Jewish Law in Consular Courts: Rethinking Legal Pluralism (Morocco, 1830–1912)[1]

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In the summer of 1878, the French consulate in the city of Mogador (now Essaouira), a port in the south of Morocco, was consumed by an unusual trial. A Jewish man named Abraham Afriat—known to all as Hazzan Bihi—stood accused of sodomizing a twelve-year-old Jewish boy named Shlomo Guigui. The French penal code of 1810 declared that anyone who committed sexual violence ("viol ou attentat à la pudeur") against a minor would be imprisoned. In Afriat's case, a conviction would also mean losing his status as a French protégé.[2]

It was not so strange for a consulate to serve as a courthouse; consuls across the Mediterranean (and beyond) exercised jurisdiction over their own nationals, as well as some locals under their protection. In those places where treaties introduced extraterritorial privileges—including Morocco and the Ottoman Empire—foreign nationals and protégés under the jurisdiction of consulates were in a position akin to diplomatic immunity today. Consuls and even vice-consuls doubled as judges when a foreigner was involved in a lawsuit (certainly in civil cases, and sometimes in criminal ones). In Morocco, the jurisdiction of a case followed that of the defendant (*actor sequitur forum rei*).[3] This was also the case for Moroccan subjects who, like

1 The author would like to thank the fellows of the Katz Center for Advanced Judaic Studies at the University of Pennsylvania during the spring of 2023 for their comments on an early draft of this article; their feedback was immensely enriching.

2 Affaire Abraham Afériat et Lion fils (1878), Tanger B 986, Centre des Archives Diplomatiques de Nantes (hereafter CADN); see the Code Pénal of 1810, Section IV, articles 331–332.

3 On Morocco, see esp. Mohammed Kenbib, *Les protégés : contribution à l'histoire contemporaine du Maroc* (Rabat: Faculté des lettres et des sciences humaines, 1996);

Afriat, had acquired consular protection. As protégés, they gained many of the same legal privileges as foreigners had in Morocco.

On Monday, August 5, Georges de Vaux, the French consul, ordered a trial against Afriat. He began by citing a document in Judeo-Arabic, written and signed by Shlomo Bensussan and Mordekhai Altit, both rabbis in Mogador. The document recorded the testimony of two other Jews—Yusuf Aflalo and Mas'ud Souissia—who said that six months earlier, standing at the window of Souissia's house, they saw Afriat "take off the boy's caftan, take off his own shirt, and have his way, without respect, with the boy in an act against nature."[4] Given that "this original document was drawn up by two rabbis, who act as *'udūl*, or notaries public, and are recognized as such in the city of Mogador"; and given the severity of the crime according to the French penal code, de Vaux declared that Afriat would be brought to trial.

Later that day, Afriat appeared before the consul and the dragoman (interpreter). He was deeply familiar with the place, having worked for the French consulate in Mogador for twenty-eight years—by dint of which he was afforded consular protection.[5] He stated his name, birthplace (Guelmim), and profession (merchant), then proceeded to deny all the accusations against him. The next day, Aflalo came to court and gave his testimony before the consul, after which Shlomo Guigui, the alleged victim, did the same. Guigui explained, "I got this habit about two years ago and Hazzan Bihi [Afriat]

Jessica M. Marglin, *Across Legal Lines: Jews and Muslims in Modern Morocco* (New Haven: Yale University Press, 2016), Ch. 6. On the Ottoman Empire, see esp. Jacques Lafon, "Les capitulations ottomanes : un droit paracolonial ?" *Droits: Revue franḍaise de théorie, de philosophie et de culture juridiques* 28 (1999): 155–80; Maurits H. Van Den Boogert, *The Capitulations and the Ottoman Legal System; Qadis, Consuls, and Beratlıs in the 18th Century* (Leiden: Brill, 2005); Will Hanley, *Identifying with Nationality: Europeans, Ottomans, and Egyptians in Alexandria* (New York: Columbia University Press, 2017); Umut Özsu, "The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory," in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffman (Oxford: Oxford University Press, 2016), 123–37. On Jews, see Sarah Abrevaya Stein, *Extraterritorial Dreams: Jews, Citizenship, and the Calamitous Twentieth Century* (Chicago: The University of Chicago Press, 2016).

4 Testimony of Shlomo Bensussan, Mordekhai Altit, and Youssef Aflalo, 2 Adar I 5638/ February 5, 1878, Tanger B 986, CADN.

5 Interrogation of Abraham Afriat, August 5, 1878, Tanger B 986, CADN. The employees of consulates—both dragomans and guards or soldiers—were eligible for consular protection.

is the sixth or seventh person who treated me thus, but since then I haven't done anything with anyone." He explained that "the scandal" and the "lack of payment" led him to stop.[6] Nine more witnesses were interrogated over the course of the week—some upholding Aflalo and Guigui's testimony, others contradicting it.

The trial took a dramatic turn on August 13th, when Guigui's mother Zahra came to testify. She explained that her son had lied about the whole thing. He had been imprisoned on February 5, and some men came to him and told him that in order to get out of prison, he had to declare that Afriat had sexually assaulted him. Zahra said that when her son was finally released from prison that day, he confessed everything to her.[7] Guigui went to the local *sofrim* to have them draw up a document explaining that his accusation against Afriat had been "a lie." He even swore to his mother on the household's set of *tefillin* and *mezuza* that Afriat was innocent. Zahra, it seems, had convinced her son to come clean: "it wasn't bad enough that you lied the first time, but you also had to lie before the Consul, may God exalt him!"[8] From this point on, the case against Afriat crumbled; the eye witnesses recanted their original testimonies—also before *sofrim*—and less than a month later, he was officially exonerated of any wrongdoing by the French consular court.

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There is much to say about this fascinating case: one wonders about the strictures against anal penetration in both Jewish law and French law, the norms surrounding homoeroticism and homosexuality in Morocco, and the question of sexual assault and pederasty.[9] But what interests me for the purposes of this article is something far more mundane: the presence

6 Interrogation of Shlomo Guigui, August 6, 1878, Tanger B 986, CADN.

7 Interrogation of Zahra, wife of Mas'ud Guigui, August 13, 1878, Tanger B 986, CADN.

8 Translation of rabbinic legal document, 12 Av 5638/ August 11, 1878, Tanger B 986, CADN.

9 There is not nearly enough written about the history of homosexuality in nineteenth-century Morocco. On homoeroticism more broadly, see Khaled El-Rouayheb, *Before Homosexuality in the Arab-Islamic World, 1500-1800* (Chicago: University of Chicago Press, 2005); Joseph A. Massad, *Desiring Arabs* (Chicago: The University of Chicago Press, 2008). On Ottoman Jews and homosexuality, see Yaron Ben-Naeh, "Moshko the Jew and his Gay Friends: Same-Sex Sexual

of Jewish legal documents in a criminal case tried in a consular court. The reliance on legal documents drawn up and signed by *sofrim* in this case is striking, and it is no exception. In other cases, consular officials relied on *batei din* to adjudicate disputes involving Jews under their jurisdiction. In nineteenth-century Morocco, Jews appearing before a consular court were not entirely free from the jurisdiction of Jewish legal institutions.

