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ELIMELECH (MELECH) WESTREICH
(TEL AVIV)

The Response of Jewish Law to Modern Science and
State Laws in German-Speaking Countries
in the Nineteenth Century¹

1. *Introduction*

The present study examines the attitude of the sages of Jewish Law (Halakhah), especially one of its most important figures, Rabbi Moses Sofer (1762-1839), toward modern medicine and state laws in German-speaking countries in the late-eighteenth and nineteenth centuries. In the period under study, far-reaching cultural, political and social changes occurred in these countries. Most prominent among these were the spread of the Enlightenment and its deep penetration into German society; the rise of modern science and medicine; the erosion of the status of religion; the emergence of the centralized state and the curbing of the power of autonomous corporations; the industrial revolution and the urbanization process. All these had a sweeping effect on traditional Jewish society and its relations with the majority Christian society.² As the Jews' communal and judicial autonomy was abolished, individual Jews and the community at large became directly subject to state laws, which interfered in their lives and controlled them, including in matters of medicine.

These changes affected Jewish society deeply. The Jewish community, which used to be united in its loyalty to tradition and the Halakhah, came unraveled. Growing numbers of Jews in Germany and in important portions of the Hapsburg Empire abandoned tradition. Unlike traditional Jewry, the modern groups undertook to *reform* the Halakhah, which they ceased to consider as being of divine origin, showing preference for the products of human wisdom and the Enlightenment, including the innovations of modern science and medicine.³ Reform Jews clearly preferred modern medicine and rejected the Halakhah when the two came into conflict. They also rejected the notion of national separatism and the messianic idea of the expected re-

- 1 This research was supported by the Cegla Center for Interdisciplinary Research of the Law, Tel Aviv University. This article is dedicated to the memory of my parents in law, Yafa Sheindel and Shmuel Goldner.
- 2 Jacob Katz, *Out of the Ghetto: The Social Background of Jewish Emancipation, 1770-1780*, Cambridge, MA 1973, 1-8.
- 3 Michael A. Meyer, *Response to Modernity: A History of the Reform Movement in Judaism*, New York and Oxford 1988, 17-19.

demption and return to Zion.⁴ The German states became the homeland of the Reform Jews and the laws of the states became their new laws.⁵ Those who continued to adhere to the Halakhah and tradition, foremost among them the Halakhic sages, came to be known as *Orthodox*. In order to face the difficult challenges of modernity, the Orthodox were compelled to struggle against the Reform movement, which represented an internal rival, in addition to resisting the pressures from outside.

The great historian Jacob Katz views Orthodoxy as a modern phenomenon and not as a direct continuation and simple duplication of traditional, pre-emancipation Jewish society.⁶ The main circumstantial change was the weakening of the coercive power of the communal leadership, lay and rabbinical alike. As a result Orthodoxy began to focus on the internal struggle against reformists and their enlightened values, unlike the traditional era, when the struggle was primarily an external struggle with the problems of everyday life themselves, which in many cases were caused by the gentile society.

This shift in focus on the part of Orthodoxy had several social and halakhic expressions. The Orthodox group continued its traditional separation from the surrounding foreign environment, but now also sought to barricade itself against the new culture that was oriented to enlightenment and human wisdom. During extreme periods this trend expanded at times even to the point of separation from the Reform groups within Jewish society as well.⁷ Orthodoxy also displayed a tendency toward increased halakhic strictness, in contrast to the relative flexibility that had characterized Halakhah during the traditional period. Unlike the judicial activism and creativity in solving problems that had previously been common, there was now an increasing emphasis on adherence to existing texts without the willingness to examine them in light of changed circumstances.⁸ This trend was prominent in confrontations between modern medicine and the Halakhah, in which Orthodoxy is commonly viewed as rejecting outright medical innovations based on human wisdom.

According to Katz, the person responsible more than any other for the creation and crystallization of the Orthodox doctrine was R. Moses Sofer,

4 Jacob Katz, *Tradition and Crisis: Jewish Society at the End of the Middle Ages* (first published in Hebrew in 1958), New York 1961, 272 f.; Meyer, *Response to Modernity* (fn. 3), 59.

5 Meyer, *Response to Modernity* (fn. 3), 205.

6 Jacob Katz, *The Controversy over the Temple in Hamburg and the Rabbinical Assembly in Braunschweig: Milestones in the Development of Orthodoxy*, in: idem, *Divine Law in Human Hands: Case Studies in Halakhic Flexibility*, Jerusalem 1998, 216 f.

7 Jacob Katz, *A House Divided: Orthodoxy and Schism in Nineteenth-Century Central European Jewry*, Hanover and London 1998.

8 Mordechai Breuer, *Orthodoxy: A Program for an Historical Evaluation*, in: Yosef Salmon/Aviezer Ravitzky/Adam S. Ferziger (eds.), *Orthodox Judaism: New Perspectives*, Jerusalem 2006, 79-87, here 79 f.

popularly known as the Hatam Sofer.⁹ Moses Sofer (Schreiber) was born in Frankfurt am Main, where he studied in a *yeshiva* (a religious high school) before moving on to Mainz and later to the Eastern parts of the Austro-Hungarian Empire. After serving as Rabbi in the Burgenland, he founded and headed an influential *yeshiva* in Pressburg (Bratislava). The Hatam Sofer became well known as an opponent of the spirit of the Jewish Haskalah movement and its main proponent, Moses Mendelssohn. The motto he coined, »The new is prohibited by the Torah,« was diametrically opposed to the spirit of modernism and enlightenment that the Reform Jews adopted so enthusiastically.¹⁰ At times, the Hatam Sofer also used this slogan in halakhic contexts discussed in this article. There is no doubt that the Hatam Sofer is the founding father of Orthodoxy, responsible both for shaping its image and conduct and for formulating its doctrine.

