Islamic law and Sasanian law

Bodil Hjerrild

A comparison between Sasanian law and Islamic law is a venture wherein there is a need to be aware of the impossibility of finding evidential proof of any connection, only probable indications. On the other hand it is a remarkable fact that precisely where Shīʿī law and Sunnī law differ a similarity may be discerned between Shīʿī and Sasanian law. The special Shīʿī creed also contains traits which seem to be influenced by Zoroastrian religion, just as Islamic ideas about government and administration of an empire owe much to Sasanian thinkers and officials.[1]

Sasanian law proper is known solely from one source, *Mātiyān i hazār Dātistān,* "The Lawbook of 1000 decisions".[2] Unhappily, this important manuscript is incomplete, and the arrangement of the subjects is somewhat arbitrary. These facts, combined with the very difficult language, make the study troublesome, but it is nevertheless an invaluable source of Zoroastrian law. The lawbook is a compilation of court decisions and jurists' opinions on complicated issues, which span different areas of law. One of the difficulties is that many subjects are treated in a way which presupposes knowledge of general terms and their implications. Thus, one has to conclude backwards from a special problem to the general rules. As the law is a compilation of rules from different ages, we are also presented with the divergent opinions and interpretations of later generations of jurists, which give us an interesting insight in the development of the law.

The law was not revealed by God as in Islam; it was made, and the court was presided over, by the clergy, and the highest authority was the *Magupatān Magupat;* the Avestan hymns may include some material which could be transformed into law, but not actual decrees. On the other hand, the law was an expression of the rules which had to be obeyed in order to maintain a pious society, and tradition has, from Sasanian times to this day, played a major role in the prescriptions to be

[1] Lambton, A. K. S., *Theory and practice in Medieval Persian government,* London 1980, ch. 1–4, 6, 10.

[2] Part 1 ed. by J. J. Modi, *Mādigān–i–Hazār Dādistān. A photozincographed facsimile with an introduction,* Poona 1901. Part 2 ed. by T. D. Anklesaria, *The Social code of the Parsis in Sassanian times or Mādigān i Hazār Dādistān,* Bombay 1913. (*MHD* refers to part 1, *MHDA* to part 2.)

followed. The secular and clerical powers cooperated closely for most of the Sasanian period, and this cooperation was also very evident in the reign of Khosroe II (591–628), who is the last Emperor mentioned in the *MHD*. This suggests that the compilation was made during his lifetime.

The Zoroastrian view of life is discemible in the law, not least in the field of family law. The succession law is expressly designed to fulfil the Zoroastrian principle of perpetuating the family line until the end of time, and to procreate sons to perform the obligatory soul services and maintain the family altar. There was, however, also a very strong worldly desire to keep possessions in the family. After the Arab Conquest these issues became even more vital in the Zoroastrian minority communities who fought a fierce, but losing, battle against the islamization of the Iranians. The law codices of these communities, the *Rivāyat*s, of which there are a few extant, were concerned with family law and religious prescriptions, whereas of course criminal law, for instance, was drafted by the Arab rulers. In the main these *Rivāyat*s reveal the same attitudes in the field of family law, but there are certain changes due to the difficult circumstances under which the Zoroastrians conducted their lives; therefore we are thrown upon the *MHD,* if we wish to concern ourselves with Sasanian law in its pure form.

As an example of the similarity between Shīʿī and Sasanian law the law of succession is very interesting. As mentioned above the Zoroastrians attached great importance to the succession. In fact, it was of such paramount importance to procure an heir to the family possessions, that the laws were so designed that it was impossible for a family to die out, if a fortune, even a small one, was involved. The following method was used to this end: the straightforward mode of inheritance was through a son by the principal wife *(pātixšāy)*. If this failed there were other possibilities. The principal wife might marry another man according to a special contract *(cakar)* and his and her children were then legally the offspring of her principal husband *(pātixšāy)*. If the wife could not perform this duty, and the couple had daughters, one of these could marry under a special contract which meant that her children were her father's legitimate heirs. She was then called an *ayōkēn*. A sister of a childless man could do the same. If there were no women of the nearest family available to perform the duty of providing an heir, another means was used. A member of the family, a friend, or a complete stranger, male or female, *(stūr)* could be called upon to enter a marriage where the children would belong to the childless testator. In such a case a pecuniary advantage was

necessary to induce the person concerned whose son, in his turn, would inherit the possessions of, and the obligations towards, the testator. If the testator was dead, the woman *(cakar* wife or *ayōkēn* daughter) or the *stūr* administered the property, until the heir came of age in his fifteenth year.

