

UNIVERSIDAD COMPLUTENSE DE MADRID
FACULTAD DE FILOLOGÍA



TESIS DOCTORAL

El divorcio en Al-Andalus en el siglo IV/X: doctrinas y prácticas legales según el Muntakhab Al-Ahkam de Ibn Abi Zamani (324/936-399/1008)

Divorce in Al-Andalus in the 4th/10th century : legal doctrines and practices according to Ibn Abi Zamani's (324/936-399/1008) Muntakhab Al-Ahkam

MEMORIA PARA OPTAR AL GRADO DE DOCTOR

PRESENTADA POR

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Abstract

This dissertation studies the dissolution of marital bonds in the 4th/10th century on the basis of the legal work of an Andalusī jurist, Ibn Abī Zamanīn's (324/936-399/1008) *Muntakhab al-aḥkām*. It examines the legal doctrines related to divorce, and the strategies and practices that were associated with them in al-Andalus within the context of the socio-legal dynamics of the period. The issues dealt with in this specific legal work are analyzed by considering other sources written within the legal Maliki tradition, such as *fatāwā* compilations and notarial records. The dissertation consists of two parts. The first part consists of five chapters analyzing, firstly, the Maliki legal school in al-Andalus during the 2nd/8th-4th/10th century and Ibn Abī Zamanīn's contributions to it, while the other chapters provide an analysis of the legal rules related to divorce, situating Ibn Abī Zamanīn's materials within a wider context. The second part offers an annotated translation of the divorce section of Ibn Abī Zamanīn's *Muntakhab al-aḥkām*.

Resumen

Esta tesis estudia la terminación del matrimonio en el siglo IV/X, según la obra legal de un jurista andalusí, el *Muntajab al-aḥkām* de Ibn Abī Zamanīn (324/936-399/1008). Examina las doctrinas jurídicas relacionadas con el divorcio y las estrategias y prácticas asociadas al mismo en al-Andalus dentro del contexto de las dinámicas sociales y legales de la época. Las cuestiones tratadas en esta obra jurídica en concreto se analizan tomando en consideración otras fuentes escritas dentro de la tradición legal maliki, como las compilaciones de *fatāwā* y los formularios notariales. La Tesis consta de dos partes. La primera está estructurada en cinco capítulos que analizan, en primer lugar, la escuela jurídica maliki en al-Andalus durante los siglos II/VIII-IV/X y las aportaciones de Ibn Abī Zamanīn a la misma, mientras que los otros capítulos brindan un análisis de las normas legales relacionadas con el divorcio, situando los materiales de Ibn Abī Zamanīn dentro de un contexto más amplio. La segunda parte ofrece una traducción comentada de la sección de divorcio del *Muntajab al-aḥkām* de Ibn Abī Zamanīn.

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INTRODUCTION

This dissertation explores the way husbands and wives experienced and negotiated the marital union and its dissolution from the perspective of the normative principles of Islamic law that both reflect and inform social and moral constructions. This dissertation does so by focusing on a specific region of the Islamic world (al-Andalus) in its early Islamic period. Divorce appears to have been equally common in Middle Eastern societies during the medieval period, even if, due to the widespread lack of pre-Ottoman court records, the evidence is primarily qualitative rather than quantitative. Nevertheless, several studies based on legal opinions (*fatāwā*) from medieval North Africa and al-Andalus give the impression of a pattern of frequent and normal divorce. The main source that I consult for my exploration of the dynamics of divorce is Ibn Abī Zamanīn's (324/936-399/1008) legal work *Muntakhab al-aḥkām* that provides relevant materials related to the strategies and practices that Muslim men and women could resort to, and informs about the divorce patterns contemplated by Islamic (more precisely, Maliki) law.

My exploration has four main objectives: to offer an overview of the legal doctrines related to the dissolution of marriage in al-Andalus in the 4th/10th century, to analyze the specificities of female agency in the pursuit of justice regarding their marital rights, to approach the Maliki legal culture through the specific case of the divorce regulations, and to contribute to the history of women in al-Andalus.

The first goal is to offer a full-length source-based study that examines the dissolution of marriage in al-Andalus in the 4th/10th century. Legal sources have been used for the study of pre-modern societies with increasing frequency. The goal of jurisprudence is finding solutions to problems that arise between individuals and it does so drawing its foundations from various legal sources that give shape to the proposed solutions. It tries to solve, theoretically at least, a conflict that may occur in real life. The tension between theory and practice is what allows to recover how the underlying human and social were established.¹

For this reason, other sources have been consulted to contextualize the divorce chapter in Ibn Abī Zamanīn's *Muntakhab al-aḥkām*, including among them earlier Maliki works such as Mālik b. Anas's (d. 179/795) *Muwaṭṭaʿ*² and Saḥnūn's (d. 240/854) *Mudawwana*,³ contemporary works such as Ibn Abī Zayd al-Qayrawānī's (310/922-386/996) *al-Risāla*⁴ and Ibn al-ʿAṭṭār (330/942-399/1009) *al-Wathāʾiq wa-l-sijillāt*,⁵ and later works such as Ibn Rushd's (d. 595/1198) *Bidāyat al-mujtahid*,⁶ and al-Wansharīsī's (d. 914/1509) *Kitāb al-Miʿyār*.⁷ The analysis of such sources - that address different goals and needs and belong to different genres - allows to give visibility to female agency in the legal sphere through their use of the legal ways opened for them, and their proactive resorting to social networks and strategic activities, but also to the limits of such agency.

The second objective is precisely to highlight the specificities of female agency in the pursuit of justice regarding their marital rights. Rather than explore whether the institution of marriage experienced a transformation over

¹ Cristina de la Puente, "Free fathers, slave mothers and their children: A contribution to the study of family structures in Al-Andalus", *Imago Temporis Aevum* VII (2013), p. 29.

² Mālik b. Anas, *Al-Muwaṭṭaʿ bi-riwāyātihi (Yaḥyā al-Laythī, al-Qaʿnabī, Abī Muṣʿab al-Zuhrī, al-Ḥadathānī, Ibn Bakīr, Ibn al-Qāsim, Ibn Ziyād) bi-ziyādātihā wa-zawāʾidihā, wa-ikhtilāf al-fāṣihā*, edited by Abū Usāma Salīm b. ʿĪd al-Hilālī al-Salafī, 5 vols. Dubayy: Majmūʿat al-Furqān al-Tijāriyya, 2003.

³ Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, 8 vols. Cairo: al-Maṭbaʿa al-Saʿāda, 1323/1905; Muḥammad b. Aḥmad al-ʿUtbī, *al-Mustakhraja min al-asmiʿa, mimma laysa fī Mudawwana (al-ʿUtbīyya)* in Ibn Rushd, *al-Bayān wa-l-taḥṣīl*, edited by Muḥammad Ḥajjī, 20 vols. Beirut: Dār al-Gharb al-Islāmī, 1984.

⁴ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley. Bradford: Diwan Press, 2018.

⁵ Ibn al-ʿAṭṭār, *Al-Wathāʾiq wa-l-sijillāt: Formulario notarial y judicial Andalusí del alfaquí y notario Cordobés m. 399/1009*, edited by Pedro Chalmeta and Federico Corriente. Madrid: Fundacion Matritense del Notariado, Instituto Hispano-Árabe de Cultura, 1983. There is a Spanish translation: Ibn al-ʿAṭṭār, *Formulario notarial y judicial andalusí del alfaquí y notario cordobés m. 399/1009*, introducción, estudio y traducción anotada P. Chalmeta y M. Marugán. Madrid: Fundación Matritense del Notariado, 2000.

⁶ Ibn Rushd al-Ḥafīd, *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*, 2 vols. Beirut: Dār al-Maʿrifa, 1409/1988.

⁷ Aḥmad al-Wansharīsī, *Al-Miʿyār al-muʿrib wa-l-jāmiʿ al-mughrib ʿan fatāwā ahl Ifrīqiya wa-l-Andalus wa-l-Maghrib*, 13 vols. Rabat: Ministry of Culture and Religious Affairs, 1981-1983.

time as already studied, for example, by Amalia Zomeño,⁸ this dissertation elucidates the types of situations women could face while getting divorced, what kind of problems arose between couples during the divorce process, what kind of strategies were open for them to defend their interests, and more generally how individuals negotiated divorce and which other means were available for couples to solve their marital problems.

The third objective, related to the previous ones, is to approach how the legal doctrines and procedures, specifically those of the Maliki school, were comprehended, implemented and even modified by a range of legal actors, including jurists, judges and rulers. Scholars brought their own interpretations on specific issues giving rise to differences of opinion: this variety is preserved in the legal texts such as Ibn Abī Zamanīn's *Muntakhab al-aḥkām* with the different legal opinions being debated, some being marginalized and some given prevalence, thus reflecting a dynamic and vibrant legal culture in all the spheres covered by the legal texts, including divorce.

My last objective is to contribute to the history of women in al-Andalus. In 1973, Pierre Guichard published his pioneering work on the anthropological structure of the Andalusī Islamic society in which he paid attention to the social and family structures focusing on families, clans, lineages and tribes, fundamentally through historical Arabic sources such as chronicles, geographical works and biographical dictionaries.⁹ The studies devoted to the social history of the Islamic West increased after its publication, including the role of women and

⁸ In studies such as *Dote y matrimonio en al-Andalus y el Norte de África: Estudio sobre la jurisprudencia Islámica medieval*. Madrid: CSIC, 2000; "Abandoned wives and possibilities for divorce in al-Andalus: The evidence of the *wathā'iq* works", in *Writing the feminine: Women in Arab sources*, edited by Randi Deguilhem and Manuela Marín. New York: I.B. Tauris, 2002; "Notaries and their formulas: The legacies from the University Library of Granada", in *From al-Andalus to Khurasan: Documents from the medieval Muslim world*, edited by Petra Sijpesteijn. Leiden: Brill, 2006; "The Islamic marriage contract in al-Andalus (10th-16th centuries)", in *The Islamic marriage contract: Case studies in Islamic family law*, edited by Asifa Quraishi and Frank E. Vogel. Massachusetts: Harvard University Press, 2008; "Families and family ties in Nasrid Granada", in *The Nasrid Kingdom of Granada between East and West*, edited by Adela Fábregas and translated by Consuelo López-Morillas. Leiden: Brill, 2020.

⁹ Pierre Guichard, *Al-Andalus Estructura antropológica de una sociedad islámica en Occidente*. Barcelona: Barral Editores, 1973.

the use of legal sources.¹⁰ *Mujeres en al-Ándalus* by Manuela Marín, published in 2000, bears witness to the many advances made in this field.¹¹ This study aims to add to the existing and ongoing contributions by concentrating on the issue of divorce.

The fields of Maliki law and the history of al-Andalus are not yet very developed in the Turkish academic context where I received my training. My dissertation topic has allowed me to become familiar with both fields and in the future it is my goal to increase the interest in both Maliki law and Andalusī history in Turkey. This context explains why I decided to go into great detail about particular topics that for me were new, including the rich *fatāwā* literature that was produced in the Islamic West. This has been a very significant opportunity for me to read sources and examine bibliography not easily accessible in Turkish libraries. But it also meant an extra effort that was necessary in terms of acquiring the required linguistic competences in both Arabic and Spanish, and of having to travel to Spain to work in libraries such as Biblioteca Tomás Navarro Tomás (CSIC) and Biblioteca Islámica Félix María Pareja. I was unable to perform the research stays that had been programmed for 2020 and 2022 because of the COVID pandemic, which has inevitably affected my work and imposed some limitations on it.

A five-tiered methodological approach has been followed in the pursuit to reach an understanding of the legal doctrines regarding divorce that circulated in al-Andalus in the 4th/10th century, and how they related to practice. The focus, as mentioned, is Ibn Abī Zamanīn's *Muntakhab al-aḥkām*, and the translation of its divorce chapter has been the first and one of the main undertakings in this dissertation. The second step has been the textual analysis of such chapter through the theoretical framework of the Maliki school. Historical contextualization of the legal cases has also been taken into account, as well as awareness of the fact that they have reached us through a process of textual fabrication and mediated formulation. The fourth step has been a comparison of divorce practices mentioned in the *Muntakhab al-aḥkām* with

¹⁰ De la Puente, "Free fathers, slave mothers and their children: A contribution to the study of family structures in Al-Andalus", p. 28.

¹¹ Manuela Marín, *Mujeres en al-Ándalus (Estudios onomástico-biográficos de al-Andalus, XI)*. Madrid: CSIC, 2000.

notarial documents related to divorce found in a contemporary work, Ibn al-‘Aṭṭār's *al-Wathā’iq wa-l-sijillāt* in order to check the extent to which there is correspondence between the contents of these two works. Finally, the attempt will be made to evaluate the agency of women from a theoretical and practical point of view in the context of Maliki legal doctrines and the practices performed in al-Andalus in the 4th/10th century.

The work has been structured into two parts. The first part that consists of five chapters addresses issues regarding Islamic law, gender, divorce, the Maliki school and Andalusī society. The first chapter offers an introduction to the Maliki legal school between 2nd/8th and 4th/10th centuries, focusing on the influence that works such as *al-Muwatṭa’*, *al-Mudawwana* and *al-Utbiyya* had on the formulation of and approach to the legal issues in the specific historical context of al-Andalus. The second chapter covers the life and works of Ibn Abī Zamanīn and offers information about his legal work *Muntakhab al-aḥkām*. The third chapter focuses on the relation between Islamic law and gender and more specifically in the divorce procedures in the Maliki legal school. The goal is to present a general overview of dynamics of divorce in Islamic law emphasizing Maliki doctrine, thus serving as an introduction to the divorce cases from the *Muntakhab al-aḥkām*. Divorce types, its differences and similarities, the economic and social consequences of divorce are basically explained according to the doctrines of the Maliki school. The fourth chapter is an examination and analysis of divorce cases from the *Muntakhab al-aḥkām* highlighting Ibn Abī Zamanīn's approach in itself and regarding other significant Maliki scholars. The last chapter of this part explores the relation between the divorce materials found in the *Muntakhab al-aḥkām* and those found in works belonging to other genres such as especially *fatāwā* and notarial records from Ibn Abī Zamanīn's times.

The transliteration system used is that of the journal IJMES (*International Journal of Middle East Studies*) which is the most frequently used when writing in English. It can be consulted at <https://www.cambridge.org/core/services/aop-file-manager/file/57d83390f6ea5a022234b400/TransChart.pdf>

PART ONE

CHAPTER I

THE MALIKI LEGAL SCHOOL IN AL-ANDALUS

(2ND/8TH-4TH/10TH CENTURIES)

1. Mālik b. Anas and his *al-Muwatṭa'*

The four Sunni legal schools - Hanafi, Maliki, Shafi'i and Hanbali - have their own legal literature as the result of applying different methodologies and following different ways of solving similar problems. They derive their names from those jurists considered to have founded them, in chronological order Abū Ḥanīfa Nu'mān b. Thābit b. Zūṭā al-Fārisī (d. 150/767), Abū 'Abd Allāh Mālik b. Anas b. al-Ḥārith al-Aṣbaḥī (d. 179/795), Muḥammad b. Idrīs al-Shāfi'ī (d. 204/820) and Abū 'Abd Allāh Aḥmad b. Muḥammad b. Ḥanbal (d. 241/855). The oldest ones, the Hanafi and the Maliki, were originally linked to two different geographical areas: Iraq and especially Kufa as regards the Hanafi, and the Hijaz and Medina as regards the Maliki.¹²

Mālik b. Anas was in fact a jurist from Medina.¹³ He was frequently called briefly the *Imām* of Medina.¹⁴ There is no record or evidence of his ever travelling to North Africa or Egypt.¹⁵ He spent his whole life in Medina teaching and issuing juristic pronouncements (*aqwāl*, *fatwās*).¹⁶ There he studied with the older Successor Nāfi' (d. 117/735), the younger Successor Ibn Shihāb al-Zuhrī (d. 124/742) and Rabī'a b. 'Abd al-Raḥmān (d. 136/753). He acquired a high reputation as both a jurist and a traditionist. His legal opinions were pursued by laymen as well as by the governor and the qadis of Medina. According to

¹² Christopher Melchert, *The Formation of the Sunni schools of law, 9th-10th centuries C.E.* Leiden: Brill, 1997, p. xiii.

¹³ John Esposito, "Maliki school of law", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed August 28, 2020 <http://www.oxfordislamicstudies.com/article/opr/t125/e1413>

¹⁴ J. Schacht, "Mālik b. Anas", in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Accessed October 16, 2020 http://dx.doi.org/10.1163/1573-3912_islam_COM_0649

¹⁵ Jonathan E. Brockopp, "Saḥnūn b. Sa'īd (d. 240/854)", in *Islamic legal thought: A compendium of Muslim jurists*, edited by Oussama Arabi, David Powers and Susan Spector. Leiden: Brill, 2013, p. 65.

¹⁶ Umar F. Abd-Allah Wymann-Landgraf, *Mālik and Medina: Islamic legal reasoning in the formative period*. Leiden: Brill, 2013, p. 33.

biographical records, the Abbasid caliph al Manṣūr (r. 136/754 - 158/775) had demanded Mālik to write a book that would provide him with a standard law code for his empire.¹⁷ Also the caliph Hārūn al-Rashīd (r. 170/786 - 193/809) is said to have wanted to impose Mālik b. Anas's legal work *al-Muwaṭṭa'* as the code for his empire as well.¹⁸

Mālik b. Anas' *Muwaṭṭa'* is one of the oldest compilations of Islamic Law and contains a large selection of *ḥadīth*, having been transmitted in different recensions from Mālik's students.¹⁹ The *Muwaṭṭa'* became so popular in the Islamic West that it came to be considered one of the six canonical collections of the Prophet's tradition, substituting Ibn Māja's *Sunan*.²⁰ However, according to Y. Dutton, the *Muwaṭṭa'* is neither a *ḥadīth* collection nor a *fiqh* book. It is a book of '*amal*', that is, of the legal and judicial practice existing in Medina at the time of Mālik b. Anas that recorded the principles, precepts and precedents on which there was consensus among the jurists of the town.²¹ According to Daniel Vazquez-Paluch, Mālik's varied terminology in the *Muwaṭṭa'* points out to different categories, varying from consensus to important differences of opinion within Medina.²² As studied in detail by Wymann-Landgraf in his book *Mālik and Medina*, the Malikis claimed that they were closer to the Prophet's tradition than the other legal schools because they followed the legal practice of Medina that was based on the imitation of what the Prophet had done and said in his town.

¹⁷ Al-Qāḍī 'Iyāḍ, *Tartīb al-madārik wa-taqrīb al-masālik li-ma'rifat a'lām madhhab Mālik*, edited by Aḥmad Bakīr Maḥmūd, 3 vols. Beirut: Maktabat al-Ḥayāh, 1387/1967, vol. 1/192.

¹⁸ Patricia Crone; Martin Hinds, *God's caliph: Religious authority in the first centuries of Islam*. Cambridge: Cambridge University Press, 2003, p. 16.

¹⁹ Juan Martos Quesada, "Islam y derecho: las escuelas jurídicas en al-Andalus", *Arbor: Ciencia, Pensamiento y Cultura* 731 (2008), p. 433; Mālik b. Anas, *Al-Muwaṭṭa' bi-riwāyātihi (Yaḥyā al-Laythī, al-Qa'nabī, Abī Muṣ'ab al-Zuhrī, al-Ḥadathānī, Ibn Bakīr, Ibn al-Qāsim, Ibn Ziyād) bi-ziyādātihā wa-zawā'idihā, wa-ikhtilāf al-fāzihā*, edited by Abū Usāma Salīm b. 'Īd al-Hilālī al-Salafī, 5 vols.

²⁰ Naṣīruddīn al-Khaṭṭāb; Hāfiz Abū Ṭāhir Zubair 'Alī Za'i (eds.), *Sunan Ibn Mājah*. Riyadh: Darussalam Publishing, 2007.

²¹ Yasin Dutton, "The Origins of Islamic law: The Qur'an, the *Muwatta'* and Madinan '*amal*'", in *Culture and civilization in the Middle East*, edited by Ian R. Netton. Richmond, Surrey: Curzon, 1999, p. 22.

²² Daniel Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*. Unpublished Ph.D. Dissertation. London: University of London, 2008, p. 42.

Dutton has argued that the Qur'an was central to Mālik's formulation of law and his methodology was always very much a Qur'an based and Qur'an generated system.²³ According to Wymann-Landgraf, in the *Muwatta'*, Mālik made use of the Qur'an to regulate the parameters of precepts and create the meanings of legal language, constituting its main legal source. Nonetheless, his approach to the law was pragmatic and rational, and it was not only based on the letter of the law or technical formalities but also applied the law in a manner informed by the Medinan tradition. The legal reasoning of Mālik was based on a wide variety of sources - apart from the Qur'an - such as Medinan praxis, isolated *ḥadīths* with complete and incomplete chains of transmission, post Prophetic reports, regional customs (*'urf*), discretion (*istiḥsān*), preclusion (*sadd al-dharā'i'*), and the unstated good (*al-maṣāliḥ al-mursala*).²⁴

Students who came to study with Mālik in Medina from different parts of the Islamic world not only studied the *Muwatta'* but also collected his legal opinions in different auditions (*samā'*, plural *samā'āt / asmi'a*).²⁵ Among those students, the Egyptians Ibn al-Qāsim (d. 191/806), Ibn Wahb (Abū Muḥammad 'Abd Allāh b. Wahb b. Muslim al-Fihri al-Qurashī al-Miṣrī, d. 197/813), and Ashhab b. 'Abd al-Azīz b. Dāwūd b. Ibrāhīm al-Qaysī al-Ma'āfirī (d. 204/820), became especially important for the reception of Mālik's doctrines in North Africa and al-Andalus. The generations that came after the death of Mālik and who acted as the main intermediaries and transmitters of Mālik's ideas were the real founders of the Maliki legal school.²⁶ They turned their eponym into an ideal authority, provided with excellent legal knowledge and exceptional personal virtue.²⁷

²³ Dutton, "The Origins of Islamic law: The Qur'an, the *Muwatta'* and Madinan 'amal", p. 61.

²⁴ Wymann-Landgraf, *Mālik and Medina: Islamic legal reasoning in the formative period*, p. 88.

²⁵ Daniel Vazquez-Paluch, "The Legal thought of an early Andalusian jurist: 'Īsā b. Dīnār", *International Journal for the Semiotics of Law-Revue Internationale de Sémiotique Juridique* 29 (2016), p. 440.

²⁶ Brockopp, "Saḥnūn b. Sa'īd (d. 240/854)", in *Islamic legal thought: A compendium of Muslim jurists*, p. 65.

²⁷ Yossef Rapoport, "Mālik b. Anas (d. 179/795)" in *Islamic legal thought: A compendium of Muslim jurists*, edited by Oussama Arabi, David Powers and Susan

‘Abd al-Raḥmān b. al-Qāsim al-‘Utaqī deserves to be especially highlighted for his relevance not only just for Andalusī Malikism but also for Malikism as a whole. His transmissions from Mālik and his own legal opinions form the major part of the contents of Saḥnūn's *Mudawwana* and al-‘Utbī's *Mustakhrāja* (see below).²⁸ He was the main teacher of the Andalusī ‘Īsā b. Dīnār and Yaḥyā b. Yaḥyā al-Laythī.²⁹ ‘Abd al-Mālik b. Ḥabīb al-Sulamī (d. 238/852) was wrongly presented by Ibn Khaldūn in his *Muqaddima* as a student of him.

Mālik's teachings were introduced in North Africa by Asad b. al Furāt (d. 2137/828) and Saḥnūn (d. 240/854). Under the Aghlabids (r. 184-296/800-910) Malikism coexisted with Hanafism.³⁰ Malikism suffered a retreat with the Fatimids' arrival in Ifriqiya in 298/910. When the Zirids of Ifriqiya stopped paying allegiance to the Fatimid caliphs in 440/1048, Malikism prospered again especially under the Almoravids (448-541/1056-1147).³¹

2. The Reception of Mālik's doctrines in al-Andalus³²

Among the many recensions (*riwāyāt*) of Mālik's *Muwaṭṭaʿ*, the most famous, popular and most frequently published is that by Yaḥyā b. Yaḥyā al-Laythī (d. 234/848) who reported what he heard from Mālik in 179/795, the year of his death.³³

Spectorsky. Leiden: Brill, 2013, p. 27; A. M. Turki, "La vénération pour Malik et la physionomie du Malikisme Espagnol", *Studia Islamica*, XXXIII (1971), pp. 41-65.

²⁸ Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, 8 vols. Cairo: al-Maṭbaʿa al-Saʿāda, 1323/1905; Muḥammad b. Aḥmad al-ʿUtbī, *al-Mustakhrāja min al-asmiʿa, mim mā laysa fī Mudawwana (al-ʿUtbiyya)* in Ibn Rushd, *al-Bayān wa-l-taḥṣīl*, edited by Muḥammad Ḥajjī, 20 vols. Beirut: Dār al-Gharb al-Islāmī, 1984.

²⁹ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 45.

³⁰ Mohamed Talbi, *L'Emirat aghlabide (184-996/800-909)*. Paris: Maisonneuve, 1966. Arabic translation: https://archive.org/details/letaiefadel_yahoo

³¹ Najm al-dīn al-Hintātī, *Al-Madhhab al-Mālikī bi'l-gharb al-Islāmī ilā muntaṣaf al-qarn al-khāmis al-hijrī- al-ḥādī ʿashar al-mīlādī*. Tunis: Tibruʿz al-zamān, 2004. ³² José López Ortiz, "La recepción de la escuela Malequí en España", in *Anuario de Historia del Derecho Español* VII (1930), pp. 1-67; M. ʿA. Makki, *Ensayo sobre las aportaciones orientales en la España Musulmana y su influencia en la formación de la cultura hispano-árabe*. Madrid: Instituto de Estudios Islámicos, 1968; Alfonso Carmona, "The Introduction of Mālik's teachings in al-Andalus", in *The Islamic school of law: Evolution, devolution and progress*, edited by P. Bearman, R. Peters and F.E. Vogel. Cambridge: Harvard University Press, 2005, pp. 41-56, 218-227.

³³ Rapoport, "Mālik b. Anas (d.179/795)", in *Islamic legal thought: A compendium of Muslim jurists*, p. 28. For a more critical view see Maribel Fierro, "El alfaquí

Yahyā b. Yaḥyā was one among the many Andalusis who since early times travelled to the East to learn religious knowledge in a journey of study (*riḥla fī ṭalab al-‘ilm*) that took them to Qayrawan, Egypt, the Hijaz, Syria and Iraq, a process on which there are many studies.³⁴ Most of those who travelled were interested in Islamic jurisprudence (*fiqh*). This was so because *fiqh* was essential in the functioning of an Islamic society, as it coordinated the relations among men and also between man and God. Islamic scholars thus needed to engage in the search of God’s norms to humankind. Through that engagement they could work as qadis, jurists, notaries and teachers, positions that made easier for them to earn a livelihood than for those who engaged in other disciplines.

