AL-QANṬARA
XXVIII 2, julio-diciembre de 2007
pp. 353-382
ISSN 0211-3589

FREEDOM AND SLAVERY IN EARLY ISLAMIC TIME (1ST/7TH AND 2ND/8TH CENTURIES)

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This article focuses on two topics: the presumption of freedom in the "literary period" (from the 8th century on) and the question of enslavement, sale, bondage or self-dedition of free persons in the "pre-literary period" (7th and 8th centuries). Based on the assumption that the legal practice in Late Antiquity influenced the discussions of the early Muslim jurists I will try to reconstruct the legal discourse of the 1st/7th and 2nd/ 8th centuries and to show that this discourse comprised interesting legal opinions with regard to the sale of children, debt-bondage and the legal position of foundlings. In the legal literature which emerged from the 2nd/8th century the jurists did not, as one would expect, deal intensively with the topic. Thus there is, as will be shown, a certain inconsistency between the lively and controversial discourse in the "pre-literary period" on the topic, which will be reconstructed in this article, and the marginalization of the topic in the legal literature afterwards.

Key words: Slavery; Islamic law; Pre-literary period; Literary period; Debt-bondage.

Este artículo se centra en dos cuestiones: por un lado, la presunción de libertad en el «período literario» (desde el s. VIII en adelante); y, por otro, la cuestión de la esclavización, venta o servidumbre —voluntaria o no— de personas libres en la «época preliteraria» (ss. VII y VIII). Asumiendo de partida la idea de que la práctica legal en la Antigüedad Tardía influyó en las discusiones de los primeros juristas musulmanes, trataré de reconstruir el discurso legal de los siglos I/VII y II/VIII y de mostrar que ese discurso contenía interesantes opiniones legales en relación a la venta de niños, servidumbre por deudas y la situación legal de los huérfanos. En la literatura legal que emergió desde el s. II/VIII los juristas, al contrario de lo que se hubiese esperado, no trataron estas cuestiones intensamente. Tal y como se muestra, existe una cierta inconsistencia entre el discurso ameno y controvertido sobre el tema del «período preliterario», que se reconstruye en este artículo, y la marginalización del tema en la literatura legal posterior.

Palabras clave: esclavitud; Derecho islámico; período preliterario; período literario; servidumbre por deudas.

Slavery as a socially important institution has been studied for different times and regions in Islam and under legal as well as social aspects. [1] According to the common view, slavery was an institution

[1] Clarence-Smith, W. G., *Islam and the Abolition of Slavery,* London 2006; Gili-Elewy, H., "Soziale Aspekte frühislamischer Sklaverei", *Der Islam* (2000), 116-168; Schneider, I., "Narrativität und Authentizität: Die Geschichte vom weisen Propheten, dem dreisten Dieb und dem koranfesten Gläubiger", *Der Islam,* 77 (2000), 84-115; Schneider, I., *Kinderverkauf und Schuldknechtschaft,* Wiesbaden, 1999; Ennaji, M., *Serving the Master,* New York, 1999; Toledano, E., *Slavery and Abolition in the Ot-*

deeply rooted in the societies of late antiquity and early Islam but was changed and restricted in Islamic time. The Qur'ān assumed the existence of slavery and regulated the practice of the institution and thus implicitly accepted it. However, as Lewis argues, the Qur'ānic legislation as confirmed and elaborated in the *sharī'a,* brought two major changes to the ancient slavery which were to have far-reaching effects: the presumption of freedom and the ban on the enslavement of free persons. According to the rules of Islamic law, it was unlawful for a freeman to sell himself or his children into slavery, and it was no longer permitted for freemen to be enslaved or given into debt-bondage for either debt or crime, as was usual in the Roman world and in parts of Christian Europe. [2]

This article focuses on these two topics: the presumption of freedom in the "literary period" and the question of enslavement, bondage or self-dedition of free persons in the "pre-literary period". It will try to reconstruct the legal discourse of the 1st/7th and 2nd/ 8th centuries, the so called "pre-literary time", on this topic. [3] In the legal literature *(kutub al-fiqh)* which emerged from the 2nd/8th century (the "literary period") the jurists did not, as one would expect, deal intensively with the topic. Thus there is, as will be shown, a certain inconsistency between the discourse in the "pre-literary period" on the topic, which will be reconstructed in this article, and the marginalization of the topic in the legal literature afterwards. Furthermore, research in the 20th century focused strongly on certain keywords such as "freedom" (as well as "rationalism" etc.), sometimes trying to project these ideas back into Islamic history, thereby often rendering a reading, an interpretation or understanding of "freedom" associated with sources, which might be problematic.

toman Middle East, Seattle, London, 1998; Lewis, B., *Race and Slavery in Islam,* Oxford, 1990; Fisher, H.J., *Slavery in the History of Muslim Black Africa,* London, 2001.

[2] Lewis, *Race and Slavery,* 5-6. For the sale of free persons into slavery see Clarence-Smith, *Islam and the Abolition,* 74-78; for examples from the Ottoman Empire see Toledano, *Slavery and Abolition,* 32, 36, 39, 87, 90, 107, 108 and 163; for Iran see Najmabadi, A., *The Story of the Daughters of Quchan,* New York, 1998; for black Africa see Fisher, *Slavery in the History,* 18-32.

[3] The name "pre-literary period" was chosen with reference to the fact that in the first two centuries of Islam we have legal literature if at all in an embryonic stage. The "literary phase of Islamic law" starts with the great compilations as Mālik's (d. 178/795) *Muwaṭṭa'*, Shaybānī's (d. 189/805) *Kitāb al-aṣl* or Shāfi'ī's (d. 204/820) *Kitāb al-umm;* see Schacht, J., *An Introduction to Islamic Law,* Oxford, 1964, 40.

The Presumption of Freedom

Al-aṣl huwa al-ḥurriyya: The basic principle is freedom. This principle is quoted whenever the subject of freedom in Islam is dealt with. Lewis states: "It became a fundamental principle of Islamic jurisprudence that the natural condition, and therefore the presumed status, of mankind was freedom". [4]

But what does it mean to say that freedom is a "basic principle"? Is it not contradictory to maintain that freedom is the "presumed status" when at the same time and in the same social context the institution of slavery exists? Which dividing line was drawn between freedom and slavery? How was freedom dealt with on the theoretical and on the practical level? Rosenthal points out that, philosophically, the question was insufficiently discussed in medieval Islamic literature. Freedom has been used as an ethical term denoting a "noble" character and, in a Sufic sense, as free from everything except God. In the political context it was discussed but did not achieve the status of a fundamental political concept. [5] Legally, freedom is mainly considered as the opposite of the status of a slave. From the 2nd/8th century onwards slavery was considered to be a status passed on only through birth (i.e. a female slave gives birth to a child whose father also is a slave) or effected through captivity, i.e. when a non-Muslim who was protected neither by treaty nor by a safe-conduct document fell into the hands of the Muslims. [6] On the other hand, the conversion of a Christian or Jewish slave to Islam did not lead to his or her manumission.

The impression that Lewis' claim, quoted above, might give, i.e. that the principle *al-aṣl huwa al-ḥurriyya* is widely mentioned in the sources, is wrong. Surprisingly, Muslim jurists have not thoroughly analysed this principle on the philosophical and legal level. Hardly does one find a discussion about the status of freedom or a discussion

[4] Lewis, *Race and Slavery,* 6; see also Santillana, D., *Istituzioni di diritto musulmano malichita con riguardo anche al sistema sciafiita,* Rome, 1938, 1, 13 ff; Rosenthal, F., *The Muslim Concept of Freedom prior to the Nineteenth Century,* Leiden, 1960, 32 ff; Brunschvig, R., "'Abd" in *EI*^{2}, 1, 24-40; the "principle of freedom" is of course no Islamic invention but existed in the legal discourse of the Antiquity as *ius naturale,* see Knoch, S., *Sklavenfürsorge im Römischen Reich,* Hildesheim, 2005, 34-40.

[5] Rosenthal, F., "Ḥurriyya" in *EI*^{2}, 3, 589.

[6] Schacht, *An Introduction,* 127.

of the cases in which this principle was violated, connected with the question of how the sale of a free person should be punished, what measures should be taken, etc. [7]

The problem needs further research but is discussed here only under the special aspect of the law of procedure. The "principle of freedom" comes into conflict with the institution of slavery e.g. in the context of the law of procedure, when people had to prove their status as a slave or a free person, because difference of status would have led to a different legal treatment at court and also to a different kind of punishment. Thus the Ḥanafī jurist Jaṣṣās (d. 370/981) mentions this principle in his commentary on Khaṣṣāf's (d. 232/847) book of council for judges *(adab al-qāḍī)*: "Because men are generally free *(li-anna an-nās aḥrār fī l-aṣl)* with the exception of four cases: testimony, talio, the *ḥadd* (i.e. Qur'ānic) punishments and blood-money". [8]

The starting point for this remark was the following situation: an accused in a penal process had claimed that the witnesses of the opposing party testifying against him were slaves and not free persons. If this were the case, they would not be allowed to testify against him. The judge ordered the witnesses to prove their legal status. He thereby turned the burden of proof on the witnesses. Thus, the simple assertion of the accused was sufficient to oblige the witnesses to prove their status as free persons.

