

The Opening Formula and Witness Clauses
in Arabic Legal Documents from the Early Islamic Period

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Arabic legal documents from early Islamic Egypt are attested in Arabic papyrus collections. These exhibit a formulaic structure that is clearly distinct from those of the Byzantine Greek tradition of legal documents, which continued to be written in the first Islamic century. The Islamic Arabic documents reflect a legal formulaic tradition that had its origins in the Ḥijāz of Arabia. This article examines the background of this Ḥijāzī tradition, with particular focus on the opening formula and the witness clauses. Parallel features are identified in Ancient South Arabian legal texts and in texts of legal nature from Northern Arabia.

INTRODUCTION

Among the extant Arabic papyri dateable to the first two Islamic centuries (seventh–eighth centuries C.E.) there are a number of legal documents. Some of these were written in the Umayyad period when Greek was still being used by the local population as an administrative and legal language. Indeed, some of the extant Arabic legal documents are bilingual texts that are accompanied by a corresponding Greek document. These early Arabic documents come from the period of cultural transition. They were used side by side with the Byzantine Greek tradition of documents or immediately after Greek ceased to be used. From this period of cultural transition we also have Coptic legal documents, which began to be produced in increasing numbers after the end of Byzantine control of the region. The Coptic documents closely replicate the formulaic structure of the Byzantine Greek legal documents, which reflects the fact that the Coptic documents developed essentially by a process of language shift in the writing of documents among a local population that

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had previously used Greek documents.¹ As a result, the language changed, but the substrate Greek formulaic structure continued.

An examination of the early Arabic legal documents shows that these documents did not arise by the same process that lay behind the Coptic legal documents. The Arabic documents exhibit radical differences in structure from that of the Greek and Coptic documents in the early Islamic period (Khan 1994b, 2008). Distinctive elements of the formulaic structure of the Arabic documents include an opening identificatory component, which often contains a demonstrative pronoun (“This is a release,” “This is what so-and-so bought”), the predominant use of the third person objective style, the placement of the date at the end, and the listing of witnesses without autograph witness clauses. The Greek and Coptic documents of the late Byzantine and early Islamic periods, by contrast, generally have the format of a so-called *cheirographon*, which resembles the structure of a letter, opening with a date and a personal address formula (e.g., “X to Y greetings”), the subjective style (i.e., use of the first and second person), and autograph witness clauses.² The early Arabic formularies are overall much simpler than the Greek and Coptic, and they lack many of the clauses that make the Greek and Coptic more legally watertight, such as warranty clauses or validity clauses, and the general prolix rhetoric that is characteristic of the documents of the Byzantine period.³

I

The Arabic formulary was not based on the Greek or Coptic, but was an independent tradition that was brought by the early Muslims to the lands that they conquered. This is demonstrated

¹ For the use of Greek and Coptic legal documents in the early Islamic period, see Fournet 2009; the contributions of T. Sebastian Richter, in Keenan et al. 2014: 28–30, 134–44, 325–38, 390–400.

² For the *cheirographon*, see Keenan et al. 2014: 34–35.

³ For this feature of Byzantine Greek documents, see T. Sebastian Richter, in Keenan et al. 2014: 83–84.

clearly in the case of a few bilingual Arabic–Greek documents from the first century A.H. that are of a legal nature.⁴ The Arabic versions of these bilingual documents exhibit, in particular, two of the distinctive features of the early Arabic documentary tradition that differ from the Byzantine Greek tradition, viz., the initial identificatory component and the witness formula.

The well-known bilingual document PERF 558 (P.Vindob. G. 39726) (Grohmann 1952: 113–15), which is dated in the year 22*h* [643], is a receipt for the provision of sheep issued by the Arab commander ‘Abdullāh ibn Jābir. The Arabic document opens, after the *basmala*, as follows:

هذا ما اخذ عبد اله ابن جبر واصحابه من الجزر من اهناس

This is what ‘Abdallāh ibn Jābir and his companions have taken with regard to sheep for slaughter from Ahnās⁵

The Greek version, by contrast, opens with an epistolary address formula characteristic of *cheirographa*:

Ἀβδέλλας ἀμῖρᾱς ὑμῖν Χριστοφόρω (καὶ) Θεοδωρακίῳ παγάρχ(οις) Ἡρακλέ(ου)s

The commander ‘Abdallāh, to you, Christophoros and Theodorakios, pagarchs of Herakleopolis

The Arabic text in the bilingual receipt PERF 585 (P.Vindob. G. 39744) (Stoetzer and Worp 1983) dated 75*h* [694f.] opens, after the *basmala*, with the identificatory noun *barā’a* “quittance (from liability)” and the document is in objective style:

⁴ In the following examples, parentheses fill out the abbreviated parts of words and square brackets indicate lacunae in the manuscripts.

⁵ Heracleopolis.

براة من سفيان بن غنيم [] من اهل مدينة اشمون [] عن
نفسه

Quittance from Sufyān ibn Ghunaym [for Apa Kyros, son of Kyros] of the people of the city of Ushmūn [] for himself [i.e., releasing Apa Kyros from liability]

The Greek text lacks the identificatory initial noun and is presented in subjective style:

Σουφιᾶν υἱ[ὸς] Γουναι[μ] [ὸ]μῖν ἄπα Κ(ύρω) Σενουθ(ίου) ἀπὸ πό(εως) Ἑρμ(ο)π(ολιτῶν)
Sufyān, son of Ghunaym, to you Apa Kyros, son of Senuthios, from the town of Hermopolis

A bilingual contract recording a release from labor dated 67*h* [686f.] has been discovered in the excavations at Nessana (P.Ness. 56) (Kraemer 1958, 3: 156–60). The Arabic document closes with a list of names of witnesses without signatures, whereas the Greek has an autograph witness clause in the first person (μαρτυρῶ “I bear witness”).