The preponderant discipline among the traditional Islamic sciences of al-Andalus was thus Islamic law (*fiqh*). Initially the Andalusis had followed the doctrines of the Syrian ‘Abd al-Raḥmān b. ‘Amr al-Awzā’ī (d. 157/774), who began establishing the first formal structures for the preservation and dissemination of religious knowledge.³⁵ But their contact with Mālik’s students in Qayrawan and old Cairo (Miṣr) made them become more and more interested in the Medinan legal school. The other important legal school at the time was the

beréber Yaḥyā b. Yaḥyā, ‘el inteligente de al-Andalus’”, in *Estudios onomástico-biográficos de al-Andalus, VIII*, edited by María Luisa Ávila Navarro and Manuela Marín. Madrid: CSIC, 1997, pp. 269-344.

³⁴ Sam Isaac Gellens, “The external perspective: *Talab al-‘ilm*, the Spanish ‘ulamā’ and Egypt”, in *Scholars and travellers: The Social history of early Muslim Egypt, 218-487/833-1094*. New York: Columbia University Press, 1986; Juan Martos Quesada, “La formación de los juristas andalusíes de la época omeya fuera de sus fronteras: principales rutas de aprendizaje”, in *Actas del IV Congreso Internacional de Civilización Andalusí. El Cairo, del 3 al 5 de marzo de 1998*, Cairo, 1998, pp. 253-268; María Luisa Ávila, “The Search for knowledge: Andalusī scholars and their travels to the Islamic East”, *Medieval Prosopography: History and Collective Biography. Special Issue: Arab-Islamic Medieval Culture* 23 (2002), pp. 125-140. Now, those travels can be checked in the database *Prosopografía de los Ulemas Andalusíes (PUA)*, directed by M. L. Ávila, accessible online at <https://www.eea.csic.es/pua/>

³⁵ Antoine Borrut, Paul M. Cobb (eds.), *Umayyad legacies: Medieval memories from Syria to Spain*. Leiden: Brill, 2010, p. 101; Steven C. Judd, ‘Abd al-Raḥmān b. ‘Amr al-Awzā’ī. London: Oneworld, 2020; Ahmad Pakatchi and Suheyl Umar, “Al-Awzā’ī”, in *Encyclopaedia Islamica*, edited by Wilferd Madelung and Farhad Daftary. Accessed October 16, 2020 http://dx.doi.org/10.1163/1875-9831_isla_COM_0318

Hanafi, favoured by the Abbasids. This meant that the Cordovan Umayyads - whose ancestors, the Umayyad caliphs of Damascus, had been deposed and massacred by the Abbasids - could not agree in having it prosper in al-Andalus.³⁶

Among the early Andalusī scholars, ʿĪsā b. Dīnār (d. 212/827) was described as the *faqīh* (jurist) of al-Andalus. His rigorous methodological approach within the boundaries of Mālik's teachings and those of his students, as studied by Daniel Vázquez Paluch, explains why he was held in high regard.³⁷

Yaḥyā b. Yaḥyā's role was not only that of transmitter of Mālik's *Muwaṭṭaʿ*, but mostly in establishing collaboration between rulers and scholars.³⁸ The revolt against Hishām b. al-Ḥakam I (d. 796/822) in Cordova during the year 202/817 had seen many jurists side with the people who complained against unjust taxation. Yaḥyā b. Yaḥyā had also been involved and suffered persecution, but eventually he was pardoned as the new Umayyad emir realized that the emerging group of scholars could channel either popular opposition or support to the ruler and that, without them, Umayyad power could be jeopardized. At the same time, Yaḥyā b. Yaḥyā also profited as the support given to him by the ruler allowed him getting the upper hand for his own followers in the struggle among the emerging factions of scholars.³⁹

It was not only the *Muwaṭṭaʿ* that the Andalusīs introduced in al-Andalus but also Saḥnūn's (d. 240/854) *Mudawwana*,⁴⁰ a work of legal casuistry (*furūʿ*) where the transmissions from the Egyptian Ibn al-Qāsim predominated and that consisted mainly in *raʾy* (individual opinion). A contemporary of the North

³⁶ Maribel Fierro, "Proto-Maliki, Maliki and reformed Maliki in al-Andalus", in *The Islamic school of law: Evolution, devolution, and progress*, edited by R. Peters and F. E. Vogel. Cambridge, Mass.: Harvard University Press, 2005, p. 72.

³⁷ Vázquez-Paluch, "The Legal thought of an early Andalusian jurist: ʿĪsā b. Dīnār", p. 442.

³⁸ Hussain Monés, "Le rôle des hommes de religion dans l'Espagne musulmane jusqu'à la fin du Califat", *Studia Islamica* XX (1964), pp. 47-88; Maribel Fierro, "The Maghreb and al-Andalus at 250 H: Rulers, scholars and their works", in *Islam at 250*, edited by Petra M. Sijpesteijn and Camilla Adang. Leiden: Brill, 2020, p. 37.

³⁹ Fierro, "El alfaquí beréber Yaḥyā b. Yaḥyā, 'el inteligente de al-Andalus'", p. 271; Maribel Fierro, "Islam: Islam in Andalusia", in *Encyclopedia of religion, Second edition*, 15 vols. Editors-in-Chief: Lindsay Jones. Detroit: Thomson/Gale, 2005, vol. 5/4595.

⁴⁰ Brockopp, "Saḥnūn b. Saʿīd (d. 240/854)", in *Islamic legal thought: A compendium of Muslim jurists*, p. 83.

African Saḥnūn, the Andalusī al-ʿUtbī (d. 254/868), produced a similar work, the *ʿUtbīyya*, also known as *Mustakhraja*.⁴¹ N. Calder has touched upon the different structure of the legal material in Mālik's *Muwaṭṭaʿ* compared to that preserved in other sources, like the *Mudawwana* and the *Mustakhraja*: in the *Muwaṭṭaʿ*, there is a explicit plan to display Mālik's opinion as supported by Qurʾān and *ḥadīth*, even if this is not made to the extremes of other *ḥadīth* oriented works. On the other hand, in the rest of Mālik's preserved material, this concern is certainly absent.⁴² These different structures seem to show different concerns and different audiences. The early Andalusī legal material obviously indicates that the *Muwaṭṭaʿ* represented the exception and not the norm that was established by *masāʾil* compilations.⁴³ More than two centuries later, Ibn Rushd al-Jadd (d. 520/1126) managed to adapt these early texts to the necessities of contemporary judicial methodology, introducing the early Maliki opinion (*raʾy*) these works contain within the context of later *uṣūl* methodology without changing substantially the doctrines.⁴⁴

During the first half of the third/ninth century, the scholars who followed the teachings of Egyptian/Medinan students of Mālik preserved in *samāʾ* works such as Saḥnūn's *Mudawwana* and al-ʿUtbī's *Mustakhraja* can be considered "proto-Maliki" as the Maliki legal school was not yet fully formed.⁴⁵ As mentioned above, the doctrine of Mālik was known in al-Andalus thanks to his Egyptian and Medinan students. These students had developed their own legal perspective, either because they did not agree with Mālik or because Mālik had not dealt with the specific issues to which they paid attention. Also, those students had in their possession various versions of Mālik's teachings. The early Andalusī proto-Maliki also diverged among themselves as followers of Ibn al-

⁴¹ Ana Fernández Félix, "Al-ʿUtbī", in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Accessed October 19, 2020 http://dx.doi.org/10.1163/1573-3912_islam_SIM_7770

⁴² Norman Calder, *Studies in early Muslim jurisprudence*. Oxford: Clarendon Press, 1993, p. 30.

⁴³ Fierro, "Proto-Maliki, Maliki and reformed Maliki in al-Andalus", p. 65.

⁴⁴ Ana Fernández Félix, *Cuestiones legales del Islam temprano: la ʿUtbīyya y el proceso de formación de la sociedad Islámica Andalusí*. Madrid: CSIC, 2003, p. 120.

⁴⁵ Melchert, *The Formation of the Sunni schools of law, 9th-10th centuries C.E.*, p. 159.

Qāsim, Ashhab or Ibn Wahb. Hence, their differences were underlined instead of their similarities. They used the differences in order to promote their reputation as they competed with each other for positions, prestige and power. The followers of Ibn al-Qāsim had the upper hand, supported by the prestige and power of Yaḥyā b. Yaḥyā and by the fact that the popular Saḥnūn's *Mudawwana* was founded on his doctrine.⁴⁶

These "proto-Malikis" paid thus more attention to what separated them than to what united them. It was under the threat posed by the *ahl al-ḥadīth* in the second half of the third/ninth century that they started to underline what they had in common. The *ahl al-ḥadīth* - whose most important representative in al-Andalus was Abū 'Abd al-Raḥmān Baqī b. Makhlad b. Yazīd (d. 276/889)⁴⁷ - criticized those who followed the doctrines of Mālik and his students for their reliance in personal opinion (*ra'y*). The criticism was difficult to withstand. During the second half of the third/ninth century, the competition between the two groups - the *ahl al-ra'y* and the *ahl al-ḥadīth*- was reflected in two main issues. The first was the polemic regarding the practice of *raf' al-yadayn fī l-ṣalāt* with each group reaching a different conclusion regarding its permissibility according to their different legal approaches and use of the sources.⁴⁸ The second was related to the persecution of Baqī b. Makhlad at the instigation of mainly Abū Muhammad 'Abd Allāh b. Muḥammad b. Khālīd b. Martinīl (d. 256/869) who is described in the sources as *ra's al-mālikiyya*. The Andalusī *fuqahā'* were worried about the new trends introduced by Baqī b. Makhlad,

⁴⁶ Ana Fernández Félix, "Biografías de alfaquíes: la generación de al-'Utbī", in *EOBA, VIII, Biografías y género biográfico en el occidente Islámico*, edited by M. L. Ávila and M. Marín. Madrid: CSIC, 1997, p. 143. See also the useful overview on the legal works circulating in al-Andalus by Juan Martos Quesada, "Los libros de cabecera del alfaquí malikí durante el emirato omeya de al-Ándalus", *Al-Andalus Magreb* 28 (2021), pp. 1-14.

⁴⁷ María Luisa Ávila, "Baqī b. Makhlad", in *Encyclopaedia of Islam, THREE*, edited by Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas and Everett Rowson. Accessed October 19, 2020 http://dx.doi.org/10.1163/1573-3912_ei3_COM_24530

⁴⁸ Fierro, "Proto-Malikis, Malikis and reformed Malikis in al-Andalus", p. 66.

finding especially upsetting his *Muṣannaf* that included *ḥadīth* contrary to the doctrines of Mālik.⁴⁹

At the same time, more and more Andalusis became interested in the study of *ḥadīth* and a convergence between the two groups came into being. One of its earliest representatives was Ibn Waḍḍāh al-Qurṭubī (d. 287/900), a contemporary of Baqī,⁵⁰ who looked for the reconciliation of the Maliki doctrines with those of the traditionists. He played a significant role in establishing an Andalusī Maliki canon which had as its basis a work of *ra'y*, Saḥnūn's *Mudawwana*, together with Mālik's *Muwatta'*.⁵¹ Ibn Waḍḍāh al-Qurṭubī and Baqī b. Makhlad did not only introduce into al-Andalus new *ḥadīth* material but also its science. *Fiqh* that was introduced in the second half of the 2nd/8th century and *ḥadīth* were seen as different sciences. The scholars who introduced *fiqh* were not referred in the sources as traditionists. *Ḥadīth* initially brought about the opposition of the Andalusī Malikis because of the threat it offered to their doctrinal teachings and to the legal applications established in al-Andalus.⁵²

3. Malikism in the age of the Cordovan Umayyad caliphate

In the fourth/tenth century, Andalusī jurists appear quite integrated in chains of teachers and pupils that connected them to Mālik's teachings and those of his students. This closely knitted networks and the study of the same works shows that, by this time, it is possible to speak of a legal Andalusī Maliki school according to Melchert's proposal. In this century also the first Andalusī

⁴⁹ Manuela Marín, "Baqī b. Majlad y la introducción del estudio del 'ilm al-ḥadīth en al-Andalus", *Al-Qanṭara* I (1980), pp. 165-208; M. L. Ávila, "Nuevos datos sobre la biografía de Baqī b. Majlad", *Al-Qanṭara* VI (1985), pp. 321-67; Nūrī Mu'ammār, *Al-Imām Abū 'Abd al-Raḥmān Baqī b. Makhlad shaykh al-ḥuffāz bi'l-Andalus*. Rabat: Matabi' 'Ukaz, 1988; A.N.M. Raisuddin, "Baqī b. Makhlad al-Qurṭubī (201-276/816-889) and his contribution to the study of ḥadīth literature in Spain", *Islamic Studies* 27 No.2 (1988), p. 163.

⁵⁰ Fierro, "Proto-Malikis, Malikis and reformed Malikis in al-Andalus", p. 58.

⁵¹ Julio Samsó, Maribel Fierro (eds.), *The Formation al-Andalus, Part 2: Language, religion, culture and sciences*. New York: Routledge, 1998, p. xxiii.

⁵² Maribel Fierro, "The Introduction of ḥadīth in al-Andalus (2nd/8th–3rd/9th centuries)", *Der Islam* 66 (1989), p. 90.

biographical dictionaries of scholars were written in which such teaching networks were recorded.⁵³

In 316/929, 'Abd al-Raḥmān III al-Nāṣir li-dīn Allāh proclaimed the Umayyad caliphate in al-Andalus after having put an end to internal revolts, particularly the revolts of 'Umar b. Ḥafṣūn and his sons.⁵⁴ Ibn Ḥafṣūn had tried to justify his revolt by seeking alternatives to Umayyad legitimacy, either by paying allegiance to Fatimids and the Abbasids or by encouraging his own image as the licit ruler of al-Andalus. Even though the Hafsunids did not succeed, the Fatimids were an important threat for 'Abd al-Raḥmān III.⁵⁵

The Fatimids' claim to the caliphate, contrary to that of the Abbasids, could be dismissed by the Cordovan Umayyads by the fact that the Fatimids were heretics because of their Shi'i Ismā'ili beliefs.⁵⁶ The Cordovan caliph opposed any trend that could be considered close to Isma'ilism, as was the case with the doctrines of the esoteric (Batini) Masarris who were persecuted. On their part, the Abbasids, as mentioned, favoured Hanafism and this legal school never had a chance to prosper under the Cordovan Umayyads. Shafi'ism, close to the doctrines of the *ahl al-ḥadīth*, had some supporters in al-Andalus but a son of 'Abd al-Raḥmān III, called 'Abd Allāh al-Zāhid, who showed sympathy towards Shafi'ism, was executed because he became suspect of organizing a conspiracy against his father. 'Abd al-Raḥmān III, as a result of all this, turned Malikism in the official legal school and it became a fundamental component in the establishment and maintenance of an Andalusī identity.⁵⁷ Under the reign of his successor al-Ḥakam II (r. 350-366/961-976), a man who was suspected of being a Fatimid missionary was executed after having been denied the right of defense according to the doctrine of Mālik. During the trial against this missionary, the

⁵³ María Luisa Ávila, "El género biográfico en al-Andalus", in *EOBA, VIII, Biografías y género biográfico en el occidente Islámico*, edited by M. L. Ávila and M. Marín. Madrid: CSIC, 1997, pp. 35-51.

⁵⁴ Amin Tibi, "'Umar b. Ḥafṣūn", in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. December 19, 2020 http://dx.doi.org/10.1163/1573-3912_islam_COM_1283

⁵⁵ Maribel Fierro, *'Abd al-Raḥmān III: The First Cordoban Caliph*. Michigan: Oneworld Publications, 2005.

⁵⁶ Fierro, "Proto-Malikis, Malikis and reformed Malikis in al-Andalus", p. 58.

⁵⁷ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 56.

new caliph proclaimed that the *madhab* of Mālik b. Anas was the best among the other legal schools. Thereby, by the fourth/tenth century in al-Andalus, Maliki scholars supported the Umayyad rulers, serving the Umayyads as judges, legal experts and advisers, and in other legal charges.⁵⁸

The legal compilations of *masā'il* introduced in the previous century continued to be studied and transmitted. The most significant text was still Ṣaḥnūn's *al-Mudawwana* that constituted the core of Mālik teachings and practices together with al-'Utbi's *Mustakhraja* that collected the auditions of early Andalusī jurists such as 'Īsā b. Dīnār and Yaḥyā b. Yaḥyā Laythī.⁵⁹ New genres made their appearance such as commentaries of the *Muwaṭṭa'*, *fatāwā* collections and compilations of 'auditions'. Maliki jurists accorded remarkable significance to the study of *fiqh* manuals, at the expense of direct interpretation (*ijtihād*) of Qur'an and *ḥadīth*.⁶⁰ Maliki treaties were introduced in al-Andalus from the East such as *al-Tafrī'* by Ibn al-Jallāb (d. 378/988), a legal work written in Basra that became a fundamental source to consult in the formulation of legal judgements, being used in al-Andalus from the 4th/10th century onwards, including the times of the Moriscos.⁶¹ At the same time, a local production developed by jurists such as Ibn Abī Zamanīn (324/936-399/1008).⁶²

⁵⁸ Juan Martos Quesada, *El mundo jurídico en al-Andalus*. Madrid: Delta Publicaciones, 2005, p. 42.

⁵⁹ Mateusz Wilk, "Le Malikisme et les Omeyyades en al-Andalus. Le droit et l'ideologie du pouvoir", *Annales Islamologiques* 45 (2011), p. 103.

⁶⁰ David Powers, *Law, society, and culture in the Maghrib, 1300-1500*. Cambridge: Cambridge University Press, 2002, p. 11.

⁶¹ Soha Abboud-Haggar, "Difusión del tratado jurídico de *al-Tafrī'* de Ibn al-Gallāb en el Occidente musulmán", in *Aragón en la Edad Media. Homenaje a Carmen Orcástegui Gros*, 2 vols., edited by Mikel de Epalza Ferrer. Zaragoza: Hesperia Libros, 1999, vol. 1/3.

⁶² On this see the study by Juan Martos Quesada, "Textos jurídicos andalusíes (siglos X y XI)", *Al-Mulk: Anuario de Estudios Arabistas* 7 (2007), pp. 89-101 and the online resource *Historia de los Autores y Transmisores de al-Andalus (HATA)*, section III on Fiqh: <https://www.eea.csic.es/red/hata/>

CHAPTER II

IBN ABĪ ZAMANĪN AND HIS *MUNTAKHAB AL-AḤKĀM*

1. A panoramic look at Ibn Abī Zamanīn's life

Abū ‘Abd Allāh Muḥammad b. ‘Abd Allāh b. ‘Īsā b. Muḥammad b. Ibrāhīm al-Murrī, known as Ibn Abī Zamanīn (324/936-399/1008),⁶³ appears as one of the most important Andalusī jurists (*faqīh*, pl. *fuqahā’*) of his generation in 4th/10th century al-Andalus. Even though research on the historical developments of Maliki doctrine and Maliki scholars are abundant, studies on Ibn Abī Zamanīn are limited. They have been carried out mainly by the editors of his Arabic texts and in Spain by María Arcas Campoy whose contribution is fundamental to comprehend Ibn Abī Zamanīn's life, intellectual production and his legal thought. Her studies on Ibn Abī Zamanīn's *Muntakhab al-aḥkām* that started to appear since 1984 covering a variety of topics have been seminal and highly influential. They have been of great help for the research carried out in this Ph.D. Dissertation that focuses on a specific topic (divorce) to which attention has not been previously paid.⁶⁴ In what follows in this section devoted

⁶³ www.eea.csic.es/pua/personaje/consulta_personaje.php?id=9633 Accessed November 12, 2020.

⁶⁴ María Arcas Campoy, “El *Kitāb Muntajab al-aḥkām* de Ibn Abī Zamanīn. Estudio, traducción y edición crítica del sumario y del Libro I.” PhD diss., University of Granada, 1984; id., “Ibn Abī Zamanīn y su obra jurídica”, *Cuadernos de Historia del Islam* 11 (1984), pp. 87-101; id., “Los Banū Abī Zamanīn: una familia de juristas”, *Miscelánea de Estudios Árabes y Hebraicos* 40-41 (1991-1992), pp. 11-20; id., “Teoría jurídica de la guerra santa: El *Kitāb qidwat al-gāzī* de Ibn Abī Zamanīn”, *Al-Andalus Magreb* 1 (1993), pp. 51-65; id., “Casuística sobre el perdón del talión en el *Muntajab al-aḥkām* de Ibn Abī Zamanīn”, *Al-Qanṭara* 26 No.2 (2005), pp. 387-403; id., “Un capítulo del *Muntajab al-aḥkām* de Ibn Abī Zamanīn sobre las calamidades agrícolas (*yāwā’ih*). Edición y traducción (Ms No 1730/d de la Biblioteca General de Rabat)”, in *El Saber en al-Andalus. Textos y estudios IV (Homenaje al profesor D. Pedro Martínez Montávez)*, edited by Clara María Thomas de Antonio and Antonio Reíllo. Sevilla: Universidad de Sevilla, 2006, pp. 43-58; id., “Notas sobre el *Muntajab al-aḥkām* de Ibn Abī Zamanīn (m. 399/1008): ediciones, manuscritos, estructura y fuentes”, in *Vivir de tal suerte. Homenaje a Juan Antonio Souto Lasala*, edited by Mohamed Meouak and Cristina de la Puente. Córdoba: Oriens Academic, CNERU, CSIC, 2014, pp. 47-64; id., “Ibn Abī Zamanīn”, in *Diccionario biográfico electrónico de la Real Academia de la historia*, 2019. Accessed October 10, 2020

to Ibn Abī Zamanīn's family and life, I rely mostly on Arcas Campoy's excellent studies where references to the primary sources can be found.

Ibn Abī Zamanīn's family was of Berber background and originally from Tlemcen (Tilimsān). He did not know exactly why his family was known as the Banū Abī Zamanīn because he never asked his father about this.⁶⁵ López Ortiz stated that Ibn Abī Zamanīn was from Cordova, while Miguel Casiri argued that he was born in Almería.⁶⁶ Arcas Campoy has shown that according to the extant Arabic sources he was born in Granada (Ilbīra) in *Dhū l-Ḥijja* 324/October–November 936. According to Qāḍī `Iyāḍ, he belonged to the Nafza, a Zanāta group that participated in the conquest of the Iberian Peninsula and was widely spread throughout North Africa. Even though the date of their settlement in Ilbīra is unknown, Ibn Abī Zamanīn's ancestors came to al-Andalus in early times.⁶⁷

We have information on various members of the Banū Abī Zamanīn family.⁶⁸ These include Abū Bakr Muḥammad b. `Abd Allāh b. `Īsā b. Abī Zamanīn (d. 428/1036-7)⁶⁹, scholar and qadi for whom his brother Abū `Abd Allāh composed the *Muntakhab al-aḥkām*, one of his main works. Two prominent characters, chronologically later, also belonged to this family: Abū Khālid `Abd

<http://dbe.rah.es/biografias/136432/ibn-abi-zamanin>; id., "Ibn Abī Zamanīn" in *Encyclopedia of Islam, THREE*, edited by Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas and Everett Rowson. Accessed October 10, 2020 http://dx.doi.org/10.1163/1573-3912_ei3_COM_30678

⁶⁵ Arcas Campoy, "Ibn Abī Zamanīn", in *Encyclopaedia of Islam, THREE*, Accessed November 15, 2020 http://dx.doi.org/10.1163/1573-3912_ei3_COM_30678; On scholars of Berber origin see Helena de Felipe, "Familias de ulemas de origen bereber en al-Andalus", *Historia, ciencia y sociedad: actas del II Coloquio Hispano-Marroquí de Ciencias Históricas* 6-10 November 1989, 1992, Granada, pp. 169-182.

⁶⁶ J. López Ortiz, "Formularios notariales de la España musulmana", *La Ciudad de Dios* 145 (1926), p. 269; M. Casiri, *Bibliotheca Arabico-Hispana Escorialensis*, 2 vols. Madrid, 1760, 1770 (reed. Osnabrück, 1969, vol. 2/88).

⁶⁷ Arcas Campoy, "Los Banū Abī Zamanīn: una familia de juristas", p. 12.

⁶⁸ Arcas Campoy, "Los Banū Abī Zamanīn: una familia de juristas"; see also https://www.eea.csic.es/pua/familia/consulta_familia.php?idf=1 Accessed November 15, 2020.

⁶⁹ Arcas Campoy, "Los Banū Abī Zamanīn: una familia de juristas", p. 16; https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=9632 Accessed November 15, 2020.

Allāh b. Muḥammad b. ‘Abd al-Raḥmān b. Muḥammad b. ‘Abd Allāh b. Abī Zamanīn (d. 544 /1150)⁷⁰, qadi and scholar from Granada, and his son Abū Bakr Muḥammad b. Abī Khālīd b. ‘Abd Allāh b. Muḥammad b. Abī Zamanīn (d. 602/1205-6)⁷¹, qadi in Granada, Berja and Málaga. Thus, members of this family were active in the legal field between the years 298/910 and 602/1205, a span of almost three centuries.

The father of Ibn Abī Zamanīn influenced his three sons, Abū ‘Abd Allāh, Abū Bakr and Abū Muḥammad, on their intellectual training and legal and religious perspectives. Being part of a religious family meant that they began to study Qur’an, *ḥadīth* and law in their early ages.⁷² Ibn Abī Zamanīn, after taking education from his father in these fields, left for Pechina (Bajjāna) to continue his studies, and afterwards settled in Cordova, where he spent most of his life. In both cities, he followed the lessons of the most prestigious teachers of the time. According to Ibn al-Faraḍī, he still lived in Cordova in the year 395/1004, even though shortly afterwards he had to return to his hometown where he died on the 3rd day of Rabī` II of the year 399/5 December 1008, at 75 years of age. Nonetheless, other biographers report that he died around 400/1009.⁷³

a. Ibn Abī Zamanīn’s teachers and students

Ibn Abī Zamanīn was devoted to studying the Qur’an, *ḥadīth* and Islamic law (*fiqh*), guided by his father, who was his first teacher, and other scholars from his home town. Ibn Abī Zamanīn received a good education from important scholars in those disciplines - an education that was needed to become a well-rounded religious scholar.⁷⁴ Here his teachers are listed in alphabetical order:

⁷⁰ Arcas Campoy, “Los Banū Abī Zamanīn: una familia de juristas”, p. 17; https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=5452 Accessed November 15, 2020.

