Chapter 6.1: Dispute Settlement in the Medieval Islamic East

Mathieu Tillier (Sorbonne Université / UMR 8167 Orient et Méditerranée)

In medieval Islam, the settlement of disputes between private individuals was mainly the responsibility of the qadi (ar. *qāḍī*), a judge appointed by the ruler who had jurisdiction over a city and the surrounding area. He usually received litigants in the city's congregational mosque, but could also organize his courtroom at home. Surrounded by a varying number of judicial officers (one or more secretaries, a chamberlain, guards in charge of maintaining order, instrumental witnesses), the qadi heard litigants and pronounced judgements based on Islamic law (*fiqh*). His justice was different from that of simple arbitrators (*ḥakam*) who were not appointed by the government but held their position by the litigants' consent. The sovereign (caliph, sultan, governor) retained the capacity to dispense justice, particularly in the form of *maẓālim* courts, a high tribunal primarily designed to examine abuses of power.[1]

The procedures followed at the qadi's court took shape gradually in the early days of Islam. In Medina, Muḥammad only played the role of arbiter to those who resorted to him, and probably did not manage to impose himself as a judge with universal jurisdiction.[2] The Qurʾān does not regulate judicial procedure and merely mentions a general framework to avoid disputes regarding transactions and debts. It recommends using written documents (Qurʾān, 2:282) and calling upon individuals to testify (Qurʾān, 2:282; 4:15; 5:106-108; 65:2). Court procedure becomes clearer only from the end of the first/end of the seventh-early eighth century, thanks to a few documentary sources (papyri) and to historical narratives. A few sources supposedly dating back to the early days of Islam tend to be contentious or difficult to date, however. Caliph ʿUmar's (r. 13-23/634-644) famous instructions to the governor of Kūfa, Abū Mūsā al-Ashʿarī (d. 42/662-3?), seems to be an apocryphal letter influenced by Ḥanafī law, perhaps based on a previous letter dating back to the Umayyad period.[3] No legal works survived from this early period. Procedures and the debates they gave rise to nonetheless left traces in pre-canonical hadith books, such as ʿAbd al-Razzāq al-Ṣanʿānī's (d. 211/827) and Ibn Abī Shayba's (d. 235/849) *Muṣannaf*s, as well as in biographical collections devoted to qadis, such as the *Akhbār al-quḍāṭ* of Wakīʿ (d. 306/918). The Umayyad era (40-132/660-750) was a period of widespread procedural experimentation.[4] After the Abbasid Revolution of 132/750, Islamic law entered its literary phase, with the composition of large legal compendia. These works led to the definition of legal procedure in various chapters devoted to claims (*daʿwā*), testimony (*shahāda*), oath (*yamīn*) and the qadi's discipline (*adab al-qāḍī*).[5]

---

[1] See M. Tillier, "Courts of law, historical," *EI*^{3}, *s.v.*

[2] N. Sinai, "Muḥammad as an Episcopal Figure," *Arabica*, 65 (2018), p.1-30, p. 9, 14.

[3] R.B. Serjeant, "The Caliph ʿUmar's Letters to Abū Mūsā al-Ashʿarī and Muʿāwiya," *Journal of Semitic Studies*, 29 (1984), p. 65-79.

[4] M. Tillier, *L'invention du cadi. La justice des musulmans, des juifs et des chrétiens aux premiers siècles de l'Islam* (Paris: Publications de la Sorbonne, 2017).

[5] In spite of differences on some issues, the major legal schools that flourished from the second half of the second/eighth century onwards largely agreed on the main lines of the procedure, whose objective, as stated by the Ḥanafi jurist al-Jaṣṣāṣ, was to "enable the holders of a right to enjoy that right" (*īṣāl dhawī l-ḥuqūq ilā ḥuqūqi-*

"Protected" people (*dhimmī*s or *ahl al-dhimma*), that is non-Muslims residing in Islamic territory, occupy a minor place in this burgeoning legal literature. Non-Muslims hailing from outside Muslim-administered land occupy an even lesser position. Jurists occasionally mention trials between *dhimmī*s and Muslims as well as trials within the *dhimmī* communities themselves. However, non-Muslims from beyond the frontier, identified as *mustaʾmin*s ("beneficiaries of safe passage [*amān*]"), appear rarely; *ḥarbī*s, that is foreigners belonging to hostile territory (*dār al-ḥarb*) and did not benefit from an *amān*, appear all the more rarely in the sources. In many cases, rules applicable to *dhimmī*s are likely to have been applicable to *mustaʾmin*s as well, although authors do not explicitly say so. One must turn to chapters devoted to the law of war and relations with the enemy, the *kutub al-siyar*, to find more references to lawsuits involving foreigners who entered Islamic territory. While the category of *dhimmī* appeared very early in Islamic law, that of *mustaʾmin* is notably absent from the *Muṣannaf*s of ʿAbd al-Razzāq al-Ṣanʿānī and Ibn Abī Shayba. This absence suggests that judicial relations with enemy peoples were less conceptualized during the Umayyad period, at a time when the conquest was still underway. Handling disputes involving foreign non-Muslims did not become an issue before the stabilization of the empire's frontiers in the second half of the second/eighth century. Similarly, available documentary sources (on papyrus, parchment, or paper) seldom refer to cross-border disputes. The only significant example, which we shall later examine, concerns a conflict with Nubia in the second/eighth century.

International or inter-communal litigation was not exclusively concerned with *dhimmī*s and *mustaʾmin*s. The Muslim community was far from homogenous, and from the first/seventh century onwards, the territories comprising the *dār al-islām* included for various periods of time political entities that did not recognize one another. Muslim scholars generally believed that they themselves belonged to the only legitimate politico-religious entity, and regarded therefore the inhabitants of other entities as dissidents. They categorized Muslim outsiders as *ahl al-ahwāʾ* ("people of passions") or *ahl al-baghī* ("people of transgression/rebels"). Judicial relations between the members of these rival entities were discussed in chapters devoted to *siyar* law, and will be examined here as well.

Studies on the judicial treatment of conflicts between Muslims of the *dār al-islām* and foreigners are almost non-existent for the first centuries of Islam. The only available work on this issue is the Arabic-language book *Aḥkām al-dhimmiyyīn wa-l-mustaʾminīn* by ʿAbd al-Karīm Zaydān, which includes a few sections on conflict resolution.[6] We shall therefore return to the primary sources to propose a theoretical and practical overview of the resolution of international and inter-community conflicts in early Islam, until the fifth/eleventh century. We shall distinguish disputes between Muslims and non-Muslims from those between non-Muslims. From the sixth/twelfth century onwards, the development of Crusader states in the Levant, the establishment of commercial treaties between Muslim governments and foreign states, and the development of new judicial institutions within the abode of Islam produced new types of sources and brought about important developments in the handling of disputes. We

him). Al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, ed. Farḥāt Ziyāda (Cairo: The American University in Cairo Press, 1978), p. 237, 254.

[6] ʿA.-K. Zaydān, *Aḥkām al-dhimmiyīn wa-l-mustaʾminīn fī dār al-islām* (Beirut-Baghdad: Maktabat al-Quds-Muʾassasat al-Risāla), 1982.

shall provide an overview of these developments based primarily on the work of contemporary historians.

1. Theory and Practice in Dispute resolution between Muslims and non-Muslims in the first centuries of Islam

The qadi was the principal judge appointed by the government and had extensive powers within the limits of adversarial procedure. Although he was not entitled to take up a case on his own accord, a qadi had jurisdiction whenever a litigant filed a claim against an identified adversary, whether civil or criminal. If the defendant did not appear at the hearing with the plaintiff, the qadi had the authority to summon the defendant, or even to have him brought by force. [7] In classical Islamic law, the institution of the qadi was primarily designed to deal with disputes involving at least one Muslim litigant. Although non-Muslim communities – mainly Jewish, Christian and Zoroastrian communities – had their own judicial institutions (see below), these only had jurisdiction over intra-community disputes and could not intervene whenever a Muslim was involved. Consequently, any dispute between a Muslim and a *dhimmī* or a *mustaʾmin* came under the jurisdiction of the qadi[8] or, if the litigants agreed, of a Muslim arbitrator.

1.1. Territoriality and obstruction of justice

Jurists disagreed over the ability of a qadi to examine a dispute between a Muslim and a *mustaʾmin* over a transaction concluded outside Islamic territory. The majority of scholars considered that Muslims had to respect Islamic legal rules wherever they were, including the *dār al-ḥarb*. This opinion was particularly that of al-Awzāʿī (d. 157/773-774) and of the Shāfiʿīs. According to these scholars, if a Muslim contracted a debt with a *ḥarbī*, and the latter entered the *dār al-islām* with a safe-conduct to claim reimbursement in court, the qadi should hear the claim and decide in his favor if he produces evidence.[9]

Conversely, Ḥanafīs adopted a territorial conception of law. Accordingly, Islamic norms were applicable only in the territory of Islam.[10] As a consequence, many actions committed by Muslims in the *dār al-ḥarb*, as reprehensible and morally objectionable as they were, could not be prosecuted in Islamic territory. This principle held true for crimes committed among Muslims themselves: such crimes were not subject to scriptural punishment upon their return

---

[7] E. Tyan, "La procédure du "défaut" en droit musulman," *Studia Islamica*, 7 (1957), p. 122-124; F.J. Ziadeh, "Compelling Defendant's Appearance at Court in Islamic Law," *Islamic Law and Society*, 3 (1996); M. Tillier, *Les cadis d'Iraq et l'État abbasside (132/750-334/945)* (Damascus: Presses de l'Ifpo, 2009), p. 297-299; *id*., *L'invention du cadi*, p. 224-229.

[8] Ibn al-Qāṣṣ, *Adab al-qāḍī*, ed. Aḥmad Farīd al-Mazīdī (Beirut: Dār al-Kutub al-ʿIlmiyya, 2007), p. 36. See A. Fattal, *Le statut légal des non-musulmans en pays d'Islam* (Beirut: Imprimerie Catholique, 1958), p. 350; ʿA.-K. Zaydān, *Aḥkām al-dhimmiyīn*, p. 569.

[9] Al-Ṭabarī, *Kitāb al-jihād wa-kitāb al-jizya wa-aḥkām al-muḥāribīn min Kitāb ikhtilāf al-fuqahāʾ*, ed. Joseph Schacht (Leiden: Brill, 1933) p. 61.

[10] See Abū Yūsuf, *al-Radd ʿalā Siyar al-Awzāʿī*, ed. Abū l-Wafāʾ al-Afghānī (Hyderabad: Lajnat Iḥyāʾ al-Maʿārif al-ʿUthmāniyya, n.d.), p. 96. In this passage, however, Abū Yūsuf takes the opposite view from Abū Ḥanīfa and considers, like al-Awzāʿī, that Muslims remain subject to Islamic law even in the territory of war.

to Islamic territory.[11] Crimes against *ḥarbī*s were held even more rigorously to this standard.[12] A claim by a *mustaʾmin* against a Muslim who had committed a crime in the *dār al-ḥarb*, had contracted a debt there, or had fraudulently appropriated goods, could therefore not be resolved, even if the *mustaʾmin* provided evidence. Al-Sarakhsī (d. c. 500/1106) specifies that the qadi must hear the claim but cannot convict the Muslim. At most, the qadi should issue a non-binding legal opinion (*fatwā*) urging the defendant to return the stolen or usurped property to its rightful owner.[13] The same principle applies to the sale of a slave outside the abode of Islam. In the event of a trial after the sale regarding a defect arising in a slave, the qadi does not pass judgment to compel the seller to take the slave back. If the seller is a Muslim, the qadi can only chide him for taking advantage of his safe conduct in the *dār al-ḥarb* and urge him to take the slave back.[14] Al-Sarakhsī suggests, however, that rare exceptions might occur. For example, al-Sarakhsī posits that a qadi can cancel the contract of a Muslim engaged in usury (*ribā*) in the *dār al-ḥarb.* The qadi can furthermore oblige the Muslim to return the capital, provided that the *ḥarbī* claimant has become a *dhimmī* or has converted to Islam in the meantime.[15] Should a dispute arise between a Muslim merchant and a foreigner in the *dār al-islām*, the latter would therefore be well advised, if he could, to turn to a non-Ḥanafī qadi to maximize his chances of getting his property back.

