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Competing Perspectives on Legal Decision Making in Early Modern Ashkenaz

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Abstract The respective roles of jurists and judges in the decision-making process offers a valuable perspective on judicial practice and the delivery of justice in early modern Ashkenazic communities. This essay is concerned with differences in the approaches of *poseqim* (jurists) and *dayanim* (judges); it suggests that these distinctions were reflections of the institutional settings in which they worked, the size of their communities, and regional factors. Data unearthed from communal records and rabbinic responsa offer important evidence of disparities between the offices of early modern *dayanim* and *poseqim*, their distinct personae, and their respective views of how judicial rulings are decided. Moreover, these differences were related to the slow transition to fixed rabbinic-communal courts in western and central Europe that was a product of forces peculiar to the resettlement of Jews in the west, the deliberate development of communal traditions, and the role of the enlightened absolutist state. The impact of the growing recourse to non-Jewish courts, especially as it evinced differences between eastern and western/central European history and culture, was also a factor. Clearly, regional forces influenced the distinct legal efforts and perspectives of judges and jurists, as did the discrete functions they were assigned, their particular training, and the institutional standing of rabbinic courts. These differences became more glaring in the two centuries prior to the collapse of the ancien régime, as structural changes in western Ashkenazic communities contributed to a new Jewish legal culture.

Keywords Jewish law · *Poseqim* · *Dayanim* · Courts · *Beit din* · Responsa · Halakhah · Metz · Ya'ir Ḥayyim Bacharach

How halakhic authorities decide matters of Jewish law has long been a topic of scholarly debate but is rarely viewed as a subject of historical investigation. Legal historians in general are deeply divided as to which factors exert the greatest influence on judicial decisions, on the reasoning and sources that underpin particular rulings, and as to whether it is possible to identify clear historical trends in the decision-making process. In the narrower field of Jewish law, rather meager scholarly attention has been devoted to the mechanics of decision making, either because most of the relevant sources, such as court and communal registers, are no longer extant or exist only in manuscript or because published texts, notably codes and rabbinic responsa, do not offer consistently clear evidence of how legal authorities came to their decisions. Owing to these lacunae, the present article limits itself to one aspect of adjudication, the functions of *poseqim* (jurists) and *dayanim* (judges) and their

respective roles in decision making. Jurists, or *juristae* as they were known in medieval Bologna, were trained experts in legal interpretation who glossed and synthesized the written law, reconciled legal contradictions, adapted the law to new conditions, and devised rules to determine which law—local or general—took precedence. Judges, for their part, assumed responsibility for administering the law and rendering decisions in court.[1] Can one identify practical, political, or intellectual differences in the approaches of *poseqim* and *dayanim*, and, if so, were these distinctions related to expectations imposed upon them by the institutional settings in which they worked, to the size of their communities, or to regional factors?[2]

The argument set forth in the pages that follow is that the efforts of judges and jurists betray distinct—often competing—legal perspectives that stemmed from the discrete functions they were assigned, their particular training, and the institutional standing of rabbinic courts. These differences became more glaring in the course of the two centuries prior to the collapse of the ancien régime, as structural changes in western Ashkenazic communities laid the groundwork for a new Jewish legal culture.

Two types of sources produced in the early modern period offer the main evidentiary foundations upon which this inquiry rests: (a) communal registers (*pinkassim*), including both minute books produced by community councils and protocols of rabbinic and lay courts, and (b) rabbinic responsa, published mainly in western Europe. Community minute books comprise a wide range of evidence concerning the judicial process, including guidelines for the appointment of *dayanim* and norms of judicial practice that appeared in various lists of communal bylaws.[3] Details of cases that were brought before lay communal tribunals, which functioned in many localities alongside rabbinic courts, were recorded in *pinkessei ha-kahal* (registers recorded by

[1] See Peter G. Stein, "Judge and Jurist in the Civil Law: A Historical Interpretation," *Louisiana Law Review* 46, no. 2 (1985): 241–57. This article is part of a larger study of early modern Jewish law: Jay R. Berkovitz, *Law's Dominion: Jewish Family, Community, and Religion in Early Modern Europe*, to be published by Cambridge University Press in 2019.

[2] It remains to be seen whether the functions that have been outlined by general legal theorists and historians are applicable to the landscape of Jewish law and jurisprudence. Ronald Dworkin, for example, in *Taking Rights Seriously* (New York, 1977), argued that American judges do not view their role as permitting them to exercise "strong discretion" (390). In response to Dworkin's assertion, Hanina Ben-Menahem has contended that judges in the talmudic era exercised considerable freedom in issuing their rulings. See Hanina Ben-Menahem, *Judicial Deviation in Talmudic Law* (New York, 1991), esp. 10–11.

[3] See, e.g., the *takkanot ha-kahal* (communal legislation) issued by the synod at Ferrara in 1554 and by Frankfurt in 1603 and 1720, in Marcus Horowitz, *Die Frankfurter Rabbinerversammlung* (Frankfurt am Main, 1897); Dov Evron, ed., *The Pinkas of the Electors of the Kehillah of Poznan (5381–5595)* [in Hebrew] (Jerusalem, 1967).

the community's governing body).[4] Court registers, for their part, contain comprehensive summaries of judicial deliberations and decisions, including elaborate data pertaining to judicial procedure and to the social and political challenges facing communities. Since litigation could be initiated by individuals of any social rank, the courts contended with a range of issues that were characteristic of the wider concerns of community members. The limiting factor for historians is that the vast majority of communal registers are still in manuscript so that at present most *pinkassim* are accessible to only a small number of specialists.[5] Registers that have already appeared in print, including various communal and court protocols, are of particular value because they offer readily available material that will enable scholars to construct a detailed picture of judicial practice in its various institutional settings.[6] Although the growing body of judicial records that has been published in recent years offers detailed evidence of how rabbinical and lay courts ruled on a host of issues, these sources have their own limitations. Except in the rarest of circumstances, neither rabbinic nor lay court records indicate the sources upon which the court relied, nor do they provide the rationales for the rulings they issued. They also do not indicate how individual judges ruled on any judicial matter.[7] That said, there is clearly much to be learned from these records about the judicial practice of rabbinic courts at the institutional level.[8]

[4]For summaries of cases that were adjudicated by Metz communal officials who constituted a lay court on certain occasions, see the Pinkas of the Community of Metz (1749–1789), Archives of the Jewish Theological Seminary of America, ms. 8136, fols. 85–86b, and the discussion in Jay R. Berkovitz, *Protocols of Justice: The Pinkas of the Metz Rabbinic Court, 1771–1789* (Leiden, 2014), 51–53.

[5]This concern is now being addressed by the International Pinkassim Project, under the auspices of the National Library of Israel in conjunction with the Central Archives for the History of the Jewish People in Jerusalem and the Simon Dubnow Institute for Jewish History and Culture at Leipzig University. The goal is to locate, catalog, and digitize Ashkenazic communal registers. For details, including scans of the first digitized *pinkassim* as well as a catalog of surviving *pinkassim*, see http://web.nli.org.il/sites/NLI/English/collections/jewish-collection/pinkassim/Pages/default.aspx.

[6]For examples of *pinkessei ha-kahal*, see Stefan Litt, *Protokollbuch und Statuten der Jüdischen Gemeinde Friedberg (16.–18. Jahrhundert)* (Friedberg, 2003), and *Jüdische Gemeindestatuten aus dem Ashkenasischen Kulturraum 1650–1850* (Göttingen, 2014). For the two recent publications of rabbinic court records, see Edward Fram, *A Window on Their World: The Court Diaries of Rabbi Ḥayyim Gundersheim; Frankfurt am Main, 1773–1794* (Cincinnati, 2012), and Berkovitz, *Protocols of Justice*.

