

# **On the Burial Delay Edict**

*Two Theological Approaches to Enlightenment*

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## **Introduction**

European Enlightenment (circa 18c), and the emancipation of the Jews that followed, brought the Jewish people unprecedented opportunity and unparalleled challenges to faith and tradition. After generations of living in ghettos with severe restrictions in practically every field of endeavor, Jews had learned to live a people apart.<sup>1</sup> And while such an isolated existence was surely uncomfortable, to put it mildly, it was also an *insulated* existence. Historian Shnayer Leiman describes Jewish society in the pre-modern era as follows:

“[It was a society such] that rabbinic authority reigned supreme and went largely unchallenged; that governmental agencies made no attempt to regulate Jewish educational institutions or to impose a minimum set of educational requirements on all citizens of the realm; that religious values dictated priorities in the Jewish community; and that a unified sense of purpose pervaded a more or less uniform and closed social and religious community.”<sup>2</sup>

Following the emancipation,<sup>3</sup> these communities that had long been protected from outside influences now became exposed. On the one hand, Jews were now able to benefit from open societies that no longer restricted their economic, social, educational or other aspirations; on the other hand, their hosts were now asking them to respond in kind and

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<sup>1</sup> S. Leiman, “Rabbinic Openness to General Culture,” *Judaism’s Encounter with Other Cultures*, p. 191.

<sup>2</sup> Leiman, p. 190.

<sup>3</sup> For the sake of accuracy, it should be noted that emancipation was not a singular event but a process over time and place (Leiman, p. 192).

adopt their rules and customs; they were asking them, in a sense, to assimilate. The truth is that the Gentiles didn't really need to push because the Jews were leaving their ghettos, and their religion, *en masse*.<sup>4</sup> The “uniform and closed social and religious community” had come to an end.

The responses to this brave new world can be categorized, according to Leiman, in three broad categories: assimilation, isolation, confrontation.<sup>5</sup> On the assimilationist side we find the Haskalah thinkers, students of Moses Mendelssohn (1729-1786), whose goal was not to maintain Judaism in a religious sense, but to “explain Judaism and bring new ideas to the Jewish people.”<sup>6</sup> On the isolationist side we find the Ultra-Orthodox thinkers led by R. Moses Sofer (1762-1839) who repurposed the Talmudic injunction – “*Hadash Assur Min HaTorah Bakol Makom*”<sup>7</sup> – to imply that any new innovation to Jewish practice is a violation of a Torah command.<sup>8</sup> And finally, in the middle, we have the confrontationists. This category, in the late 18<sup>th</sup> century, includes a broad spectrum of figures, with Moses Mendelssohn on the *Haskalah* side of the spectrum and Rabbi Yaakov Emden (1679-1776) on the Orthodox side of the spectrum.

And this brings us to a case in point.

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<sup>4</sup> George Kohler, “Berlin Enlightenment Philosophy after Mendelssohn,” Bar Ilan University course, Feb. 27, 2019. See also Leiman, p. 192.

<sup>5</sup> Leiman, p. 202.

<sup>6</sup> Kohler, *ibid.*

<sup>7</sup> Mishna Orlah (3:9): “new [grain] is forbidden [before the *omer* offering] in all places.”

#### شو"ת חותם סופר קובץ תשבות - הערות סימן נה<sup>8</sup>

3 / מילואים/ הכוונה כאן לתשובה הנדפסת לרצ'יה חיוט בשו"ת חייע"ד סי' של"ח, אבל לא נמצא שם התיבות האלה, ויתכן כי אחר שראה מון שהרב השوال מצא עצמו נגוע, מחק מהעתיקת התשובה בפנסיו אלו התיבות, [מתוך מאמרו של ר' אברהם סג"ל שישא, בהמעין הנ"ל, וראה עי"ש], והמלים: החידש אסור מן התורה, פתגם ידוע הוא מרנו זיל שמצוירו הרבה פעמים בספריו, במליצה להרחקת שינינוים וסטיות ממנגד או הלכה מקובלת, [ראאה שו"ת או"ח סוסי כ"ח, שם סי' קפ"א ד"ה וא"כ לענינו, יוי"ד סי' י"ט ד"ה יען ובינע, ועוד].