⁷¹ Arcas Campoy, “Los Banū Abī Zamanīn: una familia de juristas”, p. 18; https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=9456 Accessed November 15, 2020.

⁷² Arcas Campoy, “Ibn Abī Zamanīn”, in *Encyclopaedia of Islam, THREE*, Accessed November 16, 2020 http://dx.doi.org/10.1163/1573-3912_ei3_COM_30678

⁷³ Arcas Campoy, “Ibn Abī Zamanīn”, accessed October 10, 2020 <http://dbe.rah.es/biografias/136432/ibn-abi-zamanin>

⁷⁴ Arcas Campoy, “Los Banū Abī Zamanīn: una familia de juristas”, p. 13.

- i. His father, ‘Abd Allāh b. ‘Īsā (d. 359/969)⁷⁵ transmitted to him firstly the *Tafsīr* by Abū Zakarīyā’ Yaḥyā b. Sallām (d. 200/815), a famous commentary of Qur’an.⁷⁶
- ii. Aḥmad b. Muṭarrif (d. 352/963)⁷⁷ from Cordova. He studied only in al-Andalus and was a *ḥadīth* specialist.
- iii. Aḥmad b. Yaḥyā b. al-Shāma (d. 343/954)⁷⁸, from Cordova, studied with two transmitters of al-‘Utbī’s *Mustakhraja*: Abū Ṣāliḥ Ayyūb b. Sulaymān (d. 302/914)⁷⁹ and Ibn Lubāba (d. 314/926).⁸⁰
- iv. Ishāq b. Ibrāhīm b. Masarra (d. 352/963)⁸¹ was from Toledo but settled in Cordova. He specialized in the doctrine of Mālik and his associates according to Ibn al-Faraḍī. He studied with the jurist Ibn Lubāba (d. 314/926).
- v. Muḥammad b. Mu‘āwiya al-Marwānī (d. 358/968)⁸², from Cordova, studied with Ibn Lubāba and ‘Ubayd Allāh b. Yaḥyā.
- vi. Sa‘īd b. Faḥlūn (d. 346/957)⁸³ instructed Ibn Abī Zamanīn in *ḥadīth*. He specialized in transmitting *ḥadīth* and Maliki works, especially the *Wāḍiḥa* by Ibn Ḥabīb⁸⁴ and the *Mukhtaṣar* by Ibn ‘Abd al-Ḥakam (d. 241/829).

⁷⁵ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=5297
Accessed November 29, 2020.

⁷⁶ Yaḥyā b. Sallām, *Tafsīr Yaḥyā b. Sallām al-Taymī al-Baṣrī al-Qayrawānī min ṣūrat al-naḥl ilā ṣūrat al-ṣaffāt*, 2 vols. Beirut: DKI, 2004.

⁷⁷ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=1995
Accessed November 29, 2020.

⁷⁸ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=2071
Accessed November 29, 2020.

⁷⁹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=2620
Accessed December 7, 2020.

⁸⁰ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=10149
Accessed November 29, 2020.

⁸¹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=2152
Accessed November 29, 2020.

⁸² https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=10545
Accessed November 29, 2020.

⁸³ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=3596
Accessed November 29, 2020.

⁸⁴ M. Arcas Campoy, “Proyecto de reconstrucción fragmentaria de la *Wāḍiḥa* de Ibn Ḥabīb”, in *Miscellanea Arabica et Islamica: Dissertationes in academia ultrajectina prolatae anno MCMXC*, edited by Frederick De Jong. Leuven: Peeters Press & Department Oriesntalistiek Leuven, 1993, pp. 67-75; Ibn Ḥabīb, *Das ‘K. al-Wāḍiḥa’ des ‘Abd al-Malik b. Ḥabīb, Edition und kommentar zu Ms. Qarawīyyīn 809/40 (abwāb al-ṭahāra)*, edited partially by B. Ossendorf-Conrad. Beirut:

vii. Wahb b. Masarra al-Tamīmī al-Andalusī (d. 346/957)⁸⁵ from Firrīsh. Qādī `Iyād (d. 544/1149) stated that he excelled in law, *ḥadīth* and language.

Thus, Ibn Abī Zamanīn studied with scholars who transmitted significant works such as Qur'an's commentary, *ḥadīth* and important books of Maliki school such as Saḥnūn's *Mudawwana*, Ibn Ḥabīb's *Wāḍiḥa* and al-'Utbī's *Mustakhraja* mentioned in the previous chapter. On the other hand, he was the teacher of important and numerous disciples and students, among which (listed by their death date) Aḥmad b. 'Afīf b. 'Abd Allāh al-Umawī (d. 420/1029)⁸⁶, Sa'īd b. Salama al-Tanūkhī (d. 426/1034)⁸⁷, Muḥammad b. 'Abd al-Raḥmān b. 'Awf (d. 434/1042)⁸⁸, 'Abd Allāh b. Muḥammad b. 'Abd al-Raḥmān al-Qaysī (d. 436/1044)⁸⁹ and Ibrāhīm b. Makhlad (d. 470/1077).⁹⁰

b. The works of Ibn Abī Zamanīn

Ibn Abī Zamanīn was one of the most remarkable Andalusī jurists in his time for his knowledge, great piety, and his pure belief, according to his biographers. In Cordova, he developed his main activity as a *faqīh*. Even though in certain cases he also asserted his own opinion (*ra'y*), some of his biographers maintain that he was a jurist very attached to *ḥadīth*. He wrote a number of legal and religious works, of which around a dozen titles are known. Also, he

Beiruter, Texte und Studien, 1994; id., 'Abd al-Malik. *Kitāb al- Wāḍiḥa (tratado jurídico)*, *Fragmentos extraídos del Muntajab al-aḥkām de Ibn Abī Zamanīn (m. 399/1008)*, edited by María Arcas Campoy. Madrid: CSIC, 2002; id., *Al-Wāḍiḥa: kutub al-ṣalāt wa-kutub al-ḥayy, riwāyat Yūsuf b. Yaḥyā al-Maghāmī wa-ghayriḥi 'an Ibn Ḥabīb*, edited partially by M. Muranyi. Beirut: Dār al-Bashā'ir al-islāmiya, 2010.

⁸⁵ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=11427
Accessed November 29, 2020.

⁸⁶ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=1842
Accessed November 29, 2020.

⁸⁷ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=3690
Accessed November 29, 2020.

⁸⁸ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=9344
Accessed November 29, 2020.

⁸⁹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=5457
Accessed November 29, 2020.

⁹⁰ https://www.eea.csic.es/pua/familia/consulta_familia.php?id=1https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=261 Accessed November 29, 2020.

composed several poems but only few fragments have come down to us, preserved by Qādī 'Iyād.⁹¹

Ibn Abī Zamanīn can be evaluated as a prolific author. Most of his works are lost and others are still in manuscript. Besides his writings on legal subjects, he composed many books about *zuhd*⁹² and *raqā'iq*⁹³ such as *Kitāb ādāb al-islām*, *Kitāb ḥayāt al-qulūb*, *Kitāb al-mawā'iz*, *Kitāb al-mawā'iz al-manẓūma*, *Kitāb muntakhab al-du'ā*, *Kitāb al-nasā'ih*, *Kitāb qidwat al-ghāzī* and *Kitāb uns al-murīd fī laylihi*. As the *Kitāb qidwat al-ghāzī* is the single surviving sample of the ascetic literature by Ibn Abī Zamanīn, it is not possible to make a precise argument of his output in this area as a whole. Al-Ḥumaydī stated that his style was like the style of Ibn Abī al-Dunyā (d. 281/894),⁹⁴ which brings to mind collections of *ḥadīth* and transmissions of the Companions of the Prophet.⁹⁵ Ibn Abī al-Dunyā's works were widely transmitted in al-Andalus.⁹⁶

*List of works in alphabetical order:*⁹⁷

N.B. the word *Kitāb* is taken into consideration for the order

1. *Ikhtisār sharḥ Ibn Muzayn li-l Muwaṭṭa' (fiqh)*.
2. *Kitāb ādāb al-islām*, dealing with the norms of Islam (*zuhd*).

⁹¹ Al-Qādī 'Iyād b. Mūsā, *Tartīb al-madārik wa-taqrīb al-masālik li-ma'rifat a'lām madhhab Mālik*, vol. 2/183.

⁹² Technically, "asceticism. Rejection of material comforts to pursue personal contemplation and meditation. Encompasses notions of piety, asceticism, and renunciation." John Esposito, "Zuhd", in *The Oxford Dictionary of Islam*. Oxford Islamic Studies Online. Accessed July 23, 2020 <http://www.oxfordislamicstudies.com/article/opr/t125/e2581>

⁹³ Literally, have sympathy: *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Sādiq Qanībi and Quṭb Muṣṭafā Sanū. Beirut: Dār al-Nafa'is, 1427/2006, p. 209. Technically, it is used to refer to *zuhd* issues. Mehmet Emin Özavşar, "Zühd ve Rekāik", in *TDV İslam Ansiklopedisi*, 44 vols. Istanbul: TDV İslām Araştırmaları Merkezi, 2000. Accessed July 23, 2020 <https://islamansiklopedisi.org.tr/zuhd-ve-rekaik>

⁹⁴ Leonard Librande, "Ibn Abī al-Dunyā: Certainty and morality", *Studia Islamica* 101 (2005), pp. 5-42.

⁹⁵ Manuela Marín, "Zuhhād of al-Andalus (300/912-420/1029)", in *The Formation of al-Andalus, Part 2: Language, religion, culture and the sciences*, edited by Maribel Fierro and Julio Samsó. London: Routledge, 1998, p. 126.

⁹⁶ Juan Manuel Vizcaíno, "Las obras de *zuhd* en al-Andalus", *Al-Qanṭara* 12 (1991), pp. 417-438.

⁹⁷ For those that the discipline is known, it is indicated among parentheses. A more complete list can be found in *Historia de los Autores y Transmisores de al-Andalus (HATA)*.

3. *Kitāb ḥayāt al-qulūb* (The life of hearts) (*zuhd*).
4. *Kitāb al-mawā'iz* (Exhortations) (*zuhd*).
5. *Kitāb al-mawā'iz al-manẓūma* (Advise in verse) (*zuhd*).
6. *Kitāb al-mughrib fī ikhtiṣār al-Mudawwana*, described as an annotated abridgement of the *Mudawwana* (*fiqh*).
7. *Kitāb al-muḥaṭṭab fī tafsīr al-Muwaṭṭa'*, an abridgement of Ibn Muzayn's commentary of the *Muwaṭṭa'* (*fiqh*).
8. *Kitāb mukhtaṣar tafsīr Yaḥyā b. Sallām li-l Qur'ān*⁹⁸, a summary and commentary of Yaḥyā b. Sallām's (d. 200/815) *tafsīr*.⁹⁹ Ibn Abī Zamanīn did not only present a summary of this work but also dealt with Qur'anic verses that were skipped by the author. Additionally, he inserted new narratives and gave a new dimension to that *tafsīr* by providing additional philological analysis in various places. Ibn Abī Zamanīn made an important philological contribution, so this work is also known as the *Tafsīr* of Ibn Abī Zamanīn. He was in fact one of the first representatives of *tafsīr* in al-Andalus, showing his grasp of the discipline.¹⁰⁰ Through his work he gave relevance to the *tafsīr* of Yaḥyā b. Sallām, helping to its survival through the centuries as it is attested among the Moriscos.¹⁰¹ The text is preserved in Al-Qarawiyyin Library in Fez and partly in the British Museum in London. Also, the first six parts of the aljamiado version is preserved in the School of Arabic Studies (Escuela de Estudios Árabes) in Granada.¹⁰²

⁹⁸ Ibn Abī Zamanīn, *Mukhtaṣar Tafsīr Yaḥyā b. Sallām*, edited by 'Abd al-Salām b. Aḥmad al-Kanūnī. Tetouan: Matba'āt Altubrīs, 2001; id., *Mukhtaṣar Tafsīr Yaḥyā b. Sallām*, 2 vols., edited by Muḥammad Ḥasan Ismā'īl and Aḥmad Farīd al-Mazīdī. Beirut: Dār al-kutub al-'ilmiyya, 2003; id., *Mukhtaṣar Tafsīr Yaḥyā b. Sallām (Sūrat Āl-Imrān)*, edited partially by 'Abd Allāh b. 'Abd al-'Azīz Al-Madīmīgh. Riyadh: Imām Muḥammad b. Sa'ūd Islamic University, Kulliyat uṣūl al-dīn, n.d.

⁹⁹ See above note 76.

¹⁰⁰ Adday Hernández, "Qur'anic studies in al-Andalus: An overview on the state of research on *qirā'āt* and *tafsīr*", *Journal of Qur'anic Studies* 19-3 (2017), pp. 74-102.

¹⁰¹ Nuria Martínez de Castilla Muñoz, "La transmisión de textos entre los moriscos: Dos copias del *tafsīr* abreviado de Ibn Abī Zamanīn", *Anaquel de Estudios Árabes* 26 (2015), p. 147.

¹⁰² Arcas Campoy, "Los Banū Abī Zamanīn: una familia de juristas", p. 15.

9. *Kitāb muntakhab al-du'ā* (Selection of prayers) (*zuhd*).
10. *Kitāb al-naṣā'ih* (Advise in verse) (*zuhd*).
11. *Kitāb qidwat al-ghāzī* deals with *jihād*,¹⁰³ setting out the legal bases in religious holy war, as well as norms that determine the behavior of the combatant. It belongs to the genre of *faḍā'il al-jihād* (the virtues of *jihād*) covering both the ethics and law of *jihād*. *Qidwat al-ghāzī* consists of 24 chapters dealing with several Qur'anic verses to explain the meaning and implications of *jihād*.¹⁰⁴ It is preserved in the National Library in Madrid,¹⁰⁵ was translated into German by R. Weschel¹⁰⁶, was edited by A. Sulaymānī,¹⁰⁷ and studied by Arcas Campoy.
12. *Kitāb uns al-murīd fī laylihi* (The Intimacy of the seeker in his night) (*zuhd*).
13. *Kitāb uṣūl al-sunna* (The Foundations of the sunna) on theology.
14. *Muntakhab al-aḥkām (fiqh)*. This is the most prominent work of Ibn Abī Zamanīn to be dealt with below.
15. *Mushtamal fī uṣūl al-wathā'iq*, regarding notarial document (*fiqh*).

2. The *Muntakhab al-aḥkām* by Ibn Abī Zamanīn: contents and aims

The *Muntakhab al-aḥkām* is one of the most important and consulted works of *Nawāzil fiqh* writings in the Maliki school. *Nawāzil* (sing. *nāzila*) - meaning specific cases or cases in question- is the term used to differentiate between judicial cases which are based on real events and hypothetical cases constructed for educational purposes. Also, it defines the case itself excluding the

¹⁰³ Literally, "to strive," "to exert," "to fight"; its technical meaning is the only legal warfare in Islam, and it is carefully controlled in Islamic law. John Esposito, "Jihad", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed July 23, 2020 <http://www.oxfordislamicstudies.com/article/opr/t125/e1199>

¹⁰⁴ Arcas Campoy, "Teoría jurídica de la guerra santa: El *Kitāb qidwat al-gāzī* de Ibn Abī Zamanīn", p. 54.

¹⁰⁵ Francisco Guillén Robles, *Catálogo de los manuscritos árabes existentes en la Biblioteca Nacional de Madrid*. Madrid: Imprenta y Fundación de M. Tello, 1889, p. 235.

¹⁰⁶ Ibn Abī Zamanīn, *Das buch Qidwat al-gāzī. Ein beitrage zur geschichte der jīhād literatur*, translated and edited by Ruth Wechsel. Bonn: Diss., 1970.

¹⁰⁷ Ibn Abī Zamanīn, *Kitāb qudwat al-ghāzī*, edited by Āisha Sulaymānī. Beirut: Dār al-Gharb al-Islāmī, 1989.

solution given to the case whether it is a decision of a qadi (*ḥukm*) or a legal opinion (*fatwā*). Nonetheless, this term has frequently been used as equivalent of legal opinion, though strictly speaking they are distinct.¹⁰⁸

Nawāzil books are part of the most valued sources that the *faqīh* has to consult in order to uncover the *fuqahā'* method in the inference of judicial judgments and also in order to know how to consult the jurists. Ibn Abī Zamanīn compiled a great number of fragments extracted from the fundamental sources of Maliki law, samples from auditions and opinions of the most prestigious jurists.¹⁰⁹ Ibn Abī Zamanīn extracted texts from the main books of Maliki *fiqh*, so that the judge could find what he was looking for without having to do extensive research or consulting. Many scholars benefited from this work as attested by his wide diffusion.¹¹⁰

a. Sources of the *Muntakhab al-aḥkām*

The book comprises 10 parts dealing respectively with disputes, justice, pre-emption right, possession, marriage, divorce, sales, hidden defects, letting and renting and other issues. It contains 601 authority statements, but Ibn Abī Zamanīn only speaks as an authority 41 times, making up less than 7% of the authority statements. Ibn Abī Zamanīn mentioned narrations of fundamental scholars in various methods. This was sometimes done by him explaining the meaning of quoted statements. In some examples, this may have merely meant repeating the statement in clearer language or filling gaps in the quoted statements from another narration. At other times, nevertheless, clarification of a statement meant restricting the import of the quote.

¹⁰⁸ Meḥemed Moḥamed Twebti, "A Study and edition of *al-Tanbīh wa 'li'lām fī mustafādi 'l-quḍāti wa 'l ḥukkām* by Abū 'Abd Allāh Muḥammad b. 'Abd Allāh al-Yafranī al-Miknāsī (d. 917/1511)." PhD diss., University of London, 2002, p. 40.

¹⁰⁹ Arcas Campoy, "Un capítulo del *Muntajab al-aḥkām* de Ibn Abī Zamanīn sobre las calamidades agrícolas (*yāwā'ih*). Edición y traducción (Ms No 1730/d de la Biblioteca General de Rabat)", p. 43.

¹¹⁰ Arcas Campoy, "Casuística sobre el perdón del talión en el *Muntajab al-aḥkām* de Ibn Abī Zamanīn", p. 387.

The following are the sources quoted in *Muntakhab al-aḥkām* according to their frequency¹¹¹:

- Saḥnūn's *Mudawwana*, quoted 60 times
- 'Īsā b. Dīnār's¹¹² *Samā'*, 38 times
- Ibn Ḥabīb's¹¹³ *Kitāb (al-Wāḍiḥa)*, 33 times (Arcas Campoy was able to reconstruct part of this work thanks to Ibn Abī Zamanīn's quotations)
- Al-'Utbī's *Mustakhraja*,¹¹⁴ 23 times
- Yaḥyā b. Yaḥyā al-Laythī's¹¹⁵ *Samā'*, 18 times
- Ibn al-Qāsim's¹¹⁶ *Samā'*, 10 times
- Aṣḥab's (d. 340/951)¹¹⁷ *Samā'*, 10 times
- Ashhab's *Samā'*, 6 times
- 'Īsā b. Dīnār's *Kitāb al-jidār*, 5 times
- Ibn Muzayn's (d. 259/873) *Kitāb*¹¹⁸, 3 times
- Ibn al-Ḥasan's (d. 232/847)¹¹⁹ *Samā'*, 3 times
- Ibn Saḥnūn's *Kitāb*, twice
- Saḥnūn's *Samā'*, twice
- Ibn Wahb's (d. 197/813) *Riwāya*, Ḥusayn b. 'Āṣim's (d. 208/823) *Samā'*,¹²⁰ Ibn 'Abd al- Ḥakam's (d. 214/829) *Mukhtaṣar*¹²¹, Mūsā b. al-

¹¹¹ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 235. See also Martos Quesada, "Los libros de cabecera del alfaquí malikí durante el emirato omeya de al-Ándalus".

¹¹² https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=7252
Accessed December 1, 2020.

¹¹³ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=5739
Accessed December 1, 2020.

¹¹⁴ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=8223
Accessed December 1, 2020.

¹¹⁵ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=11714
Accessed December 1, 2020.

¹¹⁶ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=2504
Accessed December 1, 2020.

¹¹⁷ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=7567
Accessed December 1, 2020.

¹¹⁸ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=11453
Accessed December 1, 2020.

¹¹⁹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=5723
Accessed December 2, 2020.

¹²⁰ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=1265

Faraj, Muḥammad b. Khālid (d. 224/838)¹²² and Ibn al-Mawwāz's (d. 275/888) *Kitāb*¹²³ all appear once each.

The legal doctrines of Mālik have an important place in *Muntakhab al-aḥkām*, especially through Mālik's student 'Abd al-Raḥmān b. al-Qāsim al-'Utaqī, the scholar who had enormous influence in recording the positions of the school and was the source for Saḥnūn's *Mudawwana*.¹²⁴ Saḥnūn generally appears as the jurist who asks the questions found in the *Mudawwana*. It is obvious that the *Mudawwana* and the *Muwaṭṭa'* form the backbone of the *Muntakhab al-aḥkām*.¹²⁵ However, even though most of the quotes are taken literally from the *Mudawwana*, Ibn Abī Zamanīn relied primarily on Andalusī sources. The sources of authority are not much different from other 4th/10th century works. The fact that he solely quoted authorities that take part of the Maliki tradition indicates a school-consciousness where not only the eponym was significant but also encompassed the wider school tradition as evidenced by his strong reliance on Ibn al-Qāsim.¹²⁶

The person answering the questions is generally Ibn al-Qāsim who refers to Mālik. He is quoted as an authority 214 times, whilst Mālik is quoted as an authority 172 times.¹²⁷ The reason for this has a lot to do with Ibn Abī Zamanīn's use of direct quotes from Ibn al-Qāsim's *samā'* where he replies questions posed by his students, sometimes making reference to Mālik, sometimes not. Audition (*samā'*, pl. *samā'āt* / *asmi'a*) reflects the meetings in which students attended the classes of a teacher listening to his transmissions and explanations on legal questions dealing with matters such as purification,

Accessed December 2, 2020.

¹²¹ Jonathan E. Brockopp, *Early Mālikī law: Ibn 'Abd al-Ḥakam and his major compendium of jurisprudence*. Leiden: Brill, 2000.

¹²² https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=8858

Accessed December 2, 2020.

¹²³ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=9035

Accessed December 1, 2020.

¹²⁴ Şükrü Özen, *TDV İslam ansiklopedisi*, 44 vols. Istanbul: TDV İslâm Araştırmaları Merkezi, 2000, vol. 21/103.

¹²⁵ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād. Rabat: Markaz al-dirāsāt wa-l-abḥāth wa-iḥyā' al-turāth, 1439/2009, vol. 1/109.

¹²⁶ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 238.

¹²⁷ Ibid, p. 236.

prayer, fasting, charity, etc in the field of *‘ibādat* (ritual) and with marriage, divorce, sales, etc in the field of *mu‘āmalāt* (relations between men).

Apart from Saḥnūn’s transmissions, Ibn Abī Zamanīn frequently made use of the *samā’* of ‘Īsā b. Dīnār¹²⁸; in the *Muntakhab al-aḥkām*, great credit is given to his legal expertise especially from his book *Kitāb al-jidār* and also from the so-called *Madaniyya*.¹²⁹ ‘Īsā b. Dīnār was called 'the jurist of al-Andalus' being a respected scholar, knowledgeable in traditions and teacher of the *Muwatta’*, competent at expounding legal points made by Mālik and elucidating on them. For all these reasons he was a key scholar of early Malikism. His relationship with Ibn al-Qāsim was quite close, with Ibn al-Faraḍī saying that ‘Īsā b. Dīnār accompanied him and relied on him. This can be confirmed by looking at the *samā’* of ‘Īsā b. Dīnār in which he took almost exclusively from Ibn al-Qāsim. However, the issues in which ‘Īsā b. Dīnār differed from him are more common than those where he differed from Mālik.¹³⁰

The *Mustakhraja* in which Mālik and Ibn al-Qāsim give specific responses to specific questions is another source that Ibn Abī Zamanīn resorted to in order to answer the questions and emphasize legal judgments.¹³¹ Moreover, Ibn Abī Zamanīn benefited from the works by Yaḥyā b. Yaḥyā al-Laythī who had studied with Ibn al-Qāsim and internalized his opinions instead of those by Mālik. Other sources used in the *Muntakhab al-aḥkām* are the *Kitāb* by Ibn al-Mājishūn (d. 214/827), Ibn ‘Abd al-Ḥakam’s *Mukhtaṣar* and the *Kitāb* by Ibn Muzayn used in order to explain questions and reply regarding legal cases.¹³²

Ibn Abī Zamanīn was a scholar of precedent within the school, apparently not willing to exceed the boundaries. If he did not refer to Mālik, he referred to Ibn al-Qāsim. If the precedent was not Ibn al-Qāsim, then other early

¹²⁸ Hussain Monés, “‘Īsā b. Dīnār”, in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs Accessed December 2, 2020 http://dx.doi.org/10.1163/1573-3912_islam_SIM_3598

¹²⁹ Vazquez-Paluch, “The legal thought of an early Andalusian jurist: ‘Īsā b. Dīnār”, p. 426.

¹³⁰ Ibid, p. 441.

¹³¹ Fernández Félix, *Cuestiones legales del Islam temprano: la ‘Utbiyya y el proceso de formación de la sociedad islámica andalusí*, p. 98.

¹³² Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 1/114.

Maliki scholars were. Furthermore, if he did not refer to other early Maliki authorities, he followed the Andalusī tradition. Ibn Abī Zamanīn did not frequently speak in his own voice in the *Muntakhab al-aḥkām*.¹³³

b. Manuscripts and editions of the *Muntakhab al-aḥkām*

The research carried out by María Arcas Campoy and Muḥammad Ḥammād provides significant information regarding the editions, locations and genre of the *Muntakhab al-aḥkām*,¹³⁴ as well as regarding the complex structure of the book.

Muḥammad Ḥammād is responsible for the edition of the *Muntakhab al-aḥkām* that is used in this work. His extended and detailed study on the manuscripts analyses the differences and similarities among them. Also, the introduction of the book informs us on its technical features such as its index, sources, chapters and printing process.

María Arcas Campoy devoted her Ph.D. dissertation submitted in Granada University in 1982 to the *Muntakhab al-aḥkām* and afterwards published a number of articles analyzing its contents.¹³⁵ Also, she was able to reconstruct part of the *Kitāb al-Wāḍiḥa* by ‘Abd al-Malik b. Ḥabīb (d. 238/852) by collecting the fragments quoted in the *Muntakhab al-aḥkām*.