[7]See Eliav Shochetman, "The Obligation to State Reasons for Legal Decisions in Jewish Law" [in Hebrew], *Shenaton ha-Mishpat ha-Ivri* 6–7 (1979–80): 335–38. Despite the distinct social/institutional roles assigned to *poseqim* and *dayanim*, many of the dilemmas that judges face in the general legal literature are similar to those that occupy *poseqim*.

[8]For efforts to characterize the jurisprudential trends in the Metz Beit Din, see Berkovitz, *Protocols of Justice*, vol. 1.

Rabbinic responsa offer a perspective on the judicial process that contrasts sharply with accounts found in communal and court registers. Issued most often in reply to halakhic queries submitted either by rabbinic peers who reworked questions asked of them by individuals or by judges seeking clarification of a legal ambiguity, responsa advance legal opinions that are based on classical sources. They typically encompass details of how a ruling was derived and where it stood in relation to earlier opinions and provide a summary of the interpretive strategies employed by the *poseq* in reaching his conclusion. In some instances, when a particular case had also been brought before a *beit din* or had been taken up somewhat less formally by *dayanim*, responsa were wont to include details of the adjudication process that might otherwise be hidden from view. Such details are vitally important for understanding the respective judicial roles of *dayanim* and *poseqim* and, more generally, the workings of the justice system in Jewish communities.[9] In the aggregate, data unearthed both from communal records and from rabbinic responsa offer important evidence of disparities between the offices of early modern *dayanim* and *poseqim*, their distinct personae, and their respective views of how judicial rulings are decided.

Efforts to uncover divergent approaches to decision making are hampered by several obstacles. First, little systematic research has been conducted to date on the range and ranking of sources that jurists and judges considered authoritative. Such an undertaking will require a concerted effort to collect data, subject it to rigorous analysis, and correlate these findings with the circulation of works of Jewish law in print and in manuscript.[10] Second, there has been little discussion of the rules that guided jurists and judges in the decision-making process. Compiling such a list would certainly advance our understanding of judicial practice, provided that the rules were examined within the context of concrete cases.[11] Third, an aversion to investigating

[9]The present analysis draws primarily on the following collections of responsa: Moshe Shimshon Bacharach and Ya'ir Ḥayyim Bacharach, *Resp. Ḥut ha-Shani* (Frankfurt am Main, 1679); Ya'ir Ḥayyim Bacharach, *Resp. Ḥavvot Ya'ir* (Frankfurt am Main, 1699); Gershon Ashkenazi, *Resp. 'Avodat ha-Gershuni* (Frankfurt am Main, 1699); Jacob Reischer, *Resp. Shevut Ya'akov*; Yosef Steinhardt, *Resp. Zikhron Yosef* (Fürth, 1773). See the discussion in Fram, *Window on Their World*, 68–86.

[10]For an example of the type of research on book publishing that has great potential for the history of Jewish legal interpretation, see Israel Ta-Shma, "Ḥiddushei ha-Rishonim—Their Order of Publication," *Kiryat Sefer* 50 (1975): 325–36. It should be noted, however, that since the object of Ta-Shma's investigation was primarily talmudic novellas, the relevance of his investigation specifically for the history of legal decision making is less apparent.

[11]See Eliav Shochetman, *Civil Procedure in Rabbinical Courts* [in Hebrew] (Jerusalem, 2011), 3:1539–41 for a listing of rules (*kellalei pesiqah*, *shikulei pesiqah*) that are discussed briefly throughout his study. Except for one brief comment (3:1106–7), there is no sustained treatment of these rules in Shochetman's entire work.

both wider trends in halakhic decision making and the impact of external factors has dominated the field of Jewish legal history. The difficulty stems from the sheer volume of enormously detailed works of Jewish law that have been produced over the centuries and the challenging technical demands they pose. Accordingly, much of the research devoted to the history of Jewish law has tended to concentrate disproportionately on individual *poseqim*, though an impressive body of scholarship on broader themes has been produced by a smaller number of scholars, most of whom were trained or were active in Israel. The latter have produced works including, most notably, Menachem Elon's multivolume opus on Jewish law; Jacob Katz's studies of Jewish communal life, Jewish-gentile relations, and ritual; Eric Zimmer's works on late medieval *batei din* and *poseqim*; and Haym Soloveitchik's studies of medieval pawnbroking and wine production. These and other important contributions to Jewish legal history have focused mainly on the medieval period, whereas Jewish law in the early modern period is seldom considered either within the wider historical context or in terms of the interpretive methods of leading *poseqim*.[12]

Gaining an appreciation of the judicial process in its historical context is further impeded by the muted voices—indeed, in most cases, the silence—of *dayanim*, which may be attributed in large measure to the propensity of many legal systems to disguise the contributions of individual judges in order to protect them against claims of personal responsibility. Furthermore, it is evident that much of what we know about the judicial practices of *dayanim* reaches us via the very same responsa that are critical of the methods employed by the *dayanim* and of *batei din* in general. Although extra caution must certainly be used when consulting these sources, the value of the empirical data furnished by responsa, especially with respect to judicial procedures and patterns of litigation, cannot be denied. The effort necessary to meet these challenges may be daunting, but the promise of novel insights in the field of Jewish legal history can be expected to repay this investment

[12] See Menachem Elon, *Jewish Law: History, Sources, Principles*, 4 vols., trans. Bernard Auerbach and Melvin J. Sykes (Philadelphia, 1994); Jacob Katz, *Tradition and Crisis: Jewish Society at the End of the Middle Ages*, trans. Bernard D. Cooperman (New York, 1993), and *Exclusiveness and Tolerance* (London, 1961), and *Divine Law in Human Hands* [in Hebrew] (Jerusalem, 1998); Eric Zimmer, *Jewish Synods in Germany during the Late Middle Ages, 1286–1603* (New York, 1978), and *The Fiery Embers of Scholars: The Trials and Tribulations of German Rabbis in the Sixteenth and Seventeenth Centuries* [in Hebrew] (Jerusalem, 1999); Haym Soloveitchik, "Pawnbroking: A Study in Ribbit and of the Halakah in Exile," *Proceedings of the American Academy for Jewish Research* 38/39 (1970–71): 203–68, and *Wine in Ashkenaz in the Middle Ages: Yeyn Nesekh—A Study in the History of Halakhah* [in Hebrew] (Jerusalem, 2008); Ephraim Kanarfogel, *The Intellectual History and Rabbinic Culture of Medieval Ashkenaz* (Detroit, 2012); Edward Fram, *Ideals Face Reality: Jewish Law and Life in Poland* (Cincinnati, 1997).

several times over. Filling the aforementioned lacunae will advance our understanding of the social, political, economic, and cultural influences upon the courts and will enable historians to chart the varieties of legal interpretation and methodology exercised by *poseqim* and *dayanim*, especially with respect to conceptions of freedom and constraint that are at the heart of judicial theory and practice.[13]

The fact that the functions of the *poseq* and *dayan* were in some instances discharged by the same person undeniably complicates the typology set forth here but does not invalidate it.[14] *Poseqim* who also served as *dayanim* were arguably in a category of their own, and it appears that the performance of both functions by a single individual became less common over the course of the early modern period as the office of *dayan* was steadily professionalized. Examples of halakhic authorities in the early modern period who served in both capacities suggest that there was a tacit acknowledgment—and even acceptance—of the boundaries that set apart the obligations required of the two personages. The career of Rabbi Arye Loeb Günzberg is a case in point. His regular duties as chief justice of the Metz Beit Din, his continuing commitment as a *poseq*, his involvement as dean of the Metz yeshivah, and his communal responsibilities were all discrete elements of a complex rabbinic persona. While there were, unquestionably, common interests and concerns shared by *poseqim* and *dayanim*, as there were when they interpreted communal statutes,[15] the emphasis in the present essay is on the divergences between them that became increasingly significant. Differences in the two literary genres mentioned above—court records and responsa—illustrate the unmistakably distinctive functions of judge and jurist. However, it is perhaps the two institutional venues where law was decided—the *beit din* (court) and the *beit midrash* (study hall)—that will yield a deeper understanding of their distinguishing characteristics.

