AMERICAN UNIVERSITY OF BEIRUT

# SLAVES AND MATRIMONY IN THE LEGAL CULTURES OF THE LATE SASANIAN AND EARLY ISLAMIC EMPIRES.

by

TOBIAS SCHEUNCHEN

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TOBIAS SCHEUNCHEN

Approved by:

Dr. Mario Kozah, Assistant Professor — Advisor
Center for Arab and Middle Eastern Studies

Dr. Lyall Richard Armstrong, Assistant Professor — Member of Committee
Department of History and Archaeology

Dr. John Lash Meloy, Professor — Member of Committee
Department of History and Archaeology

Date of thesis defense: August 14, 2017

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# AN ABSTRACT OF THE THESIS OF

Tobias Scheunchen for Master of Arts
Major: Islamic Studies

Title: Slaves and matrimony in the legal cultures of the late Sasanian and early Islamic Empires.

Inquiries into Near Eastern comparative law have been dominated by the 'influence paradigm.' This has led to premature conclusions about the origins of Islamic law and its relationship to adjacent systems of jurisprudence. Integrating jurisprudential systems into a larger genealogical scheme, Islamic law has usually been placed at its very bottom allowed a minimal amount of originality at best. This thesis is an effort to move towards non-Orientalist genealogies by using a theoretical combination of legal culture and legal pluralism.

In this thesis, I inquire into the legal writings of Zoroastrians, Eastern Christians, and Muslims from the 5th to the 9th centuries. Thematically, I focus on matrimony and slavery. The main argument of this thesis is two-layered. First, I argue that the various forms of matrimony and slavery maintained in Sasanian, East Syrian and Islamic jurisprudence are situated at the nexus of cosmological beliefs and practical concerns of the respective communities/empires. In other words, the cosmological purview of religion is mobilized and transformed into an idiom by lawmakers for the purpose of maintaining the notion of empire/community. Secondly, I argue that the relationship between Sasanian, East Syrian, and Islamic law is marked by varying patterns including competition, interaction, and negotiation.

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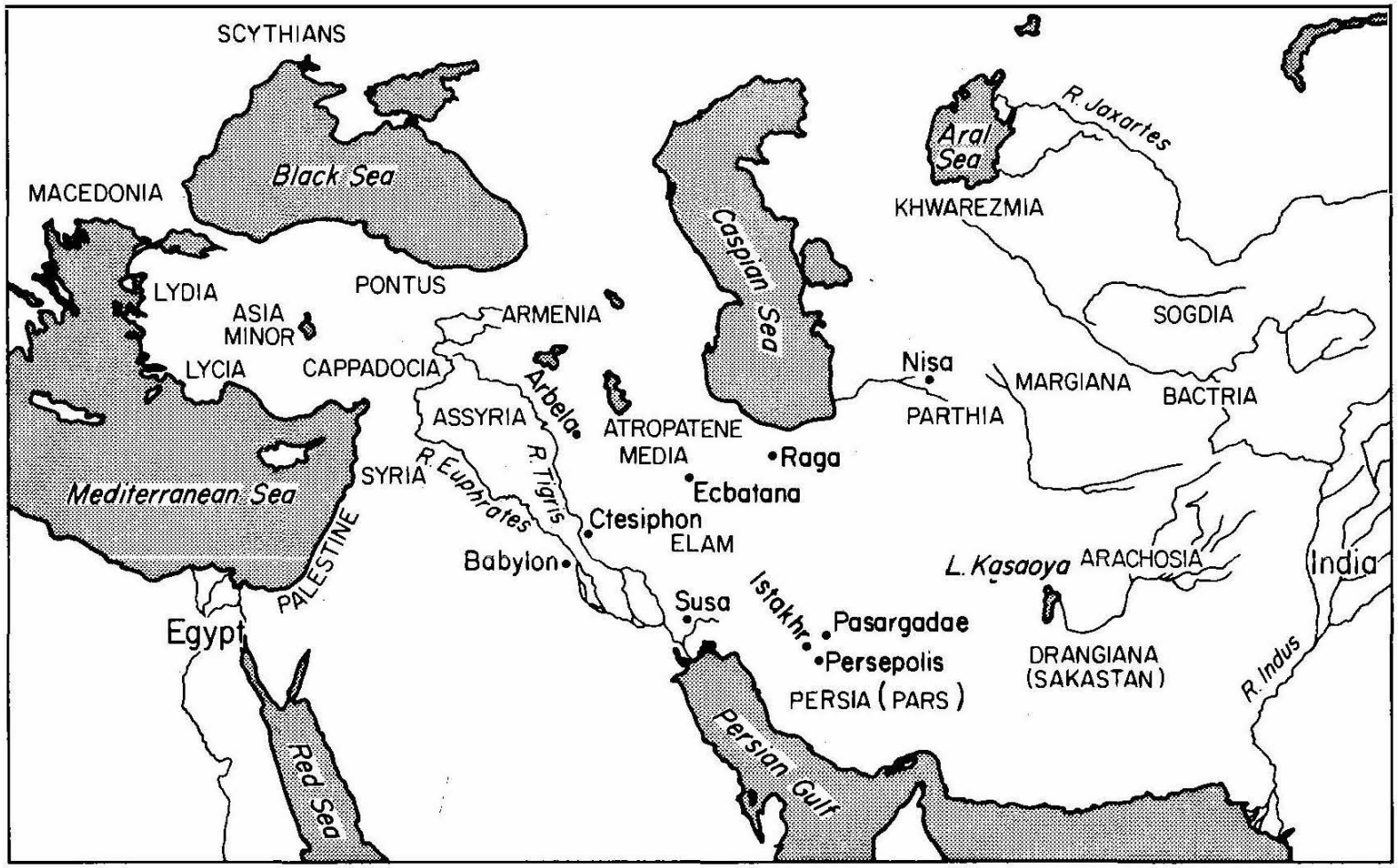
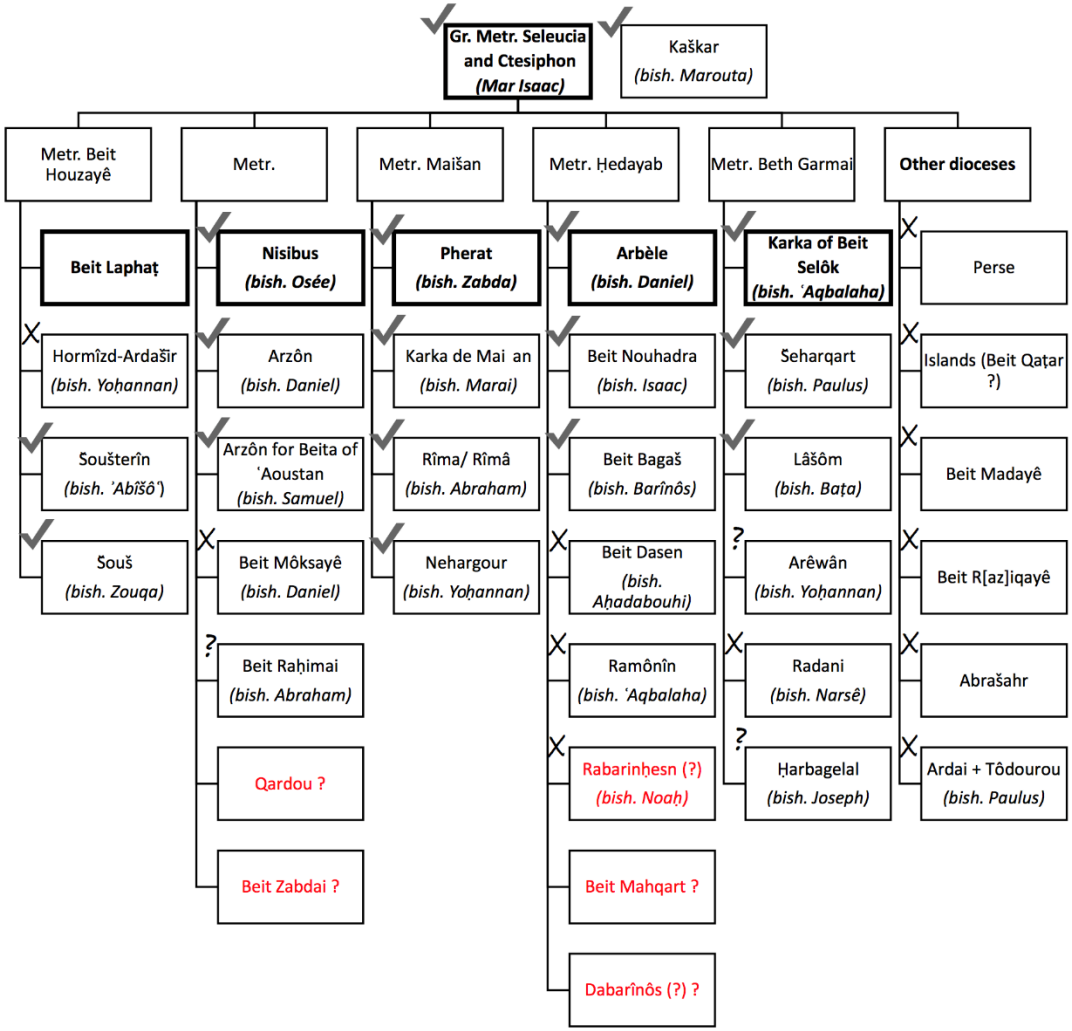
FIGURE 1: MAP OF IMPERIAL IRAN[1]




[1] Mary Boyce, *Zoroastrians. Their Religious Beliefs and Practices* (London, Boston and Henley: Routledge & Kegan Paul, 1979), xx.

FIGURE 2: ORGANIZATION AND AUTHORITY IN THE CHURCH OF THE EAST




GENERAL NOTE:

*The scheme has been prepared according to the description of the structure of the (proto-) Church of the East in the Synod of Mar Íšḥaq (410).*

*Please note that the rules of transliteration for Syriac applied throughout the remainder of this thesis have not been applied here. Rather, the names of cities, regions, and persons are in accordance with the French translation of J.B. Chabot.*

DESCRIPTION OF THE SCHEME:

*Bold lines indicate metropolitans.*

*Place names highlighted in red indicate textual disagreements leaving uncertainty on whether or not these constituted episcopal seats.*

*A tick indicates that the bishop mentioned was present at the respective synod, a cross that he was not, a question mark that we do not know exactly.*

# ABBREVIATIONS

| | |
|---|---|
| HazDP | *Hazār Dādestān* (Anahit Perikhanian) |
| HazDM | *Hazār Dādestān* (Maria Macuch) |
| SynO | *Synodicon Orientale* |
| CorJ | *Corpus Juris des persischen Erzbischofs Jesubocht* |
| EheM | *Eherecht des Patriarchen Mâr Abhâ* |
| MudK | *al-Mudawwana al-Kubrā* |
| RisF | *al-Risāla fī Uṣūl al-Fiqh* |

# NOTE ON TRANSLITERATION

## MIDDLE PERSIAN (PAHLAVI)

For the transliteration of Middle Persian (Pahlavi), I adhere to the "Transliterationsindex juristischer Termini" and "Transkriptionsindex juristischer Termini" which can be found in Farroḫmard i Wahrāmān, *Rechtskasuistik und Gerichtspraxis zu Beginn des siebenten Jahrhunderts in Iran. Die Rechtssammlung des Farroḫmard i Wahrāmān*, ed., tr., and ct. Maria Macuch (Wiesbaden: Harrassowitz Verlag, 1993), 663–740.

## SYRIAC

The Syriac transliteration corresponds to the rules for East Syriac used in *Gorgias Encyclopedic Dictionary of The Syriac Heritage*, eds. Sebastian P. Brock, Aaron M. Butts, George A. Kiraz and Lucas Van Rompay (Piscataway: Gorgias Press, 2011), x:

CONSONANTS

| | |
|---|---|
| ܐ | ʾ |
| ܒ | b |
| ܓ | g |
| ܕ | d |
| ܗ | h |
| ܘ | w |
| ܙ | z |
| ܚ | ḥ |
| ܛ | ṭ |
| ܝ | y |
| ܟ | k |
| ܠ | l |
| ܡ | m |
| ܢ | n |
| ܣ | s |
| ܥ | ʿ |
| ܦ | p |
| ܨ | ṣ |
| ܩ | q |
| ܪ | r |
| ܫ | š |
| ܬ | t |

VOWELS

| | |
|---|---|
| ܰ | a |
| ܳ | ā |
| ܶ | e |
| ܹ | ē |
| ܺ | i |
| ܼ | o |
| ܽ | u |

DIPHTHONGS

| | |
|---|---|
| ܳܘ | bāw |
| ܳܝ | bāy |
| ܺܘ | biw |

ARABIC

The transliteration for Arabic is in accordance with the *IJMES Transliteration System for Arabic, Persian and Turkish:*

CONSONANTS

| | |
|---|---|
| ء | ʾ |
| ب | b |
| ت | t |
| ث | th |
| ج | j |
| ح | ḥ |
| خ | kh |
| د | d |
| ذ | dh |
| ر | r |
| ز | z |
| س | s |
| ش | sh |
| ص | ṣ |
| ض | ḍ |
| ط | ṭ |
| ظ | ẓ |
| ع | ʿ |
| غ | gh |
| ف | f |
| ق | q |
| ك | k |
| ل | l |
| م | m |
| ن | n |
| ه | h |
| و | w |
| ي | y |
| ة | a *or* at (in constructs) |
| ال | al and -l- |

VOWELS

| | | |
|---|---|---|
| *Long* ا or | ىا | ā |
| | و | ū |
| | ي | ī |
| *Doubled* | ـيّ | iyy (final form ī) |
| | ـُوّ | uww (final form ū) |
| *Diphthongs* | وَ | au *or* aw |
| | ىَ | ai *or* ay |
| *Short* | ـَ | a |
| | ـُ | u |
| | ـِ | i |

# CHAPTER I

# INTRODUCTION

Historians interested in studying the various landscapes and places, empires and dynasties, religions and religious movements, societies and peoples of Late Antiquity may quickly feel perplexed by the seemingly endless imaginative possibilities its spatial and temporal dimensions offer to creative minds. Those ambitious enough to fathom its complex dynamics will have to indulge in the extant Late Antique material culture and a significant number of writings ranging from inscriptions to chronicles, histories, letters, disputations, apologies, refutations, grammars, encyclopedias, manuals, legal texts, and minutes.

Those seeking to turn away from Romanocentric conceptions of Late Antiquity may be intrigued by the domains East and Southeast of the Roman Empire. This region, referred to as the Near or the Middle East, is circumscribed by Asia Minor in the West and the Caucasian highlands in the North. Its Eastern frontier stretches down the Iranian plateau all the way to the Indian Ocean. The Southern coastline of the Arabian Peninsula forms a natural boundary in the South, while Ethiopia and Egypt demarcate its southern and western limits. To begin with, lumping together these territories and localities is neither conditioned naturally by a cohesive topography nor does it accurately reflect the political realities of Late Antiquity. The boundaries delimiting the Near East in Late Antiquity are, except for a few, artificial creations. Those that are not, and operated as actual frontiers, did not resemble the borders of modern nation-states; rather they were porous structures constantly renegotiated and redefined, which accounted for the movement and trade of a vast number of people, animals, and goods.

For those interested in the field a significant number of languages are worthwhile studying. The most important languages of the Late Antique Near East are Hebrew, Aramaic, Arabic, Middle Persian, Armenian, and Ethiopian, not to mention the various dialects, spoken varieties, and scripts used throughout different periods. The important role of Aramaic until the 7th or 8th century and its replacement by Arabic as the *lingua franca* of the region have led to extensive libraries in these and the Hebrew language.

The study of the Near East in Late Antiquity is complicated by the reality of disciplinary boundaries which have curtailed scholarly efforts to either an epoch, a language, empire, dynasty, religion, or society. An enthusiast of Sasanian history is likely to work in the field of Iranian Studies, whereas someone with interest in the Arabic language and literature may find himself in Islamic Studies. Semitic Studies subsume the Near Eastern varieties of Christianity. Other disciplines with no generic interest in the Near East have had their significant share in producing the most formidable scholars and research literature and have significantly enriched the study of Late Antiquity with their takes on methodology. History, archeology, sociology, and more recently anthropology and ethnography are cases in point. Despite the obvious possibilities for research, the reality is such that conflating these disciplines and fields is occasionally perceived as "out of touch" and threatening their academic rigor, expertise, and internal mechanisms. Efforts that attempt to bridge the disciplinary divide were made during the last four decades, and collaborative projects to study Late Antiquity are steadily increasing. The endeavors of Patricia Crone, Michael Cook, Jany János, and Uriel Simonsohn attest to this development.

In this thesis, I move beyond the conventional boundaries of Islamic Studies. I inquire into the legal writings of Zoroastrians, Eastern Christians, and Muslims from the

5th to the 9th centuries. Thematically, I focus on matrimony and slavery. The law on matrimony regulates relations of kinship for property to be bequeathed and inherited in the case of a person's death. It delimits the boundaries of the family as the basic unit of living and normalizes sexual reproduction by forbidding, tolerating, or demanding sexual relationships between members of society. Slave law restricts the legal capacity of certain individuals as opposed to other members of society who are granted freedom. The legal status of slaves frequently constitutes an intermediary stage before a legal subject is bestowed with the privileges of a free person.

Perhaps among the most difficult questions is why I have decided to focus on the laws of matrimony and slavery while excluding other fields of law such as property, obligations, or inheritance. Apart from the historian's convenience, these two legal fields are strongly related in the sense that, in the main, their concern is the delimitation and organization of authority over an individual. Whereas marriage laws, in these Late Antique societies, mostly focus on demarcating the boundaries of authority of a husband over his wife and specifying her legal capacity, the laws on slavery center on delineating relationships of authority between masters and slaves. The mere fact of selecting these two realms of jurisprudence largely affects the outcome of this thesis in the sense that the validity of its main arguments is from the very start circumscribed to these fields and may or may not uphold with regard to other fields of law.

This thesis seeks to answer three questions. First, what legal forms do the laws of matrimony and slavery cultivate? What I mean by legal forms are the jurists' opinions and specific legal configurations with respect to a certain field of law. The second question is how are these legal forms related to cosmology and the practical concerns of the community/empire from which they grow? The notion of cosmology encompasses

the cosmological vision(s) of the belief systems from which these legal writings emerged and to which they have subscribed, more specifically, their scriptural vision on matrimony and slavery and the significance of matrimony and slaves within the larger worldview of Zoroastrianism, Christianity, and Islam. What I mean by practical concerns are the sociopolitical needs or ethical concerns of the elite and their ambitions to shape a distinct notion of community or empire. The last question is what patterns mark the interactions between Sasanian, East Syrian and Islamic law?

The first question necessitates a descriptive approach. To respond, I engage in a close reading of relevant passages in the legal writings of Zoroastrians, East Syrians, and Muslims. For that matter, I utilize my primary sources to present and discuss the various types of matrimony as well as the legal configuration of slaves in the Sasanian and the early Islamic Empire.

The second question requires some theoretical underpinning. To respond, I use the method of legal culture. As an interpretative method, legal culture is a way of situating legal texts at the intersection with society. Therefore, I use my findings from the first question and relate these to the social fabric of the empires/communities that engendered these legal writings. My research shows that the types of marriage and the legal configuration of slaves, as discussed in the primary sources, are notably tied to cosmological justifications. These, in turn, are employed for specific sociopolitical purposes, mostly, maintaining the notion of community/empire. Thus, I develop my main argument which is that the legal forms in Sasanian, East Syrian, and Islamic law are mediated through the triangle of cosmology, lawmaking, and the practical concerns of community/empire. In other words, I argue that the types of marriage, as well as the legal

configuration of slaves, are shaped by the cosmological vision of religion and the sociopolitical or ethical concerns of its respective community.

To respond to the third question, I use legal pluralism. The theory of legal pluralism assumes that individuals in society, rather than relating to a single overarching power, navigate between multiple centers of authority. These centers are each representative of a legal system. In the context of Near Eastern law, this approach has recently been taken by Uriel Simonsohn in his *A Common Justice*.[2] By using legal pluralism, I attempt to ascertain what patterns characterize the relationship between Sasanian, East Syrian, and early Islamic law. The argument I develop in this section is that the relationship of Sasanian, East Syrian, and Islamic law is marked by varying patterns of interaction which are not restricted to influence.

Through the combined theoretical approach of legal culture and legal pluralism, I move away from the overstretched and controversial 'influence paradigm' which has long dominated the comparative study of Near Eastern law. To illustrate, the field has produced a multitude of studies addressing the relationship of Islamic law to adjacent systems of jurisprudence. The methodological proceeding in these studies is problematic. By identifying elements in Islamic law which are similar to those found in adjacent jurisprudences, such studies usually ascribe foreign origins to Islamic institutions and legal concepts, notably, in Roman-Byzantine and Judaic law. I theoretically contribute to the field by proposing the combination of legal culture and legal pluralism as an alternative methodology to proceed with.

More broadly, I develop the main arguments of this thesis in three steps. First, I explore the legal forms as regulated by the jurists. I then relate these legal forms to the

[2] Uriel Simonsohn, *A Common Justice* (Philadelphia: University of Pennsylvania Press, 2011).

societies that engendered them to gauge their particular purposes. Thirdly, I discuss how these legal forms interact with those in adjacent legal systems.

I make two main arguments in this thesis: First, I argue that the types of matrimony and the legal configuration of slaves in Sasanian, East Syrian, and Islamic jurisprudence are situated at the nexus of cosmological beliefs and the practical concerns of the respective communities/empires. In other words, the jurists mobilized and transformed the cosmological purview of religion into an idiom to sanction practices of matrimony and slavery which corresponded to the sociopolitical needs or ethical concerns of the elite. Secondly, I argue that the relationship between Sasanian, East Syrian and Islamic law is marked by varying patterns, notably, competition, interaction, and negotiation.

This thesis is divided into eight chapters. The historical, social, and religious backdrop against which the laws on matrimony and slaves in Sasanian, East Syrian, and Islamic jurisprudence unfolded is featured in the second chapter. To support my argument, I focus on the cosmological visions in Zoroastrianism, Eastern Christianity, and Islam as well as the notions of identity cultivated by the Sasanians, the East Syrians, and the Arabs. Temporally, I limit myself to the period between the 5th and the 9th centuries.

In the third chapter, I review the secondary literature relevant to this thesis. To situate my research, I map and discuss the state of the field and point out the most salient research gaps. At the end of this chapter I discuss how I build on the existing research literature. This prepares the ground for the fourth chapter, in which I develop my method of inquiry: the combination of legal culture and legal pluralism.

The fifth chapter is dedicated to theorizing jurisprudence, legal practices, and

different modes of lawmaking in the various legal traditions. At the end of this chapter, I discuss the primary sources I use in this thesis.

The sixth chapter deals with matrimony. Its subchapters are arranged chronologically—proceeding from the Sasanians, the Church of the East, to Islam. Within these chronological units, the division is vertical: from cosmological concerns, the nature and legal forms of marriage, to its implications and relevance for society. I roughly follow the three-part division of this thesis: the description of the legal forms; secondly, relating them to society; lastly, looking at how they interact with those in other legal systems. This combined structure increases comparability between the different legal systems and makes it easier for the reader to move back and forth between the chapters for the purpose of discerning distinct similarities and differences. As for Sasanian law, I am particularly concerned with shedding light on the practice of next-of-kin marriage (*ḫwēdōdah*) and the institutions of the intermediary (*ayōkēn*) and substitute-successor (*stūr*). Concerning East Syrian law, I highlight the reforms the law of matrimony underwent starting in the late 5th century. As for Islamic law, I bring into focus the bridal dower (*mahr/ṣadāq*) underlining the high importance associated with it in matrimonial agreements. I end this chapter with a preliminary conclusion, in which I converse the findings from the different chronological sections.

The seventh chapter deals with slaves and is structured similarly to the former. Again proceeding chronologically—from the Sasanians, to the Church of the East, and the Muslims—I examine the concepts and justifications pertaining to this legal status; secondly, I relate these to society; thirdly, I compare them to the other legal systems. In this chapter, I particularly focus on transactions involving slaves and the various legal problems arising. As is known at least for Islamic law, the restricted capacity of the slave

with respect to owning property proved to be contentious among legal specialists (*fuqahāʾ*). We will see that similar debates existed in Sasanian and East Syrian law. This chapter ends with a preliminary conclusion, before I summarize and conclude my findings in the eighth chapter.

# CHAPTER II

# HISTORICAL, SOCIAL, AND RELIGIOUS CONTEXT

In this chapter, I shed light on the cosmological vision of Mazdaism, Christianity and Islam as well as the notions of community of the Sasanians, East Syrians and the Arabs which burgeoned between the 5th and the 9th century. This will provide the necessary background for the main arguments of this thesis.

## A. Zoroastrianism and the Sasanians

Martin Haug's *Essays on the Sacred Language, Writings, and Religion of the Parsis*[3] from 1907 discuss the nature of Zoroastrianism (Mazdaism), its divine beings, liturgical rites, customs, and observances. Haug emphasizes the close relationship of Zoroastrian beliefs and practices with Brahmanical religions, manifested in the dogmatic and linguistic overlaps of the *Old Avesta*—a collection of the earliest Zoroastrian hymns written in Old Avestan language—with the Rig Vedas. It is thought that the Iranians and Indo-Aryans used to be a united people until around 2000–1800 BC after which their linguistic evolution continued separately.[4] The linguistic and religious resemblances found in Mazdaism and Vedic religions are attributed to this shared historical legacy.

The unmistakable hallmark of Mazdaism is its intrinsic dualism between Good and Evil reflected in the cosmic struggle between Ohrmazd (Ahura Mazdā) and Ahriman. Ohrmazd, the Beneficient God, initially brought the creations into being in a spiritual state (*mēnōg*). They then remained in this immaterial condition for 3,000 years.

[3] Martin Haug, *Essays on the Sacred Language, Writings, and Religion of the Parsis* (London: Kegan Paul, Trench, Trübner & Co. Ltd., 1907), 267–314.
[4] Mary Boyce, "The Origins of Zoroastrian Philosophy," in *Companion Encyclopedia to Asian Philosophy*, eds. Brian Carr and Indira Mahalingam (London and New York: Routledge, 1997), 5.

Meanwhile, Ahriman, dwelling in darkness, attacked the world of light. Ohrmazd offered peace, Ahriman rejected and the two spirits settled on a treaty (*paymānag*) stipulating that they would wage war for about 9,000 or 12,000 years in the material world (*gētīg*). With the treaty, the cosmic drama unfolds in three stages of 3,000 years each: the material creation (*bundahišn*), followed by the mixture of good and evil (*gumēzišn*), and a final period in which evil again separates from good (*wizārišn*).[5]

Ohrmazd, the Beneficent God, created the world of living beings (*gētīg*), and, with it, humanity, to assist him in the struggle against the lie (*drug*) represented by Ahriman. The struggle is present on all levels including the world of thought (*mēnōg*).[6] To expand the truth (*asha*) and reestablish order, man is required to support Ohrmazd on three levels: the mental, verbal, and physical. He must think, speak, and act beneficiently. Therefore, the purpose of Mazdaean rituals and liturgial practices is not simply to worship Ohrmazd but, more importantly, to create direct benefit in the cosmic order.[7] The *telos* of human existence is, other than in Christian and Muslim belief, to assist Ohrmazd in His battle against Ahriman to reestablish the cosmos.

As a living faith, Mazdaism is ubiquitous. Ontologically, it is intimately tied to the notion of exemplification (as opposed to symbolism). All mundane realities are not symbols but rather samples or instantaneous reifications of the macrocosm. For instance, the sacred fire used in worship is not a symbol of the divine spirit but immediately partakes in the divine light. That is to say, the fire hypostasizes the divine—it is Ohrmazd

---

[5] Philip G. Kreyenbroek, "Cosmogony and Cosmology i. In Zoroastrianism/Mazdaism," in *Encyclopedia Iranica* (1993). For a useful introduction to eschatology see Shaul Shaked, "Eschatology i. In Zoroastrianism and Zoroastrian Influence," in *Encyclopedia Iranica* (1998).

[6] Prods O. Skjærvø, *The Spirit of Zoroastrianism* (New Haven and London: Yale University Press, 2012), 8.

[7] Prods O. Skjærvø, "The Literature of the Most Ancient Iranians," in *Proceedings of the Second North American Gatha Conference*, eds. Sarosh J.H. Manekshaw and Pallan R. Ichaporia (Houston, TX: Federation of Zoroastrian Associations of North America, 1996), 229–230.

Himself.[8] This similarly applies to acts of worship and rituals bringing about an awe-inspiring universal reality: through every thought, word, and action, the worshipper creates direct benefit or damage in the cosmos.

The dualistic nature of Mazdaean cosmology has been the subject of much controversy. At its center is the question of whether or not Mazdaism typifies a form of monotheism.[9] The dilemma is that Ohrmazd and Ahriman are thought of as originating from the same seed. This has cast doubts on the nature of Zoroastrianism as a strictly monotheistic religion. As Herrenschmidt notes, "[t]he most widespread thesis was certainly that of a monotheistic reform […]"[10] at the hands of the Prophet Zarathustra. The prophet, who may have lived between 1700 and 1500 BC,[11] supposedly acted as a reformer of ancient Iranian religion elevating Ohrmazd over the various other deities in pre-Zoroastrian belief. How, then, can one account for the problem of Ohrmazd and Ahriman supposedly being twin brothers? The Zurvanites, occasionally condemned as heretics, settled on the existence of Zurvan (Infinite Time), a divine being that is superior and prior to Ohrmazd and Ahriman.[12] On the contrary, modern scholarship has widely accepted the resolution presented by Haug:

> The leading idea of his [Zarathustra's] theology was Monotheism, i.e., that there are not many gods, but only one; and the principle of his speculative philosophy was Dualism, i.e., the supposition of two primeval causes of the real world and of the intellectual; while his moral philosophy was moving in the Triad of thought, word, and deed. [13]

Alternatively, Mazdaism can perhaps be described as a henotheistic religion, a term coined by Friedrich Max Müller to capture the belief in a supreme god without precluding

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[8] Dastur F. M Kotwal and James W. Boyd, *A Persian Offering. The Yasna: A Zoroastrian High Liturgy* (Paris: Association pour l'Avancement des Études Iraniennes, 1991), 7.
[9] For an overview of this debate from the 17th till the 20th centuries; cf. Clarisse Herrenschmidt, "Once Upon a Time, Zoroaster," in *History and Anthropology* 3 (1987), 209–237.
[10] Clarisse Herrenschmidt, "Once Upon a Time, Zoroaster," 217.
[11] Mary Boyce, *Zoroastrians*, 18.
[12] Robert C. Zaehner, *Zurvan: a Zoroastrian Dilemma* (Oxford: Clarendon Press, 1955), 5.
[13] Martin Haug, *Essays*, 300.

the existence of other deities.[14]

The message Zarathustra proclaimed was truly revolutionary. Apart from his exaltation of Ohrmazd to the apex of the Iranian pantheon—a quasi-monotheism, so to speak—Zarathustra promised his fellow citizens individual judgment and salvation after death. His vision, therefore, differed profoundly from traditional Iranian religions in which happiness in the hereafter was declared a privilege granted only to leaders of the community.[15] The promise of an afterlife in heaven or hell, depending on the thoughts, words, and deeds achieved in the worldly sphere, had radical consequences. Most significantly, the believer was now entirely responsible for his own and the shared fate of his community in the afterlife.[16]

The world of the Sasanians (224–651) was deeply imbued with Zoroastrianism (Mazdaism).[17] Yet, it is difficult to make an argument for Mazdaean orthodoxy. The Zurvanites, Manichaeans (3rd cent.), and Mazdakites (6th cent.) are cases in point. Khodadad Rezakhani recently argued that their common designation as Mazdaean heterodoxies be *de facto* the product of early and medieval Muslim historiography. Those accounts chiefly derive from post-Sasanian efforts that purposefully aimed at manufacturing the notion of orthodoxy.[18] The Iranian socio-religious movements can best

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[14] Friedrich Max Müller, *Vorlesungen über den Ursprung und die Entwickelung der Religion. Mit besonderer Rücksicht auf die Religionen des Alten Indiens* (Strassburg: Verlag von Karl J. Trübner, 1881), 323–324.
[15] Mary Boyce, *Zoroastrians*, 16.
[16] Ibid., 29.
[17] *Grundzüge der Geschichte des Sasanidischen Reiches* is a useful introduction to Sasanian history and contains additional chapters on the Empire's structure, economy, religions, and art; cf. Klaus Schippmann, *Grundzüge der Geschichte des Sasanidischen Reiches* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1990). Also, cf. the yet only English introduction by Touraj Daryaee, *Sasanian Persia. The Rise and Fall of an Empire* (London. I.B. Tauris, 2009).
[18] Khodadad Rezakhani, "Mazdakism, Manichaeism and Zoroastrianism: In Search of Orthodoxy and Heterodoxy in Late Antique Iran," in *Iranian Studies* 48/1, 55–70. Al-Ṭabarī (d. 310/923), al-Hamadhānī (d. 1025), al-Bīrūnī (d. ca. 442/1050), Ibn Ḥazm (d. 456/1064), and al-Shahrastānī (d. 548/1153) are among the most important sources for reconstructing Sasanian history; Shaul Shaked, "Islam," in *The Wiley Blackwell Companion to Zoroastrianism*, eds. Michael Strausberg Yuhan S.-D. Vevaina, (Chichester: Wiley Blackwell, 2015), 492.

be distinguished from one another, as Shaked suggests, with regard to how they deal with the problem of evil: as a separate principle, entirely detached from the deity (e.g. Manichaeism); as on par with it (e.g. Zurvanism); or, as secondary, derivative to the good deity (e.g. Zoroastrianism/Mazdaism).[19] Regardless of where we situate these movements, as heterodoxies or within Mazdaean orthodoxy, they were invariably suppressed and obliterated by the Sasanian authorities.

For our purposes, it is worth looking at Mazdakism more closely. Following the reign of the Sasanian King Kavad I (488–531), who had initiated cadastral surveys and sweeping tax reforms, a certain Mazdak was able to rally support for his surprisingly egalitarian vision of society. He was convinced that worldly discord is the cause of quarrels involving women or property. Attempting to tackle evil at its root, he advocated communal access to women and joint property.[20] His egalitarianism must have not only fallen on deaf ears with the Zoroastrian priesthood (*āsrōnān*) but seriously unsettled them. After all, Iranian jurisprudence, particularly the law on matrimony, aimed at restricting access to women of elite households to elite males, while the complex institutions and laws of inheritance ensured that status, wealth, and nobility were maintained within the lineages of the ruling class.[21] This is most evident with regard to next-of-kin matrimony (*ḫwēdōdāh*) which was particularly praticed and promoted among the Sasanian elite. Besides indicating the formalistic way of thinking pertaining to the Mazdaean priesthood that enforced these regulations, it, moreover, illustrates that sexual relations were tried to

[19] Shaul Shaked, *Dualism in Transformation. Varieties of Religion in Sasanian Iran* (London: School of Oriental and African Studies, 1994), 21–22.
[20] Patricia Crone, "Zoroastrian Communism," in *Comparative Studies in Society and History* 36/3 (Jul. 1994), 452. On the social movements in Late Antique Iran; cf. Patricia Crone, *The Nativist Prophets of Early Islamic Iran. Rural Revolt and Local Zoroastrianism* (New York: Cambridge University Press, 2012).
[21] Richard Payne, "Sex, Death, and Aristocratic Empire: Iranian Jurisprudence in Late Antiquity," in *Comparative Studies in Society and History* 58/2 (2016), 521.

be harmonized and tied to the precepts of Mazdaean religion.[22] Mazdak's proposition for communal access to women was diametrically opposed to this thinking and threatened to dissolve the pure lineages of the Sasanian elite, and hence their foundation of power.

