

Seeking Justice among the ‘Outsiders’: Christian Recourse to Non-Ecclesiastical Judicial Systems under Early Islam

Uriel Simonsohn*

Abstract

The phenomenon of Christian recourse to non-ecclesiastical judicial systems during the first few centuries following the Muslim conquest is at the core of this paper. This phenomenon not only alludes to a reality of legal diversity but also to the social heterogeneity that has characterized Near Eastern societies long before the Arab takeover. Through the adoption of the legal-anthropological paradigm of legal pluralism and the examination of West Syrian legal sources, the paper seeks to identify the social agenda of West Syrian ecclesiastical leaders. Much of the discussion revolves around the term ‘outsiders’, *barrāyē*, and attempts to delineate the term’s various meanings within the legal discourse.

Keywords

West Syrians; episcopal courts; *dhimmah*; canon law; legal pluralism; society; Islam; community; boundaries; disputes.

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.¹ Thus in Mark 4:11 we read:

¹) I am grateful to Professor Michael Cook, Professor Hubert Kaufhold, Dr Emmanuel Papoutsakis, and Mr Jack Tannous for their useful comments on parts of this paper. The paper is based on materials which I have used in my dissertation, ‘Overlapping Jurisdictions: Confessional Boundaries and Judicial Choice among Christians and Jews under Early Muslim Rule’.

¹) For the various uses of the expression ‘those of the outside’ in early Christian sources in

‘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.”’² Similarly, 1 Cor. 5:11-13 states:

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 do not, ‘those outside’, but leaves room for ambiguity on 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. Whereas the former, the well-behaved, are part of the internal zone of the community, ‘insiders’, the latter group, the offenders, are kept outside.

Both in the East Syrian Church (so-called Nestorian) of the fifth century and the West Syrian Church (so-called Jacobite) of the seventh, the term ‘outsiders’ was increasingly used as reference to non-Christian groups. In this paper I will address the following two questions: in what context were these expressions used during the first few centuries of Muslim rule, and can these expressions tell us anything about the social formation of eastern Christian communities in general and that of West Syrians in particular during the early Islamic period?

Social scientists, in their discussions of legal pluralism, have argued that a multiplicity of legal orders exists within every social setting. In modern societies, this multiplicity can be seen in the amalgamation of coinciding orders such as the laws of the village, municipality, state, district, or regional, as well as national and transnational orders. In addition, many societies follow other forms of legal systems, such as custom, indigenous, and religious law, or

Greek see ‘ἔξω’, in G.W.H. Lampe, *A Patristic Greek Lexicon* (Oxford, 1961). For sources in Syriac see ‘ܟܘܢܝܢܐ’, in Carl Brockelmann, *Lexicon Syriacum* (Halle, 1928). Although not within the scope of the present discussion, it should be noted that the term ‘outsiders’ as referring to Muslims appeared also in Christian Arabic polemical treatises; see for example: Sidney H. Griffith, *Theodore Abū Qurrah. A Treatise on the Veneration of the Holy Icons* (Eastern Christian Texts in Translation 1; Leuven, 1997).

² All verses quoted in this paper are from the New Revised Standard Version (Anglicized Edition).

laws related to ethnic and cultural affiliations.³ Quite often we find that these systems do not coincide but overlap. Thus an individual may find himself tied to a variety of legal orders because of his or her multiple social affiliations. Since these legal orders are exploited by various power groups as a means for social control, these groups 'make competing claims of authority' and 'may impose conflicting demands of norms'.⁴ Assuming that legal pluralism can be found in almost any society, the most fascinating aspect of legal pluralism is not its existence but rather the identities of those who take part in it, their agendas, and the grounds on which they make their claims. In simple terms, the phenomenon of legal pluralism can be used as a means to unveil the social context in which it exists.⁵

With this in mind, I will show that there was nothing exceptional to the efforts of West Syrian ecclesiastical leaders to counter legal pluralism during the first centuries of Muslim rule. Rather, it is their particular attitude towards legal pluralism under Islam which deserves our attention, since it reveals a concern for maintaining the socio-confessional boundaries of a West Syrian community. The efforts of ecclesiastical leaders to maintain judicial authority, a *judicial exclusiveness*, should be seen in the context of an ecclesiastical concern with maintaining communal boundaries.

I will begin my analysis by surveying some of the late antique origins of Christian judicial systems, as well as some contemporary demands made by Christian religious leaders for judicial exclusiveness. In doing so, I hope not only to provide the necessary historical background, but also to draw attention to the prevalence of legal pluralism prior to the rise of Islam. In the next stage of my analysis, I will focus on a few points of context essential for understanding the state of the ecclesiastical judiciary under Muslim rule, particularly the Muslim legal principle that granted legal autonomy to those who fell under the protection, or *dhimmah*, of Islam, and the factors that prompted Christians to turn to non-ecclesiastical judicial systems, despite this formal autonomy. This will lay the groundwork for a presentation of West Syrian legal responses

³) See especially Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law', *Journal of Law and Society* 14.3 (1987), pp. 279-302; Sally Engle Merry, 'Legal Pluralism', *Law and Society Review* 22.5 (1988), pp. 869-896; Jaques Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later', *Journal of Legal Pluralism and Unofficial Law* 28 (1989), pp. 149-157; Brian Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', *Sydney Law Review* 29 (2007), pp. 1-63.

⁴) Tamanaha, 'Understanding Legal Pluralism', p. 1.

⁵) Lawrence Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (Oxford, 2000), p. 126.

to the recourse to non-ecclesiastical judicial systems taken by individuals of West Syrian affiliation. These responses appeared predominantly in the form of legislation of canon laws, but also through the formation of an ecclesiastical civil jurisprudence. I will conclude my paper with a linguistic analysis of West Syrian legislation dealing with the question of recourse to external judicial systems. It is here that I will highlight some of the subtle differences between earlier and later legal materials and suggest the social context for this legislation.

Christian Judicial Systems under the Late Roman Empire

Let us begin with a brief survey of some of the Christian judicial systems that prevailed under the late Roman Empire. By 'judicial system', I am referring to any legal arena in which the judgement of a third party was needed, whether that of a judge, an arbiter, a mediator, or even a negotiator. By 'Christian systems', I am referring only to those systems that were patronized by men of spiritual authority: clergy, monks, or recluses of various sorts. Late Roman ecclesiastical courts were formally recognized as judicial venues by the fourth century. In contrast to civil magistrates, ecclesiastical judges drew their authority and legitimacy both from imperial recognition and from their spiritual reputation. In 318 under the rule of the first Christian emperor, Constantine (reigned 306-337), the episcopal tribunal, or *episcopalis audientia*, received the state's formal recognition.⁶ Modern scholars often acknowledge that the background of this step was rather mundane.⁷ Clearly, the formal embracing of the episcopal court was well suited to the purpose of Christianizing the empire, as

⁶ Clyde Pharr, *The Theodosian Code and Novels and the Sirmondian Constitutions* (The Corpus of Roman Law I; Princeton, 1952), 1.27.1. For a comprehensive discussion on the evolution of the *episcopalis audientia*, see Gitilio Vismara, *Episcopalis audientia* (Milano, 1937); Walter Selb, 'Episcopalis audientia von der Zeit Konstantins bis zur Nov. XXXV Valentinians III', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte—Romanistische Abteilung* 84 (1967), pp. 162-217; Jill Harries, *Law and Empire in Late Antiquity* (Cambridge, 1999), pp. 191-211; Claudia Rapp, *Holy Bishops in Late Antiquity: The Nature of Christian Leadership in an Age of Transition* (Berkeley, 2005), pp. 242-252; John C. Lamoreaux, 'Episcopal Courts in Late Antiquity', *Journal of Early Christian Studies* 3.2 (1995), pp. 143-167. It appears that, under Roman rule, the Miaphysite Churches had not yet established a separate judiciary; see Walter Selb, *Orientalisches Kirchenrecht* 2 (Vienna, 1981), p. 80; Lucas Van Rompay, 'Society and Community in the Christian East', in Michael Maas (ed.), *The Cambridge Companion to the Age of Justinian* (Cambridge, 2005), p. 251. According to Van Rompay, the Miaphysites in the mid-sixth century, despite their dissatisfaction, were still able to come up with a 'systematic construction of a new hierarchy'.

