good. Moreover, contemporary halakha was formed out of and formed for the Galut experience. Comparing halakha to the treatment of a sick person, he notes how different situations require different types of lifestyles even if they are at times uncomfortable. Finally, he pushes back on the correlation between time and progression. It is possible that modern sensitivities are misinformed and that a pure lifestyle will conform to Talmudic ethics.

Similarly, in his letter to R. Moshe Seidel,<sup>107</sup> R. Kook makes a similar point:

The truth of the Torah can be revealed only when the entire nation of God is in its land, perfected in all its spiritual manners. Then the oral law will regain its essential condition, according to the understanding of the Great Court...

Whoever wishes to judge in these times... according to the same exalted requirements, 'it is ready for those whose foot slips.' God save us from this view. (Erder Translation)

R. Kook does invoke *Kabalat Harabim* in passing when discussing his controversial lenient ruling concerning *Heter Mechira* during *shemitta*; this is noteworthy because he is invoking the principle to be lenient:

I must stand in the breach against those who besmirch people who come to settle the land of Israel and who, in the absence of an alternative, are forced to depend on this permissive ruling, **which has already become widespread** and has a basis in the positions of the Talmuds and the decisors. Such besmirching damages the *yishuv* [Jewish population of the land] both spiritually and materially. Materially, because it is impossible for all to observe the laws of the sabbatical year without annulment, since if they will not export the goods ... the land will literally become desolate, God forbid... Spiritually, because publicizing the prohibition will close the door to entry into the land of Israel... to

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<sup>107</sup> Iggerot hare'iyah, 89

all loyal Jews, so that only those who throw the religion behind their backs will immigrate. (Berger translation<sup>108</sup>)

Interestingly, R. Kook is not satisfied with the principle of *Kabalat Harabim* alone and, indeed, he seems to imply that he looks forward to a future in which his ruling is not necessary. As a halakhic principle it would be a factor, but not the deciding one.

R. Kook's conservatism can further be observed when responding to the question of the reestablishment of the Sanhedrin.<sup>109</sup> R. Tsvi Makovsky, originally from Soviet Ukraine and later a rabbi in Tel Aviv–Jaffa, proposed reconstituting the Sanhedrin. He saw the influx of Jews to Israel as a sign of a renewed spiritual connection and believed that Zionism had practically redeemed the concept of Zion. In 1928, he published a pamphlet outlining his arguments to re-establish the Sanhedrin, supported by responses from senior European rabbis. While most approved of the idea in theory, they found it impractical and divisive in practice due to the challenge of achieving consensus among different groups.

During the final year of his life, R. Kook communicated with Makovsky, showing overall support for Makovsky's plan but cautioning against its immediate execution. R. Kook cautioned that there was “no possibility of creating a consensus among the Torah scholars of our generation” and that lack of heartfelt preparation “will lead only to polemic and no practical benefit will come out of it.”<sup>110</sup>

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<sup>108</sup> David Berger, “Texts, Values, and Historical Change: Reflections on the Dynamics of Jewish Law,” in Michael J. Harris, Daniel Rynhold, and Tamra Wright, eds., *Radical Responsibility: Celebrating the Thought of Chief Rabbi Lord Jonathan Sacks* (Jerusalem: Maggid Books, 2012), 201-216

<sup>109</sup> For more on this see Kaye, Alexander. 2020 *The Invention of Jewish Theocracy: The Struggle for Legal Authority in Modern Israel*, Oxford University Press

<sup>110</sup> Kaye translation. Zvi Makovsky, *Ve-ashiva shoftayikh* (Tel Aviv: Defus A. Moses, 1938), 37. The letter was initially produced in an article by Makovsky in the religious newspaper *Ha-hed*. Zvi Makovsky, “A”d yesod by”d ha-gadol bi-*yerushalayim*,” *Ha-hed* 12 (1935).

R. Kook expressed to Makovsky his longstanding support for a global rabbinical assembly in Jerusalem. In fact, he wrote that during his tenure as Ashkenazic Chief Rabbi at the start of the British Mandate, he had suggested such an initiative:

If we are able to organize the rabbinate properly in the Land of Israel in its branches and centers, then we will be able to turn to the whole people of Israel, especially the most influential rabbis and scholars in the exile, . . . so that they will be our partners in a single association, and send representatives from all over the exile. . . . Every year, one month will be designated for the representatives to appear. . . . The joint meeting, which will include the greatest of the rabbis of the Holy Land and of the exile, this great conference, will be called “the general rabbinate,” meaning the rabbinate of the entire Jewish people. And if God desires, we will be successful and this conference and its association will achieve right and good things, whether to strengthen the state of the Torah in all areas of religion, or to solve the greatest most general questions connected with the life of the people in the Land of Israel and in the exile, or to improve the situation of the people with regard to its external relations to the nations.<sup>111</sup> (Kaye translation)