**B. Christianity and the Church of the East**

The political and social history of the Church of the East in the Sasanian and Muslim Empire must be situated against developments in and outside the Christian community. To begin with, we cannot talk about the Church of the East as an independent church before 431. In the Council of Ephesus, convened by Theodosius II wishing to gain unanimous consent of the Church, the Christological controversy surrounding the nature(s) of Christ reached a pinnacle.[23] The egregious theological position of Theodore of Mopsuestia (d. 428) had given rise to this debate:

> If I was asked: Mary, is she the mother of man or the mother of God, *anthropotokos* or *theotokos*? I would answer that I admit both terms. The Virgin is *anthropotokos* by nature of her parturition; she is *theotokos* in virtue of relation. She is *anthropotokos* by nature due to him who was in her bosom and who was human when he came forth; she is *theotokos* because God was engendered as a man without being constrained by him.[24]

The Patriarch of Constantinople, Nestorius (d. ca. 450), had built on the explications of Theodore advocating a strict dyophysitism, or two distinct natures of Christ. Martin Jugie puts his position in a nutshell:

> The disciple of Theodore [Nestorius] recognized in Christ two subjects, two hypostases and persons: on the one hand, the Word, eternal Son of God to whom the divine qualities must be attributed, on the other, man, the son of Mary, subject of human qualities.[25]

Referring to the Virgin Mary by the title *Christotokos* (Χριστοτόκος: Christ-bearer,

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[22] Maria Macuch, "Inzest im vorislamischen Iran," in *Archäologische Mitteilungen aus Iran* 24 (1991), 153.
[23] Peter Brown, *The Rise of Western Christendom. Triumph and Diversity, A.D. 200–1000* (Oxford: Wiley-Blackwell, 2013), 116–117.
[24] [Theodore of Mopsuestia] *Fragmenta. Dogmatica*, P.G. t. LXVI, col. 992 BC, quoted and translated in Martin Jugie, *Nestorius et la Controverse Nestorienne* (Paris: Gabriel Beauchesne, 1912), 29, my translation into English from French.
[25] Martin Jugie, *Nestorius et la Controverse Nestorienne*, 31, my translation into English from French.

"Mother of Christ"), Nestorius thought he could appease all sides in the storm that Theodore had raised.[26] However, his doctrine was opposed; most fiercely by his adversary Cyril of Alexandria (d. 444) whose opposition is perhaps symbolic of the internecine rivalry between the cities of Alexandria and Constantinople.[27] At any rate, the bishops at Ephesus anathematized Nestorius and his supporters, proclaimed the Virgin Mary *Theotokos* (Θεοτόκος: God-bearer, "Mother of God"), and reconfirmed the Nicene Creed (325).[28] The consequences of Ephesus were momentous. It brought about the schism of the Church of the East with the rest of the Church and reinforced a discrete development of the Christian communities in the East which was perhaps adumbrated in the autocephalous status their bishops had already achieved in 424.[29] Moreover, the controversy on Christology would continue for decades to come.[30]

The official severing of ties with Constantinople was a relief for the Sasanian authorities. The fear of divided loyalties of Christians living in their dominions was one reason. Sebastian Brock tells us that before the mid-5th century

> […] the fate of the Christian population in Persia was intimately linked with the course of political relationships between 'two shoulders of the world' […]: times of war were times when persecution was apt to break out, while political peace meant peace for the church.[31]

In other words, international relations, to varying degrees, had influenced the attitude of

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[26] Ibid., 31.
[27] John A. McGuckin, *St. Cyril of Alexandria. The Christological Controversy. Its History, Theology, and Texts* (Leiden, New York and Köln: E.J. Brill, 1994), 12.
[28] Steven A. McKinion, "Ephesus, Council of," in *Cambridge Dictionary of Christian Theology*, eds. Ian A. McFarland et al. (Cambridge: Cambridge University Press, 2011).
[29] In 424, the Synod of Dadishoʿ had stipulated that bishops in the jurisdiction of the 'Oriental Church' must only address their grievances to the Oriental (and not the Occidental) Patriarch; *SynO*, 296.
[30] The Council of Chalcedon in 451 reanimated the dispute: does Christ maintain two separate natures, human and divine (dyophysite); or merely one, a hypostatic synthesis of human and divine (miaphysite)? The negotiations at Chalcedon resulted in another schism between the Roman-Byzantine, Melkite, and Maronite Churches on the one hand, and the Syriac Orthodox, Armenian, Coptic, and Ethiopian Churches on the other.
[31] Sebastian Brock, "Christians in the Sasanian Empire: A Case of Divided Loyalties," in *Religion and National Identity*, ed. Stuart Mews (Studies in Church History, 18, Oxford: Basil Blackwell, 1982), 7.

the Sasanian authorities towards their Christian subjects.[32] The schism undoubtedly put Persian Christians in a less precarious position, even if it did not vanquish the fears of the Sasanians.

To situate the Church of the East, we need to penetrate more deeply into how Sasanian subjects related to the notion of empire. The semantic language of Iranianness (*ērīh*) as opposed to non-Iranianness (*anērīh*) is at the heart of Sasanian identity. Sasanian nobles perceived and represented themselves capitalizing on the imperial ideology of *ērānšahr* ('territory of the *ēr*'). This notion, according Richard Payne, dovetails Iranianness (*ērīh*) with belonging to the Good Religion (*wehdēn*).[33] Christians, as by definition, did not partake in this identity; rather they were, together with other minorities, pigeonholed in the "Bad Religion" (*agdēnīh*). As non-Mazdaeans, they were considered a threat to the Zoroastrian social order because, with their different purity rites, they could potentially disrupt it and, in turn, facilitate the presence of Ahriman in the material world (*gētīg*).[34] Their lack of Iranianness (*ērīh*), however, did not prevent them from collaborating in the imperial project of *ērānšahr*.[35] To legitimize itself, the Church of the East had to produce its own narrative of identity:

> Indeed, by drawing on literary sources and landscapes to reinvent the past, the [Christian] hagiographers communicated claims to civic and noble status in novel ways to equip Christian elites with narrative arguments with which to position themselves in late Sasanian society.[36]

By mobilizing the written culture of the past, the Church elite could firmly position itself

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[32] Ibid.
[33] Richard E. Payne, "Avoiding Ethnicity: Uses of the Ancient Past in Late Sasanian Northern Mesopotamia," in *Visions of Community in the Post-Roman World. The West, Byzantium and the Islamic World, 300-1100*, eds. Walter Pohl, Clemens Gantner and Richard Payne (Farnham: Ashgate, 2012), 212–213.
[34] Richard E. Payne, *A State of Mixture: Christians, Zoroastrians, and Iranian Political Culture in Late Antiquity* (Transformation of the Classical Heritage, 56, Oakland: University of California Press, 2015), 31.
[35] Richard E. Payne, "Avoiding Ethnicity," 212.
[36] Ibid., 220.

within Sasanian society. Indeed, its strategy of defining identity appears to have been entrenched in consciously marking its tradition as written and opposed to the oral culture of Zoroastrians which it probably looked at with condescension.[37]

## C. Islam and the Arabs

The conquests of the Arab Muslims (*futūḥ*), who took over many parts of the ancient Near East in less than thirty years, are overwhelming even from a modern viewpoint. Indeed, many speculations were made with regard to what conditioned the success of the Arabs who had pushed forward as far as Nihāwand in 640/1 and Khurāsān in 650/1.[38] Theologically, the prophecy of Muḥammad—his radical demand for submission to the One God (*Allāh*), his promulgation of the resurrection (*qiyāma*) of the bodies and individual judgement by God, and his claims of an afterlife (*ākhira*) in the lofty gardens (*jinān*) or the abominable hellfires (*jahannam*)—was sweeping, but not entirely unfamiliar to the people of Late Antiquity.[39] Historically, Muḥammad is usually deemed to have had remarkable leadership skills and a charismatic personality.[40] Politically, the fatigue of the Byzantine and Sasanian Empires which had for centuries engaged in intermittent warfare, the close acquaintance the Arabs had made with them providing regiments on either side in times of war, and the perpetuation of the administrative and

[37] Reuven Kiperwassser and Serge Ruzer, "To Convert a Persian and Teach Him the Holy Scriptures: A Zoroastrian Proselyte in Rabbinic and Syriac Christian Narratives," in *Jews, Christians and Zoroastrians: Religious Dynamics in a Sasanian Context*, ed. Geoffrey Herman (Piscataway, NJ: Gorgias Press, 2014), 116.

[38] Abū al-Ḥasan Aḥmad b. Yaḥyā b. Jābir al-Balādhūrī, *Futūḥ al-Buldān* (Bayrūt: Dār al-Kutub al-ʿIlmīya, 1971), 184 (Nihāwand), 241 (Khurāsān). For the Arab conquests of the Iranian provinces in more detail, cf. ibid., 182–281. In fact, the last Sasanian king Yazdegird III was forced to escape the Arab armies, first to Merv and then Balkh. He was supposedly killed in 651/2; Klaus Schippmann, *Grundzüge*, 77.

[39] Müller shows that monotheistic motives can even be found in Arabic poetry from the pre-Islamic period such as the *qaṣāʾid* of Labīd b. Rabīʿa; Gottfried Müller, *Ich bin Labīd und das ist mein Ziel: zum Problem der Selbstbehauptung in der altarabischen Qaside* (Wiesbaden: Steiner, 1981), 143.

[40] Frants Buhl, Alford T. Welch, Annemarie Schimmel et al., "Muḥammad," in *EI*[2].

organizational fabric of the Sasanians and Byzantines in the conquered areas probably contributed to the success of the conquests.[41] It is definitely outside the scope of this thesis to address the sweeping takeover of the Arab Muslims in more detail; however, it is important to note that Islam did not simply wipe out the centuries-old traditions of the Late Antique Near East but rather set the stage for renegotiating established practices and creating new meaningfulness.

The death of Muḥammad in 9/632[42] ushered in a pervasive identity crisis of the Muslim community (*umma*) marked by contestations of and negotiations over the entitlement to political and religious authority. In addition, as the *umma* progressively transformed into an imperial polity, it was paramount for it to define its identity against the backdrop of the vast number of non-Muslims and new converts to Islam. As concerns claims to leadership, these were, at least initially, based on the preeminence of Arab Muslims reflected and epitomized in the caliphal prerequisites such as kinship (*qarāba/ṣihr*), genealogical descent (*nasab*), companionship with the Prophet (*ṣaḥāba*), excellency in faith (*sābiqa*), and personal preeminence (*faḍl*).[43] Put differently, to substantiate their claims to power, the early caliphs mobilized notions of legitimacy resting on propinquity to the tribe of the Prophet and their personal, meritorious achievements for the early Muslim community (*umma*). Naturally, the more generations there were in between caliphal authority and the Prophet himself, the more difficult it was to mobilize notions of acquaintance with the Prophet as claims to caliphal legitimacy.[44]

[41] Robert G. Hoyland, *In God's Path. The Arab Conquests and the Creation of an Islamic Empire* (Oxford: Oxford University Press, 2015), 93–95, 98–99.
[42] In this thesis, I provide most dates from the Islamic era first as *hijrī* (AH) and then as common era (CE) dates.
[43] Cf. Gernot Rotter, *Die Umayyaden und der Zweite Bürgerkrieg (680-692)* (Wiesbaden: Deutsche Morgenländische Gesellschaft, 1982), 1–36.
[44] Ibid., 248.

Therefore, as Crone and Hinds rightly state, political authority slowly transformed into a system in which "the caliphs are central to the faith here and now."[45] This is perhaps most evident in the substitution of the caliphal title *khalīfat rasūl Allāh* with *khalīfat Allāh* by the Umayyads, and the more boastful *as-sulṭān ẓill Allāh fī l-arḍ* with the ascension of the ʿAbbāsids.[46] The increased centering on caliphs in the authority claims and the self-representation of the ruling class does not mean that claims of genealogical descent from the Prophet were not activated; however, such claims were simply more difficult to make and increasingly had to rest on evidence that was doubtful at best.[47]

The reconfiguration of the cultural landscape, initially dominated by the Syro-Arabian elite, was possible because Islam provided an idiom that was attractive to diverse religious communities especially due to its linkage to power and the elite.[48] More specifically, the ʿAbbāsid Revolution opened the stage for renegotiating the relationship between conquerors and conquered. This relationship had been strained due to the increasing number of new converts to Islam who by affiliation to Arab Muslims as clients (*mawālī*) were kept aloof from the society of the conquerors.[49] Daniel Pipes puts this in a nutshell:

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[45] Patricia Crone and Martin Hinds, *God's Caliph. Religious Authority in the First Centuries of Islam* (Cambridge: Cambridge University Press, 1986), 33.

[46] Ignác Goldziher, "Du Sens Propre des Expressions Ombre de Dieu, Khalife de Dieu: Pour Désigner les Chefs dans l'Islam," in *Revue de l'Histoire des Religions* 35 (1897), 332. For the development of the notion *khalīfat Allāh*, cf. W. Montgomery Watt, "God's Caliph. Qur'ānic Interpretations and Umayyad Claims," in *Iran and Islam. In Memory of the late Vladimir Minorsky*, ed. C.E. Bosworth (Edinburgh: Edinburgh University Press, 1971), 565–574 and Rudi Paret, "Ḫalīfat Allāh – Vicarius Dei. Ein differenzierender Vergleich," in *Mélanges d'Islamologie. Volume dédié à la Mémoire de Armand Abel par ses collègues, ses élèves et ses amis*, ed. Salmon Pierre Salmon (Leiden: E. J. Brill, 1974), 224–232.

[47] To illustrate, the ʿAbbāsids staged the Prophet in a narrative which claims that he entrusted ʿAlī with the mysteries who then handed them over to his son al-Ḥanafīya who once more passed them on to a representative of the Banū ʿAbbās; David S. Margoliouth, "The Sense of the Title Khalīfah," in *A Volume of Oriental Studies. Presented to Edward G. Browne, M.A., M.B., F.B.A., F.R.C.P. Sir Thomas Adams's Professor of Arabic in the University of Cambridge on his 60th Birthday (7 February 1922)*, eds. T. W. Arnold and Reynold A. Nicholson (Cambridge: Cambridge University Press, 1922), 326.

[48] Robert G. Hoyland, *In God's Path*, 207–208.

[49] Patricia Crone, *Slaves on Horses. The Evolution of the Islamic Polity* (Cambridge: Cambridge University Press, 1980), 49–50.

> A non-Arabian who converted to Islam was, in effect, petitioning to join the society of the conquerors. To prevent this from happening in large numbers, the conquerors had to exclude non-Arabians, whether Muslim or not, from the Register [*Dīwān*] and the fruits of victory. Herein lay the usefulness of the mawla-convert status; it provided an Islamic mechanism whereby the Arabians restricted to themselves the benefits of victory.[50]

What the revolution did, was to challenge the *status quo* with the conquerors and pave the way for a thorough transformation of the ruling class of the Islamic polity. This, in fact, becomes evident when taking into consideration that the majority of ʿAbbāsid caliphs was not of 'pure' Arab origin but born of mothers (*umm walad*) who had been foreign concubines.[51] More importantly, with the ʿAbbāsid dynasty the Islamic polity witnessed an increasing inflow of the large Persian heritage into the cultural domains of Islam.[52]

This contextualization does not claim to be exhaustive. I have attempted to sketch the relevant historical, social, and religious dimensions which constitute the backdrop against which the laws on matrimony and slaves in Sasanian, East Syrian, and Islamic jurisprudence burgeoned. Since I am situating these at the intersection of cosmological beliefs and the practical concerns of community/empire, I have, first and foremost, shed light on the cosmological purview of Mazdaism, Christianity and Islam and the notions of empire/community pertaining to the Sasanians, East Syrians, and Arabs.

We now continue with the literature review.

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[50] Daniel Pipes, "Mawlas: Freed Slaves and Converts in Early Islam," in *Slavery and Abolition* 1/2 (1980), 144–145. Also, cf. the argument of Elizabeth Urban of the political ascension of the "concubines" (*umm walad*) towards the end of the Umayyad period which provides an important perspective to the rise of the *mawālī* and, more largely, the ʿAbbāsids, Elizabeth Urban, "The early Islamic mawālī: a window onto processes of identity construction and social change" (PhD diss., University of Chicago, 2012), 156–7, accessed August 18, 2017, https://search.proquest.com/docview/1027764937?accountid= 8555.

[51] Bernard Lewis, *Race and Slavery in the Middle East. An Historical Enquiry* (New York and Oxford: Oxford University Press, 1990), 39.

[52] Robert G. Hoyland, *In God's Path*, 221.

# CHAPTER III

# LITERATURE REVIEW

The concern of this chapter is to outline and discuss the literature on matrimony and slaves in Mazdaean, East Syrian, and Islamic jurisprudence. I have compiled here for the reader the most pivotal studies in order to introduce these legal systems and the socio-political milieus that produced them efficiently. At the end of this chapter, I state how, based on this review, I build on previous studies while developing my own approach to matrimony and slaves. In support of my first main argument—the types of matrimony and the legal configuration of slaves being negotiated between cosmology and the sociopolitical concerns of the community's elite—I highlight the literature that draws connections between law, the cosmological purview of religion, and sociopolitical concerns. To establish the theoretical backdrop of my second argument—the relationship of Sasanian, East Syrian, and Islamic law being marked by varying patterns—I discuss the methodological approaches that scholars have employed to make similar arguments.

The field of Sasanian history has recently seen significant contributions which challenge us to rethink the way we hitherto interpreted Sasanian relations with the Church of the East. The traditional narrative, derived from the ideological *topos* of the Christian hagiographies, has prioritized recurring persecutions of Christians at the hands of the Sasanian authorities. We currently have an increasing number of studies emerging which have put this narrative into perspective. Antonio Panaino has argued that the presence of the Christian martyrs, in particular, their frequent mention outside hagiographical literature, in secular and even non-Christian sources, more broadly indicates that persecutions were not the norm, but rather that Christians were not as a rule of thumb

excluded from influential positions.[53] He furthermore points out that the decision to locate the patriarchal see of the Church of the East in Seleucia-Ctesiphon was possibly influenced by the desire to facilitate communication with the Persian emperors who resided close-by.[54] In the same vein, Brock reminds us of the dramatic expansion of church structures; whereas in 410 there were merely six metropolitan sees and about 30 bishoprics, by the collapse of the Sasanian Empire in the seventh century, there were as many as ten metropolitan sees and 96 dioceses.[55] Having said that, the argument that Sasanian Iran would have witnessed a Christian conquest from within if it had not been for the Arabs is not convincing.[56] Nevertheless, the Church of the East, in fact, appears to have married into and maintained its supporters in the families of the Sasanian authorities.[57] This resonates with its increasing wealth and power towards the end of the Sasanian dynasty.[58] Richard Payne claims, more generally, that the Sasanian rulers patronized church institutions and, moreover, integrated them into the imperial structures of the Sasanian Empire.[59] This would perhaps turn the narrative of recurring persecutions of Christians on its head. On that note, he points out that the martyr accounts were mostly written at the hands of East Syrian authors with the intent of polemicizing and using the misdeeds of their adversaries to shape a notion of community based on the experience of

[53] Antonio C.D. Panaino, "The 'Persian' Identity in Religious Controversies. Again on the Case of the 'Divided Loyalty' in Sasanian Iran," in *Iranian Identity in the Course of History*, ed. Carlo G. Cereti (Rome, 2010), 228.
[54] Ibid., 230.
[55] Sebastian Brock, "Christians in the Sasanian Empire," 3. Likewise, William Young, in a quantitative analysis of the Church in the Sasanian and the early Muslim Empire from 1974, already pointed out the significant structural expansion of the Eastern Church in the Sasanian Empire; William Young, *Patriarch, Shah and Caliph* (Rawalpindi: Christian Study Centre 1974), 49.
[56] Antonio C.D. Panaino, "The 'Persian' Identity in Religious Controversies," 236.
[57] Geo Widengren, "The Nestorian Church in Sasanian and Early Post-Sasanian Iran," in *Incontro di Religioni in Asia tra il III e il X Secolo d.C.*, ed. Lionello Lanciotti (Firenze: Leo S. Olschki Editore, 1984), 9.
[58] Antonio C.D. Panaino, "The 'Persian' Identity in Religious Controversies," 235–236.
[59] Richard E. Payne, *A State of Mixture*, 9.

violence.[60] More largely, "differentiated, hierarchical inclusion"[61] on the part of Zoroastrian authorities could indicate an almost *millet*-like structure of the Sasanian Empire. This constitutes an important finding which I will utilize in support of my theoretical backdrop of legal pluralism which is based on the very assumption that individuals navigate between mulitple centers of authority.

As regards Sasanian jurisprudence, we are still far from a comprehensive legal theory. However, thanks to Maria Macuch—author of more than four dozen articles on law—we do have a solid idea of its nature, institutions, principles, and regulations. As regards matrimony, Macuch has greatly contributed to our understanding of the various types of marriages found in Iranian jurisprudence. To begin with, she makes an important argument with regard to what the Sasanian laws on matrimony and kinship indicate more generally:

> Almost none of these complex institutions determining the structure of kinship in Sasanian Iran would have been possible in a society confessing Manichaeism or Christianity […]. The Zoroastrian concept of life and fertility, its encouragement of endogam [sic] alliances and especially incest, was the ideological foundation on which the elaborate laws of succession and inheritance were built.[62]

She convincingly argues that the institutions in Sasanian law, their complex ways of determining kinship, as well as the overall encouragement to endogamic marriages, could only be born out of a society whose dogmatics were evidently Zoroastrian. This indicates that the precepts of Zoroastrianism, its cosmology, were intimately tied to the practical concerns of the Sasanian Empire. As I show in the sixth chapter, the law on matrimony was crucial for establishing this link.

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[60] Ibid., 27.
[61] Ibid.
[62] Maria Macuch, "Zoroastrian Principles and the Structure of Kinship in Sasanian Iran," in *Religious Themes and Texts of pre-Islamic Iran and Central Asia. Studies in Honour of Professor Gherardo Gnoli on the Occasion of his 65th Birthday on 6 December 2002*, eds. Carlo G. Cereti, Mauro Maggi and Elio Provasi (Beiträge zur Iranistik, 24, Wiesbaden: Dr. Ludwig Reichert Verlag, 2003), 243.

Macuch systematically outlines three main types of marriage in Sasanian jurisprudence: marriage with full matrimonial rights (*pādiḫšāy*), auxiliary marriage (*čagar*), and consensus marriage (*ḫwasrāyēn*). Temporary marriage is not listed as a separate type but a variation, since it may be stipulated for all types.[63] Elsewhere, Macuch contrasts auxiliary and consensual matrimony with the pleasure marriage in Islamic law (*mutʿa*; often rendered as "temporary marriage"). Above all, she concludes that Iranian jurisprudence knew a variety of temporary alliances for different purposes, most of which are, in a way or another, preserved in the pleasure marriage (*mutʿa*).[64] The relevance of matrimony in Iranian society has recently received the attention of other scholars such as Payne. He argues that the jurists aimed at "maximizing elite male access to the reproductive capacities of women."[65] The circulation of women was a substantial concern of elite households, more specifically, to create and maintain their position in the imperial structures of the Sasanian Empire.[66] Payne's findings provide the foundation of my argument that matrimonial institutions in the Sasanian Empire served the specific sociopolitical concerns of the elite, particularly, the maintenance of empire.

Yishai Kiel analyzes the doctrine of next-of-kin matrimony (*ḫwēdōdah*) against the backdrop of Mazdaean cosmological beliefs and Sasanian imperial concerns.[67] Having said that, Kiel does not produce the full picture. For instance, he fails to mention that next-of-kin marriages were often fictitious. This was the case, when a daughter was

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[63] Maria Macuch, "Herrschaftskonsolidierung und sasanidisches Familienrecht: zum Verhältnis von Kirche und Staat unter den Sasaniden," in *Iran und Turfan. Beiträge Berliner Wissenschaftler. Werner Sundermann zum 60. Geburtstag gewidmet*, eds. Chr. Reck and P. Zieme (Iranica, 2, Wiesbaden 1995), 153.
[64] Maria Macuch, "Die Zeitehe im sasanidischen Recht – ein Vorläufer der šīʿitischen mutʿa-Ehe in Iran?," in *Archäologische Mitteilungen aus Iran* 18 (1985), 203.
[65] Richard Payne, "Sex, Death, and Aristocratic Empire," 522.
[66] Ibid.
[67] Yishai Kiel, *Sexuality in the Babylonian Talmud. Christian and Sasanian Contexts in Late Antiquity* (Cambridge: Cambridge University Press, 2016), 149–181.

instituted as the intermediary successor (*ayōkēn-stūr*) of her deceased father. Before she could be married into an auxiliary marriage to bear children for him, she would legally be held as the *pādiḫšāy*-wife of her deceased father.[68] In other words, in order to connect the children born to her from an auxiliary marriage to the lineage of the juridical father, the Sasanian jurists had to utilize the artifice of a marriage between the deceased and his daughter. This shows that incestuous matrimony did not always constitute an actual marriage between the married parties. Similar to the methodology of Kiel, I situate the Sasanian types of matrimony at the intersection of Mazdaean cosmology and Sasanian imperial concerns in order to shed light on their precise functions in society.

We are not well informed on the status of slaves and their configuration in Sasanian jurisprudence. Macuch specifies four ways of becoming enslaved: the most common being war; secondly, as a result of children being sold into slavery by the *paterfamilias*; through a transaction in which a person is pledged as security for a limited time; and lastly, by descent.[69] Slavery is not restricted to non-Zoroastrians. To illustrate, the *paterfamilias* of a Mazdaean family is—under extraordinary circumstances such as a shortage of supplies (*adwadād*) —allowed to sell his children into slavery.[70] In addition, a debtor may be enslaved as a result of a transaction in which he pledges a slave.[71] Although Zoroastrians are not safeguarded from being enslaved, it is forbidden to sell a Zoroastrian slave to an infidel.[72] I deal with these cases in more detail in the seventh

[68] Maria Macuch, "Incestuous Marriage in the Context of Sasanian Family Law," in *Ancient and Middle Iranian Studies. Proceedings of the 6th European Conference of Iranian Studies, held in Vienna, 18–22 September 2007*, eds. Maria Macuch, Dieter Weber and Desmond Durkin-Meisterernst (Wiesbaden: Harrassowitz Verlag, 2010), 143.
[69] Maria Macuch, "Barda and Barda-Dāri. ii. In the Sasanian Period," in *Encyclopædia Iranica*, vol. 3.
[70] Maria Macuch, "The adwadād Offence in Zoroastrian Law," in *Shoshannat Yaakov. Jewish and Iranian Studies in Honor of Yaakov Elman*, eds. Shai Secunda and Steven Fine (The Brill Reference Library of Judaism, 35, Leiden and Boston, MA 2012), 259–260.
[71] *HazDP*, 149.
[72] Maria Macuch, "Barda and Barda-Dāri."

chapter of this study in order to gauge to what extent slave law is negotiated between the cosmological and practical concerns of the Sasanian Empire.

As Macuch observes, the slave is considered an object (*ḫwāstag*); however, Iranian jurisprudence, more generally, acknowledges his human faculties which distinguish him from other forms of property such as immovables. To be more precise, the slave is fully recognized in court as plaintiff, defendant, or witness.[73] His master can bestow him with limited legal capacity by allowing him to dispose of his own income (*pad windišn pādiḫšāykard*).[74] In this thesis, I ascertain whether the (in)capacity of slaves to acquire property is meaningful with regard to creating and assigning a particular societal purpose to the institution *per se*. To locate slaves within the society of *Ērānšahr* (Sasanian Empire), I scrutinize how Iranian jurisprudence configures them: their rights and obligations, the ways they differ from free subjects, and how enslavement can be overcome.

The literature on East Syrian jurisprudence is meager, to say the least. In *Orientalisches Kirchenrecht*, Walter Selb comprehensively maps out the sources of law and the development of East Christian jurisprudence more generally. For the Church of the East in Late Antiquity, he distinguishes between two different types of sources: the synodical records, many of which were compiled in the *Synodicon Orientale*, and the law books written by individual clerics.[75] He rightly observes that, as a formalized institution of lawmaking in the Church of the East, the episcopal synods acquired legitimacy with the Synod of Mar Isḥaq (410) or at least shortly after.[76] To support his claim, we can

[73] Ibid.
[74] Ibid.
[75] Walter Selb, *Orientalisches Kirchenrecht*, vol. 1: *Die Geschichte des Kirchenrechts der Nestorianer (von den Anfängen bis zur Mongolenzeit)* (Wien: Verlag der Österreichischen Akademie der Wissenschaften, 1981), 97–115, 165–179.
[76] Ibid., 117.

invoke threefold evidence: the reorganization of Church authority decreed at the Synod of Mar Isḥaq, the specification to biennially convene all bishops within its jurisdiction in a synod to take place in Seleucia-Ctesiphon, and the interdiction of bishops to appeal to the Western patriarchs at the Synod of Dadishoʿ (424).[77] Furthermore, Selb claims that by the 8th century the law books—or individual collections of law—had practically replaced the synods as a means of lawmaking.[78] Having said that, Hubert Kaufhold more cautiously suggests that the law books presented an aid to the ecclesiastical jurisdiction of the courts rather than replacing them entirely.[79] It is difficult to deliberate on why the mode of lawmaking in the Church of the East progressively moved away from synodical rulings towards individual juridical compilations. The consolidation of its authority and structure after the internecine struggles of the 5th and 6th centuries is perhaps one reason. In the sixth chapter, I show that these individual compilations mobilized scriptural cosmology in order to sanction monogamous marriages which ties in with my first main argument of cosmology being mobilized by jurists due to specific concerns of the Christian elite.

We are not sufficiently informed about matrimonial customs in the Church of the East. Having said that, the law on matrimony figures among the most frequently addressed themes in East Syrian writings of jurisprudence. The synodical gatherings as well as the law books of Mar Aba and Ishoʿbokht bear witness to this. Noteworthy, our knowledge on matrimonial customs rests almost entirely on the rationale that interdictions

[77] *SynO*, [Synod of Mar Isḥaq] 271–273 (Canon XXI), 264–265 (Canon VI), [Synod of Dadishoʿ] 296. For a scheme illustrating the structure and organization of the Persian Church as specified in the Synod of Mar Isḥaq see Figure II, xii.
[78] Ibid., 186.
[79] Hubert Kaufhold, "Sources of Canon Law in the Eastern Churches," in *The History of Byzantine and Eastern Canon Law to 1500*, eds. Wilfried Hartmann and Kenneth Pennington (Washington: The Catholic University of America Press, 2012), 304–305.

indicate the opposite of what they attempt to prohibit, with regard to social practice. To illustrate, the treatise of Mar Aba (r. 539–52) and his prohibition of close-kin marriage has been taken to indicate that this type of matrimony was, in a way or another, practiced among Christians. Antonio Panaino even states:

> In the already mentioned letter [the treatise of Mar Aba], the Katholikos explicitly forbids Christians to maintain unions with relatives just as it was possible according to the Zoroastrian customs, ordering a divorce in the time-span of one year or, in case of refusal, imposing the banishment from the community and the sacraments. These statements patently show the radical presence of next-of-kin marriages among the members of the VI$^{th}$ century Christian Persian Church […].[80]

I agree that the prohibition of close-kin marriage, especially due to its reiteration in different jurisprudential sources, may indicate that this matrimonial type was occasionally practiced among Christians.[81] However, to claim its "radical presence" among members of the Church of the East is certainly too far-fetched. After all, due to Mar Aba's defying the Sasanian court and converting from Zoroastrianism, we cannot rule out a fair amount of polemicism in his writings. Moreover, we should beware of making conclusions with regard to social customs, particularly, when based on this sort of evidence alone. The writings of Mar Aba, his rejection of next-of-kin marriages, will be adduced in support my argument that the Christian elite, through scriptural references, reverted to cosmology to sanction a particular concern—monogamous matrimony.

The process of delimiting matrimonial law in the Church of the East must be seen as an effort by its elite to shape a distinctive notion of community, particularly against the backdrop of an Iranian polity thoroughly invested in promoting next-of-kin unions. Having said that, we can perhaps determine different reasons as to why next-of-

[80] Antonio C.D. Panaino, "The Zoroastrian Incestuous Unions in Christian Sources and Canonical Laws: Their (Distorted) Aetiology and Some Other Problems," in *Cahiers de Studia Iranica* 36 (2008), 81.
[81] On the marital practices of Syriac Christians see Lev E. Weitz, "Syriac Christians in the Medieval Islamic World: Law, Family, and Society" (PhD diss., Princeton University, 2013), 136–143, accessed July 2, 2017, http://arks.princeton.edu/ark:/88435/dsp01ng451h571.

kin marriage was not an entirely unfamiliar practice among Persian Christians. Manfred Hutter argues that

> [t]he reason for this may be the integration of Christians as 'higher-class' people within Sasanian society, which may have led to that kind of 'Zoroastrianized' Christianity—which seemed to be accepted as 'proper' Persian by Zoroastrian officials [...].[82]

Likewise, Victoria Erhart asserts that certain Christian practices, in particular celibacy and matrimony, had to be made more admissible to the Persian elite and were thus progressively adjusted through canonical reforms.[83] The minutes of the Synod of Mar Babai (497) invoke more evidence in this regard, mentioning that the bishops convened at the instigation of the Shahanshah to reform the law on matrimony.[84] In the fifth chapter, I shall focus on precisely how the matrimonial law was laid down and what modifications it underwent with the reforms at the Synods of Mar Aqaq (486) and Mar Babai (497) as well as the prohibitions of Mar Aba in the 6th century.

There are as yet, to the best of my knowledge, no studies focusing on slavery in the territories of the Church of the East. Regardless, the Syrian law books are full of references to slaves, in particular, the *Corpus Juris* of Ishoʿbokht (d. ca. 800). We thus have a sound basis for conducting more research on them. Even though there are no in-depth studies on slave law, we already have a small but indispensable hint at the status of slaves in East Syrian law which perhaps allows us to think of this institution more broadly. In her article on slaves in Iranian jurisprudence, Macuch points out a stipulation in the

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[82] Manfred Hutter, "Mār Abā and the Impact of Zoroastrianism on Christianity in the 6th Century," in *Religious Themes and Texts of Pre-Islamic Iran and Central Asia. Studies in Honour of Professor Gherardo Gnoli on the Occasion of his 65th Birthday on 6th December 2002*, eds. Carlo G. Gereti, Mauro Maggi and Elio Provasi (Wiesbaden: Dr. Ludwig Reichert Verlag, 2003), 172.

[83] Victoria Erhart, "The Development of Syriac Christian Canon Law in the Sasanian Empire," in *Law, Society, and Authority in Late Antiquity*, ed. Ralph W. Mathisen (Oxford: Oxford University Press, 2001), 118.

[84] To be more precise, the minutes state that Babai was given instructions by the "bienveillant Zâmâsp, Roi des rois, pour que les évêques soumis à son autorité se réunissent près de lui et établissent une réforme relativement au marriage légitime et à la procreation des enfants, pour tous les clercs en tous pays"; *SynO*, 312. Somewhat differently, the Synod of Mar Aqaq (486) reports that it convened with the permission of the Shahanshah; cf. *SynO*, 299–300.

law book of Ishoʿbokht which suggests that slaves are by rule granted a *peculium* (the capacity to property). Furthermore, she rightly states that this stipulation would imply an imbalance with Zoroastrian jurisprudence which does not bestow on slaves the capacity to own property as a rule of thumb.[85] What she is hinting at is substantial pointing not only to conflicting juridical configurations of the slave but possibly different intentions behind this institution more largely. In light of the state of the field, I first attempt to systematize the capacities East Syrian law furnishes slaves with, before making assumptions on the relevance of their legal status more broadly. Due to the lack of research on slavery, it is difficult to make a fully-fledged argument for their legal configuration being tied to the cosmology of Christian religion and the practical concerns of the Christian elite. By discussing the legal stipulations in the primary sources, however, I marshal evidence supporting my argument.

Recent studies on East Syrian law have gradually challenged the common wisdom pertaining to the relationship of the Church of the East to the Sasanian Empire. This thesis builds on these new insights. In particular, the third question of this thesis—the relationship of East Syrian to Sasanian law—internalizes the finding of other scholars that Sasanian and East Syrian law did not coexist completely independently, but were in significant dialogue with each other.

When immersing oneself in Islamic law, it is fundamental to be aware of the distinction between *sharīʿa* and *fiqh*. On the *sharīʿa*, al-Khalīl b. Aḥmad (d. 175/791)—the author of the *Kitāb al-ʿAyn* (a phonetically arranged Arabic dictionary)—informs us that:

> The *sharīʿa* and the *sharāʾiʿ* [pl.] are what God prescribed to the servants [mankind] on the matter of religion and commanded to them to adhere to with regard to the prayer,

[85] Maria Macuch, "Barda and Barda-Dāri." For the stipulation in question cf. Ishoʿbokht, *CorJ*, 139 [V, 3, §16].