The ubiquity of Jewish law in consular courts tells us something much broader about law in nineteenth century North Africa, as well as about the nature of legal pluralism. Generally speaking, historians of modern law are inclined to presume the identity of norm and institution. That is, a given court—say a consular court—is an institution in which a given body of normative law is applied; the purpose of a French consular court, then, was to apply French law.[10] But examining how cases actually played out in consular courts in Morocco strongly suggests that these institutions only sometimes applied their "own" law. At times, consular officials took it upon themselves to adjudicate questions of Jewish law. Even when consular courts did apply their own laws—as in the case against Afriat, where the French consular court invoked the French penal code—they nonetheless frequently relied on Jewish legal institutions for matters of documentation. Finally, consular judicial officials regularly sent Jewish litigants to Jewish courts.

For Jewish historians with an interest in law, the presence of Jewish law in consular courts raises important questions about the nature of autonomy. I will refrain from rehearsing the extensive literature on Jewish legal autonomy,

Relations in Ottoman Jewish Society," *Journal of Early Modern History* 9 (2005): 79–108.

I should note that throughout this article, I use *halakhah* and Jewish law more or less interchangeably. I am well aware that "Jewish law" is not a perfect translation of *halakhah*, and that scholars have argued against this equivalence (e.g. Rachel Rafael Neis, "The Seduction of Law: Rethinking Legal Studies in Jewish Studies," *Jewish Quarterly Review* 109 [2019]: 119–38). Nonetheless, for the purposes of this article—and in the context of nineteenth-century Morocco—Jews and non-Jews seem to have thought about Jewish law and *halakhah* as largely equivalent.

10 I realize that many would immediately object to this characterization; there are multiple examples of a state court applying the laws of another state, or even a US court applying foreign law. Nonetheless, when it comes to legal history, there is an often unspoken presumption that the institution representing a legal community (Jewish, American, Islamic) applied the norms of that community.

except to note that most scholarship has focused on its strength or erosion.[11] Recently, many scholars are moving away from measuring autonomy on a scale of strong to weak—and also away from an emphasis on Jewish communal strictures against seeking adjudication in non-Jewish institutions. Instead, historians have pointed out that various models of autonomy coexisted; for instance, in eighteenth-century France one model "entailed adjudication in French courts, with the proviso that the judgment would be in accordance with Jewish law."[12]

The interplay between Jewish legal institutions and consular courts in Morocco suggests that autonomy may be the wrong lens altogether. Rather than try to understand Jewish legal history as a story of autonomy constantly negotiated, defended, and inevitably compromised, I propose that we move away from thinking about jurisdiction as separate spheres in which law was singular. This would entail turning our focus away from "forum shopping" (or even "norm shopping"), which suggests an overly rigid conception of the boundaries among jurisdictions. The premise of forum shopping tends to presume a tight connection between institution and norm.[13] But it is not clear to what extent institutions applied "their" norms in nineteenth-century Morocco. If Jews heading to a consular court might be required to produce Jewish legal documents there; if they found themselves sent back to a Jewish court; or if the consul adjudicated according to Jewish law, then the "shopping" metaphor falters. We might instead do well to think about Jewish legal institutions as always coexisting with other institutions (those of states, those of other religious communities, those of commercial organizations like guilds, etc.). Similarly, we might think about Jewish legal norms as coexisting with other legal norms (from states, other

11 For helpful overviews, see David Horowitz, "Fractures and Fissures in Jewish Communal Autonomy in Hamburg, 1710–1782" (Ph.D. diss., Columbia University, 2010), Introduction; Jay R. Berkovitz, *Law's Dominion: Jewish Community, Religion, and Family in Early Modern Metz* (Leiden: Brill, 2019), 44–45. See esp. Joseph Hacker, "Jewish Autonomy in the Ottoman Empire, its Scope and Limits: Jewish Courts from the Sixteenth to the Eighteenth Centuries," in *The Jews of the Ottoman Empire*, ed. Avigdor Levy (Princeton: The Darwin Press, 1994), 153–202.

12 Berkovitz, *Law's Dominion*, 46.

13 On forum shopping in consular courts, see, e.g. Ziad Fahmy, "Jurisdictional Borderlands: Extraterritoriality and "Legal Chameleons" in Precolonial Alexandria, 1840–1870," *Comparative Studies in Society and History* 55 (2013): 305–29; Julia Stephens, "An Uncertain Inheritance: The Imperial Travels of Legal Migrants, from British India to Ottoman Iraq," *Law and History Review* 32 (2014): 749–72.

religious communities, commercial organizations, etc.)—norms that were not necessarily always confined to their corresponding institutions.

More broadly, attention to the entanglement of Jewish law and consular courts suggests the need to rethink the way we use legal pluralism as a category of analysis.[14] Tamar Herzog argues that thinking about law through the lens of legal pluralism can distort our understanding of law in the premodern world. She considers legal pluralism an anachronistic category, in large part because it assumes the existence of distinct legal authorities applying distinct bodies of law:

> The aim of the law and the authorities that pronounced it was to indicate which was the right way to proceed…to ensure a just solution. Despite agreement on the final goal, the task of identifying the right solution nonetheless produced a multiplicity of diverse indications that could easily be contradictory. The result was a law that was profoundly cacophonic, where a variety of authorities and actors spoke at the same time and invoked a diversity of sources.[15]

In the premodern period, the "just solution" depended far more on the particular circumstances of the case—including the status of the individuals concerned—than on any attempt to get a case to the appropriate institution or authority which would then apply the relevant body of law.

Part of the modernization of law at the end of the eighteenth century was a transition to seeing the individual, in Hegel's words, "as a universal person in which all are identical."[16] As Henry Sumner Maine put it, law moved "from status to contract."[17] The individual becomes "the unit of which civil law takes account."[18] In a democratic, centralized state in which

14 Jessica M. Marglin and Mark Letteney, "Legal Pluralism as a Category of Analysis," *Law and History Review* (Forthcoming).

15 Tamar Herzog, "The Uses and Abuses of Legal Pluralism: A View from the Sideline," *Law and History Review* (First View) (2023): 1–12 (5–6).

16 Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford: Oxford University Press, 1942), 134 (paragraph 209). I am grateful to Itamar Ben-Ami for this citation. See also Herzog, "The Uses and Abuses of Legal Pluralism," 4.

17 Henry Sumner Maine, *Ancient Law* (London: J. M. Dent & Sons Ltd., 1917), 100. I am grateful to Carolyn Dean for this framing.

18 Maine, *Ancient Law*, 99.

jurisdictional lines were clearly drawn and sovereignty singular, status ceased to matter. "A man counts as a man"—and thus should expect equal treatment before the law—"in virtue of his manhood alone, not because he is a Jew, Catholic, Protestant, German, Italian, etc."[19] In the context of the universal individual, legal pluralism entails equivalent individuals who move among distinct legal institutions applying distinct bodies of law. But as Herzog argues, premodern societies did not necessarily think of individuals as identical or interchangeable; thus legal pluralism fails to account for the cacophonous nature of law.