R. Kook disagreed with Makovsky's idea of formally reestablishing the ancient Sanhedrin. Instead, he had previously suggested a global rabbinic network that would convene in Jerusalem annually. However, this plan never came to fruition due to the challenges of collaboration among diverse rabbis. Kook's envisioned assembly was more like a religious conference and not intended to play a central role in a Jewish state's apparatus. He supported Jerusalem as a religious center but didn't anticipate it as a supreme rabbinic body for governing a Jewish state's laws. As Alexander Kaye points out, this conservative stance contrasted with later proponents like R. Yehudah-Leib Fishman-Maimon, who claimed to be grounded in R. Kook's ideas and envisioned a modern Sanhedrin as a legislative institution capable of creating new halakhic laws applicable to a contemporary Jewish state. While R. Kook acknowledged the potential for significant changes, he never proposed their practical implementation.<sup>112</sup>

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<sup>111</sup> *ibid*

<sup>112</sup> Although Kaye's analysis is most likely correct in practice, R. Kook did seem to at least initially conceive of a central court that would make progressive changes to halakha, of course, constrained to the tradition. See *Otzarot* 235-256 and the discussion in Mirsky, 240. Importantly, in those early discussions, innovations were to be initiated by the court.



## **Kabalat Harabim and the State**

This idea of Kabalat Harabim as outlined by R. Kook played an important role for R. Kook's disciples as they sought to determine the halakhic nature of the state of Israel.<sup>113</sup>

Although the Torah acknowledges the role of rabbinic legislation and the Beit Din Hagadol, it also condones the law and rulership of the king. A basic question that Jewish scholars must deal with is what is the nature of the king's law and how does it interact with halakhic law?

In his early years, while residing in St. Galen, Switzerland during World War I, R. Kook made an important comment about the matter of non-halakhic Jewish authority:

It seems to me that when there is no king, since the king's laws relate to the general state of the nation, the rights of these laws return to the hands of the nation in its entirety.<sup>114</sup>  
(Kaye translation)

As Kaye discusses, although R. Kook's statement was likely made in passing and not necessarily intended as practical governance advice, it gained substantial significance within the context of religious Zionism as a foundational basis for future discussions among religious Zionists about political and legal authority in Israel.

This idea was radical in that although it embraced established ideas in Jewish tradition that support legal systems beyond halakha as demonstrated by the institution of the monarchy, and that the king's authority endures post-monarchy, he uniquely suggested that this authority reverts to the entire Jewish nation. Unlike his predecessors and consistent with R. Kook's general outlook, he placed political power in the collective people rather than just leadership.

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<sup>113</sup> This is discussed extensively in Kaye, Alexander. 2020 *The Invention of Jewish Theocracy: The Struggle for Legal Authority in Modern Israel*, Oxford University Press also see Yedidya, Assaf above for an overview of the issues.

<sup>114</sup> Abraham Isaac Kook, *Mishpat kohen*, 2nd edition (Jerusalem: Mosad Ha-rav Kook, 1966), 144:14. The responsum was written on 19 Tevet, 5676, which corresponds to December 26, 1915. (Kaye)

In fact, a primary student of R. Kook and an important religious Zionist figure, R. Moshe Tzvi Neria, expanded on this idea by relating it to the theory of Ramban regarding Takkanah which R. Kook employed in his own interpretations of Kabbalat Harabim.<sup>115</sup>

### **Formal Explications**

R. Kook's nationalistic approach to halakha can be understood formally in a few non-mutually exclusive ways:

Legally, we can posit that the halakhic legal system endorses a mechanism of change that is filtered through broad consensus. Such an approach is comparable to common law systems that form the basis of Anglo-American law today. Common-law theory posits that the law doesn't reside in a fixed, written code that judges strictly adhere to; instead, it emerges from the community's customs and values. Judges make decisions based on these communal norms, which gradually evolve and clarify through court rulings. A judge's role is to interpret and apply these norms, drawing from past judicial decisions. Importantly, a single judicial decision does not establish a binding precedent, and there is no ultimate, authoritative text referred to as "the law" or "the law code." The common law, as a legal framework, is intentionally open-ended, adaptable, and indefinite in nature.<sup>116</sup>

There are different ways to frame this legalistic approach:

1. The community is the authority. Like the charismatic-based Takkanah of Ramban, the community is what grants authority to the law.
2. It is a prerequisite of authority. This is the representation of Rambam. It grants legitimacy to the law as a necessary but not sufficient component.

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<sup>115</sup> See Herzog, Isaac, and Itamar Warhaftig. 1989. *Tehukah Le-Yisra'el 'al-Pi Ha-Torah*. Mosad ha-Rav Kuk, Yad ha-Rav Hertzog. pg. 217

<sup>116</sup> Adapted from <https://www.torahmusings.com/2013/12/rethinking-orthodoxy-and-biblical-criticism-vi/>

3. It is a factor that is to be considered when making halakhic decisions by recognizing that law is part and parcel of culture.<sup>117</sup>

4. Collectives work as external objective evidence that should be factored into the halakic system the same way that sevara is considered. This can be for mystical or pragmatic purposes:

On a mystical level, truth emerges from collectives, this is an almost panpsychist approach that is comparable to Jungian archetypes of the collective unconscious. Thus, collective responses are to be halakhically factored.<sup>118</sup>