Daniel Vazquez-Paluch in his study on the early Maliki jurists in al-Andalus¹³⁶ has provided important insights about this work and carried out a comparison between the *Muntakhab al-aḥkām* and the *Kitāb qidwat al-ghāzī* that sheds new light on the perspective and approach of Ibn Abī Zamanīn in different genres.

The *Muntakhab al-aḥkām* was firstly published entirely by Muḥammad Ḥasan Ismā‘īl and Aḥmad Farīd al-Mazīdī (year 2003).¹³⁷ Then appeared the

¹³³ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 242.

¹³⁴ Arcas Campoy, “Notas sobre el *Muntajab al-aḥkām* de Ibn Abī Zamanīn (m. 399/1008): Ediciones, manuscritos, estructura y fuentes”, p. 52.

¹³⁵ See above note 64 where such articles are listed.

¹³⁶ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, pp. 227-241.

¹³⁷ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥ. Ismā‘īl and A. F. al-Mazīdī. Beirut: Dār al-kutub al-‘ilmiyya, 2003.

edition by Muḥammad Ḥammād (year 2009)¹³⁸. Muḥammad Ḥammād collected 8 manuscripts to which he refers with Arabic letters such as:

- (ا) The manuscript by Al-Ḥāj Muḥammad al-Saqāṭ in Casablanca is preserved in a private library with the numbers 304 and 209. Its writing style is Maghribi and its date is 605 H.
- (ب) The manuscript in Rabat General Library was prepared by ‘Abd al-Sallām b. Sulaymān al-Khālīdī for Qāḍī Ghumāra Ibn Rayyān al-Zijlī in 1096 H., its number is 1370.
- (ت) The manuscript in National Library of Tunisia was prepared by al-faqīh Mas‘ūd al-Majdūb for ‘Alī b. Aḥmad al-Sharīf al-Halālī. Maghribi script was used, its number is 4863 and its date is 1198 H.
- (ج) The manuscript in National Library of Algeria was prepared for Muḥammad b. Sa‘īd al-Kashāshī in 1002 H. using Maghribi script and its number is 1368.
- (ح) The manuscripts in Rabat General Library, numbers are 512 and 177, are in Maghribi script. There is no information about who prepared them for whom and their exact date. There is much missing information and the author has added his own opinion in the fragments.
- (د) The manuscript by al-Faqīh al-Shaykh Muḥammad Būkhabza is preserved in a private library and there is no date and author information.¹³⁹
- (و) The manuscript in Zagora Library, numbered 2816, does not include information about that who prepared it and its date. Maghribi script was used; its first and second part are different from each other in terms of writing style.
- (ط) The manuscript in Library Royal Ḥasaniyya Rabat number 933 was prepared using clear Maghribi script.

Muḥammad Ḥammād decided to base his edition on the manuscript by Al-Ḥāj Muḥammad al-Saqāṭ (ا). The reasons of this choice were that the manuscript is the oldest, it has few errors and its writing style and numbering system are

¹³⁸ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, 2 vols., edited by M. Ḥammād. Rabat: Markaz al-dirāsāt wa-l-abḥāth wa-ihyā’ al-turāth, 1439/2009.

¹³⁹ Ibid, vol. 1/120.

clearer than others. Moreover, the editor compared all manuscripts, determined their differences and indicated them in the footnotes.

CHAPTER III

ISLAMIC LAW AND GENDER WITH SPECIAL REFERENCE TO DIVORCE PROCEDURES IN THE MALIKI LEGAL SCHOOL: AN OVERVIEW

1. Islamic law and gender

There is disagreement among Muslims about what the *sharī'a* is and how we are to draw upon it for guidance. Various scholars have studied Islamic law not only to interpret and broaden their knowledge regarding its jurisprudence but also to comprehend Islamic social reality in a precise historical period.¹⁴⁰

One of the most important common points of all different interpretations of Islam is that of underlining the fulfillment of justice in society as a main purpose of religion in general and Islam in particular. Qur'an and the traditions of the Prophet emphasize fulfillment of justice without giving it any specific definition. Hence, different interpretations of Islam present various descriptions of justice and in them women's rights and gender equality inhabit various places.¹⁴¹

Gender refers to as a social construct in the sense that specific social roles are attributed to the sexes and presented as if "natural" and as such it changes, evolves and adapts in rhythm with a changing society. Islamic legal discourse occurred in rhythm and mutuality with the progress of gendered social relations on the ground.¹⁴² Increasingly, gender has become a tool of historical analysis of social relationships based on perceived differences between the sexes.¹⁴³ Major developments have been made in the study of gender in Islamic societies over the last two decades.¹⁴⁴ Various historians have problematized present androcentric approaches, analyzing and interpreting the historical

¹⁴⁰ Judith Tucker, *In the house of the law: Gender and Islamic law in Ottoman Syria and Palestine*. Berkeley: University of California Press, 1998, p. 5.

¹⁴¹ Marziyeh Bakhshizadeh, *Changing gender norms in Islam between reason and revelation*. Berlin: Verlag Barbara Budrich, 2018, p. 9.

¹⁴² Ibid, p. 10.

¹⁴³ Başak Tuğ, "Ottoman women as legal and marital subjects", in *The Ottoman world*, edited by C. Woodhead. London: Routledge, 2012, p. 362.

¹⁴⁴ Marion Katz, "Textual study of gender", in *Islamic studies in the twenty-first century: Transformations and continuities*, edited by Léon Buskens and Annemarie van Sandwijk. Amsterdam: Amsterdam University Press, 2016, p. 87.

sources according to new methodological approaches and theoretical frameworks including that of gender.

As Judith Tucker explained “Government records, histories, biographical dictionaries, works of jurisprudence, and literature... were almost exclusively authored by members of a male elite of government officials and ‘ulama’... many of these accounts are essentially prescriptive in nature and detail the normative gender system that existed in the minds of an urban male educated elite, not the lived experiences of men as men and women as women. In working with these sources, historians have grown increasingly aware of the necessity to treat them with caution and handle them as a form of discourse about gender that reveals vested interest rather than records actual practice.”¹⁴⁵ Historians interested in gender studies purposed to establish women in the historical narrative by writing ‘her-story’ using different methods and sources. Islamic family law established the patriarchal family as polygamous, with women subordinated to their husbands’ requests in divorce, marriage and other issues. ¹⁴⁶ Using sources like inheritance deeds, marriage documents and divorce decrees, those historians have contributed to discover new ways of understanding the working of gender dynamics in everyday life.¹⁴⁷ The study of the legal regulations regarding divorce in the work of a specific author or through time - both in theory and practice - during the pre-modern period is one of the steps that allows us to get a more comprehensive view of how failed marriages affected women's lives and the resources they had at hand to get an outcome that could favor them and their children. Such view involves not only 'her story' but also the 'history of family'.

Orientalist stereotypes about Islamic family law insist on the unrestricted male right of divorce. This perception is not wrong in the sense that the woman does not have a similar right to divorce according to Islamic law,

¹⁴⁵ Judith Tucker, “Gender and Islamic history”, in *Islamic & European expansion: The forging of a global order*, edited by Michael Adas. Philadelphia: Temple University Press, 1993, p. 38.

¹⁴⁶ Tuğ, “Ottoman women as legal and marital subjects”, p. 363.

¹⁴⁷ Dalenda Largueche, “Confined, battered, and repudiated women in Tunis since the eighteenth century”, in *Women, the family, and divorce laws in Islamic history*, edited by Amira el-Azhary Sonbol. Syracuse: Syracuse University Press, 1996, p. 260.

except for few situations. Also, a wife cannot reject her husband's unilateral pronouncement of divorce. When divorce in Islam is evaluated from this perspective, Muslim women become subject to their husband's desire for and authority over the termination of a marriage.¹⁴⁸ However, dissolution of marriage in Islamic law is not only performed with *ṭalāq* divorce; *khul'*, the divorce initiated on the women's request and that gives them legal agency, should also be taken into consideration. The divorce in Islamic law cannot be comprehended accurately when only one approach or a source is considered because various dynamics, different circumstances and several sources should be evaluated together. For instance, Amalia Zomeño, regarding the sources available to study the Islamic marriage contract in al-Andalus, argues that "One Granadan *fatwā* issued by Ibn Lubb reveals that it was the custom of the notaries to register the receipt of the prompt payment even when the payment had in reality not been made." Also, she remarks: "The law and the contract did line up, but only for avoiding the invalidation of the marriage contract. What this *fatwā* clearly demonstrates is that, as historians, we should not always rely solely on the written documents." According to the Granada documents that were analyzed by the author, "Whatever terms were agreed to by the parties, payment of the deferred portion was in practice often long delayed and paid only in the event of death".¹⁴⁹ This examination reminds us that being aware of the fictive nature of the legal documents is necessary and, more generally, that the different legal sources should be assessed carefully in what they have to offer regarding the doctrine and practice of Islamic law.

This chapter offers a general overview of the basic elements of divorce in Islamic law, with references to modern studies where specific elements are analyzed, without entering into the differences between the legal schools, and only occasionally underlining the Maliki doctrine. The aim is to offer an introduction to the following chapters where the Maliki legal doctrines and practices will be dealt with.

¹⁴⁸ Tuğ, "Ottoman women as legal and marital subjects", p. 365.

¹⁴⁹ Amalia Zomeño, "The Islamic marriage contract in al-Andalus (10th-16th centuries)", p. 142.

2. Divorce types in Islam

Divorce refers to the legal termination of marital relationship. When the parties are no willing to negotiate anymore, divorce takes place. Even though many Qur'anic verses underline the undesirability of divorce, Islam does not prohibit it.¹⁵⁰ Divorce in Islam serves as safety valve in cases where the couples can no longer live together in harmony.¹⁵¹

According to Islamic law, only the husband has the right of divorce the wife without having a legal justification for his actions, but a woman has the right to demand a divorce from her husband in a few specific cases. When a wife wishes to divorce her husband and the husband refuses that, she should apply to a qadi (judge) to explain her reasons for demanding divorce.¹⁵² There are two ways in which a woman can initiate divorce:

- she may dissolve her marriage through *khul'*
- she may ask the qadi for divorce on grounds concerning her husband under specific conditions, for example, if the husband is absent for a long period of time or if the husband has failed to pay the required dower or matrimonial maintenance.¹⁵³ If the woman can prove that, then the qadi found for her legal causes for divorce, for example, regarding her husband's impotence, lack of devotion or his nonperformance of Islamic responsibilities, all of which support her case against him.¹⁵⁴ If the wife can prove that through acceptable witnesses, the qadi can sentence in her favor and grant her divorce without compromising her economic rights.¹⁵⁵

¹⁵⁰ Ziba Mir-Hosseini, *Marriage on trial: A study of Islamic family law: Iran and Morocco compared*. London: I.B. Tauris, 1993, p. 55.

¹⁵¹ John L. Esposito; Natana J. DeLong-Bas, *Women in Muslim family law, Second edition*. Syracuse: Syracuse University Press, 2001, p. 28.

¹⁵² Abdal-Rehim Abdal-Rahman Abdal-Rehim, "The family and gender laws in Egypt during the Ottoman period", in *Women, the family, and divorce laws in Islamic history*, edited by Amira el-Azhary Sonbol. Syracuse: Syracuse University Press, 1996, p. 105.

¹⁵³ Amalia Zomeño, "Abandoned wives and possibilities for divorce in al-Andalus: The evidence of the *wathā'iq* works", p. 114.

¹⁵⁴ Y. Linant de Bellefonds, *Traité de droit musulman compare*, 3 vols. Paris: Mouton & Co./The Hague, 1973, vol. 2/449.

¹⁵⁵ Abdal-Rehim, "The family and gender laws in Egypt during the Ottoman period", p. 105.

a. Repudiation (*ṭalāq*)

Ṭalāq that comes from the root *ṭ.l.q* means repudiation and refers to the release of a human being from any obligation incumbent upon him/her. In the Islamic context, it implies one spouse's release of the other spouse from the marriage bond whether by legal process or repudiation.¹⁵⁶ A man could divorce his wife in any place, at any time and for any or no reason. After the waiting of a statutory period, the divorce is automatically finalized. In this situation, there is neither role for the court nor possibility of contest by the wife. The husband has to pay the dower and provide matrimonial maintenance of his wife while she waits for the divorce to be finalized.

Jurists discussed two types of *ṭalāq* such as *ṭalāq al-sunna* and *ṭalāq al-bid'a*: both of them are divided into two categories. Even though the types of *ṭalāq al-sunna* are approved and the types of *ṭalāq al-bid'a* are disapproved, all of them are valid.

1) *Ṭalāq al-sunna* that is in consonance with the Prophet's teachings can be divided into two categories.

a) The first one is *al-aḥsan* (the better), that is, one that is entered into it slowly and attentively, without unjustly prolonging the process for the women. This form is the more proper, most approved and orthodox form of divorce because it takes place during the period of purity (the time when a woman is not in the period of menstruation) and involves kind and fair treatment of the wife. Only when the woman is between menstrual periods, her husband should pronounce the formula of divorce. The husband should not have relations with his wife for three menstrual cycles. Then, they would be formally divorced at the end of this period.¹⁵⁷ During these three cycles, he could change his mind about the divorce at any point. The couple could remarry once the divorce was final if they wanted, because this type of divorce is revocable. On the other hand, if the couple has been separated for a long time or if a woman is over the age of

¹⁵⁶ Esposito; DeLong-Bas, *Women in Muslim family law*, p. 21.

¹⁵⁷ Ron Shaham, *Family and the courts in modern Egypt: A study based on decision by the shari'a courts, 1900-1955*. Leiden: Brill, p. 105.

menstruation, the period of purity may be dispensed with. Additionally, if one of the spouses dies during the waiting period, the partner can still inherit.¹⁵⁸

b) A husband pronounces divorce separately in three consecutive periods between menstruations. Final pronouncement is necessary to bring about the divorce and the woman has to wait an additional three menstrual cycles that are called waiting period.¹⁵⁹ Then she can remarry because she would be completely free of her marital bonds. After the third pronouncement of divorce, the husband can't change his mind because this type of divorce is irrevocable so, if they want to remarry, the woman should get married to another man in the interim. The jurists claimed this type of divorce was *ḥasan* (good).¹⁶⁰

2) The second type of the *ṭalāq* divorce is *ṭalāq al-bid'a* that means the divorce of innovation or the "triple" *ṭalāq*, so-called because it involves not following the Prophet's teachings.¹⁶¹

a) The first version of this type of divorce is that a husband pronounces three divorces "triple declaration" at once, while his wife is not menstruating and she then enters her waiting period instantly.¹⁶²

b) The second form of the *ṭalāq al-bid'a* is an irrevocable declaration. It is necessary a single pronouncement that can be made in oral or written form during a period of purity or any other time, so the marital relations are finished. This type of divorce contradicts not only the teaching of the Prophet but also the Qur'anic prescription.¹⁶³ Qur'an says: "O Prophet, when you divorce women, divorce them when they have reached their period. Count the period, and fear God your Lord. Do not expel them from their houses, nor let them go forth, except when they commit a flagrant indecency. Those are God's bounds;

¹⁵⁸ Esposito; DeLong-Bas, *Women in Muslim family law*, p. 23.

¹⁵⁹ Mir-Hosseini, *Marriage on trial: A study of Islamic family law: Iran and Morocco compared*, p. 59.

¹⁶⁰ Shaham, *Family and the courts in modern Egypt: A study based on decision by the shari'a courts, 1900-1955*, p. 106.

¹⁶¹ Ibid, p. 22.

¹⁶² Judith Tucker, *Women, family and gender in Islamic law*. New York: Cambridge University Press, 2008, p. 86.

¹⁶³ Henry Toledano, *Judicial practice and family law in Morocco: The chapter on marriage from Sijilmāsi's al-'Amal al-Muṭlaq*. Colorado: Boulder, 1981, p. 32.

whosoever trespasses the bounds of God has done wrong to himself. Thou knowest not, perchance after that God will bring something new to pass.”¹⁶⁴

i. Revocable and irrevocable divorce

The way a husband pronounces the divorce is very crucial because it determines the type of divorce. He could finish his marriage simply by pronouncing a formula of divorce. With the third repetition of the phrase “I divorce you” (the three stated over any time) or the phrase “I divorce you thrice,” the couple is divorced irrevocably.¹⁶⁵ Another reason for the importance of pronouncement is that a qadi or any witnesses are not necessary for the *ṭalāq*. When a man has pronounced a divorce formula, troubles between them could arise. If the couple is in disagreement about what had transpired, the judge can be asked for a ruling. The attitude of the judge is clear: if an irrevocable divorce was pronounced by a husband, it instantly takes effect and irretrievably so the husband cannot return and he cannot have sexual intercourse with the woman.¹⁶⁶

Under the category of revocable *ṭalāq*, the husband is expected to rethink about divorce before the completion of the waiting period in which case they could live together without being required to renew their marriage contract.¹⁶⁷ The three months waiting period maintains the marriage’s continuity, providing the husband with flexibility to give up his statement. While the paternity of a child is not known, that period serves to assure the divorcee. Also, if the woman is pregnant during the pronouncement of *ṭalāq*, she must wait until after the birth of her child before her waiting period is assumed to have been completed.¹⁶⁸

¹⁶⁴ I will follow the translation of the Qur’an by Arthur John Arberry

<http://tanzil.net/#trans/en.arberry/65:1>

¹⁶⁵ Tucker, *In the house of the law: Gender and Islamic law in Ottoman Syria and Palestine*, p. 88.

¹⁶⁶ Ibid, p. 91.

¹⁶⁷ Mir-Hosseini, *Marriage on trial: A study of Islamic family law: Iran and Morocco compared*, p. 85.

¹⁶⁸ Leyla Kayhan, “Negotiating matrimony: Marriage, divorce, and property allocation practices in Istanbul, 1755-1840.” PhD diss., Harvard University, 2013, p. 142.

When revocable *ṭalāq* existed between a husband and his wife, they still have responsibilities towards each other. During that period, the woman is considered neither married nor divorced. As regards the husband, he could opt to return to the wife.¹⁶⁹ While the man is free to marry another woman during the waiting period, it is forbidden for the woman. If the woman marries another man in that period, this marriage is not valid and it would immediately be annulled. Moreover, if the woman is pregnant during that period and she marries another man consummating the marriage before giving birth, this marriage also would be annulled. She cannot return to the father of her child instantly.¹⁷⁰

ii. *Li'ān, ilā'* and *ḡihār*

Ilā' and *ḡihār* are manners in which a man bindingly announces that he will abstain from sexual relations with his wife who is able to have sexual relation at the declaration time.¹⁷¹ In other words, a man can separate himself from his wife by these two oaths.¹⁷² The oath of *ilā'* means that a husband swears to abstain from sexual intercourse with his wife. In the Qur'an, this issue is specified with these verses: "For those who forswear their women a wait of four months; if they revert, God is All-forgiving, All-compassionate; but if they resolve on divorce, surely God is All-hearing, All-knowing."¹⁷³

A man who takes an oath of *ilā'* swears not to have sexual intercourse with his wife for more than four months. After passing four months without having sexual intercourse, the wife can ask her husband what his intentions are. The situation of the marriage is determined according to this decision. At this time, the husband has the right to choose to resume sexual relations with his wife or divorce her. After four months, the marriage is not automatically suspended; the wife should make a formal demand for declaration of her

¹⁶⁹ Ibn Rushd, *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf. London: Garnet Publishing, 2000, p. 106.

¹⁷⁰ Mehmet Akif Aydın, *İslam-Osmanlı aile hukuku*. Istanbul: İlahiyat Fakültesi Vakfı Yayınları, 1985, p. 123.

¹⁷¹ Gerald Hawting, "An ascetic vow and an unseemly oath?: *ilā'* and *ḡihār* in Muslim law", *Bulletin of the School of Oriental and African Studies* 57 No.1 (1994), p.113.

¹⁷² Susan Spector, *Woman in classical Islamic law: A survey of the sources*. Leiden: Brill, 2010, p. 36.

¹⁷³ <http://tanzil.net/#trans/en.arberry/2:226>

situation, otherwise nothing occurs. The husband must respond to her demand firstly. If he cannot have sexual intercourse with the wife because of a reason, he can declare his intention to continue it as soon as possible. Maliki law specifically underlined that if a man means to be harmful to his wife and if it is known that his intention is harmful, after four months his marriage is suspended and the choice of expiating his oath of *ḡihār* or dissolution of marriage is given to him. If divorce takes place between them, it means a single revocable divorce.¹⁷⁴

ḡihār means an oath of divorce that a man swears against his wife by comparing her to his mother's back.¹⁷⁵ In the Qur'an, this issue is explained with these verses: "Those of you who say, regarding their wives, 'Be as my mother's back,' they are not truly their mothers; their mothers are only those who gave them birth, and they are surely saying a dishonorable saying, and a falsehood. Yet surely God is All-pardoning, All-forgiving. And those who say, regarding their wives, 'Be as my mother's back,' and then retract what they have said, they shall set free a slave, before the two of them touch one another. By that you are admonished; and God is aware of the things you do."¹⁷⁶

The expiation required for an oath of *ḡihār* is detailed in the Qur'an. The most desirable thing is releasing a slave; next, to fast two consecutive months and lastly, if financial and healthy conditions do not allow for those expiations, to distribute an amount of wheat to sixty poor people. If the man breaks his fast, he must start fasting all over again and he may not have sexual intercourse with his wife until the fast is completed.¹⁷⁷ Nonetheless, if he breaks his fast only a day earlier, starting again is not required for him, rather he can fast one day for making it up. If it is necessary to feed sixty poor people with an amount of wheat, an amount of flour also can be distributed. A man must finish his distribution of food before continuing sexual intercourse with his wife, but if they have sexual intercourse before he finishes, he does not start afresh with sixty new people.

¹⁷⁴ Spector, *Woman in classical Islamic law: A survey of the sources*, p. 43.

¹⁷⁵ Dutton, *The Origins of Islamic law: The Qur'an, the Muwaṭṭa' and Madinan 'amal*, p. 65.

¹⁷⁶ <http://tanzil.net/#trans/en.arberry/58:2>

¹⁷⁷ Louis Milliot, *Introduction à l'étude du droit musulman*. Paris: Sirey, 1953, p. 379.

Under these circumstances, after the oath of the husband, he still has various chances to not cut marital bonds with his wife.¹⁷⁸

Li'ān points out that if a man wants to deny paternity of the child with whom his wife is pregnant, he can prefer dissolution of marriage by that way. It doesn't matter being free or a slave woman. Also, the wife can be Jewish or Christian. This oath gives the husband the chance to accuse his wife of adultery without having any legal proof and without becoming entitled to the punishment expounded for this, and gives him also the chance also of denying paternity of a child borne by the wife.¹⁷⁹ In the process, the husband should blame on his wife that she has committed adultery in public and in front of a judge. He states that four times and then repeats his claim a fifth time after wishing the curse of God upon himself if he is not telling truth about her. If he admits he is not telling truth at any point, the *ḥadd*¹⁸⁰ punishment is given to him because of his false accusation of adultery or slander, which are eighty lashes.¹⁸¹

A wife responds to the accusation of her husband by attending in the procedure of *li'ān*. If the wife is innocent, she swears that she is so four times. In fifth time, she swears after being warned of the punishment of hell, and reconfirms her innocence after invoking the curse of God upon herself if she does not tell the truth. If she admits, she takes the *ḥadd* punishment because of adultery, and responsibility for the child is hers alone.¹⁸² If her husband does not

¹⁷⁸ Susan Spector, *Chapters on marriage and divorce*. Texas: University of Texas Press, 1999, p. 42.

¹⁷⁹ J. Schacht, "Li'ān", in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Accessed January 15, 2021

http://dx.doi.org/10.1163/1573-3912_islam_SIM_4665

¹⁸⁰ *Ḥadd*, pl. *hudūd*, punishment refers to a limit or prohibition. "A punishment fixed in the Qur'an and ḥadīth for crimes considered to be against the rights of God. The six crimes for which punishments are fixed are theft (amputation of the hand), illicit sexual relations (death by stoning or one hundred lashes), making unproven accusations of illicit sex (eighty lashes), drinking intoxicants (eighty lashes), apostasy (death or banishment), and highway robbery (death)." John L. Esposito, *The Oxford dictionary of Islam*. Oxford: Oxford University Press, 2003, p. 105.

¹⁸¹ David Santillana. *Istituzioni di diritto Musulmano malichita con riguardo anche al sistema sciafiita*. Roma: Anonima Romana Editoriale, 1926, p. 219.

¹⁸² Milliot, *Introduction à l'étude du droit musulman*, p. 380.

continue to blame her, or the wife proves her innocence, the marriage is not finished, and the husband gets punished because of slandering his wife. If they are separated by *li'ān*, remarriage is not possible for them.¹⁸³

If a husband blames his wife for having committed adultery and there is no child, he takes *ḥadd* punishment for slander. Also, he gets punished with *ḥadd* if he blames a wife from whom he is triply or irrevocably divorced, since in this case he is slandering a stranger, whether he does it during her waiting period or after it has been completed. Therefore, when the husband is finally divorced from his wife, he cannot deny the paternity of a child she bears during her waiting period.¹⁸⁴ On the other hand, if the child is born less than six months after the marriage, this issue is clear and *li'ān* procedure does not require for denial of the paternity.¹⁸⁵

b. Divorce initiated by the wife (*khul'*)

Khul' (literally, ransom) signifies to take off, for instance, one's clothes, and hence to lay down one's authority over a wife. In other words, it means in Islamic law "a divorce for which a woman must offer her husband some property or an amount of money in order to obtain divorce".¹⁸⁶ The presence of the qadi and a sentence from him are not necessary for *khul'* divorce. It requires an offer and its acceptance. A wife can negotiate her release from the marriage by agreeing to renounce all economic claims against her husband.¹⁸⁷ If the details of the renunciation agreement are registered by a notary or a qadi, it is better for purposes of legal security.

¹⁸³ Delfina Serrano, "Judicial procedure and legal practice on *li'ān* (imprecatory oath) in al-Andalus: Evidence from model *shurūṭ* collections, 11th-12th centuries", in *Justice and leadership in early Islamic courts*, edited by Intisar A. Rabb and Abigail Krasner Balbale. Cambridge: Harvard University Press, 2017, p. 151.

¹⁸⁴ Spector, *Chapters on marriage and divorce*, p. 47.

¹⁸⁵ Ayman Shabana, "Negation of paternity in Islamic law between *li'ān* and DNA fingerprinting", *Islamic Law and Society* 20 No.3 (2013), p. 179.