Monolingual Arabic papyri of a legal nature from the early Islamic period onward likewise have initial identificatory components. Some of the extant documents from the early period are written obligations that open with the identificatory phrase *dhikr ḥaqq* “declaration of obligation,” followed by the names of the creditor and debtor. The earliest attestation of this is in a document dated 42*h* [662f.], which contains a series of such written obligation documents (P. Louvre fonds Jean David-Weill 20) (Rāḡib 2007), e.g.,

ذكر حق عمر بن عسر على عمر بن ملكي

Declaration of obligation of ‘Umar ibn ‘Asr over ‘Umar ibn Malkī

A number of extant monolingual documents from the early period are quittances from obligation that open, as does the bilingual document discussed above (P.Vindob. G. 39744), with the identificatory noun *barā'a*, e.g., P.Michaelides A 744, dated 88*h* [707] (Khan 1994a):

براة لجميلة مولا ام هنيذة

A quittance for Jamīla, the freedwoman of Umm Hunayda

The demonstrative pronoun, which in many cases opens the initial identificatory component, is found already in the bilingual papyrus PERF 558 (dated 22*h* [643]) and can be reconstructed at the beginning of the bilingual contract from Nessana (67*h* [686f]; P.Ness. 56) (Kraemer 1958, 3: 156–60):

[هذا] ما [] الاسود بن عدى

[This] is what [] al-Aswad ibn 'Adī

It is found as well opening a variety of types of legal documents from the early Islamic period onward, e.g.,

Document of sale (150–159/767–775); Louvre E 6903 (Rāgib 2002, 1: 46)

هذا ما اشترى إسمعيل بن موسى من عبد العزيز بن سليمان

This is what Ismā'īl ibn Mūsā bought from 'Abd al-'Azīz ibn Sulaymān

Document of lease (180*h* [796]); P.Vindob A.P. 1151 (Grohmann and Khoury 1993: 118–19)

هـ [ذا] ما أكرأ أحمد بن عمر بن سريع

T[his] is what Aḥmad ibn 'Umar ibn Sarī' leased

Tax receipt documents issued by administrative officials that constitute a quittance (*barā'a*) from liability to pay tax also sometimes open with a demonstrative pronoun and have an identificatory component with the form *hādhā kitāb barā'a min fulān* "This is a document of quittance from so-and-so" (Frantz-Murphy 2001: 64–65; Khan 2007: 28).

Similarly, demonstrative pronouns open other types of documents of a legal nature written in the early Islamic period that have been preserved only in literary sources, e.g., the peace treaty with Damascus (13*h* [634f.]) (al-Qadi 1989: 222, 252):

هذا ما اعطى خالد بن الوليد اهل دمشق

This is what Khālīd ibn al-Walīd granted the people of Damascus

When the documents such as those cited above from the first two Islamic centuries refer to witnesses, their names are listed but they do not attach an autograph witness clause.

The corpus of Arabic documents from early Abbasid Khurasan datable to the middle of the second/eighth century (Khan 2007) provide further evidence for the fact that the early Muslims brought their own Arabic documentary formulaic traditions to the conquered provinces. These Arabic documents, most of which are of a legal nature, were discovered together with a corpus of documents written in the Bactrian language. Several of the Bactrian documents overlap chronologically with the Arabic documents. Moreover, most of the Bactrian and Arabic documents come from the same family archive. The Bactrian documents continue a pre-Islamic formulaic tradition that has parallels in a variety of documents produced in Central Asia and the Near East during the pre-Islamic period (Sims-Williams 1997: 18). It differs clearly from the formulaic tradition of the Arabic documents, which have close parallels instead with contemporary Arabic documents from Egypt, indicating that the latter tradition must have derived from a common

center.⁶ Furthermore, there are differences in the physical structure between the Bactrian and Arabic documents. The Bactrian legal documents in the corpus have the form of “double documents,” a traditional structure that is found in documents from Avroman of the Parthian period (Minns 1915) and was widespread in the Hellenistic and Roman Near East. It was used also in pre-Islamic Egypt up to the early Roman period, but was altogether replaced by the *cheirographon* by the Byzantine period (Keenan et al. 2014: 34–35). Such documents consisted of two copies, one rolled up and sealed and the other left open for consultation. The purpose of the sealed document was to function as an instrument of proof in the presence of a judge in the event of a dispute. This “double” structure is not found in any of the Arabic documents, apparently since it was not a feature of the Arabic documentary tradition that was brought to Khurasan by the Muslim conquerors.

The Arabic documents from Khurasan exhibit the distinctive features of the early Arabic formulaic tradition that have been identified above in the Arabic documents from early Islamic Egypt, the most conspicuous elements of which are the initial identificatory component and the listing of names of witnesses rather than autograph witness clauses. The identificatory component opens with a demonstrative pronoun, e.g.,

Emancipation of a slave (138*h* [755]); P.Khurāsān 29 (Khan 2007: 152)

هذا ما اعتق غالب بن نافع

This is what Ghālib ibn Nāfi‘ emancipated

A large proportion of the Arabic documents from Khurasan are tax receipts issued by administrative officials; they are presented, as above, in the form of a quittance (*barā’a*) from liability of tax. These open with one of the following three variant identificatory components:

⁶ For a similar phenomenon of uniformity in Arabic inscriptions from the early Islamic period across different regions, see Hoyland 1997: 91.