Whether one views the activity of jurists and judges as primarily legislative or judicial hinges in part on how the contested relationship of law and

[13]Treatment of judicial freedom and constraint in Jewish law has been somewhat thin. See Norman Lamm and Aaron Kirschenbaum, "Freedom and Constraint in the Jewish Judicial Process," *Cardozo Law Review* 1 (1979): 99–133; Elon, *Jewish Law*, 2:945–86.

[14]For examples of how R. Bacharach handled cases as a *dayan*, see Y. H. Bacharach, *Resp. Ḥavvot Ya'ir*, nos. 62, 78, and 180. See no. 62 for his characterization of the responsibility incumbent on a *poseq* to adjust his perspective when serving in a judicial capacity.

[15]On the interpretation of communal statutes, see Jonathan R. Macey, "Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model," *Columbia Law Review* 86 (1986): 223–68. See also Jonathan R. Macey and Geoffrey P. Miller, "The Canons of Statutory Construction and Judicial Preferences," *Vanderbilt Law Review* 45 (1992): 647–72. On the interpretation of Jewish communal documents and enactments, see Elon, *Jewish Law*, 1:422–73.

society is understood. Some legal scholars, especially those of a religiously conservative ilk, argue that opinions issued by *poseqim* are, by definition, impervious to social, economic, moral, or political considerations and that these factors are taken into account by judges only. This assessment, which is partly related to objections to the claim that law is distinct from society, is based principally on concerns that Jewish law will be regarded as historically contingent.[16] Scholars who, by contrast, view law within a historical framework maintain that *poseqim*, like *dayanim*, are influenced by "external" forces and in some instances consciously decide the law with these in mind. There is no disputing the fact that interpreters of the halakhah have invariably been constrained by text and precedent; however, the boldest have sidestepped these restrictions by dint of diverse methods of reinterpretation designed to maintain the illusion that the Jewish legal tradition remains largely unchanged despite substantial social, cultural, and political transformations over the centuries.[17]

Changes in the functioning of rabbinic courts and in their general standing resulted from two significant developments that unfolded in western and central Europe over the course of the early modern period. First, expulsions of Jews from most of western Europe and from many central European communities left the institutions of Jewish life in disarray. The number of rabbinic courts declined sharply, and those that remained had weakened substantially or were barely functioning. As a result, the office of *dayan* was stripped of the more secure institutional foundation it had enjoyed in the medieval era. Despite major rebuilding programs that accompanied resettlement efforts in the west, rabbinic courts remained largely impermanent until the mid-eighteenth century. As a rule, courts were limited to the free imperial cities, ecclesiastical territories, and Habsburg possessions. In 1603, a synod convened at the autumn trade fair in Frankfurt am Main called for the establishment of five regional rabbinic courts that were granted appellate authority in Frankfurt, Worms, Friedberg, Fulda, and Günzburg.[18] The creation of regional courts was part of a larger effort to form territorial rabbinates and to appoint district judges (*dayanei medinah*); regional panels were intended for litigants who

[16] See, e.g., the multivolume oeuvre of J. David Bleich, *Contemporary Halakhic Problems* (New York, 1977–), and "Lomdut and Pesak: Theoretical Analysis and Halakhic Decision-Making," in *The Conceptual Approach to Jewish Learning*, ed. Yosef Blau (New York, 2006).

[17] The Tosafists are a case in point. Their redefinitions freed them from the constraints imposed by precedent and reduced the appearance of innovation in their writings. On Tosafist methods of interpretation, see Kanarfogel, *Intellectual History and Rabbinic Culture*, 37–110.

[18] Mordechai Breuer, "The Early Modern Period," in *German-Jewish History in Modern Times*, ed. Michael Meyer (New York, 1996), 1:88.

wished to appeal arbitration rulings in their local communities.[19] Pronouncements admonishing community members not to bring disputes to non-Jewish courts were among the resolutions passed by the rabbinic and lay assemblies to strengthen autonomous jurisdiction. Evidence of the increased prevalence of litigation in non-Jewish courts, alongside new restrictions imposed by the state on the scope of rabbinic authority, suggest that rabbinical jurisdiction had weakened during the period under discussion. Additionally, the heavy reliance on rabbis who were imported from the east and appointed to various communal positions reveals clearly that local rabbinic leadership was slow to emerge. There seems to have been a dearth as well of competent individuals who could serve as professional *dayanim*.[20]

Second, the growth of constitutionalism in early modern western and central Europe further shaped the character of Jewish communal organization and strengthened its governance structure.[21] This also explains why the weakened state of the rabbinate cannot be taken as evidence of the waning of Jewish communal authority.[22] Social and political measures that were introduced in order to advance the organization and regulation of communal life were recorded in quasi-constitutional documents—*pinkessei ha-kahal*—starting in the sixteenth century.[23] Modern constitutionalism, which stood in

[19] Ibid., 1:203–4. See also Eric Zimmer, *Jewish Synods in Germany during the Late Middle Ages, 1286–1603* (New York, 1978), 71, 96–99.

[20] See Breuer, "Early Modern Period," 1:253–54. For divergent models of rabbinic appointment and succession in rural and urban areas in northeastern France, see Jay R. Berkovitz, *Rites and Passages: The Beginnings of Modern Jewish Culture in France, 1650–1860* (Philadelphia, 2004), chap. 1. For evidence of the decline of traditional rabbinic jurisdiction in the eighteenth century resulting from the Prussian Jewry laws of 1722/23, 1730, and 1750, see Alan Mittelman, "Continuity and Change in the Constitutional Experience of German Jewry," *Jewish Political Studies Review* 13, nos. 3–4 (Fall 2001): 71–105. The law of 1730, in particular, sought to restrict rabbinic jurisdiction to ceremonial and ritual functions, but Jewish courts persisted as forums for arbitration to which Jews were able to turn voluntarily. If litigants were not satisfied with the decision of the arbitrators, they could seek binding justice in the civil courts; this became an increasingly widespread phenomenon. For evidence of vigorous activity in the rabbinic courts alongside increased recourse to *arkha'ot* (non-Jewish courts), see the records of the Frankfurt and Metz *batei din*.

[21] On the emerging role of early modern constitutionalism, see James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton, NJ, 1990), 41–45, 61–73, 84–86. For additional sources on the history of the Jewish community, see Salo W. Baron, *The Jewish Community: Its History and Structure to the American Revolution* (Philadelphia, 1942); Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (New York, 1924).

[22] Fram, *Window on Their World*, 54–62.

[23] See Litt, *Protokollbuch und Statuten* and *Jüdische Gemeindestatuten*. On the medieval foundations of constitutionalism, see Janelle Greenberg and Michael J. Sechler, "Constitutionalism Ancient and Early Modern: The Contributions of Roman Law, Canon Law, and English Common Law," *Cardozo Law Review* 34 (2013): 1021–47.

opposition to absolutism, was the foundation of limited government through checks and balances and the separation of powers.[24] In communities that were founded on constitutionalism there appears to have been a greater tendency to cooperate and coordinate with the surrounding legal system at either the municipal or the state level. Even so, a range of political, legal, and cultural factors certainly had bearing on the frequency and scope of this phenomenon.