The legal landscape of nineteenth-century Morocco was hardly identical to that of the premodern world about which Herzog writes, especially when it came to consular courts. French law as applied in French consulates assumed a centralized system of legal authority bound to a clearly defined set of legal norms. Nonetheless, the practice of consular courts in Morocco was in many ways more reminiscent of premodern law than of the legal systems envisioned by Maine. Even the French consular courts, ostensibly there to apply the law of modern France, existed in a landscape in which the distinctions among people mattered more than the distinction between various legal systems. The ubiquity of interchange between Jewish legal institutions and consular courts suggests how frequently institutions might draw on the authority and even the norms of other legal orders. All this suggests that legal pluralism may not be the best analytical framework with which to approach the interplay between Jewish law and legal institutions and consular courts in Morocco.[20]

In what follows, I explore the entanglement of Jewish law and consular jurisdictions from the second half of the nineteenth century—after the number of people with extraterritorial privileges significantly increased in Morocco—until colonization in 1912, when extraterritoriality was mostly abolished.[21] My sources did not indicate notable change over time during this

19 Hegel, *Philosophy of Right*, 134 (paragraph 209).

20 In taking this approach, I am parting ways with my earlier work, in which I wrote about the extent to which consular courts regularly relied on notarization by Muslim notaries public (*'udūl*), dubbing this the "Moroccanization" of consular courts: Marglin, *Across Legal Lines*, 157–65. See p. 160 for a brief mention of the reliance on documents drawn up by *sofrim* in consular courts.

21 In fact, British and American consulates retained jurisdiction over their nationals after 1912: Jacques Caillé, *Organisation judiciaire et procédure marocaines* (Paris: Librairie générale de droit et de jurisprudence, 1948), 129–30, 41–45; Mohammed

period, but rather variation among the consular personnel in their attitudes towards Jewish law and their reliance on Jewish legal institutions. In looking at Jewish law in consular courts, I hope to change the way we think about jurisdiction in nineteenth-century Morocco and beyond.

The legal landscape of nineteenth-century Morocco

The theoretical sharing of jurisdiction among consular courts and local institutions was quite different from the reality on the ground. Nonetheless, it is useful to begin with an account of how things should have worked *de jure*. People with extraterritorial privileges essentially fell into two categories: they were either foreign nationals, or they had consular protection—a status by which an individual was not naturalized as a foreigner, but nonetheless acquired most of the extraterritorial privileges accorded to foreign nationals.[22] In Morocco, both foreign nationals and protégés fell under the jurisdiction of their consular courts for criminal and civil matters in which they were the defendant. If foreign nationals or protégés sued a Moroccan subject, on the other hand, they needed to do so in a local institution—be it a Jewish court, a shari'a court, or a court run by the Moroccan government. Jews in Morocco fell under the jurisdiction of Jewish courts for most intra-Jewish matters, barring some serious crimes (which could fall under the jurisdiction of either government or shari'a courts).[23]

There was a *de jure* difference between a Moroccan subject with consular protection—who remained to some degree under the sovereignty of the Moroccan sultan; and a foreign national, who was fully subject to the laws of the state to which he belonged. An influential account of extraterritoriality by Gérard Pélissié du Rausas (from 1902) explained that "as for their

Kenbib, *Juifs et musulmans au Maroc, 1859–1948* (Rabat: Faculté des lettres et des sciences humaines, 1994), 416–20.

22 There was significant confusion over the use of the term "protection" as it could refer to the act of exercising jurisdiction over nationals, or to the more specific status of consular protection. Thus a French citizen from the metropole or Algeria might be described as a "protégé" in Morocco, simply because he was under French protection (see, e.g., Féraud to MAE, July 23, 1886, CP Maroc 51, Archives du Ministère des Affaires Etrangères, La Courneuve, hereafter MAE Courneuve). I seek to reduce confusion by imposing a stricter distinction between national and protégé, despite this being something of an anachronism.

23 On the legal landscape in Morocco, see Marglin, *Across Legal Lines*, Ch. 1.

personal status, foreign protégés remain governed by their national law. In the Orient…personal status depends on nationality."[24] This would appear to offer a clear set of rules for why Jewish law showed up in consular courts; Jews with consular protection (not foreign nationality) were still subject to Jewish law for matters of personal status.

Yet even when it came to adjudicating personal status, Pélissié du Rausas cautions against consular courts applying "religious law—Muslim, canon, or talmudic"; even though this would theoretically make sense, religious courts would not recognize consular courts' authority to interpret their laws.[25] Ultimately, Pélissié du Rausas admits,

> The practice of consulates is, in this matter, strangely and incredibly confusing. It floats without a directing principle, indecisive and capricious, among the most diverse and contradictory solutions.[26]

This confusion was amply reflected in Morocco's consular courts. The jurisdictional chaos observed by Pélissié du Rausas goes beyond a question of protégés vs. foreign nationals, and extends to the interplay of consular and Jewish courts more generally.

One of the sources of this instability came from disagreements over the precise status of those with extraterritoriality. While Pélissié du Rausas asserted that a consular protégé remained a subject of the local sovereign, consular officials at times disagreed. In a case discussed below, the interpreter of the French legation in Tangier described Simtob Cohen as a "Moroccan subject" under the protection of first Italy, then Spain; as a "Jew" ("israélite"), then, it made sense for his case to be submitted to Jewish courts.[27] This view coincides nicely with Pélissié du Rausas's theory. But another French consul in Tetuan explained that the plaintiffs in question were "Jews and protected by European nations, not Moroccan subjects."[28] Not to mention that the very

24 Gérard Pélissié du Rausas, *Le régime des capitulations dans l'Empire Ottoman*, 2 vols. (Paris: Arthur Rousseau, Editeur, 1902-5), 2: 42.

25 Pélissié du Rausas, *Capitulations dans l'Empire Ottoman*, 2: 58–59.

26 Pélissié du Rausas, *Capitulations dans l'Empire Ottoman*, 2: 61.

27 Summaripa, "Note au sujet de l'affaire Darmon et Simtob Cohen, tous deux Israélites" (1863–64, no precise date), Tanger A 159, CADN.

28 "Israélites et protégés par des Nations Européennes, et pas des sujets marocains" (Abdelatif (consul in Tetuan) to Ordega, 2 January 1885, Tanger A 162, CADN).

categories of nationality, subjecthood, and protection were actively being worked out both on the ground and in the pages of jurisprudence.[29]

Whatever *de jure* differences existed between foreign nationals and protégés were frequently obscured by the paper trails of the archives. What emerges instead is the sense that consular officials mostly did not pay attention to jurisdictional niceties—including the difference between foreign nationals and protégés. Although this "confusing" state of affairs bewildered jurists like Pélissié du Rausas, it is deeply interesting for the legal historian.

