Sources for Judicial Decisions in the Rabbinic Court of Frankfurt

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Early in April 1769, the rabbinic court in Frankfurt was asked a question regarding Jewish practice by the Prince of Corvey who ruled over the German town of Höxter where there was a small Jewish community. In answering, the rabbis of Frankfurt explained to the prince, in a German translation from the Hebrew original, that their rulings were based on the Oral Torah, a concept that the rabbis felt required some elucidation even for a Christian prince who happened to be a Benedictine monk. They wrote,

> And it [i.e., the Oral Torah] is what one person received from another back to our teacher Moses, may his memory be a blessing. Also the decrees and ordinances made by our Sages, may their memories be a blessing, who came after the Talmud, whose ordinances and decrees spread and were accepted in all Jewish communities. And our laws are outlined for us briefly in all the matters listed above by the volumes of *Shulḥan `aruk* which the entire House of Israel relies on, as our eyes see.[1]

The Frankfurt rabbis clearly stated that *Shulḥan `aruk* was the ultimate expression of Jewish law and it was the basis for legal decision making.

If true, this would represent the culmination of a major shift in Ashkenazic tradition in the course of about 150 years. In the early seventeenth century, Rabbi Me'ir ben Gedaliah of Lublin belittled *Shulḥan `aruk* complaining that it presented material briefly, "like chapter headings" (*ke-ra'shey peraqim*), leaving matters unclear. Rabbi Me'ir claimed that *Shulḥan `aruk* caused many to err in the law and emphatically stated that he did not base his own legal decisions on *Shulḥan `aruk*, in fact he did not even use it for he found it to be a book with internal contradictions.[2] In the 1620s or 30s, Rabbi Joel Sirkes wrote that there was growing uncertainty about Caro's rulings and in many matters outstanding scholars

1. YIVO (Gershon Epstein Collection), MS. RG 128, folders 77–80 (New York), fol. 90r.

2. Me'ir ben Gedaliah, *She'elot u-teshubot Mahar"am Lublin* (Jerusalem: n.p., 1977), no. 135. See also, no. 102.

disagreed with Caro. He too did not approve of the use of *Shulḥan `aruk* as a stand alone legal code and urged judges to understand the underlining sources for the law before making decisions.[3] Yet during the seventeenth century the text of *Shulḥan `aruk* garnered commentaries and super-commentaries, some of which were of the highest quality such as those of Rabbi Shabbetai ben Me'ir ha-Kohen. These commentaries transformed the margins of *Shulḥan `aruk* into *the* place for up to date discussions of Jewish law.

By the first half of the eighteenth century, Rabbi Jacob Reischer (d. 1733) realized that contemporary rabbinic judges were ruling according to *Shulḥan `aruk* as a matter of course. Reischer, who served as a rabbinic judge in Prague and probably Galicia as well before writing these observations, faulted such judges for not considering the various aspects of legal questions and simply relying on *Shulḥan `aruk*. Yet the fact of the matter was that Caro's code had become the last word in Jewish law for many.[4] If rabbis such as Me'ir Schiff, Nathan Maas, and Pinḥas Horowitz in Frankfurt used *Shulḥan `aruk* as well, it would seem that all opposition to the code had fallen to the wayside by the second half of the eighteenth century.

Checking the validity of the claim of the rabbis of Frankfurt that they ruled according to *Shulḥan `aruk* is not a simple task because in Frankfurt, as in many Jewish communities, the official records of the rabbinic courts from the early modern period have not survived. Even in communities where such records do exist, such as Metz whose rabbinic court records have recently been published by Jay Berkovitz in a truly monumental volume, there are over a thousand rulings but there are no rationales for any of the judgments.[5] This is not

3. See Joel Sirkes, *She'elot u-teshubot ha-ba"ḥ ha-ḥadashot* (Koretz: Johann Anton Kreiger, 1785), no. 42.

4. See Jacob Reischer, *She'elot u-teshubot shebut Ya`aqob*, 3 vols. in 2, ed. Jacob Beck (Jerusalem: Machon Even Yisrael, 2004), no. 155, a letter to his only son, Rabbi Simeon who died in 1714. In general, Reischer was critical of the legal thinking of a number of his contemporaries. In this regard, see Shmuel Shilo, "Ha-rab Ya`aqob Reysher ba`al ha-sefer shebut Ya`aqob ha-ish bi-zemano li-zemano—li-zemaneynu," *Asufot* 11, no. 1998 (1998): 72–75.

