AN EVALUATION OF PRE-MODERN FIQH RULES PERTAINING TO THE MARITAL PRACTICES OF NON-MUSLIMS

M. Mehdi Ali

Abstract

The objective of this paper is to examine certain normative pre-modern Islamic legal rules regarding marital practices of non-Muslims, including those who later accepted Islam, as stipulated by a variety of jurists in manuals of law representing the positions of multiple legal schools. The rules regarding marital practices are particularly interesting because marriage was a highly (perhaps even the most highly) regulated feature of Islamic law, and thus rules pertaining to it shed light on broader concerns that guided the process of rule-making conducted by jurists. In conducting this analysis, I identify three overarching principles that appear to have guided Islamic marital rules pertaining to non-Muslims: (1) First, I found that there was a large degree of autonomy granted to non-Muslims in practicing their own marital customs, as long as they did not seek intervention from Islamic authorities; (2) Second, I found that most non-Islamic practices of non-Muslims that took place prior to their conversion to Islam did not pose a concern for Muslim jurists; however, practices pertaining to the parties to a marital contract were the subject of concern for Muslim jurists; and (3) Third, I found that jurists were highly concerned with keeping a certain religious hierarchy intact, especially when it came to intermarriage between Muslims and non-*kitābīs*. I argue that the seemingly liberal laws pertaining to non-Muslims derive from (A) a conception of the world held by jurists that is best understood as akin to imagined political communities, and (B) an interest in ensuring consistency in the law.

Note: All translations of primary source documents are my own.

About the Author

M. Mehdi Ali is currently a PhD Candidate in the Department of Religion at the University of Southern California, where his research focuses on Islamic legal and exegetical discourses using primary source materials in Arabic, Persian, Turkish, Azerbaijani, Urdu, and Kutchi. Mehdi graduated from Stanford University with a JD in Law, MA in Sociology, and BA in International Relations. He has also completed coursework at University of Oxford, UC Berkeley, UCLA, University of Wisconsin-Madison, Arizona State University, Qasid Arabic Institute, and Chulalongkorn University. He is a former

Fulbright Scholar (University of Jordan), Foreign Language & Area Studies Fellow (Persian), Chappell Lougee Scholar (India), and has received research funding from Stanford's Abbasi Program in Islamic Studies (Pakistan) and Stanford's Center for South Asia Studies (India). Mehdi has presented and published multiple academic articles in the fields of Islamic studies and law, including *Shiʿi Legal Discourses in Iraq and Lebanon: Exploring the Intersection of Juristic Rulings and State Legal Regimes* (Loyola of Los Angeles International & Comparative Law Review, forthcoming in 2022), *The Theory of the Imamate in the Work of Al-Sharīf Al-Murtaḍā* (Journal of Shi'a Islamic Studies, 2019), *Ijtihad Through the Lens of Critical Theory* (Rutgers Journal of Law & Public Policy, 2018), and *Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category* (Georgia Journal of International and Comparative Law, 2018). He is also co-author of *Living Under Drones*, the first major human rights investigation of U.S. drone attacks in Pakistan.

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Introduction

Justice Scalia famously argued in 1989 that "the Rule of Law is the Law of Rules."[1] His poignant criticism of haphazard rulemaking is the point of departure for this article, where I attempt to demonstrate that the conventional wisdom regarding Islamic law in American legal discourse is deeply flawed. American courts have repeatedly referred to Islamic law pejoratively as "Qadi justice"—a concept that "centers on the image of the qādī (Arabic for judge) as a medieval Muslim judge who issued arbitrary, irrational, and expedient decisions without respect for general principles of law."[2] Based on the

1. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1175 (1989).

2. Intisar A. Rabb, *Against Kadijustiz: On the Negative Citation of Foreign Law*, 48 Suffolk U. L. Rev. 343, 348–49 (2015). The phrase "Qadi justice," originally derived from the term "*kadijustiz*" made famous by Max Weber, has become a term of art in U.S. judicial

Islamic law manuals analyzed in this article, I argue that normative pre-modern Islamic legal rules demonstrate a systematic and purposive methodology that logically follows from Islamic jurists' conception of the world. The objective of this paper is to examine certain normative pre-modern Islamic legal rules regarding the marital practices of non-Muslims, including those who later accepted Islam, as stipulated by a variety of jurists in manuals of law representing the positions of multiple legal schools. These rules provide a particularly interesting case study, as they grapple with perhaps the most highly regulated feature of Islamic law. As such, rules regarding marital practices shed light on broader concerns that guided the process of rulemaking conducted by jurists. In conducting this analysis, I identify trends and make sense of seeming inconsistencies among and within the jurists' approaches. In doing so, I demonstrate that what is often referred to as "Qadi justice" was instead based on a set of broader legal principles.

