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THE POWER OF MONETARY CUSTOMS TO OVERRIDE THE LAW: ON THE INNOVATIVE APPROACH OF RABBI ISAAC ALFASI AND HIS INFLUENCE ON MEDIEVAL SPANISH RABBIS

by

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Abstract

This paper deals with the innovative approach of R. Isaac Alfasi, who ruled that for a custom to have the power to change a law that involved monetary matters, it had to be authorized by a communal enactment (*takanat kahal*). In the light of earlier sources, we see that this approach constitutes a real revolution and that it has great significance for the status of monetary customs (*minhagei mamon*) in Jewish law.

Tannaitic, amoraic and rabbinic sources up until the end of the geonic period establish clearly that monetary laws are determined according to custom and not according to talmudic law. The legal status of monetary customs in these sources is reflected in such rabbinic dicta as: "Everything [must be done] according to the local custom" (*hakol ke-minhag ha-medinah*), "Custom overrides the law" (*minhag mevatel halakhah*), and so on. However, in none of these sources is it stated that a custom is binding only if it was instituted by a communal enactment.

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[The italics in some of the passages cited below, as well as the punctuation and bracketed additions, are my own, unless otherwise stated.]

This paper analyzes the special position taken by Alfasi regarding the status of monetary customs, and examines the influence of his approach on Medieval Spanish Rabbis.

Introduction

This paper deals with the innovative approach of R. Isaac Alfasi to monetary customs (*minhagei mamon*) and their power to override talmudic law, as well as with the influence of this approach on several medieval Spanish rabbis.

Tannaitic and amoraic sources do not impose any legal requirements on a *minhag* – a custom or practice – that involves monetary matters. The legal status of monetary customs in these sources is reflected in such rabbinic dicta as: "Everything [must be done] according to the local custom" (*hakol ke-minhag ha-medinah*), "One should not change the custom of sailors" (*ein meshanim mi-minhag ha-sapanim*), "Custom overrides the law" (*minhag mevatel halakhah*), and so on.[1] During the geonic period as well, monetary customs, including those of merchants, were granted similar legal status.[2]

The rabbinic sources up until the end of the geonic period establish that monetary laws are determined according to custom and not according to talmudic law. In monetary matters, the parties to a transaction may, by agreement, stipulate a result contrary to talmudic norms.[3] Even if the parties do not make an agreement, but a local custom exists, the parties are governed by that custom, because they contract according to their local custom, which is as if they have stipulated the custom explicitly. In modern legal terminology, the custom would be regarded as an implied condition in the contract.

The practical application of the above is that in monetary matters the law is actually the default. In other words, the law applies only if the parties do not stipulate otherwise, and only if there is no local custom in relation to it.

However, in medieval times, the above situation changed. Several of the medieval rabbis ruled that for a *custom* to have the power to change a law that involved monetary matters, it had to be authorized by a communal enactment. To the best of my knowledge, the first to hold that a custom was binding only if it was instituted by a communal enactment was Alfasi.

This paper begins with an analysis of the position taken by Alfasi on the status of monetary customs. It then examines the positions of several medieval rabbis

1 R. Kleinman, *Merchant Customs (Lex Mercatoria) Relating to Methods of Acquisition in Jewish Law: Kinyan Situmta,* Ph.D. Dissertation, Bar-Ilan University, Ramat-Gan, Israel (2000) (Hebrew) (hereinafter: Kleinman, *Merchant Customs*), 24-47.

2 *Ibid*., 47-52.

3 On freedom of contract in monetary matters, see *ibid*., 131-150.

who were active in Spain after Alfasi, and compares their approaches with his.

The responsum by Alfasi which is central to this paper has been studied by various scholars from different points of view.[4] Nevertheless, it seems to me that Alfasi's attitude to monetary customs has not been explored exhaustively. This paper is an attempt to examine his approach in this specific responsum, and to use it to analyze other rulings by Alfasi in his *sefer ha-Halakhot*.

A. Alfasi

Rabbi Isaac Alfasi (North Africa – Spain, 11th century) was asked:[5]

> We have seen that our Rabbi ruled with regard to a separate deed of gift (*mattanah le-ḥud*),[6] that if it was stipulated that it may be collected [during the husband's] lifetime, it is collected in [the husband's] lifetime, unless the local custom dictates that it is not collected. And we must ascertain the root of the custom. For there is one opinion that it has never been the practice in our locality to collect it during the [husband's] lifetime, and therefore it is not collected. And there is another opinion [that this was not the practice] because people believed that according to the law it was not permissible to collect the gift [during the husband's lifetime]. But had they known that by law it could be collected, they would have collected it [during the husband's lifetime].

Alfasi's response was as follows:

> The root[7] of [an effective] custom (*minhag*), which is to be relied upon,[8] is that the majority of the community consulted with the elders of the community, and enacted whatever enactment (*takanah*) they wished, and they [all] abided by it – that is the

4 See: Rivlin, *infra n.*6; Francus, *infra n.*6; Albeck, *infra n.*13; Ta-Shma, *infra n.*13.

5 *Responsa of R. Isaac Ben Jacob Alfasi*, ed. W. Leiter (New York: Makhon Ha-Rambam, 1954), #13 (hereinafter: *Resp. Alfasi*, ed. Leiter). For the different readings, see *Responsae of the Sages of Provence*, ed. Abraham Schreiber (Jerusalem: "Akiva-Yosef" Publishing, 1967), 439. This responsum (without the query) appears, with minor changes, also in *Resp. Alfasi*, ed. Z. Byednowitz (Bilgoraj, Poland: N. Kronenberg Publishing, 1935), #85 (hereinafter: *Resp. Alfasi*, ed. Byednowitz).

6 A "separate deed of gift" is a deed of gift, separate from the marriage contract, which the bridegroom gives his bride at the time of their wedding. See Israel Francus, "*'Matanah Leḥud'* in the Gaonic and Classical Rabbinic Periods", *Shenaton Ha-Mishpat Ha-Ivri* 6-7 (1979-1980), 243-269 (Hebrew); Berachyahu Lifshitz, "*Mattanah Le-ḥud* – Acquisition and Obligation in Contrast", *Diné Israel* 12 (1984-1985), 125-154 (Hebrew); Joseph Rivlin, "More on 'a Separate Gift' and the Rebellious Wife", *Bar-Ilan* 30-31 (2006), 501-519 (Hebrew). Francus and Rivlin discuss the positions of Alfasi and Ramban on a "separate deed of gift". However, they do not discuss the validity of local custom in this regard and the requirement that the custom be instituted by a *takanah*, which is the focus of our discussion here.

