

THE ANCIENT NEAR EAST AND ISLAM: THE CASE OF LOT-CASTING

PATRICIA CRONE AND ADAM SILVERSTEIN

INSTITUTE FOR ADVANCED STUDY, PRINCETON
UNIVERSITY OF OXFORD

Abstract

This article is a contribution to the question how far there was continuity between ancient Near Eastern and Islamic culture. It focuses on the practice of using lot-casting to allocate inheritance shares, conquered land, and official functions, and briefly surveys the history of this practice from ancient through Hellenistic to pre-Islamic times in order to examine its Islamic forms as reflected in historical and legal sources. It is argued that the evidence does suggest continuity between the ancient and the Islamic Near East, above all in the first century of the *hijra*, but also long thereafter, if only at a fairly low level of juristic interest. The article concludes with some general consideration of the problems involved in the study of the two disconnected periods of Near Eastern history.

In 1993 classical archaeologists made an exciting discovery at Petra. This city, once the capital of the Nabataean kingdom, thereafter a major town in the Roman province of Arabia, had long been assumed to have been destroyed in an earthquake of 551 CE, but this proved to be wrong, and in the church of St Mary the archaeologists found a cache of papyri. Completely carbonized by the fire which had destroyed the church in the early seventh century, these papyri could nonetheless be read by means of sophisticated modern techniques, and an edition is in progress.¹ They contained the private archive of a major family of the city, covering the years from at least 537 to 593 CE. The papyri are in Greek but reflecting a community whose native language appears to have been Arabic, and among the papyri is a record of a division of an inheritance between three brothers. The

¹ For all this, see L. Koenen, R.W. Daniel and T. Gagas, 'Petra in the Sixth Century: the Evidence of the Carbonized Papyri', in G. Markoe (ed.), *Petra Rediscovered* (New York 2003), 250–61; J. Frösen, A. Arjava and M. Lehtinen (eds), *The Petra Papyri*, 1 (Amman 2002). Our thanks to Glen Bowersock for referring us to this literature.

estate, which consisted of land and buildings, was divided into three equal shares and awarded to the sons by a procedure which the editors, with reference to a comparable papyrus from Nessana, take to have been lot casting.² The Nessana papyrus, written in 562 CE, also records the division of an estate, here among four sons. The property, which consisted of buildings, farmland and personal articles, was divided into four shares of roughly equal value and awarded to the sons by lot in the presence of friends and relatives. Here, as at Petra, the parties concluded the proceedings by swearing by the Trinity and the Emperor's health that they would abide by the division.³

The interest of this discovery to historians of the Near East lies in the fact that the procedure used for the division of the property in these two papyri is endorsed in Islamic law. It is also extremely ancient and raises the question how far, and in what way, the traditions of the ancient Near East lived on to contribute to Islamic culture. In what follows we briefly survey the attestations of lot casting as an official practice from ancient Near Eastern to Islamic times and discuss what we see as its significance.

Assigning land, booty, and other property by lot

In the ancient Near East (by which, for the purposes of this article, we mean the ancient Fertile Crescent), lot-casting was much used in the division of inheritances. The standard way of distributing an inheritance in Assyrian and Babylonian Mesopotamia was to divide the property into parcels and then to assign the parcels by lot to the heirs (with variations when the eldest son was privileged).⁴ The gods themselves are said to have divided the world by this procedure. 'They took the box (of lots)..., cast the lots; the gods made the division': Anu acquired the sky, Enlil the earth and Enki the bolt which bars the sea.⁵ This is

² Cf. Koenen, Daniel and Gagas, 'Petra in the Sixth Century', 251. The papyrus (Inv. 10, P. Petra Khaled and Suha Shoman) is still unpublished. There is no explicit mention of lots in the draft edition and translation that Crone has seen, courtesy of her colleague Glen Bowersock, but the parallels with the Nessana papyrus are certainly striking.

³ C.J. Kraemer, *Excavations at Nessana*, III (Non-Literary Papyri), (Princeton 1958), no. 21. Compare nos. 16, 31, where lots are not mentioned.

⁴ *A History of Ancient Near Eastern Law*, ed. R. Westbrook (Leiden 2003), 1, 57f (general), 395f (Old Babylonian), 542f (middle Assyrian), 2, 939 (Neo-Babylonian).

⁵ *Atrahasis* in B.R. Foster, *Before the Muses: an Anthology of Akkadian Literature*³ (Bethesda, Maryland 2005), 229; also in S. Dalley (tr.), *Myths from Mesopotamia*, revised ed. (Oxford 2000), 9.

famously one of the ancient Near Eastern myths that passed into Greek culture: Zeus, Poseidon and Hades divide the world among themselves by lot in the *Iliad*, and here as in the Akkadian myth, the three gods are brothers.⁶

The custom is well attested in the Bible, too.⁷ God Himself distributed the desolate land of Edom to wild animals by lot (Isa. 34:17), and He also instructed Moses to divide the Promised Land by lot when it had been conquered;⁸ Joshua duly did so.⁹ Micah seems to have envisaged conquest as the result of divine or angelic lot casting: he prophesied that Israel would have nobody in God's assembly to cast lots for land for it (Mic. 2:5). Ezekiel added that the land would be divided up anew by means of arrows in the messianic age (Ezek. 45:1; 47:22). Land and captives taken by the Babylonians and Assyrians were apparently divided up in the same way: the Babylonians entered Israel's gate and 'cast lots for Jerusalem' (Obad. 1:11); but God would punish the nations for having divided up his land and cast lots for his people (Joel 3:3). When the Assyrians conquered Thebes in Egypt in 663 BCE, 'lots were cast for her nobles' (Nahum 3:10). The Bible does not refer to inherited land being divided by this method.

The idea of allocating new land by lots reappears in Jewish Hellenistic works. In *Jubilees*, composed by a Palestinian Jew in the second century BCE and later translated from Hebrew into Greek and Syriac, Noah divides the earth by lot between his three sons, Shem, Ham and Japheth; Canaan, the son of Ham, nonetheless settled in Shem's portion.¹⁰ In *Maccabees*, Antiochus IV (175–63 BCE) is described as sending a Syrian commander with orders to wipe out the residents

⁶ Cf. W. Burkert, *The Orientalizing Revolution* (Cambridge, Mass. and London 1992), 90f; id., *Babylon, Memphis, Persepolis: Eastern Contexts of Greek Culture* (Cambridge, Mass. and London 2004), 36. For the subsequent history of this myth, see A. Silverstein, 'From Atrahasis to Afrīdūn: on the Transmission of an Ancient Near Eastern Motif to Iran' (forthcoming).

⁷ Cf. Th. Gataker, *On the Nature and Use of Lots*² (London 1627), modernized and updated by B. Boyle (forthcoming Exeter 2008), ch. 4, §10, an extremely learned work still worth consulting despite its age; J. Lindblom, 'Lot-casting in the Old Testament', *Vetus Testamentum* 12 (1962), 164–78.

⁸ Num. 26:52ff; 33:50ff (at 54); 34:13; cf. also Josh. 21:4ff; 1 Chron. 6:54ff, where priests and Levites are given certain cities to dwell in by lot.

⁹ Josh. 18:3ff, 10; 19:51; cf. Josephus, *Antiquities*, book 5, ch. 1, pars. 22, 24, 26.

¹⁰ *Jubilees*, 8:11ff, 10:30 (tr. O.S. Wintermute in J.H. Charlesworth [ed.], *The Old Testament Pseudepigrapha* [New York 1983–5]), ii; cf. also his introduction. The detail that the division was effected by lots seems to have been lost in the later Greek, Latin and Syriac translations, but it was apparently known to the Muslims, cf. Silverstein, 'From Atrahasis to Afrīdūn'.

of Judaea and Jerusalem and to 'settle aliens in all their territory, and distribute their land by lot' (I Macc. 3:36).¹¹ Thereafter, leaving aside mere retelling of the Biblical passages, the theme of lot casting for land and/or its inhabitants seems to disappear from the indigenous sources for a long time.

Lot casting must be a universal institution, and not just as a private or *ad hoc* method of decision making: both land and fortune are things that one is 'allotted' in a great many languages. In Greek, too, a piece of land was known as a lot (*klēros*), reflecting the fact that lots were used to distribute land when colonies were set up in order to ensure that every group received an equal share. Moveable booty was distributed in the same way,¹² but whether inherited land was also divided in this way is uncertain.¹³ The practice is not attested at Athens¹⁴ nor, it would seem, anywhere else in Greek antiquity, except in a speech once attributed to Dio of Prusa (in Anatolia, d. c. 120), now held to be by Favorinus (d. mid-second century), a native of Arles: here we are told that 'brothers also divide their patrimony that way'.¹⁵ Wherever the orator may have encountered the practice, it certainly sounds similar to that attested in Petra and Nessana, but it is hard to say more on the basis of a single passage.

The Romans, who took over from the Greeks, also used lots for the distribution of land, both at home and in connection with the foundation of colonies.¹⁶ Moveable booty, too, was (or might be) distributed by lot.¹⁷ But the evidence relating to conquered land and

¹¹ Settling foreigners on land confiscated from the local population was an Assyrian practice later adopted by the Achaemenids and Macedonians alike, but this passage could be inspired by Obadiah on foreigners casting lots for Jerusalem.

¹² Cf. G. Wissowa, *Pauly's Real-Encyclopädie der classischen Altertumswissenschaft* (Stuttgart 1894–1980, hereafter Pauly-Wissowa), s.v. 'Losung', col. 1463 (Ehrenberg); D. Asheri, *Distribuzioni di terra nell'antica Grecia* (Turin 1966), 13 (drawn to our attention by D. Roussel).

¹³ Ehrenberg categorically denies it, against earlier authors (cf. Pauly-Wissowa, s.v. 'Losung', cols. 1478b).