Through an examination of Islamic legal texts, I identify three overarching principles that appear to have guided Islamic marital rules pertaining to non-Muslims:

First, I found that there was a large degree of autonomy granted to non-Muslims in practicing their own marital customs, as long as they did not seek intervention from Islamic authorities. Regulating the practices of non-Muslim communities would have been logistically difficult, and it is unlikely that imposing Islamic rules on such communities would have achieved any critical objective. I argue, however, that such an approach derived largely from a highly stratified conception of society. Even though heterogeneity and intermixing of various communities was common across Islamic empires, I argue that jurists tended to envision religious groups as comprised of what Benedict Anderson would label "an imagined political community."[3] That is to say, jurists did not feel compelled to interfere in the marital lives of non-Muslims because, in their worldview, such individuals existed outside the domain of the Islamic nation.

Second, I found that most non-Islamic practices of non-Muslims that took place prior to their conversion to Islam did not pose a concern for Muslim jurists. However, practices pertaining to the parties to a marital contract were the subject of concern for Muslim jurists. The first clause of this principle appears to be intuitive, given that jurists promulgating laws based on Islamic principles would seek to facilitate conversion to Islam. I argue, however, that such permissiveness was based on a concern for preserving the integrity of the marital contract. In other words, where elements other than the parties to a marital contract are concerned, jurists appeared to care deeply about ensuring

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opinions. Asifa Quraishi-Landes has documented a list of examples where the term is used. Asifa Quraishi, *On Fallibility and Finality: Why Thinking Like a Qadi Helps Me Understand American Constitutional Law*, 2009 Mich. St. L. Rev. 339, 340 (2009).

3. Benedict Anderson, Imagined Communities 6 (2006).

that such a contract was honored for the sake of ensuring consistency in the law. Because jurists viewed the world through the lens of imagined political communities, the process of conversion itself was not their central concern so much as their focus on the individual post-conversion. Thus, with respect to the second clause of this principle, parties to a marital contract were of particular concern to jurists because they stand as visible and ongoing features of such a contract (as opposed to other elements of the contract, e.g., the *mahr*, that do not require further engagement after fulfillment), and therefore pertain to the regulation of matters that continuously impact the individuals' status within the domain of Islam.

Third, I found that jurists were highly concerned with keeping a certain religious hierarchy intact, especially when it came to intermarriage between Muslims and non-*kitābīs*.[4] I posit that preserving such a hierarchy (i.e., by applying Islamic rulings to inter-religious marriages), even at the risk of violating the integrity of a marital contract or increasing the burden on a new convert to Islam, is a logical extension of Anderson's theory of nationalism. Establishing a robust Islamic state, ostensibly one of the main goals of Islamic jurists, required stable Islamic family units and positive reproductive outcomes.

I. Respect for Marital Customs of Non-Muslims

The rules regarding marriage in pre-modern fiqh manuals provide interesting insight into the logic of jurists who operated within an Islamic legal framework but were cognizant of and intentional about parallel religious and cultural communities and practices. In *al-Mughnī*, a highly influential Ḥanbalī text, Ibn Qudāmah states that the overarching framework for regulating marriages among non-Muslims is that such marriages should generally align with the rules pertaining to marriages for Muslims.[5] To the extent that non-Islamic practices exist, the only qualifications to this general principle are that (1) non-Muslims conducting such practices do not seek the judgment of Islamic authorities, and (2) "they should believe it [i.e., the non-Islamic act] is permitted in their religion."[6] With respect to the second qualification, al-Dasūqī makes a similar argument in his discussion of non-Islamic marriages: "We do not concern ourselves with them [i.e., their marital practices]."[7]

Through these rules, non-Muslim communities that exist within an Islamic state are trusted with the ability to self-regulate and self-organize with regard to the long-standing rules of their own communities. Furthermore, the only criterion promulgated for the acceptability of such practices was that they

4. Within the Islamic legal framework, the term *kitābī* generally refers to adherents of religions with revealed texts.

5. Muwaffaq al-Dīn Abu Muhammad ʿAbd Allāh Ibn Aḥmad Ibn Muhammad Ibn Qudāmah, 10 Al-Mughnī 37 (1997).

6. *Id.*

7. Shams al-Dīn al-Shaykh Muḥammad ʿArafa al-Dasūqī, 2 Ḥāshiyat al-Dasūqī ʿalá al-Sharḥ al-Kabīr 267 (2001).

form a part of the belief system of the parties to a marital contract. Thus, one compelling perspective is that the political and cultural milieu of the classical period, where "[t]he Islamization of the Middle East did not transform the basic institutions of the economy, or of family, tribe, and empire," set the stage for a multiculturalist environment.[8]

I argue that the stipulations for self-regulation were based on a highly stratified view of religious communities. This is evidenced by the repeated injunctions, as further demonstrated in the examples below, that self-regulation is contingent upon such marital practices being part of "their religion."[9] A rich body of scholarship argues that in pre-modern societies, the individual was largely subsumed within the group.[10] For our purposes, this means that the religious beliefs of an entire tradition were the relevant metric for analysis of individual marital practices. An understanding of the historical context of the time and space during which these texts were written makes it clear that "their religion" likely refers to the doctrines of the organized religion more generally, rather than the individual beliefs of the adherents of the faith.