Nevertheless, the present study argues that in some halakhic matters at least the Hatam Sofer did not act in what is generally viewed as a typically Orthodox manner. I will test this claim in two areas, the laws of the state and modern medicine, which challenged traditional Jewry from outside and threatened it from within. It was the Hatam Sofer's approach in coping with modern medicine and his response to state laws that enabled the emergence of German neo-Orthodoxy in the second half of the nineteenth century, which was open to modernity and admired German contemporary culture but adhered strictly to Halakhah, notwithstanding the Reform movement and the pressure it exercised.¹¹

2. *The Law of the Kingdom Is Law (Dina de-malkhuta dina)*

For over one thousand years the Jews resided in the German-speaking environment as a tolerated population, living at the discretion of various rulers who acted in the prevalent Christian spirit of the time and according to various interests, primarily economic. In general, the Jews enjoyed communal and judicial autonomy and managed their own affairs internally, including matters of medicine and health, based on Jewish law.¹² During this period, halakhic sages also formulated their attitudes toward the laws of the state

9 One of the best biographies on R. Sofer is: Jacob Katz, *Towards a Biography of the Hatam Sofer* (translated from Hebrew by David Ellenson), in: *ibid.*, *Divine Law* (ft.6), 403-443. Hatam Sofer is the acronym of his commentary to the Talmud *Hidushei Torat Moshe* (Innovations of Moses) and it is common to call rabbis by the name of their books.

10 Moshe Samet, *The New Is Prohibited by the Torah: Chapters in the History of Orthodoxy*, Jerusalem 2005, 25 ff. [Hebrew].

11 Mordechai Breuer, *Modernity within Tradition: The Social History of Orthodox Jewry in Imperial Germany*, New York and Oxford, 1992, 15-31.

12 German-Jewish History in Modern Times, New York, 1996-1998, Michael A. Meyer (ed.)/Michael Brenner (asst.ed.), vol. 1: Mordechai Breuer/Michael Graetz, *Tradition and Enlightenment, 1600-1780, 165-172, 194-203*.



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based on instructions decreed in the Talmud, with the necessary changes imposed by the various locations and times.

Jews in German lands adhered to the messianic idea, expecting redemption and a return to Zion, even though they did not perceive the German countries as inimical. According to medieval law and custom, they were considered a separate corporation, tolerated but without full citizen rights. They enjoyed social and judicial autonomy, but judicial autonomy was not unlimited and in many cases the ruler intervened and imposed his laws and orders. In these situations the question arose whether the laws of the ruler were legitimate in the eyes of Jewish law. The medieval sages addressed the problem with the help of the Talmudic dictum *dina de-malkhuta dina* (»the law of the kingdom [state] is law,« abbreviated as LKL).¹³ The meaning of this concise dictum is that the law of the land is perceived as legitimate and has to be respected and obeyed not only because of the ruler's coercive power to enforce it.¹⁴

In medieval and early modern Europe, the use of this rule expanded as a result of the intensive encounter between Jews and local kings and rulers. There was a basic controversy between medieval halakhic sages regarding the justification of the LKL rule. Some sages based it on the logic of property law: since the king is the lord of the land, he is therefore entitled to do with his property as he pleases. By contrast, others claimed that the justification derives from the very standing of the king as a ruler and not only from his being the owner of the property. Preferring the latter approach was likely to result in greater respect for the ruler. The difference between the two approaches was manifest at the time only at the theoretical level, with regard to the King of Israel. According to the »property owner« approach, the rule does not apply to the King of Israel because the Land of Israel belongs to the Jews themselves and not to the king, and therefore he cannot act by virtue of this law. By contrast, the »ruler« approach does not differentiate between the King of Israel and gentile kings. This controversy became relevant in practical terms only later when the people became the ruler, and not the person who heads the state.

This basic attitude towards LKL changed dramatically during the era of emancipation and acculturation in Germany. Reform Jews rejected the notion of national separatism and the messianic idea of return to Zion, which they regarded as concepts unsuited to the Enlightenment and the emerging national state.¹⁵ Considering the German countries as their homeland, they viewed themselves as Germans, and the laws of the state as their new laws. In

13 Babylonian Talmud, Bava Batra, 55a.

14 The most comprehensive work on this subject is by Shmuel Shilo, *Dina De-Malkhuta Dina: The Law of the State is Law*, Jerusalem 1974 [Hebrew]. Shilo, however, did not provide an integrated view of the nineteenth century per se, which is the topic of our inquiry.

15 See fn. 4 above.

some cases they turned the Talmudic dictum of LKL into a supreme rule, with all components of the Halakhah, in all areas, subordinate to it, including most important matters like marriage and divorce and desecrating the Sabbath. This Reform position would have resulted in a complete disintegration of the Halakhah and its *de facto* abolition.¹⁶ Indeed, there is no basis or justification for such an approach in the halakhic sources. The Talmud itself formulated the LKL rule in the third century, but this rule is merely one of many rules whose application depends on an entire set of factors.

The Hatam Sofer, who adopted the entire halakhic heritage, including the topics concerned with state laws, had to confront the new Reform ideology. He was fiercely opposed to the idea that Germany was the new homeland of the Jews and that the laws of the German states should become their laws too.¹⁷ Contrary to the Reform Jews, he emphasized Jewish uniqueness and nationality and encouraged his followers to emigrate to the Land of Israel and settle there.¹⁸ According to Jacob Katz, this position should have led him to reduce the status of the laws of the state, contrary to the direction followed by the Reform Jews. Such a position would have placed him on a collision course with the ruler, especially in an era of the steadily growing intervention of the state in Jewish life, which had begun with the Hapsburg Emperor Joseph II.

The Hatam Sofer addressed the topic of LKL at several levels in numerous responsa: its theoretical basis, the doctrines and its boundaries, and the response to conflicts with the Halakhah. He followed the approach that supports the status of the sovereign and maintains that his rule is derived from the authority of the ruler and not from his ownership,¹⁹ hence the obligation to obey the laws enacted by the king within the framework of his authority as a ruler and not only as the owner of the state. The Hatam Sofer's willingness to rule decisively in an ancient controversy in Jewish law was a clear indication of »judicial activism« on his part, in contrast to the ultra-Orthodox attitude that developed after his death, which was characterized by its objection to such activism.

According to the Hatam Sofer, the two approaches to LKL constitute the rational factor underlying the accepted legitimacy of the king's rule by all peoples of the world. But there is another argument for that legitimacy which is derived from the divine commandment given to Moses to respect Pharaoh and to the Prophet Elijah to respect Ahab.²⁰ These commandments were

16 German-Jewish History in Modern Times (fn. 12), vol. 1: Michael Brenner/Michael A. Meyer/Stefi Jersch-Wenzel, *Emancipation and Acculturation, 1780-1871*, 255; Gil Graff, *Separation of Church and State: Dina de-Malkhuta Dina in Jewish Law 1750-1848*, Alabama 1985. See for instance 114 f. and 120 f.