> the fasting, the pilgrimage and things alike […].[86]

His definition suggests that the *sharīʿa* primarily encompasses man's relationship to God (*ʿibādāt*), and only subordinately, interpersonal relationships (*muʿāmalāt*). To be clear, while *sharīʿa* is usually regarded invariable divine law as revealed in the *Qurʾān* and through prophetic practice (*Sunna*), the interpretations of divine law, the discipline of jurisprudence, are commonly referred to as *fiqh*.[87]

Regarding matrimony (and slaves) in the early Islamic context, Kecia Ali has provided a critical study based on a multitude of early Islamic legal texts. On the Islamic legal construction of matrimony, she writes:

> No matter what the understanding of women and their legal capacities in other contexts, when a woman becomes a wife, she inherits a remarkably consistent legal status. The specifics of her rights and duties can differ, sometimes significantly, from school to school, but the basic control over her sexuality and physical mobility that the husband gains by the marriage contract–with due modifications in the case of enslaved wives whose owners' claims must be considered–is the same. Along with his sole prerogative to end the marriage unilaterally, this control is the most basic element of marriage as regulated by the jurists.[88]

Most importantly, her findings on the nature of marriage are based on, among many others, the same primary sources as the chapter on Islamic law in this thesis. I use her analytical findings to support the main argument of this thesis which is that the legal notion of matrimony is located at the nexus of cosmological beliefs and the sociopolitical concerns of the Muslim community.

Several studies are available on slaves in Islamic law. Until recently, however, we lacked a copious roadmap of the legal configuration of slaves. Filling this gap, Rainer Oßwald, based on a large variety of Mālikī legal texts, has provided a yet unrivaled

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[86] Al-Khalīl b. Aḥmad, *Kitāb al-ʿAyn*, vol 1 (Salsalat al-Maʿājim wa-l-Fahāris [without year]), 253: "wa-l-sharīʿatu wa-l-sharāʾiʿu: mā sharaʿa l-lāhu li-l-ʿibādi min amri l-dīni, wa-amarahum bi-l-tamassuki bihi min al-ṣalāti wa-l-ṣawmi wa-l-ḥajji wa-shibhihi […]."
[87] For al-Khalīl's less useful entry on *fiqh*, cf. ibid., vol. 3, 370.
[88] Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, MA and London: Harvard University Press, 2010), 185–186

introduction with the title *Das islamische Sklavenrecht*.[89] Other studies by Patricia Crone, *Slaves on Horses*, as well as Bernhard Lewis' *Race and Slavery in the Middle East* deal with different aspects of slavery throughout the centuries.[90] A very important article was written by Daniel Pipes on the so-called clients (*mawālī*).[91] This legal status, somewhat in between freedom and slavery, acquired increasing prominence after the first century of Islam, when many non-Muslims converted to Islam in order to overcome slavery. In light of these studies, I try to ascertain the role and function that slaves are assigned in the early Islamic Empire. In addition, I attempt to gauge whether the legal configuration of the slave is in any way integrated into the cosmological purview of Islam or fulfills particular sociopolitical aspirations of the Muslim elite.

First and foremost, research on Islamic law has been concerned with exploring its relationship to other systems of jurisprudence. The discussion particularly centered on foreign elements. Goldziher (d. 1921), Bergsträsser (d. 1933), and Schacht (d. 1969) were the intellectual pioneers of examining the possibility of Roman-Byzantine elements in Islamic law. For different reasons, it has proved most difficult to determine through what channels this transmission could have taken place. Initially, Joseph Schacht suggested that Roman legal elements would have most likely entered through the discipline of rhetorical studies in Iraq, which he claims was profoundly imbued with the spirit of Hellenism.[92] Patricia Crone convincingly dismantled this theory. She concedes that rhetorical studies loomed large with respect to transmitting Late Antique culture into Islam. However, the purpose of rhetorical studies was not to acquaint students with the

[89] See Rainer Oßwald, *Das islamische Sklavenrecht* (40, Mitteilungen zur Sozial- und Kulturgeschichte der islamischen Welt, Würzburg: Ergon Verlag, 2017).
[90] See Patricia Crone, *Slaves on Horses*; see also Bernard Lewis, *Race and Slavery in the Middle East.*
[91] See Daniel Pipes, "Mawlas," 132–177.
[92] For the full argument see Joseph Schacht, "Foreign Elements in Ancient Islamic Law," in *Journal of Comparative Legislation and International Law* 32/3-4 (1950), 13–14.

precepts of Roman law, but rather to convey techniques of debate and how to argue effectively.[93]

While attempting to argue for the pervasion of foreign elements into Islamic jurisprudence, some studies have been informed by methodologies which are highly controversial. For instance, commonalities of Islamic law with other, earlier legal systems are sometimes alone taken as indicator that Islamic law was influenced by these. First, the unspoken assumption is usually that the coming into existence of legal systems, their temporal succession to one another, provides an interpretative framework for justifying commonalities. In other words, legal texts themselves then merely fulfill the purpose of confirming what is already assumed, namely that Islamic law is chronologically speaking the latest revealed Late Antique legal system. Thus, if commonalities with other earlier legal systems are found in Muslim legal texts, this merely validates the initial assumption that the earlier legal system provided tools for the later, in this case the Islamic.[94] The problem with this reasoning is that the later legal system is constantly denied originality. This results in a genealogy of power, and originality for that matter, in which Roman and Judaic law "blossoming with creativeness" are placed on top, and Islamic law, devoid of groundbreaking innovations, being historically the latest, at the very end. Secondly, the flaw of such comparative studies is not so much their claim to the adoption of foreign elements, but their lack of specifying the channels through which this alleged influence took place. To illustrate, regarding Islamic law, Ṣūfī Ḥasan Abū Ṭālib rightly states:

> In order to be able to accept this argument [traces of Roman in Islamic law], although it points towards the influence of Islamic law by Roman law, two things must be proven:

[93] Patricia Crone, *Roman, Provincial and Islamic Law, The Origins of the Islamic Patronate* (Cambridge: Cambridge University Press, 1987), 8–12.

[94] An article by Judith Wegner is indicative of this scholarship. Taking as a point of departure the classical *uṣūl al-fiqh*, Wegner embarks on a dubious journey identifying for each 'root' of Islamic law its Talmudic equivalent. In her conclusion, she denies any originality to Islamic law by stating that the entire concept of analogy (*qiyās*) was merely copied from Judaic law; Judith Wegner, "Talmudic Jurisprudence," in *AJLH* 26/1 (1982), 45–47.

> (1) that the Arabs did not have a legal system before Islam, and (2) that the Muslim jurists could have known Roman law and be influenced by it […][95]

To make a case for foreign influences in Islamic law, which is a sweeping claim, scholars should identify the specific channels through which this influence took place. Just because legal institutions, concepts, and principles in different legal writings resemble each other, this does not allow us to make an argument that one legal system necessarily influenced the other. Building on these studies and taking theirs flaws into consideration, I develop my own methodological approach to comparative Near Eastern law in the fourth, methodological chapter.

This literature review fulfilled two purposes. First, I illustrated the current state of research and identified the important findings scholars have made with regard to matrimony and slavery in Sasanian, East Syrian, and Islamic law. This thesis takes their findings into consideration to develop its main research questions: What legal forms do the laws of matrimony and slavery cultivate? How are these legal forms related to the practical concerns of the community/empire from which they grow? What patterns of interaction mark the relationship between Sasanian, East Syrian, and Islamic law? Secondly, I outlined and discussed the methodologies other scholars have used to approach comparative legal issues. Taking these into consideration, I find it more useful to revert to an alternative methodology. In the next chapter, I thus develop my own methodological approach which is a combination of the theories of legal culture and legal pluralism.

[95] Ṣūfī Ḥasan Abū Ṭālib, *Bayna al-Sharīʿa al-Islāmīya wa-ʾl-Qānūn al-Rūmānī* (al-Qāhira: Maktabat Nahḍat Miṣr), my translation into English from Arabic, 13.

# CHAPTER IV

# METHODOLOGY

Much has been written in the quest for the origins of Islamic jurisprudence. However, the manner some scholars have approached the issue frequently led to flawed conclusions. The implications of assigning the achievements of civilization to another world of thought or jurisprudence—more specifically, the hierarchization and claims of superiority that come with condensing religious systems into genealogical tables—are too sweeping and dangerous to accept unsubstantiated claims. As George Hourani aptly points out:

> To reach an adequate proof of affiliation of ideas, an intellectual historian needs one or both of two kinds of evidence: *(i) external evidence of affiliation; for example, a report of a biographer that one scholar was taught by another or was favorably impressed by his works;* (ii) detailed resemblances so close that they could not be accidental; for example, exact correspondence of sentences, or numerous correspondences in technical terms. No precise rules can be set. Combinations of external evidence with several general resemblances may give conclusions of various degrees of probability.[96]

Especially the first point has sometimes been overlooked. In other words, commonalities alone cannot suffice as evidence for influence; rather, to pinpoint foreign influences or "borrowings"—and this applies not exclusively to Islamic law—the channels or means of transmission would have to be identified. I do not think that tracing influences alone is very conducive to our understanding of different legal systems. I, therefore, suggest that we try to deliberate more broadly on the societal reasons that caused jurisprudential systems to at times adopt similar resolutions to juridical problems, whereas at other times they did not. In this thesis, I take a combined approach considering legal culture and legal pluralism as alternatives to the overused 'influence paradigm' which has long dominated the field of comparative law.

[96] George Hourani, "Muʿtazilite Ethical Rationalism," in *IJMES* 7/1 (1976), 63. Ṣūfī Ḥasan Abū Ṭālib exemplifies the argument regarding the debate on Roman influences in Islamic law; Ṣūfī Ḥasan Abū Ṭālib, *Bayna al-Sharīʿa al-Islāmīya wa-l-Qānūn al-Rūmānī* (al-Qāhira: Maktabat Nahḍat Miṣr), 13.

As I mentioned in the introduction, the first part of this thesis is descriptive. Using the primary sources, which I lay out in the fifth chapter, I extract the various types of marriage and how the law configures slaves. I do so through a close reading of relevant passages in the Sasanian, East Syrian, and Islamic legal material I cover. Thus, I respond to the first question of this thesis: What legal forms do the laws of matrimony and slavery cultivate?

For the second part of inquiry, I adopt the methodological approach that David Nelken and others coin as "legal culture." Scholars of legal culture examine the interaction of the law, its institutions and upholders with society, legal mechanisms of enforcing the law in society, and cultural values conditioning legal boundaries.[97] Regarding the objectives of legal culture, Lawrence Friedman ingeniously states:

> The vocation of legal scholarship should be (in my opinion) heavily canted toward understanding how the legal system, as an operating system, actually works; what made it this way; and how it affects the social order in which it is embedded.[98]

The primary assumption I must make to apply legal culture is that the jurisprudential writings I deal with, in a way or another, furnish insights into the realities of the society and community that engenders them and which they have a stake in shaping. Because a multitude of my sources claims to be idealized sets of law, written with the intent to harmonize different legal practices of the community, I cannot necessarily assume that they are congruent with the state of jurisdiction, meaning law applied. In the fifth chapter, in which I discuss my sources, I revisit this assumption for each text carefully. First and foremost, they are jurisprudential texts, recommendatory in nature. In other words, it is

[97] David Nelken, "Using the Concept of Legal Culture," 1–3, 8. For more literature on the concept of legal culture: see David Nelken (ed.), *Using Legal Culture* (London: Wildy, Simmonds & Hill, 2012); David Nelken (ed.), *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997); also, Henry W. Ehrmann, *Comparative Legal Cultures* (Englewood Cliffs: Prentice Hall, 1976). For a critical appraisal of the concept: cf. David Nelken, "Thinking about Legal Culture," in *Asian Journal of Law and Society* 1 (2014), 255–274.

[98] Lawrence M. Friedman, "Is there a Modern Legal Culture?," in *Ratio Juris* 7/2 (July 1994), 118.

doubtful that the laws would be enacted precisely the way the jurist describes it and more apt to reason that their presence in a jurisprudential text, to some extent, resonate with the investment of lawmakers in such legal matters.

I deploy legal culture as an interpretative method by which I situate my primary sources in relation to the societies engendering them and on which they again leave their imprint. My research indicates that the laws on matrimony and slavery were affected by cosmology and the sociopolitical efforts of the elite. Building on that, legal culture, analytically, serves as a lens through which I can gauge how the legal stipulations on marriage and slaves were mediated in a triangle with cosmology and the practical concerns of community/empire. Using legal culture, I tackle the second main question of this thesis which is how the types of matrimony and the legal configuration of slavery relate to the practical concerns of the community/empire from which they grow.

The third part of this thesis is theoretically underpinned with legal pluralism. Legal pluralism is opposed to legal centralism which is premised on the notion of a single overarching authority and jurisdiction to which individuals in a society relate. On the contrary, legal pluralism assumes that individuals relate to multiple, coexisting centers of power, each of which maintains its own jurisdiction.[99] Accordingly, in such societies, individuals are, at least in theory, exposed to different legal regimes which, more broadly, indicates

> that the 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.[100]

The *de facto* capacity of individuals to bypass an administration of justice may vary significantly. That is, even though a person may skirt the legal regime allocated to him

[99] John Griffiths, "What is Legal Pluralism?," in *JLPUL* 24 (1986), 3–4, 14–15.
[100] Ibid., 39.

by birth, its jurisdiction would usually develop mechanisms for preventing or at least making it more difficult. Conversion to another religion serves as the example *par excellence*. While, upon conversion, the convert affiliates to another administration of justice, this very act may be punished by death in the jurisdiction belonging to the religion from which he converted. Therefore, capital punishment as a measure of preventing believers from skirting may, in certain cases, be the result of competition and interaction between different legal regimes.

In *A Common Justice*, Uriel Simonsohn recently deployed the theory of legal pluralism to the jurisdiction of Jews and Christians in the early Islamic Empire.[101] His work and method have significantly inspired this thesis. To set out his method, Simonsohn questions the notion of autonomous communities which is usually acknowledged as a given in the early Islamic Empire. In other words, he tries to do away with the idea that Jews and Christians lived in isolated communities which were exclusively ruled by the laws of their religious elite and the regulations for *dhimmīs*.[102] Most importantly, Simonsohn states that many primary sources, in fact, suggest otherwise. Thus, he builds his argument stating that the principle of legal autonomy is one that grew as an ideal at the hand of Muslim writers, rather than reflecting social reality, in which autonomous authority was wishful thinking of the respective elites, but never completely actualized.[103]

For the application of legal pluralism as theoretical framework in this thesis, we must assume that individuals living in the Sasanian and the Muslim Empires navigated between different legal systems. This assumption I make based on Simonsohn's and the

[101] See Uriel I. Simonsohn, *A Common Justice*, 2011.
[102] Ibid., 7–8.
[103] Ibid., 9.

findings of other scholars such as Payne. For instance, a Christian living in the Sasanian Empire, although by birth affiliated with the legal authorities of the Church of the East, was exposed to the law of the Zoroastrian authorities.[104] In addition, the finding that next-of-kin marriages were not at all uncommon among the Christian minority in the mid-6th century strongly may point towards this social reality.[105] Thus, a Christian would effectively navigate between two centers of authority to which, for example, different ideas of matrimony were permissible. Whereas the Zoroastrian authorities highly promoted next-of-kin marriage, it was despicable to the Christian bishops. On the other hand, the strict notion of monogamy advocated by Church authorities was in stark contrast to the practice of the Zoroastrians. In my analysis, I will show that the prolonged coexistence of these legal systems led to different patterns of interaction between them which were not merely a matter of adopting foreign elements. In other words, rather than the Sasanian notion of next-of-kin marriage affecting Christian law in the sense that the Christian elite adopted this type of matrimony, I show that, in fact, the law of the Church of the East merely had to be made more permissible to Sasanian authorities. Most peculiarly, this led Christian elites to make important changes to the law on matrimony pertaining to its Church hierarchy. Using legal pluralism, I thus attempt to respond to the third main question which is: What patterns mark the interactions between Sasanian, East Syrian and Islamic law? To respond, I explore on what matters Sasanian, East Syrian and

[104] With regard to this assumption being valid in the case of Christian individuals living in the Sasanian Empire, the evidence marshaled by Payne is striking. Taking into consideration the minutes of the Synod George (676), Payne argues that it was only in 676 that the ecclesiastical hierarchy first condemned Christians using the courts of other confessions, Richard E. Payne, "East Syrian Bishops, Elite Households, and Iranian Law after the Muslim Conquest," in *Iranian Studies* 48/1 (2015), 7, 12–3. For the synodical minutes, see *SynO*, 214–226 (Syr.), 480–490 (Fre.). Mapping on to this, Mario Kozah states that the Synod of George resolved the internal struggles of the Church of the East surrounding the authority of the catholicos, Mario Kozah, "Introduction," in *The Syriac Writers of Qatar in the Seventh Century*, eds. Mario Kozah et al. (Piscataway: Gorgias Press, 2014), 15.

[105] Manfred Hutter, "Impact of Zoroastrianism on Christianity in the 6th Century," 172.

Islamic law interacted with each other, whether matrimony and slavery were part of them, and by what patterns these interactions are characterized.

To sum up, in this thesis, I proceed in three steps. First, I carve out the types of marriage and the legal configuration of slaves in Sasanian/East Syrian/Islamic law by discussing relevant passages in the primary sources. Secondly, I use legal culture to examine how matrimony and slavery were negotiated through the triad of cosmology, lawmaking, and the practical concerns of maintaining community/empire. Thirdly, I deploy the theory of legal pluralism to ascertain patterns of competition, interaction, and negotiation that marked the relationship between the jurisprudential systems of the Sasanians, the Church of the East, and the Arab Muslims.

# CHAPTER V

# JURISPRUDENCE IN LATE ANTIQUITY

## A. Jurisprudence, legal practice, and the modality of lawmaking

Before looking at matrimony and slaves more closely, we need to reflect on the sources of and the principles fundamental to jurisprudence. The latter are not legislations in the proper sense, but rather distinctions or methods the jurist uses conceptually to analyze, discuss, or judge in particular legal cases.

Jany Janós has made an ambitious attempt at collating the sources and methods of legal reasoning in Iranian jurisprudence by drawing parallels to the principles of Islamic jurisprudence (*uṣūl al-fiqh*).[106] His study is perhaps the closest the field has yet come towards a legal theory of Iranian jurisprudence. He first establishes that the *Avesta*, at least in theory, stands above all other sources of law.[107] Practically more important than the *Avesta*, according to Janós, is the role of consensus of the learned (*hamdādestānīh*). Effectively, it signified a source independent of the *Avesta* for making legal judgements. Janós identifies these learned men as sages who were, in one way or another, involved in circles of learning.[108] We do not know exactly what consensus meant in this context or how it was negotiated; however, we are informed that individual sages proclaimed their own doctrines (*čāštag*). As a legal source, doctrines epitomized the interpretations of a sage and, most importantly, constituted the main body of oral law pertaining to a circle of learning. Janós then proceeds to the tools of legal reasoning in Iranian jurisprudence:

[106] See Jany János, "The Four Sources of Law in Zoroastrian and Islamic Jurisprudence," in *Islamic Law and Society* 12/3 (2005), 291–332.
[107] Ibid., 296.
[108] Ibid., 299.

analogy, legal fiction, and presumption.[109] At last, he brings into focus the established practice of the courts (*kardag*) which, not always in compliance with the theoretical doctrines of the sages (*čāštag*), developed into an additional reference point for lawmakers.[110] In brief, this indicates that Sasanian law to some extent internalizes the tension between law in theory and law in practice. Refering to the legal practice of the courts as a source of law, the jurists, notably in post-Sasanian times, transformed *kardag* into an inlet through which the changing realities of jurisdiction could penetrate into the realm of theoretical law. With regard to Islamic law, this phenomenon is later rivaled by the Mālikīs who perhaps as the only Muslim legal school (*madhhab*) acknowledge customary law (*ʿamal*) as a source of lawmaking.[111]

The legislation in the Church of the East presupposed the convention of all metropolitans and bishops residing within its range of authority in a council or synod. These gatherings were usually headed by the Catholicos (later: Catholicos-Patriarch) or his vicar. The bishops could stipulate laws or canons only by means of consensus.[112] This modality of lawmaking was accompanied by a formal procedure of writing, signing, and confirming—qualified in the Synod of Mar Isḥaq (410):

> All these precepts, these laws, these canons must be written down; and we all must sign at the end of the verdict and confirm with our signature to an invariable pact.[113]

This procedure is likely to have been applied throughout most of the synods in the Church of the East because the synodical minutes in the *Synodicon Orientale* display significant structural and formal resemblances. It is worth noting that the stipulations made in a

[109] Ibid., 307.
[110] Ibid., 310–313.
[111] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 62–63.
[112] Hamilton Hess, *The Early Development of Canon Law and the Council of Serdica* (Oxford Early Christian Studies, Oxford: Oxford University Press, 2002), 30.
[113] *SynO*, 260, my translation into English from French.

council or synod were, first and foremost, morally as opposed to juridically binding.[114] Most importantly, the act of lawmaking was considered authoritative due to the supposed presence of the divine spirit which led the congregation on the right path.[115] We can assume that the episcopal assembly, more largely, perceived of itself as the representative of Christ's flesh from which it allegedly obtained its authority, guidance, and truth.

The synodical councils occasionally position themselves within a particular juridical legacy by mentioning the episcopal synods or canons they recognize as legitimate.[116] On that note, Hamilton Hess indicates the significance of the Council of Nicaea in the process of developing the theoretical notion of 'the council':

> First, it [the Council of Nicaea] introduced by precedent the concept and the practice of a deliberative and legislative gathering of the oecumene. Second, some fifty years after it met, Nicaea came to be regarded as the divinely inspired touchstone of orthodoxy consequent to the acceptance of Nicaea's terminological solution to the Arian problem by the council of Constantinople in 381.[117]

The role of Nicaea as a lawful template for later councils is specifically evident in its frequent mention in the synodical minutes of the Church of the East.[118] Lastly, it is important to note that a synod may choose to codify its resolutions and episcopal norms in the form of canons, however, not as a general rule. Apart from the synodical gatherings, the Church of the East, beginning in the mid-6th century, was witness to the burgeoning of legal handbooks written at the hands of individual bishops such as Mar Aba, Mar Shemʿon, and Ishoʿbokht. It is challenging to theorize or extract a common legal ideology pertaining to these law books due to their differing characters; however, we can tentatively claim that they more or less attempted to codify the diverging and rapidly

[114] Hamilton Hess, *The Early Development of Canon Law*, 73.
[115] Ibid., 76–77.
[116] Cf. for instance the Synods of Yahbalaha I (420) and Mar Babai (497), *SynO*, 278, 312.
[117] Hamilton Hess, *The Early Development of Canon Law*, 46.
[118] Walter Selb, *Orientalisches Kirchenrecht*, vol. 1: *Nestorianer*, 105.

transforming legal practices in the jurisdiction of the Church of the East.[119]

The Islamic legal tradition, somewhat similar to the Sasanian, internalizes the tension between jurisprudence and legal practice. To clarify, it is worth taking into account the position of Joseph Schacht:

> They [the *qāḍīs*] considered possible objections that could be made to recognized practices from the religious and, in particular, from the ritualistic or the ethical point of view, and as a result endorsed, modified, or rejected them. They impregnated the sphere of law with religious and ethical ideas, subjected it to Islamic norms, and incorporated it into the body of duties incumbent on every Muslim. […] As a result the popular and administrative practice of the late Umayyad period was transformed into the religious law of Islam. […] The circumstances in which the religious law of Islam came into being caused it to develop, not in close connexion with the practice, but as the expression of a religious ideal in opposition to it.[120]

In other words, Schacht claims that the religious law of Islam, by which he means jurisprudence (*fiqh*), took shape against the backdrop of the customs and administrative practices of the Umayyads. However, lawmakers did not simply incorporate but collated the ideas that came about in this setting with the rituals and ethics of Islam; the normative plain of jurisprudence developed as a result of this process and not infrequently in semantics that opposed the contemporary juridical practice. Islamic jurisprudence, therefore, presents an idealized state of the law which does not necessarily reflect jurisdiction on the ground but should rather be read in conversation and perhaps opposition to it.

By the end of the 2nd cent./8th cent. the Muslim legal specialists (*fuqahāʾ*) had begun to theoretically develop the tools of legal reasoning which would later become the linchpins of the Islamic legal schools (*madhāhib*). These tools were formed, particularly, against the backdrop of the controversy between the *ahl al-ḥadīth/ahl al-sunna*

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[119] Ishoʿbokht states this explicitly, Ishoʿbokht, *CorJ*, 9; cf. also Walter Selb, *Orientalisches Kirchenrecht*, vol. 1: *Nestorianer*, 214.
[120] Joseph Schacht, *An Introduction to Islamic Law* (Oxford 1964), 26–27.

(traditionalists) and the *ahl al-raʾy* (rationalists).[121] This controversy was, more largely, rooted in the debate on the relationship between transmitted (*manqūl*) and demonstrative (*maʿqūl*) knowledge. Accordingly, the traditionalists (*ahl al-ḥadīth*) advocated precedence of the *Sunna* of the Prophet, whereas the rationalists (*ahl al-raʾy*) prioritized the living tradition and were thus more inclined towards demonstrative (*maʿqūl*) reasoning.[122] More importantly, this debate was a prelude to the conceptualization of the more specific tools of legal reasoning, in particular, analogy (*qiyās*), approval/preference (*istiḥsān/istiḥbāb*), consensus (*ijmāʿ*), and individual reasoning (*ijtihād*).[123] These are, according to the particular school of law (*madhhab*), ranked and prioritized differently.

The legal theory of al-Shāfiʿī, as developed in his *Risāla*, expounds that every act of the believer, which is within the scope of jurisdiction, corresponds to a legal statute (*ḥukm*) contained in the divine law (*sharīʿa*).[124] The statute (*ḥukm*) must either be identified directly in the divine scripture (*Qurʾān* and *Sunna*) or may, subordinately, be inferred from these through analogy (*qiyās*).[125] As a result, he allocates priority of transmitted (*manqūl*) over demonstrative (*maʿqūl*) knowledge. By contrast, the Mālikīya make allowance for local customs (*ʿamal*) which results in the heigher weighting of demonstrative (*maʿqūl*) knowledge.[126] The means of reasoning undoubtedly do not constitute invariant templates but should rather be seen as more or less pliable guideline principles.

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[121] Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2004), 74.
[122] Joseph Schacht, *Introduction to Islamic Law*, 34.
[123] Ibid., 37; also, cf. Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, 140–147.
[124] On the development of Shāfiʿī legal doctrine, cf. Ahmed El Shamsy, "From tradition to law: The origins and early development of the Shāfiʿī school of law in ninth-century Egypt" (PhD diss., Harvard University, 2009), accessed August 19, 2017, https://search-proquest-com.ezproxy.cul.columbia.edu/docview/304889761?accountid=10226.
[125] Éric Chaumont, "al-Shāfiʿī," in *EI*[2].
[126] Similarly, cf. Joseph Schacht, *Introduction to Islamic Law*, 61–62.

**B. Legal sources: a survey**

For Iranian jurisprudence, the number of legal writings that have come down to us is meager. The principal source, which is also employed here, is a not entirely preserved legal manual with the title *A Thousand Judgments* (*Hazār Dadestān*). The *Hazār Dadestān* was written by a certain Farroḫmard i Wahrāmān at the beginning of the 7th century right before the Arab conquests.[127] Anahit Perikhanian and Maria Macuch have both edited and translated the *Hazār Dadestān*. In addition to her translation, Macuch provides an indispensable commentary to the *Hazār Dadestān* in which she discusses each stipulation in terms of its significance within Iranian jurisprudence more generally. In this thesis, I utilize Perikhanian's English translation for convenience of the reader but will adduce the German translation by Macuch at points where the English version significantly differs from the German. The text of the *Hazār Dadestān* is highly sophisticated and presumes familiarity of the reader with the complex institutions and principles of Iranian law.[128]

For the jurisprudence of the Church of the East, I use the *Synodicon Orientale* which is a collection of the synodical minutes of the Eastern Church. The corpus was supposedly compiled between 775 and 790 and has been edited and translated into French by J.B. Chabot in 1902.[129] It begins with the Synod of Mar Isḥaq (410) and ends with the

[127] Name and author of the book are mentioned in the MS itself, *HazDP*, 193 (79,3–13) and ibid., 195 (79,16-80,17). Importantly, Macuch points out that the title of the MS is often erroneously rendered *The Book of a Thousand Judgements (Mādigān-i-Hazār Dādistān)*. For the debate cf. Maria Macuch, *HazDM*, 10–11. As concerns the dating, the latest king mentioned in the *HazD* is Husraw i Ohrmazdān (r. 591–628). In the 26th year of his reign, the author states, a certain document was written and sealed. Thus, the *HazD* cannot have been written before that; Farroḫmard i Wahrāmān, *HazDP*, 227 [99,17–100,5]; also, cf. Maria Macuch, *HazDM*, 9–10.

[128] Bartholomae claims that the author of the *HazD* does not master the content of his writings because several judgements are mentioned more than once. However, his argument fails to take into account the particular purpose of the *HazD* as a manual that is designed for legal practitioners, rather than attempting to be a succinct theory of Sasanian law. Cf. Christian Bartholomae, *Über ein sasanidisches Rechtsbuch* (Heidelberg: Carl Winter's Universitätsbuchhandlung, 1910), 4.

[129] While the date is not entirely clear, Chabot argues convincingly that the compilation must have taken place sometime between 775 and 790 due to a note of the author on the Synod of Barṣauma (484), in which

Synod of Ḥenanishoʿ (775). Therefore, it is a useful historical overview of the developments in the Church of the East more generally. Other than the *Synodicon Orientale*, I use the law books of Mar Aba (*Eherecht des Patriarchen Mâr Abhâ*) and Ishoʿbokht (*Corpus Juris des persischen Erzbischofs Jesubocht*), both of which have been edited and translated into German by Eduard Sachau in 1914. The treatise written by the Patriarch Mar Aba (r. 539–52) is a collection of 20 legal statutes on issues pertaining to congress and matrimony.[130] Ishoʿbokht was ordained Metropolitan of Rev Ardashir about 780 and probably composed his *Corpus Juris* during his tenure as metropolitan.[131]

With regard to Islamic jurisprudence, I use the *Risāla fī Uṣūl al-Fiqh* by Muḥammad b. Idrīs al-Shāfiʿī (d. 204/820). Apart from being known as the eponym of the Shāfiʿīya, he made important theoretical contributions to Islamic law.[132] This

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he mentions that his corpus includes all oriental synods except this particular one due to it being illicit. Therefore, he would have certainly added the Synod of Timothy I (790) after the Synod of Ḥenanishoʿ (775) which is the last he includes; see *SynO*, 309 and J.B. Chabot, *SynO*, 13.

[130] From the last line of the treatise, we know that Mar Aba must have written it himself: "Vollendet ist das Schreiben des Mâr Abhâ, Catholicus-Patriarch des Ostens, eine Aufklärung über die Gesetze des Geschlechtsverkehrs und des Heiratens;" Mar Aba, *EheM*, 285 (§ 20). Most of the information that have come down to us about Mar Aba are from his biography which was composed shortly after his death, *Histoire de Mar-Jabalaha: de Trois Autres Patriarches, d'un Prêtre et de Deux Laïques, Nestoriens*, ed. Paul Bedjan (Paris: Otto Harrassowitz, 1893), 206–274. We are also informed that Mar Aba was a Christian convert from Zoroastrianism.

[131] Ishoʿbokht composed the *Corpus Juris* in Middle Persian (Pahlavi). From the anonymous translator's preface, we know that a certain Timothy instigated its translation into Syriac. Based on other information by the translator, scholars have concluded that the Timothy in question, is probably the Catholicos-Patriarch Timothy I (r. 780-823). Thus, the translation would have taken place sometime between 780 and 823. In addition, the translator informs us that Ishoʿbokht was ordained Metropolitan of Rev Ardashir at the hands of Ḥenanishoʿ. Looked at in conjunction with the reference to Timothy I, scholars have mutually agreed that this is by all means a reference to the latter's immediate predecessor, Ḥenanishoʿ II (r. 775–80); see Ishoʿbokht, *CorJ*, 5.

[132] The life of al-Shāfiʿī is quite well-known and has been thoroughly researched. Wüstenfeld points out the disagreement about al-Shāfiʿī's birthplace. It is most likely Ghazza. From an early age, he had memorized the *Qurʾān* and Mālik's *Muwaṭṭaʾ*. Mālik proposed to him to join his circle of students which he remained in until the latter's death in 179/795. After his stay in Medina, we are informed about a journey to Baghdād where the teachings of the *Ḥanafīya* had gained currency. Here he was initially on friendly terms with Muḥammad ibn al-Ḥaṣan al-Shaybānī who later opposed him resolutely. In 195/811, he began teaching in the disciplines of *ḥadīth*, *kalām*, and *fiqh* acquiring a circle of enthusiasts who openly advocated his views. While in Baghdād, al-Shāfiʿī supposedly compiled the first version of his *Risāla*. We are not well informed about the reasons of his later emigration to Egypt; however, Chaumont suggests that it may be related to the popularity of the teachings of Mālik in the Ḥijāz. Therefore, Egypt would have provided a more fertile soil for Shāfiʿī's doctrine to flourish. He died on a Friday in Rajab 204/820 in Fusṭāṭ; Ferdinand Wüstenfeld, *Der Imâm el-Schâfi'i seine Schüler und Anhänger bis zum J. 300 d. H.* (Göttingen:

landmark in the history of Islamic jurisprudence has recently been edited and translated into English by Joseph E. Lowry.[133] It is important to realize that the *Risāla* is primarily a theoretical compendium interested in the epistemological and methodological dimensions of lawmaking. Consequently, the *Risāla*—unlike the *Mudawwana* of Saḥnūn—does not address the manifold particulars and variations pertaining to different legal cases. However, it incidentally discloses some important theoretical notions governing matrimony and the juridical configuration of slaves. The multivolume *Mudawwana al-Kubrā* of Saḥnūn b. Saʿīd al-Tanūkhī (d. 240/854) constitutes the main source against which I analyze matrimony and slaves in the Islamic tradition.[134] The *Mudawwana* allocates to matrimony three comprehensive chapters (*kutub al-nikāḥ*) on various aspects. With regard to slaves, identifying the relevant passages is more tedious because slave law runs through the entire compendium rarely restricted to a particular chapter or section.[135]

In this chapter, I discussed and theorized the modes of lawmaking in the Sasanian, East Syrian, and Islamic legal tradition. This provided important insights into the modality of lawmaking which is crucial for analyzing the stipulations in the

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Dieterich'sche Verlags-Buchhandlung, 1890), 32–35, 41 and Éric Chaumont, "al-Shāfiʿī," in *EI²*; also, Fuat Sezgin, *GAS*. Vol 1: *Qurʾānwissenschaften, Ḥadīṯ, Geschichte, Fiqh, Dogmatik, Mystik bis ca. 430 H.* (Leiden: E. J. Brill, 1967), 484–485.

[133] See Muḥammad b. Idrīs al-Shāfiʿī, *The Epistle on Legal Theory. Muḥammad ibn Idrīs al-Shāfiʿī*, ed. and tr. Joseph E. Lowry (New York and London: New York University Press, 2013).

[134] Saḥnūn was born in Qairawān in 160/776. Although, we know that Saḥnūn travelled to Medina and Mecca, it is uncertain whether he was ever taught by Mālik himself. Based on his intellectual exchanges with Ibn al-Qāsim al-ʿAtakī (d. 191/807) and Asad b. al-Furāt (d. 212/827), he penned what was initially called the *Asadīya*. Due to the widespread impact of the *Asadīya* within North Africa, the text was again revised by Ibn al-Qāsim and given the name *Mudawwana*. Saḥnūn is, even today, affiliated with the spread and triumph of the Mālikīya in Ifrīqiyā and the development of Qairawān into an important center of learning for Mālikī jurisprudence; Fuat Sezgin, *GAS*. Vol 1: *Fiqh*, 468 and Mohamed Talbi, "Saḥnūn," in *EI²*. For matrimony in other legal schools such as the Ḥanbalīya, see Susan A. Spectorsky, *Chapters on marriage and divorce: responses of Ibn Ḥanbal and Ibn Rāhwayh* (Austin: University of Texas Press, 1993).

[135] This can be attributed to the fact that slaves are considered property while possessing undeniable human qualities which make them surface not merely in sections on property law but also in such concerned with other regulations.

jurisprudential material. In addition, I laid out the primary sources deployed in this thesis.

