

The Christians Whose Force is Hard: Non-Ecclesiastical Judicial Authorities in the Early Islamic Period

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Abstract

This paper examines the context in which church leaders in the regions of Mesopotamia and the Fertile Crescent, during the first few centuries after the Arab conquest, were objecting to the appeal of their coreligionists to judicial authorities outside ecclesiastical control. Rather than assuming that from the outset of the Islamic conquest Muslim judges served as immediate judicial alternatives, the paper shows that, at least in the early Islamic period, church leaders were often aiming their exhortations towards Christians who sought the authority of other Christian figures from outside ecclesiastical jurisdiction.

Résumé

Cet article se penche sur le contexte dans lequel les chefs de l'Église, en Mésopotamie et dans le Croissant fertile des siècles suivant la conquête arabe, s'opposaient au recours de leurs coreligionnaires à des autorités judiciaires non contrôlées par l'Église. Au lieu de supposer que des juges musulmans servent d'alternative judiciaire dès l'époque de la conquête, cet article montre qu'au début de la période islamique, au moins, les exhortations des chefs de l'Église visaient souvent des chrétiens qui s'en remettaient à l'autorité d'autres chrétiens, en dehors de la juridiction ecclésiastique.

Keywords

Late Antiquity, Islam, Eastern Christianity, ecclesiastical administration, law, canon law, *dhimmīs*, courts, monasticism, Near Eastern elites

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The *Life of Theodotus*, bishop of the Mesopotamian town Amida (d. 698), was written shortly after his death by “Simeon, a priest and precentor from Samosata, [...] as it was dedicated to me by lord Joseph the priest, disciple of the saint.”¹ Among other things, the *Life* refers to the bishop’s relationship with his Muslim overlords.² In it, Theodotus is initially portrayed as having suffered physical abuse and suspicion from the local Muslim rulers.³ Later, however, this changed and the West Syrian bishop appears to have been on such good terms with the new rulers that he was recognized as the supreme Christian leader of his city and its region:

[T]he viceroy of all the East (*ahid shulṭono de-kulo madneho*) wrote to Amida concerning Theodotus the bishop as follows: “I command that the laws of the city Amida and of all the region be given into the hands of that righteous man who holds the office of bishop in it. I have heard that he does not give preference to any persons, and for this reason I have given the laws of the Christians into his hands.”⁴

The passage refers to the authority that was granted to Theodotus by the Muslim governor. More specifically, it refers to his judicial prerogatives as a confessional leader, entrusted with maintaining “the laws of the city [...] and of all the region [...] as] he does not give preferences to any persons.” Such a decree corresponds to the principles of *dhimmi* legal autonomy that we find prescribed in Islamic legal literature roughly a century after Theodotus’s death.⁵ I propose to leave aside the question of whether Theodotus

¹ Robert Hoyland, *Seeing Islam as Others Saw It* (Princeton: Darwin Press, 1997): 156; see also Andrew Palmer, “Saints’ Lives with a Difference: Elijah on John of Tella (d. 538) and Joseph on Theodotos of Amida (d. 698).” In *IV Symposium Syriacum 1984*, ed. H. J. W. Drijvers *et al.* (Rome: Institutum Studiorum Orientalium, 1987): 203-16.

² On Theodotus, see *Ibid.*: 156-60. An edition of the *Life* of Theodotus edited by Andrew Palmer from a Syriac Ms, no. 12/17 of the Syrian Orthodox Patriarchate at Damascus is forthcoming; see Andrew Palmer, “Āmid in the Seventh-Century Syriac Life of Theodūtē.” In *The Encounters of Eastern Christianity with Early Islam*, eds E. Grypeou *et al.* (Leiden: Brill, 2006): 111, n. 1.

³ Robert Hoyland suggests that “if true at all, [...] a lower official than Ḥajjāj (Umayyad governor of Iraq, d. 714) is meant, perhaps the governor of Mesopotamia, who was then Muḥammad ibn Marwān (d. 750),” in Hoyland, *Seeing Islam*: 159, n. 157.

⁴ Hoyland, *Seeing Islam*: 159; cf. Palmer, “Amid in the Seventh-Century”: 126.

⁵ Generally speaking, according to Islamic law, *dhimmis*, i.e. Jews, Christians, Zoroastrians, and occasional other religious groups, could retain their laws and judiciary in matters pertaining to personal law; for a summary, see Antoine Fattal, “Comment les Dhimmis étaient jugés en terre d’Islam.” *Cahiers d’histoire égyptienne* 3 (1951): 321-41; Antoine Fattal, *Le statut légal des non-musulmans en pays d’Islam* (Beyrouth: l’Institut de Lettres

did in fact receive an official decree from the Muslim ruler and did in fact hold supreme episcopal and judicial authority over all Christians in his region, and will instead focus on the literary significance of this report.

The importance that the document attributes to judicial authority exemplifies the practice of securing social and religious prerogatives by means of a literary endeavor.⁶ The preoccupations of the hagiographical author of the *Life* of Theodotus resonate with contemporary exhortations of ecclesiastical leaders against Christians' appeals to non-ecclesiastical justice. Modern studies, dealing with the history of non-Muslim communities in the aftermath of the Arab conquest, tend to highlight the autonomous setting in which Christian, Jewish, and other confessional groups sustained their identity and group cohesion. Thus, the demands for judicial exclusiveness made by ecclesiastical leaders have often been seen in the context of competition with Islamic institutions over legal jurisdiction.⁷ Indeed, there is much in Islamic jurisprudence (*fiqh*) and in Christian canon law that suggests that when Christians took their lawsuits outside of the church, they often turned to Islamic courts. Yet while it is likely that such competition did exist once Islamic judicial institutions began to crystallize, there

Orientales, 1958): 344-65; Baber Johansen, "Entre révélation et tyrannie: le droit des non-musulmans d'après les juristes musulmans." In *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Brill: Leiden, 1999): 229-32.

⁶ Hoyland's remark in *Seeing Islam*: 123-4, regarding the portrayal of Christian-Muslim relations in the ninth-century Syriac *Life of Gabriel* also seems to be valid here: "this account [...] belongs to the genre of documents which sought to delineate the ideal Muslim-Christian treaty and endow it with authority by attributing it to famous Muslim figures." For a parallel phenomenon in Islamic narratives, cf. Albrecht Noth, "Die literarisch überlieferten Verträge der Eroberungszeit als historische Quellen für die Behandlung der unterworfenen Nicht-Muslims durch ihre neuen muslimischen Oberherren." In *Studien zum Minderheitenproblem im Islam I*, eds T. Nagel et al. (Bonn: Selbstverlag des Orientalischen Seminars der Universität Bonn, 1973): 282-314.

⁷ For a selection of modern studies on the theme of non-Muslim recourse to Muslim courts, see Néophyte Edelby, "L'autonomie législative des chrétiens en terre d'islam." *Archives d'histoire du droit oriental* 5 (1950-1): 307-51; Haym Z. Hirschberg, "Gentile Courts in the Geonic Period" [in Hebrew]. In *Mazkeret; Rabbi I. I. Herzog Memorial Volume*, eds S. J. Zevin and Z. Warhaftig (Jerusalem: Hekhal Shelomoh, 1962): 493-506; Jean de Menasce, "Problèmes des mazdéens dans l'Iran musulman." In *Festschrift für Wilhelm Eilers*, ed. G. Wiessener (Wiesbaden: Harrassowitz, 1967): 222; Gideon Libson, "Legal Autonomy and the Recourse to Legal Proceedings by Protected Peoples, according to Muslim Sources during the Geonic Period" [in Hebrew]. In *The Intertwined Worlds of Islam: Essays in Memory of Hava Lazarus-Yafeh*, ed. N. Ilan (Jerusalem: Mosad Bialik, 2002): 334-92.

are signs of other judicial venues that were dominated by neither ecclesiastical nor Muslim officials prior to and after the Arab conquest.⁸

This paper seeks to address the question of Christian judicial authority in the early Islamic period, i.e. the first three centuries after the Arab conquest. It concentrates on the history of the East Syrian (so-called Nestorian) and West Syrian (so-called Syrian-Orthodox or Jacobite) Churches. Yet unlike past studies, my goal is to focus on judicial institutions, *other* than ecclesiastical and Islamic, to which Christians took recourse. This analysis will contribute to our understanding of not only the social features of Eastern Christian communities, but also of contemporary Near Eastern societies in general.⁹

I shall make my point gradually, first drawing attention to questions of chronological, social, religious, and most importantly, institutional contexts. The paper begins with the general background to the institutional consolidation of the East Syrian and West Syrian Churches in general and their judicial apparatus in particular. Then, based on the assumption that judicial power is the product of social power, the paper continues to survey the variety of Christian elites found in the early Islamic period under Islamic control.¹⁰ In referring to particular cases of Christian recourse to

⁸ Throughout this paper the term "Arabs" is used to denote Muslims in the immediate period subsequent to the conquest. Whether Islam had already been fully crystallized as a separate religion in the seventh century is beyond the scope of the present discussion. Yet at least in the eyes of most Christian writers who witnessed the events of this period the new conquerors were almost always depicted according to their ethnic origin. See for example the discussion in Sebastian Brock, "Syriac Views of Emergent Islam." In *Studies on the First Century of Islamic Society*, ed. G. H. A. Juynboll (Carbondale: Southern Illinois University Press, 1982): 9-21.

⁹ The question of extra-ecclesiastical judicial authorities pertains to the broader question of extra-ecclesiastical elites. The present paper is limited, however, to judicial institutions and leaves out the discussion about the ongoing power struggles between the church and lay elites in Late Antiquity and the early Islamic period. For a selection of recent studies on this topic, see especially Arietta Papaconstantinou, "Between *Umma* and *Dhimma*: The Christians of the Middle East under the Umayyads." *Annales Islamologiques* 42 (2008): 127-56; Richard Payne, *Christianity and Iranian Society in Late Antiquity, ca. 500-700 CE* (Princeton: Princeton University, unpublished dissertation, 2010); Richard Payne, "Persecuting Heresy in Early Islamic Iraq: The Catholicos Ishoyahb III and the Elites of Nisibis." In *The Power of Religion in Late Antiquity*, eds N. Lenski and A. Cain (Aldershot: Ashgate, 2010): 397-409.

