

JEWISH JUDICIAL AUTONOMY IN
NINETEENTH CENTURY JERUSALEM:
BACKGROUND, JURISDICTION, STRUCTURE

by

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1. *Introduction*

This study focuses on Jewish judicial autonomy in Jerusalem at the end of the Ottoman period, mainly the Sephardic court that was the official rabbinical court recognized by law. I will introduce the Islamic background of Jewish autonomy, including its relations with the Sharia courts, the new geo-political environment in which the official Sephardic court operated and the institutional framework within which it was located, the scope of its jurisdiction and the structure of the court.

The Sephardic rabbinical court was part of the official rabbinical institution, which was part of the Jewish community organization. At the head of the organization was the Chief Rabbi, whose Jewish title was *Rishon Lezion* (“The First in Zion”) and whose official Ottoman title was *Hakham Bashi*. This organization had close ties to the political and cultural order of the Ottoman Empire and fulfilled an important duty in those days. However, the disintegration of the Ottoman Empire at the end of WWI also spelled the end of the Jewish institutional organization. Nevertheless, the Sephardic rabbinical court of the Ottoman era served as a source of inspiration for the development of the Jewish judicial system in the period of the British Mandate, both with respect to the extent of judicial authority and with respect to the close connection between the rabbinical court and the institution of the rabbinate. These components of the Sephardic rabbinical court remain present, in principle, in the State of Israel to this day.

The Sephardic rabbinical court in Jerusalem was created and operated at a multidimensional historical junction. In 1841, the institution of the rabbinate in Jerusalem, and with it the rabbinical court, was officially recognized by the

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Ottoman authorities, following hundreds of years of *de facto* Jewish judicial activity. The political arena within which the rabbinical court operated changed considerably under the western penetration of Jerusalem and the region in general, despite the strenuous efforts of the Ottoman regime to control the process of change and modernization.

By the middle of this period, the Jews had become the largest group in Jerusalem, and at some point outnumbered the Christians and Muslims together. This demographic change was the result of large waves of emigration from Europe, in unprecedented numbers. Profound changes also took place in the internal composition of the Jewish community. The Ashkenazim, Jews of Eastern and Central Europe, became the largest community in the course of the 1870s, but members of various other communities from the Middle East, from the Maghreb, and from Central Asia also established new centers in Jerusalem. In Jerusalem, this massive immigration created an intensive encounter among Jewish ethnic groups, on a scale not known in Jewish history in the past.

With the Ashkenazim, the “new Jew”, shaped in modern Europe and having absorbed its values, made his appearance for the first time. He was no longer committed to the halakhic tradition of thousands of years, which *inter alia* recognized the importance of Jewish judicial autonomy, but saw the core of his identity in Jewish nationalism, which he hoped to realize in the only possible place, the Land of Israel, his historic homeland. Thus, the rabbinical court in Jerusalem operated in a period that was also critical for the Jewish tradition, which was being challenged and threatened by western modernism, including the cancellation of Jewish self-government institutions.

In spite of the importance of the Sephardic rabbinical court, no comprehensive study has been devoted to it. We may assume that this has to do with the fact that the modern, nationalist Jews took over the leadership of the Jewish community following the British conquest of the country. This group regarded the Ottoman period as the era of the old community (*Yishuv Yashan*), that preceded the new Zionist community which was building the modern nation and laying the foundations of the emerging State of Israel. From their point of view, the watershed event occurred in 1882, with the arrival of the First Zionist Immigration wave, and among them the radical group, the *Biluim*. For these immigrants, this was the starting point of the new community of the new Jew. The old community and its world were important primarily as the negation of what was to come afterwards, all of which was built in the mold of the Zionist movement in its places of origin in Eastern and Central Europe. Studies devoted to the end of the Ottoman period were interested in the period beginning in 1882, and focused on the elements from which the new community evolved on the eve of the emerging

state.¹ In the new world being built by the new Jew, and especially in his consciousness, there was no room for the rabbinical court, which belonged to the old community, was Sephardic, and was part of the Ottoman political and cultural fabric, hundreds of years old.

In recent decades there has been increased interest in the world of the old community. Several studies have addressed our topic. Some research has presented a comprehensive view of the Jewish community in the Land of Israel in the 19th century.² Studies have been written about the new communities in Erets Israel;³ the relationship between them and the old *Yishuv* in the 19th century;⁴ and about the cultural and religious relations between Sephardic and Ashkenazi Jews, including their relations in the judicial area.⁵ A comprehensive article was written about the Chief Rabbinate in Jerusalem in the Ottoman era, although it relates only marginally to the rabbinical court *per se*, which was part of the institution of the rabbinate.⁶ Another work discusses the Sephardic courts in neighbouring communities in Egypt and Syria, with which the court in Jerusalem had close contacts.⁷ A recent study discusses in detail the politics associated with the *Hakham Bashi* institution in other centers throughout the Middle East that were also under Ottoman rule.⁸ To these we must add biographical sketches of central personalities involved with the Sephardic judicial institutions in the period under discussion.⁹

Note, however, that these and other studies did not focus directly on the Sephardic rabbinical court in Jerusalem as a judicial institution, but they are important because they present the historical and political context in which this

¹ The Israel Academy of Sciences and Humanities initiated a prestigious series about the history of the Jews in Erets-Israel. The title of the first volume is Israel Kolatt (ed.), *The History of the Jewish Community in Erets-Israel Since 1882* (Jerusalem: Israel Academy of Sciences and Humanities & The Bialik Institute, 1989) (Heb.). The title in Hebrew is more explicit and specifies: "Since the First *Aliyah*". It is obvious that what happened previously belongs to another world.

² M. Eliav, *Erets Israel and its Yishuv in the 19th Century, 1777-1917* (Jerusalem: Keter, 1978) (Heb.).

³ I. Bartal, *Exile in the Homeland – Essays* (Jerusalem: Hassifria Haziyonit, 1994) (Heb.).

⁴ Y. Kaniel, *Continuity and Change, Old Yishuv and New Yishuv During the First and Second Aliyah* (Jerusalem: Yad Ben-Zvi, 1981) (Heb.).

⁵ Y. Kaniel, *In Transition – The Jews of Erets Israel in the Nineteenth Century: Between Old and New and Between Settlement of the Holy Land and Zionism. Selected Articles* (Jerusalem: Yad Ben-Zvi, 2000) (Heb.).

⁶ Y. Barnai, "The Status of the 'General Rabbinate' in Jerusalem in the Ottoman Period", *Cathedra* 13 (1979), 47-69 (Heb.).

⁷ Z. Zohar, *Tradition and Change. Halakhic Responses of Middle Eastern Rabbis to Legal and Technological Change (Egypt and Syria, 1880-1920)* (Jerusalem: Yad Ben-Zvi, 1993).

⁸ Y. Harel, *Between Intrigues and Revolution, The Appointment and Dismissal of Chief Rabbis in Baghdad, Damascus and Aleppo - 1744-1914* (Jerusalem: Yad Ben-Zvi, 2007) (Heb.).

⁹ M.D. Gaon, *Oriental Jews in Erets-Israel (Past and Present)* (Jerusalem, 1938) (Heb.).

institution was active. Nor have scholars of Israeli law shown any great interest so far in the Sephardic court at the end of the Ottoman period. In recent years, scholars have begun reviewing the Mandatory and English foundations of Israeli law. Much attention has been paid to internal Jewish struggles in matters relating to the use of Jewish law and its revival by the national Jewish movement that was building the emerging state.¹⁰ I addressed some aspects of the substantive elements of Jewish law in my research on the judicial activity of the chief rabbis in the rabbinical courts in the Mandatory period.¹¹ Recently, scholars have begun investigating Ottoman law, which until now has been neglected, despite its presence in Mandatory and Israeli law for many years.¹²

The present study therefore seeks to analyze the Ottoman influences on the rabbinical court system, which is the first link and perhaps the inspiration for the later development of the rabbinical judicial system in Israel, and at the same time the last link to the Sephardic tradition in the old Ottoman and Mediterranean world.

2. Background of Jewish Judicial Autonomy in Muslim Countries

The pattern of Jewish judicial autonomy that emerged toward the end of the Ottoman era represents a very late stage in the relationship between Muslim rule and Jews living under it. In Islamic states, the Islamic religion used to be the main basis for identity, and only members of this religion were considered full citizens, with obligations and rights in the state. According to the prevailing political approach, Islamic law (*Sharia*) was the law throughout the Islamic lands (*dar el Islam*), and it shaped the conduct of the individual and of the community, including the state. Islamic law was applied by the Sharia court, which was a state court. Members of other monotheistic religions, including the Jews, were of lower status, and were called *Dhimmis*. They were not recognized as equals in the Islamic lands,

¹⁰ A. Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill: University of North Carolina Press, 2006), 127-170; R. Harris, “Absent Minded Misses and Historical Opportunities: Jewish Law, Israeli Law and the Establishment of the State of Israel”, in M. Bar-On and Z. Zameret (eds.), *On Both Sides of the Bridge: Religion and State in the Early Years of Israel* (Jerusalem: Yad Ben-Zvi, 2002), 21-55 (Heb.); R. Shamir, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* (Cambridge: Cambridge University Press, 2000); A. Radziner, “The Israeli Legislator and Jewish Law: Haim Cohn between Tomorrow and Yesterday”, *Tel-Aviv University Law Review* 29 (2005), 167-244.