The Ḥanafī jurist Sarakhsī (d. 482/1090) argues that a person of unknown status is normally, according to the outward appearance *(ẓāhir)*, to be considered a free person, but at the same time he confirms the victim's obligation to prove his status of freedom before he can receive the blood price, in case the perpetrator claims that the victim is a slave. This is done, he argues, because the original status of freedom of mankind can get lost. [9] Thus he does not see an inconsistency between the original status of freedom of mankind and the institution of slavery, but does not discuss the problem further. [10] He focuses on the ascertainment of the legal status (free or slave) and aims to preserve the institution of slavery. A transgression of the boundary between freedom and

[7] For further discussion see Schneider, *Kinderverkauf,* 23-31.

[8] Al-Khaṣṣāf, A., *Kitāb adab al-qāḍī wa-sharḥ Abī Bakr Aḥmad b. 'Alī ar-Rāzī al-Jaṣṣās,* F. Ziyadeh (ed.), Cairo, 1978, 307.

[9] A.M. al-Sarakhsī, *al-Uṣūl,* A. al-Afghānī (ed.), Beirut, 1993, 2, 222.

[10] Schneider, *Kinderverkauf,* 23-31.

slavery is thus impossible. The coexistence of freedom and slavery in Muslim society in connection with a clear tendency to preserve the institution of slavery thus led to the restriction of this principle in legal practice when both institutions came into conflict. With regard to this situation it seems interesting to put the focus on the legal discourse in the "pre-literary time", which evolved around different forms of the forfeiture or restriction of freedom. In this discussion jurists seem to have held opinions with regard to debt-bondage, self-sale and self-dedition as well as sale of free persons which differ greatly from the later consensus in the "literary period". Since the sources for these discourses require special methodological approaches, a short introduction into research, methods and the questions will be given.

Questions, methods, research

I will try to answer the following questions:

1. What kinds of forfeiture of freedom were discussed in "pre-literary time (1st/7th and 2nd /8th centuries)" and how were they discussed in the different centres of the early Islamic empire and by whom?

2. How has the discourse of this early period, the "pre-literary time", to be evaluated in contrast to the ignorance of this topic in the emergent legal literature from the 2nd/8th century onwards?

There are two assumptions underlying my arguments:

1. An analysis of early Islamic law, also in an embryonic stage, is not possible without reference to the legal situation in Late Antiquity. [11] In this context I consider the debate on the Islamic or non-Islamic origin of Islamic law as fruitless. Whereas some protagonists argue that pre-Islamic laws heavily influenced Islamic law and connect Islamic concepts and institutions to parallels in the laws of Late Antiquity, others [12] have denied this and have argued in favour of the parthenogenesis origin of Islamic law from the textual sources, i.e. Qur'ān and *Sunna.* The focus of research, according to my opinion, has to be shifted: the process of legal development after the victory of Islam in the 1st/7th century has to be understood on the basis of legal

[11] Since I am convinced that the legal systems of Late Antiquity have to be taken into account I disagree with Motzki, H., *Die Anfänge der islamischen Jurisprudenz,* Stuttgart, 1991, 4, who explicitly leaves out this aspect and concentrates on the Islamic sources.

[12] For a detailed survey of research and an analysis of the problem of the Islamic patronate, however, see Crone, P., *Roman, Provincial and Islamic Law,* Cambridge, 1987.

practices which prevailed in the region which was to become Islamic. This is the level of legal practice and regulations. The questions here are: What legal rules existed in what area? What was the legal practice which might have differed from legal rulings? Muslim jurists had to cope with this situation on the practical level, being confronted with cases of self-dedition and sale of children and, on the theoretical level, when developing a new legal system based on a religious attitude and new ethical and moral standards. I shall therefore give the normative regulations and/or legal practices with regard to the problem of enslavement and bondage of free persons in the different areas in Late Antiquity, as old Oriental law, Roman law, Christian law, Byzantine law, Jewish law, Graeco-Egyptian law and Sasanian law. The question is not whether Muslim jurists uncritically adopted or vehemently rejected the rules, practices and norms, but how they dealt with these practices, norms, and perhaps with legal texts with regard to the different legal questions, how they discussed these against the settings of their new religion and accepted, rejected or changed them in order to adapt them to their new religious and ethical standards.

2. For the "pre-literary period", the 1st/7th and 2nd/8th centuries, we have traditions containing legal opinions and rulings as well as decisions from early Muslim jurists, and even an alleged ruling of the Prophet according to which he ordered the sale of a free person into slavery. These traditions and sayings have not been preserved in the legal literature of the main schools of law but in works of marginal schools (Ibadites, Zahirites), they have not been immortalized in the canonical six books on the sayings of the Prophet but occur in early *ḥadīth* literature and such works that contain so-called "weak" sayings of the Prophet and also in historical and biographical literature as well as in commentaries on the Qur'ān and other works related to the Qur'ān. Thus, the legal discourse on freedom of the "pre-literary period" has to be reconstructed from other than the legal sources of the "literary period". The problem is a methodological one and is connected to the question of the much discussed authenticity of *aḥādīth,* the traditions which contain sayings and actions of the Prophet, and the traditions of his companions and successors: Do they go back to these persons or have they been ascribed to them for whatever reasons? The discussion of this question is controversial. [13] As Crone puts it:

[13] Schneider, *Kinderverkauf,* 62-66.

> For practical purposes it is impossible to prove a certain tradition authentic (with a very few exceptions) and it is often impossible to prove it unauthentic, too. The allocation of the burden of proof is thus of decisive importance. Defenders of the authenticity of Ḥadīth hold that traditions should be presumed to be genuine unless the contrary can be proved, whereas followers of Schacht argue the opposite; and since the contrary usually cannot be proved, the result is a straightforward clash between those who treat Ḥadīth as essentially authentic and those who treat it as evidence for later developments. [14]

I have argued elsewhere that my position is near that of Schacht, meaning that I am sceptical towards the authenticity of the Prophet's sayings as well as the sayings of his companions, whereas I would be more inclined to accept the authenticity of sayings of the successors, if there are no reasons (as e.g. contradictory statements of one person) to doubt them. [15] In this point I differ clearly from Motzki, who, in a review article of my book, focused on the dating of the Prophet's alleged sale of a free person into slavery (the Surraq-case) and argued for the authenticity of this *ḥadīth,* meaning that the *ḥadīth* belonged to the Prophet's time in Medina and contained the decision of the Prophet. I had, on the basis of an analysis of the *isnād* and *matn,* classified this *ḥadīth* as belonging to the 1st century Egyptian legal discourse. [16]

Be that as it may: it has to be stated that any attempt to reconstruct the early Islamic discourse on the question of freedom and slavery — as the reconstruction of any other discourse of that time — remains hypothetical. This is especially true for the attribution of certain rulings to certain persons and — as a consequence — to certain regions of the Islamic empire. What, however, can be stated clearly is that a discourse on this topic did take place. Different positions can be reconstructed (even if it remains uncertain whether the persons named held the alleged opinion or whether it was ascribed to them). Furthermore, the possibility that a legal ruling was attributed to a person of a high religious or social standing allows us to interpret it, at the very least, as an attempt to assign prestige to a truly important and controversially discussed legal opinion of great social relevance. There can be

[14] Crone, *Roman,* 31.

[15] Schneider, *Kinderverkauf,* 62-74.

[16] Motzki, H., "Der Prophet und die Schuldner. Eine ḥadīṯ-Untersuchung auf dem Prüfstand", *Der Islam,* 77 (2000), 1-83, and my answer to this article: Schneider, "Narrativität", 84-115.

no doubt about the existence of a legal discussion on the forfeiture of freedom and — to go one step further — about the existence of the underlying socio-legal problem connected with the sale of free persons in the "pre-literary period".

Thus we have to deal chronologically with the following categories:

1. Legal rulings and practices in Late Antiquity with regard to the sale of children, etc.

2. The legal discourse of the "pre-literary period" in Islam, i.e. the 1st/7th and 2nd/8th centuries.

3. And finally, the legal discourse as reflected in the *fiqh*-literature from the first legal texts in Islam in the late 2nd/8th century, the "literary period" of Islamic law.