Pragmatically, collective wisdom can be viewed as an emergent property between people and ways of processing information that should not be ignored. In today's globalized world that takes the Internet for granted and experienced the rise of the metaverse, bitcoin, and artificial intelligence, this is an up-and-coming field of cognitive science and a concept that is used in sociology, business, computer science, mass communications, and appears in science fiction. Wikipedia, for example, with its open editing and peer review, can be considered the ultimate manifestation of collective wisdom.<sup>119</sup>

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<sup>117</sup> This point is made by R. Aharon Lichtenstein in "Does Jewish Tradition Recognize an Ethic Independent of Halakha? Leaves of Faith, vol. 2 (Jersey City, 2004) and "The Human And Social Factor In Halakha" Tradition 36 (2002) . See also Waxman, Chaim I. "Toward A Sociology Of 'Psak.'" Tradition: A Journal of Orthodox Jewish Thought 25, no. 3 (1991) and Bleich, J. David. "Methodology of Psak." Tradition: A Journal of Orthodox Jewish Thought 51, no. 2 (2019): 7–41.

<sup>118</sup> See supra note 69. See also [https://www.chabad.org/library/article\\_cdo/aid/2778/jewish/Quantum-Reality-Ancient-Wisdom.htm](https://www.chabad.org/library/article_cdo/aid/2778/jewish/Quantum-Reality-Ancient-Wisdom.htm): The Rebbe then went on to concur with Schrodinger, with the qualification that according to the Talmud there is also collective consciousness for each of the nations of the world, the Jewish people, of course, being one of those.

<sup>119</sup> See Tanenbaum, Abraham, On Collective Wisdom and the Establishment of Halakha, Gilyonot Parshat Hashvua-Misrad Hamishpatim, Hamachlaka Limishpat Ivri- Parashat Bo- 2008, Gilyon 338 who references Surowiecki, James "The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations"(New York, 2004). Also see Tkacz N. Wikipedia and the Politics of Openness. Chicago: University of Chicago Press; 2015.

It is also important to recognize that in legal philosophy, there is a distinction between legal rules and legal principles. Legal rules have a clear, binary application - if the rule applies, it determines the legal outcome; if not, it is irrelevant. On the other hand, legal principles, even if applicable, do not mandate a specific outcome. They provide judges with reasons to decide a case in a particular way but carry varying weights and are never absolute. Principles don't dictate a fixed result; they argue for a particular direction but leave room for judicial discretion.<sup>120</sup>

Kabalat Harabim can also be viewed through this perspective.

### **Underlying Assumptions**

R. Kook's understanding makes a few interrelated assumptions.<sup>121</sup> First, he assumes that there is a correlation between the passing of time and progress. He also may be assuming ongoing revelation instead of a one-time Sinaitic occurrence.<sup>122</sup>

He may either be assuming legal positivism and therefore not caring about the truth or intrinsic value of the law. On the flipside, his ideas may assume that since law is predicated on divine will and divine will can be identified through the people then that becomes the basis for law. Similarly, it assumes either that we don't care about an original Truth given by God, that there is no such thing as a Divine truth, or that the truth of God's will changes. It also assumes a certain importance to conformity; if the collective decides, there may not be room for the

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<sup>120</sup> This distinction is made by Ronald Dworkin, *Taking Rights Seriously*, (London 1977). See also Marmor, Andrei and Alexander Sarch, "The Nature of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2019 Edition), Edward N. Zalta <https://plato.stanford.edu/entries/lawphil-nature/>.

<sup>121</sup> Many of these assumptions are major themes that can be found throughout R. Kook's writings. For an overview see Erder, *Hassidic Model*

<sup>122</sup> It is important to point out that he may not need to assume ongoing revelation from a halakhic standpoint since legally he explains that it works through the concept of Takkanah. For his metaphysical assumptions he may need to assume so and he does have these implications in other places. Such a conception can be traced back to R. Judah Halevi and Ramban. He may just think that there are different levels of revelation and assert more significance to the Sinaitic event (either for the level of its revelation or the momentous occasion of the creation of the covenant). Many differentiate between ruach hakodesh and nevuah for example. Moreover, he can understand that all development stills stems from the original source which we will discuss in the next section.

individual's deviation. He may also be making certain assumptions about divine providence<sup>123</sup> and about the nature of the Jewish people and the nature of their chosenness.

Halakhically he is assuming that Beit Din cannot or does not really make mistakes and that the prohibition of Baal Tosif is not applicable in this public and legal setting.<sup>124</sup>

### **Pragmatic Concerns and Potential Solutions**

Although R. Kook lays out the conceptual underpinnings of his idea of Kabbalat Harabim, he primarily developed the idea to defend the relevancy of contemporary halakha. He does not explain how, or if, it can be practically implemented to positively shape normative halakhic praxis or interpretation. The only clear law that was determined by this notion is the inability to deviate from the rulings of the Talmud. As we noted, there is no evidence of an intentional consensus on the acceptance of the Talmud, and it likely occurred organically.