Jewish legal documents in consular courts

The presence of *halakhah* in Moroccan consular courts is most evident from the regular mention of Jewish legal documents—that is, documents written in Hebrew, Judeo-Arabic, or Judeo-Spanish and signed by *sofrim*. All sorts of contracts show up in consular courts, from bills of debt (the most frequent), to marriage contracts (*ketubbot*), to powers of attorney.[30] The appearance of these documents in consular courts parallels the ubiquity of Islamic legal documents signed by *'udūl*, on which consular officials regularly relied.[31] Beyond the case of Morocco, there is ample evidence that non-Jewish courts in early modern Europe relied on Jewish legal documents.[32]

On the one hand, the presence of Jewish legal documents should not surprise us, even if parties involved adhered to the theoretical jurisdictional boundaries that regulated the coexistence of consular courts and *batei din*. While a Jew with consular protection or foreign nationality should only have been sued in a consular court, other Jews he did business with might be under the jurisdiction of a *beit din*. This sort of situation appears to have motivated a bill of sale from 1863, in which Mardokh (presumably a version

29 Jessica M. Marglin, "Extraterritoriality and Legal Belonging in the Nineteenth-Century Mediterranean," *Law and History Review* 39 (2021): 679–706.

30 For a bill of debt, see, e.g., Jacob Bibas, 1904, RG 84, Tangier, box #1, National Records, College Park, Maryland (hereafter NARA). For a *ketubbah*, see, e.g., A. Nicolson to Maclean Madden, 24 Oct 1902, and A. Nicolson to Maclean Madden, 21 Nov. 1902, 631/14, Archives of the Foreign Office, The National Archives in Kew, London (hereafter FO), in which a *ketubbah* is used to prove that Solomon Sananaes was born in wedlock. For a power of attorney, see, e.g., Affaire Ben Shtrit, October 1880, Tanger A 140, CADN.

31 Marglin, *Across Legal Lines*, 157–65.

32 See, e.g., Berkovitz, *Law's Dominion*, Ch. 5.

of Mordekhai, thus a Jew) described as "the Englishman" (*al-njilīzī*) sold a property (*ḥatser*) with three shops to Haim Corcos.[33] Corcos (d. 1881) belonged to a prominent Jewish family in Marrakesh and beyond; his family had acted as "merchants of the Sultan" (*tujjār al-sulṭān*) for generations, and he served as the head of the Jewish community in Marrakesh.[34] As far as I know, however, he was not under the protection of any foreign state. Thus when Mardokh sold him the property, he knew that any future dispute might end up in a Jewish court. (For good measure, the sale was also recorded by *'udūl*, a common practice among Jews in Morocco.[35])

In other instances, the presence of Jewish legal documents in consular courts is explained by the transnational force of Jewish law. The jurisdiction of Jewish law transcended political boundaries and gave legal weight to Jewish legal institutions across the Middle East and North Africa. Thus consular courts dealing with Jews from outside Morocco often had to rely on Jewish legal documents. In 1866, for instance, Abraham Benalui sold a house belonging to his uncle, situated in the mellah (Jewish quarter) of Rabat, to Francisco Torralba, a Spaniard. The chancellery of the Spanish vice-consulate of Rabat recorded the power of attorney from Benalui's uncle Isaac, who was then living in Jerusalem; this power of attorney provided evidence that Benalui was legally entitled to sell the property, and thus that the sale was valid.[36] Consulates attached the same legal weight to rulings from *batei din* outside of Morocco. In 1901, the French consulate in Essaouira recorded the verdict of the *beit din* of Tunis in a case between Maissa Cohen Ganouna and her husband Shalom. The ruling—translated into French from the original

33 Document (in Hebrew) dated 15 Ḥeshvan 5624/ October 28, 1863, Or.26.543, Oriental Manuscripts and Rare Books, University of Leiden Library. There is a note on the Arabic document in English that reads "I have sold to Sir Hayim Corcos the home ^and 3 shops mentioned above…."

34 Daniel J. Schroeter, "Corcos Family," in *Encyclopedia of Jews in the Islamic World*, ed. Norman Stillman (Leiden: Brill, 2010).

35 Document in Arabic dated 7 Jumādā I 1280/ October 20, 1863, Or.26.543, Oriental Manuscripts and Rare Books, University of Leiden Library. On double notarization, see Jessica M. Marglin, "Cooperation and Competition among Jewish and Islamic Courts: Double Notarization in Nineteenth-Century Morocco," in *Studies in the History and Culture of North African Jewry, Volume III*, ed. Moshe Bar-Asher and Steven Fraade (New Haven and Jerusalem: Yale Program in Judaic Studies and the Hebrew University Center for Jewish Languages and Literatures, 2015).

36 Sale of house from Abraham Benalui to Francisco Torralba, 19 December 1866, Rabat: 1862–1896, Tomo 34.150, Archivo Histórico de Protocolos, Madrid.

Hebrew—awarded Maissa money to pay for her maintenance during Shalom's long absence in Essaouira.[37] In Tunisia, Maissa and Shalom were under the jurisdiction of Jewish law for matters of personal status, such as marriage (and the maintenance due by an absent husband). But in Morocco, Shalom was considered a French protégé by virtue of being from a French colony, as Tunisia became a protectorate in 1881.[38] The French consulate in Essaouira was thus charged with enforcing the ruling of the *beit din* of Tunis. Consular courts recognized that Jewish law had a transnational force, necessitating the incorporation of documents produced by *sofrim* and *batei din*.

Jews with extraterritorial privileges also relied on Jewish legal documents for their own affairs; many even brought these documents to the consulates to have them copied and certified in the chancellery records. In 1859, the British vice consul in Tetuan (a city in northern Morocco)—himself a Moroccan Jew named Salomon (Shlomo) Nahon—affixed a note in Spanish to a legal document drawn up by *sofrim*. The document attested the birth of Miriam, daughter of Yahya Ben Oliel; she was born during the month of Kislev 5603 (November 1842), in Ben Oliel's house. A witness explained that he was in the habit of frequenting Ben Oliel's home at the time, and that Miriam could not be more than seventeen years old today. Below this document in Hebrew and Aramaic is Nahon's note, explaining that "the above signatures are those of the Jewish public notaries of this city, Rabbi Ruben Elmaleh and Rabbi Shemaya Roffe."[39] While it is not entirely clear who asked Nahon to record this Jewish legal document in the British chancellery records, whoever did so must have been a British protégé or national, since otherwise he or she would not have had access to the consular chancellery.

37 Extract of a judgment by the rabbinical court of Tunis, September 10, 1901, Tanger B 1002, CADN.

38 On the status of French colonial subjects outside of the French empire, see Jessica M. Marglin, "The Two Lives of Mas'ud Amoyal: Pseudo-Algerians in Morocco, 1830–1912," *International Journal of Middle East Studies* 44 (2012): 651–70; Marglin, "Extraterritoriality and Legal Belonging." On Tunisians in particular, see Jessica M. Marglin, "Citizenship and Nationality in the French Colonial Maghreb," in *Routledge Handbook of Citizenship in the Middle East and North Africa*, ed. Roel Meijer, Zahra Babar, and James Sater (London: Routledge, 2021), 53–54; Youssef Ben Ismail, "Sovereignty Across Empires: France, the Ottoman Empire, and the Imperial Struggle over Tunis (ca. 1830–1920)" (Ph.D. diss., Harvard University, 2021), Ch. 5.