5. Jay R. Berkovitz, *Protocols of Justice: The Pinkas of the Metz Rabbinic Court 1771–1789*, Studies in Jewish History and Culture (Boston: Brill, 2014).

surprising. The Ashkenazic tradition did not require rabbinic courts to rationalize their decisions. As Rabbi Moses Isserles, basing himself on an earlier source, expressed it in *Shulḥan `aruk*, "there is no need to write the rationales and proofs, we only write for them [i.e., for the litigants] the claims and the ruling."[6]

Without rationales for the law in the decisions of the courts, rabbinic responsa would seem to be an alternative place to look for a court's thinking but some caution is required. Responsa are the works of individual rabbis, not the joint thinking of tribunals. Courts often addressed specific questions to particularly learned rabbis and received specific answers.[7] Generally, courts did not ask individual rabbis to decide the case for them. How the judges received the decisions and subsequently took counsel among themselves is generally unknown.[8] It may be helpful to view responsa as somewhat analogous to letters written by non-Jewish courts to legal faculties in the early modern period. Then—as now, of course!—law professors were viewed as experts in law and courts and/or legal authorities who faced legal conundrums often turned to members of law faculties for their interpretation of the law. Professors provided written responses to specific questions and then, with the responses in hand, the courts or authorities moved forward in deciding the case. Like rabbinic responsa, the opinions of the law faculty could deal with points of law, not necessarily an entire case.[9]

6. *Shulḥan `aruk*, Ḥoshen mishpaṭ 14.4. Also see Eliav Schochetman, "Ḥobat ha-hanmaqah be-misphaṭ ha-`ibrvi," *Shenaton ha-mishpaṭ ha-`ibri* 6–7 (1979–80): 332–39, 343.

7. See Schochetman, "Ḥobat ha-hanmaqah," 343, who cites examples from Rabbis Israel Isserlein and Solomon Luria to show that sometimes the point of a responsum was to answer a specific legal question, not give a ruling in the case.

8. I am told by a friend who is *dayyan* in the rabbinic courts of Beer Sheva, that contemporary rabbinic courts in Israel routinely seek the counsel of acknowledged rabbinic authorities. However, these inquires are generally conducted on the telephone or in conversation and are rarely recorded. Modern communication and transportation allows for quick responses but, unlike in early modern Europe where the mails were crucial to the process, in contemporary life the record and rationales of the decisions are not committed to writing.

9. For example, Frommet of Dreieichenhain was a teenage maidservant in Frankfurt who murdered her Jewish employer. The city was not sure of her actual age and sent a letter to the law faculty asking whether she could be executed. The court had no problem establishing her guilt, it was the

In the 1760s, Rabbi Nathan Maas of Frankfurt did the unusual. He maintained personal records of cases that he heard as a member of one of the local rabbinic courts. There he listed the names of the litigants and their representatives, their basic claims, and the court's decision. After providing this information and dating the decision, in some cases he started a new paragraph in which he provided the rationales for the court's conclusions. The information is written in a shorthand of sorts but Maas must have expected that others would look at his jottings for he warned readers that he was writing briefly and they should look at the material carefully. The documents are in a manuscript that was obtained by the YIVO Institute for Jewish Research in New York as part of a general search for remnants of European Jewish culture in the immediate aftermath of the Second World War.[10] I have examined some of these decisions for use in this presentation but there is more work to be done and further research will undoubtedly offered a clearer picture of anything that is said here today.

Maas, who lived from about 1720 until 1794, studied at the local Frankfurt yeshiva under Rabbi Jacob Poppers and Jacob Joshua Falk and ultimately taught in the Frankfurt yeshiva. He served on the Frankfurt court for more than 40 years and published commentaries on the Talmud while leaving other works in manuscript. Late in his career he was a candidate to become the chief rabbi of Altona.[11] Maas was a scholar of the first rank and this may have made the tribunals that he was a member of somewhat more independent than others. Although all courts would have had to decide routine matters, given his high level of erudition Maas may have been more willing than most to make decisions on difficult cases without consulting a more senior rabbi. Still, in the setting of the court he always had to work with at least two other judges and the rationales for decisions would have had to be acceptable to his colleagues. His record book offers an opportunity to

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matter of punishment that was problematic. Frommet was executed in Frankfurt in November 1783.