(a) *hādhā barā'a min fulān [. . .] li-fulān*

This is a quittance from so-and-so [. . .] for so-and-so

(b) *hādhā kitāb min fulān [. . .] barā'a li-fulān*

This is a document from so-and-so [. . .] a quittance for so-and-so

(c) *hādhā kitāb barā'a min fulān [. . .] li-fulān*

This is a document of quittance from so-and-so [. . .] for so-and-so

These quittance documents issued by named officials, as is the case also with contemporary official tax quittance documents from Egypt (Frantz-Murphy 2001), employ subjective style within the operative clauses of the document (e.g., *innī qabaḍtu minka* “I have received from you”). The opening identification formula, however, is objective style, since it contains no first or second person reference, unlike the opening address formulae of Greek *cheirographa*. Furthermore, although these official documents from Khurasan and Egypt may have the appearance of letters, with an opening address formula, it should be noted that the opening formulae of these documents are distinct from the formulaic opening of letters datable to the same period. Letters open with an address formula indicating the sender and addressee. If the sender is of a higher rank than the addressee, as in, for example, letters of an official nature sent by government agents, the name of the sender is put first and the letter opens: *min fulān li-fulān* “from so-and-so to so-and-so.” There is no reference in the opening formula to the document itself, as, e.g., in *hādhā kitāb min fulān*.

II

As has been remarked, the Arabic formulary tradition must have been brought by the early Muslims to the lands they conquered. It follows, therefore, that the roots of this early Islamic Arabic tradition should be sought in Arabia. There are three main types of sources that are relevant for the investigation, viz. Old South Arabian documents and inscriptions; pre-Islamic documents and inscriptions from the north of the Arabian peninsula and adjacent regions inhabited by Arabic-

speaking peoples; and reports concerning Arabic documents in Arabia during the period of the rise of Islam.

I shall begin with the initial identificatory component. Some parallels to this feature can be found in the Old South Arabian legal documents written on wooden sticks. This material is datable to various periods before the rise of Islam (Ryckmans et al. 1994; Stein 2003, 2010). Many of the extant legal documents in this corpus open with an initial nominal phrase that refers to the content of the document. Most such documents are obligations or quittances from obligations relating to money or kind. In the corpus published by Stein (2010), for example, quittances open with the initial phrase “X [amount] which so-and-so has delivered to so-and-so.” Some obligations open with a phrase of the same structure, viz., “X [amount] which so-and-so has guaranteed to so-and-so.” A number of obligations are presented in the form of declarations and open with the phrase *dt ydkrn* [Personal Name] k- “Of this so-and-so gives notice, [namely] that” or *dkr* [Personal Name] k- “Notification of so-and-so that” (Stein 2010: 35–36). The opening formula *dhikr ḥaqq* of early Arabic obligations has a significant formal resemblance to the Old South Arabian formula for declarations of obligations. It is relevant to note that these legal documents are written in objective style, the distinctive feature of the early Arabic documents.

The Old South Arabian documents on wooden sticks exhibit autograph signatures of witnesses, which differs from the Arabic documentary tradition of the early Islamic period. In addition to these wooden sticks, there are a number of monumental Old South Arabian inscriptions of a legal nature, mainly of texts of public importance such as treaties. These differ from the sticks in that they contain lists of witnesses but not autograph signatures. According to Stein (2003), the stone inscriptions are public copies of the original signed documents and only the latter, which were deposited in archives, were legally binding.

A number of extant legal documents written on soft material (papyrus or parchment) from northern Arabia and the adjacent regions are datable to late antiquity. These include some written in Semitic languages, such as the Hebrew and Nabatean Aramaic documents from the Judean desert and Syriac documents from Dura Europos (Yadin et al. 2002; Healey 2009). The Nabatean Aramaic

documents are of particular interest, in that they exhibit elements that can be identified as Arabic legal terms (Yadin et al. 2002: 28–31), reflecting the Arabic-speaking environment in which they were written. None of these extant documents, even the Nabatean documents with embedded Arabic elements, exhibits the distinctive features of the early Islamic Arabic formula tradition; rather they resemble more closely the structure of documents written in Greek and other languages in the Near East during the Roman period.

Initial introductory phrases with a demonstrative pronoun do occur, however, in monumental texts written on stone. Some of these are of a legal nature. Some examples of Nabatean and pre-Islamic Arabic inscriptions with such openings are:

Nabatean tomb inscription (first cent. B.C.E. or first cent. C.E.) (Healey 2009: no. 7)

dnh kpr' dy 'bdw [PN]

This is the tomb that [PN] [. . .] made

Nabatean burial inscription (267 or 268 C.E.) (Healey 2009: no. 12)

th qbrw šn'h [PN]

This is the tomb that [PN] built

Namara inscription (328 C.E.)

th nfs [PN]

This is the funerary monument of [PN]

Tomb inscription Egypt (31*h* [790]) (El-Hawary 1930)

هذا القبر لعبد الرحمن بن خير الحجرى

This tomb belongs to 'Abd al-Raḥmān ibn Khayr al-Ḥijrī

Inscription on a dam from Ṭā'if, Ḥijāz (58*h* [677f.]) (Miles 1948)

هذا السد لعبد الله معوية امير المومنين بنيه عبد الله بن
صخر

This dam belongs to the servant of God, Mu'āwiya, Commander of the Faithful. 'Abdullāh ibn
Ṣakhr built it

Inscription on the textile of a turban (88*h* [707]) (Marzouk 1954; Gruendler 1993: 20)

هذه العمامة لسمويل بن موسى

This turban belongs to Samuel ibn Mūsā

Of particular relevance are a number of such inscriptions that have an opening identificatory phrase consisting of *hādhā mā* + verb, which corresponds to the structure of the opening component in Arabic legal documents, e.g.,