## The Burial Delay Edict<sup>9</sup>

The first time Jewish values confronted Enlightenment thought was on April 30, 1772, when Fredrick (a.k.a., Friedrich) II, Duke of Mecklenburg-Schwerin, promulgated an edict, based on the medical theory of his day, that opposed Jewish tradition.<sup>10</sup> Medical researchers at that time held that pronouncing an individual deceased – based on lack of breath and pulse – could lead to an erroneous presumption of death, the “deceased” only having been in a coma. Accordingly, they recommended that all burials be delayed by three days, upon which the onset of bodily decay would provide absolute certainty regarding the state of the individual. The Duke agreed and ordered that all citizens must wait three days before burying their dead.

Now, while this precautionary procedure might seem reasonable enough, it put the Jewish communities under the Duke’s aegis into a socio-religious quagmire, for a delay in burial goes against Jewish practice. Indeed, burial according to Jewish law is to take place as soon as possible after death, as learned from the biblical verse:

“His body shall not remain all night upon the tree, but thou shalt surely bury him the same day” (Deut. 21:23).<sup>11</sup>

To address the dilemma the Jewish subjects of the Duke turned to the two great leaders of the German Jewish Community: Moses Mendelssohn and Rabbi Yaakov Emden. Mendelssohn was a well-known philosopher who maintained good relations with the Gentile authorities while still upholding Jewish tradition;<sup>12</sup> and Emden was the foremost

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<sup>9</sup> For elaborations of this issue, see Shmuel Feiner, *Moses Mendelssohn - Sage of Modernity*, ch. 6; Lawrence Kaplan, “On the Boundary Between Old and New: The Correspondence Between Moses Mendelssohn and R. Jacob Emden”; David Sorkin, *Moses Mendelssohn and the Religious Enlightenment*, ch. 7.

<sup>10</sup> Feiner, p. 107.

<sup>11</sup> “One violates a biblical prohibition in delaying burial” Mishna (San. 6:5). The Talmud (San. 46b) explains that this prohibition is learned from the repeated words “thou shalt surely bury him” (*kevor tikberenu*). See Torah Temimah (ad loc, notes 160,163,164). For further discussion see, R. Aharon Lichtenstein, “The Mitzva of Burial,” <https://www.etzion.org.il/en/mitzva-burial>.

<sup>12</sup> And so held R. Emden himself (see Kaplan, p. 8). See further herein fn. 25.

rabbinic authority (*gadol hador*) in Germany at the time.<sup>13</sup> Their appreciation of one another was such that when the Jewish community had approached Emden to write the Duke, he wrote a response but told them that Mendelssohn, being more politically savvy, should write the final letter and submit it to the Duke.<sup>14</sup> The letters that followed, between Mendelssohn and the Duke, Mendelssohn and the Jewish Community, and most importantly, between Mendelssohn and Emden, provide an important window into their respective approaches to modernity. In the words of Jewish Studies Professor Lawrence Kaplan:

“The correspondence regarding early burial touches on the basic questions of change and reform in halakha, or to use Mendelssohnian terminology, the question of human accretions that blur and tarnish the pristine purity of ancient Judaism.”<sup>15</sup>

That is, both Mendelssohn and Emden realized that a measure of change was demanded in the customs of Jewish practice that had crept in over time and that could not be justified in light of reason.<sup>16</sup> On this Mendelssohn wrote that “human additions and abuses, alas, obscure [Judaism’s] splendor,”<sup>17</sup> and Emden wrote, “I do not countenance corrupted customs, particularly those newly introduced.”<sup>18</sup> Of course, as we shall see, they differed greatly in their criteria to evaluate change.

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<sup>13</sup> Kaplan, p.2. And so held Mendelssohn himself (see Kaplan, p. 6).

<sup>14</sup> See Shailat Yaavetz (3:44, p. 84). As a point of history, the community had also approached Mendelssohn directly and he had already submitted his letter before receiving the letter from R. Emden (Kaplan, p. 13).

<sup>15</sup> Kaplan, p. 2.

<sup>16</sup> Kaplan, p. 28.

<sup>17</sup> Moses Mendelssohn, *Gesammelte Schriften, Jubildumsausgabe*, ed. F. Bamberger et. al. (Stuttgart, 1971- ) 7:9 quoted in Kaplan, p. 27 and in Sorkin, ch. 7, n. 26.

<sup>18</sup> Sheilat Yaavetz 3:46, p. 90. See also Kaplan, p. 20.