1.2. Procedures

Lawsuits between Muslims and non-Muslims followed the same basic rules as those between Muslims alone. However, a few discrepancies deserve attention. During the Umayyad period, the progressive emergence of the mosque as a privileged place for judicial hearings raised the controversial issue of whether receiving non-Muslims there would be appropriate.[16] In Egypt, the qadi Khayr b. Nuʿaym (in office 120-127/738-745) held two hearings, one in the mosque for Muslims, and the other outside, at the main gate, for *dhimmī*s.[17] This situation apparently continued until around 177/793, when a Ḥanafī qadi, Muḥammad b. Masrūq al-Kindī, began to admit non-Muslims into the mosque.[18]

The qadi was supposed to treat litigants as equals by making them stand at an equal distance from him.[19] The earliest legal writings do not record controversies about this issue when non-Muslims were involved. Beginning in the fourth/tenth century, however, some jurists argued

---

[11] Al-Ṭabarī, *Kitāb al-jihād*, p. 62.
[12] Al-Shaybānī, *Kitāb al-siyar (al-Qānūn al-dawlī al-islāmī)*, ed. Majīd Khaddūrī (Beirut: al-Dār al-Muttaḥida li-l-Nashr, 1975) p. 194. Translated in M. Khadduri, *The Islamic Law of Nations* (Baltimore: The John Hopkins Press, 1966). p. 191.
[13] Al-Shaybānī, *Siyar*, p. 179/trans. p. 171-2; al-Sarakhsī, *Sharḥ al-Siyar al-kabīr*, ed Muḥammad Ḥasan Muḥammad Ḥasan Ismāʿīl (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), IV, p. 100-1.
[14] Al-Sarakhsī, *Sharḥ al-Siyar al-kabīr*, V, p. 127.
[15] Al-Sarakhsī, *Sharḥ al-Siyar al-kabīr*, IV, p. 234.
[16] Ibn Abī Shayba, *al-Muṣannaf*, ed. Ḥamad b. ʿAbd Allāh al-Jumʿa and Muḥammad b. Ibrāhīm al-Luḥaydān (Riyad: Maktabat al-Rushd, 2004), III, p. 619-20. See M. Tillier, "Les 'premiers' cadis de Fusṭāṭ et les dynamiques régionales de l'innovation judiciaire (750-833)," *Annales Islamologiques*, 45 (2011), p. 230.
[17] Al-Kindī, *Akhbār quḍāt Miṣr*, in *The Governors and Judges of Egypt*, ed. Rhuvon Guest (Leiden: Brill, 1912), p. 351. Cf. A.S. Tritton, *The Caliphs and their Non-Muslim Subjects: a Critical Study of the Covenant of ʿUmar* (London-Bombay-Calcuta-Madras: Oxford University Press, 1930), p. 177-8.
[18] Al-Kindī, *Akhbār quḍāt Miṣr*, p. 390; al-Qalqashandī, *Ṣubḥ al-aʿshā fī ṣināʿat al-inshā'* (Cairo: Dār al-Kutub al-Sulṭāniyya, 1910-1919), I, p. 419.
[19] See M. Tillier, "La société abbasside au miroir du tribunal," p. 163-164.

that such equal treatment was not mandatory in cases involving non-Muslims. The Shāfiʿī jurist Ibn al-Qāṣṣ (d. 335/946) asserts that the qadi may have the Muslim stand closer than the non-Muslim.[20] The main distinction between Muslims and non-Muslims in court procedure concerned the production of testimonial evidence. While Muslims could bring witnesses of their own faith, this right was restricted for non-Muslims. In the first/seventh century, *dhimmī*s could call on non-Muslim witnesses to prove their claims even against a Muslim adversary. Syriac chronicles report a change in the middle of the Umayyad period, when Caliph Yazīd II (r. 101-105/720-723) or his predecessor ʿUmar II (r. 99-101/717-720) decreed that the testimony of a non-Muslim against a Muslim was no longer acceptable.[21] Later jurists unanimously endorsed this ruling.[22] Therefore, as we shall see below, non-Muslims needed to call upon Muslim witnesses.

Non-Muslims, like Muslims, were allowed to take an oath of defense against the accusation of a Muslim plaintiff who failed to provide testimonial evidence. A non-Muslim plaintiff could also take an oath to support their claim if the qadi deferred the oath to them after the defendant's refusal to take it. Some jurists (Ḥanafīs and Shāfiʿīs) asked that non-Muslims take the oath on their sacred scriptures, in their community's place of worship. However, according to other jurists, such as the Ḥanafī al-Khaṣṣāf (d. 261/874), the location did not matter.[23] At any rate, jurists considered the oath taken by a non-Muslim litigant against a Muslim adversary to have no evidentiary value.[24] Christian litigants could be reluctant to engage in this procedure for religious reasons. Although Coptic documentary sources (ostraca [potsherd used as a writing surface], papyri) demonstrate that indigenous Egyptians took judicial oaths in the early centuries of Islam, this practice was not regarded well by the Copts themselves. As canonists liked to point out, Jesus had forbidden to take an oath (Matthew 5:34). In the Church of the East, Ishoʿ bar Nūn (patriarch 824-828) and Ishoʿbokht (*fl.* 800s) opposed previous canonists and permitted their flock to defend themselves in court by taking an oath.[25] Similarly, in thirteenth century Egypt, the Coptic canonist al-Ṣafī ibn al-ʿAssāl stated that taking an oath in a judicial context was sometimes necessary. He nevertheless thought it preferable for a litigant to refrain from taking an oath, and advised him to "redeem himself" (*yaftadī*) from the oath, by paying a sum of money for example.[26] This phenomenon is well illustrated by an important fifth/eleventh century document in which a Christian defendant against a Muslim plaintiff prefers to negotiate an amicable settlement in which he renounces part of his claim rather than take an oath.[27]

---

[20] Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 46. See also al-Māwardī, *Adab al-qāḍī*, II, p. 250-1; Ibn Abī l-Dam, *Kitāb Adab al-qāḍī*, p. 131; M. Tillier, "La société abbasside au miroir du tribunal. Égalité juridique et hiérarchie sociale," *Annales Islamologiques*, 42 (2008), p. 168. Cf. A. Fattal, *Le statut légal*, p. 360-1.

[21] *Chronique de Denys de Tell-Mahré, Quatrième Partie*, ed. J.-B. Chabot (Paris: Librairie Émile Bouillon, 1895), p. 20/18; Michel le Syrien, *Chronique*, ed. J.-B. Chabot (Paris: 1899-1910), II, p. 489. Cf. A.S. Tritton, *The Caliphs and their Non-Muslim Subjects*, p. 186; A. Fattal, *Le statut légal*, p. 362-3.

[22] A. Fattal, *Le statut légal*, p. 361.

[23] M. Tillier, "La société abbasside au miroir du tribunal," p. 166-167.

[24] A. Fattal, *Le statut légal*, p. 365.

[25] M. Tillier, "The Evolution of Judicial Procedures in East-Syrian Canon Law after the Islamic Conquests: The Judicial Oath," *Journal of Eastern Christian Studies*, 70 (2018), p. 227-240.

[26] Ibn al-ʿAssāl, *al-Majmūʿ al-ṣafawī*, ed. Jirjis Fīlūthāwus ʿAwḍ (Cairo: n.d.), II, p. 365.

[27] M. Tillier and Naïm Vanthieghem, "La rançon du serment. Un accord à l'amiable au tribunal fatimide de Ṭalīt," *Revue des Mondes musulmans et de la Méditerranée*, 140 (2016), p. 53-72.

Muslim jurists did not differentiate between *dhimmī*s and *mustaʾmin*s in matter of judicial procedure. Al-Sarakhsī specifies that *mustaʾmin*s had the same rights and duties as *dhimmī*s and Muslims in cases of debt. Members of all communities could thus be imprisoned for debt, or have their debtors sent to jail.[28] However, a non-Muslim from the *dār al-ḥarb*'s ability to use a representative/proxy (*wakīl*) to represent him in court was the subject of specific developments. The Islamic judicial system allowed a litigant to be represented in court by a legitimately appointed proxy, especially if he had to travel away from the city where he was on trial.[29] The issue of representation was essential for non-Muslim foreigners, especially merchants who moved from one land to another or across the Muslim world. These foreigners needed to be able to defend their interests from afar. Ḥanafīs, the most interested jurists in this issue, accepted that a foreign non-Muslim (*ḥarbī*) send a proxy to the *dār al-islām* to represent him in court, without any conditions attached to the proxy's religion. The proxy could be a *ḥarbī*, a *dhimmī*, a *mustaʾmin* or a Muslim. However, his designation as *wakīl* needed to be attested to by Muslims.[30] If a *ḥarbī* appointed a *mustaʾmin* as his representative and then returned to the *dār al-ḥarb*, his proxy had only a limited capacity according to al-Shaybānī (d. c. 189/805). The representative could definitely continue to act as a claimant in court, but according to analogical reasoning (*qiyās*), he could no longer act as defendant, because convicting the defendant through his representative was no longer enforceable. Although legal preference (*istiḥsān*) confirmed the validity of the representative's appointment even in this case, Ḥanafīs retained the ruling based on analogical reasoning.[31] Conversely, the Ḥanbalī jurist Ibn Qudāma (d. 620/1223) permitted Muslims to appoint a *ḥarbī* or a *mustaʾmin* as a proxy. According to Ibn Qudāma, this appointment remains effective even if the *wakīl* travels to the *dār al-ḥarb*, thereby allowing a Muslim to defend his own interests outside Islamic territory.[32]

Finally, the reception of foreigners in the courtroom required some notable changes. The Ḥanafī jurist al-Khaṣṣāf recommends that the qadi treat the disputes of people considered "foreigners" (*gharīb*) as a higher priority than the disputes of local people, so as not to delay a foreigner's travel.[33]Al-Khaṣṣāf however does not specify whether by "foreigners" he means litigants from outside the abode of Islam or simply travelers from distant lands. Jurists also consider the likely common case wherein a litigant is not fluent in the Arabic language used in court. This situation concerned both non-Arabic speaking inhabitants of the *dār al-islām* and travelers from abroad. The Shāfiʿī jurist Ibn al-Qāṣṣ, who lived for a long time in Ṭabaristān

[28] Al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-maʿrifa, 1406 H.), XX, p. 91. On imprisonment for debt in Islamic law, see I. Schneider, "Imprisonment in Pre-classical and Classical Islamic Law," *Islamic Law and Society*, 2 (1995), p. 158-161. On detention conditions, see M. Tillier, "Vivre en prison à l'époque abbasside," *Journal of the Economic and Social History of the Orient*, 52 (2009), p. 635-659; *id*., "Les prisonniers dans la société musulmane (II^{e}/VIII^{e}-IV^{e}/X^{e} siècle)," in E. Malamut (ed.), *Dynamiques sociales au Moyen Âge en Occident et en Orient* (Aix-en-Provence: Publications de l'Université de Provence, 2010), p. 191-212.

[29] On the *wakīl*, see al-Khaṣṣāf, *Adab al-qāḍī*, p. 499-530.

[30] Al-Shaybānī, *al-Aṣl*, ed. Muḥammad Būynūkālin (Beirut: Dār Ibn Ḥazm, 2012), XI, p. 453, 502; al-Sarakhsī, *al-Mabsūṭ*, XIX, p. 138; Ibn Qudāma, *al-Mughnī*, ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī and ʿAbd al-Fattāḥ Muḥammad al-Ḥulw (Riyad: ʿĀlam al-kutub, 1986), VII, p. 237. Cf. al-Shaybānī, *al-Aṣl*, XI, p. 211, where the author seems to contradict himself on this subject.

[31] Al-Shaybānī, *al-Aṣl*, XI, p. 453-4; al-Sarakhsī, *al-Mabsūṭ*, XIX, p. 138.

[32] Ibn Qudāma, *al-Mughnī*, VII, p. 237.