17 Katz, *The Controversy over the Temple in Hamburg* (fn. 6), 228 f.

18 See Samet, *The New Is Prohibited by the Torah* (fn. 10).

19 *Responsa Hatam Sofer*, vol. 5, *Hoshen Mishpat*, chap. 44.

20 *Ibid.*, vol. 6, *Likutim*, 86.

independent of the evil ways of the kings and were issued despite their transgressions. According to the Hatam Sofer, this argument was not a rational argument and was unique to the Jewish nation that accepted the Torah.

No less important is the Hatam Sofer's classification of the topic of LKL as a rule originating in the Torah.²¹ In Jewish law there is a basic distinction between commandments and norms originating in the Torah and those that originate in ordinances of the sages or even in custom. This distinction has many consequences. The fact that a certain halakhic rule is based on Torah law, which is the highest rung on the normative ladder, has symbolic significance and affects the weight of a given rule. For example, a rule originating in an ordinance of sages is likely to be ineffective in cases where legal action according to the Torah is required.

At no point did the Hatam Sofer agree to regard LKL as a supreme rule to which the entire body of the Halakhah is subordinate. Hence, it was important to determine the boundaries of the LKL rule, whether it applied each time the ruler enacted a new law, and if not, in what areas it did apply and whether there were preconditions for its application. The natural area for the application of the rule is that of government, for example, the imposition of taxes and customs duties. Halakhic sources in the Middle Ages and the early modern era did not question the king's authority to impose taxes, duties, fees, and so forth. But they demanded that these impositions be fair and just and apply equally to all citizens. In the case of discriminating impositions they defined the royal decrees »robbery of the land, not law of the land.«²² In the responsa collection of the Hatam Sofer I have not come across any objections to a fiscal or financial imposition, despite the fact that there existed taxes imposed specifically on Jews.²³

An area close to that of taxation is the monetary one, in which the Hapsburg Empire increasingly intervened during and after the Napoleonic wars. The various arrangements and laws enacted in this area had far-reaching consequences in various branches of civil law. For example, the introduction of the banknote to replace the coin as legal tender raised serious questions regarding the legal essence of the banknote, whether it should be considered real money or merely a note that could be traded and hence subject to all the rules that applied to this type of document. The Hatam Sofer ruled unequivocally that the banknote was money in every respect, and served exactly as the silver coin had served in the past.²⁴

The devaluation of the metal coins was another issue that directly affected the entire system of debt repayment. Some questions were addressed on these matters to the Hatam Sofer, and in principle he completely adopted the

21 Ibid., vol. 2, Yoreh De'ah, chap. 314.

22 Ibid., vol. 3, Even ha-Ezer 1, chap. 126.

23 Shmuel Ettinger, *A History of the Jewish People in the Modern Era*, ed. H. H. Ben Sasson, Tel Aviv 1969, 94 [Hebrew].

24 Ibid., vol. 4, Even ha-Ezer 2, chap. 106.

decrees of the authorities and incorporated them into the relevant halakhic rules.²⁵ But in one instance he recorded a significant reservation.²⁶ The question that arose was how to pay women's *ketubah* (the Jewish marriage agreement), when the banknotes in circulation were not worth their nominal value. The *ketubah* has several monetary components, and the Hatam Sofer ruled that most of them could be paid out with banknotes that were legal tender at the time when the payment was made. Only with regard to one component, called the principal part of the *ketubah*, did the Hatam Sofer demand that payment be made according to the real value of the coin that was specified in the *ketubah*, since sexual relations with a wife who is not guaranteed a specific amount of money – 200 zuz (silver coins) – are considered fornication.²⁷ It is clear, therefore, that the principle of LKL is not absolute, and cannot be applied if its application would breach a halakhic prohibition that includes a ritual element.

This attitude was clearly expressed when the Hapsburg Emperor visited one of the Jewish communities in Hungary at the end of the Napoleonic wars and his cortège demanded that the Emperor be welcomed by a choir of men and women. The Hatam Sofer opposed this demand vigorously, insisting on the halakhic prohibition against listening to women singing, at least in the synagogue. He argued that although Jews were obliged to respect and honor the king, it would be a disgrace to king if they violated the rule of the Torah by listening to women singing. Therefore, he claimed, the LKL rule did not apply in such a case.

In 1830 the Hatam Sofer expressed another reservation to the doctrine of LKL, with regard to conscription. Although, on the basis of LKL, the authority to draft the Jews was not doubted, he qualified the scope of the king's authority in this matter, ruling that in cases in which Jewish law exempted an individual or a group from the draft, the draft was prohibited. Specifically, the Hatam Sofer referred to students of Torah and ruled »that even if they are not exempt explicitly by the kingdom, they are in any case exempt by Torah law.«²⁸ In this case, however, he was not required to resolve a conflict between the law of the kingdom and Torah law, as even the kingdom exempted Torah students from the draft.

As the LKL rule was basically recognized in legal, but not in ritual, matters, how did the Hatam Sofer rule when the laws of the state eventually came into conflict with the ritual laws of the Halakhah? These problems increased in the period under discussion when kings and rulers increasingly interfered in internal Jewish life, including matters of marriage and divorce, which include ritual elements.²⁹ It seems that the Hatam Sofer tried to bypass

25 Ibid., vol. 5 (fn. 19), chap. 58.

26 Ibid.; ibid., vol. 2 (fn. 21), chap. 289, and vol. 6 (fn. 20), chap. 29.

27 Mishnah Ketubot, 5:1.

28 Ibid., vol. 6 (fn. 20), chap. 29.

29 Graff, Separation (fn. 16), 46-53.

the potential collisions by doing his utmost to avoid conflict with the legal authorities or disagreement with its rules and regulations.³⁰ This is manifest in several significant debates involving the traditional and Reform groups. In the debate concerning the Reform synagogue in Hamburg he sharply opposed any changes »in the language of the prayers (from Hebrew to German), changes in the text of the prayer (the omission of several passages), and the introduction of the organ into the synagogue.«³¹ The Hatam Sofer argued that it would be appropriate to separate from the Reform Jews and impose a ban on them.³² He refrained from doing so, however, because of the state prohibition that denied rabbis the authority to impose the ban.³³ But the Hatam Sofer refrained even from ordering a separation from the Reform Jews, although the state did not prohibit passive separation, i. e. without imposing a ban. This demand was made in the following generation by the Hungarian ultra-Orthodox and the German neo-Orthodox. It is possible that the Hatam Sofer sought to prevent a complete rift within the Jewish people, invoking state law merely to justify his inaction. But it is also possible that he refused to rule on the separation in order to avoid any possible confrontation with the authorities. The same approach can be seen in the two cases where Halakhah collided with modern medicine: delay in burying the dead, and sucking the blood during circumcision. These cases and the position adopted by the Hatam Sofer will be discussed in detail below.

