

# The Legal Thinking of the Tosafot:\* A Historical Approach\*

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SHU Edition

\* Dedicated to Professor Salo W. Baron, the Dean of Jewish Historians, on the occasion of his eightieth birthday.

## I. The Historical Context of Franco-German Jewry

Franco-German Jewry<sup>1</sup> was particularly sensitive to the flow of events and ideas of their times. The Jew was an integral part of the general environment of the land and was conditioned by the same patterns of thought and feelings that were affecting Medieval France and Germany. Examined in this light, the literary output of Franco-German Jewry in the fields of theology, biblical exegesis, and juridical interpretation reflect values and concerns that were grounded in the cultural and spiritual environment of their country. This was not the effect of deliberate borrowing or emulation. Rather it was an extension of a specific historical context embracing both Jews and Christians. Accordingly, in order to gain a proper perspective of the culture and contributions of Franco-German Jewry, an adequate understanding of their historical context is of the essence.

The spiritual roots of Franco-German Jewry were in Byzantium.<sup>2</sup> This tradition began to grow in the Carolingian empire.<sup>3</sup> It also exhibited some of the basic characteristics of the

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<sup>1</sup> With this term we designate the Jewish communities of northern and central France and of Teutonic lands. The Jew of Provence had a different cultural pattern and tradition than those of their coreligionist in the north. Provençal Jews distinguished themselves from their coreligionists of central and northern France, to whom they referred as "French." Oriental and Sephardic Jews were also aware of this distinction, see Jacob Mann, *Texts and Studies*, vol. 1 (New York, Ktav Publishing House, 1972), pp. 19–20. Aside from geographical and political factors, the distinctness of Provence from the rest of France was based on the fact that it alone was able to produce a secular culture relatively free from Catholic ideology and Church influence, see Christopher Dawson, *Medieval Religion* (London: Sheed and Ward, 1934), pp. 121–154. Provençal poetry was the direct effect of the troubadours coming from Spain; many of these troubadours were Sephardic Jews, see Ramón Mendez Pidal, *Poesía Árabe y Poesía Europea* (Madrid: Espasa Calpe, 1955) and *España, Eslabón entre la Cristiandad y el Islam* (Madrid: Espasa Calpe, 1956). Within this context, it is important to note that although the Jews of Gerona and Catalonia were part of the Sephardic culture and tradition, in many significant aspects they were very close to their Franco-German coreligionist, since they too lived in a society that never produced a secular culture free from Catholic ideology and Church influence.

<sup>2</sup> On the Jew of Byzantium see Samuel Krauss, *Studie zur Byzantinisch Jüdischen Geschichte*, (Leipzi,: 1914); Joshua Starr, *The Jews in the Byzantine Empire*, (New York: Burt Franklin, 1933); Andrew Sharf, *Byzantine Jewry* (New York: Schocken Books, 1971). On their intellectual activities, see H. J. Zimmels, "Scholars and Scholarship in Byzantium and Italy," *The World History of the Jewish People*, vol. 11, *The Dark Ages* (Tel Aviv: Jewish History Publication, 1966), pp. 175–188. Jewish merchants traveled from France to Byzantium, see Ibn Khordabeh. *Le livre des routes et des Provinces*, *Journal Asiatique* (1865), pp. 512–513. On the economic ties between Franco-German Jews and Byzantium, see Salo W. Baron, *A Social and Religious History of the Jews*, IV (Philadelphia: Jewish Publication Society, 1965), pp. 175–176. On the relations between Byzantine Jews and the Khazars, see the document published by S. Schechter, "An unknown Khazar Document," *JQR*, III (1912–13. p. 206, 1. 37. On the relations between the Khazars and Byzantium, see D. M. Dunlop, *The Jewish Chazars* (Princeton, N.J.: Princeton University Press, 1954),

Carolingian system. The Carolingian system incorporated the Germanic and Latin elements into an organic unity. From the Germanic elements, it adopted the tribal customs, the social organs and the civic traditions. From the Latin elements, it adopted the culture.<sup>4</sup> Likewise, Franco-German Jewry incorporated the Germanic-Jewish elements in the areas of religious customs and social organization.<sup>5</sup> It also adopted the culture from Latin elements, particularly from France.<sup>6</sup>

The Carolingian empire was influenced by the Eastern Church and Byzantine scholarship and ideas.<sup>7</sup> The Judeo Franco-German tradition, too, was strongly influenced by the ideas

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pp. 171-221. On the Karaite in Byzantium, see Zvi Ankori, *Karaites in Byzantium* (New York: Columbia University Press, 1959). Invaluable information on the economic life of Byzantines and their relations to other Jewish communities is found in S. D. Goitein, *A Mediterranean Society*, 2 vllms. (Berkeley: University of California, 1967-1971). On their impact on other Jewries, see below notes 8 – 15, and Section III notes 4 – 5.

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

<sup>4</sup> See Dawson, *Medieval Religion*, pp. 18ff.

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

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

<sup>7</sup> On the relation between the Carolingian Empire and Byzantium, see O. Harnack, *Das karolingische und das byzantinische Reich in ihren politischen Beziehungen*, Ph.D. dissertation, Göttingen, 1880; Amedié L. U. Gasquet, *L'Empire byzantine et la monarchie franque* (Paris: Hachette, 1888); Franz Dölger, *Byzanz und die europäische Staatenwelt* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1964). On the theological views current in the Carolingian Empire, see G. Haendler, *Epochen karolingischer Theologie* (Berlin: Evangelische Verlagsanstalt, 1958); and Adolf Harnack, *History of Dogma*, vol. 5 (New York; Dover Publications, 1961), pp. 275 – 331. On the influence of Byzantium on Visigothic Spain, see Paul Goubert, "L'administration de l'Espagne Byzantine," *Etudes Byzantines*, III (1945), pp. 127 – 142; IV (1946), pp. 71 – 133. On the political and religious influence of Byzantium on Spain, see *ibid.* pp. 111 – 133. This point is of fundamental importance to grasp the character of the Iberian Jewry prior to the conquest of Islam. It also

and values of Byzantine Jewry. *Shi'ur Qoma*, an early mystical work that circulated among the Jews of France and Teutonic lands, was produced in Byzantium.<sup>8</sup> This work commanded great authority and veneration in the Franco-German tradition, No other Jewish work affected the theological conceptions of this tradition -- particularly in the field of the anthropomorphisms and corporeality of God<sup>9</sup> -- as *Shi'ur Qoma*. By the first quarter of the ninth century the theological doctrines of this book were deeply entrenched in this tradition (See footnote 9). Other theological works of the same type also had wide circulation among Franco-German Jews.<sup>10</sup> Byzantine liturgy, particularly the *piyyut*, was adopted by the Franco-German Jews.<sup>11</sup> Byzantine scholarship in the field of Talmudic methodology<sup>12</sup> and biblical exegesis<sup>13</sup> deeply influenced the learning and scholarly patterns of this tradition.<sup>14</sup> Special mention should be made of the messianic movements that took place among Byzantine Jews and the impact that they had upon Franco-German

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sheds significant light on the similarities between the Jews of Northern Spain, where the effects of Oriental Jewry were limited, and Franco-German Jewry; cf. above note 1, *in fine*.

<sup>8</sup> Maimonides was the first to ascertain the Byzantine character of this work, see *Teshubot haRambam* (Jerusalem; Mekize Nirdamim, 1957), vol. 1, pp. 200 – 201. Professor Baron, *Social and Religious History*, vol. 8, pp. 29 – 31), accepts the validity of Maimonides' view; cf. Krauss, *Studien*, pp. 138 – 140.

<sup>9</sup> See Agobard, "De Judaica Superstitionibus," *Patrologiae*, [J. P. Migne], vol. 104 (Paris: Bibliothecae Cleri Universae, 1851), columns 86 – 87. On the Jewish sources of Agobard, see Bernhard Blumenkranz, *Les Auteurs Chrétiens Latin du Moyeen Age sur le Juifs et le Judäism*, (Paris: Mounton & Co., 1963), p. 165. Agobard's report of the beliefs of French Jewry was independently confirmed by a Karaite in Palestine, see Mann, *Texts and Studies*, vol. 2. p. 38.