[33] Al-Khaṣṣāf, Adab al-qāḍī, p. 100. See M. Tillier, "La société abbasside au miroir du tribunal," p. 165.

and died in the town of Ṭarsūs next to the Byzantine frontier,[34] considers the qadi's ability to recognize languages as one of many essential qualifications for the office. A qadi's court clerk must master the languages of the litigants and be able to translate their words into Arabic.[35] These skills probably compensated for the absence of a professional translators (*turjumān* or *mutarjim*) attached to tribunals in the first centuries of Islam.[36] According to the Ḥanafī Ibn Māza (d. 536/1141), foreigners whose language the qadi did not know could present their case in writing, on a petition (*qiṣṣa*) presumably written by a translator.[37] During the ensuing oral debates, if necessary, the qadi had to seek out a suitable interpreter, whose uncertain reliability could cause prejudice against a litigant.[38] The Kūfan jurists Ibn Abī Laylā (d. 148/765) and Abū Ḥanīfa (d. 150/767) considered that a single interpreter was sufficient, provided that he was a Muslim, free and reliable. According to Abū Ḥanīfa, translation should be treated as an "informational report" (*ikhbār*) establishing the truth of an affair (*ḥaqīqat al-amr*), even if only one individual reported it. This is precisely like how a single person claiming to witness the new moon suffices to end the Ramadan fast. In the eyes of al-Shaybānī, on the other hand, the translation itself had the status of a "testimony" (*shahāda*). Two trustworthy men (*ʿadl*) were thus to translate together the exchanges between the qadi and the litigants.[39] Half a century later, al-Khaṣṣāf still allowed a single individual to serve as interpreter, although he preferred that two translators work simultaneously.[40] Mālikīs and Shāfiʿīs also concluded that only a translation done by two witnesses (or a trustworthy man and two trustworthy women) was valid.[41] Translation of a qadi's statements for foreign litigants did not raise the same problems. Al-Māwardī (d. 450/1058) accepted that a single individual (even a slave) translate the qadi's words, since in this regard, the translation had only informational (*khabar*), and not testimonial, value.[42]

1.3. Case study: Egypt, Nubia, and the Amalfitans

Both documentary and narrative sources provide little information about trials involving Muslim and foreign non-Muslim litigants. The sources do record two particularly revealing cases concerning the relations between Egyptian Muslims and Nubians in the second/eighth and third/ninth centuries. Nubia, a province of the kingdom of Makuria, had resisted Muslim

---

[34] See Ibn Khallikān, *Wafayāt al-aʿyān*, ed. Iḥsān ʿAbbās (Beirut: Dār Ṣādir, 1994) I, p. 68; al-Dhahabī, *Siyar aʿlām al-nubalā'*, éd. Shuʿayb al-Arna'ūṭ and Muḥammad Nuʿaym al-ʿAraqsūsī (Beirut: Mu'assasat al-Risāla, 1413 H.), XV, p. 371-72.

[35] Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 23, 30. Cf. al-Māwardī, *Adab al-qāḍī*, ed. Muḥyī Hilāl al-Sirḥān (Baghdad: Maṭbaʿat al-irshād, 1971), I, p. 695.

[36] Relying mainly on later sources (al-Ghazālī, Ibn Farḥūn), Tyan concludes that the interpreter was a permanent official at the qadi's court. E. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 2nd ed. (Leiden: Brill, 1960), p. 258. However, we have found no evidence that this was the case in the East during the first four centuries of Islam.

[37] ʿUmar b. ʿAbd al-ʿAzīz Ibn Māza, *Sharḥ adab al-qāḍī li-l-imām Abī Bakr Aḥmad b. ʿUmar al-Khaṣṣāf*, ed. Abū al-Wafā' al-Afghānī and Abū Bakr Muḥammad al-Hāshimī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), p. 99.

[38] M. Tillier, "La société abbasside au miroir du tribunal," p. 175.

[39] Abū l-Muhallab Hayṯam b. Sulaymān al-Qaysī, *Adab al-qāḍī wa-l-qaḍā'*, ed. Farḥāt al-Dashrāwī (Tunis: al-Sharika l-Tūnisiyya li-l-Tawzīʿ, 1970), p. 27-28. See also al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, p. 328; Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 30-31.

[40] Al-Khaṣṣāf, *Adab al-qāḍī*, p. 328. See also Abū l-Muhallab, *Adab al-qāḍī*, p. 27.

[41] Al-Shāfiʿī, *Kitāb al-Umm*, ed. Muḥammad Zuhrī al-Najjār (Beirut: Dār al-Maʿrifa, 1973), VI, p. 204; Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 30; al-Māwardī, *Adab al-qāḍī*, I, p. 695-96.

[42] Al-Māwardī, *Adab al-qāḍī*, II, p. 700.

incursions in the early decades of Islam, this resistance leading to a non-aggression pact in 31/652.[43] During the Umayyad period, a more formal treaty was apparently concluded between the governor of Egypt and the Nubians, stipulating, inter alia, that both Muslim and Nubian merchants were free to travel on both sides of the frontier.[44] A letter preserved on papyrus from Muslim governor Mūsā b. Kaʿb (r. 141/758-9)[45] to the king of Makuria nonetheless documents tense diplomatic relations between the two realms along with the judicial procedure for a particular case.

A man named Muḥammad b. Zayd sent an anonymous merchant (presumably of servile condition) on his behalf to Nubia to trade and "reclaim assets that belonged to him" (*ṭalab ḥuqūq la-hu*). This last formula suggests the existence in Nubia of a judicial system in which the merchant could claim his master's property rights, acting as the latter's representative. However, the Nubians put this unnamed merchant in jail. The case then took on a diplomatic dimension. The deputy governor (*ʿāmil*) of Aswan, Salm b. Sulaymān, was informed of the situation and corresponded with the Prefect of Nubia, who requested that Muḥammad b. Zayd come in person to manage his representative's assets. Upon his arrival in Nubia, the aforementioned Muḥammad b. Zayd was arrested, severely beaten, and imprisoned for three days, after which he was released. Upon returning to Aswan, the deputy governor had Muḥammad b. Zayd present Muslim witnesses to his misfortunes, before handing the case over to the governor of Egypt, Mūsā b. Kaʿb. In Fusṭāṭ, the latter first confronted Muḥammad b. Zayd with an ambassador (*rasūl*) from the King of Nubia, Petre. Petre's men explained that the representative, still imprisoned in Nubia, had been mistaken for a Beja bandit. Instead of trying the case in person, the governor referred it to the qadi of Fusṭāṭ, Ghawth b. Sulaymān (in office 135-144/753-761).[46] The qadi ordered Petre to release the incarcerated representative with his possessions if he was still alive. In case of the representative's demise, the qadi ordered Petre to pay a 1,000-dinar compensation (*diya*). After summarizing these events, the governor Mūsā b. Kaʿb concludes his letter to the King of Nubia and Makuria by asking him to release the detained merchant or to send him the blood money if he died in prison.[47]

This papyrus, discovered at Qaṣr Ibrīm in Lower Nubia, shows that Muslims intended to trade peacefully in accordance with the treaty they concluded with the Nubians, and that violations of this treaty by one side could lead to legal proceedings. The wrongful imprisonment of a merchant, and later of his boss, was first dealt with in local proceedings before the deputy

---

[43] On these unsuccessful attempts, see R. Seignobos, *L'Égypte et la Nubie à l'époque médiévale. Élaboration et transmission des savoirs historiographiques (641-ca 1500)*, Ph.D thesis, Université Paris 1 Panthéon-Sorbonne, Paris, 2016, p. 32-52.

[44] See M. Hinds and H. Sakkout, "A Letter from the Governor of Egypt to the King of Nubia and Muqurra Concerning Egyptian-Nubian Relations in 141/758," in W. al-Qāḍī (ed.), *Studia Arabica et Islamica. Festschrift for Iḥsān ʿAbbās on his Sixtieth Birthday* (Beirut: American University of Beirut, 1981), p. 209-229, p. 215; R. Seignobos, *L'Égypte et la Nubie*, p. 75-6.

[45] On this governor, see al-Kindī, *Taʾrīḫ Miṣr wa-wulāti-hā*, in *The Governors and Judges of Egypt*, ed. Rhuvon Guest (Leiden: Brill, 1912), p. 106-108.

[46] See his biography in al-Kindī, *Aḫbār quḍāt Miṣr*, p. 356 *sq*.

[47] This letter, known by papyrologists as *P. Hinds Sakkout Nubia*, was edited by M. Hinds and H. Sakkout, "A Letter from the Governor of Egypt to the King of Nubia and Muqurra Concerning Egyptian-Nubian Relations in 141/758," in W. al-Qāḍī (ed.), *Studia Arabica et Islamica. Festschrift for Iḥsān ʿAbbās on his Sixtieth Birthday* (Beiruth: American University of Beirut, 1981), p. 209-229; see also J.M. Plumley, "An Eighth Century Arabic Letter to the King of Nubia," *The Journal of Egyptian Archaeology*, 61 (1975), p. 246.

governor of Aswan, as apparently no qadi was in office in this southern Egyptian town. Faced with difficulties, the deputy governor referred the case to the provincial governor, who in turn transferred it to his qadi to obtain a judgment according to Islamic law. It should be noted that, because of the "international" circumstances, the trial was conducted through intermediaries. The merchant imprisoned in Nubia was represented by his master, while the Nubian authorities were represented by the king's ambassador. No literary text records this case, which was perhaps too unremarkable to enter into historical annals. The annals' silence may indicate that this type of diplomatic crisis with judicial ramifications was quite usual with Nubia. Nubia was a unique case among other countries outside the *dār al-islām*, due to the treaty it signed with Egypt. One therefore cannot extrapolate how similar situations were dealt with across other borders, especially on the Byzantine and Central Asian frontiers.

A few decades later, another lawsuit involved Egyptians and Nubians, with diplomatic relations between the two countries setting the scene. This time, the incident is reported in literary form by al-Masʿūdī (d. 345/956). Muslims from Aswan, he says, owned lands (*ḍiyāʿ*) in Nubia purchased under the Umayyads and early Abbasids. The Muslims paid their land taxes to the ruler of Nubia – that is, the King of Makuria or his deputy, the Prefect of Nubia. However, when Caliph al-Maʾmūn (r. 198-218/813-833) visited Egypt in early 217/832,[48] the King of Makuria sent an embassy (*wafd*) to Fusṭāṭ to reclaim these lands. The original sellers of the land the Muslims purchased, according to the king, were his slaves and did not own these lands. These slaves only had usufructuary rights to the land and the sale was therefore illegal. The caliph referred the case to the "judge of the city of Aswan" (*al-ḥākim bi-madīnat Uswān*), who would be helped by scholars and elders in making the decision. The ensuing lawsuit pitted the land-owning inhabitants of Aswan against the King of Makuria (represented by a *wakīl*, or by the Nubians who sold the land). It threatened Muslim economic interests, as these landowners would lose their lands if the servile condition of the Nubian sellers was established. Therefore, says al-Masʿūdī, the people of Aswan resorted to trickery. They persuaded the Nubian sellers to reject the claim that they were slaves before the judge, and to declare that they were simply "the subjects" of their king. "To be a slave" of the king, the Muslims of Aswan maliciously told them, meant nothing more than that, and in this capacity Muslims were also the caliph's "slaves". This scheme was successful and the Muslim judge in Aswan approved the sale.[49] Al-Maqrīzī (d. 845/1442), who quotes this narrative, adds that a few years later, in 221/836, a prince of Makuria, Georgios, repeated his complaint to Caliph al-Muʿtaṣim (r. 218-227/833-842) when the two met in Samarra.[50] The prince's claim was equally unsuccessful because when the governor of Aswan and the judge appointed to decide the case (*al-mukhtār li-l-ḥukm*) summoned the Nubians, they continued to claim that they were only the king's "subjects." The complaint was consequently dismissed.[51] As Robin Seignobos notes, both stories likely refer to a single lawsuit that took place during the reign of either al-Maʾmūn or al-Muʿtaṣim.[52]

---

[48] See al-Kindī, *Wulāt*, p. 192.

[49] Al-Masʿūdī, *Murūj al-dhahab*, ed. Charles Pellat (Beirut: Publications de l'Université Libanaise, 1974), II, p. 131-2. This story is also narrated by al-Maqrīzī, *al-Mawāʿiẓ wa-l-iʿtibār fī ḏikr al-ḫiṭaṭ wa-l-āṯār*, ed. Ayman Fu'ād Sayyid (London: Mu'assasat al-Furqān li-l-Turāṯ al-Islāmī, 2002), I, p. 537.