In sum, the Hatam Sofer legitimized the LKL doctrine by the authority of the ruler and not by ownership; moreover, he maintained that the LKL doctrine originated in the Torah and not merely in an ordinance of the sages or a custom, and therefore the authority of LKL was of divine and not human origin. Therefore, he welcomed the law of the king in civil law matters and incorporated it into the halakhic body of law, but refused to give priority to the LKL in cases that involved ritual law matters. However, in some ritual cases the Hatam Sofer accepted *de facto* the law of the state and did not launch an active struggle against it.

The influence of the Hatam Sofer's method can be discerned in the ruling of Rabbi Professor David Zvi Hoffmann, one of the most prominent rab-

30 Responsa Hatam Sofer, vol. 4 (fn. 24), chap. 174; and *ibid.*, vol. 5 (fn. 19), chap. 19, in which the authorities intervened in the appointment of a rabbi.

31 Katz, *The Controversy over the Temple in Hamburg* (fn. 6), 217.

32 Jacob Katz, *Rabbi Raphael Cohen, Moses Mendelssohn's Opponent*, in: *idem, Divine Law* (fn. 6), 197, describes the ban and its use in Hamburg until the French Revolution as follows: »The ban served to enforce the law and guaranty discipline [...] With its aid, the [Jewish] court [headed by the Rabbi] [...] in case of a religious transgression, could compel the transgressor to abandon his ways [...] the ban requires the excommunicated person to take upon himself customs resembling those of the mourner.« The use of bans was generally abolished after the Napoleonic wars and was not used against Reform Jews. *Ibid.*, 213 f.

33 *Ibid.*, vol. 5 (fn. 19), chap. 41; Katz, *The Controversy over the Temple in Hamburg* (fn. 6), 228 f.

binical figures among German neo-Orthodox Jews at the turn of the twentieth century.³⁴ He was a member of the executive of Agudat Israel, the central ultra-Orthodox (*haredi*) party. He held an extreme position regarding the avoidance of conflict with the ruler and his laws, framing the issue as follows: considering that Jews who served in the army according to the laws of the king and the land were forced to desecrate the Sabbath and the holidays, was an observant Jew obligated to make every effort to exempt himself from the draft or at least delay his draft so as to avoid a situation in which he must desecrate the Sabbath?³⁵ He determined unequivocally that the obligation not to evade the draft was greater than a regular commandment of the Torah so that enlisting was permitted even if it entailed desecration of the Sabbath. There were two reasons for this: first, avoiding the draft was in itself a desecration of God, when the matter became known among non-Jews; second, »it hurts the Jews because the Jew haters will say that the Jews do not observe the laws of the kingdom.« The draft is permitted in particular because in this case it is not the initiative of the draftee that leads to the desecration of the Sabbath, but he »is taken according to the law of the land.«

R. Hoffmann examined also the result of an opposite ruling, which would obligate Jews to make every effort to avoid the draft. In this case, every Jew would be obligated to try to avoid the draft, but it was obvious that the vast majority would not succeed, so that the only result would be a massive desecration of God. Hoffmann's operative conclusion was to follow the order of the king and hope that the army commanders would allow the draftees to observe the Sabbath. R. Hoffmann's decision to consider enlisting in the German army as an *ab initio* solution and not only as a coerced one, is a far-reaching Halakhic position and might have been inspired by the Hatam Sofer..

We now turn to the relations between Halakhah and medicine in which at times there was also friction and even conflict between the Halakhah and state law.

3. *Halakhah versus Medicine*

In the period under discussion, the state began to interfere in the lives of all its citizens and residents, including the Jews.³⁶ Various states attempted to impose on the Jews norms based on modern medicine, which at times were in contradiction with the Halakhah. Interference by the state enjoyed the

34 R. Hoffmann was born in Hungary and was educated in an ultra-Orthodox environment. He studied at the universities of Vienna, Berlin, and Tübingen. In 1873, he joined Azriel Hilmesheimer's Rabbinical Seminary in Berlin, and after Hilmesheimer's death in 1899, Hoffmann was appointed rector of the Seminary. Jewish Encyclopedia, vol. 9, 310f.

35 Responsa Melamed le-ho'il, Frankfurt a. M. 1926, chaps. 42 and 43.

36 James J. Sheehan, German History, Oxford 1989, 435f.

complete and even enthusiastic support of modernist Jewish elements at the beginning of the *Haskalah* (Jewish Enlightenment), and later of the Reform Jews, who wanted to obtain recognition for science and medicine vis-à-vis the Halakhah and to justify their criticism of the Jews' neglect of science education.³⁷ They also sought to enable the revision of portions of tradition based on scientific assumptions that had been refuted, and even to abolish tradition altogether. The willingness of the authorities in the various countries to interfere in these matters encouraged modernist circles already in the eighteenth century to involve the authorities in communal activities in order to break the community's authority over its members.³⁸

Sages who addressed the conflict between the Halakhah and medicine were not without halakhic sources. The encounter of the Halakhah with medicine is an ancient one, and a variety of solutions had been proposed by Halakhic sages for many generations.³⁹ Nevertheless, researchers believe that in this period the reactions of central European halakhic sages departed from the traditional methods and were generally cautious and even hostile to modern medicine, often citing the Hatam Sofer's slogan, »The new is prohibited by the Torah,« as if modernism had become the enemy of Jews who persisted in preserving the Halakhah. The cautious attitude of the Hatam Sofer toward modern medicine is also illustrated by his basic uncertainty about the relevance of medical findings for Jews. His argument was that modern medicine was based on research performed on the bodies of gentiles, which were significantly different from those of the Jews who ate only kosher food.⁴⁰

One of the most serious conflicts involved the requirement to delay burial, which had already begun in the period of Moses Mendelssohn, the founding father of the Jewish Enlightenment movement in the 1770s.⁴¹ The controversy focused on the determination of the exact time of death, and the associated requirement to avoid immediate burial, which had been customary in the Jewish tradition for many generations, except in unusual circumstances. Enlightened Jewish physicians maintained vigorously that the determination of the exact time of death in Jewish tradition did not conform to modern medicine, and since even the new medicine of the day did not have an unequivocal standard for determining the exact time of death, there was a dan-

37 On the involvement of Jewish physicians in the *Haskalah* movement, see John M. Efron, *Medicine and the German Jews*, New Haven and London 2001, 64-104.