We will examine hypotheticals mentioned in the work of Al-Ṣāwī, who wrote a commentary on *al-Sharḥ al-Ṣaghīr* of Shaykh Al-Dardīr, which is among the standard Mālikī texts used at al-Azhar, and Al-Mawṣalī, whose magisterial legal manual is still among the standard Hanafī texts in the field. They comment on a number of possible formulations that elucidate the principles stated above.

In his discussion on the marriage of a *dhimmī*[11] couple, Al-Mawṣalī states the following:

> The *dhimmī* and *dhimmī*yya marry without a mahr or with a dead animal, and [if] this is permitted in their religion, that is permitted [i.e., under Islamic law] and there is no mahr for her.[12]

This indicates that a marriage conducted without *mahr*[13] or with the carcass of an animal (both of which would corrupt, but not nullify, an Islamic marital contract), does not invalidate the marriage of *dhimmīs* under Islamic law or create any sort of corruption in the marital contract. Al-Mawṣalī goes on to make an explicit connection between the permissibility of such an action in the religion of the *dhimmī* couple as being the causal factor for its permissibility

8. Ira M. Lapidus, A History of Islamic Societies 100 (2d ed. 2002).

9. Ibn Qudāmah, *supra* note 5, at 37.

10. According to Jacob Burckhardt, a 19th century Swiss cultural historian, before the Renaissance in Italy, "man was conscious of himself only as a member of a race, people, party, family, or corporation—only through some general category." Jacob Burckhardt, The Civilization of the Renaissance in Italy 129 (1904).

11. The term *dhimmī* usually refers to communities considered to be "People of the Book" (e.g., Christians, Jews, Sabians, and others).

12. ʿAbd Allāh ibn Maḥmūd ibn Mawdūd Al-Mawṣalī, 3 Al-Ikhtiyār li-taʿlīl al-Mukhtār 111 (1998).

13. Mahr is a technical legal term that refers to a bridal gift that forms an integral part of an Islamic marital contract.

under the *Sharīʿa*.[14] This rule exemplifies the stratified worldview shared by Ibn Qudāmah and al-Dasūqī, both of whom were permissive in marital laws with respect to non-Muslims.

Al-Mawṣalī provides further examples regarding acceptable marital practices of *dhimmīs*. He states, for example, that no further obligations are required of a *dhimmī* couple that conducts a marriage without witnesses or during an *ʿidda*[15] of another non-Muslim individual.[16] Obviously, both of these acts would cause a problem in an Islamic marriage,[17] but Al-Mawṣalī considers them acceptable provided that this is permissible in their own belief systems.[18] In another section, he further elaborates on the rulings regarding *dhimmīs*, stating that "there is no *ʿidda* for a *dhimmīya* in a divorce from a *dhimmī*."[19] He does not provide as explicit of a justification here as with prior examples, but we can infer that the reasoning is its permissibility in a non-Islamic belief system.

In his discussion on the same subject, Al-Ṣāwī states the following: "The corrupt *sadāq* [i.e., mahr] of the disbelievers takes effect if the contract was based on it."[20] Here, I interpret Al-Ṣāwī's reference to the contract of the disbelievers to be a version of the same argument provided by Al-Mawṣalī—i.e., the contract was drafted as such because of the disbelievers' belief system, and thus the marital act, which derives from such belief system, is valid.

Jurists of the Hanbalī, Hanafī, and Mālikī schools did not appear to be concerned with non-Muslims conducting non-Islamic marital acts, as long as they were within the bounds of the non-Muslims' own faiths and regulating their own affairs. When non-Muslims sought the intervention of Islamic authorities, however, the jurists became more restrictive in their approach.

II. Seeking a Judgment from an Islamic Court

Where non-Muslims sought the intervention of an Islamic court, jurists felt obligated to employ elements of Islamic law in constructing their rulings. This principle was introduced earlier in this article as one of the qualifications from Ibn Qudāmah (i.e., non-Islamic marital practices conducted by non-Muslims are accepted as long as they do not seek judgment from Islamic authorities). In support of his statement that "they [i.e., non-Muslims] do not seek our judgment"[21] Ibn Qudāmah cites Chapter 5, Verse 42 of the Qur'an,

14. *Id.*

15. *ʿidda* is a technical legal term that refers to a set period of time after divorce or death of a woman's husband during which time she is prohibited from marrying another man.

16. *Id.*

17. It is not clear from the readings whether these acts would invalidate the marriage or just corrupt the marital contract.

18. Al-Mawṣalī, *supra* note 12, at 111.

19. *Id.* at 173.

20. Al-Sheikh Ahmad Al-Ṣāwī, bi-Lughat al-Sālik li-Aqrab al-Misālik, 2 Ḥāshiyat Al-Ṣāwī ʿalá al-Sharḥ al-Saghīr 273 (1995).