¹⁸⁶ Manuela Marín; Randi Deguilhem (eds.), *Writing the feminine: Women in Arab sources*. New York: I.B. Tauris, 2002, p. 239.

¹⁸⁷ David Powers, "Four cases relating to women and divorce in Al-Andalus and the Maghrib, 1100-1500", in *Dispensing justice in Muslim courts: Qadis and their courts*, edited by M. Khalid Masud, Rudolph Peters and David Powers. Leiden: Brill, 2006, p. 384.

A Muslim woman has the legal right to a female-initiated or women's divorce, but she has to give some property to her husband as a ransom as previously mentioned. This amount generally involved all or a portion of the dower, sometimes her claim to the three-month maintenance stipend payable after the divorce and to any children stipend.¹⁸⁸ The *khul'* divorce imposes many economic sanctions on women; also, women generally forfeit their marital rights in order to ensure obtaining the custody of their children. The husband can exploit that situation to avoid paying divorce dues.¹⁸⁹

The *khul'* divorce that involves mutual agreement between the spouses is a crucial asset for the Muslim women who do not have a reciprocal right to initiate divorce against their husbands. This is so because even if a husband beats his wife or abandons her, the woman could not respond the same as her husband.¹⁹⁰ However, Islamic law makes some provision for a wife who finds herself in one of these circumstances. Therefore, this type of divorce provides legal subjectivity to a Muslim woman because it involves the active participation of the wife. This is the reason why it is so pervasive in *sharī'a* courts. However, the wife needs the cooperation of her husband to be successful. Thus, the husband should either share her dissatisfaction with their marriage or be swayed by the waiving of debts and sometimes by the further offer of a lump sum payment. *Khul'* is not at all a flexible and unilateral instrument like *ṭalāq*.¹⁹¹

A wife may also request dissolution of her marriage on grounds concerning her husband under specific conditions: when she can bring a proof that her husband has a particular physical defects like as a skin illness (*judhām*) or impotence; when the husband has failed to pay the necessary dower; when he absents himself for a long period of time and fails to pay the matrimonial

¹⁸⁸ Madeline C. Zilfi, "We don't get along: Women and the *khul'* divorce in the eighteenth century", in *Women in the Ottoman Empire: Middle Eastern women in the modern era*, edited by Madeline C. Zilfi. Leiden: Brill, 1997, p. 273.

¹⁸⁹ Tuğ, "Ottoman women as legal and marital subjects", p. 365.

¹⁹⁰ Mir-Hosseini, *Marriage on trial: A study of Islamic family law: Iran and Morocco compared*, p. 100.

¹⁹¹ Tucker, *In the house of the law: Gender and Islamic law in Ottoman Syria and Palestine*, p. 95.

maintenance of the woman imposed by law.¹⁹² Also, absolute reluctance of a wife towards her husband is a reason of separation. When one of these reason arises between a couple, the woman is able to initiate the divorce process via *khul'*.¹⁹³

On the other hand, most of the other rules of *khul'* are equal to *ṭalāq*. The woman who has been divorced by *khul'* cannot remarry until the waiting period has been completed. If she was divorced by *khul'* with her consent by an ill husband who then died because of his illness, the dissolution of marriage becomes valid. On the contrary, the case is simple *ṭalāq*, and she wouldn't not be one of her ex-husband's legal heirs. As with *ṭalāq*, *khul'* divorces cause complications regarding minor children and property. Also in divorce cases, disputes over goods are frequent because couples generally have discussions about disposition of the ordinary and sometimes extraordinary effects of a marital household.¹⁹⁴

i. Differences and similarities between *mukhāla'a*, *muṣālaḥa* and *mubāra'a*

The terms *mukhāla'a*, *muṣālaḥa* and *mubāra'a* all imply the same meaning, that is, a ransom is paid by a wife to obtain her divorce. However, their conditions are different from each other. The most important distinguishing feature is the amount of the ransom. The permissibility of these divorce types is directly related to the amount permissible in the transaction. The majority held that it is permitted with the mutual consent of the couples, unless consent to pay him is obtained by fear of injury to her.¹⁹⁵

The term *khul'* means that a wife pays to her husband all that he spent on her. The term *muṣālaḥa* (literally, making peace) refers to paying a part of it and the term *mubāra'a* refers to her writing off a claim that she had against him. In *mukhāla'a*, a woman can demand divorce from her husband under specific circumstances by paying ransom, as already explained so far. In the *mubāra'a*

¹⁹² Zomeño, "Abandoned wives and possibilities for divorce in al-Andalus: The evidence of the *wathā'iq* works", p. 114.

¹⁹³ Tuğ, "Ottoman women as legal and marital subjects", p. 366.

¹⁹⁴ Zilfi, "We don't get along: Women and the *khul'* divorce in the eighteenth century", p. 282.

¹⁹⁵ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/p. 82.

divorce by a wife, a couple makes an agreement to be free from their marital bonds and parties have a consensus about disclaim of her right in order to divorce. *Muṣālaḥa* involves paying a part of the dower or another amount by the woman to her husband.¹⁹⁶

ii. *Takhyīr*, *tamlīk* and *tawkīl*

Jurists separated between *takhyīr* (granting a choice) and *tamlīk* (granting possession of the right). According to Mālik, *tamlīk* is the granting of a right to a wife to pronounce her own divorce. It can be interpreted as one repudiation or more, and the husband is entitled to deny the right of the woman to more than one repudiation. On the other hand, *takhyīr* refers to the execution of divorce leading to the termination of the marital bond, unless it is a restricted form of *takhyīr*, like his saying to her wife: “choose for yourself, a single repudiation, or two repudiations”.¹⁹⁷

A husband delegates to his wife the power to release herself from his marital power and this procedure is known as *tamlīk*. The husband should say to his wife to make it, “Your matter is in your hands” (*amruki bi-yadiki*) and thus the wife acquires the ability to choose divorce thanks to it. This delegation might be made at the time the marriage is contracted or upon the existence of a certain condition, or any time during the marriage.¹⁹⁸ The husband might stipulate that if he is absent from his wife for four months without sending her maintenance, therefore she obtains the power to divorce herself. The delegation may either be determined in the marriage contract itself, in which case any subsequent divorce is irrevocable, or it might be negotiated with the wife during the process of marriage, in which case it is treated as revocable.¹⁹⁹ Also, a couple may specify a condition in the marriage contract, like that if the husband marries another wife,

¹⁹⁶ Kenneth Cuno, “Divorce and the fate of the family in modern century Egypt”, in *Family in the Middle East: Ideational change in Egypt, Iran and Tunisia*, edited by Kathryn M. Yount and Hoda Rashad. London: Routledge, 2008, p. 196.

¹⁹⁷ Ibn Rushd (al-Ḥafid), *The Distinguished jurist’s primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/85.

¹⁹⁸ Shaham, *Family and the courts in modern Egypt*, p. 103.

¹⁹⁹ Powers, “Four cases relating to women and divorce in Al-Andalus and the Maghrib, 1100-1500”, p. 385.

the first wife can obtain power to initiate divorce automatically, or that the wife has a right to initiate the divorce at any time without showing any reason.

Tamlīk is not cancelled even if the woman did not exercise it for a long period of time or till they part from the meeting. *Tawkīl* (granting of the power of attorney to a wife) is different from *tamlīk*. The husband can revoke the power of attorney before the wife exercised such power. On the contrary, he is not entitled to do that in *tamlīk*. The statement of the husband to the extent that he did not intend divorce thereby is not to be approved in case of dispute when he makes such a claim, for it is an authorization clear in its meaning, that is, it places the right of divorce in the hands of the wife. If the woman divorced herself through his appointment of authority to her, with a single repudiation, it becomes a revocable divorce. Nonetheless, she is entitled to divorce herself by a triple repudiation and the husband is not able to deny that, because of the fact that *tamlīk* implies that all the authority possessed by the man has been given to the wife.²⁰⁰

iii. Faskh (Annulment)

Faskh means to annul (a deed) or to rescind (a bargain). It is a different divorce type from the other forms so far dealt with, especially in terms of legal structure and its effects. It refers to the cancellation of a marriage by a judge by the petition of the wife or her family under definitive conditions. It exists under one of two situations: as a result of a fault in the marriage contract itself; or as a result of the absence or existence of a condition in one of the sides. However, the Maliki school only allows the first condition: a marriage gets an annulment when there is an deficiency in the contract itself, like the absence of dower or the spouse being within the prohibited degrees. This type of divorce is related especially to mistakes made in the marriage contracts.²⁰¹

Even though *faskh* is a unilateral act like *ṭalāq*, it is different from it in five principal ways. Firstly, the formalities of *ṭalāq* are not the same in terms of the pronouncement of a certain formula, the attendance of witnesses, women

²⁰⁰ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/87.

²⁰¹ Esposito; DeLong-Bas, *Women in Muslim family law*, p. 22.

being in the state of purity. Secondly, both parties have identical right to request annulment of the marriage. Thirdly, if the annulment comes out before the consummation of the marriage, the wife cannot take any portion of the dower and she is able to take only half of the dower if the annulment occurs because of her husband's impotency. Fourthly, unlike *ṭalāq*, the husband is not able to resume marital relations during the waiting period even though the wife must observe the same waiting period as in *ṭalāq*. Finally, *faskh* does not create a temporary and permanent bar between the couples, whilst the third *ṭalāq* brings the temporary bar and the ninth *ṭalāq* brings a perdurable prohibition.²⁰²

On the other hand, all jurists agree that the impotence of a husband is the most important reason for the annulment of the marriage because an impotent husband could not satisfy his wife's right to sexual intercourse. Nonetheless, one of the most important questions is that how can the judge assess whether a husband has impotency or not. If a husband claimed that he did not have sexual intercourse with his wife, women who have expert information about this situation were commissioned by a judge to examine the situation of the wife. If they decide that she is still virgin, the claim of the husband is to be trusted.²⁰³

3. Economic and social consequences for women

a. Dower (*mahr*)

Matrimony was regarded as a material and contractual act. The contracts generally are created according to the same pattern so the particular components and the order in which they appear follow formulary models. "This structure is as follows: (1) introductory formula followed by the names of the parties, (2) detailed description of the marriage payments, (3) conditions or stipulations (*shurūṭ*), (4) rights and duties of the parties, (5) guardianship (*wilāya*), (6) witness testimony, (7) signatures of witnesses and date."²⁰⁴

²⁰² Mir-Hosseini, *Marriage on trial: A study of Islamic family law: Iran and Morocco compared*, p. 40.

²⁰³ Tucker, *Women, family, and gender in Islamic law*, p. 53.

²⁰⁴ Zomeño, "The Islamic marriage contract in al-Andalus (10th-16th centuries)", p. 139.

In most cultures, contracts of marriage include the public transfer of some objects or material wealth as part of the ceremony. Bride price, dower and dowry are all terms display the transmission of property at marriage.²⁰⁵ Dower is not to be confused with bride price or gift of the bridegroom to the bride that were regional customary practices not recognized by the *sharī'a*. Ze'evi indicated the misuse of the term bride price, stating that it was at times used interchangeably with the term dower.²⁰⁶ Dowry that was given to a woman as a marriage present by her own family generally in form of household furnishings, jewelry and textiles, consists of a real entity and belongs legally to her.²⁰⁷ These gifts are in addition to legacy from her own relatives.²⁰⁸ The dowry that they match with the amount of the dower and the value of dowry have significant role in the determination of dower. Its value is not determined specifically and is left up entirely to the family of the bride.²⁰⁹ A family's status is directly related with the size and value of the dowry they provide for their daughters. The negotiation position of a woman relies much on her status and her own support networks. Hence, the amount of the dower was generally a substantial sum even though it varied tremendously by social class.²¹⁰

In legal discussion, the dower implies a socioeconomic dynamic of great importance. When a woman becomes a wife, Islam awards her privileged access to property and she should receive a dower from her husband. The dower is a

²⁰⁵ Mona Siddiqui, "Mahr: legal obligation or rightful demand?", *Journal of Islamic Studies* 6 No.1 (1995), p. 14.

²⁰⁶ Dror Ze'evi, "Women in 17th century Jerusalem: Western and indigenous perspectives", *International Journal of Middle East Studies* 27 (1995), p. 164.

²⁰⁷ Dower (*mahr*, *ṣadāq*) that is specified in marriage contract is paid by a husband to his wife but dowry (*niḥla*) is property or payment given to bride by her father. *Siyāqa* means donation by a husband to his wife. Zomeño, *Dote y matrimonio en al-Andalus y el Norte de África: Estudio sobre la jurisprudencia Islámica medieval*, p. 23.

²⁰⁸ Aharon Layish, *Sharī'a and custom in Libyan tribal society an annotated translation of decisions from the sharī'a courts of Adjābiya and Kufra*. Leiden: Brill, 2005, p. 97.

²⁰⁹ Fariba Zarinebaf-Shahr, "Women, law and imperial justice in Ottoman Istanbul in the late seventeenth century", in *Women, the family, and divorce laws in Islamic history*, edited by Amira el-Azhary Sonbol. Syracuse: Syracuse University Press, p. 93.

²¹⁰ Zomeño, *Dote y matrimonio en al-Andalus y el Norte de África: Estudio sobre la jurisprudencia Islámica medieval*, p. 89.

requisite component of any marriage contract whether it had been determined in the contract itself or not.²¹¹ The prospective husband and wife are expected to determine the amount of the dower that can be money or property given to the bride directly.²¹² Islamic law separates specified dower which is agreed upon between the parties before marriage from proper dower which is specified by the qadi in cases in which the precise sum of the dower was not determined in the contract.²¹³

Islamic law made dower payable only to the bride herself, not to the father of the bride. Any male relative, including her husband, cannot touch this dower because it becomes an inalienable and untouchable part of her private property.²¹⁴ In pre-Islamic Arabia, while dower was paid to the bride's father, bride price represented a gift from the husband to his wife.²¹⁵ The idea that the dower was not a purchase price is supported by the fact that a person was not allowed to propose himself or herself for sale in Islamic law. The price of dower was clearly a Qur'anic concept even though the value of bride price would mostly specified by custom.²¹⁶

The dower is divided into two portions such as immediate dower and deferred dower. The immediate dower that is the larger part of it is paid when the marriage contract is signed, another smaller part is paid on the termination of marriage, whether by death or divorce.²¹⁷ The payment of the dower in full is considered to be evidence of marriage, and its half would still be due if the marriage is not consummated. Moreover, the bride can refuse to consummate the marriage until the immediate dower is in her hands.²¹⁸

²¹¹ Zomeño, "The Islamic marriage contract in al-Andalus (10th-16th centuries)", p. 141.

²¹² Kayhan, "Negotiating matrimony: Marriage, divorce, and property allocation practices in Istanbul, 1755-1840", p. 193.

²¹³ Shaham, *Family and the courts in modern Egypt*, p. 27.

²¹⁴ Tucker, *Women, family, and gender in Islamic law*, p. 138.

²¹⁵ Esposito; DeLong-Bas, *Women in Muslim family law*, p. 45.

²¹⁶ Annelies Moors, *Women, property and Islam: Palestinian experience, 1920-1990*. Cambridge: Cambridge University Press, 1996, p. 127.

²¹⁷ Tuğ, "Ottoman women as legal and marital subjects", p. 363.

²¹⁸ Zomeño, "The Islamic marriage contract in al-Andalus (10th-16th centuries)", p. 141.

When any marriage contract is finalized, the husband is obligated to pay dower as a debt to his wife. If the husband dies before he has delivered the immediate dower, his wife can take this amount from his property. In the case of a deceased husband, the claim of immediate dower would be made against his estate and has to be honored in spite of the disclaimers of his other relatives, unless they could bring legal evidence that the debt has already been paid. If the woman dies shortly after her husband, the heirs of the woman could bring a claim against the estate of her husband for the amount of the immediate dower. On the other hand, if the husband is impecunious or minor, his wife can demand that amount of the dower from the father or guardian of her husband.²¹⁹

The dower protects the interest of the wife against a possible dissolution of marriage. The deferred portion of the dower secured the wife by hindering the definite entitlement of the husband to divorce her. Also, it was seen an assurance for the permanence of the woman's wellbeing in the case of her husband's death. Hence, dower refers to the reciprocal rights and responsibilities that the marital pair had toward on another. Women who lost out their deferred dowers and pursued through with the *khul'* either had to be independently wealthy or they depend on their family for financial support.²²⁰ The main sources of economic income for women used to be legacy and dower.

b. Matrimonial maintenance (*nafaqa*)

According to Islam, marriage is considered a legal and binding contract, in which each party to the marriage is bound by certain obligations in return for certain rights. In matrimony, a husband is responsible to provide the maintenance and the sustenance and clothing of his wife and children born of the union according to the *sharī'a*, even though the wife is not formally obligated to provide an income or share her property in provision of the family.²²¹ According to Hanafi doctrine, the entitlement to maintenance launches from the signing

²¹⁹ Tucker, *In the house of the law: Gender and Islamic law in Ottoman Syria and Palestine*, p. 53.

²²⁰ Kayhan, "Negotiating matrimony: Marriage, divorce, and property allocation practices in Istanbul, 1755-1840", p. 211.

²²¹ Brinkley Messick, *The Calligraphic state: Textual domination and history in a Muslim society*. Berkeley: University of California Press, 1993, p. 16.

date of the marriage contract unless the wife is not yet ripe for conjugal life. However, the Maliki and other schools argued that entitlement to maintenance begins only when the marriage is consummated.²²²

After consummation of the marriage, the husband is obligated to provide matrimonial maintenance in the form of nourishment, clothing, shelter and other necessities. The amount of the maintenance is calculated as an average between the current financial status of the husband and the economic status of the wife in her father's house prior to her marriage, because the husband should provide her at a level appropriate to the social background of the wife. The wife should sustain the life style to which she was accustomed and the husband owes this support from the moment of the consummation of the marriage until the marriage terminates by divorce or death.²²³

If the amount of monthly maintenance was not determined by a qadi or by agreement, the right of the wife to her maintenance lapses if she fails to get it for more than one month from the beginning of entitlement.²²⁴ If the amount of the maintenance takes part in the agreement or it was determined by a qadi, the arrears of maintenance stand even if not paid for a long period, whenever asked to; unless exempted by his wife, the husband has to pay it. According to some jurists, the arrears of maintenance finish upon the death of the spouse, the rebelliousness of wife or as a result of divorce in the Hanafi doctrine. Nonetheless, Maliki and other schools claimed that the arrears of maintenance remain until the husband pays them or is exempted by his wife.

The qadi was authorized to discover any of the husband's assets that might be attached when a husband went away on a trip or disappeared without leaving sufficient support. He should find the husband in a distant place and make him return to his conjugal dwelling.²²⁵ Also, he has the right to assign the money of the husband to his wife, if the husband is the beneficiary of any

²²² Shaham, *Family and the courts in Modern Egypt*, p. 68.

²²³ Tucker, *Women, family, and gender in Islamic law*, p. 43.

²²⁴ Tucker, *In the house of the law: Gender and Islamic law in Ottoman Syria and Palestine*, p. 44.

²²⁵ Zomeño, "Abandoned wives and possibilities for divorce in al-Andalus: The evidence of the *wathā'iq* works", p. 116.

foundation revenues or has any outstanding debts owed to him.²²⁶ In other words, even if a man disappears for any reason or is unable to provide maintenance, a Muslim judge is expected to award an appropriate level of maintenance. The wife would be able to borrow the money, and her husband is held responsible for paying it in return. A Muslim woman has the legal right to receive daily maintenance from her husband whatever her personal income and wealth. In the case of an absent husband, his wife may confiscate only from her husband's property that from which maintenance is regularly provided such as food, money and clothing.²²⁷ A woman whose husband is missing should appear in the court to carry out these necessities because the simple abandonment of one's wife would have been a cheaper method to cut marital ties for a husband.²²⁸

Women generally asked the qadis to decide upon appropriate amount of maintenance and gave instruction their husband's guarantor to pay them these amounts. However, sometimes the guarantor of the husband tried to avoid his legal responsibilities by denying the existence of the contract or by claiming that its formulation did not include maintenance but pointed out to other matrimonial rights. Also, some of the guarantors could argue that the contract was void according to Islamic law because the wife had not accepted it, or because a maintenance prior to its determination by way a judgment or by the way of a voluntary contract could not be validly guaranteed. Some guarantors argued that the maintenance's amount agreed between the couples was well above the economic capabilities of the husband and that the guarantor was not obliged to pay the wife such high amounts.

A husband may ask the court to decrease the level of maintenance of his wife on the grounds of economic crisis or a decline in the price of basic commodities or because of a reduction in his salary or a change in his personal status. A wife may ask the court to augment her level of maintenance on corresponding grounds. State is responsible for the application of the

²²⁶ Messick, *The Calligraphic state: Textual domination and history in a Muslim society*, p. 16.

²²⁷ Shaham, *Family and the courts in modern Egypt*, p. 71.

²²⁸ Zomeño, "Abandoned wives and possibilities for divorce in al-Andalus: The evidence of the *wathā'iq* works", p. 115.

maintenance judgments. It can first confiscate the husband's money such as confiscation of an amount from his salary, then as second and third priorities, his movable lands and property. Until the date these confiscated items are sold, the executors register all the items that were confiscated and nominate a person to keep the confiscated property in trust. The wife may want the nomination of a confiscator of her choice. Nevertheless, in the absence of such a demand the husband or somebody of his relatives may be nominated for this aim. After the sale of the property, the proceeds are given to the wife as her maintenance.²²⁹

The wife promises to serve her husband, take care of her children and be faithful to him in return for his economic support and protection in signing a marriage contract. According to Maliki law, a rebellious wife does not deserve matrimonial maintenance. Also, if the wife had previous knowledge of her husband's financial condition yet consented to marry him or remained with him if she was already married to him, she had no right of matrimonial maintenance under these circumstances.²³⁰

c. Waiting period (*'idda*)

One of the legal effects of the dissolution of marriage (or of the husband's death) is the waiting period, during which the divorced woman is forbidden to marry another man. Only after the termination of the waiting period would a new marriage be lawful. The aim of this period is to provide the divorcing husband to think calmly about the implications of his act and perhaps retreat from it; to ensure that the divorcee (or the widow) is not pregnant (to avoid future difficulties and any confusion of parentage); and to indicate the high moral value of the marital bond.²³¹ A widow has to observe the waiting period whether her marriage was consummated or not because consummation could be the subject of conflicting claims of paternity, maintenance and inheritance.

²²⁹ Shaham, *Family and the courts in modern Egypt*, p. 72.

²³⁰ Amira el-Azhary Sonbol, "Law and gender violence in Ottoman and modern Egypt", in *Women, the family, and divorce laws in Islamic history*, edited by Amira el-Azhary Sonbol. Syracuse: Syracuse University Press, 1996, p. 281.

²³¹ The waiting period for finding out a divorcee whether she is pregnant or not was necessary in pre modern period.

Nonetheless, the duty of the divorced woman to observe the waiting period is conditional upon her marriage having been consummated.²³²

The waiting period of a pregnant woman finalizes when she gives birth, while that of other women in the age of fertility continues during three menstrual periods. The duration of the waiting period for minors or women above the climacteric proceeds for three lunar months. If an older woman claims that she still menstruates, her version is accepted (her waiting period is calculated by menstrual cycles) unless her previous husband can establish the opposite. Her waiting period continues four months and ten days.²³³

Also, the length of the waiting period for a slave woman who has been divorced is two menstrual periods or two months. On the other hand, the duration of the waiting period of an *umm walad*, female slave who has borne her master children, was discussed. If her master has recognized the children as his own, she cannot be sold. Her master may either keep or manumit her during his lifetime but when he dies, the woman is automatically free. If her status is still slave, her waiting period is a month. If the status of a slave woman changes by giving birth, her waiting period is accepted as four months and ten days.²³⁴

If a husband is missing for more than a year without a valid reason and if his absence harms his wife and the woman cannot make a living with the property left behind by the man, the judge makes a necessary investigation about his absence and he appoints a period of four year to wait for his wife.²³⁵ In that process, the judge attempts to determine the whereabouts of the missing man and whether it is possible for him to return. If there are no news from him, then the judge can divorce them by simple repudiation; thereby, his wife observes her waiting period like a woman whose husband had died.²³⁶ If her husband does not come upon or send out any message during that period, she becomes available to remarry.²³⁷

²³² Esposito; DeLong-Bas, *Women in Muslim family law*, p. 20.

²³³ Shaham, *Family and the courts in modern Egypt*, p. 140.

²³⁴ Specktorsky, *Woman in classical Islamic law: A survey of the sources*, p. 54.

²³⁵ Milliot, *Introduction à l'étude du droit musulman*, p. 348.

²³⁶ Zomeño, "Abandoned wives and their possibilities for divorce in Al-Andalus: The evidence of the *wathā'iq* works", p. 118.

²³⁷ Tucker, *Women, family, and gender in Islamic law*, p. 94.

The waiting period of a woman is calculated in terms of months but if her menstruation begins within the three months period, she begins her waiting period over again and waits it in terms of menstrual periods. If the opposite situation exists, that is, a woman is in her waiting period and stops menstruating, there are two ways for her to finish her waiting period. If she is aware of why she has stopped her menstruation (because of an illness or nursing), she should wait until she starts menstruating again, then completes a new waiting period. If she has no idea about why her menstruation stopped, her waiting period continues a year, nine months to cover the eventuality of pregnancy and three months in place of the three menstrual periods.²³⁸

The man who pronounced a divorce is responsible for the maintenance of his wife during her waiting period if the couple divorces by revocable divorce. However, if the marriage had not been consummated, the costs of its support are waived. Her husband should provide her full support during this period and she has to remain in the marital domicile until the expiration of the waiting period.²³⁹ For irrevocable divorce, the same duty is compulsory on her if it is possible to ensure that the husband will not resume conjugal life with her during waiting period. If such a fear appears, the husband must either leave the house or provide housing expenses for a different dwelling she is supposed to rent.²⁴⁰

d. Providing dwelling (*sukna*)

A husband is responsible not only for matrimonial maintenance of his wife but also he has to provide a dwelling for her during their marriage and waiting period. The husband must not absent himself from this conjugal dwelling for more than six consecutive months.²⁴¹ The conjugal dwelling provided by the husband is not appropriate in various situations: the standards of the dwelling was lower to that convenient for a man of the social status of the husband; the dwelling did not obstruct the wife's exposure to the glances of neighbors and strangers, thus putting her at risk regarding her chastity; righteous neighbors

²³⁸ Specktorsky, *Woman in classical Islamic law: A survey of the sources*, p. 53.

²³⁹ Tucker, *Women, family, and gender in Islamic law*, p. 92.