Options for the settlement of differences varied according to community and region. While in most instances disputes were brought before the local rabbi and were subsequently presented to a *poseq*, a *dayan*, or a *beit din* (either rabbinic or lay) for resolution, the type of *beit din* to which litigants turned could range from a standing court to an ad hoc tribunal created by the two parties via the method known as *zabla*, an acronym for *zeh borer lo eḥad* (each chooses one [judge]).[25] Alternatively, litigants might opt to settle their differences in a non-Jewish court, though depending on the circumstance such a decision could very well be in violation of communal regulations or of Jewish legal tradition.[26] These alternatives were not in actual fact a matter of choice, however. The size of the community, its location, and the legal traditions that prevailed there determined which of the options was most apposite. Thus, in paragraph 7 of the oldest known Ashkenazic rabbinic contract, produced in Friedberg in 1574, it was stated that the community maintained a court of five that included the *av beit din* (head of the rabbinic court), the cantor, and three other judges. Paragraph 11 stated that

[24]See Neil Walker, "Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship," *Rechtsfilosofie & Rechtstheorie* 39 (2010): 206–33.

[25]Non-rabbinic "lay" courts employed communal officials to adjudicate civil matters based on principles of equity and common sense. On early modern lay courts, see Elon, *Jewish Law*, 1:27–28, 31–32; Katz, *Tradition and Crisis*, 80–82, 297 nn. 25–26, 298 nn. 30–31. On lay courts in eighteenth-century Metz, see Berkovitz, *Protocols of Justice*, 1:52 n. 20, 55 n. 27, 85 n. 15.

[26]The records of the Frankfurt and Metz rabbinic courts reveal concern that litigants might go to the general courts if they were displeased with the court's ruling. See Fram, *Window on Their World*, 121 n. 51 regarding a stipulation imposed by the Frankfurt Beit Din that litigants who failed to obey the court's ruling would pay a fine to the Jewish community and to the non-Jewish authorities. In Metz, litigants were required to sign an agreement in advance that they would "affirm and abide by" (*le'asher u-lekayyem*) the decision of the court. See Berkovitz, *Protocols of Justice*, vol. 1, pt. 1, no. 74, 24b, and vol. 2, no. 571, 119b–120a. Owing to the disjuncture between the prescriptive and historical sources—prescriptive sources that severely condemn recourse to non-Jewish courts and the growing body of evidence indicating that adjudication in non-Jewish courts was more normative than was once believed—the subject is in need of a new, systematic, and comparative treatment. For now, see Azriel Hildesheimer, "Gentile Courts in Ashkenaz at the End of the Middle Ages," in *Proceedings of the Tenth World Congress of Jewish Studies* (Jerusalem, 1990), 3:217–24; Fram, *Window on Their World*, 50–62; Berkovitz, *Protocols of Justice*, 1:108–11, 131.

litigants could decide to argue their case before the *beit din* instead of taking their dispute to the rabbi for either adjudication or arbitration.[27] As noted above, Friedberg was later included among the five permanent appeals courts established in 1603. *Poseqim*, by contrast, were usually approached with a request for a learned opinion that would certainly have bearing on how the disagreement between the parties would be resolved, though the opinion was often not meant to be a definitive ruling. In a typical case before the *beit din*, *dayanim* listened to arguments presented by the litigants, weighed the evidence, conducted further investigations as necessary, and either rendered a judgment or brokered a settlement. The general inclination to work toward a settlement acceptable to both parties was based on a long-standing talmudic tradition but was also consistent with trends in general judicial practice.[28]

With the exception of regional courts that were established in several German cities, rabbinic courts in most western communities tended to be impermanent until the tide turned in the eighteenth century. Comments by Rabbi Jacob Reischer (ca. 1670–1733) based on his experience on the great *beit din* of Prague and as *av beit din* in Anspach, Worms, and Metz suggest that *zabla* courts were the favored forum in most cases. He discussed in detail the prevailing custom in Metz where the community did not appoint fixed judges (*dayanim kevu'im*) but settled disputes by forming semi–ad hoc *batei din* via the method of *zabla*, with the *av beit din* serving as the third judge:[29]

> In many communities, even though they had permanent judges, there were numerous cases in which the parties compromised and agreed to litigate in *zabla* proceedings. Indeed, even in those communities that had permanent courts, there were special cases, normally, highly significant ones, in which *zabla* arbitration was the preferred option so that true justice would be achieved. . . . In our town, there is no fixed court, and we use the *zabla* method, which is the custom of the pious men of former days, and is in accordance with talmudic practice. . . . *Zabla* is also to be recommended in our days since the town elders often appoint their relatives and acquaintances as permanent judges even though they are neither honest nor worthy.[30]

[27]This was an agreement between the *parnassim* (communal officials) and R. Todros Man Shapira. See Litt, *Protokollbuch und Statuten*. In the Friedberg Pinkas manuscript (the earliest held at the Jewish Theological Seminary Archives), the rabbinic contract is on fols. 60b–61a.

[28]For examples of compromise settlements enacted by the Metz Beit Din, see Berkovitz, *Protocols of Justice*, 2:96–97, 121–22, 494–97. For the talmudic discussion of *pesharah*, see BT Sanhedrin 6a–b, JT Sanhedrin 1:1.

[29]The *av beit din* routinely served as the third member of *zabla* courts, indicating that the existence of this position was not proof that there was a standing *beit din*.

[30]Reischer, *Resp*. *Shevut Ya'akov*, pt. 2, no. 143.

We learn from Reischer that in some communities *zabla* courts operated alongside permanent courts, though in Metz there was no fixed court until later in the eighteenth century.

Reischer reported that some of the Metz community leaders expressed an interest in creating a fixed court, and although he conceded that they had the authority to do so, he expressed strong opposition to such attempts. First, he argued, these were at variance with established custom, and second, there was no assurance that a fixed court would be more effective in resolving disputes that could not be settled via the prevailing *zabla* system. Reischer made the case for the *zabla* court as a more historically authentic method, fully consistent with the talmudic tradition (Sanhedrin 23a) and more likely to achieve true justice. Finally, he argued that experience demonstrated that *zabla* was preferable, "particularly in these times when it is customary for leaders to appoint their relatives even when they are not qualified, which is not the case with *zabla*, because this will serve as a corrective even if one of the *dayanim* is not suitable, since the other's choice will balance it out and the result will be acceptable to both parties." Therefore, wrote Reischer, even in communities where there were fixed judges, it was customary to seek a compromise via a *zabla* court when a large sum was in dispute. He concluded that the practice should not be changed, as it was a a well-established custom (*minhag vatiqin*) that rested on solid halakhic foundation (*shurat hadin veha-halakhah*). Some attributed the *zabla*'s advantage to the balance of views it naturally fostered or to the fact that each of the judges selected by the litigants acted on behalf of the party that chose him, effectively serving as an attorney.[31] The difference between a *zabla* court and a community-established institution was that the former derived its authority from the consent of the litigants (*kiblu alayhu*), while the community-established court enjoyed the right to summon anyone subject to its jurisdiction and to compel his appearance via the threat of social, economic, or religious penalties.[32]

Reischer's account of conditions in Metz corresponds with what we know from other sources. Data culled from seventeenth- and eighteenth-century

[31] See *Encyclopedia Talmudit*, s.v. "Zabla," vol. 11, 685–86, nn. 20–21.

