

RE-NEGOTIATING INTERCONFESSIONAL BOUNDARIES THROUGH INTERTEXTUALITY:
THE UNBORN IN THE *KṬĀBĀ D-HUDDĀYĒ* OF BARHEBRAEUS (D. 1286)

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ABSTRACT: THE ARTICLE ANALYZES THE *KṬĀBĀ D-HUDDĀYĒ*, A LEGAL WORK OF THE SYRIAC POLYMATH AND ECCLESIASTIC LEADER BARHEBRAEUS. THE INTERTEXTUAL STRATEGIES ARE ASSESSED, SUCH AS COMPILATION, REDACTION AND ADAPTION OF THE *HUDDĀYĒ*'S SOURCE MATERIAL, I.E. LEGAL COMPENDIA BY AL-GHAZĀLĪ, BY THE ḤANAFĪ AL-QUDŪRĪ AND TEXTS FROM CHRISTIAN TRADITION. IT IS ARGUED THAT THE DIFFERENT NORMATIVE BOUNDARIES ESTABLISHED BY THESE SOURCE TEXTS AND THEN INTERTEXTUALLY REWORKED BY BARHEBRAEUS IN THE *HUDDĀYĒ* CAN BE READ AS (RE-)NEGOTIATION OF COMMUNAL IDENTITY FOR A CHRISTIAN COMMUNITY IN AN ISLAMIC ENVIRONMENT. TWO TREATMENTS OF UNBORN LIFE AND PREGNANCY ARE TAKEN AS AN EXAMPLE: THE FUNERAL PRAYER FOR THE MISCARRIED CHILD AND FINANCIAL COMPENSATION IN CASE OF INDUCED MISCARRIAGE.

KEYWORDS: Barhebraeus; al-Ghazālī; intertextuality; interreligious reception processes; pre-natal life; Islamic law; Syriac-Christian law

Barhebraeus, the Syriac polymath and ecclesiastic leader, is a prime example of encounters in the Middle Ages. He compiled his works from a wide variety of sources, regardless of the particular field of knowledge. This article is an attempt to further identify source texts and analyze Barhebraeus's method of compilation, as applied in his normative work *Kṭābā d-Huddāyē*. As a scholar, he was familiar with the different intellectual traditions of his environment. Yet he was also a leader of his church, first as bishop and later as maphrian, the head of the West Syrian church in its eastern territories.¹ It is important to stress both of these roles he played, scholar and ecclesiastic leader, when analyzing his *Kṭābā d-Huddāyē* or "Book of Directions." Much as legal compendia authored by Muslim contemporaries of Barhebraeus, the *Huddāyē* preserves the earlier tradition. At the same time, Barhebraeus seems to carefully introduce and alter specific rulings to meet pastoral needs. He surely was aware of these pastoral problems through his own time as bishop and visitations of smaller bishoprics under his authority as maphrian, which are recorded in his ecclesiastical chronicle.²

This article argues that Barhebraeus's method of compilation of different Islamic and Christian sources in the *Huddāyē* can be best understood as intertextual. He negotiates, or re-negotiates, the normative boundaries of his community as markers of their identity, thus enabling his people to interact with their environment without blending in

¹ For the office of the maphrian see George A. Kiraz, "Maphrian Catholicos [Syr. Orth.]," *Georgias Encyclopedic Dictionary of the Syriac Heritage: Electronic Edition*, accessed February 24, 2020, <https://gedsh.bethmardutho.org/Maphrian>.

² See Hidemi Takahashi, *Barhebraeus: A Bio-Bibliography* (Piscataway, NJ: Gorgias Press, 2013), 37–38.

entirely. The interplay of texts that Barhebraeus compiles, I argue, can be assessed as parallel to the interconfessional interaction he envisions for his church. This ties in with earlier research which either assessed his adaption of Islamic norms or the careful alteration of his West Syrian Christian tradition. In this respect, the unborn child proves to be a good heuristic tool for the analysis of identity negotiations: discussions today, but also from Christian and Muslim polemics in the past, show that the unborn child is an important arena for questions of identity. What is more, the analysis of legal rulings concerning the unborn necessitates an examination of Barhebraeus's theoretical understanding of conception and embryonic development. Thus, this study is also a contribution to the history of the unborn in general and in Syriac Christianity specifically, the latter being a desideratum until now.

After introducing the *Kṭāḇā d-Huddāyē* and Barhebraeus's source material in more detail, the article analyzes briefly the author's conception of pre-natal life. The examination of Barhebraeus's notions of the unborn appears for the first time in this article. It also serves as a background for the second part. His theoretical outlook concerning the unborn is important to understanding how he treats the unborn child from a normative point of view in the *Kṭāḇā d-Huddāyē*, compiling and altering other Christian and Islamic normative texts.

Two instances of legal rulings on the unborn from the *Huddāyē* are used as an example: In the first case, Barhebraeus rules on proper burial rites for a miscarried child. The second example is the issue of abortion within the *Huddāyē*'s section on homicide. These two examples are chosen to cover both parts of the *Huddāyē*: burial rites are situated in the realm of canon or church law; homicide is a part of penal law and a mundane affair, despite some spiritual overtones.

In my conclusion, I argue that Barhebraeus's redactional method can be conceptualized as intertextual. Through compilation and redaction of diverse sources, he mediates, as it were, between his Christian and the surrounding Islamic legal traditions on the textual level. The analysis of this intertextual mediation can serve as a key for the underlying re-negotiation of identity and communal boundaries, which Barhebraeus conveys for his church in the form of normative stipulations. As the analysis will show, Barhebraeus's proposed norms can be read on two levels, first as practical and including a pastoral outlook, as well as conceptual, with the implication of theological assumptions.

Barhebraeus's Huddāyē

The detailed analysis of rulings from Barhebraeus's *Kṭābā d-Huddāyē* necessitates a broader introduction to the text and to the state of research in order to situate my own approach. The work's Syriac title, *Kṭābā d-Huddāyē* or "Book of Directions," derives from the many *huddāyē* (sg. *huddāyā*, 'direction, guidance') it contains. In Western scholarship, the work is often referred to as *Nomocanon* because it contains both "secular" *nomoi* as well as church canons. Accordingly, the first seven chapters deal with ritual or canon law proper and contain mostly rulings from Christian tradition. The remaining thirty-three of the overall forty chapters deal with: marriage and other matters of family law; trade as well as other private and civic affairs; criminal law; and regulations on legal procedure. Many of the normative ideas in this second part derive from Islamic *fiqh*, as Carlo A. Nallino has shown.³ Besides this overlap in content, Nallino also noted that the *Huddāyē* is overall structured according to a legal compendium of Abū Ḥāmid al-Ghazālī (d. 1111), namely the *Kitāb al-Wajīz*.

³ Carlo A. Nallino, "Il diritto musulmano nel Nomocanone siriano cristiano di Barhebreo," *Rivista degli studi orientali* 9 (1922/23): 512-568.

No critical edition of the *Huddāyē* has been published. The *editio princeps* was published by Bedjan in 1898.⁴ The only complete translation into a European language, Latin, was carried out by Assemanus (d. 1782) and later printed in Mai's *Scriptorum veterum nova collectio*.⁵ Modern translations into Arabic and Malayalam, especially of the first part on church and family law, exist, as the *Huddāyē* "remains to this day the most comprehensive and systematic collection of canon law in the Syrian Orthodox Church."⁶ The medieval abridgment and translation into Arabic by Daniel of Mardin (d. after 1382),⁷ as well as Daniel's Arabic glosses to one of the Syriac manuscripts,⁸ are further important keys to the work, not only to analyze its reception but also to understand the text itself.⁹

Although there is no systematic treatment of the *Huddāyē* in its entirety, several previous examinations of this text underlie present study.¹⁰ Nallino, as indicated, made a

⁴ Barhebraeus, *Ktābā d-Huddāyē/Nomocanon*, ed. Paulus Bedjan (Paris: Harrassowitz, 1898). Another print was issued by Çiçek, Barhebraeus, *Huddāyē*, ed. Julius Çiçek (Glane-Losser, Netherlands: Bar-Hebraeus Verlag, 1986).

⁵ Barhebraeus, *Nomocanon*, ed. Angelo Mai, *Scriptorum Veterum Nova Collectio* 10 (Rome: Typis Collegii Urbani, 1838).

⁶ Takahashi, *Barhebraeus*, 67; for the modern translations see *ibid.*, 229.

⁷ Vatican City, Biblioteca Apostolica Vaticana, ms. arab 636.

⁸ Berlin, Staatsbibliothek zu Berlin, Preußischer Kulturbesitz, Orientabteilung, ms. Petermann Syr. 23 (Sachau 206).

⁹ See the remarks to the glosses by Dorothea Weltecke, "Bemerkungen zum Kapitel über die Schule in Bar 'Ebroyos *Huddoye* (dem *Nomocanon*)," in *Christen in der islamischen Welt*, ed. Sidney H. Griffith and Sven Grebenstein (Wiesbaden: Harrassowitz, 2015), 303-4.

¹⁰ Several studies use the *Huddāyē* primarily to reconstruct earlier Christian legal texts or show how they were received by the maphrian, e. g. Walter Selb and Hubert Kaufhold, *Das syrisch-römische Rechtsbuch* (Wien: Verlag der Österreichischen Akademie der Wissenschaften, 2002), and Arthur Vööbus, *Syrische Kanonensammlungen: Ein Beitrag zur Quellenkunde, I Westsyrische Originalurkunden*

very important contribution by identifying the exact Islamic background of the work.¹¹ Although he uses the *Kitāb al-Wajīz* by al-Ghazālī for his comparison, he mentions al-Ghazālī's other legal compendia, unedited at that time, to be possible source texts for Barhebraeus.¹² Recently, Hanna Khadra referred to one of these other works of al-Ghazālī, the *Kitāb al-Wasīṭ*, to be in fact the maphrian's actual source text, but he falls short of providing the reader with tangible textual proof.¹³

In his important study, Lev Weitz closely compared the *Huddāyē's* rulings on family law (i.e. marriage and inheritance) to both compendia of al-Ghazālī. He pointed for the first time to concrete passages that seem to be modeled after al-Ghazālī's *Wasīṭ* rather than his *Wajīz*. Furthermore, Weitz not only analyzed the overlap of al-Ghazālī and Barhebraeus in content but also scrutinizes the specifically Christian character Barhebraeus gives to the rulings.¹⁴

Somewhat similar, Dorothea Weltecke analyzed some of the rulings in the *Huddāyē* closely to show how they can be used as a historical source for Barhebraeus's time.¹⁵ Like Weitz, Weltecke focused on nuanced differences between the established source

I, B, Corpus scriptorum christianorum orientalium 317 (Louvain: Secrétariat du CorpusSCO, 1970).

¹¹ The Islamic character of some of Barhebraeus's rulings had been noted earlier, e.g. by the reviewers of Bedjan's edition; for a list of these see Takahashi, *Barhebraeus*, 227.

¹² Nallino, "Il diritto musulmano nel Nomocanone," 540.

¹³ Hanna Khadra, "Le Nomocanon de Bar Hebraeus: Son importance juridique entre les sources chrétiennes et les sources musulmanes" (PhD Diss, Pontificia Universitas Lateranensis, 2005).

¹⁴ Lev E. Weitz, *Between Christ and Caliph. Law, Marriage and Christian Community in Early Islam* (Philadelphia: University of Pennsylvania Press, 2018), especially 234-241. In a similar manner, Weitz also compared another normative text of Barhebraeus's, the *Ethicon*, with its Ghazālian *Vorlage*, the famous *Iḥyā' 'ulūm al-dīn*, in their respective chapters on the qualities of a good wife: Lev Weitz, "Al-Ghazālī, Bar Hebraeus, and the "Good Wife,"" *Journal of the American Oriental Society* 134, no. 2 (2014): 203-223.

texts of Barhebraeus and his own rulings. Presuming the pastoral intention of the maphrian, the analysis of the re-arrangement of Barhebraeus's rulings, she argued, can indicate social problems that the maphrian's community encountered and how he tried to solve them.