39 Tetuan Public Acts, June 13, 1859, 636/2, FO. The Jewish document is dated 10 Sivan 5619.

Even more surprising are those instances in which Jews with consular protection recorded Jewish legal documents attesting to debts or leases involving Muslims in a consular chancellery—given that cases involving Muslim Moroccan subjects should not have fallen under the jurisdiction of Jewish courts.[40] It would have made more sense in such instances to record an Islamic legal document in the consular chancellery—something Jews (as well as Muslims and Christians) did quite frequently.[41] In one puzzling instance, Mas'ud Sheriqui, a Jew working as the interpreter of the Spanish vice-consulate in the coastal city of Safi, presented a series of Islamic legal documents attesting debts owed him by Muslims. He also presented a legal document in a mix of Hebrew and Judeo-Spanish in which he appeared before two *sofrim* and "swore on the ark of the Torah" (*nishba' ke-raui 'al heikhal ha-kodesh*) that "the debts that amount to one thousand douros (*ke las deudas ke somen siento mil duros*)" owed to him by the qaids and shaykhs of Safi concern him (*pertenesen a el*).[42]

Criminal cases were especially likely to draw on Jewish legal documents. When witnesses in a criminal case were Jewish, it was common for consular officials to rely on depositions certified by *sofrim*. For instance, in 1892, Samuel Zekri, an Algerian Jew (and thus a French citizen), tried to claim an indemnity for the murder of his brother Dinar near Sefrou (a town not far from Fez, Morocco). Zekri provided legal documents signed by *sofrim* documenting both the murder and the stolen goods.[43] In an incident from 1870, the French consul in Essaouira investigated the claims of two French businessmen who had begun a business venture in Marrakesh. They had initially set up shop in the mellah, but were driven out—seemingly by the

40 See, e.g., Mogador Public Acts, 1877-1926, August 24, 1885, 631/7, FO; Abraham Corcos to 'Amara, Rabī' I 1299/ January 30, 1882, reg. 84, v. 29, NARA.
For additional instances of Jewish legal documents in consular chancelleries, see, e.g., Mogador Public Acts, 1877-1926, March 23, 1882, 631/7, FO.

41 Marglin, *Across Legal Lines*, 159.

42 Mesod Sheriqui to Foreign Minister in Spain, March 18, 1870, Correspondence concerning reclamations against Moroccan governors and sheikhs, 1871, Caja M6, exp. No. 1 (81/6), Archivo General de la Administración, Madrid. The document is translated into Spanish below the original.

43 Reclamation Zekri, 1893–96, Tanger A 165, CADN. For similar uses of depositions drawn up by *sofrim,* see: William James Elton (British consul in Mogador) to Hay, March 1, 1864, 631/3, FO; Mardokh Touboul to Hajj Hamadi al-Wujdi, 2 Av 5646/3 Aug 1886, Tanger A 165, CADN.

governor, Muhammad al-Glaoui. The French consul instructed his subordinate to take down depositions from Jews who had witnessed the events, but the *sofrim* of Marrakesh refused to take down the depositions out of fear of displeasing al-Glaoui. In the end, the consul had to settle for depositions taken down by his subordinate—clearly considered less trustworthy than those drawn up by *sofrim*.[44]

In the case against Afriat, we see something a bit different. Rather than relying solely on depositions drawn up by *sofrim*, the consular court recorded its own depositions *and* filed the originals and translations of the depositions by the *sofrim*. It is not entirely clear whether the impetus to collect Jewish legal documents came from the witnesses themselves or from the consular authorities. The testimony of Youssef (Yūsuf) Aflalo, a key witness, suggests it might have been a bit of both. Aflalo had initially claimed to have seen the sex act between Afriat and Guigui from the window of a nearby house. But under examination by the French consul, Aflalo admitted to the inconsistencies in his testimony. He asked "to draw up a legal retraction before the rabbis."[45] At the consulate, he first wrote his own Judeo-Arabic document, which begins "I, Yosef Aflalo, being that the testimony I gave was a lie," and goes on to explain the "true testimony"—that someone paid him to testify falsely.[46] Later that same day, Aflalo gave a longer version of this testimony before *sofrim*, who drew up a legal document (also in Judeo-Arabic) attesting that his previous statements—before them in February and before the French consulate—were false.[47] This document was also signed by the chief rabbi of Essaouira.

The consular court clearly gave weight to the fact that the key witnesses' retractions were made before *sofrim*. In the document declaring the case dismissed, the consul justified his decision noting that "the three retractions were made before the same rabbis [acting as *sofrim*]…and signed by the chief rabbi of the city of Mogador, [and] that they are drawn up according

44 10 January 1870, P. Achille Gambaro to French consul in Essaouira, "Affaire Faux-Jacquety," Tanger B 986, CADN.

45 Interrogation of Youssef Aflalo, August 27, 1878, Tanger B 986, CADN.

46 "Ana Yosef Aflālo kā'in an al-*'edut* di shahadtu kā'in *shekerim* wal-*'edut* ṣāfīya hīya hādī" (Interrogation of Youssef Aflalo, August 27, 1878, Tanger B 986, CADN: words in Hebrew are italicized).

47 28 Av 5638/ August 27, 1878, Tanger B 986, CADN. The rabbi who countersigned the document was Ya'akov b. 'Attar; he is described as the "grand rabbin" in the consular records.

to rabbinic law and following the custom of the country."[48] Again, part of the rationale may have been that Moroccan Jewish subjects were under the jurisdiction of *batei din*, and thus that any legal documents pertaining to them must conform to Jewish law. Part of the motive behind the consular court's desire to rely on Jewish legal documents may have been that such declarations were more likely to be truthful, or at least could be considered more trustworthy.

Oath taking and Jewish law

The matter of credibility was particularly central to the role of Jewish law and legal institutions in determining how consular courts dealt with oath taking for Jews. There is ample evidence that when Jews' cases in shari'a courts required them to swear to a statement of fact, they did so in a synagogue and according to the tenets of their own faith.[49] Cases adjudicated before consular courts similarly had Jews take oaths before rabbinic authorities.[50] This is quite different from the *more judaico* in Christian Europe, which was understood by Jews—at least by the nineteenth century—as humiliating. Rather, consuls and qadis alike presumed that Jews who took the oath before rabbis were more likely to tell the truth.

Consular officials might debate the particulars of how the oath was taken, for instance in a case in which Moses Penyer, a Moroccan Jew under British protection, was accused of owing Eliezer Davila money and thus prevented from leaving the country (a normal practice across North Africa). Davila swore an oath on the subject, but Penyer countered that Davila's oath had been sworn on Shabbat—and thus was invalid according to Jewish law and should not be admitted as valid evidence. Penyer's consul supported his claim—suggesting that consular officials similarly thought oaths should be valid according to Jewish law in order to have legal force in a consular court.[51]

Consular officials explicitly invoked the idea that oaths would be more trustworthy if Jews took them according to their own faith. In 1883,

48 Ordonnance de non lieu, September 4, 1878, Tanger B 986, CADN.

49 Marglin, *Across Legal Lines*, 40–41.

50 See, e.g., Affaire Decugis contre Pinhas Bendahan, 1845, Tanger A 138, CADN; Jordan Buy to Ordega, November 22, 1882, Tanger A 163, CADN. See also Marglin, *Across Legal Lines*, 150.