[32] Reischer, *Resp. Shevut Ya'akov*, pt. 1, no. 137, notes that *dayanim* who were chosen but were not *gemiri*—learned—were disqualified from judging, as R. Moses Isserles ruled in his gloss on *Shulḥan 'Arukh*, Hoshen Mishpat 3, unless the litigants formally accepted their authority. According to Isserles, in his gloss on Hoshen Mishpat 3:1, "if there are fixed judges in the city, a litigant cannot say 'I will not take my case before them but instead before a *zeh borer*, and so is the custom in our city.'" For views on the disqualification of a *dayan* serving on a *zabla* court because he was a relative, close friend, or enemy, see Hoshen Mishpat 22, end of par. 1; Y. H. Bacharach, *Resp. Ḥavvot Ya'ir*, no. 2; Joseph Colon, *Resp. Maharik*, Shoresh 16. For an overview, see *Encyclopedia Talmudit*, s.v. "Zabla," vol. 11, 684–97.

records suggest that fixed rabbinic courts were, with some important exceptions, largely unknown in central and western European communities until the second half of the eighteenth century. In eastern Europe, however, even in the seventeenth century, standing courts were part of the established order of communal life. Although a fixed court in Frankfurt dated from the 1620s and a second court was established in the 1690s, it appears that the communal court emerged decades later as the exclusive venue for the resolution of disputes. The relatively late appearance of communal courts in the west may be a reason that official registers of cases in Metz and Frankfurt were first compiled only in the 1770s, though the increasing importance attached to record keeping cannot be discounted. The east-west disparity in the institutional history of *batei din* is most certainly a reflection of the vastly different histories of communal life in eastern and western Europe.[33]

While the rebuilding of communities and the emergence of prominent rabbinic leadership in western and central Europe still proceeded rather deliberately in the seventeenth century, the larger and more established communities in the east offer greater evidence of institutional stability. In contrast to the scarcity of sources indicating precisely when rabbinic courts were formally established in communities west of Prague, eastern European communal records attest to the ubiquity of *dayanim* who were formally appointed to the office by the community.[34] Communal *pinkassim* referred to them by the titles *dayanei ha-kehillah* (communal judges) or *dayanim kevu'im*. The Kraków Pinkas indicates clearly that there were already fixed courts served by *dayanim* in 1595, and legislation (*takkanah*) requiring *dayanim* to record their decisions in an official register corroborates the institutional stability of the *beit din*. The possibility of conducting arbitration was also recorded in the Kraków Pinkas, though it is not clear that this was pursued expressly in *zabla* courts.[35] Overall, the situation in Kraków was consistent with the view of R. Moses Isserles (1520–72, known by the acronym Rema), who had expressed a distinct preference for fixed courts: "In my opinion, *zabla* is only applicable in a town lacking a fixed court. Where there is a fixed court, no litigant has a right to insist upon *zabla*. And this is the practice in our town."[36]

[33]For evidence from the High Middle Ages that there was no fixed rabbinic court in Metz, as intimated by Reischer, see Kanarfogel, *Intellectual History and Rabbinic Culture*, 62–64.

[34]In contrast to the situation in the west, communities and law courts continued to function despite the collapse of Poland after 1656. It is interesting to note that *zablas* evidently functioned in areas where there were firmly established courts, though this may have been primarily for purposes of arbitration or in temporary situations, as suggested by the formation of a *zabla* described in *Pinkas Va'ad Arba Aratzot*, ed. Israel Halpern (Jerusalem, 1945; 2nd ed., ed. Yisra'el Bartal, Jerusalem, 1989/90), no. 21 (Spring 1595).

[35]Kraków Pinkas, 1595, in Halpern, *Pinkas Va'ad Arba Aratzot*, no. 49, 331–33.

[36]See R. Moses Isserles, gloss on *Shulḥan 'Arukh*, Hoshen Mishpat 3:1.

The *Takkanot* of Moravia (1650) contained many references to *dayanei ha-kehillah*. For example, a reduction in compensation for a *melamed* (teacher) was to be decided by "*dayanei ha-kehillah* or by the rabbi." Article 64 stated that a civil claim must be brought before the judges in one's community or before the *av beit din*, "if there were in that particular community a rabbi or permanent judges."[37] Similar references appeared in Poznan and Kraków. It is noteworthy that an effort to delineate jurisdictional boundaries was undertaken in Kraków: civil matters were apparently the exclusive domain of *dayanei ha-kehillah* and not lay officials, while the *dayanim* were warned to steer clear of matters that were beyond their authority—presumably public policy issues.[38] For reasons that are not clear, the foregoing references to *dayanei ha-kehillah* appeared in only a handful of responsa.[39] In eighteenth-century Prague, resident scholars "functioned as adjunct members of the rabbinical court." There were five *Oberjuristen* (senior jurists) who served alongside the *av beit din* as associate judges, and there were also six "junior judges" for small claims,[40] but this was not typical of communities in either the east or the west.

Several factors characteristically set *dayanim* and *poseqim* apart in their approaches to the issues they were asked to address. First, *dayanim* carried out their duties, as a rule, in close proximity to the opposing parties and may have found it difficult to disengage themselves from the maelstrom that commonly surrounded a dispute. Unavoidable exposure to social and political forces related to the case at hand presumably had bearing on their understanding of the immediate legal questions and the wider concerns these engendered. *Poseqim*, by contrast, tended to be more removed from the opposing sides; their analysis of the legal issues was more likely to be detached, much like that of a jurisconsult commissioned to write opinions that were meant to assist the court or a town in forming its position on a policy question or in crafting legislation. Second, the implicit function of the *dayan*, as

[37] Israel Halpern, ed., *Takkanot Medinat Mehrin* (*Consitutiones Congressus Generalis Judaeorum Moraviensium, 1650–1748*) (Jerusalem, 1952), 1650, nos. 11 and 64.

[38] Halpern, *Takkanot Medinat Mehrin*, no. 117. The following is the text indicating a clear division of labor between communal judges and lay officials: "Judges of the community will judge civil cases, and communal leaders must not stick their head into civil matters and judges must not stick their heads in matters that do not involve them."

[39] The phrase does not appear at all in Y. H. Bacharach, *Resp. Ḥavvot Ya'ir* or in Reischer, *Resp. Shevut Ya'akov*. It appears once in *Resp. Maharam Lublin*, no. 108 (referring to Kraków), twice in Menahem Mendel Krochmal, *Resp. Tzemah Tzedek*, nos. 24 and 79, once in Tzvi Ashkenazi, *Resp. Hakham Zvi*, no. 76, and in one responsum in Ezekiel Landau, *Resp. Noda B'Yehuda*, vol. 1, Even ha-Ezer, no. 54. These and many other references to *dayanei ha-kehillah, dayanim kevu'im*, and *beit din kavua* were commonplace in eastern European *pinkassim*, but are almost never found in western and central European sources.

[40] Breuer, "Early Modern Period," 1:170.

understood increasingly in the seventeenth and eighteenth centuries, was to apply authoritative rules, not to make law, interpret law, or exercise judicial discretion. He was, in Montesquieu's words, "no more than the mouth that produces the words of the law." The defining ethos of the judicial office was based, in theory, on consistency and impartiality, which required judges to subordinate their personal views in order to be faithful to the law. Were a judge or a court to decide a case on the basis of a subjective judgment or legal interpretation, the judicial ruling ran the risk of being viewed as having unduly overstepped its authority.[41]

Early modern *dayanim* showed no signs of reinterpreting the law, at least not discernibly; litigants, we may assume, approached the *beit din* with the expectation that the court would enforce the law, not remake it. *Dayanim* generally followed existing statutes, whereas the resourceful *poseq* often was able to set himself free through argumentation, a tool that was not available in the same way to *dayanim*. These limitations on the judicial freedom of judges contrast sharply with the talmudic portrait that depicts a judge as far freer to interpret the law independently. As a rule, talmudic judges exercised more than a modest degree of discretion with respect to existing halakhic rules and were thereby able to ignore the weight of legal precedent on many occasions. The categories of judicial discretion and constraint cannot be applied equally to jurists and judges in the medieval and early modern periods, however, making it effectively impossible to learn much at all about medieval and early modern judges from the talmudic examples of judicial conduct.[42] Early modern *poseqim*, as compared to *dayanim*, enjoyed far greater latitude in interpreting the law, though it is important to emphasize that the judicial freedom they exercised varied widely from *poseq* to *poseq* and owed more to personal proclivities than to cultural or regional factors.

When *dayanim* were uncertain about a legal detail or about how the normative law ought to be applied, they were likely to turn to *poseqim* for clarification. Whether formally or informally, *poseqim* assumed responsibility to clarify the law, its scope, and its application in the case under review. This responsibility, though ill-defined, was a public role that was based on the *poseq*'s presumed legal expertise and proficiency in legal interpretation.

