What Can We Learn about Slavery from a Manual for Judges and Notaries?

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Introduction

This month's blog post focuses on the relevance that *shurūṭ* manuals written for judges and notaries have for understanding practices related to slavery, and legal practices more generally. *Shurūṭ* works, or "model *shurūṭ* works," as Wael Hallaq puts it in his seminal article on the topic, are works that reproduce standardised legal contracts or judicial rulings in a range of domains for easy use by legal professionals. The need for this genre arose partly because persons with inadequate knowledge of the law "would not [otherwise] be able to establish the proper formulae necessary to make a document valid and as legally watertight as possible."[1] From the middle of the second *hijrī* century onwards, private notaries (called *muwaththiqīn* or *shurūṭī*s) formed a profession distinct from scribes and other legal personnel such as the *ʿudūl* working directly for the courts. As experts in the issuing of all sorts of documents and contracts, they fulfilled the demands of private individuals whenever they wanted to enter into contracts or needed deeds for various purposes.[2] Besides judges, these private notaries are the main addressees of the genre. *Shurūṭ* (sing. *sharṭ*) is a reference to the integral conditions without which a contract, legal agreement or legal act generally, is invalid. For example, one can speak of the prerequisites of the validity of prayer (*shurūṭ ṣiḥḥat al-ṣalā*), such as being in a state of ritual purity (*ṭahāra*), facing the correct direction for prayer (*qibla*), and so on. Prayer absent a state of ritual purity is invalid. The genre of *shurūṭ* works is, however, focused more narrowly on acts that belong to the 'public' dimensions of law, such as economic transactions, the emancipation of slaves and the like.

This blog post focuses on a source composed in the ninth/fifteenth century by Shams al-Dīn al-Minhāji al-Asyūṭī (d. 880/1475) not to be confused with the famous Cairene polymath al-Suyūṭī (d. 911/1505). Al-Asyūṭī was an Egyptian scholar who lived during the Mamluk period and composed "a manual for judges and notaries that contained formularies for contract law",[3] entitled *Jawāhir al-ʿuqūd wa-muʿīn al-quḍāh wa-l-muwaqqiʿīna wa-l-shuhūd* ("The Essences of Contracts and a Guide to Judges, Notaries and Witnesses"), hereafter *Jawāhir al-ʿuqūd.*

The manual was composed to facilitate judges' dealing with cases on topics specifically related to contract law. *Shurūṭ* works provided judges, witness-notaries and court scribes with handy templates for contracts and judicial rulings into which they could insert the specific information related to the case they were asked to settle. The need for this genre arose partly as a consequence of the gradual process of increasing standardisation of Islamic law in the post-classical period. Islamic law in the post-classical period continued to be characterised by doctrinal change and adaptation, within a broader "regime of *taqlīd,*" i.e. adherence to a legal school (*madhhab*). In this context, the movement toward a higher degree of stability, predictability and consistency in legal outcomes witnessed other developments comparable to the rise of *shurūṭ* works, such as the flourishingof the *mukhtaṣar* (compendia of established doctrines in a given *madhhab*) from the seventh/thirteenth century.[4] In the Ottoman period, in the context of a highly centralised and bureaucratic imperial regime, this tendency toward greater standardisation would only increase, heralding the development of what Guy Burak has characterised as the "second formation of Islamic law".[5]

The process of increasing standardisation was already well under way already in the Mamluk period. The Mamluk Sultan Baybars I (r. 658/1260–676/1277) broke with Ayyubid policy and appointed four chief judges in his capital city of Cairo, one from each of the Sunnī legal schools. Historians have speculated on the motives for this momentous decision.[6] Local judges were also appointed from the various legal schools, which gave plaintiffs the ability to forum-shop between courts that offered them more or less favourable legal outcomes. This predictability of outcomes was a function of the fact that judges' decisions were now far more reliably aligned with the 'established' (*muʿtamad*)or 'dominant'(*rājiḥ*) *madhhab* views than was the case previously. Prominent Mamluk (and before them, Ayyubid) jurists"made it incumbent upon judges and muftis to follow the dominant doctrines of their schools and even deemed rulings not based on school doctrines to be invalid."[7]