⁷ Selb, 'Episcopalis audientia', p. 216.

this gave the bishop far greater means for serving his community. Yet the formal endorsement of the ecclesiastical judiciary should be seen primarily as an administrative adjustment in which local elites acted as agents of the imperial government.⁸

A close reading of the New Testament and Church Orders reveals that the *episcopalis audientia* was already in operation, albeit informally, prior to the reign of Constantine.⁹ The episcopal judge differed from the civil magistrate in three significant details. First, his jurisdiction was not purely religious, while his secular counterpart dealt only with civil matters.¹⁰ The bishop's court, while initially lacking this authority, with time gained jurisdiction over both civil and religious matters and was open to clergy and laymen alike. Second, ecclesiastical judgement, despite being rendered in the conventional form of a ruling, was legally considered a form of arbitration.¹¹ Finally, the bishop drew his authority from both the state and the faithful.¹²

By 355 bishops enjoyed the privilege of being tried only before their peers. This was applied also to clergymen by 411 and extended to monks and nuns as well by Justinian's days.¹³ If laymen wished to pursue litigation 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 latter was not a Christian.¹⁴ Although the road leading to the full state recognition of episcopal courts was not without obstacles, by the fifth and, to a greater extent, sixth centuries, the state had begun to enforce ecclesiastical judicial decisions on both religious and civil matters.¹⁵ Constantine's plan to extend the authority of Roman law by sanctioning ecclesiastical judicial power

⁸ Peter Brown, *Authority and the Sacred: Aspects of the Christianization of the Roman World* (Cambridge, 1995), pp. 19-20.

⁹ See Matt. 18:15-17; 1 Cor. 6:1-8; James Donaldson, *The Apostolic Constitutions 2* (Edinburgh, 1870).

¹⁰ Augustine understood his role as the head of the *familia Dei*, the family of God, also as arbiter of disputes within his community, his family; see Peter Brown, *Augustine of Hippo: A Biography* (Berkeley, 1967), p. 189.

¹¹ Harries, *Law and Empire*, p. 191.

¹² Peter Brown, *Poverty and Leadership* (Hanover, NH, 2001), p. 68.

¹³ A.H.M. Jones, *The Later Roman Empire 1* (Baltimore, MD, 1964), p. 492.

¹⁴ Pharr, *The Theodosian Code*, N 6.35.1; Rapp, *Holy Bishops in Late Antiquity*, p. 243.

¹⁵ Jones, *The Later Roman Empire 1*, p. 491; Rapp, *Holy Bishops in Late Antiquity*, 246; Gerhard E. Lenski, *Power and Privilege: A Theory of Social Stratification* (New York, 1966), p. 92; John Meyendorff, *Imperial Unity and Christian Divisions: The Church 540-680 A.D.* (New York, 1989), p. 14.

appears to have succeeded beyond expectations. By the sixth century, however, the tables had turned and the imperial system found itself in competition with the episcopal one. The requirement imposed by the Justinianic Constitution of 530—that the Gospels be present in every courtroom—demonstrates that episcopal courts were acquiring increasing judicial power at the expense of secular institutions.¹⁶ The provision of a religious veil to secular judicial proceedings can be seen as part of a broader imperial policy to centralize the judiciary and enhance control over it.

Christian Judicial Systems under the Sassanian Empire

The state of ecclesiastical courts under the rule of the Sassanians can be seen in East Syrian testimonies such as the *Life of Mar Aba*, the Catholicos of the East Syrian Church (fl. 540–552), and an eighth-century legal treatise, *Maktbānutā d-‘al Dinē* (a collection of judgements), written by the East Syrian cleric Isho‘bokt (dates unknown). These allude to East Syrian attempts to draw Christians to ecclesiastical courts.¹⁷ In the *Life of Mar Aba* we learn that the Catholicos was originally a Zoroastrian who converted to Christianity. As a result, he had to leave his official position in the Sassanian court and faced charges from his previous co-religionists:

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 (*mgušē*) bring against you, are as following: 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 (*hanpā*) and later became a Christian (italics added).¹⁸

¹⁶ See especially Caroline Humfress, 'Judging by the Book: Christian Codices and Late Antique Legal Culture', in W.E. Klingshirn and L. Safran (eds.), *The Early Christian Book* (Washington DC, 2007), pp. 141–158. See also William K. Boyd, *The Ecclesiastical Edicts of the Theodosian Code* (New York, 1905), p. 101.

¹⁷ See Oskar Braun, *Ausgewählte Akten persischer Märtyrer* (Kempten, 1915); Manfred Hutter, 'Mar Aba and the Impact of Zoroastrianism on Christianity in the Sixth Century', in Carlo G. Cereti, Mauro Maggi, and Elio Provasi (eds.), *Religious Themes and Texts of Pre-Islamic Iran and Central Asia* (Wiesbaden, 2003), p. 169; Eduard Sachau, 'Corpus Juris des Persischen Erzbischofs Jesubocht', in Eduard Sachau, *Syrische Rechtsbücher* 3 (Berlin, 1914).

¹⁸ Braun, *Ausgewählte Akten*, pp. 210–211; Paul Bedjan, *Histoire de Mar Jab-Jabalaha* (Paris, 1895), p. 254.

The concern of the accusers of Mar Aba—that he was drawing Christians away from the Sassanian judiciary—indicates that such recourse was an option.

Isho‘bokt’s work may provide further evidence for Christians’ use of Sassanian courts. The treatise attempts to harmonize legislative measures that had previously been established under the Sassanians and were later applied by the episcopal tribunal.¹⁹ Isho‘bokt’s work refers to two kinds of judges: ecclesiastical and secular. As a Christian clergyman, Isho‘bokt likely sought to restrict Christians to the jurisdiction of the ecclesiastical judge. If we accept the assumption that Isho‘bokt was drawing from earlier materials which pre-dated the Muslim period, this provides further evidence that non-Zoroastrians had recourse to Sassanian courts. Thus both Isho‘bokt’s treatise and the *Life of Mar Aba* point not only to Christians’ use of Sassanian courts, but they also attest to the existence of an ecclesiastical judiciary under Sassanian rule.

The reign of the Sassanian monarch Yazdegerd I (fl. 399–420) marked the beginning of an era of toleration towards non-Zoroastrian minorities under Sassanian rule. One of the expressions of this policy was a growing cooperation between the Sassanian rulers and local bishops.²⁰ This immediately benefited the Church by granting it the ability to organize itself and consolidate the authority of its leaders, although they remained in constant dependence on the whim of their sovereigns. Modern scholarship views the Synod of 410, in which Yazdegerd’s ‘Edict of Toleration’ was announced, as the historical moment in which the East Syrian Church gained autonomous standing within the Sassanian Empire.²¹ The synod marks the first official recognition of the Bishop of Seleucia-Ctesiphon, the Catholicos, as the head of the East Syrian Church.²² In this capacity, the Catholicos was also the supreme judicial authority of his

¹⁹ Nina V. Pigulevskaja, *Les villes de l’État iranien aux époques parthe et sassanide: contribution à l’histoire sociale de la Basse Antiquité* (Paris, 1963), p. 109.

²⁰ Scott J. McDonough, *Power by Negotiation: Institutional Reform in the Fifth-Century Sasanian Empire* (Los Angeles, 2005, unpublished dissertation), p. 253.

