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Communal Boundaries Reconsidered:
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Modern scholarship has produced an abundance of works on the history of Jews and Christians in Muslim realms. Quite often these works focus on the status of these communities as religious minorities.¹ With regard to this theme, scholars have been divided as to whether Islam showed tolerance or oppression towards non-Muslims. Yet the question of status, interesting as it is, may in fact be misleading. This is primarily due to its underlying assumptions and the perspectives it compels us to adopt. It assumes a relationship of rulers and subjects based upon communal distinction, i.e. a Muslim is a ruler and a non-Muslim is hence a subject. Furthermore, it assumes a centralist ruling agenda derived from one center that essentially must be enforced upon an entire region in an equal manner. These assumptions do not take into account the possibility of a society that could have been structured under different terms and that adhered to different principles of governance. It does not take into account different sets of relations between different social layers.² It prevents us from attributing greater weight to the meaning of localism and custom: two factors which must have played a crucial role in the formation of relations among Muslims, Jews, Christians and other religious groups. These sets of relations were not necessarily based on principles of communal demarcation that had been prescribed by certain individuals or small groups of the elite (whether Muslim or non-Muslim).

No doubt, an alternative perspective should take into account a greater variety of factors and be prepared to exercise a greater deal of flexibility towards the outcome of an analysis of the existing data. A simpler way for approaching the question of relations among these communities is to address the issue of “response” rather than of “status.” A response is something which we can safely assert without risking anachronistic setbacks. Quite often we find modern scholars adopting insufficient caution when analyzing the

¹ For works which adopted the question of status see: A. S. Tritton, *The Caliphs and Their Non-Muslim Subjects: A Critical Study of The Covenant of 'Umar* (London: F. Cass, 1970); Bat Ye'or, *The Dhimmi: A Historical Survey of Jews and Christians under Islam* (London: Associated University Presses, 1984); Antoine Fattal, *Le statut légal des non-musulmans en pays d'Islam* (Birut: Recherches publiées sous la direction de l'Institut de Lettres Orientales de Beyrouth, 1958); Walter J. Fischel, *Jews in the Economic and Political Life of Mediaeval Islam* (New York: Ktav Pub. House, 1969); Norman A. Stillman, *The Jews of Arab lands: A History and Source Book* (Philadelphia: Jewish Publication Society of America, 1979); Bernard Lewis, *The Jews of Islam* (Princeton: Princeton University Press, 1984); Mark R. Cohen, *Under Crescent and Cross: The Jews in the Middle Ages* (Princeton: Princeton University Press, 1994).

² An attempt to consider a different social structure has been proposed by Cohen in *Under Crescent and Cross*, ch. 6. Cohen employs the terms hierarchy, marginality and ethnicity as parameters of analysis of premodern societies. Nevertheless the initial premise is that of status deriving from an hierarchical society.

behaviors of pre-modern societies. Almost too easily we tend to assume that values and norms of our own time were those that prevailed among a society of an ancient past and in a different geographical location.³ While social divisions based on religious affiliations are familiar to us from recent history, we should not automatically assign them to societies of the medieval Near East, at least not in the rigid forms found in the West. “Response,” however, unlike “status,” is a human impulse rather than a value. Thus, we walk on safer ground in tracing the “response” when we think about the encounter of local Near Eastern populations with Islam. For one, the advent of a new religious-military force that took the place of older imperial regimes could not have left these populations indifferent.⁴ Yet we may assume many other aspects of Islam that should have triggered a response, whether direct or indirect, by those who now paid their taxes to a caliph and not the Byzantine or Sasanian rulers. The question of response, by its nature, is much more diverse. How a given reality is perceived varies from one group to another and even from one individual to another within the same group. This may be attributed to a wide set of factors of a psychological, sociological, and cultural nature. Hence, the way in which communal leadership reacted to the arrival, and later to the presence of Islam, could have differed from that of that of lower social strata. It is precisely this difference in response that will be sought in our discussion below.

In the present paper we shall attempt to examine the issue of response by focusing on two expressions of it: a) the response of non-Muslims to the possibility to litigate in Muslim courts; b) the response of non-Muslims to the involvement of Muslim rulers in internal non-Muslim communal disputes. These two allegedly separate matters are in fact intertwined, since they both represent a case in which non-Muslims made use of their freedom of recourse to Muslim authority in order to deal with matters of concern. Muslim rule offered non-Muslims, among other things, free access to its legal courts. At the same

³ George E. Marcus, *Elites: Ethnographic Issues* (Albuquerque: University of New Mexico Press, 1983), p. 10.

⁴ For selected literary works composed by Jews and Christians which reflect a direct response to the arrival of Islam see: Paul J. Alexander, “Medieval Apocalypses as Historical Sources,” *American Historical Review* 73 (1968), pp. 97-118; Patricia Crone and Michael Cook, *Hagarism: The Making of the Islamic World* (New York: Cambridge University Press, 1977); Sydney H. Griffith, *The Beginnings of Christian Theology in Arabic: Muslim-Christian Encounters in the Early Islamic Period* (Burlington, Vt: Ashgate, 2002); Robert G. Hoyland, *Seeing Islam as Others Saw It: A Survey and Evaluation of Christian, Jewish, and Zoroastrian Writings on Early Islam* (Princeton: Darwin Press, 1997).

time, however, it prescribed the maintenance of the existing non-Muslim tribunals as autonomous institutions. In other words, non-Muslims could have chosen to bring their lawsuits before either their own communal judges or before a Muslim qadi.⁵ Modern scholars tend to disagree as to how common this phenomenon was among non-Muslims. Yet one cannot ignore the frequent reference it received in both non-Muslim and Muslim literary materials that survived from the period under discussion.⁶ Another aspect that seemed to evolve as Muslim rule grew older was the frequency in which the Muslim authorities took part in internal communal affairs of non-Muslims. Yet what may be ascribed to Muslim initiative was quite often the result of non-Muslim invitation.⁷ These two aspects could be seen, by those who argue for a rigid system of communal demarcation, as an encroachment upon communal boundaries of the non-Muslims.⁸ Alternatively, however, it may also be perceived as an example of how boundaries were theoretical and almost non-existent in practice. This difference in perception is somewhat parallel to the one that existed between members of the religious elite and non-elite in the non-Muslims' response. The former, wishing to maintain communal boundaries and enforce their centralist role as communal leaders, opposed what they took as a breach of these boundaries. Yet the latter, through their frequent appeal to Muslim courts and invitation of Muslim involvement in their affairs, manifested much less zeal toward the formal boundaries of their community. Hence they were the objects of admonishment by their leaders for breaching the communal lines.

⁵ For an elaborate discussion on this theme see Gideon Libson, "Legal Autonomy and the Recourse to Legal Proceedings by Protected Peoples, according to Muslim Sources during the Gaonic Period" [in Hebrew], in Ilan, Nahem ed., *The Intertwined Worlds of Islam: Essays in Memory of Hava Lazarus-Yafeh* (Jerusalem: Bialik Institute, 2002), pp. 334-392. Libson argues for an allegedly contradicting position shown by Muslim legalists, who on the one hand stipulate that non-Muslims should be treated as Muslims in legal matters but, on the other hand, also stipulate that the courts of the 'protected people' should be maintained. It seems to us that the reference in the former case is to when non-Muslims choose to litigate in Muslim courts, but should they choose to litigate in their own communal courts they should be free to do so.

⁶ For non-Muslim reference see below. For Muslim references see *ibid.*, p. 339.

⁷ It is worth noting here an observation made by Joseph R. Hacker with regard to the Ottoman Empire, in his "Jewish Autonomy in the Ottoman Empire: Its Scope and Limits. Jewish Courts from the Sixteenth to the Eighteenth Centuries, in Avigdor Levy (ed.), *The Jews of the Ottoman Empire* (Princeton: Darwin Press, 1994), pp. 153-202. According to Hacker, Jewish legal autonomy was in fact limited by the central or local Muslim authorities. Not only does the evidence point to a highly conditioned legal autonomy, but it also indicates that Jewish legal system was not officially recognized as a legitimate one. See especially his remarks on p. 187.

⁸ Cf. Jacob Mann, "The Responsa of the Babylonian Geonim as a Source of Jewish history," *JQR*, vol. X (1919-1920), p. 121.

Thus, on the part of non-Muslim leadership we may assume an ongoing concern for the wellbeing of its office and its agenda to enforce communal boundaries. The source of this concern had naturally to do, in our case, with the frequency with which non-Muslims were turning to Muslim tribunals and Muslim leaders were involved in non-Muslim quarrels. These phenomena were not the outcome of a pre-designed plan of the Muslim authorities, rather a byproduct of the nature of Muslim regimes in the period under discussion. In other words, communal leaders were preoccupied on the one hand, with how to preserve power and on the other, with countering the challenges that resulted from the nature of Muslim patterns of governance and judiciary. Yet their challenge was enhanced by the fact that, unlike their Muslim colleagues, they had no political means to assert their power; no government, army, or police. In fact one might argue that their only resort was divine power. Their legitimacy as leaders was very much dependent on their ability to present themselves as expounders of divine will before their followers. At the same time we should not underestimate the force of excommunication, one of the few last practical prerogatives left in the hands of these leaders. This method, however, was by no means an equivalent to the sort of power that only a state-official could practice. Thus, non-Muslim leaders turned to the force of rhetoric (indeed not for the first time) in order to keep their flock within boundaries. This rhetoric was passed on to the masses through a network of communication.⁹ Christian bishops wrote their sermons to be read out publicly in other places. They issued canons that were to be announced throughout their sees. The Jewish *geonim* and later-appointed communal leaders communicated with their coreligionists through, among other things, letters and responsa. Non-Muslim leaders made constant efforts to maintain contact with their communities, despite their subordination to the Islamic polity and their lacking of political centers in the form of states. Through this contact these leaders were struggling to keep their communities intact and loyal to their office. In other words, a network of communication was to

⁹ See Mark R. Cohen, "Geniza Documents Concerning a Conflict in a Provincial Egyptian Jewish Community during the Nagidate of Mevorakh ben Sa'adya," in Shelomo Morag, Issachar Ben-Ami and Noram A. Stillman, eds. *Studies in Judaism and Islam: Presented to Shelomo Dov Goitein* (Jerusalem: Magnes Press, 1981), p. 136. See also *ibid.*, "Correspondence and Social Control in the Jewish Communities of the Islamic World: A Letter of the Nagid Joshua Maimonides," *Jewish History* vol. 1, no. 2 (1986), pp. 39 – 48. In both articles Cohen demonstrates how Jewish communal leaders made use of letters and literary conventions in order to maintain social control.

compensate for the lack of a fully autonomous political center.¹⁰ Sociologists and historians have already noted the important role communication plays as means to preserve power by ruling elites who are sensitive to potential threats in their environment. In this context Harold Lasswell identified the role of what he named “specialized agencies” or “specialists” which were utilized to counter the threats.¹¹ These specialists, according to Lasswell, can be schoolteachers, doctors, judges, tax collectors and others. It is through these specialists that ruling figures transmitted their agenda. Of course when applying this theory it is necessary to take into account the values at stake, and the identity of the group whose position is being examined. The use of communication as a means to consolidate power cannot be restricted to minority societies. Peter Brown speaks about the “advocacy revolution” when describing how the Roman central government, in, as early as, the fifth century, encouraged its subjects to express their grievances by submitting petitions. Contrary to the state of the scattered non-Muslim communities this policy “was brought about by the peculiar tensions created by the presence of an extended and highly centralized administration, in which top and bottom struggled to maintain communication with each other.”¹² While the direction of communication, which Lasswell describes, is from leaders to the masses and Brown’s is in both directions of the social hierarchy, their arguments illustrate a similar pattern. Leaders, when concerned with centralizing their power, utilize a network of communication.