## Mendelssohn's Approach

Before getting to Mendelssohn's approach, it is important to note that he, first and foremost, sought to disarm the Duke by arguing in the name of tolerance for the Jewish community's right to maintain its laws and customs.<sup>19</sup> Mendelssohn then explained to the Duke that the custom to bury immediately had its basis in biblical and rabbinic law;<sup>20</sup> and requested that, given the Duke's concern was solely that no one be buried alive, the edict be amended to allow for a medical practitioner to attest to the status of the deceased before burial.<sup>21</sup>

Having defended Jewish practice toward the Duke, Mendelssohn then wrote to the Jewish community and to Emden explaining that they could and should honor the edict since immediate burial is delayed for various reasons (e.g., waiting for relatives to arrive) and certainly *pikuach nefesh* is, all the more so, reason to wait.<sup>22</sup> Barring acceptance of this reasoning, Mendelssohn then suggests that if the Duke doesn't accede to his defenses, the Jews should make a burial cave, as was done in ancient times, and leave the body there for three days after which they can bury the deceased as usual.<sup>23</sup>

Here, then, is an expression of Mendelssohn's attempt to remove later emendations from Jewish practice, returning it to its pristine original quality. And so he concludes:

“And in my view, it is obligatory upon all the communities not to deviate from the paths of the ancients for their paths are paths of peace.”<sup>24</sup>

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<sup>19</sup> Feiner, p. 109.

<sup>20</sup> Kaplan, p. 13.

<sup>21</sup> Feiner, p. 109. Kaplan notes that the amendment was for the Jews only (p. 13); similarly, Sorkin, ch. 7.

<sup>22</sup> Sheilat Yaavetz 3:44, p. 83. For the differences in style between the correspondence to the community versus the correspondence to Emden, see Kaplan.

<sup>23</sup> Sheilat Yaavetz 3:44, p. 84.

<sup>24</sup> Sheilat Yaavetz 3:44, p. 84; also quoted in English in Kaplan, p. 15. Mendelssohn makes the same argument in a follow-up letter, “why should we retreat from the custom of these holy [ancients who used caves]” (Sheilat Yaavetz 3:45, p. 85).

Now, while this motive seems reasonable enough, it is the edict, prompted by reason (in this case medicine), that is the driving force. Indeed, Mendelssohn, while beholden to Jewish law and tradition,<sup>25</sup> also gives strong weight to the reason of his time as a criterion for reform of Jewish practice. Accordingly, Prof. Kaplan summarizes Mendelssohn's criteria for change as follows:

First, one would have to discover some ancient rabbinic source differing from current practice. Second, one would have to show, using enlightenment criteria, that the early practice embodied pure rational or ethical values while the current practice contradicted rational or ethical criteria.<sup>26</sup>

It is these criteria, with their emphasis on “enlightenment criteria,” that set Mendelssohn apart from more conservative thinkers like Emden, as will now be shown.

## Emden's Approach

While Mendelssohn's approach, as well as his use of Judaic source materials, appears quite cogent, Emden brings into relief the weaknesses and, certainly from the more conservative perspective, dangers of such an approach. First and foremost, he explains the flaws in the argument for using burial caves:

- a) The practice of using burial caves ended long ago, valid only in the rocky land of Israel, and only in that ancient milieu.<sup>27</sup>

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<sup>25</sup> His allegiance to Jewish tradition can be seen in his statement to the Duke: “As Jews, we are bound by the laws of our religion to fully accept the rulings of our rabbis, live in accordance with their commands, and direct all our actions in accordance with the rules and instructions of the religion” (quoted in Feiner, p.109). Sorkin has a different translation that emphasizes the obligation to rabbinic ordinance: “live according to their precepts, and to guide ourselves in all our actions according to their prescriptions and standards” (ch. 7). Feiner also quotes, what he calls, Mendelssohn’s precise position on the Jewish religion in which, while admitting certain unfortunate distortions within Jewish practice, nevertheless, proclaims: “But I am truly convinced that the essence of my religion is immovable” (p. 112). Kaplan also notes Mendelssohn’s commitment to “halakhah and rabbinic Judaism” (p. 26).

<sup>26</sup> Kaplan, p. 27.

<sup>27</sup> Sheilat Yaavetz 3:45, p. 86; 3:46, p. 89.