²¹ Jean-Baptiste Chabot, *Synodicon Orientale ou recueil de synods nestoriens* (Paris, 1902), pp. 26–27, 30, 266, 269; Mesrob K. Krikorian, ‘Autonomy and Autocephaly in the Theory and Practice of the Ancient Oriental Churches’, *Kanon* 5 (1981), pp. 114–129; Michael Morony, *Iraq After the Muslim Conquest* (Princeton, 1984), 334–337; Wolfgang Hage, ‘Die Kirche “des Ostens”’: Kirchliche Selbständigkeit und Kirchliche Gemeinsamkeit im fünften Jahrhundert’, in Gerrit J. Reinink and Alex C. Klugkist (eds.), *After Bardaisan: Studies on Continuity and Change in Syriac Christianity in Honour of Professor Han J. W. Drijvers* (Leuven, 1999), p. 141.

²² McDonough, *Power by Negotiation*, p. 235.

Church.²³ Generally speaking, the fifth century marks the beginning of the organizational consolidation of the East Syrian Church and its permanent presence within Sassanian society. It is within this context that we begin to notice bishops and monastic leaders functioning as ‘religious judges in addition to their sacerdotal duties’.²⁴

Ecclesiastical courts under Roman and Persian rule shared features of form and jurisdiction. They did not, however, share the same legal source of reference for questions pertaining to civil law. Whereas the ecclesiastical judge in the Eastern Roman Empire referred to Roman civil law, his counterpart in Persia seems to have either already possessed or to have been in the process of developing a comprehensive ecclesiastical legal code that covered both religious and civil questions.²⁵

Non-Ecclesiastical Christian Judicial Authority

The churches were not the only sources of judicial authority. Judicial services performed by recluses, monks, and rural priests were of particular significance in those times and places in which ecclesiastical institutions were lacking.²⁶ As small-scale egalitarian communities often lacking autonomous institutions, local villages had a constant need for the intervention of external figures for direction, protection, and mediation.²⁷ Thus, for example, one version of the *Life* of the Syrian holy man Simeon the Stylite (d. 459), authored by the bishop-writer Theodoret of Cyrrihus (d. 466), mentions Simeon’s role as an 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

²³ Cf. William F. Macomber, ‘The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon’, *OCA* 181 (1968), p. 181.

²⁴ Victoria Erhart, ‘The Development of Syriac Christian Canon Law in the Sasanian Empire’, in Ralph W. Mathisen, *Law, Society, and Authority in Late Antiquity* (Oxford, 2001), p. 127.

²⁵ Selb, *Orientalisches Kirchenrecht* 1, p. 43.

²⁶ Robin Lane Fox, ‘The *Life of Daniel*’, in M.J. Edwards and Simon Swain (eds.), *Portraits: Biographical Representation in the Greek and Latin Literature of the Roman Empire* (Oxford, 1997), p. 213.

²⁷ See especially Ernest Gellner, *Saints of the Atlas* (Chicago, 1969), p. 129; Peter Brown, ‘The Rise and Function of the Holy Man in Late Antiquity’, *JRS* 61 (1971), p. 87.

teaching to those present and then, after receiving the request of each and affecting some healings, he resolves the quarrels of the disputants.²⁸

Yet as Brown himself admitted in his reassessment of his 1971 paper on 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.²⁹ The holy man should not be imagined solely in the guise of a distant ascetic. A variety of evidence serves as a constant reminder of the judicial roles fulfilled by monks and rural priests outside the formal setting of the church. The Syriac treatise best 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.³⁰ The work is thought to have been composed over a stretch of time in the setting of a monastic community. It addresses two principal groups of Christians, the 'Upright', *kênē*, and the 'Perfect', *gmirē*. While it regards the members of both groups as having reached a high level of spirituality on 'a road to salvation', the different designations denote a hierarchy in which the Perfect are superior to the Upright in their spiritual stature. Thus, while the Upright assume roles of leadership within Christian communities, the Perfect are depicted as homeless individuals who wander about, begging and mediating disputes among the believers. Chapter four of the *Liber Graduum* instructs the Perfect one in the following manner:

When you meet people who are at enmity with each other, say, *Brothers, blessed are the peacemakers* ('*ābdāy 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 [that is, they act as outside arbitrators, able to act because they do not represent any local interest³¹]. They make peace in the land of their Father, and are mediators (*meṣ'āyē*) who reconcile people by imploring them, demonstrating lowliness to them, and admonishing them.³²

An examination of late antique Christian literature on the topic of the role of Christian leaders as judges and mediators yields an image of two, somewhat overlapping, spheres of judicial activity: that of the ecclesiastical organization

²⁸ Robert Doran, *The Lives of Simeon Stylites* (Kalamazoo, MI, 1992), pp. 82–83.

²⁹ Peter Brown, 'The Rise and Function of the Holy Man in Late Antiquity, 1971–1997', *Journal of Early Christian Studies* 6 (1998), pp. 353–376.

³⁰ Robert Kitchen and Martien F.G. Parmentier, *The Book of Steps: The Syriac Liber Graduum* (Kalamazoo, MI, 2004).

³¹ Kitchen and Parmentier, *The Book of Steps*, p. 43.

³² Kitchen and Parmentier, *The Book of Steps*; Michael Kmosko, *Liber Graduum* (Patrologia Syriaca 3; Paris, 1926), p. 94.

and that of the monastic community. Whether addressed to a bishop or a stylite, the principle that emerges from Christian sources is that all human problems ought to be dealt with according to Christian ideals. With regard to judicial authority, these ideals can be summarized with three basic rules. First, worldly rulers, that is secular rulers, should not pass judgement over Christians. Second, contending parties should try to reconcile, and thus avoid the need for their dispute to be resolved by a judicial decision. Finally, if a judgement is unavoidable, then it is to be rendered by a holy one, that is a bishop, or, as we have seen in the *Liber Graduum*, by a group of chosen Perfects.

Early Responses to Legal Pluralism

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 he 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.³³

The above passage from the Book of Matthew presents the principal Christian approach to disputes between believers: they are to be settled quietly and are to be brought before the arbitration of the Church only as a last resort.

The New Testament's concern with believers pursuing litigation before non-Christians is found in the Pauline command from 1 Cor. 6:1-6:

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?

The command seeks to underscore the judicial authority of Christian leaders, ambiguously referred to as 'saints'. Furthermore it clearly rejects the authority of the 'unrighteous' and 'unbelievers'. The expressions 'unrighteous' and 'unbelievers' refer in this case to either secular or non-Christian figures.

³³) Matt. 18:15-17.

The *Apostolic Constitutions* were composed in the post-Constantine era. By this time, 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 a comprehensive church order comprised of earlier church orders such as the *Didascalia* and the *Didache*.³⁴ As such, it is a useful source for considering early ecclesiastical positions regarding Christian recourse to non-ecclesiastical tribunals:

If by any management or temptation a contest arises with any one, let him endeavour 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. 6:5], or to decide their controversies.³⁵

In addition to legislation and normative Christian behavior, examples of the application of Christian principles to the question of judicial practices can also be found in early Christian treatises of questions and answers.³⁶ Despite the objection to any form of judicial contention, there appears to have been a pragmatic recognition, already in the New Testament, that such ideals could not be imposed upon all believers. Thus, if a lawsuit were to arise, it should be kept within the community rather than brought before worldly judges. Decrees against clergy taking their lawsuits outside the Church had already been given in the early fourth century by two of the bishops of Rome, Sylvester (*fl.* 314–335) and Julius (*fl.* 337–352). Both had decreed that clerics should not enter a court for any reason and should confine their legal concerns to ecclesiastical boundaries.³⁷ About a century later, far beyond the eastern frontiers of the

³⁴) For an up-to-date source analysis of the various church orders, see Paul F. Bradshaw, *The Search for the Origins of Christian Worship: Sources and Methods for the Study of Early Liturgy* (Oxford, 1992), pp. 80–110; Hubert Kaufhold, 'La littérature pseudo-canonique syriaque', in M. Debié *et al.* (eds.), *Les apocryphes syriaques* (Paris, 2005), p. 149. On the inclusion of earlier orders in the *Apostolic Constitutions* concerning the issue of litigating before non-ecclesiastical tribunals, see Vismara, *Episcopalis audientia*, p. 8.