10. YIVO MS. RG 128.

11. See the biographical summary in Michael Brocke and Julius Carlebach, eds., *Biographisches Handbuch der Rabbiner* (Munich: K.G. Saur, 2004–9), 635–36.

examine the basis for judicial decision making in a traditional Jewish court on the eve of the Enlightenment and see whether the rabbis of Frankfurt really did rely on *Shulḥan `aruk* as the final word in Jewish law.

A few cases will help illustrate more clearly the court's sources and decision making process.

The first case deals with a maidservant who worked for Isaak Schloss and his wife. The family must have been relatively well off, for not only did they employ a maidservant but when Isaak died in 1762 he left an endowment, the proceeds of which were to be used to support poor Torah scholars; he also left a wife.[12] After Isaak's death, the widow had the opportunity to release the maid from service during the spring hiring season—there seem to have been two hiring seasons during the course of the year—but the executor of the estate allowed the widow to maintain the maid as befitted her social status. The widow came to an agreement with the maid with respect to wages and a food allowance.

About three months after Isaak's demise, the widow was paid her marriage contract (*ketubbah*) effectively severing all ties between her and the estate. Once she received her marriage contract, the widow dismissed the maid. However, from the time of Isaak's death forward, the maid was never paid and she brought a claim against both the estate and the widow before the Frankfurt rabbinic court. No one denied the facts of the case. At issue was who had to pay the maid.

Through its legal representative, the estate argued that it owed neither the maid nor the widow anything for the widow had had the opportunity to release the maid after Isaak's death. Since she had not done so, the estate argued that she alone bore responsibility for the wages. The widow, through her own legal representative, admitted that the maid's claims were true and she had not been paid. She asked the court to rule according to the law and said that she would comply.

12. See Markus Horovitz, *Sefer abney zikkaron* (Frankfurt: J. Kaufmann, 1901), no. 3100. Cf., Frankfurt Memorbuch, MS. 1092, National Library of Israel (Jerusalem), fol. 198r, http://jnul.huji.ac.il/dl/mss/heb1092/index.html.

The court decided that until the date that the widow received her marriage contract, the estate was responsible for the maid's wages; from that date forward, the widow was. In addition, the court took notice of the fact that the widow had released the maidservant between hiring periods when it was difficult to find a job. This caused financial damage for the maidservant and the court stated that the widow was not only responsible for paying for the maid for the period from the payment of the marriage contract but she also had to pay the maidservant until she found another job or until the new hiring period began in the fall, whichever came first.

It should be pointed out that justice was quick. The court's judgment came just two weeks after the widow had fired the maidservant. As for the rationales for the court's decisions, they were added in a postscript by Maas.

The court ruled that the estate had to pay the maid her wages from the time of Isaak's death until the marriage contract was discharged. The court believed that custom entitled a woman of this social status to maintain a maidservant and so long as the estate had not paid the marriage contract, the widow remained a dependent of the estate. Thus the estate was obligated to provide for the widow according to her station in life.

Custom does not seem to have been sufficient grounds to force the estate to pay and to buttress their point the court drew an analogy to the case of a teacher who was hired by parents to teach their child and then, during the period of the contract, the child died. Did the parents have to pay the teacher for the duration of the contract or did the child's death terminate the contractual relationship? Here Maas specifically cited *Shulḥan `aruk* as the source for the analogy.[13] In *Shulḥan `aruk* Rabbi Moses Isserles noted that if the child died, the family had no further obligation to pay the teacher. Drawing on Isserles's ruling, the Frankfurt court suggested that the payment of the marriage contract ended the relationship between the estate of Isaak Schloss and the maidservant. One might argue that there are differences between the cases for death is not in human hands and while the discharge of a

13. See *Shulḥan `aruk*, Ḥoshen mishpaṭ 334.4. Maas mistakenly referenced 333.4

marriage contract may be inevitable, the timing is hardly Divine. Nevertheless, the court was satisfied with its conclusion.

What is of note is that the court turned to *Shulḥan `aruk* as its point of reference even though *Shulḥan `aruk* was not specifically on point. It created an analogy based on *Shulḥan `aruk* even though it may have been possible to differentiate between the cases. More significantly, the use of an analogy from a code rather than a case precedent suggests that in the rabbinic court of Frankfurt—and probably in elsewhere and earlier, as well—Jewish law had essentially turned into a civil law system in which *Shulḥan `aruk* had become the statutory code of law. Lacking a clear statute in the code, the court did not turn to precedent as one might have in a common law environment but rather the judges turned to an analogy from within the code to fill the lacuna.