¹⁰ On the interplay of social and judicial power, 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): 279-302; Sally Engle Merry, "Legal Pluralism." *Law and*

non-ecclesiastical justice, the paper highlights both the motives behind such acts and the ecclesiastical attitudes to them by analyzing cases in which Christians appeared before Muslim judicial authorities. This will be followed by a survey of the informal judicial institutions that flourished in the period immediately prior to the Arab conquest. The final analysis is devoted to pieces of evidence that suggest that members of the Eastern Christian communities had more to choose from than the judicial venues that were patronized by their churches or by the Muslim authorities. Admittedly, the evidence is fragmentary and often ambiguous, yet it is hoped that it may seem less enigmatic once read within a broader context.

General Historical Background

Both the East Syrian and West Syrian Churches trace their origins to the Christological disagreements of the fifth century, i.e. the theological controversies on the subject of the human and divine natures of Christ that dominated the ecumenical councils of Ephesus (431) and Chalcedon (451). It is within this history of doctrinal divisions that we should place the origins of the East Syrian Church of Seleucia-Ctesiphon and the West Syrian Church of Antioch. These churches were organized in regions which did not necessarily coincide with the political and administrative boundaries of the Roman and the Sasanian Empires. Thus the city of Harran in upper Mesopotamia served as a seat for bishops from the East Syrian, West Syrian, and Byzantine Orthodox (Melkite) Churches.¹¹ In general terms, the East Syrian patriarch, the Catholicos, held sway from his seat in Ctesiphon (and later in 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, however, although formally under the authority of the patriarch of Antioch, were scattered over a bipartite territory. The western part of which corresponded to the patriarchate of Antioch under Rome, while the eastern part corresponded to the region that had been held by the church under Sasanian

Society Review 22.5 (1988) 869-96; Jaques Vanderlinden, "Return to Legal Pluralism: Twenty Year Later." *Journal of Legal Pluralism and Unofficial Law* 28 (1989): 149-57; Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global." *Sydney Law Review* 29 (2007): 1-63.

¹¹ Anne-Marie Eddé et al., *Communautés chrétiennes en pays d'Islam: du début du VII^e siècle au milieu du XI^e siècle* (Paris: SEDES, 1997): 18.

rule. This partition persisted under Islamic rule in the form of the separate jurisdictions of a patriarch who resided in the monasteries of upper Mesopotamia and a metropolitan in Takrīt.

By the end of the first half of the seventh century, the subjects of both the Sasanian and Eastern Roman Empires were under Arab rule. Yet despite their unique character and individual development, these churches had certain features in common. In general, there appears to have been continuity from pre-Islamic times, as Christian communities were able to sustain communal organizations and retain cultural affiliations. Left to their own devices (or given the freedom to regain their authority), ecclesiastical leaders under Islamic rule continued to assert their control over their clergy, churches, monasteries, and schools. These institutions appear to have remained for the most part intact and had been left relatively unaffected by the turbulence of warfare in the first centuries of Islamic rule. Thus patriarchs were able to retain their position, but now, instead of paying tribute to either the Roman or Persian governments, they paid it to an Arab caliphate. At the top of the local ecclesiastical organization, the bishop retained his dual role as spiritual guide and administrator.¹²

¹² For a refutation of the “Pirenne Thesis,” which argued for a historical watershed following the Muslim conquest, see Peter Brown, *The Rise of Western Christendom* (Malden, MA: Blackwell Publishers, 2003): 9-12. For studies on questions of continuity from the pre-Islamic to the Islamic period see, Hugh Kennedy, “From Polis to Madina: Urban Change in Late Antique and Early Islamic Syria.” *Past and Present* 106 (1985): 3-27; Pau Figueras, “The Impact of the Islamic Conquest.” *ARAM* 6 (1994): 283-90; Robert Schick, *The Christian Communities of Palestine from Byzantine to Islamic Rule* (Princeton: Darwin Press, 1995): 220-4; Eddé, *Communautés chrétiennes*: 17-8; Clive Foss, “Syria in Transition, AD 550-750.” *Dumbarton Oaks Papers* 51 (1997): 266-7; Lawrence Conrad, “Varietas Syriaca: Secular and Scientific Culture in the Christian Communities of Syria after the Arab Conquest.” In *After Bardaisan: Studies on Continuity and Change in Syriac Christianity in Honour of Professor Han J. W. Drijvers*, eds G. J. Reinink and A. C. Klugkist (Louvain: Peeters, 1999): 103; Chase Robinson, *Empire and Elites after the Muslim Conquest: The Transformation of Northern Mesopotamia* (Cambridge: Cambridge University Press, 2000): ch. 2; Arietta Papaconstantinou, *Le culte des saints en Egypte des Byzantins aux Abbasides* (Paris: CNRS Editions, 2001): 10; Brown, *Western Christendom*: 304-7. See also Jean B. Chabot, ed. and tr., *Chronique de Michel le Syrien: patriarche Jacobite d'Antioche (1166-99)* (Paris: Ernest Leroux, 1899-1910), vol. 2: 474, according to which Christian leaders continued to manage civil affairs in the lands of the Arabs in late seventh-early eighth centuries. On the history of Near Eastern Christianity following the Muslim conquest, see Michael Morony, *Iraq after the Muslim Conquest* (Princeton: Princeton University Press, 1984): ch. 12; Andrew Palmer and Sebastian Brock, eds and trans., *The Seventh Century in the West Syrian Chronicles* (Liverpool: Liverpool University Press, 1993); Alain Ducellier, *Chrétiens*

Sources

The present discussion relies heavily on a corpus of ecclesiastical legal sources belonging to the East Syrian and West Syrian Churches.¹³ While the West Syrian legal materials derive almost exclusively from *synodica*, i.e. the recorded acts of synods, a large portion of East Syrian legislation comes in the form of legal regulations that were codified into canonical works. Both canonical works and *synodica* are the product of an ongoing process of ecclesiastical legislation. As such they constitute an important part of ecclesiastical attempts to regulate Christian personal, religious, and social affairs. These genres of legal literature go back as early as the fourth century, and often include principles that were established as early as the second century. Thus, in order to understand the context in which particular regulations from the early Islamic period appeared, it is essential to trace their origins in early Christian sources.¹⁴ Apart from differences in style, the two genres also attest to diverse means for advancing similar goals. In contrast to the high tone and, at times, harsh language employed in West Syrian texts, East Syrian legislation may at first strike the reader as relatively moderate. A close reading of East Syrian sources, however, reveals a similar motivation to that of West Syrians in matters pertaining to extra confessional judicial institutions. Instead of resorting to rhetorical weaponry, however, East Syrian legislators concentrated their efforts on formulating regulations that were specially designed to disadvantage those who sought external judicial services.

We may wonder to what extent the contents of such legislative collections were known at grassroots level. The lists of high-ranking clergy signatory to synodical acts, as well as the scattered references to lower ranks of clergy, suggest that the contents of these materials were familiar to ecclesiastical officials of various ranks. However, whereas in the case of the Catholic Church in the West there is some indication of the involvement of

d'Orient et Islam au Moyen Âge: VII^e-XV^e siècle (Paris: A. Colin, 1996); Gilbert Dagron *et al.*, eds, *Histoire du Christianisme: des origines à nos jours: Evêques, moines et empereurs (610-1054)* (Cambridge, Mass.: Medieval Academy of America, 1996), vol. 4; Eddé, *Communautés chrétiennes*.

¹³ For a survey of the available East Syrian legal sources from the Islamic period, see Walter Selb, *Orientalisches Kirchenrecht* (Vienna: Verlag der Österreichische Akademie der Wissenschaften, 1981-9), vol. 1: 58-79 and 165-86; for the West Syrian sources, see *Ibid.*, vol. 2: 119-31 and 154-8.

¹⁴ Selb, *Orientalisches Kirchenrecht*, vol. 1: 58-72.

laymen in legislative endeavors and the reception of legislative materials, the situation in the East remains obscure.¹⁵ Already in the first ecumenical councils of the fourth century and onward, there are signs of the participation of laymen in ecclesiastical affairs in general and in legislation in particular.¹⁶ 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.¹⁷ 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, 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 [...].¹⁸

This single testimony suggests that the clergy who were present at 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.

East Syrian legal sources of the early Islamic period can be seen in the works of the East Syrian cleric Ishoʿbokt of Fārs (c. eighth century),¹⁹ the

¹⁵ For the West, see for example Mayke De Jong, “The Limits of Kinship: Anti-Incest Legislation in the Early Medieval West (500-900).” In *From Sappho to De Sade: Moments in the History of Sexuality*, ed. J. Bremmer (London: Routledge, 1989): 48; Y. Hen, “Knowledge of Canon Law among Rural Priests: The Evidence of Two Carolingian Manuscripts from around 800.” *Journal of Theological Studies* 50 (1999): 117-34.

¹⁶ Bartholomaios Archondonis, “The Participation of the Laity in the Synods of the Greek-Byzantine Churches.” *Kanon* 3 (1977): 33-8.

¹⁷ Michael Breydy, “Les laïcs et les Bnay Qyomo dans l’ancienne tradition de l’Église syrienne.” *Kanon* 3 (1977): 51-75. Cf. Joseph Habbi, “La participation des fidèles dans la vie de l’Église d’Orient (Assyro-Chaldéenne).” *Kanon* 3 (1977): 90-5.

¹⁸ Arthur Vööbus, ed. and trans, *The Synodicon in the West Syrian Tradition*: 367-8, 375-6 *Scr. Syri.* 161-4; (Louvain: Secretariat du CSCO, 1975-6): vols. 163/375: 256-7/ 164/376: 269.

¹⁹ Eduard Sachau, ed. and trans, *Syrische Rechtsbücher* (Berlin: Verlag von G. Reimer, 1907-14): vol. 3.

