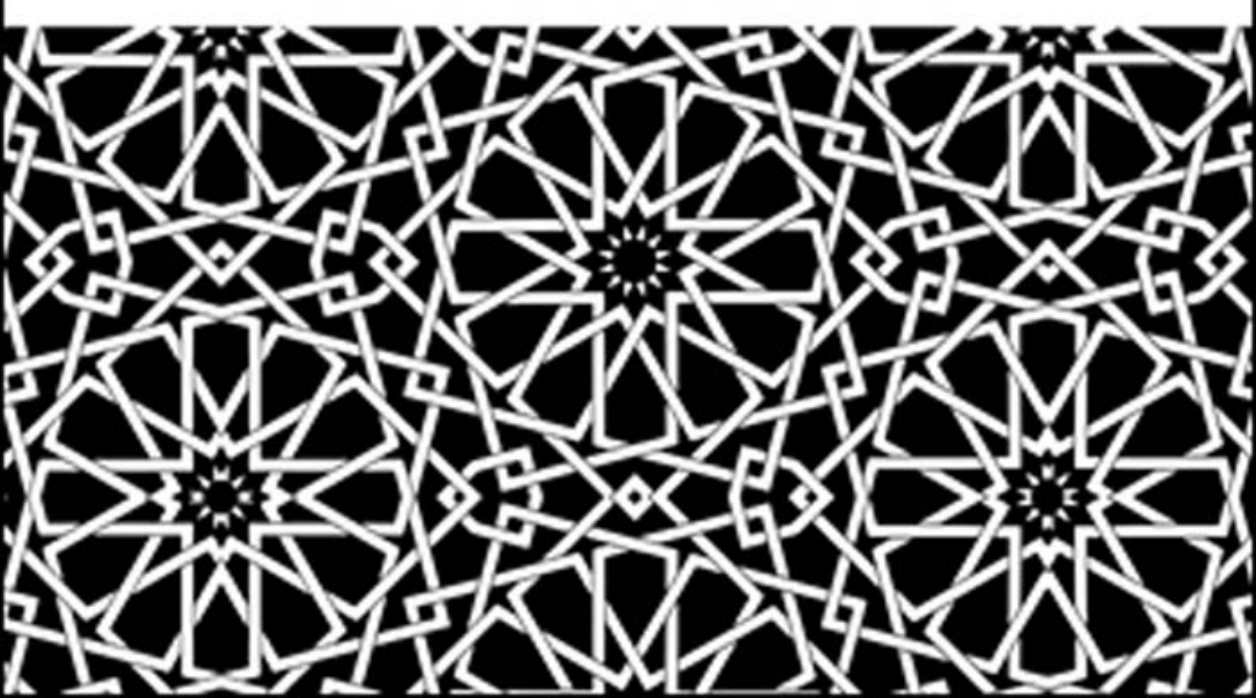
A COMMON JUSTICE

The Legal Allegiances of Christians and Jews Under Early Islam

URIEL I. SIMONSOHN



A Common Justice

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In memory of my friend Shay Green (1971–2000)

CONTENTS

NOTE ON TRANSLITERATION

The transliteration of Arabic and Judaeo-Arabic in this book follows the system of the *International Journal of Middle Eastern Studies*.

Aramaic and Syriac are similarly transcribed, with the following exceptions:

sh = š
Soft *bgd kft* letters are not indicated—thus, kh = k, th = t, etc.
Vocalization of Syriac is primarily East Syrian.
Long vowels: a = ā; u = ū; o = ō (e.g., *išō ʿ*)
Epsilon = ē

Hebrew follows the system of the *Association for Jewish Studies Review*, yet whereas Hebrew words that appear in Judaeo-Arabic texts are indicated by the transliteration of צ as ṣ, ט as ṭ, and ח as ḥ, the same consonants that appear in original Hebrew texts will occur as tz, t, and h, respectively.

The transliteration of Pahlavi follows the system of D. N. MacKenzie's *Concise Pahlavi Dictionary*.

Introduction

The fragmentary remains of Christian and Jewish legal documents composed in the Eastern Mediterranean in the first five hundred years of Islamic rule reveal that Christian and Jewish religious elites were preoccupied with the fact that their coreligionists were taking legal cases outside the community for litigation in what appear to have been primarily Islamic courts. This book examines the legislative response of Christian and Jewish religious elites to the problem posed by the appeal of their coreligionists to extra-confessional judicial institutions. Focusing on the late seventh through the early eleventh century in the region between Mesopotamia in the east and North Africa in the west, the study explores the multiplicity of judicial institutions that coexisted under early Islamic rule as part of the complex array of social obligations that bound individuals across confessional boundaries. Contrary to the notion of a non-Muslim autonomous existence in a rigid social setting, strictly demarcated along confessional lines, a comparative study of Christian and Jewish legal behavior under Islamic rule exposes a considerable degree of fluidity across communal boundaries. Such transcendence of religious affiliation threatened to undermine the position of traditional religious elites. In response, these elites acted vigorously to reinforce communal boundaries, censuring recourse to external judicial authorities and threatening transgressors with excommunication.

Maintaining judicial power as a means of sustaining social power and religious boundaries was of great importance for Christian and Jewish elites even prior to Islamic rule. The sages of the Mishnah (the tannaim) as well as the early church fathers had been preoccupied with similar, if not exactly the same, concerns. In early rabbinic Judaism, the discussion dealing with appeal to Gentile courts (*'arkha'ot shel goyim*) reflects an ambiguous approach. Despite their general opposition, the early rabbis permitted recourse to non-Jewish courts for purposes of issuing evidentiary documents, such as deeds of sale and loan, and for coercing recalcitrant litigants to obey the decisions

of Jewish courts. Yet while the early Christian position appears to have been much firmer in its objection to the use of nonecclesiastical courts, its exact meaning as to the identity of these courts remains unclear. Early Christian sources use a variety of expressions when referring to nonecclesiastical courts and judges, such as "secular," "outsiders," and "nonbelievers." In general, the early church fathers argued, litigation should be avoided; yet if inevitable, it should be pursued only before "the saints," the appointed bishops.

It is therefore evident that the rise of Islam and its subsequent rule did not trigger Christian and Jewish judicial preoccupations. The reliance of non-Muslim confessional leaders on legal principles formulated in the pre-Islamic period and their resort to some of the rhetorical motifs that had already been employed by their predecessors attest to the endurance of these concerns. Nonetheless, the frequency of references made by non-Muslim leaders to the problem of recourse to extra-confessional judicial institutions as well as the high tones in which they often expressed their objections in the period following the Islamic conquest suggests not merely a continuity but also an intensification in their concerns.[1]

The East Syrian and West Syrian Churches under Early Islamic Rule

Two Eastern Christian churches are at the center of this study: the East Syrian (so-called Nestorian) and West Syrian (Jacobite or Syrian Orthodox) Churches. The history of these churches and their parallel formation should be traced back to the Christological disagreements of the fifth century. The theological controversies on the subject of the human and divine natures of Christ dominated the ecumenical councils of Ephesus (A.D. 431) and Chalcedon (A.D. 451). It was in these controversies that the formation of the East Syrian and West Syrian Churches was conceived. The council of Ephesus saw the climax of the controversy between the Dyophysites, who adhered to the doctrine of two natures in Christ; and the Miaphysites, those in the Roman Empire who opposed this interpretation and argued for a single nature.

Twenty years later, at Chalcedon, a failed attempt to reconcile Miaphysite factions resulted in a second blow to Roman aspirations for ecclesiastical unity. By now, the adherents of a Miaphysite Christology had begun to adopt sectarian features.[2] These developments eventually gave rise to the formation of local Miaphysite churches, a process that reached its height in the sixth century,

following the policies of hostile emperors—most notably, those of Justinian (r. 527-65). It is within this history of doctrinal divisions that we should locate the origins of the two churches that constitute the Christian component of the present study: the East Syrian Church of Seleucia-Ctesiphon and the West Syrian Church of Antioch.[3]

Initially forming a significant part, if not the majority, of the population, the Syriac-speaking Christians of Mesopotamia and the Fertile Crescent were descendants of native as well as Greek cultural traditions. Since they sat at a cultural crossroads and experienced frequent changes of political authority, the cultural diversity of these people seems hardly surprising.[4] Cultural vehicles such as poetry, chronicles, hagiography, and architecture were put to work as a means of transmitting a "Christian message."[5] This message was often conveyed through the intellectual endeavors of monks in the outskirts of lay settlements. Thus the merging of pious and cultural enterprises served to enhance loyalty to the church and to local identities.[6]

For Near Eastern Christians, perhaps the most remarkable effect of the Arab conquest was the withdrawal of their past sovereigns. By the end of the first half of the seventh century, the subjects of the Sasanian and Eastern Roman Empires were under Arab rule. Yet despite their unique character and particular development, these churches had certain features in common. The image is one of a general continuity in communal structures, cultural affiliations, doctrinal divisions, and administrative patterns.[7] Left to their own devices (or given the freedom to regain their authority), ecclesiastical leaders under Islam continued to assert their control over their clergy, churches, monasteries, and schools. These institutions appear to have remained, for the most part, intact and unaffected by the turbulence of warfare in the first centuries of Islamic rule. Thus patriarchs were able to retain their positions; but instead of paying tribute to the Roman or Persian governments, they paid it to an Islamic caliphate. At the top of the local ecclesiastical organization, the bishop retained his dual role as spiritual guide and administrator.

Near Eastern Rabbanite Jews

The second confessional group with which this study is concerned is the Near Eastern Rabbanite Jews of the later geonic period (tenth and eleventh centuries). In principle and quite often in practice, Rabbanite Jews were affiliated with the geonic centers of Babylonia and Palestine and their extensions over

the vast territory between Iraq and Ifrīqiya (modern-day Tunisia). It is in this context that we find the activity of the geonic academies, as these institutions of learning were the product of an ongoing institutionalization of the rabbinic networks that had created the Mishnah and the Talmud.[8] Thanks to their scholarly reputation and hereditary office, the heads of the geonic academies of Babylonia and Palestine were perceived by a significant part of the Jewish world as spiritual leaders, entrusted with the duty (and prerogative) of guiding groups and individuals in questions of law and communal life.

The history of the geonic period is also a history of Jewish factionalism in which competing allegiances promoted the fragmentation of local communities into separate, often rival, congregations. At the same time, however, it should be observed that contention and factionalism were not necessarily signs of a declining Jewish world but rather suggest a thriving one, reflected by the fierceness of the struggle for authority. Indeed, hundreds of thousands of documents from the Cairo Geniza attest to the richness and vitality of Near Eastern Jewish life. It was a period in Jewish history that gave rise to a Judaeo-Arabic culture, a melding of ancient Jewish traditions with the nascent Islamic civilization. It is here that we find Jewish intellectuals assuming an active role in a general atmosphere of intellectual and cultural prosperity. It is here, too, that we notice a remarkable resistance on the part of many who fought not only for the preservation but also for the ongoing development of Jewish jurisprudence.

Dhimmī Autonomy

There is much to be said for considering the history of Christian and Jewish groups under Islamic rule collectively. Drawing on common theological and civil legacies, the Christian and Jewish communities under Islamic rule resembled each other in many ways.[9] They shared an eventful pre-Islamic past, in which the parting of the ways most likely came at a much later stage than contemporary narratives would have us believe. While Christian and Jewish elites were in the process of defining their respective orthodoxies, the two religious groups were about to be joined by a third monotheistic religion. As possessors of the revealed Scripture (*al-kitāb*) and adherents to a monotheistic religion, Christians and Jews were granted the protection (*dhimma*) of Islam within Islamic territory (*dār al-Islām*).[10]

Many studies dealing with the social history of Christians and Jews

under Islam presuppose that the *dhimmī* system entailed the creation of a social setting in which Christians and Jews were members of autonomous communities.[11] This assumption lay at the basis of the modern scholarly view that correlated the pre-Islamic evolution of social communities centered on a confessional identity and an Islamic social outlook of segregation of Muslims from their non-Muslim environment.[12] Here communal agents on both sides of confessional boundaries were entrusted with the preservation of communal life through an ongoing maintenance of its autonomous institutions. As such, communal autonomy has been seen as a central mechanism for the creation of a rigid demarcation between *dhimmī*s and Islamic society at large.[13]

For Muslims, the point of *dhimmī* autonomy was "to demonstrate who belonged . . . to the dominant group and who did not";[14] for Christians and Jews, it served the ultimate purpose of confessional survival. Thus the so-called Pact of 'Umar, a regulator of *dhimmī* status, was often invoked by Muslims and their *dhimmī* subjects, attesting to their mutual interest in sustaining past agreements.[15] In practical terms, *dhimmī* communal autonomy meant for Christians and Jews the right to manage their internal communal affairs independently of the Islamic state, as if they were running "a state not only within a state, but beyond the state."[16] This autonomous administration has been seen as running from the communal head down to a network of communal officers who collectively administered the community's judiciary, welfare system, and education free from any intrusion on the part of the Muslim authorities.

Communal institutions and their autonomous functioning formed the basis of *dhimmī* autonomy, while its centerpiece was the community's legal autonomy. So crucial was the maintenance of communal judicial institutions that modern scholars have argued that the realization of legal autonomy was a prerequisite for communal autonomy;[17] indeed, this single claim has been adopted by otherwise divergent modern scholars who have argued, separately, for the existence, non existence, or partial existence of communal autonomy.[18] The overriding principles that guided the majority of Muslim jurists dictated that *dhimmī*s were to conserve the usage of their laws, appoint their own judges, and have the freedom of recourse to their own tribunals.[19]

At the same time, however, Muslim jurists were well aware of the Qur'anic position that allows and even suggests that *dhimmī*s be judged in Islamic courts: "[They are fond of] listening to falsehood, of devouring anything forbidden. If they do come to thee, either judge between them, or decline to interfere. . . . If thou judgest, judge in equity between them (Q. 5:42)"; "And this [he commands]: 'Judge between them by what Allah hath revealed.' And

follow not their vain desires, but beware of them lest they beguile thee from any of that [teaching] which Allah hath sent down to thee" (Q. 5:49).

Whereas according to some Muslim authorities, these verses designate the Islamic court as a locus of optional arbitration between *dhimmī*s (suggested in Q. 5:42), others argue for the primacy of Islamic jurisdiction over *dhimmī* legal affairs (suggested in Q. 5:49).[20] Such questions can be seen as the basis of further disagreements among Muslim jurists on the issue of *dhimmī* legal autonomy. Yet in general, the majority of Muslim jurists gave permission to Christians and Jews to administer their laws independently and to pass judgment accordingly in their own courts, conditioned on the consent of both non-Muslim litigators. If one of the parties preferred to litigate in an Islamic court, the other party had no choice but to comply.

Revisiting the Paradigm of Autonomy

In his analysis of the conceptual framework of Jewish existence under medieval Islam, Haim H. Ben-Sasson stated: "Throughout the Middle Ages the Jews demanded—both from the dominant culture as well as from themselves—national and religious autonomy and cultural and social responsibility. In doing so they presented a challenge both to themselves and to the dominant society. The internal challenge gave rise to a creative spiritual force capable of offering vigilant resistance and of forging new life patterns for the community and the individual alike."[21]

Ben-Sasson's remark reflects a common perception in modern studies dealing not only, as he does, with Near Eastern Jewry but also with Christian communities.[22] These studies tend to view *dhimmī*s as well entrenched within the boundaries of national, ethnic, and religious units, segregated from their external environment. Thus, the theory goes, the survival of these communities into modern times depended on their ability to maintain firm communal discipline rooted in a confessional consciousness.[23] Accordingly, Near Eastern Christian and Jewish communities are seen as social units that submitted to a monolithic and central authority—the patriarchs or the geonim, respectively. Moreover, on the basis of their religious convictions, members of these units are depicted as having owed allegiance predominantly to their confessional institutions, thereby ascribing only secondary importance to other forms of social organization outside their community. In sum, the Christians and Jews of medieval Islam are seen as members of corporate social entities whose boundaries are determined solely by the parameter of religion.

Plausible as the paradigm of communal autonomy may seem, it is also misleading, since the assumptions underlying the notion of autonomy fail to account for some principal characteristics of pre modern Near Eastern societies.[24] The use of such expressions as "nation" and "national unity" to describe Christian and Jewish communities ascribes to *dhimmī* groups features similar to those found in medieval Christendom or in modern societies.[25] Yet in practice, the principle of autonomous units based on confessional affiliation was best realized in the minds of those who sought to implement them—namely, the religious elites—and not necessarily in the lives of their communities. A crucial mechanism for creating confessional boundaries was the promulgation of legal stipulations. These provided practical guidance to believers in their daily encounters with adherents of other religions and also employed the sort of rhetoric designed to instill in the minds of believers a notion of uncompromising membership in autonomous confessional units.[26] Quite often, this formality has been taken for reality.[27] In practice, however, the extant evidence suggests a social setting characterized by multiple sources of authority, generated by multiple social affiliations—a setting, obviously, that did not well serve the ideology of those who were preoccupied with confessional uniformity and unity.

The notion of autonomy, let alone a rigid one, is undermined by the arguments of the very scholars who have championed it, since they themselves draw our attention to the fact that *dhimmī* regulations were frequently affirmed in theory but only sporadically enforced.[28] Furthermore, as historians and social scientists have come to agree that religious convictions are not sufficient to explain social commitment, it seems that the commitment of non-Muslims to an autonomous community should be viewed with some skepticism.[29] Rather than attempt to locate the hinge of social relationships in the bonds between individuals and their confessional authorities, an understanding of the social setting under discussion should begin with an acknowledgment of a multiplicity of constantly changing sources of social power.[30] Of confessional leaders, it seems best to speak as people who shared their authority, at times unwillingly, with other figures (coreligionists and other), such as prominent merchants, landowners, scholars, holy men, courtiers.[31]

Moreover, while *dhimmī* confessional leaders sought to fortify communal segregation through rhetorical and legislative means, they also frequently called upon the intervention of the Muslim authorities at moments of convenience.[32] This plurality of authorities was dictated by a rich matrix of social ties that transcended confessional lines, thereby undermining the very notion of

autonomy.[33] It comprised a set of social allegiances, often based on a patron-client relationship, through which both parties were able to offer each other some form of social benefit.

We are dealing here with a society in which such individuals as ʿAbdallāh ibn al-Muqaffaʿ (d. ca. 756) and Yaʿaqūb ibn Killis (d. 991) were able to exploit their mixed affiliation fully, as they were born in one cultural environment, settled in another, converted to Islam, and placed their professional skills at the disposal of their Muslim sovereigns. Contrary to the notion of discrete units, the image that emerges from the social landscape of the medieval Near East is one of constantly evolving partnerships, friendships, collegial ties, and even familial bonds among members of different religions. In this respect, the evidence found in the Cairo Geniza is of utmost importance, as it clearly attests not only to the nature and character of social contracts but also to the atmosphere of freedom that had made them possible.[34] The use of the term "contracts" is not accidental in this context: it derives from the individualist and reciprocal character of the social bonds forged among members of these societies, from an "image of bargaining," as Lawrence Rosen described it, in which "each attachment, each personal quality, each basis for affiliation became a resource to be utilized in fabricating a set of allies and dependents."[35]

Thus, terms such as *ḥaqq* (right, duty, claim) in present-day Moroccan society and *niʿma* (benefit) in that of tenth-century Būyid Iraq were used to denote the reciprocal character of the personal contract drawn up by two individuals.[36] Rather than seeking the corporate, we should be in search of the individual and personal. It was through the latter that individuals became committed to a variety of other individuals in a "series of interpersonal ties, freely negotiated."[37] Under these circumstances, it is misleading to attribute to confessional communities a monopoly over people's commitments and loyalties.[38]

However salient its role may have been in the process of constructing social obligations, personalism cannot alone explain the murkiness of confessional boundaries. Late in the seventh century, the East Syrian monk John bar Penkāyē commented in his apocalyptic treatise that "there was no distinction between pagan and Christian, [and] the believer was not known from a Jew."[39] Though it is offered in the context of an apocalyptic composition decrying the lack of confessional discipline, John's comment may also suggest the continuity of a shared Near Eastern culture, in which it was often impossible for members of one religious affiliation to be distinguished, in their mundane practices, from another.[40]

Whether Christian, Jewish, or Muslim, members of discrete confessional affiliations appear to have shared a cultural orientation that may only have intensified as Arabic became the region's lingua franca.[41] It is in this context of social embeddedness that those who sought to enforce confessional divisions—namely, the religious elites—had to come up with a discourse of resistance.[42] As such, this discourse was intended to evoke in its audience emotions of fear and rage toward the other, the outsider—and also to advance, through a "symbolic separatism," the notion of a religious community and its place in the world.[43]

Thus, from the outset of the Arab conquest, we find this discourse of resistance in a rich variety of literary genres, including hymns, liturgy, sermons, chronicles, hagiographies, martyrologies, and apocalyptic narratives.[44] These works reflect the efforts of Christian and Jewish religious leaders alike to convey a message of opposition toward inter confessional contacts by depicting the Arabs as a divine punishment: immoral, transient, extractors of burdensome tribute, and ruthless persecutors. Unsurprisingly, this message corresponded to the very ideal of religious autonomy that was to provide religious elites with the legal and practical means to enforce their separatist aspirations.[45] It was meant to provide a solution to the challenge of maintaining social-confessional cohesiveness in the context of Islamic permissiveness.[46] It is against this background that we ought to view and interpret, on the one hand, the insistence of *dhimmī* leaders on judicial exclusiveness and, on the other, the incompleteness of its implementation.

The principle of legal autonomy, propounded by Muslims jurists and cherished by non-Muslim leaders, has often been presented in modern scholarship as a sign of *dhimmī* autonomy. Accordingly, the recurring violation of this principle, as reflected in the frequent non-Muslim recourse to Islamic courts, has been interpreted as a breakdown of the system—hence the harsh response of non-Muslim leaders. This interpretation, however, does not account for a broader social context in which, despite the formal segregation, members of one confession were able to interact with those of another without renouncing their religious convictions.

It is therefore of little surprise that recent calls for revisions in modern interpretations insist upon a greater emphasis on local context instead of the stringing together of isolated episodes into general phenomena.[47] In overemphasizing a "homogenous 'we' ranged against a homogenous 'them' we are risking importing a foreign social setting into our study."[48] Rather than assuming a social setting that fully embraced formal prescriptions, we should

consider a setting that witnessed constant tension between the formal and informal. Instead of dividing the social landscape into wedges of sovereigns and minorities, jurisdiction and autonomy, we should consider one that was made of overlapping realms of authority. This is not to say that confessional communities had no applicable jurisdiction or that confessional institutions did not assume a practical role; far from it. But their existence and function should be viewed alongside those of other circles of social affiliation. It is in this context that we should consider the ongoing preoccupation of confessional elites with the question of their judicial jurisdictions. Here, in line with their arguments in favor of confessional autonomy, religious elites sought to draw their coreligionists into the fold of their judiciary, all the while highly alert to the fact that members of their communities had recourse to a variety of judicial authorities outside the boundaries of the autonomy that they aspired to realize.

The Social Role of Law and Judicial Institutions

In *The Concept of Law*, H. L. A. Hart argues a position that may seem somewhat inconceivable: "It is possible to imagine a society without a legislator, courts or officials of any kind . . . where the only means of social control is that general attitude of the group toward its own standard modes of behavior in terms of what can be characterized as rules of obligation."[49] Yet Hart also acknowledges that "only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime."[50] The Christian and Jewish communities at the focus of this study did not possess such features, though at times we do find groups within these communities that were bound by highly intimate relations, not to mention religious convictions. Still, irrespective of the size and nature of local relationships, Christian and Jewish communities were often, if not always, spiritually led by men who believed that their membership in a religion and their ethnicity transcended local affiliations. In contrast to those small communities that Hart sees as capable of maintaining a social order without a legal apparatus, those under discussion were highly dependent on one: "In any other conditions in which this simple form of social control is absent inevitable symptoms of social uncertainty and incapability of adaptation to changing circumstances will appear."[51]

Legal scholars and social historians acknowledge the role of law in general and its judicial application in particular as a means of social control and the

use of that control for the purpose of social boundary maintenance, particularly by means of "monopoliz[ing] norms."[52] Here, the language of the law has importance in and of itself, as it helps empower the prescriptive aspect of the law. For example, we often find jurists not only laying down explicit rules against intermarriage, but also embellishing these rules with a vocabulary meant to underscore the negative aspects of such an act and the negative attributes of those outside the group's boundaries.[53]

We should also note the ceremonial setting in which the law is implemented. Referring to the performative quality of civic trials in the Roman Empire, Brent Shaw spoke about judicial processes as venues that constituted "a social field of rule-driven behavior."[54] Whether taking place before an imperial magistrate, in the context of a majestic tribunal, or under a tree outside a remote village, a judicial procedure implies certain ceremonial conventions. The mere appearance before the judicial figure is in itself an expression of submission on the part of the litigants. In addition, a predetermined space, in which regular conventions of speech and principles of etiquette are expected to prevail, attests to the ceremonial quality of the judicial process.[55]

Legal Pluralism: A Conceptual Paradigm

It is in light of the role of law in society and in the context of the multiple laws that governed the lives of Near Eastern societies that this study adopts legal pluralism as a conceptual framework.[56] Social scientists, in their discussions of legal pluralism, have argued that a multiplicity of legal orders exists within every social setting. When it was revived, over two decades ago, the concept of "legal pluralism" was meant to undermine that of "legal centralism"—the notion that law is exclusively prescribed by the state, administered through its formal apparatus, and is equally shared by everyone.[57] "Legal centralism" was countered with the idea that the state is not the sole patron of legal systems; it "does not have a monopoly on law."[58] Instead, rather than *one* law, legal pluralists have advocated for the prevalence of a multiplicity of laws.[59]

This multiplicity is seen in the amalgamation of coinciding legal orders such as the laws of the village, municipality, state, district, and region, as well as national and transnational orders. In addition, many societies follow other forms of legal systems, such as customary, indigenous, and religious law, or laws related to ethnic and cultural affiliations.[60] Here it is important to note that the loci of such legal orders should not be sought out only within the

courts.[61] In addition to a variety of formal types of tribunals, whether state-sanctioned or not, the redress of disputes and the validation of legal actions often take place in informal venues, through the intervention of informal institutions and figures.

Legal pluralism, then, is "the condition in which a population observes more than one body of law."[62] At the basis of this notion lies the recognition that "within any given field, law of various provenances may be operative."[63] The multiplicity of laws allows a multiplicity of legal orders, which, in turn, facilitate a multiplicity of "semi-autonomous social fields."[64] In other words, the concept of legal pluralism highlights the plurality of legal orders, as well as the plurality of social orders that the legal orders aim to sustain.[65] Quite often, this multiplicity entails the overlapping jurisdiction of legal orders and, hence, of their legal institutions, particularly when social orders are not entirely self-regulated. The same legal order may serve more than one social order. Under such circumstances, we find that the legal institutions of discrete legal orders "support, complement, ignore or frustrate one another, so that the 'law' . . . is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like."[66]

But legal pluralism can exist within a single legal order as well. Thus a distinction needs to be drawn between the existence of multiple legal institutions within a single legal order, and multiple legal institutions sanctioned by multiple legal orders—or, in other words, between "system-internal pluralism and pluralism of systems."[67] This distinction was introduced by John Griffiths in terms of "weak" and "strong" forms of legal pluralism,[68] with the former pertaining to different rules and institutions prescribed by a single order and the latter to those prescribed by separate orders. Yet both forms present instances in which "a single population . . . acts within the framework of more than one body of law."[69]

The Implications of Legal Pluralism

"Legal pluralism," writes Griffiths, is "a concomitant of social pluralism,"[70] and it is in this context that a dynamic of social control and social opportunism may occur. Since legal orders are exploited by various power groups as a means of social control, these groups "make competing claims of authority" and "may impose conflicting demands or norms."[71] However, the very competition among power groups allows clients to make use of legal pluralism to

advance social ends and gain practical advantages. Both competition and opportunism are at the heart of the social significance of legal pluralism. It is here that patrons of legal institutions (power groups) and clients (litigants) employ a variety of methods for the fulfillment of their respective agendas. While patrons tend to seek exclusive authority, clients may choose to exploit this goal to try to get a "better deal" or extract various benefits. This dynamic can accelerate when claims are put forward on religious grounds, as religious power groups tend to perceive law as crucial for the maintenance of confessional identity. Whatever their grounds, the claims of power groups are all over similar social capitals: "authority, legitimacy, supremacy, and the prerogative of control over matters within their scope."[72] What is more, these claims are not voiced in a void but are often made in relation to claims by competing powers. Consequently, we may find that institutions and forms of legal reasoning and rhetoric undergo modifications within a given legal order in response to those of competing legal orders.[73] In addition, patrons of legal orders may resort to a variety of practical measures for sustaining authority.

Legal Pluralism as a Methodological Paradigm

Legal pluralism can be found in almost any society. As a paradigm, the concept of legal pluralism can be used as a means to shed light on the social context in which it exists.[74] In addition to identifying the patrons, clients, and institutions within a multiplicity of legal orders, legal pluralism can be used to understand the interplay between social phenomena and law. As a paradigm, it helps us to assess the manner in which legal discourse, legislation, legal interpretation, and stipulation reflect the agenda of patrons of legal orders, and the place and conduct of clients within their respective legal orders and, ultimately, social orders. Here it may be useful to view laws as maps, whose "main structural feature . . . is that in order to fulfill their function they inevitably distort reality." Law, likewise, "becomes the . . . way of imagining, representing, and distorting . . . social spaces and the capitals, the actions and symbolic universes that animate or activate them."[75]

Our task, then, is to understand how and for what purposes patrons of legal orders attempt to achieve legal supremacy, and how they take into account the presence of adjacent legal orders. It is equally significant to analyze how clients of legal orders respond to claims of legal authority, exploring in particular the manner in which, for the furthering of their own ends, they

exploit, on the one hand, these claims of authority and, on the other, the multiplicity of available authorities.

Legal Pluralism in the Late Antique and Early Medieval Near East

The image that emerges from ecclesiastical and rabbinic legal sources of the period under consideration conforms to the theoretical principles of legal pluralism. The ensuing discussion will show that the patriarchs and the geonim issued their opinions and decrees in the context of competing and overlapping judicial institutions of diverse social and religious backgrounds. Rather than focusing on its manifestations, the concept of legal pluralism will serve here to consider the context in which confessional leaders made demands for judicial exclusivity and the means by which these leaders sought to achieve their goals. Because the patriarchs and the geonim opposed the freedom of their coreligionists to choose among a host of judicial possibilities, they had to come up with solutions that would enable them to win the loyalty of their coreligionists, while recognizing the realities "on the ground."[76]

The ability of litigants to bring their suits before more than one judicial institution raises a variety of social questions. Such a choice reflects the subordination of litigants to a multiplicity of judicial authorities as well as their affiliation with a multiplicity of social circles. The social questions that come to the fore, therefore, concern not only the agendas of patrons and clients but also the definition of their membership in a given social circle, their claims in favor of one social domain over another, the context of their choices, the forms of social ties they establish, and more.

Non-Muslim Confessional Elites

Ecclesiastical and Rabbanite leaders possessed the power both to conserve and to change the character of social institutions and mores.[77] When we examine the actions of these men, it becomes evident that they were constantly concerned with preserving their authority.[78] But status and power depend on resources; hence, the patriarchs and the geonim employed a variety of methods to secure the latter so as to preserve the former.[79] The particular ways in which they chose to do so depended in part on the character of the ecclesiastical and

rabbinic institutions themselves. In considering the agenda of confessional elites in such terms, it is also worth considering how Christian and Jewish communal institutions were put to use for its advancement.

The patriarchs' prerogative to convene synodical assemblies and that of the geonim to issue responsa was of crucial organizational significance, conferring upon these leaders supervisory and coordinating positions.[80] Legal authority entailed more than issuing decrees and expounding the law: the patriarchs and the geonim sought also to ensure the implementation of their understanding of the law and its principles. A close reading of some of the issued canons and responsa along with complementary narratives of diverse genres reveals the kind of messages that brewed in the episcopal centers and the academies and that were later disseminated among the believers. These fulfilled the role of shaping public opinion and served to legitimate the position of confessional elites.[81]

Thus, a complex network of communication was put to use, channeled through subordinated centers of local control, such as peripheral schools of law, monasteries, churches, synagogues, and judicial courts. The effectiveness of ecclesiastical and geonic authority was, to a large extent, dependent on the functioning of this network, as it provided a means for communicating messages as well as for gathering information about prevailing public moods.[82] It is here that a middle rank of agents who stood between the elites and the laity, shuttling information in both directions, played an important role in bringing the latter effectively under the control of the former.[83] The careers of clergy, scholars, local notables, and judges should all be viewed in light of this mediating function. The insistence on outer displays of hierarchy, including the zealous safeguarding of exclusive prerogatives, indicates the strong need on the part of confessional elites to set themselves apart from the masses and to manifest their superiority. The separation served as a reminder of the traditional social balance that had to be maintained and placed confessional elites in a position of exclusivity within well-defined boundaries.[84]

Comparing Non-Muslim Communities: Eastern Christians and Rabbanite Jews

In addition to addressing the reasons for and responses to litigation in extra-confessional institutions, the goal of this study is to present a comparative analysis. The advantage of a comparative study is that it places the data

pertaining to each group in a broader perspective, enabling an enhanced appreciation of the commonalities of the two communities and, no less so, of their unique characteristics. Thus, in examining the response of Christian and Jewish leaders to the phenomenon of legal pluralism, we are able to go beyond the immediate concerns of each confessional group separately and raise questions that follow from their juxtaposition. With respect to the differences between these groups, we must note—alongside disparities in communal structures, social institutions, and the nature of authority held by Christian and Jewish confessional leaders—an issue of chronological asymmetry.

Although Christian and Jewish communities formed a dominant part of the religious and social landscape of the Near East at the time of the Islamic conquest, the extant source material does not permit us to treat the two religious groups in parallel terms. Whereas the Christian legal sources discussed here were put down between the second half of the seventh century and the end of the tenth century, geonic responsa have largely survived only from the tenth and eleventh centuries, with several exceptions from the ninth century. Scholars of the early Islamic period will rightly observe that this gap in time should not be taken lightly, since the immediate post-conquest period is not necessarily comparable with the later period. For one, the formative centuries of Islamic rule, particularly the first and second, witnessed a gradual and partial consolidation of Islamic jurisprudence and judicial apparatus. Whereas church leaders of this period were beginning to sense the competition posed by the emerging administration of their Muslim overlords, those of the later period, along with the Jewish geonim, were already faced with and integrated into a far more developed Islamic state.

While the present discussion focuses on Near Eastern communities, it does not mean to ignore the fact that legal pluralism was not limited to the late antique and medieval Near East. Recent scholarship has drawn our attention to the struggle of religious elites in the western part of the Mediterranean to maintain judicial boundaries in the context of inter-confessional ties.[85] The case of the Jews in medieval Christendom would be of particular use in our case, as it concerns members of religious communities that were founded on similar, if not identical, legal principles.

Thus, for example, a question referred to the Mahram of Rutenberg (Rabbi Meir Ben Baruch, d. 1293) or to the Ragmah (Rabbenu Gershom Me'or ha-Gola, d. 1028 or 1040) pertained to the problem of whether a Jew may argue that his property was unlawfully taken by another Jew in a non-Jewish court. In reply, the petitioned authority answered: "The talmudic ruling to the effect

that in Babylonia, one could not press the claim of 'unlawful seizure of real property'[86] applied only to the well-regulated Persian state, the courts of which conducted their affairs in strict justice and truth. In other countries, however, where the judges accept bribery and prevent justice, that talmudic ruling does not apply."[87] The answer reflects close legal and linguistic affinities with geonic responsa, underscoring the shared world of scholarship in which both Ashkenazi and Near Eastern Jewish jurists participated.[88] Furthermore, the answer attests to the existence of similar preoccupations among Rabbanite authorities in medieval Christendom and the geonim. For Christians as well, such questions cut across denominational boundaries.[89]

Sources

This study is based primarily on two main bodies of literature: (1) East Syrian and West Syrian legal texts, including the acts of synodical assemblies that issued canons for ad hoc purposes (*synodica*) from the late seventh century through the tenth century; and (2) geonic responsa: a vast legal corpus consisting of the numerous questions and answers that were exchanged between regional Jewish leaders and the geonim. Church regulations and rabbinic deliberations represent a form of documentary evidence that is less prone to manipulations than narrative sources—chronicles, hagiographies, biographies, and so forth.

Eastern Christian materials—canonical works, or law books, as well as collections of canons—are the product of an ongoing process of legislation by ecclesiastical assemblies, synods, and jurists. These genres of legal literature go back to as early as the first ecumenical councils of the fourth century A.D. and often include principles that were established as early as the second century A.D. Thus, in order to understand the context in which particular regulations appeared, it is essential to trace their origins in early Christian sources.[90]

In addition, it should be noted that despite the affinity between the two sources and their occasional interchangeability, *synodica* and canonical treatises are to be treated as distinct genres of legal literature. While it can be argued that canonical treatises are a later development from synodical acts, we should not discard occasions in which individual canon laws were themselves proclaimed on the basis of earlier canonical works. Nevertheless, canon laws issued following synodical assemblies and regulations that appear in the works of jurists differ on a number of crucial points. Whereas synodical canons bear

the quality of immediacy, canonical regulations evoke the quality of timelessness. In other words, synodical canons can be seen as ad hoc regulations meant to address the exigencies of the moment, while regulations codified into legal treatises were meant to serve successive generations. One manifestation of this difference is in the form and tone of the stipulations. Whereas canonical regulations tend to possess an impersonal character, referring to generic conditions and often formulated concisely, synodical canons tend to be elaborate, refer to specific figures, and consist of words of admonishment and exhortation.[91]

The lists of high-ranking clergy signatory to synodical acts, as well as the scattered references to lower ranks of the clergy, strongly suggest that the contents of these materials were familiar to ecclesiastical officials. Yet in contrast to the case of the Roman Catholic Church, where there is some indication of the involvement of laymen in legislative endeavors and their reception of legislative materials, the situation in the East remains obscure.[92] With regard to the first ecumenical councils, there are signs of the participation of laymen in ecclesiastical affairs in general and in legislation in particular.[93] It has been suggested in the case of the West and East Syrian Churches that the role assigned to the clergy as repositories of legal knowledge may have been greater than in the West or in the Byzantine Orthodox Church.[94]

Having said that, it would be wrong to think of Eastern Christian laymen as being legally ignorant or deprived of access to the contents of legislative materials. The conclusion of the acts of a West Syrian synod, apparently held in 1153, gives clear instructions as to who should be informed of these canons: "We determine and decree, we, all the bishops, and the synod that has been gathered . . . that for the renewing of the church every year in the *Teshris* [October or November], these canons shall be read before the people. [This takes place] while all are gathered in the church and they shall hear the canons, and they shall renew these canons by the renewing of the church. There is no authority from God that bishops or priests or deacons may neglect them and leave them without reading."[95] This single testimony suggests that the clergy who were present in synods played a crucial role in transmitting ecclesiastical law and that the task of conveying the law to the laity was to be taken seriously.

Geonic responsa, on the other hand, were issued in reply to legal questions sent from various parts of the medieval Jewish world. In addition to their notable role to interpret the law and expound it, the responsa should be read in the broader context of letter writing, "a constitutive feature of Jewish social networks in the Mediterranean basin and the main medium in which

Jews conducted politics from afar."[96] At the same time, however, it should be noted that the vast majority of responsa that have survived are those that were sent to Jewish communities in North Africa and the Iberian Peninsula.[97] This is primarily due to the preservation of documents in the Geniza and the efforts of Jewish scholars from Ashkenaz (Western Europe), who often relied on geonic responsa for their own purposes. According to Simha Assaf, geonic letters in general and responsa in particular would be read on Saturdays in synagogues by a prominent member of the local congregation and later copied and sent out to other communities.[98] Many responsa that were later found in the Geniza are known to have been circulated by Jewish Maghrebi merchants who were constantly on the trade route between North Africa and Iraq.[99] It is in this context that we find Egypt as a point of passage for couriers between east and west. Quite often, letters that were initially written in one location were first copied in Egypt before continuing to their destination.[100]

The responsa cover a wide range of legal topics, including questions of ritual, civil law, and communal administration. As such, they serve as a useful mirror for Jewish life. Yet beyond the challenge of understanding the relationship between the responsa and early rabbinic literature—most notably, the Babylonian Talmud—our ability to draw historical conclusions from this source material depends on a careful examination of their authenticity and compatibility with the historical context in which they claim to be set.[101] Unlike Christian jurists, the geonim rarely resorted to legislation. In fact, aside from two notable cases, the geonim's legal endeavors are primarily seen as interpretations of earlier rabbinic stipulations and principles for purposes of adaptation and accommodation to the needs of their time.[102] The earliest sources we possess from the geonic period date back to the eighth century. Although formally, the geonic period is thought to have begun in the seventh or even the sixth century, the body of responsa now available becomes substantial only with materials dating from the tenth and eleventh centuries.

Structure

Part I of this book, which comprises Chapters 1 and 2, is introductory in nature, aiming to provide the reader with a sense of the high measures of legal pluralism that prevailed under the pre-Islamic Roman and Sasanian Empires and throughout the Islamic classical period, namely, until the thirteenth century. The chapters survey the various judicial institutions available to the

people of the Near East during these periods and illustrate the fact that in both pre-Islamic and Islamic contexts, the plurality of judicial bodies, generated by a plurality of legal orders, was a matter of special concern for confessional elites and political leaders. These introductory discussions will allow us to approach the question of Christian and Jewish recourse to extra-confessional judicial institutions with the understanding that legal pluralism was neither unfamiliar to the predecessors of the patriarchs and the geonim of the Islamic period nor a challenge unique to non-Muslim confessional elites.

Part II, which comprises Chapters 3 through 6, considers the Christian and Jewish recourse to extra-confessional institutions within the broad context of Christian and Jewish public life. Chapters 3 and 4 concentrate on the organization of Christian and Jewish life in general and of West Syrian, East Syrian, and rabbinic judicial institutions in particular. Chapter 3 provides an outline of Christian communal organization and its judiciary (ecclesiastical and non ecclesiastical) in the period after the Islamic conquest. The chapter highlights the complex structure of Christian elites, consisting of both clerical and lay figures whose authority was based on a variety of social capitals. Chapter 4 maps out the various circles of Rabbanite authority in the late geonic period and identifies their judicial prerogatives. The chapter closes with a comparative analysis of Jewish and Christian social institutions in the early Islamic period. This comparison will allow some preliminary suggestions with regard to the structural differences between Christian and Jewish forms of authority and intercommunal relations and discuss the character of Christian and Jewish judicial institutions. Specifically, it will be suggested that whereas the churches appear to have been in competition with Christian figures outside the ecclesiastical hierarchy, rabbinic law enabled the geonim to work in cooperation with Jewish men who had no formal capacity but nonetheless assumed crucial political and social roles in their communities.

Chapters 5 and 6 examine the specific question of Christian and Jewish recourse to extra-confessional judicial institutions. Both chapters begin with an analysis of the factors that prompted Christians and Jews to seek judgment before nonecclesiastical and non-rabbinic institutions, respectively, and the legislative response of their confessional leaders to this social phenomenon. Chapter 6 ends with a comparison of the incentives that drove Christians and Jews to seek judicial services before institutions that were not endorsed by their confessional leaders and the response of confessional leaders to these acts.

The concluding chapter brings to the fore some of the more elusive and controversial questions pertaining to the social history of Near Eastern societies in general, and of non-Muslims in particular in the first five centuries of Islamic rule. It offers a nuanced observation of Near Eastern social arrangements, arguing for the multiplicity of social affiliations, of which membership in a religious community was central but not exclusive.

CHAPTER I

A Late Antique Legacy of Legal Pluralism

The present chapter is primarily a survey of the various judicial institutions that were available under late Roman and Sasanian rule, from the late fourth century A.D. to the Arab conquest. The function of this survey is to set the stage for subsequent chapters, which deal with the early Islamic period; it will also serve to establish that a trend of multiple, overlapping legal orders was not unique to the period following the Islamic conquest but characterized Near Eastern late antique societies from early on. A consideration of the various judicial possibilities that were available to the subjects of the two empires highlights the fact that the Roman and Sasanian states were not the sole patrons of legal orders. This picture, described below in detail, conforms to the concept of legal pluralism. While in the later Roman Empire, for example, Roman law was valid in imperial courts and those of rural settlements, the law's application in the latter was often compromised by customary and indigenous practices.

The people of late antiquity had a range of judicial institutions from which to choose. These varied in their methods, sources of legitimacy, and locations. In addition to imperial and ecclesiastical courts, a host of informal judicial institutions handled disputes and legal transactions. This reality allows us to view the society under discussion in more complex terms, as governed by a constant negotiation of authority among various social powers. At times, negotiation gave way to contention, particularly in the context of authority claims made by religious leaders. Accordingly, with respect to certain well-defined issues, the church fathers and the Rabbanite sages fiercely guarded the boundaries of their respective jurisdictions.

Legal pluralism exists across a number of legal orders as well as within a single legal order. Whereas the bishop court was part of the Roman legal

apparatus following its formal endorsement in the fourth century, the judicial roles assumed by abbots and monks were not; this is only one example of the prevalence of "weak" and "strong" forms of legal pluralism that will be discussed below. Both forms, however, support the idea of a society whose members operated within more than one legal order and were able to choose from a variety of legal institutions. Admittedly, the people of the period did not possess such a schematic and all-encompassing perception of their institutions and most likely did not draw clear-cut distinctions between what is later described as "central versus provincial," "secular versus religious," or "formal versus informal" institutions. But for the present purposes, it is precisely this schematic analysis of late antique legal orders and their judicial institutions that enables us to consider their rise and formation as well as the manner in which they related to one another. "Legal pluralism is a concomitant of social pluralism,"[1] and it is this dynamic of social control and social opportunism that should be kept in mind throughout. Whatever their motives were, clients turned to a diverse group of legal authorities. Their ability to bring their suits before more than one judicial institution raises a variety of social questions. Such a choice reflects not only the subordination of litigants to a multiplicity of judicial authorities but also their affiliation with a multiplicity of social circles.

Judicial Institutions and Practices in the Eastern Roman Empire

Referring to the governor of the Mesopotamian province of ʿĀsrāʿinē (Osrohene) who held office in 497-98, the anonymous author of the early sixth-century *Chronicle of Pseudo-Joshua the Stylite* noted that every Friday the Roman official "would sit in the *martyrion* of Mār John the Baptist and Mār Addai the Apostle and settle lawsuits free of charge."[2] The image of a Roman governor presiding over judicial proceedings outside the imperial courtroom in a *martyrion* provides a rare glimpse into late Roman judicial arrangements in the eastern provinces. The church was situated only a short distance from the Roman law courts in the southwestern quarter of Edessa.[3] Yet the fact that the governor chose to pass his Fridays settling disputes in a church—moreover, one dedicated to a martyr—rather than in his formal courtroom brings to the fore some of the features of late Roman judicial practices. While the legal authority of the governor suggests the implementation of Roman law,

the chosen venue of the *martyrion* reflects the interplay of imperial law and indigenous sentiments.

At least in theory, the citizen of the late Roman Empire could choose to settle disputes before an imperial magistrate, a military commander, a landlord, a village headman, a bishop, a monk, or even a recluse.[4] Yet despite what may seem to be a highly decentralized imperial setting made up of an amalgamation of diverse institutions, things were not as fluid in practice. Rather than an absent imperial government, lying largely in major urban centers and military compounds, the image is of a sophisticated administrative scheme channeled through the services of local forces.[5] Roman rulers sought to maintain control over their vast empire by enhancing reciprocal ties with members of local elites.[6] The latter repaid the approval and sanction of the imperial government with loyalty to the empire and its laws.[7] It is this principal premise of adaptation rather than stagnation that is the basis of the present analysis of late Roman judicial institutions. In addition, the present discussion includes another type of judicial institutions: out-of-court solutions that were not always formally sanctioned by the Roman state. Here, judicial services were rendered by a diverse group of individuals whose social capitals allowed them to assume informal judicial prerogatives.

A mixture of judicial offices, formal and informal, required an ongoing process of administrative adjustments. These adjustments tended to obscure administrative boundaries, making it unclear whether a bishop was issuing a judgment within the formal setting of an episcopal court or by virtue of his personal ties with members of his congregation. Similarly, the Justinianic decree, mentioned below, making it mandatory to hold a copy of the Scriptures in an imperial courtroom and declaring the imperial law to be of divine nature, may have added to a blurring of distinctions between ecclesiastical and secular courts.[8]

Imperial Courts

Caroline Humfress, in her discussion of dispute resolution under the late Roman Empire, quotes a constitution from 529 that emphasized the emperor's role as the "sole maker and interpreter of the laws." According to Humfress, while past emperors presented themselves as such, it was only under Justinian that an attempt was made to "make this rhetoric a reality."[9] By the time of Diocletian (fl. 284-305), the second highest judicial authority to the emperor was

the provincial governor who presided over the courts as a first resort.[10] Because of the size of their jurisdiction and overwhelming load of responsibilities, the governors often delegated judicial authority to their deputies. Another way of considering this delegation of power is to classify deputies as "lesser judges." These officials dealt with affairs of a local nature because of their greater acquaintance with the affairs of local communities. The lesser judge is seen as precursor to the later-known *defensor civitatis* of the fourth century. The office is first noted in the end of the third century and is known to have included judicial authority before the fourth. The evolution of the *defensor* as a judicial post is viewed in modern scholarship as an imperial attempt to provide effective legal representation for those who were thus far denied, for whatever reason, the services of the imperial judiciary.[11] At the same time, the improvement in judicial services helped improve the notion of an imperial presence in urban centers.[12] If not from the outset, then at least by 535, the *defensor* had judicial appeal also among the well-off, thanks to his jurisdiction over legal affairs of substantial monetary value.[13] The latter development can be seen as part of Justinian's policy of restraining the damage caused by the corruption of other parts of the imperial judiciary (see below).[14]

State tribunals were available to all citizens of the empire.[15] For certain social sectors, however, these tribunals possessed a special appeal. After all, the laws of the empire were created and implemented by the same group that sought to control it.[16] Humfress points to the attempts of "high-ranking men . . . to circumvent the spirit of the emperor's legislation by using a mechanism readily available within Roman civil law itself . . . by naming a third party as a 'legitimate' heir" as a means for securing the property of illegitimate children.[17] Referring to a lawsuit of Augustine's close companion Romanianus (d. ca. 408), Peter Brown commented that "[l]itigation in the Roman Empire involved an assiduous quest for patrons; and Romanianus must have counted on the support of leading Milanese citizens to secure a favorable settlement at the imperial court."[18] For members of the imperial elite, the system offered an advantage, as they brought their lawsuits before a state court designed, operated, and used by their peers. In addition, despite the extension of citizenship to most of the empire's subjects by 400, there were still those who had less to expect of the imperial judiciary. These "have-nots," according to Humfress, included "the urban poor and rural poor, and a whole host of ever-shifting socio-legally defined types of marginalized individuals." As such, as of the early fourth century, they could expect harsher sentences extending even to the realm of "savagery."[19]

The extension of citizenship, promulgated through the *Constitutio Antoniniana* of 212 A.D., placed a greater portion of the empire under state jurisdiction; yet it also presented a threat.[20] If governors wished to introduce state law in the provinces, they had to do so with caution lest they provoke local discontent.[21] As a result, Roman legislators exercised leniency in their attempts to reconcile imperial laws with provincial legal practices.[22] This leniency should not be solely attributed to a policy meant to avoid confrontation with provincial practices. Frequent complaints about the obscure nature of Roman law, its slow administration, high cost, and the personal and professional merits of the Roman judges did not add to the popularity of state courts.[23]

Here the question of cost was of crucial significance behind a decision as to whether to pursue a legal affair in an imperial court.[24] The testimony of two "charge sheets" listing the fees of various bureaucratic services, which were found inscribed on late Roman governmental buildings in Timgad (modern Algeria) and Caesarea (Palestine), attest to the heavy financial burdens that litigation in imperial courts entailed.[25] For a plaintiff in fourth-century Timgad, the initial cost of 121 *modiee* for a case would have been about four-fifths of the annual wheat consumption for a family of four. Or, in monetary value, 121 *modiee* equaled three to four solidi, a sufficient income for an individual to live on for several months.[26] Furthermore, the fifth-century inscription from Caesarea shows that the privileged enjoyed reduced fees, while the unprivileged had to pay as much as twice the normal amount. Thus, a simple provincial litigant who chose to litigate in Caesarea had to pay approximately five solidi, "almost equal to the cost of feeding a person for one year."[27] Under such circumstances, it would not be surprising to find many Roman subjects litigating in alternative venues.[28]

The fifth-century Greek historian Priscus of Panium mentions in his *History* an encounter with a Greek-speaking former citizen of the Roman Empire. The latter's criticism of the Roman legal system was expressed as follows: "The laws were fair and Roman polity was good, but . . . the authorities were ruining it by not taking the same thought for it as those of old."[29] Roman legislation and contemporary "rhetorical fashions" suggest that Roman judges were taking bribes, fixing cases in favor of powerful citizens, engaging in extortion, manifesting judicial negligence and incompetence, and even acting sadistically. That being said, there appears to be no real evidence that would suggest such a scale of judicial corruption, or even that corruption was on the rise.[30]

The Episcopalis Audientia

Late Roman ecclesiastical courts were recognized as formal judicial institutions by the fourth century. In contrast to civil magistrates, ecclesiastical judges drew their authority and legitimacy from both imperial recognition and spiritual reputation. It was in 318 under the rule of the first Christian emperor, Constantine (r. 306-37), that the *episcopalis audientia*, the episcopal tribunals, received the state's formal recognition.[31] Despite its marked religious character, the episcopal court shared two important features with contemporary secular institutions. First, its authority was sanctioned by the Roman government. Second, its formal inception took place parallel to that of the *defensor civitatis* and was thus in line with other imperial initiatives to extend Roman legal authority by empowering local institutions.[32] Past scholars have viewed the formal sanction of the *episcopalis audientia* by Constantine as an expression of the emperor's wish to comply with the Pauline command exhorting believers to take their lawsuits before judges designated by the church (1 Cor. 6:1-6). It is now acknowledged, however, that the motivation for this step was of a rather more mundane nature.[33] While the elevation of the episcopal court may well have served the purpose of Christianizing an empire, the formal endorsement of the ecclesiastical judiciary can be seen as another form of administrative adjustment in which local elites were acting as agents of the imperial government.[34]

According to the New Testament and the church orders, the *episcopalis audientia* had already operated, albeit informally, prior to the reign of Constantine.[35] An example of its operation in the pre-Constantinian era can be found in the activities of Cyprian, the third-century bishop of Carthage (d. 258). His letters attest to the legal procedures of hearing, consulting, and passing verdict in matters pertaining to offensive clergymen.[36]

Despite common features between the *episcopalis audientia* and secular imperial institutions, the episcopal judge differed from the civil magistrate in three significant points. First, whereas his jurisdiction was not purely religious, that of his secular counterpart pertained to civil matters only.[37] Although not from its outset, the bishop's court gradually came to possess jurisdiction over both civil and religious matters and was open to clergy and laymen alike. Second, ecclesiastical judgment, though rendered in the conventional form of a ruling, was, from a legal point of view, considered a form of arbitration.[38] Finally, the bishop drew his authority from both the state and the faithful, thus fulfilling a temporal task in "an atmosphere charged with expectations of judgment that did not belong exclusively to the Roman world."[39]

Constantine's step toward a full state endorsement of the bishop's court was also a step toward its incorporation within the imperial legal apparatus.[40] By 355, bishops enjoyed the privilege of being tried only before their peers. By 411, this privilege had been granted also to clergymen and, by the time of Justinian, to monks and nuns as well.[41] If laymen wished to litigate before an ecclesiastical judge, the consent of both litigating parties was required for the tribunal to be considered lawful. With time, however, lawsuits could be transferred to an episcopal court at the request of only one of the parties, even if the other party was not a Christian.[42]

The road leading to a full state acknowledgment of episcopal courts was not without obstacles. By the end of the fourth century, an attempt was made to restrict the episcopal jurisdiction by confining it to religious matters and insisting once more on the need for the consent of both parties to litigate before a bishop. Yet by the fifth century and, to a greater extent, in the sixth century, the state had begun to enforce the bishops' decisions that pertained both to religious and civil matters.[43] According to Tony Honoré, the transformation of the episcopal courts into another form of imperial judiciary, possessing jurisdiction over matters of civil law, was eased by the fact that many prominent Christians were legal experts.[44]

The *Life* of Saint Augustine (bishop of Hippo, fl. 354-430) and his letters give some idea as to what it meant to hold spiritual authority and at the same time pass "worldly" judgment. When Augustine sat in judgment, reports his contemporary biographer, Possidius, "he heard their cases carefully and dutifully."[45] In one of his letters, Augustine turns to his Roman legal adviser, Eustochius, with a question pertaining to hiring the labor of a certain child.[46] In the same letter, Augustine refers to the "secular duties" of his court: "There even earthly judgments are sought from us, especially concerning the temporal lot of men."[47] Yet Augustine's letter also attests to his incomplete grasp of Roman law, that is, civil law. He seeks the instruction of his addressee on a number of legal points: "I ask your most pure charity to be so kind as to instruct me what is to be observed concerning those who are born of a free woman and a male slave." For the most part, however, Augustine was well informed about Roman law, as can be inferred from his ability to frequently cite it and his known collection of imperial constitutions.[48]

An important reason for the development of the *episcopalis audientia* as alternatives to secular imperial courts was their growing appeal among laypeople.[49] In one of his letters to the Rogatist bishop Vincentius from 408, Augustine speaks of those who come before his judgment, stressing the dual nature

of his sanction: "[S]hould they not, for their own good, be roused by a set of temporal penalties, as to make them come out of their lethargic sleep and awake to the health of unity? . . . For, if they were frightened but not taught, the compulsion would seem unjust."[50] The bishop's authority was perceived by some as superior to that of secular courts, as his judgment was valued not only for its legal principles but also for its morality.[51] Because of his ability to resort to sanctions that follow from his authority as congregational leader, the bishop had both secular and religious powers to rely on. Furthermore, in contrast to the imperial magistrate, the bishop's office was not limited in its tenure.[52] Ecclesiastical tribunals were relatively accessible and able to offer a short process of administering justice.[53] In contrast to the ongoing chain of appeals characteristic of the secular institution, the episcopal tribunal was not an appellate institution.[54] The point is made clear in the *Sirmondian Constitutions*, found in the Theodosian Code, yet presumably from an earlier date:

> [T]he judicial decisions, of whatsoever nature, rendered by the bishops, without any distinction as to age [of the litigants], must be observed as forever inviolate and unimpaired, namely, that whatever has been settled by the judicial decisions of the bishops shall be considered as forever holy and revered. Therefore, all cases which are tried either by praetorian or by civil law, when settled by the decisions of bishops, shall be affirmed by the eternal law of permanence; nor shall any case be subject to review which the judgment of a bishop has decided.[55]

Constantine's plan to extend the authority of Roman law by sanctioning ecclesiastical judicial power may have succeeded beyond expectations. By the sixth century, the tables had turned, as the imperial government found itself in competition with the episcopal system. It is plausible that one motivation for the Justinianic constitution of 530, insisting on the presence of the Gospels in every courtroom, was the fact that episcopal courts were becoming a preferred venue for litigation.[56]

Self-Help and Outside-Court Arrangements

It would be erroneous to view Roman Egypt as an exact model for how things worked elsewhere throughout the Eastern Roman Empire. At the same time,

an examination of the judicial institutions of late Roman Egypt may prove useful for understanding the manner in which formal and non formal judicial institutions coincided. Its administrative setting included flourishing urban centers, the seats of governors and their apparatus, as well as diverse and vast rural settlements stretching along the Nile and throughout its delta.[57] Whether the judicial institutions of late Roman Egypt were similar to those of other areas in the Near East is hard to determine; yet it is likely that the presence of Roman imperial administration next to that of local rural populations was not unique to Egypt.

Honoré, referring to the period following the extension of Roman citizenship, has argued that Roman provincial governors sought to implement Roman rule in a manner that would not provoke discontent within the provinces: "[Provincial governors] and other judges imposed the Roman legal system on the citizenry incrementally, and more cautiously in a province like Egypt that had its own well-developed legal institutions than in underdeveloped areas."[58] According to Christopher Kelly, the primary targets of appeasement were "local elites whose complicity was essential to the effective operation of government."[59]

Yet in order to fully appreciate Roman measures, it is crucial to note that administrative concessions did not entail the creation of two (or more) autonomous legal orders. The example of the Babatha and Salome Komaise archives found by the Dead Sea suggest that even in the second century, local law was tolerated while at the same time adjusted to Roman law through the adoption of the conventional forms of Roman legal documents.[60] Local institutions were thus able to sustain their station along that of formal courts as long as they continued to abide by Roman law, if only on the face of it.[61]

While landowners are likely to have dominated the rural landscape for some time, by the fourth century they were joined by the church as an administrative element that had to be taken into account by Roman provincial authorities as well. The church was gradually acquiring a central position in administrating judicial affairs. It was formally sanctioned to do so by the imperial government and thus served the agendas of Christianization and administrative adjustments. The evidence discussed by James Keenan, however, suggests that the church was also to be considered on account of its ever-increasing land holdings.[62] Evidence of this comes from the archive of Dioscorus of the village of Aphrodito. By 538, Dioscorus's father, Apollos, had become a monk, although he had not renounced his property. The monastery founded by Apollos provided the local village of Aphrodito with lands on which local farmers could live.[63]

Peter Sarris, in his study of the Apion estates in the region of Oxyrhynchus (in Upper Egypt) in the sixth century, has argued for a "highly standardized and professional character of Apion estate management" in which "legal proceedings . . . played a major part in social relations."[64] Sarris also showed that at the same time, the office of the chief regional tax collector, the *pagarch*, was held by members of the Apion family.[65] Arthur Schiller has argued that the *pagarch* held some judicial authority, whether that of an ordinary judge or as someone who received complaints in the capacity of his administrative office.[66] This fits the argument made by Sarris that landowners such as the Apions were "coming to dominate productive and social relations in the late antique Egyptian countryside."[67]

Under such circumstances, a relationship of patronage, of mutual dependence existed between the landowner and his tenants. Patrons, however, were not necessarily landowners but members of an exclusive group of prominent individuals. Thus aristocrats, government officials, men of affluence, and landowners were all in a position to offer judicial services to their vassals in exchange for labor, produce, and, most important, loyalty.[68] Such relationships are known to have prevailed in the late antique rural settlements of northern Syria and Egypt.

The career of Synesius of Cyrene (modern-day Libya) provides a useful illustration of the authority obtained by these aristocratic figures. As a member of one of the leading local families in the late fourth to early fifth century, Synesius took charge of military operations and administrative offices.[69] He was able to do so by virtue of his high social ranking and land ownership. His later election to the office of bishop of Ptolemais in 411 does not change the basic fact of the matter: Synesius's career was that of a local aristocrat who had assumed civil responsibilities at a moment of administrative change. These responsibilities, John Liebeschuetz tells us, entailed "occupying a position which had once been occupied by civic magistrates."[70]

So far, an examination has been made of the judicial role played by imperial magistrates, bishops, and landowners. Despite their various titles and sources of legitimacy, whether imperial decree, spiritual authority, or wealth, these figures were all acknowledged by the state and acted upon the principles of Roman law. Yet there were other means by which individuals could settle their disputes or validate their transactions. According to Schiller, at least a century and a half before the Arab conquest, "state litigation was absent and private arbitration was paramount for the settlements of civil disputes."[71] Right or wrong, Schiller's point confirms the widespread

practice of outside-court settlements that prevailed in late antique Egypt and outside it.[72]

Gagos Traianos and Peter van Minnen have analyzed a document from Aphrodito dating to ca. 537 that was found in the archive of the aforementioned Dioscorus.[73] The document records the settlement of a dispute over a piece of property next to the village. The dispute in this case was resolved through the work of a notary and was never brought before a formal court for resolution.[74] As such, this form of settlement is considered a private one, since it does not require the involvement of a third party for purposes of judgment but only as a negotiator. The type of notary mentioned in this case was of the *taboullarioi*, who were not only entrusted with registering the legal document but also preparing it.[75] As such, they had to possess sufficient legal education in addition to first-rate Greek and scribal skills. Most important, however, is the fact that these officials were authorized, if not appointed, by the imperial government. In sum, while the Aphrodito document of ca. 537 was issued and formulated in line with Roman law, it was attained without the involvement of the state.

Despite what may have been "a reality of undergovernance" or of "rudderless and captainless vessels" in fourth-century Egypt,[76] papyri dating from the fourth to the eighth century attest to the function of a village headman, the *lashane*, or *ape*.[77] The headman heard legal disputes and presided over less formal arbitrations.[78] He was present at the signing of contracts and the drawing up and implementation of wills. He was also responsible for the confinement of delinquents, the collection of fines, and for addressing complaints.[79] Though most of our knowledge about the administrative role of the village headman is based on Egyptian papyri—most notably, those from Aphrodito—it has been suggested that similar figures existed outside Egypt as well.[80] Alongside the headmen was often a group of local town notables, better known as the "elders." These men, clergy and laymen, customarily filled an administrative function by assisting the headman in his various tasks.[81] The judicial role of local village notables is well attested in the Nessana papyri. According to Rachel Stroumsa, the documents suggest a loose and flexible arrangement, "and one which evidently continued to co-exist side by side with the government machinery," in which respected members of the community oversaw the implementation of legal transactions and arbitrated disputes.[82] As in the other forms of out-of-court judicial practices, however, the role of rural figures was not autonomous of the Roman legal order. Roman law was made known to the rural population, particularly through prefectorial edicts "disseminated throughout the country."[83]

Christian Holy Men

Individuals who offered judicial services outside the formal courtrooms acted in the capacity of their authoritative position as leaders and men of elevated social standing. Considering the growing importance of the church in the social administration of towns and villages, it is important to note that the social rank and responsibilities that came with it also served to legitimize the judicial function of religious leaders. The judicial services performed by recluses, monks, and rural priests were of particular significance in the absence of ecclesiastical institutions.[84] As small-scale egalitarian communities that often lacked autonomous institutions, local villages had a constant need for the intervention of external figures for purposes of direction, protection, and mediation.[85] One version of the *Life* of the Syrian holy man Simeon Stylite (d. 459), which was authored by the bishop-writer Theodoret of Cyrrhus (d. 466), mentions Simeon's role as arbiter: "He can be seen sitting in judgment and handing down proper and just sentences. These and similar activities are dealt with after three in the afternoon, for he spends the whole night and the day up till three P.M. in prayer. After three P.M. he first delivers the divine teaching to those present and then, after receiving the request of each and affecting some healings, he resolves the quarrels of the disputants."[86]

Whereas the passage above illustrates Simeon's role as an arbiter, resolving disputes and handing down sentences in a rather generic fashion, a letter from the Syrian village of Panir to the stylite exemplifies a village community seeking the patronage of a holy man. The letter, from Cosmas of Panir, was appended to the Syriac version of Simeon's life and appears to be "a written covenant between the village and the holy man."[87] The letter is, in fact, the only non-hagiographic source that attests to the stylite's authority.[88]

> [T]o Mār Simeon . . . from Cosmas of the village of Panir together with the deacons and the readers and of the congregation and from the procurator and the veterans and all the village equally, all of us extol your great love in Christ, peace. . . . We are all writing to you in one perfect love concerning this. First we subscribe concerning Friday and Sunday, that be kept purely and worthily; concerning measures, that we not make ourselves two measures, but we have one true measure and one honest weight; that we not change a man's boundary; that we not cheat a hired servant and a laborer of his wages; concerning usury, that half a percent be collected on

> both old and new [debts]; about those small coins that are paid, that they be restored to their masters; that we administer honest judgment between the great and the small and that we show no favoritism; that we not accept a bribe, a man against his fellow man; that we not slander one another and not associate with robbers and magicians, that we chastise evil-doers and transgressors of the law, and we remain in the congregation for the life of our souls. Surely no one will be presumptuous and transgress these laws, or plunder, or defraud, or bribe a judge, or plunder orphans and widows or the poor, or rape a woman. . . . [W]hoever dares to transgress these, let it be according to your word, my Lord.
>
> Pray for us, my just noble and true lord, that we be established and confirmed in what you have commanded us. We trust in Our Lord that if we do your words and keep your commandments and fulfill your laws we will be helped by Christ through your prayers. Pray for us, my lord, that we not be ashamed before you or found guilty by your Lord but that openly we will do these things in righteousness and we receive life from them.[89]

In the case of Panir, the role that Simeon was expected to fulfill was not that of an arbiter but rather more of a leader, laying down and enforcing rightful conduct among the village's members. The letter serves as evidence of the stylite's position: his leadership was accepted thanks to his spiritual reputation and his position as a respectable outsider.

It is this position that enabled holy men to serve as men of judicial authority in other contexts. The stylite's function, as described in the letter, can be viewed "as one dramatic instance in a wider history of Christian arbitration and intervention, which was active from Egypt to Constantinople."[90] As Brown acknowledged in his reassessment of the rise and function of the holy man in late antiquity, holy men were not merely a late antique version of the classical holy fool but a variety of figures of spiritual reputation.[91] The "collection of sayings, dialogues, and short narratives which preserve the words of the fourth- and fifth-century Egyptian monks,"[92] the *Apophthegamta Patrum*, sheds light on some of the ideals pertaining to passing judgment in the context of a monastic community. Here the monk is guided to abstain from judging or condemning his neighbor and to refrain from resolving disputes.[93] Whereas such ideals may have been effective within the monastic community, their applicability outside it is less attested.

A collection of sixth-century questions and answers attributed to two

members of the monastic community from the village of Tawatha, outside Gaza, testifies to the role played by monks in the life of local lay communities.[94] Among the cases mentioned in this collection, one speaks of thieves who broke into a man's house. The man asked: "Should I chase after them, or should I pretend that nothing has happened?" To this, the monks replied: "Why is it that we want to take revenge instead of leaving everything to God? . . . [L]est we want to fall into vainglory, let us do nothing . . . to the thieves." Further persistence on the part of the alleged petitioner meets the following position: "Those who are on the lower level . . . seek to recuperate what they have lost. . . . This brings some people to turn to the courts."[95] Admittedly, the monks were not exercising judicial authority in its conventional form. Nonetheless, to an extent, their answers did assume a judicial capacity, as they were asked to decide on issues that required judicial resolution.