Qaṣr Burqu' Building Inscription of Prince al-Walīd (81*h* [700]) (Field 1929; Grohmann 1971: 84; Gruendler 1993: 18–19)

هذا ما بنا الامير الوليد بن امير المومنين هولا البيوت
بسنة وحدة وثمانين

This is what the prince al-Walīd, son of the Commander of the Faithful, built—these houses, in the year 81

Wooden beam over a minbar in a mosque in Tilimsān (Algeria) (199*h* [814])

هذا ما أمر به الإمام إدريس بن إدريس بن عبد الله بن حسن
بن الحسين بن على رضى الله عنهم فى شهر محرّم سنة تسع و
تسعين ومائة

This is what the imam Idrīs ibn Idrīs ibn ‘Abdallāh ibn Ḥasan ibn al-Ḥusayn ibn ‘Alī, may God be pleased with them, ordered in the month Muḥarram of the year 199

There are references in early Islamic sources to the existence of written legal documents and letters during the period in which Islam emerged. These include, for example, the Quranic command to record debts in writing,⁷ the Prophet’s Constitution of Medina, the treaty of al-Ḥudaybiyya, documents commissioned by the Prophet, and the letters that the Prophet sent to the various tribes.⁸ This indicates that writing Arabic documents of a legal nature was practiced at the time of the rise of Islam at least in the urban centers of the Ḥijāz. Furthermore, one may infer from the cursive developments in the Nabatean script and from the cursive nature of the Arabic script at the beginning of the Islamic period that there there must have been a practice of writing documents on soft materials in the centuries immediately preceding the rise of Islam (Nehmé 2010; Gruendler 1993: 135). Despite this practice of writing documents, the culture of Ḥijāz at the time of the rise of Islam was “fundamentally oral,” which differed from the more literate cultures of northern Arabia in the Roman period and of Ancient South Arabia (Macdonald 2010: 21). One reflection of this is that, unlike in the Roman world of late antiquity and in Ancient South Arabia, it appears that there were no official public archives for Arabic documents produced in the Ḥijāz at the time of the emergence of Islam. In the absence of such archives, however, there was a practice that ensured that documents, especially those of public importance, were published and given official status, namely, the hanging of the document in the Ka’ba. There is a report, for example, of an alliance

⁷ Q 2:282: “When you contract a loan for a specified term, write it down. Let a writer write between you with honesty, and let not the writer refuse to write as Allah has taught him. So let him write, and let the one who incurs the debt dictate.” The clause with which it ends, *wa-l-yumlili l-ladhī ‘alayhi l-ḥaqqu*, is reminiscent of the formula of written obligations opening with the phrase *dhikr ḥaqq*.

⁸ Wakin 1972: 5–6; Schoeler 2006: 62.

(*ḥilf*) between the tribe of Khuzā‘a and ‘Abd al-Muṭṭalib, the grandfather of the Prophet, which states that, “They drafted in writing a document between them (*katabū baynahum kitāban*) [. . .] and suspended the document inside the Ka‘ba.” There is also a report of a treatise relating to tribes concluded two generations later written on a *ṣahīfa* (written piece of skin) suspended in the Ka‘ba “to remind them of their obligations” (*tawkīdan ‘alā anfusihim*). This practice in effect gave the documents the status of public monuments. Other legal documents of a more personal nature were kept in the possession of private individuals, sometimes in the scabbard of their sword (Schoeler 2006: 63). The lack of a practice of systematic legal deposit of documents at the time of the emergence of Islam is likely to be a factor behind the reluctance to accept the legal validity of written documents in early Islamic law and the insistence on oral testimony as the only legal proof.

The legal scholar al-Ṭaḥāwī (d. 321/933) cites in one of his books of formularies (*shurūf*) a variety of Arabic legal documents written at the time of the rise of Islam that begin with the formula *hādhā mā* + verb (Wakin 1972: part 1, 2.3-2.13). Q 2:282 stipulates that the writing down of a debt must be witnessed by two people. A document from the year 39*h*, which is attributed to ‘Alī bin Abī Ṭālib and transmitted by al-Ṭaḥāwī, closes with a list of witnesses without autograph witness clauses (Wakin 1972: part 1, 2.11):

شهد على ذلك عبید الله بن ابی رافع وحياج بن ابی حياح
وكتب على بن ابی طالب ام الكتاب بيده لعشر ليالى خلون
من جمادى الاولى من سنة تسع وثلثين

‘Ubaydallāh ibn Abī Rāfi‘ and Hayyāj ibn Abī Hayyāj witnessed that. ‘Alī ibn Abī Ṭālib wrote the original document with his hand on 10 Jumādā I of the year 39

Similarly, peace treaties, such as the one with Damascus dated 13*h*, noted above, ends with a testimony that has the same structure, i.e., the verb *shahida* followed by the names of the witnesses (al-Qadi 1989: 225, 252):

شهد ابو عبيدة بن الجراح وشرحبيل بن حسنة وقضاعي بن
عامر وكتب سنة ثلاث عشرة

Abū ‘Ubayda ibn al-Jarrāḥ, Shuraḥbīl ibn Ḥasana, and Quḍā‘ī ibn ‘Āmir witnessed. It was written in the year thirteen.

This conforms with the practice of listing names of witnesses without autograph signatures in extant Arabic documents from the first two centuries A.H.