¹⁴ Cf. A.R.W. Harrison, *The Law of Athens: the Family and Property* (Oxford 1968), ch. 5 (where the possibility is not even discussed).

¹⁵ Dio Chrysostom, (attrib.) *Oratio*, 64, 25, where 'that way' refers to 'by lot' (*klērōtas*). Adduced by Gataker (*Nature and Use of Lots*, ch. 4, §12 (pp. 102 of the original work, where the references are given, misprinted as 46.25)); cf. *The Oxford Classical Dictionary*³, ed. S. Hornblower and A. Spawforth (Oxford 1996), s.v. 'Favorinus'. We are much indebted to Glen Bowersock and Christopher Jones for help with this passage.

¹⁶ Pauly-Wissowa, s.v. 'Losung', col. 1493; D.J. Gargola, *Lands, Laws, and Gods* (Chapel Hill, NC 1995), 95ff. For examples, see Dionysius of Helicarnassus, *Roman Antiquities*, II, 16; II, 35; V, 60; X, 32.

booty peters out in the third century, and the Romans do not seem to have used this method in connection with inherited property either, except in three specific circumstances. First, in actions for the division of an inheritance or common property, or for the regulation of boundaries, it was difficult to decide who was the plaintiff and who the defendant, but the person who appealed to the law was generally considered plaintiff; to this Ulpian (d. 223) adds that if the parties appealed at the same time, the matter was usually decided by lot.¹⁸ Secondly, in 428 a law was passed which entitled the *curia* (city council) to claim one fourth of the estate left by a member of the council to an outsider: the estate was to be divided into four parts, of which the *curia* would take one by lot.¹⁹ Thirdly, in 531 Justinian ruled that when several persons had been given the option, by bequest, to pick an item such as a slave and disagreement arose, they could cast lots: the winner would pick the item and pay the others the value of their share.²⁰ Division of the estate among the heirs by lot as the normal procedure in intestate succession does not seem to be attested.

In line with this, it is mostly as a literary theme that lot drawing for land is attested in the Near Eastern literature (Jewish and Christian) from the second century onwards, with no sense of a live practice behind it. The gods cast lots again, this time for the nations of the earth, in the Pseudo-Clementine *Recognitions*, a Jewish Christian work of the mid-fourth century: Simon Magus, representing heresy, here argues that there are many gods, and that it was to one of the lower gods that the Jews were assigned (a gnosticizing paraphrase of Deut. 32:8f).²¹ In the same vein, *Pirqe de Rabbi Eliezer*, a Jewish work of (perhaps) the mid-eighth century, tells us that when seventy angels descended in order to confuse the nations building the Tower of Babel, they cast lots among the nations and Israel fell to God (who is not, of course, a lower God here).²² The nations are also divided up by lot in the *Acts of Thomas*, but now among the apostles rather

¹⁷ Cf. the story of the third-century emperor Probus in *Historia Augusta, Life of Probus*, 8 (ed. and tr. D. Magie [London and Cambridge, Mass], iii, 319).

¹⁸ Justinian, *Digest*, book 5, tit. 1, 13f (ed. and tr. T. Mommsen, P. Krueger and A. Watson [Philadelphia 1985], i, 167).

¹⁹ Justinian, *Codex*, 10, 35, 2; cf. 10, 35.1; A.H.M. Jones, *The Later Roman Empire, 284–602* (Oxford 1964), 2, 747f.

²⁰ Justinian, *Codex*, 6, 43, 3, 1; cf. id., *Institutes*, II, xx, 23.

²¹ Clement of Alexandria (attrib.), *Recognitions*, ii, 39 (tr. B.P. Pratten, M. Dods and T. Smith, *The Writings of Tatian and Thophilus and the Clementine Recognitions* [Ante-Nicene Christian Library, iii, Edinburgh 1867], 218f).

²² *Pirqe de Rabbi Eliezer*, tr. G. Friedlander (New York 1971), 176f.

than the gods: India fell to Thomas.²³ Egypt, Ethiopia, Nubia and the Pentapolis fell to St Mark by lot (*qur'ā*), as a later Christian adds.²⁴ The story of the father who divides the earth between his three sons by lot may have gone into the Persian tradition, though it is only in Ibn al-Kalbī (d. 204/819 or later) that we see it: according to him, the ancient king Farīdūn divided his realm (consisting of the entire world) among his three sons by writing the names of the regions on arrows and telling each son to choose an arrow.²⁵ There does not seem to be any attestation of this method of allocating inheritance shares in Persian law or practice, however.

At this point one is tempted to conclude that the ancient practice of casting lots for land, whether conquered or inherited, had disappeared, except for some special cases where Roman law applied. But it had not. The rabbis discuss it, apparently as a live institution, with reference to two or three brothers dividing an inheritance among themselves in material from second-century Sephoris (Tiberias) in Palestine onwards;²⁶ and it now proves to have been practised by Christians in Roman Arabia, too, at Petra and Nessana.

Apparently, it was also alive in the Prophet's Arabia, at least in connection with conquered land and booty. We are told that when the Prophet conquered Khaybar (in the year 7/628), he set aside God's fifth by lot (using arrows); the rest of the conquered land was divided into eighteen portions and subdivided, according to one tradition, into a hundred plots of roughly the same productive capacity which he distributed to his followers by lot.²⁷ Of the booty from the campaign against B. Qurayza we are told that it was

²³ *Acts of Thomas*, 1 (tr. A.F.J. Klijn [Leiden 2003], 17).

²⁴ Severus b. al-Muqaffa', 'History of the Patriarchs of the Coptic Church of Alexandria', ed. and tr. B. Evetts, in R. Graffin and F. Nau (eds), *Patrologia Orientalis*, i (Paris 1907), 105.

²⁵ Al-Ṭabarī, *Ta'riḫ al-rusul wa'l-mulūk*, ed. M.J. de Goeje et al. (Leiden 1879–1901), i, 226f (Ibn al-Kalbī), with further details in Silverstein, 'From Atrahasis to Afrīdūn'. It is not clear whether the story should be taken to reflect Persian appropriation of the theme, either directly from Mesopotamian sources or via para-Biblical literature such as *Jubilees*, or simply Ibn al-Kalbī's own familiarity with the theme.

²⁶ *Babylonian Talmud*, Baba Bathra, 106a. It is not found in the Jerusalem Talmud.

²⁷ Al-Wāqidī, *Kitāb al-maghāzī*, ed., M. Jones (London 1966), ii, 680, 692; al-Māwardī, *Adab al-qādī*, ed. Y.H. al-Sirḥān, (Baghdad 1971), ii, 196f, no. 2715 (citing Wāqidī); al-Shāfi'ī in al-Bayhaqī, *Abkām al-Qur'ān*, ed. M.Z. al-Kawtharī (Cairo 1951), 163; cf. also Ibn Sa'd, *al-Ṭabaqāt*, ed. E. Sachau et al. (Leiden 1904–40), II/1, 78, 82f; ed. Beirut, 1957–60, ii, 107, 113f (without explicit mention of lots); *EP*, s.v. 'Khaybar', col. 1141a.

divided into 3072 shares, consisting partly of land and partly of moveable booty, of which a fifth was assigned to God and the rest to the Muslims by lot.²⁸ The Muslims also cast lots for the captives taken at Badr.²⁹ ʿUthmān (644–56) instructed Muʿāwiya to single out God's fifth of the booty by writing 'God' on one of the five arrows used for their allocation.³⁰ When 'Alī's followers wanted to divide the captives from the Battle of the Camel among themselves, in 36/656, 'Alī dissuaded them by first telling them to bring the lots and next, when they brought the arrows, by asking them who might get his (spiritual) mother 'Ā'isha in his lot.³¹ On another occasion he used the lots to divide non-Muslim booty.³² Of the Kufan 'Abīda b. Qays (d. 70s/690s) we are told that he would cast lots to assign the leftover from the division of moveable booty, such as a dirham, saying that this was how it had been done in past campaigns, but this was more controversial: the point of the report is that he was persuaded to stop, on the grounds that it was more equitable to use the dirham to buy something that could be distributed (by lot or otherwise).³³

All these reports are prescriptive and hardly to be taken at face value as historical reports. Taken as literature, however, they certainly suggest that Muslims who came out of Arabia took the use of lots for the division of conquered land and booty for granted. This is corroborated by the fact that the standard word for a share of the booty was *sahm* (literally 'arrow').

As regards inherited land, a Prophetic tradition reports that two men who had a dispute over inherited property submitted their case to the Prophet without having anything to prove their respective claims: he told them to cast lots and take whatever was assigned to them by this method.³⁴ The two men are not identified as brothers,

²⁸ Wāqidī, *Maghāzī*, ii, 522; cited in Māwardī, *Adab al-qāḍī*, ii, 196, no. 2714.

²⁹ Wāqidī, *Maghāzī*, i, 100, 107, 139.

³⁰ al-Sarakhsī, *Sharḥ kitāb al-siyar al-kabīr li-Muḥammad b. al-Ḥasan al-Shaybānī*, ed. Ṣ.-D. al-Munajjid (Cairo 1957–60), iii, 889.

³¹ Ibn Qutayba (attrib.), *al-Imāma wa'l-siyāsa* (Cairo 1969), i, 78.

³² Al-Nuwayrī, *al-Bidāya wa'l-nihāya* (Cairo 1975), xx, 219, where he divides the booty from Iṣfahān, even including a loaf, into seven portions (one for each of the sevenths into which Kufa was divided at the time) and distributes them by lot.

³³ Ibn Sa'd, *Ṭabaqāt*, ed. Sachau, vi, 62f; ed. Beirut, vi, 93. He was *ʿarif* (paymaster) for his tribal group.