While the exact nature of the judicial role played by the sixth-century monks of Tawatha is debatable, the evidence regarding clergy exercising legal authority in the Egyptian village of Karanis is rather straightforward. One document, dated to 439 and issued by twelve presbyters and five deacons from Karanis, is a "statement forbidding the interception of water from a particular source."[96] Indications of judicial services being rendered by monks can be found in the case of the monastery of SS. Sergius and Bacchus in the vicinity of Nessana. Among the documents excavated at Nessana are a few examples of judicial proceedings handled by members of the local monastic community and clergy. An example of one such document is a divorce agreement drawn up by a priest in 689.[97] Though the Nessana papyri are dated to the second half of the seventh century (after the Arab takeover of Palestine), the practices to which they attest trace their origins to an earlier historical period.

It is now acknowledged that the category of holy men consisted of a diverse group of individuals that included bishops, clergy, monks, and solitary stylites.[98] Thus the example of men such as Synesius, who started out as a local notable and by 411 was appointed bishop, suggests that the holy man and the local landowner could have merged into a single authority. Sometimes, this authority drew its legitimacy from material and at other times from spiritual capital.[99] Moreover, the rise of the holy man needs to be seen within the general context of Christianization. While the appointment of episcopal courts was a formal expression of that trend, the judicial functions fulfilled by rural priests, abbots, monks, and stylites constituted its informal obverse.[100] Although holy men lacked official appointment, it is possible that it was this very feature in their position that gave them so much power. The popularity of holy men as

arbiters had much to do with their reputation of being "close to God." Such a perception of the holy man not only gave special meaning to his judgment but also gave people a sense of security in his presence.[101]

Choice and Collaboration

Despite our systematic presentation of the various judicial institutions within the late Roman Empire, such a systemization was not conceived in practice, as people were not necessarily confined or obliged toward a single judicial institution. In fact, as we shall see, many of them chose to "forum shop" and appear before institutions of different social orientations, working each one to the best of their advantage.[102] Indeed, there is evidence that individuals were in a position to make judicial choices. Augustine mentions a certain Jew, Licinius, who chose to appeal to the bishop's court in order to save a piece of property he had lost to a member of the church, rather than turning to a secular authority.[103] Other cases show civil affairs falling under the jurisdiction of military magistrates and vice versa.[104] In her analysis of Coptic-language legal documents from the sixth century, Leslie MacCoull suggests that such documents, written in vernacular language (Coptic), were made for their future use in other tribunals.[105]

There is also evidence for institutional collaborations, an example of which is found in the records of the monastery of Epiphanius near the Egyptian city Thebes, dating to the sixth and early seventh centuries. Written on a fragment of pottery (an ostracon), it is a correspondence between Strategius, *lashane* of Ne, to Cyriacus, presumably the abbot of the monastery of Jeme. The *lashane* informs the abbot that he was not able to settle a certain matter because of the absence of the latter, and he assures him that he will detain certain individuals until the abbot arrives.[106] It may be that the matter to which Strategius referred was a case in which he had no standing and thus required the abbot's presence. Be that as it may, it suggests some level of coordination between judicial authorities—namely, those of the *lashane* and the abbot. Another document, recorded on a sixth-century papyrus, presents a letter signed by Shenoute, *lashane* of Jeme, and a list of other names, probably local elders, to Apa Epiphanius.[107] Here the secular authority asks the spiritual one to intervene on behalf of members of the local community who are in confinement by appealing to the *lashane* of the town where they are held.

Finally, presumably there was also some form of collaboration between a

monastic authority and a lay one in a sixth-century case mentioned in the collection of questions and answers from Tawatha. In one of its letters, a judicial authority asked the Tawatha monks: "If the fathers ask me to offer judgment on a particular matter, but I do not feel very confident in myself, then what should I do? Should I avoid or accept?" The monks replied: "For the sake of the command of the fathers, accept and tell those receiving judgment: I shall judge only according to what I think is right."[108] The passage suggests a lay leader of some judicial capacity who was asked by an ecclesiastical or a monastic figure to serve as judge in a certain affair.

Jewish Judicial Institutions

A sixth- or seventh-century document from Egypt mentions a "Jew who asked a respectable figure to intervene in a dispute which had arisen between him and his younger brother about the division of their father's property."[109] Like others, Jews had a judicial choice. By the fourth century, however, Jews formed a minority in what was formally a Christian empire. This was bound to have an impact on the choice of judicial institutions on the part of some Jews, as well as on the type of judicial institutions available to them. Jews, as members of a separate religion, traced their history in a past that long preceded that of the Christians. Yet by the time of the late Roman Empire, they lacked any form of political sovereignty. While the rabbis had addressed the problem of judicial boundaries long before Constantine, their insistence on judicial exclusivity was now charged with new energies. By now, the ancient Gentile (*goy*) judge may have been a member of a new monotheistic religion.

Modern scholarship is divided as to the extent to which Jewish social life was secluded from that of its neighbors under Roman rule.[110] A relatively old school of modern scholarship tends to view Jewish life as having been autonomous vis-à-vis its surroundings and internally consolidated in terms of its communal institutions. Tessa Rajak has judiciously argued that such a perception of pre-Islamic Jewish life was defined through a Jewish modern experience: "Modern experience readily leads us to believe that the life-arrangements required by completely orthodox Judaism, as we today know it, presuppose an intensely communal existence and scarcely leave room for more than superficial mixing."[111]

More recently, however, late antique Jewish history has been presented along a line of ongoing transition, in which the rabbis were only at the

margins of Jewish society. This process is thought to trace its origins to the period after the destruction of the Second Temple, in 70 A.D. and accelerating in the period from the formal Christianization of the Roman Empire in the fourth century into the period following the Islamic conquest. According to this revisionist approach, the Jews of late antiquity were guided and led by a variety of men and were loosely bound ideologically.[112] Nevertheless, the character and appeal of the judicial institutions that were available to Jews under late Roman rule were determined by a variety of factors, among which are the minority status of Jews, the agendas of Jewish elites, and the daily contact that Jews had with non-Jews.

By the late 390s, Roman law had outlined the boundaries of Jewish judicial jurisdiction in a way that strikingly resembled that of the church. In general, Roman law stated that a Jew, like any other Roman citizen, should bring his lawsuits before magistrates of the empire. Still, Jews were permitted to bring their lawsuits before Jewish courts. These were legally acknowledged as arbitrating bodies and, as such, required the consent of both litigating parties in order to pass judgment. The decisions issued in Jewish courts were to be enforced through the authority of the provincial governors.[113]

Roman law distinguishes between two types of law: a purely religious kind and a civil kind.[114] Whereas from the outset, the former was under the jurisdiction of Jewish courts, the latter could be brought before either a Roman or a Jewish court.[115] Such a distinction was unfamiliar to Jewish jurists, as Jewish law governs all aspects of Jewish life.[116] By 529, however, as stated in the Justinianic Code, religious as well as civil matters of Jews had to be brought before imperial magistrates as a general rule. Legal matters could be brought before a Jewish court only if both litigating parties chose to do so. The change introduced in sixth-century Roman legislation is the extension of Roman law over matters pertaining to Jewish religious law.[117] Chapter 4 below surveys the principles of the Jewish judiciary as they stem from rabbinic literature. Our present task will be only to identify some of the "Jewish" judicial possibilities that were open before Jews in the Eastern Roman Empire, most notably in Palestine.

The patriarch (*nasi*) has been seen in modern scholarship as the supreme Jewish authority within the Roman Empire.[118] Thus his office, extended through a network of emissaries throughout the Jewish diaspora, constituted the highest judicial authority until the abolishment of the patriarchate in 429.[119] This historiographic position, however, has met a counter opinion, according to which the patriarch enjoyed a lesser degree of judicial authority.[120]

Correspondingly, the testimony of early rabbinic sources, highlighting the patriarchate as the focus of Jewish leadership, is understood as one that is meant to serve a specific agenda, one that developed in the context of ongoing competition between the patriarchate and rival rabbinic circles.[121] Without attempting to resolve these two poles of historiographic perceptions, it should be noted that, at least from an imperial perspective, the patriarch, up to the time of his deposal in 429, possessed a central position.[122]

The image that emerges from early rabbinic literature is of a firmly established body of Jewish scholars operating amid late antique Jewish society.[123] The rabbis have thus been seen either as part of the patriarch's judicial administration, serving as legal experts, or outside of it, contending with the patriarch's authority.[124] Accordingly, those rabbis who submitted to the patriarch's authority were appointed on his behalf as local communal judges.[125] Yet this image should be qualified, if only because of the fact that it is provided by the rabbis themselves. Thus recent scholarship has offered an alternative scenario in which the rabbis operated at the fringes of Jewish society and, as such, should best be perceived as self-proclaimed.[126]

The fifth-century Theodosian Code refers to the *synedrii* as bodies entrusted with administrating Jewish life in the provinces.[127] The exact meaning of the term *synedrii*, however, remains unclear. It may be understood as the ancient great Sanhedrin, the council of sages that constituted both the supreme court and a legislative body of ancient Israel.[128] There is also the possibility that the *synedrii* were Jewish provincial councils that assumed local legal and political responsibilities, or possibly even several local councils operating in the same province.[129] Nevertheless, whether at an imperial, provincial, or local level, these councils were dominated by Rabbanite scholars.[130] Leaving aside the scholarly debate, the role of the rabbis should not be discounted, primarily in villages and smaller towns, where these men acquired prestige on account of their scholarly reputation. With time, the rabbis increased their interpersonal ties with the Jewish population and were gradually accepted as men of authority who served as legal specialists and judges.[131]

Two questions remain unresolved. The first relates to the exact nature of the judicial role assumed by the rabbis. While some acted on behalf of the patriarchate, others acted independently. Aside from passing judgment, a rabbi fulfilled other roles within his local community, as a teacher, scribe, or leader of prayer. By fulfilling a multiplicity of tasks within the community, the rabbi was at the center of local social life. His authority, therefore, derived from interpersonal ties with members of his community and from the high esteem in

which he was held by local Jews.[132] The second question relates to chronology. Scholarly debate over the point at which rabbis gained authority, whether by the fourth century or later, is still in progress. While an early development of a rabbinic judiciary is plausible, there is no reason to reject the assumption that at least some of the rabbis acted upon similar principles as those of Christian holy men.[133]

Formally speaking, the institutions of the Jewish judiciary that were recognized by the Roman Empire operated through a delegation of authority by the patriarch. Delegation of power was channeled not only through the rabbis but also through those who are known in the Theodosian Code as the "primates of the Jews"—local Jewish leaders.[134] The exact nature of these figures is obscure. It is hard to define the source to which these men owed their prominence. It could very well be that the term "primate" referred to the early rabbis. After all, according to the Theodosian Code, the primates were members of the *synedrii*.[135] Further reference to sources of social power can be seen with respect to the descendants of priestly families (*kohanim*). Subsequent to the abolishment of the patriarchate, there was a significant rise in the influence of this group.[136] The *kohanim*, unlike rabbis or wealthy laymen, drew their status from their lineage. They were the descendants of a not-so-long-ago tightly knit group that served in the Temple and were thus located at the center of Jewish social consensus.

The judicial role assumed by individuals who were not formally ordained through rabbinic institutions in late antiquity is unclear. Nonetheless, there is reason to believe that the aforementioned primates as well as members of priestly families were in a position to assume judicial responsibilities, as Jewish law does indeed speak of laymen as judges of some capacity. The legal principle of lay courts will be discussed in detail in Chapter 4. Suffice here to note the discussion in the Babylonian Talmud regarding a court of non specialists (*bet din shel hedyotot*).[137] The main function of this tribunal was to arbitrate. Similar courts were likely to have been operative even in tannaitic times (first–third century A.D.).[138]

Judicial Institutions and Practices in the Sasanian Empire

The study of the social history of the Sasanian Empire is far more challenging than that of the late Roman Empire. Here we must expand our search for information and also examine the testimonies of non-Sasanian sources, namely,

Christian and Jewish. The discussion in this section is divided into three parts. As in the previous section, it begins with a survey of the imperial judicial organization; it then turns to examine the state of the Christian, East Syrian judicial setting; and finally that of the Rabbanite Jews of Babylonia.

Sasanian Judicial Institutions and Their Accessibility to Non-Zoroastrians

Hierarchically organized, the Sasanian judiciary ran down from the Sasanian emperor, the supreme judge, to the rest of the empire through provincial, rural, and communal judges.[139] A notion of hierarchy can be discerned through the anonymous work known as *The Letter of Tansar*. Scholars disagree as to whether the work should be attributed to the time of the founder of the Sasanian Empire, Ardašīr (fl. 224-40), or that of the emperor Khusraw Anuširvan (fl. 531-78).[140] The work, which seeks to exalt the founder of the Sasanian dynasty, is an alleged letter written by a certain Tansar (Tōsar), chief priest of Ardashīr. Despite the difficulty of asserting its date and authorship, the work sheds valuable light on the administrative culture of the empire. It describes how a system of organizational hierarchy had been imposed over the state's bureaucracy through a legal reform:

> [The king] has set a chief over each [administrative unit], and after the chief an intendant to number them, and after him a trusty inspector to investigate their revenues . . . and he has appointed teachers and judges and priests.[141]
>
> Since we have seen that by the laws and customs of the ancients the injured received no benefit, but society suffered a mischief and loss in numbers and vigor, we have established this law and custom that people may act upon it in our own day and hereafter; and we have ordered the judges that if offenders of this kind, whose fines are fixed, repeat their offences a second time, their ears and nose are to be cut off.[142]

The Letter of Tansar represents a highly bureaucratized Sasanian administration of which the judiciary was, of course, an integral part. The second passage attests to the intention of the Persian ruler to reform the legal order in a way that brings its magistrates under his close control.[143] Second to the Sasanian king, the supreme head of the judges, stood the "judge of the empire," who was, in fact, the Zoroastrian high priest, the *mowbedān mowbed.* In the capacity of his

religious authority, the Zoroastrian priest was entrusted with the supervision of all aspects of Zoroastrian religious life. In addition to their judicial authority, at least some of the *mowbed*s served as rulers of cities or as diplomats and were highly immersed in the empire's political affairs.[144]

Nonetheless, the exact legal jurisdiction of the *mowbed* is not entirely clear. In his discussion on the function of the *mayānjīg* in the Sasanian period, Shaul Shaked makes a point that the term designated a judicial function: "Among the roles of this office was the supervision over measurements and listening to the complaints of the poor, the defense of whom it has been made a formal attribute of *mōbads*."[145] Shaked shows that the term *mayānjīg* was applied to the Zoroastrian divinity, Mithra, and it is in reference to the latter as a judge that in other texts we come across such terms as *rāst dādwar*, *dādwarīh*, *mayānjīgīh*, and *azešmānd*. These terms, according to Shaked, "denote separate judicial functions," though, he admits, "it is not possible, in our state of knowledge, to distinguish more closely between them."[146] While the reference to a variety of judicial officeholders and the ambiguous character of the *mowbed*'s office make it difficult to obtain an accurate picture regarding the state of the judiciary under Sasanian rule, they also underscore its pluralistic character.

The Pahlavi text *Rivāyat i Ēmēd i Ašawahištān* (The religious explanation of Ēmēd, son of Ašawahišt) is a ninth- or tenth-century "collection of religious, social, and civil laws based on the Zoroastrian religious codes" and is believed to reflect Zoroastrian practice from the Sasanian era.[147] Question 5 in this work refers to the duty of family guardianship. This includes an inquiry into the identity of the authority to whom the nomination of a guardian should be made. The issue of appointing family guardians sheds some light on the identity of Zoroastrian judges, as the question itself suggests that appointing guardians was a prerogative that belonged to a judicial authority. The answer establishes the following procedure:

> If a religious authority or a priest or a minister is present [i.e., the presence of these religious eminences is required for the nomination of a guardian], in that case [the nominee's] request to take family guardianship should be made to one of them. If neither an authority of the religion nor a priest nor a minister be present, [but] a sacred fire be in the vicinity, in the town, this claim should be announced by a regular visitor to that fire. If the situation does not prevail either, a righteous man who is a student of a priest, whose knowledge of the religion is rooted in his lineage, to him the request [of the official

> declaration of the guardian] should be made. If that is not available too, any adherent of Zoroastrianism in that town who is elderly, well known, and with good reputation, and his veneration for the soul and his wisdom are attested more [than the other's], to him the request [of the official declaration of the guardian] should be made.[148]

The answer should be read in the context of its time, a period in which Zoroastrians no longer enjoyed a life within Zoroastrian sovereignty. The answer, like the entire text, reflects the difficulty met by Zoroastrians in maintaining their ancient customs in the context of a general decline in priestly circles.[149] Yet the significance of this passage has also to do with the Sasanian era, as it attests once again to the crucial link between religious and judicial responsibilities in Zoroastrian eyes and, presumably, in Sasanian eyes as well.

Sasanian legal courts existed not only in central towns but also in rural settlements. In the latter, judgments were rendered by local village judges.[150] The distinction between urban and rural courts is attested in the Babylonian Talmud:

> Raba proclaimed or, as others say, Rav Huna: those who go up to the Land of Israel and who come down from Babylonia know that if an Israelite knows evidence for the benefit of a Gentile and, without being subpoenaed, goes into a Gentile court and testifies against another Israelite, in such a case, we shall excommunicate him. Why? Because [the Gentiles] collect money even on the evidence of a single witness. And we have made that statement only if it involved one witness, not two. And, further, we have made that ruling only in the case of a trial before the *mgistā* [untrained magistrates; rural courts], but [not] if it was before the *davār* [the Persian circuit court; the authorities' court], where the judges impose an oath on the evidence of a single witness.[151]

The passage refers to two judicial forums, the *mgistā* and the *davār*. Whereas the former appears to have operated in the countryside and to have been administered by lay figures, the latter appears to have been a direct extension to the Sasanian judicial apparatus.

A striking characteristic of the Sasanian Empire was a strong emphasis on social demarcation. The strength of social rank in the Sasanian Empire is suggested by the following passage in *The Letter of Tansar*: "The King of Kings has had established new customs and new ways; but family and rank are as

corner-piers and struts and foundations and pillars. When the foundation perishes the house decays, is ruined and collapses."[152]

By prescribing discrete social categories, the Sasanians were drawing on an ancient Persian heritage that sought to maintain a system based on social rank. This heritage reached a point of legislative consolidation by the fifth century A.D. through the division of the middle class into social estates.[153] Four main estates were established: priests and judges; warriors; scribes; and cultivators and craftsmen. Each estate consisted of further subdivisions. Whereas the higher classes included the king's family, vassal rulers, courtiers, state officials, and rural nobility, the lower classes comprised nomadic and rural populations.

Legally speaking, despite this scale of social ranks, Sasanian society was divided into those who possessed citizenship and those who did not. The former had access to state courts; the latter did not.[154] A member of the Sasanian society was automatically born into an agnatic group, a community. Membership in such a community entailed active participation in social life, religious worship, and personal and social security. The agnatic group includes subgroups of prominent members who held authority and regulated disputes.[155] In general, community members shared the same religion. Thus, abandoning one's religion entailed a loss of membership in one's community. Yet being a non-Zoroastrian did not mean that a person lacked civic status.[156] The Sasanian legal order was not closed to non-Zoroastrians, while non-Zoroastrians also had their own civic institutions to rely on.

Christian Judicial Institutions in the Sasanian Empire

The Sasanian Empire was ruled by the adherents of the Zoroastrian faith. Here Christians, in contrast to their status under Rome and like the Jews, were members of a religious minority group. Reading through the literary material produced by Christians and Jews under Sasanian rule, it is hard to avoid the notion of self-contained religious communities. That being said, it is worth considering these narratives as forms of a general "rhetoric of insularity," in their attempt to instill in their readers a sense of communal identity.[157] There is, therefore, reason to doubt these claims and consider the possibility that Christian and Jewish communities were not as autonomous as their religious elites wished them to be. This is suggested, among other things, by the fact that Christians and Jews had recourse to Sasanian judicial institutions.

A passage from the *Mādayān ī Hazār Dādestān* (The book of a thousand

judgments) suggests that this work—the only Sasanian legal document preserved to date—is a compilation of Sasanian judicial cases and decisions going back to the pre-Islamic period. The compilation includes very few references to non-Zoroastrians. Among those is one particular regulation addressing the question of the property of an heirless deceased:

> Non-believers [i.e., non-Zoroastrians] are not obliged to settle all [the debts of a deceased Zoroastrian head of household, as this must be done by his successors, just as] they also do not become his heirs. As regards non-believers—except for the fact that they shall not be appointed *stūr*s [persons upon whom is laid the obligation to provide a successor for a dead man who left no male issue], as well as for everything which comes, is due in line of direct family succession or [agnatic] kinship—[. . . they ha]ve [?] decisions concerning everything else as the same as those for Zoroastrians.[158]

The regulation deals with non-Zoroastrian heirs in a Zoroastrian household. It stipulates that there is no obligation incumbent upon non-Zoroastrians to appoint a successor for an heirless male (a *stūr*-ship). A possible reason for this rule was an interest by the state religion in preventing the proliferation of non-Zoroastrian successors.[159] For present purposes, of special interest is the final part of the regulation, indicating that non-Zoroastrians, except in matters pertaining to inheritance, are liable to the same decisions as Zoroastrians. This suggests that, at least partially, non-Zoroastrians fell under the same legal jurisdiction as their Zoroastrian neighbors.

Two other sources that suggest that non-Zoroastrians had access to Sasanian courts are: the *Life of Mār Abā*, the catholicos, patriarch of the East Syrian Church (fl. 540-52); and a legal treatise, *Maktbānūtā d-'al Dinē* (A collection of judgments), written by the East Syrian cleric Išō'bokt (eighth century; exact dates unknown).[160] According to the *Life of Mār Abā*, the catholicos was originally a Zoroastrian who had converted to Christianity. As a result, he had to leave his official position in the Sasanian court, and he faced charges from his previous coreligionists: "As the king released him, the king announced: that you have trespassed our orders and came, we forgive you. But these four very heavy charges, which the Magians [*mgušhē*] bring against you, are as follows: that you have turned people away from the Magian religion and converted them to Christianity; that you did not permit your fellow people to take multiple wives; that you drew lawsuits from the Magian way to yourself;

that you were first a heathen [*ḥanpā*] and later became a Christian."[161] A primary concern for the accusers of Mār Abā was the fact that he was drawing Christians away from the Sasanian judiciary, indicating that such recourse was an option.[162]

Išō'bokt's work may serve as further indication of Christian use of Sasanian courts. The treatise is an attempt to harmonize legislative measures that had already been established under the Sasanians and were applied later by the episcopal tribunal.[163] Chapter 3 of the present study discusses the contents of Išō'bokt's compilation in greater detail. For now, it should suffice to note that his work refers to matters that fall under the jurisdiction of ecclesiastical as well as secular judges. As a Christian clergyman, Išō'bokt sought to restrict Christians to the jurisdiction of the ecclesiastical judge. Drawing from earlier materials that predated Islamic rule—most notably, from Zoroastrian law—Išō'bokt was among the first ecclesiastical jurists to attempt to introduce a unified religious and civil corpus of ecclesiastical regulations to the Eastern Christian churches. His notion of a judiciary that embodied both legal realms, the religious and the secular, was likely to have been inspired by a Zoroastrian tradition. Indeed, ecclesiastical principles pertaining to civil law, such as questions of inheritance and marriage, had already emerged in the fifth century; yet the absence of an ecclesiastical civil jurisdiction could no longer be tolerated by the church.

In Išō'bokt's treatise and in the *Life of Mār Abā*, there is an attempt to draw Christians to ecclesiastical courts. The East Syrian Church, operating in Sasanian society, sought to create its own autonomous institutions.[164] The reign of the Sasanian monarch Yazdegerd I (fl. 399-420) marked the beginning of an era of toleration toward non-Zoroastrian minorities in the Sasanian Empire. One expression of this Sasanian policy was a growing cooperation between rulers and local bishops.[165] An immediate benefit to the church was its ability to organize itself and consolidate the authority of its leaders, despite their constant dependence on the whim of Sasanian rulers. The synod of 410 announced Yazdegerd's "Edict of Toleration" to the East Syrian Church. The edict granted an autonomous standing to the church within the Sasanian Empire, thus reinforcing the position of its ecclesiastical leadership. Most important, "the king offered to support the bishops' edicts and judicial decisions with the full coercive power of the monarchy."[166]

The synod of 410 also marks the first official recognition of the bishop of Seleucia-Ctesiphon, the catholicos, as head of the East Syrian Church.[167] In his capacity, the catholicos would also serve as the supreme judicial authority of his church.[168] By 424, the East Syrians were insisting that internal disputes not

be settled through the intervention of external elements.[169] Generally speaking, the fifth century marks the beginning of the organizational consolidation of the East Syrian Church with a permanent presence in Sasanian society. It is in this context that bishops functioned as judges and had their decisions enforced through the Sasanian state.[170] Whereas the catholicos stood at the top of this legal order, East Syrian bishoprics, scattered over a wide territorial jurisdiction, were facilitating the judicial activities of local ecclesiastical judges.[171]

Another source of Christian judicial authority under Sasanian rule can be seen in the roles performed by East Syrian monastic communities. The Syriac treatise better known as the *Liber Graduum*, or *The Book of Steps*, is a fourth-century work outlining the structure and principles of an ideal Christian society.[172] The work is thought by modern scholars to have been composed over a stretch of time in the context of a monastic community. It addresses two principal groups of Christians: the upright, *kēnē*; and the perfect, *gmirē*. The members of both groups are considered to have reached a high level of spirituality on "a road to salvation," yet the different designations denote a hierarchy in which the perfect are superior to the upright in their spiritual achievements. Whereas the upright assume leadership within Christian communities, the perfect are depicted as homeless individuals who wander around, begging and mediating disputes among the believers. Chapter 4 of the *Liber Graduum* instructs the perfect one: "When you meet people who are at enmity with each other, say, *Brothers, blessed are the peacemakers* [*ʿābday šlāmā*]*, for they shall be called sons of God* (Matt. 5:9). Now peacemakers are those who reconcile enemies who belong to other churches, away from their own.[173] They make peace in the land of their Father, and are mediators [*meṣʿāyē*] who reconcile people by imploring them, demonstrating lowliness to them, and admonishing them."[174]

Jewish Judicial Institutions in the Sasanian Empire

Modern scholars generally agree that the history of the Jews during the later part of Sasanian rule is one of relative religious freedom and tranquillity.[175] Part of this reality is attributed to the absence of an interest on the part of the Sasanians to draw converts.[176] In contrast to the testimony of contemporary Christian martyrologies, the Babylonian Talmud mentions only sporadic cases in which Zoroastrian priests interacted with Jews.[177]

With regard to the nature of the Rabbanite leadership in Sasanian Babylonia,

Jacob Neusner has argued that "the rabbis carried out crucial community responsibilities as judges and administrators." As such, the rabbinic courts in Babylonia "constituted the institutions of Jewish government." Neusner concludes this part of his discussion by arguing that the Jews of Babylonia were organized in a manner comparable with that of the Ottoman *millet* system, over which the exilarch (*reš galūtā*) was the sole and absolute judicial authority.[178] What seems as a logical depiction of Jewish society, however, should be met with caution, as our knowledge regarding Jewish communities and their judicial institutions under Sasanian rule derives exclusively from the Babylonian Talmud. This fact alone significantly limits our ability to discuss the history of these communities in concrete terms. The Babylonian Talmud was written throughout a period of about five or even six centuries (ca. 200-750, the latest) and records rabbinic negotiations on matters pertaining to law and ritual. It does not purport to provide a historical portrayal. Moreover, it is the product of Babylonian Rabbanite scholars who, as we shall see, had their own social agenda.

The Babylonian Talmud refers to two main Jewish judicial institutions, that of the exilarch and that of the scholars. In many ways, the situation of the rabbinic judiciary under Sasanian rule resembled the one under Rome. Similar to the patriarchate in pedigree and formality, the Babylonian exilarchate acted as the supreme Jewish judicial body.[179] The exilarch, like the Palestinian patriarch, possessed the prerogative of passing judgments that were enforceable by the state, and, in his capacity as the supreme judicial authority, he reserved the right to appoint local judges on his behalf.

Another way to assess the scope of the exilarch's prerogatives is to compare his office with that of the Christian catholicos. A close examination of the two offices gives the impression of a number of common features: both had their seats near the Sasanian monarch in the capital, occupied a centralized office, and enjoyed state recognition and empowerment. Such common features could be attributed to a common political context.[180] It is plausible that the early fifth century, which marked the beginning of Sasanian recognition of East Syrian institutions, meant the same for Jewish institutions. When adding this assumption to the Talmud's testimony, the possibility of an exilarchal judicial institution seems less unlikely.

The Talmud not only alludes to the central judicial role of the exilarch but also to that of a less institutionalized group: the Babylonian sages (amoraim).[181] As in the case of the Palestinian rabbis, the Babylonian sage maintained ongoing contacts with lay members of his religious community. Yet unlike his Palestinian

counterpart, the Babylonian sought to create a formal space in which he would interact with lay society. Furthermore, as teachers, local leaders, and judges, the Babylonian sages had the privilege of receiving, rather than approaching, their audiences.[182] While the Babylonian sages sought formal authorization from Palestine, they were gradually developing an independent pattern of practice. With time, this line of action served as an important precedent in which "new communities would rise up and assert themselves vis-à-vis their mother communities."[183] In Palestine and in Babylonia, the process by which scholarly figures assumed a central role in the lives of their communities is likely to have been gradual. This process should be seen in the background of later competition between Rabbanite circles and monarchic ones: the patriarchate and the exilarchate, on the one hand; and the geonic academies, on the other.

Christian and Jewish Responses to Legal Pluralism in the Pre-Islamic Period

Having considered the variety and accessibility of formal and informal judicial institutions under late Roman and Sasanian rules, we now turn to some of the earlier references made by Christian and Jewish sources to the question of extra-confessional judiciary. The positions cited below were not voiced by a single authority, since the Christian and the Jewish worlds, spanning from North Africa to Mesopotamia, were not uniform entities under a single leadership. Despite internal divisions, Christian and Jewish concerns for maintaining judicial exclusivity were already evident in late antiquity; the claim for judicial exclusivity and the contents of some of the sources suggest competition between religious and secular judicial institutions. It is here, therefore, that the attempt by power groups to establish exclusive judicial authority, a principal implication of legal pluralism, is best discerned.

The church fathers and the Rabbanite sages were well aware of the diversity and accessibility of the judicial institutions around them. Their insistence on the judicial exclusivity of their own institutions signals this awareness. Yet the claims of judicial authority on the part of late antique Christian and Jewish confessional leaders were not exceptional. Rather, they reflect a broader dynamic of legal pluralism in which power groups attempted to achieve social control by imposing norms through a judicial mechanism. Such claims, as we have already pointed out, tend to accelerate when they are brought on religious grounds. Maintaining a legal order in this case goes beyond social

considerations because it pertains directly to maintaining confessional identities. Still, whether for divine or for temporal ends, the goal of religious and secular patrons of legal orders was one and the same: legitimacy, supremacy, and, ultimately, exclusivity.

Christian Attitudes toward Non-Christian Judiciary

The judicial services performed by recluses and monks in the fifth century have been interpreted as a later development of an earlier role played by Christian leaders: "In the previous age of martyrdom, the role had rested on the confessors. Martyrs awaiting trials had been approached for judgments on theological authenticity, for blessings, remission of sins, and no doubt for settlement of disputes."[184] Yet as the church began to acquire an institutionalized form, assuming a role hitherto performed by secular administrators, the bishop was expected to fulfill the role of saint. It is the bishop's holy reputation that was to endow him the responsibility of providing for the poor, a task that transcended its literal meaning and took on a moral dimension: "In the Near Eastern model of society, the 'poor' was a judicial, not an economic category. . . . To give 'justice' to the 'poor' was a sign of royal energy—whether this was the energy of a king or God."[185]

In reference to a bishop or a recluse, the principle that emerges from Christian sources is that all human problems should be addressed according to Christian ideals. With particular regard to judicial authority, these ideals can be summed up in three rules: contending parties should try to reconcile, thus avoiding having their matter brought before a judicial decision; secular rulers are not to pass judgment over Christians; and if judgment is inevitable, it is to be given by a "saint"—by a bishop or, as presented in the *Liber Graduum*, by a group of chosen perfect.

The principal approach, exhorting the believers to resolve their disputes quietly, appears in the Book of Matthew: "If another member of the church sins against you, go and point out the fault when the two of you are alone. If the member listens to you, you have regained that one. But if you are not listened to, take one or two others along with you, so that every word may be confirmed by the evidence of two or three witnesses. If the member refuses to listen to them, tell it to the church; and if the offender refuses to listen even to the church, let such a one be to you as a Gentile and a tax collector" (Matt. 18:15-17).

Thus disputes between believers are to be settled privately and are to be brought before the arbitration of the church only as a final resort. The New Testament's concern with believers litigating before non-Christians is found in the Pauline command:

> When any of you has a grievance against another, do you dare to take it to court before the unrighteous, instead of taking it before the saints? Do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we are to judge angels, to say nothing of ordinary matters? If you have ordinary cases, then, do you appoint as judges those who have no standing in the church? I say this to your shame. Can it be that there is no one among you wise enough to decide between one believer and another, but a believer goes to court against a believer and before unbelievers at that? (1 Cor. 6:1-6)

The Pauline passage is the most explicit reference in the New Testament to the judicial authority of Christian leaders, ambiguously referred to as "saints." It rejects the authority of the "unjust" and "unbelievers." If the latter are contrasted with the "saints," who were designated by their Christian community, whether clergy or monks, we may surmise that the expressions "unjust" and "unbelievers" refer to either secular or non-Christian figures.

By the end of the fourth century, "judges were no longer ungodly."[186] Whereas the New Testament addressed litigation outside the Christian community during the early phases of Christianity, *The Apostolic Constitutions* was composed in the post-Constantine era. By now, appearing before an ecclesiastical judge was a legitimate and legal judicial option. Written in Syria around the end of the fourth century, *The Apostolic Constitutions* is considered to be a comprehensive church order. It comprises earlier church orders such as the *Didascalia*, *Didache*, and the *Apostolic Tradition*.[187] As such, it serves as a useful source for considering the early ecclesiastical position regarding Christian recourse to nonecclesiastical tribunals: "If by any management or temptation a contest arises with anyone, let him endeavor that it be composed, though thereby he be obliged to lose somewhat; and let it not come before a heathen tribunal. Nay, indeed, you are not to permit that the rulers of this world should pass sentence against your people; for by them, the devil contrives mischief

to the servants of God and occasions a reproach to be cast upon us, as though we had not *one wise man that is able to judge between his brethren* (1 Cor. 6:1, etc.) or to decide their controversies."[188]

Whereas the aforementioned Pauline passage uses expressions such as "unjust" and "unbelievers" to denote illegitimate judges, the passage in *The Apostolic Constitutions* refers to such judges as "heathen" and "rulers of this world." Yet there is a greater ideal than turning to the "saint" instead of "rulers of this world": "by suffering loss in the affairs of this life, thou wilt be sure not to suffer in the concerns of piety, and wilt live religiously, and according to the command of Christ." The believers are called upon to endure loss and thus avoid contention as an act of piety and fulfillment: "In fact, to have lawsuits at all with one another is already a defeat for you. Why not rather be wronged? Why not rather be defrauded?"[189]

The concept is repeated once more in *The Apostolic Constitutions*, now in a harsher tone: "But if brethren have lawsuits one with another, which God forbid, you who are the rulers ought thence to learn that such as these do not do the work of brethren [in the Lord], but rather of public enemies; and one of the parties will be found to be mild, gentle, and the child of light; but the other unmerciful, insolent, and covetous. Let him, therefore, who is condemned be rebuked, let him be separated, let him undergo the punishment of his hatred to his brother."[190] The true believer, the "mild, gentle, and the child of light," has no lawsuits. In contrast, a person who pursues lawsuits is considered a "public enemy . . . unmerciful, insolent, and covetous," and therefore must be cast out of his community.

Examples of the application of these principles can be found in early Christian question-and-answer literature, legislation, and treatises on normative Christian behavior. A letter from the aforementioned collection of questions and answers of sixth-century Tawatha contains a question about the proper conduct in a case of legal contention, which is met with this answer: "Strive, to the best of your ability, to be reconciled quickly; for it is a sign of the perfect not to be troubled by temptations that come upon them. The weak person, however, if he postpones reconciliation, later arrives at it and ends up regretting the matter; then, instead of blaming himself, he turns to blaspheme against God and loses his soul. Thus the following words are fulfilled in that person: *For what does it profit one to gain the whole world and forfeit one's life?*" (Matt. 16:26; Mark 8:36).

Once more, the idea of refraining from contention as the ideal solution to legal conflict is attested. The point is also found in a number of passages in the

Liber Graduum. Yet in the latter, as the author of this work addresses groups of different levels of piety, he is aware that not all are capable of performing the entire set of commandments. Thus in chapter 11, he guides the perfect one, who is to set an example for other believers:

> Do you want to become perfect? Pursue the great commandments. But pay attention, because if you prescribe these minor and major commandments to a person, he will not be able to observe them all at once, unless he leaves one in order to observe the other. . . . [O]ur Lord said, *Do not judge* (Matt. 7:1); and he [also] said, *If the member refuses to listen to them, tell it to the church* (Matt. 18:17). If both of them are [intended] for you, which one will you choose? . . . Therefore, these commandments, which do not judge anyone and love everyone, are spoken to the strong. . . . These minor [commandments] are spoken to the young and imperfect.[191]

The passage above suggests that although passing judgment is to be avoided, there are still those in the church who require it, as they have not "matured" but are "young and imperfect."

Such ideas may help us view early Christian canon laws exhorting believers, predominantly clergy, not to take their lawsuits outside the church. An objection against contention in court, whether presided over by an ecclesiastical judge or a layman, was shared throughout the Christian world. Yet there was a pragmatic recognition, even in the New Testament, that such ideals could not be imposed upon all believers. If a lawsuit were to arise, it was to be kept within the community and not brought before secular judges. Even in the fourth century, Roman bishops issued canons against clergy taking their lawsuits outside the church. Silvester (fl. 314-35) and Julius (fl. 337-52) had both decreed that clerics should not enter a court for any reason and should keep their legal concerns within the church.[192] A canon from the East Syrian synod of 484, held in the city of Bēt Lapat—a summer residence of Sasanian monarchs—states: "As to a clerk or a monk [*bar qyāmā w-dayrāyā*], when he has a legal claim against a secular [*ʿālmā*], he may not voluntarily and under no coercion turn to the tribunal of the outsiders [*barrāyē*]: Whoever goes out and willingly does so, and is found guilty, thus committing himself to the oaths [taken] before pagans [*ḥanpē*] or gives an ecclesiastical oath, will be listed in a particular book. He shall be received after pleading and giving penance according to the rules of the priests."[193]

In 576, Canon 5, issued at a synod of the East Syrian Church, refers to members of the Christian community who defy ecclesiastical judgment by seeking refuge outside the church:

> It is said in the synod that there are people who are excluded from the church on account of their disobedience with regard to what is proper; they then cling to their defiance and their infidelity, seeking refuge among the pagans [*ḥanpē*] and the secular [*ʿālmānāyē*]; they trouble those who have excommunicated them. They demand pardon though they do not deserve it. With regard to their matter, this synod has decreed that until they become obedient and do the proper thing, they shall remain outside the church under affliction and penitence for a certain time, whereupon they shall be forgiven.[194]

The context in which these canons were given is unknown. Chapters 3 and 5 of this volume try to uncover the identity of the nonecclesiastical judicial authorities mentioned here. For now, it would be useful to note the principal approaches of Christian leaders toward non-Christian judiciary and the signs of early ecclesiastical efforts to impose judicial exclusiveness.

Jewish Attitudes toward Non-Jewish Judiciary

The Mishnah's discussion of the validity of deeds issued in non-Jewish courts is the earliest rabbinic reference to the use of non-Jewish courts in late antiquity: "All documents that are accepted in heathen courts, even if they who signed them were Gentiles, are valid [for Jewish courts] except writs of divorce and of emancipation. Rabbi Shimʿon says: These also are valid; they were only pronounced [to be invalid] when drawn up by unauthorized persons."[195]

The Mishnah expresses an ambivalent opinion on the question of non-Jewish courts for the purposes of validating deeds. According to one opinion, the courts of non-Jews can be used for drawing up deeds, with the exclusion of bills of divorce and manumission of slaves. A second opinion, that of Rabbi Shimʿon, validates even the latter kinds of deeds when issued in non-Jewish courts.

A later rabbinic position reflects a much stricter attitude. The collection of exegesis of the Pentateuch, *Midrash Tanhuma*, ascribed to Tanhuma, a fourth-

century Palestinian scholar, states: "There he cried onto the Lord. . . . *There he made for them a statute and an ordinance and there he put them to the test* (Exod. 15:25) for them and not for the worldly nations. For he who renounces the judgments of Israel and goes before the worldly nations has transgressed against God first, and then against the Torah."[196]

The Babylonian Talmud discusses the Mishnah dealing with the validity of deeds that were drawn up in a non-Jewish court. The tannaitic rule, according to which all deeds that are drawn up in non-Jewish courts are valid except for bills of divorce and manumission of slaves, stimulated the discussion of the Babylonian sages:

> [Mishnah]: All documents that are accepted in heathen courts, even if they who signed them were Gentiles, are valid [for Jewish courts] except for writs of divorce and of emancipation. Rabbi Shim'on says: These also are valid; they were only pronounced [to be invalid] when drawn up by unauthorized persons.
>
> [Gemara]: [Our Mishnah] lays down a comprehensive rule in which no distinction is made between a sale and a gift. We can understand that the rule should apply to a sale, because the purchaser acquires the object of sale from the moment he hands over the money in their presence, and the document is a mere corroboration; for if he did not hand over the money in their presence, they would not take the risk of drawing up a document of sale for him. But with a gift [it is different]. Through what [does the recipient] obtain possession? Through this document, [is it not]? And this document is a mere piece of clay?—Said Shmuel: The law of the government is law. Or if you prefer, I can reply: Instead of "except writs of divorce" in the Mishnah, read, "except [documents] like writs of divorce."[197]

The talmudic discussion concerns two kinds of documents: "evidentiary" and "constitutive." The former documents concern activities that are effectuated by payment, namely, monies that are given in exchange for goods. Here the document, a receipt, serves as evidence of such payment (rather than effectuates the transaction). In the latter, however, no payment takes place; thus the passing of property from one person to another is effectuated by the document itself. According to the Mishnah, all documents issued in Gentile courts are valid, except those that have a religious character, such as bills of divorce

and manumission of slaves (their religious character precludes any non-Jewish involvement). In the Mishnah, however, there is no distinction between evidentiary and constitutive documents. The discussion in the Talmud concludes that evidentiary documents create no new legal state, but simply attest to one; thus they depend on credibility alone and hence are valid when issued by Gentile courts.

But in the case of constitutive documents, the Talmud asks how these can be valid if issued by a Gentile court. Such documents create legal states and therefore cannot be issued by a Gentile court, as it is outside the realm of Jewish law. The Talmud gives two different replies. The first is that, indeed, constitutive documents of Gentiles are valid in lands under Gentile rule (as was Palestine at the time of the Mishnah). Jews under Gentile rule must conform to Gentile law ("the law of the land"), and since the constitutive document (of gift) issued by a Gentile court is valid in Gentile law, it automatically becomes valid in Jewish law.

The second reply states that constitutive documents of Gentile courts are invalid. The remark of the Mishnah "except bills of divorce and manumission" should be read "*such as* bills of divorce and manumission." Bills of divorce and manumission are disqualified here not because of their religious character (which indeed they have) but, more sweepingly, because of their constitutive character.

Settling disputes in non-Jewish courts also comes up in the Talmud:

> [Gemara]: Rav Nahman said in the name of Shmuel: A *get* given under compulsion [exercised] by an Israelite court with good legal ground is valid, but if without sufficient legal ground, it is invalid, but it still disqualifies [the woman for a *kohen*].[198] If enforced by a heathen court on good legal grounds, it is invalid but disqualifies [the woman for a *kohen*]; if without sufficient legal ground, there is no tincture of a *get* about it. How can you have it [both ways]? If the [heathens are] competent to apply compulsion, it should actually be valid. If they are not competent to apply compulsion, it should not disqualify! Rav Mesharsheya explained: According to the strict rule of the Torah, a *get* enforced by a heathen court is valid, and the reason that [the rabbis] declared it invalid was to prevent any [Jewish woman] from attaching herself to a heathen and so releasing herself from her husband. If that is so, [why did Shmuel say that] if it is

> enforced [by a heathen court] without sufficient legal ground, it has not even the tincture of a *get*? Let it at least be on a par with the similar *get* exacted by an Israelite court, and disqualify the woman for a *kohen*?—The truth is that Rav Mesharsheya's [explanation] is erroneous. And what is the reason?—[A *get* enforced by a heathen court] on legal grounds is likely to be confused with [a *get* enforced by] an Israelite court on legal grounds, but [a *get* enforced by a heathen court] without proper grounds will not be confused with [a *get* enforced by] a Jewish court with legal grounds. . . . Rabbi Tarfon used to say: In any place where you find heathen law courts, even though their law is the same as the Israelite law, you must not resort to them, since it says, *These are the judgments that thou shall set before them* (Exod. 21:1), that is, "before them" and not before heathens.[199]

A court cannot issue a divorce in Jewish law. A bill of divorce can be written only upon the express instruction of the husband. If a husband refuses to give such instruction, he may, in certain instances, be coerced by the courts to do so. It is this judicial coercion that is the subject of the talmudic discussion. Some Jews turned to Gentile courts for legal implementation; otherwise, it is unlikely that a discussion about the validity of such a divorce would be found. Despite its general disqualification of a divorce coerced by a non-Jewish court, the Talmud grants such a divorce (*get*) some validity ("a tincture of a *get*"): "If enforced by a heathen court on good legal grounds, [the divorce] is invalid but disqualifies [a divorced woman from marrying a member of priestly descent, a *kohen*]."

It is noteworthy that the Talmud does not challenge the tannaitic position that "a heathen court . . . may flog a man and say to him, do what the Israelite [authorities] command you." In addition, following the question of the validity of a divorce issued in a non-Jewish court, the talmudic discussion cites the saying of the tanna Rabbi Tarfon against appeal to non-Jewish courts. While the talmudic discussion before its reference to Rabbi Tarfon focuses on the question of divorce, it now raises a much broader concern: appeal to non-Jewish courts. The sequence of the discussion creates an interplay between the question of divorce and that of appeal to non-Jewish courts in general, thus disqualifying any resort to non-Jewish courts. Nonetheless, there is no objection to the use of non-Jewish courts as a means of enforcing Jewish court decisions.

Conclusion

The judicial landscape of the Eastern Roman and the Sasanian Empires was anything but monolithic. Under both empires, there was a great diversity of judicial institutions that drew their authority from a variety of sources, including imperial sanction, religious affiliation, social rank, and interpersonal relationships. Imperial magistrates, ecclesiastical officials, and urban aristocrats on both sides of political boundaries were the formal upholders of imperial laws, thereby acting as propagators of imperial unity. Through the application of imperial law, members of the Roman and Sasanian judicial apparatus served as constant reminders of sovereignty. These officials, however, were not the exclusive possessors of judicial authority. Our evidence attests to a variety of institutions and individuals, both in urban and rural centers, who held judicial authority as well. These include village headmen, local notables, and pious individuals. A third category of judicial authority was that of minority confessional leaders, as in the case of the Jews under late Roman rule and the Christians and Jews in the Sasanian Empire.

The available evidence does not indicate the scale of recourse to more than one judicial institution, but it clearly suggests that such behavior was not exceptional. The existence of different judicial institutions within one or more legal orders is illustrative of the social and cultural pluralisms that prevailed under both empires. The choice of individuals to settle their legal disputes and validate their transactions before different institutions suggests their concurrent affiliation with different social circles. A citizen of the Roman Empire did not renounce his civil status when he chose to bring his dispute before a village headman, a landlord, or an individual of pious reputation, rather than before a formal representative of the imperial apparatus.

Yet the choice does reflect his or her simultaneous subordination to both imperial and local legal orders. Whereas judicial choice may have worked to the advantage of litigants, patrons of legal orders did not always welcome it, particularly when it undermined their authority. As the last part of our discussion has shown, such concerns were of particular relevance to the implementation and maintenance of confessional disciplines. The church fathers and the rabbis sought at every opportunity to discourage the use of extra-confessional judicial institutions. Patristic and rabbinic literatures contain concrete positions on this question, a fact that in itself points to the existence of choice, to its use, and to its social significance. Religious exhortations and prohibitions, however, were more than dry prescriptions, as they

provided the believers a way to imagine their world through concepts of holiness and worldliness, thus outlining the internal and external realms of their communal affiliation. It is here, in the context of overlapping jurisdictions or semiautonomous social fields, that law served to define social spaces by censoring recourse to extra-confessional legal orders. As we turn in the following chapters to examine legal pluralism in the Islamic period and the attitudes expressed toward this pluralism by various authorities (Muslim and non-Muslim), we should recall that these concerns were already prevalent in the period preceding Islam.

CHAPTER 2

Islam's Judicial Bazaar

> A beautiful woman appealed to the *qāḍī*. [The *qāḍī*] found her attractive and therefore sought to marry her. [In response] she said: "I do not wish to marry." . . . [S]he then turned to the chief of police [*shurṭā*], from whom she received the same [response] she had received from the *qāḍī*. She then turned to the head of the market, from whom she received the same. She then proceeded to [King] David's chamberlain, yet [once again] the response she received was the same as she had from the others. Consequently, she withdrew her lawsuit and remained at home.[1]

It is possible that this passage, taken from 'Umāra ibn Wathīma's (d. 902) ninth-century collection of prophetic tales (*Qiṣaṣ al-Anbiyā'*), reflects the author's understanding of biblical judicial arrangements in his own contemporary terms.[2] The choice between several judicial figures provides the setting for the pseudo-biblical narrative. As early as the seventh century, Muslim officials, including *qāḍī*s, police officials, market overseers, and governors fulfilled a judicial role, in a way that exhibited a plurality of overlapping judicial authorities. This feature of Islamic judicial practices was continuous with the practices of the pre-Islamic period and, as such, was the target of later Islamic state reforms.

By the early eighth century, the vast territory between the western frontiers of Central Asia in the east and the Iberian Peninsula in the west had been brought under the sovereignty of a single empire. The administrations of the Eastern Roman and Sasanian Empires had been replaced by that of Islamic government. Although still undergoing a process of consolidation and formation, the Islamic regime sought to introduce new patterns of governance and

social organization. These included the creation of a judiciary designed to serve the religious ideology of Muhammad and his followers. But the judicial organization of the Islamic state, like other areas of its administration, did not emerge overnight. Rather, its evolution was gradual and passed through a series of milestones.

The present chapter outlines and discusses the judicial institutions to which Muslims had access during the period of the broader study. A multiplicity of judicial institutions, along with a variety of other judicial practices, is seen here as an expression of a legacy handed down to the Muslims from their pre-Islamic predecessors. In this respect, this chapter, like the previous one, purports to contextualize the discussion that lies ahead. It aims not only to assist in filling in the picture of judicial arrangements but also to bolster the governing theme of this study as a whole: the prevalence of legal pluralism throughout the region and period of our discussion and the ongoing conflicts over social control that revolved around it.

The consolidation of the Islamic state entailed the formation of Islamic jurisprudence, followed by the establishment of the Islamic judiciary. At the same time, however, legal exclusiveness was never fully achieved by the Islamic state, and a diversity of legal authorities continued to persist not only within its own apparatus but also outside it, because of its inability to suppress customary practices. The Islamic state, in other words, was not the sole patron of legal institutions but rather shared its authority with local forces that either represented or supplemented it. Formally speaking, Islamic law was the sole point of reference in the administering of justice. Yet the incorporation into Islamic law of customary practices, the survival of pre-Islamic practices, and the persistence of Jāhilī norms attest to a complex setting that involved much interplay among different sources of law within the broader context of administrative decentralization, social informalism, and legal pluralism.

As in the case of the late Roman and Sasanian Empires, legal pluralism under Islamic rule implied a multiplicity of institutions within a single legal order. But in contrast to John Griffith's definition of "weak" legal pluralism, different rules and institutions were not necessarily prescribed by a single social order.[3] The Islamic state had a limited ability to legislate or to insist upon a uniform implementation of the law. Instead, it sponsored or acted alongside the legal enterprises of jurists and provided the infrastructure for the implementation of the law. Although there was formally only one recognized legal order (the *sharīʿa*), its exploitation by various social groups introduced a diverse legal setting that, in turn, facilitated a notable institutional variety. These features of

diversity and variety formed the background for an ongoing competition among the various power groups, particularly between Muslim jurists, on the one hand, and state bureaucrats and upholders of customary practice, on the other. Here, too, religious ideals were of immense importance, with judicial institutions essentially functioning as the practical application of a theological triumph: the triumph of Islam over pre-Islamic codes of normative behavior.

Islamic Judicial Institutions in Modern Scholarship

Modern scholars tend to outline the Islamic judicial organization in terms of a number of well-defined offices.[4] At the top of this structure stood the caliph, the formal successor of Muhammad, who embodied both temporal and spiritual power. The judicial office of the Commander of the Faithful stemmed from the concept that Islam is "the community of Allah," the *umma*,[5] whose first judicial authority was Muhammad.[6] The period of Allah's messenger served as a model for future generations; consequently, his successors, the caliphs, assumed the supreme position in law-giving and judgment.[7] As early as the Umayyad period, the caliph delegated judicial authority to provincial governors, who further delegated judicial prerogatives to local judges (*qāḍīs*).[8] Modern scholars view this structure as part of the evolving administration of the early Islamic state, constituted in the newly conquered territories in accordance with earlier legal traditions—most notably, Roman, Sasanian, and Arabian.[9]

The Evolution of the Islamic Judicial Organization

According to Joseph Schacht, ancient Arab practices of arbitration persisted from the time of the first caliphs until the coming of the Umayyad dynasty.[10] At the same time, the Muslims began to adopt the principles of judicial organization of their Roman predecessors: a hierarchical organization in which the head of state acts as the highest judicial figure and delegates his authority to a regional governor, who, in turn, extends this authority to a local magistrate.[11] It is commonly acknowledged that a central feature of the development of Islamic administration was the growing independence and localization of *qāḍīs* around the eighth century. Despite attempts to control the territory notionally under its sovereignty, "inadequate means of communication and inadequate public finances" were the sources of the limits to state authority.[12]

Consequently, while local *qāḍī*s enjoyed greater autonomy vis-à-vis the state, they were becoming increasingly dependent on local aristocracies and local religious leaders.[13]

The response of early Islamic governments, most notably under the Abbasids, was characterized by attempts to achieve greater centralization through an intimate involvement in the appointment of *qāḍī*s and a clearer definition of the latter's qualifications and prerogatives. In addition, the judiciary was gradually broken down into separate jurisdictions, thus rendering the *qāḍī* court limited to questions of religious law. The creation of three offices—the "chief judge," *qāḍī al-quḍāt*; the "investigation of complaints," *al-naẓar fī-l-maẓālim*; and the office of the "inspection of the markets," the *ḥisba*—has been seen in this context. The chief judge sat in the capital of the caliphate and, under the caliph, was the supreme judicial authority.[14] The office was meant to erase the previous equality between metropolitan and provincial judges. In addition and, perhaps, more importantly, by establishing this office, the Abbasid caliphate was able to place provincial *qāḍī*s under stricter surveillance and supervision.[15] By the second half of the tenth century, after the Fatimid takeover of Egypt, the office had also taken on a role in imperial politics. The Fatimids appointed their own chief judge in Cairo as part of their attempt to signal political independence. Yet while the Islamic judicial administration in the territories under Fatimid rule came under the authority of the chief judge in Cairo, the *qāḍī*s outside these territories were officially still under the authority of Baghdad.[16]

The office of the investigation of complaints has been described as one that was originally established so that litigants could lodge complaints against governmental ill treatment. This also included the miscarriage of justice, particularly by *qāḍī*s. With time, however, this court of appeal became another form of tribunal that dealt with matters of a secular nature, such as property and commercial affairs.[17] The judicial sessions of the *maẓālim* court were led by a secular dignitary, such as a governor or vizier.[18] These figures acted on behalf of the ruler and had access to means of enforcement. As such, the *maẓālim* court had a crucial advantage over that of the *qāḍī*, who had to rely on the cooperation of the police (*shurṭā*) for the enforcement of his decisions. Thus, not only was the *qāḍī*'s office placed under the control of state bureaucracy; it was also "relegated to a secondary position."[19]

The third judicial office introduced by the Abbasids, the "inspection of the markets" (*ḥisba*), had civil and criminal judicial prerogatives.[20] The establishment of this office was a further blow to the *qāḍī*'s jurisdiction. In the narrow sense, the role of the inspector (*muḥtasib*) was to address matters of dispute

that arose in the market. Yet, in practice, he was entrusted with supervision over the morality of the community and hence claimed judicial sanctions that had thus far been reserved for the *qāḍī*.[21]

The prevalent understanding is that the caliphal court, particularly under the Abbasids, sought to reserve for itself the prerogative of appointing *qāḍī*s by limiting their jurisdiction.[22] Although the first to initiate a direct appointment of *qāḍī*s was the Umayyad caliph Sulaymān ibn ʿAbd al-Malik (r. 714-17),[23] the procedure was not formalized until the time of the legal reforms of Hārūn al-Rashīd (r. 786-809). Yet centralization may have only added to the local autonomy of *qāḍī*s.[24] Hence, the first to support this administrative modification were Muslim jurists (*fuqahāʾ*) who sought to achieve greater influence over the *qāḍī*'s office at the expense of local government officials, namely, the governors.[25]

The growing involvement of legal specialists in the *qāḍī*'s office, on the one hand, and the caliphal policy of extending direct control over the *qāḍī*, on the other, is thought to have introduced a better idea as to the *qāḍī*'s judicial jurisdiction. Throughout the Umayyad period and, to a certain extent, into the early Abbasid period, *qāḍī*s were simultaneously fulfilling a variety of tasks, such as collecting taxes, acting as storytellers, and even serving as governors. This reality was to be replaced by a stricter definition of what services *qāḍī*s may and may not perform. With the establishment of the *ḥisba* and, later, the *maẓālim*, the *qāḍī*'s jurisdiction was even further limited to matters pertaining to Islamic law, the *sharīʿa*.[26] As a result, modern scholars hold the view that *qāḍī*s were increasingly drawn from a background of religious learning and specialized in religious law. Accordingly, the *qāḍī* may have received his formal appointment from the caliphal court; but in practice, his allegiance to local scholars grew stronger, and the legitimacy of his office relied heavily on their support.[27] Here joint membership in a legal school (*madhhab*) served to consolidate political factionalism.[28] It is under circumstances of mixed loyalties to state and local forces that *qāḍī*s found themselves at the center of conflicting ideological and doctrinal affiliations. By choosing to ally with the state, the *qāḍī* won its support and was officially able to secure his office. Yet such an allegiance had a price, for not only was the *qāḍī*'s judicial independence at risk but also his legal and religious integrity.[29]

Administratively, local *qāḍī*s are seen as part of a judicial hierarchy, passing on judicial prerogatives to a lower class of judges (*nuwwāb*) and entrusting them with full or partial jurisdiction over small towns.[30] Two (or more) *qāḍī*s could serve within the same geographical jurisdiction, with each one

addressing distinct legal matters, such as penal or family law.[31] The height of this specialization is thought to have come about in the ninth century. At the same time, *qāḍī*s continued to fulfill certain tasks that customarily had been in the hands of their predecessors: supervision of charitable foundations (*awqāf*), guardianship of orphans, administration of the property of absentees and men who died without heirs, addressing petitions of those seeking to convert to Islam, attending to public works, and participating in public events (Friday prayers, funerals, and announcements of the sighting of the moon that signaled the end of the Ramadan fast).[32]

S. D. Goitein, referring to the Geniza period (predominantly the High Middle Ages), observed: "The most impressive aspect of Muslim juridical organization, as evidenced in our records, is its strict centralization."[33] This statement clearly corresponds to the picture that emerges from the aforementioned summary of modern scholarship. It is an image characterized by qualities of unity, administrative hierarchy, division of tasks, and centralization. At the center of this image, we find the office of the *qāḍī*, a developed judicial institution that stemmed from its pre-Islamic precedent, the *ḥakam*. Whereas the latter was the product of an era of ignorance and chaos, the office of the *qāḍī*, at the zenith of its formation, served as a manifestation of the ideal society. As such, the *qāḍī*'s sole source of reference was the *sharīʿa*. He owed administrative loyalty to the caliphal court and ideological loyalty to Muslim jurists. Furthermore, he was highly trained and specialized and was entirely devoted to his office, thus refraining from assuming other posts.

What seems to be under debate among modern scholars is not the process by which pre-Islamic institutions were replaced by Islamic ones but rather the chronology of this process. Some are inclined to view the evolution of Islamic judicial institutions shortly after the Arab takeover within the newly conquered lands as replacing the preexisting judicial institutions found there.[34] Others choose to advance the chronology, suggesting only a gradual disappearance of pre-Islamic Arabian arbitration institutions.[35] Yet the overall image is one of an Islamic administration constantly attempting to tighten its control over *sharʿī* judicial institutions.

The centralization of the Islamic judiciary was to come at the expense of preexisting Arabian judicial institutions and practices. Émile Tyan, referring to the nature of the judicial organization under Islam, commented: "It certainly could not be the primitive system of arbitral justice of pre-Islamic Arabia that would prevail."[36] Schacht provided the reason for this development: "The arbitration of pre-Islamic Arabia and of the earliest period of Islam was no longer

adequate, and the Arab *ḥakam* was supplanted by the Islamic *qāḍī*."[37] Goitein expressed less confidence concerning the "dying out" of pre-Islamic practices: "*ḥukm al-Jāhilīyya*, judgment according to arbitrary opinion or established local practice, did not disappear immediately . . . but was replaced only gradually . . . and, as is well-known, never completely."[38]

The Sources' Bias

Plausible as modern interpretations may appear, we should recall that they are largely based on a limited body of sources. These were composed in different periods and were often used for advancing specific agendas.[39] Moreover, it is essential to stress that medieval prescriptive accounts, such as the *adab al-qāḍī* literature (see below), sought to perpetuate an ideology that was meant to denigrate the pre-Islamic period. In contrast to the chaotic pre-Islamic era, Muslim proponents endeavored to introduce, through the framework of the *umma*, features of social order and stability within a monotheistic setting.[40] In order to promote this new ideology, there was a need to constantly undermine Jāhilī values and institutions by labeling them as pagan and anarchistic.[41] Thus, for example, the term *ṭāgḥūt*, denoting (among other things) pre-Islamic Arabian deities, was a derogatory term used in the Islamic period to refer to customary Arabian legal practices.[42] The dialectic between the pre-Islamic past and the Islamic present became more pronounced in the case of judicial institutions. Here the role of the judiciary came to be of particular importance as a central means for implementing the proper conduct of Islamic life according to Allah's will. Thus, one way of treating medieval Islamic sources is less as accounts of a real society than as those of an ideal one.

We should remember that the authors of medieval accounts were legal scholars. Prescribing norms, they sought to portray an image of an ideal legal order.[43] The most explicit testimony to the views of Muslim jurists can be found in legal treatises, which systematically outlined legal principles and regulations in accordance with their respective legal affiliation (*madhhab*). Admittedly, these treatises make reference to arbitration (*taḥkīm*) as a legitimate form of Islamic adjudication. Yet when we examine arbitration principles closely, we find that, for the most part, Muslim jurists, irrespective of their legal affiliation, tended to allow this form of legal resolution in very few instances, rendering it significantly inferior to the *qāḍī*'s authority.[44]

The efforts of Muslim legal scholars to dominate legal institutions can be

seen in the composition of numerous treatises of anecdote collections and of judicial etiquette manuals (*adab al-qāḍī*).[45] The latter were composed by legal scholars of all doctrinal affiliations in order to codify a series of regulations for *qāḍī*s to follow.[46] *Adab al-qāḍī* authors were legal theorists and practicing judges who often maintained close relationships with political powers.[47] Their works reveal their preoccupation with two particular matters: general rules regarding the judiciary and judicial conduct; and judicial procedures such as testimony, swearing oaths, and issuing documents. Thus the professional prerequisites of the *qāḍī*'s office are outlined as follows in al-Khaṣṣāf's (d. 874) *Kitāb Adab al-Qāḍī*:

> [I]t is not permitted to anyone to assume the office of the *qāḍī* until he masters the Scriptures, the normative legal custom [instituted by the Prophet] [*sunna*], independent reasoning [*ijtihād*], subjective opinion [*ra'y*], and investigation [*naẓar*]. This is since [though] he may be able to master the text of the Scriptures and the legal custom, he [may] not possess the [skills of] argumentation, investigation, and locating the derivative institutes of the law [*furū'*] in their theoretical foundations [*uṣūl*]. [In that event] he will not be able to pass sentence.[48]

Procedural concerns can be seen in the discussion over testimony: "The testimony of a eunuch is permissible since he is a man, and it is included in his words: 'Get two witnesses out of your own men' (Q. 2:282). And it is told about 'Umar (the second caliph, r. 634-44) that he permitted the testimony of 'Alqama the eunuch without disapproval on the part of any of the companions."[49]

From a historical perspective, the value of this literature goes beyond the technical information that it contains. An examination of the contents of *adab al-qāḍī* works exposes the norms and patterns of practice that Muslim jurists sought to establish. Although Islamic law has developed over time, the relevance of this literature has persisted because of its theoretical and normative character.[50]

The attempt to dominate a means of social control, through which an ideological outlook could be transmitted, is exemplified by the case of medieval Muslim preachers and storytellers. Jonathan Berkey, in his study on popular preachers in medieval Islam, has convincingly shown how state bureaucrats and religious scholars sought to control the activities of popular preachers.[51] Berkey's analysis is noteworthy for the present analysis, as it illustrates a case

in which social control was channeled through a literary discourse. It concerns preachers and storytellers, who, like jurists, played a crucial role in answering questions concerning proper behavior and practice.[52]

Muslim jurists tended to stress the impeccable qualities of the *qāḍī*. The ideal judge was to avoid state appointment.[53] By highlighting cases in which individuals sought to escape judicial appointment, the authors of these works depicted the ideal scholar as a man of great piety, who appears in contrast to those who accept state employment.[54] There appear to be numerous anecdotes of this type referring to scholars who sought to escape judicial office.[55] The recurring theme of scholars escaping an appointment to the *qāḍī*'s office makes it plausible that such anecdotes were not meant only to discourage scholars from assuming temporal offices but also to encourage judges to seek appointment by sources other than the state. A variety of case studies dealing with the office of the *qāḍī* in provincial towns such as Timbuktu, Nishapur, Tyre, Tripoli, and Damascus attest to the control of local urban elites over local judicial institutions.[56] Here it is worth recalling that these elites were dominated by Muslim scholars who insisted on a monopoly over judicial appointments. In sum, the contents of medieval accounts should be taken with a grain of salt. This indispensable source material notwithstanding, far too many indications suggest that the authors of Islamic legal literature were themselves active participants in the very system that they were observing.[57]

Informality and Diversity: The Endurance of Pre-Islamic Customary Practices in the Classical Period

Early Islamic literature offers a very limited idea as to the type of judicial options that were available to Muslims. The impression of a formal and centralized judicial structure is enhanced not only by the sources' insistence on presenting such a judicial organization but also by their silence with respect to customary judicial practices. The fact that many of those who adhered to customary law were illiterate could be seen as one reason that "the literary classes" chose to ignore them and their practices.[58] While custom (*'urf* or *'ada*) had been incorporated into Islamic jurisprudence and its principles had been applied in Islamic courts, its institutional manifestations were never acknowledged.[59] As a rule, however, it would be an error to draw a rigid line between *shar'ī* and non-*shar'ī* judicial institutions in a way that would imply the wholesale adoption of strict customary or *shar'ī* legal principles.[60] Instead, customary

practice not only found its way into the *sharīʿa* but also thrived outside of its realm in the form of customary judicial institutions. Thus, rather than turning to a *qāḍī*, individuals might have chosen to settle their disputes or validate their transactions through the oversight of a variety of figures, whose legitimacy was drawn from their reputation and from personal ties to the litigants.

Notions of holiness also contributed to fostering relations of trust among individuals. This was the case, for instance, of the supernatural authority attributed by Arab tribesmen to members of holy families, who trace their authority to an ancestral background linked to a prophet or a saint.[61] Thanks to their holy reputation, such figures were found presiding over tribal arbitrations.

Pre-Islamic Arabian Judicial Institutions

Modern scholars seem to agree that the Muslims established their legal administration in the conquered territories based on past traditions. Yet the question of their main source of inspiration remains unresolved. Schacht's well-known emphasis on Iraq as the cradle of Islamic law has been countered on a number of grounds.[62] Patricia Crone has strongly argued against what she describes as Schacht's overemphasis of the adoption of foreign elements in Iraq and his disregard for the influence of Roman, Syrian, and Egyptian provincial practices, noting that "Schacht never discussed the possibility that Roman law was transmitted to Islam through Umayyad Syria."[63] Although Crone agrees that the heritage of Roman administrative paradigms cannot be denied, she argues that provincial customary practices supplemented formal ones and should therefore be taken into account in the search for the origins of Islamic models.[64]

Modifications of perceptions are indeed in order, but a stronger point needs also to be made about the role of pre-Islamic Arabia. Further challenge to Schacht's ideas has come from the direction of Harald Motzki's study of ʿAbd al-Razzāq's (d. 826) *Muṣannaf*,[65] in which he claims that it is possible through a method of assessing authenticity and forgery in early Islamic traditions "to venture back in to the first/seventh century."[66] Similarly, Wael Hallaq argues for the need to place greater weight on the role of pre-Islamic Arabian society: "It was these societies and cultures that provided the larger context in which Islam, as a legal phenomenon, was to grow."[67] Accordingly, the Qur'an and early traditions should be partially viewed as a reconfiguration of Arabian customary practices.[68] It is not surprising, therefore, to find among the early

*qāḍī*s men who had first served as arbiters in the pre-Islamic period.[69] The first generations of Muslim judges were most likely able to rule based on the only system that they were familiar with: customary Arabian practices. This presumption receives further support through the idea that the first Muslims who settled outside Arabia chose to sustain their tribal organization.[70]

Regardless of whether the origins of Islamic legal institutions are to be traced to Arabia, to the Fertile Crescent, or to Iraq, there is good reason to closely consider Arabian models. Pre-Islamic Arabian society consisted of both sedentary and nomadic groups and therefore had to create laws that would serve tribal, agricultural, and commercial needs alike.[71] The image of judicial practices that emerges from pre-Islamic Arabia is one of an "elaborate legal system with more of an institutional framework."[72] It attests to a mixture of overlapping judicial institutions of diverse forms and sources of authority.