¹¹ E. Westreich, “The Legal Activities of the Chief Rabbis During the Period of the British Mandate: A Response to the Zionist Challenge”, in A. Sagi & D. Schwartz (eds.), *A Hundred Years of Religious Zionism* (Ramat Gan: Bar-Ilan University Press, 2003), II.83-129 (Heb.).

¹² I. Agmon, *Legal Culture and Modernity in Late Ottoman Palestine* (Syracuse: Syracuse University Press, 2006); N. Bron, *Early Foundations of the Israeli Judicial System: Judges and Lawyers in Erets-Yisrael 1908-1930* (Jerusalem: Magnes, 2003) (Heb.), which focuses on the Ottoman civil system.

and the degree of discrimination against them varied depending on their religion and the circumstances of time and place. The relationship toward them had been established in the early days of Islam in a document known as the Pact of Umar, attributed by Moslem historians to Umar I (7th century), the second Caliph, or by modern historians to Umar II (8th century).¹³

There were several manifestations of the subordinate citizenship of the Jews.¹⁴ The Jews were subject to a special head tax in exchange for the protection extended to them by the Islamic regime.¹⁵ Jews were not allowed to carry arms,¹⁶ and therefore could not serve in the army, which played an extremely central role in the Ottoman Empire. In the area of religious life their situation was also far from equal, and the construction of new synagogues as well as the repair of old ones required explicit permission.¹⁷ As a rule, Jews were not allowed to rule Muslims or manage their lives, and the central government system was closed to them.¹⁸

Nevertheless, the Jews' status as *Dhimmis* meant that Islam was not forced upon them, and they were allowed to continue practicing their religion without external interference, subject to the limitations imposed on the construction of synagogues.¹⁹ Moreover, the Muslim authorities generally granted broad communal autonomy that allowed Jews to manage their community life without external interference. The government abstained from interfering in matters of marriage and divorce, which were settled by various institutions of the Jewish community, including the Jewish courts. At various times, these arrangements of judicial and communal autonomy were even recognized officially, as we shall elucidate below.

A document published for the first time by Goitein, focusing on the early Islamic period and reprinted by Gil in his comprehensive book,²⁰ states that the head of the Jewish community in the Land of Israel (who had the title of *Hagaon* or "the Sage") had the supreme legal authority. *Hagaon* was responsible for matters of matrimony (marriage and divorce); he was authorized to appoint and dismiss judges and representatives of the public, cantors, and ritual slaughterers; he had authority to declare and remove bans; and he oversaw the leaders of the

¹³ B. Lewis, *The Jews of Islam* (Princeton: Princeton University Press, 1984), 18-23.

¹⁴ *Ibid.*, at 37-38.

¹⁵ *Ibid.*, at 26-27.

¹⁶ *Ibid.*, at 25.

¹⁷ *Ibid.*, at 25, 49-50.

¹⁸ *Ibid.*, at 48-49.

¹⁹ *Ibid.*, at 20-21.

²⁰ M. Gil, "Palestine During the First Muslim Period (634-1099)", *Studies* Pt. 1 (Tel Aviv University and the Ministry of Defense Publishing House, 1983), 419-421; *idem*, "Cairo Geniza Documents", *Studies* Pt. 2, 567-569.

community and the trustees who managed community property, especially the religious endowments. At the end of the document it is emphasized that everyone must obey *Hagaon* without the right to appeal. In another document issued in 1193 by the son of Salah-a-din to the leader of the Jews in Syria and Israel, similar instructions are given.²¹ In M.A. Friedman’s translation from the Hebrew, the document states that

... we placed you over the members of your religion and over the public leaders of your community ... and the supervision of the laws that your coreligionists require, that is marriage and divorce and charity and permanent payment from the community ... the excommunication of whom you find not to be deserving....²²

The Ottoman Empire was an Islamic state in which the Muslim approach received its expression.²³ The Ottomans continued to apply the basic principles of Islam regarding the communal and judicial autonomy of the Jews. But scholars generally deny the existence of direct official recognition of the Jewish judicial institutions before the reforms of 19th century.²⁴ However, even without official recognition, the Jewish rabbinical courts ruled extensively in matters involving Jews living under the Islamic government. Thus, the 16th century in the Ottoman Empire is considered to be one of the most fertile periods in Jewish law, as attested to by the many volumes of *responsa* written in this period and by their high quality.²⁵

Nevertheless, the Jewish rabbinical courts in the Ottoman Empire, and apparently in other Islamic countries as well, had serious competition from the Sharia court, which regarded itself competent to rule in matters involving Jews, including matters having to do exclusively with divorce.²⁶ Because of the Pact of Umar, however, the Sharia courts abstained from interfering in family matters, which the Jews settled among themselves. However, if Jews turned to the Sharia

²¹ The document was published by G. Khan, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collections* (Cambridge: Cambridge University Press, 1993), 460-461.

²² M.A. Friedman, “Maimonides, Zuta and the Mukdamim. A Story of Three Bans”, *Zion* 70 (2005), 473, at n.241 (Heb.). Friedman corrected an earlier reading of this document.

²³ B. Lewis, *The Emergence of Modern Turkey* (Oxford: Oxford University Press, 1968, 2nd ed.), 13-14.

²⁴ J. Hacker, “The Chief Rabbinate in the Ottoman Empire in the 15th and 16th Centuries”, *Zion* 55 (1990), 27-82 (Heb.).

²⁵ See also Y. Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge: Cambridge University Press, 2003).

²⁶ In recent years, A. Cohen published hundreds of decisions from the Sharia Court in Jerusalem in the Ottoman era in which Jews were judged before this Court in matters of marriage and divorce. See for example, A. Cohen and E. Simon-Pkali, “Jews in the Moslem Court”, *Society, Economy and Communal Organization in the XVth Century – Documents from Ottoman Jerusalem* (Jerusalem: Yad Ben-Zvi, 1993), 355-356 (Heb.).

court for a ruling in an internal matter between themselves, even in matters of marriage and divorce, it would rule in these matters as well. Some researchers believe that this penetration of the Sharia court was the result of the lack of official judicial autonomy. This fact may also have to do with the Islamic legal process, which allowed the simultaneous existence of courts belonging to various schools, with parallel authority, and without a mechanism for determining who has the final say.²⁷ In the absence of clear borders for Jewish judicial autonomy, the effectiveness of the Jewish courts depended on the internal discipline of the members of the Jewish community, as well as on the efficiency of the Islamic state and quality of its legal system.

Working in favor of the Jewish courts were the subjective and objective obstacles Jews faced in turning to the Sharia court. The fundamental approach of public Islamic law discriminated against Jews and oppressed them. The Sharia courts were religious courts that deliberated and ruled based on religious Islamic law, which was opposed in spirit and foreign to the Jewish world. Within this legal system Jews were discriminated against officially. For example, the testimony of a Jew was not accepted if it contradicted that of a Muslim.²⁸ This discrimination would naturally have deterred Jews from turning to the Sharia court, and only overwhelming interests would have caused them to resort to the Islamic legal system.

At the same time there was an overwhelming and essentially positive factor that impelled Jews to turn to the Jewish courts – Jewish tradition. This tradition placed great emphasis on Jewish litigation based on the *halakhah* and required members of the Jewish community to have recourse only to its internal legal institutions and not to the foreign ones.²⁹ To this end, internal ordinances were enacted time and again, prohibiting recourse to the foreign legal system and requiring the exclusive use of the Jewish legal system. In the absence of direct means of enforcement, the Jewish community could not entirely prevent this phenomenon, and it could only hope to reduce it to a minimum. Its authority was especially limited when powerful economic and personal interests were at stake.

As mentioned, the extensive *responsa* literature of the halakhic sages who were active throughout the Ottoman Empire indicates intensive judicial activity in the Jewish courts. Many Jews required the services of the legal institutions – very

²⁷ For an illustration of this phenomenon, see the case mentioned by Lewis, *supra* n.13, at 40, in which the ruler took the case to a Maliki court instead of the Hanafi court in order to ensure a death sentence.

²⁸ S.D. Goitein, *Jews and Arabs, Their Contacts Through the Ages* (New York: Schocken Books Inc., 1955), 72-73; M. Maoz, *Ottoman Reform in Syria and Palestine 1840-1861* (Oxford: Oxford University Press, 1968), 186.

²⁹ M. Elon, *Jewish Law: History, Sources, Principles*, translated from the Hebrew by B. Auerbach and M.J. Sykes (Philadelphia: Jewish Publications Society, 1994), I.13-18.

likely, most of the Jews for most of the period – especially for family law but in other civil matters as well. These courts operated with the self-awareness of legal institutions having full authority, and did not perceive themselves as mere arbitrators whose authority depended on their voluntary acceptance by the parties, despite the fact that the means of enforcement available to the courts were the ban and excommunication, and it is not clear to what extent it was possible to ask for the help of the Islamic state to carry out the judgment.