East Syrian patriarchs Timothy I (d. 823)²⁰ and Ishoʿ bar Nun (d. 828),²¹ and the metropolitan Gabriel of Basra (appointed 884).²² In addition to canonical works, some of the individual canon laws issued by East Syrian synods during the seventh and eighth centuries are also available.²³ As for West Syrian legal sources, these derive primarily from the *Synodicon in the West Syrian Tradition* and the thirteenth-century canonical treatise, the *Nomocanon* of Bar Hebraeus (d. 1286).²⁴ The *Synodicon* is Ms. 8/11, discovered in the archive of the patriarchate of the Syrian Orthodox Church in Damascus. The colophon of the copy of the Ms. dates to 1204.²⁵ This West Syrian source is a collection of legislative texts that range chronologically from those “claiming apostolic origin” to the acts of a synod held in 1153.²⁶

The Ecclesiastical Judiciary

Formally speaking, the chief judicial authority within the church was the bishop. The bishop delegated his judicial prerogatives to members of the ecclesiastical hierarchy. Despite their doctrinal independence, different ecclesiastical judicial organizations shared principal features of structure and practice and traced their origins to the late Roman institution of the *episcopalis audientia*, the episcopal courts.²⁷

²⁰ Ibid., vol. 2.

²¹ Ibid.

²² Hubert Kaufhold, *Die Rechtssammlung des Gabriel von Basra und ihr Verhältnis zu den anderen juristischen Sammelwerken der Nestorianer* (Berlin: J. Schweitzer Verlag, 1976).

²³ Jean B. Chabot, *Synodicon Orientale ou recueil de synods nestoriens* (Paris: Imprimerie nationale, 1902).

²⁴ Paul Bedjan, ed., *Nomocanon Gregorii Barhebraei* (Leipzig: O. Harrassowitz, 1898).

²⁵ On Ms 8/11, see Vööbus, *The Synodicon*, vols. 161/367: ix-xix.

²⁶ Cf. Ibid., vols. 162/368: 2.

²⁷ Despite their independent evolution over time, the churches of the East shared a common legislative background, as they all drew heavily on shared canonical works written and codified during the formative centuries of Christianity; cf. Selb, *Orientalisches Kirchenrecht*, vol. 1: 39; vol. 2: 77; Wolfgang Hage, “Die Kirche ‘des Ostens’: Kirchliche Selbständigkeit und Kirchliche Gemeinsamkeit im fünften Jahrhundert.” In *After Bardaisan*: 141-8; Hubert Kaufhold, “La littérature pseudo-canonique syriaque.” In *Les apocryphes syriaques*, eds M. Debié et al. (Paris: Geuthner, 2005): 147-67; Kenneth Penington, “The Growth of Church Law.” In *The Cambridge History of Christianity*, eds A. Casiday and F. W. Norris (Cambridge: Cambridge University Press, 2007): 387-93.

It was in 318 under the rule of the first Christian emperor, Constantine (r. 306-37), that the *episcopalis audientia* received the state's formal recognition as judicial venues.²⁸ Previous scholars have viewed the formal sanction of the *episcopalis audientia* by Constantine as an expression of his wish to comply with the Pauline command exhorting believers to take their lawsuits before judges designated by the church (I Cor. 6: 1-6). Yet it seems that the motivation for this step was of a more mundane nature.²⁹ Although the elevation of the episcopal court served well the purpose of Christianizing the empire, the formal endorsement of the ecclesiastical judiciary was also an administrative adjustment in which local elites acted as agents of the imperial government.³⁰

The *episcopalis audientia* was a judicial institution which had already operated, albeit informally, prior to the reign of Constantine, according to the testimony of the New Testament and the Church Orders.³¹ An

²⁸ Clyde Pharr, trans., *The Theodosian Code* (Princeton: Princeton University Press, 1952): 1.27.1; for a comprehensive discussion on the evolution of the *Episcopalis audientia*, see Gitilio Vismara, *Episcopalis audientia* (Milano: Società editrice "Vita e pensiero," 1937); Walter Selb, "Episcopalis audientia von der Zeit Konstatins bis zur Nov. XXXV Valentini-ans III." *ZSS.RA* 84 (1967): 162-217; Jill Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1999): ch. 10; Claudia Rapp, *Holy Bishops in Late Antiquity: The Nature of Christian Leadership in an Age of Transition* (Berkeley: University of California Press, 2005): 242-52; John C. Lamoreaux, "Episcopal Courts in Late Antiquity." *J ECS* 3.2 (1995): 143-67. It seems that under Roman rule, the Miaphysite (Monophysite) churches had not yet established a separate judiciary. See Selb, *Orientalisches Kirchenrecht*, vol. 2: 80; Lucas Van Rompay, "Society and Community in the Christian East." In *The Cambridge Companion to the Age of Justinian*, ed. M. Maas (Cambridge: Cambridge University Press, 2005): 251. According to Van Rompay, despite their dissatisfaction [with the Christological position endorsed by the Roman Empire], the Monophysites in the mid-sixth century had not yet come up with a "systematic construction of a new hierarchy."

²⁹ Cf. Selb, "Episcopalis audientia": 216.

³⁰ Peter Brown, *Authority and the Sacred: Aspects of the Christianization of the Roman World* (Cambridge: Cambridge University Press, 1995): 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 Raymond Van Dam, "Bishops and Society." In *The Cambridge History of Christianity*, eds A. Casiday and F. W. Norris (Cambridge, Cambridge University Press, 2007): 357-8; see also, Rapp, *Holy Bishops*: 243; Caroline Humfress, *Orthodoxy and the Courts in Late Antiquity* (Oxford: Oxford University Press, 2007): 167-9; Kevin Uhalde, *Expectations of Justice in the Age of Augustine* (Philadelphia: Pennsylvania University Press, 2007): 29-30.

³¹ See Matt. 18.15-7; I Cor. 6.1-8; James Donaldson, ed. and ann., *The Apostolic Constitutions* (Edinburgh: T&T Clark, 1870): Book 2.

example of the operation of this institution in the pre-Constantinian era can be found in the activities of Cyprian (d. 258), bishop of Carthage. His letters attest to the legal procedures of hearing, consulting with, and passing verdicts regarding offending clergy.³² Despite some of the features common to the *episcopalis audientia* and secular imperial institutions, the episcopal judge differed from the civil magistrate in two significant points. First, his jurisdiction was not exclusively religious, while his secular counterpart only dealt with civil matters.³³ Although not at its outset, over the second half of the fourth through the six centuries, 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, despite being rendered in the conventional form of a ruling, was considered a form of arbitration from a Roman legal perspective.³⁴ Thus Peter Brown observes: "The business of the court was conducted according to Roman rules. There can be no doubt about that. Yet the process of arbitration took place in an atmosphere charged with expectations of judgment that did not belong exclusively to the Roman world."³⁵

What began with the initiative of the Roman emperor in the fourth century was to become one of the focal points of ecclesiastical power in subsequent periods. Irrespective of their doctrinal affiliations, the Eastern churches worked hard to sustain their judicial power and to elaborate it to the extent of incorporating within their jurisdiction matters of civil law that hitherto had been solely in the hands of secular rulers. Thus, in the thirteenth century, the East Syrian jurist 'Abdisho' bar Brikha (d. 1318) will defend the need of his ecclesiastical colleagues to delve into secular concerns:

Civil society is necessary for human beings, on account of the shared need to sustain temporal life [...]. Society cannot exist in any way without the action of arbitration and negotiation, nor is it rationally complete without a judge who judges among the

³² George W. Clarke, trans., *The Letters of Cyprian of Carthage* (New York: Newman Press, 1984-9); see especially letter 34.4.

³³ As the head of the *familia Dei*, the family of God, Augustine understood his role as that of an arbiter of disputes within his community, his family. See Peter Brown, *Augustine of Hippo: A Biography* (Berkeley: University of California Press, 1967): 189.

³⁴ Harries, *Law and Empire*: 191.

³⁵ Peter Brown, *Poverty and Leadership in the Later Roman Empire* (Wantage: University Presses Marketing, 2001): 68.

litigants, i.e. the strong and the weak, the wise and ignorant, etc. It is therefore necessary to constitute a judge according to the requirement of nature.³⁶

Ecclesiastical concerns to sustain judicial authority after the Arab conquest not only suggest a degree of legal vitality but also point toward the continuity of ecclesiastical administration into the Islamic period. The Arab conquest may have affected certain aspects of their social structure and organization, but, for the most part, the various Eastern churches managed to retain their position.³⁷ Yet ecclesiastical vitality was not the only sign of continuity from the pre-Islamic period. There were additional possessors of social power who may have shared the same confessional convictions with church leaders but were not part of the ecclesiastical administration and were thus barred from acquiring a formal judicial post.

A Survey of Christian Elites in the Early Islamic Period

Modern studies of the period following the Arab conquest agree that in the first two centuries of Islamic rule the structure and character of local communities were barely affected.³⁸ The phrase “an Indian summer” has been used by Chase Robinson to characterize the manner in which local Edessene elites continued to manage the affairs of their city.³⁹ The region of al-Jazīra, which Robinson has studied, aptly illustrates the subordination of local Christian populations to an elite composed of a mixture of church officials and influential laymen. This observation also seems to be valid with regard to other parts of the Islamic Near East, where the geographic distribution of Christian communities was to a great extent left intact.⁴⁰ Archeological 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

³⁶ Jacques M. Vosté, *Ordo iudiciorum ecclesiasticalorum; collectus, dispositus, ordinatus et compositus a Mar 'Abdišo'* (Rome: Typi Polyglotti Vaticani, 1940): 148.

³⁷ John Haldon, “The Works of Anastasius of Sinai.” In *The Byzantine and Early Islamic Near East*, eds A. Cameron and L. I. Conrad (Princeton: Darwin Press, 1992), vol. 1: 126.

³⁸ Kennedy, “From Polis to Madina”; Figueras, “The Impact of the Islamic Conquest”; Schick, *Christian Communities of Palestine*: 220-4; Eddé, *Communautés chrétiennes*: 17-8; Foss, “Syria in Transition”: 266-7; Conrad, “Varietas Syriaca”: 103; Robinson, *Empire and Elites*: ch. 2; Papaconstantinou, *Le culte des saints*: 10; Brown, *Western Christendom*: 304-7.