<sup>10</sup> Such as 'Oti'ot de Ribbi Aqiba, which in fact is an appendix to the *Shi'ur Qoma*, *Harba de-Moshe*, *Pirqe Ribbi*, etc. A work that had a deep effect in this tradition was *sefer ha-Bahir*. The origins of this book are unknown. However, on the basis of its Hebrew style, there is a good reason to suspect that it also came from Byzantium. Some of the linguistic peculiarities of this work are found in the writings of the Byzantine Karaite Tobias ben Moshe (eleventh century).

<sup>11</sup> See Ismar Elbogen, *Toledot ha-Tefilla ve-Ha-'Aboda be-Yisrael*, vol. 1 (Jerusalem: Dvir, 5684), pp. 136 – 137.

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

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

<sup>14</sup> R. Abraham ben Arzi'el (13<sup>th</sup> century) studied Hebrew grammar under the Byzantine scholar R. David of Greece, see Samuel Poznansky, *Beitrag zur Geschichte der heb. Sprachwissenschaft*, (Berlin: Verlag von S. Calvary & Co., 1894) p. 8.

Jewry.<sup>15</sup> Finally, it is interesting to note that there were even culinary peculiarities common to Byzantine and French Jewry.<sup>16</sup>

When considering the intellectual environment of this Franco-German tradition, attention should be paid to the enormous influence exercised by the Catholic Church in France and Teutonic lands.<sup>17</sup> It is well to remember that only the clergy had the intellectual resources to provide the state with adequately trained councilors and administrators.<sup>18</sup> Thus the influence of the Church permeated all aspects of life. Many of the characteristic features of the religious and social ideology of the Franco-German tradition were the effect of their own intellectual environment.<sup>19</sup> For instance, the mystical exegesis of the Bible based on the interplay of letters and their numerical values (*Gematriya*), peculiar to the Franco-German tradition, was also favored by the early Christian exegetes of France.<sup>20</sup> Likewise, the pietistic movements that took place among German Jews (*Haside Ashkenaz*)<sup>21</sup> are intimately related to the pietistic movements that swept throughout France and the Teutonic lands from the twelfth century on.<sup>22</sup> The main elements of German Hasidism were: a) renunciation of pleasure,<sup>23</sup> humbleness,<sup>24</sup> preaching<sup>25</sup> and repentance.<sup>26</sup> These elements were intrinsic to the ideals of piety among non-Jews.<sup>27</sup> We shall examine, for the sake of illustration, the anti-rationalistic trend that one finds in this tradition in light of the intellectual environment that prevailed in France and in Teutonic lands.

Aristotelian thought and philosophical speculations reached France from Moslem Spain. This type of speculations provoked very strong opposition. Undoubtedly, some of the opposition was grounded on the fact that this branch of rationalism came from Islam.

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<sup>15</sup> See A. Neubauer, "Egyptian Fragments II," *JQR*, IX (1897), pp. 26 – 29; D. Kaufmann, "A Hitherto unknown messianic movement among the Jews, particularly those of Germany and the Byzantine Empire," *JQR*, X (1898), pp. 139 – 151; Mann, "Ha-Tequfa," XXIII (5685), pp. 243 – 261; XXIV (5687), pp. 335 – 358.

<sup>16</sup> Cf. R. Abraham ben ha-Rambam, *Teshubot Rabbenu Abraham ben Ha-Rambam*, (Jerusalem; Meikize Nirdamim, 1937), p. 51.

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

<sup>18</sup> See Dawson, *Medieval Religion*, p. 10ff.

<sup>19</sup> A good example of the results of this approach may be seen in the essays of J. F. Baer, "The Religious Social Tendency of Sepher Hassidim" (in Hebrew), *Zion*, III (1937), pp. 1 – 50; George Vajda, "De quelques infiltrations chretiennes dans l'oeuvre d'un auteur anglo-juif du XIIIe siècle," *Archives d'histoire doctrinale et litteraire au moyen-âge*, XXVIII (1961), pp. 15 – 34.

<sup>20</sup> See Israel, "Un Commentaire," pp. 242 – 243, and especially note 4.

<sup>21</sup> For a detailed study of the content of German *Hasidut*, see Joseph Dan, *The Esoteric Theology of Ashkenazi Hasidim* (in Hebrew), (Jerusalem: Bialik Institute, 1968).

<sup>22</sup> See Harnack, *History of Dogma*, vol. 6, pp. 84 – 117.

<sup>23</sup> See R. Yehuda he-Hasid, *Sefer Ha-Hasidim* (Jerusalem: Mossad Harav Kook, 5724), ¶ 10, 15, 84, etc.

<sup>24</sup> *Ibid.*, ¶ 15, 16, 53, 54 – 55.

<sup>25</sup> *Ibid.*, ¶ 5, 6, 39, 112 – 113, 413, 1.125. Thus the necessity of a professional preacher, see *ibid.*, ¶ 19, p. 84.

<sup>26</sup> *Ibid.*, ¶ 7, 19 – 20, 26 – 27, 42, 60, 62, 82, etc.

<sup>27</sup> See note 22 above, and F. W. Bussell, *Religious Thought and Heresy in the Middle Ages* (London: Robert Scott Roxburghe House, 1918), pp. 784 ff.

However, the roots of this form of anti-rationalism were deeply entrenched in the institutional values of France. Theologians in France and Teutonic lands were deeply divided as to whether or not one may rationalize the content of the faith, although religious speculation was favored by men of the stature of William of Conches and Thomas of Aquinas, it generated strong opposition at the end of the twelfth century and throughout the thirteenth century.<sup>28</sup> Bernard of Clairvoux, who has rightly been characterized as the “great detective of heresy,”<sup>29</sup> is the best example of the orthodox position. In the year 1140, he convened a synod at Sens with the purpose of examining the doctrines of Peter Abelard. Bernard charged Abelard with discussing the foundation of the faith by the ordinary means of human reason.<sup>30</sup> The persecution of heretics and the atmosphere of suspicion that beset the study of philosophy and rationalistic theology were symptomatic of that period.<sup>31</sup> It is important to note, however, that the opposition to the study of philosophy was not uniform. Some opposed only certain philosophical works, in particular the *Physics* and *Metaphysics* of Aristotle, which were considered extremely dangerous. The works of rationalist theologians were also singled out. To illustrate: Aquinas’ *Summa* was considered dangerous, because it also examined the arguments that were made against the faith. Some, like Walter of St. Victor, strongly opposed it on the grounds that it might suggest doubts to the mind of the reader. In the year 1215, Robert of Courzon permitted the study of the *Ethics* and *Logic* of Aristotle, but he forbade the study of the *Physics* and the *Metaphysics* as well as the works of David of Dinant and the *Summa* of Thomas Aquinas. In April 1231, Pope Gregory IX addressed a bull to the teachers and students of Paris forbidding the study of natural philosophy until these works were properly examined and corrected.<sup>32</sup>

From the above it is evident that the Maimonidean controversy, as well as the opposition to rationalistic theology and philosophy among Jews, was not merely the effect of a purely internal Jewish phenomenon. Rather, it reflected the attitudes and concerns of the general environment.

The effects of the general environment on the Jews were not restricted to the realms of theology and speculative philosophy. It was also present in the fields of *Halakha* and Talmudic interpretation. In the following sections we shall proceed to examine some of the basic elements of Tosafot’s legal thinking and the methodology used in their interpretation of the Talmud in light of the method applied by the French Jurists in the analysis of Roman and Canon law.

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<sup>28</sup> See M. D’Chenu, *La Théologie au Douzième Siècle* (Paris: Librairie Philosophique J. Vrin, 1957), pp. 309 – 322.

<sup>29</sup> Bussell, *Religious Thought*, p. 695.

<sup>30</sup> On this conflict see the monograph of A. Victor Murray, *Abelard and St. Bernard* (New York: Barnes and Noble, 1967).

<sup>31</sup> For an inside glimpse on the atmosphere of suspicion and persecution of that age, see the personal account of Peter Abelard, one of its most distinguished victims, in J. T. Muckle, *The Story of Abelard’s Adversities* (Toronto: The Pontifical Institute of Medieval Studies, 1954), pp. 38 – 56.

<sup>32</sup> See Marcelino Menendez Pelayo, *Historia de los Heterodoxos*, vol. 1 (Madrid: Biblioteca de Autores Cristianos, 1965), pp. 441 – 443.