21. Ibn Qudāmah, *supra* note 5, at 132.

which addresses the Prophet directly and states that he shall not be harmed if he does not judge or if he turns away from non-believers.[22] Ibn Qudāmah extrapolates this to mean that not imposing rules upon non-Muslims will not negatively impact Muslims. Al-Dasūqī also indicates this principle in his text: "If they seek judgment from us, we judge between them according to Islamic rules."[23] I understand this perspective to be the result of a natural tension that occurred because pre-modern jurists, in my view, were wedded to a binary perspective of the world (i.e., an imagined Islamic community versus imagined non-Muslim communities). Thus, when non-Muslims sought their judgment, the logical corollary was the application of Islamic laws to such non-Muslim communities.

In one example, where Ibn Qudāmah is discussing the case of an individual who has sought the judgment of an Islamic court, he states the following:

> If a *dhimmī* marries a *dhimmīya*, if it is a condition [when he married her] that there is no *sadāq* for her, or he did not mention the *sadāq* at all, she has the right to ask for it to become an obligation, if the separation occurred before consummation. If the separation occurred after consummation, she has the right to mahr al-mithl, just as in the nikāḥ[24] of Muslims.[25]

If the parties to this contract had not sought the judgment of Muslim authorities, the woman would have been left without recourse, as we observed in a previous Part, where such a marriage was allowed because it was "permitted in their religion."[26] However, given that she sought their judgment, jurists aimed to rule with Islamic principles, even if the integrity of the original marital contract was destroyed in the process. In fact, the ruling here goes even further than it would in an Islamic marriage, wherein a separation that occurs before consummation entitles a woman to only one-half of the *mahr* amount.[27] In this particular case, however, she is entitled to ask for the full *sadāq* amount.[28] It is not immediately clear why this is the case, although one can surmise that jurists felt obligated to leave no stone unturned in providing protection to an individual once she has sought the assistance of Islamic authorities. If the separation occurs after consummation, she has the right to ask for *mahr al-mithl*,[29] which parallels the ruling for Muslims.[30] The author goes on to point out that al-Shāfiʿī agrees too with this ruling.

On the other hand, Abū Ḥanīfa has stated:

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22. The Qur'an 5:42 (M.A.S. Abdel Haleem trans., Oxford Univ. Press rev. ed. 2010).
23. Al-Dasūqī, *supra* note 7, at Vol. 4, 117.
24. In this context, the term nikāḥ refers to an Islamic marital contract.
25. Ibn Qudāmah, *supra* note 5, at 35.
26. *Id.* at 37.
27. Abu al-Walīd Muḥammad Ibn Aḥmad Ibn Muhammad Ibn Rushd, 3 Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid 46 (1994).
28. Ibn Qudāmah, *supra* note 5, at 35.
29. *Mahr al-mithl* is a technical term refers to an amount of dowry that is appropriate for a woman based on her beauty, wealth, social status, and a variety of other factors.
30. Ibn Qudāmah, *supra* note 5, at 35.

> If he marries her with the condition that there is no mahr for her, then there is nothing for her, and if he does not mention it at all, in this case there are two narrations. One of them: There is no mahr for her. And the other: She has mahr al-mithl.[31]

These narrations speak to the competing priorities of jurists. If the woman is not given any *mahr*, even after she seeks the intervention of Muslim authorities, this indicates that jurists are privileging the religious practices of the woman's community. I argue that such privileging occurs because jurists view humankind as divided into a highly stratified collection of groups. On the other hand, if she is given *mahr al-mithl*, this supports the thesis that Muslim jurists felt compelled to preserve individual rights when someone sought their help.

Quoting Ahmad ibn Hanbal, Ibn Qudāmah states with respect to a Zoroastrian woman seeking the judgment of an Islamic court:

> If she is under [i.e., married to] her brother or father, then he divorces her or he dies, then she seeks a judgment from the Muslims with a request for her mahr: There is no mahr for her. And this is because the nikāḥ is invalid from the beginning. It is not acknowledged in Islam.[32]

In order to enforce a *mahr* for a non-Muslim married under a contract that does not mention one, the woman would have to seek the judgment of the court. In the case of the Zoroastrian woman, however, *mahr* was still denied after she sought judgment because the jurist classifies the nikāḥ as invalid by virtue of the fact that it is between *mahārim*[33] and is being evaluated by Islamic authorities, even though it is not an Islamic contract. This perspective contrasts with the second narration regarding Abū Hanīfa, which provides for *mahr al-mithl* for the woman after consummation.[34]

The act of seeking judgment from Islamic authorities pushed jurists to transcend the boundary from self-regulation to imposition of Islamic laws on non-Muslim communities.

III. Converting to Islam

For Muslims who married before they converted to Islam, the acceptability of marital practices broadly fell into two categories: 1) If the practices pertained to an aspect of the marital contract other than the parties to the contract, the integrity of the contract was generally preserved; 2) If the practices pertaining to the parties to the contract were unacceptable, then the integrity of the contract was overridden by concern for conforming the practice to Islamic requirements. Ibn Rushd states a version of this in his book:

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31. *Id.*
32. *Id.*
33. A *mahram* (pl. *mahārim*) is a member of the opposite gender with whom it is impermissible to enter into a marriage (e.g., parents, siblings, children, etc.).
34. Ibn Qudāmah, *supra* note 5, at 35.