Nonetheless, any attempt to depict pre-Islamic judicial institutions along lines of hierarchy, chronological precedence, geographical dominance, or preference will face overwhelming difficulty. This is due not only to the fragmentary and scarce nature of the evidence but also to the fact that the society that hosted these institutions did not necessarily conceive of them in such terms. In a society that lacked policing institutions in the modern sense, one's personal reputation and social bonds were of immense importance. It is here, for example, that we find inter-tribal and interpersonal disputes waged through a mechanism of satire and boasting. Jāhilī poets (*shu'arā'*), using their artistic skills and endowed with access to the supernatural, were at the forefront of political, social, economic, and legal disputes[73] and were often solicited to put an end to disputes by issuing a public boasting (*mufākhara* or *munāfara*) in favor of one of the contending parties. Thus, for example, the Jāhilī poet al-Mundhir ibn Ḥarām used to arbitrate in disputes between the clans of al-Aws and al-Khazraj.[74] Of the arbiter Ghaylān ibn Salama from the tribe of Thaqīf, it is told that he would devote a day in a series of three to ruling among the people, whereas the two other days were devoted to reciting poems and attending to his camels.[75]

The role of the Jāhilī poet should be considered in conjunction with that of the diviner.[76] Similarly inspired by divine knowledge, the diviner and poet were both in a position to preside as judges over disputes. Unlike the poet, however, the diviner was often bound to a sanctuary or a place of idols. As such, he was thought to be mediating between a divine entity and those who sought judgment.[77] His decision, rendered in the form of a rhythmic oracle, would acquire a religious and divine quality.[78] The role of diviners, of

guardians of sanctuaries and shrines who were sought out to dispense judgment, resonates with an ancient Arabian practice from a much earlier period.

An example of this practice is attested in a wooden epigraphy from around the fifth to the third century B.C. The text mentions a dispute between two families over a certain quantity of grain. The parties chose two men to serve as judges. These were asked to arbitrate between them and issue a legal document. In the course of the proceedings, the judges conducted a ritual, of which details are unclear, as a means for assessing the truth in the parties' claims.[79] In no way are the judges referred to in the text as holy men of any sort; yet the incorporation of the supernatural in their judicial methods is clearly apparent.

Further evidence from ancient Arabia highlights the centrality of mystical elements to judicial proceedings. A number of conspicuous cases derive from the ʿAlmaqa Temple in Ṣirwāḥ, the south Arabian city of the Sabaean kingdom. A group of documents from the sixth to the fourth century B.C., dealing with private affairs from this temple, show that the sanctuary played an important role as a judicial center in the life of local communities.[80] Thus there is little doubt that supernatural motifs, whether expressed in the choice of venue, in a ritual, or in an individual, played a significant role in the judicial proceedings of pre-Islamic Arabia. In this respect, as in others, Arabian communities had much in common with their contemporaries outside Arabia.[81]

As of no later than the ninth century, the term *kāhin* is used in Islamic literature with reference to diviners.[82] In many of these instances, including one involving a female *kāhina*, we find diviners arbitrating by resorting to the aforementioned *munāfara*. This often followed a custom in which the contending parties verified the diviner's competence through the concealment of an object that the diviner was then to disclose by means of his supernatural powers. The practice is described, for instance, in relation to the Prophet's grandfather, ʿAbd al-Muṭṭalib ibn Hāshim, who disputed with members of the tribe of Thaqīf over a water source. The story, told by Ibn Saʿd (d. 845) in his *ṭabaqāt* and more elaborately by Yāqūt (d. 1229), well illustrates the mystic qualities attributed to the diviner as a prerequisite for his judicial competence:

> It is related that ʿAbd al-Muṭṭalib ibn Hāshim had a water source in Ṭāʾif that was claimed by Khindif ibn al-Ḥārith of Thaqīf. ʿAbd al-Muṭṭalib referred the dispute to the *kāhin* al-Quḍāʿī, Salama ibn Abī Ḥayah. ʿAbd al-Muṭṭalib and the men of Thaqīf went to him in

> Syria and hid from his eyes a vessel with a locust's head in a bag of beads. He said to them: You have hidden something foul from me. He then clapped his hands and went downward whereupon a tail-dragging creature appeared. It moved like a saw and was fixed like a peg, and it said only but "dah" and "dah." And [the *kāhin*] said: If my word is not true, then it is not competent; and it is a head of a locust in a bag of beads. They said: You are right, therefore judge.[83]

In a recent paper discussing the presence of prophetic figures in Arabia at the time of Muhammad, Christian Robin has argued that the understanding of the term *kāhin* as referring to the pre-Islamic Arabian diviner represents a modern misconception.[84] According to Robin, whereas the term attested in Arabia in this period refers to individuals who, thanks to their elevated social rank, claimed prophetic stature, the same term found on inscriptions from the Sinai and Transjordan refers to the presumed Arabian soothsayer. The two, according to Robin, are not to be confused. Robin demonstrates the attestation of the term *kāhin* in reference to Arabian contenders over acknowledgments of their prophetic qualities. The source of this misconception, Robin explains, is to be found in Islamic theological depictions of Muhammad's opponents. These depictions sought to undermine the latter by labeling them as diviners, as pagan soothsayers, as *kuhān*, rather than prophets, as they claimed to be. Whatever the exact terms may have been, the diviners appear to have been a conspicuous feature in the life of pre-Islamic Arabian society, often filling the void created by the absence of "some executive authority."[85]

Despite the ambiguous nature of the office of the Arabian *ḥakam* and the fact that it is often attributed to poets and diviners, the *ḥakam*—literally, "arbiter," "umpire," "referee," or "judge"—is perceived not only as a pre-Islamic independent institution but also as the predecessor of the *qāḍī*.[86] The ninth-century historian al-Yaʿqūbī (d. ca. 905), in his introduction to a list of "the judges of the Arabs" (*ḥukkām al-ʿArab*), comments: "The Arabs used to turn to them with regard to their affairs, bringing one another before their judgment regarding their disputes [*munāfaratihā*], legacies, water sources, and murder cases, for there was no religion of which reference could be made to its laws."[87] Thus, it seems, much weight was given in the *ḥakam*'s decisions to personal discretion and customary practice.[88]

The *ḥakam* drew his legitimacy from such virtues as "nobility, integrity, trustworthiness, leadership, seniority, glory, and experience."[89] He is thought to have addressed those matters in which the authority of the tribal chief

(*sayyid*) had proved to be ineffective.[90] He was recognized as the local wise man who passed judgment based on what he perceived as the common good of the local community.[91] Poetry from the Jāhilī period and the first Islamic decades contains many references to *ḥukkām* and their methods. Thus we learn, for example, through the poet al-Farazdaq (d. 728), that six members of the Banū Tamīm are known to have been arbiters during the time of the Jāhilīyya.[92] The notables of the Tamīm tribe are also known to have been granted the right to supervise and control markets in Mecca, al-Ḥīra, and their vicinities, most notably the market of ʿUkāẓ.[93] In light of this, we may assume that they were also charged with settling disputes and enforcing the regulations that pertained to commercial affairs.

A central method of arbitration, particularly in cases of inter-tribal hostilities and bodily injuries, was the *ṣulḥ*. The term had come to be known in Islamic law as a means of ending "conflict and hostility among believers . . . a form of contract, legally binding on both the individual and community levels."[94] It refers to disputes that arose from the inability of one party to pay a debt to another, particularly in matters pertaining to slavery, family law, and penal law.[95] But the origins of this form of settlement appear to have emerged in pre-Islamic Arabian societies, in which a murder or bodily injury had to be avenged or paid for with blood money.[96] An illustrative example of the *ṣulḥ* is found in an account relating an incident dated around 712, again in a poetic passage:

> When the Banū Fazāra had learned about the killing of Rabīʿa ibn Wahb by Ḥuṣayn ibn Dhamdham, they were fiery and so was Ḥiṣn about the killing of the son of their sister. Thus, on account of the pact between Ḥiṣn and the Banū ʿAbs, the Banū ʿAbs were fiery [as well]. Consequently, al-Ḥārith dispatched his son, who said to them: "Do you care for *labn* [camels paid as a blood-wit] more than for yourselves?" That is, his son said, "If you wish, kill him, and if you wish, take the blood money." They answered: "*Labn* is more desirable to us." Thus he sent them a hundred camels as blood money for the killing of Rabīʿa ibn Wahb, and they accepted the blood money and agreed on the *ṣulḥ*.[97]

Another common feature of pre-Islamic Arabian society to which the poem alludes is collective protection. This principle, characteristic of tribal societies, bears significance with regard to the maintenance of general order, as

it affords the protection of the individual's rights.[98] A known example of this form of group solidarity can be found in the account of *ḥilf al-fuḍūl*, an alliance formed by Meccan clans following an incident in which a Yemeni trader had ill-treated a debtor. Despite its apparent legendary nature, the significance of the tale lies in the reality that it reflects; a reality in which the prevalence of group solidarities serves to ensure justice in a period that lacked central judicial institutions.[99] The story appears in Muhammad's biography: "The clans of Quraysh decided to make a covenant and assembled for that purpose. . . . They bound themselves by a solemn agreement that if they found that anyone, either a native of Mecca or an outsider, had been wronged, they would take his part against the aggressor and see that the stolen property was restored to him. Quraysh called that alliance 'the alliance of the *fuḍūl*.' "[100]

The passage above illustrates how individual members could turn to the collective judicial authority of their alliance. The latter would decide whether the appealing individual had indeed been wronged, whereupon the alliance, in addition to its judicial role, would implement its own judgment. In principle, the *ḥilf al-fuḍūl* should be regarded as a form of alliance that was based on membership in a group of joint descent and enacted a contract of co-liability among its members.[101] But in practice, since outsiders (individuals of a separate ancestral background) regularly joined this alliance, these collective bonds of liability were not based exclusively on descent but designed for ad hoc purposes.[102] Legally speaking, co-liability such as that of *ḥilf al-fuḍūl* implied that allies were expected to assume responsibility for the actions of a member who was found guilty of an offense or to ensure that he was compensated if he had been wronged.[103] It would seem, therefore, that co-liability agreements created an autonomous legal arena within which individuals were granted protection and to which they had recourse for various grievances.

The *ḥilf* appears, then, to have performed a judicial function through the collective authority of those who partook in it. Whereas the *ḥilf* was not necessarily based on tribal affiliation, the *majlis*, the tribal assembly, presents a forum of collective judicial authority that was. A *majlis* could be found in certain urban centers as well, where disputing parties could appeal to this body to obtain a ruling.[104] Thus, a poem of the fifth-century poet 'Amr ibn Qamī'a recounts: "Yea, goodly is the Man, by my life, to whose protection thou mayst surely appeal, what time in the tribal assembly the crier raises his cry!"[105] The ruling of a tribal assembly was final and not to be reopened by litigators. The authority of the judicial body drew its legitimacy from the seniority of the tribal leaders, their nobility, and their reputation.[106]

Although there is very little to allow a systematic and concrete classification of Jāhilī judicial practices, their informal and highly diverse nature is evident. These features formed part of a culture in which values relating to reciprocal and collective obligations were shared by the participants of an elaborate social network. It was a "judicial bazaar" of sorts, in which an individual's social status defined his social obligations and, as a consequence, his choice of judicial medium.[107] Here, the legitimacy of key judicial figures was grounded in their social standing and personal ties. In the absence of central bodies of authority, familiarity with local practice and social dynamics served as the basis for issuing judgments. The multiplicity and diversity of Jāhilī judicial practices underscore a highly decentralized set of arrangements that evolved around individual figures, thereby ascribing a personal character to judicial institutions. These figures did not necessarily devote themselves exclusively to performing judicial tasks but rather fulfilled them alongside other responsibilities, as part of their general position of authority—whether as diviners entrusted with the safeguarding of a shrine, or as tribal chiefs, respectable laymen, poets, or members of a collective body.

A Reconsideration of Early Islamic Judicial Institutions

Muhammad, the first Muslim arbiter, was the last acknowledged prophet.[108] This, however, did not necessarily mean that false prophets, in one form or another, ceased to appear, or that they were no longer fulfilling judicial roles. The extant evidence makes reference to the judicial qualities of Muslim holy men only with the rise of the *ṣūfī* orders in later centuries.[109] Still, there are some earlier allusions to Arabs, perhaps Muslims, seeking the services of Christian holy men.[110] In the late seventh century, holy men continued to fulfill judicial roles. In a question addressed to the West Syrian bishop Jacob of Edessa (d. 708), the stylite John of Litarb (d. ca. 738) asked if "it is right for the stylites to give proclamation or admonition to the people or administer judgments and decree the laws employing the word of God."[111] Whether the services of Christian holy men were restricted to Christian believers is hard to say, yet it appears that they fulfilled some capacity among non-Christians as well, as can be adduced from another question from John to Jacob: "Is it right that a priest gives from the blessings of the saints to the Arabs and pagans who are tempted by the evil spirits in order to calm them and heal them or as *ḥnānā*?"[112] Jacob's

answer is instructive: "It is right by all means, it is right very much, that no one shall be hindered from something in matters like these, therefore, it shall be given to them."[113]

An instance of arbitration attributed to the time of the second caliph, 'Umar, is recorded by Ibn 'Asākir (d. 1176): " 'Ubay ibn Ka'b and 'Umar ibn al-Khaṭṭāb were in dispute over a portion of palms. . . . [T]hus 'Umar said [to 'Ubay]: 'Appoint a man from among the Muslims [who will decide on the matter] between us.' . . . The two entered before Zayd (Zayd ibn Thābit, d. 665). When Zayd saw 'Umar, he fell back on his bed, whereupon 'Umar said to him: 'The arbiter [*ḥakam*] is approached in his dwelling.' Thus Zayd knew that the two have come to receive arbitration from him."[114]

The pre-Islamic arbiter appears to have maintained his popular appeal within the Islamic theocracy. This was to such an extent that even an eighth-century *qāḍī* such as al-Qāsim ibn Ma'n (d. 791) had to resort to the arbitration of an influential figure to clear the air between him and members of the tribes of Rabī'a: "Al-Qāsim tried to reconcile a matter with them, yet they stayed away from him. He was told that '[the people of] Rabī'a obey Ḥayān ibn 'Alī al-'Anbarī; should you call upon him, their matter will no longer [trouble] you.' He thus called upon Ḥayān, asking that he may bring an end to their matter, whereupon Ḥayān sent to him[!] and appealed to them, saying: 'Do so and so'; thus they responded [in favor] and al-Qāsim's matter was resolved."[115]

Though the office of the *ḥakam* was suppressed and marginalized in Islamic jurisprudence, Muslim jurists had to come to terms with its existence and find ways of incorporating it into the *sharī'a*'s framework.[116] Al-Khaṣṣāf and his commentator, al-Jaṣṣāṣ (d. 980), spoke of the office in religious terms:

> At the beginning of this column, we have referred to the traditions of the early masters [*al-salaf min al-tābi'īn*], who gave the arbiters permission to arbitrate between litigants upon their mutual consent. For he, may he be exalted, said: *And if ye fear a breach between the two, set up an arbiter from his people and an arbiter from her people; if they desire to set the matter right, Allah will bring agreement between them, verily Allah hath become one who knoweth and is well-informed* (Q. 4:36). It has been said about a group of the companions, among them 'Umar ibn al-Khaṭṭāb . . . , who disputed with Abī ibn Ka'b over a land, that they sought the arbitration of Zayd ibn Thābit, who then arbitrated between them.[117]

As noted earlier, among the first Muslim judges were men who had initially served as arbiters in pre-Islamic Arabia. As such, these men would often be illiterate, not to mention ignorant of the principles of Islamic jurisprudence (as far as one can speak of a full-fledged juridical order in the first century of Islam).[118] Thus it is told that the eighth-century Iraqi *qāḍī* Khālid ibn Ṭalīq was lost and ignorant in matters of judgment (*qaḍā'*) and did not even know the name of the Prophet's mother. Nevertheless, his judgment was sought on account of his wisdom and evenhandedness.[119] Another example of a *qāḍī* who lacked formal legal knowledge is Iyās ibn Muʿāwīya (d. 740), whose judicial competence was attained through reliance on his own intuition.[120]

An expression of the informal character of early Islamic judicial practices is found in the manner that justice was administered de facto. A passage referring to the judicial conduct of the Egyptian *qāḍī* Khayr ibn Nuʿaym (d. 800) toward non-Muslims mentions the stairs leading to the mosque's entrance as the place where the judge would pass judgment.[121] What seems to be central in this passage are the separate venues allocated for the judgment of Muslims and non-Muslims. Whereas the former were judged in the mosque, the latter were confined to its entrance, or the steps leading to it. Accordingly, the term *majlis*, used to define the place where the *qāḍī* would hold sessions, remained in practice largely undefined.[122]

While there is little explicit reference in the narratives of early Islamic treatises to the survival of pre-Islamic Arabian or other forms of customary judiciary in early Islam, a close reading of some of these sources sheds light on the persistence of certain features characteristic of Jāhilī judicial institutions. The following is an attempt to identify some of these features in early Islamic judicial practices. Its purpose is to point out, though indirectly, a continuity of a legal culture in which pre-Islamic features of personalism and pluralism, along with customary legal practices, managed to persist within the framework of the early Islamic state. In order to make this point, we shall look at three documents, all of which discuss the judicial administration of the caliphate during the first centuries of Islamic rule: the *Kitāb al-Ṣaḥāba* of Ibn al-Muqaffaʿ; an epistle of the Basran *qāḍī* al-ʿAnbarī; and the alleged instructions of ʿUmar ibn al-Khaṭṭāb to the *qāḍī* Abū Mūsā al-Ashʿarī.

The work titled *Kitāb al-Ṣaḥāba*, or *al-Risāla fī-l-Ṣaḥāba*, attributed to Ibn al-Muqaffaʿ (d. ca. 758), the writer and court official, is thought to have been written between 753 and 758.[123] Its primary objective was to make a series of suggestions to the caliph al-Manṣūr (r. 754-75) on matters of government and administration.[124] It therefore serves as a rare testimony

to the state of governmental organization in its time. In his treatise, Ibn al-Muqaffa' points to the cities of Basra and Kūfa "and other cities in the regions [of the empire]" where he strongly condemns the "absence of uniformity . . . in rendered judgments," to the extent that even within the same city, divergence prevails "between a judge in the heart of the city and another in one of its quarters."[125] He also laments the fact that although these sentences are based on an unfounded judgment, they are considered binding by Muslims, since they are given by *qāḍī*s. The latter, while claiming to respect the *sunna*, have no idea what the *sunna* actually is. As a result, the *qāḍī*s are unable to "present convincing arguments in favor of rules that they claim traditional." In practice, the *qāḍī*s' sentences are "based on personal opinion and not on the Qur'an or tradition."[126] Therefore, Ibn al-Muqaffa' calls upon the caliph to bring about uniformity in judicial practice by subjecting it to his authority. This, says Ibn al-Muqaffa', needs to be done by strictly forbidding *qāḍī*s to deviate from the "manner which God has expounded"[127] and through the laying down of a comprehensive legal corpus. Then, "we will be able to hope that the unification of judicial practices will become a harmonized means of justice according to the opinion of the Commander of the Faithful and his word. Then, another imam will proceed in the same fashion until the end of times, God willing."[128]

Ibn al-Muqaffa' emphasizes the fact that *qāḍī*s were operating in isolation from one another and not as part of a unified state apparatus. He charges the *qāḍī*s of claiming to base their decision on Islamic traditions, namely the *sunna*, while in fact basing their decisions on what seems to have been an ambiguous tradition. It is possible to see how a certain *qāḍī* and Ibn al-Muqaffa' would agree that judicial decisions ought to be based, among other things, on *sunna*, while disagreeing as to the exact meaning of the term. In its Islamic context, the term explicitly refers to the practice of the Prophet. In a pre-Islamic context, however, it simply refers to customary practices that underwent a process of institutionalization.[129] In both cases, the term has come to denote "usages and procedures established by certain individuals."[130] The tradition that Ibn al-Muqaffa' ascribed to Iraqi judges does not appear to trace its origins to an Islamic tradition but rather to another, conceivably pre-Islamic, Arabian law.[131] It was the *qāḍī*s' stature as judges and not the reference source of their rulings that gave weight to their decisions. Being embedded in their own communities, the *qāḍī*s often took into account local circumstances before dispensing justice.[132] By qualifying a legal decision as Islamic, *qāḍī*s were able to entertain local practices within

their own courts.[133] In sum, Ibn al-Muqaffa''s criticism is indicative of a decentralized, arbitrary, and personal judicial organization that was both pluralistic and informal.[134]

Our second document is attributed to the *qāḍī* of Basra 'Ubayd Allāh al-'Anbarī (d. 785). The epistle addressed to the Abbasid caliph al-Mahdī (r. 775-85) concerns the administrative affairs of the caliphate and, as such, also touches upon the judicial procedures of its judges:

> [W]ith regard to the judgments—a judgment should be given according to what is in the Book of God, then what is in the *sunna* of God's Messenger, and if an answer cannot be found in the Book of God, then [the judgment is to be given] in accordance with what has been agreed by the learned jurists [*al-a'imma al-fuqahā'*]. If an answer cannot be found in the *sunna*, then [the judgment is to be given through the] independent judgment of the judge, who should spare no effort if he has been ordered to do so by the master, while consulting men of knowledge.
>
> With regard to the judges, the Commander of the Faithful ought to know, God willing, [that] it is expected that the judge will possess piety and insight. And if he lacks one of these two [qualities] the learned people will not endorse him. . . . And if he possesses understanding and knowledge from the Book and the *sunna* then he is qualified.[135]

Al-'Anbarī provides a list of sources to which a Muslim judge should refer in a hierarchical order. Perhaps in response to the image in Ibn al-Muqaffa''s treatise of the relative isolation in which *qāḍī*s operated, al-'Anbarī tries to provide a concrete framework in which the *qāḍī* is bound. The judge's own discretion (*ijtihād*) is left as a last resort, provided that he is sanctioned to do use it by a higher authority, a master.[136] Furthermore, the judge must possess certain qualities that stem from his learned background and full loyalty to Islam.

These brief remarks do not appear to suggest anything more than a tangible vision of how the judiciary should operate. At the same time, they can be seen as a reflection of the relative high measure of decentralization that characterized the early Abbasid regime, in which local forces exceeded the limits of their authority.[137] Moreover, the relative chronological proximity between al-'Anbarī's comments and Ibn al-Muqaffa''s suggestions allows us to assume that the two men shared similar concerns. Yet while al-'Anbarī sought to place

the caliph in subordination to the spiritual authority of the jurisconsults, Ibn al-Muqaffa' appears to be in favor of a caliphal authority that embodies secular as well as religious authorities.[138]

The final document is a letter allegedly written by the second caliph, 'Umar ibn al-Khaṭṭāb. In the letter, the caliph lists a series of instructions to the *qāḍī* Abū Mūsā al-Ash'arī (d. ca. 662), governor of Basra.[139] Modern scholars now agree that the document cannot be attributed to 'Umar.[140] Despite the uncertainty regarding its true date, the fact remains that the document was already known in the ninth century, as it is attested in the works of eminent scholars such as al-Jāḥiẓ (d. 869) and Ibn Quṭayba (d. 889).[141] Parts of the letter pertain to the questions at hand:

> (1) Pronouncing judgment is an established ordinance and followed practice [*sunna*] . . . ; (5) Conciliation [*ṣulḥ*] is permissible between people, except a conciliation that makes licit what is forbidden or forbids what is licit; . . . (7) Pay attention to comprehending what revolves disturbingly in your mind [lit., breast], that has no Qur'an or practice [*sunna*] applicable to it. . . . Then, after that, compare the matters. Then have recourse to what is most preferable to God and most in conformity of them to justice as you see it; (9) The Muslims are persons whose testimony is admissible, with the exception of a person . . . suspect on account of . . . kinship [to a litigant].[142]

Instruction 5 addresses conciliation (*sulḥ*) as a judicial method. It is possible that the term, in this case, echoes the Arabian practice, contradicting *shar'ī* principles when "mak[ing] licit what is forbidden or forbid[ding] what is licit." Instruction 7 is in line with Ibn al-Muqaffa''s memorandum and al-'Anbarī's epistle in the sense that it emphasizes the importance of the Qur'an and Islamic tradition rather than personal discretion when passing judgment. Thus it may suggest a background in which *qāḍī*s were practicing independent judgment based on their personal views and experience, rather than limiting themselves to prescriptive jurisprudence.[143]

Combining the contents of the three aforementioned documents, we are able to deduce a number of significant features that resonate with the pre-Islamic experience. Operating in relative isolation and independence, *qāḍī*s appear to have relied on legal traditions that were not necessarily endorsed by Islam and to have given much weight to their own personal discretion. Within

this context, the *qāḍī*s' personal merits and individual standing provided their courts with a legitimate judicial position, perhaps to a greater extent than the court did the same for the *qāḍī*. According to Josef van Ess, the ideas proposed by Ibn al-Muqaffa' were never realized. Islamic law remained the law of the jurists—the *mujtahidūn*—"who, in principle, decided independently, according to their individual reasoning."[144]

The inception of Islamic jurisprudence occurred in, among others, regions such as northern Arabia and Iraq, where the concept of a juridical order could not gain a foothold. It is in these regions where the judicial institution of the arbiter dominated the scene. The arbiter was called upon out of free choice, whereupon the opponents were able to choose their own law.[145] When Ibn al-Muqaffa' wrote his treatise, the office of the Muslim judge possessed common features with that of the pre-Islamic *ḥakam*. Both officeholders rendered their judgments by relying on independent reasoning, free from centralized control. Whether pre-Islamic judicial features disappeared around the time of Abbasid reforms or not, there is reason to believe that these reforms were more than caliphal attempts to consolidate authority in context of competition with religious scholars. Instead, judicial reforms should also be seen in response to the persistence of certain pre-Islamic judicial patterns.

The Prevalence of Customary Judicial Features after Abbasid Reforms

Ibn al-Muqaffa''s arguments for introducing features of centralization and homogeneity should perhaps be understood in the context of his Sasanian background. As we saw in Chapter 1, through the *Letter of Tansar*, the centralization of state administration, including that of the judiciary, was an important matter under Sasanian rule. Similar motivation may have also existed behind al-'Anbarī's position, as the latter is known to have shared ideas of juridical nature with 'Uthmān al-Battī (d. 760), a Muslim convert and an important jurist.[146] Whether or not the trigger for ninth-century reforms is to be found in the efforts of newly converted Muslim bureaucrats, there can be little doubt that the target of these reforms was the decentralized and independent character of the Islamic judicial apparatus. It is in response to this state of affairs that we should consider subsequent measures of reform on the part of Islamic governments. Having argued for the prevalence of customary judicial features in the period prior to Abbasid reforms, we shall now survey some of these features subsequent to them. Here it will be argued that despite caliphal

policies and the efforts of jurists, the Islamic judicial organization continued to possess features that can be traced back to the earlier period.

A common feature of pre-Islamic *ḥukkām* and *qāḍī*s was their undertaking of a number of tasks, of which issuing judicial decisions was only one. An arbiter might also function as a tribal chief, a soothsayer, or a poet. Similarly, early *qāḍī*s functioned as governors, tax collectors, storytellers, leaders of public prayer, financial and military officials, and people engaged in trade and commerce.[147] Such was the case of Sawwār ibn ʿAbdallāh, who was appointed *qāḍī* of Basra in 638 or 640. Beyond his judicial responsibilities, Sawwār was also charged with the tasks of leading the Friday prayers and heading the local police.[148] During the early Umayyad period, we learn that the caliph Muʿāwīya (r. 661-80) entrusted Faḍāla ibn ʿUbayd (d. 672) with both the office of the *qāḍī* and commander of raiding operations.[149]

Despite the efforts of eighth-century reformers to restrict the *qāḍī*'s office to judicial matters, it appears that even in the later Middle Ages, some *qāḍī*s still held administrative responsibilities.[150] In the Geniza, we find examples of *qāḍī*s acting as legal representatives of foreign merchants (*wakīl al-tujjār*). As such, a *qāḍī* would manage the affairs of merchants in cases of debt or act on their behalf in court.[151] *Qāḍī*s themselves often appear in the Geniza as owners of ships and great fortunes who took part in business transactions and partnerships.[152] Such examples testify to the fact that the sort of impartiality that was expected of Muslim judges was never fully achieved. They also show that just as pre-Islamic figures held judicial prerogatives in the context of their social standing, so, too, did medieval Muslim judges.

The fact that men of prominence assumed judicial offices suggests that it was not always the office but, to an extent, the person holding it that legitimized its judicial authority. The individualist character of judicial offices can also be seen in the appearance of a number of *qāḍī*s within a single jurisdiction. Through Ibn al-Muqaffaʿ's description of the Islamic judiciary of his time, we learn about two *qāḍī*s in Kūfa, one in its center and the other in one of its quarters. In addition, we learn that the two *qāḍī*s diverged in terms of the legal traditions that they applied and, consequently, their rulings.

Formally speaking, there was no reason not to have a number of *qāḍī*s operating in close proximity. *Qāḍī*s and their delegates were often granted limited territorial jurisdiction, and, at times, their office was confined to a particular legal field.[153] According to al-Māwardī (d. 1058), the scope of a *qāḍī*'s appointment must be specified, as must its locality. His appointment must be made binding so that people will submit to its jurisdiction.[154] When a *qāḍī*'s

jurisdiction is limited to a place, either a bank of a river or a quarter of a town, that *qāḍī* may not decide on matters that pertain to those coming from outside that place.[155] Finally, two *qāḍī*s may be appointed in one place, either to two separate quarters within it or charged with separate matters.[156]

While going through the details of multiple appointments within the same place, al-Māwardī noted instances in which false contenders for the office of the *qāḍī* would appear. He specifies the terms of a *qāḍī*'s appointment, namely, that it is to be carried out on account of sufficient evidence, authenticating the appointee.[157] Furthermore, anyone who is not considered a trained jurist is forbidden from seeking the office.[158] Al-Māwardī appears to have been particularly concerned with setting the boundaries between overlapping courts and making clear the rules as to who and how one may be appointed as judge. These concerns could reflect a situation in which judicial jurisdictions were not as clear as al-Māwardī wanted them to be and that the *qāḍī*'s office was prone to be occupied by unauthorized individuals.

The theme of multiple *qāḍī*s in a single jurisdiction and the concern over false contenders for the office should perhaps also be understood in the context of an apparently rather obscure role known as a "rural *qāḍī*." Commenting on al-Khaṣṣāf's distinction between rural (*rustāq*) judges and those of the city (*miṣr*, *madīna*), al-Jaṣṣāṣ observes: "The judgment [*qaḍā'*] of the supervisor over the finances [*al-'amīl*], the rural *qāḍī* or of the village *qāḍī* is not permitted, since the rulings related to the judiciary, such as the validation or invalidation of contracts, establishing people's [legal] rights toward each other, [determining] legal punishments [*ḥudūd*], and so forth should not be issued by anyone other than city *qāḍī*s."[159]

Al-Jaṣṣāṣ's interpretation may reflect the existence of certain figures who assumed judicial functions within the rural parts of Iraq in the ninth and tenth centuries.[160] Yet unlike their urban counterparts, these judges were not recognized as possessors of an equal judicial standing. Perhaps the motivation behind this inequality was guided by an attempt of the state apparatus to monopolize the judicial arena. At the same time, it seems clear that Muslim jurists did not consider rural judges legally competent. At some point, this attitude was revised to the extent that, by al-Māwardī's time, the decisions of rural judges were acknowledged as legitimate.[161]

The plausibility of a multiplicity of judges who operated within ambiguous jurisdictions further increases when one considers the factor of legal schools (*madhāhib*). While *qāḍī*s of different legal affiliations appear to have coexisted, people did not necessarily restrict themselves to a particular school. As Yossef

Rapoport has shown in the case of the early Mamluk judiciary, people were not necessarily loyal to a particular school of law, as they brought their cases before *qāḍī*s from different schools.[162] Rapoport sees the Mamluk initiative to appoint four chief *qāḍī*s from four legal schools as a response to the need for legal flexibility to avoid the difficulties that would arise from a rigid implementation of a single legal doctrine.[163] Yet we should also consider the possibility that people had options and that flexibility might have been their consequence.

In 1007, Mālik al-Fārikī is reported to have been appointed chief *qāḍī* in Egypt. One of the first actions he took was to forbid police officials from interfering in legal judgments.[164] This brief report indicates a reality in which the *qāḍī*'s judicial monopoly was not complete even within the state apparatus.[165] As we have seen earlier, one initiative taken by the state in order to limit the *qāḍī*'s authority and place it within a judicial hierarchy was to establish other judicial institutions such as the *maẓālim*, the *ḥisba*, and the office of the chief *qāḍī*. Theoretically speaking, this initiative brought about "a double administration of justice, one religious and exercised by the *qāḍī* . . . the other secular . . . exercised by the political authorities on the basis of custom, of equity and fairness."[166]

Yet in practice, it appears that this distinction was not clear-cut, as the two judicial branches often overlapped.[167] According to Hallaq, the division of jurisdictions between *shar' ī* and *maẓālim* courts in ninth-century Egypt was compromised through the latter's application to matters within the jurisdiction of the former and the employment of *qāḍī*s in *maẓālim* tribunals.[168] A fluidity of jurisdictions and appointments may have been part of a broader pattern, according to which Islamic judicial institutions were accommodated to meet public needs. Both the state and legal specialists were aware of the array of judicial possibilities that people had and of the fact that a judge of any kind had to rely on public approval.[169] Thus choice was tolerated as long as it was made between institutions that were officially endorsed.

Conclusion

Our discussion began with a summary of the Islamic judiciary in the early period as it is portrayed in modern scholarship. According to the latter, once consolidated, the Islamic judiciary took on the form of a centralized and hierarchical organization that was clustered into various jurisdictions. While this depiction represents a faithful account of a prescriptive and moral literature,

its meager reference to alternative judicial institutions and the prevalence of customary judicial practices deserves amendment.

Pre-Islamic judicial practices, both in Arabia and outside it, attest to societies that were led by individuals whose authority stemmed from their personal merits rather than their institutional affiliation. The attempt to place *qāḍī*s in direct subordination to the caliphal court and to regulate issues of judicial appointment and proceedings should be seen in this context. Yet, as early Islamic treatises indicate, such efforts met with little success. Judicial institutions were often controlled by local aristocratic families, guaranteeing their local character. According to Berkey, "the very 'otherness' of the rulers meant that their successful exercise of authority had to be negotiated through local channels."[170] The *qāḍī*, as a consequence, moved further away from the central government, and the nature of his decisions was strongly influenced by the opinions of local jurists.[171] At the same time, the nature of constraints placed by local elements gave the *qāḍī* relative freedom to exercise his own discretion.[172] Accordingly, there seems to be some sense in the idea that, to a large extent, the legal court revolved around the *qāḍī* himself.[173]

An analysis of legal treatises, caliphal decrees, chronicles, and epistolary sources from the period following Abbasid reforms points to the persistence of certain features of customary judicial practices. These reforms appear to have brought neither a complete centralization in the judicial apparatus nor concrete jurisdictions among the various judicial institutions, let alone among the *qāḍī*s themselves. Rather, what we find is a culture in which personalism and a multiplicity of overlapping institutions continued to dominate the judicial setting.

Beyond the existence of customary judicial features within the formal Islamic judiciary, there is some evidence that customary judicial institutions continued to flourish as well. It is here that the multiplicity of legal orders is best attested. In addition to the fact that many of the first Muslim judges were already recognized as judicial leaders in the pre-Islamic period, a diverse group of holy men, unofficial arbiters, and an obscure category of "rural judges" continued to offer judicial services alongside *shar'ī*, *maẓalim*, and *ḥisba* jurisdictions. There is therefore ample justification for the acknowledgment of an image of overlapping judicial institutions, formal and customary. The remarkable silence of medieval accounts with respect to informal judicial practices and institutions should be understood as an attempt to frustrate alternative legal orders by simply ignoring them. Whereas the state waged its battle through reforms, Muslim scholars resorted to texts. But these efforts to attain exclusive

legal authority reflect a trend in the opposite direction, namely, the ability of clients to turn to a variety of institutions.

The various judicial institutions, whether state-appointed, locally endorsed, or customary, all appear to have shared features of diversity, informality, and personalism. Rather than depicting a social setting that evolved around fixed institutions, we should consider a setting that evolved around individuals whose status, character, and skills gave life to the institutions in which they operated. This social reality corresponds closely to the one that we have outlined in the previous chapter in relation to the Roman and Sasanian Empires, and it is in this context that we turn now to consider Christian and Jewish recourse to Islamic courts.

PART II

The Judicial Choices of Christians and Jews in the Early Islamic Period: A Comparative Analysis

The previous chapters examined some of the features of judicial practices in the pre-Islamic Near East and Mediterranean Basin, as well as their endurance under Islamic rule. Similar to its Roman and Sasanian predecessors, the young Islamic government had to come to terms with a state of legal pluralism. Under all three regimes, local elites were empowered to assert authority and collectively offer a legal setting characterized by plurality and diversity. In such a setting, the individual was afforded choice and, in turn, an advantageous position when settling or validating legal affairs.

Whatever particular form it assumed, judicial authority meant social power. What drove individuals to turn to one judicial authority over another is not always clear. While some chose to take recourse to an authority founded on customary practice and local reputation, others sought resolution in the formal forums of empire and church. Behind these individual choices, a host of considerations appear to have been at play, including social power, personal ties, trust, and practicality, as well as religious convictions.

The reaction of ecclesiastical, Rabbanite, and Muslim jurists to legal pluralism was often one of rejection, expressed primarily through outspoken censure but also by a disregarding silence. Thus, while the church fathers and the Rabbanite sages attempted to restrict, if not eliminate, the phenomenon of recourse to extra-confessional institutions, Muslim legal scholars chose to ignore non-*shar'ī* legal frameworks. Still, rejection was not the only response, as is reflected in the willingness of the early rabbis to allow recourse to Gentile courts in certain cases, in the incorporation of Roman civil law into episcopal courts and of the endurance of Arabian arbitration into Islamic law.

Christian and Jewish Communal Organizations after the Islamic Conquest

As we turn to examine the response of ecclesiastical and Rabbanite leaders to legal pluralism in the period after the conquest, it is important to note the social setting in which these confessional elites voiced their opinions. The

East Syrian and West Syrian Churches had a pronounced regional character, while holding jurisdiction over imprecise geographic territories. Thus the city of Harran in upper Mesopotamia served as the seat of bishops from the East Syrian, West Syrian, and Byzantine Orthodox Churches (Melkites).[1] Yet in general terms, the East Syrian patriarch, the catholicos, held sway from his seat in Ctesiphon (and later from Baghdad) over an ecclesiastical setting that extended throughout Mesopotamia, eastern Arabia, and the Iranian plateau, with missionary posts as far east as India and China.

The West Syrians, though formally under the authority of the patriarch of Antioch, were scattered over a bipartite territory: a western part that corresponded to the patriarchate of Antioch under Rome; and an eastern part corresponding to the region that had been held by the church under Sasanian rule. This partition persisted under Islamic rule in the form of the dual jurisdiction of a patriarch who resided in the monasteries of upper Mesopotamia and a metropolitan in Takrīt.

Both archaeological and literary evidence suggests that Christian communities existed in a mixed landscape of urban and rural settlements. Though these settlements often hosted a local church, it appears that the source of their spiritual patronage was not restricted solely to ecclesiastics but consisted also of monks and other men of spiritual reputation. Outside the formalities of urban administration and imperial bureaucracy, an informal network of settlements led by diverse forms of spiritual patronage dominated the vast territory of Mesopotamia and the Fertile Crescent.[2]

As for the Jewish congregations that submitted to the authority of the geonic academies in the tenth century, many, if not most, were settled in urban centers—in or near major cities such as Cairo, Alexandria, and Qayrawān. Here, often congregated around regional communal institutions, Jews sought the leadership of prominent community members. These men were not only former disciples of the geonic academies but also individuals who had acquired their offices because of their affiliation with local rabbinic schools, their mercantile activities, or their membership in prominent households.

For the most part, the careers of local Rabbanite leaders attest to the fact that these men had formed an allegiance with one of the central academies. Such allegiances were characterized by both formal and informal ties, resulting in a hierocratic set of relations. At the top of this system, we find the master, teacher, and spiritual leader, the gaon, who delegates his authority through the offices of regional communal heads and judges. This was a system intended to sustain the vitality of Jewish life in a diasporic setting and also a mechanism

through which the Jewish elite sought to exert its influence and fortify its social stature—a fact that may account for the profusion of disputes within the academies and among them.[3]

Despite their shared state of religious minority, Eastern Christian and Near Eastern Jewish Rabbanite communities differed in some principal aspects of social organization. Members of the two confessional groups adhered to the authority of central figures—the patriarchs and the geonim—but these two institutions of authority differed considerably. Whereas a patriarch sat at the top of an explicitly hierarchical ecclesiastical structure, the authority of a gaon rested on a much less formal set of arrangements involving a network of interpersonal ties and master-disciple bonds. These differences in the source of their authority affected the way in which confessional leaders sought to fortify and enhance it and resulted in different definitions of the respective roles of the Christian clergy and of Jewish regional heads. Both groups of officials were entrusted with guarding communal boundaries and facilitating communication along hierarchical lines. Yet whereas ecclesiastical officials owed formal loyalty to their clerical superior, Jewish communal leaders operated within a much more fluid and informal framework.

Ecclesiastical and Rabbanite Leaders and Legal Pluralism in the Early Islamic Period

Ecclesiastical and rabbinic legal orders in the period after the conquest are explicit examples of legal orders that were not prescribed by the state or administered through its formal apparatus; nor were they shared equally by everyone. As such, they fit neatly into the conceptual framework of legal pluralism. Nonetheless, legal pluralism, as we have seen in the previous chapters, did not stop before confessional boundaries but rather manifested itself also within them. It is here, in the context of blurred boundaries and overlapping jurisdictions, customary practices, and social dynamics, that the features of legal pluralism are more difficult to identify; but here, too, the social configuration of the societies under discussion is best attested.

An analysis of the evidence from the early Islamic period highlights the continued relevance of early ecclesiastical and rabbinic exhortations against seeking legal solutions outside the authority of the church and rabbinic courts. As in pre-Islamic times, judicial authority was not held by a single social group. Accordingly, references to judicial competition should be noted while

keeping in mind the array of individuals and institutions of judicial capacity in a variety of social locations, formal and informal, religious and secular. But regardless of the precise character of the various judicial institutions, it is clear that in turning to more than one of them, members of a given religious community not only observed more than one law but also submitted to the power of more than one authority.

This multiplicity did not necessarily imply a legal dichotomy, as the blurring of social affiliations entailed also the emergence of constantly interacting legal traditions. Thus, as we shall see, one way of countering the flow of Christian litigators toward nonecclesiastical judicial institutions in general and Islamic ones in particular was to come up with an ecclesiastical civil jurisprudence—an endeavor that entailed extensive borrowing from the adjacent Sasanian, Roman, and Islamic legal orders. At the same time, the geonim, if only partially for the same reason, attempted to interpret certain halakhic principles in a way that permitted adaptation to, and even an assimilation of, Islamic law. Christian and Jewish confessional leaders, while articulating their aspirations for legal autonomy through a religious vocabulary couched in the formulations of their early predecessors, refined their rejection so as to enable interaction with, and even acknowledgment of, extra-confessional institutions.

The next four chapters constitute the heart of our discussion. They are thematically divided into two units, of which the first deals with the state of ecclesiastical and rabbinic judicial organizations in the context of Christian and Jewish public life, and the second with the reasons for and responses to litigation outside the formal fold of confessional communities. In the first part of the discussion, in order to compensate for the fragmentary nature of available evidence, we shall seek to place the question of judiciary in the broader context of Christian (Chapter 3) and Jewish communal organizations (Chapter 4). Our task here, in a way, is to inquire into a legal order as if we had no legal evidence.[4]

The aim of this stage of the analysis is to lay the groundwork for an examination of the attitudes of East Syrian and West Syrian ecclesiastical leaders and the Babylonian geonim toward the phenomenon of their coreligionists' recourse to external courts, discussed in Chapters 5 and 6. This second part of the discussion addresses two important aspects of the question of Christian and Jewish recourse to institutions beyond the authority of the patriarchs and geonim: the incentives for recourse to these institutions and the response of confessional leaders to it. The chapters begin with an examination of some of

the main reasons that Christians (Chapter 5) and Jews (Chapter 6) chose to handle their legal affairs outside an ecclesiastical or rabbinic judicial setting. The examination will consider real cases of recourse to external courts and their resonance in legal literature. This is followed by an analysis of the legal response of the churches and geonic academies through legislation by the former and legal answers by the latter.

Despite the dry and repetitive nature of the legal discourse, the hope is that by examining the content and style of confessional stipulations, we shall be able to go beyond their immediate message and use it to provide a broader social framework for the consideration of members of discrete confessional affiliations. While the message conveyed in ecclesiastical law and geonic responsa was almost uniform in its intolerance of other confessional institutions, analysis of these sources serves to nuance our picture of the social circumstances in which confessional elites operated. Legal sources, we are advised, should be read as "an ongoing process of communication in which messages of content, authority, and control-intention are modulated in many formal and informal settings."[5] As such, they may be perceived as a reflection of the social setting from which they emerge and which they govern.

The role of law and its making assumes particular importance in a society that lacks the political base of a state. Ecclesiastical and Rabbanite authorities, possessing few means of practical sanction, had to rely on the rhetorical quality of their legal discourse to elicit and sustain obedience.[6] In sociological terms, we may say that, as an elite group denied effective means of enforcement, ecclesiastical leaders were inclined to ground their authority in their ideological stance. Thus ecclesiastical and Rabbanite authority is seen here as that of "right" (the rule of an elite stratum without a political base) rather than of "might" (a power-based leadership). Whereas the latter resorts to force, the former resorts to methods of persuasion, of which a particularly useful means is legislation.[7] Beyond its immediate purpose of laying down rules and providing direction, legal discourse is an important vehicle for the articulation of symbolic power and the promotion of a social agenda.[8]

CHAPTER 3

Eastern Christian Judicial Authorities in the Early Islamic Period

As we have seen, the attempt to reconstruct the structure and practice of Near Eastern judicial institutions in the period under discussion can yield only partial results. The case of the Eastern churches is no exception in this respect.[1] The underlying assumption of the following examination is that since the ecclesiastical judiciary was an integral part of church administration, the question of its survival, status, and efficiency pertains to that of the ecclesiastical administration in general. This broad examination is followed by an outline of some basic principles of the ecclesiastical judiciary as they appear in ecclesiastical legal literature. Our discussion will also point out that ecclesiastical judges did not possess exclusive authority. Rather, ecclesiastical judicial authority was shared, willingly or not, with a diverse group of individuals whose office was not sanctioned by the church.

Once the organizational context of the Christian judicial institutions in general and the ecclesiastical judiciary in particular is laid out, the remainder of this chapter is devoted to a consideration of two crucial points related to the ecclesiastical hierarchy and its judicial administration. The first is what can be described as an underdeveloped ecclesiastical civil code. There is some evidence from the late seventh century that points to the endeavors of church legislators to develop an ecclesiastical civil code. These endeavors entailed the inclusion of Sasanian, Roman, and Islamic civil regulations in ecclesiastical juridical treatises. Here the remarks made by church leaders and jurists who endorsed the initiative of the ecclesiastical codification are of special interest. According to them, it was the lack of a unified ecclesiastical code incorporating civil and religious laws that prompted Christians to take recourse to nonecclesiastical

judicial institutions. Therefore, one form of response of ecclesiastical leaders toward legal pluralism was an elaboration and codification of their own jurisprudence. This was carried out in dialogue with neighboring legal orders that held overlapping jurisdictions with that of the church.

The second point concerns the broader question of trust. Admittedly, there is no direct evidence for lack of trust in ecclesiastical leaders or monastic servants causing the average layman's appeal to external justice. Still, given that judicial responsibilities were founded on a reputation for personal etiquette and trustworthiness, the sporadic references in ecclesiastical literatures to a decline in the reputation of church officials and monks are worth noting when considering the popularity of alternative judicial institutions among Christian laymen.

The Survival of Social and Administrative Features from the Pre-Islamic Period

The emergence of the new rulers from Arabia caught some Near Easterners by surprise. It was perhaps the resemblance of their early theological claims to those of their monotheistic predecessors that blurred the Islamic confessional identity in the depictions of many seventh-century non-Muslim authors.[2] While such an attitude may have had its motives, we should not underestimate how little was known at the time about the theological reasoning behind the nascent Arabian religion. At the same time, this attitude may serve as an indication of an early stage in the formation of the Islamic confessional identity, which would eventually mature through much later accounts.[3] A limited familiarity on the part of non-Muslim authors may also have been the result of early Islamic settlement arrangements, which, during the first century following the conquest, still confined the Muslims to their own towns.[4]

It is under these circumstances that East Syrian and West Syrian ecclesiastical and lay elites had to confront a new political reality. Local Christian elites were forced to adapt to the attending challenges of a transition period from Roman and Sasanian rule to life under Islam, renegotiating their social ranks among themselves and with the new rulers. As recently pointed out, the favorable attitude toward the Muslims, expressed in the letters of Išōʿyahb III (fl. ca. 650-59), should be read in the context of "bids of recognition and legitimacy between rival religious groups."[5] Those instances in which Christians sought the support of the Muslim authorities in "internal" Christian disputes are

not only an indication of the vitality of Christian communities. Such appeals reflect the endurance of pre-Islamic social patterns, according to which confessional leaders were acknowledged by the state and internal disputes within Christian communities involved an arbitrating, siding, or even inciting role on the part of state authorities.[6] Yet in the seventh and perhaps still in the early eighth century, Christian leaders had to do without the old patronage of the Sasanian and Roman states and try to adapt to the conventions of the new government.

It was in this social climate of an "Indian summer," to borrow Chase Robinson's metaphoric depiction, that local Edessene elites continued to manage the affairs of their city.[7] The region of al-Jazīra, studied by Robinson, nicely illustrates the fact that local Christian elites consisted of a mixture of church officials and influential laymen. Thus, in addition to ecclesiastical leaders (*mdabbrānē*), Robinson's study highlights the role of village headmen and wealthy landowners (*dihqāns*), governors (*šahārija*), and local officials of secular capacity (*archontes*).[8] This nuanced observation of Jazīran society appears valid in other parts of the Islamic Near East as well, where the geographic distribution of churches and their organization were, to a great extent, left intact.[9]

Throughout the Near East, in the period immediately following the Arab conquest, Christian communities continued to run the affairs of their towns and churches almost undisturbed. Archaeological surveys in the region of the Fertile Crescent point to the survival of ecclesiastical institutions—most notably, churches—as part of the traditional landscape of urban and rural settlements. Clive Foss, referring to Antioch, has argued that "the survival of churches into the Islamic period indicates a certain vitality of the city and its Christian community."[10] Presumably, the city's rural vicinity and its hundreds of small villages were equally vital. Whether large or small, most of these villages had small churches.[11] In Palestine and Transjordan, local Christian communities, their churches and monasteries, survived the transition.[12] Evidence of this is found in inscriptions on churches and archival documents found in churches in the Negev.[13] These attest to the continuing leadership of priests and monks, along with that of village headmen and local notables over local communities.[14] In Egypt, numerous papyri attest to the survival of both lay and ecclesiastical institutions.[15] The Coptic Church was able to maintain, at least at first, its wealth and ownership of vast land holdings.[16] Alongside the church, the same officials who held authority under Roman rule were able to sustain their office, only now sanctioned to do so by the Muslims.[17]

Towns and villages hosted multiple churches and maintained strong contacts with local monasteries. The significance of these ties was touched upon in Brown's vivid depiction of the lives of villagers in the region of the limestone massif in Syria.[18] Here, Brown argued, "the sense of community was weak. . . . Villages that were only governed by a council of elders, that is by their equals, threatened to explode without the intervention of an influential outsider."[19] These villages, Brown added, were in need of a patron. Foss mentions hundreds of villages on the limestone hills east of Antioch, which "range in size from a few houses to more than a hundred."[20] Most of these settlements had churches but were almost entirely lacking any other kind of public buildings. As of the late sixth century and into the early Islamic period, these villages "remained densely populated, increasingly poor, and overwhelmingly Christian."[21]

The survival of Christian communal life under the guidance and economy of ecclesiastical leaders provides only a partial idea as to the composition of Eastern Christian elites in this period. Alongside ecclesiastical leaders, local lay and monastic figures continued to constitute a significant factor as well. Monasteries—an important element in the lives of rural communities—were situated on the plains between population centers and the wilderness. While rural communities provided a means of livelihood and, at times, new recruits for the monasteries, the monks supplied spiritual guidance and social leadership.[22]

Although lay elites did not survive the Islamic conquest everywhere, their presence is well attested and should have thus constituted an additional source of social authority and, as we shall see, ecclesiastical anxieties.[23] It is the premise of the present discussion that the transition period between the removal of Sasanian and Roman sovereignties and the consolidation of Islamic administration, particularly in the regions of Iraq and Mesopotamia, afforded local elites an unprecedented independence. Any consideration of the judicial setting to which Eastern Christians had access in this period should be seen through this diversity of social authority. The Arab conquest may have affected certain aspects of social structures and organizations, but, for the most part, the Eastern churches managed to retain their position.[24] As we have seen in Chapter 1, ecclesiastical power was not the sole source of Christian social authority but rather had to rub elbows with various dominant lay and monastic individuals. Such categories of ecclesiastical, monastic, and lay power did not always fall neatly into place, a fact that only increased the intensity of competition over social power and, ultimately, over judicial authority.

Ecclesiastical and Lay Judicial Institutions

The ecclesiastical preoccupation with judicial competition shortly after the Arab conquest can be discerned in Canon 6, issued at the synod of the East Syrian Church in 676:

> Concerning the lawsuits of the Christians; that they should be [handled] in the church, before figures who were designated by the bishop [*prišay men apisqūpā*], with the consent of the community [*gāwā*], [whether] priests or believers; and that those who are to be judged [*netdinūn*] should not go out of the church to be judged before pagans [*ḥanpē*] or nonbelievers, whoever they may be:
>
> The lawsuits [*dinē*] and quarrels [*ḥeryānē*] between Christians should be judged in the church; and should not be taken outside [it], as [in the manner of] those who are without a law; but rather they should be judged before judges who are appointed by the bishop with the consent of the community, from amongst the priests, known for [their] love of truth and reverence for God, who possess the knowledge and sufficient understanding of the affairs brought for judgment; that [the litigators] should not otherwise, due to the impetuosity of their thoughts, take their affairs outside the church. However, if there is something that is concealed from those who are appointed as judges [*l-pusqānā d-dinē*], [the litigants] should forward their petition to the bishop, from whom they shall receive a solution for those matters on account of which they are distressed. Yet no one from amongst the believers may usurp, on his own authority, the judicial decisions [*psāqā d-dinē*] over the believers, without the permission of the bishop and the consent of the community; according to the words our Lord; so long as there is no necessity [resulting from] the command of secular rulers [*šalliṭay ʿālmā*].[25]

The canon, issued at Diren in the vicinity of the Persian Gulf and modern-day Bahrain, suggests circumstances in which members of the Christian community ignored the ecclesiastical jurisdiction and presented their legal concerns to external judicial authorities.[26] At the same time, the canon also sheds light on the structure of the ecclesiastical judiciary. Within this structure, the bishop acts as the supreme judicial authority, to whom issues that cannot be resolved at a lower judicial level should be referred. The latter consists of

clerics who were specially appointed to serve as local judges on behalf of the bishop. By now, however, the Sasanian regime, along with its judicial apparatus, was no longer the formal sovereign. While a full-fledged Islamic judiciary is still hard to envisage at this early stage, there is reason to believe that the canon is referring to judicial authorities who operated outside ecclesiastical ranks.[27]

The presence of a lay judicial authority is further suggested in a decree given by the catholicos Ḥnanišoʿ II (d. 780).[28] In his letter to two officials, a priest named Sāʿūrā and a layman named Dādā, the catholicos addressed the inheritance question of a certain widow. The woman complained that her stepson had deprived her of a share in her husband's estate. Ḥnanišōʿ thus instructed the officials to look into the matter, and, should they find the widow's claims valid, they were to instruct the stepson to pay her the share of her inheritance. "If, however, he dares to defy this judgment, it is to be enforced by Sāʿūrā by means of an ecclesiastical decree and by you, Dādā, by means of worldly authority [*šulṭānā ʿidtnāyā*]."[29] Whether Dādā was part of the ecclesiastical hierarchy or a layman cannot be said. Yet what seems evident is that he had some access to executive power outside the church.

In a different decree, Ḥnanišōʿ addressed a group of men, whose names attest to their Iranian background, regarding the possession of a monastery. The catholicos alludes to the social background of these men when he refers to them as fellow Christians who "adorned with us a stole that was formed in the water of baptism . . . our partners." These men appear to have held some form of executive authority as well, as Ḥnanišōʿ refers to the fact that they had brought to a decrease in the tax imposed on a certain "monastery of our father Abraham" and protected it from external aggression.[30] Still, while the exact nature of their authority remains unclear, the reliance of the church on Christian laymen for enforcing its decisions is instructive and allows us to observe Christian elites as a mixture of religious and secular forces.[31]

Evidence from pre-Islamic Egypt highlights the tension between ecclesiastical and lay leaders. Thus Canon 92 from the collection of Egyptian canons of Saint Basil:[32] "A lawsuit against a clerk should not be brought before the *archontes*, but before the bishop and the first presbyter."[33] The *archon* was a prominent layman in the Coptic Church.[34] Some of the *archontes* fulfilled a judicial office and, as such, collaborated with the church. The biography of Agathon, the thirty-ninth patriarch of the Coptic Church (fl. 665-81), relates a case in which some people in the Egyptian delta town of Sakhā (Sais) were

accused of having attacked local clerks with fire. The Muslim commander, Maslama (Maslama ibn Mukhallad [d. 682], governor of Egypt) dispatched seven bishops to try the accused. Upon their arrival at Sakhā, the bishops "acted in concert with a man who was a magistrate [*archon*] there, named Isaac."[35] According to Artur Steinwenter, following his study of Coptic papyri from the period before and after the Islamic conquest, the *archon* continued to fulfill judicial tasks for some time after the conquest.[36] Two other lay judicial offices that survived the conquest were those of the *pagarch* and the village headman.[37]

The authority of lay individuals who held similar prerogatives in Syria and Mesopotamia was not welcomed by the local church. Canon 27 of a West Syrian synod of 794 rejects the intervention of nonecclesiastical authorities: "None of the worldly ones [i.e., secular] has authority to speak among priests regarding ecclesiastical affairs. Therefore, if one has a lawsuit or a say [i.e., complaint], he should be brought before the bishop of his city."[38] Canon 4 of a West Syrian synod held in 817 supports the notion of Christian laymen serving in an extra-ecclesiastical judicial capacity. The canon attests to the presence of Christian dignitaries who would intervene on behalf of those condemned by the church: "[A] presbyter or a deacon or a believing man or a believing woman under excommunication by the bishop for transgression of the law, whatever it may be, has recourse to the secular rulers [*šūlṭānē ʿālmānāyē*] or to some other [person] from another[39] tribe [*aḥrānyay šarbtā*], those who are outside the fold of the church, or to a man of the dignitaries [*rišānē*] of the Christians."[40]

As noted in Chapter 1, another source of judicial competition came from figures of spiritual reputation who were not part of the ecclesiastical apparatus. The problem of monks assuming administrative posts in small Christian communities in the ninth century is attested in Canon 5, issued in a West Syrian synod held by the West Syrian patriarch Dionysius (d. 909) in 896:[41] "We adjudge that it is not allowed for a monk to be a head of a church in a village or a town. If he attacks [this rule] and dares [to do so] he shall be excluded from his service. However, not only this, but also [they are not allowed] to take upon themselves administrations as *ʾepiṭrūpē*, that is to say, the *wakilā* [most likely, the Arabic word *wiqāla*, representation and agency]."[42] The canon suggests that the members of monastic communities assumed temporal responsibilities. Although it is hard to say what exactly the nature of the post was, we may safely assume that the ecclesiastical leadership was not comfortable with it.

Jacob of Edessa refused to grant holy men judicial authority in his reply to John of Litarb's question of whether stylites may administer judgments: "It is lawful . . . but it is not useful to them. . . . [T]herefore it is not right for them. . . . They have ascended the pillar not in order to become judges of the people and to administer the laws. . . . However, to say something [more] about this, they have not been called or appointed for this by God or by the chiefs of the priests."[43]

John's question refers to the judicial authority of holy men. Clearly, Jacob was not happy with this practice and sought to discourage it. A general disapproval of unauthorized individuals serving as judges can also be seen in an incident reported by Thomas, bishop of Margā (d. ca. 850), regarding Mār Jacob (d. ca. 615-25), the first abbot of Bēt 'Ābē.[44] Early in his monastic career, Jacob was a monk in the monastery of Mount 'Izlā. At the same time, Mār Bābai (d. 628), the local abbot, discovered that a number of monks who dwelled in the outer cells of the monastery had married and were living with their wives, so he expelled these men. The abbot believed that Jacob was aware of this state of affairs and did nothing to prevent it. He therefore expelled Jacob as well and excommunicated him. The local monks objected to this on the following grounds: "Thou hast condemned the blessed meek Jacob without our knowledge. . . . He was not constituted a ruler and a corrector for thee, but for himself alone was he judge, and it was sufficient for him, and he purified his heart from seeing the wickedness of others. In which of the Scriptures canst thou shew us that we are commanded to neglect the care of our own souls, to judge the sins of others, after the manner of outside judges [judges of this world] who *pursue gnats with care, and swallow camels*?" (Matt. 23:24).[45]

The monks' position should be seen in accordance with the principle discussed in Chapter 1 regarding the Egyptian monastic community presented in the *Apophthegamta Patrum* and Jacob of Edessa's position as to the judicial role of stylites. In all cases, there is a concern that by fulfilling judicial tasks, men of spiritual reputation will be forced to betray the essence of their mission.[46]

The extant evidence does not allow us to acquire a full understanding of the components of Christian judicial authority in the early Islamic period. Despite fragmentary evidence, it appears that the judicial setting was by no means monolithic but rather offered a variety of possibilities. Bishops, priests, holy men, and lay figures were simultaneously fulfilling some judicial role. Whether this was the case throughout the territory from Egypt to Mesopotamia and at all times cannot be established with certainty.

The Ecclesiastical Judiciary: Principles and Practices

In the period following the Islamic conquest, one of the main concerns of Eastern Christian ecclesiastical leaders was to maintain their judicial organization and secure its monopoly. While the different churches shared a common legislative background, their separate existence over time introduced a gradual codification of separate legal collections that were built upon or in dialogue with local legal traditions.[47] Some idea as to the state of ecclesiastical judiciaries in the early Islamic period can be derived from Christian legal literature composed around that time. In the introduction to his legal treatise, *Maktbānūtā d-ʿal Dinē* (The book of laws), the East Syrian metropolitan Išōʿbokt explicates the reasoning behind his work:[48]

> I have observed great differences among people with respect to legal matters [*ṣebwātā d-dinē*]. [This is] not only among different faiths, different languages, or different nations, but also within the same faith, nation, and language. This is the state of Christianity. Whereas the Jews everywhere have one law [*dinā*], like the Magian heretics, and those who now rule over us,[49] the Christians are divided based on the laws stipulated in the land of the Romans and those in the land of the Persians. The latter are further distinguished from those in Babylonia, Khuzistān, and Mēšān. Similarly, there are differences in legal affairs in additional places, as even [between] districts and towns. Although the Christian belief is one, the law is not one and not the same.[50]

Išōʿbokt is concerned about the absence of legal uniformity among and within Christian communities to the extent that differences in legal traditions have reached the level of local villages. He expresses his envy of Judaism, Zoroastrianism, and Islam, as religions that, according to him, possess a uniform and concrete legal foundation. He explains this state of legal anarchy by the fact that everywhere Christian judges inconsistently rely on early and later legal sources, leaving much room for their own discretion.[51] What appears to have been at the heart of Išōʿbokt's criticism was a state of legal decentralization, instigated by an overwhelmingly old tradition of local practices. This had to be countered, according to Išōʿbokt, by means of legal reform.[52]

A contemporary of Išōʿbokt, the East Syrian catholicos Timothy I (d. 823), spoke of a similar challenge.[53] In his legal tract composed in 805, Timothy

sought to prevent recourse to the "courts and tribunals of the outsiders" because of "the lack of decrees, be it religious or civil."[54] This, according to Timothy, "is causing people to set apart and be different from one another, [based on] regions, places, kinships, languages, practices and laws. Every one of them is brought up separately according to his own custom and law."[55] Echoing Išō'bokt's concerns over the maladies of diversity and independent reasoning, Timothy expressed his own disquiet regarding the church's failure to provide its believers with a legal code in civil matters. As we shall see, such concerns were in the background of the introduction of civil regulations into ecclesiastical legal codes.

The Judicial Office

One of the few medieval East Syrian legal codes that has survived to the present day is the *Ordo iudiciorum*, composed by 'Abdišō' bar Berikā (d. 1318) in 1290.[56] Despite its relatively late date, the relevance of this source for the study of earlier periods should not be discounted. Its significance derives primarily from the fact that it is the only full and comprehensive code to have survived.[57] Hubert Kaufhold has pointed out the great resemblance between 'Abdišō''s work and that of the Coptic compiler al-Ṣafī ibn al-'Assāl (d. 1260) and argued that the East Syrian source had incorporated sections from the Coptic.[58] In addition, Kaufhold was able to show that the regulations regarding the judiciary in Ibn al-'Assāl's legal treatise were a product of direct Islamic legal influence.[59]

The section in 'Abdišō''s code that discusses the office of the ecclesiastical judge begins with an explicit statement as to who may assume the office: "The ecclesiastical judge is the head of the priests, i.e., the patriarch, metropolitan, bishop, or the one who has been made his notary [representative], or his vicar, or his local deputy [someone holding his place in judgment, sitting on his throne, whoever he may be], selected from among the priests who are worthy of that honor. It is entirely necessary to appoint a judge as nature and the Divine Book require."[60]

Serving at the top of the judicial hierarchy, the ecclesiastical judge is not only the supreme judicial officeholder but also appoints and oversees the work of other judges within his jurisdiction.[61] These judges were appointed from among the clergy, whether archdeacons or priests.[62] Next, in the section dealing with the judicial office, 'Abdišō' lists thirteen basic requirements that the appointee must meet, among those the possession

of "perfect intelligence," adherence to the "orthodox faith," and being "removed from suspicion and immune from every offense."[63] The fact that ʿAbdišōʿ's thirteenth-century code shows a full integration of civil affairs in East Syrian jurisprudence should be noted. As we shall see, ecclesiastical law did not include a civil component from the outset. The emphasis on the religious identity of the ecclesiastical judge, while attending to temporal affairs, such as disputes, management of private property, and validating wills, was a later development.[64] While ʿAbdišōʿ most likely drew from the works of others, whether Christians or Muslims, his code may indeed reflect the manner in which judicial practices were regulated through an ecclesiastical administration.[65]

The Introduction of Ecclesiastical Civil Law

So far, we have looked at some isolated references to the development of ecclesiastical jurisprudence shortly after the Islamic conquest and at some of the basic principles of the ecclesiastical judiciary. Though partial, the extant evidence gives some idea as to the nature of the challenges that ecclesiastical leaders had to face as they attempted to consolidate authority vis-à-vis their coreligionists and the Islamic regime at the same time. Their demand for legal monopoly from their coreligionists and for legal autonomy from their sovereigns should be understood in this context. In Chapter 5, we shall examine more closely the rhetoric and practical measures to which church leaders resorted for achieving this monopoly.

Yet in addition to ad hoc regulations and exhortations, this agenda can be observed in an endeavor to incorporate principles of civil law into ecclesiastical jurisprudence.[66] While religious law pertains to rules dictated by religion, civil law is concerned with private and civil rights.[67] Whereas Islamic and Jewish laws encompass religious as well as civil questions, Christian law, at least in its formative stage, was restricted to religious concerns.[68] This state of affairs did not escape the attention of Christian jurists and appears to have prompted jurists such as Išōʿbokt to come up with a comprehensive and unified ecclesiastical code, designed to integrate both legal realms.[69] Išōʿbokt begins with an admission, according to which Jesus and the apostles were not concerned with such temporal affairs as business transactions, marriage contracts, and claiming debts:

> Why neither our Lord nor his apostles have said anything with regard to human laws [*dinē ʿanāšāyē*]: For it is not fitting at all for our Lord, who will judge the dead and living through the manifestation of his kingdom, who has the authority to judge all, to fix insignificant and human laws. Moreover, for he said: *Take no gold, or silver, or copper in your belts* (Matt. 10:9); and *Sell your possessions, and give alms. Make purses for yourselves that do not wear out, an unfailing treasure in heaven* (Luke 12:33). *And everyone who has left houses or brothers or sisters or father or mother or children or fields, for my name's sake, will receive a hundredfold and will inherit eternal life* (Matt. 19:29). Was it right for him to teach how to claim capital and interest, [the legal questions of] dowry and women's property, the affairs of slaves and maidens, possessions, and other temporal properties? For this reason, he has said nothing concerning such things. It is resolutely said—Our Lord did not come to the world to regulate and administer temporal affairs. Otherwise, there would not have been a need at all for his arrival. For there were many who came before him. . . . He, however, has came to teach humans to despise what is in this world and not to value the good things in it. . . . Therefore also his apostles, who earned their wisdom through him and who imitated him, said nothing concerning human laws. Rather they introduced only their godly law [*nāmūsā*] for the sake of keeping the divine commandments and hindering from sins, out of fear of the arriving judgment.[70]

The theme of Christ as the ultimate judge is taken from 2 Tim. 4:1, where it is said that he is "to judge the living and the dead." To those familiar with the Gospels, as must have been the clerics to whom Išōʿbokt addressed his code, this may have served as a reminder to be "persistent whether the time is favorable or unfavorable; convince, rebuke, and encourage, with the utmost patience in teaching. For the time is coming when people will not put up with sound doctrine, but having itching ears, they will accumulate for themselves teachers to suit their own desires" (2 Tim. 4:2-3).