- b) The practice would not allow for observation of the deceased (i.e., to verify death) as the bodies were anyway covered in earth within the cave.<sup>28</sup>

Emden then goes on to express his suspicions regarding the motivation of the edict, noting that it appears to be less about concern for life and more about Gentile will over Jewish religious practice.<sup>29</sup> This point is debatable (as indeed Mendelssohn argued),<sup>30</sup> but it does serve as a window into the Emden mindset. It is a mindset that, while open to reason,<sup>31</sup> remains quite skeptical when that reason comes wrapped in a royal edict seeking to overturn tradition *by force*.

Going on the offensive in his response to Mendelssohn, Emden explains that one cannot so easily wave a long-entrenched practice based on Torah and Gemara, the leniencies variously employed notwithstanding. Indeed, he argues, one cannot take a sporadically applied leniency (e.g., allowing for delayed burial) and make it permanent (e.g., instituting delayed burial), for such would amount to abolishing the practice altogether. In the case of delayed burial, this would mean the complete abrogation of a practice based in the Mishna.<sup>32</sup>

Accordingly, while Emden acknowledges the need to rescind certain customs in certain circumstances,<sup>33</sup> he is nevertheless beholden to the corpus of Jewish practice as found in the Torah, Mishna, Gemara and *poskim*. In the case of immediate burial, a practice promulgated explicitly in the Mishna, Emden writes that a Mishnaic teaching is holy, handed down from Moses at Sinai; and, as such, one for which we are willing to sacrifice our very lives.<sup>34</sup> Emden summarizes his position on the subject in the following telling statement:

<sup>28</sup> Sheilat Yaavetz 3:46, p. 89.

<sup>29</sup> Sheilat Yaavetz 3:45, p. 87.

<sup>30</sup> Feiner, p. 109.

<sup>31</sup> "... he displayed great interest in the scientific innovations of his time ..." (Feiner, p. 110).

<sup>32</sup> Sheilat Yaavetz 3:45, p. 88; 3:46, p. 89.

<sup>33</sup> As quoted previously, Emden makes clear: "I do not countenance corrupted customs, particularly those newly introduced." Kaplan explains that this statement is key to understanding Emden's position (p. 23-25).

<sup>34</sup> Sheilat Yaavetz 3:45, p. 87.

Regarding what you [Mendelssohn] wrote, that the medical practitioners all agree; Heaven forbid that we should pay attention to them in connection with the laws of the Torah, for then, Heaven forefend, its foundations will be weakened and its pillars will tremble . . . [for] there is no real substance in the words of a doctor that are devoid of Torah.<sup>35</sup>

Here then is the essential position of Emden – a position that does not compromise on established religious principles in the face of enlightenment thought (again, medicine, in this case). Accordingly, Emden’s criteria for modifying Jewish practice, as opposed to those of Mendelssohn, are far more circumscribed. He was only open to consider modifying, “late, local, halakhically ill-grounded, superfluous stringencies and customs,”<sup>36</sup> and nothing more.

## Conclusion<sup>37</sup>

In conclusion, while the Enlightenment, and subsequent emancipation, offered extraordinary opportunities to the Jewish people, it simultaneously posed extraordinary challenges to the Jewish faith. The correspondence between Mendelssohn and Emden, at this first confrontation between faith and reason, provides us not only with a window into the dilemmas of those times but with the very tools to approach the dilemmas of our times. For indeed, though we live some 250 years later, the struggle to balance between the reason of our day and the ancient traditions of our people is still very much an issue. Indeed, we too must deal with maintaining traditional Judaism as a rational system to live by – constantly reevaluating old norms, ever moving forward with modernity while not breaking the framework that has maintained us as a people for over 3000 years.<sup>38</sup>

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<sup>35</sup> Sheilat Yaavetz 3:45, p. 87.

<sup>36</sup> Kaplan, p. 26.

<sup>37</sup> On a historical note, it is interesting to note that the discussion of the burial delay edict carried on long after the affair became entirely academic – see: Maharatz Chajes 52, Zeicher Yehosef YD 213. See also Hatam Sofer YD 338.

<sup>38</sup> In this vein, see R. N. Lamm on developing morality in “Amalek and the Seven Nations: A Case of Law vs. Morality,” in *War and Peace in the Jewish Tradition*, ed. by L. Schiffman & J. B. Wolowelsky (YU Press, NY:

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2007); R. W. S. Wurzburger, *Covenantal Imperatives*, p.71-2; R. N. E. Rabinovitch, "The Way of Torah, *Edah* 3:1; E. Korn, Legal Floors and Moral Ceilings: A Jewish Understanding Of Law and Ethics, *Edah* 2:2.