The typology of Arabic legal documents in the Ḥijāz at the rise of Islam, therefore, has connections with both South Arabia and North Arabia. It resembles closely the typology of the Ancient South Arabian monumental legal inscriptions. These were displayed publically, listing the names of witnesses without autograph signatures. As indicated above, the extant examples of such monumental legal texts are in principle texts of public importance, such as treaties. The use of demonstrative pronouns at the opening of the identification section of Arabic documents resembles most closely the typology of monumental inscriptions from pre-Islamic northern Arabia and the adjacent regions, such as those cited above.

The initial phrases in the Old South Arabian legal documents on sticks, such as “X [amount] which [PN] has delivered to [PN]” (see above), are most easily interpreted as expressing the topic of the document. The initial phrases, therefore, have endophoric reference, i.e., their reference is to the internal content of the text of the document. The demonstrative pronoun in monumental inscriptions from pre-Islamic northern Arabia, on the other hand, have exophoric reference, i.e., they refer to the object on which they are carved, which exists outside the text. Likewise, the demonstrative pronoun in the phrase *hādhā mā* + verb from the Islamic period clearly has exophoric reference and refers to the object on which the inscription is carved, e.g. the building of the Qaṣr Burqu‘ inscription (*hādhā mā banā*). The transfer of the typology of monumental inscriptions to Arabic documents involved not only the use of a demonstrative, but also the retention of its exophoric reference. The scope of the exophoric reference of the demonstrative in

an inscription is constituted by the boundaries of the physical object on which it is inscribed. In the case of the text of a document, the scope of the exophoric reference is constituted by the physical boundaries of the document since it refers to the physical document, as in the opening phrases of legal documents *hādhā mā ishtara* or *hādhā mā a'taqa*, where the demonstrative does not refer endophorically to the object of purchase or emancipation that are mentioned later in the text of the document, but to the document itself. The exophoric reference of the demonstrative in the phrase *hādhā mā* + verb in an inscription is clear, but when the monumental formula was transferred to documents, the exophoric reference to the physical document was not so transparent. For this reason, some early *shurūṭ* scholars proposed to add the word *kitāb* before *mā*. Al-Ṭaḥāwī reports, for example, that Abū Khālid Yūsuf ibn Khālid al-Sumtī (d. 189/905) and his pupil, Hilāl ibn Yaḥyā, began their documents of sale with *hādhā kitāb mā ishtarā* “This is the document of what [PN] bought.” Abū Ḥanīfa and the majority of Ḥanafī *shurūṭ* scholars, however, preferred the conservative retention of the formula *hādhā mā ishtarā* (Wakin 1972: part 1, 2.3). The consequence of retaining this formula, which has its roots in monumental inscriptions, without linguistic adaptation after its transfer to documents resulted in a lack of clarity that is perpetuated by the usual practice of modern scholars to translate the formula literally: “This is what [PN] bought.” The jurist al-Sarakhsī (d. 483/1090) points out that “everybody knows that it means ‘this is a document (*kitāb*) containing a declaration (*dhikr*) for what so-and-so bought.” He notes that the reason some scholars object to the phrase *hādhā mā ishtarā* and prefer *hādhā kitāb mā ishtarā* is that the shorter formula might be taken to mean that it is the copy of the document itself that is for sale.⁹

There are occasional cases in extant Arabic documents from the early Islamic period in which the word *kitāb* has been added, e.g., the emancipation document P.Khurāsān 30 (Khan 2007: 155), which opens *hādhā kitāb mā a'taqa* “This is the document of what [PN] has emancipated”—

⁹ Al-Sarakhsī, *Kitāb al-Mabsūṭ*, 30 vols. in 15 (Cairo: Būlāq, 1906–1913), 30: 168-69. Cf. Wakin 1972: 74.

compare the more conservative formula *hādhā mā a'taqa* "This is what [PN] emancipated" of P.Khurāsān 29 (Khan 2007: 152).

The transfer of the exophoric reference of the demonstrative of the monumental formula from a surrounding physical structure on which an inscription was written to the textual object of a document facilitated the extension of the formula to legal texts without a direct correlate with inscriptions that relate to a physical structure. The formula *hādhā mā banā* "This is what [PN] has built" clearly refers to a structure; this could, in principle, apply also to *hādhā mā ištarā* if what is bought (*ishtarā*) is a physical entity such as a building. Attested formulae such as *hādhā mā a'taqa* ("emancipated") or *hādhā mā akhadha [PN] min al-jazar* "This is what [PN] has taken with regard to sheep for slaughter" (PERF 558, dated 22*h* [643]), however, cannot be reasonably interpreted thus. The demonstrative pronouns do not point to entities external to the text. This semantic development is a process of abstraction, which arose from the fact that a document has a more abstract, and hence versatile, content than a physical structure.

It should be noted that even after legal documents emerged as a type of text distinct from that of inscriptions, a close relationship continued to exist between the two. This is seen by the fact that a variety of formulae that were introduced into legal documents by the *shurūṭ* scholars from the Abbasid period onward appear in some inscriptions, especially those relating to landed property. A variety of title deeds of property written on wood, for example, contain accessory clauses that are characteristic of contemporary documents, e.g.,

David-Weill 1931: 1: 54–55 (300*h* [912f.])