It is not known whether it was the absence of assistance on the part of the government in carrying out judgments that was responsible for judgments of the Jewish courts not being final, as parties with influence and resources could turn to one court and then to another and bring up their case repeatedly. (It should be stressed that we do not refer here to the courts consulting other scholars, but rather to the litigants themselves consulting multiple courts.) Thus, I am referring to repeated litigation in courts of the same level, when one of the parties turned to another court after the previous one did not satisfy his demands. This phenomenon stands out even during the period of efflorescence of Jewish law in the Ottoman Empire, in the 16th century, and examples can be found in cases discussed in the scholarly literature.³⁰

The situation in Jerusalem and elsewhere in the Ottoman Empire in the first half of the 19th century was similar to the one described above. The leader of the rabbis in the city had the title Rishon LeZion,³¹ and he stood at the head of the rabbinical system which was responsible for various areas such as overseeing slaughtering and matters of *kashrut*. The Rishon LeZion headed the rabbinical judicial system *ex officio*. The courts dealt primarily with matters of marriage, divorce, and inheritance. The title of Rishon LeZion, the manner of his appointment, and the scope of the chief rabbi's authority were internal Jewish affairs, and did not receive official recognition on the part of the Ottoman authorities.³²

In contrast to the situation in the Ottoman Empire, we have rich documentation regarding the official status of communal and judicial autonomy and its scope in Christian environments. This scope changed from time to time and from ruler to ruler. Communal and judicial autonomy were enshrined in official certificates of rights that rulers granted to members of the Jewish community, according to

³⁰ See for example the case of multiple marriage by an Ashkenazi Jew in Egypt discussed in E. Westreich, *Transitions in the Legal Status of the Wife in Jewish Law. A Journey Among Traditions* (Jerusalem: Magnes, 2002), 265-276 (Heb.). See also the case of the Ashkenazi widow and the Mugarbi (North African) levir, at 288-300.

³¹ A. Almaliach, *The Rishonim LeZion: Their History and Actions* (Jerusalem: R. Mass, 1970) (Heb.).

³² Barnai, *supra* n.6, at 49-56.

patterns customary in Europe in the Middle Ages.³³ At times these certificates of rights specified the unique powers granted to Jewish courts, and in these cases the legal authority of other judicial courts (church, state, town or other) was removed. In general, Jews did not resort to church courts in matters of marriage and divorce, and there were only rare cases in which the Christian ruler interfered in these matters regarding the Jews.

These arrangements were radically altered in the course of the 19th century, both in Islamic and in Christian countries, and the trends that had been prevalent prior to the modern era changed.

3. *Ottoman Recognition of Jewish Institutions*

Napoleon's invasion of Egypt in 1799, following the French Revolution, marks the beginning of the modern era in the Middle East, including the Land of Israel. The transition from the idea of the Land of Islam to the modern Middle East was tortuous and painful for the Ottoman Empire and its Muslim population. The essence of the process was the transfer of western values and patterns of government and their implantation in a foreign and alienated Muslim environment. This process took place as a result of enormous pressures, direct and indirect, exerted by the western powers by virtue of their military, economic, political, and cultural might, that surpassed beyond measure that of the Ottoman Empire and other Islamic countries.³⁴ At the same time it derived from Ottoman attempts to carry out internal systemic corrections that would allow the Empire to withstand these pressures.

The first manifestation of this, within a Jewish context, was the royal decree (*firman*) issued by Sultan Mahmud II in 1835 to the Rabbi of Istanbul. The decree conferred upon him officially the title of *Hakham Bashi* and appointed him as the Chief Rabbi of Istanbul and of the Empire.³⁵ This *firman* decreed that the Chief Rabbi is elected by the Jews themselves, but the Sultan must ratify their choice and order his appointment. Additional *firman*s were sent shortly afterwards to communities within Turkey.³⁶ According to Lewis, Sultan Mahmud II issued these *firman*s because he "was greatly concerned to centralize, organize and rationalize

³³ Regarding Jewish legal autonomy in medieval Germany, see A. Pakter, *Medieval Canon Law and the Jews* (Ebelsbach: Gremer, 1988); on Jewish legal autonomy in Poland up to the partition at the end of the 18th century, see J. Goldberg, *Jewish Privileges in the Polish Commonwealth* (Jerusalem: Israel Academy of Sciences and Humanities, 1985).

³⁴ A. Hourani, *A History of the Arab Peoples* (Cambridge, Mass.: Belknap Press of Harvard University, 1991), ch.16; Lewis, *Turkey*, *supra* n.23, at 67-70.

³⁵ Lewis, *supra* n.13, at 174.

³⁶ Barnai, *supra* n.6, at 57.

the government of his empire.”³⁷

The Jewish community within the Empire was greatly dispersed, and every community appointed its rabbi and officials, in complete contrast to the hierarchical structure of the two large Christian communities, i.e. the Greek and the Armenian communities. Thus, early on the Sultan issued a *firman* for the Jewish Community, which conformed to the general trend of centralization and organization of the Empire.³⁸ It should be noted that in the first years, the official rabbis were not prominent rabbis, and there was a separation between the function of the Ḥakham Bashi and the traditional function of the General (i.e., Chief) Rabbi.³⁹

A more significant change occurred shortly thereafter – a change intended to ensure the equal standing of non-Moslems, including Jews, before the law. On November 3, 1839, the “Noble Edict of the Rose Chamber” (the *Hatti-Sherif of Gülhane*) was proclaimed in the presence of Sultan Abdul Mejid, the first in a series of documents that were issued in a process that became known as the *Tanzimat* (“Reorganization”). The *Hatti-Sherif of Gülhane* proclaimed that “[t]he Muslim and other People, who are among the subjects of our imperial sultanate, shall be the object of our imperial favors without exception.”⁴⁰ This represented a revolutionary attitude, and for the first time a Muslim ruler proclaimed what may be interpreted as recognition of the equality of members of all religions in the Land of Islam. But the language was obscure, precisely in order to blunt the innovation. Indeed, from what we know of the reality in greater Syria – which included Jerusalem – the new *firman* did not change the status of minority groups, chief among them the large and strong Christian community.⁴¹

Immediately following the proclamation of the *Hatti-Sherif* in 1839, the Sultan extended the range of the *firman*s for the Jews to the large provincial cities of the Empire, including Jerusalem, in 1841,⁴² and they were granted to the rabbis of the

³⁷ Lewis, *supra* n.13, at 35.

³⁸ *Ibid.*; A. Levi, “The Establishment of the Ḥakham Bashi Institution in the Ottoman Empire and its Development between 1835-1865”, *Pe’amim* 55 (1993), 38-56 (Heb.), also saw in the *firman* an initiative of the Sultan, but he linked it to geopolitical changes that took place in the Empire following the Greek war of independence and the rise of nationalism in the Balkans. See *ibid.* for other approaches that attribute the *firman* to Jewish initiative.

³⁹ *Ibid.*, at 54. According to Levi, until 1860 the function had no importance.

⁴⁰ Maoz, *supra* n.28, at 21-23; Lewis, *supra* n.23, at 106-107.

⁴¹ Maoz, *supra* n.28, at 188.

⁴² B.Z. Dinburg, “From the Archives of the Hakham Bashi Rabbi Haim Avraham Gagin”, *Ma’asef Zion*, 1 (1926), 87, writes that the *firman* was issued on the initiative of Count A. Kamondo, who served as banker to the Ottoman government until the establishment of the Ottoman Bank, in order to strengthen the status of R. Ḥayyim Gagin. There is no contradiction between these facts. This was the general policy of the Turkish government, and the push for the *firman* in the Jerusalem community at the time was the result of pressure on the part of the Count.

various communities according to the recommendation of the Ḥakham Bashi of Istanbul. In the *firman*, the community rabbi was officially appointed as Chief Rabbi and was placed at the head of his community. His authority included responsibility for and supervision of all religious and rabbinical matters in the community. In fact, the Ḥakham Bashi was also appointed to head the rabbinical judicial system in his community. The status of the Ḥakham Bashi and his authority exceeded the boundaries of existing religious institutions (at least compared with the situation today in the State of Israel), and included also purely political and civil authority. The Ḥakham Bashi was recognized as the head of the Jewish community, representing the Jewish community before the government, and was responsible, *inter alia*, for the collection of taxes from members of his community. All this served to bring the status of the Jewish religion and of the rabbis who played a central role in it closer to that of Islam and its office holders.

In 1856, following the Crimean war, a new proclamation was issued: *Hatt-i Humayun*, which clearly and explicitly decreed the equal status of all religions.⁴³ Equality for non-Muslims, in contrast to what happened in Europe following the Emancipation, did not deny the status of religious leaders, Jewish or Christian, and did not result in the abolition of the religious judicial institutions. The Ottoman Empire continued to be a religious state, where Islam had a central role even when it began to adopt modern ways. Although it limited the extensive authority of religion in the state, it allowed it to remain in control of specific important areas, including family and inheritance law.

Following the *Hatt-i Humayun*, a special law, the *Haham haneh* (Council of Sages), was enacted in 1864.⁴⁴ This law prescribed the framework of authority of the chief rabbis throughout the empire, including Jerusalem.⁴⁵ It established Jewish community institutions and defined the authority and obligations of the Ḥakham Bashi, as well as those of the various new institutions. The law established three institutions within the Jewish community: the Ḥakham Bashi, who was the head of the community, and the General Council, which was divided into two institutions: the Spiritual Council and the Lay Council. According to Lewis, “Under the terms

See also F. M. Goadby, *International and Inter-Religious Private Law in Palestine* (Jerusalem: Hamadpis, 1926), 107 n.19: “There was an earlier *firman* issued by Sultan Abdel Majid in 1840 at the instigation of Sir Moses Montefiore”.