Jawāhir al-ʿuqūd allows one to witness the "tension between the [*madhhab*s'] eponyms' emphasis on the *ijtihād* [i.e. capacity for independent legal reasoning] requirement [for judges] and the observed court practice of *taqlīd*."[8] Al-Asyūṭī indeed assumes that judges and witness-notaries are incapable of conducting *ijtihād* on specific cases, but at the same time require easy to access knowledge on the main opinions in their *madhhab*. Therefore, he presents contracts and judicial rulings based on the most established opinion in given *madhhab*s and, where multiple such established opinions exist, presents contracts and the like for each of them. While the argument that particular contracts in the manual directly reflect social practices requires careful demonstration, it seems fair to say that *shurūṭ* works reflect contemporary judicial practice more than one would expect to be the case for summae of substantive law (*mutūn*) and legal commentaries (*shurūḥ*).[9]

The *ummahāt al-awlād* inthe *Jawāhir al-ʿuqūd*

In *Jawāhir al-ʿuqūd* there is an entire chapter devoted to *ummahāt al-awlād*.[10] An *umm al-walad* (lit. 'mother of the child') is a term referring to a female enslaved person who bears her master's child. This concept is one of the three focal points of the research of TraSIS. Assuming the master does not deny paternity, the *umm al-walad* is freed after his death and her child is born free, according to classical Sunnī jurists.[11]

At the beginning of the chapter, al-Asyūṭī discusses general aspects of the doctrines related to *ummahāt al-awlād* in the different *madhhab*s, focusing on points of disagreement among the jurists. In the later part of the chapter, he examines more specific cases, for example what happens in the event that a slave's status as an *umm al-walad* requires confirmation, as her master denies it.

In this blog post, I focus specifically on what happens in cases where an *umm al-walad*, whose master is a non-Muslim, converts to Islam. Al-Asyūṭī presents three possibilities. In the first case, the judge is a Ḥanafī:

> *So-and-so (fulān) Jew or Christian attended the judicial session (majlis al-ḥukm) of the esteemed Ḥanafī judge so-and-so, bringing with him his female slave so-and-so, Bint ʿAbd Allāh,[12] claiming to the aforementioned judge that she is his umm al-walad, that he impregnated her and that she was ennobled by [converting to] the religion of Islam. The aforementioned judge asked for her response to this [claim], and she admitted [it]. The aforementioned plaintiff requested the aforementioned judge to rule according to his madhhab and [its] doctrine, and to order her to obtain the money for her freedom (bi-l-siʿāya fī qīmatihā) [and to] give this money to the aforementioned plaintiff, and to manumit her once this is done. [The judge] accepted his request, because of its lawfulness (li-jawāzihi), according to his view. He ruled that she should obtain the money for her freedom, giving it to her master, and that once she does so, she is to be manumitted in accordance with the sharīʿa, etc, [this] while acknowledging the disagreement [of the jurists] on the subject. The [rest of the document] is to be completed in light of what has preceded.[13]*

The second judge is a Mālikī. After being asked to judge according to his *madhhab*, he finds that there are two opinions attributed to Mālik: according to the first, the enslaved woman should be manumitted, and according to the second, she must be sold to a Muslim. The judge examines both opinions carefully and rules according to the first.[14]

> *So-and-so woman attended the judicial session of the esteemed Mālikī judge so-and-so, bringing with her so-and-so Jew or Christian, claiming to the aforementioned judge that [her master] purchased her, impregnated her and had from her a male child, called so-and-so, of seven or five years of age, for example, and that she was [subsequently] ennobled by [converting to the] religion of Islam. She [requested that she] be manumitted from the defendant by virtue of her conversion to Islam. She asked the judge to ask him [the master] to confirm [these details]. The aforementioned judge put the question [to her master] and he admitted [it], adding that he had the right to sell her and receive her sale-price, asking the judge to rule accordingly. She instead asked the judge to manumit her. The judge reflected on his legal school and [its] doctrine and found that two opinions are attributed to the Imām he follows, Mālik b. Anas al-Aṣbaḥī—God be pleased with him—the first, [her] manumission and the second, [her] sale. He explored the two opinions and contemplated them, examining them closely, and then opted for the first. He prayed the istikhāra prayer, taking God as his guide and support. He complied with the request of the plaintiff and manumitted her, liberating her from slavery, ruling in accordance with the sharīʿa, etc. He [likewise ruled] that he [her former master] should not touch her again [through claiming her through her former] enslavement or servitude (riqq aw ʿubūdiyya), in accordance with the sharīʿa prohibition [of that]. The [rest of the document] is to be completed in light of what has preceded.[15]*

