RELIGIOUS MINORITIES IN CHRISTIAN, JEWISH AND MUSLIM LAW (5TH–15TH CENTURIES)

Religion and Law in Medieval Christian and Muslim Societies

8

In the middle ages, from Baghdad to Barcelona, significant communities of religious minorities resided in the midst of polities ruled by Christians and Muslims: Jews and Christians throughout the Muslim world (but particularly from Iraq westward), lived as *dhimmis*, protected but subordinate minorities; while Jews (and to a lesser extent Muslims) were found in numerous places in Byzantine and Latin Europe. Legists (Jewish, Christian and Muslim) forged laws meant to regulate interreligious interactions, while judges and scholars interpreted these laws.

Religion and Law in Medieval Christian and Muslim Societies presents a series of studies on these phenomena. Our goal is to study the history of the legal status of religious minorities in Medieval societies in all their variety and complexity. Most of the publications in this series are the products of research of the European Research Council project RELMIN: The Legal Status of Religious Minorities in the Euro-Mediterranean World (5th-15th centuries) (www.relmin.eu).

Au moyen âge, de Bagdad à Barcelone, des communautés importantes de minorités religieuses vécurent dans des Etats dirigés par des princes chrétiens ou musulmans: dans le monde musulman (surtout de l'Iraq vers l'ouest), juifs et chrétiens résidèrent comme *dhimmis,* minorités protégées et subordonnées; tandis que de nombreuses communautés juives (et parfois musulmanes) habitèrent dans des pays chrétiens. Des légistes (juifs, chrétiens et musulmans) édictèrent des lois pour réguler les relations interconfessionnelles, tandis que des juges et des hommes de lois s'efforcèrent à les interpréter.

La collection *Religion and Law in Medieval Christian and Muslim Societies* présente une série d'études sur ces phénomènes. Une partie importante des publications de cette collection est issue des travaux effectués au sein du programme ERC RELMIN : Le Statut Légal des Minorités Religieuses dans l'Espace Euro-méditerranéen (Vᶜ-XVᶜ siècles) (www.relmin.eu).

RELIGIOUS MINORITIES IN CHRISTIAN, JEWISH AND MUSLIM LAW (5TH–15TH CENTURIES)

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and John Tolan

BREPOLS

Cette publication est réalisée dans le cadre du projet de recherche RELMIN « Le statut légal des minorités religieuses dans l'espace Euro-méditerranéen (V^e XV^e siècles) » La recherche qui a abouti à cette publication a été financée par le Conseil européen de la recherche sous le septième programme cadre de l'Union Européenne (FP7/2007 2013) / ERC contrat no 249416.

This publication is part of the research project RELMIN "The Legal Status of Religious Minorities in the Euro-Mediterranean World (5th 15th centuries)". The research leading to this publication has received funding from the European Research Council under the European Union's Seventh Framework Progamme (FP7/2007 2013) /ERC grant agreement no 249416.

D/2017/0095/145
ISBN 978-2-503-56571-2
e-ISBN 978-2-503-56709-9
DOI 10.1484/M.RELMIN-EB.5.109274

Printed in the EU on acid-free paper.

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PREFACE

This book is the result of the final conference of the research program "RELMIN: The legal status of religious minorities in the Euro-Mediterranean world (5th-15th centuries)", financed through an Advanced Grant from the European Research Council (2010-2015). The conference, held in Nantes in October, 2014, brought together specialists of medieval history, law and religion, working on a broad geographical area (from Iraq to the British Iles), over ten centuries (fifth to fifteenth) and working with sources in a number of languages (Hebrew, Greek, Arabic, Latin, and various European vernaculars). This book represents in many ways the culmination of the RELMIN project, which has produced a major database of legal texts concerning religious minorities in the middle ages (http://www.cn-telma.fr/relmin/index/), designed as a tool for teaching and research, and a series of books, "Religion and Law in Medieval Christian and Muslim Societies", of which this volume is the latest installment.[1]

This book series has published the results of five years of RELMIN conferences dealing with key aspects in the study of the legal status of medieval religious minorities. The first volume, *The Legal status of Dhimmīs in the Islamic West,* published the results of a conference organized at the Centro Superior de Investigaciones Científicas (CSIC) in Madrid.[2] The central question addressed is the legal status accorded to *dhimmīs* (Jews and Christians) in the Muslim law in the medieval Muslim west (the Maghreb and Muslim Spain), based on a rich and complex corpus of legal sources, principally from the Mālikī legal tradition: including *fiqh, fatwās, ḥisba* manuals. These texts function as the building blocks of the legal framework in which jurists and rulers of Maghrebi and Peninsular societies worked. The very richness and complexity of these texts, as well as the variety of responses that they solicited, refute the textbook idea of a monolithic *dhimmī* system, supposedly based on the Pact of 'Umar, applied throughout the Muslim world. In fact when one looks closely at the early legal texts or chronicles from both the Mashreq and the Maghreb, we find a wide variety of local adaptations. Even for the *jizya*, often presented as the linchpin of this system, there is no standard model. In the period of the Islamic conquest of Spain, fiscal policy towards conquered Christians was quite varied and often based on practical considerations and respect for local traditions. The *jizya* could at times be imposed

1 For a more detailed presentation of the project and its results, see John Tolan, "The Legal Status of Religious Minorities in the Euro-Mediterranean World (RELMIN)", *Medieval Worlds* 1 (2015): 148-166.
2 Maribel Fierro and John Tolan, eds, *The legal status of Dimmi-s in the Islamic west: (second, eighth-ninth, fifteenth centuries)* (2013).

on individuals but also on groups; sometimes it was levied on lands (blurring the classic distinction between *jizya* and *kharāj*). The *jizya* was not systematically levied either in seventh-century Egypt or in ninth-century Sicily. The same wide variance in practice could be shown in other purported stipulations of the *dhimmī* system.

The sixth to eleventh centuries are a crucial formative period for Jewish communities in Byzantium and Latin Europe: this is also a period for which sources are scarce and about which historians have often had to speculate on the basis of scant evidence. Just as there had been no volume on the status of *dhimmīs* in the Islamic west, there seemed a need for a fresh synthesis on the legal status of Jews in this key period. For these reasons, RELMIN organized a conference on *Jews in Early Christian Law Byzantium and the Latin West, 6th-11th centuries*.[3] The legal sources studied in this volume provide a relative wealth of textual material concerning Jews (in Hebrew, Greek and Latin), and for certain areas and periods are the principal sources. While this makes them particularly valuable, it also makes their interpretation difficult, given the lack of corroborative sources. When the council of Vannes in 465 prohibits Christian clerics from sharing meals with Jews, for example, does this mean that there were Jews in Brittany and that clerics had been eating with them? Or does this prohibition reflect debates among the bishops present, motivated by theological concerns rather than practical issues? The lack of context (and notably of any evidence of Jewish presence in Brittany before 1209), makes the latter answer more probable, but still uncertain. Some scholars have depicted this period as one of relative tolerance towards Jews and Judaism; others have stressed measures of exclusion taken at key intervals by ecclesiastical authors, church councils and monarchs. Yet perhaps more than revealing general tendencies towards "tolerance" or "intolerance", these studies bring to light the ways in which law in medieval societies serves a variety of purposes: from providing a theologically-based rationale for social acceptance, to attempting to regulate and restrict inter-religious contact, to using anti-Jewish rhetoric to assert the authority or legitimacy of one party of the Christian elite over and against another.

The cities and towns of Europe and the Mediterranean World constituted a crucial space to study interreligious relations in the Middle Ages: both because it was above all in cities that members of different faiths lived cheek by jowl and had to work out how to compromise between the requirements of their religious law and the realities of day-to-day interaction, and because the sources which we have at our disposal give a large place to the cities, and in particular to the urban elites of the different religious communities. For these reasons, with the generous support of the Fondation des Treilles, we organized a conference on

3 John Tolan, Capucine Nemo-Pekelman, Nicolas De Lange & Laurence Foschia, eds, *Jews in early Christian law: Byzantium and the Latin West, 6th-11th centuries*, (2014).

Religious cohabitation in European towns (10th-15th centuries).[4] Medieval towns were a theater of contact between members of different religious communities, Muslim, Christian and Jewish, who rubbed shoulders in the ports and on the streets, who haggled in the markets, signed contracts, and shared wells, courtyards, dining tables, bath houses, and sometimes beds. These interactions caused legal problems from the point of view of the Jewish, Christian and Muslim judicial scholars of the middle ages, not to mention for the rulers of these towns. We dealt principally, though not exclusively, with legal sources: imperial and royal laws, urban charters and statutes, canon law, legal commentaries, learned legal opinions (in the form of *fatwās* or *responsa*). The presupposition was that these sources, underused by social and urban historians, could yield precious evidence of day to day contact between members of different religious communities living in the same city. The subjects ranged from the twelfth century to the fifteenth and from Portugal to Hungary, Crete and the Mamluk sultanate. The cities of this broad region faced similar problems and challenges, and their legal scholars (in general members of the religious elite) worked under similar constraints and with similar methods and textual sources. Hence it is possible to draw at least tentative conclusions on several key issues. First of all, legal texts can provide indications of the range and types of interreligious contact, and of the tensions or legal problems such contact could cause. Secondly, and somewhat paradoxically, such contact is attested principally in the texts of laws that attempt to limit or control it. In the absence of corroborating evidence, we may wonder to what extent such laws were effective in limiting and controlling contact, and indeed to what extent they reflect real social concerns of an urban elite, rather than abstract intellectual exercises by a clerical clique.

Various European polities expelled their Jewish or Muslim subjects between the twelfth and seventeenth centuries. The expulsions were recorded and commemorated by Jews and Muslims in exile, for whom the experience of expulsion and exile became a touchstone for the construction of community identities in their new homes. With a group of scholars from Budapest and Heidelberg working on the dynamics of diasporas we organized a conference at the Central European University in Budapest in June 2013 on *Expulsion and Diaspora Formation: Religious and Ethnic Identities in Flux from Antiquity to the Seventeenth Century*.[5] We explored the relations between expulsion, diaspora, and exile between Late Antiquity and the seventeenth century. The essays range from Hellenistic Egypt to seventeenth-century Hungary and involve expulsion and

4 Stéphane Boissellier & John Tolan, eds, *La cohabitation religieuse dans les villes Européennes, Xe-XVe siècles = Religious cohabitation in European towns (10th-15th centuries)*, (2014).

5 John Tolan, ed., *Expulsion and diaspora formation: religious and ethnic identities in flux from antiquity to the seventeenth century*, Religion and Law in Medieval Christian and Muslim Societies (2015).

migration of Jews, Muslims and Protestants. The common goal of these essays is to shed light on a certain number of issues: first, to try to understand the dynamics of expulsion, in particular its social and political causes; second, to examine how expelled communities integrate (or not) into their new host societies; and finally, to understand how the experiences of expulsion and exile are made into founding myths that establish (or attempt to establish) group identities.

A conference organized at the University of Le Mans took the broad comparative approach further*: Religious minorities, integration and the State from the Middle Ages to the twentieth century*.[6] Judaism, Christianity and Islam have been present in Europe for over a thousand years. The three monotheisms differ of course in their respective demographic importance, and in their relationship with political power: Christianity was adapted by a majority of the inhabitants of Europe by the early middle ages and became (with significant variations in different times and places) a dominant religion, over and against other, minority religions. The emergence of European states and divisions within Christianity (from the Middle Ages to the sixteenth century) often placed religious minorities in a precarious position. We see this in the fight against medieval heresies, the wars of religion, the expulsion of Jews from many European states (and the expulsion of Muslims from Sicily and Iberia), the exile of the Huguenots, and the "Jewish question" in the nineteenth and twentieth centuries. Since the late twentieth century, contemporary debates on the place of Islam in Europe and on the expression of religious identity in the public space has provoked a revived interest in the long history of religious cohabitation and interaction in Europe. We examine the ways in which states have treated religious minorities: policies involving repression, management, integration, tolerance, secularism, indifference – and various ways in which minorities have welcomed the demands of the majority. The relationship is not one-sided: on the contrary, government policies lead to resistance, negotiations (in the legal, political, or cultural spheres) or compromise.

2013 would have marked the hundredth birthday of Bernhard Blumenkranz. Born in Vienna, Blumenkranz fled the *Anschluß* and settled in Switzerland and (after the war) France, where he initiated a series of groundbreaking studies on the history of medieval Jewish-Christian relations. The anniversary was the occasion for us to reflect on the legacy of Blumenkranz, his lasting impact on work in the field and the directions the field has moved since his death in 1989. In collaboration with the Institute for Jewish history in Austria and the University of Vienna we organized a conference at the Austrian Academy of the Sciences, bringing

6 John Tolan, Ivan Jablonka, Nikolas Jaspert & Jean-Philippe Schreiber, eds, *Religious minorities, integration and the State* (2016).

together prominent scholars in the field from France, Austria, other European countries, North America and Israel: the proceedings have been published as volume 7 of our series.[7] The volume brings together 16 essays representing new research in fields in which Blumenkranz was a pioneer: the relationship between the Medieval Church and Jewish communities, the question of proselytization and conversion of Jews, the cartography of Jewish communities, and the representation of Jews in Christian art. The essays provide both an assessment of Blumenkranz's intellectual legacy and a snapshot of the evolution of the field over the last sixty years.

Throughout the RELMIN project, we have faced the problem of the functions of law: to what extent did laws concerning religious minorities reflect real social practice and to what extent were they reflections of abstract religious and legal principles? We addressed these issues more explicitly in a conference organized at the Casa Arabe in Córdoba in April 2014 entitled *Law and Religious minorities in Medieval Societies: between theory and praxis*.[8] Muslim law developed a clear legal cadre for *dhimmīs* and Roman Canon law decreed a carefully defined status' for Jewish and Muslim communities in Europe. Yet the theoretical hierarchies between faithful and infidel were constantly brought into question in the daily interactions between men and women of different faiths in streets, markets, bath-houses, law courts, and elsewhere. The twelve essays in this volume explore these tensions and attempts to resolve them. These contributions show how law was used to try to erect boundaries between communities in order to regulate or restrict interaction between faithful and non-faithful – and at the same time how these boundaries were repeatedly transgressed and negotiated. These essays probe the possibilities and the limits of the use of legal sources for the social historian.

I would like to thank all of those who made possible the RELMIN project and in particular the final conference and this final volume. We have received five years of generous funding from the European Research Council; our thanks to the council and its staff, in particular Cécile Menétrey-Monchau, who served as RELMIN's scientific officer. Special thanks also to the University of Nantes, the Maison des Sciences de l'Homme Ange Guépin, and the Région Pays de la Loire, who offered financial support and technical assistance throughout the five years and in particular for the final conference.

I furthermore thank all those who reread, evaluated and corrected the articles of this volume Mohamed H. Benkheira, Javier Castaño, Claude Denjean,

7 Philippe Buc, Martha Keil & John Tolan, eds, *Jews and Christians in Medieval Europe: the historiographical legacy of Bernhard Blumenkranz*, (2016).

8 Ana Echevarria, Juan Pedro Monferrer Sala & John Tolan, eds, *Law and Religious Minorities in Medieval Societies Between Theory and Praxis: De La Teoria Legal a La Practica En El Derecho De Las Minoria Religiosas En La Edad Media*, (2016).

Vincent Déroche, Ana Echevarria, Alejandro García-Sanjuán, Rita Costa Gomes, António Castro Henriques, Christian Müller, Adeline Rucquoi, Pierre Savy, Delfina Serrano, Claire Soussen, and Dominique Valérian. Our thanks as well to Brepols and its staff, particularly Christophe Lebbe. And thanks to Nora Berend, Capucine Nemo Pekelman and Youna Hameau-Masset for their collaboration in editing this volume.

Last but not least, warmest thanks to the RELMIN team of post-docs and PhD students, who have made the last five years a rewarding and stimulating adventure. Special thanks to project manager Nicolas Stefanni for his energy and efficiency.

John Tolan

INTRODUCTION

John Tolan

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Towards the end of the fifteenth century, in the Nasrid Kingdom of Granada, a Muslim asked the city's qāḍī, Abū ʿAbd Allāh b. al-Azraq, if he could accept the matzos that his Jewish neighbor offered him as a gift at Passover. In his response, the jurist displayed his unease. He recognized that it was not prohibited for a Muslim to accept gifts from a Jew or a Christian on the occasion of one of their holidays. He even acknowledged that the prophet Muhammad had said "Give gifts to each other, you will become friends and animosity between you will disappear". Yet he judged that accepting such presents, though not prohibited, was "reprehensible" (makrūh, مكروه). For a Muslim should keep his distance from infidels, since he is socially and religiously superior to them. Yet, he regretted, "many ignorant people among the Muslims" accepted such gifts.[1]

The fatwa that preserves this judgment was written by a Muslim in fifteenth-century Granada but echoes similar expressions ambivalence and unease provoked by interreligious contact on the part of many Jewish, Christian and Muslim authorities in the Middle Ages. From Baghdad to Barcelona, different religious communities intermingled in cities, towns and rural areas. Jews and Christians lived as *dhimmīs*, protected but subordinate minorities, in areas ruled by Muslims; while Jews (and to a lesser extent Muslims) resided in numerous places in Byzantium and Latin Europe. Thousands of normative texts, emanating from diverse Jewish, Christian and Muslim authorities, reflect attempts to define and police borders between these faith communities. A number of these texts, such as the fatwa of al-Azraq, reflect attempts to discourage (and in some cases prohibit) the "faithful" from participating in the festivities of "infidels". Various Roman laws and Church councils of the fifth and sixth centuries prohibit Christians from participating in pagan or Jewish ceremonies or celebrations;[2] others prohibited Christians from receiving gifts (in particular unleavened Passover

1 For the Arabic text of this fatwa, translations in English and French, commentary and bibliography, see Ahmed Oulddali, "On the gifts offered by Jews during their festivals", RELMIN database: http://www.cn-telma.fr/relmin/extrait252320/.

2 See, for example, Benjamin de Lee, "Christians forbidden from celebrating holidays with Jews or from receiving gifts from them", RELMIN database: http://www.cn-telma.fr/relmin/extrait271998/.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 17–24

 DOI 10.1484/M.RELMIN-EB.5.111590

bread) from Jews.[3] Thirteenth-century Catalan rabbi Solomon ben Adret speaks of problems caused during observance of Passover when non-Jews introduced leavened bread into Jewish homes, either for their own consumption or as gifts to Jews;[4] similar issues had been raised in twelfth-century Troyes.[5] A Muslim mufti was asked whether a Muslim merchant could sell his wares to *dhimmīs* during their religious festivals.[6] In 1267, the Synod of Wroclaw ruled, among other things, that Christians should not "accept a Jew or a Jewess to cohabitation with them, nor should they dare to eat and drink with them, or dance and hop merrily with them during their weddings or feasts".[7] Similarly, Richard of Swinfield, bishop of Hereford, in 1286, fulminated against his parishioners who had attended a Jewish wedding.[8] These legal texts attest both to the importance of boundaries between religious communities and to their porousness, both to the continued efforts of legal/religious elites to restrict and regulate interreligious relations and to their frequent inability to do so.

What can these legal sources teach us about the history of relations between members of diverse religious communities? Conversely, what can these relations teach us about the nature and uses of law? This book brings together 21 essays on *Religious Minorities in Christian, Jewish and Muslim Law (5th-15th centuries)*. The authors' varying approaches to these issues are united in trying to offer at least preliminary answers to three key questions: how are legal statuses of religious communities defined in medieval Jewish, Christian and Muslim law? In what ways are relations between these different groups regulated and to what ends? Finally, what consequences do these differences in confessional status have in determining access to justice? These are the three questions addressed in the comparative essays in part two of this book.

The first part of the book sets out the juridical framework of medieval societies. The legal systems of the middle ages are constructed upon key authoritative texts and their interpretation: Torah, Qur'ān, papal decretals, compendia of

3 Benjamin de Lee, "Christians forbidden from receiving gifts from Jews", RELMIN database: http://www.cn-telma.fr/relmin/extrait271996/.

4 Nadezda Koryakina, "Gentiles sending to Jews bread crumbs as a gift", RELMIN database: http://www.cn-telma.fr/relmin/extrait252359/; Nadezda Koryakina, "A non-Jew eating leavened food at a house of a Jew" http://www.cn-telma.fr/relmin/extrait252575/.

5 Nadezda Koryakina, "That person had a gentile servant", RELMIN database: http://www.cn-telma.fr/relmin/extrait254504/.

6 Emre Çelebi, "The presence of Muslims in religious festivals celebrated by the People of the Book", RELMIN database: http://www.cn-telma.fr/relmin/extrait252783/.

7 Jerzy Mazur, "Constitutions of the Synod of Wroclaw, chapter 10", RELMIN database: http://www.cn-telma.fr/relmin/extrait252878/.

8 John Tolan, "On a Jewish wedding", RELMIN database: http://www.cn-telma.fr/relmin/extrait252629/; John Tolan, "Against those who attended them", http://www.cn-telma.fr/relmin/extrait252630/.

Roman law, etc. Underpinning this is what Garth Fowden has described as the "exegetical impulse" of first-millennium culture: the process of canonizing key texts and producing commentaries on them: "that commentary was the preferred vehicle, whatever revered foundational text – *Parmenides, Categories,* Gospels or Qur'ān – one was dealing with, reflects the substantial common ground, and scriptural orientation, shared by learned exponents and systematizers of all these First Millennium traditions of thought".[9] The authors in this first section look at the construction and development of key textual corpora and of the commentaries that accrued around them as important sources for law and legal reflection in the middle ages.

Talya Fishman examines the tensions between tradition and text as loci of authority in medieval Jewish communities. The word "Torah" itself is often translated as "law", in recognition of its central role in defining the Jewish community and establishing the obligations of Jews. In the two centuries that followed the destruction of the Temple of Jerusalem in 70, a new rabbinical elite emerged as the arbiters of Jewish law and communities. At the same time as they sought to definitively delineate the canon of written Torah they produced two corpora of what came to be known as "Oral Torah" (even though it was eventually committed to writing): the *midrash halakha*, which drew legal injunctions from biblical texts, and the Mishna, which presents laws in thematic order without specific reference to biblical texts. The rabbis comprised a "textual" community (to borrow the term coined by Brian Stock), defined and legitimated by their knowledge of the texts they studied.[10] If Torah (written and oral) is the fount of law (*halakha*), it is not the only source. The Talmud itself affirms *dina de-malkhuta dina*, Aramaic for "the law of the kingdom is the law", recognizing the validity of law of other (gentile) provenance.[11] Against those rabbis who purported to derive legal strictures from their exegeses of Torah and Talmud, others countered that the consensus and accepted tradition were the ultimate guarantors of legality, and thus varied in function of time and place. Indeed a common phrase found at the conclusion of many rabbinic responsa is "this is the *halakhah* and this is the custom" – in other words, legal decisions should ideally correspond both to the textual basis of Jewish law and to established (and sometimes quite local) custom. Jewish "law" is a corpus of texts (Torah, *halakhah,* responsa), authoritative and interpretive, but it is also a process, a constant dialogue.

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9 Garth Fowden, *Before and after Muhammad: the first millennium refocused* (2014), 135-136.

10 Brian. Stock, *The Implications of Literacy: Written Language and Models of Interpretation in the Eleventh and Twelfth Centuries* (1983).

11 Mark Washofsky. "Halakhah and Political Theory: A Study in Jewish Legal Response to Modernity", *Modern Judaism* 9 (1989), 289-310, esp. 293

The basis and construction of Muslim law is in some ways similar to that of Jewish law. A textual community of scholars studies sacred scripture, the Qur'ān, and oral tradition, the Hadith (which is also subsequently consigned to writing). The Arabic terms that most closely correspond to the English "law" are probably *sharī'a* and *fiqh*.[12] *Sharī'a,* the right path, governs the lives of Muslims; *fiqh* is the interpretive science through which scholars interpret *sharī'a* and attempt to apply it. Thus when looking for texts of "law" in Medieval Islam, what we will find are not "law codes" but scholarly treatises of fiqh, as well as *fatwas*, legal consultations in which a mufti gives his opinion concerning the legality or not of various practices (quite analogous to the Jewish *responsa*, in Hebrew *she'elot u teshuvot*). In other words, "law" in medieval Muslim societies is not based on the authority of rulers, but on that of God, as interpreted by legal/religious scholars whose view on any issue can vary widely. Most of the medieval Muslim "legal texts" we deal with are commentaries either on the sacred texts themselves or on later texts of *fiqh*.

Anver Emon deconstructs the often stultifying debates on whether Islam is inherently "tolerant" or "intolerant" to religious diversity by looking at the construction of *dhimmī* restrictions from their bases in Qur'ān and Hadith through the legal debates of Muslim scholars in the Medieval and Ottoman periods. He sees the contract of protection (*dhimma*) that developed during the Muslim conquests of the seventh and eighth centuries as "a legal instrument of political inclusion and marginalization". It allowed the non-Muslim subjects of Muslim polities to continue to practice their religion, own land, and otherwise fully participate in society. Yet it also "marginalized" them in that it in theory it limited their access to political and military power and placed them in a position of symbolic inferiority to the Muslim ruling class. This *dhimmi* law, according to medieval jurists, was based on Qur'ānic principles and fleshed out by an apocryphal text attributed to the Caliph 'Umar I, the "pact of 'Umar". Emon shows how medieval Islamic jurists struggled to balance the rights of *dhimmīs* with the exigencies of *sharī'a.* This posed legal conundrums: for example, could a judge order financial compensation for a theft of pork or wine, goods prohibited to Muslim but permitted to *dhimmīs?* Could *dhimmīs* establish pious foundations (*waqfs*) with the same legal protections as Muslims? As Emon points out, the varying answers to such questions are less important to us than the process, which shows law not as a fixed corpus, but an ongoing process of continual debate, negotiation and compromise.

Kenneth Pennington examines the ways through which "law became a discipline in the Latin West during the late eleventh and early twelfth centuries": through the renewed study of key texts (notably the Justinian corpus of Roman

12 N. Calder and M. Hooker, "Sharī'a", in *The Encyclopaedia of Islam: Second Edition* (1960-2004).

law), through the construction of new syntheses in both Canon law (Decretum, Decretal collections) and civil law at various levels (as seen in a plethora of law codes issued by monarchs or by civic communes). Amidst the diversity and divergence of texts were a common methodology and a common language which permitted the emergence, in the schools and in the minds of judges, of a *Ius commune* which unified and transcended the diverse branches of law.

Jonathan Brown closes this first part by looking at two case studies: the issues of polygamy and slavery in Muslim exegetical and legal traditions, which provide concrete illustrations of the tensions between the interpretation of authoritative texts (Qur'ān and Hadith) and attempts to reconcile them with diverse and changing societal realities.

These different legal traditions have much to say about religious affiliation and proper (and improper) relations between the "faithful" and "infidels", but do not evoke the categories of "minority" and "majority": the closest term to "minority" is the Arabic *dhimmī,* even though *dhimmīs* were often a majority in strictly numerical terms in many medieval "Muslim" societies. Any attempt to demarcate "minorities" as a field of study in pre-modern history hence must be wary of anachronism. Minority rights *per se* were put forward during negotiations at the treaty of Versailles in 1919; they became an integral part of international law in 1966 with the International Covenant on Civil and Political Rights.[13] The minorities whose rights are protected may be defined in various ways, according to religious affiliation, ethnicity, language, etc. Yet the modern concept of minority depends on the existence of a majority. Paradoxically, while minorities may have existed in the middle ages, majorities apparently did not. Medieval societies were fragmented and hierarchized, with no equivalent of our modern ideas of universal suffrage and equal rights. It can be argued that before the revolution in political philosophy stretching from the work of Thomas Hobbes to Jean-Jacques Rousseau, there is no enfranchised majority. Hence our medieval "minorities", be they Jews in Christendom or Islam, Christians in Islam, or Muslims in Christendom, moved against the backdrop not of a monolithic "majority" society, but of a fragmented web of multiple institutions and jurisdictions, in which religious affiliation was indeed an important determinant of social distinction, but was far from being the only one. The essays in the second part of this book attempt to explore the diversity and complexity of the relationships between law and religious affiliation in medieval societies.

The second part of the book consists of 17 comparative studies of themes in the legal status of religious minorities in the middle ages. The first section "The

13 Robert Vandycke, "Le statut de minorité en sociologie du droit. Avec quelques considérations sur le cas québécois", *Sociologie et sociétés* 26 (1994).

right of residence of religious minorities" comprises six articles dealing with the basic legal structures that regulate the status of *dhimmīs* in polities governed by Muslims or Jews and Muslims in polities governed by Christians. To what extent are their rights to reside in their communities distinct from or similar to those of the majority community? The articles in this section focus on the Iberian Peninsula as a particularly rich theatre of interaction and legal debate: the discussions of Maliki jurists on the obligations and rights of *dhimmīs*, the (sometimes successful) attempts of Muslim minorities in Portuguese towns to obtain the status of resident or citizen, the increasing physical segregation, in the fifteenth century, of Castilian Muslims and Jews into distinct urban neighborhoods, increasingly walled and closed, and the attempts by Catalan Jews to impose legal distinctions between "native" and "foreign" Jews. This first section shows how the legal status of these different religious minorities in the Iberian Peninsula was far from fixed and static; it was on the contrary an object of continual debate and negotiation.

Section two explores ways in which the borders between these religious communities were defined, policed, crossed, and transgressed. In a broader geographic area, from Morocco (where we focus on Christian mercenaries) to the Rhineland (Ashkenazi Jewish communities), we examine questions of conversion and the use of violence and coercion in obtaining conversion. Violence, or the threat of violence, can be used to enforce these borders (by punishing Christian converts to Judaism) or to undermine them (by forcing unwilling Jews to the baptismal fonts, creating converts whose legal/religious status is dubious). Sexual intimacy across communal borders was also seen as threatening by authorities of the minority (for whom the risk was apostasy and possible violent conflict with the majority) and majority (who saw it as a threat to proper social hierarchies). Yet such theoretically strict prohibitions were frequently transgressed, and authorities (such as fifteenth-century Portuguese royal judges) rarely applied drastic penalties to the letter. To avoid such sexual mixing, the Fourth Lateran Council in 1215 imposed distinctive dress on Jews and Muslims. Medieval Jewish authorities often also sought to prevent Jews from dressing like Christians. The parallel regulations on interfaith sexuality and dress by Christian and Jewish authorities show that legal restrictions on minorities are not merely imposed by the majority authorities, but at times reflect as well the interest of the minority community, or at least of a social elite among them.

The third and final section, "Tribunals and Trials", deals with access to justice. To what extent do minority communities enjoy legal autonomy for regulating internal conflicts? How can members of minority communities have access to the majority legal system? Can *dhimmīs* practice "forum shopping" by appealing, say, to a Muslim *qādī* if their own legal authority has not given them satisfaction? Can members of minority communities bring accusations or serve as witnesses in

majority courts? The case studies in this section range from Jewish and Christian communities in seventh-century Syria to Jewish communities in thirteenth-century England and fifteenth-century Italy and Austria. The picture that emerges is not simply one of majority judges respecting (or not) the independence of minority jurisdictions. We find Muslim authorities intervening in the election of Church officials, Christian judges admitting Hebrew documents as evidence in court trials, Christian judges enforcing Jewish law or Muslim judges enforcing Christian law. This complex legal landscape could be unfavorable to members of "inferior", minority communities. But they could also, in many cases, navigate the system with skill and obtain (or avoid) justice in ways through channels of their choosing.

The volume you have in your hands offers a tentative and partial synthesis of a vast topic. By bringing together the work of scholars in various fields (law, history, religion, language), working on sources of diverse nature (narrative, legal) composed between the fifth and fifteenth centuries in areas stretching from Iraq to England, we aim to offer not only a rich panoply of case studies, but a whole which is larger than the sum of its parts. By confronting diverse experiences of religious pluralism in diverse societies over the course of a millennium, we hope above all to stimulate future research in a similarly broad and interdisciplinary spirit.

PART I

THE JURIDICAL FRAMEWORK FOR MULTICONFESSIONAL SOCIETES IN THE MIDDLE AGES

THE RELATIVE AUTHORITIES OF TEXT AND TRADITION IN MEDIEVAL JEWISH JURISPRUDENCE: GEONIC EXCEPTIONALISM IN ITS ISLAMIC CONTEXT

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Judaism is widely regarded as a text-governed culture. Its reputation as legalistic (hence, unspiritual) is rooted in Pauline rhetoric that alleges its slavish adherence to the letter,[1] and the word Torah, literally "instruction", is regularly translated as "law" (*loi, ley*, *Gesetz*). Yet it is unlikely that text ever served as the lone determinant of law for rabbinic Jews;[2] in some situations, text was not even the preeminent factor. Epistemological debates about the *source* of Jewish law's authority preoccupied the ancient Jewish scholars in Roman Palestine and Sassanian Babylonia who shaped rabbinic Judaism,[3] they engaged medieval rabbis living in Muslim and Christian lands,[4] and they continue to the present.[5] Some voices

1 Passages in the Pauline Epistles that affirm the antithesis of spirit and law are found in Romans 2 and 7; II Corinthians 3; Galatians 5 and elsewhere.

2 Even toward the end of the twelfth century, when the Babylonian Talmud's status as the pre-eminent source of rabbinic law was unquestioned, rabbinic scholars from different regions argued about the identity of the collateral sources that were to be consulted when ambiguous Talmudic directives required clarification. The sources identified by Rabbenu Tam were understood as attestations of tradition. On the debate between Rabbenu Tam and Rabbenu Meshulam, see Avraham Reiner, "*Rabbenu Tam u-Vene Doro: Qesharim, Hashpa'ot, ve-Darke Limudo ba-Talmud*", Ph.D. diss., 2002, and in Talya Fishman, *Becoming the People of the Talmud: Oral Torah as Written Tradition in Medieval Jewish Cultures* (2011), 301-307.

3 Jay Harris, *How Do We Know This?Midrash and the Fragmentation of Modern Judaism* (1994) 1-72, and see studies cited in note 20.

4 Several studies have suggested that the grisly acts of homicide and suicide committed during the First Crusade (1096) by pious Jews of the Rhineland reflect this population's willingness to perceive the behavior of ancestors as a source of cultural authority. On this hypothesis and the controversy surrounding it, see Fishman, *Becoming*, 297-298, and the studies mentioned on 338-339, notes 119-121.

5 Contemporary debates about the sources of rabbinic law find expression in disagreements about the boundaries between "*halakha*" and "meta-*halakha*", and about the relation of the latter to the former. See, Y. Lorberbaum and H. Shapira, "Maimonides' Epistle on Martyrdom in Light of Legal Philosophy", *Dine Yisrael* 25 (2008): 123-169; Haym Solveitchik, "A Response to Lorberbaum and Shapira, 'Maimonides' Epistle on Martyrdom in the Light of Legal Philosophy'" *Dine Yisrael*? (?)!63*-172*. As is clear from the latter's tactics, the disagreement, for some, is about the identity of those qualified to render decisions on these matters. When compared to premodern altercations, contemporary debates are, both literally and figuratively, academic.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 27–46

 DOI 10.1484/M.RELMIN-EB.5.111591

affirmed the primacy of the foundational text, while others affirmed the greater importance of tradition – a source of authority not derived from the foundational text, but known through communal practice. If only implicitly, these discussions also identify the elite who are empowered to interpret the text or to identify and sanction the authoritative tradition.[6]

In a pathbreaking diachronic study of this *kulturkampf* at the heart of rabbinic Judaism,[7] Jay Harris drew attention to a distinct historiographic bias.[8] While rabbinic Jews, over time and place ascribed varying degrees of legal authority to text and tradition, respectively, summary narratives tend to portray text as the weightier, and even the crucial factor in adjudication. Harris suggested that this bias reflects the momentous influence of the Babylonian Talmud [also known as "Gemara"], an Aramaic corpus whose named sages (*amoraim*) of the third through sixth centuries commented on 37 tractates of an earlier Hebrew corpus, the Mishna. Both Mishna and Talmud are corpora of Oral Torah, and their teachings were orally transmitted over the course of centuries.[9] Not only does this Talmud[10] portray the text of Scripture as the actual source of law;[11] its own text, once written, provoked commentarial activity that ultimately equipped Talmud to function as a prescriptive source of law.[12] Tosafists, European glossators of the Talmud in twelfth and thirteenth centuries, employed artful dialectical reasoning to harmonize the Talmud's internal inconsistencies, as well as the discrepancies between its teachings and the sacrosanct (and authoritative) practices of pious Jews. As both the text

6 Though this dialectic illuminates the ideological richness of rabbinic culture, these programmatic and aspirational writings hardly convey the manner in which legal decisions were actually made. Reconstruction of the practice of Jewish law in any time and place also requires consultation of archival materials, which bear witness to procedures that were actually followed and to the networks of power that ensured their enforcement. Medieval Jewish communities are often described as "autonomous", but their actual power was determined and circumscribed, at all times, by the needs non-Jewish rulers. Studies incorporating archival data include Marina Rustow, *Heresy and the Politics of Community: the Jews of the Fatimid Caliphate* (2008) and Uriel Simonsohn, *A Common Justice: the Legal Allegiances of Christians and Jews under Early Islam* (2011).

7 Harris, *How Do We Know,* 5-6.

8 Recurring locutions in Harris's prose suggest how difficult it is to escape historiography's overwhelmingly text-centered bias. Though he affirms that the meaning and cultural function of this enterprise for its tannaitic exponents remains unclear, Harris nonetheless refers to the geonic "trivialization of midrash", as if the "true" function of *midrash halakha* is/was other than what the geonim claimed. The term "restoration" reflects a similar tendency.

9 Nahman Danzig, "*Mi-talmud 'al peh le-talmud be-khtav*" *Sefer ha-Shana Bar Ilan* 30-31 (2006): 49-112; Yaakov Sussman, "*Torah she-be-'al peh – peshutah ke-mashma'ah: Koho shel qozo shel yod*",*Mehqere Talmud* 3 (2005): 209-384.

10 The last named sages of the "Palestinian", (or "Jerusalem") Talmud lived around 400.

11 See below, and Harris, *How Do We Know*, 6, 47.

12 This is the subject of Fishman, *Becoming*

and its interpreters grew in status, other approaches to rabbinic culture were overshadowed or marginalized.[13]

This essay will re-visit the ostensibly "anomalous" perspective of late Babylonian Geonim, who affirmed the primacy of tradition and the secondary status of text. Unlike the later medieval Jewish scholars whose perspectives and intellectual interventions consolidated the above-mentioned bias, the "Eminences" who led the post-talmudic academies in Baghdad between the early tenth and mid-eleventh centuries adamantly rejected the idea that ancient rabbis had exegetically derived new laws from the text of Scripture. Sa'adya Gaon [882-942], Shmuel ben Hofni Gaon [d. 1034], Sherira Gaon [906-1006] and Hayya Gaon [939-1038] all framed the sages of the first centuries as faithful tradents and not as legal innovators. According to these Geonim, their predecessors' ceaseless linkage of tradition to Scripture in answer to the question, "how do we know this?" served a purely mnemonic function; it was of no creative or generative import.

Situation of the geonic perspective within a longer historical continuum may counteract the presumption that there was something aberrant about the tradition-privileging position, or that it is in need of justification. Assessment of the geonic outlook in its own time and place (and not through the anachronistic lens of later developments) reveals that the Babylonian Talmud had not yet come to play some of the cultural roles that were later taken for granted. When, how, and why specific populations of Jews ascribed normative – as opposed to oracular, or literary, or sacred[14] – authority to texts (and, implicitly, to the elites

13 Certain manifestations and ramifications of Talmudocentrism elicited criticism from medieval Jews. See Fishman, *Becoming*, 353-388.

14 The recognition that Scripture and Talmud have not always been deemed the bearers of normative legal authority may be fruitfully linked to the observation that, under particular circumstances, each was ascribed other types of cultural authority. Jews of antiquity who regarded Hebrew Bible as the bearer of oracular authority interrogated its language for clues about the future. Readers and writers through the ages have invoked Scripture's literary authority every time they legitimate their own ideas by linking them to biblical prooftexts. And the etiquette observed in viewing and handling the Torah scroll provides social affirmation of that object's holiness. Jews of the medieval Rhineland ascribed sacrality to the texts of Oral Torah and to the accoutrements used in their manufacture, and Jews of several periods and places venerated the Mishna, which they saw as something other than a human composition. Ruminations on the cultural construction of authority appear in Michael Satlow, *How the Bible Became Holy* (Yale, 2014), 4; Jan Bremmer, "From Holy Books to Holy Bible: An Itinerary from Ancient Greece to Modern Islam via Second Temple Judaism and Early Christianity", *Authoritative Scriptures in Ancient Judaism* (2010) 327-360; Sid Z. Leiman, *The Canonization of Hebrew Scripture: The Talmudic and Midrashic Evidence* (1976). On the Rhineland Pietists, see Fishman, *Becoming*, 439-442. On Sherira's attempt to present the Mishna as something other than a human composition, see T. Fishman, "Claims About the Mishna in the *Epistle* of Sherira Gaon: Islamic Theology and Jewish History", in David Freidenreich and Miriam Goldstein, eds, *Border Crossings: Interreligious Interaction and the Exchange of Ideas in the Islamic Middle Ages*, (2012), 65-77; 184-192. On the kabbalists' perception of Mishnah, see RJZ Werblowsky, *Joseph Caro: Lawyer and Mystic*; (1962); Lawrence Fine, "Recitation of Mishnah as a Vehicle for Mystical Inspiration:

who interpreted them) are questions that shed historical light on the study of rabbinic culture. In some respects, the perspectives of the Geonim offer a "historic baseline", for it was through them that medieval rabbinic Jews of *all* subcultures (of which Ashkenaz and Sepharad are the best known) acquired familiarity with the Babylonian Talmud.

This essay will suggest that the geonic perspective on the primacy of tradition was natural for scholars who were conscious of their own capitulation to new realities. In disseminating corpora of Oral Torah – Mishna and Talmud – in written form, the Geonim consciously overrode certain rabbinic injunctions.[15] Their engagement in this transformative undertaking afforded the late Geonim unprecedented insight into the variables of cultural transmission and their allied problems. It was under these circumstances, in the Islamicate world, that the late Geonim identified tradition as a source of authority superior to any text, including that of Torah itself.

Text vs. Tradition in Rabbinic Antiquity and Historiography's Textual Bias

From the decades preceding the destruction of the Second Temple in 70 CE, through the third century, ancient rabbis and their forerunners produced two discrete Hebrew corpora of Jewish legal teachings. Both were regarded as instantiations of Oral Torah, and both were transmitted orally. The corpus known as *midrash halakha* links legal information to scriptural locutions, while Mishna, arranged around 200 CE, relays legal teachings apodictically; its relationship to Scripture is conspicuously tenuous.[16] Some have suggested that the Mishna preserves the ancestral teachings for which pre-70 Pharisees were renowned.[17] Internal inconsistencies are not uncommon within *midrash halakha*,[18] and its written compilations (produced generations later than their named tradents) follow the order of the Hebrew Bible. By contrast, Mishna is organized by topics and reads as a system with its own ordering principles.[19] There is some, but not

A Contemplative Technique Taught by Hayyim Vital". *Revue des Études Juives* 141, (1982) T. Fishman, "A Kabbalistic Perspective on Gender-Specific Commandments: On the Interplay of Symbols and Society", *AJS Review*, 17:12 (1992): 199-245.

15 BT Tem. 14a-b. The earliest source of this claim is a *beraita* of the school of Rabbi Ishmael; it is also found in BT Git. 60b. See Saul Lieberman, *Yevanim ve-Yevanut be-Erez Yisrael* (1962), 213-224; Y. N. Epstein, *Mavo le-Nusah ha-Mishnah* (1963), 2:692-706 and elsewhere. See Fishman, *Becoming*, 2-5.

16 Willem Smelik, *Rabbis, Language and Translation in Late* Antiquity (Cambridge, 2013), 227; J. Neusner, "Accommodating Mishnah to Scripture in Judaism: The Uneasy Union and Its Offspring", *Backgrounds for the Bible* (1987), 42.

17 Josephus describes the Pharisees as those who dedicate themselves to ancestral traditions in *Jewish Antiquities* 13.10.6, sections 297-298. On the likelihood that these traditions were preserved in the Mishna, see, for example, Frederick Murphy, *The Religious World of Jesus: An Introduction to Second Temple Palestinian Judaism*, (1991), 221.

18 Harris, *How Do We Know,* 23.

19 Dov Zlotnick, *The Iron Pillar: Mishnah: Redaction, Form and Intent* (1988).

total overlap[20] between the legal teachings relayed by way of *midrash halakha* and by way of Mishna.

It is not known why *tannaim*, the Palestinian sages of the first two centuries CE, generated two such different legal corpora. This riddle has given rise to many questions and theories.[21] Some posit the complementarity of these genres and assume that one was dominant (or prior), and the other a supportive adjunct (or secondary). Of these, three "big picture" explanations account for the relationship between the two genres: (a) Rabbinic scholars of antiquity regarded *midrash halakha* (and thus, Hebrew Bible) as the true source of rabbinic law, and regarded the more concise, structurally elegant, Mishna as a digest useful for memorization and/or quick consultation. (b) The Rabbis' predecessors had long preserved and transmitted the legal teachings that came to be known as Mishna, and recalled these in conjunction with their review of Scripture. The *midrash halakha*'s linkages between law and verse were the mnemonic aids that facilitated this pedagogic practice. (c) The Mishna's digest of legal teachings had been of unquestioned authority for a period of time, but shifting cultural circumstances – an elite institution's decline in power, and the concomitant need for different sort of verifiability – made it necessary to show that mishnaic teachings were supported by scriptural backing.

Other theories and speculative explanations focus on the antinomies between the two legal genres. They suggest, for example, that ancient Jews in certain regions were more inclined than those in others to rely on the scriptural text for the

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20 Some midrashim deal with legal issues untouched by the Mishna, and the legal conclusions of others sometimes disagrees with those of the Mishna. This means that midrashic texts have their own integrity and direct relationship to Scripture, or at least, to something other than Mishna. [Harris, *How Do We Know,* 10; 270, note 38].

21 The body of scholarly literature bearing on these questions is large, and growing. Among these studies are, Azzan Yadin-Israel, *Scripture and Tradition: Rabbi Akiva and the Triumph of Midrash*, (2015); Michael Satlow, *How the Bible Became Holy* (2014); D. Weiss-Halivni, *The Formation of the Babylonian Talmud*, Jeffrey Rubenstein, ed. and translator, (2013); Yakir Paz, "Re-Scripturalizing Traditions: Designating Dependence in Rabbinic Halakhic Midrashim and Homeric Scholarship", in M. Niehoff, ed., *Homer and the Bible in the Eyes of Ancient Interpreters* (2012), 269-298; A. J. Heschel, *Heavenly Torah as Refracted Through the* Generations, G. Tucker and L. Levin, translators (2007); A. Yadin, "Resistance to Midrash? Midrash and Halakhah in the Halakhic Midrashim", in C. Bakhos, ed., *Current Trends in the Study of Midrash* (2006), 35-58; Adiel Schremer, "'They Did Not Read in the Sealed Book': Qumran Halakhic Revolution and the Emergence of Torah Study in 2nd Temple Period Judaism", in in D. Goodblatt, A. Pinnick, D. R. Schwartz, eds, *Historical Perspectives From the Hasmoneans to Bar Kokhba in Light of the DSS*, (2001), 105-126; D. R. Schwartz, "Hillel and Scripture: From Authority to Exegesis", *Hillel and Jesus: Comparative Studies of Two Major Religious Leaders* (1997), 335-362; Harris, *How Do We Know*; D. Weiss Halivni, *Peshat and Derash: Plain and Applied Meaning in Rabbinic Exegesis* (NY: Oxford, 1991); J. Neusner, *Uniting the Dual Torah: Sifra and the Problem of the Mishnah* (1990); E. Z. Melammed, *Ha-yahas she-beyn midreshei halakha laMishna ve-laTosefta* (1967); EE Urbach, "*HaDerasha ke-yesod ha-halakha u-va'ayat ha-Sofrim*", *Tarbiz* 27 (1958), 166-182; J. Z. Lauterbach, "Midrash and Mishnah: A Study in the Early History of Halakha", reprinted in *Rabbinic Essays* (1951).

determination of law, or that discrete schools of *midrash halakha*, those of Rabbi Aqiva and Rabbi Ishmael, were divided not only by their different methodological approaches to Scripture, but by different ideological perspectives. Careful study of the tannaitic sources (including their manuscript variants) has enhanced many learned discussions on these topics, yet some are predicated on unproven postulates. One is that *midrash halakha* claims divine authority for the Scripture-linked law, implicitly if not explicitly. Another is that laws linked to Scripture by *midrash halakha* were actually *derived* from Scripture.[22] Both assumptions need to be balanced by historical evidence, and by the common-sense awareness that societies come to rely on a text for governance only after they have attained some measure of consolidation – at least enough to authorize the text. As one scholar noted with no little irony, the greatest legacy of Hebrew Bible may be "the radically implausible notion that one can build a community, a religion, a culture, and even a country around a text".[23]

The shadow cast retrojectively by the Babylonian Talmud has done much to bolster these unproven assumptions. The anonymous scholars who redacted this work in the sixth and seventh centuries assumed that second century *tannaim* such as Rabbis Aqiva and Ishmael had actually created rabbinic law by applying approved hermeneutical techniques to the scriptural text. The Babylonian Talmud portrays biblical exegesis as the *source* of rabbinic law, and *midrash halakha* as the tool by which these laws were generated. As Harris observes, when the Talmud asks, "how do we know this?" it assumes that the answer is to be found in the anomalies, superfluities, or location of a biblical locution.[24]

The Babylonian Talmud's assumption stands in striking contrast to the perspective of another corpus of Oral Torah, the Jerusalem (or Palestinian) Talmud, whose last named tradents lived around the year 400. The anonymous redactors of the Palestinian Talmud did not make the same assumptions about the intentions of the earlier rabbis who had produced *midrash halakha*. Amoraim of the Jerusalem Talmud perceived the distinctive exegetical approaches of the schools of Aqiva and Ishmael as systematic methods, but not as ones they used to derive new legal norms.[25] In contrast to the Babylonian Talmud, which surged in importance in the Middle Ages, the Palestinian Talmud remained culturally marginal.

The largely unprecedented encounter with the Babylonian Talmud as a written text in the Middle Ages had a transformative impact on pedagogic practices, compositional predilections, approaches to adjudication, social hierarchies, and

22 Gerald Blidstein made a similar point in his review of Jay Harris, *How Do We Know This?* In *Qiryat Sefer* 68 (1998), 212. I thank Marc Herman for bringing this to my attention.
23 Michael Satlow, *How the Bible Became Holy* (2014), 281.
24 Harris, *How Do We Know*, 48, and cf. 6, 44-47.
25 ibid.,72, and cf. 70-72.

cultural values. These changes were not triggered solely by the consignment of formerly oral teachings to writing, or by a growth in literacy. Over the course of a gradual, and at times unconscious, process of "textualization" medieval Jewish populations came to ascribe greater value to the authority of the inscribed word than they did to oral testimony, often performative in nature. The process may have reached its peak in the projects of the Tosafists. Reliance on the written word, rather than on living embodiments of tradition, favored the cultivation of logocentric skills (like dialectic); readers whose refraction of the text yielded new (and harmonizing) insights gained social cachet.[26] The dramatic cultural changes of this time might be likened to those triggered by the adoption of a new technology; societal values, no less than practice, were transformed.[27]

Though the shift from the Talmud's oral, to its written, transmission contributed to a decentralization of rabbinic authority, it was overseen by the very elite who stood to lose power – and did: the Geonim. In spite of a cultural mandate to guard the oral transmission of certain teachings, later Geonim disseminated parts of the Babylonian Talmud, in written form, to Jews living far from the ancient rabbinic centers of Babylonia and Palestine. No explicit geonic justification for this reversal has surfaced, but modern scholars relate it to the demands and opportunities created by the new realities of Jewish settlement. The Jewish Diaspora had existed for centuries, but it was not until the Muslim Conquest that the two ancient centers of Jewish life – Palestine (first Roman, and subsequently Byzantine), and Babylonia (formerly Sasanian) – were united within one empire. To survive (and develop) as a single culture under new, global, circumstances, rabbinic Jews would need to be unified by more than face-to-face instruction from institutional elites based in one of these Eastern centers. They would need to share a legal core, and for that core to be accessible to Jewish readers living in locales far from Baghdad – Qayrawan, Fez, Worms and Lucena, for example – it would need to be written down. The Geonim who oversaw this crucial cultural change lived at the heart of the Abbasid empire[28] during the very centuries when Islam's jurists were producing a comprehensive legal system. Intellectually-integrated into the scholarly environment of Baghdad,[29] geonim from Sa'adya Gaon (882-942) onward were well aware that the majority culture had produced – from its own written and oral traditions – a coherent juridical apparatus for the governance of co-religionists (and other subjects) on three continents.

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26 Fishman, *Becoming*, 274-318.

27 David Carr, *The Shallows: What the Internet Is Doing to Our Brains* (2010).

28 On the relocation of the geonic academies of Sura and Pumbedita to Baghdad, see R. Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture*, (1998) 31, n. 4.

29 See, for example, Hava Lazarus-Yaffeh, ed., *The Majlis: Interreligious Encounters in Medieval Islam*, (1999).

There is little reason to assume that a comprehensive legal system of this nature, ready for use by rabbinic Jews the world over, existed prior to this time. While ancient rabbis labored to articulate *Scripture*'s relationship to law (as discussed above), no comparable work had yet been undertaken with respect to the Babylonian Talmud. Indeed, it is not clear what functions, legal or otherwise, this corpus fulfilled for rabbinic Jews prior to geonic times, or was intended to fulfil. In the words of Robert Brody, "We have no way of knowing to what extent, if at all, the 'editors' of the Talmud – as distinct from the authors of the legal dicta embedded within it – intended to create a normative legal work, rather than an academic or literary corpus".[30] Neither its presentation of legal teachings in the form of unresolved disputes, or its inclusion of (non-legal) *aggadot* recommended the Babylonian Talmud for the prescriptive role it later came to play.

The Geonic Perspective: The Non-Self Sufficiency of the Text

From 928, when Sa'adya Gaon assumed leadership of the Suran academy, through the death of Hayya Gaon (1038), scholars at the helm of this institution insisted that tradition possessed far greater legal (or cultural) authority than the Torah (or any foundational text) could possibly bear. In staking this claim, Geonim were referring not only to the late antique past, but to their own time as well. Indeed, their claim that text, on its own, was insufficient as a source of legal authority applied to Talmud as well as to Torah.

In making this point about Torah, Sa'adya Gaon sought to clarify the function of the thirteen *middot* ascribed to Rabbi Ishmael, each of which designates a pathway of inference that a reader might employ in order to link the biblical text with a rabbinic law.[31] (The precise meaning of the Hebrew term, *middot* [*middah*, sing.] is unclear, and analysis of the Talmudic passages in which it is used does little to clear the haze. Equally confusing is the meaning of "*darash*", the verb used to describe the reader's application of the *middot* to the scriptural text).[32] Whereas the redactors of the Babylonian Talmud had assumed that each

30 Brody, *The Geonim of Babylonia,* 161.

31 The 13 *middot* ascribed to Rabbi Ishmael, a second-century Palestinian sage, are found in a *beraita* that appears as the introduction to the *Sifra*.

32 Wilhelm Bacher wrote that "the *middot* of the Torah are the qualities [*tekhunot*] of the Torah that are bound up with it and impressed upon it (like qualities of the soul). Yet it is also possible to say that the *middot* are of the nature of a measuring rod, with which one measures Scripture when one comes *le-darsho*". [W. Bacher, *'Erkei Midrash*, (1923), 70]. The term *darash* is equally problematic; it may denote interpretation or homiletic elaboration. Beyond this, the two manuscript editions of the Introduction to *Sifre* consulted by Bacher use different prepositions. This slightly alters the reader's conception of the role of the *middot*. One reads, "*Be-shlosh 'esrei middot haTorah nidresehet*", and the other, "*Me- shlosh 'esrei middot haTorah nidresehet*".

middah was a technique to be deployed in order to derive new rabbinic laws, Sa'adya claimed that each *middah* designated a mental pattern that a student of Scripture might call to mind in order to link known legal traditions to the sacred text. The *middot* were not like algorithms, whose application was of generative value. They were, he claimed, descriptive pathways; ex-post facto mnemonic aids for binding law to Torah. Students aided by these prompts could call to mind extra-textual legal teachings while engaging the biblical text, and, in this manner, affirm the coherence of all of Judaism's received traditions. In building this argument, Sa'adya likened the thirteen *middot* of Rabbi Ishmael to lists produced by the Masoretes. These Jewish scholars, Hebrew Bible specialists, consigned to writing (and may have developed) their lists of Masorah (lit. "tradition") in Muslim lands between the eighth and tenth centuries. The patterns to which they drew attention, for example, the number of times a given word or spelling appears in the Bible, are understood, among other things, as tools for mnemonic retrieval, and as anchors that stabilized the eponymous "Masoretic" version of Scripture.[33] Setting forth a conceptual proportion, Sa'adya asserted that the relationship of the thirteen *middot* to the Torah was like the relationship of the Masoretic lists to the Torah. Both were descriptive of existing patterns.

> I preface this by saying that concerning commandments, the Sages of blessed memory did not rely in their teachings on any analogy (*heqqesh*) for they did [not] turn to the analogy of their reason and their opinions, but were, rather, transmitters [of traditions received] from the emissary [Moses] and bearers of his traditions ... and it is clear from what we have explained that the Sages did not record these 13 [principles] because they proved [the laws] using them but rather compiled them because they found that the laws [*halakhot*] that they had could be combined according to these [thirteen] principles, but they were not established on the basis of the thirteen. And just as we say of the Masoretic notes that they found that there are ten occurrences [in the Bible] of the *plene* spelling of "*shall be done*", nine of "*in the good*", and eight of "*in Babylonia*", and these did not come about as a result of the Masorah, but rather, the Masorah searched and found them to be so, and just as the grammarians and others searched and found things and classified them ... so too, our Sages recorded these thirteen means [i. e., principles] in accordance with what they found through their painstaking analysis of the commandments.[34]

Sa'adya's perspective on the 13 *middot* was wholly consistent with his mission to combat Qaraism, a Jewish movement consolidated in Muslims lands of the tenth

33 See I. Yeivin, *Introduction to the Babylonian Masorah*, E. J. Revell, translator (1980).

34 The passage, in its Judaeo-Arabic original and Hebrew translation, appears in Moshe Zucker, "*Qeta'im mitokh Kitāb Taḥṣīl Al-Sharā'i' Al-Samā'īyah*", *Tarbiz* 41 (1972), 375-378). The English translation appears in R. Brody, *Sa'adyah Gaon*, B. Rosenberg, translator (2013) 34.

century[35] whose adherents rejected the authority of the rabbis and their trachings. After all, Sa'adya's insistence that Scripture was not sufficient as a source of law flouted the Qaraite assertion that nothing but the Bible was needed for legal decision making. Yet it may be unfair to assume, as have some modern scholars,[36] that this perspective (held by later Geonim as well) was determined solely by the need to combat Qaraite polemics. Analysis of passages which shed light on geonic historicist sensibilities, epistemological concerns, and insights into the variables of transmission may limn the contours of a rich and coherent worldview in which it would have made little sense to regard the foundational text as sufficient, or even as primary.

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The Geonim may well have recognized that the Babylonian Talmud's portrait of *midrash halakha* deviated from the intentions of its named tradents. In his 987 *Epistle* to the Jews of Qayrawan, Sherira Gaon described two ancient compilations of *midrash halakha*, *Sifra* (on the Leviticus) and *Sifre* (on Numbers and Deuteronomy) as "homilies on the biblical verses that show where allusions to the laws [*halakhot*] are found in scripture. And this was the manner of their recitation from the beginning, in the Second Temple, in the days of the earlier ones".[37] The geonic distinction between *midrash halakha*, and its framing within the Babylonian Talmud as a constitutive strategy, is blatantly evident in a responsum by Sherira's son, Hayya Gaon. The Babylonian Talmud had linked a law concerning a Hebrew bondsman who was injured by his Jewish master to a scriptural verse,[38] but Hayya insisted that the verse was not the source of the law in question, nor its proof. The verse was adduced for purely homiletical reasons. "The essence of the matter", wrote Hayya, "is that it is an accepted law".[39]

The geonic rejection of what might be seen as a "fundamentalist" perspective applied to any text, irrespective of its culturally privileged status. The recurring geonic insistence that Talmud, on its own, did not prescribe Jewish law could hardly have been triggered by the Qaraite assault on Rabbinism, given the

35 The distinction between Ananism and Qaraism is stressed in H. Ben Shammai, "Between Ananites and Karaites: Observations on Early Medieval Jewish Sectarianism",in *Studies in Jewish-Muslim Relations* I (1993) 19-29.

36 See, for example, L. Hoffman, *The Canonization of the Synagogue Service* (1979), 165. Marc Herman offers a fuller discussion of this perspective in academic writings in his forthcoming dissertation on Rabbi Daniel HaBavli and Abraham Maimonides. I thank him for sharing this with me.

37 B. M. Levin, ed., *Iggeret Rav Sherira Gaon*, (1972) 39.

38 *BT*, BK 28a. The verse is Nu. 35:32.

39 *Ozar HaGeonim*, BK #68, 28. This example is mentioned in Harris, *How do we know*, 81.

Qaraites' out-of-hand rejection of the Talmud. It was, instead, consistent with an epistemological outlook developed by Geonim of the Islamicate world.

In the tenth and eleventh centuries, Jewish students in the *batei midrash* [study halls] of Qayrawan (in today's Tunisia) derived their understanding of rabbinic law from the "unadorned" text of the Babylonian Talmud, unaccompanied by commentaries.[40] This experience had been made possible by Baghdadi Geonim, who disseminated the written talmudic text to Jews outside the academies, but the Geonim were hardly sanguine about its consequences. The tendency of the Qayrawanese to rely on the talmudic text met with intense geonic displeasure. In one case, Sherira Gaon ridiculed students who assumed that a particular talmudic passage[41] gave them license to keep money that an "ignoramus" had misplaced, instead of announcing that the money had been found.[42] Sherira condemned anyone who behaved in this manner and excoriated the students for their outrageous misunderstanding of rabbinic juridical procedure. Applied law was not to be derived directly from the talmudic text, thundered Sherira. Had the questioners learned from masters, living sources of tradition, they would have known that not everything preserved in the Talmud is of legal value; some passages are instructive without being prescriptive.

> These are not matters of prohibition and permission, such that one is required to tell, based on them, what is *halakhah* [law] and what is not *halakhah*! Rather, they are "extra matters" – like the rules of etiquette – telling about the depravity of ignoramuses, and [other] vain talk.

The Qayrawanese interlocutors themselves, were the true ignoramuses, wrote Sherira.

> For even if one read [Talmud] and repeated it – but did not serve rabbinic scholars [as disciples] – this is an ignoramus. For if these students had served sages [as disciples], they would never have said this.[43]

Sherira's son, Hayya Gaon, addressed another case in which talmudic teachings were (wrongly) construed as prescriptive. The question sent him by the

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40 Qayrawan ultimately did produce two important Talmud commentators, Rabbenu Hananel and Rabbenu Nisim. See Yisrael Ta Shma, *Ha-Sifrut ha-Parshanit le-Talmud be-Eiropa u-vi-Zefon Afrika I 1000-1200* (1999), 118-145.

41 *BT*, Pes. 49b

42 On *'amei ha-arez*, ignoramuses, in ancient rabbinic writings, see Aharon Oppenheimer, *The 'Am Ha-Aretz: A Study in the Social History of the Jewish People in the Hellenistic-Roman Period,* trans. I. H. Levine (1977).

43 Avraham E. Harkavy, *Teshuvot ha-Geonim* (facsimile of Berlin, 1887; 1959), Responsa 240, 117; 380, 197-198; M. Ben Sasson, *Zemihat ha-Qehilah ha-Yehudit be-Arzot ha-Islam: Qayrawan*, (1996) 237.

Jews of Qayrawan focused on the discrepancy between the local practice of blowing shofar on Rosh HaShanah, and the practice described in the Talmud.[44] The arrival in Qayrawan of immigrants who followed the Talmudic regimen eroded the confidence of local Jews, who now learned that their own practice did not conform to the text. Turning to the Gaon, they asked: How could they know which practice was truly correct? At the outset of his lengthy responsum, Hayya informed the questioners that they were making the matter unnecessarily complicated:

> That practice by which we fulfill our obligation and the will of our Creator is established and certain in our hands. That which we do is a legacy which has been deposited, transmitted, and received in tradition – from fathers to sons – for continuous generations in Israel, from the days of the prophets unto the present time ... Since we have this [received legacy] in our hands as an implemented practice [*ma'aseh zeh be-yadenu*], it is correct, [and] a law transmitted to Moses on Sinai. And since they have fulfilled their obligation [in following this practice], any difficulty vanishes.[45]

According to Hayya, the consensus of the Jewish people is the ultimate guarantor of the authority underlying any belief or practice. If such authentication is lacking, he claimed, no textual source of jurisprudence can be authoritative:

> Greater than any other proof is: [BT, Ber. 45a] "*Go out and see what the people do*". *This* is the principle and the basis of authority! [Only] *afterward* do we examine everything said about this issue in the Mishna or Gemara. Anything that arises from them and that can help to explain what we want is fine, but if there is nothing in it [Mishna or Gemara] which aligns with our wishes, and if it is not clarified through proof, this [textual teaching] does nothing to uproot the principle [of following the consensus of the Jewish people].[46]

This vehement insistence that the Talmud's legal teachings were only to be deemed authoritative when corroborated by attested practice sheds light on a formula (with several variants) that recurs at the conclusion of many geonic responsa.[47] The phrase, "This is the *halakhah* and this is the custom" affirms that the decision rendered met both of the necessary conditions.

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44 Ben Sasson, ibid., 173.

45 Levin, *Ozar ha-Geonim*, RH, Responsa 117, 61-62. My translation of this passage differs from the overlapping sections translated in Zvi Groner, *The Legal Methodology of Hai Gaon* (1985), 16-17.

46 ibid.

47 "*Ve-khen halakhah, ve-khen minhag*" or "*ve-kakh halakhah, ve-kakh minhag*". See G. Libson, "Halakha and Reality in the Geonic Period: *Taqqanah, Minhag*, Tradition and Consensus". In *The Jews of Medieval Islam: Community, Society and Identity*, ed. Daniel Frank (1995), 91.

Like their Muslim counterparts, medieval Jewish scholars in Islamic lands acknowledged consensus (Arabic, *ijma*) as a source of law,[48] and they were heavily invested in broader discussions about epistemology.[49] Medieval discussions about disparate modes of cognition – belief, opinions and knowledge – were predicated on Aristotle's understanding of these as (vaguely physiological) powers of the soul, and were triggered by the theological and jurisprudential needs of the time. Within the venue of the *majlis*, (an intellectual salon convened by a potentate in a Muslim land) representatives of disparate religions had to avoid opinion and argue solely on the basis of reason if they wished to be effective in engaging their interlocutors. These standards undoubtedly heightened epistemic awareness; indeed, concerns about one's grounds for knowing virtually haunt geonic writings. Sa'adya Gaon writes of his need to "give an account if the bases of truth and the vouchers of certainty which are the source of all knowledge and mainspring of all cognition",[50] and he discussed the sources of knowledge in the Introduction to his commentary on the Hebrew Bible[51] and in (the carefully named) *Book of Beliefs and Opinions*.[52]

Some Jewish scholars in the medieval Islamicate world (Sa'adya Gaon and Maimonides among them) embraced a fundamental premise – both ontological and epistemological in nature – that was articulated, earlier, by Muslim scholars. Divine knowledge was certain, they asserted, but human knowledge (a homonym of sorts) could only be assessed on a scale of probability.[53] This position, on its

48 Notwithstanding the rabbinic injunction to "go out and see what the people do", consensus does not seem to have had the status of a formal source of law in the Talmud. See M. Ben Sasson, "Ha-Qehilah ha-Yehudit be-Zefon Afriqah- hevrah u-Manhigut: Qayrawan 800-1057", Ph.D. dissertation, Hebrew University, 1983, 2:20n18. On the geonic conjoining of "consensus" with "tradition", see Libson, *The Jews of Medieval Islam*, 95; David Sklare, *Samuel ben Hofni and His Cultural World* (1996), 162-164, and cf. 55. Sklare notes that Rabbanites took the position of the majority as indicative of consensus, whereas Karaites did not.

49 Shlomo Pines, "The Limitations of Human Knowledge according to A1-Farabi, Ibn Bajja, and Maimonides", in I. Twersky, ed., *Studies in Medieval Jewish History and Literature* (1979), 82-109; Alfred Ivry, "Maimonides on Possibility", *Mystics, Philosopher, Politicians: Essays in Honor of Alexander Altmann* (Duke, 1982), 69-79; Charles Manekin, "Belief, Certainty and Divine Attributes in the *Guide of the Perplexed*", *Maimonidean Studies* 1 (1990), 117-141; H. A. Davidson, "Maimonides on Metaphysical Knowledge", *Maimonidean Studies* 3 (1992-1993) 49-103; Warren Zev Harvey, "Maimonides' First Commandment, Physics and Doubt", in *Hazon Nahum*: *Studies in Jewish Law* Presented to Norman Lamm (1997), 149-162; Idit Dobbs-Weinstein, "Belief, Knowledge & Certainty", *Cambridge History of Jewish Philosophy: Antiquity to the Seventeenth Century* I (2009), 453-480.

50 Sa'adya, *The Book of Beliefs and Opinions*, translated from the Judaeo-Arabic by S. Rosenblatt, (1948), 16.

51 *Sa'adiah's Commentary on Genesis*, Introduction, translation and notes by Moshe Zucker, ed. (1984), 165; 191.

52 Sa'adya, *The Book of Beliefs and Opinions*, 16-26.

53 See sources in note 48.

own, greatly enhanced the status of tradition (as opposed to text). As Sa'adya Gaon wrote,

> Were it not for the existence on the world in this world of such a thing as authentic tradition, no man would be able to identify the property of his father or his inheritance from his grandfather. Nay, he would not even be certain of being the son of his mother, let alone of his being the son of his father.[54]

When framed in this manner, tradition's status of pre-eminence appears to be a fail-safe position; it spares believers from the underlying, potentially crippling, agnosticism. The distinction between God's certain knowledge, and the – at-best, probable – knowledge of man, had a major impact on Islamic juridical thought,[55] and may have affected the legal outlook of some medieval Spanish Jews.[56]

Other manifestations of Jewish epistemological awareness may be linked to the *hadith* authentication project undertaken by Muslim jurists. Charged with developing a legal system that would meet the needs of co-religionists the world over, *hadith* scholars established criteria for discerning which *hadith*, among the masses of traditions bearing this label, were of greater authenticity – and thus, of greater soundness.[57] Shmuel ben Hofni Gaon employs the precise epistemological criteria used by Muslim authenticators in his writings,[58] and the game-changing[59] claim by rationalist geonim from Sa'adya onward, "do not rely on [the authority of] rabbinic *aggadot* [i. e., non-legal traditions]",[60] reflects a comparable impulse to winnow tradition and to establish hierarchies of authority.

Leveling the Field for Written and Oral Torah: Geonic Arguments in Context

In his efforts to awaken readers to the radical contingency of human knowledge, Sa'adya Gaon had toyed, disturbingly, with the certainties of human identity. Yet Hayya Gaon's attempt to elicit recognition of this point was perhaps more

54 Sa'adya, *The Book of Beliefs and Opinions*, 156.

55 Baber Johansen, "Truth and Validity of the Qadi's Judgment: A Legal Debate Among Muslim Sunnite Jurists from the Ninth to the Thirteenth Centuries", *Recht van de Islam* 14 (1997), 1-26.

56 The so-called "constitutive view" expressed in writings of Nahmanides and his students, R. Yom Tov Ishbili and R. Nisim Gerondi are consistent with a type of agnosticism. See Moshe Halbertal, *People of the Book: Canon Meaning and Authority* (1984) 63ff.

57 Aron Zysow, "The Economy of Certainty: An Introduction to the Typology of Muslim Legal Theory" (Ph.D. dissertation, Harvard University, 1984), 14-49; Ignaz Goldziher, "Disputes Over the Status of Hadith in Islam" in Harald Motzki, ed., *Hadith: Origins and Developments* (2004), 59-60.

58 David Sklare noted this in his pathbreaking work, 158-165.

59 See note 4.

60 For the geonic passages asserting that the *aggadot* are not to be regarded as sources of authority, see Jacob Elbaum, *LeHavin Divrei Hakhamim* (2000), 49-57.

shocking. In the above-cited responsum, Hayya enjoined the Qayrawanese questioners to stick with the traditions of their ancestors – and went on to explain how high the stakes really were:

> How do we know *at all* that we are commanded to blow [the *shofar*] on this day? [For that matter,] regarding the essence of the written Torah: How are we to know that it is *indeed* the Torah of Moses, that which he wrote from the Mouth of the Almighty, if not through the mouth [attestation] of the Community of Israel?! After all, those who testify to it are the same ones who testify that, through this deed, we have fulfilled our obligation, and [who testify that] they received this by means of tradition, from the mouths of the prophets, as Torah transmitted to Moses at Sinai. It is the words of the multitudes that testify to [the authority] of each mishna and every gemara.[61]

Like Sa'adya, Hayya compelled his readers to seriously confront the question, "in what do we trust?" – but he did so in a manner that might have provoked doctrinal anxiety. The very *identity* of Torah was contingent, he declared, and not merely its authority!

Hayya Gaon's segue from the text of Talmud to that of Scripture might have outraged the third and fourth century rabbis who introduced the notion of Oral Torah[62] and set forth regulations to ensure that it would remain distinct from Written Torah.[63] These two categories, reflecting the Hellenistic distinction between *hypomnemata* and *syngrammata*,[64] were adapted and deployed by rabbis in the period following the Second Temple's destruction to address particular needs. At a time when rival Jewish groups were circulating extra-biblical texts which they described as products of revelation, rabbis sought to delimit the canon of sacred Scripture, and, at the same time, endow their own (extra-biblical) writings with a form of authority that would not be confused with that of Scripture.[65] By the time of the late Geonim, such rabbinic insecurities about the usurpation of Hebrew Scripture appear to have receded. In their own projects, Hayya and his predecessors minimized the gap between Written and Oral Torah.

Some geonic writings that brought Scripture and Mishna into one purview were overtly tendentious. Sa'adya's recurring claim that it would be impossible to perform biblical commandments, were it not for the details provided in Oral

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61 In B. M. Levin, *Ozar ha-Geonim*, RH, Responsa 117, 62. Emphases are mine.

62 Martin Jaffee, *Torah in the Mouth: Writing and Oral Tradition in Palestinian Judaism, 200 BCE-400 CE* (2001).

63 See Fishman, *Becoming*, 2-5; Leiman, *The Canonization*

64 See Saul Lieberman, *Hellenism in Jewish Palestine: Studies in the Literary Transmission, Beliefs and Manners of Palestine in the I Century BCE-IV Century CE* (NY: JTS, 1950), 87-88, 204-205; *idem*., *Yevanim ve-Yevanut be-Erez Yisrael* (1962), 213-224; Fishman, *Becoming*, 26.

65 Marc Bregman, "*Mishnah ke-mysterion*" *Mehqere Talmud* 3 (2005): 101-109; Jaffee, *Torah in the Mouth*, 84-99.

Torah,[66] was clearly formulated to refute Qaraite claims. But Jewish scholars who studied these chronologically distant Hebrew corpora in tandem also produced fresh insights into Hebrew lexicography, the history of language and the nature of cultural transmission. It was no coincidence that they were living in "the heroic age of Arabic grammar".[67]

In several of his compositions, Sa'adya Gaon, the first lexicographer of Hebrew and its first grammarian, used the language of the Mishna in order to explain obscure biblical words.[68] This mixing of "the language of Scripture" with "the language of the sages"[69] was seen by some as controversial.[70] Nor was it devoid of polemical (anti-Qaraite) import, for it furthered Sa'adya's perspective on the cultural unity of biblical and rabbinic Judaism.[71] Yet the panoptic study of biblical and mishnaic Hebrew also cemented Sa'adya's perception of language as a living organism that shifted over time. As he affirmed at the conclusion of his volume on "isolated" biblical words,

> The language is more extensive than the Bible, and the Bible forms only part of it. And this is clear from reason and from testimony.[72]

This insight found expression in Sa'adya's own lexical and generic contributions to the Hebrew language, and in his efforts to facilitate Hebrew compositional creativity in others as well.[73]

More dramatically, Sa'adya compared the formation and transmission of the Mishnaic text to the formation and transmission of the text of Scripture. Seeing beyond the taxonomy of "Written" and "Oral" Torah established by ancient rabbis, Sa'adya asserted that, like Mishna, parts of Scripture itself had been passed

66 Sa'adya makes this argument in his *Book of the Source of the Non-Rational Commandments*, fragments of which appear, with analysis in Moshe Zucker, *Qetaim*, 404ff; in the Introduction to his Bible Commentary,in Zucker, 181-184, and in *Essa Meshali*, edited by B. M. Levin, in J. L. Fishman, *Rav Sa'adya Gaon: Qovez Torani u-Madda'i* (1943). 45-46.

67 E. Joseph Lowry, "Early Islamic Exegesis as Legal Theory: How Qur'ānic Wisdom (*Hikma*) Became the Sunna of the Prophet", in N. Dohrmann and D. Stern, eds, *Jewish Biblical Interpretation and Cultural Exchange*, (2008), 139.

68 Sa'adya does this in his *Explanation of the Seventy Isolated Biblical* Words (which includes around 100 words), and justifies the invocation of post-biblical Hebrew usages in that work's Introduction. See Brody, *Sa'adya*, 84-85.

69 In BT, AZ 58b, and in BT, Hul. 137b, the Talmud notes that the two forms of Hebrew are different.

70 Sa'adya was excoriated by Dunash b. Labrat, in *Sefer Teshuvot Dunash Halevi ben Labrat el Sa'adya Gaon*, ed., Robert Schroter (1971 reprint). See Harris, *How Do We Know*, 80.

71 Brody, *Sa'adya*, 91

72 Cited in Brody, *Sa'adya*, 90-91.

73 Sa'adya produced a rhyming dictionary, the *Egron*, in the hopes of aiding poets to write rhyming verses in the Hebrew language.

down orally over a prolonged period of time, before ultimately being set in writing. The two texts had evolved in similar ways, Sa'adya claimed; their formation-histories were structurally akin. One occasion for this comment was a scriptural passage, for Proverbs 25:21 mentions a time lag between the initial transmission of certain Solomonic proverbs and their consignment to writing: "*These also are proverbs of Solomon, which the men of Hezekiah king of Judah copied out* [*he'etiqu*]". Writing in Judaeo-Arabic, Sa'adya remarks:

> The words of this book teach us that our fathers persisted in transmitting many matters to one another [in] unwritten [form], until they were later written. For it explicitly said that these proverbs were said by Solomon, of blessed memory, and remained unwritten for some time until the men of Hezekiah wrote them. And as Jeremiah explained, in that which he said, [Jer. 17:22], "*neither carry forth a burden out of your houses on the sabbath day, neither do ye any work; but hallow ye the sabbath day, as I commanded your fathers*" – that God commanded [this] to our fathers, at the time of their Exodus from Egypt. Therefore, [in other words] it was possible for the fathers [*avot*] to transmit to one another of the commandments many commandments which Moses our teacher, of blessed memory, had heard at Sinai, but did not set in a book – until the time that the Mishna was written, and the time that the Talmud was written.[74]

This claim of Mishna's consignment to writing differs from Sa'adya's description, elsewhere, of the Mishna's lexical stabilization.[75] In the Introduction to his Judaeo-Arabic commentary on *Sefer Yezirah* [*Book of the Creation*] – a brief and enigmatic Hebrew treatise that describes the 22 letters of the Hebrew alphabet and ten digits as building blocks of creation – Sa'adya refers to this event while addressing the treatise's claim, that *Sefer Yezirah* was revealed to the Patriarch Abraham.

> Now we will come to complete the Introduction to this book. And we will say that the early ones transmitted/said, that this book was composed by our Father, Abraham, as is said explicitly at its end: "And when Abraham our father understood, the Holy One, blessed be He, was revealed upon him. [*niglah 'alav haQadosh Baruch Hu*]". And they do not say that he established the words of this book in this order, but they say that he derived these matters by means of his intellect [*hotzi et ha-'inyanim halalu be-sikhlo*]. And it became clear to him that the numbers and the letters are the beginning of things, as we will explain. And he taught them to himself and he taught them to the affirmers of God's oneness [*la-meyahhadim*] that were

74 Sa'adya's Commentary on Prov. 25:21, in *Mishlei 'im Tirgum u-Ferush ReSaG*, R. Yosef Kafih, translator, (1975-1976), 194.

75 It also differs from the formulation in one of the two recensions of Sherira Gaon's *Epistle* – composed several decades after Sa'adya's death. According to the *Epistle*'s "French" manuscript variant, neither Mishna nor Talmud were written; Mishna was "arranged".

> with him. And they [these ideas] did not cease being transmitted in the midst of our nation in unwritten form, [lit: and unwritten] just as the Mishna was transmitted and unwritten. And even part of the Scripture was, for many years, transmitted and unwritten, like [Prv 5:1] "*the proverbs of Solomon which the men of Hezekiah, King of Judah, copied out* [*he'etiqu*]".
>
> And when the time came that the sages of the nation gathered and consolidated [*rikkezu*] the matters of the Mishna, and garbed them in their own words [*ve-hilbishum milim mishelahem*] and established/fixed them [*u-qeva'um*], they did, or did something like it to the matters of this book, [*Sefer Yezira*] in a similar manner.[76]

According to Sa'adya, the formation history of *Sefer Yezira* resembled that of the Mishna in that their respective teachings were orally transmitted over a prolonged period without assuming a fixed lexical form. The ultimate "garbing" of each composition in its fixed language was undertaken by the nation's elders, who gathered for this purpose.

In relaying this narrative about the Mishna's lexical stabilization, Sa'adya was undoubtedly relying on an inherited tradition.[77] But there is also reason to assume that Sa'adya understood this pattern of text formation from his own experiential encounters with traditions of Oral Torah. As a student and teacher who engaged some of its teachings through oral/aural transmission and others in written form, Sa'adya (and his geonic successors) would have been keenly aware of the fungibility of language.

The contrast between transmission for content and for the tradition's precise language attained fuller conceptual and terminological articulation in Sherira Gaon's *Epistle*. On more than one occasion, Sherira stressed the difference between the "freestyle" and improvised language of Mishna instruction that had prevailed for generations, and the linguistic fixing of that corpus that was ultimately undertaken by Rabbi Judah the Patriarch. The distinction itself corresponds to an Arabic binary, *riwayya b'il ma'ana*, transmission for meaning, and *riwayya b'il lafz*, verbatim transmission, which featured prominently in several learned debates of Islam's first centuries.[78] One usage of this binary arose in relation to the fixing of the Uthmanic codex of the Quran, which disrupted the recitations of some of its readers;[79] it was also used by later Sunna scholars who debated whether the transmission of a text's meaning was sufficient, or whether

76 Sa'adya, Introduction to *Commentary on Sefer Yezira*, edited and translated from Judaeo-Arabic to Hebrew by Rabbi Yosef Kafih (1972), 33.

77 Sherira's account includes other traditions, such as Rabbi Judah the Patriarch's selection of the student notebook of Rabbi Meir as the model for the Mishna.

78 Wolfhart Heinrichs, *Arabische Dichtung und Griechische Poetik* (1969), 69-82.

79 James E. Montgomery, Introduction to Gregor Schoeler, *The Oral and the Written in Early Islam* (2000), 20.

it had to be relayed *ipsissima verba*.[80] The *riwayya b'il ma'ana – riwayya b'il lafz* distinction punctuated tenth century Islamic debates over the relative cultural importance of the disciplines of logic and grammar,[81] and proved important in Arabic literary theory and criticism.[82]

Within Sherira's *Epistle*, this binary is of great heuristic value; it supports the Gaon's historiographic narrative of a decline in the generations while answering the questions posed. The earliest sages had refrained from standardizing their teachings, claimed Sherira, because it was unnecessary. They had "no need to link matters [in standardized concatenations, in order] that they be recited in one [single standardized] formulation".[83] Indeed, Sherira explained, in earlier times, the sequence of teachings varied from one master to the next;[84] each one freely transmitted oral teachings to his students in an unscripted manner, "in the words that he strung together at that moment" and as he saw fit.[85] "Each one teaches them to his students like one who talks with his friend, in whatever formulation he likes".[86] Sherira's *Epistle* emphasized that this latitude in formulation enabled early sages to address the pedagogic needs of each student:

> This is how it was in the beginning: Just as we today explain [using] our [own] explanations, [so] each and every one of the sages, as he saw it, would teach all his students, each one as needed and in accord with his capabilities. There were some to whom he said [transmitted] topic headings and principles, and the rest he [the student] would understand on his own. And for others it was necessary to spell things out plainly and to draw comparisons for them.[87]

Notwithstanding the fact that the students of early sages were exposed to divergent oral formulations of the Mishna's content, the meanings they gleaned, claimed Sherira, "amounted to the same thing".[88] Throughout these early generations, all students agreed on which decisions were unanimous and which disputed; which teachings were those of individuals and which were teachings of the

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80 Gregor Schoeler, "Writing and Publishing in Early Islam: On the Use and Function of Writing in Early Islam", in ibid., 77, and 198, note 464.

81 See Muhsin Mahdi, "Language and Logic in Classical Islam", in *Logic in Classical Islamic Culture*, Proceedings of the Giorgio Levi Della Vida Conference (1970), 50-83; Gerhard Endress, "The Debate Between Arabic Grammar & Greek Logic in Classical Islamic Thought", *Journal for the History of Arabic Science* 1 (1977), 106-118; 320-322.

82 WP Heinrichs, "*lafz* and *ma'ana*" in J. Meisami and P. Starkey, eds, *Encyclopedia of Arabic Lit* (1998), v. 2: 461-462; *idem*, *Arabische Dichtung*, which draws attention to Jurjani's theory of *nazm*.

83 Levin, ed., *Iggeret Rav Sherira Gaon*, 31.

84 ibid., 18.

85 ibid., 9, 10, 48, 62.

86 ibid., 22.

87 ibid., 58.

88 ibid., 20, and cf. 48.

many.[89] It was only later, wrote Sherira, in a time marked by the loss of erudition and decline in mnemonic ability, that Rabbi Judah the Patriarch took steps to staunch the loss of knowledge. Creating an official "composition" or "concatenation" [*hibbur*], his Mishna standardized the formulation of the legal traditions that, until then, had been transmitted in diverse, and equally valid, formulations.

> And he [Rabbi Judah] agreed to arrange the *halakhah* that all recited – that it be in one voice and one formulation, and not that each and every one should recite the language to himself [as he pleased].[90]

According to Sherira, standardization of the language of tradition did nothing to alter its taxonomic status as *Oral Torah*. For whether or not Rabbi Judah's Mishnah was written down (a point over which the *Epistle*'s two recensions diverge),[91] his composition was too tersely worded to be taught without oral elaboration: "for Rabbi Judah recalled ... their main points, and did not lay out examples".[92]

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As the leaders of an institution that was disseminating the Babylonian Talmud in written form, late Geonim saw the negative cultural ramifications of reliance on written tradition. Their sense of the trustworthiness of tradition, compared to that of text (whether of Written or Oral Torah) was hardly a knee-jerk reaction to the challenges of Qaraism. Geonic engagement with rabbinic traditions, as students and as teachers, made them aware that foundational texts remained lexically malleable throughout their prolonged periods of oral transmission. A lexically stabilized text of Torah or of Talmud was but a snapshot of an organism that was inherently dynamic. The geonic conviction that tradition was of paramount importance, and of greater authority than text, was consistent with their distinction between the sacred content of tradition and its historically contingent formulations.

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89 The importance of this distinction was magnified under the influence of Islamic legal theory. See J. Goldin, "The Freedom and Restraint of Haggadah", *Studies in Midrash and Related Literature*, ed. Judah Goldin, Barry L. Eichler, Jeffrey H. Tigay (1988), 253-255, and Shmuel ben Hofni's use of *tawattur*, in Sklare, 158-165.

90 Levin, *Iggeret Rav Sherira Gaon*, 21.

91 According to the "French" version (which contemporary scholars deem more reflective of Geonic language and attitudes), Rabbi Judah the Patriarch composed the Mishnah but never actually inscribed it. According to the "Spanish" version of the *Epistle*, he wrote it down. Ibid., 71. Many scholars, including Yisrael Moshe Hazan, Y. N. Epstein, S. Lieberman, S. Abramson, D. Weiss Halivni, and Y. Sussman, have written on the question of whether R. Judah inscribed the Mishnah.

92 ibid., 43.

THE LEGAL REGULATION OF MINORITIES IN PRE-MODERN ISLAMIC LAW

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The discussion of religious minorities in Islam generally, and Islamic law particularly, is not a matter of mere historical interest. Rather, as various commentators,[1] policy institutes,[2] and even European terrorists[3] have made abundantly clear, the fear of Muslims and Islam is in part tied to a palpable fear of the early history of Islamic law's treatment of non-Muslims and the implications of that law on the attitudes of Muslim minorities in Europe and North America. In the Islamic legal tradition, the term *dhimmī* referred to the non-Muslim permanent resident in Islamic lands. The rules governing the *dhimmīs* are called the *dhimmī* rules and have been subject to considerable scholarly study and debate. It is plain that for modern readers, the *dhimmī* rules are discriminatory in ways that offend contemporary sensibilities. And those sensibilities all too often attempt to inform contemporary debate about state policies toward Muslim minorities and the Muslim majority world. Indeed, Bat Ye'or's (in)famous term *dhimmitude*[4] applies not merely to a historical period of time or tradition; rather it has become a pejorative term used by xenophobes and right wing critics in Europe and North America leveled against anyone who criticizes aggressive government policies against domestic Muslim communities or foreign Muslim states. Moreover, in various parts of the Muslim world, Islamist groups invoke the *dhimmī* rules as a means of enhancing their legitimacy as against all other groups. At the time of writing, the most notorious example is ISIS, the group that has declared an Islamic state in Iraq and has a sphere of influence extending across both Syria and

1 Sami Zemni, "The shaping of Islam and Islamophobia in Belgium", *Race & Class* 53, no. 1 (2011): 28-44; Matt Carr, "You are now entering Eurabia", *Race & Class* 48 no. 1 (2006): 1-22.

2 See for instance the report issued by the US-based Center for Security Policy, entitled *Sharia: The Threat to America.* The full report can be downloaded for free at: http://shariahthethreat.org (accessed September 16, 2014).

3 The Oslo bomber Anders Behring Breivik issued a manifesto, "2083 – A European Declaration of Independence", which is also downloadable from a wide range of websites. For a reader-friendly version, see https://publicintelligence.net/anders-behring-breiviks-complete-manifesto-2083-a-european-declaration-of-independence/ (accessed September 16, 2014).

4 Bat Ye'or, *Islam and Dhimmitude: where civilizations collide*, trans. Miriam Kochan and David Littman (2002).

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 47–76

 DOI 10.1484/M.RELMIN-EB.5.111592

Iraq. As it gained ground in Syria, ISIS reportedly began enforcing the historic *dhimmī* rules against Syrian Christians, imposing the age-old *jizya* poll tax on them if they chose to remain in the town and retain their faith.[5] Clearly, the pre-modern rules on *dhimmīs* are not mere historical artifacts for the enthusiastic antiquarian. Rather they are political fodder across the political spectrum and across various regions, and have distinct implications for governance and the governed.

However the *dhimmī* rules are used today, they nonetheless have a history. Their history is important for understanding both the function they played historically, and whether and to what extent they still play that function now when invoked by ideologies, rebels, revolutionaries, or political pundits. As suggested below, the historical intelligibility of these rules cannot be divorced from the broader imperial vision to which they contributed. That intelligibility does not persist in the same way in the current climate of modern international states, in which the measure of belonging is calibrated differently. Indeed, the fact that ISIS can and does disregard geo-political boundaries in its quest for an Islamic caliphal empire only emphasizes the way in which the enterprise of universal empire framed the meaningfulness of these pre-modern rules.

This chapter is designed to offer the reader an overview and introduction to the debates and doctrines on the *dhimmī*. It begins with a historiographic overview of the main debates concerning the *dhimmīs*. Viewing the role of myth as interpretive heuristic, it argues against the all-too-easy analyses of the *dhimmī* history that take the form of myths, whether of harmony or persecution. Instead it views the *dhimmī* rules as symptoms of the larger challenge of governing amid a diverse society. Indeed, one cannot divorce an analysis of the *dhimmī* rules from the political formation to which they were imagined to apply. As such, the chapter turns to the so-called contract of protection, the *ʿaqd al-dhimma.* This is the juridical site within which pre-modern jurists debated the *dhimmīs'* relative scope of freedom. The contract of protection, as suggested below, offered a politico-legal device by which jurists delineated the degree to which the law must accommodate and include the *dhimmī* as well as exclude and even subordinate them. But if the contract of protection framed the debates on the *dhimmī* rules, what is of particular interest thereafter is the content of those rules. Starting with an analysis of the relevant Qurʾānic verse on the *jizya,* the analysis turns to three *fiqh* debates that reveal the underlying dynamics of the *dhimmī* rules. The *fiqh* debates concern whether and to what extent the *dhimmī* can consume alcohol and pork when living under Islamic suzerainty. A corollary to that debate was whether the *dhimmī* could bring a Qurʾānically-based claim of theft against another *dhimmī*

5 Aymen Jawad al-Tamimi, "The Dawn of the Islamic State of Iraq and ash-Sham", *Current Trends in Islamist Ideology* 16 (March 2014): 5-15, 11; Catherine Philp, "Pay taxes in gold or die, Christians in Syria told", *The Times* (London, UK), March 4, 2014, 31.

who steals the former's wine and pork. Another set of debates concerned whether and to what extent *dhimmīs* could use their property to endow a Torah or Bible reading school, or to support the institutions that served their religious community. As will be shown through an analysis of these examples, the legal arguments reveal the extent to which jurists had to balance the demands of Islamic law with the accommodative spirit of the contract of protection while living in a demographically diverse polity governed by an Islamic regime.

The Historiography of the Dhimmī *Rules: Getting Past the Myths*

There is no denying the fact that the *dhimmī* rules were discriminatory because the *dhimmī* was not a Muslim. Examples of such rules include: limitations on whether *dhimmīs* could build or renovate their places of worship; clothing requirements that distinguished the *dhimmīs* from Muslims; special tax liability known as the *jizya*; and their incapacity to serve in the military. These rules and others like them were part of the broader the regime of *dhimmī* rules. In recent history, these terms have informed debates (scholarly and otherwise) about whether Islam is a tolerant religion, and thereby whether Muslims are tolerant of religious Others, both as a matter of history, and as a point of reference for characterizing Islam and Muslims today more broadly.

As Mark Cohen has ably shown, tolerance as a framing device has led to dueling myths about the *dhimmī* rules, namely the myths of harmony and persecution.[6] Adherents of the myth of harmony generally argue that the different religious groups coexisted in peace and harmony, with each non-Muslim group enjoying a degree of autonomy over its internal affairs. This image is constructed by reference to periods of Islamic history where the different religious groups coexisted without substantial turmoil or persecution. Proponents of the myth of harmony often privilege historical practice over legal doctrine, even arguing that the laws were mere academic exercises than reflective of a lived reality. At worst, they were merely different regimes of law for different groups, but without substantive differences that amount to disparaging discrimination. For instance, while some rules prohibited non-Muslims from holding high governmental office, historical records show that non-Muslims held esteemed positions within ruling regimes, often to the chagrin of Muslim elites.[7] Others might argue that

6 For a concise overview of the myths and counter-myths, see Mark Cohen, "Islam and the Jews: Myth, Counter-Myth, History", in *Jews among Muslims: Communities in the Precolonial Middle East,* ed. Shlomo Deshen and Walter Zenner (1996), 50-63. See also Mark Cohen, *Under Crescent & Cross: The Jews in the Middle Ages* (1995; 2008).

7 Mark R. Cohen, "Medieval Jewry in the World of Islam", in *The Oxford Handbook of Jewish Studies,* ed. Martin Goodman (2002), 193-218; Roger M. Savory, "Relations between the Safavid State and its Non-Muslim Minorities", *Islam and Christian-Muslim Relations* 14, no. 4 (October 2003): 435-458.

the *jizya* tax was merely an administrative matter used to organize society. *Jizya* was a non-Muslim tax, they would argue, whereas the *zakāt* was the Muslim tax. As both groups paid taxes, the *jizya* should not be considered a mechanism of intolerance and subordination.[8] Early historical sources, however, contradict this position. They characterize the Qurʾānic verse that proffers the *jizya* tax as animated by the ethic of subordination and humiliation.[9]

In a more pious vein, Muslim scholars who adhere to the myth of harmony have argued that while the rules were very much part of the Islamic tradition, they did not reflect the essential character or aspirations of the Islamic value system.[10] For instance, Isma'il Faruqi wrote that the discriminatory rules reflect the "personal understanding" of specific jurists, but are not inherent to the religion as such.[11] He did not explain what this means, though. Likewise, Murad Hoffman has acknowledges that non-Muslims were discriminated against under the law, but limits the discriminatory impact to three modes: exclusion from military service; liability for paying the *jizya* to receive military protection (a service charge as he calls it); and preclusion from being head of state.[12] He further notes that the juristic tradition, which developed other discriminatory measures, only illustrates that Muslims did not live up to the true precepts of Islam.[13] In other words, the *dhimmī* rules are a deviation from the true Islamic vision, whatever that may be.

Relying on more than mere outliers, adherents of the myth of harmony gesture to the period of Islamic rule in the Iberian Peninsula or al-Andalus. This period – often described as one of harmonious interaction between Muslims,

8 Abdelwahab Boudhiba, "The Protection of Minorities", in *The Different Aspects of Islamic Culture: The Individual and Society in Islam,* eds A. Boudhiba and M. Ma'ruf al-Dawalibi (1998), 331-346, 340-341. See also, Ghazi Salahuddin Atabani, "Islamic *Sharīʿah* and the Status of Non-Muslims", in *Religion, Law and Society: A Christian-Muslim Dialogue* (1995), 63-69, who writes that religious classifications in Islam are for making distinctions in the hereafter, but not in worldly terms. He writes that the *dhimmī* concept is not one of disparagement, but rather allowed historical minority communities to maintain the distinctiveness they needed to survive. In other words, it was a means of preserving religious pluralism, not squashing it. Likewise, see also Fazlur Rahman, "Non-Muslim Minorities in an Islamic State", *Journal Institute of Muslim Minority Affairs* 7 (1986): 13-24, 20, who writes that the *jizya* was a tax in lieu of military service. Furthermore, not all non-Muslims paid the *jizya.* He refers to ʿUmar's receipt of the *zakāt* from a Christian tribe as an example. This is likely a reference to the Banū Tahglib. Notably, Rahman does not mention that Banū Taghlib was required to pay a higher rate of *zakāt* tax than Muslims, which some have suggested equaled the amount they would have paid under a *jizya* scheme.

9 See below for discussion of the Qurʾānic verse and its various interpretations.

10 See, for example, Hussain, "Status of Non-Muslims in Islamic State", 67-79, 76; Rahman, "Non-Muslim Minorities in an Islamic State", 20.

11 Ismail R. Faruqi, "The Rights of non-Muslims under Islam: Social and Cultural Aspects", in *Muslim Communities in non-Muslim States* (1980), 43-66, 49.

12 Murad Wilfried Hoffman, "The Protection of Religious Minorities in Islam", *Encounters* 4, no. 2 (1998): 137-148, 143.

13 Hoffman, "The Protection of Religious Minorities in Islam", 145.

Jews, and Christians – lies in stark contrast to a soon-to-come Reconquista and Inquisition led by a Catholic Spain. For instance, Maria Rosa Menocal writes:

> In principle, all Islamic polities were (and are) required by Quranic injunction not to harm the dhimmi, to tolerate the Christians and Jews living in their midst. But beyond that fundamental prescribed posture, al-Andalus was ... the site of memorable and distinctive interfaith relations. Here the Jewish community rose from the ashes of an abysmal existence under the Visigoths ... Fruitful intermarriage among the various cultures and the quality of cultural relations with the dhimmi were vital aspects of Andalusian identity...[14]

Menocal recognizes the reality of political friction in that period. But such friction, she argued, was between the Muslim ruling elites, thereby rendering minority groups important political allies to different elite factions among the Muslim populace. Given the political stakes on issues of Islam today, it should not be surprising that al-Andalus figures as part of a contested history in light of contemporary ideological contests. As Anna Akasoy reminds, "[p]opular attitudes still reveal a simplistic general picture, but debates among historians are now much more nuanced".[15] For Akasoy, an important lesson to be gained from the recent ink spilled on Islamic Spain is how that history is instrumentalized for contemporary, ideological purposes. She concludes: "one lesson to be learned not so much from history ... but from the way it is presented is just how much negotiating the past is part of negotiating the present".[16] Moreover, one cannot ignore that even during the supposed harmony of the Andalusian period, Muslim jurists writing in that period preserved the *dhimmī* rules. For example, the famous philosopher Ibn Rushd (Averroes), who was also a respected jurist, wrote about the *dhimmī* rules in his well-known treatise *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*.[17] In other words, the historical argument concerning periods of peace and harmony does little to address why and to what effect the *dhimmī* legal doctrines were developed, taught, and perpetuated in pre-modern legal sources during historical periods in which peace and tolerance arguably prevailed.

The myth of harmony stands in stark contrast to the myth of persecution. The myth of persecution suggests that endemic to the Muslim mindset is a notion of

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14 Maria Rosa Menocal, *How Muslim, Jews, and Christians Created a Culture of Tolerance in Medieval Spain* (2002), 30.

15 Anna Akasoy, "*Convivencia* and its Discontents: Interfaith Life in al-Andalus", *International Journal of Middle East Studies* 42 (2010): 489-499, 491.

16 Akasoy, "*Convivencia* and its Discontents", 498.

17 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid,* eds ʿAlī Muʿawwaḍ and ʿĀdil ʿAbd al-Mawjūd (1997).

the non-Muslim as not only the Other, but also as the subservient, submissive, and the politically disempowered Other. Those adopting the myth of persecution invoke the *dhimmī* rules as positive proof for their position. They also emphasize historical accounts of Muslim rulers oppressing non-Muslims, especially those who invoked the *dhimmī* rules to justify their persecution, often to gain political legitimacy from different sectors of the Muslim polity.[18] Consequently, while the myth of harmony often represents the law as mere technicality in academic books, the myth of persecution relies on the law – as well as contemporary attitudes about pluralism and tolerance – to illustrate Islam's inherently intolerant nature.[19]

The myth of persecution is no less problematic for its emphasis on the historical to the detriment of a meaningful engagement with the jurisprudential. Perhaps the most alarmist works on this topic are the studies by Bat Ye'or, the pseudonym of Gisèle Littman, an independent scholar of Egyptian-Jewish origins, whose publications on the topic have generated considerable scholarly and political critique.[20] Adherents of the myth of persecution, such as Ye'or, rely on legal doctrine to prove their point. They invoke the law in piecemeal fashion, often without due attention to the details embedded in complex legal argument. Additionally, they reproduce pre-modern legal texts in translation as if their meaning and significance are transparent and obvious to the modern lay reader.[21] For example, Ye'or has written that non-Muslim communities could not build new places of worship and were limited in the extent to which they

18 See, for example, John O. Hunwick, "The Rights of Dhimmis to Maintain a Place of Worship: A 15th Century Fatwa from Tlemcen", *al-Qantara* 12, no. 1 (1991): 133-156; C. E. Bosworth, "The Concept of Dhimma in Early Islam", in *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society,* ed. Benjamine Braude and Bernard Lewis, 2 vols (1982), 41; Bernard Lewis, *Semites and Anti-Semites: An Inquiry into Conflict and Prejudice* (1986), 123; Jacques Waardenburg, "Muslim Studies of Other Religions: The Medieval Period", in *The Middle East and Europe: Encounters and Exchanges,* eds Geert Jan van Gelder and Ed de Moor (1992), 10-38, 13; idem, *Muslim Perceptions of Other Religions: A Historical Survey* (1999), 23; Richard Gottheil, "An Answer to the Dhimmis", *Journal of the American Oriental Society* 41 (1921): 383-457, who translates an essay in which the *dhimmī* is abused.

19 Haggai Ben-Shammai, "Jew Hatred in the Islamic Tradition and the Koranic Exegesis", in *Antisemitism Through the Ages,* ed. Shmuel Almog (1988), 161-169.

20 Robert Irwin, "Book Reviews: Islam and Dhimmitude: Where Civilizations Collide", *Middle Eastern Studies* 38, no. 4 (2002): 213-215; Paul Fenton, "Book Review: Islam and Dhimmitude", *Midstream* 49, no. 2 (2003): 40-41; Johann Hari, "Amid all this panic, we must remember one simple fact – Muslims are not all the same", *The Independent,* August 21, 2006, 25. Scholarly and not-so-scholarly sources on both sides of the tolerance debate are many. See for instance, Robert Spencer, ed., *The Myth of Islamic Tolerance: How Islamic Law Treats Non-Muslims* (2005); idem, *The Truth about Muhammad: Founder of the World's Most Intolerant Religion* (2006); idem, *Islam Unveiled: Disturbing Questions about the World's Fastest-Growing* 2002), 143-164; Aaron Tyler, *Islam, the West and Tolerance: Conceiving Coexistence* (2008); Khaled Abou El Fadl, *The Place of Tolerance in Islam* (2002); Yohanan Friedmann, *Tolerance and Coercion in Islam* (2003).

21 See for instance, Walter Short, "The Jizya Tax: Equality and Dignity under Islamic Law?" in *The Myth of Islamic Tolerance: How Islamic Law Treats Non-Muslims,* ed. Robert Spencer (2005), 73-90, whose

could restore preexisting ones.[22] But she neither revealed how this restriction was contested nor examined why it was contested at all. For some jurists, whether a religious community could build a new place of worship depended on the demographics of the relevant township. If the township included both *dhimmīs* and Muslims, then Ye'or is correct in asserting her position. But if the township was a presumably predominant *dhimmī* village then she is incorrect, according to Ḥanafī jurisprudence. Ye'or certainly utilizes important sources to support her conclusions; but her inattentiveness to how the sources are themselves framed within the discipline of the law renders her conclusions partial at best. Through her selective use of evidence, she has painted a picture of persecution without engaging the nuances of the legal tradition. Attentiveness to the nuance of legal argument, though, shows that the *dhimmī* rules were symptoms of the tricky business of governing a diverse polity.

The myths of harmony and persecution are extreme positions, between which others fall.[23] Fundamentally, though, proponents of both myths take the historical legal doctrines as givens, and present them with an eye on present political conditions. They want to know answers to compelling political questions, such as: How will Muslims live together with non-Muslims, whether as Muslim minorities or as Muslim majorities?[24] Do the *dhimmī* rules inform how Muslims view the religious Other?[25] Those presentist concerns are certainly important; the human stakes are often too painful to bear, thus making the study of the *dhimmī* rules an often contentious affair. But to analyze the historical *dhimmīs* rules in such a fashion is not only anachronistic, but also ignores important questions about the nature of law generally and Islamic law specifically. In particular this

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footnotes exceed the length of his main text in the article, and who quotes large sections from pre-modern *fiqh* manuals with little analysis or explanation.

22 Bat Ye'or, *The Dhimmi: Jews and Christians Under Islam* (1985), 57; idem, *Islam and Dhimmitude: Where Civilizations Collide* (2002), 83-85, where her references for the "unanimous opinion" of Muslim jurists are to the texts by two Shāfi'ī jurists (al-Māwardī and al-Nawawī).

23 See, for instance M. L. Roy Choudhury Sastri, "The status of *Dhimmis* in Muslim States, with special reference to Mughal India", *The Journal of the Greater India Society* 12, no. 1 (1945): 18-48, 20, who follows Tritton in suggesting that the caliph did not always observe the letter of the law, and that the treatment of *dhimmis* often depended on the attitude of the ruler in power.

24 For scholarly, public policy, and popular literature on this issue, see Andrew March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (2009); Mohammad Fadel, "The True, the Good, and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law" *Canadian Journal of Law and Jurisprudence* 21, no. 1 (2008): 5; Cheryl Benard, *Civil Democratic Islam: Partners, Resources, and Strategies* (2003); Tariq Ramadan, *Western Muslims and the Future of Islam* (2004); Abou El Fadl, *The Place of Tolerance in Islam.*

25 Wadi Zaidan Haddad, "*Ahl al-Dhimma* in an Islamic State: The Teaching of Abu al-Hasan al-Mawardi's *al-Ahkam al-Sultaniyya*", *Islam and Christian-Muslim Relations* 7, no. 2 (1996): 169; Kate Zebri, "Relations Between Muslims and Non-Muslims in the Thought of Western-Educated Muslim Intellectuals", *Islam and Christian-Muslim Relations* 6, no. 2 (1995): 255-277, 258.

approach misses questions about the relationship between law and the challenge of governing an inescapably diverse polity.[26]

In an important article published in 1999, social historian Najwa al-Qattan illustrated the weaknesses of both myths.[27] Al-Qattan reviewed records (*sijill*) of local Ottoman courts of general jurisdiction (*Mahkama*) to show that *dhimmīs* utilized the Ottoman legal system, brought suits against Muslims, and seem to have preferred the Sharīʿa-based Ottoman courts over the tribunals of their own religious community. In the article, she challenges prior historical scholarship on the degree to which minority communities enjoyed formal autonomy.[28] Nonetheless, she recognized that non-Muslim communities possessed a certain degree of judicial autonomy. *Dhimmīs* had the right to litigate most of their legal affairs in their own communal tribunals as long as their cases did not cross religious boundaries, involve capital crimes, or threaten public order and security.[29] But, as al-Qattan adeptly showed, Christians and Jews regularly made appearances in the Ottoman courts.[30] Their resort to the Ottoman court is not entirely surprising, since the general court was the principal organ for maintaining and recording public documents, such as land grants.[31] Furthermore, the Ottoman court was the only court with enforcement power, unlike the *dhimmīs*'

26 A similar critique can be made of the contemporary debates and polemics about *jihād* as an essential feature of Islamic belief. For a historical critique that situates *jihād* in a larger context of sanctified violence across space, time, and traditions, see Thomas Sizgorich, "Sanctified Violence: Monotheist Militancy as the Tie that Bound Christian Rome and Islam", *Journal of the American Academy of Religion* 77, no. 4 (December 2009): 895-921.

27 Najwa al-Qattan, "Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination", *International Journal of Middle East Studies* 31 (1999): 429-444.

28 Al-Qattan positions her article in part against a historiography that held that in the Ottoman regime, different non-Muslim religious groups were organized into autonomous communities (*millet*) with their own judges to handle private matters governed by their religious laws. Recent scholarship has suggested, though, that a centralized *millet* system did not in fact materialize until the late Ottoman period. Rather, in the empire's efforts to deal with European powers and assure them of fair treatment of religious minorities in the empire, the foreign office often employed the term "*millet*" to assure its European neighbors that the minorities were respected and enjoyed autonomy over their own affairs. Benjamin Braude, "Foundation Myths of the *Millet* System", in *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society,* eds Benjamin Braude and Bernard Lewis, 2 vols (1982), 1:69-88, 69-72; idem, "The Strange History of the Millet System", in *The Great Ottoman-Turkish Civilization,* ed. Kemal Cicek, 2 vols (2000), 2:409-408.

29 Al-Qattan, "*Dhimmis* in the Muslim Court", 429.

30 Although the absence of *dhimmī* court records leaves a gap in understanding what the communal courts were doing, existing records reveal rabbinical directives forbidding Jews from using the Mahkama, thus implicitly suggesting that Jews may have been using the Ottoman courts. Al-Qattan, "*Dhimmis* in the Muslim Court", 429. See also, Bert F. Breiner, "*Sharīʿa* and Religious Pluralism", in *Religion, Law and Society: A Christian-Muslim Discussion,* ed. Tarek Mitri (1995), 51-62; Joseph R. Hacker, "Jewish Autonomy in the Ottoman Empire: Its Scope and Limits. Jewish Courts from the Sixteenth to the Eighteenth Centuries", in *The Jews of the Ottoman Empire,* ed. Avigdor Levy (1994), 153-202, 157; Avigdor Levy, "Introduction", in *The Jews of the Ottoman Empire,* ed. Avigdor Levy (1994), 1-150, 18.

31 Al-Qattan, "*Dhimmis* in the Muslim Court", 429.

confessional tribunals.[32] Significantly, aside from cases where use of the Ottoman court was necessary, there are instances where *intra*-communal disputes were voluntarily brought to the Ottoman court, even though they could have been litigated in confessional tribunals.[33] Al-Qattan revealed that *dhimmīs* often preferred the Sharī'a's rules of inheritance and the use of the court as a marriage and property registry.[34]

Al-Qattan's research reveals two important points. First, when non-Muslims utilized the Ottoman court, they knowingly invoked the jurisdiction and application of Islamic law in their case. In other words, the Ottoman court did not rule by the *dhimmīs*' communal law. Second, far from discriminating, the Ottoman court offered a leveling mechanism that disregarded social status, place of residence, or religious background. The court, according to the *sijill* records, was not the arena of extra-legal or illegal discrimination.[35] The Ottoman court and its legal order provided a default legal system, and litigants were treated with equal fairness. According to al-Qattan, *dhimmīs* presumably opted for Ottoman courts instead of communal tribunals for various reasons, including the fact that they could get a fair hearing and prevail in an action, even against a Muslim party. Al-Qattan's research shows that such outcomes were possible, and thus poses an important historical challenge to those adopting the myth of persecution.

Importantly, al-Qattan's conception of discrimination and fair treatment has more to do with judicial discretion and administration, as opposed to the substantive doctrine of the law. Her research did not challenge, nor was designed to challenge, the fact that Islamic legal doctrines discriminated against non-Muslims. For instance, she acknowledged that, as a matter of law, non-Muslims were not allowed to testify as witnesses against Muslim parties on behalf of another party.[36] Al-Qattan's point, though, is that despite this legal disability, non-Muslims were not subjected to discrimination whereby Muslim parties would capitalize on their legal advantages when bringing cases to the Ottoman courts.[37] Even more, she held that while *dhimmīs* could not, as a matter of law, testify on behalf of plaintiff co-religionists, the latter did not necessarily lose their cases. Either *dhimmī* petitioners would have other sorts of evidence or they would

32 Al-Qattan, "*Dhimmis* in the Muslim Court", 429.
33 Al-Qattan, "*Dhimmis* in the Muslim Court", 430. See also, Ronald C. Jennings, "Zimmis (Non-Muslims) in Early 17th Century Ottoman Judicial Records: The Sharī'a Court of Anatolian Kayseri", in *Studies in Ottoman Social History in the Sixteenth and Seventeenth Centuries: Women, Zimmis, and Sharī'a Courts in Kayseri, Cyprus and Trabzon* (1999), 369.
34 Al-Qattan, "*Dhimmis* in the Muslim Court", 433.
35 Al-Qattan, "*Dhimmis* in the Muslim Court", 436.
36 Al-Qattan, "*Dhimmis* in the Muslim Court", 436-437.
37 Al-Qattan, "*Dhimmis* in the Muslim Court", 437.

have Muslim witnesses testify on their behalf. In such cases, the *dhimmī* had a fair chance of prevailing.[38] While legal doctrines handicapped non-Muslims in some ways (i. e., witness testimony against Muslims), the actual treatment of non-Muslims in the Ottoman court suggests that the court was an arena of fairness and justice, regardless of the petitioner's religious identity. The religious commitments of the parties to an action did not seem to have affected the outcome of cases.

Al-Qattan's social history takes for granted the legitimacy of the *dhimmī* rules. As a work of social history, it was not designed to present a jurisprudential perspective from which we can understand the underlying logic that normalized the *dhimmī* rules. This chapter, on the other hand, focuses on the legal reasoning that justified the *dhimmī* rules themselves. The remainder of this chapter will examine and explain the various legal doctrines on the *dhimmī* and explore how their salience, meaningfulness, and intelligibility as legal doctrine was dependent upon the context of an imperial enterprise of governance.

For pre-modern Muslim jurists, the conditions that informed the development of legal doctrines certainly included competing techniques of legal interpretation and theological first principles. But to understand the intelligibility of the *dhimmī* rules, we must also appreciate a key assumption that informed the law, namely of an imperial mode of governance, whether real or imagined.[39] The reference to the jurists' imagination of an Islamic empire draws upon Benedict Anderson's concept of "imagined community". For Anderson, a nation is "*imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion".[40] Pre-modern jurists may not have known or experienced life in an Islamic empire; nonetheless their development of legal doctrines such as the *dhimmī* rules was premised in part upon both (a) the Islamic empire as the ideal mode of governance; and (b) the existence of different peoples residing within that empire.[41] That law generally, and Islamic law specifically, would both delineate and be delineated by conceptions of community is not entirely surprising. For instance, David Friedenreich draws on Benedict Anderson

38 Ronald C. Jennings, *Christians and Muslims in Ottoman Cyprus and the Mediterranean World, 1571-1640*, 132-133; idem, "Zimmis (Non-Muslims) in Early 17th Century Ottoman Judicial Records", 347-412; Kemal Cicek, "A Quest for Justice in a Mixed Society: The Turks and the Greek Cypriots Before the Sharīʿa Courts of Nicosia", in *The Great Ottoman-Turkish Civilization,* ed. Kemal Cicek, 2 vols (2000), 2:472-491.

39 On the implications of an Islamic empire for premodern political theory, see Anver M. Emon, "On Sovereignties in Islamic Legal History", *Middle East Law and Governance* 4, nos 2-3 (2012): 265-305.

40 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism,* rev. ed. (1991), 6.

41 For a more extensive analysis of the imperial backdrop to the *dhimmī* rules, see Emon, *Religious Pluralism.*

to show that because "foreign food regulations express particular systems of classifying insiders and outsiders, they reveal the ways in which their participants imagine their own communities, other religious communities in their midst, and *the broader social order in which these communities are embedded*".[42] Consequently, as much as this chapter concerns the development of the *dhimmī* rules, it also shows that their intelligibility is premised on the pre-modern jurists' pre-commitment to an imperial mode of governance, whether real or imagined.

The Contract of Protection: A Legal Instrument of Political Inclusion and Marginalization

As much as Islam was meant as a message for all of humanity, it was made manifest (at least in the jurists' imagination) through conquest and empire. But conquest and empire had their own requirements to ensure the longevity of Islamic rule. Through conquest, a wide range of peoples, not all of whom wished to become Muslim, came under Islamic imperial suzerainty. Some of those people wanted to retain their faith tradition as well as retain possession of (if not sovereignty over) their lands. To expand and manage newly acquired lands, Muslim leaders often incorporated local populations and institutions into the administration of regional affairs, which would cut against the cost and scope of violence and military oversight required.[43] The local populace was often the most knowledgeable about its affairs and could provide efficient management, while ensuring payment of taxes to the Muslim political regime. In other words, preserving the local populations was economical for purposes of governing an expanding empire. But to the extent these local populations retained their religious traditions, they also embodied the very diversity that the law had to address. Indeed, the incorporation of a local populace (many of whom were not Muslim) into the empire raised important questions about the ramification of diversity for governing an Islamic empire that was premised upon a universalist mission but which also had very real fiscal and logistical needs.

The tension between the universal ethos and the fact of diversity was jurisprudentially negotiated through the contract of protection, called in Arabic the *ʿaqd al-dhimma*. Jurists used the contract of protection to move from the fact of diversity to a commitment to a pluralistic ethic of imperial governance. The *dhimmī,* as non-Muslim permanent resident, paid the *jizya* and thereby entered the contract of protection. In a very real sense, the *dhimmī* bought into the Islamic imperial society. This contract governed the relations between the Muslim polity and the

42 David M. Freidenreich, *Foreigner and Their Food: Constructing Otherness in Jewish, Christian, and Islamic Law* (2011), 8 (emphasis added).

43 H. A. R. Gibb, *Studies on the Civilization of Islam,* eds Stanford Shaw and William Polk (1962), 47-61; Ira Lapidus, *A History of Islamic Societies* (1988; 1991), 60-63.

dhimmīs. This is not to suggest, as a historical matter, that each and every *dhimmī* signed or otherwise consented to the terms of a specific contract. Rather the contract provided a paradigm within which jurists developed legal expectations in the form of regulations governing the *dhimmīs*, Muslims, and the officials who managed the Islamic enterprise of governance. The *dhimmīs*' entitlements and liabilities in the Muslim polity, in other words, did not inhere in the *dhimmī* as an individual, but rather were derived from a contract whose terms and content were the subject of considerable legal debate over the centuries. The contract of protection, in Islamic legal theory, served both political and legal functions. Politically, the contract of protection was the conceptual device jurists used to reconcile an Islamic universalist ethos with the fact of diversity. It represented the political agreement between the Muslim sovereign and the non-Muslim community in the interest of the latter's relative freedom and the sovereign's efficient management of the empire. Legally, the contract was the site of debate about the scope of the *dhimmī*'s freedom in the empire. The contract represented a juridified political site for the legal debates about the content of what are called the *dhimmī* rules.

The contract of protection had its historical origins in what is called "The Pact of ʿUmar". This pact is traditionally attributed to the second caliph ʿUmar and the Christian leadership in Syria. In this pact, the Christian leaders outlined the conditions they would fulfill in order to ensure their security while living under the new Muslim imperium. The pact included conditions such as:

- Non-Muslims will not build new places of worship;
- Non-Muslims will not replace dilapidated places of worship in the areas where Muslims live;
- Muslims can take refuge in non-Muslim places of worship and should be treated hospitably for three days;
- Non-Muslims will not teach their children the Qurʾān;
- Non-Muslims will not prevent relatives from converting to Islam;
- Non-Muslims will not ride upon saddles or carry weapons.[44]

Scholarship on the Pact of ʿUmar intensely differs on its historical authenticity, especially as it appears in fullest form in later texts dating from centuries after the presumed pact was made. Did it originate during the reign of ʿUmar b. al-Khaṭṭāb or was it a later invention retroactively associated with ʿUmar – the caliph who

44 For a list of such conditions reportedly in the original Pact of ʿUmar and recorded in later agreements with the non-Muslim community, see Hunwick, "The Rights of *Dhimmis* to Maintain a Place of Worship", 152-154; Bosworth, "The Concept of *Dhimma* in Early Islam", 46; Richard J. H. Gottheil, "Dhimmis and Moslems in Egypt", in *Old Testament and Semitic Studies,* eds Robert Francis Harber, Francis Brown and George Foot Moore, 2 vols (1908), 1:353-414, 382-384; Ahmed Oulddali, "The Pact of 'Umar", (2012), http://www.cn-telma.fr/relmin/extrait1068/

famously led the initial imperial expansion – to endow the contract of *dhimma* with greater normative weight?[45] Regardless of the authenticity of the Pact as such, what is more interesting for this analysis is that it nonetheless contributed (either as a real or imagined document) to the way in which later jurists concretized and legitimated the *dhimmī* rules.

For instance, the Pact of ʿUmar was often invoked by subsequent rulers as a means of containing the upward mobility of non-Muslims, and thereby upholding the legitimacy of the ruler in the eyes of the Muslim elite.[46] The Pact also offered a point of reference for ongoing debates about the scope of *dhimmī* duties and the degree to which *dhimmīs* could be constrained in new and different ways. For instance, under the Latrines Decree in nineteenth century Yemen, *dhimmīs* were required to clean the latrines in the city. Muslims were considered above such labor, and so the task was delegated to non-Muslims. But to impose this duty on *dhimmīs* went beyond the express terms of the Pact of ʿUmar. Some jurists held that the Pact set for all time the rights and duties of the *dhimmīs,* and so the *dhimmīs* could not be burdened with such tasks. Yet others, such as al-Shawkānī (d. 1255/1839), said the Pact represented a historical example that did not preclude the development of new entitlements and duties *dhimmīs* as circumstances changed. This debate, and al-Shawkānī's point in particular, shows how the contract of protection offered a site of legal debate where Muslim jurists reflected on the ongoing challenge of governing a Muslim polity amidst the fact of diversity.[47]

The Qurʾānic Beginnings of the Dhimmī Discourse

As noted above, *dhimmīs* were non-Muslims who lived permanently in regions under Muslim rule. The term *dhimmī* is related to the term *dhimma,* which refers

45 See for instance, A. S. Tritton, *The Caliphs and their Non-Muslim Subjects: A Critical Study of the Covenant of ʿUmar* (1970), who suggested that the Pact is a fabrication. For those following Tritton's analysis, see, Ben-Shammai, "Jew-Hatred in the Islamic Tradition and the Koranic Exegesis", 161-169; Hunwick, "The Rights of *Dhimmis* to Maintain a Place of Worship*",* 134; Gudrun Kramer, "Dhimmi ou Citoyen: Réflexions reformists sur le statut de non-musulmans en société Islamique", in *Entre Reforme Sociale et Mouvement National,* ed. Alain Roussilon (1995), 577-590. Gottheil, "Dhimmis and Moslems in Egypt", 357, who predates Tritton, also indicated as early as 1908 that the Pact of ʿUmar was possibly fabricated. However, Daniel C. Dennett, *Conversion and the Poll Tax in Early Islam* (1950), 63-64, believes that the Pact of ʿUmar was no different from any other treaty negotiated in that period, and that it is well within reason that the Pact we have today, as preserved in al-Ṭabarī's chronicle, is an authentic version of that early treaty. Relatedly, Milka Levy-Rubin suggests that the terms of the Pact have pre-Islamic origins. With such comparative corroboration of the terms of such agreements, Levy-Rubin argues that early surrender agreements such as the Pact of ʿUmar are historically authentic. Milka Levy-Rubin, *Non-Muslims in the Early Islamic Empire: From Surrender to Coexistence* (2011).

46 Haddad, "*Ahl al-Dhimma* in an Islamic State", 174.

47 Sadan, "The 'Latrines Decree'".

to a pledge of security,[48] and in this context it connotes both the pledge that non-Muslims made (either expressly or impliedly) with the Muslim ruling establishment, and the latter's commitment to ensure the *dhimmīs*' protection. Pursuant to the *ʿaqd al-dhimma*, the *dhimmīs* agreed to abide by certain conditions; in return, they were allowed to live peacefully in the Islamic empire. The basis and authority for the contract of *dhimma* and its conditions (implicit or otherwise) were found in scriptural and legal sources dating from the early Islamic centuries.

For instance, the Qurʾān invokes a special status for non-Muslims living under Muslim rule in Qurʾān 9:29:

> Fight those who do not believe in God or the final day, do not prohibit what God and His prophet have prohibited, do not believe in the religion of truth, from among those who are given revelatory books, until they pay the *jizya* from their hands in a state of submission.[49]

This verse raises various issues such as: who are those given revelatory books, what is the *jizya,* and what does it mean to be in a state of submission?

First, who are the people given revealed books? The interpretive tradition suggests that the people intended by this verse were the Jews and Christians, as they were (and still are) understood within Islamic theology to have received divine revelation.[50] Identifying which Christians and Jews could take advantage of the *jizya,* for pre-modern jurists, required inquiring into both the history and genealogy of those claiming special status.

Some jurists argued that the Qurʾānic verse applied only to those who could trace their genealogy to the tribe of Israel – the Banū Isrāʾīl; they alone were entitled to become *dhimmīs* by paying the *jizya*.[51] According to these jurists, among the Jews and Christians were those who were descendants of the original tribe of Israel; these were the people who received the message of God through Moses and Jesus and passed it along to their subsequent generations. A second group of Jews and Christians, they held, were ethnically unrelated to Banū Isrāʾīl, such as Christians and Jews of Arab descent.[52] This latter group was generally denied any option to claim *dhimmī* status and pay the *jizya*.

48 Ibn Manẓūr, *Lisān al-ʿArab,* 12:221.

49 Qurʾān, 9:29.

50 In later periods of Islamic history, this term was extended to include others as well. For a general overview of the phrase and its Qurʾānic roots, see G. Vajda, "Ahl al- Kitāb", *Encyclopaedia of Islam*, eds P. Bearman et al (2008; Brill Online accessed September 4, 2008).

51 Yohanan Friedmann, "Classification of Unbelievers in Sunni Muslim Law and Tradition", *Jerusalem Studies in Arabic & Islam 22* (1998): 163-195.

52 Friedmann, "Classification of Unbelievers in Sunni Muslim Law and Tradition", 167; idem, *Tolerance and Coercion in Islam,* 65-69, who associates this restrictive view principally with al-Shāfiʿī.

This ethnic limit existed alongside a time limit. Muslim theologians and jurists held that at an unspecified, but nonetheless very real, point in time the adherents of Judaism and Christianity corrupted (*taḥrīf/tabdīl*) the divine messages given to Moses and Jesus. According to Friedmann, "[c]ertain jurists maintain[ed] that after this corruption took place, it was not legitimate anymore to embrace Judaism or Christianity. Those who converted to these two religions at this late stage are therefore ineligible for *dhimmī* status".[53]

Jurists relied upon time and ethnicity, basing their position on the historical treatment of Arab Christians in the Arabian Peninsula. For instance, historical records indicate that the second caliph ʿUmar b. al-Khattāb (r. 13-23/634-644) held that Arab Christians were not People of the Book, and he was not prepared to tolerate their existence until they embraced Islam. Indeed, he ushered in a policy of expelling non-Muslim Arabs from the Arabian Peninsula, leading the Banū Najrān tribe of Arab Christians to leave the region.[54] This policy reflected the universalizing ethos of Islam through the use of expulsion or cleansing as part of an imperial policy.

Yet, the universalist ethos had its limits, especially when the imperative of empire was jeopardized. For instance, despite ʿUmar's attitude against non-Muslim Arabs, he could not sacrifice empire at all costs. Even ʿUmar had to recognize that a hostile attitude toward non-Muslim Arabs might prove harmful to the efficacy of Islamic imperial rule and expansion. So while he pushed out the Banū Najrān, ʿUmar allowed another Arab tribe, the Banū Taghlib, to retain their Christian faith without expulsion from the Arab Peninsula. The Banū Taghlib was a strong tribe, and threatened to join the ranks of the Byzantine Empire if they were not given favorable treatment under the Islamic regime. Arguably, ʿUmar "tolerated" Banū Taghlib because of this tactical concern. So, while he was dissatisfied with allowing Arab Christians to maintain their faith in the Arabian Peninsula, he nonetheless incorporated Banū Taghlib into the Muslim polity for reasons having to do with preserving the imperial enterprise of governance.[55]

ʿUmar remained fully aware of the challenge the Banū Taghlib posed to the coherence of a universalist faith tradition, though. Consequently, while he "tolerated" their presence in the empire, he also placed certain limits on them, arguably in furtherance of an Islamic universalism. For instance, he decreed that they could not baptize their children.[56] Furthermore, the fourth caliph ʿAlī b. Abī Ṭālib

53 Friedmann, *Tolerance and Coercion in Islam*, 60.

54 Goddard, "Christian-Muslim Relations", 196.

55 Interestingly, the Banū Taghlib did not want to pay the *jizya*, as they considered it humiliating for an Arab tribe to pay that particular tax. Consequently, ʿUmar conceded to their demands and allowed them to pay the Muslim tax, but at double the rate. Some studies suggest that the doubled rate of the Muslim tax might have approximated the *jizya* rate, but was applied under a different name to save the Banū Taghlib any sense of embarrassment or humiliation. Friedmann, "Classification of Unbelievers", 171-172.

56 Friedmann, "Classification of Unbelievers", 170-171.

(r. 35-40/656-661) prohibited Muslim men from marrying the women of Banū Taghlib because he did not know whether the tribe embraced Christianity before or after the corruption of their tradition.[57]

The contrasting examples of Banū Najrān and Banū Taghlib illustrate how both the universalizing ethos of Islam (e.g., the expulsion of Banū Najrān) and the imperative of empire (e.g., the concession to Banū Tahglib) provided the circumstances of intelligibility to the *dhimmī* rules. The legal rules regarding ethnicity, time, and religious identity demarcated when rulers had to fight non-Muslims and when they could countenance possibilities of truce on condition of paying the *jizya*.[58] The notable exception was the Banū Taghlib; the demands of empire required modification of the general rules. However, while the Banū Taghlib could remain in the Muslim polity, they were subjected to specific regulations that indirectly had the effect of upholding a universalist Islamic message, while maintaining the efficacy of an imperial enterprise of governance that could not ignore the pragmatics of expansion.

Moreover, as the empire expanded, the changing contexts presented new challenges to the development of legal doctrines regulating the scope of any pluralist commitment. For instance, as Muslims conquered parts of Iraq and Persia, they came into contact with Magians, which generally connotes Zoroastrians. Although the Qurʾānic verse on *jizya* technically applies only to those who have received scriptural revelation, the contingencies of conquest led Muslim conquerors to apply the rules of *jizya* and the contract of *dhimma* to those outside the Abrahamic traditions. The practice of taking *jizya* from Zoroastrians may be explained by simple pragmatics, but was legally justified by reference to traditions of the Prophet in which he was reported to have done so. However, this is not to suggest that the Zoroastrians were treated similarly to Christians and Jews. According to some jurists, since Zoroastrians were deemed equivalent to polytheists, Muslims could take the *jizya* from them, but could not marry their women or eat their meat.[59] The fact of diversity and the imperative of imperial management may have led to an increase in the scope of inclusion. The limiting content of that

57 Friedmann, "Classification of Unbelievers", 172.

58 The juristic discussion surrounding the Prophetic tradition about the Arab Peninsula contributed to a vast debate about who can and cannot be non-Muslim, in terms of an Islamic universalistic ethos that was made manifest in the Arab world and expanded thereafter. Some would suggest that the Prophetic tradition need not connote a principle of discrimination at all. Muhammad Hamidullah argues that this Prophetic tradition reflects the Prophet's political aim to secure a region of safety, security, and homogeneity for Muslims struggling to survive. Muhammad Hamidullah, "Status of Non-Muslims in Islam", *Majallat al-Azhar* 45, no. 8 (1973): 6-13, 10. While this perspective is important for its interpretive contribution to the corpus of the Islamic tradition, it does not undermine the more general argument here about how the tradition reflects the challenge of governing in a pluralist setting.

59 Michael G. Morony, *Iraq after the Muslim Conquest* (1984), 301. See also Freidenreich, *Foreigners and Their Food*.

inclusion, though, reflects a marginalization that vindicates the universalism of the Islamic message while providing for efficient imperial management.

Second, what was the jizya? This was a special poll tax non-Muslim permanent residents paid to maintain their faith and live peacefully within the Muslim empire.[60] Notably, pre-modern jurists debated whether only Jews and Christians, as the People of the Book (*ahl al-kitāb*), were entitled to this option of peaceful coexistence within the Muslim empire upon payment of the *jizya*. As the historical tradition suggests, this entitlement was expanded to others as the Muslim empire grew. Consequently, when Muslims conquered Persia and encountered Zoroastrians, commanders allowed the local religious population there to reside peacefully in the empire and maintain their faith, as long as they paid the *jizya*. Likewise in India, when Muslims conquered that region, polytheists were allowed to pay the *jizya* and live a "tolerated" existence under Muslim rule.[61] This is not to suggest that the People of the Book and others were treated alike. Although all these groups were able to live peacefully within the Muslim empire on condition of payment of the *jizya,* the People of the Book were held in higher esteem than others. That higher esteem was reflected in legal doctrines. For instance, Muslim men could marry the women of the People of the Book, but not of the polytheists. Muslims could eat the meat slaughtered by People of the Book, but not by polytheists or Zoroastrians.[62] Those without revelation posed a tension in the law – they were "tolerated" but could not be embraced by Muslims in matters of kinship and trade.

Third, what does the Qurʾānic verse mean when it states that those paying the jizya are to be in a "state of submission"? Some held that the Qurʾān implied that paying the *jizya* was designed as a mechanism to render the *dhimmīs* subordinate to Muslims.[63] Other jurists wrote that the reference to submission refers to how payment of the *jizya* was a symbolic act acknowledging the legitimacy and imperium

60 Studies have shown that the poll tax was not a Muslim invention. The Byzantine and Sassanian Empires both imposed a poll tax on Jews residing within their respective territory. See, Morony, *Iraq after the Muslim Conquest*, 306, 317-320.

61 *Al-Fatāwā al-Alāmgirīyyah = Al-Fatāwā al-Hindiyyah fī Madhhab al-Imām al-Aʿẓam Abī Ḥanīfa al-Nuʿmān* (1973), 2:244-245.

62 Friedmann, "Classification of Unbelievers in Sunni Muslim Law and Tradition", 167; Gudrun Kramer, "Dhimmi or Citizen? Muslim-Christian Relations in Egypt", in *The Christian-Muslim Frontier: Chaos, Clash or Dialogue?* ed. Jorgen S. Nielsen (1998), 35-36; Morony, *Iraq After the Muslim Conquest*, 301; Freidenreich, *Foreigners and Their Food,* 146-150.

63 Mahmoud M. Ayoub, "The Islamic Context of Muslim-Christian Relations", in *Conversion and Continuity: Indigenous Christian Communities in Islamic Lands, Eight to Eighteenth Centuries,* eds Michael Gervers and Ramzi Jibran Bikhazi (1990), 461-477; Ziauddin Ahmad, "The Concept of Jizya in Early Islam", *Islamic Studies* 14, no. 4 (1975): 293-305; Bosworth, "The Concept of *Dhimma* in Early Islam", 1:37-54; M. Izzi Dien, *The Theory and the Practice of Market Law in Medieval Islam: A Study of* Kitāb Nisāb al-Iḥtisāb (1997), 51-52; Haddad, "*Ahl al-Dhimma* in an Islamic State", 169-180. For an early

of the Sharīʿa under which the non-Muslim lived.[64] The Qurʾānic phrase was read, therefore, to ensure law, order, and authority, but not humiliation.[65] A third position, held by jurists such as Fakhr al-Dīn al-Rāzī (d. 606/1209), was that the *jizya* requirement and other *dhimmī* rules were designed to incentivize conversion to Islam. In other words, the purpose behind such provisions was not to humiliate or subjugate, but to create the conditions for conversion.[66] Humiliation or subordination, on this third reading may be unavoidable, but they were not the principal aim or purpose of the rules; rather, they were instrumental to the central objective of conversion to Islam.

In the aggregate, these different readings of the Qurʾānic verse suggest that as jurists debated how to govern amidst diversity, they contended with multiple and at times conflicting demands (e.g. the universalist aspiration of Islam, the logistical imperatives of empire). These demands informed the debates on the law, sometimes trumping each other or sitting in an uneasy compromise position. Each *dhimmī* rule, therefore, reflects different juridical balances of these demands. Each demand carried weight, but influenced legal outcomes differently depending on various circumstances associated with a particular issue.

The Dhimmī *Rules: Examples from the Sources*

As noted earlier, the *dhimmī* pays the *jizya* tax and thereby enjoys the rights and protections granted to him by the *ʿaqd al-dhimma*. But what are the terms of that contract? The contract, as a politico-legal mechanism provided jurists the discursive site to debate the scope to which the *dhimmī* was included, accommodated, and/or excluded while residing within the Muslim polity. Below are examples of the legal debates on the *dhimmīs*, and how those debates reveal the larger challenge of governing a diverse polity.

Accommodation and Its Limits: Contraband or Consumer Goods?

A fundamental feature of the contract was that it required the governing regime to protect the *dhimmīs'* property interests, just as it protected the Muslims' property interests. The scope of that protection (and thereby inclusion of the *dhimmī*'s

exegetical commentary reflecting this attitude, see Abū Bakr al-Jaṣṣāṣ, *Aḥkām al-Qurʾān,* ed. ʿAbd al-Salām Muḥammad ʿAlī Shāhīn (1994), 3:127-128.

64 Ahmad Dallal, "Yemeni Debates on the Status of Non-Muslims in Islamic Law", *Islam and Christian-Muslim Relations* 7, no. 2 (1996), 181-192, 189; Haddad, "*Ahl al-Dhimma*" 172-173.

65 Haddad, "*Ahl al-Dhimma*", 173, who refers to al-Māwardī in support of this position.

66 Jane Dammen McAuliffe, "Fakhr al-Dīn al-Rāzī on Ayat al-Jizya and Ayat al-Sayf", in *Conversion and Continuity: Indigenous Christian Communities in Islamic Lands, Eighth to Eighteenth Centuries,* eds Michael Gervers and Ramzi Jibran Bikhazi (1990), 103-119.

difference), though, is called into question when the *dhimmīs'* property interests might be incommensurable with other features of Islamic law. To demonstrate how the contract of protection was the negotiative site for deliberating on the scope of the *dhimmīs'* inclusion, this section will address whether or not the *dhimmī* could consume alcohol and pork in an Islamic polity, and in particular two exceptional debates that arose therefrom, in particular the discussion on public drunkenness and the debate on legal recourse in case of theft.

The contract of protection protected the *dhimmī* in both his person and property. But this begs an important legal question – what counts as legally protected property? Not all property is equally protected under Islamic law. The Ḥanafī al-Kāsānī said, the property that conveys such rights is considered *mutaqawwam*, or inviolable under the law.[67] Only certain types of property are legally recognized as conveying claims of exclusive use and enjoyment. The implication of this approach to property could adversely affect the interests of *dhimmīs* in their property. The adverse effect is apparent in legal debates about whether *dhimmīs* could consume pork or wine in a Muslim polity. Both items are sanctioned in Islamic legal teachings, in some cases with corporal punishment. But if *dhimmīs* could consume such items, on what basis could they do so? As a corollary, if they could own and consume wine and pork when living in a Muslim polity, could *dhimmīs* also petition the governing authorities to punish anyone who steals their wine and pork products? If they could do so, then the governing authorities of an Islamic regime would invoke Islamic legal norms to punish someone for stealing property that may not be inviolable at the outset. How can Sharīʿa doctrines both prohibit Muslims from owning or consuming such products, and also punish someone with a Qurʾānic penalty for stealing such items? The paradox of this possible outcome led jurists to question whether owners of pork or wine have the same expectation interests in their property that owners of other types of property would. The legal debate about protecting the *dhimmīs'* property interest in wine and pork illustrates how Muslim jurists used the law to include the *dhimmīs* by protecting their property interests and allowing their consumption of these items, while also demarcating the limits of that accommodation.

Consuming alcohol (*shurb al-khamr*) is a crime under Islamic law, with a penalty of forty or eighty lashes, depending on the relevant school of law.[68] The consumption of pork is prohibited to Muslims under their dietary laws. However,

67 Abū Bakr al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*, eds ʿAlī Muḥammad Muʿawwad and ʿĀdil Aḥmad ʿAbd al-Mawjūd (1997), 9:292.

68 The punishment for consuming alcohol is generally held to be forty lashes, although some schools such as the Mālikīs required eighty. For a discussion of this debate, see Ḥusayn Ḥāmid Ḥassān, *Naẓariyyat al-Maṣlaḥa fī al-Fiqh al-Islāmī* (1971), 73.

neither of these prohibitions apply to *dhimmīs;* jurists allowed *dhimmīs* to consume both items. Jurists such as al-Ghazālī and al-Kāsānī held that the contract of protection guaranteed to the *dhimmīs* that their traditions would be respected. Since the *dhimmīs'* tradition allows them to consume pork and alcohol, the contract of protection does not prohibit them from doing so.[69] Likewise, al-Kāsānī argued in similar fashion that *dhimmīs* can consume alcohol and pork because their tradition allowed them to do so. On the other hand, if the *dhimmīs'* traditions prohibited something that Sharīʿa-based rules also prohibited, the *dhimmī* was subject to liability on Sharīʿa based grounds. Where the *dhimmīs'* tradition permitted one thing, and the Sharīʿa prohibited it, jurists had to decide which tradition would prevail and why.

The jurists' decision was not always an easy one. Their decisions occurred in the discursive space of the contract of protection where they considered the imperatives of inclusion, exclusion, accommodation, and the public good. As much as jurists permitted *dhimmīs* some liberty, as in the case of consuming wine and pork, jurists limited the scope of that accommodation in light of other ancillary issues of law and legal order. For example, while jurists agreed that *dhimmīs* could consume alcohol, they nonetheless were concerned that unrestricted alcohol consumption by *dhimmīs* might endanger the social good, a general good that they often did not define, but rather simply assumed as true and important. Consequently, while they permitted the *dhimmī* to consume alcohol, jurists banned public drunkenness or public displays of alcohol.[70] In other words, the jurists permitted the *dhimmīs* to consume alcohol, despite the Qurʾānic prohibition. But they limited the scope of the *dhimmīs'* license in the interest of a virtue about the public good whose content was informed by (but not reduced to) the legal ban on alcohol consumption. In this case, while the *dhimmī* enjoyed an exception to a rule of general application, that rule of general application was used to give content to more general, abstract public good that found expression in new legal rules banning public drunkenness.

The second example of the complex of inclusion/exclusion/accommodation when governing amid diversity concerned whether a *dhimmī* can petition the governing authorities to punish a thief who stole the *dhimmī's* pork or wine.

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69 Abū Ḥāmid al-Ghazālī, *al-Wasīṭ fī al-Madhhab,* ed. Abū ʿAmrū al-Ḥusaynī (2001), 4:152; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 9:292. See also, Saḥnūn b. Saʿīd al-Tanūkhī, *al-Mudawwana al-Kubrā* (n.d.), 6:270, who does not apply the punishment for consumption of alcohol to the *dhimmī.*

70 Abū al-Ḥasan al-Māwardī, *al-Ḥāwī al-Kabīr,* eds. Alī Muḥammad Muʿawwad and ʿĀdil Aḥmad ʿAbd al-Mawjūd (1994), 13:328; Abū Isḥāq al-Shīrāzī, *al-Muhadhdhab fī fiqh al-Imam al-Shāfiʿī,* ed. Zakariyya ʿAmīrāt (1995), 3:317; al-Muzanī, *Mukhtaṣar al-Muzanī,* in vol. 5 of al-Shāfiʿī, *Kitāb al-Umm* (1990), 5:385; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 9:214. For a general discussion on the exception to the punishment for alcohol consumption, see ʿAbd al-Karīm Zaydān, *Aḥkām al-Dhimmiyyīn wa al-Mustaʾminīm fī Dār al-Islām* (1988), 179-180.

Suppose a *dhimmī* stole wine or pigs from another *dhimmī.* Moreover, following the Ḥanafī al-Kāsānī, suppose that under the *dhimmīs*' law, the property is deemed as rights conferring. Under Sharīʿa-based doctrines, though, such property was not *mutaqawwam* as they were generally deemed illicit. If the wronged *dhimmī* seeks redress under Sharīʿa against the thieving *dhimmī*, should a Muslim judge punish the thieving *dhimmī* with the Qurʾānic punishment? If the judge does so, that would effectively be using a Sharīʿa-based legal system to enforce a right to a kind of property that is not value-conferring under Sharīʿa norms, despite being value-conferring under the *dhimmīs'* tradition. If the judge were to adjudicate in the victim's favor, the judge would by implication prioritize the *dhimmīs'* tradition on property over the Sharīʿa-norms on property. Al-Kāsānī's hypothetical posed a conflicts of law issue that effectively raised questions of legal sovereignty. The hypothetical involves funneling a *dhimmī* doctrine into the contract of protection, and thereby granting it normative priority in a legal system that is deeply wedded to the Sharīʿa as a tradition and source of legitimacy. Certainly the *dhimmī* enjoyed legal protection under the contract of protection, but at what cost to the coherence, priority, and gravitas of the Sharīʿa-based legal system? Giving redress to the *dhimmī* who has lost his property certain reflects a commitment to protect people against theft. But the systemic questions forced Muslim jurists to consider the scope *and* limits of that protection.