# CHAPTER VI

# MATRIMONY

## A. Sasanian law: utilizing female reproductive capacities

### *1. Cosmogony and eschatology: the origins and benefits of marriage*

In this chapter, I discuss the various types of matrimony in Sasanian law arguing that these are closely tied to the notion of maintaining empire while being integrated into the idiom of the cosmic vision of Zoroastrianism. The *Avesta* and the Pahlavi books indicate that to reproduce the creatures supporting Ohrmazd is beneficial for the cosmos and, more largely, protects the earth from the expansion of the evil forces of Ahriman.[136] To be more precise, it is considered the private duty (*ḫwēškārīh*) of every Zoroastrian to contribute to the proliferation of human creatures.[137] According to the myth of creation, all human creatures that were and will be, originated from the first semen of next-of-kin marriage (*ḫwēdōdah*).[138] Most significantly, the religious books sanctify this particular form of marriage which is well summarized by Prods O. Skjærvø:

> Marrying one's closest relatives (parents, siblings, children) was said to be one of the foremost good deeds […], the model for which was provided by three divine and mythical unions: Ohrmazd and his daughter Spandārmad (the earth), Gayōmard and his mother Spandārmad, and the two first humans Mashī and Mashiyānī […].[139]

Cosmogony, in fact, provides for each kind of incest with first-degree relatives an

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[136] *[Vidēvdad] Wrestling with the Demons of the Pahlavi Widēwdād*, ed., tr., and ct. Mahnaz Moazami (Leiden and Boston: Brill, 2014), 353 (14.15). Also, *Dēnkard. Book 4. Zoroastrian Religious Writings From The Arsacid And Sasanian Periods*, tr. Dastur Peshotanji Behramji Sanjana, 24 (113), accessed online: http://www.avesta.org/denkard/dk4.html, July 10, 2017: "Every man that has a material body should regard his own marriage as a good work incumbent on him to perform […]. And he should promote the marriages of others."

[137] *Dēnkard, Book 7*, 1, 9, accessed online: http://www.avesta.org/denkard/dk7.html, July 10, 2017: "[Mashī and Mashiyānī] also performed the will of the creator, enjoyed the advantage of the many duties of the world, and practiced next-of-kin marriage for procreation, union, and the complete progress of the creations in the world, which are the best good works of mankind." Likewise, cf. Maria Macuch, "Herrschaftskonsolidierung und sasanidisches Familienrecht," 157.

[138] *Le Troisième Livre du Dēnkart*, ed. Jean de Menasce (Paris: Librairie C. Klincksieck, 1973), 86, 17–20.

[139] Prods O. Skjærvø, *The Spirit of Zoroastrianism*, 33–34.

archetype: Ohrmazd and Spandārmad (father and daughter), Gayōmard and Spandārmad (son and mother), Mashī and Mashiyānī (brother and sister). According to Zoroastrian dogma, these are all desirable forms of matrimony. Maria Macuch indicates that the term for incestuous marriages figures five times in the *Avesta*. However, she states that it is unclear whether it is used in the precise meaning of next-of-kin marriage.[140] The Pahlavi books support the notion of benefit that comes through instituting next-of-kin marriage, and, moreover, make evident that it is among the most meritorious deeds a believer can commit. In a law book on the proper and improper behavior of Zoroastrians, probably written in late Sasanian times, a story is quoted in which Ahriman, the representative of darkness himself, concedes the virtue and merit of next-of-kin marriage:

> Aharman [Ahriman] exclaimed thus: 'Enter into the season-festival! […] enter into the sacred feast! […] but avoid next-of-kin marriage! because I do not know a remedy for it; for whoever has gone four times near to it will not become parted from the possession of Aûharmazd [Ohrmazd] and the archangels.'[141]

Elsewhere, it is stated that next-of-kin marriage is in an inverse relationship with anal intercourse (*kunmarz*). Accordingly, the creatures of Ohrmazd, practicing next-of-kin marriage to recreate the cosmos, counteract the followers of Ahriman who engage in sinful anal intercourse to spread evil.[142] Furthermore, next-of-kin marriage is embedded in the eschatological vision of Mazdaism. This becomes evident from the Pahlavi Rivāyat:

> Just as today the most evil (comes) from sodomy, so when the Sōšāns [the Messiah] comes, all men will practise *xwēdōdah* [next-of-kin marriage], and every demon will be destroyed through the miracle and power of *xwēdōdah*.[143]

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[140] Maria Macuch, "Inzest im vorislamischen Iran," 150. The passages she points at: *Yasna*, 12, 9; *Vidēvdad* 8, 13; *Visperad* 3, 3; *Gāh* 4, 8; *Yašt* 24, 17.

[141] [*Šāyest nē šāyest*] *The Sacred Books of the East*, vol. 5, tr. E.W. West (Oxford: Clarendon Press, 1880), 389. For a brief discussion of this passage, cf. Maria Macuch, "Inzest im vorislamischen Iran," 150.

[142] Maria Macuch, "Inzest im vorislamischen Iran," 150, also, Yishai Kiel, *Sexuality in the Babylonian Talmud*, 161. Noteworthy, it is doubtful whether or not anal intercourse can be compensated for by entering a next-of-kin marriage.

[143] *The Pahlavi Riyāyat. Accompanying the Dādestān ī Dēnīg. Part II: Translation, Commentary and Pahlavi Text*, ed., tr. and ct. Alan V. Williams (Copenhagen: Munksgaard, 1990), 12 (8c6).

This chapter, more broadly, sheds light on the stipulations on matrimony in the *Hazār Dādestān*. Moreover, we investigate to what extent the cosmological sanctioning of particular types and institutions of matrimony ties in with the practical concerns of the Sasanian elite. This inquiry illustrates that the legal authorities utilized, and were forced to utilize, the idiom of cosmology for the sake of justifying the marital practices and institutions they propagated.

### *2. Marriage types*

a. Full marriage (*pādiḫšāy*)

To enter a marriage with full matrimonial rights (*pādiḫšāy*), a woman is required to obtain approval by her legal guardian (*sālār*).[144] The formulation of the stipulation in the *Hazār Dādestān*—the "sister" or "daughter"—indicates that the guardianship (*sālārīh*) over her is usually held by her brother or father. In case she enters a marriage without the approval of her legal guardian, it is considered invalid.[145] The approval is required because, when entering a *pādiḫšāy*-marriage, the guardianship over the woman is transferred from her former guardian to the *pādiḫšāy*-husband.[146]

The appropriation of the legal guardianship by the husband is a necessary condition of a *pādiḫšāy*-marriage. A stipulation in the *Hazār Dādestān* with regard to a certain Farroḫ makes this evident:

> If he declares: 'I have dissolved my marriage with (this) woman and have given her in marriage and guardianship to Farraxv [Farroḫ]', and (if) Farraxv takes the woman as a wife but declares regarding the guardianship: 'there is no need ('not needed')'; some (authorities) have stated that (in such a case) the divorce is not valid. Vahrām has stated that the reason for this is that to declare: 'not needed' with regard to the guardianship is to declare (the same) with regard to the marriage. *For a marriage cannot ('may not')*

[144] Farroḫmard, *HazDP*, 101 (36, 2–5).
[145] Ibid.
[146] Ibid., 35 (4, 15–5, 3).

*exist without guardianship* [my emphasis] […].[147]

In the case at hand, a man dissolves the marriage with his *pādiḫšāy*-wife giving her in marriage and guardianship to Farroḫ who accepts her as his wife but not the guardianship over her. Farroḫmard informs us that, according to some authorities, this marriage does not come into effect, since a *pādiḫšāy*-marriage is concomitant with the guardianship over the wife. The marriage of the husband who wanted to divorce his *pādiḫšāy*-wife is, in turn, not dissolved.

We can adduce at least two other stipulations showing that the validity of the *pādiḫšāy* is intertwined with the transfer of the legal guardianship to the *pādiḫšāy*-husband. The first states that a marriage can only be terminated with the assignment of a new legal guardian over the wife and the verbatim statement "let (her) be given (in guardianship to such a one?)."[148] The other features an interesting, more complex case. If a woman remarries after being divorced by her *pādiḫšāy*-husband and the former husband for whatever reason failed to transfer the guardianship over her, then any children born to her are legally considered his, irrespective of whether or not he is the natural father.[149] This illustrates that a marriage with full matrimonial rights is valid for as long as the legal guardianship over the wife is with the *pādiḫšāy*-husband.[150]

Once the *pādiḫšāy* is valid, both spouses have certain rights and obligations. First, it is important to note that all children born from this type of marriage are affiliated with the lineage of the husband. Macuch points out that due to the absence of

[147] Farroḫmard, *HazDP*, 35 (4, 15–5, 3); see the commentary of Maria Macuch, *HazDM*, 85-86.
[148] Farroḫmard, *HazDP*, 35 (4, 9–10).
[149] Ibid., 33 (3, 15–4, 1).
[150] The conjunction of the *pādiḫšāy*-marriage with the legal guardianship over the woman is attested elsewhere. For instance, another provision stipulates that a divorce is only valid once the question concerning the legal guardianship is settled; ibid., 295 (87, 7–10). For a further discussion of the features of the *pādiḫšāy*-marriage; see Maria Macuch, "Herrschaftskonsolidierung und sasanidisches Familienrecht," 152–153.

primogeniture in Iranian law, all sons equally are considered his legal successors and heirs.[151] Concerning the husband, the law book explicitly states that he is obliged to maintain his *pādiḫšāy*-wife:

> A well-behaved and pious wife from a *pātixšāyīh*-marriage [marriage with full matrimonial rights] (must be supported) year after year at her husband's expense, and the husband may not say: 'do not give (funds for her) support!'[152]

The *pādiḫšāy*-wife, on the other hand, commits to maintaining her husband's lineage, should he, for whatever reason, remain childless.[153] This obligation is valid even beyond his death and, as we will see, led to the development of the complex institution of the intermediary successor (*ayōkēn*). For instance, in case of the death of her childless husband, the *pādiḫšāy*-wife would be appointed his *ayōkēn* whose responsibility it was to enter an auxiliary marriage (*čagar*) the children of which are considered offspring of her deceased *pādiḫšāy*-husband.[154] Essentially, the *pādiḫšāy* implements an exchange of financial securities on the part of the husband for the lifelong commitment to producing offspring on the part of the wife.

The laws on property indicate that the termination of the *pādiḫšāy* results in the suspension of this exchange. While married, the husband can convey to his *pādiḫšāy*-wife anything he likes except land, water, plants, the house and a maximum of two slaves.[155] However, there is disagreement on what property the wife is entitled to take away with her in the case of a divorce. What is certain, is that if the divorce is consensual, she cannot raise any claim to property acquired during the marriage.[156] For different circumstances, varying opinions prevail. Farroḫmard notes that some authorities rule that the wife cannot

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[151] Maria Macuch, "Zoroastrian Principles and the Structure of Kinship in Sasanian Iran," 236.
[152] Farroḫmard, *HazDP*, 95 (33, 9–11). Elsewhere, it is stated that the husband has the duty to maintain his *pādiḫšāy*-wife as well as minor *pādiḫšāy*-children; ibid., 89 (30, 10–11); also, ibid, 91 (31, 4–6).
[153] Maria Macuch, "Herrschaftskonsolidierung und sasanidisches Familienrecht," 152–153.
[154] Ibid., 154.
[155] Farroḫmard, *HazDP*, 95 (33, 9–11).
[156] Ibid., 35 (4, 13–14).

take away with her any property obtained during the marriage, but that she is permitted to return with the dowry, meaning the share in her father's inheritance that she brought into the marriage.[157] It also states that the proper procedure is to make sure that she leaves the marriage provided for.[158] While married, therefore, the wife can expect to be compensated and provided for financially—probably due to her commitment to produce offspring even beyond the death of her husband. However, once the commitment is not sustained, meaning the marriage terminated, she is only entitled to the property that she herself brought into the marriage (the dowry) and can hardly make any claims to the financial assets of her husband.

b. Auxiliary marriage (*čagar*)

This brings us to the second type of marriage: the auxiliary marriage (*čagar*). The primary purpose of this marriage is most likely to assure the continuation of a man's lineage. Accordingly, this form of matrimony is instituted especially in the case that a *pādiḫšāy*-husband dies without a male successor. It is not limited to the wife of the deceased but could also be entered by his daughter or sister who would, similarly to his wife, be instituted as his intermediary successor (*ayōkēn*).[159] Furthermore, any other member inside or outside the family could be instituted as his substitute-successor (*stūr*)[160] and likewise procreate or bear children in an auxiliary marriage who are legally considered children of the deceased.

[157] Ibid., 35 (4, 11–13).
[158] Ibid.
[159] Ibid., 69 (21, 5–8 and 21, 8–10).
[160] "If […] they [the kinsmen] do not wish (to accept) the *stūr*ship […], (then), […] a fellow-citizen […] must be appointed (as *stūr*) in accordance with the procedural norms […];" ibid., 119 (44, 2–3).

In general, children born from an auxiliary marriage are not affiliated to the lineage of their natural father (*čagar*-father). The law book is unmistakably clear on this. They are thus authorized neither to legal claims towards him, nor to the appointment as family guardians or substitute-successors (*stūr*) in the lineage of the *čagar*-father.[161] This indicates that in a legal sense these children are not in any way related to their natural father. However, it seems that, occasionally, their status, and even that of the wife, would have been modified. More specifically, Farroḫmard informs us about the opinions of the authorities with regard to elevating the status of the *čagar*-wife and *čagar*-children to the *pādiḫšāy*-type:

> […] [I]n the chancellery of the magupat [chief-priest] of Artaxšahr-Xvarreh, it has been decreed to take into account […], that if (anyone) declares as regards a wife and child from a *čakar*-marriage: 'I have received (her/him) as a *pātixšāy*-wife and as *pātixšāy*-children', then such a decision should not be considered to have legal force […].[162]
>
> Besides that, Pusānveh ī Burzatūr Farnbaγān has said, that when (a question of the taking) a wife or child from a *čakar*-marriage as a *pātixšāy*-wife and *pātixšāy*-children (is examined), then this question is resolved in accordance (with the existing general rules) for the adoption of a son or daughter. And the wife, if she becomes a *pātixšāy* one, shall inherit (her husband's) estate and it must go to her.[163]

The articles seem to disagree with each other. In the opinion of the chancellery, statements in which the husband indicates his willingness to accept both, the *čagar*-wife and *čagar*-children, as part of a *pādiḫšāy*-agreement are not legally valid. By contrast, Pusānweh i Burzādur-Farrbayān clarifies that the official procedure in this case is for the *čagar*-father to adopt the children; whereas the wife—presumably if not yet in another *pādiḫšāy*-relation—is recognized as his *pādiḫšāy*-wife. Regarding the acceptance of the wife into a *pādiḫšāy*-wedlock, another authority, Māhdād-Gušnasp mentions that a decision on this matter must be taken in the city of Darabgird.[164] It is noteworthy that Macuch comments

[161] Ibid., 271 (A14, 9–10), 83 (27, 14–15).
[162] Ibid., 321 (A40, 9–11).
[163] Ibid., 321 (A40, 11–14).
[164] Ibid., 175 (70, 3–12).

on this passage arguing that, according to Iranian legal theory, the transformation of a *čagar*-marriage into a *pādiḫšāy* is generally not permissible, however, as the above stipulations attest, it was probably common in practice.[165]

Lastly, an auxiliary marriage is not contracted solely to produce offspring for a deceased *pādiḫšāy*-husband who remained childless. Put differently, it could also come into effect during his lifetime, as the following passage indicates:

> If he declares to his wife: 'I have granted you the right of 'self-guardianship,' the marriage is not dissolved (thereby), but she is given the right to enter into a *čakar* marriage.[166]

The stipulation is hard to analyze because we do not know due to what purpose a husband would allow his *pādiḫšāy*-wife to enter a *čagar*-marriage. We can think of at least two reasons. First, if the husband is sterile and yet without children, it would make sense for him to allow her to enter another marriage to bear him children. However, due to the transfer of the legal guardianship to her, we can assume that the children conceived in such a marriage would not be his—as we saw in one of the above stipulations which made clear that children born from other marriages are affiliated to the *pādiḫšāy*-husband only while he holds the legal guardianship over his *pādiḫšāy*-wife.[167] The second more likely reason is quite different. In this case, he would allow his wife to enter a *čagar*-marriage with the purpose of bearing children by another man who is yet childless. This is plausible against the backdrop of the legal guardianship being bestowed on her which would allow her to pass it on to the *čagar*-husband so that the children she gives birth to are affiliated to the latter's lineage.[168]

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[165] Maria Macuch, *HazDM*, 473–4.
[166] Farroḫmard, *HazDP*, 33 (3, 10–11).
[167] Ibid., 33 (3, 15–4, 1).
[168] This could, perhaps, be the case when the *pādiḫšāy*-wife was called to serve as the substitute-successor (*stūr*) of her father or brother. Macuch investigates this possibility; Maria Macuch *HazDM*, 75–76 (3.10–11).

The cases and different regulations I have discussed here are not exhaustive. It is undoubtedly beyond the scope of this thesis to deal with the vast variety of these cases in more detail. What becomes apparent though is that the auxiliary marriage was a highly developed and complex institution in Sasanian law. Furthermore, we will see that it is central to the Sasanian law on matrimony and inheritance and an indispensable institution for the intricate laws on intermediary and substitute-successors.

c. Consensus marriage (*ẖwasrāyēn*)

The last distinct type of matrimony mentioned by Macuch is the consensus marriage (*ẖwasrāyēn*). This marriage is particularly noteworthy because a daughter does not need permission by her legal guardian (*sālār*) to become a *ẖwasrāyēn*-wife.[169] The most pertinent stipulation on this type of marriage in the *Hazār Dādestān* is as follows:

> If the daughter, without the authorization of the father, marries a *gādār*(-husband): provided that she enters the marriage temporarily […], then the guardianship and her inheritance share in the estate of the father are not altered. However, if she enters the marriage without a stipulated time limit […], then the estate of the father does not pass to her and the father loses the work income of the daughter. [170]

First, the passage indicates that a habitual sexual relationship of the daughter with another man who has not been approved by her father is allowed.[171] Moreover, such an association does not release the daughter from the lineage of the father with all the implications this

[169] Maria Macuch, "Die Zeitehe im sasanidischen Recht," 198.
[170] Farroẖmard, *HazDM*, 179 (24, 7–10), my translation into English from German. Macuch's translation is more appropriate here because she translates with "Beischlaf" (sexual intercourse) rather than the suggestive "adultery." Anahit Perikhanian: "If a daughter enters into a sexual relationship without her father's sanction, then—if it is not a case of adultery as a habitual offence—this will not result in an alteration of her status as ward and as successor to (her) father. But if (it is a case) of adultery continually committed by her, then she will not receive the inheritance and the succession of her father, and her father shall likewise lose his right over the daughter's income (= revenue);" Farroẖmard, *HazDP*, 75 (24, 7–10). Also note that the text states "[…] enters into a sexual relationship without her *father's* sanction […]," rather than referring to the legal guardian. Macuch equally employs "Vater" in the German translation.
[171] The law book, more generally, underscores that "(the decision regarding) sexual intercourse belongs to the daughter;" ibid., 103 (36, 12–16). In other words, the father cannot interfere with the right of his daughter to make decisions about her sexual relationships.

entails. In other words, in spite of being in wedlock the daughter may still assume the intermediary successorship (*ayōkēnīh*) of her father and continues to have an inheritance share in his estate. This applies as long as the consensus marriage is temporary. Should it be contracted without a time limit, the daughter forfeits her share in the inheritance of the father. In the same way, any property she acquires cannot be claimed by him. The explicit mentioning that, in the case the consensus marriage is stipulated temporarily, the daughter stays within the lineage of the father, may imply that this is not the case when it is stipulated with no time limit. Judging from the loss of her inheritance share of the estate of the father and the fact that the latter cannot claim property acquired by her, we can probably assume that, in that case, she leaves her father's lineage.

More specifically, it would be useful to know whether—in the case that the consensus marriage is contracted without a time limit—the daughter is affiliated to the lineage of her *ḫwasrāyēn*-husband. Having said this, I have not come across any judgments in the *Hazār Dādestān* which would help to resolve this question.[172] Relying on evidence from the *Rivāyat-ī Hēmīt-ī Ašavahištān*, Maria Macuch answers it in the negative. Therefore, a son born from a consensus marriage, she argues, is juridically considered a "nobody's son" due to his lack of affiliation with the lineage of the father or mother. In addition, her evidence illustrates that the wife is neither entitled to maintenance by her *ḫwasrāyēn*-husband, nor to a share in his inheritance upon his death.[173]

We do not know precisely about the function of the consensus marriage in Sasanian law. However, the fact that neither husband nor wife seem to obtain material or

[172] A stipulation dealing with the selection of the substitute-successor (*stūr*), in case there are multiple candidates, incidentally mentions the *ḫwasrāyēn*-marriage. However, it does not seem to convey information that would be relevant here; Farroḫmard, *HazDP*, 113 (41, 9–13A); also, see the commentary of Maria Macuch, *HazDM*, 333–334.
[173] Maria Macuch, "Die Zeitehe im sasanidischen Recht," 199.

juridical benefits from this type of matrimony is most striking. As for the husband, the children he begets are supposedly not affiliated with his lineage and can therefore not serve as his legal successors or heirs. As for the wife, she is not eligible for maintenance or an inheritance share in the estate of her *ḫwasrāyēn*-husband. Hence, it is reasonable to assume that the primary intent of the *ḫwasrāyēn* was perhaps to sanction sexual relationships which were not authorized by the legal guardian of the daughter. This is plausible, in particular, when looking at other legal systems which similarly developed matrimonial forms making allowance for sexual relationships which could otherwise not be sanctioned.[174] Even though a daughter may enter a *ḫwasrāyēn*-wedlock without the consent of her father, it should again be noted that, under no circumstances, can she contract a marriage with full matrimonial rights without the approval of her guardian.[175]

d. Temporary marriage (*nē az ān ī hamēīg*)

Macuch rightly states that the temporary marriage (*nē az ān ī hamēīg*) is not a distinct type of matrimony but a variation, since all of the above can be contracted temporarily.[176] The temporary marriage is highly interesting with regard to its implications on the lineage of the daughter. Farroḫmard tells us:

> Vāyayār has written that if a daughter—empowered by her father—concludes (the following agreement) with someone: 'I shall be your wife for ten years', and (if) the father dies before the ten years are up, (then) a *stūr* [substitute-successor] must be

[174] The pleasure marriage (*mutʿa*) in Islamic jurisprudence is a case in point. Von Denffer argues that the *mutʿa* does, in fact, have a number of functions but most prominently the legalization of sexual relationships otherwise prohibited (e.g. prostitution); Dietrich von Denffer, "Mutʿa – Ehe oder Prostitution? Beitrag zur Untersuchung des šīʿītischen Islam," in *Zeitschrift der Deutschen Morgenländischen Gesellschaft* 128/2 (1978), 299–325.

[175] Farroḫmard, *HazDP*, 101 (36, 2–5): "It is written thus in the Dātastān-nāmak: if a sister or ('and') a daughter enters into a marriage […] without the permission of her guardian, then (this) marriage is invalid ('not good') […]." This stipulation must not be confused with the provisions pertaining to the *ḫwasrāyēn*. In other words, it does not encompass the *ḫwasrāyēn*-marriage because it is listed right under the chapter title "[…] concerning a wife with full-rights […]."

[176] Maria Macuch, "Judicial and Legal Systems. iii. Sasanian Legal System," in *Encyclopædia Iranica*, vol. 15, 181–196.

> appointed for the father until the (end of the) ten years limit. At the end of the ten years, however, she ceases to be that man's wife and becomes her father's *epikleros* [heiress].[177]

The case indicates that upon entering a temporary marriage, the daughter probably leaves the lineage of the father and is affiliated to the lineage of her temporary husband.[178] Therefore, if her father dies before the expiration of the temporary marriage, she cannot instantaneously be appointed his intermediary successor. However, once the temporary marriage expires, the daughter again switches to the lineage of the father and reassumes her obligation to serve as intermediary successor. In other words, the duty to intermediary successorship is merely suspended for the duration of the temporary marriage.[179]

The traits of the temporary marriage are ultimately determined by how it is contracted—as marriage with full matrimonial rights, an auxiliary, or a consensus marriage. In spite of the meager evidence in the law book pertaining to the temporary marriage, there is reason to assume that it significantly increased the flexibility of the marital system.[180] For instance, temporary marriages were indispensable with regard to ensuring that the substitute-successors of a deceased could—for a limited duration—attend to their duty of producing offspring for him; however, once birth was given to a male successor (or probably multiple ones considering the high infant mortality rate), their reproductive capacities were more useful elsewhere. Therefore, to prevent these

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[177] Farroḫmard, *HazDP*, 73 (23, 1–4).

[178] The law book, in fact, makes evident the disagreement among authorities on whether or not the daughter is affiliated to the lineage of her husband during a temporary marriage; ibid., 249 (A2, 7–11). The question here is whether the possessions of the daughter, in particular her dowry, stay with her temporary husband in case she deceased during the marriage. Accordingly, her property would stay with the temporary husband which strongly indicates her affiliation with his lineage. Some authorities, however, as the case goes, have ruled that this is not the case.

[179] In accordance with this, it is stated elsewhere that she remains in the status of intermediary successor (*ayōkēn*) during the temporary marriage; ibid., 203 (87, 2–3).

[180] Similarly, cf. Maria Macuch, "The Function of Temporary Marriage in the Context of Sasanian Family Law," in *Proceedings of the Fifth Conference of the Societas Iranologica Europaea held in Ravenna, October 6–11, 2003, vol.* I: *Ancient and Middle Iranian Studies*, eds. A. Panaino and A. Piras (Milano 2006), 594.

women from ending up in a marital deadlock, the temporary marriage, right from the very start, assured their recirculation with its expiration. Again, it is rather important to note that marriages stipulated with a time limit could have different functions and increased the flexibility of the legal system.

### *3. Intermediary* (*ayōkēn*) *and substitute-successors* (*stūr*)

The intermediary (*ayōkēn*) and substitute-successor (*stūr*) are perhaps among the most peculiar and intricate institutions in Iranian family law. The purpose of these institutions, more largely, is to assure the continuation of the lineage of a deceased *paterfamilias* (head of household) who does not have a male successor to whom his position and estate can be passed on. The intention inscribed in this institution is, therefore, to make sure that someone produces for him a male successor to take on the responsibility as *paterfamilias*. It is important to realize that the intermediary and the substitute-successor only create the link between the deceased *paterfamilias* and the actual successor.[181] In other words, their position itself does not bestow on them the right to successorship or a share in the inheritance of the deceased. They are, however, endowed with material benefits for which a portion in the estate of the deceased is retained.[182]

The distinction between intermediary and substitute-successor is not ubiquitous. While the law book mostly distinguishes between them, it occasionally conflates both

[181] Maria Macuch, "Herrschaftskonsolidierung und sasanidisches Familienrecht," 154.

[182] For the material benefits of *stūr*ship; Farroḫmard, *HazDP*, 113 (41, 8–9): "[…] the *stūr*ship also (presents/gives) an advantage, and that which (presents/gives) an advantage is to be received as though it were needed for the minor […]." Also, ibid., 113 (41, 16–42,1): "If he declares the following: 'I have declared this thing conveyed for *stūr*ship', and he has two daughters, (then) that (part of the estate) regarding which he made no disposition passes as personal inheritance-shares (= 'daughter's' shares) to both daughters, but that (estate) regarding (whose transfer for *stūr*ship) he made the declaration, shall go to the elder daughter on the basis of a *stūr*'s possession […]." The stipulation, more precisely, indicates that the share allocated for the substitute-successor (*stūr*) is independent of inheritance shares. Also, cf. Maria Macuch, "Herrschaftskonsolidierung und sasanidisches Familienrecht," 155.

institutions.[183] Most likely, this is related to the fact that their functions are, for the most part, identical. To be more precise, the intermediary successor constitutes a particular variant of the substitute-successor to be performed exclusively by the wife, the daughter, or the sister of a *pādiḫšāy*-husband. On the contrary, the position of the substitute-successor can, more broadly, be assumed by any person, male or female, inside or outside the family.[184] The law book is clear on the necessity of installing a substitute-successor (*stūr*) in the case that the deceased, at the time of his passing, does not have a wife or children.[185] Having said that, the position only comes into effect when the minimum amount of property owned by the deceased is either 60 or 80 *satērs*.[186] This points to the fact that the meticulous and complex rules pertaining to the continuation of the successor line, which are epitomized in the institutions of the intermediary and substitute successor, did, in fact, only apply to a group that had amassed a minimum amount of material wealth. This is evidence to support my main argument that the particular forms of marriage propagated in Sasanian law are indicative of the imperial aspirations of the ruling elite.

In view of selecting the most suitable candidate for intermediary/substitute-successorship, the *Hazār Dādestān* sets out a multitude of regulations and instructions.[187] In this inquiry, we only focus on the laws pertaining to an *ayōkēn*-daughter. To serve as the intermediary successor to her father, she must be assigned to his lineage. For instance, if she is bound in *pādiḫšāy*-wedlock, her obligation to intermediary successorship ceases

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[183] Cf. Macuch who states that while the law book distinguishes between intermediary (*ayōkēn*) and substitute-successor (*stūr*), these are, particularly in later texts, usually used interchangeably; Maria Macuch, "Zoroastrian Principles and the Structure of Kinship in Sasanian Iran," 238.
[184] Farroḫmard, *HazDP*, 119 (44, 2–3).
[185] Ibid., 33 (3, 14–15): "If at the time of his death he had neither a wife nor children, a *stūr* must be appointed."
[186] There is disagreement among the editors/translators. Perikhanian edits 60, Macuch 80 *satērs*; ibid., 117 (43, 11–13) and Maria Macuch, *HazDM*, 318, 343–344.
[187] For instance, Farroḫmard, *HazDP*, 33 (4, 1–4); 71 (22, 6–8); 75 (24, 4–7); 111 (41, 2–5); 113 (41, 5–8); 113 (41, 9–13); 113 (41, 15); 115 (42, 1–5); 115 (42, 5–9).

because she is not in her father's lineage. However, in the case the *pādiḫšāy* is dissolved and the legal guardianship over her returned to her father's lineage, she can reassume her obligation as *ayōkēn*.[188] The same rules—as stated above—apply to the temporary marriage. For as long as the daughter is bound in a temporary union, she cannot become the *ayōkēn* of her father. Meanwhile, a placeholder is appointed whom she, once the temporary marriage expires, replaces as the *ayōkēn* of her father.[189] With regard to the consensus marriage, the case is clear because the daughter—provided the *ḫwasrāyēn* is not contracted without a temporal limit—does not leave her father's lineage. These stipulations regarding the *ayōkēn*-daughter come into effect, particularly, in the case that the deceased does not have anyone else in his family who could assume the intermediary successorship (*ayōkēnīh*) for him, meaning a wife or other daughters. Following the appointment as intermediary successor, the *ayōkēn*-daughter is given into an auxiliary marriage, preferably with an agnate, to produce male offspring for the deceased she is appointed for. To make sure the children born from this marriage are correctly affiliated with the lineage of the deceased, the *ayōkēn* first needs to be placed in a *pādiḫšāy*-wedlock with the deceased. This does not apply if the intermediary successorship passes to the wife of the deceased, since she already finds herself in a *pādiḫšāy*-marriage with him. However, in the case it passes to the daughter or sister, she has to enter a *pādiḫšāy* with him. In other words, she fictionally weds her deceased father or brother, respectively. More importantly, this is an instance *par excellence* in which a next-of-kin marriage is employed as a legal strategy to ensure that children end up in the lineage desired by the legal authorities.

[188] Ibid., 69 (21, 5–8).
[189] Ibid., 203 (87, 2–3).

In his *Corpus Juris*, Ishoʿbokht hints at Zoroastrian marital practices. To be more precise, he unmistakably refers to the intermediary/substitute-successors in Sasanian law. With his habitually polemical tone against the "followers of Zarathustra," he states:

> For instance, when the deceased does not leave behind a widow or if his widow cannot give birth due to age or sterility—even in that case the name of the deceased should not vanish from the living, but rather—according to the command of Zardusht—the lineage of the deceased must under any circumstance be continued by the daughter or sister or his brother. For that purpose, [the brother] would enter marriage with a woman in the name of his deceased brother.[190]

What he asserts to be a command of Zarathustra, meaning to give the daughter, sister, or brother of the deceased in marriage with someone so that "the name of the deceased does not disappear from the living" can be taken as an explicit reference to intermediary and substitute-successors. This is telling. First, it indicates that Ishoʿbokht was familiar with the practice. Secondly, it *may* point towards both institutions not being merely a theoretical construct of Sasanian law but, in fact, applied legal practice.

Lastly, we must deliberate on the question: what do the laws on intermediary/substitute-successorship indicate about Sasanian law and society more broadly? It is evident that both institutions are, more largely, indicative of the proclivity to maintain agnatic lineages and the reproductive pressure inscribed in Sasanian law. This is initially achieved by obliging women to maintain their husband's lineage when entering a marriage with full matrimonial rights. In fulfillment of this obligation, they are, upon his death, instituted as intermediary successors to produce for him children in an auxiliary marriage. Noteworthy, the position of the intermediary (and substitute) successor is endowed with significant material incentives. The highly complex laws pertaining to this institution, in conjunction with the sophisticated legal idiom it is expressed through, indicate its centrality and importance in Sasanian law.

[190] Ishoʿbokht, *CorJ*, 97 (iv, i, §5), my translation into English from German.

### *4. The practice of next-of-kin marriage* (*ḫwēdōdah*)

The practice of next-of-kin marriage (*ḫwēdōdah*) in Iranian law and society has received the attention of many scholars. Peculiarly, the regulations pertaining to it and their reinforcement by Zoroastrian authorities, at first glance, quite significantly oppose the general prohibition of incest present in most societies which is succinctly described by Helmut Schelsky:

> The prohibition of incest applies in the first place to the three primary relationships, father-daughter, mother-son, and brother-sister, but affects other, more distant relationships in many cultures […].[191]

It appears that, in fact, the incest taboo subscribed to by other societies and their legal systems was absent in the Sasanian context reflected in the sanctioning and promoting of marriages between father and daughter, mother and son, and brother and sister.

Tying in with this, it is questionable to what extent the legal doctrine of next-of-kin marriage was able to penetrate into Sasanian society. The answer is unsatisfactory. Some references, particularly in non-Zoroastrian sources, strongly indicate that next-of-kin relationships were, in all likelihood, practiced in Sasanian Iran. Ishoʿbokht, for instance, asserts that:

> Doomed is whoever lies with the mother or sister or daughter or other such persons […]. Doomed is also Zardusht, who was overwhelmed by desire and, therefore, became notorious to many. Through the impact and the help of the demons, which rejoiced in the desire, he and his supporters were encouraged and they had the impudence to transgress what the three walls of the law kept sealed to them […].[192]

Certainly, we must not ignore the polemic in these works, particularly in the case of Ishoʿbokht, which may have led non-Zoroastrian writers to exaggerate what they considered a despicable practice.[193] However, apart from Ishoʿbokht, the Armenian

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[191] Helmut Schelsky, *Soziologie der Sexualität. Über die Beziehungen zwischen Geschlecht, Moral und Gesellschaft* (Hamburg: Rowohlt Taschenbuch Verlag, 1955), 88, my translation into English from German.
[192] Ishoʿbokht, *CorJ*, 35 (ii, ii), my translation into English from German.
[193] The *Corpus Juris*, in fact, contains severe polemics against Zoroastrians. See for instance, ibid., 97, 99.

historian Eliše Vartabed (d. 475), in his remarks on the Sasanian conquests of Christian Armenia in the 5th century, states that the Zoroastrian priests demanded from the local population

> […] to take many wives instead of one so that the Armenian nation expands, that the daughters unite with their fathers, the sisters with their brothers, the mothers with their sons, and the granddaughter with their grandfathers […].[194]

In spite of the specific historical contexts these sources were written in, their different origins make it likely that next-of-kin marriage was, in fact, more or less common in Sasanian society or, at least, among the Sasanian elite.[195] In addition, other sources such as Mar Aba could be adduced to provide similar references to the practice of next-of-kin marriage.