²⁴⁰ Shaham, *Family and the courts in modern Egypt*, p. 141.

²⁴¹ Zomeño, "Abandoned wives and their possibilities for divorce in Al-Andalus: The evidence of the *wathā'iq* works", p. 115.

who could come to the wife's rescue when she needs them do not live nearby and the wife lives together with the husband's relatives such as his wives, parents or others who damage to the complaining wife.²⁴² A wife should be settled in a separated house from the dwellings of other people. This place was defined as one with a door that could be locked and that has sufficient equipment including a private toilet and kitchen. It has to have its own water supply or the husband should provide the water when his wife needs it.²⁴³

The goods of household such as furniture, bedding and kitchen utensils are essential aspect of the legality of a dwelling. The existences of such goods in a dwelling were often the point at issue in the legal disagreements of a couple. When the wife left the conjugal dwelling and returned to her family house because of such kind of disputes, the husband was generally interested in his wife being declared rebellious. In that situation, the wife should prove that she was not rebellious to be fully entitled to her maintenance.

e. Childcare (*ḥaḍāna*)

Divorced couples could secure custody only by accepting divorce settlements in which they undertook to pay for the nursing of the child. A common divorce settlement let the mother to have custody for a determined period of time. As long as the minor child needs the mother's care, which is during *ḥaḍāna* period, a divorced woman generally takes custody of her children and the husband is responsible to provide the support for them during a legitimate period determined by the *sharī'a*. Afterwards the children were expected to go to live with their father. However, sometimes the children may prefer to remain with their mothers even after that age was reached. The judge determines the amount of alimony and the children's support, but sometimes the wives may demand to increase these support and the judge forces the husband to pay the amount of support stipulated at the time of divorce.²⁴⁴

Ḥaḍāna means "Care of a child by the mother. Custody of a child belongs to the mother or other women relatives until the child no longer needs a

²⁴² Ibid, p. 77.

²⁴³ Tucker, *Women, family, and gender in Islamic law*, p. 62.

²⁴⁴ Abdal-Rehim, "The family and gender laws in Egypt during the Ottoman Period", p. 108.

woman's care, can drink and eat unassisted, can learn about other bodily functions, and can perform ablutions or purification unassisted. For a boy this is estimated at seven years of age. A girl remains under the custody of women relatives until she reaches puberty, when she must move to the protection of men; this is estimated to be from nine to eleven years of age, in opinion of various legal authorities."²⁴⁵ However, Maliki school differs from other law schools in this issue because Maliki law asserts that a boy remains with his mother until he reaches puberty and a girl remains with her mother until she marries.

In order to take the custody of the child, the mother should be adult, sane, righteous and capable of caring for her child's comfort and education. If the mother is not capable of performing her duty, she loses this right and her mother, followed by the paternal grandmother, sisters, daughters of the sister and aunts, becomes responsible with the nursing of the child. On the other hand, if a divorced mother is married to a man not forbidden in marriage to the child in her custody, she loses the right of custody over minor children as long as marriage continues. The reason seems to be that it is considered that the marriage induces the mother to neglect her child.²⁴⁶ Besides, the mother could lose the custody if the father demanded to take the child to another locality to provide the child with better education or living standards or if the father could prove neglect on the part of the mother.²⁴⁷

However, the divorced mother cannot move with her minor children to a place that is far away from the original place where the couple lived until they divorced. She can take them only to a place where the father is able to visit his children and return to his place of abode on the same day. If the custody of the child belongs to another person instead of the mother, this person cannot move from the original place without the permission of the father, even if this place is very close. On the other hand, the father acquires custody of his son when he is deemed old enough to feed, dress and toilet himself. At this age, the boy can live

²⁴⁵ Esposito, *The Oxford dictionary of Islam*, p. 101.

²⁴⁶ Shaham, *Family and the courts in modern Egypt*, p. 179.

²⁴⁷ Yossef Rapoport, *Marriage, money and divorce in medieval Islamic society*. Cambridge: Cambridge University Press, 2005, p. 73.

with his father but a daughter has to remain with her mother until she displayed the first indications of physical maturity.²⁴⁸

When a father dies, his wife is entitled to become the guardian of her minor children, with powers over their property and interest. As guardian, she is responsible to control their fortune, which they inherited from their father. She is expected to take care of their affairs such as buying, selling, trading, receiving funds and all other kinds of dispositions until they reach maturity, comprehend their religious duties and handle their own money. In other words, she acts as their legal and legitimate proxy until they are capable of dealing with these issues.²⁴⁹

f. Breastfeeding (riḍā'a)

A mother had particular rights and responsibilities when a child is born. A baby should remain in her care whenever possible for nursing and she should take a particular allocation from the father of the child until the child has weaned. The period of lactation is fixed as two full years.²⁵⁰ Breastfeeding can be seen as a unique process for providing infants with vital nutrition, ensuring that children grow and develop in a healthy manner which decreases acquiring several infectious disease and mortality.²⁵¹ Hence, the right of the mother to nurse her baby is also a responsibility for her. If the father cannot afford to pay the nursing allowance to the mother, she could be obligated by the court to nurse her child without compensation. Furthermore, when the mother is given the nursing allowance for nursing her child with her own breast milk and she uses another woman's milk thereby the father can quit paying the allowance.²⁵²

²⁴⁸ Tucker, *In the house of the law: Gender and Islamic law in Ottoman Syria and Palestine*, p. 139.

²⁴⁹ Abdal-Rehim, "The family and gender laws in Egypt during the Ottoman Period", p. 109.

²⁵⁰ Abdel Rahim Omran, *Family planning in the legacy of Islam*. New York: Routledge, 1992, p. 97.

²⁵¹ Benaouda Bensaid, "Breastfeeding as a fundamental Islamic human right", *Journal of Religion and Health* 162 (2019), p. 3.

²⁵² Tucker, *In the house of the law: Gender and Islamic law in Ottoman Syria and Palestine*, p. 126.

The wage of the nursing is to be paid to the caretaker, who could either nurse the child herself or hire a wet nurse for the aim; while a mother cannot be forced to nurse the child, the father is obligated to pay the wage for a substitute. If the father does not provide support quickly, or he left the town, the caretaker of the child is automatically authorized to borrow money on behalf of the father in the amount of the awarded support. This amount becomes a debt of the father to the lender. If the caretaker of the child borrowed from other family members, the father should to repay those who had lent money for the support of the child as well.

If the father has disability or he died, the responsibility of the material support of the child was generally undertaken by the patrilineal family. The support of the fatherless children or the children of the insane or otherwise disabled were always provided by male relatives on the paternal side, if neither the children nor their mother had enough resources of their own. On the other hand, if the mother is an unbeliever and a sinner, her right of the child's custody is suspended, when the child reaches the puberty, if they can dispense with her care and support themselves.²⁵³

²⁵³ Samir Kaddouri, "Ibn Ḥazm al-Qurṭubī (d. 456/1064)", in *Islamic legal thought*, edited by Oussama Arabi, David S. Powers and Susan A. Spector. Leiden: Brill, 2013, p. 237.

CHAPTER IV

DIVORCE AND ITS CONSEQUENCES FOR WOMEN IN IBN ABĪ ZAMANĪN'S *MUNTAKHAB AL-AḤKĀM*

This chapter explores specific issues dealing with divorce and its consequences according to the materials recorded in the *Muntakhab al-aḥkām*, including the ways in which Ibn Abī Zamanīn related to the doctrines of the Maliki legal school and the extent to which the legal doctrines favored by him were applied in the court. When quoting the *Muntakhab al-aḥkām*, reference will be made both to the edition and to the corresponding translation as found in Part Two (indicating the number).

1. Ibn Abī Zamanīn's approach in his *Muntakhab al-aḥkām*

Different types of women are represented in the *Muntakhab al-aḥkām*: Muslim women, non-Muslim women, female slaves and *umm walads*. Their ability to act, their limitations and rights, varied according to their legal status and the role they played in marriage and divorce cases.²⁵⁴ When dealing with such cases, Ibn Abī Zamanīn quoted Qur'an, *ḥadīth* and narrations from the Prophet's Companions as authoritative, but mostly he referred to Mālik's sayings (his *ra'y*) and those from Ibn al-Qāsim, as well as those from other early Maliki authorities from Medina, Egypt and Iraq, and also al-Andalus.²⁵⁵

Ibn Abī Zamanīn was not the first to compile significant and authoritative sayings from early Maliki authorities. This does not mean that in his case, such as in those of previous scholars - more importantly, Saḥnūn b. Sa'īd (d. 240/854) and Muḥammad b. Aḥmad al-'Utbī (d. 255/869) - his effort was merely compilatory: he also carried out a selection and it was by doing so that he indicated which doctrines or legal opinions he favored because he considered them more authoritative than others. However, in general, Ibn Abī Zamanīn

²⁵⁴ Cristina de la Puente, "Slaves in al-Andalus through Mālikī *wathā'i*q works (4th-6th H/10th-12th Centuries CE): Marriage and slavery as factors of social categorization", *Annales Islamologiques* 42 (2008), p. 191.

²⁵⁵ The scholars mentioned in the *Muntakhab al-aḥkām* in the sections considered in this Dissertation can be found in the part of *Appendix 1: Scholars mentioned by Ibn Abī Zamanīn*.

stands out for his self-effacement, for his reticence to formulate opinions of his own unlike earlier Andalusī scholars such as ʿĪsā b. Dīnār (d. 212/827), Yaḥyā b. Yaḥyā al-Laythī (d. 234/848), Abū Bakr Muḥammad b. Yabqā b. Zarb (d. 381/991), and Muḥammad b. Ḥārith al-Khushanī (d. 361/971).²⁵⁶ In doing so, that is, in recording what he considered to be the established doctrine of the Maliki legal school for its use in judicial and legal procedures, he contributed to strengthening and consolidating such school in al-Andalus.

In what follows some examples are analyzed.

a. Ḥadd punishment for adultery

The *ḥadd* punishment²⁵⁷ which are applied under specific circumstances and vary from flogging to stoning are imposed for the following offenses: *ḥadd al-sariqa* (punishment for theft), *ḥadd al-ridda* (apostasy), *ḥadd al-ḥirāba* (highway robbery), *ḥadd al-shurb* (a punishment that covers the drinking of wine and consists on inflicting on the culprit 80 stripes), *ḥadd al-qadhf* (punishment for slander, i.e., a false accusation of fornication or adultery that consists in flogging the offender with 80 stripes) and *ḥadd al-zināʾ* (punishment for unlawful sexual intercourse, denoting both fornication and adultery, set at 100 stripes if the offender is not married and stoning to death if she or he is married).²⁵⁸ Both *ḥadd al-qadhf* and *ḥadd al-zināʾ* are related to divorce issues. When they are applied to, the divorce process is launched between the couples and in this way, they enter an irreversible path.

Any sexual contact outside a legal marriage is considered a crime according to the Islamic legal tradition, and it involves both fornication and adultery. Adultery - the main category of such crime - is any act of illicit sexual intercourse undertaken by any of the spouses in a legal marriage. In Islamic law, both this type of unlawful sexual intercourse and the denial of paternity are serious offenses that require serious punishments. However, the punishment of adultery is rarely documented in Islamic societies which raises the issue if it was

²⁵⁶ See on this Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 242.

²⁵⁷ See Part II, question 91.

²⁵⁸ Safia M. Safwat, "Offences and penalties in Islamic law", *Islamic Quarterly* 26 (1982), p. 149.

in fact rarely applied in practice.²⁵⁹ In the *Muntakhab al-aḥkām*, this *ḥadd* punishment is mentioned regarding specific difficult cases such as that of a missing husband whose wife remarried and was sentenced to stoning because she was considered to have performed adultery (Question 27); the case of a man who - because he was subjected to the *ḥadd* punishment or to cut his hand or foot - was divorced because of these reasons, then he died because of the *ḥadd* punishment or to the amputation (Question 91); the case of a woman who gave birth to a child when it was known that her husband had some sexual deficiency that prevented him to father a child (Question 113) and the case of a husband who had divorced his wife and she gave birth to a child after divorce (Question 149). Given that Ibn Abī Zamanīn wrote his book to be of help for jurists clarifying for them the judicial procedures, it is thus clear that he thought that cases involving *ḥadd al-zinā'* could make their way to the judicial courts, but such cases would involve rare and difficult circumstances.

The *ḥadd al-zinā'* - which is one hundred lashes for the unmarried - consists of death by stoning for the married, being the same for men and women. The Qur'an specifies that adultery is forbidden for all Muslims: "*And approach not fornication; surely it is an indecency, and evil as a way*"²⁶⁰ and "*The fornicator shall marry none but a fornicatress or an idolatress, and the fornicatress -- none shall marry her but a fornicator or an idolator; that is forbidden to the believers.*"²⁶¹ As it is known, a Muslim woman cannot marry a non-Muslim man, but a Muslim man can marry a non-Muslim woman.²⁶² According to the *Muntakhab al-aḥkām*, there is no *ḥadd* punishment for a husband whose wife is non-Muslim because offenders are divided into two groups: *muḥṣan* refers to free men and women, of full age and understanding who have been in a position

²⁵⁹ Delfina Serrano, "Paternity and filiation according to the jurists of al-Andalus: Legal doctrines on transgression of the Islamic social order", *Imago Temporis Medium Aevum* 7 (2013), pp. 59-75; Manuela Marín, "Maternidad y relaciones materno-filiales", in *Mujeres en al-Andalus: Estudios Onomástico-Biográficos de al-Andalus* XI. Madrid: CSIC, 2000, pp. 504-538; Ziba Mir-Hosseini, "Criminalizing sexuality: *Zinā'* laws as violence against women in Muslim contexts", *SUR-International Journal on Human Rights* 8 No.15 (2011), p. 11.

²⁶⁰ Al-Isrā': 32, <https://tanzil.net/#trans/en.arberry/17:32>

²⁶¹ Al-Nūr: 3, <https://tanzil.net/#trans/en.arberry/24:3>

²⁶² Khaled Abou El Fadl, "The place of ethical obligations in Islamic Law", *UCLA Journal of Islamic and Near Eastern Law* 4 (2005), p. 24.

to enjoy lawful wedlock, while *non-muḥṣan* refers to those who do not fulfill these conditions.²⁶³ Ibn Abī Zamanīn supported this argument with the doctrine of Mālik, stating: “Mālik said: If the man saw the pregnancy and he kept quiet until she gave birth, he cannot refuse the child. If he refused that while she was giving birth, a *ḥadd* punishment is given to the man if his wife is Muslim. There is no *ḥadd* for him if she is non Muslim or slave because there is no *ḥadd* for slandering them.”²⁶⁴ On his part, Ibn Rushd al-Ḥafīd also argued that the *ḥadd* punishment is not applied to slaves in view of their deficient legal capacity.²⁶⁵ Al-Sha'bī al-Mālaqī claimed that whoever approves having sexual intercourse but rejects the child and does not claim *istibrā'* is jailed until approving the child.²⁶⁶

Maliki law considers pregnancy in an unmarried woman as sufficient evidence of fornication, unless there is evidence of rape or compulsion. However, there is no juristic consensus about this issue. Some Maliki jurists required the confession of fornication to be uttered four separate times, while the majority view held that an unmarried woman's pregnancy can be used as evidence for fornication.²⁶⁷ Islamic law gives a husband the possibility of accusing his wife of adultery by an oath without presenting any legal proof and the possibility of denying the paternity of a child borne by the wife via *li'ān*.²⁶⁸ The most important stipulation is that the husband should deny the paternity before the birth of the child. After denying paternity making *li'ān*, the *ḥadd* punishment can be carried out if both sides are Muslims and free.²⁶⁹

²⁶³ Nasimah Hussin, “Revisiting Islamic punishment and its implementation in the contemporary world”, *International Conference on Humanity, Law and Sharia* 14-15 November 2018, p. 1.

²⁶⁴ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/764.

²⁶⁵ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/74.

²⁶⁶ Ibn Qāsim al-Sha'bī, *Al-Aḥkām*, edited by al-Ṣādiq al-Ḥalawī. Beirut: Dār al-Gharb al-Islāmī, 1992, p. 387.

²⁶⁷ Mir-Hosseini, “Criminalizing sexuality: *Zinā'* laws as violence against women in Muslim contexts”, p. 13.

²⁶⁸ Delfina Serrano, “Judicial procedure and legal practice on *li'ān* (Imprecatory oath) in al-Andalus: The evidence form model *shurūt* collections, 11th-12th centuries”, p. 149.

²⁶⁹ Lynn Welchman, “Honour and violence against women in modern Shari'a discourse”, *Hawwa: Journal of Women of the Middle East and the Islamic World* 5 No.2-3 (2007), p. 30.

On the other hand, according to the majority opinion of Maliki scholars, the duration of pregnancy can be as long as seven years. This suggests a concern on the part of Maliki jurists to protect women against the adultery charge and children against the stigma of illegitimacy. Mālik was reputed to have been himself a sleeping fetus, a story that probably has to be related to the question of the maximum length of pregnancy allowed under Islamic law. "All four Sunni law schools accepted a prolonged pregnancy of greater than nine months, but the notion was especially rooted in Maliki law, where pregnancies up to seven years were permitted. This ruling was widely accepted in spite of a Quranic teaching²⁷⁰ that the maximum length of time between conception and weaning of the child was 30 months."²⁷¹ According to this belief, the embryo for some unknown reason goes to sleep in the womb of the mother and remains there dormant until it is awakened.²⁷²

Ibn Abī Zamanīn paid attention to this issue, for example in the following case: "Saḥnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a man who divorced his wife with three or revocable *ṭalāq*, and then she gave birth to a child after two years - does the child belong to the first man? Ibn al-Qāsim said: Yes, if she gave birth in the period between those two years and five years. Mālik used to say: As long as she gives birth according to the duration that is usual among her peers" (Question 151).²⁷³

"Saḥnūn said: What if the woman gives birth to the child after six years? Ibn al-Qāsim said: In this case, the pregnancy came into being subsequently and the man has no connection with this issue in no way, thus she gets *ḥadd* punishment, because Mālik said: If the woman gives birth to a child after a time longer than what is usual among her peers, the child does not belong to this man, this regardless of whether she said that the waiting period (*ʿidda*) was completed or not. Saḥnūn said: What if a married man died, and his wife waited 4 months and 10 days, then she gave birth in a period of more than six months, between

²⁷⁰ Al-Aḥqāf: 15, <https://tanzil.net/#trans/en.arberry/46:15>

²⁷¹ Susan Gilson Miller, "Sleeping fetus: Overview", in *Encyclopedia of women & Islamic cultures*, edited by Suad Joseph. Accessed 01 May, 2022 http://dx.doi.org/10.1163/1872-5309_ewic_EWICCOM_0205

²⁷² Willy Jansen, "Sleeping in the womb: Protracted pregnancies in the Maghreb", *The Muslim World* 90 (2000), p. 219.

²⁷³ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/746.

the day her husband died and the time that her peers can give birth. Ibn al-Qāsim answered: The child belongs to the man, this regardless of whether she declared that the waiting period had been completed or not” (Question 151).²⁷⁴ While Ibn al-Qāsim limited the valid period between 2 and 5 years, Mālik did not give a specific duration referring to what was expected for the peers of the pregnant woman. However, Mālik claimed pregnancies up to seven years could happen according to the belief in the sleeping fetus. Ibn Abī Zamanīn preferred not to mention the specific time he favored regarding this issue, limiting himself to presenting the perceptions of both Mālik and Ibn al-Qāsim.

b. Waiting periods of female slaves

Concubinage is a type of relationship between a man and a woman whose legal implications have been discussed and regulated by all Islamic legal schools.²⁷⁵ Maliki juridical texts such as Mālik's *al-Muwattaʿa* and Ibn Abī Zayd's *al-Risāla*, among others, condone and normalize the practice of using slaves as concubines.²⁷⁶ Also, the Qurʾān accepts the distinction between slave and free as part of the natural order,²⁷⁷ as recorded in this verse: “And God has preferred some of you over others in provision; but those that were preferred shall not give over their provision to that their right hands possess, so that they may be equal therein. What, and do they deny God's blessing?”²⁷⁸

Slavery in practice is an exploitative act in which the owner utilizes to the maximum possible advantage the productivity of the enslaved person; in the case of a female slave, her sexuality and reproductive capacity.²⁷⁹ In other words, slavery means a permanent service enabled by a human being forced into servitude for the master's desire and profit; this relation is affirmed by legal

²⁷⁴ Ibid, vol. 2/746-7, Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/442-4.

²⁷⁵ Cristina de la Puente, “Límites legales del concubinato: normas y tabúes en la esclavitud sexual según la *Bidāya* de Ibn Rušd”, *Al-Qanṭara* 28 No.2 (2007), p. 409.

²⁷⁶ Cristina de la Puente, “Esclavitud y matrimonio en *Al-Mudawwana al-kubrā* de Saḥnūn”, *Al-Qanṭara* 16 (1995), p. 309.

²⁷⁷ Jonathan E. Brockopp, “Slaves and slavery”, in *Encyclopaedia of the Qurʾān*, edited by Jane Dammen McAuliffe. Leiden: Brill, 2006, vol. 5/57.

²⁷⁸ Al-Naḥl: 71, <https://tanzil.net/#trans/en.arberry/16:71>

²⁷⁹ Paul Lovejoy, *Transformations in slavery: A History of slavery in Africa*. Cambridge: Cambridge University Press, 2000, p. 76.

codes to enforce the obligations upon the slave and to ensure the master's privilege. In Islamic law, the slave is conceived as a person with rights and duties, but they are not by any means equal to those of a free person. This means that the duties and rights of slaves in divorce processes are different from others.²⁸⁰

Ibn Abī Zamanīn frequently mentions cases that involve slaves, which points to the fact that their presence was pervasive in Andalusī society. The materials compiled in the *Muntakhab al-aḥkām* also reflect that female slaves do not have the same rights as free women regarding their reproductive capacity. For example, a Muslim free woman who is widowed should have a waiting period of four months and ten nights, while a female slave's waiting period is half of the free woman's.²⁸¹ Ibn Abī Zamanīn gave an example from the audition (*samā'*) of Abū Zayd: "Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a female slave, *mukātaba*²⁸² and *mudabbara*²⁸³, when her husband dies, how long is her waiting period? Ibn al-Qāsim answered: It is half of the free woman's 'idda, that is, two months and five nights" (Question 122).²⁸⁴ In the *Muwatta'*, the waiting period of a female slave is specified as two menstrual periods: "Yaḥyā related to me from Mālik from Nāfi' that 'Abdullāh b. Umar said: When a slave divorces his wife twice, she is unlawful for him until she has married another husband, whether she is free or a slave. The 'idda of a free woman is three menstrual periods, and the 'idda of a slave-girl is two periods."²⁸⁵ Mālik argued that after the completion of two menstrual periods, their waiting period is completed so they don't have to wait any longer to remarry.

Ibn Abī Zamanīn - who presents his own view very rarely - felt the need to clarify the legal implications of a specific situation by adding the doctrine of

²⁸⁰ Chouki El Hamel, *Black Morocco: A History of slavery, race, and Islam*. Cambridge: Cambridge University Press, 2013, p. 55.

²⁸¹ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 114.

²⁸² The slave who has a contract of manumission, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 424.

²⁸³ A slave who has been freed at the death of her master, *ibid*, p. 387.

²⁸⁴ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/731.

²⁸⁵ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas: The first formulation of Islamic law*, translated by Aisha Abdurrahman Bewley. Norwich: Diwan Press, 2015, p. 437. To note that although in the cover of the book Aisha Abdurrahman Bewley's role is described as editor, she is in fact the translator of the book. From now onwards reference will be made to her translation.

Mālik after giving an example from the audition (*samāʿ*) of Abū Zayd. “Muḥammad said: When a female slave has menopause or never menstruates but she is able to have sexual intercourse, she waits three months since the day that her husband died. Then she can marry, it is the doctrine of Mālik” (Question 122).²⁸⁶ Ibn Abī Zamanīn probably decided to add this point to illustrate the difference in the waiting periods between a female slave with normal menstruations and a female slave who does not menstruate: while the first must wait two menstruation periods, a female slave who does not menstruate must wait three months to make sure whether she is pregnant from her deceased husband or not. On his part, Ibn Abī Zayd al-Qayrawānī did not mention any specific time when dealing with this issue, merely indicating that it was appropriate for a widowed female slave who did not menstruate to wait until the suspicion dissipated.²⁸⁷

c. Divorce of mother slaves: some cases related to the *umm walad*

Umm walad is the name the concubine receives when she becomes pregnant; if the owner recognizes such paternity, her legal status changes with the corresponding social results for her and her family.²⁸⁸ If the child died after birth or the mother had a miscarriage, her status of *umm walad* is irreversible, even if she does not get pregnant again. Also, her owner cannot marry her and she cannot be one of his four legitimate spouses unless released by her owner.²⁸⁹ She is automatically freed upon the death of her master. As famous Andalusī proverb says: “The slave who is pregnant has found her way.”²⁹⁰ A female slave can change her status easily in this way.

On the other hand, recognition of paternity does not only rely on the arbitrary will of the owner, because it also depends on the possibility of

²⁸⁶ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/732.

²⁸⁷ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 115.

²⁸⁸ Albert Lourde and François-Paul Blanc, “Les conditions juridiques de l’accès au statut de concubin-mère en droit malékite”, *Revue de l’Occident Musumane et de la Méditerranée* 36 (1983), p. 165.

²⁸⁹ De la Puente, “Esclavitud y matrimonio en *Al-Mudawwana al-kubrā* de Saḥnūn”, p. 323.