[50] On this ambassy, see R. Seignobos, *L'Égypte et la Nubie*, p. 131-141.

[51] Al-Maqrīzī, *al-Mawāʿiẓ wa-l-iʿtibār*, I, p. 547.

[52] R. Seignobos, *L'Égypte et la Nubie*, p. 155.

This narrative, which aims to highlight the Muslim landlords' intelligence before the Nubian king, should probably not be taken literally. Land ownership probably existed in Lower Nubia, as Seignobos remarks, and therefore the word "slaves" (*ʿabīd*) used in al-Masʿūdī's biased narrative should perhaps be taken with a grain of salt.[53] Could one not reverse the argument and think that the ruler of Makuria, in order to increase his land estate, tried to use Islamic law to his advantage by building his complaint on a rhetorical argument, namely the "servile" status of his subjects? No evidence allows us to answer. Be that as it may, the Nubian sellers were apparently not as naïve as the narrative sources suggest. Had they acknowledged that they were slaves, the Nubians would not only have lost the lands retrieved through the King of Makuria's claim, but would also have been condemned by the Muslim judge to reimburse the Aswan buyers. This event also suggests that the Nubians did not feel powerful enough to simply expropriate the Muslims and preferred to rely on judicial diplomacy, as in Muḥammad b. Zayd's case. In both stories, the king of Makuria went through diplomatic channels to sue the Muslims. Nubian judicial institutions were clearly in no position to summon the Muslim landlords. Despite the limits of this literary narrative, it suggests that Islamic judicial institutions could extend beyond the *dār al-islām* as a possible avenue for resolving cross-border disputes, perhaps because of the system's well-established structure as early as the third/ninth century.

2. Disputes Between non-Muslims in Early Islam

2.1. Lawsuits between *dhimmī*s

Jews, Christians and Zoroastrians already had courts before the Islamic conquests. In the Byzantine and Sassanid empires, rabbinic and episcopal courts enjoyed official recognition, although their justice was sometimes reduced to a form of arbitration.[54] With the exception of the Zoroastrian courts, whose fate the sources do not document, these institutions underwent important developments in the early centuries of Islam. Both Jewish and Christian judges demanded from their flock that they turn exclusively to their courts to settle their disputes.[55] Certain secular judicial institutions survived for several decades alongside religious justice. Muslim governors in Egypt maintained the doukes who administered the eparchies and at the lower level, the indigenous pargarchs who held judicial authority in their districts (ar. *kūra*). Coptic and Arab papyri show that the Copts still brought their disputes before the latter in the early eighth century CE. At the time, Muslim authorities were still poorly represented in Egypt's hinterland, and the qadi's institution had not yet proliferated. Consequently, the local inhabitants were compelled to turn to their traditional institutions.[56]

From the Umayyad period on, *dhimmī* litigants nevertheless occasionally appealed to Muslim authorities. A series of rescripts on papyrus issued by the Egyptian governor Qurra b. Sharīk (r. 90-96/709-714) illustrate how Coptic litigants in Upper Egypt brought claims regarding substantial debts or usurpations before him. In return, the governor sent written instructions to the local pagarchs, ordering them to consider evidence and decide their cases.

---

[53] R. Seignobos, *L'Égypte et la Nubie*, p. 156-7.
[54] For further details, see M. Tillier, *L'invention du cadi*, p. 401-4, 414-5, 434-441.
[55] U.I. Simonsohn, *A Common Justice. The Legal Allegiances of Christians and Jews Under Early Islam* (Philadelphia: University of Pennsylvania Press, 2011), p. 157 *sq*.
[56] See M. Tillier, *L'invention du cadi*, p. 41-77.

This rescript procedure, presumably based on pre-Islamic Byzantine practice, continued during Abbasid times. Litigants in Upper Egypt continued to send petitions to the governor of Fusṭāṭ, asking him to order local deputy governors to examine their disputes.[57]

From the 720s or 730s,[58] the Egyptian hinterland's progressive administrative Islamisation allowed *dhimmī*s to address their claims to local Muslim officials. However, the institution of qadi as such probably did not develop in secondary towns before the late third/ninth century. [59] In major cities with a large proportion of Muslims, qadi justice was a viable alternative to Jewish and Christian communal institutions from the first/seventh century on. Muslim justice attracted non-Muslim litigants who could use it to circumvent their communal law (especially in matters of inheritance and marriage) and to obtain more binding and enforceable decisions.[60] For Muslim jurists, however, *dhimmī*s were not necessarily guaranteed access to the qadi, a figure that appeared increasingly as the representative of an Islamic justice primarily intended for Muslims. Should the qadi pass judgment between non-Muslim litigants? If the two litigants did not belong to the same faith – for example, a Jew and a Christian – the qadi could not refer them to a particular communal institution and had to hear their case. In such cases, the qadi embodied state justice although he relied on Islamic jurisprudence. The answer to the question of intra-*dhimmī* lawsuits was more complicated if the litigants belonged to the same religion.

Traces of controversies on this issue date back to the first decades of the eighth century CE. In a chapter entitled "Do Muslims Pass Judgment on [the People of the Book]", ʿAbd al-Razzāq al-Ṣanʿānī presents various opinions. Caliph ʿUmar II reportedly instructed the governor of Mosul, ʿAdī b. ʿAdī, to receive non-Muslims who came to seek his justice.[61] The Syrian al-Awzāʿī agreed with this opinion.[62] The Meccan ʿAṭāʾ b. Abī Rabāḥ (d. *c*. 114/732), the Baṣran Ibrāhīm al-Nakhaʿī (d. *c*. 96/714) and the Kūfan ʿĀmir al-Shaʿbī (d. between 103/721 and 110/728) conceded that Muslim judicial authorities were free to either adjudicate cases between People of the Book or to refer them to their communal institutions.[63] According to the Medinan al-Zuhrī (d. 124/742), finally, "it is customary (*maḍat al-sunna*) for [people of the Book] to be referred, with regard to their claims (*ḥuqūq*, i.e. material disputes) and their inheritances, to those of their religion." According to the same scholar, the sole exception to this rule is a case involving corporal punishment (*ḥadd*): *Dhimmī*s were allowed to request the carrying out of *ḥadd* punishments before Muslim legal authorities.[64] If we assume that the instruction attributed

[57] M. Tillier, *L'invention du cadi*, p. 99-100. See also P.Cair.Arab. inv. n°669.
[58] Cf. P.M. Sijpesteijn, « Landholding Patterns in Early Islamic Egypt », *Journal of Agrarian Change*, 9 (2009), p. 127; H.I. Bell, "The Administration of Egypt under the 'Umayyad Khalifs," *Byzantinische Zeitschrift*, 28 (1928), p. 281.
[59] M. Tillier, *L'invention du cadi*, p. 131-4.
[60] U.I. Simonsohn, *A Common Justice*, p. 147-156, 174-182. Jessica Goldberg notes, however, that in the eleventh century, Jewish merchants documented by the Geniza preferred to turn to Jewish courts to settle their internal disputes; they complained to Islamic authorities, or threatened to do so, mostly when the proceedings before the rabbinical court failed, or when faced with an overly powerful Jewish adversary. J. Goldberg, *Trade and Institutions in the Medieval Mediterranean. The Geniza Merchants and their Business World* (New York: Cambridge University Press, 2015), p. 159-164.
[61] ʿAbd al-Razzāq al-Ṣanʿānī, *Muṣannaf ʿAbd al-Razzāq*, ed. Ḥabīb al-Raḥmān al-Aʿẓamī (Beirut: al-Maktab al-Islāmī, 1983), X, p. 322.
[62] Al-Ṭaḥāwī and al-Jaṣṣāṣ, *Mukhtaṣar ikhtilāf al-ʿulamāʾ*, ed. ʿAbd Allāh Naḏīr Aḥmad (Beirut: Dār al-Bashāʾir al-Islāmiyya, 1995), III, p. 391.
[63] ʿAbd al-Razzāq al-Ṣanʿānī, *Muṣannaf*., p. 321-2.
[64] ʿAbd al-Razzāq al-Ṣanʿānī, *Muṣannaf*, X, p. 322.

to ʿUmar II represented the official Umayyad practice, judicial hearings were initially wide open to non-Muslims. The welcoming of non-Muslims into Islamic courts suggests that Umayyad rulers regarded their judicial system as a state institution rather than a Muslim one, a view contested by scholars who adhered to a more closed and communitarian conception of the judiciary.

During the Abbasid period, jurists came to define the place of non-Muslims in qadis' courts more precisely. Jurists raised two main issues: (1) Should a qadi examine disputes between non-Muslims? (2) Under what conditions could he do so?

In response to the first question, most jurists agreed that a qadi should handle cases when approached by non-Muslims. Al-Shāfiʿī (d. 204/820), however, stated that the qadi should refrain from judging and refer the case to a judge belonging to the litigants' community.[65] The answer to the second question was, however, disputed. Among the Ḥanafīs, Abū Yūsuf (d. 182/798) allowed a qadi to handle a dispute between two non-Muslims even without the consent of one of the litigants. Ḥanbalī, Ẓāhirī, and Zaydī Shi'i jurists held the same opinion.[66] According to other jurists (including Abū Ḥanīfa), the litigants needed to agree on submitting their dispute to a Muslim qadi.[67] Hence, the qadi's justice worked for non-Muslims as an arbitration system requiring the consent of both parties.

Non-Muslims appearing before a qadi were tried according to Islamic law, with a few exceptions: Islamic law regarding marriage (such as the post-separation waiting period, the *ʿidda*), wine drinking, and fornication did not necessarily apply to non-Muslims – with slight variations depending on the qadi's legal school.[68]

The main problem when non-Muslims appealed to a qadi was that of testimonies. When confronting to a Muslim defendant, a non-Muslim plaintiff could not produce non-Muslim witnesses (see above). Could he do so when the defendant was also a non-Muslim? The *Muṣannaf*s of ʿAbd al-Razzāq and Ibn Abī Shayba suggest that second/eighth century scholars (both in Iraq and in the Hijaz) allowed the testimony of non-Muslims against an individual belonging to the same faith.[69] According to al-Ṭaḥāwī (d. 321/933), the chief qadi Yaḥyā b. Aktham (d. 242/857) said: "I collected all the opinions regarding this matter, and I did not find anyone among the predecessors who rejected the testimony of Christians against one another, with the exception of Rabīʿa [al-Ra'y]. I found that the latter rejected it in some cases], but also that he authorized it [in others]."[70] The more archaic Umayyad-era opinions seem therefore to have unanimously accepted the testimony of non-Muslims against members of their own community. Indeed, in the 120s/738s, the Egyptian qadi Khayr b. Nuʿaym, who received his

---

[65] Al-Shāfiʿī, *Kitāb al-umm*, ed. Rifʿat Fawzī ʿAbd al-Muṭṭalib (al-Manṣūra: Dār al-Wafā', 2001), VIII, p. 102. A different position is nevertheless attributed to him in al-Ṭaḥāwī and al-Jaṣṣāṣ, *Mukhtaṣar ikhtilāf al-ʿulamā'*, III, p. 392. *Cf.* A. Fattal, *Le statut légal*, p. 353; N. Edelby, *Essai sur l'autonomie législative et juridictionnelle des chrétiens d'Orient sous la domination musulmane, de 633 à 1517*, Ph.D thesis, Rome, 1950, p. 287-8.

[66] ʿA.-K. Zaydān, *Aḥkām al-dhimmiyīn*, p. 570-1.

[67] Al-Khaṣṣāf, *Adab al-qāḍī*, p. 596; Al-Ṭaḥāwī and al-Jaṣṣāṣ, *Mukhtaṣar ikhtilāf al-ʿulamā'*, III, p. 390; Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 37-38. See N. Edelby, *Essai sur l'autonomie*, p. 290; ʿA.-K. Zaydān, *Aḥkām al-dhimmiyīn*, p. 572. For later developments in Māliki law, see Ibn ʿAbd al-Rafīʿ, *Muʿīn al-ḥukkām ʿalā l-qaḍāyā wa-l-aḥkām*, ed. Muḥammad Qāsim b. ʿIyāḍ (Tunis: Dār al-Gharb al-Islāmī, 2011), II, p. 636.