7 Alfasi uses the words "*ikar ha-minhag*". The word "*ikar*" appears three times in this reponsum and can be interpreted in several ways: basis, source, beginning, root. I choose to translate it as root, which incorporates several of these meanings.

8 In *Resp. Alfasi*, ed. Byednowitz (*supra* n.5), the reading is "which should be relied upon".

> custom. And even if, after [a few][9] years, they do not know the root of the custom, but it is already an established custom, it is presumed [to have been authorized by an enactment].[10]

The questioners were referring to a previous ruling of Alfasi's, in which he states that one may stipulate to the effect that a "separate deed of gift" may be collected while the husband is still alive, unless local custom decrees otherwise.[11] The problem facing the questioners was how to deal with their local "custom" of not collecting a separate deed of gift during the husband's lifetime. There were those who were of the opinion that the gift could not be collected during the husband's lifetime because that was the "custom". However, others opposed this view and were of the opinion that, in this case, one should not rely on the "custom", as it was based on the erroneous reasoning that the law dictated that the gift could not be collected during the husband's lifetime.

Alfasi responded that "[an effective] custom (*minhag*) which is to be relied upon"[12] is one that was authorized by a communal enactment (*takanah*). Thus, Alfasi equates the terms "custom (*minhag*)" and "*takanah*", and rules that a valid custom is a *takanah*.[13] However, he goes on to make a distinction between a situation in which a new norm is instituted and a situation in which an established custom already exists.[14]

In Alfasi's opinion, to have validity, a monetary custom must be authorized by a communal enactment. Nonetheless, in the case of an *established custom* of unknown origin, one may presume that the custom had originally been authorized by a communal enactment,[15] and therefore has validity. In modern legal terms, Alfasi was making a legal presumption that every established custom had been authorized in the past by a *takanah*.

9 The addition is based on *Responsa of the Sages of Provence* (*supra* n.5).

10 For other translations of this responsum, see Menachem Elon, *Jewish Law: History, Sources, Principles* (Jerusalem/Philadelphia: Jewish Publication Society, 1994), II.715; Gideon Libson, *Jewish and Islamic law: a comparative study of custom during the geonic period* (Cambridge, Mass: Harvard Law School, 2003), 216, n.46.

11 See *Resp. Alfasi*, ed. Leiter, #14; *Resp. Alfasi*, ed. Byednowitz, #84. In the latter responsum, Alfasi rules that in the matter of "a separate deed of gift … Everything [must be done] according to the local custom (*hakol ke-minhag ha-medinah*)", but he does not relate to the possibility that the local custom contradicts the stipulation appearing in the deed of gift.

12 See the version presented *supra* n.8.

13 See Shalom Albeck, "The Principles of Government in the Jewish Communities of Spain until the 13th Century", *Zion* 25 (1960), 85-121 (Hebrew); Shlomo Tal, "Constitutional Bases of the Ordinances of the Medieval Jewish Communities", *Diné Israel* 3 (1972), 57 (Hebrew); Israel M. Ta-Shma, *Ritual, Custom and Reality in Franco-Germany, 1000-1350* (Jerusalem: Magnes Press, 1996), 53 (Hebrew); M. Elon, *Jewish La*w (Jerusalem: Magnes Press, 1988, 3rd ed.), I.580, n.107 (Hebrew).

14 Local customs that were not established customs were rejected by Alfasi in his responsa. See *Resp. Alfasi*, ed. Leiter, #110, 191, 203; Ta-Shma, *ibid*., 52.

15 Ramban too understood Alfasi's intent in this responsum as that we presume the custom was originally instituted by a communal enactment. See his responsum *infra*, text at n.31.

We may conclude from Alfasi's responsum that the basic requirement which an established custom must meet is a *theoretical* requirement; however, in *practice* there are no substantive requirements in this regard, because a custom that already exists and has become established is a valid custom, and it is unnecessary to determine whether it was instituted by means of a *takanah*.

Indeed, in various other rulings, Alfasi recognizes the validity of monetary customs, and makes no mention of the need to authorize them by means of a *takanah*. For example:

(a) According to the Mishnah, the husband is responsible for *tson-barzel*[16] property, and is liable for any financial loss incurred in this regard.[17] Alfasi ruled that even though this is "the law of the Talmud", it is not the custom to do so. Therefore, any husband who takes responsibility for the property which his wife brings to the marriage, "takes upon himself [responsibility] based on custom, and is therefore responsible only according to custom."[18]

(b) The Mishnah states: "[If] one sells produce to his fellow, [the buyer] accepts upon himself a quarter-*kav* of impurities per *se'ah* [purchased]; [for] figs – he accepts upon himself ten wormy ones per hundred [i.e. one out of ten]…"[19] Alfasi ruled: "These are the amounts when a place does not have its own custom, but when a place has a custom, one follows the custom. *As it is the established practice that in every case of this kind, 'everything [must be done] according to the local custom'*."[20]

(c) The Talmud states: "One [with whom money was deposited] should not send [the] money [back to his depositor] with [someone merely bearing] a symbol (*deyokanei*) [that identifies him as the depositor's emissary], even if witnesses are signed on it."[21] Contrary to the talmudic norm, Alfasi ruled that it is permissible to send money back with someone who is merely bearing a symbol identifying him as the depositor's emissary. His reason is: "This is the practice of merchants today, *and it is accepted that in a matter of this type, custom has validity* [and has the power to override the law] (*minhaga*

16 *Tson-barzel* property is property that a woman brings with her to the marriage, and the husband takes responsibility for it.

17 M. Yeb. 7:1; Yeb. 66a: "And these are [the rules which govern] *tson-barzel* slaves: If they die [during the course of the marriage], their death is his [the husband's] loss." The translation of passages of the Mishnah and the Babylonian Talmud cited here and later on is based on Talmud Bavli, Schottenstein edition (Brooklyn: Mesorah Publications, 1990-2005), with minor changes.