⁴³ Lewis, *supra* n.23, at 115-116.

⁴⁴ This law was published in the Ottoman General Book of Laws, translated into Hebrew, and published in 1892 by the scholar A.M. Luncz in the periodical *Jerusalem*, Vol. 4, 188-202. This law specified who was entitled to become Ḥakham Bashi, how he was to be elected, and his duties. The law also regulated the manner of election, management, and jurisdiction of the institutions auxiliary to the Chief Rabbi, including the General Council.

⁴⁵ Luncz, *ibid.*, at 188.

of this dispensation, the domination of the rabbinate, hitherto total and unchallenged, was to be limited, and in certain specified circumstances the rabbinate was required to consult with a council of laymen.”⁴⁶ At the same time, in Istanbul the functions of the Ḥakham Bashi and of the General Rabbi were united, which strengthened the position and endowed it with greater prestige.⁴⁷

This new structure was in accordance with the Millet system of the Ottoman Empire, as described by Lewis:

In the nineteenth century, as part of the great Ottoman reforms, the famous millet system... was extended... to the Jews. According to this system ... each of the religious communities of the empire was organized internally, subject to its own laws in matters of religion and personal status, administered under the authority of its own religious chief. The Jews were recognized as a millet under the authority of the Haham Bashi, the chief rabbi....⁴⁸

For forty years after the promulgation of the first *firman* in Jerusalem, we have no knowledge of additional *firman*s addressed to the rabbis of Jerusalem.⁴⁹ The rulings of several chief rabbis indicate that they received official appointments from the Sultan. In 1863, R. David Ḥazan signed his name as “Rishon Lezion, the younger Ḥayyim David Ḥazan, S.T., with the authorization of the King, may his glory rise and his kingdom endure.”⁵⁰ It seems that R. Avraham Ashkenazi, who served as Rishon Lezion between 1869-1880, also received a *firman*. In several of his rulings he noted that his authority rested on the King’s license,⁵¹ and he placed his seal on his ruling in the case of Nissim Shamama’s will as “Avraham Ashkenazi Ḥakham Bashi”, and added: “This is the seal that the King sent me”.⁵² We know of a *firman* given to R. Meir Refael Fanijil in 1890,⁵³ but only the *firman* granted in 1893 to his successor, R. Ya’akov Shaul Elyashar (hereinafter: R. Elyashar), was published.⁵⁴ After the death of R. Elyashar in 1906, the public

⁴⁶ Lewis, *supra* n.13, at 177.

⁴⁷ Levi, *supra* n.38, at 46.

⁴⁸ Lewis, *supra* n.13, at 125-126.

⁴⁹ Barnai, *supra* n.6, at 60-62, doubts that a *firman* was issued thereafter, and inclines to believe that no *firman*s were issued until R. Fanijil, in 1890.

⁵⁰ *Resp. Nadiv Lev* (Salonica, 5622-5626 (1862-1866)) *Even Ha’ezer* 8.

⁵¹ See below in the section discussing the jurisdiction of the rabbinical courts.

⁵² Ashkenazi, *Yismah Moshe* (Livorno, 1874). A photograph of the seal and in it an inscription in Hebrew with Latin characters and in Arabic is reproduced in *Resp. Mahara Ashkenaz* (Jerusalem: Ahavat Shalom Institute for Publications and Manuscripts, 1991), Introduction, 21. The Hebrew version states: “Avraham Ashkenazi, Ḥakham Bashi”. See also *ibid.*, sec. 49 (sec. 49 is copied from *Resp. She’arei Raḥamim* [Jerusalem, 5641/1881], *Even Ha’ezer* 21).

⁵³ Barnai, *supra* n.6, at 74.

⁵⁴ Reprinted in I. Beck (ed.), *Miginzei Kedem* (Jerusalem: Yad Ben-Zvi, 1977), 49-52 (Heb.). This is the first translation into Hebrew, and it was subsequently reproduced by Gaon, *supra* n.9, at 66.

status of the chief rabbi declined due to internecine struggles and tensions among various groups. One indication of this is that in the course of a decade, seven rabbis were appointed to this position. It is known that in 1911 R. Ya'akov Meir received a *firman* as Ḥakham Bashi,⁵⁵ and R. Eliahu Fanijil received a *firman* in 1907 as substitute Ḥakham Bashi.⁵⁶

The contents of the *firman*s mentioned above are very similar.⁵⁷ They were published by several scholars expert in Ottoman Turkish. In content and general structure the *firman*s were similar to that granted in 1846 to the Ḥakham Bashi of Izmir, R. Yehoshua Krispin,⁵⁸ and similar although not identical to the *firman* that the Sultan granted to R. Ḥayyim Nahum in 1909, when the Ḥakham Bashi of Istanbul was appointed the leader of rabbis throughout the Empire.⁵⁹

The infiltration of modernism into the Ottoman Empire produced official changes in the institution of the rabbinate, in the framework of which all rabbinical courts in the Empire operated. These were the official recognition of the rabbinate, and the granting of authority to civil groups within the framework of the new institutions. Lewis describes as follows what happened with the new constitution of the community in the capital, Istanbul: "Before long, the constitution became a dead letter, and while the community retained its autonomy, the rabbinate was again in full control."⁶⁰ According to this view, the status of the rabbinate in the capital improved following the statutory amendments, and only toward the end of the 19th century did civilian groups attempt to instigate changes under western influence.

There is radical disagreement as to the effect the legal changes had on the Chief Rabbinate in Jerusalem. Scholars such as Hirschberg, Eliav, and Elisar (cited by Barnai) maintained that the changes considerably enhanced the status of the chief rabbi of Jerusalem as the head of the Jewish community throughout the Land of Israel and as its representative to the government. By contrast, Barnai claimed that no change occurred in the status of the Chief Rabbi.⁶¹ Quite the opposite: in his

⁵⁵ Beck, *ibid.*, at 59-62. See Gaon, *ibid.*, at 370.

⁵⁶ Beck, *ibid.*, at 53-54.

⁵⁷ See also Barnai, *supra* n.6, at n.76, who claims that all the *firman*s given to the Ḥakhamim Bashi throughout the Empire are remarkably similar.

⁵⁸ H. Gerber and Jacob Barnai, *The Jews in Izmir in the 19th Century – Ottoman Documents from the Shar'i Court* (Jerusalem: Misgav Yerushalayim, 1984), 21-23.

⁵⁹ Beck, *supra* n.54, at 56-58.

⁶⁰ Lewis, *supra* n.13, at 177.

⁶¹ There is a vigorous debate among scholars about the status of the Chief Rabbi. Eliav and earlier writers, especially of Sephardic origin, maintained that the Chief Rabbi held high status, whereas Barnai, *supra* n.6 (throughout the whole paper and especially 58), claimed that this is an overly-romantic description and that in reality the Chief Rabbi's status was quite modest. It seems that much of Barnai's criticism is correct. However, Barnai underestimates the power of the Ḥakham Bashi, especially in relation to the judicial system.

opinion, the new legal structure promulgated in the *Haham haneh* granted official status to an independent civilian body that limited the rabbi's authority. He also showed that the authority of the Ḥakham Bashi was limited to the boundaries of Jerusalem, and even there it did not include, *de facto* if not *de jure*, the Ashkenazi, Maghreb, and Yemenite communities which tried to separate themselves from the Sephardim and achieve autonomy.⁶² In his opinion, the rabbinate of Jerusalem was in fact an “imposed rabbinate”⁶³ whose power depended upon the outside ruler and was not supported by the Jewish community.

Some of Barnai's arguments are persuasive, but it is not a foregone conclusion that the appointment of an official rabbi by the ruler and the granting of authority to civilian bodies in the *Haham haneh* changed the status of the Ḥakham Bashi or reduced his authority. The institution of a chief rabbinate which receives official recognition from the authorities is well known in the Sephardic tradition. For example, in the Christian territories of Spain in the Middle Ages, the king appointed the rabbis who were sometimes called *Rab de la corte*. Sages such as Rashba and Rosh, considered to be among the greatest sages of all times, served in these positions.⁶⁴ Both in Spain and in the Ottoman Empire the authorities merely approved the choice made by the community.⁶⁵ This is in complete contrast to the institution of the “imposed rabbi” that existed in the Russian Empire in the 19th century, where the Russian government imposed upon the community a rabbi whose qualifications were consistent with its approach and understanding and who advanced the interests of the Czar, without taking into account the views of Jewish community.⁶⁶ The Jewish community as a whole believed that these rabbis were not suited for their functions, and never conferred legitimacy upon them. On the contrary, they were usually viewed as collaborators with a foreign and hostile government. The attitude of Jews of all denominations and throughout the entire

⁶² In his article *supra* n.6, Barnai presented the statements of those who exaggerated and elaborated upon his claims rejecting the far-reaching approach, which he regarded as romantic and apologetic. I address some of his claims in greater detail in E. Westreich, “The Official Rabbinical Court of Jerusalem in the 19th Century: Its Status among Jewish Communities and the Social and Cultural Background of the Judges” (Heb.), *Jewish Law Annual* 19 (2011), 235-60.

⁶³ Barnai, *supra* n.6, at 65.