## II. Behind the Pilpul Methodology of the Tosafot

Before attempting an explicit characterization of the *pilpul*<sup>1</sup> methodology of the Tosafot<sup>2</sup> it is pertinent to point out the functional aspect of this form of analysis. Generally, it is assumed that the purpose of *pilpul* is to discover the objective meaning of the text, examined in this light it may be considered to be a faulty method of text analysis. In this chapter we wish to consider the functional aspect of the *pilpul* of the Tosafot school, as a means of accommodating Talmudic law to the realities of the Jewish community.

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

The *pilpul* methodology of the Tosafot presupposes that there is no objective *Halakha*. In the final analysis, law is grounded on the discretionary judgment of the rabbi, and it is formulated through *pilpul*. The rabbi molds the law to fit the specifics of any situation. The *pilpul* reflects the specifics of the situation as seen by the rabbi, and projects to the community the pronouncement of the law made in a hallowed text -- as interpreted and recast by the rabbi.<sup>3</sup>

Theologically, this conception of law may be connected to the Talmud. When referring to the controversies that took place between the schools of Shammai and Hillel, the Talmud said that both of them spoke “the words of the living God.”<sup>4</sup> R. Yom Tob of Seville (c. 1250-1330) reported the interpretation given by the French rabbis on this passage:<sup>5</sup>

The French rabbis, of blessed memory, asked: How could both of them be “the words of the living God,” when one is prohibiting and the other is permitting? They answered that when Moses went up to heaven to receive the Tora they showed him on every matter and matter, forty-nine grounds to prohibit and forty-nine grounds to permit. And he asked God about this. And He told him that this is given to the Sages of Israel of every generation to determine [what the law should be] according to what they [decide].<sup>6</sup>

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<sup>1</sup> This term is usually translated as “casuistry.”

<sup>2</sup> On the school of the Tosafot, see E. E. Urbach, *Baale ha-Tosafot* (Jerusalem: The Bialik Institute, 1955).

<sup>3</sup> See below, Section III.

<sup>4</sup> *Erubin*, 13b.

<sup>5</sup> *Hiddushe Ha-Ritba*, *ad loc.*

<sup>6</sup> R. Shemu'el 'Alqal'i, *Mishpete Shemuel* (Venice: 5354), *Responsum* ¶ 9, fol. 6d cites in the same name of Rabenu Yehi'el (of Paris, died c. 1265) a similar doctrine with one important addition: the law is to be determined according to “the sages of the time, if the majority agree that it is forbidden, it will be forbidden; and if the majority agree to permit it, it will be permitted.” This passage from *Mishpete Shemu'el* is quoted by R. Shelomo 'Algazi, *Halikhot Olam* (Venice: 5399), fol. 88b. The text is faulty.

Historically, the attitude of the Tosafot to the Talmudic text is similar to the attitude of the French jurisconsult to the text of Roman law.

The impasse from which the French jurisconsult took his departure was similar to that of the Tosafot described above. On the one hand, the authority of Roman law was well recognized medieval France. On the other hand, French localities were deeply affected by customs deriving from German tradition.<sup>7</sup> *Lo Codi*, Provençal code written in the twelfth century, provides an excellent example: of how the French jurist interpreted “the abstract doctrines of Roman law” in a manner that would reflect the “customary rules and local conditions” of French society.<sup>8</sup> To this effect says Vinogradoff:<sup>9</sup>

We have thus in the Provençal Codi an excellent example of the intelligent and practical use of Roman law in a region where this influence of Roman sources stretched much farther. It affected materially the state of the law in parts of France governed by customary laws derived to a large extent from German tradition. Here the process of transformation is especially suggestive. It does not start with the acceptance of an external authority from which all changes in detail should be derived, but from a kind of struggle for existence between concrete rules and institutions of German and Roman origin.

The interpretation of the Roman law text given by the French jurist was similar to that of the Tosafot explanation of the Talmudic text.

It happened not infrequently that the practitioner or the learned judge, who were the chief agents in the process picked out one or the other doctrine not in its proper a logical sense, but in order to confirm or to prove some opinion of their own, which possibly did not fit in exactly with the concrete rule brought forward to support it.<sup>10</sup>

Referring to Beaumanoir commentary to the *Corpus Juris*, Vinogradoff made the following observation:<sup>11</sup>

*His object was not to present us with a faultless commentary on the Corpus Juris, but to make use of some of the Roman doctrines for his own purpose as a wise judge of France.*

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Instead of “Yehi’el” it was misprinted “Hanan’el.” R. Hayim Yosef David ’Azulai, *Rosh David* (Mantua: 5539), fol. 14c. did not notice the misprint and quotes the above doctrine in name of “Hanan’el.” It is important to observe that this doctrine has nothing to do with the talmudic passage quoted above. The meaning of that passage is that since there no longer is a supreme court, conflicts between lower court or jurisconsults may not be denied authoritatively; therefore all opinions are equally valid. Expresses judicially, this means that (since there no longer is a supreme court) Jewish law is horizontal with no vertical dimension. That is to say, that it may not be decided on the principle of authority, but rather on the principle of mutual equality and reciprocity.

<sup>7</sup> See Paul Vinogradoff, *Roman Law in Medieval Europe* (Oxford: Clarendon Press, 1929, pp. 75 – 77, 82 – 83, 93 – 96.

<sup>8</sup> *Ibid.*, p. 75.

<sup>9</sup> *Ibid.*, p. 77.

<sup>10</sup> *Ibid.*, p. 94; cf. pp. 93 – 95.

<sup>11</sup> *Ibid.*, p. 96.

The Tosafot and French methods of interpreting authoritative texts were deliberate, and not the result of “misinterpretation.” Both schools were capable of understanding, to different extents, the primary sense of the legal texts. Referring to the method of interpreting legal texts in the Middle Ages, Sir Frederick Pollock wrote:<sup>12</sup>

*It was considered perfectly fair throughout the Middle Ages to apply any text of authority in any sense that it could be made to bear, without regard to what the original historical sense might have been. The more authoritative the text, the more application were presumably to be discovered in it; and the most far-fetched use of the text is no proof that the writer has misunderstood its primary meaning.*

Finally it is worth noting that the methods of interpretation used by French jurists and the Tosafot were determined, in part, by a similar historical situation. By the time Western Europe began to emerge from the Dark Ages, they no longer had any contacts with a living tradition that could help them interpret Roman law texts. Therefore they had to resort to a *pilpulistic* analysis of the text. Professor H. F. Jolowicz called attention to this situation:<sup>13</sup>

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

Likewise when Jewish scholarship began to emerge in northern France and Germany, they had no real contact with the living tradition of the Talmudic academics in the Orient.<sup>14</sup> The *pilpul* of the Franco-German Talmudist reflects the method used by the

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<sup>12</sup> Sir Frederick Pollock, *Essays in the Law* (London: Macmillan and Co., 1922), p. 48.

<sup>13</sup> H. F. Jolowicz, “The Stone That the Builders Rejected: Adventures of Some Civil Law Texts”, *Seminar*, XII (1954), p. 39.

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

The authority of the Ge’onic tradition was never seriously acknowledged in France and Teutonic lands. Although on occasion a Franco-German scholar would substantiate his points by making reference to the position of the Ge’onim, this was done for the sake of winning an argument. To illustrate, R. Tam occasionally supports his argument from Yehudai Ga’on (cf. R. Tam, *Sefer Ha-Yashar* [Vienna: 1811], fol. 73b; 74 (a) a, b, c; 74 (b) c; Tosafot *Hullin*, 97a, s.v. ‘*Amar Raba*, etc.) Elsewhere, where the opinion of R. Yehudai Ga’on does not correspond to his views, R. Tam remarked (*Pisqe Ha Rosh, Mo’ed Qatan*, III, 3 [Venice: 5281], fol. 35d): “one may not rely on this particular on the author of *Halakhot Gedolot*, on the grounds that Rab Yehudai Ga’on, the author of *Halakhot Gedolot*, was blind and occasionally his disciples wrote in his name what he did not order (them to write) and what he did not believe.” (Cf. B. M. Levin, *Osar Ha-Ge’onim, Mashqin* [Jerusalem: The Hebrew University Press Association, 1931], p. 30 and the notes of the editor). It is important to remember that R. Yehudai Ga’on (eighth century) is the earliest Ga’on whose work has reached us. Both his work and his reputation as a scholar were supreme. It is worth noting that the fact of Yehudai Ga’on’s blindness was mentioned once by Ha’ayye Ga’on in order to explain how a specific passage that was known to be spurious was interpolated in some copies of *Halakhot*