The role of communication is more important, however, in the life of communities that are politically subordinate. As such, these communities lack state institutions as means of governance and their leadership tends to be decentralized within vast territories through the mediating office of local leaders.¹³ Between the Jews and the

¹⁰ The role of communication as means of control is a feature with which I deal extensively in my dissertation work. It should be seen as another form of response yet of a more generic nature.

¹¹ Harold D. Lasswell, “The Structure and Function of Communication in Society,” in Lyman Bryson, ed. *The Communication of Ideas* (New York: Institute for religious and social studies, 1948), p. 45; Lasswell further divides these “specialists” into three categories: one group surveys the political environment of the state as a whole, another correlates the response of the whole state to the environment, and the third transmits certain patterns of response from the old to the young.

¹² Peter Brown, *Poverty and Leadership in the Later Roman Empire* (Wantage: University Presses Marketing, 2001), p. 83.

¹³ Gerhard, E. Lenski, *Power and Privilege: A Theory of Social Stratification* (Chapel Hill: University of North Carolina Press, 1984), p. 56.

Christians, who were to live under Muslim rule, the former were the first to experience political subordination. For them the need to maintain a communal lifestyle based on *halakhah* triggered a network of communication. Alongside this stood the need to address matters of general interest which concerned the dealings with non-Jewish rulers.¹⁴ There was also a group of Christians who had developed a similar mode for preserving their religious identity prior to the arrival of Islam while lacking a political center: the East-Syrian church, later known as the Nestorian church. Already under Sasanian rule, the East-Syrian church issued restrictions of all sorts regarding interactions with non-Christians and Monophysites.¹⁵ Here too, the service of religious specialists, i.e. the clergy, was crucial in order to reinforce communal allegiance.

Yet, for the rest of the eastern sees, the arrival of the Muslims meant a severance for the first time from Constantinople. This placed the vast majority of Near Eastern Christianity alongside Jews and East-Syrian Christians, as groups cut off from their ecumenical center. We should note that this political development was not merely due to the appearance of a new empire, but also had to do with internal Christological divisions that took place in the preceding centuries. The fact remains, however, that by this point both Jews and Christians were confronted with the presence of Islam and experienced its effects. We are dealing with two different religious communities which possessed many common features. This state of affairs could serve as an advantage if we are to address the issue of Muslim and non-Muslim relations through a comparative method. Thus, through the analysis of materials which circulated within these communities, as part of the communication network utilized by their leaders, we may pose several questions. How did Jews and Christians respond to the freedom of recourse to Muslim authorities, and was there a difference in response? If yes, what could account for this difference? What was the agenda of the elite and how was it implemented? What was the nature of the tension between this agenda and the inclination of the non-elite? Finally, to what extent did actual communal demarcation prevail under Islam?

¹⁴ On communication and Halakhah see Sophia Menache, *Communication in the Jewish Diaspora: The Pre-Modern World* (New York: E.J. Brill, 1996). Menache lists the synods in Ashkenaz, the diffusion of ordinances, traveling merchants and wandering scholars as among the primary means of medieval Jewish communication.

¹⁵ Hoyland, *Seeing Islam*, p. 19.

A word about the nature of the sources:¹⁶ The sources on which this study is based are largely of legal genre. For the Jewish side we primarily have geonic responsa, along with a selection of private and legal letters found in the Cairo Geniza, both deriving from the late tenth to the twelfth centuries. The lack of “Jewish” sources for earlier periods has been acknowledged by scholars as a central cause for obscurity of early Jewish history under Muslim rule. At the same time, however, almost all of the “Christian” material that will be presented here, made up of canon law collections, derives from the late seventh to the early tenth centuries (with one exception from the twelfth century). In other words we are dealing with a situation in which the chronological incompatibility between the Jewish and the Christian sources is almost complete. This fact should be considered when trying to draw conclusions based on the study’s adopted comparative methodology.

A. Non-Muslim Appeal to Muslim Authorities

As mentioned above, Muslim rule did not mean a halt in the legal activities of existing Jewish and Christian communal courts. We may assume the Muslim inclination was to practice a similar policy, already manifested by their Byzantine and Sasanian predecessors, in which the existing judiciary organization was kept intact. The ecclesiastic authorities of the recently conquered provinces, i.e. bishops and Jewish-appointed judges (*dayanim*) enjoyed the judicial privileges which they had known for a long time.¹⁷ Non-Muslims, however, also had free recourse to Muslim courts. The position of Islamic law is that the court may arbitrate not only between two non-Muslims, but also when one of the litigants forced the other to appear before the court.¹⁸ And indeed, the testimony of the existing literary evidence points to the fact that many non-Muslims chose to take their lawsuits outside their own communal courts.

i. Jewish Response:

¹⁶ In what follows, translations mine unless indicated otherwise.

¹⁷ Fattal, *op. cit.*, p. 344.

¹⁸ Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Custom during the Geonic Period* (Cambridge, Mass.: Harvard University Press, 2003). p. 103.

At the background of any analysis of Jewish *modus operandi* with regard to the freedom of litigation in Muslim courts, it may be useful to consider the Talmud's discussion on the matter. The discussion begins with the following position: *all deeds which appear in legal courts of the heathen ones, although those who sign them are the heathens, are valid, except for bills of divorce and manumission of slaves.*¹⁹ According to this we may conclude that Jewish *halakhah*, already prior to Muslim time, expressed relative flexibility toward litigation before non-Jewish tribunals. Litigating before non-Jewish tribunals had not been entirely ruled out; rather it was restricted. The evidence presented below, deriving from geonic responsa and geniza letters of the period between the tenth to the twelfth centuries, reflects how earlier reference to the issue of non-Jewish courts continued to serve as a basis for later opinion and practice.

An example of how Talmudic opinion was relied upon may be illustrated through the following geonic responsum, from the beginning of the eleventh century, for which we only have the answer part.²⁰ The *gaon* addressed a case in which a woman signed a deed of gift for her son in a Muslim court. He explained that what the woman had done was wrong since such a transaction cannot be relied upon. The *gaon* based his position on the Talmudic stipulation mentioned above. He explained that the meaning of this stipulation is that only deeds in the nature of deeds of sale could in fact be valid if signed in a non-Jewish court. Apparently what the *gaon* was referring to was a distinction between deeds of gift, bills of divorce, or manumission of slaves on the one hand, and deeds of sale on the other. The transactions of the former took place entirely within the court, while those of the latter were known to take place both within and outside the court. According to the *gaon*, the execution of a transaction that enabled the testimony of Jewish witnesses could be brought before a Muslim court. Such was the case of a deed of sale. Yet in the case of a deed of gift, for which the sole testimony is given within the court, the *gaon* did not want to see it brought before a Muslim judge. The *gaon* knew that according to Muslim law non-Muslim witnesses could not serve in a Muslim court. This would mean that the transaction would not be witnessed by Jewish witnesses.

¹⁹ Bavli, Gittin, 9b

²⁰ Avraham Eliyahu Harkavi, *Geonic Responsa* [in Hebrew] (Jerusalem, 1966), responsum 491/ 37, p. 249.

Another case that illustrates this principle, also going back to the eleventh century, appears in the correspondence between Yosef ben 'Amram, head of the Jewish court in Sijilmasa (that flourished in the eleventh century) and Rabbi Yitzhak Alfasi (d. 1103). Ben 'Amram, referring to the above Talmudic discussion asked the following:²¹

Regarding what is said [that] *all the deeds which appear in legal courts of the heathen ones, although those who sign them are the heathen ones, they are valid, except for bills of divorce and manumission of slaves*. Should the rule be not merely bills of divorce and manumissions of slaves which are exceptional, but also all matters which are *as* bills of divorce [*gittei nashim*]. That is, all things which fall into the same category as bills of divorce, hence also deeds of gifts. Or can we accept the opinion of Shemuel, who said the rule of the government should be followed²² [*dina de-malkhuta dina*] and thus according to him deeds of gifts are validated in courts of non-Jews.

The question reflects two poles of opinion: on the one hand an exclusive opinion that nullified only specific deeds which were signed in non-Jewish courts, i.e. bills of divorce and manumissions of slaves and on the other hand an inclusive opinion that strived to apply the Talmud's formula on a wider category of deeds, i.e. deeds of gift. The *gaon's* answer reflected the second opinion, in which he objected to the signing of deeds of gift in non-Jewish courts. Furthermore, the *gaon* stated "we have not heard in our school about anyone who relied upon a deed of gift that was given in a court of gentiles."

It seems that the major impediment, considered by those *geonim* who wished to restrict as much as possible the litigation of Jews before non-Jewish courts, was that Jews were not accepted by the Muslim court as recognizable witnesses. The notion, which goes back to Talmudic times, was that non-Jewish testimony was not trustworthy. And yet, when it came to Muslim courts the ambivalence reflected in geonic responsa is striking: on the one hand non-Jewish testimony was not to be trusted, on the other, non-Muslim courts were considered reliable. A responsum found in the geniza,²³ which could be attributed to either Sherira Gaon (d. 1006), Hai Gaon (d. 1038), or Shemuel ben Hofni (d. 1034), refers to the following Talmudic discussion:²⁴

A Jew who sold a donkey to his Jewish friend and a gentile came and forced him from him, i.e. took the donkey by force [for the gentile claims the donkey belongs to him

²¹ Harkavi, op. cit., responsum 72/ 20, p. 51.