The remarkable feature in this very complicated scheme of succession is that only heirs in a direct line are legal heirs. This is why the law has to provide the testator with a son, even if he is son only legally, but not biologically. The women played an important role in this whole complicated business; theoretically, several generations of women might succeed one another[3] and administer the property, until a son finally came into the real possession thereof.

If we consider the respective succession laws of the Sunnites and the Shīᶜites, there is a striking and important difference. The traditional Sunnī succession is based on two systems: 1. The traditional tribal law where only male agnates could inherit; e.g., a brother would inherit the whole of a testator's fortune, if there were no sons, while a wife and daughters were left without a share. 2. The prescriptions of the Qur'an by which the tribal laws were mitigated and a new group of heirs by marriage instituted. The Qur'anic prescriptions did not form a fully developed system of rights to inheritance; support from the Hadith is not sufficient, and this has given the Sunnites the chance to supplement the system with their traditional rules. Thus, by the fusion of these two systems agnatic relatives enjoyed priority, insofar as this was not contrary to the Qur'anic rules. In Sunnī law the Qur'anic heirs could not exclude male agnates, which meant, e.g., that if a testator had a brother, a female grandchild was excluded from inheritance. The Qur'an has even been interpreted in such a way that the rules fit the old system: the Qur'an provides that a brother will only inherit, provided that the testator dies without having a child *(walad)*. Sunnī law interprets child as son, whereas Shīᶜī law interprets child as son or daughter or their issue in a direct line.

Shīᶜī succession law includes all relatives in the same priority system where the guiding principle is the degree of relationship, and does not bestow special advantages on agnatic relatives; therefore a female grandchild would inherit in preference to a paternal uncle.

It has been commonly acknowledged that the Sunnī succession laws

[3] Hjerrild, B., Ayōkēn: Woman between father and husband in the Sasanian era, *Orientalia Lovanensia Analecta* 48/1993, pp. 79–86.

were a combination of the Qur'anic prescriptions and the pre–Islamic tribal traditions; but it has been maintained that the Shīᶜī succession was only dependent on the Qur'an[4], and owed nothing to the jurisprudence and legal systems which prevailed in the areas where the Shīᶜī spread. This conception is possibly based on the fact that the Shīᶜites themselves adhere to this view.

The Shīᶜites gained their strongest foothold where the Sasanids had ruled in Iran and present day Iraq. Therefore it is natural to ask whether the Shīᶜī succession law continues a trend which can be distinguished in Sasanian law, especially in the points where it differs from Sunnī law. If this is so, the development of Shīᶜī law is analogous to that of the Sunnī with regard to the assimilation of existing rules.

To return to the Sasanian succession we can ignore the intricate ways of securing heirs for the moment and focus upon the main principles: there was no right of primogeniture, every son inherited an equal share, the principal wife the same as a son, and daughters half of this share. There is no evidence of other relatives inheriting. This is naturally a spur to fulfil the religious duty of continuing the family line by some of the means I have decribed above; moreover these means were necessary, if the family possessions were to remain in the family. The notion of inheritance in a direct line only is a remarkable feature of Sasanian law.

The Qur'anic rules about wives' and daughters' right to inherit were on Arabic soil a new phenomenon which gave the women advantages which they had not known hitherto. In Iran, however, it was a matter of course that women inherited, and that succession might be carried on through them; thus the Sunnī version of Islamic law meant a step backwards for the Iranian women.

The question of the succession of Muḥammad caused discord and the eventual rupture between the Sunnites and the Shīᶜites. The Sunnites maintained that the successor should be found amongst the agnatic relatives, while the Shīᶜites asserted that the succession had to go through Muḥammad's daughter Fāṭimah and her husband to their sons and their descendants. The Sunni point of view reflects the patriarchal, patrilinear system which aimed at keeping the possessions and power within the tribe by its emphasis on the male agnatic heirs. The Shīᶜites were not so much concerned with tribes as with families. In their view the direct descendants of Muḥammad through Fāṭimah were the legitimate succes-

[4] Coulson, N. J., *Conflicts and tensions in Islamic jurisprudence,* Chicago 1969.

sors of the Prophet, and yn Sasanian terminology she would have been *ayōkēn,* daughter, ᶜAlī *stūr,* i.e. intermediary successor. I propose that their viewpoint reflects the traditional succession law which they had followed for centuries. Thus, the Shīᶜites did not form their succession law on the basis of the example they set by choosing ᶜAlī and his sons as successors; on the contrary: they chose ᶜAlī and his sons as successors and interpreted the Qur'anic inheritance laws according to their former traditions.