⁶⁴ Y. Baer, *A History of the Jews in Christian Spain*, trans. L. Schoffman (Philadelphia: Jewish Publication Society of America, 1961-5722), 167-169, 184-190.

⁶⁵ This was also the case in Muslim countries, in which the Jewish community elected its leader, the Sage, whereas the ruler, the Sultan, approved the choice. See, Gil, *supra* n.20; Friedman, *supra* n.22.

⁶⁶ The appointed rabbi was forced onto the community without consultation, and in general he did not have the qualifications that were traditionally required of a rabbi, which are first and foremost great scholarship in *halakhah* and fear of God. The central requirement of the Russian authorities was that the rabbi have a high school matriculation certificate and knowledge of the Russian language. He was expected to show concern for the interests of the state among the Jewish population. As a result, Jewish communities in Russia often had two rabbis, an official rabbi imposed by the state and another rabbi elected by the public.

Diaspora toward the institution of the Ḥakham Bashi was different. Especially remarkable is the attitude of the great *poskim* in Russia: those who were bitter enemies of the institution of the “imposed rabbi” adopted the position of the Ḥakham Bashi and his deputy in the controversy over the *shmitah*, and referred Jews to his court for his signature on the required documents.⁶⁷

Nevertheless, the new law was potentially harmful to the status of the rabbinate. The law was drafted in a period of extensive changes and instability in the Ottoman Empire in many areas: political, military, social, economic, cultural, and judicial. Significant changes took place within the Jewish community as well, and at times social and cultural upheavals challenged tradition and its bearers, the community of rabbis and Torah scholars. The innovations proposed by the new law had the potential to accelerate processes of change and even disintegration, but at the same time they could help adapt the institutional structure of the rabbinate to the new reality.

A retrospective view indicates that different scenarios developed. As Lewis noted, in Istanbul the law did not create a real change, and it was easily circumvented by the rabbinical institutions. This was primarily because at that time, no social strata among the Jewish community had undergone westernization. The same was true for Thessalonica, where, according to Mazower, the reforms only strengthened the status of the Chief Rabbi, as attested by reports from non-Jewish sources.⁶⁸ In the Middle East, however, we witness many upheavals following the appointment of the Ḥakham Bashi, which at times brought the Jewish communities to the verge of crisis and disintegration. Yaron Harel’s book about the appointment and dismissal of chief rabbis provides a comprehensive and enlightening description of the communities of Baghdad, Damascus, and Aleppo.⁶⁹ In Jerusalem, the community followed a middle ground: the rabbinate was not strengthened by the new Law, but neither did the community disintegrate following the changes. Only after the death of R. Elyashar in 1906 did the internal struggles between the various factions cause the rapid decline of the status of the chief rabbi, reminiscent of what happened in other cities in the Middle East.

The difference between the communities in Jerusalem and elsewhere in the Middle East is surprising, as the situation in Jerusalem was even more complex than that in other centers. A prominent characteristic of Jerusalem was its impressive growth and development in many areas, unparalleled anywhere in the Empire. Demographically, the growth was spurred by the arrival of many important rabbis, by ethnic variety and by a change in the ethnic balance of power

⁶⁷ Westreich, *supra* n.62.

⁶⁸ M. Mazower, *Salonica City of Ghosts – Christians, Muslims and Jews, 1430-1950* (New York: Harper Collins, 2004).

⁶⁹ Harel, *supra* n.8.

(with the Sephardim losing their majority and supremacy), strong westernization, increased presence of western powers, secularization, and nationalism. It seems that the rabbinical leadership in Jerusalem had scholarly stature and public leadership qualities that enabled it to channel the various factors in a way that strengthened rather than weakened the community. In particular, it was able to derive great benefit from its official status and the authority conferred upon it. In the wake of its successes, it even acquired high international esteem, so much so that “most of the world consult us with regard to their questions and doubts,” as noted by one of the Chief Rabbis in the 1870s, R. Avraham Ashkenazi.⁷⁰

In an answer to a question addressed to R. Ashkenazi, we find clear expression of this approach to the function of chief rabbi. In a certain community, the name of which he declined to reveal, a minority group attempted to undermine the status of the elected rabbi and harassed him in various ways. They sought to abolish a “*firman* and royal proclamation from the exalted king” stating that he shall be “rabbi and ruler, and apart from him no man shall raise his hand.” In order to fight his opponents, the rabbi incurred many expenses until he was able to secure a renewed royal certificate and thus continue in his position. The rabbi now demanded compensation from the minority group, and R. Avraham Ashkenazi was asked to state his opinion about the matter. The questioners note that “it appears that the appointment of Ḥakham Bashi is intended to preserve...” spiritual life. In other words, the institution of the Ḥakham Bashi is vital for the Jewish community, and the rabbi therefore has the authority to coerce the minority to accept his decisions and bear the expenses.

In his answer, R. Avraham Ashkenazi supports the position of the questioners without reservation and imposes the payment of compensation on the opposing minority. One of his arguments is that these expenses of the rabbi were intended “for the sake of the rabbis”. A second argument is that the appointment of a Ḥakham Bashi is:

... the law of the realm, for it is now the law in the large cities that no one is appointed head if not by the *firman* [of the King], who makes sure that most of the community is satisfied, and if so, who should be telling him [the king] what to do, and his decision is the law, because in fact, an expert and competent rabbi was elected.

Thus, the *Haham haneh* has full validity; this requires that communities in large cities appoint a chief rabbi, and the sultan ensures that most of the community is satisfied with the choice. In other words, this is not an arbitrary choice for the exclusive benefit of the government (as was the case of the “imposed rabbi” in Czarist Russia), but the appointment of a rabbi elected by the majority of the

⁷⁰ *Resp. Mahara*, 33 (307a).

community for its own interest. In this case, based on the data available to us, this is a rabbi who is expert in the *halakhah*, and therefore there is no questioning the validity of the royal appointment.

Indeed, the rabbis who held the position of chief rabbi of Jerusalem were great scholars, expert in the Torah, who elevated the honor of the official rabbinate and enhanced its prestige, despite its official status and the delegation of some of its authority. The chief rabbis always headed the rabbinical court, which was one of the important institutions of the rabbinate, and to a great extent its calling card for the outside world.⁷¹ As a judicial institution, the fact that it had official status as part of the institutionalized rabbinate was of added importance. Often decisions must be enforced by coercive means, or at least by the looming threat of the use of force, which only the state can supply or at least authorize.⁷² In 19th century Jerusalem, even where the Jewish community was by and large traditional, it was preferable to have a court with limited jurisdiction with the means to enforce its decisions rather than a court with broad authority that rested on internal support only.⁷³

4. *Scope of Jurisdiction*

Official legal recognition conferred additional authority on the rabbinical judicial system. This trend of official recognition of the rabbinical judicial system contrasts with developments in Western Europe, the cradle of modernism, during the corresponding period, as well as developments in Central and Eastern Europe. In these areas, modernism resulted in the rapid loss of an almost one thousand-year-old judicial autonomy, and already in its first stages the Jews were required to renounce judicial self-rule.⁷⁴ In Eastern Europe, in the territories of the former Polish Kingdom, which were under the rule of the Prussian, Austrian, and Russian

⁷¹ In Damascus there was a period in which the Ḥakham Bashi was not the head of the judicial system, and another rabbi discharged that function, together with other judges who belonged to the Spiritual Council. This was also the situation in Istanbul between 1835-1860. See Harel, *supra* n.8.

⁷² Anyone familiar with the rabbinate and the rabbinical courts in Israel knows that the rabbinate is weak and lacks prestige, whereas the rabbinical courts have authority and a certain amount of prestige, at least among the public that observes the tradition. Official recognition of rabbinical courts exacts a price in that their authority is limited, and in many areas, jurisdiction lies with the civilian courts. Nevertheless, official recognition grants the rabbinical courts in Israel a means of enforcement that makes them the most powerful rabbinical courts in the world today.

⁷³ Not to mention that in practice the rabbinical court continued to act as it had in the past and to rule on ritual and other subjects for which it had not received official authority.

⁷⁴ Especially prominent in this regard is the Jewish community in France, which was the first to receive equal rights following the French Revolution. In his appeal to the Jewish community in 1806, Napoleon made it patently clear that equal rights and continued Jewish judicial autonomy are contradictory notions and that one will result in the rejection of the other.

Empires, by the turn of the 19th century the Jews had already lost most of their judicial and communal autonomy, which was finally abolished in the Russian Empire in 1844.⁷⁵

The change in the status of the Sephardic court took place within two separate frameworks in which the Ottoman government was active during the reform era of the *Tanzimat*: modernization of the legal system and the achievement of equal status for all religions. During this period, new courts were established in the Empire in various domains, civilian in their character and influenced by European legal systems that eroded the authority and exclusiveness of the Sharia courts. The Ottoman government did not incorporate the existing Jewish court system into the new legal system of the state.⁷⁶ Indeed, there was no room for the Sephardic court within the new legal system, which was essentially secular and influenced decisively by European law. Its correct position was within the environment of the old religious system in which the Sharia courts existed, and it continued to retain great strength.