To the extreme, the halakha recognizes that an *Ir Hanidachas*, a consensus-based sin is to be entirely destroyed. Where is the line drawn between communal sin and communal sanctification? Moreover, R. Kook does not explain who comprises the halakhic community that can grant acceptance to halakha.<sup>125</sup> Can Kabbalat Harabim be invoked to be permit halakhot or only to add stringency? How can one posek ever maintain their own opinion against the consensus? Why is Christianity, for example, which has a much larger constituency than Judaism, not considered to have attained the divine sanction from communal acceptance? How is one to act while a norm is in the midst of being accepted?

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<sup>123</sup> See for example Orot Ha-Kodesh, 1:117

<sup>124</sup> Further discussion of these issues can be found in Feldman, Daniel. 2021. *Binah Ba-Sefarim : Bene Binah : He'arot u-Ve'urim Ve-Tsiyune Me'orot Be-Divre Ha-Mefarshim Uye-Sifre Ha-Poskim Be-Dinim de-Rabanan*

<sup>125</sup> See above Shalom Rosenberg who thinks that R. Kook limits his community to the rabbinic elite. R. Chaim Hirschensohn applies the community to anyone that is shomer mitzvot even minimally, like merely attending synagogue (See Malachai Bakodesh 2:2 88-90). Hazon Ish seems to limit these concepts to the rabbis, see Kuntres Hashiurim 708. A similar view can be found by R. Joshua Falk Cohen, in his discussion of the Talmud's authority in the introduction to *Sefer Me'irat 'Einayim*, who bases it only on rabbinic consensus.

More fundamentally, however, there are certain implications of such an approach that must be dealt with. Placing halakha in human hands, no matter how much Divine Providence is injected, still cheapens the religious experience to a watered-down version of God that makes no absolute demands from humanity. In a sense, the notion of the covenant is turned on its head –is the nation holding the mountain over God’s head?

Moreover, as with other nationalistic outlooks, there are moral concerns. If we must accept the people’s will, what we seem to be left with is an unchallengeable fundamentalism; how can we protect from the “tyranny of the majority?”<sup>126</sup> If there is anything that modern history has shown us is that nationalism and religion are of the most destructive forces known to mankind; asserting their equivalence can have disastrous moral consequences.

It is important to note that even in medieval times of Kehal, scholars worked to integrate the communal enactments into the Jewish legal system to prevent these enactments from evolving into a separate legal system that paralleled traditional Jewish law. Three safeguards were put in place to ensure this integration:<sup>127</sup>

1. Approval by a Distinguished Person: Before enacting a communal law (takkanah), it needed approval from a respected individual within the community. This approval was

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<sup>126</sup> This issue is fleshed out in Josh Yuter, The Conceits of “Consensus” in Halakhic Rhetoric. <https://joshyuter.com/2014/04/06/judaism/jewish-law-halakha/conceits-consensus-halakhic-rhetoric/>. It is worth pointing out that R. Kook himself was not concerned about this moral dilemma because he believed that nationalism that is constrained by a religion that is moral at its core cannot become corrupted:

Nationalism alone, when it strikes root deep in the nation’s heart, may degrade and animalize its spirit the same way that it can elevate it. Witness patriotic France, which enlightened wise men took to be the redemption of humanity, and go see what became of them! Our nationalism is protected against this wildness, but only when guided by its nature, which is God’s spirit that is upon us, as promised by our Prophets that it will not depart from our offspring and theirs, says God, from now and forever. (Mirsky Translation, Otzarot, 242.)

<sup>127</sup> See further in Takkanot Ha-Kahal <https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/takkanot-ha-kahal>.

aimed at maintaining some control by halakhic scholars over the enactments and emphasized the connection between the takkanah and halakhic authority.

2. Consistency with Principles of Justice and Equity: Communal enactments were required to adhere to the principles of justice and equity, ensuring they did not encourage moral laxity or impose undue burdens on the community. They had to serve the greater good and not arbitrarily disadvantage individuals or minorities.
3. Halakhic Interpretation: Competent halakhic scholars were responsible for interpreting and scrutinizing communal enactments. They applied established rules of halakhic interpretation and compared the takkanah's content and formulation to existing halakhic rules.

These safeguards allowed communal enactments to be integrated into the Jewish legal system, aligning them with the principles, objectives, and spirit of Jewish law. Communal leaders viewed these enactments as a means to address specific legal issues within the framework of the halakhah while upholding the sanctity of Jewish law. They also contributed to the development of legal principles, safeguarding minority rights, ensuring equality before the law, and guiding legislative processes within the Jewish community. R. Kook, whose legal understanding of *Kabalat Harabim* seems to be based at least partially on the concept of the *Takkanah*, would likely agree that these principles would certainly need to be factored in before institutionalizing a communally accepted enactment.