In the following part first the legal rulings and practices of Late Antiquity are given, then the consensus of the "literary period" is shortly summarized to depict the discrepancy and in the end the legal discourse for the "pre-literary period" on the different topics is reconstructed, so that the difference to the pre-Islamic rulings and practices as well as to the Islamic later consensus can be outlined.

The legal discussion on the forfeiture of freedom in the 7th and 8th centuries

The loss of freedom, enslavement and bondage happened because of debt, as the sale of free persons due to poverty or as a punishment. Enslavement as a punishment existed in Roman law, but there are no examples in the Islamic sources as far as I know.

1. *Enslavement because of debt, debt-bondage and self-dedition*

Concerning enslavement or bondage because of debt, three degrees have to be distinguished, all subsumed under the legal term of "execution against the person" — in contrast to "execution against the property" —. This execution against the person takes different forms: the (a) sale of a free person into slavery; (b) debt bondage, in which the debtor had to work for the creditor either for a certain time

or until he could pay off his debt and was set free; (c) self-dedition, mostly, as it seems, into bondage, not into slavery. [17]

Ad a) Late Antiquity: Enslavement because of debt and debt-bondage was known in old Oriental law [18] as well as Roman law, [19] but seems to have fallen into disuse. In Late Antiquity there is a clear tendency to restrict the execution to debt bondage and, later on, to imprisonment. [20] Debt bondage was obviously legally acceptable in Sassanid, [21] Jewish, [22] Egyptian, [23] Christian, [24] and Roman Provincial law. [25] In practice it seems to have been a well-established institution to satisfy the creditor's claim in the respective territorial area. Self-dedition occurred again in old Oriental law, [26] in Sassanid law, [27] in Jewish law [28] and in Graeco-egyptian law. [29] The decision to give oneself into slavery was accepted in Christian law [30] and existed in Roman law. [31]

[17] Imprisonment because of debt is the solution of the classical Islamic law, see Schneider, *Kinderverkauf,* 38-49.

[18] Mendelsohn, I., *Slavery in the Ancient Near East,* New York, 1949, 23 ff; Chirichigno, G. C., *Debt-Slavery in Israel and the Ancient Near East,* Sheffield, 1993, 5 ff.

[19] Kaser, M., *Das römische Privatrecht,* München, 1992, 359; Mitteis, L., *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs,* Leipzig, 1935, 451.

[20] For the same development in German law see Kaufmann, "Schuldknechtschaft", in A. Erler and E. Kaufmann (eds.), *Handwörterbuch zur deutschen Rechtsgeschichte,* Berlin, 1964-, 4, 1514 ff.

[21] Macuch, M., *Rechtskasuistik und Gerichtspraxis zu Beginn des 7. Jahrhunderts im Iran,* Wiesbaden, 1993, 393 ff.

[22] Cohen, B., *Jewish and Roman Law. A Comparative Study,* New York, 1966, 1, 58; Cohn, H.H., "Slavery", in *Encyclopedia Judaica,* Jerusalem, 1971-72, 14, 1655 ff.

[23] Mitteis, *Reichsrecht,* 447 ff; Biezunska Malowist, I., "L'esclavage dans l'Egypte gréco-romaine", in *Actes du colloque 1972 sur l'esclavage,* Paris, 1972, 86.

[24] Gülzow, H., *Christentum und Sklaverei in den ersten drei Jahrhunderten,* Bonn, 1969, 81, 102.

[25] Mitteis, *Reichsrecht,* 456 ff; Finley, M.I., *Ancient Slavery and Modern Ideology,* London, 1980, 143. For a detailed discussion of the different terminologies and implications for the institution of slavery, debt-bondage, etc. see Schneider, *Kinderverkauf,* 290-303.

[26] Mendelsohn, *Slavery,* 19.

[27] Perikhanian, A., "Iranian Society and Law", in E. Yarshater (ed.), *The Cambridge History of Iran,* 3/2, Cambridge, 1983, 674.

[28] Urbach, E.E., "Laws regarding Slavery as a Source for Social History of the Period of the Second Temple, the Mischnah and Talmud", *Papers of the Institute of Jewish Studies,* 1 (1964), 84.

[29] Taubenschlag, R., *The Law of Greco-Roman Egypt in the Light of the Papyri 332 b.D.-640 a.D.,* New York, 1944, 52.

[30] Gülzow, *Christentum,* 79.

[31] Mitteis, *Reichsrecht,* 362.

"Literary period": The Islamic law of obligation does not allow enslavement owing to debt or debt bondage at all, not even self-dedition. It only knows imprisonment because of debt. This meant that the debtor was arrested if he refused to pay. He was released either when he paid or after his inability to pay became clear. Imprisonment was thus only used to exert pressure on the debtor, not to punish him. [32] The creditor had no access to the debtor and could not force him to work. [33]

"Pre-literary period": Perhaps the most interesting legal ruling refers back to the Prophet, attributing to him the sale of a free person into slavery. The story has been preserved in different variations, ranging from the simple statement of the sale of a free person because of debt to intricate narratives. [34] The story can be summarized as follows: a man called Surraq ("brazen thief") lives in Medina and enters into business with a Bedouin or with the people of Medina. Having received merchandise — sometimes a camel, sometimes clothes — he disappears without paying, sells the merchandise and wastefully spends the money. The vendor complains to the Prophet and the Prophet orders Surraq to return either the merchandise or pay for it. As Surraq is not able to do so, the Prophet advises the creditors to sell Surraq on the market; surprisingly, however, in most versions the creditors decide to set Surraq free, arguing that they will deserve God's reward.

Here is one variant given as an example, which is interesting insofar as Zayd b. Aslam (d. 136/753), who reports this story, meets this man, Surraq, in Egypt, where he tells him the story which of course allegedly goes back to the Prophet's time in Medina: [35]

[32] Schneider, I., "Imprisonment in Preclassical and Classical Islamic Law", *Islamic Law and Society,* 2 (1995), 157 ff, 158-161.

[33] Schneider, *Kinderverkauf,* 38-47; for the special position of Ibn Ḥazm see Ibn Ḥazm, *Al-Muḥallā,* M. Shākir (ed.), Cairo, 1928-1933, 8, 172, 173, who argues that the debtor should work off his debt. For the institution of the so-called *mulāzama,* see Schneider, *Kinderverkauf,* 45-47. *Mulāzama* in the Ḥanafī school of law meant the supervision of the debtor by the creditor. In case the creditor realized that the debtor accumulated again money, the creditor could demand it from him. He could not, however, make him work.

[34] For the collection of the variants of this *ḥadīth* see Schneider, *Kinderverkauf,* 74-122.

[35] 'Alī al-Dāraquṭnī, *Sunan,* 'A.H. al-Madanī (ed.), Cairo, 1996, 3, 61, n.º 236. For other versions see Schneider, *Kinderverkauf,* 361-374.

> ... from ʻAbd al-Raḥmān and ʻAbdallāh, sons of Zayd b. Aslam from Zayd b. Aslam: I saw an old man in Alexandria, who was called Surraq and I said to him: "What kind of name is this?" He answered: "The Prophet called me so". I asked: "Why?" He answered: "I came to Medina and told the people that I would receive property *(māl)*. They made transactions with me, but I wasted their property and they brought me to the prophet". He said: "You are a thief" and he wanted me to be sold at the market for the price of four camels. My creditors asked the purchaser: "What will you do with him?" and he said: "I will let him go free". So the creditors said: "We cannot renounce more than you God's reward" and they set me free.

Surraq seems to be a fictive person. His name is found in the different *isnāds* and also in the special literature on traditionalist, sometimes under the name of "Surraq", sometimes with another first name, and, according to some sources, he even was a companion of the Prophet. [36] There are different chains of transmitters and several versions of the texts, sometimes with, sometimes without the Egyptian frame story. The *ḥadīth* clearly circulated in Egypt because of the names of Egyptian transmitters in some of the *asānīd.* According to my research, we can trace back the *ḥadīth* only to the 1st century in Egypt, because there are too few indications as to confidently verify its authenticity. [37]

Several points have to be taken into consideration: 1. The story is difficult to interpret, both in terms of its formal aspects and of contents. It reveals many inconsistencies in its contents and style and transmission. There is no independent version of this story which can be traced back to Medina. [38] 2. The fact that the Prophet is said to have acted this way lends the tradition a special prestige. We therefore have to date the emergence of the tradition before the establishment of the consensus in the "literary period" of Islamic law. 3. The story contains a form of execution against the person which seems to have no longer been in use in Late Antiquity, beside attributing a decision to the Prophet which is, according to the law of the "literary period of Islam", completely unacceptable. 4. The alleged ruling of the Prophet contradicts Qur'ān (2:280), a verse which advises the believer to have patience with a debtor. It also contradicts the Constitution of Medina, according to

[36] Schneider, *Kinderverkauf,* 110-114.