Clearly, our eighth-century jurist acknowledged: it is not fitting for the godly ones to put down laws pertaining to human affairs. Išōʿbokt's position stems from a theological principle, according to which divine and temporal affairs cannot mix. In an ideal Christian society, material concerns and personal interests are of no importance and hence do not demand legal attention. By

the eighth century, however, East Syrian leaders could no longer accommodate the absence of civil regulations in an ecclesiastical code. Their task was to eliminate differences in the legal traditions adopted in Christian communities and the consequent recourse of Christian individuals to judicial institutions outside the church.

Almost half a millennium after Išōʿbokt, ʿAbdišōʿ bar Berikā's code was already fully integrated by civil regulations. By now, the justification for incorporating civil law into ecclesiastical jurisprudence was less apologetic: "Civil society is necessary for human beings due to the common need to sustain temporal life. . . . In no way can society exist without the action of arbitration and negotiation, nor is it rationally complete without a judge who judges among the litigants, the strong and the weak, the wise and ignorant, etc. It is therefore necessary to constitute a judge according to the requirement of nature."[71]

The full acknowledgment of the need to provide legal means for sustaining "temporal life" reflects the long way that East Syrian jurists have gone in the process of formulating their own ecclesiastical civil law. This process, it should be noted, had already begun prior to the Islamic conquest and around it.[72] Similar efforts were made in the Armenian Church by the Julianist theologian Yovhannes Mayragomecʿi (d. ca. 652-67). In his work, Mayragomecʿi sought, among other things, to extend ecclesiastical justice to matters that, until then, had been dealt with according to custom under the jurisdiction of a secular judge.[73]

The backdrop to the Mayragomecʿi initiative can be seen in two coinciding developments that affected the internal organization of the Armenian Church: the disappearance of the Armenian monarchy in 428; and the need to establish a religious autonomy under Sasanian rule, as of the fifth century.[74] The Armenian example reflects an early ecclesiastical concern for "secular affairs" at a historical moment in which the Armenian Church lacked the patronage of a Christian regime and had to adjust to the social reality entailed by living under Sasanian rule. Yet it is in the period following the Islamic conquest that we come across far more examples of such endeavors.[75]

Christian legal sources composed throughout the period after the conquest attest to the fact that the churches attempted to apply their legal jurisdiction to religious as well as civil matters.[76] Išōʿbokt was a major proponent of the incorporation of civil regulations. His classification of law is built upon a threefold division: (1) *triṣūtā*—rectitude, referring to a moral code manifested through the Word, Jesus Christ, in thought and action;[77] (2) *dinā*—civil law, distinctive of *triṣūtā* in the sense that "not all that is in the

law [*dinā*] is right [*triṣ*] and not everything that is right is in the law." While both concepts of law suggest adherence and implementation, *dinā* is the one that should be enforced;[78] and (3) *nāmūsā*—the Christian law, a moral law, that "instructs what one should and should not do."[79] The *nāmūsā* was originally proclaimed by various authorities: rulers, parents, and teachers.[80] For our purposes, it is important to note Išō'bokt's awareness of the differences between religious and civil laws, as he recognized the need to integrate them into a single legal code.

Some reference to the incorporation of civil law into West Syrian jurisprudence is found, too. A collection of synodical acts and civil regulations ranges chronologically from those "claiming apostolic origin" to the acts of a synod held in 1153.[81] Although it is difficult to determine when and how civil regulations came to be included in West Syrian legal collections, it may be useful to note the compiler's introduction to this West Syrian collection: "We begin to write the book that contains all the new canons of the later patriarchs . . . and all the laws, judgments, sentences, and heritages and the rest [of the administrative affairs] of the Greek kings [i.e., Roman emperors], as well as of all the judgments, laws, sentences, heritages, [legislation regarding] liberation of slaves, and of all the properties and the rest [of the administrative affairs] of the Arab rulers under whose sentences the believers act and whose laws they accept."[82]

The passage above attests to the inclusion of Roman and Islamic civil regulations in a West Syrian legal order. Bar Hebraeus's (d. 1286) thirteenth-century *Nomocanon* (*Ktōbō d-Huddōyē*, a collection of ecclesiastical law) is the most comprehensive West Syrian legal treatise known to this day.[83] In addition to the inclusion of materials from earlier synodical acts and church orders, roughly two-thirds of the *Nomocanon* deals with matters of civil law, of which its primary source appears to have been the work of the Muslim jurist al-Ghazālī (d. 1111), *Iḥyā' 'Ulūm al-Dīn*.[84] Chapter 38 of the *Nomocanon* addresses the issue of "secular judgments":

> The divine Paul wrote on the tablets of the saints of the church of God in Corinth: *If the world is to be judged by you, are you incompetent to try trivial cases?* (1 Cor. 6:2). *Do you appoint as judges those who have no standing in the church?* (1 Cor. 6:4). So that his words be made known, he said these things to the disgrace of those who were judged [*metdinin*] before outsiders [*barrāyē*] and nonbelievers [*lā mhaymnē*]. Their justice is not that of the saints

> [*qaddišē*] and appointed ones [*qrayyē*], that is, the bishops shall not bring secular lawsuits [*dinē ʿālmānāyē*].[85]

Bar Hebraeus begins his discussion of judicial procedures pertaining to civil matters by following a common literary pattern of citing 1 Cor. 1:1-6, regarding recourse to secular judges. He then makes a distinction between the laity and "the saints," namely, bishops, with respect to the sort of legal matters with which members of either group should be concerned. While bishops do not bring forth "secular lawsuits," they are the ones who judge them; secular matters are to be addressed within the church.

With the available evidence, it is almost impossible to give an exact chronological point at which West Syrian jurists began to incorporate civil regulations into their codes. We may assume, however, that Islamic rule constituted a significant incentive to these initiatives. Our evidence related to the East Syrian Church, on the other hand, suggests that the initiative had already begun under Sasanian rule.[86] That said, the increase in civil regulations and the efforts to put down comprehensive legal collections as of the second half of the eighth century are instructive and may help to explain a similar motivation among West Syrian lawmakers.[87]

While the East Syrian Church had to adapt to a non-Christian state order even prior to Islamic rule, the West Syrians, at least those of the former Roman Empire, faced similar circumstances only after the Islamic consolidation of power.[88] For the West Syrians under Roman rule, the idea of giving the emperor what is his and God what is God's (cf. Matt. 22:21) did not prevent bishops from issuing legal decisions of civil nature but did exempt ecclesiastical jurists from coming up with their own civil regulations. As long as the Roman Empire continued to wield power, its civil legal code was valid in the eyes of ecclesiastical jurists.[89] This perception was based on the idea of the emperors "as instruments of Divine Will."[90]

Once Roman power gave way to Islam, the Eastern Churches would gradually have to address the fact that it was no longer a Roman emperor but a caliph who was to serve as the supreme legal authority. The elaboration of Islamic jurisprudence also meant the creation of an alternative legal institution that encompassed secular as well as religious affairs. The absence of ecclesiastical civil principles in the context of a non-Christian state placed ecclesiastical leaders at risk of losing control over their communities.[91]

Indeed, the question of civil jurisprudence may have played a role in the translation of Roman law into Syriac even in the fifth century.[92] Yet the extent

to which the Syrian-Roman law book was the basis of future ecclesiastical legal codification seems limited.[93] In a letter that Timothy I wrote to the East Syrian community in the Mesopotamian province of Elam, the catholicos sought to establish ecclesiastical matrimonial laws on the basis of three legal sources: the fourth-century apostolic canons; the canons of the council of Neo-Caesarea; and the laws of the Roman emperors, "those which have been accepted by the holy synods."[94]

While Roman imperial law is thought to have been incorporated into East Syrian jurisprudence around the eighth century, it was by no means the sole source of ecclesiastical civil jurisprudence.[95] In addition to the aforementioned reference of West Syrians to Islamic law, Išō'bokt's dialogue with Zoroastrian legal principles is well attested.[96] East Syrian and West Syrian jurists were either relying on or creating themselves a defused form of secular and religious legal code by integrating legal principles of diverse cultural, religious, and geographical provenances. These legal enterprises were partially, if not largely, in response to competition with nonecclesiastical Christian judicial institutions and an expanding Islamic legal administration.[97]

A Note on the Spiritual Reputation of Ecclesiastical and Monastic Leaders

The social action of the church depended on the moral authority of its clergy.[98] Though indirectly, the extent to which church officials were trusted and respected by their lay coreligionists also bears relevance to the state of the ecclesiastical judiciary. The Coptic apocalyptic text of *Ps. Athanasius*, written during the first half of the eighth century, depicts the Arab conquest as a manifestation of divine wrath, provoked "because of the sins of priests and monks."[99] Accordingly, it has been interpreted as a literary composition intended to address the misbehavior of Coptic ecclesiastical and monastic servants.[100] Assuming that this was indeed the background behind the apocalyptic narrative, we could wonder about the extent to which the problem was shared by monks and officials in other parts of the Eastern Christian world. The available evidence does not provide a full answer, yet there is ample evidence to suggest that ecclesiastical concerns over such matters were not limited to Egypt or to the eighth century.

In some of the Christian literature composed shortly after the Islamic conquest, there is allusion to the problem of clerical and monastic improper,

even defiant, behavior. Canon laws, chronicles, and legendary tales suggest that ecclesiastics and monks had to sacrifice much of their spiritual standing within their communities in order to retain their offices or simply overcome material constraints. Canon 12, issued at a synod convened by the West Syrian patriarch Dionysius I of Tell-Maḥrē (d. 845) in 817, gives some indication of this:[101]

> Then, when the holy synod considered the condition of this time, many monks, out of necessity of circumstances that have occurred, have left their holy habitations to stay in monasteries and convents that are generally far from towns and had taken care and applied themselves to dwell in the mountains and the deserts. These saints have lived [bearing a] thought removed from the world. [Yet though] they were obliged due to compulsion of the time to dwell in monasteries around towns and even in the towns themselves and in the villages, this has not been viewed [with consent, despite] the trouble and compulsion of the time. The Lord's verdict is applied to them in its entirety. . . . [I]n no way may one dwell in one of the places in the town or in the country of the bishop without his will and his permission. And those who are worthy to live like that and are free of suspicion must be seen not to interfere with anything in interior [matters] but have regard only for the bishops.[102]

The canon speaks of monks abandoning their original monastic habitations in favor of monasteries closer to lay settlements or within these settlements themselves. The cause of ecclesiastical concerns in this case seems to have been the consequent threat that these monks were posing to ecclesiastical authority. Yet the canon also points to the blurring of boundaries between monastic and lay communities in a manner that undermined the spiritual reputation of the monastic office. This state of affairs is also presented in the eighth-century *Chronicle of Zuqnin*.[103] The background to the following passage is a caliphal decree to register the properties of churches and monasteries around 768-69:

> [E]very day members of the same village, or two villages, made lawsuits against each other concerning the boundaries of fields. . . . [E]ven the monastic order went beyond due ordinance, and instead of *Take your cross and follow me* (Luke 9:23), monks

> owned horses, herds of oxen, and flocks of goats and sheep. Each one possessed plots that he acquired from the lands of the community. They went outside to own vineyards and houses in the villages and to ride horses with saddles, like the pagans. They walked according to the wishes of their hearts, not submitting to the superior who had been assigned over them by God.[104]

The anonymous chronicler, a monk himself, portrays monks attending to matters of personal gain through the acquisition of property and by conducting themselves in a manner that violated their monastic oath. According to Andrew Palmer, negative opinions of this sort, held among the laity in the region of Ṭūr ʿAbdin in the eighth century, gradually brought an end to monastic and lay ties.[105] Thus, Palmer observed, monks lost their legitimacy to act as mediators and regulators within their society. They could no longer serve as defenders of the oppressed, as they themselves had become the oppressors.[106]

Such degradation was not confined to monks; bishops and clergy were targets of similar condemnations. In the case of the latter, a central concern was over the practice of simony. Though not unique to the Islamic period, simony should be considered in the context of increasing economic pressure.[107] Islamic rule meant additional economic burdens on the ecclesiastical treasury—a challenge that was often met by extracting payments in exchange for clerical appointments.[108] An ecclesiastical preoccupation with simony can be discerned in a biographical section on the patriarch Abbā Khāyīl (d. 907) in the *History of the Patriarchs of the Egyptian Church*:

> When the patriarch's senses were restored and his fears allayed, the synod assembled with him and deliberated about the case of the money that had been borrowed and about what remained [to be paid] to the *amīr*. They agreed to go to their sees and to take from every man a carat of gold. They violated by their deed the canon of the fathers, the apostles, and the Saintly Doctors of the church who say that neither gold nor silver is to be taken for the gift of God which is the priesthood, namely, the laying on the hands.[109] Then they took from the ten bishops whom they had appointed to the sees what had been imposed upon them.[110] . . . [T]he circumstances made it necessary [for the patriarch] to journey through the see and to violate the canons, and the word of God became as a merchandise [that is] sold for dinars to him who asks to be ordained priest.[111]

The patriarchs and bishops who were under constraints to pay exorbitant and multiple contributions to the state, while confronted with dwindling treasures, were obliged to seek alternative sources of income. Beyond the ethical problem was also a practical one: by admitting candidates to ecclesiastical offices in exchange for payment, the church was exposing its institutions to the service of men of little skill and questionable reputation.[112]

Another side to ecclesiastical appointment was the increasingly common pattern discussed earlier in this chapter, in which the appointment of church officials was confirmed by Muslim authorities. This not only entailed frequent intrigue and cajoling at the caliphal court but also the accordance of caliphal decrees in exchange for payment.[113] Once appointed, the head of the church had to secure good relations with the Islamic government, therefore becoming more and more dependent on the whim of Muslim rulers.[114]

The appointment of *dhimmī* leaders was to become an exchange of benefits between Muslim and non-Muslim confessional leaders.[115] Yet the patriarch's dependency on his Muslim patrons had a price, as the office was "won at the expense of his pride as a Christian."[116] A chapter from the *Life* of Theodotus, bishop of the Mesopotamian town of Amidā (d. 698), portrays the relations that the West Syrian bishop maintained with the Arab rulers.[117] The story mentions the bishop as someone who had been entrusted by the Muslims to supervise legal affairs pertaining to local Christians.[118] Whether fictional or authentic, this eighth-century narrative confirms contemporary procedures, according to which Muslim leaders would sanction the authority of non-Muslim communal heads. Such arrangements may have cast a shadow over the spiritual standing of ecclesiastical officials who worked hard to compensate for their weaknesses by stressing the managerial side of their office. Thus, it has been suggested that hagiographies composed around the mid-eighth century reflect a transition in which the saint's supernatural qualities and ascetic reputation were marginalized with respect to his managerial traits.[119]

It is not the aim of the present discussion to argue for a general decline in the good name of clergy and monks in the period following the Islamic conquest. Clearly, the available evidence does not allow more than speculation. Yet it seems evident that the church did assume temporal authority and had become increasingly subordinated to the Islamic treasury. As such, it was perceived—at least, by some of its lay members—as an administrative cog meant to serve the needs of an Islamic bureaucracy, rather than an autonomous entity dominated by the saints, the *qaddiše*, to whom the church fathers and later generations of jurists referred in their exhortations.

Conclusion

Our discussion in this chapter has touched upon some of the main features of Eastern Christian ecclesiastical organizations and their judiciaries, in particular. Bearing in mind the methodological problems that result from the fragmentary and inconsistent nature of the evidence, it is important to refrain from drawing equal conclusions about the various Christian communities under Islamic rule or even about those communities of a single church.

Nonetheless, it stands to reason that throughout the period and region under discussion, the churches and their respective congregations did share certain common features. Ecclesiastical officials and institutions continued to play a central role in the lives of Eastern Christians after the conquest, functioning, through a network of churches and monasteries, as spiritual leaders and as administrators of communal life.[120] But the churches were not alone in assuming leadership roles; the presence of additional power factors is more than alluded to. These included laymen but also individuals who possessed some form of spiritual authority, yet remained outside the ecclesiastical hierarchy. The withdrawal of the old empires and gradual consolidation of Islamic authority introduced Christian elites into a so-called Indian summer, in which leadership roles had to be negotiated and redefined. As a result, the challenge of sustaining a functioning ecclesiastical judiciary and preserving its relevance increased.

There is some evidence from the late seventh century and later suggesting that Christians appeared also before Christian judges who were not part of the ecclesiastical apparatus. Within the church itself, there was some confusion regarding the question of who may serve as a judge and, in particular, whether holy men were allowed to assume such a post. Whether these individual testimonies reflect the circumstance of all churches in all places is impossible to say; yet there is enough evidence to suggest that the ecclesiastical judiciaries were all experiencing some level of competition from nonecclesiastical Christian elites.

Drawing on a common scripture as the basis for their ideological outlook and relying on the sanctions of their Muslim sovereigns, ecclesiastical leaders faced the challenge of compromising the holy with the profane. A critical arena in which this confrontation played out was the realm of law in general and its judicial application in particular. The role of ecclesiastical judges was not only to regulate social order but also to ensure the implementation of an ideology that sanctified confessional, denominational, and social boundaries.

Within the framework of this sort of ideology, there was no room for anything but a unified ecclesiastical legal order with full monopoly over the law and the normative behavior of Christians. Any divergence, any alternative, would thus be considered a challenge, if not a threat.

Therefore, one form of response to legal competition came through a reform of ecclesiastical jurisprudence. This entailed the inclusion of juridical elements that were originally found in Sasanian, Roman, and Islamic laws and, as such, fit well into the conceptual framework of legal pluralism. The inclusion of these elements reflects the tendency of legal orders to compete and interact with one another in a manner that allows for mutual influence. The agenda of fortifying an ecclesiastical legal monopoly is conspicuously reflected in the legal endeavors of East Syrian and West Syrian jurists as they attempted to incorporate within the once purely religious ecclesiastical codes a set of principles of civil law. The enterprise, it should be noted, was a prolonged one and ultimately may not have been successful in ensuring that Islamic courts or customary practices would not represent attractive alternatives. Ecclesiastical jurists knew that in order to compete with lay and Islamic judicial alternatives, ecclesiastical judges had to be armed with a comprehensive and uniform jurisprudence. They also insisted that these judges must be "removed from suspicion and immune from every offense."[121] References to simony, disorders in ecclesiastical appointments, and questionable reputations of ecclesiastics did not escape the attention of ecclesiastical legislators, nor were they likely to be discarded by potential lay litigators.

CHAPTER 4

Rabbanite Judicial Authorities in the Late Geonic Period

To an extent, the appearance of Jews before Islamic courts tends to marginalize the fact that within the rabbinic order itself, judicial institutions also differed. Our upcoming examination, in Chapter 6, of the attitudes of the Babylonian geonim toward the phenomenon of Jewish recourse to Islamic courts demands preliminary remarks regarding such internal differences. The complex and decentralized character of the rabbinic judiciary, we shall argue in the present chapter, corresponded to that of contemporary circles of rabbinic authority. Proceeding from the assumption that confessional judicial institutions formed part of a broader communal structure, this chapter begins with an overview of two partially overlapping political frameworks within the Jewish world under Islamic rule: the central geonic headships in Babylonia; and the regional Egyptian and North African communities in the "West."

Upon examining the relative significance of these two spheres of Jewish public life, one cannot avoid noting a measure of ambiguity regarding the exact balance between them. This sense of ambiguity persists in the second part of the chapter, which is devoted to an outline of the rabbinic judicial institutions. As in the case of Eastern Christianity, Jewish leadership and judicial roles in this period were often performed by the same figures. But in contrast to the clergy, Jewish officeholders were not ranked according to a fixed hierarchical structure. Thus, rabbinic judicial institutions must be examined in the context of intercommunal relations and a power play between central and regional forces.

Notwithstanding the geonim's claim to authority and the attested recognition of this claim, we must not overlook the limitations of geonic power.

The geonim inherited these limitations from their pre-Islamic predecessors, who similarly had to accommodate to life within a non-Jewish sovereignty and therefore lacked the coercive prerogatives of an independent social organization.[1] The resulting intersection of concerns over social power and judicial authority is the theme of the latter part of this chapter. But first, we turn to early rabbinic principles and examine their realization in the context of the relations between the Babylonian academies and regional communities.

Rabbinic Social Organization in the Late Geonic Period

For the modern historian of the medieval Near Eastern Jewish world, the period from the Islamic conquest to the second half of the ninth century presents a notable challenge. While contemporary non-Jewish sources make little, if any, reference to Jewish affairs, Jewish sources consist of only a handful of halakhic, apocalyptic, and poetic treatises. In an attempt to reconstruct this obscure period in Jewish history, modern scholars have often sought to supplement early evidence with that of later periods.[2] This approach has been rationalized by the idea that "because of the fundamentally conservative nature of the period and its institutions, extrapolation to the earlier period appears to represent a reasonable risk."[3] Much suggests an institutional continuity from the time of the Babylonian sages under Sasanian rule to that of the geonim, some five hundred years later; but reconstructing the Jewish historical picture of the seventh through the ninth century by considering it through the lens of earlier and later evidence remains a hazardous affair.

As we have seen in Chapter 3, despite high measures of continuity, the challenges faced by Eastern Christian leaders were constantly in flux. In the seventh century, ecclesiastical judicial power came under threat primarily from competing elements within the Christian communities; but by the ninth century, this competition had become compounded as a consequence of the consolidation of an Islamic legal apparatus. The reality of the Eastern Christian world of later centuries was clearly not a replica of earlier times—an understanding that holds true also for Near Eastern Jews.

By contrast, the task of shedding light on the period following the late ninth century entails fewer risks. Generally speaking, sources dating from the late ninth to the early eleventh century concerning the state of Jewish social organization can be divided into four categories: Jewish and Islamic historiographic compositions; private letters; official letters issued by Islamic

governments; and geonic responsa. Despite the relative richness of evidence from later periods, the question of Jewish social organization is yet to be fully resolved. The materials found in the Cairo Geniza tell the history of communities governed by regional institutions while formally subordinate to the authority of the central leaderships in Babylonia and Palestine. It is hard to say how much influence these distant centers held over regional communities. Can we take contemporary reports at face value and assume a hierocratic organization in which regional communities across the eastern parts of the Mediterranean were under direct control of Babylonian and Palestinian centers? If so, what was the fate of the communities outside this territorial sphere? The following discussion does not aim to resolve these difficult questions but rather tries to highlight the constant tension that existed between centers and periphery as an important factor in the history of Jewish groups under Islam.

The Epistle of Rabbi Nathan the Babylonian, one of the few Jewish historiographic compositions to have been written in the tenth century, conveys the image of a territorial division of administrative jurisdictions, *reshuyot*, allocated to the exilarch, the gaon of Sura, and the gaon of Pumbedita.[4] Within each jurisdiction, the exilarch or the gaon had direct control over the judicial appointments of regional communities. In exchange for regularly supplying judges (or affirming their appointment) and supervising their work, the head of the *reshut* was to receive an annual income from each community. These centralist prerogatives are mentioned again in a letter outlining the authority of the Palestinian gaon. A document from 1036 is a draft of a letter to a Jewish notable in Egypt in which the Palestinian gaon requested a renewal of his appointment from the Fatimid caliph al-Mustanṣir (r. 1036-94). The document lists a series of prerogatives traditionally held by the gaon, among them the exclusive right to appoint and dismiss communal officials and oversee judicial courts.[5]

Such testimonies gave rise to the modern perception of a Jewish world governed by four centers: the exilarch, the two geonim of Babylonia, and the gaon in Palestine.[6] Though it has been commonly acknowledged that by the ninth century, the exilarch's office had gradually lost prominence, modern scholars continue to accept the hierocratic paradigm of geonic authority.[7] There is much reason to suppose the existence of such a paradigm in which the rabbinic academies operated side by side through the maintenance of jurisdictional boundaries. Ongoing correspondence between the geonim and regional officials in Egypt and the western parts of the Mediterranean on matters of communal appointments, the dominance of graduates of the geonic

academies in communal life, and, of course, the responsa literature all attest to the intimate ties between the central bodies and regional communities.

At the same time, this historiographic view of intercommunal relations ought to be refined. Although Rabbanite regional leaders shared a common pattern of expressing loyalty to the geonic centers, it would be wrong to treat in the same terms the Jewish communities outside the *reshuyot* and those within them. The Jewish communities that, by the late tenth century, had begun to consolidate their local institutions, in North Africa, Sicily, and even before that in Spain, were in theory and practice beyond the direct authority of the central academies in Babylonia and Palestine. Without discrediting the dominant role of geonic centers, our understanding of geonic relations with regional communities to the west of Palestine should bring into account the autonomy of these regional communities in relation to geonic authority.[8]

While rejecting the "assumption that Eastern Jewry was subject to centralist authority and largely bereft of communal consciousness and autonomy," Mark Cohen sees Jewish communal life under Islamic rule through an informal set of arrangements that were simultaneously established among community members and vis-à-vis the centralist authority of the academies.[9] This is best confirmed by the evidence from the Geniza. Studies of this exceptional archive attest to an elaborate communal organization, most notably that of the Jewish communities of Egypt and North Africa.[10] While some communities administered their affairs under the supervision of geonic authority, others possessed an autonomous administration and maintained ties with the geonim on a voluntary basis as a mere gesture of respect.[11]

The revised image of relations between Rabbanites and Karaites, recently offered by Marina Rustow, helps us to perceive Jewish institutional loyalties in this period as anything but exclusive. While seeking the leadership of the geonic academies in general and their heads in particular, Rustow observes how Near Eastern Jews "sensed no contradiction in offering fealty to more than one institution."[12] It is impossible to present an exact account of which communities were under direct control of geonic authority. Yet the overall impression from the evidence is of a constant power struggle between centralist and regional forces. What may strike the modern observer as two discrete spheres of administration was more likely to have been a constant interplay between center and periphery. Rather than a rigid implementation of principles of hierarchy, it seems that the spheres of geonic and regional powers were intertwined and based on mutual interests.[13] In what follows, we shall seek to bring out the structural subtleties of central and regional Jewish leaderships.

Despite our separate analysis of geonic and communal authority, it will soon become evident that these authorities were well interwoven.

The Geonim: Self-Image, Means of Asserting Authority, and Challenges

In the tenth-century *Epistle of Rav Sherira Gaon* (head of the Babylonian academy of Pumbedita in Baghdad; d. 1006), the writer set out to recount the history of the Jewish academies of Babylonia from the beginning of the amoraic period (ca. 220 A.D.) to his own time.[14] The narrative conveys a notion of a direct link between the ancient Babylonian academies and those of the tenth century. True or false, the significance of the story stems from its representation of a geonic self-image, as the heirs of a chain of authorities dating back to the third century A.D.[15] This central point in geonic perceptions is crucial for understanding geonic claims to supreme authority within the Jewish world of their time.[16]

Though Jews sought guidance from geonic centers in Babylonia and in Palestine, we shall limit our discussion to those in Babylonia, primarily for two reasons. First, most of the surviving responsa come from the Babylonian academies. Second, there appears to be a key difference between the position of the Babylonian geonim and that of the Palestinians. Whereas the former were primarily preoccupied with internal Jewish affairs, the Palestinian gaon seems to have held certain temporal authority, having been recognized also by the Muslim authorities as a religious leader, namely, head of the Rabbanite Jews in the Fatimid Empire.[17]

By the beginning of the tenth century, the two Babylonian academies had transferred their seats from their traditional locations in Sura and Pumbedita to the Abbasid capital of Baghdad. As head of the academy, the gaon divided his time between fulfilling academic responsibilities and addressing the needs of regional communities. The gaon communicated with regional communities through the exchange of letters and immiseries. The former was founded on a network of ties with regional leaders who were often graduates of the Babylonian academies.[18] Personal ties, collegial dependence, and deep-rooted notions of respect were some of the main factors that contributed to a continuous flow of questions to the geonic centers. Many of these petitions, it has been suggested, were formulated in a way that left little doubt as to the absolute acceptance of geonic authority.[19]

At the same time, we should assume varying degrees of geonic influence. While graduates of Babylonian academies were keen to maintain obedience to

their former masters, even outside the formal boundaries of the *reshuyot*, their motives did not necessarily harmonize with those of their peers, who were affiliated with a different Babylonian center or with the academy in Palestine.[20] Disputes stemming from conflicting loyalties to the different centers were common in Egyptian and North African communities, especially as these became popular destinations for Jews from Mesopotamia and the Fertile Crescent.[21] In addition to the adoption of different liturgical traditions—Babylonian and Palestinian—these communities were led by individuals who offered varying degrees of submission to the geonic centers.[22]

An epistle from the beginning of the ninth century, attributed to an unknown figure, Pirqoy ben Baboy, tendentiously depicts the severe impact of Roman rule over Palestinian Jewry and its traditions:[23]

> [S]ince evil Edom decreed a persecution [*shemad*] over the Land of Israel, forbidding the recitation of the Torah, they had to conceal all the books of Torah lest they be burned. And when the Ishmaelites came, they had no Torah books and no scribes who had the skill of processing skins and [knew] on which side to write the Torah books. . . . [A]nd the sages have stipulated that it is forbidden to read a book of Torah that has not been properly written. . . . [At the same time,] in Babylonia, the Torah never ceased among Israel . . . [for] Babylonia has not fallen under an evil kingdom and neither the oral Torah nor practice have been forgotten by the two academies at any time.[24]

Despite its obscure origin, it has been established that the epistle was written to the Jewish communities in North Africa and Spain by a supporter of the Babylonian academies.[25] The writer goes to great pains to argue for the supremacy of Babylonian practice and to undermine the legitimacy of Palestinian tradition and authority. The conflict between Babylonian and Palestinian centers has received ample attention in modern scholarship.[26] Such controversies were bound to be a source of tension among regional officials and their congregations. Under these circumstances, it is possible to see how the academies became a cause of division rather than unity for regional communities.

Competition was not confined to the Babylonian-Palestinian arena but occurred also within the Babylonian academies themselves. Thus Sherira Gaon informs us of a dispute in the academy of Pumbedita around 825. The affair

resulted in the temporary removal of the reigning gaon, Avraham ben Sherira (d. 828), due to his support for the losing contender for the office of exilarch.[27] Other conflicts to which Sherira refers are that between the gaon Menaḥem ben Yosef ben Ḥayya (d. 860) and the gaon Matityahu ha-Kohen ben Ravrabi (d. 869) in 858, and that between the chief judicial authority (*av bet din*) of Pumbedita, ʿAmram ben Mishwi (death date unknown) and the gaon Aharon ha-Kohen ben Yosef Sarjado (d. 960) in 943.[28] Such confrontations over the office of gaon do not appear to have been rare and may have caused much confusion among supporters of the academies.

The question of regional loyalties to different centers should be seen within a broader set of challenges to geonic power. These challenges formed part of the background of geonic agendas and initiatives vis-à-vis regional communities in general and their leaderships in particular. According to Moshe Gil, there is no indication of separatist inclinations on the part of regional communities toward the academies. Instead, Gil argues, the academies enjoyed an indisputable position that was safeguarded by private allegiances between the geonim and regional communal leaders.[29] Gil's conclusions are based primarily on the absence of evidence for opposition to geonic leadership. Yet this is a *conclusio e silentio*, and rejecting such a possibility on account of lack of evidence is not, in principle, any less speculative than accepting it. In fact, the institutional independence of regional communities, such as those in North Africa, did not necessarily conflict with their loyalty to the sacred centers of Babylonia and Palestine. Moreover, it can be equally argued that the absence of signs of defiance or independence on the part of regional officials may suggest the limitations of geonic authority. Since the geonim had few means of coercion and a limited amount of influence, regional communal leaders may not have found it necessary to challenge their authority.[30] Signs of such weakness can already be detected within the academies themselves. Here the geonim possessed very little formal power, to the extent that "tyranny on the part of the gaon could have resulted in mass exodus of scholars from the academy."[31] This state of affairs was not much different from that of regional communities distant from the centers in Babylonia. Here the geonim were inclined to acknowledge the relatively autonomous character of regional communal administrations.[32]

In addition to internal disputes, a state of financial distress is expressed in a few letters sent by heads of the academies to their supporters, requesting that they resume the flow of queries, along with donations. In a letter written in 962 by Neḥemya ha-Kohen, gaon of Pumbedita (d. 968), the gaon asks his

addressees in Fusṭāṭ to send their "donations, pledges, and tithes as their fathers have done in the past," protesting that "we have not seen anything from you and we do not know why you have forsaken us."[33] A similar plea was made by Sherira Gaon in the same year, when he was serving as head of the academy's court (*av bet din*). He sent a letter to a Jewish notable in Fusṭāṭ, a former student of the academy who had studied under the supervision of Sherira's father, Ḥananya Gaon (d. 943). In the letter, Sherira stressed the "covenant" between the academy and, presumably, the congregation in Fusṭāṭ. He asked the addressee to "remember our hardship and that when our master, Aharon Gaon [Aharon ha-Kohen ben Yosef Sarjado, d. 960], was still alive, the donations and the tithes of the people of the West and all the land of Ifrīqiya would be sent along with queries."[34] The academies were accustomed to relying on donations that came along with legal queries. Appeals for queries and donations were of particular significance when the economic resources available to the Babylonian academies began to dwindle.[35]

In comparison, within the *reshut*, an important source of income was the annual payments that were sent to the academies from regional communities in the form of taxes levied on local courts.[36] A rare example of a rejection of geonic authority underscores the severity with which such an action was perceived by the gaon. A tenth-century responsum mentions a judge from a community within the *reshut* who chose to free himself from the yoke of the gaon's authority. Consequently, the gaon, who had initially appointed this rebellious judge, relieved him of his judicial office.[37] A regional judge would most likely have to rely on the support of other members of his community in order to defy geonic authority so bluntly.[38] This brings us to the relative role and weight of regional officials within the social organization of Near Eastern Jewish communities.

Regional Rabbanite Leaders: Their Ties with Geonic Centers and Growing Independence

In contrast to the concrete definitions of ecclesiastical officeholders, the case of Near Eastern communal officials attests to a much looser and less formalized organization.[39] According to Goitein, active membership in the Jewish communities mentioned in Geniza documents was voluntary.[40] Active membership refers to the assumption of various offices by members of the community, as communal leaders of various ranks, judges (*dayyanim*), cantors

(*hazanim*), and officers in charge of the charitable fund (*parnasim*). Communal officers drew respect and obedience so long as they received public approval. The public's freedom of choice to support or oppose its leaders was sustained through what Goitein defined as a "democratic right" of withdrawal.[41] The act was manifested by the refusal of an individual or a group to take part in the congregational prayer or their abstaining from making pledges to the charitable fund. Thus, Goitein concluded, "a statute or resolution was binding only on persons who had either signed it or attended its solemn promulgation."[42] Yet it seems that for the geonim and their supporters at the regional level, a certain measure of formality did exist. Despite the historical uncertainty as to the exact form and nature of the *reshuyot*, for Sherira Gaon, Nathan the Babylonian, and others, the hierocratic principle was anything but theoretical.

Regional communal officials were often directly appointed by the geonic centers of Babylonia or Palestine. They maintained close ties with the geonim, based on mutual benefits. While the geonim endorsed their appointment and tenure, regional officials responded with loyalty and represented geonic interests before the Muslim authorities and local congregations.[43] At the same time, regional officials could change or have multiple allegiances vis-à-vis the geonic centers. Elinoar Bareket's study of the structure of the regional Jewish community in Fatimid Egypt provides an outline of some of the principal characteristics of regional communal leaders.[44] Bareket's findings point to the close affinity between regional officials and geonic centers.

Thus Ephrayim ben Shemaria (d. 1055), supreme judge of the Palestinian congregation in Fusṭāṭ, was appointed by the Palestinian gaon, maintained extensive correspondence with the Palestinian academy, and raised funds for it, while remaining in contact with the Babylonian academy of Pumbedita in Baghdad. Yefet ben David (d. 1057) was an assistant to Ephrayim ben Shemaria, as well as a scribe, cantor, and overseer of slaughter procedures and pious foundations. Yefet is also known to have relied on the support of the Palestinian gaon. Shemaria ben Elḥanan (d. 1011) served as judge and head of the Babylonian congregation in Fusṭāṭ. Shemaria maintained close ties with the academy of Pumbedita, where he studied and was ordained. He served as liaison between Pumbedita and the congregation in Fusṭāṭ. In 1006, he transferred his support to the academy in Palestine. Elḥanan ben Shemaria (d. 1026) served as a judge in Fusṭāṭ, then as head of the Babylonian congregation in Fusṭāṭ, and was eventually acknowledged as leader of the entire Rabbanite community in Fusṭāṭ and its representative before the academies. He

received his training in Pumbedita, maintained close contact with it, and was known for his loyalty to both academies. At some point, however, following his father's (Shemaria's) decision, he transferred his support to the Palestinian academy.

Our sources suggest that the hierarchy, maintained through informal sets of obligations between geonic centers and regional communities, began to erode by the end of the tenth century.[45] The gradual shift of power from geonic centers to regional communal elements can be attributed to several factors. First was the political fragmentation of the Islamic world into multiple (often contending) centers. Second, the migration of Jews to the western Mediterranean and their resulting economic prosperity helped establish additional focal points of social power. These challenged the traditional balance of authority, if only on account of the geonim's growing dependence on their support. Third, the demise of the Palestinian center in Jerusalem in the second half of the eleventh century, following the Seljūq conquest of the city in 1073, served as another blow to centralized authority. Fourth, internal struggles within geonic centers and the rise of competing figures to geonic authority not only degraded the spiritual image of the geonim but also revealed their weaknesses and reliance on influential figures outside the academies.[46] Finally, the growing role of regional communal officials as representatives before the Muslim authorities took on greater significance, enabling them to enhance their regional power.[47]

The geonim's initiative in bestowing honorary titles upon regional and local leaders was a reaction to a decline in their power.[48] Some of these titles, such as *dayyan* (judge), *mumḥe* (legal specialist), and *ḥaver* (member of the Palestinian academy), denoted ranks and positions within the Jewish community; others were bestowed in recognition of the scholarly merits of their bearers.[49] The title *nagid* in its medieval context appears to have made its first appearance when given in 1015 to a prominent communal leader in Qayrawān, Avraham ibn 'Ata. The title was later invested upon numerous leaders in various parts of the Near East and Spain and, with time, came to denote a formal office.[50] Thus Cohen concluded in his study on the rise of the office of the head of the Jews in Egypt that the geonim "strove to achieve worldwide authority . . . through the generous dispensation of honorific and academic titles to local alumni and contributors."[51]

Goitein and Cohen both argue that there has been a misperception on the part of modern scholars as to the chronological point at which a counterforce to geonic authority began to emerge within the Jewish community of Egypt.

According to Cohen, this misperception is, among other things, due to an anachronistic attribution of authority to Jewish Egyptian figures who bore the title *nagid* during the eleventh century. In practice, the title entailed a formal authority only at a much later stage. Nevertheless, its emergence in the early eleventh century should be viewed within the political context of its time. The initiative of bestowing honorary titles upon regional officials and notables was one of several geonic attempts to stem the tide of autonomous inclinations on the part of regional forces.

The background of the distribution of honorary titles can also be seen in the aforementioned composition of Nathan the Babylonian.[52] The report, it has been argued, was meant to stress the central role and leadership of the Babylonian academies—a depiction designed to regain the trust of the chronicle's readers in the central authority of the Babylonian academies.[53] Thus the point of describing the prerogatives and activities of the Babylonian institutions was to contrast them with the chronicler's preceding depictions of disputes and inner struggles within the academies. Nathan the Babylonian sought to draw the attention of his readers to the fact that despite temporary moments of crisis, the academies retained their traditional central position.[54] Such an interpretation of the chronicle does not make the organizational structure of the Jewish world in geonic times any less obscure. Still, it further points to the tension between central and regional leaderships in the period under discussion. This tension ought to be kept in mind when we turn to identify those who fulfilled judicial offices within the Jewish communities, the source of their authority, and the geonic responsa on matters of judicial authority.

The Rabbinic Judiciary

In order to properly evaluate the judicial organization and practice of the Jewish communities under discussion, it is essential that we begin by laying out some basic principles of rabbinic judicial practices found in early rabbinic literature. Regarding the structural requisites of the Jewish legal order, Menahem Elon observes: "For a legal system to be practical and functional there must be a court structure and an operating judicial system." According to Elon, such courts "existed in all places of exile even after the loss of national independence."[55] For the cursory reader who is not familiar with the principles of rabbinic judiciary, such phrases as "court structure" and

"Jewish courts" may give the impression of a judicial setting founded on a formal and well-defined hierarchy, similar in character to modern judiciaries. Yet as we have seen in Chapter 1, the increasingly dispersed nature of Jewish settlement in antiquity did not enable the creation of a centralized judicial organization. Accordingly, early rabbinic prescriptions reflect a greater concern over matters of procedure than judicial institutionalization. It is through procedure that the early rabbis sought to establish judicial hierarchy within the rabbinic legal order.

Early Rabbinic Principles

David Ellenson, referring to the question of legal authority in the absence of a centralized legal order, observed that "in the Bavli tractate of Sanhedrin the sages imagine a fully articulated hierarchy of courts and an improbably rigorous system of procedural justice."[56] Indeed, the insistence of early rabbinic authorities over proper procedure should be noted along with their relative tolerance of the existence of multiple judicial institutions. The discussion in the Babylonian Talmud in this regard is instructive:

> [Abaye said:] The warning against opposing sects is only applicable to such a case as that of two courts of law in the same town, one of whom rules in accordance with the views of Bet Shammai while the other rules in accordance with the views of Bet Hillel. In the case, however, of two courts of law in two different towns [the difference in practice] does not matter. Said Raba to [Abaye]: Surely the case of Bet Shammai and Bet Hillel is like that of two courts of law in the same town! The fact, however, is, said Raba, that the warning against opposing sects is only applicable to such a case as that of one court of law in the same town, half of which rule in accordance with the views of Bet Shammai while the other half rule in accordance with the views of Bet Hillel. In the case, however, of two courts of law in the same town [the difference in practice] does not matter.[57]

While the Babylonian sages were concerned with the problem of disagreement among those presiding over a single court, they accepted the possibility of conflicting opinions between adjacent judicial institutions. As we shall see,

two of the most striking features of the rabbinic judiciary were a plurality of opinions and a plurality of judicial institutions within a single locality. At the same time, rabbinic sources reflect an attempt to outline jurisdictions. This can be deduced from the following tannaitic source:

> Our Rabbis taught: Whence do we know that judges are to be set up for Israel?—From the verse, *You shall appoint judges and officials* (Deut. 16:18). Whence do we deduce the appointment of officers [to execute the sentence of the court] for Israel?—From the same verse [where it is added] *and officials*. Whence the appointment of judges for each tribe?—From the words, *throughout your tribes* (ibid.). And the appointment of officers for each tribe? From the words, *in all your towns* (ibid.). . . . Rabban Shim'on ben Gamliel said: Of *they shall render just decisions* and *your tribes* indicates that the tribal court must judge only those of its own tribe.[58]

The tribal society of the ancient Israelites provides a model jurisdiction here. According to Rabban Shim'on ben Gamliel, people should settle their affairs within the judicial boundaries of their social group, namely, their tribe or their community. While a Jewish male who bears a record of honest conduct may serve as judge, rabbinic sources also prescribe the qualities of those presiding over judgment. Referring to the time in which "controversies multiplied among Israel," namely, the period before the destruction of the Second Temple (70 A.D.), the Tosefta speaks of the stages in the careers of the judges who presided over the court of the hewn-stone chamber in Jerusalem: "And from there they send for and examine everyone who is wise and prudent, fearful of sin and of good repute, in whom people found pleasure. They make him a judge in his town. Once he has been made a judge in his town, they promote him and seat him on the rampart's court, and from there they promote him and seat him in the court of the hewn-stone chamber [*lishkat ha-gazit*]."[59]

Though the court of the rampart and the hewn-stone chamber may have existed in early Roman Palestine, a similar arrangement is not attested for the period following the destruction of the Second Temple. Nonetheless, rabbinic passages dealing with legal jurisdiction, judicial appointment, and judicial hierarchy were to constitute the guiding principles of the Jewish judiciary for later generations. That said, early rabbinic literature does not refer to fixed legal courts. Instead, the basic principle found in rabbinic discussions is that almost any adult Jewish male could serve in a judicial capacity of some kind.[60]

The Babylonian Talmud specifies the individual's moral obligation to prevent any form of sinful transgression:

> Whoever can forbid his household [to commit a sin] but does not, is seized for [the sins of] his household; [if he can forbid] his fellow citizens, he is seized for [the sins of] his fellow citizens; if the whole world, he is seized for [the sins of] the whole world. Rav Papa observed: And the members of the Resh Galuta's [household] are seized for the whole world. Even as Rav Hanina said: Why is it written: *The Lord enters into judgment with the elders and princes of his people* (Isa. 3:14): If the princes sinned, how did the elders sin? But say, [he will bring punishment] upon the elders because they do not forbid the princes.[61]

In its interpretation of Lev. 26:37, the Talmud reaffirms the mutual responsibilities of Jews to correct one another: "[Does the verse] *they shall stumble over one another*—meaning, one [will stumble] through the sin of the other, teach that all are held responsible for one another?—There the reference is to those who had the power to restrain [their fellowmen from evil] but did not."[62] According to Shalom Albeck, it is this egalitarian outlook implanted in the Torah that legitimized the demand that every individual must prevent his fellow Jew from committing wrong. Thus, he is responsible not only for preventing sin but also for assuring the fulfillment of the Torah's words, a responsibility not exclusively reserved for ordained judges.[63]

Even within this relatively fluid definition of judicial authority, rabbinic law provides certain rules and definitions that restrict the array of choices and regulate the manner in which judicial forums were to operate. When seeking judgment, litigants could agree to pursue one of the following procedures: (a) appoint as judge one or three individuals of lay stature (sing., *hedyota*), namely, those who have not received formal legal training; (b) appear before one or three experts (sing., *mumhe*). Experts were scholars who most likely graduated from a central institution of learning (*bet midrash*) or even from one of the academies (*yeshivot*); or (c) appear before an ordained expert (*samukh*): a scholar appointed to serve as judge of the great court (*bet ha-din ha-gadol*), the court of the academy, or a court appointed by the academy.[64] The guiding principle was to treat judicial decisions as opinions. The judge is thought of as an expert in the field of law, and his primary duty is advise and guide the people according to the Torah.[65]

While judgment was the prerogative of laymen as well as scholars, a penalty could be meted out only by an expert.[66] Nevertheless, the effectiveness of such a punitive ruling was dependent on the willingness of the general public to endorse it, as judges had little, if any, real means of coercion;[67] the collective will of the community to which the litigants belonged was crucial for executing a judicial decision. The provision of public approval as a means of implementing judicial decisions provides the judicial procedure with a social dimension of which its most explicit expressions are ostracism (*shamta*) and excommunication (*herem*).[68]

The character and method of Jewish judicial practices in early rabbinic literature is very much the result of local conditions. As we have seen earlier, in the discussion of Bet Hillel and Bet Shammai, the presence of two legal courts in a single town was not considered unusual. The possibility is suggested once more in a discussion in the Babylonian Talmud regarding the selection of judges by parties:

> Mishnah: Civil actions [are to be tried] by three [*bet dins*, or judges]. Each [litigant] chooses one, and the two jointly choose a third. . . .
>
> Gemara: Why should each of the parties choose one [*bet din*]: do not three suffice?—The Mishnah is meant thus: If each party chose a different legal court, [so that one is not mutually accepted], they must jointly choose a third. . . . Rav Papa said: It may even refer to experts, e.g., the courts of Rav Huna and Rav Hisda.[69]

The principle here is that the Mishnah instructs each litigant to choose a judge, and the two appointed judges select a third, who will try the case.[70] The talmudic discussion provides an example of two neighboring legal courts of experts from which judges could be selected, namely, the courts of Rav Huna and Rav Hisda. The former was within Sura and the latter in its outskirts.

Near Eastern Rabbinic Judicial Institutions

The urban character of the Jewish communities of medieval Islam should be recalled when we examine the structure and performance of the Jewish judiciary in the late geonic period.[71] Indeed, the overwhelming presence of town

dwellers in the responsa cannot be overlooked. Most of these towns hosted a variety of Jewish judicial institutions, staffed by scholars and prominent laymen. In what follows, we shall concern ourselves with the Jewish judiciary in the geonic realm. More specifically, we shall seek to identify those who filled judicial offices and examine the extent to which their practices corresponded to the principles outlined in early rabbinic literature.

A Court of High Standing

Formally speaking, the geonim presented themselves, and were acknowledged by their supporters, as the official heirs of the great Sanhedrin.[72] As such, they maintained the supreme judicial office of the *bet ha-din ha-gadol* (great court) within the rabbinic legal order of their time. Though the structure and organization of the Jewish communities in geonic times had radically changed from that of antiquity, the hierocratic principle was maintained. Thus geonic centers assumed the role of a supreme court, and the responsa issued there were considered binding rulings.[73] Concurrently, geonic responsa also shed light on the local character of Jewish judicial institutions.[74] The court of high standing (*bet din hashuv*) is attested in many of the responsa. Those who presided as judges in this court were scholars who were graduates of one of the academies or of a regional institution of learning. Being well versed in the halakhah, these scholars imbued their tribunal with the rank of a court of high standing. In a responsum to Ya'aqov ben Nissim ben Shahin (a leader of the Jewish community in Qayrawān; d. 1006), the gaon, either Rav Sherira or Rav Ḥayya (d. 1038), provided a definition of such a court:

> [In reply to] what you asked regarding the saying attributed to our teachers said in a number of places: "A formal acquisition was made at a court of high standing [*bet din hashuv*]"[75]—what does a court of high standing mean and what kind of courts are not considered high standing? This matter is clear: [A court of high standing is] a legal court presided over by a scholar who is known in his locality and its vicinity for his wisdom. And when it is announced that this person is acting as judge regarding such and such a matter, many are silent and hear his words. [In addition] he is considered among the wise men of Israel and their courts.[76]

Quite often, uncertainty over who should serve as judge and the weight of his judgment in a particular case would prompt litigants to turn to a member of the local institution of learning (*bet midrash*) who was an ordained (*samukh*) judge.[77] In North Africa, such judges were not necessarily appointed by the Babylonian centers but rather by local congregations.[78] In a responsum from Rav Sherira, the gaon outlined the qualities of an expert judge (*mumhe*): "An expert judge is a great master as [the amora] Rav Nahman was considered in his time—well versed in the Mishnah and what is said in the Talmud, and also excels in his judgment and knows how to compare legal issues to the [prevailing] laws [*hilkātā*] and traditions [*šmū'ātā*]."[79]

The geonim were clearly aware of the limitations of their own power and acknowledged the existence of judicial courts that did not fall under their direct appointment.[80] In a responsum addressed to scholars from the local institution of learning of Ya'aqov ben Nissim in Qayrawān, Rav Ḥayya made a distinction between courts that were under the direct authority of the Babylonian academies and those that were not: "The custom in Babylonia is that the high court [that of the academy] appoints the judges in every district. . . . When a person refuses to litigate before an appointed judge, then that person must be forced to do so and be struck for his refusal, for such a court is like a high court. . . . However, in the case of legal courts in distant places that are not appointed by the high court, these are considered as tribunals in Syria [*'arka'ot she-be-Surya*]."[81]

The distinction made here between courts appointed by the geonim and courts that are not is useful for understanding judicial hierarchy in geonic terms. While a court appointed by the Babylonian center was considered a formal extension of the court of the academy, namely, a court of high standing (*bet ha-din ha-gadol*), a court outside the sphere of geonic appointments is classified as similar to "tribunals in Syria." The latter is referred to in the Babylonian Talmud as a judicial forum over which laymen (*hedyotot*) judges used to preside.[82] Apparently in talmudic times, Syria was considered a region that lacked learned men. Thus, the gaon concluded that in the case of courts that were not appointed by the academy, a debtor had the right to refuse to appear before them on the grounds of their incompetence.

Dayyanim

Regional judges (*dayyanim*) received their salary from the public's fund. Whether a graduate of an institution of learning or a local notable, a judge

had to have sufficient legal education and a good grasp of legal principles. At the same time, his judgment was also based on an intimate familiarity with the members of his community.[83] The geonim, for their part, treated regional judges with respect and recognized their authority.[84] As of 1065, the most prominent Jewish communal leader in Egypt was referred to by the title "head of the Jews" (*ra'īs al-Yahūd*). As noted by Cohen, the title *ra'īs*, "head," was attached to a variety of officeholders: "It was an extremely flexible term, due largely to its generic applicability to any individual in high position."[85] We often find it attached to the titles of local Jewish communal officials such as "head of the congregation" (*rosh ha-kahal*) and "judge" (*dayyan*). At times, one gets the impression of a single office, held by the head of the regional Jewish community.[86] The head of the Jews in Egypt sat at the top of an administrative hierarchy in Fusṭāṭ, extending his authority over Jewish officials in local communities outside the old part of the Egyptian capital. Goitein referred to the juridical authority of the head of the Jews in Egypt as "the most conspicuous aspect of his office."[87] As possessor of the highest judicial rank in his community, the *ra'īs* himself would not sit in judgment. In the beginning of the eleventh century, his judicial authority was still conditional on geonic approval, though public consent was becoming increasingly important. There is some evidence that in the capacity of his judicial office and in similarity to the gaon, the head also responded to queries from various parts of the Jewish community in Egypt.[88]

Unlike his Babylonian counterpart, the Palestinian gaon held a political office. As head of the Rabbanite Jews within Fatimid sovereignty, the political aspect of the gaon's office may have been similar to that of regional leaders who later assumed an administrative responsibility over regional communities in Egypt, North Africa, and other parts of the Mediterranean. In a letter sent from Fusṭāṭ to Qayrawān in 1039, the writer refers to a famous rivalry between Nathan ben Avraham (d. ca. 1045-51) and the Palestinian gaon, Shelomo ben Yehuda (d. 1051) over the office of the gaon.[89] The letter indicates that one of the means by which Nathan's party sought to gain the upper hand was to ask the Fatimid authorities to remove the Palestinian gaon from his judicial office. This, the writer requests, was to be done by transferring the Jewish legal administration into the hands of the chief Muslim authority, the *qāḍī al-qūḍāt* in Cairo.

Although the Egyptian communal head had the authority to appoint local judges (*dayyanim*), their appointment had to be approved by members of their community as well.[90] A dispute over the reappointment of a judge in

the Egyptian delta town of al-Maḥalla illustrates this requirement.[91] Through a document in which the *nagid* Mevorakh ben Saʿadya (d. 1111) reinstituted the head of the Jewish community in al-Maḥallah, who was also the chief judicial authority there, we learn that a certain group within the community refrained from taking part in local synagogue services and other forms of communal gathering in which the local head was present.[92] Consequently, the official left town, thus leaving behind him a judicial void, as he was the only formally appointed judge.[93]

Zqenim

Formal ordination through one of the academies or a local institution of learning was not indispensable for legitimizing a judicial office. In the absence of legal specialists, judicial roles were assumed by certain individuals whose legitimacy derived from their standing within their community. These men were designated as the local elders (*zqenim*). They were either local communal leaders or men of limited legal training. In a responsum written by Rav Ḥayya, the gaon refers to a place in which the judicial office was assumed by members of the local Jewish congregation who were not formally appointed by the academy: "[I]n a place where there is no appointed judge, and there is one among Israel [i.e., the local Jews] who is indebted on account of a loan, a deposit, or a will: The debtor is to be brought before the elders, the scholars, and the notables of the town who shall stipulate what he must pay according to what is incumbent on him by law."[94]

Whether made up of experts or laymen, a rabbinic judicial institution would normally consist of three judges. According to Goitein, this arrangement was based on the principle of Jewish law that "none may judge alone save One."[95] In a responsum attributed to Rav Naḥshon (d. ca. 879), the gaon referred to a case in which a congregation appointed three judges, whereupon it turned out that one of the litigants was a relative of one of the judges. The gaon ruled that that judge was to be replaced by another. While the three judges had been appointed by the congregation, the replacement was to be appointed by the remaining two judges. This, Rav Naḥshon explained, "is since the law is founded on the judges and not on the litigants. For it is said 'the sages rule—the two judges nominate [the third],'[96] and thus is the rule."[97] Once the judicial process has commenced, the appointment of a third judge was in the hands of the judges themselves.

The judicial role played by the elders presents a historiographic challenge.[98] On the one hand, these men were often prominent members of their congregations whose primary occupations were of private nature. On the other hand, the elders are often referred to in our sources as members of a formal communal institution.[99] In a statute issued by the Palestinian gaon around 1044, the gaon limited the authority of the chief judge of the community in Fusṭāṭ, Ephrayim ben Shemarya, by appointing a board of ten elders with whom he was obliged to consult before giving judgment.[100] Another example of a gaon's acknowledgment of the judicial role of the elders is found in a responsum attributed to Rav Ḥananya Gaon (d. 943):[101]

> Regarding your question: A city was captured by Gentiles and put to fire, looted and destroyed, [with the result that] the marriage contracts [of the city's people] were lost; the law in the city being that the women would bring from their side a small dowry and would have [the husbands] write for them much property, twice as much as what the women brought. May our lord instruct us how the marriage contract should be implemented, whether in the lifetime of the husband or after his death . . . and what should be done in the matter of the marriage contracts of the people of this city in light of the event that took place.
>
> [Answer:]. . . . [T]he elders of the city have permission to fix statutes [*taqqanot*] for the people of their city and to place them under the rule of their legislation. And there is no greater statute than one that relieves the people and the folks of their town from inequity and ensures peace for their households and for a man and his home. And when they do this thing, the breach shall be closed and the incident shall be resolved.[102]

The responsum tells of a certain town that suffered a violent attack that resulted in the loss of marriage contracts. The question at hand pertains to determining the size of the women's share in the lost contracts. Here the gaon's approach reflects a clear recognition of the leadership of the local elders and the legal prerogatives it carried with it.

According to Goitein, the board of elders was composed of men of high social rank; they were "the upper layer in the Jewish middle class."[103] Unlike the communal head and expert judges, however, the elders assumed judicial responsibilities for ad hoc purposes. Rather than as a fixed institution,

the body of elders would normally operate alongside official institutions and assist them when needed.[104] It would be more useful, then, to speak of the elders as a social group whose members fulfilled a variety of communal tasks, one of which was acting as judges. This fluidity in official definitions is further discerned when we realize that the primary determinant for an individual's inclusion within the local body of elders was his social standing.[105] Performing their tasks on voluntary terms, these men had to fulfill their public duties at the cost of their personal affairs, a sacrifice not always willingly made.

Qahal

In addition to individuals, the collective authority of the congregation (*qahal*) appears to have possessed some judicial power as well. This feature was characteristic of communities that adhered to Palestinian tradition, though it may also have prevailed in other communities that simply lacked a formal judicial court. The duty of the congregation to decide a question of a legal nature applied particularly to cases in which a member of the congregation felt that his rights had been violated in some manner. Under such circumstances, that individual had the right to stop the public prayer and have his grievance redressed through a procedure called *istighātha ilā al-Yahūd* (to call upon the Jews) or *mustaghith ilā Yisrā'el* (calling Israel for help).[106] Although the congregation did not assume a formal judicial role, its decision to endorse the complaint would significantly increase its force, as the congregation would then press the local rabbinic court to bring the matter toward a judicial resolution. An anonymous gaon addressed the question of whether it is permissible for a litigant to stop the Sabbath prayer as a means of claiming from another litigant "what he thinks is rightfully his or in order to compel him to attend court":

> If he does this for some time . . . in order to entice [the congregation] to assist him against the other one [the accused], then this is permissible. . . . However, in Iraq this [procedure] is not known [for it is not incumbent] upon the public to oversee [the implementation of] the law and justice, but this duty [is incumbent] only upon a legal court. The public must abide by what the court stipulates, such as deciding [on the matter of an]

> accused, a warning, an ostracism, or an excommunication. Thus, in every place where there is an appointed judge who oversees law and justice, the plaintiff should turn only to him [the judge] and not to the public.[107]

The judicial function of the congregation is attested in Geniza documents. Through a letter sent from Alexandria to the head of the Jews in Fusṭāṭ, we learn about a certain individual who acted in an unauthorized way as the legal representative of an orphan. Consequently, the offender was brought before the congregation in order to force him to rectify his misconduct.[108] Another example can be found in an eleventh-century appeal written by two orphan girls to the congregation. The girls pleaded with the congregation to restore their share in their father's estate.[109]

Enforcement

The ability of the institutions outlined above to enforce their decisions was limited. The most effective and often the only sanction that Jewish judicial institutions had at their disposal was the proclamation of ostracism and excommunication.[110] A responsum from Rav Palṭoi Gaon (d. 858) illustrates how the effectiveness of these measures was dependent on the collaboration of the public:

> As to what you asked, is an excommunication the same as an ostracism and, if not, what is an excommunication and what is an ostracism?
>
> [Answer:] an excommunication is an ostracism [*nidui*] in which the individual is ostracized and a warrant to obey the penalty of excommunication has been written regarding him. [This occurs] after [the culpable] has been ostracized for thirty days and he refuses to comply with the court's decision, whereupon he is excommunicated and expelled from the community of Israel. The form of the proclamation of ostracism should be written as follows: To the scholars, the heads of the synagogues, the elders, the arbiters, and the benefactors of synagogues—may your well-being increase! We hereby inform you that such-and-such owes money to another person and we have ruled against him, yet he did not submit, or

> has committed a certain violation. [Consequently,] we ostracized him for thirty days, yet he did not comply and did not demand that he be released from the ostracism. Thus, we have excommunicated him at the entrance to the legal court. You as well, when you receive the warrant [of ostracism] and proclamation of excommunication, should excommunicate him and ostracize him indefinitely and declare that his nourishment is considered as that of a heathen and his wine is libation wine and his fruits are untithed [*tebel*], and his books are those of magicians. You should cut his show-fringe [*tsitsit*], remove the case affixed on his doorpost [*mezuzah*], not pray in his presence, not circumcise his son, not let his sons learn in synagogues, not bury his dead, not admit him in any company, wash the cup after [it is used by] him, and treat him [as is accustomed to treat a person] with contempt and as is accustomed [to treat] Gentiles.[111]

Conclusion

We have no means of verifying the claims of the geonim and their supporters about the actual jurisdiction of the *reshuyot*, the so-called territorial jurisdictions coordinated among the two Babylonian academies and the exilarch. Nor can we measure the scope of geonic leadership in comparison with that of the Sanhedrin. Nevertheless, it seems evident that the geonim perceived themselves as supreme leaders of the Jewish world of their time and hoped that others would, too. While the tenth and eleventh centuries witnessed the growing importance of regional Jewish communal affairs in Egypt and North Africa, a considerable part of the Jewish world continued to show loyalty to the Babylonian geonim.

Geonic authority was, for some, a source of exclusive spiritual guidance and administrative control; but for others, it was compromised, if not replaced, by additional sources of social power. The geonim claimed authority on the grounds that they constituted a direct link to the talmudic sages. This asset was put to use against competing centers of authority such as the exilarch and the Palestinian academy. Using their reputation and building upon a network of personal ties with former students, the geonim cajoled and demanded the subordination and enduring loyalty of regional communities. Constant appeals to supporters at regional levels reveal an ongoing struggle for power. The distribution of

honorary titles to leading communal figures, the transmission of self-promoting materials, and extensive exchanges of letters with regional leaders may all be seen as part of an ongoing attempt to counter threats to geonic power. In addition, the geonim had an interest in preserving the social power of regional supporters. Correspondingly, preserving judicial authority was an integral part of local and regional Jewish politics of the time, and the struggle for judicial power within the community was a focal point of political contention.[112]

The judicial setting in the geonic period was founded on principles expressed in early rabbinic sources. This diverse structure of the Jewish judiciary was maintained through the active service of scholars, communal officials, and prominent laymen. Here, legal knowledge, scholarly reputation, and social rank often merged as sources for judicial legitimacy. These were of particular value in communities outside direct geonic control.[113]

Despite what may appear as a loose organization channeled through diverse forms of authority, it is precisely the intercommunal ties, linked by a relatively unified halakhic base, that allow us to perceive the geonic realm as a legal order. The vitality of the rabbinic judiciary is primarily confirmed through the testimony of Geniza documents.[114] The halakhic principle that allowed almost any individual to serve as judge—provided that he was a Jewish male with a clean record and was not a relative of one of the litigants—eased the process of recourse to Jewish law. Yet despite the halakhic permission to appear before any given Jewish tribunal and the heavy reliance of these tribunals on the approval and collaboration of the public, the geonim tried to encourage litigation before appointed courts. In a responsum mentioned above, an anonymous gaon stipulated that "in every place where there is an appointed judge who oversees law and justice, the plaintiff should turn only to him and not to the public."[115] This demand can be seen as part of a wider trend, described by Robert Brody as the "increasing institutionalization of the academies."[116]

Certain social circumstances had a direct impact on the nature of the Jewish judiciary.[117] The personal character of the Jewish judiciary did not stem solely from the fact that people had the freedom to select their judges but also from the realities of small-scale communities in which members maintained close familial, social, and commercial ties. Moreover, many, if not most, of the regional Jewish elites were engaged in commerce and through it were in contact with one another. Thus it is highly likely that judges and litigants were bound to one another by ties outside the court. This fact also contributed to the effectiveness of judicial decisions.[118] Despite their meager coercive power,

"the cohesiveness of comparatively small groups . . . largely compensated for this weakness."[119] Moreover, the plurality of courts already evident in early rabbinic sources was enhanced during our period because of the growth of Jewish communities, particularly in the western parts of the Mediterranean. Jewish migration also meant an importation of new traditions and practices. This introduced a social setting of coinciding congregations and, in some cases, coinciding legal courts, as in the case of Fusṭāṭ, which hosted separate courts for the Palestinian and Babylonian congregations.

Concurrently, our evidence conveys an image of a delicate balance between the Babylonian centers and the Jewish communities in Egypt and North Africa. This balance was maintained through a heightened concern for office and honorific gestures guided by constant preoccupations with loyalty, obedience, trust, and networking. It is in this context of ties between the geonim and regional officials that we should locate Jewish judicial arrangements. In order to properly appreciate the judicial roles of expert judges, lay judges, and congregations, it is essential that we realize the social setting in which these people operated. During the tenth and eleventh centuries, the Babylonian geonim made constant efforts to gain the support of these leaders in Egypt and North Africa. Claiming superiority in the realm of the halakhah, distributing honorary titles, and maintaining frequent contacts with former disciples were all part of a broader geonic endeavor to sustain power. These ambitions merged with a living legal tradition and, as such, contributed to the structurally diverse and decentralized character of the Jewish judicial setting.

A comparison of Jewish and Christian social institutions casts light on some notable differences between the two religious communities, as well as a few striking similarities. Eastern Christian communities in the first few centuries after the Islamic conquest consisted of urban as well as rural societies. Like their pre-Islamic predecessors, small rural communities were often dependent on the authority of local figures who were not part of the ecclesiastical apparatus. Monks, recluses, landowners, and village headmen served here as an alternative to ecclesiastical authority and therefore were a source of concern for the church. In the cities, too, we may assume, ecclesiastical leaders were unable to achieve a monopoly over Christian social affairs. We find references in West Syrian canon laws and East Syrian judicial decrees to Christian officials who had access to Islamic executive power. These officials appear to have undermined church authority through their ties to the Islamic administration.

Unlike Eastern Christians, the majority of medieval Near Eastern Jews were concentrated in urban centers. For Jewish confessional elites, the geonim,

and regional leaders, this meant greater accessibility to their respective congregations. But like their Christian counterparts, Jewish leaders were exposed to competing claims of authority within their own community. These claims, advanced by the supporters of rival geonic centers, had a factionalist effect on regional communities, especially outside the realm of direct geonic authority.

Whereas the category of Eastern Christian elites in the early Islamic period included individuals of ecclesiastical and nonecclesiastical backgrounds, Near Eastern Jewish elites were primarily divided along the lines of congregational affiliations. Accordingly, ecclesiastical leaders had to negotiate their position with nonecclesiastical Christian elites, while the geonim were forced to wrestle with the shifting loyalties of regional leaders. In both these realms, however, we are dealing with groups of confessional leaders who appear to have been continuously preoccupied with sustaining their authority in the absence of effective means for its imposition. Lacking the coercive power of a state-based administration, ecclesiastical and Rabbanite leaders had to find alternative ways of advancing their respective agendas—patriarchs and bishops by relying on the loyalty of their clergy, and the geonim on the collaboration of regional leaders. While patriarchs and bishops communicated their messages through the ecclesiastical hierarchy, the geonim built upon what was often the voluntary consent of former disciples and colleagues who went on to fulfill leadership roles in regional communities. Accordingly, in grounding their claims of authority, ecclesiastical and Rabbanite leaders drew on a variety of social capitals. Whereas the bishops claimed apostolic succession, the geonim presented themselves as heirs of the great Sanhedrin and descendants of a long chain of Rabbanite authorities who could be traced back to tannaitic times. Furthermore, Christian and Jewish confessional leaders claimed authority on account of their prerogative to interpret and accommodate divine law.

Thus, lineage, continuity, and scholarly erudition were some of the more important forms of capital upon which confessional leaders based their authority. Here, texts of diverse kinds—legal regulations and answers as well as chronicles, legendary tales, and hagiographies—assumed a crucial role as conduits for claims of authority. The dissemination of these texts and the implementation of their message underscore the role of communication between centers and periphery in the consolidation and sustenance of authority. Exhortations for ecclesiastical discipline alongside rebukes of rebellious clergy were not infrequent in the ecclesiastical discourse and can be found in the surviving narratives. In Rabbanite circles, these took the form of intercommunal

polemics, master-disciple networks, pleas for legal queries, and an extensive exchange of letters.

A survey of Christian and Jewish judicial institutions reveals a relatively overlooked group of informal institutions. As heirs of a late antique legacy of social organization, Christian and Jewish individuals continued to fulfill judicial roles outside the formally appointed episcopal and rabbinic courts. These judges and arbiters were able, in both religious worlds, to perform judicial services, thanks to a similar dynamic. This dynamic may be described as one of reciprocity, of a contractual exchange, as men of spiritual reputation and political power outside formal confessional institutions negotiated their authority. Alternatives to judicial authority should be examined within the context of the structural differences between ecclesiastical and rabbinic social institutions.