38 A good example is the Marcus case which was well analyzed by Katz, Rabbi Raphael Cohen (fn. 32), 200-213.

39 Elimelech Westreich, *Innovations of Modern Science and Medicine in the Ruling of the Israeli Rabbinical Court* [Hebrew], in: *Mishpatim, the Student Law Review* (Hebrew University of Jerusalem) 26 (1996), 425-492, here 427-446.

40 *Innovations of Hatam Sofer on Babylonian Talmud, Avodah Zarah* 31b; *ibid.*, *Shbath* 86b; *Responsa Hatam Sofer*, vol. 3 (fn. 22), chap. 101.

41 For a comprehensive and detailed halakhic and historical discussion on this topic, see Samet, *The New Is Prohibited* (fn. 10), 157-227. On the early debate and the involvement of Jewish physicians, see Efron, *Medicine* (fn. 37), 95-104.

ger that a person who had lost consciousness but was still alive might be buried. Although the traditional communities intensely opposed any change in an old and deep-rooted custom, the state authorities interfered in the conflict and in many states ordered the Jewish community to delay burial for a few days.

Over sixty years later, in 1836, a fierce debate on the issue arose within Orthodoxy, involving the Hatam Sofer and R. Zvi Hirsch Chajes, a moderate and quasi-enlightened Orthodox Rabbi from Galicia.⁴² R. Chajes referred a question to the Hatam Sofer whether a Cohen was allowed to examine a person who had died and approve burial a few days later.⁴³ One of R. Chajes's arguments was that death should be considered uncertain until proven by the delay test. It should be noted that at that time the delay of burial itself was no longer an issue of practical halakhic debate because, as the Hatam Sofer had written, the law of the Empire mandated the delay, and it had done so for a long time.

The issue produced an intensive correspondence between the two rabbis. The Hatam Sofer's first response was published in his book of responsa, in which he raised classical and typical halakhic arguments.⁴⁴ His second response was published only by R. Chajes in his book, together with R. Chajes's own comments and criticism.⁴⁵ In this instance, the Hatam Sofer expressed also meta-halakhic arguments that are not common in the regular halakhic discourse and which form the main source and basis for the common portrayal of the Hatam Sofer as taking a radical stand in the conflict between Halakhah and medicine.

On this issue, the Hatam Sofer gave absolute preference to the halakhic view over the medical one, arguing that the determination of death in Jewish tradition was either based on medical knowledge that had been known to scientists at the time the Torah was given but forgotten over the years by the medical professionals, or that it was a rule given to Moses at Sinai. His necessary conclusion was that »all the winds in the world shall not move us from the place of our Holy Torah,« not even the new medicine and science.⁴⁶ He rejected all lenient rulings and demanded that attenuating circumstances

42 R. Chajes (1805-1855) was born in Brody, Galicia, and was elected to the rabbinate of the important community of Żółkiew. He corresponded with the leading *maskilim* of Galicia and Italy and was described as »one of the rare Gaonim of his age, versed in all the chambers of the Torah and unequaled as a research worker.« Despite his leanings toward Haskalah and secular studies, he was a staunch defender of Orthodoxy. Chajes opposed the Reform Rabbinical Conference of Brunswick (1844). *Encyclopaedia Judaica*, 2nd edition, vol. 4, 56). For the debate see Samet, *The New is Prohibited* (fn. 10), 215-223.

43 R. Zvi Hirsch Chajes, *Darkhei ha-hora'ah* (The ways of ruling), Żółkiew 1843, chaps. 1-3 [Hebrew].

44 *Responsa Hatam Sofer*, vol. 2 (fn. 21), chap. 338.

45 Chajes, *Darkhei ha-hora'ah* (fn. 43), chap. 6.

46 *Responsa Hatam Sofer*, vol. 2 (fn. 21).

should not be brought to public knowledge in order to avoid providing an opportunity for those who wanted to breach the limits of the Halakhah. He even recommended increasing the severity of prohibitions in general: those that had been ranked as having originated in custom would henceforth be ranked as having originated in the sages, and those that had been ranked as having originated with the sages would henceforth be ranked as having originated in the Torah, once again using his slogan that innovation was prohibited by the Torah.⁴⁷ It does not seem exaggerated to call this position radical.

This, indeed, is how the Hatam Sofer's position has been commonly described by researchers and at large. However, he adopted a different and even opposite view on another issue, which was also surrounded by a fierce controversy: the sucking of the infant's blood by the *mohel* during the circumcision ceremony, a practice that, according to the Talmudic sources, was intended to prevent a health risk to the infant.⁴⁸ It was argued that if the person performing the circumcision (the *mohel*) sucked the blood, it was contrary to the standards of modern medicine, endangering the child and at times even the *mohel* himself. State authorities again interfered and asked the Jews to stop the *mohalim* from performing the act. In this case the Hatam Sofer agreed that the blood be removed with a sponge because of the danger to the child, and showed no opposition to changing a common custom so deeply rooted in the Talmud and tradition.

Katz noted that in 1837 the Hatam Sofer agreed to the alternative solution when it was explained to him that the traditional procedure posed a certain danger to the infant. But according to Katz the matter had come up in a confrontation with medical officials, without the involvement of Reform Jews. Consequently, the Hatam Sofer did not feel any threat to tradition and responded in a manner that was customary before the modern age. His students and followers, who later confronted the Reform Jews in this matter, responded according to the policy outlined in the case of the delay of burial, that is, complete adherence to tradition and absolute rejection of medical and scientific findings that contradicted it. In other words, they insisted that the *mohel* should suck the blood.⁴⁹

Nonetheless, it is puzzling that three years before he passed away, after a generation of leading the struggle against the Reform movement, the Hatam Sofer was not aware of the potential use of this topic by the Reform Jews. I believe that the Hatam Sofer used a polemical style only when the main issue was a direct confrontation with reformist ideas, such as the case of delaying burial and the questions concerning the practices in the Reform temple in

47 Chajes, *Darkhei ha-hora'ah* (fn. 43), chap. 7.

48 For a comprehensive and detailed halakhic and sociological-historical discussion on this topic, see Jacob Katz, *The Controversy over the Mezizah: The Unrestricted Execution of the Rite of Circumcision*, in: idem, *Divine Law* (fn. 6), 357-402.