My own approach is based particularly on the research by Weitz and Weltecke. However, Barhebraeus goes beyond the redaction and alteration of Islamic or Christian sources in writing his *Huddāyē*. As will become apparent, especially when analyzing his rulings on abortion, Barhebraeus presents a complex patchwork of legal traditions from both Christian normative writings and from different Islamic legal works. By carefully singling out such redactional techniques as compilation, addition, summary, rephrasing, and reinterpretation, it is possible, I argue, to reconstruct how the maphrian tries to situate his community in the medieval patchwork of confessions.

Intertextual analysis has been applied and developed mostly within literary studies.¹⁶ The intertextual study of normative texts or the use of intertextual analysis for the reconstruction of history is less developed. As Manfred Pfister notes, one must be careful not simply to denote the traditional study of sources and *Vorlagen* as intertextual.¹⁷ When studying a text such as Barhebraeus's *Huddāyē*, it is helpful to move away from ideas of "influence," which in our case would consider how writers such as al-Ghazālī, for example, would have had on Barhebraeus. To the contrary, my study focuses on the self-contained and creative redaction of sources which the maphrian undertakes. As said

¹⁵ Dorothea Weltecke, "Zum syrisch-orthodoxen Leben in der mittelalterlichen Stadt und zu den Hūddōyē (dem Nomokanon) des Bar 'Ebrōyō," in *Orientalia Christiana: Festschrift für Hubert Kaufhold zum 70. Geburtstag*, ed. Peter Bruns and Heinz O. Luthé (Wiesbaden: Harrassowitz, 2013), 585-613.

¹⁶ See e.g. Manfred Pfister, "Konzepte der Intertextualität," in *Intertextualität: Formen, Funktionen, anglistische Fallstudien*, ed. Ulrich Broich and Manfred Pfister (Tübingen: Max Niemeyer, 1985), 1-30.

¹⁷ Cf. *ibid.*, 10.

before, I argue that this intertextual redaction can be used to analyze the normative outlook of Barhebraeus on his church's intercommunal interaction.

The Islamic Legal Compendia behind the Huddāyē

There are three Islamic legal texts that should be considered to have served Barhebraeus as source material for his *Huddāyē*: two Shāfi'ī compendia by al-Ghazālī and a Ḥanafī compendium by al-Qudūrī. I shall introduce them in some detail, first because the character and place of the legal compendia by al-Ghazālī need to be highlighted as they serve as prime *Vorlage* for Barhebraeus, especially concerning structure; and second, because I was able to identify al-Qudūrī's *Mukhtaṣar* as another *Vorlage* for the *Huddāyē*.

The famous theologian Abū Ḥāmid al-Ghazālī (d. 1111) wrote four compendia of law, all of which have hardly been studied in Western scholarship. The shortest one, the *Khulāṣat al-mukhtaṣar* is not considered here, because it is an abridgment of the *Mukhtaṣar* of al-Muzanī (d. 878) and follows a different model. The longest of the remaining three legal compendia is the *Kitāb al-Basīṭ*. Said to be based on al-Juwaynī's *Nihāyat al-maṭlab*, it has not been published but is extant in several manuscripts.¹⁸ A brief analysis by Lev Weitz and myself make it seem unlikely that the *Basīṭ* underlies the *Huddāyē*.¹⁹ Whereas the *Wajīz* and *Wasīṭ* are often applauded for their clear structure, the *Basīṭ* seems to lack this, contrary to al-Ghazālī's claim in the foreword to the *Wasīṭ*.

¹⁸ See Carl Brockelmann, *History of the Arabic Written Tradition: Volume 1* (Leiden: Brill, 2016), 473 and Carl Brockelmann, *History of the Arabic Written Tradition: Supplement Volume 1* (Leiden: Brill, 2016), 781.

¹⁹ I want to express my gratitude to Lev Weitz for sharing his private copies of the *Basīṭ* and discussing our cursory reading during a workshop in Hamburg in June 2017.

This lack in structure (or its size²⁰) would also make for its lack of reception compared to both other compendia.²¹

The *Kitāb al-Wasīṭ* was first published in 1997.²² In its prologue, al-Ghazālī does in fact portray it as an abridgment of the *Basīṭ*: The reason for excerpting the *Basīṭ*—despite “the abundance of its usefulness” (*ghazāra fawā’idihī*)—is the alleged laziness of students who are not willing or able to delve into such a comprehensive work. Although it seems as if al-Ghazālī wants to blame the students and the overall *Zeitgeist* of scholarly laxity, he does “admit” that he also used a “higher degree of exactness” (*mazīd ta’annuq*) in “arranging the material” (*taḥsīn al-tartīb*) of the *Wasīṭ*.

One compendium by al-Ghazālī remains to be considered, the *Kitāb al-Wajīz*. Apart from the *Khulāṣa*, it is the shortest of his legal compendia. It was first published in 1899.²³ The *Wajīz* is often said to be an abridgment of the longer *Kitāb al-Wasīṭ*²⁴ and,

²⁰ In its prologue al-Ghazālī states regarding the *Wasīṭ* that not more than “a third of a tenth” of the questions of the *Basīṭ* is missing (other versions read “one tenth”). However, this does not inform us about its length, i.e. how extensively the answers to these questions were presented.

²¹ One possible explanation is that the *Basīṭ* stems from the same sort of scholarly practice as the *Khulāṣa* and was later revised and further abridged in form of the *Wasīṭ*. Especially the prologue of the *Basīṭ* could provide further information to this effect.

²² Abū Ḥāmid al-Ghazālī, *al-Wasīṭ fī l-madhhab*, 7 vols., ed. Aḥmad M. Ibrāhīm (Cairo: Dār as-Salām li-l-ṭibā’a wa-l-nashr wa-l-tawzī’ wa-l-tarjama, 1997); for the mss. see Brockelmann, *History of the Arabic Written Tradition*, vol. 1, 473–74 and Brockelmann, *History of the Arabic Written Tradition: Supplement vol. 1*, 781.

²³ Abū Ḥāmid al-Ghazālī, *al-Wajīz fī fiqh al-imām al-Shāfi’ī*, 2 vols. (Cairo: Maṭba’at al-ādāb, 1899). Two further editions have recently been published: Abū Ḥāmid al-Ghazālī, *al-Wajīz fī fiqh al-imām al-Shāfi’ī*, 1 vol., ed. Aḥmad F. al-Mazīdī (Beirut: Dār al-kutub al-‘ilmīya, 2004), which I refer to; another edition, *al-Wajīz fī fiqh al-imām al-Shāfi’ī*, 2 vols., ed. ‘Alī Mu’awwaḍ and ‘Ādil ‘Abd al-Mawjūd (Beirut: Dār al-Arqam b. Abī al-Arqam li-l-ṭibā’a wa-l-nashr wa-l-tawzī’, 1997), lacks the chapter on *farā’id*.

²⁴ See e. g. Brockelmann, *History of the Arabic Written Tradition*, vol. 1, 474

aside from minor differences, it does in fact resemble the latter's structure. In the prologue, however, al-Ghazālī presents the concise work with its "clear structure" (*badī' tartībīhi*) as an aid for the reader's memory. Most notably, "exceptional opinions" (*wujūh ba'īda*) are omitted. Also, al-Ghazālī introduces a system of signs (*rumūz*) in the form of letters above the respective rulings to indicate possible *ikhtilāf* or scholarly disagreement to al-Muzanī, Abū Ḥanīfa, and Mālik. These characteristics would have made the *Wajīz* useful as a reference work for students and maybe legal practitioners. What is more, it is also what may have made it useful for Barhebraeus when authoring a similar compendium for his own community.

Both works, the *Wasīṭ* and the *Wajīz*, must be taken into consideration as potential *Vorlagen* for Barhebraeus's *Huddāyē* according to their arrangement of the legal material. The possible use of the works by the maphrian corresponds to their vivid reception in the Shāfi'ī *madhhab*. Together with two works of Abū Ishāq al-Shīrāzī (d. 1083) and al-Muzanī's *Mukhtaṣar* they were conceived as the "established five" (*al-khamsa al-mashhūra*).²⁵ These formed the basis for the later Shāfi'ī compendia of al-Rāfi'ī (d. 1226) and al-Nawawī (d. 1277). In this regard, Barhebraeus's Christian use of al-Ghazālī's legal compendia parallels their Islamic reception in the contemporary Shāfi'iyya. One reason for the maphrian's appropriation of Ghazalian texts in *fiqh*, which was suggested by earlier research, was Barhebraeus's usage of al-Ghazālī's texts in his other writings.²⁶ The vivid reception of al-Ghazālī's legal compendia in Barhebraeus's times should be considered as an important additional aspect.

²⁵ See Yaḥyā b. Sharaf al-Nawawī, *al-Taḥḍīb al-asmā' wa-l-lughāt*, 4 vols. (Beirut: Dār al-kutub al-'ilmiyya, ca. 1980; reprint of the edition Cairo: Idārat al-ṭibā'a al-Muniriyya, 1927), 1.3.

²⁶ See e.g. Hidemi Takahashi, "The Influence of al-Ghazālī on the Juridical, Theological and Philosophical Works of Barhebraeus," in *Islam and Rationality*, ed. Georges Tamer (Brill, 2015), 303-325.

That Barhebraeus must have been basically informed about Islamic legal discourse can also be inferred from his use of another compendium, from a different school, the Ḥanafīyya. Based on comparison of the passages analyzed for this article, and some cursory comparison of other sections, al-Qudūrī's *Mukhtaṣar* can be concluded to be yet another compendium of Islamic *fiqh* that was used by Barhebraeus for his *Huddāyē*. Regarding its concision and reception within its *madhhab*, the *Mukhtaṣar* of Abū al-Ḥusayn al-Qudūrī (d. 1037) is comparable to al-Ghazālī's compendia.²⁷ The *Mukhtaṣar* is a key text of the Ḥanafī school and has been commented on many times. One reason for its popularity is certainly its concision.²⁸ Many manuscripts are extant and several printed editions of the text exist, which show the ongoing reception and central place of the *Mukhtaṣar*.²⁹ There are minor differences in the different editions within the passages under scrutiny here. This should not be surprising considering how widely distributed the text was. However, there is also good reason to take into consideration one of the many commentaries of the *Mukhtaṣar* as an additional source for

²⁷ For al-Qudūrī see now Talal al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlubughā's Commentary on the Compendium of Qudūrī* (Leiden: Brill, 2017), 23–36; for his reception see also Brannon M. Wheeler, "Identity in the Margins: Unpublished Ḥanafī commentaries on the *Mukhtaṣar* of Aḥmad b. Muḥammad al-Qudūrī," *Islamic Law and Society* 10, no. 2 (2003): 182–209.

²⁸ *Ibid.*, 184–91.

²⁹ I refer to the edition Abū l-Ḥusayn Aḥmad Muḥammad b. Aḥmad b. Jaʿfar al-Qudūrī, *al-Mukhtaṣar fī l-fiqh al-Ḥanafī*, ed. Kāmil M. M. ʿAwīḍa (Beirut: Dār al-kutub al-ʿilmiyya, 1997). There is also a bilingual Arabic-English edition: Abū l-Ḥusayn al-Qudūrī, *The Mukhtaṣar of Imām Abū'l-Ḥusayn Aḥmad ibn Muḥammad ibn Aḥmad ibn Jaʿfar ibn Ḥamdān al-Qudūrī al-Baghdādī (362 AH-428 AH): A Manual of Islamic Law according to the Ḥanafī School*, ed. Ṭāhir M. Kiānī (London: Ta-Ha, 2010); for the manuscripts see Brockelmann, *History of the Arabic Written Tradition*, vol. 1, 159 and Brockelmann, *History of the Arabic Written Tradition*, suppl. vol. 1, 296–98.

Barhebraeus:³⁰ In some details, Barhebraeus's *Huddāyē* seemingly corresponds to passages of the *Hidāya* by Burhān al-Dīn al-Marghīnānī (d. 1197).³¹ The *Hidāya* preserves the text of its *matn*, al-Qudūrī's *Mukhtaṣar*, quoting it passage by passage and expanding it through the commentary, becoming in turn a key text of its own within the Ḥanafīyya.³² The *Hidāya*'s inclusion of the *Mukhtaṣar* would explain the correspondence between Barhebraeus's *Huddāyē* and al-Qudūrī's text as well as some resemblance to al-Marghīnānī's *Hidāya*.³³ In sum, regarding the diversity of the material that Barhebraeus's uses for his legal compendium, we find a picture similar and just as complex as in his other writings.