²⁹⁰ Nadia Lachiri, “Andalusī proverbs on women”, in *Writing the feminine: Women in Arab sources*, edited by Randi Deguilhem and Manuela Marín. New York: I.B. Tauris, 2002, p. 42.

investigations being made to check whether the owner had possessed the female slave in accordance with the principles of Islamic morals. The owner can have sexual intercourse with the concubine and he has to prevent her from having sexual intercourse with anybody. The owner cannot temporarily loan or transfer her because this implies an incitement to prostitution. The owner is responsible for her decency.²⁹¹

The *umm walad* acquires a series of inalienable rights. Selling her is forbidden and she cannot be separated from her children or from her home by force. Moreover, she cannot be compelled to work outside her home for a wage.²⁹² When a slave is pregnant and she is sold, the sale is cancelled. If the owner did not know that the slave was expecting his child, the sale may take place but if he was aware of that, that would be a crime. In the *Mudawwana*, this issue is explained like this: if the owner married his *umm walad* to another man, this action is ethically detestable. Nonetheless, if the liaison takes place it is legal and the husband declares that he does not know of any case where such a union was annulled.²⁹³

Ibn Abī Zamanīn frequently mentioned the divorce of *umm walads* in the *Muntakhab al-aḥkām*. He quoted the *Mudawwana* regarding this issue²⁹⁴: “Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding an *umm walad*, when she is set free and she has a child - is she in the same position as a divorced woman according to the doctrine of Mālik? Ibn al-Qāsim answered: Yes” (Question 172).²⁹⁵ Also, Ibn Abī Zamanīn quoted from the audition of ‘Īsā b. Dīnār: “Muḥammad said: in the audition (*samā’*) of ‘Īsā, Ibn al-Qāsim said regarding the *umm walad* who was set free after having agreed to renounce her children giving the custody to their father, they have to be returned to her. This is so because she is not like a free woman who makes *muṣālaḥa* with her

²⁹¹ Marion H. Katz, “Concubinage, in Islamic law”, in *Encyclopedia of Islam, THREE*, edited by Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas and Everett Rowson. Accessed May 01, 2022

http://dx.doi.org/10.1163/1573-3912_ei3_COM_25564

²⁹² Ibn Rushd al-Ḥafīd, *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*, vol. 1/394.

²⁹³ Saḥnūn b. Sa’īd, *Al-Mudawwana al-kubrā*, vol. 4/52-53.

²⁹⁴ Ibid, vol. 5/362.

²⁹⁵ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/760.

husband in return of giving the children to him” (Question 172).²⁹⁶ The child of the *umm walad* is considered freeborn but the custody of the child belongs to the father and his family, not to the *umm walad*. Hence, she cannot make an agreement on the custody of the child in return to divorce.

Ibn Abī Zamanīn argued that when an *umm walad* is set free by her owner, she is in the same position as a divorced woman. Then, he claimed that an *umm walad* cannot make *muṣālaḥa* with her husband in return of giving the children to him as a free woman can because an *umm walad* does not have the same rights as a free woman has in the divorce process. If she had the same rights, the *umm walad* would be able to make *muṣālaḥa* with her husband and give to him custody of their children as a ransom. But that is not the case.

On the other hand, Ibn Abī Zamanīn argued that the waiting period (*‘idda*) of an *umm walad* is like the *‘idda* of the female slave, not that of a free woman. She has to observe her waiting period after her owner died. If she is menstruating when her master died, she waits one more menstruation period.²⁹⁷ However, a free woman should wait 4 months and 10 days.²⁹⁸ On his part, Ibn Abī Zayd al-Qayrawānī mentioned that a concubine or a concubine-mother do not have the same rights as legitimate spouses.²⁹⁹ Taking all this into consideration, it can be said that the situation of an *umm walad* is neither like a free woman nor like a slave. Her position is in between of them.

Ibn Abī Zamanīn preferred not to present his own view regarding some questions while presenting the arguments made by various Maliki scholars, as in the question regarding the debate of pregnancy duration and *ḥadd* punishment. However, if he thought it necessary to clarify the legal implications of a specific situation by adding his own view, he specified it, as in the question regarding a woman's request to make *khul'* with her husband before the consummation of the marriage (Question 47).³⁰⁰

²⁹⁶ Ibid, vol. 2/760.

²⁹⁷ Ibid, vol. 2/732.

²⁹⁸ Al-Baqara: 234, <https://tanzil.net/#trans/en.arberry/2:234>

²⁹⁹ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 179.

³⁰⁰ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/698.

d. Divorce of minors

Ibn Abī Zamanīn indicates that a girl should not be hurried to marry before reaching puberty. He mentions in the *Muntakhab al-aḥkām*: “Ibn Muzayn asked: Is pubescence accepted as a limit for marriage according to your opinion? Aṣḥab said: This has been mentioned but it is a weak position. What I consider preferable is that she is not hurried to marry until she reaches the situation that I described to you. Aṣḥab said: If her guardian marries off this woman after pubescence, her nuptials are cancelled, except if she has reached the puberty age and (for some reason) she has not yet menstruated” (Question 25).³⁰¹ If there is no specific necessity regarding the marriage of a girl before puberty, she should wait until her menstruation takes place according to this information.

The marriage of a young woman was mostly in the hands of family members. There is a certain order between the members: the power to do so was wielded first by the father of the child, then his widow, then by the adult brothers of the child and lastly by a paternal uncle. A girl or a woman's father or guardian would negotiate the terms of her marriage. According to Mālik's doctrine, fathers have special authority and they can force their daughters to marry.³⁰²

The deceased father can give this power to his daughter's designated guardian via testament. The father's power to compel his minor daughter's marriage does not pass by inheritance so it should be conveyed by designation. Nevertheless, if the father did not expressly grant this authority to another person, the testator successor of the father in guardianship does not enjoy the power to compel marriage. When the father died or disappeared and did not appoint a guardian for his minor daughter, the girl could not marry prior to reaching the age of majority.³⁰³ Ibn Abī Zamanīn explained the situation of a virgin orphan girl who reached the menstruation age, but did not menstruate. “Ibn Muzayn said: I asked Aṣḥab about a virgin orphan girl who did not

³⁰¹ Ibid, vol. 2/691.

³⁰² Jessica A. Coope, *The most noble of people: Religious, ethnic and gender identity in Muslim Spain*. Michigan: University of Michigan Press, 2017, p. 102.

³⁰³ Mohammad Fadel, "Reinterpreting the guardian's role in the Islamic contract of marriage: The Case of the Maliki school", *The Journal of Islamic Law* 3 (1998), p. 7.

menstruate although she had reached the menstruation age - can her guardian marry her off with her consent? Aṣḡagh said: If all her peers menstruate or her situation turned into that she cannot menstruate according to the opinion of women, she can marry” (Question 24).³⁰⁴ She does not have to wait for marriage even if she did not menstruate in this situation. Her peers should be taken into consideration when the decision for her marriage is taken.

On the other hand, if an orphan girl has reached marriageable age and if she is in danger of falling into moral corruption or economic ruin because of the fact that she cannot marry, *al-sultān* (that is, someone endowed with authority, be it the ruler or any of his delegates) can permit her guardian by relation to contract her marriage. In the divorce situation, “Mālik said: When an orphan girl reaches puberty and her guardian marries her off, he cannot make *mubāra’a*³⁰⁵ (woman's demand for divorce by giving up all her economic rights) without her consent, in the same way that it is not permissible to marry her off without her consent. In this her situation is different from that of a boy” (Question 67).³⁰⁶ However, there is no consensus about this topic between the companions of Mālik. Ibn Abī Zamanīn indicated this disagreement in the *Muntakhab al-aḥkām*: “Muḥammad said: The companions of Mālik are in conflict regarding the topic of making *mubāra’a* of an orphan girl who does not have a father, a guardian or a protector/overseer provided by the political authority (*al-sultān*). Yaḥyā has narrated from Ibn al-Qāsim: It is permissible before puberty or after but only if her *muṣālaḥa* is similar to her peers. Saḥnūn said the same” (Question 67).³⁰⁷

The role of the *sultān* mentioned by Ibn Abī Zamanīn in various questions deserves attention. The *sultān* refers to the political authority, the ruler, or his representative (the governor, for example, or the judge). In the early Maliki texts, the *sultān*'s role pertain to four situations: when help is needed in claiming a right endorsed by the *fiqh*; in adjudications for a practical reason, e.g., “the guardian of a little boy, and the delegate of the political authority (*khalīfat al-sultān*) who has been put in charge to make *muṣālaḥa* on his behalf”³⁰⁸; when

³⁰⁴ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/691.

³⁰⁵ See Part II, question 45.

³⁰⁶ Ibid, vol. 2/706.

³⁰⁷ Ibid, vol. 2/707.

³⁰⁸ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/706.

a solution required by equity needs to be adopted and in circumstances that fall under the *sultān*'s exclusive jurisdiction. Early Malikis claimed that the judgment of the *sultān* can be reversed by the qadi only if it is manifestly corrupt. Later Malikis argued that a qadi or a mufti has a right to redress an incorrect judgment.³⁰⁹

The issue of a little girl's *mubāra'a* by her father or guardian was debated between the companions of Mālik as Ibn Abī Zamanīn remarked. To make *mubāra'a*, the girl should pay a compensation to obtain her divorce. Ibn al-Qāsim argued that the peers of an orphan girl who does not have a father, a guardian or a protector/overseer provided by the political authority (*al-sultān*), should be taken into consideration. Nonetheless, even though Mālik argued that a guardian cannot make *mubāra'a* without the consent of the orphan girl who reached puberty, he can do that for a little girl who did not reach puberty. "Saḥnūn said: Ibn Nāfi' has narrated that Mālik said: I do not find objectionable to make *mubāra'a* by the delegate for a little girl who did not reach puberty and was married by him because he is like her father who marries off her. If the delegate acted according to right reflection and interpretative effort, the little girl cannot object to that when she reaches puberty" (Question 66).³¹⁰

These cases demonstrate that marriage and divorce were not simply a private relationship between the husband and wife and to lesser extent their families, particularly when one of the spouses is a minor. When the marrying parties are younger than what is the norm in the lawful marriage, the marriage contract could take place at the initiative of legal custodians or proxies. Ibn Abī Zamanīn selected cases that show that Ibn al-Qāsim did not agree with Mālik about this issue. Ibn Abī Zamanīn, instead of stating his own opinion, presented various views so that his readers could make their own selection.

In Question 66 above, it is to note Ibn Abī Zamanīn's reference to "right reflection and interpretative effort" (*'alā wajh al-naẓar wa-l-ijtihād*) when a jurist proceeds to develop an argument that is properly formulated according to his

³⁰⁹ Hiroyuki Yanagihashi, "The Judicial functions of the *sultān* in civil cases according to the Mālikīs up to the sixth/twelfth century", *Islamic Law and Society* 3 No.1 (1996), p. 43.

³¹⁰ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/706.

best legal judgment, then the jurist may make a mistake given that he is using his rational powers, but that does not entail that is legally invalid.

2. Economic consequences of divorce for women

The instance of divorce is one of the most prominent ways in which one can unveil the economy within marriage, particularly regarding the role of women's involvement and agency, and this can be done by an evaluation of the disputes and negotiations regarding divorce cases. In divorce procedures, the foundation of marriage, that is, the sharing of wealth and property can be broadly contested by the separating parties, thus putting to the fore what is brought into the marriage and what is taken away at its disintegration by the involved individuals.³¹¹

The law of marriage can be seen as mainly a law regulating economic transactions and woman's access to and control over it.³¹² A husband has some responsibilities during marriage, divorce and after the divorce process such as providing matrimonial maintenance and dwelling for his spouse. Even though the financial situation of a woman is not as important as that of a man, it sometimes plays an important role such as in the cases initiated by the woman paying compensation to her husband for divorce. Also, if the wife is pregnant or has a child, the responsibilities of the husband towards them are higher. In this part, the cases regarding specific economic issues in the *Muntakhab al-aḥkām*, particularly regarding matrimonial maintenance during and after divorce, providing dwelling during waiting period, the economic rights of a pregnant woman and the compensation provided by wives in order to secure a divorce will be discussed.

e. Matrimonial maintenance during and after divorce

The matrimonial maintenance provided by the husband was considered to be the principal source of livelihood for his wife and an allowance for childcare. A husband is responsible for the upkeep of the household as the

³¹¹ Kayhan, "Negotiating matrimony: Marriage, divorce, and property allocation practices in Istanbul, 1755-1840", p. 55-6.

³¹² Flavia Agnes, "Economic rights of women in Islamic law", *Economic and Political Weekly* 31 No.41/42 (1996), p. 2832.

primary caretaker of his wife and children. The maintenance of the wife, whether the woman is rich or poor, is responsibility of her husband.³¹³ The amount of the allowance does not only depend on the husband's social status and income, but also relies on his wife's social and economic status. As already indicated, it is possible to reach detailed and comprehensive understanding about the economy of the family particularly with respect to women's involvement and agency, though an evaluation of the negations and disputes regarding divorce cases.³¹⁴

The main question seems to be: does the man have to provide maintenance during the legally required waiting period for his wife whom he has divorced irrevocably, until she is free to remarry, or does his liability extend to lodging only?³¹⁵ Muslim scholars agree that, when the divorce is revocable, the woman has to fulfill her waiting period in the house of her husband and during this time, the husband has to provide maintenance and dwelling for her. In other words, the woman is still entitled to demand her maintenance and suitable living conditions from her husband, while the husband maintains the right to recant his decision to divorce during the waiting period.³¹⁶ However, there is a disagreement between Muslim scholars about whether the irrevocably divorced woman should be treated the same or not.³¹⁷

The term allowance "*nafaqa*"³¹⁸ in the *Muntakhab al-aḥkām* designates both the maintenance provided by the husband during marriage and the alimony dues he has to pay after divorce. A husband was supposed to pay a specific monthly fee as allowance after he divorces his wife as well as during the waiting

³¹³ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 116.

³¹⁴ Kayhan, "Negotiating matrimony: Marriage, divorce, and property allocation practices in Istanbul, 1755-1840", p. 55.

³¹⁵ Joseph Schacht, *The origins of Muhammadan jurisprudence*. Oxford: Clarendon Press 1967, p. 225.

³¹⁶ Kecia Ali, "Marriage in classical Islamic jurisprudence: A survey of doctrines", in *The Islamic marriage contract: Case studies in Islamic family law*, edited by Frank Vogel and Asifa Quraishi. Cambridge: Harvard University Press, 2008, p. 32.

³¹⁷ G. R. Hawting, "The role of Qur'an and *ḥadīth* in the legal controversy about the rights of a divorced woman during her 'waiting period' (*'idda*)", *Bulletin of the School of Oriental and African Studies* 52 No.3 (1989), p. 444.

³¹⁸ See Part II, question 75.

period.³¹⁹ It was determined during the time of the marriage contract, especially taking into consideration the necessities of the wife and the resources of the husband.³²⁰ The abundance of questions regarding allowance in the cases recorded in the *Muntakhab al-aḥkām* indicates that men were suspect to potentially neglect their duty to provide for the wives they repudiated.

In the *Muwaṭṭaʿ*, Mālik explained the issue of providing maintenance after irrevocable divorce in this way: “Yaḥyā related to me from Mālik from ‘Abdullāh b. Yazīd, the *mawlā* of al-Aswad b. Sufyān from Abū Salama b. ‘Abd al-Raḥmān b. ‘Awf from Fāṭima bint Qays that Abū ‘Amr b. Ḥaṣṣ divorced her absolutely while he was away in Syria. His agent sent her some barley and she was displeased with it, saying, ‘By Allah, I don’t expect anything from you.’ She went to the Messenger of Allah and mentioned it to him. He said: ‘You have no maintenance’. He then ordered her to spend her *‘idda* in the house of Umm Sharīk.’ Then he added: Yaḥyā related to me from Mālik that he heard Ibn Shihāb say: A woman who is absolutely divorced does not leave her house until she is free to remarry. She is not entitled to maintenance unless she is pregnant. In that case, the husband supports her until she gives birth.”³²¹

Ibn Abī Zamanīn followed the doctrine of Mālik regarding this issue and argued that there is no matrimonial maintenance for a woman who has been divorced irrevocably. He explained this issue with this quotation: “Saḥnūn asked Ibn al-Qāsim: Is there a matrimonial maintenance for a woman who makes *khulʿ*? Ibn al-Qāsim said: No, except if she is pregnant. It is the same for the woman who is divorced by irrevocable *ṭalāq*, there is no matrimonial maintenance for her” (Question 127).³²² Both of them argued that when the marital bond between the spouses disappeared with an irrevocable divorce, the economic relations between them end, unless they have children.

³¹⁹ Paul R. Powers, *Intent in Islamic Law: Motive and meaning in medieval Sunni fiqh*. Leiden: Brill, 2005, p. 130.

³²⁰ Spectorsky, *Chapters on marriage and divorce*, p. 41.

³²¹ Mālik b. Anas, *Al-Muwaṭṭaʿ of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 430.

³²² Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/734.

b. Providing dwelling during the waiting period

The conjugal dwelling that is one of the components of the maintenance must be provided by the husband for the wife during marriage.³²³ Also, the divorced woman continues to stay in the conjugal dwelling during the waiting period that provides a reconciliation opportunity for the couples.³²⁴ However, a woman who wants to divorce her husband can give up the right of the dwelling during the waiting period as a ransom to secure a divorce. This situation is only valid for *khul'* divorce. If the husband divorces his wife and there is no *khul'* agreement between them, he must provide the dwelling for her.³²⁵

Ibn Abī Zamanīn recorded the case of a pregnant woman who requests *khul'* divorce from her husband. He quoted from the *Mudawwana* but also underlined his own opinion. "Mālik asked in the audition (*samā'*) of Ibn al-Qāsim regarding a pregnant woman who made *mukhāla'a* with her husband. He divorced her with irrevocable *ṭalāq* so the man had to pay her maintenance. Then he died while he was not living with her and before she gave birth. Has the maintenance expired with his death?"³²⁶ Ibn Abī Zamanīn added: "Muḥammad answered: Ibn al-Qāsim separated dwelling and maintenance;³²⁷ there is here room for speculation. There is controversy regarding his doctrine" (Question 130). However, in the *Mudawwana*, the limits of this issue are drawn very clearly, because Mālik stated that in the case of a couple who made *khul'* when the woman was pregnant and then the husband died, the woman is entitled to continue receiving maintenance because of her pregnancy. After giving birth, the maintenance is not paid to her anymore.³²⁸

Ibn Abī Zamanīn gave great importance to this issue as shown by the fact that he mentioned it constantly. For instance, "Saḥnūn asked Ibn al-Qāsim: What about a woman whose husband died and it was known that her marriage was

³²³ Suad Joseph, Afsaneh Najmabadi, *Encyclopedia of women and Islamic cultures: Family, law and politics*. Leiden: Brill, 2003, p. 443.

³²⁴ Powers, *Intent in Islamic Law: Motive and meaning in medieval Sunni fiqh*, p. 131.

³²⁵ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/700.

³²⁶ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/737, quoting Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/338.

³²⁷ Ibn Abī Zamanīn is referring here to Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/475-476.

³²⁸ Ibid, vol. 5/338.

invalid because of the fact that they were milk siblings or they were in a situation forbidden by God - does she have a waiting period because of his death? Ibn al-Qāsim said: No, she should cleanse her womb during three menstruation periods" (Question 119).³²⁹ To understand the reference to milk siblings, it has to be taken into account that all Islamic legal schools agreed that marriage between siblings is forbidden, even if they disagree about the details. The foster mother acquires the status of the mother and the foster sibling acquires the status of real sibling.³³⁰ That is, the marriage considered in the question was invalid because the spouses could in fact not have been married to each other.

Ibn Abī Zamanīn continues in this way: "If this situation is known before the death of the husband and they were separated, the waiting period is necessary for her, as whatever is necessary in a licit marriage should be done here as well. Dwelling and maintenance should be provided. This is the doctrine of Mālik" (Question 119). In this case, the woman should have the waiting period after divorce even she married a milk sibling because it is necessary to ascertain whether she is pregnant or not. During the waiting period, marriage is forbidden for her so she needs a place to stay and money to live. The husband is responsible to provide all of them. The approach of Ibn Abī Zamanīn on this issue follows the views of other Maliki scholars.

Mālik explained the matrimonial maintenance in a similar way with the precedent from Madina in his *Muwattaʿa*: "Yaḥyā related to me from Mālik from Saʿīd b. Ishāq b. Kaʿb b. ʿUjra from his paternal aunt, Zaynab bint Kaʿb b. ʿUjra, that al-Furayʿa bint Mālik b. Sinān, the sister of Abū Saʿīd al-Khudrī, informed her that she went to the Messenger of Allah and asked to be able to return to her people among the Banū Khudra since her husband had gone out in search of some of his slaves who had run away and he had caught up with them near al-Qudūm (which is six miles from Madīna) and they had killed him. She said: "I asked the Messenger of Allah if I could return to my people in the Banū Khudra, as my husband had not left me a dwelling which belonged to him, and had left me with me no maintenance. The Messenger of Allah said, 'Yes,' so I left. When I was

³²⁹ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/730-31, quoting Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/458.

³³⁰ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/41.

in the courtyard, the Messenger of Allah called me or summoned me, and I answered him. He said, 'What did you say?' I repeated the story about my husband. He said: 'Stay in your house until what is written reaches its term.' I did the 'idda in the house for four months and ten days."³³¹

On the other hand, according to Ibn Abī Zamanīn, changing dwelling during the waiting period is not appropriate. He explains this issue with the example from the *Mudawwana*: Saḥnūn asked: Can a woman (whose husband died) move to another house during her waiting period? Ibn al-Qāsim said: If she is afraid that the house could collapse, she can move, also if the house is in a location where she is afraid of thieves, she can move and also because of similar issues. In sum, if she moved to a new dwelling because of a necessity, she can continue her waiting period in the new place" (Question 134).³³²

He continues with the quotation from the *Mudawwana*: "Ibn al-Qāsim said: If a divorced woman left the place where she was having her waiting period and stayed in another place, then she demanded from her husband the rent of the new place where she had the waiting period, she cannot do that. Saḥnūn asked: If the woman left the place where she was supposed to wait without an excuse, the political authority (*al-sulṭān*) should force her to return to that place."³³³ "Ibn al-Qāsim said: Whoever divorces his wife with revocable *ṭalāq*, he can go back to her and is not obligatory for him to travel with her until he has returned to her."³³⁴ "Ibn al-Qāsim said: A woman who had the waiting period because of *ṭalāq* or death has to pass the waiting period in her house or in another place in which her stuff is, she can wait in any place in which she can lock the door of her rooms."³³⁵³³⁶ In this issue, Ibn Abī Zamanīn followed the view of Ibn al-Qāsim.

³³¹ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 438.

³³² Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/738, quoting Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/458.

³³³ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/459-460.

³³⁴ Ibid, vol. 5/464.

³³⁵ Ibid, vol. 5/465.

³³⁶ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/738.

c. Economic rights of a pregnant woman

Being pregnant is extremely significant for women in Islamic law because, as we have seen in the above-mentioned cases, it can provide essential privileges to the women. Pregnancy, as already discussed, is for example the only way to change the status of female slaves. Thanks to this situation, women can obtain new economic and social rights. When a woman is pregnant with her husband's child, she is entitled to demand maintenance support from him. Ibn Abī Zamanīn explained this issue with a quotation from Ibn al-Qāsim and with the relevant verse. "...But if she is pregnant, then God says: 'If they are with child, expend upon them until they bring forth their burden.'³³⁷ God makes possible the right of dwelling and matrimonial maintenance for pregnant women. The women who are not divorced by irrevocable *ṭalāq* are provided dwelling, maintenance and dress by their husbands, this regardless of whether they are pregnant or not" (Question 127).³³⁸ Ibn Abī Zamanīn quoted from Mālik regarding this issue and he said that when the woman gives birth, the maintenance provided by the husband concluded. The father becomes responsible only for his child's maintenance after this. "Mālik said: If the husband of a woman died, and they had divorced or made *khul'* while she was pregnant, the maintenance continues to be paid to her because of her pregnancy. After giving birth, the maintenance is not paid to her anymore."³³⁹

Even if the parents get divorced, the bond between them continues thanks to the child, so the father continues to be responsible for providing for their needs according to Ibn Abī Zamanīn's explanation. While married, a husband is expected to provide for housing, food, and his wife's clothes according to the social class of the woman or the agreement they reached at the time the marriage was contracted. Depending on this agreement and the social class of the wife, the maintenance could include servants and a standard of living consistent with that of the wife's peers.³⁴⁰ Nonetheless, there is no specific amount provided by the husbands for their pregnant wives as Ibn Abī Zamanīn

³³⁷ Al-Ṭalāq: 6, <http://tanzil.net/#trans/en.arberry/65:6>

³³⁸ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/734.

³³⁹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/338.

³⁴⁰ Hawting, "The role of Qur'an and *ḥadīth* in the legal controversy about the rights of a divorced woman during her 'waiting period' (*'idda*)", p. 440.

mentioned from the quotation of Ibn Nāfi'. The majority of the jurists who followed the Maliki school have a consensus about this issue. "Ibn Nāfi' said: Mālik said: According to our doctrines, there is no specific standard for the pregnant woman's matrimonial maintenance by rich or poor, in city or village, for top or bottom level. The husband gives it according to his financial situation. If the husband's financial situation improves, he can hire a servant."³⁴¹

Ibn Abī Zamanīn mentioned the situation of a divorced pregnant woman whose husband wants to go on a journey. "In the audition (*samā'*) of Ibn al-Qāsim, Mālik said: It was asked regarding a man who divorced his wife, then he wanted to go on a journey. The woman claimed that she was pregnant and told him: 'Ensure the maintenance for me'. Mālik answered: There is no maintenance for her, the man in this situation is like the man who continues to live in his place, but he has to stay with her to check if the pregnancy continues with her, in which case maintenance is collected for the woman and given to her. Then the man is not refrained from his journey" (Question 129).³⁴² "Mālik said: If the man pays out his wife voluntarily, then he learns that she is not pregnant, she does not owe anything to him. If the man pays out his wife on the orders of the political authority (*al-sultān*), then she should pay it to him back" (Question 129).³⁴³

At this point, Ibn Abī Zamanīn felt the need to give detailed information about the subject using *al-'Utbīyya*: "Muḥammad said: In the audition (*samā'*) of Yaḥyā, Ibn al-Qāsim said: If a woman who is pregnant and who is divorced with irrevocable *ṭalāq* demands clothes, if she is in the early period of the pregnancy, her husband should provide her clothes. If only three months and less remains for birth taking place, the necessary things during this period are provided to her. If clothes were provided for her in the early period of the pregnancy, then the remaining part is given to her in cash".³⁴⁴

³⁴¹ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/734.

³⁴² Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/735 who is referring to a transmission compiled by al-'Utbī that can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa-l-taḥṣīl*, vol. 4/335.

³⁴³ Ibid, vol. 2/736.

³⁴⁴ This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa-l-taḥṣīl*, vol. 4/339-440.

Through this text is clear that Ibn Abī Zamanīn did not totally agree with the doctrine of Mālik. The situation that was mentioned by Mālik specified which type of divorce occurs between the couple because the divorce type is effective on whether the husband should provide the maintenance and dwelling for his divorced wife during the waiting period or not. What is mentioned is only 'a man who divorced his wife', it is not known whether the divorce was revocable or not. Ibn Abī Zamanīn, on his part, specified that the couple divorced with irrevocable *ṭalāq* when she was pregnant, and that the husband is still responsible to provide her needs because of the pregnancy. Ibn Abī Zamanīn elucidates what the man should provide exactly and in which period of pregnancy.

d. The compensation provided by wives

The cases regarding *khul'* represent the negotiations women used to release themselves from their marital bonds. *Khul'* means the dissolution of marriage at the initiative of the wife and is a commonly practiced type of divorce. One of the most important features of *khul'* is that it means an irrevocable separation. An offer and its acceptance are two major components for its realization. The consent of the woman is necessary even though there is reason to believe that women could be forced by their husbands to start a *khul'* procedure. In fact, *khul'* offered the husband certain advantages such as the possibility of finalizing the marriage without having to fulfil the economic obligations required in *ṭalāq*. A wife is obliged to compensate her husband economically if she wants to initiate the divorce.