²² Bavli, Gittin, 10a

²³ Simhah Assaf, *Geonic Responsa from the Geniza* [in Hebrew] (Jerusalem: Makor, 1942), responsum 17/ 5, p. 23.

²⁴ Bavli, Baba bathra, 45a.

and not to the Jew who sold it], *the ruling is that he compensates him from his, i.e. that the seller will go and return the donkey which was taken. And if not – he should pay the buyer his money* [since indirectly he caused the donkey to be taken from him]. *We do not say this* [that he must compensate him], *only if the gentile's claim is true, for it is possible that the gentile is claiming falsely...*

The *gaon*, in his reference to this discussion, commented that it reflects the fact that the word of any gentile is false and his oath is a lie. Yet at the same time the *gaon* added:

It therefore stands to reason that the Ishmaelites [i.e. the Muslims] are strict when it comes to witnesses [and hence their courts are reliable]. And so, similarly they will act towards Jews. But there is not a court of law in every city...and not in every place are there witnesses of the *mu'addalīn* sort.

The last part of this statement introduces another major issue relevant to our discussion, i.e. the witnesses of the *mu'addalīn* sort. These witnesses were regarded as a special institution within the Muslim legal system. *Mu'addalīn* witnesses, i.e. trustworthy witnesses, were individuals who were proclaimed to be reliable for testimony after a process that verified their character.²⁵

A responsum from either Sherira or Hai further indicates the extent of reliability which the *geonim* attributed to the *mu'addalīn* witnesses. The *gaon* responded to a question whether claiming debts can be done based on the rulings of non-Jewish courts (i.e. Muslim):²⁶

Thus we have seen that where we are now, Baghdad, non-Jewish courts accept only wise, great, and wealthy witnesses, who have not been involved in plunder and lie, and who are distinguished among their coreligionists and are called *mu'addalīn*. Of this sort, if they gave testimony upon a deed of sale or loan and arranged the testimony in their courts and their judge accepted it, then so shall we accept the same deed, and it is valid in our courts. And this is at present our daily custom. And the other great cities in Babylon have the witnesses of the non-Jews of that category. Yet there are distant places, that only lie and deceit are known in them, and their deeds we do not accept, similar to the ruling of the answer which you have found.

The last responsum presents a somewhat opposite approach to the relatively restrictive and strict one adopted in the previous responsa. It clearly indicates a position which outwardly legitimized the appeal to Muslim courts. To say the least, when it came

²⁵ See Tyan Emile, *L'organisation judiciaire en pays d'Islam* (Paris: Société Anonyme, 1938), vol. 1, pp. 352-4; Hirschberg, op. cit., I, p. 240.

²⁶ B.M. Levin, *Geonic Responsa* [in Hebrew] (Haifa, 1928-1943), responsum 32, p. 14.

to claiming debts, Muslim courts were considered as a better alternative. Through a question sent by the prominent communal leader of Qayrawan,²⁷ Ya'acov ha-Haver ben Nissim (d. 1006/7), we hear about a case in which a ruling, given by a Jewish court, ordering a debtor to pay his debt had not been followed.²⁸ As a result the claimant of the debt took the matter before a Muslim court. Yet the witnesses who gave testimony in favor of the claimant in the Jewish court were not accepted by the Muslim one. Thus, the question which followed was whether the claimant may ask "respectable" (*hashuvim*) witnesses, who were normally accepted as legitimate by the Muslim court, to testify on his behalf, despite the fact that these witnesses did not have first-hand knowledge of the affair, but could only rely on the Jewish court's verdict. Before turning to the *gaon*'s reply we should already note two instructive elements in the question itself. First, we have a clear indication of Jews appealing to a Muslim court due to what appears to be the inability of the Jewish court to enforce its own decision. Furthermore, it is evident that Muslim judges did not accept everyone's evidence but only the sort coming from what is termed in the question as "respectable." It should be reasonable to assume that by "respectable" witnesses the reference was to the *mu'addalim* sort. The *gaon* responding did not agree with the line of action proposed by his petitioner. Instead, he suggested that in the Muslim court the Jewish court's verdict would be mentioned by the claimant. Yet he asked that an appeal to the Muslim court take place only after the obstinate debtor had been first excommunicated for thirty days. Should the debtor claim he has no means to pay his debt, then he should not be summoned before a Muslim court, but rather made to swear upon his statement. On the other hand, should the debtor show an intention to escape excommunication, and thus run the risk of losing the money, the claimant should not wait for thirty days and appeal immediately to the Muslim court. Once again, the *gaon* clearly shows a regard in which turning to a Muslim court is legitimate. He recognized the limits of the Jewish court to enforce its judgment, noting the limits of the harshest of its enforcement methods, i.e. excommunication. Moreover, it is interesting to note the *gaon*'s suggestion that the Jewish court's verdict be mentioned in the Muslim

²⁷ See Menahem Ben Sasson, *The Emergence of the Jewish Community in the Lands of Islam* [in Hebrew] (Jerusalem: Magnes, 1996), pp. 308-316. Ben Sasson argues that the Jews of Qayrawan would turn to Muslim courts for three main reasons: implementation of the verdict, the advantage of the legal procedures in these courts, and collaboration between Jewish and Muslim courts.

²⁸ Harkavi, op. cit., responsum 233/ 43, p. 111.

court. This may suggest a channel of cooperation between the two legal systems, an “interplay of courts,” to use Goitein’s expression.²⁹

Geonic responsa reveal primarily the response of the *geonim* to the issue of litigation before Muslim tribunals. As to members of the lower levels of Jewish society, although their behavior may be discerned from within the lines of this literature, at times quite straightforwardly, the picture is rather limited. Thus, we are fortunate to have at our disposal a second source of evidence – letters from the Cairo geniza. Indeed recourse of Jews to Muslim courts is not a rare sight in these letters. And it is through these individual cases that much can be learned about the non-elite’s motivation and position towards this possibility.

Quite often, it seems, Jews would exploit the mere potential of appealing to a Muslim court in order to achieve their goals before even turning to such a court. In a petition sent by a Jewish silk-weaver to the nagid (the Egyptian Jewish communal leader) around the middle of the twelfth century, the worker asks for the latter’s intervention.³⁰ He asks the nagid to intervene before the local Jewish court and instruct its judges to rule a payment in installments of a debt the worker owed to his employer. Otherwise, the petitioner adds, he may be imprisoned for not paying his debt. Through this last statement the petitioner is referring to the potential outcome of his inability to pay his debt. This would cause the employer, i.e. the claimant, to turn to a Muslim court which would be able to enforce the payment of the debt. The petitioner realized the nagid would want to avoid such an outcome, hence he concludes with a comment that the nagid would be obliged to cover the debt. Thus, the nagid prevents recourse by the employer to a Muslim court. Another letter that reflects the individual’s awareness of communal leaders’ concern regarding recourse to Muslim courts is an appeal of an orphaned girl to the community in the beginning of the eleventh century.³¹ The girl appealed to the community not to forsake her and her little sister, who had been deprived of their share of their father’s inheritance. In the appeal, the girl mentions the custom of the community to excommunicate whoever appeals on matter of inheritance to Muslim courts. Yet she

²⁹ S. D. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza* (Berkeley: University of Californian Press, 1967-1993), vol. II, p. 395.

³⁰ Taylor-Schechter Collection (TS) NS J 277.

³¹ Elkan Nathan Adler Collection (ENA) 2341 .1; The date is given by Gil, in Moshe Gil, *Palestine during the First Muslim Period* [in Hebrew] (Tel-Aviv: Tel-Aviv University, 1983), vol. II, p. 402.

states that since she is left with no alternative she will have to turn to “their judges,” i.e. the Muslims.

It seems that also parties who signed legal agreements perceived the threat of turning to Muslim courts as severe. Quite often we find written agreements containing a commitment on both sides not to turn to a Muslim court should a dispute arise. Such is the case in a document dated to 1052 from Fustat.³² The statement in the document releases a certain merchant of a debt he owed. In the latter part of the document we have the sides agreeing that, should any future dispute arise, they would not bring it before the “courts of the nations of the world” (*ummot ha-`olam*), namely the Muslim courts. Instead, they agree to deal solely on the basis of Jewish law. In another document from Jerusalem dated to 1071, we have a settlement of an alimony suit. The deed ends with a demand from the woman’s side to swear not to turn to non-Jewish courts.³³

As we have already noted above, the geniza documents portray a reality in which a certain level of mutual-acknowledgment or cooperation existed between the Jewish and the Muslim legal systems. According to a document from Fustat dated 1100, a father and son, disputing over an inheritance left by the mother, grandmother and great-grandmother, brought their case before a Muslim court. Apparently what had begun to be litigated before a qadi moved to a Jewish court. The Jewish judge ruled that the father should deposit one half of all his possessions in the Jewish court and both sides should return to the Muslim court to conclude the trial, whereupon they would equally divide the objects of litigation.³⁴ In another case from Alexandria dated to 1042, we find a Jewish judge testifying before a qadi that there were no objections for a seven-year old girl to be married to a certain man who was originally supposed to marry her deceased sister.³⁵

So far we have seen instances of Jewish litigation before Muslim tribunals. Another expression of the Jewish recourse to Muslim authorities appears in petitions and appeals in cases of communal strife.³⁶ The relationship between the Rabbanite and

³² Jewish National and University Library (JNUL) .1

³³ ENA 2557 .1; The date is given by Gil, in Gil, *Palestine*, vol. III, p. 29.

³⁴ Goitein, *Med. Soc.*, III, p. 247.

³⁵ TS 13 J 8 .31

³⁶ See for example in Geoffrey Khan, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collections* (Cambridge: Cambridge University Press, 1993), pp. 326-329; Samuel Stern, *Fatimid Decrees: Original Documents from the Fatimid Chancery* (London: Faber and Faber, 1964), pp. 15-20. The latter is an example for a decree issued by the Muslim authorities in response to a Jewish petition.