هذه الدار بجميع حقوقها وحدودها سفليها وعلوها وكل حق
 هو لها داخل فيها وخارج منها لمحمدة تكنا ام حبيب ابنت
 محمد بن حفص و لابنها على بن مرزوق مشاع غير مقسوم

This house with all its rights, its boundaries, its lower floor, its upper floor, every right belonging to it, within it and without it, belongs to Muḥammada, called Umm Ḥabīb ibnat Muḥammad ibn Ḥafṣ and to her son ‘Alī ibn Marzūq, shared in common, not divided¹⁰

Early Islamic sources refer to the public display in the Ka‘ba of documents of public importance. It is clear how a monumental formula could be transferred to such public documents, but it is less clear how the monumental formula (*hādhā mā* + verb) could be transferred to documents of a private nature without such public importance. A possible explanation is that the monumental formula underwent a process of downgrading as a result of which it was extended from public documents to private documents.¹¹

The opening identificatory component in written obligations and quittances that have the form *dhikr ḥaqq* and *barā’a* respectively, without a demonstrative, should also be interpreted as having exophoric reference in conformity with the typology of documents beginning with *hādhā mā*. The sense, therefore, is “[a document of] declaration of obligation” and “[a document of] quittance.” This is made explicit in opening formulae that add *kitāb* (*hādhā kitāb barā’a* “This is a document of quittance”), which is found in some extant documents (see above).

III

I shall now examine in greater detail the development of the component of Arabic documents referring to witnesses. As has already been noted, the extant Arabic legal documents from the first two Islamic centuries do not have autograph witness clauses—only a list of the witnesses’ names, as in the above-mentioned document attributed to ‘Alī ibn Abī Ṭālib. Clearly, in

¹⁰ Similar accessory clauses are also found in other types of inscriptions, such as those establishing a *waqf*; e.g. Sharon 1966 (d. 301*h* [913]); 1997: 13, no. 1 (dated 400*h* [1009f.]).

¹¹ The process of downgrading formulae can be identified also in the historical development of Arabic letters (Khan 2008).

the early Islamic period written declarations of witnessing were not regarded as reliable or legally binding. Only oral testimony could validate a document.¹² This differed from the documentary practice of the surrounding cultures prior to the establishment of Islam, in which autograph witness clauses were attached to legal deeds. Such a practice is found, for example, in the Old South Arabian legal documents on wooden sticks, and in Nabatean and Syriac—and also Greek—documents.

Some relationship can nevertheless be identified between the formulae relating to witnessing in the early Arabic documents and those in pre-Islamic documents. This applies to the phrase *shahida fulān ‘alā nafsihi* “So-and-so witnessed for himself,” which is found in some early Arabic documents,¹³ indicating that the party of the legal act confirmed acceptance of a legal obligation arising from the act. This has parallels in Aramaic and Hebrew legal documents dating from the first half the first millennium C.E., e.g., in two Syriac documents from Dura Europos: *ʾnfšh šhd* “He testifies for himself”; *ʾnpšh šhd* “[PN] testifies for herself.”¹⁴ As mentioned, a similar type of phraseology is reported to have appeared in a treaty between Arab tribes written on a *ṣaḥīfa* at the time of the rise of Islam and suspended in the Kaʿba.

An associated feature of the documentary practice of the surrounding cultures was the format of double documents, whereby the witnessed deeds were given legal force by a system of archiving or at least the creation of secure copies.¹⁵ As remarked above, there does not appear to have been a comparable practice in the Ḥijāz at the period of the rise of Islam. As a consequence, oral transmission was regarded as a more reliable means of preserving knowledge of authoritative

¹² Schacht 1950: 188.

¹³ E.g., P.Michaelides 744B (88*h* [707]; Khan 1994a); P.Khalili 9 (104*h* [723]; Khan 1992: 100).

¹⁴ Healey 2009: 253, 266. See Khan 1994a: 364 and 1994b: 201–2 for details.

¹⁵ For archiving of Greek documents in the Roman period, see Keenan et. al. 2014: 62–82. For the evidence of archiving of Syriac and Old South Arabian legal documents, see Healey 2009: 264–75 and Stein 2003 respectively.

reports and texts. This applied not only to reports of witnesses, which gave legal validity to documents, but also to the transmission of hadith and of poetry.

According to Gregor Schoeler (2006), who has examined in detail the phenomenon of orality in early Islam, oral transmission of hadith and poetry in the early period was not entirely unsupported by writing. Although written texts were not used for public performance and teaching, there is evidence that by the second Islamic century transmitters of these traditions did use written notes as aides-mémoire. These were private texts that were not published. Written transmission finally became approved as a means of publication and official transmission of these genres of texts by the third century A.H.

A similar typology of development can be identified in the development of the recording of the witnessing of Arabic legal documents. In the first two *hijrī* centuries, the public performance of witnessing was oral, but by the third century it was performed in writing by means of autograph witness clauses written by the witnesses. Here also, there appears to have been an intermediate stage in which witnesses wrote private, unofficial notes to record their acts of witnessing. These written notes were separate from the legal documents, which were public, official texts. Reference to the existence of these private written records is found in some extant legal documents from the second half of the second century and the beginning of the third century A.H., where in addition to a list of witnesses there is an indication that each witness wrote a document recording his act of witnessing.

Document of lease (180h [796]) (Khan 2003); P.Michaelides B.59

شهد على ذلك جابر بن عبد الحميد بن ابي الجوزية القرشي
وكتب كتاب شهادته بامرہ وعمران بن عيسى بن ابي رتبيل
الخافقي وكتب شهاده بيده

Jābir ibn ‘Abd al-Ḥamīd ibn Abī al-Jawziyya al-Qurashī witnessed that and he wrote the document of his testimony by his instruction, and ‘Imrān ibn ‘Īsā ibn Abī Rutbīl al-Ghāfiqī [witnessed] and wrote his testimony with his hand¹⁶

The written testimony referred to here is not added to the document. It is also significant that the phrase *wa-kataba kitāba shahādatihi bi-amrihi* “he wrote the document of testimony by his instruction” (i.e., he had somebody write it for him), implies that the written document of testimony contained only the testimony of this witness and not of both witnesses. The witnesses can be assumed to have made written copies of their testimonies for their own private records. Such private records of testimonies can be identified in some extant papyri. This applies, for example, to the following, which is dated to the first half of the third *hijrī* century:

Record of testimony (230*h* [845]); P.Khalili 186 (Khan 1992: no. 12)

[ب]—سم الله الرحمن الرحيم
شهدت فى كتاب ليعقوب
بن اسحق بن اسمعيل البغدادى
على [هـ]—رون مولى اسحق بن
اسمعيل البغدادى ان ليعقوب
بن اسحق عليه تسعين دينار
حالة ليعقوب عليه اشهدنى

¹⁶ Other extant legal documents from the end of the second and the beginning of the third centuries A.H. have similar witness formulae; cf. Khan 1994a: 201 for further details; Thung 1996: doc. no. 2 (178/795).