[37] The method I based my arguments on relied on an analysis of the different *asānīd* in combination with the analysis of the different versions of the texts *(mutūn)*.

[38] Schneider, *Kinderverkauf,* 74-133.

which believers should not forsake a debtor among them, but give him help. [39] Furthermore, the jurist Zuhrī (d. 125/742) from Medina states: "When at the time of the prophet a person got indebted, we do not know that a free person had been sold for this". [40]

With regard to story's contents it has to be asked: How could the Prophet, the leader of the community in Medina, order the sale of a free person when at the same time the creditor felt obliged to leave Surraq free — for religious reasons? The creditor's action makes sense before the backdrop of the rulings in the Qur'ān and the Constitution of Medina. However, in this case the Prophet's alleged order would be against the Qur'ānic ruling as well as against the Constitution.

In my opinion we are dealing here with the polished narrative of a typical legendary story: The Prophet, knowing how events will unfold, orders the sale of Surraq, being sure that the sale will not happen, and thus Qur'ān (2:280) will not be violated. And everything evolves as he had known before. [41]

However, the *ḥadīth,* even if not authentic, was useful for the discussion in the context of this legal problem and surely was made use of. It was somehow discarded from the canonical legal literature which emerged in the 2nd/8th and 3rd/9th centuries. It survived only in marginal sources, confronting the jurists who came across it with the problem of how to evaluate an alleged decision of the Prophet which clearly contradicted the later consensus. Later Muslim jurists either chose to ignore this *ḥadīth* or called it "weak" and rejected its authenticity. [42]

The story, however, made its way into a modern Egyptian court: 'Ashmāwī, the Egyptian jurist, discussed this prophetic ruling in a judgment of the year 1987 on interest. [43]

[39] Watt, M., *Muhammad at Medina,* Oxford, 1981, 226.

[40] 'Abd al-Razzāq b. Hammām al-Ḥimyarī, *al-Muṣannaf,* H. al-A'zamī (ed.), Beirut, 1972, 10, 286.

[41] Schneider, "Narrativität", 111.

[42] Schneider, *Kinderverkauf,* 262-278. Al-Naḥḥās, A. G., *Kitāb al-nāsikh wa-l-mansūkh,* Cairo, 1905, 82, points to the possible interpretation of Qur'ān, 2:280 as being *nāsikh* to the practice of enslavement because of debts; Ibn Ḥazm, *al-Muḥallā,* 9, 17, points to an old debate on the topic *(khilāf qadīm)* but does not refer to the Surraq-*ḥadīth;* Ibn Qudāma, *al-Mughnī,* M. R. Ridḍā (ed.), Cairo, 1947, 5, 336, argues that as a free person cannot be sold, the Prophet intended only to sell Surraq's labour-force.

[43] 'Ashmāwī, M.S., *Al-ribā al-fā'ida fī l-Islām,* Cairo, 1988, 95-102, see 98, with his judgment of the *Maḥkamat isti'nāf al-Ismā'īlīya* from January 5th, 1987.

Ad b) With regard to debt bondage several traditions, especially from Egypt and Syria, have been preserved, but not for the Ḥijāz. [44] An interesting example is the alleged letter of the caliph ʻUmar b. ʻAbd al-ʻAzīz (r. 98/717-101/720) to his Egyptian judge ʻIyāḍ b. ʻUbaydallāh (d. 112/730), preserved in al-Kindī's (d. 349/961) book on Egyptian judges. In this letter the caliph answers a legal question this judge had obviously posed before.

Letter of ʻUmar b. ʻAbd al-ʻAzīz, year 99/717 to ʻIyāḍ: [45]

> You mentioned a man who had bought female slaves with delay of payment together with an increase of the amount. Then he sold them only for a third of the sum. His debt amounted to 300 Dinars. You told me that his creditors came to you and asked you to sell the debtor to them (creditors)/to sell the debtor for their benefit *(yubāʻu lahum:* he was sold to them/he was bought (by someone else?) for them?). You handed him over to them, advising them to wait for my answer. Order the man to work off his debt *(fa-l-yasʻa fī llaḍī ʻalayhi)*. He is responsible until he has paid off his debt. Do not allow the creditors to sell him, but advise them to handle him with care, so that God will give what is upon the debtor.

The caliph's letter comprises the following points:

1. The decision what shall happen to the debtor has to be a court decision. The creditor cannot force the debtor to work without a judgment.

2. The debtor has to work off his debt, i.e. he becomes a bondman as long as he has not paid the complete sum.

3. He is not a slave, because the creditors cannot sell him.

4. Furthermore, the creditors are obliged to treat the debtor adequately. This is argued as being in their interest, so that the debtor can work and pay back his debt.

Thus, the caliph, according to this letter, explicitly accepts debt-bondage and explicitly rejects the enslavement of the debtor. And furthermore, the institution of debt-bondage is restricted by legal and moral rules: the creditors are made responsible for the well-being of the debtor and cannot sell him to other persons.

[44] All traditions which seem to go back to the Ḥijāz have common links in the Iraq so that enslavement because of debt and debt bondage cannot be proved to have existed in Medina and Mecca (Schneider, *Kinderverkauf,* 198).

[45] Al-Kindī, ʻUmar b. Yūsuf, *Kitāb al-quḍāh,* R. Guest (ed.), Leiden, London, 1912, 336 ff.

Another tradition is transmitted through the Egyptian lawyer Layth b. Sa'd (94/713-175/791), from the judge 'Ubaydallāh b. Abī Ja'far (60/679-132/749): [46] "He (the judge, I.S.) should not put him into prison but let him work for his debt. This is also the opinion of al-Layth b. Sa'd and Abū Sulaymān (i.e. Dāwūd al-Ẓāhirī, I.S.) and his supporters".

'Ubaydallāh b. Abī Ja'far lived at the same time as 'Iyāḍ, both were Egyptian judges. Several other traditions deal with this alleged decision of 'Umar b. 'Abd al-'Azīz. [47] The Egyptian scholar Ibn Lahī'a (d. 174/790) transmitted versions of the Surraq-*ḥadīth* [48] and Layth several traditions with regard to debt-bondage. Ibn Ḥazm stated that Layth himself voted for debt-bondage. [49] There are, in the end, strong indications that 'Umar b. 'Abd al-'Azīz actually decided in favour of the debt-bondage. [50]

Whereas the Egyptian traditions use the verb *sa'ā* there is another group of traditions concerning 'Umar b. 'Abd al-Azīz which seems to have circulated in Iraq and uses the verb *ājara.* [51]

Whereas 'Umar seems to have voted for debt-bondage, he is said to have decided against slavery in another case: a *dhimmī*-couple was brought before Ḥasan al-Baṣrī because the husband was accused of having sold his wife. Again a letter allegedly was written to the caliph, and in this case 'Umar advised Ḥasan to punish both — husband and wife — and to throw them into prison. [52] This makes sense because first of all the husband had intended to sell his wife into slavery and not into debt-bondage. Sale into slavery had been forbidden by 'Umar in his letter to the Egyptian *qāḍī.* Furthermore, the husband acted on his own and thus committed a crime whereas debt-bondage

[46] Ibn Ḥazm, *al-Muḥallā,* 8, 171.
[47] Schneider, *Kinderverkauf,* 133-146.
[48] Schneider, *Kinderverkauf,* 142-143.
[49] Ibn Ḥazm, *al-Muḥallā,* 8, 171-172.
[50] For a detailed argumentation see Schneider, *Kinderverkauf,* 147-156.
[51] A. J. M. b. al-H. al-Tūsī, *Al-Khilāf,* Qom, 1956, 2, 116, states that Abū Ḥanīfa, Shāfi'ī, Mālik and most of the jurists voted against debt-bondage, but that Aḥmad b. Ḥanbal, Isḥāq b. Rāhwayh, 'Umar b. 'Abd al-'Azīz, 'Ubaydallāh b. al-Ḥasan al-'Anbarī and Sawwār b. 'Abdallāh al-Qāḍī wanted the debtor to work off his debt (Verb: *ājara)*; Ibn Rushd, *Bidāyat al-mujtahid,* Beirut, 1983, 2, 293, however, states that 'Umar alone voted like this. See Schneider, *Kinderverkauf,* 150 and 378-80.
[52] Ibn Abī Shayba, *al-Muṣannaf fī l-aḥādīth wa l-āthār,* Hyderabad, 1966-1983, 6, 542.

had been considered by ‘Umar as a court decision and not as a private act. It can be stated without doubt that debt-bondage — but not enslavement because of debt (or because of other reasons) — was well known and practised in Egypt in the 1st century.