The ecclesiastical judiciary, tracing its origins to the *episcopalis audientia*, was centered on the judicial authority of the bishop, who, in turn, delegated his authority to lower-ranking clergy. By contrast, the rabbinic judiciary in the geonic period was of a much looser nature, decentralized and diverse. While the ecclesiastical judiciary operated under a hierarchical and strictly defined apparatus, the rabbinic court system reflected a relatively diffuse and informal arrangement contingent upon particular circumstances. This is not to say that the rabbinic organization lacked order, structure, or even hierarchy but only that it appears to have possessed the sort of flexibility that was absent in the ecclesiastical judiciary. Whereas Christian laymen were rejected by ecclesiastical authorities and denied all judicial prerogatives, prominent members of Jewish communities were embraced by the rabbinic judicial apparatus and were regarded as an integral part of it.

The ecclesiastical and rabbinic legal orders shared a crucial weakness: possessing little coercive power, ecclesiastical and Rabbanite judges were highly dependent on the goodwill and cooperation of their respective communities for the implementation of their judgments. Yet whereas ecclesiastical judges, as members of a highly institutionalized organization, were likely to be identified by their lay coreligionists as a separate group, Rabbanite judges seem to have been more integrated into their own communities.[120] Whether institutionally remote or socially embedded, ecclesiastical officials and Rabbanite judges were part of an elite group—a religious elite—seen by many of their coreligionists, as well as by the Muslim authorities, as leaders of their communities. Thus, a crucial link between the judiciary and the principle of communal autonomy was established, as the demands for exclusive judicial authority coincided with demands for communal authority.

CHAPTER 5

Christian Recourse to Nonecclesiastical Judicial Institutions

A papyrus from the town of al-Ushmūnayn in central Egypt, dated around the beginning of the tenth century, records the appeal of two Christian residents of al-Rayramūn to an Islamic court. In it, the litigants express their explicit wish to be judged according to Islamic law (*bi-muqtadhā al-shar' al-sharīf*).[1] Such occurrences of Christian recourse to extra-ecclesiastical courts were not uncommon, as is confirmed in the contents of ecclesiastical legal collections and canon laws issued at individual synods in the period following the Islamic conquest.[2] But the reasons for this widespread phenomenon, as well as its diverse character, stand to shed light on the social circumstances in which it occurred. An important factor behind the weakening of the ecclesiastical judiciary was a relatively recently introduced and somewhat unfamiliar ecclesiastical civil law. In this regard, we should note Išō'bokt's attempt to introduce a uniform and unified ecclesiastical jurisprudence, as well as testimonies of irregularities in the ecclesiastical legal realm.[3] These attest to a general state of inconsistency and unfamiliarity with civil regulations among episcopal judges. It is with these considerations in mind that we turn to examine the reasons for and ecclesiastical responses to Christian recourse to extra-ecclesiastical judicial alternatives.

Recourse to Nonecclesiastical Justice: Incentives

Validation and Enforcement

As noted in Chapter 2, the consolidation of Islamic rule and its emphasis on domestic affairs was accompanied by, among other things, the crystallization and elaboration of an Islamic judicial apparatus. The new legal order was in a

position to offer an attractive alternative to those of non-Muslims in general and the churches in particular. It was a legal order sanctioned by the ruling majority and, as such, possessed greater means of enforcement.[4] Whereas an ecclesiastical judge had as his only instrument of enforcement the punishment of excommunication, the *qāḍī*'s decision could often be enforced by the local police (*shurṭā*).[5] As the Islamic bureaucracy developed, registering property and overseeing business transactions in the local market, the need to validate economic ties through an Islamic court grew stronger.[6] Moreover, for a contract to be enforceable by an Islamic court, it had to be issued there in the first place.

An Islamic court record from Egypt, written in 1003, concerns the emancipation of a slave girl. The document mentions a Christian woman, Isṭūrheyūh, daughter of Serge ibn Ablīde, who declared the emancipation of a slave girl called ṣafrā in Arabic and Dajāsha in Coptic.[7] At the bottom of this declaration, we find a list of three, presumably Muslim, witnesses. The name of the emancipator appears to be a Coptic name,[8] whereas the formula toward the end of the document is a paraphrase of Qur'anic verses.[9] Another document, dated 1056, attests to a commercial transaction between the Christians Abū Sarī ibn Helia ibn Rafrafīl and Thīdros ibn Kīl ibn Halistūs, both from a village in the Egyptian district of al-Fayyūm.[10]

Questions of Inheritance

While references to questions of inheritance in Christian legal sources are relatively frequent, we find that nonecclesiastical courts served as a means for both securing and escaping the implementation of wills.[11] A concern for the former can be seen in a document of release issued around 697-99, found in the Egyptian monastery of Apa Paulos on the mount of Jeme. In what appears to be an administrative court of the Muslim governor of Egypt, presided over by a *pagarch*, the document records a monk's pledge to leave a sum of thirteen holokottinos (Roman solidi) for charitable purposes.[12] A document of this sort was usually issued as part of a settlement of inheritance, where the addressee was released from any future suit against the property or funds he received. The monk gave his commitment not to appeal to any other tribunal in order to retrieve the sum.[13]

Still, ecclesiastical institutions were not always able to secure the implementation of wills in which pledges of property were made to the church. Canon 8 issued at the aforementioned West Syrian synod held in 896 states:

"The wills coming from the people to the churches, monasteries, and the poor shall be entrusted into the hands of the stewards, those who have been set apart for this [duty], and not into the hands of the members of the family. A brother who is seen to transgress [*'bar*] this regulation [*ṯḥūmā*] and especially if he takes refuge [*netgawwes*] with the outsiders [*barrāyē*], is not allowed to enter the church of God until he no longer transgresses the word of God."[14]

The offense to which the canon refers concerns those who have entered monastic life and have entrusted their property to their families instead of abiding by the stipulation to hand over such property to a monastic steward. The canon also suggests that one way of withholding property from the church was by taking "refuge with the outsiders."

Another example of a dispute over the property of a monk is provided in a decree issued by the East Syrian catholicos Ḥnanišō' II:

> In the year sixty-nine (688) of the rule of the Arabs, when we used to be in the cities of the catholicos (Seleucia and Ctesiphon), Qardag, abbot of the monastery of our father Abraham, appealed to us against the heirs of Qardūnā, once abbot of the same monastery. A property was given to Qardūnā at the time of his departure from the monastery by the catholicos, George (fl. 661–80/81). [It has been given to him] so he may provide for himself during his lifetime only, [yet Qardūnā's heirs] have laid hold of the inheritance as something that is rightly theirs. And although many times they have been told and reproved by the abbot and others that they are wrongly taking that possession and should hand it over, they have not submitted. Therefore, we who attest to this quarrel, wish to draw your attention, in accordance with what that abbot Qardag has asked us. We have learned from you about the matter through Ormizd, what you know, that the property was given to Qardūnā and his brothers from George for his lifetime only; and it was not meant for eternal inheritance. Therefore, when we received this testimony from you we confirmed it, that all the property . . . whether houses or cattle or mills or vineyards or fields . . . should be returned to the monastery. . . . It is not lawful for anyone to claim this property. Whoever acts against our verdict will be excommunicated [*mettaḥam*]. . . . We have issued this decree not just with regard to your testimony but also because Qardūnā and his kinsmen are no longer bound by divine law [*dinā*].[15]

Ḥnanišō‘’s decree presents a case in which family members of a former abbot attempted to gain possession over property that belonged to the monastery. Though the case does not deal with an appeal to external judges, it may allude to a case in which Christians had recourse to an Islamic court. This can be accounted for on the grounds that Islamic law "recognizes succession *ab intestate* as the only form of succession."[16] Interestingly, in the later part of the decree, Ḥnanišō‘ refers to an instance in which Qardūnā bribed certain "close associates" of the authorities (*šalliṭay zabnā*) so that they might assist him against the church during the reign the catholicos of Išō‘yahb III.[17]

Matrimony

According to Walter Selb, regulations dealing with matrimonial procedures were still exceptional in the seventh century, as legislators continually attempted to formalize them.[18] The formal fixing of the wedding ceremony and its Christianization were achieved at a relatively late date.[19] By the ninth century, it was customary among Christian communities in Mesopotamia for a marriage ceremony to include the delivery of a ring by the groom, a priestly benediction, and the testimony of a Christian layman. The procedure is partially elucidated in Išō‘bokt’s book of laws:

> As for a Christian man who puts down the engagement conditions [issues an engagement contract] without the mediation [*meṣ‘āyūtā*] of priests and believers, through a document or mediation of pagans [*ḥanpē*], and takes a Christian woman as wife, yet afterward he [regrets and] does not wish to take her: we do not forcefully compel such a man to take that woman according to Christian law [*nāmūsā*], since he had not married that woman according to Christian law [in the first place]. [Incidentally,] those pagans also do not stipulate that a man can leave his wife whenever he pleases. Therefore, also we do not compel them, for they had not established their covenant before us.[20]

Išō‘bokt’s definition of a properly conducted matrimonial agreement can be deduced from his description of an invalid one. The mutual obligations established through a matrimonial procedure that did not include some basic required elements were not binding in the eyes of ecclesiastical jurists. The

stipulation also suggests that non-Christian figures were overseeing Christian matrimonial agreements.[21] The couple that chose to unite "through the mediation" (under the authority) of non-Christians was to abide by the rules of the legal order that had jurisdiction over this marriage; ecclesiastical jurisdiction had no application in such a case.

A survey of Islamic legal opinions on the validity of non-Islamic marriage agreements shows that among the early Muslim jurists, some did not regard a marriage valid unless it had been contracted according to Islamic law.[22] This alone may have been an important factor behind the decision to draw up marriage contracts outside the church. It stands to reason that non-Muslims who sought to legalize their matrimony based on Islamic principles would have drawn up their marriage contracts in Islamic courts. There are some indications that by the ninth century, certain Christians chose to unite in matrimony by notarizing their marriage in an Islamic court. Thus, for example, we learn about a marriage contract from 885 between Yohannes, son of Shanūda from the Egyptian town of Ashmūn, and Darwā, daughter of Shanūda.[23] While the parties' names indicate their Christian background, the formula of the record attests to the fact that the court was Islamic.[24]

Nevertheless, we should not assume that every reference to non-Christian marriage denoted marriage contracts drawn up in Islamic courts. It is plausible that nonecclesiastical marriage arrangements also form the background to Canon 13 issued at the synod of the East Syrian Church of 676:

> A woman may not unite with a man without the consent of her parents, by means of the Holy Cross and a blessing priest. Women who have not experienced marriage and who were betrothed through their parents' household should be betrothed to a man through Christian law [*nāmūsā*], according to the custom [*ʿyādā*] of the believers, the consent of their parents, by means of the Holy Cross of our salvation, and through the priestly benediction. . . . It is necessary and very useful that the betrothal contract be carried out by means of the source of our life and our salvation. . . . If they transgress [*nʿbrūn*] these things, wishing to unite in a novel manner, despising the proclaimed law [*nāmūsā*], when they have mutual complaints . . . they shall remain without a legal claim against each other and shall not be considered worthy to be delivered from their oppression by those appointed judges [*aylēn*

> *d-sāymin ʿal dinā*]. In addition, they shall be excommunicated from the church.[25]

It is difficult to see this canon issued in response to the registration of Christian matrimonial agreements before Muslim *qāḍī*s.[26] Nonetheless, irrespective of the exact nature of the arrangement to which the canon refers, its contents manifest the legislative principles by which ecclesiastical jurists sought to undermine the validity of such arrangements. Both this canon and Išōʿbokt's regulation follow a legal principle according to which marriages that were improperly conducted were deemed invalid and thus kept outside the jurisdiction of an ecclesiastical court. In addition to regulating Christian marriage and exhorting against marrying "in a novel manner" (without the sanction of the church), the canon warns that those married outside the church forfeit the option of appearing before an ecclesiastical judge—a point worth bearing in mind, should they wish to defend their matrimonial rights before an ecclesiastical tribunal in the future. This particular point is repeated in Išōʿ bar Nūn's (d. 828) law book: "There are people who said simple words to one another regarding their children, sons and daughters, so that they marry them to one another, while not resorting to the testimony of a priest and their fellow believers and [without] presenting the Cross, the Holy Water, and the ring. [When] afterward, they do not wish to speak to one other, there is no verdict [*gzār dinā*] in their case."[27]

In the West Syrian Church, we find similar marriage procedures. Canon 31 issued at the synod of Bēt Bātin held in 794, states:

> Since it is a divine thing to give a woman to a man, we have established that it is not permissible for any believer to get engaged to a woman without the intermediation of a priest. The engagement should be done in this manner: The parents of the young man and the young woman join in the same place. . . . [O]nce [the couple] wishes to get engaged they enter a church and deposit the ring by the holy altar, where they are brought together as also those who are summoned for testimony. . . . [T]hey thus become engaged through the intermediation of the Holy Church.[28]

The trend of alternative matrimonial arrangements met a harsh response on the part of West Syrian jurists who equated "secular marriages" with adultery. Canon 6 from the aforementioned synod held by the West Syrian patriarch

Dionysius of Tell Maḥrē in 817, states: "If a believing man or a believing woman burns with lascivious desire toward those [institutions] that are called secular marriages [*zawāgē ʿālmānāyē*], he truly commits the abominable impurity of adultery."[29] In the case of irregular marriages, the West Syrian legal discourse appears to take a harder line than that of the East Syrian one. We may note in the last example that the canon defines the nature of the offense ("the abominable impurity of adultery") and the immoral quality that has led to it ("lascivious desire"). The harsh tone might reflect, in this case, the proliferation of "irregular betrothals," of which Canon 11 of a West Syrian synod from 878 speaks: "With regard to the many quarrels [*ḥeryānē*] and confusions that we have seen . . . that have happened in the churches and the homes of the believers on account of betrothals that are not regular [*lā mṭaksūtā*]) . . . the betrothal shall occur through the mediation of the priests . . . by all means so that they gird up the ecclesiastical blessings, through the blessings that the priests give, in the comeliness of regularity and the custom of the heads of the fathers."[30]

The canon depicts irregular betrothals as a source for disputes and confusions. These were likely to occur, as we learn from East Syrian regulations, because of the unwillingness of the church to deal with conflicts resulting from matrimonial arrangements made outside it.

Influence over Judgment

Another advantage to the use of Islamic courts derived from the role that Christian laymen played in Islamic administration. These officials offered their coreligionists useful means for achieving personal ends. As servants of the court and its administration, Christian officials were in a position to intervene before the rulers in favor of their coreligionists.[31] Ecclesiastical legislators were well aware of these methods, as personal ties with Christian courtiers could work against the church itself. Canon 4 of the West Syrian synod held in 817 attests to the presence of Christian dignitaries who would intervene on behalf of those condemned by the church:

> A presbyter or a deacon or a believing man or a believing woman under excommunication by the bishop for transgression of the law [*ʿbar nāmūsā*], whatever it may be, has recourse [*metgawwes*] to the secular rulers [*šūlṭānē ʿālmānāyē*] or to some other [person] from another [cf. Vööbus: "foreign"] tribe [*aḥrānyē šarbātā*], those

> who are outside [*l-barr*] the fold of the church, or to a man of the dignitaries of the Christians so that the bishop is pressed by any one of all these actions and by the intercession of these various persons, to loosen the law of God and the excommunication that has been legitimately imposed.[32]

Christian officials in the Islamic administration also functioned as secretaries, as, for example, under Abbasid governments. They were employed in, among other places, bureaus of justice as scribes, archivists, and local court administrators.[33] Because of their office, these secretaries were required to have a good knowledge of juridical proceedings and statutes.[34] By taking part in the life of both their Christian congregation and the Islamic judiciary, Christian officials may well have served as intermediaries between the two.

Escaping Judgment

Canon 4 of the West Syrian synod held in 817 also highlights a central motive behind violations of ecclesiastical judicial boundaries: the avoidance or reversal of ecclesiastical judicial decisions. Išō'bokt refers to a case in which a defendant in a trial originally held before an ecclesiastical judge went to a "pagan" (*ḥanpā*) judge and sued the claimant. In doing so, Išō'bokt argues, the defendant caused harm to the claimant. Therefore, "the harm, damage, and toil shall be claimed from the one who litigated before pagans and will be used against him even through [his] seizure [*ēsārā*], namely, through excommunication [*kelyānā*]."[35] By turning to a court outside the church, the defendant may have attempted to manipulate the alternative legal institution for a verdict in his favor, or simply to exploit what could have been an advantageous regulation within a different legal order.

The appeal to an alternative court in order to counteract an ecclesiastical verdict was, understandably, a source of concern for the church, as it undermined its authority, particularly that of its leaders. A recurring theme in canons issued at West Syrian synods is that of individuals who were excommunicated or who received an unfavorable sentence. Some of these individuals turned to nonecclesiastical bodies to escape or revoke the ecclesiastical sentence. Canon 11 issued at a synod in 758 under the leadership of the West Syrian patriarch Giwargi I[36] (d. 790) states: "One who has lawfully [*nāmūsā'it*] been excommunicated [*psiq*] by his bishop and who then goes to take refuge

[*gawsā*] among pagans [*ḥanpē*] as someone who absolves [*nḥassē*] the canon and annoys [*malez*] his bishop—the curse [*ḥermā*] of God from the entire synod shall be upon him so that Christians shall not know him at all."[37]

The offense of taking "refuge among pagans" to which the canon refers is ambiguous. The Syriac verb *gws*, translated by Arthur Vööbus in the sense of "seeking refuge," can also be taken to mean "taking recourse." Canon 25 of a West Syrian synod of 794 states: "He who abandons his bishop and takes recourse [*metgawwes*] to secular rulers [*šulṭanē ʿālmānāyē*] . . . is like that one who harms [*maḥssar*] his companion in one of the ways—we have determined by the dominical anathema [*psāqā mārānāyā*] that he should not enter the church and have intercourse [*netḥallṭūn*] with Christians."[38]

It could be that the ambiguity in the meaning of *metgawwes* in this case is not accidental but rather indicative of the conflation of the act of appealing to external authorities with that of seeking refuge outside the church. In other words, turning to an external authority in a way that undermines ecclesiastical authority was more than a mere violation of its jurisdiction; it was an act of flight from the implementation of justice by taking refuge with an illegitimate authority.

What was the nature of such an action? Does it denote seeking the protection of external authorities or, rather, is it a term used to denote a judicial process in which individuals appeared before an alternative tribunal in an attempt to revoke an ecclesiastical verdict? An extensive collection of synodical acts of the West Syrian Church contains quite a few canons that refer to the phenomenon of Christians "seeking refuge among / having recourse to" nonecclesiastical authorities. Many of these canons were issued in response to petitions submitted to Muslim authorities by members of the clergy at moments of internal dispute within ecclesiastical circles.[39] In Egypt, a contemporaneous incident concerning the fifty-fifth Coptic patriarch, Shenoute I (d. 880), suggests a possible background to this legislation.[40] The author of his biography in the *History of the Patriarchs of the Egyptian Church* relates an affair in which a certain individual who sought to be appointed bishop was refused by Shenoute. Consequently, the candidate for the office took the following steps:

> He found a man who was a monk, a native of Syria, and he went with him to his place of dwelling and gave him money and clothed him with garments. He instructed him to walk with him as if [the monk] was the patriarch, and he should borrow from him money and go with him to witnesses to testify for him. When he had

> arranged this with the monk, he went with him to witnesses who did not know the patriarch, and they said to him: "We testify for thee," and he said: "It is well." Then he took the certificate and concealed it on him, and he was seeking a day to find a means by which to bring the father to the *hakim* [*sic*].[41]

The story above narrates the manner in which a candidate for a bishop's office attempted to impose his will on the Coptic patriarch by manipulating a nonecclesiastical court. Had he succeeded, the man would have obtained the desired office by forcing the church to accept the court's verdict. We may assume a similar background in the following two canons issued by Coptic patriarchs. Canon 29 issued by Patriarch Christodulos (d. 1077) decrees:[42] "If a deacon or another person has spoken against a priest, and has gone against the order of the church to seek aid from the sultan or judge, and has turned away from the priests and the church to other than they, and has claimed that which is not his by right, if he be a priest, let him be suspended from his office, and if he be a layman, let him be denied the Eucharist."[43]

The point is made once more in Canon 12 of a synod convened in 1078 by Christodulos's successor, Cyril II (d. 1092):[44] "It is incumbent on all the priests and laity, if a dispute or any secular matter arise between them, to guard against any of them going to other legal authority than that of the church, but they shall go to their bishop that he may decide between them, and they shall not go away to other legal authority, except at [the bishop's] command."[45]

Reviewing the various incentives for choosing nonecclesiastical tribunals allows us to assume that, for the most part, Islamic judicial institutions served as immediate alternatives to ecclesiastical ones. All the same, in line with the diverse image of Christian elites in this period, it is important to note that Christians had recourse to other judicial institutions as well. Ecclesiastical concerns for judicial exclusivity were not restricted to Islamic competition but also to "Christian" judicial institutions of no ecclesiastical official standing. These institutions posed a threat to ecclesiastical authority not on account of their confessional otherness but rather because of their social separateness. The Christians who rendered judgments outside the authority of the bishop provided an institutional alternative to the ecclesiastical judiciary. Nonetheless, whether it was a Christian or a Muslim judicial authority, the reasons that drove Christians to seek legal solutions outside the church were similar. Indeed, Christian nonecclesiastical and Muslim judicial authorities often represented appealing alternatives precisely because of their institutional detachment.

Ecclesiastical Responses

From the late seventh to the tenth century, numerous regulations deal with the problem of Christian recourse to nonecclesiastical judicial institutions. While these vary in tone, vocabulary, and the level of detail they provide, the majority of the regulations share a general disapproval of any kind of recourse to judicial institutions other than those of the church. So far, we have seen ecclesiastical regulations that addressed particular cases of Christian recourse to judicial bodies, primarily in order to provide a sense of the various motives behind such acts. In what follows, we shall look at a variety of legal regulations, both of a general and of a more specific kind, that prohibit recourse to external judicial authorities. Canon 6 of the East Syrian synod of 676, discussed in Chapter 3, is the earliest example of ecclesiastical preoccupation with recourse to external justice in the period after the Islamic conquest. Around the same time, Canon 24 in a series of canons issued by the West Syrian bishop Jacob of Edessa stipulated: "It is not lawful for the clerics when they have a lawsuit [*dinā*] to go to the outsiders [*barrāyē*] but to the judgment [*dinā*] of the holy church."[46] While both canons were written in Syriac and issued around the later part of the seventh century, differences in their vocabulary should not pass unnoticed. Whereas the East Syrian legislator used the epithets *ḥanpē*, "pagans," and *šalliṭay ʿālmā*, "secular rulers," the West Syrian refers to *barrāyē*, "outsiders."[47] We shall soon discuss this terminology.

Harsh Rhetoric

In the introduction to the acts of a West Syrian synod, held by Patriarch Qūryaqūs of Tagrit (d. 817) in 794, we read:[48]

> When we found that these laws [*nāmūsē*] and commandments [*pūqdānē*] had for a long time become obscure in the minds of the believers and have become as [a thing] unknown to them, we see that it is [for this reason that] various rebellions [*mardawātā*] and sufferings [*ʾūlṣānē*] of every kind have come upon us from foreign people [*bnayē nūkrāyē*]. On that account, we have been estranged [*arḥeknan*] from the relationship [*baytāyūtā*] to the Father who is in heaven, whenever we trod underfoot the laws and commandments that had been set by him. We, poor and sinners, thought . . . there

> was nothing that would remove . . . the various sufferings by the barbarian nations [*ʿammē barbarāyē*], unless we took recourse [*netgawwes*] to the divine law [*nāmūsā*].[49]

The passage above reflects an axiomatic outlook of ecclesiastical leaders: hardships and sufferings caused by "foreign people" and "barbarian nations"—most likely, the Muslims—are the outcome of an ongoing disregard for "divine law."[50] The restoration of God's providence (*baytāyūtā*) can be achieved only through "recourse" to his law. Canon 27, which we have seen in Chapter 3, is from the same synod: "None of the worldly ones has authority to speak among priests regarding ecclesiastical affairs. Therefore, if one has a lawsuit or a say, he should be brought before the bishop of his city."[51] In principle, the phrase "worldly ones," namely, "secular ones" could refer to powerful Christian laymen or to Muslims. But what was the nature of the "ecclesiastical affairs" to which the canon refers? Canon 46 provides us with some idea:

> He upon whom the anathema of the church [*psāqā d-ʿidtā*] has been issued has no authority to enter the church. If he dares [to do this] and transgresses [*neʿbar*] it or approaches [*metqareb*] the worldly authorities [*šūlṭānē ʿālmānāyē*], we have adjudged and decreed that he also shall not participate in the holy mysteries. Likewise also he who has been cast out [*meštadar*] by the bishop and the judges [*dayyānē*] of the town upon whom a sentence [*dinā*] has been put by them and who dares [nevertheless] to trespass [*ʿbar*] the sentence of their anathema [*psāqā*], he will have this punishment marked on him—Christians shall not mingle [*netḥalṭūn*] with him.[52]

The canon speaks about certain individuals who have been excommunicated by the ecclesiastical leadership and have attempted to reverse this sentence by appealing to "worldly authorities." Violating the anathema of the church (*psāqā d-ʿidtā*) through recourse to external authorities was meant to cause the latter to pressure ecclesiastical judges to reverse their decisions. This, we may presume, was one possible meaning of the legislator's reference to the interference of secular figures in ecclesiastical affairs.

As noted earlier, other instances of appeal to external authorities were prompted by disputes pertaining to religious practice. Qūryaqūs's tenure is known to have witnessed turbulences on account of disagreements over the celebration of the Eucharist.[53] One aspect of this state of affairs was the strong

opposition to the patriarch by a party of clergymen. Thus, according to the West Syrian patriarch and historian Michael the Syrian (d. 1199), Qūryaqūs tried to counter the threat by means of excommunication, while his adversaries in response petitioned the Abbasid caliph Hārūn al-Rashīd in 806: "We would like to inform the amīr that Qūryaqūs . . . is the enemy of God and of all the Muslims. He has built churches in Byzantium; he exchanges letters with the Byzantines and he refuses to remain in the place where you are."[54]

Canon 14 of another synod held by Qūryaqūs in 812 or 813 was probably issued in direct response to the events portrayed by Michael:

> If Satan moves confusion [*šgūšyā*] between two clergymen and a layman shall enter unlawfully between them and shall raise the hand against one of them beating or revealing him so that he helps to cause a quarrel, he has no authority to enter the church and participate in the divine mysteries for three months nor to loosen the *nezirūtā* [abstinence, continence, chastity] for one month. If any of the clerics shall seek help [*netgawwes*] among the worldly authorities [*šūlṭānē ʿālmānāyē*] in those affairs which they have become agitated among themselves regarding the altar and the church, despising the sentence [*psāqā*] of the Holy Church, he has no authority to serve or to approach the altar for three months together with the *nezirūtā* for one month. Under the same decision shall be placed that one who makes a factious meeting and tears asunder the altar and hinders the service or the sacrifice.[55]

Once again, we find reference to a lay figure fulfilling a judicial role by stepping into a dispute and, presumably on account of his decision, siding with one of the parties. The canon then speaks of those who seek refuge with or aid from "worldly authorities," along with an explicit identification of the offenders: clergymen. The canon's indication as to the nature of the matters in dispute, namely, "altar or church," echoes Michael's narrative about the differences that arose in Qūryaqūs's time over the celebration of the Eucharist.

The patriarch who succeeded Qūryaqūs, Dionysius of Tell Maḥrē, appears to have encountered challenges similar to those faced by his predecessors. According to Michael, Dionysius had the task of "healing the torn body of the church."[56] The introduction to these canons, issued in 817, resonates with some of the language and outlook articulated in the canons issued by Qūryaqūs:

> Because of the difficulty [*ʿasqūtā*] of the present time and the trouble [*šgišūtā*] and the confusion [*blilūtā*], nearly everyone has corrupted [*ḥbal*] his way on earth. . . .
>
> Indeed, due to the rigidity of the neck [*qšyūt qdālā*] and the contempt [*mbasrānūtā*] of the people who nearly all have been [thus] because of the laxity [*rapyūtā*] of the present time and because they have conversed [*ešta'iw*] with those outside [*l-barr*] and have been carried off [*etgrepw*] and have been corrupted [*etḥabelw*] and deceived [*ezdipw*]—we bring forward [canons].[57]

Yet rather than blaming the believers for the "sufferings of the time," as in the introduction to the synod of 794, the passage from 817 reflects a revised perception of causality: it is the "difficulty of the present time and the trouble and the confusion" that has "corrupted" peoples' ways and stiffened their necks. As a result, they have been led "to converse with those outside." Canon 4 of this synod tells more about the nature of the offense:

> If a presbyter or a deacon or a believing man or a believing woman under excommunication [*metpasaq*] by the bishop for transgression [*ʿbar*] of the law [*nāmūsā*], whatever it may be, has recourse [*metgawwes*] to the secular rulers [*šūlṭānē ālmānāyē*] or to some other [person] from another [cf. Vööbus: "foreign"] tribe [*aḥrānyē šarbātā*], those who are outside [*l-barr*] the fold of the church, or to a man of the dignitaries [*rišānē*] of the Christians so that the bishop is pressed by any one of all these actions and by the intercession [*pyāstā de-parṣūpā*] of these various persons, to loosen [*nešrē*] the law [*nāmūsā*] of God and the excommunication [*ṣāqā*] that has been legitimately imposed . . . he who dares anything like this so that he transgresses, this holy synod has determined that he shall be excluded [*netnakrē*] totally from mingling [*ḥūlṭānā*] with Christians and from participation in the holy mysteries and from the exchange of greeting and receiving with the believers. . . . [T]he Son of God will not pardon him in this world or in the future one, [for he is] as one who has become a traitor [*mšalmānā*] to the piety [*šafirūt dḥeltā*] and the law [*nāmūsā*] of the Christians.[58]

To a greater extent than in any of the preceding canons, this canon makes explicit reference to the various authorities to which members of the Christian community had recourse. Those "who are outside" are classified as "secular rulers," being

from "another tribe," or "a man of the dignitaries of the Christians," namely, a Christian lay leader or courtier. It should be noted that another possibility to Vööbus's rendering of *rišānē* as "dignitaries" is that of "magistrates," thus offering further evidence to the presence of nonecclesiastical Christian judges.[59] Nevertheless, while these phrases may still keep us in the dark as to the ecclesiastical legislator's meaning, Canon 4 of a synod of 878 leaves little room for speculation:

> Regarding the persons who shamelessly and ignorantly transgress [*'bar*] the law [*nāmūsā*] in something that has been determined, be it because of mortal sins [*ḥṭāhē d-mawtā*] or canonical censure [*taqnūnitā*] or punishment [*masāmbrišā*] that was right to place on them through the bishop or by another who has been appointed to correct this, who fall into rage and bitter madness so that they become enemies [*b'ldbābē*] of the legislator [*sā'em nāmūsā*] and devise a manner of perdition [*ābdānā*] against him and who seek to have their anathema [*psāqā*] abolished by means of worldly rulers [*šūlṭānē ālmānāyē*] or the chiefs [*rišānē*] of the Arabs [*ṭayyāyē*] or the Christians whose force is hard.[60]

Provided that both canons address similar concerns, it is plausible to conclude that the phrases of "another tribe" may indeed refer to "Arabs," namely, Muslims, and that "dignitaries of the Christians" refers to powerful Christian laymen. The image of competing authorities is highly nuanced in this canon and helps us perceive earlier canons more clearly. The tone and language of both canons suggest how seriously the offenses were taken by the ecclesiastical authorities: those who seek external judgment "devise . . . perdition against" the ecclesiastical legislator.[61] This brings us back to the introduction to the acts of the synod of 794, with its exhortation to the believers to have recourse to divine law. Without such recourse, the offender "shall be excluded totally from mingling with Christians," and "the son of God will not pardon him, [for he is] as one who has become a traitor."[62]

Unlike West Syrian legal materials, which derive almost exclusively from synodical acts, a large portion of the surviving East Syrian legislation comes in the form of codified legal regulations. Beside obvious differences in style, the two literary genres also attest to different means for advancing similar goals. A close reading of East Syrian regulations reveals a shared motivation among East Syrian and West Syrian legislators to discourage recourse to external judicial institutions. Yet in contrast to the high tone and, at times, harsh language employed in West Syrian texts, East Syrian legislation appears at first glance as

relatively moderate. Instead of resorting to rhetorical weaponry, East Syrian legislators concentrated their efforts on formulating regulations specially designed to disadvantage those who sought external judicial services. That said, however, East Syrian legislation is not entirely devoid of high tones. Thus Timothy's position toward those "Christians, men or women, who appear before outside judges [*dayyānē d-barrāyē*]":

> If they are Christian, how can they go to judges outside? For God has said to them, through the mouth of his servant, Elijah the Prophet: *Is it because there is no God in Israel that you are going to inquire of Baal-zebub, the god of Ekron?* (2 Kings 1:3) And if they go to judges outside, how can they be Christian? For Paul has said to them: *You cannot partake of the table of the Lord* (1 Cor. 10:21) and in another table. And *you cannot drink the cup of the Lord and the cup of Beli'al* (ibid.). If thus people dare to transgress [*ma'bar*] the apostolic canon, they must perform penance and almsgiving and cover themselves in sackcloth and ashes.[63]

Elijah's rebuke of King Ahazia's messengers who were sent to ask the idol in Eqron whether the Israelite king would recover from his injury is directed here toward those who choose to litigate outside the church. Timothy presents violations of the ecclesiastical jurisdiction as analogous to that of abandoning God and committing idolatry. Consequently, he decrees that in accepting the judicial authority of "outsiders," Christians forfeit their place among true believers.

Advantages

Vigorous exhortations are a rare event in the surviving East Syrian legal literature from the Islamic period. Another way to discourage appeals to non-ecclesiastical judicial institutions was to draw attention to the advantages of ecclesiastical ones. Išō'bokt's regulations include references to cases in which litigants did not possess sufficient evidence to pursue their causes before "external" and "secular" judges. Such deficiencies, it seems, were not treated as severely in an ecclesiastical court:

> If the claimant from the outset has no valid deed or if [the deed] is doubtful, and [if he] does not have valid witnesses or there is

> doubt [about them], outside judges [*dayyānē men d-l-barr*] do not accept his statement and do not summon the defendant to court. We, however, as we know and are convinced that [there are] many [who] give one another a thing discreetly, of which no one knows about, we accept his statement, even if he does not have a deed and witnesses, providing the claimant does not have a reputation of being dishonest, slanderous, and litigious. We adjudicate in his matter according to what is right.[64]

Išō'bokt makes a similar point in cases of deficient deeds, according to which "worldly judges [*dayyānē men d-'ālmā*], however, do not pass sentence."[65] Perhaps a similar concession should be discerned in the acceptance of non-Christian testimony. Let us consider first the early authority of the third-century church order, the *Didascalia Apostolorum*: "You shall not admit a testimony from the heathen against any of our people; for through the heathen the Enemy contrives against the servants of God. . . . For the heathen are not to know of your lawsuits, and you shall not admit the testimony from them against yourselves."[66]

In contrast to this explicit stipulation, Timothy's position with regard to a Muslim's testimony may appear surprising at first glance: "If [the Muslim witnesses] are God-fearing and faultless, then their testimony should be accepted, be it in a matter pertaining to a debt or another matter. Yet if they are not God-fearing, then their testimonies should not be taken, especially regarding a matter of belief."[67] The attribution of reliability to non-Christian testimony could have resulted from the fact that Christian testimony was not always available. Were an ecclesiastical judge to deny the testimony of non-Christians, litigators would be obliged to take their lawsuits elsewhere.

Whereas certain regulations were meant to exploit the limitations of a competing legal order as a means to attract litigants, other regulations suggest an attempt to disadvantage those who appealed to a nonecclesiastical judicial institution. The manner in which ecclesiastical legislators sought to prevent marriages from being conducted outside the church, discussed in Chapter 3, should be seen in line with their efforts to enable litigants to litigate on account of deficient bills. In the latter case, an argument was made for litigating before an ecclesiastical institution because of its procedural leniency; but in the case of marriages, legal arrangements conducted before nonecclesiastical authorities lost their validity within the ecclesiastical jurisdiction.

Disregard

Another way of discouraging recourse to external courts, or at least undermining it, was to ignore their judicial mandate in cases where they would clearly have one. Thus in Timothy's law book, we find a regulation addressing a case in which a Christian struck a fellow Christian. Clearly, such an offense falls into the category of penal law, where legal jurisdiction, according to *dhimmī* regulations, belonged to the Islamic judiciary.[68] Yet the regulation found in Timothy's law book dictates that recourse to a nonecclesiastical court for criminal offenses should be considered an even greater offense than that of assault. Timothy condemned any Christian who, in response to the physical assault of another Christian, sought retribution through the authorities (*šulṭānā*):

> Both the one who assaulted and the one who was attacked have acted in a non-Christian manner and one that is not becoming for Christians. The latter [is considered so] since he did not endure, but [chose] to recompense a bad deed through a bad deed. For it is not right for one bad thing to be recompensed by another. There is a greater offense in the latter than in the former, for whereas the former offense is simple, the latter is twofold [in its severity]. [In seeking retribution] he violated our Lord's commandment that [for a blow] in one cheek he turn the other cheek and give up his coat and cloak (cf. Matt. 5:39, 40). Second, he despised God's law, on account of what he said, "do not make your own judgment; I shall judge on your behalf" (cf. Rom. 12:19), said God. Yet [in seeking retribution] he has honored the law of the outsiders [*dinā d-barrāyē*] and of humans. It is, therefore, right that both men will be strangers to the church and the mysteries.[69]

Timothy's criticism of seeking external justice as an act of retribution arises from three violations performed through this act: striking back, seeking revenge, and giving precedence to "the law of the outsiders." All this is stated in a way that seems to mitigate the initial offense of physical attack. Timothy treats the act of seeking external judgment more severely than the violation of the divine commandment prohibiting physical assault. The regulation undermines the legitimacy of a civil authority external to the church that is entrusted with upholding public order. In a similar vein, and perhaps to a greater extent, two regulations in the law book of Išō' bar Nūn go as far as abstaining from any reference to the existence of an external civil tribunal:

> If a Christian holds out his hands into the blood of his fellow [Christian], in free will, he shall be excluded indefinitely from the church and from mingling with Christians, since it is not right that hands that have touched the blood of a human be in proximity to the holy mysteries.[70]
>
> If a man, of whatever rank, gives poison to another so that he may die, and his act becomes publicly evident, he shall leave the church indefinitely, since he is not worthy of partaking in the holy mysteries. And if the leader does not expel him after his deed becomes known then he will be held accountable before God.[71]

While both regulations address matters of a criminal nature, the absence of any reference to the Muslim civil authorities as enforcers of public order is striking. A logical assumption would be to view this effort as part of an ecclesiastical policy of confining internal Christian affairs to the ecclesiastical judiciary. Such an attempt would be in line with similar legislative steps designed to keep Christians away from the Islamic judiciary.

Pragmatism

Ecclesiastical regulations also reflect a certain willingness on the part of jurists to concede the fact that members of their community were appearing before nonecclesiastical institutions. When appearing before Islamic courts, litigators were in a position to force their opponents to appear in court. The point is addressed in Išō‘ bar Nūn's law book: "Christian people who have a lawsuit with one another and who despise ecclesiastical law by going before outside judges [*dayyānē d-l-barr*] so that they may judge between them, shall be firmly rejected by the head and bishop, who will exclude them from the church for a certain time. If one of them, however, was unwillingly summoned on account of the other's compulsion he shall not be rejected, but [only] he who has forcefully compelled his fellow [Christian] and pressed him against his will."[72]

Despite the general objection, under certain circumstances Christian lawmakers allowed recourse to nonecclesiastical institutions. We have seen in Chapter 3, through a ruling issued by Ḥnanišō‘, that the catholicos sought the intervention of "the authorities," should a certain stepson refuse to give his stepmother her share in the will of his deceased father.[73] It seems that the

catholicos, realizing the limited effect of the sanctions at his disposal, was willing to bring a matter of a civil nature to the discretion of nonecclesiastical judgment.

A regulation from Išō'bokt's legal collection concerning valid bills not only elucidates the legal principle underlying valid testimonies but also attests to the validity of bills issued outside the church:

> A valid deed is one that bears a signature of either those from the church, or those appointed by kings [*mālkē*] and rulers [*šalliṭānē*]. But a deed over which there is doubt is one signed by witnesses. Valid deeds that are brought before judgment can be legally used. But those signed by witnesses should be examined. If the witnesses who signed it are believers and are known by everyone in the place of that church as God-fearing, and there is a valid testimony regarding them, then we use [the deed bearing the witnesses' signature] as a valid one. But if this is not the case, then we doubt it.[74]

The regulation is akin to that of Timothy regarding valid witnesses.[75] However, whereas Timothy is prepared to admit the testimony of Muslims, so long as they are "God-fearing," Išō'bokt specifies that witnesses must be "believers," thus suggesting that they must be Christians. At the same time, Išō'bokt acknowledges the validity of deeds issued by Muslims authorities, the "kings and rulers." Such pragmatic considerations could not have been accepted unless ecclesiastical jurists had ascribed some measure of reliability to external institutions.

The Discourse and Its Agenda: An Examination of Christian Legal Rhetoric

One way of examining the legislative wordplay in canon law is by contrasting this phase of legislation with its earlier legal manifestations. Two principal early references to the judiciary that may serve useful for the analysis of the development of Eastern Christian ecclesiastical legislation are the passages in 1 Cor. 6:1-6 and chapter 11 of the *Didascalia Apostolorum*. The value of these sources derives from two special circumstances. First, as we shall see, Christian legislative sources dealing with extra-ecclesiastical litigation often include direct citations or paraphrases of these early materials. Second, both sources appeared in Syriac, prior or contemporary with the Islamic conquest,

and thus share a linguistic basis with regulations from the Islamic period.[76] The task of exploring terminological divergences by means of a synoptic study between early sources and those of the period under discussion is one that deserves its own study. Nevertheless, it is worth noting one such change with regard to the epithets used to refer to nonecclesiastical judges. The use of a particular epithet to denote the "other" may be of particular importance in the process of disclosing the agenda of the ecclesiastical legislators.
The New Testament's concern with believers pursuing litigation before non-Christians is found in the Pauline command from 1 Cor. 6:1–6:

> (1) When any of you has a grievance [*dinā*] against another, do you dare to take it to court [*ndūn*] before the unrighteous [*'awwālē*], instead of taking it before the saints [*qaddišē*]? (2) Do you not know that the saints will judge the world? And if the world is to be judged [*metdin*] by you, are you incompetent to try [*la-mdan*] trivial cases [*dinē*]? (3) Do you not know that we are to judge [*dayninan*] angels?—to say nothing of ordinary matters [*aylēn da-d-'ālmā*]? (4) If you have ordinary cases [*dinē*], then, do you appoint as judges those who have no standing in the church? (5) I say this to your shame. Can it be that there is no one among you wise enough to decide [*našwē*] between one believer and another [the Syriac version should be rendered "to deal equally between his brethren"]? (6) but a believer goes to court [*metdin*] against a believer, and before unbelievers [*aylēn d-lā mhaymnin*] at that?[77]

The command speaks of the exclusive judicial authority of the church and its leaders, namely, bishops, ambiguously referred to as "saints." It rejects the authority of the "unrighteous" and "unbelievers," referring to Christian lay or to non-Christian figures.

In the *Didascalia,* chapter 11, the appeal to non-Christian tribunals is treated in the "Exhortation to Bishops and Deacons":

> Now for a Christian this is becoming praise, that he have no evil word with any man. But if by the agency of the Enemy [*b'eldbābā*] some temptation befall a man, and he have a lawsuit [*dinā*], let him strive to be quit of it, even though he be to suffer some loss: and at all events let him not go to the tribunals of the heathen [*dayyānē de-ḥanpē*]. And you shall not admit a testimony from the heathen [*ḥanpē*] against any

Table 1. The epithet for nonecclesiastical judges in Eastern Christian legal sources

Principal terms	**NT**	***Didascalia***	**East Syrian synods**	**East Syrian treatises**	**West Syrian synods**	**West Syrian treatises**
Quarrel/matter/lawsuit	*dinā*	*dinā*	*dinā*; *ḥeryānā*	*dinā*	*ḥeryānā*	
Law/litigate/have recourse	*ndūn*		*netdinūn*; *nehwūn qdām parṣūpā*; *nepqūn mellayhūn*		*metgawwas*; *ešta'iw*	*metdinin*; *ndūnūn*
Nonecclesiastical judge	*'awwālē*; *lā mhaymnin*	*dayyānē de-ḥanpē*	*ḥanpē*; *lā mhaymnē*; *šalliṭay 'ālmā; barrāyē*	*ḥanpē*; *šulṭānē*; *barrāyē*; *dayyānē men d-l-barr*; *dayyānē men d-'ālmā*	*šūlṭānē ālmānāyē*; *a̲ḥrānyē šarbātā*; *ṭayyāyē*; *barrāyē*	*barrāyē*; *lā mhaymnē*; *dayyānē 'ālmānāyē*
Ecclesiastical judge	*qaddišē*		*aylēn d-sāymin 'al dinā; prišay men apisqūpā*; *dayyānē d-mhaymnē*; *aylēn d-metparšin le-pusqānā d-dinā qaddišē*; *qrayē*			
Render judgment/mediate	*ndūnūn*; *našhwē*		*ntdinūn*	*meṣ'āyūtā*; *dinā*	*pyāstā d-parṣūpā*	
Secular (worldly) affairs	*Aylēn da-d-'ālmā ennēn hānā*				*'ālmānāyē*	

> of our own people; for through the heathen, the Enemy contrives against the servants of God. Wherefore, because the heathen are to stand on the left (cf. Matt. 25:33), He called them "the left hand"; for our Saviour spoke thus to us: *do not let your left hand know what your right hand is doing* (Matt. 6:3). For the heathen are not to know of your lawsuits, and you shall not admit a testimony from them against yourselves, nor go to law before them (cf. 1 Cor. 6:1).[78]

Comparing the sources from the pre-Islamic period with those of the Islamic period enables us to identify the different epithets used to denote nonecclesiastical judges more clearly. Table 1 is a systematic attempt to make such a comparison. It is divided chronologically, denominationally, and according to literary genre. Against the two canonical passages quoted above from the New Testament and the *Didascalia*, the next four columns are divided into sources of East Syrian and West Syrian provenance. The latter are subdivided into synodical acts (e.g., the East Syrian synod of 676) and legal compilations (e.g., Išōʿbokt's legal collection).

While certain expressions show in the sources rather consistently—for example, *dinā* for lawsuit or dispute and the verb *dūn* for litigation and its synonyms—we can note differences in references to nonecclesiastical judges. In 1 Corinthians, nonecclesiastical judges are referred to as *ʿawāllē*, which could denote any of the following: "unjust," "unrighteous," "lawless," "evil," "wrongdoers," or "wicked men." In the New Testament and the *Didascalia*, these judges are identified based on their confession as "nonbelievers" (*lā mhaymnin*) and "pagans" (*dayyānē d-ḥanpē*), respectively. Eastern Christian Sources from the Islamic period appear to adopt some of these epithets and add a few of their own, mostly variants of the expression "secular rulers" (*šalliṭay ʿālmā*) and "outsiders" (*barrāyē*).

The term "outside" and its cognates were employed by early Christian sources in a variety of senses and contexts, among which are "pagan," "catechumens," "excommunication," "heresy," "a position outside of the ranks of clergy," "an outer circle of believers," "profane," and "secular institutions." This diversity of meanings and the classification of things as within or without reflect an effort to draw a physical line within a given social setting.[79] Thus Mark 4:11: "And he said to them, 'To you has been given the secret of the kingdom of God, but for those *outside*, everything comes in parables.' " Similarly 1 Cor. 5:11-13: "But now I am writing to you not to associate with anyone who bears the name of brother who is sexually immoral or greedy, or is an idolater,

reviler, drunkard, or robber. Do not even eat with such a one. For what have I to do with judging those *outside*? Is it not those who are *inside* that you are to judge? God will judge those outside. 'Drive out the wicked person from among you.' "

The passage in Mark distinguishes between those who have been "given the secret of the kingdom of God" and those who have not, namely, "those outside," but leaves room for ambiguity as to the distinction between these groups. The Pauline passage, however, reflects an attempt to create a physical separation between two groups of believers, the moral as opposed to the sexually immoral, covetous, idolatrous, drunkard, and so forth. The former, the well-behaved, are part of the internal zone of the community, "insiders"; the latter group, the offenders, are kept outside.

Of particular interest are the epithets employed in West Syrian synodica: "another tribe" (*aḥrānyē šarbātā*) and "Arabs" (*ṭayyāyē*). Early Christian legislators, when referring to external judges, chose to emphasize the ethical and confessional attributes of such judges. Their depiction in the early Islamic period as outsiders and the stress on their ethnic features is instructive, suggesting that ecclesiastical legislators sought to establish a social demarcation that was not limited to confessional differences. This leaves us with the expression "secular judges" (*dayyānē ʿālmānāyē*). Though often referring to Muslims in this period, it would be wrong to accept this interpretation in every instance in which a noun is followed by the adjective form of *ʿālmā* ("world," i.e., "worldly").[80] The recorded legal stipulations do not reveal their original meaning, and therefore it is quite impossible to determine whether a regulation had initially referred to Christian or Muslim judges. Both kinds of judges were known to handle legal cases of a civil nature: secular law or worldly law. Either way, the intention of ecclesiastical legislators was to underscore an overriding illegitimacy of rendering judgment on such matters outside the church.

West Syrian and East Syrian legal sources are almost unanimous in their objection to recourse to nonecclesiastical judicial institutions. Their insistence on ecclesiastical judicial exclusiveness is often accompanied by a terminology meant to invoke a notion of socio-confessional boundaries. Accordingly, regulations and canon laws addressing the issue of recourse to external judges convey an image of life within and outside a properly ordered Christian community. Life within this community involves attending church, participating in collective prayer and ritual, maintaining social ties with fellow believers, submitting to the leadership of the ecclesiastical hierarchy, and ultimately abiding by "divine law." Through the use of a set of vocabulary consisting of

expressions such as "transgression," "trespassing," "having recourse," "seeking refuge," and so forth, our sources convey an image of passing from life inside the community to that outside it. Consequently, the offenders find themselves forbidden to enter a church and mingle with fellow Christians, suspended from office, excommunicated, and denied the Eucharist.

Furthermore, the reasons for excluding offenders from the community are expressed in similar terms: they had "recourse to the rulers," conducted ceremonies "in the absence of priests and believers," drew litigants to secular judges, "took refuge among pagans," "abandoned their bishop," and "turned away from the priests and the church." As Palmer observed, the "need to defend Christianity against its enemies required the law to be laid down about what entitled a person to call her/himself a Christian."[81] Or, in other words, a terminology of sanctity was employed to define the boundaries of worldly affairs.[82]

Conclusion

From the outset, the rule was clear: disputes were to be handled within the fold of the Christian community before an ecclesiastical tribunal. Any transgression of this stipulation was perceived as a severe violation of ecclesiastical jurisdiction and, more important, as an act that verged on confessional renunciation. These are the terms in which ecclesiastical legislators chose to convey their message. Thus, a carefully designed discourse of inclusion and exclusion was put to use for the delineation of principles of normative behavior. The strong emphasis on the religious offense obscured the social implications of seeking justice outside the church, an act that did not necessarily have anything to do with religious convictions. Regulations meant to discourage litigation before nonecclesiastical institutions were fixed by ecclesiastical leaders throughout the Islamic world as early as the second half of the seventh century. In addition to reflecting the ecclesiastical position, these regulations serve to shed light on those particular instances in which people chose to turn to nonecclesiastical authorities.

Combined with the testimony of Egyptian papyri and historiographic narratives, East Syrian and West Syrian legal sources attest to the diversity and frequency of appearances of Christians before authorities other than bishops and priests. Christian and Muslim men of judicial authority of different social and institutional orientations constituted a plurality of alternatives to ecclesiastical judges. In this legally pluralistic setting, the Islamic courts were

often the preferred judicial venue for the validation of commercial transactions, the manumission of slaves, and marriage contracts. Securing such legal commitments, it appears, required more than an ecclesiastical confirmation in order to be held legally valid outside the boundaries of church jurisdiction. Individuals had choice in this matter, and a decision had to be made. But their considerations were not necessarily purely legal in nature. The intermediation of Christian officials in the Islamic administration offered Christian litigants a means of influencing the decisions of Islamic as well as ecclesiastical courts. Whereas in the case of the Islamic judiciary, this involvement may have increased its appeal, external attempts to influence ecclesiastical decisions were likely to weaken ecclesiastical judges.

In a state of legal pluralism, the disproportionate power of one legal order relative to all others bears crucial significance.[83] Power limitations, for example, made it difficult for church officials to impose the implementation of inheritance pledges to the church once family members of the deceased sought to annul them by turning to extra-ecclesiastical authorities. In fact, escaping an ecclesiastical judgment was a more common motivation of individuals who challenged church authority by appealing to other authorities. The phenomenon of Christian recourse to nonecclesiastical courts was driven by a mixture of mundane and ideological considerations; but in the eyes of ecclesiastical legislators, these different motivations were largely conflated. The principled opposition to ecclesiastical leaders through appeals to the Muslim authorities amounted to the same as appeals motivated by the practical concern for validating contracts or reversing unfavorable verdicts.

For ecclesiastical jurists, the different motives and circumstances behind appeals to external judicial institutions were of less importance than the trend itself. In their attempt to secure the authority of the ecclesiastical legal order, church leaders resorted to a highly reprimanding discourse, asserting their own authority and denouncing that of others. Those who overstepped the ecclesiastical jurisdiction were invariably labeled as lax, corrupt, ignorant, and shameless individuals who have fallen "into rage and bitter madness so that they become enemies of the legislator."[84] Their actions were likened to apostasy and presented as the cause of all contemporary hardships.

Judging from the East Syrian legal collections, it appears that ecclesiastical efforts to curb this phenomenon were also channeled through a variety of legal techniques intended to make recourse to alternative judicial institutions less attractive by issuing rules that would conflict with those of competing orders. Imbuing their own institutions with legal "advantages," such as the admission

of "doubtful" deeds and the testimony of "doubtful" witnesses, they thereby disadvantaged those who had originally appeared before external courts. Thus, for example, they stipulated that those who had conducted their matrimonial affairs outside the church forfeited the right to settle any later differences between them in an ecclesiastical court. The ecclesiastical response, however, was more complex than mere rejection and ostracization. There is some indication of a pragmatic approach on the part of ecclesiastical jurists, who acknowledged not only the fact that Christians had to appear before nonecclesiastical judges once compelled by the appeal of a contending party but also that certain decisions by ecclesiastical judges would have to be enforced by nonecclesiastical authorities. Jurists had to come to terms with the fact that Islamic courts were notarizing legal documents and therefore recognized their validity in ecclesiastical courts, too.

Finally, our discussion regarding the legal reform initiated by eighth-century ecclesiastical leaders must be noted in this context. Through the incorporation of civil regulations into a unified ecclesiastical legal code, the legal reform was aimed in part at countering the flow of Christian litigators to nonecclesiastical judicial institutions. The hope was that once the compilation of ecclesiastical legal principles would be completed in a way that regulated both the religious and civil affairs of Christians, the latter would no longer see the need to take their lawsuits outside the church.

Beyond its functional utility, an integrated and uniform body of legal regulations served the purpose of group identification. It prescribed a common way of life that was to be shared by coreligionists and maintained within the boundaries of ecclesiastical control. Yet the existing legal diversity and its institutional application—the targets of ecclesiastical reforms, exhortations, and regulations—were also expressions of an older tradition of social interaction that did not conform to ecclesiastical aspirations. Part of the agenda of church leaders should thus be seen in the context of an ongoing clash with competing legal orders. It was an agenda of social essence, meant to protect the positions, interests, and status of church leaders through the dictation of the normative behavior of their laity. Thus their aim was not restricted to safeguarding confessional boundaries; it included countering the judicial alternative posed by Christian individuals who stood outside the fold of ecclesiastical administration.

CHAPTER 6

Jewish Recourse to Islamic Courts

In a letter dating from 1030 by the Palestinian gaon Shelomo ben Yehuda, the gaon listed a series of Karaite allegations against the Rabbanites. Interestingly, instead of refuting these allegations, the gaon's principal line of defense was the claim that the Rabbanites should not be held solely responsible for these violations because such acts were committed by Karaites as well.[1] The gaon expressed his distress over the ineffectiveness of the practice of excommunicating those who sought judgment in Islamic courts: "We excommunicate those who violate God's Sabbath! [Yet] the majority violate it; for who keeps the Sabbath as it should be?!... [Should we then excommunicate] those who go out to litigate before the Gentiles and claim inheritance according to their laws, [while] many who are found in disadvantage litigate before the Gentiles?"[2]

This remark may best encapsulate the question of Jewish recourse to Islamic courts. Despite its avowed objection to the phenomenon and the apparent harsh measures against offenders, Jewish leadership was ultimately rather powerless in its attempts to suppress this reality. Recently, Jewish recourse to Islamic courts has been considered in the context of interplay between Islamic and Jewish law.[3] The aim of the present chapter, however, is to consider geonic responsa dealing with this phenomenon within the social context of their time.

This chapter begins with a discussion of the circumstances and incentives that drove Jews to seek the services of Islamic courts. For purposes of analysis, we shall attribute this to three main factors: the weaknesses of Jewish judicial institutions; the advantages inherent in the Islamic judiciary; and environmental causes, namely, factors that derive from life within a Muslim majority.

The second part of this chapter is an examination of geonic attitudes toward Jewish recourse to Islamic courts. As noted earlier, the scope of surviving

responsa is rather limited and consists primarily of replies to queries that were sent by Jewish officials in the "West"—Egypt, North Africa, and Spain—in the late ninth through early eleventh century.[4] In addition to the chronological gap, further distinctions between the Christian and Jewish legal sources should be noted. Whereas ecclesiastical legal positions were articulated through *regulations*, the geonim expressed *opinions*. The geonim, for the most part, did not legislate, nor did they address matters that pertained to a group, but only those pertaining to individual cases. Another important distinction has to do with the fact that when the geonim addressed the issue of non-Jewish tribunals, they appear to have been referring solely to Islamic courts.[5]

Jewish Recourse to Islamic Courts: Motives

Numerous Geniza documents attest to the centrality of Islamic judicial institutions in the daily lives of Jews.[6] Recognizing their leadership's sensitivity to this phenomenon, Jews exploited their freedom of choice as a means for legal manipulation. In a document referred to in Chapter 4, mentioning the appeal of two orphan girls to their congregation regarding their share in the inheritance of their father, the girls threatened to take their matter before an Islamic court:[7] "We cry to God, may he be exalted, and to you, the House of Israel—do not leave us empty-handed. You [who] excommunicate on the Mount of Olives all who obtain their inheritance through the judgments of the Gentiles. . . . [W]e are two orphan girls at home; there is no one who will support us but the Master of the world and Israel and their judges. Our sin will be on the head of the one who hears our cry and does not treat us two according to the law of the Torah in matters of inheritance."[8]

The girls mentioned in their appeal the practice of excommunicating on Mount Olives those members of the Jewish community who turned to non-Jewish courts. In doing so, they alluded to what might be the outcome should their matter remain unresolved.[9] By threatening to turn to an Islamic court and suggesting that the addressees would be held accountable for their sin, the girls hoped to induce the congregation to assist them.

Other examples of the presence of the Islamic judiciary in the background to internal Jewish legal affairs can be found in contracts between two Jewish parties. These often contained a reference to the possibility of recourse to an Islamic court.[10] As Goitein noted, these provisions should be seen as indications of a common practice to turn to Islamic courts.[11] Such legal threats were

not hypothetical; neither were the reasons for turning to Islamic courts. The motives that drove Jews to seek justice outside their communities varied and intensified according to circumstances.

Weaknesses of the Jewish Judiciary

In our discussion on the Jewish judiciary in Chapter 4, we saw that a considerable number of those who served as judges were, in fact, laymen who possessed legal knowledge. These men often served as judges while assuming additional responsibilities in their communities or being bound by other obligations, such as business partnerships.[12]

Two cases recorded in the Geniza exemplify how it may have been difficult to convene the Jewish court when judges were away. The first is a court record from Fusṭāṭ, written in 1016. It relates the case of a merchant from Palermo who protested having to wait a full month before the Jewish court would convene.[13] In another document from Fusṭāṭ, written in 1027, we learn of a defendant, a Jewish merchant from Spain, who wished to be judged by a Jewish court, yet one of the three members of the court had excused himself for being busy and for "other reasons."[14] In the first case, the merchant from Palermo complained to the police (*shurṭā*) in Fusṭāṭ, whereupon the head of the public police took the Jewish judge into custody.[15] In the second case, the merchant from Spain obtained from "the caliphal court a rescript to the governor of the capital to see him righted."[16] The matter was finally resolved by decreeing that "if the three judges mentioned would not take up the matter during the following two weeks, each party was free to apply to a government court."[17]

A crucial weakness of the Jewish judiciary was its limited coercive power. For modern scholars who have dealt with the question of recourse to Islamic tribunals, the issue of limited enforcement has been regarded as a central motive for preferring Islamic over Jewish tribunals.[18] Here it has been argued that the Jewish adoption of Islamic legal practices was partially the result of the fact that Jewish law was not state-sanctioned and therefore of limited means of enforcement.[19] The reliance of Jewish judges on the local public was crucial for implementing judicial decisions, most notably for coercing recalcitrant litigants or offenders of various sorts.[20]

Even with the cooperation of the public, the sanctions of a Jewish court were effective only so long as they were applied within the Jewish community.

Once the offenders stepped outside the boundaries of Jewish confessional jurisdiction, legal sanctions lost their value. This vulnerability of the Jewish judiciary was apparently exploited by those who had knowingly violated the law and sought to escape punishment. An example of such a motive could be the background to a responsum from an anonymous gaon: "A man who betrothed a woman had a brother, and that brother, an evil one, tempted his brother's bride and violated her so she became pregnant. Since she sensed that she was pregnant, they fled to the Gentiles and spent time there for many years."[21] The concern about Jews escaping communal judgment by seeking refuge with non-Jews is also expressed in a responsum attributed to Natronai Gaon (d. 858):[22] "[Concerning] a man who committed an offense and was seen [committing it] on a Sabbath or on a holiday, there is fear that [should his matter be addressed] after the passing of the Sabbath he may escape and seek refuge with a Gentile."[23] The tone of a query sent to Ḥayya Gaon suggests that avoiding Jewish judgment by appealing to the Muslims was not uncommon: "We wish to inform the gaon that [in those instances] when two litigants come to court, one strong and the other weak, we hear their arguments and [examine] their evidence. We then proclaim before them the verdict, and they leave. When the strong one refuses to pay his debt, decreed by law, he first seeks support with the authority of Ishmaʿel, thus escaping [the verdict]. Consequently, they [both] return before us and we arrange a compromise between them."[24]

At least in some cases of "seeking refuge among the Gentiles," the losing party or a convicted offender hoped that the verdict of a Muslim judge would be to his advantage. In another query, Ḥayya Gaon was asked about a case in which a debtor refused to obey the ruling of the local judges and pay his debt. The petitioners asked the gaon if they might refer the case to a Muslim judge and use the testimony of the Jewish judges and witnesses against the debtor. Instructively, the gaon advised that this course of action was not only permissible but even sensible.[25]

Still, the hesitation as to whether to appeal to an Islamic court for enforcement is noteworthy. The background of this hesitation can be discerned in a query of an unknown date concerning a debtor whose debt was recorded before a Jewish court.[26] Since the debtor would not comply with the Jewish court's judgment, the creditor turned to an Islamic court. The petitioner's concern was that the Jewish court would provide the Islamic one with testimonies that it gathered against the debtor, knowing that "this may lead to the debtor's arrest."[27] The jurisdiction of Jewish courts also ended in legal cases pertaining to Jewish apostates. It was therefore in the interest of creditors to issue deeds

of debt in Islamic courts as a means of safeguarding their loan. A responsum of Ḥayya Gaon mentions the case of a Jewish widow who had "an Arab deed of debt against a certain apostate."[28] Since the woman could not appear before the Muslim judge, she asked a prominent member of her congregation to stand on her behalf before the court and obtain the property for her.

Advantages Inherent in the Islamic Judiciary

Decisions issued in Islamic courts were not only enforceable but were also imbued with a formality that transcended Jewish jurisdiction. The common practice of registering lands in Islamic courts has been understood in the context of periodical surveys that were conducted by the Muslim authorities for tax purposes. The possession of a legal document written in Arabic and signed by a *qāḍī* proved useful once the Muslim authorities would seek to appropriate land.[29] Arabic legal documents from the Fatimid and Ayyūbid periods were simultaneously issued in Jewish and Islamic courts.[30] The dual registration of assets had to do with the fact that any transfer of property entailed a tax levied by the government and hence demanded its certification.[31]

From a responsum attributed to Saʿadya Gaon (d. 942) we learn about deeds of debt that were drawn up in Jewish and Islamic courts at the same time.[32] An explanation for *dhimmī* recourse to Islamic courts, though regarding Ottoman Damascus, appears relevant in our case as well. According to Najwa al-Qattan, such recourse should be seen, among other things, in the capacity of the Islamic court "as a public record office, a depository for all kinds of official and notarized agreements."[33] Thus, for example, a legal document issued in an Islamic court recording the purchase of a portion of a house in 1056: the document describes a purchase made by a Jewish money changer, Abū al-Faraj ibn Ṣadaqa ibn Ṣemaḥ, from his uncle, Dāʾūd ibn Ṣemaḥ, a Jewish indigo dealer. The document outlines the size, structure, substance, and location of the house. It then notes the details of the sale and mentions that the transfer of tax and commission were included in the total payment of ten dinars.[34] Thus, it appears, in legal matters of a strictly non-Muslim nature, Islamic courts fulfilled an administrative function that was devoid of religious meaning.[35]

Another reason for turning to an Islamic court was to obtain a bill of divorce. One issue that has drawn the attention of modern scholars in Sherira Gaon's *Epistle* is the "recalcitrant wife" (*moredet*) enactment.[36] The term refers to a woman who refuses to have intercourse with her husband or, alternatively,

a woman who refuses to perform domestic labor.[37] From a legal standpoint, the refusal can be seen as a sign of a woman's wish to obtain a bill of divorce. In his *Epistle*, Sherira Gaon notes that during the time of the gaon Rav Rabba (d. ca. 660), in 651, it had been enacted that a woman may obtain a bill of divorce immediately.[38] This enactment was made in contrast to the stipulation regarding a recalcitrant wife in the Babylonian Talmud, where it is stated that a woman who seeks a divorce must wait twelve months before she may receive the bill. During this period, she is not entitled to support from her husband.[39] Separate reference to this enactment is found also in a responsum from Sherira Gaon. The Babylonian gaon explained that the change in the talmudic stipulation was introduced "when the sages saw that the daughters of Israel seek the support of the Gentiles [*nitlot ba-goyim*] in order to obtain their letters of divorce."[40] Scholars suggested that by "Gentiles," Sherira was referring to Muslims who would probably have supported the cause of these women, provided they converted to Islam.[41] Thus an Islamic court would free the woman on the ground of the illegality of marriages of Muslim women to non-Muslim men. Yet the idea that Jewish women would convert to Islam to obtain a divorce through Islamic courts has no evidence to support it, not to mention the little likelihood of *shar'ī* courts in 651.[42] Without attempting to resolve this intriguing historical question, it may be that Sherira provided the details of an early event based on his own contemporary knowledge.

By the late tenth to the early eleventh century, it was conceivable for Jews to obtain a divorce by means of Islamic adjudication. A responsum discovered and edited by Mordechai Friedman sheds new light on legal procedures and Jewish communal organization in Qayrawān, in what appears to be the time of the Zīrīd dynasty.[43] The responsum describes a betrothal between two young people. At some point, the boy's father lost his fortune, consequently prompting the girl's father to appear before a local Jewish judge, the *nāẓir*, to break the engagement.[44] The latter ruled that the marriage agreement was binding and had to be effectuated. The girl's father refused to comply with this ruling and turned to the local sultan to obtain an annulment of the betrothal agreement. The *nāẓir* was not alarmed about this because a divorce decided upon by non-Jewish courts was considered unlawful in rabbinic law (*get me'use*).[45] This, however, was wrongly assumed, as a divorce could be considered unlawful only if it was obtained through the compulsion of the authorities.[46] The matter, however, was eventually brought before another Jewish judge, "a great wise man," who permitted the annulment of the marriage in order to prevent the authorities' intervention. While the affair was finally resolved through a

Jewish judicial authority, it indicates that breaking matrimonial arrangements through a Muslim authority was an option in some cases.

Benefits from litigating in Islamic courts had also to do with advantageous legal principles. A letter sent by the Palestinian gaon to the Jewish community of Rafiah (Rafaḥ) in ca. 1020 deals with a dispute over an inheritance.[47] The writer mentions that the losing party chose to go to the *qāḍī*, perhaps in hope of a better decision. A similar hope was also in the background of a judgment issued by a Jewish court in Fusṭāṭ in 1020.[48] The document mentions a Jewish woman who turned to the *qāḍī al-quḍāt* regarding an inheritance. Though the woman was warned against this course of action, she went ahead and pursued her case before the Islamic tribunal.