The Ḥanafī al-Kāsānī resolved the immediate question by prioritizing the view that wine and pork are not *mutaqawwam,* or in other words are not value conferring. Consequently, if a *dhimmī* steals wine from another *dhimmī,* the thieving *dhimmī* will not suffer the punishment for theft, despite having stolen something that does not belong to him.[71] Under a Sharīʿa analysis, if such property has no value, then no theft has occurred. Moreover, to use the coercive power of Sharīʿa to redress the theft of a type of property that is condemned under Sharīʿa might appear to "over-accommodate" the *dhimmī* at the expense of legal consistency and the public good sought through Sharīʿa regulations. However, this does not mean the *dhimmī* who has lost his property is without recourse. Some (but not all) jurists permitted the *dhimmī* to seek financial compensation for the value of the property stolen.[72] This might seem inconsistent given that jurists held the original property to lack any value. If it has no value, how can there be any financial redress? This inconsistency is itself meaningful, if only to showcase the challenges of governing amid diversity. The general rules and principles yield to particular interests in exceptional situations, yielding pragmatically acceptable (but systemically incoherent) outcomes.

71 Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 9:292.
72 See, Emon, *Religious Pluralism,* 112.

Al-Kāsānī's argument is one example of how the *dhimmī* rules reflect much more complicated inquiries about governance, pluralism, accommodation and legitimacy. The general bans on the consumption of alcohol and pork, coupled with the exceptions for *dhimmīs*, reveal how jurists used legal argument both to accommodate *dhimmīs* and limit the scope of that accommodation in the interest of a presumed public good. The legal debates of are interesting not so much for what the black letter rules are, but rather for what they reveal about the dynamics of legal ordering in a complex society. Those dynamics show how Muslim jurists acknowledged, respected, and accommodated the *dhimmīs'* traditions by exempting them from certain Sharīʿa liabilities. The scope of that accommodation, though, had to be limited where it posed a threat to the social good of the Islamic polity, whether defined in terms of Sharīʿa norms or concerns with the priority and pride of place given to Sharīʿa in an Islamically defined governance system.

Property, Piety, and Securing the Public Good: The Case of Charitable Endowments

The third example to be addressed reveals the jurisprudential significance of the "public good", which operated in the backdrop of the *dhimmī* rules. Jurisprudentially, reference to the "public good" was a device by which jurists could determine whether an accommodation was appropriate or went too far. As discussed above, a *dhimmī* who consumed alcohol was exempted from the ban on consumption in light of the contract of protection, which was the means of accommodating the *dhimmī's* difference. That particular accommodation, though, was an exception that vitiated neither the general ban nor its implications for a general public policy concern about public drunkenness.

Another more powerful example concerned whether *dhimmīs* could create charitable endowments, or *awqāf* (sing. *waqf*), for the purpose of teaching the Bible or Torah. To create a charitable endowment was a legal entitlement that accrued to a property owner as a private individual. However, under the law, charitable endowments were by their nature intended to influence the public weal. The entitlements of private ownership (including the power to bequest) raised concerns when property was donated for public purposes that could contravene the public good. In other words, while interests in private property were protected, the scope of that protection was limited in light of competing interests of a more general, public nature. Consequently, the debate about whether and to what extent a *dhimmī* could endow a charity reveals a juristic balance between respect for the *dhimmī's* private property interests, and the imperative to protect an Islamically defined public good. The appropriate balance depended on what

one considered to contribute to or diminish the public good, and how best to strike an appropriate balance in diverse settings where not all members of the polity share the same set of core values. As will be suggested below, the public good was defined and rendered intelligible in terms of an Islamic universalist ethos made manifest through empire. Hence, the rules limiting the scope of the *dhimmī's* bequeathing capacity were manifestations of that those two features of governance, which thereby gave content to Sharīʿa-based doctrines.

Two ways to create a charitable endowment are (1) a bequest that takes effect upon the testator's death (i. e. *waṣiyya*), and (2) an *inter vivos* transfer of property directly into a trust (*waqf*). Shāfiʿī and Ḥanbalī jurists generally agreed that *dhimmīs* could create trusts and issue bequests to any specified individual (*shakhṣ muʿayyan*), regardless of religious background, although some jurists limited the beneficiaries to one's kin group.[73] This permissive attitude was based on the legal respect of private ownership (*tamlīk*) and the entitlements of the property owner by virtue of his or her claim on the property.[74] Shāfiʿī and Ḥanbalī jurists held that the *dhimmī's* private property interest was sufficiently important to warrant the right to bequest property to other individuals.

However, if the *dhimmī's* bequest was for something that might adversely affect the public interest (understood in terms of an Islamic universalism), then the bequest was a sin against God and was invalid under the Sharīʿa.[75] To hold otherwise was to use the institutions of an Islamic polity to legitimate practices that contravene an Islamically defined public good. Consequently, if a *dhimmī* created a charitable trust to support building a church or a school for Torah studies, Shāfiʿī jurists invalidated the *waqf,* because it constituted a sin (*maʿṣīya*) that the law could not protect.[76]

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73 Al-Ghazālī, *al-Wasīṭ,* 2:397-398. Al-Māwardī, *al-Ḥāwī al-Kabīr* 8:328-330, wrote that there is a dispute about whether a non-Muslim can make a bequest to anyone other than a free Muslim of legal majority; al-Nawawī, *Rawḍat al-Ṭālibīn wa ʿUmdat al-Muftīn,* 3rd ed. (1991), 5:317, held that a *waqf* could be for the benefit of a *dhimmī,* but not for an enemy of the state (*ḥarbī*) or apostate; al-Shīrāzī, *al-Muhadhdhab,* 2:323-324, allowed *waqfs* for specified *dhimmīs* but noted the debate about *waqfs* for the benefit of apostates or enemies of the state.

74 Al-Ghazālī, *al-Wasīṭ,* 2:397-398. Abū ʿAbd Allāh b. Mufliḥ, *al-Furūʿ,* ed. Abū al-Zahrāʾ Ḥāzim al-Qāḍī (1997), 4:513; Ibn Qudāma, *al-Mughnī* (n.d.), 5:646

75 Al-Ghazālī, *al-Wasīṭ,* 3:41-42; al-Nawawī, *Rawḍa,* 6:107, allowed a *waṣiyya* to be for the benefit of *dhimmīs, ḥarbīs,* and apostates; Ibn Qudāma, *al-Mughnī,* 6:103, analogized a *waṣiyya* to a gift, and said that both could be given to *dhimmīs* and *ḥarbīs* in the *dār al-ḥarb;* Abu ʿAbd Allāh b. Mufliḥ, *al-Furūʿ,* 4:513l; al-Bahūtī, *Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ* (1997), 4:442; al-Muḥaqqiq al-Ḥillī, *Sharāʾiʿ al-Islām fī Masāʾil al-Ḥalāl wa al-Ḥarām,* ed. Ṣādiq al-Shīrāzī, 10th ed. (1998), 1:482.

76 Al-Ghazālī, *al-Wasīṭ,* 2:397; Ibn Shihāb al-Dīn al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj,* 3rd ed. (1992), 5:366. The Jaʿfarī al-Muḥaqqiq al-Ḥillī interestingly held that a *Muslim* could not create a *waqf* to support a church, synagogue, or schools for studying the Torah or Bible. However, he allowed a non-Muslim to do so, thus introducing yet another complicated piece into the debate. Al-Muḥaqqiq al-Ḥillī, *Sharāʾiʿ al-Islām,* 1:459.

A precise, nearly syllogistic analysis was provided by the Shāfiʿī jurist al-Shīrāzī. First, he held that a charitable *waqf,* in its essence, was a pious endowment that brought one close to God (*qurba*). Second, anyone who created a charitable endowment through a bequest or *waṣiyya* created an institution that bestowed bounties (*hasanāt*) on others. Lastly, he concluded that any charitable endowment that facilitated sin (*iʿāna ʿalā maʿṣīya*) was not lawful.[77] By implication, to render such endowments as unlawful was to deem them as having no bounties whatsoever. Indeed, for al-Shīrāzī, such institutions perpetuated disbelief in the land of Islam, which was tantamount to sin. Indeed he argued that a charitable endowment in support of a church was void (*bāṭila*) as its bounty was sinful.[78] Al-Shīrāzī went so far as to liken a bequest in favor of a church or synagogue to a bequest that arms the Muslim polity's enemies, thereby equating both in terms of their potential to inflict harm on the Muslim polity.[79] In other words, for al-Shīrāzī, a charitable endowment of a Bible or Torah reading school were not simply sinful; they were a security threat that had to be contained for the benefit and perpetuation of the Islamic governing regime and the polity it governed. To permit such charitable endowments as a matter of law was to use Islamic law, both in terms of its doctrines and institutions, contrary to the public good.

Ḥanafī jurists took a different position than the Shāfiʿīs and Ḥanbalīs. They addressed charitable endowments by reference to a hypothetical about a *dhimmī* who bequests his home to be a church, as opposed to leaving it to a specifically named person. Abū Ḥanīfa held this bequest lawful because it constitutes a pious, devotional act for the *dhimmī* (i. e. *qurba*), and must be respected just as Muslims respect the *dhimmī's* faith in other regards. In other words, while both al-Shīrāzī and Abū Ḥanīfa viewed charitable endowments as bringing one closer to God, Abū Ḥanīfa believed that what brought one close to God differed depending on the tradition to which one belonged. Abū Ḥanīfa's students, Muḥammad al-Shaybānī and Abū Yūsuf, however, disagreed with their teacher because they (like al-Shīrāzī) deemed such a bequest sinful (*maʿṣiya ḥaqīqa*) despite the *dhimmī's* belief that it was a pious act.[80]

This dispute within the Ḥanafī school raised a fundamental question for governance amidst pluralism: should one measure the act's impact on the public good in terms of the *dhimmī's* tradition or in terms of the prevailing

77 Al-Shīrāzī, *al-Muhadhdhab,* 2:323-324.

78 Al-Shīrāzī, *al-Muhadhdhab,* 2:341-342.

79 For another argument, the Ḥanbalī Ibn Qudāma argued that a bequest could not be made to support schools for teaching the Torah or the Bible because both had been abrogated by the Qur'ān and contain corruptions. Ibn Qudāma, *al-Mughnī,* 6:105. See also al-Bahūtī, *Kashshāf al-Qināʿ,* 4:442.

80 Badr al-Dīn al-ʿAynī, *al-Bināya Sharḥ al-Hidāya,* ed. Ayman Ṣāliḥ Shaʿbān (2000), 13:495; Ibn Nujaym, *al-Sharḥ al-Baḥr al-Rāʾiq* (1997), 9:302; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 10:500-501.

Islamic one?[81] To resolve this question, the Ḥanafī al-ʿAynī offered four possible outcomes:

- If a bequest was licit in the *dhimmī's* tradition but not in the Islamic tradition, many Ḥanafīs held that it should be allowed, although other schools (as well as other Ḥanafīs) disagreed.
- If the dhimmī's bequest would be a pious act if a Muslim did it but not according to his own tradition – e.g. supporting the Muslim pilgrimage to Mecca (i. e. *ḥajj*) or constructing a mosque – the bequest was invalid because it undercut the *dhimmī's* tradition. However, if the *dhimmī* designed the bequest to benefit specifically named individuals to go on the *ḥajj,* for instance, the bequest is valid, since the beneficiaries' capacity and private interests as property owners are to be respected under the law.
- If the bequest concerned a matter that was lawful under both the *dhimmī's* beliefs and Islamic beliefs, it was valid.
- If the bequest was unlawful pursuant to both the *dhimmī's* tradition and the Muslim tradition, it was invalid.[82]

By offering these alternatives, al-ʿAynī illustrated the underlying issues at stake, namely the *dhimmī's* private property interests that he holds as an individual, the private beneficiary's interests in property, the limits on the *dhimmī* in light of his tradition's requirements, and lastly the public good. In the interest of upholding the *dhimmīs'* private property interests, al-ʿAynī granted *dhimmīs* the authority to create pious endowments that did not violate any precept in the *dhimmīs'* traditions or the Islamic one. To allow such bequests upheld the Islamic values underpinning the polity and enterprise of governance, and evinced respect for the *dhimmīs'* tradition. Notably, the *dhimmī* could not make a bequest that was lawful under Islam but presumably unlawful (or even disadvantageous) under the *dhimmīs'* tradition. Respect for the *dhimmīs'* tradition animated this outcome, thereby illustrating the significance of the contract of protection in negotiating this particular legal outcome. Notably, though, one cannot ignore the fact that the *dhimmīs'* private rights of property disposition were limited by his own tradition, regardless of how a particular *dhimmī*-grantor subjectively felt about the matter. The most difficult and perplexing issue was, of course those cases where the bequest was valid under the *dhimmī's* tradition, but not in the Islamic tradition. This was the case on which jurists disagreed, as noted above.

81 Indeed, this was the dilemma in the jurisprudence noted in al-ʿAynī, *al-Bināya,* 13:495.

82 Al-ʿAynī, *al-Bināya,* 13:496; Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 9:302; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 10:500-501.

To further complicate matters, the Mālikīs had their own approach. They addressed the issue of charitable endowments by reference to the religious association of the testator, the framework of Islamic inheritance law, and the prevailing tax regime. Under Islamic inheritance law, two-thirds of a decedent's property was distributed to designated heirs. The decedent was free to bequest the remaining one-third to non-heirs.[83] Mālikīs asked, though, whether a Christian *dhimmī* with no heirs could bequest all of his property to the head of the church, the Patriarch. According to many Mālikī jurists, the Christian could only give one-third of his estate to the Patriarch; the remaining two-thirds escheated to the Muslim governing regime, which was considered his lawful heir in this case.[84] Even if the testator left a bequeathing instrument that transferred his whole estate to the Patriarchate, the above arrangement was to be carried out nonetheless.[85]

The application of this rule, however, depended on whether the *dhimmī* was personally liable to the governing regime for the *jizya* or whether the *dhimmī* community was collectively liable for a fixed tax payment. If the *dhimmī* was personally liable for paying the *jizya* directly to the government, the above ruling on escheat to the government applied. The rationale for this rule was as follows: with the death of the *dhimmī*, the ruling regime lost its annual tax revenue from him. Consequently, the escheat of his estate was designed to offset the regime's lost source of revenue.[86]

Suppose, however, that the *dhimmī* community's leadership collected the *jizya* from its members and delivered a fixed payment to the ruling regime on behalf of the community. If the fixed tax payment did not decrease with deaths of community members, many Mālikīs allowed individual *dhimmīs* (presumably without heirs) to bequest their entire estate to whomever they wished.[87] This particular ruling worked to the financial benefit of the ruling regime. The regime still received the same *jizya* tax payments, suffering no diminution in tax revenue. Any financial loss was distributed to the *dhimmī* community, since its tax liability did not diminish with the death of its community members. To offset that financial loss, the Mālikīs permitted *dhimmīs* to bequest their entire estate to their community where the decedents lack any heirs.

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83 On the rules of inheritance in the Qurʾān and Islamic law, see Q 4: 11-12; David Powers, *Studies in Qur'an and Hadith: The Formation of the Islamic Law of Inheritance* (1986).

84 Ibn Rushd (al-Jadd), *al-Bayān wa al-Taḥṣīl* (1988), 13:326-327.

85 Ibn Rushd (al-Jadd), *al-Bayān,* 13:326-327. See also al-Ḥattāb, *Mawāhib al-Jalīl,* ed. Zakariyya ʿAmīrāt (1995), 8:515, who relates this view, and criticizes another that upholds the validity of any *waṣiyya* by a *kāfir;* Shihāb al-Dīn al-Qarāfī, *al-Dhakhīra,* ed. Saʿīd Aʿrāb (1994), 7:12.

86 Ibn Rushd (al-Jadd), *al-Bayān,* 13:326-327. See also al-Qarāfī, *al-Dhakhīra,* 7:35.

87 Ibn Rushd (al-Jadd), *al-Bayān,* 13:326-327. However, Ibn Rushd did note others who disagreed with him, and held that the estate escheats to the state when there is no heir. Al-Qarāfī, *al-Dhakhīra,* 7:12, held the same view as Ibn Rushd al-Jadd but also noted the disagreement on this issue.

In conclusion, when a *dhimmī* endowed a religious institution, Muslim jurists were concerned about legitimating such charitable institutions through the law. To use Sharīʿa categories to uphold non-Muslim religious institutions was ironic, given the role of Sharīʿa in ensuring a public good defined in terms of a universalist Islamic ethos. The legal debate about the scope of the *dhimmī's* power to bequest property for religious purposes shows that Muslim jurists grappled with the effects of diversity on the social fabric of the Islamic polity. The legal debates on the issue were juridical attempts to account for and respect the *dhimmī's* conception of piety and property interests, the public good, and, for some, the security of the Islamic polity. Regardless of the analytic route any particular jurist adopted, the legal debate reveals that the *dhimmī* rules were hardly clear cut indices of tolerance or intolerance, harmony or persecution. Rather they were symptoms of the larger, more difficult, and arguably globally shared challenge of governing amid pluralism.

Conclusion

This chapter started with an analysis of the historiography of the *dhimmī* rules to suggest that any attempt to frame these rules in terms of the competing myths of harmony or persecution is analytically reductive not to mention anachronistic. Certainly these rules offend the twenty-frst century sensibilities; but to adopt that sense of outrage as a starting point in the study of these rules reveals less about the historical tradition and more about the ideological standpoint of the scholar writing about these rules today. Rather, to understand these rules in their legal context demands that we recognize their position relative to an imperial enterprise of governance, whether real or imagined. Analyzing the *dhimmī* rules in that context not illuminates and explains the underlying legal logic of these rules, but also reveals the inevitable connection between law and governance. Moreover, it highlights the fact that the connection between law and governance is particularly prominent, poignant, and even painful when a member of a minority community appeals for legal judgment. For a judge, determining the scope of accommodation that will be granted to a minority claimant is not an easy matter. The more judicial and other government officials encounter the demands of diverse communities, the more they will need to balance the communities' demands with the core values of the prevailing governing system. The more an official defers to the core values as against claims of difference, the more minority groups will feel unduly oppressed. But the more jurists accommodate the demands and values of the "other", the more they may undermine the integrity and sovereignty of the prevailing legal and political order.

As cases from different jurisdictions reveal, diversity poses profound challenges to a legal system, given the degree to which the law is in a mutually constitutive relationship with the prevailing enterprise of governance. This is hardly unique to Islamic law. Rather, it has been and remains a feature of contemporary legal systems around the world today. For instance, in the twentieth century, the U.S. Supreme Court constitutionally justified limiting the religious freedom of Jehovah's Witnesses in the name of national security and well-being. In *Minersville School District v. Gobitis* (1940), Lillian and William Gobitis were expelled from the public schools of Minersville School District for refusing to salute the U.S. flag as part of a daily school exercise as required of all students by the local school board.[88] Justifying the court's decision, Justice Frankfurter wrote:

> The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. This Court has had occasion to say that "... the flag is the symbol of the nation's power,- the emblem of freedom in its truest, best sense. ... it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression".[89]

For Frankfurter J., national unity is an essential condition for order and wellbeing: "[n]ational unity is the basis of national security".[90] Recalling al-Shīrāzī's concern on security and charitable endowments, Frankfurter J'.s remarks suggest that to exempt the children from saluting the flag would threaten national unity and security.[91]

In more recent years, countries in Europe and North America have increasingly issued (and passed) legislation that bans certain forms of veiling for Muslim women. Muslim women who wear the veil are often (re)presented as threats to security, the national polity, or as outsiders whose religious beliefs make them incapable of truly being "one of us".[92] The creation of mosques has also become

88 *Minersville School District v. Gobitis,* 310 U.S. 586 (1940).

89 *Gobitis*, 310 US 586 at 596.

90 *Gobitis*, 310 US 586 at 595. Frankfurter J. was aware of the stakes at issue in this case. The claims of a religious minority are weighed against the demands of the polity for national well-being and order. The legislation at issue is neither specific nor particular; it is a general rule of law that is well within the power of the legislature to put into effect. Frankfurter J. seemed especially compelled to respect the power of the legislation in matters such as education, as the court lacks the competence to advise on education policy.

91 Notably, the case was overturned three years later in *West Virginia State Board of Education v. Barnette. West Virginia State Board of Education v. Barnette,* 319 US 624 (1943). Nonetheless, *Gobitis* is a reminder that no political system is immune from the challenges of governing amidst pluralism.

92 Examples of such cases are from France, the United Kingdom, and the United States. For a case where a covered Muslim woman was denied French citizenship because her religious beliefs were deemed incompatible with French core values, see *In re: Mme M* (Case #286798). *Le Conseil d'Etat* [http://www.conseil-etat.fr/ce/jurispd/index_ac_1d0820.shtml] (accessed on September 23, 2008). For

a point of concern for countries such as Switzerland and the United States. In Switzerland, a campaign that featured an ominous image of a covered Muslim woman standing next to missile-like minarets emanating from the Swiss flag galvanized the populace such that it passed a referendum that constitutionally banned the erection of any minarets in the country.[93]

Ironically, contemporary concerns about Muslims in Europe and North America have more in common with the *dhimmī* rules than many may realize. In both cases, legal and political arguments are used to regulate the bodies of the "Other" in a manner that is linked to majoritarian values that are deemed to animate and legitimate the governing regime. Whether in the Islamic or liberal constitutional case, both share in the very human phenomenon of addressing anxieties about the public good by targeting those who are different and, quite often, powerless to resist.

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a UK case in which a high school girl's desire to wear a *jilbab,* in contradiction of school policy, was transformed into a symbol of extremism and threat to others, see *Shabina Begum* (respondent) v. *Headteacher and Governors of Denbigh High School* (appellants), [2006] UKHL 15. For a US case in which a niqab wearing Muslim woman was held to legal standards that ignored her status as an American citizen, see *Sultaana Lakiana Myke Freeman v. State of Florida, Department of Highway Safety and Motor Vehicles* Mp/ 5D03-2296, 2005 Fla Dist. Ct. App. LEXIS 13904 (Court of Appeal of Florida, Fifth District, September 2, 2005).

93 Christopher Caldwell, "No Minarets, Please", *The Weekly Standard* 15, no. 3 (December 14, 2009); Bandung Nurrohman, "A lesson to draw from the Swiss ban on minarets", *The Jakarta Post,* 15 December 2009, 7.

WESTERN LEGAL COLLECTIONS IN THE TWELFTH AND THIRTEENTH CENTURIES

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Law became an academic discipline in the Latin West during late eleventh and early twelfth centuries. The foundations of this "Renaissance of Law" was Justinian's codification of Roman law in the sixth century.[1] The recovery of Justinian's legislation was, however, a slow and challenging task. The only part that seems to have survived intact in the West was his *Institutes*. The other sections, the *Digest*, the *Codex*, and Justinian's later legislation, the *Novellae*, seem to have circulated in pieces or as older abbreviations. While Justinian's codification was being reassembled in Italy, Trans-Alpine scholars fashioned new abbreviations and some translations of Roman law texts. Like the Italians they had awaken to the importance of Roman jurisprudence for contemporary legal problems that could not be resolved adequately with Germanic customary law. Their books began to circulate in the early twelfth century North of the Alps. The glosses in the margins of these works indicated they were used to teach. They remained sources of Roman legal concepts and principles North of the Alps during the twelfth century, but their influence and significance waned as law schools were established in in Southern Europe. No major center of legal studies emerged where they were used. Abbreviations were not enough. After Gratian finished the last, massive recension of his *Concordia discordantium canonum c.* 1140 Northern canonists continued the tradition of abbreviating legal texts and produced a large number of shorten versions of Gratian's text.

The first task that confronted the first teachers of law in Italy at the end of the eleventh century was the reconstruction of the complete texts and the translations of those sections that were in Greek. The result was a medieval construct of Justinian's codification that resembled but differed from the original.[2] The medieval *Digest* and *Codex*, just as their forerunners in Justinian's codification, were

1 Pennington, "Corpus iuris civilis", *Dictionary of the Middle Ages* (1983) vol. 3, 608610.

2 Charles M. Radding and Antonio Ciaralli, *The Corpus iuris civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival* (2007); on the stages in which the *Digest* was recovered, see Wolfgang P. Müller, "The recovery of Justinian's Digest in the Middle Ages". *Bulletin of Medieval Canon Law* 20 (1990) 129. On the manuscript tradition of the *Institutes*, see Francesca Macini, *Sulle tracce delle istituzioni di Giustiniano nell'alto medioevo: I manoscritti dal VI al XII secolo* (2008).

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 77–98

 DOI 10.1484/M.RELMIN-EB.5.111593

divided into books, the books then subdivided into titles and each title contained subchapters of excerpts of the Roman jurisconsults (*Digest*) or laws (*Codex*). The medieval *Corpus iuris civilis* was known as the *Littera Bononensis*. Since the *Digest* was not recovered in one piece, the early teachers of law, called glossators because they "glossed" their texts, divided the *Digest* into three sections: *Digestum vetus*, corresponding to Book one, title one, law one to Book 24, title two (in modern citation Dig. 1.1.1 to Dig. 24.2), *Infortiatum*, Dig. 24.3 to 38.17, *Digestum novum*, Dig. 39.1 to 50.17. The *Codex* was separated into two parts, books 1 through 9 and books 10 to 12. The other important difference between the medieval and classical text was that the *Novellae* were ordered very differently from Justinian's arrangement. The various titles were placed in nine "collationes" and the entire work was called the *Authenticum*. The abbreviated texts of Justinian's legislation that were added to the margins of the Codex were called "authenticae". Perhaps the jurists' most important work in the dawn of western jurisprudence was to integrate texts of Justinian's later legislation into the margins of the *Codex*.[3] The final medieval version of Justinian's codification was not finished until *c.* 1120, but the jurists continued to add additional legal texts until the fifteenth century. From the late eleventh century the books of Justinian's codification became the *libri legales* that were taught in the schools and used in the courts of continental Europe.[4]

Several points should be emphasized. The beginnings of western jurisprudence were based on the authority of ancient and Byzantine Roman legal texts. Justinian's codification was a "Christianized" Roman law which enhanced its authority. Its Christian heritage was an important factor in its acceptance. The first known teachers of law, Pepo and Irnerius, began to teach the texts in Bologna without any mandate from secular or ecclesiastical rulers. The response of students was swift and remarkable. Bologna very quickly became the center of European legal studies.

The literature that these texts inspired, more than the texts themselves, was crucial for establishing law as a foundation stone of medieval society.[5] There is scant manuscript evidence for Pepo's teaching,[6] but hundreds of glosses and the

Radding and Ciaralli's book should be read with caution. Their descriptions of the manuscript traditions is good; their conclusions less so, especially their chapter on the *Codex*.

3 Pennington, "The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The *Authenticae*", *Rivista internazionale di diritto comune* 22 (2012) 3553.

4 On the *Libri legales* and their role in the law schools, see the chapter of Michael H. Hofflich and Jasonne M. Grabher, "The Establishment of Normative Legal Texts: The Beginnings of the *Ius commune*", *The History of Canon Law in the Classical Period, 11401234: From Gratian to the Decretals of Pope Gregory IX,* edd. Wilfried Hartmann and Kenneth Pennington (2008) 121.

5 Hermann Lange, *Römisches Recht im Mittelalter*, 1: *Die Glossatoren* (1997) and Lange and Maximiliane Kriechbaum, *Römisches Recht im Mittelalter*, 2: *Die Kommentatoren* (2007) are the best introductions to the literature produced by the medieval civilians (i.e. teachers of Roman law).

6 Luca Loschiavo, "*Secundum Peponem dicitur ... G. vero dicit*: In margine ad una nota etimologica da Pepo ad Ugolino", *Rivista internazione di diritto comune* 233249.

marginal *authenticae* are attributed to Irnerius in early Roman law manuscripts. In the mid-twelfth century, the "four doctors" of Roman law at Bologna, Bulgarus, Martinus, Jacobus and Ugo, glossed and commented on the *libri legales*, advised emperors, and trained the next generation of jurists. Three of the most important were Johannes Bassianus, Placentinus and Azo.[7] The capstone of this first stage of medieval jurisprudence stimulated by the *libri legales* was the Ordinary Gloss of Accursius from Florence that he wrote to the entire body of Roman law and finished in the middle of the thirteenth century.[8] No other jurist accomplished that mammoth task before or after. The close connection between Roman and canon law, the *Ius commune*, was already firmly established by the time Accursius entered the law school at Bologna. Two very important early thirteenth-century canonists, Vincentius Hispanus and Sinibaldus Flieschi (Pope Innocent IV) studied with Accursius.

In the 1120s and 1130s canon law also became an academic discipline. The evolution of canon law was more difficult than Roman law because there were no authoritative texts that could be used in the classroom. Although collections of canon law texts had been compiled from the sixth century on, and a great wave of canonistic activity began at the beginning of the eleventh century with the *Decretum* of Bishop Burchard of Worms (between 1008 and 1012), none of these private collections was suited for teaching. Further, since they were private, the canonical collections did not have the imprimatur of Justinian's codification. Burchard had compiled a very large, comprehensive collection of texts and arranged them in twenty books. He seemed to recognize that the Church needed a universal body of law. His massive collection also can be seen as the legal beginnings of the reform movement within the Church.[9]

There was no immediate successor to Burchard's vision. Most of the canonical collections compiled between 10001100 were much more limited in scope. Their main focus was not comprehensive coverage but ecclesiastical reform. Certain areas in Central and Northern Italy, Southern and Central France, Normandy, the Rhineland and England emerged as important centers of canonistic activity but no one region, including Rome, dominated the compilation of texts.

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7 For information about these jurists and many others, now consult *Dizionario biografico dei giuristi italiani (XII-XX secolo)*, edd. Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletti (2013); strangely Placentinus is missing from the *Dizionario*.

8 Lange, *Römisches Recht* 335351; see also, Horst Heinrich Jakobs, *Magna Glossa: Textstufen der legistischen glossa ordinaria* (2006).

9 On the *Libri legales* and their role in the law schools, see the chapter of Michael H. Hofflich and Jasonne M. Grabher, "The Establishment of Normative Legal Texts: The Beginnings of the *Ius commune*", *The History of Canon Law in the Classical Period, 11401234: From Gratian to the Decretals of Pope Gregory IX,* edd. Wilfried Hartmann and Kenneth Pennington (2008)20012021. Greta Austin, *Shaping Church Law around the Year 1000: The Decretum of Burchard of Worms* (2009).

Burchard's *Decretum* circulated widely. It was still being cited by canonists in the early thirteenth century. At the end of the eleventh century, Bishop Ivo of Chartres imitated Burchard by compiling another comprehensive canonical collection. Ivo's *Decretum*, however, did not enjoy the same wide reception as Burchard's. An abbreviation of Ivo's *Decretum*, most likely not compiled by Ivo, the *Panormia*, did have a much wider circulation but was far from a comprehensive collection of canonical texts.[10]

Whether comprehensive or not, the eleventh-century collections shared a number of common traits. They were all systematic collections, arranged topically. Churchmen no long found the older, chronologically arranged collections useful. The reformers recognized that to achieve their goals they needed compilations of law that provided texts to support their opinions and that emphasized the central role of the pope in the governance of the church. Although historians have debated whether certain collections reflect a papal or an episcopal agenda for church government or whether some collections were vehicles for and products of the reform movement, these questions are difficult to answer. The canonists collected a wide variety of texts from older collections. Most of the collections dealt with many aspects of ecclesiastical life. Some of them were obviously concerned with certain issues: papal authority, monastic discipline, clerical marriage, simony, and others. Most collections, however, reflect their authors' search for general norms to govern ecclesiastical institutions and to enforce clerical discipline. Historians' attempts to describe a collection as having a single purpose mislead readers with oversimplifications of complex agendas. It should also not be overlooked that all these eleventh century collections were private. The papacy did not yet take any interest in shaping canonical jurisprudence.

Before the twelfth century, canon law existed as a body of norms embedded in the sources. The collections of canon law included conciliar canons, papal decretals, the writings of the church fathers, and to a more limited extent, Roman and secular law. These collections did not contain any jurisprudence because they existed in a world without jurists. There were no jurists to interpret the texts, to place a text into the context of other norms of canon law, and to point out conflicts in the texts written at various times in different places. The evidence for this generalization lies in the margins of the manuscripts of the pre-Gratian collections: they are almost completely empty and lack interpretive glosses.

The teaching of canon law began in the early twelfth century. With the teaching of canon law came jurisprudence. Although the evidence is not conclusive,

10 Christof Rolker, *Canon Law and the Letters of Ivo of Chartres* (2010).

Gratian of Bologna was probably the first person to begin teaching canon law. He chose the city of Bologna to establish his studio, most likely because the city had already become an important center for teaching Roman law. Until recently the only secure fact that we knew about Gratian was that he compiled a collection of canons entitled the *Concordia discordantium canonum*, later called the *Decretum*. We also knew that Gratian's *Decretum v*ery quickly became the most important canonical collection of the twelfth century. It later became the foundation stone of the entire canonical tradition and the first book of the *Corpus iuris canonici*. It was not replaced as a handbook of canon law until the *Codex iuris canonici* of 1917 was promulgated.

Since the ground breaking discovery of Anders Winroth we have learned much more about Gratian. Winroth discovered four manuscripts of Gratian's collection that predated the vulgate text of the *Decretum*. Since then another manuscript of an early recension of Gratian has been discovered in the monastic library of St. Gall, Switzerland. Although all five manuscripts must be studied in detail before we fully understand their significance, some conclusions can already be made. The first recension of Gratian's work was much shorter than the last recension. The differences between the recensions mean that Gratian must have been teaching at Bologna for a significant amount of time before he produced his first recension and that there was a significant period of time between the early and later recensions. Some evidence points to Gratian's having begun his teaching in the early twelfth century; other evidence points to the 1130s. In any case, Gratian's last recension of his work was finished in the late 1130s or early 1140s and immediately replaced all earlier collections of canon law in the classroom.[11]

Gratian became the "Father of Canon Law" because the final version of his collection was encyclopedic and because he provided the schools with a superb tool for teaching. His last "edition" of his *Decretum* was a comprehensive survey of the entire tradition of canon law. He drew upon the canonical sources that had become standard in the canonical tradition and assembled a rich array of texts, about 4000 in all. His sources will never be known with certainty. He drew upon a collection very similar to the *Collectio canonum trium librorum* and other central Italian collections. He also took much from Alger of Liège's *De misericordia et iustitia* in Causa one.[12] Alger's work did not circulate in Italy, and Gratian's knowledge and use of Alger's work may be evidence that Gratian studied at Laon

11 For bibliographical information about Gratian and his *Decretum*, see Pennington, "The Biography of Gratian: The Father of Canon Law", *University of Villanova Law Review* 59 (2014) 679706 and "La biografia di Graziano, il Padre del diritto canonico", *Rivista internazionale di diritto comune* 25 (2014) 2560, an augmented version of the English essay.

12 Robert Kretzschmar, *Alger von Lüttichs Traktat "De misericordia et iustitia": Ein kanonistischer Konkordanzversuch zus der Zeit des Investiturstreits: Untersuchungen und Edition*. (1985).

or some other Northern school.[13] Gratian's sources were variegated. He included genuine and forged papal decretals, local and ecumenical conciliar canons, a rich collection of writings of the writings of the church fathers – more than any other earlier canonical collection, 1200 chapters in all – Roman law, and many citations taken from the Old and New Testaments.

Gratian introduced jurisprudence into canonical thought. His first innovation was to insert his voice into his collection to mingle with those of the Fathers of Nicaea, St. Augustine, and the popes of the first millennium. He did this with *dicta* in which he discussed the texts in his collection. Alger of Liège's tract may have provided Gratian with a model for presenting texts and commentary together. Gratian, however, systematically pointed to conflicts within the texts and proposed solutions. His use of the dialectical "distinction" was an emerging methodology in the early twelfth-century schools. His *dicta* and *causae* made the *Decretum* ideal for teaching, and it became the basic text of canon law used in the law schools of Europe for the next five centuries.

In addition to the novelty of his *dicta*, Gratian created a collection of canon law that was organized differently than any earlier collection. At the core of his collection he constructed 36 cases (causae). In each case he formulated a problem with a series of questions. He then would answer each question by providing the texts of canons that pertained to it. When the text of the canon did not answer the question without interpretation or when two canons seemed in conflict, Gratian provided a solution in his *dicta*. Gratian's hypothetical cases were effective teaching tools that were ideally suited to the classroom.[14]

Perhaps the most important parts of his work for the beginnings of European jurisprudence were the first twenty distinctions of the 101 distinctions (distinctiones) of the first section. In these twenty distinctiones he treated the nature of law in all its complexity. Justinian's codification of Roman law that was being taught in Bologna at the time Gratian was working on his *Decretum* defined the different types of law but did not create a hierarchy of laws and did not discuss the relationship between the different types of law. Gratian did that in his first twenty distinctions. These twenty distinctions stimulated later canonists to reflect upon law and its sources. Gratian began his *Decretum* with the sentence: "The human race is ruled by two things, namely, natural law and usages" (Human genus

13 Atria A. Larson and John Wei have explored the possible connections between Gratian and the northern schools, see e.g. Larson, "The Influence of the School of Laon on Gratian: The Usage of the *Glossa ordinaria* and Anselmian *Sententie* in *De penitentia* (*Decretum* C.33 q.3)", *Mediaeval Studies* 72 (2010): 197244 and Wei, *Gratian the Theologian* (2016) 6061, 8994, 152156.

14 Christoph H. F. Meyer, *Die Distinktionstechnik in der Kanonistik des 12. Jahrhunderts: Ein Beitrag zur wissenschaftsgeschichte des Hochmittelalters* (2000). Cf. the theory of John Noël Dillon, "Case Statements (themata) and the Composition of Gratian's Cases", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Kanonistische Abteilung 92 (2006) 306339.

duobus regitur naturali videlicet iure et moribus). The canonists grappled with the concept of natural law and with its place in jurisprudence for centuries. Their struggle resulted in an extraordinary rich jurisprudence on natural law and reflections on its relationship to canon and secular law. A very distinguished historian has written: Gratian's *Decretum* was "essentially a theological and political document, preparing the way – and intended to prepare the way – for the practical asserting of the supreme authority of the papacy as lawgiver of Christendom".[15] This sentence might possibly describe the purpose of Anselm of Lucca (and other canonists of the reform period) but not Gratian's plan for his work. If Gratian's goal for the *Decretum* were to be limited to one idea (a dubious idea) it would be that he wanted to describe the relationship of law to all human beings. Gratian's purpose is clearly revealed in the first distinctions in which he analyzed the different types of law. Gratian's other purpose, I would argue his primary purpose, was to create a book for the teaching of canon law.

Although it was not a well-organized text, Gratian's *Decretum* quickly became the standard textbook of medieval canon law in the Italian and Transmontane schools. Its flaws were minor. The revisions of his work sometimes introduced confusion and ambiguity, but the canonists were only sometimes dismayed by his conclusions, comments or organization. In the age following Gratian when the study of canon law became a discipline in the schools in Italy, Southern France, and Spain, the jurists began to fashion the first tools to construct a legal system that met the needs of twelfth-century society. Gratian's *Decretum* surveyed the entire terrain of canon law, but his book was only an introduction to the law of the past. Although it provided a starting point for providing solutions, it did not answer many contemporary problems directly. The three most pressing areas in which the jurists used the new jurisprudence to transform or to define institutions were procedure, marriage law, penance, and the structure of ecclesiastical government.[16] In the first half century after Gratian, the jurists concentrated on these problems, and their teachings and writings vividly reflect these concerns.

The earliest changes may have been the addition of chapters to Gratian. They were inserted into the text itself or added to the margins. Although the canonists of the twelfth century called them *paleae*, they did not know from whence the term came. Huguccio conjectured that the word meant "chaff" added to the good grain; other authors thought that the term was derived from the name of Paucapalea, one of the first commentators on the *Decretum*. He, they surmised, had been responsible for the *paleae* added to Gratian's text. Later canonical collections, especially *Compilatio prima*, also added canons that had been omitted by

15 Richard Southern, *Scholastic Humanism and the Unification of Europe* (Oxford: Blackwell, 1995) 305.
16 Atria Larson, *Master of Penance: Gratian and the Development of Penitential Thought and Law in the Twelfth Century* (2013) is an excellent example how Gratian's text forged a jurisprudence.

Gratian from earlier collections. Almost all of the earliest manuscripts contained glosses that referred to canons in Burchard's *Decretum* and to the relevant parts of Lombard law. Gratian did not use Burchard, and these glosses suggest canons that he might have considered. The citations to Lombard law underline the importance of Germanic customary law in Northern Italy.

Many reasons compelled the papacy to take notice of the law school at Bologna. The Church had become much more juridical during the course of the twelfth century. St. Bernard's famous lament in his letter to Pope Eugenius III (1153) that the papal palace is filled with those who speak of the law of Justinian confirms what we can also detect in papal decretal letters. The new jurisprudence influenced the *arengae* and the doctrine of decretals. Canonists undoubtedly drafted these letters in the curia. The rush to bring legal disputes to Rome became headlong in the second half of the twelfth century. Litigants pressed the capacity of the curia to handle their numbers. Popes delegated many cases to judges-delegate, but the curia was still overburdened.

Although papal decretal letters surpassed the *Decretum* as the basic texts for the study and practice of canon law by the beginning of the thirteenth century, Gratian's *Concordia* reigned without significant rivals in the schools and the courts from *c.* 1140 to 1190. Perhaps the most significant aspect of canon law's entry into the law schools of Europe was it relationship with Roman law. Gratian incorporated much Roman procedural law into his *Decretum*. His successors employed the jurisprudence of Roman law to shape and explain canonical institutions. By the second half of the twelfth century, no jurist could be ignorant of either canonical or Roman jurisprudence. Contemporary jurists called this jurisprudence the *Ius commune*. It was not a set of laws but a construct of principles, concepts and norms that reigned in Europe until the seventeenth century.[17]

The second half of the twelfth century witnessed a transformation of canon law from a discipline based on the explication of Gratian's *Decretum* to a legal system based on papal decretals. This sea change in the sources of law demanded a change in the books used to study, teach, and interpret canon law.[18] Bernard of Pavia, also known as Bernardus Balbi or Bernardus Papiensis, inaugurated the age of the decretalists, those jurists who concentrated on papal decretals in their teaching and writing. He had glossed Gratian's *Decretum* during the 1170s, beginning his career at Bologna in the age of the Decretists. Like his teacher, Huguccio,

17 For an extended discussion of the *Ius commune*, see Manlio Bellomo, *L'Europa del diritto comune* (1989); also Pennington, "Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept", *Rivista internazionale di diritto comune* 5 (1994) 197209 and *Syracuse Journal of International Law and Commerce* 20 (1994) 205215.

18 The best guide to what follows are the essays in *The History of Canon Law in the Classical Period, 11401234: From Gratian to the Decretals of Pope Gregory IX* (2008) and the individual biographies in *Dizionario biografico dei giuristi italiani (XIIXX secolo)*.

Bernard followed a "cursus honorum" that became a common pattern for jurists in the thirteenth century. He studied and taught at Bologna, became provost of Pavia in 1187, bishop of Faenza in 1191, where he succeeded Johannes Faventinus to that episcopal seat, and then, in 1198 he became bishop of Pavia. As a canonist Bernard's importance was that he gave form and organizational principles to the study and teaching of papal decretals that remained standard in the schools for the rest of the Middle Ages and into the early modern period. He compiled a collection of decretals and other texts that Gratian had excluded and called it a *Breviarium extravagantium*. Every later collection of papal decretals adopted Bernard's organizational pattern. After the compilation of *Compilationes secunda* and *tertia* after *c.* 1210, Bernard's *Breviarium* was cited as *Compilatio prima* by the canonists.

Bernard's *Breviarium* was a breakthrough for canonistic scholarship. Papal decretals had begun to occupy an ever more important position in canon law since the 1160s, but the canonists had not yet devised a way to deal with them. Small, unsystematic collections were first compiled and often attached as appendices to Gratian's *Decretum*. Gradually larger collections were made, but since they were usually not arranged systematically, they were difficult to use, consult, and impossible to teach.

Bernard compiled his *Breviarium* between 1189 and 1190, while he was provost of Pavia. The new collection took the school at Bologna by storm. Although, like Gratian's *Decretum*, it was a private collection, the canonists immediately used it in their classes and wrote glosses on it. Bernard's *Brevariuum* served as an introduction and as a blueprint for a new system of canon law.

In his prologue to the collection, Bernard wrote that "he had compiled 'decretales extravagantes' from both new law and old law and organized them under titles". Bernard was modest. He revolutionized the study of the "ius novum". Some earlier collections had been arranged according to titles, but none as systematically as Bernard's. Roman law once again provided the canonists with a model. The titles of Bernard's collection in books one and two follow the organization of Justinian's codification. With the structure of his collection Bernard underlined the interdependence of Roman and canon law in the late twelfth century and reminded students of canon law that Roman law was essential for their studies.

Bernard did not imitate *Digest* by dividing his collection into a large number of books. He divided his compilation into five books, each with a general subject. Later canonists used the mnemonic verse "Iudex, Iudicium, clerus, connubia, crimen (Judge, Court, Clergy, Marriage, and Crime)" to remember the contents of each book. Bernard's division into five books was used by almost every later collection.

Bernard collected more than recent papal legislation. When he wrote that he had compiled a collection of "extravagantes" he meant all materials that circulated independently of Gratian. He included many canons from ancient councils and

synods, a large number of letters of Pope Gregory I, and many letters of pre-Gratian popes. The bulk of his collection, however, consisted of the decretals of Pope Alexander III (11591181). Alexander's legislation had exercised an decisive influence on canon law, and the canonists had recognized his importance. Bernard included three texts of Pope Gregory VIII (1187) and three of Pope Clement III (11871191). These decretals, together with the fact that Bernard called himself the provost of Pavia – he held that post until 1191 when he became bishop of Faenza – establish the dates between which Bernard must have put the finishing touches on his collection.

The jurists immediately began to teach Bernard's *Breviarium* at Bologna and produced a number of commentaries on it. In Northern Europe they also tinkered with his text by adding decretals to it. Their innovations were not new. Canonists had added material to established private collections for centuries. The Pseudo-Isidorian Decretals, Burchard of Worm's and Ivo of Chartres's collections, *The Collection in 74 Titles*, and Gratian's *Decretum* had all undergone minor changes in their texts introduced by anonymous jurists. These collections were "collectiones vivantes", and their texts reflected their use. In Bologna by the end of the twelfth century, perhaps because the jurists' commentaries on the collections froze them in the form in which they were received, this practice of cheerfully altering canonical texts diminished but did not completely disappear. In Northern Europe, the practice continued until well into the thirteenth century.

In 12091210 Pope Innocent III (11981216) authenticated Petrus Beneventanus' collection of his own decretals. This action marked the first time that a pope had endorsed a private canonical collection.[19] The canonists quickly adopted the text in the schools and called it *Compilatio tertia*. The papal imprimatur helped to assure its success. A short time later, Johannes Galensis (John of Wales) compiled *Compilatio secunda*, and, although unaided by papal approval, his collection became a "received text" in the law schools. Their success was probably due as much to their timing as to their editorial skills. The schools and the courts needed certainty. Papal decretals were now providing that certainty. Decretals also provided another key element in canon law. They contained decisions that the papal curia had rendered on cases appealed to Rome. They were, in other words, case law rather than statements of law or legal principles. These appellant decisions provided canonists with a rich lode of problems and situations on which to develop a sophisticated jurisprudence.[20] Canon law remained a "case law system" until 1917.

Pope Innocent III was the first pope to issue a legal collection of his own legislation when he promulgated the canons of the Fourth Lateran Council

19 Pennington, "The Making of a Decretal Collection: The Genesis of Compilatio tertia", *Proceedings of the Fifth International Congress of Medieval Canon Law, Salamanca 1976* (1980) 6792.

20 e.g. the rich commentaries on Honorius III's *Etsi membra*, Pennington, A Representation in Medieval Canon Law", *The Jurist* 64 (2004) 361-383.

(November 1215) as a separate collection. They were immediately glossed and taught in the schools. A short later, Johannes Teutonicus compiled a new collection of Innocent's decretals into which he incorporated the Fourth Lateran conciliar canons. Innocent refused to authenticate the collection, but, undaunted, Johannes provided his collection with an apparatus. In spite of the pope's disapproval, after the pope's death (July 1216) *Compilatio quarta* was accepted by the schools.[21] This was a significant sign that canon law was not yet under the control of Rome. This would change during the course of the thirteenth century.

After 1217 the Studio in Bologna was dominated by one figure, Tancred of Lombardy, often referred to as Tancred of Bologna. Pope Honorius III selected him to compile a collection of his decretals sometime before 1226. By this time Tancred's stature was so great, and his rivals so few, that it is difficult to imagine whom Honorius might have chosen other than the archdeacon. Honorius chose Tancred and by doing so he also set a precedent. Canonical collections would no longer be the products of initiatives of private jurists; with only a few exceptions popes began to order collections of their decretals. With *Compilatio quinta* the papacy took control of its law. For the next century decretal collections were "official" compilations, ordered by the papacy, and sent to the law schools. The age of the "private" decretal collection had momentarily passed.

The last major figure in the period before 1234 was the Catalan Dominican, Raymond of Penyafort. He had studied at Bologna and then taught law between 1218 and 1221. After his return to Barcelona, he entered the Dominican order in 1222. Pope Gregory IX summoned him to Rome in 1230 and asked him to compile a new compilation of canon law that would replace all the earlier collections of decretals with one volume. We do not know if he worked alone or with other jurists in the curia. In his bull, *Rex pacificus*, with which Gregory promulgated the new collection in 1234, he called Raymond's work a *Compilatio*, but the canonists quickly adopted the name *Decretales Gregorii noni*. Along with Gratian's *Decretum*, it became the most important collection of papal decretals in the schools and in the courts of Europe. It was also known as the *Liber extra* (The book outside Gratian's *Decretum*).

Like the medieval civilians, the canonists who taught and interpreted Gratian's *Decretum* and the collections of decretals created an enormous body of literature. At first, in imitation of the Roman law jurists they wrote glosses on their texts but soon graduated to composing *summae*, more expansive commentaries, on them. They wrote glosses on all the different books of canon law and eventually were recognized as the standard, ordinary glosses in the schools

21 Pennington, "The Fourth Lateran Council, its Legislation, and the Development of Legal Procedure", *Texts and Contexts in Legal History: Essays in Honor of Charles Donahue*, ed. John Witte, Jr., Sara McDougall, Anna di Robilant (2016).

and the courts. From the middle of the thirteenth century, the canonists began to write massive commentaries on the standard decretal collections. Two jurists are particularly important illustrations of this development in the thirteenth century: Pope Innocent IV and Hostiensis.

Pope Innocent IV wrote a detailed and sophisticated commentary on the Decretals of Gregory IX *c.* 1245. Every jurist from his immediate contemporaries to Hugo Grotius in the seventeenth century cited his commentary. He probably began writing it long before he became pope and continued revising it up to the time of his death. He also wrote a commentary on his constitutions of the First Council of Lyon and on the additional decretals that were added to the constitutions in 1246 and 1253. The work was widely distributed in manuscripts and printed in a number of editions between 1477 and 1570.

Innocent emphasized papal authority and power in his commentary. His great predecessor, Pope Innocent III, had established the foundations of papal authority within the church and over secular affairs. Innocent IV expanded and refined Innocent III's legislation in significant ways. He claimed that the pope could choose between two imperial candidates, could depose the emperor (a power he exercised at the First Council of Lyon), and could exercise imperial jurisdiction when the imperial throne was vacant. Although he granted non-Christian princes the right to hold legitimate political power, he tempered that right by asserting that they must permit Christian missionaries to preach in their realms. In his commentary on the bull of deposition that he had promulgated at the First Council of Lyon (*Ad apostolicae dignitatis apicem*, Liber sextus 2.14.2), Innocent made remarkable claims for papal authority. The pope did not need the council to validate the deposition of the emperor, because only the pope, not the council, has fullness of power. Innocent asserted that Christ had the power and authority to depose or condemn emperors by natural right (ius naturale). He concluded that the pope had the same authority since he held the office of the vicar of Christ. It would be absurd, he argued, if after the death of St. Peter human beings were left without the governance of one person ("regimen unius personae"). Few popes in the Middle Ages made a more powerful argument for the legitimacy and justness of papal monarchy. Few popes, if any, were more learned in canon law.[22]

Hostiensis (Henricus de Segusio) (*c.* 12001271) was a contemporary of Innocent IV. These two jurists dominated the second half of the thirteenth century. Hostiensis wrote a massive commentary on the Decretals of Gregory IX and on the Decretals of Innocent IV. He also wrote a *Summa* on the Decretals of Gregory IX. He worked on his commentary over his entire life and finished

22 See Alberto Melloni, *Innocenzo IV: La concezione e l'esperienzadella cristianità come regimen unius personae* (1990).

its final redaction just before his death. His work circulated widely and became a touchstone for all later canonists.[23]

Although the canonists continued to write commentaries on the *libri legales* during the fourteenth and fifteenth centuries, another literary genre emerged and became important: consilia. The jurists wrote consilia to advise litigants and judges in court cases. We have consilia that date back to the late twelfth and early thirteenth centuries, but they become genre of great significance in the first half of the fourteenth century. The purpose of the consilia was practical: to advise litigants and judges on specific legal issues raised by a particular case. Consilia quickly became a major source of jurisprudence in the *Ius commune*. The fourteenth and fifteen centuries have been called the "Age of Consilia". The jurists wrote thousands of consilia, and some jurists earned considerable fees by writing them. Baldus de Ubaldis (†1400) wrote several thousand consilia and reputedly earned a substantial portion of his income from them.[24]

Codification and Books of Canon Law in the Thirteenth Century

If he had seen the canon law curriculum at the Law School at Bologna *c.* 1300, Gratian would have been pleased and surprised. He would have been pleased that his book still occupied a central place in the study of canon law. Every student of law studied the *Decretum*. He would have been surprised that Dante Aligheri placed him in Paradiso. Not many poets have bestowed honors on jurists. He would not have anticipated the complete triumph of the papal decretal. Gratian understood canon law as being based on many different kinds of authoritative texts. By the end of the thirteenth century, however, the canonists were transfixed by the papal decretal.

Since the early thirteenth century when Pope Honorius III commissioned Tancred of Bologna to compile a collection of his decretals, popes had followed his lead. Pope Boniface VIII (12941303) – who was not a jurist admired by Dante – established a committee of canonists to compile a collection of his own decretals, Pope Innocent IV's decretals, conciliar canons from Lyon I and II, and other papal decretals that had circulated in other private thirteenth-century collections. This collection of canon law was called the *Liber Sextus*. Although it was divided into five books and organized like every collection since Bernardus of Pavia's *Breviarium*, it derived its name from being the sixth book added to the five books of Gregory IX's Decretals. Boniface promulgated the new collection on 3 March, 1298 and sent it to

23 Pennington, "Enrico da Susa (cardinale Ostiense)", *Dizionario biografico dei giuristi italiani (secc. XIIXX)*, edd. Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletti, *Dizionario dei giuristi italiani (XIIXX secolo)* (2 vols. 2013) 1.795798.

24 Pennington, "Baldus de Ubaldis", *Rivista internazionale di diritto comune* 8 (1997) 3561.

all the major schools of canon law. Just as Gregory IX wanted his collection to be a comprehensive and exclusive collection of canonical norms from Gratian to 1234, Boniface's collection was to be the sole witness of papal decretal legislation from 1234 to 1298. The canonists continued to cite decretals that had not been included in the collections but only rarely. The papacy had put its firm stamp on canon law.

During the fourteenth century, two more papal collections appeared. Pope Clement V (13051314) ordered a collection of his decretals be compiled that also included the canons of the Council of Vienne (13111312). He died before the collection could be properly promulgated. His successor, Pope John XXII (13161334), a distinguished jurist himself, had the collection revised and issued the new collection on 25 October 1317. In the canonical literature this collection was named the *Constitutiones Clementinae*.

The *Clementinae* was the last official collection promulgated by the medieval papacy. There were two more private collections that were accepted by the schools: the *Extravagantes Johannis XXII* and the *Extravagantes communes*. The *Extravagantes Johannis XXII* contained twenty decretals issued by Pope John XXII during his pontificate. The *Extravagantes communes* evolved later. The collection contained seventy canons from an array of late medieval popes. The schools accepted these collections, and the canonists wrote extensive commentaries on them.

These facts raise a question about Western canon law that is very difficult to answer. Why did the popes stop promulgating decretal collections after 1317 and not consider a new papal collection of decretals until the end of the sixteenth century? It seemed as if the papacy had taken control of its legal system between 1226 and 1317. It promulgated its law officially, following the model established long before by the Emperor Justinian. Although the decretal collections were not comprehensive statements of law like Justinian's, they provided the law schools with fundamental tools for teaching law. During the thirteenth and early fourteenth centuries one might conclude that the popes perceived their legal role and their authority within the Church much as modern governments do when they exercise control of their legal systems within their territorial states. Like modern governments the popes promulgated, shaped, authenticated, and controlled their legal systems. This model ends after 1317. There were no papal collections of canon law until Pope Gregory XIII promulgated a unified *Corpus iuris canonici* in 1580. Much later Pope Benedict XIV (17401758) issued a volume of his decretals and Pope Pius X (19031914) published five volumes of his acts in the early twentieth century.

Although a definitive answer cannot be given, several observations can be made. First the question reflects our conception of how legal systems should be structured and not theirs. No medieval or early modern jurist considered any institution (state) to be the sole producer and repository of law. Second, a new type of collection of papal judicial decisions arose in the fourteenth

century, the *Decisiones Romanae Rotae*. It reported the cases of the papal Court of Audience that was known as the Rota. This court began to carry the main case load of the papal curia at the end of the thirteenth century. Scholars have attributed the collection to one of two Englishmen, Thomas Falstaff and William Bateman. Falstaff was an auditor for the Rota in the middle of the fourteenth century. He also worked in the papal court at Avignon. In either case it may not be by chance that an English jurist conceived of collecting the cases of a single court. The English Year Books that contained the reports of the English Royal courts may have provided a model for the work.

During the thirteenth and fourteenth centuries popes participated less and less in the daily work of the papal court. Whereas early papal decretals contained decisions in which the pope sometimes, if not always, heard the cases, by the fourteenth century papal letters were no longer the primary vehicles for reporting the judicial activity of the papal curia. It was during this time that the judicial office of the curia became known as the Roman Rota. Papal auditors (auditores) commonly heard the cases that were appealed to Rome. When Pope John XXII (13141334) promulgated the decretal *Ratio iuris* (1332) in which he granted auditors ordinary power to hear cases, the pope confirmed a practice that had been in place for more than a century. During the fourteenth century the "Decisiones" or "Conclusiones" of the Rota were gathered together and manuscripts of them circulated widely. These decisions of the Rota became another source of authority within canon law. By the fifteenth century the *Sanctae Romanae Rotae Decisiones* were published each year. This practice continues until the present day. A consequence of this institutional development was that collections of papal decretals became far less relevant for canon law.

The decretal collections of the thirteenth and early fourteenth century remained the cornerstones of canonical jurisprudence. They were the *libri legales* that were used in the classrooms and the courtrooms of Europe. In the second half of the sixteenth century, the papacy decided to revise these standard texts of canon law. In 1566 Pope Pius V convened a committee to examine the complicated textual basis of the *libri legales*, especially the texts in Gratian's *Decretum*. These scholars were called the *Correctores Romani*. The committee was guided in part by one of the most brilliant scholars of the age, the Spaniard, Antonio Agustín. Pope Gregory XIII promulgated a new *Corpus iuris canonici* based on the careful scholarship of the *Correctores Romani* 1580. It was printed for the first time in Rome during 1582. Antonio Agustín's work *De emendatione Gratiani* is a window into the work of the *Correctores*. Pope Gregory XIII's revised and authenticated version of the standard texts of canon law remained in force until the *Codex iuris canonici* was promulgated in 1917.

The Books of Feudal Law

In the middle of the twelfth century the jurists began to collect texts and gather them together that treated the rights and obligations of lords and vassals who were bound by feudal contracts. By the thirteenth century, these books were used to teach in the law schools.[25] The law regulating the relationships of lords and vassals in the period before about AD 1000 was primarily based upon unwritten customary usages. The sources from the period 8001000 contain terms like lord (*dominus*), vassal (*vassalus*), fief (*beneficium* or *feudum*) that later jurists would carefully analyze and define. Historians have learned that when they find these words in early medieval sources, they cannot simply assume that the words describe the lord and vassal relationship that is found in later feudal law, in which a lord bestowed a fief upon a vassal in return for military service and the vassal swore homage and fealty to the lord.

In the period from 800 to 1150, the word that described a fief (sometimes, but not always, a piece of land) was generally *beneficium*. Although the word *feudum,* from which the English word feudal is derived, is found in early sources, it replaced *beneficium* as the standard word to describe a fief only during the twelfth and thirteenth centuries. At the same time the law governing the bestowal of fiefs, the rights of lords and vassals, and the complicated property rights of fiefs emerge from unwritten, ill-defined, customary chaos in which rules and principles were fluid. For political relationships the feudal contract had several advantages over a contract in Roman law. The feudal contract could be inherited and broken for political reasons. When a feudal contract passed from one generation to another, the bonds that the contract cemented were renewed in public ceremonies that reminded each party of its obligations and duties.

Law can exist without jurisprudence, but law without jurisprudence is uncertain. Unless there are jurists to interpret the law, the rights of persons cannot be secure. Before about 1100 Europe was a land without jurists and without jurisprudence. In the first half of the twelfth century the study of law in schools began in north central Italy, especially in the city of Bologna. A professional class of jurists began to teach, practice, and participate in the exercise of power in the courts of the nobility and the governmental institutions of the Italian towns. They used Justinian's codification of the sixth-century *Corpus iuris civilis* (Collection of civil law) as the

25 Peter Weimar, "Die Handschriften des 'Liber feudorum' und seiner Glossen". *Rivista internazionale di diritto comune* 1 (1990): 3198. Gérard Giordanengo, *Le droit féodal dans les pays de droit écrit: L'exemple de la Provence et du Dauphiné, XII^e-début XIV^e siècle* (Rome: École Française, 1988). Also his essays "Epistula Philiberti". *Féodalités et droits savants dans le Midi médiéval* (1992) and "Consilia feudalia". *Legal Consulting in the Civil Law Tradition*, edited by Mario Ascheri, Ingrid Baumgärtner, and Julius Kirshner (1999). Giordanengo has done the best work on French feudal law.

text upon which they commented and with which they taught. Gratian produced a book of canon law upon which the jurists based the study of ecclesiastical (canon) law. These books became the standard *libri legales* (law books) for the study of law, the *ius commune,* in the schools and for the practice of law in the courts.

There were no books for feudal law. Because secular and ecclesiastical institutions were involved in legal relationships that were feudal, there was a need for written law and a jurisprudence that would provide an interpretive tool to understand it. Monasteries had feudal ties with persons and institutions. Bishops had feudal relationships with men and towns. Towns had feudal contracts with other towns and persons. The nobility had traditional feudal contracts with vassals but also with towns. Feudalism had become much more than a contract that regulated and defined a relationship between a lord and a vassal. Lawyers who studied the new *ius commune* at Bologna and other schools quickly realized that texts were needed. Mid-twelfth-century jurists began to organize the study of feudal law around a diverse set of texts. The most unusual was the central role that a letter of Fulbert, the bishop of Chartres in the early eleventh century, played in the development of feudal law.

William V, the count of Poitou and duke of Aquitaine, had asked Fulbert for advice about the obligations and duties that a vassal owed to a lord. William had troubled relationships with his vassals. In his reply (*c.* 1020) Fulbert wrote a short treatise on feudal relationships that circulated fairly widely. Its future as a fundamental legal text was assured when Bishop Ivo of Chartres (10911115/1116) placed it in his canonical collections. Around 1120 Gratian placed it in his *Decretum* where it became a locus classicus for canonistic discussions of the feudal contract and the relationship of lord and vassal. Fulbert told William that when a vassal took an oath to his lord, six things were understood to be contained in it whether explicitly expressed or not: to keep his lord safe, to protect him from harm, to safeguard his secrets, to preserve the lord's justice, to prevent damage to his possessions, and not to prevent the lord from carrying out his duties. Fulbert alleged that he got this list from written authorities, but his exact source, if there was one, has never been discovered. For the next four centuries jurists cited Fulbert's list of obligations and duties as being central to the feudal oath of fealty.

The canonists' discussion of this text illustrates why feudal law became so important in the later Middle Ages. They applied Fulbert's principles to the relationship between popes and bishops, between the emperor and the pope, and between bishops and the clerics under them. The greatest canonist of the twelfth century, Huguccio of Pisa, noted that these principles applied to the oath that the emperor and bishops made to the pope and that clerics sometimes made to their bishops. Huguccio and later canonists concluded that if a cleric gave legal assistance to litigants in a law case against the church or bishop to whom he

had sworn an oath, he could be deprived of his benefice just as a vassal could be deprived of his fief for the same offense. Principles of feudal law were extended into relationships that had little to do with the traditional bond between a lord and vassal. Canonistic commentaries also seem to have shaped the ethical and moral standards that a vassal had to maintain. Although they certainly drew upon unwritten customary practices, the canonists laid down the rules in their commentaries on Fulbert's letter that forbade vassals from violating the sanctity of their lords' women (wives, daughters, and other members of the household) and from injuring their lords' interests in court by testifying against them.[26]

The basic books of feudal law were formed in the second half of the twelfth century. In the middle of that century Obertus de Orto, a judge in Milan, sent his son Anselm to study law in Bologna. When Anselm reported to his father that no one in Bologna was teaching feudal law, Obertus wrote two letters to his son (that may be rhetorical conceits) in which he described the law of fiefs in the courts of Milan. Those letters became the core of a set of texts for the study of feudal law. Obertus put his letters together with other writings on feudal law, especially from Lombard law, to create the first of three "recensions" of the *Libri feudorum* (in the manuscripts the book was also named *Liber feudorum, Liber usus feudorum, Consuetudines feudorum*, and *Constitutiones feudorum*). The manuscripts of the first two recensions reveal that there was no standard text. Some of them included eleventh- and twelfth-century imperial statutes of the emperors Conrad II, Lothair II, and Frederick I. Manuscripts of the second recension often contained the letter of Fulbert of Chartres and additional imperial statutes. Typical of legal works in the second half of the twelfth century, the jurists and scribes added texts of various types (*extravagantes*) to this recension. There are almost no two manuscripts that contain exactly the same text. The text's entry into the schools must have been slow because the jurists did not immediately comment on it. The first jurist to write a commentary on the *Libri* was Pillius de Medicina, a jurist of Roman law. He wrote his commentary on the second recension around 1200, probably while he was a judge in Modena. He did not comment on all parts of the *Libri*, leaving the interpretation of Fulbert's letter to the canonists. This illustrates an important point about feudal law in the twelfth century: its jurisprudence was not the product of one area of law but of the *ius commune*.

The final or vulgate recension of the *Libri feudorum* added constitutions of the Emperor Frederick II, the letter of Fulbert, and other texts that had circulated in the twelfth-century manuscripts. Accursius, the most important jurist of Roman law in the thirteenth century, wrote a commentary based on Pilius'

26 Pennington, "Feudal Oath of Fidelity and Homage", *Law as Profession and Practice in Medieval Europe: Essays in Honor of James A. Brundage,* edited by Kenneth Pennington and Melodie Harris Eichbauer (2011) 93115.

in the 1220s. It may have gone through several recensions, not all by Accursius. Accursius also wrote the *Glossa ordinaria* on the rest of Roman law at about the same time. His authority and the importance of feudal law combined to give *Libri feudorum* along with Accursius' *Glossa ordinaria* a permanent place in the *Ius commune*. From the 1230s on, the *Libri* was included in the standard manuscripts of Roman law that the stationers at the law schools produced for jurists, students, and practitioners. They placed it immediately after the medieval *Authenticum* (legislation of Justinian). In the fourteenth century Johannes Andreae questioned whether the *Libri feudorum* had been legitimately included in the *libri legales* since no public official had mandated its inclusion in the body of law. Johannes presented both sides of the question, but most jurists decided that it was a legitimate text because it had been accepted by custom and the schools.

Canon law continued to contribute to the jurisprudence of feudal law after the twelfth century but did not produce any legislation as central as Fulbert's letter. Pope Innocent III (11981216) touched upon feudal matters in many of his letters, two of which entered the official collections of canon law under the title *De feudis*. One of these letters shaped feudal law in an important area: the right of a lord to bestow a fief when he had taken an oath not to bestow the fief on someone else. Feudal law in the later Middle Ages found its jurisprudential roots in Roman law, canon law, and in secular legal systems. This cross-fertilization accounts for the vigor of feudal law until the end of the sixteenth century.

The first penetration of feudal law into secular law can be found at the beginning of the thirteenth century. When the commune of Milan published its statutes in 1216, the titles that dealt with feudal law were taken primarily from the *Libri feudorum*. The statutes contain an oath that a vassal took to his lord: "I swear that I will be henceforward a faithful man and vassal to my lord. I will not lay open to another to [my lord's] injury what he has entrusted to me in the name of fealty". When the emperor Frederick II promulgated a law code for the Kingdom of Sicily in 1231, the Constitutions of Melfi, he carefully regulated the succession of fiefs and the rules governing the nobility in bestowing fiefs. The jurists commented on Frederick's legislation and incorporated it into the jurisprudence of the *ius commune*. After the early thirteenth century many secular legal codes dealt with feudal customs in their jurisdictions. They acknowledge a wide range of different practices. In Spain the *Siete partidas* and in France the *Établissements de Saint Louis* dealt extensively with the customary law of lords and vassals.

Feudal relationships generated legal problems and court cases in the later Middle Ages. The earliest reports of court cases involving feudal disputes and using feudal law date to the late twelfth century, and their numbers proliferate during the thirteenth and fourteenth centuries. As the number of these cases increased, jurists were called upon to write *consilia* (legal briefs) to solve them. The

jurist who best illustrates this development is Baldus (Baldo degli Ubaldi). He had taught for many years in the republican city of Perugia when, in 1390, Gian Galeazzo Visconti called him to the University of Pavia. Baldus became Gian Galeazzo's court lawyer and devoted much of his time struggling with Visconti's legal problems and those of his vassals. Gian Galeazzo was attempting to assert feudal rights over his vassals, and to support his lord, Baldus became enmeshed in the intricacies of feudal law. He finished a commentary on the *Libri feudorum* in 1393. It became the most important exposition of feudal law in the late Middle Ages. Baldus also wrote a number of long *consilia* in which he tried to give legal justification to the state based on feudal privileges, rights, and obligations that Gian Galeazzo wanted to create. Baldus found it difficult to justify Gian Galeazzo's claims when they violated deeply embedded norms of feudal law and the *Ius commune*. The result was a series of torturous and convoluted *consilia* whose composition betrays Baldus's ambivalence about his task.

Feudal law remained an important part of European jurisprudence until the seventeenth century. Jurists regularly treated feudal problems in their *consilia*. They also continued to write commentaries on the *Libri feudorum*. The last two great commentators on feudal law were Johannes Antonius de Sancto Georgio and Mattheus de Afflictis in the sixteenth century, who wrote extensive and widely circulated commentaries on the *Libri.*

Books of the Ius proprium: Collections of Local Law

The *Ius commune* was the jurisprudence of the schools and the courts. It served as a set of norms for all of Western Europe. The customary law of kingdoms and local communities remained valid law under the umbrella of the *Ius commune*. Its norms could and did trump those of the *Ius commune*, but the jurisprudence of the *Ius commune* more often provided the interpretive framework for fashioning and interpreting local laws, using the terminology of the medieval jurists, the *iura propria*. The first European monarch to issue a code of laws for his kingdom, King Roger II of Sicily († 1154), is a good illustration of the process through which Roman law shaped local customary law.[27] Rogers's jurists produced a body of legislation that scholars have dubbed the *Assizes of Ariano* but which are called "constitutiones" in Roger's codification. His legislation was important for several reasons: no other secular European prince promulgated such a sophisticated body of laws in the first half of the twelfth century; no other ruler ordered his legislation compiled into a systematically organized collection; his legislation reveals a close connection to

27 For what follows see Pennington, AThe Birth of the Ius commune: King Roger II=s Legislation,@ *Rivista internazionale del diritto comune* 17 (2006) 140 and "The *Constitutiones* of King Roger II of Sicily in Vat. lat. 8782", *Rivista internazionale di diritto comune* 21 (2010) 3554.

the teaching and study of Roman law in Northern Italy; his constitutions may be the earliest example that we have of the nascent *Ius commune*'s influence on secular law; and, finally the Emperor Frederick II's commission of jurists incorporated more than half of his legislation into the *Constitutions of Frederick II* in 1231 (also called *The Liber Augustalis* or *The Constitutions of Melfi* in the older literature) that remained the law of the land in Southern Italy until the early nineteenth century.[28] Most importantly, embedded in Frederick's *Constitutions*, Roger's constitutions lived on. His legislation and Frederick's were glossed and taught in the schools. If one wished to join Charles Homer Haskins in signaling the importance of the Normans in European history, one could do far worse than choosing Norman legislative activity in Sicily as a milestone in European legal history.[29]

Roger's *Constitutions* have been described as "not being an organic whole" and as having "imperfections".[30] This conclusion asks not only the wrong question but also gives an anachronistic answer. Roger's was not comprehensive like Justinian's codification, but no twelfth-century jurist would have thought to compile such a code. When Frederick II promulgated his *Constitutions* a century later, it too was far from comprehensive. Secular codifications would remain disjointed segments of mosaics that only partially pictured the legal systems for which they were designed. Comprehensive codes belong to the modern world and the jurisprudence of Austinian sovereignty. Modern civil law codes do attempt to cover all parts of the legal system, but law in the Middle Ages could be found in many cupboards, not just in the legislative authority of the state. In a society in which customary law still played such an enormous role, in which large areas of the law were in the hands of ecclesiastical courts, and in which whole areas of the law such as procedure and law merchant were not thought of as being within the purview of the legislator, no jurist would ever have attempted to compile a code that incorporated every jot and tittle of the law of the land.[31]

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28 The appearance of Wolfgang Stürner's magnificent edition of the *Constitutions* has made work on Norman legislation much easier. In his introduction he has dealt with many of the contentious problems surrounding Roger's and William II's laws; on the question of the title of Frederick's *Constitutions* see Stürner, *Die Konstitutionen Friedrichs II. für das Königreich Sizilien* (1996) 78.

29 Norman legislation in England during the twelfth century was not nearly as sophisticated as that of their cousins in the South. Patrick Wormald has written: "<In the eleventh and twelfth centuries> The Italian materials would alone argue the existence of a vigorous legal profession. *Leges Henrici* and its ilk are confirmation that there was none in England", *The Making of English Law*: *King Alfred to the Twelfth Century*, 1: *Legislation and its Limits* (1999) 470, and more generally, 465483. See *Leges Henrici primi*, ed. and trans. L. J. Downer (1972) 31; see also the remarks of Mario Caravale, "Giustizia e legislazione nelle assise di Ariano", *Alle origini del costituzionalismo Europeo*: *Le assise di Ariano, 11401990* (1996) 320 at 1820, who emphasizes the point that both Norman kings emphasize their unitary authority over their kingdoms and their administration of justice.

30 See Hubert Houben, *Roger II of Sicily: A Ruler between East and West* (2002) 142143.

31 See the general remarks of Armin Wolf on legislation and codification in "Die Gesetzgebung der entstehenden Territorialstaaten", *Handbuch der Quellen und Literatur der neueren europäischen*

Although they were not taught in the schools, many other kingdoms, principalities, and cities gathered together their legislation and customary laws in the high Middle Ages. The most precocious were the city states of Italy. Genoa, Piacenza, and Pisa promulgated statutes in the first half of the twelfth century. There is manuscript evidence that jurists glossed them and participated in their composition. In the thirteenth century cities in northern Europe followed.[32] Perhaps the most important and sophisticated royal legislation was the *Siete partidas*, promulgated by Alfonso X of Castile († 1284) for his Kingdom of Castile. Like the *Constitutions* of Frederick II it had a life span that stretch into the nineteenth century.[33]

Conclusion

What distinguishes western European law, the *Ius commune*, and its jurisprudence from other legal systems is its institutional foundations in the law schools. Its authority was not derived from a great legislator, although it contained legislation from a large number of rulers, and its jurisdiction was not enforced by a powerful, universal monarch. The schools had one language, one set of books, one tradition, and one literature. Whether students studied in Bologna, Montpellier, Oxford, or Salamanca, one set of books, one set of interpretive glosses on those books, provided them with a common jurisprudence. This did not mean that Terence's maxim "quot homines, tot sententiae" no longer was valid in law. What it did mean is that the jurists understood each other's arguments and the sources and reasoning of contrary opinions perfectly. It may not have brought concord in the schools and the courtrooms, but it did bring a common ground.

Privatrechtsgeschichte: 1. Mittelalter (1100–1500): Die gelehrten Rechte und Die Gesetzgebung (1973) 517–565, especially 552–555; also consult the still classic study of European codification, Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* (Acta Universitatis Upsaliensis, Studia Iuridica Upsaliensia 1; Stockholm-Uppsala-Göteborg 1960) 288–366.

32 Wolf, "Gesetzgebung" 566–586. The Pisan statutes are the most thoroughly studied: Claudia Storti Storchi, *Intorno ai Costituti pisani della legge e dell'uso (secolo XII)*: Europa Mediterranea, Quaderni 11. Napoli: Liguori, 1998). Paola Vignoli, *I costituti della legge e dell'uso di Pisa (sec. XII)*: *Edizione critica integrale del testo tràdito del "Codice Yale" (ms Beinecke Library 415): Studio introduttivo e test, con appendici* (Fonti per la Storia dell'Italia Medievale, Antiquitates 23. Roma: Istituto Storico Italiano per il Medio Evo, 2003).

33 *Las Siete Partidas del sabio rey don Alonso el nono* (3 vols Salamanca 1555), an edition containing a gloss that pays much attention to the Ius commune; see also *Las Siete Partidas, t*ranslated by Samuel Parsons Scott and edited by Robert I. Burns (2001) with a helpful introduction.

SCRIPTURE, LEGAL INTERPRETATION AND SOCIAL PRAXIS IN THE ISLAMIC TRADITION: THE CASES OF POLYGAMY AND SLAVERY

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Historians examining the relationship between scripture, interpretation and society confront three distinct images that a civilization has produced. First, there is the canon of scripture that the civilization has stamped as divinely revealed or authoritative – "licensed for exegesis", to quote Frank Kermode.[1] Second, there is the corpus of interpretation built up around that scripture by its clerical guardians, representing an effort to elaborate a coherent system of norms to apply in the surrounding society. Finally, there is the lived "reality" of how scripture and its interpretation are received in that society. Historians are tempted to view this third, social manifestation as more a "reality" than an idealized image because, in an important sense, it develops outside the total control of the clerical class. It may also reveal itself directly to historians through artifacts preserved beyond the reach of the mediating hand of tradition. Yet even this social manifestation is in great part an image formed by the civilization that bequeaths it, since the "reality" that modern historians see is frequently only what its civilization's own chroniclers or curators saw fit to archive, memorialize or build.

Beyond these three facets confronting the historian, we find an awkward fourth element: an elusive and intriguing awareness on the part of an interpretive tradition and its surrounding society of the incongruity of its parts. Scripture supposedly contains idealized truth. Its clerical guardians supposedly churn out faithful interpretations of it. And society supposedly heeds their direction. But these relationships are characterized by compromise and negotiation as much as by clear authority and direction. Scripture may originate from on high, but a canon of scripture is produced by its community. So are its interpreters influenced by worldly realities. And so their audiences can have voices of their own.

In the history envisioned by Islamic civilization, the coming of the Muhammad's revelation was to be a watershed. The morals, rituals and social structures of Arabia and wherever in the old world God's religion was embraced

1 Frank Kermode, "Institutional Control of Interpretation", *Salmagundi*, 43 (1979), 72-87 (83).

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 99–114

 DOI 10.1484/M.RELMIN-EB.5.111594

were supposed to give way to the new rule of God's law, the Shariah. This new normative order, arranging Muslims' lives from the details of worship to the fine print of sales contracts, was derived from what Muslim scholars understood very early on to be the two sources of divine revelation brought by Muhammad, the book of God (The Quran), and its applied explanation and commentary in the Prophet's precedent (Sunna). The former was a well-delineated and relatively concise book. The latter was composite and fluid, contained in the statements transmitted from and attributed to Muhammad (Hadiths) and often in communal practice and techniques of moral reasoning.

The normative order of the Shariah, however, was equally a product of the assumptions and structures of both the Arabian society from which it first sprang and the Late Antique Near Eastern cradle in which it flourished. The ulama, the indigenous class of Muslim scholars, undertook interpreting Islam's scriptures for its swelling body of followers in order to guide their societies. But this interpretive corps was also the product of those societies. As we shall see, voices from within those societies also often had their own opinions on elements of the normative order as well. The ulama believed absolutely that God had deposited ultimate truth and moral guidance with them in the form of revelation. But they also understood that their scriptures had to be read in accordance with extrinsic truths. As is clear in the two case studies examined here, those of polygamy and slavery, the ulama were well aware of the dialogic relationship between the truth in scripture and the realities of the world around them. In fact, it framed their hermeneutic system.

The Hermeneutic Process in Islamic Scholarship

Commenting on the issue of salvation from his garret in a Damascus madrasa, the thirteenth-century jurist, theologian and (unusually) bachelor al-Nawawi (d. 1277) reminded his reader that, when a definitive *testimonium* of scripture and the conclusions of scholars have made a certain position of religious law clear, all other related scriptural evidence must be interpreted in this light. This would have been a process and principle immediately familiar to Augustine or Maimonides. As Leo Lefebure has described, this was the hermeneutic bedrock of all the Abrahamic scriptural traditions: "We interpret the part in light of the whole, and then we reinterpret the whole in light of our new understanding of the part".[2] An amalgamated reading of the Quran and the various textual and praxis-preserved elements of the Sunna yields certain principles, through which those component textual pieces are then reread.

2 Muhyi al-Din al-Nawawi, *Sharh Sahih Muslim*, 15 vols (1987), I-II, 331-332; Leo Lefebure, "Violence in the New Testament and the History of Interpretation", in *Fighting Words: Religion, Violence, and the Interpretation of Sacred Texts*, ed. by John Renard (2012), 76.

There were other hermeneutic filters as well. Augustine had commanded Christian readers of the Bible to "Let your book be the divine page, that you may hear it. Let your book be the world, that you may behold it".[3] Muslim scholars also believed that the verses (literally "signs", Arabic *ayat*) of God's revealed word in the Quran and the signs of God in nature had to be read in consonance with one another. The Quran and Hadiths were read according to what Muslim scholars determined to be possible according their understanding of reason as well as according to their empirical observation of nature and society. These will all appear in the case studies of polygamy and slavery undertaken here.

The Case of Polygamy in Islamic Law

In his decades-long struggle to revive what he understood to be the true form of Islam, one that was both authentic and modern, Muhammad Abduh (d. 1905) found few beasts blacker than polygamy. Whether as a young cleric, a journalist, a Shariah court judge or eventually the Grand Mufti of Egypt, he never ceased his arguments for restricting the practice of polygamy, at the very least through better education and if possible through legal restriction on marriages. The Quran had allowed men to marry up to four women, Abduh acknowledged, but he believed that since the early days of Islam Muslims had completely disconnected polygamy from the original social purpose for which the Quran had allowed it and turned it into a major social ill.

Abduh's reading of the Quran provides a useful point of departure for investigating polygamy in Islamic law and society. For Abduh, reading the verses of the holy book dealing with the issue yielded a clear message. Polygamy was not the desired norm for marriage, he believed. It was a means to deal with the problem of unmarried women who needed care, and otherwise it was almost certainly an arrangement that found disfavor with wives and God alike.[4] The main verses on polygamy occur in the Quran's Chapter of the Women (*Surat al-Nisa'*). The section of the chapter opens with a reminder of Muslims' duties to their families, adding a warning to care responsibly for the money of orphans. The Quran then reads:

> If you know that you will not be just concerning the orphans, then marry from among the women what seems goodly to you, two or three or four. And if you know that you will not be fair, then one woman, or those whom your right hands possess (concubines). That is more suitable, that you might not do injustice (Quran 4:2-3).

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3 Augustine, *Enarratio in Psalmum*, 45:47 (available at http://www.augustinus.it/latino/esposizioni_salmi/index2.htm).

4 Muhammad 'Abduh, *al-A'mal al-Kamila*, ed. by Muhammad 'Amara, 6 vols (1993), II, 76-92.

The holy book then continues to address additional fiduciary duties towards orphans and others.

This section has historically been read in connection with a later part of the same chapter, which is clearly connected by the themes of the treatment of orphans, especially ones married by their guardians, as well as the importance of harmony within a married couple and the recommendation to resolve any problems that arise. At 4:127-129, the Quran begins again dealing with questions asked about women but first discusses orphaned women who have been taken as brides but have not received their due dower. The Quran then talks about a wife who suffers mistreatment from her husband and how it is best for couples to reconcile. It continues, "And you (plural) *will not be able to be fair between women*, and if you (plural) are intent upon it then do not incline so much, leaving [the woman] hanging. And if you (plural) reconcile and fear God, indeed God is merciful and forgiving" (emphasis mine).

Commenting on these verses, Abduh notes that, as all earlier Muslim scholars had affirmed, verses of the Quran had to be read in the context of the circumstances of their revelation during the life of the Prophet. This was essential for ascertaining why God had sent them down and what He intended by them. The most widely accepted reports about the revelation of these particular verses explain how they addressed men who had taken responsibility for female orphans as wards and then later wanted to marry them. This presented the potential problem not only of these men taking advantage of their authority to compel their desired bride into marriage on unduly favorable terms, but the men might also use the orphan's own money, held in trust, to pay the dower that they owed their brides.[5] Abduh points out that the Quranic permission for polygamy was thus specific to marrying those weak members of society who needed care. It was not a general rumination on marriage or open-ended permission for polygamy. For Abduh, the most general principle comes in the Quranic warning that men can never treat multiple wives justly. If a man had more than one wife, it was his unambiguous duty to treat each one equitably. Since this was effectively impossible, by the Quran's own admission, polygamy could only be allowed as the necessary a solution to exceptional problems. It could not be a general practice.[6]

The Sunna of the Prophet, as encapsulated by Hadiths, reinforces the importance of a husband treating his wives fairly and equally. In one Hadith, found in four of the six canonical Sunni Hadith collections, the Prophet warns, "If a man has two wives but does not balance between them, he will be brought forth on the Day of Judgment crippled on one side of his body".[7]

5 See *Sahih al-Bukhari*: *kitab al-tafsir*, *bab surat al-nisa' – bab wa in khiftum…*

6 'Abduh, *al-A'mal al-Kamila*, II, 76-92.

7 *Jami' al-Tirmidhi*: *kitab al-nikah*, *bab ma ja'a fi al-taswiya bayn al-dara'ir*; *Sunan al-Nasa'i*: *kitab 'ushrat al-nisa'*, *bab mayl al-rajul ila ba'd nisa'ihi dun ba'd*.

This seems to support Abduh's reading. But a second, crucial Hadith, found in the same Hadith collections, introduces a distinction in the duty of fair treatment. The Prophet's most famous wife, Aisha, reports, "The Prophet would divide his time equally and fairly between his wives, and he would say, 'O God, this is my division on that of which I am the master (*fi-ma amliku*), so do not blame me for that of which You and not I are the master'".[8]

This Hadith provides the point on which Abduh and pre-modern Muslim scholars disagreed. For Abduh, equal treatment of co-wives was effectively impossible because no man could to render unto each wife that level of exclusive attention and affection that she would require to feel satisfied. Instead, discord would inevitably emerge between wife and husband, between co-wives, or both. The dominant opinion amongst the Muslim ulama, however, is clear: the fairness (*'adl*) that the Quran urges or requires between wives only encompasses outward behavior, like dividing up time and material resources, as well as the outward etiquette of the compassionate treatment of all one's wives.[9] The Quranic command to treat wives fairly cannot mean actually loving each wife equally or inclining to each one equally, since humans cannot control this. Even the Prophet could not control love, hence his statement to God that this was within God's power along. The seminal mystic Ibn Arabi (d. 1240) explains the Prophet's invocation that God not blame him for what lies outside his control thus: God's statement that "You will not be able to treat them fairly" is God's expression of understanding that no man, not even the Prophet, can control emotional attachment and love. God only finds displeasure or casts blame for any bias or unfair inclination that husbands "show openly" (*yuzhir*). Due to the Prophet's lofty status, Ibn Arabi explains, he seeks God's forgiveness even for this thing that people cannot control or be blamed for.[10]

In arriving at this understanding of a husband's duty towards his wives, Muslim scholars demonstrated not only the way in which different units of

8 Ibid. This Hadith was considered sound by al-Hakim al-Naysaburi and al-Suyuti; Jalal al-Din al-Suyuti, *al-Jami' al-Saghir* (2004), 438.

9 Works surveyed in this study include those of al-Tirmidhi (d. 892), Shafi'i scholars like al-Khattabi (d. 998), al-Ghazali (d. 1111), Ibn Hajar (d. 1449), al-Munawi (d. 1622); and the Hanafi scholars al-Zabidi (d. 1791) and 'Abd al-Ghani al-Dihlawi (d. 1879).

10 Al-Tirmidhi says that what God controls is "love and longing (*al-hubb wa al-mashaqqa*)". Al-Khattabi concurs, as does al-Ghazali, Ibn Hajar, al-Munawi, 'Abd al-Ghani al-Dihlawi and al-Zabidi, with the later saying that there is consensus amongst ulama that justice (*'adl*) here only concerns actions and outward behavior, not feeling and love, since no one can control that; *Jami' al-Tirmidhi*, ibid.; Hamd al-Khattabi, *Ma'alam al-Sunan*, 4 vols (1981), III, 218-219; Ibn Hajar, *Fath al-Bari Sharh Sahih al-Bukhari*, ed. by 'Abd al-'Aziz Bin Baz and Muhammad Fu'ad 'Abd al-Baqi, 16 vols (1997), IX, 391; Shams al-Din al-Munawi, *Fayd al-Qadir Sharh al-Jami' al-Saghir*, ed. by Hamdi al-Damardash Muhammad, 13 vols (1998), IX, 4921; Murtada al-Zabidi, *Ithaf al-Sada al-Muttaqin Sharh Ihya' 'Ulum al-Din*, 10 vols (1994), V, 368-369; 'Abd al-Ghani al-Dihlawi and others, *Sunan Ibn Majah al-Muhashsha* (n.d.), 141.

scripture could function to sculpt an aggregate meaning. They also showed the important role of empirical observation in delineating what the words of God and His prophet – true, by definition – could mean if their truth was to be preserved. It was taken as an empirical axiom that humans cannot control the emotion of love, only how they act on it. This is exemplified in, and partially built on, the standard interpretation of another Hadith, in which the Prophet told his followers that, "None of you truly believes until I am dearer to him than his parent or his child". This Hadith cannot be referring to the naturally occurring affection one has for one's close kin, noted prominent Muslim clerics, since that cannot be controlled. It must mean the "love by choice (*hubb al-ikhtiyar*)" by which a person chooses whom to grant devotion and loyalty.[11]

As a result of their interpretations of the Quranic verses and the above Hadiths, Sunni scholars held that a Muslim man can only marry up to four women.[12] It is the position of all the Sunni schools that a husband must divide his days and nights equally between them, with major opinions in the Maliki, Hanafi and Hanbali schools saying that it is required or recommended to offer each equal treatment in terms of housing, clothing, allowance, etc. Marriages in pre-modern Islamic civilization were generally private arrangements between families or individuals (for example, the groom and the bride's guardian). It was up to these private parties to prospectively enforce these norms of treatment. No judge sat for a formal procedure to ascertain whether a groom really had the means to marry more than one woman. Of course, the court was frequently a source of redress in disputes *after* marriage. Court records from Islamic civilization leave no doubt that a good amount of court traffic was made up women, and Ottoman records include examples of wives complaining about their husbands' treatment.[13]

Abduh's interpretation also clashed with an important stream of Islamic thought in the realm of theology. As Abduh understood it, the Quran presented polygamy as an exception rather than a rule, allowing it as a solution for particular social problems and stressing both the importance of the equal and fair treatment of wives as well as the effective impossibility of reaching this bar. This presented a

11 Al-Nawawi, *Sharh Sahih Muslim*, I-II, 374; al-Munawi, *Fayd al-Qadir*, XII, 6506-6507; Ibn Hajar, *Fath al-Bari*, I, 83. Interestingly, there were some dissenting voices in the pre-modern tradition. The famous eighteenth-century revivalist scholar of Medina, Abu al-Hasan al-Sindi (d. 1726-1729), rejected the notion that a husband's obligation (*taklif*) did not extend to love and affection of the heart, since, if God had not intended this dimension in His command, the Prophet would not have made his invocation for God's aid; Abu al-Hasan al-Sindi and others, *Saman al-Nasa'i bi-Sharh al-Hafiz Jalal al-Din al-Suyuti wa Hashiyat al-Imam al-Sindi*, 2 vols (n.d.), II, 94.

12 Ibn Hajar in the *Fath* says that there is consensus that you can only marry four wives, with only some Shiite sects disagreeing; Ibn Hajar, *Fath*, IX, 172.

13 Wael Hallaq, *Shari'a* (2009), 193-194.

real problem for some pre-modern Muslim theologians, especially the Maturidi school of theology that predominated in much of Central Asia. This school in particular did not accept that God could "command what man cannot bear (*taklif ma la yutaq*)". If God urged men, in certain circumstances, to marry up to four women, provided that husbands treated each wife equally, but then also said that this was impossible, then God would be commanding the impossible, which God could not do.[14] Followers of the Maturidi school thus read the Quranic verses and Hadiths through the interpretive lens required for those scriptural *testimonia* to be true within the larger framework of Islamic theology and empirical observation. Ultimately, contra Abduh, the mainstream of Islamic legal discourse held that, if a polygamous man had co-wives unhappy with the emotional shares they had been dealt, this was not the man's responsibility.

At the level of historical practice in Muslim societies, it seems ironic that it is Abduh's anomalous reading of scripture that best described actual behavior. Of course, Islamic civilization was and remains vast, diverse, unfriendly to generalization and often unwilling to provide consistent data for more accurate observations. As Franz Rosenthal observed, however, from what we do know, monogamy was the most dominant form of marriage in the classical Islamic period (for economic reasons, amongst others).[15] There were outlying cases, to be sure. Ibn al-Jawzi (d. 1201) tells of one Abu Bakr al-Sabbagh (d. 1032), a Muslim scholar in Baghdad of no particular repute but no doubt of substantial means who married over 900 women.[16] But there are also stories that seem to prefigure Abduh. It was said that when the caliph Harun al-Rashid wanted to marry a second wife, his first wife called upon the famous scholar and ascetic Sufyan al-Thawri (d. 778) to mediate. When the caliph read the Quranic verse giving men the right to marry up to four wives, al-Thawri ordered him to read through the section warning men only to marry one woman if they could not deal justly with more. "And you are not being just," al-Thawri added.[17]

Basim Musallam has observed that, based on material in the biographical dictionaries penned by ulama in Egypt in the fifteenth and sixteenth centuries, polygamy was very rare. It occurred in only 2% of the cases of the women whose biographies he found. It was also very unsuccessful when it did happen; in all

14 Abu Bakr Ibn al-Arabi, *Ahkam al-Quran*, ed. by Muhammad Bakr Ismail, 4 vols (2002), I, 591. Here the author, Ibn al-Arabi, holds that this verse is proof that God can "ordain what is unbearable/not possible". See also, Abu Mansur al-Maturidi, *Ta'wil al-Qur'an*, ed. by Bekir Topaloglu and others, 19 vols (2005), IV, 60-61.

15 Franz Rosenthal, "Fiction and Reality: Sources for the Role of Sex in Medieval Muslim Society", in *Society and the Sexes in Medieval Islam*, ed. by Afaf Lutfi al-Sayyid-Marsot (1979), 17.

16 'Abd al-Rahman Ibn al-Jawzi, *al-Muntazam fi tarikh al-muluk wa'l-umam*, ed. by Muhammad 'Abd al-Qadir 'Ata and Mustafa 'Abd al-Qadir 'Ata, 18 vols (1992), XV, 232.

17 Abu Nu'aym al-Isbahani, *Hilyat al-awliya'*, 10 vols (1996), VI, 378.

cases, the first wife either divorced her husband, forced him to divorce his second wife, or went mad.[18] Evidence from as early at 800 CE shows that at some points and places Muslim women actually structured their marriage contracts in order to prevent polygamy.[19] Sixteenth-century Cairene court records show that 41% of women inserted rights to divorce if their husband took a second wife, 24% if he took a concubine.[20]

This does not mean that medieval Muslims were committed to lifelong partnerships. Serial monogamy was not rare at all. About one third of the women in Musallam's data set married more than once, with 17% marrying three times and one woman marrying eight times. One particularly interesting case is that of Ittifaq, a concubine bought from Africa who flourished in the harem of Egypt's Mamluk rulers, became famed for her wit and intellect and eventually married four sultans and a vizier.[21] Musallam's data for the fifteenth century seems to be corroborated in other periods in Egypt. Documents from eleventh-to-thirteenth-century Egypt show that 45% of women married a second or third time.[22] In the early 1800s, the Swiss traveler John Burckhardt (d. 1817) noted that, "Polygamy is much less frequent than Europeans imagine", and just a few decades later the British lexicographer and ethnographer Lane remarked that it was very rare indeed.[23] For all Abduh's worries, a 1907 census in Egypt carried out just two years after his death indicated a polygamy rate of around 6% percent. A few other points on the vast map of the Muslim world corroborate this impression: an Algerian census of 1906 showed little over 7% percent of marriages as polygamous. In Indonesia in the 1930s, in various regions, around 2% to 9% percent of married Muslim men were polygamous.[24]

In legal vision and social reality Islamic civilization seems to have followed in the same patterns as the pre-Islamic Near East. In ancient Sumer there is evidence of polygamy amongst the ruling class, but it was not widespread. In Babylonia, polygamy was permitted but limited. The Babylonian Laws of Eshnunna (*c.* 1800 BCE) seem to reflect poorly on polygamy, and the subsequent law code of Hammurabi (*c.* 1750 BCE) allows it only in specific situations, such as when a man's first wife was a priestess barred from having children. Later, in the Assyrian

18 Basim Musallam, "The Ordering of Muslim Societies", in *The Cambridge Illustrated History of the Islamic World*, ed. by Francis Robinson (1998), 193-194.
19 Adolf Grohmann, "Arabische Papyri aus den Staatlichen Museen zu Berlin," *Der Islam* 22 (1935), 30-31.
20 Hallaq, *Shari'a*, 188.
21 Robert Irwin, *The Arabian Nights: A Companion* (1994), 174.
22 Musallam, "The Ordering of Muslim Societies", 194.
23 John Lewis Burckhardt, *Arabic Proverbs* (2004), 141; E. W. Lane, *Manners and Customs of the Modern Egyptians* (2005) 138, 180.
24 Kenneth Cuno, "Marriage: Historical Practice", *Oxford Encyclopedia of Islam and Women*, ed. by Natana Delong-Bas (2013), I, 611. (610-617).

realm polygamy was common amongst the ruling families, though many scholars contend that it was only allowed for the royal family.[25]

We find similar situations in the more immediate predecessors to the Islamic legal tradition. Polygamy was permitted among the Jewish community of the Near East. It continued to be permitted amongst Jews living in Islamic civilization even after the eleventh-century ban amongst Western European Jews, though as of the twelfth century, in Egypt at least, Jewish marriage contracts generally included a stipulation that the husband not take another wife (with men marrying second wives only with the first wife's permission, as in cases of childlessness).[26] But there is no evidence that polygamy was particularly common. Similarly, Zoroastrian law in pre-Islamic Iran allowed polygamy, but it is unclear how widespread it was.[27]

The simple fact was that polygamy was expensive and, it seems, often emotionally trying. It is tempting to find traces of this back in the common roots of the Semitic languages, where we find what seems to be extremely early historical evidence for this dismal assessment of polygamy. Across most Semitic languages, the roots for the word "harm" and "co-wife" are the same (true even in modern Arabic, in which co-wife is *darra* and *darar* is harm). Fascinatingly, it does not seem to be the case that the word for "co-wife" was derived from "harm" in proto-Semitic. Conversely, either "harm" was "derived" from "co-wife" or the two meanings were too closely related for any clear genetic descent to be determined.[28]

At some point the infeasibility of polygamy became cliché. In the early fifteenth-century book of bawdy entertainment, *The Perfumed Garden of Sensual Delight*, one character describes his recent marriage to a second wife: "I'm powerless to control the new one, the old one's a law unto herself, and I'm staring poverty in the face".[29] A popular Egyptian saying (our source here comes from the late 1800s), was "*illi yatgawwiz itnayn ya qadir ya fajir* (whoever marries two women is either up to it or a sinner)" and was used as an aphorism for someone who dares to do something that he won't be up for.[30] In Palestinian Arabic we find the saying "*al-durra murra* (the co-wife is bitter)".[31]

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25 Elisabeth Meier Tetlow, *Women, Crime, and Punishment in Ancient Law and Society: Volume I The Ancient Near East* (2004), 49, 56, 209, 213. Amongst Axial era societies, only India seems to have seen polygamy more commonly among lower and middle classes; Peter Stearns, *Sexuality in World History* (2009), 39.

26 Ben-Zion Schereschewsky and Menachem Elon, "Bigamy and Polygamy", in *Encyclopaedia Judaica*, ed. by Michael Berenbaum and Fred Skolnik, 2nd ed. (2007), III, 691-694. There is one example of a man with two wives from a marriage register dated 1023 CE; Mordechai Akiva Friedman, *Jewish Marriage in Palestine: A Cairo Geniza Study* (1981), I, 331, 450; II, 446.

27 Bodil Hjerrild, *Studies in Zoroastrian Family Law* (2003), 16.

28 Akkadian: *serretu*; Hebrew: *sara*; Aramaic: *'arṛa*; South Arabic/Ethiopic: *dar*; Arabic: *darratun*; Gotthelf Bergstrasser, *Introduction to the Semitic Languages*, trans. by Peter T. Daniels (1983), 210-211.

29 Muhammad al-Nafzawi, *The Perfumed Garden of Sensual Delight*, trans. by Jim Colville (1999), 11.

30 Ahmad Taymur Basha, *al-Amthal al-'Ammiyya* (2010), 101.

31 Ismail Yusuf, *al-Jami' fi al-Amthal al-'Ammiyya al-Filistiniyya* (2002), 230.

Popular language read this understanding back into scripture, or more properly put, ersatz scripture was fashioned out of popular wisdom. In books that Muslim scholars in Egypt and Syria composed from the fifteenth century to the nineteenth on instances in which popular sayings were wrongly attributed to the Prophet, we find sayings like "I do not love the those men who undertake too many tastings (*La uhibbu al-dhawwaqin*)" (some versions of the saying include the same warning for women) and "Having a large family is one of the two types of poverty (*kathrat al-'iyal ahad al-faqrayn*)".[32] Here we see a rejection not only of polygamy but also of serial monogamy.

The Case of Slavery in Islamic Scripture, Law and Society

The second case study presented here for the interaction of scripture, its scholarly channeling into communal norms, and the reactions of society at large is that of slavery. Slavery was an integral part of economic and social life in the Late Antique world, and the Quranic revelation accepted it as a reality. Though it recognizes slavery, the Quran does repeatedly urge Muslims to free slaves as a good deed. It associates manumission with the conduct of a believer and seems to instruct a Muslim to agree to a manumission agreement should his slave propose one (24:33).

The Quran also sets manumission as an explicit form of expiation for a variety of sins and torts. A Muslim who accidentally kills another person should free a believing slave and pay compensation to the victim's family (4:92); a Muslim who breaks an oath should free a Muslim slave, or, if unable, feed ten needy people, or, if unable to do that, fast for three days (5:89); a Muslim who returns to his wife after making an oath of renunciation (*zihar*) must free a slave, or, if unable, feed sixty needy, or fast for two months (58:53). We find this last expiation recipe in a Hadith as well, where the Prophet assigns this series of duties to a Muslim who has had sex with his/her spouse during the Ramadan fast (or, according to the Hanafi and Maliki schools of law, a Muslim who breaks their fast intentionally in any way).[33]

The Prophetic Sunna, in the form of Hadiths, provided more exhortations to manumission and good treatment of slaves. Freeing a slave frees all one's limbs from hellfire in the Hereafter, explains one Hadith.[34] If your slave brings you food,

32 Muhammad al-Amir al-Kabir al-Maliki, *al-Nukhba al-Bahiyya fi al-Ahadith al-Makdhuba 'ala Khayr al-Barriyya*, ed. by Zuhayr al-Shawish (1988), 93. Similar Hadiths are found in the *Musannaf* of Ibn Abi Shayba and the *Tarikh Ishahan* of Abu Nu'aym al-Isbahani, where Hind bin Abi Hala says of the Prophet that "the Prophet did not criticize the 'tasters' or praise them".

33 *Sahih al-Bukhari*: *kitab al-sawm*, *bab idha jama' fi Ramadan*.

34 *Sahih al-Bukhari*: *kitab al-'itq*, *bab ma ja'a fi al-'itq wa fadlihi*.

another Hadith instructs, even if you do not seat him with you, still you should offer him a bite or two.[35] Hadiths also provided many more details about the legal mechanics of slavery as well as the rights that slaves enjoyed and the restrictions placed on their masters.

Islamic law strictly forbade the enslavement of Muslims. Nor could Muslims enslave non-Muslims living as protected minorities (*dhimmi*s) within a Muslim polity. If a slave became Muslim, however, this did not in any way entail his or her manumission. Islamic legal discourse thus devoted a great deal of attention to the rights and obligations of Muslims who were slaves. The original sources of the Shariah, the Quran and Sunna, however, generally discuss slaves in the context of non-Muslim prisoners of war captured in battles on the frontiers of Islamdom.

The Hadith with the most specific instructions on how slaves should be treated provides a high standard. Found in the two most esteemed Hadith collections in Sunni Islam, the report quotes the Prophet telling his followers that their slaves are "your brothers, whom God has put under your control, so feed them from what you eat, cloth them from what you wear, and do not burden them with work that overwhelms them. If you give them more than they can do then assist them".[36]

Widely recognized Hadiths also drew limits on the punishments that could be meted out against slaves: "Whoever beats his slave for something other than a *hadd* (the recognized corporal punishments under the Shariah) and bloods flows, the expiation is freeing him". There was even a report circulated amongst Muslim scholars that the Abbasid caliph al-Mansur (d. 775), who struck one of his slaves on the head during a surveying expedition, immediately reproached himself. "You are free, for the sake of God", the caliph told the slave, citing his own transmission of this Hadith, through his ancestors, from the Prophet.[37]

Like marriage practices, the shape, features and degree of the institution of slavery differed widely across the spacial and temporal expanses of Islamic civilization. During the Prophet's lifetime and in the first decades of the Islamic conquests, captives from wars of expansion were a major source or slaves. After these first stages of the Islamic conquests and successful raiding against the Byzantines ended in the mid ninth century, slaves were generally imported into Muslim lands from Central Asia and Sub-Saharan Africa via mainly non-Muslim slave traders. From the mid ninth century until the fifteenth, the Central Asia route brought Turkic slaves, either already skilled in mounted warfare or trained to be, as bodyguards for the caliphs and later as units of armies. It also brought Slavs culled

35 *Sahih al-Bukhari*: *kitab al-'itq*, *bab idha atahu khadimuhu bi-ta'amihi*.

36 *Sahih Muslim*: *kitab al-ayman*, *bab it'am al-mamluk mimma ya'kulu wa ilbasihi mimma yalbisu wa la yukallifuhu ma yaghlibuhu*; *Sahih Bukhari*: *kitab al-ayman*, *bab al-ma'asi min amr al-Jahiliyya*...

37 Al-Khatib al-Baghdadi, *Tarikh Baghdad*, ed. by Mustafa 'Abd al-Qadir 'Ata, 14 vols (1997), VIII, 158; *Sahih Muslim*: *kitab al-ayman*, *bab suhbat al-mamalik wa kaffarat man latama 'abdahu*.

by Scandinavian slave traders from amongst the populations of southern Russia and bound for domestic service in the Middle East. From Africa came slaves who would be a used for a wide variety of tasks. Later, in the Ottoman period, African eunuchs were imported to guard the harems of the Ottoman elite. The diverse contexts in which slavery manifested itself in Islamic history make even estimating its intensity at various points incredibly difficult, but it seems clear that, from modern-day Morocco to South East Asia, tens of millions of people lived, worked, found freedom or died as slaves in the Muslim world.[38]

There were important differences between slavery in the Late Antique Near East and slavery in the medieval Islamic period. The notion of debt slavery quickly disappeared in Islamic law and society. Though it reappeared informally at various points in Islamic history, especially in South and Central Asia, this removed one of the major economic routes into slavery for the freeborn.[39] Slaves had limited rights to engage in contracts, own property and to marry.[40] Slaves were brought from outside the Abode of Islam, so there was no indigenous slave breeding practice. Unlike the Americas, agricultural slavery was rare in Islamic civilization (in fact, it had become very rare in the late Roman Empire).[41] The most grueling labor led to disastrous results. The use of African slaves for the backbreaking job of clearing salt from the alluvial farmland of southern Iraq in the ninth century led to a major series of slave revolts known as the Zanj rebellion (869-883 CE) that disrupted the entire region.

There were dominant continuities in the institution of slavery, however, which shaped the norms that the ulama derived from their scriptural sources. The above Hadith commanding Muslims to treat slaves like their brothers did lead to a consensus amongst Muslim jurists that one could not make slaves work more than they could bear, but otherwise what appeared to be that Hadith's clear command to egalitarian treatment had little impact in Shariah discourse.[42] Even in the idealized world of legal interpretation amongst the ulama, the

38 Archeological estimates put the number of Turkic military slaves in ninth-century Baghdad at 100,000. Between 1400 and 1650, around 200,000 Balkan youths were enslaved in the Ottoman *devshirme*. From 1800-1909 the Ottomans imported around 200,000 slaves from the Caucasus, mostly Circassians. See William Gervase Clarence-Smith, *Islam and the Abolition of Slavery* (2006), 12-16.

39 Harald Motzki, Nicolet Boekhoff-van der Voort and Sean Anthony, *Analysing Muslim Traditions* (2010), 127; Clarence-Smith, 76-78.

40 See Yvonne Seng, 'A Liminal State: Slavery in Sixteenth-Century Istanbul,' in *Slavery in the Islamic Middle East*, ed. by Shaun Marmon (1999), 33.

41 Ehud R. Toledano, *The Ottoman Slave Trade and its Suppression* (1982), 6; Glanville Downey, *The Late Roman Empire* (1969), 47. One group that did use slaves for agriculture, the Circassians of the Caucasus, caused some turmoil when they moved into the Ottoman realm in the 1860s, bringing their agricultural slaves. Apparently, the Circassians engaged in the trade of freeborn Muslim Circassian children, which Ottoman officials correctly recognized as clearly against the Shariah; Toledano , 273.

42 Al-Nawawi, *Sharh Sahih Muslim*, XI-XII, 144.

dominant social and economic realities of the medieval period tempered the high expectations set forth in the Hadith. Slaves were simply not the social equals of freemen, and there could be no question about requiring such treatment. As the famous fifteenth-century Egyptian scholar Ibn Hajar wrote, the above Hadith must be understood as calling for charitably beneficence, (*muwasa*), not parity in every respect (*musawa min kull jiha*). The logic of society's hierarchy could not be violated. Even one who aims for the ideal of exceptionally good treatment of his slaves, writes Ibn Hajar, cannot do so in a way that would lead to this favoring the slave over his own free children.

What constituted good or adequate treatment of slaves was not based on an ideal of fraternity with slaves but was rather based on local conventions of reasonable and good treatment. This interpretation of the above Hadith was shaped by another Hadith on the treatment of slaves. It reads, "The slave is owed his food and his clothing according to what is right in custom (*ma'ruf*)..." This could vary from region to region and time to time.[43]

The Quranic verse instructing believers, "and those among your slaves who seek an agreement [for manumission], make an agreement if you know there to be good in them..." was understood by some early Muslim scholars to denote an obligation to accept a slave's proposal to buy his or her freedom in installments. This remained a prominent position in the Hanbali school of law. For the vast majority of Muslim scholars, however, the Quranic verse could only be a recommendation. What might seem like a command had to be read in the established legal context of the relationship between masters and slaves, in which it was out of the question for the slave to dictate terms.[44]

Similarly, despite the ideal acted on by the Caliph al-Mansur, it was recognized by almost all ulama that a norm such as requiring a master to free a slave whom he had caused to bleed was only encouraged and not legally required. The Shariah discourse on the limits to punishing slaves seems to be a continuity of late Roman law. The opinion of the medieval Maliki school of law, predominant in North Africa, held that a master who beat a slave severely or caused severe injuries should be punished by the government and the slave freed.[45] This is reminiscent of the norms dating back to Constantine but set in Justinian's Codex (Book 9, Title 14), which warned that a master could be criminally prosecuted for intentionally inflicting fatal wounds on a slave but not for injuries or death resulting from routine chastisement or punishment.

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43 See *Sahih Muslim*: *kitab al-ayman*, *bab it'am al-mamluk mimma yu'kal*...; Ibn Hajar, *Fath*, V, 218-219; al-Nawawi, ibid.

44 Muhammad bin Ahmad al-Qurtubi, *al-Jami' li-Ahkam al-Qur'an*, ed. by Muhammad Ibrahim al-Hifnawi and Mahmud Hamid 'Uthman, 20 vols (1994) VI, 532-533.

45 Al-Nawawi, *Sharh Sahih Muslim*, XI-XII, 137-138.

If the law could not require the beneficent treatment of slaves, there seems to have been a strong urge in Muslim scholarly discourse to promote it at a hortatory or pastoral level. This is primarily evident in the plethora of forged and "weak" Hadiths to the effect. "Weak" Hadiths were reports that ulama could not reliably trace to the Prophet and thus lacked the compelling authority of well-attested Hadiths, though they played an important role in the popular preaching and the ulama's ethical exhortative writings. Forged Hadiths were those that scholars recognized as having no basis in the Prophet's speech. Although, in theory, ulama uniformly condemned any use of such material, forged Hadiths often played a role similar to "weak" ones.[46] One "weak" Hadith that can be traced back at least to the early tenth century quotes the Prophet saying, "The slave enjoys three particulars with his master: that the master not rush the slave in his prayers, that he not force him to get up from his meal, and that he provide for him to eat his fill".[47] This was certainly not an enforceable legal norm.

Not all the apocryphal appeals to Prophetic authority were so enlightened. Among the sayings that ulama from the fourteenth century onward identified as being falsely attributed to the Prophet, we find material that adds a pejorative racial element to slavery. Though never as synonymous as in the Americas, in Islamic civilization there developed as association between slavery and racial groups like Sub-Saharan Africans and Turks. In the Ottoman Empire, for example, an overall ranking emerged among the various sorts of slave. Slaves from the Caucasus or Southern Russia were viewed as the most valuable and noble, followed by Ethiopians and then Sub-Saharan Africans.[48]

A fourteenth-century scholar in Damascus identified a whole series of Hadiths denigrating Africans and African slaves. Some of these forged Hadiths treated Africans and slaves as coterminous.[49] One has the Prophet say that, "The black African, if he is hungry he steals, and when he gets full he fornicates". Though many of these items of ersatz scripture probably originated from the sayings of lay Muslims, some circulated amongst the ulama as well.[50] One story, which shows no signs of being historically reliable, tells of the great early Muslim scholar al-Shafi'i

46 Jonathan Brown, "Even if It's Not True It's True: Using Unreliable Hadiths in Sunni Islam", *Islamic Law and Society* 18 (2011), 1-52.

47 Al-Munawi, *Fayd al-Qadir*, X, 5040.

48 Toledano, *The Ottoman Slave Trade*, 6.

49 Ibn Qayyim al-Jawziyya, *al-Manar al-Munif fi al-Sahih wa al-Da'if*, ed. by 'Abd al-Fattah Abu Ghudda (2004), 101.

50 One revealing comment comes from the famous seventeenth-century Ottoman intellectual Katib Chelebi (d. 1657). Remarking on a book entitled *Kitab al-Sudan wa fadlihim 'ala al-baydan* (Blacks and their Virtue over Whites), written by one Muhammad b. Khalaf al-Marzubani (d. 919), he says, "I do not consider something like this from him to be unlikely, since he wrote *Favoring Dogs over Many of those Who Wear Clothing* (i.e., humans)"; Katib Chelebi, *Kashf al-Zunun*, ed. by Muhammad 'Abd al-Qadir 'Ata, 3 vols (2008), III, 49.

(d. 820) sitting in a mosque teaching. He sees a man come in looking around amongst the servants and slaves sleeping in the mosque, and al-Shafi'i sends one of his students to ask the man if he was looking for a one-eyed, black slave. If so, al-Shafi'i tells him, he will find the slave in jail. And indeed that was where the owner found him. Asked how he predicted this, al-Shafi'i cites the Prophet's wisdom; either the slave had been arrested for stealing or detained for fornication.[51]

In the cases of polygamy and slavery, there is salient continuity between pre-Islamic and post-Islamic society in the Near East. Polygamy was allowed but not common. Slavery was an institution, but slave owners' treatment of slaves was restricted by law and culture. To a large extent, this continuity was facilitated by the ulama, whose interpretation of Islam's often-iconoclastic scriptures and derivation of norms was profoundly influence by their cultural milieu, its logic of social hierarchies and the realistic limitations of enforcing norms. It can and has been argued that the Quran only permits polygamy as a solution for women in particular need of care, but the empirical observations of Muslim scholars and their reading of Prophetic precedent led them to leave the practice relatively unregulated. Prophetic Hadiths raised a remarkably high standard for the treatment of slaves and the obligation to manumit them, but this standard could survive only as a suggested ideal in a society permeated by slavery and its concomitant hierarchies. Not only did society shape the interpretation of scripture, we see that anonymous voices could coopt the voice of scripture itself. In competition with the guidance offered by Islam's clerical guardians, in the markets and streets of Cairo or Damascus, popular axioms about marriage, race and slavery were at times granted Prophetic voice.

51 Shams al-Din al-Sakhawi, *al-Maqasid al-Hasana*, ed. by Muhammad 'Uthman al-Khisht (2004), 119-120; Isma'il al-'Ajluni, *Kashf al-Khafa 'amma Ishtahara min al-Ahadith 'ala Alsinat al-Nas*, ed. by Ahmad al-Qalash, 2 vols (1997), I, 262.

PART II

COMPARATIVE STUDIES

SECTION ONE

RIGHTS OF RESIDENCE

INTRODUCTION

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À l'époque médiévale, dans les mondes juifs, chrétiens et musulmans, la différence religieuse est source de distinction dans des domaines variés du droit. Les mesures afflictives, vexatoires ou de protection décidées par les pouvoirs politico-religieux dominants, les droits et privilèges négociés et obtenus par les groupes minoritaires concernent en effet des domaines aussi divers que les matières fiscales, pénales et processuelles, contractuelles et économiques, familiales et patrimoniales, que la propriété, le culte ou les rites.

Les contributeurs du présent chapitre ont concentré leurs investigations sur les matières qui leur paraissaient les plus élémentaires, et desquelles leurs semblaient avoir dépendu toutes les autres. Il s'agit des règles relatives à la résidence d'une part, et de celles qui permettent le maintien d'une vie communautaire autour d'un culte d'autre part. De fait, ce n'est que si le droit de résidence de la minorité en tant que communauté religieuse se trouve admis que se posent les problèmes afférents des rapports avec les autorités (dans les domaines de la fiscalité, de la justice et de la répression pénale notamment) ; et de la réglementation des relations quotidiennes avec les autres groupes (en matière de voisinage, de contrat, de témoignage, de commerce, ...etc.).

Il a donc été décidé d'interroger dans des termes identiques les sources juridiques venues des terres musulmanes et chrétiennes, en leur demandant d'abord ce qui avait fondé, justifié et garanti la résidence des individus issus de minorités religieuses. Le même travail a été effectué sur des sources d'origine juive. Certes, les communautés juives médiévales ne disposent d'aucune souveraineté en la matière, mais elles sont tout de même amenées à la réglementer dans des circonstances que nous préciserons plus loin.

Il n'est pas possible que soit tirée une conclusion générale de ces études parallèles, pour des raisons évidentes tenant à la diversité des contextes politiques et religieux envisagés, des époques (les sources analysées par les différents contributeurs remontent aux VIII^e^ et IX^e^ siècles de notre ère, d'autres au XIV^e^ et XV^e^ siècles), et des situations spécifiques ainsi que des univers intellectuels particuliers entourant l'édiction de chacun des textes. Mais la comparaison sur des aspects précis, aussi périlleuse soit-elle, méritait d'être faite car, méthodologiquement, l'interdisciplinarité a des vertus reconnues dont celle, en particulier, de permettre

Religious Minorities in Christian, Jewish and Muslim Law (5^th^–15^th^ centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 119–126

 DOI 10.1484/M.RELMIN-EB.5.111595

le renouvellement des problématiques. Ainsi, nous verrons plus loin comment ce travail de réflexion en équipe a permis à chacun de s'extraire des questionnements dans lesquels pouvaient l'enfermer l'historiographie de sa discipline.

Mais avant d'en venir à ce point, nous voudrions nous arrêter un instant sur une autre difficulté particulière qui a pu gêner la comparaison. Elle tient au fait que les sources juridiques utilisées par les contributeurs travaillant sur le monde musulman paraissaient *a priori* plus difficiles à exploiter que les sources des droits chrétien et juif. En effet, les documents sélectionnés par Anna Matheson et Marisa Bueno pour l'Espagne et le Portugal chrétiens du XII^e^ au XV^e^ siècle sont de nature législative (chartes royales ou municipales), coutumière, ou sont des actes de la pratique. Ceux qu'utilise Nadezda Koryakina pour documenter la vie juridique des communautés juives des villes aragonaises aux XIII^e^ et XIV^e^ siècles sont des consultations rabbiniques (*she'elot u-teshuvot* ou *responsa*) et des règlements communautaires (*taqanot*). Toutes ces sources ont ceci en commun qu'elles paraissent directement entées dans la réalité sociale et politique de leur temps. À l'inverse, les sources du droit musulman, issues dans leur majorité de livres de *fiqh*, semblaient, à cause de leur origine doctrinale, théorique et abstraite, se prêter plus difficilement à une exploitation historique. C'est cette difficulté qu'ont dû affronter Ahmed Oulddali, Farid Bouchiba et Géraldine Jenvrin.

Ahmed Oulddali s'appuie sur deux livres de *fiqh* du XI^e^ siècle de notre ère, leurs auteurs appartenant à des écoles (*maḏāhib*) juridiques sunnites différentes, l'école šāfiʿite (issue de l'enseignement du juriste al-Šāfiʿī, mort au Caire vers 820) et l'école ḥanafite (se rattachant à Abū Ḥanīfa de Bagdad, mort en 767). Il s'agit du *K. al-Ḥāwī* du šāfiʿite al-Māwardī (m. 450/1058) et du *K. al-Mabsūṭ* du ḥanafite al-Saraḫsī (m. 483/1091). Ces écrits présentent des caractères propres aux œuvres de doctrine et proposent des catégories juridiques bien délimitées et caractérisées. L'avantage de la clarté de ces exposés peut cependant comporter un versant négatif, qui est leur caractère en apparence anhistorique, et qu'Ahmed Oulddali s'efforce de surmonter. Ainsi peut-on, explique-t-il, deviner, lorsque le šāfiʿite Māwardī expose que les devoirs exigés des *ḏimmīs* en échange de la résidence ne sont pas tous également contraignants et qu'il existe entre eux une hiérarchie, que ces obligations furent, à des époques et dans des contextes difficiles à reconstituer, négociées par les populations soumises. C'est la raison pour laquelle, dit Ahmed Oulddali, ces obligations étaient tantôt sévères – comme ce fut le cas sous le règne de certains califes tels que l'Umayyade ʿUmar b. ʿAbd al-ʿAzīz (r. 717-720), l'Abbasside al-Mutawakkil (r. 847-861) et le Fatimide al-Ḥākim (r. 996-1021), ainsi qu'au Maghreb à l'époque almohade – tantôt souples et allégées. Par conséquent, ce droit ne découle pas uniquement des textes fondateurs du droit musulman – Coran et Sunna – mais apparaît bien comme circonstanciel, résultant de pactes particuliers, passés au moment des redditions des villes et

des décisions des califes, et révélant chaque fois l'existence de rapports de force spécifiques.

Farid Bouchiba insiste bien, en introduction de son article, sur la dimension évidement historique des livres de *fiqh,* qu'il exploite en même temps que de nombreuses consultations juridiques (*fatāwā*). Ils ne sont rien d'autre, écrit-il, « que la somme des produits d'une époque et d'un lieu ». D'ailleurs, « le pluralisme normatif des différentes écoles juridiques sur un même point de droit révèle les réalités sociales des milieux où celles-ci se sont élaborées et normalisées ». Il propose de concentrer l'analyse sur une école juridique en priorité, en l'occurrence celle des mālikites – maghrébins et andalous. Les sources mālikites constituent d'ailleurs une documentation essentielle pour ces régions, la production des chroniqueurs étant, avant le Bas Moyen-Âge, de moindre importance. Et Farid Bouchiba assure que les traités principaux qu'il propose à l'étude, la 'Utbiyya d'al-'Utbī (m. 868) et la Mudawwana de Saḥnūn (m. 856), transmirent certes la doctrine de Mālik et de ses disciples mais organisèrent aussi très concrètement le droit applicable en al-Andalus et au Maghreb. De plus, ajoute-t-il, les juristes (*fuqahā'*) mālikites considéraient la *'āda* (usage) et le *'urf* (coutume), ainsi que le *'amal* (pratique judiciaire) comme des sources du droit, « ce qui témoigne du caractère réaliste de cette école juridique, et de son adaptation aux diverses sociétés au travers des âges. »

En somme, le *fiqh* musulman et son caractère principalement doctrinal ne doit pas décourager l'historien et constitue bien une source susceptible de révéler les situations juridiques réellement vécues par les *ḏimmīs*, pour peu que l'on réussisse à le replacer dans le contexte immédiat de son édiction.

Le travail de Géraldine Jenvrin présente l'œuvre d'un penseur cordouan du XIII[e] siècle exilé au Caire, al-Qurṭubī (m. 671/1272). Cette œuvre, explique-t-elle, est un commentaire du Coran dans le genre traditionnel du *tafsīr*, mais elle emprunte aussi au genre du droit, avec une attention portée aux « fondements de la Loi » (*uṣūl*) et aux « règles qui en dérivent » (*furū'*). La démarche de cet homme du XIII[e] siècle consiste à revenir au Coran comme une source fondamentale du *fiqh*, et à justifier, en développant particulièrement ce point, l'existence de doctrines juridiques divergentes par la diversité des exégèses du Livre saint. L'auteur – à l'instar des philosophes grecs de l'époque classique, qui séparaient les lois de la nature (*physis*) et celles des hommes (*nomoi*), ainsi que des juristes musulmans qui l'ont précédé – distingue un « droit de Dieu » (*huqūq Allāh*) et un « droit des Hommes » (*huqūqal adāmiyyīn*). Et cette distinction lui permet de rappeler que, contrairement aux musulmans, les non-musulmans ne sont pas tenus d'obéir au premier mais simplement au second. En conséquence, le pacte de la *ḏimma* donne droit non seulement à la résidence des non-musulmans protégés (*ḏimmīs*) mais à la protection de leurs activités, même illicites au regard du droit musulman.

La première question ayant occupé les auteurs de ce chapitre est, avons-nous dit, le droit de résidence, et nous voulons expliquer maintenant comment elle a permis à chacun de renouveler ses propres questionnements. L'équipe s'est formulée le problème en ces termes : Jusqu'à quel point la stabilité de la résidence des minorités religieuses était-elle tributaire de leur degré d'intégration dans la communauté politique du groupe majoritaire ? Cette manière de poser la problématique était inspirée d'une historiographie spécifique, celle qui s'intéresse aux conditions juridico-politiques de la présence des juifs en chrétienté occidentale avant les vagues d'expulsion qui se succédèrent à partir du XII[e] siècle et jusqu'à la fin du Moyen-Age[1]. L'historien Salo Baron a estimé que les juifs avaient reçu, dans l'Empire romain à partir de la fin du IV[e] siècle, dans les royaumes romano-barbares et dans l'Empire franc, des statuts à part – par le canal de chartes de privilèges – qui avaient eu pour effet de les exclure des communautés politiques de leur temps, royaumes et empires christianisés. Pendant la période féodale qui avait suivi, ils avaient préféré « l'alliance royale » au protections seigneuriales[2]. Le droit de résidence des juifs en chrétienté n'avait ainsi pas été fondé sur leur qualité de sujets à part entière mais avait dépendu de liens personnels et contractuels tissés avec les princes. À cet égard, leur condition se rapprochait plus de celle des *ḏimmīs* dans les pays musulmans que de celle des populations paysannes. Et dans *A History of the Jews in Christian Spain*, Yitzhak Baer propose une analyse comparable[3]. Si les juifs avaient par la suite été les victimes régulières de déportations, il fallait en rechercher la cause dans la fragilité de leur attachement juridique aux communautés politiques dans lesquelles ils vivaient. De fait, toute crise était susceptible de mettre à mal leur séjour et de se résoudre dans des expulsions.

Cette conception a été rapprochée d'une idée développée par Hannah Arendt dans le dernier chapitre de *Les origines du totalitarisme. II : L'Impérialisme* (paru en 1951) consacré à l'analyse de la crise des réfugiés et des apatrides survenue en Europe dans l'Entre-deux-guerres[4]. Elle explique que certains peuples qui vivaient en Europe centrale et orientale dans les territoires ayant appartenu aux quatre empires (allemand, austro-hongrois, ottoman et russe) démantelés à l'issue du premier conflit mondial s'étaient vus imposer par la Société des Nations (SDN) le statut de « minorités nationales », dont les droits de résidence étaient protégés par des traités internationaux. D'autres au contraire avaient été dotés d'un gouvernement propre et avaient formé des Etats-nations calqués sur le modèle

1 Les lignes qui suivent s'inspirent de l'exposé de M. Kriegel, « De l'alliance royale à la religion d'Etat. Yerushalmi entre Baron, Baer, et Arendt », in S.-A. Goldberg, *L'Histoire et la mémoire de l'Histoire. Hommage à Yosef Hayim Yerushalmi* (2012, 29-43).

2 S. Baron, *A Social and Religious History of the Jews*, 1967, t. XI, 1967, 119

3 Y. Baer, *A History of the Jews in Christian Spain*, vol. 1 (1961, 1992).

4 H. Arendt, *Les origines du totalitarisme, II : L'impérialisme*, 1951 (2002, 564-573).

occidental. Seuls les seconds étaient devenus des nationaux à part entière, quand les premiers, condamnés à vivre dans ces nouveaux Etats-nations, s'étaient rapidement retrouvés victimes de déportations, soit que leur nationalité leur avait été confisquée par les gouvernements de ces Etats (comme ce fut le cas pour un million et demi de Russes dénaturalisés et expulsés d'Union soviétique par exemple), soit que, chassés de chez eux sans espoir de retour, ils fussent devenus apatrides dans les faits et condamnés à trouver refuge dans les pays occidentaux. Ainsi, conclut Hannah Arendt, seuls les nationaux avaient pu voir leurs droits de résidence, et tous ceux qui en découlaient, garantis dans les faits, quand les autres, que protégeaient *seulement* les droits naturels et universels de l'homme, s'étaient retrouvés « sans droits ».

Cette distinction moderne entre « nationaux » et « étrangers » avait-elle aussi eu une incidence importante aux temps médiévaux ? L'appartenance ou non à la communauté de référence (étatique, urbaine ou seigneuriale) avait-elle constitué au Moyen-Age un critère déterminant pour la stabilité de la résidence comme de nos jours la possession de la nationalité ?

Anna Matheson s'est employée à répondre à cette question en étudiant ce qu'avait été la condition, au regard du droit de cité, des juifs et des musulmans (*mudéjares*) qui vivaient dans les villes portugaises des XIII^e^, XIV^e^ et XV^e^ siècles. Les modes d'accès à la citoyenneté (*vizinhança*) de ces villes paraissent avoir été relativement souples. Ils variaient certes selon les lois municipales mais, en règle générale, pouvaient prétendre au droit de cité ceux qui y étaient nés (les *naturales*) et ceux qui y avaient résidé plus d'un an (les *moradores*), la décision d'inscription d'un nouveau citoyen étant à la discrétion des magistrats de la ville. Mais ce titre ne donnait pas automatiquement accès à la totalité des droits politiques puisque, si l'ensemble des citoyens pouvait participer aux assemblées municipales élargies (*assembleias alargadas*), seules les élites (*homini boni* ou *homens bons*) étaient admises à siéger dans les *assembleias restritas ordinárias* au cours desquelles se prenaient les décisions les plus importantes. Il semblerait donc, si nous la suivons bien, que les privilèges recherchés par le moyen de la citoyenneté étaient moins de nature politique qu'économique. En effet, si les *vizinhos* devaient acquitter une taxe de résidence (1 solde à Lisbonne) et étaient redevables des impôts locaux et royaux ainsi que de l'accomplissement de prestations gratuites de service, ils bénéficiaient tout de même, par rapport aux simples résidents et étrangers, d'exemptions fiscales substantielles. En particulier, ils se trouvaient exemptés du paiement de la majorité des péages (*portagens*) dus pour l'importation de denrées commerciales dans la ville. Il ressort de ceci que les juifs et musulmans qui avaient un intérêt certain à, de résident, devenir citoyens, étaient les marchands à qui ce titre accordait des avantages commerciaux par rapport à leurs concurrents. Mais, pour compliquer le tableau, l'auteure relève également que de simples résidents

juifs et musulmans de Lisbonne pouvaient, à l'instar de résidents chrétiens, être dispensés des droits de péage (contre paiement d'1 solde au fisc royal). De plus, il arrivait que les résidents des villes fussent admis à siéger avec les *vizinhos* dans les assemblées délibératives (*assembleias alargadas*) et, dans la ville de Loulé, Anna Matheson confirme la présence de résidents juifs et maures au sein de ces assemblées.

En somme, les avantages du droit de cité ont peut-être été court-circuités par ceux qu'offraient privilèges et exemptions. Ces derniers auraient eu pour effet d'écraser en fait, mais aussi en droit, les différences statutaires, si essentielles de nos jours, entre citoyen, résident et étranger. Juifs et musulmans paraissent donc avoir arbitré, pour choisir le statut qu'ils souhaitaient obtenir, entre des impératifs politiques et financiers, ces derniers l'ayant parfois emporté. On pourrait se demander, avec Hannah Arendt dans *Les origines du totalitarisme. I : L'Antisémitisme* (1951), si le choix de cette seconde stratégie n'était pas révélateur d'une certaine cécité politique des juifs – et, nous l'ajoutons, des musulmans –, aux conséquences funestes à terme, sans qu'il soit possible, sur la foi de cette seule étude de cas, de confirmer ou d'infirmer cette question pourtant cruciale[5].

Ce sont également des considérations d'ordre fiscal qui, nous dit Nadezda Koryakina, auraient conduit certains juifs marchands à ne pas rechercher le titre de citoyen et, plus encore, à tout faire pour l'éviter. L'auteure étudie le cas de ce juif de Lleida qui, au XIII[e] siècle, avait souhaité, pour affaire, déménager à Barcelone sans sa famille. Etaient compétentes pour régler les détails juridiques de cette migration, non seulement les autorités municipales, mais aussi celles des communautés juives de provenance et de destination. C'est que ces dernières devaient collectivement acquitter à la ville un impôt régulier et fixe, et avaient de ce fait intérêt à élargir le nombre de leurs contribuables. Comme le souligne Nadezda Koryakina : « Ce principe avait un impact significatif sur la politique d'immigration des communautés. » C'est ainsi que, plutôt que de retenir à elles le pouvoir souverain de fixer les conditions d'accès à la citoyenneté, les autorités municipales, directement intéressées, partageaient très pragmatiquement cette compétence avec les communautés juives. La littérature des *taqanot* issue des leaders communautaires et les *she'elot u-teshuvot* des rabbins des XIII[e] et XIV[e] siècles définissent donc, en partant du Talmud, différents statuts : celui des natifs (*bnei ha-ir*), celui des résidents de plus d'un mois (*yoshvei ha-ir*) et une troisième

5 H. Arendt, *Les origines du totalitarisme, I : Le totalitarisme,* 1951 (2002, 244). Signalons que, revenant, dans une conférence donnée en 1995, sur les accusations de Hannah Arendt, Yosef Hayim Yerushalmi ne voit dans l'attitude des juifs médiévaux consistant à ne pas avoir systématiquement recherché l'appartenance à la communauté politique et à lui avoir préféré parfois « l'alliance royale » aucune preuve d'une quelconque inconséquence politique, en restituant cette stratégie dans un contexte politico-juridique médiéval aux antipode du nôtre. Y. H. Yerushalmi, *Serviteurs des rois et non serviteurs des serviteurs. Sur quelques aspects de l'histoire politique des Juifs*, 2011.

catégorie apparemment peu stable, celle des *ha-darim ba-ir*. Dans l'affaire ci-mentionnée, rabbi Solomon ben Aderet (mort en 1310) devait résoudre le conflit opposant l'*aljama* de Barcelone au nouveau-venu, lequel se posait dans des termes opposés à ceux que l'on aurait pu croire, puisque la communauté plaidait pour une conception ouverte de la citoyenneté quand le second souhaitait demeurer résident et *francos*, c'est-à-dire libre de toute obligation fiscale.

Si nous nous transportons à présent dans le monde musulman, le problème de la résidence des *ḏimmīs* et son rapport avec leur intégration dans le corps politique se pose dans l'historiographie dans des termes différents. Mais Ahmed Oulddali a pourtant accepté d'apporter des éléments de réponse à la problématique commune de l'équipe, en utilisant le *K. al-Mabsūṭ* du juriste Šams al-Dīn al-Saraḫsī. L'auteur ḥanafite rappelle les distinctions classiques fondées sur l'appartenance religieuse et sur la qualité ou non de sujet du *Dār al-Islām*. Il redit des frontières nettes, du moins sur le papier, existant entre les non-musulmans qui bénéficiaient du droit de résidence dans les territoires musulmans – les infidèles protégés (*ḏimmī*) – et ceux qui, étrangers (*ḥarbī*) originaires de territoires sous contrôle ennemi (*dār al-ḥarb*), ne pouvaient prétendre qu'à de courts séjours munis de « sauf-conduits » à durée limitée (*amān*), en devenant temporairement « bénéficiaires de la sauvegarde » (*musta'mins*). Ahmed Oulddali souligne, au-delà des généralités rappelées, l'apport original de Šams al-Dīn al-Saraḫsī. En effet, cet auteur déclare : « En vertu du contrat de protection, il [*i. e.* le *ḏimmī*] est devenu l'un des habitants de notre territoire (*ṣāra min ahl dārinā*) et, de ce fait, il réside sur une terre qui est à lui (*dār nafsih*), [même] s'il n'en est pas réellement propriétaire. » Le contrat de protection, commente Ahmed Oulddali « permet aux adeptes des autres religions d'appartenir pleinement au *Dār al-islām* de sorte que celui-ci devient le leur. » Mais ce lien, ajoute-t-il, n'est pas simplement d'assise territoriale. Il est aussi un lien de solidarité en ce sens que le *ḏimmī* est solidaire des musulmans et non de leurs ennemis, ce que révèlent les lois sur le témoignage, les trésors trouvés ou la fiscalité qui discriminent toutes nettement entre les non-musulmans de l'intérieur et ceux de l'étranger. Ainsi le pacte de la *ḏimma* génère-t-il plus que des obligations contractuelles réciproques (et donc révocables), puisqu'il intègre les minorités au sein d'une communauté solidaire par rapport à l'extérieur.

La seconde question était relative aux règles permettant le maintien d'une vie communautaire autour d'un culte et a été traitée par Farid Bouchiba pour al-Andalus et le Maghreb aux VIII^e^-XV^e^ siècles, et par Marisa Bueno pour les royaumes chrétiens ibériques du XIII^e^ au XV^e^ siècle. Le premier s'est concentré sur les lieux de culte des *ḏimmīs*. Les tensions religieuses se cristallisent en effet fréquemment autour des édifices et des objets cultuels. Leur visibilité en faisant des marqueurs identitaires efficaces les transforme, pour cette raison même, en sujets privilégiés des réglementations restrictives venues des autorités. L'auteur a

ainsi étudié les réglementations du droit mālikite comparées à celles des autres écoles juridiques. Il en détaille toute la complexité, les régimes s'avérant plus ou moins stricts selon la nature des villes (*amṣār*) concernées. Le juriste Ibn Qudāma al-Maqdisī rappelle ainsi que le *fiqh* partage les villes en trois catégories, selon qu'elles ont été conquises par les armes (*'anwa*), par reddition (*ṣulḥ*) ou que ce sont des villes « nouvelles », dites *muḫtaṭṭa*.

Marisa Bueno a quant à elle montré comment les minorités juives et musulmanes avaient pu être autorisées à demeurer dans leurs milieux culturels, religieux et sociaux respectifs, et dessine une topographie religieuse détaillée de nombreuses villes chrétiennes de la péninsule ibérique. Les communautés juives purent vivre dans des quartiers à part parfois entourés de murs les transformant en de véritables forteresses (« château des juifs »). Ce regroupement facilitait d'une part l'application des règles halakhiques (lesquelles sacralisent les espaces et le temps), et protégeait d'autre part les juifs des attaques sporadiques de leurs voisins chrétiens. Les musulmans (*mudéjares*) se trouvaient plus dispersés que les juifs, du fait que leur droit n'imposait pas de frontières rituelles aussi strictes que celles des juifs. Le premier cas de quartier réservé (*morería*), octroyé en 1266 par Alphonse X à la communauté de Murcie, s'explique ainsi uniquement par des contraintes de sécurité. Mais Marisa Bueno montre comment l'avantage de la vie groupée, réclamé au départ par les groupes minoritaires, s'est, à la fin du Moyen-Age, retourné en quelque sorte contre eux, puisqu'ils finirent par se trouver enfermés dans des murs contraints. En effet, la situation se durcit à partir du XV^e^ siècle, ce qui s'explique par le contexte des luttes politiques castillanes qui voyaient s'affronter le pouvoir royal et les élites nobiliaires. Les minorités religieuses devinrent les cibles privilégiées de la noblesse pour atteindre indirectement le roi. Finalement, en 1480, les souverains Isabelle et Ferdinand devaient imposer la création de *juderías* et de *morerías.* Il n'y eut ainsi pas en Espagne, conclut Marisa Bueno, de modèle ségrégatif stable pendant tous les siècles médiévaux, mais ce dernier s'est sensiblement transformé.

En définitive, ces six études, menées à partir de sources de natures extrêmement variées pour documenter la condition juridique des minorités religieuses dans des mondes très différents, relèvent la gageure consistant à interroger par des questionnements neufs et un comparatisme encore rare, la manière par laquelle les trois religions du Livre expérimentèrent, aux temps médiévaux, une coexistence sur notre sol européen.

LES CONDITIONS DE LA RÉSIDENCE DU *ḎIMMĪ* : ENTRE RÈGLES ABSOLUES ET RELATIVES

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La question du statut des « protégés » (*ḏimmīs*) en islam suscite bien des débats, y compris chez les historiens spécialistes du Moyen âge. En témoigne le nombre croissant des travaux qui, ces dernières années, ont été consacrés au sujet[1]. On peut néanmoins remarquer que beaucoup de chercheurs étudient la *ḏimma* au travers du prisme du Pacte de ʿUmar[2], comme si celui-ci en était le texte fondateur. Cette manière de procéder nous semble manquer de rigueur d'une part parce que la *ḏimma* a préexisté audit Pacte, d'autre part parce que les droits et les devoirs des non-musulmans ont été définis de manières fort diverses par les juristes du VIII[e] et du IX[e] siècle. Ces derniers élaborèrent de fait chacun leurs propres listes de dispositions en s'inspirant à la fois de la tradition du Prophète et des traités conclus pendant les conquêtes. Ils n'avaient donc pas en leur possession un modèle unique pouvant faire autorité. Autrement dit, pour ces premiers juristes, la question de savoir quelles devaient être les obligations des *ḏimmīs* envers des musulmans relevait encore du domaine de la recherche

1 Certains de ces travaux s'appuient sur de véritables recherches historiques et contribuent ainsi à une meilleure connaissance du sujet. D'autres défendent des thèses fantaisistes ou sont trop tendancieux pour être utiles. C'est le cas des travaux de Bat Ye'or et de quelques autres. V. à ce sujet A. M. Emon, *Religious Pluralism and Islamic Law. Dhimmī and Others in the Empire of Law*, 2012, 34-46 ; M. R. Cohen, « Islam and the Jews : Myth, Counter-Myth, history », in *Jews among Muslims*, Sh. Deshen, W. P. Zenner (éd.), 1996, 50-63.

2 Le pacte de ʿUmar (*ʾahd ʿUmar*) ou les stipulations de ʿUmar (*al-šurūṭ al-ʿumariyya*) est un texte mentionnant un ensemble de mesures restrictives prises à l'encontre des tributaires. Les sources musulmanes l'attribuent au deuxième calife ʿUmar b. al-Ḫaṭṭāb (r. 634-644). Mais sa composition date vraisemblablement de l'époque abbasside. Le Pacte de ʿUmar, texte arabe et traductions [en ligne], disponible sur <http://www.cn-telma.fr/relmin/extrait1068/> (Consulté le 01 décembre, 2014).Sur le contenu de ce pacte et les différents problèmes qu'il soulève, v. aussi A. Fattal, *Le statut légal des non-musulmans en pays d'Islam*, Beyrouth, Dar el-Machreq, 1986², 60-63 ; M. R. Cohen, « What was the pact of ʿUmar ? A literary-historical study », *JSAI* 23 (1999), 100-131 ; M. Levy-Rubin, *Non-Muslims in the Early Islamic Empire.From Surrender to Coexistence*, 2011, 2-112.A. Noth, « Abgrenzungsprobleme zwischen Muslimen and Nicht-Muslimen : Die "Bedingungen ʿUmars (*aš-šurūṭ al-ʿumariyya*)" unter einem anderen Aspekt gelesen », *JSAI* 9 (1987). 290-315.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 127–148

 DOI 10.1484/M.RELMIN-EB.5.111596

personnelle (*iǧtihād*)[3], même s'il y avait un petit nombre d'éléments qui faisait l'unanimité[4].

De surcroît, l'opinion généralement admise selon laquelle le pacte de ʿUmar, dès le IX^e^ siècle de l'ère chrétienne, se serait imposé comme un canon doit fortement être nuancée[5]. De fait, une conception toujours minimaliste de la *ḏimma* se rencontre encore chez nombre d'auteurs postérieurs au X^e^ siècle. Ainsi, dans leurs inventaires des mesures concernant les *ḏimmīs*, ces juristes différencient les obligations inhérentes au pacte de protection des autres restrictions qui pouvaient être imposées aux habitants non musulmans d'une ville ou d'une région en vertu d'un traité de capitulation passé avec eux. Une telle distinction trahit le souci de hiérarchiser les dispositions de la *ḏimma* en prenant en considération le fait que beaucoup d'entre elles ne pouvaient s'appliquer de manière systématique ou universelle[6].

Il convient dès lors de s'interroger sur la manière dont les juristes musulmans conçoivent la protection octroyée aux non-musulmans et sur le statut légal des personnes dites « protégées ». Pour ce faire, nous allons nous appuyer essentiellement, mais pas exclusivement, sur deux ouvrages de droit datant du IX^e^ siècle, à savoir le *K. al-Ḥāwī* du juriste šāfiʿite al-Māwardī (m. 450/1058) et le *K. al-Mabsūṭ* du ḥanafite al-Saraḫsī (m. 483/1091). La principale raison qui a présidé au choix de ces sources est que leurs auteurs respectifs vécurent à une époque où la pensée juridique musulmane avait atteint son apogée. Les normes du droit, y compris celles qui concernaient les non-musulmans, étaient déjà établies, même si, au sein des écoles de jurisprudences, on continuait à en débattre différents aspects. Aussi, les opinions exprimées par ces deux juristes sont-elles représentatives de ce que l'on peut considérer comme étant la conception élaborée de la *ḏimma*.