³⁵) James Donaldson, *The Apostolic Constitutions* 2.45 (Edinburgh, 1870), p. 74.

³⁶) See, for example, John Chryssavgis, *Barsanuphius and John: Letters* 2 (Washington, DC, 2006), Letters 666–667, pp. 233–234.

³⁷) Raymond Davis, *The Book of Pontiffs (Liber Pontificalis): The Ancient Biographies of the First Ninety Roman Bishops to AD 715* (Translated Texts for Historians, Latin Series 5; Liverpool, 1989), pp. 15, 27.

Roman Empire, a canon from the East Syrian Synod of Bet Lapat of 484 states the following:

A clerk or a monk who has a charge against a lay person may not voluntarily and under no coercion turn to the tribunal of the outsiders (*barrāyē*). Whoever goes out and willingly commits an offence by making an oath before pagans (*hanpē*) or gives a false testimony, will be listed in a special book. He shall be received after pleading and giving penance according to the rules of the priests.³⁸

In 576, another East Syrian synod addressing the issue refers to certain members of the Christian community who seek to defy ecclesiastical judgement by seeking refuge and aid from certain circles outside of the church:

It is said in the synod that there are men who are excluded from the Church since they refuse to submit to what is just, they wish to cling to their defiance and their infidelity, seeking refuge among the pagans (*hanpē*) and the worldly (*‘almānāyē*); 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 once they submit [to the Church] and do the proper thing, they shall remain outside the Church under affliction and penitence, for a certain time, whereupon they shall be forgiven.³⁹

The context is missing; we do not know the specific background to these canons. We may assume that in light of its minority status under Sassanian rule, the East Syrian community, or rather the East Syrian leadership, was the first to develop greater sensitivity to questions of communal boundaries. At the same time, it may very well be that these canons were targeting a narrower sector, such as the clergy or even Christological rivals who were seeking the intervention of external elements in the course of ecclesiastical clashes.⁴⁰ Thus, while it seems clear that from the outset ecclesiastical authorities were preoccupied with maintaining a judicial monopoly, there is less clarity as to the identity of those who undermined it. The matter is slightly clearer when we turn to examine the contents of canon laws from the early Muslim period. A relatively rich corpus of regulations issued by East Syrian, West Syrian, and Coptic legislators sheds light on the face of extra-ecclesiastical judicial systems.⁴¹ These

³⁸) Chabot, *Synodicon*, pp. 623–624.

³⁹) Chabot, *Synodicon*, pp. 117, 376–377.

⁴⁰) See especially Erhart, ‘Christian Canon Law’.

⁴¹) Since my paper discusses the case of West Syrian communities, my analysis will be limited to West Syrian regulations. For a selection of East Syrian materials, see especially Chabot, *Synodicon*; Eduard Sachau, *Syrische Rechtsbücher* (3 vols.; Berlin, 1907–1914);

regulations appear to have a vocabulary and tone similar to those of the pre-Islamic period, while still including additional linguistic elements that suggest the context in which they were given.

Legal Pluralism under Islamic Rule

Modern studies agree that the structure and character of most local communities was almost inconceivably affected in the aftermath of the Arab conquests.⁴² 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 argues that in Antioch 'the survival of churches into the Muslim period indicates a certain vitality of the city and its Christian community.'⁴³ We may assume that a similar vitality on the rural level supported hundreds of small villages, the majority of which were centered on small churches that served the spiritual needs of their local congregations.⁴⁴ Historians also agree that the Arabs sought to maintain

W. Hoenerbach and O. Spies, *Ibn Al-Taiyib. Fiḡh al-Naṣraniya—Das Recht der Christenheit* (Leuven, 1956-1957); Hubert Kaufhold, *Die rechtssammlung des Gabriel von Baṣra und ihr Verhältnis zu den anderen juristischen Sammelwerken der Nestorianer* (Berlin, 1976); For Coptic materials see O.H.E. Burmester, 'The Canons of Christodulos, Patriarch of Alexandria (AD 1047-1077)', *Le Muséon* 45 (1932), pp. 77, 82; Aziz S. Atiya, Yassā 'Abd al-Masiḥ, and O.H.E. Burmester, *History of the Patriarchs of the Egyptian Church* 2.3 (Cairo, 1943), p. 254; O.H.E. Burmester, 'The canons of Cyril II, LXVII Patriarch of Alexandria', *Le Muséon* 49 (1936), pp. 268, 282; Wilhelm Riedel, *Die Kirchenrechtsquellen des Patriarchats Alexandrien* (Aalen, 1968), p. 232.

⁴² Hugh Kennedy, 'From Polis to Madina: Urban Change in Late Antique and Early Islamic Syria', *Past and Present* 106 (1985), pp. 3-27; Pau Figueras, 'The Impact of the Islamic Conquest', *Aram* 6 (1994), pp. 283-290; Robert Schick, *The Christian Communities of Palestine from Byzantine to Islamic Rule* (Princeton, 1995), pp. 220-224; Anne-Marie Eddé, Françoise Micheau, and Christophe Picard, *Communautés chrétiennes en pays d'islam: du début du VIIe siècle au milieu du XIe siècle* (Paris, 1997), pp. 17-18; Clive Foss, 'Syria in Transition, AD 550-750', *DOP* 51 (1997), pp. 266-267; Lawrence Conrad, 'Varietas Syriaca: Secular and Scientific Culture in the Christian Communities of Syria after the Arab Conquest', in Reinink and Klugkist (eds.), *After Bardaisan*, p. 103; Chase Robinson, *Empire and Elites after the Muslim Conquest: the Transformation of Northern Mesopotamia* (Cambridge, 2000), Ch. 2; Arietta Papaconstantinou, *Le culte des saints en Egypte des Byzantins aux Abbasides* (Paris, 2001), p. 10; Peter Brown, *The Rise of Western Christendom* (Malden, MA, 2003), pp. 304-307.

⁴³ Foss, 'Syria in Transition', p. 192.

⁴⁴ For a general survey of late antique settlements in the region of the Limestone Massif, see Georges Tchalenko, *Villages antiques de la Syrie du Nord: le massif du Bélus à l'époque*

previous Roman and Persian administrative organizations, a significant element of which was the judicial organization.⁴⁵ In general, Islamic law formally stipulated that the traditional prerogatives of confessional elites in *dhimmi* communities would be maintained. Accordingly, the Protected People were able to obtain formal sanction for maintaining their laws and tribunals. This position is confirmed by archival documents and by a great number of Muslim legal authorities.⁴⁶

Despite this freedom to run an independent judicial organization, both Christians and Jews regularly had recourse to Muslim judicial systems in addition to or instead of those of their religious communities. Both legal codes and canon laws issued by individual synods in the period following the Muslim conquest reflect an ongoing ecclesiastical preoccupation with Christians' recourse to non-ecclesiastical courts. This alone should testify to the frequency of such recourse.⁴⁷ Before I consider some of the specific reasons why Christians sought judgement outside of the Church, it is worth noting a few broader factors which may have contributed to this trend. One such factor may have been the apparent, continuous decline of the good name of clergy and monks. It is outside the scope of the present paper to discuss the details of this phenomenon.⁴⁸ This decline may explain some of the difficulties experienced by ecclesiastical leaders when demanding loyalty to the Church, since their personal integrity was in question.

romaine (Paris, 1953-1958); Georges Tate, *Les campagnes de la Syrie du Nord du IIe au VIIIe siècle: un exemple d'expansion démographique et économique à la fin de l'antiquité* (Paris, 1992); J.-P. Sodini *et al.*, 'Déhès (Syrie du Nord), Campagnes I-III (1976-1978). Recherches sur l'habitat rural', *Syria* 57 (1980), pp. 1-304; Foss, 'Syria in Transition', p. 198.