فى ذى القعدة سنة ثلثين
وماتين

In the name of God, the merciful and compassionate,
I bore witness in a document for Ya'qūb
ibn Ishāq ibn Ismā'īl al-Baghdādī
against [Hā]rūn, the freedman of Ishāq ibn
Ismā'īl al-Baghdādī, that Ya'qūb
ibn Ishāq was owed by him ninety dinars,
[the payment] by him [of this] to Ya'qūb being now due. He called me to witness
in Dhū al-Qa'da, in the year two hundred and thirty

Because this document is written in the first person singular and relates to the testimony of only one of the witnesses of the legal act concerned, it is very likely that it is a private record made by that witness.

Legal documents containing autograph witness clauses written at the bottom of the text are attested in the Arabic papyri from the beginning of the third/ninth century onward.¹⁷ This shift to an official, public written recording of testimonies after an intermediate period of public orality and private writing corresponds to the development of the transmission of hadith and poetry both typologically and chronologically. The general shift from oral to written transmission is likely to have conditioned the rise of the autograph witness clauses in Arabic documents. The fact that the private record of testimony presented above is dated to the first half of the third century, suggests that private records continued to be made in a period of transition between the two typologies of witnessing.

¹⁷ The earliest such document that I am aware of is P.Cair.Arab 89 (dated 209*h*) (Grohmann 1934).

For references, see Khan 1994b: 201.

The shift from oral to written transmission was brought about by a variety of factors. In the early Abbasid period, writing was used extensively by state secretaries of non-Arab, mainly Iranian, descent to compose epistles (Schoeler 2006: 72) and this is likely to have been a stimulus for the writing of other types of text. The Abbasid period also saw the rise of a centralized bureaucracy, which required the production of large quantities of written documents—this could well have been one of the drivers of a more literary culture.¹⁸ Another factor behind the emergence of the practice of writing autograph witness clauses was doubtless the impact of the work of the Muslim jurists who began to develop legal formularies (*shurūf*) from the Abbasid period onward. As I have shown elsewhere, many elements of the newly developed formularies can be identified as having a basis in pre-Islamic models, in particular in the Aramaic legal tradition, and these could have included the feature of autograph witness clauses, which, as remarked, were found in Aramaic documents from the pre-Islamic period.¹⁹

The introduction of the institution of professionally accredited witnesses known as *ʿudūl*, established in Egypt in 174/790 by the *qāḍī* Ibn Fuḍāla (al-Kindī 1912: 386, 612), may have been another factor facilitating the shift to writing autograph witness clauses. The suitability of these witnesses was verified by a judge and their testimonies and dispositions could not be rejected.

A further factor was the development of an archival culture in the Abbasid period.²⁰ The existence of archives ensured a safe, public repository to protect written documents from

¹⁸ Like the state secretaries, the administrators running the Abbasid bureaucracy were predominantly of Iranian background (Khan 2007: 13–65). For the documentary culture of the Abbasid administration, see Khan 2007. Administrative bureaucracy is likely to have stimulated the development of an increasingly written culture also in medieval Europe; cf. Clanchy 2013.

¹⁹ Khan 1994a: 205, 212.

²⁰ For the development of archival culture in the Abbasid period, see Sijpesteijn 2007; van Berkel 2014. For archives specifically of documents relating to property, see Vorderstrasse 2013. There are a few references in extant sources to the existence of a repository of documents (*bayt al-*

falsification, crucially the record of witnessing, which validated documents. Some legal documents with witness clauses also contain an annotation referring to the registration of a document in a court archive. The act of registration granted the written documents probative value.²¹

The legal documents that have been preserved in the Khurasan corpus of Arabic documents datable to the middle of the second/eighth century contain lists of names of witnesses after a single verb *shahida* rather than autograph witness clauses (Khan 2007). These documents from the eastern edge of the Islamic empire, therefore, conform with the early Islamic practice in this respect. It is significant, however, that although the documents from Khurasan do not contain autograph signatures of witnesses, they do contain clay bullae with a physical mark of the witnesses, in the form of an impression of a fingernail or of a seal, containing a name or image (Khan 2007: 82–90). At the end of document P.Khurāsān 25 (Khan 2007: 141), it is stated that “Maskan [the issuer of the document] and the witnesses have set their seal to it” (*wa-khatama maskan wa-l-shuhūd*).

Bullae with seal stamps are found among the Arabic papyri from Egypt. These were used to authorize official documents, such as tax receipts²² and safe-conduct permits.²³ The practice of witnesses of legal documents impressing their seal on bullae is, however, unattested in the Arabic papyri from Egypt, as far as I am aware. There are, nevertheless, references in Arabic literary texts to such a practice in the early Islamic period.²⁴

qarātīs) in the time of the third caliph, al-‘Uthmān (Bravmann 1968). Al-Kindī (ed. Guest, 1912: 354) reproduces a document from a court archive datable to the late Umayyad period (131*h* [748]); cf. the analysis of the document by al-Qadi 2007.