49 *Ibid.*, 359-363.

Hamburg.⁵⁰ But in other cases, where the main issue was a halakhic matter, he did not give too much consideration to the ways in which Reform Jews could exploit his decisions. The Hatam Sofer certainly did not adopt the Reform approach of always preferring science and medicine to the Halakhah since he regarded the Halakhah as representing eternal, revealed truth, and as such as being beyond challenge. Nevertheless, it would be incorrect to describe him as a radical who rejected all medical and scientific findings that contradicted the Halakhah, even in cases of potential challenge by Reform Jews. This is made abundantly clear by his commentary to the Talmud, which researchers who studied his opinions, including Katz, have overlooked.⁵¹ The Talmudic topic he addressed that is relevant to this context focuses on the female reproductive organs and the blood contained in one of them. According to the Halakhah, blood from the »origin,« which is not specified, prohibits matrimonial relations between man and wife until the wife's immersion in the *mikveh* (ritual bath). The classical commentators of the Talmud, Rashi and the *Tosafot*, whose rulings are generally not contested, interpreted the Talmudic text in a certain way.⁵² The Hatam Sofer wanted to identify the organs, which are mentioned in the Talmud by symbolic names such as »room,« »corridor and »attic.« He sought help in the commentaries of Rashi and the *Tosafot*, but, as he wrote:

»After investigating books, authors, surgeons and surgical texts we cannot deny the reality which is not according to the interpretation of Rashi and the *Tosafot* [...] hence we have to accept what *Rambam* wrote in his code [...] and therefore I did not take the trouble to elucidate the words of Rashi and the *Tosafot* on this Talmudic issue because it is impossible to make them fit the true reality.«⁵³

50 Katz, *The Controversy over the Temple in Hamburg* (ft. 6), 218-222, 228-230; and idem, *The Second Day of Festivals*, in: Katz, *Divine Law* (fn. 6), 263-268.

51 The commentary to tractate Nidah was already printed in Warsaw in 1902.

52 R. Shlomo Izhaki (1041-1105), known as Rashi, studied in the *yeshivot* (religious high schools) of the Rhine and became a central persona among north, central and east European Jewry. He is mostly famous for his commentary to the Torah and the Talmud. His followers during the twelfth and thirteenth centuries in northern France and Germany are known as Tosafists, and their writings and method of interpretation of the Talmud were generally accepted by Ashkenazi Jews and also strongly penetrated other Jewish traditions.

53 Innovations of Hatam Sofer, *Babylonian Talmud*, Nida 18a. Maimonides, known in rabbinical literature as Rambam (from the acronym Rabbi Moses Ben Maimon); b. Spain 1135-Egypt 1204, rabbinic authority, codifier, philosopher, and royal physician. The most illustrious figure in Judaism in the post-talmudic era, and one of the greatest of all time. His code *Mishneh Torah* became the most influential Halakhic source among the Sephardic and Eastern Jewish communities in the Middle Ages. However, for the Ashkenazi communities Rashi and *Tosafot* remain the authoritative figures.

The Hatam Sofer stated quite clearly that in this case the commentary of Rashi and the *Tosafot* did not accord with the findings of contemporary medical sources. Showing complete preference for the medical sources, he rejected the interpretation of Rashi and the *Tosafot* to the Talmud and adopted Maimonides' alternative interpretation, arguing that it was impossible to deny »true reality« as reflected in surgeons' and surgical texts. These are not the words of a radical; they reveal a different persona, of a man who studied medical texts, conversed with surgeons and was prepared to adopt verified findings even if they contradicted the great commentators.

How are we to reconcile this approach with his rejection of science and medicine in other cases? It could be argued that in the area of Talmudic interpretation he did not feel threatened by the Reform Jews and therefore, as in the matter of the circumcision blood, adopted a moderate and substantive approach rather than a defensive and hostile one. But it is difficult to accept this argument, and to qualify the openness that the Hatam Sofer demonstrated here as confined only to exceptional cases. After all, he lived in an era of acculturation and Reform, from the late 1780s, when he wrote his first responsa, until his death in Pressburg in 1839. His responsa and rulings in matters of medicine attest to an open attitude that is reflected in his interpretation of the Talmudic text about the female reproductive organs rather than to the defensive attitude manifest in the case of delaying burial. Below are several of his responsa in medical matters.

In an answer to a question in 1800, he again addressed the issue of the woman's reproductive organs and reiterated his position on the interpretation of the Talmud. The main point contained a rejection of the *Tosafot* and a preference for Maimonides' method. Again the Hatam Sofer relied on medical literature and noted that »I have before me other explicit books of expert physicians who *are not Jews*.« And he noted that he had spoken with physicians and that they supported Maimonides' position, which disagreed with the *Tosafot*.⁵⁴

In another case regarding the reproductive organs, the Hatam Sofer was asked about the position of R. Landau, who was active in the second half of the eighteenth century.⁵⁵ This sage relied on what he had learned from contemporary physicians and consequently disagreed with several halakhic sages from the first part of that century. He argued that the earlier sages, one of whom had also been a physician, should be preferred to the new physicians, but added: »and whoever knows a little about the science of surgery will

54 Responsa Hatam Sofer, vol. 2 (fn. 21), chap. 167 (emphasis added). In this response he is more explicit and writes: »[...] I asked physicians and so they told me [...].«

55 Ibid., chap. 173. R. Ezekiel ben Judah Landau (1713-1793) known as the Noda bi-Yehudah, after one of his works. In 1754 he became rabbi of Prague and the whole of Bohemia and was one of the greatest halakhic authorities of the eighteenth century in central and eastern Europe. Encyclopaedia Judaica, 2nd ed., vol. 12, 459-462.

understand this.« In other words, he did not reject reliance on the findings of medicine, believing that familiarity with the field of surgery supported his position.