We should not assume, however, that expectations of advantageous rulings in Islamic courts were based solely on differences in law. There are allusions to the fact that people were called before an Islamic court as a means of pressure. An example of forcing a certain man to give a false statement against his own will by calling him to an Islamic court is mentioned in a responsum from Saʿadya Gaon: "Ṣemaḥ argues that the sum of one hundred golden coins that Ḥayim and Shalom claimed from him in a legal court [is invalid]. . . . [It is] a claim [without merit] based on his testimony in favor of [Ḥayim and Shalom] through the compulsion of a Gentile judge."[49] Here a certain debtor (Ṣemaḥ) sought to free himself from the claims of his creditors by arguing that his earlier statement was given under pressure of a non-Jewish court. True or false, the claim is indicative of the usefulness of such a line of defense and may therefore reflect the prevalence of such practices. In a letter written in the second half of the eleventh century by a widow from Alexandria, the woman relates how she had lost her estate following a false testimony given before the "Gentiles."[50] Another letter from Alexandria, written in 1080, mentions an attempt to seize the property of a Jewish widow and her children through an appeal to an Islamic court.[51]

Bribery served as a means of gaining the favor of an Islamic court. In a responsum of Sherira Gaon, we learn about a Jewish man who lost a certain item. The item fell into the hands of a Muslim and was bought from him by another Jew. The Jew who lost the item sought to reclaim it but was met with the refusal of the person currently in possession of the lost object. The latter argued that the original owner had waived his right to it. Such a claim could be made according to Jewish law only if there was no identifying mark on the lost item and there was proof that the original owner had lost hope of recovering it (*ye'ush*).[52] In such an event, the finder of the lost object would gain

possession over it. Yet the original owner was not prepared to surrender easily: "I had not given up on it, for I have witnesses whom I ask and with whom I inquire from then until now, that they let me know about the whereabouts of the object and where the thieves have gone. [I do this] so that I may take [those who hold the lost object] before the king or their judge and take what is mine. . . . And if not, I would have bribed their elders and notables, and they would have helped me to rescue what is mine from their hands."[53] The passage is instructive because it demonstrates a form of legal collaboration between Jews and Muslims and because it shows that bribery was a way of influencing a judicial decision. Bribing Muslim officials, Goitein tells us, was not a rare method for influencing an Islamic court so as to obtain a favorable decision: "This mode of trying to influence the judges is reflected in our records far more frequently than outright bribery (perhaps because the latter did not require expression in writing)."[54]

The Social Environment Factor

It has long been the consensus of modern scholars that the Jews under Islamic rule were socially embedded within their non-Jewish environment.[55] This notion was further enhanced with the discovery of the Cairo Geniza.[56] The close relationship between Jews and Muslims was expressed in myriad ways, whether social, cultural, or political. Such a state of affairs was the foundation for what Gideon Libson calls "the commitment theory": "the adoption of majority customs by the minority, to the point that they become a commitment."[57]

Inter-confessional ties bore particular relevance to the issue of witnesses. A Jewish individual who interacted with Muslims on a daily basis would be more likely to use their testimony in a court of law than that of a distant coreligionist.[58] A responsum issued by Ṣemaḥ Gaon (d. ca. 890) tells of a man who died in Egypt, far from home:

> A man went to trade in the towns of Egypt and his cargo was heavy; he came upon a city and deposited some of his goods with a Jew so that he may return after eight days [and claim them back]. Yet he left and did not return, even after three months. His wife, father, and mother thought that he would return for the month of Tishrei for the holidays, and now they are concerned that perhaps something has happened to him. . . . Some Ishmaelites and Christians told them

> "we know how to sail and we left, yet [his boat] sank since he did not know how to sail." They gave a description of his face, appearance, and size and even told them his name.[59]

The only ones who could testify to the death of the Jewish man in the aforementioned case were non-Jews. The appearance of Muslims as witnesses in Islamic courts at the event of a Jew's death is notable in Geniza records. One such example is an Islamic legal record of 1036 concerning the death of a Jewish man and his son. Among the witnesses who identified the deceased was a Muslim witness named ʿAlī ibn Ḥusayn.[60]

An example of the use of Muslim witnesses is found in a responsum referring to the debts of a deceased Jew. Among the latter's creditors was a Jew who "had an Ishmaelite deed of debt . . . and Ishmaelite witnesses."[61] The Islamic court ruled that the property left by the deceased should be divided between the Jewish creditor and a Muslim creditor. Although Islamic law permits the testimony of non-Muslims when the litigants are non-Muslims, the Jewish creditor chose to rely on Muslim witnesses.

Geonic Positions toward Jewish Recourse to Islamic Courts

The frequency with which Jews turned to Islamic courts cannot be quantified or even roughly estimated, though its numerous attestations in our sources is noteworthy. The varied motives for appealing to Islamic courts, the accessibility of Islamic judicial institutions to non-Muslims, and, finally, geonic preoccupations with the different questions that emanated from the use of extra-confessional institutions are all instructive. In what follows, we shall turn to geonic attitudes toward Jewish recourse to Islamic courts. The main medium through which the geonim articulated their positions on this matter was the responsum. For purposes of analysis, the literary corpus is broken down into three main categories: geonic attitudes toward Islamic ethics in general and the Islamic judiciary in particular; expressions of geonic opposition to the use of Islamic courts; and signs of pragmatism.

Interpretation Rather than Innovation

A review of geonic responsa suggests that, for the most part, the geonim tried to stick as close as possible to early rabbinic sources when formulating their

opinions. At the same time, there are signs of attempts to adapt the halakhah to the social mores and needs of the period.[62] Yet adaptation did not necessarily mean a lenient attitude, as interpretations of early rabbinic sources could have gone either way.[63] A useful example of a severe geonic approach is a ninth-century legal modification regarding the inheritance of a Jewish apostate. According to Rav Natronai Gaon, a convert may not inherit property from his Jewish father.[64] Natronai's position is considered a halakhic innovation in the context of what may have been a wave of Jewish conversions, meant to highlight the disadvantages resulting from apostasy.[65] Yet in practice, as Oded Ir-Shai convincingly shows, Natronai was simply exploiting a moment in which the halakhah did not "reveal its explicit meaning."[66] Thus instead of treating Natronai's position as a pure act of legislation, we should regard his initiative as an extrapolation, an exploitation of a talmudic ambiguity, enabling the gaon to incorporate into the halakhic system his own perceptions.[67]

A remarkable example of this legal method is found in a query regarding men who shaved their armpits and genitalia. The query was referred to Sherira Gaon or to Ḥayya Gaon. The petitioner was concerned with the removal of such hair, an act that was originally prohibited by the early sages.[68] The gaon's answer sheds light on the legal reasoning at play: "It is the current practice in both academies of ours, for the past two hundred years to allow the removal of hair from the armpits and private parts. . . . [E]very place has its own custom for distinguishing between men and women. According to the practices of those years [the talmudic period], it was not customary for men to remove hair from their armpits and private parts, and whoever did so was considered to adopt feminine practice."[69] In a separate responsum, probably from the same authority, the gaon grounds his opinion on the fact that, having been scattered in the diaspora, Jews must now accommodate themselves to local practices: "Anything with which the local people adorn themselves is also permissible for the people of Israel who live among them."[70] The issue of external appearance in general and dress in particular is related to the biblical principle of *you shall not follow their statutes* (Lev. 18:3). This principle was seen as a basic prescription for demarcation between Jews and their non-Jewish environment.[71] It is tempting to view geonic attitudes in this context as pragmatic to the extent of innovation at the expense of earlier prescriptions. Yet once again, as in the issue of an apostate's inheritance, there is no sign of a legislative initiative. Instead, what we see is a variant interpretation of earlier sources or an exploitation of a legal lacuna as a means of adjusting to prevailing practices.

The question of whether the geonim can be viewed as legislators is

significant. As legislators, the geonim would be expected to be more prepared to confront the halakhah and subordinate it. An acknowledgment, however, that geonic responsibility was to interpret the halakhah and rule in agreement with its prescriptions calls for different expectations. Michael Walzer, in his discussion of how to read rabbinic texts, describes the theological concept of the Jewish community as "a sacral fellowship under God" in which "all legitimate actions have coherence and integrity within this order, whereas illegitimate actions disrupt and desacralize the polity."[72] It can be debated as to whether the halakhah served as the sole or prime definer of what should be regarded as legitimate in terms of practice. Yet there can be no doubt that in geonic terms, the halakhah did fulfill such a purpose. As halakhic authorities, the geonim drew from early rabbinic sources at every legal juncture.[73]

A significant share of the legal questions that were posed to the geonim derived from life within a non-Jewish environment. Though bound by halakhic norms, the geonim had at their disposal a variety of means for arriving at legal solutions. These included the adoption or borrowing of customs, proposing new interpretations of early rabbinic sources, and taking advantage of occasional ambiguities in their language. Among the geonim were legislators as well; yet the evidence for legislative activity is extremely limited.[74] Perhaps if there had been evidence of more than two cases of geonic enactments (*taqqanot*), we would have been able to say more on geonic legislation. These two instances are the aforementioned enactment pertaining to a recalcitrant wife and that on the collection of debts by the heirs of a creditor.[75]

Geonic Opinions on Extra-Confessional Courts

Before examining the responsa on questions related to extra-confessional courts, it may be useful to review some of the principal early rabbinic discussions that address the use of such courts. As noted in Chapter 1, these pertain to the issuance of deeds and the settlement of disputes. The talmudic discussion dealing with the validity of deeds issued in non-Jewish courts concerns two kinds of documents: evidentiary and constitutive. In the former, what effectuates the transaction is an exchange of monies for property; in the latter, it is the document itself. Based on this distinction, it was stipulated that evidentiary actions that had been effectuated in a non-Jewish court would be considered valid in Jewish courts, while constitutive actions

would not be considered valid. As for settling disputes in non-Jewish courts, the Gemara overridingly prohibits such a course of legal action. At the same time, it allowed the use of non-Jewish courts as a means of enforcement of Jewish judicial decisions.

Although indirectly, a third principle that appears relevant to non-Jewish courts concerns the value of non-Jewish testimony. Although in most cases, non-Jewish testimony was inadmissible in a Jewish court, Jews would often resort to the testimony of Muslims when appearing before Islamic courts. Early rabbinic authorities disagree as to the value of a non-Jew's testimony. One view, already discussed at length, gives full credence to Gentile testimony for all evidentiary purposes.[76] A differing opinion, however, discounts all Gentile testimony. Citing Ps. 144:8, *whose mouths speak lies* with reference to non-Jews, it was stipulated that the testimony of non-Jews could be relied upon only if the truth of their remarks could be independently ascertained that they were not lying—for example, when under oath in their own courts and their testimony is given *en passant* with its speaker innocent of its significance.[77]

Attitudes toward Islamic Judicial Integrity

Having reviewed the basic rabbinic principles on questions pertaining to non-Jewish judicial institutions, we shall now turn to examine the application of these principles in geonic responsa. The first set of responsa touch upon aspects of geonic perceptions of Islamic ethics in general and judicial institutions in particular. The significance of this analysis derives from an acknowledgment of the responsa's communicative quality through their circulation among Jewish communities.[78]

A responsum from Rav Sherira to Ya'aqov ben Nissim of Qayrawān deals with deeds of debt issued in Islamic courts. The gaon begins by citing parts of the query:

> In the present time, we claim debts according to them [i.e., deeds of debt issued in Islamic courts], yet we have found a responsum that says that they are not to be used for claiming debts and that they are not to be relied upon due to fear of forgery. [According to that responsum,] in older times these deeds [issued in non-Jewish courts] were used to claim debts, when the sages of Israel regarded

> them to be reliable. But in this age in which we are well informed that all their affairs are made of deceit and lies, their deeds are not reliable at all, for all of them are considered forgeries. Thus it is written *whose mouth speak lies* (Ps. 144:8).[79]

The question suggests that, contrary to contemporary practice, there were at least some among the geonim who objected to the use of Islamic courts for notarizing deeds of debt. The writer understands that such deeds were considered valid from an early rabbinic point of view, but explains that since at present non-Jewish courts cannot be trusted, they are no longer to be used. To this, the gaon replied:

> It is thus our opinion that this city in which we are now, Baghdad, Gentile tribunals accept only discerning, prominent, and rich witnesses, who are untainted by theft, or lie, or deception and who excel in their piety and are called *al-mu'addalīn*. Of this sort, if they testified to a deed of sale or loan and their testimony was registered in their tribunals and their judge accepted it, then so do we judge based on that deed, and it is valid by us. This is at present our daily [i.e., common] practice. And in other great cities of Babylon, there are Gentile witnesses who are appointed to testify, who excel in their piety and are very wary of speaking deceitfully, how much worse so of speaking falsely. [Generally, however,] we do not know what is in their heart, and all Gentiles are not automatically accepted by us as witnesses, but rather are viewed with suspicion. [Yet since] our masters said "even if those who signed them were Gentiles, they are valid" (Mishnah Gittin 1:5), we too validate them. [However,] there are distant places and villages that are not so, and [their witnesses] are known for their lying and deceit. They are accustomed to act [only] on the basis of reciprocity [i.e., testify in favor of someone in the expectation of receiving a reciprocal favor][80] and receive benefit for their testimony. Of this sort, we do not accept as valid their legal documents, as you found in the responsum that you mentioned. As for forgery, surely we are wary of it everywhere, and these Gentiles are wary of forgery and do not accept [even] a deed written in the handwriting of its witnesses, even if they came and said "this is our handwriting," [their document] is not accepted until they say [i.e., testify orally], "we remember this testimony that we gave regarding

> so-and-so, whom we testify for, and whom we know in person and by name, so-and-so son of so-and-so" [i.e., authentication of their signature or handwriting is insufficient, as they must attest equally to the veracity of the statements made in their handwriting.] So, too, we do not rely on their deeds, unless they are accepted in their courts. And since this is the case, there is no possibility of forgery.[81]

This responsum sheds light on certain Islamic judicial procedures and allows us to glimpse, through the eyes of the gaon, at the state of the Islamic judiciary in tenth-century Iraq.[82] When we compare the gaon's permission to draw up deeds of sale and debt in Islamic courts with earlier rabbinic principles, we find his position to be anything but innovative. Note that the gaon refers only to evidentiary instruments, such as sale and loan documents, and not to constitutive ones, such as gifts.

Yet what stimulated the query leading to this responsum was the all-inclusive prohibition by another authority, presumably a gaon, of drawing up *any sort* of deed in Islamic courts, irrespective of early rabbinic principles regarding Gentile courts. Thus the question at hand was not the legality of drawing up deeds in Islamic courts but a question of reliability. In other words, the petitioners were concerned with the integrity and reliability of Islamic courts in light of what had been perceived as a poor reputation. The gaon not only confirmed the reliability of Islamic courts in major cities but also mapped out those Islamic courts that could be trusted. The gaon's position seems straightforward: "Gentile courts accept only discerning, prominent, and rich witnesses . . . who excel in their piety and are called *al-mu'addalīn*."[83] His statement reveals a high regard for the Islamic judiciary and confidence in its reliability. At the same time, his appreciation is qualified, as he distinguishes between Islamic courts in major towns and those in villages and remote places. The latter, the gaon cautioned, have a reputation of accepting the testimony of untrustworthy witnesses and hence, presumably, cannot be considered as adequate judicial venues.[84]

In another responsum, attributed to Rav Ḥayya, we find a more nuanced observation of the Islamic judiciary. Once again, the query referred to the gaon reflects a concern as to the reliability of judgments given in Islamic courts. The Babylonian Talmud discusses a seller's liability toward a buyer in the event of a third party claiming ownership of a sold property on the basis of a prior lien on that property. It is stipulated that if the third party claiming ownership of the property is a Gentile, the seller's liability takes effect only

if the claimant had made his charge through a Jewish court. If, however, he had made his claim through a non-Jewish court, the seller is not liable to the buyer, as the Gentile claimant is considered a "grabber" (*'ones*): someone who forced another person to do something against his will.[85] In the context of the talmudic discussion, the gaon was asked if a claim made through an Islamic court is equally invalid, thus rendering the claimant a "grabber." A halakhic designation of Islamic courts as facilitating "grabbers" would severely undermine their reliability:

> As to your question with regard to what is related: Raba, or some say Rav Papa, issued a proclamation: [Know] all you that go up [to Palestine] or go down [to Babylon] that if an Israelite sells an ass to a fellow Israelite and a Gentile comes and forcibly takes it from him, "it is the duty of the first to help him to rescue it" (BT Bava Batra 45a). [Question:] These tribunals of Ishmaelites that are strict in matters of theft and distrain Jewish property only through honest witnesses, [who attest] before them, do we consider them as "grabbers" or not? And is the sentence in this case that [the Israelite] compensate [his fellow Israelite] or not?[86]

The legal problem with which the petitioners appear to be concerned is whether to follow the above principle of the Talmud despite the fact that Islamic courts and their witnesses are known for their honesty. To this, Ḥayya answered:

> [O]rdinarily, we would accept the principle of Amemar: "Generally speaking, the heathen is a 'grabber' " (BT Bava Batra 45a), and so the Scripture says of them: *Their mouth speaketh vanity and their right hand is a right hand of falsehood*." Surely there are among those who follow the religion of the Ishmaelites some who are strict in matters of theft and distrain Jewish property only through honest witnesses, [who attest] before them. However, not in every place is there a tribunal court of the authorities [*bei davār*] that prevents the plundering of an Israelite and [that ascertains] that nothing is taken illegally. Not everyone among [the Ishmaelites] obeys the verdict of the tribunal of the authorities and not in every place are there *mu'addalīn* witnesses who refrain from uttering falsehood. Rather, there are places that do not have tribunals of the authorities, and all Gentiles there are [considered] "grabbers" and thieves. The

> rule to be practiced there is according to Amemar's opinion. There are places in which lowly people take bribe in exchange to their testimony; there, too, all [Gentiles] are [considered] "grabbers," as Amemar said. There are also people who do not obey the ruling of the authorities' tribunal, strong armed men who are connected to the king or other [powerful] people. Such people, even in a place where there is a tribunal of the authorities and [also] witnesses who excel [in their honest way], are [viewed] as "grabbers" in accordance with Amemar's dictum.[87]

In principle, Ḥayya Gaon agreed that Amemar's stipulation should not apply to courts that are considered reliable and honest. He calls such courts *bei davār*, a term that we encountered in Chapter 1 in relation to the talmudic reference to Sasanian courts.[88] As we have seen, the term *bei davār* applies to the Sasanian state courts, as opposed to the *mgistā*, which refer to rural courts presided over by untrained judges. Thus, according to Ḥayya, so long as the tribunals were appointed by the Muslim authorities, their verdicts can be relied upon and they should not be considered "grabbers."

The problem arises in places that lack a tribunal of the authorities. Furthermore, even where there are such tribunals, not everyone obeys their verdicts and not in every place are there available witnesses of the *muʿaddalīn* sort. These last points served to delegitimize the authority of some Islamic courts on the grounds that they could not enforce verdicts and did not have reliable witnesses at their disposal. We do not know the location of these courts or their relative number. Moreover, the responsa do not instruct how to assess the reliability of Islamic courts in general. Indeed, such questions may have occurred to the petitioner upon reading the gaon's reply; yet it seems that the ambiguity was not accidental. It may have served in this case for instilling doubts in the minds of potential litigators before deciding to appear before an Islamic court.

The responsa above give some idea about Islamic judicial procedures and the attitudes of Rabbanite confessional leaders toward the Islamic judiciary. More specifically, they reflect an ambivalence on the part of the geonim as to the level of reliability that can be ascribed to the Islamic judiciary. Along with their willingness to credit Islamic courts as trustworthy institutions, the geonim applied early rabbinic principles of distrust in Gentiles in general and their judicial institutions in particular. By adopting this approach, the geonim were able to remain loyal to halakhic prescriptions, while questioning the utility of appearing before Muslim judges.

Geonic Objections Couched in Early Rabbinic Principles

Geonic responsa also attest to instances in which the geonim were obliged to take a more concrete stand on the question of recourse to Islamic courts. As we have seen, a recurrent theme in geonic responsa dealing with appeals to Islamic courts is of Jewish litigants refusing to accept the verdict of Jewish judges. When a losing party chose to ignore the Jewish court's decision, the litigant, in whose favor the Jewish court had ruled, would turn to an Islamic court for enforcement. A responsum of Rav Palṭoi (d. 858) suggests that the gaon gave his petitioners unconditional permission to take recalcitrant litigants before non-Jewish tribunals: "[Regarding] Reuven who has a claim against Shim'on, and [Shim'on] refuses to appear before the [Jewish court], [Reuven] may take the matter before a non-Jewish tribunal so he may claim what is his."[89] This responsum has been seen as an indication of geonic leniency toward the use of non-Jewish courts.[90] When we closely examine those instances in which the geonim permitted such recourse, however, we realize that these were of a very particular type. The geonim allowed recourse to Islamic courts only as a means of compelling recalcitrant litigants who had already been found liable by a Jewish court. This often occurred in cases of claiming debts. The permission to use a non-Jewish court as a means of coercion does find legal grounds in early rabbinic sources.[91]

The acceptance of non-Jewish courts as a means of enforcement for decisions of Jewish courts is found in a passage in Arabic referring to Rav Ḥayya Gaon's *Sefer Musar ha-Dayyanim* (The book of judges' ethics), dealing with the legitimacy of a verdict given in a non-Jewish court:[92]

> The Gentiles . . . their verdicts are forbidden, even if they rule according to the Jewish law, as it has been told "Rabbi Tarfon used to say . . . " (BT Gittin 88b). And I have seen [Ḥayya Gaon] give this opinion [in response] to a query <a query sent to him from our master Birkya>[93] in which he permitted [recourse to tribunals] of Gentiles and to testify in favor of an Israelite against [another] Israelite with regard to what he knows on the matter [of dispute] between them. But this is only when that party has already [had a judgment issued against him] and was [legally viewed as an *alam* (a violent person who can be controlled only by superior force and not by law); it is therefore] incumbent upon him to report the truth. . . . [For he knows] on account of his [current] state

> that he is an *alam* and that he should [therefore] do this thing with him, [namely,] to press [the *alam* into compliance], lest the plaintiff's right [of enforcement] be lost. But *ab initio*, before a proper judgment has been issued against him and [the defendant] refuses to pay, God forbid that [Rav Ḥayya Gaon] permitted this—as [Rav Ḥayya Gaon] wrote in the book *Adab al-Quḍā* [*sic*]. And this is his [exact] language in response to the question [i.e., the responsum]: . . . this is permitted only after he knows that circumstances necessitate it, [but to do] so *ab initio* [is forbidden].[94]

According to Ḥayya Gaon, before turning to a non-Jewish court as a means of compelling a recalcitrant debtor, two crucial requirements must be fulfilled: first, the culprit must be given ample warning of the potential consequences of his refusal to comply with the Jewish court's decision; and second, before turning to a non-Jewish court, the recalcitrant party has to be legally declared so, namely, an *alam*. The second condition underscores a procedure in which the Jewish court retains its legal jurisdiction and the non-Jewish court is perceived as a mere instrument of enforcement.

A responsum in the same vein was given by Ḥayya Gaon to Yaʿaqov ben Nissim of Qayrawān. In his query, Yaʿaqov related the case of a Jew who refused to follow the Jewish court's decision and pay his debt. In an attempt to recover his property, the creditor transferred the case to an Islamic court; yet the Islamic court did not accept the witnesses who originally testified in favor of the creditor in the Jewish court. Thus Yaʿaqov asked: Is it allowed to select two "prominent" witnesses whose testimony is accepted by the non-Jewish judge so that they would testify in favor of the creditor or, instead, testify as to the Jewish court's decision?[95] The Muslim judge may have rejected the first witnesses on the grounds that they were not on his list of trustworthy witnesses. This can be deduced from Yaʿaqov's reference to "prominent witnesses whose testimony is accepted." The query suggests that not only among Muslims but also among non-Muslims were those who were formally considered trustworthy for testimony in Islamic courts and perhaps even designated as *muʿaddalīn*. Clearly, it would have been impossible for them to serve as witnesses in cases concerning Muslims.

The designation of Jews as trustworthy witnesses by an Islamic court is instructive. It reflects a reality in which the number of "Jewish cases" brought before an Islamic tribunal called for adequate arrangements of this sort.[96] The process by which the trustworthiness of non-Muslim witnesses would

be determined can be observed in a report about the Egyptian judge Khayr ibn Nuʿaym (d. 800): "He used to accept the testimony of Christians regarding one another and the Jews regarding one another, and inquire about their trustworthiness among their coreligionists."[97]

Returning to our query, Ḥayya Gaon allowed for the "prominent witnesses" to testify regarding the verdict of the Jewish court. Yet this course of action was to be pursued only once the debtor was first excommunicated for thirty days. If the debtor claimed that he had no means to pay his debt, he was not to be drawn to an Islamic court but made to give a statement under oath.[98] The gaon gave the creditor permission to appeal directly to an Islamic court without the period of thirty days on the following condition: "Surely, if we see that he is escaping and it has been discerned that on account of his fear, he is escaping excommunication and [there is a risk for] the property . . . being lost and there is [ample] ground to [believe this] thing, then once the Jewish court has ordered the payment, the [debtor] should be warned that he will be charged in a court of the authorities [*bei davār*]."[99]

The application of Islamic judicial decisions for securing the rights of creditors can also be seen in the placing of the *adraktā* at the disposal of Jewish litigants. The *adraktā*, often mentioned in the Talmud, is a deed issued by a Jewish tribunal in favor of a creditor so that he may claim his debt by seizing the assets of the debtor.[100] It authorizes the creditor to seize the property held by the debtor or property that he alienated after contracting the debt.[101] An example of how this procedure was implemented is found in a formulary from an anonymous "geonic court":[102]

> [S]ince we have seen that [the debtor] has not submitted to the judgment of the chief magistrate [*av bet din*] and has violated the scriptures . . . we have stipulated in his regard this *adraktā*. We have ruled that the one who is claiming [his debt] may receive any asset and property that [the debtor] owns . . . and he may do with it as he wishes and no one can protest this. . . . Any son of Israel who has seen this *adraktā* has permission to give testimony before the Gentiles as to what is due to [the creditor,] and [no one] should fear this [i.e., giving testimony before a non-Jewish court].[103]

While clearly an instrument intended to serve the Jewish court, the *adraktā* was now placed at the disposal of Jewish litigants for claiming debts in

Islamic courts. At the same time, it should be noted that the *adraktā* had first to be issued in a rabbinic court and only then enforced through the Islamic court.

The examples above can be seen in line with the general geonic opposition toward appeals to Islamic courts. In cases of recalcitrant litigants, the geonim were primarily concerned with protecting the material rights of litigators and implementing the rule of the halakhah. Still, permission of recourse to Islamic tribunals for the purpose of enforcement was accompanied by the insistence that litigants exhaust all possible means before resorting to non-Jewish tribunals.[104] Thus, a responsum from Sherira Gaon:

> He who is liable for debts or a deposit and refuses to pay, and in his town there is a Gentile tribunal that does not take bribes and accepts the testimony of an Israelite concerning a fellow Israelite, the elders and scholars [of the town] may instruct the witnesses to go before the [Gentile] judge. . . . [Yet] whoever refuses to accept the verdict [of a Jewish court] should first be warned, and if he persists in his refusal, then it is permitted to testify against him. . . . [However,] in a place where you can collect the debt through [the decision] of Israelites, or an expert judge [*mumhe*], do not seek their [i.e., the Gentiles'] judgment.[105]

Another common theme in geonic responsa is that of issuing or validating deeds that affirmed various forms of agreements. Here, too, the geonic position followed early rabbinic principles, stipulating that only deeds of sale and loan (that is, evidentiary agreements) may be drawn up in non-Jewish courts. In a responsum from an anonymous gaon, the acceptance of deeds of sale issued in non-Jewish courts was explained on the grounds that the transaction was documented in the presence of valid witnesses.[106] A responsum of Shemu'el ben Ḥofni (d. 1013) or of Sa'adya Gaon further elucidates the matter. The responsum was given in reply to a query regarding the property left by a deceased man. The latter had not notarized his will in a Jewish court but in an Islamic court "without Israelite witnesses," thus making it difficult to determine who was to inherit his property—his wife or his sons. While the widow was able to recover some of her husband's landed property through her marriage contract that was registered in a Jewish court, the gaon was asked to decide if she could appeal to an Islamic court and demand the rest of her husband's property. The gaon replied:

> [With regard to what] he registered for her [i.e., pledged her through a deed] in Ishmaelite deeds: it should [first] be examined if he decreed [his property] in the form of a Gentile [deed]; [if so, such deeds] have no value, and [the lands] should go to [his] sons. But if he wrote in the form of a [deed of] sale and if the witnesses are of the *'udūl* [kind] . . . then the lands belong to the wife and should be added to her marriage contract. As we learn that "all documents that are accepted in heathen courts, even if they who signed them were Gentiles, are valid [in Jewish courts] except for writs of divorce and of emancipation." (Mishnah Gittin 1:5)[107]

Resting his opinion on the rabbinic principle, according to which the only kind of deeds issued in a non-Jewish court that are valid in a Jewish one are deeds of sale and loan, the gaon ruled that the widow could demand her husband's lands only if these were passed on to her in the form of a deed of sale. The second part of the responsum provides the reasoning behind the decision:

> And for what reason is a deed of gift drawn up in tribunals of Gentiles nullified? For we learn so in the Talmud as [our Mishnah] lays down a comprehensive rule in which no distinction is made between a sale and a gift. [Yet] we can understand that the rule should apply to a sale because the purchaser acquires the object of sale from the moment he hands over the money in their presence, [for which] the document is a mere corroboration; had he not handed over the money in their presence, they would not take the risk of drawing up a document of sale for him. But with a gift [it is different]. Through what [does the recipient] obtain possession? Through this document, [is it not]? (BT, Gittin 10b). . . . [T]he sale takes place through the giving of money, in which the deed merely serves as a record. But in the case of divorce and gift, these are not effectuated through the transaction of money but solely by the deed. Therefore, anything [i.e., any transfer of property] that is effectuated by the giving of money, [the deed of attestation] may be drawn up in a Gentile court. But whatever is effectuated [only] by the deed itself, [such a deed] cannot be drawn up in Gentile courts. Thus in the case of this widow, if the deeds that were drawn in Ishmaelite courts are deeds of gift, they are not valid. If they are deeds of sale and they present three features—that they are signed by *'udūl* witnesses, the witnesses know the

> deceased, and the witnesses' handwriting can be identified—then the land belongs to the widow.[108]

The responsum reflects a geonic inclination to accept the final dictum of the talmudic discussion.[109] According to this opinion, the tannaitic stipulation invalidating deeds of divorce and manumission of slaves also referred to other deeds "*like* deeds of divorce." Here again, we find the classic talmudic distinction between evidentiary documents and constitutive ones. The former simply attests to the transaction; the latter constitutes the transaction itself.[110]

While there appears to be a general consensus as to the validity of deeds of sale issued in Islamic courts, there is at least one responsum that suggests a different approach with regard to deeds of debt:[111]

> The deed that Lea wrote against her son through the Gentiles—by law, she cannot claim anything through it. This is on account of what is said, "all documents that are accepted in heathen courts . . . are valid [in Jewish courts]" (Mishnah Gittin 1:5). This is only in the case of sales for which the transaction is attested. But in other cases, such as in the case of gifts and loans, for which their rules are different from ours, they are not worth a thing. And if Lea violated [the law] and claimed [a debt] through the laws of the Gentiles, she should be excommunicated until she returns what she claimed.[112]

According to this anonymous gaon, deeds of loan are to be included in the category of deeds that cannot be drawn up in non-Jewish courts. The argument made in support of this position is rather exceptional: the woman's deed of debt that she held against her son was declared invalid because non-Jewish legal rules are "different from ours," namely, from Jewish ones.

Pragmatic Considerations and Practical Measures

In none of the responsa above do we find the slightest departure from early rabbinic stipulations. The geonim were willing to tolerate recourse to external tribunals only in those instances that were also tolerated by their predecessors. In certain cases, the geonic positions appear to have been even less lenient than those of early Rabbanite authorities. As we have seen earlier,

some of the responsa expressed reluctance toward recourse to Islamic courts, referring to their problematic reputation and classifying them as "grabbers." Yet our evidence suggests that Jewish use of Islamic courts was far from sporadic and marginal. Consequently, the geonim had to come up with additional measures that would keep Jews within the rabbinic jurisdiction. These measures were of particular importance in the context of limitations to geonic power and of Jewish social embeddedness in the non-Jewish environment.[113]

Objection to the adoption of Islamic legal practices had to be carefully considered, as disregard of their public's inclinations would render the geonim's authority burdensome.[114] Thus, in conjunction with numerous examples showing a conservative approach and a sincere opposition to transgression of judicial lines, the geonim exhibited a legal creativity that included borrowing elements from Islamic jurisprudence.[115] The point of legal innovation through the adoption of customary practice in the social context of Near Eastern Jewry has been well noted in modern scholarship.[116]

Libson's work on the incorporation of Islamic legal practices in Jewish law is a useful starting point for considering geonic tactics.[117] Libson argues, with particular reference to judicial practices, that the question of recourse to Islamic courts was a key factor behind Islamic influence: "[T]he geonim adopted various procedural practices that were sometimes identical with those provided by the Islamic courts, in the hope that Jews would feel less need for the use of the Islamic legal system."[118] Libson describes geonic adoption of Islamic practice and Jewish custom partially in response to the rivalry with Islamic jurisprudence in general and its judiciary in particular. He views the adoption of Islamic legal practices as specifically for the purpose of solidifying the Jewish judicial jurisdiction: "Some of these customs were adopted so that Jewish law would be able to offer a solution similar to that provided by Islamic law, and thus to minimize recourse to Islamic courts."[119]

Thus, the absorption of Islamic law may be seen as serving the purpose of asserting exclusivity. The geonim transformed these elements in a manner that would enable them to claim juridical ownership over them.[120] An example of this method is a responsum endorsing the *suftaja*, "having seen that people do business with one another using it."[121] The *suftaja* was a document issued for collecting a payment in another city.[122] Its adoption, as the responsum indicates, attests to a legal responsiveness toward contemporary circumstances.[123] Though it would seem contradictory to insist on judicial exclusiveness, on the

one hand, and to allow the adoption of Islamic legal practices, on the other, both measures can be seen as part of a wider effort to sustain geonic legal leadership.

There is also indication of adherence to the legal maxim "the law of the government is the law" (*dinā d-malkūtā dinā*). This legal maxim, attributed to the Babylonian sage Shemu'el, addresses the legal conduct of Jews living under non-Jewish rule. According to Shemu'el, in certain cases, the law of the foreign government supersedes Jewish law. The Mishnah stipulates that "all documents that are accepted in heathen courts, even if they who signed them were Gentiles, are valid [in Jewish courts] except for writs of divorce and of emancipation."[124] The Talmud offers two conflicting opinions in this case. The first, as we have already seen, invalidates any constitutive document, any document that effectuates a new legal state, such as a deed of gift (in contradistinction to a deed of sale, which is effectuated by payment).

The second talmudic opinion was that of Shemu'el, who argued "the law of the government is law."[125] Accordingly, all deeds—indeed, all transactions that do not have a religious character—should be dealt with on the basis of the rules of the non-Jewish authorities. Put differently, whether of sale or of gift, all deeds drawn up in non-Jewish courts should be accepted in Jewish courts. In the available responsa dealing with the validity of deeds issued in non-Jewish courts, Shemu'el's opinion seems rather uncommon, to say the least.[126] According to Sherira Gaon or Ḥayya Gaon, "all the adjudicators ruled in this manner, and there is no indication of anyone who relied on a deed of gift that was issued in a court of Gentiles. . . . [T]hus, those who seek to claim a piece of land through a deed of gift issued in a Gentile court are at a disadvantage . . . and their deed is not relied upon."[127]

A single responsum, attributed to the gaon Rav Ḥaninai (d. 769), has been viewed as an exception to the rule.[128] The gaon stipulated that "all deeds drawn up in Gentile courts, even though those who sign them are Gentiles, are valid, excluding only bills of divorce and manumission of slaves."[129] In adopting the maxim of *dinā d-malkūtā dinā*, Rav Ḥaninai treated bills of divorce and manumission of slaves as the only documents that could not be issued in Islamic courts, rather than as a category of documents that encompassed a broader set of documents.

Conclusion

The geonic opinions that emerge from the surviving responsa pertaining to Jewish recourse to Islamic tribunals are almost uniform in their observance of early rabbinic rules. The geonim prohibited the use of Islamic courts for the purpose of drawing up constitutive documents and for dispute resolution. At the same time, they allowed it for drawing up evidentiary documents and for enforcing decisions that had been given by Jewish courts, with particular regard to the payment of debts. The question remains, therefore, as to whether these positions can shed light on the social context in which they were articulated.

Despite their legal formulation and reliance on early rabbinic principles, the responsa offer the modern observer a glimpse into the social circumstances of daily life and, more specifically, illuminate the reasons behind Jewish recourse to Islamic courts. In addition to the responsa, Geniza documents recording petitions to the local community, agreements over the division of inheritances, and commercial partnerships all indicate that the mere suggestion of appealing to an Islamic court could have resulted in the rapid resolution of a legal problem within the rabbinic legal order itself or, by the same token, in the breakup of a business partnership.

Thus, competition over legal authority, born within a context of legal pluralism, created opportunities for individuals to advance their aims even before they actually turned to an Islamic court. Such threats could not have been effective had they been merely hypothetical. But they were made against a setting in which Jewish judicial institutions had little to no coercive power and were administered by individuals who were often busied by additional preoccupations—most notably, communal leadership and the demands of business partnerships. It is in relation to these shortcomings that Islamic institutions possessed crucial advantages. The fact that these institutions were administered by members of the ruling majority afforded them greater means of enforcement and implementation.

The individual was well aware of the legal dynamics generated by the overlap of legal jurisdictions, namely, "that coexisting normative systems make competing claims to authority . . . that each has some capacity to exert power within a social arena, and . . . of the inconsistency of the substantive norms and processes."[130] While this awareness often enabled individuals to exploit their own confessional order, it also gave them the choice of settling their legal affairs before a judicial institution that best suited their immediate needs, irrespective of its religious affiliation. Our evidence attests to changing

considerations, highlighting instances in which Jews sought to escape judgments issued in rabbinic courts and find refuge in non-Jewish environments, annulling Jewish marriage agreements and manipulating Muslim court officials through bribery. But there were also less dramatic considerations. These included the hope of getting a more advantageous ruling in an Islamic court, the need to validate legal documents so that they could later be presented before officials in the Islamic bureaucracy, extracting debts from former Jews who had converted to Islam, and the reliance on the testimonies of Muslims.

As we examine the responsa, we find that despite their strict adherence to early rabbinic prescriptions, the geonim also presented a variety of approaches to the problem of judicial competition, ranging from utter distrust and rejection to dependence and even collaboration. A close relationship between the Jewish and Islamic legal orders is evident in the responsa through their depiction of well-known institutions (for example, *ʿudūl* witnesses) and their adoption of Islamic legal practices (for example, *suftaja*). Able to anticipate particular clashing points with the Islamic legal order, the geonim put forth opinions that variously conflicted with or adapted to Islamic rules and norms.

While in some of the responsa, the geonim's familiarity with Islamic judicial practices was coupled with a general endorsement of Islamic judicial credibility, other instances suggest a more reluctant approach. Despite an early rabbinic permission to draw evidentiary documents in non-Jewish courts, Jewish petitioners were warned about the maladies of the Islamic courts, some of which, according to Ḥayya Gaon, had problems enforcing their decisions and did not have trustworthy witnesses at their disposal.[131]

Indeed, some geonim went so far as to legally denounce Islamic judicial institutions as "grabbers." While anchored in the legal discourse, the intended effect of such statements was primarily to impose norms that would discourage recourse to Islamic institutions despite their acknowledged jurisdiction. In other instances, we find that the geonim not only permitted but actively encouraged the use of Islamic courts to compel recalcitrant Jewish litigants. The geonim recognized the need for judicial coercion and therefore outlined the procedures that had to be observed before turning to an Islamic court for implementation.

These points of contact between the two legal orders also exposed the vulnerability of rabbinic jurisdiction, bringing to the fore its limited social power. One possible description of the social agenda behind geonic attitudes toward Islamic courts is a commitment on their part to an autonomous Jewish

existence, meant to ensure the survival of Jewish life in exile. Whether they interpret geonic attitudes as rigid and steadfast or lenient and accommodating, modern scholars agree that underlying the geonic position was a zeal for safeguarding Jewish law. In view of their spiritual mandates to interpret correctly and apply the halakhah, it may seem only natural for the geonim to be disturbed by the fact that Jews were acknowledging the authority of non-Jewish judges. Seeking judgment in non-Jewish courts came at the expense of Jewish judgment, Jewish law, and, to a certain extent, Jewish confessional identity. It undermined the agenda of achieving halakhic hegemony and gave way to an undesirable legal pluralism.

Regrettably, however, the responsa dealing with judicial authority do not seem to tell us much about geonic motives and agendas. They make no reference to these questions, instead keeping to a dry legal discussion almost entirely devoid of any background information. Their matter-of-fact legal tone and argumentation, couched in religious terms, tend to conceal a host of social issues that go beyond what was traditionally viewed in modern scholarship as the maintenance of communal autonomy. Important as it was for questions of confessional identity, geonic insistence on the exclusive judicial authority should also be seen in the context of law and its judicial application in the absence of executive power.

It is pertinent to recall that those who petitioned the geonim were geographically distant from the academies. The geonim, despite their close ties with their correspondents and their communities, provided legal solutions from a distance, and what may have been an adequate course of action in Iraq was not necessarily so in North Africa. This problem forms part of the broader difficulty involved in comparing Jewish communities in general and those of premodernity in particular. Rather than assume a single pattern from which diverse forms of Jewish social organization and behavior emerged, we should accord greater weight to local circumstances, taking into account social, cultural, and religious changes that occurred in Jewish communities in response to their non-Jewish environment.[132]

These changes were products of social processes that took place in the context of population movements, regime changes, and inter-confessional commercial and social relationships. They are a crucial factor in our understanding of the significance of the fact that the geonim were situated in one part of the Islamic Near East while their addressees were in another. And they may partly explain why we find among the geonim those who were willing to accommodate local customs and to recognize popular inclinations.[133] Indeed,

while Jewish confessional identity gave Rabbanite Jews a primary sense of self-identification, once we observe them in a broader social landscape, the markers of confessional boundaries tend to blur and coincide with additional forms of social affiliation, facilitating the collective participation of members of discrete confessional affiliation in expanded social circles.[134]

Christian and Jewish Recourse to Extra-Confessional Institutions: Motivation and Response

Combining the examples of Christian and Jewish appeal to extra-confessional judicial institutions provides us with a vivid account of the incentives for such appeals. The fact that certain incentives appear more commonly in Christian-related evidence and others in the Jewish sources does not necessarily imply that Christians and Jews were differently motivated. Many of their reasons are similarly grounded in the fact that Christians and Jews both partook in a general public life that transcended the boundaries of their confessional affiliations. The admission of non-Christian testimony in ecclesiastical courts, according to East Syrian jurists, and examples of Jews relying on the testimony of Muslims to proclaim the death of Jewish individuals in Jewish courts allude to this intermingled reality. Yet even from the perspective of distinct legal orders, ecclesiastical regulations and geonic responsa reveal an intriguing level of familiarity between competing legal orders. The fact that ecclesiastical jurists endorsed the validity of legal transactions conducted in Islamic courts and the reference to the *ʿudūl* in the responsa are only some of the signs of the interplay between different orders.

Indeed, extra-confessional social relations on formal and informal levels should be counted as a main factor behind Christian and Jewish recourse to legal institutions outside their confessional organizations. We shall come back to this question in the final part of this book. But short-term, more pragmatic, and seemingly ad hoc considerations also played a significant role. Clearly, means of enforcement were of crucial significance. The testimonies of Egyptian papyri and Geniza documents provide an important reminder of the advantages enjoyed by Islamic judicial institutions by virtue of their powers to provide greater measures of enforcement than non-Islamic confessional institutions.

In addition to their executive power, Islamic courts served as public record offices in which properties, loans, wills, commercial, and even matrimonial

agreements were registered. By registering their legal affairs in Islamic courts, Christians and Jews were not only securing their commitments toward each other but also vis-à-vis the state, retaining their signed documents as proof of ownership in the event of state-initiated property surveys or the conversion of one of the parties in a legal transaction.

Christians and Jews turned to Islamic institutions also to manipulate, influence, or even escape the judgment of ecclesiastical and rabbinic judicial institutions. As we have seen, the mere threat of appealing to a Muslim judge was often a successful means of pressuring communal tribunals into issuing a favorable sentence. Other examples suggest that Islamic institutions were put to use as a means of pressing the ecclesiastical judiciary through the intervention of Christian officials in the Islamic court. Though elusive, there is some evidence that people were called to appear before an Islamic court, where they were pressured to give a false statement. Here references to Muslim judges and witnesses who took bribes help to elucidate the nature of informal arrangements outside the courtroom. By turning to competing legal orders, litigants hoped not only to press their own confessional institutions or benefit from favorable verdicts but also to evade conviction altogether. The expression "seeking refuge with the pagans/Gentiles/temporal authorities" is thus commonly found in Christian and Jewish legal sources, referring to those instances in which Christians and Jews escaped the verdict of their confessional leaders by appealing to Islamic authorities.

Claims of Judicial Exclusiveness

Ecclesiastical and geonic arguments for judicial exclusiveness were made through a variety of means, promoted on a variety of grounds, and enhanced by a variety of practical measures. A comparative analysis of the manner in which ecclesiastical leaders and the geonim sought to discourage institutional infidelity on the part of their coreligionists suggests that while they were driven by a common agenda of drawing litigants to their respective orders, their methods were not always the same. Here it should be noted again that Rabbanite authorities were mainly, if not solely, preoccupied with Jewish recourse to Islamic courts. Geonic responsa make no reference (and thus no objection) to any judicial authorities other than Islamic.

By contrast, the ecclesiastical employment of such ambiguous expressions as "outsiders" and "secular" is not coincidental, as church concerns were

directed toward a wider variety of judicial venues. While the Islamic judiciary may have posed a central threat to ecclesiastical jurisdiction, the exhortations of Christian legislators were directed against the judicial activities of nonecclesiastical institutions more generally. The insistence on clergymen as the only authorized judges and the refusal to accommodate the role played by holy men, monks, and laymen obliged ecclesiastical legislators to wage their battle at once on a number of fronts.

As we consider the various means by which Christian and Jewish jurists sought to discourage extra-confessional litigation, we should not overlook those instances in which they treated external judicial institutions as legitimate venues for the implementation of their own judicial decisions. Ecclesiastical and Rabbanite leaders were well aware of their own limitations. Their sporadic willingness to acquiesce with recourse to extra-confessional judicial authorities and even rely on their power should be interpreted in this context. The point is particularly evident in geonic responsa that permitted recourse to Islamic courts as a means of compelling recalcitrant litigants, particularly with respect to the repayment of debts. Though these instances are rare, there is even evidence of a geonic endorsement of the legal maxim "the law of the government is the law."

Yet the severe tones, predominantly in West Syrian canon laws, along with the employment of a vocabulary and polemical argumentation in ecclesiastical regulations and geonic responsa alike, attest to an awareness on the part of confessional leaders of the communicative qualities of their texts, designed to transmit to the general public an unequivocal warning against recourse to external judges. Adopting a reasoning similar to that of apocalyptic and historiographic narratives, ecclesiastical leaders attributed contemporary hardships caused by "foreign people" and "barbarian nations" to a general disregard for God's law. This disregard, in turn, was said to be expressed in the acts of recourse to a host of nonecclesiastical judicial authorities, described as members of "another tribe," the "dignitaries of the Christians," "Arabs," "Christians whose force is hard," and, more broadly, "outsiders."

Such severe violations of the ecclesiastical jurisdiction were to meet the heavy consequences of social exclusion and divine condemnation. Geonic depictions of Islamic courts, while far more moderate, were often in a similar vein. At first glance, it would appear that the geonim ascribed a degree of reliability to Islamic institutions and legitimized their judicial role in accordance with early rabbinic prescriptions. However, a close reading of the responsa reveals a general attitude of distrust toward Islamic judicial institutions and an attempt to delegitimize their authority by arguing that many of them had few

means of enforcement, that they relied on the testimony of false witnesses, and that they therefore ought to be legally considered "grabbers."

At the same time, the ecclesiastical jurists and the geonim did not confine themselves to rhetorical virtuosity, devising particular regulations through which they sought to disadvantage those who took their lawsuits outside their religious communities. Thus, for example, the admission of deeds that had been rejected in Islamic courts and the testimonies of non-Christians in ecclesiastical courts imbued the latter with an appealing leniency. Yet their refusal to acknowledge the validity of matrimonial arrangements conducted through nonecclesiastical institutions served as a reminder that recourse to external institutions still had its disadvantages. Similarly, while the geonim recognized the utility of Islamic enforcement, they outlined a set of criteria that had to be met before resorting to it.

Finally, the ecclesiastical attempt to incorporate civil and religious laws within a single unified code that would apply to all Christians, along with geonic accommodations of Islamic legal practices, should be seen as part of the general effort to keep Christians and Jews within the jurisdictions of their respective communities. By the eighth century, ecclesiastical leaders realized that a central motivation for their coreligionists' recourse to nonecclesiastical authorities was the absence of a comprehensive ecclesiastical code that would apply to religious as well as civil affairs and would be uniformly imposed within an ecclesiastical fold. Yet competition with judicial alternatives induced not only an ecclesiastical legal reform but also an extensive interplay with the adjacent legal orders of the Sasanian, Roman, and Islamic states.

In a similar way, it has been argued, the geonim sought to tackle the problem of recourse to Islamic courts by incorporating Islamic legal practices into their own order. The geonim's familiarity with Islamic jurisprudence in general and with Islamic judicial procedures in particular is evident from the responsa. It stands to reason that this knowledge was partially, if not largely, inspired by the recurring litigation of Jews in Islamic courts. Indeed, there is some suggestion that the institution of *'udūl* witnesses, traditionally understood in modern scholarship as purely Islamic, was fulfilled by Jews when the judicial matter at hand pertained to Jewish litigants.

Conclusion

> On what ground do they make this claim?. . . . They bring forth their [Torah] books and do not understand God's work. They have not achieved even the smallest thing in comparison to a disciple of the most junior gaon. . . . [H]ow is it that these foxes, who have not read the sources, dare to dispute God and his legacy, [namely, at present,] whoever has vigorously studied the entire Talmud and grasped everything since the time of Joshua ben Nun, [for] the halakhah should be recited through the words of one man to another.

In the responsum above, Sherira Gaon addresses the members of a North African community, regarding certain scholars who "dispute and speak against the geonim."[1] Rather than explicitly identify those who challenged geonic authority, the gaon chooses to highlight their incompetence and ignorance. It is in contrast to such faults that the geonim, heirs of the ancient rabbinic oral tradition, were able to claim exclusive legal authority. Claims of this sort were made against a background of legal decentralization, exhibited through the local inclinations of regional communities in general and those outside the *reshut* in particular.

It is here, too, that we note the merging of law and social authority. By the time of Sherira Gaon—the tenth century—confessional leaders had long since reached the understanding that legal power was crucial for sustaining social power. The legal endeavors of eighth- and ninth-century leaders—specifically, the East Syrians Išō'bokt and Timothy I and the Muslim convert 'Abdallāh ibn al-Muqaffa'—suggest a historical moment in which monotheistic religions stepped up their efforts to achieve legal centralization. Ibn al-Muqaffa''s memorandum and Išō'bokt's introductory remarks to his legal collection underscore their common preoccupation with the lack of legal uniformity and centralization. Both officials lament the inconsistent nature of legal traditions

and the resort of confessional judges to arbitrary custom, with the Muslim secretary speaking of the divergence of legal practices within towns, and the East Syrian cleric relating the state of affairs in Christian villages in almost exact terms. Accordingly, they propose the same reform: the creation of a unified and comprehensive legal order that will govern the lives of all believers. Shortly after Išō'bokt made this call, his coreligionist the catholicos Timothy I explained the need for such legal reform: it was to prevent Christian litigation in extra-confessional courts. This practice, he explained, causes "people to set apart and be different from one another, [according to] regions, places, kinships, languages, practices, and laws."[2]

This study has been an attempt to tell the history of Near Eastern religious communities in the early Islamic period through the lens of their judicial practices. The phenomenon of individuals taking recourse to judicial institutions of diverse social, religious, and cultural orientations was not unique to the period. Exhortations to remain within confessional jurisdictions were not made for the first time after the Islamic conquest but appear to have been a steady feature of monotheistic legal traditions from the outset. Yet while confessional agendas persisted, so did the tendency of individuals to select those judicial authorities that best suited their needs. A myriad of considerations fed into the choice to settle one's legal problems and validate one's legal transactions before a given judicial institution. Though these include such mundane factors as cost, proximity, and efficiency, the phenomenon itself raised many weighty questions pertaining to the social affiliations of the people at the center of this study.

On the face of it, Christian and Jewish confessional leaders were primarily concerned with the legal competition posed by the Islamic state. Islamic courts are well attested in canon laws and geonic responsa. Nonetheless, probing these texts and examining them in a broader context have revealed that the demands for judicial authority paint a much more dynamic picture: ecclesiastical and Rabbanite demands were made against a general setting of legal pluralism, facilitated by a social landscape of overlapping group affiliations, personal ties, and competing sources of authority.

Our examination of claims of judicial authority and their immediate context began with an assessment of their pre-Islamic origins. The rich and diverse evidence pertaining to legal arrangements under the late Roman and Sasanian Empires allowed us to explore their endurance under Islam. Despite chronological and ideological differences, all three states claimed political legitimacy on religious grounds, and by the third century, political leaders began to assert

authority on God's behalf. These demands did not disappear with the rise of Islam but rather intensified.

Under Islam, legal pluralism was obscured and marginalized, as jurists sought to articulate their opinions in religious terms. Therefore, the attempt to understand the social dynamics of the early Islamic period required us to trace the sources of social power in the pre-Islamic period. Chapter 1 described this period as characterized by complex social structures within which operated a diverse set of judicial institutions. Governed by considerations of sovereignty and administrative efficiency, Roman rulers empowered bishops to assume judicial prerogatives and also imbued the judicial authority of local elites with state legitimacy. It would seem, though it is hard to establish, that the Sasanian acknowledgment of East Syrian institutions was similarly motivated. Under the Sasanians, we found a detailed, if somewhat obscure, judicial apparatus, manned by members of the Zoroastrian clergy. The latter's tribunals, it appears, were open to non-Zoroastrians as well.

Within the Christian and Jewish legal orders themselves, judicial power was not held by a single authority. Extending across political boundaries, the authority over the Christians and the Jews of the Roman and Sasanian Empires was often negotiated among a diverse group of religious and lay elites. It is with respect to communities living under these empires, then, that we began to consider judicial choices in their religious and social context. It is here, too, that we first came across the response of Christian and Jewish confessional elites to these choices. Their statements and stipulations are important for understanding later documentation; yet their significance goes beyond questions of legal analysis. Through their tone and reasoning, legal prescriptions also served the purpose of transmitting an image of a religious community tightly bound by its judicial institutions.

Under Islam, too, the justification for judicial authority was offered in terms of religious ideology. Thus the consolidation of an Islamic judicial apparatus under the direct authority of the caliphs went hand in hand with the rejection of Jāhilī legal practices in general and judicial ones in particular. By the eighth century, the rulers of the new Islamic state had set out to centralize their judicial apparatus and outline its tasks and jurisdictions. This entailed not only the subordination of Muslim judges to the caliphal court but also the canonization of legal principles along with the elimination of customary practices of pre-Islamic Arabian origin.

Rather than sticking to the image presented by Islamic legal narratives, we attempted in our survey of the judicial institutions to which Muslims had

recourse to take into account a greater variety of factors. In particular, our understanding of Islamic legal ties was significantly nuanced by considering, on the one hand, the survival of pre-Islamic practices in the early Islamic period and, on the other, the limited success of the Abbasid reforms initiated in the late eighth to the early ninth century. As we have seen, these ties, whether with *qāḍī*s, arbiters, government officials, or holy men, were often forged through personal contacts of reciprocal value rather than through the formal channels of institutions. Under the first caliphs and the Islamic empires of the high Middle Ages, judicial roles were assumed by individuals of social prominence, and legal affairs were handled before a variety of institutions of overlapping jurisdictions (geographic and legal). The evolution of an Islamic social setting based on individual authorities was to amplify patterns similar to those that had already governed the lives of Near Eastern communities prior to Islam.

Pre-Islamic social institutions were not affected by the Arab conquest, at least not at first. As they had done before the conquest, ecclesiastical leaders continued after it to share their authority with Christian lay elites. First under a very loose grip of Islamic authority and later alongside its gradual consolidation, Eastern Christian churches worked incessantly to form communities whose sole point of reference was divine decree. While ecclesiastical positions and injunctions were articulated in religious terms, their content concerned not only Muslim but also nonecclesiastical Christian authorities. Accordingly, judicial authority was claimed in the context of an ongoing competition with both theological and social contenders. Indeed, we may assume that early on, before Islamic institutions began to permeate the lives of non-Muslims, it was nonecclesiastical Christian elites who would have been the primary preoccupation of ecclesiastical authorities. Combined with pre-Islamic evidence, church regulations from the early Islamic period provided us with a complex picture of Christian judicial authorities, a category that, apart from ecclesiastical judges, included laymen, monks, and ascetic figures.

Such a diversity of sources of authority was characteristic also of Near Eastern Jews. The exclusive identification of Gentile courts in geonic responsa as Islamic is admittedly instructive but does not conceal the fact that geonic authority, too, had to be negotiated. Owing to the lack of ecclesiastical institutions and means of enforcement, the central leaders of the rabbinic world were forced to rely on the loyalty of regional trustees. This decentralization of social power was compounded by the relative ease with which rabbinic law sanctioned the judicial authority of Jewish individuals. This was particularly true in the case of communities that were outside the formal realm of the *reshuyot*:

Egyptian and North African communities. Here, alongside regular rabbinic courts, members of the Jewish community were often asked to serve as judges alongside their daily affairs. The effectiveness of their decisions was dependent on the willing compliance of the legal parties and also on public consent. The latter, in the form of local congregations, appears in some instances to have possessed a judicial capacity as well. These small-scale communities were characterized by the close-knit ties of their members, which had the effect of charging judicial proceedings with a personal significance. The geonim took great pains to sustain their ties with regional leaders, many of whom were their former disciples. It is here that the social role of the exchange of questions and answers is best exemplified. The geonim demanded the ongoing flow of questions as a reassuring sign of loyalty and also because of the donations that came with them. When the questions began dwindling in the tenth century, additional means were used to revive social networks. One of these was the allocation of honorary titles to leading communal figures as a way of securing their support. While the reciprocity of center-periphery ties was designed to preserve social power on both ends, it came at the expense of the institutional hierarchy to which the geonim aspired. Nonetheless, it was this loose character of Jewish public life that was so crucial for the maintenance of the rabbinic legal order. The geonim's ability to negotiate power rather than dispute it, along with the relative leniency of rabbinic principles, enabled a diverse group of individuals to assume judicial authority within a single legal order.

The response of confessional elites to religious pluralism must be understood in the context of these social complexities. It cannot be summed up as an attempt to secure communal autonomy vis-à-vis the Islamic state, since the struggle for judicial power occurred not only between legal orders but also within them. On the Christian side, the battle was waged on two main fronts: the codification and canonization of ecclesiastical legal regulations of religious and civil types; and a strong objection to violations of the ecclesiastical jurisdiction. Both responses were supposed to serve a single goal: the prevention of Christian recourse to nonecclesiastical judicial authorities.

While the effectiveness of these initiatives cannot be measured, their examination allows us to discuss the kind of society they aimed to create. Ecclesiastical regulations pertaining to the problem of recourse to extra-confessional institutions suggest that the phenomenon was widespread. Its diverse character is attested through references to the many different judicial authorities that Christians used and to the various considerations guiding their judicial

choices. In response, ecclesiastical regulations were set forth in order to exhort, rebuke, and discourage Christians from breaching the ecclesiastical jurisdiction. Ecclesiastical leaders continuously modified the legal discourse of their late antique predecessors, reciting patristic injunctions along with contemporary elaborations. Such expressions as "outsiders," once used to designate nonbelievers in a predominantly pagan environment, were now put to use against the *ṭayāyyē* and the *ālmānāyē*, the Arabs and the worldly ones. The social order of the religious community, delineated by internal and external spaces, was to dictate the principles of normative behavior. Thus the demand for religious segregation was also a demand for social control. The outsiders were identified not only by their confessional commitments but by their social ones as well.

Ecclesiastical demands were made against the background of a legal pluralism that exposed the weaknesses of the ecclesiastical legal order, highlighting the limited effect of its coercive power and social control. Thus, rather than simply resorting to a discourse of power, ecclesiastical jurists exhibited a willingness to accept the existence of competing legal orders and to absorb some of their principles. While less than a handful of regulations permit the testimony of non-Christians in ecclesiastical courts and the appearance of Christians before nonecclesiastical judges, the absorption of civil legal regulations of Zoroastrian, Roman, and Islamic provenance in ecclesiastical collections clearly demonstrates this openness. Yet what may seem a degradation of ecclesiastical law was, in fact, a further step toward the formation of a Christian communal identification, in which both the sacred and the temporal were to be administered under the single authority of the church.

Unlike ecclesiastical prescriptions, geonic responsa tell us little about their underlying motivations, other than a strict fulfillment of early rabbinic principles. Indeed, for the most part, geonic positions regarding the recourse to non-Jewish courts were not very different from those of early Rabbanite authorities. Accordingly, their willingness to tolerate the use of non-Jewish courts was almost always limited to the issuing of commercial transactions and the enforcement of monetary obligations. Yet even here, we find some divergence from original principles. Whereas certain geonim ascribed to Islamic law greater jurisdiction than the early rabbis had to Gentile courts, others qualified early rabbinic permissions to issue deeds in non-Jewish courts by referring to the problematic reputation of Islamic institutions. Nonetheless, the responsa do throw into relief some of the social circumstances that prompted Jews to seek judicial services outside their religious community. The lack of coercive power on the part of Rabbanite judges was undoubtedly a central

reason for the Jewish recourse to Islamic courts, but so, it appears, was the social integration of members of discrete religious affiliations. Under certain circumstances, Jews were forced to rely on the testimony of their Muslim neighbors, to validate their business transactions according to Islamic law, and to secure their property through the agency of Muslim notaries. Indeed, it stands to reason that Jews and Christians turned to extra-confessional authorities for much the same reasons—not only for purposes of convenience and efficiency but also as a natural consequence of the fact that their social ties were not confined to their coreligionists.

Laymen and Jewish religious leaders themselves were aware of their leadership's limitations. Thus, whereas the geonim sought to incorporate certain Islamic legal practices and acknowledged the coercive utility of Islamic courts, our evidence suggests that Jewish litigants were mindful of their leadership's sensitivities, often manipulating their confessional institutions by threatening to take their lawsuits to Islamic courts. Like ecclesiastical jurists, the geonim realized that the incorporation of Islamic legal principles into Jewish jurisprudence through specially designated legal vehicles was to serve the greater objective of sustaining the vitality of the rabbinic legal order. Geonic familiarity with Islamic legal principles in general and judicial practices in particular attests to the interplay between the two legal orders. It is quite conceivable that this interplay was generated through the recurrent interdependence of Islamic and Jewish judicial institutions in administering justice.

With regard to the Rabbanite Jews, it would be wrong to describe the legal pluralism that they enjoyed merely as a choice between Jewish and Islamic judicial institutions. As we have seen, the rabbinic legal order itself offered a plurality of judicial institutions managed by individuals who held both formal and informal social prerogatives within their communities. This diversity was designed to meet the varying needs of individuals and should be seen in the broader context of judicial choice, on the one hand, and of the high measures of legal decentralization in this period, on the other. In the absence of means to enforce their institutional hierarchy, the geonim appear to have placed much emphasis on legal procedure. As worrisome as Jewish recourse to Islamic courts may have been, the geonim were primarily concerned with the proper conduct of justice. From this perspective, Muslim judges and Jewish lay judges may well have represented an equal threat to geonic authority.

The judicial choices of Christians and Jews and the positions of their confessional leaders were governed by principles similar to those of their pre-Islamic predecessors and their Muslim contemporaries. Throughout late

antiquity and on, religious elites were empowered with social prerogatives, whether as leaders of theocratic states or of religious communities, and the religious and temporal realms of authority complemented each other. So, for example, heresy was presented as a source of social disorder in Islam and of foreign rule to Eastern Christians. Similarly, the social act of litigating in extra-confessional courts was equated with confessional renunciation. Concurrently, parallel patterns of social commitments cut across confessional boundaries. While confessional affiliation played a central role in people's lives, their choice of judicial authority was also determined by considerations of trust, personal relations, and informal conventions. It seems that the notable development under Islamic rule was less the intensification of legal pluralism than the growing demands for judicial exclusiveness.

To a greater extent than their Muslim sovereigns, Christian and Jewish confessional leaderships were forced to resort to networking and communication as a means of advancing their goals. Lacking effective institutions through which to impose their authority, the patriarchs and the geonim labored to sustain chains of command and legal jurisdictions. Despite sharp differences between the ecclesiastical and rabbinic hierocracies, Christian and Jewish ecumenical leaders argued their cases on similar grounds: both groups of leaders claimed to be descendants of an ancient chain of authorities and to possess the exclusive prerogative of speaking on God's behalf and expounding his message. These claims were transmitted through texts of diverse genres: legal, historiographic, anecdotal, and polemical. Against these claims of exclusive authority, we find a relatively overlooked group of individuals and institutions that wielded power but were not part of the formal apparatus of their religious communities. The geonim accommodated this judicial authority of laymen and graduates of competing learning institutions, while church leaders were not always keen to collaborate with their nonecclesiastical counterparts within the Christian community. The reason for this difference appears to be partly structural: the rabbinic legal order, unlike the ecclesiastical, was founded not on a fixed hierarchy but on master-disciple networks. More important, Jewish law displayed a far more lenient attitude toward the judicial authority of laymen and local congregations.

In both Christian and Jewish communities we find that judicial authorities were selected by litigants for reasons other than just their legal expertise. No less important was the coercive power of a given judge, which was, in turn, a function of his reputation and social standing. And in the absence of formal means of coercion, the personal background of the judge could ensure

his ability to instigate public approval and collaboration. Such considerations were likely to have drawn litigants toward their confessional institutions, but also in the opposite direction.

The available evidence shows that Christian and Jewish appeals to Islamic courts were often devoid of religious content and that these courts effectively were instruments for the advancement of various personal ends. It is in this respect that, in the eyes of ecclesiastical and geonic leaders, Islamic institutions were grouped together with informal Christian and Jewish judicial institutions as constituting a common problem: the decentralization of judicial power. Consequently, the demands of non-Muslim confessional elites for legal autonomy vis-à-vis the Islamic legal order were made in conjunction with their demands for legal exclusiveness within their respective communities. Yet the efforts of ecclesiastical and geonic jurists to maintain authority were not restricted to objection and rejection; they were also exerted through a common willingness to modify their own legal orders while recognizing the advantages offered by competing orders. The incorporation of civil regulations of diverse legal traditions into ecclesiastical codes and the geonic adoption of Islamic legal practices suggest a common mechanism. In pursuing such measures, the ecclesiastical and the rabbinic legal orders demonstrated their ability to adapt to a multi-centric legal environment rather than merely opposing it.

Semiautonomous Communities

Despite the strong emphasis in legal texts on the religious aspect of judicial transgressions, something more than religious identity appears to have been at stake for Christian and Jewish elites in the early Islamic period. While the positions articulated by religious elites imply a social landscape carved primarily along religious lines, the daily lives of their coreligionists suggest otherwise. In fact, the demands for judicial exclusiveness were made in the context of a decentralized setting dominated by a multiplicity of social, and hence, judicial, authorities. Christians and Jews turned to a variety of judicial institutions for a variety of reasons—pragmatic, religious, even political. These included the validation of commercial transactions, pledges of inheritance, matrimonial arrangements, the registration of property, the implementation of legal commitments, and the resolution of disputes. Beyond these particular, immediate motivations, the underlying state of legal pluralism was facilitated by a shared

culture of personal ties based on trade in social commodities, such as the exchange of power and prestige for security and patronage.

It is against this social background that religious elites advanced their claims and in this context, too, that we were able to observe the social order under Islam as one that was dictated not only by religious principles. That said, the existence of religious communities is undeniable. Social scientists speak of communities as social groups governed by a shared value system, which subsequently provides its members with a sense of identity.[3] The Eastern Christian and Jewish communities of this study clearly fit this definition. Less clear, however, is the question of precedence—whether communal relationships are constructed on the basis of a preexisting shared culture or whether the latter is the product of communal relationships. A broader definition of community treats it as a "network of relationships," established on the basis of shared interests—primarily economic production and security.[4] Once formed, it provides those affiliated with it with a sense of membership through solidarity, identification, memory, and a common goal.[5] Victor Turner's concept of "communitas," ever-changing communities formed through people's alternating life experiences, may be of use here.[6] The resilience of communities in Turner's model enables us to acknowledge the fluid nature of human bonds and the possibility that confessional boundaries were not the sole markers of communal membership.