³⁴ Abū Dāwūd, *Sunan* (Cairo 1982), ii, 295 (*K. al-qadā, bāb fī qadā' al-qāḍī idhā akhta'a*); cited in Ibn Qayyim al-Jawziyya, *al-Ṭuruq al-ḥukmiyya fī siyāsāt al-sharʿiyya*, ed. N.A. al-Ḥamad (Mecca 1428), ii, 743 (in a useful list of Prophetic traditions on *qur'a*), where further references are given. For an Imāmī Shī'ite version,

however, and the issue is their dispute in a situation without proof rather than the normal procedure in intestate succession. We are also told that when Abān b. ‘Uthmān was governor of Medina in the reign of ‘Abd al-Malik (685–705), a man manumitted the six slaves who were his only property on his deathbed; and since bequests were not allowed to exceed a third of the property, Abān drew lots and manumitted the two slaves who had the lucky draw.³⁵ The Prophet is said to have used the same solution when two earlier Medinese manumitted six slaves who were their only property, but this is presumably a simple reworking of the Umayyad report (though it was of course the Prophetic precedent which became canonical).³⁶ Here too the procedure diverges from that attested at Nessana and Petra, for the lots are not being used to allocate equal shares, but rather to pick out two winners. Though it seems unlikely that the inhabitants of Petra and Nessana should have been the only Arabs to use lots as the normal procedure for the division of inherited land, the practice does not seem to be attested in the material on the rise of Islam. We do however find it in classical Islamic law: here we are told that once the property had been divided into parcels representing the smallest fractions to be distributed, the heirs could draw lots among themselves for the parcels; if the estate consisted of different types of property, such as houses and land, the different types had to be divided up separately; they could not be bundled together as was done at Nessana.³⁷

The Near East is not the only region in which lots have been used for the partition of inherited land. It crops up in Europe, too. Thomas

see al-Majlisī, *Bihār al-anwār* (Tehran 1357–92), civ, 324. Our thanks to Aron Zysow for help in connection with this tradition.

³⁵ Al-Shāfi‘ī, ‘K. al-qur’a’, in his *Umm* (Beirut 1993), viii, 5; cf. J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford 1956), 201f. For further references, see Bayhaqī, *Aḥkām al-Qur’ān*, 162n.

³⁶ Ibn Abī Shayba, *al-Muṣannaḥ*, ed. M.A. al-Nadwī (Bombay 1979–83), xiv, 158, nos. 17934f; Shāfi‘ī, ‘K. al-qur’a’, *Umm*, viii, 5 (where one manumitter is a woman, the other an Anṣārī male); further references in Bayhaqī, *Aḥkām al-Qur’ān*, 162n.

³⁷ Māwardī, *Adab al-qāḍī*, ii, 194f, nos. 2709ff, cf. also 204, nos. 2746ff; al-Nawawī, *Minhāj al-ṭālibīn*, ed. and tr. L.W.C. van den Berg (Batavia 1882–4), iii, 395ff; Ibn Rushd, *Bidāyat al-mujtahid*, ed. M.S. al-Muḥaysin and Sh. M. Ismā‘īl (Cairo 1970–4), ii, 298ff; tr. I.A. Khan Nyazee and M. Abdul Rauf (Reading 1996), ii, 319ff (both with further discussion); al-Marghīnānī, *al-Hidāya* (Cairo n.d.), iv, 46; tr. C. Hamilton, 2nd ed., (Lahore 1957), iv, 571 (*K. al-qisma*); *al-Mawsū‘a al-fiqhiyya*, xxxiii (Kuwait 1995), 139 (drawn to our attention by A. Zysow); A. ‘Abd al-‘Azīz, *Fiqh al-kitāb wa’l-sunna* (Nablus 1999), iv, 2305.

Aquinas (d. 1274) knew of it,³⁸ and English Common Law endorsed it for the partition of land held in coparcenary from medieval down to modern times.³⁹ The solution is likely to have commended itself wherever property had to be distributed among equally entitled claimants, and it could in principle turn up anywhere in unrelated forms. The Near Eastern forms come across as related in that all they treat lot-casting as a standard way of dividing land and other property, not simply as a last resort or special solution, as in Roman or Common law. The same may well have been true among many other peoples in ancient times, however, especially in connection with conquered land, and the Near Eastern forms are not related etymologically: the usual term for a lot in the sense of the object used in the procedure is *pūr(u)* in Assyrian, *isqu* in Babylonian, *goral* in Hebrew (where it also stands for the share allotted), and *qur'a* in Arabic, with *sahm* ('arrow') as the normal word for the lot awarded. But though they may have originated separately in pre-historic times, by the time we have literary evidence, the Near Eastern institutions stand apart from those of the neighbouring lands in that they still treat lot-casting as the standard mode of division, even in connection with inheritance law, and even, after the coming of Islam, when the heirs were awarded highly unequal shares. It is with reference to this feature that we treat them as so many members of a single family, visible in the cuneiform, Jewish, Greek papyrological, and Muslim records at different times and places thanks to a combination of local conditions and the haphazard manner in which the evidence has survived.

One interesting point here is that if it had not been for the chance preservation of the two Greek papyri, one might have taken lot-casting for the distribution of land in early Islamic society and classical law to represent a case of Jewish *Fortleben* in Islam; for until the papyri were discovered, it was only in rabbinic texts that the practice seemed to be alive in connection with inheritance shares, and the rabbis would of course have had much to say about the Biblical use of lot

³⁸ He describes it as a method used for the division of inheritances in case of disagreement, without giving further details (Thomas Aquinas, *Commentary on the Ephesians*, tr. M. L. Lamb [Albany 1966], book 1, lecture 4, *ad* Eph. 1:11).

³⁹ An estate held in coparcenary was taken by several heirs as if they were a single person, for example when the deceased only left daughters (the principle being that there could only be one heir, normally the eldest son, who would take everything in the absence of a will). The use of lots for the partition of such estates is first described by Thomas de Littleton (d. 1481), cited in Gataker, *Nature and Use of Lots*, ch. 4, §12 (pp. 104 of the original work); it is endorsed in Great Britain, Courts, *The Legal Guide*, 1 (London 1839), 324f, but is now obsolete.

drawing in connection with conquered property, had they been asked. But as the papyri show, the inference would have been false. Lot-casting for the allocation of inherited property had remained a live practice in Roman Arabia, too, and also, as the accounts of the Prophet's procedures suggest, in connection with conquered land and booty elsewhere in Arabia. What the striking similarity between Jewish and Islamic law reflects is not, in this particular case, Jewish *Fortleben* in Islam, but rather the shared roots of Jewish and Islamic culture in the ancient Near Eastern tradition. We seem to have here a case comparable to that of circumcision, practised by both the Jews and the Arabs (eventually Muslims), not by the one borrowing from the other, but rather by both retaining an ancient custom which had once been widespread in the Near East (notably in Egypt). In the case of circumcision, the Biblical record played a role in endowing the old Arabian practice with a new religious meaning. There is no suggestion that it did so in the case of lot-casting.

It is because the Arabs were apt to preserve ancient practices also recorded in the Jewish scripture that Old Testament scholars (Wellhausen prominent among them) used to study Arabia with such interest, with special attention to the bedouin because the ancient Israelites had been pastoralists. It is the townsmen of Arabia that we see at work at Nessana and Petra, but the bedouin continued to furnish parallels into modern times: Musil reports that in what he called Arabia Petraea (former Roman Arabia) agricultural land belonging to the whole tribe would be divided into fields of equal size every year and distributed among the families or tribal groups by lot.⁴⁰ The continuity with ancient Near Eastern practice in Arabia should presumably be related to the forbidding nature of the peninsula. Difficult to conquer and colonize, it was the only region of the Near East to escape a millennium of Greek, Roman or Persian domination, though parts of it (including Petra and Nessana) fell under foreign rule for periods ranging from centuries to decades. We have to stress, however, that the Jews and the Arabs may not have been the only inhabitants of the Near East to use lot-casting for the division of inherited property in late antiquity, for on the Jewish side it is in rabbinic literature that it is attested, not in the Bible. This suggests that what the rabbis discussed was a practice they shared with their neighbours, or in other words that in this particular case the rabbinic literature should not be seen as evidence

⁴⁰ A. Musil, *Arabia Petraea* (Vienna 1907–8), 3, 294.

for the Jews alone, but also for the larger Aramaic culture of which they formed part.

Choosing people by lot

It was not only in connection with the distribution of land and its inhabitants that lot-casting was used in the ancient Near East; people were selected for a wide variety of functions by that method, too. The Assyrians used sortition to choose the annual occupant of the 'office of the year eponym', a dignitary who had the privilege of having a calendar year named after him.⁴¹ The king himself never seems to have been chosen by lot in ancient Mesopotamia,⁴² nor do priests. But the Bible tells us that Saul was chosen as king by lot,⁴³ and the Samaritan Chronicle has it that the first Samaritan king was chosen by the same method.⁴⁴ In Pseudo-Philo (c. 50–150) the Israelites also choose Kenaz as their leader against the Philistines by lot, directed by an angel, and repeatedly tried the same method to find a successor to Phinehas without success.⁴⁵ By Roman times succession to the high priesthood of the Jews had come to be decided in the same way, with explicit reference to ancient practice.⁴⁶

In Biblical times, lots were also used to single out the groups and individuals who were to serve as temple musicians and gate keepers in ancient Israel (1 Chron. 24:5ff, 25:8ff, 26:13f), and to allocate rotating responsibilities such as the serving as priests and providing wood offering to the temple (Neh. 10:35).⁴⁷ Zachariah was a priest chosen by lot to officiate at a particular time (Luke, 1:8f),⁴⁸ and Peter found a replacement for the apostle Judas by selecting two men and then casting lots (Acts 1:23–6), a procedure which was to be imitated

⁴¹ W.W. Hallo, 'The First Purim', *The Biblical Archaeologist* 46 (1983), 19f.