The court went further and cited another opinion regarding the obligations of the estate of a renter who died in the course of the lease. Here there were a number of earlier authorities who dealt with the matter but, again, the court only referred to *Shulḥan `aruk* and followed it even though Rabbi Solomon ibn Adret was of a different opinion and was noted as such by Isserles in a gloss. Maas wrote, "and we agreed that Rabbi Solomon ibn Adret disagreed with the *Shulḥan `aruk* but we ruled according to *Shulḥan `aruk*."[14]

Maas did not expand on the court's thinking but he realized that the case at hand was a more complicated matter than the court's ruling would suggest. While Maas's brief explanation of the court's rationales show little sophistication beyond the analogy, he concluded with the following: "and I have written briefly and I wrote at length the opinion in this [matter] in a responsum on these laws to Rabbi Aaron Schloss, head of the rabbinic court in Offenbach and also to Rabbi Aaron Ochs and they agreed with me."[15] Apparently Maas

14. Ibn Adret disagreed in the case of a rental because he thought that a lease on real estate was akin to selling the property for the agreed upon period. This may not have applied in the case of hired labour.

15. YIVO MS. RG 128, fol. 21v.

had dealt with these legal questions elsewhere and he was content to make a reference to a responsum that he wrote but that has not yet come to light.[16]

This case appears to support the claim that *Shulḥan `aruk* was the acknowledged code and, indeed, a search of Maas's rationales shows that this case was not unique. Time after time Maas made reference to *Shulḥan `aruk* as the source of the courts' decisions. In one instance Maas wrote that "these laws are simple and scattered" in a particular section of *Shulḥan `aruk* and that sufficed.[17]

It was not only in the context of the court that Maas ruled according to *Shulḥan `aruk*. Maas recorded an arbitration case that he heard alone. Apparently the two sides were willing to accept Maas's ruling without recourse to a court. Not needing to convince peers, this would have been a fine opportunity for Maas to return to the talmudic text and develop some of his thoughts in what appears to be the longest single justification in the entire manuscript. Interestingly, both parties had legal representation that tried to advance their clients' claims through various arguments, yet Maas wrote that he thought that the legal professionals involved in the case did a very poor job of reasoning. In his notes he rejected their claims and took the arbitration in a different direction yet his only source material was *Shulḥan `aruk*. In an approximately 300 word piece, he forwarded rules for deciding between different opinions expressed within *Shulḥan `aruk* and showed how each of the litigants was mistaken in their reasoning, all based on *Shulḥan `aruk*. Talmudic citations, reference to responsa, and/or precedents are not to be found in the decision.

The tendency to rule according to *Shulḥan `aruk* sometimes raised rather startling legal conclusions. Ruling in the matter of an estate that did not have the financial resources to pay all claims against it, the court stated that obligations to the widow, for whom the estate was duty bound to provide housing, preceded those of all other creditors. Maas specifically stated that the basis for the ruling was, again, *Shulḥan `aruk* and Maas cited

16. In another case, Maas wrote that the court had ruled in the matter previously and that he hope to write a responsum on the matter (YIVO MS. RG 128, fol. 26r).

17. YIVO MS. RG 128, fol. 24v.

specific sections to prove his point. What is strange is that in a section of *Shulḥan `aruk* that Maas did not cite it states that a widow does not have priority creditor rights on moveable property.[18] With regard to personal property, i.e., non-real estate assets, Caro ruled that even those creditors whose debts post-dated the marriage contract could be paid before the widow. Moreover, already in 1727, some 35 years before this case, the Frankfurt community had made an ordinance that a widow could not claim priority for her marriage contract over recognized debts.[19] Perhaps in this particular case the issue at hand was living quarters and the court may have viewed this as a priority debt. Nevertheless, the issue must has nagged at Maas for he added that he later found another source to support the court's ruling in one of the classical commentaries on *Shulḥan `aruk*.

Here too it appears that the code had come to outweigh common law. This was not the first—or last—time this case came up in Frankfurt as is demonstrated by the ordinance from 1727, an ordinance that was still in force in 1788. That families had insufficient assets to meet their financial obligations was not a new or uncommon phenomenon. Nevertheless, the Frankfurt rabbinic court did not turn to common law to solve this matter.