51 Protest of Moses Penyer, recorded by Elton, February 2, 1859, 631/2, FO.

the French consul in Tangiers wrote about the ease with which Jews from Morocco declared themselves to be Algerian—and thus claimed extraterritorial rights as French citizens. He recommended that notaries writing up attestations of origin require that the "Jews called to testify should swear on the Torah Scroll before their rabbis. This formality will, I think, guarantee the sincerity of their declarations."[52] By forcing Jewish witnesses to swear in a religiously significant way, this official reasoned, they would be far less likely to falsify their testimony. The Algerian Jewish witnesses in question were presumably French citizens; their Jewishness should not have mattered in a French court.[53] Yet clearly this French official continued to think of these witnesses as Jews first, and thus sought a legal procedure that incorporated Jewish legal procedure.

If anything, it was Jews themselves—not consular officials—who sought to avoid taking oaths in the synagogue. This, too, suggests the function of swearing as ensuring adherence to social expectations about truthfulness and the gravity of oaths. A case from 1880 illustrates this nicely: Jourdan Buy sued the brothers Samuel and Pinhas Toledano, who were French protégés, for unpaid debts. The Toledanos declared bankruptcy, claiming they did not have the funds to pay Buy back. Buy insisted that the brothers take an oath on the Torah scroll; like the French consular official, he presumed that the Toledanos were more likely to tell the truth if they took an oath according to Jewish law. But the Toledano brothers resisted; as the French consul explained, "an oath <u>on the sefer</u> [Torah] is, for Moroccan Jews, shameful, and aside from certain private cases of the most serious nature, they cannot swear [an oath] without inviting the disapproval of their coreligionists."[54] The fact that the Toledano brothers were under French protection had no bearing, either on Buy's request that they take the oath "on the sefer," or on the French consul's

52 "en exigeant des israélites appelés en témoignage, le serment sur le <u>Sefer</u> par devant leurs rabbins. Cette formalité me semble seule de nature à guarantir la sincérité de leurs déclarations" (Monfraix to MAE, August 1, 1883, CP Maroc 47, MAE Courneuve).

53 I say most because Jews from the Algerian Sahara were not granted citizenship with the Crémieux Decree: see Sarah Abrevaya Stein, *Saharan Jews and the Fate of French Algeria* (Chicago: University of Chicago Press, 2014). Moreover, some Moroccan and Tunisian Jews who had settled in Algeria had to apply for naturalization as Algerians: see Laure Blévis, "En marge du décret Crémieux. Les Juifs naturalisés franḍais en Algérie (1865–1919)," *Archives juives* 45 (2012): 47–67.

54 Vernouillet to Buy, October 20, 1880, Tanger B 1326, CADN.

explanation that such a course of action would harm their reputations. The only consideration was whether the Toledano brothers were willing to take a step as serious as swearing on a *sefer Torah*.

Asking Jews to swear an oath according to Jewish law presumed the same economy of credibility entailed in presenting legal documents signed by *sofrim*. Even when Jewish legal institutions did not have formal jurisdiction over the case at hand, they nonetheless had a central role to play in consular courts. It seems that Jewish legal institutions retained a monopoly on producing trustworthy evidence concerning Jews even once these Jews were no longer under the jurisdiction of *batei din*.

Adjudication between *batei din* and consular courts

Lest we think that consular courts only relied on Jewish legal institutions to produce trustworthy evidence, I now turn to the numerous cases in which Jews with extraterritorial privileges ended up taking their cases to *batei din* for adjudication. Again, this happened both when some of the parties were Moroccan subjects, and when all those involved had extraterritorial privileges of some sort.

In many instances, Jews voluntarily agreed to submit a particular case to a Jewish court despite their ability to have it adjudicated in a consular court. This seems to parallel the way in which observant Jews today use *batei din* as a form of arbitration in the contemporary United States—though I caution that we should be careful to avoid jumping to conclusions about the parallels between the present and the past.[55] Nonetheless, it seems that consular officials treated these cases much like arbitration. If the parties involved were both Jewish and felt that a Jewish court was the best venue in which to sort out their differences, consular courts seem rarely to have objected.

For instance, in 1882, Mordekhai Bensason, a Jewish Moroccan subject, sued Joseph Bensadon, a fellow Jew from Algeria (and a French citizen). The case involved a contested inheritance from the daughter of Maimon Bensadon Casis, presumably a relative of Joseph Bensadon. Bensason technically should have sued Bensadon in a French consular court; presumably he wanted the case to go before the *beit din* because of a legal document signed by *sofrim*

55 See esp. Chaim Saiman, "The American Beth Din System: Halakhah, Law and Society," unpublished paper presented at the Katz Center for Advanced Judaic Studies, December 5, 2022.

in his possession in which Maimon's daughter transferred her estate to him before she died.[56] On March 16, both Bensason and Bensadon signed documents attesting that they wanted their dispute to be judged by the chief rabbi of Tangier, Mordekhai Bengio.[57] The notes suggest the personal dimension of jurisdiction: Bensadon wrote that "As for me, I go through the order of Monsieur the Consul of France, and I go through the law that Rabbi Mordekhai [Bengio] will determine concerning the case I have with Monsieur Mordekhai Ben Moshe Bensusan."[58] Questionable grammar aside, this note suggests that Bensadon was not so much agreeing to the institutional jurisdiction of Tangier's *beit din*, but rather that he was submitting to Rabbi Bengio's personal jurisdiction. Bensadon's reasoning evokes the original meaning of jurisdiction as *iuris dictio*, the capacity to "say the law."[59] In this case, as in others, the consular authorities seem perfectly willing to have Jews voluntarily submit their legal matters to a *beit din*.[60]

At times consular courts attempted to manage appeals among different *batei din* located in various Moroccan cities. Although Moroccan Jews had no centralized system of appeal until it was imposed on them by French colonial authorities in 1918, they could nonetheless dispute the ruling of a given *beit din* by bringing a case before the rabbis of a different city.[61] In a case from 1866, the British subject Yamin Ferares was dissatisfied with the decision of *beit din* of Essaouira; the British vice-consul there approved his desire to appeal the case before "the Hebrew tribunal in Tangier."[62]

In some instances, consular officials actively worked to send certain cases to a Jewish legal institution for adjudication. This might even involve the cooperation of Moroccan government officials, such as in the case against

56 Translation of a legal document, 18 Tishrei 5642/ October 11, 1881, "Mardoché de Moise Bensason v. Joseph Bensadon," Tanger A 163, CADN.

57 Note with no title signed in Hebrew by Joseph Ben Sa'adun, March 16, 1882, "Mardoché de Moise Bensason v. Joseph Bensadon," Tanger A 163, CADN.

58 "Moi je passe par l'ordre de Monsieur le Consul de France et je passe par la loi qui me fera Rby Mordejay pour la question que j'ai avec Monsieur Merdoj Ben Mosé Bensusan."

59 Herzog, "The Uses and Abuses of Legal Pluralism," 5.

60 See, e.g., Botbol to Féraud, 3 September 1885, Tanger A 162, CADN; Abdelatif to Ordega, 2 January 1885, Tanger A 162, CADN.