⁴² M.T. Larsen, 'The City and its King', in *Le Palais et le royauté*, ed. P. Garelli (Paris 1971), 298f (against Oppenheim).

⁴³ 1 Sam. 10:19–21. But God's answer in v. 22 must have been given by a seer or prophet, cf. J. Lindblom, 'Lot-casting in the Old Testament', 165n.

⁴⁴ J. Macdonald, *The Samaritan Chronicle*, no. II (Berlin 1969), 99.

⁴⁵ Latin text (originally Hebrew) and English translation in H. Jacobson, *A Commentary on Pseudo-Philo's Liber Antiquitatum Biblicarum* (Leiden 1996), 25:1f; 49:1.

⁴⁶ Josephus, *Wars*, book 4, ch. 3, pars. 7f.

⁴⁷ Cf. Josephus' amplifications, *Antiquities*, book 7, ch. 14, par. 7.

⁴⁸ Compare *Protoevangelium of James* 24:4 in W. Schneemelcher and R. McL. Wilson (eds), *New Testament Apocrypha*, 1 (Cambridge 1991), 437, where Zachariah in his turn is replaced by Simeon by lot.

by later Christians in the Near East and the West alike.⁴⁹ Indeed, the word ‘clergy’ is derived from *klēros*, ‘lot’, the clergy being people allocated to God.⁵⁰ Lot casting may also have been used to assist the decision who should be admitted as new members of the community at Qumran, but this is disputed.⁵¹

Again, the Greeks and the Romans had similar practices. In Greece lot-casting was used for the selection of magistrates, especially in democracies, where it was of fundamental importance as an egalitarian device.⁵² The Romans would distribute functions among magistrates already chosen by sortition. Consuls and praetors, for example, would cast lots among themselves to determine the assignment of campaigns and provinces (‘What if the casting of lots had allocated you Africans or Spaniards or Gauls to rule over?’, as Cicero asked his brother, then governor of Asia);⁵³ lots were also used to determine voting order and other sequences, to choose officials for special tasks, and in diverse other connections, including (at least on one occasion) that of selecting recruits.⁵⁴ We even hear of bandits who reputedly used lots to decide which members of the gang should labour or serve the

⁴⁹ For thirteenth-century nuns choosing an apostle (as patron saint) by lot, see G.G. Coulton (tr.), *Life in the Middle Ages*, 1 (Cambridge 1928), 69f. Thomas Aquinas held that lot-casting could not be used for ecclesiastical office after the arrival of the Holy Spirit (*Commentary on the Ephesians*, book I, lecture 4), but the Mennonites of today choose priests by lot (personal communication from Christopher Melchert). In the Middle East known to T. Fahd, monks would decide by lot which novices should receive the habit (*EP*, Leiden 1956–2004, s.v. ‘ḵur’a’).

⁵⁰ This too is discussed in Pauly-Wissova, ‘Losung’, cols. 1466f (and indeed by Aquinas, *loc. cit.*).

⁵¹ Lots figure prominently in the Dead Sea scrolls, but almost exclusively in a metaphorical sense (Y. Licht, ‘The Term Goral in the Writings of the Judean Desert Cult’, *Beth Miqra* 1, 1956, 90–9 [Hebrew]). For the question of its use in admissions, see W.A. Beardslee, ‘The Casting of Lots at Qumran and in the Book of Acts’, *Novum Testamentum* 4 (1960), 245–52; S.J. Pfann, ‘The Essene Yearly Renewal Ceremony and the Baptism of Repentance’, in D. Parry and E. Ulrich (eds) *The Provo International Conference on the Dead Sea Scrolls* (Leiden 1999), 337–52; P.S. Alexander, ‘Predestination and Free Will in the Theology of the Dead Sea Scrolls’ in J.M.G. Barday and S.J. Gathercole (eds) *Divine and Human Agency in Paul and His Cultural Environment* (London 2007), 27–49.

⁵² *Oxford Classical Dictionary*, s.v. ‘sortition’; Pauly-Wissova, s.v. ‘Losung’, cols. 1475ff.

⁵³ Cicero, *Ad Quintum fratrem*, 1, 9, 27.

⁵⁴ Pauly-Wissova, s.v. ‘Losung’, cols. 1494ff; Gargola, *Land, Laws, and Gods*, 95; R.J.A. Talbert, *The Senate of Imperial Rome* (Princeton 1984), 61, 139, 144, 207f, 347–53 (drawn to our attention by Nathan Rosenstein); N. Rosenstein, ‘Sorting out the Lot in Republican Rome’, *American Journal of Philology* 116, 1995, 43–75, with the recruits at 44, n7.

others,⁵⁵ but whether this can count as an example of official use is another question.

On the Greek and Roman side, the official use of lots for the allocation of office and functions seems to have petered out by late antique times, and the evidence is thin on the Near Eastern side as well. Rabbinic literature does admittedly abound in discussions of temple duties and other Old Testament institutions, but it is all academic. Choosing priests, monks and other ecclesiastical personnel by lot is more likely to have continued among the Christians, thanks to the precedent set by Peter's choice of Matthew by this method. It is reflected in the *Protoevangelium of James*, where Mary is chosen by lot for the privilege of weaving a particular item,⁵⁶ but the only attestation relating to real life that we know is modern.⁵⁷ This undoubtedly reflects our ignorance of the vast mass of relevant Syriac literature. Once again there is some ambivalent evidence on the Iranian side:⁵⁸ in the account of Ardā Virāz' journey to heaven and hell, Ardā Virāz is chosen for the journey by three lances (*nēzag*) which are thrown at him. But this procedure was in the nature of an ordeal rather than lot casting, for the lances were meant to confirm or deny the suitability of a man already chosen; there were no other candidates.⁵⁹ One would be inclined to conclude that the once prevalent practice of choosing people for high office and other functions by lot had died out.

Again, however, the practice must have survived in Arabia. Unfortunately, there does not seem to be any documentary evidence for this. Three pre-Islamic inscriptions, one from Allāt's temple at Palmyra and two from Yemen, do refer to lot casting, but they probably refer to divination.⁶⁰ We are told, however, that the pre-Islamic Quraysh would choose men to lead them in war by lot and accept the candi-

⁵⁵ B. Shaw, 'The Bandit', in A. Giardina (ed.), *The Romans*, tr. L.G. Cochrane (Chicago and London 1993), 330 (with ref. to Apuleius, *Metamorphoses*, 4.8).

⁵⁶ *Protoevangelium of James* 10:2 (in Schneemelcher and Wilson, *New Testament Apocrypha*, 1, 430).

⁵⁷ Cf. Fahd, above, note 49.

⁵⁸ The Persians are envisaged as casting lots to fix the day on which the Jews were to be killed in the Book of Esther (3:7). The institution credited to them here is Akkadian, but whether it can be inferred that the Persians had adopted it is unclear.

⁵⁹ Cf. P. Gignoux, 'Une ordalie par les lances en Iran', *Revue de l'Histoire des Religions* 200, 1983, 155–61. The procedure is construed as lot-casting in S. Shaked, 'Quests and Visionary Journeys in Sasanian Iran', in J. Assmann and G.G. Stroumsa (eds), *Transformations of the Inner Self in Ancient Religions* (Leiden 1999), 73.

⁶⁰ R.G. Hoyland, *Arabia and the Arabs* (London 2001), 156.

date even if he was a minor or very old;⁶¹ and the terms *qarīʿ* and *maqrūʿ* (chosen by lot) were used in the sense of chief, leader and person chosen.⁶² In line with this we later hear of lot-casting for the selection of caliphs. The Christian astrologer, Theophilus of Edessa, active under the caliph al-Mahdī (d. 169/785), tells us that when Yazīd I died, the future Marwān I (64/684–5) proposed to solve the succession dispute which ensued by drawing lots; this was apparently agreed, but when Marwān's name came up, his rival al-Ḍahḥāk b. Qays refused to accept the result, so the two of them fought it out at Marj Rāhiṭ.⁶³ Al-Jāḥiẓ also knew of lot-casting in connection with the choice of caliphs, though he did not think it was necessary: in his view, the rightful claimant would always be known without the need for formal procedures, just as everyone knew who was the most generous man or the best horseman among Qays in the Jāhiliyya without discussion of their merits or *shūrā* or casting lots (*al-iqrāʿ wa'l-musāhama*).⁶⁴ Lot-casting was endorsed by some jurists for situations in which two candidates for the caliphate were equally qualified, or when two of them had come to be elected by some mishap, but others disagreed.⁶⁵ 'In our opinion, lots are required by the law to spare people's feelings, not to establish rights' (*li-taṭyīb al-qulūb dūna ithbāt al-ḥuqūq*), as al-Nasafī (d. 508/1114) observed with reference to the second situation, meaning that it could only be used for the random distribution of things to which people had a lawful claim, not to pick out winners.⁶⁶ No caliph actually seems to have been chosen by this method, but

⁶¹ Ibn al-Jawzī, *al-Muntaẓam* (Beirut 1992–3), ii, 217f, apparently from Ibn al-Kalbī.

⁶² Ibn Manẓūr, *Lisān al-ʿArab*, Beirut 1955–6; Murtaḍā al-Zabīdī, *Tāj al-ʿArūs*, ed. ʿA. Shīrī (Beirut 1994), both s.v. 'qr'.

⁶³ Theophilus as reconstituted by R.G. Hoyland, *Seeing Islam as Others Saw it* (Princeton 1997), 647, cf. 400ff.