It is rather important to note that the *Hazār Dādestān* illustrates that the sanctioning of these next-of-kin marriages was of utmost necessity to making sure that the offspring procured by an *ayōkēn* could be assigned to the lineage of the deceased *paterfamilias*.[196] Put differently, the matrimonial institutions in Sasanian law can, for the most part, not function without sanctioning next-of-kin marriage. To sum up, the doctrine of *ḫwēdōdah* was not only cosmologically sanctioned by the religious authorities, but was at its very heart necessary to ensure that the complicated legal institutions of the Sasanians were coherent and could at all come into effect.

### *5. Sustaining elite households*

Regarding "women of high rank such as the queen and the mother of the king," Touraj

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[194] Eliše Vartabed, *Collection des Historiens Anciens et Modernes de l'Arménie*, ed. Victor Langlois (Paris: Librairie de Firmin Didot Frères, 1869), 199, my translation into English from French.
[195] However, the fact that the Sasanians entered marriages with next-of-kin relatives, does not indicate the absence of a natural aversion to incest. This point is well discussed by Maria Macuch; cf. Maria Macuch, "Inzest im vorislamischen Iran," 151–152.
[196] Maria Macuch, "Incestuous Marriage in the Context of Sasanian Family Law," 143.

Daryaee writes that they "were much freer [than women from lower classes] in the scope of their activity and decision making."[197] He then explains that the Sasanian seals, as well as the rock-reliefs which depict women of high rank attending the royal banquets (*bazm*) illustrate those women's importance. At this point, he quite clearly, in my view, confuses importance with freedom. Women of high rank were indeed considered indispensable in the Sasanian Empire in many regards, in particular, as regards producing male successors for the ruling class. However, we can argue that this responsibility, anchored legally in their obligation to serve as intermediary and substitute-successors, made them—to use the terminology of Daryaee—less "free" than women of lower rank.

The flexibility of marital unions in Sasanian law, accomplished, in particular, through the institution of auxiliary marriage and temporary alliances, could *de facto* lead to women (and men) entering a number of marriages during their lifetime. The restrictions imposed with regard to intermediary and substitute successors—the minimum property of 60 or 80 *satērs*—points towards the pressure to sexual reproduction these regulations exerted on members of elite households. Although we have few indicators about the lives of the elite in society, these legal stipulations quite clearly illustrate that reproduction was not optional but rather an indispensable requirement to maintain the lineages of the Sasanian rulers. To augment opportunities for sexual reproduction, the authorities legitimized sexual relationships that are usually prohibited. The sanctioning of next-of-kin marriage was accomplished by wrapping it in the idiom of Zoroastrian cosmology which proved to be the most obvious solution. Not only since Ohrmazd himself had sexual intercourse with his daughter but because the Zoroastrian heritage provided abundant references that could be mobilized to sanction the practice. To sum up, the legal

[197] Touraj Daryaee, *Sasanian Persia*, 59.

stipulations on Sasanian matrimony discussed in this chapter provide significant evidence in support of the first main argument of this thesis which is that matrimony is mediated between the cosmological purview of religion and the sociopolitical concerns of empire.

## B. East Syrian law: challenging traditions of matrimony

### *1. On the nature of Christian marriage: marrying strangers* (*masbā d-nukrāye*) *and monogamy*

The matrimonial legislation of the Church of the East is largely conditioned by the scriptural precepts of Christian religion. However, to argue that it was out of touch with the matrimonial realities of the majority populations in the Sasanian and Muslim Empires would be impracticable. This chapter sheds light on the interwoven nature of lawmaking in the Church of the East with the Sasanian polity while arguing that East Syrian law was subject to certain relaxations resulting in a notion of Christian matrimony which was probably more acceptable to the Sasanian authorities. Marriage, as ruled by the Church of the East, is dominated by two principles both outlined by our 8th-century author Ishoʿbokht. The first is the conviction of marrying strangers (*masbā d-nukrāye*), that is, individuals with whom one is not related through kinship.[198] In the opinion of Ishoʿbokht:

> The benefit of marrying strangers becomes manifest in manifold ways. In an increase of friendly relations, succor, satisfaction and advantage which grows from mutual relationships of love and friendship. Furthermore, marrying strangers is devoid of other flaws […].[199]

Marrying strangers (*masbā d-nukrāye*), as opposed to marrying close-kin (*masbā d-qaribā*), leads to the proliferation of love (*tawseptā d-ḥubā*), succor (*ʿudrānā*), satisfaction (*nyāḥā*), and the advantage (*yutrānā*) of man.[200] To illustrate, the author asserts that a man who gives his daughter and his son in marriage to a man and a woman, respectively, from another place (*dukā ḥritā*) extends into two new families. He contrasts this with the case of a close-kin marriage arguing that it neither results in an extension of the family nor in the proliferation of love among mankind. What is more, Ishoʿbokht

[198] Ishoʿbokht, *CorJ*, 31 (bk. ii, ii) (Ger.).
[199] Ibid. (Ger.), my translation into English from German.
[200] Ibid., 30, ll. 7–8 (Syr.).

visualizes the more intricate problems associated with close-kin marriage (*masbā d-qaribā*). For instance, a man whose daughter is concomitantly his wife suffers two losses (*treyn mawtā*) in the case that his wife dies; whereas someone whose daughter is not his wife, may find solace with and the support of the daughter.[201] It is most likely that, apart from the anguish that could be triggered through next-of-kin marriages, such alliances were especially disliked among the jurists due to the significant problems they caused with regard to inheritance. At any rate, in his narrative strategy, Ishoʿbokht frames Christian marriage as directly integrated into the larger cosmological realm arguing that evil (*bʿeldbābā*) became aware of the benefits that marrying strangers (*masbā d-nukrāye*) brought to mankind and therefore began to counteract it.[202] Whereas in the Mazdaean tradition evil is associated with anal intercourse (*kunmarz*), Ishoʿbokht most notably equates it with close-kin marriage (*masbā d-qaribā*).

Ishoʿbokht exactly defines close-kin marriage (*masbā d-qaribā*). He stakes out its boundaries by listing all family members a Christian must not marry. Based on a command in the *Old Testament*, he thus states:

> Of those mentioned in the Old Testament [who are forbidden for you to marry]: The *mother*. The *daughter*. The *wife of the father* [stepmother]. The *sister*. *The daughter of the father* [sister] or the *daughter of the mother* [half-sister]. The *sister of the father* [aunt]. The *sister of the mother* [aunt]. The *wife of the brother* [sister-in-law]. The *wife of the uncle* [aunt]. The *mother-in-law*. The *daughter-in-law*. The *daughter of the wife* [stepdaughter]. The *daughter of the son* [granddaughter]. The *daughter of the daughter* [granddaughter].[203]

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[201] Ibid., 32, l. 2 (Syr.).
[202] Ibid., 30, ll. 24–26 (Syr.).
[203] Ibid., 28, ll. 19–22, (Syr.): "men ayleyn d-ktibon b-nāmusā natimā. emā. bartā. atat abā. hātā. bart abā. aw bart emā. ḥātā d-abā. ḥātā d-emā. atat aḥā. atat dādā. ḥmātā. kaltā. bart attā. bart brā. bart bartā." The passage in the *Old Testament* Ishoʿbokht refers to is in all likelihood *Leviticus* 18, 6–16: "None of you shall approach anyone near of kin to uncover nakedness: […] You shall not uncover […] the nakedness of your *mother*[,] […] the nakedness of your *father's wife*[,] […] the nakedness of your *sister*, your *father's daughter* or your *mother's daughter*, […] the nakedness of your *son's daughter* or of your *daughter's daughter*, […] the nakedness of your *father's wife's daughter*, begotten by your father, […] the nakedness of your *father's sister*[,] […] the nakedness of your *mother's sister*, […] the nakedness of your father's brother, that is, you shall not approach his wife [*father's brother's wife*] […]. You shall not uncover the nakedness of your *daughter-in-law*[,] […] the nakedness of your *brother's wife* […];" *The New Oxford*

The *Corpus Juris* further stipulates that the term 'mother' includes the mother of the mother, 'daughter' the daughter of the daughter and the daughter of the son, and 'wife of the father' her daughter and daughter's daughter.[204] The law is not only attentive with regard to explicitly defining the core of kinship from which a man may not, under any circumstances, marry but also specifies that someone must not enter a marriage with a divorcee (*attā d-šbiqā*), pagan (*ḥanfā*), an unbeliever (*kfurtā*), or a magician (*ḥarāša*).[205] In addition, matrimonial alliances are, more largely, restricted to Christian women (*bart haymnutā*).[206]

The second principle is monogamy. The *Corpus Juris* states different reasons for its necessity. These, Ishoʿbokht asserts, become manifest "through the act and the word of God" (*men ʿabrā w-men meltāh d-alāhā*).[207] The "act" manifests itself in the initial creation of merely a single woman (*ḥdā attā*) for one man.[208] Put differently, Ishoʿbokht uses the monogamous cohabitation of Adam and Eve as a precedent to, more largely, justify the Christian ideal of monogamy. With respect to the "word," he invokes a passage from the *Old Testament* which states:

> Therefore a man leaves his father and his mother and clings to his wife, and they become one flesh.[209]

Moreover, the unification of husband and wife, manifest in the conflation of their bodies into one flesh during the sexual act as well as perpetual wedlock, is at the heart of the

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*Annotated Bible. New Revised Standard Version with the Apocrypha. An Ecumenical Study Bible*, eds. Michael D. Coogan, Marc Z. Brettler, Carol A. Newsom, and Pheme Perkins (Oxford: Oxford University Press, 2010), 169 (*Lev* 18, 6–16).

[204] Ishoʿbokht, *CorJ*, 29 (bk. ii, i) (Ger.).

[205] Ibid., 30, ll. 1–3 (Syr.).

[206] Ibid., 30, l. 3 (Syr.).

[207] Ishoʿbokht, *CorJ*, 52, l. 18 (Syr.).

[208] Ibid., ll. 19–20 (Syr.).

[209] *The New Oxford Annotated Bible*, 14–15 (*Gen* 2, 24). In addition, Ishoʿbokht points to a passage in the Gospels (*Matthew* 19, 6): "So they are no longer two, but one flesh. Therefore what God has joined together, let no one separate;" ibid., 1774 (*Mat* 19, 6).

notion of Christian matrimony. The symbol of the flesh more broadly implies that both bodies enter a state in which they relinquish authority over themselves becoming subsumed under the physical and mental control of the united flesh. This corroborates with another reference by Ishoʿbokht to the *Gospel* which states:

> For the wife does not have authority over her own body, but the husband does; likewise the husband does not have authority over his own body, but the wife does.[210]

In brief, the reasons for monogamy proposed by our author are twofold, one resulting from the life of Adam and Eve as a monogamous couple, the other from God's verbal utterance concerning the unified flesh. Also, I would like to suggest that the monogamous type of marriage hailed in the Eastern Church may be thought of as a reproduction of the strict monotheism laid claim to by Christianity. The personal relation of man to God, particularly, the requirement not to associate shareholders to the divine being, clearly reverberates in the realm of Christian matrimony. In other words, God's demand to exclusivity in the religious pantheon can be thought of as epitomized in the relationship between husband and wife. The prohibition not to have more than a single partner attests to this. In brief, the commitment of husband and wife to perennial fleshly unity in the material realm somewhat symbolizes the exclusive spiritual merger of the human mind with the truths of divine knowledge.

The hermeneutics of the *Corpus Juris* take on shape through two main strategies. On the one hand, Ishoʿbokht relentlessly polemicizes the adherents of "Zardušt" dismissing the practice of next-of-kin marriage (*masbā d-qaribā*). In other words, his staging of Christian matrimony to a significant extent relies on contrasting it with Zoroastrian law. This, more largely, illustrates how strongly the debates with the Zoroastrians reverberated within Christian matrimonial law. Related to this, Sebastian

[210] Ibid., 2008 (1 *Cor* 7, 4). For the reference by Ishoʿbokht, see Ishoʿbokht, *CorJ*, 53 (bk. ii, ix) (Ger.).

Brock argues that the narrow dimensions of matrimony, particularly, the Christian ideal of virginity, were rather sensitive issues in interactions with the Zoroastrian authorities.[211] On the other hand, the metropolitan frequently adduces Biblical passages which not only provide him with the conceptual tools to justify his views but which he simultaneously employs to establish textual authority. More broadly, this inquiry will show that while Ishoʿbokht's ideal of matrimony is largely based on a literalist interpretation of scripture, his precursors had advocated a notion that was considerably in line with concurrent societal norms which were largely dictated by a Zoroastrian majority.

### *2. Filing for divorce* (*purshānā*)*—the impossible?*

Divorcing a wife or husband is perhaps among the most cumbersome, if not impossible, undertakings for adherents of Eastern Christianity. Moreover, the law, as exhibited by Ishoʿbokht, is scrupulous with regard to setting meticulous restrictions aimed at preventing the dissolution of a marriage. Noteworthy, the conditions to divorce a spouse are different depending on whether it is instigated by the husband or the wife. The *Corpus Juris* mentions three cicumstances under which a husband may divorce his wife: if she renounces God (*kapurāyā db-alāhā*), commits adultery (*gawrā*), or murder (*qeṭlā*).[212] Ishoʿbokht specifies that magic (*ḥarušutā*) belongs to the category of renouncing God.[213] We are further informed about the reasons why separations under the above circumstances are permissible. Apostasy (*kapurāyā db-alāhā*) is considered a legitimate ground for divorce due to the individual's abandonment of the community of believers.[214]

[211] Sebastian Brock, "Christians in the Sasanian Empire," 14.
[212] Ishoʿbokht, *CorJ*, 56, ll. 28–29. (Syr.).
[213] Ibid., ll. 29–30. (Syr.): "d-āp ḥarušutā. kapurāyā íteyh db-alāhā."
[214] Ibid., 58, ll. 2–3 (Syr.): "w-layt lā(h) šawtāfutā: ʿam d-ḥli alāhā."

This applies to men and women equally. As concerns adultery (*gawrā*), it constitutes a reason for divorce because the woman who commits it, destroys the fleshly union with her husband.[215] Murder, on the other hand, results in divorce because it leads to "the separation of the coherence and natural composition of the soul and the body"[216] of the one who commits it. Other than for the above reasons, a man may divorce his wife in order to reach perfection (*b-ʿelāt myatrutā*). In other words, if he decides to become an ascetic the divorce is sanctioned by God with the justification that the love to God is always superior to the love of other people (*Matthew* 10, 37).[217]

The leverage of women to divorce their husbands is minimal at best. That is, women can make claims based on apostasy and murder, but not adultery.[218] The *Corpus Juris* makes this unmistakably clear laying out the proper procedure to be adhered to in the case of a husband's adultery:

> However, if one witnesses that the husband commits adultery, then he must be confronted, reprimanded, and penalized and be excluded from the sacraments, but his wife shall not be divorced from him.[219]

In other words, even though he shall be "confronted, reprimanded, and penalized," the wife will have to live with the reality of her husband committing adultery and can hardly rely on the assistance of the bishops. More importantly, we need to ask why a wife whose husband committed adultery is not bestowed with the legal capacity to divorce him, whereas he—in the case that she is unfaithful to him—is. The justification expounded by Ishoʿbokht is not only witty but attests to a larger concern that the law of matrimony is commonly regulated by: inheritance law. A wife, who delivers a child procreated in an

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[215] Ibid., ll. 3–4 (Syr.): "gawrā dēn meṭul d-bayn baynā(h) ḥablat l-mḥaydutā d-šawtāfutā(h). b-yad naqifutā(h) dal-gabrā ḥrinā."
[216] Ibid., 58, ll. 5–6. (Syr.): "qṭal d-paršat l-naqifutā w-rukābā kiyānāyā d-nafšā ʿam fagrā."
[217] Ibid., 63 (bk. ii, xiii) (Ger.).
[218] Ibid., 63–65, 59–61 (bk. ii, xiv, xii) (Ger.).
[219] Ibid., 59, 61 (bk. ii, xii) (Ger.), my translation into English from German.

illicit sexual relationship, necessarily brings the child into the wedlock with her deceived husband. The child by reason of becoming affiliated with its unnatural father would be entitled to the financial assistance and a share in the inheritance of its non-natural father.[220] To avoid this responsibility inflicted by the act of adultery of the wife, the husband is legally protected through his capacity to dissolve a marriage with an unfaithful wife. On the other hand, if the husband commits adultery impregnating another woman, the child born from such an illicit encounter does not cause any financial burden for the deceived wife because it is not affiliated with the lineage of her or the husband.[221] Ishoʿbokht elucidates that the capacity given to husbands with regard to divorcing their wife is to account for two realities: that women are more trustworthy in matters of parentage and that husbands bear the costs for maintaining their wives.[222] This is perhaps an example *par excellence* where the law quite obviously acknowledges doubt. This doubt is counterbalanced by lawmakers by protecting the party it compromises. In other words, providing husbands with the capacity to divorce their wives is *de facto* to balance out their legal position as opposed to their wives. Overall, we need to note that claims for adultery could be mobilized by husbands, but not wives, who wanted to separate from their spouses.

Other circumstances could lead to a divorce. For a wife keen on separating, perhaps the most blissful situation to arise is for her husband to develop a physical condition preventing him from cohabitating with her. In that case, she must not remain with him for more than a year.[223] Thus, the law, to some extent, safeguards a fertile

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[220] Ibid., 59 (bk. ii, xii) (Ger.).
[221] Ibid. (Ger.).
[222] Ibid., 58, ll. 26–28 (Syr.): "wab-fasiqtā b-šarbā d-mawlādā d-banāye w-šušāṭā d-yubālā nāše yatir mhimānan men gabre. w-tub meṭul d-laḥmā w-tursāyā w-nafqātā d-nāše men gabre haw."
[223] Ibid., 82, ll. 10–16 (Syr.): "ʿal attā d-ezlat l-baytā d-baʿlā(h) w-lā meškaḥ d-neštutaf lā(h) meṭul ʿeltā d-mawme kinaye […]. en dēn lā ṣābyā šalliṭ lā(h) d-lā titab yatir men šentā."

environment. If the husband or wife becomes captive, the other party is allowed to dissolve the marriage after three years of waiting. However, it is clearly stated that keeping up the wait is highly appreciated and a sign of chastity and marital love.[224] By far the worst thing that could happen to a wife is if her husband travels and is not heard of. Even if he does not maintain her, she must keep up the wait for at least seven years before she may, with significant hardship, ask the authorities to separate from him. However, if the husband provides a living for her while traveling, she must wait for an additional three years to be capable of filing for divorce.[225] The significant constraints for women regarding the dissolution of a marriage may indicate that divorces on behalf of wives were rare. To get rid of her husband, the best a woman could do was to hope that he murders someone, becomes a pagan or develops an erectile dysfunction.

The many references to Biblical passages as well as the adoption of scriptural reasoning indicate that the *Corpus Juris* is profoundly grounded in the spirit of textuality. In other words, Ishoʿbokht's interpretation of matrimony is largely in accordance with the cosmological and spiritual notions of Christian religion. More importantly, it evolved in reaction and conflict to a practice of lawmaking which, in its heydays at the end of the 5th century, had attempted to account for the changing realities of the Christian community under Sasanian rule.

### *3. The Sasanians accommodating their interests?—the synods of 486 and 497*

The minutes immediately following the synod of 486, referred to as the Synod of Mar

[224] Ibid., 84, ll. 7–9 (Syr.): "kul kmā men d-yatir nṭar l-gabrā. aw attā d-eyn hāde. ātā maḥwā d-nakfutā. w-hubā d-lut šawtefēh."
[225] Ibid., ll. 13–16 (Syr.): "en dēn mṭet l-šawtāfutā w-layt lā(h) men māzunā w-tursāyā men baʿlā(h). šbaʿ šnin zadeq lā(h) d-tsaybar w-tkater. āf ʿdamā l-ʿšar šnin zadeq d-tsaybar."

Aqaq, indicate it took place only two years after the Synod of Barṣawma (484). The latter, we are informed, is considered to have been illicit and is therefore not included with its synodical minutes in the *Synodion Orientale*.[226] The Patriarch Babowai, who assumed office between 457 and 484, was a Christian convert from Zoroastrianism. Supposedly, he strongly sympathized with the Chalcedonians to the frustration of Barṣawma, the metropolitan of Nisibis, who, as a pronounced advocate of diophysitism, fiercely opposed him. As the story has it, Babowai wrote a letter seeking assistance from the Roman Emperor Zeno, in which he condescendingly spoke of the Sasanian Empire. The letter made its way to Barṣawma who sent it to Shah Firūz. In the illicit synod of 484, Barṣawma congregated with a multitude of supporters against Babowai. Babowai was eventually put to death on the order of the Shah.[227] As far as the *Synodicon Orientale* is concerned, the Patriarch Mar Aqaq made peace with Barṣawma who acknowledged him as patriarch and was pardoned for his arbitrary behavior.[228]

The preliminary minutes to the Synod of Mar Aqaq (486) begin by listing the bishops who participated in the congregation. Immediately after, the writer records the year and place the synod was held. Accordingly, it convened "in the month of 'iloul of the second year of the peace-loving and amiable Wâlèš, King of Kings […] in this place […],."[229] From the minutes of the Synod of Mar Babai (497), we know that 'this place' corresponds to Beth ʿAdray.[230] In total, the Synod of Mar Aqaq issued three canons. The first equates to a definition of the creed of the Church of the East. The second stipulates

[226] *SynO*, 308–309.
[227] William Young, *Patriarch, Shah and Caliph*, 54; also, cf. Jean B. Chabot, *SynO*, 308, footnote 1.
[228] *SynO*, 308; also, cf. Wilhelm Baum and Dietmar W. Winkler, *The Church of the East. A Concise History* (London and New York: RoutledgeCurzon, 2003), 28.
[229] *SynO*, 299–300, my translation into English from French.
[230] *SynO*, 312, ll. 13–14. Same, J. B. Chabot, *SynO*, 300, footnote 2. Baum and Winkler incorrectly state that the synod convened in Seleucia-Ctesiphon; Wilhelm Baum and Dietmar W. Winkler, *The Church of the East*, 28.

that ascetics must not live in townships or villages, among the people, where they could easily become a source of dissent but should rather remain in places that accord to their habit.[231] The third and perhaps most sweeping canon states:

> Now and in future, no bishop must create obstacles or difficulties to interdict marriage in the country that he governs and the church where he exercises his functions. […] And, in fact, we have support in favour of this command from the Great Doctor: 'In reality, it is better to take a wife than to be burned by desire.' Everyone of us will choose one of two things: *perfect abstinence, or a regular marriage* […]. '[…] The bishop should be flawless, husband of a single woman.' […] It is also allowed to every deacon, who has already been ordained to the diaconate, to unite with a woman by a regular and legitimate marriage […]. Our teachings are that someone, who voluntarily chooses to stay away from marriage, must live in solitude and without distractions in a monastery, in purity and abstinence. […] The legitimate marriage and the procreation of children, be it before, be it after the imposition of hands, is a good thing that is acceptable to God.[232]

Significantly, the canon recognizes two distinct paths or lifestyles of man: the first being complete abstinence, the other being monogamous marriage. Most importantly, it expressly states that representatives of the episcopal hierarchy may at any time, before or after their being ordained to priesthood, decide to contract a marriage. This stipulation is confirmed by the Synod of Mar Babai (497) which, as is clearly indicated by the synodical text, was instigated by the Shahanshah:[233]

> We all, bishops, […] have made reforms for our people and flock with respect to marriage and the procreation of children and we have allowed that: from the Patriarch up to the last one in the hierarchy, everyone can openly contract a chaste marriage with a single woman in order to procreate children […].[234]

It is, in fact, peculiar why the bishops would make such significant adjustments to Christian matrimonial law. Perhaps, most telling is the mentioning that the Shah not only called for the convention of the bishops in a synod but the remark that he explicitly demanded from them to

> […] establish a reform related to legitimate matrimony and the procreation of children

[231] *SynO*, 302.
[232] Ibid., 303–305, my translation into English from French.
[233] Ibid., 312.
[234] Ibid., 312, my translation into English from French.

for the entire clergy in the whole country.[235]

I disagree with the observation of Baum and Winkler that the canons of the Synod of Mar Aqaq are tantamount to an abolishment of celibacy.[236] Looked at in conjunction with the Synod of Mar Babai, it was certainly a setback for celibacy as well as the East Syrian monastic tradition both of which are circumscribed by the command that ascetics should live secluded among equals and monogamy being contrived as the preferable lifestyle of bishops. We do, in fact, know that the matrimonial reforms of these synods were not merely theoretical but actualized in practice. To illustrate, while we have no evidence pointing towards the fact that any of the Patriarchs, who ruled before these changes occurred, were in wedlock, we know that already Mar Babai himself as well as Mar Shila, the patriarch superseding him, were both married men.[237]

Sebastian Brock expounds that Christian relations with the administration of *Ērānšahr* hinged on the state of affairs with the Roman Empire.[238] That is, the ability of the Church of the East to coexist as well as its political leverage significantly depended on keeping a low profile regarding its Western coreligionists. However, once the ties with the Roman Church were officially severed at the Council of Ephesus (431), the proliferation and integration of the Church of the East into the Sasanian imperial structure progressively had to depend on other factors. I suggest that two concerns are especially valid: restricting the missionary activities of the Church of the East and preventing the spillover of Christian matrimonial ideals on the Zoroastrian population. Other scholars

[235] Ibid., my translation into English from French.
[236] Wilhelm Baum and Dietmar W. Winkler, *The Church of the East*, 32. Also cf. Yarshater, Ehsan (ed.), *The Cambridge History of Iran*, vol. 3 (2): The *Seleucid, Parthian and Sasanian* Periods (Cambridge: Cambridge University Press, 2008), 944; and Christopher Buck, *Paradise and Paradigm: Key Symbols in Persian Christianity and the Bahāʾī Faith* (Albany, NY: State University of New York, 1999), 79.
[237] William Young, *Patriarch, Shah and Caliph*, 54; also, Wilhelm Baum and Dietmar W. Winkler, *The Church of the East*, 32.
[238] Sebastian Brock, "Christians in the Sasanian Empire," 7.

have recently pointed out that conversions of Zoroastrians were momentous only when done by members of the Sasanian elite.[239] With regard to matrimony, it seems that the Sasanian elite, represented by the Shah, had a keen interest in modifying the East Syrian law to make it more acceptable to the Zoroastrian public. Keeping ascetics out of the public view as well as promoting monogamy among the episcopal hierarchy was certainly a way to go. Even though these reforms were not in line with the East Syrian tradition, they could be justified by references to scripture. More importantly, the adjustments stipulated at the Synods of Mar Aqaq and Mar Babai strongly point to the applicability of legal pluralism as a framework of inquiry. Rather than assuming the Sasanian elite imposed its idiosyncratic matrimonial laws on the Christian minority, the notion of monogamy which was innate to Eastern Christianity became the bargaining chip in the interaction between Sasanian and East Syrian jurisprudence. The pattern of interaction marking the relationship between both jurisprudences is negotiation, rather than influence. To maintain its standing and leverage within *Ērānšahr*, the representatives of the Church of the East had to sanction certain adjustments which proved more acceptable to the Zoroastrian authorities.[240] The latter, most likely, considered these changes necessary to prevent the spillover of Christian matrimonial ideals, particularly, celibacy and monogamy, on the Zoroastrian population which could have undermined the authority of the Sasanian elite by threatening the reproductive machinery of the empire.

### *4.* (*Re*)*negotiating matrimony: the prohibitions of Mar Aba*

With the juridical adjustments made at the Synods of Mar Aqaq (486) and Mar Babai

[239] Richard E. Payne, *A State of Mixture,* 52.
[240] Similarly, Manfred Hutter argues that the Church of the East molded a kind of "Zoroastrianized" Christianity recognized by the Zoroastrian authorities as properly Persian; cf. Manfred Hutter, "Impact of Zoroastrianism on Christianity in the 6th Century," 172.

(497), the East Syrian law on matrimony became subject to relaxations more admissible to the Zoroastrian authorities. However, these do not necessarily account for the increasing popularity of consanguineous marriages among Christians in the beginning of the 6th century. There *may or may not* be a causal connection with the synodical reforms. In other words, it is conceivable that the reforms East Syrian law saw, its approximation to Sasanian standards, had more far-reaching repercussions on Christian matrimony. What I mean is that with the *de facto* undermining of celibacy and an episcopal hierarchy which increasingly contracted marriages, the Christian ideal of matrimony perhaps did not survive unscathed. However, we lack evidence that would corroborate this.

Whatever the reasons, the 6th-century treatise of Mar Aba attests to the fact that next-of-kin marriages posed an unwelcome reality the Christian elite could not control. More specifically, his writing constitutes a meticulous discussion of the various types of close-kin matrimony and the reasons why they are prohibited.[241] Similarly to Ishoʿbokht, Mar Aba frequently adduces Biblical references to again sanction a model of matrimony that is more in line with the tenets of scripture. Put differently, whereas monogamous relations practiced by the episcopal hierarchy were and could willingly be sanctioned through biblical references, the practice of marrying next-of-kin was, after all, deeply entrenched in the Zoroastrian tradition.[242] When viewed in conjunction with the *Corpus Juris*, the prohibitions of Mar Aba, more largely, are indicative of an attempt by the Christian elite to reclaim the legal space it had ceded to the Zoroastrian authorities. To be more precise, sanctioning monogamy of the episcopal elite was acceptable even to the bishops; however, the prevalence of next-of-kin marriage threatened to undermine the

[241] Mar Aba, *EheM*, 260: "leh l-syāmā d-fuqdāne d-ʿal šawtāfutā qadišā b-sedrā nṭarinan. w-ʿal kul ḥad ḥad menkun."
[242] Manfred Hutter, "Impact of Zoroastrianism on Christianity in the 6th Century," 171.

support base of the Church of the East because the practice was closely associated with Mazdaism. The pattern characterizing the relationship of East Syrian to Sasanian jurisprudence at this moment, was again not influence, but negotiation—this time in favor of an outlook on matrimony which was more permissible to the Christian elite.

### *5. Reclaiming legal space?*

To theorize the boundaries of Christian matrimony, it is worthwhile resorting to the classification of sexual regimes suggested by Helmut Schelsky.[243] From the types Schelsky suggests, the 'sexual regime' pertaining to the Church of the East is aptly captured by what he refers to as '*absolute* monogamy' which he defines as:

> Monogamy [Einehe] in which the woman is sexually bound to her partner for a lifetime with the threat of severe punishment or other sanctions, whereas the same is expected from him to the degree that his wife complies with these social expectations […].[244]

The severe restrictions regarding marriage, and, notably, the hardship of divorce, indicate that the East Syrian law on matrimony profoundly contrasts with Sasanian law which aims at assuring that Zoroastrian subjects would contract a multitude of marriages during their lifetime. To sanction monogamy, the religious elite reverted to scriptural interpretations capitalizing on the notion of the husband and wife's conflation in one flesh. Most importantly, the Biblical scripture provided the historical precedent of Adam and Eve which was mobilized to approve of the righteousness of absolute monogamy against the backdrop of a Zoroastrian majority which adhered to conflicting standards. The ideal of monogamy was, on the microcosmic plain of the relationship between man and woman, an emblematic reflection of a Christian's putative relationship with God.

[243] Schelsky divides matrimonial regimes into four different types: moderate polygamy, absolute polygamy, moderate monogamy, and absolute monogamy. Helmut Schelsky, *Soziologie der Sexualität*, 31, my translation into English from German.
[244] Ibid.

Peculiarly, when the Christian elite was coerced to reform the laws on matrimony pertaining to the episcopal hierarchy, the notion of monogamy seems to have functioned as a bargaining chip in negotiating adjustments. The changes adopted indicate that the integration and leverage of the Christian community in the Sasanian Empire were, while mostly a smooth process, dependent on complying with the orders of the Zoroastrian authorities. Although we have no indicators as to why next-of-kin marriages were more frequently practiced at the inception of the 6th century, we have illustrated that the Christian elite, such as Mar Aba and Ishoʿbokht, was keen on reclaiming the legal space that had been ceded to the Sasanians, particularly, since this type of marriage could not be justified by reverting to Christian cosmology but was deeply entrenched in the Mazdaean tradition.

In this chapter, I invoked significant evidence in support of my main research arguments. First, it becomes apparent that the Christian bishops deployed cosmology, interwoven in scriptural references, for varying purposes. The synodical reforms showed that the idiom of cosmology could, in fact, be utilized to accommodate the interests of the Zoroastrian authorities. Meanwhile, the writings of Mar Aba and Ishoʿbokht indicate that it could also serve the promotion of a distinctive notion of Christian community whose elite fashioned a vision on matrimony in conflict with that of the Zoroastrian majority it lived under. Secondly, from those moments where East Syrian and Sasanian law came in close contact, it becomes apparent that their interaction was—at least for the late 5th century synods and the legal compilations of Mar Aba and Ishoʿbokht—a matter of negotiation.

## C. Early Islamic law: fiscal emancipation of women?

### *1. The conditions of marriage* (*shurūṭ al-zawāj*)

In this section, I carve out the legal nature of Islamic marriage, as regulated by al-Shāfiʿī and Saḥnūn b. Saʿīd al-Tanūkhī, and attempt to relate it to society. Thus, I marshal evidence in support of my first main argument that matrimony is mediated through the triad of cosmology, lawmaking, and the sociopolitical concerns of the religious elite.

A close reading of the chapters "*fī shurūṭ al-zawāj*" and "*shurūṭ al-nikāḥ ayḍan*" in the *Mudawwana* indicate that what Saḥnūn is dealing with are the conditions that can lawfully be stipulated in wedlock. His stipulations, more largely, provide important insights into the nature of Islamic matrimony as regulated by the Mālikī jurists. The format of Saḥnūn's inquiry is, as throughout his work, responsa. His first question is:

> If he [a man] married a woman on the condition that he does not marry a second wife and does not take a concubine. Is this marriage, with this condition, annulled if this was known before consummation according to the saying of Mālik?[245]

The question is answered by Mālik with the words: "the marriage is permissible, but the term is void."[246] Mālik then states that the marriage is allowed based on the authority of Saʿīd b. al-Musayyab (d. 95/715) and others who ruled that the conditions stipulated for this marriage—not to marry a second wife and not to take a concubine—are not such that would annul the marriage.[247] Subsequently, Saḥnūn makes reference to the story of a man who lived under ʿUmar b. al-Khaṭṭāb. This man supposedly entered a marriage, which in its contract stated that: "he would not take her out of her country."[248] This condition, just

[245] Saḥnūn, *MudK*, vol. 2, 131, ll. 1–2 [fī shurūṭ al-nikāḥ]: "a-raʾayta in tazawwaja imraʾatan ʿalā an lā yatazawwaja ʿalayhā wa-lā yatasarrira a-yufsakhu hādhā l-nikāḥu wa-fīhi hādhā l-sharṭu in udrika qabla l-bināʾi fī qauli Mālik?"
[246] Ibid., ll. 2–3: "al-nikāḥu jāʾizun wa-l-sharṭu bāṭilun."
[247] Ibid., ll. 3–4.
[248] Ibid., ll. 6–7: "lā yukhrijuhā min arḍihā." For an interpretation of the same passage, see Kecia Ali, *Marriage and Slavery in Early Islam*, 73.

like the above, was considered null, but did not corrupt the marriage contract.[249] Note that all conditions previously discussed do not annul wedlock.