61 Marglin, *Across Legal Lines*, 32, 183.

62 Frederick Carstensen to R. Drummond Hay, November 21, 1866, 631/3, FO.

Haim Assor, a British subject. The British consul and Muhammad Bargash, the Moroccan minister of foreign affairs, agreed that the case should be adjudicated before the *beit din* of Essaouira. Assor, however, was dragging his feet: while he never explicitly said that he did not want to submit the case to a *beit din*, he claimed that he was in Marrakesh and unable to come to Essaouira. The British vice-consul explained that all he had to do was appoint a representative ("oukil au chraa," or *wakīl*) armed with a power of attorney.[63] Assor then failed to draw up a power of attorney with *sofrim*, which was required by the *beit din*.[64] But there was never doubt among the consular authorities—nor among the Moroccan minister of foreign affairs—that this case belonged in a *beit din*.[65]

Perhaps the greatest indication that most consular authorities considered *batei din* appropriate fora for adjudication among Jews are those cases in which one of the plaintiffs tried to appeal the ruling of a Jewish court in a consular one. In some instances, the consuls are clear that the *beit din*'s ruling must be upheld: the French consul explained that the rabbinic court is the "most common and legitimate of all" when all the plaintiffs were Jewish.[66] There were certainly instances in which consular officials contested the jurisdiction of a *beit din*. In 1863, Simtob (Shemtov) Cohen sued the widow of Darmon, a French protégé. Cohen was an Italian protégé when the case started but had since lost his Italian protection and become a Spanish protégé. Darmon requested that the case be adjudicated in the *beit din* of Tangier—presumably because the case concerned a *ḥazaka*, or right to occupation, which she had inherited from her father. However, before the *beit din* could rule, the Italian consul "shamefully dismissed" Cohen from his protection. Now that he was a Spanish protégé, the French consul had to ask Salvador Rizzo, his Spanish counterpart, to permit the parties to again appear before the Jewish court. Rizzo responded "that he opposed their appearance [before the *beit din*] and would forbid Cohen from submitting [to its jurisdiction] … M. Rizzo protested extensively about the injustice and absurdity of this law [Jewish

63 Beaumier to White, September 10, 1874, 631/5, FO.

64 Hay R. Drummond Hay to Hay, July 20, 1875, 631/5, FO.

65 For another case in which consular and Moroccan officials collaborate to ensure that a case among protégés is heard by a Jewish court, see Dossier Benchimol, 1903-1905, Tanger B 461, CADN.

66 Vernouillet to Hay, January 11, 1880, Himayat, Direction des Archives Royales (*Mudirīyat al-Wathā'iq al-Mālikīya*), Rabat, Morocco.

law], declaring that no Spaniard should submit to it.[67] While the outcome of the case went unrecorded in the archives, this is a clear instance in which the preponderance of practice was on the French consul's side. Rizzo objected to having a Spanish protégé submit to Jewish law, knowing full well that protégés and even Jews with foreign nationality regularly appeared before *batei din*. Like all matters of law, jurisdiction could be contested in theory—but the legal reality on the ground was one in which "Spaniards" like Cohen regularly appeared before Jewish courts.

The adjudication of *halakhah* in consular courts

Given the frequent recourse to Jewish legal documents and institutions, it should come as no surprise that consular officials often found themselves in the position of having to adjudicate questions of *halakhah* in their courts. The adjudication of *halakhah* in non-Jewish courts is attested in early modern Europe[68]; in modern France (regarding Algerian Jews under the jurisdiction of Jewish law)[69]; in modern Italy[70]; and in consular courts across the Mediterranean.[71] The prevailing narrative remains that the autonomy of Jewish courts receded in the face of state centralization—whether that began in the eighteenth, nineteenth, or twentieth century.[72] Part of the significance of the adjudication of *halakhah* in consular courts in the late nineteenth century is

67 Summaripa, "Note au sujet de l'affaire Darmon et Simtob Cohen, tous deux Israélites" (1863-64, no precise date), Tanger A 159, CADN.

68 Verena Kasper-Marienberg and Edward Fram, "Jewish Law in Non-Jewish Courts. A Case from Eighteenth-Century Frankfurt at the Imperial Aulic Council of the Holy Roman Empire," *Max Planck Institute for Legal History and Legal Theory Research Paper Series No. 2022–21* (2022): 1–86. See esp. pp. 11–13 for an overview of scholarship on non-Jewish courts applying *halakhah* in early modern Europe.

69 Jessica M. Marglin, "Jewish Law Across the Mediterranean: The Last Will and Testament of Nissim Shamama, 1873–1883," in *Ha-historiah ha-arukhah shel yehudei artzot ha-islam be-yisrael* ed. Noah Gerber and Aviad Moreno (Beer Sheva: Ben Gurion University Press, 2021), 417–18 (Hebrew).

70 Jessica M. Marglin, *The Shamama Case: Contesting Citizenship Across the Modern Mediterranean* (Princeton, NJ: Princeton University Press, 2022).

71 See esp. Nathan Brown and Amihai Radzyner, "Tzeva'ah goralit: ha-ma'avakim 'al ha-yerushah shel 'ha-Rotshild me-'Aden'," *Ha-'Umah* 200 (2015): 162–78.

72 See, e.g., Berkovitz, *Law's Dominion*, Ch. 5; Marglin, *Across Legal Lines*, Ch. 7; see also Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millenia* (Cambridge, MA: Harvard University Press, 2018), Chs. 12–13.

that it disrupts the periodization of legal centralization. From the perspective of the Mediterranean, European law was hardly nationalized or centralized around 1800. The practices of the early modern period—in which people were adjudicated not according to the law of the land, but according to their status—persisted throughout the nineteenth century and into the twentieth.

Most of the time, consular courts found themselves adjudicating questions of Jewish law because Jewish litigants brought Jewish legal documents as evidence for their claims. Jews and non-Jews under consular jurisdiction had Jewish business partners, tenants, and relatives who were Moroccan subjects, and thus under the jurisdiction of *batei din*—in other words, it was only natural that these Jews would rely on Jewish notaries public in order to draw up whatever legal documents they had. Consuls then had to weigh the validity of these legal documents.