Another important principle is captured in the Hatam Sofer's view of the relation between the physician's diagnosis and the halakhic position, which he elaborated in some of his responsa.⁵⁶ He maintained that a distinction should be drawn between a statement that purports to make a determination about an individual person and a statement of a general nature. Statements by physicians are accepted by the Halakhah as determinations of a general nature. A physician's diagnosis regarding an individual person, however, is not accepted as an absolute and certain ruling but as one that contains an element of uncertainty. Thus, in cases in which life and limb are at stake, Jewish sages accept the physician's diagnosis even regarding an individual person, as the halakhic rule itself states that even a doubtful matter of life and death takes precedence over a Torah commandment. But with regard to other matters having to do with Torah commandments they judge the physician's diagnosis according to the rules that determine the weight of statements that are not certain. In modern terminology, his position could be presented as follows: the medical finding is of a statistical nature, and rabbinical authorities accept medical rulings accordingly; but with regard to an individual patient the determination is not absolute, as the individual may deviate from the statistical rule.

We can say that the Hatam Sofer treated medical statements in a similar way as the courts regard expert medical testimony in cases of accidents and other compensation suits. The expert medical opinion is subject to judicial appraisal and to cross-examination by attorneys. It is not accepted as self-evident and beyond appeal, and at times it is rejected in part or altogether, despite the fact that significant portions belonging to the field of medicine are accepted today by the courts without reservation or appeal. We know today that the level of medicine at the beginning of the nineteenth century was such that it was justifiably treated as a field of incomplete certainty.

In the light of these considerations, how should we view the Hatam Sofer's statements about the relevance of medical findings based on the bodies of gentiles for kosher-fed Jews? The belief that diet had a decisive effect on human health was prevalent at that time in Germany,⁵⁷ so that his views in the matter do not necessarily reflect a radical approach. Even today there is strong belief that diet affects health, although differences in diet do not invalidate the relevance of research findings across social groups with significant dietary variations. In his time, the degree of relevance of diet for health was not yet clear. But one should note that with regard to anatomical findings, the Hatam Sofer did not hesitate to use medical knowledge accumulated

⁵⁶ Responsa Hatam Sofer, vol. 2 (fn. 21), chaps. 173 and 175.

⁵⁷ Efron, *Medicine* (fn. 37), 70ff.

by non-Jewish physicians and scientists and did not claim that diet affected these findings as well.

Naturally, when there was a discrepancy between scientific and halakhic opinions, the Hatam Sofer did not always prefer the former. When asked about a halakhic ruling in the Talmud that was challenged by medical science he distinguished between a Talmudic instruction originating in Divine revelation, which in Jewish tradition is traced to the event of Moses's reception of the tablets at Sinai, and Talmudic instructions based on medical rules (*halakhot*).⁵⁸ In other words, he argued that Talmudic statements that are based on revealed sources are not affected by contradictory medical findings, but others, which are based on medical findings, can be changed in light of advances in medical knowledge and technique.

This approach permits two ways of responding to scientific and medical innovations. One is to reject all contradictory scientific and medical findings on the basis of the argument that Talmudic rules are based on revelation and cannot be changed. This was the method adopted by the Hungarian ultra-Orthodox, who after the death of the Hatam Sofer considered themselves as his real followers. The other is to adopt scientific discoveries that have been validated by stringent scientific criteria, a path followed by German neo-Orthodoxy, which was founded by R. Samson Raphael Hirsch after the death of the Hatam Sofer.⁵⁹

The issue of the circumcision blood perturbed the neo-Orthodox, who on the one hand were wholly committed to the Halakhah but on the other sought to participate in modern life. When the state authorities prohibited the act, one of the sages of the group, Rabbi Michael Cahan, made extensive efforts to develop an instrument that would allow the extraction of blood following the circumcision indirectly in a way that would meet the strictest standards of hygiene and also the demands of the Halakhah. His activity involved extensive negotiations with the best physicians and scholars in Germany, including Robert Koch, who later became a Nobel laureate in physiology and medicine. Cahan eventually succeeded in his endeavor and asked the approval of R. Hirsch. R. Hirsch made his position clear: Torah commandments are absolute truths and must be observed. Nevertheless, the products

⁵⁸ Responsa Hatam Sofer, vol. 3 (ft. 22), chap. 17.

⁵⁹ R. Samson Rafael Hirsch (1808-1888), rabbi and writer; leader and foremost exponent of Orthodoxy in Germany in the nineteenth century. The neo-Orthodox movement was crystallized and its institutions were established during the second half of the nineteenth century. In essence, the movement is connected with R. Samson Raphael Hirsch and his doctrine of *Torah im derekh erez* («Torah together with the conduct of life,» meaning in this context secular culture), which he expressed in his major writings. In 1851 R. Hirsch became rabbi of the Orthodox separatist community of Frankfurt and from then on he was able to realize his ideas and plans in a suitable environment. Encyclopaedia Judaica, 2nd ed., vol. 9, 129-132; vol. 15, 82 f.; see also *ibid.*, fn. 11, 15-23.



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of modern science and medicine, which had determined that there was there was a danger of infection when the procedure is carried out by the mouth of the *mohel* were also of great value and must be heeded. Thus it was necessary to seek in earnest a reconciliation of the two, and whenever it succeeded, this was cause for celebration. He wrote:

»Thus we are happy – and we are sure that every Jew who fears the word of God rejoices with us – to receive the proposal of authoritative physicians and specialists in the science of medicine who recommend a new method whereby there is no possibility of contamination and that satisfies the obligation of extracting the blood according to the rule of the Talmud and the rabbinical authorities.«⁶⁰

Hence, R. Hirsch, who admired the modern German culture, and the Hatam Sofer, who asserted that the new is forbidden by the Torah, shared the same position in the conflict between Halakhah and medicine. Medicine was neither totally accepted nor totally rejected; it was medicine within the boundaries of Halakhah. Moreover, in both great controversies, the burial of the dead and the circumcision blood, R. Hirsch and the Hatam Sofer did not criticize the state authorities and did not try to circumvent their orders. Indeed, both fully respected the rulers and their laws and made every effort to avoid conflicts, hoping to continue living on German soil until the coming of the Messiah, who would lead them to Zion.