Ad c) Self-dedition

Self-dedition meant that a person gave or surrendered himself or herself into bondage (not enslavement, as it seems) out of his/her own free will, not perforce a legal judgment. As in the case of debt-bondage, the main reasons for this were financial difficulties and debts.

“Pre-literary time”: The Arabic terminology is: “he acknowledged the status of slavery / to be a slave against himself: *aqarra annahu ‘abd*”. Most self-dedition traditions circulated in Iraq. The following tradition is from Rabī‘ (d. around 190/806), a jurist in Basra:

> I asked him (Rabī‘, I.S.) with regard to a Muslim who had bought a man on the market. The purchaser had asked him and the man had said that he was a slave. Later on the man found out that he was a free person. Now, though he could not find the vendor again who had sold the man to him, (Rabī‘) answered: “He does not own the man, but the purchaser can let him work *(yastas‘īhi)*, if he does not get his money, as if he were a free man, who acknowledged the status of slavery against himself *(ka’annahu aqarra bi-l-‘ubūdiyya wa-huwa rajul ḥurr)*”. [53]

At his time Rabī‘ was leader of the Basrian Ibadites and he was *muftī.* [54] In this case a man seems to have sold himself, explicitly stating his status as a slave to the purchaser. When it turned out that he was a free person Rabī‘ decided that he was not a slave, arguing that the purchaser did not own him, but as the purchaser had a financial loss the man had to work off “as if he were a free man, who acknowledged the status of slavery against himself”. From this text the conclusion can be drawn that self-dedition was a well-known practice and that it was dealt with in the same way as self-sale, in which case obviously the person had to work to pay off the price. Rabī‘ uses the verb to “let work”, but it is not clear from the context, whether debt-bondage with the creditor’s right to let the debtor work is also meant here.

[53] Rabī‘, H., “Futyā ar-Rabī‘ b. Habīb”, in E. Francesca, *Un contributo al problema della formazione e dello sviluppo del diritto islamico,* Neapel, 1994, Appendix, 8.

[54] Francesca, *Un contributo,* 35.

With regard to self-dedition the verb *aqarra* is used. It means in later legal terminology to acknowledge (e.g. a child as one's own child) and in the context of a criminal case to confess. In other texts men are given as pawns. [55] Decisions in favour of self-dedition are ascribed to 'Umar b. al-Khaṭṭāb. [56] All these traditions have a common link with Qatāda (d. 117/735) in Basra so that the traditions circulated in Basra, but there is no proof that they really go back to the caliph living in Medina. [57] 'Alī b. Abī Ṭālib (d. 34/656), the fourth caliph, is said to have decided that a person who acknowledges the status of slavery against himself is a slave, but again this decision might not go back to 'Alī. [58] Ja'far al-Sādiq (d. 148/765), living in Medina, is said to have accepted self-sale, but the tradition clearly circulated in Iraq. [59] The Kufian scholar Ibrāhīm al-Nakha'ī (d. 95/713) has several traditions in favour of self-dedition. [60] All these traditions do not prove automatically that the persons named actually decided this way, but they surely prove that self-dedition was a known — and at least partly accepted — practice in Iraq, whereas this practice is not confirmed for Medina. There were other voices, too, in Iraq: Sha'bī (d. around 95/713) in Kufa decided against self-dedition, as did 'Aṭā' (d. 114/734) in Mecca. [61] 'Aṭā' stated explicitly that a free person was no slave.

[55] Ibn Ḥazm, *al-Muḥallā,* 9, 17; 'Abd al-Razzāq, *al-Muṣannaf,* 10, 194; Ibn Abī Shayba, *al-Muṣannaf,* 5, 279.

[56] 'Abd al-Razzāq, *al-Muṣannaf,* 10, 194; Ibn Ḥazm, *al-Muḥallā,* 9, 17; Ibn Ḥajar, *Fatḥ al-bārī bi-sharḥ ṣaḥīḥ al-Bukhārī,* M. 'Abd al-Bāqī 'A. Ibn Bāz (ed.), Beirut, 1990, 4, 418.

[57] Schneider, *Kinderverkauf,* 176-177.

[58] Ibn Bābūyah, *Man lā yaḥḍuruhu al-faqīh,* Mūsawī al-Ḥarshān (ed.), Teheran, 1970, 3, 84, preserved an alleged statement of 'Alī b. Abī Ṭālib that all men are free with the exception of this slave (sic! Not: free person! I.S.) who acknowledges the status of slavery against himself (while he is a major) and the person against whom two witnesses state that he is a slave. See also Ibn Abī Shayba, *Al-Muṣannaf,* 5, 339. As 'Alī voted for a hard punishment in the case of the sale of a free person (see below) such a decision of 'Alī in favour of self-dedition does not seem probable.

[59] Schneider, *Kinderverkauf,* 195-196.

[60] 'Abd al-Razzāq, *al-Muṣannaf,* 10, 194; Ibn Abī Shayba, *al-Muṣannaf,* 5, 279; the traditions deal with free persons who give themselves as pawns and they are reported by the Kufiyan Mughīra (d. 136/753).

[61] 'Abd al-Razzāq, *al-Muṣannaf,* 10, 194: "Ibn Juraij said: I asked 'Aṭā' with regard to a man who acknowledged the status of a slave against himself. He answered: 'The free man is not slave'". With regard to Sha'bī in Kufa see Ibn Abī Shayba, *al-Muṣannaf,* 5, 339, Sha'bī stated: "The free person does not become a slave, even if he acknowledges himself as a slave".

Thus the Egyptian texts focus on debt-bondage, Iraqi ones on self-dedition. It is possible that both institutions served as a means to guarantee the creditor's claim to the debtor's money. Regrettably, the texts are often too short to reveal more information about reasons, forms and function of these different legal institutions.

2. *Enslavement of family members*

"Late Antiquity": Sale of wives and especially of children occurred through in the old Oriental laws. [62] With regard to Late Antiquity, this issue has to be seen against the backdrop of the position enjoyed by the *pater familias* in Roman law and his right to have family members at his disposal. In Roman law the paternal authority originally meant the right of the father to kill the child, to sell or abandon it *(vitae necisque potestas)*. [63] In Late Antiquity this right was restricted, but never completely abolished. Diocletian (r. 284-305 a.D.) prohibited the sale and pawning of children, [64] but Constantine legitimised it again under certain conditions in 313 a.D., [65] as did Justinian (r. 527-565), who restricted it to cases of extreme poverty and allowed the father to get the child back. [66] The different stages of the legal discussion on the sale of children show that it was a burning social issue throughout the whole period of Antiquity. It was particularly pressing in times of natural disasters, such as in the 4th and 5th centuries. Whereas it was not always legally acceptable it was most certainly practised all the time. [67]

A quite unrestricted father's power over the family members is to be found also in Sasanian law, [68] and the Jewish father (not the

[62] Mendelsohn, *Slavery,* 5; Kienast, D., "Kinderkauf, -verkauf", in E. Weidner and W. von Soden (eds.), *Reallexikon der Assyriologie,* Leipzig, 1928-, 5, 598 ff .

[63] Kaser, *Das römische Privatrecht,* 35; for the wife this power was more restricted.

[64] Kaser, *Das römische Privatrecht,* 281 ff.

[65] Memmer, M., "Ad servitutem aut ad lupanar. Ein Beitrag zur Rechtsstellung von Findelkindern nach römischem Recht unter besonderer Berücksichtigung von § 77, 98 Sententiae Syriacae", *Zeitschrift der Savignystiftung für Rechtsgeschichte, röm. Abt.*, 108 (1991), 53.

[66] Kaser, *Das römische Privatrecht,* 278 ff. "Zweiter Abschnitt. Die nach-klassische Entwicklung", in *Handbuch der Altertumswissenschaft,* 3 T., 3 B., 2. Ab. München (1975), 142 ff.

[67] Memmer, "Ad servitutem", 25, 43 ff; Mitteis, *Reichsrecht,* 359.

[68] Bartholomae, C., *Die Frau im sasanidischen Recht,* Heidelberg, 1924, 7; Perikhanian, "Iranian Society", 639.

mother) had the right to sell his minor daughter if he saw no other possible means to secure the family's survival. A daughter was sold when the family was in economic difficulties, or when the family was about to lose or had already lost its house. It preceded the taking of a credit. The sold daughters had to serve their new masters as concubines, i.e. the sale included the right for the purchaser to have sexual relations with the girl. [69] In Graeko-Egyptian law children were sold and given as pawn. There are documents for the years between 730 and 785 — already the Islamic time — according to which children were sold to an Egyptian monastery. [70] There is no source on the sale of children in pre-Islamic Arabian law. The Qur'ān (45:58) forbids the killing of new born baby girls.