[68] Al-Ṭaḥāwī and al-Jaṣṣāṣ, *Mukhtaṣar ikhtilāf al-ʿulamā'*, III, p. 390; Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 37.

[69] ʿAbd al-Razzāq al-Ṣanʿānī, *Muṣannaf*, VIII, p. 356-9; Ibn Abī Shayba, *al-Muṣannaf*, VII, p. 692-6. Cf. Ibn Ḥazm, *al-Muḥallā* (Cairo: Idārat al-Ṭibāʿa al-Munīriyya, 1352 H.), IX, p. 410; J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), p. 210.

[70] Al-Ṭaḥāwī and al-Jaṣṣāṣ, *Mukhtaṣar ikhtilāf al-ʿulamā'*, III, p. 341.

dhimmī litigants outside the mosque, "accepted the testimony of a Christian against a Christian, of a Jew against a Jew, and investigated their trustworthiness (*ʿadāla*) among their co-religionists."[71] In the early Abbasid period, the Egyptian jurist al-Layth b. Saʿd (d. 175/791) still upheld this practice.[72] During the second half of the second-eighth century, the testimony of one Christians for another was still accepted in Mesopotamia, in cases related to taxation, according to Syriac sources.[73]

An evolution took place at the same time, however, when some jurists – first Mālik b. Anas (d. 179/795) and his disciples, then al-Shāfiʿī – began to reject categorically the trustworthiness of any non-Muslim. These jurists thus undermined the validity of a non-Muslims' testimony even against their co-religionists. Other jurists, more nuanced, took into consideration whether or not the litigants belonged to the same religion. Two tendencies stand out in the classical era:

(1) Ḥanafīs accepted not only the testimony of a non-Muslim against his co-religionist, but also inter-confessional testimony, whatever the nature of the case. Therefore, the testimony of Christians against a Jew or a Zoroastrian, of Jews against a Christian or a Zoroastrian, etc. were all valid. Al-Ṭaḥāwī justifies this opinion by arguing that "all disbelief (*kufr*) is considered a single religion (*milla*)."[74] Ismāʿīlī *fiqh* also allows non-Muslims to testify against each other.[75] Zaydīs consider a *dhimmī*'s testimony against another valid, but some deny Zoroastrians this right.[76] Ibāḍīs all accept testimonies within the same confessional group (a Christian against a Christian, a Jew against a Jew), but are divided on inter-confessional testimony (a Christian against a Jew or vice versa), with some accepting it and others not.[77] Muslim jurists did not take into consideration that Jews and Christians were themselves divided between different theological or communal affiliations (Rabbanites versus Karaites, Melkites versus Jacobites/West-Syrians versus Nestorians/East-Syrians).

(2) On the other hand, Mālikīs, Shāfiʿīs and Imamīs categorically invalidated the testimony of non-Muslims against other non-Muslims, whether or not they belonged to the same faith.[78] Later, Ḥanbalīs showed more hesitation on this point. Aḥmad b. Ḥanbal (d. 241/855) apparently accepted the testimony of non-Muslims against one another, but al-Khallāl (d. 311/923) did not agree with him and forbade inter-confessional testimony.[79]

---

[71] Al-Kindī, *Akhbār quḍāt Miṣr*, p. 351.
[72] Al-Ṭaḥāwī and al-Jaṣṣāṣ, *Mukhtaṣar ikhtilāf al-ʿulamā'*, III, p. 340.
[73] *Chronique de Denys de Tell-Mahré*, p. 186/154, 205/170.
[74] Al-Ṭaḥāwī, *Muḫtaṣar al-Ṭaḥāwī*, ed. Abū l-Wafā' al-Afghānī (Hyderabad: Lajnat Iḥyā' al-Maʿārif al-Nuʿmāniyya, n.d.), p. 335. See also al-Shaybānī, *al-Aṣl*, VII, p. 588; XI, p. 516; Ibn Ḥazm, *al-Muḥallā*, IX, p. 409.
[75] Al-Qāḍī al-Nuʿmān, *Daʿā'im al-islām*, ed. ʿĀsif b. ʿAlī Aṣghar Fayḍī (Cairo: Dār al-Maʿārif, 1951), II, p. 514.
[76] Ibn al-Murtaḍā, *al-Baḥr al-zakhkhār al-jāmiʿ li-madhāhib ʿulamā' al-amṣār*, ed. Muḥammad Muḥammad Tāmir (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001), VI, p. 35.
[77] Abū Ghānim al-Khurāsānī, *al-Mudawwana al-ṣughrā* (Oman: Wizārat al-Turāth al-Qawmī wa-l-Thaqāfa, 1984), II, p. 110-11; *id*., *al-Mudawwana al-kubrā*, ed. Muṣṭafā b. Ṣāliḥ Bājū (Oman: Wizārat al-Turāth wa-l-Thaqāfa, 2007), III, p. 97, 107.
[78] Al-Ṭaḥāwī and al-Jaṣṣāṣ, *Mukhtaṣar ikhtilāf al-ʿulamā'*, III, p. 340. See also Ibn ʿAbd al-Ḥakam, *al-Mukhtaṣar al-ṣaghīr*, Ms Süleymaniye nº 966 (Istanbul), fol. 73r; Ṣaḥnūn, *al-Mudawwana al-kubrā* (Cairo: Maṭbaʿat al-Saʿāda, 1323 H.; rep. Dār Ṣādir), IV, p. 21-2; Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 104; al-Ṭūsī, *al-Mabsūṭ fī fiqh al-imāmiyya* (Beirut: Dār al-Kitāb al-Islāmī, 1992), VIII, p. 218. Cf. N. Edelby, *Essai sur l'autonomie*, p. 295-6; A. Fattal, "How Dhimmīs were Judged in the Islamic World," in R. Hoyland (ed.), *Muslims and Others in Early Islamic Society* (Aldershot: Ashgate, 2004), p. 100; A. El Shamsy, "The Logic of Excluding Testimony in Early Islam," in I.A. Rabb and A. Krasner Balblale (ed.), *Justice and Leadership in Early Islamic Courts* (Cambridge: Harvard University Press, 2017), p. 3-15.
[79] Ibn Qudāma, *al-Mughnī*, XIV, p. 173.

This restriction on non-Muslims' testimony, even regarding internal community disputes, compelled *dhimmī*s to change their notarial habits. The gradual spread of Muslim courts in the empire's hinterland increased the likelihood that disputes would be heard before a qadi. In Egypt, where the Mālikī and Shāfiʿī schools gained majorities at the turn of the ninth century, non-Muslims soon resorted to calling on Muslims to testify for their legal deeds. Therefore, legal documents mentioning exclusively Christian contracting parties, written in Arabic according to Muslim legal formulas (*shurūṭ*), multiplied from the third/ninth century onwards. Such documents increasingly ended with subscriptions of Muslim witnesses. In the following centuries, this phenomenon expanded, to the point that Christian legal documents from the Fatimid period were systematically drawn up by Muslim notaries.[80]

Finally, Muslim judicial institutions could collaborate with those of the *dhimmī*s. Muslims considered non-Muslim judicial systems to be of limited scope. In classical law, only Ḥanafīs accept the official appointment of a non-Muslim as qadi among his co-religionists.[81] Mālikīs, Shāfiʿīs and Ḥanbalīs, on the other hand, consider non-Muslim judicial institutions as mere arbitration (*taḥkīm*).[82] While *fiqh* recognizes arbitration as binding, an arbitrator cannot rule on criminal matters (*ḥadd* and *lex talionis*), which are the exclusive domain of the Islamic state.[83] Being reduced to the status of arbitrators meant that non-Muslim authorities had to refer criminal cases to Muslim courts. Moreover, as one could appeal against an arbitrator's award before a qadi,[84] the same was likely to happen for non-Muslim judges' decisions, either to obtain a different decision or to enforce a judgment if one of the parties refused to comply.[85] In the event of an appeal, some qadis probably confirmed the decisions of community judges while others, as advocated by al-Māwardī, considered that they did not have to respect a non-Muslim judge's decision.[86] Several Geniza documents also show that Jews in Egypt regularly appealed to the Fatimid and then Mamluk rulers through the *maẓālim* institution. The purpose of such appeals was to obtain rescripts requiring the community court to judge their case, or to obtain a decision different from that of their community court.[87]

2.2. Lawsuits between foreigners (*mustaʾmin*s)

Lawsuits between *mustaʾmin*s generally followed the same rules as those applied to *dhimmī*s. The fault line dividing jurists who considered a qadi entitled to hand down a ruling by virtue of a *mustaʾmin*'s appeal and those jurists who required the consent of both litigants paralleled the *dhimmī* cases, with a few nuances. For example, although al-Awzāʿī considered adjudication between *dhimmī*s as mere arbitration, he requested that the qadi decide between two *mustaʾmin*s

[80] M. Tillier, *L'invention du cadi*, p. 126-127. See also L. Weitz, "Islamic Law on the Provincial Margins: Christian Patrons and Muslim Notaries in Upper Egypt, 2nd-5th/8th-11th Centuries," *Islamic Law and Society*, 27 (2019), p. 5-52.
[81] Al-Māwardī, *al-Aḥkām al-sulṭāniyya wa-l-wilāyāt al-dīniyya*, ed. Aḥmad Mubārak al-Baghdādī (Kuwait: Maktabat Dār Ibn Qutayba, 1989), p. 89. See E. Tyan, *Histoire de l'organisation judiciaire*, p. 90.
[82] Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 37-38. See also N. Edelby, *Essai sur l'autonomie*, p. 273; A. Fattal, "How Dhimmīs were Judged," p. 91-5.
[83] Al-Khaṣṣāf, *Adab al-qāḍī*, p. 585-587; al-Māwardī, *Adab al-qāḍī*, II, p. 381; ʿUmar b. ʿAbd al-ʿAzīz Ibn Māza, *Sharḥ Adab al-qāḍī*, p. 483. See M. Tillier, *Les cadis d'Iraq*, p. 310-2.
[84] See M. Tillier, *Les cadis d'Iraq*, p. 314.
[85] N. Edelby, *Essai sur l'autonomie*, p. 275; U.I. Simonsohn, *A Common Justice*, p. 190.
[86] Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, p. 89.
[87] M. Rustow, "At the Limits of Communal Autonomy: Jewish Bids for Intervention from the Mamluk State," *Mamlūk Studies Review*, 13 (2009), p. 133-159, p. 138, 150-151.

even if they did not agree to submit their dispute to him.[88] He thus took into account the fact that *mustaʾmin*s did not have access the judicial system of a specific community. Conversely, al-Shāfiʿī insisted on the arbitral nature of qadi adjudication for *mustaʾmin*s, and on the qadi's right to refuse to hear their disputes.[89] As for Mālikīs, they consented to adjudicating between foreigners in the territory of Islam only if they belonged to a population that was a beneficiary of a *ṣulḥ*, that is a peace treaty.[90]

Generally speaking, Ḥanafīs are those who provide more details about justice for the *mustaʾmin*s. Any dispute about a transaction or an act committed in the *dār al-islām* was to be treated in the same way, whether the litigants were *mustaʾmin*s or Muslims. The qadi was to mete out justice to all, to punish murderers with execution or blood money, and so forth. The only exceptions were the scriptural punishments (*ḥudūd*) for fornication and theft, as stoning and amputation could not be applied to *mustaʾmin*s.[91] On the other hand, Ḥanafīs' territorial conception of law also had consequences on the acceptability of claims between *mustaʾmin*s. If two *mustaʾmin*s litigated for a debt (*dayn*) or a deposit (*wadīʿa*), the qadi could only consider their dispute if the deal had been contracted in the *dār al-islām*. If the deal had been contracted in the *dār al-ḥarb*, the litigants had to either become *dhimmī*s or convert to Islam for the qadi to handle their case. Such a change in personal legal status allowed them to sue in court for financial claims contracted abroad, but not claims relating to real estate in the *dār al-ḥarb* (as in cases of land usurpation, *ghasb*). They could not claim their land rights abroad before a qadi whose authority did not extend there.[92]