By asking his second question, Saḥnūn continues his inquiry attempting to put his finger on what contractual terms would result in the annulment of wedlock.[250] Based on the authority of Mālik, he presents a legally complicated and linguistically challenging case:

> Whoever marries a woman with conditions placed on himself, then reaches a compromise (settlement) with her or divorces her: if he waits until she has completed her waiting period [*ʿiddatuhā*] and marries her in a new marriage, then, Mālik said, those conditions remain incumbent on him so long as anything remains from that divorce (the divorce of that marriage) [*yalzamuhu tilka al-shurūṭu mā baqiya min ṭalāqi dhālika al-mulki shayʾun*]. He said: and if he, in the second marriage, stipulates that he marries on the condition that it [the second marriage] is not accompanied by those conditions; he said: if he stipulated a condition in the second marriage, then that it is of no use. And those conditions for it [the marriage] are obligatory so long as anything remains from that divorce.[251]

In the case described, a man enters the first marriage on certain conditions the nature of which we are not informed. The marriage is then divorced and the waiting period of the wife (*ʿidda*)—usually four lunar months and ten days—comes into effect. Once the waiting period expires, the couple remarries. As the above passage has it, the same terms stipulated in the first marriage come into effect in the second. Saḥnūn reinforces this point by stating that, even if the husband stipulates that the second marriage is based on the condition that the terms from the first marriage are void, it is not valid. What remains unclear here is whether the man's stipulating the second marriage conditionally invalidates only the terms or the entire marriage. This question is, indeed, not explicitly

[249] Saḥnūn, *MudK*, vol. 2, 131, ll. 8–9: "wa-laysa hādhā min al-shurūṭi allatī yafsadu bihā al-nikāḥu."
[250] Ibid., ll. 13: "fa-ayyun shayu l-shurūṭi allatī yafsadu bihā al-nikāḥu fī qawli Mālik?"
[251] Ibid., ll. 14–18: "man tazawwaja imraʾatan ʿalā shurūṭin talzamuhu thumma innahu ṣālaḥahā aw-ṭallaqahā taṭlīqatan fa-inqaḍat ʿiddatuhā thumma tazawwajahā baʿda dhālika bi-nikāḥin jadīdin qāla: qāla Mālik: yalzamuhu tilka al-shurūṭu mā baqiya min ṭalāqi dhālika al-mulki shayʾun. qāla: wa-in sharaṭa fī nikāḥihi al-thānī annahu innamā yankaḥu ʿalā an lā yalzamuhu min tilka al-shurūṭi shayʾun. qāla: wa-in sharaṭa fī nikāḥihi al-thānī fa-inna dhālika lā yanfaʿuhu, wa-tilka al-shurūṭu lahu lāzimatan mā baqiya min ṭalāqi dhālika al-mulki shayʾun."

answered by the text. However, from the context of the passage, particularly, the question preceding it "what is the kind of condition upon which the marriage becomes void?", I conclude that the marriage, rather than its conditions, is annulled based on the man's attempt to stipulate it with the condition that the terms of the first marriage do not apply. In addition, it remains unclear at this point what the expression "so long as anything remains from that divorce" (*mā baqiya min ṭalāqi dhālika al-mulki shayʾun*) hints at. We do not precisely know if there is a point in time where nothing "remains of the divorce" and whether somebody would then be allowed to contract a marriage in defiance of the terms from the first marriage he entered with that woman. However, it may simply refer to the obligation of the husband to stick to the conditions stipulated in the first marriage contract.

The legal passages on the conditions of marriage are particularly instructive regarding the legal status of women, the way the law at times protects, enforces, opposes, or infringes on their interests. For instance, the case below illustrates how the law on the one hand acknowledges the financial exposure of a wife in the case that she illicitly attempts to stipulate conditions to a marriage contract before it is concluded, whereas on the other it may act in accordance with her interests if placing such conditions on her husband, with his agreement, after the marriage contract has been concluded:

> If a man marries a woman and she demands conditions from him in exchange for renouncing a part of her dower, then does she have a right to the part of the dower she renounced or not? He said: What she renounced from the dower in the marriage contract is not hers, and she did not place a condition on him. And, in fact, the condition she made to the husband is invalid except if it is a manumission or a divorce (from another woman). This is the saying of Mālik. I said: What do you think if she renounced a portion of the dower after contracting the marriage in exchange for placing on him these conditions? He said: They (the conditions) are incumbent on him and the property is his (the portion of the dower she renounced). He said: And if he does not fulfill the conditions she placed on him, then the property goes back to her (*rajaʿat fī l-māli*) taking it as if he did not stipulate that he would not take her from her country, not take a concubine to his side, and not marry (in addition to her). I said: And if she gave him the property on the condition that he does not add another wife to her, then, if he marries

> another wife, is she (the first wife) divorced three times? He said: A divorce is instigated and he does not take back the property because she (the first wife) purchased her (own) divorce with what she set down for him.[252]

In the above case, a couple enters a marriage while the wife attempts to impose certain conditions on her husband. For him to abide by these, she offers to renounce a portion of her dower. Saḥnūn states that the part of the dower she renounces she cannot reclaim (*mā ḥaṭṭat min dhālika fī ʿuqdati l-nikāḥi, fa-lā yakūnu lahā*). In this case, the law does not assume a protective function in terms of guaranteeing the financial integrity of the wife presumably because the wife is not supposed to ask for certain conditions before the conclusion of the marriage contract. Thus, the conditions she demanded are considered invalid (*bāṭil*). Importantly, whereas the conditions are considered annulled, the marriage is not. We are further informed that her condition is not considered annulled if it encompasses either a manumission, presumably her own if she was the slave girl (*jāriya*) of the man she is getting married to, or a divorce, possibly her husband's divorcing another wife before she enters wedlock with him. Saḥnūn continues his inquiry by clarifying whether she can place conditions on him after the marriage has been contracted. Accordingly, if she does so, the portion of the dower she revokes in return for these conditions is considered part of his property. However, should he fail to abide by these conditions after having agreed to them, the portion of the dower she renounced again becomes part of her property. If her condition was that the husband should not marry

[252] Ibid., 132, ll. 6–7 [shurūṭ al-nikāḥ ayḍan]: "law anna rajulan tazawwaja imraʾatan wa-sharaṭat ʿalayhi shurūṭan wa-ḥaṭṭat min mahrihā li-tilka al-shurūṭi, a-yakūnu lahā ma ḥaṭṭat min dhālika am lā? qāla: mā ḥaṭṭat min dhālika fī ʿuqdati l-nikāḥi, fa-lā yakūnu lahā ʿalā l-zawji shayʾun min dhālika wa-mā sharaṭat ʿalā l-zawji fa-huwa bāṭilun illā an yakūna fīhi ʿitqun aw-talāqun wa-hādhā qawlu Mālik. qultu: a-raʾayta in kānat innamā ḥaṭṭat ʿanhu baʿda ʿuqdati l-nikāḥi ʿalā an sharaṭat ʿalayhi hādhihi l-shurūṭa? qāla: yalzamuhu dhālika wa-yakūnu lahu al-mālu. qāla: fa-in atā shayʾan mimmā sharaṭat ʿalayhi rajaʿat fī l-māli fa-akhadhathu mithla mā yashtariṭa an lā yakhrujahā min miṣrihā wa-lā yatasarrira ʿalayhā wa-lā yatazawwaja qultu: fa-in kānat aʿṭathu al-māl ʿalā an lā yatazawwaja ʿalayhā, fa-in tazawwaja ʿalayhā fa-hiya ṭāliqun thālithan? qāla: fa-in fuʿila waqiʿa l-ṭalāqi wa-lam yarjaʿ fī l-māli li-annahā ishtarat ṭalāqihā bimā waḍaʿat ʿanhu."

another woman in addition to her, and if he does not abide by it taking another woman, then the first wife's marriage with her husband is divorced. In other words, the part of the dower she renounced is used to "purchase" the divorce from her husband, should he fail to abide by her condition not to take another wife. What becomes apparent from this case is that a wife may—in return for giving up a part of her dower—stipulate certain marriage conditions after the marriage has been contracted. Although we can see a clear infringement of her financial integrity in terms of the law accepting that she reduces her own dower, the wife also has the possibility to advance her interests and have them, to some extent, legally protected. In that case, if the husband attempts to breach the conditions by marrying another wife, the law is keen on safeguarding the first wife's interest by providing her with the option of an immediate divorce.[253] Thus, a wife cannot stipulate monogamy; however, the law functions in accord with her interest, dissolving the marriage, in the case her husband does not stick to his promise not to take other wives in addition to her. Moreover, since this divorce necessarily activates her husband's obligation to pay her what is left of her dower, the husband's breaching of his promise could be financially costly. To some extent, thus, the interests of women who find themselves in marriages are safeguarded legally.

This subchapter has led to important findings. First, whereas certain conditions stipulated in a marriage contract result in its annulment, others do not. For instance, when remarrying his wife, a husband is obliged to adhere to the same marriage conditions as in his first marriage with her, if not, the second marriage is (most likely) considered

[253] Kecia Ali discusses this scenario, cf. Kecia Ali, *Marriage and Slavery in Early Islam*, 74–5. Also, cf. a more general reference in Kecia Ali, "Progressive Muslims and Islamic jurisprudence: the necessity for critical engagement with marriage and divorce law," in *Progressive Muslims on justice, gender and pluralism*, ed. Omid Safi (Oxford: Oneworld, 2003), 168 in which she states that this constituted a rather important issue for the Muslim legal schools on which their opinions differed substantially.

annulled. Having said that, other conditions, such as the promise not to take a wife out of her hometown, do not result in the invalidation of a marriage but merely do not come into effect. Perhaps most strikingly, the law generally seems to allow that women exchange part of their dower in return for certain marriage conditions (after the marriage contract has been concluded). Thus, it seems to be accepting of the trade-off that comes by exchanging financial integrity with more favorable circumstances in wedlock. It would certainly be premature to engage in conclusions about the social ramifications of such legal stipulations. However, this small number of laws on the conditions of marriage shows the ambiguous tendencies of the law, on the one hand, allowing, to some extent, the infringement on women's financial integrity, while on the other, protecting their individual interests by enforcing the immediate termination of a marriage in case the husband acts counter to his promise not to take other wives.

### *2. Women forbidden to marry* (*muḥarramāt al-nisāʾ*)

In his *Risāla*, al-Shāfiʿī provides an entire subchapter on what women somebody must not marry. He begins by quoting Q 4:23 and Q 4:24:

> [23] Forbidden to you are your mothers, daughters, sisters, aunts paternal and maternal, nieces on your brothers' or sisters' sides, milk-mothers who suckled you and milk-sisters, mothers of your wives, and step-daughters in your custody from wives with whom you have consummated marriage—unless you have not consummated marriage with them, in which case no blame attaches to you. Forbidden too are legal wives of your own sons, and marriage with two sisters—unless that act belongs to the past. God is All-Forgiving, Compassionate to each. Forbidden too are married women, unless they be your slaves. [24] The Book of God thus commands you. Licit for you is all that lies outside these limits, provided you use your wealth to contract legal marriage, not fornication. To those women among them whom you take pleasure in marrying, you must render their dowries, as a legal obligation. But no blame attaches to you regarding what you have willingly agreed upon, once the legal obligation is fulfilled. God is All-Knowing, All-Wise.[254]

[254] *The Qur'an*, tr. Tarif Khalidi (London: Penguin Classics, 2008), 65 (Q 4:23–4). For the quotation by al-Shāfiʿī, see al-Shāfiʿī, *RisF*, 146.

Following this quotation, al-Shāfiʿī comments on how to interpret the stipulations in these Qurʾānic verses. To begin with, he points out that the verse could have two meanings. The first, he states, is the apparent meaning (*al-maʿnā huwa al-ẓāhir*) of the verse.[255] Reinforcing that all women the verse explicitly mentions as prohibited are indeed prohibited (*mā sammā Allāh min nisāʾi muḥarraman muḥarramun*), al-Shāfiʿī expounds that, by inference, all those it is silent on are lawful by reasoning of the verse's silence on them (*bi-l-ṣamti ʿanhu*). By mentioning everything that is not allowed, it becomes clear to the reader/listener what is.

Subsequently, he expands on the rationale underlying the explicit designation of relational combinations in Q 4:23 such as marrying "two sisters." Accordingly, the purpose of such combinations (*jamʿ*) is different from that of interdiction not to marry (one's) mothers, daughters, maternal, or paternal aunts.[256] Whereas marrying the latter is prohibited due to the relationship with them not being subject to change, it is not prohibited to marry two sisters *per se* because one can alter one's relationship with them. However, it is not one's own relationship with the two sisters, but rather the sister's relationality to each other that triggers the interdiction. That is, their relationship as sisters constitutes the legal cause (*ʿilla*) for this marriage to be considered despicable. In line with this reasoning, al-Shāfiʿī states that each sister alone is presumptively permissible (*ḥalāl fī l-aṣl*).[257] Effectively, a man can marry two sisters, but simply, not be married to them simultaneously.[258] Most importantly, we can gauge that the prohibition not to marry mothers (daughters, maternal, or paternal aunts) is more powerful—because the

[255] Al-Shāfiʿī, *RisF*, 146, ll. 11–2.
[256] Ibid., ll. 12: "taḥrīmu al-jamʿi bi-maʿnā ghayri taḥrīmi al-ummahāti […]."
[257] Ibid., ll. 14–5: "wa-kāna fī nahyihi ʿan al-jamʿi baynahumā dalīlun ʿalā annahu innamā ḥurrima al-jamʿu wa-anna kulla wāḥidatin minhumā ʿalā al-infirādi ḥalāl fī l-aṣli […]."
[258] Ibid., ll. 13–4.

relationship with a mother cannot be modified—than the prohibition to marry sisters, who only in their relationality to each other as sisters, are forbidden.

The purpose behind such legal reasoning must be gauged particularly against the backdrop of the formation of the Muslim legal schools in the 9th century, more precisely, the transformation of the circles of jurisprudence centered on individual figures into authoritative doctrinal complexes.[259] In other words, I do not want to suggest that applied legal practice may not have already had internalized the prohibition not to marry two sisters, but I assume that in the time of al-Shāfiʿī such legal judgements still needed to be sanctioned through hermeneutics and legal reasoning. The hermeutic method of al-Shāfiʿī, therefore, can be deemed crucial in terms of providing a roadmap to interpreting Qurʾānic commandments.

Theorizing his notion of "relational prohibitions" in the Qurʾān, al-Shāfiʿī marshals another example by reverting to the decree that a man must not marry more than four women. To begin with, he states that each woman must be lawful for the husband to marry (*al-nisāʾ al-mubāḥāt*).[260] Similar to the previous example, he argues that the fifth woman is not unlawful as such, meaning as a single wife (*qad kānat al-khāmisa min al-ḥalāl bi-wajhin*), but only in her relationality to the other four. He reinforces this by stating that the Qurʾānic stipulation of "lawful are those other than the ones mentioned" indicates the permissibility of marriage in the sense that marriage is generally encouraged; however, this does not apply absolutely (*lā muṭlaqan*), but is based on the condition that a marriage is entered lawfully (*ʿalā al-sharṭ alladhī aḥallahu bihi*).[261] In consequence, a

[259] Cf. Wael Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 33–34.
[260] Ibid., 148, ll. 3–4: "fa-inna al-nisāʾa al-mubāḥāti la yaḥillu an yankaḥa minhunna akthar min arbaʿi […]."
[261] Ibid., 148, ll. 5–7.

man who is married to four women can—as regards his fifth marriage—only comply with the conditions of lawfully entering a marriage, if he first divorces one of the others.

The account of al-Shāfiʿī is conducive to my inquiry in two ways. First, the Qur'ānic decree he invokes sets out the realm of women that are considered unlawful to marry. Most of those forbidden are next-of-kin relatives. Therefore, in similar fashion to Ishoʿbokht, unlawful women are explicitly listed. In comparison, al-Shāfiʿī's restriction encompasses a slightly smaller circle of next-of-kin relatives than that of Ishoʿbokht. To the ones mentioned by al-Shāfiʿī through his reference to Q 4:23 and 4:24, Ishoʿbokht adds the stepmother, the half-sister, the sister-in-law, and granddaughters, but does not mention "the mothers that suckled you." Of course, the stepmother and the half-sister can easily be explained away by arguing that the Islamic terminology of "mother" and "sister" is inclusive of these two. However, it is conceivable that maternal half-sisters and sisters-in-law were lawful to marry since, in patrilinear fashion, they do not constitute blood relatives.

What I think is more striking is the unmistakable flexibility of legal reasoning by which the Qurʾānic stipulations could be interpreted. This points to the applicability of the main argument of this thesis, namely, that the laws on matrimony were negotiated between the scriptural purview of religion as well the sociopolitical, and in this case, the concerns of the legalists. In the case of al-Shāfiʿī, we quite clearly see that the scriptural prohibitions of certain women—which others could potentially read as absolute prohibitions—needed to be clarified through sophisticated argumentation and legal reasoning. Furthermore, this legal reasoning constituted a strategy through which the prohibitive character of the Qurʾānic stipulations could be grasped while at the same time avoiding their interpretation as *strictly* prohibitive. In other words, while the jurist had to

come to terms with the essence of prohibition innate to these passages, he could macerate their strictly prohibitive character by making them dependent on certain conditions that would minimize the purview of applicability of such prohibitions.

### *3. Saḥnūn's types of marriage*

a. Unprotected (exchange) marriage (*nikāḥ al-shighār*)

Saḥnūn adduces a multitude of legal opinions concerning the definition of the term *nikāḥ al-shighār*. To begin with, he states that, based on an *isnād* leading back to ʿUmar, the authorities of al-Qāsim, Ibn Wahb (d. 196/812), and ʿAlī b. Ziyād (d. 183/799) transmit:

> The Messenger of God prohibited the *shighār*. The *shighār* is when [a] man gives his daughter into marriage with a man on the condition that the other man gives his daughter into marriage with him while no dower [*ṣadāq*] is stipulated between them.[262]

Due to the variations of the *nikāḥ al-shighār*, it is rather difficult to determine the least common denominator of this type of marriage. It is usually an agreement between two men who contract marriages for at least two people over whom they maintain the legal guardianship without stipulating the appropriate dower.

Other legal cases help us to elucidate the boundaries of the *shighār*. In its most common variety, the *nikāḥ al-shighār* is probably stipulated as an exchange between two men, in which a family relative of each is given in marriage to the other:

> Give your lady in marriage to me and I (in return) give my lady in marriage to you; and there will be no dower [*mahr*] between them. Is this (then) a *shighār* in the opinion of Mālik? He said: Yes.[263]

Note that the marriages are contracted without a dower (*mahr*). Saḥnūn tells us that the

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[262] Saḥnūn b. Saʿīd al-Tanūkhī, *MudK*, vol. 2, 98, ll. 19–20 [nikāḥ al-shighār]: "rasūl Allāhi […] nahā ʿan al-shighāri, wa-l-shighāru an yuzawwija al-rajulu ibnatahu li-rajulin ʿalā an yuzawwijahu al-ākhiru ibnatahu wa-laysa baynahumā ṣadāqun."

[263] Ibid, 98, ll. 4–5: "zawwijnī maulātaka wa-uzawwijuka maulātī wa-lā mahrun baynahumā, a-hādhā min al-shighāri ʿinda Mālik? qāla: naʿm."

classification as *nikāḥ al-shighār*; however, is not dependent on these marriages being stipulated as an exchange of female blood relatives, but can similarly be contracted as marriages with or between slaves.[264] Put differently, regardless of whether the exchange encompasses free people or slaves, there is no legal differentiation with respect to classifying the marriages as *shighār*.[265] In addition, it is laid out that the *shighār* does not necessarily need to entail a marriage of the stipulating parties, but may be contracted by them solely for the purpose of marrying their respective male and female slaves with one another.[266]

Regardless of the people being married in consequence of a *shighār*-exchange, there is mostly consensus among the jurists that the *nikāḥ al-shighār* is not sanctioned by the Muslim authorities. This is commonly justified with reference to the saying of the Prophet. The reasoning for interdiction, stated by Kecia Ali, seems to be the lack of stipulating a dower (*mahr/saḍāq*).[267] In other words, what makes this marriage repulsive to lawmakers is the infringement on the wife's financial protection that comes with the absence of the dower (rather than her lack of consent in contracting the marriage). This is made evident by Saḥnūn:

> I opine that an equal dower must be given to each one [woman] because both of them require it and the *shighār*, in which no dower is stipulated, is prohibited.[268]

More specifically, the consequence of not stipulating a dower for the women these marriages are contracted for is that their bodies, particularly their vulvas (*buḍʿ*), are not made permissible for the husbands:

> The *shighār* is when [a] man gives a woman into marriage and the other giving a woman

[264] Ibid., ll. 8–12.
[265] Ibid., l. 9: "al-shighāru bayna al-ʿabīdi mithla al-shighāri bayna al-aḥrāri."
[266] Ibid., ll. 11–12: "zawwij ʿabdī amataka bilā mahrin ʿalā an uzawwija ʿabdaka amatī bilā mahrin anna hādhā kulluhu siwāʾun wa-huwa shighārun kulluhu."
[267] Kecia Ali, *Marriage and Slavery in Early Islam*, 57–58.
[268] Saḥnūn, *MudK*, vol. 2, 99, ll. 13–14 [nikāḥ al-shighār]: "wa-arā an yafraḍa li-kuli wāḥidatin ṣadāqun mithluhā li-anna hādhayni qad faraḍā wa-l-shighāru al-ladhī nahā ʿanhu huwa al-ladhī lā ṣadāqun fīhi."

> into marriage with him while the vulva [*buḍʿ*] of one of them like that of the other is not made permissible with a dower.[269]

Accordingly, due to the absence of the dower, sexual intercourse with the women the marriage is contracted with is considered illegitimate. Kecia Ali points to the complicated relationship between the financial and bodily integrity of women in the Islamic legal context. Although, she states, women could be married off by their guardians without their consent, infringing their financial integrity was something more serious.[270] The above passage supports the notion of the direct relationship created by jurists between the financial and bodily integrity of women. In other words, it is due to the lack of the dower that the body of a woman is not made permissible. Thus, the financial protection of a woman is, following the opinion of Saḥnūn, at the center of reasoning for allowing a man access to her body.

b. Marriage of the daughter without her consent (*bi-ghayr riḍāhā*)

Saḥnūn begins by clarifying that, according to Mālik, it is not permissible to force someone into marriage.[271] He immediately restricts this provision stating that the father may compel his virgin daughter (*ibnatihi al-bikr*), young son (*ibnihi al-ṣaghīr*), slave girl (*amatihi*) and slave (*ʿabdihi*) or the guardian his orphan child (*yatīmihi*) to marry.[272] Nevertheless, from the subsequent cases it becomes evident that forced marriages are permissible, but generally not desired. For instance, the girl, who is a virgin (*bikr*) and incompetent (*safīha*), should not be given in marriage to someone without her approval

[269] Ibid., 99, ll. 3–4: "wa-l-shighāru an yankaḥa al-rajulu imraʾatan wa-yankaḥahu al-ākhiru imraʾatan buḍʿa iḥdāhumā b-buḍʿi al-ukhrā bi-ghayri ṣadāqin wa-mā yashbahu dhālika."
[270] Kecia Ali, *Marriage and Slavery in Early Islam*, 57–58.
[271] Sahnūn, *MudK*, vol. 2, 100, ll. 15–16 [inkāḥ al-ab ibnatahu bi-ghayr riḍāhā]: "wa-lā yajburu aḥadun aḥadan ʿalā al-nikāḥi ʿinda Mālik."
[272] Ibid., ll. 16–17.

(*riḍāhā*).[273] It would, therefore, seem that the rationale is to ensure that marriages are contracted respecting the daughter's right of approval.

Even though the law hints at this link, it does not tie the legal validity of a marriage to the daughter's approval since this would lead to an infringement of the father's authority over her which is guaranteed through his guardianship. Nevertheless, her right to approval (*riḍāhā*) somewhat collides with the authority of the father. The strained balance between daughter's approval and father's authority is perhaps epitomized in a reference Saḥnūn makes to the opinion of Ibn al-Qāsim on this matter:

> I opine that it is allowed for the father to give her in marriage except if there is harm from it, then it is forbidden.[274]

Based on this, the ultimate say is with the father.[275] He can marry her even without her consent, but it is not desirable. Thus, by placing on the father a moral imperative not to give her into marriage against her will, the law tries to resolve the dilemma between paternal authority and the integrity of the daughter.

c. Marrying without a legal guardian (*bi-ghayr walī*)

The paramount position of the legal guardian is particularly reflected in the discussion on the consequences of marrying without further notice to the guardian. Kecia Ali claims that the term *walī* is understood, in this regard, to exclude fathers in the capacity of guardians.[276] The footnote, in which she cites a number of chapters from the *Mudawwana* in support of her claim, does not explicitly clarify how she comes to this conclusion. At

[273] Ibid., ll. 19: "lā tazawwij illā bi-riḍāhā."
[274] Ibid., ll. 27–28: "fa-arā anna inkāḥa l-abi iyyāhā jāʾizun ʿalayhā illā an yaʿtiya min dhālika ḍararun fa-yamnaʿu min dhālika."
[275] Based on evidence from the *Mudawwana* and the *Umm* of al-Shāfiʿī, Kecia Ali concludes that the power of the father over his daughter encompasses her virginity, rather than her maturity or age; Kecia Ali, *Marriage and Slavery in Early Islam*, 35.
[276] Kecia Ali, *Marriage and Slavery in Early Islam*, 35.

any rate, marriages without a legal guardian can lead to dreadful consequences which Saḥnūn points out in unabashed fashion:

> I said: Do you opine that when [a] man marries [a] woman in the presence of witnesses without notice to the guardian, [then], according to the saying of Mālik, are they, the husband, the wife, the witnesses, and whoever married them, to be smitten or not? He said: I heard Mālik being asked about this and he asked: did he penetrate her? He answered: no, the witnesses denied they were present and said: He did not penetrate her. He [Mālik] then said: There is no punishment incumbent on them but I opine that if he penetrated her, the wife, husband, and whoever married them would be punished. I said: and the witnesses? Ibn al-Qāsim said: yes, the witnesses too if they knew about it.[277]

Therefore, the pertinent question with regard to marrying without a legal guardian is whether or not sexual intercourse between the married parties took place before the guardian came to know of the marriage contract. In case it did, the married parties as well as the witnesses, and the officiant who sanctioned the marriage are to be punished. Notably, the legal notion of punishment as the consequence of adultery (*zināʾ*) is based on Qurʾānic scriptural decrees.[278]

It is important to note that Saḥnūn, more largely, justifies his opinion that marrying without the permission of the guardian is tantamount to adultery by linking it to the divine commandments as apparent in two *aḥādīth* of which slightly different versions are found in the *Ṣaḥīḥ*-collection of Bukhārī. The first:

> The adulterer who commits adultery is not a believer at the time of committing adultery and a thief is not a believer at the time of committing theft, and Allāh revealed the boundaries of the faith and the limits (?) of the faith.[279]

The second *ḥadīth* he quotes is a direct moral imperative directed at men:

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[277] Sahnūn, *MudK*, vol. 2, 117, ll. 14–18 [fī al-tazwīj bi-ghayr walī]: "qultu: a-raʾayta idhā tazawwaja al-rajulu al-marʾata bi-ghayri amri walī bi-shuhūdin, a-yuḍrabu fī qauli Mālik al-zawju wa-l-marʾatu wa-l-shuhūd wa-lladhī zawwajahā am lā? qāla: samiʿtu Mālik-an yusʾalu ʿanhā fa-qāla: a-dakhala bihā? Fa-qālū: lā wa-ankara al-shuhūdu an yakūnū ḥaḍarū fa-qālū: lam yadkhul bihā fa-qāla: lā ʿuqūbatun ʿalayhim illā annī raʾaytu minhu an law dakhala ʿalayhā la-ʿūqibū l-marʾata wa-l-zawja wa-lladhī ankaḥa. qultu: wa-l-shuhūda? qāla Ibn al-Qāsim: naʿam, wa-l-shuhūda in ʿalimū."

[278] Q 4:25, 24:2, 25:68.

[279] Ibid., 118, ll. 5–6: "lā yaznī al-zānī ḥīna yaznī wa-huwa muʾminun wa-lā yasriqu wa-qad anzala Allāhu ḥaddahu ʿalā l-īmāni wa-qaṭʿahu ʿalā l-īmāni."

> Do not marry the woman without a guardian.[280]

More broadly, the understanding of illicit sexual intercourse resulting in the punishment designated for adultery is closely connected to the notion that legitimate sexual intercourse requires the possession of authority over a woman. This possession can only be granted by her guardian who, when agreeing to the marriage contract, subsequently hands over the guardianship to the husband. Noteworthy, this is significantly in accord with a remark made by Kecia Ali:

> The connection between *milk* and lawful sexuality stands at the core of all regulation of marriage and divorce and by its absence marks discussions over punishment for illicit sex. [281]

Thus, based on the legal cases featured by Saḥnūn and the secondary literature, we may confidently state that the intertwined nature of authority and the legitimacy of sexual relationships is central to the laws on Islamic marriage as regulated by the Mālikī school.

d. Fixed-term marriage (*al-nikāḥ ilā ajal*)

The fixed-term marriage (*al-nikāḥ ilā ajal*) must not necessarily be equated with the pleasure marriage (*mutʿa*) which is practiced particularly among the contemporary Shīʿa and is often rendered as "temporary marriage."[282] Saḥnūn at least once refers to *al-nikāḥ ilā ajal* as *mutʿa*. Taking into consideration the distinct historical development the *mutʿa* has undergone and to avoid confusion, I do not employ the term *mutʿa* except in the case where expressly referred to as such by the author.

Judging from Saḥnūn's discussion, it becomes evident that the meaning of *nikāḥ ilā ajal* is not throughout tantamount to that of the *mutʿa*. He begins by decreeing that a

[280] Ibid., l. 11: "lā tatazawwaj al-marʾata illā bi-walī."
[281] Kecia Ali, *Marriage and Slavery in Early Islam*, 12.
[282] For a brilliant article on the pleasure-marriage (*mutʿa*), see Dietrich von Denffer, "Mutʿa – Ehe oder Prostitution," 299–325.

marriage—contracted with the permission of the guardian (*bi-idhni walī*), a dower (*bi-ṣadāqin qad sammāhu*), and stipulated to expire after months (*ashhur*), a year (*sana*), or two years (*sanatayn*)—is void (*bāṭil*).[283] Further down his inquiry, Saḥnūn reiterates this interdiction by establishing a link to the *mutʿa*. More precisely, he claims that somebody cannot contract a valid marriage by declaring: "I marry you for a month" because this would correspond to stipulating a *mutʿa*.[284] The author, therefore, makes clear that in its first meaning, *ilā ajal* implies a temporal limit to the marriage itself.

Subsequently, Saḥnūn discusses a complicated legal case—the translation and interpretation of which remains somewhat uncertain—presumably to illustrate that the term *nikāḥ ilā ajal* may be understood in another way and is not necessarily synonymous with the *mutʿa*. The case is as follows:

> I asked: What do you think if he tells her, after the expiration of one month, I will marry you and her guardian and she herself are satisfied with this? He said: This marriage is invalid and it must not be contracted. I asked: Did you consider [the case of] a man marrying a woman for 30 dīnārs in cash and [or?] 30 dīnārs on credit to be paid after a year? He said that Mālik said: I do not like this marriage and he said no more. Mālik said: This is not the (kind of) marriage I have encountered. I said: So, what do you prefer if this occurs? He (Mālik) said: I allow it and grant the husband to consummate the marriage if he brings it (the money) immediately. She must not keep herself from him. The 30 promised for later are due with the appointed time. I asked: So, if the duration is prolonged or if he says: the 30 are hers upon (his) death or (their) separation? He said: As concerns his saying (that it is hers) upon (his) death or (their) separation, it is invalid. He should not consummate the marriage. Mālik also said: If he postpones it (the payment of the 30 dīnārs) to a significantly later point, then I opine it is allowed. He should not postpone (the payment) after that.[285]

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[283] Sahnūn, *MudK*, vol. 2, 130, ll. 8–9 [al-nikāḥ ilā ajal]: "idhā tazawwaja imraʾatan bi-idhni walī bi-ṣadāqin qad sammāhu tazawwajahā ilā ashhurin aw-sanatin, aw-sanatayni a-yaṣlaḥu hādhā al-nikāḥu? […] hādhā al-nikāḥu bāṭilun."

[284] Ibid., ll. 18–19: "in qāla atazawwajuka shahran […] qāla Mālik: al-nikāḥu bāṭilun yafsakhu wa-hādhihi al-mutʿatu."

[285] Ibid., ll. 20–28: "qultu: a-raʾayta in qāla lahā in maḍā hādhā l-shahru fa-anā atazawwajuka wa-raḍiya bi-dhālika walīhā wa-raḍiyat? qāla: hādhā l-nikāḥu bāṭilun wa-lā yuqāmu ʿalayhi. qultu: a-raʾayta law anna rajulan tazawwaja imraʾatan bi-thalāthīna dīnāran naqdan aw [probably editor's mistake]-thalāthīna nasīʾatan ilā sanatin? qāla: qāla Mālik: lā yuʿjibunī hādhā l-nikāḥu wa-lam yaqul lanā fīhi akthara min hādhā. qāla Mālik: laysa hādhā min nikāḥin min adraktu, qultu: fa-mā yuʿjibuka min hādhā al-nikāḥu in nazala? qāla: ajīzuhu wa-ajʿalu li-l-zawji idhā atā bi-l-muʿajjali an yadkhula ʿalayhā wa-laysa lahā an tamnaʿahu nafsahā wa-takūnu al-thalāthuna al-muʾakhkhara ilā ajlihā. qultu: fa-in ṭāla al-ajlu aw-qāla fī l-thalāthīna al-muʾakhkhara innahā ilā mawtin aw-firāqin? qāla: ammā idhā kāna ilā mawtin aw-firāqin fa-

At first glance, it is perhaps not evident how, through this case, Saḥnūn advances a second semantic notion of the term *nikāḥ ilā ajal*. First, a man attempts to stipulate a marriage with a woman telling her that he will marry her after a specified period of one month. Accordingly, this marriage does not come into effect. Subsequently, Saḥnūn asks whether a man may contract a marriage with a woman in exchange for 30 dīnārs in cash and the same amount on credit to be paid by him after a year. Somewhat reluctantly Mālik opines that husband and wife can consummate the marriage, the wife not being allowed to refuse her husband, if he pays 30 dīnārs immediately (*bi-l-muʿajjali*) after contracting the marriage. The second part of the stipulation states that the husband may pay the remaining 30 dīnārs (*al-thalāthuna al-muʾakhkhara*) after a stipulated time, but certainly before his death or dissolution of the marriage. What this case seems to hint at, more largely, is that a man may contract a marriage with a wife, even though he cannot pay her the full amount of her dower immediately. The 30 dīnārs paid up front are, therefore, given as a security to the wife to make sure she does not end up without any dower. It becomes evident in this case that the underlying rationale is the protection of the financial integrity of the wife. By looking at this stipulation in conjunction with the first question of the above case—the promise of a man to marry a woman after a certain period—it becomes evident that a man's promise alone is insufficient for a marriage contract to come into effect; rather, he needs to come up with at least part of her dower to reinforce his intent to marry her. The second meaning of the term *ilā ajal* thus hints at a marriage in which payment of the dower is deferred. In other words, *ajal* in this context refers to postponing the payment of the dower. This type of marriage is, according to Saḥnūn, generally

huwa mafsūkhun mā lam yadkhul bihā wa-kadhālika qāla Mālik wa-ammā idhā kāna ilā ajalin baʿīdin fa-arāhu jāʾizan mā lam yatafāḥash baʿda dhālika."

prohibited, except if the husband pays at least a portion of the dower upon contracting the marriage.

This chapter has illustrated that the *nikāḥ ilā ajal* has two meanings: the first being a marriage with a stipulated time limit; the second being a marriage in which the payment of the dower is deferred. Both types are, according to Saḥnūn, prohibited. In this subchapter on fixed-term marriage, it has become evident that although the essentials of the law are based on and correspond to the scriptural commands such as the prohibition not to stipulate marriages with an expiry date (*mutʿa*), the Muslim jurists of the 9th century were in the process of laying down the hermeneutical tools in order to establish guidelines for interpreting the stipulations in the Qurʾān and Sunna.

### *4. Stipulating the bridal dower* (*ṣadāq/mahr*)

The previous subchapters have already illustrated that stipulating the bridal dower (*ṣadāq*/*mahr*) was a frequently recurring theme in the regulations on Islamic marriage. The inquiry has shown that it is generally desirable, according to the law, to stipulate a dower—an appropriate one at the best. In the *Risāla*, al-Shāfiʿī enumerates the necessary requirements for a marriage contract to be valid:

> The marriage is composed of four things: the approval of the deflowered bride, [approval of] the bridegroom, that the guardian of the woman marries her [off], and the presence of witnesses when the marriage is contracted […][286]

In the conditions mentioned, the bridal dower is not one of them. This matches, at least partially, with the evidence adduced in this chapter. Notably, the stipulations on the fixed-term marriage (*al-nikāḥ ilā ajal*) illustrated that the financial integrity of a wife could not

[286] Al-Shāfiʿī, *RisF*, 250, ll. 11–12 [ṣifat nahy Allāh wa-nahy rasūlihi]: "fa-idhā jamaʿa l-nikāḥu arbaʿan riḍā l-muzawwaji al-thayyibi wa-l-muzawwaji wa-an yuzawwija l-marʾata walīhā bi-shuhūdin ḥalla l-nikāḥu […]."

be neglected completely. Al-Shāfiʿī puts the Islamic (or at least the Shāfiʿī) jurisprudential view on the bridal dower in a nutshell:

> And if someone were to stipulate a dower that is preferable to me, the marriage is not annulled by reason of omitting the dower [*ṣadāq*] because God confirmed in his scripture [the validity] of marrying without a dower and this is written in other places than this.[287]

Even though the bridal dower is not a mandatory condition for a marriage to come into effect, the law's inclination is evidently towards stipulating it. Our inquiry has produced evidence in support of this. The perspicuous prohibition of the exchange marriage (*nikāḥ al-shighār*) and the regulations pertaining to the fixed-term marriage (*nikāḥ ilā ajal*) are a case in point. As I discussed, the very rationale behind their proscription is based on the complicated link between financial and bodily integrity of women. By ensuring their financial security with the bridal dower, sexual relationships with women are made permissible to men. Having said that, the stipulations on the terms of marriage (*shurūṭ al-zawāj*) made plain that women could forfeit a portion of their dower in return for more favorable marriage conditions for as long as this exchange occurred after contracting the marriage.