To summarize: Whereas the sale of a wife was not always legally accepted, the sale and pawning of children often was. Especially the sale of children seems to have been a common practice. As a matter of fact, it often comprised sexual services for the girls.

In the "literary period of Islamic law" the sale of free persons was prohibited, as stated above.

As far as the "pre-literary period" is concerned, two Ḥijāzī traditions are interesting, one allegedly going back to Sa'īd b. al-Musayyab (d. 94/712) and the other to Zuhrī (d. 125/742).

Sa'īd b. al-Musayyab was asked with regard to a man who had sold his child. He answered:

> If he sold a person of age and agreeing, then — if the purchaser had sexual relations with her — a woman will be punished with *ḥadd* and the father with a painful punishment. The father has to give back the price. A child (resulting from this relation) has the status of a legitimate child. A (sold) male of age will be punished as his father with a painful punishment and the father has to give back his price as a fine. [71]

The text seems to be a *fatwā* and not a judgment in a legal case, because Sa'īd discusses different possibilities. At the same time,

[69] Häusler, E., *Sklaven und Personen minderen Rechts im alten Testament,* Köln, 1956, 96 ff; Urbach, "Laws regarding Slavery", 16; Cohen, *Jewish and Roman Law,* 1, 171; Cohn, "Slavery", 14, 1655 ff; for the Christian law see Christian law: Selb, W., *Sententiae Syriacae,* Vienne, 1990, 53, 65, 160.

[70] Taubenschlag, *The Law of Greco-Roman Egypt,* 52, 103; Thissen, H., "Koptische Kinderschenkungsurkunden", *Enchoria,* 14 (1986), 121 ff.

[71] 'Abd al-Razzāq, *al-Muṣannaf,* 10, 195.

however, he restricts the discussion to cases of children who were of age and had consented.

From Sa'īd's order that the father has to pay back the price, it becomes clear that the sale of a daughter as well as of a son is illegal and this practice has to cease. However, he considers the sexual relations between the purchaser and the girl resulting from the sale as being illegal as well, and the punishment to be meted out is in line with the new and harsh Islamic standards for proper moral and sexual behaviour: with *ḥadd.* [72] But why is the child then legal? [73] And why does he not take into consideration that the sold boy, too, was abused? Sa'īd stops his casuistic argumentation here. He does not discuss other possible variants, e.g. the case — which according to the legal practice in Late Antiquity surely prevailed — that a major or minor-aged girl was sold on the basis of the paternal constraint against her will or that a minor-aged girl was sold and subsequently consented, in which case it had to be discussed whether the consent of a minor was acceptable. He ignores the possibility — which, according to the sources of Late Antiquity, seems to have been the social reality — that the girl might have been forced into the sale by the father out of pure poverty. And he does not discuss the (later) Islamic concept of *ijbār,* according to which the father had the right to marry his minor child, but had to use his paternal constraint with respect to the welfare of the child and to keep the dower he received for her until she reached puberty. In the discussion of the case he not only ignores important legal facts but also completely the underlying social situation (poverty) and the socio-legal family relations (paternal power) as well as the social pressure which normally prevents children to act against the decisions of their parents. He rather focuses on the — prohibited — sexual relations resulting from the sale between the purchaser and the girl. [74] As a consequence, the original victim of a trade — the girl

[72] Schacht, *An Introduction,* 178.

[73] In classical Islamic law a *walad al-zinā'* cannot be recognized as legitimate, see Schneider, "Kindeswohl im islamischen Recht", *Recht der Jugend und des Bildungswesens,* 2 (2006), 185 ff.

[74] Motzki, H., "Muslimische Kinderehen in Palästina", *Die Welt des Islams,* 27 (1987), 82-90, analysed *fatāwā* of the 17th century in Palestine and argued that fathers and other male relatives gave their —minor— daughters into marriage, received the dower (which they, according to the law, had to keep until the girl became major) and used the money for other purposes (p. 87). He states that either poverty or greed were the reasons (p. 88). These cases show that practically the "sale" of daughters occurred — as

— is turned into a liable person who is subjected to the harshest possible punishment: *ḥadd* in case of illegal sexual relations is either, according to the Qur'ān, to be punished with 100 lashes or, as fixed in later law, in certain cases with stoning to death for a person being *muḥṣan,* i.e. having had sexual relations in a legal relation. [75]

At the same time, however, the Muslim jurists surely knew about the social conditions under which the sale of children occurred: Zuhrī, another jurist, dealt with a similar case. Mentioned in the case presented to him for judgement was the — legally irrelevant — excuse of the father, namely that poverty had forced him to act in this way. Zuhrī makes no reference to this in his decision.

Al-Zuhrī reported that a man sold his daughter and the purchaser had intercourse with her. The father (said): "Poverty forced me to sell her". Zuhrī decided: "The father and the girl are punished everyone with 100 lashes, in case the girl was of age. The purchaser gets back the price but has to pay dower to the girl because of the intercourse he had with her. However, the father is obliged to pay this dower back to the purchaser as a fine. If, however, the buyer knew that she was a free person, this is not the case. Then he has to pay the dower and the father does not have to give it back to him and the purchaser is also lashed 100 times. In case the girl was not a major, only the father is punished". [76]

Like Sa'īd, he decided that the father and the girl were to be punished with 100 lashes (this is again *ḥadd)*. As in Sa'īd's ruling, the sale is considered illegal because the purchaser gets his money back. But now the issue of dower payment plays a role: the purchaser has to pay a dower, meaning that the sale is retroactively turned into a marriage and thus legalized. Then, however, the punishment of the girl with 100 lashes makes no sense, because this is the punishment for illegal sexual relations. The retroactively validated marriage should have turned the illegal sexual relations into a legal relationship. [77] Zuhrī only takes majority age into consideration, not consent. He does not discuss the question whether or not the consent of the daugh-

it seems: all the time — but was dealt with not as "sale" but as a part of the (legal) child marriage with the illegal consequence that the father kept the dower.

[75] Goichon, A-M., "Ḥadd", in *EI*^{2}, 3, 20-22.

[76] 'Abd al-Razzāq, *al-Muṣannaf,* 6, 542 ff.

[77] Sa'īd had argued that a child from this relation is a legal child.

ter makes any difference. Her exemption from punishment if she was a minor can be explained with the general exemption of minors from *ḥadd* punishments. But perhaps it could be argued that in this case the paternal constraint on a minor is acknowledged. As a consequence, Zuhrī, who was confronted with an act of sale of a child out of poverty, as Sa'īd, ignores the social reality and focuses on the sexual relationship, which has to be punished. A further inconsistency in Zuhrī's argument is that he lets the purchaser pay the dower to the girl, but that — in case the purchaser knew her status — "the father" has to give the dower back. According to Qur'ān the dower is to be paid to the bride (4:4) and not to the father. Only in case the girl is a minor he has to keep it for her but is not allowed to spend it.

Both legal rulings, by Sa'īd and Zuhrī are inconsistent and difficult to understand. They do not reveal an intense legal (and social) reflection of the problem.

Summarizing, it can be stated that the sale and enslavement of family members, especially children, was rejected by the Muslim jurists. For this legal theme there are mainly traditions from the Ḥijāz, as quoted above, but also from Ibn 'Abbās (d. around 68) from Mecca. [78] The Kufian scholar Sufyān al-Thawrī (d. 161/777) also decided in this way. [79] Normally both — husband and sold wife — are punished. Only in one case this seems not to have been the case: the Umayyad governor Yūsuf b. 'Umar (d. 127/744) asked the Kufian jurist and judge Ibn Shubruma (d. 144/761) whether to punish a husband who sold his wife with *qaṭ'* — the punishment for thieves —. But Ibn Shubruma (d. 144/761) rejected this, comparing women to *amāna,* entrusted property. Yūsuf decided to beat the husband more than the *qaṭ'*-punishment [80] would have been. [81]

3. *Enslavement and sale of free persons*

"Late Antiquity": Other than the sale of family members and especially children the sale of a free person seems to have been illegal ac-

[78] Ibn Abī Shayba, *al-Muṣannaf,* 6, 542 ff, Ibn 'Abbās and Ḥasan al-Baṣrī are both said to have decided on harsh punishment in the case of the sale of a wife by her husband.
[79] 'Abd al-Razzāq, *al-Muṣannaf,* 10, 195.
[80] For the punishment for theft see Schacht, *An Introduction,* 179-180.
[81] 'Abd al-Razzāq, *al-Muṣannaf,* 10, 195.

cording to all pre-Islamic laws. In old Oriental and Jewish law especially the abduction of children was forbidden. [82] In Egypt forced labour existed. [83] In Roman law it was prohibited, but an exception was made by Justinian — beside the sale of children — in case a free person sold himself with intent to defraud, taking a part of his price *(pretii participandi causa)*. In this case — which is similar to self-sale or self-dedition — purchaser and purchased person acted together and divided the money between them. [84]

In the "literary period of Islamic law" the sale of a free person was not allowed. But there is one interesting decision in comparison to the cases of the sale of family members, especially wives, just dealt with. Shaybānī (d. 189/805) discusses the purchase of a woman with whom the purchaser had intercourse before it turned out that she was a free person. This is a case of a sale of a free person, not of a family member. However, the discussion can be compared to Sa'īd's and Zuhrī's discussion as quoted above in the case of sold daughters.