Christian jurists of their time. Both Jews and Christians were reacting to their respective situations that were the effect of the Carolingian history and geography. Therefore, it is quite natural to find similar characteristics in their approaches to the study of legal texts. Jolowicz's description of the medieval attitude toward legal texts applies perfectly to the Tosafot:<sup>15</sup>

*One result of such all attitudes is that a passage may, quite unconcernedly, be taken from the context in which it is found and transferred to some totally unrelated subject.*

When examining the method and objectives of the Tosafot special attention should also be paid to the methods of interpreting Canon law in twelfth and thirteenth century France. There were two major objectives in the study of canon law: the harmonization the different patristic texts and collections of Canon law, and the adaptation of these texts to the specific situation of the local church.<sup>16</sup> The *Decretum* of Yves of Chartres<sup>17</sup> and especially the *Sic et Non* of Abelard<sup>18</sup> are excellent illustrations of how the French canonist harmonized the different collections of canon. The methods of analysis used in the process of interpreting and harmonizing canon texts are ultimately related, both in

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*Gedolot* (cf. 'Osar Ha-Ge'onim, *Mashqin*, p. 30, quoting *Sefer Yohasin*). The fact of Yehudai Ga'on's blindness was never applied by the Ge'onim to any other passage. However, since according to R. Tam's argument the fact of Yehudai Ga'on's blindness may be made to bear against any point in which *Halakhot Gedolot* does not happen to conform to one's views, R. Tam was in fact totally undermining the authority of this work.

Another factor that ought to be considered are the paraphrases and pseudo-geonic works that circulated in France and in Teutonic lands. Some of these works were of inferior quality and may have been instrumental in undermining the prestige and the authority of the Ge'onim, (cf. E. E. Urbach, "The Participation of German and French Scholars in the Controversy about Maimonides," (Hebrew) in *Zion*, XII (1947/48), pp. 151 – 152). Finally, it is important to remember that in Western Europe the title "Ga'on" was applied to any scholar; and it was not considered the exclusive title of the heads of the academies in Babel, cf. Gerson Cohen, *Sefer Ha-Qabbalah*, (Philadelphia; The Jewish Publication society, 1963), p. 88 and note 469. Therefore some of the "Geonic" material in Franco-German literature comes from local rabbis, e.g. the statute attributed to the "Ge'onim" that meat that was not salted within three days from the time of slaughtering may no longer be cooked (see *Tur Yore De'a*, ¶ 69 and *Bet Yosef*, *ad loc.*) did not originate from the heads of the academies in the orient (accordingly Maimonides and all previous authorities do not mention it) but from Germany.

The attitude of the Tosafot to the authority of the Ge'onim corresponds to the attitude expressed by Abelard on the authority on the later Church writers. Abelard, in his *Sic et Non*, published in *Ouvrages Inédits D'Abélard*, (Paris: Collection de Documents Inédits, 1836), p. 14, established the principle that:

*In the lesser work of later writers, which are contained in countless volumes, if perchance some things are thought to differ from the truth because they are no intelligibly written, the reader or listener in that case still has his free judgment to approve of what pleases him or reject what offends him, Therefore, all things of this type – if they are not defended by sound reasoning and canonical authority which can show that what is being argued or narrated either is completely correct or could be so – a person is not reproved for disliking them or choosing not to believe in them.*

All subsequent quotations from the *Sic et Non*, are direct English translations from the Latin text of this edition.

<sup>15</sup> "The stone That the Builders Rejected," p. 39.

<sup>16</sup> See J. Ghellinck, *Le Mouvement Théologique du XIIe Siècle* (Paris: Librairie Victor Lecoffe, 1914), pp. 317 – 338.

<sup>17</sup> *Ibid.*, pp. 298 – 303.

<sup>18</sup> *Ibid.*, pp. 331 – 338.

content and form, to the *pilpul* methodology used by the Tosafot.<sup>19</sup> The *De Excommunicandis vitandis* of Hinemar of Reims excellently illustrates how ancient canon texts were adapted through interpretation to the actual situation of the German Church.<sup>20</sup> As we shall see, the same concern and methods of adaptation were manifest in the school of the Tosafot.

### III. Interpretation and Accommodation of Talmudic law

The Franco-German school had a liberal attitude toward the text of the Talmud, It is well known that this school felt free to amend, interpolate and delete from the text of the Talmud.<sup>1</sup>

The liberal attitude of the Franco-German school toward the text of the Talmud reflects the scholarly standards of Byzantium, and France. From early time, Byzantine scholars felt free to amend both secular<sup>2</sup> and sacred<sup>3</sup> a texts on the basis of personal opinion. Likewise, the Judeo-Byzantine scholar R. Yishaq ben Malki Sedeq (c. 1090-1160) felt free to amend the text of the Talmud on the basis of personal opinion.<sup>4</sup> Probably as a result of Byzantine influence,<sup>5</sup> French canonist corrected the writings of the Church Fathers on the grounds that the sacred writings were subject to corruption and errors from the copyists.<sup>6</sup> Abelard excellently developed this point. In the introduction to *Sic et Non*, Abelard formulated the principle that contradictions found in the sacred writings may be the result of corruptions in the text and errors of the copyists. The following is a translation from the prologue:<sup>7</sup>

Again, Jerome on Psalm LXXVII says, concerning the ascription of its title, which is transcribed as 'Asaph':

*Thus it is written according to Matthew: When the Lord had spoken in parables and they did not understand, etc., these things. (He says) were to fulfill what the prophet Isaiah wrote: "I shall open my mouth in parables," Thus read the gospels even today; yet it is not Isaiah who says this but Asaph. Likewise, then, we may simply say that what is*

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<sup>19</sup> See below, Section III.

<sup>20</sup> See *Le Mouvement Théologique de XIIe Siècle*, pp. 328 – 329.

<sup>1</sup> See *Sefer Ha-Yashar*, Introduction (e.g. *ibid.* 619 – 620, fol. 73c-d); J. H. Weiss, "Toledot Rabbenu Ya'aqob Tam," *Bet Talmud*, III (5643), pp. 134 – 138; B. Lewin in his Introduction to 'Iggeret Rab Sherira Ga'on, pp. XLIX – LI.

<sup>2</sup> See Robert Devreesse, *Introduction a l'étude des Manuscrits grecs* (Paris; Librairie C. Klincksieck, 1954), pp. 73 – 77; cf. 81, 86.

<sup>3</sup> Cf. *ibid.*, pp. 123 – 124, 137 – 139.

<sup>4</sup> See S. Liberman, *Tosefet Rishonim*, vol. 4, Introduction, pp. 20 – 21. On his influence on the school of the Tosafot, see above, Introduction, note 13.

<sup>5</sup> On the Byzantine influence on France, see above, Introduction, note 7. The influence of Byzantium upon France relating to the transmission of texts may be seen in the ms. of Epsinomis Parisinus Gr. 3009 – 2 which incorporated the Byzantine versions contained in the margin (0<sup>4</sup>) of the ms. Parisinius Gr. 1807 = A (stemming from Vaticanus Gr. 1 = 0).

<sup>6</sup> See *Le mouvement théologique de douzième siècle*, p. 332 ff.

<sup>7</sup> *Sic et Non*, pp. 5 – 6.

written in Matthew and John, that the Lord was crucified at the sixth hour, but in Mark at the third hour -- that this was a scribal error, and in Mark “the sixth hour” has (originally) been written, but that many (scribes) thought that instead of the Greek sign<sup>8</sup> there was a gamma, just as in the above case it was a scribal error by which they wrote Isaiah for Asaph. For we know that many churches were assembled from ignorant Gentiles. Therefore, when they would read in the gospel, “to fulfill what was written in the prophet Asaph,” he who first wrote a copy of the gospel, said to himself: who is this prophet Asaph? He was not known among the people. And what did he do? In order to correct an error, he made error. We may say something similar in another passage according to Matthew, where, he says, “He took the thirty pieces of silver, the price of him on whom a price has been set, as it is written in the prophet Jeremiah.” In Jeremiah we cannot find this at all, rather in Zechariah. It is clear, therefore, that this is an error as above.