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3 On sait que les juristes musulmans s'interdisent le recours à l'interprétation personnelle lorsqu'il y a un texte (*naṣṣ*) faisant autorité (*i. e.* un verset coranique ou une tradition authentique).

4 Parmi ces éléments admis par tous on trouve notamment le versement de la capitation (*ǧizya*) que les juristes considèrent comme une prescription coranique.

5 Pour beaucoup d'historiens, les lois de la *ḏimma* furent définitivement fixées au cours du IX^e^ siècle. Les mesures consignées dans le pacte de ʿUmar se seraient alors imposées comme un code applicable aux non-musulmans vivant en terre d'islam. V. à ce sujet, A.-M. Eddé, F. Micheau et Ch. Picard, *Communautés chrétiennes en pays d'Islam. Du début du VII^e^ siècle au milieu du XI^e^ siècle,* 1997, 56-57 ; J.-Cl. Garcin *et al.* (ed.), *États, sociétés et cultures du monde musulman médiéval (X^e^-XV^e^ siècle)*, 2000, III, 130.

6 Pour mieux saisir l'importance de cette distinction, il faut savoir quele pacte de protection, tel qu'il est conçu par les juristes, est un contrat (*ʿaqd*) tacite consistant à garantir aux non-musulmans la sauvegarde de leurs personnes et de leurs biens en échange du versement par eux de la capitation (*ǧizya*). Ses conditions, peu nombreuses, concernent tous les tributaires et sont considérées comme le minimum requis pour pouvoir jouir de la protection. Parallèlement à ce pacte qui ne donne pas nécessairement lieu à un document écrit, il pouvait y avoir un traité mentionnant les conditions spécifiques imposées aux non-musulmans lors de la conquête de leur ville par les musulmans. Si un tel traité existe, ses clauses prennent aussi un caractère obligatoire, mais elles ne s'appliquent en principe qu'aux habitants de la ville concernée. Cette catégorie d'obligations représente en réalité une bonne partie des dispositions de la *ḏimma* habituellement mentionnées dans les ouvrages de droit, comme nous allons le voir.

Le présent travail se divise en deux parties. La première traite des obligations du *ḏimmī* et du classement dont elles font l'objet dans les traités de droit musulman. Nous donnerons un bref aperçu sur le traitement réservé aux autres religions au début de l'islam, en insistant notamment sur les évolutions de la législation dans en ce domaine depuis l'époque de Muḥammed. Ensuite, nous étudierons les principes de classification et de hiérarchisation des dispositions de la *ḏimma* tels qu'ils apparaissent chez al-Māwardī. Dans la seconde partie, nous aborderons la question du statut juridique des non-musulmans résidant en pays d'Islam. Pour mieux comprendre la nature de ce statut, nous le comparerons à celui de l'étranger de passage dans les territoires musulmans (*musta'min*).

Les devoirs hiérarchisés du ḏimmī

La *ḏimma* primitive

D'après l'historiographie arabe dont les sources écrites les plus anciennes datent du début du IX[e] siècle, c'est le Prophète lui-même qui a jeté les bases d'un statut particulier pour les non-musulmans résidants en territoires musulmans[7]. La tradition rapporte en effet qu'entre 625 et 632, Muḥammad avait conclu des traités de paix avec les habitants de plusieurs localités situées dans la Péninsule arabique. Tel fut le cas avec les populations chrétiennes de Naǧrān, de Bahreïn et d'Ayla. Le contenu exact de ces traités est difficile à connaître. La raison en est que, parmi les quelques textes qui nous ont été transmis, certains sont confus ou contradictoires. D'autres ont subi des modifications plus ou moins importantes ou ont été forgés à des époques postérieures[8]. Mais il est à peu près certain qu'au moins une partie de ces accords stipulait que les chrétiens devaient acquitter une taxe fixe, versée en espèce ou en nature[9]. En contrepartie, les musulmans s'engageaient à garantir leur sécurité et celle de leurs biens. Des conventions similaires eurent lieu avec les juifs de Ḫaybar, de Fadak et de Wādī al-Qurā, en vertu desquelles les habitants de ces localités pouvaient continuer à cultiver leurs terres, moyennant le versement de la moitié de leurs récoltes[10].

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7 Les informations dont on dispose sur cette première période de l'islam proviennent principalement des récits rédigés à partir du IX[e] siècle. Or, ces récits sont souvent le fruit d'une construction et ne reflètent pas nécessairement la réalité des événements qui eurent lieu deux siècles auparavant. Il convient donc de les prendre avec précaution. V. à ce sujet, Th. Bianquis, P. Guichard et M. Tillier, *Les débuts du monde musulman, VII[e]-X[e] siècle. De Muḥammad aux dynasties autonomes*, 2012, 12.

8 V. A.-M. Eddé, F. Micheau, Ch. Picard, *Communautés chrétiennes en pays d'Islam.* 55.

9 V. Al-Balāḏurī,*Futūḥ al-buldān*, éd. ʿAbdallah al-Ṭabbāʿ, 1987, 83-106 ; A. Fattal, *Le statut légal des non-musulmans*, 18-24.

10 Al-Balāḏurī, *Futūḥ*, 23-41 ; Abū Yūsuf, *Kitāb al-Ḫarāǧ*[désormais, *Ḫarāǧ*], 1979, 50-51 ; W. Kallfelz, *Nichtmuslimische Untertanen im Islam :Grundlage, Ideologie und Praxis der Politik frühislamischer*

Après la mort du Prophète, les califes orthodoxes (Abū Bakr, ʿUmar, ʿUṯmān et ʿAlī) maintinrent ces traités et en conclurent d'autres avec les populations des régions par eux conquises. Par ailleurs, le dispositif prévu initialement pour les juifs et les chrétiens fut étendu aux adeptes des religions sabéenne et zoroastrienne. Bien qu'ils ne fussent pas à proprement parler des monothéistes, les zoroastriens furent assimilés aux gens du Livre. On leur octroya les mêmes droits que ces derniers, mais il n'était pas permis aux musulmans d'épouser leurs femmes ou de consommer leur nourriture[11].

Ainsi, si l'on en croit les sources musulmanes, la *ḏimma* proposée aux gens du Livre à l'époque du Prophète aurait comporté peu de conditions. Les populations juive, chrétienne et zoroastrienne avaient pour principal devoir vis-à-vis des autorités musulmanes de payer les taxes exigées d'elles. Cette sorte de convention s'inspirait probablement des us et coutumes de l'Arabie préislamique, où les guerres tribales se soldaient souvent par des arrangements financiers entre belligérants, les vainqueurs imposant aux vaincus un tribut à verser en numéraire ou en nature.

Dans la mesure où elle émanait de la tradition du Prophète, cette forme primitive de *ḏimma* s'est imposée comme le modèle à suivre en matière de relations entre les musulmans et les adeptes des religions protégées. Aux VIII^e^ et IX^e^ siècles, les juristes s'y référaient pour définir les termes des traités de paix (*ṣulḥ*) pouvant être conclus avec les habitants des villes prises par les armées musulmanes[12].C'est ainsi que dans les ouvrages de droit composés à partir de cette époque, les *ḏimmīs* étaient souvent appelés « les gens de la capitation » (*ahl al-ǧizya*) par référence à la taxe particulière qu'ils payaient et qui les distinguait des autres groupes non-musulmans, à savoir les associateurs (*mušrikūn*)[13] et les infidèles n'ayant pas conclu de traité avec les musulmans (*ḥarbīyūn* ou *muḥāribūn*)[14].

Si la *sunna* fournissait les éléments de base permettant de définir le cadre général de la *ḏimma*, elle ne pouvait répondre concrètement aux questions de plus en plus nombreuses que suscitait l'existence de populations non-musulmanes au sein des territoires musulmans. Il fallait donc légiférer pour adapter le droit aux situations

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Herrscher gegenüber ihren nichtmuslimischen Untertanen mit besonderem Blick auf die Dynastie der Abbasiden (749-1248), 1995, 19-22.

11 V. *Ḫarāǧ*, 29 ; al-Šāfiʿī, *al-Umm*[désormais, *Umm*],éd. R. F. ʿAbd al-Muṭṭalib, 2001, V, 434. A. Fattal, *Le statut légal,* 13 ; 133 ; W. Kallfelz, *Nichtmuslimische Untertanen im Islam,* 91.

12 Pour établir la possibilité d'accorder la protection aux non-musulmans en échange de la *ǧizya*, les juristes s'appuient sur Coran 9,29 et surtout sur les quelques traditions attestant que le Prophète percevait une taxe des juifs et des chrétiens qui vivaient dans les régions sous son contrôle. V. par exemple,*Umm,* V, 684.

13 En théorie, les associateurs (*mušrikūn*) sont exclus de la *ḏimma* en raison de leurs croyances païennes. Mais certaines écoles juridiques limitent cette exclusion aux polythéistes arabes, voire aux seuls membres de la tribu de Qurayš qui est celle du Prophète. V. Ibn Rushd al-Ǧadd, *al-Muqaddimāt al-mumahhidāt,* 1988, I, 376 ; Ibn al-Qayyim, *Aḥkām ahl al-ḏimma*, éd. Y. b. A. al-Bakrī, 1997, I, 89-92.

14 V. par exemple, *Ḫarāǧ,* 122 ;*Umm*, V, 479.

nouvelles tout en préservant le cadre hérité de l'époque du Prophète. Telle fut la politique des califes successifs qui, par leurs multiples décisions, firent évoluer les lois de protection sans en remettre en cause les fondements. Intégrées par les juristes, ces décisions califales donnèrent lieu à une conception plus élaborée de la *ḏimma*.

De la *ḏimma* primitive à la *ḏimma* élaborée

Cette évolution est étroitement liée au contexte des conquêtes. En effet, l'avancée rapide des armées musulmanes dans les territoires anciennement sous domination byzantine et perse donna lieu à une situation nouvelle. Les vastes régions conquises dont la Mésopotamie (Irak), la Perse, la Syrie-Palestine (*al-šām*) et l'Égypte étaient essentiellement peuplées de chrétiens et de zoroastriens. Pour en assurer l'administration, les califes et les gouverneurs durent mettre en place des mesures adaptées aux besoins et à la situation de chaque province. De ce fait, les nouveaux traités de conquêtes se trouvèrent plus développés, comportant un certain nombre de conditions supplémentaires[15]. On y voit apparaître des clauses concernant la protection des édifices religieux, la construction des ponts et l'entretien des routes. Certains traités mentionnent également l'obligation pour les non-musulmans de venir en aide aux combattants et aux civils musulmans, et l'interdiction de toute forme de collaboration avec l'ennemi. L'accumulation de ces mesures fit passer la *ḏimma* à un niveau d'élaboration plus poussé mais sans que l'on note pour autant de véritable rupture avec les pratiques mises en place pendant la période précédente.

Le pacte de ʿUmar est vraisemblablement l'un des documents résultant de ce travail de compilation. Bien que les circonstances exactes de sa composition demeurent inconnues, il semble bien que ses auteurs ont réuni des éléments d'origines diverses, dont certains provenaient des traités de conquête musulmanes et d'autres s'inspiraient de pratiques antérieures à celles-ci. En effet, comme l'a bien montré M. Levi-Rubin, il existe nombre de similitudes entre les dispositions du pacte de ʿUmar et les lois romaines, byzantines et perses en vigueur au Moyen-Orient avant l'avènement de l'islam[16].

D'autres documents renfermant des clauses plus ou moins nombreuses ont vu le jour entre le VIII[e] et le IX[e] siècle sans être aussi connus que le pacte de ʿUmar. Deux d'entre eux nous sont fournis par le juriste ḥanafite Abū Yūsuf (m. 182/798) d'une part, et par al-Šāfiʿī (m. 204/820) d'autre part. S'appuyant sur des matériaux puisés dans la tradition du Prophète et dans la pratique des califes antérieurs, ces juristes semblent avoir voulu donner aux souverains et aux fonctionnaires

15 Ces traités posent les mêmes problèmes que ceux datant de l'époque du Prophète. En effet, les textes qui nous sont parvenus sont altérés, ce qui ne permet pas d'en connaître avec certitude le contenu. V., Cl. Cahen, « *Ḏh*imma », *EI*[2], II, 234.

16 M. Levy-Rubin, *Non-Muslims in the Early Islamic Empire,* 8-20, 120-130.

de l'État une vision d'ensemble qui leur permettrait d'administrer efficacement les populations non-musulmanes. Pour ce faire, ils s'efforcèrent d'élaborer des listes complètes et harmonisées de dispositions pouvant servir de modèle. Cette volonté de doter l'administration califale d'un catalogue de mesures apparaît clairement chez Abū Yūsuf, qui a composé son traité d'impôt foncier (*Kitāb al-Ḫarāǧ*) à la demande du calife abbasside Hārūn al-Rašīd (r. 786-809)[17]. Dans le cas d'al-Šāfiʿī, l'objectif poursuivi semble être double : il s'agissait de proposer un formulaire contenant l'ensemble des règles que les non-musulmans devaient observer d'une part, et d'enseigner aux élèves juristes comment rédiger un traité de paix d'autre part[18].

Au cours des siècles suivants, les juristes se sont penchés sur les droits et les devoirs des non-musulmans vivants sous la loi musulmane en partant des décisions prises depuis l'époque du Prophète. Conscients du fait que ces mesures ne se valaient pas ni n'avaient toutes force de loi, ils essayèrent de les organiser selon un classement qui prenait en compte l'importance de chacune d'elles. Parmi les auteurs ayant opté pour cette méthode, on peut citer al-Ġazālī (m. 555/1111) et surtout al-Māwardī[19]. Ce juriste qui fut au service du calife abbasside al-Qā'im (r. 1031-1075) propose deux logiques de classement. Il en applique l'une dans sa somme juridique intitulée *al-Ḥāwī al-kabīr* et l'autre dans son traité de droit public connu sous le titre de *al-Aḥkām al-sulṭāniyya*[20]. C'est sur la première que nous allons nous appuyer. Plus détaillée, elle permet de mieux saisir les principes ayant présidé au classement adopté par l'auteur.

Le classement des obligations du *ḏimmī* par al-Māwardī

Al-Mawārdī s'efforce de mettre de l'ordre dans un amas de mesures en les organisant selon une hiérarchie qui, comme nous allons le voir, tient compte d'une multitude de critères. Sa façon de procéder est originale parce qu'il distingue les

17 V.*Ḫarāǧ*, 127 ; M. Levy-Rubin, *Non-Muslims in the Early Islamic Empire,* 77-78.

18 *Umm*, V, 471-472, 479 ; Le traité proposé par al-Šāfiʿī a la forme d'un formulaire notarié prêt à l'emploi. Cette convention-type était destinée à servir comme un modèle pour la rédaction des traités de paix entre les musulmans et les habitants des villes conquises. V. A. Fattal, *Le statut legal*, 77-81 ; M. Levy-Rubin, *Non-Muslims in the Early Islamic Empire,* 78-82 ; 173-175 ; M. R. Cohen, « What was the pact of ʿUmar ? », 119-120.

19 V. al-Ġazālī, *al-Wasīṭ fī al-maḏhab*[désormais, *wasīṭ* sans nom d'auteur], éd. M. M. Tāmir, 1997, VII, 79-87. Des classifications de forme similaire se trouvent chez certains auteurs ḥanbalites, v. par exemple, Ibn Qudāma al-Maqdisī, *al-Muġnī*, éd. A. al-Turkī, 1997, XIII, 247-248 ; Ibn al-Qayyim, *Aḥkām ahl al-ḏimma*, II, 1360-1361.

20 Al-Māwardī, *al-Ḥāwī al-kabīr* [désormais, *Ḥāwī*], 1994, XIV, 316-319 ; *Id*., *al-Aḥkām al-sulṭāniyya* [désormais, *Aḥkām sulṭāniyya*], éd. A. M. al-Baġdādī, Koweït, Dār Ibn Qutayba, 1989, 184-185 ; *Les statuts gouvernementaux ou règles de droit public et administratif*, trad. E. Fagnan, 1915, 305-306 ; *The Ordinances of Government*, trad. W. H. Wahba, 1996, 161.

conditions intrinsèques, celles qui sont inhérentes au pacte de la *ḏimma* de celles qui ne le sont pas. Les premières vont de soi dès lors qu'il y a contrat de protection et, de ce fait, il n'est pas nécessaire de les mentionner dans les traités. Tel n'est pas le cas des conditions extrinsèques qui ne s'appliquent que si elles figurent comme clauses dans un traité ayant été conclu avec les non-musulmans. Autrement dit, notre auteur classe les obligations imposées aux *ḏimmīs* en fonction de leur importance et selon qu'elles sont introduites par le contrat de protection lui-même ou par les clauses stipulées dans un traité de capitulation[21]. C'est ainsi qu'il divise l'ensemble des conditions en cinq catégories que nous résumons ici.

Les conditions imposées par le contrat de protection

Cette catégorie renferme trois articles : les *ḏimmīs* doivent a) acquitter la capitation (*ǧizya*) ;b) se soumettre à la loi musulmane ; c) s'abstenir de combattre les musulmans. Ces obligations s'appliquent d'emblée dès lors qu'il y a un contrat de *ḏimma*. Aussi n'est-il pas nécessaire de les stipuler dans le traité de paix susceptible d'être conclu entre l'autorité musulmane et les non-musulmans. Lorsqu'on les stipule, ce n'est que pour corroborer les conditions déjà établies par le contrat. La violation de l'une d'elles entraîne la rupture du pacte de protection[22].

Les conditions imposées par le contrat de protection, selon certains juristes, ou par le traité de capitulation, selon d'autres[23]

Cette catégorie renferme six articles :a) les *ḏimmīs* ne doivent ni attaquer ni dénaturer le Livre de Dieu ; b) ni proférer des insultes contre le Prophète en l'accusant de mensonge ou en jetant le discrédit sur lui ; c) ni parler de la religion musulmane pour la dénigrer ou la contester ; d) ni détourner un musulman de sa foi ni lui nuire dans sa personne ou ses biens ; e) ni forniquer avec une musulmane ni la prendre pour épouse ; f) ni venir en aide aux ennemis ou accueillir aucun de leurs espions, ni leur transmettre des informations sur les musulmans[24]. Ces actions, précise al-Māwardī, sont interdites en raison de leur caractère illicite en islam.

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21 Il faut savoir que les juristes distinguent le contrat de protection (*ḏimma*) en tant que tel du traité de paix ou de capitulation que les musulmans peuvent conclure avec la population non-musulmane d'une ville conquise.

22 *Ḥāwī,* XIV, 317..
مَا وَجَبَ بِالْعَقْدِ، وَكَانَ الشَّرْطُ فِيهِ مُؤَكِّدًا لَا مُوجِبًا فَثَلَاثَةٌ أَشْيَاءَ : أَحَدُهَا الْتِزَامُ الْجِزْيَةِ ... وَالثَّانِي الْتِزَامُ أَحْكَامِهَا بِالْإِسْلَامِ فِيمَا أَجَابُوهُ مِنَ الْمُسْلِمِينَ، لِقَوْلِهِ تَعَالَى : وَهُمْ صَاغِرُونَ وَالصَّغَارُ أَنْ تَجْرِيَ أَحْكَامُ الْإِسْلَامِ عَلَيْهِمْ. وَالثَّالِثُ أَنْ لَا يَجْتَمِعُوا عَلَى قِتَالِ الْمُسْلِمِينَ...

23 Pour certains juristes, dit al-Māwardī, les conditions relevant de cette deuxième catégorie sont introduites d'emblée par le contrat de protection, si bien qu'il n'est pas nécessaire de les stipuler alors que, pour d'autres, elles doivent être stipulées dans le traité.

24 *Ḥāwī,* XIV, 317-318.

Aussi les *ḏimmīs* doivent-ils s'en abstenir, si ceci est expressément mentionné dans le traité de capitulation.

Mais certains juristes vont plus loin en affirmant que ces conditions procèdent du contrat de protection lui-même, et que l'on ne les mentionne dans le traité de paix que pour insister sur leur caractère obligatoire. Ainsi leur caractère coercitif serait indépendant du traité lui-même. Ces juristes mettent en avant le préjudice que les délits en question pourraient provoquer chez les musulmans. Et c'est pourquoi ils considèrent que si les *ḏimmīs* violent ces interdictions, le contrat sera rompu[25].

Pour d'autres juristes en revanche, les devoirs relevant de cette catégorie ne sont pas introduits par le contrat de protection en tant que tel, puisqu'ils ne font pas partie des obligations inhérentes à la capitation (*lawāzim al-ǧizya*). Mais ils prennent un caractère obligatoire s'ils sont stipulées dans le traité, parce qu'il s'agit d'empêcher des actions illicites pouvant entraîner un préjudice évident. Parmi les juristes qui sont de cet avis, certains soutiennent que la violation des précédentes conditions conduit à la rupture du contrat de protection[26]. D'autres affirment le contraire. Selon eux, la rupture n'a lieu que lorsque les *ḏimmīs* violent les clauses intrinsèques du contrat. Or, les interdictions susmentionnées ne font pas partie de celles-ci[27].

> Les conditions que le contrat de protection n'impose pas mais qui prennent un caractère strictement obligatoire quand elles sont stipulées par un traité

Comme la précédente, cette catégorie comporte six articles dont voici un résumé. Les *ḏimmīs* doivent s'abstenir des choses suivantes : a) bâtir des édifices plus hauts que ceux des musulmans ; b) construire de nouvelles églises ; c) montrer les croix ;d) consommer du vin ou exhiber des porcs dans les lieux publics[28] ; e) manifester ostentatoirement leurs croyances fausses concernant *ʿUzayr*[29] et le Messie ; f) réciter publiquement leurs livres, leurs prières ou sonner les cloches[30]. Si ces choses, déclare al-Māwardī, sont prohibées c'est parce qu'elles sont répréhensibles (*munkar*, pl. *munkarāt*). Les *ḏimmīs* sont sommés d'y renoncer. Cependant, les

25 *Ḥāwī,* XIV, 318.

26 Ces conditions deviennent obligatoires dès lors qu'elles sont stipulées dans un traité. *Ḥāwī,* XIV, 318

27 *Ḥāwī,* XIV, 318.

أَمَّا الْقِسْمُ الثَّانِي : وَهُوَ مَا وَجَبَ بِالشَّرْطِ، وَاخْتُلِفَ فِي وُجُوبِهِ بِالْعَقْدِ وَهُوَ مَا مُنِعُوا مِنْهُ لِتَحْرِيمِهِ، وَذَلِكَ سِتَّةُ أَشْيَاءَ : أَحَدُهَا أَنْ لَا يَذْكُرُوا كِتَابَ اللَّهِ بِطَعْنٍ عَلَيْهِ وَلَا تَحْرِيفٍ لَهُ. وَالثَّانِي أَنْ لَا يَذْكُرُوا رَسُولَ اللَّهِ (ص) بِتَكْذِيبٍ لَهُ، وَلَا إزْرَاءٍ عَلَيْهِ. وَالثَّالِثُ أَنْ لَا يَذْكُرُوا دِينَ اللَّهِ بِذَمٍّ لَهُ، وَلَا قَدْحٍ فِيهِ. وَالرَّابِعُ أَنْ لَا يَفْتِنُوا مُسْلِمًا عَنْ دِينِهِ، وَلَا يَتَعَرَّضُوا لِدَمِهِ أَوْ مَالِهِ. وَالْخَامِسُ أَنْ لَا يُصِيبُوا مُسْلِمَةً بِزِنًا، وَلَا بِاسْمِ نِكَاحٍ. وَالسَّادِسُ أَنْ لَا يُعِينُوا أَهْلَ الْحَرْبِ، وَلَايُؤْوُوا عَيْنًا لَهُمْ، وَلَا يَنْقُلُوا أَخْبَارَ الْمُسْلِمِينَ إلَيْهِمْ. فَهَذِهِ السِّتَّةُ تَجِبُ بِالشَّرْطِ، وَفِي وُجُوبِهَا بِالْعَقْدِ قَوْلَانِ : أَحَدُهُمَا تَجِبُ بِالْعَقْدِ، وَيَكُونُ الشَّرْطُ تَأْكِيدًا، تَعْلِيلًا بِدُخُولِ الضَّرَرِ بِهَا عَلَى الْمُسْلِمِينَ، فَعَلَى هَذَا إنْ خَالَفُوهَا انْتَقَضَ عَهْدُهُمْ. وَالْقَوْلُ الثَّانِي إنَّهَا لَا تَجِبُ بِالْعَقْدِ، تَعْلِيلًا بِدُخُولِهِمْ تَحْتَ الْقُدْرَةِ، وَخُرُوجِهَا عَنْ لَوَازِمِ الْجِزْيَةِ، لَكِنَّهَا تَلْزَمُ بِالشَّرْطِ، لِتَحْرِيمِهَا وَظُهُورِ الضَّرَرِ بِهَا... فَعَلَى هَذَا إنْ خَالَفُوهَا بَعْدَ اشْتِرَاطِهَا، فَفِي انْتِقَاضِ عَهْدِهِمْ بِهَا قَوْلَانِ : أَحَدُهُمَا يَنْتَقِضُ بِهَا عَهْدُهُمْ لِلْزُومِهَا بِالشَّرْطِ. وَالْقَوْلُ الثَّانِي لَا يَنْتَقِضُ بِهَا عَهْدُهُمْ، لِخُرُوجِهَا عَنْ لَوَازِمِ الْعَقْدِ.

28 Cela inclut aussi le fait de donner à boire ou à manger à un musulman du vin ou du porc.

29 Le Coran reproche aux juifs et aux chrétiens de croire respectivement que ʿUzayr est le Messie sont les fils de Dieu (Coran, 9, 30). V. H. Lazarus-Yafeh, « ʿUzayr », *EI²*, X, 960.

30 *Ḥāwī,* XIV, 318.

positions divergent quant aux effets de la violation de l'une de ces interdictions sur le maintient du pacte de protection[31].

Les conditions que le contrat de protection n'impose pas ni qui ne prennent de caractère strictement obligatoire même stipulées dans un traité

Elles sont également au nombre de six :a) il leur est interdit d'utiliser pour montures des chevaux ;b) ils doivent changer leur tenues vestimentaires en portant les signes distinctifs et la ceinture (*zunnār*),de sorte que l'on puisse les reconnaître et les différencier des musulmans[32] ; c) ils doivent enterrer leurs morts de manière discrète, sans montrer ostensiblement leurs cortèges funéraires ; d) et sans qu'il y ait étalage de pleurs ou de lamentations ; e) ils ne doivent ni entrer dans les mosquées ; f) ni posséder des esclaves musulmans[33].

Ces prescriptions, dit al-Māwardī, portent sur des actes pouvant offenser les musulmans. Elles ne s'appliquent que si elles ont été stipulées dans un traité. Si une telle stipulation existe, les *ḏimmīs* seront tenus de l'observer. Ceux d'entre eux qui refusent de s'y soumettre encourent une peine discrétionnaire (*taʿzīr*)[34], mais leur statut de « protégés » ne sera pas remis en cause, car les règles auxquelles ils auront désobéi n'ont pas été instituées pour proscrire des actes illicites où répréhensibles[35]. Autrement dit, on n'annulera pas le contrat de protection pour des infractions aussi vénielles[36].

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31 *Ḥāwī,* XIV, 318.
وَأَمَّا الْقِسْمُ الثَّالِثُ : وَهُوَ مَا لَا يَجِبُ بِالْعَقْدِ، وَيَجِبُ بِالشَّرْطِ، وَهُوَ مَا مَنَعُوا مِنْهُ لِأَنَّهُ مُنْكَرٌ، فَذَلِكَ سِتَّةُ أَشْيَاءَ : أَحَدُهَا أَنْ لَا يَعْلُوا عَلَى الْمُسْلِمِينَ فِي الْأَبْنِيَةِ... وَالثَّانِي أَنْ لَا يُحْدِثُوا فِي بِلَادِ الْإِسْلَامِ بِيَعَةً، وَلَا كَنِيسَةً... وَالثَّالِثُ أَنْ لَا يُجَاهِرُوا الْمُسْلِمِينَ بِإِظْهَارِ صُلْبَانِهِمْ. وَالرَّابِعُ أَنْ لَا يَتَظَاهَرُوا بِشُرْبِ خُمُورِهِمْ، وَخَنَازِيرِهِمْ، وَلَا يَسْقُوا مُسْلِمًا خَمْرًا، وَلَا يُطْعِمُونَهُمْ خِنْزِيرًا. وَالْخَامِسُ أَنْ لَا يَتَظَاهَرُوا بِمَا قَدَّرَهُ الشَّرْعُ مِنْ قَوْلِهِمْ عُزَيْرٌ ابْنُ اللَّهِ، وَالْمَسِيحُ. وَالسَّادِسُ أَنْ لَا يُظْهِرُوا بِتِلَاوَةِ مَا نُسِخَ مِنْ كُتُبِهِمْ، وَلَا يُظْهِرُوا فِعْلَ مَا نُسِخَ مِنْ صَلَوَاتِهِمْ وَأَصْوَاتِ نَوَاقِيسِهِمْ. فَهَذِهِ سِتَّةٌ تَجِبُ عَلَيْهِمْ بِالشَّرْطِ لِأَنَّهَا مَنَاكِيرُ لَزِمَ الْمَنْعُ مِنْهَا بِالشَّرْعِ، فَإِنْ خَالَفُوهَا، فَفِي بُطْلَانِ عَهْدِهِمْ بِهَا قَوْلَانِ عَلَى مَا مَضَى.

32 Le *Zunnār* est une ceinture spéciale que portaient les *ḏimmīs,* v. A. S. Tritton, « Zunnār », *EI²*, XI, 617 ; A. Fattal, *Le statut légal*, 96-101.

33 *Ḥāwī,* XIV, 318-319.

34 Le droit musulman reconnaît deux sortes de peines : l'une est fixée par le Coran, ce sont les peines coraniques ou légales (*ḥdd*, pl. *ḥudūd*), et l'autre est laissée à la discrétion des juges. Plus légères, les peines relevant de la seconde catégorie ne s'appliquent théoriquement qu'aux délits non passibles de *ḥadd*. Parmi les sanctions pouvant être décidées à ce titre par le magistrat, il y a l'emprisonnement et la flagellation.

35 *Ḥāwī,* XIV, 319.
وَأَمَّا الْقِسْمُ الرَّابِعُ : وَهُوَ مَا لَمْ يَجِبْ بِالْعَقْدِ، وَاخْتُلِفَ فِي وُجُوبِهِ بِالشَّرْطِ، وَهُوَ مَا مُنِعُوا مِنْهُ، لِتَطَاوُلِهِمْ بِهِ، وَذَلِكَ سِتَّةُ أَشْيَاءَ : أَحَدُهَا أَنْ يُمْنَعُوا مِنْ رُكُوبِ الْخَيْلِ عِتَاقًا، وَهِجَانًا... وَالثَّانِي تَغْيِيرُ هَيْئَاتِهِمْ، بِلُبْسِ الغِيَارِ وَشَدِّ الزُّنَّارِ، لِيَتَمَيَّزُوا مِنَ الْمُسْلِمِينَ بِاخْتِلَافِ الْهَيْئَةِ ... وَالثَّالِثُ أَنْ يُخْفُوا دَفْنَ مَوْتَاهُمْ، وَلَا يُظْهِرُوا إِخْرَاجَ جَنَائِزِهِمْ. وَالرَّابِعُ أَنْ لَا يُظْهِرُوا عَلَى مَوْتَاهُمْ لَطْمًا، وَلَا نَدْبًا، وَلَا نَوْحًا. وَالْخَامِسُ أَنْ لَا يَدْخُلُوا مَسَاجِدَنَا صِيَانَةً ... وَالسَّادِسُ أَنْ لَا يَتَمَلَّكُوا مِنْ رَقِيقِ الْمُسْلِمِينَ عَبْدًا، وَلَا أَمَةً... فَهَذِهِ السِّتَّةُ إِنْ لَمْ تُشْتَرَطْ عَلَيْهِمْ لَمْ تَلْزَمْهُمْ، وَفِي لُزُومِهَا إِذَا شُرِطَتْ عَلَيْهِمْ وَجْهَانِ : أَحَدُهُمَا لَا تَلْزَمُ لِخُرُوجِهَا عَلَى مُحَرَّمٍ وَمُنْكَرٍ، فَعَلَى هَذَا إِنْ خَالَفُوهَا بَعْدَ اشْتِرَاطِهَا عُزِّرُوا عَلَيْهَا، وَلَمْ يَنْتَقِضْ بِهَا عَهْدُهُمْ. وَالْوَجْهُ الثَّانِي أَنَّهَا تَلْزَمُ بِالشَّرْطِ ... فَعَلَى هَذَا إِذَا خَالَفُوهَا بَعْدَ الشَّرْطِ، فَعَلَى انْتِقَاضِ عَهْدِهِمْ بِهَا قَوْلَانِ عَلَى مَا مَضَى.

36 C'est ce qui les différencie des conditions relevant de la deuxième et de la troisième catégorie. Notons qu'al-Māwardī mentionne un autre point de vue selon lequel, en cas de violation des conditions appartenant à cette catégorie, le contrat de protection sera rompu.

Les conditions que ni le contrat de protection ni les clauses d'un traité n'imposent

Ce sont les six prescriptions suivantes : a) les *ḏimmīs* ne doivent pas élever la voix en présence des musulmans ; b) ni les devancer dans les assemblées (*maǧālis*) ; c) ni les gêner quand ils circulent sur les chemins ; d) ni les employer dans des tâches ingrates ou humiliantes ; e) ils doivent les saluer les premiers ; f) et leur venir en aide en cas de besoin[37].

Les *ḏimmīs*, explique al-Māwardī, peuvent être soumis à ces obligations dans le but de les abaisser et de les avilir. S'ils refusent de les respecter, on les obligera à s'y plier et s'ils récidivent, on les punira en leur infligeant des peines discrétionnaires. Mais en toute hypothèse, leur violation n'entraînera pas la rupture du pacte de protection[38].

Comme on peut le constater, la plupart des prescriptions mentionnées dans ce passage du *K. al-Ḥāwī al-kabīr* sont connues. Al-Mawārdī les puise dans la littérature juridique de son époque ainsi que dans la pratique des califes successifs. Notons, parmi ces dispositions, que certaines furent mises en œuvre pour la première fois sous le règne du calife abbasside al-Mutawakkil (r. 847-861). C'est notamment le cas de la mesure qui consistait à marquer les maisons habitées par des non-musulmans en fixant des figurines en bois sur leurs portes[39].

Le classement opéré par al-Māwardī vise en réalité à séparer les dispositions premières et impératives de celles qui sont secondaires ou de moindre importance. L'idée apparaît clairement dans le *K.al-Aḥkām al-sulṭāniyya,* où l'auteur divise les conditions de la *ḏimma* en fonction de leur caractère obligatoire ou recommandé. Les conditions obligatoires correspondent précisément à celles qui figurent dans les deux premières catégories mentionnées dans le *K. al-Ḥāwī*. Toutes les autres dispositions sont considérées comme recommandées[40]. Il est vrai que les deux catégories avaient tendance à se confondre dans l'esprit de certains juristes ou du moins dans leurs écrits[41].

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37 *Ḥāwī,* XIV, 319.

38 *Ḥāwī,* XIV, 319.
وَأَمَّا الْقِسْمُ الْخَامِسُ : وَهُوَ مَا لَا يَجِبُ بِعَقْدٍ، وَلَا شَرْطٍ، وَهُوَ مَا زَادَ عَلَى إِذْلَالِهِمْ، وَذَلِكَ سِتَّةُ أَشْيَاءِ : أَحَدُهَا أَنْ لَا يُعْلُوا أَصْوَاتَهُمْ عَلَى الْمُسْلِمِينَ. وَالثَّانِي أَنْ لَا يَتَقَدَّمُوا عَلَيْهِمْ فِي الْمَجَالِسِ. وَالثَّالِثُ أَن لَا يُضَايِقُوهُمْ فِي الطَّرِيقِ.... وَالرَّابِعُ أَنْ يَبْدَءُوهُمْ بِالسَّلَامِ... وَالْخَامِسُ إِذَا اسْتَعَانَ بِهِمْ مُسْلِمٌ فِيمَا لَا يَسْتَضِرُّوا بِهِ أَعَانُوهُ. وَالسَّادِسُ أَنْ لَا يَسْتَبْذِلُوا الْمُسْلِمِينَ مِنْ مِهَنِ الْأَعْمَالِ ... فَهَذِهِ السِّتَّةُ تُشْتَرَطُ عَلَيْهِمْ إِذْلَالًا لَهُمْ، فَإِنْ خَالَفُوهَا لَمْ يَنْتَقِضْ بِهَا عَهْدُهُمْ، وَأُجْبِرُوا عَلَيْهَا، إِنِ امْتَنَعُوا مِنْهَا، فَإِنْ أَقَامُوا عَلَى الِامْتِنَاعِ عُزِّرُوا

39 Al-Māwardī mentionne cette mesure qu'il attribue au calife ʿUmar I. Or, il semblerait que ce soit al-Mutawakkil qui l'a décrétée, v. *Ḥāwī,* XIV, 319. Sur les décrets de ce calife, v. A. Fattal, *Le statut légal*, 102, 212.

40 *Aḥkām sulṭāniyya,* 184.

41 Cette confusion apparaît dans beaucoup de traités de droit musulman, à commencer par le *K. al-Umm* d'al-Šāfiʿī qu'al-Māwardī paraphrase et commente dans son *Ḥāwī*. En effet, al-Šāfiʿī énumère les conditions de la *ḏimma* en les mentionnant les unes après les autres, sans les hiérarchiser. Conscients du fait que certaines de ces conditions ont un caractère plus contraignant que d'autres, des juristes šāfiʿites, tels qu'al-Māwardī et al-Ġazālī, introduisent différentes méthodes de classification.V.*Umm*, V, 471-473, 493-494 ;*Wasīṭ*, VII, 79-87 ; *Aḥkām sulṭāniyya,* 184-185.

Al-Māwardī établit un autre principe de hiérarchisation fondé sur les cinq statuts légaux que sont l'obligatoire et l'interdit, le recommandable ou le répréhensible et le licite. C'est ainsi qu'il divise les prohibitions en fonction de leur statut illicite (*ḥarām*), ou répréhensible (*munkar*). De la sorte, il les expose de manière graduée, suivant leur degré de gravité. Regroupés dans la deuxième catégorie, les actes considérés comme illicites font l'objet d'une interdiction formelle qui, d'ailleurs, concerne aussi bien les musulmans que les *ḏimmīs*. Le fait de blasphémer, d'attaquer le Coran ou de nuire aux musulmans relève de délits graves en Islam. Aussi, celui qui s'en rend coupable encourt-il une peine pouvant aller jusqu'à l'exécution capitale, même pour le musulman. Partant de là, certains juristes soutiennent que ces interdictions s'appliquent en vertu du contrat de protection et qu'il n'est pas nécessaire de les stipuler dans un traité. Mais selon une autre opinion, ce sont des conditions extrinsèques au contrat dont la mise en œuvre dépend des clauses incluses dans le traité de paix établi lors de la conquête de la ville. Quant aux choses non permises aux *ḏimmīs* parce qu'elles sont répréhensibles, elles consistent en des actes créant un préjudice de moindre importance pour les musulmans, comme la construction de nouveaux lieux de cultes ou l'exhibition de croix sur la place publique.

Les deux dernières catégories renferment des conditions pouvant être stipulées mais qui ne portent pas sur des actes illicites ou répréhensibles. Certaines d'entre elles figurent dans le pacte de ʿUmar, ce qui n'empêche pas al-Māwardī de les considérer comme des dispositions secondaires et d'en souligner le caractère non obligatoire[42].C'est bien la preuve, s'il en fallait une, que pour cet auteur comme pour d'autres le pacte de ʿUmar n'est pas l'unique modèle de référence et, surtout, qu'il ne possède pas l'autorité du code ou du canon que l'on a souvent tendance à lui attribuer[43].

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42 Il s'agit notamment des mesures relatives aux signes distinctifs (*ǧiyār*) et celles qui obligent les non-musulmans à enterrer leurs morts de manière discrète. V.*Ḥāwī,* XIV, 318-319 ; *Aḥkāmsulṭāniyya,* 184-185.

43 Si la plupart des juristes musulmans se réfèrent au pacte de ʿUmar, beaucoup d'entre eux ne considèrent pas toutes ses dispositions comme des obligations fermes et indiscutables. Par ailleurs, le pacte n'est pas systématiquement cité dans les ouvrages de *fiqh*. Les auteurs de ces traités se contentent généralement des mesures les plus importantes à leurs yeux, comme celles qui concernent la construction des édifices religieux et le port du *zunnār*. À cela il convient d'ajouter le fait que pour nombre de juristes, certaines clauses du pacte ne peuvent s'appliquer que si elles sont stipulées dans le traité de paix conclu avec les non-musulmans. Tous ces éléments permettent de penser que, contrairement à ce que M. Levy-Rubin semble affirmer à la suite de beaucoup d'autres chercheurs, le pacte de ʿUmar n'a jamais acquis le statut d'un canon. En effet, un texte canonisé est censé s'imposer à tous de sorte que son contenu devienne indiscutable. Or, ce ne semble pas être le cas du pacte. Les juristes s'y réfèrent comme ils se réfèrent à d'autres traditions relatant la pratique des quatre premiers califes. Et certains d'entre eux n'hésitent pas à restreindre l'application de telle ou telle mesure, prétextant qu'elle doit être préalablement stipulée. V. M. Levy-Rubin, *Non-Muslims in the Early Islamic Empire,* 2-4, 60, 100.

Enfin, al-Māwardī détaille les conséquences qu'entraîne la violation par les non-musulmans des obligations de la *ḏimma*. De sa classification, il ressort que seul le manquement à celles qui relèvent de la première ou de la deuxième catégorie peut conduire à la rupture du contrat de protection. En principe, cette rupture a lieu lorsque les *ḏimmīs* n'observent pas les engagements inhérents au contrat, tels que le versement de la capitation et la soumission à l'autorité ; ou lorsqu'ils commettent un crime à l'encontre de l'islam ou des musulmans. Il perd alors son statut de protégé et devient passible de la peine de mort, une fois sa culpabilité établie. Mais même dans ce cas, le droit šāfiʿite prévoit une solution pour éviter l'exécution. En effet, pour beaucoup de juristes de cette école, le tributaire ayant perpétré un crime doit être protégé jusqu'à ce qu'il rejoigne un lieu où il sera en sécurité[44].

Par ailleurs, comme l'explique al-Māwardī, les écoles juridiques ne sont pas d'accord sur la nature des infractions pouvant entraîner l'annulation dudit statut. L'exemple suivant illustre parfaitement les divergences qui existent entre eux. Pour la plupart des juristes, le non versement de la taxe de capitation conduit à la rupture de la *ḏimma*. Toutefois, les ḥanafites établissent une différence entre le *ḏimmī* qui refuse de se soumettre à l'obligation de verser la *ǧizya* parce qu'il ne la reconnaît pas comme telle et celui qui ne paie pas la taxe par manque de moyens ou pour une toute autre raison. Pour eux, seul le premier verra son statut annulé[45]. En effet, le second n'ayant pas renié ses engagements, il ne sera pas inquiété. La taxe qu'il n'a pas payée sera considérée comme une dette. Par ailleurs, certains juristes, dont al-Ġazālī, soutiennent que la rupture du contrat ne peut être établie de manière évidente que si le *ḏimmī* déclare ouvertement la guerre aux musulmans[46].

Nature et conséquences du contrat de protection

Nous avons vu que pour certains juristes, les prescriptions relevant de la deuxième catégorie (l'interdiction de nuire aux musulmans et à leur religion) comptent parmi les obligations introduites par le contrat de protection lui-même, alors que pour d'autres, elles font partie des choses qu'il faut stipuler. Cette divergence s'explique vraisemblablement par le fait que la pratique de la *ḏimma*, telle que la relate la tradition du Prophète ne comportait que deux conditions principales : la soumission à l'autorité musulmane et le versement de la capitation[47]. Les juristes

44 *Ḥāwī,* XIV, 320 ; *Wasīṭ*, VII, 86. Il s'agit de mettre l'individu ayant perdu son statut de protégé à l'abri d'éventuelles actions malveillantes en le reconduisant hors du territoire musulman. On ignore si une telle mesure d'éloignement a été appliquée.

45 *Ḥāwī,* XIV, 317.

46 *Wasīṭ*, VII, 85.

47 C'est du moins ce que semblent penser les juristes musulmans. Selon eux, cette forme de *ḏimma* est celle qu'a pratiquée le Prophète. Les exemples qu'ils citent le plus souvent sont ceux de Ḫaybar de Naǧrān

attachés à ce modèle « prophétique » ou primitif de protection refusent d'y inclure des éléments supplémentaires. De leur point de vue, la *ḏimma* consiste en un contrat entre deux parties. Or, comme tous les autres contrats synallagmatiques (mariage, vente, location, etc.), celui-ci comporte des conditions de base qu'il doit réunir pour être valide. Il s'agit principalement d'un échange d'obligations réciproques : les musulmans s'engagent à défendre et à protéger les non-musulmans qui, de leur côté, reconnaissent la souveraineté musulmane et consentent à payer la taxe annuelle.

Certes, l'imām peut décider bon d'imposer d'autres obligations aux tributaires, mais pour ce faire, il doit coucher par écrit les clauses souhaitées dans le traité de paix qu'il passe avec eux. Cela limite considérablement, du moins en théorie, sa liberté d'édicter de nouvelles règles, puisque les traités sont établis lors de la conquête des villes ou des régions concernées et ne peuvent être modifiés que par accord l'accord des deux parties. En effet, changer unilatéralement les termes d'une convention existante revient à manquer aux engagements pris par l'autorité musulmane et par la communauté toute entière à l'endroit des *dimmīs*. Les juristes insistent beaucoup sur ce point. Pour eux, l'imam doit veiller au strict respect des traités contractés avec les non-musulmans, car il y va de la sincérité des engagements pris au nom de tous les croyants[48]. Dès lors, si les conditions supplémentaires ne figurent pas dans le traité conclu au moment de la prise de la ville, on ne pourra les imposer et c'est la *ḏimma* initiale qui prévaut.

En concevant le pacte de protection comme un contrat, les juristes ramènent ses conditions à un strict minimum. Voici par exemple comment al-Māwardī le définit : « C'est un contrat qui consiste à permettre aux gens du Livre de vivre en territoire musulman en échange d'une taxe de capitation qu'ils acquittent annuellement[49] ». Une définition similaire est proposée par une autre grande autorité šāfiʿite, al-Ǧazālī : « C'est un contrat par lequel nous nous engageons à les (*i. e.* les gens du Livre) laisser vivre sur nos territoires, à les protéger et à les

et du Yémen. Pour les historiens modernes, les récits relatant les accords passés entre le Prophète et les non-musulmans de ces regions sont le fruit d'une construction opérée par les auteurs musulmans à partir du IX^{e} siècle. Mais aux yeux des juristes, ces récits font partie de la sunna qui est la deuxième source du droit musulman. V. par exemple, *Ḫarāǧ*, 50-51, 71-73 ; *Umm*, V, 478 ; Ibn Qudāma, *al-Muġnī*, XIII, 206.

48 V. *Ḫarāǧ*, 14, 125-126. Partant du principe que les mesures applicables aux non-musulmans dépendent directement de l'accord conclu avec eux lors de la conquête, les juristes recommandent d'établir, pour les habitants de chaque ville conquise, un traité mentionnant leurs droits et devoirs spécifiques. Ce traité constituera la base du traitement qui leur sera réservé. V. *Umm*, V, 489, 493. Conscient de l'importance de tels traités, al-Māwardī préconise de les conserver dans les registres officiels de l'État pour pouvoir les consulter en cas de besoin, car « chaque population non musulmane possède un traité qui peut être différent de ceux des autres ». V. *Aḥkām sulṭāniyya*, 185.

49 *Ḥāwī*, XIV, 297.

أَن يُقَرَّ أَهْلُ الكِتَاب عَلَى المقَام فِي دَارِ الإِسْلام بِجِزْيَةٍ يُؤَدُونَها عَلَى رِقَابِهِم فِي كُلِ عَام.

défendre, en échange de leur soumission et du versement par eux de la capitation »[50]. Ainsi, le contrat de protection est souvent défini par les dispositions initiales qui existaient au début de l'Islam. Cela montre bien qu'aux yeux des juristes, il peut y avoir *ḏimma* sans les obligations secondaires lesquelles furent ajoutées par les différents califes[51].

Autrement dit, si les juristes aiment à énumérer toutes les mesures susceptibles de s'appliquer aux *ḏimmīs* telles qu'elles figurent dans le pacte de ʿUmar et dans d'autres listes qui se sont constituées par accumulation au fil du temps, ils n'oublient pourtant pas qu'à l'origine le pacte de la *ḏimma* ne comportait que deux conditions indiscutables, à savoir la capitation et la reconnaissance de la souveraineté musulmane. Ce sont ces conditions-là qui constituent la norme. Tout le reste dépend des circonstances.

On sait par ailleurs que les juristes font la distinction entre les villes habitées par les musulmans et celles qui abritent uniquement des *ḏimmīs*. Selon eux, certaines règles de la *ḏimma* ne s'appliquent que dans la première catégorie de villes. Il s'agit notamment des interdictions portant sur la construction de nouveaux lieux de culte, l'usage des cloches et l'exhibition des croix, du vin et des porcs. Voici un texte d'al-Šāfiʿī dans lequel cette idée apparaît clairement :

> Quand ils [*i. e.*, les *ḏimmīs*] vivent à l'écart [des musulmans] (*munfaridīn*), dans une localité qui leur appartient, [l'imām] ne leur interdira pas de bâtir des églises ni d'élever des édifices. Il ne prendra aucune mesure restrictive en ce qui concerne leurs porcs, leur vin, leurs fêtes ou leurs processions[52].

Ces propos montrent explicitement que seules les conditions de base sont de nature à s'appliquer partout et de manière uniforme. Ils confirment également que le droit musulman admet des situations où les obligations des tributaires se trouvent réduites au minimum. L'existence de cette forme minimaliste de *ḏimma* chez les juristes et plus généralement dans l'esprit des fidèles explique, peut-être, le fait qu'à certaines époques l'on ait appliqué des mesures restrictives alors qu'à d'autres,l'on se soit contenté de prélever les taxes[53]. On peut dire que les deux

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50 *Wasīṭ*, VII, 55.

51 V. par exemple, Ibn Qudāma, *al-Muġnī,* XIII, 245. Cet auteur ḥanbalite affirme que la validité du contrat de protection dépend de deux conditions, à savoir le versement de la capitation et la soumission à la loi musulmane.

52 *Umm*, V, 496.
وإن كَانُوا فِي قَرْيَةٍ يَمْلِكُونَهَا مُنْفَرِدِين لَمْ يَمْنَعْهُم إحْدَاث كَنِيسَةٍ ولَا رَفْع بِنَاء، ولَا يعْرِضُ لَهُم فِي خَنَازِيرِهِم وخَمْرِهِم وأَعْيَادِهِم وجَمَاعَاتِهِم.
Une opinion similaire se rencontre chez les auteurs mālikites. V. par exemple, Ibn ʿAbd al-Barr, *al-Kāfī fī fiqh ahl al-madīna al-mālikī*, 1992, 220-221.

53 On sait que les lois de la *ḏimma* n'ont pas été appliquées de manière systématique. En effet, si certains califes prirent des mesures très dures à l'encontre des non-musulmans, d'autres avaient une politique

pratiques correspondaient chacune à une conception différente du traitement qui devait être réservé aux non-musulmans vivant en terre d'islam. Ces deux conceptions ont continué à s'exprimer simultanément, même si la tendance favorable au durcissement des règles l'emportait parfois, notamment en période de crise. Ce fut le cas sous le règne de certains califes, tels que l'Umayyade ʿUmar b. ʿAbd al-ʿAzīz (r. 717-720), l'Abbasside al-Mutawakkil (r. 847-861) et le Fatimide al-Ḥākim (r. 996-1021), ainsi qu'au Maghreb à l'époque almohade[54].

Nous avons vu que l'évolution des règles de la *ḏimma* est étroitement liée aux conséquences démographiques de la conquête. En effet, pour s'assurer le contrôle durable des villes conquises où les musulmans étaient parfois numériquement minoritaires, les califes ont dû prendre de nouvelles mesures destinées à règlementer la présence des autres religions dans l'espace islamisé. Les mesures concernant la construction de nouveaux lieux de culte, le port de signes distinctifs, l'interdiction de sonner les cloches et de montrer les croix sur la place publique, l'utilisation d'un certain type de montures, etc., concourent toutes à une telle entreprise de réglementation. Ces dispositions peuvent donc nous renseigner sur les divers problèmes soulevés par la présence massive de populations non-musulmanes dans l'espace musulman ainsi que sur les solutions envisagées par certains califes pour les résoudre. Mais il n'en demeure pas moins qu'elles sont liées aux circonstances parfois très particulières qui ont présidé à leur mise en place.

C'est la raison pour laquelle, une démarche qui consisterait à étudier la situation des *ḏimmīs* dans la société musulmane uniquement à partir des restrictions mentionnées dans le pacte de ʿUmar ou dans les décrets de tel ou tel calife ne peut qu'être partielle et conduit à des généralisations abusives. Du reste, une telle manière de procéder, si elle fait connaître les mesures en question, ne permet pas de comprendre en quoi consiste le statut de *ḏimmī* en droit musulman ni de savoir quelles en sont les spécificités et les implications.

Pour éviter ces écueils méthodologiques et aboutir à une meilleure compréhension de la *ḏimma*, il convient de considérer la conception que les juristes eux-mêmes se faisaient du statut des sujets « protégés ». C'est l'objet de la seconde partie de notre étude.

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beaucoup plus souple. Seules les taxes semblent avoir été prélevées de manière régulière et constante. Cela tend à montrer que la mise en œuvre des restrictions ne fut pas toujours considérée comme nécessaire par les autorités musulmanes. Autrement dit, il était légalement possible de se limiter aux obligations de base et plus particulièrement à la fiscalité.

54 Sur les périodes ayant connu un durcissement des règles de la *ḏimma*,v.A.-M. Eddé, F. Micheau, Ch. Picard, *Communautés chrétiennes en pays d'Islam*. 68-72.

Le statut du ḏimmī *comparé à celui du non-musulman de passage dans un territoire musulman (*musta'min*)*

Jusqu'ici nous nous sommes surtout intéressés aux différentes obligations des *ḏimmīs* et à la catégorisation qu'en ont faite les juristes. De cette analyse, il apparaît clairement que, pour les juristes, seules certaines mesures doivent s'appliquer inconditionnellement et de manière systématique. Ce sont les conditions inhérentes à la *ḏimma*. Les non-musulmans qui acceptent de s'y soumettre obtiennent le droit de vivre en paix sous la loi musulmane. Leur sécurité et celle de leurs biens est alors garantie par l'autorité, conformément aux termes du contrat de protection. Mais qu'en est-il de leur statut dans la société majoritairement musulmane ? Sont-ils considérés comme des sujets faisant partie de la communauté politique de référence ou bien comme des étrangers ? Les sources juridiques auxquelles nous nous référerons ne traitent pas directement de ces questions. On peut néanmoins y trouver quelques éléments de réponse en procédant à un examen approfondi des passages portant sur les différentes catégories de non-musulmans. C'est l'approche que nous voulons esquisser ici à travers des textes provenant de notre seconde source à savoir le *K. al-Mabsūṭ* du juriste transoxanien Šams al-Dīn al-Saraḫsī.

Ḏimmī, *musta'min* et *ḥarbī*

Cet auteur ḥanafite se livre à des réflexions fort intéressantes sur la *ḏimma* dont il s'efforce d'expliciter le sens et de montrer les corollaires juridiques. Selon lui, de par le contrat de protection qui les lie aux musulmans, les *ḏimmīs* font partie intégrante du *dār al-islām*. Voici ce qu'il déclare à ce sujet dans le chapitre traitant de la *ǧizya* :

> En vertu du contrat de protection, il [*i. e.*le *ḏimmī*] est devenu l'un des habitants de notre territoire (*ṣār min ahl dārina*) et, de ce fait, il réside sur une terre qui est à lui (*dār nafsih*), [même] s'il n'en est pas réellement propriétaire[55].

La phrase *ṣār min ahl dārina* signifie mot à mot : il est devenu membre de notre maison. Mais la traduction que nous avons choisie nous paraît plus exacte. En effet, le mot *dār* renvoie surtout à la notion de territoire. Les juristes musulmans l'emploient souvent pour distinguer les territoires musulmans (*dār al-islām*) de ceux qui sont sous le contrôle de l'ennemi (*dār al-ḥarb*). En ce sens, le contrat de

55 Al-Saraḫsī, *al-Mabsūṭ*[désormais, *Mabsūṭ*], ed. Kh. al-Mays, Beyrouth, Dār al-Kutub al-ʿilmiyya, 1994, X, 81.

لِأَنَّهُ بِعَقْدِ الذِّمَّةِ صَارَ مِنْ أَهْلِ دَارِنَا فَإِنَّمَا يَسْكُنُ دَارَ نَفْسِهِ وَلَا يَسْكُنُ مِلْكَ نَفْسِهِ حَقِيقَةً.

protection permet aux adeptes des autres religions d'appartenir pleinement au *dār al-islām,* de sorte que celui-ci devient le leur. Cependant, al-Saraḫsī semble aller encore plus loin dans son analyse. Pour lui, la relation qui lie musulmans et *ḏimmīs* ne tient pas seulement au fait que les uns et les autres habitent le même territoire ; elle est aussi due au lien de solidarité qui se crée entre eux[56]. Scellé par le contrat de protection, ce lien fait que le *ḏimmī* rejoint le camp musulman et devient membre de la collectivité que forme le *dār al-islām*. Les musulmans le considèrent alors comme l'un des leurs, en ce sens qu'il est solidaire avec eux et non pas avec leurs ennemis[57].

De par leur appartenance à l'espace politique géré par un pouvoir musulman, les *ḏimmīs* bénéficient de droits spécifiques qui leur sont consentis à l'exclusion des autres catégories de non-musulmans. Évoquant ces droits, al-Saraḫsī répète inlassablement qu'ils sont consécutifs au statut de membres de la collectivité dont jouissent les sujets protégés[58]. La déclaration suivante illustre bien son opinion. C'est un passage traitant du témoignage en justice. L'auteur y explique la différence entre le *ḏimmī* et le non-musulman étranger (*musta'min*) qui reçoit un sauf-conduit lui permettant d'entrer en territoire musulman et d'y séjourner pour une durée limitée :

> Le témoignage des *ḏimmīs* en faveur ou contre les *musta'mins* est permis, contrairement au témoignage des *musta'mins* pour ou contre les *ḏimmīs*, car le *ḏimmī* compte parmi les habitants de notre territoire (*min ahl dārinā*) et, de ce fait, il ne peut retourner au *dār al-ḥarb*, à la différence du *musta'min* [...] Quant aux *musta'mins*, ils ne sont pas devenus habitants de notre territoire, et c'est pourquoi on leur permet de retourner au *dār al-ḥarb* et on les empêche de séjourner trop longtemps dans le *dār al-islam*[59].

Ainsi, en tant que membre de la « Communauté », le *ḏimmī* a le droit de se porter témoin dans un procès impliquant une personne étrangère. Il en va différemment pour le *musta'min* qui ne possède pas la capacité de témoigner en faveur ou contre un sujet protégé parce qu'il appartient à *dār al-ḥarb* et que, de ce fait, il ne jouit d'aucune solidarité au sein du *dār al-islām*. Certes, en sa qualité de

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56 *Mabsūṭ*, XVI, 139.

57 Pour ce juriste, le *dār al-islām* forme un bloc uni. Ses habitants sont solidaires entre eux, même s'ils appartiennent à des religions différentes, v.M. Grignaschi, « La valeur du témoignage des sujets non-musulmans (*dhimmī*) dans l'Empire Ottoman », in *La preuve, Recueils de la Société Jean Bodin pour l'histoire comparative des institutions,* 18/13 (1963), 218-220.

58 V.*Mabsūṭ*, XXVI, 133-134.

59 *Mabsūṭ*, XVI, 139.
شَهَادَةُ أَهْلِ الذِّمَّةِ عَلَى المُسْتَأْمِنِينَ جَائِزَةٌ بِخِلَافِ شَهَادَةِ المُسْتَأمِنِينَ عَلَى أَهْلِ الذِّمَّةِ، لِأَنَّ الذِّمِّي مِنْ أَهْلِ دَارِنَا حَتَّى لَا يتَمَكَنُ مِنَ الرُجُوعِ إِلَى دَارِ الحَرْبِ بِخِلَافِ المُسْتَأمِنِ... فَأَمَا المُسْتَأمِنُون مَا صَارُوا مِنْ أَهْلِ دَارِنَا وَلِهَذَا يُمَكَّنُونَ مِنَ الرُجُوعِ إِلَى دَارِ الحَرْبِ وَلَا يُمَكَّنُونَ مِنْ إِطَالَةِ المَقَامِ فِي دَارِ الإِسْلَامِ.

porteur d'un sauf-conduit, il peut entrer dans le territoire musulman pour y séjourner pendant un temps limité. Mais cela ne lui donne aucun droit proprement dit. En outre, le fait qu'un homme puisse se porter témoin en justice lui confère une certaine autorité. Or, un « infidèle » venant d'un pays ennemi (*ḥarbī*)[60] ne saurait avoir de l'autorité sur les sujets d'un État musulman, que ceux-ci soient musulmans ou non.

Ici, al-Saraḫsī applique un principe communément admis par les ḥanafites selon lequel, s'agissant du témoignage, le *musta'min* est au *ḏimmī* ce que celui-ci est au musulman[61]. Pour lui, de même que le *ḏimmī* ne peut témoigner en faveur ou contre un musulman, de même le *musta'min* ne peut témoigner en faveur ou contre un *ḏimmī*[62].Cette incapacité est consécutive aux différences de statut. En effet, les *ḏimmīs*, du fait de leur appartenance au *dā ral-islām,* sont considérés comme supérieurs aux non-musulmans étrangers, de la même manière que les musulmans, de par leur adhésion à l'islam, sont supérieurs aux *ḏimmīs*. D'autres auteurs ḥanafites sont du même avis. C'est le cas d'Ibn al-Humām (m. 861/1456) qui déclare que le *dimmī* jouit d'une position élevée par rapport au *musta'min* (*aʿlā ḥālan minhu*), parce qu'il est membre de notre maison[63].

Il y a donc bien une hiérarchie socio-juridique entre les individus et entre les groupes dans laquelle les musulmans occupent la première place et les *ḥarbīs* (y compris les *musta'min*) la dernière[64]. Quand aux *ḏimmīs*, ils ont un statut intermédiaire tout en étant, il faut y insister, plus proches des musulmans que de leurs propres coreligionnaires grâce aux liens engendrés par l'appartenance au même espace politique. Cette proximité se reflète dans les règles juridiques qui s'appliquent à eux, comme le montre le passage suivant du commentaire d'al-Saraḫsī sur le *K. al-siyar al-kabīr* d'al-Šaybānī (m. 189/804).Le texte traite de la question du trésor trouvé (*rikāz*).

> Quand un *ḏimmī* découvre un trésor ou une mine d'or, d'argent, de plomb ou de mercure en territoire musulman, il en est comme pour le musulman : il verse le cinquième de ce qu'il a trouvé [au trésor public] et le reste est à lui. [Il en est ainsi] avec ou sans la permission de l'imām, car il [*i. e.*, le *ḏimmī*] compte parmi les habitants

60 Le *musta'min* conserve son statut de *ḥarbī*, même s'il est autorisé à séjourner temporairement en pays musulman.

61 V. al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, 2003, IX, 58-59.
فَشَهَادَةُ الذِّمِّي عَلَى المُسْتَأْمِن كَشَهَادَةِ المُسْلِمِ عَلَى الذِّمِّي، وَشَهَادَةُ المُسْتَأْمِنِ عَلَى الذِّمِّي كَشَهَادَةِ الذِّمِّي عَلَى المُسْلِم.

62 *Mabsūṭ*, XVI, 139 ; En théorie, le témoignage du *ḏimmī* dans un procès impliquant un musulman n'est pas recevable, mais il y a des exceptions. V. sur ce sujet, A. Fattal, *Le statut légal,* 361-363 ; A. Oulddali, « Recevabilité du témoignage du *ḏimmī* d'après les juristes mālikites d'Afrique du Nord », in M. Fierro, J Tolan (éd.), The *legal status of ḏimmī-s in the Islamic West* (*second/eighth-ninth/fifteenth centuries*), 2013, 275-281.

63 Ibn al-Humām, *Šarḥ Fatḥ al-qadīr*, 2003, VII, 392-393.

64 Dans cette hiérarchie, la position du *must'min* ne diffère pas de celle du *ḥarbī*.

> de notre territoire et, de ce fait, notre loi s'applique à lui comme s'il s'agissait d'un musulman[65].

Il n'en va pas de même lorsqu'un non-musulman étranger (*ḥarbī*) découvre un trésor en terre musulmane. Voici ce qu'en dit al-Šaybānī, dont al-Saraḫsī explique les propos :

> Si un *ḥarbī* entre en territoire musulman muni d'un sauf-conduit (*amān*) et qu'ensuite, il trouve un trésor ou une mine dont il extrait de l'or, de l'argent ou du fer, l'imām lui prendra tout ce qu'il a trouvé et ne lui en laissera rien, car il s'agit alors d'un butin [...], or un *ḥarbī* ne peut prétendre à une part du butin fait par les musulmans[66].

Dans un autre passage portant sur le prélèvement de la dîme (*ʿušr*) due par les marchands, al-Saraḫsī fait une distinction entre le musulman et le *ḏimmī,* d'une part, et le non-musulman *ḥarbī* d'autre part. Selon lui, si un *ḏimmī* déclare au percepteur d'impôts que les biens trouvés en sa possession lors d'un voyage lui appartiennent et que ces biens ne sont pas des marchandises destinées à la vente, on le croira sur parole, comme s'il s'agissait d'un musulman. Il ne payera donc pas de taxe sur les biens concernés. En revanche, si un *ḥarbī* fait la même déclaration, on vérifiera ce qu'il dit et on lui demandera de prouver sa bonne foi. En effet, à elle seule, sa parole ne suffit pas à l'exonérer de la dîme, étant donné qu'il ne réside pas dans le territoire musulman[67].

Tous ces textes montrent bien que le tributaire jouit du même droit que le musulman parce que l'un comme l'autre sont chez eux en terre d'islam. On pourrait multiplier les exemples.

Les droits des *ḏimmīs*

En réalité, la plupart des protections dont bénéficient les musulmans s'appliquent par extension aux *ḏimmīs*[68]. Ces derniers peuvent exercer leurs droits dans à peu près tous les domaines de la vie quotidienne. La loi protège leurs intérêts individuels et collectifs au même titre que ceux des musulmans. Outre la sécurité des personnes et des biens, elle leur garantit la liberté de circuler et de s'établir partout

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65 Al-Saraḫsī, *Šarḥ K. al-siyar al-kabīr*, éd. M. Ḥ. al-Šāfiʿī, 1997, V, 303-304.
وَمَا أَصَابَ الذِّمِّيُ مِنْ رِكَازٍ فِي دَارِ الإِسْلَامِ أو مَعْدَنِ ذَهَبٍ أو فِضَّةٍ أو رَصَاصٍ أو زِئْبَقٍ فَهُوَ وَالْمُسْلِمُ فِيهِ سَوَاء : يُخَمَّسُ مَا أَصَابَ وَمَا بَقِيَ فَهُوَ لَهُ، سَوَاءٌ كَانَ بِإِذْنِ الإِمَامِ أَو بِغَيْرِ إِذْنِ الإِمَامِ، لِأَنَّهُ مِنْ أَهْلِ دَارِنَا وَيَجْرِي عَلَيْهِ حُكْمُنَا فَكَانَ بِمَنْزِلَةِ الْمُسْلِمِ.

66 V. al-Saraḫsī, *Šarḥ K. al-siyar al-kabīr,* V, 303-304 ; *Mabsūṭ*, II, 215.
إِذَا دَخَلَ الحَرْبِي دَارَ الإِسْلَامِ بِأَمَانٍ فَأَصَابَ رِكَازَاً أَو مَعْدَناً، فَاسْتَخْرَجَ مِنْهُ ذَهَباً أَو وَرَقاً أَو حَدِيداً فَإِنّ إِمَامَ الْمُسْلِمِينَ يَأْخُذُهُ مِنْهُ كُلَّهُ، وَلَا يَكُونُ لَهُ شَيْءٍ، لِأَنَّ هَذَا غَنِيمَةٌ... وَالحَرْبِي لَا حَقَّ لَهُ فِي غَنَائِمِ الْمُسْلِمِين.

67 V. *Mabsūṭ*, II, 200.

68 V. par exemple, A. Emon, *Religious Pluralism and Islamic Law,* 65.

en territoire musulman à l'exception de la région du Ḥiǧāz qui abrite les lieux saints[69]. Les tributaires possèdent également le droit d'avoir des propriétés et des biens, et celui de contracter. Il en va de même pour les autres capacités civiles. Les hommes libres parmi eux conservent leur liberté puisqu'il n'est pas permis de les réduire en esclavage ou de les asservir sans raison valable. Et s'ils sont faits prisonniers par l'ennemi, les autorités musulmanes doivent œuvrer pour leur libération comme elles le font pour les captifs musulmans[70].

Les traitements distinctifs évoqués dans la première partie de notre étude concernent des situations dans lesquelles la prééminence des musulmans et de leur religion est en jeu. Quatre exemples illustrent ce cas. Il s'agit de l'interdiction faite au non-musulman d'épouser une musulmane, de posséder un esclave musulman, de témoigne dans un procès impliquant un musulman et d'occuper une charge publique lui permettant d'exercer une autorité sur les musulmans. Pour les juristes, les interdictions de cette nature furent instituées afin de préserver la supériorité de l'islam sur les autres confessions[71].

Par ailleurs, les communautés non-musulmanes jouissent d'une large autonomie administrative et judicaire qui leur permet de gérer leurs affaires internes selon leurs propres lois. C'est ainsi que les conflits opposant des personnes d'une même confession se règlent le plus souvent devant les tribunaux communautaires. La justice musulmane n'intervient officiellement qu'en cas d'atteinte à l'ordre public ou lorsque le crime commis est passible d'une peine légale (*ḥadd*). Cette forme d'autonomie a beaucoup contribué au maintien d'une vie communautaire au sein des populations juives et chrétiennes du monde musulman. Comme le soulignent plusieurs historiens, l'existence d'institutions juives a facilité non seulement la préservation mais aussi l'épanouissement d'une culture judaïque en terre d'islam[72].

Sur le plan religieux, le contrat de protection inclut le libre exercice des confessions minoritaires et la préservation des lieux de culte. Initialement accordées aux gens du Livre, ces garanties furent octroyées, par la suite, aux adeptes d'autres religions présentes dans l'espace musulman. Les *ḏimmīs* pouvaient donc pratiquer leurs religions dans leurs demeures ou au sein des édifices prévus à cet effet, à condition qu'ils évitassent les manifestations ostentatoires. Ce devoir de discrétion concernait notamment les communautés chrétiennes dont certaines célébrations se faisaient dans les lieux publics. Une autre mesure affectant la vie religieuse des minorités est celle qui interdit la construction de nouveaux lieux de culte dans

69 *Wasīṭ*, VII, 66 ; *Ḥāwī,* XIV, 334.
70 Ibn al-Qayyim, *Aḥkām ahl al-ḏimma*, II, 856.
71 V. sur ce point, Ibn al-Qayyim, *Aḥkām ahl al-ḏimma*, II, 1220 ; A. Fattal, *Le statut légal*, 134 ; 363.
72 V. M. R. Cohen, *Under Crescent and Cross. The Jews in the Middle Ages*, 2008, 52-54 ; J.-Cl. Garcin *et al*., *États, sociétés et cultures du monde musulman médiéval*, III, 136-137.

les villes musulmanes. Les juristes lui consacrent de longs développements dans leurs ouvrages. Pour beaucoup d'entre eux, la construction de nouveaux édifices religieux est interdite dans les villes fondées par les musulmans ainsi que dans celles qui furent conquises de vive force, et permise dans les autres cas. Mais pour d'autres juristes, l'interdiction de construire de nouvelles églises ou de restaurer les anciennes si elles menacent ruine dépend du traité conclu avec les habitants lors de la conquête de la ville. Si ce traité la stipule, elle s'appliquera. Dans le cas contraire, on ne pourra l'imposer. Al-Māwardī semble être de cet avis[73].

Si le contrat de protection fait entrer les *ḏimmīs* dans le giron du *dār al-islām*, il ne leur permet pas de revendiquer un statut comparable à celui des musulmans. Il y au moins deux raisons à cela. La première est qu'un tel statut est réservé aux seuls fidèles qui adhèrent à l'islam, en professent la foi et en observent les préceptes. Les adeptes des autres religions n'y accèdent pas, à moins qu'ils ne se convertissent, auquel cas ils rejoignent la communauté des croyants et deviennent membres à part entière de la société musulmane. Notons au passage que pour certains auteurs musulmans, les dispositions de la *ḏimma* et plus particulièrement la *ǧizya* ne furent établies que pour inciter les non-musulmans à embrasser l'islam[74].

La seconde raison est que les musulmans, en tant que groupe dominant, avaient tout intérêt à maintenir leur prééminence sur les minorités qui étaient dans une position d'infériorité. C'est d'ailleurs ce qui explique la mise en place de mesures pouvant paraître à notre époque comme discriminatoires à l'égard des tributaires. Il fallait en effet « manifester la supériorité des musulmans dans leur relation de pouvoir avec les non-musulmans »[75]. Certains califes eurent recours à de telles politiques par conviction, en croyant satisfaire à leur devoir de chefs de communauté. D'autres souverains agirent ainsi sous la pression des savants rigoristes dont l'influence était redoutée, notamment pendant les périodes de crise. Dans un cas comme dans l'autre, ils justifiaient leurs actions par la nécessité de réaffirmer la suprématie de l'islam sur les autres religions. Cette même nécessité a conduit les juristes à pérenniser les décisions prises par les différents califes en les incluant dans les conditions générales de la *ḏimma*, comme le fait al-Māwardī dans la classification que nous avons mentionnée.

Conclusion

Au terme de cette étude, il apparaît que les règles de la *ḏimma* telles qu'elles existent dans la littérature juridique musulmane n'ont cessé d'être interprétées,

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73 *Ḥāwī,* XIV, 322-323 ; *Wasīṭ*, VII, 80.

74 V. par exemple Faḫr al-Dīn al-Rāzī, *Mafātīḥ al-ġayb*, éd. Muḥyiddīn ʿAbd al-Ḥamīd *et al*, 1938, XVI, 32 ; A. Emon, *Religious Pluralism and Islamic Law,* 75.

75 J.-Cl. Garcin *et al*-, *États, sociétés et cultures du monde musulman médiéval*, III, 130.

hiérarchisées et même reconsidérées par les juristes à travers les siècles. Cela tient en grande partie au fait que la plupart des mesures restrictives concernant les tributaires n'avaient pas de fondement dans les sources traditionnelles du droit musulman. Instituées par différents califes après la mort du Prophète, elles ne figuraient ni dans le Coran ni dans la sunna. Pour les légaliser, il fallait les présenter comme faisant partie de la pratique des Compagnons (*ʿamal al-ṣaḥāba*), et ce par le biais du pacte attribué à ʿUmar I. C'est, nous semble-t-il, le procédé qui a permis aux juristes de les intégrer à leur système.

Mais si les restrictions imposées aux *ḏimmīs* ont fini par être insérées, d'une façon ou d'une autre, dans le *fiqh*, elles ne sont pas devenues pour autant des obligations au sens juridique du terme. En effet, comme le montre la classification d'al-Māwardī, les juristes ne tiennent pour obligatoire qu'un nombre limité de conditions parmi lesquelles il y a le versement de la *ǧizya* et la reconnaissance de la souveraineté musulmane. Ce sont les conditions minimales dont dépend la validité du contrat de protection. Les autres dispositions sont, pour la plupart, inapplicables telles quelles. Elles n'acquièrent force de loi que si elles ont été préalablement stipulées dans le traité de paix conclu avec les non-musulmans. Ce classement hiérarchique a des conséquences juridiques. L'une d'elles est que seule la violation par le *ḏimmī* d'une condition de base peut entraîner la rupture du contrat de protection. Les infractions de moindre importance sont seulement passibles de peines discrétionnaires proportionnelles à leur gravité.

Ainsi, en assimilant la *ḏimma* à un contrat synallagmatique, les juristes établissent un cadre légal dans lequel s'insèrent les droits et les devoirs des tributaires. Les mesures qui sortent de ce cadre sont certes maintenues mais reléguées au second plan.

Si nous avons insisté sur ce point, c'est pour montrer que la question du statut juridique des non-musulmans ne doit pas être étudiée uniquement à l'aune des listes d'obligations mentionnées dans les traités de droit musulman et qu'il faut approfondir la recherche en prenant en considération d'autres parties de la littérature juridique. C'est ce que nous avons entrepris de faire dans la présente étude. Les textes d'al-Saraḫsī dont nous avons cité quelques exemples illustrent l'intérêt d'une telle démarche puisqu'ils permettent de mieux appréhender la vision des juristes quant à place des minorités religieuses dans le monde islamique médiéval. Les *dimmīs* y apparaissent comme partie intégrante du *dār al-islām* dans lequel ils vivaient en vertu du contrat de protection. Leur appartenance à une religion autre que l'islam ne faisait pas d'eux des étrangers au regard de la loi, même s'ils étaient en situation d'infériorité par rapport aux musulmans.

LES *ḎIMMĪ*-S ET LEURS LIEUX DE CULTE EN OCCIDENT MUSULMAN : ÉGLISES ET SYNAGOGUES EN DROIT MUSULMAN (POINT DE VUE MĀLIKITE)

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Pouvez-vous nous expliquer, que Dieu vous accorde le succès, les témoignages qui attestent que la synagogue (*šunūġa*) est de construction récente. Nous avons vu que ces témoignages exigent sa destruction (*hadm*) après interpellation finale (*iʿḏār*) [des propriétaires][1]. Les lois musulmanes ne permettent pas aux tributaires (*ahl al-ḏimma*) juifs ou chrétiens l'édification (*iḥdāṯ*) de nouvelles églises (*kanā'is*) et synagogues (*šanūġa*) dans les villes musulmanes, ni au milieu des musulmans.

Attestent de cela : ʿUbayd Allāh b. Yaḥyā, Muḥammad b. Lubāba, Ibn Ġālib, Ibn Walīd, Saʿd b. Muʿāḏ, Yaḥyā b. ʿAbd al-ʿAzīz, Ayyūb b. Sulaymān et Saʿīd b. Ḫumayr.

> (Ibn Sahl, *Waṯā'iq fī aḥkām qaḍā' ahl al-ḏimma fī l-Andalus mustaḫraǧa min maḫṭūṭ Al-aḥkām al-kubrā*, M. ʿAbd al-Rahman Khallāf (éd.), Le Caire, 1980, p. 77)

Il y a déjà plus d'un demi-siècle, Evariste Lévi-Provençal, dans son *Histoire de l'Espagne musulmane*, alors qu'il développait quelques pages sur les églises en al-Andalus, s'appuyait sur un texte relevant de la littérature jurisprudentielle, et plus précisément cet extrait manuscrit, cité ci-dessus, des *Aḥkām al-kubrā* d'Ibn Sahl[2]. Il en concluait, à partir de ce texte, qu'il fut accordé aux chrétiens la possibilité de maintenir leurs églises à l'intérieur de Cordoue, sans pour autant leur permettre d'en construire de nouvelles, excepté dans les zones suburbaines qu'ils

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1 et article est une version remaniée et augmentée d'une communication présentée au colloque final du projet ERC Relmin « Minorités et cohabitations religieuses du Moyen Âge à nos jours », Nantes, 20-22 octobre 2014. L'auteur tient à remercier Delfina Serrano, John Tolan, ainsi que les lecteurs anonymes désignés par l'éditeur pour leur relecture et leurs suggestions.
Il est de principe, en droit musulman, qu'avant de condamner la partie, le juge doit lui adresser une dernière interpellation, afin de la mettre en demeure de produire ses derniers arguments, si elle en a.

2 Lévi-Provençal, Evariste, *Histoire de l'Espagne musulmane. Tome 3. Le siècle du Califat de Cordoue*, 1999 (1ère édition 1950), 224.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 149–172

 DOI 10.1484/M.RELMIN-EB.5.111597

habitaient, éloignés des musulmans. Dans son étude minutieuse qui porte sur cette *fatwā*, Jean-Pierre Molénat réfute les assertions de Lévi-Provençal au sujet des églises intra-muros, démontrant que toutes les églises de la vieille ville furent détruites, et ajoutant : « la construction de nouvelles églises a bien été permise hors de la vieille ville, mais cela non pas à la suite de la *fatwā* du début du IV^{e}/X^{e} siècle, mais vers la fin du II^{e}/VIII^{e} siècle[3]… ».

L'historien rompu à la lecture des chroniques arabes et latines se trouve dérouté lorsqu'il s'agit des lieux de culte des *ḏimmī*-s en terre d'Islam. Si les chroniqueurs et autres annalistes font régulièrement mention des églises et des synagogues en péninsule Ibérique, par exemple, très rarement nous livrent-ils leurs explications quant à la légitimité de celles-là. Ainsi, le lecteur, quand bien même fut-il un médiéviste, ne peut que trop difficilement s'y retrouver et comprendre les motivations qui poussèrent les souverains musulmans à tolérer ou non les édifices juifs et chrétiens. C'est d'ailleurs en grande partie cette raison qui justifie le choix de notre sujet. À notre connaissance, il n'existe pas d'écrit, sur les églises et les synagogues, présentant un panorama de la pensée juridique mālikite qui nous présenterait les options juridiques retenues par les *fuqahā'* (jurisconsultes) sur ce thème. Pour cela, il nous a paru opportun de proposer un texte qui puisse permettre de mieux appréhender ce sujet, mais aussi de lever certaines zones d'ombre et de démentir certaines assertions. Par exemple, Gérard Troupeau, dans son article consacré aux églises en terre d'Islam, concluait par ces deux phrases : « Après la conquête musulmane, les Chrétiens n'eurent plus le droit d'édifier de nouvelles églises ; ils avaient seulement la possibilité d'entretenir et de restaurer les anciennes, qu'en théorie ils conservaient. Mais en fait, au cours des siècles, de nombreuses églises furent confisquées et converties en mosquées, ou bien détruites ». La réalité historique fut-elle aussi manichéenne que la version proposée par notre auteur ? A la lecture de ces quelques lignes tirées de l'article *kanīsa* de la monumentale *Encyclopédie de l'Islam*, l'on est en droit de s'interroger sur les sources de notre auteur. Si celles-ci, au moins pour l'extrait cité, semblent s'arrêter à Antoine Fattal, *Le statut légal des non-musulmans en pays d'Islam*, comme G. Troupeau semble le suggérer, alors on comprend mieux ce laconisme et surtout le raccourci qui nous est suggéré, faisant fi des considérations spatio-temporelles d'un *dār al-islām* qui à certains moments de son histoire s'étendait d'Est en Ouest du Sind au Maroc actuel, abstraction faite des orientations doctrinales des souverains et des dynasties. En effet, quelle ressemblance y a-t-il entre Le Caire fatimide au début du XII^{e} siècle et une Cordoue mālikite sous domination almoravide à la

3 Molénat, Jean-Pierre, « La fatwa sur la construction des églises à Cordoue au IV^{e} /X^{e} siècle », in *The Legal status of ḏimmī-s in the Islamic West (second/eighth-ninth/fifteenth centuries)*, Fierro, Maribel et Tolan, John (éd.), 2013, 157-165.

même époque ? Une chose est sûre, pour al-Andalus les fouilles archéologiques de ces dernières décennies donnent tort à notre auteur.

C'est pour toutes ces raisons, mais aussi afin de combler un angle mort de la recherche, que nous avons arrêté notre investigation à l'étude des sources mālikites, maghrébines et andalouses, s'intéressant aux lieux de culte des *ḏimmī*-s en occident musulman. Qu'on ne s'y trompe pas, si parfois la très complexe casuistique que nous rapportons ici, en tentant de la simplifier et de la classifier, peut sembler relever de la typologie, c'est à l'aide de celle-ci que l'on trouvera les moyens de bien interpréter les textes des chroniqueurs ou encore les recherches archéologiques pour al-Andalus et le Maghreb. En dehors de cette connaissance, l'erreur interprétative guettera le chercheur qui s'exposera au risque d'être privé de clés de lecture indispensables dans un univers historique fort complexe et difficile à saisir. Effectivement, puisque, pour étudier l'histoire des *ḏimmī*-s en occident musulman à l'époque médiévale, nous ne disposons pas de sources archivistiques comparables à celles qui sont conservées pour l'histoire européenne, nous sommes donc dans l'obligation d'aller chercher l'information vers d'autres catégories de sources. Bien évidemment, les sources juridiques procèdent, au sujet des *ḏimmī*-s, de leur point de vue propre, et il serait vain d'éluder les conditions dans lesquelles celles-ci doivent être utilisées par le médiéviste. Les traités de droit musulman ont pendant longtemps été tenus éloignés des terrains d'investigations des historiens, qu'ils considéraient comme trop théoriques, ce qui empêchait la reconstitution de la réalité sociale jusqu'à un certain point. Toutefois, la rédaction de ce droit n'est rien d'autre que la somme des produits d'une époque et d'un lieu. De surcroît, le pluralisme normatif des différentes écoles juridiques sur un même point de droit révèle les réalités sociales des milieux où celles-ci se sont élaborées et normalisées. Si l'insuffisance des sources d'archives nous obligent à réévaluer les sources juridiques, cela doit être encore plus souligné pour certaines zones géographiques et certaines époques où les autres sources littéraires manquent considérablement. Dans le cas du Maghreb, la production des historiens, avant le bas Moyen Âge, est bien moindre que celle des *fuqahā'* mālikites. De plus, on rejettra la thèse qui tend à voir dans le *fiqh*, un droit musulman homogène de l'Est à l'Ouest du monde islamique. Au contraire, nombreuses sont les écoles de droit (*maḏāhib*) qui virent le jour dans le *dār al-islām*. D'ailleurs, celles-ci trouvèrent un ancrage là où les mentalités et les pratiques qui les singularisaient s'accordaient avec les exigences des espaces où elles se fixèrent. C'est pourquoi il n'existe pas de livre de *fiqh* totalement abstraits et sans un minimum d'assujetissement à la réalité. Autrement dit, si la *'Utbiyya* d'al-'Utbī (m. 868) et la *Mudawwana* de Saḥnūn (m. 856) transmirent la doctrine de Mālik et de ses disciples, ces ouvrages organisèrent aussi la Loi en al-Andalus et au Maghreb. Bien souvent, les études portant sur le droit musulman assemblent pêle-mêle les références des écoles

juridiques, les périodes et les régions. Le mélange le plus hétéroclite de références s'y cotoient. La citation d'un juriste d'Orient des premiers siècles de l'Islam se juxtapose à celle d'un andalou plus tardif. Bien évidemment, cette confusion serait respectable si elle était justifiée, mais il n'en est rien. On se gardera de considérer le droit musulman uniforme, comme M. Jourdain s'imaginait que tous les Turcs se ressemblaient. Pour notre exposé, nous avons délimité nos recherches à l'école mālikite. Ce *maḏhab* qui se développa principalement en Occident musulman confère aux recherches qui lui sont consacrées, que le chercheur le veuille ou non, la qualité d'études régionales. Pour les autres régions du monde musulman, l'entrecoupement régulier des *maḏāhib* amènera l'historien à travailler selon d'autres modalités. Ajoutons à cela que les *fuqahā'* mālikites considèrent la *'āda* (usage) et le *'urf* (coutume), ainsi que le *'amal* (pratique judiciaire) comme des sources de la Loi. Ce qui témoigne du caratère réaliste de cette école juridique, et de son adaptation aux diverses sociétés au travers des âges. Bien évidemment, tout ce qui vient d'être dit sera peu ou prou vrai selon le types d'ouvrages étudiés où les *masā'il* seront traités de manière plus ou moins concrète. Dans le cas des lieux de culte, ce qui importe pour nous n'est pas d'opposer les normes juridiques aux pratiques sociales, mais d'identifier plutôt la manière dont les premières peuvent être utilisées comme ressource pour les premières afin de restituer le passé.

Dans son récent article sur la formation de la doctrine mālikite relative aux lieux de culte[4] des *ḏimmī*-s[5], Alejandro García Sanjuán, après avoir exposé le débat historiographique sur cette question, présentait dans la dernière partie de son texte, qui en est le cœur, les deux grandes traditions juridiques mālikites, celle de Kairouan et celle d'Ibn al-Māǧišūn (m. 213/828), ce qui, selon nous, représente une très bonne approche pour notre sujet. Bien avant lui, Antoine Fattal, dans son chapitre consacré au « statut des édifices du culte[6] », divisé en trois sous-chapitres (1. La doctrine des légistes ; 2. Les traités des premiers califes ; 3. Les faits historiques), présentait une matière riche d'un point de vue onomastique et toponymique, ainsi que du point de vue des destructions et des constructions. Mais à aucun moment il ne nous révèle les points de convergence entre tous ces actes compilés à la manière d'une interminable litanie. D'un trait de plume lapidaire, il exposait la doctrine de Ša'rānī (m. 973/1565) contenue dans son *Mīzān*

4 Sur la position des jurisconsultes musulmans, cf. Ibn Qayyim al-Ǧawziyya, *Aḥkām ahl al-ḏimma*, al-Bakrī Yūsuf et al-'Ārūrī Šākir (éd.), 1997 ; Tritton, A. S., *The Caliphs and Their Non-Muslim Subjects. A Critical Study of the Covenant of 'Umar*, 1930 et Fattal, Antoine, *Le statut légal des non-musulmans en pays d'Islam*, 1958.

5 Garcia Sanjuán, Alejandro, « La formación de la doctrina legal mālikí sobre lugares de culto de los ḏimmíes », in *The Legal status of ḏimmī-s in the Islamic West (second/eighth-ninth/fifteenth centuries)*, Fierro, Maribel et Tolan, John (éd.), 2013, 131-155.

6 Fattal, Antoine, *Le statut légal des non-musulmans*, 1958, 174-203.

ainsi que quelques règles énoncées par le ḥanafite Abū Yūsuf[7] (m. 182/798). Malheureusement, ces deux textes ne sont que d'une infime utilité pour le lecteur et ils lui apportent trop peu de lumière pour lui permettre de pénétrer véritablement toute une casuistique bien souvent absconse. C'est donc afin de partir d'une division différente de celle d'Alejandro Sanjuán, pleinement recevable au demeurant, et pour combler les lacunes du texte de A. Fattal que nous prenons le parti d'adopter un plan novateur. Ainsi, dans un premier temps, nous rappellerons brièvement comment les juristes musulmans divisaient les villes (*amṣār*). En effet cette division est fondamentale pour notre sujet puisqu'elle gouvernait des réglementations sur les édifices cultuels sensiblement différentes. Puis, dans un second temps, nous étudierons un certain nombre de *fatwā-s* et textes normatifs[8] relatifs à la permanence, la destruction, la rénovation et la construction *ex novo* des lieux de culte des *ḏimmī*-s.

La division des villes selon les fuqahā'

Si les jurisconsultes (*fuqahā'*) musulmans d'époque médiévale scindaient le monde en deux espaces[9], *dār al-islām* (terre d'Islam) et *dār al-ḥarb* (terre non-musulmane), cette division en appelait une autre, celle des *amṣār* musulmans (pl. de *miṣr*, ville). Pour Ibn Qudāma al-Maqdisī[10], qui reprend cette division de jurisconsultes qui le précédèrent, les *fuqahā'* distinguaient pour ces villes trois catégories : a- celles qui avaient été conquises par les armes (*'anwa*)[11] ; b- celles qui l'avaient été par reddition (*ṣulḥ*)[12], à propos desquelles il faut ajouter qu'elles se répartissent elles-mêmes en deux types : celles qui étaient habitées par les *ahl al-ṣulḥ*[13] qui versaient la *ǧizya* mais qui appartenaient aux musulmans et celles qui appartenaient aux *ahl al-ṣulḥ* versant le *ḫarāǧ* aux musulmans ; et c- les villes

7 *Ibid*., 174-175.

8 Sur l'utilité de ces sources pour l'historien, cf. Bouchiba, Farid, « Cohabitation religieuse et pratiques alimentaires à Cordoue au XI-XII[e] siècles d'après le grand *qāḍī* Ibn Rušd », in *La cohabitation religieuse dans les villes Européennes, X[e]-XV[e] siècles. Religious cohabitation in European towns (10[t]-15[th] centuries)*, Boisselier, Stéphane et Tolan, John (éd.), 2014, 63-88.

9 Pour certains šāfi'ītes et ḥanafites il existe une troisième catégorie qui est celle du *dār al-ṣulḥ* ou *dār al-'ahd* et qui correspond aux terres non conquises par les musulmans, mais dont la paix lui est « acheté » par le versement d'un tribu garantissant une trêve entre les deux parties.

10 Ibn Qudāma al-Maqdisī, *al-Muġnī*, Le Caire, Maktaba al-Qāhira, 1968, 9/354-356. On se reportera aussi aux *Aḥkām ahl al-ḏimma*, 1173-1209, ainsi qu'au volume deux du Mi'yār aux endroits où il est fait mention des églises et des synagogues.

11 Celles-ci deviennent de *facto* des terres d'Islam.

12 Khadduri, Majid, « Ṣulḥ », *EI*[2], IX 880-881.

13 Les habitants ayant conclu un traité avec l'autorité musulmane.

« nouvelles[14] » dites *muḥtaṭṭa*[15]. À présent, voyons dans les grandes lignes quelles furent les positions des juristes mālikites, ainsi que celles de ceux des autres écoles sunnites au sujet des lieux de culte dans ces divers espaces.

Les villes conquises par les armes (*ʿanwa*)[16]

Selon la doctrine mālikite, il ne sera pas permis d'élever (*iḥdāṯ*) de nouveaux lieux de cultes dans les villes conquises par les armes (*ʿanwa*), car celles-ci sont devenues des biens (*milk*) appartenant aux musulmans. Cependant, selon al-Laḫmī (m. 478/1058), qui se distingue des autres *fuqahāʾ* par cet avis singulier, les églises en présence ne seront pas détruites. C'est là aussi l'un des avis de l'école ḥanbalite et šāfiʿīte. Selon l'autre avis ḥanbalite, et selon « l'avis le plus sûr » (*aṣaḥḥ*)[17] des šāfiʿītes, les édifices devront être détruits, car la terre appartient aux musulmans. C'est aussi l'avis de la majorité des savants mālikites (Ibn Šās, al-Qarāfī, Ibn Rāšid, etc.).

Les ḥanafites quant à eux soutiennent qu'ils ne seront pas détruits et resteront possession des *ḏimmī*-s. Cependant, ils devront les transformer en lieux d'habitation (*masākin*) et ne plus s'en servir pour le culte. La littérature juridique nous apprend, à propos des églises en présence, que les ḥanafites s'appuient sur ce que firent les Compagnons (*ṣaḥāba*), autrement dit ne pas détruire les édifices religieux des pays conquis par la force (*ʿanwa*). D'aucuns arguent que la présence des églises et synagogues en terre d'Islam conquises par *ʿanwa* témoignent de cela. De plus, ils s'appuient aussi sur l'ordre du calife omeyyade ʿUmar Ibn ʿAbd al-ʿAzīz (m. 102/720) à ses gouverneurs (*ʿummāl*) de ne détruire aucune synagogue, église ou pyrée[18].

Les villes conquises par reddition (*ṣulḥ*)[19]

Les terres de *ṣulḥ* se divisent en trois catégories. Premièrement, celles pour lesquelles les *ḏimmī*-s consèrvent la propriété du sol mais versent le *ḫarāǧ*. Il leur sera permis d'y construire de nouveaux lieux de culte (*iḥdāṯ*) selon les doctrines

14 Sur ces nouvelles villes voir par exemple pour al-Kūfa l'étude que lui consacre Djaït, Hichem, *Al-Kūfa, naissance de la ville islamique*, 1986.

15 Exemple Kūfa, Baṣra. Dans sa traduction de la *Muqaddima*, Vincent Monteil traduit le mot *iḫtiṭāṭ* par *planification [des villes]*, ou encore par *urbanisme*. De son côté, Rosenthal traduit ce terme par *planning*. Voir Ibn Khaldûn, *Discours sur l'histoire universelle. Al-Muqaddima*, 1967.

16 **cf. *al-Muġnī*, 9/355 et *Aḥkām ahl al-ḏimma*, 1198-1202**

17 Dans la terminologie šāfiʿite on rencontre le plus souvent le terme *aṣaḥḥ* par opposition au *ṣaḥīḥ*. Le premier est utilisé lorsqu'il y a une divergence très prononcée sur une question. Et le second lorsque celle-ci est moindre. Dans un ordre de grandeur, le *mašhūr* est un avis plus fort que le *aẓhar* et le *ṣaḥīḥ* est supérieur au *aṣaḥḥ*.

18 al-Ṭabarī, *Tārīḫ al-umam wa l-mulūk,* s. d., V 364.

19 **cf. *al-Muġnī*, 9/355-356 et *Aḥkām ahl al-ḏimma*, 1202-1209**

mālikites, ḥanafites et ḥanbalites. C'est aussi « l'avis le plus sûr » (*aṣaḥḥ*) des šāfi'ites[20]. L'avis de tous ces juristes est motivé par le fait que la terre appartient aux *ḏimmī*-s. Deuxièmement, celles dont la propriété appartient aux musulmans et pour lesquelles les *ḏimmī*-s versent la *ǧizya*. Il sera licite ou non d'élever des édifices en fonction de ce qui a été stipulé dans le *ṣulḥ*. Troisièmement, si c'est un *ṣulḥ* de type *muṭlaq* (absolu), les constructions seront interdites pour les ḥanafites, šāfi'ites et ḥanbalites. De leur côté, les mālikites autorisent les constructions en dehors des lieux habités par les musulmans. Quant aux anciens édifices, les mālikites, ḥanafites et ḥanbalites permettent qu'ils soient maintenus. Selon l'avis le plus sûr (*aṣaḥḥ*) des šāfi'ites, ils devront être détruits.

Les villes ex novo (*muḫtaṭṭa*) bâties par les musulmans[21]

Dans les villes nouvellement bâties telles qu'al-Kūfa, al-Baṣra, Bagdad ou Wāsiṭ, les juristes sont unanimes à considérer qu'il n'est pas possible d'élever de nouvelles (*iḥdāṯ*) églises ou synagogues, ni aucun autre lieu de culte où les *ḏimmī*-s pourraient se rassembler. Pour Ibn Šās (m. 610/1210) : « si les tributaires se trouvaient dans une ville bâtie par les musulmans (*fī balda banā-hā l-muslimūn*), il leur serait interdit d'y élever (*binā'*) des lieux de culte[22] ». Les *ṣawmaʿa*-s[23] seront soumises au même régime. De même, parce qu'ils sont voisins des musulmans, ils ne battront pas le *nāqūs* (simandre). Ces interdits sont motivés par le fait que la terre (*milk*) appartient aux musulmans. D'ailleurs, pour les jurisconsultes, même si les *ḏimmī*-s avaient passé un pacte avec l'Imām (*i. e.* le souverain) leur permettant d'élever un édifice, ce pacte serait nul. Il existe d'ailleurs à ce sujet la tradition prophétique suivante, que l'on rencontre bien souvent sous la plume des *fuqahā'* dès lors qu'ils abordent ce sujet : « on ne construira pas de *kanīsa* en terre d'Islam (*dār al-islām*) et on ne restaurera pas celles qui tombent en ruines[24] ». Cependant, on se gardera de comprendre derrière l'expression *ex novo* que lesdites villes avaient

20 L'autre avis šāfi'ite stipule que cela leur sera interdit, car les terres sont sous autorité musulmane.

21 cf. *al-Muġnī*, 9/354-355 et *Aḥkām ahl al-ḏimma*, 1173-1198

22 Ibn Šās, 'Abd Allāh Ibn-Naǧm, '*Iqd al-Ǧawāhir al-ṯamīna fī maḏhab 'ālim al-madīna*, Abū l-Aǧfān, Muḥammad (éd.), 2003, I 331.

23 Le juriste ḥanafite Ibn 'Ābidīn (m. 1252/1836) nous donne la définition suivante de la *ṣawmaʿa* dans sa *Ḥāšiyya* : « la *ṣawmaʿa* est un édifice élevé afin de se vouer au culte loin des gens », Ibn 'Ābidīn, Muḥammad B. Amīn, *Ḥāšiyat Ibn 'Ābidīn. Radd al-muḥtār 'alā al-Durr al-muḫtār*, Ḥusām al-Dīn Farfūr, 'Abd al-Razzāq Ḥalabī, et Muḥammad Sa'īd Ramaḍān al-Būṭī (éd.), 2000, III 271. Pour Faḫr al-dīn al-Rāzī « les *ṣawāmi'* (pl. de *ṣawmaʿa*) sont des édifices chrétiens qu'ils construisent dans les déserts », cf. al-Rāzī, Faḫr al-Dīn Muḥammad ibn 'Umar, *al-Tafsīr al-kabīr,* 1934, XXIII 230. On a aussi pu soutenir (*qīla*) que les *ṣawāmi'* sont les lieux de culte des Sabéens, cf. Ibn Qayyim al-Ǧawziyya, *Aḥkām ahl al-ḏimma*, al-Bakrī Yūsuf et al-'Ārūrī Šākir (éd.), 1997, III 1171.

24 Ibn 'Adī, *al-Kāmil fī ḍu'afā' al-riǧāl*, 1984, III 1199. Dans ses *fatwā*, al-Subkī (m. 756/1355) rapporte ce *ḥadīṯ*. Et il ajoute que le transmetteur Sa'īd b. Sinān est désaprouvé par certains, et considéré comme probe (*ṯiqa*) par d'autres. Ajoutant que c'est un homme vertueux du Šām et dont Ibn Māǧah rapporte les *ḥadīṯ*.

toutes été construites sur des terrains vierges d'habitants et de constructions. Bien souvent, les villes étaient élevées autour ou à côté d'un habitat primitif dans lequel pouvait se trouver une église, une synagogue, etc. Dans ce dernier cas de figure, les mālikites, šāfi'ītes et ḥanbalites sont d'avis que les *ḏimmī*-s qui y vivent garderont leurs anciens lieux de culte. Quant au ḥanafite Muḥammad b. al-Ḥasan al-Šaybānī (m. 189/805), il présente deux avis. Au chapitre du « *al-'ušr wa l-ḫarāǧ* », il soutient que les anciens édifices cultuels devront être détruits, et au chapitre « *al-iǧāra* », il est d'avis contraire[25]. Il semblerait toutefois que ce soit le second avis qui ait prévalu tout au long de l'histoire.

Permanence, destruction, restauration et construction ex novo *des édifices religieux*

Permanence ou destruction des lieux de culte sur les terres conquises par traité (*ṣulḥ*)

La plupart des mālikites, dont al-Laḫmī (m. 478/1058) et Ibn Šās, sont d'avis que les lieux de culte se trouvant sur des terres qui n'appartenaient pas aux musulmans par le passé resteront, sous certaines conditions, entre les mains des tributaires. Dans son chapitre relatif au pacte de *ḏimma* (*ḥukm 'aqd al-ḏimma*), Ibn Šās écrit : « Le pacte de *ḏimma* nous impose des obligations ainsi qu'à eux (*i. e.* les *ḏimmī*-s). On ne devra pas s'attaquer à ces derniers, et nous devrons garantir leurs vies et leurs biens. [De même], on ne détruira pas leurs kanā'is (pl. de kanīsa)[26]… ». Et d'ajouter un peu plus loin : « Si la terre a été conquise par reddition (*bil-ṣulḥ*) et qu'il leur est permis d'y habiter en échange du versement du *ḫarāǧ* mais que les immeubles (*abniyya*) appartiennent aux musulmans et qu'ils stipulent que des *kanā'is* seront maintenues, cela est autorisé. Cependant, si le pays a été conquis et qu'il a été conclu que les terres leurs appartiennent et qu'ils versent le *ḫarāǧ*, [alors], que leurs *kanā'is* ne soient pas démolies. Et que leurs volontés soient respectées[27]. »

C'est d'ailleurs à ce sujet, au XV^e^ siècle, et plus précisément au sujet des synagogues du Touat[28], qu'al-'Aṣnūnī, *qāḍī* de Touat, interrogea les jurisconsultes de Tlemcen et de Fès. Dans un premier temps, et à la demande d'al-Figuīguī,

25 *Ḥāšiyat Ibn 'Ābidīn*, III 273.
26 *'Iqd al-Ǧawāhir al-ṯamīna*, I 330.
27 *'Iqd al-Ǧawāhir al-ṯamīna*, I 331.
28 La *fatwā* sur les synagogues du Touat a été récemment étudié par Elise Voguet, « Les communautés juives du Maghreb central à la lumière des fatwā-s mālikites à la fin du Moyen Âge », in *The Legal status of ḏimmī-s in the Islamic West (second/eighth-ninth/fifteenth centuries)*, Fierro, Maribel et Tolan John (éd.) 2014, 295-306, ou encore, par O. Hunwick dans un article publié dans al-Qanṭara XII (1991). Hunwick situe cette *fatwā* dans un contexte historique précis : l'arrivée dans la région de musulmans et de juifs expulsés de la péninsule Ibérique, ce qui provoqua un déséquilibre démographique.

al-ʿAṣnūnī avait rendu une *fatwā* autorisant le maintien des synagogues, s'appuyant, au passage, sur une *fatwā* d'Ibn al-Ḥāǧ au sujet de chrétiens jouissant d'un pacte (*muʿāhidīn*) qui furent contraints de quitter al-Andalus pour l'Afrique du Nord. Ces derniers réclamaient la possibilité de construire de nouvelles églises, là où ils résidaient à présent. Ibn al-Ḥāǧ, répondit favorablement à leur requête, considérant qu'ils conservaient les droits acquis dans le passé[29]. Cependant, al-Maġīlī (m. 909/1503) et son fils s'opposèrent très vivement à cette décision, déclarant que « ces synagogues devront obligatoirement être détruites (*inna hadma-hā wāǧib*). Et que tout *muftī* qui soutient qu'elles doivent être maintenues est un imposteur (*daǧǧāl*)[30] ». À la suite de nombreux troubles, al-ʿAṣnūnī consulta donc les jurisconsultes de Fès et de Tlemcen à ce sujet[31].

Ibn Zakrī (m. 899/1494), *muftī* de Tlemcen à l'époque zayyānide, répondit à cette question en prendant la défense des tributaires contre al-Maġīlī. Dans l'une des deux *fatwā*-s qu'il consacra à cette question, il déclara que : « La loi religieuse ne permet pas de démolir les synagogues en question, telle est l'opinion des meilleurs jurisconsultes malékites. [ ], l'injustice envers les tributaires est prohibée par la loi religieuse, ainsi que le disent Allah et son Apôtre, qui défend même d'entrer chez un tributaire sans son autorisation. Donc, la loi défend la démolition des synagogues sus-mentionnées[32] ». Dans sa seconde *fatwā* portant toujours sur les synagogues du Touat, Ibn Zakrī ajouta qu'il n'était pas permis de détruire les édifices ayant été construits avant la conquête, et que dans le cas des synagogues du Sahara, il apparaissait le plus souvent que ces pays étaient la propriété des habitants[33]. Il ne sera donc pas permis de démolir ces synagogues, car celui qui le ferait agirait : « [...], par animosité et oppression envers les *ḏimmī*-s[34] ».

De son côté, le jurisconsulte al-Māwāsī (m. 896/1491), qui représente une voie médiane, soutient l'opinion suivante[35]. Les synagogues du Touat et des autres *qṣūr*[36] du Sahara, qui font partie du *dār al-islām*, ne sauraient être tolérées, sauf

29 al-Wanšarīsī, Aḥmad ibn Yaḥyā, *al-Miʿyār al-muʿrib wa-l-ǧāmiʿ al-muġrib ʿan fatāwī ʿulamāʾ Ifrīqiyya wa-l-Andalus wa-l-Maġrib*, Ḥaǧǧī, Muḥammad, ʿArāyišī, Muḥāmmad et al-Šarqāwī Iqbāl, Aḥmād (éd.), 1981, II 215. Voir *infra* notre chapitre « d- Construction d'édifices *ex novo* sur les terres de *ṣulḥ* ».

30 *al-Miʿyār al-muʿrib*, II 216. C'est aussi l'opinion d'al-Figuīguī.

31 *al-Miʿyār al-muʿrib*, II 216.

32 Amar, Emile, *La Pierre de touche des fétwas de Aḥmad al-Wanscharîsî. Choix de consultations juridiques des faqîhs du Maghreb*, Archives marocaines, 12, nº 1, 1908, 249-252.

33 Saḥnūn, ʿAbd al-Salām b. Saʿīd, al-Mudawwana al-kubrā, 1994, III 435 « *bāb fī iǧāra l-kanīsa* ».

34 *al-Miʿyār al-muʿrib*, II 228.

35 *al-Miʿyār al-muʿrib*, II 225-227. On y trouve deux *fatwā*-s de ce même juriste.

36 Sur les *qṣūr* du Sud algérien voir Chekhab-Abudaya, Mounia, *Patrimoine architectural du Sud algérien : le qṣar, type d'implantation humaine au Sahara. Régions du wādī Rīġ, du wādī Miya, du wādī Mzāb et du wādī Saggūr*. Thèse en histoire de l'art sous la direction d'Alastair Northedge, Université Paris 1 – Panthéon Sorbonne, 2012, 2 vol.

s'il appert que les juifs du Touat ont construit ces synagogues en vertu d'une clause de leur pacte de *ḏimma*. Quant aux anciens édifices, construits avant la conquête, ils ne doivent pas être détruits, car il se peut que les *ḏimmī*-s aient reçu l'autorisation de les élever. Il faudra donc que le plaignant apporte la preuve de ses assertions s'il souhaite voir les synagogues détruites. D'ailleurs, la règle juridique, contenue dans un *ḥadīṯ* rapporté par Ibn ʿAbbās le rappelle : « *al-bayyina ʿalā l-muddaʿī wa l-yamīn ʿalā man ankar*[37] » (le demandeur est tenu de fournir la preuve et le serment est imposé à celui qui nie la chose). À cette règle processuelle fondamentale, qui est là pour protéger les droits des accusés, et qui s'applique aussi aux juifs et aux chrétiens, la loi musulmane ajoute la suivante : « *al-aṣl barāʾat al-ḏimma* », que l'on pourrait traduire par « le fondement juridique [considère] toute personne innocente », ou encore par le principe de droit pénal bien connu de la présomption d'innocence. Ces deux règles musulmanes citées ci-dessus, qui sont des principes fondamentaux de la justice pénale, préjugent en faveur de la non-culpabilité de toute personne accusée[38]. Ainsi, ce n'est pas à la personne poursuivie de prouver son innocence, mais c'est à la partie poursuivante d'apporter la preuve de la culpabilité. Par conséquent, en l'absence de preuve le maintien des synagogues s'impose.

Un autre cas de figure est celui consigné dans les *Aḥkam al-kubrā* d'Ibn Sahl emprunté aux *Aḥkām* d'Ibn Ziyād. Il y est fait mention du conseil des juristes (*šurā*) de Cordoue qui, après consultation, approuva la démolition d'une synagogue (*šanūġa*) récemment construite à Cordoue, considérant que les *ḏimmī*-s ne pouvaient bâtir d'églises et de synagogues dans les villes musulmanes au milieu de ces derniers. La *fatwā* d'Ibn Sahl précise que : « il n'y a nulle trace, dans les lois de l'Islam, d'une permission de construire de nouvelles églises et synagogues dans les villes musulmanes[39] ». C'est aussi l'avis de al-ʿAbdūsī (m. 849/1446), qui

37 D'après Ibn ʿAbbas le Prophète a dit : « Si l'on reconnaissait aux hommes le bien fondé de toutes leurs prétentions, les uns ne manqueraient certes pas de revendiquer les biens et la vie des autres ; mais le demandeur est tenu de fournir la preuve et le serment est imposé à celui qui nie la chose », *ḥaḍīṯ* considéré comme authentique par les traditionnistes et rapporté par al-Buḫārī (nº 4552), Muslim (nº 1711), al-Bayhaqī (1/252), (5/332), al-Dāraqutnī (4/107), etc.

38 Ou encore de la Convention européenne de sauvegarde des droits de l'homme « Toute personne accusée d'une infraction est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie » (art. 6-2).

39 Voir *al-Miʿyār al-muʿrib*, II 246 ; Ḥallāf, ʿAbd al-Wahhāb, *Waṯāʾiq fī aḥkām qaḍāʾ ahl al-ḏimma fī l-Andalus mustaḫraǧa min maḫṭūṭ al-Aḥkām al-kubrā (Documentos sobre procesos referentes a las comunidades no musulmanas en la España musulmana)*, 1980, 30-31 et 77-80 ; Idriss, Hady-roger, « Les tributaires en Occident Musulman médiéval », *Mélanges Armand Abel*, 1974, I 174 ; Lagardère, Vincent, *Histoire et société en occident musulman au Moyen Âge : analyse du Miʿyâr d'al-Wansharîsî*, 1995, 55. Voir aussi Molénat, Jean-Pierre, « La fatwa sur la construction des églises à Cordoue au IVᵉ /Xᵉ siècle », in *The Legal status of ḏimmī-s in the Islamic West (second/eighth-ninth/fifteenth centuries)*, Fierro, Maribel et Tolan, John (éd.), 2013, 157-165 et Mazzoli-Guintard, Christine, *Vivre à Cordoue au Moyen Âge : solidarités citadines en terre d'Islam aux Xᵉ-XIᵉ siècles*, 2003, 93-94.

fut interrogé au sujet de l'édification d'une synagogue (*kanīsa*) dans une localité récemment fondée en Ifriqiyya et qui fut détruite à l'initiative d'un dévot musulman. Les juifs souhaitant la reconstruire, al-'Abdūsī répondit que ni la construction (*iḥdāṯ*), ni la restauration (*iṣlāḥ*) n'étaient possibles[40].

La destruction des lieux de culte sur les terres conquises par force (*'anwa*)

L'ensemble des juristes mālikites, mais aussi ceux des autres écoles, sont d'avis qu'on détruira les églises et les synagogues de construction post-musulmane sur les terres conquises de vive force (*'anwa*). C'est ce que rapporte al-Ṭurṭūšī (m. 520/1126) dans son *Sirāǧ al-mulūk* : « Quant aux *kanā'is*, 'Umar b. al-Ḫaṭṭāb, qu'Allāh le Très-Haut l'agrée, décida que toutes celles qui n'existaient pas avant l'Islam soient détruites[41] ». C'est d'ailleurs ce que fit à Ṣan'ā' le gouverneur du Yémen 'Urwa b. Muḥammad, à l'époque du septième calife omeyyade Sulaymān b. 'Abd al-Malik (m. 96-99/715-717) et du huitième 'Umar b. 'Abd al-'Azīz (m. 101/720).

Il y a cependant une divergence qui persiste au sein du mālikisme au sujet de ces destructions. Certains considèrent qu'elles ne doivent concerner que les églises et les synagogues d'époque post-musulmane (al-Laḫmī m. 478/1058). Pour d'autres, elles s'imposent à toutes les époques, que ce soit avant ou après les conquêtes musulmanes. De son côté, Ibn al-Māǧišūn (m. 213/828) est catégorique : « On détruira tous les lieux de culte des tributaires habitants des terres conquises de vive force (*'anwa*)[42] ». C'est aussi l'avis d'Ibn Šās : « Si nous (*i. e.* les musulmans) en venions à posséder leur terre par la force (*qahran*), alors l'Imām (le souverain) ne saurait y tolérer un quelconque édifice cultuel (*kanīsa*), mais ceux-là devront être détruits[43] ».

La restauration, la reconstruction et l'agrandissement des anciens édifices

Il semblerait que pour ce qui concerne les édifices religieux des tributaires, la plupart des jurisconsultes musulmans s'appuient sur ce que les chrétiens du Cham

40 *al-Mi'yār al-mu'rib*, II 249 ; *Mélanges Armand Abel*, I 194 ; *Histoire et société en occident musulman au Moyen Âge*, 52.

41 al-Ṭurṭūšī, *Sirāǧ al-mulūk*, Fatḥī Abū Bakr, Muḥammad (éd.), 1994, II 550.

42 Ibn Abī Zayd al-Qayrawānī, 'Abd Allāh ibn 'Abd al-Raḥmān, *al-Nawādir wa l-ziyādāt 'alā mā fī al-Mudawwana min ġayrihā min al-ummahāt*, Ḥaǧǧī, Muḥammad (éd.), 1999, III 376 ; *'Iqd al-Ǧawāhir al-ṯamīna*, I 331.

43 *'Iqd al-Ǧawāhir al-ṯamīna*, I 331. Pour plus de détails sur la position des quatre écoles juridiques, on se reportera *supra* à notre première partie, au chapitre intitulé « 1. Les villes conquises par les armes ('anwa) ».

(Syrie) auraient stipulé lors du traité qu'ils conclurent avec le calife 'Umar[44]. Voici l'extrait qui nous intéresse :

> Au nom d'Allāh, le Bienfaiteur miséricordieux ! Ceci est une lettre adressée par les Chrétiens de telle ville, au serviteur d'Allāh, 'Umar b. al-Ḫaṭṭāb, commandeur des Croyants. Quand vous êtes venus dans ce pays, nous vous avons demandé la sauvegarde (*amān*) pour nous, notre progéniture, nos biens et nos coreligionnaires. Et nous avons pris par devers vous l'engagement suivant : nous ne construirons plus dans nos villes et dans leurs environs, ni couvents, ni églises, ni cellules de moines, ni ermitage. Nous ne réparerons point, ni de jour ni de nuit, ceux des édifices qui tomberaient en ruines, ou qui seraient situés dans les quartiers musulmans[45].

D'un point de vue mālikite, dans le livre d'Ibn Ḥabīb (m. 238/853), Ibn al-Māǧišūn ajoute, après avoir rappelé l'interdiction de construire de nouveaux édifices, et celle de détruire les anciens sur les terres *'anwa* : « On leur interdira de restaurer les anciennes *kanā'is* si elles tombent en ruines, sauf si cela a été stipulé dans le pacte. Alors on respectera celui-ci. On leur interdira les agrandissements, qu'ils soient visibles ou non (*ẓāhira wa l-bāṭina*)[46] ». Après avoir rapporté ce qui vient de précéder, Ibn Šās ajoute que de son côté Ibn 'Abd al-Barr[47] (m. 463/1071) soutient : « On ne les empêchera pas de restaurer ceux qui sont délabrés et menacent ruine (*mā wahā min-hā'*)[48] ».Selon le point de vue d'Abū Ḥafṣ al-'Aṭṭār (m. 427/1036) : « On interdira aux Chrétiens d'élever en hauteur leurs églises et de les transformer. Si elles sont en *ṭūb* (brique cuite), on ne pourra les changer en pierres. De même, on leur interdira d'embellir les façades extérieures des églises[49] ». À ce sujet, un texte du X^e^ siècle nous apprend qu'un juif de Kairouan, proche du souverain (*al-sulṭān*), voulut reconstruire une synagogue (*kanīsa*) et que le célèbre juriste al-Qābisī (m. 403/1013) s'y opposa[50]. Par ailleurs, il ne leur sera pas interdit de consolider

44 Pour plus de détails sur ce texte on se reportera aux commentaires d'Ahmed Oulddali in Notice n° 1068, projet RELMIN, « Le statut légal des minorités religieuses dans l'espace euro-méditerranéen (V^e^-XV^e^siècle) ». Edition électronique Telma, IRHT, Institut de Recherche et d'Histoire des Textes – Orléans http://www.cn-telma.fr/relmin/extrait1068.

45 *Le statut légal des non-musulmans*, 61.

46 *Nawādir*, III 376 et *'Iqd al-Ǧawāhir al-ṯamīna*, I 331. Voir aussi al-Qarāfī, Aḥmad Ibn-Idrīs, *al-Ḏaḫīra*, Ḥaǧǧī, Muḥammad et Bū-Ḫubza, Muḥammad al-Amīn (éd.), 1994, III 458.

47 Sur la place des *ḏimmī*-s chez ce *faqīh*, et plus précisément dans son *Kāfī*, on se reportera à l'étude de Müller, Christian, « Non-Muslims as part of Islamic law : Juridical casuistry in a fifth/eleventh century law manual », in *The Legal status of ḏimmī-s in the Islamic West (second/eighth-ninth/fifteenth centuries)*, Fierro, Maribel et Tolan, John (éd.), 2013, 21-63.

48 Cf. Ibn Abd al-Barr, *al-Kāfī fī fiqh ahl al-madīna al-mālikī*, al-'Aššā Ḥassūna al-Dimašqī, 'Irfān (éd.), 2007, I 297 « *bāb fī sīra fī ahl al-ḏimma* ».

49 *al-Mi'yār al-mu'rib*, II 259 ; *Mélanges Armand Abel*, I 178-179.

50 *al-Mi'yār al-mu'rib*, II 259 ; *Mélanges Armand Abel*, I 175. *Histoire et société en occident musulman au Moyen Âge*, 24.

les bâtiments et d'élever les portes si le niveau de la terre a augmenté[51]. Sur cette question, le *faqīh* mālikite d'Égypte Ḫalīl b. Isḥāq (m. 776/1374) nous dit, dans son *Muḫtaṣar*, que la rénovation est permise si cela a été stipulé, et dans le cas contraire cela est interdit. Bien évidemment, son opinion concerne les terres *ʿanwa*[52].

Quant aux anciens lieux de cultes construits avant les conquêtes par reddition, cela est possible, car s'il est permis aux tributaires d'y construire de nouveaux édifices, à plus forte raison il leur est permis de rénover les anciens.

Al-Qarāfī (m. 684/1285), important juriste mālikite qui vécut aux époques ayyubīde et mamlūk, adopte une position marginale sur la question. Pour lui, on ne reconstruira pas les édifices qui se sont effondrés et on ne les rénovera pas, qu'ils se trouvent en terre de *ṣulḥ* ou *ʿanwa*.

Aussi, il semblerait que sous l'effet de l'islamisation des populations, la plupart des églises tombèrent en ruine suite à leur désertion par les fidèles et non pas parce que leur restauration en fut interdite[53]. C'est en tout cas ce que rapporte le šayḫ al-Tiǧānī qui visita Tozeur au début du XIVe siècle : « La preuve que cette contrée fut conquise sans résistance résulte de ce que les églises que les chrétiens y avaient, quoique en ruines, subsistent encore de nos jours et qu'elles ne furent point démolies par les conquérants, qui se contentèrent de construire une mosquée en face de chacune d'elles[54] ».

De leurs côtés, les écoles ḥanafite, šāfiʿīte et ḥanbalite soutiennent qu'on permettra aux *ḏimmī*-s de restaurer leurs édifices religieux, tout au moins ceux pour lesquels le maintien a été stipulé dans le pacte. Car une interdiction entraînerait la ruine des bâtiments et correspondrait en quelque sorte à leur destruction. Un avis marginal chez les šāfiʿītes soutient qu'on les empêchera d'embellir l'extérieur des bâtiments. Cependant, l'avis le plus autorisé permet de les embellir en les recouvrant d'un enduit, par exemple, à l'intérieur et à l'extérieur[55].

Au sujet de la reconstruction des édifices détruits ou en ruines, les ḥanafites et les šāfiʿites (selon l'avis le plus autorisé -*aṣaḥḥ*-), et c'est aussi une *riwāya*[56]

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51 *al-Miʿyār al-muʿrib*, II 259.

52 ʿIllīš, Muḥammad, *Mināḥ al-ǧalīl šarḥ Muḫtaṣar Ḫalīl*, 1989, III 222-223 « *bāb al-ǧihād : faṣl fī ʿaqd al-ǧizya* ».

53 Cf. par exemple Bango Torviso, Isidro Gonzalo, « El neovisigotismo artistico de los siglos IX Y X : la restauración de ciudades y templos. I », *Revista de Ideas Estéticas*, 37, 319-338 et Calvo Capilla, Susana « La conversion des églises en mosquées » in Calvo Capilla, Susana, « Les premières mosquées et la transformation des sanctuaires wisigothiques (92H/711-170H/785) », *Mélanges de la Casa de Velázquez*, 41-42, 2011, 131-163 (et plus particulièrement les pages 147-150). Voir *infra*, note 94.

54 cf. *Voyage du scheikh Et-Tidjani dans la Régence de Tunis, pendant les années 706, 707 et 708 de l'hégire 1306-1309 de J.-C.* Traduit de l'arabe par M. Alphonse Rousseau, 1853.

55 Nawawī, Yaḥyā b. Šaraf, *Rawḍat al-ṭālibīn wa ʿumdat al-muftiyīn*, Šāwīš, Muḥammad Zuhayr (éd.), 1991, X 324.

56 Nom d'action du verbe *rawā*, qui signifie à l'origine « porter, transporter de l'eau » et à partir de là « transmettre, rapporter ». Le terme *riwāya* s'applique à la notion technique de transmission de poèmes, de récits, de *ḥadīṯ*, de *fiqh*, etc.

d'Aḥmad b. Ḥanbal, considèrent qu'il sera possible aux *ḏimmī*-s de reconstruire ces édifices si le maintien de ceux-là a été stipulé dans le pacte. Car, bien entendu, les bâtiments ne sauraient traverser le temps sans en subir les dommages (vétusté, etc.). Dans le cas des reconstructions, les tributaires ne devront pas augmenter la taille des anciens édifices. Ils devront aussi utiliser les mêmes matériaux que ceux utilisés lors de la première construction. De leur côté, les ḥanbalites ainsi que deux šāfi'ītes al-Iṣṭaḫarī (m. 328/939) et Ibn Abī Hurayra (m. 345/956) soutiennent qu'il n'est pas permis aux tributaires de reconstruire les édifices tombés en ruines. Ils assimilent cela à de la construction *ex novo* (*iḥdāṯ*) en terre d'Islam.

La construction d'édifices *ex novo* sur les terres de *ṣulḥ*

Si le titre précise « terres de *ṣulḥ* », c'est tout simplement que dans le cas des terres *'anwa* (conquises « de vive force »), le problème ne se pose presque pas puisque la construction de nouveaux édifices y est interdite pour la majorité des juristes. Ainsi, il y a quasi-unanimité quant à l'interdiction de construire des *kanā'is* ou *biya'* sur les terres musulmanes dites *'anwa*, et les terres *muḫtaṭṭa*, excepté dans le cas où le souverain (Imām) le permet. Toutefois, cette permission doit être accordée au moment de la conquête (*fatḥ*)[57] et non après celle-là, pour les terres conquises de vives forces (*'anwa*). Quant aux terres musulmanes (*balad al-muslimīn*), cette autorisation doit être contemporaine du premier établissement (*waqt al-nuzūl*)[58] des *ḏimmī*-s. D'ailleurs, le *šayḫ* de Fès Abū l-Ḥasan al-Ṣaġīr (m. 719/1319) est d'avis que « le souverain (Imām) peut accorder aux tributaires la construction d'églises ou de synagogues si la *maṣlaḥa* (intérêt) est supérieure à la *mafsada* (dommage), par exemple, s'ils sont plus experts que les musulmans dans l'art de bâtir (*binā'*), de planter (*ġars*), etc. Car il y a là un grand intérêt pour l'essor de la cité[59] ». De fait, cela est aussi valable dans le cas où leur installation au milieu des musulmans entraineraient un affaiblissement des ennemis infidèles (*ahl al-ḥarb*).

En 1126, les Almoravides transférèrent des *mu'āhidīn*[60] d'al-Andalus vers le Maroc[61]. Interrogé sur les mozarabes qui furent contraints de quitter al-Andalus pour le Maroc, Abū 'Abd Allāh b. al-Ḥāǧǧ (m. 529/1135) considère que le

57 *al-Mi'yār al-mu'rib*, II 241.
58 *al-Mi'yār al-mu'rib*, II 241.
59 *al-Mi'yār al-mu'rib*, II 241.
60 Personne s'engageant par un pacte (*'ahd*) envers une autre. Ce terme désignait au Moyen Âge ceux qui, parmi les « Gens du Livre », se soumirent aux conquérants musulmans en échange du *'ahd* ou de la *ḏimma* (protection).
61 Sur ce sujet voir l'article de Delfina Serrano Ruano « Dos fetuas sobre la expulsión de mozárabes al Magreb en 1126 », *Anaquel de Estudios Árabes*, 2, 1991, 163-192.

souverain (Imām) peut accorder aux *ḏimmī*-s un lieu pour y construire leur édifice religieux afin de remplacer les autres bâtiments que les tributaires possédaient en péninsule Ibérique, eu égard à l'intérêt général (*maṣlaḥa*). Il écrit :

> Ces Chrétiens sont décrits comme étant des *mu'ahidīn* et cela suppose la pérennité du pacte de *ḏimma* précédemment conclu. La loyauté envers eux (*wafā'*) est d'obligation canonique (*wāǧib*). Il est donc permis à chaque communauté (*ṭā'ifa*) de construire une *bī'a* afin qu'ils y pratiquent leur religion. Mais on leur interdira de sonner les cloches (*nawāqīs*)[62]. Car l'Emir des Croyants leur a ordonné de quitter al-Andalus, où ils représentent un danger pour les musulmans. J'ai d'ailleurs pu observer que certains mālikites partagent ce point de vue et c'est ce que je considère comme vrai[63].

D'ailleurs, le souverain almoravide Yūsuf b. Tāšufin consulta pour cette affaire le *qāḍī* de Grenade Abū l-Qāsim b. Ward (m. 540/1146) au sujet des biens haboussés au profit des églises. Ibn Ward répondit à cette question en 1127. Pour ce *qāḍī*, si la vente des biens que possèdaient les Chrétiens tributaires, déportés de Séville à Meknès, en al-Andalus est permise, celui-ci s'oppose fermement à l'édification d'une église pour ces déportés. Selon ce jurisconsulte, chacun doit pratiquer son culte à domicile[64].

Quant aux terres de *ṣulḥ* (reddition), il est possible d'y construire de nouvelles *kanā'is*. C'est l'avis de l'ensemble des mālikites, hormis Ibn al-Maǧišūn (m. 213/828).Celui-ci précise que si l'on ne peut pas construire de *kanīsa* dans le *dār al-islām*, il est tout de même possible pour les *ḏimmī*-s qui se trouveraient à l'écart des musulmans de construire dans leurs localités des *kanā'is*, et d'y introduire du vin ou des cochons. Voici ce qu'il soutient *ad litteram* :

> Il n'est pas permis de stipuler [dans le contrat de] *ṣulḥ* [la possibilité] d'élever [des édifices]. On leur interdira cela. Sauf dans les localités où ils n'habitent pas avec des musulmans. Cela leur est possible, même s'ils ne l'ont pas stipulé dans le pacte. [Bien évidemment], tout ce qui vient d'être dit est valable pour les terres de *ṣulḥ*. Quant aux tributaires habitant les terres *'anwa*, après leur avoir imposé la *ǧizya* on ne leur laissera aucun édifice (*kanīsa*). Tous seront détruits[65].

Par ailleurs, ce juriste ajoute qu'il n'est pas permis au souverain (Imām) de stipuler dans le pacte la possibilité de construire des *kanā'is* parmi les musulmans, mais que cela reste possible pour les lieux où ils vivent entre eux.

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62 *Mi'yār*, II 215.

63 *al-Mi'yār al-mu'rib*, II 21 ; *Mélanges Armand Abel*, I 189 ; *Histoire et société en occident musulman au Moyen Âge*, 66. Et Lagardère, Vincent, « Communautés mozarabes et pouvoir almoravide en 519 H/1125 en al-Andalus », *Studia Islamica*, LXVIII, 1988, 99-119.

64 *Histoire et société en occident musulman au Moyen Âge : analyse du Mi'yâr d'al-Wansharîsî*, 364-365 et Lagardère, Vincent, *Les Almoravides. Le djihâd andalou (1106-1143)*, 1998 110-111

65 *'Iqd al-Ǧawāhir al-ṯamīna*, I 331.

Toujours à propos des édifices *ex novo*, le juriste tunisien al-Burzulī (m. 841/1438) fut interrogé au sujet d'une église (*kanīsa*) construite par les chrétiens dans leur *fundūq*[66]. Nombre de savants s'opposèrent à l'édification de celle-ci. Voici la réponse d'al-Burzulī :

> Ils ont construit une nouvelle église dans leur *fundūq* et ont élevé quelque chose qui ressemble à une tour (*ṣawmaʿa*) [...] Ils apportèrent l'acte du traité (*kitāb al-ʿahd*), dans lequel il est établi qu'on ne saurait leur interdire de construire une demeure pour y célébrer leur culte. Ils arguèrent par ailleurs que la construction qui ressemble à une tour (*ṣawmaʿa*) leur sert à éclairer. Le *qāḍī* envoya quelqu'un inspecter celle-ci, [afin d'y voir s'il s'y trouvait une cloche].

Et Burzulī d'ajouter : « Il la trouva comme il l'avait décrite[67] ».

Anselme Adorno, contemporain d'al-Burzulī, qui se rendit à Tunis compte deux chapelles, qui existaient déjà au XIII^e^ et XIV^e^ siècles. Il témoigne :

> Au-delà de la porte orientale de la cité, on trouve les [funduḳs] des marchands chrétiens étrangers : Génois, Vénitiens, Pisans, Florentins et Catalans [...] Le [funduḳ] des Génois et celui des Vénitiens sont les principaux et les mieux bâtis [...] Les Génois [...] ont édifié une très belle église dédiée à saint Laurent, où ils célèbrent une messe quotidienne. Les Vénitiens ont aussi une église dédiée à sainte Marie[68].

Ce récit de voyageur est fort instructif sur la situation des libertés de culte accordées aux chrétiens à Tunis au XV^e^ siècle au sein de leurs *funduq*. Et, il est très vraisemblable, même si rien ne l'indique expressément, que la consultation juridique qu'al-Burzulī eut à rendre concernait l'une de ces églises décrites par Anselme Adorno.

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66 Pour plus d'informations sur le *fundūq*, voir Constable, Olivia Remie, « Funduq, Fondaco, and Khan in the Wake of Christian Commerce and Crusade » in Laiou, A. E. et Mottahedeh, R. P. (dir.), *The Crusades from the Perspective of Byzantium and the Muslim World*, 2001, 145-146. Ou encore, Valérian, Dominique, « Les marchands latins dans les ports musulmans méditerranéens : une minorité confinée dans des espaces communautaires ? », in Anastassiadou-Dumont, M., *Revue des mondes musulmans et de la Méditerranée*, 107-110 (2005), 437-458 et plus particulièrement le premier chapitre « L'espace de la nation : le foundouk ».

67 al-Burzulī, Abu-'l-Qāsim Ibn-Aḥmad, *Ǧāmiʿ masāʾil al-aḥkām li-mā nazala min al-qaḍāyā bi-'l-muftīn wa-'l-ḥukkām*. Fatāwā al-Burzulī, al-Hīla, Muḥammad al-Ḥabīb (éd.), 2002, II 20 ; *al-Miʿyār al-muʿrib*, II 215-216 ; *Mélanges Armand Abel*, I 193 ; *Histoire et société en occident musulman au Moyen Âge,* 39.

68 cf. Heers, J. et De Goer, G., *Itinéraire d'Anselme Adorno en Terre Sainte (1470-1471)*, 1978, 103. Cité par Maillard, C., *Les Papes et le Maghreb aux XIII^ème^ et XIV^ème^ siècles. Étude des lettres pontificales de 1199 à 1419*, 275

Dans une *mas'ala*[69] transmise par le cordouan al-'Utbī (m. 254-255/868-869) dans sa *Mustaḫraǧa*[70] :

> Mālik (m. 179/795) fut interrogé au sujet des *kanā'is* qui se trouvent dans les nouvelles villes musulmanes en terre d'Islam (*al-fusṭāṭ al-muḥdaṯa fī ḫuṭaṭ al-islām*). Que faire s'il leur avait été donné [*i. e.* aux non-musulmans] un terrain non-bâti (*'arāṣ*)[71], et qu'ils leur avaient loué afin d'y élever des *kanā'is* ? Il a répondu : elles devront être transformées et détruites. On ne les laissera pas ainsi. Il ne s'y trouve aucun bien[72].

Dans son commentaire, Ibn Rušd[73] (m. 520/1126) explique que cette *mas'ala* est identique à ce que l'on trouve dans la *Mudawwana*[74] et les autres ouvrages mālikites, ajoutant qu'il ne connaît aucune divergence à ce sujet. Pour notre commentateur, l'origine de cette pratique serait à rechercher dans la parole du Prophète : « On n'élèvera parmi vous ni chrétienté, ni judaïsme (*lā tarfa'anna*[75] *fīkum yahūdiyya wa lā naṣrāniyya*) », c'est-à-dire ni ni église (*kanīsa*) ni synagogue (*bī'a*)[76]. Et d'ajouter que les *ahl al-ṣulḥ* auront toute latitude pour construire de nouvelles églises et rénover les anciennes dans leurs *qurā*[77] (villes, villages) pour lesquelles ils ont conclu un pacte. Bien évidemment, à condition

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69 Daiber, Hans, « Masā'il wa adjwiba », *EI*², VI 621-624.

70 Sur cette oeuvre majeure du mālikisme ainsi que son auteur, voir Fernández Félix, Ana, Cuestiones legales del islam temprano. La Utbiyya y el proceso de formación de la sociedad islámica andalusí, 2003.

71 Le texte du *Bayān* nous donne la lecture suivante *'irāḍ* (côté ou moitié), cf. Ibn Rušd al-ǧadd, *al-Bayān wa l-taḥṣīl wa l-šarḥ wa l-tauǧīh wa l-ta'līl fī masā'il al-mustaḫraǧa*, Haǧǧī, Muḥāmmad (éd.), 1988, IX, 340. Néanmoins, il faut plutôt suivre ce qui est rapporté dans le *al-Mi'yār al-mu'rib*, II 242, *'irāṣ*, qui a beaucoup plus de sens selon nous dans ce contexte. Voici la définition du mot *'arṣa* pl. *'araṣāt*, *a'rāṣ* et *'irāṣ* : cour d'une maison ; grand espace non-bâti entre les maisons ; enclos, enceinte, place ; table de l'échiquier, du damier ; champ de bataille, arène, plat en terre cuite ou en fer sur lequel est cuit le pain, etc.

72 *Bayān*, IX 340.

73 Sur cet auteur voir l'article très bien documenté de Delfina Serrano Ruano, « Ibn Rushd al-Jadd (d. 520/1126) », in Arabi, Oussama, Powers, David Stephan et Spectorsky, Susan A. (éd.), *Islamic Legal Thought : A Compendium of Muslim Jurists*, Leyde, Brill, 2013, 295-322. Et Bouchiba, Farid, « Cimetières et opérations funéraires en al-Andalus : ḏimmī-s et non-musulmans face à la mort. Étude de cas à partir du Kitāb al-ǧanā'iz de la *Mustaḫraǧa* d'al-'Utbī (m. 255/869) et de son commentaire *al-Bayān wa l-taḥṣīl* du qāḍī Ibn Rušd al-Ǧadd (m. 520/1126) », in *The Legal status of ḏimmī-s in the Islamic West (second/eighth-ninth/fifteenth centuries)*, Fierro, Maribel et Tolan John (éd.), 2014, 215-241.

74 *al-Mudawwana al-kubrā*, III 435.

75 Le verbe *rafa'a* étant à l'*aoriste énergique lourd*, alors la dernière lettre radicale prendra une *fatḥa* et non un *nūn* comme le transcrit Jean-Pierre Molénant dans son article « La place des chrétiens dans la Cordoue des Omeyyades, d'après leurs églises (VIII^e-X^e siècles) », *Al-Qanṭara* XXXIII 1, enero-junio 2012, 160.

76 On trouvera sous d'autres plumes des traductions différentes de celle proposée pour ce *ḥadīṯ*. Voir Molénat, Jean-Pierre, « La place des chrétiens dans la Cordoue des Omeyyades, d'après leurs églises (VIII^e-X^e siècles) », *Al-Qanṭara* XXXIII 1, enero-junio 2012 160 « N'élevez parmi vous rien des Juifs ni des Chrétiens » et Mazzoli-Guintard, Christine, *Vivre à Cordoue*, 94, comprend « Il est interdit aux chrétiens et aux juifs de se dresser (*rafa'a*) entre les musulmans ».

77 Sing. *qarya*.

qu'ils se trouvent à distance du *dār al-islām* et que les musulmans n'habitent pas avec eux. De plus, toutes ces possibilités offertes sont, selon Ibn Rušd, réalisables dans le cas où cela n'aurait pas été stipulé lors de la conclusion du traité. C'est aussi ce que soutient l'andalou Ibn Ḥabīb (m. 238/853) dans sa *Waḍīḥa*. Il rapporte cela de Muṭarrif (m. 282/895) et d'Ibn al-Māǧišūn (m. 164/780). Néanmoins, Ibn Rušd précise que si leurs *qurā* se situaient dans le *bilād al-islām*, alors ce qui vient d'être mentionné ne leur serait pas permis, sauf si une autorisation leur était accordée. C'est d'ailleurs ce qui est rapporté de Mālik dans la *Mudawwana*[78]. Il y a par contre divergence au sujet des terres *'anwa*. Ibn al-Qāsim soutient que cela ne leur sera pas permis contrairement à d'autres juristes qui leur accordent cette possibilité[79].

Toujours à ce sujet, on trouve dans la *Mudawwana* de Saḥnūn, au chapitre du travail à forfait (*ǧu'l*) et du louage (*iǧāra*), quelques développements au sujet de la *kanīsa* :

J'ai[80] dit : que penserais-tu si je louais ma maison à une personne qui s'en servait comme *kanīsa* ou pyrée (*bayt nār*)[81] alors que celle-ci se trouve dans un *miṣr* [*i. e.* ville construite par des musulmans] ou dans l'une des *qaryā* des *ḏimmī-s* ? Il[82] a dit, Mālik a répondu : il ne me plaît pas qu'un homme vende ou loue sa demeure à un individu qui l'emploiera comme *kanīsa* […][83].

Il s'interroge à cette occasion sur la possibilité de participer en tant que salarié à la construction d'une *kanīsa*. Et toujours au même chapitre, Saḥnūn questionne de nouveau Ibn al-Qāsim au sujet de l'opinion de Mālik relative à la construction de nouvelles *kanā'is* en terre d'Islam. Et Ibn al-Qāsim de lui répondre : « oui, Mālik réprouvait cela[84] ».

Désirant plus de précisions à ce sujet, Saḥnūn demanda à Ibn al-Qāsim si Mālik réprouvait que les non-musulmans aient des *kanā'is* ou bien qu'ils en construisent de nouvelles dans leurs *qurā* pour lesquelles ils ont passé un pacte. Mālik lui aurait répondu que les *ḏimmī*-s ne pouvaient avoir de *kanā'is* en terre d'Islam (*bilād al-islām*) sauf s'ils en avaient reçu la permission. Ibn al-Qāsim considère qu'il n'y a pas à le leur interdire dans leurs *qurā* pour lesquels ils ont

78 *al-Mudawwana al-kubrā*, III 436 ; *al-Mi'yār al-mu'rib*, II 241 et *Bayān* IX 340.
79 *Bayān*, IX 340-341.
80 Saḥnūn.
81 Al-Laqqānī (m. 958/1551) fut interrogé au sujet d'un groupe de juifs au Caire qui avaient consacrés une de leurs demeures pour leur prière. Il répondit que cela leur est interdit. Même si cette maison ne porte pas le nom de *kanīsa*, il n'en reste pas moins que c'est une synagogue.
Le *muftī* de Tunis, Muḥammad b. Qāsim al-Raṣṣā' (m. 894/1489) considère qu'il est interdit de vendre un terrain aux *ḏimmī*-s si l'on sait qu'ils souhaitent y ériger un lieu de culte. Toutefois, cela reste possible, dans le cadre de la construction de maisons.
82 Ibn al-Qāsim.
83 *al-Mudawwana al-kubrā*, III 436.
84 *al-Mudawwana al-kubrā*, III 436.

passé un pacte, car c'est leur territoire. Ils peuvent en vendre la terre et les édifices, et rien n'appartient aux musulmans[85]. Par contre, si leurs terres ont été conquises par les musulmans de vive force (*'anwa*), il leur sera interdit d'y élever des *kanā'is*. Attendu que la terre appartient alors aux musulmans, les vaincus ne peuvent ni vendre, ni hériter de ces terres. Celles-ci sont considérées comme *fay'* (butin) des musulmans. Et même s'ils se convertissaient à l'Islam, ces terres ne leur appartiendraient pas. De même, il ne serait pas possible d'édifier de lieux de cultes dans les villes construites par les musulmans, comme al-Fusṭāṭ, al-Baṣra, al-Kūfa, etc., sauf, pour Mālik, dans le cas où cela aurait été stipulé lors du pacte. Alors, l'engagement des musulmans à l'endroit des tributaires devra être tenu.

Les églises furent-elles détruites ou transformées en mosquées lors de la conquête musulmane de la péninsule Ibérique ?

Il apparaît évident, malgré les affirmations contenues dans les récits de conquête à propos des destructions d'églises, que celles-là relèvent du *topos* plutôt que de la réalité. Nombreux furent les édifices chrétiens qui demeurèrent en usage après l'arrivée des musulmans. Dans son article qui portait sur la mosquée de Saragosse, José Antonio Hernández Vera convenait que ses fouilles archéologiques du sous-sol de la cathédrale de *La Seo*, avaient révélé la présence d'un *forum* romain[86] à cet endroit. Par contre, sous la mosquée, seul fut découvert l'angle du *podium* d'un temple romain, cet édifice ayant été construit essentiellement sur un terrain inoccupé[87]. La première grande mosquée de Séville bâtie sur ordre de ʿAbd al-Raḥmān II en 214/829 semble avoir été construite sur les vestiges d'un bâtiment romain tardif, adjacent au *forum* de l'ancienne Hispalis romaine. La mosquée, qui porte aujourd'hui le nom du couvent de Santa Clara de Cordoue, fut érigée à la fin du X^e^ siècle sur les vestiges d'un édifice romain tardif[88]. À Tolède, la mosquée de Bāb al-Mardūm ou du Cristo de la Luz bâtie en 390/999-1000 fut construite en mordant sur une chaussée romaine[89]. Contrairement à ce que prétendent certaines sources, Saragosse, Séville, Cordoue et Tolède, pour ne citer qu'elles, révèlent que toutes les mosquées de la péninsule Ibérique ne furent pas construites sur l'emplacement

85 *al-Mudawwana al-kubrā*, III 436.

86 Celui-ci correspondrait à l'un des deux forums impériaux construit à l'époque de l'empereur Auguste.

87 Hernández Vera, José Antonio, « La mezquita aljama de Zaragoza a la luz de la información arqueológica », *'Ilu. Revista de Ciencias de Las Religiones*. Anejos, nº 10, 2004, 65-91.

88 La thèse qui identifiait les structures découvertes lors des fouilles du couvent Santa Clara à une église paléo-chrétienne ou byzantine est très sérieusement remise en question, cf. Marfil Ruiz, Pedro, « El templo paleocristiano descubierto en la antigua iglesia del convento de Santa Clara de Córdoba », *Boletín de la Real Academia de Córdoba*, 131, 1996, 197-210.