In this case, Shaybānī decided that the purchaser had to pay dower *(mahr)*, even if he had not known that she was a free person. Shaybānī states that his colleagues in Medina would have decided differently in such a case: they would have decided that the purchaser only had to pay if he knew her status as a free woman. This is in agreement with Zuhrī's decision quoted above. The jurists from Medina argue, according to Shaybānī, that the woman had been legally bought at the slave market. [85] Shaybānī sides with the woman in this case and awards her the dower because, he argues, she might have been raped or abducted. However, he does not go so far as to consider punishment of the purchaser. [86] He also does not consider — as his colleagues from Medina in the case of a sold daughter — to punish the woman for the illicit intercourse. His perspective of the case is the perspective of the purchaser and to some extend the perspective of the

[82] Mendelsohn, *Slavery,* 5; Elon, "Pledge", in *Encyclopaedia Judaica,* 3, 636 ff.

[83] Adams, B., *Paramoné und verwandte Texte. Studien zum Dienstvertrag im Rechte der Papyri,* Berlin, 1964, 7.

[84] This case has been discussed widely in different legal literatures, in Justinan's compilation as well as the Syrian-Roman law-books. See Buckland, W.W., *The Roman Law of Slavery,* Cambridge, 1970, 427-429.

[85] This, however, cannot be found in Zuhrī's decision quoted above.

[86] Shaybānī, M. b. al-H., *Kitāb al-Ḥujja 'alā ahl al-Madīna,* A. al-Afghānī (ed.), Hyderabad, 3, 196.

woman, who should get according to his opinion her dower. His aim clearly is to retroactively make the relation "legal" through payment and then not to deal with the — actual illicit — intercourse anymore. This shows a quite pragmatic approach to the legal problem of illicit intercourse resulting from the sale of a free person.

"Pre-literary period of Islamic law": In accordance with the law of the Late Antiquity the sale of free persons is absolutely forbidden. ʻAlī b. Abī Ṭālib is said to have punished the sale of a free person with *qaṭʻ,* whereas Ibn ʻAbbās voted for imprisonment. [87] Thus the discussion was not whether but how this act should be punished — according to Qur'ānic rules or not. Some cases parallel to the Roman *pretii participandi causa* are reported for the early Islamic time, too, sometimes with the explicit mentioning that the price was divided between the two persons. [88] Jaʻfar aṣ-Ṣādiq is said to have decided in a similar case that both, purchaser and purchased person — who seem to have disappeared after the sale and repeated this fraud — should be punished with the cutting of (both) their hands, "because they are thieves of themselves and of the money of the people". [89] In cases like this it is difficult to decide whether the decision was based on actual cases reported to the Muslim jurists or whether the jurists might have had information of legal texts — especially Justinian's — or whether cases like this were discussed in teaching sessions.

4. *Enslavement of a foundling*

The "laws of Late Antiquity" contain different rulings about the foundling: in old Oriental law foundlings were usually raised as slaves, [90] in Christian law the foundling owed the finder ten years of work, [91] in Roman law the fate of foundlings is described with *ad servitutem aut ad lupanar:* for work or prostitution. [92] In late Roman

[87] ʻAbd al-Razzāq, *al-Muṣannaf,* 10, 195; Ibn Abī Shayba, *al-Muṣannaf,* 6, 542; al-Kulaynī, A.J.M., *Kāfī,* ʻA. al-Ghaffārī (ed.), Teheran, 1968-1984, 7, 229.

[88] Ibn Abī Shayba, *al-Muṣannaf,* 6, 542; ʻAbd al-Razzāq, *al-Muṣannaf,* 10, 193. Zuhrī decided both should be punished. Maʻmar (d. 152/769) reports a decision in this case made by al-Ḥasan al-Baṣrī; see also Ibn Abī Shayba, *al-Muṣannaf,* 6, 542 ff.

[89] Kulaynī, *Kāfī,* 7, 229-230.

[90] Mendelsohn, *Slavery,* 5.

[91] Selb, *Sententiae,* 57 ff, 65 ff, 77, 98; Memmer, "Ad servitutem", 24.

[92] Memmer, "Ad servitutem", 21.

Provincial law it seems that the finder was given a right to choose: he could raise the child as a slave or as a free person. Constantine decided in 331 a.D. that the father who abandoned a child lost his *potestas* over the child and could not demand it back. As a consequence, the finder who raised the child could decide freely on the child's status. No matter whether the child was originally free or not he could decide to raise him/her as a slave. [93] Later the abandonment of children was prohibited. But generally the possibility of choice for the finder seems to have been practised. [94] In Egypt children, who were collected from the waste disposal site were dealt with as slaves. [95]

In the "literary period of Islamic law" foundlings were considered free. They were raised as Muslims when found in Muslim quarters of the city or as Christians or Jews when found in Christian or Jewish quarters. [96]

For the "pre-literary period" there are different opinions: 'Umar b. al-Khaṭṭāb allegedly decided that foundlings were slaves. [97] Ibrāhīm al-Nakha'ī is credited with holding contradictory opinions: he ruled that the founder could choose the status of a foundling and that the foundling had to be considered a free person: Ibrāhīm al-Nakha'ī said with regard to the foundling: "(The finder) can choose. If he wants it to be free, it is free, if he wants it to be a slave, it is a slave". In the same source, also on the authority of Ibrāhīm al-Nakha'ī: "The foundling is free". [98]

Ibn Qudāma confirms the consensus of the community on the status of freedom of the foundling, with the exception of Ibrāhīm al-Nakha'ī. [99] This last quotation does not mean necessarily that Ibn Qudāma accuses Ibrāhīm to decide on the enslavement of the foundling, but could be in convenience with the opportunity of choice which Ibrāhīm had voted for. Again a parallel to the different legal rulings in Late Antiquity can be seen, but again it is not possible to

[93] *Idem,* 27 ff, 46 ff, 64.
[94] *Idem,* 70 ff.
[95] Taubenschlag, *The Law of Greco-Roman Egypt,* 55.
[96] Delcambre, A-M., "Lakīṭ", in *EI*^{2}, 5, 639.
[97] Ibn Abī Shayba, *al-Muṣannaf,* 5, 220.
[98] *Idem,* 5, 220 ff.
[99] Ibn Qudāma, *al-Mughnī,* 5, 679.

find out whether the Muslim jurists decided on the basis of cases presented to them or discussed legal problems hypothetically or even had texts they commented on. However, the different opinions attributed to Ibrāhīm an-Nakha'ī reflect a controversial debate in this time, which seems to have taken place in Kufa, where he lived.

Summary

There has been a discussion on the following issues in "pre-literary time": enslavement because of debt, debt bondage and self-dedition, sale of family members, and the legal status of foundlings. Different cases from different perspectives were discussed with differing results. Legal institutions were more or less carefully described, and in several cases even clear punishments were prescribed. Debt-bondage and self-dedition and the enslavement of foundlings were accepted by some jurists — other than in later legal literature — whereas the sale of free persons was prohibited and punished from the beginning. In this context the question who was to be punished — especially in the case of sold daughters — and what the punishment should be like (Qur'ānic or not Qur'ānic) was discussed with different results.

A second interesting result concerns Egypt as a hitherto neglected centre of legal discourse which played an important role beside the Ḥijāz (Mecca and Medina) and Iraq (Kufa and Basra).