18 Alfasi to Yeb. 66a (22a).

19 M. B.B. 6:2; B.B. 93b.

20 Alfasi to B.B. 93b (47a).

21 B.K. 104b. Based on Rashi and Tosafot there, the interpretation of *deyokanei* is a seal with which he signs the missive. On this topic see Kleinman, *Merchant Customs*, 51-52; Elimelech Westreich, "Elements of Negotiability in Talmudic and Gaonic Times", in this volume.

milta he)."[22]

In each of the above three examples, the custom contradicts an explicit mishnaic or talmudic law, but nonetheless Alfasi accords it validity. In the second example, he bases his ruling on the tannaitic dictum that "everything [must be done] according to the local custom",[23] and in the third example he relies on a corresponding geonic dictum that "a custom has validity" and can override the law.[24]

Given Alfasi's fundamental position, in each of the three cases above we would have to say that when he uses the word "custom", he is referring to a custom that has presumably been established by a *takanah*, and consequently has the power to change the law. Indeed, Alfasi mentions in the first and third examples – and we also know from other sources – that he is referring to rulings[25] handed down by the *geonim*.[26] Evidently, these rulings have the power to change the law in monetary matters.[27]

To the best of my knowledge, Alfasi was the first to rule that a monetary custom must be authorized by a *takanah*. The question arises as to the underlying *reason* behind this position.

In his responsum, Alfasi does not provide the rationale behind his ruling, and we can only surmise as to his reasoning. It would appear that in Alfasi's opinion, monetary customs have a lower status than monetary law, since the law was established by the rabbis, whereas customs were created by the community and not by a body possessing halakhic authority.[28] A law involving monetary matters may be altered if so stipulated by the parties to a transaction, or if there is general

22 Alfasi to B.K. 104b (37b).

23 On this dictum, its source and meaning, see Kleinman, *Merchant Customs*, 24-35.

24 This expression is frequently cited by the *geonim* (followed by the medieval rabbis) as proof of the power of a custom to change the law. See Kleinman, *ibid*., 47.

25 It is not within the scope of this paper to discuss the extent to which "the rulings of the Geonim" may be regarded as *takanot*, and the precise definition of a *takanah*. On this subject, see Y. Brody, "Were the Geonim Legislators?", *Shenaton Ha-Mishpat Ha-Ivri* 11-12 (1984-1986), 297-315 (Hebrew). In any event, Alfasi certainly regarded the rulings of the *geonim* as an authoritative source that had the power to confer validity on monetary customs.

26 On *tson-barzel* property – example (a) – see Alfasi to Yeb. 66a (21b); Rambam, *Ishut* 22:35; B.M. Lewin, *Otsar ha-Gaonim*, vol. 7, Tractate Yebamot (Jerusalem: Merkaz Publishing, 1936), 157. Rambam there begins with the expression "the *geonim* ruled", but further on, like Alfasi here, speaks about a "custom"; with regard to a *deyokanei* – example (c) – see Alfasi, *supra* n.22 and the sources cited *supra* n.21.

27 Albeck, *supra* n.13, at 104-105, explains that in Alfasi's opinion, the validity of enactments and rulings of the *geonim* is solely due to the fact that the parties knew about them, and consequently they can be regarded as an implied condition in the transaction.

28 This approach differs from the approach that was common in *Ashkenaz* at that time, that a custom was evidence of a halakhic tradition, and therefore in many cases gave preference to the custom over talmudic law. See. for example, Israel M. Ta-Shma, *Early Franco-German Ritual and Custom* (Jerusalem: Magnes Press, 1992), 27-35 (Hebrew). See also *infra*, text at n.40.

agreement on the part of the members of the community, which is expressed through a communal enactment. But a custom that develops *spontaneously* does not have the power to override the law, as it does not reflect agreement on the part of every member of the community to act in accordance with it.[29]

However, Alfasi was aware that, in many instances, the Mishnah and the Talmud decree that a custom has validity in monetary matters without mentioning the requirement that the custom had to be enacted by a *takanah*. In order to resolve the inconsistency between the talmudic sources and his position, Alfasi adds a legal presumption, according to which a custom that has become established is *presumed* to have originated as a *takanah*. Since a communal enactment reflects the agreement of all members of the community, it therefore has the power to override the law in monetary matters.

Whatever may have been the reasoning behind Alfasi's position, the above responsum was well known to some of the medieval Spanish rabbis who came after him. Several, though not all, of them uphold Alfasi's approach and rule that a monetary custom must be authorized by a communal enactment. Nonetheless, there are certain differences even among those who uphold this basic approach. We will now explore the positions taken by three medieval Spanish rabbis.[30]

B. Ramban

[1] Rabbi Moses ben Naḥman – Naḥmanides (Spain, 13th century) wrote a responsum[31] that deals with the custom of writing a "separate deed of gift" for the bride and her future children. In this responsum he rules that "according to the law", you cannot convey property to unborn children. He goes on to say:

> We do not rule according to this custom unless *the communal leaders* [*tovei ha'ir*] *enacted a takanah* to the effect that 'any man in our community who marries – his wife and her future children shall be entitled to a certain proportion of the [separate] gift', and so on. In any case, if the custom was upheld by a rabbinical court of law in previous generations, we may presume that [the communal leaders] apparently established it originally as a *takanah*, and the law is therefore determined according [to this custom]. And the same has been written in the responsum of our great Rabbi of blessed memory [= Alfasi]."

29 Albeck, *supra* n.13, at 103-105, offers a similar explanation of Alfasi's approach. However, he does not relate to the second part of the responsum, which is dealt with in the text in the next paragraph.

30 On the approach of Rambam (Maimonides), Rosh and Ribash on this matter, see Kleinman, *Merchant Customs*, 61-69, 76-78. On Ramah (R. Meir Abulafia), see Albeck, *supra* n.13, at 105-106. Albeck posits that the opinion of Ramah is the same as that of Alfasi. It appears to me that Ramah's opinion is the same as that of Ritva, whose position will be explained later on.

31 *Resp. Ramban* (Naḥmanides), ed. H.D. Chavel (Jerusalem: Mossad Harav Kook, 1975), #7, pp. 14-15.

Here, Ramban upholds both parts of Alfasi's position: in *principle*, in order for a custom to have the power to change a monetary law, it must have been authorized by a communal enactment. In *practice*, however, a custom that is already established is presumed to have been enacted in the past by a *takanah*.[32] In referring to a custom that was "upheld by a rabbinical court of law", I believe Ramban meant that the existence of the custom was proved in a rabbinical court, and not that we know that the custom was established by the rabbinical court as a *takanah*.[33] For if it is known for *certain* that the custom had originally been enacted by a rabbinical court, it would not have been necessary for Ramban to state that "[the communal leaders] *apparently* established it originally as a *takanah*."

[2] We encounter Ramban's basic position in two other instances, in his novellae to *Baba Batra*. Ramban's responsum above deals with a situation whereby the custom contradicts the talmudic norm. In his novellae, Ramban makes a distinction between two types of situation: one in which the talmudic law is clear, the other in which it is not. In the latter case, a custom has validity even if it was not enacted as a *takanah*. However, in a situation in which the law is clear, a custom has validity only if it was enacted as a *takanah*.