> With respect to marriages that were contracted prior to Islam [i.e., the parties' acceptance of Islam] and then became subject to Islam, they agreed about it that if they both converted to Islam together, meaning, from the husband and the wife, and whoever is party to the marital contract is permissible under Islam from the beginning, then Islam permits that [i.e., the marriage].[35]

A. *Islamically Non-Compliant Dowry*

We will begin by exploring the rulings of Al-Mawṣalī, who provides details regarding the acceptability of an Islamically non-compliant dowry when one or both parties converts to Islam.

> If the *dhimmī* marries the *dhimmīya* with khamr or *khinzīr*, and then they accept Islam or one of them becomes Muslim, she gets that dowry as they are. If not [i.e., he does not have them], for khamr she gets the value of it, and for *khinzīr* she gets mahr al-mithl.[36]

Al-Mawṣalī's ruling here complies with the principle expressed by Ibn Rushd (i.e., the marriage is permissible in Islam), but a slight distinction exists in that the acceptability of the Islamically non-compliant *mahr* changes depending on whether the husband possesses such *mahr* upon conversion to Islam. If he does have the *mahr*, then the ruling is that the wife gets it without any changes. Here, the jurists appear to want to preserve the integrity of the original marital contract if he is already the owner of a prohibited item. If he does not possess it, then the ruling is still the same for *khamr*[37] (i.e., she gets it as is), but for the *khinzīr*,[38] this is substituted with *mahr al-mithl*. The reason for this distinction is unclear from a reading of the text, although one conceivable reason is that the prohibition on *khamr* in the Islamic tradition came about more gradually (i.e., in the form of various stages of Qur'anic revelations)[39] than the prohibition on *khinzīr*.[40] This may have resulted in categorizing the *khamr* as an item that is acceptable from a transactional perspective, in contrast to *khinzīr*, which, due to the nature of Qur'anic revelations, may not have been transactionally acceptable. One could then extrapolate from this line of reasoning that Hanafī jurists may have been interested in balancing the integrity of a marital contract with adherence to Islamic requirements to the maximum extent possible, although obviously neither objective is neatly achieved in this instance.

With regards to *dhimmīs* who entered into a marriage without a *mahr*, or with the *mahr* of a dead animal, or without witnesses, or in the *ʿidda* of another *kafir*, who then later convert to Islam, Al-Mawṣalī states that there is no need

35. Ibn Rushd, *supra* note 27, at 91.
36. Al-Mawṣalī, *supra* note 12, at 112.
37. *Khamr* is a technical term that refers to an alcoholic beverage.
38. *Khinzīr* is a term that refers to swine.
39. *See generally* Kathryn M. Kueny, The Rhetoric of Sobriety: Wine in Early Islam (2001).
40. *See, e.g.*, The Qur'an, *supra* note 22, at 2:173, 5:3, 6:145, 16:115.

to repeat the marriage under an Islamic formula, and no post-conversion rectification is required.[41] Here again, we find Al-Mawṣalī going to great lengths to preserve the integrity of the original marital contract. The fact that the *mahr* of a dead animal does not need replacement with *mahr al-mithl* is of particular interest, since it appears to dovetail with the legal rule that allowed for *khamr* to be an acceptable *mahr*. Again, one conceivable answer is that a dead animal is still a transactionally acceptable item.

Al-Ṣāwī also comments on a similar issue. In reference to a nikāḥ with a corrupted dowry, he states the following:

> It is acknowledged if they accept Islam because the wife enabled him to have intercourse with her at a time when she thought it was permissible. But if there is no receipt of the *sadāq* al-mithl nor intercourse before their acceptance of Islam . . . the husband has the choice to pay *sadāq* al-mithl and this is the way he affirms the nikāḥ.[42]

In other words, conversion to Islam does not invalidate the marriage or the marital contract. For the payment of the *mahr* after the conversion, however, the husband has the option of paying the dowry with a corruptive item (e.g., *khamr* or *khinzīr*), or with *mahr al-mithl*. One interpretation here would be that the jurist is trying to reduce the burden on the new convert to Islam. This argument falls short, however, because the jurist does not make a distinction between a husband that already possesses such item (the logical inference being that this would reduce the burden on the husband) versus one that does not (i.e., for this individual it would not matter that a specific *mahr* was specified, since he can give something else of equivalent value). A more compelling argument is that the jurist was more concerned about the marital contract itself, rather than what comprises the *mahr* (whether corruptive or not), which, as will be established below, does not necessarily destroy even an Islamic marital contract.