³⁹ Robinson, *Empire and Elites*: 57.

⁴⁰ Eddé, *Communautés chrétiennes*: 18.

to Antioch, has argued that “the survival of churches into the Islamic period indicates a certain vitality of the city and its Christian community.”⁴¹ 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.⁴² Though both the size and distribution of local populations seem to have survived the Arab takeover, warfare and natural disasters left their marks on the region. This became apparent through a drastic impoverishment of the local population, the gradual disappearance of public buildings from the pre-Islamic period, and the departure of local aristocracies to Byzantine territory. It is therefore important to note the survival of church administrations despite these transformations. The same is true for that part of Mesopotamia where “the lands east of the Euphrates had no formal administrative status in the Ṣufyānid period (661-84).”⁴³

As we turn to examine the situation in Palestine and Transjordan we find once again that local populations were only moderately affected by the new conquerors’ takeover. The Christian population, along with its churches and monasteries, appears to have survived the transition.⁴⁴ Evidence of this is found in inscriptions and archival documents found in churches in the Negev. These attest to continuity in church activities on a local level, both as an administrative framework and as a focal point of social life.⁴⁵ In Egypt, changes in the capacity and administration of the local Coptic Church did not occur overnight either. Shortly after the Arab conquest, the new rulers reinstalled the Coptic patriarch in Alexandria, while substantial numbers of supporters of the Byzantine Church fled the country. Here too, ecclesiastical institutions, at least at first, appear to have maintained both their landed property and their income.⁴⁶

⁴¹) Foss, “Syria in Transition”: 192.

⁴²) Ibid.: 198.

⁴³) Robinson, *Empire and Elites*: 44.

⁴⁴) Schick, *Christian Communities of Palestine*: 85-9; Alan G. Walmsley, “The Social and Economic Regime at Fihl (Pella) between the 7th and 9th Centuries.” In *La Syrie de Byzance à l’Islam VII^e-VIII^e siècles: Actes du Colloque international, Lyon—Maison de l’Orient Méditerranéen, Paris—Institut du Monde Arabe, 11-15 Septembre 1990*, eds P. Canivet and J.-P. Rey-Coquais (Damas: Institut Français de Damas, 1992): 254. Walmsley further states that “this interpretation has been argued for the other late antique sites of north Jordan.”

⁴⁵) Particularly in the towns of Sabota (Shivta), Elusa (Halutza), and Nessana; cf. Figueras, “The Impact of the Islamic Conquest”: 282.

⁴⁶) Robert H. Charles, ed. and ann., *The Chronicle of John Coptic Bishop of Nikiu* (Amsterdam: Apa-Philos Press, 1982): 200; Alfred J. Butler, *The Arab Conquest of Egypt* (Oxford: Clarendon Press, 1978): ch. 27.

Ecclesiastical authorities were not the sole controllers of local administrations. Both monasteries and lay landowners provided local villagers with an economic foundation and an administrative framework.⁴⁷ Throughout the Near East, towns and villages hosted multiple church buildings and maintained strong contacts with local monasteries. The significance of these ties was touched upon in Brown's vivid description of the lives of villagers in the region of the limestone massif in northern Syria.⁴⁸ Here, Brown argues, "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."⁴⁹ These villages, Brown adds, were in need of a patron. By the late fifth century, both church and monastic figures increasingly assumed this role.

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."⁵⁰ Most of these settlements had churches but lacked virtually 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."⁵¹ Nearby monasteries were situated on the plains between population centers and the wilderness. Their relations with rural communities can be seen in the form of economic exchange, with monks providing spiritual guidance and lay settlements supplying means of livelihood and, at times, new recruits.⁵²

⁴⁷ Ewa Wipszycka, *Les ressources et les activités économiques des églises en Égypte du IV^e au VIII^e siècle* (Brussels, Fondation Égyptologique Reine Élisabeth, 1972): 52-4.

⁴⁸ For a general survey of late antique settlements in the region of the limestone massif and the process in which large estates in this region broke down into smaller units, see Georges Tchalenko, *Villages antiques de la Syrie du Nord: le massif du Bélus à l'époque romaine* (Paris: P. Geuthner, 1953-8); Hugh Kennedy and J. H. W. G. Liebeschuetz, "Antioch and the Villages of Northern Syria in the Fifth and Sixth Centuries." *Nottingham Mediaeval Studies* 32 (1988): 73; Georges Tate, *Les campagnes de la Syrie du Nord du I^{er} au VI^e siècle: un exemple d'expansion démographique et économique à la fin de l'antiquité* (Paris: Libr. orientaliste P. Geuthner, 1992).

⁴⁹ Peter Brown, "The Rise and Function of the Holy Man in Late Antiquity." *Journal of Roman Studies* 61 (1971): 87.

⁵⁰ Foss, "Syria in Transition": 198.

⁵¹ *Ibid.*: 204.

⁵² Brown, *Western Christendom*: 174, 186, 273, 287, 306-7; Andrew Palmer, *Monk and Mason on the Tigris Frontier: The Early History of Ṭur 'Abdin* (Cambridge: Cambridge University Press, 1990): 77, 107.

Another form of social power can be found in the activities of individuals who did not necessarily attain their position on account of their spiritual reputation, but rather on account of their wealth and relations with imperial administrations. In his study on the Muslim and non-Muslim elites in the region of al-Jazīra shortly after the Arab conquest, Robinson has provided us with a detailed survey of local Christian elites.⁵³ When the Arabs took over, local elites submitted to their new rulers just as they had done previously to the Romans and Sasanians. These elites consisted of ecclesiastical officials but also of village headmen, the *dihqāns*, and wealthy landowners, the *shahārija*.⁵⁴

Christians' Appeals to Non-Ecclesiastical Justice: Muslim Authorities

Both legal codes and canon laws issued at individual synods in the early Islamic period reflect an ongoing ecclesiastical preoccupation with the phenomenon of Christians taking recourse to non-ecclesiastical courts. In many, if not in most, cases, the sources evoke a strong ecclesiastical contention with Islamic legal institutions, most notably the *shar'ī* court. Christian appeals to Muslim judicial authorities are not at the center of our present discussion. Yet an analysis of informal Christian judicial institutions and their threat to ecclesiastical agendas should also take into account cases in which Christians chose to refer questions of dispute and transaction to Muslim authorities. After all, it seems that the sources of ecclesiastical anxieties in both cases were the same, as both the Islamic and extra-ecclesiastical Christian institutions were undermining the authority of the church. Furthermore, an analysis of cases in which Christians made use of Islamic institutions may shed further light on the reasoning behind their appeal to informal Christian judicial institutions.

The choice of non-Muslims to appear before Islamic judicial authorities seems quite understandable in light of some of the crucial advantages the Islamic judiciary possessed over *dhimmī* judicial institutions in general and the ecclesiastical judiciary in particular. For the most part, and increasingly into later centuries, the new legal order possessed greater means of

⁵³ Robinson, *Empire and Elites*.

⁵⁴ Ibid.: ch. 4, *passim*; it should be noted, however, that lay elites did not survive the Arab conquest everywhere. In most cases, local aristocrats who strongly identified with Byzantium and were administratively linked with it chose to abandon their positions and emigrate to Byzantine territories; see Foss, "Syria in Transition": 224.

enforcement than the church.⁵⁵ Whereas an ecclesiastical judge had as his only instrument of enforcement punishment through excommunication, the *qāḍī*'s decision could often be enforced by the local police (*shurṭā*).⁵⁶ Furthermore, as the Islamic administration developed its bureaucracy, registered property, and oversaw business transactions in the local market, the need to validate economic ties through an Islamic court grew stronger. For a contract to be enforceable by an Islamic court, it had to be issued by such a court in the first place.⁵⁷

Another advantage to the use of Islamic courts derived from the role played by Christian laymen in the Islamic administration. These officials offered their coreligionists useful means for achieving personal ends. As servants of the court and its administration, Christian officials may have been in a position to intervene before the rulers on behalf of their coreligionists.⁵⁸ Furthermore, Christian officials in the Islamic administration also functioned as secretaries. They were employed, among other places, in bureaus of justice as scribes, archivists, and local court administrators. Because of their office, these secretaries were required to have a good knowledge of juridical proceedings and statutes.⁵⁹ 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.

Other factors of a more practical and individual nature should 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 and perhaps also illustrates

⁵⁵ Selb, *Orientalisches Kirchenrecht*, vol. 1: 214.

⁵⁶ Émile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam* (Paris: Recueil Sirey, 1938), vol. 1: 433-5.

⁵⁷ See, for example Geoffrey Khan, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collections* (Cambridge: Cambridge University Press, 1993).

⁵⁸ Hans Putman, *L'église et l'islam sous Timothée I (780-823)* (Beyrouth: Dar el-Machreq Éditeurs, 1975): 109; here it may be useful to cite cases that illustrate the intervention of Jewish officials who served in the Muslim administration in favor of their coreligionists. See for example a letter written by Se'adyah Gaon (d. 942) from Baghdad to a Jewish congregation in Egypt in S. Havlin and I. Yudlov, eds, *The Teachings of the Geonim* [in Hebrew] (Jerusalem: Vagshal, 1992), vol. 1: 81-7: "[O]f every wish and request you may have from the kingdom, please inform us so that we may order the prominent masters in Baghdad... and they shall answer you on behalf of the king."

⁵⁹ Cécile Cabrol, "Une étude sur les secrétaires nestoriens sous les abbassides (762-1258) à Bagdad." *PdO* 25 (2000): 420-1.

the scope of their authority over them.⁶⁰ Canon Eight issued at a synod held by the West Syrian patriarch Dionysius (d. 909) in 896 states thus:⁶¹

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 this regulation and especially if he takes refuge with the outsiders, is not allowed to enter the church of God until he no longer transgresses the word of God [...].⁶²

Ecclesiastical institutions were not always able to secure the implementation of wills in which pledges of property had been made to them. More specifically, the offense to which the canon refers concerns those who entered monastic life and entrusted their property to their families instead of obeying the stipulation to hand over such property to a monastic steward. The canon also reveals that one way of withholding property from the church was to take “refuge with the outsiders.” Despite its ambiguity, the term “outsiders” appears to denote Muslims in this case, as it does in Christian sources that were written around this period and later.⁶³ It should be noted, however, that the act of taking refuge with the Muslim authorities does not necessarily suggest an appeal to an Islamic court, but rather an attempt to undermine the ecclesiastical legal jurisdiction by escaping the implementation of its judicial decisions.