Barhebraeus's Conception of Pre-Natal Life

Before treating Barhebraeus's legal stipulations regarding burial rites for a miscarried child and punishment for abortion, a brief analysis of his conception of pre-natal life in his theoretical writings³⁴ is in order (more detailed aspects can be found in the footnotes). In general, there is no single passage or chapter in his writings which treats both embryological development and ensoulment in more detail. The maphrian's most de-

³⁰ For the commentaries of the *Mukhtaṣar* see Brockelmann, *History of the Arabic Written Tradition*, vol. 1, 159 and Brockelmann, *History of the Arabic Written Tradition*, suppl. vol. 1, 296–98 as well as the studies by Wheeler, "Identity in the Margins" and al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition*.

³¹ Burhān al-Dīn Abū al-Ḥasan 'Alī b. Abī Bakr al-Marghīnānī, *al-Hidāya sharḥ bidāyat al-mubtadī*, 8 vols., ed. Na'īm A. N. Muḥammad (Karachi, Pakistan: Idārat al-Qur'ān wa-l-'ulūm al-islāmiyya, 1417 h).

³² Wheeler, "Identity in the Margins," 186–188.

³³ The similarity of the titles, *Huddāyē* and *Hidāyā*, is curious, as well. On the other hand, the idea of guidance expressed by the root *h/d/y* is rather generic.

³⁴ For an overview of his theological and philosophical works see Takahashi, *Barhebraeus*, 63–73.

tailed treatment of procreation and embryogenesis is found within his greater philosophical encyclopedia, the *Ḥēwaṭ ḥeḵmṭā* or “Cream of Wisdom.” Yet ensoulment is not discussed here.³⁵ What further complicates the issue is a probable change in Barhebraeus’s notion of ensoulment when comparing his two theological compendia, the earlier and more extensive *Mnāraṭ quḍshē* or “Candelabrum of Sanctities” and the later and shorter *Kṭābā ḡ-Zalgē* or “Book of Rays.”³⁶

There also exists an Arabic “Abridged Treatise on the Human Soul” (*Maqāla mukhtaṣara fī l-nafs al-bashariyya*) ascribed to Barhebraeus.³⁷ Although its authenticity can be disputed,³⁸ it can serve to analyze Barhebraeus’s theory of conception and ensoulment, because it comprises the most important aspects to that effect.

³⁵ This assessment is based on my study of the fifth chapter of Barhebraeus’s zoology within the *Ḥēwaṭ ḥeḵmṭā* or “Cream of Wisdom,” for which I used the manuscripts Damascus, Syriac Orthodox Patriarchate, ms. 239, fol. 120r–123r, and ms. 240, fol. 135v–140v as well as Florence, Laurenziana, ms. Or. 83, fol. 104v–108r. An edition and translation of this chapter is in preparation and will be part of my PhD thesis.

³⁶ Compare Ján Bakoš, *Psychologie de Grégoire Aboulfaradj dit Bārhebraeus d'après la huitième base de l'ouvrage le candélabre des Sanctuaires* (Leiden: Brill, 1948), 42 (Syriac text: 71–72) and *Book of Zelge by Bar-Hebraeus* [sic] (Istanbul: Zafer Matbaası, 1997), 174. This difference was noted already by Oscar Braun, *Moses bar Kepha und sein Buch von der Seele* (Freiburg i.B.: Herder, 1891), 140. In my PhD thesis (in preparation), I will argue that Barhebraeus must have changed his opinion after dealing (for the first time? more closely?) with Avicenna’s discussion on substantial change and re-reading his Christian witnesses accordingly; for the deliberations of Avicenna see Jon McGinnis, “On the Moment of Substantial Change. A Vexed Question in the History of Ideas,” in *Interpreting Avicenna: Science and Philosophy in Medieval Islam*, ed. by Jon McGinnis with the assistance of David C. Reisman (Leiden and Boston: Brill 2004), 42–61.

³⁷ Louis Cheikho, “Al-nafs al-bashariyya. Maqāla mukhtaṣara ṣannafahā al-ab al-‘ārif bi-llah Abū l-Faraj al-ma‘rūf bi-bn al-‘Ibrī,” *Machriq* 1 (1898): 745–49, 828–33, 934–38, 1084–87, 1113–20; for reprints and other editions see Takahashi, *Barhebraeus*, 268–69.

In the beginning of the *Maqāla mukhtaṣara* (sec. 8), the Aristotelian concept of the soul is given, i.e. as first perfection of a natural body which has potentially life, thinking, and intellect (*kamāl awwal li-jism ṭabīʿī dī ḥayāh fikr ʿaql bi-l-quwwa*). According to this concept, the soul is the active principle of animate beings and acts through certain faculties. Among others, these faculties are responsible for nurturing the body and making it grow (sec. 13 & 14). This underlies the later question (sec. 31), if the soul is created before, after, or together with the body. First, the idea of the pre-existence of the soul in respect to the body is refuted. On the other hand, it is argued against the soul's posteriority: "Some (*qawm*) say that the soul is created forty days after the body, which is a groundless allegation (*zaʿm bāṭil*). As to a body without a soul that nurtures it, its formation (*taṣawwur*), generation (*takwīn*), and its passing from one form to another (*intiḳāl min ṣūra ilā ṣūra ukhrā*) would be impossible."

³⁸ Georg Graf noted that the *Maqāla mukhtaṣara* depends heavily on Mushē bar Kēpā's (d. 903) "Mēmrā on the soul", see his *Geschichte der christlichen arabischen Literatur, Erster Band: Die Übersetzungen* (Vatican City: Biblioteca Apostolica Vaticana, 1944), 273-74. However, this is true for the psychology of the two theological compendia of Barhebraeus, too. If one identifies the Arabic *Maqāla mukhtaṣara* with the otherwise lost *Mēmrā shennāyā* supposedly written rather early in Barhebraeus's life (see Takahashi, *Barhebraeus*, 72-73), the following hypothesis could be assumed: Barhebraeus's made an Arabic excerpt from Mushē's "Mēmrā on the soul," which he later used for the psychological part of his *Mnāraṭ quḍshē*. However, I have also compared the text of the *Maqāla mukhtaṣara* as published by Cheikho (which is not a critical edition) with a further manuscript in Berlin (Berlin, Staatsbibliothek zu Berlin, Preußischer Kulturbesitz, Orientabteilung, ms. Berol. Or. Quart 887 [59 Aßfalg]). In fact, the comparison reveals many disagreements. Adding the fact that manuscripts containing the *Maqāla mukhtaṣara* are rather scarce, a different hypothesis could be that it is a later Arabic excerpt of Barhebraeus psychological teachings by a different person and thus rather freely transmitted compared to an original work.

Hence, it is concluded that the last possible opinion (*qawl*) must prove true, namely, that the soul comes into being (*tūjad*) together with the body. This happens, when the body is suitable for the human form (*yaṣlūḥ li-ṣ-ṣūrat al-insāniyya*), i.e. when its figure is well-proportioned (*bi-i'tidāl qawāmihi*) and its mixture coagulated (*istiḥqām mizājīhi*). The presentation is brief and condensed, but the underlying notions clearly match discussions of conception and embryogenesis prevalent at the time.³⁹ The most important aspect is the idea of a mixture becoming hard and differentiated. This constitutes something that could be described as a proto-body.⁴⁰ This proto-body is then

³⁹ For a detailed analysis of medical notions of pre-natal life in medieval Islam see Ursula Weisser, *Zeugung, Vererbung und pränatale Entwicklung in der Medizin des arabisch-islamischen Mittelalters* (Erlangen: Lüling, 1983). For a recent overview and study with further literature see Nahyan Fancy, "Generation in Medieval Islamic Medicine," in *Reproduction. Antiquity to the Present Day*, ed. by Hopwood et al. (Cambridge: Cambridge University Press, 2018), 129-140. See also, e.g., Mohammed S. Belguedj, "L'embryologie chez le Medecin Ali Rabban al-Ṭabarī et dans le commentaire coranique de Faḥir [sic] al-Dīn al-Rāzī," in *Actas del V Congreso Internacional de Filosofia Medieval I* (Madrid : Editorial Nacional, 1979), 551-560; Carmela Baffioni, "L'embryologie islamique entre heritage grec et Coran: Les philosophes, les savants, les théologiens," in *L'embryon: formation et animation. Antiquité grecque et latine, tradition hébraïque, chrétienne et islamique*, ed. by Luc Brisson et al. (Paris: Librairie Philosophique J. Vrin, 2008), 213-231.

⁴⁰ This description of embryonic development in the *Maqāla mukhtaṣara* entails passing from one form to another, growing, coagulation and proportion of stature is more explicated and detailed compared to the two authentic Syriac theological compendia by Barhebraeus, which it is somehow related to. Still, this does not help in determining if it is, in fact, an earlier excerpt of Mushē by Barhebraeus himself or a later excerpt of Barhebraeus's teachings by someone else (cf. footnote 38 above): In the earlier *Mnāraṭ quḍshē* the view of later ensoulment of an already existing body is ascribed to certain Syriac church fathers and rejected by Barhebraeus. In the later *Kṭābā d-Zalgē*, however, he asserts that it cannot be the sperm drop (Syr. *nuṭptā*, a motive most likely taken from Avicenna) but the perfected body which receives the soul. The maphrian now sides with the Syriac fathers (without, however, explicitly rejecting the Greek fathers whose position he had embraced in his earlier work). In

fit for the human soul, which is its form but also active principal nourishing the body and making it grow. Moreover, it is important to keep in mind the Aristotelian notion of the soul as perfection of the body *in potentia*. The faculties of the soul are present but are not necessarily enfolded or active. Even the rational faculty, which distinguishes humans from other animals, only starts to act after birth, as Barhebraeus states in his zoology.

Barhebraeus's theoretical notions of pre-natal life as briefly presented will be an important reference point to understand the maphrian's rulings on the unborn child, which are under scrutiny in the two remaining sections.

my reading of both passages, I would argue that the underlying Aristotelian notion of soul as form and perfection of the body generally stays the same. What changes is Barhebraeus's metaphysical understanding of when it is right to speak of a "human substance." In other words, the body of the sperm drop does not have the same substantial form as the human body (cf. footnote 36 above). This, in turn, leads Barhebraeus to reassess the rather exegetical arguments of the Syriac church fathers. Somewhat puzzling, the *Maqāla mukhtašara* ascribed to the maphrian seems to provide the idea of the body's perfection (e.g. *i'tidāl qawāmihi*), which in principle accords with the argument of the *Kṭāḇā ḡ-Zalgē* (however, it also resembles the ideas laid out in a passage of the *Mnāraṭ quḡshē*, see Bakoš, *Psychologie de Grégoire Aboulfaradj*, 12, Syriac text: 20-21). On the other hand, the *Maqāla mukhtašara* rejects ensoulment on the fortieth day - against the *Kṭāḇā ḡ-Zalgē*, where an interpretation of Lev 12,2-5 (originally by the Syriac father Philoxenus of Mabug, d. 523) is brought forth in support of the argument: The duration of forty days (for a female child: eighty days) set for purification after birth is explained by the pregnant carrying an unanimated body without a soul. The problem, then, is interpreting the fortieth day: is it counted after conception or "after the body"? And, if the latter, is it after the body of the semen or a body suitable for the human form or soul? The misunderstandings and confusion could have happened to Barhebraeus when excerpting Mushē or to someone excerpting Barhebraeus and unfamiliar with the metaphysical ideas of substantial change according to Avicenna, leaving no solution to the problem of authorship of the *Maqāla mukhtašara*.