Consular courts did not always privilege Jewish legal precepts over their own. A case in point is the lawsuit between Simha Elmaleh, widow of Judah Elmaleh, and George Broome (a British national). Elmaleh sued Broome in 1879, claiming that Broome had taken possessions of goods owned by her late husband. Ratto, her lawyer, produced a *ketubbah* (marriage contract) as evidence that the late Elmaleh owed his widow 1,800 Spanish dollars. When the *ketubbah* was translated into English, the court found that Judah Elmaleh had promised to pay Simha 1,200 Spanish dollars, plus 200 "other coins of which the value was not specified" (presumably *zuzim*, the standard amount allotted to widows or divorcees in Rabbinic texts); additionally, it recorded that Simha had brought household goods worth 600 Spanish dollars into the marriage. The lawyer concluded that the *ketubbah* "entitled her to come between the Estate and the creditors." Presumably, Simha and her lawyer Ratto (who was not Jewish) had in mind the halakhic principle that upon the death of her husband, a widow was entitled to collect both the bride price and her personal property. Her right to this sum (also known as the *ketubbah*) put her in the position of a creditor on the estate of her late husband.[73]

Broome argued that the *ketubbah* "was a sample of the so-called settlements common among the native population" in which they fictitiously agree to pay their wives far more than they can afford: "The money stated to be settled on Plaintiff was imaginary: no proof being adduced that deceased possessed a quarter of twelve hundred dollars at the time of his marriage."[74] The consular

73 See, e.g., *Shulḥan 'Arukh*, Even ha-'Ezer 66, 100:1–3.

74 Simha Elmaleh v. George Broome, June 13, 1879, 631/7, FO.

court ruled in favor of Broome, deeming the *ketubbah* insufficient evidence for Simha's claims.[75] In this instance, the court refrained from examining the question of *halakhah* in depth; instead, it took Broome's word at face value—that the financial details of the *ketubbah* produced by Simha Elmaleh were fictional. Presumably, a *beit din* would have ruled quite differently in this matter, awarding Simha priority over her late husband's other creditors.

Three years later, the American consular court in Essaouira similarly felt it was perfectly capable of adjudicating points of Jewish law. Yet in this case, the consular court intended to respect *halakhah*. The case concerned a disputed estate among members of the Corcos family, leading merchants in Essaouira. Donna Corcos and her son Solomon sued Solomon's uncles Abraham and David for withholding his inheritance from his grandfather's estate. The Corcoses initially brought the dispute to the local *beit din*, which had ruled for Abraham and David based on their taking an oath by which they swore that they had not appropriated any property belonging to Donna and her son. Dissatisfied with this result, Solomon appealed the matter to the *beit din* in Marrakesh, which ruled that the oath was invalid since the defendants had not produced any of the relevant documents. The Marrakesh *beit din* ruled that all the documentation had to be produced before the case could be adjudicated.[76] Finally, Donna and Solomon took the uncles to the American consular court, where Abraham was the US vice consul.

The consul sided with the Marrakesh *beit din*. He explained "that the judgment given by a tribunal confining its decision to an oath on the part of defendants does not appear sufficient inasmuch as an oath cannot exonerate any party from responsibility where he is bound to show books, deeds, or other documentary evidence which must exist in a business of this nature, as explained in the reversal of the judgment by the Morocco [Marrakesh] tribunal, which has similar jurisdiction to that of Mogador."[77] Although he does not explicitly invoke an attempt to rule according to Jewish law, the principle that defendants should swear an oath only in the absence of documentary evidence is widely accepted.[78] Needless to say, what *halakhah* actually says

75 Ruling, Simha Elmaleh v. George Broome, June 16, 1879, 631/7, FO.

76 Felix Mathews to Abraham Corcos, July 22, 1882, RG 84, vol. 1, NARA.

77 Ibid.

78 See, e.g., *Shulḥan 'Arukh*, Ḥoshen Mishpat 87–96. In the end, the consul recommended that each side appoint arbiters (referred to as "referees") to avoid the expense of continued litigation.

in this instance is disputable, given that two *batei din* ruled differently and that we lack details about the documentary evidence in question.

A similar need to adjudicate between competing Jewish legal documents arose in a case from 1896 among Jews living in Ksar el-Kebir. The plaintiffs, Serfaty and Altit—both Moroccan subjects—sued David Medina, under French jurisdiction. Serfaty and Altit rented a store from Medina, but then Medina demanded rent in advance and, upon being refused, damaged the merchandise deposited there. When Serfaty and Altit sued Medina for damages, Medina claimed that the rental contract had been invalid because it was in the name of his son, who had not been in Ksar el-Kebir that day (which was attested in another document signed by *sofrim*); thus the rental contract was false. Serafty and Altit admitted that the rental contract was indeed in the name of Medina's son, but this was because Medina had been put under *ḥerem* ("mis hors la loi") by the rabbis in Ksar el-Kebir as punishment for perjury. The city's *sofrim* had been forbidden "to draw up acts in his [Medina's] name." Medina had thus drawn up the rental contract in his son's name, "which he does, by the way, for all notarized acts which concern him."[79] The court ruled in favor of Serfaty and Altit, deeming the rental contract valid and forcing Medina to pay damages.[80] Presumably the consul invalidated Medina's legal document claiming his son was absent on the day the rental contract was drawn up—giving legal weight to the lease in Medina's son's name.

Disputed estates frequently brought Jewish law into non-Jewish courts, and consular courts in Morocco were no exception.[81] In 1899, Haim Benchimol, one of Tangier's most prominent Jews and a French citizen, was sued by his deceased sister-in-law's relatives. Esther Sicsu had been married to Haim's brother Moses; Moses wrote a will in 1875 leaving her his property, and in 1879 Esther agreed to leave her estate to Haim after her death. But Esther's sisters and niece—Hadra, Messody, Hadra, and Preciada—believed that the

79 Serfaty and Altit v. David Medina, September 15, 1896, Tanger F2, CADN. Someone under *ḥerem* was prohibited from standing near other Jews in the community or from entering a synagogue—and thus, presumably, from using a *beit din* or having legal documents notarized by *sofrim*: see *Shulḥan 'Arukh*, Yoreh De'ah 334:2; Aaron Kirschenbaum, *Bet Din Makkin ve-Onshin: Ha-Anishah ha-Pelilit be-Am Yisrael: Torata ve-Toldoteha* (Jerusalem: Magnes Press, 2013), 441–51. I am grateful to Chaim Saiman for these references.

80 Serfaty and Altit v. David Medina, October 30, 1896, Tanger F2, CADN.

81 Brown and Radzyner, "Tzeva'ah goralit."; Marglin, *The Shamama Case*.

1875 will and the 1879 contract were invalid according to Jewish law. Haim countered that both were valid, all drawn up "according to the customary legal form in Moroccan Jewish communities of the Castilian [Sephardi] rite." The court rules in Benchimol's favor, declaring the legal documents in question "authentic" according to "rabbinic law, the only one applicable in this case."[82] The court justified its decision citing the fact that the legal documents in question were properly notarized by *sofrim*, and thus should be assumed to be valid.

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Seen through the lens of legal pluralism, the adjudication of Jewish law in consular courts—as in other non-Jewish courts—is something of an anomaly, an exception made to accommodate a complex jurisdictional landscape. Yet historians may be better served by setting aside the model of legal pluralism, and instead seeing the interplay of Jewish and consular courts as akin to the legal landscape of premodern Europe described by Herzog. Sources of legal authority were multiple and nearly always overlapped. Legal authorities like the consular courts drew on multiple sources of normativity. When the individuals concerned were Jewish, these sources of normativity frequently included Jewish law and Jewish legal institutions. And while this article has only looked at practices in Morocco, I suspect that similar patterns can be found elsewhere in the Middle East and North Africa where extraterritorial privileges existed.

82 Hadra Sicsu, Messody Sicsu, Hadra Sicsu, and Preciada Sicsu vs. Haim Benchimol, November 8, 1899, Tanger F4, CADN.