89 Ruiz Taboada, Arturo, Arribas Domínguez, Raúl, « El acceso norte de la Toletum romana : el descubrimiento de una vía monumental bajo el conjunto del Cristo de la Luz », *El Nuevo Miliario*, 4, 2007, 5-13.

d'anciennes églises. Cela s'explique, entre autres, par le fait que beaucoup de ces églises continuèrent à être fréquentées après l'arrivée des musulmans[90]. Ces derniers auraient préféré construire des mosquées *ex novo* en des lieux distincts, et laissèrent aux chrétiens la jouissance de leurs églises. Un autre cas célèbre que nous trouvons chez Ibn Ḥayyān (m. 987/1076) dans son *Muqtabis* concerne Tolède. Les habitants auraient demandé à l'émir Muḥammad I (m. 273/886) l'autorisation de restaurer le minaret de la grande mosquée, souhaitant au passage adjoindre cette dernière à l'église qui était adjacente à la tour[91]. Dans son *Rawḍ al-Miʿṭār fī ḫabar al-aqṭār* le géographe al-Ḥimiyarī (m. 900/1494) nous apprend qu'à Séville une église se trouvait à coté de la grande mosquée[92].

Nous aurons bien compris à la lecture de ce qui vient de précéder que s'il fut plutôt rare que les musulmans construisent leurs mosquées sur d'anciens édifices chrétiens, en vertu des traités de reddition (*ṣulḥ*), l'on est par contre assuré que nombre de ces églises furent abandonnées et tombèrent en ruine suite à la conversion à l'islam des populations[93]. D'ailleurs, nous rejoignons ici l'opinion de Susana Calvo Capilla au sujet de la conversion des églises en mosquée :

90 En Palestine, très rares sont les églises byzantines qui furent converties en mosquées, cf. Schick, Robert, *The Christian Communities of Palestine from Byzantine to Islamic Rule : A Historical and Archaeological Study*, 1995, 130. De façon plus générale pour le *bilād* al-Šām, l'archéologie invalide la thèse de la destruction généralisée des églises, cf. Burns, Ross, *Damascus : A History*, 2005.

91 Ibn Ḥayyān, *Muqtabis min anbāʾ ahl al-andalus II-2*, Maḥmūd ʿAli Makkī (éd.), 1973, 327.

92 Al-Ḥimyarī, *Al-Rawḍ al-miʿṭār fī ḫabar al-aqṭār* (La péninsule Ibérique au Moyen-Âge), Évariste Lévi-Provençal (éd. et trad.), 1938, 15 et trad. 21.

93 Sur l' « abandon, ruine et transformation des églises » en péninsule Ibérique, voir le chapitre (147-150) que Susana Calvo Capilla consacre à ce thème dans son article « Les premières mosquées et la transformation des sanctuaires wisigothiques (92H/711-170H/785) », *Mélanges de la Casa de Velázquez*, 41-42, 2011, 131-163. L'auteure de cet article passe en revue les églises de la région de Tudmīr, les églises wisigothiques de Santa María de Melque (Tolède) et d'El Gatillo de Arriba (Cáceres), l'église et le baptistère wisigothiques d'Algézares (Murcie), la basilique wisigothique de Casa Herrera (Badajoz) et le la ville-palais wisigothique de Recópolis (Zorita de los Canes, Guadalajara). Selon Susana Calvo Capilla « Tous les exemples précédents semblent indiquer que le processus d'islamisation et de transformation sociale et urbanistique des petites villes et des agglomérations rurales anciennes a été long. Au début, alors qu'ils étaient encore peu nombreux, les musulmans nouvellement arrivés s'installaient dans des structures préexistantes en respectant les églises, où continuait de se dérouler le culte chrétien. Quand les musulmans tendaient à devenir plus nombreux, les églises et les cimetières chrétiens étaient laissés à l'abandon et n'étaient que rarement réemployés. La basilique de Casa Herrera (Badajoz), le monastère de Santa María de Melque (Toledo), le palais de Recópolis (Guadalajara), les églises d'Algezares (Murcie) et d'El Gatillo (Cáceres) montrent que, malgré une occupation initiale des lieux à l'époque émirale, les musulmans n'ont en général pas converti les sanctuaires en mosquées, et ne les ont pas non plus détruits totalement. Ils les ont souvent pillés et parfois sécularisés. Les sites mentionnés laissent penser qu'une réorganisation de la population se produisit tout au long des VIII[e] et IX[e] siècles : les villages, palais ou monastères en milieu rural furent abandonnés au profit de villes de fondation récente, le tout répondant à une nouvelle stratégie de peuplement. Ce processus d'abandon explique que la dégradation de nombre de ces églises rurales ait été très lente, au point que, deux ou trois siècles plus tard, les chrétiens qui repeuplèrent les terres reprises aux musulmans purent encore les restaurer ».

> Il semblerait logique que les musulmans, pour faire la prière, aient d'abord réutilisé les églises locales avant de construire leurs premières mosquées du vendredi, de la même façon que les chrétiens, après la conquête d'al-Andalus, ont transformé de façon systématique les mosquées en églises. Pourtant, d'après les exemples que nous venons d'exposer et d'après les sources arabes, ce phénomène de conversion a été plutôt exceptionnel[94].

Néanmoins, les églises purent être détournées de leur usage initial d'autres manières. Tel est le cas, par exemple, de l'église Sainte-Rufine de Séville qui devint la résidence du gouverneur, ou encore, de la basilique wisigothique de Casa Herrer (Badajoz) dont la niche semble indiquer la transformation du bâtiment en mosquée. Cependant, les *graffiti* arabes sur les fûts des colonnes laissent présumer un usage de ce lieu comme une prison à l'époque amirale, aux IX^e^ et X^e^ siècles. Tout cela semble révéler que le processus d'islamisation fut long. Alors qu'ils étaient peu nombreux à leur début, les musulmans s'installèrent dans des édifices déjà existants tout en épargnant les églises où les chrétiens continuèrent de pratiquer leur culte. Lorsque les musulmans devinrent plus nombreux, les églises furent laissées à l'abandon sans que les musulmans ne les emploient comme lieux de prière. Ce sont ces abandons qui expliquent que la dégradation des églises rurales fut lente et non pas parce que les *fuqahā'* en interdirent la restauration ou la reconstruction. Voilà pourquoi trois siècles plus tard, lors de la Reconquista, les chrétiens qui arrachèrent les terres aux musulmans purent restaurer ces églises.

Conclusion

Au terme de cette étude, force est de constater que la question des lieux de culte s'enrichit sans cesse du réexamen des sources jurisprudentielles. L'exercice du culte religieux nécessitant l'utilisation de biens matériels, meubles et immeubles, très tôt se posa le problème de la construction et de la restauration de ces derniers. En terre d'Islam, les biens des religions non-musulmanes étaient gérés par chaque communauté religieuse qui jouissait de ses propriétés comme des biens privés qui n'appartenaient donc pas au domaine public[95]. Dans la continuité des empires romain et byzantin, en terres musulmanes, en dehors de la religion officielle, on ne considéra jamais les édifices cultuels religions « minoritaires »[96] comme des

94 Voir « La conversion des églises en mosquées » (150-155) in Calvo Capilla, Susana, « Les premières mosquées et la transformation des sanctuaires wisigothiques (92H/711-170H/785) », *Mélanges de la Casa de Velázquez*, 41-42, 2011, 131-163.

95 C-à-d. à « l'Etat » musulman. Voir *Le statut légal des non-musulmans*, 214-231 « Les rapports de l'Eglise et de l'Etat musulman ».

96 Bien évidemment, nous n'entendons pas ce terme dans le sens de minorité numérique. En effet, pendant les premiers siècles de l'Islam, les populations chrétiennes furent bien souvent supérieures en

biens publics. La gestion des biens du culte était confiée aux dignitaires religieux, sans que le souverain musulman ne s'immiscât franchement dans leurs affaires[97]. Cette solution qui n'avait rien de nouveau était tout de même soumise à un ensemble de lois qui, si elles garantissaient la possibilité pour chaque communauté de disposer de lieux de culte, ne fixaient pas moins les limites de cette liberté. En effet, comme nous l'avons présenté plus haut, pour ce qui relevait de la permanence, de la restauration et des constructions *ex novo* des églises et des synagogues, mais aussi des pyrées, des monastères et des cellules des ermites, la prérogative revenait à « l'Etat » musulman. De surcroît, le type de conquête[98] des territoires non-musulmans, par les armes (*ʿanwa*) ou par reddition (*ṣulḥ*), semble avoir eu un impact fondamental sur le devenir des édifices religieux. Malheureusement, nos connaissances à ce sujet restent à ce jour fragmentaires, et il semble que les jurisconsultes ne s'accordent pas sur ce point.

Dans la mesure où une partie des textes présentés tout au long de cet article sont dits normatifs (*furūʿ*), on évitera de les considérer à priori comme ayant été exécutés en pratique. Pour aller un peu plus loin sur le sujet, il serait intéressant de recouper ceux-là avec les recherches archéologiques[99]. Mais la tâche n'est pas aisée. En effet, il est surprenant de remaquer que nos connaissances des lieux de culte chrétien d'époque wisigothique l'emportent sur celles que nous avons des sanctuaires chrétiens d'époque musulmane.

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nombre. Sur la définition et l'utilisation du mot « minorité », cf. par exemple les contributions de Stéphane Boisselier et Martin Aurell in, *Minorités et régulations sociales en Méditerranée médiévale*, 2010 ou encore Pentassuglia, Gaetano, *Minorités en droit international*, Strasbourg, Editions du Conseil de l'Europe, 2004, 57-79.

97 L'on sait tout de même que ce fut le plus souvent les émirs qui confirmaient les prélats dans leur dignité en leur accordant un diplôme d'investiture. En effet, certains parmi eux étaient tenus de percevoir l'impôt. Les patriarches avaient aussi à rendre la justice entre les fidèles. Par ailleurs, en péninsule Ibérique la convocation des conciles ainsi que la nomination et la destitution des évêques passa des rois wisigoths aux souverains musulmans. Selon Antoine Fattal « Les rapports de l'Eglise et de l'Etat musulman furent marqués dès le premier jour par l'immixtion du pouvoir civil dans les affaires ecclésiastiques. Mais il convient de reconnaître que l'ingérence des autorités musulmanes était mesurée et discrète, comparée à celle des empereurs byzantins et des satrapes sassanides », *Le statut légal des non-musulmans*, 218-219.

98 Cf. García Sanjuán, Alejandro, *La conquista islámica de la península ibérica y la tergiversación del pasado*, Madrid, Marcial Pons Historia (« Estudios »), 2013 et le compte rendu de cet ouvrage par Guichard, Pierre, « Retour sur le problème historiographique de la conquête arabe de l'andalus », *Arabica*, 61, nº 6, 2014, 769-782. Ou encore Lagardère, Vincent, *Campagnes et paysans d'Al-Andalus (VIIIe-XVe s.)*, 1993, 21-23. Même chez un auteur mālikite du Xe-XIe siècle, al-Dawūdī (m. 403/1013), nous ne trouvons pas un avis tranché sur le type de conquête, *ṣulḥ* ou *ʿanwa*, réalisé pour l'Ifriqiyya, al-Andalus et la Sicile. Voir al-Dawūdī, Aḥmad b. Naṣr, *Kitāb al-Amwāl*, Rabat, Markāz iḥyāʾ al-turāṯ al-maġribī, s. d., 70 : « Les *riwāyāt* (transmissions) au sujet de l'Ifriqiyya sont divergentes. On a dit (*qīla*) : elle a été conquise par reddition (*ṣulḥan*). On a dit (*qīla*) : par les armes (*ʿanwa*) ».

99 Nous avons dans le cadre de la rédaction de cet article consulté nombre de publications sur l'archéologie en al-Andalus. Mais le nombre de caratère imposé pour cet article ne nous permet pas de rendre compte de ces travaux dans une bibliographie finale.

Au total, toutes les *fatwā-s* ici étudiées attestent l'existence de communautés juives et chrétiennes organisées et disposant dans bien des cas de lieux de culte, parfois haboussés au profit des personnels religieux. Toutefois, il importe de souligner que ces textes purent subir des entorses, ou encore ne furent pas toujours suivis et connurent des réactualisations dans les moments difficiles où juifs et chrétiens pouvaient se montrer menaçants. Ce fut par exemple le cas lorsqu'en 1228, « Ferdinando III, roi de Castille et de Léon, traita avec al-Ma'mūn la concession d'une troupe de mercenaires chrétiens. Il obtint alors des libertés religieuses répertoriées par Ibn Abī Zarʿ et Ibn Khaldūn. Les chrétiens avaient le droit de bâtir une église dans cette ville, d'y pratiquer le culte et d'y faire sonner les cloches pour la prière. La cause du christianisme et du calife légitime étaient liées par le biais des mercenaires chrétiens. Ainsi, quelques années après, raconte Ibn Abī Zarʿ, son opposant détruisait cette église nouvellement bâtie[100] ». Quelques siècles plus tard le mufti mālikite marocain al-Hilālī (m. 1175/1761) nous dit dans son *Nūr al-baṣar* que : « S'il est avéré que la pratique (*ʿamal*) des Andalous aux V^e^ et VI^e^ siècles fut d'autoriser (*iḏn*) les chrétiens (*naṣārā*), jouissant du pacte de *ḏimma*, de construire de nouvelles églises (*kanā'is*) en terre *ʿanwa* ou dans les villes musulmanes *ex novo*, vers lesquelles ils furent transférés, ils ne nous est pas autorisé de les suivre en permettant aux juifs (*yahūd*) de Siğilmasa de construire de nouveaux édifices. Car les habitants d'al-andalus étaient voisins des ennemis infidèles à cette époque. C'est pourquoi il était de leur intérêt (*maṣlaḥa*) de leur permettre cela afin qu'ils (*i. e.* les chrétiens) ne quittent pas les musulmans pour rejoindre leurs frères infidèles … Car le renforcement de l'ennemi leur aurait porté préjudice, alors que nous nous sommes à l'abri de cela[101] ». Au delà de la question des lieux de culte, ce texte démontre aussi le caractère « réaliste » du *fiqh*. De fait, il apparaît au travers de ces sources que, parfois, les souverains pouvaient, en fonction de leurs intérêts, aller à l'encontre des principes du droit musulman relatifs aux lieux de culte des tributaires. Le traitement réservé aux édifices religieux ressort donc bien, par moment, d'une histoire politique et idéologique. Il n'en demeure pas moins qu'il dépend aussi fondamentalement du statut juridique que possédaient ces biens, et intéresse à ce titre l'histoire du droit. Or ce dernier aspect est largement moins exploré. Voilà aussi pourquoi nous avons accordé la priorité à ces textes.

Malgré les limites de notre étude, nous espérons que tous les avis des *fuqahā'* que nous avons apportés, ainsi que notre découpage que nous espérons novateur et pertinent, seront autant d'informations qui éclaireront les chercheurs s'intéressant aux lieux de culte des *ḏimmī*-s en terre d'Islam.

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100 cf. Maillard, C., *Les Papes et le Maghreb aux XIII^ème^ et XIV^ème^ siècles. Étude des lettres pontificales de 1199 à 1419*, 292.

101 Al-Hilālī, Abū l-ʿAbbās, *Nūr al-baṣar*, Ould Muḥammad al-Amīn, Muḥammad Maḥmūd (éd.), 2007, 136.

LA *ĞIZYA* DANS LA « LOI DIVINE » SELON LE COMMENTAIRE CORANIQUE D'AL-QURṬUBĪ (M. 671/1272)

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En acceptant d'acquitter la *ğizya* et de se soumettre à certaines restrictions et obligations, les non-Musulmans vivant en Terre d'Islam (*ḏimmī-s*) jouissent d'une protection juridique (*ḏimma*) qui leur donne droit à la sécurité de leurs personnes, de leurs biens et de leurs activités (y compris celles qui sont considérées comme illicites dans la religion musulmane), ainsi qu'à une liberté religieuse et à une juridiction autonome pour les litiges qui les concernent en propre. Sur le plan de la conception juridique, le pacte de la *ḏimma* est fondateur de la reconnaissance du *ḏimmī* comme sujet de droits et d'obligations dans la loi islamique[1]. Cela rejoint le sens de *ḏimma* en arabe qui renvoie aux notions de contrat/pacte, mais aussi de protection et d'obligation. Les *ḏimmī-s* sont aussi appelés *muʿāhidūn* ou *ahl al-ʿahd*, littéralement les personnes s'engageant dans une promesse (*ʿahd*). Dans le droit Musulman, toute personne dès sa naissance se trouve dotée d'une *ḏimma*, c'est à dire une « capacité de jouissance », une personnalité juridique qui fait de lui un sujet de droit et d'obligation[2]. Une autre acception juridique du terme renvoie à la *fides*, le lien d'obligation qui lie le débiteur au créancier. Là comme l'explique Ch. Chehata, « la notion de *ḏimma* ne se restreint pas à l'obligation contractuelle, elle n'est ni le lien d'obligation ni l'obligation, mais le réceptacle de la *fides* engagée »[3].

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* Mes remerciements à Christian Müller, Mohammad Hocine Benkheira et Alejandro García Sanjuán pour leurs commentaires constructifs sur cet article, rédigé dans le cadre du Projet Relmin, au sein duquel je prépare une thèse sur « le statut légal du *ḏimmī* dans le commentaire coranique d'al-Qurṭubī (m. 671/1272) ».

1 Anver Emon parle de « Contract as politico-legal paradigm of governance » dans « Religious Minorities and Islamic Law : Accommodation and the Limits of Tolerance », in A. M. Emon, M. Ellis and B. Glahn, (eds), *Islamic Law and International Human Rights Law* (Oxford 2012). Voir aussi A. M. Emon, *Religious Pluralism and Islamic Law. Dhimmī and Others in the Empire of Law*, Oxford, Oxford University Press, 2012. Et Ch. Müller, « Non-Muslims as part of Islamic law : Juridical casuistry in a fifth/eleventh century law manual », in M. Fierro et J. Tolan (eds), *The Legal status of ḏimmī-s in the Islamic West (second/eighth-ninth/fifteenth centuries)*, (Turnhout, Brepols, 2013), p. 21-63.

2 Voir B. Johansen, « Entre révélation et tyrannie : le droit des non-Musulmans d'après les juristes Musulmans » in *id.* (ed.) *Contingency in a Sacred Law : Legal and Ethical Norms in the Muslim Fiqh,* (Leiden, 1999), p. 219-348.

3 Ch. Chehata, "*Dhimma*", *Encyclopédie de l'Islam,* (1913-1942), II, 238.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 173–190

 DOI 10.1484/M.RELMIN-EB.5.111598

L'histoire de l'élaboration juridique de la *ğizya* et du pacte de la *ḏimma* dont découle la condition juridique du *ḏimmī* peut être éclairée par des œuvres de la doctrine médiévale[4]. Le commentaire coranique d'al-Qurṭubī (m. 671/1272) retiendra ici toute notre attention parce qu'il fut composé à une époque où les écoles recherchaient à leurs règles construites, une validation dans la « première source formelle » de la loi : le Coran[5]. Reconnu par les biographes comme « le plus grand et dernier savant de Cordoue », al-Qurṭubī (m. 671/1272)[6] est un exégète tourné vers la jurisprudence malikite et la théologie ash'arite. Il émigra en Egypte et y vécut la deuxième moitié de sa vie, forcé de quitter Cordoue suite à sa conquête par les Chrétiens en juin 1236. Son monumental commentaire du Coran peu connu de l'académie occidentale connait un certain succès chez les Musulmans aujourd'hui. Intitulé *La compilation (complète) des statuts juridiques coraniques*[7], il a pour spécificité d'allier les traits systématiques et encyclopédiques du genre de l'exégèse coranique (*tafsīr*)[8] avec ceux du commentaire spécialisé sur les « statuts (ou préceptes) coraniques (*Aḥkām al-Qur'ān*) »[9]. Faisant de la casuistique et du

4 Sur les débats historiques relatifs aux « Pacte de 'Umar » et au pacte de la *ḏimma* voir l'étude récente de M. Levy-Rubin, *Non-Muslims in the Early Islamic Empire. From Surrender to Coexistence* (Cambridge 2011). Pour un panorama théorique de ce que disent les sources scripturaires (Coran, *ḥadīṯ*) et juridiques voir Y. Friedmann, *Tolerance and Coercion* (2003). M. Ayoub, *Dhimmah in Qur'an and Hadith*, in Robert Hoyland (ed.), *Muslim and Others in Early Islamic Society*, (Cambridge, 2004). A. Carmona Gonzalez, « Doctrina sobre la ğizya en el occidente islamico pre-moderno » in M. Fierro et Tolan (eds), *op. cit.*, 91-111.

5 Sur cette conception de l'histoire doctrinale voir Ch. Müller, « Recht I : vormodern », in R. Brunner (ed.), *Islam. Einheit und Vielfalt einer Weltreligion* (2016).

6 Voir « Ibn Farḥ al-Qurṭubī, Abū 'Abd Allāh », *Biblioteca de al-Andalus*, 2004, III, 113-116. R. Arnaldez, 'al-Ḳurṭubī. » *EI*, 2ᵉ édition, V, 512-513. Le *Dībāǧ* d'Ibn Farḥūn (II, 308-309) et le *Nafḥ al-ṭīb* d'al-Maqqarī (II, 2010-2012, 615, 693 ; III, 235). Parmi ses ouvrages, ses biographes citent d'abord son commentaire du Coran, puis ils indiquent des ouvrages sur l'explication des « plus beaux noms de Dieu » ; en ascèse (« *Qam' al-ḥirṣ* ») ; eschatologie (« *al-Taḏkira...* ») ; sur l'invocation de Dieu (« *al-Tiḏkār* ») ; un commentaire du commentaire du Muwaṭṭa' de Mālik par Ibn 'Abd al-Barr (« *Šarḥ al-taqaṣṣī* ») et une *Urǧūza* où ont été réunis les noms du Prophète.

7 *Al-Jāmi' li-aḥkām al-Qur'ān wa-l-mubīn li-mā taḍammanahu min al-sunna wa-ayāti-l-furqān*. Edité une vingtaine de fois entre 1933 et 2013, il compte entre 20 et 24 volumes selon les éditions. Il est partiellement traduit en anglais (Bewley, 2003) et en espagnol (Zakarya Maza Abu Mubarak, 2005). Nombreuses études en langue arabe sur ce *Tafsīr* dont al-Fart (1982), al-'Īsaā (2005), Salmān, (1993), al-Sanūsī (1998), Zalaṭ (1979).

8 Sur le genre du *tafsīr* les études fleurissent récemment : M. Shah (ed.), *Tafsīr : Interpreting the Qurʾān*, 4 vols (London and New York, 2013) réédite nombreuses études. K. Bauer (ed.), *Aims, Methods and Contexts of Qur'anic Exegesis (2nd/8th-9th/15th Centuries)* (Oxford, 2013). A. Goerke, and J. Pink (eds), *Tafsīr and Islamic Intellectual History. Exploring the Boundaries of a Genre* (Oxford, 2015). Pour un panorama sur l'esthétique et l'histoire du genre voir C. Gilliot, « Exegesis of the Qurʾān : Classical and Medieval », *Encyclopaedia of the Qurʾān*, J. D. McAuliffe (ed.), (Leiden, 2002) II, 99-124 ; J.D McAuliffe, « The Genre Boundaries of Qur'ānic Commentary » in *id.*, B. D. Walfish and J. D. Goering (eds), *With Reverence for the Word : Medieval Scriptural Exegesis in Judaism, Christianity, and Islam*, (Oxford, 2003).

9 Nombreux sont les Malikites andalous qui ont excellé dans ce genre et sont cités par al-Qurṭubī : Ibn Aṣbaġ (m.343/955) et al-Ballūṭī al-Qurṭubī, Makkī b. Abī Ṭālib (m.437/1045), Abū Bakr Ibn al-'Arabī (m.543/1148), Ibn Faras al-Ġarnāṭī (m.335/966). En dehors d'al-Andalus, les principaux auteurs malikites d'*Aḥkām al-Qur'ān* sont : Yaḥyā b. Sallām al-Baṣrī (m. 200/815), al-Qāḍī Ismā'īl al-Ǧahḍamī (m. 282/895-6),

genre de la divergence juridique (*ʿilm al-ḫilāf*) une matière essentielle, le commentaire d'al-Qurṭubī aspire selon Roger Arnaldez à « préciser le sens et la portée de la loi ». Il introduit selon lui dans le genre du *tafsīr* une matière propre aux traités de théorie du droit relatifs aux « Sources de la loi » (*uṣūl*) et aux « règles qui en dérivent » (*furūʿ*)[10]. Les énoncés prescriptifs apparaissent comme étant moins déduits du Coran lui-même que de la tradition exégétique juridique[11] et méta-juridique. À la différence des ouvrages « classiques » dans le genre des *Aḥkām al-Qurʾān* qui se concentrent d'une part sur les versets prescriptifs et d'autre part sur leur exégèse juridique, le commentaire d'al-Qurṭubī est systématique, il traite tous les versets suivant leur ordre canonique et présente l'exégèse juridique dans sa relation aux circonstances de la révélation ainsi qu'aux exégèses philologiques et théologiques. Cela rejoint une autre particularité de cet ouvrage qui est de présenter les doctrines juridiques (*aqwāl*) et les règles de droit (*šarāʾiʿ*) comme reposant d'une part sur les traditions prophétiques et celles des Anciens, d'autre part sur la tradition exégétique philologique et narratives ; mais aussi parfois sur les sciences linguistiques indépendantes, comme la lexicologie, la grammaire et la rhétorique, ainsi que certaines sciences coraniques comme les « lectures » (*qirāʾāt*) et l'« abrogation » (*nasḫ*).

L'étude de la *ḏimma*, cette protection juridique octroyée au *ḏimmī*, dans ce *tafsīr* systématique et juridique du 13e siècle, questionne l'intégration de l'« Autre » dans une loi conçue comme islamique (dans ses références et ses destinataires) et comme étant d'origine divine (*šarʿ*). Elle interroge la manière par laquelle l'intégration du non-Musulman dans la loi islamique se justifie d'un point de vue littéraire et mythique, par la tradition exégétique. Les « droits de Dieu » (*ḥuqūq Allāh*) et les « droits des hommes » (*ḥuqūq al-ādamiyyīn*) désignent dans la théorie légale deux niveaux de la loi. Le premier réfère aux obligations du croyant envers Dieu, comme l'application des peines légales (*ḥudūd*) et les règles de la pureté rituelle (*ṭahāra*). Le second est relatif aux obligations des croyants dans les relations sociales (*muʿāmalāt*). Alors que les Musulmans sont soumis aux « droits des hommes » et aux « droits de Dieu »[12], al-Qurṭubī insiste sur le fait que les non-Musulmans

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Ibn Ḫuwayz Mindād (m.390/999). Parmi les Shafiites : Abū Thawr al-Kalbī (m.240/854), Abū Naṣr al-Qušayrī (m.344/955), al-Šāfiʿī (m.204/820) rapporté par al-Bayhaqī (m.458/1066), al-Kiyā al-Ṭabarī (m.504 /1110). Parmi les Hanafites : ʿAbū ʿUbayd al-Qāsim B. Sallām al-Hirāwī (m.224/838), al-Ṭaḥāwī (m. 321/833), al-Qummī (m.350/919), al-Ğaṣṣāṣ (m.370/ 980), Ibn al-Sirāj al-Qūnawī (m.770/1368-9).

10 R. Arnaldez, "al-Ḳurṭubī"., *op. cit.*

11 Sur cette notion, voir M. H. Benkheira, « Portée d'un livre-miroir : peut-on parler d'une exégèse juridique du Coran ? » (A paraitre).

12 On trouve des discussions en 2016 dans *OASIS* sur ce sujet dans les œuvres d'*uṣūl* et d'*iḫtilāf* à propos des *ḥudūd*, voir par exemple al-Māwardī (m. 450/1058), *al-Ḥāwī al-Kabīr*, 13:67 ; al-Ġazzālī (m. 505/1111), *al-Wasīṭ*, 4 :131-132 ; Ibn al-ʿArabī (m. 543/1148), *Kitāb al-Qabas*, 3:1019 ; Ibn Rušd (m. 595/1198), *Bidāya*, 2:662-663. Voir les études de B. Johansen, « Property as an institution of social integration », in *op. cit.*, 208-218 et A. Emon, « Ḥuqūq Allāh and Huqūq al-ʿIbād : A Legal Heuristic for a Natural Rights

ne sont théoriquement pas tenus à ces derniers[13]. Nous examinerons comment l'auteur, tout en considérant les règles de la *ḏimma* comme étant du ressort exclusif du « droit des hommes », inscrit ces règles dans la « loi divine » (*šarʿ*). La *ḏimma* apparaît dans son commentaire comme découlant de trois conceptions historico-mythiques et juridiques de la *ǧizya* qui seront ici l'objet de notre article : la *ǧizya* infligée comme châtiment divin dans « les droits de Dieu » (1) comme une peine (*ʿuqūba*) sanctionnant « un crime (*ǧarīma*) » contre Dieu dans les « droits des Hommes » (2) impliquant un statut inférieur (*ṣaġār*) dans la société (3).

La ǧizya *comme un châtiment divin : une conception méta-juridique*

Dans le commentaire d'al-Qurṭubī, non seulement les versets à teneur prescriptive mais également ceux à teneur théologique ou faisant référence à des évènements historico-mythiques[14], deviennent le fondement du sens juridique. Le sens de la *ǧizya* imposée aux *ḏimmī-s* se construit *a posteriori* et de manière implicite sur une *ǧizya* qui aurait été imposée aux Juifs (*yahūd, Banū Isrāʾīl*)[15] dans les temps anciens des histoires islamiques et bibliques. L'exégèse des versets évoquant les Gens du Livre[16], les polémiques théologiques, les « pactes » (*ʿahd*) et alliances (*mīṯāq*), le combat contre eux et les temps derniers, sont les lieux propices à l'élaboration du sens de la soumission et de l'avilissement (« *ṣaġār* ») attachée à la *ǧizya*[17], que le Coran d'ailleurs ne mentionne qu'une seule fois en ces termes :

> Combattez ceux qui ne croient ni en Dieu ni dans le Jour du Jugement, et qui n'interdisent pas (*lā-yuḥarrimūn*) ce que Dieu et Son Prophète ont interdit, ceux qui ne professent pas la religion de la vérité (*dīn al-ḥaqq*), parmi ceux qui ont reçu le Livre (*al-Kitāb*), jusqu'à ce qu'ils versent la ***ǧizya*** par leurs propres mains (*ʿan-yadin*), **après s'être soumis/humiliés/manifestant des signes d'humilité (*wa-hum ṣāġirūn*)**[18] ». (Q. 9:29).

Regime », *Islamic Law and Society* (13/13 2006), 325-391. Voir aussi J. Schacht, *Introduction to Islamic law* (Oxford 1964) index, s.vv. *ḥaḳḳ ādamī* et *ḥaḳḳ Allāh*.

13 Il présente les discussions sur ce point dans le commentaire de Q. 8:38 : *Tafsīr al-Qurṭubī*, ed. ʿAbd Allāh ʿAbd al-Muḥsan al-Turkī, Muʿassassa al-Risālah, Beyrouth, 2006, 9:500-504.

14 Voir sur ce point l'étude d'A. Rippin, "The Construction of the Arabian Historical Context in Muslim Interpretation of the Qur'an", in K. Bauer (ed.), *op. cit*.,173-199.

15 Le Coran réfère aux « Enfants d'Israël » une quarantaine de fois, désignant le peuple de Moïse mais également les Gens du Livre, Chrétiens et Juifs contemporains du Prophète. Voir, S.D Goitein, "Banū Isrāʾīl"., *EI*. (1960) I, 1020-1022. U. Rubin, "Children of Israel (Banū Isrāʾīl)", *EI*. (Leiden, 2007) III, 124-128.

16 Voir G. Vajda, "Ahl al- Kitāb"., *EI*. (2008) ; I. Albayrak, « The People of the Book in the Qur'ān », *Islamic Studies* (47/43 2008)301-325.

17 Les versets dans le commentaire desquels al-Qurṭubī développe le sens de la *ǧizya* sont : Q. 2:49-61-62-114-256, Q. 3:55-58-59-61-75-110 à 115, Q. 4:26-84, Q. 5:13-41-42-45-56-105, Q. 8:61, Q. 9:5-28-29-33-41, Q. 7:129-152, Q. 17:81, Q. 22:40, Q. 27:40, Q. 29:46, Q. 38:35, Q. 43:61-62, Q. 59 :2 à 4, Q. 61:69.

18 Nous avons souligné les passages importants en gras et mentionné les multiples traductions de « *wa-hum ṣāġirūn* » : A. Kasimirski traduit par « qu'ils soient soumis » ; R. Blachère par « alors qu'ils sont humiliés » ; D. Masson par « après s'être humiliés » ; J. Berque par « en signe d'humilité ».

Dans son commentaire, al-Qurṭubī explique que la *ğizya* comme le *ḫarāj* furent adoptés en premier par Moïse, en vue d'abaisser (*aḏalla*) et d'éprouver (*'aḏāb*) et qu'ils furent réintroduits par le Prophète Muhammad (m. 632)[19]. Al-Qurṭubī mentionne l'imposition d'une *ğizya* dans le cadre d'accords passés entre les Musulmans et des communautés voisines, telles les tribus juives de Médine et des alentours ainsi que certains groupes mecquois et certains Chrétiens yéménites (les Banū Najrān par exemple). Il signale que la *ḏimma* référait à ces accords ou traités (*'ahd*)[20]. La *ğizya* aurait été imposée aux Juifs les premiers : d'abord au peuple de Moïse (les *Banū Isrā'īl*), puis aux Juifs de Médine coupables de trahison, ensuite à certaines tribus juives proches de Médine, avant de l'être aux Gens du Livre dans le contexte de la première conquête à Tabūk[21].

Ces différentes *ğizya-s* apparaissent en explication des termes ambigus de « *ḵizy* » *et* « *ḏilla* » frappant les « Enfants d'Israël » (*Banū Isrā'īl*) dans le Coran[22]. Ces termes polysémiques[23] qui renvoient dans l'exégèse philologique aux notions d'humilité, de soumission (*ṣaġār*), de bassesse, d'avilissement, voire d'ignominie, sont associés dans le commentaire d'al-Qurṭubī à la *ğizya* entendue comme un châtiment divin qui aurait été imposé en différentes circonstances : par Pharaon aux *Banū Isrā'īl* qui lui étaient asservis ou qui représentaient pour lui des étrangers sur le point d'envahir et de détruire l'Egypte[24] et lorsqu'ils firent preuve d'ingratitude envers Moïse et Dieu[25]. Notons qu'une telle interprétation des termes se démarque cependant de celle d'al-Rāzī (m. 606/1210) qui, s'il n'exclut pas que la *ğizya* puisse comme la « bassesse » (*ḏilla*) être une punition (*'uqūba*) divine de l'ordre du miracle (*mu'jiza*), refuse toutefois d'y voir

19 Dans le commentaire de Q.8:61 (*Tafsīr*, 10:62-66.)

20 Voir C. E. Bosworth, « The Concept of *Dhimma* in Early Islam », in B. Braude and B. Lewis (eds), *Christians and Jews in the Ottoman Empire : The Functioning of a Plural Society* (1982), 41. Il explique que lors des premières conquêtes, les populations se soumettaient contre un *'ahd* ou une *ḏimma,* c'est-à-dire contre la promesse de recevoir une protection en échange de laquelle les Musulmans recevaient l'hospitalité. En ce sens la « protection » était réciproque.

21 Pour une approche du sens primitif et historique de la *ğizya* aux débuts de l'Islam voir A. Ziauddin, "The concept of *ğizya* in early Islam", *Islamic studies* 14, 1975, 293-305.

22 Particulièrement à propos des versets Q. 2:61 (*Tafsīr*, 2 :146-158) et Q. 3:112 (*Tafsīr*, 5:665-670).

23 Le terme « *ḫizy* » apparaît onze fois dans le Coran (Q. 2:85-114, Q. 5:33- 41, Q. 9:63, Q. 10:98, Q. 11:66, Q. 16:27, Q. 22:29, Q. 39:26, Q. 41:16) et réfère – selon les interprétations et les traductions- à une bassesse, un avilissement ou à une humiliation frappant les Infidèles ici-bas (*dunyā*) en attendant une grande souffrance (*'aḏāb*) dans l'au-delà (*al-āḫira*), le Jour du Jugement ou les feux de l'enfer. Le terme « *ḏilla* » apparaît six fois dans le Coran : quatre fois qualifiant les pieux (Q. 2:85-114, Q. 5:33- 41, Q. 9:63, Q. 10:98, Q. 11:66, Q. 16:27, Q. 22:29, Q. 39:26, Q. 41:16) ; et trois fois désignant la bassesse ou l'ignominie qui frappe les Gens du Livre (*ḍuribat 'alayhim al-ḏilla* : Q. 2:61, Q. 3:112, Q. 7:152) « parce qu'ils avaient renié les signes de Dieu et tué les prophètes » (*ḏālika bi-annahum kānū yakfurūn bi-āyāt Allāh wa yaqtulūn al-anbiyā'*).

24 Dans le commentaire de de Q. 2:49 (*Tafsīr*, 2:80-89).

25 Dans le commentaire de Q. 2:61 : « L'avilissement/l'humiliation/la vilénie/l'humilité (*ḏilla*) et la misère (*maskana*) s'abattirent sur eux ; ils encoururent la colère de Dieu. Cela est parce qu'ils reniaient les révélations de Dieu, et qu'ils tuaient sans droit les Prophètes ; parce qu'ils désobéissaient et transgressaient. »

une référence, car selon lui, elle n'était pas appliquée du temps de Moïse[26]. Dans le commentaire par al-Qurṭubī de Q. 7:129[27], la *ǧizya* est la sanction[28] à la fois des Juifs de Pharaon et de ceux de Médine accusés d'avoir brisé le pacte (*'ahd*) avec le Prophète. À propos de Q. 7:152 où la « colère de Dieu et la *ḏilla* » s'abattent sur ceux qui ont adoré le Veau d'or, al-Qurṭubī associe de nouveau la *ḏilla* à une *ǧizya*. Il signale cependant qu'il est peu probable qu'elle ait été appliquée à cette époque mais qu'elle le fût plutôt aux descendants de ces adorateurs[29] : les tribus juives proches de Médine – les Banū Naḍīr et les Banū Qurayẓa[30] – accusées d'insubordination envers le Prophète. L'auteur rapporte que ces tribus auraient hérité la punition de leurs ancêtres[31]. Il évoque aussi par une tradition de Mālik (m. 179/712) que les adorateurs du veau d'or avaient été frappés de *ḏilla* à cause de leur statut d'innovateurs (*mubtadi'ūn*)[32]. Notons qu'Abū Ḥayyān al-Andalusī (m.745/1344), Andalou de la génération postérieure à al-Qurṭubī, présente une argumentation historique similaire à propos de Q. 2:61 : pour lui, la *ḏilla* qui s'abat sur les « Fils d'Israël » est bien un châtiment divin miraculeux. Elle réfère à la *ǧizya* que le Prophète aurait imposé aux Juifs de son époque, car comme les *Banū Isrā'īl* : « Ils reniaient les révélations de Dieu, et tuaient les prophètes[33] ».

Dans le commentaire de Q. 5:13[34], l'imposition de la *ǧizya* sanctionne la mécréance (*kufr*) en plus de la trahison : al-Qurṭubī associe la rupture de l'alliance (*naqḍ al-mīṯāq*) mentionnée dans le verset[35], à celle de l'alliance divine puis à celle du pacte (*'ahd*) avec Muhammad par certains Juifs de Médine. La dureté des cœurs mentionnée dans le verset est interprétée comme référant à la « mécréance » (*kufr*) des coupables (qui ne sont pas tous les Juifs de Médine, précise l'auteur). Il ajoute à son argumentation la tradition célèbre d'Ibn 'Abbās (m. 687) : « Nous (Dieu) les avons éprouvés par la *ǧizya* » (*'aḏabnāhum bi-l-ǧizya*).

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26 *Tafsīr* de Faḫr al-Dīn al-Rāzī à propos de Q. 2:61 (*Tafsīr*, 2:146-158).

27 *Tafsīr*, 9:302-303.

28 Le « *aḏā* » (mal, souffrance) mentionné dans le verset est ici interprété par « *ǧizya* » selon une tradition d'al-Ḥassan al-Baṣrī (m.728) également transmises dans les *Tafsīrs* d'al-Māwardī (m. 450/1058), 2/249 et du Ḥanbalite Ibn al-Ǧawzī (m. 597/1200), 2:146.

29 Repris du *Tafsīr* lexicologique d'al-Naḥḥās (m. 338/949), 3:84.

30 Al-Qurṭubī donne les détails juridiques de la *ǧizya* considérée comme butin (*fay'*) lorsqu'elle fut imposée à ces tribus dans le commentaire de Q. 59:57. Les références et les sources d'al-Qurṭubī citées dans cet article proviennent de l'édition de son *Tafsīr* extrêmement documentée d'ʿAbd Allāh ʿAbd al-Muḥsan al-Turkī (Muʾassassa al-Risālah, Beyrouth, 2006).

31 Egalement mentionné dans les *Tafsīr-s* d'al-Baġawī (m. 516/1122), 2:202 et d'Ibn al-Ǧawzī (m. 597/1200) 3:266.

32 Mentionné dans les *Tafsīrs* d'Ibn al-Jawzī, 3/266 et d'al-Rāzī, 15:13.

33 *Tafsīr* d'Abū Ḥayyān al-Andalusī à propos de Q. 2:61.

34 *Tafsīr*, 7:379-383.

35 Q. 5:13 : « Mais parce qu'ils ont rompu leur alliance, Nous les avons maudits et Nous avons endurci leurs cœurs. Ils altèrent le sens des paroles révélées et oublient une partie de ce qui leur a été rappelé. Tu ne cesseras pas de découvrir leur traîtrise, sauf chez quelques-uns d'entre eux ».

Dans le commentaire d'al-Qurṭubī, la perte de la protection divine occasionnée par la rupture de l'Alliance divine justifie le pardon que les Musulmans doivent leur accorder par un pacte de protection (*ḏimma*)[36]. Ainsi, lorsque Q. 3:112 évoque un secours possible contre la *ḏilla* « par une corde de Dieu et une corde des hommes »[37], al-Qurṭubī voit dans l'image de la « corde avec les hommes » une référence à la « protection » (*ḏimma*) et à la « sécurité » que les Juifs obtiennent de Muhammad (m. 632) et des Musulmans en échange du tribut[38]. Le pacte de protection avec les Musulmans en échange de la *ğizya* apparaît donc bien en compensation de la perte de la *ḏimma* divine. Cette interprétation suggère que la *ğizya* découlerait d'un commandement divin tout en étant le dû d'une protection que l'autorité et la loi islamique sont obligées (devant Dieu) d'offrir et de maintenir. Elle fait écho à la conception selon laquelle le Musulman aurait reçu la protection divine (des feux de l'enfer) en échange de l'application de la loi, objet de l'alliance entre l'homme et Dieu. Ici apparaît implicitement que la protection de la *ḏimma* viendrait en remplacement de la protection divine perdue, et que le Musulman – protégé par Dieu – serait chargé, par obligation religieuse, d'offrir une protection au non Musulman[39]. De même que la notion de « sécurité » (*amān*) - qui réfère pour les non-Musulmans à la protection de la *ḏimma* – est présente dans la foi musulmane (*īmān*[40]) ; de même la « soumission » (*ṣaġār*) exigée des *ḏimmī-s* envers le pouvoir Musulman peut être mise en parallèle avec le sens littéral du terme *islām* (soumission à la volonté de Dieu)[41].

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36 « *fa-ʿfu ʿanhum wa-ṣfaḥ mā dāma baynaka wa-baynhahum ʿahd wa-hum ahl al-ḏimma* ». *Tafsīr*, 7:382-383.

37 Littéralement : « Où qu'ils se trouvent ils sont frappés d'ignominie / opprobre (*ḏilla*), à moins (d'un secours providentiel) par une corde de Dieu et une corde des hommes (*illā' bi-ḥablin min-Allāh wa-ḥablin min-al-nās*) » (Q. 3/112).

38 « *yu'addūn ilayhim al-ḫarāj fa-yu'aminūnahum* » ; également dans le *Tafsīr* d'al-Baġawī, 342.

39 Sur la protection politique en remplacement de la protection divine, voir B. Johansen, *op. cit.,* 219-238.

40 Comme l'explique L. Gardet dans son article de l'Encyclopédie de l'Islam sur la racine "*Īmān*" : « celle-ci « connote l'idée d'être en sécurité, se confier à, s'en remettre à. D'où: bonne foi, sincérité (*amana*), puis fidélité, loyauté (*amāna*), et donc l'idée de sauvegarde accordée (*amān*). La IV[e] forme *āmana* a le double sens de croire, donner sa foi, et (*avec bi*) de protéger, mettre en sécurité. De même J.J.G Jansen, dans son article de l'Encyclopédie de l'Islam sur « *Mu'min* » explique : « Étant donné que, dans le Ḳurʾān (LIX, 23), Dieu Lui-même est appelé *mu'min*, il serait logique d'en déduire que le sens primitif arabe de « quelqu'un qui protège, donne la sécurité », doive être préféré. De même, *īmān*, dans Ḳurʾān, LIX, 9, devrait être compris comme signifiant le « fait de donner une protection et une sécurité mutuelles » ». Sur les sens primitifs, coraniques et théologiques d'*imān* et d'*islām* voir T. Izutsu, *The concept of belief in Islamic theology. A semantic analysis of îmân and islâm* (Tokyo 1965). M. M. Bravmann, *The spiritual background of early Islam.Studies in ancient Arab concepts* (Leiden 1972) p. 7-31. C. Schöck, "Belief and unbelief, in classical Sunnī theology"., *EI.* (2007).

41 Sur les sens primitifs, coraniques et théologiques d'*imān* et d'*islām* voir T. Izutsu, The *concept* of *belief in Islamic theology. A semantic analysis of îmân and islâm* (Tokyo 1965). M. M. Bravmann, *The spiritual background of early Islam. Studies in ancient Arab concepts* (1972)1977-1931. C. Schöck, "Belief and unbelief, in classical Sunnī theology"., *EI.* (2007).

Le « *ḵizy* » mentionné dans Q. 5:41 est également interprété comme référant à la *ǧizya*[42], toujours envisagée comme une punition humiliante (*ḏull*), elle est ici imposée à tous les Gens du Livre du fait qu'ils ont corrompu leurs lois[43]. Dans le contexte coranique de la « conquête » (*fatḥ*) - identifiée au « *ḵizy* » qui frappe les mécréants dans le monde d'ici-bas (*dunyā*) en Q. 2/114[44] - le « commandement divin » (*amr*) visant à sanctionner la « maladie des cœurs » (Q. 5/52) est interprété comme référant à l'imposition de la *ǧizya*[45].

De manière générale, la *ǧizya* s'inscrit dans une perspective eschatologique : elle est représentée comme une souffrance (*'aḏāb*) ici-bas (*dunyā*), les Gens du Livre étant humiliés (*ḵizy*) en attendant une plus grande souffrance (*'aḏāb*) encore dans l'au-delà (*al-āḵira*)[46] et dans les feux de l'enfer[47]. Ou bien en attendant que tous se repentent et se convertissent à la fin des temps[48], lorsque Jésus reviendra le Jour du Jugement, diriger la prière à Jérusalem, qu'il abolira la *ǧizya* et le porc, et qu'il détruira les églises[49].

Ailleurs, particulièrement dans le commentaire des sourates médinoises, époque où les relations avec les Gens du Livre se durcissent, la *ǧizya* est liée à un contexte politique et guerrier : envisagée comme un instrument de combat au même titre que l'emprisonnement (*saby*) ou la mise à mort (*qatl*), elle a pour fonction d'attester de la domination du « parti de Dieu » (*ḥizb Allāh*) défini par l'auteur comme étant formé de ceux qui obéissent à Dieu et au Prophète[50].

Enfin, l'auteur relie explicitement le sens de la *ǧizya* appliquée aux *ḏimmī-s* dans la loi à ses dimensions mythiques et eschatologiques lorsqu'il associe le châtiment divin de la « *ḏilla* » s'abattant sur les « Enfants d'Israël » (Q. 2:61) à la soumission, l'abaissement ou l'avilissement (« *ḏull wa-ṣaġār* ») impliqués dans

42 Mentionnée également dans le *Tafsīr* grammatical et lexicologique d'al-Zaǧǧāǧ (m.311 /923), 2:177.

43 Sur cette question voir C. Wilde, « Is there room for corruption in the "Books" of God ? », *The Bible in Arab Chistianity*, Leiden, Vol. 6, 2006, 225-240. Gordon Nickel, « Islamic Accusations of Falsification in Scholarly Perspective », in *id*. (ed.), *Narratives of Tampering in the Earliest Commentaries on the Qur'ān*, Brill, Leiden, 2010, p. 1-14.

44 *Tafsīr*, 2:320-324. Egalement dans le *Tafsīr* d'Ibn 'Aṭiyya (m.541/1146), 1:199

45 *Tafsīr*, 8:48. Cette interprétation est présentée par une tradition d'al Suddī (m.128/745) également transmise dans Ṭabarī (8:513) qui interprète le commandement de Dieu (« *amr* ») mentionné dans le verset comme une référence à la *ǧizya*.

46 Comme à propos de Q. 2:114 où al-Qurṭubī reprend son prédécesseur andalou Ibn 'Aṭiyya, 1:199.

47 Commentaire de de Q. 5:41. *Tafsīr*, 7:484.

48 Voir par exemple le commentaire de Q. 27:40.

49 Voir par exemple le commentaire de Q. 43:61-62 par al-Qurṭubī où il reprend les traditionnistes Muslim (m. 875) 155 et Ibn Māja (m. 273/886) 4:78 ; ainsi que les *Tafsīrs* de Ṭabarī (m. 310/923) 20/631-633 ; d'al-Māwardī (m. 450/1058) 5:335 ; d'al-Baġawī (m. 516/1122), 4:144 ; d'al-Zamaḫšarī (m. 538/1144) 3:494.

50 Commentaire de de Q. 5:56, *Tafsīr*, 8:56-59, où al-Qurṭubī reprend le *Tafsīr* d'al-Wāḥidī (m. 468/1075), *al-Wasīṭ* 2/202.

l'obligation légale de payer la *ğizya* (« *al-ḏilla farḍ al-ğizya* »)[51]. Notons qu'Ibn Kaṯīr (m.774/1373) ajoute à cette même interprétation celle d'al-Ḥasan al-Baṣrī (m. 110/728) rapportée dans Ṭabarī (m.310/923)[52] : « Dieu les a abaissés (*aḏallahum*) pour qu'ils ne s'opposent pas, ils étaient ainsi placés sous les pieds des Musulmans, et la communauté (des Musulmans) les avait ainsi dépassés (*adrakathum*) ».

La ğizya *comme une punition [ou peine] pour un crime (contre Dieu)*

Chez al-Qurṭubī, la dimension divine punitive de la *ğizya* qui apparaît dans les épisodes historico-mythiques que nous venons de mentionner, conduit à la déduction de doctrines juridiques issues des prescriptions coraniques. Cet assemblage contribue à justifier les doctrines dans un système de normes divines (*šarʿ*) fondé sur ce que la traditionn musulmane appelle les « droits de Dieu ». L'auteur s'engage dans cette voie en s'appuyant sur les élaborations de son précurseur Abū Bakr Ibn al-ʿArabī (m.543/1148)[53] pour qui la *ğizya* serait une « punition » ou une « peine » (*ʿuqūba*) sanctionnant un « crime » (*jarīma/jināya*) contre Dieu. Cette conception qui apparaît rarement chez les auteurs malikites, est particulièrement développée chez les auteurs d'autres écoles juridiques comme le Hanafite al-Ğaṣṣāṣ (m.370/ 980) dans son *Aḥkām al-Qur'ān*, et le Hanbalite Ibn Qayyim al-Ğawziyya (m. 1351) dans son traité sur les *ḏimmī-s* (*Aḥkām ahl al-ḏimma*)[54]. Le verset Q. 9:29, où se trouve la seule mention du terme *ğizya* dans le Coran, offre la base coranique la plus importante pour la justification du pacte de la *ḏimma* dans la « loi divine » (*šarʿ*). Dieu y ordonne de combattre les « Gens du Livre » (*ahl al-kitâb*) jusqu'à ce qu'ils acquittent la *ğizya* en manifestant des signes de « soumission » ou en « étant humiliés » (*ṣaġār – Qātilū [...] min alladīn ūtū-l-Kitāb ḥatā yuʿṭūn al-ğizya ʿan-yadin wa-hum ṣāġirūn.*). Le principal enseignement, selon

51 Il s'agit d'une tradition d'al-Ḥasan al-Baṣrī (m. 110/728) et de Qatāda (m. 120/737) rapportée dans le *Muṣannaf* d'ʿAbd al-Razzāq (m. 211/827), 1:47 ; al-Ṭabarī, 2:26 ; Ibn ʿAṭiyya (m. 541/1146), 1:155. Dans le commentaire de ce verset par Ṭabarī, la *ḏilla* renvoie à la soumission (*ṣaġār*) impliquée dans le paiement de la *ğizya* en échange de la sécurité (*amān*) et la permission de rester dans un état de mécréance qu'il incombe aux Musulmans de donner. Il argumente en citant le verset de la *ğizya* (Q. 9:29) et par une tradition de Qatāda selon qui la *ḏilla* réfère au paiement de la *ğizya* « en étant abaissés/soumis » (*ʿan-yadin wa-hum ṣāġirūn*).

52 Ṭabarī à propos de de Q. 3:112.

53 Fameux juriste et théologien sévillan d'époque almoravide, également auteur d'un commentaire coranique d'*Ahkam al-Qurā'n*. Voir, V. Lagardère, « Abū Bakr al-ʿArabī, grand cadi de Séville », *Revue de l'Occident Musulman et de la Méditerranée*, N° 40, 1985, 91-102. M.I al- Mašinī, *Ibn al-ʿArabī al-ishbīlī wa-tafsīruhu Aḥkām al-Qur'ān* (Beyrouth 1991). Pedro Cano Ávila y otros, « Ibn al-Arabi al-Maafiri, Abu Bakr », *Biblioteca de Al-Andalus*, II,129-158 (Almería 2009). D. Serrano, « El Corán como fuente de legislación islámica : Abū Bakr Ibn al-ʿArabī y su obra *Ahkām al-Qur'ān* », in M. H. Larramendi y S. Peña Martin (eds), *El Corán ayer y hoy. Perspectivas actuales sobre el islam. Estudios en honor del Profesor Julio Cortés* (2008). R. El Hour, « Ibn al-ʿArabī », *Christian-Muslim Relations. A bibliographical History* (2013) V, 520-523.

54 Voir M.-Th. Urvoy « La violence morale dans *Ahkâm Ahl al-Dhimma* d'Ibn Qayyim al-Jawziyya », in M. A. Amir-Moezzi (ed.), *Islam : identité et altérité, Hommage à Guy Monnot, O.P.*, tome 165, 2013.

les Malikites, est que les adeptes des autres religions monothéistes et par extension tous les non-Musulmans résidants en Terre d'Islam doivent reconnaître leur situation d'infériorité (*ṣaġār*), en acceptant de verser la taxe de capitation (*ǧizya*). Al-Qurṭubī expose dans le commentaire de Q. 9:29[55] les principes qui rendent licite dans la « loi divine » « le combat (*muqātala*) » des Gens du Livre afin qu'ils payent la *ǧizya* mentionnée dans le verset. Ces principes sont exprimés dans les catégories juridiques de la « cause » (*sabab*) et de l'« objectif » factuels et théoriques (*ġāya*) de la règle. Ces catégories servent à accorder les doctrines juridiques (*aqwāl*) et les règles de droit (*šarā'i'*) aux prescriptions divines. Al-Qurṭubī explique, reprenant implicitement les développements d'Ibn al-'Arabī sans en citer la source[56] :

> Dieu ordonne de combattre tous les mécréants du fait qu'ils aient tous été frappés de mécréance, mais Il mentionne de manière exceptionnelle les Gens du Livre, leur attribuant un statut spécial, par bienfaisance envers leur Livre, du fait de leur connaissance *du monothéisme, des prophètes, des lois, des confessions (milal) et tout particulièrement de Muhammad, de sa confession (milla) et de sa communauté (umma). Mais ils ont nié cela* [...] *leur crime (ǧarīma) s'est avéré d'autant plus grand. Dieu a alors spécifié leur statut* et fait que le combat (contre eux) (*qitāl*) ait pour objectif (*ġāya*) qu'ils donnent la *ǧizya* et non plus de les tuer (*badalān 'an-al-qatl*).[57]

Les détails de cette élaboration par les « causes » et les « objectifs » afin de justifier par la « loi divine » (*šar'*) des doctrines juridiques, se retrouvent chez Ibn al-'Arabī lorsqu'il considère le verset Q. 2:193[58] comme la « preuve scripturaire univoque » (*naṣṣ*) de « l'objectif » du combat (*ġāyat-al-qitāl*) ; celui-ci visant selon lui à « l'éradication de la mécréance » tandis que sa « cause » est la mécréance[59]. De là Ibn al-'Arabī déduit que « Q. 9:29 spécifie le sens général de C., 2/193 en lui ajoutant un autre "objectif" »[60] qui est la *ǧizya* .

Puis, al-Qurṭubī introduit la conception de la *ǧizya* comme une « punition » ou une « peine » (*'uqūba*) pour « crime » (*ǧināya/ǧarīma*) en rapportant des propos attribués par Ibn al-'Arabī[61] à son maitre hanbalite de Bagdad, Ibn 'Aqīl (m.1119)[62] : « L'injonction de combattre les mécréants dans Q. 9:29 est un ordre

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55 *Tafsīr*, 10:161-171.

56 Les propos d'Ibn al- 'Arabī transmis par al-Qurṭubī sont ici signalés en italique. On les retrouve dans son *Aḥkām al-Qur'ān*, 2:475, Casus 3 du commentaire de Q. 9:29.

57 *Tafsīr* al-Qurṭubī, commentaire de Q. 9:29, Casus 1. p. 162 -163.

58 Q. 2:193 : « Combattez-les jusqu'à ce qu'il n'y ait plus d'association (*fitna*) et que la religion (*dīn*) soit entièrement à Dieu seul ».

59 « *al-sabab al mubīḥ li-l-qitāl al-kufr* ».

60 « *ḫaṣṣaṣa min al-ḥāla al-'āmma ḥāla uḫrā ḫāṣṣa wa zāda ilā-l-ġāyati-l-ūlā ġāya uḫrā* ». Ibn al-'Arabī, *Aḥkām*, 1:154-157.

61 Ibn al-'Arabī, *Kitāb al-Qabas*, 2:473.

62 Abū al-Wafā' 'Alī Ibn 'Aqīl (m. 513/1119) est un célèbre juriste et théologien hanbalite de Bagdad qui enseigna le droit à Ibn al-'Arabī. Influencé par le mu'tazilisme, Makdisi le décrit comme une « grande

de punir (*amr bi-l-ʿuqūba*) ; la mécréance indique le péché (*ḏanb*) qui nécessite (*awğaba*) la punition »[63]. On remarque ici la qualification du commandement divin par la catégorie de « *ʿuqūba* » qui a le sens de peine dans la théorie juridique[64]. La conception légale de la *ğizya* rejoint ici le châtiment divin affligé aux Gens du Livre pour leur refus d'adopter l'Islam. Ainsi, al-Qurṭubī explique à propos de Q. 2:209[65] que la punition divine (*ʿuqūba*) sur « ceux qui savent » est plus forte qu'elle ne l'est sur « ceux qui ne savent pas » : les *Ahl al-Kitāb* sont punis par Dieu parce qu'ils ont reçu dans leur Livre l'avertissement de la prophétie de Muhammad (m. 632), alors que ceux qui n'ont pas été avertis de l'Islam ne peuvent être punis d'avoir méprisé ses lois. Il y aurait donc dans cette citation comme un jeu sur l'ambiguïté sémantique du terme de *ʿuqūba* : peu utilisé par les exégètes pour qualifier la *ğizya* , il est dans le *Tafsīr* d'al-Qurṭubī un terme polysémique qui réfère selon les contextes soit au châtiment divin soit à une peine ou à une punition dans le « droit des Hommes ». De plus le terme « *awğaba* » exprime que la « loi divine » « nécessite » la punition et il indique clairement la déduction d'une règle de droit à partir d'une prescription divine. On retrouve les détails de cette argumentation dans le commentaire de Q. 9:29 par Ibn al-ʿArabī :

> « Nos maîtres ont prouvé (*istadalla*) que la *ğizya* était une punition nécessaire à cause de la mécréance (*wajabat bi-sabab al-kufr*). Or la mécréance est un crime (*ğināya*) qui nécessite punition »[66].

Ibn al-ʿArabī déclare ainsi qu'il suit l'interprétation des maîtres de son école qui déduisent (*istadalla*) de la « loi divine » la dimension punitive de la *ğizya*. La « cause » (*sabab*) du combat dans la « loi divine » (*šarʿ*) rend licite cette sanction légale. La mécréance n'est plus seulement un « péché », objet du courroux divin devant être éradiqué par un combat mené par les croyants, mais elle devient la cause factuelle et théorique qui transforme la *ğizya* en une règle de droit. Envisagée comme la peine d'un « crime » contre Dieu, l'imposition de la *ğizya* apparaît ici comme un commandement divin et acquière ainsi le statut d'une obligation légale pour le Musulman.

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personnalité sunnite dont la vie et les écrits éclairent l'une des périodes les plus importantes du développement de la pensée religieuse islamique et qui se tient à la tête d'un mouvement de progrès au sein du traditionalisme sunnite ». Voir H. Laoust, « Le Hanbalisme sous le Califat de Bagdad », *REI*, 1959, 67-128.G. Makdisi, "Ibn ʿAḳīl", *EI*, Leiden, 2ème édition. *Id.*, *Ibn ʿAqīl et la résurgence de l'Islam traditionaliste au XI*e *siècle*, (1963).

63 *Tafsīr* al-Qurṭubī, commentaire de Q. 9:29, Casus 1. p. 162 -163.

64 Sur les crimes et les peines dans le *fiqh*, voir par exemple : Muhammad Abū Zahra, *al-Ğarīma wa-l-ʿuqūba fī al-fiqh al-islāmī*, Dār al-fikr al-ʿarabī, al-Qāhira (*s.d*).

65 *Tafsīr*, 3:395-396.

66 « *waǧaba an-yakūna musabbabuha ʿuqūba* ». Ibn al-ʿArabī, comentaire de Q. 9:29, Casus 11 , *Aḥkām*, 2:482.

La ǧizya *comme la manifestation d'une soumission (ṣaġār) traduite par un statut inférieur*

Au fil du commentaire de Q. 9:29 organisé en « Casus (masā'il) », l'auteur compare la manière par laquelle les juristes de différentes écoles fondent leurs doctrines et les règles qui en découlent, sur diverses exégèses possibles. Cette méthode encyclopédique et pluraliste rappelle les traits caractéristiques de certains ouvrages d'époque almohade, tel celui de controverses légales d'Averroès : Bidāyat al-mujtāhid…[67]

L'interprétation du rituel de paiement énoncé dans Q. 9:29 apparaît déterminante dans la conception juridique de la *ǧizya* , c'est-à-dire lorsqu'elle est définie comme le pilier du pacte et fondatrice du statut inférieur du *ḏimmī* dans le droit. C'est en effet à partir de la figuration coranique de l'attitude à adopter au moment d'acquitter le tribut : « de leurs propres mains en étant soumis » (*ʿan-yadin wa hum ṣāġirūn*)[68], que le discours juridique justifie le statut inférieur du *ḏimmī* dans la société. Ici, les interrogations sur le sens de la soumission (*ṣaġār*) apparaissent en filigrane : réfère-t-elle à une « humiliation » concrète qui serait subie au moment de payer le tribut ? Ou à des signes d'humilité accompagnant le paiement comme une métaphore de l'allégeance du *ḏimmī* à l'autorité islamique ? Est-elle la figure d'une condition « humble », « humiliée » ou bien « avilie » du *ḏimmī* dans la société islamique ? Dans quelle mesure la soumission dans le paiement de la *ǧizya* implique-t-elle une soumission à la loi et à la justice islamique et pose-t-elle les bases du pacte de la *ḏimma* ?

Le commentaire d'al-Qurṭubī présente en quinze Casus (*mas'ala*), les différentes doctrines relatives à la *ǧizya* et leurs lectures respectives du verset :

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67 Voir R. Brunschvig, « Averroès juriste », dans *Èt. d'Or… Lévi-Provençal*, Paris 1962, 1, p. 35-68. A. M. Turki, « La place d'Averroès juriste dans l'histoire du mālikisme et de l'Espagne musulmane » in *id*., (ed.) *Théologiens et juristes de l'Espagne musulmane*, Paris 1982. Yasin Dutton, "The Introduction to Ibn Rushd's "*Bidāyat al-Mujtahid*"", Islamic Law and Society, Vol. 1, No. 2, 1994, p. 188-205. D. Urvoy, *Averroès* : *Les ambitions d'un intellectuel musulman*, Flammarion, 1998, Paris, p. 112 et suivtes. M. Fierrro, "The legal policies of the Almohad caliphs and Ibn Rushd's *Bidāyat al-mujtahid*", *Journal of Islamic Studies* 10/3, 1999, p. 226-248.

68 Nous choisissons la traduction « soumission » pour les raisons qui apparaitront par la suite. Voir les autres traductions possibles note 16. On retrouve les débats philologiques, exégétiques et historiques suscités par cette expression du verset dans : F. Rosenthal « Some Minor Problems in the Quran 9/29 – *Al Jizyata ʿan Yadin* » (1953) in R. Paret (ed.), *Der Koran, Wege der Forschung* (Darmstadt, 1975),283-287. C. Cahen, « Coran IX-29 : *Ḥattā yuʿṭū l-ǧizyata ʿan yadin wa-hum ṣāghirūn* », *Arabica* 9 (1962),76-79. M. Kister, « *ʿAn yadin* » (Qurʾān, IX/29) An Attempt at Interpretation", *Arabica* 11 (1964),272-278. M. M. Bravmann, « The Ancient Arab Background of the Qurʾānic Concept *al-Ǧizyatu ʿan yadin*, *Arabica* » 13/13 (1966),307-331. U. Rubin, « Quran and Tafsir : The Case of '*an yadin* », *Der Islam* 70 (1993),133-144. J. D. McAuliffe, « Fakhr al-Dīn al-Rāzī on Ayat al-Jizya and Ayat al-Sayf », in M. Gervers and R. Jibran Bikhazi (eds), *Conversion and Continuity : Indigenous Christian Communities in Islamic Lands, Eighth to Eighteenth Centuries* (1990)103-119.

1. Dans le première Casus, l'auteur expose les raisons pour lesquelles ce verset rend licite la *ğizya*, précisant que celle-ci n'avait jamais été perçue avant que ne soit révélé ce verset. En relation avec le verset précédent, il explique que la *ğizya* fut établie en vue compenser le manque à gagner suite à l'interuption des relations commerciales avec les Polythéistes ; après qu'il leur ait été interdit de pénétrer dans le sanctuaire de la Mecque (Q. 9:28). De là, se trouvent déduit de l'exégèse, les raisons du combat contre les Gens du Livre et de l'octroi qui leur est fait, d'un statut spécial. Al-Qurṭubī conclut ce Casus avec l'affirmation que l'imposition de la *ğizya* est un commandement divin établi en vue de punir les Gens du Livre, parce qu'ils n'avaient pas reconnu le message du Prophète de l'Islam ; cela alors qu'ils possédaient un Livre – la Torah et la Bible –, la connaissance du monothéisme, de ses dogmes et de ses lois.
2. Dans le deuxième Casus, al-Qurṭubī rapporte les débats des juristes sur « de qui peut être percue la ğizya (*fi-man tu'ḫaḏ al-ğizya*) ». Il montre la manière par laquelle al-Šāfi'ī (m.820) fonde sur ce verset, la doctrine selon laquelle la *ğizya* s'applique exclusivement aux Gens du Livre, qu'ils soient arabes ou étrangers. Il ajoute qu' al-Šāfi'ī, Ibn Ḥanbal (m.855) et Abū Ḥanīfa (m.767) fondent l'application de la *ğizya* aux Zoroastriens sur la pratique (*sunna*) du Prophète. Quant à l'école malikite – écrit-il –, elle suit la doctrine d'al-'Awzā'ī (m.774) pour qui la *ğizya* s'applique à tout type de mécréants, arabes et étrangers. Puis notre auteur mentionne les divergences d'opinions entre les premières autorités malikites : Ibn al-Qāsim (m.191/806), Ašhab (m.204/820) et Saḥnūn (m.240/854) refusent d'appliquer la *ğizya* aux Arabes polythéistes ; tandis qu'Ibn Wahb (m.197/813) la refuse aux Arabes zoroastriens. Al-Qurṭubī mentionne cependant un avis contraire d'Ibn al-Qāsim et conclut par une tradition d'Ibn al-Ğahm (m.249/863) selon qui la *ğizya* était appliquée à tous les mécréants à l'exception des Qurayshites, soit pour leur épargner l'humiliation (*ḏilla*), soit parce qu'ils s'étaient tous convertis à la conquête de la Mecque[69].
3. Dans le Casus 3, al-Qurṭubī rapporte la tradition prophétique transmise dans le *Muwaṭṭa*' de Mālik (m.179 /712) qui a rendu licite la ğizya aux Zoroastriens. Il mentionne l'avis d'al-Šāfi'ī (m.820), pour qui ces derniers appartenaient aux Gens du Livre avant qu'ils ne changent. Al-Qurṭubī valide cette position par d'autres autorités ('Alī b. Abī Ṭālib (m. 659), 'Abd al-Razzāq (m. 211/827)) et rapporte d'Ibn 'Aṭiyya (m. 541/1146) la reconnaissance faite aux Zoroastriens de leur prophète Zoroastre[70].
4. Dans le Casus 4, al-Qurṭubī expose les discussions des juristes autour du montant de la *ğizya*. Doit-il être fixe et identique pour tous ? ou varie-t-il selon

69 Développement que l'on retrouve dans le manuel de son contemporain malikite égyptien : Ibn Šās (m. 616/1219), intitulé '*Iqd al-Ğawāhir*, 1:486.

70 Ibn 'Aṭiyya, *ibid.*

les accords de conquête ? Faut-il fixer un montant minimum et un montant maximum ? Doit-il être adapté à la capacité de paiement des pauvres ? Les riches doivent ils payer pour les pauvres ? Al-Qurṭubī rapporte l'approbation de Mālik sur ces deux dernières questions et distingue entre les traités de paix et le pacte de la *ḏimma* : au contraire des habitants des contrées conquises qui doivent payer le montant fixé dans les traités de conquête ; le montant redevable par les *ḏimmī-s* varie à la discrétion du *Wālī*[71].

5. Dans le Casus 5, al-Qurṭubī expose la doctrine selon laquelle la *ǧizya* ne se perçoit que des hommes en âge de combattre et en capacité de payer. Sur ce point, les juristes sont unanimes explique t-il. L'auteur rappelle que ses maitres (malikites) ont justifié cette doctrine en s'appuyant sur l'injonction de combattre dans Q. 9:29, de laquelle ils déduisent également que la *ǧizya* ne s'applique pas à l'esclave en âge de combattre car il n'est pas propriétaire de quelque bien pour pouvoir le donner[72]. Puis l'auteur expose une divergence entre Mālik et Ibn Mājišūn (m. 164/780) sur l'imposition de la *ǧizya* aux moines[73].
6. Dans le Casus 6, al-Qurṭubī mentionne qu'il n'est pris aucune autre taxe du *ḏimmī* à part celle du *ʿušr* sur son commerce hors du *Dār al-islām*. Il expose la divergence entre les juristes de Médine et ʿUmar sur son montant ainsi que sur le nombre de redevance à l'année[74].
7. Dans le Casus 7, l'auteur détaille les protections et les restrictions des *ḏimmī-s*, ainsi que les obligations du Musulman envers eux et les punitions que chacun encoure s'il venait à violer les règles. La production et la vente de vin et de porc sont autorisées tant qu'ils payent la *ǧizya* et que cela n'est pas visible aux Musulmans. Al-Qurṭubī évoque le remplacement du vin du *ḏimmī* spolié par le Musulman et son dédommagement lorsqu'il est déversé par erreur en guise de sanction (pour l'avoir fait apparaitre dans l'espace public)[75]. Il rappelle que les *ḏimmī-s* sont soumis à la justice (*maẓālim*) et que s'ils choisissent de recourir au juge Musulman pour les litiges qui les concernent en propre, le juge est libre d'accepter ou non. S'il accepte, il devra juger selon la loi islamique. L'auteur ajoute qu'un *ḏimmī* faisant montre d'agressivité au moment d'acquitter la *ǧizya* doit être remis à sa position d'infériorité (*ṣāġiran*)[76].
8. Le Casus8 expose la divergence entre les Malikites et les Shafiites au sujet de « la contrepartie pour laquelle la *ǧizya* est due (*fī-mā wajabat al-ǧizya ʿanhu*) ».

71 Doctrine de Sufyān al-Ṯawrī (m. 161/778) rapportée dans *al-Tamhīd*, 2:130.
72 Voir *Aḥkām al-Qur'ān* d'al-Kiyā al-Ṭabarī (m.504/1110), 3:194.
73 Rapporté dans *al-Iqnāʿ* d'Ibn al-Munḏir (m.319/931), 2:472 ; *al-Kāfī*, 2:479 ; Ibn al-ʿArabī, *Aḥkām*, 2:910 ; Ibn ʿAṭiyya, *ibid*.
74 Voir *al-Kāfī*, 1:480
75 *ʿIqd al-Ǧawāhir*, 1:491.
76 Dans *al-Kāfī*, 1:484 et Ibn al-Munḏir : *al-Awsaṭ*, 11:16-20.

Celui qui se convertit devra t'il payer la *ğizya* pour la période précédant la conversion pendant laquelle il a bénéficié de la *ḏimma* ? L'interprétation normative du verset dans l'explication de la règle diffère selon que la *ğizya* est envisagée comme prix de la résidence (en Terre d'Islam) ou en échange du droit à rester dans la mécréance[77].

9. Le Casus 9 traite du sort des populations conquises refusant de payer la *ğizya* et de se soumettre à l'autorité, sans qu'aucun des deux partis ne commettent d'autre infraction. Dans ce cas, les Musulmans doivent les combattre et les envahir de nouveau. Leur traitement sera ceux des prisonniers de guerre et ils seront un butin (*fay'*)[78].
10. Le Casus 10 examine le traitement des *ḏimmī-s* dans les infractions de droit commun. Ils sont égaux aux Musulmans tant qu'ils payent la *ğizya* . Lorsqu'ils sont victimes, on en réfère à leur *ḏimma* pour leur rendre justice. Il ne faut pas les rendre esclave. Celui qui rompt le pacte n'engage pas sa communauté, chacun est responsable individuellement. On reconnait ceux qui sont fidèles à leur pacte parce qu'ils renient ceux qui ne le sont pas[79].
11. Le Casus 11 déduit du sens étymologique de la *ğizya* (la contrepartie d'un don) que sa contrepartie est ici la sécurité (*amn*).
12. Le Casus 12 évoque la licéité pour les Malikites de punir (*'uqūba*) les *ḏimmī-s* refusant de payer la *ğizya* alors qu'ils en ont la capacité. Tandis que ceux qui n'en n'ont pas la capacité ne sont pas punis puisqu'ils en sont déjà exempts[80]. L'argument est soutenu par le *ḥadiṯ* qui désapprouve qu'on impose une chose trop lourde au *ḏimmī*.
13. Le Casus 13 décline les multiples sens de « *'an-yadin* » : payer de soi-même sans être contraint ; En étant accusé, blâmé, reproché (*maḏmūmīn*), opprimé (*'an qahrin*) debout (*qā'im*) ; Par bienfaisance (*in'ām*)[81]...
14. La question 14 explique que la main du *ḏimmī* qui acquitte la *ğizya* se place sous celle du percepteur ; contrairement au Musulman qui acquitte la *ṣadaqa*. L'auteur conclut par la maxime : « Dieu élève qui Il veut »[82].
15. Le Casus 15, le *ḵarāj* ne doit pas être appliqué au Musulman qui cultive ou achète une terre, du fait que cela implique une soumission et une infériorité (*ṣaġār*)[83].

77 Texte étudié plus loin.
78 Egalement dans *al-Kāfī*, 1:483 et Saḥnūn (m.240/854) : *al-Mudawwana*, 2:21.
79 Voir *al-Kāfī*, 1:483-484
80 Cette doctrine est présentée dans le commentaire du *Ṣaḥīḥ Muslim* du maitre d'al-Qurṭubī à Alexandrie : Abū al-'Abbās al-Qurṭubī (m. 656h.), *al-Mufhim*, 6:599.
81 Mentionnée dans al-Naḥḥās (m. 338/949), 2:197-198 et al-Zağğāğ (m.311/923), 2:442.
82 Voir Ibn al-'Arabī, *Aḥkām*, 2:912.
83 Al-Qurṭubī mentionne ici trois récits rapportés dans 'Abd al-Razzāq (m. 211/827), 1:47.

Il ressort de cette liste que la *ǧizya* apparaît presque systématiquement liée à la soumission et au statut inférieur de celui qui en est redevable. De plus, bien que le pacte de la *ḏimma* ne soit pas cité ou peu suggéré, il apparaît en arrière fond du paiement de la *ǧizya* en signe de soumission (*ṣaġār*) à l'autorité et à la loi en échange de la sécurité et de la protection.

Le débat présenté dans le huitième Casus au sujet de la contrepartie de la *ǧizya* (« *fi-mā waǧabat al-ǧizya ʿanhu* ») montre différents usages des interprétations exégétiques dans l'inscription des règles de la *ǧizya* dans les prescriptions divines. La divergence entre les Malikites et les Shafiites sur la question de savoir si celui qui se convertit avant la perception de la *ǧizya* en reste redevable, provient de ce qu'il existe une différence doctrinale sur la contrepartie de la *ǧizya* selon qu'elle est envisagée comme prix de la résidence (en Terre d'Islam) ou bien en échange du droit à rester dans la mécréance. Cette divergence s'appuie sur des interprétations différentes de la soumission exprimée dans Q. 9:29 et sont formulées dans le huitième Casus

> Les juristes ont divergé sur la contrepartie de la *ǧizya*. Selon les Malikites, elle se substitue au combat contre la mécréance. Selon al-Šāfiʿī (m.820), elle est le prix de la vie (*damm*) et de la résidence [en Terre d'Islam] (*suknā-l-dār*). La conséquence est que si nous [les Malikites] supposons que la *ǧizya* se substitue au combat, alors celui qui se convertit à l'Islam – que ce soit un jour avant ou après la perception – n'est pas redevable de ce qui précède (*lī-mā maḍā*). En revanche pour al-Šāfiʿī, la *ǧizya* est une dette permanente en contrepartie de la protection (*dayn mustaqirr fi-l-ḏimma*), et la conversion ne l'annule pas car elle est le prix de la résidence en Terre d'Islam (*ujra-l-dār*). Certains Hanafites sont d'accord avec nous ; d'autres sont d'avis que la *ǧizya* est le prix de la défense et du *jihād*[84] [...] L'avis de Mālik est le meilleur (*aṣaḥḥ*), car le Prophète a dit : « le Musulman n'est pas soumis à la *ǧizya* » [...] et les juristes de notre école trouvent une preuve textuelle à cette doctrine dans l'expression coranique « donner la *ǧizya* de ses mains, en étant soumis/humiliés/humbles » (Q. 9:29). Lorsqu'il y a conversion, le sens de ce verset ne peut s'appliquer. Il n'y a pas de divergence sur le fait que lorsque les *ḏimmī-s* se convertissent, ils ne payent plus la *ǧizya* de leurs « mains, en étant soumis/humiliés/humbles ». Si pour al-Šāfiʿī, le converti continue de payer la *ǧizya* , ce n'est pas de la manière évoquée dans le verset[85]. Car il envisage la *ǧizya* comme une dette (*dayn*) dont le récent converti est redevable en compensation d'une chose dont il a profité par le passé (*bi-sabab sābiq*) [avant sa conversion] et qui est la résidence et la sécurité[86]. (Pour al-Šāfiʿī) elle est donc analogue à toute dette[87].

84 Dont les non-Musulmans sont exempts dans le droit islamique. Mentionné dans Ibn al-ʿArabī, *Aḥkām* (2:911) qui attribue cette doctrine à al-Qayrawānī (m. 310/922).

85 « *lā ya'ḫuḏ ba'd al-islām ʿalā-l-wajh allaḏī ḳālahu Allāh* »

86 Mentionné dans *Aḥkām al-Qur'ān* d'al-Kiyā al-Ṭabarī (m.504 /1110), 3:195.

87 Huitième Casus du commentaire de Q. 9:29 : sur « la divergence des juristes à propos de la compensation de la ǧizya ». *Tafsīr*, 10:168-169.

Ici, il apparaît clairement que l'argumentation d'al-Qurṭubī repose sur une hiérarchie de preuves scripturaires en vue de valider la doctrine de l'école malikite : l'interprétation de la notion de soumission (*ṣaġār*) dans Q. 9:29 suivie d'une tradition prophétique vient corroborer l'avis du maître Mālik (m. 179/712). La combinaison de ces trois sources introduit la position attribuée à l'école malikite. Dans la doctrine de Mālik présentée par al-Qurṭubī, la notion coranique de soumission sert à justifier que la *ğizya* ne puisse en aucun cas s'appliquer à un *ḏimmī* qui se convertirait à l'Islam avant sa perception. Pour Mālik la conversion annule tout ce qui précède (droits, obligations, délits...) et parce que la *ğizya* implique nécessairement la soumission formulée dans le verset, elle ne peut pas s'appliquer. Au contraire, dans la doctrine attribuée à al-Šāfiʿī, la *ğizya* n'implique pas nécessairement la soumission formulée dans le verset et peut s'appliquer aux récents convertis qui n'auraient pas acquitté ce qu'ils doivent pour la protection dont ils ont bénéficié dans le passé. Cet argumentaire montre une mise en adéquation entre la doctrine de Mālik et l'exégèse du verset, alors que la conception attribuée à al-Šāfiʿī révèle un usage relatif du sens coranique de la soumission (*ṣaġār*) en vue de justifier l'application de la *ğizya* à des Musulmans (récemment convertis). Dans cette seconde lecture, la soumission coranique ne fait pas loi, elle n'est pas une condition juridique de l'application de la *ğizya* . Cette divergence sur l'interprétation normative d'une partie du verset (et non sur sa signification comme le souligne al-Qurṭubī) témoigne du jeu de l'élaboration juridique sur la distinction entre le sens exégétique de la *ğizya* et sa définition légale recherchée. Cela laisse entrevoir les accommodations possibles face au principe général selon lequel la doctrine ne doit pas contredire la littéralité du Coran[88].

Un autre exemple de l'adaptation du couple soumission-*ğizya* en vue de valider une doctrine, se trouve dans le deuxième Casus à propos de l'exemption de la *ğizya* pour certains non-Musulmans au statut social supérieur. L'auteur explique que « les Qurayshites ne doivent pas être soumis à la *ğizya* , du fait de leur proximité avec le Prophète et afin de leur épargner humiliation (*ḏilla*) et soumission (*ṣaġār*) ». Ici le sens exégétique de la soumission continue de déterminer le sens légal de la *ğizya* mais cette fois *a contrario* : le principe de l'infériorité sociale déduit de la notion de soumission formulée dans le verset prime sur celui de l'absence d'Islam et justifie l'indifférence à l'égard de la confession de ceux qui en sont exempts. Dans ce même Casus, l'auteur met en avant la doctrine malikite sur l'imposition de la *ğizya* à l'ensemble des non-Musulmans sans distinction de religion, y compris les Polythéistes. Contre al-Šāfiʿī (m.820) qui restreint la *ğizya*

88 Sur ces points, voir M. H. Benkheira, « Les juristes et le Coran : un contresens d'al-Šāfiʿī (m. 204/820) au sujet du verset II 232 ? », in *Mélanges de l'Université Saint-Joseph*, 64 (2012), 171-195. Et l'étude de Ludmila Zamah sur le *Tafsīr* d'al-Qurṭubī : « Master of the Obvious : Understanding *Zahir* Interpretations in Qur'anic Exegesis », in K. Bauer (ed.), *op. cit*., 263-277.

aux seuls Gens du Livre selon une lecture stricte du verset, l'auteur expose ainsi l'absence de distinction entre les religions du Livre et les autres religions mais aussi avec les Païens.

Conclusion

L'argumentaire d'al-Qurṭubī illustre la préoccupation savante d'inscrire dans les prescriptions divines les doctrines juridiques relatives à la *ǧizya* . Cette exégèse paraît ainsi s'inscrire dans la recherche de la « validation coranique » des règles de droit (*šarā'i'*) et des doctrines (*aqwāl*) antérieurement formulées. Doctrines juridiques que notre auteur fait reposer sur l'interprétation plurielle du patrimoine exégétique avec ses traditions externes à la pensée juridique, les histoires prophétiques et bibliques porteuses de représentations mythiques et eschatologiques primordiales. Nous ne pouvons donc pas, semble-t-il, comprendre la conception de la *ǧizya* comme une peine pour un crime contre Dieu comme une quelconque justification politico-juridique de la persécution des *ḏimmī-s* en des circonstances historiques concrètes[89].

Un point apparaît en revanche certain : si la conciliation du monothéisme islamique avec les autres monothéismes n'est pas possible sur le plan théologique et de la représentation historico-mythique, elle est recherchée sur le plan juridique, dans un « droit des Hommes » fondé sur « les droits de Dieu ». Les *ḏimmī-s* ayant perdu leur lien protecteur avec Dieu peuvent rétablir cette relation par leur soumission à l'autorité et à la loi islamiques[90]. Conception qui peut paraître paradoxale puisqu'elle implique la réhabilitation du mécréant, en vue de légitimer dans la « loi divine » (*šar'*) son intégration dans la société.

89 Sur la thèse de l'élaboration doctrinale de la *dimma* en fonction de circonstances historiques, voir par exemple : A. Abu Sulayman, « al-dhimmah and related concepts in historical perspective », *Institute of Muslim Minority Affairs. Journal*, 9/1, 1988. L'auteur juge la sévérité du juriste hanbalite Ibn Qayyim al-Ǧawziyya (m. 1351) à l'encontre des *ḏimmīs*, à l'aune des croisades et de la transition post-mongole.
90 Comme l'explique B. Johansen. *Op.cit.* 219-238.

MUSLIMS, JEWS, AND THE QUESTION OF MUNICIPAL MEMBERSHIP IN TWELFTH- TO FIFTEENTH-CENTURY PORTUGAL*

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Within the context of medieval Portugal, the question whether Jews and free Muslims were considered municipal members (*vizinhos*) is hardly straightforward. The purpose of this chapter is to touch briefly on what the status of *vizinho* entailed and to highlight the fact that not all Jews and Muslims were necessarily excluded from all of the associated privileges, regardless of whether they held the actual title of *vizinho*. The discussion will focus on the principal economic benefit of *vizinhança* "municipal membership": immunity from *portagens* (sg. *portagem*), toll payments on commercial activity involving the transportation of goods into a municipality. Because of this tax break, *vizinhança* was typically sought by local tradesfolk, and our study therefore compares the economic privileges extended to Jewish, Muslim, and Christian merchants. While *vizinhos* trading in their own municipality would typically have been exempt from most types of *portagens*, resident Jews and Muslims would, according to current scholarship, have been obliged to pay.[1] However, an examination of previously untranslated and in many cases unpublished material concerning Lisbon will show that, in the fourteenth century, religious minorities who were resident there apparently shared the same exonerations enjoyed by *vizinhos* with regard to certain tolls. Lisbon presents an interesting case for study since it was a thriving metropolis, the first documented community of free Muslims lived in a district outside its walls (the *arrabalde*), and a local community of Jews had been established by the time of the Islamic occupation.[2] All the more interestingly, this port city had

* The argument presented in this paper was aided immensely by discussions with Dr António Castro Henriques, and I am extremely grateful for the time and care he took in commenting on an early draft of the chapter. I am also indebted to Dr Rita Costa Gomes for her insight on a later version of this paper. Any errors that remain are of course my own.

1 Saul António Gomes, "Grupos Étnico-Religiosos e Estrangeiros", in *Portugal em Definição de Fronteiras: Do Condado Portucalense à Crise do Século XIV*, ed. by Maria Helena da Cruz Coelho and Armando Luís de Carvalho Homem, Nova História de Portugal 3 (1996), 309-383 (323-324 and 350); Maria José Ferro Tavares, *Os Judeus em Portugal no Século XV*, vol. 1 (1982), 186.

2 Maria Filomena Lopes de Barros, *A Comuna Muçulmana de Lisboa. Séculos XIV e XV*, Biblioteca de Estudos Árabes 4 (1998); Gomes, "Grupos Étnico-Religiosos", 358-359; Maria José Ferro Tavares,

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 191–218

 DOI 10.1484/M.RELMIN-EB.5.111599

a large number of resident foreign merchants (Genoese, Aragonese, etc.), and these too enjoyed certain economic privileges (exemption from certain tolls but exclusion, it would seem, from the status of *vizinho*).[3] The context for this city's administration was thus quite distinct from that of small villages or towns in the interior of Portugal; the lenient traditions described in material concerning fourteenth-century Lisbon were not necessarily exercised uniformly throughout the realm, and within Lisbon itself our evidence does not confirm how longstanding these traditions were. Building on previous discussions by Maria José Ferro Tavares and Humberto Baquero Moreno, it will be argued that, for a proper understanding of the municipal status of religious minorities in medieval Portugal, one must take into account factors involving date, geographic area, and the distribution of individual or community privileges.[4] To make this point, I will be drawing on a wide variety of sources from throughout Portugal that range in date from the twelfth to the fifteenth centuries, including municipal charters, collections of customary law, legal proceedings, and records from both Cortes ("parliamentary assemblies") and town council meetings.

Muslims, Jews, and Their General Status

In the first royal charter issued to free Muslims in Portugal, that granted to the communities in Lisbon, Almada, Palmela, and Alcácer do Sal in 1170, it is clear that they are regarded as protected subjects of the Crown – a status secured for them through a series of head taxes and through tributary payments drawn from their produce.[5] The status shared by Jews as protected royal subjects was similarly contingent on a set payment to the royal fisc, as is exemplified in a letter to the municipal officials of Bragança that was issued by D. Dinis (ruled 1279-1325) and that, in its discussion of an annual tax to be paid by resident Jews, includes the statement:

"Finanças e Fiscalidade das Comunas Judaicas Peninsulares", in *Finanzas y fiscalidad municipal. V Congreso de Estudios Medievales* (1997), 135-166 (139-140); Maria José Ferro Tavares, *Os Judeus em Portugal no Século XIV*, 2nd ed. (2000), 12.

3 Lisbon, Arquivo Nacional da Torre do Tombo (ANTT), *Chancelaria de D. Fernando*, bk 1, fols 84v-87r (response to article1); articles 3 and 9 of the inquiry in Lisbon, Arquivo Histórico da Câmara Municipal (AHCML), *Livro dos Pregos*, doc. 98, fols 85r-94v; see also note 66 below. Due to space restrictions, discussion of the benefits extended to alien, non-Portuguese merchants will not be included in this study.

4 Tavares, *Judeus no Século XV*, 186-187; Tavares, *Judeus no Século XIV* (2000), 67; Humberto Baquero Moreno, "A Sentença do Rei D. João I, contra os Judeus de 1412", *Lvcerna. Homenagem a D. Domingos de Pinho Brandão* (1984), 411-415.

5 Alexandre Herculano et al., eds, *Portugaliae Monumenta Historica. Leges et Consuetudines* (hereafter *PMH-LC*), 2 vols (1856-1868), I, 396-397. On these tributary taxes, see Anna Matheson, Notice no. 252640, RELMIN project, "The Legal Status of Religious Minorities in the Euro-Mediterranean World (5th-15th Centuries)", Telma Web edition, IRHT, Institut de Recherche et d'Histoire des Textes – Orléans http://www.cn-telma.fr/relmin/extrait252640/.

> And if other Jews come to this land to live, each one will pay his share of the abovementioned 600 *maravedís* that the abovementioned Jews must pay me. And I order that you will not allow anyone to harm or manhandle or cheat these Jews, because if not you will end up having to face me on account of it.[6]

These minorities enjoyed religious freedom as well as a certain degree of self-government. They were organized into *comunas*, which, as Soyer succinctly explains, were "officially recognized administrative and jurisdictional corporations assembling Jews or Muslims living in a certain town and area".[7] Individual Muslim *comunas* were headed by an elected Muslim communal magistrate, the *alcaide*, and the Jewish *comunas* were headed at the local level by a lower rabbi (*rabi-menor*) and at a kingdom-wide level by the chief rabbi (*rabi-mor*).[8]

A fair amount of documents describing the taxes paid by Muslims have survived (e.g., four twelfth- and thirteenth-century royal charters to free Muslim communities and, most notably, a lengthy late fourteenth- or early fifteenth-century confirmation of them),[9] yet records enumerating the variety of taxes paid by Jews do not predate the mid-fourteenth century.[10] Similarly, no early charter

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6 ANTT, *Chancelaria de D. Dinis*, bk 1, fol. 57v: "E sse outros judeus hy veerem a essa terra morar, page cada huum assy como acaeçer a cada huum em seu quinhom dos sobreditos vj° maravedis, que mi am a dar os sobreditos nomeados judeus, E mando'vos que nom sofrades que nenguum faça a esses judeus mal, nem força, nem torto, ca senom a vós me tornaria Eu porende" (edited in Tavares, *Judeus no Século XIV* (2000), 52-53 note 4).

7 François Soyer, *The Persecution of the Jews and Muslims of Portugal. King Manuel I and the End of Religious Tolerance (1496-1497)* (2007), 31; for full discussion, see Barros, *Comuna*, 20.

8 These *comunas* are not to be confused with *judiarias* and *mourarias*, the latter two terms signifying the geographic area in a town where Jews and Muslims respectively tended to reside (Soyer, *Persecution*, 28-40).

9 Namely, the charters to the free Muslims of Lisbon, Almada, Palmela, and Alcácer do Sal (1170), referenced above at note 5; to the free Muslims of Silves, Tavira, Loulé, and Santa Maria de Faro (1269), in Leontina Ventura and António Resende de Oliveira, eds, *Chancelaria de D. Afonso III. Livro I*, vol. 2 (2006), 20-21; to those of Évora (1273), in Ventura and Oliveira, eds, *Chancelaria de D. Afonso III*, 155-156; and Moura (1296), in Rosa Marreiros, ed., *Chancelaria de D. Dinis. Livro II* (2012), 481-482. The confirmation of these charters is edited in Herculano, *PMH-LC*, II, 98-100, and its date is discussed in Barros, *Comuna*, 65-66. See Anna Matheson, Notice nos 254398, 254400, 254433, and 254481, RELMIN project, "The Legal Status of Religious Minorities in the Euro-Mediterranean World (5th-15th Centuries)", Telma Web edition, IRHT, Institut de Recherche et d'Histoire des Textes – Orléans http://www.cn-telma.fr/relmin/recherche/.

10 Earlier sources do however provide dispersed references to taxes such as the obligation of the Jews of Lisbon to provide an anchor and hawser for the royal galley; some information can also be gathered from a document dated 1316 that describes outstanding debts owed by all *comunas* to the Crown. Reference to the anchor is found in ANTT, *Chancelaria de D. Dinis*, bk 1, fols 141v-142v; edited in João Martins da Silva Marques and Alberto Iria, *Descobrimentos Portugueses. Documentos para a sua História*, 3 vols (1944-1971; repr. 1988), I, 46 doc. 51; discussed in Maria José Pimenta Ferro, *Os Judeus em Portugal no Século XIV* (1970), 121; and in Soyer, *Persecution*, 50. Dom Dinis's letter to all Jewish *comunas* of the kingdom is preserved in ANTT, *Chancelaria de D. Dinis*, bk 3, fols 104r-105r; discussed in Henrique da Gama Barros "Judeus e Mouros em Portugal em Tempos Passados", *Revista Lusitana*, 34 (1936), 165-265 and 35 (1937), 161-238 ((1937) 162-163 docs 209 and 210); Ferro, *Judeus no Século XIV* (1970), 123-124; and Tavares, "Fiscalidade e Finanças", 142-143.

survives that outlines the rights of Jews and their obligations to the king: though Pedro I confirmed a number of privileges issued to *comunas* throughout Portugal, these confirmations are short and do not provide much detail. Letters sent by D. Pedro to the municipal authorities of Santarém, Lisbon, and Setúbal in 1366, however, indicate that local custom in these areas exempted Jews from forms of military service typically reserved for Christians (guarding the borders, owning horses and armour, transporting prisoners and monies).[11]

It is clear from the early records that Jews and Muslims were protected by royal authority and were directly subordinate to the king.[12] They enjoyed religious freedom and a degree of administrative and juridical autonomy in return for their tributary payments. Functioning thus as semi-autonomous groups, they were in many respects separated from the municipality and its liberties.[13] One might therefore expect that Jews and Muslims could not join the ranks of *vizinhos* or enjoy their rights and privileges. However, this, as we shall see, was not always the case.

Vizinhança – *Aquisition, Privileges, and Obligations*

Three terms are key within our discussion of municipal status: within a given municipality, a *natural* was someone who was born there; *morador* can, for our purposes, most safely be translated as "inhabitant" (to avoid contradictions in current scholarship as to whether this was a permanent resident or a newcomer not yet fully established in a community);[14] and a *vizinho* (from Latin *vicinus* > Vulgar Latin *vicinu*), in the technical sense of the term studied in this chapter, was a male head of household who had met the district's specific requirements for membership.[15] Neither of these terms is mutually exclusive, just as how, in modern times,

11 António Henrique de Oliveira Marques et al., eds, *Chancelaria de D. Pedro I, 1357-1367* (1984), 522-524 docs 1107, 1108, and 1110.

12 For full discussion, see Soyer, *Persecution*, 21-83; Tavares, *Judeus no Século XIV* (2000), 52 and passim; Tavares, *Judeus no Século XV*, 76-77 and passim; Maria Filomena Lopes de Barros, *Tempos e Espaços de Mouros. A Minoria Muçulmana no Reino Português (Séculos XII a XV)* (2007); Manuel Viegas Guerreiro, "Judeus", in *Dicionário de História de Portugal*, ed. by Joel Serrão, 6 vols (1989), III, 409-414; Gomes, "Grupos Étnico-Religiosos", 309-383.

13 Barros, *Tempos e Espaços*, 299-302, 312-323; Marcelo Caetano, *A Administração Municipal de Lisboa durante a 1.ª Dinastia* (*1179-1383*) (1990), 19.

14 Mário Sérgio da Silva Farelo, "A Oligarquia Camarária de Lisboa (1325-1433)", (unpublished doctoral dissertation, Universidade de Lisboa, 2008), 211; Armindo de Sousa, "Tempos Medievais", in *História do Porto*, ed. by Luís A. de Oliveira Ramos, 2nd ed. (1995), 231; Maria Ângela da Rocha Beirante, *Évora na Idade Média* (1995), 579.

15 Farelo, "Oligarquia", 209-223. In an effort to prevent modern concepts of citizenship from biasing our discussion of *vizinhança* in early Portugal, a neutral translation of *vizinho* as "municipal member" has been employed here. It should be noted, however, that the term has elsewhere been translated as "citizen" (e.g., Soyer, *Persecution*, 52) and it is therefore important to distinguish the *vizinho* from the *cidadão*: though the latter today means "citizen", in the medieval period the title *cidadão* was restricted to those members of the elite who were capable of holding the most elevated offices in the town council (e.g.,

one can be both a natural and a citizen of the same territory. The term v*izinho* carries two different meanings that overlap somewhat: it can be applied loosely in the general sense of "neighbour" (as one living in the same *vicus* "village", the meaning preserved to this day), but in the contexts studied at present, it clearly refers to one's fiscal status within the municipality.[16] It is used here with specific regard to those who have acquired *vizinhança* "municipal membership" – a status that, as noted above, would have appealed to local merchants.

It is key to highlight at the outset that, in the thirteenth to the early fifteenth centuries, the requirements to become a *vizinho* could differ according to municipality, and it was local custom that typically decided what these requirements would be. According to a late thirteenth-century account of the customary law of Beja, an outsider had to, among other things, rent a house and live in it for one year before he could become a *vizinho* and thus be excused from paying *portagens* in the area.[17] In certain other areas, outsiders, in addition to satisfying basic residency requirements, had to pay a membership fee in order to become *vizinhos*. An undated document outlining the rules of the *portagem* paid in Santarém (the *Foral da Portagem de Santarém*) states that, in order for an outsider to become a *vizinho* there, the payment of 1 *soldo* per household had to be rendered:

> *Item*, the king has from all those who come to live in Santarém and its municipal boundaries, and who live there to become *vizinhos*, a single *soldo* from each household, and they will not be distrained or forced if they do not wish to pay it. And [he also receives it from] those who wish to pay, even though the Crown representative or clerk may not want to receive the *soldo* from him who wants to pay it (?). And this *soldo* is paid to be a *vizinho* according to the customary law of said town.[18]

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alvazil "judge", *vedor* or *vereador* "councillor", *procurador* "attorney", *almoxarife* "treasurer") and whose noble status bore them the right to bear arms and ride on a saddle.

16 The clearest discussion of the different meanings of the term *vizinho* is found in Alexandre Herculano (with revisions by José Mattoso and Ayala Monteiro), *História de Portugal desde o Começo da Monarquia até o Fim do Reinado de Afonso III*, vol. 4, rev. edn (1981), 355-366; for more recent discussion, see Farelo, "Oligarquia", 211-223.

17 "Mais aqueles mercadores que alugam casas por sam migeel dano a ano e en elas moram e comem e fazem fogo e teem leytos e estes ataaes fazem nosco uiziidade en todalas cousas e estes som uezinos en non dam portagem" (Herculano, *PMH-LC*, II, 57); "But those merchants who rent houses on Michaelmas from year to year and live in them and eat in them and light the hearth and have beds, and such persons uphold the duties of *vizinhança* with us in all matters: these are *vizinhos* and they do not pay *portagem*". On the origin of this custom, see Herculano et al., *História de Portugal*, 359.

18 Lisbon, ANTT, Gaveta 10, maço 12, no. 17 fol. 17r: "Item El Rey ha de todos aquelles q*ue* vierem morar a Santare*m* e a seu termo e hy mora*m* pe*r*a serem vezinhos senhos *soldos* de cada hu*ũ*a casa e no*m* seram penhorados nem costrangidos se o no*m* q*ui*serem pagar e os q*ue* quiserem pagar ainda q*ue* o p*rocurad*or ou escp*reua*m pagar nom queyra rreçebe*r* o soldo daquell que o quiser pagar E esto soldo paga p*ar*a ser vezinho segu*n*do costume da dita villa". The *Foral da Portagem de Santarém* is preserved in ANTT, Gaveta 10, maço 12, doc. 17, fols 15r-17v; ANTT, Gaveta 10, maço 12, doc. 17a, 61-74; ANTT, *Reforma das Gavetas*, bk 18, fols 273r-276v; and ANTT, Ordem de Cristo e Convento de Tomar, maço 35, no. 740, fols 1r-8r.

Significantly, this passage indicates that *moradores* could opt *not* to pay the *soldo* and thus not be considered *vizinhos*.

While the term *vizinho* "municipal member" appears frequently in thirteenth-century sources such as the collections of customary law, it should be noted that this technical sense is not commonly employed in the twelfth-century municipal charters (*forais*, sg. *foral*) though the technical sense is clearly described (without use of the term *vizinho*) in the charters derived from the Santarém-Lisbon-Coimbra model (dated 1179). These charters state that, each year, natural inhabitants could opt to pay 1 *soldo* in order to renew their exemption from the *portagem*: "Merchants who are naturals of the town and who wish to pay the *soldada*, that *soldada* will be accepted from them. If moreover they do not wish to pay the *soldada*, they must pay the *portagem*".[19] Later sources make it clear that the payment described as a *soldada* here was in fact 1 *soldo*, as is illustrated in a document outlining the tolls due in Lisbon (the *Foral da Portagem de Lisboa*, issued in 1377):

> It is a custom of the city of Lisbon that merchants who are naturals pay 1 *soldo* of *vizinhança* each year. And through this payment they are exempted from the *portagem* and customs duties on the items listed in this book.[20]

We thus see that the 1 *soldo* that was paid by outsiders to obtain *vizinhança* in Santarém is the same amount paid by naturals of Santarém, Lisbon, and Coimbra (and other municipalities whose charters are derived from the Santarém-Lisbon-Coimbra model) in order to renew their status.

Most significantly, however, as shall be more fully discussed below, this 1 *soldo* is also the same amount that was eventually paid by monied Jews in Lisbon and perhaps by Muslims there as well in order to obtain letters of membership (*cartas de vizinhança*). We know this from much later, fourteenth- and early fifteenth-century sources. For instance, the passage from the *Foral da Portagem de Lisboa* cited immediately above goes on to read: "And Jews and Muslims also pay this *soldo*".[21] This would appear to indicate how inclusive municipalities such as Lisbon

19 "Mercatores naturales uille qui soldatam dare uoluerint recipiatur ab eis. Si autem soldatam dare noluerint dent portagium" (Herculano, *PMH-LC,* I, 407, 413, 417). Of the charters descended from the Santarém-Lisbon-Coimbra model, this clause does not occur in the charters to Beja (1254), Odemira (1255), Povos (1195), or Vila Viçosa (1270). For discussion of the principal families of Portuguese charters, see James F. Powers, "The Creative Interaction between Portuguese and Leonese Municipal Military Law, 1055 to 1279", *Speculum*, 62.61 (January 1987), 58-80; António Matos Reis, *História dos Municípios (1050-1383)* (2007), 95-132.

20 See note 21 below. See also Iria Gonçalves, "Soldada", in *Dicionário de História de Portugal*, ed. by Serrão, VI, 58.

21 ANTT, *Traslado do Livro da Portagem de Lisboa*, fol. 30v: "He forall da çidade de lixboa q*ue* os m*er*cadores naturaães dem e*m* cada hu*ũ* an*n*o hu*ũ* *soldo* de vizinha*n*ça E po*r* esto escusam po*r*tagem e

were, if natural Christian residents, local Muslims, and local Jews alike could all obtain the economic benefits of *vizinhança* by paying the same amount (1 *soldo*). However, other evidence makes it clear that not all municipalities granted religious minorities this option of purchasing *vizinhança*.

How exclusive the title of *vizinho* was and how rigorously members of the town council vetted candidates (with assessment criteria often involving calculations of wealth and sometimes including residency requirements) also differed according to municipality. Fourteenth-century records show that in Porto, for instance, candidates for *vizinhança* were first assessed by municipal judges and attorneys before they would allow them to meet the king's steward (the *mordomo*), pay him the *soldo*, and write their name in the register.[22]

The privileges that accompanied the status of *vizinho* are not expressly defined for us in the sources. It may, in certain areas, have entitled its holder to certain political rights, but it is difficult to determine the extent to which the political power of these *vizinhos* differed from regular *moradores* in municipal assemblies – especially since, in some cases, it is not always clear that the two terms are not being used synonymously with the former in its more general sense.[23] Moreover, while there is room for variation in the systems of local government adopted in different municipalities, prior to the mid-1300s, there were in general two if not three types of administrative meetings. Restricted assemblies (*assembleias restritas ordinárias*) were attended by the local elites, the *homini boni* or *homens bons* of the town (by the fourteenth century, a large percentage of these would have been wealthy merchants),[24] and these men alone held decision-making power at these particular convocations; *vizinhos* and *moradores* could only attend by special invitation and they had no vote. Conversely, *assembleias alargadas* "popular

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custumage*m* das coussas *con*theudas em este liu*r*o pe*r*o ja esta em husso de rregateiras e mesteiraães q*ue* faze*m* algu*ũ*s lauores q*ue* uendem paguam com os me*r*cadores E asy paguam este *soldo* judeus e mouros". This manuscript copy is partly edited in Marques and Iria, *Descobrimentos*, I (suppl.), 51-60 doc. 42. Other copies are listed below at note 58 and discussed at pp. 205-209. Oddly, Barros does not include this passage in his list of documentary sources on the history of Jews and Muslims in medieval Portugal even though he discusses this text in "Judeus e Mouros"(1936), 169-170 docs 3 and 4. The clause likewise does not appear to have been discussed by subsequent scholars of religious minorities in Portugal.

22 Farelo, "Oligarquia", 213-214; Sousa, "Tempos Medievais", 231-233; Torquato Brochado de Souza Soarez, *Subsídios para o Estudo da Organização Municipal da Cidade do Pôrto durante a Idade-Média* (1935; repr. 1989), 102-103.

23 For detailed discussion of the *vecinos* of Castile and León, their political rights, and the methodological factors involved in determining these rights, see Félix Martínez Llorente, "El régimen jurídico de la vecindad medieval y las novedades del *ius commune*", in *Las sociedades urbanas en la España medieval*, ed. by Juan Ignacio Ruiz de la Peña et al. (2003), 51-80. The potential for confusion is made evident in Reis, *História dos Municípios*, 65-66.

24 Maria Helena da Cruz Coelho, "'Em Prol do Bom Governo da Cidade': A Presença dos Elites Urbanas nas Cortes Medievais Portuguesas", in *La Gobernanza de la Ciudad Europea en la Edad Media*, ed. by Jesús Ángel Solórzano Telechea and Beatriz Arízaga Bolumburu (2011), 299-322 (309-310).

municipal assemblies", announced by town crier, were open to all *vizinhos* and *moradores*. And if Arnaldo Sousa Melo's study of the categories of deliberative meetings in fourteenth- to fifteenth-century Porto can be applied to other areas, upon invitation, a limited number of *mesteiriais* (labourers, craftsmen, and other professionals, some of whom would have been *vizinhos*) could participate as representatives of their trade and have deliberative powers in restricted extraordinary assemblies (*assembleias restritas extraordinárias*).[25] The extent of the political involvement of *vizinhos* and *moradores* would have depended on which type of meeting was more commonly adopted in a particular area. Of course, all three are known to have been employed concurrently in some municipalities as well, in which case the type of meeting enacted would have depended on the matter to be discussed. In the case of Lisbon specifically, with the exception of a short spell between 1285 and 1298, the administration of local affairs and the election of representatives was typically decided by ordinary assemblies restricted to the Christian *alcaide* (the commander of the garrison), judges, and the *homens bons*.[26]

After the mid-1300s, upon new legislation promulgated by Afonso IV instituting the Regime of the *Corregidores* (*Regimento dos Corregedores*) – *corregedores* being special magistrates appointed by the king to oversee municipal justice and management – wide-scale changes to local administration were gradually introduced that aimed to place government in the hands of a select few *homens bons* chosen by the *corregedor* himself.[27] The accepted wisdom among historians has been that these *assembleias alargadas* were in sharp decline after 1340, but Melo has recently demonstrated that they persisted in Porto alongside the new model for meetings of municipal administration well into the early fifteenth century. Both in Porto and in Lisbon, however, their decline was met by a rise in the occurrence of restricted extraordinary assemblies.[28]

Though the extent of the political and non-political privileges of *vizinhança* may be subject to local variations and is thus not entirely clear-cut, it is absolutely certain from the records that *vizinhança* was accompanied by fiscal privileges, namely exemption from certain council taxes and from royal customs duties, including certain forms of the *portagem*.[29] The general obligations that accompanied

25 Arnaldo Sousa Melo, "Os Mesteirais e o Governo Urbano do Porto nos Séculos XIV e XV", in *La Gobernanza de la Ciudad Europea*, ed. by Solórzano and Arízaga, 323-347.

26 See Farelo, "Oligarquia"; and Caetano, *Administração*, 32-33.

27 Reis, *História dos Municípios*, 73. The first *Regimento dos Corregedores* (*c.* 1332) is edited in Caetano, *Administração*, 131-137; a revised version dated to 1340 is edited at 138-154; both are discussed at 51-58.

28 Melo, "Os Mesteirais"; Caetano, *Administração*, 26-33 and 70-74.

29 The description of the fiscal benefits of *vizinhança* presented above is based on current scholarship, including Farelo, "Oligarquia", 212-213; and Herculano et al., *História de Portugal*, 359. While this description is supported in numerous early records, including many that concern Lisbon, it should be noted that some other records are not always clear as to whether the privilege of exemption from the toll was restricted to *vizinhos* or extended to *moradores* in general. See, for example, the description of the

vizinhança do not seem to have been any different from the obligations for which regular *moradores* were responsible: the payment of certain standard council taxes and royal dues, the performance of military service, and the *serviço de aposentadoria* (the obligation to provide accommodation for the itinerant royal court when it visited the territory).[30]

Some twelfth- and thirteenth-century *forais* granted residents exemption from paying *portagens* throughout the entire realm, as is exemplified in the charter to the inhabitants of Proença-a-Velha (issued in 1218): "The men of Proença shall not pay the *portagem* in all of Portugal".[31] Later sources make it clear that these privileges were restricted to *vizinhos* and led to issues involving tax fraud: merchants were relocating to places where inhabitants were granted such immunity, obtaining *vizinhança*, and then returning to their former homes while still retaining the benefits of realm-wide exemption from *portagens*. In 1436, in an effort to curb this practice and secure his dues, D. Duarte passed a law that aimed to make the criteria for obtaining *vizinhança* in any given municipality uniform throughout the country.[32] As shall be seen, his reforms also impeded any attempts made by Jewish or Muslim *moradores* from claiming *vizinhança* and reaping its fiscal benefits.[33]

Moradores – *Jewish, Muslim, and Christian*

Significantly, in some contexts, the term *morador* "inhabitant" encompasses all those, whether Christian, Jewish, or Muslim, who reside in a given townland. This is exemplified in its use in the *Foral da Portagem de Lisboa* cited below,[34] and it is also seen in a number of fifteenth-century records concerning the municipality of Loulé.

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privilege enjoyed by the *moradores* of Elvas in records of the Cortes of 1439, discussed below at pp. 211 and cited in Anna Matheson, Notice no. 326280, RELMIN project, "The legal status of religious minorities in the Euro-Mediterranean world (5th-15thcenturies)", Telma Web edition, IRHT, Institut de Recherche et d'Histoire des Textes – Orléans http://www.cn-telma.fr/relmin/extrait326280/. The possibility that some regular *moradores* might also have been exempt from the *portagem* in some areas does not detract from the general argument presented in this paper, and our focus on instances where *vizinho* is indisputably used in its technical sense will help us to avoid any methodological complications that might otherwise result from the likelihood of privileged *moradores*.

30 Though some scholars might be tempted to argue that this lack of distinction between the responsibilities of *moradores* and *vizinhos* can be attributed to the fact that *forais* were typically written for *vizinhos,* such a comment would be influenced by an understanding of the latter term in its more general sense. Again, the study presented above is strictly focussed on the restricted use of *vizinho* described at pp. 194-196.

31 "Homines prohencie non dent portadigo in toto portugalie" (Herculano, *PMH-LC*, I, 578); another example is found in the *Foral de Idanha-a-Velha* (1229) at Herculano, *PMH-LC*, I, 614-615.

32 The letter is preserved in *Ordenações Afonsinas* (henceforth *OA*) II. 30.

33 See below, pp. 214-215.

34 See below, note 63.

The case of Loulé is particularly interesting because documentation from the meetings of its town council has survived in especially abundant proportions.[35] Though these records are somewhat late for our purposes, they nevertheless show that local Jews and Muslims were included among the *moradores* regularly summoned to attend the municipality's *assembleias alargadas* from at least 1402 onwards. The topics covered in the meetings to which they were invited were not specific to religious minorities; the latter thus had a voice on issues concerning general economic matters, municipal organization (elections, etc.), and a variety of other topics.[36] The documents also show that the *homini boni* who were called together to confer at certain meetings included Jews and Muslims. For instance, the meeting held to elect a new Crown attorney in 1487 was attended by "homes boons assy christãos e mouros e judeus".[37]

This leniency may well be unique to Loulé. In her analysis of the Louletan sources, Filomena Barros has concluded that, though there was certainly a large and vital *mudéjar* population in Loulé, the *comuna* itself does not appear to have been a self-governing entity. Records bear witness to at least two fifteenth-century *alcaides* and a number of other Muslim officials (an imam, an *almotacé* "market inspector", an *almoxarife*, and two *escrivãos*), yet Barros has been unable to locate mention of a *tabelião* "notary". The apparent lack of such a figure and the content of certain municipal records suggest to her that the Muslims there at that period had little juridical autonomy and were instead subject to the local town council. If she is correct,[38] then the *homens bons judeus e mouros* who convened at some meetings would not only have been the elite of the Jewish and Muslim *comunas* but

35 Humberto Baquero Moreno, ed., *Actas de Vereação de Loulé*, vol. 1 (1984); Manuel Pedro Serra, ed., *Actas de Vereação de Loulé, Séculos XIV-XV*, separata de *Al-'Ulya: Revista do Arquivo Histórico Municipal de Loulé*, 7 (1999/2000); Luis Miguel Duarte, *Actas de Vereação de Loulé, Século XV*, separata de *Al-'Ulya*, 10 (2004).

36 For a detailed survey of these records, see Barros, *Tempos e Espaços*, 323-341; and Maria de Fátima Botão, *A Construção de uma Identidade Urbana no Algarve Medieval: O Caso de Loulé* (2009), 190 note 8. There is also evidence of Jewish and Christian goldsmiths convening at an assembly in Porto in 1402. The latter appears to have been an atypical convocation, and the Jews at this meeting seem to have been treated as a distinct social group called to attend because of their profession, not because of their status as *moradores* (Melo, "Os Mesteirais", 345).

37 Serra, *Actas de Vereação*, 225; see discussion in Barros, *Tempos e Espaços*, 325.

38 To my knowledge, no detailed study of the Jewish *comuna* of Loulé has yet been published that might offer a point of comparison. For recent general discussion of the religious minorities in the municipality of Loulé, see Botão, *Construção*, 190-198. Interestingly, we might note that, according to records of an *assembleia alargada* that was held in Lisbon on 7 August 1285 and presided over by D. Dinis, the people of Lisbon requested that the king order local Jews and Muslims to report to the municipality's Christian *alcaide* and local magistrates – a move that would have compromised the autonomy of the *comuna* – but the request was rejected. The text is edited in Francisco Brandão, *Monarchia Lusytana*, vol. 5 (1650), 314v-315v escritura 18; Câmara Municipal de Lisboa, *Documentos para a História da Cidade de Lisboa. Livro I dos Místicos dos Reis, Livro II dos Reis D. Dinis, D. Afonso IV e D. Pedro I* (1947), 100; and discussed in Caetano, *Administração*, 30-31.

they would also have been elite members of the municipal council (*concelho*).[39] This possibility reminds us of the methodological importance of treating discussion of each municipality separately.

There are, moreover, randomly recorded instances of Jews and Muslims of other localities participating, to our surprise, in duties that were typically reserved for Christian *moradores* (e.g., fulfilling certain levels of military service).[40] It is particularly interesting that Jews and Muslims were also responsible for providing the *serviço de aposentadoria*, since, after 1361 (when laws requiring them to live in separate areas of town were enacted), this would appear to have transcended the idea of segregation – unless the royal solicitors who requested these lodgings were in fact doing so for the Muslims and Jews of their retinue.[41] While the present study aims to highlight how the question of the municipal status of religious minorities is blurred by the fact that some communities had access to fiscal benefits typically reserved for municipal members, these other lines of inquiry are equally fruitful in gauging the role of Jews and Muslims in the municipalities in which they lived.

Religious Minorities and the Portagem

As mentioned above, the *portaticus* (in Latin; *portagem* in Portuguese), based on the *portorium* of Roman law, was a toll on goods brought into a town for sale by outsiders or non-*vizinhos*.[42] The term at times takes on a looser, compendious sense in some sources, signifying the tolls paid for a variety of different transactions: e.g., the toll paid by travellers for watering their livestock in the local river, or the toll for importing goods via a *foz* "river mouth" (the latter tax is more accurately known as the *dízima*). While *vizinhos* were exempt from most *portagens* in their own municipality, certain tolls were ineluctable, such as the fee for bringing in goods intended for sale via ship (paid by the *vizinhos* of Santarém), or for commodities brought in via the *foz* (paid by the *vizinhos* of Lisbon).[43]

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39 I use the terms "municipal council" and "town council" interchangeably in this paper to translate *concelho*. On the history of the *concelho*, see Reis, *História dos Municípios*, 70; Herculano et al., *História de Portugal*, 33-589.

40 For a survey of such instances, see Soyer, *Persecution*, 54-59.

41 For discussion of the *serviço de aposentadoria* and the Jews, see Tavares, "Finanças e Fiscalidade", 160-162. For a list of Christians who sought *aposentadoria* from Muslims, see Barros, *Comuna*, 16; and *Tempos e Espaços*, 709-710.

42 Vulgar Latin variants in Portuguese sources include *portagium, portadigum, portadicus, portadico, portadgo, portalgo*.

43 Iria Gonçalves, "Portagem", in *Dicionário de História de Portugal*, ed. by Serrão, V, 122-123; Ruy d'Abreu Torres, "Dízima", *Dicionário de História de Portugal*, ed. by Serrão, II, 326-328; António Henrique de Oliveira Marques, *Hansa e Portugal na Idade Média* (1959), 122; *Foral da Portagem de Santarém* in Lisbon, ANTT, Gaveta 10, maço 12, no. 17 fol. 17r. For *portagens* paid by the *vizinhos* of Lisbon, see ANTT, *Chancelaria de D. Fernando*, bk 1, fol. 84v.

With respect to collection of the *portagem*, the procedure outlined in the Évoran family of charters states that foreign merchants would have been obliged to register and stay with a host who was a resident of the municipality.[44] It is suspected, based on what can be gleaned from other sources, that the merchant's wares were typically kept in the host's storehouse and, once all sales were completed, the host, in recompense for his assistance, received a third of the *portagem*. The host would have been responsible for paying the remaining two thirds to a *portageiro* (either a royal officer or, later, a tax farmer).[45] Though the *portagem* was a *direito real* "royal tax", this two-third balance typically went to either the king, ecclesiastics, or the local lord depending on which of the three governed the area and issued the *foral*. Toll rates differed according to municipality, and amounts typically depended on the quantity and type of commodity involved. This is made clear in the twelfth- and thirteenth-century municipal charters,[46] but it is best illustrated in later charters outlining the *portagem* payments of specific towns (e.g., the above-mentioned *Foral da Portagem de Lisboa* and *Foral da Portagem de Santarém*). These provide lengthy, detailed lists of tolls due for a variety of goods, whether raw materials (spices, grain, ore, fish, shellfish, fruit, etc.) or finished products (tiles, leather clothing, etc.).

Early municipal charters and collections of customary law contain frequent mention of Muslims in relation to the *portagem,* yet, with one possible exception, they contain no mention whatsoever of Jews paying this royal tax. This is best illustrated in the *foral* of Proença-a-Velha (issued by Pedro Alvites, Master of the Temple, in 1218), which sums up the standard rule as follows: "Concerning *portagens* and passages and customs from Muslims and Christians, a third part is given to their host, and the [remaining] two thirds to the brothers [of the Temple]".[47] To my knowledge, the only mention of Jews in relation to the *portagem* in these twelfth- and thirteenth-century sources occurs in a thirteenth-century collection of the customary law of Beja, where the question whether Jews from outside the municipality should be subject to the toll is moreover presented as a *contenda* – "a matter of dispute", an instance where there is confusion concerning the proper procedure. The sole surviving manuscript copy is damaged and the ruling is illegible:

44 See, for example, the *foral* of Idanha-a-Velha (1229) in Herculano, *PMH-LC*, I, 614-615.

45 F. Salles Lencastre, *Estudo sobre as Portagens e as Alfândegas em Portugal (Séculos XII a XVI)* (1891), 1-2; João Lúcio d'Azevedo, *Elementos para a História Económica de Portugal (Séculos XII a XVII)* (1967; repr. L1990), 39.

46 For example, the Santarém-Lisbon-Coimbra model of charters reads: "Portagia uero et forum et quinte sarracenorum et aliorum ita persoluantur sicut consuetudo est, exceptis his que superius scripta sunt, et uobis relinquo" (*Foral de Coimbra* in Herculano, *PMH-LC*, I, 417).

47 "De portagines, et de passagines, et de decimas, de mouros, et de christianos tercia parte detur suo hospite, et duas partes ad fraires" (Herculano, *PMH-LC*, I, 578).

> Another cause for disagreement is that they want to receive one *maravedí* from every Jew who passes through our town ... a Jew who ... pays *portagem*.[48]

Did some Jews in the thirteenth century believe that they did not have to pay *portagens* anywhere in the kingdom? Certainly, the scarce mention of Jews paying *portagens* would seem somewhat curious, knowing as we do that Jewish merchants were tremendously active in domestic and international trade in twelfth- to fifteenth-century Portugal.[49] Did they have a special arrangement with the king? This may be suggested in a letter issued by Afonso III in 1272 that states that Jews in the Algarve were also required to pay *dízimas* and *portagens* on items transported via the *foz* but collection of their payments appears to have been overseen by the *rabi-mor* or his *almoxarifes*.[50] Apart from some early fourteenth-century records from the municipality of Sesimbra, there is little evidence of Jewish subjection to the toll prior to the reign of Fernando I (1367-1383).[51]

As noted above, the situation regarding free Muslims is entirely different. They are described as subject to the toll in the twelfth- and thirteenth-century municipal charters descended from the Évoran model (1166). These texts moreover illustrate the variety of taxes involving Muslims that fell under the general umbrella of *portagem* payments. Not only were Muslim merchants required to pay upon entering a town with, for example, a cartload of rabbit skins, but payments were also made for transactions involving the admittance of three types of Muslims (presumably captives) to market: a slave to be sold, an enslaved Muslim seeking to buy his freedom, and a Muslim accompanying his lord to assist him in his trade:

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48 "A outra contenda he que querem filhar huum marauedi de cada huum iudeu que passa per nossa uila ... hum judeu que ... da portagem" (Herculano, *PMH-LC*, II, 57; ellipsis marks are Herculano's to denote where the manuscript is illegible). Another edition is found in José Francisco Correia da Serra, ed., *Collecção de Livros Ineditos de Historia Portugueza: Dos Reinados de D. João I, D. Duarte, D. Affonso V, e João II*, vol. 5 (1824), 483. A passage from the *Costumes de Castelo Bom* (regarding the payment of 1 *morabitinus* to *alcaides* for buying fish on a Friday) does not appear to relate to the *portagem*: "Judeo qui comparare pescado: Totus judeus qui pescado comparare in uernes pectet 1 morabitinum a los alcaldes et si christianus comparauerit pora iudeus, pectet 1 morabitinum a los alcaldes, sin autem iuret cum 1º uicino" (Herculano, *PMH-LC*, I, 770).

49 For discussion of Jewish mercantile activity in the twelfth to fourteenth centuries, see Tavares, *Judeus no Século XIV* (2000), 116-121.

50 The letter is edited in Marques and Iria, *Descobrimentos*, I, 10-11 doc. 16. It is discussed in *Descobrimentos*, II. 1, 278-279 and in Gomes, "Grupos Étnico-Religiosos", 350. See also Marques and Iria, *Descobrimentos*, I, 24-25 doc. 33.

51 Barros, "Judeus e Mouros"(1936), 182 doc. 39. Barros references Sesimbra, Arquivo Histórico Municipal, *Livro do Tombo da Villa de Cezimbra e seu Termo* (the transcription dated 1728), fols 5 and 405, which I have not been able to consult directly.

> Concerning the *portagem* [...] For a cart-load of rabbits brought by Christians, 5 *solidi*. For a cart-load of rabbits brought by Muslims, 1 *morabitinus* [...] For a Muslim whom they sell in the market, 1 *solidus*. For a Muslim who redeems himself, a tenth. For a Muslim who labours alongside his lord, a tenth.[52]

This Évoran *foral* is one of the few extant documents that distinguish between the amounts paid by Muslims and Christians as a toll. Unfortunately, in 1166, the *morabitinus* was a Muslim coin of no fixed value, limiting our ability to gauge the extent of any disparity in fees paid.[53] Yet Évora was a frontier town: for many years throughout the course of the Portuguese Reconquista, it was the only town in the Muslim South that was in Christian hands. Recorded mentions of free Muslims living in Évora do not predate 1273; it is therefore possible that the text is in fact referring to Muslims from outside the territory.[54]

The wording in the Penamacor recension of charters descended from this Évoran model is somewhat ambiguous and may actually suggest that local

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52 "De portagem [...] De carrega de christianos de conelios V solidos. De carrega de mauris de coneliis I morabitinum [...] De mauro quem uendiderint in mercato I solidum. De mauro qui se redimeret decimam. De mauro qui taliat cum suo domino decimam" (Herculano, *PMH-LC*, I, 392-393). My translation of *taliat* (*taliaverit* in most charters descended from this Évoran model) requires some explanation. In Old Portuguese, meanings of the verb *talhar* (> Vulgar Latin *taleare* "to cut") include "to cut, divide, tailor"; "to cut through (in the sense of travel in a direct route)"; and "to settle upon, agree, fix" (Joaquim de Santa Rosa de Viterbo et al., *Elucidário das Palavras, Termos e Frases que em Portugal Antigamente se Usaram e que Hoje Regularmente se Ignoram*, 2nd ed. (1865; repr. 1965), s.vv. *talhar* I and II). *Taliat* could therefore signify "labours alongside", "travels alongside", or, "comes to an agreement with". The use of *pepigerit* (3sg. future perfect active indicative of *pangere* "fastens, makes fast, drives in" but also "to agree upon, settle") instead of *taliaverit* in the *forais* of Penamacor (1209) and Proença-a-Velha (1218), which are descended from the Évoran charter, supports the first and last of these possibilities: "aut cum domino suo pepigerit" (Herculano, *PMH-LC*, I, 539 and 578). A more detailed but much later account of this clause occurs in the late fourteenth- or early fifteenth-century confirmation of the tributes paid by Muslims (Herculano, *PMH-LC*, II, 98-100). Item number 6 of this confirmation may reconcile these readings by relating that the Muslim negotiated financial remuneration for his labour (presumably for assisting his lord at market since the earliest known instance of this clause occurs within the context of *portagem* payments).

53 On the *morabitinus*, see António Henrique de Oliveira Marques, "A Circulação e a Troca de Produtos", in *Portugal em Definição de Fronteiras*, ed. by Coelho et al., 487-528 (521-528); António Mendes Correia et al., eds, *Grande Enciclopédia Portuguesa e Brasileira*, vol. 17 (1960), s.v. *morabitino*; and Joaquim Veríssimo Serrão, *História de Portugal. Vol. 1. Estado, Pátria e Nação (1080-1415)*, 5th ed. (1995), 196.

54 Barros, *Tempos e Espaços*, 139-140; Gomes, "Grupos Étnico-Religiosos", 333. Another example of a text outlining tolls paid by Muslims is the collection of the customary law of Castelo Bom (also a frontier town) dated *c.* 1188-1230: "Tota bestia maior que uiniere de mauros cum carga det medium morabitinum in portatico, et de la ida Ia quarta de morabitino. Et el asno que uaia Ia octaua et de uenita Ia quarta. Et de las bestias mayores que leuaren a uender dent singulas octauas de morabitino. Et de asino ad sua razon: cauallo de siela 1 morabitinum: de las uacas tomen singulas octauas. De carneros tomen de La I carnero" (Herculano, *PMH-LC*, I, 789). Records do not indicate that a community of free Muslims was living in Castelo Bom at the time that this text was composed (Barros, *Tempos e Espaços*, 32), and it is possible that here, too, the clause refers to fees paid by non-local Muslims.

Muslims were exempt from the *portagem*, as exemplified in the *foral* of Penamacor: "Christians and Muslims who do not live in Penamacor or its territory are to pay these *portagens*".[55] However, there is little evidence that Muslim populations were established in the territories whose *forais* were of this particular recension. What is more, extant administrative records of *portagens* paid in the medieval period are rare, and they do not elucidate whether the payments were made by local or non-local Muslims. Our ability to measure the extent of any privileges is therefore restricted. If local Muslims were in fact obliged to pay the *portagem*, it is possible that the procedure involving registration with a host would not have applied to them since they lived nearby. The distribution of *portagem* dues paid by local Muslims might therefore have been different, but this is not specified in the early charters.[56]

Religious Minorities and Vizinhança *in Lisbon*

We have seen that, according to the municipal charters of Lisbon, Santarém, and Coimbra, *mercatores naturales* could purchase exemption from the *portagem* for 1 *soldo* (which, at the time, was the typical pay for a few days of non-specialized work; its purchasing power was the equivalent of a new pair of shoes or six large chickens).[57] We have also seen that the late fourteenth-century *Foral da Portagem de Lisboa* indicates that the Jews and Muslims of Lisbon – who were also arguably

55 "Istas portagines dent christiani et mauri qui non habitauerint in penamocor neque in suis terminis" (Herculano, *PMH-LC*, I, 540). Cf. the *Foral de Proença-a-Velha*: "Istas portagines dent homines christianos sive mauros que non morant in prohentia nec in terminis suis" (p. 579). On the Penamacor recension, comprised of the *forais* to Penamacor (1209), Proença-a-Velha (1218), Idanha-a-Velha (1229), Salvaterra (1229), Sortelha (s.d.), and Penagarcia (1256), see Maria Cristina Cunha, "Forais que tiveram por modelo o de Évora de 1166", *Revista da Faculdade de Letras: História*, 5 (1988), 69-94 (80 and passim).

56 Note, however, that a different distribution of *portagem* dues concerning Muslims may be described in records from the inquiries into land and property rights (*inquirições*) conducted by Afonso II between 1220 and 1223 regarding Coimbra. ANTT, Gaveta 3, maço 10, doc. 17 fol. 7v: "Templarij [...] habent terciam de portagine in Colimbria de habere mourisco. et dedit eis domina Regina Tarasia pro anima sua Templo" (Saúl António Gomes, "As Ordens Militares e Coimbra Medieval: Tópicos e Documentos para um Estudo", in *Ordens Militares: Guerra, Religião, Poder e Cultura. Actas do III Encontro sobre Ordens Militares*, ed. by Isabel Cristina F. Fernandes, vol. 2 (1999), 64 doc. 11). It is difficult to determine whether the distribution of dues collected from Muslims outlined here is referring to a tradition different from the standard 1/3 to one's host and 2/3 to the king/military order/ecclesiastics that is outlined in the Évoran family of municipal charters. Since the text also does not make clear whether the Muslim goods being taxed were carried in by Muslims themselves or by Christian traders, there is a limit to how much one can deduce from this reference.

57 *Posturas Municipais de Coimbra* (1145), edited in Manuel Augusto Rodrigues and Avelino de Jesus da Costa, eds, *Livro Preto Cartulário da Sé de Coimbra* (1999), 769-772 doc. 576; one chicken was worth 2 dinheiros (=0.166 soldos) according to the *foral* of Arganil issued in 1175 (Herculano, *PMH-LC*, I, 403). According to a document preserved in ANTT, S. Jorge de Coimbra, maço 6, no. 25, the daily wage in 1260 was 1 *soldo*. I am grateful to António Henriques for locating this document (*non vidi*) and for providing me with these calculations of the value of the *soldo* in 1179.

mercatores naturales – had likewise been able to purchase exemption by paying the same *soldo de vizinhança*.[58]

This *Foral da Portagem de Lisboa* and the majority of other extant sources mentioning the exemption of Lisboetan religious minorities from paying *portagem* are each in their own way related to records concerning a dispute that arose *c.* 1371 between Fernando I's officials and the *concelho* of Lisbon. According to a lengthy account of this dispute that is preserved in the chancellery of D. Fernando, merchants in Lisbon had previously been exempted from certain types of *portagens* there upon payment of the annual *soldo de vizinhança*, but those responsible for collecting the *portagem* were now contravening local custom and exacting all tolls regardless. This document, dated 11 October 1371, indicates that, after an enquiry into earlier practices, the royal court ruled in favour of Lisbon's *vizinhos*.[59] There is no mention of Jews or Muslims in this particular record, but a later abridged account of the affair indicates that the Jewish *comuna* of Lisbon was included among those whose rights were transgressed by the tax collector. The latter document, dated 1379, shows that, though Fernando I ruled in favour of the *vizinhos* of Lisbon in 1371, difficulties with tax collectors persisted and the case concerning the Jewish *vizinhos* was ultimately judged separately.[60]

This latter document is particularly significant because it indicates that, despite their religion and their existence as a semi-autonomous *comuna*, the Jews of Lisbon considered themselves to be *moradores e vizinhos* of the municipality so long as they made the annual payment of the *soldo de vizinhança*, which exempted them from paying certain tolls and customs. Upon this payment, moreover, the document indicates that they received *cartas de vizinhança* issued by the town council. The record also provides the name of the tax collector with whom these

58 ANTT, *Traslado do Livro da Portagem de Lisboa*, fol. 30v cited above at note 21 (this copy is dated *c.* 1434). This same *foral* also describes local Jews and Muslims as being exempt from paying the *dízima* on fruit transported for their own private consumption in the same way that Christain *vizinhos* are: "E de custume q*ue* de cada hu*ñ*a destas coussas q*ue* trouueram ou e*n*uiarem aos vezinhos de lixboa e a outros qua*e*es q*ue*r me*r*cadores q*ue* som na di*c*ta çidade asy xpãos come jude*us* e mouros p*ar*a seu ma*ntimen*to e despendere*m* em sas casas nom pagua*m* dizima saluo sse vierem pella foz nom escusam a dizima" (ANTT, *Traslado do Livro da Portagem de Lisboa*, fol. 27v). The corresponding passage in a later fifteenth-century copy occurs at ANTT, *Livro da Portagem de Lisboa*, fol. 37r; discussed by Barros, "Judeus e Mouros"(1936), 169-170 doc. 4. Another shared exemption from the *dízima* is described at ANTT, *Traslado do Livro da Portagem de Lisboa*, fol. 28v; ANTT, *Livro da portagem de Lisboa*, fol. 38r; discussed by Barros, "Judeus e Mouros"(1936), 169 doc. 3. Yet another example of shared exemptions from customs and excise duties is contained in ANTT, *Livro da Portagem de Lisboa* (the foliation in this manuscript (reference code PT/TT/FC/001/356) is not continuous; the passage is located at file 47 of the digital copy available at http://digitarq.dgarq.gov.pt/).

59 ANTT, *Chancelaria de D. Fernando*, bk 1, fols 84v-87r; partly edited in Marques and Iria, *Descobrimentos*, I (suppl.), 295-296 doc. 180.

60 ANTT, *Chancelaria de D. Fernando*, bk 2, fols 54r-55r.

difficulties first began: Lopo Martins, who, as records show, was the treasurer responsible for collection of the *portagem* in Lisbon (the *almoxarife da portagem de Lisboa*) in 1371 and again from 1381 to 1382.[61]

After a long and protracted affair, we learn from a document dated 1414 and concerning the Jews of Leiria that the Lisboetan Jewry eventually lost the privilege of *vizinhança* and exemption from the *portagem*.[62] We also learn this from revisions to the *Foral da Portagem de Lisboa*. The original *foral* was issued by D. Fernando in 1377 after a detailed enquiry into the rules and rates pertaining to the toll in Lisbon, but updates to former procedure were later introduced into the text, either by D. Fernando himself (once judgment had been passed concerning the Jews of Lisbon) or by a successor. The copy in ANTT, *Traslado do Livro da Portagem de Lisboa* states, "Concerning Jewish and Muslim *moradores* of the city of Lisbon: they used to be exempt from paying the *portagem* along with the Christians but now they pay".[63] Abrogation of former exemptions are also signalled in the earliest surviving copy of the *foral* – that commissioned by João I in 1401 – where it is explained that the changes were the result of new tax farming procedures implemented in the final quarter of the fourteenth century. According to this text, tax farmers had requested that religious minorities no longer be exempt:

> And Jews and Muslims who live in [Lisbon] enjoyed the same privilege as Christians in that they paid neither *portagens* nor customs, but once the *portagem* was contracted to tax farmers, the latter asked and we conceded that they will no longer be excused as they were previously.[64]

The claim put forward by the Lisboetan Jewry *c.* 1379 – namely that they had customarily been issued *cartas de vizinhança* by the municipal council – is corroborated in the abovementioned record concerning the Jews of Leiria. The payment of 1 *soldo* per capita for these letters is not mentioned in the latter source, but this omission may simply be due to the brevity of the document. We are fortunate to have the depositions from an inquiry into former practice concerning the

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61 A biographic account of Lopo Martins is found in Farelo, "Oligarquia", 541-547; see 744 for a list of officials responsible for collecting the *portagem* in fourteenth-century Lisbon.

62 Arquivo Distrital do Porto, *Cabido da Sé do Porto*, bk 1673, parchment no. 2, discussed below at pp. 213-214.

63 ANTT, *Traslado do Livro da Portagem de Lisboa*, fol. 33r: "Dos judeus e mouros moradores na çidade de lixboa husauam com os xpaãos de nom paguarem portage*m* nem custumagem e ora paguam"; discussed in Barros, "Judeus e Mouros"(1936), 169 doc. 3.

64 ANTT, *Traslado do Foral da Portagem de Faro*, fols 11v-12r: "E desto husaua*m* judeus e mouros q*ue* mora*m* na dita cidade co*n*me os xpaãos q*ue* no*m* pagaua*m* portage*m* ne*m* custumage*m* e depoys q*ue* a portage*m* for arre*n*dada dema*n*daro*m* nos e no*m* escussam conmo ante escussauam". The corresponding passage in the copy dated to 1434 occurs at ANTT, *Traslado do Livro da Portagem de Lisboa*, fol. 10r.

portagem in Lisbon that was undertaken from *c.* 1378-1381 for the Lisboetan court case (preserved in AHCML, *Livro dos Pregos*, doc. 98, fols 85r-94v).[65] Articles 2 and 5 of the inquiry indicate that, according to local custom, both Muslims and Jews had been exempt from paying the *portagem* in Lisbon. The text does not provide a detailed description of this custom and whether or not it involved payment of a *soldo*, yet we may note, for that matter, that there is likewise no mention of Christian naturals paying the *soldada*.[66] It is also not overtly specified anywhere in the rubric of the articles or the recorded testimony that, in association with their exemption from the *portagem*, the Jews and Muslims of Lisbon were considered *vizinhos* or issued *cartas de vizinhança*. However, one might deduce their acceptance as *vizinhos* from Joham Duraãez's response to article 5, in which he states that all *vizinhos* were exempt from the payment without offering a distinction between the denominations mentioned in the rubric of the article – a lack of objection may well signify consent.[67]

Evidence of Muslims likewise objecting to Lopo Martins and his overzealous exaction of the *portagem* has not come to light.[68] Nevertheless, we have seen that information gathered from the inquiries into former practice that are contained in the *Foral da Portagem de Lisboa* and in the *Livro dos Pregos* suggests that Muslims had also been exempted from the toll, with the former text specifying that they, like the Jews, had paid 1 *soldo* to obtain *vizinhança* and its associated

65 A different manuscript copy is edited in Câmara Municipal de Lisboa, *Documentos para a História da Cidade de Lisboa. Livro I de Místicos, Livro II del rei Dom Fernando* (1949), 227-258 (part of doc. 21). Tavares, in *Judeus no Século XIV* (2000), 67 note 65, and *Judeus no Século XV*, 209 note 113, lists additional documents related to this court case that, working remotely, I have not myself been able to locate despite the kind efforts of the staff at the Arquivo Histórico da Câmara Municipal de Lisboa: AHCML, *Livro 1.º de Provisões e Privilégios de D. Fernando*, doc. 21, fols 28-29v; and *Livro 1.º dos Místicos*, codex 2, fol. 19. Moreno omits references to the manuscript sources altogether in his discussion of the case ("A Sentença do Rei", 411). It may be helpful here to correct the errors in Tavares's references for what appears to be the *Foral da Portagem de Lisboa* in her abovementioned lists: details should read ANTT, *Feitos da Coroa*, Núcleo Antigo 357 (previously *Forais antigos*, maço. 2, no. 3) – this is the 1434 copy of the *foral* referenced in the present article as *Traslado do Livro da Portagem de Lisboa*; and ANTT, *Feitos da Coroa*, Núcleo Antigo 356 (previously *Forais antigos*, maço. 2, no. 2) – referenced in the present article as *Livro da Portagem de Lisboa*.

66 Article 2: "[...] E desto husavam judeos e mouros que moram na dita çidade come xpaãos que nom pagam portagem nem costumagem E depois que a portagem foy rendada demandaromnos e nom escusam come ante escusavam" (fol. 86r); article 5: "[...] E este diretio nom pagavam judeus nem mouros moradores na dita cidade de lixboa salvo depois que a portagem foy rendada que os constrangerom e pagam" (fol. 87v). See also article 10 (cited below at p. 210), which states that resident Jews and Muslims of municipalities where *vizinhos* are issued realm-wide exemption from the *portagem* are likewise exempt. The only reference to the *soldo* occurs in article 3, where it is mentioned in passing and with regard to Genoese merchants trading in Lisbon.

67 AHCML, *Livro dos Pregos*, doc. 98, fol. 87v.

68 Again, I am unable to locate certain documents listed by Tavares (see note 65 above), and I am therefore unable to verify whether they contain evidence corroborating the right to *vizinhança* among the monied Muslims of Lisbon.

fiscal benefits. This statement from the *Foral da Portagem de Lisboa* regarding Muslim payment of the *soldada* does not appear to be corroborated in any of the above-discussed records descended from the 1371 court case. To my knowledge, it is not supported anywhere.[69] At present, the only clear evidence of religious minorities who were card-carrying municipal members in Lisbon concerns the Jews. This discrepancy reminds us that it is imperative to treat Muslims and Jews separately in discussions of the social history of religious minorities in Portugal.

Religious Minorities and Vizinhança *in Portugal*

In his efforts to tighten regulations concerning the acquisition of *vizinhança* and exemption from the *portagem*, D. Duarte passed laws making it clear that local Jews and Muslims were not to be considered *vizinhos* and they were not to be excused from paying tolls in the municipalities where they resided.[70] The need for this legislation suggests that there were certain loopholes that made some Muslims and Jews try to claim (and, at an earlier stage, possibly even succeed in claiming) some of the same privileges as *vizinhos* of the areas in which they lived. That they sometimes succeeded in benefitting from realm-wide exemption is suggested by a late fourteenth- or early fifteenth-century revision to the *portagem* rules of Lisbon which states that religious minorities who had previously benefitted from what would seem to be realm-wide exemption from the toll were now subject to it: "Concerning Jews and Muslims who live in the realm

69 One possible line of inquiry that I have not been able to pursue involves records from the Cortes of 1331 discussed by Barros (*Tempos e Espaços*, 313). According to article 23, the Muslims of Lisbon alleged that they held a special privilege (granted by D. Dinis and confirmed by Afonso IV) preventing the Christian *almotacé* from entering the Muslim district in order to fine them for transgressions against the town council's *almotaçaria*: they were "exemptos que os Almotaçees nom entrem ao aRaualde pera leuar deles pena ssobr 'esto aynda que os achem en falssura" (edited by Barros from AHCML, *Livro I° de Cortes*, fol. 22, *non vidi*). A paraphrase of the document in contemporary Portuguese is provided in Caetano, *Administração*, 121-129. According to a letter from D. João I that is summarized in *OA* II. 71, Jewish *comunas* had of old been granted autonomous regulation of their own *almotaçaria*, governed by their own Jewish *almotacé*, and one might presume that the same privilege of self-government was granted to Muslims in this respect (see discussions of the *almotaçaria* in Tavares, *Os Judeus no Século XV*, 77-78; Barros, *Tempos e Espaços*, 312-314). In the year 1280, the council of Évora had had to obtain a special privilege from D. Dinis in order to force resident Jews and free Muslims to comply with the market prices set by the council's *almotaçaria*: "Em outra parte senhor pedevos merecê o concelho dEvora que os mouros forros e os judeus usem com elles os feictos da almotaçaria assi como vesinhos" (ANTT, *Chancelaria de D. João II*, bk 26, fol. 66v; edited in Gabriel Pereira, *Documentos Históricos da Cidade de Évora* (1885; repr. 1998), 32-34 doc. 22). A letter issued by D. Dinis in 1309 moreover indicates that Jews and free Muslims in Évora had refused to obey this directive, likely because of their own longstanding privilege (ANTT, *Odiana*, bk 1, fol. 147v; Pereira, *Documentos,* 50-51 doc. 33). If the free Muslims of Lisbon were *vizinhos*, would they have been required to comply with the municipal *almotaçaria*? If so, then the fact that they arranged for this special exemption could stand as indirect evidence of their status as municipal members.