It is perhaps most important to note that, judging from the stipulations covered in this chapter, whereas the law could operate as a safeguard of women's interests particularly in cases in which these interests are guaranteed through a promise or oath made by the husband; it could also be compliant with regard to infringements on the financial integrity of a wife such as giving up a portion of her dower. Nevertheless, even though the dower is neither legally mandatory nor stably installed, the recurring recommendation to stipulate one, more largely, indicates that the matter occupied a legal

[287] Ibid., ll. 14–15: "wa-law sammā ṣadāqan kāna aḥabba ilayya wa-lā yafsadu l-nikāḥu bi-tarki tasmīyati l-ṣadāqi li-anna Allāha athbata l-nikāha fī kitābihi bi-ghayri mahrin wa-hādhā maktūbun fī ghayri hādhā al-mawḍiʿi."

spot that was noticeably saturated by the ethical concerns of the legalists. These ethical concerns perhaps constituted a way of dealing with the dilemma between ensuring the authority of the husband over his wife and ensuring her financial integrity.

### *5. Situating the Islamic law on matrimony*

In this chapter, I marshaled evidence in support the first main argument of this thesis. The descriptive part, the variety of stipulations I discussed, attests that matrimony in Islamic jurisprudence is, first and foremost, treated by demarcating the boundaries between the permitted and the prohibited in addition to being crosscut by a variety of moral categorizations such as preferred and disliked. In other words, the nature of Islamic matrimony is carved out, by Saḥnūn as well as al-Shāfiʿī, by reverting to the hermeneutic method of "definition by default." By clearly pointing to what is forbidden, the legal subjects know that everything which is not, is allowed. More broadly, the overtone is: what is not expressly forbidden, is allowed even if to varying moral degrees.

In support of my primary research argument— the nature of matrimony being mediated through the triad of cosmology, lawmaking, and the practical concerns of the Muslim elite—this chapter has shown that the Muslim jurists reverted to stipulations of matrimony pertaining to the Qurʾān and Sunna while tying them to certain conditions through which their strictly prohibitive character could be toned down. In other words, coating legal provisions in scriptural references, the jurist could, through sophisticated legal reasoning and hermeneutics, macerate strict prohibitions and create room for making permissible such things as taking a fifth wife (after divorcing one of the others) or marrying two sisters (after divorcing the first). In other words, by tying divine decrees in the Qurʾān and Sunna, that could potentially be interpreted as strictly forbidden, to

specific conditions, the jurists created frameworks within which they could interpret these prohibitions more leniently. The degree to which these frameworks allowed for lenient interpretations of prohibitions is, at least to some extent, representative of the ethical concerns of the Muslim jurists. Thus, jurisprudence as suggested by al-Shāfiʿī and Saḥnūn was at no point detached from the personal concerns of the juristic elite—rather, they were very much situated at its heart.

**D. Preliminary conclusion**

This chapter was geared towards responding to my three main research questions from the perspective of matrimonial law: What legal forms do the laws of matrimony cultivate? How are these legal forms related to cosmology and the practical concerns of the community/empire which they grew out of? What patterns mark the interactions between Sasanian, East Syrian, and Islamic law?

First, I focused on Sasanian law. For that purpose, I carved out the types of matrimony discussed in the *Hazār Dādestān*. Most importantly, Sasanian jurisprudence knew a variety of marriage types reaching from full (*pādiḫšāy*), auxiliary (*čagar*) to consensus marriage (*ḫwasrāyēn*). In addition, each of these types could be contracted temporarily (*nē az ān ī hamēīg*). The numerous variations of matrimonial agreements bestowed the legal system with a significant amount of flexibility.

Secondly, I looked at how these matrimonial forms were mediated through the triangle of cosmology, lawmaking, and the concerns of the elite. By mobilizing references to Mazdaean cosmology—creating direct benefit in the larger cosmos through sexual reproduction and following the example of Ohrmazd to procreate with next-of-kin—the Sasanian authorities effectively sanctioned its jurisprudential notion of matrimony which was, more largely, geared towards sustaining elite households. The presence of sociopolitical concerns in the law on matrimony is perhaps most evident in the institutions of the intermediary (*ayōkēn*) and substitute-successors (*stūr*), both of which served the particular historical conjuncture of Sasanian rule. By weaving the maintenance of elite households in the law of matrimony the rulers made sure the sun on the Sasanian Empire would not set all too soon.

Thirdly, I focused on East Syrian law. The unmistakable hallmark of the laws on

Christian matrimony is absolute monogamy. The law is rigorous in terms of curbing the presence of next-of-kin marriage (*masbā d-qaribā*) and promoting marriages with strangers (*masbā d-nukrāye*). The prohibiton of next-of-kin marriages loomed large in jurisprudential writings from the mid-6th century onwards as illustrated by the prohibitions of Mar Aba and the *Corpus Juris* of Ishoʿbokht.

Subsequently, I examined how East Syrian matrimony was mediated between the cosmological vision of Christianity, lawmaking, and the sociopolitical concerns of the Christian elite. The treatises of Ishoʿbokht and Mar Aba indicated that scripture, particularly, references to the inseparable union of husband and wife decreed by God were mobilized to sanction monogamy and foster a distinct sense of community. Perplexingly, the monogamous vision of matrimony, which was closely knit to Christian ideas of cosmology, also served as the bargaining chip when the Sasanian elite demanded adjustments of the East Syrians laws on matrimony pertaining to the episcopal hierarchy. More broadly, the inquiry on East Syrian matrimony illustrated how much the bishops tied matrimonial laws to Christian cosmology in order to establish a communal sense of identity—deliberately made distinct from that of the Sasanians.

In the last part of this chapter, I focused on Islamic law. The *Mudawwana* of Saḥnūn and the *Risālā* of al-Shāfiʿī were employed to outline the types of matrimony known to Islamic law. The most characteristic feature is that most of the marriage types discussed by the Muslim jurists were prohibited. The nature of matrimony is overwhelmingly defined by default. Marriage exchanges (*nikāḥ al-shighār*), marrying without a guardian (*bi-ghayr walī*), and fixed-term marriages (*nikāḥ ilā ajal*) were for the most part interdicted. Marrying from the core of next-of-kin relatives was interdicted. Conditions stipulated in before contracting marriage (*shurūṭ al-zawāj*) were not

interdicted, but did simply not come into effect.

After that, I discussed how Islamic matrimony was mediated through the triangle of cosmology, lawmaking, and the sociopolitical concerns of the Muslim elite. Saḥnūn and al-Shāfiʿī unmistakably based their legal opinions on scriptural commandments, particularly prohibitions. That is, Qurʾānic decrees and prophetic practices were not only a model and entry point to their discussions, but provided them with the larger interpretative framework of what is allowed and what is not. While their legal reasoning and hermeneutics were coated in the language of scripture, the jurists could macerate divine interdictions—which could have otherwise been read as strictly prohibitive—by tying them to certain conditions which resulted in a smaller purview of applicability of prohibitions. Thus, Islamic jurisprudence, as advanced by al-Shāfiʿī and Saḥnūn, was significantly saturated by the ethical concerns of the jurists to the degree that the ethics of the jurist ultimately determined to what extent divine prohibitions were toned down or not.

The findings of this chapter point to the applicability of my first thesis statement. For all three legal systems, it has become evident that it is impossible to scrutinize the laws on matrimony in isolation from notions of cosmology and the aspirations of the elite—sociopolitical or ethical—that loom behind allowing or forbidding specific types of matrimony. In terms of epistemology, scriptural cosmology as well as the sociopolitical and ethical concerns of the elite were altogether factors that determined the nature of jurisprudence. More importantly, scriptural notions of matrimony could be utilized to include, undergird, but also to curb or prohibit the matrimonial realities pertaining to the Sasanian and Islamic Empires.

Regarding the question what patterns marked the interactions between Sasanian,

East Syrian, and Islamic law, this chapter adduced some evidence. Two historical moments are especially noteworthy: first, the convocation of the synod in 497 at the hands of the King of Kings for the East Syrian bishops to reform the law on matrimony pertaining to the episcopal hierarchy; secondly; Mar Aba's prohibitions from the mid-6th century. Both moments show that the underlying pattern of interaction, at least between Sasanian and East Syrian law, was a matter of negotiation, rather than influence. However, to support the second main argument of there being *varying* patterns of interaction, we would have to adduce more evidence.

I shall now revisit my two these statements by once again examining Sasanian, East Syrian, and Islamic jurisprudence from the perspective of slavery laws.

# CHAPTER VII

# SLAVES

## A. Sasanian law: slave trade—a risky financial venture

### *1. Prelude: basic legal concepts in Sasanian property law*

a. Substance (*bun*) and fruit/increase (*bar*)

Maria Macuch aptly theorizes the key concepts of Sasanian property law. Considering that slaves constitute a type of property, it is useful to outline these. In particular, with regard to gauging the status of slaves in the Sasanian Iranian context, the conceptual notions their status is based on are crucial. Every legal object (*ḫwāstag*) is composed of a substance (*bun*) and a fruit/increase (*bar*) or income/interest (*windišn/waḫš/waḫt*).[288] We can exemplify this distinction by looking at an orange tree. The tree itself, including the roots, stem, branches, twigs, and leaves, are the substance (*bun*). The oranges that are yet to grow constitute the fruits/increase (*bar*). This distinction is essential to many principles and institutions of Sasanian law, particularly, the law of inheritance and endowments. As for the slave, the substance (*bun*) is the body. The fruit/increase (*bar*) encompasses everything that cannot be fully anticipated but creates value such as the slave's labor and, supposedly, pregnancies.

b. Ownership (*ḫwēšīh*) and possession (*dārišn*)

The second important distinction is made between ownership (*ḫwēšīh*) and possession (*dārišn*). To own an object (*ḫwāstag*) is to have full authority over it, including the right

[288] Maria Macuch, "Substance and Fruit in the Sasanian Law of Property and the Babylonian Talmud," in *Proceedings of the Conference on "Talmudic Archeology," University College London, June 22–24, 2009* (Leiden: Brill, 2015), 248.

to use, transfer, bequeath, sell, or even destroy it. On the contrary, the right to possession (*dārišn*) implies only the physical control of an object (*ḫwāstag*) but not necessarily ownership.[289] For example, someone leasing a plot of land possesses it, but does not have ownership of it. To sell or transfer it, is not permissible. However, if he buys the plot, he acquires ownership of it, which implies that he does not merely have physical control over it but can transfer, resell, bequeath, or even destroy it. As a legal object (*ḫwāstag*), the slave can be owned by another party. What is more difficult, however, is whether he himself is authorized to ownership and/or possession of property. The *Hazār Dādestān*, in fact, illustrates that the slave, by rule, does not have the capacity to acquire property.[290] Property transferred to him thus comes into ownership of the slave's master. Even so, a master may bestow on his slave limited legal capacity. In that case, the slave is authorized to dispose over his own income (*pad windišn pādiḫšāykard*) and is thus entitled to acquire property from third parties.[291]

### *2. Transacting slaves*

a. Selling and pledging slaves

We have multiple cases in the law book in which slaves are part of a transaction, particularly, as sold commodities or pledges. First of all, it is important to note that slaves owned by Zoroastrians must not be sold to non-Zoroastrians:

> A slave may not be sold to a non-Zoroastrian. If, however he is sold, (then) both of them (the buyer and the seller) shall be considered thieves by the Zoroastrian *rat* [priest] on account of the slave (i.e. the action shall be equated with theft - A.P.) and they shall be branded […].[292]

[289] Ibid., 248–249.
[290] It appears that the slave in terms of his incapacity to acquire property matches the legal status of women and minors; Farroḫmard, *HazDP*, 151 (58, 16–59, 1): "In addition to a woman, a slave, and a minor, others from the same category are also to be considered insolvent unless it is evident that they are solvent […]."
[291] Maria Macuch, "Barda and Barda-Dāri."
[292] Farroḫmard, *HazDP*, 29 (1, 13–15).

The stipulation, in fact, indicates that selling slaves to non-Zoroastrians is not only undesirable but punished by the law. Thus, both contracting parties, the vendor as well the non-Zoroastrian purchaser, are to be convicted of theft. We can reasonably assume that the prohibition strives to prevent the transfer of slaves who have been living in the households of Zoroastrians to environments in which they would be exposed to the Bad Religion (*agdēnīh*).

Even though slaves are legally considered objects (*ḫwāstag*), they undeniably possess human qualities. Interestingly, this results in a multitude of legal problems in cases where slaves are stipulated as commodities in transactions:

> When he sells a pregnant female-slave—if the pregnancy is visible—then the pregnancy is also sold (i.e. the fruit is included in the transaction - A.P.).[293]

Accordingly, if the pregnancy of the slave-woman is visible when contracting the sale, the child is included in the sale. As a logical consequence thereof, the pregnant slave, whose pregnancy is not yet visible, is sold without the child. More generally, the vendor only conveys to the contracting party what he intends to sell, rather than what the legal object (*ḫwāstag*) possibly is. Since the pregnancy cannot be anticipated at the time when the contracting parties stipulate the transfer, the law works in favour of the vendor following the maxim of *ignorantia facti excusat*—the facts of which he is ignorant, he cannot be held responsible for. More importantly, it seems that the time the child is conceived is critical. If conceived while the slave-woman is under ownership of the vendor, then the vendor has the legal right to profit from the fruit (*bar*), meaning the child. However, if conceived after the sale, the child comes to be owned by the purchaser. This corroborates when looking at another stipulation:

> It is also said, that if Farraxv concluded (the following) agreement concerning a slave-woman with Mihrēn: "(she shall belong (?)) to you after my death," Pērož ī

[293] Ibid., 111 (40, 17–85, 2).

> Veh-Ōhrmizdān and Pusānveh ī Burzātur Farnbaγan (… … … … … …) (if) a child is born (to the slave-woman) in Farraxv's lifetime, then he should not be conveyed (to Mihrēn).[294]

Similarly, in this case, a slave-woman who is stipulated to be transferred at the time of Farroḫ's death, is merely conveyed within the scope of her substance (*bun*) excluding the fruits (*bar*) she generates during the lifetime of Farroḫ. To sum up, the legal maxim in transactions of pregnant slaves seems to be determined by two factors: the intent of the vendor and the time the child is conceived.

According to Sasanian law, the trading of slaves is, more largely, a volatile financial venture that entails significant risks for the contracting parties. These risks are not limited to the fruits (*bar*) of the slave, which we discussed, but expand to his substance (*bun*). In the following, more complicated legal case, this becomes quite evident:

> If Farraxv makes the following contract with Mihrēn: 'whatever you choose ('name') that has a value of 200 (*drahms*) (from) the estate belonging to me, shall belong to you'. And if Mihrēn declares his agreement to the receipt (= the transfer to him) of several slaves who were minors at that time and valued at 200 (*drahms*) altogether and who now are valued each separately at 200 *drahms*, then—since their value has grown because of their (= the slave's) bodily improvement (i. e. the minors are now fully grown - A.P.) and not because of a conjunction of prices in the town/*šahr*—the transfer shall be made in accordance with their present value and not with what they were worth at the time of the drawing up of the contract. And the declaration (made by Mihrēn regarding his agreement to receive several slaves - A.P.) is not in force.[295]

In this case, Farroḫ and Mihrēn stipulate a transaction of multiple slaves, who at the conclusion of the contract altogether have a value of 200 *drahms*. The increase in the value of the slaves, which results from their bodily improvement, to 200 *drahms* each, voids the stipulated contract causing Mihrēn to receive only a single slave. It would be interesting to know, whether the same logic applies to cases where the slaves' value decreases, would the seller have to add more slaves? We cannot answer this question

[294] Ibid., 241 (108,8–11); also, see Farroḫmard, *HazDM*, 650–651. Perikhanian's and Macuch's translations are identical in spite of the lacunae in the passage.
[295] Farroḫmard, *HazDP*, 141 (54, 11–15).

here. Likewise, certain insecurities prevail in transactions in which slaves are pledged to a creditor. Should, after pledging the slave, he be manumitted by the debtor, then, unless the debtor is insolvent, the slave is immediately free. To compensate for the loss of the creditor, the debtor is obliged to pay an equivalent sum of money to him, or, otherwise, the creditor may hold the slave in pledge until the money is settled.[296] This, more largely, indicates that transactions of slaves bore a significant amount of risk for all parties involved. Similar to animals and other living property, the law book had to account for the fact that slaves were perhaps less consistent in their market value than other things, and subject to the human experience of disease, pregnancy, and death.

Most peculiarly, Sasanian slave law does not protect Zoroastrian believers from becoming enslaved. In contrast to other legal systems, there seems to be no contradiction between slavery and being an adherent of the Good Religion (*wehdēn*). In fact, the law book stipulates that a contracting party itself may end up enslaved as a result of stipulating a slave trade with someone:

> If Farraxv receives Mihrēn from Āturfarnbay, as a slave (= *loco servi*) once again, then—if Āturfarnbay makes a claim—Farraxv must hand Mihrēn over, otherwise (Āturfarnbay) shall be entitled to seize Farraxv (himself) in compensation ('exchange') for Mihrēn […].[297]

In this case, the debtor (Farroḫ) is enslaved in case he does not comply with the creditor's (Ādufarrbay) demand to return the slave (Mihrēn). The stipulation indicates that the property of the creditor must be maintained by all means, even if this leads to enslaving a fellow Zoroastrian. So far, our inquiry has shown that slave trade was associated with significant risks for the contracting parties. These risks were not limited to the *de facto* loss or conversion of slaves into other forms of property but could be as significant as a

[296] Ibid., 107 (39, 2–5). For another stipulation with similar outcome, cf. ibid., 107 (38, 13–17).
[297] Ibid., 149 (58, 9–14).

contracting party itself becoming enslaved as the result of transacting a slave.

b. Selling children into slavery

Selling children into slavery is generally not allowed. However, under extraordinary circumstances, the *paterfamilias* may sell a child for its own sake and the protection of other family members. This has been well researched by Maria Macuch.[298] The law book is clear that transactions of children or other family members under the guardianship of the *paterfamilias*, are only permissible under two circumstances as indicated by the following stipulation:

> Only the father is authorized to sell the child into slavery. And he is authorized to sell (the child) in the case of (impending) death and injury (*margīh ud rēštagīh*), (but) he (=the father) is only authorized to sell it (= the child) for its (own) sake (*pad ān ī ōy*). In the case of an *adwadād* ("inability to maintain") the father is authorized to sell it (= the child) for the sake of his (= the father's) own (needs) (*pad ān ī xwēš*) and for its (= the child's) sake (*pad-iz ān ī ōy*) and that of the mother (*ud mād*), for himself (*pad ān ī xwad*) and for the sake of him, who has been affected (by the *adwadād*) (*pad ān ī ōy kē abar mad ēstēd*). And the other guardians are authorized to sell it (= the child) for the sake of themselves (*pad ān ī xwad*) (and) of him, who has been affected (by the *adwadād*) (*pad ān ī . . . ōy kē abar mad ēstēd*).[299]

The first features a situation of general emergency in which the child would be exposed to imminent harm resulting in its injury or death. It is important to highlight that the rationale behind the selling of the child in this situation is only the well-being of the child itself, rather than that of other parties. The second situation is referred to with *adwadād*. By conflating the stipulations in the *Hazār Dādestān* with the usage of the term in other sources, Macuch makes out four different meanings of the term of which only one is relevant to the case at hand. Accordingly, it implies a shortage of supplies or a lack of

[298] See Maria Macuch, "The adwadād Offence in Zoroastrian Law," 247–269.
[299] Farroḫmard, *HazD*, (33, 6–9), quoted in Maria Macuch, "The adwadād Offence in Zoroastrian Law," 260.

food.[300] Other than in the first scenario, the child can be sold in order to protect not only its own well-being but also that of other family members. Another stipulation illustrates that the selling of family members by the *paterfamilias* is not restricted to children but may also affect the wife, the adopted son or daughter as well as the substitute-successorhip (*stūr*) or legal guardianship (*sālārīh*) over a woman.[301] From these stipulations it becomes clear that selling children (and other family members) was only an option in rare instances. In those "destitute situations" were it was, the rationale behind such transactions was, first and foremost, the safeguarding of the child itself, and only, in the second place, the protection of other family members.

### *3. Manumitting slaves*

a. Full and partial manumission

Manumission is the act of freeing a slave. Some legal systems, at least in theory, are based on the notion that being a slave and being an adherent of the respective religion is mutually exclusive. The stipulations we discussed in which Zoroastrians may end up being enslaved as the result of a transaction, an imminent harm or a shortage of supplies, have shown that this is not the case in Sasanian law. However, it seems that in order to acquire new adherents to the Good Religion (*wehdēn*), the legal system developed certain incentives that mainly applied to slaves. First, it is written that if a slave owned by a Christian master converts to Zoroastrianism, he is manumitted and must remunerate the former master with his market value.[302] Therefore, a slave belonging to a Christian could, at least in theory, escape slavery by converting to Zoroastrianism. The benefit of

[300] Maria Macuch, "The adwadād Offence in Zoroastrian Law," 260.
[301] Farroḫmard, *HazDP*, 95 (33, 6–9).
[302] Ibid., 29 (1, 10–13).

manumission that comes with conversion becomes only effective, however, if the master of the slave does not simultaneously convert to Zoroastrianism. In other words, should both, master and slave, convert, then the slave is not subject to manumission.[303] The second part of the above stipulation features a rather elusive scenario:

> It is written in one place that if a slave belonging to a Christian converts to Zoroastrianism ('the Good Religion') and (enters the service) of a Zoroastrian, (the latter) must return the value ('price') of the slave to (his former master) and free the slave, and the latter (= the slave) must compensate him for this loss […].[304]

Macuch suggests that this passage probably functions as an obligation to the Zoroastrian community to come up with the financial support of a slave-convert to help him pay the release money to his former master.[305] This can be made sense of against the background that, with the manumission of the slave, his financial responsibilities towards the non-Zoroastrian community would immediately be settled. Perhaps a bit too far-fetched, but an interesting alternative reading is that the slave enters a kind of contractual relationship with someone from the Good Religion (*wehdēn*) who—in the Zoroastrian version of the Muslim *mawālī*—would oversee his integration into the community while provisionally covering the costs of the slave's release.

The stipulations in Sasanian law make clear that manumissions could be partial. What is meant is that, rather than fully freeing the slave, only a portion of him may be manumitted. For instance, if he is owned by shareholders each of whom owns one-half of the slave, then, if one shareholder manumits his half, the slave is one-half free and one-half enslaved. Manifold scenarios, in fact, are conceivable, meaning that a slave could be released to even the tiniest portion of his substance (*bun*). This procedure is similarly

[303] Farroḫmard, *HazDM*, 25 (1, 16–17). Note that the translation of Perikhanian is entirely different in this case; cf. Farroḫmard, *HazDP*, 29 (1, 16–17).
[304] Ibid., 29 (1, 10–13).
[305] Maria Macuch, *HazDM*, 34–35.

attested to in other systems of jurisprudence. More importantly, we need to ask what the practical implications of a partial manumission are. The law book features a rather interesting case which Perikhanian and Macuch translate quite differently. According to Perikhanian:

> Alongside it is written that if he makes the following declaration: 'I have conveyed this slave to Mihrēn for one year out of every two', then this slave cannot be manumitted without mutual consent. And if one of them frees his share (= his share of the real right on the slave—A. P.) with the consent of the other, then note should be taken (that the slave) is entirely free (one year out of every two).[306]

Given this translation, the right to dispose of the slave is owned by two persons. Their shares in the slave are equal allowing them to each make use of him at intervals of one year. In addition, the stipulation states that approval is needed by the other party if a shareholder wants to manumit his share in the slave. Once approval is attained, the slave is transformed into a hybrid oscillating between the status of freedom and slavery in intervals. In other words, whereas he is free for one year, he is again fully enslaved in the next. The translation of Macuch leads to an entirely different result:

> And along with the (sentences), which are written down, it must be kept in mind: When someone declares: 'This slave should is given by me to Mihrēn every two years for (a) year', (then) nobody is authorized to manumit the slave, except by mutual agreement. And if one [shareholder] releases his share with the agreement of the other [shareholder], (then) he (= the slave) (is considered) free to equal shares (*hamēwēn*).[307]

In her commentary, Macuch explains that the case features a situation in which two shareholders hold the right of disposal over the slave. To manumit a share in the slave, the approval of the other shareholder is needed. In the case he approves, the slave in terms of who owns him continues to oscillate between the two; however the partial manumission, in fact, causes each shareholder to only profit to half of what they used to of the slave's labor since he now benefits from his labor to one-half, while the other half

[306] Farroḫmard, *HazDP*, 171 (69, 3–6).
[307] Farroḫmard, *HazDM*, 467 (69, 3–6), my translation into English from German.

goes to both shareholders together.[308] What is peculiar about Macuch's version is that it seems unintelligible why the shareholder, who manumits his share in the slave, should be allowed to further profit from the substance and fruit of the slave. From a contextual—not philological—perspective, the translation of Perikhanian appears more plausible.

Before continuing, it is important to note that the fruits (*bar*) of slaves are always as free as their substance (*bun*). In other words, if a female-slave is manumitted to one tenth, then children born to her, are free to the same extent.[309] We can reckon that this equally applies to slave labor and other fruits produced by the slave.

b. Reclaiming former slaves into slavery

The law book is mostly clear on protecting manumitted slaves from being reclaimed into slavery by their former masters or others. For instance, if a slave is part of a transaction of a father with his wife and children, in which the father stipulates that the estate he *will* acquire shall be conveyed to them, then, in the case that he subsequently manumits a slave, the slave cannot be claimed by the wife or children as the following legal passage indicates:

> Vahrān has said that if a father transmits to his wife and children (the estate which) he will receive and he subsequently frees a slave (from servitude), then, according to the opinion of Syāvaxš, the (former) slave cannot ('may not') be brought back from his (acquired status of) a 'subject of the King of Kings,' and I express the same opinion, but Rāt-Ōhrmizd had rendered a different judgement on this question […].[310]

In the opinions of Farroḫmard and Siyāvaḫš, this is also the case if the father promises to them his current estate of which the slave is a part of. Again, if he subsequently manumits the slave, the latter cannot be reclaimed by the wife or children.[311] More broadly, we can

[308] Maria Macuch, *HazDM*, 470.
[309] Farroḫmard, *HazDP*, 27 (1, 6–7).
[310] Ibid., 67 (20, 7–10).
[311] Ibid., 91 (15–32,1).

gauge that a slave's manumission is given priority over property claims. In other words, once the slave acquires freedom, he can only with difficulty be reclaimed into slavery.[312]

### *4. Locating the slave in Ērānšahr*

In spite of the various stipulations extant in the *Hazār Dādestān*, it remains rather difficult to situate slaves and their societal role within the larger context of the Sasanian Empire. What is peculiar is that being enslaved is not mutually exclusive with being an adherent of the Good Religion (*wehdēn*). At first glance, it would, therefore, seem that cosmology did not play a role in the configuration of the law on slavery. However, the incentive of manumission set for non-Zoroastrians slaves owned by Christian masters indicates that slave law was not entirely isolated from the precepts of Mazdaism. By buying into Mazdaean religion, the slave was rewarded with manumission. Thus, the law makes use of an interesting tool: offering to slaves an exchange—rejecting their undesirable position in the realm of the Bad Religion in exchange for their attaining freedom. In this case, Mazdaean cosmology functions as a persuasive argument through which slavery can be overcome. I assume that the law's specification that this applies to slaves owned by *Christian* masters is rather important. This is perhaps the sociopolitical side of the equation. In other words, the Sasanian authorities probably had a keen interest in making sure that such slaves would convert to Zoroastrianism, rather than Christianity. In brief, this may indicate that my first main research argument holds true—even if significant uncertainties remain. Thus, the Sasanian configuration of slavery was at least to some extent mediated through the triangle of cosmology, lawmaking, and the sociopolitical concerns of the elite. Furthermore, the stipulation concerning the manumission of slaves

[312] More stipulations exist on cases in which slaves are claimed by someone in spite of having been manumitted; ibid, 305 (A31, 15–32, 2).

owned by Christians in the case they convert to Mazdaism evidently presents a matter in which the Sasanian laws competed with East Syrian. The underlying pattern of interaction in this case—in support of my second main argument—is, therefore, competition.

## B. East Syrian law: rather enslaved than manumitted?

### *1. Slavery—a corollary of the original sin?*

Although we have more than 30 stipulations about slaves in the *Corpus Juris*, it remains rather difficult to conceptualize their legal status. In the second chapter of his useful *Das Islamische Sklavenrecht*, Rainer Oßwald contrasts various justifications of slavery in the Christian and Islamic tradition.[313] In consideration of the lack of research on slavery in the East Syrian tradition, it is perhaps worthwhile reverting to the prominent reasoning articulated by Augustine (d. 430) who is considered to be among the most influential of Western Christian theologians and philosophers:

> The prime cause of slavery, then, is sin, so that man was put under man in a state of bondage; and this can be only by a judgement of God, in whom there is no unrighteousness, and who knows how to assign divers punishments according to the deserts of the sinners.[314]

Of course, we do not know whether Eastern Christianity functioned based on the same assumption about managing its slaves. However, considering the shared historical development and textual legacy of the Eastern Church with its Western counterpart until the mid-5th century and even beyond, it is not unlikely that East Syrian writers had internalized similar rationales about slavery. Most importantly, contriving slavery as a corollary of the original sin (*peccatum originale*) may have significant implications for its reception in the legal realm.[315] Theologically speaking, since the original sin constitutes an irreversible mundane reality, slavery is, in turn, perpetually sanctioned. In other words, the individual cannot overcome the legacy of the original sin. The

[313] See Rainer Oßwald, *Das islamische Sklavenrecht*, 19–28.
[314] Augustine, *De civitate Dei*, 19.15, quoted in Peter Garnsey, *Ideas of slavery from Aristotle to Augustine* (Cambridge: Cambridge University Press, 1996), 47.
[315] Garnsey convincingly argues that for Augustine slavery is rooted in the original sin, rather than merely individual sin. For the entire argument see Peter Garnsey, *Ideas of slavery*, 219; also, Rainer Oßwald, *Das islamische Sklavenrecht*, 20.

justification of Augustine, therefore, implies that there is no expiration to slavery.[316] This premise may, more largely, condition the dimensions of East Syrian law in terms of incorporating only a few incentives to overcome this limited legal status or even abolish the institution of slavery *per se*. I am aware that most of this is speculative. To improve our understanding of slavery in East Syrian law and make a more nuanced judgment, we must, therefore, attempt to make sense of the legal stipulations that have come down to us.

### *2. Sketching the legal status of the slave*

a. Root (*ʿeqārā*) and fruit (*firā*)

East Syrian law, similar to Sasanian, distinguishes between the root (*ʿeqārā*) and fruit (*firā*) of property. This is made evident by the following stipulation:

> If a man pledges to another man, without making any stipulation, a female slave [*amtā*], female camel, goats, or sheep which give birth: if the female slave [*amtā*], female camel, or the sheep gives birth, then, because the born [*yaldā*] is not fruit [*firā*] but root [*ʿeqārā*], what is born to the female slave, the female camel, or the sheep in the state of being pledged, belongs to the debtor […].[317]

This stipulation features a case in which a female slave or animals are part of a pledge. Accordingly, if the female slave, while in possession of the pledgee, gives birth to a child, the pledgee does not acquire the child, but it rather belongs to the pledger. The reason given is that the child is not considered the fruit (*firā*) but the root (*ʿeqārā*). This hints at the fact that the pledgee is allowed to make use of the fruit (*firā*) of the slave, whereas the right to profit from the root (*ʿeqārā*) stays with the pledger. By reason thereof, the pledgee, in the case he nourishes and rears the slave child at his expense, is entitled to

[316] In his comparison, Oßwald hints at this pointing out that in Islam unbelief – which constitutes the Muslim justification for slavery – can, at least in theory, be overcome by conversion whereas the original sin cannot; cf. Rainer Oßwald, *Das islamische Sklavenrecht*, 26.
[317] Ishoʿbokht, *CorJ*, 159–161 (bk. v, vii, § 10) (Ger.), my translation into English from German.

reclaim the costs he incurred from the pledger.[318] In another stipulation featuring the birth of children to a female slave, it is stated that, if she is manumitted by her master, and the latter does not declare that the yet unborn are also free, they are nevertheless manumitted together with her.[319] Theorizing both stipulations, it seems that the fruit (*firā*)—root (*ʿeqārā*) distinction does, at least in the case of slave children, not come into effect until they are born, since in both stipulations the yet unborn are equated with the mother who corresponds to the root (*ʿeqārā*) of property.

b. The *peculium* of the slave

The *Corpus Juris* is clear that the slave is, by nature of his status, granted a *peculium*. In other words, he may freely acquire and dispose of property as becomes evident in a passage stating:

> If a man endows his male or female slave with a house, a field, or something else, the male or female slave can do with it whatever he or she wants during life, and even dispose of it in death by means of testation.[320]

Accordingly, the slave does not only have the right to property in the actual sense but bequeaths it to whomever he wishes provided he die testate. If he fails to make a will, his property is returned to its donator (here: master). This provision is restricted, however, by the following paragraph, in which Ishoʿbokht states that if the slave was given property by his first master, then given to another master, and fails to make a will, his property stays with the second master.[321] At any rate, Ishoʿbokht informs us that the slave is

[318] Ibid.
[319] Ibid., 179 (bk. v, xiii, § 4) (Ger.).
[320] Ibid, 138, l. 27–140, l. 1 (bk. v, iii, § 16) (Syr.): "En yaheb gabrā l-ʿabdēh aw l-amtēh baytā aw ḥaqlā aw meddem ḥrin, šalliṭ man haw ʿabdā aw amtā b-haw meddem l-meʿbad ak d-ṣābē b-ḥayaw(hy) w-āp b-ʿunndānēh b-diyatiqā. En dēn lā mzabben aw yāheb w-māʾēt, hāpēk haw meddem ʿal meddem d-law dílēh ítaw(hy) l-ḥabrēh d-yahebtēh lāk."
[321] Ibid., 141 (bk. v, iii, § 18) (Ger.).

allowed to acquire property, to dispose of it, and bequeath it to who he wants.[322] As a result, upon his death, the slave's property is not necessarily allocated to his Christian master, and therefore slave property not bound to be transmuted into Christian ownership.

Although the slave can own property, he does not necessarily have the right to maintain the property he acquired in slavery when manumitted. The following stipulation makes this evident:

> If someone manumits a slave or a female slave and does not together with him manumit his things, then the things are not released from his [the slave's?] property.[323]

In other words, a slave may be freed, whereas his property remains in slavery. This happens if the master manumits his slave without the explicit mention that the slave's assets are also released. In that case, the slave's possessions are transmuted into the property of his master. This provision is, in fact, bizarre. Whereas the slave while being in the state of slavery can freely dispose of his property, upon his manumission he cannot. Put differently, the slave acquires freedom but loses all his acquired property upon manumission. The trade-off seems quite simple: freedom for loss of assets. This may be telling about the function East Syrian law assigns to slaves. Based on the fact that with manumission a slave loses all his property, the incentive to be manumitted is rather small. From a strictly economic perspective, the slave may find it more useful to remain enslaved because he can acquire and preserve his property, whereas, when he is manumitted, he incurs a complete loss.