Funeral Rites for the Miscarried Child

The rulings on proper burial for a miscarried child are introduced by Barhebraeus into Syriac legal thought by using and reshaping corresponding Muslim regulations. There are several rulings related to the unborn in his *Huddāyē* found within different legal contexts such as baptism, burial, inheritance, trade, and criminal law. The question of proper funeral rites for a miscarried child is found in chapter six (“On the burial of the dead”), which is the last chapter concerning ritual or canon law.⁴¹ The chapter is divided into two sections (Syr. *pāsoqē*),⁴² within which several canons or rulings by Christian authorities are cited. Apart from these citations, additional *huddāyē* are given by the maphrian. The heading *huddāyā* signals that Barhebraeus establishes a normative concept of his own, rather than drawing on Christian tradition.⁴³ Three *huddāyē* at the end of the first section deal with the actual practice of preparing and burying the dead, the last of which is the *huddāyā* on the miscarried child.⁴⁴

⁴¹ Barhebraeus, *Kṭābā d-Huddāyē/Nomocanon*, 68–72.

⁴² The first section deals with the funerary office, the burial, and the graves; the second treats memorial services, unlawful lamentation and commemoration of people of different faith (Syr. *‘uhdānā ḡa-(a)hrēnyay shubḥā*), i.e. heterodox.

⁴³ For the importance of these passages as historical sources see Weltecke, “Bemerkungen zum Kapitel über die Schule in Bar ‘Ebroyos Huddoye (dem Nomocanon),” 303 and Weltecke, “Zum syrisch-orthodoxen Leben in der mittelalterlichen Stadt.” Weitz sees the heading *huddāyā* as division of paragraphs, see *Syriac Christians in the Medieval Islamic World: Law, Family, and Society* (PhD diss., Princeton University, 2013), 295. These diverging interpretations are due to the different character of the work in the ecclesiastical and the “secular” part, which Weltecke and Weitz analyzed respectively.

⁴⁴ Strikingly, there is an Arabic paraphrase of these stipulations about actual burial practice on the margin of the *Huddāyē* in ms. Berlin Petermann Syr. 23: Whereas the rulings in the first part of the section are attributed to authorities and known from other sources as well, the concrete practice of burial seems to be of interest for the readership of the text, who annotate it in their vernacular. To my

The problem regarding this burial does not seem to be—as comparison with Islamic legal compendia suggests—if the miscarried child is buried, but if it is buried accompanied by prayer (Syr. *ba-ṣlotā*).⁴⁵ According to the maphrian, the prayer for the “embryo that a woman miscarries” (Syr. *‘ulā*⁴⁶ *d-yāḥṭā a(n)tṭā*) is not only permissible but explicitly ordered (Syr. *ba-ṣlotā meṭq̄bar*). However, the condition for proper burial is that the child’s forms must be perfected (Syr. *en eshtamlyān ṣurāṭēh*)—if this is not so, there is no funeral prayer (Syr. *w-ellā lā*). Barhebraeus then asserts that it is not right or befitting (Syr. *zādeq*) to listen to those who reject the prayer on the grounds that the child is not baptized. On the contrary, the maphrian asserts that the aborted child is “a child of believers” (Syr. *yaldā(h)w da-mhaymnē*) and the baptism of the parents counts for their child as well, “through which here are baptized the unbaptized” (Syr. *d-bāh ‘āmdin lā ‘midē d-hārkā*).

An important key to the analysis of the rulings on burial for the miscarried child is the social aspect of the burial rites. Many of the preceding canons deal with the question of

knowledge, this is the first treatment of the burial of a miscarried child in a Syriac normative text. Similar and even more detailed discussions about the ritual state of a child during birth can also be found in the Maronite *Kitāb al-Hudā*, see Emmanuel Khoury, “Les sacrements de l’initiation chrétienne dans kitab al-huda,” *Parole de l’Orient* 3, n° 1-2 (1967): 309-23.

⁴⁵ According to the other canons on burial in the *Huddāyē*, the one leading the prayer should be a priest; only if no orthodox priest is available, the laity is responsible. Islamic compendia also discuss the position of burying a miscarried child without prayer. However, in what follows, burial always refers to “proper burial” including prayer for the dead. Thus, the word “burial” is used interchangeably with funeral prayer or more generally (proper) funeral rites.

⁴⁶ Bedjan in his edition vocalizes *‘welā*, which can be found as a variant in the dictionary of Jacques E. Manna, *Chaldean-Arabic Dictionary. Reprinted with a new appendix by Dr. Raphael J. Bidawid* (Beirut: Babel Center Publications, 1975), 533. I will not indicate further slight variants in Bedjan’s rendering, e.g. *(a)ḥrānāyā* for *(a)ḥrēnāyā*.

interaction with heretics when burying the dead. What is at stake is the social inclusion and exclusion of the dead person to be buried, of family and kin, as well as of the wider community. The affiliation to the dead based on neighborhood or family relation can intersect with group identity based on confession.⁴⁷ For example, the maphrian (following Jacob of Edessa, d. 708) allows participating in funerals of heretics, as long as one does not participate in singing the hymns. However, this is granted out of human love (Syr. *meṭṭol ḥubbā (a)nāshāyā*) and thus implicitly denoted as a compromise to the rightful norms.

Hence, the burial for the miscarried child can also be interpreted as a social issue: is the child inside or outside the group? Barhebraeus argues against unnamed people who deny proper burial for the miscarried child and would thus exclude the child from the community. Their reason to deny the funeral prayer is that the child is not baptized. Baptism here becomes the marker of group identity excluding or including the person to be buried.

Barhebraeus's argument that the baptism of the parents counts as baptism for their progeny should thus not be perceived primarily as a theological one.⁴⁸ The maphrian's

⁴⁷ See the ruling by John of Tella (d. 538), which Barhebraeus quotes in the first section, permitting the funeral prayer of an orthodox believer by an heretic priest if no orthodox priests live in the vicinity. (Also, concerning the grave, only necessity allows the burial of an orthodox next to a heretic according to John.) Strikingly, Barhebraeus here inserts a *huddāyā*—the only one besides the three at the end of the section—and contradicts John: The dead is to be buried by orthodox laypeople rather than a heretic priest.

⁴⁸ His argument conceived as theological has in fact caused considerable trouble for its interpreters. The Latin translation adds a footnote—whether by Assemanus or Mai—"I do not know what fable this author follows" (*nescio quam fabulam sequitur heic auctor*). The editor Bedjan objects the ruling twice, once stating that "this teaching is not accurate" (*lā ḥattiṭ yulpānā hānā*). Even the medieval Arabic translator seems to feel the need to explain Barhebraeus's argument: The child "is prayed for because

qualification of the ruling is important: only here (Syr. *hārkā*) does the baptism of the parents count. This accords with a canon in the second chapter of the *Huddāyē* treating the baptism of a pregnant catechumen.⁴⁹ Barhebraeus refers back to the council of Neo-Caesarea (held in 315) and decrees: “A pregnant catechumen shall be baptized; then, when her child is born, he is baptized as well, as he does not participate (Syr. *mshāwtṗā*) in her baptism.” This ruling by the maphrian can be compared with the Syriac version of the canons of Neo-Caesarea,⁵⁰ which reads: “Concerning a catechumen who is found pregnant, it is lawful that she is baptized whenever she wills. For nothing in this matter makes the mother communicate [something] to the child, since everyone demonstrates his own will through confession.” Strikingly, the maphrian alters his source material: he explicitly declares the baptism of the child obligatory after the mother’s baptism while

it is the child of believers. For as we established in our theological books (*kutubnā l-kalāmiyya*): The baptism happens on the last day, baptizing the one not baptized here (*hunā*),” ms. Vat. arab 636, fol. 69v. As of yet, I was not able to trace the reference made to theological books. There seems to be some connection to the question of the fate of prematurely deceased children as discussed often in the context of theodicy. That the Arabic translation hastens to straighten the theological problem posed by Barhebraeus’s ruling does not necessarily indicate if the unnamed adversaries forbidding proper burial for the miscarried child are a mere rhetoric device by the maphrian or if an actual debate had been taking place in his community (and still persisted in the translator’s time).

⁴⁹ Barhebraeus, *Kṭābā d-Huddāyē/Nomocanon*, 26.

⁵⁰ I assume here that the Syriac version of the canons of Neo-Caesarea preserved in the manuscript Paris, Bibliothèque nationale de France, ms. Syr. 62, fol. 133r–v is close to what Barhebraeus used as his source (cf. footnote 74 below). For a discussion of possible legal texts Barhebraeus used see Herman G.B. Teule, “Juridical Texts in the Ethicon of Barhebraeus,” *Oriens Christianus* 79 (1995): 23–47, where Teule suggests this Paris manuscript as a source of Barhebraeus’s *Ethicon*. The Neo-Caesarean canons in this manuscript only show minor differences compared to the version in the so-called Synodicon, cf. Arthur Vööbus’s edition: *The Synodicon in the West Syrian tradition: I* (Louvain: Secrétariat du CorpusSCO, 1975), 101.

pregnant. In contrast, the earlier tradition stressed the theological aspect of the ruling, namely the consent of the catechumen to be baptized.⁵¹ Barhebraeus on the other hand relates the “usual” procedure, as it were: The child is baptized after birth and thus becomes part of the community.⁵² Only in the exceptional case of a miscarriage—hence the qualifying “here” (Syr. *hārkā*)—does the maphrian assume the baptism of the believing parents to be a marker for the child also. Moreover, to counterbalance the missing theological argument or proof, he uses his authority in a rhetorical way: “for us” (Syr. *lan*) the child counts as baptized, as opposed to the opinion of the unnamed “others.” The child is included in the community because she or he belongs to the parents and is thus buried with prayers as a member of this community.

The issue of funeral prayer for the miscarried child can also be understood in an interreligious context. This is based on a comparison with the possible sources of Barhebraeus’s ruling, namely, the norms to this effect as presented in Islamic law. Both compendia of al-Ghazālī, the *Wasīṭ* and the *Wajīz*, as well as al-Qudūrī’s *Mukhtaṣar*, treat the funeral prayer of the miscarried child. That Islamic norms are, in fact, underlying the

⁵¹ This is in line with the theology of baptism as Barhebraeus presents it in his *Mnāraṭ quḏshē*. The baptism is described here as “relation to God” (*baytāyuṭā ḡa-lwāṭ Allāhā*). This relation must be based on a baptized person’s faith, while faith is described as the consent of the rational soul to this relation; see Radbert Kohlhaas, *Jakobitische Sakramententheologie im 13. Jahrhundert: Der Liturgiekommentar des Gregorius Barhebraeus* (Münster: Aschendorff, 1959), 33–36, 97–99. Barhebraeus does not treat or even mention child baptism in the context of his baptism theology.

⁵² In fact, the rulings on baptism parallel the ones on burial in that both can be read having a social rather than theological character and dealing with in- and exclusion. In the chapter on baptism, the question of (re-)integration of people baptized by heretics is one of the main concerns. This would also make for the excessive use by Barhebraeus of rulings treating (re-)baptism of heretics possibly not extant in his time – they can be read to show patterns of ex- and inclusion through proper baptism rites; cf. Barhebraeus, *Kṭābā ḡ-Huddāyē/Nomocanon*, 20–28.

maphrian's ruling on the miscarried child can be inferred from the fact that we find no comparable statement in the earlier Christian tradition.⁵³ For a proper comparison, the parallel passages of all three Islamic texts are taken into consideration; to this end, they are also situated in their respective textual tradition.

The three Islamic works analyzed use a number of terms and concepts that can be traced back to certain *aḥādīth* and appear time and again in Islamic legal discussions concerning miscarried children or newborns more generally.⁵⁴ The term mostly used for a miscarried child is *siqṭ* (or *saqṭ*, from the root *s/q/ṭ* 'to fall').⁵⁵ The crying of a newborn is referred to as *istahalla* or *ṣarakha*.⁵⁶ In more detailed treatments, the jurists also discuss

⁵³ What is more, we also find a description of the concrete funeral practices, i.e. how to prepare the dead for the burial, in a longer *huddāyā* by Barhebraeus. The stipulations clearly parallel the corresponding chapter of al-Ghazālī's *Wasīṭ* but, again, the maphrian Christianizes the Islamic practice. Here, too, seems to exist no Christian regulation Barhebraeus can turn to. Whether he tries to re-establish a Christian version of an Islamic practice prevailing among the common people of his community or if he introduces something completely new cannot be determined for the time being.