If the text of the Bible did not escape corruption, there is no reason to assume that the writings of the later Fathers were safe from error.<sup>9</sup>

*What, then, is so surprising, if even in the gospels some passages have been corrupted by the ignorance of scribes, so also it sometimes happens in the writings of the later Fathers, which are of much less authority. If, then, something in the writings of the saints should perhaps seem at variance with the truth, it is required by piety and humility and owed to charity (which trusts all, has faith in all, endures all, and does not easily suspect faults in those whom it esteems) that we believe either that the passage has not been faithfully interpreted or that it has been corrupted, or else that we confess that we do not understand it.*

The liberal attitude toward the text is reflected in the Franco-German position that the Talmudic text was not put into writing until post-talmudic times, late in the Middle Ages.<sup>10</sup> Accordingly, the Talmudic text was never authoritatively fixed. Since there was no authoritative transmission of the text, it was subject to further development and errors.

The attitude of the Franco-German school toward the text helped to eliminate many difficulties from the Talmud and made it easier to expound. For example, there is a passage in Berakhot, 46a, in which the numbers “three” and “four” are related to the After-Meal Blessing. According to the Ge’onim, these numbers refer to the Blessings contained in the After-Meal Blessing.<sup>11</sup> This explanation meets with a serious difficulty: the above-mentioned numbers are in the masculine gender; in Hebrew, “blessing” is feminine.<sup>12</sup> The Ge’onim did not resolve this difficulty. Accordingly R. Yisshaq ‘Alfasi

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<sup>8</sup> He is referring to the *digamma*, which equal six.

<sup>9</sup> *Sic et Non*, p. 6.

<sup>10</sup> See Rashi, *Baba Mesī’a*, 33a, s.v. *ve-ena midda*. For a further discussion of this point, see R. Yossef Hazzan, *Hiqre Leb, Oray Hayyim*, (Salonica, 5614), fol. 12b; cf. Lewin in his Introduction to *Iggeret Rab Sherira Ga’on*, p. LXVII.

<sup>11</sup> See *Osar Ha-Ge’onim, Berakhot* (Haifa: 1928), p. 80; and *Hilkhot Rab Yisshaq Alfasi*, cited below, note 13.

<sup>12</sup> Cf. R. Shelomo ibn Adret, *Hiddushe Ha-Rishba, Berakhot, ad. loc.*

gave a different explanation.<sup>13</sup> He demonstrated, on the basis of the texts of the Babylonian and Palestinian Talmuds that these numbers refer to the number of persons among whom the After-Meal Blessing may be divided and not to the numbers of the blessings. Thus the number is in the masculine gender. Rashi, however, followed the explanation of the Ge'onim. However, he avoided the difficulty of the Ge'onim by simply changing the gender of the numbers from masculine to the feminine.<sup>14</sup>

The Tosafot, occasionally, prefaced their analysis of the Talmud by declaring that the sense of the text is *lav davqa* (not exact). The *lav davqa* methodology revolutionized the study of the Talmud and changed the content of Jewish law.<sup>15</sup> This methodology is grounded on the assumption that the rabbinic texts may be interpreted not in accordance to their usual sense. The methodology, as well as the philosophy of language that it projected, was brilliantly formulated by Abelard. Abelard, in his attempt to reconcile the conflicting views found in the writings of the Church Fathers, formulated the semantic principles that the same word may be differently used by different writers. Likewise, different writers may have wanted to express the same thought with different words:<sup>16</sup>

*And what mostly prevents us from achieving that understanding is the unusual manner of speaking and, especially, the various meanings of individual words, since the same word is used sometimes with one meaning and sometimes with another. Indeed, just as each (word) has an abundance of meanings, so also each and every (writer) has an abundant vocabulary. And since according to Cicero in all things repetition is the mother of satiety (that is, it causes distaste). One must vary one's words, even within a single matter, and not strip everything down with common and ordinary words. Therefore, as the blessed Augustine says, they (Scripture and ecclesiastical literature in general) are protected from becoming base, and are that much more gratifying since they are sought out with greater effort and searched with more difficulty.*

Moreover, occasionally the text is “written according to human opinion rather than the truth of the matter.”<sup>17</sup>

*Some things even in the gospel seem to be written according to human opinion rather than the truth of the matter -- as when Joseph, according to common opinion and custom, is called the father of Christ even by the mother of the Lord himself! She spoke as follows: “Your father and I have been anxiously looking for you.” And according to*

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<sup>13</sup> *Hilkhot Rab Yisshaq Alfasi, Berakhot* (Venice: Bragadin, 5312), 169, fol. 36b.

<sup>14</sup> Rashi, *Berakhot*, 46a, s.v. Birkhat.

<sup>15</sup> The question whether a text is *Davqa* or *Lav Davqa*, is of the essence, cf. *Shebu'ot*, 39b. However, whether the sense if *Davqa* or *Lac Davqa* is to be determined on the basis of the context and internal evidence, as is the case by all talmudic commentators and jurists, e.g. Rabbenu Nissim, *Shabbat*, Chapter 2, (22b) s.v. *Amar Raba Haya Tafus; Pesahim*, Chapter 2 (37a), s.v. *Abal Bimot Ha-Pesah*; Chapter 3 (49a), s.v. *Gemara, Bat Kohen*; Maran Yosef Caro, *Bet Yosef, Orah Hayyim*, 423, s.v. *ve-Cal*; 436, s.v. *u-Ma-She'amor*; 534, s.v. *Mutar*, etc. Tosafot, as all talmudic commentators, also treat the question of *Davqa* and *Lav Davqa* in this sense. However, what is peculiar to the school of the Tosafot is to declare without regards to context, language, or internal evidence. It is in this specific sense that *Lav Davqa* methodology is examined in this section.

<sup>16</sup> *Sic et Non*, pp. 3 – 4.

<sup>17</sup> *Ibid.*, pp. 8 – 9.

*visual perception, we sometimes call the sky starry, sometimes not; at time (we say) the sun is hot, at times not at all; now (we say) the moon shines more or less, and now not at all -- although these things, which do not always appear the same to us, nevertheless forever and eternally remain the same.*<sup>18</sup>

It is intellectually acceptable to describe things not in accordance to what they really are:<sup>19</sup>

*In short, since the use of daily speech is in accordance with the judgment of the bodily senses, many things are said to be other than what they are in fact. For, although in the whole universe there is no place totally empty, which is not full either of air or some body, nevertheless we call a box utterly empty in which we perceive nothing visually. Whoever judges things according to the vision of his eyes, sometimes calls the sky starry, sometimes not; at times the sun is hot, at times not at all; now (he says) the moon shines more or less, and now not at all --although these things, which do not always appear the same to us, are nevertheless always the same in fact.*

The same semantic principle applies to the writings of the Church Fathers:<sup>20</sup> “What then is so surprising if sometimes the holy Fathers also mention, or even write, things from opinions rather than from truth?”

Accordingly,

*when opposite things are said by the same writer, we must carefully distinguish what is intended as a summary of instruction, what as a granting of indulgence, and what as an encouragement to perfection, in order to seek the solution of the contradiction in accordance with the diversity of intentions. If it is a precept, (we must determine) whether it is general or particular -- i.e., whether it is directed to all men in common or to certain men in particular. With dispensations both their times and reasons must be distinguished. Since often what is allowed at one time is found to be prohibited at another; and more often what is commanded for strictness is sometimes tempered by dispensation. These things must especially be distinguished in the teaching of the principles and rules of the Church.*<sup>21</sup>

The following illustrate the *lav daqva* methodology of the Tosafot.

In *Berakhot*, 14a, the Talmud makes reference to “the days when on individual (*yahid*) recites the *Hallel* in its totality”. The Tosafot declared:

*“An individual” is lav davqa, even a Congregation is meant by “an individual,” since all Jews are not congregating together as they used to when slaughtering the Pascal sacrifice in the fourteenth of Nisan, “To recite [the Hallel] in its totality,” is lav davqa,*

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<sup>18</sup> Cf. *ibid.*, p. 9 ff.