Karaite Jews present another level of Jewish recourse to Muslim authorities. During the first half of the eleventh century a series of events related to the rivalry between these communities took place in Palestine.³⁷ These events began with a demand of the Rabbanites from the Palestinian *gaon* to excommunicate the Karaites in 1029. The *gaon* himself was reluctant to take such an action. Among the incidents recorded in this affair was the arrival of the Muslim governor of Jerusalem accompanied by the ‘elders,’ i.e. leaders of the synagogue who were responsible for attending the rabbinical court, supporting the head of the community in his efforts to enforce religious duties and, more generally, to protect public morality. Excommunication proclamations were traditionally given during the annual announcement of the calendar of the next year on Mount Olives. In this case the ‘elders’ wanted the proceedings of the calendar-announcement to pass peacefully, without the excommunication proclamation. Thus, they were hoping this could be managed through the governor’s presence.³⁸ In this case the governor of Jerusalem played an important role as monitor of public ritual.³⁹

Further developments lead to direct appeals to the Fatimid Caliph al-Zāhir (d. 1035) which resulted in the caliph’s decreeing equal treatment toward the two Jewish communities.⁴⁰ Jewish leaders in Fustat, such as Ephraim ben Shemarya (d. 1055), made every effort to prevent recourse to the Fatimid authorities in cases of similar quarrels.⁴¹ In 1030 the Palestinian *gaon*, Solomon ben Judah (d. 1051) reports that the Karaites refused to back down on issues of disagreement with the Rabbanites, and as a result the Fatimid authorities stepped into the scene in favor of the Karaites. According to the *gaon* this had been achieved due to the influence the Karaites had in the Fatimid court.⁴²

Reading through geonic responsa and geniza material we notice that our evidence reflects a number of contrasting positions and agendas that were presented by the various parties. The freedom of litigation before Muslim tribunals prompted a practical response on behalf of what should be assumed to be a considerable number of members of Jewish

³⁷ For a comprehensive discussion regarding the relationship between Rabbanites and Karaites during this period see: Marina Rustow, *Rabbanite – Karaite Relations in Fatimid Egypt and Syria: A Study Based on Documents from the Cairo Geniza*, Unpublished PhD dissertation (University of Columbia, 2004).

³⁸ Ibid, p. 285.

³⁹ Ibid

⁴⁰ Ibid, p. 297.

⁴¹ Ibid, p. 300.

⁴² Ibid, pp. 302-303.

communities. No doubt the vast discussion devoted to the matter in geonic literature reflects the frequent recourse of Jews to Muslim courts. It has been rightly suggested that this recourse was the outcome of the ability of Muslim courts to execute their verdicts.⁴³ Furthermore, it seems that some Muslim legal authorities, although a minority, were in the opinion that if both litigants were non-Muslims then instead of the Muslim law it was permissible to follow the personal law of the litigants, e.g. Jewish law.⁴⁴ Under such conditions it would seem that the incentive for litigating in a Muslim court was not Muslim law itself, rather the power Muslim courts had to enforce the law, an advantage they had over the non-Muslim ones. Goitein suggested further incentives to turn to Muslim courts:⁴⁵

First, persons approached a government court when the law applied there was more advantageous to them. Second, for the litigants unsuccessful in a lawsuit in the Jewish court, the government served as a kind of court of appeal; or vice versa, when the opposite party refused to appear before the Jewish court, government was approached with the request to force him to do so. Finally, deeds were made out at a government court (or, concurrently there and before a Jewish authority) in order to safeguard their legality and to have them as an instrument of proof should litigation at a government court ensue.

The non-elite's response was countered by the positions set forward by the Jewish elite, namely the *geonim* and community leaders. Often referring to the Talmudic discussion, the *gaon* would try to restrict as much as possible the sort of matters for which Jews turned to Muslim courts. Similarly, communal leaders in Egypt wished to prevent such recourse. It would seem that many of the *geonim* who addressed the issue wished to restrict litigation in Muslim courts to deeds of evidence, i.e. deeds of sale and deeds of indebtedness.⁴⁶ After all, non-Jewish evidence was not to be trusted and was suspected of deceit. Yet, these two poles of response, as much as they fall nicely into categories of elite and non-elite, are not as uniform as they may seem. Our responsa clearly manifest cases in which *geonim* attributed legitimacy to Muslim courts and their institutionalized witnesses, i.e. the *mu'addalīn*. Furthermore, we have seen cases in which judicial office-holders either instructed their verdicts to be mentioned in Muslim courts or showed up themselves in these courts. This could be taken as a certain level of mutual

⁴³ Libson, *Jewish and Islamic Law*, p. 101.

⁴⁴ Libson, *Jewish Autonomy*, p. 351.

⁴⁵ Goitein, *Med. Soc. II*, p. 398

⁴⁶ Libson, *Jewish and Islamic Law*, p. 101.

acknowledgement between the Jewish and Muslim legal systems. At the same time, it has already been suggested that the resilience that the geonim expressed in their attitudes towards litigating in Muslim courts was an outcome of their realization that instead of trying to eliminate the phenomenon altogether it would be wiser to try and only narrow it down.⁴⁷ On the other hand, some members of the non-elite wished to prevent recourse to Muslim courts, as we have seen in formulas of legal agreements that forbade future disputes to be brought before non-Jewish courts. A similar pattern of ambivalence appears with regard to Jewish appeal to Muslim authorities in cases of internal communal strife. The case of the Rabbanites and Karaites reveals how, on the one hand, Jewish leaders such as the ‘elders’ in Palestine wished to use the Muslim governor of Jerusalem and his agents as means to prevent fulfillment of the masses will, i.e. the Rabbanite crowd who was eager to see a ban proclaimed against the Karaites. On the other hand, we may note once again the efforts made by Jewish leaders in Egypt to prevent similar appeals to those coming from Palestine to the Fatimid rulers in events of quarrel.

ii. Christian Response:

*When any of you has a legal dispute with another, does he dare go to court before the unrighteous rather than before the saints? Or do you not know that the saints will judge the world? And if the world is to be judged by you, are you not competent to settle trivial suits? Do you not know that we will judge angels? Why not ordinary matters! So if you have ordinary lawsuits, do you appoint as judges those who have no standing in the church? I say this to your shame! Is there no one among you wise enough to settle disputes between fellow Christians? Instead, does a Christian sue a Christian, and do this before unbelievers? The fact that you have lawsuits among yourselves demonstrates that you have already been defeated. Why not rather be wronged? Why not rather be cheated? But you yourselves wrong and cheat, and you do this to your brothers and sisters!*⁴⁸

The passage above from the New Testament is the earliest Christian reference to the issue of recourse to authorities external to the church. Once again, it would be useful to consider this reference in the light of the medieval material. We shall come across much of the terminology employed here in our sources; It would be useful to take note of a few of the more common wordings. The NT refers here to “unrighteous” verses “saints”

⁴⁷ Libson, *Jewish Autonomy*, p. 337.

⁴⁸ I Corinthians, 6:1-8.

attesting to the contrast between non-Christian and Christian arbitrators respectively. “Legal dispute,” “Suits,” and “Lawsuits” are synonyms for litigation and quarrel.

Another early text is a Syriac work of the third century, the *Didascalia Apostolorum*, composed in the northern part of Syria:⁴⁹

Now for a Christian this is becoming praise, that he have no evil word with any man. But if by the agency of the Enemy some temptation befall a man, and he have a lawsuit, let him strive to be quit of it, even though he be to suffer some loss: and at all events let him not go to the tribunals of the heathen. And you shall not admit a testimony from the heathen against any of our own people;...For the heathen are not to know of your lawsuits, and you shall not admit a testimony from them against yourselves, nor go to law before them...But if there be brethren who have a quarrel one with another...reprove him...and afterwards receive him, that he may not utterly perish. For when such are corrected...they will not have many lawsuits.

In some cases, the *Didascalia* employs a similar vocabulary as the NT, yet not always. This work may be useful for a better understanding as to how the Gospel’s words were understood, at least by early Christians. The *Didascalia* explicitly mentions “the tribunals of the heathens” when referring to non-Christian tribunals. Yet what the *Didascalia* underscores are two issues that make it clear what values are at stake. First is the issue of internal disputes – when Christians “quarrel with one another.” This should be avoided and prevented to the outmost extent. Secondly, should one choose to proceed with the dispute before legal tribunals, he should remember that the main reason to avoid litigation before non-Christian tribunals is the untrustworthiness of the word of a non-Christian. At any rate, when one is reprovved for his actions he should always be accepted back “that he may not utterly perish.” This last remark should be kept in mind when we read later source-evidence dealing with the fate of those who transgressed the law. Another point of comparison between the NT and the *Didascalia* are the adjectives used for non-Christians. In the former it is “unrighteous” and in the latter “heathen.” The meanings of early Christian terminology are beyond the scope of this paper, yet, once again, it is noteworthy for later reference. In both passages there is stress on communal lines that separate Christians from others. The overall message is to avoid temptation by the Evil one and thus remain within these lines.

⁴⁹ Trans. From R. Hugh Connolly, *Didascalia Apostolorum* (Oxford: Clarendon Press, 1929), pp. 109-110.

Appeal to non-Christian tribunals recurs throughout early and medieval Christian canons.⁵⁰ There is great value in this genre of legislative sources from an historical perspective, since not only is it dateable and identifiable, it also bears the mark of immediacy.⁵¹ The canons that will be discussed below derive primarily from synods assembled by the West-Syrian Patriarchs of Antioch, with two exceptions. The first is a single canon issued by another West-Syrian, Jacob of Edessa (d. 708) and the second is the Synod of the East-Syrian catholicos, Mar George (d. 680) in 676. In general, the sources that are analyzed here date from the late seventh century till the ninth, with one additional piece of evidence dating from the twelfth.

The East-Syrian church presents a special case in which we find a Christian community that had already experienced communal life under the rule of a non-Christian entity prior to the arrival of the Muslims. Hence, an East-Syrian canon law had been applied from the early day of the community's creation. Along with canon law the offices of the ecclesiastical judge appeared already by mid sixth century. The judge was in fact a man of the clergy, whose authority was provided through divine sanction. In other words, the judge's will was that of God.⁵² Next to the priest-judge there existed also an office of a civil authority. Both were responsible for matters on a local level and were subject to the catholicos.⁵³

In the introduction to the list of canons issued in the synod which took place under the authority of the East Syrian catholicos, Mar George I in Beth Qatraye it is said, among other things:⁵⁴

After we have applied our attention to all the matters which required correction, we have found various matters which required formulation in a canonic document. And some that although they have been issued already, should be reissued by us in this document.

⁵⁰ Cf. *The Book of Pontiffs (Liber Pontificalis): The Ancient Biographies of the First Ninety Roman Bishops to AD 715* (England: Liverpool University Press, 1989). p. 15 for bishop Silvester's (AD 314-335) decrees; p. 27 for bishop Julius' (AD 337-352) decrees.

⁵¹ Arthur Vööbus, "The Synodicon in the West Syrian Tradition," *CSCO*, Vol. 368 (1975), p. 1.