To further elucidate these rulings, it will be helpful to understand the nuances in the rulings regarding the validity of a marital contract among Muslims that have *khamr* or *khinzīr*. In the case of an Islamic marriage that is conducted with a *mahr khamr* or *khinzīr*, Al-Mawṣalī states that the marital contract is valid, and that the *mahr* is *khamr*.[43] Ibn Rushd provides further details regarding the various schools:

> If the *sadāq* consists of khamr or khinzir or fruit that has not yet begun to ripen, or a wandering camel, Abū Hanīfa says [regarding it]: The contract is valid if mahr al-mithl occurs in it. From Mālik there are two narrations with regards to it. The first of them: The corruption of the contract and its rescission before intercourse and after it, and this is also Abu Ubayd's

41. Al-Mawṣalī, *supra* note 12, at 111.
42. Al-Ṣāwī, *supra* note 20, at 273.
43. Al-Mawṣalī, *supra* note 12, at 104.

> opinion. Second: That if it [i.e. the marriage] is consummated, it [i.e. the marital contract] is established and she has [the right to] *sadāq* al-mithl.[44]

Ibn Rushd's summary of Abū Hanīfa's position on the matter differs from Al-Mawṣalī's summary. Al-Mawṣalī provides that *khamr* is required, whereas Ibn Rushd states that Abū Hanīfa only requires *mahr al-mithl*. This difference is difficult to reconcile and weakens the argument that the Hanafī perspective is concerned with preserving the integrity of the original marital contract.

With respect to the Mālikī point of view discussed in the quotation above, according to Ibn Rushd, there are two different perspectives. The first perspective appears to nullify the contract because of the objectionable *mahr*, whereas the second perspective acknowledges the existence of a marital contract if consummation occurs, although it does not honor it fully, instead requiring that *mahr al-mithl* be paid in lieu of the original objectionable *mahr*. Ibn Rushd believes the differences can be accounted for by understanding whether "the judgment of nikāḥ [is comparable] to the judgment of sale."[45] According to Ibn Rushd:

> The one who said that its judgment is the judgment of sale—they said: the nikāḥ becomes corrupted with the corruption of the *sadāq*, just as a sale becomes corrupted with the corruption of the price. The one who said: The validity of the *sadāq* is not a condition of the validity of the nikāḥ, by the evidence that the mention of *sadāq* is not a condition with regards to the validity of the contract, said: the nikāḥ is valid, and is valid with the *sadāq* al-mithl.[46]

The second opinion here aligns partially with Al-Ṣāwī's formulation above, although the reader will note that Al-Ṣāwī provides the option of paying either the original *mahr* or the *mahr al-mithl*.

B. *Impermissible Parties to a Marital Contract*

We will now move to rulings regarding impermissible parties to a marital contract, which has provided perhaps the most interesting body of rulings in the field. Ibn Rushd provides the example of a man who is married to more than four women, with two of those women being sisters, and then converts to Islam.

> Mālik said: He chooses four from them, and the one who he likes from the two sisters. This was also said by al-Shāfiʿī, Ahmad, and Dāwūd. Abū Hanīfa and al-Thawrī, and Ibn Abī-Layla said: He chooses the first ones that he contracted with. And if he married them in a single contract, there is a separation between him and them.[47]

None of the jurists described by Ibn Rushd allow for a marriage to exist wherein a husband would be married to more than four women or married to any combination of women who might be sisters. As long as contracts fit within

44. Ibn Rushd, *supra* note 27, at 51.
45. *Id*.
46. *Id.* at 51–52.
47. *Id*. at 91.

certain Islamic bounds, jurists tried to preserve the integrity of marital contracts. None of the individual marital contracts are considered invalid, despite the fact that, in aggregate, the marriages would be considered objectionable. However, where a contract itself contains a corruptive element, and that element pertains to the parties, then the contract is considered invalid altogether.

This begs the question: Why was there such a deep concern for the parties to the marital contract? One conceivable reason would be the desire to follow the Qur'anic text. This answer seems incomplete, however, since dowry is also mentioned in the Qur'an,[48] yet certain jurists are willing to overlook this requirement even after conversion to Islam. A more likely answer is that, unlike a dowry, the parties to a contract are ongoing and visible features of an Islamic marriage. Allowing *mahārim* to remain married, for example, would mean that the commandments of God would be publicly undermined for as long as such relationship existed, which would undoubtedly challenge the societal norms being promulgated by the jurists. Thus, the marriage of the women in the scenario described by Ibn Rushd is considered nullified. Based on this logic, we can extrapolate that even if the scenario consisted of a marriage contract involving only two women, neither of whom were sisters, it would still be nullified, since the corruptive factor would be present in the contract.

Al-Dardīr, the author whose text Al-Ṣāwī wrote a commentary on, provides agreement on this point:

> If a disbeliever accepts Islam and he has many women under him [i.e., married to him] or women who it is prohibited to have as wives at the same time, he should choose four, i.e., four of them (if he accepts Islam with more than four). Even if the chosen ones are the last ones in the order of marriages or he married them all with a single contract, whether he had intercourse with them or not. And if he wills, he can choose less than four or choose none.[49]

In other words, if a disbeliever who converts to Islam is married to more than four women, then he must reduce his number of wives until he becomes Islamically compliant. This is the case whether or not the marriages were the result of a single contract. Although it is not stated explicitly, we can assume that if the marriages were conducted pursuant to separate contracts, each individual contract would still be valid, but in aggregate, they would be invalid.