<sup>19</sup> *Ibid.*, p. 10.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

since surely it is firmly established that “the days in which an individual (*yahid*) does not recite the Hallel in its totality” (*'Arakhin*, 10b) there is not obligation whatsoever to say it at all, even partially.<sup>22</sup>

It is worth observing that in the quotation from *'Arakhin*, 10b, the same term “*yahid*” is interpreted in its literal sense, in order to demonstrate that “to recite in its entirety” is not to be interpreted in its literal sense.<sup>23</sup>

In *Mo'ed Qatan*, 23a, the Talmud states that a widower may remarry “immediately” (*le'altar*) if he either has no children or if he has young children who need care. The Talmud corroborates this teaching by citing a precedent in which Joseph the Kohen lost his wife and proposed to her sister “at the cemetery.” Tosafot made the following comment:<sup>24</sup>

*Lav Davqa*, since a mourner during the seven days is for forbidden [to marry].<sup>25</sup>

The *lav davqa* methodology is very frequently used by this school.<sup>26</sup> In many cases the editor of the Tosafot assumed that the reader was aware that the *lav davqa* methodology was employed and did not consider it necessary to specify that the method employed is *lav davqa*.<sup>27</sup>

Occasionally, the Tosafot also prefaced their analysis by declaring that the meaning of a given passage in *davqa*, “only,” that is to say, that although the sense of the passage is general, it ought to be limited to a particular situation about which no allusions are found in the text. To illustrate: According to talmudic law it is prohibited to draw water on the Sabbath by means of a wheel, on the grounds that a person might also draw water for his garden or his ruin.<sup>28</sup> The Tosafot made the following analysis:<sup>29</sup>

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<sup>22</sup> S.v. *Yamim*. On the precise meaning of this Tosafot, see R. Yisshaq de Mayo, *Shorshe Ha-Yam*, vol. 1 (Salonica: 5567), fol. 177b, s.v. *Hinne*.

<sup>23</sup> Cf. Tosafot, *'Arakhin*, 10 a-b, s.v. *Shemona 'Asar Yamim*.

<sup>24</sup> S.v. *l'eAmar*; cf. Tosafot, *Yebamot*, 43b – 44a, s.v. *Shane*.

<sup>25</sup> In no place in rabbinic literature it is stated that a widower may not remarry during the seven days of mourning for his wife. According to Maimonides, the basic difference between a widower and other mourners stems from the fact that mourning for a wife is not biblical, see MT *Ebel*, 2: 1. Therefore in cases of distress the rabbis were lenient with the husband. To compensate for this leniency the rabbis forbade the widower whose children are no longer in need of care, to remarry until three holy days have elapsed. However, according to the explanation given by the Tosafot that this delay was required in order that the widower should not think of his deceased wife while having marital relations with his new wife, it is incomprehensible why the rabbis allowed him to remarry in case that he has no children. Finally, it is interesting to note that, although the rabbis permitted the widower to remarry in cases of distress they explicitly forbade him to have marital relations until after thirty days, see *Mo'ed Qatan*, 23a; MT *'Ebel*, 6: 5. Nonetheless, R. Tam allowed a widower who had no children to remarry and have sexual relations within thirty days of mourning, see Tosafot s.v. *Abat*, *Ketubbot*, 4a. Incidentally, there are so many opinions in this school as to when and how a person in mourning may marry that practically all contingencies are comprehended in the above mentioned concessions that in certain circumstances a widower may remarry.

<sup>26</sup> Cf. *Rosh Ha-Shana*, 15b, s.v. *Nahagu*; 19a, s.v. *'Assurin*; *Megilla*, 28a, s.v. *Ki*, *Baba Qamma*, 38a, s.v. *Nasa*; 69a, s.v. *Kol*; *Hullin*, 96b, s.v. *'Ad*; etc.

<sup>27</sup> *Hullin* 98a, s.v. *Be-Besat*.

<sup>28</sup> *'Erubin* 104a.

*R. Tam explained that to be davqa with large wheels that draw large quantities of water at one time; then there is room to forbid. However, ours are small, and we do not forbid it.*

The *davqa* methodology is frequently used by this school.<sup>30</sup> Occasionally, the editor of the Tosafot takes it for granted that the reader is aware that the analysis is of *davqa* category and does not specify that the methodology being used is *davqa*.<sup>31</sup>

This method of legal analysis somehow resembles in spirit the method referred to by Jolowicz:<sup>32</sup>

*A text originally said “You are not to do X;” some then altered it by saying “You are not to do X unless is the case,” from which we can infer that if Y is not the case then X is permissible.*

Abelard made explicit reference to the *davqa* methodology when he declared that one must determine a whether a precept “is general [=lav *davqa*] or particular [=davqa].”<sup>33</sup> When interpreting a legal text, the Tosafot were especially concerned with local custom. This concern was particularly true in the German communities, for whom ancestral custom was always right, even when contradicting rabbinic or biblical law.<sup>34</sup> The veneration for custom was prevalent throughout the Middle Ages, particularly among Germanic people.<sup>35</sup> The Tosafot's attitude to custom, however is less consistent. Some customs were considered authoritative;<sup>36</sup> others were not.<sup>37</sup> No clear criterion is formulated as to what are the determining elements of an authoritative custom. Be that as it may, in many instances, the Tosafot's analysis of legal material reflects their concern and veneration for local customs. The following cases may illustrate our point, According to the Mishna, *Shabbat*, 4: I, it is forbidden to cover up hot food on the Sabbath with any substance that increases the heat of the food. Local custom, however, was to cover the food with coal. To this effect, write the Tosafot.<sup>38</sup>

*R. Isaac says that one may justify the local custom, (as follows). In the case of peat [mentioned in the Mishna] there is ground to fear that he might cover all of it [the pot] inside it. However, in our stoves, there is no ground for such fear. Furthermore, there are some who made a large hole [in the ground] and they build inside it a construction of*

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<sup>29</sup> *Ibid.*, s.v. *Gezera*.

<sup>30</sup> Cf. *Shabbat* 9b. s.v. *Be-Tisporet* 47a; s.v. *Bigde*; 'Erubin 101b, s.v. *Ki*; *Besa* 30a, s.v. *Tenan*; *Baba Qammia* 35b, s.v. *Zot*; 36a, s.v. *Ra'ui*; *Baba Mesi'a* 69a, s.v. 'Ellu 69b s.v. *Ki*; etc.

<sup>31</sup> E.g. 'Erubin 13a, s.v. *Halakha*; *Hullin* 110b *Kabda*.

<sup>32</sup> “The Stone that the Builders Rejected,” p. 38.

<sup>33</sup> *Sic et Non*, p. 10.

<sup>34</sup> See R. Yosef Qolon, *She'elot u-Teshubot* (New York: 5718), 9, fol. 11a; 54, fol. 37b-d.

<sup>35</sup> See H. J. Jolowicz, *Lectures on Jurisprudence* (London: Oxford University Press, 1963), pp. 193 – 199; cf. C. K. Allen, *Law in the Making* (Oxford: Clarendon Press), pp. 87 – 89.

<sup>36</sup> See *Sefer Ha-Yashar*, 618, fol. 73b, c, d; 621, fol. 74 (b), c, d.

<sup>37</sup> See Tosafot, *Baba Batra*, 2a, s.v. *be-Gevil*; *Berakhot* 48a, s.v. *ve-let*.

<sup>38</sup> *Shabbat* 48a, s.v. *De-Zetim*.

bricks around all of it and also at the bottom. Then they heat it well and they sweep [the ashes and coal] and cover up in it the pot, this [procedure] is not equal to the case of covering up [the food], because they (the rabbis) did not forbid it unless he covers up (the pot) and fasten [the heating substance] around the pot, as with ashes.” R. Barukh explained that there is a difference between the additional heat [produced by] peat and the additional heat of our stoves. Because [in the case of] a stove its heat is the effect of the fire and it is always decreasing in heat. However, [in the case of] the peat it is increasing the heat on its own.<sup>39</sup>

Let us take another illustration of the same type. The Mishna, Berakhot, 1:4, stipulates that where a long benediction is prescribed, it is not permissible to recite a short benediction, and when a short benediction is prescribed, a long benediction is not permissible. Referring to the benedictions of the *Shema*, it specifies that there is “one long and the other short.”

To many this Mishna seemed to be contrary to the local custom of inserting liturgical poems in the blessing of the *Shema*.<sup>40</sup> R. Tam, however, upheld the local custom by interpreting “one long and the other short” to mean that “either one may be either long or short.”<sup>41</sup>

Another factor taken into consideration by the Tosafot is the economic situation of the Jewish society. R. Yehuda ibn ‘Ayyash (c. 1705 - c. 1760) observed that Ashkenazic legislation is consistently more lenient in matters concerning commerce with wine and loan-interest since their economy was heavily dependent on these types of transactions.<sup>42</sup> A few illustrations will suffice. According to the Mishna Pesahim, 3:1, one must remove even mixtures of *hameš* (leaven) from one’s property before Passover.<sup>43</sup> This injunction would impose a heavy economic burden on Jewish society. R. Tam’s explanation of the Mishna reflects this concern.<sup>44</sup>

In the opinion of R. Tam, “These must be removed at Passover” refers to food. It means only from the table, because, one may not eat them. However, there is no transgression [by keeping them on one’s property] of the injunction “Let it not be seen” (Ex. 13:7).