The Mishnah at the beginning of tractate Baba Batra states that "Partners who agreed to make a partition in a courtyard [that they own jointly], must build a wall in the centre [of the courtyard]." The Mishnah discusses the physical requirements for the wall. With respect to the kinds of bricks with which the partners must build the wall, the Mishnah rules as follows:

> [If they live in] a place where [people] are accustomed to building [courtyard partitions with, for example,] rough-edged stones (*gevil*), smooth, planed stones (*gazit*) … they must build [with that material]. All [constructions must be done] according to local custom (*hakol ke-minhag ha-medinah*).

Further on, the Mishnah states that the width of the wall depends on the type of

32 Ramban generally, although not always, upholds the rulings of the *geonim* and Alfasi. On this and on his approach to custom, see Ezra Shvat, "The Status of Custom in the Writings of Ramban and His Catalonian School", *Shenaton Ha-Mishpat Ha-Ivri* 18-19 (1992-1994), 448 (Hebrew); Israel M. Ta-Shma, *Talmudic Commentary in Europe and North Africa: Literary History - Part II: 1200-1400*, 2nd edition (Jerusalem: Magnes Press, 2004), 33-34, 39 (Hebrew); Tsvi Groner, "Legal Decisions of *Rishonim*, and their Attitudes Towards their Predecessors", in E. Fleischer et al. (eds.), *Me'ah She'arim: Studies in Medieval Jewish Spiritual Life in Memory of Isadore Twersky* (Jerusalem: Magnes Press, 2001), 267-278; Shalem Yahalom, *The Halakhic Thought of Nahmanides According to his Provencal Sources*, Ph.D. Thesis, Bar-Ilan University, Ramat-Gan, 2003, 110-111 (Hebrew); Moshe Halbertal, *By Way of Truth: Nahmanides and the Creation of Tradition* (Jerusalem: Shalom Hartman Institute, 2006) 77-116 (Hebrew); Yoel Florsheim, "Nachmanides – Counter-Revolutionary?", *Zion* 67 (2002), 465-471 (Hebrew); *idem*, "Naḥmanides and His Approach to Custom", *Sinai* 131 (Tevet-Adar B, 2003), 3-40 (Hebrew); 132 (Nisan-Sivan, 2003), 30-51 (Hebrew).

33 Compare with the *Resp. of Rabbeinu Bezalel Ashkenazi*, #7 (Jerusalem: Orot Ma'arav, 1994), 92, s.v. *veyesh*.

stone that is used:

> [If the wall is constructed with] rough-edged stones (*gevil*) – this [partner] must provide three handbreadths (*tefaḥim*) [of land for the foundation], and the other [partner] must provide three *tefaḥim* [of land for the foundation].
>
> [If the wall is built with smooth] planed stones (*gazit*) – this [partner] must provide two and one-half *tefaḥim*, and the other [partner] must provide two and one-half *tefaḥim*.

Ramban[34] makes a distinction between the questions of the type of wall and the wall's thickness. Several alternatives with regard to the type of the wall are listed in the Mishnah, with the choice dictated by the local custom. By contrast, the width of the wall – which the Mishnah determines precisely – must be constructed exactly according to the measurements laid down in the Mishnah. Ramban continues:

> However, certainly if there was a local custom known to the partners [as to the width of the wall], such as *one which the townspeople authorized by a communal enactment in the presence of all [of the townspeople]*, the [partners] are bound to build according to the known custom, even if it involves building with rough-edged stones that are four cubits wide."

With regard to the *type* of wall, the Mishnah does not determine its precise nature, but instead offers several possibilities, and it is custom that dictates which of the possibilities is chosen. In this case, there is no requirement that the custom be enacted by a *takanah*.

However, the Mishnah establishes a clear-cut law with respect to the wall's *width*. Consequently, in this regard, a custom that was not enacted as a *takanah* has no validity, whereas one that was enacted as a *takanah* has the power to change the law laid down in the Mishnah. Thus, even though the Mishnah states that rough-edged stones must be six *tefaḥim* wide, if the custom in a particular place is to build with rough-edged stones that are 4 cubits (= 24 *tefaḥim*) wide, and it was enacted as a *takanah*, the custom has validity.

[3] Ramban's position with regard to monetary customs is expressed very clearly in the *sugya* of the returning of the *kiddushin* money. A *baraita* in Baba Batra states: "[In] a place where the custom is to return the *kiddushin* money [if the marriage is not completed] – they must return [it]. [In] a place where it is the custom not to return [it] – they need not return [it]."[35]

The Babylonian amoraic sage, Shmuel, is cited as commenting on this *baraita*

34 Ramban, *Novellae*, ad B.B. 2a, s.v. *matni'[tin]*.

35 B.B. 144b

as follows:

> The *Baraita* taught [this rule] only [for cases] where she [the bride, is the one who] died. But if he [is the one who] died, they do not return [the *kiddushin* money]. What is the reason? [For in the case of his death] she is able to say, 'Give me my husband, and I will rejoice with him.'

In other words, should the bridegroom die, the bride could claim: since it is not my fault that the marriage was not consummated, I do not have to return the *kiddushin* money that was given to me at the betrothal. Shmuel's argument in this *sugya* was adopted by the other *amoraim*.

Thus, in the event that the bridegroom dies, there is a conflict between the *custom* of returning the *kiddushin* money on the one hand, and the *law* that the money is not returned, based on the argument of "Give me my husband" [Shmuel's rule], on the other. As stated, the ruling in the above *sugya* in the Babylonian Talmud was decided according to the view of Shmuel – that in this situation, the law overrules the local custom.