In the final case, al-Asyūṭī discusses what happens if the judge is a Shāfiʿī. In this case, the judge rules to separate them (i.e. bar them from sexual relations), requiring the master to provide material support and clothing for her and her child (*nafaqa*) until his death, whereupon she is manumitted.

> *So-and-so woman, who used to be Christian or Jew, attended the judicial session of the esteemed Shāfiʿī judge so-and-so, having been ennobled [by converting to] the religion of Islam. She brought with her so-and-so Jew or Christian, and claimed to the aforementioned judge that he purchased her, impregnated her and had from her a male child called so-and-so, of three years of age, for example, and that she was [subsequently] ennobled by [converting to the] religion of Islam, while he remained an unbeliever. She asked the judge to ask him [the master] to confirm [these details]. The aforementioned judge put the question [to her master] and he admitted [it], so the aforementioned plaintiff asked the aforementioned judge to rule against the defendant in accordance with his madhhab and to separate them [i.e. bar them from sexual relations] until his death, whereupon she would be manumitted, and [that] he [be further charged with] providing her with maintenance and clothing in accordance with the sharīʿa. The judge complied with her request because of its lawfulness in his view,etc, while acknowledging the disagreement [of the jurists] on the subject.[16][16]*

Conclusion

In these three cases, almost identical in their premises, we see how the author presents the various opinions held by the different *madhhab*s on what happens to the *umm al-walad* of a non-Muslim master when she converts to Islam. While one must be cautious about claiming that there is a real plaintiff initiating a lawsuit before an Egyptian judge behind each of these cases, still, the fact that al-Asyūṭī preserved these legal formulae indicates that this must have been within the horizons of possibility of contemporaneous judges. It likewise confirms previous research on the agency of enslaved women pursuing lawsuits, suggesting that their rights might be upheld in court.

I would like to thank the entire TraSIS team for their useful remarks on this blog post, and in particular Omar Anchassi for his incredible intellectual generosity and careful editing.