⁴⁵ See, for example, Petra Sijpesteijn, 'The Arab Conquest of Egypt and the Beginning of Muslim Rule', in Roger S. Bagnall (ed.), *Egypt in the Byzantine World, 300-700* (Cambridge, 2007), pp. 437-459.

⁴⁶ On the question of *dhimmi* legal autonomy and a summary of its treatment by the four Sunni legal schools, see Antoine Fattal, *Le statut légal des non-musulmans en pays d'Islam* (Beyrouth, 1958); Gideon Libson, 'Legal Autonomy and the Recourse to Legal Proceedings by Protected People, According to Muslim Sources during the Gaonic Period' (in Hebrew), in Nahem Ilan (ed.), *The Intertwined World of Islam: Essays in Memory of Hava Lazarus-Yafeh* (Jerusalem, 2002), pp. 334-392; Neophyte Edelby, 'The Legislative Autonomy of Christians in the Islamic World', in Robert Hoyland (ed.), *Muslims and Others in Early Islamic Society* (Burlington, VT, 2004), pp. 37-82.

⁴⁷ Kaufhold, *Gabriel von Başra*, p. 4.

⁴⁸ For signs of this decline, see especially Jean-Baptiste Chabot, *Incerti auctoris chronicon anonymum pseudo-Dionysianum vulgo dictum* (CSCO 104, Syr. 53; Leuven, 1965), pp. 261-262; Ewa Wipszycka, *Les ressources et les activités économiques des églises en Égypte du IVe au*

Another factor contributing to ecclesiastical shortcomings was a recently introduced and somewhat unfamiliar Christian civil code. Perhaps the most instructive remark on this matter is that of the East Syrian Catholicos Timothy I (d. 823), who referred to 'those who due to the non-existence of verdicts, judgements, and laws, constantly have recourse to the courts and judgements of the outsiders, due to the lack of verdicts and judgements which are required for worldly life.'⁴⁹ The Muslim judiciary possessed a number of crucial advantages over the ecclesiastical judicial administration in this respect. The consolidation of Muslim rule and its emphasis on domestic affairs testifies, among other things, to the crystallization and elaboration of an Islamic jurisprudence. The new legal system was in a position to offer an attractive alternative to that of the Church. For one, it was a legal system sanctioned by the ruling authorities, and thus possessed greater means of enforcement.⁵⁰ Furthermore, as the Muslim administration developed its bureaucracy, registered property, and conducted oversight of business transactions in the local market, the need to validate economic ties through a Muslim court grew stronger.

A further advantage of the use of Muslim courts stemmed from the role played by Christian laymen in Muslim administration. These officials offered their co-religionists useful means to achieve their personal ends. As servants of the court and its administration, Christian officials were in a position to intervene before the sovereigns, in favour of their co-religionists.⁵¹ Ecclesiastical legislators were well aware of this process, as personal ties with Christian courtiers could work against the Church itself. Thus Canon 4 of a West Syrian synod held at Callinicum, presumably in 817, clearly attests to the presence of Christian dignitaries who would intervene in favour of those condemned by the Church:

If a presbyter or a deacon or a believing man or a believing woman under excommunication by the bishop for transgression of the law ('*bar nāmōsā*), whatever it may be, has recourse (*metgawwas*) to the secular rulers (*šultānē 'almānāyē*) or to some other person from those of another (cf. Vööbus: 'a foreign') tribe (*ḥrānyay šarbitā*), those who are

VIIIe siècle (Bruxelles, 1972), pp. 196-212; Arthur Vööbus, *The Synodicon in the West Syrian Tradition 2* (CSCO 375-376, Syr. 163-164; Leuven, 1976), ed. pp. 33-34, trans. p. 36; Andrew Palmer, *Monk and Mason on the Tigris Frontier: the Early History of Ṭur 'Abdin* (Cambridge, 1990), p. 77.

⁴⁹) Sachau, *Syrische Rechtsbücher 2* (Berlin, 1908), pp. 56-57.

⁵⁰) Selb, *Orientalisches Kirchenrecht 1*, p. 214.

⁵¹) Hans Putman, *L'église et l'islam sous Timothée I (780-823): étude sur l'église nestorienne du temps des premiers Abbassides* (Beirut, 1975), p. 109.

outside (*l-bar*) 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 ...⁵²

More practical and individual factors need to be considered as well. The relative frequency of references to questions of inheritance in Christian legal sources suggests the extent to which Christian legislators were concerned with such matters.⁵³ Non-ecclesiastical courts served as a means for both securing and escaping the implementation of wills. Ecclesiastical institutions were not always able to secure the implementation of wills that included pledges of property made to them. Canon 8 issued in a synod held by the West Syrian Patriarch Dionysius (d. 909) at Bet Mar Sila in 896 states the following:⁵⁴

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 (*ṭhumā*) and especially if he takes refuge (*netgawwas*) with the outsiders, (*barrāyē*) is not allowed to enter the church of God until he no longer transgresses the word of God ...⁵⁵

Marriage and the process leading to it are subjects which drew much attention on the part of Christian legislators.⁵⁶ According to Walter Selb, regula-

⁵² Arthur Vööbus, *Synodicon* 2, ed. p. 29, trans. p. 32.

⁵³ See, for example, in East Syrian legal collections: Ḥnanisho's judicial decrees in Sachau, *Syrische Rechtsbücher* 2, pp. 15-51; Timothy's law book, in Sachau, *Syrische Rechtsbücher* 2, pp. 91-117; Isho' bar Nun's law book, *Syrische Rechtsbücher* 2, pp. 133-147; The legal collection of Isho'bokt, *Syrische Rechtsbücher* 3, pp. 91-127; Simeon's canons, *Syrische Rechtsbücher* 3, pp. 203-253; John bar Abgare's law book, in Hubert Kaufhold, 'Der Richter in den syrischen Rechtsquellen. Zum Einfluß islamischen Rechts auf die christlich-orientalische Rechtsliteratur', *Oriens Christianus* 68 (1984), pp. 47-92; For West Syrian legal collections, see Vööbus, *Synodicon* 2, trans. pp. 68-158; Paul Bedjan, *Nomocanon Gregorii Barhebraei* (Paris, 1898), pp. 172-186.

⁵⁴ On Dionysius and this synod, see Vööbus, *Synodicon* 2, trans. p. 61; Selb, *Orientalisches Kirchenrecht* 2, p. 129; Ignatius Aphram I Barsoum, *The Scattered Pearls: A History of Syriac Literature and Sciences* (2nd ed.; Piscataway, NJ, 2003), pp. 404-405.

⁵⁵ Vööbus, *Synodicon* 2, ed. p. 60, trans. pp. 64-65.

⁵⁶ See, for example, in East Syrian legal collections: Timothy's law book, in Sachau, *Syrische Rechtsbücher* 2, pp. 73-91, 105-107; Isho' bar Nun's law book, *Syrische Rechtsbücher* 2, pp. 121-131, 135, 153, 161-169, 171, 175; The legal collection of Isho'bokt, *Syrische Rechtsbücher* 3, pp. 25-69, 71-89; Mar Aba's matrimonial law, *Syrische Rechtsbücher* 3, pp. 258-285; for the West Syrian Church, see Vööbus, *Synodicon* 2; Bedjan, *Nomocanon*, pp. 117-161.

tions dealing with matrimony are exceptional because legislators continuously attempted to formalize them.⁵⁷ The formal fixing of the wedding ceremony and its Christianization were achieved at a relatively late stage. By the ninth century, it was customary among Christian communities in Mesopotamia that a marriage ceremony would include a delivery of a ring by the groom, a priestly benediction, and the testimony of a Christian layman. The trend of alternative matrimonial arrangements triggered a harsh response by West Syrian legislators who considered 'secular marriages' synonymous to adultery. Thus Canon 6, in a synod held by the West Syrian Patriarch Dionysius in 817, stipulates: 'If a believing man or a believing woman burns with lascivious desire towards those [institutions] which are called secular marriages (*zuwwāgē 'ālmānāyē*), he truly commits the abominable impurity of adultery.'⁵⁸ On the face of it, conducting marriage ceremonies outside the Church does not suggest an alternative judiciary. Yet there is some evidence, particularly from Egypt and Palestine, that Christians made use of Muslim courts, or non-ecclesiastical civil courts of some nature, in order to register their marriage agreements.⁵⁹