This conclusion in the Babylonian Talmud appears to contradict the dicta of "custom overrides the law" (*minhag mevatel halakhah*) and "a custom has validity" (*minhaga milta he*), which establish that in monetary law, the custom has ascendancy over the law. Ramban deals with this problem as follows:

> Our stating that a custom has validity (and has the power to override the law) holds true only if it was enacted as a *takanah* by the townspeople or by seven communal leaders … but other customs do not override the law, with the exception of a law that is unsettled and in doubt (*halakhah rofefet*)…[36]

Ramban remains consistent in his approach. A monetary custom that was authorized by a communal enactment has the power to override the law. By contrast, a custom that was not enacted by a *takanah* cannot override the law unless we are confronted with a *halakhah rofefet* – a law that is unsettled and in doubt.[37] The custom of returning the *kiddushin* money, which is discussed in the above *sugya*, was not established as a communal enactment, and it therefore does not have the power to override the law as determined by the amoraic sage Shmuel.[38]

Elsewhere as well, Ramban states that one should follow the custom in the case of a "*halakhah rofefet*".[39] Based on Ramban's position presented above, he is

36 Ramban, *Novellae*, *ibid*., s.v. *ha de-amrinan* (Jerusalem: Machon Ma'arava, 1993), 159.

37 The source of the term *halakhah rofefet* (an unsettled *halakhah*) is in Y. Yeb. 7:3 [8a]; Y. Peah 7:5 [20c].

38 This explanation was advanced also by the Spanish rabbis who came after him. See R. Solomon b. Adret (Rashba), *Novellae*, ad B.B. 144b, s.v. *ha de-amri'[nan]*, in the name of "there are those who explain"; R. Yom Tov b. Ishbili (Ritva), *Novellae*, ad B.B. 145a, s.v. *ve-ata*.

39 This refers to customs that do not only involve monetary matters. See Ramban, *Novellae*, ad

apparently saying that when the law is unclear, a custom has validity even if it was not enacted as a *takanah*.

To summarize: in his responsum, Ramban adopted Alfasi's position, and ruled that, in theory, a monetary custom has the power to override the law only if it was authorized by a communal enactment. However, if we are dealing with an established custom, it can be assumed that it had originally been authorized by a communal enactment. As stated, Ramban added a distinction not found in Alfasi's responsum: in the case where the law is unclear, a custom has validity even if it was not enacted as a *takanah*.

Prof. M. Halbertal maintains that whereas in Franco-Germany (*Ashkenaz*), a custom was given the broad definition of a living tradition that was true to the *halakhah*, Rabad (Rabbi Abraham b. David of Posquières), followed by Ramban, espoused a narrower definition of a custom. According to their approach, the community, by means of its customs, has the authority only to add prohibitions (*ḥumrot*) to the existing law, whereas rabbinic scholars alone have the authority to touch the law itself (that is, to make it more lenient).[40]

According to Halbertal, Ramban's unique approach to the *sugya* of the returning of the *kiddushin* money should be interpreted according to his position that a local custom does not have the power to change the law (unless it was authorized by a communal enactment or by rabbinic scholars)."[41] Halbertal adds that Ramban's unique position on matters of custom should be viewed against the background of his personality, the community in which he lived, and the nature of his halakhic works.[42]

I agree with Halbertal that Ramban's approach, above, limits the power of monetary customs. However, it should be noted that restricting the power of a monetary custom did not originate with Ramban. Although Halbertal does not mention it, Ramban clearly states in the above responsum[43] that in this matter he is adopting the position of Alfasi.

C. Rashba

In his novellae, R. Solomon b. Abraham Adret (Spain, 13th century) cites

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B.B. 162a, s.v. *ve-im tomar lamah* (the way a bill is written by scribes); *Resp. Ramban* (*supra* n.31), #42, 71 (*inyanei ribbit*); *Torat Ha'adam, Kitvei Haramban*, II, ed. H.D. Chavel (Jerusalem: Mosad Harav Kook, 1964), 260 (order of the Prayers on the Ninth of Av).

40 Halbertal (*supra* n.32), 100-102.

41 *Ibid*., 105.

42 The subject is beyond the scope of this paper. See *ibid*., 113-116.

43 *Supra*, text at n.31.

Alfasi's responsum presented earlier.[44] But careful scrutiny of Rashba's words there and elsewhere reveals that he rejects Alfasi's position.

In his novellae and responsa,[45] Rashba clearly asserts that monetary customs have ascendancy over talmudic law even if *they were not instituted by a communal enactment*.

Rashba derives his approach from the legal principle of "ascertaining lay usage" (*doreshin leshon hedyot*) found in the Babylonian Talmud.[46] According to his interpretation of this principle, monetary law is decided according to the practices that laymen engage in, even if these practices were not legislated by halakhic authorities or by a communal enactment.

Lay usage is legally binding on the parties to a transaction, even if they do not incorporate it explicitly in their legal document. The reason behind this is that since laymen routinely engage in legal transactions in accordance with the local practice, the presumption is that the parties intend to conform to these practices and it is therefore as if they stipulated the custom explicitly. As mentioned above,[47] in monetary matters a condition agreed upon between the parties takes precedence over a talmudic norm. Thus, a monetary custom overrides talmudic law even if it was not enacted by a *takanah*.[48]

Below are several sources in which Rashba expresses the above position:

[1] Rashba states his position unequivocally in a responsum that deals with the validity of different types of customs:[49] "And this is the custom among merchants ... *Even though … it was not instituted by the townspeople* [as a *takanah*] … and even if it contradicts the law … [it has validity]. Because once this custom became widespread, whoever entered into a legal transaction in a particular place – did so in accordance with the common custom … and it is as binding as if it had been stipulated [in a legal document]."

[2] Rashba's opinion in monetary customs is reflected in another responsum. Like Alfasi and Ramban,[50] Rashba discusses the matter of a "separate deed of gift" but arrives at a different conclusion: "It should be noted that the provisions of the

44 Rashba, *Novellae*, ad B.B. 144b, s.v. *ha-de'amrinan*.

45 Rashba, *Novellae*, *ibid*.; *Resp. Rashba* 2, #268; *Resp. Rashba Attributed to Nahmanides*, #14.

46 B.M. 104a-b.

47 *Supra*, text at n.3.

48 On "ascertaining lay usage" (*doreshin leshon hedyot*), see Elon, *supra* n.10, at 422-432; Kleinman, *Merchant Customs*, 37-42. Rashba adopted the position of Ramban with regard to this principle. However, as stated above, with regard to the question of whether a monetary custom must be established by a *takanah*, Rashba does not follow the approach of Alfasi and Ramban.

49 *Resp. Rashba* 2, #268.

50 See *supra*, text at nn.6 and 31.

ketubbah and the gifts that one gives to his wife at the time of marriage depend on customary practice; *even if it is not a practice agreed to by the townspeople* [i.e., by formal agreement or enactment] but a practice that laymen follow on their own."[51]

[3] Rashba follows the same approach also in the question of returning the *kiddushin* money. As we have seen above, Shmuel's rule ("Give me my husband") overrules the custom of returning the *kiddushin* money, and Ramban already discussed the contradiction between this ruling and the dictum that a "custom overrides the law".[52]

Rashba, too, struggles with this problem. He cites Ramban's explanation in the name of "there are those who explain", that only a custom instituted by a communal enactment has the power to override a monetary law, but rejects Ramban's opinion because it does not conform to the Babylonian Talmud's *sugya* of "ascertaining lay usage" (*doreshin leshon hedyot*).[53] As stated above, Rashba concludes on the basis of this *sugya* that a monetary custom overrides a talmudic law even if the custom was not instituted by a *takanah*. Rashba reconciles Shmuel's rule with two explanations which he himself admits are "forced".