1. Wael Hallaq, "Model *Shurūṭ* Works and the Dialectic of Doctrine and Practice," *Islamic Law and Society* 2 (1995), 109–34 (at 115). ↩
2. Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 92. ↩
3. Ahmed Fekry Ibrahim, "Rethinking the *Taqlīd* Hegemony: An Institutional, Longue-Durée Approach," *Journal of the American Oriental Society* 136 (2016), 801–816 (at 814). ↩
4. As discussed by Mohammad Fadel in his important article "The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*," *Islamic Law and Society* 3 (1996), 193–233. ↩
5. Guy Burak, *The Second Formation of Islamic Law: The Ḥanafī School in the Early Modern Ottoman Empire* (Cambridge: Cambridge University Press, 2015). Other important works in this context include Abdurrahman Atçıl, *Scholars and Sultans in the Early Modern Ottoman Empire* (Cambridge: Cambridge University Press, 2017); James Baldwin, *Islamic Law and Empire in Ottoman Cairo* (Edinburgh: Edinburgh University Press, 2017) and, most recently, Samy Ayoub, *Law, Empire, and the Sultan: Ottoman Imperial Authority and Late Ḥanafī Jurisprudence* (Oxford: Oxford University Press, 2020). ↩
6. On Baybars I, see Peter Thorau, "Baybars I, al-Malik al-Ẓāhir Rukn al-Dīn," in the *Encyclopaedia of Islam, THREE* online: http://dx.doi.org/10.1163/1573-3912_ei3_COM_23709 (accessed 20/7/2023). For his appointment of four chief judges, see Sherman Jackson, "The Primacy of Domestic Politics: Ibn Bint al-Aʿazz and the Establishment of Four Chief Judgeships in Mamlûk Egypt," *Journal of the American Oriental Society* 11 (1995), 52–65; Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qāḍī*s under the Mamluks," *Islamic Law and Society* 10 (2003), 210–28. ↩
7. Ibrahim, "Rethinking the *Taqlīd* Hegemony," 813. ↩
8. Ibid. ↩
9. On the relationship of *shurūṭ* works to judicial practice, see Hallaq, "Model *Shurūṭ* Works," 116–19 and *passim*. On the incorporation of novel legal doctrines in works of substantive law, see idem, "From *Fatwā*s to *Furūʿ*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society* 1 (1994), 29–65. One must be careful not to overly accentuate this difference between genres: see, for example, the important remarks in Samy Ayoub, *Law, Empire, and the Sultan*, 68, 102. ↩
10. Shams al-Dīn al-Minhāji al-Asyūṭī, *Jawāhir al-ʿuqūd wa-muʿīn al-quḍāh wa-l-muwaqqiʿīna wa-l-shuhūd*, 2 vols. (Cairo: Maṭbaʿat al-Sunna al-Muḥammadiyya, 1995), 2:561–70. I thank Ashraf Hassan and Laura Emunds for bringing this work to my attention. ↩
11. For an account of the early divergence of opinion on this question, see Ibn Kathīr (d. 774/1373), *Juzʾ fī bayʿ ummahāt al-awlād*, ed. ʿUmar b. Sulaymān al-Ḥafyān (Beirut: Muʾasassat al-Risāla, 1427/2006). I thank Omar Anchassi for bringing this work to my attention. ↩
12. Ibn or Bint ʿAbd Allāh is used to indicate conversion to Islam. ↩
13. Al-Asyūṭī, *Jawāhir al-ʿuqūd*, 2:565. ↩
14. For a survey of early legal opinion on the ruling on the *umm al-walad* of a non-Muslim master who converts to Islam, see Ibn al-Mundhir (d. 318/930), *al-Awsaṭ min al-sunan wa l-ijmāʿ wa l-ikhtilāf*, ed. Muḥammad ʿAbd al-Salām, 15 vols. (al-Fayyūm: Dār al-Falāḥ, 2009), 8:603–604 (the editor includes useful cross-references to other legal works). Ibn al-Mundhir mentions six opinions: (1) the master is invited to accept Islam, and if he does so, she remains his *umm al-walad*, and if he refuses to do so, she is to obtain her sale-price and is sold (to a Muslim) at this price. If the master converts only after she is sold off, the slave woman cannot be his *umm al-walad*, but she must continue to obtain her sale-price (to compensate him), but if he dies before she does so, she owes him nothing, and is manumitted (this view is attributed to Sufyān al-Thawrī and, less certainly, to the *ahl al-raʾy*); (2) that her sale-price is obtained and she is partly manumitted, and when the remaining part (of her sale-price) is paid, she is manumitted (this view is attributed to al-Awzāʿī); (3) she is manumitted and owes her former master nothing (this view is attributed to Mālik b. Anas); (4) that her sale-price is awarded to her master from the Treasury (*bayt al-māl*), and the master is made to accept this willy-nilly, and she is manumitted (this view is attributed, with some uncertainty, to ʿUmar b. ʿAbd al-ʿAzīz); (5) that she compensates her master every day with the value of her (daily) service (i.e. her service is assigned a value and she 'pays' him through continued service), and if she does so (fully) before her master dies, she is manumitted, and if he dies before she compensates him for her full sale-price, she is manumitted (this view is attributed to ʿAbd Allāh b. al-Ḥasan); (6) that she withdraw from her master (i.e. refrain from sexual relations), who is made to pay her maintenance (*nafaqa*), and can use her for anything besides sexual relations, including renting out her service to others, until he dies, whereupon she is manumitted (this view is attributed to al-Shāfiʿī and Aḥmad, and less certainly to Mālik b. Anas). This (i.e. 6) is the view which Ibn al-Mundhir himself accepts. I owe this footnote to the intellectual generosity of Omar Anchassi. ↩
15. Al-Asyūṭī, *Jawāhir al-ʿuqūd*, 2:565–66. ↩
16. Ibid., 566. ↩

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