Judicial authority was granted, *inter alia*, to the chief rabbis of Jerusalem by various *firman*s, which were published in the Turkish language. As a basis for analysis I will use the Hebrew version of the *firman* granted to R. Elyashar, because of R. Elyashar’s elevated status and because of the fluency of the translation,⁷⁷ even if there are no significant differences between the various *firman*s. Below is the text of the document:

And if there is a conflict between two Jews in matters of marriage and divorce according to their religion and about any other matters, and the aforementioned rabbi [=Ḥakham Bashi] or those appointed by him will bring about agreement between them according to their religion and the will of both parties, and to elucidate the matter, as needed, an oath shall be taken in their synagogues... And the sages who are under the rabbi [=Ḥakham Bashi] shall not contract, without his authorization and knowledge or the authorization of his appointees, marriages prohibited by their religion. And if one of the Jewish community wishes to take a wife and to divorce her, or to take a second wife and travel to other places in order to marry, the marriage shall not be completed and there shall be no marriage without the license of the aforementioned rabbi. And officials shall not force the Jewish sages to authorize a Jew to marry a woman against their religion.⁷⁸

⁷⁵ Nevertheless, the Russian government recognized Jewish marriages and appointed rabbis to perform them, but these were expected to serve the objectives and policies of the government, and they did not represent the Jewish public.

⁷⁶ This was contrary to the conduct of the Mandatory Government, which regulated the status of the rabbinical court within the legal system in the Land of Israel in the King’s Order in Council, 1922, a constitution of sorts for the Land of Israel under the British Mandate.

⁷⁷ The Hebrew translation of this *firman* is also the most elegant and convenient to use.

⁷⁸ *Supra* n.55.

Prominent in the *firman* is the central role occupied by marriage and divorce as part of the authority conferred upon the Ḥakham Bashi. This authority has two parts. One is of a supervisory nature and includes determining fitness for marriage, conducting the marriage ceremony, and arranging the divorce. The other focuses on ruling in cases of conflict relating to marriage. In judicial matters regarding marriage and divorce, the Sultan directs a warning to the representatives of the government, including the Qadi, not to interfere with the Ḥakham Bashi and his representatives in the judicial process.⁷⁹ Regarding matters of marriage and divorce the warning is directed at the Jewish public, and it orders sages and Jewish public officials to avoid acting in these matters.

A recurrent feature found in several of the *firman*s would seem to indicate that the Ḥakham Bashi and his court received very broad authority in matters other than personal status if the parties agreed to litigate there. The *firman* granted to the Ḥakham Bashi of Izmir in 1846⁸⁰ states: “And if any of the Jews wishes to conduct marriage or divorce according to the Jewish custom or if two Jews are in conflict *in another matter*, the aforementioned rabbi or his representatives shall intervene in the matter with the agreement of the two parties and according to custom.” A similar formulation appears in the *firman* granted to R. Elyashar in 1893, in which matters of marriage and divorce are included together with other issues: “And if there is an argument between two Jews about matters of marriage and divorce according to their religion or about *other matters*...” Similar language and greater detail appear in a *firman* granted to R. Ya‘akov Meir: “If there is an altercation between two Jews regarding marriage and divorce, and also *in other matters*, the rabbi himself or his representatives are entitled to judge between them according to their religion if both sides agree to it”. It is clear that “other matters” refers to any regular civil matter that is not marriage or divorce. This amounts to granting the court judicial authority, by agreement, in all civil matters.⁸¹ However, among scholars who have studied the judicial authority of the Jewish courts, as far as I know no one has adopted such a far-reaching approach regarding the scope of this authority, and no evidence has been found to support such an interpretation. On the contrary, comparison with the judicial authority of the Christian courts indicates

⁷⁹ “And there shall be no intervention or prevention of the courtesies customary with them on the part of the Kadi or government officials. And they will be careful not to take from them money by coercion or force for the license given to the said Ḥakham and his representatives to deal according to the laws of their religion in matters of marriage and divorce...”

⁸⁰ *Supra* n.58.

⁸¹ See the newspaper *Havatsalet*, published in Jerusalem on 11.06.05, for an item based on a monthly report by Kiaḥ describing the situation of the Aleppo community and its institutions. Regarding the conduct of Jewish rabbinical courts it is written that rabbis in court “rule for their people according to the Torah of Moses including in matters of money and in conflicts if the two parties come before them to be tried”.

that the judicial authority of the Christian courts did not include civil matters.⁸² This conclusion is reinforced in light of what Zvi Zohar wrote about the debate between the rabbis regarding the obligation to register land holdings with the land registry bureau of the Ottoman Empire during this period.⁸³ It is clear from what he writes that in the period of the *Tanzimat*, the Ottoman government sought to limit corporate-personal law and to expand national legislation to new areas, and thus make all the subjects equal before the law.⁸⁴

Two cases receive special consideration: taking a second wife, and marriage of a member of the community outside the boundaries of the Ḥakham Bashi’s judicial authority. These types of marriage are included in all the *firman*s known to us and mentioned above, except that the matter of the marriage outside the limits of the Ḥakham Bashi’s authority does not appear in the *firman* to R. Nahum. It is possible that the omission was because R. Nahum was appointed rabbi of the entire Empire, and therefore every place within the Empire was under his authority, as opposed to community rabbis whose authority was limited to their areas of residence, so that a member of the community could go to some other place within the Empire and ask to marry there. Indeed, in a *firman* granted to R. Yehoshua Krispin in Izmir⁸⁵ there is mention of the supervision of marriage outside the boundaries of the community as part of his authority.

In Gulak’s *Otsar Hashtarot* there is a 16th century marriage contract (*ketubah*) from Salonica containing a clause in which the man obligates himself as follows: “And further said So-and-so obligated himself not to remove his said wife from this city in order to take her to another place to live there.”⁸⁶ In another recently published book of bills originating in Jerusalem in the 17th century,⁸⁷ we find an obligation contracted by a man not to take his wife away from Jerusalem or from any other place they agree upon. Indeed, in *ketubot* common among the Sephardic population in the Land of Israel it was customary in later generations to add a clause in which the man obligated himself not to take his wife outside the area bounded by Aleppo in the north and Alexandria in the south.

However, these two matters, which were arranged by custom through the marriage contract, were not unquestioned in the Sephardic tradition in the Land of Israel, as well as in other places, and they therefore still required supervision and

⁸² *Infra* near n.92.

⁸³ Zohar, *supra* n.7, at 153, 186.

⁸⁴ *Ibid.*, at 177.

⁸⁵ *Ibid.*, at 58.

⁸⁶ A. Gulak, *Otsar Hashtarot* (Jerusalem: Defus Hapo‘alim, 1926), 48 (Heb.).

⁸⁷ *Sefer Tikkun Soferim of Rabbi Yitshak Tsabab*, copied in Jerusalem in the year 1635 by the scribe Y. Morali (Notes and Introduction: Ruth Lamdan) (Tel Aviv: The Goldstein-Goren Diaspora Research Center, Tel-Aviv University, 2009), 83.

intervention on the part of the judicial authorities. Marrying a second wife was not prohibited by a general ordinance in the Sephardic and eastern traditions, as it was under the Ban of Rabbi Gershom applicable to Ashkenazim. Among the Spanish exiles around the Mediterranean Basin there was a custom of adding a clause to the *ketubah* whereby the husband committed not to marry a second wife. This commitment was of a contractual nature, and the penalty for breaching it was generally the payment of the *ketubah* and additional sum of liquidated damages. Over the generations, various problems arose with regard to the interpretation of the clause. For example, does the clause apply absolutely or are there grounds that justify its violation, for example, the commandment to be fruitful and multiply or the levirate commandment? At times an exception was added to the clause, specifying that if the woman does not give birth within ten years, the man will be permitted to marry a second wife. Even here it was not possible to avoid debate, and the intervention of the judicial system was needed to determine whether this condition had been met and how the woman should be compensated. An additional difficulty relating to polygamy is the fact that among the eastern communities as well as among a segment of Moroccan Jews whom the Sephardic Jews encountered in the Land of Israel at least,⁸⁸ the monogamy clause was not invoked.

An additional area in which the court had jurisdiction was that of succession. In western jurisprudence this area is considered to be part of civil and not religious law. In Islamic jurisprudence, however, succession is considered to be part of family law, and the Ottoman legislator left this area within the realm of the Sharia court. It is not surprising, therefore, that in the *firman*, the Sultan explicitly mentioned matters of succession, although only with regard to rabbis. The *firman* to the Rabbi of Izmir, for example, states that government officials are not allowed to take possession of the estates of rabbis who die without heirs. Moreover, it states that the wills of rabbis are valid according to Jewish law despite the fact that the request to validate the will “shall be heard in the Sharia court by means of Jewish witnesses from their own communities”. Similar instructions were included in the *firman* granted to R. Ya‘akov Meir.⁸⁹

The competence of the Jewish court in relation to issues of inheritance and other matters may be elucidated by comparing it to the judicial authority of Christian courts in the Ottoman Empire. Because of the close connection between the jurisdictions of the Christian and Jewish courts, there is no doubt that the Jewish courts received similar jurisdiction. Note, however, that the court of the large

⁸⁸ In Jerusalem in the second half of the 19th century, there was a growing presence of Oriental groups that may have influenced Sephardic males and caused them to evade their responsibilities under the *ketubah*. But most likely this is not the reason why this authority was given to the Ḥakham Bashi in the *firman*. The clause also appears in the *firman* given to Ḥaim Nahum, the Ḥakham Bashi in Istanbul, and in that community there were not large numbers of Oriental Jews.