R. Kook's approach was controversially adopted by prominent orthodox feminist theologian Tamar Ross in her seminal work, *Expanding the Palace of Torah*, and subsequent essays. Ross takes R. Kook's ideas along with postmodernist theories of law and hermeneutics to form a conception of revelation she dubs "Cumulative Revelation" that serves to ameliorate modern

issues of feminism within an Orthodox framework. For Ross, establishing such a view of revelation could allow feminists to legitimately adopt halakhic practices they feel are correct, in spite of mainstream normative opposition, in hope that they be accepted by the larger halakhic community. The big assumption Ross makes is that R. Kook would condone her intentional subversive methodology for the introduction of halakha. She even writes, “nothing is to stop individuals from privately assuming such standards for themselves.” I am not interested in evaluating her analysis of R. Kook’s writings as much as how her take can be used to provide a broad perspective on the practical implementation of his ideas.

Ross compares R. Kook’s consensus-based nationalist take on halakha to Robert Cover’s famous essay, *Nomos and Narrative*.<sup>128</sup> Cover’s model of law, as embraced by some American legal theorists, presents a flexible approach that is inclusive in its interpretation and understanding of law. Cover draws inspiration from the Jewish legal tradition to propose a model of law capable of addressing contemporary legal dilemmas while allowing for pluralism in interpretation and practice.

Cover’s model emphasizes the importance of narratives in legal traditions, suggesting that law is not a static set of rules, but a reflection of the values and norms embedded in narratives. These narratives give meaning to legal principles and connect them to the community’s moral visions. Law, in this sense, serves as a bridge between present norms and values and the community’s envisioned moral ideals.

Cover identifies two essential elements in legal development. The “paideic” or world-creating mode generates new narratives and visions of legal meaning, while the “imperial” or world-maintaining mode counteracts the diversity of interpretation by enforcing universal norms

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<sup>128</sup> Robert M. Cover, “The Supreme Court, 1982 Term - Foreword: *Nomos and Narrative*,” *Harvard Law Review* 97 (1983)



while also tolerating pluralism. This interaction between different modes allows for dynamic legal development.

Cover's model highlights the role of the legal community, including judges and practitioners, in creating legal meaning. People's commitment to narratives and their willingness to live by them are crucial in establishing legal authority and justification. Legal meaning is not solely determined by texts or authoritative bodies but is shaped by the community's acceptance of specific interpretations.

Overall, Cover's model views jurisprudence as dynamic, capable of transforming narratives into new legal realities and implementing redemptive visions. It shifts the criteria for determining legal meaning from legal establishments to the broader community of practitioners.

After using Cover to establish the importance of the community in the creation of law she uses the work of modern scholars of interpretation, Hans Gadamar and Stanley Fish,<sup>129</sup> to highlight the roles that the larger community plays even when it comes to the individual's interpretation of texts by defining the predispositions inherent to the interaction between text and reader so that not just any interpretation is acceptable.

However, despite recognizing the substantial impact of the community in the formation of halakha, she finds a purely consensus-based halakha without further constraints to be lacking.

Instead, she proposes three constraints<sup>130</sup> to consensus that are to be employed when it comes to the grounding of halakhic practice:

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<sup>129</sup> Hans G. Gadamer, *Truth and Method* (New York: Seabury, 1975); Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge, Mass.: Harvard University Press, 1980).

<sup>130</sup> It is worth noting Ronald Dworkin's idea in *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986). Dworkin proposes that we view legal development as the continuation of a book, constrained to the coherency of the narrative. Ross, however, finds such a conception of a constraint at risk of bias and not helpful for a just system.

1. Appeal to consensus of experts.<sup>131</sup>
2. Commitment to the halakhic community in which the transformative narrative is to be played out.
3. Commitment to this narrative's claims to a dimension of transcendence.

Overall, these seem very consistent with the passages we have seen from R. Kook. Despite placing so much value on consensus, Ross recognizes the crucial role that rabbis play in the halakhic process, a point that R. Kook repeatedly stressed.

Moreover, she stresses the commitment to the halakhic community. R. Kook's unique contribution is an understanding that the rejection of certain norms marks the rejection of the community, and that change cannot be implemented to community that is identified by those very norms. Thus, for instance, saying that Christianity is a successive revelation that is based on its large consensus is untenable because it marks a break from the community in which the narrative is to be played out. A community, in a sense, is self-defining.

Perhaps the most controversial element in Ross's book is her approach to the third constraint. Rightfully, as explicated by advocates of the modern orthodox formalistic approach to halakha, a normative system not grounded in transcendence is ridiculous and self-serving. She quotes

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<sup>131</sup> This importance of halakhic experts even within a consensus-based approach cannot be understated. Gil Student astutely makes the point:

No equivalent figures are to be found among the feminists—or “neo-Conservatives” (large “C”), as they have been called. Their ranks include brilliant academics and educators, accomplished speakers and clergymen, but no established halakhic authorities. In a common-law system, the greatest responsibility lies with the judge. The neo-Conservatives have no judges and are therefore outsiders to the system. So far, for a variety of reasons, they have failed to convince any judge to embrace their cause. Lacking a qualified judge, they are powerless to enact real change.