70 See below, pp. 214-215.

and who live in municipalities that have letters of exemption from paying the *portagem*: [they] used to enjoy [the same exemptions] as the Christians but now they pay".[71] And in deposition records from the Lisboetan court case, one finds that these realm-wide exemptions from tolls on certain items had formerly been upheld in Lisbon for *all* merchants of such privileged municipalities, whether Christian, Muslim, or Jewish: "And Jews and Muslims who live in areas where these letters have been granted were exempt from this *portagem* in the same way that Christians are".[72]

Tavares has argued, with respect to the Jews of Portugal, that "[i]t is probable that the question of the [right of] Jewish inhabitants [to] *vizinhança* was only raised at the end of the fourteenth century".[73] She bases this statement on the abovementioned court records that show that the monied Jews of Lisbon had previously obtained the status of *vizinhança* by paying 1 *soldo* per capita. However, one difficulty with such a general statement is that it does not take into account the fact that payment of the *soldo* was not necessarily a universal pre-requisite to acquire or renew *vizinhança*: as noted above, procedures in place for the acquisition of municipal membership could differ according to municipality. Also, though we have clear evidence that local Jews in areas other than Lisbon obtained *vizinhança* (namely in Viseu, Leiria, and possibly Porto),[74] evidence has not been presented to confirm that the procedure they followed to acquire this status in Viseu (and Porto?) was necessarily the same as that followed by Christian *vizinhos* of the same territory. In the case of Leiria, we know that the Jews obtained

71 ANTT, *Traslado do Livro da Portagem de Lisboa*, fol. 32v: "Dos judeus e mouros q*ue* morom no Reyno e morom em algu*ũ*as villas q*ue* ham ca*r*tas de no*m* paguarem po*r*tage*m* husauam com os xpaãos e ora paguam".

72 AHCML, *Livro dos Pregos*, doc. 98, fol. 89v: "E esta portagem escusaua*m* judeos e mouros q*ue* moram nos lugares hu ha*m* taaes c*ar*tas come os xpaãos".

73 "[É] provável que a questão da vizinhança dos moradores hebraicos só se tenha posto nos finais do século XIV" (Tavares, *Judeus no Século XV*, 186-187); Tavares, "Finanças e Fiscalidade", 140 and 158.

74 See Tavares, *Judeus no Século XIV* (2000), 67-68. According to a record of disputes that arose between the bishop and town council of Porto that is edited in *Corpus Codicum Latinorum et Portugalensium eorum qui in Archivo Municipali Portucalensi Asservantur Antiquissimorum*, vol. 2 (1917; repr. 1972), during the reign of D. Dinis, the town council decided that Jews and Muslims no longer required the bishop's approval to relocate to Porto. The text states that they are free to come live "as *vizinhos*"; it does not state that they *are vizinhos*, and the context moreover does not make it clear that *vizinho* is not used in the general sense of "neighbor": "Jt*em* des tanto tenpo q*ue* a memoria dos homee*n*s no*m* he em cont*ra*yro, foy husado e Custumado q*ue* ne*n*huu*m* Judeu ne*m* Mouro no*m* morem na d*i*ta Çidade sem outorgame*n*to e mandado do senhorio. E ora os do d*i*to Conçelho mandam li morar os Jude*us* e sofrem Aos da dita Çidade q*ue* lhes alquie*m* (=aluguem) as casas e*n* q*ue* mora*m*. O q*ue* nom he se*r*uiço de deus ne*m* p*ro*l dos q*ue* mora*m* na d*i*ta Çidade" (p. 257); "Jt*em* Ao q*uar*to agrauo dos Mouros e Jude*us*. Mandar*om* q*ue* possam viue*r* na te*rr*a come vizinhos. e sse mal hasare*m* dessy lançe*m*nos fora e denlhes pea segundo for o feyto" (p. 261). These passages are discussed in Artur Carlos de Barros Basto, *Os Judeus no Velho Porto*, separata de *Revista de Estudos Hebraicos*, 1 and 2 (1929), 39-41; and Tavares, *Judeus no Século XIV* (2000), 67-68.

vizinhança in a different manner: through a *carta de vizinhança* that was issued by João I to the entire community.

Evidence of kings granting such community-wide *cartas de vizinhança* would moreover suggest that Jews were not considered innately eligible for municipal membership as Christians were – had they been, they would not have required this special privilege. The example given concerning Leiria postdates the end of the fourteenth century, but references to earlier community-wide letters issued to other municipalities are found scattered throughout the sources, as are references to exemptions granted to certain Jewish or Muslim individuals from areas where community-wide exemptions had not been issued.[75] Since the procedures outlined for Jewish acquisition of *vizinhança* in these sources sometimes differs from the procedures followed by Christians (most clearly illustrated by their need for special privileges), it follows that the Jews were, in many municipalities, viewed differently – as a group without an inherent right to *vizinhança*.

Perhaps most importantly, according to the above-cited *Foral da Portagem de Lisboa*, Muslims had also formerly been able to pay the *soldo de vizinhança* in Lisbon and yet there is no clear evidence that Muslims would have been eligible for municipal membership in other municipalities.[76] Nowhere else are they referred to as *vizinhos* (apart from the possible exception of Porto). The only indisputable evidence of Muslims sharing the same economic privileges as municipal members is limited to the frontier town of Elvas, and even in this case, Muslim residents were not automatically eligible for release from the *portagem*: as records from the Cortes of Lisbon (1439 and 1455) show, their exemption had not been municipally issued but had been obtained through royal privilege in recompense for military service. During times of war with Castile, rather than simply guard the royal tents or the baggage train, they had participated in combat – a duty that was generally reserved for Christian *moradores*.[77] Their exemption thus had little to do with payment of a *soldo de vizinhança*.

Interestingly, these Cortes records, too, do not preserve the voice of a Muslim community objecting to their payment of the *portagem*: it was the municipality of Elvas that asked Afonso V to reinstate the exemption that had formerly been

75 For instance, in the same documents concerning the Jews of Leiria, D. João's directives to tax collectors indicate that exemptions issued by his predecessors would be honoured: "E esto ffazede saluo se os dictos judeus nos mostrarem cartas nosas ou dos reis que ante nos fforam per que os ajam por ujzinhos" (Moreno, "A Sentença do Rei", 414; discussed below at pp. 213-214).

76 ANTT, *Traslado do Livro da Portagem de Lisboa*, fol. 30v cited above at p. 196.

77 ANTT, Leitura Nova, *Odiana*, bk 6, fol. 141v; ANTT, *Chancelaria de D. Afonso V*, bk 2, fol. 8; ANTT, *Odiana*, bk 3, fol. 173v; ANTT, *Chancelaria de D. Afonso V*, bk 15, fol. 81v; see Anna Matheson, Notice nos 326280 and 326281, RELMIN project, "The Legal Status of Religious Minorities in the Euro-Mediterranean World (5th-15th Centuries)", Telma Web edition, IRHT, Institut de Recherche et d'Histoire des Textes – Orléans http://www.cn-telma.fr/relmin/.

granted by his forbearers. The municipality alleged that resident Muslims had always been granted this privilege in gratitude for their service, and the combined facts that Elvas was only conclusively adopted into Portugal *c.* 1229 and that it was a frontier town against an at times hostile neighbour lend support to their claim – enlistment could well have been a cause for exemption from the toll there as far back as the town's genesis under the Portuguese Crown. Clearly, it was in the municipality's best interests to have extra men fighting against the Castilians, and the ability to offer the Muslims release from the toll as an incentive to fight would still have been in their favour considering Elvas's strategic location for Portugal's intervention in the current Castilian civil wars (1433-1443).[78] Still, while the motive for indulgent behaviour towards the Muslims of Elvas is clear, it is specific to the local context; one must approach discussion of the geographically disperse Muslim *comunas* on a case-by-case basis.

Despite the abovementioned vague wording in the Penamacor recension of municipal charters that may or may not suggest that local Muslims (if indeed there were any) were excused from the *portagem*,[79] the permissive attitude towards the Muslims of Lisbon that is reflected in the *Foral da Portagem de Lisboa* and in the depositions in the *Livro dos Pregos* was not universally extended to all Muslims of the kingdom. Rights differed according to municipality, as is suggested by the special privilege that for years had to be issued to the Muslims of Elvas in order for them to be exempt from the *portagem*. Since the treatment of Muslims in the Lisboetan records was not exemplary, it would seem unadvisable to base an argument concerning the status of the Jews of the entire realm on these same records concerning Lisbon.

Also, though there is clear evidence of leniency towards Jews in fourteenth-century Lisbon, there is no evidence from an earlier period to confirm how far back the practice of accepting Jews as *vizinhos* was exercised. Surviving records of communal exemptions elsewhere are moreover – apart from the possible case of the Jews and Muslims of Porto – limited to the fourteenth and early fifteenth centuries. The records certainly suggest that Jews were often successful in their petitions for the privilege of *vizinhança*; it appears that considerably less evidence of such success among Muslims *comunas* has survived. But even if neither minority were automatically eligible for *vizinhança* within a municipality, it is clear that, in some districts, Jews and/or Muslims shared *de facto* the same economic benefits as *vizinhos de jure*. However, from the late fourteenth century onwards, laws restricting access to such privileges began to be imposed.

78 António Henrique de Oliveira Marques, *Portugal na Crise dos Séculos XIV e XV*, Nova História de Portugal 4 (1987), 550-555. I owe this point to Dr António Castro Henriques.

79 Discussed above at p. 204-205.

The Abrogation of Leniency (Late Fourteenth/Early Fifteenth Century)

Dom Fernando's ruling that stripped the Lisboetan Jewry of their right to *vizinhança* and exemption from the *portagem* set a precedent for later revocations of fiscal exemptions elsewhere in the kingdom. Records dating to the reign of his successor, João I, again present evidence of Jews refusing to pay the *portagem* in their municipality, once more for the reason that they considered themselves *vizinhos*, but this time because they were granted this status by royal privilege; there is no mention of the *soldo de vizinhança*. This evidence concerning the Jews of Leiria is found in a letter dated 8 August 1414 in which an earlier letter (dated 16 January 1412 and describing the Leirian court case) is transcribed.[80] In this instance, the Jews, according to their testimony, were granted the privilege of *vizinhança* in a letter issued by D. João himself. Yet the Crown attorney, Bartolomeu Domingues, rejected their claim because a separate letter had been issued by the same king stating:

> no Jews in our land should enjoy the privileges of temporary residences (*estaus*) nor are they to be considered *vizinhos* for the reason that they do not participate in military service but instead live by their crafts and trades and they [therefore] should not be considered *vizinhos*.[81]

In defence of his position, Domingues reportedly argued:

> despite the fact that the Jews of Lisbon and Guimarães and other regions of [the king's] realm show letters from the councils where they are *moradores* so that they may be considered *vizinhos*, tax collectors still make them pay the said *portagem* and collect it for the king along with his other dues.[82]

He also reminded the courts of D. Fernando's aforementioned judgement that revoked the right to *vizinhança* from the Jews of Lisbon.

Dom João's final judgement not only deprived the Jews of Leiria of the status of *vizinho*, he extended his decision to the Jews of the entire realm. As of 1412, *cartas de vizinhança* issued to Jews by municipal councils were nullified; no longer

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80 Arquivo Distrital do Porto, *Cabido da Sé do Porto*, bk 1673, parchment no. 2; edited in Moreno, "A Sentença do Rei", 413-415.

81 "[P]orque nenhuus judeus da nossa terra nom deujam dauer priujllegios de estaaos nem seerem auudos por ujzinhos porque nom serujam em Guerra mais ujujam por sseus ofiçios e mesteres e nom deujam de seer auudos por vizinhos" (Moreno, "A Sentença do Rei", 414).

82 "Que nom enbargando que os judeus de Lixboa e de Gujmaraees nem doutros llogares dos nosos regnos mostrassem carta dos conçelhos onde fossem moradores per que os ouuessem por ujzinhos que os costrangessem que todauia pagassem a dicta portagem e arecadassem pera nos com os outros nossos djreitos" (Moreno, "A Sentença do Rei", 414).

would Jews be able to benefit from the status of *vizinho* unless they had been granted this privilege in a royal letter. The same ruling is extended to Muslims in another document attributed to João I, in the confirmation of tributes paid by free Muslims in Portugal:

> Moreover no Jew or Muslim is a *vizinho* and, on account of this, they pay the king the *portagens* and levies that are due from them, and they cannot be excused from this except by a letter from the king addressed to them specifically, and they are not excused by any other means.[83]

While the king's decision with regard to Leiria is clear, the reason for the seeming contradiction that he would uphold previous royal letters of privilege issued by himself and his predecessors but not the letter that he himself granted to the *comuna* of Leiria remains a mystery.

João I's successor, D. Duarte, issued further legislation regarding religious minorities and their attempts at claiming exemption from the *portagem.* His decree regarding the Jews is preserved in *Ordenações Afonsinas* (henceforth *OA*) II. 69 under the heading "That Jews are not to be excused from paying the *portagem*, nor considered *vizinhos* in any municipality, even if they have lived there for a long time".[84] The context likely concerns Jewish inhabitants of municipalities whose *forais* have exempted them from paying the toll in the entire kingdom, as is succinctly stated in the corresponding rule for Muslims, the heading of which reads, "That Muslims are not to enjoy the same privileges extended to Christians, who, as *vizinhos* of certain districts, are exempt from paying *portagens* and other customs duties":

> King D. Duarte, my lord and father of praised reputation, when an infante passed a law in which he ordained that, regardless of whether, by letters and privileges or charters by his father the king or by the kings that preceded him, the *moradores* and *vizinhos* of some places are excused and privileged so that they do not pay *portagens* and passages and other customs dues, the Muslims of his kingdoms and dominions who live in these same places are not to benefit from such privileges, graces, mercies, and charters given to the Christians. In all cases, the Muslims are to pay these duties just as those who neither reside there nor are *vizinhos* there do.

83 "Item nenhuum mouro nem judeu nom som uizinhos e porem pagam a elrrei suas portageens e dereitos que delles ha dauer e nom se podem scusar saluo per carta delrrey que para ello aiam em special e doutra guisa nom som scusados" (Herculano, *PMH-LC*, II, 100).

84 "Que os Judeos nom sejam escusados de pagar Portagẽ, nem avudos por vizinhos em alguũ Villa, ainda que hi morem longamente" (*OA* II. 69); see Anna Matheson, Notice no. 326282, RELMIN project, "The Legal Status of Religious Minorities in the Euro-Mediterranean World (5th-15th Centuries)", Telma Web edition, IRHT, Institut de Recherche et d'Histoire des Textes – Orléans http://www.cn-telma.fr/relmin/extrait326282/.

> This law having been reviewed by us, we order that it be observed and upheld as it is described above, and in the manner that it was devised by the aforesaid king and lord and already confirmed by us in the corresponding case concerning the Jews, because we hold it to be in the service of God and in our own interests as well as those of our kingdoms.[85]

Duarte does not mention what happened to Jews and Muslims who already held royal letters of privilege. Judging from the afore-seen records of the Cortes of 1439 and 1455, which indicate that the Muslims of Elvas did not pay *portagens* during his rule, it would seem that previous royal exemptions were respected.

Despite his rescindment of Jewish access to the status of *vizinho*, confusion persisted regarding their obligation to pay certain customs and excise taxes. The district auditor (*contador da comarca*) of Trás-os-Montes, for instance, had a difficult time getting Jews at the fair of Santa Maria de Azinhoso to pay the *sisa* for the reason that the *concelho* considered them exempt by virtue of an old letter of privilege.[86] Exemptions were moreover granted in the reign of Duarte's successor, Afonso V: in 1476, in an effort to increase the population of Miranda do Douro, he granted that all Jews who moved there would benefit from the same privileges that the *vizinhos* held.[87] Privileges addressed to individuals also continued to be issued: in 1455, upon request by the municipality of Mourão, which faced a shortage of tradesmen, he granted that the five Jewish and Muslim professionals (a cobbler, a tailor, a potter, a blacksmith, and a shearer) who were willing to move to Mourão could share the same privileges as the *vizinhos* of the town.[88] And in 1465, upon request by D. Alvaro de Bragança, the king granted José Negro,

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85 "Que os Mouros nom gouvam dos Privilegios, per que os Chrisptaaõs como vizinhos dos Lugares som izentos de pagarem portageẽs, e outras custumageẽs: ElRey Dom Eduarte meu Senhor, e Padre de louvada memoria em seendo Ifante fez Ley, per que hordenou, que nom embargante que per Cartas, e privilegios, ou foraaes, que per ElRey seu Padre, ou pelos Reyx, que antes forom, sejam escusados, e priviligiados os moradores, e vizinhos d'algũs Lugares, que nom paguem portageẽs, e passageẽs, e outras custumageẽs, os Mouros de seos Regnos, e Senhorio, que morarem em os ditos Lugares, nom gouvissem de taaes privilegios, graças, e mercees, e foraaes dados aos Chrisptaõs; e que em todo caso os Mouros pagassem esses direitos assy como os que hy nom moram, nem som hi vizinhos. A qual Ley vista per nós mandamos que se guarde, e compra, como suso dito he, e pela guisa, que per elle dito Rey, e Senhor foi hordenado, e per nos ja confirmado em tal caso ácerca dos Judeos; porque o entendemos assy por serviço de Deos, e nosso, e bem de nossos Regnos" (*OA* II. 108). See Anna Matheson, Notice no. 326283, RELMIN project, "The Legal Status of Religious Minorities in the Euro-Mediterranean World (5th-15th Centuries)", Telma Web edition, IRHT, Institut de Recherche et d'Histoire des Textes – Orléans http://www.cn-telma.fr/relmin/extrait326283/.

86 ANTT, *Chancelaria de D. Duarte*, bk 1, fol. 121r and bk 3 fol. 75 (*alterum non vidi*); discussed in Tavares, *Judeus no Século XV*, 203 note 21.

87 João II's confirmation of this grant is preserved in ANTT, *Chancelaria de D. João II*, bk 18, fol. 126v (*non vidi*); discussed in Barros, "Judeus e Mouros" (1937), 178-179 doc. 234.

88 João II's confirmation of this grant is preserved in ANTT, *Chancelaria de D. João II*, bk 8, fol. 219v; discussed in Barros, "Judeus e Mouros"(1936), 175 doc. 19; Soyer, *Persecution*, 73.

merchant of Lisbon, a *carta de vizinhança*.[89] Despite these indulgent acts, one might still presume, as Tavares and Moreno do, that new exemptions became much less frequent in the fifteenth century.[90]

It has been posited that the decline of exemptions extended to Jews in this period had much to do with the ascension of the Christian mercantile class in the late fourteenth and early fifteenth centuries and the curbing of Jewish competitors who already had the advantage of strong links in international trade.[91] Of course, rather than ascribe this change solely to interfaith rivalry, one might also be tempted to consider Fernando's reforms to the collection of *direitos reais* as having something to do with the period of economic crisis and social upheaval that marked mid- to late fourteenth-century Portugal: such an initiative to extort all possible avenues of income would have been necessary to finance war (in Fernando's reign, the war against Enrique II of Castile; in João I's reign, the Luso-Castilian war of 1383-1411 and the conquest of Ceuta) and to finance maritime exploration (especially in the reigns of D. João and D. Duarte).[92] We might also call attention to the motive expressed by D. Duarte himself in *OA* II. 30. 1: the desire to secure all royal property (*património real*).[93] Similar reasoning had been used earlier by João I in his aforementioned decision regarding the Jews of Leiria and the entire realm, and the protection of *património real* is known to have motivated many other initiatives carried out by these two kings.[94] Moreover, considering the criticism directed at the Crown for instituting the heavy tax burden of the *sisas gerais*, kings could hardly be remiss in the collection of other *direitos reais*.[95] In view of all this, the objections to Jewish exemption from the *portagem* voiced by tax farmers could not be ignored.

Conclusion

The question of the municipal status of religious minorities is obscured by the fact that the principal fiscal privilege held by municipal members could, in some districts, be shared by Jews and Muslims, either upon purchase of *vizinhança* or upon receipt of royally or municipally issued letters of immunity. Our ability to

89 João II's confirmation of this grant is preserved in ANTT, *Chancelaria de D. João II*, bk 9, fol. 12.

90 Tavares, *Judeus no Século XV*, 186-187; Moreno, "A Sentença do Rei", 413.

91 Tavares, *Judeus no Século XV*, 187; Moreno, "A sentença do Rei", 413.

92 On this period of crisis, see António Henrique de Oliveira Marques, *History of Portugal. Vol. 1: From Lusitania to Empire* (1972), 108-118; and Marques, *Portugal na Crise*.

93 "[S]omos per Direito theudo ao refrear quanto bem podermos e nom leizarmos minguar o Patrimonio Real, que nos he dado pera soportamento de Nosso Estado" (*OA* II. 30. 1).

94 Tavares, "Finanças e Fiscalidade", 149.

95 António Castro Henriques, "The Rise of a Tax State: Portugal, 1371-1401", *e-journal of Portuguese History*, 12.11 (June 2014), 49-66; Rui Manuel Figueiredo Marcos, "A Administração Fiscal Portuguesa Anterior ao Século XIV: Alguns Aspectos Fundamentais", *Direito*, 16.12 (2007), 27-36 (33-35).

determine the extent of the privileges actually exercised by Muslims and Jews is limited by the survival rate of the sources, yet records do clearly indicate that access to exemptions not only varied according to municipality but also changed over time: exemptions were in decline after the third quarter of the fourteenth century, when it became more common for tax farmers to collect the *portagem* for the king, presumably because these men objected to the loss in revenue.

Though it is striking to see that, earlier in the fourteenth century, Lisboetan Jews had been able to purchase *vizinhança* and its associated fiscal privileges at the same price paid annually by natural Christian inhabitants, no strong evidence has yet come to light to prove that Muslims could do the same. Nevertheless, whether or not some members of Muslim *comunas* were granted the actual status of *vizinho*, we know that the Muslims of Elvas, at least, were granted the economic benefits of exemption from the toll in Elvas. Records also indicate that some Muslim and Jewish *moradores* of privileged areas may well have succeeded in enjoying the same realm-wide exemptions from the *portagem* that were extended to the municipality's Christian inhabitants.

This discussion has raised a number of important questions, not all of which have been answered. For instance, what was the motive behind the municipality of Lisbon's acceptance of Jews (and perhaps Muslims) as *vizinhos* since, according to modern historians, the *soldada* was paid to the royal fisc and not the municipality?[96] Also, was the *soldo* really paid in its depreciated value as a symbolic payment, as scholars such as Iria Gonçalves have suggested, or was it used as a unit of measure (meaning that the contemporary equivalent of the original worth of the *soldo* was paid, without depreciation)?[97] Such queries beg further attention from economic historians so that we may come to a fuller understanding of the municipal status of religious minorities in twelfth- to fifteenth-century Portugal.

96 Henrique da Gama Barros, *História da Administração Publica em Portugal nos Séculos XII a XV*, 2nd ed., vol. 5 (1948), 92; Azevedo, *Elementos para a História Económica*, 39; Gonçalves, "Portagem". Any discussion of motive should take into account in the fact that occasional traders, petty saleswomen (*regateiras*), and foreign merchants such as the Genoese had also been customarily exempted from certain toll payments in Lisbon. See notes 3 and 66 above.

97 Gonçalves, "Portagem".

JEWISH CITIZENS VERSUS JEWISH FOREIGNERS: THE LEGAL STATUS OF A MINORITY WITHIN THE MINORITY IN MEDIEVAL CATALONIA

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This paper aims at contributing to debates over the legal status of Jews in Europe by the end of the Middle Ages. Other scholars in this book provide detailed treatment of the subject for various geographic areas and periods. I will confine myself to analyzing relations between Jewish citizens living in Medieval Catalan cities and Jewish foreigners arriving to those cities for the purpose of commercial gain.[1] Basing on Hebrew *responsa* of the late thirteenth – early fourteenth cent. and royal registers written in Latin,[2] I will consider the legal status of Jewish citizens (including their capacities and incapacities) and that of foreigners. It will be shown what they were called, and what possibilities were offered to those who wished to change status.

There is an extensive bibliography concerning Jewish citizens in medieval Aragon.[3] I would like to praise Juliette Sibon and Claude Denjean for an article on the Jewish *civitas* in Marseille, Catalonia and Majorca.[4] According to Yom Tov Assis, the establishment of an *aljama* meant that theoretically no Jew could be outside its jurisdiction, and all newcomers, after a limited period, joined automatically the Jewish community.[5] It is interesting to see at least briefly, as I am

1 It is not known for sure if Jews in Spanish peninsula were regarded by the royal authority as cives either of the entire kingdom or of a particular city. However, Instructions to the bailiff (baiulus) of Majorca Bn. De Verino call some of them "cives Maioricarum" ("judeum civem Maioricarum nomine Jacob Bendallel"). See Baer, *Die Juden im christlichen Spanien, Erster Teil Urkunden und Regesten*, vol. 1, 145.

2 I use some documents from royal registers stored at the Archivo de la Corona de Aragón (ACA) related to the kings Pedro III (d. 1285), Alfonso III (d. 1291) and James II (d. 1327) which contain royal acts concerning taxes paid by Jews and legal conditions of Jewish migrants.

3 J. Amador de los Rios, *Historia social, politica y religiosa de los judios de Espana y Portugal*. 3 vols (1984), 416-427; Y. Baer, *A History of the Jews in Christian Spain* (1992), 85-93; Y. Assis, *The Golden Age of Aragonese Jewry: Community and Society in the Crown of Aragon, 1213-1327.* (1997), 75-90; C. Guilleré, Girona al segle XIV, trad. de Núria Mañé, vol. 1 (1993), 506 p.; C. Soussen, *"Judei nostri". Juifs et chrétiens dans la Couronne d'Aragon à la fin du Moyen Âge* (2011), 13-49.

4 C. Denjean, J. Sibon, "Citoyenneté et fait minoritaire dans la ville médiévale. Étude comparée des juifs de Marseille, de Catalogne et de Majorque au bas Moyen Âge", *Histoire urbaine*, vol. 32 (2011) 73-100.

5 Y. Assis, *Jewish Economy in the Medieval Crown of Aragon: Money and Power* (1997), 134.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 219–232

 DOI 10.1484/M.RELMIN-EB.5.111600

planning to do in this paper, what were the advantages and disadvantages of being a citizen or a foreigner.

R*esponsa* do not use the term "cives",[6] they propose instead a number of categories which are defined according to Jewish tradition. I will try to clarify their meaning and provide interpretation. The term "resident" seems to be too vague, since it covers various categories of Jewish city-dwellers; however, I am going to use it sometimes. Jews as citizens possessed a particular legal status which allowed them to be distinguished from foreigners. This means that there is a bunch of texts defining their rights and responsibilities vis-à-vis non-citizens. These texts include *taqanot* (regulations issued by the community leadership) and legal advices given through rabbinic correspondence (*responsa*). These regulations covered almost all spheres of economic and personal life.[7]

I take a special interest in the status of Jewish foreigners, who preserved their liberties as inhabitants of their native cities or had to submit to exclusive jurisdiction of the court in cities where they engaged in commercial activities. One of my goals is to find out what were the primary criteria for their identification – belonging to the Jewish people or to the population of a particular city. Also, I will examine to what extent regulations concerning foreigners the Christian laws were taken into account by Jewish legal experts. Ultimately the following question needs to be answered as a conclusion: did the Jewish foreigners constitute (from the point of view of civic or princely authorities) a distinctive legal category within the public legal realm of Catalan cities?

The Jewish Citizens

There are very few texts written in Hebrew defining various kinds of city residents and the period of time spent in a particular city which was necessary for changing status from a foreigner to a citizen. *Responsa* of rabbi Solomon Aderet (d. 1310) attributed to his teacher Nahmanides (d. 1270) contain a letter from a Jew who left the Catalan city of Lleida for a year (from *Pessah* till *Pessah*).[8] The purpose of his leave is unknown. Before his depart, he declared under an oath[9] before the Jewish tribunal of Lleida that he wanted indeed to leave the city alone. However,

6 See C. Denjean, J. Sibon, "Citoyenneté et fait minoritaire dans la ville médiévale. Étude comparée des juifs de Marseille, de Catalogne et de Majorque au bas Moyen Âge", *Histoire urbaine*, vol. 32 (2011) 73-100. This publication argues that although Jews under the Crown of Aragon were not explicitely called "cives", their actual situation was very similar to Jewish "citizens" of Marseille, for example (ibid., 75 – 76).

7 In Rashba's opinion, the Jews were allowed to use Christian judges to solve the matter of financial claims, even if both the plaintiff and the defendant were Jewish. See *Responsa of Rashba attributed to Ramban,* 137 (2001), 34.

8 *Responsa of Rashba attributed to Ramban,* 267 (2001), 217.

9 ibid.: נשבעתי בזה הלשון: ע»ד רבים, להיותי יוצא, אני לבד, מעיר לידרא

a few lines later it becomes clear that he wanted to go away with those members of his family (he was married and had children) who would agree to follow him. It became apparent later that he was only able to take one of his sons with him, since his wife was not allowed to leave Lleida due to an order of the city governor. It could be suggested that he was not able either to take a great deal of his property with him. As a result of these challenges, he asked for a legal advice from rabbi Solomon Aderet trying to find out if there were any means for him to come back to the city and to benefit from his belongings, at least for a limited period of time. We learn from this text that in order to stop being a resident in Lleida in the late thirteenth century, a Jewish person (male) was supposed to take an oath in front of the Jewish communal court.[10] The man mentioned in Aderet's letter specified that he was leaving the city alone. "The governor of the city" who supposedly pursued the interests of local Jews, prevented his wife and some of his children from following the head of the family. It is evident that this decision was motivated by the intention to save the property of that family within the Jewish community of Lleida.

A permission from non-Jewish authorities to move on was necessary. The archives of the Crown of Aragon contain a chart dated 14 February, 1325/1326 by which King James II ordered to Othon de Moncada to check the possibility for two Jews from Lleida to settle in Aytona and to reassure their move even despite the regulations of the Jewish community of Lleida which stepped forward against the move of its members.[11]

In the aforementioned *responsum*, Aderet provided a long reply containing several important points. He distinguished three categories of city residents: those living in the city (*yoshvei ha-ir*, very often the term "*anshey ha-ir*" is used as well in the same context), "the sons of the city" (*bnei ha-ir*), and those who rent or own houses in the city (*ha-darim ba-ir*). According to Aderet, all of them have different meaning in the Talmud. *Yoshvei ha-ir* are those staying in the city during more than thirty days.[12] It is noteworthy that Rashba used this term for non-Jews as well.[13] The sons of the city are those who spend more than a year in

10 Female members of Jewish communities did not enjoy full legal capacity and were not counted as city residents. This probably implies that at least married women or women living under the auspices of their parents in Lleida were not subject to taxation separately from their husbands or fathers.

11 Archivo de la Corona de Aragón (ACA), C, Reg. 228, 26v., com.: J. Régné, *History of the Jews in Aragon: Regesta and Documents, 1213-1327*, ed. by Y. T. Assis, A. Gruzman (Jerusalem: Magnes Press, 1978), n 3367.

12 *Responsa of Rashba attributed to Ramban* 267 יום שלשים בעיר מתעכב נקרא, שהיושב לפי. (2001), 217.

13 *Responsa of Rashba*, pt 1 (1997), no. 83, 49. This text deals with the following question: if an unknown grave is situated near a Jewish house in a city where the majority of inhabitants (anshey ha-ir – that is "people of the city") are non-Jewish, then should the grave be identified as Jewish or not? Aderet answers that the solution, according to the Talmud, should rely on the majority of the city population: if they are not Jewish, then the grave should be considered non-Jewish as well. Therefore, Aderet seems to apply the term "anshey ha-ir" both to Jews and non-Jews.

the city in question.[14] The last mentioned category does not have a clear definition in the *responsum*, but Aderet says that *ha-darim ba-ir* correspond neither to the first nor to the second categories. In the first part of the same letter, the Jew who had left the city of Lleida for a year said about himself that till the next year he "would not be among *ha-darim ba-ir*",[15] which means that the term "*ha-darim ba-ir*" related to those physically occupying a dwelling unit in the city. This statement finds a support in another rabbi Solomon's letter in which he answers the question whether Jews sharing the same courtyard with a gentle who went out of the city and does not reside ("*dar*") in it anymore[16] had to rent his house. Aderet says clearly that in this case there is no difference whether the person who leaves his house is Jewish or not, the ruling is the same.[17]

In order to better explain the term "*ha-darim ba-ir*", Rashba introduces terminology from local languages. He argues that Jews in his times used local languages and not Hebrew in judicial proceedings and commercial relations. As he points out, not necessarily the meaning of the word "dar" ("*estante*" as he puts it) would be the same in Lleida and in Huesca.[18] In his opinion, any person having a house or an apartment in some city[19] during a particular period of time could bear the title "estante", but that very period of time should be defined according to local laws and practices. Then he refers to the experience of his own community in Barcelona, where a merchant arriving from outside for business purposes who did not wish to stay permanently in the city was not called "estante" of Barcelona even after a year of his stay. Since his permanent residence was in another city, he was attributed the status of foreigner. The question should be asked, which category mentioned by Rashba is covered by the term "citizen". It seems that all the three notions describe various nuances of the concept referred to as "citizen", but none of them entirely reflects its complexity.

The citizenship provision, as interpreted by Rashba, depended on location of a person and his house. In his opinion, taxation was not supposed to be citizenship-based. As for the Jews of Barcelona, for example, their personal income tax obligation to that city was limited to tax on only the income earned within that city.[20] This territorial taxation applied to Jews possessing property or having income outside their locality.

Bibliography helps us to answer the following question: was it an advantage to be a foreigner or not? According to M. Sánchez Martínez, due to progressively

14 ibid.: ובן עיר לא נקרא, עד שיתעכב שנה תמימה.
15 ibid.: עוד מלאת שנה תמימה שלא אהיה מהדרים בעיר לידרא
16 *Responsa of Rashba attributed to Ramban* 214 (2001), 176: ואינו דר באותה חצר.
17 ibid.
18 ibid.: שאני מדמה, שאתה לא נשבעת בלשון חקודש, אלא בלשון העם: שלא אהא אשטנט»ה דלידרא.
19 ibid.: אני רואה, שאין קורין אשטנט»ה, אלא למי שקובע דירה במקום.
20 *Responsa of Rashba attributed to Ramban* 140 (2001), 35.

increasing taxes, for example, extraordinary ones, in the first half of the fourteenth cent.,[21] certain communities, although not many of them, complained about their financial hardship, since a part of Jewish population fled in order to escape taxation.[22] As a result, their taxes were lowered considerably, like, for example, in the cities of Ariza and Vic.[23] In addition to this, the king ordered to Jews of Huesca, Tarazona, Borja and Allagón to sue their memebers who had migrated for financial reasons.[24] Aderet's letters imply that local authorities were able to directly prohibit Jews from moving to other places under threat of a fine.[25] However, if the king was interested in migration, he was able to act in favor of migrants despite the resistance of local Jews. For instance, a chart dated 14 February, 1325/1326 issued by king James II ordered to Othon de Moncada to check the possibility for two Jews from Lleida to settle in Aytona even against the will and the regulations of the Jewish community of Lleida.[26]

J. Sibon et C. Denjean described xenophobia that was apparent in Catalonia, where Jews of Aragon who were not originally from Barcelona or Perpignan were regarded in those cities as inferior.[27] Since Jews benefited from exclusive protection of the king in exchange of a fixed tax,[28] they were interested in ensuring their position, so the policy of Christian authorities who divided between *judei extranei* and Jewish citizens was indirectly influenced by local Jewish community.[29]

The Jewish Foreigners

Although paying much attention to foreign Jews, their capacities and incapacities, Aderet did not attribute to them a specific title. Rather, he called them "*shelo hayu mibney hair*" – "those who were not sons of the city".[30] Baer cites a lengthy Jewish *taqana* (a list of community regulations) which was approved by King Pedro III in Figueras in May 6, 1285.[31] This text says that Jews living in particular communities should pay taxes with the community they belong to. Those who leave their communities and join some other *aljamas* for a time should not be obliged to

21 M. Sánchez Martínez, "La fiscalidad catalanoaragonesa y las aljamas de judíos en la época de Alfonso IV (1327-1336): los subsidios extraordinarios", *Acta historica et archaeologica mediaevalia # 3* (1982), 113.
22 ibid., 116.
23 ibid., 116-117.
24 ibid., 113.
25 *Rashba, Responsa attributed to Ramban*, n 272 (2001), 222.
26 ACA, C, Reg. 228, 26v. Com.: Régné, n 3367.
27 C. Denjean, J. Sibon, "Citoyenneté et fait minoritaire dans la ville. Étude comparée des juifs de Marseille, de Catalogne et des Baléares au bas Moyen Âge", *Revue d'Histoire urbaine, 32*, décembre 2011, 90.
28 ibid., 74.
29 ibid., 99.
30 *Responsa of Rashba* (1997), pt 3, no. 406, 220: שלא היו מבני העיר.
31 Baer, *Die Juden im Christlichen Spanien. Erster Teil, Urkunden und Regesten* (1929), 143 – 145.

share taxes with the communities they stay in on a temporary basis.[32] The Jewish foreigners are called "*francos*", i. e. free from paying tax.[33]

This *taqana* demonstrates one of tax-payment principles that were addressed by Yom Tov Assis.[34] As he noticed, all Jewish residents had to pay their share of taxes with the local community. This principle had a significant impact on the community's emigration policy.[35] Therefore, Jewish communities were very much against the immigration of their members.[36]

Aderet described legal situation of Jewish city residents along with non-Jewish ones. It seems that he saw no considerable difference between their statuses.[37] Jews in Spain possessed in turn the right to lay down a number of conditions related to Jewish newcomers. In most cases addressed in *responsa*, the groups of Jewish foreigners were represented by merchants. Also there are a few examples of scribes, butchers,[38] those responsible for circumcision and sometimes even rabbis hired by the community. Nahmanides in his letters tells how they were appointed: a Jewish community chose ten representatives who took the responsibility for selecting a scribe and a butcher and made an oath with regard to their choice.[39] It should be noticed that normally the job of a butcher or a scribe was inherited by a son from his father, but, if none of them was available, the community was allowed to elect "a foreigner". In a few cases, migration was caused by poverty. In January 28, 1284/1285, Bellhom Levi, a Jew of Besalú, who had by that time the status of "hostage" – a debtor who was obliged to reside in a limited area until his debt is repaid, was given a permission to leave his city.[40] The restrictions imposed on him were lifted by the infant don Alfonso on a temporary basis. Migrations were caused, among other things, by court's decision, as it happened in 1312 with a number of Jews of Tarragona.[41] They were condemned by the archbishop in aiding two Christians to accept Judaism, and then sentenced by the king to banishment and confiscation of their property.[42] In such cases, expelled Jewish population could possibly try to join some other community.

Jews in Aragon were subjected both to the royal power and to the authority of community leaders. Although normally Jewish communities enjoyed administrative autonomy, any conflict between a Jewish individual and a community could

32 ibid,145.
33 Régné, *op. cit*., vol. 1, 229, n 1267; 125, n. 691; 139, n. 770; 151, n 836; 314, n. 1742;
34 Y. Assis, *Jewish Economy in the Medieval Crown of Aragon: Money and Power* (1997), 80-85.
35 ibid., 135.
36 ibid.
37 *Responsa of Rashba*, pt 1, n. 83 (1997), 49.
38 *Responsa of Ramban,* n. 77: ושאלתא בבני העיר שקבלו עליהם בשבועה טבח וסופר.
39 ibid.
40 ACA, Reg. 62, f. 119 v.; Régné, vol. 1, 231, no. 1274.
41 Baer, *Die Juden im christlichen Spanien*, Erster Teil *Urkunden und Regesten,* vol. 1, 202.
42 N. Roth, *Conversos, Inquisition, and the Expulsion of the Jews from Spain* (2002), 213.

get the king's officials involved. In May fifteenth, 1283 Don Alfonso annulled the decision of the Jewish community of Alagón to expel a number of Jewish butchers and to prohibit their work in the city for four years.[43]

Although the period of time defined by the Jewish tradition for a person to be considered a foreigner in a particular city were 30 days, Aderet permitted to a foreigner to keep his status for a longer period of time if his family stayed in another place and did not move with him.[44] He comes to an important conclusion: the status of Jewish city residents (permanent and temporary ones) should be defined not so much on the basis of the Talmud, but rather according to local regulations (apparently non-Jewish) that differed from place to place.[45]

The Tax Status of Jewish Citizens vis-à-vis Jewish Foreigners

The major difference between Jewish citizens and Jewish foreigners in Aragonese cities involved the issue of taxation. Jewish residents were obliged to pay taxes, while foreigners were not. Jews in Aragon paid regular and irregular charges to the crown, their complexity being comprehensively treated in bibliography.[46] C. Guilleré pointed to the fact that royal taxation policy had a disproportional impact on Jewish population.[47] This idea was developed by Y. Assis who underlined that being only a small fraction of the society, Jews paid a considerable part of tax amount.[48] Jews of Aragon faced heavy tax burden, sometimes intolerable.[49] However, M. Sánchez Martínez argued that Jewish communities in the first half of the fourteenth cent., with rare exceptions, were not exposed to financial disaster due to excessive taxation.[50]

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43 Régné, 192, n 1066.

44 *Responsa of Rashba,* pt 1, n 1213 (1997), 547

45 *Responsa of Rashba,* pt 1, n 1213 (1997), 547

46 I. Epstein, *The Responsa of Rabbi Solomon ben Adreth of Barcelona, 1235-1310, as a source of the history of Spain: studies in the communal life of the Jews in Spain as reflected in the Responsa, and the Responsa of Rabbi Simon b. Zemah Duran, as a source of the history of the Jews in North Africa,* (1968), 8; Y. Assis, *Jewish Economy in the Medieval Crown of Aragon, 1213-1327: Money and Power* (1997) 133-152; M. Sánchez Martínez, *Le système fiscal des villes catalanes et valenciennes du domaine royal au has Moyen Âge* (1999), 20-29; C. Guilleré, "Les Juifs de Gérone au milieu du XIV^{e} siècle", *Temps i espais de la Girona Jueva, 23-25 mars 2010* (2011), 175-204; C. Soussen, *"Judei nostri". Juifs et chrétiens dans la Couronne d'Aragon à la fin du Moyen Âge* (2011), 80-85; C. Denjean, J. Sibon, "Citoyenneté et fait minoritaire dans la ville. Étude comparée des juifs de Marseille, de Catalogne et des Baléares au bas Moyen Âge", *Revue d'Histoire urbaine, 32,* décembre 2011, 74-75.

47 C. Guilleré, "Les finances de la Couronne d'Aragon au début du XIV^{e} siècle (1300-1310)", *Estudios sobre renta fiscalidad y finanzas en la Cataluña bajomedieval* (1993), 505-506.

48 Y. Assis, *Jewish Economy in the Medieval Crown of Aragon, 1213-1327: Money and Power* (1997), 133.

49 C. Soussen, ibid., 95'.

50 M. Sánchez Martínez, "La *fiscalidad catalanoaragonesa* y las aljamas de judíos en la época de Alfonso IV (1327-1336): los subsidios extraordinarios", *Acta historica et archaeologica mediaevalia*, Núm.: 3 (1982), 114.

One text from Téruel (June 6, 1310) demonstrates that Jewish communities also paid a poll-tax calculated according to the property value. This chart says that, as a result of a dispute between the communities of Barcelona, Lleida and Tortosa it was decided that half of a property belonging to each family in those cities was subject to taxation.[51] It is interesting that the poll-tax is relatively rarely mentioned by our sources, instead, the taxes paid jointly often become a matter of discussion,[52] probably because the distribution of payments caused various debates. Therefore it is tax shares that are normally mentioned.[53] An overall amount of taxes was defined by the king, and then payments were distributed within a Jewish community, according to the number of its members and economic value of each household. In case of failure of payment, a punishment was laid upon the entire community without exception for those who paid their share of charges. However, there are examples of personal exemption from this punishment.[54] Such privilege was granted in 1319/1320 to Abraham Albanet and to Jahuda, son of Astrug d'en Bonsenyor of Barcelona.[55]

Aderet's *responsa* permit to add some details to this picture. Paying taxes was an inevitable condition in order to actively participate in community life. Only Jewish taxpayers were allowed to elect community representatives and to be elected, according to royal regulations issued by James II for the Jews of Hueska in August 12, 1313.[56] Aderet in his letters says that city residents are entitled to issue regulations concerning *middot* (taxes), gates, the salary of hired workers, and transportation within the city limits.[57] The city residents had the right to elect ten representatives in order to hire a butcher and a scribe. They also could appoint one or more judges.[58] Jews living in city quarters where the army stayed, were obliged to feed soldiers, fund war campaigns, pay for king's horses[59] and the like.

However, the right of tax exemption was considered to be an important liberty, and Jews living in Catalan cities on a temporary basis tried to benefit from this opportunity as much as possible. They relied on both Jewish law and royal

51 ACA, C, Reg. 206, 124v-125r. Com.: Régné, n 2909.
52 Régné, vol. 1, n 119, 120, 166, 167, 169, 170, 508, 684, 948, 3020, etc.
53 ibid., n 107, 1621.
54 Régné provided commentary on a document of which unfortunately I haven't found the original, dated 1315. This text deals with a Jewish physician from Barcelona who was allowed to leave the Jewish quarter of the city in order to meet his non-Jewish patients, provided that he had paid his share of taxes, even if the rest of the community was enclosed within the quarter. See Régné, n 3020.
55 ACA, C, Reg. 217, 242v et 262v.
56 ibid., 198, n 2976.
57 *Responsa of Rashba,* pt 5, n 164 (based on *BT Baba Batra* 8), (1998), 99.
58 ibid., 4, n 308.
59 Régné, vol. 1, n 948.

acts in order to confirm their exoneration. Talmud proposed a one-year term[60] after which a Jew would become a city resident being obliged to pay all taxes and duties as any other full community member. In this case, king's role was sometimes crucial, because he was able to grant a longer period of tax exemption than one year offered by Talmudic law. The letters of tax non-solidarity were issued or confirmed by the crown.[61] In April, 1320, James II permitted to Abraham of Castlars and Jahiel of Castlars – both Jews of Besalú to move to another place without an obligation of paying taxes during 15 years.[62]

Sometimes Latin texts reflect the legal status of Jewish foreigners as it was formulated by Talmudic and post-Talmudic tradition. By an act signed in Lleida in November 27, 1259, James I obliged any Jewish foreigner after spending one year in Lleida to share payment of taxes with the the community.[63] By another chart dated June 1, 1305, James II, taking into account that some Jews only migrate in order to avoid paying royal charges, decided that a foreigner could only become a resident in a city if he brings there his family and participate in Jewish holidays, celebrations of marriage and circumcision.[64]

Disputes on Taxation Issues between Jewish Residents and Foreigners

The major contradiction between citizens and foreigners was due to the problem of taxation. Jewish communities were interested in making foreigners share the burden of taxes. Foreigners, in turn, would like to benefit as long as possible from tax exemption. Jewish law provided a clear and simple principle: the property of a person could only be taxed in the place where it was kept.[65] If a man lived somewhere having his property outside, the tax was collected in the city where the property was found. If a person could not pay his taxes due to his absence, one could collect the amount of his taxes later from him or from his heirs after his death. Meanwhile his duties were paid by the community who calculated his debts. It is evident that this situation was uncomfortable for Jewish communities.

Taxes varied not only from country to country (or, more precisely, from one feudal domain to another), but also from city to city. Aderet recognized that taxation was not a matter of the Jewish law but rather a domain of local customs

60 *BT, Baba Batra*, 8a.
61 Régné, op. cit., n 2969, 197.
62 ACA, C, Reg. 218, 27r. Com.: Régné, n 3128. Pub.: Baer, n 173, 214.
63 ACA, C, Reg. 10, 121v. Com.: Jacobs, Joseph, An Inquiry into the Sources of the Jews in Spain, (1894), 14, n 172a; Régné, n 122.
64 ACA, C, Reg. 203, 31v-32r. Com.: Régné, n 2841.
65 *Responsa of Rashba* pt 5, n 178 (1998), 109: דאין פורעין מס בשום מקום, על ממון הקבוע לאדם שיש לו במקום אחר.

and various community regulations and agreements.[66] Although in principle a poll tax was supposed to be calculated depending on the number of the Jewish community members, in practice a lord or a city council were able to require an amount of the duties fixed as they liked. It becomes evident from a letter of Isaac ben Sheshet (d. 1408) that certain community members were exempt from taxes on the basis of a personal agreement with the community. In this particular case it was a cantor of Alcalá for whom tax exemption was established by the community judges (*berurim*).[67] Such an exemption did not require any written agreement.[68]

Aderet treated similar issues in a number of letters. One of them is an answer to a question from an unknown community which asked if they were allowed to sue and even enslave Jewish foreigners refusing to pay taxes together with all the Jews in their city.[69] They referred to the ban placed upon those foreigners by the community judges. What is interesting about this question is the fact that women were mentioned as tax payers along with men.[70] However, Aderet's decision was prohibitive. He answered that the community was not allowed to compel foreigners to pay taxes outside of their city of residence.[71] He relied upon the liberty of non-Jewish governors to tax their Jewish subjects. Any person residing in a particular city was subject to the city lord. One of such lords is called "knight" by Aderet.[72] He noticed that although the borders used to change, the right of non-Jewish rulers of collecting taxes from their Jewish subjects was guaranteed by their power. He added that if Jewish foreigners owned a house in a particular city, but the rest of their property was far away, the community could not tax the entirety of their belongings. Only the property which was found within the city was subject to taxation.[73] This last text provides a better understanding of the difference between "sons of the city" (*bnei ha-ir*) and those who only had a house or an apartment in the city (*ha-darim ba-ir*). The entirety of the property belonging to "*bnei ha-ir*" was taxed, while "*ha-darim*" only paid duties related to a part of

66 *Responsa of Ribash*, n 477. Here Isaac ben Sheshet brings forward a response by Solomon Aderet dealing with a debt of an unknown community, where he says: כל ענייני המסין, אני רואה: בכל מקום ומקום, הולכין אחר המנהג, לא על פי הדין הגמור.

67 *Responsa of Ribash, n* 476: שאם התנה החזן עם הברורים הראשונים, שיהיה פטור מן המס.

68 ibid.: ויש בזה עדים.

69 *Responsa of Rashba* pt 1, n 664 (1997), 325. שאלת אם יכולין אנשי העיר לשעבד איש או אשה מעיר אחרת וממלכות אחרת ועוסקין בארצם בנדוי או בחרם שיפרע במס מה שהם גוזרין עליהם אם לאו. "You asked if the city residents could enslave a man or a woman from another city or from another kingdom, and in their land those people deal with a ban or excommunication [imposed in order to make them] pay tax which was fixed for them, or not?"

70 ibid.

71 ibid.: דכל שאינו בן עירם ואפילו הוא ממלכותם אינו חייב לתת בשום דבר עם אנשי עיר אחרת.

72 *Responsa of Rashba* pt 1, n 626 (1997), 310: עוד השיב בדבר אחר מן הפרש שהוא אדון לכל בני העיר.

73 ibid.

their belongings. Therefore, one may argue that the words "sons of the city" refer to citizens while the term "ha-darim" applies to residents.

Other Concerns Related to Civic Status

The cases when a foreign Jew dwelling in a certain city was taken captive created a huge issue. In this case, it was not the community of his native city, but the community where he lived that was obliged to redeem him by paying a ransom. Aderet's correspondences reflect the anxiety of an unknown community which did not wish to risk money for a person who never really belonged with them. They asked if there was any possibility to make that foreign Jew once released from captivity share taxes with the community which saved him.[74] Aderet was strict in his judgment declaring that the law provided no ways of taxing a foreign person in a city where he had no property, even if he lived there briefly.[75]

The matter of jurisdiction was another problematic issue. In principle, Jewish judges appointed by the community were entitled to sue any Jew residing in the city to which that community belonged. However, any verdict delivered by local judges was only valid within their city of residence having no value outside the city.[76] That's why there was always a possibility to escape the judgment by leaving the city where trial was held. *Responsa* proposed a number of solutions for these issues. Aderet described the custom existing in his native city of Barcelona where the local community used to prevent Jewish foreigners from commercial activities lest the city residents lose their profit.[77] If merchants from other cities still wanted to do business in Barcelona, they had to become citizens and pay taxes in Barcelona.[78] The same practice was mentioned in a letter of Isaac ben Sheshet who spent a few years in Barcelona.[79] This author says that anyone who spent more than twelve months in a city becomes "a son of the city" regardless where his family stays.[80] This ruling also seems to be influenced by Barcelonian usages.

Belonging to a particular community granted to a person protection of interests in disputes with members of other communities. However, there was a strong conviction that some laws apply regardless local regulations. In one of

74 *Responsa of Rashba* pt 1, n 788 (1997), 396.

75 ibid.: אבל כאן שלא תבעו ממנו כלום בפרט אלא בכלל לאנשי העיר סתמא דמילתא אינו תובע אלא לפי ממונו.

76 *Responsa of Rashba* pt 1, n 664 et al.

77 ibid.: שבתחילה מתרין אותם שלא יתעסקו בגבולם מפני כי לולי הם יתעסקו ויסחרו בני העיר הזאת ויהא להם ריוח וטוב הארץ.

78 ibid.: ואם ירצו להתעסק שם יהיו כאחד מהם ויפרעו עמהם מס לפי הממון שמתעסקים שם אבל לא על כל אשר להם.

79 *Responsa of Ribash,* n 132: עוד כתבת, כי הקהל עשו הסכמה בכח חרם ונדוי, וקיימוה כלם שכל מי שיבא לדור בכאן עם הקהל, שיתחייב לפרוע עמהם בכל הוצאותיהם וצדקותיהם, במסים ובכל צרכיהם.

80 *Responsa of Ribash,* n 132, this text deals with a foreign merchant living most likely in Barcelona who betrothed a woman in another city:

his *responsa* Rashba described a debate between a Jew from Monzon and his fellow Jew from Lleida concerning a loan guaranteed by the real estate situated in Monzon.[81] His debtors refused to pay saying that there is a law in Monzon preventing the creditor from having his money back. According to that law, anyone buying a land or a house in the city was obliged to send a notification to the synagogue. Then anyone who could claim his rights for the purchase should come to the *berurim* during next fifteen days, after which the buyer or heir was considered to be in full right of possession. The creditor renounced the validity of this ruling in his case, as he did not belong to the community of Monzon, therefore he was not acquainted with the law. The judges contacted Rashba in order to resolve the issue. Aderet decided in favor of the creditor. In his opinion, the rules concerning loans applied regardless of the citizenship and local regulations, therefore the debt must be repaid in any case.[82] He also wrote that local rules referred exclusively to the Jews living in the community which instituted those rules.[83]

Aderet's *responsa* contain a number of examples showing resistance of Jewish communities against the attempts of its members to leave the community, since this could make the burden of taxes heavier for those who stayed. A question sent to Rashba from the city of Zaragoza dealt with a fee imposed upon Jews who married their daughters or sisters to foreigners. This local custom is described as follows: since there was a rule to make Jews leaving Zaragoza pay their share of taxes before depart, the community decided to establish the same regulation for those whose female relatives married someone who did not belong to the community of the city. In this case, a father or a brother of a girl leaving the city had to pay to the community an amount equal to her dowry.[84] This innovation provoked strong objections, causing a debate with a Jewish man who married his daughter to a foreigner. This father refused to pay the aforementioned fee to the community using as an argument the fact that the ceremony of marriage took place in the city of Zaragoza,[85] and not outside the city walls. The issue was delivered to Aderet who decided that the father was right. This text shows, among other things, that the share of taxes paid by Jewish individuals was at times not a fixed sum and could be modified not only on demand of Christian authorities, but also by the will of local Jewish community leaders.

81 Responsa of Rashba (from manuscript), pt 6, n 277, 48.
82 ibid.: דמשורת הדין הוא קודם וגובה ממנו.
83 ibid.: אין להם לתקן על מי שאינו מבני עירם.
84 *Responsa of Rashba*, pt 3, n 406 (Jerusalem: Machon Yerushalayim, 1997), 220.
85 ibid.

Conclusion

Neither Hebrew texts, nor Latin sources in medieval Aragon use the term "cives" as referring to Jewish population. However, *responsa*, although bound by sometimes narrow wording of Talmud, dealing with categories like "sons of the city" apply that wording to both Jews and non-Jews. In addition to this, instructions of renowned Jewish experts like Rashba on the status of full community members were aligned with local socio-economic and judicial practices based upon the concept which was very close to that of "cives".

Documents written in Latin from the archives of Barcelona, primarily from the reign of James II of Aragon give us a better understanding of the status enjoyed by Jewish foreigners living in Catalan cities in the first half of the fourteenth century. This status represented a combination of legal norms derived from civil law and Jewish tradition starting from the Talmud. It is interesting that, concerning legal and social conditions of foreigners, documents of non-Jewish origin sometimes even repeat Hebrew ones showing that Christian authorities were able to accept requirements of Jewish tradition on that matter. At the same time, all the regulations concerning collection of taxes, their amounts and types, individual or collective exemptions were defined by Christian rulers and officials leaving no space for debate among Jews.

The legal status of foreigners was formulated *ex adverso*: they possessed certain rights, obligations, capacities, and incapacities that assigned them to a separate social group due to the fact that they did not acquire full membership in the Jewish community of a given city. Their distinctive name in Hebrew was "those who are not the sons of the city".[86] They were called *francos* because they enjoyed exemption from taxes outside their home and were free to circulate, unlike the locals who, as Y. Assis said, were rendered prisoners of their own community.[87] Both Jewish communities and the king in the late thirteenth to early fourteenth cent. were interested in acquiring new taxpayers, therefore they provided legal options for a period of adaptation to requirements of a new *civitas*, after which Jewish foreigners were compelled to join the list of citizens.

86 שאינם בני העיר.

87 Y. Assis, *Jewish Economy in the Medieval Crown of Aragon: Money and Power* (1997), 135.

LES MURS DE LA FOI : LES FRONTIÈRES IDENTITAIRES DANS LES QUARTIERS MUSULMANS ET JUIFS DE LA CASTILLE MÉDIÉVALE*

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La création, à la fin du XV^e^ siècle, de quartiers spécifiques (*apartamientos*) pour les juifs et les musulmans illustre la volonté politique de ce temps consistant à distinguer les minorités confessionnelles pour éviter le « *vivir a vueltas con los cristianos* ». La délocalisation des quartiers juifs et musulmans ainsi que la construction de murs contraints illustre bien la manière par laquelle la société chrétienne avait, à la fin du Moyen Âge, fini par se représenter les minorités juives et musulmanes, désormais conçues comme dangereuses et devant être isolées. En plusieurs lieux, ces murs et ces portes demeurent encore visibles dans la topographie urbaine. Néanmoins, l'idée selon laquelle ces vestiges témoigneraient d'une réalité stable pendant les siècles médiévaux nous paraît plus servir des intérêts touristiques et politiques que témoigner de la réalité historique.

En arrière-plan de ce sujet figure le mythe de la *convivencia*, et de la construction de l'altérité[1]. Il est de fait difficile d'écrire sur les juifs et les musulmans des royaumes hispaniques médiévaux sans devoir composer avec le problème de la *convivencia*. Ce concept fut créé par Américo Castro en 1948, dans un passage de *España en su historia* traitant des relations entre chrétiens, juifs et musulmans. En réalité, il ne constituait qu'un prétexte pour disserter sur « l'Espagne éternelle » et l'originalité de son identité hybride, fruit d'une fusion des éléments chrétiens, musulmans et juifs[2]. Bien que Castro n'ait nulle part utilisé le terme de

* Cette publication est réalisée dans le cadre du projet de recherche RELMIN, « Le statut légal des minorités religieuses dans l'espace Euro-méditerranéen, (V^e^-XV^e^ siècle) ». La recherche qui a abouti à cette publication a été financée par le Conseil Européen de la recherche sous le septième programme cadre de l'Union Européen FP7/ ERC contrat n°249416.

1 La bibliographie sur le sujet est très abondante, entre autres : J. V. Tolan, *Saracens. Islam in the Medieval European Imagination*, New York, 2002 ; R. Chazan, *Fashioning Jewish Identity in Medieval Western Christendom*, 2004, 91-122 ; C. L. Tieszen, *Christian identity amid Islam in Medieval Spain,* 2013.

2 Notons que cette vision fut contestée par Sánchez Albornoz, lequel minimisa l'influence des musulmans et des juifs dans la création de la nation espagnole A. Castro, *España en su Historia : Cristianos moros y judíos*, 1983 [1re édition, 1948], 41-61 ; C. Sánchéz Albornoz, *España, un enigma histórico*, Barcelone, 1965 [1re édition, Buenos Aires, 1956], vol. I, 99-100.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 233–258

 DOI 10.1484/M.RELMIN-EB.5.111601

convivencia pour décrire les relations harmonieuses entre les trois confessions, le concept prit par la suite ce sens idéal et irénique[3]. Il fut ainsi, dès les années 1960, repris par de nombreux auteurs. Chez Thomas Glick se développa l'idée qu'il y avait eu acculturation et coexistence, cependant ternies par des moments de tensions dans la vie quotidienne. Il évoque une forme de « *stabilized pluralism* », qui aurait demandé un effort social collectif de la part des membres des différents groupes ethniques[4]. Ron Barkai propose quant à lui une vision dynamique de cette coexistence, par l'analyse des politiques menées envers les minorités entre le XIII[e] et XV[e] siècle[5]. De nos jours, l'idée d'une coexistence idéalisée a été reprise par la monographie de Menocal, laquelle insiste sur la richesse des échanges culturels[6].

Cependant, la plupart des historiens contemporains ont décidé d'en finir avec la *convivencia,* qu'ils ont remplacée par de nouveaux concepts, comme par exemple la *conveniencia* chez Brian Catlos[7]. De nos jours, ce *topos* fait donc l'objet de nombreuses révisions critiques qui lèvent ce voile idéologique[8]. La réaction la plus véhémente provient du milieu des études juives. Ces historiens, profondément marqués par l'Holocauste de la deuxième Guerre Mondiale, ont mis l'accent sur l'intolérance des royaumes chrétiens, en insistant sur la continuité et la stabilité des mécanismes de violence antijuifs[9]. Benjamin Gampel a fondé son analyse à partir des rapports économiques existants entre les diverses communautés. Ces rapports n'empêchaient pas des frictions pendant les périodes de tensions politiques, et des mesures de répression contre les membres des religions dominées,

3 R. M. Menocal, *Ornament of the World. How Muslims, Jews and Christians Created a Culture of Tolerance in Medieval Spain,* 2002, 8-22.

4 Th. Glick et O. Pi-Sunyer, « Acculturation as an Explanatory Concept in Spanish History », *Comparative Studies in Society and History*, 11 (1969), 136-154.

5 R. Barkai, *Chrétiens, musulmans et juifs dans l'Espagne médiévale : de la convergence à l'expulsion,* Paris, 1994 ; T. Ruiz, *From heaven to Earth. The Reordering of Castilian Societies (1150-1350)*, 2004.

6 R. M. Menocal, *Ornament of the Word. How Muslims, Jews and Christians Created a Culture of Tolerance in Medieval Spain,* 2002, 8-22.

7 B.A Catlos, « Contexto y convivencia en la Corona de Aragón : propuesta de un modelo de interacción religiosa entre grupos etno-religiosos minoritarios y mayoritarios », *Revista de Historia medieval,* 12/201(2002), 259-268.

8 F. García Fitz, « Las minorías religiosas en la Edad Media Hispánica ¿mito o realidad ? », in A. García, *Tolerancia y convivencia étnico religiosa en la Península Ibérica durante la Edad Media*, 2003, 13-56 ; J. Ray, « Beyond Tolerance and Persecution : Reassessing Our Approach to Medieval *Convivencia* », *Jewish Social Studies*, 11/12 (2005), 11-18 ; A. Novikoff, « Between Tolerance and Intolerance in Medieval Spain », *Medieval Encounters*, 11/11-2 (2005), 7-36 ; M. Sofer, « Beyond Convivencia : Critical Reflection on the Historiography of the Interfaith Relations in Christian Spain », *Journal of Medieval Iberian Studies*, 1 (2009), 19-35 ; J. Tolan, « Au-delà des mythes de la coexistence interreligieuse : contact et frictions quotidiennes d'après des sources juridiques de l'Espagne médiévale », *Cahiers de la Méditerranée,* 86 (2013), 225-236.

9 Y. Baer, *A History of the Jews in Christian Spain,* 1961, vol. 1, 15-22 ; B. Netanyahu, *The Origins of Inquisition in Fifteenth Century Spain,* 1995.

même si elles ne furent pas toujours appliquées[10]. Bien que l'idée d'une continuité de l'intolérance ait été nuancée dans les années 90 par David Nirenberg, lequel souligne que « la réalité était toujours plus complexe, mêlant des moments de véritables interactions et d'exclusions, c'est-à-dire des épisodes de violences en période de paix », le même auteur souligne la continuité des idées persécutrices chez les théologiens chrétiens et présente un panorama général de discrimination contre les juifs sur trois mille ans d'Histoire[11]. De même, ce dernier propose un modèle explicatif complexe sur la formation des identités à travers le concept de « Neigboring faiths », par lequel il souligne que chaque communauté façonne sa propre identité au voisinage de l'autre[12].

En tout cas, bien que la coexistence physique et matérielle des juifs et des musulmans sous domination chrétienne ait été une réalité dans la Castille du bas Moyen âge, l'utilisation du terme *convivencia* pour définir l'art de vivre ensemble implique *per se* une déformation de la réalité de la période. Dans les *Siete Partidas*, lois subsidiaires en Castille pendant le Bas Moyen Âge à partir de l'*Ordenamiento d'Alcalá* de 1348, l'aptitude des chrétiens à vivre avec les musulmans et les juifs est définie comme une *toleratio*. Il s'agit donc bien de supporter leur présence parmi eux[13].

Dans ce contexte historiographique complexe, nous aborderons la création des quartiers spéciaux. Nous concentrerons notre attention sur le territoire de la Castille et nous placerons dans la *longue durée*, bien que notre intérêt se portera en particulier sur le XV^e^ siècle, à partir des prédications de Vincent Ferrer et des Ordonnances de Valladolid de 1412. Le problème de la périodisation est fondamental afin de relativiser l'idée d'un modèle ségrégatif stable au cours des siècles médiévaux.

Par ailleurs, notre approche discursive s'intéressera prioritairement au rôle des lois et des discours théologiques en arrière-plan des discours idéologico-politiques qui ont conduisirent progressivement à la création de quartiers spécifiques, en tant qu'éléments performatifs de la ville. En d'autres termes, nous établirons une analyse à plusieurs niveaux afin de comprendre les rapports entre la théologie, la fabrication de la loi et ses effets concrets. Le cadre urbain est un espace privilégié pour l'étude des relations entre les diverses communautés[14], et qui

10 B. Gampel, « Jews, Christians and Muslim in Medieval Iberia. *Convivencia* Through the Eyes of Sephardi Jews », in V. B. Mann et Th. Glick, *Convivencia : Jews, Muslims and Christians in Medieval Spain*, 1992, 11-38.

11 D. Nirenberg, *Communities of Violence, Persecution of Minorities in The Middle Age*, 1996, 3-18 ; ID., *Anti-Judaism : the Western tradition*, 2013.

12 D. Nirenberg, *Neighbouring Faiths : Christianity, Islam, and Judaism in the Middle Ages and Today*, 2014.

13 D. Carpenter, *Alfonso X and The Jews : An edition of a Commentary on Partidas 7 :24 « De los judíos »*, 1986, 105.

14 S. Boisselier, « La cohabitation religieuse dans les villes Européens, X^e^-XVI^e^ siècles : quelque remarques préalables », in S. Boisselier et J. Tolan, *La cohabitation religieuse dans les villes Européennes, X^e^-XV^e^ siècles,* 2015, 9-18.

nous permet d'évaluer les rapports existants entre une loi et sa capacité à transformer l'espace et à marquer les identités au travers de la création de quartiers. Les sources interrogées sont surtout d'origine législatives, mais nous les avons confrontées aux documents de la pratique judicaire dans le but de connaître leur niveau d'effectivité.

Légiférer sur la ville castillane : histoire d'une démarche

Les villes fonctionnaient comme des lieux de coexistence entre les membres des différentes communautés, une coexistence bien réglée par les lois propres à chaque communauté et, dans un cadre général, par la législation castillane. À partir de quel moment est-il possible d'attester de l'existence de quartiers séparés, exclusifs et obligatoires, c'est-à-dire d'« *apartamientos* » pour les musulmans et les juifs dans la législation castillane ? Quels conflits furent provoqués par la mise en pratique de cette obligation ?

Le cadre général de la législation municipale et royale avant 1412

A la suite de la conquête chrétienne, les villes se sont réorganisées en fonction de nouveaux critères, ceux de la société féodale où le roi, l'Eglise et les nobles étaient les vecteurs directeurs de la société. Tout d'abord, il est à noter que la formation du droit local médiéval est un processus d'une grande complexité[15]. Les premières lois octroyées afin de réorganiser les villes furent les chartes de population et les *Fueros*[16]. Dans une première période ces lois – *fueros breves* – sont courtes et rédigées en latin. Mais à partir du XIII[e] siècle, les textes – *fueros extensos* – sont plus développés et écrits en *romance*. En ce qui concerne le régime juridique réservé aux juifs et aux musulmans par le droit municipal, il faut remarquer une dissymétrie dans la quantité des lois qui leur sont respectivement consacrées, correspondant à la différence de leurs rôles sociaux respectifs[17]. En effet, ce déséquilibre s'explique par le fait que l'installation des juifs dans les villes reprises aux musulmans était ancienne, et que les autorités désiraient soutenir ces communautés qui se trouvaient dans les espaces frontaliers[18]. À l'inverse, les

15 A. M. Barrero García, M. L. Alonso Martín, *Textos de derecho local español en la Edad Media*, Madrid, 1989, 24-26 ; A. M. Barrero García, « El proceso de formación del derecho local medieval a través de sus textos : los fueros castellanoleoneses », in J. I. de la Iglesia Duarte, *I Semana de Estudios Medievales de Nájera*, 2001, 91-132.

16 T. Muñoz y Romero, *Colección de Fueros Municipales y Cartas pueblas de los Reinos de Castilla y León, Corina de Aragón y Navarra,* 1847.

17 P. León Tello, « Disposiciones sobre judíos en los fueros de Castilla y León », *Medievalia,* 8 (1988), 223-252.

18 J. Ray, *The Sefardic Frontier, The Reconquista and the Jewish Comunity in Medieval Iberia*, 2006, 11-36.

musulmans étaient les vaincus, les ennemis à dominer, et étaient de ce fait mentionnés comme des esclaves ou comme des prisonniers, comme l'illustrent les lois du *Fuero de Medinaceli* (1124)[19].

Pourtant la présence de *mudéjares* – c'est-à-dire de musulmans libres – avant le XIII[e] siècle dans la région de la vielle Castille, est débattue[20]. Miguel Ángel Ladero Quesada soutient que les *mudéjares* de ces villes étaient des immigrés venus de l'ancien royaume de Tolède. Molénat va plus loin en affirmant que, depuis la conquête de Tolède (1085), il ne restait plus aucune population *mudéjar* et que les musulmans installés dans la vieille Castille provenaient de l'immigration de ceux du sud résultant de la conquête castillane de l'Andalousie[21]. Cependant, Ana Echevarría Arsuaga et Serafín Tapia ont mis en exergue la présence de *mudéjares* dans les villes de la Vieille Castille, qui sont arrivés comme captifs et qui, plus tard, se sont converti ainsi que leur descendants[22]. Dans le cas de la Mancha, la présence de *mudéjares* sous domination des Ordres Militaires est mise en lumière par les travaux de Villegas y Almagro Vidal[23].

Avant la conquête de Tolède, les références aux juifs et aux musulmans libres ne sont pas très nombreuses dans les *Fueros.* En ce qui concerne les juifs, ils bénéficient de privilèges octroyés par le roi, comme à Castrojeriz (974). Néanmoins, les références sont plus abondantes à partir du XII[e] siècle. Ceci résulte de l'expansion castillane et de la nécessité de repeupler et réorganiser les nouvelles villes sous domination chrétienne. Ces circonstances expliquent qu'une politique spéciale ait été menée par les rois castillans pour attirer les populations vers ces nouvelles villes en octroyant tant aux musulmans qu'aux juifs des privilèges et des exemptions. Cette politique se cristallisa dans la création d'une loi-type implantée dans plusieurs villes, bien qu'avec de légères variantes. La loi-type la plus répandue fut le *Fuero de Cuenca* (1190) qui fut étendu à plus de cent villes, telles Alcaraz, Alarcos, Zorita de los Canes ou Baeza, entre la fin du

19 T. Muñoz y Romero, « Fuero de Medinacel », *Colección..., op. cit.,* 433-443. Contexte général, F. García Fitz, « *¿De exterminandis sarracenis ?* El trato dado al enemigo musulmán en el reino de Castilla y León durante la Plena Edad Media », dans M. Fierro, F. García Fitz, *El cuerpo derrotado. Como trataban musulmanes y cristianos a los enemigos vencidos (Península Ibérica, siglos VII-XIII),* 2008, 113-166.

20 Sur le mot *mudéjar*, voir E. Lapiedra, « Sobre *ad al-dayan* y *mudayyan* en el discurso histórico literario », *Shark-al-Andalus*, 16-17 (1999-2002), 25-44.

21 P. Guichard et J.-P. Molénat, « Dans al-Andalus, les ulémas face aux chrétiens », in A. Bazzana, N. Bériou, *Un itinéraire historique du Haut Atlas à Paris et à Padua*, *Averroès et l'averroïsme,* 2005, 191-200.

22 A. Echevarría Arsuaga, « La "mayoría" mudéjar en León y Castilla : legislación real y distribución de la población (siglos XI-XIII) », *En la España Medieval*, 29 (2006), 7-30 ; S. Tapia, « Los mudéjares de la Extremadura castellano-leonesa : notas sobre una minoría dócil », *Studia histórica, Historia Medieval*, 7 (1989), 95-126.

23 R. Villegas Díaz, « Acerca de la permanencia de la población musulmana en el Campo de Calatrava », *VI Estudios de Frontera. Población y poblamiento*, 2006, 779-792 ; C. Almagro Vidal, « De nuevo sobre la pervivencia mudéjar en el Campo de Calatrava. El sector sudoccidental », in *VIII Estudios de Frontera. Mujeres y Frontera*, 2011, 29-40.

XII^e^ et la fin du XIII^e^ siècle[24]. Dans tous ces lois municipales, les musulmans et les juifs étaient admis comme des habitants des villes avec les mêmes franchises et privilèges que les chrétiens[25]. Seul le *Fuero de Sepúlveda* établit des différences, comme l'interdiction pour les juifs de posséder des propriétés dans la ville[26].

Il convient de remarquer que dans ces *Fueros,* la tendance générale est l'absence de mention concernant des quartiers spécifiques attribués aux non-chrétiens. En réalité, les juifs et les musulmans libres avaient le droit de vivre parmi les chrétiens et selon leurs propres lois. Parmi les exemples qui attestent ce fait, il faut mentionner le *Fuero de Briviesca* (Burgos) octroyé par Alphonse VII en 1123[27] ou, plus explicite, le *Fuero Viejo de Alcalá* (1135) octroyé par des archevêques de Tolède, dans lequel il était permis aux juifs de choisir librement leur résidence[28]. Toutefois, hors de l'espace castillan, des quartiers spécifiques apparaissent dans les lois, comme dans le *Fuero de Tudela* octroyé à la ville par Sancho le Sage à la suite de la reconquête de la ville en 1118. Dans ce cas, le roi octroie aux juifs le droit de s'installer en centre-ville, près du siège du pouvoir aragonais, dans un quartier entouré d'une muraille, ce qui lui donne l'aspect d'une fortification à l'intérieur de la ville connue comme le « château des juifs ». De plus, le souverain s'engage à respecter les droits de propriété perpétuels qu'ils possédaient dans les quartiers d'avant l'occupation aragonaise et à octroyer d'autres propriétés dans le nouvel emplacement[29]. Cette localisation privilégiée s'explique par la volonté de récompenser la communauté juive de Tudela pour son aide pendant la reconquête de la ville. De leur côté, les musulmans, en tant que vaincus, devaient quitter le centre-ville et s'installer en dehors des murs[30]. L'emplacement de leur ancien quartier a été confirmé par la découverte des vestiges d'une ancienne mosquée juxtaposée au mur de la cathédrale lors de la fouille archéologique de la *Plaza Vieja*[31].

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24 A. M. Barrero García, « La familia de los Fueros de Cuenca », *Anuario de historia del derecho español*, 46 (1976), 83-94.

25 R. de Ureña y Smenjaud, *Fuero de Cuenca. Forma primitiva y sistemática, texto latino, texto castellano y adaptación del Fuero de Iznatoraf,* 1935, 120, I, 10 ; cf. Notice n° 252458, projet RELMIN, http://www.cn-telma.fr/relmin/extrait252458/

26 E. Sáez, *Fuero de Sepúlveda,* Segovie, 1953, 10, titre 12.

27 G. Martínez Díez, « Fuero de Briviesca », *Fueros locales en el territorio de la provincia de Burgos*, 1982, 135-136, n° 15.

28 G. Sánchez, *Fueros castellanos de Soria y Alcalá de Henares,* Madrid, 1919, 305.

29 G. Lopetegui, « Archivo General de Navarra 1150-1194 », *Archivo General de Navarra 1134-1194*, 1997, doc. 39. Notice n° 254421, projet RELMIN, http://www.cn-telma.fr/relmin/extrait254421/.

30 J. A. Lema Pueyo, « Capitulación de Tudela », *Colección Diplomática..., op. cit.,* doc. 91 ; cf. Notice n° 254446, projet RELMIN, http://www.cn-telma.fr/relmin/extrait254446/.

31 L. Navas Cámara, B. Martínez Aranaz *et al.,* « Las excavaciones de urgencia de la Plaza Vieja (1993). Le necrópolis cristiana y nuevos datos sobre la Mezquita Aljama », *Trabajos de Arqueología Navarra*, 12 (1995-1996), 91-174.

De même, sous Alphonse le Sage, il n'existe pas de référence à des quartiers spécifiques ni dans *las Siete Partidas* ni dans les lois des *Cortes*. Les mentions retrouvées relèvent de la législation ecclésiastique, notamment de deux conciles provinciaux. Le premier, le concile de Salamanca (1335), contenait l'interdiction faite aux juifs d'habiter des maisons contiguës aux églises et aux cimetières « parce que Moïse, le Législateur, a prescrit aux innocents de ne pas s'approcher des tentes des pécheurs ». Le second, le concile de Palencia (1388), établit que les infidèles ne pourront pas élire domicile parmi les chrétiens et inversement[32]. Toutefois, les normes d'origine ecclésiastique ne furent pas reprises par les lois séculières de la période, de sorte que les juifs et les musulmans continuèrent à élire domicile dans le centre ville parmi les chrétiens. Malgré tout, elles attestent d'une préoccupation des autorités ecclésiastiques qui devait se confirmer au XV^e^ siècle.

Bien que les quartiers spécifiques ne fussent pas considérés comme obligatoires par les autorités chrétiennes, le regroupement de la communauté était plus commode pour la perception des impôts. De même, leur agrégation autour de lieux de culte et de commerce renforçait le sentiment d'appartenance à une communauté dotée d'une identité propre et d'une certaine autonomie juridique pour ce qui concernait ses matières propres, jusqu'en 1412.

Les « châteaux des juifs », ou les murs permis

La population juive était installée dans la péninsule ibérique depuis l'Antiquité, même si les sources écrites comme archéologiques les plus abondantes datent de l'époque des Omeyyades. L'un des cas les plus connus est celui de Tolède, dont le château des juifs se situait sur la rivière du Tajo, très proche de l'actuel emplacement de la synagogue de Sainte-Marie-la-Blanche. Il est mentionné dans une écriture de 1163 à propos d'un prêt en faveur du juif Isaac ben Abuyusef, lequel donne en garantie la moitié de sa maison située dans le « château des juifs » sur la rivière du Tajo[33]. Nous avons des traces de l'existence de la nouvelle juiverie, dans un document de 1270, à propos de la vente d'une maison placée dans l'*arrabal* des juifs, près de la route entre la nouvelle juiverie, *castillo nuevo*, et la porte de l'ancienne, *el castillo viejo*[34]. À la fin du XV^e^ siècle, le vieux château des juifs, dont ses tours, était presque entièrement détruit. Mais ses limites sont décrites dans un

32 G. D. Mansi, « Concile de Salamanca 1335 », *Conciliorum Nova Amplissima Collectio Sacrorum*, Vénice, 1782, vol. 25, Canon XII, 36, col. 1055 ; « Concile de Palencia 1388 », *Ibid.,* vol. 26, Rub. 5, col. 743.

33 P. León Tello, *Los judíos de Toledo..., op. cit.,* vol. 2, doc. 897 ; cit. J. Passini, « El barrio de Arriasa y tres elementos de la aljama judía de Toledo en el siglo XV : la carnicería, la sinagoga vieja y el castillo de los judíos », *Sefarad*, 68/61 (2008), 48.

34 A. González Palencia, *Los Mozárabes de Toledo*, Madrid, vol. 3, 570, n° 1135 ; J. P Molenat, « Quartiers et communautés à Tolède (XII^e^-XV^e^ siècles) », *En la España medieval*, 12 (1989), 173 : « *en la calle que era adarve, en el adarve llamado "Ueld Elazri", y dicha calle comunica por su principio con la vía que se dirige*

document de 1492 : le château se situait entre les boucheries des juifs et la rue qui descend au Tajo[35]. Au cours des siècles, l'ancien château des juifs fut seulement un des quartiers de la grande juiverie, la *Judería Mayor* qui abritait entre ses murs des autres secteurs : Arriasa, Sofer et Hamanzeit[36]. Mais en dehors des murs de l'ancien juiverie, les juifs s'installèrent à l'Alacava, qui occupait la majeure partie de la *colación* de Saint-Roman et est décrit à partir de documents mozarabes du XIII[e] siècle[37]. Dans le cas de Tolède ainsi que dans d'autres tels que Lorca, Madrid, Cordoue, les chantiers archéologiques entrepris pour le réaménagement de la ville ont mis en exergue la morphologie de ces quartiers entourés de murs et situés en centre ville[38].

En dehors des territoires d'al-Andalous, dans le nord de la vieille Castille, les autorités ont autorisé la création de quartiers et de murailles pour les entourer, ce qui explique leur apparence de forteresses à l'intérieur de la ville et l'emploi du qualificatif « château des juifs ». Dans les années 1980, ils ont été identifiés par León Tello dans trente villes castillanes à partir de documents d'archives[39]. Cependant, la liste n'est pas exhaustive et il conviendrait d'étudier les 177 juiveries localisées dans la vieille Castille par une monographie spécifique pour une meilleure compréhension de ce type d'établissement. Dans les documents, ils sont évoqués par deux dénominations fréquentes : *castro iudeorum* ou *castellum ioudeorum,* qui font référence à l'existence d'un espace fortifié[40].

Parfois, l'existence de murailles fut le résultat de violences et de révoltes contre les juifs, comme à Castrillo de Matajudíos, pendant le règne de Sancho III Garcés dit le Grand. Ce quartier se constitua à la suite du déplacement des juifs de Castrojéreiz vers un endroit sécurisé, après qu'une attaque de chrétiens se fut soldée par la mort de soixante-neuf juifs[41]. De même, le « château des juifs » de la ville de Cea fut créé après des violences contre les juifs commises après la mort d'Alphonse VI par les habitants de la ville et des villes voisines telles que

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desde nuestra "sueca" hacia el adarve sin salida conocido por Adarve del Olivo », y por su fondo comunica dicha calle con la vía que se dirige de la puerta de nuestro castillo nuevo a la puerta del castillo viejo. »

35 León Tello, *Los judíos de Toledo..., op. cit.*, vol. 1, doc. 97, 619 ; J. Passini, « El barrio de Arriasa... », *op. cit.,* 48.

36 J. Passini, *La juderia de Toledo*, 2011, 16-64.

37 A. González Palencia, *Los Mozárabes..., op. cit.*, docs. 674, 1141, 1147, 1148, 1149, 1151 ; planimétries dans J. Passini, *La juderia..., op. cit.,* 65-79.

38 J. Gallardo Garrido et J. A. González Ballesteros, *La judería del castillo de Lorca en la baja edad Media, estudio arqueológico,* 2009 ; E. Andreu et V. Paños, « Nuevas perspectivas de la ubicación de la judería medieval de Madrid : evidencias arqueológicas », *Revista Historia autónoma*, 1 (2012), 53-72.

39 P. León Tello, « La estancia de judíos en castillos », *Anuario de Estudios Medievales,* 19 (1989), 451-468.

40 H. Diament, *The Toponomastic Reflexes of Castellum and Castrum : a Comparative Pan Romanic, Study,* 1972, 80.

41 J. A. Lema Pueyo, *Colección diplomática de Alfonso I de Aragón y Pamplona (1104-1134)*, 1990, vol. 27, 384 ; cf. Notice n° 252386, projet RELMIN, http://www.cn-telma.fr/relmin/extrait252386/.

Carrión et Saldaña. Ces hommes furent pardonnés en 1127 par Alphonse VII qui demanda également la création d'un quartier protégé dans un document de 1166[42].

Dans le cas de León, les juifs s'installèrent originellement dans le *Castro Iudeorum* localisé tout près, à Puente Castro, lieu qui fut détruit en 1196 après les campagnes de Pedro II d'Aragon et d'Alphonse VIII de Castille contre Alphonse IX de León. En résultèrent la destruction de la synagogue, de la forteresse et des maisons ainsi que la capture de prisonniers juifs. Ceux d'entre eux qui demeurèrent sur place s'installèrent dans la ville de León, dans le quartier de Sainte-Anne. La description la plus détaillée de cet évènement est celle de Yosef ben Sadiq d'Arévalo vers 1468[43]. Il atteste qu'un an après sa destruction, Alphonse IX de León donnait ce lieu à la cathédrale et aux évêques de la ville : « *...iure hereditatio castro iudeorum cun sua uilla, sutum super ripam de Torio iuxta Legionem et omnes terras tan cultas quam incultas ad iudeos pertienentes* »[44]. Récemment, des travaux archéologiques ont mis en lumière l'existence de vestiges juifs dans le *Castro Iudeorum* non seulement à partir des pierres tombales du cimetière, mais aussi des maisons et des céramiques datant du haut Moyen Âge[45].

Mais la violence n'explique pas toujours la construction de murs, d'autant plus qu'elle n'était pas fréquente pendant les premiers siècles de l'expansion castillane. Par exemple, les juifs purent être en charge de la défense et de la maintenance de différentes villes castillanes comme à Calatrava pendant le royaume d'Alphonse VIII[46], à Burgos[47] où Hita. La présence de juifs dans la forteresse d'Hita fut la conséquence de la donation par Pedro I[er] du château à Samuel Leví, en tant qu'entrepôt pour les richesses de la Couronne. Mais la population juive s'installa dans le centre ville, parmi les chrétiens, comme en attestent l'inventaire de Osuna qui fut réalisé à la demande du Duc de l'Infantado après l'expulsion de 1492[48]. Les *Fueros de Castilla* (1248) contiennent une mention de la présence de juifs dans les châteaux. Il s'agit de la loi 217 qui leur ordonne de remettre les clefs du château au *merino* royal afin d'empêcher la fuite de criminels refugiés dans la

42 J. Rodríguez, *Las juderías en la provincia de León*, León, 1976, 352-353 ; P. León Tello, « La estancia... », *op. cit.,* 454.

43 E. Cantera Burgos, *El libro de la Cábala. Un fragmento histórico de José ben Zadic de Arévalo,* Salamanque, 1928, 33-53 ; Y. Moreno Koch, *Dos crónicas hispano-hebreas del siglo XV*, 1992, 47.

44 Archivo de la catedral de León, nº 1073 (13 juillet 1197) ; cité par J. González, *Alfonso IX*, 1945, vol. 2, 153-155, nº 105.

45 J. Castaño et J. L. Avelló, « Dos nuevos epitafios hebreos dela necrópolis de Castro de los judíos (Puente Castro) », *Sefarad*, 61/62 (2001), 299-318 ; R. Martínez Peñín, « La producción cerámica medieval del "Castro Iudeorum" (Puente Castro, León) », *Arqueología y territorio medieval*, 14 (2007), 163-208.

46 A. ben Davis, *Séfer ha-Kabbalah*, in J. Bagés Tarrida, *Libro de la tradición*, 1972, 73.

47 P. León Tello, « La estancia... », *op. cit.,* 455.

48 F. Cantera Burgos et C. Carrete Parrondo, « La judería de Hita », *Sefarad,* 32 (1972), 249-305.

ville et de punir d'une amende les juifs qui avaient ouvert la porte, permettant ainsi à ces derniers de s'échapper[49].

La règle générale suivie jusqu'au XIV^e^ siècle par les rois castillans fut en somme de favoriser l'installation des juifs dans les centres urbains sans les contraindre à habiter entre les murs de leur quartier. En fait, la présence de murs apparaissait plutôt comme le résultat d'une licence concédée aux communautés juives de vivre selon leur Loi. Cela impliquait l'existence de quartiers ethno-religieux fondés sur l'appartenance commune à une mémoire fondatrice et à des lois propres spécifiques reconnues par les autorités de la ville. Ainsi, afin de protéger leur identité et leurs intérêts, une grande part des domiciles juifs ont été placés près des synagogues et de leurs commerces pour faciliter la vie quotidienne. La muraille autour du quartier pouvait donc s'expliquer pour des raisons internes à la communauté. En effet, dans la tradition juive, le calendrier est un marqueur de l'espace. Les jours de *Shabbat* sont des temps sacrés consacrés au repos et à la prière. Cette sacralisation de la vie exigeait la délimitation d'un espace domestique privé, puisque la circulation des personnes en dehors de ce cadre était interdite, de même qu'il était prohibé de porter des enfants, des objets ou de la nourriture en dehors de la maison, consacrée au repos. À cause de ces restrictions, la vie était complexe et, afin de la faciliter, dans les anciens quartiers juifs, les maisons qui partageaient une cour pouvaient être considérées comme des espaces privés grâce à la fiction juridique de l'*erouv*[50]. Celle-ci est fondée sur un traité de Talmud connu comme *Erovin,* un traité sur le vivre ensemble et les échanges permis entre les espaces publics et privé. En ce sens, les murs autour des quartiers juifs étaient conçus comme un moyen d'assimiler un faubourg enclos à un domaine privé afin de lever les interdits dans le territoire circonscrit[51].

Enfin, à Tolède, bien que, lors de la guerre civile entre Pierre I^er^ de Castille dit le Cruel et Henri II Trastámara, la *Judería Mayor* – alors partisane du roi Pierre I – resta inattaquable grâce à ses murs, elle ne résista pas. En effet, selon le récit du chroniqueur Pedro López d'Ayala, elle fut l'objet d'attaques venues des partisans d'Henri en 1354. Cet acte provoqua la réaction de Pierre I^er^ qui vint à secours des juifs et grimpa les murs du quartier grâce à des cordes que ces derniers avaient installées[52]. Après la victoire finale d'Henri, il fut ordonné à l'évêque Gómez Manrique de démolir une partie des murs et de bâtir des portes afin de maintenir le contrôle du quartier[53]. Les lois des *Cortes de Burgos* de 1367

49 G. Sánchez, *Libro de los Fueros de Castilla*, 1924, 113, loi 217.

50 I. J. Yuval, *Deux peuples dans ton sein*, 2012, 94.

51 S-A. Goldberg, « De la Bible et des notions d'espace et temps. Essai sur l'usage des catégories dans le monde ashkénaze du Moyen Âge à l'époque moderne », *Annales. Histoire, Sciences Sociales*, 52/55 (1997), 987-1015.

52 P. López de Ayala, « Crónica del rey don Pedro », in G. Zurita, *Crónica de los Reyes de Castilla*, 1799, vol. I, 184.

53 P. León Tello, *Los judíos de Toledo,* 1979, 157-158.

reprirent cette ordonnance en interdisant aux juifs d'entourer leurs quartiers de murs. Les autorités castillanes considéraient l'existence de murs à l'intérieur de la ville comme un phénomène dangereux car ils isolaient le quartier et rendaient incontrôlables les activités des juifs, ce qui rendait les révoltes possibles.

La dispersion des musulmans dans les villes castillanes

Le droit musulman, également autorisé par les autorités castillanes pour la réglementation interne des communautés *mudéjares,* ne possédait pas de normes aussi rigides que celles des communautés juives autour la sacralisation des espaces de vie. Mais en règle générale, la concentration des musulmans dans les villes était tout de même plus importante autour de leurs mosquées et de leurs commerces. Ils étaient cependant autorisés à vivre parmi les chrétiens, même au centre-ville, ce qui dépendait seulement de leur capacité économique. L'inexistence d'un quartier réservé aux musulmans est bien attestée à Tolède. Après la reconquête de la ville en 1085 et jusqu'au XIII[e] siècle, il existait plusieurs mosquées et maisons appartenant à des musulmans au centre-ville, comme il apparaît dans le recueil de documents notariés écrits en arabe, édités et partiellement traduits par González Palencia. Cette riche documentation atteste, notons-le au passage, de la transformation de plusieurs mosquées en églises entre le XII[e] et le XIII[e] siècle[54]. L'abattoir des musulmans lui-même était placé en centre-ville, près de la cathédrale, entre l'église de Saint-Justo et les bains du Caballel[55]. Des vestiges de maisons musulmanes apparaissent dans les chantiers archéologiques, tant en centre-ville qu'en dehors des murs, dans les quartiers en expansion. Quoiqu'il en soit, comme le souligne Molenat, il n'a jamais existé à Tolède de quartier musulman, et les occurrences du terme *morería* ne sont apparues qu'au XIV[e] siècle[56].

Le premier cas de quartier réservé aux musulmans dans une ville castillane découla d'une loi octroyée par Alphonse X en 1266 aux *mudéjares* de Murcie en réponse à leur demande de protection après la révolte de 1264[57]. Dans ce contexte, il leur fut octroyé le privilège de bâtir une muraille afin protéger la communauté de possibles attaques[58], ainsi que des portes dans le quartier de l'Arrixaca (les portes

54 A. González Palencia, *Los mozárabes de Toledo en los siglos XII y XIII*, Madrid, vol. 3, docs. 898, 160, 738, 314, 417.

55 C. Delgado Valero, *Toledo Islámico*, Tolède, 1987, 90 ; J. Passini, *Casas y casas palacio. Espacio doméstico*, 2004, 157, n° 322.

56 J.- P. Molénat, « Quartiers et communautés… », *op. cit.*, 163-189.

57 A. García Sanjuán, « Causas inmediatas y alcance de la revuelta mudéjar de 1264 », in *Actas Simposio Internacional de mudejarismo. Mudéjares y moriscos, cambios sociales y culturales*, 2004, 505-518.

58 I. Codom et J. Torres Fontes, *Archivo Municipal de Murcia, Privilegios originales*, 4, *Documentos de Alfonso X el Sabio,* 1963, 29-31, doc. XVIII.

d'Abū Zayd et de la Jarada)[59]. Cependant, la population de la *morería* de Murcie commença à quitter la ville au XIVe siècle, malgré les efforts de Ferdinand IV pour freiner leur exode[60]. À partir de la moitié du XIVe siècle, les chrétiens commencèrent à s'installer dans l'Arrixaca où ils fondèrent, en 1341, la paroisse de Saint-Antolín dans la partie située à l'extrême ouest du quartier[61].

Les *apartamientos* des juifs et des Sarrasins au XVe siècle : de la théorie à la pratique

« Le voisin d'un Juif ne sera jamais un bon chrétien », prêche Vincent Ferrier de Valence pendant sa campagne de prédication des années 1411-1412. Pour ce dominicain, les sermons constituaient des instruments de prosélytisme et de justification de l'idéologie antijuive. Ils inspirèrent les autorités chrétiennes pour la mise en place d'une législation incitant à la conversion[62]. Ainsi les *Lois d'Ayllon* (1412) données par Catherine de Lancastre pendant la période de régence de son fis Jean II[63]. Ces lois fournissent une tentative de redéfinition des rapports entre la majorité chrétienne et les minorités religieuses, et visent à abattre le principe de coexistence en remettant en vigueur les mesures restrictives relatives aux minorités qui avaient été évoquées dans la législation des *Cortes* pendant les siècles précédents[64]. Une des mesures prévue par les lois mais jamais appliquée avait été l'établissement de quartiers réservés pour les musulmans et les juifs afin d'éviter la contamination des *nouveaux chrétiens* par les idées et croyances des infidèles. On lit, dans les *Lois d'Ayllon* :

> Désormais tous les Juifs et les Juives, les Sarrasins et les Sarrasines de mes royaumes et seigneuries doivent habiter séparés des chrétiens et des chrétiennes dans un lieu séparé de la ville de laquelle ils sont voisins, et ils doivent être entourés par un mur avec une seule porte pour entrer dans leur quartier[65].

Le 11 mai 1415, Benoît XIII confirma dans une bulle les dispositions de ces lois concernant la séparation des quartiers afin d'éviter le risque de contamination

59 D. Menjot, *Murcie castillane une ville au temps de la frontière : 1243-milieu du XVe siècle*, 2002, 99.
60 J. Torres Fontes, *Murcia medieval. Testimonio documental*, Murcie, 1980, 152.
61 J. Navarro Palazón et P. Jiménez Castillo, « El urbanismo islámico y su transformación después de la conquista cristiana : el caso de Murcia », in J. Passini, *La ciudad medieval, de la casa al tejido urbano*, 2001, 71-130.
62 C. M. Losada, « Ley divina y ley terrena : anti-judaísmo y estrategias de conversión en la campaña castellana de san Vicente Ferrer (1411-1412) », *Hispania Sacra*, 132 (2013), 603-640.
63 R. Amrán, « Las leyes de Valladolid de 1412 », *Textures, Cahiers du Centre d'Études Méditerranéennes Ibériques et Ibéro-américaines*, 2 (1996), 181-192.
64 A. Echevarría Arsuaga, « Catalina of Lancaster, the Castilian Monarchy and Coexistence », in R. Collins et A. Goodman, *Medieval Spain : Culture Conflict and Coexistence*, 2002, 79-122.
65 F. Fernández y González, *Estado social y político de los mudéjares de Castilla,* 1866, 400-405, doc. LXXVII ; notice RELMIN nº 243846, http://www.cn-telma.fr/relmin/extrait243846/.

des convertis[66]. Pour autant, quelle fut la mise en œuvre des Ordonnances de 1412 et quel impact eurent-elles dans la topographie urbaine ? Comment ces lois affectèrent-t-elles la vie des juifs et des musulmans ?[67] Il se trouve que les effets de la prédication du dominicain et la mise en œuvre des Ordonnances ne furent pas les mêmes dans toutes les villes de Castille.

La campagne de prédication de Vincent Ferrier culmina durant l'hiver 1411-1412 à Valladolid et donna lieu à l'« édit d'enfermement » d'avril 1412. La loi fut alors appliquée à la lettre et les *mudéjares* furent établis au sud de la ville, près de la *Puerta del Campo* en 1414, sur les terrains loués par les représentants de l'*aljama* au chapitre de la Cathédrale[68]. Les frontières du quartier musulman ne sont pas clairement définies, elles semblent jouxter l'un des murs de la ville et un bras du fleuve Esgueva. Ses limites actuelles sont la rue de la Ronda, Puerta del Campo, la rue Olleros et l'arrière du couvent de Saint Francisco sur la Plaza Mayor. Les fouilles archéologiques ont mis en évidence l'existence de différents ateliers de poterie tout au long de la rue d'Olleros, activité qui était l'une des professions les plus communes des *mudéjares*[69]. Ces derniers restèrent dans ce quartier au sud de la ville jusqu'à l'ordre de 1502 qui rendit leur baptême obligatoire. À cette date, il change de dénomination pour s'appeler le quartier Santa María[70]. De leur côté, les juifs de Valladolid se déplacèrent en 1413 vers le quartier qui leur fut assigné sur les terres appartenant au couvent dominicain de San Pablo, comme le révèle le bail signé entre les représentants de l'*aljama* et ceux du couvent : 35 florins d'or furent demandés pendant la première année, puis 40 florins d'or chaque année. Grâce à ce contrat, nous savons aussi que le quartier avait été entouré d'un mur par ordre du roi et accessible par deux portes[71].

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66 AHN, Madrid, Clero, pergaminos, carpeta 3030, nº 13 ; J. Amador de los Ríos, *Historia social, política y religiosa de los judíos de España y Portugal*, 1875, vol. 2, 627-653.

67 A. Echevarría Arsuaga, « Política y religión frente al Islam. La evolución de la legislación real castellana en el siglo XV », *Qurtuba*, 4, (1999), 45-72.

68 *Valladolid, Santa María de la Antigua, Libro de Cuentas de Fábrica*, año 1486-1542, fº4, vº8, Febrero, jueves, 1487 : « *Este barrio de sant maria tuvo su principio el año 1414 que la aljama de los moros tomaron a censo perpetuo una media huerta con su noria que Theresa Sanchez habia dado al cabildo con carga a ciertos aniversarios y en ella fabricaron casa los moros para vivir en esta villa con ciertas condiciones que se expresan en el contrato pasado ante Pedro Garcia de Bertadillo notario publico de las cuales es la principal el pago de quarenta florines en cada un año de buen oro » ;* cité par M. Gómez Andreu, « La Aljama de Valladolid : nuevas aportaciones », *Anaquel de estudios árabes*, 15 (2004), 148.

69 F. J. Moreda Blanco et J. Nuño González, « El Testar de la calle Olleros (Duque de la Victoria) de Valladolid », in *Actas del I Congreso de Arqueología Medieval Española*, 1986, vol. 5, 456-472 ; O. Villanueva Zubizarreta, *La actividad alfarera en el Valladolid bajomedieval*, Valladolid, 1998, 303.

70 M. Moratinos García et O. Villanueva Zubizarreta, « Consecuencias del decreto de conversión al cristianismo de 1502 », *Sharq-al Andalus,* 16-17 (1999-2002), 121-144.

71 AHN, Clero Valladolid, San Pablo, Carpeta 3502, nº 2 et nº 3 ; cité par A. Rucquoi, « Les juifs dans la région de Valladolid », *Revue du monde musulman et de la Méditerranée*, 63-64 (1992), 127.

Dans certaines villes, les institutions ecclésiastiques étaient propriétaires des terrains assignés pour les nouveaux quartiers ou des anciens immeubles du centre-ville occupés par les minorités expulsées. Elles furent donc parties prenantes dans les transactions immobilières. Un cas notable de cette situation se produisit dans la ville d'Ávila, où l'abandon des maisons et commerces placés en centre-ville et loués par les juifs et les musulmans au chapitre de la cathédrale provoqua une perte de revenus pour l'Eglise. Cette situation est évoquée par l'évêque d'Ávila, Juan de Guzman, dans une lettre écrite aux chanoines de la cathédrale : « Elles [les propriétés ecclésiastiques] seront perdues puisque personne ne veut habiter lesdites maisons depuis que les juifs et les musulmans sont partis vivre dans l'enclos, parce que la plupart desdits maures et juifs habitaient ces maisons[72] ». Le chapitre de la cathédrale s'étant donc trouvé le premier lésé par l'abandon des anciens domiciles des juifs et musulmans et le plus intéressée à maintenir ses revenus, le déplacement des minorités fut donc mené sans zèle, et il n'était toujours pas complètement achevé 1482. Ainsi, certains juifs continuèrent à vivre et posséder des commerces dans les rues proches de la cathédrale[73], de même que des musulmans restèrent près des quartiers des mosquées, dites de San Esteban et de la Solana jusque 1476[74].

En revanche, les effets des lois de 1412 et de la prédication se ressentirent fortement à Palencia, où les conversions des juifs furent assez nombreuses[75]. En 1415, dans un décret, Sancho de Rojas évêque de la ville donna les immeubles de l'ancienne synagogue à la confrérie de San Salvador[76], et les juifs qui étaient restés se regroupèrent probablement autour la rue des Pellejerías.

Dans la ville de Ségovie, l'*aljama* juive était plus puissante que celle des musulmans. En effet, y résidaient Abraham Senneor, rabbin, financier et conseiller des rois catholiques, ainsi que différentes familles proches de la Couronne. Ceci explique pourquoi l'application de la norme ne fut pas aussi dure dans cette localité que dans d'autres villes de Castille. Cependant, malgré la puissance de l'*aljama,* un quartier réservé fut assigné aux juifs suite aux Lois de 1412. Il était placé à l'intérieur des murs de la ville, entre le quartier de l'Almuzara, la paroisse de Saint André et le couvent des Mercédaires[77]. De même, les musulmans n'avaient

72 AHN Cod. 397 B, f. 115 ; P. León Tello, *Los judíos de Ávila*, 1963, 13, nº 125.

73 P. León Tello, *Los judíos de Ávila, op. cit.,* 12-14.

74 Archivo Histórico Provincial de Ávila (AHPAv), Protocolo 421, f. 183 (31 Julio 1476), et en ce qui concerne la mosquée de la Solana, Archivo Ayuntamiento de Ávila, Sección Histórica (AAA-H), caja 1, leg. 42, (6 Nov.1476) ; cité par S. Tapia, « Los mudéjares de la Extremadura castellano leonesa : notas sobre una minoría dócil, 1085-1502 », *Studia Histórica, Historia Medieval,* 7 (1989), 110.

75 AHN, Clero pergaminos, carp. 1727, 8 y 18 ; P. León Tello, « Los judíos de Palencia », *Boletín de la Institución Tello Téllez de Menenes,* 25 (1967), 52, doc. 7.

76 Archive Municipal de Palencia, actes sans numéro, 3 ; cité par León Tello, « Los judíos de Palencia », *op. cit.*, 54, doc. VIII.

77 A. Represa Rodríguez, *Notas para el estudio de la ciudad de Segovia en los siglos XII-XIV*, 1950, 7-10.

pas un quartier clairement déterminé et se concentraient pour la plupart autour de l'actuelle rue du Carmen, entre la Place du Azoguejo, le fleuve Clamores et les quartiers de Saint Lorenzo et de Saint Marcos[78].

La prédication associée à la forte atmosphère antijuive du moment provoqua la diffusion d'histoires, probablement inventées entre 1411 et 1450, et reprises plus tard dans le *Fortaletium Fidei* d'Alonso de Espina (1462)[79]. L'une de ces légendes raconte comment le juif Mayr Alguadex, ancien médecin d'Henri III, fut inculpé pour avoir, avec d'autres juifs, profané une hostie dans la synagogue de Ségovie vers 1410. Selon la légende, pendant la profanation, un miracle se produisit et les piliers de la synagogue s'effondrèrent au sol. Pour ce crime, le médecin juif fut arrêté et soumis à la torture jusqu'à ce qu'il admît sa culpabilité et fût condamné[80]. La synagogue majeure fut transformée en l'église du Corpus Christi vers 1421, comme un rappel du miracle.

Après le décès de la régente, Catherine de Lancastre, le 2 juin 1418, le désordre régna en Castille le temps que les descendants de Ferdinand d'Antequera s'imposent comme les nouveaux régents de Jean II. Au cours de cette période, le gouvernement était clairement aux mains du *Mayordomo* royal Juan Hurtado de Mendoza, appuyé par son neveu Alvaro de Luna, ainsi que par le puissant et influent juif Abraham Benveniste. Dans ces circonstances, le Conseil royal accorda la suspension de l'Ordonnance de 1412 en Castille et exigea, à sa place, l'application de celle d'Enrique III, plus favorable aux juifs en ce qui concerne l'exercice des fonctions publiques et leurs professions. Mais cette suspension ne fut pas définitive, puisqu'elle fut annulée par Jean II quelques mois plus tard[81]. Après avoir été proclamé roi en 1419, Jean II adressa en 1426 une lettre à tous les territoires de la Couronne de Castille (Castille, León, Tolède, Galice, Cordoue, Murcie, Jaén) dans laquelle il suspendit définitivement les Ordonnances données par sa mère et ordonna l'application, à leur place, de la disposition de 1418. Celle-ci était plus favorable aux minorités religieuses que la précédente, malgré l'obligation pour les juifs et les musulmans d'habiter dans des quartiers particuliers et de porter des signes distinctifs[82].

Au cours des règnes de Jean II (1418-1454) et d'Henri IV (1454-1474), le problème des minorités s'inséra dans le cadre de luttes politiques castillanes dans lesquelles s'affrontaient les élites nobiliaires et le pouvoir royal. Les deux monarques essayèrent de protéger les juifs et les musulmans castillans. Jean II décréta deux

78 J. Contreras y López de Ayala, *La morería de Segovia*, 1967, 6.

79 M. Ginio, « The Fortress of Faith at the End of the West », in O. Linor et G. B. Stromsa, *Contra Iudeos. Ancient and Medieval Polemics Between Christians and Jews*, 1996, 217.

80 F. Fita, « La judería de Segovia. Documentos inéditos », *BRAH*, 6 (1886), 354-357, doc. 6.

81 Archivo Municipal de Murcie, Actes. Cap. 1418, f. 69 ; cité par J. Torres Fontes, « Los judíos murcianos en el reinado de Juan II », *Murgetana*, 15 (1965), 102-103.

82 Archivo Municipal de Murcia, Cartulario Real, 1411-1429, f. 196-197 ; cité par *Ibid*., 104-105.

dispositions à cette fin : la *Pragmatique* de 1443 pour annuler l'influence de la législation restrictive d'origine pontificale[83] (notamment, la *Bulle Super Gregem Dominicum* de 1442 d'Eugène IV au contenu similaire aux Ordonnances de 1412) ; et la *Lettre d'Arévalo* de 1450[84].

A son tour, le roi Henri IV mit en place une politique de protection des minorités, mais qu'il ne put continuer lorsque la guerre civile éclata en Castille à partir de 1462. Dès cet instant, les minorités devinrent les boucs émissaires des tensions entre la noblesse et le roi. La *Sentence de Medina del Campo* de 1465 reflète ce conflit, qui fut initiée par Pedro Pacheco, marquis de Villena, pendant l'absence à la cour des conseillers royaux Lucas d'Iranzo et Beltrán de la Cueva. Cette disposition ordonnait aux juifs et aux musulmans de s'installer hors de la ville dans un délai d'un an à partir de sa promulgation, sous peine de la perte de leurs propriétés. En même temps, la sentence exigeait des chrétiens qu'ils sortissent de l'espace assigné aux juifs et qu'ils vendissent leurs propriétés dans ce quartier[85]. L'objet de cette loi était le regroupement des juifs et des musulmans dans des lieux spécifiques, afin de faciliter le prélèvement fiscal. Par la même occasion, les nobles neutralisaient les mesures de conciliation que le roi avait accordées afin d'éviter les révoltes des minorités contre lui[86]. Bien que la Sentence n'ait pas été appliquée, elle exprimait l'antipathie d'une grande partie de la noblesse castillane à l'égard des musulmans et des juifs, et établissait un précédent aux lois postérieures. Plus tard, en effet, la séparation des quartiers des *mudéjares* et des juifs dans toutes les villes de Castille allait être exigée lors des *Cortes* de Tolède de 1480 pendant le règne d'Isabelle et Ferdinand. Les juifs et musulmans durent alors s'installer dans les quartiers spécifiques dans un délai de deux ans[87] :

> Nous ordonnons que les Juifs et Sarrasins de toutes les villes de notre Royaume, qui habitent soit les terres royales, soit les terres seigneuriales, soit les terres de *behetria*, soit les terres des ordres religieux, doivent avoir des juiveries et des *morerías* spécifiques et séparées, et ils ne doivent pas habiter mêlés aux chrétiens ni partager les mêmes quartiers. Nous ordonnons que cette disposition soit mise en application dans les deux années suivantes à compter de la publication de nos lois [...]

83 J. Amador de los Ríos, *Historia social..., op. cit.,* 992-995.

84 J. Castaño, « Las aljamas judías a mediados del siglo XV : la Carta Real de 1450 », *Inicio*, 18 (1995), 181-203.

85 Sentence de Medina del Campo, *Memorias del Rey don Enrique IV de Castilla*, Real Academia de la Historia (éd), Madrid, 1835-1913, vol. 2, 367 ; cf. Notice nº 326624, projet RELMIN, http://www.cn-telma.fr/relmin/extrait326624/.

86 I. Beceiro Pita, « Argumentos ideológicos de la oposición nobiliaria bajo los Trastámara », *Cahiers de linguistique hispanique médiévale,* 25 (2002), 211-237.

87 *Cortes de Toledo 1480*, *Cortes de los Antiguos Reinos de Castilla y Léon*, Real Academia de la Historia (éd.), 1884, 149-151 ; notice nº 252385, projet RELMIN, http://www.cn-telma.fr/relmin/extrait252385/.

En somme, le jeu d'équilibre entre la noblesse et les minorités fut une question cruciale dans la construction politique de la monarchie castillane, dont la balance a finalement penché du côté de ces dernières lors des *Cortes* de Tolède. Afin d'appliquer la loi, divers *visitadores* et légats royaux ont été chargés de surveiller la délimitation des nouveaux quartiers, aussi bien dans les villes de *realengo* que dans les terres de *señorío*. Par ailleurs, les synagogues et mosquées se situant en dehors des quartiers assignés devaient d'être fermées, sans interdiction d'en bâtir en ces nouveaux quartiers.

Les effets matériels de la loi à partir de 1480 et les problèmes entre communautés selon la documentation de la pratique judicaire

La nouvelle réorganisation de l'espace urbain provoqua des multiples transactions immobilières et déclencha la spéculation foncière. Malgré le fait que la Couronne avait mis en œuvre un système de garantie des transactions grâce au contrôle de taxateurs chargés de l'estimation de la valeur des biens immobiliers dans les anciens quartiers dans le but de les échanger pour une propriété de valeur similaire dans le nouveau quartier, plusieurs procès entre juifs, chrétiens et musulmans furent ouverts en cette matière.

Les quartiers réservés et la spéculation foncière

L'urgence du déménagement obligatoire vers les nouveaux quartiers assignés aux communautés juives et musulmanes provoqua l'augmentation de la demande immobilière et, par conséquent, la hausse du prix des immeubles construits dans ces quartiers. Parfois, ces terrains étaient déjà bâtis, ce qui forçait les nouveaux acquéreurs juifs et musulmans à acheter les maisons à leurs anciens propriétaires, lesquels, dans la plupart des cas, voulaient aussi profiter de la situation en augmentant le prix. Par ailleurs, le déplacement des minorités vers les nouveaux quartiers les obligeait à vendre à bas prix leurs biens immobiliers dans leurs anciens quartiers ou à les échanger avec un autre propriétaire contre un bien, souvent de valeur inférieure. Ce fut le cas dans la ville de Palencia où la délimitation des quartiers fut réalisée par le *regidor* de Madrid, Juan Çapata, qui, ne connaissant pas la localité, demanda conseil à certains résidents de la ville. Ceux-ci avaient, en réalité, intérêt à acquérir les immeubles des juifs placés au centre-ville à bas prix. Ce conflit d'intérêt les poussa, parfois, à mentir et se traduisit par d'injustes dépossessions au cours de la réassignation des propriétés. C'est ce qu'il se produisit pour la maison du juif Yuçe Agay, lequel n'était pas un *vecino,* résident de la ville, puisqu'il habitait à Torremojón, un village proche de Palencia. Le *regidor* échangea la maison de ce juif contre l'immeuble de la femme d'Alonso de Osorio, placé dans le quartier

assigné aux juifs, près de la rue María Gutierrez, du côté nord-ouest de la ville et d'une valeur inférieure. Yuçe Agay porta plainte contre cette résolution et ouvrit une action devant les tribunaux royaux qui se prononcèrent en sa faveur en 1484[88].

Durant la même période, dans la ville de Badajoz, un autre juif, le rabbin David de la Linda, avait acheté quelques maisons dans le quartier établi pour les juifs au prix défini par les *regidores*. Mais, quelques années plus tard, l'ancien propriétaire lui réclama une somme compensatoire car il considérait que le prix fixé n'était pas le bon et entama plusieurs actions en justice contre le juif afin de récupérer ses anciennes propriétés. Aux vues de la situation, le rabbin se saisit aussitôt de la justice royale qui lui reconnut son droit de propriété[89].

Les musulmans furent également victimes de prix abusifs et de réclamations injustes. Pour illustrer cela, prenons le cas de Mohammed de Trujillo qui avait échangé sa maison contre une autre avec un chrétien de la ville en 1481. Deux années plus tard, ce dernier lui réclama une somme supplémentaire en compensation[90]. Dans certains cas, les musulmans en ont appelé à la justice royale pour faire respecter les prix fixés. C'est le cas de la sentence rendue par les Rois Catholiques en 1489 accordant au maître Çulema de Séville le droit soit de récupérer des maisons qu'il avait vendue dans l'ancien quartier musulman de Séville à un prix plus bas que celui qui avait été établi, soit de demander une somme compensatoire[91].

Différents rythmes d'application selon la juridiction des terres

D'après les *Cortes* de Tolède, le paysage urbain de la plupart des villes castillanes s'est ainsi transformé. L'installation des minorités dans des nouveaux quartiers ne fut pas simple. D'un côté, la loi s'est appliquée selon différents rythmes en fonction de la juridiction des terres : celles du *realengo,* à savoir la juridiction royale où la loi s'est appliquée immédiatement ; ou celles du *señorio,* appartenant à la noblesse ou aux ordres militaires dans lesquelles l'application de la loi dépendait de la volonté du seigneur, selon la disposition 76 des *Cortes* de Tolède. C'est le cas de la ville de Plasence (Cáceres), qui était sous l'autorité de la famille des Zúniga, où l'application de la loi ne fut pas stricte. Dans cette ville, les juifs se déplacèrent vers un nouveau quartier suite à la démolition de leur synagogue et d'une partie de leurs maisons au centre-ville à cause de la construction du couvent de Santo Domingo[92]. Cet évènement nous est parvenu à travers diverses plaintes des juifs

88 Archivo General de Simancas, Registro General del Sello, AGS, RGS, 148408, 106, cf. F. Suarez Bilbao, *Judíos castellanos entre 1432-1492. Ensayo de una prosopografía,* 1987, doc. 372.
89 AGS, RGS,148408, 10 : F. Suarez Bilbao, *Judíos castellanos..., op. cit.,* doc. 374.
90 AGS, RGS, 148310, 55.
91 AGS, RGS, 148908, 368.
92 J. Sendín Blázquez, « Convento e iglesia de Santo Domingo. Los dominicos en Plasencia », *Alqántara*, 64 (2006), 99.

contre les Zúniga afin de rester dans le quartier de Santo Domingo, au motif que le *visitador* chargé de délimiter les nouveaux quartiers en 1481 en avait ainsi décidé[93].

De l'autre côté, il faut noter que les résistances des chrétiens à vendre leurs propriétés dans les quartiers assignés aux minorités selon les prix officiels, a ralenti l'application de la loi. Pour illustrer ces tensions à l'intérieur de la communauté chrétienne, il est intéressant d'étudier le cas de Palencia où les craintes des voisins empêchèrent l'installation de la juiverie. Le premier lieu choisi fut la rue Traspalacio, mais cet ordre d'installation suscita l'opposition des voisins qui ne voulaient pas que les juifs leur soient si proches. Par la suite, un autre espace de la ville fut choisi, la rue de Valdesería proche du Palais des Evêques, mais, là encore, les plaintes des voisins empêchèrent que la loi soit mise en œuvre. À ce propos le Conseil de la ville décida, le 19 septembre 1481, que les juifs devaient résider à proximité de leurs boucheries, dans la rue de la Carnicería mais, une autre fois, les doléances des voisins entravèrent le projet. Il fallut attendre la décision du 28 septembre pour que l'installation des juifs soit définitive dans la rue María Gutierrez, nommée de nos jours Los Soldados, et proche de la place de León, connue comme la nouvelle *judería* et, après l'expulsion, comme le quartier de Santa Fe. De leur côté, les musulmans s'installèrent dans la rue Juan Calzado, connue aujourd'hui comme celle d'Alonso Fernández de Madrid[94].

Malgré la disposition des *Cortes* de Tolède qui avait prévu un délai de deux ans pour une assignation effective des quartiers, ce fut un processus bien plus lent. Ainsi, à Cordoue et dans d'autres villes, cela ne se fit que vers 1490[95]. À Séville, il fallut atteindre jusqu'en 1490 pour définir la délimitation précise du quartier des musulmans. En fait, il s'agissait d'un petit quartier de trente maisons et doté d'une mosquée qui fut cantonné au quartier du Adarvejo, dans la *collación de San Pedro*[96]. Enfin, le cas d'Écija est encore plus tardif puisqu'il est daté d'environ 1492[97].

Les transformations de la ville : nouveaux quartiers et topographie urbaine

La création de quartiers réservés provoqua la transformation des villes : construction de murs pour les entourer, ouverture de portes, démolition d'édifices et construction de nouveaux bâtiments. Dans plusieurs cas, les juifs et les

93 AGS, RGS, 149105, 97.

94 G. Ruiz González, « Los judíos de Palencia en la Edad Media », *Palencia en la historia,* 1 (1982), 115-142, 137 ; Mª J. Fuentes, *La ciudad de Palencia en el siglo XV. Aportación al estudio de las ciudades medievales en la Edad Media*, 1989, vol. 2, 244.

95 AGS, RGS, 149004, 186.

96 A. Collantes de Terán, *Los mudéjares sevillanos*, *Actas del I Simposio Internacional de Mudejarismo,* T"ruel, 1981, 228.

97 AGS, RGS, 149204, 124.

musulmans s'installèrent sur les terres de croissance de la ville ou bien près des portes, le long des murailles de la ville. La construction de murs en pierre est attestée dans des Ordonnances Municipales, comme celles d'Avila de 1485 qui ordonnèrent la construction des murs solides et d'un arc de pierre à la place des poutres de bois[98].

Etudier les sources d'archive en corrélation avec les donnés des chantiers archéologiques permet de mieux cerner ces modifications urbaines. Le débat historiographique sur la localisation des quartiers juifs commença dès le XIX[e] siècle, pour autant la chronologie de ces évolutions demeure peu claire.À ce propos, quelques commentaires autour de la création du nouveau quartier juif de Madrid nous semblent pertinents. Amador de los Ríos le situait à Lavapiés[99], mais les études plus récentes mentionnent plutôt plusieurs endroits de la ville : le quartier de Santa María, la porte de Balnadú, la porte de Guadalajara jusqu'au XV[e] siècle et, plus tard, dans les alentours de la Porte de la Vega[100]. Les dernières fouilles archéologiques autour du Palais Royal et de l'église de Santa María de la Almudena ont mis en évidence la présence d'un petit quartier juif juxtaposé à la muraille de l'époque émirale dans laquelle des portes ont été ouvertes[101]. Le déplacement du quartier juif est prouvé par l'existence de deux synagogues à proximité, l'une placée dans les alentours de l'ancien quartier près du Palais Royal et l'autre près du Campo del Rey, c'est-à-dire à l'extérieur de l'ancienne enceinte de la période islamique mais à l'intérieur du nouveau mur construit pour agrandir la ville. La première est mentionnée dans un document de 1403 attestant de la vente de maisons dans la *collación* de Santa Maria[102]. Quelques années plus tard, en 1481, un autre document fait mention de la deuxième synagogue[103]. Par ailleurs, suite aux « lois d'enfermement » des *Cortes* de Tolède, les juifs transférèrent leur quartier mais, encore en 1481, il existait des résidents juifs dans le quartier de Santa Maria de la Almudena, comme par exemple Mosé Adaroque[104].

Les données archéologiques, mais aussi les sources documentaires, attestent donc de ces transferts, comme ce fut le cas pour Medina del Campo (Valladolid).

98 J. M. Monsalvo Antón, *Las ordenanzas medievales de Ávila y su tierra,* 1990, 67-49.

99 F. Fita, « La judería de Madrid en 1391 », *BRAH,* VIII (1886), 439-466.

100 F. Ugorri Casado, « El ensanche de Madrid en tiempos de Enrique IV y Juan II. La urbanización de las cavas », *Revista de la Biblioteca de Archivos y Museos,* 23 (1954), 3-63.

101 E. Andreu ET V. Paños, « Nuevas propuestas... », *op. cit.,* 64.

102 AHN, Sección Clero, carpeta 1364 1º : « Unas casas en la colección de santa María de la Almudena, aledaños, casas de la dicha compradora, casas del convento del dicho monasterio, la calle del Rey y la sinagoga de los judíos. »

103 Archivo de la Villa de Madrid, AVM, ME, f. 259r° : « un solar que ellos han cerca de la synoga, aledaños, solar que tiene a censo Juan de Madrid. »

104 AVM, IV, f. 261 r : « El 26 de Septiembre de 1481, Mose Adaroque debde 260 maravedís y un par de gallinas a Pero González por el alquiler de una casa en la collación de Santa María de la Almudena. »

En effet, le quartier juif fut déplacé de la rue de San Francisco à un autre espace près de la porte de la muraille[105].

La création d'un quartier clos pour les musulmans est parfaitement claire à Ávila, ville dans laquelle la population *mudéjar* était très nombreuse[106]. Le déplacement des musulmans dans un quartier spécifique provoqua la réalisation de nombreux chantiers en ville. D'un côté, comme en atteste divers documents du XV[e] siècle, il fallut abandonner les mosquées qui étaient à l'intérieur de l'enceinte urbaine (San Esteban, la grande mosquée de la ville ; la mosquée de la Solana près de la muraille ; et la mosquée de l'Alquibla). Il fallut, par ailleurs, en construire une nouvelle dans le nouveau quartier du Berrocal au lendemain des lois de 1480 qui permettaient la construction des édifices de culte dans les nouveaux quartiers lorsque les anciennes mosquées étaient fermées[107].

Par ailleurs, le transfert de la juiverie d'Ávila provoqua aussi quelques troubles. Les juifs furent installés dans deux quartiers : celui d'Adaja et celui des Telares près du mur occidental de l'enceinte de la ville. Cependant, ces espaces étaient relativement petits pour une communauté juive assez nombreuse. Dans chaque maison, deux ou trois voisins étaient alors contraints de cohabiter. L'étroitesse et l'insalubrité découlant de ce déménagement, poussèrent l'*aljama* à faire appel aux Rois catholiques qui ordonnèrent l'ouverture d'une enquête pour résoudre la question[108].

Les *apartamientos* et les pertes économiques

La création de nouveaux quartiers s'avéra, parfois, préjudiciable aux juifs et aux musulmans comme il fut mis en exergue dans une missive de l'*aljama* des juifs de Guadalajara aux Rois Catholiques en 1495 : « le déplacement de leur quartier, loin de leurs ateliers, leur avait causé du tort parce qu'ils n'avaient pas d'autre endroit pour développer leurs activités[109] ». C'est pourquoi, les demandes de sauvegarde et de protection royale furent fréquentes. Dans la plupart des cas, la réponse des Rois fut favorable et se traduisit par l'envoi de lettres de sauvegarde aux Conseils des villes. Par ailleurs, les Rois accordèrent aux juifs ou aux musulmans le droit de maintenir leurs commerces et leurs activités productives en centre-ville, à condition de ne pas y manger et dormir. Diverses missives reprirent cette concession :

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105 AGS-RGS, 149511, 112 : « Fernán Pérez de Meneses, juez de bienes de los judíos del Obispado de Salamanca y de la abadía de Medina del Campo, que cumpla una carta y confirmación dada a los alabarderos de la dicha villa en virtud de las cuales dejaron sus casas en la calle de San Francisco Y se pasaron a un sitio situado junto a la primera puerta de la judería que solía ser fasta el postigo de enmedio arrimado a la cerca de la dicha villa ».

106 A. Echevarría Arsuaga, *The City of the three Mosques : Ávila and its Muslims in the Middle Ages,* 2011.

107 J. Jiménez Gadea et A. Echevarría Arsuaga *et al., La memoria de Ala. Mudéjares y moriscos de Ávila,* 2011, 17.

108 AGS, RGS, 148603, 89 ; F. Suarez Bilbao, *Judíos castellanos..., op. cit.,* doc. 589.

109 AGS, RGS, 148502, 217 ; *Ibid.,* doc. 432.

en 1485 à Guadalajara, les commerces juifs placés en centre-ville furent protégés, ainsi que leurs tanneries placées à proximité du fleuve[110] ; de même furent préservés les commerces de Badajoz[111], de Palencia et d'autres petites villes comme Carrión. Dans cette dernière, l'*apartamiento* provoqua plusieurs plaintes des juifs, comme celle de la juive Urosol, propriétaire d'un commerce et d'une maison en centre-ville qui avait été déplacée dans le nouveau quartier. En raison de cela, elle avait perdu son activité économique et décida de faire appel à la justice royal afin de la récupérer en obtenant la réponse positive des Rois en 1486[112].

La création de portes à la juiverie fut aussi source de problèmes. Parfois, leur fermeture empêchait les habitants du quartier clos de se rendre à leurs commerces et d'exercer leurs activités quotidiennes. C'est le cas de Çulema Aben Sancho de Guadalajara qui se plaignit aux Rois Catholiques en déclarant que cela l'empêchait de développer son activité professionnelle en 1488[113].

Le déplacement des juifs de Madrid affecta aussi les activités des médecins juifs de la cour. Tel fut le cas de Rabí Jaco qui habitait dans le Campo del Rey et qui avait quelques fois dû se heurter à la porte de la juiverie fermée sans pouvoir entrer. Il reçut alors une lettre de sauvegarde lui permettant d'habiter au centre-ville et ainsi mieux rendre service à la cour[114].

Dans le cas de Cuenca, la situation des *mudéjares* empêcha l'application de la loi des *apartamientos*. En effet, le conseil de la ville intercéda pour la petite communauté de sept familles dans une missive adressée à la Reine Isabelle le 23 avril 1482, dans laquelle il expliqua l'impossibilité pour ces familles pauvres de se déplacer et l'utilité qu'elles restent dans la ville en raison de leurs professions. La Reine le leur permit[115].

Les épisodes de violence entre les communautés juives, musulmanes et chrétiennes

L'ordre d'une séparation physique entre les différentes religions poussa, parfois, les chrétiens à provoquer le conflit, comme ce fut le cas à Ségovie. En effet, une cour appartenant au couvent du Corpus Christi était limitrophe au mur du quartier juif. Celui-ci possédait une porte ouverte qui rendait les déplacements aisés entre les deux lieux. Les rapports de voisinage se virent aggravés lorsque les chanoines du Parral placèrent l'image d'un crucifix du côté du mur juif, ce qui fut

110 AGS, RGS, 148504, 196 ; *Ibid.,* doc. 453.
111 AGS, RGS, LEG, 148505, 9 ; *Ibid.,* doc. 478.
112 AGS, RGS, 148606, 09 ; P. León Tello, « Los judíos de Palencia... », *op. cit.,* 78, doc. XVI.
113 AGS, RGS, 148802, 104.
114 AVM, Actas Original, Tomo I, f. 41v° ; cité par F. Ugorri Casado, « El ensanche de Madrid... », *op. cit.,* 38.
115 Archivo Municipal de Cuenca (AMC), Leg.203, f. 18v° ; AMC, Leg.205-202-257, cité par M. García Arenal, « La aljama de moros de Cuenca en el siglo XV », *Historia, Instituciones, documentos*, 4 (1977), 43.

perçu pour une provocation par ces derniers. Par la suite, les juifs du quartier décidèrent de dépêcher Jacobo Cachopo, procurateur de l'*aljama,* devant la justice royale, afin de dénoncer cette félonie et de solliciter la fermeture de la porte ainsi que le retrait de ce crucifix en 1485[116].

Parfois la tension pouvait se transformer en violence, comme ce fut le cas dans la petite ville de Valmaseda (Vizcaya) où les chrétiens essayèrent de chasser les juifs en utilisant des armes et les menacèrent pour les empêcher de demander la protection royale et la récupération de leurs maisons en centre-ville en 1486[117].

Les actes de violence dans les *morerias* furent moins fréquents car, dans la plupart des villes, ces communautés étaient moins importantes tant quantitativement que qualitativement. Dans quelques villes de la Vieille Castille, comme Ágreda (Soria), des vols dans le quartier musulman furent attestés.

La violence crût à la fin du XV[e] siècle, le décret de conversion (1502) approchant. Cela est probant pour les *mudéjares* d'Aranda de Duero (Valladolid) à travers les plaintes que les autorités de l'*aljama* avaient présentées au Conseil Royal. Dans celles-ci, ils explicitaient leur peur de sortir de leur quartier pour assister à la campagne d'évangélisation obligatoire menée par un franciscain dans l'église de Sainte Marie. Face à cela, le Conseil Royal les exempta de s'y rendre et interdit la prédication dans la mosquée[118].

Les conflits qui se produisaient opposaient aussi bien les chrétiens aux juifs et musulmans que les juifs aux musulmans. Ce fut le cas notamment à Guadalajara, lorsque les juifs s'installèrent dans un quartier où les musulmans avaient des propriétés. La hausse du prix des ventes poussa les juifs à faire appel à la justice royale. Le tribunal rejeta leur plainte en 1487 car ils n'avaient pas besoin d'acheter les maisons des Sarrasins, la loi n'ayant pas pour but de séparer les musulmans des juifs mais seulement des chrétiens[119].

Des murs de leur foi aux murs de la foi : la toleratio *brisée.*

L'analyse de l'évolution de la législation concernant les *morerías* et les *juderías* entre le XIII[e] et XV[e] siècle et sa mise en œuvre permet de démontrer l'idée d'un modèle ségrégatif stable au cours des siècles médiévaux. Jusqu'au XV[e] siècle, musulmans et juifs ont établis leurs foyers et leurs commerces autour de leurs propres mosquées et synagogues sans contraintes. De plus, les autorités de l'*aljama* se présentaient en médiateurs entre la communauté et les pouvoirs castillans, afin de favoriser leur intégration dans la société, tout en respectant certaines limitations à

116 AGS, RGS, 148506, 34 ; F. Suarez Bilbao, *Los judíos castellanos..., op. cit.*, doc. 487.
117 AGS, RGS, 148603, 60.
118 M. A. Ladero Quesada, *Los mudéjares de Castilla en tiempos de Isabel I*, 1969, 245-246.
119 AGS, RGS,148703, 51.

leur cohabitation[120]. Cependant, l'existence de liberté résidentielle pour les musulmans et les juifs n'était pas une garantie d'assimilation dans une société qui devait les tolérer en attendant qu'ils se convertissent sans contrainte, et qui s'employait à marquer les dissemblances entre les différentes communautés du corps social.

Dans le cas des juifs, nous observons une évolution dans la création des murs permettant d'entourer leurs quartiers, indiquant la représentation et la perception que s'en faisaient les chrétiens ainsi que leur progressive marginalisation en tant qu'ennemis de la foi. Il s'agit d'une évolution des murs tolérés par les autorités des villes aux murs imposés et obligatoires à la fin du XV^e^ siècle. Jusqu'à cette période, la plupart des juiveries étaient placées en centre-ville, entourées d'un mur répondant aux besoins de la communauté, à savoir vivre selon leurs lois, les murs de leur foi, et non pas à une volonté ségrégative des autorités chrétiennes. Cependant, à partir des dispositions des *Cortes* de Burgos de 1367, les murs des juiveries commencèrent à être démolis, permettant ainsi de contrôler les activités des juifs et d'éviter les révoltes. Les épisodes de violences de 1391, ainsi que les campagnes de conversion de Vincent Ferrer et les Ordonnances de 1412, provoquèrent de multiples conversions en cette moitié du XV^e^ siècle, ainsi qu'une crise d'identité de la société chrétienne qui commença à mettre en place des barrières sociales, brisant ainsi l'ancienne *toleratio* afin d'établir différentes barrières sociales, comme la pureté de sang, et sexuelles[121]. La délocalisation des quartiers juifs et la construction des murs et portes permettaient d'ériger des barrières matérielles dans le cadre urbain, afin d'éviter la coexistence entre les infidèles et les chrétiens et, plus particulièrement, la contamination des « nouveaux chrétiens », assez nombreux dès 1430.

De même, le panorama des *apartamientos* des musulmans ne fut pas régulier au XV^e^ siècle et ceux qui furent mis en œuvre le furent dans les villes où les *mudéjares* étaient assez nombreux. Dans celles où la communauté était petite, comme à Cuenca, ils restèrent dans leurs anciennes maisons en centre-ville.

Quoi qu'il en soit, les plus grandes transformations des villes associées au réaménagement des juifs et musulmans dans leurs quartiers enclos et spécifiques se produisirent à partir des *Cortes de Tolède* de 1480. L'application de la loi provoqua des modifications de la strate urbaine qui déclenchèrent la spéculation foncière et de nombreux procès entre les autorités des *aljamas* juives et musulmans et les autorités chrétiennes. Dans la plupart des cas, tant les *qadis* que les représentants des *aljamas* juives cherchèrent la protection royale afin d'éviter les prix abusifs et les dépossessions injustes.

120 J. V. Tolan, « Une convivencia bien précaire : la place des Juifs et des Musulmans dans les sociétés chrétiennes ibériques au Moyen Âge », in G. Saupin, R. Fabre et M. Launay, *La tolérance. Actes du colloque international de Nantes pour le quatrième centenaire de l'Édit de Nantes,* 1999, 385-394.
121 D. Nirenberg, *Neighboring Faiths, op. cit.*, 143-167.

En conclusion, la création des *juderías* et des *morerias* à la fin du XV^e^ siècle fut la cristallisation matérielle d'une rupture sociale qui avait débutée en 1391 et qui se renforça avec les discours théologiques du XV^e^ siècle, ancrés dans le programme politico-identitaire de la Couronne castillane-aragonaise. L'idée d'effacer les traces de l'Islam et de réduire le judaïsme semblait inscrite dans le développement historique de la création de cette dernière et d'un Etat moderne espagnol fondé sur la Chrétienté.

SECTION TWO

DISTINGUISHING MINORITIES: SEGREGATION, VIOLENCE, PROTECTION

INTRODUCTION

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The articles in this section explore Christian responses to the problem of minorities (including Christian minorities in lands of Islam) in the context of persecution and discrimination. All of them focus on situations where a minority's status was at stake. These minorities were either endangered by violence and needed legal protection, or were imagined to be potentially problematic, even a danger to majority society, and therefore the authorities endeavoured to mark out their correct place in society through legal means. In the latter case, even law itself was used as a form of violence against minorities. The section therefore engages with legal thinking in medieval Christendom concerning the status of minorities.

From the point of view of the Catholic Church, Christian minorities, even mercenaries in the service of a Muslim ruler, were to be protected. Therefore, several popes corresponded with rulers of Morocco in order to try to ensure this protection. (It should be noted, however, that these mercenaries fought for the ruler locally, and did not engage in war against their Christian coreligionists). Non-Christian minorities within Christendom were also to benefit from ecclesiastical protection as long as they were seen not to transgress norms laid down by the same authorities.

It is a well-known stereotype that laws and normative texts tell us about mentalities, but not about 'how it really was'. The articles in this section demonstrate that we can move beyond that assessment. Legal texts are consistently related here to other types of sources that allow us glimpses into a more complex relationship between Christians and members of other religious groups. A broader methodological point may be deduced from this; contrasting different types of documents, whether they are sources from Christian and from Jewish authors (as in the articles of E. Baumgarten and P. Tartakoff), or normative texts and documents from legal practice (as in F. Soyer's work) is a particularly fruitful way of investigating the lives of medieval minorities, which makes it possible to nuance long-standing suppositions.

In addition, the dynamics of Christian – non-Christian interaction are thrown into sharper focus: reading the normative texts against the glimpses of actual practices highlights the nuances of legislators' anxieties and also shows both majority and minority responses to real interactions on the ground. While

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 DOI 10.1484/M.RELMIN-EB.5.111602

Christian fantasy played a key role in casting non-Christian minorities in a negative light, interactions between members of the Jewish (and in the Iberian peninsula, Muslim) minority and the Christian majority were more multifaceted than the reading of Christian sources alone will show. Legal texts themselves gain new meaning in this way, can be recontextualized in their own times, and can be used to access social history rather than some theoretical norm. Both legal definitions of the meaning of coercion in baptism, and legal prohibitions of types of interaction between Jews and Christians were rooted in real life experiences, rather than in the rarified air of academic discourse.

New results arise not only from a comparison between different source-materials, but also from the careful charting of changes and developments in the same kind of texts over a longer time period. Whether one focuses on papal letters (C. Maillard) or canon law (J. Sherwood), differences which at first glance might be slight prove to be significant, throwing light on how solutions to the same issues changed over time. We cannot speak of one uniform ecclesiastical attitude to minorities, but rather, of several different agents who had dissimilar agendas and solutions.

Temporal change, moreover, was not linear. For example, popes could hope for and then relinquish the possibility of the Moroccan ruler's conversion, while continuing their correspondence with these rulers. The Visigothic councils of Toledo advocated the impossibility for Jews forcibly converted to Christianity to return to their original faith. Such rigorist attitude was later relinquished, with ecclesiastical authorities favouring the opposite solution, until decretists of the later half of the twelfth and thirteenth centuries returned to the tenets prohibiting reversion.

All of the papers concern minorities within Christian society with the exception of Clara Maillard's, who looks at the Christian minority within Islamic society, but, like the others, analyzes Christian responses to this situation. The articles flag up similar processes: the existence of multiple interactions and mixing between members of the majority and minority communities, even in periods such as the thirteenth century that are traditionally defined in scholarship as times of persecution. Such interaction included even Christian conversion to Judaism within Christian Europe. Thus the articles demonstrate that reality was always more ambiguous than our scholarly labels might suggest.

They also reflect on the discrepancies between ideals encapsulated in legislation and practical pragmatism that was often necessary to ensure other interests. These for example could be financial ones, such as the Portuguese rulers' reliance on taxes from Jews and Muslims, but not necessarily. Such practical interests could also be spiritual ones, since it is possible that popes tolerated the military service that Christian warriors rendered Muslim rulers in Morocco because they

hoped that these Christians could also serve as nodes for evangelizing Muslims. Such pragmatism often mitigated harsh punishments set by the laws. Therefore, while the theological requirement of ensuring that non-Christians have no mastery over Christians, redeemed by Christ's blood, was upheld in principle, it was at times belied by practice.

These articles also restore more agency to religious minorities than the traditional image of persecution would have it. While voluntarily living under Muslim rule, Christian mercenaries in Morocco also saw themselves as part of Christendom and sometimes asked for papal help. Nor did members of minorities apply uniquely to their own religious and legal authorities. Muslims and Jews applied for exemptions from Christian legislation that aimed at segregation. In addition, religious minorities at times actively defended their tenets. Thus Jews vocally criticized Christian beliefs and were able to raise doubt in the minds of some Christians at least concerning the truth of Catholic tenets. Moreover, while not proselytizing openly, they still attracted converts in the thirteenth century through everyday interaction, despite the extreme danger such converts from Christianity to Judaism put themselves in. Concern over intermingling is a particularly interesting aspect of majority – minority relations that sheds more light on the active agency of minority groups. Boundary maintenance and building group cohesion were not only concerns for the majority society, but appeared among the minorities as well. Thus Jews also tried to maintain their communities and cohesion by setting themselves apart within a majority Christian society by rules and regulations which touched for example on hairstyle and clothing: issues also regulated by Christians. This demonstrates that Jews were not merely victims of Christian legislation.

Instead of Christian authorities imposing rules on a Jewish minority, elders of the minority community themselves conceptualized boundaries and wished to maintain them. Yet the concerns from the Christian and Jewish side did not coincide exactly. Ecclesiastics were concerned with distinguishing Jews from Christians through dress codes. Jewish authorities regulated with minute precision the possibilities of dressing as a Christian in order to save oneself, and focused on hair as the locus of potential assimilation that was to be guarded against. The crucial difference in the practical maintenance of community boundaries had to do with relations of power. While majority society could impose restrictions and segregation and punish disobedience, members of the minority had to rely on the authorities of majority society to protect them.

While the minority communities themselves as well as secular rulers and authorities all influenced the lives of minorities, these articles also demonstrate the crucial significance of the papacy in many instances. Popes intervened in minority life as well as maintaining contact with Muslim sovereigns, and even tried to

initiate the latter's conversion when they judged the circumstances to be propitious for that endeavour. Finally, no matter how nuanced the picture becomes, we should not forget the responsibility of Christian ecclesiastical authorities for persecution. After all, it was in the aftermath of the unprecedented violence of the first crusade against Jews that Christian legal experts developed a definition of consent that legitimized extreme coercion in bringing Jews to the baptismal font.

SEGREGATORY LEGISLATION AND JEWISH RELIGIOUS INFLUENCE ON CHRISTIANS IN THE THIRTEENTH CENTURY

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The thirteenth century is widely regarded as a turning point for the worse in the history of Jewish-Christian relations. Within the context of a rise in expressions of intolerance on the part of Christians toward an array of minority groups, the blood libel proliferated, charges of host desecration emerged, Jewish books were burned, and Jews were massacred in Germany and France and expelled from England. In addition, in 1215, the Fourth Lateran Council introduced legislation requiring Jews to be readily distinguishable from everyone else by their clothes, and decrees to this effect multiplied across Christendom. These well-known sartorial regulations belonged to a constellation of measures promulgated by popes, kings, and church councils that sought to segregate Christians and Jews, forbidding the two groups from eating, socializing, and living together, as well as from burying their dead and worshipping in close proximity to one another.[1]

Segregatory legislation had many aims, including ostracizing and degrading Jews.[2] In light of rising tensions between Christians and Jews in the thirteenth century, however, it is intriguing that Christian authorities often justified segregatory measures on the grounds that Jews and Christians excessively intermingled. Moreover, in light of Jews' increasingly vulnerable status, it is curious that, among the dangers of Jewish-Christian intermingling of which Christian authorities warned, Jewish religious influence on Christians ranked high.

Some scholars have dismissed statements to the effect that thirteenth-century Jews had the potential to religiously influence Christians as rhetorical vestiges of a bygone age. Since late Antiquity, church councils and popes forbade a variety

1 For overviews of these measures, see Shlomo Simonsohn, *The Apostolic See and the Jews: History* (Toronto: Pontifical Institute of Mediaeval Studies, 1991), 133-146 and Solomon Grayzel, *The Church and the Jews in the Thirteenth Century*, vol. 1 (1966 [rev. edn.]), vol. 2 (1989), 1:59-70.

2 On the ways in which segregatory legislation related to concerns about ritual purity and the definition of group boundaries, see, for example, Kenneth Stow, *Jewish Dogs: An Image and Its Interpreters: Continuity in the Catholic-Jewish Encounter* (2006); James Brundage, *Law, Sex, and Christian Society in Medieval Europe* (2009); David Nirenberg, "Conversion, Sex, and Segregation: Jews and Christians in Medieval Spain", *American Historical Review* 107 (2002): 1065-1093.

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 DOI 10.1484/M.RELMIN-EB.5.111603

of Jewish-Christian interactions in the name of preventing Jews from spiritually corrupting Christians. Jews were formidable rivals by any measure in the eyes of the early church, and segregatory efforts formed part of an effort to ensure that church's very survival.[3] By the thirteenth century, however, the power dynamics between Christians and Jews had evolved dramatically. A persecuted Jewish minority now lived at the mercy of a mighty Christian majority that cast Jews as the archvillains in its sacred history no less. From this perspective, it may seem absurd to suggest that Jews were still in a position to religiously influence Christians. Indeed, medieval Christians and Jews widely recognized – as do modern scholars – that the dominant culture was far more likely to shape the subordinate culture than *vice versa*, and there is no question that Christian culture did profoundly shape medieval Jewish life.[4] In light of these observations, it would seem that medieval Christians actually had every reason to think that Jewish-Christian intermingling would, if anything, draw Jews into the Christian flock and not the other way around.