⁶⁰ See, for example, in East Syrian legal collections: Hnanisho’s judicial decrees in Sachau, *Syrische Rechtsbücher*, vol. 2: 15-51; Timothy’s law book, *Ibid.*: 91-117; Isho’ bar Nun’s law book, *Ibid.*: 133-47; the legal collection of Isho’bukt, *Ibid.*, vol. 3: 91-127; Simeon’s canons, *Ibid.*, 203-53; John bar Abgar’s law book, in Hubert Kaufhold, *Syrische Texte zum islamischen Recht: das dem nestorianischen Katholikos Johannes V. bar Abgār zugeschriebene Rechtsbuch* (München: Verlag der Bayerischen Akademie der Wissenschaften, 1971): 47-92. In West Syrian legal collections, see Vööbus, *The Synodicon*, vols. 164/376: 68 ff; Bedjan, *Nomocanon*: 172-86.

⁶¹ On Dionysius and this synod, see Vööbus, *The Synodicon*, vols. 164/376: 61; Selb, *Orientalisches Kirchenrecht*, vol. 2: 129; Ignatius Aphram Barsoum, *The Scattered Pearls* (Piscataway, NJ: Gorgias Press, 2003): 404-5.

⁶² Vööbus, *The Synodicon*, vols. 163/375: 60 and vols. 164/376: 64-5.

⁶³ On the context for the use of this term in West Syrian legal literature from the early Muslim period see Uriel Simonsohn, “Seeking Justice among the ‘Outsiders’: Christian Recourse to Non-Ecclesiastical Judicial Systems under Early Islam.” In *The Religious Origins of Nations: The Christian Communities of the Middle East*, ed. B. ter Haar Romeny (Leiden: Brill, 2009): 191-216.

Another example of a dispute over the property of a monk is provided by a legal discussion in a collection of judicial decrees issued by the East Syrian Catholicos Ḥnanishoʿ II (d. 780):

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 Qarduna, once abbot of the same monastery. A property was given to Qarduna at the time of his departure from the monastery by the Catholicos, George (d. 680/1). [It has been given to him] so he may provide for himself during his lifetime only, [yet] they [i.e. Qarduna'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 abbot Qardag has asked us. We have learned from you about the matter through Ormizd, what you know, that "the property was given to Qarduna 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 [...]. We have issued this decree not just with regard to your testimony, but also lest Qarduna and his kinsmen further degrade the divine law [...].⁶⁴

Ḥnanishoʿs verdict presents a case in which the 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 in fact allude to an instance in which Christians took recourse to an Islamic court. This is because Muslim law "recognizes succession *ab intestate* as the only form of succession."⁶⁵

Marriage and the process leading to it are questions that drew much attention from Christian legislators.⁶⁶ According to Walter Selb, regulations dealing with matrimony are exceptional because legislators continually attempted to formalize them.⁶⁷ The formal fixing of the wedding

⁶⁴ Sachau, *Syrische Rechtsbücher*, vol. 2: 6-9 ; cf. Robinson, *Empire and Elites*: 102.

⁶⁵ Edelby, "L'autonomie législative": 340.

⁶⁶ See, for example, in East Syrian legal collections: Timothy's law book in Sachau, *Syrische Rechtsbücher*, vol. 2: 73-91, 105-7; Ishoʿ bar Nun's law book, *Ibid.*: 121-31, 135, 153, 161-9, 171, 175; the legal collection of Ishoʿbokt, *Ibid.*, vol. 3, 25-69, 71-89; Mar Aba's matrimonial law, *Ibid.*: 258-85. For the West Syrian Church, see Vööbus, *The Synodicon*, vols. 161/367, 164/376: *passim*; Bedjan, *Nomocanon*: 117-61.

⁶⁷ Selb, *Orientalisches Kirchenrecht*, vol. 1 : 206.

ceremony and its Christianization were only achieved at a relatively late date.⁶⁸ 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 by Ishoʿbokt:⁶⁹

If a Christian man makes an engagement contract in the absence of priests and believers, in writing or through the intermediation of pagans (*hanpe*), and takes a Christian woman as [his] wife, yet afterwards, he does not wish to take her as [his] wife, we do not compel such a man to take that woman according to Christian law, for he did not take that woman according to Christian law. [Moreover], for the pagans also do not stipulate that a man can leave his wife whenever he pleases. Therefore, since they have not made their contract before us we do not compel them.⁷⁰

Ishoʿbokt's definition of a properly conducted matrimonial agreement is provided through a description of a legally invalid procedure. 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. Ishoʿbokt's decree suggests that non-Christian figures were overseeing the matrimonial procedure. The couple that chose to unite "through the intermediation," i.e. under the authority of non-Christians, was to abide by the legal institution meant to enforce this marriage; ecclesiastical jurisdiction had no application in such a case. As for the identity of those who supervised these matrimonial arrangements, modern scholars tend to interpret the term *hanpe*, "pagans," in Syriac sources of the late eighth century as Muslims.⁷¹

A survey of Islamic legal approaches regarding the validity of non-Islamic marriage agreements shows that there were some Muslim jurists who did not regard any marriage as valid unless it had been contracted according to Islamic law.⁷² It stands to reason that non-Muslims who

⁶⁸ Cf. Korbinian Ritzer, *Le mariage dans les Églises chrétiennes du Ier au XI^e siècle* (Paris: Cerf, 1970): 149-58; Louis Edakalathur, *The Theology of Marriage in the East Syrian Tradition* (Rome: Mar Thoma Yogam, 1994): 15, 77; Philip Lyndon Reynolds, *Marriage in the Western Church: The Christianization of Marriage during the Patristic Medieval Periods* (Leiden: Brill, 1994): xiii-xix.

⁶⁹ *Ibid.*: 208.

⁷⁰ Sachau, *Syrische Rechtsbücher*, vol. 3: 78-9.

⁷¹ See Hoyland, *Seeing Islam*: 148; Sidney Griffith, *Syriac Writers on Muslims and the Religious Challenge of Islam* (Kottayam: St. Ephrem Ecumenical Research Institute, 1995): 8.

⁷² See, for example, Libson, "Legal Autonomy": 335.

sought to legalize their matrimony according to Islamic principles would have drawn up their marriage contracts in Islamic courts. There are some indications that by the ninth century certain Christians were choosing 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 Shanūdah from the Egyptian town of Ashmūn and Darwā, the daughter of Shanūdah.⁷³ While the parties' names indicate their Christian background, the formula of the record attests to the fact that the court was Islamic.⁷⁴

Another motive for turning to non-ecclesiastical courts was to avoid or reverse the decisions of ecclesiastical judges. Isho'bokt's legal collection refers to a case in which a defendant in a trial originally held before an ecclesiastical judge went to a "pagan" judge and sued the claimant:

[W]hen one [the defendant] goes to a pagan judge (*dayyana hanpa*) and litigates against his opponent [i.e. the claimant] and complains against him and draws him there [i.e. to a pagan court], this causes harm and damage to the claimant. The harm, damage and toil shall be claimed from the one who litigated before pagans (*hanpe*) and will be used against him even through hindrance (*esara*), that is, through excommunication.⁷⁵

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 exploit what could have been an advantageous regulation. We may again assume by the use of the epithet "pagan" that the canon in this case refers to an Islamic court.

The appeal to an alternative court in order to reverse an ecclesiastical verdict posed a major concern for the church, as it undermined its authority, and particularly that of its leaders. A recurring theme in canons issued at West Syrian synods concerns individuals who had either been excommunicated or had received an unfavorable sentence. Some of these individuals chose to turn to non-ecclesiastical bodies in order to escape or revoke the ecclesiastical sentence. According to Canon Eleven, issued at a

⁷³ Adolf Grohmann, *Arabic Papyri in the Egyptian Library* (Cairo: Egyptian Library Press, 1934), vol. 1: document 40.

⁷⁴ Cf. a marriage contract between Muslims from 878, *Ibid.*: document 39.

⁷⁵ Sachau, *Syrische Rechtsbücher*, vol. 3: 184-5; see also Istvään Perczel, ed., *The Nomocanon of Metropolitan Abdisho of Nisibis* (Piscataway, NJ: Gorgias Press, 2005): 136.

synod of 758 under the leadership of the West Syrian patriarch Giwargi I (d. 790):

One who has lawfully been excommunicated by his bishop and who then goes to take refuge (*gawsa*) among pagans (*hanpe*) as someone who absolves the canon and annoys his bishop—the curse of God from the entire synod shall be upon him so that Christians shall not know him at all.⁷⁶

The offense of “seeking refuge among pagans” to which the canon refers is ambiguous. The Syriac verb *g.w.s*, translated by Arthur Vööbus in this case as “seeking refuge,” can also be taken to simply mean “to take recourse.” The ambiguity in this case may not have been accidental and as such is an indication as to how the act of appealing to external authorities was perceived by the legislator. In other words, turning to an external authority in a way that undermined the authority of the church was more than a mere evasion of ecclesiastical jurisdiction. It was an act of flight from the implementation of justice by taking refuge with an illegitimate authority. It is hard to say in this case whether the canon is referring to people who turned to an Islamic court or merely to a Muslim patron of some capacity in a way that undermined the decision of the ecclesiastical judge. The patriarch and church historian Michael the Syrian (d. 1199) refers to a number of instances in which parties who challenged a bishop’s authority would turn to Muslim authorities for support.⁷⁷ Yet the mere act of taking refuge with a Muslim authority in a way which undermined an ecclesiastical legal decision attests once more to the vulnerable position of the ecclesiastical jurisdiction, at least in its own eyes.