It is important to note that the Tosafot lifted economic restrictions between Jews and Christians even when involving basic theological issues. Let us examine a few such cases.

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<sup>39</sup> Cf. R. Shemu’el de Medina, *Sh’elot u-Teshubot*, vol. 1, *Yore De’a* (Salonica: 5557), 193, fol. 113a.

<sup>40</sup> Cf. *Tosafot R. Yehuda Hasid*, in *Berakha Meshulleshet* (Warsaw: 5623), fol. 3b, s.v. ‘Ahat.

<sup>41</sup> *Tosafot Berakhot* 11a, s.v. ‘Ahat.

<sup>42</sup> R. Yehuda ‘Ayyash, *Bet Yehuda* (Leghorn: 1746), fol. 116c. s.v. *ube-’Inyan*.

<sup>43</sup> On the current interpretation of this Mishna, see J. W. Epstein, *Introduction to Tannaitic Literature* (Heb.) (Jerusalem; The Hebrew University Press, 1957), pp. 329, 334.

<sup>44</sup> *Tosafot, Pesakim*, 42a, s.v. *ve-’Ellu*. On further concessions on Pesah made on economic basis, see *Sefer Ha-Yashar*; 622, fol. 74 (b), c. The *Tosafot in Pesahim*, 30a, s.v. ‘Amar Raba, *in fine*, is apologetic.



According to the rabbis, a Jew may not establish a partnership with a gentile, because in case of a conflict the Jew could not administer an oath to a gentile.<sup>45</sup> The reason for this restriction is that the gentile will swear by his gods or divinities. R. Tam allowed Jews to establish partnerships with Christians and to administer an oath to them.<sup>46</sup>

*R. Tam allows [the administration of an oath to a Christian], because this case is as if he is rescuing [his property] from their hands . . . furthermore, R. Tam demonstrates, from that case mentioned, the last chapter of Megilla, whet Abuha bar Ihi said: “May I be rewarded because I never established a partnership with a Cuthean” (Megilla, 28a).<sup>47</sup> Now, if partnership with a gentile is forbidden, why should he have mentioned [that he had not transgressed the above injunction] it? . . . Moreover, R. Tam explained that in these days all [Christians] swear by their saints, and although they mention with them the name of God, meaning with it something else (i.e. Jesus), this is not idolatrous name, since they mean with it, the Creator of Heaven and Earth. And although they associate the name of God with something else (i.e. Jesus) . . . non-Jews are not forbidden on that [to associate another being; with God]. . . .<sup>48</sup>*

The rabbis forbade Jews to have commerce or to drink wine that was handled by a gentile.<sup>49</sup> However, wine was an important factor in the economic and social life of France. Therefore, great efforts were made by the French rabbis to demonstrate that this injunction did not apply to their particular situation. They emphasized that this injunction was valid only in a place where wine was used for “idolatrous services.” Although wine was used in the Mass, in which the Blood of Jesus was transubstantiated into wine, in their opinion this ritual, somehow, did not fall into the above-mentioned injunction.<sup>50</sup> It should follow that the injunction forbidding the drinking of wine manufactured by Christians should be lifted too. However, this injunction was upheld. It is relevant to note that French Jews were lax in the observance of thus injunction.

To facilitate Judeo-Christian relations, sometimes the Tosafot reformulated Christian theology contrary to Christian dogma. Some examples will suffice.

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<sup>45</sup> *Sanhedrin* 63b.

<sup>46</sup> Tosafot *Berakhot* 2b, s.v. *Shemma*.

<sup>47</sup> A Cuthean is a Samaritan – not a gentile. On the status of the Cuthean in Jewish law, cf. *Hullin* 3b – 6a, where many Jewish scholars believed that he was fit even to perform the ritual of slaughtering. Although the final law excluded them from all Jewish ritual, c.f. MT *'Abadim* 6: 6, the above mentioned injunction certainly did not apply to them, since the Samaritans did not swear by other gods. Accordingly, Abuha bar Ihi considered partnership with a Cuthean not to be included, in the strict sense of the law, under the prohibition of establishing a partnership with a gentile.

<sup>48</sup> On the theological implications of this thesis, see R. Efrayim Kas, *Sha'ar Efrayim*, (Zultzbach: 5448), *Orah Hayyim*, 24.

<sup>49</sup> Mishna *'Aboda Zara*, 2: 3; *'Aboda Zara*, 30b – 31a.

<sup>50</sup> Tosafot *'Aboda Zara*, 57b s.v. *Le-Apuqe*; c.f. *Bayit Hadash, Yore De'a*, 123, s.v. *Uma She'amar* in fine. R. Yishma'el Kohen, *Zera' Emet*, vol. 2 (Leghorn: 5556), fol. 34b, showed that the Christian Mass is definitely included in the talmudic definition of idolatrous services. Historically and theologically the eucharist is related to magical rites and it is incompatible with Judaism; see Morton Smith, *The Secret Gospel* (New York: Harper & Row, 1937), pp. 101 – 103; cf. *ibid.*, pp. 133, 140.

In order to allow Jews to purchase from the priests and sacristans<sup>51</sup> the bread offered in the Mass, the Tosafot insisted that it was brought merely “as a present to the priests, not as sacrifice.”<sup>52</sup> This explanation is not consistent with Christian dogma, which sees in the Eucharist of the Bread a transubstantiation Jesus’ flesh. Likewise, the Tosafot permitted Jews to purchase candles that were offered in churches, on the grounds that he were brought as “ornaments,” not as votive offerings.<sup>53</sup> This explanation overlooks the well-known fact that candles were and still are the most common votive offering in the church. Occasionally they also overlooked historical facts. For example, the rabbis prohibited a Jew to rent a house to gentiles.<sup>54</sup> Jews, however were allowed to rent their houses to Christians on the grounds

*that these properties do not belong exclusively to us since we have to pay taxes on them to gentiles.*<sup>55</sup>

This explanation overlooks the fact that in Talmudic times also, the Jews had to pay similar taxes on his property<sup>56</sup> and nonetheless he was forbidden to rent it to gentiles.<sup>57</sup>

Allowances were made to alleviate the burden of the law, especially when affecting the mores of the community. We shall examine a few such cases.

Jewish law forbids shaving or washing clothing on the 9th of Ab.<sup>58</sup> However, when this day falls on a Thursday, the Tosafot permitted Jews to shave and to wash clothing in the afternoon to facilitate the preparation of the Sabbath.<sup>59</sup>

*However, whenever the 9th of Ab falls on Thursday, it is permitted to wash the clothing and to shave in the afternoon, in order to honor the Sabbath. One should not wait (to do this) until Friday, since it would be burdensome for the Sabbath.*

Another illustration of the same type: Jewish law requires that one recite the *Shema* of the evening after the appearance of the stars.<sup>60</sup> This requirement was inconvenient to many who wished to retire early. It was particularly difficult if one followed the opinion of R. Tam that “the appearance of the stars” takes place seventy-two astronomical minutes after sunset.<sup>61</sup> However, R. Tam allows the discharge of this obligation seventy-two astronomical minutes before sunset.<sup>62</sup> He arrived at this conclusion by applying to evening *Shema* the law of the evening *Amida*. The evening *Amida* is considered to

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<sup>51</sup> For some interesting details on the commerce between French Jews and the clergy in the 14<sup>th</sup> century, see Isadore Loeb, “Deux livres de commerce du XIV<sup>e</sup> siècle,” REJ, IX (1884), pp. 45 – 46.

<sup>52</sup> Tosafot *’Aboda Zara*, 50b, s.c. *Ba’enan*.

<sup>53</sup> Tosafot, *ibid*.

<sup>54</sup> Mishna *’Aboda Zara*, 1: 9.

<sup>55</sup> R. Eli’ezer ben Natan, *Eben Ha-’Ezer*, vol. 1 (New York: 5718), 290, fol. 125b; c.f. *ibid.*, 291.

<sup>56</sup> *Baba Babtra*, 54b; cf. Tosafot *’Aboda Zara*, 59a, s.v. *Bassar*.