As the earlier mentioned use of analogy points out, codes had their limitations and this became clear in a dispute regarding who was responsible for the costs involved in home improvements. It seems that some owners of homes in Frankfurt did not always take care of their properties. A number of houses were in poor condition and the possibility that walls might collapse led the community to undertake repairs unilaterally. After the renovations were completed, the community charged the home owners for the expenses plus interest. This led to at least one familial dispute after the owner of one of the repaired houses gave one of his sons full rights to a portion of the house and then died before making payment to the community for the repairs.

In part, the court decided this case based on *Shulḥan `aruk*. Although the code did not address the situation directly, it left ample room to conclude that the community was

18. *Shulḥan `aruk*, Eben ha-`ezer 102.2.

19. Frankfurt Pinqas, no. 499.

well within its rights to fix the wall and charge the residents for the work.[20] The tricky part was not the allocation of liability but the interest charges. Regarding the latter, the court struggled for this was not dealt with by the code. Bereft of clear guidance, the court did what I have not found that it did in any other case: it returned to the Talmud to seek out relevant sources and advance a legal proposition.[21]

Based on Rabbi Maas's notebook, it would seem that by the second half of the eighteenth century, at least in Frankfurt, rabbinic courts had come to see *Shulḥan `aruk* with its commentaries as the code of Jewish law. The court not only followed its rulings but turned to it to draw analogies. Only if "The Code" failed them did the judges of the court return to the Talmud to try and find their way in uncharted waters.

Maas was not alone in his methodology. At least one responsum in the collection of Rabbi Pinḥas Horowitz, who was the chief rabbi of Frankfurt during the later part of Maas's life, dealt with a case that was decided by the rabbinic court. Like Maas, Horowitz seems to have used responsa as a forum for expanding on a decision that the court made.[22] The case dealt with a perpetual fund that was set up by the bequest of a woman in the community. Unfortunately, the fund did not attain the returns that had been expected and when there was a shortfall in income there was a question as to which of the beneficiaries should suffer the loss. In addition, there had been some delay in establishing the fund, further reducing the income to be distributed on the anniversary of the donor's death (*yahrzeit*). The executors of the estate asked the court, on which both Maas and Horowitz sat, for guidance in how to proceed.[23]

20. See *Shulḥan `aruk*, Ḥoshen mishpaṭ 375.7.

21. YIVO MS. RG 128, fol. 25r.

22. The case is outlined in the court diary of Rabbi Ḥayyim Gundersheim. See Edward Fram, *A Window on Their World: The Court Diary of Rabbi Ḥayyim Gundersheim, Frankfurt am Main 1773–1794* (Cincinnati: Hebrew Union College Press, 2012), no. 140.

23. The case was included in the diary of Rabbi Ḥayyim Gundersheim. See Fram, *A Window on Their World*, no. 140.

In his responsum, Horowitz immediately cited *Shulḥan `aruk* as the first point of reference.[24] This seemed to be a perfect source for Caro said that if someone on their death bed said give money to A and then to B, then A had to be fully paid before B could begin to receive anything. Having examined the will and found that it used exactly this sort of language, the matter seems to have been solved. However, the woman not only ordered who should be given, she calculated the exact amounts to be given as well. This complicated matters because it suggested that the amount was also a criteria. The search for sources ended here. There was no further attempt at analogies or a hunt for precedent. *Shulḥan `aruk* was literarily the last word. Unable to determine an correct answer, the court ordered a compromise which favoured those listed first, the criteria found in *Shulḥan `aruk*.

As for the question of the delay in depositing the money, this was a matter that the court could not find mention of in *Shulḥan `aruk* and so Horowitz sought material in the Babylonian and Jerusalem Talmuds and cited earlier responsa. It would appear that *Shulḥan `aruk* was the code of choice but when it was silent on an issue then courts had no choice but to look for other source material. This was true in Maas's own records as well. Only when he could not find a place of reference in *Shulḥan `aruk* did Maas return to the talmudic text.

In sum, it would seem that *Shulḥan `aruk* with the comments that had found their way around the printed page had indeed become the final word in Jewish law in Frankfurt by the second half of the eighteenth century. This is not surprising given the ease of use of *Shulḥan `aruk*. Unlike custom, codes provided a legal stability that crossed borders, something that was useful to jurists and business people alike. Almost everyone wants a stable and predictable marketplace, and a code offers just that.

24. Pinḥas Horowitz, *Sefer she'elot u-teshubot gib`at Pinḥas* (Józefów: B. Zetzer, 1885), no. 72, with *Shulḥan `aruk*, Ḥoshen misphaṭ 248.1 (not 243 as referenced in Horowitz's text).