⁵⁴ However, the tradition was not static, as there was a shift of emphasis comparing early normative discussions regarding pre- and neo-natal life with the later discourse, even if key terms and notions of these discussions can be traced back to *ḥadīth*, cf. Thomas Eich, "Abortion – Islamic Perspectives," in *Oxford Handbook of Religious Perspectives on Reproductive Ethics*, ed. Dena Davis (forthcoming) and Thomas Eich, "Patterns in the History of the Commentation on the so-called *ḥadīth Ibn Mas'ūd*," *Journal of Arabic and Islamic Studies* 18 (2018): 137-162.

⁵⁵ For the terminology of *saqṭ* see Thomas Eich, "Induced Miscarriage in Early Mālikī and Ḥanafī Fiqh," *Islamic Law and Society* 16 (2009): 302-36, 324.

⁵⁶ While the *Wasīṭ* mentions the miscarried child going out (*kharaja*), the *Wajīz* explicates that the child has to cry (*ṣarakha*). The closeness in writing of *ṣarakha* and *kharaja* makes a copying mistake at some point not entirely impossible and the print of the *Wasīṭ* does mention that two of the manuscripts add *ṣarakha* at the margin. This might be a later comment stemming from comparison to the *Wajīz* or another work. The appearance of *ṣarakha* together with *istahalla* is already attested in *ḥadīth*, cf. e.g.

other such signs of life as e.g. twitching (*ikhtalaja*). Generally, the intention is to determine the legal consequences of a premature as opposed to a “normal” birth regarding the neo-natal signs of life (*‘alāmāt al-ḥayāh*). Among these consequences are the waiting period for a woman to remarry (*‘idda*), the financial compensation for the killing of an embryo (*ghurra*, on this see the next section), or, as in this case, proper burial rites. From this perspective, only the signs clearly perceivable *after* birth can be used to establish clear proof of the status of the child. The criterion of *istihlāl* possibly has its background in the assumption of infusion of the spirit at birth (together with the first breath or crying).⁵⁷ Regarding the burial of a miscarried child, the *Mukhtaṣar* of al-Qudūrī, in its usual brevity, simply states: “Who cries (*istahalla*) after birth is named, washed, shrouded and prayed for; and if he does not cry, he is wrapped in cloth (*udrija fī khirqa*) and not prayed for.”⁵⁸

Al-Ghazālī in his compendia adds the criterion of formation or definition (*takhtīṭ*) of the miscarried child.⁵⁹ Three cases can be discerned in his judgement: (1) In case it cries or shows other post-natal signs of life, it is treated as an adult (*fa-huwa ka-l-kabīr*).⁶⁰ (2) If

Ṣaḥīḥ al-Bukhārī (Damascus: Dār Ibn Kathīr li-l-ṭibā‘a wa-l-nashr wa-l-tawzī‘, 2002), 327 (chap. *Kitāb al-Janā‘iz*, sec. *Idha aslama al-ṣabī*).

⁵⁷ See Eich, “Abortion – Islamic Perspectives.”

⁵⁸ Al-Qudūrī, *al-Mukhtaṣar fī l-fiqh al-Ḥanafī*, 48.

⁵⁹ *Wajīz*, 87-88 and *Wasīṭ*, 2.375-76, respectively.

⁶⁰ For the adult as counterpart of the child or—in other words—the question of the child as full human being see Avner Gil’adi, *Children of Islam: Concepts of Childhood in Medieval Muslim Society* (Basingstoke, UK: Macmillan, 1992), 80. Another example of this juxtaposition of adult and child is the question if the funeral prayer for a child (not necessarily a newborn) is to any avail as the child is seen as sinless, cf. Yaḥyā b. Sharaf al-Nawawī, *Kitāb al-maḡmū‘ sharḥ al-Muhadhdhab li-l-Shīrāzī*, 23 vols., ed. Muḥammad N. al-Muṭṭī (Jidda: Maktabat al-irshād), 5.216.

the embryo is not formed, it is wrapped in cloth (*khirqā*⁶¹) and there is no prayer. (3) The last case is that the child is formed (“and if the human shape becomes apparent,” *wa-’in zahara shaklu l-ādamī*⁶²) but shows no other post-natal signs of life. Al-Ghazālī mentions differing opinions within his *madhhab* in this case. One possible opinion (*qawl*) is to treat the formed child as an adult by inferring the spirit from the shape (*istidlālān bi-shakl ‘alā al-rūḥ*).⁶³ The relation of shape and animation (or presence of a spirit) was introduced in al-Ghazālī’s Shāfi’ī *madhhab* in an earlier discussion: His teacher al-Juwaynī, himself already referring to earlier authorities, brings up the argument that formation can serve as a proof of the embryo being infused with the spirit (*rūḥ*), and thus being alive.⁶⁴

⁶¹ Like in the case of al-Qudūrī, note the different terminology used for wrapping the miscarried child who does not show any signs of life (*adraj fī khirqā*) as opposed to proper shrouding (*takfīn*).

⁶² The term *takhṭīṭ* is used by al-Ghazālī again in his treatment of the fine for the embryo analyzed in the next part of this article.

⁶³ There is no indication which of the different opinions al-Ghazālī prefers. The later commentator Ibn al-Ṣalāḥ (d. 1245) ruled that the best option (*aṣaḥḥ*) is to wash the miscarried child, but not pray for him or her, see al-Ghazālī, *al-Wasīṭ fī l-madhhab*, 2.376 n. 3.

⁶⁴ I refer here to the *Nihāyat al-maṭlab*, the most important reference underlying al-Ghazālī’s compendia. Its author al-Juwaynī (d. 1085) considers the formation of the miscarried child as an important criterion for the funeral prayer, cf. ‘Abd al-Malik b. ‘Abd Allāh b. Yūsuf al-Juwaynī, *Nihāyat al-Maṭlab fī darāyat al-madhhab*, 21 vols., ed. ‘Abd al-‘Azīm Maḥmūd al-Dīb (Jidda: Dār al-minhāj li-l-nashr wa-l-tawzī’, 2007), 3.32-34. He states that the infusion of the spirit into the child is to be expected at the same time when it is formed (*idhā badā al-takhlīq fa-qad dakhala awwān tawaqqu‘ jarayān rūḥ*). The possibility that a long time (*zamān ba‘īd*) passes between the beginning of the formation (*awā’il al-takhlīq*) and the streaming of the spirit is in fact considered by al-Juwaynī but rejected. The discussion found in al-Juwaynī’s *Nihāya* is probably related to different interpretations of the underlying *ḥadīths*, cf. Mohammed Ghaly, “Beginning of Human Life: Islamic Bioethical Perspectives,” *Zygon* 47, no. 1 (2012): 175-213; and Eich, “Induced Miscarriage in Early Mālikī and Ḥanafī Fiqh.”

In regard to both criteria, crying and formation, the underlying speculations about animation are more implicit than explicit; in the passages analyzed here, the Muslim jurists allude to their tradition rather than engage in detailed speculations on theoretical aspects of ensoulment regarding the embryo. At any rate, for a proper burial the child supposedly must have been alive at some point. This is indicated by having a spirit or *rūḥ*. The term *nafs* or soul is not apparent, at least in the texts considered here.

Comparing this Islamic discourse with Barhebraeus's ruling on burial for the miscarried child, it is noteworthy how he appropriates his source material to a Christian understanding. Concerning terminology, Barhebraeus does not have a technical term for *siqṭ* and thus renders "an embryo that a woman miscarries" using the Syriac verb *iḥeṭ*.⁶⁵ More remarkably, formation (*takhtīt*) is paraphrased by "its forms are completed."⁶⁶ This, I argue, can be understood as an Aristotelian reading by Barhebraeus along the lines of his embryological conceptions sketched earlier: The proto-body must be suitable to receive the soul. Barhebraeus seems to see the completion or perfection of the body's forms to be a (not necessarily *the*) significant point in the actualization of the human being, which is composed of material body and form-giving soul. Accordingly, the outer criterion of formation used by the maphrian parallels his probable source, namely al-Ghazālī's legal writings. But the underlying notion is different: For Barhebraeus it is not the embryo's animation or being alive, but its actualization of being a human inferred from the completion of its forms. One must be careful to conceive this as a notion of absolute human dignity or constituting a concise concept of personhood. In

⁶⁵ Similar paraphrases, however, also appear in Islamic legal texts, e.g. in al-Juwaynī, *Nihāyat al-Maṭlab fī darāyat al-madḥhab*, 3.32: "*fa-idhā asqaṭat al-mar'a*."

⁶⁶ Interestingly, the marginal note in ms. Berlin Petermann Syr. 23 paraphrases back to Arabic (emendation in brackets): "*al-saqṭ alladhi ḡahara [fīhi] al-takhtīt yughsal wa-yu[ṣallī 'alayhi]*."

other words, the question at stake is not who is a human being or a person *per se*, but who deserves proper burial and prayer.

The post-natal signs of life figuring under *istihlāl* in Islamic legal texts do not appear in Barhebraeus's discussion. This can be explained in various ways: Barhebraeus does not even discuss the option of post-natal ensoulment in his speculative writings. How much more so would he dismiss infusion of the spirit at birth as a legal criterion? On the other hand, post-natal signs of life as a criterion are possibly conceived by the maphrian as too Islamic looking at their terminological and conceptual background in *ḥadīth*. A rather simple explanation which should not be entirely dismissed, however, is that the maphrian closely adheres to his *Vorlage* by al-Ghazālī, who uses *takhṭīṭ* as one important criterion. I would argue that all three explanations somehow play together.

What is more, the criterion of communal belonging is not discussed by the Muslim jurists in the case of burial for the miscarried child. Yet, al-Marghīnānī's *Hidāya* decides on funeral prayer for a child in captivity according to the parents' religious belonging. As there is no Muslim practice comparable to baptism in respect to infants and their introduction to the community,⁶⁷ the *fuqahā'* generally do not seem interested in the communal identity or any possible identity marker when it comes to the prayer for the miscarried child. This is true also for al-Marghīnānī's treatment in respect to the miscarried child. However, he introduces communal belonging in respect to the funeral prayer for a child as captive.⁶⁸ The question of the child's adherence to Islam is discussed, and he asserts that the child's status as Muslim can be inferred from the relation to his or her parents or even only one parent. Although the overlap to

⁶⁷ This is *not* to say that there is no comparable identity marker in general, most notably the *shahāda*. Male circumcision, on the other hand, comes into question as an outward sign, but is usually not seen as salvific or decisive criterion for inclusion into the community.

⁶⁸ Al-Marghīnānī, *al-Hidāya sharḥ bidāyat al-mubtadī*, 2.149.

Barhebraeus's deliberations are not as apparent as in the other cases presented here, there is ample reason to take into consideration al-Marghīnānī's discussion as possible inspiration to Barhebraeus, especially because the passage in question follows immediately after al-Marghīnānī discusses burial for the miscarried child. This is another indication that it was, as mentioned before, al-Marghīnānī's commentary to al-Qudūrī's text, rather than the *Mukhtaṣar* itself, that the maphrian made use of.

To sum up, Barhebraeus's ruling on the funeral prayer for the miscarried child can be presented as follows: He makes use of the concept of formation found in al-Ghazālī's legal compendia to introduce a new criterion apart from baptism. His phrasing of "completion of forms" represents an Aristotelian reading of this criterion and provides an implicit argument, i.e. the entitlement to proper burial according to the actualization of the human nature of the child. On the other hand, post-natal signs of life referred to in the Islamic legal discourse as *istihlāl*, with a clear background in *ḥadīth*, are dismissed by the maphrian. What is more, Barhebraeus must somehow deal with the traditional Christian criterion of baptism as a marker of group identity. In doing so, he does not do away with it, but uses the social aspect of baptism to conceive the miscarried child as part of the community via the baptized parents. The missing theological argument concerning this "virtual" baptism is counterbalanced with rhetoric: Contrasting his stance ("for us the baptism counts") with the dissent by unnamed others ("it is not appropriate to listen to those saying..."), he uses his authority rather than a real rationale.