The final paradox is this: by virtue of the fact that halakhah is a mixed system in which precedent plays such a strong role, conservatives (small “c”) will always have the stronger argument. Progress and innovation are important to the vitality of the halakhic community, but proposed changes have to be measured by expert jurists who command respect from their colleagues and the broader community.

Deviation requires justification, and justification requires authoritative judges.

See Student, Gil *The Art of "Halakhah"* - Mosaic Magazine 2013

<https://mosaicmagazine.com/response/uncategorized/2013/12/the-art-of-halakhah/>

Martin Jaffee that a "Jewish practice without grounding in the divine has no more compelling a claim to the religious attention of Jews than the Code of Hammurabi."<sup>132</sup>

However, because of this assertion, philosophical questions about the nature of God and language, and her simultaneous conviction that halakha has developed to the extent that it is unreconcilable with the past, she conceives of this notion of Cumulative Revelation.

It is important to point out that R. Kook's approach to this third constraint was different and maintained a more nationalistic bent. As we saw, R. Kook held that halakha was binding even without claims to transcendence because it forms the cultural norms of the nation. Anyone who wishes to identify as "Jewish", even secularly, must oblige himself to halakha. R. Kook's hope and belief was that praxis of the external cultural norms of halakha would free practitioners from their ego and material temptations that prevent them from the "pure belief" in the Sinaitic Revelation.

Ross takes issue with such a secular and cultic approach, rightfully considering it not a long-term solution:

A halakhic narrative that completely dispenses with transcendence (mythic or otherwise) and leaves all its interpretation's claims to authority up to contemporary communal life and its interpretive ingenuity will inevitably lose its fervor and passion and the reason for its existence. Community (unlike God) does not demand total devotion. A reconstructed legal narrative that is unaccompanied by an equally thoughtful reconstruction of its connection to the divine is, ultimately, a hermeneutic failure. It may engender a new nomos, but that new nomos will not be halakhah. (Ross, 161)

R. Kook would agree that it is not a long-term solution. He would argue that such an approach is still the pathway towards the long-term solution. However, Ross thinks that other passages of R. Kook's writings would support her notion of Cumulative Revelation. If she is

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<sup>132</sup> Ross, 161

correct, then even R. Kook's notion of the pure faith of Sinaitic revelation could be explained in those terms.

Ross's conception of Cumulative Revelation is based primarily on post-modern philosophy, Hassidic thought, and passages from R. Kook.

Her idea makes three assumptions:

1. Revelation is dynamic and unfolding and not a one-time Sinaitic event.
2. This revelation is formed not through a voice of God, but through divinely inspired intermediaries, including rabbinic authorities, texts, and history.
3. Later evolutions of Revelation cannot uproot the original message which acts as the "primary cultural linguistic filter."

To allow for Cumulative Revelation fit with the dogmatic principle of faith "Torah Min Hashamayim" Ross employs modern theories of language to explain that the purpose of a dogmatic truth statement is to affirm a form of life but not to describe a truth.<sup>133</sup> In a manner reminiscent of the Maharal's disputes with Azariah dei Rossi regarding conflicts of Torah and science,<sup>134</sup> she argues that statements of faith and statements of reason function on different planes, or in her Wittgensteinian terms, play different language games.

Ross's views on revelation mark a very fine line between Mordechai Kaplan's naturalism and the conservative movement's ideas of Catholic Israel.<sup>135</sup> Her contention is that they are different

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<sup>133</sup> Many have related the idea of halakha and language see, for example, Koppel, Moshe. "Judaism as a First Language." *Azure*, no. 46, 2011, pp. 63–98. That these dogmatic statements were intended as attitudinal statements is not new and have been used to explain statements of halakha lemoshe misinai; see <https://etzion.org.il/en/talmud/ch-2-vi-sinaitic-tradition-or-theoretical-analysis> for examples. Interestingly the dogma of the thirteen principles themselves may themselves be based on consensus and therefore more fluid in interpretation. See Hasam Sofer YD 356 and *Likutei Sichot* Vol. 35 p. 27 explained by Wiederblank, Nethanial <https://www.torahmusings.com/2021/03/faith-in-the-modern-world/>: Also see Berman, Joshua Ani Maamin, Part 2

<sup>134</sup> See Maharal, *Be'er Hagolah Be'er Shishi*, more recently such an approach has been championed by figures like R. Jonathan Sacks see Sacks, Jonathan. 2011. *The Great Partnership : Science, Religion and the Search for Meaning*. 1st American ed. Schocken Books.

<sup>135</sup> On Catholic Israel see Berger, 111.

in that she preserves the idea of a perfect and metaphysical God and that in her form of process theology the past traditions are not to be rejected but play an integral role in the unfolding of the revelation of God.<sup>136</sup>

Indeed, in his letter to R. Seidel, R. Kook strongly defends this point:

You said that according to my words the Torah is continually developing. Heaven forbid! I never said such a strange thing. The idea of development, as most people understand it, is of change, [and this idea] leads to irreverence.” ( Iggerot hare’iyah 89, Translation Erder)

R. Kook maintains that, from his perspective, all novel interpretations were already encompassed within the original Torah. Furthermore, in that letter, he identifies several significant constraints on the halakhic process, of which we have already noted, including the limitation of his ideas to a Sanhedrin situated in the fully redeemed land of Israel and not in exile.