Legal schools that categorically rejected the testimony of non-Muslims, even against their co-religionists, such as the Mālikīs, the Shāfiʿīs and the Imamīs, did not conceive of a legal difference between *dhimmī*s and *mustaʾmin*s. The only valid witnesses either could produce were Muslims. By contrast, Ḥanafīs were more flexible. According to Abū Yūsuf and al-Shaybānī, a *dhimmī* could testify against a *mustaʾmin*, but not the other way around, which established a de facto hierarchy between the two categories. A *dhimmī* was considered more reliable than a *mustaʾmin* because he was integrated into the *dār al-islām*. To testify against a *dhimmī*, a *mustaʾmin* needed therefore to become a tributary himself. The two jurists also held that *mustaʾmin*s could testify against one another, but only on the condition that they originate from the same realm (*dār*): a Byzantine could not, therefore, testify against a Nubian, and vice-versa.[93]

2.3. Case-study: A lawsuit between Christians in the late Umayyad period

The *History of the Patriarchs of Alexandria*, the "primitive" version of which was composed in Arabic in the fifth/eleventh century[94] and the "vulgate" version two centuries later, describes a dispute between Melkites (Chalcedonians) and Copts (Miaphysites) under the last Umayyad

[88] Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 36.
[89] Al-Ṭaḥāwī and al-Jaṣṣāṣ, *Mukhtaṣar ikhtilāf al-ʿulamāʾ*, III, p. 392. See ʿA.-K. Zaydān, *Aḥkām al-dhimmiyīn*, p. 570.
[90] Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 36.
[91] Al-Ṭabarī, *Kitāb al-jihād*, p. 56.
[92] Al-Shaybānī, *al-Siyar al-kabīr*, p. 179/trans. p. 171; al-Sarakhsī, *Sharḥ al-Siyar al-kabīr*, I, p. 247-8; V, p. 127.
[93] Al-Shaybānī, *al-Aṣl*, XI, p. 231; al-Sarakhsī, *al-Mabsūṭ*, XXVI, p. 42; Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 104.
[94] See J. den Heijer, « Mawhūb ibn Manṣūr ibn Mufarriǧ (XIe siècle) : petit essai biographique », *Parole de l'Orient*, 14 (1987), p. 203-217.

caliph, Marwān II (r. 127-132/744-750). The story begins with the arrival in Syria of "merchants from the countries," a vague expression that could either refer to foreigners visiting the *dār al-islām*, or to Christians, presumably Melkites, who came from Egypt. These merchants, who collected money for the caliph, asked him in exchange to let them build churches in Egypt, and Marwān agreed to this project. The Melkite patriarch, called Theophylact (or Cosmas), then stepped in to claim that the Copts seized many churches from the Chalcedonians in Egypt at the time of the conquest. He therefore asked the caliph to write to the governor of Egypt and urged him to return the church of St. Menas (Abū Mīnā) in Maryūṭ, near Alexandria, to the Melkites. Theophylact himself brought to the governor ʿAbd al-Malik b. Mūsā b. Nuṣayr (r. 132/750) the letter in which the caliph asked the governor to investigate (*yukshifa al-ḥāl*) the dispute between the Miaphysites and the Chalcedonians.

Having read this letter, the governor summoned the two patriarchs to Fusṭāṭ. Initially, he entrusted the investigation to two administrators: the head of the *dīwān* (a Muslim) and a certain ʿĪsā b. Tamun (primitive recension) or ʿĪsā b. ʿĀmir (vulgate), whom the Chalcedonians tried to bribe. The two administrators asked each patriarch for a written statement of their arguments. After a month, neither party was able to provide sufficient evidence in support of his claims, and the procedure failed as a result. The governor then refered the case to a "son of a Muslim qadi," named Abū al-Ḥusayn (henceforth referred to as "the qadi" by the authors), whom he instructed to "judge" (*yaḥkum*) the case. The qadi first asked the two patriarchs to rewrite their reports and then, after several twists and turns, including a quasi-riot between Christians at the governor's hearing, was obliged to offer a definitive judgment.

The qadi, who sat surrounded by administrators (*aṣḥāb al-dawāwīn*), secretaries, and elites (*wujūh*) from Fusṭāṭ, started by asking the Miaphysite patriarch, Michael, to swear that the disputed church belonged to his community. Michael refused, arguing that his religion did not allow him to take the oath (see above), but that he could prove his right in writing (*masṭūr*). The qadi then turned to the Melkite patriarch, Cosmas, to ask him to take the oath. The Melkite accepted and the qadi asked for a witness in addition to his oath. When he appeared unable to produce any witness, the qadi invited the Miaphysite Michael to produce one. Michael answered that inscriptions engraved on a church column could testify in his favor. The qadi sent trusted men, secretaries, and translators to decipher the inscriptions. When the inscriptions proved the Miaphysite Patriarch right, the qadi decided in his favor and assigned the church to his community.[95]

This story, clearly written by anti-Melkite Copts, has not only a polemical dimension, but shows also how non-Muslims were expected to use Muslim institutions in the course of their conflicts. Their appeal to the caliph, justified by the high rank of the litigants, initially prompts the implementation of a rescript procedure, comparable to the one documented for the governor of Fusṭāt (see above), but at a higher level. The Egyptian governor to whom the present case was first referred apparently attempted to resolve it in an administrative manner through the examination of written petitions, a procedure that was later commonly applied in *maẓālim* courts. When this administrative procedure failed, the case was referred to a qadi. The latter's *kunya*, Abū al-Ḥusayn, does not match that of any qadi referenced by the sources. The qadi in

[95] *Historia Patriarcharum Alexandrinorum*, ed. Ch.F. Seybold (Paris: Carolus Poussielgue, 1904), I, p. 174-180; *History of the Patriarchs of the Coptic Church of Alexandria*, III, ed. B. Evetts, *Patrologia Orientalis*, 21 (1909), p. 119-132.

office at the very end of the Umayyad period was Abū Muḥammad ʿAbd al-Raḥmān b. Sālim al-Jayshānī.[96] If the dispute occurred a little earlier, however, the judge might have been Khayr b. Nuʿaym (d. *c*. 136/753-4). This particular qadi's *kunya* is controversial, and he left behind a reputation of rendering justice between Christians and Jews and accepting their testimonies.[97] The text of the *Patriarchs* describes the qadi as an old, honest, and benevolent man, an account that corresponds well with the positive image of Khayr ibn Nuʿaym in Islamic sources. The procedure as described in this narrative does not completely match the ideal advocated for by classical *fiqh*. The qadi begins by asking for oaths from both parties, whereas *fiqh* requires that the plaintiff be asked to produce witnesses first. The request for oaths is, however, addressed first to the defendant, which is consistent with Islamic legal requirements. The plaintiff takes an oath and is asked to produce a witness, which corresponds to the procedure *al-yamīn maʿa al-shāhid* (an oath in addition to a witness), later permitted by the Mālikīs.[98] In this case, the "witness" finally produced by the plaintiff is a written document, which is rejected by the classic procedure, but is reminiscent of an archaic Islamic procedure called "the testimony of the dead."[99]

Disentangling what corresponds in this account to archaic judicial practices typical of Umayyad-era judicial experiments from what polemical restitution by Coptic authors is difficult, in the absence of other sources. After all, the narrative clearly distinguishes the "bad" Melkite who does not hesitate to take an oath from the "good" Miaphysite! In spite of its imprecisions, and even its reconstructions, the text reveals the manner in which Egyptian Christians viewed their lawsuits before Islamic institutions, using either administrative authorities or the qadi's jurisdiction, whose procedures they had to adapt to.

3. Trans-Frontier Disputes between Muslims

3.1. The issue of frontiers

As we noted above, *fiqh* addresses the issue of lawsuits between foreigners and Muslims within *dār al-islām*. However, jurists scarcely discuss the possibility of a dispute that would compel a Muslim to seek justice in the *dār al-ḥarb*, whether against another Muslim or a non-Muslim. Jurists mainly address the issue of military justice in the context of cross-frontier expeditions. Although a military judge (*qāḍī al-ʿaskar*) occasionally existed, with jurisdiction on an army, judicial authority in early Islamic field armies was mainly in the hands of officers, whose duties included protecting the booty from soldiers' greed and maintaining discipline among the troops. According to Ḥanafīs (and opposing al-Shāfiʿī's opinion), however, a simple officer could not pronounce scriptural punishments (*ḥudūd*), which were the prerogative of a direct representative of the caliph, such as a city governor.[100]

Outside of martial situations, could Muslims approach the judicial authorities of foreign states to settle their internal disputes? The settlement of Muslims in certain foreign territories

[96] Al-Kindī, *Akhbār quḍāt Miṣr*, p. 353.
[97] Al-Kindī, *Akhbār quḍāt Miṣr*, p. 351. On this qadi, see *supra*.
[98] See M. Tillier, *L'invention du cadi*, p. 242 and *passim*.
[99] See M. Tillier, *L'invention du cadi*, p. 348-351.
[100] See M. Tillier, "Rendre la justice en temps de guerre. Les juges de l'armée aux trois premiers siècles de l'hégire," in M. Eychenne et al. (ed.), *Guerre et paix dans le Proche-Orient médiéval (X^e-XV^e siècle)* (Cairo-Beirut: Institut français d'archéologie orientale-Institut français du Proche-Orient, 2019), p. 189-215.

justified, early on, the establishment of local Islamic judicial institutions. The historian al-Masʿūdī (d. 345/956) reports that in Abbasid times, the Khazar kingdom had a pluralistic judicial system. Two qadis had jurisdiction over the Muslims of the king's army, two judges had jurisdiction over the Khazars and judged on the basis of the Torah, two Christians judged on the basis of the Gospels, and one judge decided disputes between Slavs, Russians, and other pagans. The same author claims that in cases of doubt, non-Muslim judges referred the case to the two qadis who decided on the basis of Islamic law.[101] Similarly, an Arab traveler from the first half of the third/ninth century mentions the existence of a qadi in Canton, appointed by the Chinese government and in charge of settling disputes between Muslims.[102] The peculiarities of Islamic civil justice outside of *dār al-islām* are not otherwise documented. All we can say is that a Muslim merchant travelling to the Khazars or to certain cities in China could appeal to these institutions in case of a claim against another Muslim living in the same region.

However, to what extent were Muslim travelers able to appeal to foreign judicial institutions? We do not know. The letter from the Egyptian governor Mūsā b. Kaʿb to the King of Makuria, which we mentioned earlier, suggests that prosecuting adversaries across the frontier was no easy affair. In addition to the case we examined, the letter refers to the impunity enjoyed by a certain Saʿd, who left for Nubia with assets belonging to Egyptian holders. The Nubians imprisoned him, thereby preventing his adversaries from recovering their property.[103] The text seems to refer to a commonplace scenario. In Nubia, Saʿd is said to have traded merchandise belonging to partners, and his detention prevented these partners from suing him to recover their capital or the profits from the sale. For what reason did Saʿd's partners not travel to Nubia themselves? Was it because of the difficulty of such a journey? Or because they feared that they would not be able to appeal to local institutions? We do not know. This example shows, however, that claiming one's rights in a foreign country, even against another Muslim, was not an easy task, and that one sometimes had to appeal to the governor of the frontier province with the hope that diplomacy would help resolve the issue.

3.2. Lawsuits between members of rival communities

When one thinks of borders, those separating *dār al-islām* from *dār al-ḥarb* most naturally come to mind. Nevertheless, the division of the Islamic realm into different politico-religious entities since ancient times requires considering these entities as separate states. As a matter of fact, jurists theorized conflict resolution across separate political domains and formulated a dichotomy between, on the one hand, *ahl al-ʿadl* ("righteous people," that is, both orthodox in their faith and faithful to the legitimate ruler) and, on the other hand, *ahl al-baghī* ("transgressive people," that is, heterodox people and rebels against the legitimate ruler). All jurists, whatever their sectarian affiliation (Sunni, Shi'i, Khariji), consider their own community to represent the righteous party, and that other politico-religious entities represent the transgressive party. For example, a Sunni jurist within the Abbasid caliphate classifies the

[101] Al-Masʿūdī, *Murūj al-dhahab*, I, p. 214
[102] Jean Sauvaget, *Aḫbār aṣ-Ṣīn wa l-Hind. Relation de la Chine et de l'Inde* (Paris: Les Belles-Lettres, 1948), p. 7.
[103] We try here to clarify a situation that is described in more vague terms: "One of the merchants of the people of our country, Saʿd by name, came to you with much wealth, having made off with it from its owners, and you detained him among you, stood between him and the one who rightly pursued him and protected him from him." M. Hinds and H. Sakkout, "A Letter from the Governor of Egypt," p. 220/trans. p. 227.