The social and identity aspects of Barhebraeus's ruling can be read on two different levels, I argue: practical or pastoral as well as conceptual or theological. On the practical level, I propose that allowing this practice was possibly a matter of pastoral care for bereaved parents. The loss of a person, even more so of a child, is a disruption of the

community and threatens communal stability.⁶⁹ Funeral rites foster communal integrity after such a disruption.

What is more, however, Barhebraeus's Syriac community is living in an interconfessional and interreligious setting. If one assumes the unnamed opponents of proper burial for the miscarried child as real (rather than a rhetoric device), it is evident that bereaved Christian parents had been denied coping with their loss in the way that their Muslim neighbors were. Certainly, the possibility of a proper burial for the miscarried child does not necessarily pose the threat of conversion of grieving parents. Yet, it might make Islamic religious practice appear more true-to-life and thus attractive. By allowing this burial practice, Barhebraeus potentially lessens the attraction to the dominant Muslim religion.

Beyond the practical implications possibly intended by the maphrian, the introduction of the ruling can be read as a shift on the conceptual level as well. The fate of dead infants and miscarried children had time and again figured as a problem in philosophical and theological discussions.⁷⁰ How do they take part in salvation when they die

⁶⁹ That the loss of unborn children was in fact an issue in Barhebraeus's medieval Middle Eastern context we can infer from the literary genre specifically aiming at bereaved parents, treating at times the loss of miscarried children see Gil'adi, *Children of Islam*, 67–115. An interesting example for parents' grief and way to cope with child loss is also found in a literary source, namely a toy in a children's grave, cf. Hend Gilli-Elewy, *Bagdad nach dem Sturz des Kalifats: Die Geschichte einer Provinz unter ilh̄anischer Herrschaft (656-735/1258-1335)* (Berlin: Klaus-Schwarz-Verlag, 2000), 196.

⁷⁰ Cf. the reference in the Arabic translation of the *Huddāyē* to "theological books" which treat this problem, footnote 48 above. Famous in this regard is Gregor of Nyssa's *De infantibus praemature abreptis*. Whether this text was known to Barhebraeus in Syriac is not clear or even doubtful, because it seems not to have been widespread; cf. Martien F. G. Parmentier, "Syriac Translations of Gregory of Nyssa," *Orientalia Lovaniensia Periodica* 20 (1989): 143–93, 153. For treatises on the loss of children in Islam see, Gil'adi, *Children of Islam*, 67–115.

prematurely? And why are they taken away despite their innocence? The denial of the proper burial based on the criterion of baptism is certainly problematic in the case of miscarried children. The child had simply no chance to become a member of the community formally, although he or she certainly would have been baptized if born alive. Barhebraeus now includes the child into the community through burial and funeral prayer. Not only the funeral prayer but also the inclusion in and belonging to the community can be seen as expressions and means of salvation. Although not fully developed, this line of argument can be read as an implicit contribution to the problem of theodicy or divine justice, which Barhebraeus here offers to his community.

Furthermore, the maphrian now regulates the proper burial along the same lines as his Muslim counterparts. Thus, the ruling can serve to prove how Barhebraeus's Christian community is in accord with a sense of (divine) justice across communal borders. The Christians cannot be criticized for denying the dignity or honor to be buried properly to someone having human shape.⁷¹ Still, the speculative backdrop implicit in the ruling is Aristotelian and ties in with the Christian theology that Barhebraeus lays out in his other writings. Hence, the ruling sets the Christian community aside from certain traditions and speculative notions regarding ensoulment prevalent in the Islamic tradition, but seeks overlap with the latter at the same time. We will see the same

⁷¹ For example, al-Juwaynī explicitly refers to the child's inviolable right (*ḥurmat haqqihi*) when treating the burial of the miscarried child, see al-Juwaynī, *Nihāyat al-Maṭlab fī darāyat al-madhhab*, 3.32. In general, however, the concept of *ḥurma* in Islamic legal discussions is complex and cannot easily be subsumed under a modern concept of dignity, cf. Birgit Krawietz, *Die Ḥurma: Schariatrechtlicher Schutz vor Eingriffen in die körperliche Unversehrtheit nach arabischen Fatwas des 20. Jahrhunderts* (Berlin: Duncker & Humblot, 1991), 317-28. Also, for the idea of the human shape as the worthiest of all creation see e.g. Muḥammad Faḥr al-Dīn al-Rāzī, *al-Tafsīr al-kabīr* (Beirut: Dār al-fikr li-l-ṭibā'a wa-l-nashr wa-l-tawzī', 1401 h / 1981), 21.13-14.

phenomenon of seeking overlap while preserving difference in Barhebraeus’s treatment of abortion when analyzing the second example.

“Abortion” in the *Huddāyē*

Whereas the ruling on burial for the miscarried child is essentially a Christian re-appropriation of an Islamic practice, the norms set out by Barhebraeus for what is commonly referred to as abortion use both Christian and Islamic textual traditions in specific ways. Before we discuss these rulings on abortion by the maphrian, a distinction in terminology is in order: in contemporary language, “abortion” in most cases refers to *intentional* abortion of the unborn child. On the other hand, *spontaneous* abortion is often termed miscarriage. In the legal discussions of the analyzed sources, however, what is treated most can be termed *induced* miscarriage.⁷² This means that the abortion is not spontaneous but caused by some outward influence; if this is intentional is not necessarily relevant. Throughout the following, I use abortion as a general term while specifying it where necessary.

In the *Huddāyē*, Barhebraeus issues two different rulings on abortion, one on intentional abortion, the other on induced miscarriage. We find both treated under homicide (*qeṭlā*), which is the first section of chapter thirty-four of the *Huddāyē* dealing with “severe felonies deserving punishment” (Syr. *saḵalwātā rawrbātā ḡ-šāwyān la-msām b-rēšā*).⁷³ Barhebraeus redacts the entire section in an intertextual manner, using both Christian and Islamic material. After analyzing the wider frame of the section on homicide, I will introduce the respective passages treating abortion in their immediate textual context and check them against their sources.

⁷² I owe this distinction to Thomas Eich, see his “Induced Miscarriage in Early Mālikī and Ḥanafī Fiqh.”

⁷³ Barhebraeus, *Ktābā ḡ-Huddāyē/Nomocanon*, 430-437.

In chapter thirty-four, Barhebraeus discusses several other crimes apart from homicide. The chapter heading as well as most of the crimes treated find their parallel in al-Ghazālī's compendia, where in both *Wasīṭ* and *Wajīz* we find an equivalent chapter headed *al-janāyāt al-mūjiba li-l-'uqūbāt*. What al-Ghazālī presents are in fact the punishments for *ḥudūd* or transgressions of divine law. Unlike al-Ghazālī and Barhebraeus, al-Qudūrī's *Mukhtaṣar* uses the heading *Kitāb al-ḥudūd* and arranges the crimes in different order.

What is more, in Islamic legal works, homicide (or assault generally) is usually a topic or chapter of its own, outside the *ḥudūd*. This is because assaults are regulated according to *lex talionis* or *qiṣāṣ*. They are not seen foremost as transgression of divine laws but as a legal issue between the victim and the culprit (or their respective kin). Interestingly, Barhebraeus incorporates homicide into the chapter on "severe felonies to be punished." Thus, he generally keeps the overall arrangement of al-Ghazālī, who treats homicide before *ḥudūd*. At the same time, Barhebraeus Christianizes the collection of severe felonies: drinking alcohol and the specifically Quranic *kaḍf*, false accusation of adultery, are omitted.

Barhebraeus's prologue to the chapter on felonies is remarkable as well. He juxtaposes (1) the spiritual law (Syr. *nāmosā ruḥānāyā*) introduced by Christ, which teaches forgiveness and non-violence; and (2) "this worldly state" (Syr. *quyāmā hānā 'almānāyā*), which compels the community to punish and discipline felons according to the laws introduced by Moses. As an example, the maphrian introduces the *lex talionis* by referring to Exodus 21:14 and "other laws."

The following rulings on homicide are an interesting *melange* of, mostly, al-Qudūrī's *Mukhtaṣar* and letter 188 of Basil of Caesarea (d. 379).⁷⁴ Basil is freely introduced by Barhebraeus as a Christian authority, and mostly used when it comes to the spiritual aspect of the punishment: penance through exclusion from the community and gradual re-admission.

What led to identifying al-Qudūrī's *Mukhtaṣar* as underlying Barhebraeus rulings is, in fact, the fivefold distinction of intention discussed in the beginning of the section. Punishment for homicide according to intention is very old: it figures e.g. in Exodus, in Basil's letters as well as in al-Ghazālī's compendia. But the division along five forms of intention is presented foremost by al-Qudūrī (and his later commentators).⁷⁵ Also, the entire structure of Barhebraeus's section on homicide follows al-Qudūrī's respective

⁷⁴ This is the first of the three so called Canonical Letters of Basil, published by Périclès-Pierre Joannou, *Discipline générale antique: 2. Les canons des Pères Grecs* (Rome: Tipografia Italo-Orientale "S. Nilo," 1963), 92-158. Many of the writings of Basil had been translated to Syriac, see Sebastian Brock, "Traduzioni siriache degli scritti di Basilio," in *Basilio tra Oriente e Occidente: Convegno Internazionale "Basilio il Grande e il Monachesimo Orientale," Cappadocia 5-7 ottobre 1999*, ed. Étienne Baudry (Magnano, Italy: Qiqajon [Comunità di Bose], 2001), 165-180. A seemingly complete Syriac translation of the Canonical letters is only known to be extant in ms. Paris, Bibliothèque nationale de France, ms. syr. 62. According to Walter Selb, *Die Geschichte des Kirchenrechts der Westsyrer (von den Anfängen bis zur Mongolenzeit)* (Wien: Verl. der Österr. Akad. der Wiss., 1989), 116 n. 124, the other witnesses omit the first eight canons, which include the passages by Basil found in Barhebraeus's *Huddāyē*. What also points to some direct or indirect relation of Barhebraeus's text and ms. BnF syr. 62 is the wrong identification of Amphilochius as Basil's uncle (Syr. *ḥālā*) in both texts. Although the Syriac reception of Basil's Canonical letters certainly deserves more study, for the time being I use the version extant in Paris for comparison in the course of this study; cf. also footnote 50 above.

⁷⁵ Shams al-Dīn al-Sarakhsī, *Kitāb al-Mabsūṭ*, 31 vols. (Beirut: Dār al-ma'ārifā, n.d.), 26.59 accredits the fivefold distinction to Abū Bakr al-Jaṣṣās al-Rāzī (d. 981). To follow the exact traces of the distinction is beyond the scope of this article.

chapter. As mentioned, the maphrian masks the Islamic origins of his rulings by referring to unspecified “other laws” along the ones given by Moses.

Having introduced the overarching framework in which Barhebraeus introduces Christian and Islamic elements, let us turn back to the passages treating abortion. The first ruling treats intentional abortion: Those who give poison to women to cause an abortion (Syr. *a(y)ḵ d-yāḥṭān*), are willful murderers (Syr. *qāṭolē ṣebyānāyē*), like people killing with poison or sorcery in general. All of these culprits need to be punished (Syr. *mḥaybē*). The ruling is attributed to Basil and introduced along others by the same Church Father, e.g. the liability for homicide of a soldier killing in battle or of women who accidentally kill their husbands by giving them aphrodisiacs. Barhebraeus here summarizes and rearranges the rulings given by Basil in Canon VIII. The main difference in the exact phrasing is to whom each one explicitly attributes the abortion: Basil focuses on women, either as administering drugs or taking poison themselves to cause an abortion. The maphrian speaks of unspecified persons causing women to abort.

The textual contexts in the *Huddāyē* as well as in Basil’s letters suggest the question of intention and subsequent liability of the culprit as the main issue at stake. The interrelation of motives pertaining to sorcery, poison and abortion is old and common in the Christian tradition. This is often related to the notion of deviance from faith because of the sorcery involved or interpreted as a crime against God’s creation. In our case, Barhebraeus inserts the rulings immediately after discussing the five categories of intent.