A useful way to avoid or reverse the decisions of ecclesiastical judges was to transfer the legal matter to some form of secular judicial authority that was likely to be more forceful than the Church. By turning to a court outside the Church, the defendant may have attempted to either manipulate the alternative legal system in order to win a favourable verdict, or simply to exploit what could have been an advantageous regulation within that system. The appeal to an alternative court in order to counteract an ecclesiastical verdict posed a major threat to the Church as this undermined its authority, particularly that of its leaders. A recurrent theme within canons issued by West Syrian synods is the problem of individuals who were either excommunicated or received an unfavorable sentence. Some of these individuals chose to turn to non-ecclesiastical elements in order to escape or remove ecclesiastical sentences. Thus, for example, Canon 11 issued in a synod in 758, held at Kepharnabu under the leadership of the West Syrian Patriarch Giwargi I (d. 790):⁶⁰

⁵⁷ Selb, *Orientalisches Kirchenrecht* 1, p. 206.

⁵⁸ Vööbus, *Synodicon* 2, ed. pp. 30-31, trans. p. 33.

⁵⁹ See, for example, sixth-century marriage contracts issued in Roman civil courts in Nessana, Palestine, in Casper J. Kraemer, *Excavations at Nessana* 3 (Princeton, 1958), pp. 53, 64; cf. ninth-century marriage contracts between Christians in Egypt in Adolf Grohmann, *Arabic Papyri in the Egyptian Library* 1 (Cairo, 1934), pp. 73, 82.

⁶⁰ On Giwargi I and the background to this synod, see Vööbus, *Synodicon* 2, trans. p. 3; Selb, *Orientalisches Kirchenrecht* 2, p. 128; Barsoum, *The Scattered Pearls*, pp. 369-370.

One who has lawfully (*nāmusā'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 (*mallez*) his bishop—the curse (*ḥermā*) of God from the entire synod shall be upon him so that Christians shall not know him at all.⁶¹

The offense of ‘seeking refuge among pagans’ to which the canon refers is somewhat ambiguous. The Syriac verb *gws*, translated by Arthur Vööbus as ‘seeking refuge’, can also be taken to simply mean ‘have recourse’. Thus in Canon 25 of a West Syrian synod held in 794 at Bet Batin:

He who abandons his bishop and has recourse (*metgawwas*) to worldly rulers (*šultānē* ‘*almānāyē*), he is like that one who harms (*maḥsar*) 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 (*nethallṭun*) with Christians.⁶²

The choice of an ambiguous expression in this case might not be accidental and may indicate how recourse to external authorities was perceived by the legislator. Simply put, recourse to an external authority in a way that undermines Church authority was more than a mere betrayal of ecclesiastical jurisdiction; it was an act of escaping justice by taking refuge in an illegitimate authority. It is hard to determine the exact nature of the recourse to external authorities involved in this case, but it seems clear that members of the West Syrian community were seeking the protection and intervention of extra-ecclesiastical authorities in order to escape or revoke ecclesiastical sentence. Furthermore, it appears that many of these canons were issued in connection with petitions made to Muslim authorities by the clergy during the course of disputes within ecclesiastical circles.⁶³ Thus, for example, the tenure of the West Syrian Patriarch Quryaqos (d. 817) is known to have experienced internal ecclesiastical turbulences because of disagreements over the celebration of the Eucharist.⁶⁴ One

⁶¹ Vööbus, *Synodicon* 2, ed. p. 4, trans. p. 5.

⁶² Vööbus, *Synodicon* 2, ed. p. 12, trans. p. 14.

⁶³ See, for example, a report by Michael the Syrian of a dispute that broke out during the time of Giwargi I in 758, trans. Jean-Baptiste Chabot, *Chronique de Michel le Syrien: patriarche jacobite d'Antioche (1166-1199)* (Paris, 1899-1924), Vol. 2, p. 525. The latter's ordination caused a schism within the Church over differences concerning who should be appointed Patriarch.

⁶⁴ Indeed, not for the first time, these disagreements concerned the question of the liturgical formula *Panem caelestem frangimus*, ‘we break the heavenly bread’, in the celebration of the Eucharist. See Chabot, *Chronique* 3, p. 17.

aspect of this state of affairs was a group of West Syrian clergy's strong opposition to the Patriarch. The Patriarch tried to counter these threats by excommunication. His adversaries responded to this by petitioning the 'Abbāsid Caliph Hārūn al-Rashīd in 806.⁶⁵

Ecclesiastical Responses

Eastern Christian jurists, among whom were included West Syrians, responded to Christians' use of non-ecclesiastical judiciary in two ways. First, they employed the legislation of ad hoc canons to exhort both clergy and laity against such external appeals. Second, they created an ecclesiastical civil jurisprudence. While religious law pertains only to matters of religion, civil law pertains to the 'establishment, recovery, or redress of private and civil rights'.⁶⁶ Although both Islamic and Jewish jurisprudence encompass religious and civil questions, Christian jurisprudence, in its formative stage, restricted itself to religious concerns only.⁶⁷ In an ideal Christian society, material concerns and personal interests are of no importance. Thus Isho'bokt states in the introduction to his legal code: 'In no manner has our Lord nor his apostles said anything regarding human judgements. For it is not fitting for my Lord to judge the dead and living in his kingdom above, to fix laws regarding minor and human judgements.'⁶⁸ Hence there is no need for civil questions to be legally addressed. Nevertheless, the acknowledgement of the need to provide legal means for sustaining 'temporal life' can be seen as a later stage in the continued formation of an ecclesiastical civil law. This process appears already to have begun prior to the Muslim conquest, as we find civil regulations of the East Syrian Church as early as the sixth century. Similar efforts were exerted within the Armenian Church by the Julianist theologian Yovhannēs Mayragomec'i (d. c.652-667) who, among other things, sought to extend ecclesiastical justice to matters which until then had been dealt with according to customary practice under the jurisdiction of a secular judge.⁶⁹ These examples reflect a concern for

⁶⁵ Chabot, *Chronique* 3, p. 19.

⁶⁶ Henry Campbell Black, *A Law Dictionary* (St Paul, MN, 1910), 'civil action'.

⁶⁷ Putman, *L'église*, p. 61; Richard B. Rose, 'Islam and the Development of Personal Status Laws among Christian Dhimmis: Motives, Sources, Consequences', *The Muslim World* 72.3-4 (1982), p. 161.

⁶⁸ Sachau, *Syrische Rechtsbücher* 3, pp. 16-19.

⁶⁹ Aram Mardirossian, *Le livre des canons Arméniens de Yovhannēs Awjneg'i: église, droit et société en Arménie du IVe au VIIIe siècle* (Leuven, 2004), p. 400.

‘worldly affairs’ among various ecclesiastical circles even at a relatively early stage. It is in the period following the Muslim conquest, however, that we find far more examples of such endeavours.⁷⁰

Our knowledge of the incorporation of civil law into West Syrian jurisprudence derives primarily from a synodic collection known as the *Synodicon in the West Syrian Tradition* and the thirteenth-century canonical treatise of Barhebraeus, *Ktōbō d-Huddōyē*, the *Nomocanon*. The former is an edited manuscript found in the collection of the Patriarchate of the Syriac Orthodox Church in Damascus. The colophon dates it to 1204.⁷¹ It is a collection of West Syrian legislative texts, the earliest of which ‘claim[s] apostolic origin’ and extends up to acts of a synod held in 1153.⁷² Due to the literary nature of the West Syrian Synodicon, it is difficult to identify the process by which civil regulations were incorporated into West Syrian jurisprudence. Nevertheless, it may be useful to note the compiler’s introduction to this collection:

We begin to write the book which contains all the new canons of the later patriarchs ... and all of the laws, judgments, sentences and heritages and the rest [of the administrative affairs] of the Greek kings, 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] by the Arab rulers under whose sentences the believers act and whose laws they accept.⁷³

Clearly this statement ought to be regarded with caution, since it is given by an anonymous figure. Yet the mere fact that the corpus includes civil regulations, both Roman and Muslim, suggests that they were incorporated into ecclesiastical legal jurisdiction.