A different explanation, adduced by Ramban and Rashba, asserts that the *sugya* of returning the *kiddushin* money pertains to a case in which no local custom exists. In addition, the meaning of the ruling that "In a place where the custom is to return the *kiddushin* money – they must return it", is that in a place that does not have any custom, the law is the same as in a place in which the custom is to return it.[54] The linguistic problem here is obvious. However, what forced those who held this opinion to interpret it in this way was what they, and Rashba, perceived as the simple assumption, that "if a custom exists, it is clear that one must follow the custom … and there is no one who disputes this."[55]

In the view of those who hold this opinion, including Rashba, and contrary to Ramban's opinion, where a monetary custom exists, one must always follow that custom, *and it is unthinkable that the law* (in this case, Shmuel's rule) *should override the local custom*.

51 *Resp. Rashba Attributed to Nahmanides*, #14 (The translation is based on Elon, supra n.10, at 430). In other responsa as well, Rashba ruled that a "separate deed of gift" depends on the local custom. See *Resp. Rashba* 1, #990; *ibid*., 4, #52.

52 See *supra*, text at nn. 35-38.

53 Rashba, *Novellae*, *supra* n.44.

54 The opinion of "there are those who explain" is cited by Ramban, *supra* n.36, and by Rashba, *supra* n.44. Ramban rejects their opinion, whereas Rashba upholds it, since it conforms to his position. See following paragraph.

55 Ramban, *supra* n.36; and similarly in Rashba, *supra* n.44.

[4] There is one instance in which Rashba appears to deviate from his general approach. Rashba was asked whether a man who installed windows in his house, from which it was possible to see his neighbour's tiled roof, was violating the prohibition of visual trespass (*hezzek re'iyyah*).[56] The questioner noted that in his locality it was not regarded as visual trespass, as it was not customary there to put the tiled roofs to use. Rashba replied that, according to the law, visual trespass does not apply to tiled roofs, and added:

> Especially if it is the custom there [to install windows in the direction of the roof], and there has already been litigation with regard to this custom in the rabbinical court in your town … And even if according to talmudic law [it is regarded as visual trespass – it is allowed] because a custom that was instituted by the *Rishonim* [as a *takanah*], and which underwent litigation in the courts, overrides the law...[57] And in all [such instances], a custom that was instituted by a *takanah* overrides the law.[58]

In this ruling, Rashba ascribes the power of a custom to override the law to the assumption that it had originally been instituted by a *takanah*. This is similar to Alfasi's opinion and *contrary* to his own position that a custom has validity even if it was not enacted as a *takanah*.[59]

In my opinion, the different ruling in the latter responsum is due to the subject under discussion – visual trespass.[60] In several of his responsa, Rashba rules that even if it was the custom not to be careful about observing the law of visual trespass, "it is a custom based on error, and is therefore not a [valid] custom." His reasoning is that visual trespass is not an ordinary monetary matter (*mamon*), but rather a matter of "*issur*" (ritual prohibition), and therefore cannot be nullified by custom.[61] In his novellae as well, Rashba rules that there is no validity to a local custom in matters of visual trespass.[62]

In view of the above, it is clear that even though Rashba is of the opinion that a

56 Visual trespass is the ability to see what a neighbour is doing in his courtyard.

57 Rashba uses the biblical phrase *gavelu rishonim* (Deut. 19:14) in the sense of a communal enactment. It is the same in *Resp. Rashba* 4, #260.

58 *Resp. Rashba* 2, #43.

59 In *P.D.R.* 4, 303, the High Rabbinical Court inferred from this responsum that according to Rashba "a custom cannot override the law unless the custom was instituted by the rabbis (*vatikin*)". The court did not mention Rashba's ruling in his other responsa and novellae presented above, in which he expressly rejects this position.

60 R. Ḥaim Benveniste, *Kenesset HaGedolah*, H.M. 201, Hagahot Bet Yosef, D, comments on the above contradiction in *Resp. Rashba* 2, between #43 and #268, and resolves it differently: a distinction should be made between "merchant customs" (2, #248), which have the power to override the law, and "other monetary customs" (2, #43), which do not, unless they were instituted as a *takanah* by the rabbis. However, in view of the sources cited above, it is clear that vis-à-vis other monetary customs, Rashba is of the opinion that "a practice that laymen follow of their own accord" has validity. See, e.g., *supra*, text at n.51.

61 See *Resp Rashba* 2, #268; *ibid*., 4, #325.

62 Rashba, *Novellae*, B.B. 2a, s.v. *b'levenim*.

custom which the people practice of their own accord has validity, it does not apply to matters of visual trespass, in which case a custom does not have validity unless it was instituted by a communal enactment.[63]

Rashba rules similarly in another responsum, which deals with damage caused by outhouse odours: "And even if the Israelites [and not just the Gentiles] behave in this way, it is not a [valid] custom unless it was expressly enacted by the communal leaders." Here too, the reasoning is based on the type of damage: "as bad odours cause physical damage, and no person takes upon himself to suffer physical damage".[64]

The factor common to visual trespass and outhouse odours is that both cause permanent physical damage. According to Rambam (Maimonides): "It is hard for one to endure these kinds of damage, and we presume that one who suffers the damage has not waived his right to prohibit them inasmuch as he is subjected to permanent suffering."[65] Consequently, many of the medieval rabbis ruled, based on the Babylonian Talmud,[66] that there is no legal title (*ḥazakah*) with regard to these types of damage.[67] In the aforementioned responsa, Rashba rules similarly, that a local custom has no power to permit these types of damage.[68]

In summary, Rashba rejects the position of Alfasi and Ramban. In Rashba's opinion, a monetary custom that contradicts talmudic law has validity even if it was not enacted by a *takanah*. However, as regards visual trespass and suffering caused by bad odours, Rashba – apparently due to the severity of the damage – maintains that a custom has no validity in these areas unless it was authorized by a communal enactment.