⁸⁹ *Supra* n.9, at 370.

Christian community in Jerusalem – the Orthodox community – adopted the inheritance laws of Islamic law and did not apply the Byzantine law that was accepted by the Church.⁹⁰ There was no similar phenomenon in the rabbinical courts. Matters of inheritance were always considered to belong to both the ritual and civil spheres, and the Jewish courts always tried to apply the *halakhah* in all matters that came before them.

According to Goadby, who wrote the basic treatise on matters of jurisdiction in Palestine after the British occupation, the determining stage was the *Hatti Humayun* law enacted in 1856 shortly after the Crimean War under the pressure of England and France.⁹¹ This law was intended to promote equality among the various citizens of the Ottoman Empire, protect religious rights, and guarantee the privileges granted to various religions. This law granted official judicial authority to the Christian communities in matters of inheritance if the parties belonged to the Christian community and agreed to be tried by the Church court.

The issue of inheritance remained unclear, however, and close to the enactment of this legislation a memorandum was issued to the superpowers (England and France) indicating that all other civil cases related to religious matters may not come under the jurisdiction of the Church court even by agreement.⁹² Eventually, a document issued by the Grand Vizier in 1891 to the Orthodox and Armenian communities declared that the Patriarch had judicial authority in matters of marriage and divorce. In addition, the institutions of the Church were authorized to adjudicate conflicts related to the wills of members of the community as long as the heirs were from the community and were not foreign citizens.⁹³ The head of the community had judicial authority only over members of his congregation, that is, those who belonged to the same religion and were Ottoman citizens.⁹⁴

Thus, basic jurisdiction applied in matters of marriage and divorce, and in these matters the jurisdiction of Church courts was exclusive. Additional jurisdiction in matters of inheritance was parallel and not exclusive. According to Goadby, the jurisdiction of Jewish courts was similar:

What has been said with reference to non-Moslem Communities in general applies also to the Sephardic Jewish Community. A body of Regulations issued by the Porte

⁹⁰ F. M. Goadby, *supra* n.42, at 114. He also writes that “In practice all questions of succession were brought before the Moslem courts, which distributed the estate in accordance with the Moslem law...”.

⁹¹ *Ibid.*, at 103.

⁹² *Ibid.*, at 104.

⁹³ *Ibid.*, at 104-105.

⁹⁴ See *ibid.*, at 105 n.17: “... but the Meglis Milli (=Court of a Millet) has jurisdiction in the case of non-Ottomans who are not subjects of a state possessing Capitulations and who in their own country are subject to religious courts of their community e.g. Persian Jews”.

in 1864 regulated the appointment of the Grand Rabbi (Hahem Bashi) and the constitution of the communal Councils. Art. 29 provides that all “religious” matters are within the competence of the Spiritual Council (Beth-Din). In Constantinople at least, jurisdiction in matters of personal status was, we are told, exercised within much the same limits as those observed in the case of the Orthodox Patriarchate.⁹⁵

Accordingly, the basic jurisdiction of the Sephardic rabbinical court applied in matters of marriage and divorce, and in these matters the jurisdiction of the court was exclusive. Additional jurisdiction in matters of inheritance was not exclusive, but paralleled that of the Sharia courts and matched the jurisdiction of the Christian courts. In all cases, both litigants had to be members of the Jewish community and Ottoman citizens as preconditions for the jurisdiction to apply.

This path of development of judicial authority, at least as far as the Jewish court is concerned, is not consistent with what appears in the various *firmans*. We saw that the first *firman* from Jerusalem, whose content is known to us, is from 1841, and was given to the Chief Rabbi of Jerusalem. Another *firman* that reached us was given to the Chief Rabbi of Izmir in 1846, before the declaration of the above mentioned *Hatti Humayun*. We also saw that the last *firman* granted to a chief rabbi of the Empire was given in 1909, decades after the above-mentioned law, and it too is similar, by and large, to the early *firmans*. The same is true of the *firman* granted in 1908 to the Chief Rabbi of Aleppo and for the *firman* granted in 1911 to R. Ya‘akov Meir, the Rabbi of Jerusalem. The meaning of the two paths and the relationship between them requires in-depth study of the history of Ottoman law, which is beyond the scope of this paper. It appears to me, however, that we can base our view concerning the scope of jurisdiction on the *firmans* granted in Jerusalem to chief rabbis, which do not deviate significantly from the more general path by which judicial autonomy was granted to minorities in the Ottoman Empire.

5. *Structure of the Court*

The various *firmans* do not address the establishment of the Jewish court, and naturally they do not address its composition or the manner of its operation. Nevertheless, the *Haham haneh* law specifies the establishment of the institution called the “Spiritual Council”.⁹⁶ According to Goadby, the Spiritual Council is in fact the Jewish judicial institution, the *Beth Din*, which received its jurisdiction within the framework of the authority conferred upon it to deal with religious matters.⁹⁷ This is also the conclusion reached by Yaron Harel regarding the

⁹⁵ *Ibid.*, 106-107.

⁹⁶ Sec. 4 of the law. See Luncz, *supra* n.44, at 195-200.

⁹⁷ *Ibid.* See also B.Z. Gat, *The Jewish Settlement in Erets Israel in the Years 5600-5641 (1840-1841)* (Jerusalem: Yad Ben-Zvi, 1974), 73 (Heb.).

division of authority in the Damascus community.⁹⁸ According to Harel, the seven members of the Spiritual Council formed the official Jewish judicial institution. In the Hebrew translation published by Luncz we find:

The obligations of the head of the Spiritual Council and of its members were as follows: First, their obligation was to punctiliously preserve religious matters... And although it was the responsibility of this Council to oversee matters having to do with religion and the community, they could not interfere in any religious matters that were not assigned to them by the Ḥakham Bashi...⁹⁹ Only the Ḥakham Bashi and the head of the Spiritual Council and his deputies had the authority to mete out spiritual punishment such as the ban, and the foremost obligation of the Ḥakham Bashi and of all the commissions was to ensure that these authorities were not assigned to other people except those mentioned.¹⁰⁰

Nothing has been said here about members of the Spiritual Council functioning as a rabbinical court. Rather, they functioned as “supervisors” of sorts, who were responsible for the observant character of the community.

Neither do we have proper documentation to confirm the claim that the Spiritual Council also operated as a judicial institution. In fact, there were more than seven members in the various courts, which indicates that, at least in the first years, existing patterns in Jewish courts in Jerusalem, such as the number of the judges, were preserved.

The structure of the Jewish court in Jerusalem in the 18th century is described in the research of Barnai,¹⁰¹ who writes that we do not have detailed descriptions of rabbinical courts and their activities, but based on fragments of accounts from various sources it is possible to assemble the following picture. There were two to three rabbinical courts in Jerusalem, with panels of three judges each. Toward the end of the 18th century, accounts point to the existence of four panels of three judges, which alternated every three months. There was also a rabbinical court of seven judges, which was sometimes called the Great Rabbinical Court, or *Beit Hadin Hayafeh*. The hypothesis is that this court convened to decide difficult cases or to enact special ordinances.

According to R. Binyamin Navon (1788-1851), who was head of a *Beth Din* in Jerusalem, the custom in Jerusalem in his time was that the courts changed their composition every three to four months.¹⁰² Thus, the courts had three to four different panels of three judges each. There was no high court of appeals, and we

⁹⁸ Harel, *supra* n.8.

⁹⁹ Art. 23.

¹⁰⁰ Art. 30.

¹⁰¹ Y. Barnai, *The Jews in Erets-Israel in the Eighteenth Century – Under the Patronage of the Constantinople Committee Officials of Erets-Israel* (Jerusalem: Yad Ben-Zvi, 1982), 188-191 (Heb.).

¹⁰² *Resp. Bnei Binyamin: Vekarev Ish*, chap. 27.

have no knowledge of any given panel being considered more specialized or being assigned especially difficult cases. There is a possibility, which I was not able to substantiate, that the Spiritual Council that was established as a result of the 1864 law and which included seven sages served as a court of appeal. It is possible that in difficult cases two panels were combined, or that an existing panel was enlarged by the addition of veteran and experienced judges appointed *ad hoc*. It is also possible that this expanded panel served at times as an appeals court that reviewed rulings by the regular panel. R. Ya'akov Meir indicated as much¹⁰³ when he served as Chief Rabbi of the Land of Israel, alongside R. Kook.

It is possible that R. Elyashar, who was more influential than any other rabbi in the period of the Ḥakham Bashi, attempted to assume the authority of an appeals court, as can be inferred from his actions regarding the case of a widow and orphans that was brought before a panel headed by R. Yosef Nissim Burla. Several sages criticized the ruling, and R. Elyashar decided to nullify it and hand down another ruling in its stead.¹⁰⁴ In response, R. Burla issued a severe condemnation, asking how R. Elyashar allowed himself to nullify a court ruling in opposition to a principle rooted in the *halakhah* whereby one court does not nullify the ruling of another.¹⁰⁵ R. Burla also cited earlier rulings by R. Elyashar himself in opposition to the nullification of a ruling by a previous court, and showed that this was R. Elyashar's position in the past.