Fatimids as transgressive, and conversely, an Ismāʿīlī jurist within the Fatimid caliphate categorizes the Abbasids as transgressive. Because each of these competing political entities established judicial institutions, jurists had to determine their degree of reliability and the possibility of interactions between neighboring legal systems.

In cases of litigation between residents of two competing politico-religious entities, the first possibility was that the lawsuit take place in the presence of the two litigants before the qadi of one of the two realms. Since both were Muslims, any qadi could examine their dispute. However, the confessional identity of the witnesses was an issue. What procedures should be taken in the case of a foreign plaintiff from a Realm of the Transgression, carrying the burden of producing witnesses to prove his complaint? Could the qadi of the Righteous accept the testimony of heterodox witnesses (*fiqh* speaks in this case of *ahl al-ahwāʾ*, "people of passions")? Sunni jurists generally answer in the affirmative. Regardless whether the witnesses are Shi'is, Kharijis, or belong to other theological tendencies deemed deviant, Sunni jurists recognize these groups as Muslims and therefore accept their testimony, provided that their moral rectitude (*ʿadāla*) is attested to. However, they reject the testimony of members of certain Shi'i sects known to blindly affirm the honesty of their co-religionists, a belief that may result in groundless testimonies. Sunni jurists also reject the testimony of sectarian Muslims who consider other Muslims to be infidels (such as the Azraqis) and who allow false testimony in order to harm them. The Ḥanafī jurist Abū Yūsuf also excluded some Shi'is who openly insulted those Companions that opposed Caliph ʿAlī, first Shi'i Imām and cousin of the Prophet Muḥammad.[104] On the other hand, Shi'i law, both Imāmī and Ismāʿīli, rejects the testimony of any transgressive man, that is any non-Shi'i, because as a heterodox he must be considered as depraved.[105] A Shi'i in Sunni territory thus had greater capacity to assert his rights than a Sunni in Shi'i territory.

The second possibility was the exchange of letters between judges of the litigants' districts. Since the second/eighth century, a procedure allowed a plaintiff to sue an adversary residing in another city. The plaintiff would file his complaint before the local qadi, produce his witnesses before him, and once his testimonial evidence had been validated, the qadi would record his preliminary decision in a letter to the judge in the defendant's city. Upon receiving the letter, the addressed qadi would summon the defendant and convict him on the basis of these testimonies.[106] The implementation of this procedure was more difficult when the two qadis belonged to different political-religious entities. Could an orthodox qadi use a letter from a heterodox qadi in judicial proceedings? Sunni jurists were divided on this issue. The Ḥanafī jurist al-Shaybānī rejected such letters, since the qadi of the transgressive realm is categorically suspect of deliberately harming righteous people. Al-Shaybānī only accepted such a letter if the qadi employed by the heterodox district was himself orthodox.[107] The Mālikīs were also hostile to accepting such correspondence,[108] as were Imāmī and Ismāʿīlī Shi'is.[109] Al-Shāfiʿī's position stands out against this quasi-unanimous rejection. Although he considers the letter sent by a

[104] Al-Shaybānī, *al-Aṣl*, XI, p. 512; al-Khaṣṣāf, *Adab al-qāḍī*, p. 302-303; al-Shāfiʿī, *Kitāb al-umm*, VII, p. 509-510, 530.
[105] Al-Ṭūsī, *al-Mabsūṭ*, p. 278; al-Nuʿmān, *Daʿāʾim al-islām*, II, p. 511-512.
[106] For more details on this procedure, see M. Tillier, *Les cadis d'Iraq*, p. 366-399.
[107] Al-Shaybānī, *al-Aṣl*, VII, p. 517-518.
[108] Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 112.
[109] Al-Ṭūsī, *al-Mabsūṭ*, VII, p. 277; al-Nuʿmān, *Daʿāʾim al-islām*, II, p. 540.

qadi of the heterodox realm to be suspicious, he points out that categorically rejecting such letters would undermine the fulfillment of justice, and he advocates a case-by-case examination, with the addressed qadi checking both that judicial procedure has been properly followed by his heterodox colleague and that the testimony mentioned in the letter is based on acceptable witnesses.[110] However, the addressed qadi had little means to verify the testimonies produced before his correspondent, given the distance separating politico-religious entities. These different views perhaps imply that the written procedure across the internal frontiers of the Islamic Empire was not consistently efficient. An individual in conflict with a member of a neighboring entity would likely have better off traveling himself with his witnesses or sending a proxy.

4. Litigations Between Muslims and Foreigners During the Late Middle Ages

Since the Umayyad period, several institutions could be involved in the settlement of disputes involving foreigners, including the governor, the qadi, and other administrators. Beginning in the sixth/twelfth century, and especially in the seventh/thirteenth century, several factors led to important practical changes in conflict resolution. The establishment of the Crusader kingdoms in the Levant gave rise to new institutions dealing with conflicts involving Muslims and non-Muslims. Moreover, the development of the Italian maritime Republics led to their conclusion of commercial treaties with Muslims, treaties that included judicial clauses. The development of specific institutions also allowed the Mamlūks to adapt their judicial system to the increasing number of disputes between Muslims and foreigners.

4.1. Cross-border justice during the Crusades

The first crusade, launched in 1096, led to the establishment of four Latin states in the Near East in the subsequent years: the County of Edessa, the Principality of Antioch, the County of Tripoli, and the Kingdom of Jerusalem. Throughout the Levantine coast, as well as in northern Mesopotamia, Muslim populations became subject to Christian rule for a period ranging from a century and a half in some regions to three centuries in others. The first century of Frankish domination is poorly documented from the judicial point of view, and we do not know to what extent Islamic jurisdictions were kept in Crusader territories. At the end of the sixth/twelfth century, a qadi was in office at Jabala (Gibel), in the Principality of Antioch, but determining whether this situation was exceptional or representative of more general practices is impossible.[111]

In the Kingdom of Jerusalem, three different courts are known to have handled cases involving Muslims. The *Cour des Syriens* had jurisdiction over all non-Latins, especially Muslims, for any case of lower justice. This court was presided over by a *raʾīs* and consisted of an unknown number of jurors. Although Muslims could testify, their word had a lower value than that of the Latins. In the seventh/thirteenth century, the *Cour des Syriens* seems to have

[110] Al-Shāfiʿī, *Kitāb al-umm*, VII, p. 529-530.

[111] Cl. Cahen, *La Syrie du nord à l'époque des Croisades et la principauté franque d'Antioche* (Paris: Paul Geuthner, 1940), p. 428, 462. Cf. J. Riley-Smith, *The Feudal Nobility and the Kingdom of Jerusalem 1174-1277* (New York: Palgrave MacMillan, 1974), p. 89; H.E. Mayer, "Latins, Muslims and Greeks in the Latin Kingdom of Jerusalem," *History*, 63 (1978), p. 185. On controversies regarding this issue, see A.M. Bishop, *Criminal Law and the Development of the Assizes of the Crusader Kingdom of Jerusalem in the Twelfth Century*, Ph.D thesis, Toronto, 2011, p. 69.

largely merged with the *Cour de la Fonde*, a merchant court consisting of six Latin or native Christian jurors who had jurisdiction over Muslim merchants.[112] High justice involving commoners or natives was rendered at that time by the *Cour des Bourgeois*, before which Muslims could not testify. However, they could take an oath, although their oath had a lower value than that of the Latins.[113]

Judicial relations between the Crusader states and the Islamic territories are somewhat better understood than Crusader justice for resident Muslims. In the sixth/twelfth century, the Muslims of *dār al-islām* could bring cases before Frankish justice, as shown by the example of the famous knight Usāma ibn Munqidh (d. 584/1188). Around 1140, the Frankish lord of Banias, who had stolen a flock of sheep in Islamic territory during a period of truce (*ṣulḥ*), eventually returned the flock, but kept the lambs born in the meantime. Therefore, Usāma filed a complaint with King Foulque (Fulk) of Jerusalem, who referred the complaint to six or seven knights. They granted Usāma a financial compensation of 400 dinars.[114] In the late seventh/thirteenth century, when the Crusader states' power waned, they signed treaties with the Mamlūks providing for the retrocession of Frankish territories and the creation of jointly administered *condominia* (*munāṣafāt*).[115] These treaties decreed what criminal procedures would be followed in case of theft or homicide. If the guilty party was arrested, he would be brought before the authority of his own community – a representative of the sultan if he were a Muslim, a representative of the Crusader state to which the territory belonged if he were a Christian – who would base his judgment on that community's law. A representative of the other polity had to be present at the hearing.[116] If the culprit was not identified, treaties defined a period of investigation (between 15 and 40 days) at the end of which the head of the involved locality and three other people chosen by the plaintiff would have to swear to tell everything they knew about the crime (a procedure reminiscent of *qasāma* as understood by the Ḥanafīs[117]). If local community's representatives refused, the plaintiff's oath based on suspicion would be accepted. In the case of homicide, the treaties stipulated either that the accused community would release a captive of equivalent status or that they would pay blood money (*diya*).[118]

4.2. Commercial treaties with the maritime Republics

The development of trade in the Mediterranean and the economic and strategic interests it represented for the Islamic polities, led them to grant special treatment to disputes between residents of Islamic countries and foreign merchants. As early as the Fatimid period (297-567/909-1171), a case illustrates how Muslim authorities protected merchants in order to protect the Fatimids' economic interests. In 386/996, a fire devastated the arsenal of al-Maqs,

---

[112] J. Riley-Smith, *The Feudal Nobility*, p. 90-91; p. 6-8; A.M. Bishop, *Criminal Law*, p. 69.
[113] J. Riley-Smith, *The Feudal Nobility*, p. 87-90; A.M. Bishop, *Criminal Law*, p. 67.
[114] Usāma b. Munqidh, *Kitāb al-iʿtibār*, ed. Philip K. Hitti (Princeton: Princeton University Press, 1930), p. 65. On this incident, see A.M. Bishop, "Usāma ibn Munqidh and Crusader Law in the Twelfth Century," *Crusades*, 12 (2013), p. 63.
[115] P.M. Holt, "The Treaties of the Early Mamluk Sultans with the Frankish States," *Bulletin of the School of Oriental and African Studies*, 43 (1980), p. 72.
[116] P.M. Holt, *Early Mamluk Diplomacy (1260-1290). Treaties of Baybars & Qalāwūn with Christian Rulers* (Leiden: Brill, 1995), p. 40-41, 52, 115.
[117] See R. Peters, "Murder in Khaybar: Some Thoughts on the Origins of the *Qasāma* Procedure in Islamic Law," *Islamic Law and Society*, 9 (2002), p. 132-167.
[118] P.M. Holt, "The Treaties of the Early Mamluk Sultans," p. 72-73.

near Cairo, and destroyed a large part of the Fatimid fleet. The Amalfi community that resided nearby fell under immediate suspicion, and the mob lynched about 100 Amalfians, looting their property as well. The vizier, the commander of the army and the chief of police launched an investigation. According to al-Maqrīzī, who relies on al-Musabbiḥī (d. 420/1030), the Amalfians confessed to setting fire to the fleet. However, against all expectations, the Fatimid regime did not punish them, and only punished the mob that had attacked them. The authorities ordered the restitution of property to the Amalfians, while the looters were pursued and many were executed.[119] As Claude Cahen explains, the 200 or so Amalfians in Cairo controlled wood and iron trade, which were strategic materials for the Fatimid navy.[120] The authorities' retaliation – no text mentions the intervention of a qadi – followed state interests and aimed at protecting a foreign community that played a key role in Fatimid military policy.