This paper argues, however, that persistent – and, in fact, increasingly frequent – references on the part of high medieval Christian authorities to the risk of Jewish religious influence on Christians actually reflected and illuminate key facets of thirteenth-century Jewish-Christian relations. When read against Jewish texts and archival records, they remind us that Jews and Christians interacted on multiple registers, some of which created micro contexts whose power dynamics ran counter to those that characterized the period more broadly. Christian conversion to Judaism was one possible outcome of these situations, if an unusual one. At the same time as Christian authorities' portrayals of Jewish religious influence on Christians aligned to an astonishing degree with daily realities, shedding light on Jewish-Christian dynamics far more multi-faceted than typically imagined, however, they nevertheless diverged from daily realities in vital ways, as well, in particular in their depiction of Jews as predators who nefariously and aggressively

3 On Jewish proselytism in antiquity, see the sources listed in Louis Feldman, "Conversion to Judaism in Classical Antiquity", *Hebrew Union College Annual* (2003): 115 n. 1. On the "Jewish mission" prior to the eleventh century, see Bernhard Blumenkranz, *Juifs et Chrétiens dans le Monde Occidental 430-1096* (1960), 159-211. On the boundaries between "Judaism" and "Christianity" during the first centuries of the Common Era, see Daniel Boyarin, *Border Lines: The Partition of Judaeo-Christianity* (2006).

4 On attraction to Christianity among medieval Jews in northern Europe, see Ivan G. Marcus, "Jews and Christians Imagining the Other in Medieval Europe", *Prooftexts* 15 (1995): 209-226; Ivan G. Marcus, "Hierarchies, Religious Boundaries and Jewish Spirituality in Medieval Germany", *Jewish History* 1 (1986): 7-26; Ivan G. Marcus, "A Pious Community and Doubt: Quiddush ha-Shem in Ashkenaz and the Story of Rabbi Amnon of Mainz", *Studien zur jüdischen Geschichte und Soziologie: Festschrift Julius Carlebach* (Heidelberg: Carl Winter Universitätsverlag, 1992), 97-113; Jeremy Cohen, "Between Martyrdom and Apostasy: Doubt and Self-Definition in Twelfth-Century Ashkenaz", *Journal of Medieval and Early Modern Studies* 29 (1999): 431-471. On the concerns of medieval Jewish leaders in Spain about the seductiveness of Christian society, see Jonathan Ray, "Beyond Tolerance and Persecution: Reassessing Our Approach to Medieval *Convivencia*", *Jewish Social Studies* 11 (2005): 1-18.

sought to convert cradle Christians to Judaism. I suggest that this dark portrayal of Jews' intentions and methods lays bare deep-seated ecclesiastical anxieties about the weaknesses of the Christian flock and the status of Christianity vis-à-vis Judaism two millennia after *ecclesia* first touted its triumph over *synagoga*.

Christian Authorities on Two Types of Jewish Influence

Thirteenth-century papal, royal, and conciliar sources portray Jews as negatively influencing Christians religiously in two general ways. First, Jews could sow doubts in Christians' hearts about Christianity by, for instance, mocking and insulting Christian beliefs and practices in ways that could easily "infect the Lord's sheep".[5] In 1205, for example, in the bull *Etsi non displiceat*, in the context of listing scandalous Jewish behaviors in France, Pope Innocent III described Jews running around town on Good Friday, laughing at Christians for believing in "some peasant who was hung by the Jewish people" and seeking thereby to turn Christians away from their worship.[6] Informal Jewish-Christian religious debates in the course of which Jews were bound to attack Christian beliefs were also liable, in the words of Pope Gregory IX in his 1233 bull *Sufficere debuerat*, to cause "simple-minded [Christians] to slide into the snare of error".[7]

A second way Jews could negatively influence Christians religiously according to Christian authorities was by attracting Christians to Judaism.[8] Christian leaders frequently decried the alleged Judaizing tendencies of Jews' Christian servants. To cite but one example, in 1205, in a letter to a priest in the archdiocese of Sens, Pope Innocent III lamented how, by living together "with those whom hard-heartedness blinds to the recognition of the true light", Christian servants

5 Gerona, Spain. Arxiu Diocesà de Girona, Lletres episcopals 63, fol. 170r–v.

6 Grayzel, *The Church and the Jews,* 1:104-109 (#14). On this bull, see John Tolan, "Of Milk and Blood: Innocent II and the Jews, Revisited," in *Jews and Christians in Thirteenth-Century France* (2015), 139-149.

7 Grayzel, *The Church and the Jews,* 1:198-201 (#69). Informal Jewish-Christian debates were prohibited also at the turn of the thirteenth century in the Synodical Rules of Odo de Sully (Grayzel, *The Church and the Jews,* 1:300 [#IV]); in 1254, by King Henry III of England (Thomas Rymer, *Foedra, Conventiones, Literae, etc.* [1745], 1:293); and in 1267, at the Council of Vienne (Grayzel, *The Church and the Jews,* 2:248 [#XIX]).

8 Of course, these two ways of negatively influencing Christians religiously were not mutually exclusive – sowing doubt about Christianity could lead to attraction to Judaism. In the *Siete Partidas*, compiled around 1265, King Alfonso X of Castile specified that "Jews should be very careful to avoid ...converting any Christian...[by] praising [the Jewish] law and disparaging [the Christian law]" (*Las siete partidas del Rey Don Alfonso el Sabio,* 7.24.2, ed. Real Academia de la Historia [1807], 670). Moreover, it was feared also that sowing doubt about Christianity could lead to Christian heresy. On possible connections between Jews and Christian heretics in medieval Europe, see Louis I. Newman, *Jewish Influence on Christian Reform Movements* (1925; repr.1966); the sources listed in Salo Baron, *A Social and Religious History of the Jews,* 18 vols. (1952-1983), 9:267-268 n. 5, 268 n. 6; David Berger, "Christian Heresy and Jewish Polemic in the Twelfth and Thirteenth Centuries", *The Harvard Theological Review* 68 (1975): 287-303; and Norman Roth, "Jews and Albigensians in the Middle Ages: Lucas of Tuy on Heretics in Leon", *Sefarad* 41 (1981): 71-93.

were "introduced into the darkness" of Jewish error.[9] Christian authorities also alleged, however, that Jews recruited converts outside their homes, thereby drawing a broader swath of Christian society to Judaism. In 1286, in the bull *Nimis in partibus*, which was sent to the archbishops of York, Evreux, and Canterbury, Pope Honorius IV instructed clergy to stop Jews from "trying to attract" faithful Christians to Judaism. He claimed that Jews were inviting Christians to worship with them in synagogue on Sabbaths and holidays.[10] The Leonese bishop Lucas of Tuy (d. 1249) accused Jews of "leading [Christian] magistrates to their own [Jewish] worship with gold."[11]

Christian Authorities on the Circumstances of Jewish Influence

Christian authorities portrayed Jews as religiously influencing Christians – whether by instilling doubts in them or attracting them to Judaism – under two kinds of circumstances. The first involved encounters between Christians and Jews in which the dominant and ecclesiastically sanctioned Jewish-Christian power dynamics – according to which Jews were to be subordinate to Christians as a punishment for rejecting and killing Christ – were, in one way or another, subverted.[12] When a Christian servant lived in a Jewish home, for instance, or Christians attended a Jewish wedding, or Christians and Jews informally debated matters of faith, Jews were, respectively, the employer, the social majority, and Christians' peers. In these situations, the power dynamics were such that Jews actually stood a chance of influencing Christians.[13]

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9 Grayzel, *The Church and the Jews,* 1:110-111 (#15). On medieval legislation concerning non-Jewish servants in Jewish homes, see Friedrich Lotter, "Imperial versus Ecclesiastical Jewry Law in the High Middle Ages: Contradictions and Controversies concerning the Conversion of Jews and their Serfs", *Proceedings of the Tenth World Congress of Jewish Studies, Jerusalem, August 16-24, 1989,* ed. David Assaf (Jerusalem, 1990), BII: 53-60.

10 Grayzel, *The Church and the Jews,* 2:157-162 (#50). On how Honorius came to know such details, see Solomon Grayzel, "Bishop to Bishop I," in *Gratz College Anniversary Volume*, ed. Isidore David Passow (Philadelphia, 1971), 131-145. On the bull sent to the archbishop of Evreux, see Isidore Loeb, "Bulles Inédites des Papes," *Revue des Études Juives* 1 (1880): 293-298, at 298.

11 Gustave Saige, *Les juifs du Languedoc antérieurement au XIV^e siècle* (1881), 235-236 (#20). See Baron, *A Social and Religious History, 9:*57-58.

12 On the foundations of the Christian view that Jews were to be subordinate to Christians, see Jeremy Cohen, *Living Letters of the Law: Ideas of the Jew in Medieval Christianity* (1999), 19-65. For a useful theoretical discussion of medieval ethno-religious identity that addresses the various ways in which groups conceived of themselves and one another as well as the different registers in which they interacted, see Brian Catlos, *Muslims of Medieval Latin Christendom, c. 1050-1614* (2014), 508-535.

13 Shaye J. D. Cohen, too, has pointed out that Christians who were "under Jewish authority" were particularly "susceptible to Jewish influence" ("Between Judaism and Christianity: The Semicircumcision of Christians According to Bernard Gui, His Sources and R. Eliezer of Metz", *Harvard Theological Review* 94 [2001]: 305). Even in the Jewish home, however, influence could proceed in both directions. An intriguing passage in the thirteenth-century German pietistic work *Sefer Hasidim* attributes the greater

Christian authorities also portrayed Jews as religiously influencing Christians under conditions in which intellectual inclinations and affective bonds took precedence. Suggesting that Jewish teachers and ideas could exert a powerful attraction, in 1213, the Council of Paris denounced Jews for "wickedly pretending to explain the superficial plausibility of [Jewish] law" to Christians.[14] In addition, documents advocating the segregation of Christians and Jews frequently cite a desire to prevent the "danger" of romantic entanglements. Some of these records refer to Jewish men sleeping with Christian wet nurses who lived in their homes, in which cases the power dynamics would have favored Jewish influence.[15] But others refer to fornication and adultery between Christians and Jews more generally.[16] Although these sources do not directly link sex and conversion (they usually simply condemn interfaith sex as a grave sin in its own right), it is not difficult to imagine how romantic relationships with Jews could have been regarded as a gateway to Judaizing.

Realities Consonant with the Representations of Christian Authorities

The vignettes of everyday Jewish-Christian interactions that appear in documents that call for Jewish-Christian segregation are often at odds with the stereotype of thirteenth-century Jews as the passive victims of Christian aggressors. We are not accustomed to imagining thirteenth-century Jews trumpeting their unflattering views of Christianity, nor are we accustomed to imagining thirteenth-century Christians working for or socializing with Jews, let alone going over to Judaism. Reading these passages alongside Jewish texts and archival records, however, invites a reassessment of the nature of "typical" thirteenth-century Jewish-Christian relations, highlighting the multiplicity of contexts in which Jews and Christians encountered one another and the fluidity of Jewish-Christian power dynamics.

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prevalence of Jewish apostasy in one locale to the fact that the Jews there allegedly had closer relationships with their Christian employees. See discussion in Chaviva Levin, "Jewish Conversion to Christianity in Medieval Europe Encountered and Imagined, 1100-1300" (PhD diss., New York University, 2006), 158-159 and Elisheva Baumgarten, *Mothers and Children: Jewish Family Life in Medieval Europe* (2004), 137. For an example of ecclesiastical outrage at Christians attending a Jewish wedding in thirteenth-century England, see, Grayzel, "Bishop to Bishop," 137.

14 Grayzel, *The Church and the Jews,* 1:306-307 (#VIII).

15 On medieval Jews and their wet nurses, see Rebecca Lynn Winer, "Conscripting the Breast: Lactation, Slavery and Salvation in the Realms of Aragon and Kingdom of Majorca, *c.* 1250-1300", *Journal of Medieval History* 34 (2008): 164-184 and Elisheva Baumgarten, "Jewish Conceptions of Motherhood in Medieval Christian Europe: Dialogue and Difference", *Micrologus: Natura, Scienze e Società Medievali* 17 (2009): 149-165.

16 See, for example, Grayzel, *The Church and the Jews,* 1:156-157 (#44), 1:166-167 (#49), 1:168–169 (#51), 1:204-207 (#71), 206-207 (#72), 1:258-259 (#107), 1:282–283 (#122), 1:294-295 (#133), 1:308-309 (#X), 1:314-315 (#XVI); 2:244-246 (#VI), 2:254-565 (#XV), 2:273 (#XXVII), 2:273-274 (#XXIX), 2:284 (#XLV).

To begin, an array of sources indicates that it is plausible that Jewish ridicule and refutations of Christianity actually instilled doubts in some Christians about the Christian faith. It is well known that Jews disparaged Christianity among themselves,[17] and it seems entirely possible that exposure to this behavior influenced the views of Jews' Christian employees. Moreover, as David Berger has noted, "the assertiveness and self-confidence of Ashkenazic [and, I would add, Sephardic] Jews were remarkable", and Jews often aired their religious views in public.[18] Jewish and Christian sources confirm that one context in which they did so was in informal debates with Christians. Jewish references to these debates indicate that Jewish interlocutors could strive to be aggressive. According to the thirteenth-century *Sefer Nizzahon Yashan,* Jewish interlocutors were "not to allow [their] antagonist to change the subject", and they were to "be strong-willed by asking questions or giving responses that deal[t] with the specific issue at hand and not permitting [their] antagonist to extricate himself from that issue until it ha[d] been completed...[so that] the Gentile [would be] thoroughly embarrassed".[19] Christian references to these debates suggest that Jewish interlocutors often got the upper hand. To prevent damage to the Christian faith, King Louis IX of France allegedly advised that, when a Jew "defamed the Christian law", a Christian layman would do best hastily to "pierce his midriff, so far as the sword would enter".[20] Likewise fearing a negative outcome for Christianity, Thomas Aquinas advised against Jewish-Christian disputations unless publicly organized and managed by the church.[21] Although it is not possible to ascer-

17 On Jewish anti-Christian practices and their historiography, see Elliott Horowitz, *Reckless Rites: Purim and the Legacy of Jewish Violence* (2006). On medieval Jewish anti-Christian polemics, see, for example, Daniel Lasker, *Jewish Philosophical Polemics against Christianity in the Middle Ages* (1977; 2nd ed. 2007). On Jews recounting the *Toledot Yeshu* both in private and in public, see Paola Tartakoff, "The *Toledot Yeshu* and the Jewish-Christian Conflict in the Medieval Crown of Aragon", in *Toledot Yeshu ("The Life Story of Jesus") Revisited,* ed. Peter Schäfer, Michael Meerson, and Yaacov Deutsch (2011), 297-309. Also see Anna Sapir Abulafia, "Invectives against Christianity in the Hebrew Chronicles of the First Crusade", in *Crusade and Settlement: Papers read at the First Conference of the Society for the Study of the Crusades and the Latin East and presented to R. C. Smail,* ed. P. Edbury (1985), 66-72; William Chester Jordan, "Marian Devotion and the Talmud Trial of 1240", in *Religiongespräche im Mittelalter,* ed. Bernard Lewis and Friedrich Niewhohner (1992), 61-76; Ruth Langer, *Cursing the Christians? A History of the* Birkhat ha-Minim (2012), esp. 66-101.

18 David Berger, *The Jewish-Christian Debate: A Critical Edition of the* Nizzahon Vetus (1979), 22-23. See David Berger, "Mission to the Jews and Jewish-Christian Contacts in the Polemical Literature of the High Middle Ages," *American Historical Review* 91 (1986): 576-591.

19 Berger, *The Jewish-Christian Debate*, 169 (#155) (=108 [#155] in Hebrew). See discussion in Berger, "Mission to the Jews," 588-591.

20 Jean de Joinville, *Histoire de Saint Louis* (1921), 23.

21 Jakob Guttmann, *Das Verhältniss des Thomas von Aquino zum Judenthum und zur jüdischen Literatur* (1891), 5-6 and Alex Novikoff, *The Medieval Culture of Disputation: Pedagogy, Practice, and Performance* (2013), 167-171. The Council of Trier forbade "ignorant clergy" from disputing with Jews in the presence of the laity (Grayzel, *The Church and the Jews,* 1:319 [#XIX]; 2:270 [#XXV]).

tain whether interactions of these kinds actually sowed doubt, some medieval Christians asserted that they, in fact, did. According to the late thirteenth-century Crusade chronicle of Jean de Joinville, for instance, King Louis IX lamented that Christian onlookers at Jewish-Christian disputations "went away misbelievers through not fully understanding the Jews".[22] And an early fourteenth-century inquisitorial transcript quotes the Christian residents of a town in Aragon as affirming that "blasphemous" Jewish outbursts to the effect that Christ was not divine were "strengthening [the Jewish] sect" and sowing doubts in Christians.[23]

An array of sources also confirms that a number of middle- and upper-class Christians officially went over to Judaism during the Middle Ages. There are over sixty documented cases between the ninth and the fourteenth centuries of relatively wealthy, educated Christians formally converting to Judaism following a period of religious instruction, circumcision (in the cases of men), and ritual immersion. So one learns from records from the Cairo Geniza, documents from archives in Catalonia and England, tombstones in Germany, the writings of rabbinic authorities, proceedings of the medieval inquisition, and accounts by individual converts.[24] Moreover, as conversion to Judaism was of necessity clandestine (being punishable by death), and as few records of such conversions were produced and even fewer have survived, it is likely that there were more such cases than we shall ever know.

In consonance with the hints noted above in papal, royal, and conciliar documents, these sources indicate that romantic liaisons and the experience of studying Hebrew and Jewish sources with rabbis could play a role in conversions.[25] In 1222, for instance, a Christian deacon was burnt at the stake in Oxford for undergoing

22 Joinville, *Histoire,* 23.

23 Barcelona, Arxiu de la Catedral de Barcelona, Codex 126, fol. 391r–v. See discussion in Paola Tartakoff, *Between Christian and Jew: Conversion and Inquisition in the Crown of Aragon, 1250-1391* (2012), 130.

24 On these cases, see Kenneth Auman, "Conversion from Christianity to Judaism in the Middle Ages" (Masters thesis, Yeshiva University, 1977); Wolfgang Giese, "In Iudaismum lapsus est. Jüdische Proselytenmacherei im frühen und hohen Mittelalter (600–1300)," *Historisches Jahrbuch der Görres-Gesellschaft* 88 (1968), 407-418; Norman Golb, "Jewish Proselytism: A Phenomenon in the Religious History of Early Medieval Europe," The Tenth Annual Rabbi Louis Feinberg Memorial Lecture, University of Cincinnati, 1988; Gilbert Dahan, *Les intellectuels chrétiens et les juifs au moyen âge* (1990), 189-191,

25 On medieval Christian Hebraism, see, for example, Israel Yuval and Ora Limor, "Skepticism and Conversion: Jews, Christians, and Doubters in 'Sefer ha-Nizzahon'", in *Hebraica Veritas? Christian Hebraists and the study of Judaism in early modern Europe*, ed. Allison P. Coudert and Jeffrey S. Shoulson (2004), 159-180; Beryl Smalley, *The Study of the Bible in the Middle Ages* (1952); Aryeh Grabois, "The *Hebraica Veritas and* Jewish-Christian Intellectual Relations in the Twelfth Century", *Speculum* 50 (1975): 613-634; Deborah Goodwin, *Take Hold of the Robe of a Jew*: *Herbert of Bosham's Christian Hebraism* (2006); Deeana Copeland Klepper, *The Insight of Unbelievers: Nicholas of Lyra and Christian reading of Jewish text in the later Middle Ages* (2007).

circumcision and marrying a Jewish woman.[26] In 1275, a London Dominican known as Robert of Reading, who had himself circumcised and married a Jewish woman, was said to have been "well-trained in Hebrew".[27] Describing the intellectual engagement with Judaism of a proselyte named Abraham ben Abraham, Rabbi Joel ben Isaac ha-Levi of Bonn (d. *c.* 1200) explained that Abraham had drawn "near to the Lord's work, to seek the Lord [and] to study the Torah and the holy tongue".[28] Evidence of conversion to Judaism demonstrates that, during the same century when Jews were strongly associated in the popular Christian imagination with the devil, filth, and greed, and when Jewish books were consigned to flames on account of their "infectious", "blasphemous", and "heretical" contents, some Christians found individual Jews and Judaism so deeply attractive that they risked their lives to become one with them.

Understanding Ecclesiastical Anxieties

Although cases of conversion to Judaism were few and far between, their very existence – especially when involving Christian clerics and other educated or high-ranking individuals – had to have been deeply troubling to Christian authorities. The departure of members – and in particular leaders – from the Christian fold threatened the cohesion of the Christian community. Moreover, it rendered the relation between "dominant" and "subordinate" groups unstable and uncertain, suggesting that the Christian community's confidence in the self-perpetuating strength of its cultural norms might be misplaced.[29]

From a theological perspective, conversion from Christianity to Judaism challenged Christian notions of revelation and salvation, which understood Christianity as fulfilling the promises of Hebrew Scripture and viewed Christians as replacing the Jews as God's chosen people. Moreover, due to the great risks involved in conversion to Judaism – not to mention the occasional martyrdoms of Christian converts to Judaism, including seven men and three women who

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26 See Frederic William Maitland, "The Deacon and the Jewess; or, Apostasy at Common Law", in *Roman Canon Law in the Church of England: Six Essays,* ed. Frederic William Maitland (1898), 158-179.

27 *The Chronicle of Bury St. Edmunds*, ed. Antonia Gransden (1964), 58.

28 Avraham (Rami) Reiner, "The Dead as Living History: On the Publication of *Die Grabsteine vom jüdischen Friedhof in Würzburg, 1147-1346*", in *Death in Jewish Life: Burial and Mourning Customs in Medieval Ashkenaz*, ed. Stefan C. Reif, Andreas Lehnardt, and Avriel Bar-Levav (2014), 207-208; Jacob Katz, *Exclusiveness and Tolerance: Studies in Jewish-Gentile Relations in Medieval and Modern Times* (1961), 78-79. Earlier cases of conversion to Judaism involving intellectual engagement include those of Bodo, the palace deacon to Emperor Louis the Pious; Wecelin, a priest of Duke Conrad in eleventh-century Germany; Archbishop Andreas of Bari in eleventh-century Italy; and Johannes son of Dreux (Obadiah) in early twelfth-century Italy.

29 On the significance of religious conversion in the context of majority-minority relations, see Gauri Viswanathan, *Outside the Fold: Conversion, Modernity and Belief* (1998), esp. xi, 87.

embraced death in Mainz during a late-thirteenth century pogrom[30] – it may have appeared unsettlingly plausible to some Christians that, in the words of a passage from the *Sefer Nizzahon Yashan*, Christians would not convert to Judaism unless they "knew for certain that the [Christian] faith was without foundation and that it was all a lie, vanity and emptiness".[31]

These concerns must have been all the more alarming to Christian authorities as they joined a constellation of factors in high and late medieval Europe that seemed to indicate that Christianity's victory over Judaism was not secure. Not only did some Christian preachers, such as Francesc Eiximenis and Berthold of Regensburg, cast Jews as morally admirable (if in the context of upbraiding Christians), praising the solemnity with which Jews fasted and worshipped, their modest dress, and their dedication to their families,[32] but Christians observed how, in subversion of the prescribed social order, many Jews actually prospered. Christians not only worked in Jewish homes, but they borrowed money at interest from Jews and bought meat from Jews that Jews did not deem fit for Jewish consumption. In certain parts of Europe, Jews even acceded to public office.[33]

Where Fact Shades into Fantasy

Whereas claims in papal, royal, and conciliar sources about Jews instilling doubts in Christians and about Christian attraction to Judaism seem to have reflected some realities, assertions that Jews actively recruited Christian converts diverge sharply from other evidence. Of course, Christians could not convert to Judaism without Jewish support, and Jewish sources refer to various stages of the Jewish conversion process that required Jewish guidance. In the thirteenth-century *Sefer ha-Yashar*, for instance, Rabbi Moshe of Pontoise referred to a proselyte whose "master, the brother of rabbi Moshe, had taught him day and night Torah and Mishnah".[34] At the turn of the thirteenth century, Rabbi Joel ben Isaac ha-Levi of Bonn described a convert who "dwelled with us for a long time", moving between the communities of Cologne, Speyer, and Würzburg.[35] In the context of a discussion regarding whether a *ger toshav* was permitted to touch kosher wine,

30 See Adolf Neubauer, "Le Memorbuch de Mayence", *Revue des Études Juives* 4 (1882): 1-30.

31 Berger, *The Jewish-Christian Debate,* 206-207 (#211) (=144-145 [#211] in Hebrew).

32 See David Viera, "The Evolution of Francesc Eiximenis's Attitudes toward Judaism", in *Friars and Jews in the Middle Ages and Renaissance*, ed. Steven J. McMichael and Susan E. Myers (2004), 155 and Irven Resnick, *Marks of Distinction: Christian Perceptions of Jews in the High Middle Ages* (2012), 238. On positive medieval Christian perceptions of Jews, also see Marc Saperstein, "Christians and Jews – Some Positive Images", *Harvard Theological Review* 79 (1986): 236-246.

33 See the discussion in Grayzel, *The Church and the Jews,* 1:27-28 and Simonsohn, *History,* 147-154.

34 Avraham (Rami) Reiner, "L'attitude envers les proselytes en Allemagne et en France du XI^{e} au XIII^{e} siècle", *Revue des Études Juives* 167 (2008): 99-119, at 111-112.

35 Reiner, "L'Attitude", 110 and Reiner, "The Dead as Living History", 199-212.

the Tosafot mention a proselyte who had been circumcised and who "lived a long time as a Jew without yet having proceeded to ritual immersion".[36] There is no indication, however, that thirteenth-century Jews sought to draw Christians to Judaism in the first place. On the contrary, in keeping with talmudic instructions and on account of the dangers involved, Jews appear to have discouraged prospective converts.[37]

Papal, royal, and conciliar sources that cast Jews as "luring", "ensnaring", and "seducing" Christians into converting to Judaism reflected and propagated thirteenth-century Christian stereotypes of Jews as malevolent predators. Indeed, it is significant that some of the documents that refer to Jews religiously influencing Christians also accuse Jews of being ever at the ready to murder Christians,[38] crucify Christian children,[39] and sell Christian children into slavery.[40] It is possible, however, that, in the context of grappling with fears about Jewish religious influence, depicting Jews as maliciously aggressive served additionally as a way of exonerating Christians for what would, by any other measure, appear to have been a shocking and shameful lack of religious commitment. Indeed, it was perhaps to this same end that papal, royal, and conciliar sources so often specified that the Christians whom Jews influenced were "simple-minded" and "ignorant".[41] Moreover, by demonizing Jewish religious influence, Christian authorities also avoided acknowledging an even greater scandal, namely, that thirteen centuries after the birth of Christ, Judaism still retained vitality and allure.[42]

36 Reiner, "L'Attitude", 114. See also *Sefer Hasidim*, ed. J. Wistinetzki and J. Freiman (Frankfurt am Main, 1924; repr. 1955-1964), 77 (#214).

37 See, for example, the Babylonian Talmud, tractate *Yevamot* 47a-b and the thirteenth-century instructions published in *Zikhron Brit la-Rishonim*, ed. J. Glassberg (1892), 132, as well as the case published in Mordechai Friedman, *Ribbui Nashim Be-Yisrael* (Jewish Polygyny in the Middle Ages: New Documents from the Cairo Geniza) (1986), 335-339 (#13). On attitudes toward Christian converts to Judaism among twelfth-century Ashkenazi rabbinic authorities, see Reiner, "L'Attitude"; Ben Zion Wacholder, "Cases of Proselytizing in the Tosafist Responsa", *The Jewish Quarterly Review* 51 (1961): 288-315; Ephraim Kanarfogel, "Approaches to Conversion in Medieval European Rabbinic Literature: From Ashkenaz to Sefarad", in *Conversion, Intermarriage and Jewish Identity*, ed. Robert S. Hirt, Adam Mintz and Marc Stern (2015), 217-257.

38 Grayzel, *The Church and the Jews,* 1:104-109 (#14).

39 *Siete Partidas*, 7.24.2.

40 Grayzel, *The Church and the Jews,* 1:244-245 (#99).

41 See, for example, Grayzel, *The Church and the Jews* 1:198-201 (#69), 2:106-110 (#28); Giovanni Mansi, *Sacrorum conciliorum collectio* (1779-1782), 24:176; and *Registrum Ricardi de Swinfield*, ed. W. W. Capes (1909), 121.

42 On the relationship between medieval Christians' doubts about Christianity and their "irrational" attribution of unobservable characteristics to Jews, see Gavin Langmuir, *History, Religion, and Antisemitism* (1990), esp. 302.

Conclusions

In sum, examining the pronouncements of Christian authorities about Jewish religious influence in conjunction with Jewish texts and archival records sheds light on the multi-faceted nature of thirteenth-century Jewish-Christian relations. Although Jews were widely maligned, financially exploited, legally discriminated against, violently attacked, and expelled from major polities, they were not passive in the face of Christian abuse, and nor were Christian attitudes and behaviors toward Jews always abusive. On occasion – and far too frequently for the tastes of Christian authorities – Christians worked for Jews, socialized with Jews, fell in love with Jews, studied Hebrew and Jewish texts with Jews, and even risked their lives by converting to Judaism.

Moreover, a closer look at the circumstances under which thirteenth-century Jews and Judaism could influence Christians religiously (whether by instilling doubts in Christians about Christianity or by proving attractive to Christians) suggests that Jewish-Christian power dynamics were fluid. Although the overarching balance of power between thirteenth-century Christians and Jews was such that a powerful Christian majority held sway over a vulnerable Jewish minority, in daily life, this balance could shift. Christians worked for Jews, including in Jewish homes, Christian guests were in the minority at Jewish social events, and Christians who engaged in informal theological arguments with Jews could find that they were no match for their interlocutors.

Together with an appreciation of the theological significance of Christian conversion to Judaism in the context of two millennia of religious rivalry, an appreciation of the extent to which personal experiences and subversions of reigning Jewish-Christian power dynamics could upend the dominant direction of religious influence deepens our understanding of why high medieval Christian authorities considered Jewish-Christian intermingling so hazardous. More broadly, it reminds us to resist assigning medieval Christians and Jews to fixed categories in relation to one another.

LEGAL RESPONSES TO CRUSADE VIOLENCE AGAINST JEWS

Jessie Sherwood

Ph.D.

As is well known, Pope Urban II called Christians in the Latin West to undertake an armed pilgrimage to reclaim Jerusalem and assist their brethren in the East in 1095, and in 1096 some of those Christians who answered that call turned their swords on Jews living within Latin Christendom. According to Guibert de Nogent, at Rouen those preparing for this expedition forced Jews into a church, and "put them to the sword regardless of sex or age, except those who subdued themselves to the Christian condition".[1] Similarly, Hebrew and Latin chronicles alike report that at Trier, Regensburg, Worms, Mainz, and other cities in the Rhineland, "Jews were forcibly baptized, or killed, or they killed themselves".[2] Neither violence against Jews nor their forcible baptism were unknown to Latin Christendom, but hitherto Christians had not, to all appearances, employed such dire threats or wholesale violence to compel conversions.[3] Scholars have, as a con-

1 Guibert de Nogent, *Monodiae* 2.5, in *Autobiographie,* Edmond-René Labande, ed. (1981), 246-247. "His dictis, arma presumunt et in quandam ecclesiam compellentes, utrum vi nescio an dolo inde recutiunt, et gladiis indiscrete sexu et aetates addicunt, ita tamen, ut qui christianae conditioni se subderent, ictum mucronis impendentis evaderent". *Cf.* Eadmer, *Historia Novorum in Anglia*, Martin Rule, ed. (1844), 98-99; William of Malmesbury, *Gesta Regum Anglorum* 4, R. A. B. Mynors, R. M. Thomson & Michael Winterbottom, eds (1998), 317; Norman Golb, *Les juifs de Rouen au Moyen Âge: Portrait d'une culture oubliée* (1985), 77-91.

2 *Annales Augustani*, MGH *Sciptores* vol. 3, George Pertz, ed. (1839), 134. "Ab his, quia multitudini confidebant, in plerisque urbibus Iudaei coacti baptizabantur, aut interimebantur, aut se ipsos interficebant". *Cf.* Albert of Aachen, *Historia* Bk. 1.28, *Recueil des historiens des Croisades*, vol. 4 (1879), 292-293; *Annales Hildesheimenses Continuatio,* MGH *Scriptores* vol. 3, 106; *Annalista Saxo*, MGH *Scriptores* vol. 6, D. G. Waitz & P. Kilon, eds (1844; 1925), 729; *Bernoldi Chronicon*, MGH *Scriptores* vol. 5 (1844; 1925), 464-465; *The Chronicle of Rabbi Eliezer bar Nathan*, trans. Shlomo Eidelberg, *The Jews and the Crusaders: The Hebrew Chronicles of the First and Second Crusade,* 79-93; *The Chronicle of Solomon bar Simson*, in Robert Chazan, *European Jewry and the First Crusade* (1987), 243-297; Ekkehard von Aura and Frutolf of Michelsberg*, Chronicon* in *Frutolfs und Ekkehards Chroniken und die Anonyme Kaiserchronik*, Franz-Joseph & Irene Schmale, eds (1972), 108, 125; *Gesta Treverorum*, *continuatio prima* 1.17, MGH *Scriptores* vol. 8, George Pertz, ed. (1925) 190-191; *Mainz Anonymous*, App. S in Chazan, *European Jewry*, 225-242; Otto of Freising, *Chronicon* 7.2, MGH *Scriptores* vol. 20, George Pertz, ed. (1898), 249; Sigbert of Gembloux, *Chronica*, MGH *Scriptores* vol. 6, 367.

3 Daniel Callahan, "Ademar of Chabannes, Millennial Fears and the Development of Western Anti-Judaism", *Journal of Ecclesiastical History* 46 (1995): 19-35; Lawrence Duggan, "For Force is Not of God": Compulsion and Conversion from Yahweh to Charlemagne", in *Varieties of Religious Conversion in the*

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 277–288

 DOI 10.1484/M.RELMIN-EB.5.111604

sequence, dedicated some attention to debating what, why, how, and when these attacks happened.[4] Similarly, Jewish communities' responses to the violence and its aftermath, although not wholly unprecedented, have also been the subject of careful analyses and furious debates.[5] Christian authorities' legal responses have, understandably, drawn less attention than either the violence or its aftereffects within Jewish communities.[6] For, as aberrant as both the massacres and forced conversions were, in the immediate aftermath Christian authorities responded much as their predecessors had done under similar circumstances in previous centuries: they implicitly and explicitly permitted forcibly baptized Jews to revert.[7]

Middle Ages, John Muldoon, ed. (1997), 49-51; Richard Landes, "The Massacres of 1010: On the Origins of Anti-Jewish Violence in Western Europe", in *From Witness to Witchcraft: Jews and Judaism in Medieval Christian Thought*, Jeremy Cohen, ed. (1996), 79-112; David Malkiel, *Reconstructing Ashkenaz: The Human Face of Franco-German Jewry, 1000-1250* (2009), 44-72; Marcia Colish, *Faith, Fiction & Force in Medieval Baptism Debates* (2014), 232-250. My thanks to Irven Resnick for directing me to Colish's book.

4 See Matthew Gabriele, "Against the Enemies of Christ: The Role of Count Emicho in the Anti-Jewish Violence of the First Crusade", in *Christian Attitudes toward the Jews in the Middle Ages: A Casebook*, Michael Frassetto, ed. (2007), 61-82; Chazan, *European Jewry,* 72-75, 199-222; Jeremy Cohen, "A 1096 Complex? Constructing the First Crusade in Jewish Historical Memory, Medieval and Modern", in *Jews and Christians in Twelfth-Century Europe*, Michael Signer & John VanEngen, eds (2001), 9-26; Eidelberg, *The Jews and the Crusaders*; Benjamin Kedar, "The Forcible Baptisms of 1096", in *Forschungen zur Reichs, Papst-, und Landesgeschichte. Peter Herde zum 65. Geburtstag von Freunden, Schülern und Kollegen dargebracht*, vol. 2, Karl Borchardt and Enno Bünz, eds (1998), 187-200; Friedrich Lotter, "'Tod oder Taufe': Das Problem der Zwanstaufen während des Ersten Kreuzzugs", in *Juden und Christen zur Zeit der Kreuzzüge*, Alfred Haverkamp, ed. (1999), 107-152; David Malkiel, "Destruction or Conversion: Intention and Reaction, Crusaders and Jews, in 1096", *Jewish History* 15.13 (2001): 257-280; Jonathan Riley-Smith "The First Crusade and the Persecution of the Jews", *Studies in Church History* 21 (1984): 51-72; Kenneth Stow, "Conversion, Apostasy, and Apprehensiveness: Emicho of Flonheim and the Fear of the Jews in the Twelfth Century", *Speculum* 76 (2001): 911-933; Susanna Throop, *Crusading as an Act of Vengeance, 1095-1216* (2011), 64-70.

5 e.g. Chazan, *European Jewry*, 137-168, 174-179; Jeremy Cohen, *Sanctifying the Name of God: Jewish Martyrs and Jewish Memories of the First Crusade* (2004); *idem*, "'The Persecutions of 1096' – From Martyrdom to Martyrology: The Sociocultural Context of the Hebrew Crusade Chronicles", [in Hebrew] *Zion* 59 (1994): 169-208; Susan Einbinder, *Beautiful Death: Jewish Poetry and Martyrdom in Medieval France* (2002); Simha Goldhin, "The Socialization of 'Kiddush ha-Shem' among Medieval Jews", *Journal of Medieval History* 23 (1997): 117-138; Israel Yuval, "Vengeance and Damnation, Blood and Defamation: From Jewish Martyrdom to Blood Libel Accusation", [in Hebrew] *Zion* 58 (1993): 33-90; *idem*, *Two Nations in Your Womb: Perceptions of Jews in Late Antiquity and the Middle Ages*, (2006), 135-204; Mary Minty, "*Kiddush ha-Shem* in German Christian Eyes in the Middle Ages", [in Hebrew] *Zion* 59 (1994): 209-266.

6 Chazan, *European Jewry*, 169-179; Shlomo Simonsohn, *The Apostolic See and the Jews*, vol. 7, *History* (1992), 13-17.

7 *Codex Theodosius* 16.18.23, Theodor Mommsen & Paul Meyer, eds (1905), 1:893; Gregory I, *Scribendi ad fraternitatem* (591), *Reg. 1.45*, in *Registre des Lettres,* vol. 1, Pierre Minard, ed. (1991), 228; Bernard Blumenkranz, *Juifs et chrétiens dans le monde occidental, 430-1096* (1963), 81-100; Walter Goffart, "The Conversions of Avitus of Clermont, and Similar Passages in Gregory of Tours", in *To See Ourselves as Others See Us*, Jacob Neusner & Ernest Frerichs, eds (1985), 473-474. Even in Visigothic Spain, where successive Councils of Toledo and several kings attempted to retain baptized Jews, other secular and ecclesiastical authorities condoned reversions. Toledo IV, c. 57 and 59; Tol. VI, c. 3; Tol. VIII, c. 12; Tol. IX, c. 17; Tol. XII, c. 9; Tol. 16, c. 1; Tol. 17, c. 8, in J. Vives, ed., *Concilios Visigóthicos e Hispano-Romanos*

According to Eadmer's *Historia novorum*, the Jews of Rouen approached William Rufus of England and Normandy with a bribe, asking him to compel baptized Jews to revert. William complied, and "caused many, subdued by threats and terror, to receive their original error".[8] Similarly, Henry IV of Germany granted "the enjoyment of their own laws to the Jews who were compelled, as is customary" on his return from Italy in 1097.[9] Henry also added Jews to the Mainz Peace of 1103, extending the protections enjoyed by women, merchants, and ecclesiastics to his Jewish subjects.[10] Only Clement III, the anti-pope installed by Henry IV, objected to the widespread reversions. In a letter to the bishop of Bamberg, he scolded the episcopacy for allowing baptized Jews to apostatize. Clement admonished them "to correct this, according to canonical decree, and after the examples of the fathers, lest the sacrament of baptism and the salvific invocation of the name of God should seem to be annulled".[11] He was not, however, much heeded. Despite some disgruntlement among Christian chroniclers like Eadmer, other bishops seemingly did nothing to forestall baptized Jews' return to Judaism.[12]

Decades later when Christian authorities began addressing 1096 and its aftershocks in earnest, protection and reversion were again the poles around which their responses converged. From roughly the 1120s onwards, popes and then the emperor issued and reissued laws intended to prevent or circumscribe both

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(1963), 210-211, 237, 285, 305, 497-498 and 534-546; *Leges Visigothorum* 12.2.4, 12.2.10, 12.2.16, 12.2.17, 12.2.18, 12.3.3, 12.3.9, 12.3.14, MGH *Legum Nationum Germanicarum* vol. 1, Karolus Zeumer, ed. (1902), 414, 416-417, 424-427, 432-433, 436-437, 442-443.

8 Eadmer, *Historia Novorum*, 99. "Plures ex illis minis et terroribus fractos, abnegato Christo, pristinum errorem suscipere fecit". See also William of Malmesbury, *Gesta Regum Anglorum*, 317; Guibert, *Monodiae* 2.5, 247. Eadmer's inversion was not atypical, see Anthony Bale in *Feeling Persecuted: Christians, Jews and Images of Violence in the Middle Ages* (2010).

9 Frutolf of Michelsberg *Chronicon*, 108. "Henricus imperator ab Italia rediens Ratisponam Baioarię urbem venit ibique aliquamdiu moratus Iudęis, qui baptizari coacti sunt, legibus suis uti, ut fertur, concessit". See also Ekkehard von Aura, *Chronicon,* 126, and *Mainz Anonymous*, 227; R. Chazan, *European Jewry*, 137; Friedrich Lotter, "The Scope and Effectiveness of Jewry Law in the High Middle Ages", *Jewish History* 4.1 (1989): 39; *idem*, "Imperial Versus Ecclesiastical Jewry Law in the High Middle Ages: Contradictions and Controversies Concerning the Conversion of Jews and their Serfs", *Proceedings of the World Congress of Jewish Studies* Div. B., vol. 2 (1989): 57

10 Henry IV, *Pax Moguntina*, in MGH *Constitutiones et acta publica imperatorum et regum*, vol. 1, Louis Weiland, ed. (1893), 125. See also Anna Sapir Abulafia, "Continuity and Change in Twelfth-Century Jewish-Christian Relations", in *European Transformations: The Long Twelfth Century*, T. F. X. Noble & John VanEngen, eds (2012), 321; Lotter, "Imperial Jewry Law", 37-39.

11 Clement III, *Quod contra ecclesiae* (1097-1098), in *The Apostolic See and the Jews,* vol. 1, *Documents: 492-1404*, Shlomo Simonsohn, ed., (1988), 42. "Quod quia inauditum est et prorsus nefarium, te et omnes fratres nostros verbo Dei constringimus, quatinus id, secundum canonicam sanctionem et juxta Patrum exempla, corrigere festinetis, ne sacramentum baptismi, et salutifera invocatio nominis Domini videatur annullari". Lotter "Imperial Versus Ecclesiastical Jewry Law", 57.

12 Cosmas of Prague thus blamed the returns on episcopal laxity *Chronica Boemorum* 3.4, 3.49, MGH *Scriptores rerum Germanicum* vol. 2 (1923), 164-165, 222.

the bloodshed and the unwilling baptisms that had accompanied them. These were often more elaborate versions of earlier protections, but there seems little doubt that they were responding, at least in part, to the violence seen in 1096.[13] Almost fifty years after unwilling baptizands returned openly to their natal religion, Christian legists began wrestling, albeit more indirectly, with reversion. Unlike those issuing legal protections, these legists advanced new or reworked much older measures that insisted, as their predecessors had not, that baptized Jews should be compelled to live as Christians. Neither the protections nor the restrictions on reversion were entirely consistent, nor did they follow a neat trajectory, but they subtly altered Jews' legal status within Latin Christendom nevertheless.

Protection

Sicut Iudeis, the papal bull of protection, built on earlier safeguards to Jewish existence within Christendom, such as the eleventh-century decretals of Alexander II,[14] and became the template for addressing subsequent threats to it. First issued by Calixtus II between 1099 and 1124, *Sicut Iudeis* discouraged violence against Jews generally, and forbade killing or coercing them to convert specifically. According to the earliest extant version of the *Sicut Iudeis*, promulgated by Alexander III (1159-1181) following another outburst of violence during the Second Crusade in 1146,[15] Jews, though they had elected not to convert, sought papal protection. Out of Christian piety and in the footsteps of Popes Calixtus and Eugenius (1145-1153), Alexander declared, "we grant them the shield of our protection".[16] He decreed that Christians ought not to "compel the reluctant or

13 Abulafia, "Continuity and Change", 321; Solomon Grayzel, "The Papal Bull *Sicut Judeis*", in *Studies and Essays in Honor of Abraham A. Neuman,* Meir Ben-Horin et al., eds (1962), 243-280; Rebecca Rist, "Papal Protection and the Jews in the Context of Crusading, 1198-1245", *Medieval Encounters* 13 (2007): 282-283, 288-289; Simonsohn, *The Apostolic See and the Jews*, 16-17; Kenneth Stow, "Hatred of the Jews, or Love of the Church: Papal Policy toward the Jews in the Middle Ages", in Shmuel Almog, ed. *Antisemitism through the Ages* (1988), 71-89.

14 Alexander II *Omnes leges* (1063), *Placuit nos* (1063), and *Licet ex devotionis* (1065), in Simonsohn, 35-37.

15 See, *inter alia*, Chazan, *European Jewry*, 169-179; David Berger, "The Attitude of St. Bernard of Clairvaux toward the Jews", *Proceedings of the American Academy for Jewish Research* 40 (1972): 89-108; Rist, "Papal Protection", 282-283.

16 Alexander III, *Sicut Judaeis* (1159-1181), in Simonsohn, 51. "Nos ergo, cum in sua magis velint duritia permanere, quam prophetarum verba arcana cognoscere atque Christianae fidei et salutis notitiam habere, quia tamen defensionem et auxilium nostrum postulant, ex Christianae pietatis mansuetudine praedecessorum nostrorum felicis memoriae Callisti et Eugenii Romanorum pontificum vestigiis inhaerentes, ipsorum petitiones admittimus eisque protectionis nostrae clypeum indulgemus". See also http://www.cn-telma.fr/relmin/extrait10387/; Grayzel, *The Church and the Jews in the XIIIth Century* (1198-1254), 3d ed. (1989); *idem*, "Pope Alexander III and the Jews", in *Salo W. Baron Jubilee Volume*, vol. 2 (1974), 555-572.

the unwilling to come to baptism", nor should they injure, kill, or despoil Jews extrajudicially, desecrate their cemeteries, or alter existing customs.[17] *Sicut Iudeis* was repromulgated by Clement III in May 1188, two weeks before he was to call the Third Crusade, and again by Celestine III during his pontificate between 1191 and 1198.[18] It was subsequently incorporated into the *Constitutio pro Iudeis*, first published by Innocent III in 1199.[19] The *Constitutio* prefaced the text of *Sicut Iudeis* with a sharper condemnation of Jewish obduracy and an exegetical rationale for their ongoing existence, but retained the *Sicut Iudeis*'s protections against death, injury, forced conversion, disruption, and desecration.

Like his counterparts in Rome, Frederick Barbarossa iterated earlier laws safeguarding Jewish lives and property,[20] which had suffered in 1096. He reissued the privileges and protections that Henry IV had vouchsafed to the Jewish community at Worms in 1090, and added the Jews to his own Peace of 1171. In a letter, dated 6 April 1157, addressed to the bishops, abbots, and nobles of his kingdom, Frederick confirmed in perpetuity his predecessor's statutes to the Jews of Worms and their associates. Among the proffered protections were explicit prohibitions against and penalties for coercing, injuring, and murdering Jews. Taking Jewish children and baptizing them was forbidden, under pain of a hefty fine, and a waiting period was established for potential converts: "If one of the [Jews] voluntarily wishes to be baptized, let him be kept back for three days, so that it is wholly known whether he truly forfeits his own law for the sake of the Christian law or for some injury inflicted upon him".[21] Frederick, like Henry, imposed a steep penalty on those who plotted or lay in ambush to kill a Jew: twelve pounds of gold for those who could pay, the loss of both eyes and one hand for those

17 *Sicut Judaeis*, in Simonsohn, 51. "Statuimus enim, ut nullus Christianus invitos vel nolentes eos ad baptismum venire compellat, sed, si eorum quilibet ad Christianos fidei causa confugerit, postquam voluntas ejus fuerit patefacta, Christianus absque calumnia efficiatur". See also http://www.cn-telma.fr/relmin/extrait103877/.

18 *Sicut Iudeis*, Simonsohn, 66 and 68; Grayzel, "The Papal Bull *Sicut Judaeis*", 243-280; *idem,* "Popes, Jews and Inquisition from 'Sicut' to 'Turbato'", in *Essays on the Occasion of the Seventieth Anniversary of the Dropsie University*, Abraham Katsh & Leon Nemoy, eds (1979), 151-188; Rist, "Papal Protection", 288-290; Simonsohn, *The Apostolic See*, 42-45.

19 *Constitutio pro Iudeis*, in Simonsohn, 74-75; Robert Chazan, "Pope Innocent III and the Jews", in John Moore, ed., *Pope Innocent III and his World* (1999), 187-204; Grayzel, "The Papal Bull *Sicut Judaeis*", 243-280; *idem*, "Popes, Jews, and Inquisition from 'Sicut' to 'Turbato'", 151-188; Rist, "Papal Protection", 289-301.

20 Henry IV *Diplomata Heinrici* IV.2, nos 411-412, MGH *Diplomata Regum et Imperatorum Germaniae,* vol. 6, Dietrich von Gladiss & Alfred Gawlik, eds (1952), 546-551; *Pax Moguntina*,125; Lotter, "Imperial Jewry Law", 33-39.

21 *Diplomata Friderici I*, no. 166, MGH *Diplomata Regum et Imperatorum Germaniae*, vol. 10.1, Heinrich Appelt, ed. (1975), 285. "Nullus filios aut filias eorum invitos baptizare presumat aut, si captos vi vel furtim raptos vel coactos baptizaverit, duodecim libras auri ad erarium regis persolvat. Si autem aliquis eorum sponte baptizari voluerit, triduo reservetur, ut integre cognoscatur, si vere christiane religionis causa aut pro aliqua illata sibi iniuria legem suam deserat". Lotter, "Imperial Jewry Law", 37-39.

who could not, and one pound for those who inflicted nonfatal injuries.[22] Some fourteen years later in 1179, Frederick included Jews, "who belong to the emperor's fisc", among clerics, monks, women, merchants, and others who "should enjoy the peace on every day".[23] These protections may even have had some practical effect. According to Robert Chazan, Frederick's timely intervention forestalled depredations on the Jewish communities under his aegis during the preparations for the Third Crusade.[24]

Reversion

Rather than building upon the edicts of the previous two centuries, when legists revisited reversion from the mid-twelfth century onwards, they parted company from their forbears by creating new and resurrecting much older barriers. Frederick's contemporary, Louis VII banned such returns outright in 1144, making it a capital crime. In a letter addressed, "to all the faithful of the church of God", Louis wrote that reports of Jews converting and then returning to Judaism had reached him. In response, he mandated that any Jews "reborn through baptism in Christ, [who] presumed to fly back to the error of their old [life], should not dare to remain in our kingdom", and if seized they were to be condemned to death or lose a limb.[25] There is no evidence that his legislation was enforced, either before or after the second Crusade, and presumably its reach never extended beyond Louis's own borders.[26] Nevertheless, Louis's edict marked a definite departure from the earlier policies of Henry IV, William Rufus, and the German episcopate.

Of more lasting import was the *Concordia discordantium canonum*, or the *Decretum*, and the commentaries it inspired. Compiled in two separate recensions between the 1120s and 1158, the *Decretum* both became the primary textbook for canon law, and established it as a field of study.[27] It also created a forum for

22 *Diplomata Friderici*, no. 166, 286.

23 *Innovatio pacis franciae rhenensis* 277.271, in MGH *Constitutiones* vol. 1, 381. "Ville, villarum habitores, clerici, monachi, feminae, mercatores, agricole, molendina, Iudei qui ad fiscum imperatoris pertinent, venatores et ferarum indagatores, quos weidelude dicimus, omni die pacem habeant, nisi hii qui laqueos tendunt et compedes ponunt, qui nullo die aut loco pacem debent habere".

24 Robert Chazan, "Emperor Frederick, the Third Crusade, and the Jews", *Viator* 8 (1977): 89-94.

25 *Ep*. 19, *Recueil des historiens des Gaules et de la France, nouvelle édition,* vol. 16, Martin Bouquet & Léopold Delisle, eds. (1878), 8. "Statuimus igitur et regia auctoritate sancimus ut quicumque deinceps Judæorum per baptismi gratiam in Christo renati ad suæ vetustatis errorem revolare præsumpserint, in toto regno nostro remanere non audeant, et, si capi poterint, vel capitali damnentur judicio vel membrorum portione multentur".

26 Gavin Langmuir, *Toward a Definition of Anti-Semitism* (1990), 137-116.

27 A. A. Larson, "Early Stages of Gratian's *Decretum* and the Second Lateran Council: A Reconsideration", *Bulletin of Medieval Canon Law*, 27 (2007), 21-57; Anders Winroth, *The Making of Gratian's Decretum* (2000), 1-2; *idem*, "The Two Recensions of Gratian's Decretum", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 83 (1997), 22-31; Robert Southern, *The Making of the Middle Ages* (1953), 205-206, 215.

an academic discourse about coerced baptisms and the religious status of such baptizands within *Distinctio* 45, otherwise dedicated to clerical correction, when it cited a Gregorian decretal and a Visigothic canon concerning Jews and conversion. *Qui sincere* (D. 45, c. 3), the Gregorian decretal, is an excerpt from a letter from Gregory to the bishop of Naples. In it Gregory forbids coercion, and counsels Christians to adopt persuasion, rather than hostility, when trying to convert others. As the *Decretum* explained in the opening rubric, others "should be drawn to the faith, not with harsh words, but with sweet ones".[28] The resulting canon exhorted Christians to employ "blandishments not severity, lest antipathy should further repel the minds of those whom reason rendered could clearly stir" when proselytizing,[29] and to refrain from disrupting Jews' rites and holidays because it was not conducive to their conversion. The Visigothic canon, *De Iudeis* (D 45, c. 5) citing the Fourth Council of Toledo's Canon 57 in its entirety forbade both coercion and reversion under the rubric: "Jews are not to be compelled to the faith, still if the unwilling receive it, they are to be compelled to keep it; whence it is established in the fourth Council of Toledo: just as the Jews are not to be compelled to the faith, thus neither are the converted allowed to withdraw".[30] Because only the willing would be saved, the canon declared that Jews should "be induced by the free use of their own will rather than impelled by force" to accept Christianity.[31] However, those who had already been baptized under duress, because they had participated in Christian sacraments, ought "to be compelled to keep the faith which they have received by force or by necessity".[32]

The discord between these canons and within *De Iudeis* became a springboard for discussions about violence, coercion, and the status of baptized Jews for the decretists, the legists who explicated, interpreted, and commented on

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28 D.45.3. Paris, Bibliothèque nationale de France, MS lat. 3884/3881, fol. 55r; *Decretum*, vol. 1, *Corpus iuris canonici*, Emil Friedberg & A. L. Richter, eds (1955; 1995), 160. "*Item Pascasio Episcopo Neapolim. Non asperis, sed blandis uerbis ad fidem sunt aliqui prouocandi".* See also http://www.cn-telma.fr/relmin/extrait30485/

29 D.45.3. Paris, Bibliothèque nationale de France, MS lat. 3884/3881, fol. 55r; *Decretum*, 160. "Qui sincera intentione extraneos a Christiana religione ad fidem cupiunt rectam adducere, blandimentis debent non asperitatibus studere, ne quorum mentem reddita a plano ratio poterat prouocare, pellat procul aduersitas. Nam quicumque aliter agunt, et eos hoc sub uelamine a consueta ritus sui uolunt cultura remouere, suas illic magis, quam dei probantur causas attendere". See also http://www.cn-telma.fr/relmin/extrait30485/

30 D. 45.5, *Decretum,* 161. "*Iudei non sunt cogendi ad fidem, quam tamen si inuiti susceperint, cogendi sunt retinere. Unde in Tolletano Concilio IV. statutum est: sicut non sunt Iudei ad fidem cogendi, ita nec conuersis ab ea recedere permittitur".* See also, http://www.cn-telma.fr/relmin/extrait30482/

31 D. 45.5, *Decretum,* 162. "Ergo non ui, sed libera arbitrii facultate ut conuertantur suadendi sunt, non potius inpellendi".

32 D. 45.5, *Decretum,* 162. "Qui autem iampridem ad Christianitatem coacti sunt, sicut factum est temporibus religiosissimi principis Sisebuti, quia iam constat eos sacramentis diuinis associatos, et baptismi gratiam suscepisse, et crismate unctos esse, et corporis Domini extitisse participes, oportet, ut fidem, quam ui uel necessitate susceperint, tenere cogantur, ne nomen Domini blasphemetur, et fides, quam susceperunt, uilis ac contemptibilis, habeatur".

the *Decretum*. Moreover, in doing so, a few of them – most notably Rufinus of Bologna, Stephen of Tournai, and Huguccio of Pisa – referred to forms of coercion not found in the *Decretum*. *De Iudeis* referred to coercion and force (*inpellendi* and *cogendi*), but Rufinus, Stephen, and Huguccio to varying degrees, referred to physical or bodily violence echoing the eleventh-century Crusader chronicles more than seventh-century Visigothic legislation.

Written around 1164,[33] Rufinus of Bologna's commentary elaborated the *Decretum*'s exhortations against coercion, and sought to reconcile them with *De Iudeis*'s insistence on reluctantly baptized Jews remaining Christians, as well as allowances for coercion found elsewhere in the *Decretum*. Rufinus directly quoted the *Decretum*'s admonishment that Jews should not be compelled to convert but once compelled should be coerced to remain Christian in the introduction to his commentary on *Distinctio* 45.[34] His subsequent commentary of the specifics of *Qui sincere*, *De Iudeis*, and coercion turned on this passage and its dual prohibitions against forcible conversions and reversion. Of *Qui sincere*, Rufinus stopped briefly to note only "that is lightly and sweetly".[35] Turning to *De Iudeis* and its opening rubric, he argued that forcibly baptized Jews could be compelled to remain, because their consent could be inferred, "as a consequence of time", seemingly by virtue of participation in Christian sacraments.[36] Nonetheless, he maintained, "If not, they were never to be compelled to retain what they at no time approved and received unwillingly".[37] Rufinus also compared *De Iudeis* to another canon, *Iam vero* (C.23, q. 6, c. 4), which advised imposing taxes to induce peasants to embrace Christianity. According to Rufinus, these canons' advice on coercion was not in conflict, because "one coercion is through bodily violence or of personal properties: that is forbidden here; the other through the pressure of requisition: that is enjoined there".[38] Stephen of Tournai, another student of Bologna, likewise distinguished between prohibited and permitted coercion, maintaining that *De Iudeis* prohibited "bodily violence", while *Iam vero* allowed fiscal pressures.[39] He also followed Rufinus in postulating

33 Rudolf Wiegand, *Glossatoren des Dekrets Gratianus* (1997), 406-407.

34 Rufinus, *Summa Decretorum*, Heinrich Singer, ed. (1963), 104. "Unde etiam Iudei ad fidem non sunt cogendi, tamen si ad eam venerint, ut permaneant, sunt constrigendi".

35 ibid., 106. "*Qui sincera,* etc. et *infra a plano*, i.e. leviter et suaviter".

36 ibid., 106. "*Iudei non sunt cogendi ad fid., quam tam. si inviti suscep.* – 'et per consequentiam temporis eos consensisse fidei presumi potuerit' subaudi –, *cogendi sunt retinere;* unde in proximo capitulo: 'quia', inquit, 'iam constat eos sacramentis divinis associatos'".

37 ibid., 106. "Si quominus, nunquam essent cogendi retinere quod nullo tempore probaverunt et inviti susceperunt".

38 ibid., 106. "Sed coactio alia est per corporalem vel propriarum rerum violentiam: quod hic interdicitur; alia per exactionis instantiam, utpote usurarum vel pensionis: quod ibi fieri mandatur". Cf. Colish, *Faith, Fiction, & Force*, 283.

39 Stephen of Tournai, *Summa Decretorum* D. 45.5, in *Die Summa über das Decretum Gratiani*, J. F. von Schulte, ed. (1891; repr. 1965), 65; Burgh. lat. 287, fol. 24r. "C. 5 *vim inferre*. Signatur infra contra C. 23, q. 6 *Iam vero*. Sed hic violentia corporalis prohibetur ibi exactio temporalium zelo conversionis facta permittitur".

that baptizands, if they had "been imbued with our faith" by participation in its sacraments, should be compelled to keep the faith.[40]

Huguccio of Pisa, among the most influential of the decretists, was even more specific about the violence that might be used to coerce Jews to convert in his *Summa*, written between 1188 and 1190.[41] Regarding *Qui sincera*, he argued that the converting and recently converted should be met with sweetness rather than asperity, and alluded to violence, fear, and extortion, when explaining why.[42] In commenting on *De Iudeis*, he distinguished between permissible and impermissible forms of coercion, as Rufinus and Stephen had, but his list of forbidden forms of coercion was longer: "one is not to be compelled to the faith through bodily violence, or the confiscation of his goods, or through terror, as is said, but he can be weighed down with the burden of exactions, so that he may be drawn to the faith more easily".[43] He also argued that consent need not be voluntary or coeval, the unwillingly baptized could consent *post facto* by participating in Christian sacraments. Moreover, he declared, "one who is baptized by what is judged to be conditional coercion – I will strike you or despoil you, I would destroy or injure you, unless you are baptized – should be compelled to keep the faith, because through such coercion, he is made willing from unwilling, and the willing are baptized".[44] The specifics of coercion in Huguccio's *Summa*, the physical violence and the threats of death and injury, so closely mirror the accounts of forced baptism in 1096 and, to a lesser extent, in 1146 that it seems probable that he was aware of and informed by those realities.

Conclusions

Forcibly baptized Jews were no more bound to remain Christians by these jurists than crusaders and other Christians were effectively barred from baptizing Jews

40 Stephen of Tournai, *Summa*, D. 45.45, Schulte, ed. 65; Burgh. lat. 287, fol. 24r. "Alia litera: *si semel imbuti* fide nostra; iunge post aliqua quae interponuntur: fidem tenere coguntur".

41 Heinrich Heitmeyer, *Sakramentenspendung bei Häretikern und Simonisten nach Huguccio* (1964); Wolfgang Müller, *Huguccio: The Life, Works and Thought of a Twelfth-Century Jurist* (1994), 2-6, 21-22.

42 Huguccio of Pisa, *Summa Decretorum* D. 45.3, Munich, Bayerische Staatsbibliothek, clm 10247, 46r; Admont, Codex Admontensis 7, fol. 61r-61v; Vatican City, Biblioteca Apostolica, Vat. lat. 2280, 43v.

43 Huguccio, *Summa* D. 45.5, Codex Admontensis 7, 61v; clm 1027, 46v; Vat. lat. 2280, 44r. "Qui non est cogendus ad fidem per corporalem uiolentiam, uel per ablationem suarum rerum uel per terrorem, vt hic dicitur, sed potest grauari maiori onere pensionis ut sic facilius trahatur ad fidem". See also http://www.cn-telma.fr/relmin/extrait254292/

44 Huguccio, *Summa* D. 45.5, Codex Admontensis 7, 61v; clm 1027, 46v.; Vat. lat. 2280, 44r. "Set tamen baptizatur et sacramentum accipit, quia siue uolens siue nolens, siue uigilans siue dormiens, quis baptizetur in forma ecclesie sacramentum accipit. se uero coactione conditionali quis baptizetur, puta te uerberabo uel spoliabo, uel interficiam uel ledam, nisi baptizeris, debet cogi ut fidem teneat, quia per talem coactionem de nolente efficitur, quis uolens, et uolens baptizatur, uoluntas enim coacta, uoluntas est, et uolentem facit".

under duress by *Sicut Iudeis*. These interdicts were regularly flouted throughout the twelfth century. After the call of the Third Crusade in 1189 and on the heels of a contretemps with a Jewish delegation to Richard I's coronation, a riot erupted at Westminster. In the ensuing melée, one Benedict of York "despaired of his life, was baptized ... and so avoided the threat of death, and the hands of his persecutors", according to Roger of Hovden.[45] In the aftermath of the violence, which spread to London where it caused considerable damage, Benedict was brought before Richard I and the archbishop of Canterbury. There, he identified himself as Benedict and a Jew, repudiating his baptism. When Richard asked the archbishop what should be done, the prelate replied "He does not want to be a Christian, let him be the Devil's man".[46] Thus Benedict lived out the remainder of his life as a Jew, because, Roger fretted, "no one objected" to his doing so.[47]

While of questionable efficacy during the twelfth century, as Benedict's history illustrates, the edicts and debates of the twelfth century became the foundations for later legislation. Louis's decree on reversion had limited effect, but the decretists' commentaries were incorporated into canon law. When issuing the decretal that would come to define the limits of consent and coercion in later medieval canon law, Pope Innocent III borrowed from Huguccio's *Summa*. His *Maiores ecclesiae* of 1201 declared that "one who is drawn violently by fear and threats, lest he incur some injury, receives the sacrament of baptism", is conditionally willing, and obliged to remain a Christian.[48] Only those "who never agree, but thoroughly refuse" were not expected to live as Christians, provided they managed to survive the experience.[49] After baptized Jews were brought under

45 Roger of Hoveden, *Chronica*, *Pars Posterior*, William Stubbs, ed. (1868-1871; repr. 1964), 12. "Inter quos erat Benedictus Judæus Ebroaci, qui cum a Christianis ita persecutus esset, et vulneratus, ut de vita desperaret, baptizatus est a Willelmo, priore ecclesiæ Sanctæ Mariæ Eboraci, in ecclesia Innocentum, et vocatus est Willelmus, et sic evasit mortis periculum, et manus persequentium". *Cf.* William of Newburgh, *Historia Anglicana* vol. 4.1, H. C. Hamilton, ed. (1856), 3; Robert Stacey, "Crusade, Martyrdoms, and the Jews of Norman England, 1096-1190", in *Juden und Christen zur Zeit der Kreuzzüge*, 245-249.

46 *Chronica*, 12-13. "Et ait illis: 'Quid ergo faciemus de eo?' cui archiepiscopus Cantuariensis, minus circumspecte quam esset necesse, respondit in spiritu furoris sui, 'Ille Christianus esse non vult, homo Diaboli sit'".

47 ibid., 13. "Sed quia non erat qui resisteret, præfatus Willelmus reversus est ad Judaicam pravitatem, qui postmodum parvo interlapso tempore obiit apud Northamtoniam, et factus est alienus a communi sepultura Judæorum, similiter et Christianorum, tum quia factus fuerat Christianus, tum quia ipse, sicut canis reversus ad vomitum, rediit ad Judaicam pravitatem".

48 Innocent, *Maiores ecclesiae* (1201), *Corpus Iuris Canonici*, vol. 2, 3.42.3, 646. "Propter quod inter invitum et invitum, coactum et coactum, alii non absurde distinguunt, quod is qui terroribus atque suppliciis violenter attrahitur, et ne detrimentum incurrat, baptismi suscipit sacramentum, talis quidem, sicut et is, qui ficte ad baptismum accedit, characterem suscipit Christianitatis impressum, et ipse tanquam conditionaliter volens, licet absolute non velit, cogendus est ad observantiam fidei Christiane". See also http://www.cn-telma.fr/relmin/extrait30473/

49 *Maiores ecclesiae,* 646. "Ille vero, qui nunquam consentit, sed penitus contradicit, nec rem, nec characterem suscipit sacramenti, quia plus est expresse contradicere quam minime consentire: sicut nec ille notam alicuius reatus incurrit, qui contradicens penitus et reclamans thurificare idolis cogitur violenter".

the purview of the papal inquisition, inquisitors used Innocent's distinctions as a metric for determining whether a baptized Jew belonged to the Church and their own jurisdiction.[50] Thus the overt violence of the Crusades presaged the indirect, judicial violence of the inquisition.

Similarly, many of the protections established by the papacy and the emperors were retained and even expanded in subsequent centuries. Imperial privileges, including the three-day wait to establish a baptism's legitimacy, were maintained by Henry and Frederick's successors into the thirteenth century.[51] Frederick II also expanded the imperial bulwark against violence by refuting the charge that Jews were in the habit of using human blood as part of their rites, and forbidding Christians to harass them on these grounds in 1236.[52] Likewise, the papacy maintained, even broadened, its protections against violence and forced baptism during the thirteenth and fourteenth centuries. Innocent IV, confronted with rumours that Jews were kidnapping Christian children to use their blood, investigated and publicly refuted this accusation in 1247.[53] When the pastoureaux raged through southern France and northern Iberia in 1320, Pope John XXII ordered local authorities to protect Jews and their belongings.[54] In 1348, in the midst of the Black Death, Clement VI rebutted accusations that Jews were responsible for spreading the disease.[55] Each of these decretals echoed the *Sicut Iudeis*, applying or expanding its provisions to meet these new threats. While they might have been less effective than their authors or Jewish communities desired, these protections remained constants of papal policy. Haphazard though their development was, both the enduring protections for and the inquisitorial prosecution of baptized Jews had their roots in crusader violence.

Grayzel, *The Church and the Jews*, 6-7; Irven Resnick, "Marriage in Medieval Culture: Consent Theory and the Case of Mary and Joseph", *Church History* 69.62 (2000): 366.

50 Clement IV *Turbato corde* (1267) and Gregory IX *Turbato corde* (1274), in Simonsohn, 236-237, 244-245; Bernard Gui, *Practica inquisitionis heretice pravitatis* 5.1, *Manuel de L'Inquisiteur*, 2d ed. G. Mollat, ed. (2006), 2:7; *Le Registre d'Inquisition de Jacques Fournier: Évêque de Pamiers (1318-1325)*, vol. 1, Jacques Duvernoy, ed. (1965), 177-190; Solomon Grayzel, "The Confession of a Medieval Jewish Convert", *Historia Judaica* 17 (1955): 89-120.

51 Lotter, "Imperial Legislation", 38, 41-42. Some of these protections, however, were eroded by later editions.

52 Friedrich II, *Privilegium et sententia in favorem iudaeorum*, MGH *Constitutiones* vol. 2 (1896) 274-276; Langmuir, *Toward a Definition of Anti-Semitism*, 263-281; Yuval, *Two Nations*, 278-282.

53 Innocent IV, *Sicut Iudeis* and *Lacrimabilem Iudeorum*, in Simonsohn, 192, 194-195, 198; Gregory X reiterated these protections in his own *Sicut Iudeis* (1272), and again in 1274, in Simonsohn, 242-243, 245.

54 *Carissimis in Christo*, in Simonsohn, 318-319; Malcolm Barber, "The Pastoureaux of 1320", *Journal of Ecclesiastical History* 32 (1981): 143-166; David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* (1996), 43-92; Kenneth Stow, "The Avignonese Papacy, or After the Expulsions", in Jeremy Cohen, ed. *From Witness to Witchcraft*, 276-297; http://www.cn-telma.fr/relmin/extrait87466/.

55 *Universis fratribus*, in Simonsohn, 397-398; Stow, "Avignonese Papacy", 276-297; Grayzel, "Popes, Jews, and Inquisition", 151-188.

MINORITY DRESS CODES AND THE LAW: A JEWISH-CHRISTIAN COMPARISON

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One of the most infamous edicts that emerged from the Fourth Lateran Council in 1215 convened by pope Innocent III proclaimed that Jews must wear a visible marker that would indicate their faith. Canon 67 declared:

> In some provinces a difference in dress distinguishes the Jews or Saracens from the Christians, but in certain others such a confusion has grown up that they cannot be distinguished by any difference. Thus it happens at times that through error Christians have relations with the women of Jews or Saracens, and Jews and Saracens with Christian women. Therefore, that they may not, under pretext of error of this sort, excuse themselves in the future for the excesses of such prohibited intercourse, we decree that such Jews and Saracens of both sexes in every Christian province and at all times shall be marked off in the eyes of the public from other peoples through the character of their dress. Particularly, since it may be read in the writings of Moses [Numbers 15:37-41], that this very law has been enjoined upon them.[1]

Among the messages conveyed in this canon is the broad enactment of a practice that according to many scholars was not implemented during the decades immediately following the Council, distinct Jewish clothing.[2] The rhetoric of the text suggests that the main impetus for this law was social, an attempt to clearly distinguish between the members of the different faith communities and help prevent unintentional association between Christians and members of the opposite sex, whether Jewish or Muslim, as stated "at all times shall be marked off in the eyes of the public from other peoples through the character of their dress".

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1 I quote the translation by H. J. Schroeder in http://www.ccjr.us/dialogika-resources/primary-texts-from-the-history-of-the-relationship/264-lateran4; see also the description of this council at http://www.cn-telma.fr/relmin/auteur1485/.

2 For a discussion of this law and implementation, see A. Cutler, "Innocent III and the Distinctive Clothing of Jews and Muslims", *Studies in Medieval Culture* 3 (1970): 92-116 and most recently Eric Silverman, *A Cultural History of Jewish Dress* (2013), 47-60. See also Solomon Grayzel, *The Church and the Jews in the Thirteenth Century*, ed. Kenneth R. Stow (1989), 2: 30, nn. 42-44; Shlomo Simonsohn, *The Apostolic See and the Jews* (1991), 7: 135-138; David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* (1996), 133.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 289–300

 DOI 10.1484/M.RELMIN-EB.5.111605

On the other hand, Canon 68 took a different approach, offering a theological basis for its position:

> Moreover, during the last three days before Easter and especially on Good Friday, they shall not go forth in public at all, for the reason that some of them on these very days, as we hear, do not blush to go forth better dressed and are not afraid to mock the Christians who maintain the memory of the most holy Passion by wearing signs of mourning. This, however, we forbid most severely, that any one should presume at all to break forth in insult to the Redeemer. And since we ought not to ignore any insult to Him who blotted out our disgraceful deeds, we command that such impudent fellows be checked by the secular princes by imposing proper punishment on them so that they shall not at all presume to blaspheme Him who was crucified for us.[3]

This passage considers allowing Jews or Muslims to appear in public during the days preceding Easter to be unacceptable on spiritual grounds, for their finery would put Christian mourning garb to shame. The logic behind the two canons differs significantly. Whereas one line of argument is practical and seeks to prevent any excuses that could be offered in the future if a Christian and a non-Christian engaged in improper contact, the other attempts to eliminate the cause for any inferiority that Christians might feel vis- à-vis their neighbors, and as such, is more symbolic.[4] The content of these canons leaves no doubt that Jews, Muslims and Christians who lived in close proximity wore similar clothing and thus could be mistaken for one another; furthermore, they had common standards of what constituted finery or clothes of mourning.[5] Above all these two canons indicate that Christian authorities and members of the religious minorities all recognized the importance of outward appearance for communicating social and religious hierarchies. They also demonstrate that unwitting contact and religious insult could result from the lack of distinction between the members of different religious communities.

Legal statutes are replete with discussions of and allusions to how minority and majority religious groups perceived each other, via their apparel and outward appearance.[6] These matters are voiced not only in Christian European legal codes but

3 http://www.ccjr.us/dialogika-resources/primary-texts-from-the-history-of-the-relationship/264-lateran4.

4 Cutler argues that its aim to humiliate religious minorities exceeded any practical purpose.

5 This shared sense of style and decorum is most important in my eyes as an indicator of a commonly held perspective. For a discussion on the significance of medieval attire, see Norman Stillman, "Introduction", in Yedida Kalfon Stillman, *Arab Dress, A Short History: from the Dawn of Islam to Modern Times*, ed. Norman Stillman (2000), 1-2; Dyan Elliott, "Dress as Mediator Between Inner and Outer Self: The Pious Matron of the High and Later Middle Ages". *Medieval Studies* 53 (1991): 279-308.

6 Many of these statutes were collected by Solomon Grayzel, *The Church and the Jews in the Thirteenth Century* (1966), 1: 59; 61-66; 156-157; 168-169; 280-281; 320-321; 328-329; 334-335 and Idem, *The Church and the Jews*, 2: 64-66; 90; 106-107; 137-138 and by Simonsohn, *Apostolic See*, 8: 155 "badge" 156; "cloth and

can be seen in legal texts produced by other religious groups in other geographical areas as well. For example, the Pact of Umar and its many versions that were current up until modern times discuss many aspects of hair and apparel, standard concerns of Muslim rulers throughout the medieval and modern periods.[7]

In the case of religious minorities in medieval Christian Europe, while previous scholarship has acknowledged regulations concerning clothing and appearance, it has largely been in the context of studying the theological and ideological relationships between these faith groups; research has only recently begun to focus on the implications of these laws for examining the actual appearance of members of these societies.[8] Even less attention has been brought to the codes that minorities developed to distinguish themselves from the surrounding majority. This article is devoted to one such minority response, by examining references to dress in thirteenth-century Jewish statutes from northern Europe and comparing them to select papal instructions, such as the canons quoted above, and local directives.

Whereas the Fourth Lateran Council recommended the need for distinguishing clothing to be worn by minorities in the rhetoric of superiority, local Christian guidelines provide operational details.[9] Thus some specify the garb that may be worn by Jews and prohibit items of clothing that may not. For example, two mid-century letters sent by Innocent IV discuss the rounded capes that were associated with Christian clergy. Innocent advises Jews not only to abandon the practice of wearing these capes but also to wear "a habit benefitting them, one by which they may be distinguished not only from clergy but even from laity".[10] Innocent IV's instructions also underscore the reality that, for all practical purposes, Jews and Christians wore identical clothing and that Jews even wore garments that were identified with Christian ecclesiastics. This notion has resonance in Jewish sources as well.

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clothing"; Flora Cassen, "Identity or Control: The Jewish Badge in Renaissance Italy". Ph.D. Dissertation, New York University, 2008.

7 See Mark R. Cohen, "What was the Pact of Umar: A Literary Historical Study", *Jerusalem Studies in Arabic and Islam* 23 (1999): 107; 129-130 and see the RELMIN database.

8 Discussions of usury are far more prevalent than those regarding clothing. See, for example, the sources collected by Robert Chazan, *Church, State and Jew in the Middle Ages* (1980), 205-220. See also in the emphases in Grayzel, *Church and the Jews*, according to the index "usury" and Simonsohn, *Apostolic See*, 7: 94-227. As for the meanings of clothing within Christian society, see Maureen Miller, *Clothing the Clergy: Virtue and Power in Medieval Europe, c. 800-1200* (2014) and Ulinka Rublack, *Dressing Up: Cultural Identity in Renaissance Europe* (2010). In the context of Jewish-Christian relations see also Diane Owen-Hughes, "Distinguishing Signs: Ear–rings, Jews and Franciscan Rhetoric in the Italian Renaissance City", *Past and Present* 112 (1986): 3-59; Nora Berend, "Medieval patterns of social exclusion and integration: The regulation of non-Christian clothing in thirteenth-century Hungary" *Revue Mabillon*, n.s. 8, 69 (1997): 155-176.

9 Grayzel, 1: 156-157; 168-169; 328-329; 334-335. 2: 246, 259 See also n. 10.

10 Grayzel, 1:280-281; 318-321; 2:242-243; 246 where Jewish men are instructed to wear pointed hats (Vienna 1267).

Medieval rabbinic writings consider Jewish dress and outward appearance in a number of genres and contexts. For the purpose of this article, I focus primarily on communal ordinances (*takkannot*), for these are roughly analogous to papal ordinances, although they tend to relate to regional contexts, as each area had its own local Jewish leadership.[11] I will augment this evidence with material from other Jewish literature, including moral exempla from *Sefer Hasidim*, instructions in custom books (*sifrei minhag*) and Books of Commandments (*sifrei mitzvot*) as well as exegesis on the Bible and Talmud. Despite this wealth of sources, no standard approach or unit of discussion within halakhic writing to Jewish dress or coiffure emerges, neither can we readily find a depiction of Jewish appearance. However, one theme becomes clear: these rabbinic texts respond to the same concern expressed by the Lateran Council. Namely, Jews resembled their Christian neighbors so closely that they could hardly be distinguished from one another.

As a point of departure, similarities can be drawn between the badge recommended by the Fourth Lateran Council and the so-called "Jewish hat". As scholars have demonstrated, like distinct clothing, this hat was not uniformly worn by Jews until the late thirteenth century or even some time in the fourteenth century, which is to say that it was not common attire for Jewish men when the Fourth Lateran Council convened. Jewish dress was determined by local Jewish custom or imposed by other local codes. Moreover, Guido Kisch suggested that, like the capes mentioned above, the hat that later became known as the Jewish hat, had originally been worn by Christian clergy.[12] This relationship underlines the fluidity of fashion and how the associations of a single garment could change over time.

The search for interdictions against certain types of garb or writings about exceptional modes of dress represents one way of investigating the Jewish wardrobe and its distinctiveness. For example, some sources mention Jewish travellers who disguised themselves on their journeys by wearing garb that was associated with priests, monks or nuns.[13] Whereas this seems to be a fairly common practice while in transit, discussions of the behaviors that were acceptable under those conditions affirm this as an exceptional practice that was associated with travellers and was not common within the city environs. These texts suggest that distinctions between Jewish and Christian clothing existed and was recognized

11 I have based my work primarily on Louis Finkelstein's edition of the Rhineland synods, Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (1964[2]).

12 Guido Kisch, "The Yellow Badge in History". *Historia Judaica* 4 (1942): 106-107. See Cassen, "Identity or Control".

13 A number of editions of *Sefer Hasidim* are available. I have relied on the Parma manuscript (referenced here as SHP), whose facsimile edition was published by Ivan Marcus, (1985). For a comparison of manuscripts, I have also consulted Princeton University Sefer Hasidim Database (PUSHD) https://etc.princeton.edu/sefer_hasidim. See SHP #199, 202, 203, 260-262, 1922.

by members of both communities; however, the scope of this evidence is limited by the particular circumstances, where Jews were opting for monastic "disguises" rather than the clothing worn by Christian laity. *Sefer Hasidim* notably includes numerous mentions of "gentile clothing" (*malbush nokhri*) versus "Jewish clothing" (*malbush yehudi*).[14]

Further study of medieval Hebrew sources reveals that considerations of outward appearance are included in commentaries on biblical or talmudic prohibitions.[15] During the Middle Ages the commentators remark on how hair is groomed far more than on modes of dress. For example, the biblical prohibition of shaving and the rabbinic instructions from late antiquity concerning haircuts received significant attention. So too, communal ordinances devote attention to hair and significantly less attention to clothing. The first section of *Takkanot ShUM* (ordinances from the Jewish communities of Speyer, Worms and Mainz which can be dated to synods held in the 1220s) addresses daily conduct and appearance,[16] stating:

We the undersigned have decreed with the scroll of the Torah in hand:

> That no member of the covenant shall dress after the manner of the gentiles (*malbush nokhri*, literally vestment of the gentiles) and should not wear sleeveless clothing (*rahiti' halulei yada'im*). No one shall have long hair after the fashion of non-Jews.
> No one shall shave his beard either with a razor or in such a manner as approximates the effect of a razor.[17]

This ordinance continues by enumerating the responsibilities that a gentile can carry out in a Jewish home during the Sabbath, how wine for Jewish consumption should be stored, and the regulations over which foods cooked by non-Jews may be eaten by Jews.[18]

In broad terms, the many issues listed in these medieval decrees can be traced to laws concerning Jewish practice that originate in the Bible or the Talmud. For example, the biblical verse "You shall not copy the practices of the land of Egypt where you dwelt, or the land of Canaan to which I am taking you; nor shall you follow their laws" (Lev. 18:13) has been interpreted as a caution against many practices, including those related to attire. In medieval sources, the prohibitions

14 Ibid.

15 For a detailed discussion of this subject, see Elisheva Baumgarten, *Practicing Piety in Medieval Ashkenaz: Men, Women and Everyday Religious Observance* (2014), 173-190.

16 These translations are based on Finkelstein, Jewish Self-Government, 225, 233-234, with occasional emendations. For a full consideration and discussion of these ordinances, we await the work of Dr Rainer Barzen, whom I thank for discussing this selection of ordinances with me.

17 Finkelstein, ibid., 234.

18 Ibid., 236.

that are derived from this verse are often referred to as *hukot hagoyim* (the laws of the gentiles), a code of sorts that sought to differentiate Jewish actions and appearances from the norms of the surrounding society.[19] Interestingly, when these ordinances were renewed after the Black Death, matters pertaining to clothing were omitted, an indication of how styles and standards had changed and perhaps by that point in time Jews did wear more distinctive dress.[20]

The thirteenth-century ShUM ordinances explicitly relate their directives regarding shaving and long hair to men; in contrast, the general admonition against *malbush nokhri*, with its prohibition against sleeveless garments, may be read as an instruction for both men and women, since gender remains unspecified in the text. An attempt better to understand each prohibition offers visual evidence of select aspects of medieval Jewish appearance. One preliminary observation that may be self-evident still bears repeating: these ordinances leave no doubt that, to a meaningful degree, Jews and Christians could not be distinguished from one another on the basis of their appearance despite textual references that indicate clothing as a differentiating factor.

Clothing

The ShUM ordinance is rather vague with respect to clothing, noting only that Jews should not wear the same clothing as Christians, with one specific provision against sleeveless garments. Rashi remarks on this same detail when he explains that Christian women (*nashim edomiyot*), unlike their Jewish counterparts, wear sleeveless dresses.[21] By emphasizing that Christian women wore dresses that left their underarms bare, Rashi's comment seems to affirm that women's attire was at issue. This detail may not imply significant differences in the styles of dress: it is plausible that a Jewish woman and a Christian woman could have worn identical clothing but for the cut of their sleeves. Rashi describes this distinction more as a neutral observation than as a choice to be avoided, but with the passage of time, a change of location or a simple shift of perspective the ordinances transform this distinction in garb into a prohibited fashion.

What exactly is "Christian clothing"? If this category referred to attire that identified clergy or members of monastic orders, we would expect terminology that corresponded to Christians in those roles, namely *galah* (monk), *komer* (monk/priest) or *komeret* (female monastic). To the contrary, *nokhri*, which is first found in the words of the biblical prophet Zephaniah – "And on the day

19 See "Hukot haGoyim", *Talmudic Encyclopedia*, ed. Joshua Hutner (1983), 17: 305-325, esp. 307-312.
20 A comparison between the text from the Rhineland synods (see n. 11) and the one from 1381 reveals this. See Finkelstein, ibid., 251-256.
21 Rashi, BT Gittin 90b, s.v. "*uferuma mishnei tzedadehah*".

of the Lord's sacrifice, I will punish the officials and the king's sons and all who don a foreign vestment (*malbush nokhri*)" (Zeph. 1:8)[22] – is the most general word choice possible in this context. Rashi interprets this verse explaining that Zephaniah is actually referring to the jewels worn by idol worshippers during their pagan rituals.[23]

This interpretation raises the question of whether these medieval dictates applied to ornamentation or articles of clothing? As Giles Constable has outlined, the color of cloth was a source of bitter debate among twelfth-century reformers.[24] Elaborating on Constable's insight, Gábor Klaniczay has asserted that the quality and quantity of fabric and the presence (or absence) of ornamentation on a garment signaled its wearer's economic and religious status. Color generally carried widely recognized cultural meanings, as illustrated by select colors that were associated with seasons in the liturgical calendar, as reflected in clerical vestments.[25]

In the context of the statute from the ShUM communities, the nature of this prohibition and its application is unclear. However, it seems that the authors of this ordinance, leaders from three Rhineland communities, were confident that their Jewish peers would understand the code for dress and appearance intended by "*malbush nokhri*". These words may have referred to subtle details rather than whole garments. For example, Jews would not have worn cloth woven from both linen and wool (*sha'atnez*) or decorations that would contradict their religious identity (such as a cross/crucifix).[26] This boundary is articulated in a roughly contemporary passage from *Sefer Hasidim* which provides instruction for a Jew who might wear *malbush nokhri* in order to conceal his identity during an attack on the Jewish community. He is instructed to ensure that his "Christian clothes" be made from the appropriate materials and that he refrain from carrying or wearing a cross.[27]

Halakhic discussions that offer guidance to those who held clothing as pawns underscore the similarities in Christian and Jewish attire as well. Objects that were pledged as securities did not just lie in storage; rather, it is evident that Jews used these objects – which could be articles of clothing – in their daily routines. Thus some texts discuss the importance of washing clothing that was stained with

22 See 2 Kings 10:22 where Jehu orders the priests of Ba'al to be provided with the *malbush* needed for their worship.

23 Rashi, Zephaniah 1:8 s.v. "*malbush nokhri*".

24 Giles Constable, *The Reformation of the Twelfth Century* (1996), 188-194.

25 Gábor Klaniczay, "Fashionable Beards and Heretic Rags". In *The Uses of Supernatural Power: The Transformation of Popular Religion in Medieval and Early Modern Europe*, ed. Gábor Klaniczay (1990), 51-78.
See also the work of Michel Pastoureau on the significance of different colors. See his *Bleu: Histoire d'une couleur*, (2000); *Vert. Histoire d'une couleur*. (2013).

26 SHP #200, 202, 203.

27 Ibid.

blood or dirt so that, in the event that a Jewish woman notices blood while wearing a Christian woman's dress that has blood on it, she would be able to ascertain whether she is ritually impure.[28]

Hair

The second part of the ShUM ordinance on appearance places restrictions on hair styles and grooming facial hair, concerns that unambiguously applied to men. Here the medieval authorities were following the biblical interdiction, "You shall not round off the side-growth on your head, or destroy the side-growth of your beard" (Lev. 19:27) and the talmudic constraints on wearing hair styles that too closely resembled those associated with idolators.[29] The ordinances explicitly (and repeatedly) declare two styles for men's hair unacceptable: *komi*, described in the Talmud as the haircut of magicians, and *blorit*, long hair.[30]

In his studies of hair and beard styles over thirty years ago, Giles Constable identified trends for hair and beard styles among Christian men during the High Middle Ages which varied according to place and rank. During the eleventh century, many young men had their hair ritually cut to ensure a "decent" and "respectful" appearance in church.[31] In certain orders, hair and beards were ritually cut with accompanying blessings at regular intervals during the year.[32] By the twelfth century, Christian clergy were uniformly expected to be clean-shaven.[33] In the thirteenth century, clean-shaven faces and short hair had become normative among the laity as well. At that time, some noblemen began wearing long hair. The potency of hair as a symbol was further underlined in the fourteenth century when members of the so-called *Devotia moderna* wore their hair in specific style that was one of their trademarks.[34]

Numerous medieval Jewish commentators describe their Christian contemporaries as models when explaining the talmudic categories noted above. Rashi, for instance, defines *komi* as having the crown of the head shaved while the sides and back remain long, reminiscent of tonsure.[35] He explains that some Jews

28 Joseph Shatzmiller, "Church Articles: Pawns in the Hands of Jewish Money Lenders". In *Wirtschaftsgeschichte der mittelalterlichen Juden*, ed. Michael Toch (2008), 93-102.

29 BT Sanhedrin 22b; 49a; BT Avodah Zarah 29a. Notably, these styles were not limited to idolators. For example, David's strongmen from the period before he became king were said to have had long hair.

30 Ibid.

31 See n. 7.

32 Constable, "Introduction". In *Burchardi, ut videtur, abbatis Bellevallis, Apologia de barbis. CCCM* 62, (Turnhout: Brepols, 1985), 103-130; Klaniczay, "Fashionable Beards", 67.

33 Constable, ibid., 103-130; Klaniczay, "Fashionable Beards", 59-60.

34 John Van Engen, *Sisters and Brothers of the Common Life: The Devotio Moderna and the World of the Later Middle Ages* (2008), 2.

35 Constable, Reformation, 194-195.

adopted this style to conceal their religious identity.[36] In his *Sefer Gematriyot*, Judah the Pious characteristically introduces a more stringent position by stating that no man who grows his hair long, cuts his beard with scissors, or wears non-Jewish clothing should be called to the Torah in synagogue.[37]

The prohibition against ritual haircutting, which had been considered idolatrous in antiquity, was extended to Christian customs during the Middle Ages. A number of rabbinic commentators on the classic Talmudic texts, equated these customs with tonsure, a hallmark of Christian clerics, which was therefore prohibited among Jews. Echoing the earlier mention of "Jewish beards", the technique for cutting hair became an intrinsic criterion for determining the acceptability of hair styles.[38]

Despite the desire of some rabbinic authorities to regulate the grooming of facial hair and hair styles, it seems that most medieval Jewish men imitated their neighbors (with the noteworthy exception of tonsure, which was indeed excluded from Jewish custom).[39] The ordinances offer little guidance about hair style and, as in the case of clothing, seem to assume that their audience would find the practices they are prohibiting obvious. Some rabbinic passages imply that Jews went to non-Jewish barbers; if that were the case, then the resemblance between hair styles[40] among men in these two medieval communities would be rendered even less coincidental.[41] Furthermore, Eric Zimmer has argued that Jewish sideburns as instructed in the Bible were not normative among Jewish men in medieval Europe.[42] In this cultural environment, as noted above, the Rhineland synods suggest that cutting hair or shaving like Christian men were common practices that the rabbis sought to deter.[43]

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36 This comment refers to the past rather than to the present: Rashi, BT Me'ila 17a, s.v. "*vesipper komi*".

37 Judah b. Samuel, *Sefer Gematriyot*, ed. Yaakov Israel Stahl. Jerusalem, 2005#30. Judah includes any man who wears his hair long (*blorit*), is clean-shaven or has cut his beard, or wears "non-Jewish" clothing. See also SHP, #1664.

38 Moses b. Jacob of Coucy, *Sefer Mitzvot Gadol (Semag)* (1547; repr. 1961), Lo Ta'aseh #57; Isaac b. Joseph of Corbeil, *Sefer Amudei Golah haNikra Sefer Mitzvot Katan* (1820; repr.1979), #71. Cutting the hair of priests and oblates was an aspect of Christian ritual; see Mayke De Jonge, *In Samuel's Image: Child Oblation in the Early Medieval West* (1996), 35-49, 61-62.

39 For a fuller discussion of this matter see Elliott S. Horowitz, "On the Significance of the Beard in Jewish Communities in the East and in Europe in the Middle Ages and Early Modern Times". *Pe'amim* 59 (1994): 124-148 [Hebrew]. We await Michael Silber's History of the Jewish beard.

40 The Aragonese Jewish scholar Solomon ibn Parhon noted that some Jewish men imitated the hair styles of the knights of their generation; see his lexicon, Salomonis b. Abrahami, *Salomonis b. Abrahami Parchon Aragonensis Lexicon Hebraicum.* Ed. Solomon Rapoport (1844; repr. 1970), fol. 12b, "g.l.b".

41 See, for example, Tosafot, BT Avodah Zarah 29a, s.v. "*hamistaper*"; Isaac b. Moses, *Sefer Or Zaru'a*, (1862), 4: Piskei Avodah Zarah, #150-151; Samson b. Tzadok, *Sefer Tashbetz* (1901), #542.

42 Eric Zimmer, *Society and Its Customs: Studies in the History and Metamorphosis of Jewish Customs* (1996), 47-48 [Hebrew].

43 Finkelstein, *Jewish Self-Government*, 59, 225. These statutes incorporate talmudic terminology.

The logic behind these ordinances is apparent in biblical commentaries whose authors remark that distinctive hair and clothing will enable Jews to maintain their separate status. For example, one commentary attributes an opinion to Eleazar b. Judah (a contemporary of Innocent III and IV) where he asserts that God anticipated that the Christian clergy (*komrei Yeshu*) would shave their side burns off entirely, which explains why the Bible prohibits cutting them.[44]

The most thought provoking point in the ordinance about shaving in my eyes is that Jewish men are not only warned against shaving with a razor but they are also told to avoid shaving in "a manner that approximates the effects of a razor".[45] In other words, this regulation states that even if one can find a permissible means to replicating their neighbors' look, they should not exercise it. As in the case of the clothing, these are small distinctions that seem to make a big difference. If we look beyond the thirteenth century, it is noteworthy that beards and hats came to epitomize images of medieval Jewish men – irrespective of the heterogeneity in practice that is documented by texts from that time.

Appraising the canons from the Fourth Lateran Council and Jewish communal ordinances allows for reflection on majority-minority relationships and modes of operation. Both genres place great value on outward appearance and indicate that during the thirteenth century, as a whole, members of the religious majority and minority had remarkably similar appearances, at least among their lay members. Another shared feature of these documents is that they each convey messages that were clearly not observed, at least at the time of their composition in the thirteenth century.

Alongside these similarities, significant contrasts between the documents can be noted. The jurisdiction of their authors is central among these differences. Whereas the Pope saw himself as an authority over all members of Christian society, Jewish leaders saw themselves only responsible for their fellow Jews living in their community and there was much debate over jurisdiction between neighbouring communities and therefore little power within entire regions, certainly regarding customs of dress. Yet, despite the disparity in the scale of their reach, the degree of enforcement available to both types of leaders is questionable.

Another difference relates to the content of these instructions. The Christian decree requires that Jews wear distinguishing clothes and refrain from venturing outdoors at certain times, rather than articulating a specific clothing or look, while Jewish leaders steered their community away from specific garb and practices. This difference is a significant expression of the limits of rabbinic power in contrast to the Christian notion of papal power, whether real or imagined.

44 Ephraim Kanarfogel, *The Intellectual History and Rabbinic Culture of Medieval Ashkenaz* (2012), 367. See also Zimmer, *Society*, 44-50.

45 Finkelstein, *Jewish Self-Government,* 234.

It is possible that this also reflects a difference between what one imposes on an external group in contrast to restrictions upon one's own group.

Finally, one aspect of this comparison raises questions for future research on these texts – namely their differing attitudes toward men and women. Both texts attempt to direct the actions of all Jews. However, the Jewish discussion of beards and haircuts is markedly male oriented. The gender specificity of the ordinances about clothing are mixed: the prohibition from wearing sleeveless garments may or may not be gender specific, whereas the capes that resembled clerical garb and the hats in question were certainly worn by men. Undoubtedly, these regulations were written by men and aimed at men, which can lead one to wonder to what extent women fit into their scheme. On a practical level, we might ask how effectively distinctions between these faith communities were achieved if men were the primary actors? The Fourth Lateran Council's instructions suggest that an outward symbol of Christian or non-Christian status would help to prevent connections between these religious communities, without explicit distinction between men and women, yet the specific references to observances in different areas refer only to men. Other texts, such as anti-Jewish legends from the twelfth and thirteenth century as well as illuminations and decorations in religious books and churches also suggest that Jewish men were more religiously visible than Jewish women.[46] This leads to many questions concerning the difference between the ways men and women manifested their religion via clothes. In conclusion, I have sought to demonstrate the extent to which gender, community and faith were broadcasted in everyday appearances. Surely future studies of legal texts as well as other genres merit further investigations of these matters.

46 Miri Rubin, *Gentile Tales: The Narrative Assault on Late Medieval Jews* (1999), 70-77; Sara Lipton, "Where Are the Gothic Jewish Women? On the Non-Iconography of the Jewess in the *Cantigas de Santa Maria*". *Jewish History* 22 (2008): 139-177.

PROHIBITING SEXUAL RELATIONS ACROSS RELIGIOUS BOUNDARIES IN FIFTEENTH-CENTURY PORTUGAL: SEVERITY AND PRAGMATISM IN LEGAL THEORY AND PRACTICE*

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The issue of sexuality and reproduction across religious and ethnic lines has always been one of the major flashpoints and causes of anxiety in power relations between different communities. In numerous societies, and across different eras, many attempts have been made to dissuade or prevent interfaith sexuality through the force of religious injunctions and legislation: from the biblical proscriptions (Deuteronomy 7: 3-4 and Corinthians 6:14) to late Roman and medieval canonical legislation and finally to the modern anti-miscegenation laws introduced in parts of the United States (before 1967), Nazi Germany or Apartheid South Africa. In the late Roman and medieval Christian world, the fear that unrestricted contact between Christians and Jews or Muslims, and especially sexual activity, would lead to apostasy or heresy led canon lawyers to prominently consider the theme of such sexual relations in their treatment of Jews and caused the secular authorities to severely punish them through fines, castration or even death by burning.[1]

The Iberian Peninsula was probably the region of medieval Christendom where the greatest number of Jews and Muslims lived under Christian rule in the various Christian kingdoms which steadily expanded southwards at the expense of the Islamic rulers of *al-Andalus* from the eleventh to the fifteenth centuries. The Muslim minority included both "free" and enslaved Muslims, the latter mostly having become slaves after their capture during Christian campaigns or raids into Muslim Spain. From the twelfth century, the Church and Christian rulers sought to prevent the possibility of sexual interaction between the followers of different faiths and especially between Jewish or Muslim men and Christian women. The Church's canonical prohibition on interfaith sexuality was supplemented

* I would like to express my gratitude to Professor Maria Filomena Lopes de Barros (University of Évora) for reading an early draft of this work and making a number of useful suggestions.

1 James A. Brundage, "Intermarriage between Christians and Jews in Medieval Canon Law", *Jewish History*, 3 (1988), 25-40.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 301–316

 DOI 10.1484/M.RELMIN-EB.5.111606

by secular legislation that included a mixture of preventative segregationist laws seeking to strictly police contact between Christians and Jews or Muslims on one hand whilst punishing those who actually engaged in such forbidden sexual intercourse with the death penalty. The use of the death penalty was not merely intended to punish the guilty, but also to fulfil an exemplary function as a deterrent to other would-be transgressors. The focus on sexual interaction between Christian women and Jewish or Muslim men is often blatant in such secular law codes. In the 1178 municipal charter (*fuero*) of the town of Cuenca in Castile, it was stated that the Christian woman "surprised" with her non-Christian sexual partner should be burnt but no mention was made of Christian men who had sex with Jewish or free Muslim women. The same charter only concerned itself with those Christian men who had intercourse with and/or impregnated the Muslim slave women of other Christians, setting out the financial compensation that was to be paid to their owners but was seemingly unconcerned about the legality of sexual relations between Christian men and non-Christian women.[2] Similar laws can be found in royal and municipal law codes introduced throughout the Iberian Peninsula in the thirteenth and early fourteenth centuries.[3]

The study of anxieties relating to sexual relations between the Christian, Muslim and Jewish populations in the medieval Iberian Peninsula and the judicial response that they provoked provides historians of relations between different groups (medieval, modern and contemporary) with a fascinating insight into the role played by sex in the dynamic of power relations between different religious groups. In his influential *Communities of Violence*, David Nirenberg examined the issue of "sex and violence between majority and minority" through documentary allegations of interfaith sexuality and accusations made to law courts in the lands of the medieval crown of Aragón. He argues that barriers to sexual intercourse between people of different faiths (not just those erected by Christians but also by Muslims and Jews) both created and contained violence that perpetuated inequalities in the power relations between the Christian majority and the Jewish and Muslim minorities. Moreover, in respect to relations between Jews and Christians, Nirenberg has highlighted a change in the manner in which segregationist legislation seeking to ban or prevent sexual relations between Christians and Jews in medieval Spain was part of a wider attempt to stabilize a Christian identity in the wake of the mass (and in many cases coerced) conversion of Jews in 1391 and the following decades. Nirenberg has posited that the primary preoccupation of such segregationist legislation, and the religious debate that supported

2 James F. Powers (ed. and tr.), *The Code of Cuenca: Municipal Law on the Twelfth-century Castilian Frontier* (Philadelphia, 2000), 81 and 85.

3 See Jonathan Ray, *The Sephardic Frontier. The Reconquista and the Jewish Community in Medieval Iberia* (Ithaca, 2006), 165-169.

it after the 1430s, was not so much fear of the biological act of sexual intercourse between Jews and Christians, but rather the desire to ensure the reproduction of Catholic orthodoxy amidst the fear that insincere converts (judaizing *conversos*) would intermarry with, and corrupt, Christians.[4]

This work examines the nature and development of the normative laws seeking to prohibit sexual relations between Christians and minority religious groups (Jews and Muslims) in fifteenth-century Portugal where such minorities were tolerated and allowed to organise their own communal lives in autonomous "communes" (*comunas*) under royal protection until their expulsion or forced conversion by King Manuel I (1495-1521) in 1496. It compares and contrasts the normative legal response with the documentary evidence preserved in the records of the Portuguese royal chancery/appellate court. Commenting on the difference that exists between the draconian penalties imposed by normative laws, most notably the death penalty for Jews and Muslims who had sexual relations with Christians, and the relative leniency apparent in the records of the royal chancery court (the imposition of fines), this work draws the reader's attention to this striking discrepancy and asks why such an inconsistency existed and what its wider historical significance actually is. It discusses how historians should approach the surviving legal evidence and the historiographical problems inherent in using it. Finally it argues that the realities of fifteenth century Portugal – especially a situation in which the monarchy was keen to protect its Jewish and Muslim "property" – created a set of circumstances in which the severity of the law was by necessity largely mitigated by royal pragmatism.

The Legal Norm: Death and Segregation

The legal attempts to prevent interfaith sexuality in medieval Portugal followed much the same course as in the adjacent Christian kingdoms of the Iberian Peninsula. Just as in neighbouring Castile, evidence of anxieties about interfaith sexual activity appears in the late twelfth and early thirteenth centuries. The municipal charter (*foral*) granted in this period to the town of Castelo Bom, a disputed border stronghold that did not come under Portuguese rule until the end of the thirteenth century, included a section seeking to establish the number and quality of witnesses that were necessary to arrest and convict a Jew for having sexual relations with a Christian woman. Just as in the case of the *fuero* of Cuenca in Castile, the preoccupation focused on sexual relations between a minority

4 David Nirenberg, C*ommunities of Violence. Persecution of Minorities in the Middle Ages* (Princeton, 1996), 127-165 and "Conversion, Sex, and Segregation: Jews and Christians in Medieval Spain", *The American Historical Review*, 107 (2002), 1065-1093.

male and majority female since no mention is made about Christian men who transgressed faith boundaries in a similar manner.[5]

Segregationist legislation appeared in Portugal during the fourteenth century. King Afonso IV (1325-1357) decreed that Jews must wear a yellow symbol on their hats to mark them out from Christians. In 1391, King João I (1385-1433) renewed the decree after Christian representatives complained that few Jews wore the symbols and that many concealed them. The monarch changed the symbol to a red star stitched onto the clothing of Jews and ordered it to be of the same size as the royal seal, adding that the failure of any Jew to comply would be punished by the confiscation of the culprits' clothing and a fortnight in prison. The celebrated painted altarpiece, attributed to Nuno Gonçalves and generally known as *The Adoration of Sao Vicente de Fora* (dated by art historians around 1472 and currently exposed in the *Museu Nacional da Arte Antiga* in Lisbon) features a Jewish courtier prominently wearing such a conspicuous red badge composed of six radiating arrow-shaped points that form the outline of a Star of David.[6] Muslims were similarly affected by the legal obligation to wear either distinctive clothing (notably burnooses) or symbols. A document dating from 1359 indicates that, under King Pedro I, Muslims were compelled to wear distinctive long-sleeved garments (known as *aljubas*) although the king responded to complaints about the impracticality of such garments by allowing the Muslims of the town of Moura to don burnooses instead.[7] By the reign of Afonso V (1438-1481) at the latest, Muslims were all legally compelled to wear a distinctive red badge on their clothing in much the same manner as the Jews although it is worth noting that Christian urban representatives gathered at the parliament held in Évora-Viana de Alvito in 1482 complained bitterly about the lax enforcement of the legislation forcing Jews and Muslims to wear symbols upon their clothing.[8]

The establishment of *mourarias* and *judiarias*, physically segregated quarters in Portuguese towns reserved for Muslims and Jews, was first instituted in 1361 by King Pedro I (1357-1367) following complaints made by Christian urban representatives in a parliament assembled in the town of Elvas. Five years later, the same monarch promulgated new legislation that intended to place further limitations on social interaction between non-Christians and Christians. Claiming to be acting upon the information of "good men who are worthy of trust" (*homens boons*

5 A. Herculano et José da Silva Mendes Leal, *Portugaliae Monumenta Historica*, Vol. 2: *Leges et Consuetudines* (Lisbon, 1888), 760.

6 J. Leite de Vasconcellos, *Etnografia portuguesa* (Lisbon, 1958), Vol. 4, 88; H. da Gama Barros, "Judeus e mouros em Portugal em tempos passados", *Revista Lusitana*, 34 (1936), 192, doc. 63; *Arquivo Histórico da Câmara Municipal de Lisboa*, *Livro dos Pregos*, fol. 110r, doc. 129; *Ordenações Afonsinas*, *livro* II, title 86.

7 A. H. de Oliveira Marques (ed.), *Chancelarias Portuguesas. D. Pedro I* (Lisbon, 1984), doc. 360, 143.

8 François Soyer, *The Persecution of the Jews and Muslims of Portugal. King Manuel I and the End of Religious Tolerance* (Leiden, 2007), 64-66; A.N.T.T., *Núcleo Antigo*, nº 118, fols 157r-158r and 172v-173r.

dignos de creer), King Pedro decreed that Muslims or Jews were not to leave their respective quarters after the church bells had sounded the call for vespers. That the creation of what amounted to ghettos was closely linked to fears about interfaith sexuality is confirmed by the fact that the same law specified that the punishment of those Jews or Muslims who had sexual relations with Christians "through the will, deceitfulness and artifice of the Devil" (*per aazo e engano e arteirice do diaboo*) was to be the death penalty. Whilst this law also affected Christian men who had sexual relations with Jewish or Muslim women, the focus clearly remained on preventing sexual relations between Christian women and Jewish or Muslim men. Beyond the imposition of the death penalty, the law of 1366 also sought to regulate in remarkable detail any possible contact between Christian females and non-Christian males. Christian women were forbidden from entering Jewish or Muslim quarters unless they were accompanied by Christian men: one man if the woman was unmarried but two men if she was married. If they could not find men from their own entourage, then the Christian women were to request the company of Christian officials guarding the segregated quarters or, failing that, of royal officers. Even more strikingly, the law actually described in detail two distinct itineraries circumventing the Muslim quarter of Lisbon that Christian women were ordered to take on pain of death.[9]

King Pedro's 1361 law was the first of many segregationist measures seeking to impose a curfew on the Jewish and Muslim subjects of the Portuguese crown. Under continued pressure from the town council of Lisbon, King João I (1385-1433) renewed the prohibition on Jews dwelling outside *judiarias* in 1395. Five years later, he decreed that Jewish quarters must be enlarged to accommodate the Jewish population and to deprive Jews of any justification for residing outside of their quarters. Around the same time, King João also forbade Jews and Muslims from frequenting Christian taverns in towns where taverns existed in the Jewish quarters.[10] Finally, in 1412, King João I and his officials sought to clarify the legislation introduced by King Pedro by detailing the penalties that any Jew older than fifteen would incur if he was discovered outside the Jewish quarter after vespers (nightfall). Any offender would be fined 5000 *reais* for a first offence, 10,000 *reais* for a second offence and a publicly flogged for a third offence. The King did, nevertheless, specify circumstances that would justify a Jewish presence outside the Jewish quarter after nightfall. These included those Jewish travellers coming

9 *Arquivo Nacional da Torre do Tombo* (henceforth A.N.T.T.), *Chancelaria de D. Pedro I*, *livro* 1, fols 124r-124v; A. H. de Oliveira Marques (ed.), *Chancelarias de D. Pedro I*, 535-536, doc. 1131; See also M. F. Lopes de Barros,"Body, baths and cloth: Muslim and Christian perceptions in medieval Portugal", *Portuguese Studies*, 21 (2005), 8 and L. F. Oliveira and M. Viana, "A mouraria de Lisboa no sec. XV", *Arqueologia Medieval*, 2 (1993), 193.

10 A.N.T.T., *Chancelaria de D. João I*, *livro* 1, fol. 78r; *Ordenações Afonsinas*, *livro* I, title 62 (item 17)band *livro* II, titles 80 and 91.

to the Jewish quarter from outside the town who arrived belatedly and found that the gates of the quarter were already shut and locked, Jewish doctors and surgeons on medical visits and any Jewish tax collectors on business errands for the crown. In the last two cases, however, the individuals concerned were always to be accompanied by Christian assistants or attendants.[11]

The enduring concern caused by the possibility that "vulnerable" Christian women could fall prey to Jewish sexual desire is clearly expressed in a detailed law promulgated during the reign of King Duarte (1433-1438) forbidding Jews from entering into any dwelling where Christian women were alone and commanding that Christian women were similarly barred from entering into the houses of Jews. The legal edict specified that Jews could not enter the residences of "women of [monastic] orders, widows or virgins" and "married women" whose husbands were not present. If Christian women had any business to transact with Jews, then they were to do so under the public gaze in the street or at the door of their houses but not within. The only exceptions were to be made in the cases of Jews exercising certain professions that justifiably required a degree of privacy or access to the interior of dwellings such as physicians, surgeons, tailors, wool carders, notaries, stone masons and carpenters. It was conceded that such professionals could legally be in the presence of Christian women by themselves "even though they do not bring Christian men with them". Jewish merchants could only enter into the house of a Christian woman if "one or two" other Christian men or women were also present. Non-compliance would, in the first two instances, result in a fine of 50,000 *libras*, two-thirds of which would go to the denunciators as a reward. For a third offence, however, the culprit(s) would be publicly flogged.[12]

King Duarte's law went further in its remaining subsections. It specified that a further exemption would be granted to Jewish travellers and merchants who found themselves in remote areas of the kingdom, such as those who travelled through the mountainous areas purchasing honey, wax and rabbit pelts from villagers for resale in larger urban centres. These Jews were exempt because they were far from the main towns of the kingdom – which it listed as Lisbon, Santarém, Évora, Coimbra, Porto, Beja, Elvas and Estremoz – as well as all of its other "large localities" (*lugares grandes*) in which Jewish quarters were located and it was therefore practical for them to stay in inns and houses where Christian women would inevitably also be found. Christian women themselves could not enter into the premises of Jewish merchants, artisans and blacksmiths to purchase goods without a Christian male escort. Moreover, they could only enter Jewish quarters to purchase goods from the doors or street stalls of Jews and then only with an adult male Christian to chaperone them and during the hours of daylight.

11 *Ordenações Afonsinas*, *livro* II, title 80.
12 *Ordenações Afonsinas*, *livro* II, title 67.

Christian women who broke these laws faced punishments that varied according to their social status. Women from "honourable" backgrounds were exposed to fines of 50,000 *reais* whilst those from lower social backgrounds were to be forced to pay fines varying between 10,000 to 20,000 *reais* for the first two offences and risked a public flogging for a third offence.[13]

These laws were later incorporated into the legal compendium known as the *Ordenações Afonsinas* at the behest of King Afonso V (1438-1481). That monarch also contributed by decreeing in 1455, as a result of pressure from the parliament, that no Christian female older than ten years of age could enter into Jewish quarters. The same monarch also ruled in the *Ordenações Afonsinas* that any Jew and Muslim who was discovered to have concealed his identity "with the intention of sinning with Christian women" should be seized and enslaved.[14]

Royal Pragmatism: The Documentary Evidence

The severity of the medieval Portuguese laws condemning interfaith sexual activity and seeking to prevent it through segregation is all too apparent even though the laws of Pedro I, João I and Duarte demonstrate that practical considerations were not ignored entirely. Such legislation was, however, normative in function and to gain a better understanding of the extent and manner in which these laws were actually enforced, one must look to the surviving fifteenth-century registers of the Portuguese royal chancery (*livros das chancelarias reais*) which are presently preserved in the Portuguese National Archive of the *Torre do Tombo* in Lisbon. It is on the pages of the various books of the Portuguese royal chancery that are recorded the many royal exemptions and pardons (*cartas de isenção e perdão*) that were granted by the Portuguese crown to individuals and communities. In the case of pardons, the individuals concerned were usually appealing sentences imposed upon them by lesser courts. Insofar as the laws regarding interfaith sexuality and segregation are concerned, the documentary record leaves no room for doubt: many pardons and exemptions were granted to Christians, Jews and Muslims who in one way or another had transgressed the strict legal prohibition on interfaith sexual relations or the segregation decreed by Pedro I in the fourteenth century and confirmed by subsequent monarchs.

The meticulous research of Maria José Ferro Tavares and Maria Filomena Lopes de Barros has revealed two interesting facts.[15] The first is that the laws seek-

13 *Ordenações Afonsinas*, *livro* II, title 67.

14 *Ordenações Afonsinas*, *livro* V, titles 25 and 26.

15 Maria José Pimenta Ferro Tavares, *Os Judeus em Portugal no Século XV* (Lisbon, 1982), 2 Vols and Maria Filomena Lopes de Barros, *Tempos e Espaços de Mouros. A Minoria Muçulmana no Reino Português (Séculos XII a XV)* (Lisbon, 2007).

ing to prevent sexual contact between Christians and Jews or Muslims by segregating them were certainly enforced up to an extent and many of those pardoned were fugitives who had fled to neighbouring Spain or were in hiding in Portugal. Nevertheless, a degree of legal flexibility existed on appeal since individuals could apply for, and certainly received, exemptions. The second is that the sentence of death imposed upon those who transgressed the law banning interfaith sex was not systemically implemented and that serious questions abound about the extent to which it was actually applied.

Regarding the first point, the enforcement of the segregationst legislation is not in doubt. The fact that, throughout the fifteenth century, individual Jews and Muslims sought privileges from the crown to permit them to reside outside of their designated quarters or build special doors allowing them to exit their quarters when the gates were shut (in the case of Jewish medical practitioners) is evidence that it was not safe to do so without an official permit. In 1456, a Muslim in Évora was pardoned after he had resisted arrest when he was surprised in a quarter of the town where Christian prostitutes plied their trade (Évora's *mancebia*) by an officer of the law who accused him of seeking to "sleep with some of the unmarried women who were there". The Muslim claimed that his presence in the area was an innocent mistake, caused by the fact that he had taken a shortcut on his way back to the Muslim quarter of the town.[16]

Further documentary evidence of the fear that laws inspired in transgressors can be found in a pardon granted in 1499 by the crown to a Christian couple, Diogo Pires and his wife Isabel de Góis, two years after all the Jews and Muslims of Portugal had been compelled to convert or leave. According to the pardon, Diogo Pires had once been a Muslim and, before his conversion, had entered into a loving relationship with Isabel, by whom he had a child. Sixteen years before – therefore in 1483 – Diogo had converted to Christianity and married Isabel, apparently with the consent of Isabel's mother and relatives. They subsequently had a total of five children who survived infancy. The couple's reason for seeking a pardon was that they were well aware they had broken the law by having sexual relations prior to Diogo's conversion "when he was a Muslim and she was a Christian". Consequently, they feared being retroactively arrested by the King's magistrates even though King Manuel had put an end to religious pluralism in his kingdom in 1496. On the whole, it seems dubious that the royal authorities would have enforced the 1366 decree after 1496. It is more likely the couple feared that malicious neighbours or personal enemies within their community might seek to take advantage of their delicate position by denouncing them. By appealing for a pardon, Diogo Pires and Isabel de Góis may well have been pre-empting any

16 A.N.T.T., *Chancelaria de D. Afonso V*, *livro* 13, fol. 2v

potential legal trouble in the future. It would seem, therefore, that the relative leniency shown by the Portuguese crown to those appellants who had flouted the laws on interfaith sexuality, which shall be discussed below, should not be understood to be representative of wider attitudes within Portuguese society or presumed to indicate a "relaxed" approach to interfaith sexuality in practice.[17]

Yet the concession of exemptions by the crown meant that the rigidity of the law did not necessarily preclude it from being successfully circumvented. Even the legislation introduced by King Pedro I, João I and Duarte had recognised this problem by noting the cases in which Jews could reside outside of their segregated quarters or leave them during the night-time curfew. The registers of the royal chancery contain numerous privileges granted by the crown either to individual Jews and Muslims or to specific Jewish and Muslim communities, allowing non-Christians to travel or stay outside the Jewish and Muslim quarters or to stay in inns and taverns during their travels. In many cases, the petitions were deemed to be justified by real professional obligations such as, to cite only two examples among many, the critical need for Jewish physicians to visit their Christian patients at any time of the day or the need of Jewish merchants in the fishing port of Setúbal to purchase the freshly landed catch of fish in the early hours of the morning, well before the sun had risen. In the latter case, however, the precise itinerary that the Jews were to take from their quarter to the seashore – naming the specific streets – was explicitly established to prevent any abuse of this concession.[18] The Jewish community of Setúbal was not the sole recipient of a communal privilege exempting its members from the legal curfew imposed upon Jews. As early as the reign of King João I, the Jews of the town of Estremoz were similarly allowed to exit their quarter whenever they saw fit in order to tend to their commercial or agricultural pursuits and this privilege was later confirmed by his great-grandson João II (1481-1495). Also during the reign of João I, more precisely in 1387, the Jews and Muslims of Évora received a similar concession following their complaints of the "harm" they suffered as a result of the curfew and in view of the fact that they "served the king and [town council]".[19]

Even Christian women, whom the law considered to be particularly "vulnerable", could receive exemptions from the prohibition on visiting the Jewish or Muslim quarters without a male escort in order to sell their goods there. In Évora,

17 A.N.T.T., *Chancelaria de D. Manuel I*, *livro* 45, fol. 15v.

18 For many examples of Jewish physicians and Jews with other professions granted such privileges see Maria José Pimenta Ferro Tavares, *Os Judeus em Portugal no Século XV*, Vol. I, pp. 407-411 and for the exemption granted to the Jews of Setúbal see A.N.T.T., *Chancelaria de D. João II*, *livro* 14, fol. 55r.

19 A.N.T.T., *Chancelaria de D. João II*, *livro* 21, fols 130v-131r and Gabriel Pereira, *Documentos Históricos da Cidade de Évora* (Évora, 1885), 153, doc. 128

a widow named Ines Eanes received permission from the crown in July 1464 to send one or two young women into the *judiaria* or *mouraria* of the town, presumably to sell products on her behalf. Another privilege, this time dating from December 1469, was granted to a widow named Ines Afonso enabling her to enter the Muslim or Jewish quarters of Évora without a male attendant to sell olive oil. In her case, however, the privilege stated that only Ines herself could enter these areas since "[the crown has] been informed that she is so old and has such a good [reputation] as to deserve that we should grant her this licence". Apparently, Ines's age was thought to be sufficiently advanced to preclude any possibility of sexual contact with Jews or Muslims.[20]

Beyond the granting of exemptions and privileges, numerous Jews and Muslims received pardons for sexual relations with Christian women, as did Jewish and Muslim women accused of carnal intercourse with Christian men during the reigns of Kings Afonso V and João II. The relative number and regularity of these pardons demonstrates that the death penalty was far from a fatality for those men and women – whether Christian, Muslim or Jewish – who were accused of flouting the law. The pardons not only included instances of sexual relations between unmarried individuals but also the potentially much more explosive incidents of adultery with married women across religious lines. Thus, by way of illustration, the Jewish cobbler Judas Guedelha from Sintra (west of Lisbon) received a pardon for sexual relations with a married Christian woman, and two Muslim residents of the port of Setúbal named Ali and Muhammad received pardons from the crown for committing adultery with Christian wives in exchange for the payment of fines.[21] In the case of Muhammad, the transgressing Muslim received his pardon despite the fact that his legal offence was aggravated by assisting his Christian lover to terminate an unwanted pregnancy by providing her with an abortifacient potion to drink.[22] Interestingly, the royal pardons for these adulterers specify that the offenders had been forgiven by the cuckolded Christian husbands, presumably after financial compensation had been paid. Jewish and Muslim women who committed adultery with Christian men were treated no differently. A Muslim woman residing in Santarém (north of Lisbon), who had committed adultery with a Christian and had become a fugitive, was pardoned by the crown and fined 500 *reais* in 1486 after her Muslim husband forgave her for her "sin and error".[23] The sentences imposed by the law courts, it would seem, depended to a large extent on the gravity of the offence, varying from

20 "*... por quanto nos hauemos emformacom que he em tall hydade e tam boa que merece lhe darmos a dicta licenca*". A.N.T.T., *Chancelaria de D. Afonso V*, *livro* 8, fol. 88v and *livro* 31, fol. 128.
21 A.N.T.T., *Chancelaria de D. Afonso V*, *livro* 13, fol. 15v and *livro* 32, fol. 6r.
22 A.N.T.T., *Chancelaria de D. João II*, *livro* 23, fol. 103r.
23 A.N.T.T., *Chancelaria de D. João II*, *livro* 4, fol. 27v.

monetary fines to periods of exile to remote military outposts. When compared to other pardons listed in the registers of the royal chancery, the pardons granted to Christian, Jewish or Muslim men and women who had violated the law of 1366 are no different from the more numerous ones handed to Christians who had committed adultery with other Christians or Christian women who were pardoned for having been the concubines of priests.[24]

As David Nirenberg has shown in his study of the treatment of sexual relations between Christians and Jews and Muslims in Aragón, prostitutes and "women of bad repute" were the focus of considerable anxiety and were protagonists in many accusations of miscegenation. In line with the thinking of Saint Augustine on the subject (in his work *De Ordine*, II.4.12), the existence of brothels and prostitutes was tolerated in medieval Portugal as in the rest of the Iberian Peninsula as a necessary evil: a sexual and social pressure valve through which the greater sin of adultery and sexual promiscuity affecting women from "honourable" sections of society could be obviated. Although prostitutes were as concerned by the 1366 prohibition on interfaith sex as any other Christian women, the easy accessibility of female sex workers stoked fears that they would sell their bodies to Jewish and Muslim clients even though there were certainly Jewish brothels serving the larger Jewish quarters in Portugal and there exists limited documentary evidence of Muslim prostitutes fulfilling the same task in the Muslim communities.[25]

The royal pardons in the *Torre do Tombo* shed precious light not only on the world of prostitution and the procuring of sex in fifteenth-century Portugal but also on the role played by prostitutes and their pimps ("*rufiões*") in flouting the laws prohibiting Christian-Jewish-Muslim sexual intercourse. The overwhelming majority of the cases detailed in these pardons involved Jewish or Muslim men who had intercourse with Christian prostitutes, often with the assistance of Christian procurers. Thus, for instance, a pardon granted to one Christian pimp named Luís Eanes who sold the sexual favours of a Christian woman under his control to a Muslim in the southern town of Faro reveals that the transaction took place in exchange for "a pair of shoes and other things".[26]

Sexual relations between prostitutes and clients of different faiths were theoretically subject to the same capital punishments as other interfaith sexual

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24 See, for instance, A.N.T.T., *Chancelaria de D. Afonso V*, *livro* 9, fol. 71v. For various other cases see Luís Miguel Duarte, "Crimes na Serra", *Estudos em Homenagem ao Professor Doutor José Amadeu Coelho Dias* (Porto, 2006), Vol. 2, 86-91.

25 Maria José Pimenta Ferro Tavares, *Os Judeus em Portugal no Século XV*, Vol. I, pp. 244, 266; Henrique da *Gama Barros*, "*Judeus e Mouros* em Portugal em tempos passados", *Revista Lusitana* 35 (1937), 182 and Maria Filomena Lopes de Barros, *Tempos e Espaços de Mouros. A Minoria Muçulmana no Reino Português (Séculos XII a XV)*, 592-593.

26 A.N.T.T., *Chancelaria de D. Afonso V*, *livro* 5, fols 41v-42r.

relations but the pardons reveal that Christian prostitutes and their non-Christian clients were also able to benefit from royal clemency. They also strongly suggest that the death penalty was not applied even in the lower courts. An example of this appears to be presented by Ali Valente, a resident of the town of Elvas accused of "sleeping" (*dormir*) with various Christian women. The women were apparently prostitutes who plied their trade from Ali's shop. The document reveals that prior to his appeal Ali was not condemned to death in the lower courts but rather to serve a year of exile at the remote town of Mertola on the border with Castile. His royal pardon, granted in October 1486, indicates that Ali was able to knock three months off his sentence of exile in exchange for the payment of a fine of 300 *reais*.[27]

Even though the law of King Pedro I only concerned physical participants in interfaith sexuality, pimps also appear to have been the target of judicial punishment for enabling such criminal intercourse to occur. The case of the Christian pimp named Luís Eanes, who sold the sexual favours of a Christian prostitute to a Muslim has already been described above. Another beneficiary was the Christian João Vaz of the port of Setúbal who was imprisoned for having prostituted women and "given them to Christians, Muslims and Jews to fuck" (*as dava a ffoder a christãos e mouros e judeus*) and especially for his treatment of an unmarried Christian girl (*manceba*), whom he had "given to fuck" (*dando a foder*) to numerous Muslim customers. João Vaz, in spite of this and other heinous crimes such as violent assaults and robberies as well as having broken out of jail in Évora, received a royal pardon in 1440 as part of a kingdom-wide amnesty for crimes committed prior to 1436.[28]

The various royal laws on interfaith sexuality do not explicitly mention the possibility of conversion to Christianity as a way to avoid the death penalty. Laws protecting the succession rights of converts and conversions to Christianity resulting from legal proceedings for thefts or other crimes certainly did occur as did instances of marriages in which one partner had voluntarily converted to Christianity. The documentary evidence is nonetheless extremely sparse regarding cases directly resulting from the prosecution of interfaith sexuality.[29] A rare and notable case was that of a personal physician of King Afonso V, named Master Afonso, who took the "Christian" name of his royal patron at the baptismal font after having been accused of sexual relations with Christian women.[30]

27 A.N.T.T., *Chancelaria de D. João II*, *livro* 8, fol. 73r.
28 A.N.T.T., *Chancelaria de D. Afonso V*, *livro* 20, fol. 148v.
29 On the conversion of Jews and Muslims in fifteenth-century Portugal see Maria José Pimenta Ferro Tavares, *Os Judeus em Portugal no Século XV*, Vol. I, pp. 440-444 and Maria Filomena Lopes de Barros, *A comuna muçulmana de Lisboa (sécs. XIV–XV)* (Lisbon, 1998), 148-152.
30 A.N.T.T., *Chancelaria de D. Afonso V*, *livro* 35, fols 92v-93r.

Conclusion

As it stands, the documentary evidence raises a thorny question: were the men and women granted pardons for their sexual crimes rare and exceptional cases, individuals whose wealth and/or social connections allowed them to purchase pardons from the crown? It is not, and never will be, possible to know exactly how many cases of interfaith sexuality came before the lower courts and never proceeded to reach the highest court in the kingdom or even how many actually reached the royal chancery on appeal. The surviving registers of the Portuguese royal chancery are far from complete. In 1526 there were 48 extant registers for the reign of João I but three years later the keeper of the royal archives reported that he could only find four registers which are the ones that presently survive in the Portuguese national archives. Moreover, insofar as the reign of King João II is concerned, the registers corresponding to the years 1485, 1493, 1494 and 1495 have all disappeared.[31] This fact alone should act as a warning against making any definitive pronouncement upon the question. In spite of the lacunae in the documentary evidence, it is nevertheless possible to arrive at some tentative conclusions.

One aspect of the pardons that is particularly striking is that the individual recipients came from a wide variety of socio-economic backgrounds within the Christian, Jewish and Muslim communities. Amongst the Jews pardoned for having sexual relations with Christian women can be found a physician, a tailor and a cobbler whilst Maria Filomena Lopes de Barros's research into the economic activities of the Muslim residents in fifteenth-century Portugal has demonstrated that in their overwhelming majority the Muslims occupied lowly socio-economic positions.[32] As such, it does not appear that the recipients of pardons were only high-status Christians, Jews or Muslims benefitting from a favourable treatment due to their wealth or connections. It is tempting to speculate that, despite the opprobrium that sexual transgression might have caused within Jewish and Muslim communities, communal solidarity may have assisted in the raising of funds necessary to pay the fines and thus purchase royal pardons for Jews and Muslims threatened with harsh penalties. Perhaps such solidarity could have been motivated by the aim of preventing conversions to Christianity. The Jewish and Muslim communities were certainly capable of such acts of collective solidarity but, as yet, no documentary evidence of this has emerged in cases of royal pardons granted to Jews or Muslims.[33]

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31 P. A. de Azevedo and A. Baio, *O Arquivo da Torre do Tombo. Sua história, corpos que o compõem e organização* (Lisbon, 1989), 32-33.

32 See Maria Filomena Lopes de Barros, *Tempos e Espaços de Mouros*, 497-530.

33 For examples of communal solidarity see, for instance, the measures taken (in Jewish communities) to care for orphans or (in Muslim communities) to purchase slaves in order to free them and integrate them within the community. F. Soyer, *The Persecution of the Jews and Muslims of Portugal*, 31-33 and 44.

To understand why the royal authorities were willing to display "leniency" to those guilty of interfaith sexual relations, it is worth examining the situation from the Portuguese crown's perspective. From such a standpoint, it is easy to discern reasons why it would have been hesitant to implement the death penalty in cases of interfaith sexuality. The crown stood to lose, in financial terms, from the application of the death penalty in cases of Jews and Muslims accused of having sex with Christians. As in the rest of Europe, the Jews of medieval Portugal were under the direct authority of the monarch, who claimed rights over both their persons and property. Moreover, Jews (and Muslims in the Iberian Peninsula) contributed special taxes to the royal treasury in return for the crown's protection. Likewise, the Muslim communities in the southern half of the kingdom appear to have been subject to the same status from the thirteenth century onwards. In addition to losing valuable taxpayers in a geographically undersized kingdom with a small population compared to its European neighbours, the Portuguese crown might also be faced with the added burden of having to pay compensation to third parties since it frequently granted the taxes rendered by Muslims and Jews to individuals as rewards and pensions, just as it did with many other benefices (lands, offices, etc.) during the fourteenth and fifteenth centuries. When religious pluralism was abolished in 1496, King Manuel I was forced to compensate those beneficiaries who thereby lost revenue.[34] Regarding the sums raised as a result of prosecutions and fines, it can hardly be claimed that the crown benefitted greatly in purely pecuniary terms. The law, as we have seen above, specified that denunciators would reap a substantial share of any assets confiscated from transgressors and the crown only benefitted indirectly from granting pardons since the sums collected through fines levied in exchange for pardons were usually paid into the *arca da piedade* (literally the "mercy chest"), a special royal fund designed to support works of charity, alms for the poor and the ransoming of Christian captives held in Muslim lands: activities that may well have inflated the Portuguese crown's prestige but did not make a great contribution to its coffers.

Finally, the striking contrast between the legal severity advocated by the royal decree of 1366 and the relatively "lenient" pardons granted to Christians, Muslims and Jews who flaunted it can probably best be explained when we consider the close link between law, theology and ideology. In an era when kings justified their authority and right to rule by proclaiming their concern to safeguard an ecclesiastical moral order as well as the entwined religious and secular welfare of their subjects, such a link cannot be ignored. Accordingly, the role of the normative legal decrees of the medieval kings of Portugal concerning religious segregation and the prohibition on interfaith sexuality was always, to a large extent, ideological.

34 François Soyer, *The Persecution of the Jews and Muslims of Portugal*, 52, 167, 189 and 194.

Such decrees publicly proclaimed royal support for the lofty ecclesiastical ideal, formulated so clearly by the papacy during the fourth Lateran Council in 1215, of a united, homogenous and moral Christian society preserved from the perils and influences of daily interaction with Jews and Muslims. Thus, for instance, King Duarte prefaced his law preventing Christian women from coming into unsupervised contact with Jews with a pious proclamation:

> Our intention has always been, and continues to be, by the Grace of God, to control and limit the dealings between Christians and Jews, for the greater service of God and the benefit of our kingdoms.[35]

Grandiloquent proclamations aside, however, a practical pragmatism reigned. In practice, and prior to King Manuel's expulsion edict of 1496, the fifteenth-century kings of Portugal and their officials did not allow ideology to dictate the judicial treatment of sexual transgressors of different faiths. This contradiction between the ideal and the real was without doubt an essential factor in maintaining the often difficult coexistence of Christians, Jews and Muslims.

35 *Ordenações Afonsinas*, *livro* II, title 67.

PROTECTION DES CHRÉTIENS EN TERRE D'ISLAM ET DISCUSSION ENTRE PAPES ET SOUVERAINS MUSULMANS : LE CAS SINGULIER DES MERCENAIRES DU MAROC

Clara Maillard

Relmin

Il y eu au XIII[e] siècle un véritable échange entre le Saint-Siège et le Maghreb. Les pontifes ont écrit des lettres à destination de l'Afrique du Nord, adressées essentiellement aux chrétiens qui vivaient au Maghreb, et surtout à ceux qui résidaient au Maroc[1]. Plus ponctuellement les papes envoyèrent des lettres aux souverains maghrébins[2], principalement aux sultans almohades. Ainsi entre 1199 et 1251, six courriers leur sont adressés, cinq concernent les mercenaires chrétiens à leur solde.

Certains de ces textes ont beaucoup intéressé les historiens. Le premier, Pierre de Cénival, s'est penché sur les lettres du pontife Innocent IV datée de 1246[3] : un danger pèse sur les chrétiens et le pape demande, pour leur sécurité, des forts qui n'ont pas été accordés. Le frère Koehler reprend le même exposé et pose la question : l'échec de la diplomatie pontificale a-t-il favorisé la défection des mercenaires chrétiens, passés ensuite du camp almohade à celui des Marīnides[4] ? Cela est très peu probable. André Vauchez ajoute qu'avant Innocent IV, déjà Grégoire IX s'était cru assez fort pour menacer le sultan et qu'il fut suivi dans sa politique par Innocent[5]. Anna Unali a repris cette idée et note la singularité des pontifes qui d'un côté interdisent le commerce avec les musulmans et de l'autre autorisent les mercenaires chrétiens à combattre pour les Maghrébins. Elle justifie cet antagonisme en formant l'hypothèse que les pontifes souhaitaient utiliser les mercenaires pour favoriser la « pénétration religieuse » des chrétiens au Maghreb[6]. Philippe Gourdin souligne lui aussi que « le pape veut en faire le

1 30 destinées aux chrétiens au Maroc, 5 aux chrétiens en Afrique et 2 à ceux de Tunis.

2 9 lettres.

3 de Cenival, « L'Église chrétienne de Marrakech au XIII[ème] siècle », in *Hespéris Tamuda*, 1927, t. VII, 80-81.

4 H. Koehler, *L'Église chrétienne du Maroc et la mission franciscaine 1221-1790*, 1934, 38-42.

5 A. Vauchez, « Les chrétiens face aux non-chrétiens », in *Histoire du christianisme des origines à nos jours*, t. V, « Apogée de la papauté et expansion de la chrétienté 1054-1274 », 1993, 729.

6 A. Unali, « Pénétration religieuse et territoriale des chrétiens au Maghreb au XIII[ème] siècle », *Mésogeios 7 (2000)*, 146.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 317–332

 DOI 10.1484/M.RELMIN-EB.5.111607

noyau d'une nouvelle chrétienté africaine, au risque de contredire sa politique du *Devetum* »[7]. Nous nous proposons donc de compléter ce corpus épistolaire et de l'analyser plus en détail.

Le dialogue entre les papes et les Almohades commença quelques années après la bataille d'Alarcos, après une victoire des musulmans sur les chrétiens[8]. Il n'était pas encore question de mercenaires dans la correspondance pontificale mais déjà le Saint-Siège connaissait l'existence du « Miramolin », roi de Marrakech. En 1199, Innocent III écrivait au calife almohade al-Nāṣir, successeur du glorieux al-Manṣūr[9]. L'objet principal de la bulle est l'envoi de trinitaires sur ses terres, ces religieux consacraient un tiers de leurs biens au rachat des captifs. Le premier souci du Saint-Siège est la protection des prisonniers chrétiens au Maroc. Dans cet échange le pape n'est pas en position de force. Par l'intermédiaire des trinitaires il s'adresse au calife pour régler un point pratique, mais à la dernière ligne, il dit espérer que la vérité du Christ soit inspirée le plus rapidement possible au calife almohade[10]. Cette phrase reprend la formule d'adresse : « que vous parveniez à la connaissance de la vérité[11] ». Même si le sujet abordé est tout autre, le pape souhaite, sans insistance, la conversion d'al-Nāṣir. Giulio Cipollone a noté que ce courrier est le premier qu'Innocent III a envoyé à un prince musulman et qu'il est très souvent cité dans les écrits sur les relations entre Chrétienté et Islam[12]. Pour lui le choix d'al-Nāṣir fut probablement dicté par la proximité du Maroc qui facilitait l'ambassade. Enfin il modère la valeur de l'invitation à se convertir faite par Innocent III à l'Almohade ; la formule était fréquemment utilisée par la chancellerie pontificale. Pour cet auteur ce texte est « exceptionnel » ; les échanges épistolaires entre papes et musulmans étant rares. Il convient d'ajouter qu'il inaugure une correspondance entre la papauté et les sultans almohades qui, sans être soutenue, dura plus de cinquante ans.

Les armées musulmanes, tant en Orient qu'en Occident, étaient constituées en partie de mercenaires, d'étrangers. Les souverains d'al 'Andalus avaient déjà, en plus des troupes arabes et berbères, des contingents chrétiens dans leurs armées. Les empires berbères, Almoravides et Almohades firent de même[13]. Au début du XIII[e] siècle la fonction de ces hommes était clairement connue du pape. L'intérêt

7 Ph. Gourdin, « La papauté a-t-elle une politique maghrébine pendant le Moyen Âge ? », *Alessandro VI dal Mediterraneo al Atlantico*, (Cagliari 17-19 mai 2001), Archivi di stato Saggi 82, 2004, 210.

8 A. Huici-Miranda, « al-Arak », in *Encyclopédie de l'Islam*, Leiden, Brill, et Paris, Maisonneuve et Larose, 1960-2009.

9 1199, mars, 8. *Inter opera misericordie*. Reg. Vat. 4, f. 148r°-v°.

10 1199, mars, 8. *Inter opera misericordie*. Reg. Vat. 4, f. 148r°-v°. Voir G. Cipollone, *Cristianità-Islam : cattività e liberazione in nome di dio, il tempo di Innocenzo III dopo « il 1187 »*, 1992, 506.

11 « *ad Veritatis noticiam pervenire* » *Ibidem*.

12 G. Cipollone, *op. cit.*, 428-433.

13 F. Clément, « Reverter et son fils, deux officiers catalans au service des sultans de Marrakech », *Medieval Encounters*, 2003, 9, 80.

pontifical se porta particulièrement sur le sort des mercenaires au royaume de Marrakech. Les Castillans prédominaient parmi ces mercenaires[14]. Ce corps de soldats chrétiens était commandé par un *alcayt*, chef qui était nommé soit par le souverain de Marrakech ou soit par celui de la couronne d'Aragon. Les sultans avaient intérêt à ce que ces soldats demeurassent longtemps à leur service. Certains ne quittèrent jamais l'Afrique[15].

Honorius III, 1216-1227

Vingt ans plus tard Honorius III, écrivit lui aussi à un calife almohade. Ce pape était d'une envergure moindre que son prédécesseur mais se préoccupa plus du Maroc. Et si Innocent III s'inquiétait des captifs retenus au royaume de Maroc, Honorius III s'occupa lui des mercenaires qui y travaillaient. En septembre 1219, il s'adressait Miramolin[16]. Un frère de l'ordre de l'hôpital de Saint-Jean-de-Jérusalem fut chargé de remettre la lettre à al-Mustanṣir. Les mercenaires chrétiens sont l'unique sujet de la lettre, sans doute le pape répond-il à une demande des chrétiens. Il semble parler d'égal à égal, de souverain à souverain. Il indique à l'Almohade qu'il n'est pas dans son intérêt d'écouter ceux qui lui conseilleraient d'interdire aux chrétiens demeurant sur sa terre de vivre librement sous leur loi. Le pontife lui demande de se comporter comme lui : dans la Chrétienté les musulmans peuvent vivre selon leur rite donc au Maroc les chrétiens doivent avoir la même liberté. Il précise même que dans l'armée almohade ils sont cavaliers comme d'autres qui ne sont pas chrétiens. Il insiste sur le fait que le pape doit s'occuper de ces mercenaires « confisqués au peuple chrétien ». Enfin il lui demande une réponse : « apprends-moi que nos fidèles peuvent vivre librement sous leur loi ». Honorius III instaure un véritable dialogue avec al-Mustanṣir. Cette fois aucune formule invitant le souverain musulman à se convertir n'est ajoutée.

En 1223, ce même pape écrivit aux « chrétiens dispersés au Maroc » qu'il était très affecté par ce qu'il avait appris[17] : les fidèles avaient rapporté au pontife que le « roi du Maroc » les obligent à l'accompagner à sa table de banquet pour faire bombance les soirs de victoires y compris le dimanche et durant le carême. Les mercenaires chrétiens lui demandent donc une grâce pour ces manquements. Pourquoi

14 R. Salicrú I Lluch, « Mercenaires castillans au Maroc au début du XV^{ème} siècle », *Migrations et diasporas méditerranéennes : X^{e}-XVI^{e} siècles*, actes du colloque de Conques, octobre 1999, réunis par M. Balard et A. Ducellier, 2002, 418.

15 M.-D. López Pérez, « Marchands, esclaves et mercenaires : les transferts de populations dans la Maghreb médiéval », *Diasporas et migrations européennes (XI-XVI^{ème} siècle)*, [actes du colloque Toulouse-Conques, 14-17 octobre 1999], 2002, 400-402.

16 1219, septembre, 5. *Expedire tibi non credimus*. Reg. Vat. 10, f. 127v°, ep. 559. http://www.cn-telma.fr/relmin/extrait268770/.

17 1223, mai, 13. *Nimia sumus orribilitate*. Reg. Vat. 12, f. 41r°-v°, ep. 146.

le pape ne s'adresse-t-il plus à l'Almohade ? Est-ce parce que la première ambassade n'a pas donné de suite ou parce qu'il ne reste plus que ce point qui pose problème ? Il est possible de noter qu'il n'y a pas d'attaques particulières dans le texte à l'égard de l'Almohade, pas d'insultes ni de critiques. Et si le pape est horrifié par ce que vivent les mercenaires chrétiens il ne remet pas en cause leur fonction au Maroc. Trois ans plus tard il décida même fonder un évêché pour ces mercenaires[18]. Il précise qu'il a su que les chrétiens du Maroc ont reçu avec joie la nouvelle de l'arrivée future d'un évêque. Le pontife recevait des nouvelles des événements marocains, une relation entre le Saint-Siège et les mercenaires du Maroc était bien établie.

Après la défaite de Las Navas de Tolosa, les Almohades en essuyèrent d'autres, notamment entre 1225 et 1230, infligées par les rois portugais[19], de Léon[20] ou d'Aragon[21]. La place des mercenaires était alors importante, ils avaient un rôle croissant pour la dynastie almohade et permirent à plusieurs califes d'accéder au trône[22]. En 1228, un traité entre al-Maʿmūn et Fernando III, roi de Castille et de Léon favorisait l'organisation de la nouvelle troupe chrétienne[23]. Cette garde personnelle avait été concédée contre des places fortes dans le Haut-Guadalquivir[24]. Fernando III s'assura aussi que les mercenaires puissent avoir une église pour y pratiquer le culte et le droit de sonner les cloches[25]. Il est difficile de connaître l'emplacement dans Marrakech où le corps de garde s'installa car les traces laissées par l'histoire – notamment la description de la ville par Marmol[26] ou le plan portugais de la ḳaṣba[27] – datent de la fin du XVI[e] siècle. De manière sûre il devait être à proximité du pouvoir donc dans le palais almohade, la ḳaṣba. Le chroniqueur Ibn Abī Zār' rapporte un événement particulier au sujet du calife al-Maʿmūn. Mécontent du soutien des chefs religieux de Marrakech à son opposant Yaḥyā, il renia Ibn Tūmart, à l'origine de la doctrine almohade, et proclama Jésus véritable *mahdī*[28]. Charles-Emmanuel Dufourcq précise que cette décision ne doit pas être

18 1226, février, 20. *Urgente officii nostri*. Reg. Vat. 13, f. 121v°, ep. 249.