Ross bases her ideas on R. Kook’s writings that view the evolution of the world as progressively revealing a larger preexisting ideal, his ideas of discovering God within history, and his assertion that there are divinely deliberate factors that facilitate or obstruct our abilities to perform mitzvot or entertain certain ideas. Ultimately, in her interpretation of R. Kook the narratives we inhabit are the product of Providence.

This book was not without criticism. It was attacked on many angles, including its uncritical acceptance of feminist ideology, its seemingly irreverent attitude to the thirteen principles of faith, and its halakhic analysis. R. Aharon Lichtenstein famously attacked an early draft of the book reportedly saying that Rabbi Soloveitchik would turn over in his grave upon hearing these things.<sup>137</sup>

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<sup>136</sup> See Prof Tamar Ross on Revelation and Biblical Criticism <https://kavvanah.blog/2013/06/12/prof-tamar-ross-on-revelation-and-biblical-criticism/>

<sup>137</sup> [https://www.lukeford.net/profiles/profiles/tamar\\_ross.htm](https://www.lukeford.net/profiles/profiles/tamar_ross.htm), July 11, 1999 Haaretz.

Ross has a point when employing R. Kook for a theology of religion in an era of post modernism. Postmodernism explores the illusion of the self and a singular graspable truth. Instead, postmodern theories posit that individual identity and truths are defined by communal narrative. In post-modern theology, therefore, there is an emphasis on faith rather than knowledge. Since faith cannot be verified scientifically, instead of attempting to justify a preference for one's own worldview or way of life, the focus is to phenomenologically describe the outlook of members of a particular community. Such truths are perceived as culturally particular social constructs so that they function primarily as demarcations of communal boundaries.<sup>138</sup> R. Kook's ideas of *Kabalat Harabim* emphasize the unique perspective of the Jewish people and point to the inability to separate communal identification from its perspective. In a way, part of his method of dealing with the conflict between religion and personal autonomy is to purposefully deny the assumption of autonomy. Identification is subject to cultural norms. Thus, to a certain extent, there is no free reign of the posek to rule as he pleases, he is confined to the community to the extent that it allows for a range of pluralism within its narrative.<sup>139</sup>

Ross does raise very important questions and many aspects of her solutions were either misunderstood, unquestioned, or at least can be modified. Whether her analysis of the feminist issue is completely lucid or not, as has been pointed out, it is a secondary, albeit important aspect of her work.<sup>140</sup> Ross's larger point is that there are inseparable biases in our interpretation of texts

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<sup>138</sup> For more on this see Feldmann Kaye, Miriam. 2019. *Jewish Theology for a Postmodern Age*. The Littman Library of Jewish Civilization. The Littman Library of Jewish Civilization.

<sup>139</sup> See again in Cover's *Nomos and Narrative*, For more on the acceptable range of pluralism see Rosensweig, Michael. "ELU VA-ELU DIVRE ELOKIM HAYYIM: HALAKHIC PLURALISM AND THEORIES OF CONTROVERSY." *Tradition: A Journal of Orthodox Jewish Thought* 26, no. 3 (1992): 4–23.

<sup>140</sup> See Feldmann Kaye

and in the halakhic process, even if not consciously applied, that are shaped by communal narratives. Even her critics agree that this is a part of her work that cannot be ignored.<sup>141</sup>

The notion of implicit biases in the interpretation of texts and halakha is a formidable critique of modern orthodox halakhic conceptions of halakhic formalism that asserts mathematics-like principles of learning Torah that can be objectively applied. Moreover, even recent academic scholarship of Talmudic and halakhic history have challenged the modern orthodox vision of the halakhist applying strict formalistic rules to halakha.<sup>142</sup>

Additionally, Ross is proposing an innovative solution to general issues of modernity including biblical criticism, clashing modern moral sensibilities, and historical awareness that must be otherwise addressed.

Ostensibly, what makes Ross's work so controversial is that it claims two contradictory goals. On the one hand, it claims to be a phenomenological description of the believer, revealing the dormant assumptions that always were. On the other hand, it also attempts to acts as a moderate voice of social activism, encouraging what may best categorized as halakhic disobedience (not as disobedience to halakha but as in civil disobedience, a peaceful form of political protest to the status quo while remaining within the system).