He goes on to further state:

> Or he can choose one of two sisters or one of the sisters of the ones that it is prohibited to marry at the same time. Whether he married her first or last, married both of them at the same time or one after the other, had intercourse with both or with one or no intercourse at all. And he can choose a mother or the daughter and leave the other. If he didn't enjoy her, meaning if he didn't enjoy one of them, whether the chosen one was married first

48. *See, e,g.*, The Qur'an, *supra* note 22, at 4:4.

49. Abu al-Barakāt Ahmad Ibn Muhammad Ibn Ahmad Al-Dardīr, 2 al-Sharḥ al-Saghīr ʻalá Aqrab al-Masālik ilá Madhab al-Imam Mālik 424 (2010).

> or last, or whether they were married in one contract, otherwise if he had intercourse with both of them, they become prohibited and if he had intercourse with one she becomes eligible to keep if he wills and the other one becomes prohibited forever.[50]

Here, he is commenting on a situation where a man has married multiple wives and two of them are sisters (which would be prohibited under an Islamic contract). In this case, al- Dardīr is in agreement with Ibn Rushd in that only one sister can be chosen. Interestingly, Al-Dardīr also provides a hypothetical where a man has married both a mother and daughter and has had intercourse with both of them.[51] In this scenario, neither is permissible in a marriage after conversion. Intuitively, this does not make much sense, since one would think that the ruling of a mother and daughter should be analogized to the ruling of two sisters. Perhaps the jurists are concerned here for the integrity of familial relationships, with the theory being that the bond of two sisters can withstand the trauma of one being divorced due to the other, but on account of the nature of the relationship between a mother and daughter, this might cause irreparable damage. This theory is speculative, and further work will need to be done to comprehend the difference here.

Lastly, we will look to the ruling documented by Al-Mawṣalī regarding marriage between *mahārim*, which adds nuance to the rulings examined thus far with respect to the parties to a marital contract:

> If a Zoroastrian accepts Islam, he must separate between him and whoever he marries of his mahārim.[52]

If a man becomes a Muslim and he is married to any *mahram*, a separation without *talāq* (i.e. divorce) occurs, because the marriage is considered invalid in the first place. This is similar to the ruling provided by Ibn Qudāmah, where a woman who was married to her father or brother seeks the intervention of an Islamic court in order to receive *mahr*, which he states would be denied because the marriage itself is considered invalid from the beginning.

In this Subpart, I documented two phenomena that I have observed with respect to legal rulings on non-Muslims who converted to Islam. First, I argue that, as long as the parties to a marital contract are not Islamically objectionable, jurists tried to preserve the integrity of the marital contract. Where exceptions exist, I hypothesize that they relate to the transactional unacceptability of the objectionable items. Second, I argue that, where the parties to a marital contract were Islamically objectionable, these objections tended to override concerns for preserving the integrity of the marital contract. I view this as a logical conclusion given jurists' concern with maintaining clear boundaries between Muslim and non-Muslim communities. This is because a party

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50. *Id*.
51. *Id.*
52. Al-Mawṣalī, *supra* note 12, at 112.

to an Islamic marriage that is objectionable from an Islamic perspective would threaten the stability of the ethos of the marital unit within an Islamic state.

IV. Preserving Hierarchy

In this Subpart, I argue that—notwithstanding the foregoing principles mentioned in this paper—the jurists' concern with preserving a certain religious hierarchy over non-*kitābīs* tended to override other important considerations in their rulemaking. For example, Al-Ṣāwī provides the following ruling:

> If he [i.e., the husband] accepts Islam and under him [i.e., married to him] is a Zoroastrian, then there is a separation in her nikāḥ, and she is not acknowledged in that state as long as she is a Zoroastrian.[53]

Here, the ruling is that the contract is *a priori* invalid, not due to the type of relationship between the husband and wife, but deriving from the religious identity of the wife. Al-Ṣāwī does not explicitly opine on whether her conversion (whether simultaneous or non-simultaneous) would result in a valid Islamic marital contract, though this appears to be the implication.

In Al-Mawṣalī's formulation regarding a Zoroastrian married to *mahārim*, this question was not considered, although it appears he was referring to a situation where both parties converted to Islam. In his book, Al-Mawṣalī states the following:

> If the husband of a Zoroastrian becomes Muslim, then if the wife becomes Muslim, then that is permitted. If not, they are separated without talāq [i.e., the marriage was not valid so there cannot be talāq].[54]

As was the case for Al-Ṣāwī, the religious identities of the parties are sufficient cause to nullify the marital contract, if the wife does not convert to Islam. Al-Mawṣalī provides more detail, however, by stating that if they both embrace Islam, then the marital contract is not considered invalid. According to al-Dasūqī, "if he [i.e., the husband] accepts Islam and under him is a Zoroastrian wife, if she was mature, then they are separated if she doesn't accept Islam."[55] This is in agreement with Al-Ṣāwī's rule above.