⁵² Michael G. Morony, *Iraq after the Muslim Conquest* (Princeton: Princeton University Press, 1984), p. 332.

⁵³ *Ibid.*, p. 367.

⁵⁴ Trans. from J. B. Chabot, *Synodicon Orientale ou recueil de synods nestoriens* (Paris: Imprimerie nationale, 1902), p. 480.

Among the various canons issued in this synod the sixth canon deserves our special attention:⁵⁵

Concerning the lawsuits of the Christians: that they should handle within the church in the presence of figures designated by the bishop, with the consent of the community, especially the priests and the believers. And they should not go out of the church, to be judged before pagans or non-believers. Trials and quarrels among Christians should be arbitrated in the church. And should not go out as by those who are without a law, but before judges that are appointed by the bishop with the consent of the community, especially the priests who are known for their love of truth and the fear of God, and who possess the knowledge and sufficient acquaintance with the affairs in order to judge them. And not otherwise due to the haste of their minds, should they litigate outside the church. But if there is something that is concealed from those who are appointed as judges, they may bring their petition before the bishop. And from him they shall receive a solution to the matters with which they are distressed. But one from among the believers has no authority to make his own rule and violate the verdict of the judges of the believers outside the command of the bishop and the consent of the community, by the words of our Lord. As much as there may be distress the commandment of worldly rulers should not occur.⁵⁶

Canon law is in its nature less innovative than reaffirming. It served the need to reaffirm certain matters which the ecclesiastical leadership felt were either neglected or improperly carried out, hence the remark in the introduction to the canon list. Canon 6 of the East-Syrian synod in 676 was meant to address directly the issue of Christian recourse to non-Christian authorities. It reminds us in its language of parts of the NT and the Didascalia, yet it goes beyond the contents of the earlier texts and sheds light on a number of matters. The stress is of course on the need to maintain litigation within the church, yet the notion of community and its hierarchical structure cannot be ignored. One must act in accordance to the will of the community and its ecclesiastical institutions. For it is only those appointed from within the community, by the bishop, who possess sufficient knowledge to serve as judges. We should assume, based on the need to reaffirm this canon that Christians at this time did in fact turn to Muslim arbitrating bodies. We may further assume that one of the incentives to do so was possible dissatisfaction with the verdicts or the quality of the Christian magistrates' work. This can be attested by the stress on the qualification of the magistrates and referral to the bishop in cases when a

⁵⁵ Trans. from J. B. Chabot, *Synodicon Orientale*, p. 480.

⁵⁶ Fattal reads this line differently from Chabot: "so long as the constraint of the command of the mighty ones does not oblige it," see Fattal, *op. cit.*, p. 346.

litigator feels he was not satisfied with the decision of the local Christian judge. Taking one's litigation outside the church was to practice an independent decision that does not correspond with the proper order of the community. Towards the end of the canon we may notice, however, instances in which recourse to Muslim tribunals was considered imperative due to "the constraint of the command of the mighty ones," i.e. the Muslims. The phenomena of recourse to Muslim tribunals had also preoccupied later East-Syrian patriarchs such as Timothy I (d. 823) who wrote in 805 a law book which consisted of civil regulations.⁵⁷ By doing so he attempted to remove the reasons for Christians to turn to Muslim tribunals.⁵⁸

A similar concern to the matter can be found within West-Syrian canonic literature contemporary to the East-Syrian Mar George. A canon published by Jacob of Edessa (whether or not from the short period of his office as bishop it cannot be said) illustrates this concern: "It is not right for the clergy when they have a lawsuit, to go to outsiders, rather [they should go] to the judges of the holy church."⁵⁹ Here it is obvious the canon is addressing clergy. The historical setting of the issuing of this canon is unknown, therefore it is hard to say whether its intention was to discuss mere litigation in Muslim courts, or rather matters which pertained to internal disputes within the Christian ranks. We may suspect communal strife in this case. A relatively large number of canons were issued in light of Christian clergy petitioning Muslim government in cases of internal disputes. The twelfth-century Syrian Orthodox patriarch and historian, Michael the Syrian reports such a dispute that began during the time of the West-Syrian patriarch of Antioch, George I (d.790), in 758. His ordination caused a division within the church due to disagreement among the bishops as to who should be appointed patriarch.⁶⁰ Another major schism occurred during the time of Patriarch Quryaqos of Takrit (d. 817) which was caused by a disagreement concerning the Eucharist. According to Michael this had brought about a strong opposition of bishops and clergy toward the patriarch. The

⁵⁷ Eduard Sachau, *Syrische Rechtsbücher* (Berlin, G. Reimer, 1907-14), vol. 2, pp. 53 - 117

⁵⁸ Fattal, op. cit., p. 346.

⁵⁹ Trans. from Vööbus, op. cit., vol. 367, p. 272.

⁶⁰ J. B. Chabot, *Chronique de Michel le Syrien: patriarche jacobite d'Antioche (1166-1199)* (Paris: Ernest Leroux, 1899-1910), vol. 2, p. 525.

latter tried by means of excommunication to deal with the threat to his position, while his adversaries in response petitioned the Abbasid caliph Harun al-Rashid (d. 809) in 806:⁶¹

We would like to inform the Amir that Quryaqos ...is the enemy of God and of all the Muslims. He has built churches in Byzantium; he exchanges letters with the Byzantines and he refuses to remain in the place where you are...

Petitioning the caliph severely endangered the patriarch's position. Non-Muslim communal leaders were appointed at times with the consent of the caliph and at times directly by him. It would seem only natural for the patriarch to counter these oppositionist actions with suitable legislation. The following two canons should be considered within this context. The first of them was issued in a synod convened in 794. The introduction clearly indicates the political background:⁶²

When we find that these laws and commandments had become since a long time obscure in the minds of the believers and have become as [a thing] unknown to them, we see that it is [for this reason that] various rebellions and sufferings of every kind have come upon us from foreign people [i.e. the Muslims]. On that account we have been estranged from the relationship of the Father who is in heaven, whenever we trod underfoot the laws and commandments that had been by him ...there was nothing that would remove the anger of God from us, as well as the various sufferings by the barbarian nations, unless we took recourse to the divine laws. ...if you observe [the canons listed below] you will find eternal life through them.

The introduction provides us with the background for the issuing of the particular canons. The hardship of the time, caused by the Muslims is the outcome of the negligence of the law. Only proper observance of the commandments (among them the one forbidding appealing non-ecclesiastical authorities), would restore peace.

Canon 27 of this synod follows a similar pattern that we have seen above:⁶³ "No one of the worldly ones has authority to speak among priests regarding ecclesiastical affairs. Therefore, if one has a lawsuit or a say, he should be brought before the bishop of his city." Yet by "worldly authorities" we can assume refers to Muslims or Christian officials who were appointed by the Muslim government. These officials had no business getting involved in matters that pertain to the Christian community, since those were considered "ecclesiastical affairs." It is quite clear that by this the issuers of the canons

⁶¹ Trans. from French trans. of Chabot, *Michael the Syrian*, vol. 3, p. 19.

⁶² Trans. from Vööbus, *op. cit.*, vol. 375, p. 10.

⁶³ Trans. from *Ibid.*, p. 12.

were in fact charging those who had invited either Muslim or Christian government officials to take part in Christian internal matters. The second canon, number 14 of a synod convened in 812 or 813, was probably issued in direct response to the events portrayed by Michael the Syrian concerning the petition to Hārūn al-Rashīd:⁶⁴

If any one from among the clergy shall seek refuge with the worldly authorities regarding those matters which are agitated among them, may it be the altar or church, despising the holy ecclesiastical sentences. Then he does not have permission to serve or an altar to approach for three months. And he is to practice *nezirutha* [chastity] for one month. Under the same sentence shall be placed that one who makes a factious meeting and tears asunder the altar and hinders the service or the sacrifice.

Once again the reference is to those from among the Christian community who sought refuge or aid by the “worldly authorities.” In light of what we know regarding the historical proceedings, we should assume in this case a reference to Muslims. It is clear this has been done regarding matters that are entirely internal, since they are of religious nature, e.g. “altar or church.” The punishment awaiting such an act, which is severe as “hindering the service or the sacrifice,” is relatively moderate. This could be due to possible appeasement intentions of the ecclesiastical leadership.

The patriarch who succeeded Quryaqos, Dionysius I of Tellmahreh (d. 845), appears to have confronted similar challenges as those of his predecessors. According to Michael, Dionysius had the task of healing the torn body of the church.⁶⁵ He began by issuing already at his election-synod a canon prohibiting making the Eucharist formula an object of strife. The introduction to the list of canons issued in 817 referred explicitly to the problem:⁶⁶

The rigidity of the neck and the contempt of the people who nearly all have been [thus] because of the laxity of the present time and because they have conversed with those outside and have been carried off and have been corrupted and deceived.

It is the “laxity of the present time” that, according to the canon-issuers, has led members of the community “to converse with those outside.” Hence canon number 4 of this synod:⁶⁷

⁶⁴ Trans. from Vööbus, op. cit., vol. 375, p. 21.

⁶⁵ Trans. from French Trans. of Chabot, Michael the Syrian, vol. 3, p. 28.

⁶⁶ Trans. from Vööbus, op. cit., vol. 375, p. 28.

⁶⁷ Trans. from *ibid*, p. 29.

If a presbyter or a deacon or a believing man or a believing woman, while excommunicated by the bishop, on the account of any matter considered as a transgression of the law, seeks refuge with these worldly authorities, or with other men from among other nations, those who are outside the fold of the church, or with someone from among the leaders of the Christians, so that through one of all these methods, by the pleading before these various [persons], the bishop may be compelled to loosen the law of God and a sentence which was legitimately decreed. ... he who dares to do 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....and 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.

Much can be said through this canon about the context of its issuing. Let us begin with the figures it addresses and those whom it does not: a presbyter and a deacon, men of clergy of course, yet of lower rank. There is no mention, however, of a priest or a bishop. On the one hand it points to the fact that, as we have already seen through Michael's report, clergymen had indeed petitioned the caliph. On the other hand, among those petitioners were bishops, yet the canon makes no reference to such office-holders. Was this a means to discard the rank of the petitioners by the bishops of the synod, or alternatively, could it reflect an appeasing intention? Next to the clergy there is also in the canon a reference to simple laity, i.e. "a believing man or a believing woman." Thus we should make note of the fact that the petitioning of the "outsiders" was not restricted to a certain group within the community, but in fact was coming out from various parts of it.