<sup>57</sup> Cf. R. Hiyya Pontremoli, *Sefihit Bidbash* (Salonika: 5608), 49, fol. 135b ff.

<sup>58</sup> Mishna *Ta’anit* 4: 7; c.f. *Bet Yosef, Orah Hayyim*, 551 s.v. *Uma She’amar Rabbenu She’im*.

<sup>59</sup> Tosafot *Ta’anit* 30a s.v. *Ve-tarvaihu*.

<sup>60</sup> *Berakhot*, 2a.

<sup>61</sup> Tosafot, *Pesahim*, 94a, s.v. *Ribbi*.

<sup>62</sup> Tosafot *Berakhot*, 22a, s.v. *Me’ematai*.

have been either at the time of the burning of the daily afternoon sacrifice,<sup>63</sup> that began more than an hour before sunset,<sup>64</sup> or at the time of Jacob's Prayer<sup>65</sup> that was also before sunset.<sup>66</sup> It is important to note that there is no relation whatsoever between the laws pertaining to the 'Amida and the laws pertaining to *Shema*'. Nonetheless R. Tam expounded:<sup>67</sup>

*If you would ask: How come that we recite (the Shema') so early in the day? One may answer that we have established the law to be like Rabbi Yehuda, who said in the Chapter "The Morning Prayer" that the time of the Afternoon Prayer is until seventy-two astronomical minutes before sunset, Immediately after begins the time of the Evening Prayer [i.e., of the 'Amida of the Evening]*

This is method of analysis was applied to alleviate many personal situations. For instance, Jewish law forbids a close relative of deceased to eat meat or drink wine before the burial.<sup>68</sup> Nonetheless R. Tam did not abstain from eating meat and drinking wine when his sister died. He argued that since he did not have to take part in her burial he was exempt from the aforementioned restrictions:<sup>69</sup>

*When the sister of R, Tam died, he was informed [about the matter] in another city where he was. Nonetheless he ate meat and drank wine. He justified his behavior on the grounds that since she had a husband, and he is obligated to bury her, he was no longer forbidden [to eat] meat and [drink] wine. According to this reason even if he would have been in the [same] city he would have been permitted [to drink wine and eat meat].<sup>70</sup>*

Jewish law forbids one to marry within the thirty days of mourning, Nonetheless R. Tam allowed an engaged girl who lost her bother to marry within thirty days of the death:<sup>71</sup>

*R. Tam allowed an engaged woman who lost her brother after inviting relatives, close to the wedding, to be married within the thirty days. The reason [for this decision] is in order that the [future] husband would reproduce; since if he would not marry this [woman] he would not marry another [in the time being]. It is probably even if she was not engaged that he would have allowed [the wedding] since he [the groom] liked her more than another.<sup>72</sup>*

Accordingly to Jewish law a husband is forbidden to have marital relations with his adulterous wife and he must divorce her.<sup>73</sup> She is also forbidden to marry the adulterer on

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<sup>63</sup> *Berakhot*, 26a.

<sup>64</sup> Cf. *Pesahim*, 58a ff.

<sup>65</sup> *Berakhot* 26a, cf. *Hullin*, 91b.

<sup>66</sup> See *Tosafot Berakhot*, 26b, s.v. *Ya'aqob*.

<sup>67</sup> *Tosafot Berakhot* 2a. s.v. *Me'ematai*.

<sup>68</sup> *Berakhot* 17b.

<sup>69</sup> *Tosafot Ha-Rosh*, 11d, printed in *Berakha Meshulleshet* (Warsaw: 5623).

<sup>70</sup> See *Tosafot R. Yehuda Hasid*, 8b in *Berakha Meshulleshet*.

<sup>71</sup> *Halakhot Ha-Rosh*, *Mo'ed Qatan*, Chapter 3, para. 49.

<sup>72</sup> Cf. *Tosafot Yebamot* 43b, s.v. *Shane*.

<sup>73</sup> Cf. *Qiddushin* 66a; *Ketubbot*, 51b.

the basis on the principle that “just as she became forbidden to the husband she had also become forbidden to the adulterer.”<sup>74</sup> R. Tam exempted adultery with a gentile from this law.<sup>75</sup> Adultery with a gentile does not forbid the adulteress to her husband or to the adulterer.<sup>76</sup>

*R. Tam allowed a [married] Jewish woman who had become an apostate and had sexual relations with a gentile to be kept by that gentile after he converts. Since we cannot apply in his case [the principle] just as she had become forbidden to her husband, she had also become forbidden to the adulterer.*

We shall conclude this study by examining a principle of far-reaching ramifications in the application of rabbinic law. According to the Tosafot, whenever the reason of a rabbinic interdiction is no longer operative the interdiction expires.<sup>77</sup> The basic juristic conception underlying this principle was excellently expressed by Abelard. In his view, the student of Canon law must determine “the times and reasons” of the law, “since often what is allowed one time is to be prohibited at another, and more often what is commended for strictness is sometimes tempered by dispensation.”<sup>78</sup>

The application of this principle is far-reaching, especially since it is quite difficult to demonstrate that the supposed reason of a given interdiction is in fact valid in another society and time.<sup>79</sup> A few illustrations will suffice to show how this principle was applied. Rabbinical law forbids the eating of cheese manufactured by gentiles. To this effect commented R. Tam:<sup>80</sup>

*R. Tam said that nowadays there is no simple reason to forbid cheese manufactured by gentiles. Since the reason that it was forbidden is because [of the possibility of] having been bitten [by a serpent].*

The Mishna *Besa* 5:2 forbids the clapping of hands on the Sabbath and Holydays. The Talmud explains that the reason for this injunction is to prevent people from “fixing musical instruments.”<sup>81</sup> By “fixing” (*Yetaqqen*) it is meant tuning musical instruments,

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<sup>74</sup> Mishna *Sota* 5: 1.

<sup>75</sup> Cf. Tosafot *Baba Qamma*, 38a s.v. 'Ella.

<sup>76</sup> Tosafot *Ketubbot* 3b, s.v. *Velidrosh*.

<sup>77</sup> See: R. Shemu'el ben Me'ir, on *Pesahim*, 107b s.v. *o dilma samukh*; Tosafot *Besa* 6a, s.v. *Veha'iddana*; Tosafot *'Aboda Zara*, 15a s.v. *Imur*; Tosafot *ibid.*, 21a s.v. *Af Bemaqom*; Tosafot *ibid.*, 73a s.v. *Ika*; R. Me'ir of Rottenburg *Halakhot Semahot*, fol. 2d ff. printed in *Mahane Leviyya* (Leghorn: 5549).

<sup>78</sup> *Sic et Non*, p. 10.

<sup>79</sup> It should be remembered that there is little relationship between the “reason” given by the rabbis for the promulgation of an interdiction and the actual reasons that moved them to promulgate such an interdiction. See Yerushalmi, *'Aboda Zara*, 2: 8 fol. 41b-c, and *'Aboda Zara*, 35a. Juridically, it makes no sense to admit that an individual rabbi or a group of rabbis – that have no judicial authority – could have the right to ascertain that a “reason” of a law that was promulgated by a legally constituted body – the talmudic *Bet Din* – is no longer operative and thereby the law had ceased to be binding.

<sup>80</sup> Tosafot *'Aboda Zara*, 35a s.v. *Hada*.

<sup>81</sup> *Besa* 36b. The TY *Besa* 5:2, fol. 63a seems to give a different reason for this injunction. However, there is no practical consequence to this difference since for the rabbis the “reason” given to an injunction was not operative; cf. above note 79.

especially string instruments that need constant adjustment. The Tosafot, however, interpreted “fixing” to mean ‘manufacturing,’<sup>82</sup> arriving at the following conclusions:<sup>83</sup>

*[The aforementioned injunction applies] only in their day, when they were experts in manufacturing musical instruments, then there was a reason to forbid [clapping hands]. However, in our case, we are not experts in manufacturing musical instruments therefore there is no reason to forbid (clapping hands).*

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<sup>82</sup> In no place in rabbinic literature is the (aramic) root TQN (to fix) is used to mean “to build, to make.” However, the Hebrew 'Asa “made” is used also as “to fix.” Therefore, although 'Asa can mean to fix *Yetaqen* does not mean “to make.”

<sup>83</sup> *Besa* 30a, s.v. *Tenan*.