⁶⁴ Al-Jāḥiẓ, *al-Uḥmāniyya*, ed. ʿA.-S. M. Hārūn (Cairo 1955), 266. In Ibn Ṭāwūs, *Faṭḥ al-abwāb bayna dhawī ʿl-albāb wa-bayna rabb al-ʿarbāb fī ʿl-istikḥārāt*, ed. Kh. al-Khaffāf (Beirut 1989), 267ff (chs 20–1), *musāhama* consists of drawing lots from paper with names written on them, whereas a *qurʿa* is an object such as a pebble or a rosary bead, but it was not necessarily so in Jāḥiẓ' time. (Our thanks to Etan Kohlberg for drawing Ibn Ṭāwūs' work to our attention.)

⁶⁵ Abū Yaʿlā, *al-Aḥkām al-sultāniyya*, ed. M.Kh. al-Fiḳī, second printing, Cairo 1966, 25 (where lot-casting is prescribed in the first situation and is one out of two acceptable views in the second); al-Māwardī, *al-Aḥkām al-sultāniyya*, ed. M.J. al-Ḥadīthī (Baghdad 2001), 60.1, 62.–6; tr. W.H. Wahba (Reading 1996), 6, 8, on unnamed jurists (without verdict on the first situation, but with arguments against lot-casting in the second).

⁶⁶ Abū ʿl-Muʿīn al-Nasafī, *Tabṣīrāt al-adilla*, ii, 826f, against al-Qalānisī and al-Kaʿbī. His position is Ḥanafī, cf. below.

much later we hear of an Ottoman grand vizier who was chosen by lot (drawn from pieces of paper with the names of candidates written on them).⁶⁷ This was in 1204/1789f, at the beginning of the reign of Selim III, and its relevance to our present concerns is uncertain.

There seems to have been a tradition in Arabia of choosing people for other functions by lot as well. The Prophet is said to have decided which wife should accompany him on his travels by lot-casting;⁶⁸ the Medinese are said to have used lots to determine who should have the privilege of hosting the Prophet;⁶⁹ 'Alī is credited with using lots to settle a case in Yemen in which three men denied paternity of a child that any one of them could have fathered.⁷⁰ 'Umar II is said to have included the wives and children of the soldiers in the *diwān* and cast lots to decide who should receive a hundred and who forty dirhams, i.e. from the income of the immovable booty which was paid out as stipends.⁷¹ All these examples refer to men in official positions, but hardly to lot-casting as a regular, public institution (though all decisions recorded for the Prophet were to assume that character). We do, however, encounter lot-casting as a regular institution in connection with mobilisation.

When 'Uthmān permitted Mu'āwiya to conduct campaigns by sea, he stipulated that Mu'āwiya was not to select the men himself or cast lots among them (*lā tantakhib al-nās wa-lā tuqri' baynahum*), but rather to let them decide themselves whether to go.⁷² Sortition was apparently among the methods normally used in the army to decide who was to go on duty. Of a Syrian soldier who went on annual summer campaigns in the Byzantine empire in the reign of Mu'āwiya we are told that he had a bad dream predicting that he would be the killer of an eminent Medinese and thereby doom himself to Hell;

⁶⁷ Ahmed Cevdet Pasha, *Tarih-i Cevdet* (Dersaadet 1309), v, 18 (on Ruscuklu Hasan Pasha). We owe this reference to Şükrü Hanioglu.

⁶⁸ Ṭabarī, *Ta'riḫ*, i, 1519. Compare *Babylonian Talmud*, Shabbath, 149b, on how Nebuchadnezzar would cast lots to decide which of his recently acquired (male) captives to have sexual relations with.

⁶⁹ Ibn Sa'd, *Ṭabaqāt*, ed. Sachau, iii/1, 288; ed. Beirut, 396 (s.v. 'Uthmān b. Maẓ'un').

⁷⁰ He imposed two thirds of the blood-money (for the child) on the man picked out as the father, presumably on the reasoning that he had caused the other two men to lose a third of a child each. The Prophet found this solution uproariously funny (Ibn Ḥanbal, *Musnad*, Cairo 1313, iv, 373; Wakī', *Akhhbār al-quḍāh*, ed. 'A.-'A.M. al-Marāghī, Cairo 1947-50, i, 91). For a variant involving two men and a slave girl, see al-Majlisī, *Bihār*, xl, 244f, cf. also civ, 63.

⁷¹ Ṭabarī, *Ta'riḫ*, ii, 1367.

⁷² *Ibid.*, i, 2824.

when people were chosen by lot for Yazīd I's campaign against Medina (*ḍuriba qur'at ba'th al-Madīna*) in 63/682f, this man had the misfortune to be selected (*fā-aṣābatnī al-qur'a*).⁷³ In these two examples it is the authorities who have used lots, but there are also stories in which it is the soldiers themselves who do so, some set in the Prophet's time. A Medinese desirous of martyrdom told the Prophet that he had missed the battle of Badr because he drew lots with his son to decide which one of them should go and it was his son's lot that had come out (*kharaja sahmuhu*).⁷⁴ *Qur'a* was used to select eighty men from a group of volunteers in connection with another expedition.⁷⁵ In these stories enlistment is envisaged as voluntary, but only one man can go because one has to stay behind to look after the family, or only eighty men are needed of the many who have volunteered. In another *ḥadīth*, Abū Hurayra invokes the example of a man who goes on campaign with some people and whose lot does not come out (*lam yakbruj sahmuhu*) because he has not said 'amen';⁷⁶ here the volunteers are already on campaign and the question is who should go on a particular expedition in the course of it. We also hear of men in the mid-Umayyad period who would cast lots among themselves when they were called up to decide who should actually go; those who won would stay at home in return for payment of a sum known as *ja'ā'il*.⁷⁷ Here the assumption seems to be that a particular tribal group would be told to supply a specified number of men and that the men could decide for themselves whom to send: they all wanted to stay at home rather than to be martyred. The Ottomans provide a much later parallel for the use of lots in connection with military service, too. Al-Majlisī records that when 'Umar Pāshā (1764–76), Mamluk governor of Iraq on behalf of the Ottomans, arrived, he 'imposed harsh lot-casting on them (*ishtadda 'alayhim al-qur'a*)' and took soldiers from villages and the *amṣār*, high and low, learned

⁷³ Ibn Qutayba, *al-Imāma wa'l-siyāsa*, i, 215f.

⁷⁴ Wāqidi, *Maghāzī*, i, 212, on Sa'd b. Khaythama; cited in Majlisī, *Bihār*, xx, 125.

⁷⁵ *Ibid.*, xxi, 77 (on *ghuzāt al-silsila*).

⁷⁶ Al-Haythamī, *Majma' al-zawā'id* (Beirut 1982), ii, 113 (*K. al-ṣalāh, bāb al-ta'mīn*).

⁷⁷ M. Bonner, 'Ja'ā'il and Holy War in Early Islam', *Der Islam* 68, 1991, 47f, with reference to T. Nöldeke, *Delectus Carminum Arabicorum* (Wiesbaden 1933), 77, and other sources where the poet is said to have been called up by Mu'āwiya's governor of Kufa (but the campaigns in Khwārizm only started in the governorship of Qutayba); Ṭabarī, *Ta'rikh*, ii, 1029, without the poem, where the expedition is despatched by 'Abd al-Malik. Exactly how the procedure worked is not clear.

and ignorant, and 'Alids and others alike.⁷⁸ When Muḥammad 'Alī (1805–48) introduced conscription in Egypt, *qur'a* was apparently also meant to be used;⁷⁹ the Ottoman conscription system of 1848 was actually known as *Qur'a nizamnamesi* (regulation on the drawing of lots);⁸⁰ and lots were also used to draft soldiers in Egypt under Khedive Ismail (1863–79).⁸¹

We abstain from the attempt to account for the Ottoman examples. The point of interest to us is that in the period with which we can claim some familiarity (from the rise of Islam to the Mongols), references to the use of lots in an official context are clustered in the first century, where the Prophet, the Rāshidūn and the Umayyads form a continuum, to fall off rapidly thereafter, except in connection with legal procedure. No doubt more will turn up, but it seems reasonable to infer that the official use of lot-casting for the selection of persons was a practice rooted in Arabia.

The Qur'ān and the Law

Lot-casting figures in the Qur'ān, but only as a literary theme, not as a live practice or an object of legislation. Two passages are relevant. The first is Q. 3:44, concerned with Mary. Much of what the Qur'ān has to say about her life reflects the *Protoevangelium of James*, a work written in Greek some time after 150, widely read in the Christian Near East, and translated into Syriac in the sixth century. In this work we read that Mary grew up in the temple and that the priests decided to marry her off when she was twelve years old, lest she pollute the temple by having periods (this passage is strikingly reminiscent of the story of the 'Mouse-Maiden' in the *Pañcatranta/Kalīla*

⁷⁸ al-Majlisī, *Bihār*, liii, 331.

⁷⁹ Kh. Fahmy, 'The Nation and its Deserters: Conscription in Mehmed Ali's Egypt', in E.J. Zürcher (ed.), *Arming the State: Military Conscription in the Middle East and Central Asia 1775–1925* (London and New York 1999), 67, citing Sir John Bowring's report of 1840 on how men would be seized without any order, arrangement, inscription 'or lot-drawing'.

⁸⁰ E.J. Zürcher, 'The Ottoman Conscription System in Theory and Practice, 1844–1918', in Zürcher, *Arming the State*, 82f, with a description of the system. Prof. Şükrü Hanioglu, to whom we are much indebted for help on Ottoman questions, tells us that the draw of lots for conscription was called *qur'a-i sher'iyye* in the vernacular, military service being a religious duty. According to Fahd, *qur'aya girmek* came to mean 'reaching the age of military service' (*EP*, s.v. 'qur'a'). See also Granquist in Lindblom, 'Lot-casting', 169n, where the system is slightly different from that described by Zürcher.