The examples cited above confirm the assertions of modern scholars that much of the ecclesiastical preoccupation with Christian appeals to non-ecclesiastical courts emerged in the context of the availability and advantages of Islamic judicial venues. Yet these assertions do not provide a full answer to the question of ecclesiastical anxieties. After all, right after their dramatic takeover the Muslims appear to have kept to themselves and only gradually developed a jurisprudence and a legal apparatus that could constitute a real alternative.⁷⁸

⁷⁶ Vööbus, *The Synodicon*, vols. 163/375: 4 and vols. 164/376: 5.

⁷⁷ See, for example, in Chabot, *Michel le Syrien*, vol. 2: 525: a report by Michael the Syrian of a dispute that broke out during the time of Giwargi I in 758.

⁷⁸ See especially Richard Gottheil, “The Cadi: The History of This Institution.” *Revue des études ethnographiques et sociologiques* 1 (1908): 385-93; Muhammad Hamidullah,

Christians' Appeals to Non-Ecclesiastical Justice: A Late Antiquity Precedent

Keeping in mind the diversity of the Christian elites, the gradual evolution of Islamic judiciary, and the reasoning behind the choice of Christians to handle their legal affairs outside the church, we now turn to consider the existence of alternative judicial venues to those of the church or Islamic institutions.⁷⁹ Ecclesiastical concerns for judicial exclusivity were not restricted to Islamic competition, but also to other "Christian" judicial institutions, i.e. extra-ecclesiastical institutions patronized by non-ecclesiastics. These institutions posed a threat to ecclesiastical authority not on account of their confessional otherness, but rather on account of their social, and consequently institutional, separateness. Most importantly, the Christians who rendered judgments outside the authority of the bishop provided an institutional alternative to the ecclesiastical judiciary.

Yet extra-ecclesiastical judicial venues were not an invention of the early Islamic period, but rather a feature of Late Antiquity that had existed ever since the first episcopal courts.⁸⁰ Members of Near Eastern communities in general and Christians in particular had been accustomed to refer their legal concerns to a variety of formal and informal figures long before the period under discussion. Our evidence suggests that under both Roman and Sasanian rule, in addition to the formal services rendered by imperial and ecclesiastical magistrates, people sought out the judicial services of other figures as well.

One such figure, who was able to sustain his authority under Islamic rule, was the Egyptian *pagarch*. A study of the Apion estates in the region of Oxyrhynchus (in Upper Egypt) in the sixth century highlights the judicial role of the *pagarch* within the general setting of Apion estate

"Administration of Justice in Early Islam." *Islamic Culture* 9 (1937): 163-71; Tyan, *Histoire de l'organisation judiciaire*; Louis Massignon, "Cadis et naqïbs baghdadiens." *WZKM* 51 (1948): 106-15; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1966): *passim*; and more recently, Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005): ch. 3.

⁷⁹ Here it should be stressed for those who are not familiar with this history of Christianity that unless assuming both clerical and monastic responsibilities, monks were not considered part of the ecclesiastical hierarchy, i.e. part of the formal ecclesiastical apparatus.

⁸⁰ On the multiple judicial systems under the Eastern Roman Empire, see Harries, *Law and Empire*: ch. 1; Humfress, *Orthodoxy and the Courts*: ch. 1; Kaius Tuori, "Legal Pluralism and the Roman Empire." In *Beyond Dogmatics: Law and Society in the Roman World*, eds J. W. Cairns and P. Du Plessis (Edinburgh: Edinburgh University Press, 2007): 39-52.

management.⁸¹ The office of the *pagarch* operated in the context of patronage-based relationships. A patron may have been an aristocrat, a government official, a landowner, or a man of great wealth, whose obligations toward his clients, namely his vassals, included dispensing justice. In exchange, his vassals would repay with labor, produce, and, most importantly, loyalty.⁸² The career of Synesius of Cyrene (modern-day Libya) provides a useful illustration of the authority obtained by aristocratic figures. As a member of one of the leading local families in the late fourth to early fifth centuries, Synesius took charge of military operations and administrative offices.⁸³ He was able to do so by virtue of his high social rank 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 time when the empire's administration was weakening. These responsibilities, John Liebeschuetz tells us, entailed "occupying a position which had once been occupied by civic magistrates."⁸⁴

Secular judicial authority was not exclusively in the hands of aristocrats or landowners. Papyri dating from the fourth to the eighth centuries attest to the informal role of a village headman, the *lashane*, or *ape*.⁸⁵ The headman heard legal disputes and presided over informal arbitration procedures.⁸⁶ He would witness the signing of contracts and the drawing up and execution of wills. He was also responsible for the confinement of

⁸¹ Peter Sarris, *Economy and Society in the Age of Justinian* (Cambridge: Cambridge University Press, 2006): 70, 78; for more on the office of the *pagarch*, see Abraham Schiller, "The Courts are no More." In *Studi in onore di Edoardo Volterra*, ed. Luigi Aru (Milano: A. Giuffrè, 1971), vol. 1: 469; Artur Steinwenter, *Das Recht der koptischen Urkunden* (München: Beck, 1955): 55; J. H. W. G. Liebeschuetz, "The Pagarch: City and Imperial Administration in Byzantine Egypt." In *From Diocletian to the Arab Conquest: Change in the Late Roman Empire* (Aldershot: Variorum, 1990): 163-8.

⁸² Brown, "Holy Man" (1971): 85.

⁸³ J. H. W. G. Liebeschuetz, *Barbarians and Bishops: Army, Church, and State in the Age of Arcadius and Chrysostom* (Oxford: Clarendon Press, 1990): 231.

⁸⁴ *Ibid.*: 232.

⁸⁵ Georg Schmelz, *Kirchliche Amtsträger im spätantiken Ägypten: Nach den Aussagen der griechischen und koptischen Papyri und Ostraka* (München: K. G. Saur, 2002): 302; on the role of the village headman and the evidence relating to this office, see Steinwenter, *Das Recht der koptischen Urkunden*: 54-5; Schmelz, *Kirchliche Amtsträger*: 302-18.

⁸⁶ Schiller, "The Courts": 470; Chris Wickham, *Framing the Early Middle Ages: Europe and the Mediterranean 400-800* (Oxford: Oxford University Press, 2005): 423.

delinquents, the collection of fines, and for addressing complaints.⁸⁷ Though most of our knowledge about the 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.⁸⁸ Alongside the headmen we often find a group of local town notables, better known as the “elders.” These men customarily filled an informal administrative function by assisting the headmen in his various tasks. As such the group of elders would often include both clergy and laymen.⁸⁹

The consolidation of episcopal courts as venues of judicial authority was merely the formal recognition of an existing trend. While bishops and their delegates were first endorsed by Roman emperors and later by Sasanian and Islamic governments, other Christian religious leaders continued to operate informally, outside episcopal supervision. The well-recognized role of the holy man as patron of local villages is an example of one alternative to the bishop’s court. Being small-scale egalitarian communities which often lacked autonomous institutions, small villages had a constant need for the intervention of external figures to provide direction, protection, and mediation.⁹⁰ Thus one version of the *Life* of the Syrian holy man Simeon Stylite (d. 459), written by the bishop and writer Theodoret of Cyrillus (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 teaching to those present and then, after receiving the request of each and affecting some healings, he resolves the quarrels of the disputants.⁹¹

While the passage depicts in a rather generic fashion Simeon’s role as an arbiter who resolved disputes and handed down sentences, a letter from

⁸⁷ H. E. Winlock and W. E. Crum, *The Monastery of Epiphanius at Thebes* (New York, 1926), pt. 1: 176-7; Schmelz, *Kirchliche Amtsträger*: 303.

⁸⁸ 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.

⁸⁹ Gagos Traianos and Peter Van Minnen, *Settling a Dispute: Toward a Legal Anthropology of Late Antiquity Egypt* (Ann Arbor: University of Michigan Press, 1994): 14; Winlock and Crum, *The Monastery of Epiphanius*, pt. 2: documents 163, 95.

⁹⁰ Cf. Ernest Gellner, *Saints of the Atlas* (Chicago: University of Chicago Press, 1969): 129; Brown, “Holy Man” (1971): 87.

⁹¹ Robert Doran, trans, *The Lives of Simeon Stylites* (Kalamazoo, Mich.: Cistercian Pub., 1992): 82-3.

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."⁹² The letter is, in fact, the only non-hagiographic source that attests to the stylite's authority.⁹³

[T]o Mar Simeon [...] from Cosmas of the village of Panir together with the deacons and the readers and 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 they 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 [...] whoever 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 [...].⁹⁴

In the case of Panir, the role Simeon was expected to fulfill was not that of an arbiter so much as a leader who sat down and enforced 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

⁹² Ibid.: 23.

⁹³ Robin Lane Fox, "The *Life of Daniel*." In *Portraits: Biographical Representation in the Greek and Latin Literature of the Roman Empire*, eds M. J. Edwards and S. Swain (Oxford: Clarendon Press, 1997): 212.

⁹⁴ Doran, *Lives of Simeon Stylites*: 195-6.

in a wider history of Christian arbitration and intervention, which was active from Egypt to Constantinople.⁹⁵

As Brown himself confesses 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.⁹⁶ The precursor to the holy man should not only be sought in the figure of the ascetic recluse. 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.⁹⁷ Some of the cases mentioned in the Tawatha collection address the various social obligations of Christian laymen. Thus, for example, a case is discussed in which thieves 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 [...] lest we want to fall into vainglory, let us do nothing [...] to the thieves." Further persistence on the part of the alleged petitioners received the following answer: "Those who are on the lower level [...] seek to recuperate what they have lost [...]. This brings some people to turn to the courts [...]."⁹⁸ Admittedly, the monks do not appear to be exercising judicial authority in its conventional form, i.e. judicial proceedings that consist of litigation and rendering judgment. Yet it is through their letters that the monks of Tawatha can be seen assuming a certain judicial capacity by addressing concerns of a judicial nature.

While the exact nature of the judicial role played by the sixth-century monks of Tawatha is debatable, the evidence regarding the Egyptian village of Karanis presents the legal authority of local clergy. 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 [...]."⁹⁹ Further indications of judicial services rendered by monks

⁹⁵ Lane Fox, "The *Life of Daniel*": 213.