Without the second agenda, Ross presents a philosophically sophisticated approach to religion, halakha and theology in a postmodern era. However, her second agenda undermines the first and demonstrates the slippery slope of placing religion as the act of faith of buying into a

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<sup>141</sup> Yoel Finkelman acknowledges that "Orthodoxy must come to understand that all language is inherently bound to a particular time and cultural atmosphere" see Yoel Finkelman , Tamar Ross. A Critique of Expanding the Palace of Torah: Orthodoxy and Feminism by Tamar Ross, with a response by Tamar Ross. in Revelation Without Meaning" Akdamot, volume 4 , issue 2 , p. 199 - 207 Posted: 2004

<sup>142</sup> Although there has been some pushback on how expansive such a charge could be made. See for example, Rosensweig, Michael S. 1996. Debt Collection in Absentia: Halakhah in a Mobile and Commercial Age. Also Soloveitchik, Haym "Angle of Deflection" in Tablet Magazine. <https://www.tabletmag.com/sections/history/articles/angle-of-deflection-soloveitchik>

language game. By proposing intentional activism due to external tensions, Ross has abandoned the rules of her own game.<sup>143</sup> The halakhic game, at the very least as we have it now, does not act because of tension, but out of the formalistic principles it perceives. Change is subtle and can only be acknowledged in hindsight.

Nonetheless, Ross's first aspect can be a very useful model when dealing with contemporary issues of religion and especially when considering the practical implementation of the ideas of Kabbalat Harabim. Faith and reason can operate on different planes. The history and underlying mechanics of halakha do not need to operate the same way that the halakhist approaches Talmud Torah and psak. While it may be true that communal norms function on the backend as creating our narratives and interpretive dispositions, ultimately the believer's approach to Talmud Torah and psak is formalistic and subject to constraints. These are the two levels of Sinaitic belief that R. Kook speaks about. Viewed in this way, R. Soloveitchik's formalism is the experience of the halakhist as he learns Torah and adjudicates halakha, while R. Kook's cultural nationalism highlights the experience of a Jew's broader relationship to halakha. Ultimately both combine to a holistic religious perspective.

This approach is perhaps best stressed by the late Shagar (R. Shimon Gershon Rosenberg) when describing the perception of the believer to Talmud Torah:

The central methodology of lamdanut is phenomenological. . . . [The text is] explained and debated through its own internal explanations. Outside influences, such as critical research, should not affect lamdanut. This is because the phenomenon of lamdanut works according to its own laws. External influences would [be harmful] because they reduce faith by offering psychological or sociohistorical explanations: this is reductionism [and it] destroys the foundations of the principles of the believer. It presents nothing but a

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<sup>143</sup> The truth is that Ross does not propose much radical social activism. She proposes that women ask rabbis more questions and learn more torah so that there are more informed opinions in the mix. She even acknowledges this by noting how many feminists will be disappointed with her conclusions. However, as she herself would readily acknowledge, it is her rhetoric that may count most.



violent rewriting [of texts]. [This is because] it destroys understanding of the self through the force of external influences.<sup>144</sup> (Feldmann Kaye Translation)

For Shagar this is to the extent that even the context of Talmud Torah is significant:

[The beit midrash] can be described in a variety of ways: devekut, berit, and so on. But ultimately we are talking about an experience. It must be stated that this does not refer to a psychological event; it is not [even] an event as such. Its breadth [as an experience] is far broader than what is usually considered to be a psychological event, and therefore it should not be considered as such . . . in actuality, [lamdanut] is [made up of] . . . multiple experiences, all of which [are] understood by the learner as a religious experience of berit and devekut.<sup>145</sup> (Feldmann Kaye translation)

Therefore, the social nature of Talmud Torah is integral to its study:

What is the daf yomi learner seeking? . . . Is he searching for halakhot relevant to his office work? Obviously not . . . on the contrary! He is actually seeking a distinctive genre of study, an ‘otherness’ of learning, because this otherness is his contact . . . with holiness. The otherness, the difference from daily [activities], is [in fact] the Holy. . . . This learner is seeking the antithesis of critical learning . . . an enclave away from the chaos of modernity. This is the covenant of Torah.<sup>146</sup> (Feldmann Kaye translation)

As R. Soloveitchik so often stresses, maintaining the “Otherness” of the encounter with the Divine Text gives the halakhic religious system the transcendence necessary for objectivity, it differentiates the so-called spiritual high from the true religious experience. Ross is bothered by the question how can one ever know what is revelation and what is fantasy? Her suggestion is that we can only try our best and throws the question back on those who experienced the original revelation at Sinai. Ross may be correct that all we can know is our experience. However, by abiding by the rules of the language game, and experiencing them as a divine command, the rules themselves can ensure the objectivity of the transcendence. In this way R. Kook’s *Kabbalat Harabim* can help provide a sophisticated approach to halakha in the modern era, as both a constraint and a responsibility of the Jewish nation for halakhic development.

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<sup>144</sup> Shagar, *Loving You Unto Death* (Heb.), 7.

<sup>145</sup> Shagar, *On His Torah He Meditates* (Heb.), 180

<sup>146</sup> Shagar, *Broken Vessels* (Heb.), 31–2.

## **Conclusion**

I have attempted to outline the history, background, assumptions and explications of R. Kook's idea of Kabbalat Harabim. I have attempted to show that R. Kook's approach contains two elements; it is a halakhic principle that was seldom invoked but factored into the general halakhic process, but it also offered a larger framework to solve issues of identity and contemporary halakhic practice. Such an approach can be useful in contemporary times when dealing with similar issues and later postmodern critiques of religion.