Our evidence has shown that confessional identity and communal organization did not bar individuals from seeking the judicial services of institutions outside these categories. The vocal insistence of confessional elites on their legal jurisdictions highlights their perception of judicial transgressions as acts that clashed with their communal authority. This alone allows us to treat extra-confessional institutions as representatives of extra-confessional social groupings. The act of litigating outside confessional boundaries, however, was not a sign of religious renunciation on the part of "transgressors" but rather of their simultaneous participation in more than one social circle. While social circles other than confessional communities may not have operated as full-fledged communities, they did have the capacity to create their own rules and the means for their enforcement, whether through a formal policing body or by social ostracism.[7] Thus, perhaps it would be more useful to speak of these circles as semiautonomous communities in which individuals partook based on their cultural, economic, political, *and* religious ties.[8] Judicial competition, therefore, underscoring the relations between discrete legal orders, gives way to judicial choice, with the discussion focusing on individuals and their

various social affiliations.[9] The creation of semiautonomous communities as social fields was enabled through personal ties. In contrast to the paradigm of autonomy that launched our discussion, a paradigm of isolated corporate religious groups, the model of semiautonomous communities underscores the absence of social segregation.[10] By perceiving the social background of judicial choices in such terms, we come to see their social effects—particularly the ways in which they helped stabilize social relations within and between religious communities. Thus the ability of individuals to choose to create social commitments with individuals outside their confessional community may have been what enabled confessional communities themselves to sustain their relevance and basic structure.[11]

ABBREVIATIONS

AAS	Asian and African Studies
AHR	American Historical Review
AI	Annales Islamologiques
AJSR	Association of Jewish Studies Review
ARLSS	Annual Review of Law and Social Sciences
BJRULM	Bulletin of the John Rylands University Library of Manchester
BS	Balkan Studies
BT	Babylonian Talmud
Cd	Chronique d'Égypte
CE	The Coptic Encyclopedia. Edited by Aziz Atiya. New York: Macmillan, 1991.
CHRC	Church History and Religious Culture
DGRG	Dictionary of Greek and Roman Geography. By William Smith. Boston: Little Brown, 1854.
DO	Dumbarton Oaks Papers
EI^1	Encyclopedia of Islam. 1st ed. Edited by M. Th. Houtsma et al. Leiden: Late E. J. Brill, 1913-38.
EI^2	Encyclopedia of Islam. 2d ed. Edited by P. Bearman et al. Leiden: Brill, 1960-2005.
GCAL	Geschichte der christlichen arabischen Literatur. By Georg Graf. Vatican: Biblioteca Apostolica Vaticana, 1944-53.
GRBS	Greek, Roman, and Byzantine Studies
GSL	Geschichte der syrischen Literatur. By Anton Baumstark. Bonn: De Gruyter, 1968.
HMEIR	Harvard Middle Eastern and Islamic Review
IC	Islamic Culture
ICMR	Islam and Christian-Muslim Relations
IJ	Irano-Judaica
Islamic L. & Soc'y	Islamic Law and Society

ISR	International Studies Review
JA	Journal Asiatique
JAOS	Journal of the American Oriental Society
JBBRAS	Journal of the Bombay Branch of the Royal Asiatic Society
JCLIL	Journal of Comparative Legislation and International Law
JECS	Journal of Early Christian Studies
JESHO	Journal of the Economic and Social History of the Orient
JH	Jewish History
JJP	Journal of Juristic Papyrology
JLP	Journal of Legal Pluralism and Unofficial Law
JLS	Journal of Legal Studies
JNES	Journal of Near Eastern Studies
JOLS	Journal of Law and Society
JPS	Journal of Palestine Studies
JRS	Journal of Roman Studies
JSAI	Jerusalem Studies in Arabic and Islam
JSem S	Journal of Semitic Studies
JSS	Jewish Social Studies
JTS	Journal of Theological Studies
Law & Soc'y	Law & Society Review
MSR	Mamlūk Studies Review
MW	The Muslim World
NMS	Nottingham Mediaeval Studies
ODB	The Oxford Dictionary of Byzantium. Oxford: Oxford University Press, 1991.
PO	Patrologia Orientalis
P & P	Past & Present
PS	Patrologia Syriaca
REE	Revue des études ethnographiques et sociologiques
RIDA	Revue internationale des droits de l'antiquité
ROMM	La Ravue de l'Occident Musulman et de la Méditerranée
SI	Studia Islamica
SLR	Sydney Law Review
Yale J.L. & Human	Yale Journal of Law & the Humanities
YLJ	Yale Law Journal
ZPE	Zeitschrift für Papyrologie und Epigraphik
ZSS.RA	Zeitschrift des Savigny-Stiftung für Rechtsgeschichte

NOTES

INTRODUCTION

1. For a selection of modern studies on the theme of non-Muslim recourse to Muslim courts, see Edelby, "L'autonomie législative des chrétiens en terre d'Islam"; Fattal, "Comment les dhimmis étaient jugés en terre d'Islam"; Fattal, *Le statut légal des non-musulmans en pays d'Islam*, 344-65; Hirschberg, "Gentile Courts in the Geonic Period"; de Menasce, "Problèmes des mazdéens dans l'Iran musulman," 222; Johansen, "Entre révélation et tyrannie," 229-32; Libson, "Legal Autonomy and the Recourse to Legal Proceedings by Protected Peoples"; and Libson, *Jewish and Islamic Law*. For related studies in the modern era, see Zafrani, "Les relations judéo-musulmanes dans la littérature juridique"; Amnon Cohen and Simon-Pikali, *Jews in the Muslim Religious Court*; Hacker, "Jewish Autonomy in the Ottoman Empire"; al-Qattan, "Dhimmis in the Muslim Court"; and Joseph, "Communicating Justice." For studies dealing with the opposite phenomenon, i.e., Muslim recourse to non-Muslim courts, see Abou El Fadl, "Islamic Law and Muslim Minorities."

2. For a detailed account of the sources and outcomes of these theological disputes, see Frend, *The Rise of the Monophysite Movement*; and Baum and Winkler, *The Church of the East*. Scholars tend nowadays to opt for the term "Miaphysite," meaning "one nature," rather than "Monophysite," meaning "single nature." While the latter stresses the singularity of Christ's nature, the former stresses the unity of divine and human in that nature.

3. It should be noted that the division of Eastern Christianity into Miaphysites and Dyophysites has been chosen here for purposes of simplification. In practice, the dogmatic differences were much more nuanced; see Brock, "The 'Nestorian' Church."

4. On the Eastern Christian cultural and intellectual world of late antiquity, see Murray, *Symbols of Church and Kingdom*. See also Palmer et al., *The Seventh Century in the West-Syrian Chronicles*; Brock, ed., *The Hidden Pearl*; and Brown, *The Rise of Western Christendom*, chap. 12.

5. Brown, *The Rise of Western Christendom*, 168.

6. An instructive passage attributed to the catholicos Sabrišoʿ II (d. 835) suggests a decline in the activities of ecclesiastical schools and of those located in monasteries; see Gabriel of Basra, *Book of Laws*, 303-5. See also Griffith, *Arabic Christianity in the Monasteries of Ninth-Century Palestine*.

7. For a refutation of the "Pirenne Thesis," which argued for a historical watershed

following the Islamic conquest, see Brown, *The Rise of Western Christendom*, 9-12. For a brief survey of studies on questions of continuity from the pre-Islamic to the Islamic period, see, in this volume, Chapter 3, 100-102. On the history of Near Eastern Christianity following the Islamic conquest, see Morony, *Iraq after the Muslim Conquest*, chap. 12; Palmer et al., *The Seventh Century in the West-Syrian Chronicles*; Ducellier, *Chrétiens d'Orient et Islam au Moyen Age*; Dagron et al., eds., *Evêques, moines et empereurs (610-1054)*; and Eddé et al., eds., *Communautés chrétiennes en pays d'Islam*.

8. The most explicit reference to this continuity is the late tenth-century treatise of Rav Sherira Gaon (d. 1006); see Rav Sherira Gaon, *The Epistle*.

9. Cf. Goitein, *Mediterranean Society*, 2:1-5.

10. See Cahen, "Dhimma"; and Johansen, "Entre révélation et tyrannie," 224. Similar privileges were applied to the Zoroastrians and other groups; see Friedmann, *Tolerance and Coercion in Islam*, 84.

11. See, e.g., Goitein, "Minority Self-Rule and Government Control in Islam"; Morony, "Religious Communities in Late Sasanian and Early Muslim Iraq"; Young, *Patriarch, Shah, and Caliph*, 112-27; Lory, "Les musulmans et les autres"; M. Cohen, *Jewish Self-Government in Medieval Egypt*; Morony, *Iraq after the Muslim Conquest*, 347; M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*; Eddé et al., *Communautés chrétiennes en pays d'Islam*, 60-65; Robinson, *Empire and Elites after the Muslim Conquest*, 32; and Jonathan Berkey, *The Formation of Islam*, 92. See also the references cited in Rustow, *Heresy and the Politics of Community*, 71 n. 7.

12. H. Ben-Sasson, "The Middle Ages," 386, 388-89; Herrin, *The Formation of Christendom*, 8; Sharot, "Religious Syncretism and Religious Distinctiveness," 27; and Hoyland, *Seeing Islam as Others Saw It*, 18-19.

13. Fischel, *Jews in the Economic and Political Life of Medieval Islam*, x.

14. Lewis, *The Jews of Islam*, 31.

15. Tritton, *The Caliphs and Their Non-Muslim Subjects*; Stillman, *The Jews of Arab Lands*, 1:26; Gil, *A History of Palestine*, n. 236 (reference is given to notes rather than pages to guide readers through the English and Hebrew versions); M. Cohen, *Under Crescent and Cross*, 112; M. Cohen, "What Was the Pact of 'Umar?"; Edelby, "L'autonomie législative des chrétiens," 37; Noth, "Abgrenzungsprobleme zwischen Muslimen und Nicht-Muslimen"; and Levy-Rubin, "Shurūṭ 'Umar and Its Alternatives."

16. Goitein, *Mediterranean Society*, 2:1.

17. On the significance of legal autonomy according to Christian and Jewish jurists, see, in this volume, Chapters 5 and 6.

18. Goitein, "The Interplay of Jewish and Islamic Laws"; idem, *Mediterranean Society*, 2:395 ff.; Morony, *Iraq after the Muslim Conquest*, 353; Dagron et al., *Evêques, moines et empereurs*, 417; and Ray, *The Sephardic Frontier*, 136-43.

19. For detailed accounts of Sunni regulations on the question of *dhimmī* legal autonomy, see Edelby, "L'autonomie législative des chrétiens"; Fattal, "Comment les dhimmis étaient jugés en terre d'Islam"; and Libson, "Legal Autonomy and the Recourse to Legal Proceedings by Protected Peoples."

20. Fattal, *Le statut légal des non-musulmans en pays d'Islam*, 352-53.

21. H. Ben-Sasson, "The Middle Ages," 386.

22. *Supra*, n. 12.

23. Sharot, "Religious Syncretism and Religious Distinctiveness," 23-24.

24. The paradigm of autonomous confessional communities as the overriding principle of the social landscape of the medieval Near East and Mediterranean has recently been challenged: El-Leithy, "Coptic Culture and Conversion in Medieval Cairo, 1293-1524 a.d.," chap. 2; Klein, *Jews, Christian Society, and Royal Power in Medieval Barcelona*, esp. 26-51; Ray, *The Sephardic Frontier*, 104-5; Rustow, "Karaites Real and Imagined"; Papaconstantinou, "Between Umma and Dhimma"; MacEvitt, *The Crusades and the Christian World of the East* (see his judicious comments on 2, 14); Rustow, *Heresy and the Politics of Community*, chap. 3; Rustow, "At the Limits of Communal Autonomy"; Payne, "Persecuting Heresy in Early Islamic Iraq"; and Payne, "Christianity and Iranian Society," 6-14.

25. See, e.g., Goitein, *Mediterranean Society*, 2:273; Gil, *A History of Palestine*, n. 728; and Edelby, "L'autonomie législative des chrétiens," 45.

26. Walzer et al., eds., *The Jewish Political Tradition: Membership*, 1: 3.

27. Klein, *Jews, Christian Society, and Royal Power in Medieval Barcelona*, 27; Ray, *The Sephardic Frontier*, 105; Rustow, *Heresy and the Politics of Community*, 72; and Payne, "Christianity and Iranian Society," 161-63.

28. See, e.g., Lewis, *Jews of Islam*, 57; and M. Cohen, *Under Crescent and Cross*, 66, 164.

29. Cahen, "Histoire économico-sociale et islamologie," 198-99; Douglas, *How Institutions Think*, 19; C. Mitchell, "The Religious Content of Ethnic Identities"; and Papaconstantinou, "Between Umma and Dhimma," 127.

30. M. Mann, *The Sources of Social Power*, 1:17-18; and MacEvitt, *The Crusades and the Christian World*, 12.

31. Rustow, *Heresy and the Politics of Community*, 70; and idem, "At the Limits of Communal Autonomy," 133-59.

32. Morony, *Iraq after the Muslim Conquest*, 346; and Rustow, "At the Limits of Communal Autonomy," 135.

33. Humphreys, *Islamic History*, 256. Cf. Donner, *Narratives of Islamic Origins*, 140-41, suggesting that the complexity of historiographic traditions highlights the fact that "individuals usually belong simultaneously to several overlapping communal groupings"; and Papaconstantinou, "Between Umma and Dhimma," 132: "Although the visible definition of the groups was religious, their composition could at least partly be dictated by other factors that also have group-creating power, so to speak, in particular status, kinship, ethnicity and territoriality."

34. Goitein, *Mediterranean Society*, 1:55-76.

35. Rosen, *Bargaining for Reality*, 4, 11.

36. Ibid., 60-61; and Mottahedeh, *Loyalty and Leadership in an Early Islamic Society*, 72-78. Cf. the pre-Islamic practice of bestowing gifts, in Sizgorich, "Do Prophets Come with a Sword?."

37. Rosen, *The Justice of Islam*, 6.

38. Udovitch, "Formalism and Informalism in the Social and Economic Institutions

of the Medieval Islamic World," 74-75 Mottahedeh, *Loyalty and Leadership*, 175; and N. Hurvitz, *The Formation of Hanbalism*, 11, 159-60.

39. Mingana, ed. and trans., *Sources Syriaques*, 1:151–79; English translation from Hoyland, *Seeing Islam*, 9.

40. Halbertal, "Coexisting with the Enemy"; Biale, ed., *Cultures of the Jews*, xviii-xxiii; and G. Stroumsa, "Religious Dynamics between Christians and Jews in Late Antiquity (312-640)."

41. Lewis, *Jews of Islam*, 83; Sharot, "Religious Syncretism and Religious Distinctiveness," 27-28, 30-39; Hoyland, *Muslims and Others in Early Islamic Society*, xxix ff.; and Griffith, *The Church in the Shadow of the Mosque*, 13-14, 21-23.

42. Cf. "a cluster of apocalyptic expressions," in Morony, "History and Identity in the Syrian Churches," 14; and "the anti-assimilation rhetoric," in Papaconstantinou, "Between Umma and Dhimma," 150.

43. Wansbrough, *The Sectarian Milieu*, 98; R. Cohen, "Language and Conflict Resolution," 26; and Boyarin, *Border Lines*, 1-11.

44. See Alexander, "Medieval Apocalypses as Historical Sources"; Moorhead, "The Monophysite Response to the Arab Invasions"; Brock, "Syriac Views of Emergent Islam"; Martinez, "The Apocalyptic Genre in Syriac"; Fiey, "The Last Byzantine Campaign into Persia"; Haldon, "The Works of Anastasius of Sinai"; Drijvers, "The Gospel of the Twelve Apostles"; Palmer et al., *The Seventh Century in the West-Syrian Chronicles*, passim; Drijvers, "The Testament of Our Lord"; Reinink, "The Beginnings of Syriac Apologetic Literature in Response to Islam"; M. Cohen, *Under Crescent and Cross*, chap. 10; Hoyland, *Seeing Islam as Others Saw It*, passim; Yahalom, *Liturgical Poetry and Reality in Late Antiquity*; Elitsur, *The Liturgical Poetry of Rabbi Pinhas ha-Kohen*; Griffith, *The Church in the Shadow*, passim; Papaconstantinou, "They Shall Speak the Arabic Language and Take Pride in It"; and Papaconstantinou, "Between Umma and Dhimma," 143.

45. Hoyland, *Muslims and Others in Early Islamic Society*, xviii. Cf. Donner, *Narratives of Islamic Origins*, 129; and Nirenberg, *Communities of Violence*, 6: "When medieval people made statements about the consequences of religious difference, they were making claims, not expressing accomplished reality."

46. Douglas, *How Institutions Think*, 9; and Ray, "Beyond Tolerance and Persecution," 4.

47. Nirenberg, *Communities of Violence*, 7, 12; S. Mitchell and G. Greatrex, eds., *Ethnicity and Culture in Late Antiquity*, xii; Papaconstantinou, "Between Umma and Dhimma," 137; and Payne, "Christianity and Iranian Society," 9-11.

48. Reisman, "Autonomy, Interdependence, and Responsibility," 408.

49. Hart, *The Concept of Law*, 89.

50. Ibid.

51. Ibid., 91.

52. On the law as a means of sustaining control, see M. Mann, *The Sources of Social Power*, 1:7, 22; Rosen, *The Justice of Islam*, 35; and Satlow, "*Texts of Terror*," 274, 294. See also N. Hurvitz, "From Scholarly Circles to Mass Movements," 986, where the writer underscores the role of Sunni schools of law in general and of the Ḥanbalī one

in particular in the formation of "legal communities," in which the jurists "articulated and recorded the distinctive legal doctrines that both regulated their adherents' lives down to the most minute details and at the same time set them apart from the other *madhahibs*."

53. On legislative language as a means of supporting the interests of elites, see G. Lenski, *Power and Privilege*, 52.

54. Shaw, "Judicial Nightmares and Christian Memory," 537. Cf. S. Lieberman, "Roman Legal Institutions in Early Rabbinics and in the Acta Martyrum," 19, referring to the observation of the second-century Palestinian sage Rabbi Meir: "The trial was public; the judge could observe the reaction of the spectators."

55. Honoré, "Roman Law AD 200–400," 111; Harries, *Law and Empire in Late Antiquity*, 41, 56, 58, 79; G. Lenski, *Power and Privilege*, 57; and Elon, *Jewish Law*, 1:14. On ceremony and power, see Sanders, *Ritual, Politics, and the City in Fatimid Cairo*; Lincoln, *Authority*, 9; Rosen, *The Justice of Islam*, 7; and Last Stone, "Rabbinic Legal Magic."

56. For a selection of historical studies on multiple judicial practices in the context of multiple legal orders, see Wollf, *Das Problem der Konkurrenz von Rechtsordnungen in der Antike*; Wickham, "Land Disputes and Their Social Framework in Lombard-Carolingian Italy, 700-900"; N. Hurvitz, "From Scholarly Circles to Mass Movements"; van den Boogert, *The Capitulations and the Ottoman Legal System*; Lange, "*Ḥisba* and the Problem of Overlapping Jurisdictions"; Humfress, *Orthodoxy and the Courts in Late Antiquity*; Oudshoorn, *The Relationship between Roman and Local Law in the Babatha and Salome Komaise Archives*; and Tuori, "Legal Pluralism and the Roman Empire."

57. John Griffiths's paper is still considered the most comprehensive discussion of legal pluralism; see Griffiths, "What Is Legal Pluralism?."

58. Tamanaha, "The Folly of the Social Scientific Concept of Legal Pluralism," 193.

59. For a recent survey of studies on legal pluralism, see, esp., Shahar, "Legal Pluralism and the Study of Shari'a Courts," 112-41.

60. Santos, "Law: A Map of Misreading," 280-81; Merry, "Legal Pluralism," 869; and Tamanaha, "Understanding Legal Pluralism," 1. In the early 1990s, a debate evolved as to whether the concept of legal pluralism actually refers to an amalgamation of legal orders or of "rule systems," or "systems of normative order." Brian Tamanaha has argued that the concept of legal pluralism has been "constructed upon an unstable analytical foundation," as the premise that "there are all sorts of normative orders not attached to the state which nevertheless are law . . . [and as such] is a slippery slides to the conclusion that all forms of social control are law." See Tamanaha, "The Folly of the Social Scientific Concept of Legal Pluralism," 192-93. Tamanaha's criticism was countered by Franz von Benda-Beckmann in "Who's Afraid of Legal Pluralism?," 48; Benda-Beckmann saw "law as a dimension of social organization . . . [restricting] society's members' autonomy to behave and construct their own conceptions." See also Woodman, "The Idea of Legal Pluralism," 12: "[F]or most subjects of state law there is no significant distinction between this and other normative orders. . . . Tamanaha's argument is irrelevant to the empirical question. That it would be convenient to distinguish between law and social ordering in general has nothing to do with the question whether a distinction exists."

61. Galanter, "Justice in Many Rooms," 17-19.

62. Woodman, "The Idea of Legal Pluralism," 3.

63. Griffiths, "What Is Legal Pluralism?," 38.

64. The term "semi-autonomous social field" has been adopted by Griffiths subsequent to its introduction in Moore, "Law and Social Change"; the term refers, in Moore's words, to an "arena in which a number of corporate groups deal with each other. . . . The concept of a semi-autonomous social field puts emphasis on the issues of autonomy and isolation, or rather, the absence of autonomy and isolation" (722).

65. Vanderlinden, "Le pluralisme juridique," 20.

66. Griffiths, "What Is Legal Pluralism?," 39. Cf. Benda-Beckman's suggestion to "reserve the concept to the duplicatory, parallel character of legal forms . . . [rather than] more general and encompassing terms such as complexity or multiplicity," in Benda-Beckmann, "Who's Afraid of Legal Pluralism?," 60.

67. Benda-Beckmann, *Property in Social Continuity*, 23; and idem, "Who's Afraid of Legal Pluralism?," 63.

68. Griffiths, "What Is Legal Pluralism?," 5.

69. Shahar, "Legal Pluralism and the Study of Shari'a Courts," 120.

70. Griffiths, "What Is Legal Pluralism?," 38.

71. Tamanaha, "Understanding Legal Pluralism," 1.

72. Ibid., 42. See also Vanderlinden, "Return to Legal Pluralism," 151.

73. Merry, "Legal Pluralism," 870; and Berman, "The New Legal Pluralism," 236.

74. Cf. Rosen, *The Justice of Islam*, 126.

75. Santos, "Law: A Map of Misreading," 281, 286. Cf. Galanter, "Justice in Many Rooms," 13; and Berman, "The New Legal Pluralism," 231.

76. See, e.g., M. Cohen, "Correspondence and Social Control in the Jewish Communities of the Islamic World."

77. Marcus, ed., *Elites*, 8-9.

78. The preservation of social power is seen here to be of particular import; see G. Lenski, *Power and Privilege*, 37: "It influences almost every kind of decision. . . . [F]ear of the loss of status and honor is one of the few motives that can make men lay down their lives on the field of battle."

79. For examples of the resources held by religious elites, see Eickelman, *Knowledge and Power in Morocco*, 4-9; and N. Hurvitz, *The Formation of Hanbalism*, 27-30, 59-63.

80. Marcus, *Elites*, 16; and G. Lenski, *Power and Privilege*, 38. Cf. M. Mann, *The Sources of Social Power, 1:* 7; and Bourdieu, *Outline of a Theory of Practice*, 183-84.

81. G. Lenski, *Power and Privilege*, 53.

82. Lasswell, "The Structure and Function of Communication in Society," 45; Douglas, *Natural Symbols*, 77-79; Lincoln, *Authority*, 4-5; Bourdieu, *Language and Symbolic Power*, 37-39, 67-75; Menache, ed., *Communication in the Jewish Diaspora*, 1-13; Brown, *Poverty and Leadership in the Later Roman Empire*, 83; R. Cohen, "Language and Conflict Resolution," 25-29; and Silverstein, *Postal Systems in the Pre-Modern Islamic World*, 186.

83. Marcus, *Elites*, 10; and G. Lenski, *Power and Privilege*, 62.

84. Douglas, *Purity and Danger*, 2-4, 95-96, 114, 124.

85. Ray, *Sephardic Frontier*; and Klein, *Jews, Christian Society, and Royal Power in Medieval Barcelona*, 29-35.

86. BT Gittin 58b.

87. Agus, *Urban Civilization in Pre-Crusade Europe*, 2:752; and Grossman, "The Attitude of the Early Scholars of Ashkenaz toward the Authority of the *Kahal*," 195.

88. See also Rashi (Rabbi Shelomo Yitzhaki, d. 1105), "[Gentile] judges accept bribery and prevent justice," in Agus, *Urban Civilization in Pre-Crusade Europe*, 2:753. The Rita' (Rabbi Yosef Tuv Elem, d. ca. 1070) permitted appeal to Gentile courts as a means of coercing recalcitrant litigants, in Moshe bar Ya'qov of Coucy, *Sefer Mitzvot Gadol*, Mitzvot 'Ase, 107, 189d; M. Cohen, *Under Crescent and Cross*, 94; and Grossman, *The Early Sages of France*, 63.

89. See, e.g., the cases of the Coptic and Armenian Churches briefly discussed in Chapter 3 of this volume.

90. Selb, *Orientalisches Kirchenrecht*, 1:58-72.

91. Ibid., 1:58, 71-72.

92. For the West, see, e.g., M. de Jong, "The Limits of Kinship," 48; and Hen, "Knowledge of Canon Law among Rural Priests."

93. Archondonis, "The Participation of the Laity in the Synods of the Greek-Byzantine Churches."

94. Breydy, "Les laics et les Bnay Qyomo dans l'ancienne tradition de l'église syrienne"; cf. Habbi, "La participation des fidèles dans la vie de l'église d'Orient."

95. Vööbus, ed. and trans., *The Synodicon in the West Syrian Tradition*, 163/375: 256-57/164/376: 269.

96. Rustow, *Heresy and the Politics of Community*, xix; cf. Walzer, *The Jewish Political Tradition*,: 5.

97. Nakhalon, *The Kahal and Its Enactments in the Geonic Period*, 1.

98. Assaf, *The Geonic Period and Its Literature*, 215. See also Gil, *Jews in Islamic Countries in the Middle Ages*, n. 102.

99. M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 21.

100. Assaf, *The Geonic Period and Its Literature*, 213; and Goitein, *Mediterranean Society*, 1:22.

101. J. Mann, "The Responsa of the Babylonian Geonim as a Source of Jewish History," 458-61; and Assaf, *The Geonic Period and Its Literature*, 136.

102. See, in this volume, Chapter 6, for more on the question of geonic interpretation rather than legislation.

CHAPTER 1. A LATE ANTIQUE LEGACY OF LEGAL PLURALISM

1. Griffiths, "What Is Legal Pluralism?," 38.

2. Pseudo-Joshua the Stylite, *Chronicle*, ed. and trans. Trombley and Watt, 27.

3. Ibid., n. 133.

4. On the multiple judicial systems under the Eastern Roman Empire, see Harries, *Law and Empire*, chap. 1; Humfress, *Orthodoxy and the Courts in Late Antiquity*, chap. 1; and Tuori, "Legal Pluralism and the Roman Empire."

5. Arguments as to the absence of the Roman imperial government have been made, inter alia, in Brown, *Augustine of Hippo*, 189; and Bagnall, *Egypt in Late Antiquity*, 62-63. The notion has also been at the center of a thesis arguing for a complete elimination of state litigation in sixth-century Egypt, in Schiller, "The Courts Are No More," 1:469-502. But cf. Honoré, "Roman Law AD 200–400," 109, 111, 115, 124, who challenges the "decline thesis" by rejecting "the straightforward model of decline" and seeking "to strike a balance between elements of decline and elements of progress, elements of continuity and elements of change," owing to the "rule of the *Rechtsstaat* [which] . . . helped to counterbalance the weakness of a state." See also Keenan, "Egypt," 615, who argues that at least the "collection of grain for Constantinople required cooperation among all the Egyptian provinces," thus attesting to a thriving administration. And see Kelly, "Bureaucracy and Government," 183, who identifies an imperial tactic "to strengthen the apparatus of central government control."

6. See, esp., Sarris, *Economy and Society in the Age of Justinian*.

7. This delegation of power has been a part of a pattern of rule; see Kelly, "Justice," 531.

8. Humfress, "Law and Legal Practice," 179.

9. Ibid., 169.

10. Harries, *Law and Empire*, 54; and Honoré, "Roman Law," 110.

11. Harries, *Law and Empire*, 54; and Honoré, "Roman Law," 110. See also Jones, *The Later Roman Empire*, 284–602, 1:144-45; and Frakes, *Contra Potentium Iniurias*.

12. Frakes, *Contra Potentium Iniurias*, 40.

13. Of up to 300 solidi, according to Kelly; see Kelly, "Justice," 531.

14. Sarris, *Economy and Society in the Age of Justinian*, 210.

15. S. Lieberman, "Roman Legal Institutions in Early Rabbinics and in the Acta Martyrum," 13: "As the place of the Roman trials the rabbis generally mention the basilica."

16. Kelly, "Justice," 531.

17. Humfress, "Civil Law and Social Life," 206.

18. Brown, *Augustine of Hippo*, 8.

19. Humfress, "Civil Law and Social Life," 210.

20. On the question of whether Roman law was fully applied in the provinces following the *Constitutio Antoniniana*, see Tuori, "Legal Pluralism and the Roman Empire."

21. Crook, *Law and Life of Rome*, 283; and Honoré, "Roman Law," 115. On the partial and slow process of implementation of Roman law in Egypt, see Modrzejewski, "Diritto romano e diritti locali."

22. Cf. Cotton, "Private International Law or Conflicts of Laws," 237-38, 242, 246. On the role of Roman lawyers and bureaucrats as lawmakers, see ibid.; and Honoré, "Law Codes," 539.

23. Jones, *The Later Roman Empire*, 1:470; Bagnall, *Egypt in Late Antiquity*, 63-65; Harries, *Law and Empire*, 77; and Uhalde, *Expectations of Justice*, 23.

24. Humfress, *Orthodoxy and the Courts*, 31.

25. For Timgad, see Kelly, *Ruling the Later Roman Empire*, 138 ff.; for Caesarea, see Holum et al., "A Schedule of Fees."

26. Kelly, *Ruling the Later Roman Empire*, 141.

27. Holum et al., "A Schedule of Fees," 293.

28. Cf. Schiller, "The Courts Are No More."

29. Blockley, trans., *The Fragmentary Classicising Historians of the Later Roman Empire*, 2:273.

30. Harries, *Law and Empire*, 153-71. See also Frakes, *Contra Potentium Iniurias*, 2, where it is argued that Roman lawyers possessed a "wicked nature" and "a general lack of justice," which prevailed as of the late fourth century. Cf. Honoré, "Roman Law," 110; according to Honoré, by the fifth century, "the quality of judicial decision [given in imperial courts] improved because more judges had legally trained assessors."

31. Pharr, trans., *The Theodosian Code*, 1.27.1. On the *episcopalis audientia*, see Vismara, *Episcopalis audientia*; Selb, "Episcopalis audientia"; Ziegler, *Das private Schiedsgericht*, 167-74; Harries, *Law and Empire*, 191 ff.; Rapp, *Holy Bishops*, 243 ff.; and Lamoreaux, "Episcopal Courts in Late Antiquity." Under Roman rule, the Miaphysite Churches had not yet established a separate judiciary. See Selb, *Orientalisches Kirchenrecht*, 2:80; and Van Rompay, "Society and Community in the Christian East," 251. According to Van Rompay, despite their dissatisfaction, the Monophysites in the mid-sixth century were yet to come up with a "systematic construction of a new hierarchy."

32. Frakes, *Contra Potentium Iniurias*, 221; and Sarris, *Economy and Society*, 210.

33. Selb, "Episcopalis audientia," 216.

34. Brown, *Authority and the Sacred*, 19-20. Another reason for promoting the status and influence of bishops was that bishops, like eunuchs and barbarians, could not attempt to replace the emperor. "They had no political ambitions"; see Van Dam, "Bishops and Society," 357-58.

35. See Matt. 18:15-17; 1 Cor. 6:1-8; and Donaldson, ed. and ann., *The Apostolic Constitutions*, bk. 2. See also Schöllgen, *Die Anfänge der Professionalisierung des Klerus und das kirchliche Amt in der syrischen Didaskalie*, 130-34; and Humfress, *Orthodoxy and the Courts*, 153.

36. Clarke, trans., *The Letters of Cyprian of Carthage*; see, esp., letter 34.4. See also Rémondon, "L'église dans la société égyptienne à l'époque Byzantine," 254.

37. As head of the *familia Dei*, the family of God, Augustine understood his role also as arbiter of disputes within his community, his family. See Brown, *Augustine of Hippo*, 189.

38. Harries, *Law and Empire*, 191.

39. Brown, *Poverty and Leadership*, 68.

40. Rapp, *Holy Bishops*, 243; Humfress, *Orthodoxy and the Courts*, 167-69; and Uhalde, *Expectations of Justice*, 29-30.

41. Jones, *The Later Roman Empire*, 1:492.

42. Pharr, trans., *Theodosian Code*, N Vl 35.1; and Rapp, *Holy Bishops*, 243.

43. Jones, *The Later Roman Empire*, 1:491; Meyendorff, *Imperial Unity and Christian*

Divisions, 14; N. Lenski, "Evidence for the *Audientia Episcopalis*?," 92; and Rapp, *Holy Bishops*, 246.

44. Honoré, *Law in the Crisis of Empire 370–455*, 4. See also Humfress, "Defensor Ecclesiae"; and Humfress, "A New Legal Cosmos." Humfress sees church judiciary as becoming an integral part within the "imperial legal arena" rather than simply "a religious department of the *res publica*."

45. Weiskotten, ed., *Sancti Augustini*, 87.

46. Eno, trans., *Fathers of the Church*, 81:171-74, letter 24. See also Lepelley, "Liberté, colonat et esclavage d'après la lettre 24."

47. Uhalde, *Expectations of Justice*, 2: "[T]he challenge of representing divine justice while simultaneously engaging in and even presiding over the mess of worldly justice was still novel for church officials."

48. N. Lenski, "Evidence for the *Audientia Episcopalis*," 88.

49. Lamoreaux, "Episcopal Courts," 148.

50. Parsons, trans., *Fathers of the Church*, 10:58-59, letter 96.

51. Boyd, *The Ecclesiastical Edicts of the Theodosian Code*, 92.

52. Brown, *Augustine of Hippo*, 191.

53. Ibid., 190; and Uhalde, *Expectations of Justice*, 9, 28.

54. Honoré, "Roman Law," 111.

55. Pharr, trans., *The Theodosian Code*, 477.

56. See, esp., Humfress, "Judging by the Book"; and Boyd, *The Ecclesiastical Edicts of the Theodosian Code*, 101.

57. See, esp., Bagnall, *Egypt in Late Antiquity*, 62 ff.

58. Honoré, "Roman Law," 115.

59. Kelly, "Bureaucracy and Government," 183.

60. Oudshoorn, *Roman and Local Law*, 204.

61. Crone, *Roman, Provincial and Islamic Law*, 14; and Cotton, "Private International Law or Conflicts of Laws."

62. Keenan, "Egypt," 620.

63. See Wipszycka, *Les ressources et les activités économiques des églises en Égypte du IVe au VIIIe siècle*.

64. Sarris, *Economy and Society*, 70.

65. Ibid., 78; on the office of the *pagarch*, see Liebeschuetz, "The Pagarch."

66. Schiller, "The Courts Are No More," 469. See also Steinwenter, *Das Recht der koptischen Urkunden*, 55.

67. Sarris, *Economy and Society*, 95.

68. Brown, "The Rise and Function of the Holy Man in Late Antiquity," *JRS* 61 (1971): 85.

69. Liebeschuetz, *Barbarians and Bishops*, 231.

70. Ibid., 232.

71. Schiller, "The Courts Are No More,"471. On arbitration in late antique Egypt, see also Modrzejewski, "Private Arbitration in the Law of Greco-Roman Egypt." For a critique of Schiller's thesis, arguing that silence cannot be a justifiable ground for arguing that

imperial courts were not operating in Egypt during the late Roman period, see Ziegler, *Das private Schiedsgericht*, 273. See also Simon, "Zur Zivilgerichtsbarkeit im spätbyzantinischen Ägypten." Though exceptional, an appeal of monks from the Egyptian monastery of Apa Hierax to the imperial court in Constantinople in the sixth century attests to the enduring vitality of the imperial system; see Urbanik, "P.Oxy. LXIII 4397."

72. See also Boyd, *The Ecclesiastical Edicts of the Theodosian Code*, 89-90; Steinwenter, *Die Streitbeendigung durch Urteil, Schiedsspruch und Vergleich nach griechischem Rechte*; Allam, "Observations on Civil Jurisdiction in Late Byzantine and Early Arabic Egypt"; Bagnall, *Egypt in Late Antiquity*, 162; and Humfress, "Law and Legal Practice."

73. Traianos and van Minnen, *Settling a Dispute*.

74. Ibid., 23.

75. On the notary, see "notary," *ODB*, 3:1495.

76. Bagnall, *Egypt in Late Antiquity*, 134, 137.

77. Schmelz, *Kirchliche Amtsträger im spätantiken Ägypten*, 302. On the role of the village headman and its evidence, see Steinwenter, *Das Recht der koptischen Urkunden*, 54-55; and Schmelz, *Kirchliche Amtsträger im spätantiken Ägypten*, 302-18.

78. Schiller, "The Courts Are No More," 470; and Wickham, *Framing the Early Middle Ages*, 423.

79. Winlock and Crum, *The Monastery of Epiphanius at Thebes*, pt. 1, 176-77; and Schmelz, *Kirchliche Amtsträger im spätantiken Ägypten*, 303.

80. Wickham, *Framing the Early Middle Ages*, 139, 448, 455. According to Wickham, the Nessana papyri suggest that villages were administered by headmen in the Negev.

81. Traianos and van Minnen, *Settling a Dispute*, 14; and Winlock and Crum, *The Monastery of Epiphanius*, pt. 2, 95, doc. 163.

82. R. Stroumsa, "People and Identities in Nessana," 71.

83. Hobson, "The Impact of Law on Village Life in Roman Egypt," 194-97.

84. Lane Fox, "The *Life of Daniel*," 213. For a comprehensive and detailed analysis of the judicial functions fulfilled by clerics and monks as they appear in late antique Egyptian papyri and ostraca, see Schmelz, *Kirchliche Amtsträger im spätantiken Ägypten*, 255-88.

85. See, esp., Gellner, *Saints of the Atlas*, 129; and Brown, "The Rise and Function of the Holy Man in Late Antiquity," 87.

86. Theodoret of Cyrrhus, *The Lives of Simeon Stylites*, trans. Doran, 82-83.

87. Ibid., 23.

88. Lane Fox, "The *Life of Daniel*," 212.

89. Theodoret of Cyrrhus, *The Lives of Simeon Stylites*, trans. Doran, 195-96.

90. Lane Fox, "The *Life of Daniel*," 213.

91. Brown, "The Rise and Function of the Holy Man in Late Antiquity," 1971–97 JECS 6/3 (1998): 353-76.

92. Gould, *The Desert Fathers on Monastic Community*, v.

93. Ibid., 91, 117-32.

94. Chryssavgis, trans., *Barsanuphius and John*. For a study of the social role of the monastic community of Tawatha, see Hevelone-Harper, *Disciples of the Desert*.

95. Chryssavgis, trans., *Barsanuphius and John*, 2:233-34, letters 666-67.

96. Bagnall, *Egypt in Late Antiquity*, 138.

97. Kraemer, *Excavations at Nessana*, 3:163, doc. 57.

98. Rapp, "The Elite Status of Bishops in Late Antiquity in Ecclesiastical, Spiritual, and Social Contexts," 380.

99. Brown, *Authority and the Sacred*, 18.

100. Hevelone-Harper, *Disciples of the Desert*, 79 ff.; Kennedy and Liebeschuetz, "Antioch and the Villages of Northern Syria in the Fifth and Sixth Centuries," 74; and Wickham, *Framing the Early Middle Ages*, 423.

101. Schmelz, *Kirchliche Amtsträger im spätantiken Ägypten*, 255.

102. Harries, *Law and Empire*, 8; and Uhalde, *Expectations of Justice*, 28.

103. Eno, trans., *Fathers of the Church*, 81:65-68, letter 8.

104. See, e.g., Kraemer, *Excavations at Nessana*, 3 60-62, doc. 19; 89-90, doc. 29.

105. MacCoull, "Why Do We Have Coptic Documentary Papyri before AD 641?;" cf. Papaconstantinou, "Dioscore et la question du bilinguisme dans l'Égypte du VIe siècle." For a parallel practice, using documents in Aramaic in second-century province of Arabia, see Oudshoorn, *Roman and Local Law*, 89.

106. Winlock and Crum, *The Monastery of Epiphanius*, pt. 2, 192, doc. 151.

107. Ibid., 195, doc. 163. On Apa Epiphanius, see MacCoull, "Prophethood, Texts, and Artifacts."

108. Chryssavgis, trans., *Barsanuphius and John*, 258, letter 720.

109. Cited in Modrzejewski, "Private Arbitration in the Law of Greco-Roman Egypt," 244.

110. See, e.g., Avi-Yonah, *The Jews under Roman and Byzantine Rule*; but cf. Schwartz, *Imperialism and Jewish Society*. For a general overview of the debate, see Goodblatt, "The Political and Social History of the Jewish Community in the Land of Israel, c. 235-638," 4:404-30.

111. Rajak, *The Jewish Dialogue with Greece and Rome*, 335.

112. Schwartz, *Imperialism and Jewish Society*, 180.

113. Goodblatt, *The Monarchic Principle*, 133. On the legal jurisdiction of Jewish authorities in Roman legislation, see Linder, *The Jews and Judaism*, 148-53.

114. Linder, *The Jews and Judaism*, 148.

115. Ibid.; Rabello, "Jewish Civil Jurisdiction at the Time of the Emperor Justinian," 398-99.

116. Elon, *Jewish Law*, 1:4.

117. Rabello, "Jewish Civil Jurisdiction," 403.

118. Juster, *Les juifs dans l'empire romain*, 393-95; Goodblatt, "Political and Social History," 416; and Hezser, *The Social Structure of the Rabbinic Movement in Roman Palestine*, 5.

119. Goodblatt, *Monarchic Principle*, 133; and Schwartz, *Imperialism and Jewish Society*, 117.

120. Goodblatt, *Monarchic Principle*, 417; Hezser, *The Social Structure of the Rabbinic Movement*, 9; and Schwartz, *Imperialism and Jewish Society*, 180.

121. Peretz Hayuth, "The Jewish Judges in Palestine," 436.

122. Gafni, "The World of the Talmud," 230.

123. Peretz Hayuth, "The Jewish Judges in Palestine," 429-43; cf. Hezser, *The Social Structure of the Rabbinic Movement*, 77.

124. Goodblatt, "Political and Social History," 416-17.

125. Juster, *Les juifs dans l'Empire romain*, 398; and Goodblatt, *Monarchic Principle*, 122.

126. See, esp., Hezser, *The Social Structure of the Rabbinic Movement*; and Kalmin, *The Sage in Jewish Society of Late Antiquity*, 34.

127. Goodblatt, *Monarchic Principle*, 273.

128. During this period, Palestine was divided into three separate administrative units: *Palaestina prima, secunda, and tertia*. These developments have led some modern scholars to argue that the Sanhedrin was split into two councils, operating in two of the three Palestines that were populated by Jews; see Avi-Yonah, *The Jews under Roman and Byzantine Rule*, 229.

129. Hezser, *The Social Structure of the Rabbinic Movement*, 7.

130. Goodblatt, *Monarchic Principle*, 273.

131. Idem, "Political and Social History," 427; and Hezser, *The Social Structure of the Rabbinic Movement*, 92.

132. Hezser, *The Social Structure of the Rabbinic Movement*, 92.

133. Schwartz, *Imperialism and Jewish Society*, 195.

134. Goodblatt, *Monarchic Principle*, 134.

135. Ibid., 273; Avi-Yonah, *The Jews under Roman and Byzantine Rule*, 238. According to Michael Avi-Yonah, whereas "the authority of the rabbis declined . . . [t]he influence of laymen, formerly despised . . . began to rise. The rich among them now became the leaders in their communities . . . jointly with the local rabbis and judges."

136. Ir-Shai, "*Ateret rosho ke-hod ha-melukha senuf sefirat shesh li-khevod u-l-tif'eret*," 70.

137. BT Sanhedrin 3a-3b.

138. Elon, *Jewish Law*, 1:19.

139. A. Christensen, *L'Iran sous les Sassanides*, 301.

140. Boyce, trans., *The Letter of Tansar*, 16.

141. Ibid., 41.

142. Ibid., 42.

143. Jany, "Persian Influence on the Islamic Office of *Qāḍī al-Quḍāt*," 153.

144. See Shaked, "Administrative Functions of Priests in the Sasanian Period"; see the literature cited there for a selection of studies on the priests in the Sasanian Empire.

145. Idem, "Mihr the Judge," 1; and idem, "Some Legal and Administrative Terms of the Sasanian Period." Shaked's study of the title "advocate (or protector) of the poor" (*driyōšān jādag-gōw ud dādwar, or jādag-gōw dādwar ī driyōšān*) has led him to argue that the title was not a function by itself, as suggested by Jean de Menasce, but a honorific title, "used . . . as a complimentary title designating the mōbads of Fārs in particular."

146. Idem, "Mihr the Judge," 12.

147. Safa-Isfehani, ed. and trans., *Rivāyat-i Hēmīt-i Ašawahištān*, vii.

148. Ibid., 30-31.

149. Choksy, *Conflict and Cooperation*, 122.

150. A. Christensen, *L'Iran sous les Sassanides*, 300.

151. BT Bava Kama 113b–114a.

152. Boyce, trans., *The Letter of Tansar*, 43.

153. Perikhanian, "Iranian Society and Law," 632.

154. Ibid., 633.

155. Ibid., 644.

156. Ibid., 634.

157. A. de Jong, "Zoroastrian Religious Polemics and Their Contexts," 58.

158. Perikhanian, trans., *The Book of a Thousand Judgments*, 155, passages 60, 16-61.

159. Macuch, *Rechtskasuistik und Gerichtspraxis zu Beginn des siebenten Jahrhunderts in Iran*, 426.

160. Braun, ed., *Ausgewählte Akten*; and *Corpus Juris des persischen Erzbischofs Jesubocht*, vol. 3 of Sachau, ed. and trans., *Syrische Rechtsbücher*. On Mār Abā, see *GSL*, 119. On Išō'bokt, see *GSL*, 215.

161. Braun, *Ausgewählte Akten*, 210-11; and Mār Jabalaha, *Histoire*, ed. Bedjan, 254.

162. Hutter, "Mār Abā and the Impact of Zoroastrianism on Christianity," 169.

163. Pigulevskaja, *Les villes de l'état iranien aux époques parthe et sassanide*, 109.

164. Krikorian, "Autonomy and Autocephaly in the Theory and Practice of the Ancient Oriental Churches."

165. McDonough, "Power by Negotiation," 253.

166. Ibid., 255; and Chabot, ed. and trans., *Synodicon Orientale ou recueil de synods nestoriens*, 21-22, 30.

167. McDonough, "Power by Negotiation," 235.

168. See Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon," 181.

169. Baum and Winkler, *The Church of the East*, 20.

170. Erhart, "The Development of Syriac Christian Canon Law in the Sasanian Empire," 127; and Payne, "Persecuting Heresy in Early Islamic Iraq," 400.

171. McDonough, "Power by Negotiation," 235. Cf. Payne, "Christianity and Iranian Society," 162: "But beyond the synodal records and Mār Abā's writings there are no traces of such a system of Christian courts, and the Christian legal writings themselves do not claim judicial authority over the faithful until the Synod of George in 676 and suggest that, at least among Christians, communal legal institutions were weak."

172. Kitchen and Parmentier, trans., *The Book of Steps*.

173. Ibid., 43: "[that is, they act as outside arbitrators, able to act because they do not represent any local interest]."

174. Ibid.; Kmoskó, ed. and tran., "Ketābā de Maskātā," 94.

175. Gafni, "The Political and Economic History of Babylonian Jewry," 799; Brody, "Judaism in the Sasanian Empire"; and Herman, "The Babylonian Exilarchate in the Sasanian Era," 44.

176. Brody, "Judaism in the Sasanian Empire," 52.

177. Gafni, "The Political and Economic History of Babylonian Jewry," 798.

178. Neusner, *A History of the Jews in Babylonia*, 244-45.

179. Gafni, "The Political and Economic History of Babylonian Jewry," 802.

180. Herman, "The Babylonian Exilarchate in the Sasanian Era," 283.

181. Gafni, *Land, Center and Diaspora*, 113.

182. Kalmin, *The Sage in Jewish Society of Late Antiquity*, 7.

183. Gafni, *Land, Center and Diaspora*, 116.

184. Lane Fox, "The *Life of Daniel*," 212.

185. Brown, *Poverty and Leadership*, 69.

186. Uhalde, *Expectations of Justice*, 28.

187. For a source analysis of the various church orders, see Bradshaw, *The Search for the Origins of Christian Worship*, 80-110. On the inclusion of earlier orders in the *Apostolic Constitutions* with special reference to the question of litigation before nonecclesiastical tribunals, see Vismara, *Episcopalis audientia*, 8.

188. Donaldson, ed., *The Apostolic Constitutions*, 74, sec. 45.

189. 1 Cor. 6:7.

190. Donaldson, ed., *The Apostolic Constitutions*, 74-75, sec. 46.

191. Kitchen and Parmentier, trans., *The Book of Steps*, 114-15.

192. David, trans., *The Book of Pontiffs*, 15, 27.

193. Chabot, ed. and trans., *Synodicon Orientale ou recueil de synods nestoriens*, 623/624.

194. Ibid., 117/376-77.

195. Mishnah Gittin 1:5.

196. Rabinovits, ed., *Midrash Tanhuma*, 384.

197. BT Gittin 10b.

198. A priest is forbidden to marry a divorced woman. See Lev. 21:7, BT Gittin 81a; and Bava Batra 160b.

199. BT Gittin 88b; Mishnah 9:8.

CHAPTER 2. ISLAM'S JUDICIAL BAZAAR

1. Ibn Wathīma, *Kitāb Bad' al-Ḫalq wa-Qiṣaṣ al-Anbiyā'*, ed. and trans. Khoury (*Les legends prophétiques dans l'Islam, depuis le Ier jusqu'au IIIe siècle de l'Hégire*), 123-24.

2. See Noth and Conrad, *The Early Arabic Historical Tradition*, 52.

3. Griffiths, "What Is Legal Pluralism?," 5; cf. Kuran, "The Economic Ascent of the Middle East's Religious Minorities"; the paper argues that under Islam, the only ones who did not enjoy the benefits of legal pluralism were the Muslims themselves.

4. See, esp., Gottheil, "The Cadi"; Hamidullah, "Administration of Justice in Early Islam"; Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*; Massignon, "Cadis et naqībs baghdadiens"; and Schacht, *An Introduction to Islamic Law*.

5. Von Grunebaum, *Medieval Islam*, 142.

6. Goitein, *Studies in Islamic History and Institutions*, 131.

7. It has been suggested that the miḥna should be viewed as a watershed for this set of arrangements; see, esp., Crone and Hinds, *God's Caliph.* Cf. *Zaman*, "The Caliphs, the 'Ulamā,' and the Law."

8. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 1:134; and Kennedy, "Central Government and Provincial Elites in the Early Abbasid Caliphate," 29.

9. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 1:119, 122; and von Grunebaum, *Medieval Islam*, 3.

10. Schacht, *An Introduction to Islamic Law*, 24.

11. Whereas scholars have seen Umayyad rule in direct continuity with Roman administrative structures, the Abbasids are thought to have adopted a number of state institutions from Sasanian models; see, esp., Schacht, *An Introduction to Islamic Law*, 25; Tyan, "Kāḍi"; and Morony, *Iraq after the Muslim Conquest*, 37-41, 85.

12. Von Grunebaum, *Medieval Islam*, 1.

13. See Bulliet, *The Patricians of Nishapur*; Kennedy, "Central Government and Provincial Elites in the Early Abbasid Caliphate," 31; Coulson, "Doctrine and Practice in Islamic Law," 216; and Mikhail, "Egypt from Late Antiquity to Early Islam," 251.

14. Von Grunebaum, *Medieval Islam*, 163. For a recent discussion on the origins of the office, see Jany, "Persian Influence on the Islamic Office of *Qāḍī al-Quḍāt*."

15. Tyan, "Kāḍi"; and Schacht, *An Introduction to Islamic Law*, 50. Cf. Crone, *Provincial and Islamic Law*, 108, according to whom the office was that of "a late antique official taken over by the Arabs under a Jewish terminology."

16. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 1:214.

17. Schacht, *An Introduction to Islamic Law*, 51; and Powers, "On Judicial Review in Islamic Law," 316.

18. Ulrich Rebstock suggests that the secular nature of the *maẓālim* court could explain the silence of *adab al-qāḍī* authors regarding this institution; see Rebstock, "A Qadi's Errors," 13.

19. Von Grunebaum, *Medieval Islam*, 165.

20. Schacht, *An Introduction to Islamic Law*, 25. A tenth-century text of Būyid provenance that "summarizes the collected experience of the Abbasid bureaucracy" is now considered to be the earliest treatment of the institution; see Silverstein and Sadan, "Ornate Manuals or Practical *Adab*?."

21. Von Grunebaum, *Medieval Islam*, 165.

22. Hallaq, *The Origins and Evolution of Islamic Law*, 79.

23. Schacht, *An Introduction to Islamic Law*, 50; Bligh-Abramski, "The Judiciary," 58; and Hallaq, *The Origins and Evolution of Islamic Law*, 57.

24. Bligh-Abramski, "The Judiciary," 56.

25. Hallaq, *The Origins and Evolution of Islamic Law*, 79.

26. Schacht, *An Introduction to Islamic Law*, 54; and Bligh-Abramski, "The Judiciary," 58.

27. Hallaq, *The Origins and Evolution of Islamic Law*, 77.

28. Coulson, "Doctrine and Practice in Islamic Law," 216.

29. Rebstock, "A Qadi's Errors," 15.

30. Johansen, "The All-Embracing Town and Its Mosques," 86-87.

31. Hallaq, *The Origins and Evolution of Islamic Law*, 80.

32. Ibid., 99; and Bligh-Abramski, "The Judiciary," 58.

33. Goitein, *Mediterranean Society*, 2:364.

34. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 1:119; and Schacht, *An Introduction to Islamic Law*, 24.

35. Goitein, *Studies in Islamic History and Institutions*, 134.

36. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 1:122.

37. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence," 1:37; and idem, *An Introduction to Islamic Law*, 24.

38. Goitein, *Studies in Islamic History and Institutions*, 134.

39. For a summary of the available sources, see Masud, Peters, and Powers, "Qadis and Their Courts," 1 ff.

40. Wansbrough, *The Sectarian Milieu*, 50.

41. Obermeyer, "*Ṭāhgūt, Man*ʿ, and *Sharīʿa*," 366.

42. Stewart and Fahd, "Ṭāghūt." See also a series of questions addressed to the ninth-century leader of the Ḥanbal school, Aḥmad b. Ḥanbal, devoted to the question of killing a *kāhin*. The figure attested here is clearly one of a soothsayer; see al-Khallāl, *Ahl al-Milal wa-al-Ridda wa-al-Zanādiqa wa-Ṭārik al-Ṣalāt wa-al-Farāʾiḍ*, ed. Ibrāhīm b. Ḥamad b. Sulṭān, 2:533-34.

43. Coulson, "Doctrine and Practice in Islamic Law," 215; and Hallaq, *The Origins and Evolution of Islamic Law*, 77.

44. For a review of the principles of *taḥkīm* according to the different legal schools, see [Anonymous], *al-Mawsūʿa al-Fiqhīyya*, 10:234 ff.

45. Of the former, see, e.g., al-Tanūkhī, *Nishwār al-Muḥāḍara wa-Akhbār al-Mūdhākara*, ed. al-Shāljī. The most recent discussion is in Tillier, "L'exemplarité chez al-Tanūkhī."

46. For a list of selected treatises by Ḥanafī, Shāfiʿī, and Mālikī authors, see Schneider, *Das Bild des Richters in der "adab al-qaḍī" Literatur*, 148-51.

47. Ibid., 248.

48. Al-Khaṣṣāf, *Kitāb Adab al-Qāḍī*, 29.

49. Ibid., 706.

50. Schneider, *Das Bild des Richters in der "adab al-qaḍī" Literatur*, 198.

51. Berkey, *Popular Preaching and Religious Authority in the Medieval Islamic Near East*.

52. Ibid., 22. At least during the first centuries of Islam, *qāḍīs* are reported to have served also as preachers and storytellers; see Coulson, "Doctrine and Practice in Islamic Law," 212; Bligh-Abramski, "The Judiciary," 47; and Hallaq, *The Origins and Evolution of Islamic Law*, 40. Examples of such figures are the *qāḍī* of Egypt Sulaym b. ʿItr (d. 694), who served as *qāḍī* and as *qāṣṣ* (storyteller); the *qāḍī* of Damascus ʿA'idh Allāh b. al-Khawlānī (d. 699), who is mentioned also as a *qārī*ʾ (Qur'an reciter); and ʿAbd al-Raḥmān al-Khawlānī, who was entrusted with the offices of "judiciary, storytelling, and the treasury." See al-Kindī, *Kitāb al-Wulāh*, ed. Gottheil, 5; Ibn Ṭūlūn, *Quḍāt Dimashq*, ed. al-Munajjid, 5; and Wakiʿ, *Akhbār al-Quḍāt*, ed. al-Marāghī, 3.

53. It is related of the scholar Khālid b. ʿImrān (d. 742 or 747) that the governor of Ifrīqiya sought to appoint him *qāḍī*. In order to avoid the appointment, Khālid fled to Alexandria. He later came across a man called al-Khaḍer, and the following dialogue took place: " 'Khālid, 'Ubayd Allah (governor of Ifrīqiya, d. 741) asked you to assume the office of *qāḍī* and you refused him?' I answered: 'Yes.' He said: 'You have done well and you should know that Allah, blessed be he and may he be exalted, if he hates his servant he casts him on to them [i.e., to serve temporal rulers]' "; see al-Mālikī, *Kītāb Riyāḍ al-Nufūs fī Ṭabaqāt 'Ulamā' al-Qayrawān wa-Ifrīqiya*, ed. al-Maṭwī, 104.

54. Coulson, "Doctrine and Practice in Islamic Law," 212.

55. Wensinck, "The Refused Dignity," 497; and N. Hurvitz, *The Formation of Hanbalism*, 84-85.

56. See Bulliet, *The Patricians of Nishapur*; Saad, *Social History of Timbuktu*; and Shoshan, "The 'Politics of Notables' in Medieval Islam."

57. Juynboll, *Muslim Tradition*, 41-42; and Tillier, "L'exemplarité chez al-Tanūkhī," 13.

58. Stewart, "Tribal Law in the Arab World," 473.

59. Schacht, *An Introduction to Islamic Law*, 77, 80, 84; Libson, "On the Development of Custom as a Source of Law in Islamic Law," 132; and Rosen, *The Justice of Islam*, 96.

60. The case of the Bedouin population in the region of Jerusalem and Bethlehem serves as a useful illustration. Trends of social development experienced by these groups over the past century have induced many of them to abandon the tribal framework as a social system. These developments also carried implications for the personal background of those who fulfill judicial responsibilities, as these men were chosen not only because of their role as tribal leaders but also based on their possession of other forms of political and social power. Another legal aspect of this trend can be seen in the incorporation of *shar'ī* legal procedures into Bedouin judicial practices. So, for example, despite the fact that written documents are considered unnecessary for the validation of transactions in Bedouin judicial institutions, it appears that their adoption in *shar'ī* systems has led to their increasing popularity in Bedouin institutions as well. Thus, the movement from nomadic to sedentary society in this case illustrates "the assimilative power of the *sharī'a* over custom in tribal arbitration." See Layish and Shmueli, "Custom and Sharī'a in the Bedouin Family according to Legal Documents from the Judean Desert."

61. See Serjeant, "Ḥaram and Ḥawṭah, the Sacred Enclave in Arabia."

62. Schacht, "Foreign Elements in Ancient Islamic Law."

63. Crone, *Roman, Provincial and Islamic Law*, 8.

64. Ibid., 15; and idem, "Jāhilī and Jewish Law," 167.

65. Motzki, *The Origins of Islamic Jurisprudence*.

66. Ibid., xiv.

67. Hallaq, *The Origins and Evolution of Islamic Law*, 8; see also idem, "The Use and Abuse of Evidence."

68. Idem, *The Origins and Evolution of Islamic Law* or "The Use and Abuse of Evidence," 32.

69. E.g., the arbiter Ghaylān b. Salama, who had ten wives but had to choose four after he converted to Islam. See al-Maydānī, *Majmaʿ al-Amthāl*, ed. Zarzūr, 1:72.

70. Van Ess, *Theologie und Gesellschaft im 2. und 3. Jahrhundert Hidschra*, 2:124; according to van Ess, prominent tribal figures continued to fulfill a certain judicial role after the Islamic conquest. The term '*arīf*, "the one who knows," was often "applied to the holders of certain military or civil offices, based on competence in customary matters, '*urf*." During the first two centuries of Islamic rule, the '*arīf* was chosen from among tribe members to fulfill a variety of tasks—most notably, the distribution of stipends, but also arbitration and supervision over the general order; see Wakī', *Akhbār al-Quḍāt*, ed. al-Marāghī, 2:347. See also Crone, *Slaves on Horses*, 25-33; and Carver, "Transitions to Islam," 208. On the persistence of tribal arrangements in early Islamic urban centers, see Wheatley, *The Places Where Men Pray Together*, 10.

71. The sedentary/nomadic dichotomy should be qualified, as the two were in constant interaction with each other. See Hoyland, *Arabia and the Arabs*, 20; and Hallaq, *The Origins and Evolution of Islamic Law*, 26.

72. Hoyland, *Arabia and the Arabs*, 124.

73. Goldziher, *Muslim Studies*, 45-49; see also Bamyeh, *The Social Origins of Islam*, 247.

74. Ibn Ḥazm, Jamharāt *Ansāb al-'Arab*, ed. Lévi-Provençal, 327; and Ibn al-Kalbī, *Nasab Ma'ad wa-al-Yaman al-Kabīr*, ed. Ḥasan, 1:391.

75. Al-Maydāni, *Majma' al-Amthāl*, ed. Zarzūr, 1:72.

76. Blachère, *Histoire de la littérature arabe*, 2:332.

77. Wellhausen, *Reste arabischen Heidentums*, 131-36.

78. Fahd, *La divination arabe*, 118.

79. Stein, *Die altsüdarabischen Minuskelinschriften auf Holzstäbchen aus der Bayerischen Staatsbibliothek in München*, 245-55.

80. Nebes, "Sabäische Texte," esp. 303. See also Multhoff and Stein, "Tempeldiebstahl und andere Schlechtigkeiten," regarding two texts dealing with the administration of justice in sanctuaries.

81. See, in this volume, Chapter 1, 36-39.

82. Numerous references to *kuhān* are made in Muḥammad b. Ḥabīb's (d. 859/60) *Kitāb al-Munammaq fī Akhbār Quraysh*; see, e.g., Ibn Ḥabīb, *Kitāb al-Munammaq fī Akhbār Quraysh*, ed. Fāriq, 20-21, 104-14, 345-46, 405. These instances are originally discussed in Crone, *Meccan Trade and the Rise of Islam*, 86-88.

83. Al-Yāqūt, *Mu'jam al-Buldān*, ed. al-Jundī, 5:463-64. See also Ibn Sa'd, *Kitāb al-Ṭabaqāt al-Kabīr*, ed. 'Umar, 1:68-69.

84. Robin, "Les signes de la prophétie en Arabie à l'époque de Muhammad." I wish to thank Prof. Robin for sharing his paper with me.

85. Hamidullah, "Administration of Justice in Early Islam," 164; and Khadduri, *War and Peace in the Law of Islam*, 232.

86. Tyan, "Ḥakam." See also in Ibn 'Asākir, *Tā'rīkh Madīnat Dimashq*, ed. Shīrī and al-'Umrawī, 23:66-67: when the Prophet inquired into the reason that Abū al-Ḥakam was a certain man's namesake, the man answered: "[F]or I arbitrate among the people of my tribe in matters [of dispute], in a way that both parties are content. Thus I have been named Abū al-Ḥakam when I still had no son"; and in al-Janadī, *Al-Sulūk fī Ṭabaqāt al-'Ulamā'*

wa-al-Mulūk, ed. al-Ḥiwālī, 1:88, where, upon the request of the Christian people of Najrān for an arbiter, Muhammad replied: "'I shall send with you a trustworthy headman,' and informed the greatest among the companions on the matter."

87. Al-Yaʿqūbī, *Ibn-Wādhih qui dicitur al-Jaʿqubī Historiae*, ed. Houtsma, 1:299.

88. Crone, *Meccan Trade and the Rise of Islam*, 188; according to Crone, the Jāhilī arbiter Saʿīd b. al-ʿAs was a layman.

89. Al-Yaʿqūbī, quoted in Hoyland, *Arabia and the Arabs*, 123. See also Goitein, *Studies in Islamic History and Institutions*, 129; and Hallaq, *The Origins and Evolution of Islamic Law*, 35.

90. Fahd, *La divination arabe*, 118.

91. Rebstock, "A Qadi's Errors," 2; and al-Iskāfī, *Kitāb Lutf al-Tadbīr*, ed. al-Bāqī, 76.

92. Bevan, ed., *Kitāb al-Naqāʾiḍ*, 1:139.

93. Kister, "Mecca and Tamīm," 146; Crone, *Meccan Trade and the Rise of Islam*, 156; and Hallaq, *The Origins and Evolution of Islamic Law*, 12.

94. Khadduri, "Ṣulḥ."

95. Schacht, *An Introduction to Islamic Law*, 148.

96. Hallaq, *The Origins and Evolution of Islamic Law*, 18; cf. Lang, "Sulha Peacemaking and the Politics of Persuasion."

97. Bevan, *Kitāb al-Naqāʾiḍ*, 1:105-6.

98. Landau-Tasseron, "Alliances among the Arabs," 145.

99. On the *ḥilf al-fuḍūl*, see Hamidullah, "Administration of Justice in Early Islam," 163; Pellat, "Ḥilf al-fuḍūl"; and Crone, *Meccan Trade and the Rise of Islam*, 143-44.

100. Ibn Hishām, *The Life of Muhammad*, trans. Guillaume, 86.

101. Cf. Goldziher, *Muslim Studies*, 65-67.

102. Landau-Tasseron, "Alliances among the Arabs," 145, 149.

103. Ibid., 156-57.

104. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 1:31; and Morony, *Iraq after the Muslim Conquest*, 83.

105. Lyall, ed. and trans., *The Poems of ʿAmr son of Qamīʿah*, 13; originally cited in Hoyland, *Arabia and the Arabs*, 122.

106. Hamidullah, "Administration of Justice in Early Islam," 163; and Khadduri, *War and Peace in the Law of Islam*, 21.

107. Cf. Rosen, *Bargaining for Reality*, 17; and idem, *The Justice of Islam*, 40.

108. Cf. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence," 30. Schacht noted that in the Qurʾan, the verb referring to Muhammad's judicial activity is *ḥ-k-m*, whereas *q-d-aʾ* (used for *qāḍī*) is made in relation to his decisions made in a political context.

109. Cornell, *Realm of the Saint*; and Takim, *The Heirs of the Prophet*. See, e.g., in Cornell, *Realm of the Saint*, 55, 58: ʿAbd al-Jalīl b. Wayḥlān (d. 1143), "an important advocate of eastern Sufi tradition in Morocco," who "was called upon to mediate local disputes and to act as a semiofficial ombudsman."

110. Vööbus, *The Synodicon in the West Syrian Tradition*, 161/367: 248-49; 162/368: 228: question 6. See also Hoyland, *Seeing Islam as Others Saw It*, 159: the eighth-century *Life* of

Theodotus relates that the seventh-century bishop of Amida was respected among members of all confessions and that "Christians, Arabs and pagans came to obtain a blessing from him."

111. Vööbus, *The Synodicon in the West Syrian Tradition*, 161/367: 248; 162/368: 227–28: question 5.

112. Vööbus, *The Synodicon in the West Syrian Tradition*, 161/367: 249; 162/368: 28: question 6. Cf. Thomas of Margā, *The Book of Governors*, ed. and trans. Budge, 1:393/2:666; on the appeal of Christians to a holy man for the same purpose, *ḥnānā* can be translated as "pity," "mercy," "compassion," but also in a liturgical sense: a compound of oil, dust, and water, mixed with the relics of saints or with earth taken from holy places. See Smith, *A Compendious Syriac Dictionary*, 149, col. b.

113. Vööbus, *The Synodicon in the West Syrian Tradition*, 161/367: 249; 162/368: 228–29: question 6.

114. Ibn ʿAsākir, *Taʾrīkh Madīnat Dimashq*, ed. Shīrī and al-ʿUmrawī, 19:318. See also the examples of Ḥasan al-Baṣrī (d. 728), in Wakīʿ, *Akhbār al-Quḍāt*, ed. al-Marāghī, 1:309; and of Suwwār b. ʿAbdallāh (d. 755), in al-Fasawī, *Kitāb al-Maʿrifa wa-al-Taʾrīkh*, ed. al-ʿUmarī, 2:247. Both examples are originally cited in van Ess, *Theologie und Gesellschaft*, 2:124 n. 5.

115. Wakīʿ, *Akhbār al-Quḍāt*, ed. al-Marāghī, 3:180, 2:124. Originally cited and discussed in a section dealing with arbitration in Tillier, *Les cadis d'Iraq*, 313 n. 171.

116. Tillier, *Les cadis d'Iraq*, 309.

117. Al-Khaṣṣāf, *Kitāb Adab al-Qāḍī*, ed. Ziyāda, 584; originally discussed in Tillier, *Les cadis d'Iraq*, 313.

118. Van Ess, *Theologie und Gesellschaft*, 2:123.

119. Wakīʿ, *Akhbār al-Quḍāt*, ed. al-Marāghī, 2:127, 130; originally cited in van Ess, *Theologie und Gesellschaft*, 2:123 n. 2.

120. Wakīʿ, *Akhbār al-Quḍāt*, ed. al-Marāghī, 124.

121. Al-Kindī, *Kitāb al-Wulāh*, ed. Gottheil, 44. See also Ibn Ḥajar al-ʿAsqalānī, *Rafʿ al-Iṣr ʿan Quḍāt Miṣr*, ed. ʿUmar, 156.

122. Tillier, "Un espace judiciaire entre public et privé."

123. Ibn al-Muqaffaʿ, *al-Risāla fī-l-Ṣaḥāba*, ed. and trans. Pellat, 1.

124. Goitein, *Studies in Islamic History and Institutions*, 150; and Ibn al-Muqaffaʿ, *al-Risāla fī-l-Ṣaḥāba*, ed. and trans. Pellat, 42-45.

125. Ibn al-Muqaffaʿ, *al-Risāla fī-l-Ṣaḥāba*, ed. and trans. Pellat, 42-45.

126. Ibid.

127. Ibid.

128. Ibid.

129. Bravmann, *The Spiritual Background of Early Islam*, 155; and Schacht, "Pre-Islamic Background and Early Development of Jurisprudence," 34. According to Schacht, *sunna*, reflecting an ancient practice, was still valid in the early Islamic period.

130. Bravmann, *The Spiritual Background of Early Islam*, 167.

131. Hallaq, *The Origins and Evolution of Islamic Law*, 55. According to Hallaq, it was an Arabian custom to which *qāḍīs* referred; Hoyland, *Arabia and the Arabs*, 121-22.

132. Cf. Rosen, *The Justice of Islam*, 19.

133. Coulson, "Muslim Custom and Case Law," 18.

134. Cf. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence," 38; Schacht argues that the first *qāḍīs* were obliged to rely heavily on their personal opinion (*ra'y*), "which took the letter and spirit of the Qur'anic legislation and of other recognized Islamic religious norms into account as much as they thought fit."

135. Wakī', *Akhbār al-Quḍāt*, ed. al-Marāghī, 2:101.

136. Makdisi, *The Rise of Colleges*, 2.

137. Zaman, "The Caliphs, the 'Ulamā,' and the Law," 10.

138. Cf. Tillier, "Un traité politique du IIe/VIIIe siècle."

139. First to publish and study the document was Margoliouth. See Margoliouth, "Omar's Instructions to the Kadi."

140. Robert Serjeant has argued that the document "has nonetheless the validity of representing the attitudes of the Islamic '*ulamā*' as they evolved in the early second century—to which it undoubtedly belongs"; see Serjeant, "The Caliph 'Umar's Letters," 66. Schacht, however, dated the document to the third century of Islam; see Schacht, *An Introduction to Islamic Law*, 16.