60 Responsa Shemesh Marpe, Brooklyn 1992, chap. 55.

Autorinnen und Autoren

AISCHA AHMED, geb. 1973, promoviert im Fach Neuere Geschichte an der Freien Universität Berlin zum Thema »Arabische Präsenzen in Deutschland 1871-1945. Eine Studie zu Migration, Ethnizität und Gender«. Sie ist Stipendiatin der Heinrich-Böll-Stiftung.

SCHIRIN AMIR-MOAZAMI, geb. ■ ■, schloss 2004 ihre Promotion in Soziologie und Politikwissenschaft am Europäischen Hochschulinstitut in Florenz ab. Sie lehrt an der Europa-Universität Viadrina, Frankfurt (Oder) und ist Mitarbeiterin im Projekt »Muslime in Europa und ihre Herkunftsgesellschaften in Asien und Afrika im Vergleich«. Zu ihren Forschungsinteressen zählen islamische Bewegungen in Europa, Religionspolitiken, Öffentlichkeitstheorien und Geschlechterfragen.

bitte ergänzen

S. N. EISENSTADT, geb. 1923, ist Professor Emeritus der Hebräischen Universität Jerusalem sowie Senior Researcher am Jerusalemer Van Leer-Institut. Zu den wesentlichen Themen seiner umfassenden Forschungs- und Publikationstätigkeit gehören Soziologische Theorie, mit besonderem Augenmerk auf makrosoziologische Analyse sowie Gesellschafts- und Kulturdynamik, Vergleichende Zivilisationsforschung sowie Prozesse der Moderne und Globalisierung.

KAREN KÖRBER, geb. 1967, ist promovierte Soziologin und beschäftigt sich mit Fragen von Migration, Identität und Ethnizität. Sie hat sich in zwei Projekten mit der Einwanderung russischsprachiger Juden nach Deutschland befasst und führt zurzeit am Institut für Europäische Ethnologie/Kulturwissenschaft an der Philipps-Universität in Marburg ein DFG-Projekt über transnationale Familiarität durch.

SHAI LAVI, geb. 1970, ist Rechtssoziologe und Direktor des Taubenschlag Institute of Criminal Law an der Universität Tel Aviv. Im Rahmen seines derzeitigen Forschungsprojekts beschäftigt er sich mit dem Spannungsfeld zwischen der jüdischen und muslimischen Tradition und dem deutschen Recht seit dem 18. Jahrhundert, insbesondere mit der Entwicklung des rituellen Schächtens in Deutschland unter dem Einfluss der modernen Wissenschaft, Moral und Ästhetik.

GILAD MARGALIT, geb. 1959, ist Senior Lecturer im Fachbereich für Allgemeine Geschichte an der Universität Haifa sowie Stellvertretender Direktor des Haifa Center of German and European Studies. Im Fokus seiner Forschungsarbeit stehen Vergangenheitsbewältigung in Nachkriegsdeutsch-

land, deutsche Erinnerungspolitik sowie die Einstellung gegenüber Minderheiten (Juden, Sinti und Roma, Türken) in Deutschland.

DAVID MOTADEL, geb. 1981, ist Doktorand und Gates Scholar an der Historischen Fakultät der Universität Cambridge, wo er zur deutschen Islampolitik während des Zweiten Weltkriegs promoviert. Zudem ist er wissenschaftlicher Mitarbeiter des Projekts »Islam in the West« des Centre national de la recherche scientifique, Paris.

SHULAMIT VOLKOV, geb. 1942, ist Professor für Neuere Geschichte an der Universität Tel Aviv, wo sie auch den Konrad-Adenauer-Lehrstuhl für Vergleichende Europäische Geschichte innehat. Sie ist Mitglied der Israelischen Akademie der Wissenschaften. In den Jahren 1986-1993 war sie Direktorin des Instituts für deutsche Geschichte sowie 1997-2000 Leiterin der School of History der Universität Tel Aviv. Ihre zahlreichen Publikationen befassen sich vornehmlich mit deutscher Sozialgeschichte, deutsch-jüdischer Geschichte und der Geschichte des Antisemitismus. Zudem hat sie sich mit der Geschichte der Aufklärung und der Historiographie des Nationalsozialismus beschäftigt.

ELIMELECH (MELECH) WESTREICH, geb. 1950, ist Associate Professor an der Juristischen Fakultät der Universität Tel Aviv. Seine Spezialgebiete sind historisches und zeitgenössisches jüdisches Familien- und Handelsrecht. In jüngster Zeit hat er insbesondere zu sephardischen und orientalischen Traditionen innerhalb der jüdischen Familie geforscht.

URIYA SHAVIT, geb. 1975, ist Historiker und Fellow am Moshe Dayan Centre for Middle Eastern and African Studies an der Universität Tel Aviv, wo er im Fachbereich für Nahostgeschichte unterrichtet. Seine Forschungsschwerpunkte sind Demokratiediskurse in arabischen Gesellschaften sowie muslimische Minoritäten in der westlichen Welt.

YOSSEF SCHWARTZ, geb. 1965, ist Senior Lecturer für mittelalterliche Philosophie und Ideengeschichte am Cohn Institute for the History and Philosophy of Science and Ideas an der Universität Tel Aviv. Sein Forschungsinteresse gilt vornehmlich den interkulturellen Aspekten der Philosophie und Wissenschaft des Mittelalters und deren Transformation im Laufe des europäischen Säkularisierungsprozesses.

NIKOLA TIETZE, geb. ■■, ist wissenschaftliche Mitarbeiterin am Hamburger Institut für Sozialforschung. Zu ihren Forschungsbereichen gehören muslimische Religiosität in Deutschland und Frankreich, Sprachen- und Religionspolitik und Integration der EU sowie Zugehörigkeitskonstruktionen in der Einwanderungsgesellschaft.

URSULA WOKOECK, geb. 1959, ist Lehrbeauftragte für Nahostgeschichte in der Abteilung für Graduiertenstudien der Rothberg International School an der Hebräischen Universität Jerusalem sowie der Abteilung für Mitteloststudien der Ben-Gurion Universität, Beer-Sheva. Ihre Forschungsinteressen gelten der Geschichte der Orientalistik, insbesondere an deutschen Universitäten, der Entwicklung der Geschichtsschreibung zum modernen Nahen und Mittleren Osten sowie der Sozial- und Rechtsgeschichte des Osmanischen Reichs und seiner Nachfolgestaaten.