The explanatory clause "while excommunicated" provides us with the context in which these actions take place, and of course corresponds with the information we received through Michael. In other words, the appeal to the Muslims was by those who were previously excommunicated by their church and through this appeal they were hoping to be taken back. Once again the descriptive terminology provided in order to refer to the Muslims is "worldly authorities," "men from among other nations," "who are outside the fold of the church," indeed these references do not leave us with much doubt as to the identity of the appealed body in this case, the Muslim authorities. Yet there seems to be another body to which appeals were addressed, "someone from among the leaders of the Christians." By this, it is quite likely, that the canon is referring to Christian officials who were not part of the ecclesiastical leadership, but figures appointed by the

Muslim regime, who had access to the government and as a result enjoyed a high status within their own community. For what purpose were these appeals to other authorities rather than those of the church? Yet again the motivation was to compel bishops to loosen the law. The bishop issued the excommunication and through the intervention of external bodies it was hoped that he would cancel his decree. As a result of these severe actions of appealing to other authorities, we should note the strong language employed in the canon as to what will be the destiny of those who made such a recourse: “he shall be excluded totally from mingling with Christians,” “the son of God will not pardon him,” “[for he is] as one who has become a traitor.” These words do not merely draw attention to the severity of the acts, as they were perceived by the ecclesiastical authorities, rather they may also indicate both the weight and frequency of these actions. Furthermore, as harsh as the language is, it in fact reveals the relative weakness of the ecclesiastical authorities, for the only means of enforcement which they could employ were threats of communal and divine excommunication. We should not underestimate the impact such threats would have on a heavily religious society, yet their efficiency was limited.

Apparently such threats were not intimidating enough for one of Dionysius’ rivals, Abiram. Consider this event according to Michael:⁶⁸

In c. 824, Abiram, along with his band of rebels, went to meet the Abbasid caliph ‘Abdallah⁶⁹ in Raqqa to obtain a decree. The patriarch Dionysius went also to this place. The patriarch was received first, the amir asked him about Abiram and his band. The patriarch reported to him on their rebellion against the patriarch Quryaqos and on the rest of their actions, and their intention to obtain a diploma to cause disorder in the land, because there was no one who would accept them. Next the amir saw Abiram, who claimed before him to be the patriarch.

The affair which caused not only Dionysius’ rival to appeal to the caliph, but also Dionysius himself, was evidently a contention over the office of the patriarch.

What seems to have also prompted recourse to Muslim authorities were periodic episodes in which the church was going through structural fragmentation. Canons and chronicles attest to these episodes in which there had been an ongoing absence of leadership and a deterioration in the state of ecclesiastical institutions. In the year of his consecration, patriarch of Antioch Ignatius II (d. 883) had convened a synod of which its

⁶⁸ Trans. from French trans. of Chabot, Michael the Syrian, vol. 3, pp. 55-6.

⁶⁹ Abū al-‘Abbās ‘Abd Allāh al-M’āmūn, known as al-Mā’mūn (d. 833).

introductory note is quite revealing. Here the era is referred to as one “full of punishments,” and we should assume it refers to the difficulties caused by past events, namely the absence of a patriarch since the death of John III in 873:⁷⁰

...the church has been widowed of a common father and the chief of the fathers during these years more than in other times and that also many parishes have been deprived of shepherds...and nearly every person has been acting by the will of his heart .

One of the natural outcomes of this climate of anarchy was a recourse to Muslim authorities, (moreover now at the point that the church itself lacks a leader). Thus canon 4 of this synod:⁷¹

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 legislation and devise a manner of perdition against him and who seek to have their anathema abolished by means of worldly rulers or the chiefs of the Arabs or the Christians whose force is hard.

We should note the identity of the Muslim leaders now specified more than before, “chiefs of the Arabs.”

Once again in 896 the synod led by the Antiochene Patriarch Dionysius II (d. 909) issues canon 24 which is almost an exact replicate of earlier ones:⁷²

Because of the evil inclination there is for some quarrel with someone of the brothers so that they leave the sheepfold of the church and go to law before outsiders through which abuses and harms are caused, [as by] those who come under the anathema of God; they shall not enter the church and shall not participate in the holy mysteries.

Although within a significant distance in time from the above mentioned synods, the Canons of the Monastery of Mar Hananya present an interesting case for our discussion. These canons, issued by Johannan metropolitan of Marde (d. 1164), were part of a wider set of activities which the metropolitan initiated. “His activities comprised of large scale work of restoration of debris, rubble and ruins. All the sources testify to the fact that with his work a new wind of enlivening effects began to sweep through the eparchy of Marde.”⁷³ Thus, the background to Johannan’s reform is attested to in the

⁷⁰ Trans. from Vööbus, op. cit., vol. 375, p. 52.

⁷¹ Trans. from ibid, p. 53.

⁷² Trans. from ibid, p. 63.

⁷³ Trans. from ibid, vol. 376, p. 213.

preceding remarks to a dateless corpus of canons issued during the metropolitan's episcopacy:⁷⁴

When we came from our former country of Urhai [Edessa] to this diocese, we found that not in one of the monasteries of this land was there any monk at all of our people of the Jacobites, none at all, except for a few isolated ones who were found, one or two at a place with [only] a pretended name and not knowing how to wear a hood, nor the dress of the monks...all the monasteries of this land had been long devastated and desolate. And there were Kurds or lay people in the monasteries as I found also in this monastery [i.e. the monastery of Mar Hananya]but God helped and we reestablished all of them as they were before ...teaching could not be found at all in this land [and] nothing of our own Syriac Jacobite manner of speech. You oh spiritual sons, who have lived in this land before us, are acquainted with this... but now monks began to go out, one and two, taking the initiative, and they came together to these places...and build for themselves other monasteriesmy desire, however, was that all the monks under my authority should be united in one flock in one place...and so that the order of this community and the services of the congregation may not be confused, we are setting up some suitable canons.

Clearly, the agenda set by Johannan is to reestablish the rule of the Jacobite, i.e. West-Syrian church in his metropolis through the renovation of monasteries, reaffirming Jacobite customs of ecclesiastical conduct, and most importantly, removing independent initiative from the hands of the monks and placing it in the hands of the ecclesiastical leadership, i.e. his own. Hence, the stress in canon 8 on communal unity which is imaged by a human body. As such it has only one head, and it is not right for any part of the body to go against the head:⁷⁵

All of you shall equally be in the manner of the inner part of the body, so that each member has his special service [Rom. XII: 4]. One, indeed, is the head in which the mind dwells as a king and through everything directs the entire body; also there is the eye seeing for the entire body, ... The apostle says at length all these [things] which are necessary for us in order that some people should not be prepared for a quarrel against the one who stands in the head, whether the abbot or the chief of the brothers or the stewards...he who is in subjection to the community – [through him] the quarrel has no power to become [a matter] of opposition to the canon of the community. If anybody is not so, he becomes a destroyer of the peace and of the rule of the community.

⁷⁴ Trans. from Vööbus, op. cit., vol. 375, pp. 214-219.

⁷⁵ Trans. from ibid, p. 221.

Now that the ecclesiastical body is properly established, with its head possessing complete authority, the logic of the issue of appeal to non-ecclesiastical authorities is much easier explained in canon 31:⁷⁶

A monk who brings out the secrets of the monastery or any talk of the transgression of the brothers or about the fighting or quarrels of the brothers or who appeals to the seculars about these canons, which we have ordered for this monastery, or who goes to an authority in a lawsuit which he has or [engages] in a fight with another monk or who abandons the judgment of the church and also these canons, etc. even though he has someone who can give judgment [in his case], such a man shall be excommunicated and cut off from the messianic body and entirely from Christianity and also from the mysteries of the church completely. And he shall in no way be accepted in this monastery if it can truly be witnessed against him that he has committed one of these evils or calumny and accusation before the rulers and the officials and judges and leaders of this country. And the more so if he goes to seek help from the foreigners against the monastery and these monks in whatever case it might be. Such a one we do not accept as a Christian and believer in Christ, and we hold as an unfrocked one and as accursed and as a stranger and despised is any person who commits the evils we mentioned, whoever commits this offense and becomes a stumbling block to all members of this sacerdotal monastery, which ever man goes and creates strife and offense against monks and laymen.

The phenomena of Christian recourse to Muslim authorities evidently triggered much agitation among Christian leadership circles. The canon material which was used here to illustrate this concern reflects a major preoccupation with issues of a central communal authority and maintenance of communal lines. This may be exemplified first through the sort of terminology employed in the canons. Although these canons bring out similar ideas which originally appeared in early Christian literature, e.g. NT and Didascalia, the terminology points to a different agenda by the later generations. While the early sources speak about the authorities external to the church as “heathens” and “unrighteous” the later canons refer to similar circles as “outsiders,” “barbarians,” “other nations,” and “Arabs.” This difference in terminology is not coincidental. It reflects on the one hand a common goal to Late Antique and medieval ecclesiastical authorities to safeguard the boundaries of their community. Yet on the other hand, while for late antique authorities what signaled the main difference between their young Christian communities and their surroundings was a matter of religious code, for medieval authorities it was more a matter of social demarcation. By the time of the Muslim state

⁷⁶ Trans. from Vööbus, op. cit., vol. 375, pp. 228-9.

the Christians needed fewer reminders of the uniqueness of their religion, for as such Christianity was not threatened. Rather, what stood at risk to the eyes of the bishops was the social implications that derived from the religious difference, i.e. a separate, well-defined community. Hence, the recurring stress in the canons and the introductions to them on the need to maintain a unified community that is founded upon a fixed hierarchy of clergy. Any sign of independent acts on behalf of a member of the community would be immediately perceived as a violation of the proper order.

At the same time, however, a significant number of Christians thought otherwise and chose to turn to the Muslim authorities with issues they felt could not be dealt with satisfactorily within their traditional institutions. Another side to the Muslim alternative was its service as a means to resolve political strife within the leadership level of the Christian community. The extent to which the harsh language of the bishop's reprove refers to litigation in Muslim courts is hard to say. What seems to be an issue of litigation in the East-Syrian synod of 676 should be taken with considerable skepticism. In the seventh century Muslim jurisdiction was still taking form, not to mention that most arbitration was practiced by local governors and leaders, rather than by qadis.⁷⁷ These local governors were quite often Christians themselves, hence the other type of authorities referred to in the canons – “worldly” and “secular,” i.e. the Christian laymen appointed by the Muslims to administrative offices. As for the rest of our evidence, it is seems that much of it, if not all appears to come in light of the historical context given by Michael the Syrian and other Christian chronicles. In other words, what seemed to evoke recourse to Muslim authorities and as a result the canons, was the political confrontations within Christian communities, and the periodical fragmentation of communal institutions.