141. Rebstock, "A Qadi's Errors," 4.

142. Serjeant, "The Caliph 'Umar's Letters," 66-67; Serjeant's translation is taken from Margoliouth, "Omar's Instructions to the Kadi."

143. Fyzee, "Law and Religion in Islam," 41; Instruction 9 deals with the issue of testimony and prohibits a witness who is related to one of the litigating parties. Clearly, such a rule would make sense in many societies, but Serjeant suggests viewing it "in light of the practice in tribal society in which kinship would be anything but an obstacle in giving an oath"; Serjeant, "The Caliph 'Umar's Letters," 72.

144. Van Ess, "Le liberté du juge dans le milieu basrien du VIIIe siècle," 25.

145. Ibid., 26; see also idem, *Theologie und Gesellschaft*, 2:124.

146. Van Ess, "Le liberté du juge dans le milieu basrien du VIIIe siècle," 27.

147. Makdisi, *The Rise of Colleges*, 55; Juynboll, *Muslim Tradition*, 12; Bligh-Abramski, "The Judiciary," 43-53; and Hallaq, *The Origins and Evolution of Islamic Law*, 34 ff. See also the case of 'Abd al-Raḥmān b. Ḥujayra (d. 702), referred to in al-Qāḍī, "The Salaries of Judges in Early Islam," 16. Ibn Ḥujayra is reported as holding three positions: chief judge, chief preacher, and head of the treasury.

148. Wakī', *Akhbār al-Quḍāt*, ed. al-Marāghī, 2:60, 81.

149. Ibn Ṭūlūn, *Quḍāt Dimashq*, ed. al-Munajjid, 2.

150. Cf. Goitein, *Mediterranean Society*, 2:312.

151. Ibid., 1:187.

152. Ibid., 2:294, 366, 367.

153. Hallaq, *The Origins and Evolution of Islamic Law*, 80.

154. Al-Māwardī, *Kitāb al-Aḥkām al-Sulṭānīyya*, ed. Enger, 116.

155. Ibid., 122.

156. Ibid., 123.

157. Ibid., 114.

158. Ibid., 125.

159. Al-Khaṣṣāf, *Kitāb Adab al-Qāḍī*, 446-47; originally discussed in Tillier, *Les cadis d'Iraq*, 303.

160. Tillier, *Les cadis d'Iraq*, 305.

161. Al-Māwardī, *Adab al-Qāḍī*, ed. al-Sarḥān, 2:168. See also al-Sarakhsī, *Kitāb al-Mabsūṭ*, ed. al-Ḥanafī, 16:98; originally discussed in Tillier, *Les cadis d'Iraq*, 306 n. 124 and 307 n. 128.

162. Rapoport, "Legal Diversity in the Age of *Taqlīd*," 222.

163. Ibid., 220. Cf. Escovitz, "The Establishment of Four Chief Judgeships in the Mamluk Empire"; and Nielsen, "Sultan al-Zahir Baybars and the Appointment of Four Chief *Qadis*."

164. Ibn Ḥajar al-'Asqalānī, *Raf' al-Iṣr 'an Quḍāt Miṣr*, ed. 'Umar, 317.

165. See also Goitein, *Mediterranean Society*, 2:371.

166. Schacht, *An Introduction to Islamic Law*, 54.

167. Ziadeh, "'*Urf* and Law in Islam," 65. See also Lange, "Ḥisba and the Problem of Overlapping Jurisdictions."

168. Hallaq, *The Origins and Evolution of Islamic Law*, 101.

169. Rebstock, "A Qadi's Errors," 13.

170. Berkey, *The Formation of Islam*, 206.

171. Powers, "On Judicial Review in Islamic Law," 338.

172. This method of judgment has received formal recognition in the legal literature under the term *ijtihād*: "a judge must use his judicial faculties." See al-Māwardī, *Kitāb al-Aḥkām al-Sulṭānīyya*, ed. Enger, 112.

173. Hallaq, *The Origins and Evolution of Islamic Law*, 59.

PART II. THE JUDICIAL CHOICES OF CHRISTIANS AND JEWS IN THE EARLY ISLAMIC PERIOD

1 Eddé et al., eds., *Communautés chrétiennes en pays d'Islam*, 18.

2. Brown, *The Rise of Western Christendom*, 186.

3. Cf. Rustow, *Heresy and the Politics of Community*, 74. Rustow offers useful categories for breaking down the meaning of Jewish communal authority vis-à-vis the geonic centers. These include "religious and scholarly loyalties," e.g., master-and-disciple relations; "synagogue attendance," i.e., generating ties based on a common liturgical tradition (Babylonian, Palestinian, or Karaite); "educational decisions," i.e., the choice of joining a particular learning institution; "administrative structure," i.e., the choice to donate money to a particular institution; and "legal services," i.e., the choice of judicial venue.

4. Cf. Wormald, *The Making of English Law*, 1:xii, chap. 3.

5. Reisman, "Autonomy, Interdependence, and Responsibility," 407.

6. Cf. Satlow, "*Texts of Terror*," 275.

7. G. Lenski, *Power and Privilege*, 55.

8. See, e.g., ibid., 52; Douglas, *How Institutions Think*, 9; and Bourdieu, *Language and Symbolic Power*, 105–9.

CHAPTER 3. EASTERN CHRISTIAN JUDICIAL AUTHORITIES IN THE EARLY ISLAMIC PERIOD

Parts of this chapter have appeared separately in Simonsohn, "The Christians Whose Force Is Hard."

1. Kaufhold, "Der Richter in den syrischen Rechtsquellen," 92. On Eastern Christian judicial institutions, see Steinwenter, *Das Recht der koptischen Urkunden*; Selb, *Orientalisches Kirchenrecht*; Gallagher, *Church Law and Church Order in Rome and Byzantium*, 187-226; and Mardirossian, *Le livre des canons arméniens de Yovhannē Awjnec'i*, 22-25.

2. Among the terms used to designate the Arabian invaders in seventh-century Christian narratives were "Arabs" (Syr., *'arbāyē, ṭayyāyē*), "barbarians" (Syr., *barbarāyē*), "Hagarenes" (*hagrāyē*), "Ishmaelites" (*Išma'lāyē'*), "migrants" (Ar., *muhājirūn*), and "Saracens" (Gr., *Sarakēnos*). See, e.g., Hoyland, *Seeing Islam as Others Saw It*, 69, 77, 94, 117, 123, 127, 144, 162.

3. On the early layer of Islamic traditions in which Christians and Jews are considered part of the Community of Believers, see Friedmann, *Tolerance and Coercion in Islam*, 19-32; and Donner, "From Believers to Muslims."

4. Crone, *Slaves on Horses*, 18-29, 29-33; Hoyland, "New Documentary Texts and the Early Islamic State"; Robinson, *Empire and Elites after the Muslim Conquest*, 166; and Johns, "Archaeology and the History of Early Islam," 418. Despite Hoyland's disagreement with the perception in modern scholarship of a low level of centralization on the part of early Islamic administration, his conclusions confirm that the Muslims sought to retain a supervising position over an existing system; cf. Foss, "Egypt under Mu'āwiya Part I."

5. Papaconstantinou, "Between Umma and Dhimma," 138-39.

6. The continuity in these patterns under Sasanian and Islamic rule is convincingly illustrated in Payne, "Persecuting Heresy in Early Islamic Iraq." For the early Islamic period, see, e.g., the dispute between the Jacobites and Maronites held before caliph Mu'āwīya, recorded in the *Maronite Chronicle* and discussed in Papaconstantinou, "Between Umma and Dhimma," 133-36. Echoes of the dispute in the background to the election of Ḥnanišō' II (fl. 775-79) are found in the introduction to the acts of the electing synod; see Chabot, ed. and trans., *Synodicon*, 245/515–250/521. The opponents of the office of the catholicos sought to undermine the election through the charge that it was achieved through Islamic interference. In Syriac hagiographies, see Robinson, *Empire and Elites after the Muslim Conquest*, 15-16.

7. Robinson, *Empire and Elites after the Muslim Conquest,* 57.

8. Palmer, *Monk and Mason on the Tigris Frontier*, 162; and Hoyland, *Seeing Islam as Others Saw It*, 158.

9. Eddé et al., eds., *Communautés chrétiennes en pays d'Islam*, 18. See Michael the

Syrian, *Chronique de Michel le Syrien*, ed. and trans. Chabot, 2:474, according to which Christian leaders continued to manage civil affairs in the lands of the Arabs in the late seventh to early eighth century.

10. Foss, "Syria in Transition," 192.

11. Ibid., 198.

12. Schick, *The Christian Communities of Palestine from Byzantine to Islamic Rule*, 85 ff.; and Walmsley, "The Social and Economic Regime at Fihl (Pella) between the 7th and 9th Centuries," 254.

13. Namely, in Sabota (Shivta), Elusa (Halutza), and Nessana; Figueras, "The Impact of the Islamic Conquest," 282.

14. R. Stroumsa, "People and Identities in Nessana," 55-60, 76.

15. Wipszycka, *Ressources et les activités économiques*, 52-54; and Rémondon, "L'église dans la société égyptienne," 262.

16. Foss mentions a papyrus with a record of an instance from 663 in which a thief who was a tenant of a bishop was judged by the latter. According to Foss, the document illustrates an exercise of judicial authority in the capacity of land holding; see Foss, "Egypt under Mu'āwiya Part II," 266.

17. We may assume this to have been to an even greater extent in the countryside, where Islam was more heard about than actually witnessed. See Papaconstantinou, "Historiography, Hagiography, and the Making of the Coptic 'Church of the Martyrs' in Early Islamic Egypt," 86; and Robinson, *Empire and Elites after the Muslim Conquest,* 44.

18. For a general survey of late antique settlements in the region of the limestone massif and the process by which large estates in this region broke down into smaller units, see Tchalenko, *Villages antiques de la Syrie du Nord*; Kennedy and Liebeschuetz, "Antioch and the Villages of Northern Syria in the Fifth and Sixth Centuries," 73; and Tate, *Les campagnes de la Syrie du Nord du IIe au VIIe siècle*.

19. Brown, "The Rise and Function of the Holy Man in Late Antiquity" (1971), 87.

20. Foss, "Syria in Transition," 198.

21. Ibid., 204.

22. Brown, *The Rise of Western Christendom*, 174, 186, 273, 287, 306-7; and Palmer, *Monk and Mason*, 77, 107.

23. In most cases, local aristocrats who strongly identified with and were administratively linked with Byzantium chose to abandon their positions and immigrate to Byzantine territories. See John Coptic Bishop of Nikiu, *Chronicle*, ed. and trans. Charles, 200; Butler, *The Arab Conquest of Egypt*, chap. 27; and Foss, "Syria in Transition," 224.

24. Kennedy, "From Polis to Madina"; Haldon, "The Works of Anastasius of Sinai," 1:126; Figueras, "The Impact of the Islamic Conquest," 283-90; Fuller and Fuller, "Continuity and Change in Syriac Population at Tell Tuneinir, Syria"; Schick, *The Christian Communities of Palestine from Byzantine to Islamic Rule*, 220-24; Eddé et al., eds., *Communautés chrétiennes en pays d'Islam*, 17-18; Foss, "Syria in Transition," 266-67; Conrad, "Varietas Syriaca," 103; Robinson, *Empires and Elites after the Muslim Conquest*, chap. 2; Papaconstantinou, *Le culte des saints en Egypte des Byzantins aux Abbasides*, 10; and Brown, *The Rise of Western Christendom*, 304-7.

25. Chabot, ed. and trans., *Synodicon*, 219/484–85.

26. Healey, "The Christians of Qatar in the 7th Century A.D." See also Payne, "Christianity and Iranian Society," 198; according to Payne, the synod of 676 was an extension of a canon previously applied only to the clergy.

27. Cf. Edelby, "L'autonomie législative des chrétiens en terre d'islam," 50. The early conquerors were confined at first to their own cities and had no interest in integrating with local communities. See Crone, *Slaves on Horses*, 29-33; and Schacht, "Pre-Islamic Background and Early Development of Jurisprudence," 35. According to Schacht, Muslim scholars were at first indifferent toward jurisprudence, "as it fell outside the sphere of religion"; Wheatley, *The Places Where Men Pray Together*, 40.

28. The decree is part of a collection of judicial decrees sent from the catholicos to various bishops and lay leaders; Sachau, ed. and trans., *Syrische Rechtsbücher*, 2:1-51.

29. Ibid., 2:26-27: 14.

30. Ibid., 6-12:4.

31. Cf. Villagomez and Morony, "Ecclesiastical Wealth in the East Syrian Church from Late Antiquity to Early Islam," 314-15, where the writers argue that "the theory of double sanction, both ecclesiastical and secular, for the canon law of the East Syrian Church under the Sasanians does not appear to have continued under the Muslims. The Muslim government was not legally expected to enforce ecclesiastical decisions"; and Morony, *Iraq after the Muslim Conquest*, 367. See also Papaconstantinou, "Between Umma and Dhimma," 147; a reason for the obscure nature of Christian secular authority might have to do with the fact that local Christian elites were gradually joining monastic and ecclesiastical ranks as a result of the Islamic administration's increased grip over local administration.

32. Cf. Riedel, ed. and trans., *Die Kirchenrechtsquellen des Patriarchats Alexandrien*, 232; according to Riedel, the collection of Egyptian canons of Saint Basil is a product of a long period of redaction, for which there is much to suggest an Islamic context.

33. Ibid., 271.

34. Stewart, "Archon." See also MacCoull, "Patronage and the Social Order in Coptic Egypt"; and Papaconstaninou, "Between Umma and Dhimma," 145.

35. Evetts, ed. and trans., "History of the Patriarchs of the Coptic Church of Alexandria."

36. Steinwenter, *Das Recht der koptischen Urkunden*, 53.

37. See Sijpesteijn, "Shaping a Muslim State," 233-36; and Foss, "Egypt under Muʿāwiya Part II," 274.

38. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 12/ 164/376: 14: 27.

39. Cf. ibid., 164/376: 14: 27: "foreign."

40. Ibid., 163/375: 29-30/ 164/376: 32-33.

41. On Dionysius and this synod, see ibid., 164/376: 61; Selb, *Orientalisches Kirchenrecht*, 2:129; and Barsoum, *The Scattered Pearls*, 404-5.

42. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 60/ 164/376: 64-65:5.

43. Ibid., 161/367: 248-49/ 162/368: 227-28:5.

44. Thomas of Margā, *The Book of Governors*, ed. Budge, 1:lxx.

45. Ibid., 1:35-36/2:62-63.

46. Cf., in this volume, Chapter 1, for a discussion on monastic judicial authority.

47. Ecclesiastical jurists of discrete churches drew on shared canonical works written and codified during the formative centuries of Christianity. It stands to reason that despite doctrinal differences, the various ecclesiastical judiciaries shared the same features of structure and practice; see Selb, *Orientalisches Kirchenrecht*, 1:39, 2:77; Hage, "Die Kirche 'des Ostens' "; Kaufhold, "La littérature pseudo-canonique syriaque"; Humfress, *Orthodoxy and the Courts*, 206; and Pennington, "The Growth of Church Law," 387 ff.

48. See *GSL*, 215-16; and Sachau, *Syrische Rechtsbücher*, 3:ix.

49. See also Sachau, *Syrische Rechtsbücher*, 3:20/21: 14: "Regarding the claim of the Jews and the pagans that the Christians have no civil law." An Islamic accusation against the Christians was that they have no law. Cf. Crone, "Islam, Judeo-Christianity and Byzantine Iconoclasm"; and Nau, ed. and trans., "Un colloque du patriarche Jean," 251–61.

50. Sachau, *Syrische Rechtsbücher*, 3:8/9: 1.

51. Ibid.

52. Cf. Crone, *Roman Provincial Law*, 15.

53. On Timothy I, see *GSL*, 217-18.

54. Sachau, *Syrische Rechtsbücher*, 2:56/57.

55. Ibid., 58/59.

56. On 'Abdišō' bar Berikā, see *GSL*, 323-24; and Selb, *Orientalisches Kirchenrecht*, 1:76 ff.

57. Kaufhold, "Der Richter in den syrischen Rechtsquellen," 95.

58. Ibid., 96.

59. Ibid., 102. See Edelby, "L'autonomie législative des chrétiens," 40, for a discussion of the causes for Islamic influence on ecclesiastical jurisprudence.

60. Bar Berikā, *Ordo iudiciorum ecclesiasticorum*, trans. Vosté, 148.

61. Selb, *Orientalisches Kirchenrecht*, 2:236.

62. Kaufhold, "Der Richter in den syrischen Rechtsquellen," 91.

63. Bar Berikā, *Ordo iudiciorum ecclesiasticorum*, trans. Vosté, 149-52.

64. Ibid.

65. Kaufhold, "Der Richter in den syrischen Rechtsquellen," 104.

66. This theme has been discussed in detail also in Edelby, "L'autonomie législative des chrétiens."

67. "Civil action," in Black, *A Law Dictionary*.

68. Putman, *L'église et l'islam sous Timothée I*, 61; and Rose, "Islam and the Development of Personal Status Laws among Christian Dhimmis," 161.

69. Originally written in Persian, Išō'bokt's legal treatise was translated into Syriac at the order of Timothy I.

70. Sachau, *Syrische Rechtsbücher* 3, no. 16, 18/17, 19:10. See also Bar Berikā, *The Nomocanon of 'Abdišō'* of Nisibis, ed. Perczel, 131.

71. Bar Berikā, *Ordo iudiciorum ecclesiasticorum*, trans. Vosté, 148.

72. Thus, e.g., two canons of the catholicos Išō'yahb I (d. 596) and a list of regulations issued by the seventh-century East Syrian metropolitan Šem'ūn Rēwardašir (lived during the reign of Išō'yahb III) deal with inheritance. On Išō'yahb I, see *GSL*, 148. For his canons,

see Chabot, ed. and trans., *Synodicon*, 157-417: 24; 181/440: 14. On Šem'ūn Rēwardašir, see *GSL*, 206-7. For his collection of regulations, see Sachau, *Syrische Rechtsbücher*, 3:204-53.

73. Mardirossian, *Le livre des canons arméniens de Yovhannē Awjnec'i*, 400.

74. Ibid., 223, 289.

75. See the legal collection of the catholicos Išō' bar Nūn (d. 828) in Sachau, *Syrische Rechtsbücher*, 2:133-47. On Išō' bar Nūn, see *GSL*, 219-20. See Gabriel of Basra, *Book of Laws*. On Gabriel (appointed in 884), see *GSL*, 235; Selb, *Orientalisches Kirchenrecht*, 1:73 ff.; and Ibn al-Ṭayyib, *Fiqh al-Naṣrānīya*, ed. Hoenerbach and Spies. See also Mardirossian, *Le livre des canons arméniens de Yovhannē Awjnec'i*, 29; according to Mardirossian, during the centuries following the Islamic conquest, judges of the Armenian Church became increasingly less familiar with civil laws. Moreover, Armenian secular law was never recorded, causing litigants to be deprived of any real possibility of action before their confessional courts. Consequently, by the second half of the eleventh century, "Armenians rubbed elbows with other groups and began to address a variety of tribunals."

76. Kaufhold, "Der Richter in den syrischen Rechtsquellen," 91; and Mardirossian, *Le livre des canons arméniens de Yovhannē Awjnec'i*, 400.

77. Sachau, *Syrische Rechtsbücher*, 3:10, 12/11, 13:3.

78. Ibid., 4.

79. Ibid., 7; cf. ibid., 291-92.

80. Ibid., 8.

81. Vööbus, *The Synodicon in the West Syrian Tradition*, 162/368: 2-26.

82. Ibid., 163/375: 1/ 162/368, 23.

83. On Bar Hebraeus, see *GSL*, 312-13; on his Nomocanon, see Nallino, *Raccolta di scritti editi e inediti*, 4:214-87.

84. Nallino, *Raccolta di scritti editi e inediti*, 4:215.

85. Bar Hebraeus, *Ktōbō d-Huddōyē (Nomocanon Gregorii Barhebraei)*, ed. Bedjan, 480.

86. Cf. Selb, *Orientalisches Kirchenrecht*, 1:43.

87. Cf. Papaconstantinou, "Between Umma and Dhimma," 149: In the eighth century in Upper Egypt, Coptic legal texts were drawn up by professional notaries, mostly laymen, and still cited the "imperial laws" as their legal reference.

88. Cf. Crone, "Islam, Judeo-Christianity and Byzantine Iconoclasm," 71 n. 55; Crone argues that there is no evidence of interest in Christian jurisprudence in pre-Islamic Syria and therefore rejects a pre-Islamic starting point.

89. Rose, "Islam and the Development of Personal Status Laws among Christian Dhimmis," 161. See also Selb, *Orientalisches Kirchenrecht*, 2:80; and Pennington, "The Growth of Church Law," 386.

90. Rose, "Islam and the Development of Personal Status Laws among Christian Dhimmis," 161.

91. Bar Abgārē, *Law Book*, ed. Kaufhold, 24-25.

92. Cf. Crone, *Roman Provincial Law*, 12. According to Crone, the translation of the Syro-Roman law book was a product of a much later period, prompted by competition with the Muslims, who claimed that the Christians had no law: "[I]t was certainly as a

showpiece of Christian law that the book was to be accepted throughout eastern Christianity without ever being applied." See Crone's remark on a common Islamic accusation of Christians not possessing law in Crone, "Islam, Judeo-Christianity and Byzantine Iconoclasm," 63. The charge is already attested in 644; see Nau, ed. and trans., "Un colloque du patriarche Jean" (where the accusation still takes the form of a question: Are the Christian laws in the Gospel or not?). See also Sachau, *Syrische Rechtsbücher*, 3:20-21:14. The claim was still made by the time of the Muslim scholar Ibn Taymīyya; see Ibn Taymīyya, *Kitāb Iqtiḍā' al-Ṣirāṭ al-Mustaqīm Muhkālafat Aṣḥāb al-Jaḥīm*, ed. and trans. Memon, 209.

93. Selb and Kaufhold, *Das syrich-römische Rechtsbuch*, 1:51-64.

94. Braun, ed. and trans., *Timothei patriarchae I epistulae*, 1:102-6/67-69.

95. Crone, *Roman, Provincial and Islamic Law*, 12.

96. Sachau, *Syrische Rechtsbücher*, 3:xii; Macuch, "Ein mittelpersischer *terminus technicus* im syrischen Rechtskodex des Īšō'bōkht und im sasanidischen Rechtsbuch," 149-60; and de Menasce, "Some Pahlavi Words in the Original and in the Syriac Translation of Išōbōkht's Corpis Juris."

97. Selb, *Orientalisches Kirchenrecht*, 1:214; Kaufhold, "Der Richter in den syrischen Rechtsquellen," 94; and Bar Abgārē, *Law Book*, 24-25, 29-30.

98. Rémondon, "L'église dans la société égyptienne," 261.

99. Martinez, "Eastern Christian Apocalyptic in the Early Muslim Period," 463. See also Suermann, "Die Apokalypse des Ps.-Athanasius."

100. Martinez, "Eastern Christian Apocalyptic in the Early Muslim Period," 520-21; and Hoyland, *Seeing Islam as Others Saw It*, 282. On the theme of the moral conduct of clergy and monks in the Coptic Church during the first centuries of Islamic rule, see Beltz, "Ethos und Ordination."

101. On Dionysius of Tell-Maḥrē, see *GSL*, 275-76; Vööbus, *The Synodicon in the West Syrian Tradition*, 164/376: 27 n. 1; and Selb, *Orientalisches Kirchenrecht*, 2:128.

102. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 33-34/ 164/376: 36; Vööbus's English translation has been slightly modified to suit needs of syntax and clarity.

103. On *The Chronicle of Zuqnin*, see *GSL*, 273-74; Witakowski, *The Syriac Chronicle of Pseudo-Dionysius of Tell Maḥrē*; and Brock, *A Brief Outline of Syriac Literature*, 62.

104. Harrak, ed. and trans., *The Chronicle of Zuqnin*, 230; and Pseudo-Dionysianum, *Incerti auctoris Chronicon vulgo dictum* II, ed. Chabot, 262.

105. Palmer, *Monk and Mason*, 77.

106. Ibid., 183.

107. See Wipszycka, *Ressources et les activités économiques*, 196-212; according to Wipszycka, in late antiquity, ordinations were negotiated in trade-style manner.

108. Ibid., 212. See also Papaconstantinou, "Between Umma and Dhimma," 147; and R. Stroumsa, "People and Identities in Nessana," 55.

109. Cf. Acts 8:18–21.

110. Ibn al-Muqaffa', *History of the Patriarchs of the Egyptian Church*, ed. 'Abd al-Masīḥ and Burmester, 2:109/135r.

111. Ibid., 117/136v. See also Burmester, "The Canons of Cyril II, LXVII Patriarch

of Alexandria," 279; and Riedel, *Die Kirchenrechtsquellen des Patriarchats Alexandrien*, 231-33, 260.

112. Wipszycka, *Ressources et les activités économiques*, 212.

113. Eddé et al., eds., *Communautés chrétiennes en pays d'Islam*, 123; and Dagron, *Evêques, moines et empereurs*, 417. For Egypt, see Sijpesteijn, "Egypt after the Islamic Conquest," 188-89.

114. Eddé et al., eds., *Communautés chrétiennes en pays d'Islam*, 127.

115. For allusions to this in Syriac hagiographies from eighth- and ninth-century al-Jazīra, see Robinson, *Empire and Elites after the Muslim Conquest,* 15-16. Cf. the Abbasid practice of granting government officials titles in recognition of their services as part of an exchange of political benefits, in Rustow, *Heresy and the Politics of Community*, 77.

116. Palmer, *Monk and Mason*, 182.

117. On Theodotus, see Hoyland, *Seeing Islam as Others Saw It*, 156-60. An edition of the *Life* of Theodotus edited by Andrew Palmer from the Syriac ms., no. 12/17 of the Syrian Orthodox Patriarchate at Damascus, is forthcoming; see Palmer, "Āmīd in the Seventh-Century Syriac Life of Theodūṭē," 111 n. 1.

118. Palmer, "Āmīd in the Seventh-Century Syriac Life of Theodūṭē," 112.

119. Idem, *Monk and Mason*, 183.

120. Gabriel of Basra, *Book of Laws*, 37.

121. Bar Berikā, *Ordo iudiciorum ecclesiasticorum*, trans. Vosté, 149-52.

CHAPTER 4. RABBANITE JUDICIAL AUTHORITIES IN THE LATE GEONIC PERIOD

1. See, in this volume, Chapter 1, 50-52.

2. For selected studies on the history of the Jews under Islam during the first three centuries following the conquest, see Assaf, *The Geonic Period and Its Literature*; Gil, *A History of Palestine*; Yahalom, *Liturgical Poetry and Reality in Late Antiquity*; Gil, *Jews in Islamic Countries in the Middle Ages*; and Hoyland, *Seeing Islam as Others Saw It*, esp. 307-20.

3. Brody, *The Geonim of Babylonia*, xix.

4. The term applies to exilarchic and geonic jurisdictions. See Neubauer, ed., *Mediaeval Jewish Chronicles*, 2:85-87.

5. Goitein, *Palestinian Jewry in Early Islamic and Crusader Times*, 70-76. See also Rustow, *Heresy and the Politics of Community*, 294-96.

6. Gil, *A History of Palestine*, n. 728; idem, *Jews in Islamic Countries in the Middle Ages*, nn. 73-74; and Brody, *The Geonim of Babylonia*, 58-59.

7. On the decline of the office of the exilarch, see Brody, *The Geonim of Babylonia*, 80 ff.

8. See, esp., M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*; idem, "Religious Leadership in Islamic Lands." Cf. Baer, "The Origins of the Organization of the Jewish Community of the Middle Ages."

9. M. Cohen, "Jewish Communal Organization in Medieval Egypt," 73-86.

10. See, esp., Goitein, *Mediterranean Society*, 2; Gil, *Documents of the Jewish Pious Foundations from the Cairo Geniza*; M. Cohen, *Jewish Self-Government in Medieval Egypt*; Gil, *A History of Palestine*; Gil, *Jews in Islamic Countries in the Middle Ages*; Bareket, *The Jewish Leadership in Fustat*; and M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*.

11. Goitein, *Mediterranean Society*, 2:5 ff.; M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 401 ff.; and M. Ben-Sasson, "Religious Leadership in Islamic Lands," 189.

12. Rustow, *Heresy and the Politics of Community*, 75.

13. M. Ben-Sasson, "Religious Leadership in Islamic Lands," 178.

14. On the *Epistle* of Rav Sherira Gaon, see Brody, *The Geonim of Babylonia*, 20-25.

15. Groner, *The Legal Methodology of Hai Gaon*, 5-6.

16. See Gil, *Jews in Islamic Countries in the Middle Ages*, n. 87; according to Gil, the geonim sought to ascribe to their decisions a divine nature, thus articulating God's will.

17. Brody, The Geonim of Babylonia, 58 n. 21. Cf. Gil, *Jews in Islamic Countries in the Middle Ages*, n. 101; Gil argues that the Babylonian seats of the geonim should not be seen as mere spiritual centers but rather as possessing qualities of a national and public leadership. On the office of the Palestinian gaon, see Gil, *A History of Palestine*, nn. 728-63; and Rustow, *Heresy and the Politics of Community*, 94-98. The petition of the Palestinian gaon Shelomo b. Yehuda, sent to the Fatimid caliph al-Ẓāhir in ca. 1030, as well as the one to al-Mustanṣir in 1036 (*supra*, 122), present the gaon as a communal leader, endorsed by the Muslim authorities.

18. Goitein, *Mediterranean Society*, 2:12.

19. Groner, *The Legal Methodology of Hai Gaon*, 4.

20. Gil, *Jews in Islamic Countries in the Middle Ages*, nn. 104-32.

21. On the migration of Jews from Mesopotamia to North Africa, see ibid., 675 ff. ; and Bareket, *The Jewish Leadership in Fustat*, 15 ff.

22. See Rustow, "At the Limits of Communal Autonomy," 137. Rustow reports about seventeen recorded petitions, submitted by the Jews to the Fatimid authorities in Egypt and Palestine on account of factional disputes within the community. Some of these disputes were promoted by internal struggles within the academies; see, e.g., the dispute discussed here over the headship of the Palestinian academy between Shelomo b. Yehuda and Nathan b. Araham. Conflicts due to opposing liturgical traditions were also the background for such invitations; see, e.g., Friedman, "A Dispute for Heaven's Sake". The thirteenth-century dispute over the Sabbath prayer during the time of the *nagid* Avraham b. Moshe b. Maimon (d. 1237) reached a level for which the intervention of the Muslim authorities was warranted.

23. On the epistle and a recent interpretation of its background, see Brody, "Pirqoy ben Baboy."

24. Ginzberg, ed., *Ginze Schechter*, book 2, 561-63.

25. Brody, "Pirqoy ben Baboy," 10.

26. Hints of competition are found even in early rabbinic sources; see, e.g., the story of Rav Kahana in BT Bava Kama 117a. A famous dispute between the two centers in the geonic period concerns the Jewish calendar; see Gil, *A History of Palestine*, nn. 785-89.

27. Rav Sherira Gaon, *The Epistle*, passage 119.

28. On these affairs, see ibid., passages 121 and 130. See also Gil, *Jews in Islamic Countries in the Middle Ages*, nn. 136, 146.

29. Gil, *A History of Palestine*, n. 790.

30. See M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 401.

31. Brody, *The Geonim of Babylonia*, 148.

32. Ibid., 151.

33. Gil, *Jews in Islamic Countries in the Middle Ages*, doc. 15.

34. Ibid., doc. 20; and see J. Mann, *Texts and Studies in Jewish History and Literature*, 1:86.

35. Sklare, *Samuel ben Ḥofni Gaon and His Cultural World*, 79.

36. Gil, *Jews in Islamic Countries in the Middle Ages*, n. 98.

37. Sklare, *Samuel ben Ḥofni Gaon and His Cultural World*, 80-83, 97-98.

38. Ibid., 83.

39. M. Cohen, "Jewish Communal Organization," 80, 86.

40. Goitein, *Mediterranean Society*, 2:92.

41. Idem, *Palestinian Jewry*, 50.

42. Idem, *Mediterranean Society*, 2:42.

43. Bareket, *The Jewish Leadership in Fustat*, 76.

44. Ibid., 100 ff., 144 ff.

45. See M. Ben-Sasson, "Religious Leadership in Islamic Lands," 182; according to Menahem Ben-Sasson, centralist and regional leaderships continued to share authority until the fourteenth century. See also Rustow, *Heresy and the Politics of Community*, 157-58.

46. See, e.g., the aforementioned disputes in the academy of Pumbedita, *supra*, 125-26; the eleventh-century dispute between the Palestinian gaon Shelomo b. Yehuda and Nathan ben Avraham in Gil, *A History of Palestine*, n. 870; and Rustow, *Heresy and the Politics of Community*, 302-22.

47. The rise in power of local *dhimmī* leaders as representatives of their communities before the Muslim authorities should be seen in the context of the decomposition of Muslim administration as a result of the consolidation of regional Muslim powers. See, e.g., M. Cohen, *Jewish Self-Government in Medieval Egypt*, chap. 2; and idem, "Administrative Relations between Palestinian and Egyptian Jewry during the Fatimid Period."

48. On the parallel function of honorific titulars in Islamic and Jewish contexts, see Rustow, *Heresy and the Politics of Community*, 76-83.

49. On the meaning of these titles and the occasions on which they would be given, see Goitein, *Mediterranean Society*, 2:8 ff.; and Gil, *A History of Palestine*, nn. 742, 490-94.

50. Goitein, *Mediterranean Society*, 2:23-24.

51. M. Cohen, *Jewish Self-Government in Medieval Egypt*, 30.

52. *Supra*, 122.

53. On the treatise and its agenda, see M. Ben-Sasson, "The Structure, Goals, and Content of the Story of Nathan ha-Babli."

54. Ibid., 140.

55. Elon, *Jewish Law*, 1:6.

56. Ellenson, "Controversy and Dissent," 1:312.

57. BT Yevamot 14a.

58. BT Sanhedrin 16b.

59. Neusner, trans., *The Tosefta*, Sanhedrin 7:1.

60. Albeck, *Jewish Courts in the Talmudic Period*, 15.

61. BT Shabbat 54b–55a.

62. BT Sanhedrin 27b.

63. Albeck, *Jewish Courts in the Talmudic Period*, 21, and the ref. there to BT 'Arakhin 16b.

64. Albeck, *Jewish Courts in the Talmudic Period*, 69, 117-22.

65. Ibid., 43.

66. For an analysis of Tosefta, Bava Kama 9:11, dealing with the difference in authority between the court of experts and that of laymen, see Albeck, *Jewish Courts in the Talmudic Period*, 23, 25.

67. On the rare use of flogging, see Baron, *A Social and Religious History of the Jews*, 5:16; and Satlow, "*Texts of Terror*," 275.

68. For the reference to BT Mo'ed Katan 17a, see Albeck, *Jewish Courts in the Talmudic Period*, 26, 31.

69. BT Sanhedrin 23a.

70. Ibid., Tosafot.

71. Goitein, *Mediterranean Society*, 1:75; M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 393; Gil, *Documents of the Jewish Pious Foundations*, 25; Stillman, *The Jews of Arab Lands*, part 1, 29; M. Cohen, *Under Crescent and Cross*, 90; Libson, "Halakhah and Reality in the Gaonic Period," 70; and Stillman, "The Jews in the Medieval Islamic City."

72. Gil, *Jews in Islamic Countries in the Middle Ages*, n. 87; and Brody, The Geonim of Babylonia, 56-58.

73. Lifshitz, "The Legal Status of the Responsa Literature," 268, 276.

74. See also the discussion in Assaf, *Jewish Legal Courts and Their Procedures in the Post-Talmudic Period*, chaps. 5-8, 12; Y. Hurvitz, "Jewish Legal Courts in the Geonic Period"; and Rustow, *Heresy and the Politics of Community*, 267.

75. BT Nedarim 27b.

76. Harkavy, ed., *Zikhron la-Rishonim ve-gam la-Akhronim*, 117-18: 240.

77. M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 272, 279.

78. Ibid., 319-20, 322.

79. Moda'i, ed., *Sefer Sha'arei Tzedeq*, 4/7: 35 ; cf. BT Sanhedrin 6a.

80. M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 320, 322 n. 175.

81. Harkavy, ed., *Zikhron la-Rishonim*, 80:180.

82. BT Sanhedrin 23a.

83. M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 295.

84. Groner, *The Legal Methodology of Hai Gaon*, 16.

85. M. Cohen, *Jewish Self-Government in Medieval Egypt*, 166. On the use of the title by Jews and other confessional groups in the Islamic Near East, see ibid., 166-71; and Rustow, *Heresy and the Politics of Community*, 101. See also *infra*, n. 59 in its Syriac form, *riša*.

86. On the office of head of the Jews in Egypt, see, esp., M. Cohen, *Jewish Self-Government in Medieval Egypt*; Goitein, *Mediterranean Society*, 2:23 ff.; Sela, "The Head of the Rabbanite, Karaite and Samaritan Jews"; Sela, "The Headship of the Jews in the Fatimid Empire in Karaite Hands"; Bareket, *The Jewish Leadership in Fustat*, 65 ff.; and Bareket, "Ra'īs al-Yahūd in Egypt under the Fatimids." In North Africa, see M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 347 ff.

87. Goitein, *Mediterranean Society*, 2:33-34.

88. Bareket, *The Jewish Leadership in Fustat*, 67.

89. Gil, *A History of Palestine*, doc. 192; an edition of the same document is also in M. Cohen, "New Light on the Conflict over the Palestinian Gaonate, 1038-1042." About the controversy, see Gil, *A History of Palestine*, nn. 869-84.

90. Goitein, *Mediterranean Society*, 2:33.

91. M. Cohen, "Geniza Documents concerning a Conflict in a Provincial Egyptian Jewish Community during the Nagidate of Mevorakh ben Sa'adya."

92. Ibid., 130.

93. This appears to have been the norm; constellations of Jewish settlements would normally include only a single officially recognized judge; see Goitein, *Mediterranean Society*, 2:314.

94. Lewin, *Otzar ha-Geonim*, Gittin, 209-10: 490.

95. Goitein, *Mediterranean Society*, 2:312. On the institution of three judges, see Elon, *Jewish Law*, 1:23.

96. Mishnah Sanhedrin 3:1; see also *supra*, 134, in relation to BT Sanhedrin 23a.

97. Moda'i, *Sha'arei Tzedeq*, 4/7:33.

98. Goitein, *Mediterranean Society*, 2:322.

99. On the duties of the elders, see ibid., 2:58 ff.

100. TS 13 J 30, 5, in Goitein, *Palestinian Jewry in Early Islamic and Crusader Times*, 110-11.

101. There seems to be disagreement over the true identity of the gaon in this case. While some early Rabbanite authorities following the geonic period (*rishonim*) attribute the responsum to Rav Sherira or to Rav Ḥayya, some modern scholars attribute it to Matityahu Gaon (d. 969) or even to an authority before him. See Nakhalon, *The Kahal and Its Enactments in the Gaonic Period*, 59.

102. Moda'i, *Sha'arei Tzedeq*, 4/4:16.

103. Goitein, *Mediterranean Society*, 2:60.

104. M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 329.

105. Goitein, *Mediterranean Society*, 2:172.

106. Ibid., 2:324. According to Goitein, "when the Torah scroll was taken out, the complainant would stand up on the reader's platform and detain the reading of the Torah in order to bring his case before the congregation first"; M. Ben-Sasson, "Religious Leadership in Islamic Lands," 182.

107. Assaf, ed., *Teshuvot ha-Geonim mi-Kitvei-Yad she-bi-Genizat Cambridge*, 108; cf. M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 332 n. 233.

108. TS 13 J 16, 3.

109. Gil, *A History of Palestine*, doc. 217.

110. On the limited resort and effect of excommunication in medieval Near Eastern Jewish communities, see Rustow, *Heresy and the Politics of Community*, 73, 267; according to Rustow, legal decisions issued in Jewish courts were embellished by a range of phrases aimed to achieve a binding implementation.

111. Moda'i, *Sha'arei Tzedeq*, 4/5:14.

112. See *supra*, 137, on the attempts of the party of Nathan b. Avraham to expropriate the judicial authority of the Palestinian gaon.

113. M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 324.

114. Goitein, *Mediterranean Society*, 2:311-12.

115. *Supra*, 141.

116. Brody, *The Geonim of Babylonia*, 38.

117. See Libson, *Jewish and Islamic Law*, 9, where he speaks of the diachronic and synchronic effects on Jewish legal practice.

118. On the central role of Jewish businessmen in communal affairs and the leadership roles that they played, see Goitein, *Mediterranean Society*, 1:164-69; M. Cohen, *Jewish Self-Government in Medieval Egypt*, 85-86, 91; Bareket, *The Jewish Leadership in Fustat*, 100 ff.; M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 105-9; and Frenkel, *The Compassionate and the Benevolent*, 209.

119. Goitein, *Mediterranean Society*, 2:2.

120. The recurrent distinction made in our sources between appointed judges, chosen bishops, and priests, on the one hand, and the believers, on the other hand, suggests a clearly defined boundary between the ecclesiastical hierarchy and Christian laity. It should be noted, however, that many among those who joined ecclesiastical ranks had done so after years of monastic service, secluded from lay society.

CHAPTER 5. CHRISTIAN RECOURSE TO NONECCLESIASTICAL JUDICIAL INSTITUTIONS

1. Grohmann and Khoury, eds., *Chrestomathie de papyrologie arabe*, 140-41, doc. 79. I wish to thank Luke Yarbrough for drawing my attention to this document.

2. Gabriel of Basra, *Book of Laws*, 4.

3. See, in this volume, Chapter 3, 111–14.

4. Selb, *Orientalisches Kirchenrecht*, 1:214.

5. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 1:433-35; note the dependence of ecclesiastical judges on public approval. Cf. the ecclesiastical judge, in Bar Berikā, *Ordo iudiciorum ecclesiasticorum*, 52: the ecclesiastical judge "must have the capacity for exercising authority in matters to be pursued through him. . . . There needs to be consent of all the subjects of his region that he should have power over them."

6. *Supra*, Chapter 5, 66.

7. Grohmann, ed., *Arabic Papyri in the Egyptian Library*, 1:61, doc. 37.

8. Ibid., 1:64 n. 4.

9. Ibid., n. 14.

10. Ibid., 1:144-55. For further examples, see court records dating back to 952, 960, and 1016, in ibid., 1:174, doc. 58; 1:185 , doc. 60; 2:157, doc. 119.

11. See, e.g., in East Syrian legal collections: Ḥnanišō', in Sachau, *Syrische Rechtsbücher*, 2, passim; Timothy's law book, ibid., 91-117; Išō' bar Nūn's law book, ibid., passim; Išō'bokt, ibid., 3:91-127; Šem'ūn Rēwardašir, ibid., 203-53; and Bar Abgārē, 47-92. In West Syrian legal collections, see Vööbus, *The Synodicon in the West Syrian Tradition*, 164/376: 68 ff.; and Bar Hebraeus, *Ktōbō d-Huddōyē*, 172-86.

12. On the document, see Schiller, ed., *Ten Coptic Legal Texts*, 9, 16-17.

13. Ibid., 23.

14. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 60/ 164/376: 64-65: 8.

15. Sachau, *Syrische Rechtsbücher*, 2:6-9:4. On the addressees of this decree, see, in this volume, Chapter 3, 104; see also Robinson, *Empire and Elites after the Muslim Conquest,* 102.

16. Edelby, "L'autonomie législative des chrétiens," 70.

17. Sachau, *Syrische Rechtsbücher*, 2:6-9:4.

18. Selb, "Zur Christianisierung des Eherechts"; and idem, *Orientalisches Kirchenrecht*, 1:206-13.

19. See Ritzer, *Le mariage dans les églises chrétiennes du Ier au XIe siècle*, 149-58; Edakalathur, *The Theology of Marriage in the East Syrian Tradition*, 15, 77; and Reynolds, *Marriage in the Western Church*, xiii–xix. For the treatment of this theme in East Syrian and West Syrian legal collections, see, e.g., in East Syrian legal collections: Timothy in Sachau, *Syrische Rechtsbücher*, 2:73–91, 105–7; Išō' bar Nūn, ibid., 121–31, 135, 153, 161–69, 171, 175; Išō'bokt, ibid., 3:25–69, 71–89; and Mār Abā, ibid., 258–85. For the West Syrian Church, see Vööbus, *The Synodicon*, 161/367, 164/376: passim; and Bar Hebraeus, *Ktōbō d-Huddōyē*, 117-61.

20. Sachau, *Syrische Rechtsbücher*, 3:78/79: 9.

21. The term *ḥanpē*, "pagans," in Syriac sources of the late eighth century is usually understood as referring to Muslims. See Hoyland, *Seeing Islam as Others Saw It*, 148; and Griffith, *Syriac Writers on Muslims and the Religious Challenge of Islam*, 8.

22. See Libson, "Legal Autonomy," 335.

23. Grohmann, ed., *Arabic Papyri in the Egyptian Library*, 1, doc. 40.

24. Cf. a marriage contract between Muslims from 878, ibid., doc. 39.

25. Chabot, ed. and trans., *Synodicon*, 223/487-88.

26. *Supra*, 179.

27. Sachau, *Syrische Rechtsbücher*, 2:128/29: 29.

28. Mounayer, trans., *Les synodes syriens jacobites*, 51.

29. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 30-31/ 164/376: 33.

30. Ibid., 163/ 375: 56-57/ 164/376: 60.

31. Putman, *L'église et l'islam sous Timothée I*, 109.

32. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 29-30/ 164/376: 32-33.

33. For a survey of Christian officials in Islamic administration, see Cheikho, *Wuzarā' al-Naṣrāniyya wa-Kuttābuhā fī al-Islām, 622-1517*.

34. Cabrol, "Une étude sur les secrétaires nestoriens sous les Abbassides (762–1258) à Bagdad," 420–21.

35. Sachau, *Syrische Rechtsbücher*, 3:184/85: 2b. See also Bar Berikā, *The Nomocanon of 'Abdišō' of Nisibis*, 136. We may assume by the use of the term "pagan" that the canon is referring, in this case, to an Islamic court.

36. On Giwargi I, see Vööbus, *The Synodicon in the West Syrian Tradition*, 164/376: 3; Selb, *Orientalisches Kirchenrecht*, 2:128; and Barsoum, *The Scattered Pearls*, 369-70.

37. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 4/ 164/376: 5.

38. Ibid., 163/375: 12/ 164/376: 14.

39. See, e.g., Michael the Syrian, *Chronique de Michel le Syrien*, ed. and trans. Chabot, 2:525. Michael reports a dispute that broke out during the time of Giwargi I in 758. The latter's ordination caused a schism within the church because of differences as to who should be appointed patriarch.

40. On Shenoute, see CE, 7:2135-36.

41. Ibn al-Muqaffa', *History of the Patriarchs of the Egyptian Church*, ed. 'Abd al-Masīḥ and Burmester, 2/1, 41.

42. On Christodulos, see Atiya, CE, 2:544-47.

43. Burmester, "The Canons of Christodulos, Patriarch of Alexandria (AD 1047-77)," 77–82. See also Ibn al-Muqaffa', *History of the Patriarchs of the Egyptian Church*, ed. 'Abd al-Masīḥ and Burmester, 2/3, 254.

44. On Cyril II, see Atiya, CE, 3:675-76.

45. Burmester, "The Canons of Cyril II, LXVII Patriarch of Alexandria," 268–82.

46. Vööbus, *The Synodicon in the West Syrian Tradition*, 161/367: 272/ 162/368: 247: 24.

47. On the term "outsiders" in its Eastern Christian context, see also Simonsohn, "Seeking Justice among the 'Outsiders.'"

48. On Qūryaqūs, see Vööbus, *The Synodicon in the West Syrian Tradition*, 164/376: 7; Selb, *Orientalisches Kirchenrecht*, 2:28; and Barsoum, *The Scattered Pearls*, 376-78.

49. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 8/ 164/376: 9-10.

50. The term "barbarian" has been customarily used in pre-Islamic Near Eastern narratives in reference to Arabs; see Vassilios, "The Arabs as 'Barbaroi' before the Rise of Islam." For the use of the term "barbarian" to denote Muslims, see the Syriac apocalyptic text of Ps. Methodius in Pseudo-Methodius, *Die syrische Apokalypse des Pseudo-Methodius*, ed. and trans. Reinink, 540:31 / 541:52.

51. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 24/ 164/376: 14; Vööbus rendered *mardawātā* as "rebellions," while the lexical alternatives "chastisements" or "tribulations" seem more adequate.

52. Ibid., 163/375: 16-17/ 164/376: 18.

53. Indeed, not for the first time, these disagreements concerned the liturgical formula *Panem caelestem frangimus*, "we break the heavenly bread," in the celebration of the Eucharist; see Michael the Syrian, *Chronique de Michel*, 3:17.

54. Ibid., 3:19 .

55. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 21/ 164/376: 23.

56. Michael the Syrian, *Chronique de Michel le Syrien*, 3:28.

57. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 27-28/ 164/376: 30-31.

58. Ibid., 163/375: 29-30/ 164/376: 32-33: 4.

59. Cf. Chabot, ed. and trans., *Anonymi auctoris Chronicon ad A.D. 1234 pertinens*, 293 f. /228 f.; reference to Christian leaders in the Umayyad period as *rišānē*.

60. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 53/ 164/376: 57: 4.

61. See also ibid., 163/375: 63-64/ 164/376: 68: 24 from the synod of 896 held by the Jacobite patriarch Dionysius II (d. 909) in which the acts of such offenders who "leave the sheepfold" are the source of "abuses" and "harms."

62. Ibid., 163/375: 29-30/ 164/376: 32-33.

63. Sachau, *Syrische Rechtsbücher*, 2:66–67: 12.

64. Ibid., 3:182–83:8: 1.

65. Ibid., 188–89:5.

66. Connolly, trans., *Didascalia Apostolorum*, 109-10.

67. Sachau, *Syrische Rechtsbücher*, 2:106, 108/107: 76.

68. Fattal, *Le statut légal des non-musulmans en pays d'Islam*, 113 ff.; and Edelby, "L'autonomie législative des chrétiens," 75-80.

69. Sachau, *Syrische Rechtsbücher*, 2:68/69: 13. See also *Bar Berikā*, *The Nomocanon of 'Abdišō' of Nisibi*s, 135.

70. Sachau, *Syrische Rechtsbücher*, 2:172, 174/173, 175: 125.

71. Ibid., 174/75: 129.

72. Ibid., 168, 170/169, 171: 115.

73. See, in this volume, Chapter 3.

74. Sachau, *Syrische Rechtsbücher*, 3:186-89: 1.

75. *Supra*, 104.

76. The translation date of the *Didascalia* from Greek into Syriac is unknown. While some scholars suggest the fourth century, others opt for the seventh. See Ortiz de Urbina, *Patrologia syriaca*, 249; Brock, trans., *The Liturgical Portions of the Didascalia*, 5; and Fonrobert, "The Didascalia Apostolorum," 487.

77. Kiraz, *Comparative Edition of the Syriac Gospels*.

78. Connolly, trans., *Didascalia Apostolorum*, 109-10. For the Syriac text, see Lagarde, ed., *Didascalia Apostolorum*, 48-49.

79. For the various uses of the expression "those of the outside" in early Christian sources in Greek, see "ἔξω" in Lampe, *A Patristic Greek Lexicon.* For sources in Syriac, see

"*barrāyē*," in Brockelmann, *Lexicon Syriacum*. The term "outsiders" as referring to Muslims appeared also in Christian Arabic polemical treatises; see Theodore Abū Qurrah, *A Treatise on the Veneration of the Holy Icons*, trans. Griffith. According to Griffith, Abū Qurrah's Arabic was the same as the one in eighth- and ninth-century South Palestinian texts, which were mostly translations of Greek and Syriac originals.

80. See Hoyland, *Seeing Islam as Others Saw It*, 543.

81. Palmer, *The Seventh Century in the West-Syrian Chronicles*, xi.

82. Cf. Payne, "Persecuting Heresy in Early Islamic Iraq," 409.

83. Tamanaha, "Understanding Legal Pluralism," 46.

84. Vööbus, *The Synodicon in the West Syrian Tradition*, 163/375: 53/ 164/376: 57.

CHAPTER 6. JEWISH RECOURSE TO ISLAMIC COURTS

1. J. Mann, *Texts and Studies in Jewish History and Literature*, 2:63-64; idem, *The Jews in Egypt and in Palestine under the Fāṭimid Caliphs*, 1:139-40; and Rustow, *Heresy and the Politics of Community*, 230.

2. Gil, *A History of Palestine*, doc. 121.

3. See Libson, *Jewish and Islamic Law*, chap. 4; Libson analyzed some of the responsa dealing with Gentile courts that are also presented in the following discussion. While Libson's aim was to highlight legal questions, our goal in this chapter is to go beyond such an endeavor and to examine these answers from a social perspective.

4. Assaf, *The Geonic Period and Its Literature*, 211.

5. This is in contrast to ecclesiastical regulations, which referred to Islamic courts within an array of other nonecclesiastical judicial possibilities. This is not to suggest that Jews acted differently from their non-Jewish neighbors. Just as a Muslim could have chosen to litigate before a *qāḍī* or an arbiter, and a Christian before a priest, a fellow layman, or a Muslim official, we should not assume that the Jews were restricted to choosing between their own confessional leaders or Muslim judges only.

6. Goitein, *Mediterranean Society*, 2:398 ff.

7. See, in this volume, Chapter 4

8. Gil, *A History of Palestine*, doc. 217.

9. Ibid., doc. 274.

10. See, e.g., Mosseri A 43 (VII 42), which contains an agreement signed by two parties in 1055. The agreement refers to an inheritance case and stipulates obligations, should one of the parties bring the case before a Muslim court. See Goitein, *Mediterranean Society*, 2:401; and M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 314-15.

11. Goitein, *Mediterranean Society*, 2:401. Inheritance agreements from the Geniza contain similar stipulations; see, e.g., P. Lieberman, "A Partnership Culture," docs. 7, 20.

12. Under certain circumstances, especially in cases related to finances, nonordained experts as well as laymen were permitted to assume judicial responsibilities; see Albeck, *Jewish Courts in the Talmudic Period*, 100. See also Rashi's interpretation of BT Sanhedrin

3a; the Rosh, Sanhedrin, chap. 1; and Goitein, *Mediterranean Society*, 2:172, referring to the judge whose "position was often precarious owing to the institutional weakness or the vicissitudes of fortune of the organizations they served." A Jewish judge from Egypt who was engaged in a business partnership and traded various commodities, such as wine, cheese, and sugar, would travel on business from time to time. See Motzkin, "The Arabic Correspondence of Judge Elijah and His Family," 24-25.

13. Bodl. MS Heb. b. 13 (cat. 2834, no. 23), 42.

14. TS 13 J 5, 1.

15. See ibid.

16. TS 13 J 5, 1; commentary taken from S. D. Goitein's typed texts.

17. Ibid.

18. Goitein, *Mediterranean Society*, 2:398; Hirschberg, "Gentile Courts in the Geonic Period," 494; M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 313; and Elon, *Jewish Law*, 1:15.

19. Libson, *Jewish and Islamic Law*, ix.

20. See, in this volume, Chapter 4, 128, 134.

21. Lewin, *Otzar ha-Geonim*, Yevamot 181:426.

22. According to Robert Brody, Rav Natronai's date of death was actually 866; see Brody, "Amram Bar Sheshna—Gaon of Sura?."

23. Brody, ed., *Teshuvot Rav Natronai bar Hilai Gaon*, 1:281-82: 157; cf. Lewin, *Otzar ha-Geonim*, Yom Tov 40:107, where the same query was referred to another gaon, though without mention of the possibility of seeking refuge with a Gentile. According to Brody, the gaon was probably Rav Palṭoi (d. 858). See Brody, *Teshuvot Rav Natronai bar Hilai Gaon*, 1:281 n. 1.

24. Ginzberg, ed., *Ginze Schechter*, 2:126: 135.

25. Lewin, *Otzar ha-Geonim*, Gittin 209:490.

26. TS 13 J 26, 21 verso.

27. Ibid.

28. Lewin, ed., *Ginze Qedem*, 1:77: 15b; see ibid., n. 8, where Lewin suggests viewing this responsum as an example of how difficult it was for a Jew to claim property from an apostate.

29. Gil, *A History of Palestine*, n. 274.

30. Khan, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collections*, 1.

31. Ibid.

32. Müller, ed., *Teshuvot Geone Mizrah u-Ma'arav*, 23:94; legal documents would be issued in both tribunals for purposes of release of debts and issuing deeds as well. See Goitein and Friedman, *India Traders of the Middle Ages*, 347; and P. Lieberman, "A Partnership Culture," doc. 25.

33. Al-Qattan, "Dhimmis in the Muslim Court," 429.

34. Khan, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collections*, 56-60.

35. Al-Qattan, "Dhimmis in the Muslim Court," 440.

36. Tykocinski, *Geonic Enactments*, 11 ff.; Brody, "Were the Geonim Legislators?"; Brody, "Judaism in the Sasanian Empire"; Brody, *The Geonim of Babylonia*, 62; and Libson, *Jewish and Islamic Law*, 111.

37. BT Ketubot 63a.

38. Rav Sherira Gaon, *The Epistle*, 101:5.

39. BT Ketubot 63b.

40. Lewin, *Otzar ha-Geonim*, Ketubot 191-92:478; cf. BT Gittin 88b, where it is stated that the reason behind the declaration of a divorce enforced by a heathen court as invalid was to prevent Jewish women from attaching themselves (*tola 'atsma*) to heathens and so releasing themselves from their husbands.

41. Brody, "Were the Geonim Legislators?," 295.

42. See the case of British India, where "until 1939 . . . apostasy was recognized as valid grounds for the dissolution of the marriage contract. . . . Consequently, a number of Muslim women . . . apostatized in order to rid themselves of undesirable husbands." Zaman, *The Ulama in Contemporary Islam*, 29; and Libson, *Jewish and Islamic Law*, 103 n. 68.

43. Friedman, "An Intervention of the Authorities."

44. On the *nāẓir*, see ibid., 216; and M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 325.

45. See BT Gittin 88b.

46. Friedman, "An Intervention of the Authorities," 220.

47. Gil, *A History of Palestine*, doc. 43.

48. Ibid., doc. 44; and Goitein, *Mediterranean Society*, 2:400.

49. Müller, ed., *Teshuvot Geone Mizrah u-Ma'arav*, 24b:96.

50. Frenkel, *The Compassionate and the Benevolent*, doc. 42.

51. Ibid., doc. 591.

52. See BT Bava Mesi'a 22a.

53. Moda'i, *Sha'arei Tzedeq*, 4/1:20.

54. Goitein, *Mediterranean Society*, 2:365. Note also in Harkavy, ed., *Zikhron la-Rishonim*, 140:278, Sherira Gaon's remark about some Muslim witnesses in his time: "They are accustomed to act [only] on the basis of reciprocity [i.e., testify in favor of someone in the expectation of receiving a reciprocal favor] and receive benefit for their testimony."

55. See, e.g., Fischel, *Jews in the Economic and Political Life of Medieval Islam*; Stillman, *The Jews of Arab Lands*; Lewis, *The Jews of Islam*; Gil, *Jews in Islamic Countries in the Middle Ages*; M. Cohen, *Under Crescent and Cross*; and Wasserstrom, *Between Muslim and Jew*.

56. See, e.g., J. Mann, *Jews in Egypt*; Goitein, *Mediterranean Society*; Friedman, *Jewish Marriage in Palestine*; Gil, *A History of Palestine*; and M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*.

57. Libson, *Jewish and Islamic Law*, 47. On the theory of "opinion necessitates," see ibid., 239 n. 173.

58. Cf. BT Yevamot 121b; Gittin 19b, 28b, from which it can be deduced that the

testimony of a non-Jew is not acceptable unless it is given *en passant*, i.e., made without awareness of its significance. See also Goitein and Friedman, *India Traders of the Middle Ages*, 538.

59. Lewin, ed., *Otzar ha-Geonim*, Yevamot 239:586. A similar case, mentioning Muslim merchants as the sole witnesses to the drowning of the Jew Ḥalfon ha-Levi near Aden, is brought in a letter from the rabbinic court of Fusṭāṭ in 1146. See Goitein and Friedman, *India Traders of the Middle Ages*, 527-28.

60. Khan, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collections*, 241-42.

61. Lewin, *Ginze Qedem*, 1:69: 13. On the use of such deeds, see M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 81.

62. See Libson, "Halakhah and Reality in the Gaonic Period," 67-99; according to Libson, the geonim possessed "tools" for adapting the law to new circumstances, "while still maintaining the formal halakhic framework." These he classified as: *qabbalah* (tradition), *taqqanah* (enactment), *minhag* (custom, usage), *midrash* (exegesis or interpretation), *sevarah* (legal logic), and precedent. Cf., on the sources of Jewish law, Elon, *Jewish Law*, 2:221.

63. The question of legal adaptation is the current work in progress of Mark Cohen. Cohen argues through the example of Maimonides for a subtle, yet crucial, adaptation of legal principles to contemporary social circumstances by means of legal codification. I would like to thank Prof. Cohen for sharing with me his "Maimonides Code of Jewish Law and the Economic Realities of the Islamic World" (paper presented at Tel Aviv University, January 8, 2008).

64. Mussafia, ed., *Teshuvot ha-Geonim*, 23; for the talmudic discussion, see BT Qiddushin 17b-18a.

65. Ir-Shai, "The Apostate as an Inheritor in Responsa of the Geonim," 438.

66. Ibid., 449; see also a reference to an anonymous responsum criticizing Natronai, in Mussafia, ed., *Teshuvot ha-Geonim*, no. 24.

67. Libson, "Halakhah and Reality in the Gaonic Period," 77; Libson classifies "areas where talmudic law proper left a vacuum or did not render an explicit ruling," as a form of adaptation through custom.

68. See BT Nazir 58b.

69. Lewin, ed., *Otzar ha-Geonim*, Nazir 200:201.

70. Ibid., 202.

71. As is well known, Islamic law insists that *dhimmī*s retain a distinctive dress in order to maintain confessional separateness. For a summary of these regulations, see Fattal, *Le statut légal des non-musulmans en pays d'Islam*, 60-63. An analysis of these regulations and a discussion of their context in late antiquity and early Islam is forthcoming in Simonsohn, "The Pact of 'Umar in Context."

72. Walzer et al., eds., *The Jewish Political Tradition*, 1:xxxix.

73. Elon, *Jewish Law*, 1:47; and Walzer et al., eds., *The Jewish Political Tradition*, 1:xl.

74. Elon, *Jewish Law*, 1:47, 2:644; Walzer et al., eds., *The Jewish Political Tradition*, 1:xxxix; and Brody, *The Geonim of Babylonia*, 63.

75. On the former, see *supra*, 178-79; on the latter, see Brody, *The Geonim of Babylonia*, 63. See Brody, "Were the Geonim Legislators?"; and cf. Elon, *Jewish Law*, 2:646.

76. *Supra*, 58-60.

77. BT Gittin 28b.

78. See Drory, *Models and Contacts*, 132-34.

79. Harkavy, ed., *Zikhron la-Rishonim*, 140:278.

80. On the term *gomlin*, see BT ʿAvoda Zara 61b.

81. Harkavy, ed., *Zikhron la-Rishonim*, 140:278.

82. See also M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 313, 316.

83. *Muʿaddalūn*, i.e., trustworthy, witnesses were individuals formally declared reliable for testimony after a process that verified their character. See Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 1:352-54; idem, *Le notariat et le régime de la preuve par écrit dans la pratique du droit musulman*, 16-45; Schacht, *An Introduction to Islamic Law*, 122, 125, 128; and Hirschberg, *A History of the Jews in North Africa*, 1:240.

84. Shilo, *Dina de-Malkhuta Dina*, 50; and Gil, *A History of Palestine*, n. 273. Cf. M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 104, who views this responsum as an expression of the relatively low value attributed to deeds issued in Islamic courts in comparison with those issued in Jewish courts; and cf. Libson, *Jewish and Islamic Law*, chap. 5, n. 63.

85. BT Bava Batra 45a.

86. Assaf, ed., *Teshuvot ha-geonim mi-kitvei-yad she-bi-Genizat Cambridge*, 23:16.

87. Ibid.

88. See, in this volume, Chapter 1, 46.

89. Lewin, ed., *Otzar ha-Geonim*, Bava Kama 69:227; cf. "Pisqei ha-rosh," in *Masekhet Bava Kama min Talmud Bavli*, 226.

90. Libson, *Jewish and Islamic Law*, 102; yet given the fact that we are now left with what is most likely a shortened version of the original answer, it is difficult to establish the geonic reasoning with certainty. This report was given by Rabbi Asher ben Yehiel of Toledo (d. 1327), written some four centuries after Rav Palṭoi and from a distance of several thousand miles from the original speaker.

91. See BT Gittin 88b and its analysis above; yet cf. Libson, *Jewish and Islamic Law*, 102.

92. According to the compiler, the passage is taken from Rav Ḥayya's lost tractate, *Sefer Musar ha-Dayyanin*, which was originally written in Arabic under the title *Kitāb Adab al-Quḍā* [*sic*]. For a list of medieval sources that cite parts of the book, see Lewin, ed., *Otzar ha-Geonim*, Bava Kama 99 n. 5.

93. See M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 216 n. 151. Ben-Sasson suggests identifying the name with that of Birkiya b. Yosef of Qayrawān.

94. Havlin and Yudlov, eds., *Toratan shel Geonim*, 5:105. See also Lewin, ed., *Otzar ha-Geonim*, Bava Kama 99:290.

95. Harkavy, ed., *Zikhron la-Rishonim*, 111:233.

96. Cf. M. Ben-Sasson, *The Emergence of the Local Jewish Community in the Muslim World*, 328, who identifies these "important witnesses" as part of the local body of elders.

97. See *supra*, 238, n. 121.

98. On the procedure, enacted during the geonic period, of taking an oath of destitution, see Tykocinski, *Geonic Enactments*, 51 ff.

99. Harkavy, ed., *Zikhron la-Rishonim*, III:233.

100. BT Bava Kama 112b; and Bava Batra 169a.

101. Aptowitzer, "Formularies of Decrees," 45; and Tykocinski, *Geonic Enactments*, 137.

102. Aptowitzer attributed this formulary, along with nine others, to a Babylonian geonic court of the beginning of the geonic period; Aptowitzer, "Formularies of Decrees," 23.

103. Ibid., 27.

104. See also Lewin, ed., *Otzar ha-Geonim*, Bava Kama 69:227.

105. Ibid., Gittin 209:490.

106. Ibid., 36:85.

107. Assaf, ed., *Teshuvot ha-Geonim*, 76: 66.

108. Ibid.

109. Libson, *Jewish and Islamic Law*, 101.

110. See, in this volume, Chapter 1, 58.

111. Ibid.

112. Harkavy, ed., *Zikhron la-Rishonim*, 249:492.

113. See Brody, *The Geonim of Babylonia*, 151; whether the geonim held formal authority within the *reshuyot* or not, it seems evident that in the regions west of Palestine, subordination to geonic power was primarily a matter of choice. In centers such as Fusṭāṭ and Qayrawān, the Babylonian geonim were "in no position to compel recognition . . . and would have little choice but to recognize the legitimacy and authority of properly constituted local courts."

114. Libson, *Jewish and Islamic Law*, 32.

115. Brody, *The Geonim of Babylonia*, 63-64.

116. Udovitch, "The 'Law Merchant' of the Medieval Islamic World," 126-30; and M. Cohen, *Under Crescent and Cross*, 88-94.

117. Libson, *Jewish and Islamic Law*; see also Goitein, "The Interplay of Jewish and Islamic Law," 55-76.

118. Libson, *Jewish and Islamic Law*, 103.

119. Ibid., 58.

120. Libson, "Betrothal of an Adult Woman by an Agent in Geonic Responsa," 180; and Sharot, "Religious Syncretism and Religious Distinctiveness," 28.

121. Harkavy, ed., *Zikhron la-Rishonim*, 215:423; and see Goitein, *Mediterranean Society*, I:42-45; 2:237-38.

122. M. Cohen, *Under Crescent and Cross*, 93.

123. The adoption of an Islamic legal practice is also noted by Libson in the case of Jewish fathers who were given permission to betroth their adult daughters without asking

for their approval. According to Libson, there was a strong Islamic influence on Jewish family law in general in the geonic period; see Libson, "Legal Status of the Jewish Woman in the Gaonic Period." For the situation in Palestine and Egypt in this period, see Friedman, *Jewish Marriage in Palestine*.

124. Mishnah Gittin 1:5.

125. BT Gittin 9b.

126. See, e.g., Assaf, ed., *Teshuvot ha-Geonim*, 73-76:66.

127. Harkavy, ed., *Zikhron la-Rishonim*, 51:82.

128. Shilo, *Dina d-Malkhuta Dina*, 49; and Libson, *Jewish and Islamic Law*, 102.

129. Moda'i, *Sha'arei Tzedeq*, III/ 6:24.

130. Tamanaha, "Understanding Legal Pluralism," 43.

131. Assaf, ed., *Teshuvot ha-Geonim*, 23: 16.

132. Sharot, "Religious Syncretism and Religious Distinctiveness," 23, 25.

133. Libson, *Jewish and Islamic Law*, 31, 34.

134. Vanderlinden, "Return to Legal Pluralism," 151.

CONCLUSION

1. Moda'i, *Sefer Sha'arei Tzedeq*, 2; and see Gil, *Jews in Islamic Countries in the Middle Ages*, n. 87.

2. Sachau, *Syrische Rechtsbücher*, 2:58/59.

3. Anthony Cohen, *The Symbolic Construction of Community*, 9, 38.

4. G. Lenski, J. Lenski, and Nolan, *Human Societies*, 39.

5. K. Christensen and Levinson, eds., *Encyclopedia of Community*, 1:xxxi.

6. Turner, *The Ritual Process*, chap. 4.

7. Cf. Moore, "Law and Social Change," 745: "state-enforceable law and socially enforced rules."

8. Ibid., 722.

9. Vanderlinden, "Return to Legal Pluralism," 152.

10. Moore, "Law and Social Change," 722.

11. See Nirenberg, *Communities of Violence*, 13.

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