Based on the foregoing rules, I argue that such marriages (i.e., where a man converts to Islam and his wife does not) are considered invalid because jurists were being intentional about propagating a certain religious hierarchy. If the marriage of a non-converting, non-Muslim wife were acknowledged, this would obligate a Muslim man to confer certain marital rights (e.g., *mahr*) to a non-*kitābī* woman that he had not contemplated when he entered into the marriage. This is in contrast to situations where a woman converts to Islam and her husband does not. For example, Al-Mawṣalī, provides the following ruling regarding *kuffār*:

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53. Al-Ṣāwī, *supra* note 20, at 212.
54. Al-Mawṣalī, *supra* note 12, at 113.
55. Al-Dasūqī, *supra* note 7, at 267.

> If the wife of a kāfir becomes Muslim, Islam is offered to him, if he becomes Muslim, then she is his wife. If not, they become separated. And the separation is considered talāq.[56]

If the husband does not accept Islam, the ruling is that there is a separation, and such a separation is considered a *talāq*. This implies that the marital contract is not nullified, although in the converse situation (i.e., where the wife does not accept Islam), it is considered to be nullified. What considerations would drive Al-Mawṣalī to draw a distinction between the genders? Under my hypothesis, the Muslim woman is given the benefit because the *talāq* would confer upon her certain rights (e.g., *mahr*), thus perpetuating the intended religious hierarchy.

Ibn Rushd's text provides further nuance to the topic.

> Mālik, Abū Hanīfa, and al-Shāfiʿī said: If the woman [i.e., kitābīyya] accepted Islam before him [i.e., the husband], then he accepted Islam in her *ʿidda*, he has a right to her, and if he [i.e., the husband] accepted Islam and [then] she [accepted Islam], then her nikāḥ is valid.[57]

In this scenario, Ibn Rushd indicates that the three mentioned jurists were in agreement that if a *kitābīyya* accepts Islam first, then for the marriage to remain valid, not only does he have to accept Islam, but it also has to be within a certain period. Whether failure to accept Islam during this period would result in a nullification or a divorce is not clear from the text provided, although one could surmise that it is considered to be a *talāq* since Ibn Rushd mentions an *ʿidda* period.

The distinctions become even more interesting when we move out of the realm of conversion to Islam and into the realm of conversion between and among other religions. In his legal commentary, Al-Ṣāwī states the following:

> If a Jew or Christian [free-woman or slave-woman] converted to a Zoroastrian, or a dahrīya or what is like that, the nikāḥ [with a non-Muslim man] is not permitted.[58]

Thus far, we have observed that non-*kitābī* religious identities in marriages to Muslims are sufficient to cause the relegation of other established legal principles. In this ruling, we observe a similar phenomenon in marriages among non-Muslims. It is clear that being a Jew or Christian is not a corruptive factor in the marital contract. Upon conversion to a non-*kitābī* religious identity, however, such as becoming a Zoroastrian or *dahrīya*, the nikāḥ is considered invalid. This speaks to the importance that jurists gave to privileging certain religious groups and thereby maintaining a religious hierarchy within an Islamic state. The converse of this rule, also provided by Al-Ṣāwī, further illuminates this point.

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56. Al-Mawṣalī, *supra* note 12, at 113.
57. Ibn Rushd, *supra* note 27, at 92.
58. Al-Ṣāwī, *supra* note 20, at 271.

> But if a Zoroastrian converted to Judaism or Christianity, then . . . the nikāḥ is valid after the conversion.[59]

If a follower of Zoroastrianism converted to Judaism or Christianity, then the marital contract was considered to be valid. This is in accordance with my hypothesis, since such conversion to a *kitābī* religion strengthens the hierarchy that jurists were trying to establish.

Conclusion

This paper has examined the works of a range of pre-modern Islamic jurists to develop a theory about their rulings regarding the marital practices of non-Muslims, including those individuals who later accepted Islam. This theory can be summarized as follows: (1) Non-Muslims were granted autonomy with respect to their marital customs, provided they did not seek input from Islamic authorities; (2) most (but not all) non-Islamic practices of non-Muslims were unproblematic for jurists so long as they occurred before conversion to Islam; and (3) jurists strove to preserve religious hierarchy. Based on a review of the evidence, I have argued that the seemingly liberal laws pertaining to non-Muslims derive from (A) a conception of the world held by jurists that is best understood as akin to imagined political communities (notwithstanding the fact that Muslim and non-Muslim individuals were often living in integrated societies), and (B) an interest in ensuring consistency in the law.

The analysis here is limited given the small sample set of rulings focused specifically on the marital practices of non-Muslims, as well as the fact that the jurists selected represent a wide temporal and geographical range. For future work in this area, the key will be to delve deeper into further rulings that do not conform with the general theories posited here. Nonetheless, this paper demonstrates that "Qadi justice" is actually a thoughtful system of rules that is based on a coherent worldview and designed to achieve a certain set of objectives.

59. *Id.*