Barhebraeus’ *Nomocanon* represents the most comprehensive West Syrian legal codification known to this day, and consists of both civil and religious regulations. Despite its relatively late date, the compilation testifies to the judicial works of much earlier sources, thus suggesting an earlier West Syrian concern for civil matters.⁷⁴ Chapter 38 of the *Nomocanon* addresses the issue of ‘worldly judgements’:

⁷⁰ Cf. Edelby, ‘The Legislative Autonomy’, p. 40.

⁷¹ About Ms. 8.11, see Vööbus, *The Synodicon in the West Syrian Tradition 1* (CSCO 367–368, Syr. 161–162; Leuven, 1975), ed. pp. ix–xix.

⁷² Vööbus, *Synodicon 1*, trans. pp. 2–26.

⁷³ Vööbus, *Synodicon 2*, ed. p. 1, trans. p. 1.

⁷⁴ On Barhebraeus’ *Nomocanon*, see Carlo A. Nallino, *Raccolta di scritti editi e inediti 4* (Roma, 1942), pp. 214–287.

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]. As his saying was made known: to the disgrace of those who were judged (*metdinin*) before outsiders (*barrāyē*) and non-believers (*la mhaymnē*), He said these things. Their justice is not that of the holy (*qaddišē*) and called ones (*qrayyā*), that is, the bishops shall not bring (*ndunun*) worldly lawsuits (*dinē ‘ālmānāyē*) ...⁷⁵

Barhebraeus began his discussion of judicial procedures pertaining to civil matters by following a common literary pattern: he cited 1 Cor. 1:1-6 concerning recourse to worldly judges. He then made a distinction between the laity and 'the saints', that is, bishops, with respect to the sort of legal matters with which each group should be preoccupied. Unlike the laity, bishops should not bring forth 'worldly lawsuits'. Despite the profane quality of worldly matters, they should, nevertheless, be handled within the Church.

Muslim rule played an important role in triggering ecclesiastical initiatives to incorporate civil jurisprudence. While East Syrian leaders had sought to administer their organization as an autonomous entity prior to Muslim rule, other Churches developed similar ambitions only after the withdrawal of the Roman Empire. One way of explaining the difference between the development of jurisprudence under the East Syrian Church and that of Churches under past Roman rule is Roman law. As long as the Roman Empire continued to wield power, its civil legal code was valid in the eyes of ecclesiastical legislators.⁷⁶ This acknowledgment was based on the belief that the emperors were 'instruments of Divine Will'.⁷⁷ With this belief in mind it has been argued that 'the innate respect of the faithful for the legislative role of the Roman civil authorities led them to submit to and adopt many of the laws of the Caesars'.⁷⁸ Once Roman power gave way to Islam, however, the churches became part of an empire with a civil code that was no longer identified with a Christian ruler. As Muslim jurisprudence gained greater importance within the new theocracy, every aspect of life was regulated according to Islamic law. Under such circumstances ecclesiastical leaders began to realize that without a uniform and detailed civil corpus they were in danger of losing control over their communities.⁷⁹

⁷⁵) Bedjan, *Nomocanon*, p. 480.

⁷⁶) Rose, 'Islam', p. 161; see also Selb, *Orientalisches Kirchenrecht* 2, p. 80.

⁷⁷) Rose, 'Islam', p. 161.

⁷⁸) Rose, 'Islam', p. 161.

⁷⁹) Hubert Kaufhold, *Syrische Texte zum islamischen Recht: das dem nestorianischen Katholikos Johannes V. bar Abgare zugeschriebene Rechtsbuch* (München, 1971), pp. 24-25.

The second kind of ecclesiastical response to the phenomenon of legal pluralism came in the form of numerous canon laws prohibiting recourse to non-ecclesiastical judicial systems. These canons vary in tone, vocabulary, and the level of detail which they provide on the subject matter. An early West Syrian canon that prohibits recourse to non-ecclesiastical leaders is attributed to Jacob of Edessa (d. 708). It states the following: 'It is not lawful for the clerics when they have a lawsuit (*dinā*) to go to the outsiders (*barrāyē*) but to the judgement (*dinā*) of the holy Church.'⁸⁰ It appears that Jacob was concerned with the possibility of disputes being settled not only by non-Christians or seculars, but also by individuals who possessed spiritual authority outside ecclesiastical ranks. In a question referred by John of Litarba (d. 737/738) to Jacob, the stylite asks if 'it is right for the stylites to give proclamation or admonition to the people or administer judgements and decree the laws employing the word of God?'⁸¹ To this Jacob replied:

It is lawful ... but it is not useful to them ... therefore 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 nor appointed for this neither by God nor by the chiefs of the priests.⁸²

It is plausible that John's question reflects a certain measure of accepted practice, that is, of holy men assuming a judicial role among members of the laity. Clearly, Jacob was not happy with this trend and sought to discourage it.

For the most part, West Syrian canons on the matter of non-ecclesiastical judgement are found in the acts of synods from the late eighth to the tenth centuries. Michael the Syrian describes the role of Patriarch Dionysius of Tel Mahre (d. 845) as a 'healer to the torn body of the Church'.⁸³ The introduction to the acts of a synod held by Dionysius in 817 depicts contemporary difficulties and confusion as a factor in the corruption of the believers in a way that has caused them 'to converse with those outside'. Canon 4 of this synod talks about clergy and laymen who have had recourse to secular rulers, to men from another tribe who are outside the fold of the Church. Expressions such as 'those who are outside', 'secular rulers', people from 'another tribe', seem ambiguous at first. Yet Canon 4 of a synod of 878 held at Callinicum leaves little room for doubt as to the identity of these external authorities:

⁸⁰) Vööbus, *Synodicon* 1, ed. p. 272, trans. p. 247.

⁸¹) Vööbus, *Synodicon* 1, ed. p. 248, trans. pp. 227-228.

⁸²) Vööbus, *Synodicon* 1, ed. pp. 248-249, trans. p. 228.

⁸³) Chabot, *Chronique* 3, p. 28.

Regarding the persons who shamelessly and ignorantly transgress ('bar) the law (*nāmō-sā*) in something which has been determined, be it because of mortal sins (*ḥṭāhē d-mawtā*) or canonical censure (*taqnunitā*) or punishment 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'eldbābē*) of the legislator (*sā'em nāmōsā*) and devise a manner of perdition (*abdānā*) against him and who seek to have their anathema (*psāqā*) abolished by means of worldly rulers (*šultānē 'almānāyē*) or the chiefs (*rēšānē*) of the Arabs (*ṭayyāyē*) or the Christians whose force is hard.⁸⁴

It is plausible that the phrase 'of another tribe' may indeed refer to 'Arabs', but also to powerful Christian laymen, thus providing a nuanced image of competing authorities.

Symbolic Power through Legislative Discourse

Ecclesiastical regulations regarding the issue of recourse to external judicial systems are almost unanimous in their objection. Yet the message which emerges from both individual synods and canonical works can tell us more. This message assumes special significance when we recall that ecclesiastical authorities possessed few means of sanction and coercion in order to elicit and sustain obedience. We are dealing here with authoritative figures whose main method of control was 'right' rather than 'might' and who therefore resorted to means of persuasion to achieve control.⁸⁵ A particularly useful means of persuasion for this effort was legislation. Beyond its immediate purpose to lay rules and provide direction, legal discourse is also an important vehicle for articulating symbolic power and promoting the social agenda of the elites.⁸⁶

One way of examining the legislative wordplay in canon law is by placing a particular phrase of legislation against its earlier legal manifestations. Two principal early references to judiciary that are useful for the analysis of the development of Near Eastern ecclesiastical legislation is the passage in 1 Cor. 6:1-6 and Chapter 11 in the *Didascalia Apostolorum*. The value of these sources is a result of two unique factors. First, Christian legislative sources concerning the question of extra-ecclesiastical litigation often include direct citations or

⁸⁴ Vööbus, *Synodicon* 2, ed. p. 53, trans. p. 57.