63 A communal enactment does not have the power to allow matters of *issur*, but it does have the power to determine that a particular behaviour is not considered to be visual trespass, and consequently does not involve any *issur*. A distinction should be made between installing a window that faces onto a courtyard used by the neighbours on a regular basis, and installing a window that faces a tiled roof which is hardly, if ever, used. With regard to the latter, a *takanah* can establish that it does not create a situation of visual trespass. Indeed, the questioner testifies that in his locality, installing a window that faces a tiled roof is not regarded as visual trespass, since such roofs are not put to use.

64 *Resp. Rashba* 4, #325.

65 Rambam, "Neighbours", 11:4.

66 B.B. 23a: "Rav Naḥman has said in the name of Rabbah bar Avuha: 'There is no legal title (*ḥazakah*) to [things which cause] damage'. There are two interpretations of this. Rav Mari said: [It applies] to smoke; Rav Zevid said: [It applies] to an outhouse."

67 Regarding the different positions on this matter see *Rishonim*, B.B., *ibid*., ad loc.; R. Yosef Karo, *Ḥoshen Mishpat*, 155:36; Rema, *Ḥoshen Mishpat*, 154:3; Shlomo E. Glicksberg, *Ecology in Jewish Law: Preventing Personal Environmental Damage*, Ph.D. Dissertation, Bar-Ilan University (Ramat-Gan, Israel, 2005), 240-244 (Hebrew). For a summary of the topic, see "*Hezzek re'iyyah*", *Talmudic Encyclopedia* (Jerusalem: Encyclopedia Talmudit, 1957), VIII.690-694; "*harḥakat nezikin*" (*Preventing Personal Environmental Damage)*, *Talmudic Encyclopedia* (Jerusalem: Encyclopedia Talmudit, 1961), X.692-693 (Hebrew).

68 On the validity of a custom in this matter, see also Rema, *Ḥoshen Mishpat* 157:1; Rabbi Gideon Perl, "The Obligation of the Municipalities to Prevent Visual Trespass", *Teḥumin* 19 (1999), 58 (Hebrew).

D. Ritva

R. Yom Tov b. Abraham Ishbili (Spain, 13-14th centuries) also adopts the position taken in Alfasi's responsum, but appears to go a step further.

We can understand Ritva's basic opinion on monetary customs if we combine his statements on three different issues.

[1] Ritva, like Ramban and Rashba, has difficulty reconciling the principle that a custom overrides the law with the *sugya* of returning the *kiddushin* money.[69] He explains it as follows:

> And it is true that any custom that is *enacted as a takanah by the townspeople* (*tenai benei ha'ir*) has the power to override a clear law, as does any [valid] monetary stipulation. But *an ordinary custom* [that was not authorized by a communal enactment] does not have the power to override a clear law, but only a law that is unsettled (*rofef*) and in doubt. And in the present matter, we are dealing with an ordinary custom [that was not authorized by a communal enactment] … [and it therefore cannot override the law of "give me my husband"]. Alfasi too gave this explanation in [his own] responsum."[70]

Ritva clearly rules that a monetary custom that was not authorized by a communal enactment does not have the power to change the law.

From the above, one might conclude that Ritva is of exactly the same opinion as Alfasi. But based on the following two sources, I believe that Ritva holds a different view. While he adopts Alfasi's approach that a monetary custom has no validity if it was not enacted as a *takanah*, he does not agree with the legal presumption which Alfasi introduces,[71] and which is upheld by Ramban,[72] that every established custom was originally instituted as a *takanah*. In Ritva's opinion, a custom has the power to overrule the law only if it is known *for certain* that that particular custom had been enacted as a *takanah*.

[2] Ritva's approach is clearly expressed in his novellae on the law regarding *situmta*, and is particularly striking in view of the interpretations of other medieval rabbis on this *sugya*.[73]

69 This *sugya* was discussed above in relation to the positions of Ramban (*supra*, text at n.35) and Rashba (*supra*, text at n.52).

70 Ritva, *Novellae*, ad B.B. 145a, s.v. *ve-ata* (ed. Y.D. Ilan, Jerusalem: Mossad Harav Kook, 2005), 1062.

71 *Supra*, text at n.5.

72 *Supra*, text at n.31.

73 On the positions of Ritva and other medieval rabbis with regard to *situmta*, see Ron S. Kleinman,

The Talmud in B.M. 74a states: "Rav Pappi said in the name of Rava: The *situmta* effects acquisition (*Hai situmta kanya*)." The conclusion at the end of the *sugya* is "in a place where they have the custom that it effects actual acquisition – they do indeed acquire [by it]."

In the opinion of most of the medieval rabbis, a *situmta* is a seal or sign that the purchaser stamps on the merchandise to indicate that from that moment onward the marked object belongs to him. According to a different interpretation found among the medieval rabbis, a *situmta* is a handshake.[74] Although according to mishnaic law, chattels are acquired only by particular modes of acquisition, such as by "pulling" (*meshikhah*), the medieval rabbis concluded, based on the *sugya* of *situmta*, that if it was the custom to effect an acquisition of merchandise in other ways, these had validity. In their opinion, this *sugya* constitutes an important source for establishing the status of custom with regard to modes of acquisition.[75]

Ritva, by contrast, explains the *sugya* in a different manner, which divests custom of the authority to change the law. Ritva adopts an interpretation put forth by his teacher, Rabbi Aaron Halevi (Rea)[76] in the name of his older brother, Rabbi Pineḥas Halevi of Barcelona.[77] Both brothers lived in Barcelona in the second half of the 13th century. Ritva writes as follows:

> *Situmta* is a kind of coin that has no design on it, and the merchants give it as a token when they buy something. And it is not known whether they give it as money … [and it thereby does not effect title,] or whether they give it as barter (*ḥalifin*) [and thereby it effects full title] … And we say [at the end of the *sugya*] that in a place where it is customary [to purchase in this way], it effects title, for [the coin] was surely given with the intention of [carrying out] a barter [transaction].[78]

"Early Interpretations of the Bible and Talmud as a Reflection of Medieval Legal Realia", *Jewish Law Annual* 16 (2006), 33-48; Kleinman, *Merchant Customs*, 193-210.

74 For an etymological and historical analysis of the term *situmta*, see Ron S. Kleinman, "*'Hai situmta kanya'* (B.M. 74a): Interpretation of Rava's Statement in Light of Talmudic Realia", *Sidra* 18 (2003), 103-118 (Hebrew); Berachyahu Lifshitz, "Situmta - Between Acquisition and Contract", in M. Corinaldi et al. (eds.), *Studies in Memory of Professor Ze'ev Falk* (Jerusalem: Schechter Institute of Jewish Studies, 2005), 59-69 (Hebrew).