With regard to the question who discusses what problems and where the discussions took place the answers have to be given more cautiously because of the methodological problems to reconstruct early Islamic history and legal rulings as outlined above. There is, however, strong evidence that the *ḥadīth* according to which the Prophet sold Surraq circulated in Egypt in the 1st/7th century and there are so far no indications that it was firmly rooted in the social history of Medina. [100] Zuhrī's statement has to be taken seriously that he did not have information on the sale of a free person by the Prophet. There seem to be no independent traditions proving the existence of debt-bondage or enslavement because of debt in the Ḥijāz, but it was

[100] For a possible interpretation of the Surraq-story in connection not with debt but with theft, see Schneider, *Kinderverkauf,* 339-346.

in Egypt that debt-bondage in an (authentic?) letter of ʻUmar b. ʻAbd al-ʻAzīz was considered a legal means to satisfy the creditor's claim. The jurist Layth b. Saʻd gave also such a judgment. Thus, there was something like a "prevalent discourse" in the regions: whereas Egypt accepted the debt-bondage, in the Iraqi towns Kufa and Basra self-dedition (but not, as it seems, debt-bondage) was widely accepted whereas the jurists from the Ḥijāz seem not to have been inclined to accept any forfeiture or restriction of freedom. With regard to the sale of daughters and wives, traditions from Iraq and the Ḥijāz can be found. In comparison to the situation in Late Antiquity a new sexual moral attitude comes up: sold daughters (especially when they were major) and wives were punished together with the father/husband who sold them. The Ḥijāzīs seemed to be inclined to punish them especially for the sexual relation resulting from the sale of a daughter. They referred to the Qur'ānic punishments for illegal sexual relations. In Iraq the Qur'ānic punishments were not considered adequate. This focus on the sexual crime, actually a consequence of the sale, was given up in later legal literature: Shaybānī shows a practical — Iraqian? — solution of the problem by retroactively turning the illicit relation into a marriage.

In the discussions of the "pre-literary time" the Roman concept of *patria potestas* was not recognized, the social situation was not taken into account. But also the concept of *wilāya* as existent in later Islamic law is not yet discussed.

However, the different judgments reveal no uniform concept of freedom at that time. They merely reflect the problem of securing the existence of both institutions: freedom and slavery in the early Islamic society. This has to be seen before the backdrop of Late Antiquity, where at least the sale of children and debt-bondage were normal legal practices. In this context Jaʻfar and Ibn Shubruma equated women with — trusted — property (which had to be safeguarded), whereas the Ḥanafī jurist Kāsānī (d. 586/1191) [101] explicitly stated that a free person was no property. This was the *communis opinio* in later legal literature.

Only rarely did the caliphs intervene. However, ʻUmar's letter to his Egyptian *qāḍī* could be authentic. Among the persons giving

[101] Al-Kāsānī, ʻAlā'addīn, *Kitāb al-Badā'iʻ al-ṣanā'iʻ fī tartīb al-sharā'iʻ,* Beirut, 1982,7, 67.

opinions and judgments only a few judges can be discovered: ʻIyāḍ b. ʻUbaydallāh and Ibn Lahīʻa in Egypt and Ibn Shubruma in Kufa as well as Ḥasan al-Baṣrī in Basra were judges. Whereas Schacht argued that the early *qāḍīs,* officials of the Umayyadd administration, by their decisions laid the basic foundation of what was to become Islamic law, [102] the situation in this legal field is different. The decisions of ʻIyāḍ (for debt-bondage) and of Ibn Shubruma, who decided that women were to be dealt with like entrusted property, and Ḥasan al-Baṣrī, who decided to punish husband and wife in case of the sale of the wife, did not become the basis of later Islamic law. Most decisions seem to have been given by jurists, and in many cases they are not based on the Qur'ān. These discourses, judgments, discussions and opinions of the jurists which were presented here reflect an independent examination of the legal practice and perhaps reveal a knowledge of legal rulings and legal discussions of Late Antiquity. The reconstructed discourse indicates that Muslim jurists in the first two centuries did not borrow legal rulings from the pre-Islamic laws, but instead critically evaluated the cases, reaching decisions which complied in their opinion with the new Islamic standards. The arguments and discussions, however, are not always connected to the underlying social situation and do not reveal a thorough legal reflection of these cases. This is especially true for the discussion of what to do with sold daughters who were used by the purchaser as concubines. Qur'ānic rules are not always sufficiently applied, e.g. with respect to the dower. On the other hand, Qur'ānic punishments are applied quite often, as the example of the *ḥadd*-punishment for sold girls shows. As a consequence, it can be summarized, that the decisions do not reflect a high standard of intellectual analysis. All this reflects a jurisprudence which was somehow based on Qur'ānic analogies (if still crude ones), on new moral standards aiming to restrict sexual relations to conjugal relations or relations with slave girls who were clearly slaves and on common religious sentiments.

With regard to the second question asked at the beginning, it has to be stated that the "pre-literary" phase is an — independent — phase in

[102] Schacht, *An Introduction,* 25.

the development of Islamic law, at least in this field of law. [103] Problems which were in later legal literature ignored, were discussed controversially, although if not always in an intellectual satisfying way. The reason for ignoring this problem of great social relevance cannot lie in the disappearance of practices such as the sale of free persons and debt-bondage. It is very unlikely that the social circumstances determining such practices simply disappeared with the emergence of Islam. The reasons why legal topics — even of such great social and legal relevance — remained outside this mainstream literature are surely complex and cannot be discussed here. But they must be sought in the character of this literature. Here only some considerations can be made.

Fiqh-literature is not, as has been upheld for a long time, purely fictive. [104] However, it could be argued that certain discourses gained admission into certain genres of literature and not in others. Whereas the discussion of the Surraq-*ḥadīth* concerning a legal topic can be found in (non-canonical) *ḥadīth*-literature and *tafsīr* books, but not in *fiqh*-literature, cases of the sale of children are discussed in biographical and again non-canonical *ḥadīth*-literature, sometimes in *fatāwā.* This shows a clear separation of the topics dealt with in the different genres of literature.

The *fiqh*-literature, evolving around the 2nd/8th century, is based on the discussion of a set of practices, questions and rules. It did not generate general discussions of themes. Furthermore, it remained obviously focused on certain topics. The problem of forfeiture or restriction of freedom was left out. As a consequence, the jurists of the following centuries did not develop proper legal instruments to deal with this problem. No clear definitions of freedom and slavery and no general discussions of the problems arising out of the coexistence of these two institutions in the same society can be found.

Here it seems interesting to take a look at Roman law. The Roman jurists, too, did not develop a systematic of natural law *(ius naturale)* but used the term *ius naturale* in different contexts with different meanings. As a consequence, the institution of slavery on the one

[103] D. Powers similarly argues for the time after Muḥammad that there had been an early independent period in the law of inheritance, Powers, D., *Studies in Qur'ān and Hadīṯ. The Formation of the Islamic Law of Inheritance,* Los Angeles, 1986, 209 ff.

[104] Schneider, I., *Das Bild des Richters in der adab al-qāḍī-Literatur,* Frankfurt a.M., 1990, 167-173.

hand and the status of freedom of every man on the other hand were both seen founded in the *ius naturale.* [105] A parallel can be drawn to the Islamic discussion of the basic principle of freedom. It was discussed, e.g. in the context of the law of procedure, but not analysed with all its implications on a general level.

As a consequence, we would have to consider legal literature not as fictive, but somehow as reflecting or focusing on a special brand of discourse of legal problems, on juristic skills by developing the system of casuistic argumentation but not as a literature trying to discuss problems with deeper philosophical import.

How then can we reconstruct legal practice and legal reality, if not from legal literature? The history of Islamic slavery has still to be written. [106] For Egypt in the 19th century, Lane reports the sale of children: "Hence, it is not a very rare occurrence, in Egypt, for children to be publicly carried about for sale by their mothers or by women employed by their fathers". [107] What Lane considered to be a sale was perhaps — as Motzki showed for the 17th century Palestine — the practice of child marriage, in which fathers — against the law — received their daughter's dower. [108] Motzki based his argument on a deep knowledge of *fiqh*-literature and a *fatāwā*-collection. He could not have analysed the practical cases without knowledge of the legal norms laid down in the *fiqh*-literature.

Debt-bondage surely existed in the feudal forms of peasant exploitation in rural areas. Here sources on the economic history of the villages could furnish information. Sato [109] has described relations between the tenant *(muqṭa')* and the farmer *(fallāḥ)* in 13th century Egypt as being a bond of hard labour *(sukhra)*. However, a study connecting sources of the rural economic situation and legal prescriptions could reveal more information on this legal practice.

To conclude we can say that a topic of great social and legal relevance which jurists had once discussed controversially was ignored in

[105] Knoch, *Sklavenfürsorge,* 35.

[106] But see as a good overview touching many of the topics dealt with here in the history of Islam and in different regions: Clarence-Smith, *Islam and the Abolition.*

[107] Lane, E. W., *An Account of the Manners and Customs of the Modern Egyptians, written in Egypt during the years 1833-1835,* London, 1890, 175-176.

[108] Motzki, *Muslimische Kinderehen.*

[109] Sato, T., *State and Rural Society in Medieval Islam: sultans, muqta's and fallahun,* Leiden, 1997, 234.

the legal literature of Islam — despite its social and legal brisance —. As a consequence, the reconstruction of legal practice has to take into account both: legal literature and other genres of literature such as the *fatāwā,* but also sources for the social history, which so far have not been analysed under this aspect.

Recibido: 05/03/07
Aceptado: 07/06/07