This focus on intention rather than sorcery is seen also in comparison with another passage on intentional abortion in Basil’s letter. Here, in Canon II, abortion is discussed by Basil in more detail, especially denying any importance to the formation of the unborn child in the discussion of how the woman is punished. The discussion focuses on

the moral aspect of destroying the unborn child and endangering the woman's own life. Strikingly, Barhebraeus does not make use of Basil's discussion about formation. He also does not treat the issue of infanticide or abandonment of newborn children in a broader sense as Basil does in his letter. On the other hand, despite its brevity, the treatment of intentional abortion distinguishes Barhebraeus's *Huddāyē* from most Islamic legal compendia. Although intentional abortion figures elsewhere in Islamic normative thought,⁷⁶ it is not found in al-Qudūrī's *Mukhtaṣar* or al-Ghazālī's *Wajīz* or *Wasīṭ*. Hence, in respect to rulings on the unborn, the inclusion of intentional abortion in the section on homicide (along the ones on sorcery or discussing a soldier being liable of killing) awards the text a distinctive Christian character.

Apart from intentional abortion, Barhebraeus treats induced miscarriage as well. Seemingly conceived as a different legal problem, it follows later in the text, towards the end of the section on homicide. The paradigmatic case the maphrian refers to is financial compensation when someone hits the stomach of a pregnant woman who then has an abortion. Although the question of intent is not explicitly discussed, the motive of striking the stomach of a pregnant woman is common and usually treated as unintentional. Given this and the fact that Barhebraeus treats intentional abortion earlier (albeit through drugs), it is very plausible to assume the issue to be one of induced miscarriage, not intentional abortion.

As a result of the strike, Barhebraeus distinguishes several cases:

- If the child is born dead, there is a fine of 50 gold dinars.

⁷⁶ See Marion Holmes-Katz, "The Problem of Abortion in Classical Sunni *fiqh*," in *Islamic Ethics of Life: Abortion, War, and Euthanasia*, ed. Jonathan E. Brockopp (Columbia: University of South Carolina Press, 2003), 25-50.

- For a child born alive who dies later, the fine is 1,000 gold dinars. This corresponds to the full fine for a male adult.⁷⁷
- If the mother dies while or shortly after giving birth to a dead embryo, the fine amounts to 550 gold dinars, that is 500 for the mother (i.e. half of the fine for the male adult), and 50 for the dead child.
- The fine amounts to 500 gold dinars, if the mother dies before giving birth.

Barhebraeus adds that only half the sum is due if the child is female. Also, the fines for the miscarried children of slave women are treated: in the case of a male child, $\frac{1}{20}$ of what the child would have been worth, had it been alive, but $\frac{1}{10}$ in case of a female child.⁷⁸

The entire passage is taken almost verbatim from al-Qudūrī's *Mukhtaṣar*. Nonetheless, several differences can be noted. The first is, again, related to terminology. In Islamic *fiqh* there is a special term for the financial compensation of a child born dead: *ghurra*. Barhebraeus does not make use of the term, which goes back to *ḥadīth*, neither does he attempt to somehow translate it. Rather, he uses the generic expression “he (i.e. the culprit) pays.”

Besides, al-Qudūrī prescribes the *ghurra* in relative terms, i.e. “half of a tenth,” or five percent of the full *diyya*. Moreover, he treats the fine only in relation to the miscarried

⁷⁷ These fines are listed earlier in the section. Equating 1,000 gold dinars with 10,000 dirhams (Syr. *zūzē*) is another proof of Barhebraeus using a Ḥanafī *Vorlage*, as the Shāfi‘īs usually equate 1,000 gold dinars with 12,000 dirhams. Also, there is yet another indication that the maphrian in fact uses al-Marghīnānī's *Hidāya* rather than al-Qudūrī's *Mukhtaṣar* itself. Al-Qudūrī only presents the Ḥanafī view of the full *diyya* for a non-Muslim; on the other hand, al-Ghazālī only mentions the fine of one third as the usual *diyya* set by his Shāfi‘ī school. Strikingly, Barhebraeus sets the fine for killing a non-believer (Syr. *gaḥrā lā mhaymnā*) to half of the full amount. This parallels al-Marghīnānī' account of the Mālikīs' view, who set the *diyya* for a non-Muslim to half of the full amount.

⁷⁸ For this calculation see Eich, “Induced Miscarriage in Early Mālikī and Ḥanafī Fiqh,” 316–18.

child itself: If only the mother dies, in respect to the child, nothing is due.⁷⁹ Barhebraeus on the other hand sets concrete amounts as described above and even re-calculates some, seemingly facilitating the comprehension of the different cases. Elsewhere, the maphrian describes Islamic legal writing as vast, but thus also as confusing and even contradictory.⁸⁰ It is feasible that he wants to spare his readers this confusion, who are not used to the casuistic details of *fiqh*.

It is striking that formation as a criterion for the punishment of induced miscarriage is absent. As noted above, it had also been absent in the treatment of intentional abortion. Hence, by omitting the criterion of formation, Barhebraeus's ruling could be read as implicitly emulating Basil's rejection of the formation's importance. What is more, had formation as a criterion been important to Barhebraeus, he could have easily drawn on the passage in Exodus 21:22-3 (on which more below) but also on his second Islamic reference, as al-Ghazālī discusses formation in both of his legal compendia in respect to induced miscarriage. In doing this, he uses the terms for the embryological stages already used in Qur'ān and *ḥadīth*.⁸¹ These specifically Islamic overtones could very well be a reason rendering al-Ghazālī's line of argument less fit for a Christian work in the maphrian's eyes.

On the other hand, the discernment of the child's sex to set the fine would *de facto* presuppose formation. The formation of organs and members in general concurs more

⁷⁹ There are some differences as to this in the different versions of the *Mukhtaṣar*; some, in fact, add the *diya* due for the mother.

⁸⁰ See Weltecke, "Bemerkungen zum Kapitel über die Schule in Bar 'Ebroyos *Huddoye* (dem Nomocanon)," 303. This statement might be a trope, though.

⁸¹ *Wasīṭ*, 6.380-83 and *Wajīz*, 408. A similar example, where Barhebraeus seemingly omits parts of Qur'ānic embryology, can be found in his adaption of the Avicennian idea of substantial change within his philosophical writings, cf. footnote 36 above.

or less simultaneous to the development of the child's sexual organs. We can safely assume that the scientifically and medically trained maphrian was well aware of this fact. From this perspective, the criterion of formation is implicitly present through the criterion of the child's sex.

What is more, one can also take into account that the outlook of the *Huddāyē* is rather straightforward and more true-to-life than casuistic: a very early abortion can hardly be distinguished from some other situations, such as, for example, a delayed menstrual flow.⁸² Last but not least, it has to be taken into consideration that Barhebraeus simply stays true to his *Vorlage*, i.e. al-Qudūrī's *Mukhtaṣar*. As in the case of the funeral prayer, all the said reasons might collude.

In sum, there are several interrelated aspects as to how the ruling on induced miscarriage and financial compensation included by Barhebraeus figures in his Christian legal compendium. One is the transcultural aspect: the motive of a person hitting a woman's belly and causing abortion is found already in the Code of Hammurabi, as well as in the Book of Exodus and later in *ḥadīth*. After all, the *Huddāyē* gathers—as Barhebraeus claims in the introduction—"in worldly affairs all that which the Greek emperors decreed and what aims at justice in this way."

The motive of induced miscarriage is also found in Barhebraeus's Bible commentary, the *Awṣār rāzē*, when elaborating on Exodus 21:22-3.⁸³ Although it is not unusual for

⁸² That is why the "quickening" of the child felt by the mother was one of the most important signs of pregnancy in pre-modern times. For possible modern misconceptions, which are due to our changing perception of pregnancy through scientific advancement see Barbara Duden, "Zwischen ›wahrem Wissen‹ und Prophetie: Konzeptionen des Ungeborenen," in *Geschichte des Ungeborenen: Zur Erfahrungs- und Wissenschaftsgeschichte der Schwangerschaft, 17.-20. Jahrhundert*, ed. Barbara Duden (Göttingen: Vandenhoeck & Ruprecht, 2002), 11-48.

comments to be very brief in this work,⁸⁴ Barhebraeus only notes two things in regard to induced miscarriage. First, he states, but does not discuss, the variant of the Septuagint. In contrast to the Hebrew text and the Syriac Peshitta, the Greek text sets the punishment depending on the formation of the aborted child.⁸⁵ The other laconic note of Barhebraeus is that the fine for this crime in his own time (Syr. *nāmosē d-zaḅnan*) amounts to fifty dinars. From this passage, a comment in passing, it seems as if it is rather natural for the maphrian to punish this crime. Although the passage in Exodus figures in theological discussions elsewhere,⁸⁶ I have not found any law or norm concerning induced miscarriage in earlier Christian legal texts. This considered, the concise ruling of al-Qudūrī's *Mukhtaṣar* serves Barhebraeus to set a decisive legal ruling for this possible legal problem.

As in the case of proper burial for the miscarried child, Barhebraeus's issuing of regulations not present in the earlier tradition can be read on both a practical as well as a conceptual level. However, deliberations about the *Huddāyē's* possible implications for legal practice come with some limitations in the case of criminal laws. We know rather little about legal practice in the Middle East before the Mamlūk era.⁸⁷ What is more, researchers have often questioned Christian legal autonomy beyond matters of religious practice, family law and inheritance. They base their assumption for the most part on

⁸³ Martin Sprengling and William Creighton Graham, *Barhebraeus's Scholia on the Old Testament: Part I: Genesis - II Samuel* (Chicago: The University of Chicago Press, 1931), 132-33.

⁸⁴ See Simone Pratelli, "Gregory Barhebraeus' Commentary on the Twelve Prophets in the Storehouse of Mysteries: Introduction, Critical Text, and Translation" (PhD diss., Università di Pisa, 2011), 59.

⁸⁵ For this difference between the Hebrew and the Septuagint, see e. g. Daniel Schiff, *Abortion in Judaism* (Cambridge, UK and New York: Cambridge University Press, 2002), 1-26.

⁸⁶ Cf. Mushē bar Kēpā's treatment in Braun, *Moses bar Kepha und sein Buch von der Seele*, 84.

⁸⁷ See the introduction to Christian Müller, *Der Kadi und seine Zeugen: Studie der mamlukischen Ḥaram-Dokumente aus Jerusalem* (Wiesbaden: Harrassowitz, 2013).

Muslim writings sketching out ideals.⁸⁸ In addition, the political instability of the entire region in Barhebraeus's time needs to be considered; assessment on jurisdiction can hardly be generalized and must be considered from case to case, if an assessment is possible at all.