### *3. Manumitting slaves*

Resembling Sasanian law, the *Corpus Juris* states the possibility of partially manumitting

[322] Likewise, cf. Maria Macuch, "Barda and Barda-Dāri."
[323] Ibid., 178, ll. 2–3 (bk. v, xiii, § 3): "w-en nāš mḥadded l-ʿabdēh aw l-amtēh: w-lā mḥadded ʿamē meddem d-it lēh: lā mḥadded men qenyānēh."

slaves. To begin with, the degree to which a slave is free is inherited to his offspring. The law book features an example in which a female slave is owned by shareholders with one of them holding a tenth of her. In the case that he manumits his share in the female slave, then, we are informed, the children born to her are free to the extent of one tenth.[324] Furthermore, the labor produced by the slave is free to as much as the slave:

> A slave or a female slave, who has been partially manumitted, can work and acquire property for himself within the part he rules to the extent it has been manumitted.[325]

Together with the above, we can be quite confident that the fruit (*firā*) of the slave corresponds, in its degree of freedom, to the slave himself. In another, rather interesting case, several slaves are owned by multiple shareholders. Accordingly, if one of the shareholders releases the share he owns in the entirety of slaves without explicitly specifying which slaves are to be manumitted, then the slaves to be manumitted are decided by lot.[326] Therefore, the law recognizes randomness as a given when it comes to the manumission of slaves. In addition, the *Corpus Juris* is clear on the fact that slaves—once manumitted—for no reason be reclaimed into slavery.[327]

### *4. Eternal slavery?*

We have been able to sketch some of the features pertaining to slaves in East Syrian jurisprudence. Most importantly, slaves are, by the nature of their legal status, bestowed with the capacity to own property. This significantly distinguishes them from how slaves are configured in Sasanian law. Peculiarly, while the slave can acquire, sell, and even bequeath property while being enslaved, he potentially loses all his assets upon

[324] Ibid., 179 (bk. v, xiii, § 5) (Ger.).
[325] Ibid., 178 (bk. v, xiii, § 7, a) (Syr.): "ʿabdā aw amtā kad ḥdā men kmā menun mḥadded. b(h)ēy mnātā šalliṭ lēh l-meʿbad ʿabdā l-nafšēh wa-l-mebʿā qanyānēh l-nafšeh mḥaddedā (h)ēy."
[326] Ibid., 179 (bk. v, xiii, § 6, b) (Ger.).
[327] Ibid., 177–179 (bk. 5, xiii, § 2) (Ger.).

manumission. Economically speaking, the effect is that manumission is supposedly discouraged from the perspective of the slave. However, judging from the stipulations we covered, it remains rather difficult to draw a lucid picture of slaves and their function within the community of the Church of the East. Perhaps related to the fact that the Christian community was not in a position of an imperial actor, we should assume that lawmakers rather neglected slave law, with most of the judgments they produced being ad-hoc stipulations rather than systemically integrated into East Syrian jurisprudence. Nevertheless, it is striking that the justification for slavery advanced by Augustine, his reference to the original sin, with the consequence that slavery constitutes a legal status that must be endured and is eternal, somewhat matches with the small incentives East Syrian slave law sets out for slaves with regard to attaining freedom. To advance our understanding of slavery in the context of the Church of the East, scholarship has to pin down the justifications for slavery in Eastern Christianity which are perhaps not found in jurisprudential but theological writings.

Should the justification for slavery expounded by Augustine hold true in the context of Eastern Christianity, then the first main argument of this thesis would be substantiated. Taking into consideration the shared historical and textual legacy of the Church of the East with Western Christianity, this is not too unlikely. In that case, we could create a direct link between cosmology and the configuration of the East Syrian laws on slavery. In other words, because slavery is a corollary of the original sin, with no end in sight, the social institution of slavery would be contrived with almost no incentives for subjects being enslaved to overcome it. This, however, at least for now, is speculative.

## C. Early Islamic law: from slaves to clients

### *1. Islamic justifications for slavery*

In his very recent *Das islamische Sklavenrecht*, Rainer Oßwald notes that the attitude towards slavery in Islam in the main matches that of Christianity.[328] Notably, Oßwald points to the fact that the later rationale of the Muslim jurists, according to which the natural state of man corresponds to freedom (*aṣl al-nās al-ḥurrīya*), in conjunction with the notion that slavery is rooted in unbelief (*aṣl al-riqq huwa al-kufr*), is absent in the legal writings of the early Mālikīya up until Ibn Abī Zaid (d. 386/996).[329] Tying in with this, Irene Schneider mentions that the *Adab al-qāḍī*, the legal manual of a certain Khaṣṣāf (d. 261/847), features the first express reference to the notion that the natural state is freedom (*al-aṣl huwa al-ḥurrīya*).[330]

Most importantly, we must discuss the close tie the Muslim jurists cultivated between slavery (*riqq*) and unbelief (*kufr*). By utilizing unbelief as a justification for slavery, the jurists established an immediate connection to the realm of Islamic cosmology: punishment for unbelief. In spite of creating this clear link to cosmology, it seems, however, that the purpose behind it was to account for the significant number of people who had been captured as slaves with the spread of Islam. Bernard Lewis mentions, in this regard, that capturing was, at least as concerns the early centuries of Islam, the most important source of slavery.[331] Thus, it, more largely, seems that reverting to the cosmological justification for slavery served the express sociopolitical purpose of legitimizing the reality of many subjects in the Islamic Empire who did not have the same

[328] Rainer Oßwald, *Das islamische Sklavenrecht*, 22.
[329] Ibid.
[330] Irene Schneider, *Kinderverkauf und Schuldknechtschaft. Untersuchungen zur frühen Phase des islamischen Rechts* (Stuttgart: Steiner, 1999), 24.
[331] Bernard Lewis, *Race and Slavery in the Middle East*, 9.

privileges as the rest.

With the Islamic notion of slavery being closely tied to the concept of unbelief, the pertinent question emerging is whether by discarding unbelief somebody can overcome slavery. For that matter, it is useful to invoke a passage from al-Shāfiʿī's *Risāla*:

> Mālik reported to us from Hilāl b. Usāma from ʿAṭāʾ b. Yasār from ʿUmar b. al-Ḥakam, who said: I came to the Messenger of God with a slave girl. I asked him: Oh, Messenger of God, must I manumit her? The Messenger of God spoke to her: Where is God? She answered: In heaven. He then asked: Who am I? She said: You are the Messenger of God. He said: Free her.[332]

I suggest interpreting the anecdote as an incident of testing. That is, the slave girl is tacitly questioned about her religious conviction. Since she knows that God "resides" in heaven and correctly identifies the Messenger of God—probably measuring up to the standards of what al-Shāfiʿī considered a decent Muslim—the Messenger of God commands to her master that she should be manumitted. This case would suggest that conversion to Islam is sufficient a condition for a slave to be manumitted; however, the inquiry will show the practical side to the equation was quite different.

### *2. The legal (in)capacity of the slave to property*

Al-Shāfiʿī invokes a conceptual distinction between ownership (*mulk*) and possession (*iḍāfa ilayhi*). This distinction is crucial, when it comes to the question of the *peculium* of slaves. Thus, a slave by reason of lacking ownership of himself, cannot but possess property. That is, property is attributed to him (*iḍāfa ilayhi*), but not owned by him (*lā annahu mālikun lahu*). The distinction is self-evident to al-Shāfiʿī who in jovial word play

[332] Al-Shāfiʿī, *RisF*, 62, ll. 10–12 [bayān farḍ Allāh fī kitābihi ittibāʿ sunnat nabīhi]: "akhbaranā Mālik ʿan Hilāl bin Usāma ʿan ʿAṭāʾ bin Yasār ʿan ʿUmar bin al-Ḥakam qāla ataytu rasūl Allāhi bi-jāriyatin fa-qultu yā rasūl Allāhi ʿalayyi raqabatun a-fa-uʿtiquhā? fa-qāla lahā rasūl Allāhi ayna Allāhu? fa-qālat fī l-samāʾi fa-qāla wa-man anā? qālat anta rasūl Allāhi qāla fa-aʿtiqhā."

states:

> […] it is evident from the Practice [*sunna*] of the Messenger of God that the slave does not own property, that what he owns is, in fact, owned by his master, that the name of the property is with him, however, it is only attributed to him [*huwa iḍāfatun ilayhi*] because it is in his (two) hands, (however) he is not the owner of it [*lā annahu mālikun lahu*], and will not be the owner of it, and he does not (even) own himself; how can he himself own, when he is (in fact) owned [*wa-kayfa yamliku nafsahu, wa huwa mamlūkun*], can be sold, donated, and inherited […].[333]

Most importantly, al-Shāfiʿī situates this passage after invoking a report by Ibn ʿUyayna according to which the property owned by a slave belongs to the seller in the case that the slave is sold. In other words, al-Shāfiʿī does not buy into the report of Ibn ʿUyayna and, therefore, rectifies what he considers to be a mistaken legal configuration of slaves. On the contrary, he argues that the incapacity of the slave to own property manifests itself in the fact that, like other property, he is owned by someone else, may be sold, donated, or inherited. Thus, it seems that—as was the case in Sasanian and East Syrian law—the legal configuration of the slave, in the opinion of al-Shāfiʿī, is based on the conceptual distinction between ownership (*mulk*) and possession (*iḍāfa ilayhi*). Due to being owned, slaves themselves can only possess assets, but not claim ownership.

Furthermore, al-Shāfiʿī elucidates that the incapacity to own property affects the slave's ability to inherit. Theoretically speaking, if a slave were to inherit a share in somebody's estate, his master would acquire the property bequeathed to the slave. This is made evident by the following stipulation:

> And if the slave is father or someone else for whom a share of inheritance is allocated, then if it is given to him, the property (of the inheritance) is his master's, [even though] the master is not the father of the deceased and not an heir to the estate of the deceased. Therefore, if we were to give [a share in the inheritance] to the slave because he is the father, then what we give, we would, in fact, give to the master for whom no inheritance share is allocated, so that [in effect] we bequeath [our property] to someone God did not

[333] Ibid., 124, ll. 16–19 [al-farḍ al-manṣūṣ alladhī dallat al-sunna ʿalā annahu innamā arāda al-khāṣṣ]: "[…] fa-lammā kāna bayinnan fī sunnati rasūl Allāhi anna l-ʿabda lā yamliku mālan, wa-anna mā malaka l-ʿabdu fa-innamā yamlikuhu li-sayyidihi, wa-anna isma l-māli lahu innamā *huwa iḍāfatun ilayhi*, li-annahu fī yadayhi, *lā annahu mālikun lahu*, wa-lā yakūnu mālikan lahu wa-huwa lā yamliku nafsahu, *wa-kayfa yamliku nafsahu, wa huwa mamlūkun* yubāʿu wa-yūhabu wa-yūrathu […]."

> make an heir. Therefore, we do not bequeath [our property] to the slave, as it was described, and not to anyone who does not combine in himself freedom, submission [*Islām*], and innocence of murder so that he is not a murderer.[334]

Highly interesting, the rationale behind denying slaves to inherit property is that, due to their incapacity of owning property, the share of inheritance allocated to them would not be acquired by them, but rather by their masters. This, more largely, is, according to al-Shāfiʿī, in contradiction with the will of God. In other words, God would not want that an inheritance share effectively passes to someone else than He intends. Based on this, al-Shāfiʿī decrees that slaves, like unbelievers and murderers, must, by nature of their status, not be allocated a share in anyone's inheritance.

Regardless of al-Shāfiʿī's unreserved opinion, other sources contradict his assessment that slaves, by nature of their legal status, lack the capacity to own property. In this regard the finding of Oßwald is perhaps the most plausible. He expounds that the problem regarding the *peculium* of the slave is that his master has the right to requisition the property of the slave (*intizāʿ*). This, more largely, seems what is at stake when granting a *peculium*. In other words, the concept of *intizāʿ* conflicts with the notion of the slave's capacity to property. Oßwald keenly points out that, in practice, this problem was resolved with the master's tacit acceptance that the slave had his own property whereas he could at any time requisition it.[335] At any rate, the *Mudawwana* of Saḥnūn indicates that al-Shāfiʿī's legal configuration of slaves pertaining to their *peculium* was not consistently applied throughout the Islamic legal schools, and perhaps idiosyncratic to him. This will become apparent in the subchapter on slave manumission, in which the

[334] Ibid., 126, ll. 1–4: "wa-in kāna al-ʿabdu aban aw-ghayrahu mimman summiyat lahu farīḍatan fa-kāna law uʿṭiyahā mulkuhā sayyidahu ʿalayhi lam yakun al-sayyidu bi-abī al-mayit wa-lā wārithan summiyat lahu farīḍatan fa-kunnā law aʿṭīnā al-ʿabda bi-annahu abun innamā aʿṭīnā l-sayyida alladhī lā farīḍatan lahu fa-warrathnā ghayra man warrathahu Allāhu fa-lam nuwarrith ʿabdan limā wuṣifat wa-lā aḥadan lam tajtamiʿ fīhi l-ḥurrīyatu wa-l-islāmu wa-l-barāʾatu min al-qatli ḥattā lā yakūnu qātilan."

[335] Rainer Oßwald dedicates an entire chapter to the question of the *peculium* based on his research of Mālikī legal texts; see Rainer Oßwald, *Das islamische Sklavenrecht*, 71.

cases featured indicate that Saḥnūn wrote his legal treatise based on the assumption that slaves own property.

### *3. Manumitting slaves*

The idea of manumitting slaves is, apart from being conditioned by the sociopolitical realities of the early Islamic Empire, integrated into the larger worldview of Islam. Besides from decreeing that masters should be kind towards "who[m] your right hands possess" (Q 4:36, Q 24:58), the Qurʾān generally considers slave manumission a beneficent act evoked particularly in instances where believers are compelled to atone for their sins (*kaffāra*). This is made evident in Q 4:92:

> A believer must not kill a believer except by mistake. Moreover, whoever killed a believer by mistake should free a believing slave and present blood money to his [the dead person's] family except if they waive their right to it. If [the deceased] was from a hostile tribe of you and was a believer, then you should free a believing slave. But if he was from a tribe that you have a treaty with, then you should present blood money to his family and free a believing slave. Whoever does not have these [at his disposal], should fast for two consecutive months seeking repentance from God. God is Knowing and Wise.[336]

Most importantly, this illustrates that, concerning slavery, the Qurʾān provides some more or less clear-cut ethical standards which, to some degree, have permeated the realm of slavery laws as reflected in the complex regulations pertaining to manumission.

Saḥnūn's *Mudawwana* includes a lengthy chapter entitled *Kitāb al-mukātab* in which he focuses on the formalities and procedures of what is known as manumission contract (*kitāba*). Legally speaking, the *kitāba* constitutes a contractual agreement as a result of which a slave is manumitted by his master in exchange for paying off his value

[336] Q 4:92: "wa-mā kāna li-muʾminin an yaqtula muʾminan illā khaṭaʾan wa-man qatala muʾminan khaṭaʾan fa-taḥrīru raqabatin muʾminatin wa-diyatun musallamatun ilā ahlihi illā an yaṣaḍḍaqū fa-in kāna min qawmin ʿadūwin lakum wa-huwa muʾminun fa-taḥrīru raqabatin muʾminatin wa-in kāna min qawmi baynakum wa-baynahum mīthāqun fa-diyatun musallamatun ilā ahlihi wa-taḥrīru raqabatin muʾminatin fa-man lam yajid fa-ṣiyāmu shahrayni mutatābiʿayni tawbatan min Allāhi wa-kāna Allāhu ʿalīman ḥakīman."

in installments. Indeed, this arrangement is highly interesting with respect to what I discussed in the subchapter on the capacity of slaves to ownership. Saḥnūn—who is an advocate of the position that slaves may own property—points to a legal problem that arises when stipulating a manumission contract:

> He said: Mālik said: if a man stipulates a manumission contract with his slave [*ʿabdahu*], then the property of the slave [*māl al-ʿabd*] (stays with) the slave, if as debt [*dainan*] or something similar, a loan [*ʿarḍan*] or by religious duty [*farḍan*]; except if the master conditions something else when he stipulates it [the manumission contract]. Then, (in that case) it [the property] stays with the master. But if he did not condition it, then the master must not seize the property after the manumission contract [*ʿaqd al-kitāba*]. He said that Mālik said: if a man stipulates a manumission contract with his slave, then his [the slave's] property follows the conduct of manumission [*bi-manzilat al-ʿitq*].[337]

In line with this stipulation, a master can only invoke his right to requisition the slave's property (*intizāʿ*) up until contracting his manumission. To be more precise, the slave is, except if stipulated otherwise in the *kitāba*, allowed to take away the property he acquired in slavery in exchange for remunerating his former master. Most importantly, Saḥnūn emphasizes that the master must, under no circumstances, reclaim the property of the manumitted slave (*mukātab*), in the case he omitted requisitioning his property before the manumission.

In another stipulation, Saḥnūn qualifies the latter point by declaring that this regulation does not come into effect with regard to children a slave conceived with another female slave. More specifically, the author states:

> Ibn Wahb, on what Mālik said about the slave's hiding of his child, conceived with his slave girl, from his master until he is manumitted: there is no property of the slave and the manumitted slave when it comes to their children. They [the children] are not part of the property belonging to them. If the slave is manumitted, his property follows him [into freedom] according to the custom [*sunna*]. But the children do not follow him [into freedom] […]. Indeed, their [the slave's and the manumitted slave's] children are in the

[337] Sahnūn, *MudK*, vol. 2, 472, ll. 17–20 [li-man yakūn māl al-mukātab idhā kātabahu sayyiduhu]: "qāla: wa-qāla Mālik: idhā kātaba al-rajulu ʿabdahu fa-inna jamīʿa māli l-ʿabdi li-l-ʿabdi dainan kāna aw-ghayra dhālika ʿarḍan kāna aw-farḍan illā an yashtariṭahu al-sayyidu ḥīna yukātibuhu, fa-yakūnu dhālika li-l-sayyidi, fa-in lam yashtariṭhu fa-laysa li-l-sayyidi an yaʾkhudhahu baʿda ʿaqdi l-kitābati. qāla: wa-qāla Mālik: idhā kātaba l-rajulu ʿabdahu tabaʿahu māluhu bi-manzilati l-ʿitqi."

state of slavery.[338]

The case makes evident that even in the case the slave purposefully concealed the fact of his slave girl's pregnancy hoping that the children born to her would together with him be manumitted, he can, by no means, make demands in terms of claiming ownership of the children. Rather, the children born belong to the master and do not follow their begetter into freedom. Thus, children born to a slave girl, by all means, remain in the status of slavery, no matter if conceived before or after the stipulating the manumission contract.

### *4. From slaves to clients (mawālī)*

In his valuable article on the state of manumitted slaves in Islam, Daniel Pipes informs us about the prevailing uncertainties pertaining to this peculiar legal status.[339] Scholars agree that in particular after the first century of the Islamic conquests, manumitted slaves, rather than being fully released, obtained the position of *mawālī*. In other words, freed slaves acquired a fictitious affiliation of kinship to Arab Muslims by means of stipulating a contractual relationship (*walāʾ al-islām*) with a Muslim sponsor (*mawlāʾ*).[340] This would, more largely and in the long term, assure their integration into the genealogies of the rulers. However, it is also clear that clientage (*walāʾ al-islām*) became a historical necessity in the early Islamic Empire to prevent the privileges of Arab-Muslims from watering down. In other words, due to the increased attraction to convert to Islam for its

[338] Ibid., 427, l. 24–428, l. 2: "Ibn Wahb, qāla Mālik: fī kitmāni l-mukātabi waladahu min amatihi ʿan sayyidihi ḥattā yuʿtaqu qāla: laysa māla l-ʿabdi wa-l-mukātabi bi-manzilati awlādihimā li-anna awlādahimā laysū bi-amwāli lahumā idhā ʿutiqa l-ʿabdu tabaʿahu māluhu fī l-sunnati, wa-laysa yatbaʿuhu awlāduhu […] wa-innamā awlāduhumā bi-manzilati riqābihimā […]."
[339] Pipes, Daniel, "Mawlas," 133.
[340] For a concise article on the origins, development, and different types of clientage, see Ulrike Mitter, "Origins and Development of the Islamic Patronate," in *Patronate and Patronage in early and classical Islam, eds. Monique Bernards and John Nawas* (Leiden and Boston: Brill, 2005), 70-133.

social and financial benefits—in conjunction with the notion that Muslim should, at least theoretically, not be enslaved—the elite of the Empire needed to find loopholes to impede this process. I read the instigation of *walāʾ* based on this assumption.

I illustrated in this chapter that the Islamic legal stipulations pertaining to slaves are closely tied to Qurʾanic cosmology as well as the sociopolitical concerns of the Muslim elite. In spite of the Islamic justification for slavery being closely linked to the notion of unbelief, the Qurʾān simultaneously urges leniency and kindness towards slaves. Moreover, manumitting slaves figures as a beneficent act which the believer is demanded to abide by in the case he needs to atone for previous sins, particularly, murder. This results in an interesting equation: on the one hand, scripture provides the cosmological sanctioning for enslaving subjects that have not subscribed to Islam, on the other, it lays out the ethical guidelines for treating them kindly and, if possible, manumit them. Whereas the cosmological integration of slavery is certainly crucial, the laws were nevertheless conditioned by sociopolitical concerns. The social reality of the early Islamic Empire, which in its conquest period experienced the influx of a significant number of people who were captured as slaves, most likely induced the Muslim jurists to deal with and find mechanisms of accommodating those people in the long run. The complexity of slavery law and the multitude of legal opinions, which even diverge on simple questions such as whether a slave is entitled to property, attests to the fact that carving out legal mechanisms to deal with slaves was of utmost importance. Invoking the institution of *walāʾ*—which we are, in fact, quite little informed about—show that the legal stipulations pertaining to slaves were largely shaped by the concerns of the Muslim Arab elite which presumptively had a keen interest to engrave their own privileges in stone.

**D. Preliminary conclusion**

In this chapter, I attempted to respond to my three main question research questions from the perspective of slavery laws: How are slaves legally configured? How do these configurations relate to cosmology and the practical concerns of the community/empire which they grew out of? What patterns mark the interactions between Sasanian, East Syrian and Islamic law?

I began by focusing on Sasanian law. Regardless of being Zoroastrian nor not, the status of slavery potentially affects anyone. For instance, a Zoroastrian may be enslaved because of transacting a slave or simply by being sold by the *paterfamilias*. By nature of their legal status, slaves are not bestowed with the capacity to own property but may be granted limited legal capacity which allowed them to acquire property. Once manumitted, the slave is protected by the law not to be reclaimed into slavery.

Secondly, I discussed how the legal configuration of slaves in Sasanian law relates to cosmology and the sociopolitical aspirations of the Sasanian elite. Regarding cosmology, it is most striking that the law rewards slaves owned by Christian masters with manumission in the case they convert to Zoroastrianism. Thus, the conversion to Mazdaism constituted a means through which slavery can be overcome. This incentive is, in turn, tied to the elite's concern of making sure that slaves owned by *Christians* convert to Zoroastrianism, rather than Christianity. Thus—despite uncertainties remaining—the Sasanian laws on slavery were integrated into a cosmological vision mobilized by the elite to gain new adherents of the Good Religion.

Subsequently, I focused on East Syrian law. The law grants the slave with a *peculium* by nature of his status. Thus, he can own, acquire, and even bequeath property. Most peculiarly, upon manumission the slave loses his entire property, which, from the

economic perspective of the slave, creates significant discouragement for him to become manumitted.

In the following step, I looked at how the legal status of slaves in East Syrian law is integrated into cosmology and the sociopolitical concerns of the elite. Due to the lack of knowledge on how the Church of the East justified slavery, it is hard to bridge the gap between slavery and the realm of cosmology. Augustine's justification which, although from another historical conjuncture, may hold true for slavery in the Eastern Christian context. Accordingly, slavery is considered a corollary of the original sin with the result that there is practically no end to it. Should this justification hold, then the links to law and the practical concerns of the elite are quite evident. In that case, the absence of incentives for slaves to overcome their legal status of slavery could be well explained by these laws resting on the cosmological notion of eternal slavery. The subchapter on East Syrian law has shown the limitations of the first main argument for which no concrete evidence could be invoked.

In the last subchapter, I focused on Islamic law. The legal opinions of the jurists diverge significantly on whether the slave can be granted a *peculium*. More largely, it seems that, in practice, the capacity of the slave to own property was accepted with the restriction that his master could at any time make use of his right of requisition. As concerns manumission, the slave could stipulate a manumission contract (*kitāba*) with his master which would lead to his being manumitted in exchange for paying off his own and the value of his property in installments. Such manumission agreements, by rule, did not include children conceived with a female slave.

Lastly, I looked at how the Islamic laws on slavery were negotiated between cosmology and the sociopolitical concerns of the Muslim elite. Whereas slavery in the

Islamic context is, in terms of its justification, closely tied to the notion of punishment for unbelief, the Qurʾān equally provides important ethical guidelines when it comes to treating slaves. Behaving kindly towards them is recommended and manumitting slaves is even made compulsory (with alternative options) in the case of grave sins the believer must seek to repent for. The Muslim jurists, more largely, seem to have mobilized the cosmological sanctioning for slavery to account for the significant number of enslaved people in the Muslim Empire. Moreover, the complex regulations and institutions pertaining to slavery point to the fact that viable solutions had to be found to the problem. Related to the fact that slavery was tied to the notion of unbelief, once the storm of the conquests had settled, the Muslim Emperors witnessed an increasing amount of slave converts attempting to overcome their restricted legal status through conversion to Islam. The Muslim jurists acted accordingly by invoking the institution of *walāʾ al-islām* which was geared towards preserving Arab Muslim privileges.

This chapter has led to moderate findings in support of my first thesis statement. The link between cosmology, lawmaking, and the sociopolitical concerns of elites became apparent in the Sasanian slavery laws, potentially—if more evidence can be found—the East Syrian, and tolerably the Islamic. My impression is that, although the laws on slavery in these three legal systems are to some degree integrated into the language of cosmology, other factors were perhaps more important. This may also be related to the fact that slavery law, in contrast to matrimony, had to be more flexible, due to unexpected influxes of slave populations into society, and was perhaps more often established through ad-hoc provisions.

The third research question—what patterns of interaction marked the relationship of Sasanian, East Syrian, and Islamic law—could be answered to a satisfying degree. The

express stipulation in Sasanian law that slave-converts to Zoroastrianism who are owned by *Christian* masters are to be rewarded with manumission, quite evidently illustrates that, on this matter, the interaction of Sasanian with East Syrian law was a matter of competition. By presenting to slaves owned by Christians the opportunity to be released in exchange for giving up their old religion, Sasanian law set a significant incentive for them to convert. However, the question is whether this opportunity would have been grabbed by a slave who was owned by a Christian, since—as I discussed in the East Syrian laws on slavery—that slave would have lost all his property upon conversion. In other words, the very rationale behind East Syrian law setting negative incentives for slaves regarding manumission—their entire loss of assets—was perhaps the Church elite's ambition to prevent their slaves from converting to Zoroastrianism. Thus, to contain the problem of Christian converts to Zoroastrianism, East Syrian lawmakers were probably compelled to find a resolution to the problem: withholding the property of slaves in case of their manumission. This points towards the fact that the relationship between Sasanian and East Syrian law was, on certain issues, marked by competition.

# CHAPTER VIII

# CONCLUSION: TOWARDS A SHARED FRAMEWORK OF LATE ANTIQUE LEGAL EPISTEMES?

This thesis was a comparative inquiry into Sasanian, East Syrian, and Islamic law through the themes of matrimony and slavery. The period of investigation was restricted to legal texts reaching from the 5th to the 9th century. The findings in support of the main arguments were made by adhering to three main questions: What legal forms—types of matrimony and configurations of slavery—do the laws cultivate? How are these legal forms related to cosmology and the practical concerns of the community/empire from which they grow? What patterns mark the interactions between Sasanian, East Syrian, and Islamic law?

To respond to these questions, I developed a three-step methodology. The first step was descriptive. Based on my primary sources, I extracted the types of matrimony and how slavery is configured in these legal traditions. The second step relied on legal culture which provided an analytical lens to situate the primary sources at the nexus of cosmology and the practical concerns of community/empire. In the third step, I reverted to legal pluralism which provided the theoretical assumptions of how coexisting legal systems can potentially interact with one another.

In this thesis, I made two arguments: First, I argued that the legal forms pertaining to matrimony and slaves in Sasanian, East Syrian, and Islamic law were mediated through the triangle of cosmology, lawmaking, and the sociopolitical concerns of the respective community/empire. In addition, I argued that the relationship between Sasanian, East Syrian, and Islamic law was marked by varying patterns of interaction.

In the chapter on matrimony, I made significant findings in support of my first

argument. The subchapter on Sasanian law indicated that the Zoroastrian authorities mobilized references to cosmology—the cosmic benefit that comes with sexual reproduction and the precedent of Ohrmazd who engaged in sexual intercourse with his relatives—for the purpose of sanctioning matrimonial institutions, particularly, next-of-kin marriage (*ḫwēdōdah*), intermediary (*ayōkēn*), and substitute-successors (*stūr*). These institutions, in turn, served the specific needs of the Sasanian elite: maintaining royal lineages and increasing sexual reproduction. Thus, the first main argument holds true regarding Sasanian law.

In the ensuing subchapter, I dealt with matrimony in East Syrian law. Most importantly, the Christian elite, in a similar fashion to the Zoroastrian authorities, employed scriptural references to cosmology to justify their notion of matrimony which was deeply ingrained in "absolute" monogamy. However, as illustrated, mobilizing scriptural notions could fulfill diverging purposes: on the one hand, it proved to be the bargaining chip in negotiations with the Zoroastrian authorities when the Christian elite was compelled to reform the laws on matrimony pertaining to the episcopal hierarchy; on the other, it became the distinguishing feature in the process of demarcating the East Syrian community after the practice of next-of-kin marriage had gained popularity among Christians. Hence, the argument of matrimony being situated at the nexus of cosmology, lawmaking, and the sociopolitical concerns of the elite is equally valid in the case of East Syrian law.

Subsequently, I examined matrimony in Islamic law. The subchapter illustrated that the Muslim jurists reverted to stipulations of matrimony pertaining to the Qurʾān and Sunna while tying them to certain conditions through which their strictly prohibitive character could be toned down. Most importantly, this perhaps shows how flexibily

scriptural and cosmological notions could be mobilized depending on what matrimonial practices were, according to the specific historical conjuncture, desirable. Even though, apart from ethics, we do not know exactly for what sociopolitical purposes such references to cosmology were mobilized, it shows that the main argument is equally applicable—even if perhaps not as visibly as in the previous cases—to Islamic law. Thus, Islamic matrimony was mediated through cosmology, lawmaking, and the ethical concerns of the elite, the latter being reflected in the creation of legal frameworks within which the Muslim jurists could macerate the prohibitive character of divine commandments.

To sum up, the chapter on matrimony has unmistakably pointed to the applicability of my first thesis statement. We can, therefore, confidently state that the jurisprudential writings on matrimony in the Sasanian and early Islamic Empire cannot be looked at in isolation from the cosmological and sociopolitical concerns of the elite and the communities that produced them. Most importantly, it seems that the jurists utilized scriptural cosmology as a tool which provided a useful idiom to reinforce the legitimacy of matrimonial practices which, in turn, served the agendas and sociopolitical aspirations of the community's elite.

In the chapter on slavery, I made moderate findings in support of my first thesis statement. The subchapter on Sasanian law illustrated that cosmology was utilized by the Sasanian elite to attract slaves owned by Christian masters to convert to Mazdaism. Thus, the laws on slavery were, to some degree, integrated into a cosmological vision mobilized by the elite in order to gain new adherents of the Good Religion.

In the ensuing subchapter, I focused on East Syrian law. Due to the lack of knowledge regarding justifications for slavery in the context of the Church of the East, it

proved hard to gauge to what extent cosmology is intertwined with the legal stipulations on slavery. The justification of Augustine—which is perhaps applicable to the Church of the East—would indicate that the laws on slavery create no incentives for this legal status to be overcome because it would be tied to the cosmological notion of the original sin leading to perpetual mundane slavery.

The last subchapter on Islamic law showed that the Muslim jurists justified slavery with the cosmological notion of unbelief and furnished it as a means through which the sinful believer could atone for his sins. Meanwhile, slavery laws were significantly conditioned by the sociopolitical reality of the Islamic Empire which compelled them to creativeness resulting in the establishment of new institutions such as through which the diminishing number of slaves could be controlled efficiently.

The chapter on slaves, more broadly, adduced reasonable evidence with respect to my first thesis statement. Most importantly, all three legal systems seem, to a greater or lesser extent, establish a visible link between cosmology, lawmaking, and the concerns of the elite in slave matters. Regardless, it appears that concerning slavery, cosmology was not as frequently mobilized to justify legal practice as in the case of matrimony. This could be related to the fact that slavery laws, in contrast to marriage, were more often the product of ad-hoc regulations.

In addition, I marshaled important evidence in support of the second thesis statement which is that the relationship between Sasanian, East Syrian, and Islamic law being marked by varying patterns of interaction. First, I did not locate such patterns with regard to Islamic law. However, this does not mean that they cannot be found. Taking into consideration that I only focused on the laws of matrimony and slavery, it does not seem unlikely that such patterns exist in other fields of law such as property, obligations,

or inheritance. As concerns Sasanian and East Syrian law some critical moments of interaction—conclusive towards *varying* patterns—could be singled out. Three moments are particularly noteworthy: first, the convocation of a synod in 497 by the King of Kings for the East Syrian bishops to reform the law on matrimony pertaining to the episcopal hierarchy—an instance of negotiation; secondly; Mar Aba's prohibitions from the 6th century geared towards containing next-of-kin marriage which had gained increased popularity among the Christian flock—again an instance of negotiation; and thirdly, the express stipulation in Sasanian law that slave-converts to Zoroastrianism owned by *Christian* masters are to be rewarded with manumission—an example of competition. The problem with recognizing patterns of interaction is mostly a practical one. They do not emerge except in the rare case in which the historian is fortunate enough to come across such unique references and their implications with regard to other legal systems. For the record, the patterns of interaction singled out with regard to the relationship between Sasanian and East Syrian law are negotiation and competition.

So, how are the findings of this thesis relevant more broadly? The first main result—matrimony and slaves in Sasanian, East Syrian, and Islamic law being mediated through the triangle of cosmology, lawmaking, and the practical concerns of community/empire—is critical with regard to future scholarly inquiries. To be more precise, it indicates that matrimony and slavery laws in these traditions can neither be looked at in isolation from the cosmological visions innate to the respective belief system nor the practical concerns of elites. More broadly, the argument shows that law on matrimony and slavery in these societies is not based on religious precepts and value systems alone but is significantly influenced by the mundane realities of community, empire, and politics.

The second main result—the relationship of Sasanian and East Syrian law being marked by *varying* patterns of interaction, particularly, negotiation and competition—is highly significant on a methodological plane. Whereas previous studies have approached comparative law particularly with the view to pinpointing influences—and all the problematic assumptions underlying this method—this thesis has shown that interactions between Late Antique legal systems are far more complicated. In that regard, the methodological approach of legal pluralism was conducive to illustrating that varying patterns mark such legal interactions. More importantly, if we strive to move towards non-Orientalist genealogies and produce findings which are *not* based on the assumption that Roman and Judaic law alone provided the legal tools for most of the societies and legal systems that came after, then legal pluralism provides an important methodological tool for future studies.

Mapping on to this, the method of legal culture illustrated that jurisprudence in Late Antiquity was not simply in line with the precepts of religion; rather, the jurists modeled and molded the laws by relying on and constantly revisiting the societal and political needs of their respective communities/empires. This finding is very important, if we are keen to dismantle the scholarly assumption that the law of theocratic societies is best examined by focusing on scripture. In fact, as my research has indicated, scriptural rationales were throughout mobilized by the jurists; however, what particular cosmological rationales were activated and how they would be integrated into legal writings strongly depended on what was at stake for the elite—more broadly speaking, the specific historical conjuncture of the community/empire.

This thesis highlighted that significant conversations and intellectual exchanges appear to have existed between the legal cultures of the Sasanian and early Islamic

Empire. Rather than functioning in isolation from one another, their relationship was marked by varying patterns of interaction—not restricted to the absorption of foreign elements. This, more largely, points to the reality of a Late Antique legal space in which varying legal epistemes coexisted, while being simultaneously integrated into a shared legal framework of interaction in which jurists referenced and conversed with one another beyond confessional boundaries and, if necessary, modified their legal stipulations—in other words, a legal space comprised of shared Late Antique legal epistemes.

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