⁸⁵ On the use of words as means for asserting authority by elites that lacked coercive power, see Peter Brown, *Power and Persuasion in Late Antiquity: Towards a Christian Empire* (Madison, WI, 1992).

⁸⁶ See, for example, Lenski, *Power and Privilege*, p. 52; Mary Douglas, *How Institutions Think* (Syracuse, NY, 1986), p. 9; Pierre Bourdieu, *Language and Symbolic Power* (Cambridge, MA, 1991), pp. 105-109.

paraphrases of these early materials. Second, both sources appeared in Syriac at a relatively early stage and thus share linguistic details with regulations from the Muslim period. The following table is a synoptic analysis of these early sources along with those of the period under discussion:

Principal terms	NT	<i>Didascalía</i> ⁸⁷	East Syrian synods	East Syrian treatises	West Syrian synods	West Syrian treatises
Law/litigate/ have recourse	<i>ndun</i>	<i>tetdinun</i>	<i>netdinun;</i> <i>nehwōn qdam</i> <i>paršōpā;</i> <i>nappqun</i> <i>mellayhōn</i>		<i>metgawwas;</i> <i>eštā'iw</i>	<i>metdinin;</i> <i>ndunun</i>
Non- ecclesiastical judge	<i>'awwālē; lā</i> <i>mhaymnin</i>	<i>dayyānē</i> <i>d-ḥanpē</i>	<i>ḥanpē; lā</i> <i>mhaymnē;</i> <i>šallitay 'ālmā;</i> <i>barrāyē</i>	<i>ḥanpē;</i> <i>šultānā;</i> <i>barrāyē;</i> <i>dayyānē men</i> <i>da-l-bar;</i> <i>dayyānē men</i> <i>d-'ālmā</i>	<i>šultānē</i> <i>'ālmānāyē;</i> <i>ḥrānyay</i> <i>šarbtā;</i> <i>ṭayyāyē;</i> <i>barrāyē</i>	<i>barrāyē; lā</i> <i>mhaymnē;</i> <i>dayyānē</i> <i>'ālmānāyē</i>
Ecclesiastical judge	<i>qaddišē</i>		<i>aylēn</i> <i>d-sāymin 'al</i> <i>dinā; prišay</i> <i>men apisqōpā;</i> <i>dayyānē</i> <i>d-mhaymnē;</i> <i>aylēn</i> <i>dmetparšin</i> <i>l-pusqānā</i> <i>d-dinē</i>			<i>qaddišē;</i> <i>qrayyā</i>
Render judgement/ mediate	<i>ndunun;</i> <i>našwē</i>		<i>netdinun</i>	<i>meṣ'āyē; dinā</i>	<i>pyāstā d-</i> <i>paršōpā</i>	
Worldly affairs	<i>aylēn</i> <i>da-d-'ālmā</i> <i>ennēn ḥānā</i>				<i>'ālmānāyē</i>	

Sorting the sources of the pre-Islamic and Islamic periods into adjacent categories of period, literary genre, and doctrinal affiliation not only enables us to identify more clearly the different epithets used to denote non-ecclesiastical

⁸⁷ R. Hugh Connolly, *Didascalía Apostolorum* (Oxford, 1929), pp. 109-110; for the Syriac text, see Paul de Lagarde, *Didascalía Apostolorum* (Osnabruck-Wiesbaden, 1967), pp. 48-49.

judges, but perhaps also helps to explain these differences. While certain expressions appear rather consistently in the sources, e.g. *dinā* for lawsuit or dispute and the verb *dwn* for litigation and its synonyms, we can note differences in the terms used to refer to non-ecclesiastical judges. In 1 Corinthians, non-ecclesiastical judges are referred to as *‘awwālē*, a term that could be translated as any of the following: ‘unjust’, ‘unrighteous’, ‘lawless’, ‘evil’, ‘wrongdoers’, or ‘wicked men’. Another term used to signify such judges is *lā mhaymnin*, that is, ‘non-believers’. The seventh-century Syriac translator of the *Didascalia*, however, chose to use the term *dayyānē d-ḥanpē*, that is, ‘pagan judges’. Sources from the Muslim period adopt some of these epithets and add a few of their own which are variants of the words *šallitay ‘ālmā*, ‘worldly rulers’, and *barrāyē*, ‘outsiders’. Of particular interest are the epithets employed in West Syrian synodica: *ḥrānyay šarbtā*, ‘those of another tribe’, and *ṭayyāyē*, ‘Arabs’. Clearly, early Christian legislators, when referring to external judges, chose to emphasize the ethical and confessional attributes of such judges. At the same time, however, both the depiction of these judges during the early Muslim period as outsiders and the stress on their ethnic features is instructive. Thus, it may be argued that ecclesiastical legislators sought to establish a social demarcation that was not limited to confessional differences.

West Syrian and East Syrian legal sources, as well as the few examples we have from Coptic sources, share certain features. The most striking of these is the almost uniform objection to recourse to non-ecclesiastical judicial systems. In addition, the insistence on judicial exclusivity is often accompanied by terminology meant to invoke a notion of socio-confessional boundaries. Thus the terminology of canon laws that address the issue of recourse to external judges conveys an image both of life within and of life outside of a properly ordered Christian community. Life within the community involves attending the church, partaking in collective prayer and ritual, maintaining social ties with fellow believers, submitting to ecclesiastical leadership, and abiding by ‘divine law’. A vocabulary consisting of words such as ‘transgression’, ‘trespassing’, ‘having recourse’, ‘seeking refuge’, and so forth, creates an image of passing from life within the community to life outside of 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 reasoning behind the exclusion of offenders from their community is expressed in similar terms, as they had ‘recourse with 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 Church’.

Conclusions

The marks of an underdeveloped civil jurisprudence, although less acute for East Syrian legislators who had already experienced life under foreign rule, were shared by all Churches which came under Muslim power. This made it difficult for the ecclesiastical judiciary to compete with that of the Muslims as the latter had the advantage of a better consolidated, state-administered judicial system. This alone may have been sufficient to drive Christians to non-ecclesiastical judicial systems. Yet there were also other factors involved. The testimony of court records in Egyptian papyri, medieval chronicles, and legal stipulations found in canonical treatises and synodical acts provides a vivid picture of the motives behind Christians' appeals to external forums of judiciary. These attest to a combination of both pragmatic and ideological considerations. In the eyes of ecclesiastical legislators, the intentions of certain individuals within the fold of the Church to oppose its leadership merged with the concerns of validating contracts and reversing unfavorable verdicts. For ecclesiastical legislators, the motives and circumstances behind appeals to external courts appear to have been less of an issue than the trend of seeking external justice itself. Through extensive references both in synodica and canonical works and the use of reprimanding rhetoric and legislative manoeuvres, ecclesiastical legislators waged their battle against Christians' recourse to non-ecclesiastical judgement. The Church's response, as it is presented in legal sources, shows an agenda that went beyond merely safeguarding the vitality of ecclesiastical judiciary. Rather, the sources portray the very essence of a discrete Christian community as being at stake. It is for this reason that the question of loyalty to ecclesiastical judiciary became of immense importance, as socio-confessional boundaries were, to a great extent, sanctioned by the surveillance of the Church law enforcers, the ecclesiastical judges.

Uriel Simonsohn
Leiden University
u.i.simonsohn@religion.leidenuniv.nl