The second point on which I want to compare Sasanian and Islamic law is, like the first, one where Shīᶜī and Sunnī jurisdictions differ, namely the question of the temporary marriage contract, *mutᶜa*[5]. Sasanian law included marriage contracted for a specified length of time, which was agreed when the parties married. This type of marriage was used in general as one means to procure heirs for a man lacking an heir. For instance, a daughter could enter a 10 year's marriage contract. If her father died without male heirs in this period, no intermediary successor would be installed, but his daughter would fulfil the duty of providing him with a son after the ten years had elapsed. This means that her progeny during the 10–year period belonged to her husband, and thereafter she had to enter another type of marriage either with him or with another man to procure an heir for her father.[6]

Another type of temporary marriage occurred, if a daughter took a husband of her own choice without her father's sanction; in this case she might choose to keep her husband forever, and in consequence lose her right to a share of the patrimony, or she might choose to let her marriage be temporary and retain her right of inheritance.[7] In the first case her father would lose his daughter's income, in the second he would keep it. The daughter thus had the choice of having economy and right of inheritance in common with either her husband or her father. This meant, in fact, that she had the right to choose her own guardian *(sardār).* In a temporary marriage the husband and wife did not have

[5] Hjerrild, B., En sammenhæng mellem sasanidisk og shī'itisk familieret, *Islam: familie og samfund,* Århus 1984.
Macuch, M., Die Zeitehe im sasanidischen Recht – ein Vorläufer der shiᶜitischen mutᶜa–Ehe in Iran?, *Archaeologische Mitteilungen aus Iran,* 18, Berlin 1985, pp. 187–203.

[6] *MHD* 23.1–4.

[7] *MHD* 24.7– 10. See also Hjerrild, B., The *Cakar* marriage contract and the *cakar* children's status in *Mātiyān i hazār Dātistān and Rivāyat i Ēmēt i Ašvahistān, Orientalia Lovanensia Analecta,* 16, Leuven 1984, pp. 103–114.

economic relations, at least by law, nor did they inherit each other. But as far as can be inferred from the scanty material, the economic relations depended on which kind of temporary marriage it was. In the case where the marriage is based on levirate, there is certainly separate economy. Opinions among jurists differ as to whether or not the bride's dowry belongs to her intermediate husband in the case where the marriage is not based on levirate.[8]

As we have seen from this short discussion there were several ways of concluding a marriage contract; actually, it seems to me that it was possible to agree on exactly *the* contract which would fit any given situation, the only condition being that one accepted the economic results of one's choice. The *cakar* marriage whereby a wife bears children who would legally belong to her first husband was probably also of the sort which might be concluded for a specific period, but we have no evidence for this; yet this type of marriage was very similar to the type by which a daughter bears children for her father, so it would be rather peculiar, if it had to be for life. Children born in these temporary marriages were all legitimate. Their father could be their biological father, but if the marriage was of the levirate kind, their father was not the biological father but the man to whom their mother owed a duty to bear heirs.

The *mutʿa* marriage exists now only among the Shīʿites, whereas the Sunnites abolished this type of marriage contract (except sometimes in Mecca), although it was in use in Arabia in pre-Islamic times. The common features in the Sasanian and the Shīʿī temporary marriage are that in *mutʿa* there is no joint economy, at least not necessarily, and the parties have no mutual right of inheritance. Likewise, the children are the legitimate progeny of their father, whereas in the Arabic temporary marriage in pre-Islamic times they were considered solely the offspring of their mother. This might indeed be the very reason why the custom continued in Shīʿī areas but not in Sunnī. The Shīʿī temporary marriage, constructed in accordance with a Sasanian model, produced legitimate children, but if the Sunnites allowed a temporary marriage based on their traditional temporary marriage contract, the children would be illegitimate, and thus according to the Islamic code they would be born as a result of adultery. Furthermore, in Iran this type of marriage was such an integral part of the family pattern, that it would have seemed

[8] *MHDA* 2.7–11.

strange to condemn it, especially when in many instances it was extremely practical.

I am convinced that it will be possible to uncover other examples of a similar kind, but a systematic comparative legal study between Sasanian and Shīʿī law ought to be done by a team of scholars.