Three centuries later, while the mercantile activities of the Italian merchant Republics (Genoa, Venice, Florence, Pisa) were flourishing, the Mamlūks ratified numerous treaties with them. These treaties took the form of decrees (*marsūm*) issued by the sultan, granting the Republics' merchants "stipulations" (*shurūṭ*).[121] These treaties addressed in particular how disputes involving foreign merchants would be handled in Islamic lands.[122] From the 1340s, Venetian notarial deeds also shed light on the organization of such justice.[123]

Disputes within foreign communities fell under the jurisdiction of consuls, who represented these Republics in Islamic lands. However, if the case involved a Muslim or a member of any another foreign community, the consul had no jurisdiction.[124] Until 1360, the competent authority to settle disputes between Muslims and foreigners remained the qadi, and only if he failed to reach a decision did the litigants turn to the sultan.[125] As noted above, foreign litigants unfamiliar with procedural Islamic law faced difficulties in recovering their claims. Italian merchants could not produce Christian witnesses to support their claims, nor could they resort to written and circumstantial evidence, as they were not accepted by the qadi.[126] Conversely, Muslim merchants who knew Islamic law could defend their interests more efficiently. For instance, in 1352-1353, Muslim debtors of Italian merchants managed to escape their obligations by using Ḥanafī law, which enabled them to be declared bankrupt. This type of incident undermined trade, and the Shāfiʿī jurist al-Subkī (d. 769/1368) subsequently issued a

---

[119] Al-Maqrīzī, *Ittiʿāẓ al-ḥunafā' bi-akhbār al-a'imma al-fāṭimiyyīn al-khulafā'*, ed. Jamāl al-Dīn al-Shayyāl (Cairo: Wizārat al-Awqāf, 1996), I, p. 290; id., *al-Mawāʿiẓ wa-l-iʿtibār*, III, p. 619-620; Yaḥyā b. Saʿīd al-Anṭākī, *Ta'rikh al-Anṭākī al-maʿrūf bi-Ṣilat Ta'rīkh Ūtīkhā*, ed. ʿUmar ʿAbd al-Salām Tadmūrī (Tripoli: Jarrous Press, 1990), p. 233-234. On this case, see also Y. Lev, *State and Society in Fatimid Egypt* (Leiden: Brill, 1991), p. 159.
[120] Cl. Cahen, "Le commerce d'Amalfi dans le Proche-Orient musulman avant et après la croisade," *Comptes rendus de l'Académie des inscriptions et belles-lettres*, 121 (1977), p. 291-301, p. 292-3. See also Cahen, "Un texte peu connu relatif au commerce oriental d'Amalfi au X^{e} siècle," *Archivio Storico per la Province Napoletane*, 36 (1953-4), p. 1-8.
[121] On these treaties, see the references provided by G. Christ, *Trading Conflicts: Venetian Merchants and Mamluk Officials in Late Medieval Alexandria* (Leiden: Brill, 2012), p. 49-50.
[122] See for instance J. Wansbrough, "Venice and Florence in the Mamluk Commercial Privileges," *Bulletin of the School of Oriental and African Studies*, 28 (1965), p. 499, 501-503, 506, 508.
[123] F. Apellániz, "Judging the Franks: Proof, Justice, and Diversity in Late Medieval Alexandria and Damascus," *Comparative Studies in Society and History*, 58 (2016), p. 352.
[124] F. Apellániz, "Judging the Franks," p. 351.
[125] F. Apellániz, "Judging the Franks," p. 354; G. Christ, *Trading Conflicts*, p. 54.
[126] F. Apellániz, "Judging the Franks," p. 352.

fatwā advocating that disputes involving foreign merchants be brought before the sultan, not the qadi.[127]

Therefore, although qadis continued to settle some simple cases, especially when the plaintiff was a Muslim,[128] sultanic institutions took precedence in order of authority during the second half of the eighth/fourteenth century for the resolution of everyday disputes. The Mamlūks developed a judicial system parallel to that of the qadi's court, which they called *siyāsa. Siyāsa* was rooted in the old institution of *maẓālim*, the "court of redress for abuses" that was attached to the ruler's capacity to exercise executive justice.[129] Besides the sultan, who presided over *maẓālim* hearings himself, the primary functioning judge of this institution was the *ḥājib* (chamberlain). While still respecting a framework with references to Islamic law, this judicial system was not bound by the procedural rules that *fiqh* dictated to the qadis. The Ḥanbalī jurists Ibn Taymiyya (d. 728/1328) and Ibn Qayyim al-Jawziyya (d. 751/1350), who elaborated on an existing *siyāsa sharʿiyya* theory, expanded the categories of evidence acceptable under the *siyāsa* regime to include clues, circumstantial evidence, and written documents, all of which were acceptable before the *maẓālim* court.[130] If necessary, non-Muslims could testify in *siyāsa* tribunals, even when Muslims were involved.[131]

As Apellániz has shown, *siyāsa*'s greater flexibility allowed it to become the main judicial institution dealing with disputes between Muslims and foreigners, especially when the latter acted as plaintiffs (with the burden of proof). This jurisdiction accepted accounting books and Latin documents as evidence.[132] However, Mamlūk commercial treaties emphasized that foreign merchants should have their contracts notarized by trustworthy Muslim witnesses (*ʿudūl*).[133] The testimony of such witnesses remained the most effective means to defend their rights. Outside Cairo, *ḥājib* courts soon opened in Damascus, Aleppo and Tripoli. They were so successful that some Franks even turned to them to settle internal Frankish disputes. Venetian notaries attended *siyāsa* trials and recorded judgments in Latin for later use before Italian institutions.[134] In the ninth/fifteenth century, foreigners no longer expected to appear before a qadi, and treaties dating from that time even excluded this possibility.[135]

Furthermore, some Muslim merchants in the Mamlūk Empire anticipated the resolution of disputes before Christian authorities, and had notaries draw up their contracts in Latin.[136] Apellániz highlights the case of a Muslim who, in order to gain a good reputation among Latins, agreed to appear before a Latin arbitration court that was primarily intended to settle internal

---

[127] F. Apellániz, "Judging the Franks," p. 355.
[128] F. Apellániz, "Judging the Franks," p. 370; G. Christ, *Trading Conflicts*, p. 146-151.
[129] See J. Nielsen, *Secular Justice in an Islamic State: Maẓālim under the Baḥrī Mamlūks, 662/1264-789/1387* (Leiden: Nederlands Historisch-Archaeologisch Instituut te Istanbul, 1985), p. 31-32; M. Tillier, "The *Maẓālim* in Historiography," in A.M. Emon and R. Ahmed (ed.), *Oxford Handbook of Islamic Law* (Oxford: Oxford University Press, 2018), p. 359-360, 366.
[130] B. Johansen, "Signs as Evidence. The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof," *Islamic Law and Society*, 9 (2002), p. 187; F. Apellániz, "Judging the Franks," p. 375.
[131] F. Apellániz, "Judging the Franks," p. 359.
[132] F. Apellániz, "Judging the Franks," p. 363, 370, 375
[133] F. Apellániz, "Judging the Franks," p. 360, 362, 365; see J. Wansbrough, "Venice and Florence," p. 498, 511.
[134] F. Apellániz, "Judging the Franks," p. 370-376.
[135] F. Apellániz, "Judging the Franks," p. 357. See for instance J. Wansbrough, "Venice and Florence," p. 499, 512.
[136] F. Apellániz, "Judging the Franks," p. 363, 365.

disputes between foreign merchants. Nonetheless, this case eventually ended up on appeal before an emir's court.[137]

The eighth/fourteenth century treaties concluded between the Ottomans of Anatolia on the one hand and the Venetians and Genoese on the other also reveal how different systems of dispute resolution could intertwine. In Ottoman lands, consuls enjoyed absolute judicial authority over their subjects. They could examine criminal cases, imprison convicts and pronounce capital punishment without the Ottoman authorities being entitled to interfere. In the event of a dispute between a member of one of the Italian merchant communities and an Ottoman, several legal procedures were available. As with the Mamlūks, Italian claimants could file a complaint before the Ottoman emir or his representative. However, some Ottoman litigants did not hesitate to turn to Genoese and Venetian institutions, prosecuting Italians before their consul or even addressing Latin courts outside Ottoman territory. Kate Fleet even observes that authorities could occasionally organize a mixed court, bringing together both the consul and the *nāʾib* (deputy) of the sultan. The two figures, together, would render a single joint judgment.[138]

CONCLUSION

Islamic law recognized the rights of foreigners and non-Muslims living in the territory of Islam, as well as those of "heretics" belonging nonetheless to the *umma*. All were as entitled as "orthodox" Muslims to obtain justice. Both *dhimmī*s and *mustaʾmin*s resorted in the early centuries of Islam to the main Islamic judicial authority, the qadi, whenever a dispute involved a Muslim. In the event of a dispute between non-Muslims, however, Muslim jurists were reluctant to regard the qadi as the most competent authority to hear their cases. This created a significant de facto difference between *dhimmī*s and *musta'min*s. According to many jurists, the former had to be referred to their community's institutions. For *dhimmī*s, qadi justice had the status of an arbitral jurisdiction, requiring the prior agreement of the litigants to abide by its decision. Conversely, *mustaʾmin*s did not necessarily have a community within Islamic territory that possessed judicial institutions. The qadi therefore remained the main authority in case of disputes between *mustaʾmin*s, especially in Ḥanafī opinions – other jurists, however, were reluctant to acknowledge this authority. *Mustaʾmin*s were therefore apparently less judicially protected than *dhimmī*s. Not only did they lack community justice, but their legal capacity before the qadi was limited. According to the Ḥanafīs, they could only defend rights contracted abroad against other *mustaʾmin*s by becoming *dhimmī*s. Similarly, according to the same jurists, a *mustaʾmin* could not testify against a *dhimmī*, while the reverse was possible. The underlying idea thus seems to be that Islamic justice was above all intended for the residents of *dār al-islām.* Islamic law was primarily meant for the subjects of Islamic rule who paid taxes to the political authority, and to a much lesser degree for the simple beneficiaries of a safe-conduct.

Beyond these observations, international justice presented two categories of problems. Firstly, in material terms, it often required the litigants' travel, hence the extensive use of proxies (*wakīl*s). Nevertheless, in Islamic domains, the representative role of these proxies had to be attested to by Muslims witnesses, which created practical difficulties. These difficulties

[137] F. Apellániz, "Judging the Franks," p. 368, 370.
[138] K. Fleet, "Turkish-Latin Diplomatic Relations in the Fourteenth Century: The Case of the Consul," *Oriente Moderno*, 83 (2003), p. 607-611.

were all the greater because the *wakīl*'s capacity to act on behalf of his employer was reduced once the latter returned to his home country. Secondly, this justice system raised important legal problems. According to the territorial conception of law defended by the Ḥanafīs, crimes and misdemeanors committed by Muslims outside of *dār al-islām* could not be prosecuted. Similarly, the qadi faced greater legal obstacles in the case of disputes between *mustaʾmin*s over rights contracted in *dār al-ḥarb*. In addition, evidence was a major issue, as it soon became impossible to call non-Muslim witnesses against Muslim opponents. In Umayyad times, non-Muslims could testify against each other in disputes that did not involve Muslims. From the beginning of the Abbasid period onwards, a large number of jurists (Mālikīs, Shāfiʿīs and Imamīs) denied non-Muslims this power even for their internal disputes. These restrictions forced non-Muslims to adapt and, especially in *dhimmī* communities, to use Muslim notaries. Similarly, the reluctance of Christians to take oaths, for religious reasons, weakened their ability to defend themselves in court, which also required adjustments in canon law.

Some of these problems were solved in the Late Middle Ages, when contact between Muslims and foreign states increased, especially when the Muslims' economic interests led them to conclude trade agreements with the Italian maritime Republics. These treaties allowed, first of all, *mustaʾmin*s who hailed from these republics to establish a community judicial system, supervised by the consuls. In addition, the development of *maẓālim* tribunals to deal with disputes between Muslims and foreigners during the Mamlūk period offered the non-Muslims a form of justice less constrained by the Islamic law of evidence. This in turn allowed non-Muslims to better defend their claims against Muslim litigants.

Finally, international law also applied between residents of competing domains of *dār al-islām*. The existence of rival politico-religious entities forced jurists to define the procedure for disputes between Muslims belonging to these distinct entities. Once again, the main obstacle to the resolution of their disputes was the question of testimony, as the word of a Muslim considered heterodox was not necessarily accepted in court. In general, Sunni jurists were apparently more likely than Shi'i ones to accept that an inhabitant of a rival state could assert his rights before a qadi.