[41] On those occasions when an innovative or unprecedented ruling was issued, it was not uncommon for judges or the court to stress the conservative nature of their ruling by characterizing innovative judgments as no more than carefully reasoned interpretations of existing law. See Jerome Frank, *Law and the Modern Mind* (New York, 1930), 35–37.

[42] See Ben Menahem, *Judicial Deviation*, chap. 1, where jurists and judges are often referred to interchangeably. It may be that the overlap and similarity pertain more to *amoraim* (talmudic sages, 200–500 CE) who are usually understood to function in a judicial capacity though their resemblance to *poseqim* in medieval and modern times is more pronounced.

In early modern responsa one finds many instances when *poseqim* were approached either by *dayanim* seeking expert advice or by litigants wishing to learn whether the judgment rendered by the *beit din* was free of error. This is consistent with a more general phenomenon noted by legal historians Shaunnagh Dorsett and Shaun McVeigh: "One audience for the jurist is the judge." It is "the responsibility of the jurist to provide … clarification through the exposition of fundamental principles. … It is the jurist as legal scientist who represents the meaning of the law" and "the primacy of analytical jurisprudence."[43] The frequent exchanges between *poseqim* and *dayanim* that are recorded in the responsa literature offer evidence of what may be assumed to have been ongoing interaction between the two types of judicial personages and of the authority structure that governed their relationship.[44]

Poseqim were not all in agreement on the demands made of *dayanim* in the pre-1750 period. While *dayanim* were hardly free of criticism in the late Middle Ages,[45] it appears that the greater prevalence of dissatisfaction in the early modern period was related both to the rifeness of untrained judges and to the growing differentiation of judges from jurists with respect to judicial and juristic functions.[46] Some *poseqim* expressed heightened concern for potential abuses in the system, especially when litigants attempted to influence the opinion of judges. R. Meir Katznellenbogen of Padua (1473–1565) stated

[43] Shaunnagh Dorsett and Shaun McVeigh, "The Persona of the Jurist in Salmond's Jurisprudence: On the Exposition of 'What Law Is,'" *Victoria University of Wellington Law Review* 38, no. 4 (2008): 776–77.

[44] The following examples illustrate the nature of this interaction: (1) In *Resp. 'Avodat ha-Gershuni*, no. 3, R. Gershon Ashkenazi was asked for his opinion on a ruling of *dayanim* in a commercial dispute that was subsequently challenged by one of the litigants who claimed that one of the witnesses was unqualified. Following a lengthy consideration of the core legal issues in the case, he concluded that the witness was qualified and that the *dayanim* had ruled correctly. (2) In *Resp. 'Avodat ha-Gershuni*, no. 74, Ashkenazi was asked to rule on a dispute concerning a betrothal contract that did not spell out the details of the penalty clause. He stated that the general practice in a civil dispute was to respond only to *dayanim* who were judging the case. This suggests that there were normative guidelines that were followed by *poseqim* in such matters. (3) In *Resp. Ḥut ha-Shani*, no. 71, R. Moshe Shimshon Bacharach addressed his responsum to *dayanim* in Frankfurt. (4) In *Resp. Zikhron Yosef*, Hoshen Mishpat, no. 5, R. Yosef Steinhardt indicated that he had been asked to express his opinion on "a question I was asked by a judge who sat on a court" regarding a will of a dying man.

[45] See, e.g., Yitzhak (Eric) Zimmer, *The Fiery Embers of Scholars: The Trials and Tribulations of German Rabbis in the Sixteenth and Seventeenth Centuries* [in Hebrew] (Jerusalem, 1999), 113–14.

[46] On distinctions between judges and jurists in their training and authority, and specifically with respect to the deference of judges to jurists, see Peter G. Stein, "Judge and Jurist in the Civil Law: A Historical Interpretation," *Louisiana Law Review* 46, no. 2 (1985): 241–57, esp. 251–52.

that he and other *poseqim* had decided not to respond to any query related to an ongoing dispute unless they were approached by both parties. The reason, he explained, was that they had seen much corruption result from the unscrupulous behavior of litigants.[47] More vocal was R. Judah Loew ben Bezalel, the Maharal of Prague (ca. 1512–1609), in admonishing *dayanim* who violated judicial protocol by writing conditional decisions after hearing only one side's testimony (ex parte).[48] It stands to reason that if many early modern rabbinic courts in western and central Europe were impermanent until the second half of the eighteenth century, then the legal culture may not have been sufficiently developed to guarantee compliance with the best judicial practices. It also stands to reason that *dayanim* who served on ad hoc courts may have been in some instances untrained and even amateur, at least in the estimation of well-regarded *poseqim*.[49] There is much in the early modern responsa literature that points in this direction, but not all observers concurred.

Rabbi Moshe Shimshon Bacharach (1607–70), for one, defended *dayanim* against the demand that they record in writing the reason for their judgments. In *Resp. Ḥut ha-Shani* he argued that (a) they did not have the authority to render a judgment against the will of the litigants; they were selected by both parties, either as a court of arbitration or as a *zabla* court, and (b) there was no reason why they should submit their rulings to a *poseq* for review, since the premise that *dayanim* were subordinate to *poseqim* was, in his estimation, groundless, and *poseqim* therefore had no right to encroach on the authority of *dayanim*. For this reason, he issued a decree declaring that *dayanim* were under no obligation to send their rulings to the *poseq* or to put their judgments in writing.[50] It is worth noting that this view stood in blatant opposition to the ruling of *Shulḥan 'Arukh*, Hoshen Mishpat 14:4, which required a *dayan* to inform a litigant of the reason for the judgment against him in order to assure him that the judgment was not in any way partial. The obligation was even greater, according to R. Moses Isserles, if the litigant requested a written explanation. Bacharach's position was consistent with the minority view that limited the requirement to issue a written judgment to instances where the *beit din* enjoyed coercive authority.[51] The judicial frameworks discussed by R. Bacharach were, clearly, either *zabla* courts or arbitration panels.

[47] Meir Katznellenbogen, *Resp. Maharam Padua* (Venice, 1553), no. 40.

[48] Judah Loew b. Bezalel, *Sefer Netivot 'Olam* (Prague, 1596), 1, *Netiv ha-din*, chap. 2. According to Maharal, judges who acted in this way bore responsibility for aiding the litigant in becoming a "cunning rogue [*rasha 'arum*]."

[49] See Katznellenbogen, *Resp. Maharam Padua*, no. 43, for an extended discussion of the problem of untrained *dayanim*.

[50] M. S. Bacharach and Y. H. Bacharach, *Resp. Ḥut ha-Shani*, no. 27.

[51] See Hoshen Mishpat 14:4 and Rema gloss. Further, according to Rema, "the *dayan* is not obliged to write the reasons and proofs, but only the general arguments and the final ruling.

A generation later, discussion among *poseqim* continued to focus predominantly on impermanent courts. This emphasis is evident in the responsa published by Bacharach's son, R. Ya'ir Ḥayyim Bacharach (1638–1702), who devoted considerable attention to the role and authority of *dayanim* on *zabla* courts,[52] while little discussion, if any, of communal courts or community *dayanim* appeared in his work.[53] Moreover, in sharp contrast to his father, the younger Bacharach tended to be highly critical of the *dayanim* of his day and frequently voiced unconcealed discontent with their rulings. His perspective is evident in roughly a dozen cases in which he was asked to review a decision issued by a *beit din* and/or the performance of *dayanim*. In quite a number of instances *dayanim* turned to R. Bacharach with requests for guidance on inheritance issues and commercial disputes. In this respect, the *poseq* as embodied by R. Bacharach functioned as an appellate judge.[54] He provided clear instruction that was unmistakably intended to assist *dayanim* in their understanding of finer points of law that were likely to arise in the *beit din*.[55] On a number of occasions he questioned their technical competence when he found the reasoning for their rulings problematic. It was not uncommon for him to excoriate *dayanim* when a judicial decision had missed an important detail, overlooked a crucial talmudic passage, or misunderstood a fundamental legal principle.[56] In *Ḥavvot Ya'ir*, nos. 91–92, for example, R. Bacharach expressed shock to a *beit din* that had crafted a contract that was fundamentally flawed. He utterly rejected the validity of the document the *beit din* had produced, objecting to the inclusion of a conditional clause that wrongly bound the seller by certain obligations following the sale. He also challenged the failure of the *beit din* to formalize the agreement through the assumption

. . . And one only writes from a *beit din katan* to a *beit din gadol*, but a *beit din gadol* is not required to put its ruling in writing, as it is not suspected of erring.