⁸¹ J.P. Dunn, *Khedive Ismail's Army* (New York 2005), 43.

wa-Dimna). The priests assemble the widowers of the people and tell them to bring a rod, and when a dove flies out of Joseph's rod, they assign Mary to him.⁸² In other words, it is a miracle that singles out Joseph as her husband, not lots. But lots appear in other stories in the *Protoevangelium*, and on a later occasion it even mentions that Joseph himself had won his bride by lot.⁸³ The Qur'ān, on the other hand, briefly declares that 'you (sg.) were not there when they threw their rods (to determine) which of them should take care of Mary' (*idh yulqūna aqlāmahum ayyubum yakfulu Maryama*, 3:44), seemingly referring to the version with the miracle (and presenting the contest as over *kafāla*, care, rather than marriage).⁸⁴ But the exegetes generally understood the rods as 'the arrows with which the lot-drawers (*al-mustahimūn*) from among the sons of Israel cast lots (*istahama*) for the guardianship of Mary', as al-Ṭabarī puts it.⁸⁵

The second passage is in the story of how Jonah came to be thrown overboard from the ship on which he was travelling. In the Bible, Jonah is identified by lots as the sinner on whose account the storm is sent (Jon. 1:7). In the Qur'ān there is no reference to the storm, the ship is simply overloaded, so lots are cast to determine who should be jettisoned; but Jonah is a guilty party here too, and this does seem to be what the lots indicate: he has run away (*ābaqa*) and behaved shamefully (*wa-huwa mulīm*), and when he cast lots, his plea was rebutted (*fā-sāḥama fā-kāna min al-mudḥidīn*) (37: 140–2).

The fact that lot-casting is mentioned in the Qur'ān in connection with venerable figures meant that the procedure had excellent legitimation. It also generated some stories in which Muḥammad's *kafāla*, like Mary's, is decided by lots.⁸⁶ But since it was only in accounts of

⁸² *Protoevangelium of James*, 8:2–9:1, in Schneemelcher and Wilson, *New Testament Apocrypha* 1, 429f; in the Indian story it is her father's house that should not be polluted (cf. the six versions of the passage, including the old Syriac, in F. de Blois, *Burzōy's Voyage to India and the Origin of the Book of Kalīla wa-Dimnah* [London 1990], 7ff).

⁸³ *Protoevangelium of James*, 19:1, in Schneemelcher and Wilson, *New Testament Apocrypha* 1, 434 (Tischendorf's version).

⁸⁴ The *Protoevangelium* thinks of Mary as a perpetual virgin and accounts for Jesus' brothers by casting Joseph as an old widower with children by his first marriage when he wins Mary. In the Qur'ān, the old man who wins her is Zakariyyā (cf. 3:37), the father of John the Baptist, and her husband has completely disappeared, an interesting development which must tell us something about the religious milieu reflected in the Qur'ān.

⁸⁵ Ṭabarī, *Tafsīr*, ad 3:44; similarly Fakhr al-Dīn al-Rāzī, *Tafsīr*, *ad loc.*, and Ibn 'Arabī, below, note 87.

earlier religious communities that the procedure is mentioned, it did not shape Islamic law on this topic. As Ibn al-ʿArabī observed, in the earlier *sharīʿa*, lot-casting had been sanctioned for general use, whereas it was only used in specific cases in Islamic law, and not in connection with *kafāla*; nor would using lots to throw a man overboard be acceptable under Islamic rules, as both he and others pointed out.⁸⁷

As Ibn al-ʿArabī noted, lot-casting did, however, remain acceptable in Islam in other contexts. First, as mentioned already, the jurists accepted that inheritances (and other joint property) could be allocated by lot. They seem to have done so without any controversy, and the method is still prescribed for the partition of joint property in the Ottoman *Majalla*.⁸⁸ It is a remarkable example of continuity from the ancient to the modern Near East, if only at a fairly low level of juristic interest.

That booty could be allocated among equals by lot seems also to have been widely accepted, at least as long as it was only a method of allocation of the appropriate shares rather than the assignation of things left over. The imam was charged with concern for the feelings of his subjects (*murāʿāt qulūb al-rāʿiyya*) and avoidance of preferential treatment, as al-Sarakhsī explained; for this reason division of the booty was done by *qurʿa*, both in connection with the fifth set aside for the imam and for the distribution of the remaining four fifths. The four fifths would also be assigned to the pay-masters (*ʿurafāʾ*) by lot, and each *ʿarif* would divide the portion assigned to him among the men of whom he was in charge by *qurʿa*, too, he said (using terminology from the Umayyad period). He adduced the Prophet's choice of a wife to accompany him on his travels by lot as the paradigmatic case in that the Prophet had used lots to spare their feelings (*tat'yībān li-qulūbihinna*).⁸⁹ In connection with partition, the Mālikī Ibn Rushd also tells us that the jurists accepted lot-casting *tat'yībān li-nufūs al-mutaqāsīmīn*.⁹⁰ It was on the same principle that the Shāfiʿites and others accepted that one could choose prayer leaders, *naqībs*

⁸⁶ Al-Balādhurī, *Ansāb al-ashraf*, ed. M. Ḥamīdallāh (Cairo 1959), 85.

⁸⁷ Ibn ʿArabī, *Aḥkām al-Qurʾān*, ed. ʿA.M. al-Bijāwī (Cairo 1378/1958), iv, 1610f; al-Qurṭubī, *al-Jāmiʿ li-ahkām al-Qurʾān* (Cairo 1967), xv, 126; and, before both of them, al-Jaṣṣāṣ, *Aḥkām al-Qurʾān* (Beirut 1994), iii, 496f; all *ad* 37:141.

⁸⁸ *Al-Majalla* (*Mecelle-yi ahkām-i ʿadliye*), book x, articles 1151, 1156; cf. also 1180 (available in English at www.iiu.edu.my/deed/lawbase/al-majalle).

⁸⁹ Sarakhsī, *Sīyar*, iii, 889f. On his handling of the Prophet's precedent in connection with wives, see also below, note 98.

⁹⁰ Ibn Rushd, *Bidāya*, ii, 299.2; tr. Nyazee, i, 320 (translated 'for the satisfaction of the persons participating in the partition').

and other persons by sortition when the candidates were equally entitled:⁹¹ the contenders had to be *mustawīna fi 'l-ḥujja*, as al-Shāfi'ī said.⁹²

There were situations in which some jurists, above all the Ḥanafīs, deemed lot-casting to amount to gambling (*qimār*), however. If a man manumitted slaves worth more than a third of his property in death, sickness or by will, the Shāfi'īs, Ḥanbalīs, Mālikīs and Imāmīs would draw lots and manumit however many could be accommodated within the third in accordance with the Prophetic *ḥadīth*, but the Ḥanafīs held that all the slaves should be set free and obliged to work until they had paid off the value of the unmanumitted parts.⁹³ Similarly, when two men claimed ownership of some property and adduced equally valid proof, the Shāfi'īs, Ḥanbalīs and Imāmīs accepted (among various other solutions) that one could cast lots and give the disputed property to the winner, directly or by having him take the oath which settled the matter; there were *ḥadīths* in which the Prophet and 'Alī did so. But the Ḥanafīs (and Mālikīs) would divide the property, arguing that the *ḥadīths* dated from the period before the prohibition of gambling.⁹⁴ There were also traditions in which the Prophet cast lots to decide who should swear first (in the situation in which two parties raise claims against

⁹¹ Māwardī, *Aḥkām*, 273 (*niqāba*), 278 (leadership of prayer), 532.ult. (order on the military roll), 589.ult. (retaliation); tr. Wahba, 109, 113, 224, 254; Nawawī, *Minhāj*, iii, 99f, 102 (*ḥadāna*), 119f (retaliation), 379 (admission to the court room). The Mālikīs and Ḥanbalites also accept lot-casting in such situations (*Mawsū'a*, xvii, 138ff, 148f), and the Imāmī Shī'ites list many more (see Ḥusayn al-Karīmī al-Qummī, *Qā'idat al-qur'a*, Qum 1420 [1999], 20f; Muḥammad Jawād Ash'arī, *Barrasī-yi ḥujjiyat-i qur'a* (Qum 1382 [2003]), 106ff, 120).

⁹² Shāfi'ī, 'K. al-qur'a', *Umm*, viii, 3; Bayhaqī, *Aḥkām al-qur'ān*, 158.

⁹³ 'Abd al-Wahhāb b. 'Alī al-Baghdādī, *al-Isḥrāf 'alā masā'il al-khilāf*, ed. H. Ṭāhir (Beirut 1999), ii, 990 (no. 2005); al-Ṭūsī, *al-Nihāya*, Beirut 1970, 105ff; Ash'arī, *Barrasī*, 109. Some Mālikīs rejected *qur'a* if the slaves had been freed in death sickness (Ibn Rushd, *Bidāya*, ii, 405f (*K. al-'itq*); tr. Nyazee, ii, 450f). Compare the case of a man who divorces one of his four wives and marries a fifth in death sickness without it being known which of the four he had in mind: Yaḥyā b. Aktham (eventually classified as a Ḥanafī) would let all five inherit and observe the *'idda*, the Ḥanbalīs and some Imāmīs would cast lots for the one who had been divorced (Ibn Qayyim al-Jawziyya, *al-Ṭuruq al-ḥukmiyya fi siyāsāt al-shar'iyya*, ed. N.A. al-Ḥamad (Mecca 1428), ii, 744, 789; Karīmī, *Qā'ida*, 21; Ash'arī, *Barrasī*, 111. Cf. *Mawsū'a*, xvii, for the Mālikī and Shāfi'ite solutions.