²¹ See Khan 1993: 8; 1990: 49–50 and the references cited there.

²² Grohmann 1924: 80; Karabacek et al. 1894: 22 (PERF 820-822).

²³ Rāgib 1997.

²⁴ Grohmann 1924: 84.

The use of the bullae to preserve the mark of witnesses in the Arabic documents from Khurasan was a continuation of a local practice. Impressions of fingernails and seals by parties and witnesses on bullae is a feature of the Bactrian documents, in both the pre-Islamic and early Islamic periods,²⁵ and seals were an integral part of legal and administrative documents in earlier periods in regions under Parthian and Sasanian rule—the Parthian legal documents from Avroman had seals attached to them; while the use of seals on contracts in the Sasanian period is referred to in the Sasanian law code *Mādayān ī hazār dādestān* (The Book of a Thousand Judgments).²⁶ Furthermore, numerous Pahlavi documents with bullae-bearing seals are extant, some datable to the seventh and eighth centuries C.E. The bullae on these Pahlavi documents were used for authorization, but in the current state of research it is not clear whether they bore the marks of witnesses to legal documents.²⁷

Autograph witness clauses from the time they are attested in the third/ninth century have the structure of syntactically independent clauses. They are in objective style (third person) and each open with the verb *shahida* followed by the name of the witness. They also generally have some kind of complement of the verb. An example of a typical witness clause is *shahida [PN ibn PN] bi-jamī' mā fī dhālika al-kitāb* “[PN son of PN] testified to all that is in that document” (P.Michaelides B134, dated 280 h [893]). In many cases these clauses contain the phrases *bi-khattihi* “in his writing,” indicating that the witness himself wrote the testimony. In some cases the clause is qualified by the phrase *bi-amrihi* “by his instruction,” indicating that the clause was not strictly an autograph, but was written by a proxy scribe according to dictation by the witness.

The autograph witness clauses—or witness clauses written by proxy scribes—were a direct record of the oral validation of the document. If a legal document was challenged at a later date, however, these witnesses were summoned to repeat their testimony orally in court (Wakin 1972:

²⁵ Sims-Williams 1997: 14.

²⁶ Choksy 1988: 194.

²⁷ See Gignoux 1996: 63; Azarpay 2003.

66–67). Thus, though written by the hand or instruction of the witnesses themselves, according to most schools of Islamic law the written testimonies had no probative value. The Mālikī school did accept the autograph declarations of witnesses as proof if a secondary witness testified that the handwriting was genuine (Tyan 1959: 70–72). Nevertheless, most extant medieval Arabic legal documents written in areas where the Mālikī school was not the predominant one, such as Egypt, contain autograph declarations of the witnesses.²⁸

As we have seen, the declaration of legal testimony, which was the validating core of a legal act, was always partitioned from the description of the legal act itself. It was kept separate by being oral rather than written in the early Islamic period; later, it began to be written in separate private records, and, finally, was appended to the document of the legal act itself. This separate status of the witness clauses expressed itself also in differences in language. Many extant Persian legal documents, with dates ranging from the end of the fourth to the seventh centuries A.H. (beginning of eleventh to thirteenth centuries C.E.), have witness clauses that are in Arabic, or predominantly Arabic, written with the same formulaic structure of witness clauses as in Arabic documents.²⁹ This indicates the greater conservatism that is observed with regard to the form of the witness clauses due to their importance in the legal act.

Of particular interest is the existence of Arabic witness clauses on copper plates that were written in the southern Indian port town of Kollam in 849 C.E. These plates award trade privileges to merchant associations that were active in the town. The main text is written in Tamil, but the Arab merchants attach their authorization of the privileges by adding witness clauses in Arabic with the usual formula for autograph witness clauses. They are inscribed in a uniform script style, so they must have all been written for the merchants by the same scribe. There are witnesses

²⁸ For a discussion of the development of legal proof by written documents, see Johansen 1997.

²⁹ Gronke 1982: 11, for Persian documents from Ardabīl; Haim 2014: 60–61, for documents from Afghanistan. This applies also to unpublished Persian legal documents, such as those in the Khalili Collection in London (I thank Zahirhassan Bhalloo for drawing this to my attention).

clauses also in Pahlavi and Judeo-Persian.³⁰ This is an extreme case of independence of the Arabic witness clauses from the text of the document, since the document is not only written in a different language, but also under a non-Muslim jurisdiction.³¹

CONCLUSION

In summary, there was an Arabic legal formulary tradition in the Ḥijāz at the time of the rise of Islam, which the early Muslims brought with them to various regions of the Middle East during the Islamic conquests. This had its roots in a monumental type of legal text, which was originally intended for public display. It was validated by witnesses orally, for written records of the testimony had no legal validity and there was no systematic public archiving. The monumental formulae underwent various semantic changes involving the transfer of reference of the initial demonstrative pronoun from the physical object on which the transcription was written to the document. Originally, it seems, the monumental typology was introduced for documents of public importance, but this was subsequently extended to private documents by a process of downgrading. By the second *hijrī* century, witnesses made private written records of their oral testimonies. The formularies then underwent radical changes in the Abbasid period. These changes can be attributed in large measure to the activity of jurists based in Iraq. The emergence of autograph witness clauses also conforms to the shift from oral to written publication of traditional Islamic texts, such as hadith and poetry.

³⁰ For these plates, see Narayanan 2013 and the website of the project on the plates led by Elizabeth Lambourn, <http://849ce.org.uk/>.

³¹ For the background of these Arabic witness clauses, see Khan forthcoming [2018].

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