[52] See, e.g., Y. H. Bacharach, *Resp. Ḥavvot Ya'ir*, nos. 2–3, 5.

[53] See, e.g., ibid., nos. 90–91.

[54] See ibid., nos. 90–93, 171, 97, and 131. For Bacharach's strong and lengthy reaction to criticism that was leveled against him by a *dayan* who opposed his ruling on commercial competition, see ibid., no. 42. On additional attention to the distinction between the functions of *dayan* and *poseq*, see ibid., no. 78. Cf. Reischer, *Shevut Ya'akov*, pt. 2, no. 145, where Reischer reports that he was approached by a *dayan* who was asked by litigants to devise "a compromise that approximates the law [*pesher karov le-din*]." The *dayan* asked Reischer for guidance on how to do this, as it appeared that one side should receive the entire amount. He responded that compromise requires division, and this is the reason why the *dayanim* in BT Bava Batra 133b were referred to as *dayanei ḥaẓaẓah* (judges who divide in half). The *dayan*, in Reischer's view, could decide according to his own judgment in order to make peace between the sides. In the case of *pesher karov le-din* the settlement should be one-third and two-thirds.

[55] See Y. H. Bacharach, *Resp. Ḥavvot Ya'ir*, nos. 62, 65, and 78.

[56] See, e.g., ibid., no. 165.

of an obligation via a ritualized act of acquisition (*kinyan sudar*). In another case, he objected vehemently to the settlement of a dispute via compromise because the argument used to substantiate the plaintiff's claim was deeply flawed owing to a judicial error. The evidence, he insisted, showed clearly that the alleged negligent party was responsible. R. Bacharach therefore derided the *dayan* for having persuaded the litigants to accept a compromise agreement.[57] In another case, he took a *dayan* to task for improperly drawing an analogy between two distinct matters. By so doing, argued R. Bacharach, the *dayan* overstepped his authority and came to a wrongful judgment.[58]

Equally deserving of censure, in the estimation of R. Bacharach, was a *dayan* who refused to affix his signature to the decision of the court because he disagreed with the judgment. Following a detailed analysis of Hoshen Mishpat 19, Bacharach concluded that the *dayan* must be forced to follow normal procedure because of *tikkun 'olam*—understood as a societal imperative—and must be punished for refusing to comply.[59] And on the question of written judgments, R. Bacharach expressed astonishment at Rema's statement that it was not obligatory for the judge to provide "reasons and proofs."[60] In R. Y. H. Bacharach's view, the failure of a *dayan* or

[57] Ibid., no. 45. The judges, according to Bacharach, were guilty of judicial error because they had improperly relied on the argument of *migo* to achieve the compromise. *Migo* (lit., insofar), a method used to establish the credibility of the plaintiff, was based on the premise that the plaintiff could have made an even stronger argument. It was unacceptable in this case because it could not serve as the basis for a judgment in favor of the plaintiff when the court was aware that there was nothing more to claim. Bacharach added that he would have publicized the matter as a judicial error were he not concerned about the public controversy that this would have caused.

[58] See ibid., no. 165. The phrase conveying the notion of a judicial error based on an imperfect analogy was "eikh ta'ah dayan bedimyono davar le-davar."

[59] Ibid., no. 147. The *dayan*'s attempt either to submit the case to *beit din ha-gadol* (a superior court) or to have *dayanim* added to the *beit din* was unacceptable if the other two *dayanim* were opposed. If the *mara d'atra* (communal rabbi) was the one who refused to sign, then the two remaining *dayanim* could issue a judgment as if there were three *dayanim*. Cf. Ashkenazi, *Resp. 'Avodat ha-Gershuni*, no. 108, concerning the question whether the selection of the third judge in a *zabla* court could be made by the two judges to the exclusion of the litigants. Ashkenazi's opinion was that although the two *dayanim* make the selection, it is not required that this be done without the knowledge of the litigants. Implicit in this ruling was the conviction that the involvement of the litigants would ensure a more equitable judgment. Cf. Reischer, *Resp. Shevut Ya'akov*, pt. 1, no. 138, concerning a *dayan* who saw that the other two judges were distorting the judgment and it was not possible for him to protest without causing severe difficulty. In Reischer's view he ought to state that he is unfamiliar with [the law] so that other *dayanim* would be added to the court. See Hoshen Mishpat 18:1 in relation to the foregoing responsum issued by Reischer.

[60] See *Pitchei Teshuvah*, Hoshen Mishpat 14, subpara. 10, in reference to Rema's gloss on Hoshen Mishpat 14 (n. 51 above).

of a *beit din* to conform to the principles of Jewish law represented a serious violation of the social compact and therefore demanded that the *poseq* use strong criticism and public censure against the recalcitrant *dayan*. In this case Bacharach urged the enactment of a communal ordinance to ensure compliance in the future. These cases presented an opportunity to clarify the principles that governed adjudication and judicial procedure, particularly in light of the well-defined boundaries that in Bacharach's view set apart the two judicial roles of *poseq* and *dayan*.[61]

Whether the range of responsibilities of *dayanim*, the degree of their compliance with legal guidelines, and the frequent dissatisfaction of *poseqim* with their performance diminished the respect and authority enjoyed by the *beit din* qua institution was a question that depended on a variety of factors. Certainly in the minds of *poseqim* the institutional standing of the *beit din* was paramount. For this reason, it appears, R. Moshe Shimshon Bacharach had ruled that evidence of judicial error on the part of *dayanim* (in a *zabla*) would not warrant redoing the case. He argued that a judicial error could be overlooked if it could be established that a judgment was based on "truth and justice" (*emet ve-tzedek*), that is, on equity. Accordingly, there was no justification for exposing *dayanim* to "double humiliation," and in one such case he recommended a compromise agreement in order to avoid disgracing the judges.[62] R. Ya'ir Ḥayyim Bacharach, for his part, went so far as to insist that a court ruling, or the signatures of the *dayanim*, enjoyed the halakhic status of *edei kinyan* (witnesses to a transaction), who were considered absolutely critical for the certification of a note of indebtedness. In his view, the signatures of *dayanim* carried sufficient legal weight so that even where there were no witnesses to provide authentication, the note could be certified by the court.[63] The impermanence of the *beit din* in Worms, where Bacharach resided, does not appear to have undermined its halakhic gravitas.

Dayanim and *poseqim* differed sharply with respect to the scope of the law that defined their respective functions. The differentiation between the two may well have been a reflection of uneven levels of training and erudition, though equally significant differences resulted from the institutional framework in which *dayanim* and *poseqim* labored. Rulings issued by *pose-*

[61] For other cases that reflect Bacharach's concerns about *dayanim* and the judicial process, see Y. H. Bacharach, *Resp. Ḥavvot Ya'ir*, nos. 3, 5, 42, 60, and 156.

[62] See M. S. Bacharach and Y. H. Bacharach, *Resp. Ḥut ha-Shani*, no. 60. Cf. Ashkenazi, *Resp. 'Avodat ha-Gershuni*, no. 31, which required a litigant to affirm and uphold the ruling of *dayanim*. The *poseq* considered this to be a weighty obligation that should not be second-guessed: "[One should] uphold all that was issued by the *beit din* and must not undermine or challenge them."