⁹⁴ Al-Sarakhsī, *al-Mabsūṭ* (Beirut 2001), xvii, 49f; al-Khaṣṣāf, *Adab al-qāḍī*, 391, no. 452; Baghdādī, *Isḥrāf*, ii, 983 (no. 1993); Nawawī, *Minhāj*, iii, 440ff; *Mawsū'a*, xxxiii, 142f; Ṭūsī, *Nihāya*, 343f; Karīmī, *Qā'ida*, 105ff; Ash'arī, *Barrasī*, 108; cf. F. Rosenthal, *Gambling in Islam* (Leiden 1975).

each other and both have to swear), but the Ḥanafīs held that the judge should decide in most such situations.⁹⁵ The reasoning is clearly that lots could not be used in situations in which all claimants were entitled, but only some could be satisfied in full, or only one person was entitled, but nobody knew who that person was: picking out the lucky winners by lots amounted to gambling with their legal rights. Al-Shāfi'ī also had reservations about lot-casting in the latter case, but Ḥanbalites endorsed it in both.⁹⁶ Those who claimed that *qur'a* amounted to gambling and had been abrogated were ignorant, foul, or positively evil people, Ibn Ḥanbal said; they had the temerity to label a Prophetic decision *qimār*.⁹⁷ Polemicists who credit Abū Ḥanīfa with the statement *al-qur'a qimār* typically cast him as rejecting the use of lots altogether. The Imāmīs are among them.⁹⁸ According to them, sortition was acceptable in all matters unknown (*kullu majhūl fa-fibi 'l-qur'a*), a principle they defend to this day.⁹⁹

Attitudes to lots

In the Old and New Testaments, too, all forms of lot-casting are consistently envisaged as an appeal to the divine: God could see differences hidden to the human eye; there are passages in which the outcome of lot casting is explicitly equated with His will (1 Sam. 10:24; Prov. 16:33; Acts 1:23–6). The Greeks may once have thought in similar terms, though it has been argued that they never did so

⁹⁵ Cf. *Mawsū'a*, xxxiii, 147f.

⁹⁶ Cf. Ibn Taymiyya, *Ṣiḥḥat uṣūl madhhab ahl al-Madīna* (Beirut n.d. [1980?]), 85f. Our thanks to Aron Zysow for drawing this work to our attention.

⁹⁷ Ibn Qayyim al-Jawziyya, *Turuq*, 742, 744f, 747f.

⁹⁸ Thus Karīmī, *Qā'ida*, 18. He later notes that the *Mawsū'a* shows Abū Ḥanīfa to have accepted *qur'a* in general, only to cite a barrage of stories in which Abū Ḥanīfa rejects the Prophet's precedent, including the latter's use of *qur'a* for choosing a wife to accompany him on a journey (pp. 101f). Since the Prophet's use of lots in connection with wives is a situation in which the procedure was used to pick a winner, Abū Ḥanīfa may well in fact have disliked this *ḥadīth*, but according to Sarakhsī (above, note 89), none of the wives had any legal right to accompany him (whereas the slaves did have a legal right to such freedom as the estate allowed by virtue of the bequest).

⁹⁹ Ṭūsī, *Nihāya*, 345f; Majlisī, *Biḥār*, x, 203; xiv, 325; Ibn Ṭāwūs, *Faḥ al-abwāb*, 272 (citing Ṭūsī); Ash'arī, *Barrasī*, 106; Muḥammad Ḥusayn Faḍl Allāh, *al-Qur'a wa'l-istikhāra* (Beirut 1417/1997), 24ff, against Abū Ḥanīfa, Ibn Abī Laylā and Ibn Shubruma at 27, 29; Karīmī, *Qā'idat al-qur'a*, 34f.

in connection with divisory lot casting.¹⁰⁰ Divisory lot-casting is an expression coined by Thomas Aquinas for the use of lots to determine who should have or do what, as opposed to consultative and divinatory lot-casting, used to decide what to do and to obtain information about the future respectively.¹⁰¹ From ancient times to late antiquity the Greeks seem to have envisaged lot-casting of the divisory kind as a matter of chance, and the same is true of the Romans.¹⁰² It was a matter of *fortuna*, as Justinian called it in his legislation.¹⁰³ Their attitude affected their Hellenized Near Eastern subjects. Josephus, for example, famously tells how the rebels at Masada chose ten men by lot to kill the rest of them, and thereafter each other,¹⁰⁴ and how he himself had used lots to decide who, of his small band about to be captured by the Romans, should kill whom first (he surrendered as one of the last to survive). He too seems to think of the outcome as a matter of luck. He does put it to the reader that his own survival could have been due to God's providence rather than to chance, but it sounds like mere self-justification.¹⁰⁵

The Sunnī jurists generally seem to have thought of divisory lot-casting (*qur'a*) in much the same sober vein as their Greek and Hellenized predecessors. Their attitudes must of course have varied in place and time and we cannot claim to have studied them in any detail, but unlike Aquinas who (invoking Augustine) identified all sortition as 'a questioning concerning realities whose occurrence depends on the divine will', they convey little impression of seeing the divisory form as an appeal to God. They make no attempt to distinguish it from, or relate it to, consultation (*istikhāra*) or divination (*istiqsām*, *kihāna*), apparently taking it for granted that they were

¹⁰⁰ Cf. N.D. Fustel de Coulanges, *The Ancient City*, New York n.d. (originally published Paris 1864), 182f (book III, ch. x); Pauly-Wissova, s.v. 'Losung', cols. 1461ff, mostly disagreeing with Fustel de Coulanges and claiming that the Greeks distinguished between the lot as a divine oracle and as a tool of equality from the start.

¹⁰¹ Thomas Aquinas, *Commentary on the Ephesians*, book 1, lecture 4, citing Proverbs 18:18 ('The lots put an end to dispute') in justification of the first. He put lot-casting for the selection of people in the consultative rather than the divisory category. For other classifications, see Gataker, *Use and Nature of Lots*, ch. 3.

¹⁰² Rosenstein, 'Sorting out the Lot', esp. 51.

¹⁰³ Cf. Justinian, above, note 20; also Favorinus (Ps.-Dio), above, note 15. *Fortuna* had once been a goddess, but only in the sense that everything beyond human control could be seen as divine.

¹⁰⁴ Josephus, *War*, book 7, ch. 9, par. 1; cf. Y. Yadin, *Masada: Herod's Fortress and the Zealots' Last Stand* (London 1966), 201.

¹⁰⁵ Josephus, *War*, book 3, ch. 8, par. 7.

different; and those who classified *qur'a* as gambling in some situations evidently thought of it as a matter of chance. Their opponents did sometimes counter this by presenting it as an appeal to the divine: one *ḥadīth* displays the Prophet as casting lots in a situation in which there would be winners and losers with the prayer, 'O God, give judgement among your servants with truth', and Ibn Ḥanbal is credited with the statement that 'the lot hits the truth' (*al-qur'a tuṣību 'l-ḥaqq*).¹⁰⁶ But such statements are rare in the Sunnī material we have seen.

Even on a superficial reading, the Shī'ites come across as different. Using lots was indeed a way of delegating matters to God in their view,¹⁰⁷ and particularly effective if it was done by the imam: his *qur'a* never went wrong, being in the nature of *wahy*, they said.¹⁰⁸ The seventh/thirteenth-century Shī'ite scholar Ibn Ṭāwūs did think of lot-casting as a form of consultative divination, *istikhāra*;¹⁰⁹ and *qur'a* and *istikhāra* are also treated together in booklets by contemporary Shī'ites, including Faḍl Allāh, who repeats that lot-casting is a way of delegating problems to God. He mentions unidentified persons who hold that only the imam can do lot-casting, on the grounds that only he knows the special prayer to be said in connection with it (an argument perhaps designed to eliminate the whole institution), but he rejects it on the grounds that no special prayer is needed. The method is only to be used when there is no other solution, he says, and its purpose is simply to solve a problem, not the unveiling (*kashf*) of anything; but God does not cheat, as he also says.¹¹⁰

By way of contemporary comment, it may be worth noting that there has been much interest in divisory lots as a political device in both England and America in recent years.¹¹¹ Most Westerners probably think of the procedure as archaic, not so much because they see

¹⁰⁶ Sa'īd b. al-Musayyab's *ḥadīth* in Sarakhsī, *Mabsūt*, xvii, 49 (with *takhrīj*); Ibn Ḥanbal in Ibn Qayyim al-Jawziyya, *Turuq*, ii, 745.

¹⁰⁷ Thus several traditions in Majlisī, *Bihār*, xci, 234; civ, 325.

¹⁰⁸ Majlisī, *Bihār*, ii, 177; xxvi, 32; xl, 245, 328, 363; liii, 331, 332, etc.

¹⁰⁹ Ibn Ṭāwūs, *Faḥ al-abwāb*, 267ff.

¹¹⁰ Faḍl Allāh, *Qur'a*, 26, 30, 33, 49, 62f, 65. For the question whether lot-casting is the prerogative of the imam (as claimed in some traditions), see Ash'arī, *Barrasī*, 56ff. For lot-casting, *istikhāra* and *istiḡsām* in another booklet, see Ḥusaynī, *Qā'ida*, 123ff.

¹¹¹ E. Callenbach and M. Phillips, *A Citizen Legislature* (Berkeley 1985); K. Sutherland, *The Party is Over: Blueprint for a Very English Revolution* (Exeter 2004); revised as *A People's Parliament* (Exeter 2008); B. Goodwin, *Justice by Lottery* (Exeter 2005). Our thanks to Anthony Barnett for these references.

it as a form of gambling or divination as because they think they can do better than random chance. (In fact, this seems to have been the Ḥanafī attitude, too, but since the Prophet had endorsed sortition, it was only via his prohibition of gambling that they could reject it.)¹¹² Even today, however, Westerners usually accept the principle of random selection in connection with juries, which are still chosen by (computerised) lot-casting, and it is precisely this principle that is attracting attention as a way of introducing direct representation and popular control to counter what nowadays goes under the name of the ‘democratic deficit’. As a democratic device, random selection is what one book on the subject calls ‘the Athenian option’,¹¹³ heartily disliked by a philosopher such as Ibn Rushd because it took no account of virtue;¹¹⁴ but as an antidote to partiality and special interests in general it was wholeheartedly endorsed in the Islamic legal tradition. Ancient though the practice is, it may still be in for new roles, and not just in the West.¹¹⁵

The Return of the Near East

Here, however, our interest is not in modern politics, but rather in the relationship between ancient Near Eastern and Islamic culture. The question has not been much studied, but it has received some attention of late,¹¹⁶ deservedly in our view, because it amounts to asking how far we can reconstruct the cultural and religious history of the Near East as a single, continuous narrative rather than as dis-

¹¹² The explanation offered by Rosenthal, *Gambling*, 33, does not fit the contexts in which *qur'a* was identified as gambling.