⁹⁶ Peter Brown, "The Rise and Function of the Holy Man in Late Antiquity." *Journal of Early Christian Studies* 6.3 (1998): 353-76.

⁹⁷ John Chryssavgis, trans., *Barsanuphius and John: Letters* (Washington: Catholic University of America Press, 2006); for a study of the social role of the monastic community of Tawatha, see Jennifer Hevelone-Harper, *Disciples of the Desert: Monks, Laity, and Spiritual Authority in Sixth-Century Gaza* (Baltimore: Johns Hopkins University Press, 2005).

⁹⁸ Chryssavgis, *Barsanuphius and John*, vol. 2: letters 666-7, 233-4.

⁹⁹ Roger S. Bagnall, *Egypt in Late Antiquity* (Princeton: Princeton University Press, 1993): 138.

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.¹⁰⁰

Following Brown's revision of his initial ideas, it has now been acknowledged that the category of holy men consisted of a diverse group of individuals including bishops, clergy, monks, and solitary stylites.¹⁰¹ The example of men such as Synesius of Cyrene, a local notable who had been appointed bishop by 411, suggests that the holy man and the local landowner could often have been two sides of the same authority. At times this authority drew its legitimacy from material and at others from spiritual capital.¹⁰² The rise of the holy man should be placed within the general context of Christianization. While the appointment of episcopal courts was a formal expression of that trend and its imperial embrace, the judicial functions fulfilled by rural priests, abbots, monks, and stylites served as an informal expression of the same phenomenon.¹⁰³

The judicial services performed by holy figures were of particular significance in places without ecclesiastical institutions.¹⁰⁴ Although holy men lacked an official appointment, this very feature of their position may have given them even greater power. The popularity of holy men as arbiters partially stemmed from their reputation of being pious and "close to God." Such a perception of the holy man not only gave special significance to his judgment but also gave people a sense of security in his presence.¹⁰⁵ This

¹⁰⁰ Casper J. Kraemer, *Excavations at Nessana* (Princeton: Princeton University Press, 1958), vol. 3: documents 57, 163; though the documents are dated to the second half of the seventh century, i.e. after the Arab takeover of Palestine, it seems likely that these practices did not make their first appearance at that specific time, but trace their origins back to an earlier historical period. One such document is a divorce agreement drawn up by a priest in 689. On the judicial practices in late antique Nessana and their social context, see also Rachel Stroumsa, *People and Identities in Nessana* (Durham, NC: Duke University, unpublished dissertation, 2008): ch. 1.

¹⁰¹ Claudia Rapp, "The Elite Status of Bishops in Late Antiquity in Ecclesiastical, Spiritual, and Social Contexts." *Arethusa* 33.3 (2000): 380.

¹⁰² Brown, *Authority and the Sacred*: 18.

¹⁰³ Hevelone-Harper, *Disciples of the Desert*: 79; Kennedy and Liebeschuetz, "Antioch and the Villages of Northern Syria": 74; Wickham, *Framing the Middle Ages*: 423.

¹⁰⁴ 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*: 255-88.

¹⁰⁵ *Ibid.*: 255.

may have been the case with the members of a community described in the Syriac treatise known as the *Liber Graduum*, or the *Book of Steps*. In this Syriac fourth-century work, written by a Christian subject of the Sasanian Empire, we find an outline of the structure and principles of an ideal Christian society.¹⁰⁶ Modern scholars think that the work was composed over a stretch of time in the context of a monastic community. It addresses two principal groups of Christians: the Upright, *kene*, and the Perfect, *gmire*. The members of both groups are considered to have reached a high level of spirituality on “a road to salvation,” but the different designations denote a hierarchy in which the Perfect are superior to the Upright in their spiritual achievements. Whereas the Upright assume leadership roles within Christian communities, the Perfect are depicted as homeless individuals who wander about, begging and mediating disputes among the believers. Thus chapter four of the *Liber Graduum* instructs the Perfect:

When you meet people who are at enmity with each other, say, *Brothers, blessed are the peacemakers, for they shall be called sons of God.* (Mt. 5: 9) Now peacemakers are those who reconcile enemies who belong to other churches, away from their own. They make peace in the land of their Father, and are mediators who reconcile people by imploring them, demonstrating lowliness to them, and admonishing them.¹⁰⁷

Christians' Appeals to Non-Ecclesiastical Justice in the Early Islamic Period

The image of judicial activities in Late Antiquity is diverse. It introduces an intriguing amalgamation of authoritative figures who assumed the role of judges, arbiters, and mediators. Irrespective of their varied social resources, recluses, monks, wealthy landowners, and village headmen all performed tasks of a judicial nature. Our evidence suggests that individuals of both spiritual reputation and social eminence continued to operate in a judicial capacity in the period after the conquest. This evidence is found in ecclesiastical legal formulations that were meant to discourage both judicial patrons and clients from taking lawsuits outside the church. Canon Six issued at the synod of the East Syrian Church in 676, for example, states:

¹⁰⁶ Robert Kitchen and Martien F. G. Parmentier, trans. and anns., *The Book of Steps: The Syriac Liber Graduum* (Kalamazoo, Mich.: Cistercian Publications, 2004).

¹⁰⁷ Ibid.: 43; for the Syriac, see: Michael Kmosko, ed., *Liber Graduum* [Patrologia Syriaca, 3], (Paris: Firmin-Didot et socii, 1926): 94 (Syriac).

Concerning the lawsuits of the Christians; that they should be [handled] in the church, before figures who were designated by the bishop (*prishay men apisqupa*), with the consent of the community (*gawa*), [whether] priests or believers; and that those who are to be judged (*netdinun*) should not go out of the church to be judged before pagans (*hanpe*) or non-believers, whoever they may be:

The lawsuits (*dine*) and quarrels (*heryane*) between Christians should be judged in the church; and should not be taken outside [the church], 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 they [i.e. the litigators] should not otherwise, due to the impetuosity of their thoughts, take their affairs outside the church. However, if there is something which is concealed from those who are appointed as judges (*l-pusqana d-dina*), they [i.e. 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 (*psaqa d-dine*) 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 [based on] the command of secular rulers (*shallitay 'alma*).¹⁰⁸

The canon suggests circumstances in which members of the Christian community ignored the ecclesiastical jurisdiction and presented their legal concerns to an external judicial authority. The canon was issued at Diren in the vicinity of the Persian Gulf and modern-day Bahrain in the second half of the seventh century.¹⁰⁹ By then the Sasanian regime, along with its judicial apparatus, had given way to Islamic sovereignty. As already noted, however, it is unlikely that at this early stage the Muslims were in a position to introduce their own judicial alternatives. Despite its ambiguous tone, the canon seems to be referring to the judicial powers of some form of lay authority.¹¹⁰ Moreover, the last part of the canon suggests occasions in which “believers may usurp [...] authority to pass judicial decisions (*psaqa d-dine*) over the believers, without the permission of the bishop.”

The possession of some judicial authority by laymen may further be attested in a ruling given by the Catholicos H̄nanišoʿ II. The Catholicos wrote to two officials, Saʿura and Dada, regarding the inheritance rights of a certain widow. The woman complained that her stepson had deprived

¹⁰⁸) Chabot, *Synodicon*: 219/484-5.

¹⁰⁹) John F. Healey, “The Christians of Qatar in the 7th Century A.D.” In *Studies in Honour of Clifford Edmund Bosworth v. I*, ed. I. R. Netton (Leiden: Brill, 2000): 222-37.

¹¹⁰) This interpretation has also been suggested by Edelby, “L'autonomie législative”: 320.

her of a share in her late husband's estate. Thus Ḥnanisho' instructed the officials to look into the matter and to order the stepson to pay the woman her share if her claims proved to be valid. But "if he rebels against this judgment, it is to be enforced by Sa'ura through the instruction of the church and by secular authority, through Dada."¹¹¹ Though it is difficult to determine with certainty whether Dada was part of the ecclesiastical hierarchy or a layman, it seems that he had some influence on an executive authority outside the church. There is little reason to identify this element as the Islamic state authorities, since there is no evidence for cases in which Muslims enforced the judicial decisions of *dhimmīs*.¹¹² One possible answer to the question of Dada's authority would be to interpret the phrase "secular authority" as a reference to members of the non-ecclesiastical Christian elite.¹¹³

Part of the answer may also be found in Islamic-ruled Egypt. According to Wilhelm Riedel, the collection of Egyptian canons of St. Basil is a product of a long period of redaction, much of which took place after the Arab conquest.¹¹⁴ It is not certain whether Canon Ninety-Two of this collection derives from the Islamic period or predates it. However, it does attest to the tension between the ecclesiastical and lay judicial authorities: "A lawsuit against a clerk should not be brought before the *archontes* ("chiefs" in Greek), but before the bishop and the first presbyter, so that they can act according to the canon."¹¹⁵ The *archon* "was a lay member of the Coptic Church who through long years of experience and dedication to the church has earned an honored status as a leading member of the Coptic community."¹¹⁶ Among the *archons* there were some who fulfilled a judicial office and, as such, also collaborated with the church. This is gathered from

¹¹¹ Sachau, *Syrische Rechtsbücher*, vol. 2: 26-7.

¹¹² Cf. Cynthia Villagomez and Michael Morony, "Ecclesiastical Wealth in the East Syrian Church from Late Antiquity to Early Islam." In *After Bardaisan: Studies on Continuity and Change in Syriac Christianity in Honour of Professor Han J. W. Drijvers*, eds G. J. Reinink and A. C. Klugkist (Louvain: Peeters, 1999): 314-5, where the authors 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."

¹¹³ Morony, *Iraq*: 367.

¹¹⁴ Wilhelm Riedel, ed. and trans, *Die Kirchenrechtsquellen des Patriarchats Alexandrien* (Leipzig: Deichert, 1900): 232.

¹¹⁵ *Ibid.*: 271.