[63] Y. H. Bacharach, *Resp. Ḥavvot Ya'ir*, no. 78.

qim tended to be informed by broader communal concerns, whereas those of *dayanim* were more likely to evince a more limited halakhkic orientation. This is evident from the criticism of *dayanim* serving on *zabla* courts, where a relatively narrow conception of Jewish law prevailed. *Poseqim*, by contrast, embraced a more expansive notion of Jewish law that rested on greater erudition in talmudic and halakhic literature, and in communal law as well. The latter reflected the broader will and, in some instances, the political concerns of the community,[64] though the degree to which communal legislation was taken into account by *poseqim* or ignored by *dayanim* varied widely as it was contingent on a host of regional and institutional factors.[65] When applying the law, *dayanim* were expected to render judgments based on their understanding of prevailing norms and conventions. Regrettably, generalizations of this sort are not consistently reliable.

Centuries earlier, commenting on a question concerning an ambiguity in a communal *takkanah* (statute), the thirteenth-century Spanish *poseq* R. Solomon ben Aderet (Rashba) averred that the meaning was to be determined by the communal leaders at the time and was not to be based on the original intent of the framers of the statute. Ultimately, in his view, the *beit din*, serving as the agent of communal government, would make this determination, since "all depends on the understanding of the court in each place, in accordance with the terminology customarily used; as in the case of all laws that pertain to civil disputes, vows, bans, sanctifications, and oaths, the rule is to understand them according to common parlance."[66] In similar fashion, R.Y.H. Bacharach charged *dayanim* with responsibility for appraising the degree of humiliation that resulted from violent or aggressive speech. Insofar as humiliation was a social construction, it was necessary in his view to entrust the assessment of the phenomenon to persons who were experienced in rendering such a judgment. So it was, as well, with regard to altercations. It was agreed by *poseqim* that such matters were to be judged according to "the way of the world and human behavior." These were, in Bacharach's view, less a matter of divine law and more a matter of human judgment. Though

[64] This is consistent with the assumption of legal historians that the office of jurist was characterized by its allegiance to the will of the state (or the community).

[65] John Salmond, a leading theoretician of law and jurisprudence in New Zealand, carefully distinguished between judge and jurist based on the premise that the fundamental conception of law is located in the state and consists of "the body of principles recognized and applied by the State in the administration of justice." See John Salmond, *Jurisprudence; or, The Theory of the Law*, 2nd ed. (London, 1907).

[66] R. Solomon ben Aderet, *Resp. Rashba*, vol. 3, no. 409, vol. 4, no. 268, cited in Elon, *Jewish Law*, 1:449–51.

not empowered to interpret the law as *poseqim* were, *dayanim* nonetheless served as arbiters of established social norms.[67]

In short, *dayanim* may be likened to clinical experts responsible for discerning the facts of a case; they were expected to use their judgment to determine *how* to apply the law and, in certain circumstances, *which* law to apply. A judge's expertise was not primarily in law and legal theory but in the practical application of the law, much like a practicing physician who administers treatment to a patient based on a physical examination, in sharp contrast to the role of a scientist whose work in medical research, though not connected directly to the patient, is nonetheless critical to the patient's well-being. The role of the *poseq* was akin to that of the scientist, as his interests and concerns were primarily, though admittedly not always, theoretical. The challenge facing *dayanim*, regardless of the time period, was to determine the relative weight of legal principles, especially when there were two or more values or principles involved. *Poseqim*, for their part, were invariably obliged to consider the wider implications of the case for the community at large. For both *dayanim* and *poseqim* the question was at once practical and theoretical: which techniques were to be used in making these judicial determinations?[68]

From the mid-eighteenth century, with the establishment of permanent courts in the west, there was increased evidence of robust judicial functioning and the emergence of a more developed judicial culture. As the functions of *dayanim* became institutionalized and professionalized, the scope of their authority widened. The records of the Metz and Frankfurt rabbinic courts contain much that suggests that a reliable tradition of jurisprudence had evolved through the regularization of judicial procedures. Furthermore, there is ample evidence indicating that the courts had developed an independent authority, though still perhaps subject to the advice of jurists, that enabled them to render judgments that enjoyed the respect of both Jewish communal leaders and halakhic authorities. This was true with regard to the settlement of cases involving inheritance, guardianship, marital property, and various commercial and financial disputes. Especially far-reaching was the confidence with which the Metz Beit Din was able to rule on the sensitive issue of when to authorize

[67] Y. H. Bacharach, *Resp. Ḥavvot Ya'ir*, no. 65. The following are the two original formulations regarding humiliation and altercations, respectively: "שבענייני בושת הכל הולך אחר המובן" (para. 6) and "והסכימו כל הפוסקים שבענייני קטטות הולכים אחר סדר העולם ודרך הבריות" (para. 2).

[68] See, e.g., the role of *umdena d'mukhaḥ* (an established presumption) as a tool available to the *dayan* in determining that an oath could be reversed and administered to the claimant; Ashkenazi, *Resp. 'Avodat ha-Gershuni*, no. 91.

recourse to the non-Jewish courts and when to incorporate general law in its deliberations.[69]

Conclusion

Focusing on the respective roles of jurists and judges in the decision-making process, this essay has offered several observations on what can be termed the "delivery" of justice. On the basis of direct and indirect evidence drawn from responsa literature and communal records, it has suggested that the slow transition to fixed rabbinic-communal courts in western and central Europe was part of a larger historical process whose pace was influenced by factors that included the lateness in the resettlement in western/central European communities, the preoccupation with rebuilding communities, the late development of communal traditions in the west, and the role of the enlightened absolutist state. Also of interest was the impact of the growing recourse to non-Jewish courts, especially as it reflected differences between eastern and western/central European history and culture. At issue is whether these factors together constitute a pattern that accounts for regional differences with respect to Jewish law, community, and judicial practice.

Regional and institutional variations, including, especially, the role of communal legislation in the judicial process, account for many of the differences in the approaches of *dayanim* and *poseqim*. In the west greater legal authority was attached to communal legislation than in the east, though local forces were often at play. *Poseqim* such as R. Ya'ir Ḥayyim Bacharach viewed *takkanot ha-kahal* (communal legislation) as having a legal standing that superseded halakhah in matters pertaining to public welfare.[70] This corresponded to a general conception of the office of the jurist as subordinate to the will of the state. Bacharach, by his strong endorsement of communal authority and legislation, was in step with German jurist Samuel Pufendorf and others whose natural law theory was the basis for a state-based desacralized jurisprudence rooted in the administration of justice in society.[71] Once communal *batei din* were established in the west, as in Metz and Frankfurt in the second half of the eighteenth century, they came into their own as public

[69] See, e.g., Berkovitz, *Protocols of Justice*, vol. 2, no. 538 for a judgment that sought to ensure that the liability of guardians and their wives would stand up according to both Jewish law and French law. See also examples in cases in which the Metz Beit Din authorized litigants to seek justice in the French civil courts, in ibid., vol.1, pt. 1, no. 77.

[70] See Jay R. Berkovitz, "Crisis and Authority in Early Modern Ashkenaz," *Jewish History* 26, nos. 1–2 (2012): 191–99.

[71] Dorsett and McVeigh, "Persona of the Jurist," 771.

institutions that operated in full compliance with communal legislation and with the full confidence of communal government. The *dayanim* who were appointed to these courts assumed the role of representatives of the community at large, and the public character of these *batei din* was reflected in the preponderance of cases involving guardianship, inheritance, the division of marital property, and public morality. At the same time, as is especially evident in the Metz rabbinic court proceedings, the *beit din* of the later eighteenth century had emerged as an institution that was careful to conform to the civil law of the state to the fullest extent possible.