19 Il reprend Elvas, Beja, Juromenha, Serpa. Ch. Picard, *Le Portugal musulman (VIII[ème]-XIII[ème] siècle), l'Occident d'al-Andalus sous domination islamique*, 2000, 110.

20 Il reprend Mérida et Badajoz. *Ibidem*.

21 La première grande conquête de Majorque. J. Tolan, *Les Sarrasins. L'islam dans l'imagination européenne au Moyen Âge*, traduit de l'anglais par P.-E. Dauzat, coll. historique, 2003, 240-241.

22 F. Clément, « Reverter et son fils, deux officiers catalans au service des sultans de Marrakech », 2003, 81.

23 Ibn Abi Zar, *Roudh el-kartas*, *Histoire de souverains du Maghreb (Espagne, Maroc) et Annales de la ville de Fès*, traduction de A. Beaumier, 1860, XI, 351.

24 Ibn Khaldūn, *Histoire des Berbères*, traduction de M. G. de Slane, 1852-1856, t. II, 235.

25 Ibn Abi Zar, *op. cit.*, 351 et Ibn Khaldūn, *op. cit.*, t. II, 236.

26 Marmol, *L'Afrique*, *Description de Affrica*, 1572, t. III, 50-60.

27 H. Koehler, « La Kasba sâadienne de Marrakech, d'après un plan manuscrit de 1585 », *Hespéris*, 1940, t. XXVII, 16-18.

28 F. Clément, « La rhétorique de l'affrontement dans la correspondance officielle arabo-andalouse aux XII[e] et XIII[e] siècles », *Cahiers de linguistique hispanique médiévale*, 2005, vol. 28, 239. Ibn Abī Zār', *op. cit.*, 359. Ibn Khaldūn, *op. cit.*, t. II, 236.

exagérée : « il s'en tenait à la tradition coranique relative au second avènement de Jésus avant le Jugement Dernier[29] ». Il affirmait aussi ses bonnes relations avec les chrétiens et pouvait par-là se rapprocher de la Castille alors qu'il était en position de faiblesse. Il rétablit plus tard la prééminence du *mahdī*. Les mercenaires continuèrent à servir sous le successeur d'al-Ma'mūn, al-Rashīd qu'ils portèrent également sur le trône[30].

Grégoire IX, 1227-1241

En 1233, Grégoire IX écrivit par deux fois au roi de Marrakech[31]. Il s'agissait alors de lui exposer la foi chrétienne afin qu'il se convertisse et de lui recommander l'évêque de Fès et ses compagnons franciscains[32]. Cette fois l'initiative paraît bien pontificale car cette lettre fait partie d'un envoi à divers souverains musulmans et le sort des chrétiens ne constitue pas le motif premier de l'envoi. C'est l'unique lettre pontificale à avoir ces caractéristiques. Et si certains historiens ont vu dans cette lettre le début d'une mise à profit des défaites des rois de Marrakech par Grégoire IX[33] il ne faut pas omettre que Grégoire IX n'écrivait pas seulement au « Miramolin ». Cette année-là, il répondait à l'invitation du roi de Géorgie et lui envoyait, comme aux souverains de Konya, de Bagdad, de Damas, du Caire ou de Marrakech, des franciscains munis d'une même exposition de la foi chrétienne. Il faut donc resituer ce texte dans un contexte plus large alors que la croisade marquait un temps d'arrêt. Le texte débute par une invocation, le ciel et la terre sont pris à témoin, puis il est écrit qu'« il » (donc chaque souverain à qui est adressé le texte) néglige de reconnaître la foi malgré de si nombreux signes. Grégoire IX souligne qu'« il » est le prince d'un peuple, que s'il entend le message qui lui est exposé il achèvera « les prémices du peuple à croire au Christ[34] ».

Si le prosélytisme pontifical s'inscrit dans un contexte plus large de relation entre Chrétienté et Islam, le pape utilise l'évêque qui sert les soldats chrétiens comme intermédiaire. Le prosélytisme fut rendu possible grâce au corps de mercenaires chrétiens du Maroc. Ainsi cette lettre est accompagnée d'une seconde qui la précise[35]. Et ce double envoi témoigne de la relation particulière qu'entretenaient

29 Ch.-E. Dufourcq, *L'Ibérie chrétienne et le Maghreb XII^ème-XV^ème siècle*, 1990, V-52.

30 F. Clément, « Reverter et son fils, deux officiers catalans au service des sultans de Marrakech », 2003, 81.

31 1233, mai, 26. *Coelestis altitudo et*. Reg. Vat. 17, f. 341r°, ep. 129.

32 *Ibidem* et 1233, mai, 27. *In aliis litteris*. Reg. Vat. f. 36v°-37r°, ep. 135.

33 A. Unali, « Pénétration religieuse et territoriale des chrétiens au Maghreb au XIII^ème siècle », 2000, 146.

34 1233, février, 15. *Celestis altitudo consilii*. Grégoire IX, L. Auvray, *Les registres de Grégoire IX*, Bibliothèque des Écoles Françaises d'Athènes et de Rome, 1907, t. I, 632, n° 1.099-1.100.

35 1233, mai, 27. *In aliis litteris.* Reg. Vat. f. 36v°-37r°, ep. 135.

les papes avec les Almohades. Anna Unali constate que, par rapport au courrier d'Innocent III, « le ton et le contenu de cette lettre semblent tout à fait changés [...] le calife ne semble plus appartenir à un monde presque inconnu[36] ». La lettre informe aussi sur la bienveillance du calife à l'égard de l'évêque de Fès. Le pape parle des espoirs de conversions qu'ont fait naître en lui l'attitude bienveillante d'al-Rashīd à l'égard des frères. Le texte répète une longue exhortation à se convertir. Elle constitue l'essentiel de la lettre. Sans doute à cette date l'importance stratégique des mercenaires chrétiens au service de l'Almohade dû-t-elle nourrir l'espoir de voir un souverain maghrébin recevoir le baptême. Et, lorsque Grégoire IX tenta de le convertir il mentionna ces mercenaires. Il emploie l'expression les fidèles qui te servent[37]. Mais il ne mentionne pas les violences que subirent ces chrétiens dans une église de Marrakech en 1232, violences narrées dans deux textes rédigés au siècle suivant, le *Roudh el-kartas* d'Ibn Abi Zar[38] et la *Chronique des XXIV généraux*[39].

Grégoire IX ne s'inquiète pas de ces événements mais écrit que les chrétiens ne peuvent demeurer au service du calife almohade si ce dernier reste « l'ennemi du Christ[40] ». C'est l'unique lettre où est mentionnée comme inacceptable la situation de ces chrétiens ; ils servent, avec les armes, un « ennemi du Christ ». Certes Grégoire IX usa de la menace afin de convertir le sultan almohade mais il ne faisait que pointer du doigt une aberration et exposer une interdiction qui aurait déjà dû être énoncée. Cette dernière phrase, plus menaçante, fut interprétée comme un jalon de l'affermissement de la position pontificale face au calife. Force est de constater cependant que les chrétiens continuèrent à le servir. Aucune lettre de Grégoire IX leur demandant de quitter le territoire n'est consignée aux Archives secrètes du Vatican, aucune réponse non plus. La dynastie mu'minide les protégea. Que cette protection vienne à manquer et ils se trouvaient à la merci d'ennemis. La situation favorable des chrétiens au Maroc a peut-être favorisé l'intérêt pontifical pour ces contrées éloignées de la Terre Sainte mais il est difficile de lire cette lettre à la seule lueur de la *reconquista* et des instabilités maghrébines. Il faut considérer un rapport de force plus large entre la Chrétienté et l'Islam qui n'était pas forcément à l'avantage du souverain pontife. De plus cette tentative de conversion n'eut point de suite du temps de Grégoire IX qui pourtant écrivit en 1235 au Seldjoukide de Rūm et au souverain Ḥafṣide[41]. Et si sa position était

36 A. Unali, *art. cit.*, 146.

37 « *tibi a suis fidelibus serviatur* ». *Ibidem*. http://www.cn-telma.fr/relmin/extrait268736/.

38 Ibn Abi Zar, *Roudh el-kartas*, 1860, 363.

39 « *Chronica XXIV Generalium Ordinis Minorum* ». *Analecta Franciscana*, Quaracchi, 1897, t. III, 33.

40 « *Alioquin, si forte. Christi hostis esse malueris quam amicus, nullatenus patiemur, sicut nec pati debemus, quod tibi a suis fidelibus serviatur* ». 1233, mai, 27. *In aliis litteris.* Reg. Vat. f. 36v°-37r°, ep. 135. http://www.cn-telma.fr/relmin/extrait268736/.

41 1235, mai, 15. *Nobilitatis tuae litteris*. L. de Mas-Latrie, *Traités de commerce...*, Paris, 1866, II, n° XI.

si forte pourquoi se réjouit-il en 1237 de l'état florissant de l'Église de Marrakech – depuis 1232, la cathèdre avait quitté Fès pour Marrakech – dont les paroissiens, les mercenaires, ont continué à servir le calife almohade malgré les menaces pontificales ?

Innocent IV, 1243-1254

Les archives conservent une trentaine de lettres d'Innocent IV à propos du Maghreb. Elles parlent de conversion, de croisade, de l'Ifrīḳiya mais surtout du Maroc. En octobre 1246 ce pontife envoya Lope Fernandez de Ayn à Marrakech comme évêque[42]. Sa mission était importante, il partit avec de nombreuses lettres. L'une d'elle était adressée aux rois de Tunis, Ceuta et Bougie[43]. Il ne s'agit pas d'un courrier isolé mais d'une lettre qui s'intégrait dans une action diplomatique plus large. Innocent IV se souciait des chrétiens et surtout des commerçants qui demeuraient sous leur sceptre respectif. Pas un mot ne les invite à la conversion. Il s'adresse aux infidèles sans être prosélyte.

Quelques jours plus tard, il prit soin d'écrire une longue lettre au « roi de Marrakech »[44]. Cette dernière est plus personnelle et plus complexe. Elle rappelle l'échange établi entre les pontifes et les Mu'minides depuis 1199 et se fait l'écho de celle envoyée par Grégoire IX. Lorsque le courrier fut rédigé, Abū Saʿīd était au pouvoir et poursuivait la politique favorable aux libertés religieuses du corps de mercenaires chrétiens de ses prédécesseurs. Innocent IV le savait et écrivait en conséquence. Il tente d'amener le calife à la conversion, puis lui expose clairement les difficultés rencontrées par les combattants chrétiens et enfin lui demande l'attribution de places fortes pour les protéger.

La missive commence par des remerciements. Le pape souligne le sort envieux que réserve l'Almohade aux chrétiens dans son royaume, ainsi que la protection qu'il – ou ses prédécesseurs – fournit à l'Église de Marrakech contre les ennemis de la foi chrétienne ; il s'en réjouit. Innocent IV parle alors des mercenaires en ces termes : « les chrétiens que tes prédécesseurs ont amenés sur tes terres[45] », et précise qu'ils se battent pour lui. Le pape connaissait clairement leur fonction. Le pontife écrivit au calife que fortifié par les chrétiens, il a repoussé les attaques de ses adversaires, que les chrétiens combattent avec courage pour son territoire. Le pape insiste sur le lien entre l'Almohade et ses mercenaires, mettant en avant leur vaillance, les triomphes passés et l'intérêt qu'il a à les tenir à son service. Le

42 1246, octobre, 31. *Gaudemus in Domino*. Reg. Vat. 21, f. 342v°, ep. 246.
43 1246, octobre, 25. *Pater spirituum dominus*. Reg. Vat. 21, f. 343r°, ep. 248.
44 1246, octobre, 31. *Gaudemus in Domino*. Reg. Vat. 21, f. 342v°, ep. 246.
45 « *Christianos in terram tuam per dictos praedecessores introductos extulisti* ». 1246, octobre, 31. *Gaudemus in Domino*. http://www.cn-telma.fr/relmin/extrait268738/.

pape associe étonnement le recrutement de chrétiens par le calife à une volonté de sa part d'accroître les édifices pieux et les fidèles de la foi chrétienne sous sa domination[46]. Il écrit que ces chrétiens combattent pour lui et pour la défense de la foi chrétienne[47]. Il justifie ainsi que des fidèles du Christ puissent être les soldats d'un calife musulman.

Innocent IV relève ici un fait particulier qui, sans doute, l'a amené à croire possible la conversion du roi de Marrakech. Ce dernier a défendu la cathèdre Marrakchi contre des ennemis. Même si cela s'explique par la place stratégique et technique qu'avaient prise les mercenaires chrétiens comme appui du pouvoir almohade, l'ambiguïté de la situation est notée par le pontife, ainsi que l'existence d'ennemis sérieux contre cette dynastie.

Ensuite lui est faite la longue invitation à se convertir au christianisme. Celle-ci est plus précise que celle de Grégoire IX. Le pontife appuie son argumentation sur les victoires que les Almohades ont remportées. Si ces attaques ont réussi c'est grâce à l'aide du Christ ; c'est un présage. Il l'interpelle par des invocations : « Ô fasse que tu accèdes au sommet de la contemplation et que tu goûtes aux douceurs de la sagesse divine[48] ! » Ensuite, s'il se convertit, il pourra figurer parmi les princes affectionnés par le Saint-Siège et sa terre comme lui pourront être défendus par le Siège apostolique. Deux points sont à noter qui reflètent les réflexions apostoliques en matière de conversion. Le pape espère voir le peuple se convertir à la suite de son souverain. Et il ne souhaite pas forcer la conversion d'Abū Saʿīd car c'est à lui seul d'en prendre la décision. Ce vœu répond au principe qu'une conversion est valide uniquement si elle est voulue par l'infidèle[49].

En 1246, les courriers consignés dans les *Registra Vaticana* ne sont pas aussi belliqueux que ceux qui ont été enregistrés quelques années plus tard. Peut-être Rome tentait-elle une politique plus subtile, avant les tentatives de croisade, et escomptait que la Chrétienté pourrait s'agrandir à l'Ouest par alliance et conversion. Elle l'espérait aussi à l'Est avec les Tartares. Jean de Plan Carpin était envoyé à l'empereur tartare[50] et Lope Fernandez, évêque de Marrakech, au calife almohade ; chaque souverain ayant des chrétiens dans son royaume et chaque ambassade des finalités doubles : politiques et religieuses[51]. Et le propos central d'Innocent IV est bien de protéger ses ouailles éloignées qui se battent contre de

46 « *quod pia loca et Christianæ fidei sectatores in ditione tua positos geris in proposito augmentare* », *ibidem*.

47 « *in defensione catholicae fidei et ecclesiae tuique regni subsidium contra eos insurgant viriliter* », *ibidem*.

48 « *O utinam ad arcem contemplationis ascenderes et modicum de dulcedine divinae sapientiae praegustares !* » 1246, octobre, 31. *Gaudemus in Domino*. http://www.cn-telma.fr/relmin/extrait268738/.

49 *Histoire du christianisme des origines à nos jours*, 1993, t. 5, 724.

50 A. Paravicini Bagliani, « Innocent IV », in *Dictionnaire historique de la papauté*, sous la direction de Ph. Levillain, 2003, 885.

51 J. Muldoon, *Popes, Lawyers and Infidels : The Church and the Non-Christian World, 1250-1550*, 1979, 41.

durs ennemis. En 1246 le pape était conscient du danger qui menaçait les chrétiens. À plusieurs reprises déjà, ils avaient subi des massacres et leurs ennemis pouvaient à nouveau les surprendre. Les ennemis en question sont les Marīnides qui opérèrent par des razzias répétées contre le pouvoir almohade. La lettre qu'apporta l'évêque de Marrakech est datée d'octobre 1246, mais on ne sait pas quand ce dernier était arrivé au Saint-Siège ni quelles attaques marīnides avait pu être rapportées au pape. Ibn Abī Zār' raconte qu'à l'époque de la proclamation d'Abū Sa'īd, en 1242, les Marīnides avaient de plus en plus de pouvoir, il ajoute que le calife almohade « envoya contre eux diverses armées, mais [qu']elles furent toutes défaites[52] ». Il rapporte ces expéditions menées par « une armée innombrable d'Almohades, d'Arabes et de Chrétiens[53] ». Craignant qu'« ils ne finiss[ent] par être entièrement écrasés[54] », le pape désire qu'à l'avenir les chrétiens soient protégés et demande à l'Almohade des places fortifiées et des forts sur la mer où les chrétiens pourraient se réfugier. La lettre n'est pas menaçante, bien au contraire elle est toute centrée sur la défense des mercenaires au service d'un souverain infidèle, et souligne en conclusion le lien qui unit les intérêts des chrétiens à celui du calife.

Les lettres qu'emporte Lope témoignent de ce que le pontife a été renseigné sur la situation marocaine. Lope « a pris soin d'exposer » au Saint-Siège les difficultés inhérentes à ce diocèse[55]. Le pontife écrit à l'Almohade : « ce que nous avons appris à ton sujet, par notre vénérable frère l'évêque de Maroc[56] ». Il est assez renseigné à cette date pour évoquer les libertés accordées à l'Église de Marrakech et la protection des mercenaires chrétiens. Pourtant aucun document n'indique qu'à cette date Lope ait déjà fait le voyage jusqu'au Maghreb. La personne qui informa la cour apostolique de la vie des chrétiens du Maroc n'est pas connue. De plus une phrase laisse également sous-entendre un échange passé avec le sultan (lettre non conservée ou message de bouche) : « tu dis avoir des ennemis cruels[57]. »

Le dernier paragraphe est la recommandation de l'évêque de Marrakech et des frères mineurs. Le pape précise : « Quant à ce que le dit évêque te dira de notre part, concernant le salut de ton âme, reçois-les avec la même foi incontestable que si nous te parlions avec notre propre bouche[58] ». Le départ de Lope est un très bel

52 Ibn Abi Zar, *Roudh el-kartas*, 1860, 368.

53 *Ibidem*.

54 L. Godard, « Les Évêques de Maroc sous les derniers Almohades et les Beni-Merin », *Revue Africaine*, t. III, oct. 1858, 4.

55 1246, novembre, 11. *Fidei tue puritas*. Reg. Vat. 21, f. 343v°, ep. 251.

56 « *sicut venerabili fratre nostro Marrochitano episcopo nobis innotuit exponente* » 1246, octobre, 31. *Gaudemus in Domino*. http://www.cn-telma.fr/relmin/extrait268738/.

57 « *cum duros hostes [...] habere dicaris* », *ibidem.*

58 « *Super hiis autem quae dictus episcopus tibi ex parte nostra dixerit quae salutem animae tuae prospiciant, illam indubitatam fidem adhibeas, ac si tibi ore proprio loqueremur* », *ibidem.*

exemple d'ambassade. Sous le pontificat d'Innocent IV l'évêque de Marrakech devint un véritable trait d'union entre la papauté et le Maroc. Le pontife avait connaissance des réalités maghrébines et conscience de la complexité de la situation. Pour y répondre, il choisit d'envoyer l'évêque de Marrakech qui gérait des affaires de nature différente : l'Église de Marrakech, le déroulement du culte, la vie des chrétiens au Maroc, la conversion du calife almohade, et le développement de la foi chrétienne. Avant 1251, la croisade n'était pas encore concrètement préparée ; l'idée se faisait jour sérieusement. Aussi l'ambassade de Lope en 1246 pouvait aussi permettre d'obtenir des informations. Tout l'arsenal épistolaire qui fut remis à l'évêque doit lui faciliter la tâche et lui donne une certaine liberté. L'évêque était un diplomate.

Lope Fernandez ne partit pas au Maroc avant le milieu de l'année 1247. Au printemps 1248, Abū Saïd, alors qu'il engageait une expédition contre les Ḥafṣides, fut tué au sud d'Oujda par des insoumis. L'armée en déroute fut surprise lors de sa retraite par les Marīnides et tomba aux mains de ses assaillants. « Dès lors, il ne resta plus aux Almohades le moindre espoir de rétablir leur domination[59] ». Un nouvel almohade, al-Murtaḍā, plus rigoriste que le précédent, prit la succession d'Abū Saʿīd. Cette même année Séville était conquise par Fernando III, roi de Castille.

Dès 1250 l'évêque de Marrakech était de retour à Rome avec un courrier daté du 10 juin 1250. Cette lettre est bien la réponse faite par al-Murtaḍā à celle de 1246, elle est bien adressée « au souverain incontesté des rois de la Chrétienté, [...] le Pape Innocent[60] ». Il s'agit du seul écrit d'un souverain maghrébin qui ait été conservé par les papes. François Clément dans son article sur « La rhétorique de l'affrontement dans la correspondance officielle arabo-andalouse aux XII^e^ et XIII^e^ siècles »[61] s'attarde sur cette lettre. La correspondance almohade, écrite dans un style littéraire, est régie par des règles strictes de présentation. Pour cet auteur l'adresse au pontife, ci-dessus citée, respecte la « bienséance diplomatique » pour mieux marquer ensuite sa supériorité[62]. La réponse d'al-Murtaḍā est claire et sans appel :

> Nous savons que les intelligences supérieures répugnent à admettre qu'Il ait un fils ou qu'Il soit appelé le père : d'ailleurs, le Souverain miséricordieux est au-dessus des opinions professées par les trinitaires, les idolâtres et les athées[63].

59 Ibn Khaldūn, *Histoire des Berbères*, 1852-1856, t. IV, 37.
60 E. Tisserant et G. Wiet, « Une lettre de l'almohade Murtadā au pape Innocent IV », *Hespéris Tamuda*, 1926, t. VI, 34-37.
61 215-241.
62 *Ibidem*, 226.
63 E. Tisserant et G. Wiet, *art. cit.*, 34.

L'unitarisme de l'Almohade est affirmé fermement, le christianisme attaqué violemment. Le caractère tranché de la réplique a été très remarqué par les historiens[64] ; elle est moins nuancée que celles qu'ont faites les « émirs de Syrie ou le sultan du Caire[65] » au même pontife. François Clément parle de mépris à l'encontre des chrétiens et de « flagornerie protocolaire »[66] à l'encontre du pontife mais retient aussi qu'al-Murtaḍā prend quelques précautions avec le pape puisqu'il a besoin des mercenaires chrétiens. Le texte fait aussi les louanges des hauts personnages de l'Islam. Le pape a donc pu lire l'histoire de Muḥammad, de ses nobles compagnons, de leurs conquêtes d'Orient jusqu'en Occident, des quatre premiers califes *rāshidūn* et du *Mahdī*.

Ce texte revient aussi sur l'échange épistolaire entre le pape et lui. Il précise qu'il a reçu les lettres du pape et qu'il y a répondu. Il s'arrête sur les qualités du prélat marrakchi ainsi que sur l'importance de la présence d'un religieux au service des chrétiens.

Innocent IV demandait également des places de sûreté pour les chrétiens. Eugène Tisserant et Gaston Wiet considère une fin de non-recevoir au sujet de ces places[67]. Mais je ne pense pas que ces réserves doivent faire oublier la phrase « Nous confirmons donc [...] nos raisons d'union avec vous ». Le souverain musulman repositionne le pontife dans la place que lui-même et ses prédécesseurs peuvent occuper : celle de se soucier des chrétiens tant que leurs demandes ne risquent pas d'être dommageables au pouvoir almohade. Ainsi al-Murtaḍā, en réfutant les fondements mêmes du christianisme, ne rompt-il cependant pas complètement la relation épistolaire.

En 1251, l'évêque de Marrakech exposa au pape ce qu'il avait appris au Maroc et fit part au Saint-Siège de la réponse du souverain almohade[68]. Innocent IV rédige ensuite une réponse à son attention. Aucun mot n'évoque cette opposition au christianisme, aucune phrase prosélyte ne figure. Le message était assez clair pour qu'Innocent IV abandonne ses démarches. Il traite avec un souverain refusant tout dialogue spirituel pour protéger les chrétiens qui le servent. Il lui rappelle qu'il a négligé ses prières et a omis d'accorder les places fortes sur le littoral aux chrétiens pour que leurs familles puissent vivre en sécurité, il insiste : « ta magnitude ne doit pas souffrir que les chrétiens, qui ardemment se sont attachés à

64 *Ibidem,* 51 ; H. Koehler, *L'Église chrétienne du Maroc et la mission franciscaine*, 40 ; A. Unali, « Pénétration religieuse et territoriale des chrétiens au Maghreb au XIII[ème] siècle », 148 ; Ph. Gourdin, « La papauté a-t-elle une politique maghrébine pendant le Moyen Âge ? », 210. F. Clément, « La rhétorique de l'affrontement dans la correspondance officielle arabo-andalouse aux XII[e] et XIII[e] siècles », 226-227.

65 E. Tisserant et G. Wiet, *art. cit.*, 51.

66 F. Clément, *art. cit.*, 226.

67 E. Tisserant et G. Wiet, *art. cit.*, 52.

68 1251, mars, 17, *Constitutus in praesentia*. Reg. Vat. 22, f. 60r°, ep. 436. http://www.cn-telma.fr/relmin/extrait268753/.

ton service, par manque de lieux dans lesquels ils se retirent le temps nécessaire, endurent, sous ton pouvoir, toutes les injures et les violences[69] ». Cette fois la lettre est menaçante. S'il ne le fait, le pape ordonnera à l'évêque de Marrakech d'exiger leur départ[70].

Le pape lui pose cet ultimatum : si les chrétiens n'ont pas de places fortes pour se réfugier, alors ils ne pourront plus te servir. Grégoire IX, lui, le posait en ces termes : si tu ne te convertis pas alors les chrétiens ne pourront plus te servir[71]. Derrière cette sommation apparaît une grande concession : le pape ne remet plus en question le service d'un souverain infidèle par des fidèles. Les lettres de 1251 sont précises quant aux menaces qui pèsent sur les fidèles du Christ au Maroc : souvent les chrétiens au service du « Miramamolin » partaient dans son armée et devaient laisser seuls leurs femmes et leurs enfants parfois capturés par les Sarrasins, tués ou contraints d'abjurer leur foi[72]. L'expédition belliqueuse menée par la papauté contre le Maroc ne fut préparée plus activement qu'un an et demi plus tard. Sans doute le pape l'avait-il déjà à l'esprit, cela pouvait l'inciter à préserver les mercenaires. C'est la dernière lettre à l'adresse d'un Mu'minide enregistrée aux Archives secrètes du Vatican. Les places de sûreté n'ont pas été réalisées et les chrétiens ont continué à le servir. Un projet de croisade vers le Maroc est confirmé en 1252 et en 1269 le pouvoir almohade chutait. Les mercenaires passèrent au service des Marīnides.

Un lien était bien établi entre Rome et les « souverains de Marrakech ». Presque tous les papes de la première moitié du XIII[e] siècle se sont adressés à eux. La lettre d'al-Murtaḍā en 1250 atteste quant à elle que les souverains almohades lisaient ces lettres. Le dialogue entre papauté et Almohades est encore plus visible au temps d'Innocent IV. C'est un véritable échange de courrier dans lesquels des phrases rappellent d'autres correspondances. La présence de chrétiens au Maroc a facilité ce contact et même provoqué ; souvent il semble que se sont les chrétiens du Maroc qui sont venus demander de l'aide au pontife. À une exception près, ces lettres parlent en premier lieu du sort des chrétiens sur place. Cette correspondance permit aux papes un certain prosélytisme. Aucune lettre exposant la foi chrétienne à d'autres souverains maghrébins n'a été conservée aux archives. Et si les tentatives de conversion ont été plus prononcées lorsque

69 *Ibidem*.

70 *Ibidem* et 1251, mars, 17. *Constitutus in praesentia*. Reg. Vat. 22, f. 60r°, ep. 437. http://www.cn-telma.fr/relmin/extrait268754/.

71 1233, mai, 27. *In aliis litteris.* Reg. Vat. f. 36v°-37r°, ep. 135. http://www.cn-telma.fr/relmin/extrait268736/.

72 « *nam cum oporteat multos ex illis frequenter ad exercitum tuum ire, vel alios pro tuis servitiis laborare, nec habeant tuta loca ubi uxores, filios ac alios consanguineos relinquere valeant, Sarraceni, opportunitate captata, multos ex eis interficiunt et nonnullos cogunt fidem catholicam abnegare* ». 1251, mars, 17. *Constitutus in praesentia*. Reg. Vat. 22, f. 60r°, ep. 436. http://www.cn-telma.fr/relmin/extrait268753/.

la situation politique des Almohades était plus faible il ne faut pas omettre un contexte plus large des relations entre Chrétienté et Islam pas toujours en faveur du Saint-Siège et les concessions des pontifes face au pouvoir almohade. Seul Grégoire IX posa le problème de la condition des mercenaires. Honorius III auparavant en avait parlé sans embarras. Innocent IV accepta cette situation, il y a un *decrescendo* entre le discours Grégoire IX et d'Innocent IV. Les papes agissaient surtout comme des pasteurs, s'assurant que leurs brebis pourraient bien observer les pratiques religieuses et vivre en sécurité[73] et malgré l'imperméabilité du Maghreb au christianisme, aucun pape n'empêcha que des chrétiens servent des musulmans avec des armes. La papauté savait également que ces hommes partaient accompagnés de noyaux familiaux. Le danger pour ces fidèles n'était que plus grand. La papauté tenta d'encadrer et de protéger ce corps de soldats. Une question reste en suspens : essaya-t-elle de l'instrumentaliser ? Il est clair que les papes endossaient un double rôle, protecteur des chrétiens et « interface » avec les infidèles. Mais au-delà de ce constat on peut se demander si Innocent IV demanda les places de fortes en vue de la croisade qui se préparait. Y avait-il un intérêt stratégique ? Auraient-elles pu être utilisées comme base de la croisade en préparation ou auraient-elles pour servir de protection pour les chrétiens en cas de guerre entre la Castille et le calife almohade ? Dans tous les cas, elle n'eut jamais les moyens d'une telle politique.

Par ailleurs par ces échanges la papauté eu des informations de première main sur le Maroc. Le Saint-Siège semble savoir que, lorsque les mercenaires chrétiens sont attaqués, c'est que le pouvoir en place est lui-même attaqué, ainsi il sait quand l'empire almohade est affaibli. Malheureusement ces régions sont peu décrites dans les lettres. Le Maroc est appelé royaume du Miramolin ou royaume de Marrakech mais il est peu décrit. Seul Honorius III présice que ce royaume est « d'une vaste ampleur »[74] et les chrétiens y sont dispersés en des lieux éloignés. Des Maghrébins il n'est rien dit, seuls les souverains sont nommés, de manière relativement précise. Le souverain almohade est appelé « Miramolin », translittération latine du titre califal[75]. En 1219, Honorius III s'adresse à lui par ce nom : *Albyacole*[76]. Il est alors désigné en tant que roi de Marrakech. Lorsque les courriers pontificaux s'adressent à lui, les qualificatifs d'illustre, *illustris*, ou de noble, *nobilis*, attaché à un seigneur, sont ajoutés. Les termes sont neutres en ces temps où les papes négociaient avec ces souverains. À l'inverse dans la première moitié du

73 J. Muldoon, *Popes, Lawyers and Infidels*, 1979, 41.

74 « *christiani per diversa et remota loca illius regni que vaste amplitudinis esse describitur ubique dispersi...* » 1226, février, 20. *Urgente officii nostri*. Reg. Vat. 13, f. 121v°, ep. 249.

75 « Amîr al-mu'minîn, [...] titre protocolaire réservé en islam au détenteur du califat », *Dictionnaire historique de l'islam*, sous la direction de J. et D. Sourdel, 1996, 1028

76 1219, septembre, 5. *Expedire tibi non credimus*. Reg. Vat. 10, f. 127v°, ep. 559.

XIV^e siècle, alors que se jouait la bataille de Salado, un terrible portrait est dressé par la papauté du souverain du Maroc il est le « roi profane et blasphémateur de Benimarin parmi les rois agaréens blasphémateurs et ennemis de la Croix[77] ». Il est alors « l'ennemi profane et le cruel adversaire de la foi orthodoxe[78] ».

Les lettres pontificales

1199, mars, 8. *Inter opera misericordie*. Reg. Vat. 4, f. 148 r°-v°.
Édition : G. Cipollone, *Cristianità-Islam : cattività e liberazione in nome di dio*, p. 506.
1219, septembre, 5. *Expedire tibi non credimus*. Reg. Vat. 10, f. 127v°, ep. 559.
Édition : http://www.cn-telma.fr/relmin/extrait268770/
1223, mai, 13. *Nimia sumus orribilitate*. Reg. Vat. 12, f. 41r°-v°, ep. 146.
Édition : Pressutti, *Regesta Honorii Papae III*, Roma, Loescher, 1888, t. II, n. 4.352.
1226, février, 20. *Urgente officii nostri*. Reg. Vat. 13, f. 121v°, ep. 249.
1233, février, 15. *Celestis altitudo consilii*. Reg. 16, f. 88v°-90v°ep. 295.
1233, mai, 26. *Coelestis altitudo et*. Reg. Vat. 17, f. 34r°, ep. 129.
Édition : J. H. Sbaralea, *Bullarium Franciscanum,* Rome, 1759-1768, t. I, p. 105.
1233, mai, 27. *In aliis litteris*. Reg. Vat. f. 36v°-37r°, ep. 135.
Édition : http://www.cn-telma.fr/relmin/extrait268736/.
1235, mai, 15. *Nobilitatis tuae litteris*.
Édition : L. de Mas-Latrie, *Traités de commerce et de paix*, Paris, 1866, p. 11, n° XI.
1246, octobre, 25. *Pater spirituum dominus*. Reg. Vat. 21, f. 343r°, ep. 248.
Édition : L. de Mas-Latrie, *Traités de commerce et de paix*, Paris, 1866, p. 13, n° XIV.
1246, octobre, 31. *Gaudemus in Domino*. Reg. Vat. 21, f. 342v°, ep. 246.
Édition : http://www.cn-telma.fr/relmin/extrait268738/.
1246, novembre, 11. *Fidei tue puritas*. Reg. Vat. 21, f. 343v°, ep. 251.
Édition : Wadding, *Annales Minorum*, Quarracchi, 1931-1935³, t. III, p. 529, n° 47.
1246, octobre, 30. *Circa opera pietatis.* Reg. Vat. 21, f. 344r°, ep. 255.
Édition : Wadding, *Annales Minorum*, Quarracchi, 1931-1935³, t. III, p. 177, n° XXIII.
1251, mars, 17, *Constitutus in praesentia*. Reg. Vat. 22, f. 60r°, ep. 436.
Édition : http://www.cn-telma.fr/relmin/extrait268753/

77 1340, mars, 7. *Exultamus in te*. Reg. Vat. 128, f. 51r°-52v°, ep. 14.
78 1339, mars, 22. *Tam litterari quam*. Benoît XII, BEFAR, 663, n° 2.286.

1251, mars, 17. *Constitutus in praesentia*. Reg. Vat. 22, f. 60r°, ep. 437.
Édition : http://www.cn-telma.fr/relmin/extrait268754/
1251, mars, 17. *Constitutus in praesentia*. Reg. Vat. 22, f. 60r°, ep. 438.
Édition : http://www.cn-telma.fr/relmin/extrait268755/
1339, mars, 22. *Tam litterari quam*.
Édition : Benoît XII, BEFAR, *Lettres secrètes et curiales*, p. 663, n° 2.286.
1340, mars, 7. *Exultamus in te*. Reg. Vat. 128, f. 51r°-52v°, ep. 14.

SECTION THREE

TRIBUNALS AND TRIALS

INTRODUCTION

Youna Hameau-Masset

Relmin-CRHIA

Justice has become a privileged object of historical study[1] because it is one key to understanding sociability.[2] Indeed, "law constitutes the glue of social life. It is also, in a way, the expression of its intimacy, its way of being and thinking[3]". By studying the legal status of religious minorities and their access to justice, it is possible to glimpse aspects of their lives. The purpose of this section is to determine whether the singular condition of religious minorities resulted in a limitation of their civil rights (such as the ability bring an action to court or to defend oneself in court), their procedural rights, and the extent to which religion was reflected in the charges and sentences. In this way, we can measure the fair treatment by the justice and judgment according to the belief of the defendant, and the response of the right to religious pluralism. As Amartya Sen notes in his critique of John Rawls' conception of justice "there are some crucial inadequacies in this overpowering concentration on institutions (where behavior is assumed to be appropriately compliant), rather than on the lives that people are able to lead. The focus on actual lives in the assessment of justice has many far-reaching implications for the nature and reach of the idea of justice[4]". An account of the place of minorities in society through the issue of their treatment by the justice system cannot be limited to the study of norms. It is necessary to question their effectiveness and their application through the documents of judicial practice.

When a dispute erupts or a crime is discovered, the plaintiff or informant made a declaration before a judge. This raises the question of the organization and the division of jurisdiction, both material and territorial, which affected the ability of the various authorities to hear court cases, civil and criminal, involving litigants of the minority religion. When they oppose a member of the majority,

1 P. Bastien and others, "Introduction: normes et pratiques", in *Normes juridiques et pratiques judiciaires du Moyen Âge à l'époque contemporaine. Actes du colloque de Dijon (octobre 2006)*, ed. by B. Garnot (2007), 5; I. Mathieu, *Les Justices seigneuriales en Anjou et dans le Maine à la fin du Moyen Âge* (2011), 16.

2 "*Une des clefs d'intelligibilité du social*": T. Delpeuch, L. Dumoulin and Cl. de Galembert, *Sociologie du droit et de la justice* (2014), 10.

3 "*Le droit constitue le ciment de la vie sociale; il est aussi, en quelque sorte, l'expression de son 'intimité'. C'est-à-dire de sa façon d'être et de penser*": V. Toureille, *Crime et châtiment au Moyen Âge V^e^-XV^e^ siècle* (2013), 11.

4 A. Sen, *The Idea of Justice* (2009), xi.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 335–340

 DOI 10.1484/M.RELMIN-EB.5.111608

the judicial authorities of the kingdom are competent to try the case, as Delfina Serrano and Martha Keil show in their articles. However, did members of minority gain access to judicial charges in such courts? Could they serve as judges,[5] lawyers or members of a jury? Christian authorities by and large refused Jews and Muslims these roles, fearing that they could obtain authority and coercive power over Christians. This is a fundamental limit of the rights of religious minorities in justice.

Moreover, to settle a dispute between two persons belonging to a religious minority, their own courts appear *a priori* competent, as we see in the article by Adam Bishop. However, this competence is not exclusive, as we find the majority judges intervening in minority cases and at times applying minority law, as Delfina Serrano shows. She highlights the differences in perception on this issue according to Muslim jurists, like Ibn Hazm, for whom all disputes were to be presented before a Muslim judge. Does the jurisdiction vary according to the nature of the dispute, meaning only in civil cases and first instance? As agreed between the parties or a judge's decision to transfer jurisdiction of the case? If this resulted from a decision of the parties, it is called "forum shopping", that is to say, the possibility for a litigant to apply to the court which he thinks will make the decision most favorable to his interests.[6] Thus, individuals were familiar, to some extent, with their rights and the functioning of justice, enough to use it to their ends.

Finally, the other limit of the jurisdiction of the courts of religious minorities is the choice of their officers. Uriel Simonsohn indicates some interference by Muslim authorities in the appointment or election of officers and Christian clerics in their resignation; but also they are calling them to this arbitration to resolve internal conflicts provoked at each election.

To measure the legal rights of religious minorities, first we should consider whether the litigant's confession or that of the defendant influenced his ability to sue or defend in court. The authors of these articles do not report limitations in that moment of the procedure but rather demonstrate that the issue does not really arise in terms of confession but rather gender and legal and social status. Thus, Aleida Paudice presents the status of Jewish women as "a minority within a minority" resulting in limited procedural rights, Adam Bishop shows that the position of Muslim slaves in the Latin East is analogous. We find these differences in status within the system of legal evidence: women and slaves saw their ability to testify limited or impossible.

5 Cf. Y. Hameau-Masset, "L'intégration des juifs et des musulmans dans la ville de Tortose à travers l'étude de leur capacité processuelle (deuxième moitié du XIII[e] siècle-premier quart du XIV[e] siècle)", in *La cohabitation religieuse dans les villes européennes, X[e]-XV[e] siècles*, ed. by J. Tolan et S. Boissellier (2014), 274-291.

6 G. Cornu, *Vocabulaire juridique* (2014), 475.

The restrictions on types of evidence that may be shown during a trial and procedures for control are strict, as we see through various examples of testimonials, oaths and scriptural proofs. Testimonials are subject to specific regulations, as we see in the articles of Delfina Serrano and Adam Bishop. He speaks of "equity" in the procedural law, which is also found in the Iberian Peninsula, resulting in the fact that each party should have witnesses of each confession in the trial. However, there is a real hierarchy in the value of the testimony: witnesses' religious status determines the weight to be given to his their words. Delfina Serrano attests, meanwhile, that according to some legal experts, the probative value of the testimony of a Christian is minimal compared to that of a Muslim. According to Ibn Rushd, it is not possible to have only Christian witnesses in a trial between Christians judged by a Muslim officer.

Furthermore, the witnesses before their testimony, and the parties in dispute, should to take an oath assuring to tell the truth, as another way to prove. This benefit had probative value and was realized according to the *Assizes of Jerusalem*, on the Gospels for Christians, the Quran for Muslims, the Torah for Jews and their own version of the Pentateuch for Samaritans. However, these rules may differ depending on the location, for example in Catalonia Jews could swear on the Law of Moses or on a particularly humiliating text called Curses.[7]

For her part, Judith Schlanger examines another type of evidence, written documents. Through the analysis of falsified documents and the control of the judicial authorities against them, she demonstrates the probative value of the written word in a court of justice. However, the documents' truth is verified by corroborating testimony – the witness during contraction of a loan may for example confirm its value – as could be the case in reverse – the word of a witness corroborated by a document. An expert could also control the value and origin of the document. It was usually a notary who verified the signature, content, and handwriting.

Finally, Adam Bishop mentions another type of evidence, the duel, which was allowed only between Christians and at their request; a Jew or a Muslim could not challenge a Christian. Added to this, other forms of proof included ordeals, search warrants, and confessions, which could be extracted under torture. We can note that during the probationary phase of a trial, the procedural rights of religious minorities may differ from those of the majority. Then, there are differences in the assessment of their word and sometimes a harder or humiliating treatment. It was at this time also that checks facts and words are the most drastic, even if it does not always prevent the spread fanciful assertions as ritual murder (Aleida Paudice), hatred and resentment or fomentation of alliances.

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7 A. García y García, "Los juramentos e imprecaciones en los *Usatges de Barcelona*", *Glossae. Revista de Historia del derecho europeo*, 7 (1995), 51-79; J. X. Muntané i Santiveri, "Anàlisi de l'estructura del jurament de les malediccions dels jueus catalans", *Revista de Dret Històric Català*, 13 (2014), 9-48.

Once the judge has considered the charge and the evidence, he has to decide which laws we will invoke in making its decision. He may thus be confronted with a case legal pluralism, according to the general or local standards and privileges in Christian lands or to *fiqh* in Muslim lands. Depending on the locality, the existing law may differ, although some seem followed widely. Adam Bishop mentions the links between the *Assizes of Jerusalem* and Iberian *fueros*. However, he also reported a problem of primary importance to know which law applied, many registers that can inform us about the kingdoms of Jerusalem, Cyprus and Acre were destroyed. Likewise, in Muslim lands, the sources of judicial practice are very rare, it is very difficult to know the reality of standards, their implementation and effectiveness in the courts. Added to this is that the majority judge must sometimes take into account the specific rights of religious minorities. Thus, he may have to judge on the basis of the law of the minority, even though he is often in principle forbidden to do so according to juridical restrictions of, for example, the *halakha*. Martha Keil shows how this knowledge of Jewish law by Christian judges represents a certain acculturation between rights and testifies to a relative permeability of legal texts and norms. The Judicial or economic sphere is a place of contacts especially in the vocabulary of contracts, in particularly loan contracts as confirmed Judith Schlanger. The judge and the litigants must therefore have knowledge of this normative pluralism. They could play "forum shopping" to exploit differences in the law of the realm and theirs, as demonstrated by Delfina Serrano.

We must then study criminal law and offenses and penalties to underline possible differences in treatment between minorities and majorities, in accordance (or not) with written norms. The question of the law's effectiveness is key here because this area of the law was probably the most important issue for minorities. Litigants incur criminal liability and heavy penalties which might impact their social status but, even more, their lives and physical integrity. Adam Bishop mentioned these differences for Jewish and Muslim doctors who, if their patient died or was wounded, were liable to a heavier sentence than a Christian doctor.

One final question involves the application of a particular criminal law through the study of documents of legal practice, but also addresses the flaws in the legal system and the administration of justice. These flaws could exacerbate the fragile status of minorities, or, on the contrary, allow litigants to negotiate to lessen the constraint, mainly due to sentence remissions. The law is a network of potentiality which gives rise to specific instances of mobilization of rules.[8] This

8 "*Un système de potentialités à partir desquelles se déploient des activités spécifiques de mobilisation des règles*": P. Lascoumes, "Normes juridiques et mise en œuvre des politiques publiques", *L'Année sociologique*, 40 (1990), 50.

is more than a simple set of laws but a tool, a resource available to litigants.[9] It is therefore necessary to study social practice[10] and challenges in the courts, which go far beyond mere compensation for damage suffered. For this it is essential to measure the knowledge of the legal status of the litigants and how they mobilized this status, not viewed as an external constraint but as a means to achieve their ends. This is reflected in the article by Judith Schlanger showing that Jewish creditors could fabricate falsified documents for use in courts of justice.

9 S. Cerutti, *Étrangers. Enquête sur une condition d'incertitude* (2012).
10 B. Lepetit, *Les formes de l'expérience. Une autre histoire sociale* (1995), 13-16.

MUSLIM INVOLVEMENT IN NON-MUSLIM POLITICAL AFFAIRS IN THE EARLY ISLAMIC PERIOD

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The history of non-Muslim communal leadership in the early Islamic period should be read in light of the internal and external spheres of communal life: negotiations of power within the community, on the one hand, and with the Muslim authorities on the other.[1] The brief discussion that follows is based on the analysis of legal sources of Christian and Jewish provenance dealing with aspects of communal leadership and is framed by the considerations outlined above.[2] At the same time, it touches also on the sources of legitimacy upon which communal leaders drew, the self-perception and desired image of these leaders, points of disagreement or strife within communities, and the some of challenges that non-Muslim religious authorities faced in the context of life under Islamic rule.

1 On the history of non-Muslim communal leadership in the early Islamic period, see William Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon", *Orientalia Christiana Analecta,* 181 (1968), 179-200; S. D. Goitien, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza* (1967-1993), vol. 2, 5-39; Hans Putman, *L'église et l'islam sous Timothée I (780-823): étude sur l'église nestorienne au temps des premiers 'Abbāsides: avec nouvelle édition et traduction du Dialogue entre Timothée et al-Mahdi*. (1975), 28-58; Mark R. Cohen, *Jewish Self-Government in Medieval Egypt* (1980); Walter Selb, W. Selb, *Orientalisches Kirchenrecht* (1981-1989), vol. 1, 84, 213-211; John Madey, "The Correlation of the Bishop to his Eparchy according to the Canonical Sources of the Syro-Antiochean Church", *Christian Orient* 4 (1983), 170; Moshe Gil, *A History of Palestine, 634-1099* (1992) [originally in Hebrew: *Palestine during the First Muslim Period* (1983)], 728-916 [numbered by sections rather than page numbers]; Michael Morony, *Iraq after the Muslim Conquest* (1984), 369-371; Elinoar Bareket, *Fustat on the Nile: The Jewish Elite in Medieval Egypt* (1999) [originally in Hebrew: *The Jewish leadership in Fusṭāṭ in the First Half of the Eleventh Century* (1995); Anne-Marie Eddé, Françoise Micheau and Christophe Picard, *Communautés chrétiennes en pays d'islam: du début du VII^e siècle au milieu du XI^e siècle* (1997), 63-65; Robert Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture* (1998), ch. 4; Moshe Gil, *Jews in Islamic Countries in the Middle Ages* (2004) [originally in Hebrew: *In the Kingdom of Ishmael* (1997)], 68-85 and 87-135 [numbered by sections rather than page numbers]; Menahem Ben-Sasson, "Religious Leadership in Islamic Lands: Forms of Leadership and Sources of Authority", in *Jewish Religious Leadership: Image and Reality*, ed. by Jack Wertheimer (2004), vol. 1, 177-209; Andrew Palmer, "Āmīd in the Seventh-Century Syriac Life of Theodūṭē", in *The Encounters of Eastern Christianity with Early Islam*, ed. by Emmanouela Grypeou and other (2006), 111-139.

2 For an overview of the legal sources discussed in this paper, see Uriel I. Simonsohn, *A Common Justice: The Legal Allegiances of Christians and Jews under Early Islam* (2011), 17-19.

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 DOI 10.1484/M.RELMIN-EB.5.111609

Formalism and Pragmatism

In his introduction to the synod of 818, the West Syrian patriarch Dionysius of Tell Maḥrē (818-845) paints a rather bleak picture of to the state of the church and the West Syrian community of his time:

> Because of the difficulty of the present time and the trouble and the confusion, nearly everyone has corrupted his way on earth; further, because of this sort of thing, it is rather suitable that we say that we have been despised and delivered up and oppressed and struck. ... Let us amend ourselves, our beloved ones, considering as wise men the causes of evil which have come upon us and the troubles and the various and manifold afflictions. ... the admonition of these things is needed due to the rigidity of the neck and the contempt of the people who nearly all have been [thus]. Because of the laxity of the present time and because they have conversed with those outside and have been carried off and have been corrupted and deceived, we bring forward [these canons]. .[3]

Dionysius' words resonate with the contents of eastern Christian apocalyptic, hagiographic, and historiographic narratives from the late sevent to eighth century. These tend to portray Christian communities in a state of subjugation to foreign rule as a result of internal theological disputes and of decline in religious fidelity.[4] The biblically-inspired recurring motif is of the sinful community whose suffering is the outcome of divine decree. At the same time, the inclusion of these notions as an introduction to a series of legal regulations, ecclesiastical canon laws, which address matters of ecclesiastical administration and clerical discipline is noteworthy. Indeed, in the period immediately preceding and following Dionysius' consecration, the West Syrian Church is known to have undergone a series of turbulences resulting from internal rivalries that triggered Muslim interventions in ecclesiastical affairs. Accordingly, the introductory passage seeks to establish a link between contemporary turbulences and the fact that Christians were conversing with "those outside the church". Yet while ecclesiastical formal

3 Arthur Vööbus, ed. and trans., *The Synodicon in the West Syrian Tradition* (1975-1976), vol. 375, 27-28 (Syr.)/376, 30-31 (Eng.).

4 See Francisco J. Martinez, "Eastern Christian Apocalyptic in the Early Muslim Period: Pseudo-Methodius and Pseudo-Athanasius" (Ph.D. diss. 1985); idem, "The Apocalyptic Genre in Syriac: The World of Pseudo-Methodius", in *IV Symposium Syriacum, 1984: Literary Genres in Syriac Literature*, ed. by Han J. W. Drijvers and other (1987), 337-352; *The Seventh Century in the West Syrian Chronicles,* ed. and trans. By Andrew Palmer and other (1993); Peter Bruns, "Von Adam und Eva bis Muhammed – Beobachtungen zur syrischen Chronik des Johannes bar Penkaye", *Oriens Christianus* 87 (2003), 47-64; Gerrit J. Reinink, "East Syrian Historiography in Response to the Rise of Islam: the Case of John bar Penkaye's *Ktaba D-Reš Melle*", *Redefining Christian Identity: Cultural Interaction in the Middle East since the Rise of Islam*, ed. by Jan J. van Ginkel and other (2005), 77-89.

positions suggest a ubiquitous opposition to external interferences, our sources suggest a rather ambivalent approach in practice.

Christian and Jewish communal leaders are known to have played a central role in the history of Muslim – non-Muslim relations. Beyond the immediate task of mediating between their communities and the Muslim government, typically lobbying for the former and implementing the policies of the latter, these leaders stood at the forefront of a struggle tosustain religious boundaries. Accordingly, the leaders of the eastern Christian and Jewish Rabbanite communities under early Islamic rule feature in contemporary literary sources as religious leaders whose positions on matters of religion, communal life, and those pertaining to their Muslim overlords, were driven by agendas to sustain office, uphold communal institutions, and stem sectarian oppositions.[5]

Ecclesiastical Administration

It has been argued, based on accounts found in the *History* of the West Syrian patriarch and historian Michael the Syrian (d. 1199), that West Syrian patriarchs would often rely on Muslim authorities for the tasks of securing their office and suppressing their rivals within the church.[6] This is further corroborated by Canon 50, issued in a West Syrian synod held in 869. The canon rules that two eparchies (divisions of ecclesiastical administration bearing a certain measure of independent jurisdiction) shall be placed under the authority of the maphrian (West Syrian prelate who was second in hierarchy to the patriarch) in Takrīt "if the Arabs agree to it".[7] While the canon betrays a close affinity between ecclesiastical and Islamic administrations, we should not assume that ecclesiastical leaders were in favor of it. So, for example, the introduction to the acts of an East Syrian synod held in 775 reveals the objections of the ecclesiastical leadership to a joint attempt of the Abbasid caliph al-Mahdī (775-785) and Isaac bishop of Kaškar to nominate a monk from Kaškar to the office of catholicos; the initiative did not receive the approval of the assembled bishops who instead elected the bishop of Lašōm, Ḥnanišōʿ II (775-779). The introduction, written by Ḥnanišōʿ himself, begins with a brief note about the nine-year vacancy of the ecclesiastical throne.[8]

5 The example of the seventh-century East Syrian catholicos Išōʿyahb III of Adiabene (650-658) is a case in point; see Arietta Papaconstantinou, "Between Umma and Dhimma: The Christians of the Middle East under the Umayyads", *Annales Islamologiques*, 42 (2008), 138-139 and 146; Richard Payne, "Persecuting Heresy in Early Islamic Iraq: The Catholicos Ishoyahb IIIand the Elites of Nisibis", in *The Power of Religion in Late Antiquity*, ed. by Andrew Cain and Noel Lenski (2010), 397-409.

6 See Andrew Palmer, *Monk and mason on the Tigris frontier: the early history of Ṭur ʿAbdin* (1990), 181.

7 *Les synodes syriens jacobites,* trans. by Joseph Mounayer (1963), 75, canon 50.

8 *Synodicon Orientale ou recueil de synodes nestoriens,* ed. and trans. by Jean B. Chabot (1902), 245 (Syr.)/515 (Frc.) – 246 (Syr.)/517 (Frc.).

The dramatic depiction of this period leaves little doubt about the magnitude of the crisis: during these years, the church "remained widowed and desolate [...] plundered by beasts", and has become the object of ridicule by Jews and pagans, who "tainted the habitations of saints and settled in their vicinity, making them houses of commerce for the caravans and the pagans. The ecclesiastical property and lands that were meant to provide for the needy were plundered, falling into the hands of the impure, those who possess scurvy desires". The passage then turns to relate the events that led to the nomination of the monk from Kaškar and justifies its rejection on the grounds of it being an innovation, and a scheme to take over the patriarchal office by sectarian elements within the ecclesiastical hierarchy. Nonetheless, the bishop of Kaškar is not rebuked but rather called upon to support the rest of the ecclesiastical leadership in its decision to appoint Ḥnanišō', with the latter presenting the party from Kaškar with a plea for their forgiveness.

Ḥnanišō' II and his supporters explained their opposition to the appointment of a new patriarch on procedural grounds. The election founded on Muslim support was described as a dangerous step that would undermine the electing prerogative of the ecclesiastical leadership and which amounted therefore to an undesirable innovation. What appears to have been at stake was the protection of the central ecclesiastical institution; yet the narrative reveals more than that. The choice to highlight the intervention of the Muslim authorities is not coincidental but rather served further justification for invalidating the nomination of the monk from Kaškar.[9] This rationale, alongside the depiction of the state of the church during the time in which the patriarchal throne was unfilled and the appeasing appeal to the party from Kaškar, provide a rather rich portrait of the ecclesiastical leadership's self-perception and agenda. The head of the church is presented as the primary foundation upon which ecclesiastical affairs and the wellbeing of the entire Christian community securely rest. He is the protector of the church and of its sacred assets ("habitations of saints") and temporal ones (property and lands), the overseer of normative behavior, and defender of religious boundaries. At the same time, the fulfillment of these tasks was crucially dependent on the autonomous function of the ecclesiastical administration and the unambiguous support of the ecclesiastical leadership of its supreme chief, the catholicos.

Clerical Order

While the patriarchs would often seek official recognition from Islamic governments, the issue of clerical appointment through the intervention of

9 It should be born in mind, however, that the pattern of ecclesiastical invitations of govermental interventions in disputes within the churches go back to the Sasanid period; see Morony, *Iraq*, 346-354.

non-ecclesiastical powers appears to have constituted a constant irritation for the shepherds of the church.[10] Canon 7 of an East Syrian synod held in 676 speaks of clergymen who obtain their office through the support of "secular authorities".[11] Likewise, West Syrian canon laws issued from the late eighth century and throughout the ninth century repeatedly mention clergymen and lay members of the community who appeal to or take refuge in the hands of secular authorities, at times referred to more concretely as Arabs.[12] The legal references to instances of West Syrian clergy inviting Muslim intervention correlate with Michael the Syrian's historiographic narrative . The latter suggests that quite often the background to these appeals were disagreements over the appointment of particular individuals to the patriarchate or the proper performance of liturgical practices.[13] West Syrian and East Syrian canon laws dealing with clergymen who appealed to Muslim officials refer to these officials variably as "outsiders", "worldly rulers", "secular rulers", "chiefs of the Arabs", "pagans", and "Ishmaelites".[14] At the same time, the tone is invariably harsh, and those accused of stepping outside the Christian fold are held accountable for the troublesome state of the church and the Christian community at large. At the same time, these canons also highlight the presence of low-rank ecclesiastical officials and non-ecclesiastical members of the Christian community who assumed leadership roles of different capacities. The actions of non-ecclesiastical leaders posed a threat to the formal ecclesiastical leadership and were therefore the target of ongoing rebuke and regulation. A canon issued in a West Syrian synod held in 878 tells of individuals who had been condemned and punished by the church and later sought the support not

10 Cf. the case of general 'Ubaydallāh b. Ziyād (d. 686), who promised John of Dasen, the metropolitan of the city to establish him as patriarch in John bar Penkaye, *Ktābā d-resh mellē*, in *Sources Syriaques*, ed. and trans. by Alfonso Mingana (1907), part 2, 156 (Syr.)/184 (Frc.); cited in Robert Hoyland, "Jacob of Edessa on Islam", *After Bardaisan: Studies on Continuity and Change in Syriac Christianity in Honour of Professor Han J. W. Drijvers*, ed. by Gerrit J. Reinink and A. C. Klugkist (1999), 152. On the approval of patriarchal appointments by the Muslims, see Putman, *L'église et l'islam sous Timothée I*, 123.

11 Chabot, *Synodicon Orientale*, 485(Syr.)/220 (Frc.): canon 7.

12 See for example, Vööbus, *The Synodicon in the West Syrian Tradition*, vol. 375, 21 (Syr.)/ 376, 23 (Eng.): canon 14; vol. 375, 53 (Syr.)/376, 57 (Eng.): canon 4; vol. 375, 60 (Syr.)/376, 65 (Eng.): canon 9.

13 See for example during the tenure of the West Syrian patriarch Qūryaqūs of Takrīt (793-818): Vööbus, *The Synodicon in the West Syrian Tradition*, vol. 375, 21 (Syr.)/ 376, 23 (Eng.): canon 14; Michael the Syrian, *Chronique de Michel le Syrien: Patriarche jacobite d'Antioche (1166-1199)*, ed. and trans. by Jean B. Chabot (1899-1910), vol. 3, 17. According to Michael the dispute surrounded the celebration of the Eucharist. Similar circumstances are attested during the time of patriarch Dionysius of Tell Maḥrē (818-845); see Vööbus, *The Synodicon in the West Syrian Tradition*, vol. 375, 29-30 (Syr.)/ 376, 32-33 (Eng.): canon 4; Michael the Syrian, *Chronique*, vol. 3, 28.

14 On *ḥanpē* as Muslims, see Hoyland, *Seeing Islam as Others Saw It*, 148; and Sidney H. Griffith, *Syriac Writers on Muslims and the Religious Challenge of Islam* (1995), 8; on the use of the term "outsiders" in canon law, see Uriel Simonsohn, "Seeking Justice among the 'Outsiders': Christian Recourse to Non-Ecclesiastical Judicial Systems under Early Islam", *Church History and Religious Culture,* 89/81-3 (2009), 191-216.

only of "the chiefs of the Arabs" but also of "the Christians whose force is hard".[15] The comment thus suggests the presence of another social power ("the Christians whose force is hard") in addition to the church and the Muslim authorities. Admittedly, the extant evidence does not allow for a conclusive identification of those Christian figures who posed a threat to ecclesiastical power. Yet it does offer some support for the assumption that the reference was to the dominant place of various types of Christian elites outside ecclesiastical ranks.[16]

Monastic Discipline

A particular group that is known to have maintained a tense relationship with the ecclesiastical administration even before the Islamic takeover is that of monks.[17] Given the authority-contending nature of their spiritual reputation and close contacts with rural populations, monks were constantly exhorted to obey the church and acknowledge its authority. These calls should be seen more broadly in light of ecclesiastical concerns for exclusive leadership in the context of a social landscape patronized by a variety of power groups. Still, the circumstances of the early Islamic period, and especially of the eighth and ninth centuries, afforded monks, who typically sided with various contenders to the patriarchal throne, a particularly vital role in ecclesiastical politics.[18] Canon 6 of a West Syrian synod held in 878 orders monks to remain in their monastic dwellings and forbids them to settle in lay settlements, become heads of local churches, and delve into secular affairs as local administers.[19] The term employed in reference to monks who assumed temporal responsibilities is the Arabic word for agent – *waqīl*, suggesting that monks may have functioned as representatives of local Christian communities vis-à-vis the Muslim government, specifically in matters of tax collection. This state of affairs may have also formed the background to a brief report given in the eighth-century *Chronicle of Zuqnīn*. Referring to a caliphal decree to register the properties of churches and monasteries around 768-769, the anonymous author reports that in those times monks

15 *The Synodicon in the West Syrian Tradition,* ed. and trans. by Arthur Vööbus (1975-1976), vol. 375, 53 (Syr.)/ 376, 57 (Eng.), canon 4.

16 See Uriel Simonsohn, "The Christians Whose Force Is Hard: Non-Ecclesiastical Judicial Authorities in the Early Islamic Period", *Journal of the Economic and Social History of the Orient,* 53/54 (2010), 579-620.

17 See Han J. W. Drijvers, "Rabbula, Bishop of Edessa: Spiritual Authority and Secular Power", in *Portraits of Spiritual Authority: Religious Power in Early Christianity, Byzantium, and the Christian Orient*, ed. by Jan W. Drijvers and J. W. Watt (1999), 147; Michael Gaddis, *There Is no Crime for Those who Have Christ: Religious Violence in the Christian Roman Empire* (2005), ch. 6.

18 Palmer, *Monk and Mason*, 183-184.

19 Vööbus, *The Synodicon in the West Syrian Tradition*, vol. 375, 54 (Syr.)/ 376, 58 (Eng.), canon 6. See also ibid, vol. 375, 59-60 (Syr.)/ 376, 64 (Eng.), canon 5.

> owned horses, herds of oxen, and flocks of goats and sheep. Each one possessed plots that he acquired from the lands of the community. They went outside to own vineyards and houses in the villages and to ride horses with saddles, like the pagans. They walked according to the wishes of their hearts, not submitting to the superior who had been assigned over them by God.[20]

The phenomenon of monks moving into lay settlements – first villages and later towns – has been viewed in "the broader context of a general drift of the agrarian population towards the cities as a result of a system of taxation … since the third quarter of the eighth century".[21]

There are also indications, however, that monks were forced to leave their monasteries. Canon 12 of the West Syrian synod held in 818 notes the movement of monks given "the condition of this time" and "out of necessity of circumstances which have occurred", suggesting a backdrop of general unrest.[22] It has been observed that the ninth century was marked by a general feeling of insecurity in the face of the rise of local lords, a development that would have rendered the position of non-Muslims all the more precarious, without the protections, or at least predictability, of a strong Islamic central government.[23] A sense of turbulence is further reinforced through another canon of the same synod, stipulating that if, "due to the emergency of the time and to coercion", a bishop moves to another town, he should respect the jurisdiction of that town's local bishop.[24] While the exact nature of these difficult circumstances remains obscure, a decree issued by the East Syrian catholicos Ḥnanišō' II in the late eighth century points to the effect of warfare on the physical movement of ecclesiastical officials. The decree notes that fighting in the vicinity of Iraq prevented the catholicos from travelling there.[25]

Compromising Ecclesiastical Integrity

Preoccupations with threats to ecclesiastical power coming from the direction of Christian laymen and monks were likely in response not only to the latter's activities

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20 *Anonymi auctoris Chronicon ad AD 1234 pertinens, I. Praemissm est Chronicon anonymum ad AD 819 pertinens,* ed. and trans. by Jean B. Chabot (1937), 262 (Syr.)/ *The Chronicle of Zuqnin,* ed. and trans. by Amir Harrak (1999), 230 (Eng.).

21 Palmer, *Monk and Mason*, 185; see also Palmer's reference to Claude Cahen, "Fiscalité, propriété, antagonismes sociaux en Haute-Mésopotamie au temps des premiers 'Abbāsides, d'après Denys de tell-mahré", *Arabica* 1/2 (1954), 136-152.

22 Vööbus, *The Synodicon in the West Syrian Tradition*, vol. 375, 33-34 (Syr.)/ 376, 36 (Eng.), canon 12.

23 Palmer, *Monk and Mason*, 185; see also Palmer's reference to Marius Canard, "'Īsā b. al-Shaykh", *Encyclopedia of Islam, Second Edition*.

24 Vööbus, *The Synodicon in the West Syrian Tradition*, vol. 375, 29 (Syr.)/ 376, 32 (Eng.).

25 *Syrische Rechtsbücher,* ed. and trans. by Eduard Sachau (1907-1914), vol. 2, 28, 30 (Syr.)/29, 31 (Ger.), decree 16.

but also, more generally, to the deterioration of ecclesiastical reputation. Numerous canon laws allude to this condition and offer explanations for it. The West Syrian synod held in 818, drawing a direct link between contemporary circumstances and clerical appointments, refers to bishops who, "due to the coercion of these rebellious times, being tormented by the enemies of faith", consecrate clergy "without examination and without the order".[26] While external pressures may have played a role in ecclesiastical appointments, we should also consider economic constraints as a real reason for improper appointments. The practice of simony – the buying of ecclesiastical offices – was a long-time preoccupation of the church, and although this particular phenomenon is attested mostly in pre-Islamic and Islamic Egypt, the economic burdens placed upon the churches under Islamic rule were not limited to a particular region.[27] Thus, for example, there is some reference to the fact that churches, monasteries, and ecclesiastical officials were liable to paying taxes. Canon 19 issued in the aforementioned synod of the East Syrian Church in 775 stipulates that those who are appointed by the bishop should not collect the poll-tax from him.[28] The testimonies from Islamic Egypt are of patriarchs and bishops in constant struggle with a state of declining material resources. To an extent, it was this reality that paved the way of questionable figures, often of significant financial means, to ecclesiastical offices.[29] Accordingly, the aforementioned canon 7 of the East Syrian synod held in 676 also warns those who wish to assume an ecclesiastical office and receive ordination no to achieve these goals "by means of gift".[30]

In other instances, sporadic references in the legal literature speak of the absence of competent clergymen. Thus, regulation 97 in the legal collection of the East Syrian catholicos Išō bar Nūn (823-828) mentions clergymen who adopt other confessions and craftily conceal their beliefs;[31] and the East Syrian metropolitan Gabriel of Basra, in his *Nomocanon* (composed 884-891), cites the observation of catholicos Sabrišō' II (d. 835) that all the churches in Mesopotamia were devoid of knowledgeable clergymen.[32] At times it was direct Muslim pressure that forced

26 Vööbus, *The Synodicon in the West Syrian Tradition*, vol. 375, 33-34 (Syr.)/ 376, 36 (Eng.), canon 10.

27 See Eva Wipszycka, *Les ressources et les activités économiques des églises en Égypte du IV^e au VIII^e siècle* (1972), 196-212; according to Wipszycka, in late antiquity, ordinations were negotiated in a trade-style manner.

28 Chabot, *Synodicon Orientale*, 225-226 (Syr.)/ 489-490 (Frc.).

29 Ibn al-Muqaffa', *History of the Patriarchs of the Egyptian Church*, ed. by Yassā 'Abd al-Masīḥ and O. H. E. Burmester (1943), vol. 2, 109 (Ar.)/135r (Eng.); 117 (Ar.)/136v (Eng.). See also Oswald H. E. Burmester, "The Canons of Christodulos, Patriarch of Alexandria (AD 1047-1077)", *Le Muséon,* 45 (1932), 279; *Die Kirchenrechtsquellen des Patriarchats Alexandrien,* ed. and trans. by Welhelm Riedel (1968), 231-233 and 260. For some reference to the phenomenon outside Egypt, see Papaconstantinou, "Between Umma and Dhimma", 147; and Rachel Stroumsa, "People and Identities in Nessana" (PhD diss. 2008), 55.

30 Chabot, *Synodicon Orientale*, 220 (Syr.)/ 485 (Frc.), canon 7.

31 Sachau, *Syrische Rechtsbücher*, vol. 2, 160 (Syr.)/ 161 (Ger.), regultion 97.

32 *Die Rechtssammlung des Gabriel von Baṣra und ihr Verhaltnis zu den anderen juristischen Sammelwerken der Nestorianer,* ed. and trans. by Hubert Kaufhold (1976), 303.

priests to compromise liturgical practices. Thus, much closer to the time of the Arab conquest, the West Syrian bishop Jacob of Edessa (684-689) addressed the legal concerns of a petitioner involving, among other things, a priest who was forced to give communion to a Christian woman who had united with a Muslim man, and a priest who was compelled to dine with a Muslim ruler and later prayed and burned incense in his presence.[33]

Islamic Sanction of Rabbanite Authority

The dependence of Jewish communal authority on Islamic sanctions is well attested in a tenth-century historiographic composition, which presumably went by the title *Akhbār Baghdād* ("Reports of Baghdad") and is often referred to in modern scholarship by the name *seder ʿolam zuṭa* ("small world chronicle").[34] Among other things, it provides a rare glimpse on the affairs of the Jewish communities in under Islamic rule, the rabbinic academies in Iraq, Rabbanite leaders, and notable communal members. It is here that we learn that the Jewish exilarch (*rosh ha-gola* or *reš galūtā*), the official leader of the Jewish Babylonian diaspora from Biblical times up to *c.* tenth century, held the prerogatives of appointing judges in and levying taxes from the Jewish communities in his domain. The narrative contains a report according to which at one point the son of the exilarch David ben Zakkai (928-942), who was sent on a mission by his father to Fars, received an unfriendly welcoming from the local Jewish community. Consequently, the son reported home and his father, in addition to proclaiming various forms of excommunications and anathemas upon the Jews of Fars, had also informed the Muslim authorities. The local Muslim official in Fars was then asked to affirm the authority of the exilarch's son and side with him against the local Jewish oppositionists.[35]

About a century later, in 1036, a letter was sent from Palestine to the caliphal court in Egypt for the confirmation and renewal of the prerogatives of the

33 Respectively, Hoyland, *Seeing Islam*, 604, question 75; *Reliquiae iuris ecclesiastici antiquissimae,* ed. by Paulus de Lagarde (1856), 139, question 56. Jacob of Edessa's questions and answers touch upon matters of liturgy, theology, ecclesiastical and monastic authority, inter-confessional and inter-denominational relations, and more. Despite its separate classification, there seems to be a measure of ambiguity in the distinction between the legal genre of questions and answers and that of canon laws. On Jacob of Edessa and his various literary enterprises, see Anton Baumstark, *Geschichte der syrischen literature mit Ausschluss der christlich-palästinensischen Texte* (1968), 248-254; and more recently the collection of essays in *Jacob of Edessa and the Syriac Culture of his Day,* ed. by Bas Ter Haar Romeny (2008); on his juridical activity, see François Nau, "Les résolutions canoniques de Jacques d'Édesse", *Le Canoniste contemporain,* 37 (1904), 256-276, 366-376, 468-477, 562-572; Hoyland, *Seeing Islam*, 161-163, 344, 601 ff.; Herman G. B. Teule, "Jacob of Edessa and Canon Law", in *Jacob of Edessa*, ed. by Romeny, 83-100.

34 See Gil, *Jews in Islamic Countries*, xvi.

35 *Seder ʿolam zuṭa* in *Mediaeval Jewish Chronicles and Chronological Notes*, ed. by Adolf Neubaauer (1895), vol. 2, 86.

Palestinian ga'on – the head of the central rabbinic academy and supreme leader of the Rabbanite Jews under Fāṭimid rule. The list of prerogatives includes the ga'on's exclusive right to appoint and dismiss communal officials and oversee judicial courts.[36] What little reference exists in geonic responsa and correspondences to the question of communal leadership echoes some of the issues that come up in Christian sources. In 986/987, in reply to a query sent from the Jewish community of Qayrawān, Rav Sherira Ga'on, the head of the academy of Pumbedita (968-1006), wrote a lengthy account known as the *Epistle of Rav Sherira Ga'on* (*Iggeret Rav Sherira Ga'on*).[37] Sherira was asked primarily about the legal history of rabbinic literature from the time of the sages of the Mishnah, but was also posed the question of the identity, time, and tenure of the heads of the rabbinic academies in Babylonia from the sixth century to his day. Despite its exceptional length and frequent digressions to historiography proper, the treatise has been classified as a responsum.[38] It is also regarded, however, along with the ninth-century *Epistle of Pirqoy ben Baboy* and the above tenth-century *Akhbār Baghdād*, as one of the few literary expressions of the claims of the Babylonian ge'onim to exclusive leadership vis-à-vis the house of the exilarch and of the Palestinian ga'on.[39] It is in this competitive context that we should read Sherira's reference in his treatise to the custom of certain exilarchs to buy their office from the Islamic court:

> Until about 200 years ago, since the exilarchs enjoyed strong authority during the Persian period and at the beginning of the Ishmaelites' time too, the [exilarchs] would also buy their office through payment from the kings of the Yishmaelites ... but our fathers ... abandoned these ways of the exilarchate and sided with the rabbis of the academy, seeking humility and lowliness. ... In the midst of the Yishmaelite period, in the time of David ben Yehuda (*c.* 825) the exilarch, [the exilarchs] were humiliated in the eyes of the authorities, and [so] the heads of Pumbedita did not follow them.[40]

36 See S. D. Goitein, *Palestinian Jewry in Early Islamic and Crusader Times* [in Hebrew] (1980), 70-76: The letter sent to the Fāṭimid caliph al-Mustanṣir in 1036, presents the ga'on as a communal leader who was endorsed by the Muslim authorities. See also a slightly earlier petition of the Palestinian ga'on Shelomo b. Yehuda that was sent to the caliph al-Ẓāhir in ca. 1030 in Gil, *A History of Palestine*, 728-763; and Marina Rustow, *Heresy and the Politics of Community: The Jews of the Fatimid Caliphate* (2008), 94-98.

37 On the *Epistle* of Rav Sherira Ga'on, see Zvi Groner, *The legal methodology of Hai Gaon* (1985), 5-6. Brody, *The Geonim of Babylonia*, 20-25.

38 ibid., 20.

39 See Robert Brody, "Pirqoy ben Baboy and the History of the Internal Polemics in Judaism", in *Jewish Culture in Muslim Lands and Cairo Geniza Studies*, ed. by Mordechai A. Friedman [in Hebrew] (2003); Menahem Ben-Sasson, "The Structure, Goals, and Content of the Story of Nathan ha-Babl", in *Culture and Society in Medieval Jewry*, ed. by Robert Bonfil and other (1989), 137-196.

40 Rav Sherira Gaon, *The Epistle of Rav Sherira Gaon (Iggeret R. Scherira Gaon in der französischen und spanischen Version, unter Benutzung aller Handschriften mit erklärenden Noten)*, ed. by Benjamin M. Lewin (1921), 92-93; see Gil, *Jews in Islamic Countries*, 79.

Questions regarding its historical reliability notwithstanding, the report does convey a general impression of the types of relations that were forged between Islamic and ecclesiastical administrations. It thereby supports the conclusion that non-Muslim leaders drew their authority not only from their standing and spiritual reputation within their own communities but also from the recognition they received from the caliphate and its agents.[41] Conversely, the negative light in which such procedures are cast in the *Epistle* and in Eastern Christian canon laws should be understood not merely as an attempt on the part of the patriarchs and the ge'onim to degrade their rivals but also as a way of legitimizing their own appointment and office by way of underscoring their own independence. The rejection of external interventions and of the use of material means to acquire leadership positions served to fortify communal jurisdictions and amplify the untainted image of those who claimed exclusive authority over their coreligionists.

Mixing the Sacred and the Holy

Another aspect of the impact of Islamic rule over non-Muslim communal leaders, noted above in a canon law of the East Syrian Church and partly confirmed also in a gaonic responsum, concerns the burden of the poll-tax. The relevant responsum was issued by the head of the academy of Sura, Rav Naḥshon Ga'on (874-882), in reply to a question of whether the poll-tax or other taxes to cover the expenses of the king and the ministers can be collected from rabbis. The responsum opens with the ga'on's principled view that "even though the king and his ministers cast over Israel taxes illegally, oppress, and lay heavy burdens over the public, nothing should be taken from the rabbis".[42] Rabbanite scholars are known to have fulfilled central roles in their communities as leaders and judges, and although the responsum does not reveal whether communities did in fact exempt them from the poll-tax, the question suggests an actual social dilemma and alludes to particular circumstances under which scholars may have been equally required to pay the tax. Such a reality may have constituted part of the backdrop to references in geniza letters to the business engagements of Jewish communal officials.[43]

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41 Putman, *L'église et l'islam sous Timothée I*, 126-127; Eddé, *Communautés chrétiennes*, 63-65.

42 *Zikhron la-rishonim ve-gam la-akhronim,* ed. by Avraham E. Harkavy (1887), 264, res. 537; see also Gil, *Jews in Islamic Countries*, 173.

43 See Goitein, *Mediterranean Society*, vol. 2, 172, referring to the judge whose "position was often precarious owing to the institutional weakness or the vicissitudes of fortune of the organizations they served". A Jewish judge from Egypt who was engaged in a business partnership and traded various commodities, such as wine, cheese, and sugar, would travel on business from time to time. See also Aryeh L. Motzkin, "The Arabic Correspondence of Judge Elijah and His Family: A Chapter in the Social History of Thirteenth-Century Egypt" (Ph.D. diss., 1965), 24-25.

Conclusion

Beyond the immediate concerns of church leaders, the legal sources discussed above highlight the endurance of a late antique pattern that saw ecclesiastical affairs administered through the application of secular powers.[44] These sources also allow us to map the social configuration of Christian communities, consisting of a matrix of powers in which the church had to negotiate its position with lay elites, monks, opposing clergy, and their Muslim overlords.[45] To this end, the ecclesiastical leadership presented itself as the exclusive upholder of orthodoxy, a task that had assumed particular urgency in the context of Christian minority status. The patriarch and his administration thus took on a role that extended far beyond spiritual guidance into matters of both holy and temporal natures, including, crucially, the role of interceding between their communities and the Islamic government. This picture is corroborated in the rabbinic responsa (if only in a small number of references), and also, to a significant extent, in other forms of evidence left behind by the Rabbanite communities found in the Cairo geniza.

44 Morony, *Iraq*, 334-340; Payne, "Persecuting Heresy in Early Islamic Iraq".

45 Michael the Syrian, *Chronique*, vol. 2, 474, according to which Christian leaders continued to manage civil affairs in the lands of the Arabs in the late seventh to early eighth century. See Chase Robinson, *Empire and Elites after the Muslim Conquest: The Transformation of Northern Mesopotamia* (2000), 57; the region of al-Jazīra, studied by Robinson, nicely illustrates the fact that local Christian elites consisted of a mixture of church officials and influential laymen. Thus, in addition to ecclesiastical leaders (*mdabbrānē*), Robinson's study highlights the role of village headmen and wealthy landowners (*dihqāns*), governors (*šahārija*), and local officials of secular capacity (*archontes*); also Palmer, *Monk and Mason*, 162; Eddé, *Communautés chrétiennes*, 18; Hoyland, *Seeing Islam*, 158; Stroumsa, "People and Identities in Nessana", 55-60 and 76.

JEWISH BUSINESS CONTRACTS FROM LATE MEDIEVAL AUSTRIA AS CROSSROADS OF LAW AND BUSINESS PRACTICE

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Introduction

The discussion of "culture" and "cultural assets" and thus of cultural differences, similarities, demarcations, and cultural transfers often refers to art, religion, material culture, science, and language.[1] Several examples drawn from medieval Austria may serve to illustrate this point: a Hebrew Codex (*Sefer Mordeḥai*) and a mass book from a monastery decorate one and the same Christian painting studio.[2] (Fig. 1a and b) The only surviving medieval illuminated Ashkenazi Ketubah, dated 1391/1392 and from Krems, depicts the bridal couple in a Bohemian and French-influenced painting style.[3] (Fig. 2) A minstrel's ring dating from the latter half of the thirteenth century, part of a significant non-Jewish treasure trove discovered in Upper Austria, bears the typical Jewish name *Vivelinus* in its engraving.[4] Christian and Jewish banquet tables were resplendent with the same

1 This contribution is based on a lecture I gave at the conference organised by Elisabeth Hollender and Rebekka Voß, "Ashkenaz at the Crossroads of Cultural Transfer", International Conference, November 5th–7th 2012, Institute of Judaic Studies, Goethe-Universität Frankfurt am Main. These results have also been published in German: Martha Keil, "'...und seinem Köcher Anglis' Kulturtransfer, Polemik und Humor in jüdischen Geschäftsurkunden des mittelalterlichen Österreich" in *Festschrift für Friedrich Battenberg,* ed. by Rotraud Ries and Markus J. Wenninger = Aschkenas 26/1 (2016), 101115.

2 Martha Keil, "Gemeinde und Kultur – Die mittelalterlichen Grundlagen jüdischen Lebens in Österreich", in *Geschichte der Juden in Österreich,* ed. by Eveline Brugger, Albert Lichtblau and Martha Keil (2006, repr. 2013), 15122 (2829, pictures on 28); Andreas Fingernagel and Alois Haidinger, "Neue Zeugen des Niederösterreichischen Randleistenstils in hebräischen, deutschen und lateinischen Handschriften", *Codices Manuscripti,* 39/40 (February 2002), 1541; mainly based on French and Italian sources: Joseph Shatzmiller, *Cultural Exchange: Jews, Christians, and Art in the Medieval Marketplace* (2013), esp. 113140

3 Karl G. Pfändtner, "Ketubba", in *Europas Juden im Mittelalter. Katalog zur Ausstellung,* ed. by Historisches Museum der Pfalz Speyer (2004), 196 (fig. 197); Martin Roland and Andreas Zajic, "Illuminierte Urkunden des Mittelalters in Mitteleuropa", in *Archiv für Diplomatik, Schriftgeschichte, Siegel- und Wappenkunde*, ed. by Walter Koch and Theo Kölzer (2013), vol. 59, 241432 (404405, and fig. no. 39); Roland and Zajic, "Les Chartes Médiévales Enluminées dans les Pays d'Europe Centrale", *Bibliothèque de l'École des chartes,* 169 (2011), 151253 (216).

4 Keil, "Gemeinde und Kultur", 53; Stefan Krabath, "Die metallenen Trachtbestandteile und Rohmaterialien aus dem Schatzfund von Fuchsenhof", in *Der Schatzfund von Fuchsenhof,* ed. by Bernhard

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 353–368

 DOI 10.1484/M.RELMIN-EB.5.111610

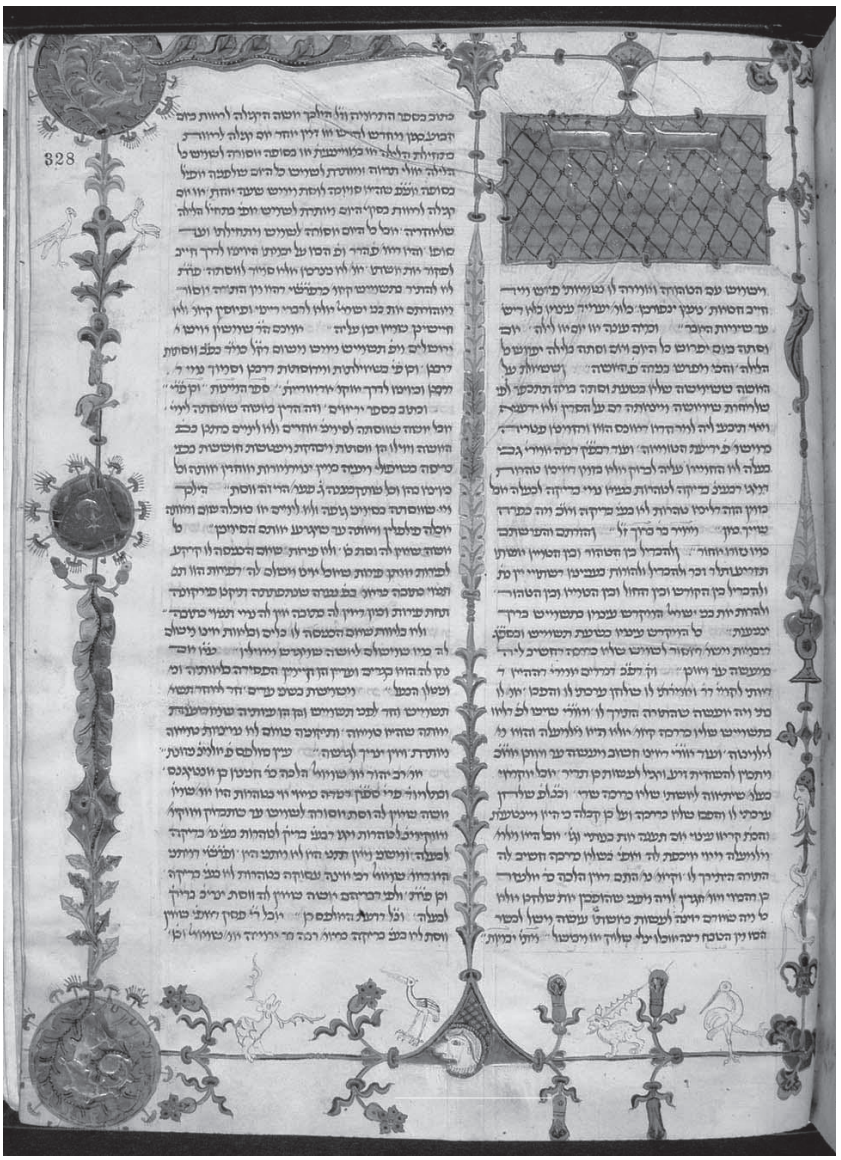

Fig.1(a): Sefer Mordechai, Lower Austria 1371/72, Budapest, Széchényi-National Library, Cod. Hebr. 1, fol. 328r.

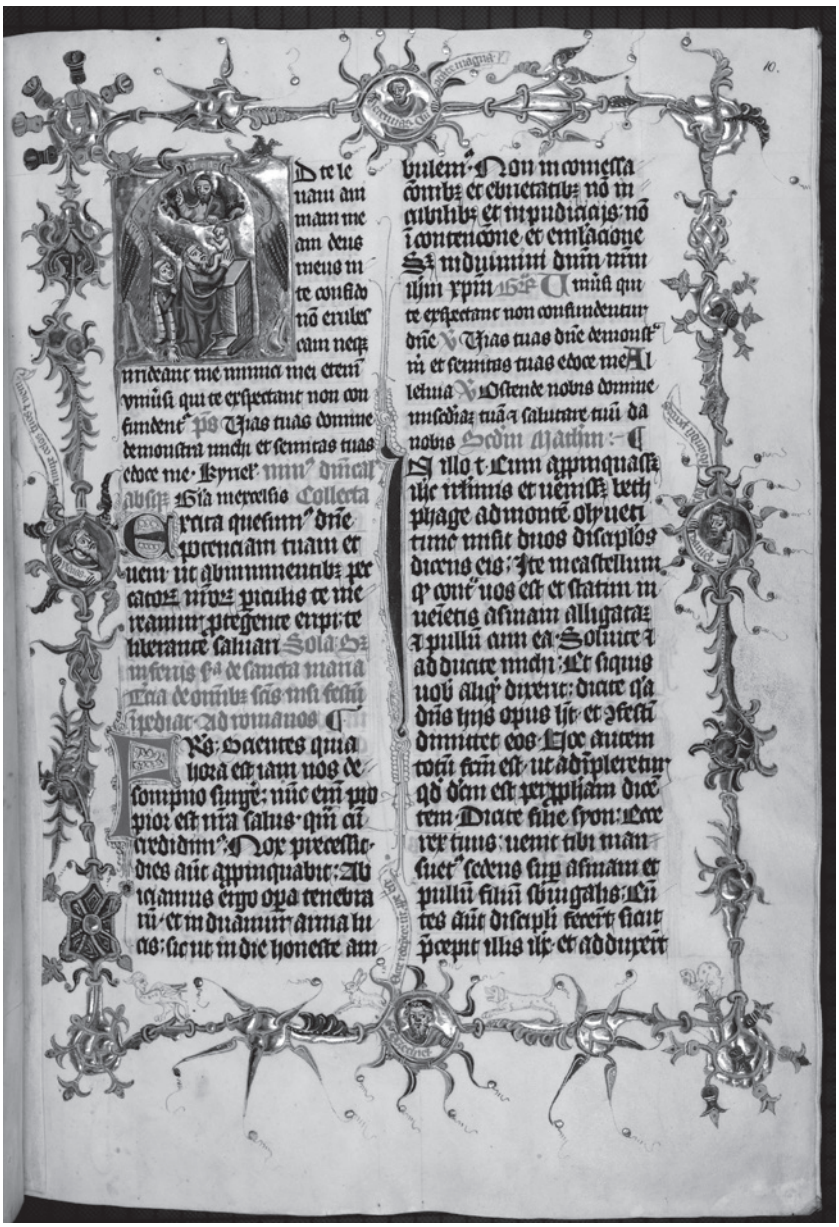

Fig. 1(b): Klosterneuburger Missale, 2. Hälfte 14. Jahrhundert; Klosterneuburg Monastery Library, Cod. 74, fol. 10r.

Fig. 2: Ketubba, Krems 1391/92, Vienna, Austrian National Library, Cod. hebr. 218

magnificent tableware, and the owners made a public display of their precious objects in so-called "display credenzas" (German: "Schaukredenzen").[5] The Austrian finds may not be as spectacular as, for example, those valuable items belonging to the Erfurt Jewish Treasure, with its splendid gems and silver goblets.[6]

Prokisch, Thomas Kühtreiber and others (2004), 213395 (303 and n. 893, with assignment to Vivilinus of Bern, 1294).

5 Keil, "Gemeinde und Kultur", 86; Shatzmiller, *Cultural Exchange*, 58.

6 *Die mittelalterliche jüdische Kultur in Erfurt 1: Der Schatzfund. Archäologie – Kunstgeschichte – Siedlungsgeschichte; 2: Der Schatzfund. Analysen – Herstellungstechniken – Rekonstruktionen*, ed. by Sven

Nevertheless, they provide clear evidence that, in spatial and in cultural terms, those Jews living in the East of the Old Empire did not dwell in the ghetto.

Cultural Transfer in Economic Life

One fundamental aspect of the human existence and way of life is often excluded from the discussions about culture, namely the business sphere. I am not referring to economic theories and systems, but to the processes that shape our shared economic life, and continuously adapt it to the demands of daily practice. Legal norms, ethics, communication, and even aesthetics represent the foundations of this cultural process, which does not reveal itself as overtly as a text, a work of art, or a building. Economic processes are shaped by those in power, and depend on climatic and political factors. However, they are also the meeting places of various groups of stakeholders and their respective cultures, and cultural phenomena come together in myriad ways in the context of business processes.[7] Today, we can still find thousands of the products of these economic processes in the archives. Business contracts – our focus is on those contracts that featured Jewish and Christian parties – represent a microcosm of the cultural transfer. The course of business transactions and their written records take the shape of mutual interference, reception, and assimilation, leading to polemic discrimination and even to defamation. They are a shared space, a contact zone *par excellence*.[8]

The determination of transfer processes requires comparative methods and consequently relies on sources that describe a single phenomenon in two distinct cultural spheres. In this context, the most meaningful sources in the area of business are business contracts in the German language, which include an annotation in Hebrew or – though this is admittedly very rare – a translation into the Hebrew language. The recording of medieval Jewish documents, which has been carried out continuously at the "Institute for Jewish History in Austria" since 2003, is still far from being concluded. The three volumes published to date

Ostritz (2010). See for comparison *Der Schatzfund von Wiener Neustadt*, ed. by Nikolaus Hofer. Mit Beiträgen von Birgit Bühler, Bernadette Frühmann and others (2014), 264273.

7 Eveline Brugger and Birgit Wiedl, "*...und ander frume leute genuch, paide christen und juden*. Quellen zur christlich-jüdischen Interaktion im Spätmittelalter", in *Räume und Wege. Jüdische Geschichte im Alten Reich 13001800*, ed. by Rolf Kießling, Stefan Rohrbacher and others (2007), 285305, download: http://www.injoest.ac.at/files/brugger_wiedl__quellen_interaktion.pdf (accessed 1. July 2016); Brugger, "*Do musten da hin zue den iuden varn* – die Rolle(n) jüdischer Geldgeber im spätmittelalterlichen Österreich", in *Ein Thema – zwei Perspektiven. Juden und Christen in Mittelalter und Frühneuzeit*, ed. by Brugger and Wiedl (2007), 122138; download: http://www.injoest.ac.at/files/brugger_wiedl_ein_thema_zwei_perspektiven.pdf (accessed 1. July 2016); on aspects of time, holidays, and calendars see Elisheva Carlebach, *Palaces of Time: Jewish Calendar and Culture in Early Modern Europe* (2011), 142159.

8 See Alexandra Binnenkade, *KontaktZonen. Jüdisch-christlicher Alltag in Lengnau* (2009), esp. the chapter about moneylending (243274).

include 1863 editions and summaries from the very earliest days of the Jewish immigration to Austria (i. e. the end of the twelfth century) until 1386.[9] The current project deals with the years leading up to 1404.[10]

As the number of surviving documents rises disproportionately from the 1360s onwards, several thousand additional documents can confidently be anticipated. A mere five per cent, approximately, can be expected to include addenda in Hebrew, as the validation in accordance with Jewish Law occurs in compliance with the respective local Jewish accepted tradition, the *minhag*.[11] Even so, the Hebrew annotations that have already been edited or have been transcribed so far offer abundant illustrative material for the cultural transfer in the economic field. Similarly, the sources recorded as part of the project "Corpus of Sources on the History of the Jews in the Late Medieval Empire" at the Arye Maimon Institute of Jewish History at Trier University have also already provided valuable insights with regard to this issue.[12]

Common Concepts

The term "to join" (German: "verbinden") illustrates how straightforward it was for Christian and Jewish parties to establish a common ground for business relations. In Early Modern High German this term also expresses the intention "to pledge", given that the complete wording is as follows: "I join *mit mein trewn* (with my faith)", in other words *bona fide*, in good faith, reliably and honestly. The legal certainty is further reinforced by the frequent addition of *an eides statt* ("in lieu of an oath") as substitute for and equivalent of swearing an oath. The originators of a document announce that they themselves do not bear a seal, and that they will therefore "join" under the seal of a superior or a judge. In doing so, they undertake to observe the process described in the contract in writing. The "joining" does not only take place between Christian men and women and other Christians under the seal of a third Christian. To give an example of this, a woman, who did not carry her own seal, joined under the seal of her husband: In a contract

9 Eveline Brugger and Birgit Wiedl, *Regesten zur Geschichte der Juden in Österreich im Mittelalter* (2005), 1: *Von den Anfängen bis 1338* download: https://e-book.fwf.ac.at/detail_object/0:55?SID=&actPage=&type=listview (accessed 1. July 2016); Brugger and Wiedl, *Regesten zur Geschichte der Juden in Österreich im Mittelalter* (2010), 2: *13391365* download: https://e-book.fwf.ac.at/detail_object/0:58?SID=&actPage=&type=listview (accessed 1. July 2016); Idem, (2015), 3: *13671386* download: https://fedora.e-book.fwf.ac.at/fedora/get/0:766/bdef:Asset/view (accessed 1. July 2016).

10 http://www.injoest.ac.at/de/projekte/laufende-projekte/regesten/regesten.html#s1192 / (accessed 1. July 2016). The follow-up project is financed by the Austrian Science Fund as well (P 28609, P 28610).

11 51 documents of the total of 1146 published in Brugger and Wiedl, *Regesten 2*, include annotations in Hebrew. On *minhag*, see Keil, "Gemeinde und Kultur", 3033 and 6061; Yitzhak Eric Zimmer, *Society and its customs. Studies in the history and metamorphosis of Jewish customs* (1996) [in Hebrew].

12 http://www.medieval-ashkenaz.org/ (accessed 1. July 2016).

dated 1368, a noblewoman called Margret, sister of *Otto von Wildungsmauer*, declares that she does not bear her own seal, and *dez verpint ich mich bei mein treun under meins wirt insigel* ("therefore I join with my faith under the seal of my husband"). Her husband *Stephan von Toppel* was Master of the Household (*Hofmeister*) to Duke Leopold III. of Austria.[13]

When conducting business with Christians, Jewish originators of contracts usually joined under the seal of the municipal judge (*Stadtrichter*) or the judge of the Jews (*Judenrichter*), a Christian public officer appointed by the Duke or by the town, who was authorized to dispense justice in law suits between Jews and Christians.[14] In his contract dated 1368, Lesir of Friesach (Carinthia) announced the seals of a knight and of the judge of the Jews of Friesach, "under which we, I, the above named Lesir, Jew of Friesach, my wife and my heirs, join with our faiths in lieu of an oath, to remain reliable and truthful (*staet und war*) in all things, and to undertake what is written in the letter above".[15]

As is well known, the Hebrew signature (*ḥatima*), in its dual significance as signature and seal, is the legally valid equivalent of the Christian seal.[16] Christians, who did not bear a seal of their own, particularly women, or Christians belonging to the middle or lower classes, would ask a superior individual to conduct the sealing. In the case of Jews, as previously mentioned, the municipal judge or the judge of the Jews (in small towns in one person) were authorized to perform this function. Members of the Jewish upper class, whose high degree of creditworthiness permitted a close association with a Christian ruler, did not require the seal of a third party, as the legal effect of their signature was deemed sufficient: An agreement from a court of arbitration dated 1367 names the two originators as "We, Earl (*Graf*) Ulreich of Cilli, Captain (*Hauptmann*) of Carniola, and *Yzzerli der Jude von neuburg marchthalben* (Isserlein of Korneuburg) *verrihen mit dem brif und tun kund* (profess with this letter and declare)". This was confirmed with the Earl's seal *und mit meins vorgnannten Izzerleins des juden underhantschrift und zaichen zu ainer merern gezeugnüss der warheit wand ich aigens insigels nicht enhan* ("and with the signature and sign of myself, the previously named Isserlein,

13 Stadtarchiv Klosterneuburg (StAKl, Municipal Archives Klosterneuburg), Uk. 1368 VIII 13, online: www.monasterium.net (Archive Klosterneuburg CanReg, Illustration, full text and summary). Concerning women bearing their own seal see Andrea Stieldorf, *Rheinische Frauensiegel. Zur rechtlichen und sozialen Stellung weltlicher Frauen im 13. und 14. Jahrhundert* (1999); Stieldorf, "Die Siegel bürgerlicher Frauen in rheinischen Städten", *Geschichte in Köln,* 48 (2001), 4585.

14 Eveline Brugger, "Von der Ansiedlung bis zur Vertreibung. Juden in Österreich im Mittelalter", in Brugger, Keil and others, *Geschichte der Juden in Österreich* (2006, reprint 2013), 123227 (141151); Klaus Lohrmann, *Judenrecht und Judenpolitik im mittelalterlichen Österreich* (1990), 6973.

15 Brugger and Wiedl, *Regesten 3*, 73, no. 1256 (sub dato 1368 August 13).

16 Martha Keil, "Ein Regensburger Judensiegel des 13. Jahrhunderts. Zur Interpretation des Siegels des Peter bar Mosche haLevi", *Aschkenas, Zeitschrift für Geschichte und Kultur der Juden,* 1 (1991), 135150 (135140).

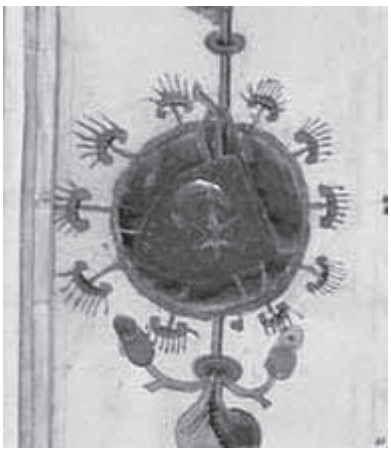

Fig. 3: Picture of a Jewish seal in Sefer Mordechai (Fig. 1a, left margin)

the Jew, for a better testimony to the truth, as I do not bear an own seal").[17] The signature, including the father's name in accordance with Jewish law, is proudly displayed at the end of the document: *Israel ben ha-nadiv Rab Aharon satzal*.[18]

However, there is an indication that Isserlein did in fact bear a seal of his own: Although it has not survived as an object, a "typically Jewish" seal pattern depicting a crescent moon and a star in the escutcheon is displayed in one of the margins of the Sefer Mordechai mentioned earlier, which Isserlein commissioned in 1371 (Fig. 3). If the medallion is not to be interpreted as an act of high-handedness by the Christian painter, two explanations remain. Firstly, the contract is dated May 1367, and it is indeed possible that at this time, four years before the illumination of the Sefer Mordeḥai, Isserlein did not yet bear a seal. The second explanation could be this: Isserlein had a seal, but did not use it for authentication purposes, because the Hebrew signature sufficed to establish the required legal certainty, even in the sphere of Christian law. As a matter of fact, no sealed contracts exist from any of the leading Austrian moneylenders, who provided their dukes loans of several thousand pounds. However, in a very small number of cases contracts have survived, which are authenticated by a Jewish seal with Hebrew seal script, but are lacking a Hebrew signature.[19] As typical aristocratic and patrician

17 Brugger and Wiedl, *Regesten* 3, 36, no. 1192 (sub dato 1367 May 20).

18 Various forms of Hebrew signatures in Keil, "*Petaehja, genannt Zecherl*: Namen und Beinamen von Juden im deutschen Sprachraum des Spätmittelalters", in *Personennamen und Identität*, ed. by Reinhard Härtel (1997), 119146 (138141).

19 There are only very few documents that are authenticated exclusively by a Jewish seal, see Brugger and Wiedl, *Regesten 1*, 101, no. 98 (sub dato 1298 January 8), 109110, no. 111 (sub dato 1302 December 4); or

attributes, seals are regarded as prestige objects of a class, to which the members of the Jewish upper class wished to belong, and which they were indeed part of, from a purely material point of view. Consequently, if a Jew had a seal made, even though he did not require it as a legal means, we can assume that the motivation for its use lay in the need for representation and membership. Seals and their design represent fascinating objects of cultural transfer from the Christian sphere. The frequently used seal pattern of the Jewish hat, in particular, has frequently been a contentious issue in academic discussions.[20]

Shared Wordings, Divisive Interpretation

Business contracts become unequivocal *crossroads*, when the Hebrew document, intended for internal Jewish use, provides an almost literal translation of the German, Christian wording into the Hebrew language. Only rarely are these contracts contained on a separate piece of parchment; in most cases, the Hebrew text is added with a signature below the German text. If the first part of the German contract states: *ich verrich und tue kund allen, die disen prif lessen* ("I profess and declare to all who read this letter"); or *ich vergeh offentlich mit disem prif* ("with this letter I publically avouch"), then the Hebrew wording is: נחנו חתומי מטה מודים בהוראה גמורה ומודיעים לכל רואי כתבינו זה: "We, the undersigned below, avouch with full disclosure and let it be known to all, who see this our document" [...].[21]

This wording can be found, with minor variations, in almost every Hebrew authentication. In the present case, closer examination reveals a fine detail at the intersection of Christian and Jewish business practice: The originators Isserlein of Marburg, as well as Mosche and Chatschim of Cilli, confirm the delivery of a debt instrument *am michel tag und im Tischri 119 nach der kleinen Zeitrechnung* ('on Saint Michael's Day and in *Tishri* 119 in the minor era'), in other words, on 29 September, according to the Christian calendar of saints. However, the rest of the date, month and year, was established following the Jewish calendar. Mixed dates of this kind are frequently found in Hebrew business contracts. The question arises, why a purely inner-Jewish use of a charter did not dictate a purely Jewish dating system. My research, as well as that of others, supports the

122123, no. 129 (sub dato 1305 September 1).

20 Andreas Lehnertz, *Judensiegel im Aschkenas (1273–1390). Zur Einleitung.* http://www.medieval-ashkenaz.org/quellen/judensiegel/einleitung.html (accessed 1. July 2016); Martha Keil, "*Kulicht schmalz* und *eisen gaffel* – Alltag und Repräsentation bei Juden und Christen im Spätmittelalter", *Aschkenas, Zeitschrift für Geschichte und Kultur der Juden,* 14/11 (2004), 5181 (7281).

21 Brunner and Wiedl, *Regesten 2*, 206, no. 880 (sub dato 1358 September 29). Some examples from England at Judith Olszowy-Schlanger, "The Money Language: Latin and Hebrew in Jewish Legal Contracts from Medieval England", in *Studies in the History of Culture and Science. A Tribute to Gad Freudenthal*, ed. by Resianne Fontaine and others (2011), 233250.

assumption that Jews also thought in terms of the Christian calendar, and used the most important dates of the business year, such as Saint George or Saint Michael or Carnival Day, for orientation purposes.[22]

From time to time, the designation of these Saints Days also served as a source of inspiration or as a space for anti-Christian polemics. For example, the Hebrew contract issued by Yizḥak bar Yoseph ha-Levi of Pettau (Ptui, today's Slovenia) for Haug of Duino on 20 May 1361 twice mentions the date of payment as *sankt Jakobstag* ('Saint James' Day'), the 25th of July, with the addendum *Ya'akov tam'e*, the "impure James", in the sense of ritually impure.[23] As mentioned above, the specification of payment dates in accordance with Saints' Days was not an unusual practice, even among Jews, though only two, Carnival Day and Saint James's Day, sometimes feature the addendum *tam'e*. There is an obvious explanation: The Jewish religion not only includes a Carnival, namely Purim, but also reveres a "Saint Jacob", who is to be distinguished from the "James" of the "impure" Christian world (the German name for both is "Jacob").[24]

The "impure James" is not the only anti-Christian allusion in this contract. The German contract, document or transcription – based on the Hebrew word, the distinction cannot be clearly made – is described as *passul*. כתוב בכתב פסול שלו כן *ken katuv bi-khtav passul shelo* – "So it has been written in his legally unsuitable letter…". A neutral expression could have served in the place of *passul*: To provide an example, *Plimel*, the daughter of Rabbi Aron Blümlein, a woman from a prominent family of rabbis and moneylenders, used "in the Aramaic language" (*bi-l'shon arami*), which was already used as a pseudonym during the Talmudic period to mean Roman and subsequently Christian.[25] The expression בכתיבת גוים *bi-khetivat goyim*, "in the writing of the Goyim, the Non-Jews", was in keeping

22 Carlebach, *Palaces,* 115140; Justine Isserles and Philipp E. Nothaft, "Calendars Beyond Borders. Exchange of Calendrical Knowledge Between Jews and Christians in Medieval Europa (12th15th Century)", *Medieval Encounters,* 20 (2014), 137 (1622; 3132).

23 Brugger and Wiedl, *Regesten 2*, 258259, no. 983 (sub dato 1361 May 20). Carlebach, *Palaces*, 130, cites *tum'ot*, impurities, for St. Thomas' Day, probably used because of the accordance of the two words.

24 See also "Cursed Thursday' for *jeudi saint*, Maundy Thursday, in: Israel J. Yuval, "Christliche Symbolik und jüdische Martyrologie zur Zeit der Kreuzzüge", in *Juden und Christen zur Zeit der Kreuzzüge,* ed. by Alfred Haverkamp (1999), 87106 (95, sources: 94, 29). Other examples of anti-Christian polemics by Isserles and Nothaft, "Calendars", 18, n. 36; 21, n. 48; 31; 32, n. 86; on polemics and mockery against Christian holidays in general see Carlebach, *Palaces*, 119123, against Mary and Christian holidays 123132. On polemics against Petrus in illuminations of Medieval Hebrew manuscripts see Shatzmiller, *Cultural Exchange*, 136.

25 Marcus Jastrow, *A Dictionary of the Targumim, the Talmud Babli and Yerushalmi, and the Midrashic Literature* (1903), 2 vols, 123, *arami*; Styrian Provincial Archives, no. 5790 (sub dato 1442 April 29), the image is online: http://images.monasterium.net/img/SI-PAM/Zbirka-listin/si_pam-0001_00109.jpg (accessed 16. Dec. 2014). See Keil, "Geschäftserfolg und Steuerschulden. Jüdische Frauen in österreichischen Städten des Spätmittelalters", in *Frauen in der Stadt*, ed. by Günther Hödl, Fritz Mayrhofer and others (2003), 3762 (44).

with everyday language use, and was used, for instance, by Merchel, son of Häslein of Friesach, to confirm the payment of a debt in 1380.[26] In contrast, as further examples shall illustrate, annotations using Hebrew letters made in German contracts were defined as *judisch geschrift*, an entirely non-judgemental neutral term.[27]

Viewed against the background of its religious-cultic context, *passul* certainly expresses an aspect of impurity, of cultic unsuitability, and thus, of disparagement, which falls into the area of polemics, as does the malapropism of the Christian saints' names.[28] According to the Trier scholar of Yiddish, Martin Przybilski, "Polemics (thus) serve, first and foremost, to describe the positively understood self by mirroring it in the negative foil of the other". In this sense, he clearly distinguishes polemics from defamation, which "does indeed aim to disparage the target".[29] In reality, though, there is a very fine line between polemics used in the cause of religious differentiation and a simple insult, "a rather brusque direct dialogue", to use the words of Israel Yuval.[30] As these examples illustrate, Hebrew business documents can also be the location of such messages. And yet, the precondition for formulating these polemics is the knowledge and understanding of Christian religious contents, that form a shared, but nevertheless mutually separating cultural space.[31]

The second part of the customary wording of authentications, the promise to adhere faithfully and honestly according to the agreements made above, is also translated literally into the Hebrew language in most annotations: יש לי לקיים כל מה שכתוב בכתב הזה אני ויורשי, "It behoves me to adhere to all that is written in this letter, I and my heirs", as Abrech of Friesach confirms to a number of Austrian noblemen in 1357.[32] The Hebrew translation of the official ducal title "Hofmeister" (Master of the Ducal Household) as *Ba'al Ḥazer*, "Lord, or owner, of the estate", is a particular delicacy in this annotation. A third typical formulation is illustrated

26 Brugger and Wiedl, *Regesten* 3, 305, no. 1651 (sub dato 1380 March 5).

27 The Hebrew annotation is signed by Musch, Isserlein's grandson of Marburg/Maribor, who himself referred to the כתב של גוי, the "letter of the goy". Brugger and Wiedl, *Regesten 3*, 193194, no. 1456 (sub dato 1375 January 16).

28 See n. 23 and Carlebach, *Palaces*, 129, on the transformation of the eleven thousand virgins (*betulot*) in the Martyrology of St. Ursula of Cologne) into "*eleven passulim*" in a Jewish computus manual (*sefer evronot*) of the sixteenth century.

29 Martin Przybilski, "Zwei Beispiele antichristlicher Polemik in Spätantike und Mittelalter: *tol'dot jeschu* und *nizzachon jaschan*", in Brugger and Wiedl, *Ein Thema – zwei Perspektiven*, 254268 (254), download: http://www.injoest.ac.at/files/brugger_wiedl_ein_thema_zwei_perspektiven.pdf (accessed 1. July 2016).

30 Yuval, "Christliche Symbolik", 87.

31 See Keil, "... und seinem Köcher *Anglis*", 110115.

32 Brugger and Wiedl, *Regesten 2*, 186187, no. 840 (sub dato 1357 March 16).

by the following: ונתננו להם אילו השירות להיות בידם לזכות ולראייה "We have given them these lines, so that they may lie in their hands justly and as evidence".[33]

A fourth category of wording relates to the assurance that the Jewish originator has carried out, or is yet to carry out, all that has been agreed voluntarily and without compulsion:

> נחנו חתומ׳ מטה מודיע לכל שכל מה דכתי׳ לעי׳ בכת׳ הפסול זה בקשתינו וחפצינו בלי אונס אלא בלב שלם
>
> We, the undersigned below [although there is only one signature, the one of Mosche, son of Jacob, Isserlein"s grandson of Marburg/Maribor] announce to all [the verb is used in the singular], that all that has been written above in this legally unsuitable letter, is our petition and our desire, without compulsion, but rather wholeheartedly.[34]

This exuberant protestation of free will – Mosche declares that Cholo of Seldenhofen, the Captain of Styria and thus one of the most important members of the Styrian aristocracy, is free of all debt – is, in turn, infracted by the use of the term *passul*. In this instance, once again, we cannot know for certain whether this refers to the Latin script, which is used in the contract, or to the Christian law that comes to bear in this case, or to the specific transcription of the specific procedure.

Common Language

Hebrew annotations are especially fascinating when the German formulations are reproduced in Hebrew letters, but *bi-leshon Ashkenaz*, in the German or Yiddish language. This choice of languages was not only made by women. Some Jewish business women, among them the previously mentioned Plimel, daughter of Rabbi Aron Blümlein, certainly wrote their annotations on business contracts with Hebrew letters and in the Hebrew language, and they signed these themselves. In her document, she followed the customary formulation, which also employed the grammatically correct female form of the verb (Fig. 4): "I, the undersigned below, avow and let it be known to all that all that is written above in the Aramaic letter, is my will and my request. So says Plimel, daughter of the Rabbi Aharon, the martyr, a blessing upon his memory".[35] Further evidence of the "crossroads" character of contracts of this kind can be found in the different composition of the signature: As originator, complying with Christian legal customs, she calls herself *Plumel die Judin, maister murckleins wittib zu marchburg*

33 Brugger and Wiedl, *Regesten 2,* 246, no. 958 (sub dato 1360 August 18), issued and signed by the brothers Mosche and Chatschim of Cilli.

34 Brugger and Wiedl, *Regesten 2*, 306307, no. 1082 (sub dato 1364 May 19).

35 Styrian Provincial Archives, no. 5790 (1442 April 29), see n. 25.

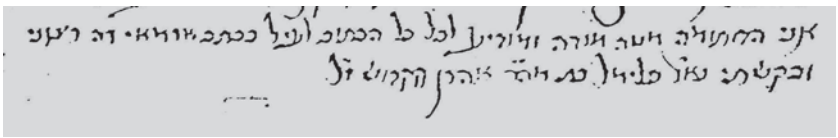

Fig. 4: Hebrew signature of Plimel, 1442

('Plumel the Jewess, widow of Rabbi Murklein of Marburg'). However, her Hebrew signature bears her father's name, in keeping with Jewish law.[36] To date I have discovered only four such Hebrew annotations by women, but I hope to find some more as the document project progresses.

Conversely, there were also men who were clearly not sufficiently proficient in Hebrew, or lacked any knowledge thereof entirely, and consequently added their annotations in the German language. In 1454, Isserlein, son of Merchlin of Wiener Neustadt, announced his *judische hantgeschrift* (Jewish handwriting) in his receipt, but *de facto* he wrote in German using Hebrew letters: *Ich beken alles was oben stet. Israel* ('I avouch all that is stated above. Israel').[37] In contemporary source material, *judisch* always means Hebrew. In this case, the designation refers to the script and not to the language, which Ashkenazi Jews would, of course, consider to be 'German language', *bi-leshon Ashkenaz*.[38] The patronym is also missing; in the German document Israel names himself after his mother, the prominent moneylender Sara, called Gutlein, who, in turn, was known as "the Merchlin", after her deceased husband Merchlein.[39]

A woman called Seld, who also came from Wiener Neustadt, presents herself as being even more strongly rooted in the German language:

> איך זעלדא יודן ווייקן דש דאז אלש מיין וויל אישט באש אין דען פריף גשריבן אישט נאום זעלדא בת ליזר ז״ל
>
> *Ich Selda juden veken dass das als mein will ist bas in den prief geschriben ist. Neum Selda bar Leser sal.* ("I, Seld [the *aleph* at the end of a word following a consonant

36 I cannot decide if Plumel's given name was Plimel or if she just changed *yud* and *vav*. Keil, "Petachja", 140141.

37 Stadtarchiv (Municipal archives) Wiener Neustadt, Scrin. N 189 (1454 December 10); Keil, "Petachja", 140.

38 "*Leshon Ashkenaz*" – in this context Yiddish – in rituals of repentance (*meḥilot*): Keil, "Und wenn sie die Heilige Sprache nicht verstehen...", Versöhnungs- und Bußrituale deutscher Juden und Jüdinnen im Spätmittelalter", in *Language of Religion – Language of the People. Medieval Judaism, Christianity and Islam*, ed. by Ernst Bremer, Jörg Jarnut and others (2006), 171189 (180182); statements of eye witnesses in "*leshon Ashkenaz*" were collected by Shneur Zalman Shazar, *Ore Dorot: Meḥkarim we-he'arot le-Toldot Israel ba-dorot ha'aḥaronim* (1971), 239319.

39 Martha Keil, "Der Liber Judeorum von Wr. Neustadt (14531500) – Edition", in *Studien zur Geschichte der Juden in Österreich,* ed. by Keil and Lohrmann (1994), 1, 4199 (9798).

> is not pronounced], profess that all that is written in this letter is my will. So says Seld, daughter of Lesir").[40]

Seld is so deeply embedded in the German language that she even adopts transposition p, b and w, the so-called betacism, into the Hebrew script. She differentiates between long and short A (*dass* and *das*), and between a double S (ss), which she depicts with the Hebrew letter *sin*, and a vocalised S, for which she uses *zain*. I do not believe that Seld is an exceptional phenomenon, and that her superior expressiveness in German is explained by the fact that women were prohibited from learning Hebrew. It seems far more likely, and numerous small clues lead to this conclusion, that Ashkenazi Jews and Jewesses with a certain level of education generally thought, read, and even wrote in German. After all, without the ability to write in German, such a transposition to the world of Hebrew letters would not be possible. That there is, in fact, no German documentary evidence in the Latin script from Ashkenazi Jews until the year 1500 may be due to the assessment of Latin as *passul*, ritually unsuitable and impure, as explained above.[41]

Résumé-Conclusion

No area of Christian-Jewish co-existence during the medieval Ashkenaz period produced more personal contacts than the business sphere. The Austrian Jewry Ordinance by Duke Friedrich II, dated 1244, regulated this area of contact in great detail and in a most advantageous manner for the Jewish moneylenders.[42] This early charter for the Jewish settlement of Austria can already be seen a seam joining the Christian Jewry Law and Jewish Law. It is an innovative new creation by the ducal chancellery, and relied on no immediate templates. It is quite obvious that Jewish advisors contributed to the elaboration of individual rules, as the inclusion of certain rules from the Mishna clearly shows.[43] Due to these Jewish-legal influences and concerns, the Jewry Ordinance emerged as a crossroads of Christian and Jewish legal culture, particularly with regard to the rules governing money lending. This privilege was adopted by all the important rulers in Central and Eastern Europe, and remained in force until the modern era in

40 Vienna, Archiv der Universität Wien (UAW, University Archives Vienna), Document B 139 (sub dato 1484 July 14).

41 These thoughts were expressed by Ivan Marcus in a private discussion with Rainer Barzen and myself during the Crossroads conference in Frankfurt.

42 Brugger and Wiedl, *Regesten 1*, 3538, no. 25 (sub dato 1244 July 1), see the literature there. English translation of the 1244 Ordinance: http://www.fordham.edu/halsall/jewish/1244-jews-austria.html (accessed 1. July 2016).

43 Brugger, "Ansiedlung", 138141; Friedrich Lotter, "Talmudisches Recht in den Judenprivilegien Hainreichs IV.? Zu Ausbildung und Entwicklung des Marktschutzrechts im frühen und hohen Mittelalter", *Archiv für Kulturgeschichte,* 71 (1989), 5592.

the territories of Bohemia, Moravia, Hungary, Poland and Silesia. Thus, despite lying on the fringes of the Empire, Austria emerged as the hub of fundamental Jewish legal provisions.

During loan transactions, Jews and Jewesses interacted with Christian men and women from all social classes, from rulers and nobility, to townspeople, farmers, craftsmen, servants, and prostitutes. It is, therefore, not surprising that the written records of these transactions contain elements of both legal systems and business practices. German-Hebrew business contracts are not only material cultural goods in their own right, they also serve as media of cultural transfers and as the space of a shared legal, linguistic, and generally cultural zone between Jews and Christians in the field of economics and of business practices.

THE TREATMENT OF MINORITIES IN THE LEGAL SYSTEM OF THE KINGDOM OF JERUSALEM

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The crusader states that were founded following the First Crusade were a short-lived western European outpost in the Middle East. The most important state on the mainland, the Kingdom of Jerusalem, lasted from 1099 until 1291, although most of it was lost in 1187; for most of the thirteenth century the Kingdom of Jerusalem was confined to a few cities along the Mediterranean coast, with its capital at Acre. The Kingdom of Cyprus was founded in 1191 after the Third Crusade, and survived until the fifteenth century when it came under Venetian control. After 1291, when Acre was destroyed, Cyprus was the only crusader state remaining in the Mediterranean. This paper deals with the religious minorities in the legal texts of the Kingdom of Jerusalem, and of Cyprus, which also used the laws of Jerusalem.

The inhabitants of the Kingdom of Jerusalem were quite varied in ethnicity and in religion. The European conquerors and their descendants were Latin-rite Catholics, speaking French, Italian, and other European languages, and formed a relatively small ruling class over a much larger indigenous population of Muslims, eastern Christians, and Jews. There were Sunni and Shi'ite Muslims, as well as Ismaili, Druze, and other Islamic sects, but the crusaders did not distinguish between the different kinds of Muslims. There were very few Jews in the kingdom and the crusaders rarely mentioned them, but they did recognize the difference between Jews and Samaritans. The eastern Christians were more numerous and the crusaders took greater interest in them: among others, the groups recognized in crusader law were Greek Orthodox, Syrian Orthodox or Jacobites, Maronites, Nestorians, Georgians, and Armenians.[1]

The "legal majority" represented by the Latin crusaders was actually by far the numerical minority. As a result, the social, economic, religious, political, military, and, in this case, legal interactions between the crusaders and their

1 Joshua Prawer, "Social classes in the Crusader States: The 'Minorities'", in *A History of the Crusades,* ed. by Kenneth M. Setton, Norman P. Zacour and Harry W. Hazard, V: *The Impact of the Crusades on the Near East* (1985), 65-70.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 369–380

 DOI 10.1484/M.RELMIN-EB.5.111611

subjects were quite complex. The crusaders probably interacted often with their fellow Christians, despite their religious differences, but they tended to settle in areas that had always been traditionally Christian, and did not often interact with Muslims or, especially, Jews.[2] Nevertheless, the arrival of the crusaders interrupted the previous social order. The Muslims, who had been at the top of the social hierarchy before the establishment of the Kingdom of Jerusalem, were now at the bottom.

The crusaders created a two-tiered legal system, with a "High Court" and a "burgess court". The High Court was for the noble class, the great landowners of the kingdom, the aristocrats and knights. The aristocrats were all Latin Catholics, so the laws of the High Court hardly ever mention non-Catholics, except in the few situations where they might appear before the court. There are numerous sources for the laws of the High Court: the earliest are the canons of the Council of Nablus in the early-twelfth century[3] and the anonymous *Livre au Roi*, dating from the early-thirteenth century,[4] while the most important are the assizes of John of Ibelin[5] and Philip of Novara,[6] written in the mid-thirteenth century. There are also minor thirteenth-century texts written by Geoffrey le Tor[7] and James of Ibelin.[8]

The other court, the burgess court, had jurisdiction over the non-noble western Catholic population, including the powerful class of merchants and tradesmen, as well as over all other inhabitants of every religion. Cases involving non-Catholics were heard by a sub-court of the burgess court, the "market court", although the main burgess court would still judge serious crimes and crimes committed by a minority member against a Latin Christian. The burgess court had a separate set of assizes, written anonymously around the same time as those of the High Court, in the mid-thirteenth century.[9] Another anonymous text for the burgess court, the *Livre contrefais*, was written in the late thirteenth century.[10]

Unfortunately it is difficult to discuss actual court procedure in the Kingdom of Jerusalem, as we have only the evidence provided in the legal texts themselves.

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2 Ronnie Ellenblum, *Frankish Rural Settlement in the Latin Kingdom of Jerusalem* (1998), 36-37.

3 Benjamin Z. Kedar, "On the origins of the earliest laws of Frankish Jerusalem: the canons of the Council of Nablus", *Speculum* 74 (1999), 310-335.

4 *Le Livre au roi*, ed. by Myriam Greilsammer (1995).

5 John of Ibelin, *Livre des Assises*, ed. by Peter W. Edbury (2003).

6 Philip of Novara, *Le Livre de forme de plait*, ed. and trans. by Peter W. Edbury (2009).

7 Geoffrey le Tor, "Livre de Geoffroi le Tor", in *Recueil des historiens des croisades*, *Lois*, ed. by Auguste-Arthur Beugnot, vol. 1 (1841, repr. 1967).

8 James of Ibelin, *Livre de Jacques d'Ibelin*, in *RHC Lois*, ed. by Beugnot, vol. 1.

9 *Les Livres des Assises et des Usages dou Reaume de Jerusalem sive Leges et Instituta Regni Hierosolymitani*, ed. by Édouard H. Kausler (1839).

10 *Abrégé du Livre des Assises de la Cour des Bourgeois*, in *Recueil des historiens des croisades*, *Lois,* ed. by Auguste-Arthur Beugnot (1843, repr. 1967), II; hereafter referred to by its more accurate title, the *Livre contrefais*.

According to the assizes, there were court records: the burgess court kept records before 1251, and the high court began to keep written records in that year as well.[11] But these records no longer exist; Jerusalem's records were presumably destroyed when Acre was conquered in 1291, and records from Cyprus have also not survived. It is possible to discuss how minorities should have hypothetically been treated according to the assizes, but it is much harder to prove how they were actually treated before the courts.

I will try to show in this chapter that, based on the small amount of existing evidence, minorities were treated relatively fairly in the crusader courts. There is an underlying theme of equity for all religious groups in the assizes, even if in certain circumstances the crusaders did not treat the minorities fairly in practise. As one example of fair treatment, the different religious groups were able to testify in the courts. A second example is the practise of slavery, which was entrenched in the crusader states and would seem to be inherently unfair to the minorities. But the assizes provide many opportunities to be freed from slavery, one of which caused a long dispute between the church and the secular rulers and which also provides us with some of the only evidence of the assizes being put to practical use. Lastly, it is possible to discuss the concept of equity by examining certain types of laws that are missing from the crusader assizes but are found in other areas of Europe where different religious groups lived together.

The hierarchy of acceptable testimony in the assizes is an example of the crusaders' attempt to treat minorities fairly in both court systems. This hierarchy is consistent across all the major thirteenth-century assizes, which all deal with the question to some degree. Essentially, of course, Latin Catholics were at the top; their testimony was preferred above all others and was always acceptable. If a Latin could not be found, it was preferable to seek out the testimony of an eastern Christian, and if none were available, then the testimony of a Muslim or a Jew would be accepted.

In the High Court there are only a few specific instances in which non-Catholics can testify. John of Ibelin's assizes state that non-Catholics can testify only against people who follow the same religion as they do, and only in cases where they were testifying about someone's age or ancestry.[12] In other words, it might happen that a Catholic nobleman claimed to have been born at a certain time, or to have been descended from a certain other person, and was consequently claiming to hold certain rights. If he had no material proof of his claims, he was expected to find

11 Joshua Prawer, *Crusader Institutions* (1980, repr. 1998), 290-291.

12 John of Ibelin, ch. 58. Geoffrey le Tor agrees that non-Catholics cannot testify but does not list any exceptions; *Livre de Geoffroi le Tor*, ch. 32. James of Ibelin is the only jurist who does not deal with the issue at all.

fellow Catholic witnesses who could vouch for him, and if he could find none, then an eastern Christian, then a Muslim or a Jew. But this was the case only if the person disputing the claim was also using witnesses from these religions. If this other person had Catholic witnesses, non-Catholics could not contradict their testimony.

Philip of Novara gave the example of a Catholic nobleman who needed witnesses to testify about the boundaries of his fief. In this case, a Muslim could testify "*selon sa lei*" if no western or eastern Christian could be found; i. e. not only could he testify in the court, but he would swear on the Qur'an as well.[13]

Elsewhere in the high court assizes, the testimony of a Muslim or Jew is valid if a defendant needs to postpone his scheduled day in court and no western or eastern Christian can be found to bring his message to the court, "*quar en tel cas doit un home estre creu [...] mais que il jure selonc sa loy*", i. e. here as well the Muslim or Jew can swear on their own holy books.[14]

John and Philip also allude to the hierarchy of testimony in cases where a knight assaults someone from a lower class. This was the "assise de cop aparant", an assault resulting in a visible wound, and according to the two jurists it was one of the oldest laws of the kingdom, promulgated in the twelfth century by "king Baldwin".[15] John says that if a Catholic knight assaults a fellow Catholic, the punishment is a fine of 100 bezants. If the victim is an eastern Christian, Muslim, or Jew, they are welcome to accuse their Catholic attacker before the court, but the fine for assaulting a non-Catholic is only 50 bezants.[16] Philip does not specifically mention who may or may not make an accusation, but agrees that the fine for assault against a non-Catholic is only 50 bezants rather than 100.[17]

The High Court assizes say nothing more about minority testimony. Non-Catholics could not bring cases before the High Court, so there is nothing in these assizes about members of different religions testifying against each other. It was only outside of the isolated world of the Catholic aristocratic class that the different religious groups really interacted with each other. The burgess court (and the market court under its jurisdiction) often dealt with non-Catholics, and so the burgess assizes give far more details about members of different religions testifying against each other.

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13 "according to his law". Philip of Novara, *Le Livre de forme de plait*, ch 53. Philip does not mention Jews, but as his text is more succinct than John of Ibelin's, it could be that "Muslims" is shorthand for "Muslims and Jews". This law was not mentioned by John of Ibelin, but this chapter from Philip was copied into his text in the fourteenth century; John of Ibelin, app. 3.11.

14 "for in such a case the man, of whatever religion, should be considered trustworthy...if he swears according to his faith". John of Ibelin, ch. 48; Philip of Novara, *Le Livre de forme de plait*, ch. 26; *Livre contrefais* 2.11.

15 Possibly Baldwin II (r. 1118-1131) or Baldwin III (r. 1143-1162). See Prawer, *Crusader Institutions*, 428.

16 John of Ibelin, ch. 101. The only exception is if the victim is a slave, as slaves cannot accuse their masters of assault. See below for the treatment of slaves in crusader law.

17 Philip of Novara, *Le Livre de forme de plait*, ch 60.

As a typical example, the burgess assizes present the case of a Muslim who is indebted to a Catholic. The Catholic can accuse the Muslim in court, but if the Catholic has no witnesses of any faith, the Muslim can simply "swear on his law" that he owes no debt. In the opposite case, however, the Catholic has a slight advantage in court. If a Muslim accuses of a Catholic of owing a debt but has no witnesses, the case is simply dismissed and the Catholic does not need to swear an oath to the Muslim.[18]

The burgess assizes go on to specify what kinds of witnesses are required for every other combination of disputes between the different religious groups. For example, if a Nestorian accuses an Orthodox Syrian of owing a debt, or a Syrian accuses a Samaritan, or a Muslim accuses a Jew, the accuser must have two witnesses from the same faith as the accused. In other words, testimony can only be given against someone from the same faith. To use the last example, a Muslim can make an accusation against a Jew, but cannot personally testify against him. The accusation must be corroborated by testimony from two Jews.[19]

The above laws applied to the market court. Disputes over debts or other monetary issues that were worth more than a certain amount of money (usually one mark of silver), criminal cases (assault, murder, etc), and cases involving at least one Catholic person were heard before the main burgess court, where non-Catholics were treated somewhat less fairly. There, Catholics could testify against members of any other religion, because cases were heard by a panel of jurors and only Catholics could be jurors in the burgess court.[20] In cases of serious crimes that had no witnesses, crusader law allowed for the case to be settled by judicial duel, but non-Catholics were again at a disadvantage because they were not allowed to challenge a Catholic to a duel. They could, however, defend themselves if a Catholic challenged them.[21]

In contrast to the relatively fair treatment of minorities when they appeared before the courts as witnesses, the inherently unfair practise of slavery was also entrenched in the crusader states. Slaves often appear in crusader historical sources; for example, a workforce including 400 slaves was used to repair the fortress of Saphet in the 1260s,[22] and the adventurer and diplomat Usama ibn Munqidh frequently mentions seeing Muslim slaves in the twelfth century.[23]

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18 Kausler, ed., ch. 59. In canon law, it was considered an indignity for a Catholic to swear an oath to a Muslim (or a Jew). This is echoed in a Latin gloss at the end of chapter 264 of the burgess assizes.

19 Kausler, ed., ch. 63.

20 Kausler, ed., ch. 137.

21 Kausler, ed., ch. 269.

22 Hugh Kennedy, *Crusader Castles* (1994), 196.

23 Usama ibn Munqidh, *The Book of Contemplation: Islam and the Crusades*, trans. Paul M. Cobb (2008), 93-95.

There is also quite a lot of external evidence for the interaction of slaves with the crusader legal system, something that cannot be said for the majority of people who lived in the crusader states, even the Latins. Not only are slaves mentioned in the assizes themselves, but the treatment of slaves in Jerusalem led to disputes between the secular rulers and the church over the content and application of the assizes.

Slaves have an interesting position in the assizes. In one sense, they can be bought, sold, and damaged, like any other type of property. This is especially true in the twelfth-century canons of Nablus, where Muslims are mentioned exclusively in the context of slavery.[24] The thirteenth-century assizes cover the sale of injured or diseased slaves;[25] fugitive slaves;[26] slaves offered as a security for a debt;[27] and many other aspects of slavery. The crusaders were evidently quite concerned with their Muslim slaves as property, and this would have been one of the ways that Muslims could interact, however passively, with the crusader courts.

In another sense, Muslims slaves are not just property but also people. Unlike their free counterparts, Muslim slaves could not act as witnesses, accuse people of crimes, or even appear in court at all on their own behalf.[28] But as people, they could be freed from slavery by their masters and gain most of the rights of any other free person. Freed slaves could leave wills, and there were inheritance laws for those who died intestate, just like for other free people.[29] They could also become the heir of their former master.[30] But if they committed certain crimes, they could be forced to return to their former state of servitude.[31]

Slaves who were freed by their master could certainly remain Muslim and would have the same status as any other free Muslim.[32] The burgess assizes also mention "*baptisés*", baptized slaves, as Muslim slaves could also gain their freedom simply by converting to Christianity.[33] An actual example of slaves converting to Christianity is preserved in a crusader legal document. In 1264, an eastern Christian merchant named Saliba wrote a will in which he mentioned his baptised slaves. They had been Muslims, but were baptised, freed from slavery, and

24 Kedar, ed., "Council of Nablus", canons 12-16.
25 Kausler, ed., ch. 16 and 34; *Livre des Assises*, ch. 118.
26 Kausler, ed., ch. 225 and 249.
27 Kausler, ed., ch. 205.
28 John of Ibelin, ch. 58; Kausler, ed., ch. 199.
29 Kausler, ed., ch. 200-201.
30 Kausler, ed., ch. 203.
31 Kausler, ed., ch. 202.
32 Kausler, ed., ch. 204. See also Marwan Nader, "Urban Muslims, Latin laws, and legal institutions in the Kingdom of Jerusalem", *Medieval Encounters* 13 (2007), 243-270.
33 Kausler, ed., ch. 204, 249.

were given Christian names, and as free persons they were able to witness the testament of their former master.[34]

However, this method was usually not so straightforward and caused a significant legal controversy in the legal states. The crusaders were never particularly interested in converting the much larger Muslim population. It was the Muslim slaves themselves who took the initiative to convert when they became aware of the legal loophole that allowed them to gain their freedom by converting. But in response, many crusaders, unlike the eastern Christian merchant Saliba, simply refused to baptise their slaves. The crusaders may have been afraid of losing a valuable workforce, or they did not trust that their slaves were converting sincerely, a common fear in medieval Europe.[35]

This was unacceptable to the church, which argued that converting Muslims to Christianity was desirable regardless of the circumstances or of the ultimate sincerity of the conversion. In 1237, Pope Gregory IX even agreed to a compromise: the crusaders had to honour every request for baptism, but baptised Muslims would remain enslaved, even though this was specifically contrary to the crusaders' own assizes.[36] The crusaders were apparently unwilling to ignore their own laws, so instead they ignored Gregory's letter, and he sent another on the same subject in 1238.[37] This compromise was later established as an ecclesiastical statute in the churches of Jerusalem and Cyprus, with the proclamation of the Statute of Jaffa in 1253.[38] But the crusaders ignored this as well. In 1264, another letter was issued by Pope Urban IV, who had been patriarch of Jerusalem before becoming pope and probably knew well the difficulties involved in converting Muslim slaves.[39] In that same year, Urban sent another letter mentioning two specific converts, who were being neglected by the local church and could not support themselves.[40]

The above examples of testimony and slavery are only two of the vast number of legal questions covered in the crusader assizes. But they can also serve as representative examples of the principle of equity that underlies crusader law. Whether

34 *Cartulaire général de l'ordre des hospitaliers*, ed. by Joseph Delaville Le Roulx (1894-1906), III, 91-92, no. 3105.
35 Kedar, *Crusade and Mission: European Approaches Toward the Muslims* (1988), 147.
36 *Régistres de Grégoire IX*, ed. by Lucien Auvray (1907), no. 3792.
37 Auvray, no. 4147.
38 The Statute of Jaffa was also incorporated into an ecclesiastical collection of laws on Cyprus around 1340. *The Synodicum Nicosiense and other documents of the Latin Church of Cyprus, 1196-1373*, ed. by Christopher Schabel (2001), ch. 27, 104-107.
39 *Les régistres d'Urbain IV*, ed. by Jean Guiraud (1904), no. 1925.
40 Guiraud, no. 2518. See also Kedar, *Crusade and Mission*, 151.

or not the texts were actually used in practice, the crusaders at least theoretically wanted to avoid abusing their own power against the social minorities.

The assizes of the burgess court explicitly state that members of the other religious groups should be treated equally because they are "homes come les Frans".[41] Was this simply the opinion of whoever wrote this particular chapter, or was it an underlying principle of crusader law?

This equal status proposed by the author of the burgess assizes is, clearly, somewhat of an idealized picture, and not all of the assizes depict minorities in this way. As shown above, the laws of both the High Court and burgess court permit non-Catholics to testify against the Catholic ruling class, but only in limited circumstances. However, it is significant that each group can "*iurer sur leur lei*", i. e. Catholics can swear on the Latin Gospels, other Christians on the Gospels in their own languages, Muslims on the Qur'an, Jews on the Torah, and Samaritans on their own version of the Pentateuch.[42] However, the very same assize of Jerusalem that claims that all religious groups should be treated equally also forbids non-Catholics from serving as jurors in the main burgess court, and forbids Muslims and Jews from serving as jurors in any of the courts.[43]

In other assizes, the crusaders limited the neighbourhoods in which non-Catholic merchants could live in the cities, or at least in Acre, the main city and (since the loss of Jerusalem in 1187) *de facto* capital of the kingdom. Although minorities were free to trade in the capital, they could not live wherever they wished and were confined to one neighbourhood in the "upper market".[44] Another area where minorities were somewhat, but not quite, equal was medicine. The assizes about doctors give harsher punishments for injuring or killing a Christian during a medical procedure than those imposed for injuring or killing a Muslim slave.[45] On the other hand, Muslim doctors had the right to practise medicine according to crusader law, and Muslim doctors are often mentioned in other narrative texts from Jerusalem.[46] There were non-Christian doctors on Cyprus at least until the fourteenth century, when the church attempted to forbid them from practising on the island.[47]

Equity in crusader law, or the lack thereof, can also be explored by looking at what is *not* mentioned in the assizes, especially when compared to legal codes from Spain, where Christians, Muslims, and Jews also lived together. There are

41 "men just like the Franks". Kausler, ed., ch. 236. In crusader sources, the Western Latin crusaders typically called themselves "Franks".
42 "swear on his law". Kausler, ed., ch. 236.
43 Kausler, ed., ch. 236.
44 Kausler, ed., ch. 238. Presumably the same was true for the other cities.
45 Kausler, ed., ch. 231, ch. 233.
46 Piers Mitchell, *Medicine in the Crusades: Warfare, Wounds, and the Medieval Surgeon* (2004), 31-34.
47 *Synodicum Nicosiense*, ch. 14.

many similarities between the assizes of Jerusalem and Spanish legal texts, particularly the municipal *fueros*, although the Spanish texts often mention Jews where the crusader laws mention Muslims. The hierarchy of testimony was similar in Spain: in the municipal *fueros* of Cuenca and Haro in Spain, a trial between a Christian and a Jew required one Christian and one Jewish witness,[48] and the municipal *fuero* of Funes, like the burgess assizes, required Christians to have two Jewish witnesses when making an accusation against a Jew.[49] The *fuero* of Cuenca also allowed for Jews to swear oaths on the Torah, as was the case in Jerusalem.[50] Muslims and Jews were also allowed to be doctors in Catalonia, just like in the crusader states.[51]

The similarities can also help us see what is "missing" from the assizes of Jerusalem. For instance, in crusader law there is no allowance for "forum shopping". Different religious groups could apparently not attempt to have their cases heard in different courts in order to obtain a more favourable judgement. The assizes are very specific about which courts had jurisdiction over different kinds of cases, at least for cases between people of different religions. But what happened when a Muslim had a dispute with a Muslim, or a Jew with a Jew, or a Syrian Christian with another Syrian? Were there Muslim, Jewish, and eastern Christian tribunals that handled their own disputes? There is evidence from charters and narrative sources for the existence of a *ra'is*, Arabic for "head", who was probably the leader of a Muslim or Syrian Christian community, and among whose duties may have been the settlement of minor disputes between members of their own community.[52] Unfortunately, the crusader assizes make no specific mention of any minority courts or any specific duties that a *ra'is* may have performed.

In fact, the same chapter of the burgess assizes that espouses equality for all religious groups also notes that disputes between members of the same religion would be heard in the market court. In such cases, there was no need to find witnesses of the same faith as the accused, and anyone could testify, no matter what religion he followed.[53] This may also be another example of the crusaders' idea of equity – everyone had legal rights, as long as they appeared before the crusader courts.

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48 *El Fuero de Cuenca*, ed. By Rafael de Ureña y Smenjaud (1935), ch. XXIX.32; Jewish Fuero of Haro, ch. 9, in "Fueros de la Rioja", ed. By G. Martinez Diez, *Anuario de Historia del derecho español,* 49 (1979), 437-439.

49 Jewish Fuero of Funes, in "Archivo General de Navarra 1150-1194", ed. By Guadalupe Lopetegui Semperana, *Archivo General de Navarra 1134-1194* (Donostia, 1997), doc. 42.

50 Fuero of Cuenca, XXIX.17.

51 *Constitucions de Catalunya: Incunable de 1495* (1988), I.2.5.4.2.

52 Jonathan Riley-Smith, *The Feudal Nobility and the Latin Kingdom of Jerusalem, 1174-1277* (1973), 89-90.

53 Kausler, ed., ch. 236.

The crusader legal texts are also relatively silent about the sorts of activities that Christians were forbidden from performing with non-Christians. The earliest laws of the kingdom, the canons of the Council of Nablus, essentially forbid all contact between Muslims and Christians outside the context of slavery; sexual contact was not allowed, and Muslims were forbidden from dressing like Christians.[54] But the fundamentalism of the early crusaders was soon lost, and none of these prohibitions are repeated in either the high court or burgess court assizes. There are no sumptuary laws in the assizes, nor any prohibition against social interactions or eating and sharing food.

There was no regulation of debts; anyone, even Catholics, could owe a debt to anyone else of any other religion. This was not unique; Christians could owe debts to Jews in Catalonia, and, as in Jerusalem, Jews would need Christian witnesses to accuse Christians of non-payment.[55] But the laws of Catalonia record an extremely long and derogatory oath that Jews had to swear when testifying against a Christian,[56] which was however shortened or eliminated in other Spanish law codes.[57] The assizes of Jerusalem do not record any particular oath to be spoken by Muslims or Jews, but given the context of the assize there was probably no difference in the oaths sworn by any of the religious groups, except in the book upon which it was sworn.

There is one activity that is expressly forbidden in crusader secular law: intermarriage between Christians and Muslims.[58] Intermarriage apparently did happen on rare occasions.[59] It has also been suggested that intermarriage was forbidden in the thirteenth-century assizes because it was still happening, even though both canon and secular did not recognize such marriages as valid.[60]

The above evidence shows that the authors of the crusader assizes recognized the idea that everyone should be treated equally, but was this principle an underlying theme in crusader law in general? The crusaders established a legal system in which they were firmly at the top, but there was some room for flexibility in both the high court and the burgess courts. Despite their small population, the presence of the crusaders at the top of the social hierarchy was a disruption to the

54 Kedar, "Council of Nablus", canons 12-16.

55 *Constitucions de Catalunya*, I.1.9.2.2; Constitutions of Barcelona, ch. 2, in *Cortes de los antiguos reinos de Aragón y de Valencia y principado de Cataluña* (1896), t. 1, pt. 1, 120.

56 *Constitucions de Catalunya*, I.1.9.1.

57 Jewish fuero of Tudela, ch. 3, in Lopetegui Semperana, doc. 39; Jewish Fuero of Funes; Jewish Fuero of Haro, ch. 10.

58 Kausler, ed., ch. 177.

59 Usama ibn Munqidh, 152.

60 James Brundage, "Marriage law in the Latin Kingdom of Jerusalem", in *Outremer: Studies in the History of the Crusading Kingdom of Jerusalem*, ed. by Benjamin Kedar, Hans Mayer and R. C. Smail (1982), 262. See also Marwan Nader, "Urban Muslims", 260.

previous social order. The Muslim inhabitants, previously at the top of the social pyramid, were now essentially at the bottom and could easily find themselves enslaved by the new social majority.

The crusaders seem to have understood this, and took steps to ensure that all inhabitants of the kingdom – even slaves – were treated fairly by the courts. But only a relatively small number of assizes deal with minorities, and not all of them share this principle of equity. The ideal presented in some of the written laws also may not have extended to actual practise, given that the crusaders sometimes refused to free their slaves even in circumstances where slaves were legally required to be freed. The crusader kingdom had a strictly hierarchical structure in which European crusaders ruled a much larger group of people who had decreasing amounts of rights depending on their ethnicity, religion, and social status. In reality, it was inherently unfair, despite attempts to treat everyone fairly under the law. It could ultimately be said that the crusaders believed that "all men are equal, but Catholics are more equal than others".