We should also consider a possible increase in the appeal of Christians to Muslim authorities, and/or a diminishing in power of their leaders. This could be discerned through the gradual growth in severity of the sort of punishments that awaits the transgressors. While early canon sources talk about temporal withdrawal of the offenders, and practice of *nezirutha* the later canons go as far as eternal anathema in this and the next world. This development should be considered along with the gradually louder tone

⁷⁷ Neophyte Edelby, “The Legislative Autonomy of Christians in the Islamic World” in Robert Hoyland ed. *Muslims and Others in Early Islamic Society* (Burlington, VT: Ashgate, 2004), p. 50.

of the canons in their reference to the violators. The identity of those who committed the offence, according to the canons, is diverse; they come from all parts of the community, both clergy and regular laymen.

B. Jews and Christians: Similarities and Differences

The following part of the discussion will be devoted to a comparative analysis of the evidence presented above. The comparison will focus on two main issues: response and agenda. Both Jews and Christians reflect, in the literary works they have left behind and the testimony to their activities, a response to the option of recourse to Muslim authorities. The response was either through a direct addressing of the matter, e.g. canons forbidding recourse to external authorities, or through practice, e.g. litigating before Muslim courts. Another feature embedded in the evidence is the diversity of the parties involved. We are not dealing here with merely a two-sided society, made out of leadership and masses. Rather, what we have is a much more stratified society, made out of various internal layers within each social category. Thus, Jewish leadership meant spiritual leaders such as the *geonim*, communal leaders as the Jewish headship in Egypt, Jewish holders of governmental office, judges and the institution of the elders. At the same time, Jewish members of a lower status meant simple laborers, wealthy individuals (who were probably educated), merchants, children and more.

Similarly, the Christian community was made up of various social layers and one cannot always be sure whether a given group was part of the Christian leadership or laity. Thus, we have Metropolitans, patriarchs, bishops, who no doubt were part of the leadership, yet it is hard to say whether presbyters, deacons and priests were also part of this group. Furthermore, there were Christians who assumed public office through Muslim appointment; were those considered leaders or commoners? The answer to this is probably somewhere in the middle and depends much on who is asked. A patriarch would most probably say yes. We can find a clear definition of laity in the canons under the terms “believing men” and “believing women.” This social diversity should be taken into account when we consider the various responses, since each one of these sub-groups had its own agenda, due to its place, rank and role in society. In other words, we should

assume a given response to be the outcome of an existing agenda. Our analysis, however, will begin with the response, after which I shall try to establish the agenda behind it.

i. Response

Quite clearly, the most striking feature common to both Jewish and Christian leadership was their general objection to members of their community appealing to other than their own communal authority. *Geonim* and Jewish communal leaders along with patriarchs and bishops presented this basic stand, yet not in the same manner and with a relatively high measure of ambivalence. While throughout the various canons issued between the seventh to the twelfth century, the Christian tone and formula is almost uniform in its objection, Jewish opinion seems to have shown some flexibility. The *geonim* permitted a certain degree of recourse to Muslim tribunals and differed as to the measure of this degree. Some were more restrictive than others. While certain *geonim* would legitimize an appeal to a Muslim court on account of the trustworthiness of their institutions, others would try to restrict the issues for which such recourse would be allowed. Yet in their responsa they all relied upon Talmudic stipulations, as also canons reflected how early sources were interwoven into them. At the same time, ambivalence cannot be attributed only to Jewish leadership, as we saw Patriarchs and bishops appealing and petitioning the Muslim caliph in order to promote political goals. These acts, although not justified in formal decrees, reflect an alternative response to the one manifested through canons.

We should note, however, that the patriarch fulfilled a wider role than that of the *gaon*. The former was not only a spiritual authority, but also the communal leader in practice. The second part of the patriarch's duty could find its counterpart within Jewish society in the role of the communal leader, Exilarch (*Rosh ha-Gola*) in Babylon, and Head of the Jews (*Ra'is al-Yahud*) in Egypt. We have seen cases in which the Jewish communal leader, or head of one of the congregations there, showed sincere reluctance toward Jewish appeal to Fatimid authorities. We have seen examples of efforts to avoid such a development, through proclaiming excommunication, paying one's debt in order for his claimant not to appeal to a Muslim court and arbitration in an inter-sect strife. On the other hand, quite often Jewish communal leaders assumed their office due to their

access to the imperial court. This had been exploited, as we have seen in the case of the Rabbanite-Karaite strife, by the latter in order to obtain a favorable decree. Non-Muslim holders of public office were in fact a frequent target of appeal and therefore an ongoing threat to communal leaders. Hence, it is not surprising to find them in canons forbidding taking one's lawsuit outside the church. It is clear that the agendas and the ideas expressed by communal leaders were not uniform. We cannot ignore, however, the fact that both Jewish and Christian leaders were employing similar methods for transmitting these ideas. The circulation of canons, responsa and letters served as central means for maintaining authority and surveillance by both Jewish and Christian leaders.

Under the leadership of communal leaders a crucial role was played by an intermediate level of leadership within both the Christian and Jewish arenas. By "intermediate" I mean to refer to various figures who had mediating role between the highest level of leadership and the masses. These figures played the role of "specialists" mentioned in the introduction as part of Lasswell's communication theory. On the Jewish side we find them as judges and 'elders,' and in the Christian community these are mainly the various lower ranks of clergy. Although it is hard to have an exact idea as to their response, we should not underestimate those instances in which we saw Jewish judges considering aspects of Muslim law in their verdicts or even Jewish judges appearing before a Muslim court. Also telling is the example of the Jewish elders in Palestine inviting the Muslim governor of Jerusalem to take part in the annual calendar-announcement on Mount Olives. As for the Christian clergy, these seem to be the main object of reproof and admonishment on the matter of appeal to Muslim authorities. It is quite possible that the reason for this was not so much to prevent clergy from committing such acts, but in order that these would transmit the message to wider circles within the community.

The other pole of response is of course represented by the non-elite. If earlier we were able to draw a common line between Jewish and Christian leadership, then we can similarly do so with respect to its followers, perhaps to a greater extent. Yet in the case of the latter our sources suffer from a crucial disadvantage, since in most cases they mainly sound the voice of the leadership. This should be said with the exception of the geniza documents, which quite often portray the actions of the common man. Nevertheless, the

voice of members of the non-elite is echoed through that of the leadership. It is not coincidental that we possess a relatively high number of non-Muslim sources that deal with the issue of recourse to Muslim authorities. Furthermore, the richness of detail, the often high tones of rebuke and the imagery analogies employed, should all testify to a common practice. Both Jews and Christians found themselves turning to Muslim authorities when they were dissatisfied with decisions that were taken regarding their matters in their own communities. Another frequent driving-force was internal disputes that caused rival parties to petition the Muslim authorities.

ii. Agenda

A diversity of responses should reflect that of agendas. The overall picture that emerges from our survey of responses reflects an ongoing tension between two main currents: the first towards a higher degree of communal enclosure, in which appeals to Muslim authorities should be restricted to a minimum, if not entirely eliminated; the second towards frequent interaction with circles external to the communal body. The influence of religious law on these responses should not be underestimated, and clearly the law itself is embodied in the language of the source. The complexity of the Talmudic stipulation can be identified through the ambivalence of geonic responsa, whereas the strictness of early Christian sources can be discerned as well. Yet beyond their instrumental functions, these religious foundations, on which our sources relied, gave birth to two other significant factors – the outlook of the leadership and the carving of formal communal boundaries. The patriarchs and bishops who sat in the various synods and issued canons prohibiting recourse to non-Christian authorities spoke often about the need to maintain the proper order and hierarchy of the community.

As we have seen, the idea of a properly ordered society was conveyed, among other things, through an imagery of a human body. Within this image the ecclesiastic leader is seen as the head and the laity as the bodily members. Such an image was meant to underscore the need for obedience on the one hand, and oppose independent initiatives by individuals, on the other. . It seems quite likely that what triggered this discourse and the canons was a concern regarding the safeguarding of communal boundaries and the central role of the bishop as the head of the community. These boundaries were

Comment [a1]: I find this sentence unclear

enhanced, among other things, through communal law courts.⁷⁸ Any movement towards the outside was considered a threat to both communal boundaries and the ecclesiastical office in its center. Canons served in such cases an important role of “drawing the faithful into an operating community of law which would distinguish them from the people around them.”⁷⁹ We may assume similar concerns on behalf of the Jewish leadership. Yet the difference in response has been already highlighted. The tone and vocabulary that Christian leaders employed is not found in geonic responsa or in geniza documents on the matter of recourse to Muslim authorities. This does not necessarily imply an entirely different agenda, rather a possible difference in outlook and an evident difference in the nature of their respective communal offices. The geonic responsa reflect both relative flexibility and adaptation toward non-Jewish courts.⁸⁰ Through means of adaptation to Muslim law the *geonim* tried to offer legal solutions similar to those offered by the Islamic law. At the same time, however, “they were sufficiently flexible to permit such recourse in exceptional cases, so as not to damage the delicate fabric of orderly social life and to maintain their own position and authority.”⁸¹ This attitude should first and foremost be accounted by the tradition that arose from the foundation of religious codes.

As for the difference in the nature of the leadership roles, we should keep in mind the difference between the Christian office and the Jewish one. The former embodied in one office that which existed in the latter as two separate functions. In other words, we could say that the patriarch was for the Christians what both the *gaon* and the Jewish communal leader were for the Jews. Thus, it stands to reason that the sort of threat the patriarch experienced by recourse to external authorities to his office, was not the case for the *gaon*. The latter’s status had no reliance on territory, nor a particular community, nor did he fulfill an instrumental function as a communal leader. Yet in the case of local

⁷⁸ Hoyland, *Seeing Islam* p. 18 talks about how religious groups gradually transformed themselves into communal organizations with their own schools, law courts, places of worship, hierarchy and so on. Thus they were effectively socio-legal corporations ordered along religious lines.

⁷⁹ Morony, *op. cit.*, p. 364.

⁸⁰ Another mode of geonic response towards Jewish appeal to Muslim courts which should be considered, and has not been discussed in this essay, is innovation. According to Mann, *op. cit.*, pp. 121-122, “one of the first innovations the geonim had to make not long after the Arab conquest of Iraq was, [according to] Sherira, already in 660. The geonim initiated an innovation regarding a woman who defied her husband and was thus rendered liable to the charge of being a *moredet*. According to the new ruling, such a woman should be divorced at once. According to Sherira the geonim were forced to make this innovation due to the trend of women to turn to Muslim courts to force their husbands to give them a divorce.”