That said, I suggest considering at least two aspects regarding the practical implications of the *Huddāyyē* for the rulings on abortion. As mentioned before, *qiṣāṣ* or

⁸⁸ Nallino, "Il diritto musulmano nel Nomocanone," 568; and Hubert Kaufhold, "Der Richter in den syrischen Rechtsquellen: Zum Einfluß islamischen Rechts auf die christlich-orientalische Rechtsliteratur," *Oriens Christianus* 68 (1984): 91-113, 110. More recently, Selb and Kaufhold regarding the *Huddāyyē* put an interest for the praxis in the foreground, cf. Selb and Kaufhold, *Das syrisch-römische Rechtsbuch*, 1.54. Even without documentary evidence, the narrative and historiographical sources need to be studied more closely. For further research on Christian judicial autonomy, also beyond matters of family and inheritance, I suggest to think more about the complex nature of judicial practice in an overall Islamically legitimized arena, where different stakeholders compete for power and influence: One aspect are the roles and functions of a city's *qāḍī* and other bureaucrats compared to the elites of the city's Christian population, both clerics and laypeople. These Christian elites are often confessionally divided, at times cooperating at other times in competition. As we know, pre-modern jurisdiction was not neatly separated from other forms of power, as the rivalry between *qāḍī* and *maẓālim* courts of the ruler show, cf. e.g. Albrecht Fuess, "Zulm by Maẓālim? The Political Implications of the Use of Maẓālim Jurisdiction by the Mamluk Sultans," *Mamluk Studies Review* 13 (2009): 121-147, 122-25. Also, the police or *shurṭa* as well as the market inspector (*muḥtasib*) had functions which the modern separation of power would deny. Reading Barhebraeus's ecclesiastical chronicle, one can encounter different instances of Christian leaders' involvement in worldly and seemingly also judicial power, e.g. a bishop using violence to extort the consent of his flock (Barhebraeus, *The ecclesiastical chronicle: An English translation*, translated by David Wilmshurst (Piscataway, NJ: Gorgias Press, 2016), 414); the Muslim governor of Mardin asking the governor of Mosul "to place the maphrian in charge of his region" (ibid., 420), a Maphrian mounting a horse and fighting aggressive Kurds (ibid., 444), a Christian emir allowing to build a church (ibid., 452) or imprisonment at the hands of the East Syrian catholicus (ibid., 460). One striking but ambiguous case

lex talionis is not a state affair but a legal issue between the two parties involved.⁸⁹ On this basis, bishops as heads of their local Christian communities can be assumed to either judge or arbitrate in matters of criminal assault. Also, one can consider the bishops' possible role before it even comes to court trials outside their jurisdiction, either by "crime prevention" or counseling their flock. For these tasks they would have to know "the laws of the time" as Barhebraeus compiles them in respect to all legal matters, including induced miscarriage.⁹⁰

Reading the *Huddāyē's* stipulations on abortion on a conceptual level, one can observe – similar to the ruling on funeral prayer for the miscarried child – that Barhebraeus shows how his own community is in accordance with the overarching judicial system. He accomplishes this by issuing legal norms not just for induced miscarriage but in respect to the whole legal issue on homicide. Underlying his rulings is the concise *Mukhtaṣar* of al-Qudūrī. At the same time, he introduces Christian concepts taken from Basil.⁹¹ This is specifically the case with intentional abortion through drugs

is also the (capital?) punishment decreed by the catholicus after a Christian converted to Islam, see Gilli-Elewy, *Bagdad nach dem Sturz des Kalifats*, 91.

⁸⁹ An exception is certainly if the crime has political motives or implications threatening stability of power; cf. a case narrated in Barhebraeus, *The ecclesiastical Chronicle*, 266.

⁹⁰ Considering this, in the section on homicide the maphrian even adopts the *khilāf* or diverging legal opinions which al-Qudūrī offers the reader, possibly to inform the reader of the different practices.

⁹¹ There are more examples for the intertextual approach of Barhebraeus: How he uses material from both Basil and al-Qudūrī can further be elucidated by the fact, that Barhebraeus decrees manumission of a slave as (spiritual) atonement—this is not to be found in Basil, but rather in Islamic law. Also, the maphrian usually uses examples of intention from al-Qudūrī, but in between also uses one example from Basil. What is more, Barhebraeus Christianizes the opting of the victim's kin for financial compensation instead of retaliation, in that he refers back to the chapter's introduction, where mercy is portrayed as a Christian trait.

seen as willful murder—a traditional Christian *topos*, marking the self vis-à-vis a majority context which is portrayed as “immoral.” Each of the two concepts is missing in the respective other tradition: intentional abortion in the Muslim legal works, induced miscarriage in the Christian sources. Picking up both, we find Barhebraeus once more using different legal traditions to compose a concise normative outlook for a Christian community in an Islamic context.

Conclusion

To conclude, I want to recollect the two roles Barhebraeus serves in and for his community: community ruler and prolific writer and intellectual. In his *Huddāyyē*, both the rulings on burial of the miscarried child and on abortion reflect this. They can be understood as concerning their practical implications for the community, thus showing the maphrian’s pastoral care, as Weltecke has stressed. The rulings could have informed bishops “on the ground” how to handle possible legal problems or care for bereaved parents in the case of early pregnancy loss. On the other hand, one can situate his legal work as part of a theological discourse—not, however, with speculative means but rather with a normative outlook. The underlying concepts of justice that Barhebraeus presents, e.g. the necessity to punish criminal assaults, had not been discussed adequately before in his Christian tradition.

What is more, both interpretations, practical and theoretical, of the passages under scrutiny can be read as addressing inter-confessional issues. This is no surprise considering the circumstances under which Barhebraeus’s West Syrian community lives, i.e. in an overall multi-religious, albeit mostly Islamic context. The rulings and instructions that the maphrian offers place Syriac Christians within the overarching Islamic normative context and preserve specifically Christian ideas and markers at the

same time. The Christian notions concerning the unborn, as found also in Barhebraeus's speculative writings, can be discerned in normative ideas otherwise taken from Islamic texts.

We have seen that Barhebraeus's intertextual redaction process comprises different methods such as:

- Compilation of different source material, e. g. using and interlacing al-Qudūrī and Basil
- Addition, e. g. the interpretation of the miscarried child's baptism through its Christian parents
- Re-interpretations, e. g. a Christian-Aristotelian reading of the child's formation as actualization and perfection of body and soul
- Summary, e. g. Basil's treatment of intention and killing
- Shift of focus, e. g. the baptism of a pregnant woman not passing to her child and the child's baptism afterwards

It should also be noted how Barhebraeus uses different sources to structure his works. The overall structure of the *Huddāyyē* is taken from al-Ghazālī's legal compendia; as I have shown, the section on homicide is modeled after al-Qudūrī's *Mukhtaṣar*. It is feasible that other chapters or sections of the *Huddāyyē* have yet other *Vorlagen*, concerning both structure and content. This fits into the picture regarding recent research on Barhebraeus's other works, which has identified ever more and various sources he used.⁹²

Throughout the present article, I have used terms such as *Vorlage*, source or reference. The reason is that I refrain from denoting entire texts of other authors as

⁹² See, e.g., Jens O. Schmitt, *Barhebraeus, Butyrum Sapientiae, Physics: Introduction, Edition, Translation, and Commentary* (Leiden: Brill, forthcoming).

intertexts, precisely because Barhebraeus uses only sections of them. By intertextuality, then, I refer primarily to the *method* Barhebraeus applies in the *Huddāyē*, not necessarily to the character of the relations between the different texts. Islamic works of *furū'* for instance comprise a complex but densely knit net of textual relations (mostly within but also beyond a single *madhhab*).⁹³ The threads of this net can be followed diachronically in both directions and compared synchronically. Thus, in the analysis one could theoretically start with a certain text and tentatively explore the entire net of texts.

Comparing these intertextual references in Islamic legal literature to the references in the *Huddāyē*, the latter seem rather dispersed and fragmented.⁹⁴ Intertextual relations in this sense can be seen, at most, in the first chapters of the work on canon law proper. But even here, the maphrian draws from many different Christian sources. Beginning with the *Huddāyē*, it would prove rather difficult to assess the net of Christian normative thought. The maphrian does not collate the whole of the tradition as, for example, the Syriac Synodicon does. This latter text does somewhat resemble certain Islamic *furū'* works since both the Synodicon and the *furū'* works emulate the tradition as a whole. Hence, these texts have aspects of literary endeavors trying to encapsulate and re-enact the tradition.⁹⁵ The practical rather than literary aim of the *Huddāyē* is

⁹³ See Al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition* and Wheeler, "Identity in the Margins."

⁹⁴ This is also the reason why the historian cannot adequately assess the *Huddāyē* as a whole, as Weltecke has rightly stated: "Zum syrisch-orthodoxen Leben in der mittelalterlichen Stadt," 590.

⁹⁵ Of course, the works of *furū'* are more than mere repetition and recollection of the earlier tradition, as recent research has shown, see e.g. Al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition* and Ahmed El Shamsy, "The Ḥāshiya in Islamic Law: A Sketch of the Shāfi'i Literature," *Oriens* 41, 3-4 (2013): 289-315.

emphasized in this article precisely because the *Huddāyē* does not embody the whole of the Christian tradition and because Barhebraeus compiles exactly what seems to serve him in shaping a specific normative outlook.

It goes without saying that the *Huddāyē*'s aim at praxis does not necessarily mean that all the norms issued by the maphrian were in fact practically implemented. On the other hand, beyond the prescription of concrete rulings, the normative outlook inevitably involves concepts of ethics and justice. These conceptual aspects of the *Huddāyē* can indeed convey ideas normally laid out in more literary genres, such as theological treatises. I mentioned these conceptual aspects in respect to the passages analyzed. But this is a far cry from an undertaking that theoretically and scholastically explores norms and the law as an end in itself, as has been noted concerning Islamic legal thinking.⁹⁶

Future research could build on the present study by granting more attention to yet further potential sources in other sections of the *Huddāyē*. For example, are there more indications that al-Marghīnānī's *Hidāya* was possibly used by Barhebraeus? Are there other rulings within canon law proper not attributed to Christian authorities that parallel Islamic norms? Also, the close analysis of the different intertextual techniques, which I have tentatively outlined and categorized above, can serve to further assess the norms set by Barhebraeus. Which passages from other texts are abridged, rearranged, or rephrased, and how? Comparing passages on the same legal problem from different works identified as Barhebraeus's source material, what can be learned by paying attention to what was *not* used by the maphrian?

⁹⁶ See e.g. Jonathan E. Brockopp, "Saḥnūn's Mudawwanah and the Piety of the "Sharī'ah-Minded,"" in *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss*, ed. A. K. Reinhart and Robert Gleave (Leiden and Boston: Brill, 2014), 129-141.

Both approaches—i.e. looking for further sources and analyzing their intertextual use by Barhebraeus—possibly provide us with answers to two different sets of question. First, along the lines of Weltecke’s approach, this research gives a glimpse of Barhebraeus’s environment and problems that the Syriac Christians faced in his time. Second, it adds to our knowledge of the reception history of Islamic legal compendia. In this respect, I do not argue that they were regularly read across communal boundaries, although there are important instances of this happening, as works similar to the *Huddāyē* in the Coptic and East Syrian church show.⁹⁷ A promising starting point would be to ask in what context exactly Barhebraeus learned about the texts and how exactly he had access to them.

A few words are also in order to conclude the thematic thread of the present article, i. e. unborn life. Barbara Duden has drawn attention to the conceptual shifts concerning the unborn from early modernity to today: the idea of the unborn child as a human life (“ein Leben”) and its absolute rights developed along and through new technological methods and scientific progress. This awareness proves to be helpful in understanding Barhebraeus, too, and it shows how contemporary questions on the “beginning of life” can lead to wrong assumptions when posed to (or rather: imposed on?) pre-modern texts. As we have seen, being animated or having a soul does not necessarily entail

⁹⁷ There is one more point which certainly needs more study: As mentioned, the Arabic glosses to the Syriac text of the *Huddāyē* as well as its Arabic translation seem to turn back to the underlying Islamic legal texts. This phenomenon in Barhebraeus’s Arabic reception – rather than re-translating the maphrian’s often idiosyncratic Syriac – has been noted for his philosophical texts, cf. Hidemi Takahashi, *Aristotelian Meteorology in Syriac: Barhebraeus, Butyrum Sapientiae, Books of Mineralogy and Meteorology* (Leiden: Brill, 2004), 601–4. In this respect, it is worthwhile to take into consideration the different language skills of the Christian clerics, either Syriac or Arabic, a problem which is time and again mentioned as a pastoral issue in Barhebraeus’s chronicle.

rights equaling those of children already born. Rather, by using the Aristotelian concept of the form-giving soul, the actualization of human forms seems to be an important point of reference in determining the legal status of a child, but it is certainly not the only one. This of course is not to say that unborn life was no concern of the maphrian. The imaginary (“perfection of form” vs. “formation along spirit infusion”) as well as the norms (“abortion through drugs is willful murder”) concerning the unborn are important issues to demarcate oneself from the other. Nevertheless, one needs to be careful not to confuse the demarcation lines of today with those of earlier times.

Barhebraeus’s *Huddāyē* as a legal work remains a highly interesting text to study in the context of medieval intellectual and communal interaction. I have argued that the normative outlook that the text provides can be read as a case of Barhebraeus sketching out the re-negotiations of identity for his Christian community in an overall Islamic context. The intertextual character of redacting Christian and Islamic material can be used to trace the identity boundaries that the maphrian wants to set out for his flock. What is more, the *Huddāyē* as a legal work can be understood to imply norms in both a practical and conceptual perspective, thus offering a glimpse both into social as well as intellectual history.