It is unclear whether R. Elyashar's change of heart was the result of having achieved the position of Ḥakham Bashi and therefore wanting also to serve as the supreme judicial institution and appeals court. Only a more in-depth study of this complex issue can answer that question. The results of such a study may also shed light on the controversy that caused a great commotion in the Jewish community and in rabbinical and judicial circles during the early Mandatory period around the establishment of the Great Rabbinical Court of Appeals.¹⁰⁶

The various *firman*s and the *Haham haneh* law determined that the Ḥakham Bashi headed the judicial system, but the details of his jurisdiction were not specified in these legal documents. From various *responsa* we learn that in many

¹⁰³ E. Westreich, "The Legal Activities of the Chief Rabbis During the Period of the British Mandate: A Response to the Zionist Challenge" (Heb.), in A. Sagi & D. Schwartz (eds.), *A Hundred Years of Religious Zionism* (Ramat Gan: Bar-Ilan University Press, 2003), Vol. 2, p.90 (Heb.).

¹⁰⁴ *Resp. Olat Ish, Hilkhoh Shutaḥin* 1. The work was published by R. Elyashar himself in 1899, in the middle of his tenure as Ḥakham Bashi.

¹⁰⁵ Y. Burla, *Yosef Omets* 40:18, *Moda'ah biFshsharah*. For his severe economic deprivation in his dotage and his lament about the poverty of many of the scholars, see *ibid.*, at 406, Sec. 9, *Talmid ḥakham*.

¹⁰⁶ See Westreich, *supra* n.103, at 85-93. Attempts on the part of the Ḥakham Bashi in Aleppo, R. Dweik, to nullify court rulings produced severe friction and caused most of the scholars in town to support efforts to remove him from office. See Harel, *supra* n.8, at 124.

cases, judges or heads of judicial tribunals issued rulings¹⁰⁷ contingent upon the approval of the Chief Rabbi. There are a large number of these in the writings of R. Elyashar, concerning which he approached R. Avraham Ashkenazi,¹⁰⁸ who appended his signature and at times added a ruling of his own, sometimes noting that it was with the approval of the King (i.e., the Sultan).¹⁰⁹ It appears that granting this approval represented the not insignificant beginning of the kind of supervision and monitoring activity usually reserved for appeals courts. It is also a manifestation of the prestige and power granted to the Ḥakham Bashi, which made other judges subordinate to the authority of the Ḥakham Bashi. His signature on the ruling gave it official validity before the Ottoman government and made its enforcement possible through state mechanisms.

In the absence of an appeals forum, the challenge of standardized rulings, which is one of the signal functions of an appeals court, fell to the first and only forum. We can assume that several factors helped the system cope with this assignment and made its proper functioning possible. First, during this period the rabbinical court was exceptionally homogeneous. The judges were of Sephardic origin, raised and educated in Jerusalem or in the communities of Asia Minor or the Balkans; they shared similar *halakhic* traditions and held the same values.¹¹⁰ Secondly, the Ḥakham Bashi, who headed the judicial system, was likely to impose his approach by virtue of his official standing, and thereby create substantial standardization of the law. The rabbis who served as Ḥakham Bashi of Jerusalem enjoyed a significant degree of professional authority and personal prestige, which made it easier for them to achieve this goal. Thirdly, the rabbis themselves acted to create standardization in the law and to ensure respect towards all the verdicts, so as not to damage their professional prestige and the functioning of the system entrusted to them. For example, with regard to the writing of names on *gittin* (bills of divorce), which is a complex matter and subject to many controversies, a conference of judges decided that every forum would accept the decision of the preceding forum,

¹⁰⁷ In *Resp. Simḥah La'ish* he seeks the agreement of R. Ashkenazi only in the *Even Ha'ezer* portion, which is the legal part, not about ritual issues and matters affecting daily life.

¹⁰⁸ These generally appear in his writings published before the death of R. Ashkenazi, *Resp. Bnei Binyamin Vekarev Ish*, as well as *Resp. Simḥah La'ish*. Subsequently R. Fanijil was elected, and R. Elyashar was elected his deputy. At this stage, the number of approvals by R. Fanijil decreased, as R. Elyashar was in fact discharging the functions of Chief Rabbi because of the advanced age and weakness of R. Fanijil. We can find examples in the *Resp. Bnei Binyamin Vekarev Ish, Even Ha'ezer* 6, 15, 29-30, 31-32, 33, 34-35; *Resp. Simḥah La'ish, Even Ha'ezer* 8, and many others. In secs. 16 and 18 there is an appeal for the approval of Chief Rabbi Ḥayyim David Ḥazan. Other chief rabbis did the same; see sec. 11, where R. Yitshak Kobo appends his approval to a decision by R. Binyamin Navon.

¹⁰⁹ In the case of the governor's will, which greatly preoccupied the Jewish sages, R. Ashkenazi applied his seal, on which was written “Avraham Ashkenazi, Ḥakham Bashi”. See also *Resp. Bnei Binyamin, Hoshen Mishpat* 16.

¹¹⁰ Westreich, *supra* n.62.

to avoid any denigration of the *gittin*.¹¹¹

6. Summary

This study focused on Jewish judicial autonomy in Jerusalem, mainly the official Sephardic rabbinical court, at the end of the Ottoman period. The Sephardic rabbinical court was part of the official institutionalized rabbinate, which was part of the Jewish communal organization. At the head of this organization was the Chief Rabbi, whose official Ottoman title was *Ḥakham Bashi*. The relationship of Moslem rulers toward the Jewish community and institutions had been established in the early days of Islam in a document known as The Pact of Umar. The basic principle was that the government abstained from interfering in the internal life of the Jews, especially in matters of marriage and divorce, which were settled by various institutions of the Jewish community, including Jewish courts. The Ottomans continued to apply this basic principle of Islam regarding the community and judicial autonomy of the Jews. Nevertheless, scholars generally deny the existence of direct official recognition of Jewish judicial institutions before the reforms of the 19th century.

In the 19th century the Ottomans attempted to carry out internal systemic corrections that would allow the Empire to withstand the pressures of modernity. The first manifestation of this within a Jewish context was the royal decree (*firman*) issued by Sultan Mahmud II in 1835 to the Chief Rabbi of Istanbul and later to the Chief Rabbi of Jerusalem in 1841. Meanwhile, in November 1839, the *Hatti-Sherif of Gülhane* proclaimed that non-Muslims among the subjects of the Empire shall be the object of the imperial favors without exception, and thus began the period of organization known as the *Tanzimat*. In 1856 a new proclamation was issued – the *Hatt-i Humayun*, which clearly and explicitly decreed the equal status of all religions.

Equality for non-Muslims, in contrast to what happened in Europe following the Emancipation, did not deny the status of religious leaders, Jewish or Christian, and did not result in the abolition of the religious judicial institutions. The Ottoman Empire continued to be a religious state, where Islam and other religions, including Judaism, had a central role even when it began to adopt the modern ways. Although it limited the extensive authority of religion in the state, it left it in control of specific important areas, including family and inheritance law.

Following the *Hatt-i Humayun*, a special law was enacted in 1864, named *Haham haneh* (Council of Sages). This law prescribed the framework of authority for the chief rabbis throughout the empire, including Jerusalem. It established

¹¹¹ *Resp. Bnei Binyamin* 27.

Jewish communal institutions, and defined the authority and obligations of the Ḥakham Bashi and of the various new institutions. This law established a Spiritual Council which some scholars claim – a claim which has so far not been confirmed – functioned as a rabbinical court. In any case, the various *firmands* and the *Haham haneh* law determined that the Ḥakham Bashi was at the head of the judicial system.

Details of the scope of the jurisdiction of the Ḥakham Bashi were specified in the *firmands*, which are all similar but not identical. Another legal source for the scope of jurisdiction is comparison with the Christian courts. The basic jurisdiction of the Sephardic rabbinical court applied in matters of marriage and divorce, and in these matters the jurisdiction of the court was exclusive. Additional jurisdiction in matters of succession was not exclusive but paralleled that of the Sharia courts and matched the jurisdiction of the Christian courts. In general, both litigants had to be members of the Jewish community and Ottoman citizens as a precondition for the jurisdiction to apply. Yet, it is not clear to what extent the rabbinical court had official jurisdiction in civil matters, even if all the litigants agreed to the jurisdiction of the rabbinical court.

In any case, the fact that the rabbinical court of Jerusalem had official status as part of the institutionalized rabbinate was extremely significant. Often the enforcement of decisions required coercion, or at least the impending threat of the use of force, which only the state could supply or at least authorize. The fact that Ḥakham Bashis of Jerusalem, who always headed the rabbinical court, were great scholars, added to its prestige and power and made the Sephardic court one of the important institutions of the rabbinate, and to a great extent its calling card for the outside world.

The structure of the Sephardic court was not a modern one, and it lacked an appeals court, although we can discern some activity – most commonly associated with the great Ḥakham Bashis, R. Ashkenazi and R. Elyashar – that represents the not-insignificant beginning of the kind of supervision and monitoring activity usually associated with appeals courts. The foundation of an appeals court was to preoccupy the rabbinical court during the period of the Mandate, following strong demands by the British government for modernization. This rabbinical court, which became part of the new British order, in fact succeeded the Sephardic court and was inspired by it in two important respects: with respect to the extent of judicial authority, and in the close connection between the rabbinical court and the institution of the rabbinate.