¹¹⁶ R. Stewart, "Archon." In *The Coptic Encyclopedia*, ed. Aziz S. Atiya (New York: Macmillan, 1991), vol. 1: 229.

the biography of Agathon, the 39th patriarch of the Coptic Church who held office from 665 to 681. The biography relates a case in which some people of Sakhā¹¹⁷ were accused of having assaulted a group of local clerks with fire. The Muslim commander, Maslama,¹¹⁸ 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.”¹¹⁹ Although it is unclear whether holding a similar judicial prerogative, it may be that a parallel authority to the Egyptian *archon* in the region of al-Jazīra is attested in the *Life of Theodotus*. The *Life* makes mention of *arkhāns*, who appear to have been lay Christian leaders holding authority.¹²⁰

In his study of Coptic papyri from the period around the Arab conquest, Artur Steinwenter argues that, in addition to the *archon*, Christians referred their legal concerns to judicial institutions that had survived from the pre-Islamic period.¹²¹ It is in this context that we, once again, come across the *pagarch* and the village headman, the *leshane*. Thus, for example, it was a *pagarch* who granted a release from the implementation of a will, around 697-9, attested in a document issued by the administrative court of the Muslim governor of Egypt. The document records a monk’s pledge to leave a sum of thirteen *holokottinos* (Roman *solidus*) for charitable purposes.¹²² A document of this sort was usually issued as part of a settlement of an inheritance, in which the addressee was released from any potential 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.¹²³ Subject to the authority of the Muslim governor, by the second half of the seventh century the *pagarch*’s court was a secular judicial institution that was administered by a Christian official. It seems highly unlikely

¹¹⁷ Sakhā, also known by its Greek name Sais, was an episcopal city in the center of the Delta. See under “Sais” in William Smith, *Dictionary of Greek and Roman Geography* (Boston: Little Brown and Co., 1854), vol. 2: 874.

¹¹⁸ Maslama ibn Mukhallad (d. 682), governor of Egypt; see: “Masalma b. Mukhallad,” EI2.

¹¹⁹ B. Evetts, ed., trans., and ann., *History of the Patriarchs of the Coptic Church of Alexandria* (PO 2-4; Paris: Firmin-Didot, 1904-14), vol. 3: 9.

¹²⁰ Palmer, “Saints’ Lives with a Difference”: 206; Hoyland, *Seeing Islam*: 158; Robinson, *Empire and Elites*: 57.

¹²¹ Steinwenter, *Das Recht der koptischen Urkunden*: 53.

¹²² On the document, see Abraham A. Schiller, *Ten Coptic Legal Texts* (New York: The Metropolitan Museum of Art, 1932): 9, 16-7.

¹²³ *Ibid.*: 23.

that only two decades after the conquest, the traditional holders of this office, such as those of the Apion estates, had been replaced by Muslim officials.

Canon Twenty-Seven of a West Syrian synod of 794 contains a reference to such Christian laymen: “No one of the worldly (i.e. secular) 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.”¹²⁴ Canon Four 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:

If 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 (*shuṭṭane ʿalmanaye*) or to some other [person] from another¹²⁵ tribe (*ḥranyay sharbita*), those who are outside the fold of the church, or to a man of the dignitaries (*rishane*) 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 [...] he who dares anything like this so that he transgresses, this holy synod has determined that he shall be excluded totally from mingling with Christians and from participation in the holy mysteries and from the exchange of greeting and receiving with the believers [...] the Son of God will not pardon him neither in this world nor in the future one, [for he is] as one who has become a traitor to the piety and the law of the Christians.¹²⁶

The canon lists more explicitly than any of the preceding canons the various authorities to which members of the Christian community had recourse. Those “who are outside” are classified as “secular rulers,” as ones from “another tribe,” or as “a man of the dignitaries of the Christians,” most likely a Christian lay leader or courtier. It should be noted that another possible interpretation of *rishane*, which Vööbus translates as “dignitaries,” is “magistrates,” and thus supports the possibility of non-ecclesiastical Christian judges. While these phrases remain unclear about the ecclesiastical legislator’s meaning, Canon Four of a West Syrian synod of 878 leaves little room for doubt:

¹²⁴ Vööbus, *The Synodicon*, vols. 163/375: 24 and vols. 164/376: 14.

¹²⁵ Cf. *Ibid.*: “foreign.”

¹²⁶ *Ibid.*, vols. 163/375: 29-30 and vols. 164/376: 32-3.

Regarding the persons who shamelessly and ignorantly transgress the law in something which has been determined, be it because of mortal sins or canonical censure 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 of the legislator and devise a manner of perdition against him and who seek to have their anathema abolished by means of worldly rulers (*shulṭāne almanaye*) or the chiefs (*rishane*) of the Arabs (*tayyaye*) or the Christians whose force is hard.¹²⁷

Assuming that the two canons address similar concerns, it seems plausible that the phrase “another tribe” refers to “Arabs” while “dignitaries of the Christians” denotes powerful Christian laymen.

Our sources also suggest that the phenomenon of holy men, serving as arbiters or fulfilling a certain judicial role, did not vanish in the early Islamic period. These men apparently constituted a source of judicial competition for the ecclesiastical administration. Although not technically laymen, stylites and monks were not considered part of the ecclesiastical hierarchy either and hence were not authorized to have judicial responsibilities. In a question posed by John of Litarb (d. 737/8) to Jacob of Edessa (d. 708), the stylite asked the renowned bishop 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?”¹²⁸ 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.¹²⁹

It is plausible that John’s question reflects a prevalent practice of holy men assuming a judicial role among the laity. Clearly, Jacob was not happy with this phenomenon and sought to discourage it.¹³⁰

¹²⁷ Ibid., vols. 163/375: 53 and vols. 164/376: 57.

¹²⁸ Vööbus, *The Synodicon*, vols. 161/367: 248 and vols. 162/368: 227-8.

¹²⁹ Ibid., vols. 161/367: 248-9 and vols. 162/368: 228.

¹³⁰ Robert Hoyland describes Jacob’s reputation as “notorious for his legislative activity,” and suggests that “his stint as a bishop and his authority make it likely that much of the material [from him] reflects real problems encountered by and put to Jacob...”; see Hoyland, *Seeing Islam*: 160-1.

The general disapproval of unauthorized individuals serving as judges can also be seen in an incident reported by Thomas, bishop of Marga (d. c. 850), regarding Mar Jacob (d. 615-25), the first abbot of Beth 'Abhe.¹³¹ Early in his monastic career, Jacob was a monk in the monastery of Mount 'Izla. During this time, the local abbot Mar Babhai (d. 628) discovered that a number of monks who dwelt in the outer cells of the monastery had married and were living with their wives. As a result, Mar Babhai expelled these men. The abbot believed that Jacob had been aware of this state of affairs and had done nothing to prevent it. He therefore expelled Jacob as well and excommunicated him. The local monks objected to this and protested to Mar Babhai:

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).¹³²

The above position, attributed to the monks of Mount 'Izla, should be seen as more than just an attempt to vindicate Mar Jacob. It also points to a general distaste among monks for assuming the position of judges in the manner of "secular rulers." Here too, as in the case of the stylites mentioned in the question referred to Jacob of Edessa, there is a concern that by fulfilling judicial tasks men of spiritual reputation will be forced to betray the essence of their mission.

Conclusions

The theme of judicial authority goes far beyond the immediate question of legal authority. The ability of litigants to bring their suits before more than one judicial institution raises a variety of social questions. Such a choice not only reflects the subordination of the litigants to a multiplicity of judicial authorities, but also their affiliation with a multiplicity of social circles

¹³¹ See E. A. Wallis Budge, *Thomas of Marga—The Book of Governors* (Piscataway, NJ: Gorgias Press, 2003), vol. 1: lxx.

¹³² *Ibid.*, vol. 2: 62-3.

and with a multiplicity of ideologies. When examining the sources cited above we are still unable to draw a complete picture of the judicial setting in every part of the Eastern Christian world. Both the fragmentary nature of the evidence and the absence of a clear context in which to place it provide obvious difficulties for the historian. Despite these obstacles, 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 all played some judicial role. Whether this was the case throughout the territory from Egypt to Mesopotamia and at all times is impossible to determine. Yet while it is clear that certain circles within the churches were disturbed by the fact that lawsuits were being addressed outside ecclesiastical tribunals, it does not seem all that clear that the single source of judicial competition was the nascent Islamic administration.

My aim has been to demonstrate a rather complex setting in which the struggle of ecclesiastical authorities over judicial prerogatives did not only arise with the Islamic judiciary or in the context of *dhimmi* legal autonomy. Instead, scattered references, gathered from legal sources of the early Islamic period and supported by pre-Islamic testimonies, suggest that some Near Eastern Christians sought out the judicial services of Christian figures who were not part of the ecclesiastical apparatus. These figures drew their legitimacy to serve as judges or arbiters from their social standing, whether on account of their spiritual reputation, material wealth, or occupation. Their existence and popularity, both before and after the Arab conquest, helps us to better understand the social landscape in which Eastern Christians conducted their personal affairs. Perhaps a more useful way of considering social arrangements would be in the context of a society dominated by a matrix of personal obligations.¹³³ Under these circumstances it would be misleading to attribute to formal confessional institutions a monopoly over people's commitments and loyalties.¹³⁴ It is in this

¹³³ Cf. Lawrence Rosen, *Bargaining for Reality: The Construction of Social Relations in a Muslim Community* (Chicago: University of Chicago Press, 1984): 4, 11, 60-1. See also, Roy P. Mottahedeh, *Loyalty and Leadership in an Early Islamic Society* (Princeton, NJ: Princeton University Press, 1980): 72-8.

¹³⁴ Abraham L. Udovitch, "Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World." In *Individualism and Conformity in Classical Islam*, eds A. Banani and S. Vryonis (Wiesbaden: Otto Harrassowitz, 1977): 74-5; Mottahedeh, *Loyalty and Leadership*: 175; Nimrod Hurvitz, *The Formation of Hanbalism: Piety into Power* (London: Routledge, 2002): 11, 159-60.

context too that we should understand the effort of the author of the *Life* of Theodotus to legitimize the judicial monopoly of his hero as someone who drew his legitimacy both from spiritual reputation and a formal Islamic decree.

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