⁸¹ Libson, *Jewish and Islamic Law*, p. 103.

Jewish communal leaders, the evidence that related to them points to a similar pattern to that of the Christian patriarchs. They too had an agenda to prevent to the utmost extent any Jewish recourse to Muslim authorities.

The intermediate level of communal leadership, i.e. judges, communal elders on the Jewish side and clergy on the Christian, reflects a much more complex response. It seems these were torn between their formal role to maintain communal boundaries and their immediate needs that caused them to violate the very code with which they were entrusted. Furthermore, this intermediate level of leadership experienced much more frequent contact with its Muslim environment. Daily interactions between non-Muslim and Muslim officials did not correspond with the distinction strived for by the high leadership. A further blow, and a much more forceful one, to communal walls came from the direction of the masses. After all, it was the intermediate leadership's role to communicate a distinctive identity to the common members of the community. Thus, a certain degree of laxity within the former group transformed into an even wider phenomenon with respect to the latter. For the non-elite, which had daily contacts with members of other religions through a large variety of channels, turning to Muslim authorities was just another expression of a socially embedded community. The fact that communal leadership suffered from periodic instability, internal competition and incompetent law-enforcers could have contributed to a further distancing of the masses from their communal center.

C. The Question of Communal Boundaries

The mode of response of the various groups within non-Muslim communities toward recourse to Muslim authorities reveals a diversity of agendas. To a significant extent these agendas were dictated by the social platform on which Muslim and non-Muslim communities coexisted. An apparent feature of this platform was the complex and intensive network of inter-communal relations. Jews, Christians and Muslim had daily contact in almost every possible sphere. As I have argued above, petitioning Muslim authorities and litigating before Muslim tribunals were merely expressions of a reality in which communal boundaries were blurred. Naturally this state of affairs did not correspond with the communal leadership's agenda, whether non-Muslim or Muslim for

that matter. Yet it seems to me that we should attribute the ongoing and vast discussion as to how communal boundaries should not be crossed over, to what was in fact an opposite direction of movement. In other words, both Jewish and Christian sources reflect the great extent in which Jewish and Christian elites were preoccupied with the phenomenon of recourse to Muslim authorities. It is thus plausible to argue for a correspondence between elite preoccupation and non-elite practices.

Comment [a2]: This could be state more clearly given its importance

It is easy to be taken in by the impressions given by much of the literary evidence that stresses the existence of communal boundaries. Yet we should not forget that these materials were composed by the very group that sought to maintain these boundaries. On the other hand we cannot ignore the fact the frequent business transacted between members of different religions and the need to legalize these activities served as a crucial incentive for recourse to Muslim courts.⁸² Contact between Muslims and non-Muslims had been initiated on both sides. Christian saints served as meaningful spiritual figures not only for the Christian laity but for Muslims too.⁸³ Jews, Christians and Muslims lived often on the same streets and even in the same houses.⁸⁴ All these and other signs indicted a highly integrated society in which one would maintain his communal affiliation, but at the same time possess membership within a wider social circle. What some would argue to be a centralizing trend on the part of Muslim governments with regard to distinct systems of legislation in their territories,⁸⁵ could in fact be interpreted differently. Such an interpretation would locate the initiative on the non-Muslim side rather than on the Muslim. In other words, it should be seen less as a Muslim trend of centralization than as a non-Muslim attempt of integration.⁸⁶

The blurring of communal boundaries may be attributed to three other factors:

a) The state of communal fragmentation: non-Muslim communal institutions had suffered from the lack of a state-supporting administration. The existence of their institutions lay

⁸² Libson, *Jewish and Islamic Law*, p. 101.

⁸³ Morony, *op. cit.*, p. 370; See also Karl-Erik Rignell, *A Letter from Jacob of Edessa to John the Stylite of Litarb Concerning Ecclesiastical Canons* (Malmö: Gleerup, 1979), p. 53, where John of Litarb asks Jacob of Edessa whether "it is right that a priest gives the "blessing" of the saints to the Arabs or the pagans."

⁸⁴ On interfaith symbiosis and cooperation see: Goitein, *med. soc.*, II, p. 289.

⁸⁵ Edelby, *op. cit.*, p. 53.

⁸⁶ See also Hoyland, *Seeing Islam*, p. 18: "Muslim authorities manifested with time a growing involvement in the internal affairs of their non-Muslim subject communities. This was largely due to the invitation of the latter for such an involvement."

entirely in self-sufficient means. Our evidence shows how various episodes of deterioration in the state of monasteries and churches, to the extent of an absence of the patriarch, served as an incentive for independent actions on behalf of the clergy. Therefore, we can assume that these periodic chaotic outbreaks drove many in search of social safety within the existing institutions of the Islamic state.

b) The role played by an intermediate level of leadership: the most crucial role for maintaining communal boundaries was in the hands of those from among the leadership who had daily contact with the masses. Those were not the patriarch, bishop, *gaon* or a communal leader, but rather the lower ranks of clergy, judges and various office-holders within the community. It was their task to “to reinforce allegiance to the community. They did so by urging attendance of the communal institutions, issuing restriction regarding interactions of all sorts, promoting distinctive insignia and symbols, and disseminating propaganda against adherents and beliefs of all other groups.”⁸⁷ Yet this group began to show laxity with regard to the ideology it was meant to enforce, and it too appears to have been part of the general social setting. Therefore, the message that was transmitted to the masses was not of strict communal demarcation.

c) A method of flexibility: we should also take into account a phenomenon which can be seen taking form also within Muslim circles with particular relevance to judicial institutions. A recent study by Yossef Rapoport, of the appointment of four chief qadis, one from each sunni school, by sultan Baybars⁸⁸ argues this step was to allow flexibility.⁸⁹ In other words, to prevent the legal system from becoming too rigid. “The quadruple judiciary enabled litigants, regardless of personal school affiliation, to choose from the doctrines of the four schools.”⁹⁰ This step, apparently, had been already preceded during the Fatimid period. In 1130 four chief qadis, an Isma’ili, Shi’i, Shaf’i’i and Maliki had been appointed. According to Rapoport the establishment of four chief qadis should be seen as an institutional reform of the judicial system, aimed at achieving

⁸⁷ Hoyland, *Seeing Islam*; see also Morony, op. cit., p. 369, “The religious leaders themselves were responsible for a degree of contact and collaboration with non-Christians. The practical limitation to communal barriers is important for an understanding of early Islamic society, as is the existence of the formal barriers themselves.”

⁸⁸ Sultan Baybars al-Bunduqdārī, Mamluk ruler of Egypt, between 1260-1277.

⁸⁹ Rapoport, “Legal Diversity in the Age of *Taqlid*: the Four Chief *Qadis* Under the Mamluks,” *Islamic Law and Society* 10,2 (2003), pp. 210 – 228.

⁹⁰ *Ibid*, p. 210.

the double purpose of uniformity and flexibility.⁹¹ As for the particular case of *dhimmis*, an analysis of *sijill* volumes from Damascus, covering the years 1775 to 1860 by Najwa al-Qattan,⁹² yields a number of conclusions indorsed in this paper. According to al-Qattan the numerous voluntary appearances of dhimmis before Muslim tribunals, in matters of an intra-communal nature, should not be regarded as evidence of contradiction with Jewish and Christian doctrinal beliefs. Alternatively, al-Qattan suggests a “need to view the *mahkama* (Muslim court) less as an institution dedicated to ‘Muslim’ justice and the primacy of religious identity over and above processes of fairness, and more as a public space openly accommodating to the everyday needs of all its clients.”⁹³

All this bears significance in our case for two reasons: first, it underscores the common inclination of people to appeal to courts which do not necessarily coincide with their religious affiliation. Second, it provides an example in which the leadership recognizes the flaws of a rigid legal code and practices flexibility in its application.

Conclusion –

In the above discussion we have tried to focus on the issue of non-Muslim response to Muslim rule. We offered this method as an alternative to the issue of status which has been employed by past scholars in order to explore the matrix of interfaith relationships within Muslim sovereignty. There are many alleys through which one may walk in order to explore patterns of non-Muslim response to Muslim rule, perhaps as many as the lines of contact between the two communities. The alley that we chose to pass through in this paper was that of non-Muslim appeal to Muslim authorities. This declaration of intention could be regarded by some as an answer to a research question, posed prior to a survey of the evidence since it assumes non-Muslim appeal, rather than Muslim intervention. The wide range of evidence that was presented here, does in fact point to this state of affairs. Islam opened its institutions to the participation of non-Muslims and the latter responded favorably. Jews and Christians frequently turned to

⁹¹ Rapoport, *Legal Diversity*, p. 226.

⁹² Najwa al-Qattan, “Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination,” *IJMES* 31 (1999), pp. 429-444.

⁹³ *Ibid.*, p. 440.

Muslim tribunals and Muslim leaders in order to obtain solution to their daily problems. We should note, however, that the evidence presented in the discussion above does not indicate a formal confrontation between Muslim institutions and non-Muslim ones. There was no declared or hidden agenda, as far as we can tell, on the part of the Muslims to undermine non-Muslim communal authority. The phenomenon of non-Muslim recourse to Muslim authorities should be considered, first and foremost, as a by-product of the nature of Muslim forms of governance and judiciary. By turning to Muslim institutions, Jews and Christians were leaving behind their traditional communal institutions and posing a threat to the status of these institutions, those who ran them and ultimately the communal boundaries which were enforced through them. This development triggered a spectrum of responses from various parts within non-Muslim communities. One would expect to find a uniform response on behalf of each communal sector, yet what one finds is, in fact, an even more complex picture. Not all communal leaders kept away from inter-communal cooperation, whether Jews or Christians, and not all their followers abandoned traditional communal institutions. It is practically impossible to obtain statistics of the phenomenon. It is of particular interest that non-Muslim elites were violating the very same regulations which they themselves had insisted upon. This does not imply that these regulations were absent at any time from the period preceding the Muslim conquest and throughout its existence; rather it suggests high measures of elite pragmatism. In order to achieve a better understanding for the background to the actions of both leaders and led we must take into account the particular context of a given community as a whole, and the contexts on which its internal sectors and individuals acted. At the same time, however, there is one general feature that seems to have dominated the social-historical scene. We are dealing here with highly defused societies in which communal affiliation could co-exist next to other spheres of affiliation that went beyond communal boundaries. Yet in order to make this point more concrete, further evidence that pertains to a wider variety of social aspects must be examined.