THE WOMEN OF THE TRENT TRIAL (1475-1478)

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In this paper I intend to examine the documents of the Trent trial focusing on the Jewish women and their role in the trial. A very vast literature is available on the trial and its context; here I attempt to open some possible disciplinary lines of research across legal history, social history and gender history. The history of women can be examined from the perspective of the minority. Women were not in fact a minority but had the status of a minority, not enjoying political rights for example, and being discriminated against legally, socially and economically. Jewish women were a minority within a minority.[1] Moreover, women and Jews (and more so, Jewish women) were thought to have a connection with the devil and to practice witchcraft against the Christian religion.[2] "Jewish women, victims twice over as members of a defective" gender within a "degenerate people".[3] There are no sources on women by women; historians have to search for the voices in the male narrative, to reconstruct what their *Weltanschauung* and their awareness of being a minority could have been.[4] In Judaism, as in Islam and Christianity, women are biologically inferior. Jewish women are treated in the sources like slaves and minors. The Jewish approach towards law was shaped by the Jewish legal system but also by that of their neighbours, Muslims and Catholics. In some cases, women strategically used the coexisting systems, turning to non-Jewish courts for help.[5]

1 See Robert Bonfil, "Gender history e storia degli ebrei", in *Donne nella storia degli ebrei d'Italia: atti del IX Convegno internazionale "Italia judaica", Lucca, 6-9 giugno 2005,* ed. by Michele Luzzati and Cristina Galasso (2007), 31.

2 See Henry Abramson, "A Ready Hatred: Depictions of the Jewish Woman in Medieval Anti-Semitic Art and Caricature", in *Proceedings of the American Academy for Jewish Research*, 62 (1996), 118.

3 See ibid., 1 and 17: "Misogyny and theological anti-Judaism are intertwined in the earliest representations of Christian art in Western Europe, and played an important role in the imaging of sacred history".

4 On Jewish women in legal texts see also Howard Adelman, "Law and love: the Jewish family in early modern Italy", *Continuity and Change*, 16 (2011), 283-303. See Avraham Grossman, *Pious and Rebellious Jewish women in Medieval Europe* (2004), 3.

5 See H. Adelman, *Law and love*, 291. See A. Grossman, *Pious and Rebellious*, 8: "...the status of Jewish women within society and family and the attitude toward them were determined by three main factors: the biblical and Talmudic heritage, the attitude toward women in the neighbouring Christian and Muslim societies within which the Jews lived and acted, and the role of the woman in supporting the family and in running household affairs".

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 381–394

 DOI 10.1484/M.RELMIN-EB.5.111612

Their role consists entirely of that of wives, mothers and housewives as prescribed by the *halakha*, the Jewish law.[6] *Halakha* incorporated what were the social norms that discriminated women.[7] "Discrimination against women is most apparent in matrimonial law, inheritance law, and other laws touching on their personal status and their ownership of money or property"[8] Non elite women were often more free than upper-class women, who were more bound by family ties. In general, property had to be kept within the family. The main property of women consisted of the dowry which included three main parts: money, jewellery, and clothes and fabrics. The dowry was as essential a part of Jewish matrimonial law as it was for Christian matrimonial law.[9] The husband was responsible for conserving the value of the dowry undiminished until his death, when the dowry and other properties that belonged to a woman reverted to her control. In medieval Italy several women are attested to work as moneylenders, especially widows but also those married with children.[10] Women sought opportunities to have more freedom and not always did what their legal and social status prescribed and what their husbands expected from them.[11]

This paper will focus on the Italian and Ashkenazi women during the first half of the fifteenth century, since the women of the Trent belonged to the two communities.[12] The documents taken into account here are the records of the trial against the Jews of Trent, the richest source on an inquisitional trial.[13] It

6 See the introduction on women in Judaism by Ruth Lamdan, *A Separate People: Jewish Women in Palestine, Syria and Egypt in the Sixteenth Century* (2000), 3: "Most of the restrictions imposed on women by *halakha* were the result of decisions, interpretations or constraints introduced by the early or later rabbinical authorities (*Rishonim* and *Aharonim* respectively)".

7 On the halakhic ideal of the submissive and modest wife and the reality of women ' s life see Grossman, *Pious and rebellious*, chapter 6, 123-126.

8 See Lamdan, *A separate people*, 4.

9 The granting of a dowry was used by the Church as a means of conversion of Jewish girls who did not have a dowry and wanted to get married, See Piet Van Boxel, "Dowry and the conversion of the Jews in Rome", in *Marriage in Italy 1300-1500*, ed. by Trevor Dean and K. J. P. Lowe (1998), 116-127.

10 See Anna Foa, "Le donne nella storia degli ebrei d 'Italia", in *Le donne delle minoranze. Le ebree e le protestanti d' Italia*, ed. by Claire E. Honess and Verina R. Jones (1999), 21.

11 See H. Adelman, "Law and Love", 292.

12 The Renaissance in Italy and its way of life, more permissive regarding interreligious interactions and sexual relations, influenced also Jewish society, see A. Grossman, *Pious and Rebellious*, 145-148.

13 My work is based on the records published by Diego Quaglioni and Anna Esposito. I am greatly indebted to Professor Quaglioni for his help and very precious and essential advice, without him this article would not have been written. For a history of the trial I refer to the publications by Diego Quaglioni, *Processi contro gli ebrei di Trento (1475-1478)* (2008) 2 vols. I also rely on the thorough work by Wolfgang Treue, *Der Trienter Judenprozess: Voraussetzungen, Abläufe, Auswirkungen (1475-1588)* (1996). The documents edited and published by Quaglioni and Esposito are based on the Wien, Oesterreichische Nationalbibliothek, Cod. 5360, cart. saec. XV, mm.300 × 200, cc. 441. See the description of the codex in Anna Esposito, Diego Quaglioni, *Processi contro gli ebrei*, II, 57-63. In this paper I will also refer to an unpublished source: the MS BCT1-6342, which contains the summaries of the *Inquisitiones speciales*. For a description of the manuscript see Fabrizio Leonardelli, Diego Quaglioni, Silvano Groff, "Simonino

is noteworthy that women are often present in legal sources. Their voices have to be heard through the mediation of the notaries and of men, but nonetheless they are mentioned in legal transactions, wills, contracts, etc., which show that women could be financially independent and often turned to non-Jewish authorities to gain more freedom and more power than that which the rabbinic authorities granted them. Very few women though are called to testify before the inquisitional court; men, fathers, husbands, sons, were held accountable for their crimes.[14] Therefore, this source is particularly interesting, because all women play a decisive role in the trial. The trials against women were at the centre of a dispute between the bishop Johannes Hinderbach and the Holy See. The papal nuncio Giovanni dei Giudici tried in fact to free the women and the children convinced of the innocence of all the Jews. At the time of the trial though, he had been objected and was about to leave Rovereto where he had searched for the protection of the Venetian Republic.[15] The Jews of Trent were accused of having murdered a small child for ritual purposes. This child was Simon, the son of Andreas Gerber, also called Unferdorben (uncorrupted). The aim of the bishop Hinderbach was to prevent that women were heard in Rome, giving their version of the alleged crime committed by the Jews: ritual murder. In order to silence them there was no better way to provide his own version of the events, as he had already done with the Jewish men, forced to confess a crime they had never committed. Through the confessions extorted under torture, Hinderbach succeeds in his plan, thwarting all the efforts of the apostolic commissary Giovanni Baptista dei Giudici to save the women and restore the truth about the Trent case but also about the blood libel accusation in general.[16]

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da Trento: un nuovo esemplare degli atti del processo agli ebrei del 1475 acquistato dalla Biblioteca (MS BCT1-6342)", *Studi Trentini. Storia*, 90, 1 (2011), 259-270. Object of my current research work is a comparison of the published sources with the abovementioned manuscript, focusing in particular on the figure of Anna.

Among the various bibliographical sources see also Paul Oskar Kristeller, "The Alleged Ritual Murder of Simon of Trent (1475) and Its Literary Repercussions: A Bibliographical Study", in *Proceedings of the American Academy for Jewish Research*, 59 (1993), 103-135.

14 See Susanna Peyronel Rambaldi, "Mogli, madri, figlie: donne nei gruppi eterodossi italiani del Cinquecento", in *Le donne delle minoranze*, 48: "Dal punto di vista giuridico, le donne perché intrinsecamente subalterne, sia fisicamente, sia moralmente per la loro '*levitas*', '*fragilitas*', '*imbecillitas*', '*infirmitas*', parole che ritornano tradizionalmente nei testi giuridici, erano considerate con un metro diverso dagli uomini e la legge collocava quindi tutte le donne sotto la tutela del padre o del marito".

15 For a description of the events I refer to the aforementioned publications by Quaglioni, *Processi contro gli ebrei*, and Treue, *Der Trienter Judenprozess*.

16 See Diego Quaglioni, "Rituali della grazia a Trento nel 1477", in *Grazia e Giustizia Figure della clemenza fra tardo medioevo ed età contemporanea,* ed. by Karl Härter and Cecilia Nubola (2011), 131-132: "Era chiara la volontà d´impedire che il commissario portasse a Roma le donne degli ebrei o anche solo la loro 'voce' la loro libera testimonianza dell´ingiustizia commessa contro i loro congiunti, costretti con smisurati tormenti a confessare un delitto mai commesso". On 6 February 1478 the women' s proxies in Rome are revoked and the bishop achieves completely his aim.

The Accusation of Ritual Murder

The blood libel accusation was repeatedly brought against the Jews since the twelfth century.[17] It never had any foundation but was nevertheless very popular and widespread among all social statuses. It employed in fact different means of divulgation and popularization besides the written medium, such as dramatizations, art reproductions, and new cult creations. It is noteworthy that blood had a particular meaning and significance in the Middle Ages also from an anthropological point of view: "blood the element that affirms or contradicts the notion of an integral body, marking the margins inside which an individual can be accepted and included".[18] It is though in the German world, in Fulda in 1235 that the special significance of the use of blood by the Jews appears.[19] Jews were accused of extracting Christian blood from Christian bodies to empower themselves.[20] In the case of Simon of Trent the two accusations of host desecration and ritual murder converge. In both the Christian and Jewish traditions, blood comes from God, but whereas Christians are cleansed by Jesus' blood, Jews are impure and detached from God and here lies the absurd accusation of their need for Christian blood to compensate their separateness. Another fundamental element in the discrimination of the Jews was money: religion and magic defined the blood libel also on a mythical level; money and economic welfare were the elements that brought the accusation in the reality and served the purpose of those who had interest in appropriating themselves of the Jewish possessions.[21] As blood drinker and greedy usurer, the Jew was an outcast; he was dehumanized because he was excluded from the spiritual salvation offered by Jesus. The Jews being ethnically and religiously different were therefore feared and seen as dangerous, delivering pain and cruelty, becoming a social danger to be only sometimes tolerated and more often annihilated. The Jews were not the only victims of this accusation but they were the main victims, although the Jewish

17 See Rainer Erb, "Die Ritualsmordlegende: von den Anfängen bis ins 20. Jahrhundert", in *Ritualmord, Legenden in der europäischen Geschichte*, ed. by Susanna Buttaroni and Stanisław Musial (2003), 12. The first accusation dates back to the 1144 in Norwich.

18 See Bettina Bildhauer in Francesca Matteoni, "The Jew, the Blood and the Body in Late Medieval and Early Modern Europe", *Folklore*, 119, 2 (August 2008), 183 and further on the same page: "René Girard when he defines blood as the visible matter of violence (Girard 1997, 38), which outlines both the battle between different social groups, dramatically manifested in persecution and murder, and the hidden, more resistant conflict between the body itself and human identity".

19 See F. Matteoni, "The Jew, the Blood", 185.

20 See *On everyone's lips": Humanists, Jews, and the tale of Simon of Trent*, ed. by Stephen Bowd and J. Donald Culligton (2012), 4-6. The authors show the role played by Italian humanists in the spreading of the cult by examining Latin texts written between 1475 and 1482.

21 See F. Matteoni, "The Jew, the Blood", 190.

religion forbids the use of blood for any purpose, least of all its consumption for magic and religious rites.[22]

As Diego Quaglioni has pointed out, from a juridical point of view, the trials against the Jews of Trent are unique considering the period in which they took place: the last quarter of the fifteenth century. They are all the more unique in view of the crime for which Jews were charged: ritual murder in contempt of the Christian faith. The whole trial is based on the presumption of guilt and in this sense the records are not testimonies of the opinion of the Jews; they are informative about the prejudices, mind-set and opinions of those who interrogated and executed the Jews. The Jews were only to confirm a truth owned by those who accused them of committing a crime they had no proof about. Through the introduction of torture the only voice heard is that of the judge; what is left of the accused is the *reus* (the accused, an object from res), a figure without voice. Therefore, we cannot look for the voice of the Jews in the records, since they do not have one. The historical importance of the documents lies elsewhere. Among other things, they represent a rich and important source for the history of the prejudice against the Jews and how it was articulated; only in this respect the Jews spoke the truth. They were aware of this prejudice and knew what the accusators wanted to hear because they had witnessed across the centuries the growth and development of the blood libel. The trials are also important because they represent the construction of a legal procedure and the structuring of a legal literature.

The Context of the Accusation

The context of the accusation was the city of Trent, whose political organization resembled that of the cities of Northern Italy. The population was mostly Italian speaking, but there was a strong German speaking minority. The consular elite of the city was mostly of Italian origin. At the top of the social hierarchy and head of the city was the prince-bishop, at the time Johannes Hinderbach. Beside him, representing the imperial rule of the Archduke Sigismund of Trion, was the Austrian *capitaneo*, Jacob Spaur at the time of the trial.[23] The township had also its magistracy led by the *Podestà*, during the trial Giovanni de Salis.[24] There is no information about the population of Trent at the time. Most information refers to the first half of the sixteenth century. In this time the population ranged approximately from 8000 to 10,000 inhabitants. Since it was a bishop's city Trent

22 See Hillel J. Kieval, "Representation and Knowledge in Medieval and Modern Accounts of Jewish Ritual Murder", *Jewish Social Studies*, New Series, 1, 1 (Autumn, 1994), 58-59.

23 He had to declare his loyalty toward the bishop; he was nevertheless the highest ducal officer.

24 He had to be a jurist coming from outside Trent, proposed by the consuls and assigned by the bishop to his post for one year. He exercised the highest jurisdiction after the Bishop.

was highly influenced by the religious institutions. The main churches, attended both by the German and Italian communities, were the cathedral of St. Vigilio and the church of St. Peter.[25] From the economic point of view Trent was an important centre of trade. The most important trading good was wine, produced elsewhere and sold to the neighbouring regions, mostly to the north, like Austria and Bavaria. Salt, grain, wood and woollen fabrics were other important products. A significant part of the economic activities was also textile production. Due to its position, another flourishing business, attested by the high numbers of guesthouses (mostly owned by Germans, who found in this a very profitable activity) was the hosting of the many traders and travellers who passed through Trent.

The German minority and its quarter is the set of the ritual murder accusation. The German presence in South Tirol was recent, around the middle of the thirteenth century. There were no or very few Germans in Trent unlike in other cities in Trentino. In 1279 the Mary Brotherhood was established, and to this organisation belonged members of the different trades and crafts; the wealthiest of all were the innkeepers. The brotherhood was very active within the community. While in the public institution the German minority was not adequately represented, among the clergy the situation was different. In fact in 1474 the bishop Hinderbach had obtained that two thirds of the cathedral's chapter had to be of German origin and German speaking. The majority of the small Jewish community were also German speaking.

Jewish Presence in Trent

Before the beginning of the fifteenth century no Jewish presence is attested in Trent. The first mention of a Jew is from 1403 when the bishop Ulrich III von Brixen mentions two Jews in connection with moneylending. In fact, the main three families involved in the trial saw two moneylenders among them (Angelus and Samuel). In 1462-1463, an Isaac is mentioned as living in Trent; his daughter Anna married the physician Tobias who had moved to Trent. At the same time arrived in Trent from Nuremberg the moneylender Samuel, who in 1469 obtained from the bishop for himself and his family the permission to dwell in the city for five years and to work as a moneylender. Another moneylender, Angelus from Verona, is mentioned in the sources in 1469. The small Jewish Ashkenazi community consisted of twenty-one adults, as well as some children and adolescents. Samuel's family was the most numerous. He came from Nuremberg and lived since 1463 in Trent. His father was Seligman Bak of Coburg and during the trial he declares himself a student of Rabbi David Sprinz of Nuremberg. He was married

25 San Peter was the centre of the German cult. See Serena Luzzi, *Stranieri in città, Presenza tedesca e società urbana a Trento (secoli XV-XVIII)* (2003), 175-180.

to Brunetta, whose family background is unknown, had a son called Israel, who was thirty years old and was married to the twenty-three years old Anna. She was of northern Italian descent and had lived until the time of marriage for seven years in Montagnana near Padua. In Samuel's house, which hosted the only synagogue of Trent, lived his over eighty years old uncle Moses who alternately is said to have come from Wurzburg, Bamberg or Sachsen. He had lived in many different German cities before moving to his nephew. He had come to Trent with his son Mohar and his daughter in law Bella, whose father was a Seligman of Nuremberg. They had married twenty years before in Nuremberg and had lived subsequently in Halle and Mulz in Tirol. Their son Bonaventura lived with them in Samuel's house. In the same house lived the cook Bonaventura, also from Nuremberg and the servant Vitalis, who came from Weissenburg but had relatives in Italy. During Easter, from the Holy Thursday to the Saturday, a curfew was imposed on the Jews, as was common in Christian Europe, except for Samuel, who as a doctor, could go out.

The second family was that of Tobias. His father was a Jordan of Magdeburg. After the death of his first wife Anna, the daughter of Isaac of Trent, he had married, only a few months before the trial, Sara, daughter of Abraham of Schbeischenbord (Schwäbisch Werd). She was thirteen years old when she married Elias of Marburg and moved with him to Treviso where she had lived for six years until his death. A year later, she moved to Mestre where she dwelt four years as a widow before meeting Tobias. At the time of the trial she must have been older than twenty-five years old. Both had children from their first marriages, and for their education Tobias had hired the nineteen-year-old teacher Moses. He was born in a small city near Ansbach from a Salomon and had spent a very miserable adolescence in Nuremberg in the hospice for poor people. In Trent he also worked as cantor in the synagogue. Tobias also had a cook called Salomon (son of a Mendelein and formerly of Innsbruck) who was considered a simpleton and a servant called Joaff, son of a Seligman of Ansbach. He was also a very poor man, had worked many years as servant and carter and after having being abandoned by his family, had come to Trent to work as a servant for his relative Tobias or live off his charity.

The third family was that of the moneylender Angelus (son of a Salomon) who came from Verona. A Hebrew source calls him Asher or Ansel Ha-Levi which indicates that he was also of Ashkenazi descent.[26] He had come to Trent five or six years before the trial after spending seven years at the house of his uncle Anselmo near Brescia. With him lived his mother Brunetta, his wife Dulceta, his divorced sister Bona who beforehand had lived near Novara and several sons. Angelus had a servant called Lazarus, the son of an Aaron from Serravalle in Friuli and a cook named Isaac, son of a Jacob from Griedel in the Wetterau.

26 See R. Po-Chia Hsia, *Trent 1475 Stories of a ritual murder trial* (1992), 20.

Eighteen months before the trial he had lived in Kleeberg in Hesse, but due to financial difficulties had moved to Trent and had left his family with a rich relative called Lehep in Vetzberg. Since the accusation of ritual murder took place during Passover, several guests were visiting, who were also involved in the trial. In the house of Tobias lived Israel, scribe, bookbinder and illuminator, who although only twenty-three years old had spent many years travelling for work. Son of a Mohar or Meier from Brandenburg, he had come to Trent from Lombardy and was heading towards Germany. He had arrived in Trent the Friday before Passover and wanted to continue his trip but was prevented from doing so by an injury to his foot. Therefore Tobias invited him to spend the festivity at his place.

Angelus hosted Moses of Bamberg (son of an Aaron from Ansbach) in his house. He had come with his adolescent son Isaac to Trent and was headed to Padua where he wanted to enrol his son in a Jewish school and find himself work. Also Moses was in Trent to escape misery and poverty in his homeland. After the death of his wife Frayt eight years before he had left his home in Bayreuth and had worked as a domestic or peddler.

The houses of the three families were situated in the German quarter, not far from the river Etsch/Adige. Samuel 's and Tobias ' houses were separated by three *domuncoli*, but through their roofs one could communicate or even visit the other. The house of Samuel lay to the south and the west next to a street and to the east bordered with one of the aforementioned *domuncoli*, the house of the innkeeper Michael zur Rose and where a tailor called Roper lived, indicated in the records as *Sneider Jued* or *sartor Iudeorum*, the tailor of the Jews.[27] Samuel's house was the biggest and hosted a synagogue and a *miqwe*.[28] Samuel and Angelus were wealthy and lent a considerable amount of money to Trent citizens, which, as mentioned offers an explanation for another reason behind the trial.

The women in the trial

The trials against women specifically also prove to have served multiple purposes: the inquisitors intended to confirm accusations that Jewish medical practice involved the consumption of Christian blood; and the trials were fundamental to the establishment of the popular cult of the martyred child St Simonino, which is an unprecedented expression of popular devotion brought forth by blood libel.[29]

27 See Anna Esposito and Diego Quaglioni, "Le donne nei processi contro gli ebrei di Trento, 1475-1476", in *Donne nella storia degli ebrei d' Italia*, 130.

28 Place for the women ritual bath. The wife of Berthold a relative of Roper called the tailor of the Jew seemed to have attended the ritual bath. See W. Treue, *Der Trienter Judenprozess*, 76.

29 On the history and development of the cult of Saint Simonino see W. Treue *Der Trienter Judenprozess*, 225-284 and Valentina Perini, *Il Simonino Geografia di un culto* (2012).

Women are not accused of having murdered the child or of having witnessed the alleged crime, since it had allegedly taken place in the small synagogue where they were not admitted. They are guilty of knowing about the crime and are the depositors of the knowledge of the ritual of all the previously committed crimes.

The centre of women' s life in Trent was the German quarter, and specifically the *Canton*, near the river and where different craftsmen lived, especially tanners and cobblers but also innkeepers and blacksmiths. The women of the trial are mostly ordinary women, of different wealth and education. In general the Jewish women taken into account here seem to be better educated than Christian women and to the better level of education corresponded also more freedom within the "public space". Each woman had a different degree of independence as the records show.[30] The documents on women show more than those on men the relations between Jews from different cities and those who had the misfortune to be hosted in Trent for the 1475 Passover.[31] Women were more itinerant than men; due to family reasons they were forced to move because of their father or husband. It is the case with Bella who, after living with her parents in Nuremberg, marries at sixteen years old Mohar and moves to Halle with her husband where she lives for six years and then moves again to Mulz before settling down in Trent. She had been living in Trent for ten years with her husband and her father in law, Moses, and her son Bonaventura. Women are not always detained in prison like men, but also in Samuel' s house and in Roper' s house (the already mentioned so called Jewish tailor).[32] Among the women, Brunetta holds a special place in more than one way. She is described by the men and the other women as the most educated and skilful among the women. In her household nothing happens without her approval; she runs the household but also her husband' s pawnshop. Defined *sagax et tacita*, sharp and secret, she is almost treated like the men by the authorities, brought to jail and tortured. (After giving a first confession under torture, she retracts everything, refusing to plead guilty.[33] No documents are extant about Brunetta. There are no records about Samuel' s wife; the only evidence of her alleged confession and conversion is a note by the bishop Hinderbach, but she never ratified any confession.[34] She died in jail and was buried on 26 October 1477. In the records Brunetta is described as having taken a more active role than

30 See A. Esposito, *Le donne nei processi contro gli ebrei di Trento*, 2, 52.

31 See A. Esposito, *Le donne nei processi contro gli ebrei di Trento,* 40.

32 On the *torre di piazza* (square´s tower) and the warder Michael, *magister Michael Barberius* (barber), *Kerkermeister* see the article by Diego Quaglioni, "Il diavolo nella torre. La torre di piazza e la giustizia penale a Trento alla fine del Quattrocento", in *La torre di piazza nella storia di Trento,* ed. by Franco Cagol, Silvano Groff, Serena Luzzi (2012), 239-246. Michael was warder and surgeon.

33 See A. Esposito, *Le donne nei processi contro gli ebrei di Trento*, 2, 133.

34 See A. Esposito, *Le donne nei processi contro gli ebrei di Trento*, 2, 45. The treatment of Brunetta and the tortures inflicted upon her resemble those inflicted upon the witches.

the other women in the kidnapping and killing of the child, being aware from the beginning of the plans and of their execution. As Anna Esposito points out in the wooden sculpture kept in the Museo Diocesano, she is the only woman represented, standing next to Samuel, therefore witnessing the murder; her head though turns away from the scene with a horrified look. Next to Brunetta, the most educated woman was Anna, also called Guendlin, Abraham' s of Lazarus of Brescia (Montagnana) daughter. She was Israel' s wife and Samuel' s daughter in law. Anna had her own prayer book and kept a copy of the *Haggadah* next to her bed. She was also in charge of returning the pawns to the depositors under the supervision of the official authorities since she could read Hebrew (pawn books were in fact usually written in Hebrew). Her trial was therefore delayed until 1 March. She is tortured in Samuel' s house to the extent that she passes away and almost dies. The content of the interrogation records becomes increasingly rich as the trial progressed because the accused, in fear of being put to torture again, were forced to invent additional details. In fact, a common trend seen in these records is that women will first deny the crime, they then confess after being tortured and, to satisfy their torturers and ease their pain, they provide more and more details until they have given what their inquisitors consider to be a full confession. Women are forced in particular to add more and more details to the reconstruction of the events regarding the ritual uses of blood:

> Asked why the Jews eat and drink the blood of a Christian child, she replies that they eat and drink it in contempt of the tolle "hanged one",[35] i. e. Jesus, God of the Christians, whom the Jews hate. She says, being questioned, that the Jews use this blood for another purpose: she says that it has some healing properties and among these healing properties they say that if someone drinks from said blood, his/her stomach will be cleansed, and it promotes a rosy complexion. Also, it prevents the Jews from stinking. She claims moreover that many offer it to weak women to prevent preterm birth. Having been asked, she says that she knows this because she has heard it said. Asked from whom she heard it said and whether she has used it herself, she replies that she

35 To hang תלה and hung/hanged תלוי. See also Bona' s records in A. Esposito, *I processi alle donne*, 162: "The word 'tolle' means 'male scoundrel hanged' and the word 'tluyo' means female 'scoundrel hanged' as Bona believes it means, understanding that 'tolle' is Jesus, whom the Christians worship as God and 'tluyo', Maria, whom the Christians call the mother of Jesus". The motif of the hanging instead of the crucifixion also originates from the *Toledot Yeshu*, see *Toledot Yeshu*, 7. According to the Toledot Yeshu Jesus was buried in an aqueduct, water reservoir. The finding of Simon ′s corpse in the drainage system of Samuel ′s house could be a coincidence, or could perhaps hint to a complex ploy architected against the Jews of Trent also based on the knowledge of the *Toledot Yeshu* in the Christian German environment. It raises many questions regarding the role of the Toledot Yeshu in the Christian anti-Jewish prejudice. Moreover the role played by the Jewish convert John from Feltre, main witness in the trial and of the blood libel, although already detained in prison for other crimes. On the role of water in the *Toledot Yeshui* see Michael Meerson, "Meaningful Nonsense: a Study of Details in Toledot Yeshu", in *Toledot Yeshu*, 191-195.

> heard this from her mother-in-law, Brunetta, and that she has never drunk such blood to protect a pregnancy. She was then ordered to exit the stuba[36] and to go down to the torture chamber if she would not tell the truth. Responding to the threat, she said that she does want to tell the truth and that the truth is that in her second pregnancy, while she was in danger of a miscarriage, she, as advised by Brunetta, took a boiled egg and on it she placed a small amount of the powdered blood of a Christian child. She ate that egg with the powder. She adds that from this pregnancy she later bore a daughter.[37]

The same purpose serve the confessions of the first two women under investigation (3 November 1475) who were Bella of Bonaventura from Nuremberg (widow of Mohar of Mosé of Samuel from Würzburg, executed on 22 June) and Sarah of Abraham of Marburg, twice widow of Elia from Marburg and Tobias of Jordan of Sachen of Magdeburg).[38] They are also forced to expand on the ritual use of blood and its alleged properties for the Jews. According to the Christian prejudice, whereas men are in charge of acquiring the blood and to ritually gain it from the victim' s body, since women are not always allowed in the synagogue, they held the secrets of its usage, as its employment belongs to the domestic world. The rituals are of men, but the alleged practical uses belong to the women' s world. Thus speaks Brunetta for example:

> Interrogated, she says, as she heard from Samuel's wife, Brunetta, and from Mohar, husband of the same Bella, that the aforementioned blood of a Christian child, drunk by Jews, is used so that they do not stink among Christians, and if they did not drink, they would stink. She adds that the aforementioned blood also strengthens weak pregnant women so that they can carry the foetus to its full term. She moreover claims to have heard, as above, that the aforementioned blood is sometimes given as a drink with wine to Jewish women who suffer from abundant menstrual bleeding and that the blood, if drunk, reduces the menstrual flow.[39]

In Sara' s record we find another element characteristic of the women interrogations: the use of gestures and the description of the insults allegedly uttered against the Christian faith.

> Untie me so that I can demonstrate with my hands what the Jews did to insult the body of the child as it lay on the *almemar*.[40] Thus Sara, by order of the lord podestà, was un-

36 German for a heated living room.
37 For the Latin text see A. Esposito, *I processi alle donne*, 76-84.
38 On the role of words taken and given under torture see Mario Sbriccoli, "Tormentum idest torquere mentem. Processo inquisitorio e interrogatorio per tortura nell' Italia comunale", in *La parola all' accusato*, ed. by J.-C. Maire-Vigueur and C. Paravicini Bagliani (1991).
39 See A. Esposito, *I processi alle donne*, 194-197.
40 The pulpit. See http://www.jewishencyclopedia.com/articles/1283-almemar.

> tied, and after she had been untied, having been interrogated as above, she then made an obscene gesture (ficam facere) with her right hand, saying that all Jews who were there made obscene gestures in this way.[41] She also said that while the aforementioned gestures were being made by said Jews, said Jews were uttering some words in Hebrew with which she is not familiar, nor does she understand their significance. Asked why the Jews made obscene gestures, she replied that she does not know and she was thereupon ordered to be bound, but before she was bound she said: "You must know and understand well that when obscene gestures are directed at someone, they are done to slight the person at whom they are directed". Asked how they scorned the child and why they defamed him, she replies that they did it because the boy was Christian, because Christians are enemies of the Jews. Asked why Christians are enemies of the Jews, she responds that it is because Christians say that we Jews killed their God. Asked how the Jews killed the God of the Christians, she responds that her Jews know well how Jesus, Lord of the Christians, was killed, and that the Jews also preserve in their books how he died, and that we Christians also know it well. She adds that we Christians do not accurately portray the death of our God who in fact was not murdered by the Jews in the way that we Christians relate it but was instead hung by the neck.[42]

These insults against the Virgin Mary and the Christian faith, i. e. that Jesus was a bastard and Mary a menstruating prostitute, likely originate from the *Toledot Yeshu* (the Book of the Life of Jesus).[43] This text is a chronicle of Jesus from anti-Christian perspective, and it was popular especially among the Ashkenazi Jewry of the Middle Ages.

Bona is forced to confirm that the small Jewish community had committed the crime previously

> Bona appeared and was asked by the aforementioned lord podestà whether she knew [first hand] or had heard it said that a Christian child had been killed and where and by whom and how. She replies that maybe about three or four years ago – she does not remember when exactly except that it was before the feast of Passover, and she is not able to confirm whether it was on the vigil of their Easter or before the vigil – Tobias brought a boy on a certain evening, he took it into Samuel's house and he was murdered on the same evening in the room that faces the synagogue.[44]

41 Gesture probably consisting of thrusting a fit in the direction of the recipient with the thumb protruding between the index and second fingers. Vanni Fucci makes this gesture in Dante, Inferno, XXV, 2 (Al fine de le sue parole il ladro / le mani alzò con amendue le fiche), See Enciclopedia Treccani online: www.treccani.it/enciclopedia/fica_(Enciclopedia-Dantesca)/.

42 See A. Esposito, *I processi alle donne*, 124-127.

43 See *Toledot Yeshu* ("The life Story of Jesus") Revisited, ed. by Peter Schäfer, Michael Meerson, Yaacov Deutsch (2011), 6. The work was written in Aramaic by Jewish scholars in Babyloninan yeshivot during the second-third century of Islam. On the history of the work, his many recensions and the Christian reception of it, See Peter Schäfer, "Agobasd ' s and Amulo ' s Toledot Yeshu", 'in *Toledot Yeshu*, 33-48.

44 See A. Esposito, *I processi alle donne*, 160-164.

In the records women resemble at times witches, through the eyes of the inquisitors. The use of Christian blood for medical purposes brings forth the association of women with magic and sorcery, a very ancient one, connected with the phenomena of childbirth and pregnancy and with men' s control of sexual desire.[45] Besides the theological arguments against the Jews, who are enemies of the Christians and despise Jesus and the Virgin (called bastard *mamzer* and prostitute *zonah*), there is a whole set of superstitions used against the Jews in the trial, part of the anti-Semitic prejudice among common people confirmed and enforced by the authorities also in the legal records and in particular in the women's records.[46]

Another distinguishing trait in the women's records is the extensive use of gestures in their accounts as already pointed out. Upon examination of the trial records, it is evident that women provided more detailed accounts of gestures and insults against Christianity than did the interrogated men. If Brunetta dies without converting, the same did not happen to the other women, who were all forced to convert.[47] On 12 January 1477, after repenting Bella and Anna are baptized in the chapel of St. Andrea del Buonconsiglio. One week later Sara is baptized together with Salomon, Tobias' servant (who becomes John). All women receive Christian names: Elisabeth, Susanna, Chiara and Justina (Bona).

Women's records are richer in details of their everyday life – the ritual bath, the preparation of food, the playing of cards in the *stuba*, the visit to sick neighbours, etc. They inform us about the family history of the women, their relations with the other members of the small Trent community, with their community of origin and the local society. They offer a cross-section of biographical information, sometimes providing insight into the real feelings of the women and their perception about their condition. The records shed light on the more general question about the role of Jewish women within the family and the society. Marriage was a turning point in a life of a woman, as the importance of the dowry shows. Proof of that is, for example, the fact that in all documents is noted the age of the first marriage.[48] Among wealthier Jewish families women married earlier;

45 Women are blamed for using sorcery for seducing men; see A. Grossman, *Pious and rebellious*, 20 and F. Matteoni, 189: "Whoever performed magic entered a domain that was considered characteristic of the Jewish tradition. Jews had been known for their magic since ancient times and Moses was included among the most powerful magicians ever".

46 See for example Anna: "They said that this same God of the Christians was of illegitimate birth, born of a menstruating prostitute, saying in Hebrew '*zona nitda*', which means "menstruating prostitute" in Latin". See Eli Yassif, "Toledot Yeshu: Folk-Narrative as Polemics and Self Criticism", 113-125. See also Miri Rubin, *Gentile Tales* (1999), 73-77. In the host desecration narrative Christian women were said to have stolen the hosts to sell them to the Jews. In the Trent trial Bona also mentions that once Tobias had received a Christian boy from a Christian woman.

47 Dolcetta/Dulceta dies before being baptized, her death is notified on 15 January 1476, also Brunetta, Angelo's mother dies in jail and is buried on 26 October 1477.

48 On Jewish family in Medieval Europe see E. Baumgarten, *Mothers and children* (2007).

less affluent Jewish women married at an older age. Marriages, as was the case among Christian women, were meant to establish or cement trade alliances and women's dowries represented an important economic asset for men. The women of the trial got married young: Sara and Bona at thirteen and fourteen, Bella at sixteen, Anna between sixteen and seventeen.[49] The phenomenon of social endogamy was widespread; families tended to arrange marriages with families who had the same level of wealth, came from the same environment and also spoke the same language.[50] Divorce was admitted in Jewish law, men could divorce more easily than women, but women could obtain the divorce from the rabbis in some cases, for example when the husband left them. Bona, Angelus' sister was for example divorced. She had married in Mestre the Jew Mazio and with him, she had moved from Mestre to Borgo Manero near Novara. After her husband had squandered her dowry gambling and had left her without means, she had divorced him in Conegliano and turned to her brother' s help in Trent and lived with him.[51] As we have seen in the case of Brunetta, some women could have economic power, being trusted by their husbands, while others were more relegated to the domestic environment. Women had to negotiate with men their space and role outside the domestic environment and the extent of their freedom depended on several recurring factors: wealth, education, support by the family of origin, widowhood, the traditions and regulations of their community and obviously the male counterpart.[52] Urban economy favoured a more active role of women and a wider space of autonomy.[53] Like their Christian neighbours, women were active in trade and business, often owned properties and supported their family.[54] This paper has attempted to provide some lines of investigation, the richness and abundance of the material allow us to concentrate on many different aspects of the trial even when restricting our research field to the women' s role in the trial. Women played a role of primary importance for the fixation of the anti-Jewish prejudice and the establishment of the cult of St. Simonino.

49 According to A. Foa, *Le donne nella storia degli ebrei d'Italia*, 14. Italian Jewish women got married later unlike the women taken into account here mainly of Ashkenazi descent.

50 See A. Grossman, *Pious and rebellious*, chapter 2. Grossman discusses the phenomenon of child marriage, widespread in the Christian and in the Jewish world.

51 See A. Esposito, *I processi alle donne*, 50; A. Esposito and D. Quaglioni, "Le donne nei processi contro gli ebrei di Trento 1475-1476", 131.

52 See also A. Grossmann, *Pious and Rebellious*, 2: "the profound economic change that occurred in Jewish society in the Middle Ages and its transformation into a bourgeois or petit-bourgeois society, exerted a stronger positive influence upon the status of the Jewish woman than any other factor".

53 See also A. Grossman, *Pious and Rebellious*, 117: "Jewish society was greatly influenced by the milieu of the Gentile city, but not that of the village". Most of the Jews in Europe lived in cities.

54 See A. Grossman, *Pious and Rebellious*, 118-119.

LA YAJUZ LI-HUKM AL-MUSLIMIN AN YAHKUM BAYNA-HUMA: IBN RUSHD AL-JADD (CORDOBA, D. 1126 CE) AND THE RESTRICTION ON DHIMMIS SHOPPING FOR ISLAMIC JUDICIAL FORUMS IN AL-ANDALUS[1]

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The practice of shopping for Islamic judicial forums – i. e. voluntary resort to Islamic justice by the Jewish and Christian tributaries of a Muslim ruler – is well documented for all the pre-modern period and beyond, East and West. Yet the frequency of forum shopping is in sharp contrast with the limited references to the practice in Islamic legal sources, Muslim jurists' point of view being the position from which we have chosen to start our contribution to the subject. The local context mentioned in the title is given by our focusing on a series of jurists from al-Andalus:the term is not used in a restrictive way since either the frequency of contacts at all levels – military, political economic, cultural…– or the fact of having formed a political unity with the Far and central Maghrib for a crucial part of its history render our conclusions extendable and applicable to both sides of the Straits of Gibraltar, when not based on or reinforced by doctrines and practices documented out of the local and temporal limits of the historiographical concept of al-Andalus. As the conditions under which dhimmis were allowed to live in Islamic territory were an integral part of Islamic legal doctrine, the information relevant to study forum shopping in the corresponding law manuals is normally disseminated throughout different chapters, sections and subsections, in the same way as rules concerning groups with differentiated rights vis à vis the free male Muslim, e.g. women, minors or slaves are not the object of separate treatment. And though significant advances have already been made to expand our knowledge about the legal status of dhimmis in general and forum shopping in particular,[2] we are still at the stage of gathering together and exploiting new evidence.

1 This paper collects results from the research project "In the footsteps of Abu `Ali al-Sadafi : tradition and devotion in al-Andalus and the Maghrib (XIth to XIIIth centuries C.E.)" funded by the Spanish Ministry of Economy and Competitiveness (Ref. FFI2013-43172-P).

2 See Antoine Fattal, *Le Statut Légal des non-Musulman en pays d'Islam* (1958); Haim Zafrani, "Judaïsme d'occident musulman. Les relations judéo-musulmanes dans la littérature juridique. Le cas particulier du

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 395–412

 DOI 10.1484/M.RELMIN-EB.5.111613

Dhimmis' Forum Shopping in al-Andalus: Sources

This paper explores the issue of dhimmis forum shopping in the specific context of al-Andalus, drawing on seven Arabic texts addressing the questions of whether or not and under what conditions Muslim judges are competent to impart justice to Christians and Jews when no Muslim is involved. They come from a period stretching between the tenth and the twelfth century CE and they all originated in Cordoba. They consist of three *fatwas,* a legal question from Ibn Hazm's compilation of Zahiri legal doctrine plus three questions from Ibn Rushd al-Jadd's *al-Bayan wa-l-tahsil*, the latter work being a commentary to an earlier compilation of Maliki doctrine, namely al-Utbi's *Mustakhraja*.[3] Six texts thus reflect the opinions of Maliki jurists, while the seventh represents the opposing Zahiri position. The texts do not result from a selection but make up the total yielded by a preliminary and not exhaustive search in a number of authoritative repositories of Andalusi jurisprudential activity.[4] So, their value does not rely on their being quantitatively representative or even on their being unknown to other scholars

recours des tributaires juifs à la justice musulmane et aux autorités représentatives de l'État souverain", *Studia Islamica*, 64 (1986), 125-149; Matthias B. Lehmann, "Islamic Legal Consultation and the Jewish-Muslim 'Convivencia'. Al Wansharisi's Fatwa Collection as a source for Jewish Social History in al-Andalus and the Maghrib", *Jewish Studies Quarterly*, 6 (1999), 25-54 (48-54); Najwa al-Qattan, "Dhimmis in the Muslim court: legal autonomy and religious discrimination", *International Journal of Middle Eastern Studies*, 31 (1999), 429-444; Gideon Libson, "Legal Autonomy and the Recourse to Legal Proceedings by Protected people, according to Muslim Sources during the Gaonic Period", in *The Intertwined World of Islam: Essays in Memory of Hava Lazarus-Yafeh*, ed. by Nahem Man (2002), 334-392 [In Hebrew]; Libson, *Jewish and Islamic Law. A Comparative Study of Custom During the Geonic Period* (2003), 101-112; Ron Shaham, "Shopping for legal forums: Christians and family law in modern Egypt", in *Dispensing Justice in Islam: Qadis and their Judgments*, ed. by Muhammad Kh. Masud, Rudolph Peters and David Powers (2006), 451-469; Uriel I. Simonsohn, *A common justice: the legal allegiances of Christians and Jews under early Islam* (2011); Christian Müller, "Non-Muslims as part of Islamic law: Juridical casuistry in a fifth/eleventh-century law manual", in *The Legal status of dimmi-s in the Islamic West (second/eighth-ninth/fifteenth centuries)*, ed. by John Tolan and Maribel Fierro (2013), 21-64; Elise Voguet, "Les communautés juives du Maghreb central à la lumière des *fatwa-s* malikites de la fin du Moyen Âge", in Fierro and Tolan, 301-303; Jessica M. Marglin, "Jews in *Shari'a* Courts: A Family Dispute from the Cairo Geniza", in *Jews, Christians and Muslims in Medieval and Early Modern Times. A Festschrift in Honor of Mark R. Cohen,* ed. by Arnold E. Franklin, Roxani Eleni Margariti, Marina Rustow and Uriel Simonsohn (2014), 207-225.

3 See Aḥmad al-Wansharisi, *al-Mi'yar al-mu'rib wa-l-jami' al-mughrib 'an fatawa 'ulama' Ifriqiya wa-l-Andalus wa-l-Maghrib*, ed. by Muhammad Hajji and others, 13 vols (1981), VII, 438-439; X, 56 and 128-130; Abu l-Walid Muhammad b. Ahmad Ibn Rushd al-Jadd, *al-Bayan wa-l-tahsil wa-l-sharh wa-l-tawjih wa-l-ta'lil fi masa'il al-Mustakhraja*, ed. Muhammad Hajji (1984), IV, 186-187; IX, 293-294; X, 21-23; Abu Muhammad `Ali b. Ahmad Ibn Hazm, *al-Muhallà*, ed. Ahmad Muhammadsha Kara, 11 vols (1928-1934), IX, 425-426, question (*mas'ala*) 1795.

4 The search has been restricted to the topic of dhimmis' voluntary resort to Islamic justice. Texts dealing with mixed litigations have been excluded because, in such cases, Islamic justice is not optional but imperative.

concerned with the study of forum shopping.[5] However, their joint analysis enables a reconstruction of different currents concerning Muslim jurists' approach to the phenomenon of forum shopping, identifies points of friction between legal doctrine and actual legal practice, and compels us to reflect on the role played by a given historical context in shaping a certain individual's legal discourse.

Questions

The pieces of evidence presented in this paper have little to say about the reaction of Jewish and Christian religious elites towards their coreligionists shopping for Islamic judicial forums on which so much light has been shed recently by Uriel Simonsohn's seminal *A common justice: the legal allegiances of Christians and Jews under early Islam*.[6] Rather they describe how certain Maliki jurists of al-Andalus tried to preserve their influence and to safeguard the unity and cohesion of the Muslim community by means of restricting social interaction in a public sphere constituted by judicial venues, among other physical and intangible spaces. Barring Christians and Jews from the Muslim judicial arena, without contravening the conditions of their covenant, was part of a larger trend towards a harsher Islamic legal discourse concerning the dhimmis.[7] In the Islamic west, the tendency emphasizing the need to enforce the rules marking inter-communal

5 A first draft of the research collected in this article – including Ibn Hazm's distinctive doctrine on forum shopping to which, to the best of my knowledge, nobody else had paid attention thus far – was presented on 29 March 2013 at a session of the seminar "Minorités religieuses en méditerranée occidentale (XII^{e}-XIV^{e} siècles): Maghreb, Italie, Péninsule Iberique, Provence" organized within the frame of the RELMIN ERC Project and to which I was kindly invited by its principal researcher, John Tolan (Nantes, Maison des Sciences de l'Homme Ange Guépin). A second draft was presented at the international conference "Law and Religious Minorities in MedievalSocieties: between theory and praxis" organized by Ana Echevarría (UNED Madrid), Juan Pedro Monferrer (University of Cordoba) and John Tolan (RELMIN, University of Nantes) – whom I also wish to thank for their generosity – and held in Cordoba, Casa Árabe, April 28-30, 2014. A third draft was presented at the RELMIN final conference held in Nantes, Maison de Sciences de l'Homme Ange Guépin October 20-22, 2014. Studies where the texts examined in this paper have already been used include the following: Lehmann, 48-54; Ana Fernández Félix, *Cuestiones legales del Islam temprano: la "ʿUtbiyya" y el proceso de formación de la sociedad islámica andalusí* (2003); Ana Echevarría, "Los marcos legales de la islamización: el procedimiento judicial entre cristianos arabizados y mozárabes", *Studia historica. Historia medieval*, 27 (2009), 37-52; Cyrille Aillet, *Les mozarabes: christianisme, islamisation et arabisation en Péninsule Ibérique (IX^{e}-XII^{e} siècle)* (2010); Farid Bouchiba and Ahmed Oulddali, "Non-musulmans et *dhimmis* dans le *Kitab al-Muhalla* d'Ibn Hazm al-zahiri (m. 456/1064)", in *Sujet, Fidèle, Citoyen: Espace Européen (XI^{e} XXI^{e} siècles)*, ed. By Dominique Avon (2014), 41-69.

6 See above, note 1.

7 See Claude Cahen, "Dhimma", in *Encyclopaedia of Islam, second edition*, ed. by Bernard Lewis, Charles Pellat and Joseph Schacht. Assisted by John Burton-Page, C. Dumont and V. L. Ménage (1965), II, 227a-230b; Tolan, "Concluding remarks", in Fierro and Tolan, 368. Cf. Lehmann, 54, who restricts the deterioration of the situation of Western dhimmis between the tenth and the fifteenth century CE to the realm of legal practice, "though not in doctrine".

segregation and legal inferiority can be documented from the second half of the eleventh century CE onwards, especially after the loss of the city of Barbastro to a Christian army in 1065.[8] In our texts, that tendency, expressed in terms of a strong reluctance to have Jews and Christians tried by a Muslim and ensuing from a strict implementation of the principles of Islamic legal methodology, is best represented by Ibn Rushd al-Jadd (d. 1126 CE), the most prominent Maliki jurist of his time.[9] At the other side of the doctrinal spectrum, the Malikis' concern for internal unity and coherence was shared by the Zahiri Ibn Hazm (d. 1064 CE).[10] Yet the latter proceeded with a completely opposite scheme in mind.

Ibn Rushd's position marks a turning point in the development of Maliki legal doctrine concerning dhimmis' legal autonomy, namely a shift from permission to administer their laws independently, to the obligation to do so. Ibn Hazm, on the contrary, advocates an integral conception of Islamic justice that embraces dhimmis and Muslims alike while keeping their inequality of rights.

Moreover, our texts show that the relevant Maliki positions were far from being monolithic and do not always reflect actual legal practice but personal views about an "ideal" for the most part incompatible with prevalent socio-economic relations and balances. They also provide some insight into the litigants' motives to have recourse to Islamic authorities and so disobey the injunction not to trespass communal limits unnecessarily.

Jurisdiction: Is the Muslim Judge Competent to Impart Justice to Christians and Jews, and under What Circumstances?

The question of the nature, obligatory or optional, of Islamic jurisdiction over issues voluntarily submitted to it by the dhimmis is central to discussions about judicial pluralism and forum shopping in pre-modern Islamic polities.[11] However, our texts display a concern for a slightly different question, namely whether Islamic law is competent to deal with legal issues concerning the dhimmis irrespective of the Muslim judge's readiness to intervene.

Two additional approaches were essayed in order to restrict dhimmis' access to Islamic justice. The first consisted in stressing that even when both dhimmi litigants agreed to resort to Islamic justice, entitlement to handle their cases required

8 See Fierro, "La religión", in *Los reinos de taifas. Al-Andalus en el siglo XI*, ed. by María Jesús Viguera (1994), VIII-1, 455-492.

9 An overview of his life and works in Delfina Serrano Ruano, "Ibn Rushd al-Jadd", in *Islamic Legal Thought. A Compendium of Muslim Jurists,* ed. by Oussama Arabi, David Powers and Susan Spectorsky (2013), 295-322.

10 See Camilla Adang, Maribel Fierro and Sabine Schmidtke, *Ibn Hazm of Cordoba. The Life and Works of a Controversial Thinker* (2013).

11 See Fattal, 353; Simonsohn, 6; Müller, 40.

the permission of their confessional judges as well. Restrictions also affected the reverse situation, namely when it was the dhimmi judge, e.g. a bishop, who refused to settle a dispute held by two coreligionists and sent them to the Muslim judge, something he was not entitled to do if the parties did not agree to it. With the second approach, Muslim judges were reminded of their freedom to choose not to intervene even when all the other conditions had been met.

Mixed Lawsuits

Islamic jurisdiction is competent to interfere in dhimmis' legal issues whenever a Muslim is involved. Yet the limits were sometimes difficult to determine as illustrated by a case presented to Ibn `Attab (964-1069). The case concerned a property endowed by two Jews in favour of their nephew (*habbasa-ha `alay-hi `amma-hu*) and sold subsequently to a Muslim man. According to Ibn `Attab, the Muslim *qadi* is not entitled to intervene in disputes arising out of the constitution or preservation of endowments established by dhimmis (*ahbas ahl al-dhimma*), all the more so when these endowments are different in nature from Islamic pious foundations (*ahbas al-muslimin*). This means, among other things, that the former can be reversed at any moment. The Jewish beneficiary of the property endowed by his uncles and subsequently sold to a Muslim cannot demand to have his case adjudicated by a Muslim even if he is in possession of a document drafted according to Islamic law standards attesting to the constitution of the endowment.[12]

Is the Muslim Judge Competent when one of the Dhimmi Litigants Does Not Agree to Submit to His Authority?

Concerning the question of the reluctant party, several tenth century Cordoban jurists were consulted about the case of a Jewish woman who sued a Jewish man

12 See al-Wansharisi, *Mi`yar*, VII, 438-439. See an earlier and longer version of the fatwà in Ibn Sahl (d. 486/1093), *Diwan al-ahkam al-kubrà: al-Nawazil wa-l-a`lam li-Ibn Sahl*, ed. Rashid al-Nu`aymi, 2 vols (1997), II, 1117-1119; Ibn Sahl, *al-Ahkam al-kubrà*, partial ed. by Muhammad `Abd al-Wahhab Khallaf, *Watha'iq fi ahkam qada' ahl al-dhimma fi l-Andalus* (1980), 26-28 and 65-68. The case is discussed by Alejandro García Sanjuán in his *Till God inherits the earth: Islamic pious endowments in al-Andalus (9-15th centuries)* (2007), 93. Endowments are, together with inheritances, the areas most likely to put the jurisdictional limits between Islamic, Rabbinic and Ecclesiastical laws at stake. See Ibn Rushd al-Jadd, *Bayan*, IX, 375-377 and Serrano Ruano, "Dos fetuas sobre la expulsion de mozárabes al Magreb en 1126", *Anaquel de Estudios Arabes* 2 (1991), 163-182 online at http://digital.csic.es/bitstream/10261/9036/9031/Dos%20fetuas%20sobre%20la%20expulsi%c3%b3n%20de%20moz%c3%a1rabes.pdf; García Sanjuán, *Till God inherits the earth*, 90-94; Lehmann, 48-50; Echevarría, "Los marcos legales de la islamización", 48, n. 38; forthcoming Johannes Pahlitzsch, "The Development of Christian Waqf in the Early and Classical Islamic Period (7th to 12th C.)", in *Les fondations pieuses waqf-habous chez les chrétiens et les juifs en terre d'Islam*, ed. by R. Deguilhem and R. Saliba. I thank the author for allowing me to consult this paper prior to publication.

before their judges. The man, who acted on behalf of his father, appeared before the Muslim judge claiming that he had a copy from the register of Cordoba's chief judge [concerning a former judgment in his favour] as well as several legal documents whose contents had been verified by Muslim witnesses. He also established that there was enmity between the Jewish judges and jurists, on the one hand, and his father on the other. The woman, for her part, claimed that her right to the disputed object had been established before the Jewish judges on the grounds of Jewish witnesses' testimony and that, were the case to be decided by the Muslim judge, her right would be cancelled.

All the muftis except Ibn `Abd Rabbihi (d. *c.* 966/7) and Ibn al-Harith (d. 971), agreed that either fact, i. e. the case having been previously decided by a Muslim judge or the possession of Arabic documents verified by Muslim witnesses, entitled the man to resort to the Muslim judge. Two muftis added enmity to the list of valid arguments to have the case submitted to Islamic jurisdiction, whereas Ibn Maysur (d. 1013) proposed a middle solution: He endorsed Ibn `Abd Rabbihi's opinion and thus awarded the Jewish woman the right to pursue her claim before the Jewish judges, sparing her the pain of appearing before Muslim authorities against her will, unless her claim concerned murder and non-intentional killing since, in that case, Muslim authorities are obliged to intervene to the exclusion of any other jurisdiction "for preventing the shedding of their blood takes the place of the protection granted to them by Islam (*li-anna dima'a-hum ḥuqinat bi-makan dhimmati-him min al-Islam*)". On the other hand, he gave the man a free hand to use the Islamic testimonies he had in his favour before a Muslim tribunal in order to cancel the result of her action.[13] A similar argument stressing the compelling force of written testimonies issued by upright Muslim witnesses was made by Ibn `Attab when consulted about a different case also involving a group of Jews.[14]

Dhimmis Rejected by Their Own Judicial Authorities

According to the Ifriqiyan Maliki jurist Sahnun b. Sa`id al-Tanukhi (Qayrawan d. 240/854-855) a bishop who refuses (*abà*) to settle a litigation between two coreligionists and sends them to the Muslim judge, does an injustice if the parties do not agree to it. The bishop is not entitled to do so, nor is it fitting for the Muslim judge to adjudicate the case. Conversely, if the litigants were ready to appear before the Muslim judge, the bishop would not be allowed to block their decision, since Christians can submit themselves to Islamic jurisdiction and have a right not to be judged by the bishop.

13 See al-Wansharisi, *Mi 'yar*, X, 128-130.
14 See al-Wansharisi, *Mi 'yar*, X, 56.

This opinion is transmitted in al-`Utbi's (d. 255/869) *Mustakhraja* and commented by Ibn Rushd al-Jadd in his *al-Bayan wa-l-tahsil*, which gives him the opportunity to present a comprehensive and detailed treatment of forum shopping and conflict between Islamic and dhimmi jurisdictions according to the Maliki school of law. At the same time, he stresses the validity of the established limitations of dhimmis' right to shop for Islamic judicial forums. With this plan in mind, Ibn Rushd rephrases the case considered by Sahnun, shifting the stress on the unanimity regarding the right to appear before a Muslim judge when both dhimmi litigants agree to it, towards unanimity concerning the lack of competence of a Muslim judge when there is a disagreement either between the bishop and the Christian litigants or between the litigants themselves. Ibn Rushd states that even when both dhimmi litigants agree to resort to Islamic justice, entitlement to handle their cases requires the permission of their confessional judges as well.[15] This is so, he adds, in matters concerning sales, repudiation, manumission and statutory sanctions.

Ibn Rushd seems concerned that dhimmis' capacity to opt for Islamic justice and reject their own confessional authorities might be understood as a means to circumvent justice, all the more so when their Muslim counterparts were not entitled to give up their judges. This appears to be the reason why he resumes the commentary with the observation that the "injustices" dhimmis commit against each other must be tried either by a Muslim judge when the necessary preconditions are met, or by their own judges, regardless of whether they agree to it or not, and whether it is the parties who request that the judge hear their case or the judge who takes the initiative to intervene.[16]

Ibn Rushd's generic reference to "injustices" (*ma yataẓālamūn bi-hi*) is specified in another passage of his *Bayan* where the term is placed in connection with Ibn al-Qasim's (Egypt d. 191/806) opinion concerning Islamic jurisdiction over non-Muslims in the fields of property, sales, pledges (*ruhun*), usurpation (*ghasb*), murder and homicide (*qatl*), and bodily harm (*jirah*). These "injustices" are mentioned in opposition to other legal areas in which Islamic law is not competent, such as statutory crimes (*hudud*) when committed by dhimmis, manumission,

15 This position seems to go against the prevalent school opinion mentioned by the Maliki Ibn `Abd al-Barr (al-Andalus d. 463/1071) at least as far as sales are concerned. According to Ibn `Abd al-Barr when both non-Muslim litigants agree to seek justice with a Muslim judge, it is better to pass judgment on them than returning the case to their confessional judge. See Müller, 39. Though he does not mention him explicitly, Ibn Rushd's opinion might well have drawn on Ibn Abi Zayd al-Qayrawani's who stressed the need to secure the agreement of both the confessional judge and the litigants for a Muslim judge to impart justice to non-Muslims. See Notice no. 252603, projet RELMIN, "Le statut légal des minorités religieuses dans l'espace euro-méditerranéen (V^{e}-XV^{e}siècle)". Edition électronique Telma, IRHT, Institut de Recherche et d'Histoire des Textes – Orléans http://www.cn-telma.fr/relmin/extrait252603/. Also see the case mentioned by Echevarría in "Los marcos legales de la islamización", 48.

16 See Ibn Rushd al-Jadd, *Bayan*, IX, 293-294 and 375-377.

repudiation, usury (*bay ʿ al-riba*), marriage and other similar subjects[17] whereby a distinction is made between statutory crimes (*hudud*) on the one hand, and other – private – crimes and torts like usurpation, unfair behaviour concerning alien property of a kind different from theft (*sariqa*), bodily harm, and murder and homicide on the other. In the case of the latter type of crime, Muslim authorities must step in even if the involved parties do not request them to do so.[18] As Ibn Rushd puts it, all this is on account of the contract of protection granted to the dhimmis according to which they have a right to be protected in exchange for the payment of the poll tax (*li-anna-hu inna-ma akhdh al-jizya min-hum ʿalà dhalik fa-huwa min al-wafa' bi-l- ʿahd la-hum*).[19] The legal autonomy awarded to the dhimmis must therefore guarantee that everybody receives his/her share of a justice unconcerned about issues like the charging of interest or domestic abuse.[20]

Theft and calumny were an exception to the rule establishing the optional character of Islamic jurisdiction over statutory crimes committed by the dhimmis.[21] However, this fact is not mentioned by Ibn Rushd. After having declared that Islamic jurisdiction in matters of *hudud* is optional, he simply mentions that three different opinions apply to the case, just hinting his preference for the third option. According to the first opinion, the Muslim judge is obliged to adjudicate the case independently of the parties' wishes; according to a second opinion he is not obliged to deal with the case unless the parties voluntarily submit to his jurisdiction. The third is Malik's opinion, *ergo*, the one favoured by Ibn Rushd since he does not mention the authors of the other two: the Muslim judge is not obliged to intervene even if the parties ask him to do so. The latter opinion is in line with Ibn ʿAbd al-Barr's at least as far as unlawful intercourse

17 See Ibn Rushd al-Jadd, *Bayan*, IV, 186-187.

18 That in practice blood crimes are dealt with by Islamic justice does not necessarily preclude the possibility that Rabbinic and Ecclesiastical authorities are occasionally given jurisdiction over murder and homicide committed by their coreligionists. This is all the more likely when Islamic law treats murder and homicide as private claims that, contrary to *hudud*, are prosecuted only at the request of the victim or his/her relatives. For indications of Andalusi bishops' capacity to deal with the repression of blood crimes and torts, and their eventual misuse of this capacity, see Echevarría, "La jurisdicción eclesiástica mozárabe a través de la Colección Canónica Hispana", in *Von Mozarabern zu Mozarabismen. Zur Vielfalt kultureller Ordnungen auf der mittelaterlichen Iberischen Halbinsel*, ed. by Matthias Maser, Klaus Herbers, Michele C. Ferrari and Hartmut Bobzin (2014), 141, 142 and 143.

19 See Ibn Rushd al-Jadd, *Bayan*, IV, 187. On the considerations involved by the contract of protection awarded to the dhimmis according to Ibn ʿAbd al-Barr see Müller, 37-38. On granting justice to dhimmis as a means to enhance caliphal legitimacy see Marina Rustow, "The legal status of dimmi-s in the Fatimid East: A view from the palace in Cairo", in Fierro and Tolan, 307-332 (309). For an actual sample in which Islamic law is claimed to protect a dhimmi against the usurpation committed by a "powerful" person see Lehmann, 49.

20 Islamic tribunals' lack of competence concerning dhimmis' family issues is endorsed by Qasim al-ʿUqbani (Tlemcen, d. 854/1450) in the specific event of domestic abuse. See Voguet, 302-303.

21 See below.

is concerned.[22] However and inasmuch as Ibn Rushd's opinion refers to statutory sanctions generically, it seems to go against actual legal practice, as will be shown below.

Commenting further on Ibn al-Qasim's opinion, Ibn Rushd hints that contrary to what might be inferred from Sahnun's *Mudawwana*, once the Muslim judge agrees to adjudicate a case presented to him by the dhimmis, he is obliged to follow Islamic law exclusively. The capacity to opt mentioned in a series of Coran verses relevant to this contingency refers to his decision to accept or reject the case, not to the legal source from which to draw his judgment.[23]

Concerning matters in which the Muslim judge is competent only at the request of the parties (such as sales, marriage, interpersonal transactions and other related issues), two equally valid though divergent opinions apply. According to the first, when two dhimmis appear before a Muslim judge, he is obliged to adjudicate their case if both parties agree to submit to his jurisdiction. Now it is not surprising to see Ibn Rushd expressing his preference for the second opinion by specifying that whenever dhimmis request the Muslim judge to adjudicate their case, the latter may opt for accepting or refusing on the grounds of Coran V, 42: "If they come to you, judge them or withdraw", and that this was Malik's opinion.[24]

Neither Ibn `Abd al-Barr nor Ibn Rushd explain why a bishop would refuse to impart justice to his coreligionists or turn to a Muslim judge concerning a case

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22 The divergence in both jurists' formulation of the relevant opinion is noteworthy, however. According to Ibn `Abd al-Barr "If they chose that 'our' [Muslim] judge should adjudicate then he rules according to Islam, if he wishes" (See Müller, 41) whereby optionality and the need to apply Islamic law are stressed. Ibn Rushd for his part places the emphasis on the absence of obligation: "he [i.e. the Muslim judge] is not obliged to that [i.e. to adjudicate matters fitting the Islamic definition of statutory crimes according to Islamic law] even if they [i.e. the non-Muslims] submit voluntarily to his jurisdiction".

23 See Ibn Rushd al-Jadd, *Bayan*, IV, 187. Ibn Rushd's stress on the need to follow Islamic law exclusively may have also been motivated by Malik b. Anas' being attributed the opinion that the dhimmis should be judged on the basis of their own law, not on that of the presiding judge. See Marglin, 210, n. 17, quoting Gideon Libson. Cf. Fernández Félix, 383 and 489 (quoting *Bayan*, III, 5-7). Also see Echevarría, "Los marcos legales de la islamización", 45-46. Whenever a Muslim is not the natural judge of the litigants, the Arabic *hkm* may be rendered as jurisdiction, law, justice or judgment (*hukm*) rather than as arbiter (*hakam*). Consequently, the verb *hakkama* may appear in the sense of asking a Muslim to adjudicate (i.e. to perform as *qadi*) rather than asking someone to arbitrate a conflict. *Tahkim*, then, may not refer to the arbitration award but to dhimmis voluntarily addressing a Muslim judge for him to pass formal judgment (*qada'*) on their case. It is true that voluntary resort to Islamic justice on the part of the dhimmis shares many characteristics of the Islamic institution of arbitration. A *hadd* punishment, however, cannot be established by an arbiter. See below. Also see Serrano Ruano, "Bringing arbitration (*taḥkīm*) and conciliation (*ṣulḥ*) under the qāḍī's purview in Mālikī al-Andalus (10th to 12th centuries C.E.)" forthcoming in *Revue du Monde Musulman et de la Méditerranée* (2016).

24 See Ibn Rushd al-Jadd, *Bayan*, IX, 293-294. *The Qur'an*, English translation by M. A. S. Abdel Haleem. Parallel Arabic Text (New York: Oxford University Press, 2010 second ed.).

presented to him by Christian litigants.[25] Sahnun's petitioner was not concerned with enforcing a certain ruling obtained through applying ecclesiastical law but with passing judgment according to this same law. The documented limitations of dhimmi courts to enforce certain rulings, and the need to transfer them to the dominant Muslim judicial apparatus,[26] do not then suffice to explain the problem at hand. Though our text seems to refer to two men, the possibility that their case is connected with the custom practised by bishops and ecclesiastical judges of refusing to settle marital arrangements, disputes and divorces when a marriage contract has been drawn up outside the church is not remote.[27] Be that as it may, Ibn Rushd's emphasis on the parties' joint agreement reflects a court practice in which that requirement was not systematically taken into account.[28]

Limitations and Disadvantages of Submitting Voluntarily to Islamic Jurisdiction

From among the many questions from `Isà b. Dinar (d. Cordoba 212/827) to Ibn al-Qasim included in al-`Utbi's *Mustakhraja*, Ibn Rushd comments on one concerning two Christians who disputed over a certain amount of money and took their case before a Muslim judge. Ibn al-Qasim states categorically that if only Christian witnesses can be presented by the parties, the judge cannot issue a formal judgment. All he can do is to help them reach an agreement. Their case is similar to that of Muslim litigants who can only rely on disproved witnesses. `Isà introduces a variable here, namely that the parties agree to accept each other's itnesses, notwithstanding their not being upright. In that case, Ibn al-Qasim specifies, neither party is allowed to withdraw after the witnesses have given testimony.

As it stands, the text implies that non-Muslim witnesses can be equated with disproved Muslim witnesses and that, under certain circumstances, the *qadi* may accept them and issue judgment based on their testimonies. This possibility is rejected by Ibn Rushd, on the grounds that when parties agree to accept each other's witnesses despite the fact that they are not upright, risk (*gharar*) is involved. In his view, it is not permissible for the *qadi* to issue judgment on the basis of these testimonies since this goes against God's command to use witnesses

25 This seems to have been a fairly common practice, however. See Simonsohn, 7 stating that dhimmi confessional leaders frequently requested the intervention of Muslim authorities at moments of convenience. In his *Jewish and Islamic Law*, 102 Gideon Libson points out that "there remained certain areas ... in which legal necessity prompted" Jewish judges' recourse to non-Jewish courts. "Such were the execution of judgments issued in Jewish courts, the institution of legal proceedings against recalcitrant litigants, and the hearing of testimony against them. In such cases it was in fact incumbent upon the Jewish judges to ensure that the case would be referred to the non-Jewish court".

26 See Simonsohn, 148, 172, 176-178.

27 As in the cases mentioned by Simonsohn, 150-153, 163.

28 For examples see Simonsohn, 6, 165, 173 and 180 and Libson, *Jewish and Islamic Law*, 103, 110. For a case in which the requirement was respected see Voguet, 302-303.

whose testimony is acceptable. However, if they reach a settlement on the basis of disproved witnesses, with or without advance knowledge of the exact content of their testimonies, the rules pertaining to arbitration apply and, accordingly, the parties cannot withdraw from the process once the witnesses have given testimony, either individually or jointly.[29]

However disadvantageous for dhimmis the theoretical impossibility of obtaining a formal judgment (*qada'*) on the grounds of non-Muslim witnesses may seem, the remaining option of conciliation (*sulh*) and arbitration (*tahkim*) through the agency of the *qadi* was not a minor matter, for it left open an opportunity to obtain partial recognition of a right not contemplated by ecclesiastical or rabbinic law.[30] In this specific respect, and as long as we may assume that most legal disputes among Muslims themselves ended up with an agreement in which each litigant gave up part of his/her initial claim for the sake of a common interest, i. e. sparing time and money, dhimmi and Muslim litigants were put on an equal footing. Be that as it may, Ibn Rushd's insistence on the need to respect the rule contrary to adjudication on the basis of dhimmis' testimony points, once again, to a reality in which exceptions to the rule, while not widespread, could occasionally occur.[31]

Motivations and Expectations

Apart from overcoming the procedural restrictions imposed upon them by Islamic law,[32] dhimmis wanting to try their chance with Islamic justice risked getting enmeshed between the condemnation of their religious elites and the

29 See Ibn Rushd al-Jadd, *Bayan*, X, 21-23. See other instances of rejection of dhimmi witnesses in Echevarría, "Los marcos legales de la islamización", 48 and Simonsohn, 191.

30 As shown in a family dispute analysed by Jessica Marglin dealing with a Cairene Jewish man who sued his father before the *qadi* and managed to have him agree to deliver to him half of his mother's property, despite the fact that, according to Jewish law, the son was not entitled to inherit from his mother. The author does not appear to be aware that the defendant's decision to accept part of his son's claim might well not have been reached on the grounds of a formal ruling, but on those of conciliation or arbitration due to a lack of Muslim witnesses. Ibn Rushd al-Jadd's remark on the limitations of the *qadi* when no Muslim witnesses can be produced by the dhimmi parties makes it possible to see Jessica Marglin's case in a new light.

31 As in the cases reported by Müller, 60-61; Simonsohn, 192-193 and Marglin, 210 and n. 20. Müller observes that the prohibition did not stop the oath of a dhimmi being accepted to complete the testimony of a single male upright Muslim (*al-yamin ma ' al-shahid*) in those legal areas where this kind of proof (i.e. witness plus the oath of the party) was admitted, e.g. disputes on property rights. Also (ibid.), the dhimmi could acknowledge obligations, *iqrar* or recognition being another form of proof. Apart from that, dhimmis could be summoned to court to perform as experts. See Oulddali, "Recevabilité du témoignage du dimmi d'après les juristes malikites d'Afrique du Nord", in Fierro and Tolan, 275-292.

32 The inequality of rights between Muslims and dhimmis did not apply in the case of *mazalim* justice, i.e. that exerted directly by the ruler and his agents, which could occasionally overlap with that exerted by confessional judges. See Rustow, "The legal status of dimmi-s in the Fatimid East...".

reluctance of Muslim jurists. Opting for Islamic justice, then, must have offered enough prospects of success to be worth the trouble.[33]

From the array of motivations that might have moved Andalusi dhimmis to seek Muslim judicial authorities, two come clearly to the fore: first a possibility to escape the negative consequences of enmity between one of the parties and their own community's jurists and judges. Second, to exploit differences between Islamic and dhimmi internal laws that were deemed susceptible to turn in favour of the claimant's interest, namely the sacred and inalienable status of endowed properties even though Islamic law recognizes that status only to endowments established by a Muslim. The Jewish claimant of the above mentioned *fatwa* might have ignored this fact. Another possibility is that, being fully aware of the difference, he wielded the argument that the property had been sold to a Muslim to create confusion in the hope that either ignorance or divergence of opinions would incline the final decision in his favour.[34] Be that as it may, the claimant's resort to Islamic justice in an attempt to escape the detrimental consequences of the sale of a property previously bequeathed in his favour, speaks of rabbinic authorities with sufficient capacity to enforce sale contracts. At the same time, the muftis' answer points to a lack of interest in increasing the natural limitations affecting non-Muslim justice in a pluralistic legal order dominated by Muslims.

Though in mixed lawsuits, documents certified by both Muslim and dhimmi authorities were accepted,[35] in a system dominated by Muslims, having Muslim witnesses and Arabic documents was central to overcoming restrictions to the freedom of choice, putting dhimmis in a position of superiority with respect to their coreligionists, and thus could be used to pressure ecclesiastical and rabbinical authorities.

Ibn Hazm's Doctrine

Let us now go back to the eleventh century CE to deal with the Zahiri position represented by Ibn Hazm. Zahiri jurisprudence was never implemented by Islamic tribunals in al-Andalus. This fact did not prevent Ibn Hazm from exerting a certain degree of influence outside the boundaries of his legal school, for he

33 Talking about the Jews living under Muslim rule during the Geonic period, Gideon Libson identifies "the frequency of business transacted between members of different religions and the non-Jewish courts' authority to execute legal decisions" as factors encouraging them to turn to Muslim courts, apart from possibilities to obtain legal remedies not contemplated by Jewish law. See Libson, *Jewish and Islamic Law*, 101.

34 For cases in which similar strategies were successful see Simonsohn, 180.

35 Marglin's "Jews in *Shari'a* Courts" is extremely illustrative as to dhimmis' simultaneous resort to both Muslim and non-Muslim courts to have their legal deeds acknowledged, ratified and registered. Also see Voguet, 301-302.

was a great scholar and a persuasive polemicist. Moreover, his opinions enable a clarification, completion and expansion of aspects of doctrine and practice that are not dealt with by our Maliki jurists.

Ibn Hazm's position differs radically from that of the Malikis. In his view, Jews, Christians and Zoroastrians must compulsorily submit to Islamic jurisdiction, whether they want it or not. This position is in harmony with Zahirism's aspiration to universality, which does not admit competing or discordant versions of Islam[36], let alone, as we shall see, the implementation of non-Islamic laws in the *dar al-islam*. According to Ibn Hazm, it is not permitted to relegate dhimmis to their religious law nor to send them to their confessional judges. He argues on the grounds of precedents from the time of the well guided caliphs, Prophetic hadith and Coran, in this order, not on those of the pact of `Umar, for example, where no explicit mention is made of dhimmis' legal autonomy.[37] Like Abu Hanifa and some of his followers,[38] Ibn Hazm holds that Coran V 42 was abrogated by Coran V 49: "So judge between them according to what God has sent down. Do not follow their whims".[39] But in contrast to the Hanafis, Ibn Hazm admits no exception. The question of how the Muslim judge is to handle the inequality of rights between Muslims and dhimmis, most notably the status of dhimmi witnesses, is not addressed explicitly by the Zahiri. His doctrine concerning witness testimony specifies that a non-believer cannot testify for or against a Muslim, dhimmis counting here in the ranks of the *kuffar*. He also holds that only Muslims can perform as witnesses when the non-Muslim litigants adhere to different confessions. No objection is made, however, concerning dhimmis performing as witnesses of their coreligionists when both litigants belong to the same confession.

Ibn Hazm finds it contradictory that his Sunni counterparts – the Malikis among them – allow dhimmis a large degree of legal and judicial autonomy at the same time as they submit them to Sunni legal doctrine on the statutory sanctions for theft and calumny, in contrast to those established for fornication

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36 On the claim to universality in Ibn Hazm's Zahirism see Daniel Potthast, *Christen und Muslime im Andalus. Andalusische Christen und ihre Literatur nach religionspolemischen Texten des zehnten bis zwölften Jahrhunderts* (2013), 126.

37 On this specific trait of the pact of `Umar see Lehmann, 50. Among the arguments on which Ibn Hazm grounds his doctrine of the integrity of Islamic justice there is a tradition reporting an order against the Zoroastrians issued by the caliph `Umar b. al-Khattab but this is not part of the known versions of the famous Pact of `Umar, though it undeniably testifies to Ibn Hazm's respect for the authority of the second of the "well-guided" caliphs. This question is examined in more detail in my "Forum shopping in al-Andalus (II): Discussing Coran V, 42 and 49 (Ibn Ḥazm, Ibn Rushd al-Jadd, Abū Bakr Ibn al-'Arabī and al-Qurṭubī)", forthcoming in *Law and Religious Minorities in Medieval Societies: between theory and praxis ed. by Ana Echevarría, Juan Pedro Monferrer & John Tolan*, (RELMIN 9), Brepols Publishers.

38 See Fattal, 352-353.

39 English translation by M. A. S. Abdel Haleem.

and wine-drinking which were exclusive to Muslims. In doing so he qualifies Ibn Rushd's aforementioned statement on *hudud*, where no exception is made of those *hudud* which the other Sunni jurists considered the dhimmis were accountable for, i. e. theft and calumny. Rather than constituting a mental lapse, Ibn Rushd's silence might respond to an attempt to create the impression that the whole category of *hudud* was optional when committed by the dhimmis and, thereby, to further restrain dhimmis' chances of taking any advantage from Islamic law. Be that as it may, the fact that both jurists tripped over the same stone, though leading them to completely opposite conclusions – ranging from the dhimmis' total inclusion within the scope of the Islamic legal doctrine on *hudud* to their total exclusion from it–, is illustrative of the strange parallelisms that critical approaches to received wisdom may produce, however contradictory they may look when seen from the surface.

In addition, Ibn Hazm refers to "selling free persons" as a practice included in the category of statutory crimes (*hudud*) and for which both dhimmis and Muslims should be held accountable before Muslim judicial authorities. Clearly Ibn Hazm had perpetrators in mind but his statement implies that if a free dhimmi were sold like a slave, he should be protected against the crime in the same way as Muslims were.[40]

As if feeling the need to justify himself, he emphasizes the defensive purpose of his doctrine by stating that "as long as the jurisdiction of unbelief is in force we will not be the ones who subdue them but they will be the ones who subdue us" (*fa-idha ma turiku yahkumuna bi-kufri-him fa-mā aṣgharnā-hum bal hum aṣgharū-nā wa-mu ʿādh bi-Llāh min dhalika*). Yet Ibn Hazm's integral conception of Islamic law does not amount to a suppression of the dhimma covenant, a measure actually taken by the Almohads about a century later.[41] He admits that

40 I asume Ibn Hazm refered to the enslavement of free persons in the context of the war between Christians and Muslims in the Iberian Peninsula, and that he was mainly thinking about free Andalusi captives, Muslim and non-Muslim, enslaved by the Christian enemy. Indeed, this is the impression that can be drawn from his statement in *Muhallà*, VII, 306. However, in *Muhallà* IX, 8-9 he mentions the sale of a free Christian as the punishment corresponding to him for adultery according to ecclesiastical law – and castration as that corresponding to the priest incurring in the same misconduct (See Bouchiba and Oulddali, 67-68 n. 91, and 65 n. 86 respectively). He might have also targeted the practice of delivering free persons – especially children – to the creditor of their parents as a means to satisfy an unpaid debt. I am not aware of the existence of this practice in medieval Iberia, but its presence is documented for the Ottoman Mediterranean. See Eugenia Kermeli, "Children treated as commodity in Ottoman Crete", in *The Ottoman Empire: Myths, Realities and 'black Holes'. Contributions in Honor of Colin Imber*, ed. by Eugenia Kermeli and Oktay Özel (2006), 269-282.

41 Forcing all their Muslim, Christian and Jewish subjects to convert to the Almohad creed. However, this measure does not seem to have lasted very long and dhimmis did not disappear from Almohad al-Andalus and the Maghrib, at least as far as Jews were concerned. Two important jurists of the period, ʿAli b. Yahyà al-Jaziri (d. 585/1189) and Averroes (i.e. Abu l-Walid Muhammad b. Ahmad. b. Muhammad b. Ahmad b. Rushd also known as Ibn Rushd al-Hafid, thegrandson of our Ibn Rushd al-Jadd), carried

Christians and Jews should be allowed to keep their religious beliefs and practices and considers them exempt from Islamic rituals such as the payment of *zakat*, Ramadan fasting, *jihad* and prayer.[42]

In consistency with his doctrine, Ibn Hazm holds that the skills, moral virtues and technical qualifications to be met by the ideal candidate to qadiship must be suitable for judging dhimmis and Muslims alike.[43] Ibn Hazm's inclusion of the dhimmis within the exclusive purview of Islamic justice has other important consequences, such as his definition of a concept that bears the utmost relevance when establishing the punishment of unlawful intercourse: Malikis differentiate between the punishment of he or she who possesses *ihsan* (i. e. the *muhsan*), in the sense that the former is subject to stoning to death if found guilty of *zinà* while the non-*muhsan* is subject to a hundred lashes and one year banishment. For the Malikis, the condition of *ihsan* includes being free, Muslim, and having enjoyed sexual relationships within marriage or concubinage. For Ibn Hazm, however, the main defining trait of *ihsan* is the latter element, so that married dhimmis are also included in the category of *muhsan*. Yet by the same token, married dhimmis are protected against false accusations of *zinà* in the same way as are Muslims.[44]

Conclusions

In the particular case of forum shopping Andalusi jurists – Ibn Hazm and Ibn Rushd al-Jadd in particular- they seem to have been less concerned with the consolidation of Islamic legal and judicial institutions than with political fragmentation and ideological disintegration within the Muslim community itself. The hardening of Maliki discourse on the dhimmis in which we have framed Ibn Rushd's position on forum shopping appears to be motivated by the increasing

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on writing about the dhimmis as if nothing had changed in their legal status and their right to administer themselves according to their own laws. The case of Averroes is particularly significant, for he performed as chief qadi of Cordoba and Seville for the Almohads. See an illustrative example involving *zinà*, false accusation of *zinà* and imprecatory oath (*li 'an*) in al-Jaziri, *al-Maqsad al-mahmud fi talkhis al-'uqud (Proyecto plausible de compendio de fórmulas notariales)*, ed. by A. Ferreras (1998), 102 and Ibn Rushd (al-Hafid, i.e. Averroes), *The Distinguished Jurist's Primer. A Translation of Bidayat al-Mujtahid*, by Imran Ahsan Khan Nyazee reviewed by Muhammad Abdul Rauf (1996), II, 144.

42 Though he requires from them acknowledgment that Muhammad is God's messenger in order to receive permission to reside in Muslim land in exchange for the *jizya* tax. Also, and contrary to most Sunni jurists, he includes monks among those obliged to pay that tax. However, he considers dhimmi merchants who have to travel abroad as being exempt from the tithe (*'ushr*) imposed on them by the Malikis and the Hanafis. Also, he extends to dhimmis the prohibition against selling wine and pork, or lending money at interest (*riba*) . See Bouchiba and Oulddali, 60-62, 65.

43 See Ibn Hazm, *Muhallà*, IX, 425-426, question (*mas'ala*) 1795.

44 See Serrano Ruano, "Paternity and filiation according to the jurists of al-Andalus: legal doctrines on transgression of the Islamic social order", *Imago Temporis. Medium Aevum*, VII (2013), 65-66 drawing on Ibn Hazm, *Muhallà*, XI, 237, 265-268 and 276-281.

military pressure exerted by the Christians to the North of the Iberian Peninsula, but also by concerns comparable to those identified by Mark S. Wagner when analysing the case of a scholar from early twelfth century San`a in Yemen. Consulted as to whether a certain *qadi* had to intervene in a litigation involving the status of a synagogue, the scholar reacted stressing the boundaries between Muslims and dhimmis, and the latter's separation from the Islamic judicial system, an attitude deriving "less from an intention to maintain the autonomy of the Jewish courts than from the intention to maintain the divine nature of Islamic law" safe from the unbelief represented by Jewish law.[45] Such a need may become particularly pressing if the *qadi,* or the mufti, is a recent convert to Islam himself.[46]

Ibn Rushd's efforts to keep the dhimmis away from the Islamic judicial system did not lead to a limitation of the latter's legal autonomy. Yet, inas much as freedom of choice denotes a certain well being, a tendency to restrict dhimmis' capacity to shop for Muslim judicial forums is a tendency marking a certain deterioration. This is so at least at the doctrinal level, for we have no evidence that such views materialized in actual judicial practice. In fact, the arguments so carefully deployed by Ibn Rushd to convince his peers of the need to restrict dhimmis from appearing in Islamic judicial forums to the strict minimum reflect an audience of Muslim judges reluctant to let them go.

Be that as it may, and however reluctant Ibn Rushd's attitude towards forum shopping may have been, it cannot be considered to have culminated in the *fatwa* recommending deportation for a series of Christians from Granada and Seville that he issued shortly before his death.[47] First, because high treason constitutes sufficient grounds to consider the *dhimma* pact broken, and those Christians were suspected of having aided king Alfonso I of Aragon in an expedition against al-Andalus carried out in 1125, the unexpected success of which, for the Maliki jurists of the Almoravid period, constituted an emotional shock as severe as the seizure of Barbastro had been for their predecessors. Secondly, because, after the banishment was made effective following a decree by the Almoravid emir `Ali b. Yusuf one year later, the right to dispose of the properties the banished had left behind in al-Andalus was acknowledged to them by other muftis of the period, including

45 See Mark S. Wagner, "The Case of the Kuḥlānī Synagogue in Ṣan'ā', 1933-1944", in *The Convergence of Judaism and Islam. Religious, Scientific, and Cultural Dimensions*, ed. by Michael M. Laskier and Yaacov Lev (2011), 135-136.

46 There are sound reasons to believe that either Ibn Rushd al-Jadd or his immediate ancestors were recent converts to Islam, his rise as the most authoritative legal scholar of his time being closely related to the rule of the Almoravids. See Serrano Ruano, "Ibn Rushd al-Jadd", 297-298 and "Explicit cruelty, implicit compassion: Judaism, forced conversions and the genealogy of the Banu Rushd", *Journal of Medieval Iberian Studies*, 2/2 (2010), 217-233.

47 See Serrano Ruano, "Ibn Rushd al-Jadd", 307.

Qadi `Iyad and Ibn Ward, confiscation being recommended only in those cases where neither the owner nor his/her heirs could be identified.[48]

Legal discourse and policies on the legal status of the dhimmis and their right to administer themselves according to their own laws in the pre-modern Muslim West experienced an evolution that was unseen elsewhere until the colonial era: from respect of dhimmis' legal autonomy to its enforcement, from accommodating inter-communal mingling and interaction to emphasizing the rules marking the legal inferiority of the dhimmis, from imposing a total submission to Islamic legal jurisdiction to suppression of the dhimma as a whole. None of these tendencies prevailed long enough or became so widespread as to fully eradicate the others. Willingly or unwillingly, consciously or unconsciously, Maliki jurists such as Ibn Rushd made a remarkable contribution to the efforts of their Jewish and Christian counterparts to keep their clients within the limits of their respective confessional judiciaries,[49] out of a common concern to protect their own group interests. Interaction and collaboration across confessional boundaries were thus not restricted to the laymen's realm or to that of daily socio-economic relations, but extended to the world of the religious and the intellectual elites as well. Training, gender, profession and economic background may be more decisive in defining one's position and role in society than religious confession. Yet when the tables were turned and Muslim jurists had to confront the facts and deal with the situation of those Muslims who had become a minority under Christian rule in Iberia and the south of Italy, all these approaches, their disparate Maliki, Zahiri and Almohad origins notwithstanding, merged into a given sector within Malikism, represented by al-Wansharisi (d. 914/1508, the same figure who compiled some of the *fatwas* examined in this paper), whose reaction was not limited to condemning and abhorring their coreligionists' resort to Christian justice. Rather, permanence in Christian territory, whatever the risks for the lives and properties of those involved, was banned under threat of severe punishment and excommunication (*takfir*).[50]

48 See Serrano Ruano, "Dos fetuas sobre la expulsion de mozárabes al Magreb en 1126".

49 On which see Simonsohn, 210.

50 See Fierro, "La emigración en el islam: conceptos antiguos, nuevos problemas", *Awraq*, 12 (1991), 20-22; Jocelyn Hendrickson, *The Islamic Obligation to Emigrate: Al-Wansharīsī's Asnā al-Matājir Reconsidered* (Ph.D. Dissertation, 2009); Alan Verskin, *Oppressed in the Land? Fatwas on Muslims Living under Non-Muslim Rule from the Middle Ages to the Present* (2013).

HEBREW DOCUMENTS AND JUSTICE: FORGED QUITCLAIMS FROM MEDIEVAL ENGLAND

Judith Olszowy-Schlanger

EPHE/IRHT

The forging of legal documents was a widespread practice in the medieval world. When written evidence started to gain more weight than oral testimony by the later Middle Ages, forgery followed suit as a collateral effect of this emerging literacy-oriented bureaucratic mentality.[1] In thirteenth-century England, the forging of documents is also attested in the legal conflicts involving Christian and Jewish protagonists. Some unscrupulous parties, belonging to both faiths, had recourse to forgery to advance their case. Such occurrences raise questions on the legal definition of the forgery, on the ways it is unmasked and on the punishments it entails. Moreover, beyond obvious issues of crime and punishment, the forgeries to be studied here have important implications for Jewish-Christian relations. Indeed, they attest to the reliance on Hebrew documents in Christian courts, and also to a perverse and insufficient but nonetheless real knowledge of the other's legal practices, languages and customs.

The starting point of the present study are two documents bearing on transactions between Christian and Jewish individuals, documents whose diplomatic analysis reveals to be forgeries. They were both written in the thirteenth century to be used in court in order to pervert the course of justice, obtain illicit gain of cause, and harm the opponent party. I will first present these documents and show on what grounds I have concluded they were fakes. I will then examine the evidence of the law suits recorded in the Plea Rolls of the Exchequer of the Jews and in other sources to assess the extent of the practice of forging documents in Jewish-Christian affairs, as well as attitudes and means possessed by the courts (or defendants) to identify and sanction the documentary forgery.

1 See G. Constable, "Forgery and plagiarism in the Middle Ages", *Archiv für Diplomatik* 29 (1983), 1-41, esp. 2-3; Ch. Brooke, "Approaches to medieval forgeries", in *Medieval Church and Society. Collected Essays* (1971), 100-120. For an overview of various scholarly attitudes to the question of medieval "monastic" forgeries, ranging from apologists of such forgers to those who put the 'monastic' forgeries on par with selfish profit-motivated forgeries, see E. A. R. Brown, "Falsitas pia sive reprehensibilis: Medieval forgers and their intentions", in *Fälschungen im Mittelalter. Internationaler Kongress der Monumenta Germaniae Historica, München, 16.-19. September 1986* (1988), I, 101-119.

Religious Minorities in Christian, Jewish and Muslim Law (5th–15th centuries), ed. by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman & John Tolan (*RELMIN*, 8) pp. 413–438

 DOI 10.1484/M.RELMIN-EB.5.111614

As stated, the production and use of fakes in court implies a high status of literacy and the reliance on written records over oral testimonies. In medieval England, documents in Hebrew following Jewish formulae and applying Jewish means of authentication were recognized in both Jewish and Crown courts (under some conditions that varied with time) as binding legal proof. According to the charter of privileges for the Jews in England issued by King John in 1201, in litigations between Jews and Christians, the written documents presented by the Jews had the status of valid evidence (*Et si Iudeus de querela breve habuerit, breve suum erit ei testis*).[2] In the thirteenth century, the validity of Hebrew documents concerning transactions between Jewish and non-Jewish parties was restricted to documents issued, deposited and registered in an official archa, a wooden chest jointly supervised by Christian and Jewish clerks (chirographers) appointed by the Crown and locally represented by the sheriffs. This registries system was devised in the last years of the twelfth century during the administrative reorganization inspired by Archbishop and Chancellor Hubert Walter under Richard I, and was described by the contemporary chronicler Roger of Hoveden.[3] The archae functioned in the main towns of Jewish settlement until the expulsion of 1290. Throughout the thirteenth century, the local chests' officials were answerable to the central 'bureau for Jewish affairs', the Exchequer of the Jews, based at Westminster.[4] The system required all transactions to be accompanied by a document drawn up in three copies. Each party held one original copy, while the third authenticated copy was deposited in the archa (chest), within ten days of the transaction. Both forged documents examined below were produced and used in the context of such official registries for Christian-Jewish transactions.

The Documents

Among the corpus of some 258 extant parchment documents containing Hebrew script written in England in the twelfth and thirteenth centuries, two documents stand apart on palaeographical grounds, due to their unusual handwriting and appearence. These are Westminster Abbey Muniments 6738 (Fig. 1) and 6739

2 J. M. Rigg, *Select Pleas, Starrs and Other Records from the Rolls of the Exchequer of the Jews, AD 1220-1284* (1902), 1.

3 Ed. W. Stubbs, *Chronica Rogeri de Hoveden*, 4 vols (1868-1871), III (1870), 266; Idem, (revised by H. D. C. Davis), *Select Charters and Other Illustrations of English Constitutional History* (9th edition) (1929), 256. For English translation, see H. T. Riley, *The Annals of Roger de Hoveden comprising the History of England and of Other Countries of Europe*, II, part 2, AD 1192 to 1201 (1853 reprint 1994), II, part 2, 338-339.

4 For the creation and functioning of the archa system, see, for example, H. G. Richardson, *The English Jewry under Angevin Kings* (1960), 14-19; R. R. Mundill, *England's Jewish Solution. Experiment and Expulsion, 1262-1290* (1998), 153-208; Idem, "The archa system and its legacy after 1194", in *Christians and Jews in Angevin England. The York Massacre of 1190, Narratives and Contexts*, ed. by S. Rees Jones and S. Watson (2013), 148-162; J. and C. Hillaby, *The Palgrave Dictionary of Medieval Anglo-Jewish History* (2013), 95-97.

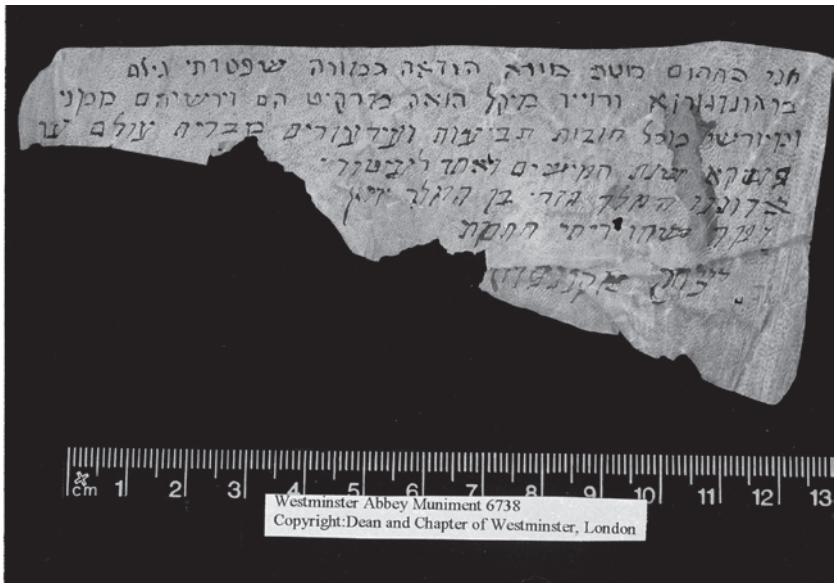


Fig: 1

(Fig. 2). Both documents were published by Myer Davis in 1888, and have been consequently well known ever since.[5] However, neither their first editor nor subsequent scholarship had noticed or commented on their incongruous features and spurious nature. In the process of preparing a new facsimile edition of the complete Hebrew documentary corpus from England, I have studied these documents and concluded they were thirteenth century fakes written with criminal intent.[6]

Both documents, written in Hebrew, are quitclaims of the debts contracted by Christian individuals with Jewish creditors. On the face of it, in WAM 6738 the Jewish creditor Isaac of Campeden releases two Christian individuals, William of Hunworth and Roger Michel of Holt Market from all their debts "from the creation of the world to Easter of the year fifty of the reign of Henry III", which corresponds to 17 April 1267 (Julian calendar). The place of writing is not mentioned. It was most probably Norwich, since most records concerning Isaac ben Joseph of Campeden stem from Norwich.[7] Also the names and origin of the Christian creditors (difficult to decipher given the unusual shape of the letters and spelling) point to East Anglia

5 M. D. Davis, שטרות, *Hebrew Deeds of English Jews before 1290* (1888), no. 57, 150 and no. 27, 63.
6 J. Olszowy-Schlanger, *Hebrew and Hebrew-Latin Documents from Medieval England: a Diplomatic and Palaeographical Study* (2015), no. 7 and no. 8.
7 See Olszowy-Schlanger, *Hebrew and Hebrew-Latin Documents*, comments to no. 7. He is once mentioned in the Plea Rolls of the Echequer of the Jews as a 'Jew of Oxford'.

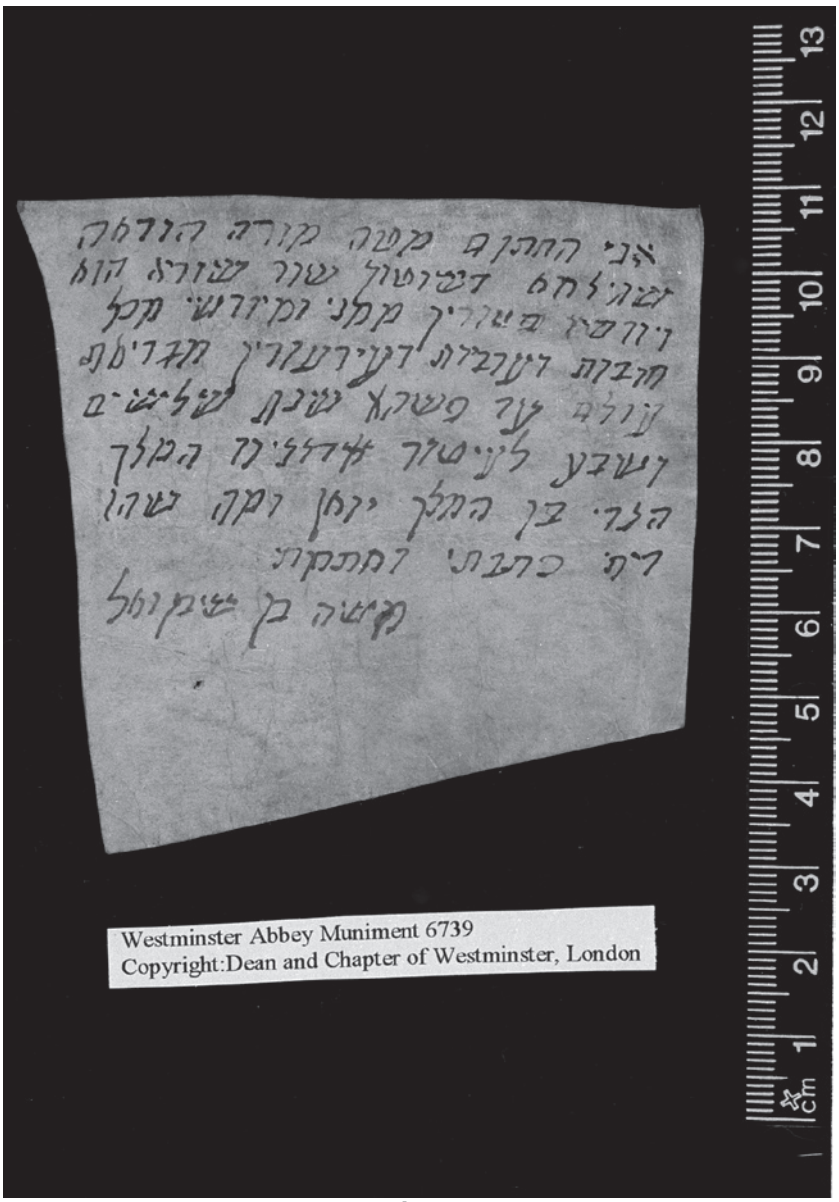


Fig: 2

as the origin of the deed: Hunworth in situated in Norfolk and Holt was a nearby market town. Most importantly, however, this quitclaim is related to WAM 6807,[8] a sale by the same Isaac of Campeden of the debt of 6 marks owed to him by William of Hunworth and Roger Michel of Holt Market who acted as William's surety, to Miriam daughter of Joseph. The sale of this debt took place in Norwich, on 1 August 1266, some 9 month before our quitclaim. Written in excellent Hebrew by a professional clerk, Menaḥem ben Yehoshayah, who wrote a number of other extant deeds from Norwich,[9] WAM 6807 helps to decipher the less clearly written WAM 6738 and to elucidate some of the circumstances of the transaction.

WAM 6739 is also a quitclaim. This time, a Nottingham Jew, Moses ben Samuel, releases William of Sutton-sur-Soar from all his debts, "from the beginning of the world till Easter, year 37 of Henry III", which corresponds to 20 April 1253 (Julian calendar). The name of the place is not mentioned, but Sutton-upon-Soar is situated within the range of the Nottingham archa, and Moses ben Samuel is mentioned in deeds from this town.[10] I have not come across any record of the original debt concerned by this quitclaim, but we possess several documents by Moses ben Samuel concerning other transactions.

Why Forgeries?

As said, already at first glance both documents appear unusual, the handwriting is clumsy, the text is strewn with mistakes which show that the scribe did not understand the text he copied. To confirm the hypothesis of forgeries, the documents have been submitted to a thorough diplomatic analysis, including their material features and their text and formulae.

The analysis begins by the documents' palaeographical features. It takes into consideration the general aspect of the script and the comparison of the handwriting of the quitclaims, including the ductus and the morphology of specific letters, first to each other, and then to the other relevant documents.

Global Impression

Put together and compared with other documents, these two quitclaims raise immediate doubts about their authenticity, although their thirteenth century date is unquestionable. The first global impression of the script and handwriting is decisive: these are the only two documents in the entire extant English Hebrew

8 Davis, *Shetarot*, no. 54, 140-142, Olszowy-Schlanger, *Hebrew and Hebrew-Latin Documents*, no. 76.

9 For his handwriting, see Olszowy-Schlanger, *Hebrew and Hebrew-Latin Documents*, 4.4.2.1.

10 Indeed, Moses ben Samuel is mentioned in a number of documents from Nottingham, see Olszowy-Schlanger, *Hebrew and Hebrew-Latin Documents*, no. 24 (1251), 38 (1271), 69 (1260), 86 (1262), 87 (1262).

corpus which are written by a scribe who lacks even the most basic training in Hebrew script. The scribes and authors of all the other extant Hebrew documents from England, while they naturally vary in calligraphic skills, are all proficient in current rapid Hebrew documentary script. Many achieve a truly professional quality.[11] Notwithstanding the inherent differences in individual handwritings, the letters follow a consistent basic ductus. Such a consistent way of tracing specific letters was acquired through a formal education or scribal training.

The script of our two quitclaims is quite different in that the letters were traced in a different way than that attested in all the other extant deeds. One may imagine that they are written in a child's hand, maybe by someone whose scribal education stopped early in life. However, even unexperienced scriptors of Hebrew texts, including children, do follow a writing method which consists of tracing components of a letter according to the instruction of the teacher. The final effect differs from one person to another according to his individual 'performance', but the way the letter is traced at least aims to imitate a stereotyped learned model.[12] In our quitclaims, the letters are not 'written' but rather 'drawn': the writer attempts to imitate the forms of the Hebrew letters without following a consistent ductus: the number and direction of individual strokes and the way they meet to form a particular letter. He rather tries to obtain a form resembling that of a model by drawing traces in an order, direction and relationship to each other which differ from the way Jewish individuals learned to write.

Handwriting

The results of a closer examination of the handwriting are even more puzzling. A palaeographical analysis suggests that both documents were written by the same hand who wrote the main text and the signature. However, the documents are supposed to emanate from two different Jewish individuals, and two different names figure at the bottom of the deeds; WAM 6738 is signed with the name of Isaac of Campeden, and WAM 6739 with that of Moses ben Samuel.

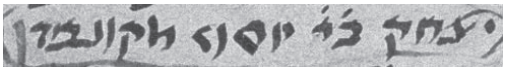
Not only do Isaac of Campeden and Moses ben Samuel appear here as having the same handwriting – and thus, being the same person, but their signatures differ from the signatures of Isaac of Campeden and Moses ben Samuel attested in other – genuine – documents.

11 Olszowy-Schlanger, *Hebrew and Hebrew-Latin Documents,* chapter 4.

12 See M. Beit-Arié, "Stéréotypes et individualités dans les écritures des copistes hébraïques du Moyen Âge", in *L'écriture: le cerveau, l'œil et la main*, ed. by C. Sirat, J. Irigoin and E. Poulle (1990), 201-219. For the teaching methods of writing in Oriental Jewish communities, see J. Olszowy-Schlanger, "Learning to write in Mediaeval Egypt: children's exercise-books from the Cairo Geniza", *Journal of Semitic Studies,* 48 (2003), 47-69.

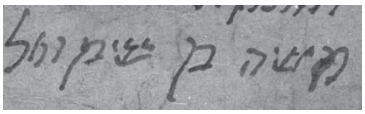
The handwritten signature of Isaac of Campeden appears in the aforementioned related WAM 6807. The difference is unmistakable:

WAM 6738

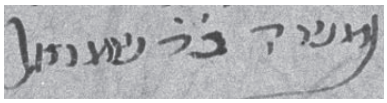


WAM 6807

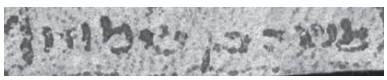
The signature of Moses son of Samuel is attested in four documents and bears no resemblance whatsoever to the signature in WAM 6738:



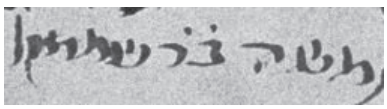
WAM 6739



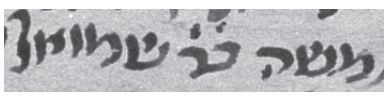
WAM 6755



WAM 6769



WAM 6817



WAM 6817a

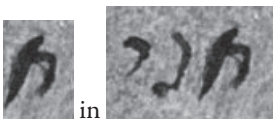
Thus the signatures of Isaac of Campeden and of Moses ben Samuel in genuine documents are different, respectively, from WAM 6738 and WAM 6739, and in turn, these two signatures of two different people are written by the same hand in both WAM 6738 and WAM 6739. Moreover, this scriptor of WAM 6738 and WAM 6739 'draws' clumsily the shapes of the Hebrew letters. The frequent confusion of the forms shows that he does not understand what he is writing, and does not know the phonetic value of the letters and their combinations.

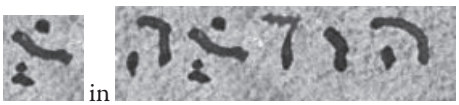
Unusual Ductus and Morphology of Some Letters

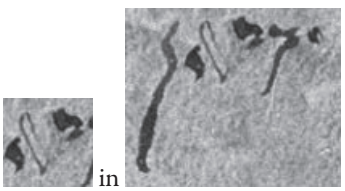
First of all, the same letter can display a variety of forms. Some variability of the graphic forms for the same letter is common even for a well trained scribe. However,

the discrepancies here are striking. The letter *aleph*, for instance, appears under six graphic forms (not to count slight variations) which differ in their ductus and final shape. One observes the shifting between the two genres of the Hebrew script – square and current documentary minuscule. Legal Hebrew deeds from medieval England are normally written in documentary genre of script which differs from the square genre used in most books, especially in Bible manuscripts. A change of genre of a letter which appears in its square form in a text written in documentary script is attested a few times in professionally written documents from England, but there it is used exclusively to write the chirograph divisae and as the means to fill up short lines and justify the left-hand margin.[13] In our two forged quitclaims, the forms which imitate square and the forms which imitate documentary script are used interchangeably and incoherently in various places of the document.

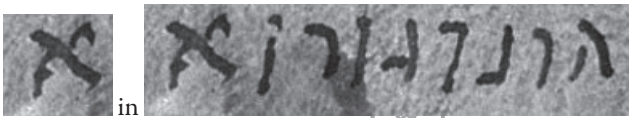
Letter *aleph* in WAM 6738

 in (אני)

 in (הודאה)

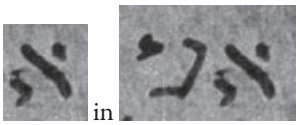
 in (יואן)

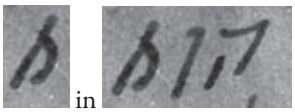
 in (אדוננו)

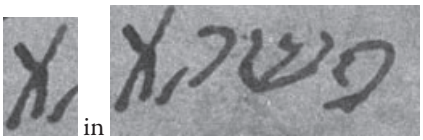
 in (הונדגורוא)

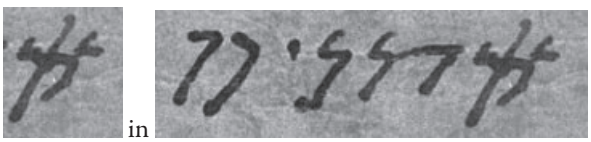
13 Olszowy-Schlanger, *Hebrew and Hebrew-Latin Documents*, 3.1.3.3 (7).

Letter *aleph* in WAM 6739

 (אני)

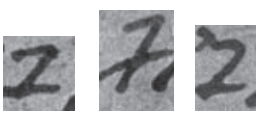
 (הוא)

 (פשקא)

 (אדונינו)

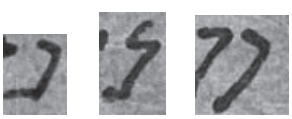
The letter *beth* is especially interesting, because its various forms are written either with the base on the left, in the middle or on the right of the right-hand downstroke:

Base of the *beth* in WAM 6739

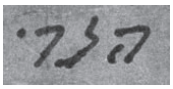
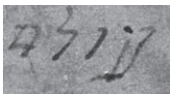


The letter *nun* in initial or medium position presents as well a variety of forms, including forms with a long base and a shorter head, forms with a very short base and a longer head ended with a prominent curved serif, or forms without the base at all.

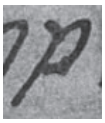
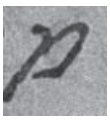
Nun in WAM 6739:



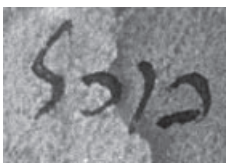
In one case in WAM 6739, a *nun* is traced in a way reminiscent of a *lamed*, with its head pointing upwards instead of the usual position parallel to the headline.

 *nun* in  (הנרי) versus  *lamed* in  (עולם)

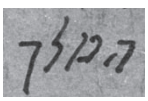
The letter *mem* in initial and medium position is also characteristic. Its left-hand downstroke can vary in length quite considerably and go well below the baseline, resembling a final *nun*.

Mem in WAM 6738   *Mem* in WAM 6739  

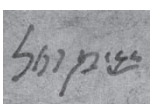
This form of *mem* is unusual in itself. Even more relevant are the cases where the scribe did not trace the *mem* as a single letter but confused it with combinations of other letters. Thus the initial *mem* of the word מכל in WAM 6738 is traced in two separate parts which are reminiscent of a *kaph* followed by a *vav*:

 WAM 6738, מכל

Similarly, in WAM 6739, the *mem* of המלך is traced in two separate parts which resemble a *nun* followed by a *vav*:

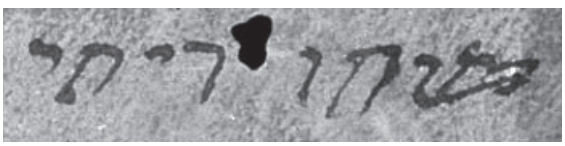
 WAM 6739 המלך

The *mem,* in שמואל in the signature of WAM 6739, has a ductus and form almost identical to the preceding word, בן.

 WAM 6739 שמואל and  WAM 6739 בן

Lack of Understanding of the Hebrew Text

There are also frequent confusions between the following similar letters: *vav* and *nun*, *daleth* and *resh* and *he* and *ḥeth*. It can be argued that this type of inconsistencies and confusion between letters indicates that the scriptor did not understand the text he copied, but tried to imitate the forms of a model. The aforementioned confusion between מ (letter *mem*) and בן is relevant in this matter. A similar lack of understanding is probably reflected in the treatment of the word שהודיתי, "that I have declared", as two separate words. In WAM 6738, there is a large space between the *vav* and *daleth* (traced like a *resh*), while in WAM 6739 the word is separated in two, with its second part written in a new line. Given that logotomy is extremely infrequent in Hebrew manuscripts, and that the word has not been separated for the sake of justification, it seems that the scriptor considered the two parts as two different words, just like in WAM 6738.



WAM 6738: Space in the middle of the word שהו\דיתי

To recapitulate, the comparison of the signatures with other documents signed by the named individuals and the analysis of the script shows that our two quitclaims were written by a different person than the ones they purport to. The ductus and morphology of the letters show that the writer was not trained to write according to accepted norms of Hebrew writing, and that he very probably did not receive any Jewish scribal training or learned to write in a Jewish context. This conclusion is strengthened by his evident lack of understanding of the Hebrew contents of the deeds. This leads us to suggest that the two quitclaims were forged by a non-Jewish writer. The fact that they are preserved among Westminster Abbey collections which stem from the contents of medieval archae,[14] indicates that they were indeed produced in court as valid quitclaims in order to avoid the repayment of the debts by the Christian debtors mentioned in them. We have no clue as to the identity of the forger, except that he was active in East Anglia and copied documents for different 'clients'. Unfortunately, I have not been able to find any published or identified records which would tell us what happened in the specific

14 The relationship between the archae and the collections of Hebrew deeds in Westminster Abbey was first suggested by Joseph Jacobs and Lucien Wolf in their *Bibliotheca Anglo-Judaica. A Bibliographical Guide to Anglo-Jewish History* (1888), XVIII.

cases of our two forged quitclaims. Had the foul play been exposed by the creditors or the judges? What steps did the court take to prove that the documents were forgeries? Were the false claims sanctioned? Was the forger exposed and punished? Was there a difference of sanction of the forgery because the forgers were evidently Christians and the victims Jews? For the time being, these questions cannot be answered. However, we can imagine some possible solutions by studying evidence concerning other contemporary cases of documentary fraud, as recorded in the Plea Rolls of the Exchequer of the Jews.

Documentary Forgery in Jewish-Christian Affairs in England

Close examination of the extant corpus of documents with Hebrew script stemming from the archae (258 in total) shows that only two – less than 0.5% – are forgeries. However, contemporary accounts and records indicate that forging documents was a frequent practice. Indeed, the importance of written documents in regulating Jewish-Christian financial transactions, and especially moneylending, accounts for the frequency of cases involving the invalidity of documents brought in front of the Justices of the Jews. These cases concern several aspects of the functioning and authority of written deeds,[15] but forgery takes a prominent place. Some cases concern quitclaims presented by Christian debtors and contested by Jewish creditors as fakes. Other cases, on the contrary, record debt acknowledgements produced by Jews and contested by the summoned Christian parties. Claims and investigations of forgery are mentioned throughout the thirteenth century. In some periods, especially under Edward I, there must have been an increase in the number of forgeries (with notable impact to the King's treasury) because the King himself demanded a systematic scrutiny of all quitclaims presented by Christian debtors, even if no one suggested that they might be spurious.[16] Thus, in a letter written in 1280 in favour of a London financier Aaron

15 Many records denounce fraudulent use of documents, though not necessarily their forgery as such. Loan documents produced by Jews may be contested because their stipulations appear not to be conform to the general legal framework of the Statutes of the Jewry. For example, in a complicated case of Licoricia of Winchester contra Thomas son of Thomas de Charlecote, in 1253, Thomas refuses to repay a huge debt of £400 (including interests accrued to the initial loan of £180), because he claims that the interest rate charged is higher than the permitted 2 pence for a pound per week, and that the interests are calculated on the basis of the initial capital and accrued interest, while interest out of interest is explicitly forbidden by the Statutes of the Jews, see Rigg, *Select Pleas*, 38-39. Quitclaims by Jewish creditors may be formally conform, but they were sometimes obtained by violence or under threat. Cresse son of Genta accuses Robert de Culworth (who commanded the Tower of London where the London archa was at the time of the Barons' upheaval) claiming that in 1268 Robert took out of the London archa the documents concerning Cresse's and his brother's loans, and extracted from him the counterparts of the deeds under threat, see Rigg, *Select Pleas*, 38.

16 Richardson, *English Jewry*, 31.

son of Vives, the King asks the Justices not to accept the quitclaims presented by Christians without a thorough examination. The letter specifies that some Christian debtors took advantage of the imprisonment of the Jews by the King himself to produce forgeries attesting to the repayment of their debts.[17] But at the time of Edward I, there was also an increase of cases in which the Jews seem to have presented forged debt acknowledgements to obtain unlawful reimbursements. In a recent paper, Paul Brand examines documents, including petitions by three important monastic houses, Reading, St. Alban's and Osney, concerning such allegedly false claims, addressed to the King in 1290, shortly before the expulsion. According to Brand, the increase of the cases involving forgery contributed to "create the climate of opinion" which prompted the expulsion on 1 November 1290.[18] However, the Plea Rolls of the Exchequer of the Jews and our documents attest to a proliferation of forgeries also during the reign of Henry III, even if the 1270s witnessed an increase in the number of cases.[19] All in all, it seems that forgery of legal documents was actually a fairly frequent occurrence in Jewish-Christian legal dealings, and that the thirteenth century authorities were fully aware of its extent and potential damage.

Faced with this wide spread phenomenon, the courts dealing with Jewish-Christian transactions had necessarily to follow certain procedures and criteria to accept or reject the claims of fraud. In his seminal work *From Memory to Written Record*, M. T. Clanchy has observed that English courts employed a poorly developed range of procedures in dealing with forgeries. He pointed out that the main procedure was the recourse to oral testimony and oath, that is a way of assessment "by pre-literate wager of law and not by tests using writing". He contrasted the English situation with that in Southern Europe, and especially in Italy.[20] Indeed, Italian legal authorities, such as Huguccio of Pisa (d. 1210), the commentator of Gratian's *Decretum*, wrote about ways of preventing and controlling documentary fraud. The unmasking of a gang of forgers in Rome in 1198 prompted the Pope Innocent III to formulate general rules to prevent forgeries. These rules included the need for the documents to be precisely dated, written by authorized scribes, enrolled in registers kept by notaries or public authorities. If there is a doubt

17 Rigg, *Select Pleas*, 112-113: *Et quia accepimus, quod, postquam Iudeos regni nostri capi fecimus, quedam false facte sunt acquietancie, et eciam starra, inter Christianos et Iudeos, vobis mandamus, quod si contingant debitores quoscunque acquietancias vel starra aliqua debitorum quorumcumque coram vobis proferre, tunc nullam quietanciam vel liberacionem huiusmodi debitoribus, quousque legitime vobis constare possit, acquietancias vel starra illa fideliter et legitime fuisse facta secundum Legem et Consuetudinem Scaccarii Iudaismi predicti*.

18 P. Brand, "New light on the expulsion of the Jewish community from England in 1290", *Reading Medieval Studies,* 40 (2014), 101-116.

19 See Richardson, *English Jewry*, 10, 31, 34, 72, 114, etc.

20 M. T. Clanchy, *From Memory to Written Record. England 1066-1307* (1993) (2nd edition), 324.

about a document's authenticity, records should be consulted, or contents and physical features of the writing material, seal and its attachment to the parchment should be investigated.[21] Clanchy claims that English law did not develop these means of identifying forgeries due partly to the absence of a sophisticated notarial institution. While he quotes one example of a physical examination of the document (taken as it happens from the Plea Rolls of the Exchequer of the Jews), he considers it as exceptional, and successful only because the claim of forgery was issued by an expert in law, while his opponent was a Jew and the document "was evidently an amateur forgery".[22]

It is indeed likely that the developed methods preconized by Italian lawyers were not common in English courts. However, a more systematic study of the rolls of the Jewish Exchequer shows that the physical and textual examination of the suspect documents was frequent, and was referred to in place of or in addition to oral testimony. It is the case that arguments listing criteria for unmasking forgeries are usually included in the defendants' depositions, rather than in the words of the judges themselves. This is due to the nature of the rolls, which record the pleas of the parties and do not always detail the court's actions. There is however no doubt that these criteria – to which we should now turn – corresponded to the way the official examination of the alleged forgeries was conducted.

Criteria to Unmask a Fraud

Several criteria were used to assess whether the document was a forgery or not. One of these criteria was based of the 'defect of procedure', which could lead to rejecting an a priori genuine document as invalid. This included claims that the document had not been registered with the authorities or/and that its copy had not been deposited in the relevant archa. The other criteria were based on the physical and formulaic qualities of the document itself. These included:

- its physical features such as the state of the parchment and wax sealing;
- its handwriting and signature;
- its style, language and contents of the text, and/or of the means of authentication (a 'historical' conformity of the document with the claim).

Procedural defects were often evoked to invalidate a document. They referred either to the absence of the document's copy in the archa or to the absence of its enrollment during a specific scrutiny of the archa's contents. Moreover, the

21 See F. Bougard and L. Morelle, "Prévention, appréciation et sanction du faux documentaire (VI^{e}-XII^{e} siècle)", in *Juger le faux (Moyen Âge – Temps modernes)*, ed. by O. Poncet (2011), esp. 46-49.

22 Clanchy, *From Memory to Written Record*, 324 quoting V. H. Galbraith, *Studies in the Public Records* (1948), 50-51.

chirographers could be accused of placing an illicit counterfeited copy in the archa under their care.

As we saw, the validity of a transaction required the placement of its certified copy in the archa. This copy remained in the archa as long as its contents were binding. For more security, the documents deposited in the archa were also enrolled by the clerks. In some cases, lists of bonds were drawn up systematically as part of the routine archa business. Such was the case of the Norwich Day Book which listed all transactions in the Norwich archa in 1225-1227[23] or of two short fragments of a Nottingham register in Latin and Hebrew covering transactions in 1230-1232.[24] The chirographers' duty to keep systematic records of transactions and documents is indeed mentioned in Roger of Hoveden's description of the organization of the archa,[25] and in the rolls of the Jewish Exchequer in the 1270s.[26] However, in most cases, the enrollment at the level of the local archa was not systematic. To control the contents of the archa, notably to calculate the taxes payable by the Jews, the Crown central administration regularly requested that the lists of all the bonds kept at a specified time in an archa be drawn up and sent to Westminster.

In addition to their role in taxation, these lists were regularly used as evidence in trials at the Exchequer of the Jews. An interesting case is that of Iohanna wife of a certain Roger Bacon, in Colchester in 1244, who rejected the demand of repayment of a debt claimed by Isaac ben Benedict and his business partner Isaac of Warwick. She argued that the debt is null and void because, although a copy of the loan document was found in the Colchester archa, it was not listed in the register of the archa contents made by Brother Gaufridus (Geoffrey), the King's Almoner. Since the debt acknowledgement found in the archa was dated prior to Brother Geoffrey's scrutiny of the archa, it should normally have been included in his lists. Iohanna does not explicitly suggest that the document in the archa is a forgery, but quotes the absence of the enrollment as a proof of the invalidity of the loan-claims against her. The tribunal acted upon her words. Brother Geoffrey's scrutiny rolls were checked and indeed there was no mention of this debt to be found. The decision of the tribunal was in favour of Iohanna. The Jewish creditors were condemned to pay her damages for their claim considered as unlawful. There remains the question of the copy of the loan acknowledgement, which had been duly deposited in the archa. How come it was not registered by Brother Geoffrey?

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23 Ed. V. Lipman, *The Jews of Medieval Norwich,* the Jewish Historical Society of England (1967), no. I-IV.
24 Ed. Olszowy-Schlanger, *Hebrew and Hebrew-Latin Documents*, no. 55 and 155 (two separate fragments of the same leaf).
25 Ed. Stubbs, *Chronica Rogeri de Hoveden*, III, 266.
26 See P. Brand, *Plea Rolls of the Exchequer of the Jews preserved in the National Archives (previously Public Record Office)*, vol. VI: Edward I, 1279-1281 (2005), 7.

The court decided that the chirographers of Colchester should be summoned to explain the presence of the document in their archa and its absence from the enrollment, but we do not know the result of the investigation.[27] A very similar case of a loan document present in the archa but not recorded in the scrutiny carried out by the same Brother Geoffrey in 1244 is the debt of William de Warenne claimed by Isaac the Chirographer of Winchester.[28] The genuine nature of these two documents is not questioned, but the circumstances of their emission and archiving invalidate them as if they were false. Sometimes, the defendants accuse the chirographers of placing in the archa an illicit counterfeited copy, like, for example, in 1275, when Hugh son of Robert Fitchet claimed that Christian and Jewish chirographers had fraudulently placed in the Exeter archa a chirograph of his father's for a presumed debt of £80.[29]

When the copy of the acknowledgement produced in court by the creditor is absent from the archa, an explicit accusation of forgery usually follows suit. Unscrupulous individuals often took advantage of a destruction of an archa to claim that the contested bond had never been deposited in it, and that the loan had never existed. Thus, when Moses of Clare produced a chirograph to claim a debt of £4 from Henry of Whaddon in 1268 in Cambridge, Henry accused Moses of fraud, claiming that there was no loan document concerning this debt in the Lincoln archa before this archa was burned (probably during the riots of the Barons' War in 1266).[30] Here, the claim of forgery is explicit and concerns the document itself. However, the argument that the document is a fake is not based on its physical examination but on the absence of its corroborating copy in the archa.

This administrative condition apart, most claims of alleged forgery bear on the external and textual features of the documents themselves. An excellent example, described in both the Plea Rolls of the Exchequer of the Jews for 1221 and in the Annals of Dunstable Priory, is the claim opposing Richard Prior of Dunstable to Moses ben Brun. The latter claimed a debt of £24, presenting a chirograph bond drawn up "in the year following the death of Henry II" between Prior Thomas and the Convent of Dunstable and Brun, Moses's father.[31] Prior Richard rejected the chirograph as a forgery, and provided an array of irrefutable arguments based on the quality of the text, the physical state and the means of authentication. Firstly, the quality of Latin is too poor to be attributed to Prior Thomas who was a good and conscientious clerk and would never make mistakes

27 Rigg, *Select Pleas*, 9-10.
28 Rigg, *Select Pleas*, 13-14.
29 Rigg, *Select Pleas*, 83-84.
30 Rigg, *Select Pleas*, 41.
31 Rigg, *Select Pleas*, 4.

in Latin such as those contained in this document.[32] Secondly, the handwriting of the chirograph does not emanate from the Priory's scriptorium. Moreover, continued Richard, Dunstable Priory is particularly careful about the validity of its documents: the Convent's seal is kept under no less than five keys and all charters are written exclusively by the hand of a designated and authorized person. Richard called as a witness a canon of the House who had been in charge of writing all Dunstable Priory's documents for the past forty years. The canon confirmed that this particular chirograph of contention was not written in his handwriting.[33] Thirdly, an examination of the state of the parchment showed that it had been fraudulently manipulated and altered. Richard pointed out that it bore traces of being washed, then whitened with chalk (chalk was still visible in the folds) and finally the newly written text had been blackened with grease to appear ancient.[34] Finally, the seal is all wrong: the document is supposed to record a debt contracted thirty years earlier by Prior Thomas, but it bears the counterseal of Richard himself, who has been prior for only eighteen years.[35] Prior Richard was not content with demonstrating the forgery. He added explanation of how the forgery could have happened – indeed, he probably still felt the need to explain how his own seal happened to appear on this document. Apparently, soon after he, Richard, was made prior, he drew up a charter confirming tenancy to one of the Priory's tenants in Berkhamsted. This charter was sealed with the seal of the Convent and countersealed with Richard's personal seal. It seems that at one point, the tenant in question borrowed the sum of 5 shillings from Moses ben Brun, and handed his tenancy charter (and a garment) to Moses as a gage. When the tenant reimbursed his debt, Moses gave him back his pawned supertunic, but kept the charter. It is precisely this charter and its counterseal which were tampered with to look ancient and to be used fraudulently against the Priory.[36]

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32 *In primis dicit, quod dictus Thomas, Prior, bonus et discretus clericus fuit, et peroptimus, nec aliquam cartam conficeret cum falso Latino, sicut continetur in ista.*

33 *Preterea dicit, quod tempore eiusdem Prioris et adhuc est consuetudo quod sigillum Conventus includitur sub v clavibus, nec erat aliqua carta scripta nisi de manu alicuius canonici eiusdem domus; et producit quendam canonicum, qui xl annis transactis omnes cartas eiusdem domus propria manu scripsit, de cuius manu littera illa non est.*

34 *Nam intellegit quod lota est, et postea dealbata, ita quod in plicitis illius carte apparet albedo crete, et quod littera denigrata est, sicut esset de pinguidine (SIC!), ut littera illa ita vetus appareat.*

35 *Preterea dicit, quod apparet manifestissime Christianis et Iudeis quod est falsa, et ideo quia carta dicti Thome Prioris loquitur de xxx annis transactis vel amplius, et iste Ricardus Prior, cuius sigillum invenitur contra sigillum illius carte non fuit Prior nisi xviii annis iam transactis.*

36 *Dicit eciam, quod alia de causa intelligit quod falsa est, quia postquam fuit Prior, fecit cuidam homini suo de Berkhamstede cartam confirmacionis domus sue de tenement suo signatam signo Conventus et contrasignatam sigillo eiusdem Prioris, quod factum fuit postquam idem Ricardus factus fuit Prior; et homo ille necessitate compulsus invadiavit eidem Mosseo cartam illam et supertunicam pro v s., et ad terminum statutum solvit eidem Mosseo v. s., et Iudeus reddidit eidem homini supertunicam et retinuit cartam. Et ideo intellegit quod de carta illa fecit dictus Iudeus falsinam istam.*

In the face of these crushing arguments, Moses ben Brun stopped claiming the reimbursement of the debt. His version of events focused now on refuting the accusation of forgery and no longer on receiving the payment. He denied that he had acquired the charter by way of gage and rejected the accusation of forgery. When asked how he got hold of the charter in the first place, he answered that he got it as a part of his wealthy father's inheritance. He told that his father, Brun, lost several charters, so when a licence was given to the Jews to make public and enroll all the concealed charters, he (Moses) bought this chirograph from a certain servant and had it enrolled. Moses claimed that he was unaware of any fraud in the document, and thus did not seek to procure other writings recording the debt contracted by Dunstable Priory. He was however unable to give the name or any details concerning the servant who had sold him the chirograph. The issue of this conflict is not recorded in detail in the rolls of the Jewish Exchequer, but the Annals of Dunstable Priory report that the charter was proved false by the King's Justices, one of whom was Martin de Patishulle.[37]

Moses ben Brun was particularly unlucky. His opponent, Richard, the Prior of Dunstable, was none else than master Richard of Morins (*c.* 1161-1242), who was a canonist lawyer, teacher of law at Bologna University and the author of a legal tractate *Ordo Iudiciarius*. As stated by Clanchy, an amateurish forgery presented by Moses ben Brun stood no chance with such a trained legal scholar.

However, the skilful exposure of forgery was by no means exceptional or restricted to eminent, Bologna trained canon lawyers. A series of arguments based on the document's formal aspects were put forward by Vives Benjamin and his opponent, Gerebert de Sancto Claro, in a 1219 litigation.[38] Both parties presented conflicting written documents, and both claimed that the other's deed was a fake. When Vives demanded from Gerebert the reimbursement of the debt of 62 and a half marks recorded by a chirograph drawn up in the names of Vives ben Benjamin (Morell) of Oxford and his sister Damete, Gerebert tried various excuses to avoid the repayment. He started by claiming that the chirograph recording the original debt was a forgery. He stated that the wax sealing was older than the chirograph itself, and added that the foot of this chirograph had never been deposited in any archa, and finally that neither himself nor anyone on his behalf were present when this chirograph was drawn up. He refers here to one of the most widespread forgers' techniques, the attaching an original seal to a forged document.[39] While an inquest into the chirograph and its seal was underway,

37 Ed. H. R. Luard, *Annales Monastici*, vol. III, 66; Galbraith, *Studies*, 51.

38 J. M. Rigg (ed.) *Calendar of the Plea Rolls of the Exchequer of the Jews Preserved in the Public Record Office*, vol. I: Henry III, 1218-1272 (1905), 17.

39 Described in detail in a bulla by Pope Innocent III, see C. R. and M. G. Cheney, *Letters of Pope Innocent III concerning England and Wales* (1967), xxii.

Gerebert changed his tactics. He did not deny any longer the original debt, but produced a starr – a Hebrew quitclaim, allegedly drawn up in his favour by Vives and Damete. The starr was apparently signed by two Jewish witnesses, Jacob ben Meir and Jacob ben Leo. This time Vives ben Benjamin challenged the authenticity of the quitclaim presented by Gerebert. His defense was based on two criteria: first, the Hebrew of the starr is bad, and therefore could not have been written by the Jewish individuals whose names appear as witnesses; second, the quitclaim is not in Vives's handwriting. This is an important point: Vives stressed that Jewish quitclaims were normally written by the creditors themselves and not by the witnesses of the release, and since he was not the writer of the deed in question, it must be a fake. It is indeed the case that, while other types of Hebrew documents in England are written by professional clerks (who counted also as witnesses), the extant Hebrew quitclaims are autographs of the creditor or of his attorney. Gerebert's reply to this last argument shows surprising familiarity with Jewish customs. He maintained that the starr was genuine and that, while it is true that Jewish men wrote their quitclaims by themselves, when the creditor was a woman her starr was written by witnesses. And in this case, the creditors were Vives and his sister Damete. The starr remained under the seal of the Justices awaiting a further trial, while both parties found pledges: Vives called Copin of Worcester and Jacob Crespin to certify that the quitclaim was false, while Gerebert turned to Reginald de Bungay and Henry le Convert, to support its validity.

Judging the documents' authenticity by their handwriting identification is particularly frequent. In addition to the above examples, we may quote the case of Richard of Radley who claimed, in 1275-1276 in London, that he had reimbursed a debt of £40 to Benedict son of Jacob, and produced a Hebrew starr acquitting him of this debt. Benedict ben Jacob replied that this starr was a fake, and that it was made fraudulently in his name. The way to prove it is to establish that the starr is not in his handwriting.[40] Similarly, in 1284, a starr of acquittance produced by Adam son of Hamo de la Mare of Caluiston to prove that his father's debt of 38 marks towards Cresse ben Milo le Eveske, Jew of Bristol, had been reimbursed, was rejected as a forgery on the basis of the handwriting of the signature.[41]

Claims of forgery can also be argued on the basis of the contents alone. In 1244, a Jewish creditor demanded the reimbursement from Reginald de Dunham of a debt contracted by his father, John. However, Reginald pointed out that at the time indicated by the loan chirograph, his father, John, had been dead. He must have been able to prove it, because the Jew agreed to release him of this debt.[42] Very often, the arguments are based on 'mistaken identity'. Thus, when

40 Rigg, *Select Pleas*, 89-90.
41 Rigg, *Select Pleas*, 129-130.
42 Rigg, *Calendar of the Plea Rolls,* I, 70.

Copin of Oxford claimed, in 1218, a payment of £12 from Thomas de Mara, for a loan which Thomas's father, William, had borrowed from Isaac ben Moses of Bristol, Thomas presented a starr whereby Isaac ben Benedict acquitted Thomas and William from all their debts. Copin replied that the starr was by a wrong man, Isaac ben Benedict and not Isaac ben Moses. Thomas admitted that he could not read Hebrew, but offered to produce witnesses who could attest that he had received this document from Isaac ben Moses.[43] Likewise, when Yose son of Pigge demanded a reimbursement from the Abbey of Pershore, producing a charter certified by a certain Abbot Elias, the Abbey denied that they have ever had such an abbot. This 'historical' fact was established by an oath, and entailed a judgment in favour of the Abbey.[44]

However, claims based on the identity of the signatories could be overridden by the physical examination of the document and of its seal. For instance, in 1268 in York, the Prior of Gisburn was called to pay Lord Edward a debt of £40 contracted with Yose of Kent, but contested the bond as a fake. The document was sealed by a certain Prior John of Overton, but the Priory argued that no person of this name had ever been a prior of Gisburn. Lord Edward's attorney did not address the question of the prior's identity at all, but demanded straight away the collation of the seal. At first, the prior did not comment on the seal, but, when pressed, admitted that the wax had been indeed impressed with a seal he himself used to possess. But he claimed that the seal, authentic in itself, was attached to the charter by fraud.[45] In conclusion, however, the seal's identification was irrefutable and the request of the creditors seems to have been accepted, since the prior abandoned his line of defense and settled for a fine of 100 shillings.

Procedure

As we saw, in some cases, the impressive arguments for or against authenticity of a deed advanced by a party made his opponent falter in his claims, and allowed for a speedy conclusion. In other cases, however, the forgery had to be proved or disproved through various procedures available to the judges. These procedures involved consulting existing enrollments, examining the documents and, in particular, their means of authentication (seals and signatures) for physical signs of forgery, comparing them with other documents and seals emanating, truly or allegedly, from the same source and scribe. The investigation and comparison (*collatio*) of documents and seals was done by expert witnesses. In some cases, the witnesses summoned to the court had direct knowledge of the case at hand or

43 Rigg, *Calendar of the Plea Rolls,* I, 2.
44 Rigg, *Select Pleas*, 96-98.
45 Rigg, *Select Pleas*, 39.

were capable to recognize the handwriting or the seals challenged in the trial. But most frequently they were a body of 'experts', notably clerks and chirographers, who were familiar with the ways of production and registration of the documents in general. These expert witnesses constituted a jury and announced their verdict as a declaration under oath.

Chirographers were regularly summoned to attest or explain the presence of a document in the archa. The claims of the absence of documents in the archa or in the enrollments could be easily solved by checking the archa contents or the relevant registers. When the contents of the archa had been damaged and a party took advantage of this for claiming that a specific document was a fake, the only expedient used by the court was to question the chirographers responsible for the archa prior to the calamity. When the aforementioned Henry of Whaddon claimed that there was no copy of the bond he owned to Moses of Clare in the Lincoln archa before it was burned, the Lincoln chirographers were summoned and interrogated; they declared that the archa had actually contained this bond before it was destroyed.

Chirographers were often called as expert witnesses to examine the documents, even if these were not from the archa in their charge. As professional clerks trained in writing business, they could easily detect flawed deeds. When a document's authenticity was doubted, the interested party had the right to ask for a charter to be taken from the archa to be examined by experts, that is, chirographers.[46] The authentication of the documents became a rule in the 1270s, when quitclaims had to be systematically verified and confirmed either by their author or by the chirographers, even if their authenticity was not challenged by one of the parties.[47] It seems that the right to summon experts to examine suspected deeds had to be paid for. In 1244, heirs of a certain Nicholas were asked by Peytevin of Bedford to repay Nicholas's debts as recorded in a chirograph. The heirs claimed that Peytevin forged the document and put it in the chirographers' chest illegally. In order to summon the chirographers to examine the document before the Justices, the heirs had to pay half a mark to the King.[48]

In addition to chirographers, other expert witnesses could be called to judge the authenticity of a document. Juries could be composed of individuals who were qualified to make a competent decision in a specific case. These were often the people who knew the handwriting of the party challenged in the trial. In the aforementioned case of Richard of Radley against Benedict ben Jacob, Benedict demands an expert examination of his handwriting: he "puts himself upon Jews who know his hand" (*ponit se super Iudeos qui manum suam cognoscunt; et hoc*

46 Richardson, *English Jewry*, 10: *petunt inspeccionem dicte carte*.
47 Richardson, *English Jewry*, 31.
48 Rigg, *Calendar of the Plea Rolls,* I, 79.

offert verificare). Twelve named Jewish individuals appeared before the judges and declared under oath (*super sacramentum suum*) that the starr was not made by Benedict, was not in his handwriting and was not sealed with his seal (*predictum starrum nunquam fuit factum ipsius Benedicti, nec sigillatum sigillo suo, nec manu sua scriptum*). The jury of six Jews of Bristol working upon the King's request gave their verdict in the aforementioned case of Adam son of Hamo de la Mare of Caluiston against Cresse son of Milo le Eveske. They declared under oath that the starr produced by Hamo and its signature were not the work of Cresse (*non est factum dicti Cressei, nec manu sua signatum*). Their verdict was decisive. An interesting example of a work of the experts and criteria they used is a record (alas incomplete) of a case in 1252, involving Elias ben Abraham of Wilton who demanded the repayment of a debt of £12 from Henry Trenchaunt.[49] When Henry produced Elias's starr of acquittance, Elias recognized that it was his document, but claimed forgery, because instead of 'Wilton' the document had 'Wynton'. It is difficult from the record to understand the importance of this substitution; was the name of the locality an essential element of the conflict, or did Elias use this difference of one Hebrew letter (*lamed* for *nun*) as a formal excuse to invalidate the document as flawed? Be it as it may, a jury composed of several Jews examined the document and declared on oath that the handwriting was Elias's but the ink was different (maybe the ink of the name of the town?). Two of the jurors were Elias's relatives (so they knew his handwriting well): they spotted some discrepancies in the way the starr was written: the handwriting was indeed Elias's, but not the 'interlineation'. According to Rigg, the record is too damaged to be certain, but it seems that the case was resolved in Henry's favour.

In some cases, a simple demand by a wronged party to proceed with a collation of the deeds or seals is sufficient for the forger, or alleged forger, to abandon his claims. As we saw, in the litigation of Prior of Gisburn contra Lord Edward's attorney, the prior changed his line of defense as soon as the attorney mentioned the need to collate the seals. While initially the prior claimed that the document was a fake and was sealed by another person, unknown to the convent, the prospect of collation made him admit that the sealing was his own. He still claimed that he was a fraud victim, this time suggesting that his seal was attached fraudulently to the document, but his case became so weak that he ended up paying fine to Lord Edward.

49 Rigg, *Calendar of the Plea Rolls,* I, 112.

Punishment

Falsitas was certainly considered to be a *crimen* in the thirteenth century, and brought disgrace on forgers, when caught.[50] Some scholars suggested that authorities took a rather lenient view of this crime; in their classic *History of English Law*, Pollock and Maitland state outright that "the making of false documents with intent to defraud was not severely punished until the sixteenth century".[51] This impression is probably related to the type of forgeries which had been the focus of scholarly interest: the so called 'monastic' forgeries. With the increase of the importance of written evidence, monasteries took to 'faking' charters purporting to an earlier foundation period in order to confirm their long lasting *status quo* which was hitherto based on a non-written but usually truthful tradition. These forgeries are often presented by scholars as devoid of selfish motivations; they were necessary expedients to make fit an existing but unrecorded status to the bureaucratic mentality of the Later Middle Ages.[52] Indeed, both in the case of such monastic forgeries and of criminal falsification, the typical forgers of documents were Church clerks – the writing specialists *par excellence*. As holders of an ecclesiastical status, they could not be submitted to physical punishment, mutilation or death penalty.[53]

In contrast, the study of sources stemming from the court litigation records, like the ones presented here, reveals different attitudes to documentary fraud. Faking or using faked documents was seriously punished, as was the accusation of forgery against genuine deeds.

Evidence for the records of the Exchequer of the Jews shows indeed a remarkable difference in the treatment reserved to ecclesiastical clerks and to secular forgers. When proved wrong, clerics were treated leniently: when they lost their case, they had merely to pay fines. Thus, Prior of Gisburn, when he lost to Lord Edward through expert attorney advice, got off lightly by making fine with his opponent. Secular individuals resorting to documentary fraud, however, Jews and Christians alike, could easily end up in prison or even in the gallows. When the aforementioned charter produced by Yose ben Pigge and Isaac of Warwick against the Abbey of Pershore is proved false by an oath of twelve jurors, both Jews are imprisoned. It seems that the same fate was reserved to lay Christians, although little evidence on their prison penalty is found in the Rolls of the Exchequer of

50 G. Constable, "Forgery and plagiarism in the Middle Ages", *Archiv für Diplomatik,* 29 (1983), 17.

51 F. Pollock and F. Maitland, *The History of English Law* (1898) (2nd edition), II, 540-541.

52 See Constable, "Forgery and plagiarism", 2-3; Brooke, "Approaches to medieval forgeries", 100-120. For an overview of various scholarly attitudes to the question of medieval forgeries, ranging from apologists of medieval forgers to those who put the 'monastic' forgeries on par with selfish profit-motivated forgeries, see Brown, "Falsitas pia sive reprehensibilis: 101-119.

53 Brooke, "Approaches to medieval forgeries", 102.

the Jews. Upon the investigation of a quitclaim starr presented by Adam son of Hamo de la Mare of Caluiston against Cresse son of Milo le Eveske of Bristol, Adam was bound to pay his debt of 38 marks – a lenient solution. The record states however, that the only reason Adam was not sent to prison was because the forged starr was not his but had been made by his now deceased father.

It seems that more severe punishments were reserved to the forgers rather than to those who used the forgery in court. A dramatic case is recorded in the Plea Rolls, under Hereford and London in 1244. A certain Hugh le Brun (apparently a Christian) was arrested in possession of a false document. He explained that he merely agreed to the request of Yose ben Abraham of Hereford, to follow him to Thomas the chirographer, to draw up a chirograph for a debt of £12, in the name of Moses ben Abraham and Robert de la Brewe. The catch was that Hugh le Brun had willingly played the role of Robert de la Brewe. Apparently, to compensate him for this impersonation, Yose ben Abraham had promised Hugh a release from a debt and an official authorization to withdraw Hugh's proof of indebtedness from the Hereford archa. Yose denied the charges, and claimed that he went to see Thomas the chirographer at Moses ben Abraham's request. However, Thomas the chirographer said that Moses had dropped in to see him very briefly, and that the chirograph was made by Yose and Hugh after Moses had left. The wax for sealing was given to Thomas by Yose. Moses denied any involvement in the matter. The verdict recognized Hugh's and Yose's guilt. This crime of forging a document by impersonating a party was sanctioned severely: both culprits were sentenced to death by hanging.[54]

Death by hanging was apparently also the verdict for the aforementioned Moses le Brun in his unsuccessful fight against the Bologna-trained Prior Richard of Dunstable. The Plea Rolls of the Exchequer of the Jews tell that Moses le Brun is to be imprisoned, but the Annals of Dunstable expand on his punishment. He was, in fact, confined in the Tower of London to await execution, but the Jews paid the King a mark of gold to differ the judgment (*pro iudicio differendo*). Moses spent more than one year in prison, and when it was no longer possible to defer, the Jewish community ransomed him for the sum of £100, to save him from hanging (*Et postmodum, cum amplius prorogare non possent, dederunt regi centum libras ne suspenderetur in ligno*). He was not executed but was forced "to abjure the kingdom on the Torah scrolls", and became outlawed (*Et sic super rotulum suum dictus Iudeus abiuravit regnum regis et ultagatus est*).[55]

54 Rigg, *Calendar of the Plea Rolls, I*, 75.
55 *Annales Monastici*, 66.

Conclusions

We do not know whether the forgery of the two documents, WAM 6738 and 6739, have ever been uncovered. Their preservation in the corpus emanating from medieval archae shows that they were certainly produced as evidence of a debt repayment. No known records tell us whether they had ever been challenged. As we saw, forging documents was a very serious crime, unmasked through well defined procedures including calling expert witnesses (Christian and Jewish) and examining physical and textual features of the documents as well as their conditions of production and conservation in the archa. Penalties for secular forgers and forgery users could be severe, including death by hanging or banishment. The sources are silent as to what happened to the Christian forgers of WAM 6738 and 6739 and to their Jewish victims, if ever discovered. What is certain is that using diplomatic procedures akin to those of the medieval courts: identifying flawed language and comparing the signatures and handwriting to those of other documents, we are able to expose these two quitclaims as forgeries and thus, seven hundred years after their juridical power had expired, to set the record straight.

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