75 On the legal foundations to *kinyan situmta*, see Ron S. Kleinman, "'*Kinyan Situmta*' – Merchants' Customs Relating to Methods of Acquisition in Jewish Law: Legal Foundations and Implementations in Modern Civil Law", *Bar-Ilan Law Studies* 24 (2008), 243-298 (Hebrew).

76 On Aaron Halevi, see Ta-Shma, *infra n.*32, at 66-69.

77 R. Pineḥas taught his younger brother Torah. Israel Ta-Shma identifies him as the author of *Sefer Haḥinukh*; see I. Ta-Shma, "The author of *Sefer Haḥinukh*", *Kiryat Sefer* 55 (1980), 787-790 (Hebrew). However, this identification has been challenged: see Jacob S. Spiegel, "R. Pineḥas Halevi and his *azharot* for the Sabbath preceding Rosh Hashana" (Hebrew), in *Memorial Volume for Rabbi Yitsḥak Nissim* (Jerusalem: Yad Harav Nissim, 1985), VI.72-73 (Hebrew).

78 Ritva, *Novellae* ad B.M. 74a, s.v. *hai situmta kanya,* ed. Shilo Raphael (Jerusalem: Mossad Harav Kook, 1992), 627-628; also quoted in *Shita Mekubetset* ad loc.

According to Ritva's explanation, and contrary to the opinions of other medieval rabbis, custom cannot *create* a new mode of acquisition that is not mentioned in the Talmud. Custom can only *testify* to the merchant's intention – that the coin is given to indicate the intention of carrying out a barter transaction.

Ritva ends by revealing that his reasoning in this *sugya* goes hand in hand with his basic approach to monetary customs:

> There is no need, with respect to this [merchant] custom, that it be a 'condition [= enactment (*tenai*)] of the townspeople', but it is sufficient that it [be] an ordinary custom, since this custom does not override the law in any way.

According to Ritva, custom in the case of a *situmta* does not override the laws of acquisition – but only testifies to the merchant's intention at the time of the giving of the coin. Therefore, it is unnecessary for this custom to be established by a communal enactment. Ritva is consistent in his approach – that had the reference been to a custom that changes the law, it would have had validity only had it been instituted by a communal enactment.

[3] Ritva's approach leads him to a unique interpretation of the tannaitic dictum "Everything [must be done] according to the local custom" (*hakol ke-minhag ha-medinah*).

When a person hires workers, he may make any stipulations he wishes. The Mishnah discusses how the conditions of employment are determined had the workers been hired without any stipulations made:

> [If] one hired [day] labourers, and [subsequently] tells them to arise early [for work] and to remain [at work] until dark, [the law is as follows]: [If they live in] a place where [the labourers] are accustomed not to arise early [for work] or not to remain until dark, he has no right to compel them [to do so] … Everything [must be done] according to the local custom.[79]

Ritva interprets the Mishnah as follows:

> [The dictum that] everything [must be done] according to the local custom means that in *such* matters, the rabbis based [the law] on the local custom, and [the custom] does not require a communal enactment (*tenai benei ha'ir*).[80]

According to Ritva, a monetary custom has the power to override the law in one of two situations where the validity of the custom derives from an external source of authority. The first – when the custom is established by a communal enactment; the second – when talmudic law expressly directs us to the custom. In Ritva's opinion, the dictum "Everything [must be done] according to the local custom"

79 M. B.M. 7:1; B.M. *ibid*., 83a.

80 Ritva, *Novellae* ad B.M. 83a, s.v. *hakol keminhag hamedinah* (*supra* n.78), 713.

refers to a special *takanah* enacted by the rabbis which determined that, in that particular matter, one must follow the custom. We may infer from this that when it is neither a case of the law directing us to the custom, *nor* a custom established by a communal enactment – the custom does not have the power to change the law.

Had Ritva's opinion been the same as that of Alfasi and Ramban, he would not have had to produce this explanation. He would have explained the doctrine "Everything [must be done] according to the local custom" as follows: a local custom has validity, because we *presume* that it had originally been enacted as a *takanah*. The fact that Ritva does not use this explanation is consistent with his approach that he does not accept the aforementioned presumption of Alfasi and Ramban.

Thus, Ritva's opinion is that a monetary custom that was not established by the rabbis or by means of a communal enactment does not have the power to change the law.

Summary

This paper has explored the positions of Alfasi and of several medieval Spanish rabbis who came after him regarding the power of monetary custom to override the law.

We are given to understand from the talmudic sources that there are no legal restrictions of any kind on monetary customs, and they have the power to change the law. The same can be understood from the geonic sources. However, we encounter a different and innovative approach in a responsum by Alfasi.

According to this responsum, and based on his writings elsewhere, Alfasi's approach to monetary customs appears to consist of two parts:

A. *In theory*, a monetary custom has validity only if it was authorized by a communal enactment.
B. *In practice*, there is a legal presumption that any established custom is assumed to have been originally instituted by a communal enactment.

The practical implication of Alfasi's position is that any established monetary custom has the power to change the law, because it is presumed to have been established in the past by a communal enactment.

Medieval Spanish rabbis who came after Alfasi were familiar with this responsum. However, they were divided in their opinions about it:

Ramban upholds both parts (A and B) of Alfasi's position. However, Ramban adds a distinction that does not appear in Alfasi's writings. Ramban distinguishes between a situation in which the law is clear and one in which it is not.

I. If the law is not clear – for example, when the law offers a choice of

several alternatives,[81] or when the law is unsettled and in doubt (*halakhah rofefet*),[82] a custom has validity even if it was not enacted by a *takanah*.

II. If the law is clear – a custom has validity only if it was enacted by a *takanah*.

Rashba disputes Alfasi's theoretical position (A), and thus has no need for the legal presumption (B). According to Rashba, a monetary custom overrides talmudic law even if it was *not instituted by a communal enactment*. However, in matters of visual trespass and bad odours, Rashba rules in his responsa, apparently due to the seriousness of the damage which they cause, that custom has no validity unless it was established by a communal enactment.

Ritva upholds Alfasi's theoretical position (A), but not the legal presumption (B). Ritva's writings indicate that, in contrast to Alfasi's position, if we do not know for *certain* that the monetary custom was established by a communal enactment (or by the rabbinic authorities), it does not have validity.

The practical implication of Ritva's approach is that when a monetary custom, even if it is an established custom, contradicts the law, it has no validity, unless we know that it was authorized by a communal enactment.

81 As in the case of the type of wall which the partners build between them. See *supra*, text at n.34.

82 See *supra*, text at n.36.