¹¹³ Cf. A. Barnett and P. Carty, *The Athenian Option: Radical Reform for the House of Lords* (Exeter 2008); cf. also O. Dowling, *The Political Potential of Sortition* (Exeter 2008), which examines lot-casting as a political device in both Athens and the Western tradition.

¹¹⁴ Cf. P. Crone, *Medieval Islamic Political Thought* (Edinburgh 2004), 280 and note 111 thereto.

¹¹⁵ Curiously, a ballot or election is actually *iqtirā'* in modern Arabic (see H. Wehr, *A Dictionary of Modern Literary Arabic* [Wiesbaden 1966], s.v.). Other words may be more common (notably *intikhāb*), but *iqtirā'* was used in the Iraqi election in 2005, see http://www.newsday.com/news/nationworld/nation/ny-oiraqelectiongallery_0,322603.photo_gallery?index=7 (photo 2).

¹¹⁶ Cf. S. Dalley (ed.), *The Legacy of Mesopotamia* (Oxford 1998); M. Levy-Rubin, ‘On the Roots and Authenticity of Conquest Agreements in the Seventh Century’, *Jerusalem Studies in Arabic and Islam* 34, 2008; and the MELAMMU Project (www.aakkl.helsinki.fi/melammu).

jointed parts studied under the rubrics of Biblical, Greek, Roman, ancient Iranian, and Islamic history. Between them, the ancient and the Islamic periods cover most of the history of the region, but not all of it: there is a thousand years in between the two, and this is where the problem arises.

The thousand years in question are those in which the Near East was under colonial rule, first under the Achaemenids, next under Alexander and his successors, and thereafter under the Greeks and the Romans in its western part, under the Parthians and the Sasanians in Iraq. As the foreigners moved in with their own cultural traditions, the high culture of the Near East was unseated and increasingly reduced to a local tradition of limited interest to those who mattered. The ancient Near Eastern tradition did not die, of course. It changed when it ceased to be written in cuneiform languages and was expressed instead in Aramaic, but as Aramaic culture it lived on. Unfortunately, very little of it has come down to us. We do have Jewish writings in Aramaic, and from the third century CE onwards also Christian ones, but the pagans who formed the vast majority in the region for most of the period have not left us much. By and large, we are forced to study the Near East through the eyes of its conquerors, who remained outsiders to the region in the sense that they continued to be orientated towards their own cultural centres even after having made themselves thoroughly at home in the land. As ill luck would have it, the bulk of the Persian tradition is also lost, so that for practical purposes we only have one pair of foreign eyes, those of the Greeks and the Romans. Some of those who wrote in Greek were Near Easterners by origin, and some of them did try to make their native tradition available in Greek, adapted to Greek tastes. But the bulk of these writings is also lost, and most of the Near Easterners who wrote in Greek had assimilated the hegemonic culture so thoroughly that they sound no different from people of other origin writing in that language. The Jews are again the main exception.

From the third century CE onwards, however, all this begins to change. In 211 all members of the Roman empire were granted Roman citizenship (some minor exceptions apart), with the result that all now had to live by Roman law. Since people could not change their ways overnight whatever the degree of Roman control, inevitably this meant that much of what they actually practised was a mixture of Roman and native law. Often called 'provincial law', such native law surfaced in both the eastern and the western parts of the empire, and some of it came to be officially endorsed as Roman

law.¹¹⁷ What this means for us is that the indigenous tradition begins to be visible in the hegemonic culture. The two Greek papyri from Petra and Nessana are perfect examples: the lot-casting by which the shares were allocated was a provincial practice, not a procedure specified in Roman law.

Christianity made for even greater change. It originated as a Near Eastern religion carried by speakers of Aramaic, initially Jews, thereafter Jews and gentiles. A socially inclusive movement in which Greeks and non-Greeks, elite and masses, were brought together in a manner hitherto unknown in the Mediterranean, it gradually converted the entire empire to Near Eastern, if increasingly Hellenised, modes of thought, and in the Near East itself it allowed for a more extensive resurfacing of Aramaic culture as the Christians of Syria and Mesopotamia took to writing in Syriac (i.e. the Aramaic dialect current at Edessa). The establishment of a new capital in Constantinople also contributed to the 'Orientalisation' of the Roman empire, to use the term adopted by those who see the process from the Greek or Roman point of view. From our point of view, 'Orientalisation' is simply a way of saying that it becomes possible to see continuities outside the sphere of law as well.

The return of the Near East continued after the Arab conquest, for if Christianity was a kind of homecoming for the Near Eastern provincials, this was even truer of Islam. The Arabs were Near Easterners who definitively unseated the Greeks from their hegemonic role in the region. By then, of course, Greek culture had served as the high culture of the Near East for close to a thousand years, so that there was no way of shedding it: it had gone into the bloodstream of the local culture. But living by Greek culture under the hegemony of Greeks, who continued to see themselves as its ultimate arbiters even in its Christian form, was quite different from continuing Greek cultural ways on one's own terms, with or without awareness of their Greek origin. Initially, of course, the Arabs were much like the Greeks in that they saw themselves as arbiters of Islamic culture and they too were prejudiced against Aramaeans. But their hegemonic position was shortlived. As converts to Islam, the Aramaeans assumed the legacy, and eventually also the ethnicity, of the Arab conquerors and became their own cultural masters. When we speak of the Arabs today, it is largely the former Aramaeans (and Copts) that we have in mind. Consequently, a great deal of Islamic culture is Aramaic culture,

¹¹⁷ See J. Mélèze Modrzejewski, 'Diritto romano e diritti locali', in A. Schiavone, et al. (eds), *Storia di Roma*, III/2 (Turin 1993), 985–1009.

brought into Islam in the form in which it had developed under Greek and Persian rule, to develop in new directions thereafter.

This is the overall framework in which the connections between ancient Near Eastern and Islamic culture have to be pursued. Lot-casting as an official procedure provides us with a striking example of such a connection, with a typically uneven distribution of documentation: well attested in the cuneiform record, its only attestation in Aramaic seems to be in Jewish works. This is presumably due to the loss of the pagan Aramaic tradition rather than the disappearance of the practice, though it would help if it turned up in Syriac too. As it is, however, we do have it in Greek, and as good luck would have it, the Greek evidence comes from Petra and Nessana, which puts us in the rare situation of having conclusive evidence for pre-Islamic Arabia. Thereafter the evidence is plentiful, but only for the time of the Prophet, the Rāshidūn and the Umayyads: as the Arab conquest society wanes, so do the attestations. We do find discussion of the practice in Islamic law, but incidental references to the practice in real life seem to disappear until its curious reappearance under the Ottomans. Even the Jews eventually cease to mention it. Partition by lot-casting is still discussed in the Gaonic literature, dating from c. 700–1050; but there is no reference to it in the *Kitāb al-mawārīth* of Sa'adiya Gaon (d. 942), for all that it covers inheritance issues in detail, nor do we know of any in the Cairo Geniza. In short, the overall impression one gets is that what came out of Arabia was in this case an institution that no longer meshed with the way things were done in the rest of the Near East. It came and it went, leaving behind only some traces.

One may contrast this with another institution of ancient Near Eastern origin in Islamic law, the clause requiring a freed slave to remain with his or her master until the latter's death, i.e. as a servant. Known as *paramonē* ('remaining by'), it was also found as a labour contract for free people. Originating as a contract of adoption designed to provide for the manumitter in old age, it was transmitted from the Near East to Greece at an early stage, and after Alexander's conquest of the Near East the indigenous and the Greek forms of the institution interacted, to breed an amazing range of variations. The Romans accepted the validity of such contracts when they were made by non-Roman subjects under their own law, but not as part of Roman law. Inevitably, however, it came to be practised under Roman law after the universal grant of citizenship, and though the guardians of Roman law resisted this development, they may eventually have capitulated. With or without official recognition, the *paramonē* remained a prominent

part of provincial practice in the Near East. It was also known in Arabia, where free slaves seem often to have been adopted very much as they had been in the ancient Near East. We encounter the *paramonē* as a free labour contract at Nessana and as an archaic requirement of staying with the master in the Ḥijāz and elsewhere. After the conquests it is reflected in a wide variety of forms in a large number of *ḥadīths* attributed to early jurists and the Rāshidūn, and it formed the raw material of what the Muslims were to systematise as *kitāba* and *tadbīr*.¹¹⁸

If the contract had not been so important outside Arabia, it would presumably have had much the same history as lot-casting: it would have come and gone, leaving behind some traces. But far from receding into obscurity, it generated massive discussion and two new formal institutions. Manumission was of course of much greater practical importance in daily life than lot-casting, so the examples are not entirely comparable. For all that, it is hard not to suspect that the key transmitters of originally ancient Near Eastern culture will prove to be the inhabitants of the Fertile Crescent, now assisted by the Arabian tradition and now without it, but not usually the Arabians on their own.

Addresses for Correspondence: pcrone@ias.edu, adam.silverstein@orinst.ox.ac.uk

¹¹⁸ Cf. P. Crone, *Roman, Provincial and Islamic Law* (Cambridge 1987), ch. 5, and the literature cited there.