The most important discussion regarding *khul'* divorce is related to the consent of the husband. Two groups of religious scholars - conservatives and pragmatists - interpret this issue in different ways. While the conservatives only permit a woman to divorce through *khul'* with the consent of the husband, pragmatists argue that the consent of the husband is not necessary to legitimize a *khul'* pronouncement.³⁴⁵ The religious scholars' attitudes towards *khul'* and its procedures differ markedly. Although Ibn Abī Zamanīn does not express his

³⁴⁵ Mahmoud Jaraba, "The practice of *khul'* in Germany: Pragmatism versus conservatism", *Islamic Law and Society* 26 (2019), p. 1.

opinion properly in the *Muntakhab al-aḥkām*, it is possible to make inferences about his opinion from the quotations he chose, particularly the part about *khul'*, licit things from *khul'*, necessary things from *ṭalāq* in *khul'* and in nonreciprocal *mukhāla'a*.

As we have seen so far, Ibn Abī Zamanīn mentions his own opinion very rarely, but on this issue he made an exception to the point of stating "in my opinion". This he did regarding the case of a couple who wanted to make *khul'*, but there was a disagreement between them: "Mālik was asked about a man who had married a woman paying her a specified dower, then the woman gave ten *dīnārs* to him as a ransom before having sexual intercourse with him and subsequently she wanted to add half of the dower to the ransom. Mālik said: "She is not entitled to do that." Ibn al-Qāsim heard from al-Layth that he said the same thing on this issue" (Question 47).³⁴⁶ In this case, the husband already paid the dower but their marriage was not consummated. It can be said that the husband did not owe anything to the woman because prompt dower was paid and deferred dower did not need to be paid because of the fact that they did not have sexual intercourse. Then the woman gave ten *dīnārs* to him as a ransom. Her intention was to add half of the dower to the ransom. However, according to the doctrines of Mālik, Layth b. Sa'd and Ibn al-Qāsim, she can't do that. It is here that Ibn Abī Zamanīn states: "In my opinion, as regards this issue, it is the same whether the dower has been paid in cash or not. One of the things that explains this issue is that if he had given her the dower in cash, and subsequently she had invited him to leave her or to make *mubāra'a*, and he had done so, then she is (required) to give back to him all that she took from him. She is fact *ḥarām* for him and thus she is not entitled to anything from the dower in the case that she had taken possession of it. In the case that she had not taken the dower, she cannot demand it from him. If the woman had said to him before having sexual intercourse: 'Divorce me, I will give you a determined amount of my dower', he is to take what she gives and she is entitled to receive half of the remaining part of the dower in the case that he had not paid it in cash to her" (Question 47).³⁴⁷

³⁴⁶ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/698.

³⁴⁷ Ibid, vol. 2/698.

Ibn Abī Zamanīn did not only mention his own opinion but also he examined the issue in depth to clarify it. As we understand from his explanation, when a woman requests to make *khul'* with her husband before the consummation of the marriage, she should pay the dower back as a ransom. Until this point, all scholars who mentioned this subject agree on this issue, but Ibn Abī Zamanīn added another possibility: if the woman made an agreement with her husband about a specific amount to give him as a ransom from the dower, she should pay it but she is also entitled to take the remaining part of the dower. In other words, by accepting her statement that she will ransom herself with part of her dower, even if he had not given it to her, the man is obliged to take what she gives him and to pay her the remaining part of the agreed upon dower.

On the other hand, Ibn Abī Zamanīn argues that a woman should not be harmed because of the ransom that is provided by her for her husband in order to obtain *khul'* (Question 36).³⁴⁸ Another important *khul'* case from the *Muntakhab al-aḥkām* is about the uncertainty of a ransom for *khul'*. The scholars agreed that *khul'* is licit even if it takes place including an element of uncertainty. Ibn Abī Zamanīn said: “Saḥnūn asked Ibn al-Qāsim: ‘What is your opinion regarding a woman who makes *mukhāla’a* with her husband in return for a slave of hers whom she has not described nor has her husband ever seen him before? Is this *khul'* licit?’ Ibn al-Qāsim said: ‘Yes. This issue falls into the same category as performing *mukhāla’a* in return for an escaped slave, an escaped camel, unripe fruit or an unborn baby. *Khul'* is valid in all these cases, and to the man belongs the thing determined for *mukhāla’a* by the woman’. Saḥnūn and others apart from him said: All of them are valid because the man releases *ṭalāq* from his hand, and the release of *ṭalāq* from his hand entailing danger of loss, harm or failure (*bi-l-gharar*) is licit. One should not act with *gharar* to go against marriage” (Question 49).³⁴⁹

Mālik in the *Mudawwana*³⁵⁰, Ibn Abī Zamanīn in the *Muntakhab al-aḥkām*, Ibn Abī Zayd al-Qayrawānī in the *Risāla*³⁵¹ and Ibn Rushd (al-Ḥafīd) in

³⁴⁸ Ibid, vol. 2/695.

³⁴⁹ Ibid, vol. 2/699-700.

³⁵⁰ Saḥnūn, *Al-Mudawwana al-kubrā*, vol. 4/154 and 5/353.

³⁵¹ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 105.

the *Bidāyat al-mujtahid*³⁵² argued the same. The most interesting aspect here is the acceptance of uncertain element in the realization of *khul'* while any marriage involving uncertainty is not accepted.

3. Acquired responsibilities by dissolution of marriage

Just as there are responsibilities that come with marriage, the responsibilities that come with divorce are not to be underestimated. These responsibilities are not only relevant to the social bonds but also related to economic obligations. The relationship between the couples continues even after the termination of the marriage. Its length depends on the situations and relationships between the couples, particularly if they have a child, as in such a case the time will be longer, but if otherwise, their relationship will end in less time, after a while.

Scholars gave importance to the marital rights and responsibilities that are acquired by divorce. They agreed about the obligations but they differed on four points such as the time of the obligation, amount, for whom is it obligatory and upon whom.³⁵³ Childcare, breastfeeding, custody of the children and remarriage of the divorced woman are primary issues discussed in the *Muntakhab al-aḥkām* regarding the responsibilities arising after divorce. These are dynamics that are related to each other directly and play an important role in regulating the social and economic relationship between spouses after their separation. Islamic law specified the responsibilities and duties between the couples, with the scholars developing different interpretations and nuances regarding them.

a. Childcare and breastfeeding after divorce

There are many rights which children have over their parents and similarly parents have over their children. Most of the doctrines of the Maliki school underlined the domestic character of a mother's upbringing of her children, stressing the importance of her role until the children are able to eat,

³⁵² Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/80.

³⁵³ Ibid, vol. 2/63.

drink, and dress by themselves. Islamic law insisted that infants be breastfed for at least two years especially when couples have disagreement on the issue or the mother had been divorced.³⁵⁴ Also, the scholars were strict about protecting the child's best interest in terms of determining the limits of the relationship that a father could have with his child while the child was still in the care of the mother.

In the *Muntakhab al-aḥkām*, Ibn Abī Zamanīn paid careful attention to children and breastfeeding. The concern that guides the cases discussed is the general welfare of the child. He argued that the mothers breastfeed their children but the fees should be provided to them by the fathers. In other words, the mother is responsible to breastfeed the child but the father is the person who has to provide the financial support for this. Ibn Abī Zamanīn made a quotation from the *Mudawwana al-kubrā*: "Saḥnūn said: I asked Ibn al-Qāsim: What if the father died and the mother is breastfeeding her child and she is responsible for it, does the necessity of breastfeeding the child disappear for her? Ibn al-Qāsim said: If the child has financial means, it is like that, but if the child has no financial means, she breastfeeds the child because breastfeeding is necessary for her due to matrimonial maintenance. Ibn al-Qāsim told Saḥnūn: The maintenance of the child is not responsibility of the woman" (Question 184).³⁵⁵

On the other hand, even if the father died, the responsibility of the breastfeeding does not attach to the mother. She may be forced to breastfeed the child, but only for a fee. "Ibn al-Qāsim said: If the father died and the child has financial means and the mother refuses the breastfeeding of the child, she can do that. She then rents a foster mother with the financial means of the child, but if it is feared that the child will not accept someone else, the mother is forced to breastfeed the child and a fee is paid to her. This is the doctrine of Mālik" (Question 184).³⁵⁶ This fee must be as much as the wage that is offered to an

³⁵⁴ Avner Giladi, *Infants, parents and wet nurses: Medieval Islamic views on breastfeeding and their social implications*. Leiden: Brill, 1999, p. 116.

³⁵⁵ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/765-66 quoting Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/416.

³⁵⁶ Ibid, vol. 2/766.

unfamiliar woman and the economic and social status of the woman determines its amount.³⁵⁷

Ibn Abī Zamanīn explained this situation in this way: “Saḥnūn said: What if they have disagreement about the wage of the breastfeeding? The mother says: “I can breastfeed the child in return of such a wage”, and the husband finds a foster mother to breastfeed the child in return of a lesser wage than that asked by the mother. Mālik said: If the mother does not accept the wage that is offered to an unfamiliar woman, she is not entitled to do that. If the mother requests the same wage that would be paid to an unfamiliar woman, she can do that. The father is not entitled to separate the mother and the child. If the child does not accept a foster mother and it is feared that the child may be affected, the mother is more entitled and the money is paid to her. If she does not accept, she is forced to do that” (Question 185).³⁵⁸

There is divergence between jurists regarding the rights of the husband over the wife with respect to nursing and taking care of the house. According to Mālik and some of his followers, breastfeeding is an obligation for a woman of lower status and not for one with a higher status unless the child will not accept except her breastfeeding. The reason of this disagreement is probably related to how to interpret the verse on breastfeeding: does it convey that breastfeeding is an obligation or not?³⁵⁹ Ibn Abī Zamanīn internalized the doctrine of Mālik regarding this issue as it is clear from the above-mentioned cases. On the other hand, the child should not be affected by this situation negatively. If the child is affected negatively by this situation, the father provide the wage for the suckling and his divorced wife breastfeed the child even though she does not have to do that.

³⁵⁷ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/63.

³⁵⁸ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/766.

³⁵⁹ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/66.

b. Custody of children

In the Maliki school, custody has two separate but interrelated components such as *ḥaḍāna* and *wilāya*.

The *ḥaḍāna* refers literally to nurturing, nursing and raising, and determines who looks after the children and where they inhabit. Maliki law gives priority to the mother in this issue.³⁶⁰ The custody and care of a child belongs to the mother until the child reaches puberty, which is defined differently for each gender.³⁶¹ When the economic setback experienced by women after divorce is taken into consideration, it was not always possible for them to care for their children. If the mother is not able to do it or she dies, *ḥaḍāna* will pass to other close relatives.³⁶²

Wilāya means literally power, authority and supervision, particularly related to the child's upbringing and supervision, providing the maintenance of the child and making sure that the child is brought up as Muslim.³⁶³ The father has the responsibility to supervise the general upbringing of the child while the child is staying with the mother or other family custodians. The father as a natural guardian of the child is responsible for the upbringing, protecting, feeding and clothing of the child. He is obliged to provide all the expenses that are related to the upbringing of the child such as accommodation, education, discipline, consent the marriage and religious upbringing.³⁶⁴

Ibn Abī Zamanīn in the *Muntakhab al-aḥkām* argued that *wilāya* (supervision) comes before from *ḥaḍāna* (care). These two major elements related to the custody provisions have different legal effects, giving rise to another area of contradiction. "Saḥnūn said: What if the father wants to go somewhere and takes with him the children from someone else than their mother and both of them are from the place where they married and divorced? Ibn al-Qāsim said: Mālik said: If the intention of the father is to settle in the place where is moving, he can take the children. Mālik said: The guardians of the

³⁶⁰ Saḥnūn, *Al-Mudawwana al-kubrā*, vol. 5/99.

³⁶¹ Ibid, vol. 5/356.

³⁶² Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/757.

³⁶³ Mir-Hosseini, *Marriage on trial: A study of Islamic family law: Iran and Morocco compared*, p. 212.

³⁶⁴ Mahdi Zahraa and Normi A. Malek, "The concept of custody in Islamic law", *Arab Law Quarterly* 13 No.2 (1998), p. 158.

children in this case are similar to the father, they can move with them wherever they want, regardless if their mother married or not, as long as the children stay with their father or their guardian. The mother is told: "Join them, if you wish". Mālik said: It is not necessary for her to go to the place that the children went with their father and guardian, except if the place is close such as at post distance or like that" (Question 169).³⁶⁵ In that case, the father is entitled to move with his children wherever they want and the decision of the mother is not important. The Qur'an underlines the importance of the father's role in this issue: "Call them after their true fathers; that is more equitable in the sight of God."³⁶⁶ It is obvious that the mother's share of custody is subordinated to that of the father. In other words, the child belongs to the father and the care of the child is only temporarily entrusted to the mother. Also, mothers must fulfill certain conditions to take the custody of their children such as being intelligent, having capacity to take charge of the child, being trustworthy, having moral soundness, providing safe environment for the child, having prudence and not having infectious diseases.³⁶⁷

Also, Ibn Abī Zamanīn follows Mālik and the jurists of the Maliki school regarding the issue that raising the child as a Muslim by the mother is another condition to obtain custody. Thus, Ibn Abī Zamanīn in his *Muntakhab al-aḥkām* quotes the *Mudawwana* when dealing with a mother who is not Muslim: "If it is feared that she will make them drink wine or eat pork, she has to be joined with Muslims and forbidden to allow such things to happen, but the child is not taken from her. Saḥnūn said: What if the woman is Zoroastrian, her husband converted to Islam, with her there are little children and she did not accept to convert. Ibn al-Qāsim said: She is in the same situation as the Muslim woman regarding custody" (Question 170).³⁶⁸ The right of *ḥaḍāna* given to mothers cannot be

³⁶⁵ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/758, quoting Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/358.

³⁶⁶ Al-Aḥzāb 5, <https://tanzil.net/#trans/en.arberry/33:5>

³⁶⁷ A. D. Russel and A. M. Suhrawardy, *A Manual of the law of marriage from the Mukhtaṣar of Sīdī Khalīl*. London: K. Paul, 2010, p. 323.

³⁶⁸ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/758-59, quoting the *Mudawwana al-kubrā* by Saḥnūn b. Sa'īd, vol. 5/359

denied even if she is a Christian, a Jew or a concubine, unless she is found wanting or she waives the right.

On the other hand, a mother loses the custody under specific circumstances such as in the situations of marrying someone, having an immoral life, neglecting to take proper care of the child, being apostate and waiving the right of the custody voluntarily, regardless there is a reason or not.³⁶⁹ Islamic law when deciding who has the right to care for a child established a rank of preferences taking into consideration the interest of the child. Although women seem to be preferable to men, the cases recorded in the *Muntakhab al-aḥkām* show that women are subject to men.

c. Remarriage for a divorced woman

The factor that determines whether a divorced couple will remarry or not is the type of divorce they choose. Divorced women are allowed to remarry, which was another way of securing their livelihood. This issue is specified in the Qur'an with this verse: "So if a husband divorces his wife (irrevocably), he cannot, after that, re-marry her until after she has married another husband and he has divorced her. In this case there is no blame on either of them if they reunite, provided they feel that they can keep the limits ordained by Allah. Such are the limits ordained by Allah, which He makes plain to those who understand."³⁷⁰ This regulation according to Islamic law intends to deter men from hastily divorcing their wives.³⁷¹

Ibn Abī Zamanīn explained this issue quoting from the book of Ibrāhīm b. Muzayn (d. 259/873), then he added his own explanation. "In the book of Ibn Muzayn: He said: I asked 'Īsā about the opinion of the Prophet when he mentioned *nikāḥ al-muḥalla*³⁷² and he said: No (she cannot remarry her former husband), until he (the new husband) enjoys the sexual relation (*tadhūq al-*

³⁶⁹ Russel and Suhrawardy, *A Manual of the law of marriage from the Mukhtaṣar of Sīdī Khalīl*, p. 330.

³⁷⁰ Al-Baqara: 230, <http://tanzil.net/#trans/en.arberry/2:230>

³⁷¹ Kayhan, "Negotiating matrimony: Marriage, divorce, and property allocation practices in Istanbul, 1755-1840", p. 316.

³⁷² *Al-muḥalla* is the man who marries a divorced woman in order to make it possible for the first husband to marry her again, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 383.

'*usayla*').³⁷³ What did the Prophet mean with this expression? 'Īsā said: What the Prophet meant was that the woman is not lawful for you until consummation of marriage has taken place with the (new) husband who married her, and this implies that (the following has to take place): the touching of sexual organs one with the other, and that sexual relation occurs by penetration, i.e. intercourse, even if he does not ejaculate" (Question 11).³⁷⁴ Ibrāhīm b. Muzayn (d. 259/873) referred to 'Īsā b. Dīnār (d. 212/827), an early Andalusī scholar who had studied with Mālik's student, the Egyptian Ibn al-Qāsim.

The *ḥadīth* quoted is taken from *al-Muwaṭṭa'*³⁷⁵. The Prophet used the metaphorical expression "*tadhūq al-'usayla*" to explain the situation by which a woman becomes licit for her former husband. 'Īsā b. Dīnār explained what this expression means. Consummation of marriage should take place with the new husband for the woman to become licit for her former husband. Ibn Abī Zamanīn, who mentioned his own opinion very rarely in the *Muntakhab al-aḥkām*, added his view after 'Īsā b. Dīnār's explanation. Muḥammad said: the 'little honey' (*al-'usayla*) is a metaphorical way of expressing the sweetness of the sexual intercourse. Whoever penetrates a woman (with at least the glans penis, i.e. the head of his penis), he has enjoyed sexual intercourse with her (*qad dhāqa al-'usayla*). Some lexicographers said: "*usayla* is the diminutive of honey (*al-'asal*)", and indeed it is the diminutive of *al-'asal* because honey is accepted as feminine and masculine word, but what is the prevalent view is to consider it a feminine word" (Question 11).³⁷⁶

Ibn Abī Zamanīn did not focus on the *nikāḥ al-muḥallal* or remarriage of a divorced woman with her former husband. He focused on giving details about the metaphorical expression used in the *ḥadīth* and how lexicographers evaluated this expression exactly. He did this because it is not easy to comprehend what *al-'usayla* refers. On his part, Qāḍī 'Iyāḍ mentioned the same *ḥadīth* to explain the same issue in his book *Madhāhib al-ḥukkām fī nawāzil al-*

³⁷³ Orgasm, *ibid*, p. 281.

³⁷⁴ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/687.

³⁷⁵ Mālik b. Anas, *Al-Muwaṭṭa' bi-riwāyātihi (Yaḥyā al-Laythī, al-Qa'nabī, Abī Muṣ'ab al-Zuhrī, al-Ḥadathānī, Ibn Bakīr, Ibn al-Qāsim, Ibn Ziyād) bi-ziyādātiḥā wa-zawā'idihā, wa-ikhtilāf al-fāzihā*, edited by Abū Usāma Salīm b. 'Īd al-Hilālī al-Salafī, vol. 2/526.

³⁷⁶ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/687.

*aḥkām*³⁷⁷ but he preferred to focus on the context instead of on the linguistic details. Also, al-Sha'bī al-Mālaqī³⁷⁸ mentioned the same *ḥadīth* in his *Al-Aḥkām*.³⁷⁹ Aḥmad b. Muḡhīth al-Ṭulayṭulī³⁸⁰ was asked regarding a man who divorced his wife three times in a one time or various times and then he wanted to return to her without marrying another person. The question is whether he can return to her or not. He gave the same example as Ibn Abī Zamanīn, i.e., no, he cannot remarry his former wife, until he (the new husband) enjoys the sexual relation (*tadhūq al-'usayla*). Thus, Ibn Abī Zamanīn, Qāḍī 'Iyāḍ and al-Sha'bī al-Mālaqī were interested in the same issue and gave the same specific example and references, but the fact that Ibn Abī Zamanīn concentrated on the linguistic aspects of the issue may indicate that jurists were not yet familiar with its meaning, while later scholars had already assimilated it.

³⁷⁷ Muḡammad b. 'Iyāḍ, *Maḍāhib al-ḥukkām fī nawāzil al-aḥkām: La actuación de los jueces en los procesos judiciales*, translated and edited by Delfina Serrano. Madrid: CSIC, 1998, p. 466.

³⁷⁸ See note 454.

³⁷⁹ Ibn Qāsim al-Sha'bī, *Al-Aḥkām*, p. 230.

³⁸⁰ See note 536.

CHAPTER V

OTHER LEGAL GENRES AND IBN ABĪ ZAMANĪN'S VIEWS ON DIVORCE IN HIS *MUNTAKHAB AL-AḤKĀM* IN RELATION TO THEM

In a general way, the law aims at regulating human communities by ordering behavior and imposing sanctions on deviations from such behavior with the purpose of ensuring justice. Differences arise in historical communities, among other factors, according to the different understandings of what the sources of the law are and what justice is. Also, the value of legal texts as historical sources is elicited by the fact that one may therein comprehend diverse conflicts arising among various elements of society in different historical periods and geographical areas. The analysis of such conflicts involves exploring the different ways in which they are addressed and solved, including the judicial systems as well as matters pertaining to the legal capacity of individuals.³⁸¹

As regards the premodern Islamic world, archival records of judicial procedures are largely absent,³⁸² especially if compared with the Ottoman case.³⁸³ There are however exceptions both outside³⁸⁴ and inside al-Andalus.³⁸⁵

³⁸¹ For the Islamic context and for the case of women see Cristina de la Puente, "Juridical sources for the study of women: Limitations of the female's capacity to act according to Maliki law", in *Writing the feminine: Women in Arab sources*, edited by Randi Deguilhem and Manuela Marín. New York: I.B. Tauris, 2002, p. 95.

³⁸² On this see Eduardo Manzano, "Introduction", in *From al-Andalus to Khurasan: Documents from the Medieval Muslim world*, edited by P. Sijpesteijn, L. Sundelin, S. Torallas and A. Zomeño. Boston: Brill, 2007, p. xviii.

³⁸³ On this see Suraiya Faroqhi, *Approaching Ottoman history: An Introduction to the sources*. Cambridge: Cambridge University Press, 2010, p. 8; Uriel Heyd, "Some aspects of the Ottoman *fatwā*", *Bulletin of the School of Oriental and African Studies* 32 (1969), p. 36.

³⁸⁴ For the case of the Fāṭimīs see Marina Rustow, *The lost archive: Traces of a caliphate in a Cairo Synagogue*. Princeton: Princeton University Press, 2019, p. 2.

³⁸⁵ For the Nasrid period studies see A. Zomeño, "Transferencias matrimoniales en el Occidente Islámico medieval: las joyas como regalo de boda", *Revista de Dialectología y Tradiciones Populares* 51 (1996), pp. 79-96; id., "Notaries and their formulas: The legacies from the University Library of Granada", pp. 59-77; id., "When death will fall upon him: Charitable legacies in 15th century Granada", in *Charity and giving in Monotheistic religions*, edited by Miriam Frenkel and Yaacov Lev. Berlin: Walter de Gruyter, 2009, pp. 217-234; id., "From private collections to archives: How Christians kept Arabic legal documents in Granada", *Al-Qanṭara* 32 (2011), pp. 461-479; id., "Families and family ties in Nasrid

This scarcity has directed scholars who work on Islamic legal procedures to take advantage of literary sources, most especially legal formularies, manuals for market inspectors and *fatāwā* compilations, but also historical chronicles and biographical sources.³⁸⁶ The most useful type of source in order to check the relation between theoretical legal sources and legal practice are *fatāwā* compilations. Their usefulness as regards the interplay between theory and practice increases if the materials taken from such compilations are complemented by those found in *wathā'iq* works. Given that the focus of this study is the *Muntakhab al-aḥkām* by Ibn Abī Zamanīn, we shall concentrate on *fatāwā* from the same period (4th/10th century) and on a *wathā'iq* work by another fourth/tenth century author, *al-Wathā'iq wa-l-sijillāt* by Ibn al-'Aṭṭār (d. 399/1008).³⁸⁷ The aim is to analyze similarities and differences in the context of dissolution of marriage. *Fatāwā* compilations and *wathā'iq* works can inform us of the concrete possibilities available to women when they decided to use legal and judicial procedures or were drawn by others into them.³⁸⁸

Fatāwā and *wathā'iq* will be explored in what follows in separate sections. For each case, there will be first a general presentation of their characteristics and then a more concrete approach focusing, as mentioned, on the works chronologically close to Ibn Abī Zamanīn.

Granada", in *The Nasrid Kingdom of Granada between East and West*, pp. 195-215; Maribel Fierro, "Documentos legales en fuentes andalusíes", *Al-Qanṭara* XXII (2001), pp. 205-9; María Jesús Viguera Molins, "Documentos en crónicas árabes", in *Documentos y manuscritos árabes del Occidente Musulmán medieval*, edited by Nuria Martínez de Castilla. Madrid: CSIC, 2010, pp. 189-204; Alfonso Carmona, "Tres documentos en la literatura biográfica andalusí de nombramiento para cargos judiciales", in *Cadíes y cadiazgo en al-Andalus y el Magreb medieval: Estudios onomástico-biográficos de al-Andalus XVIII*, edited by Rachid El Hour. Madrid: Consejo Superior de Investigaciones Científicas, 2012, pp. 99-119.

³⁸⁶ Powers, "Four cases relating to women and divorce in al-Andalus and the Maghrib, 1100-1500", p. 383.

³⁸⁷ Ibn al-'Aṭṭār, *Al-Wathā'iq wa-l-sijillāt: Formulario notarial y judicial Andalusí del alfaquí y notario Cordobés m. 399/1009*, edited by Pedro Chalmeta and Federico Corriente. There is a Spanish translation: Ibn al-'Aṭṭār, *Formulario notarial y judicial andalusí del alfaquí y notario cordobés m. 399/1009*, introducción, estudio y traducción anotada P. Chalmeta y M. Marugán.

³⁸⁸ Zomeño, "Abandoned wives and possibilities for divorce in al-Andalus: The evidence of the *wathā'iq* works", p. 114.

1. *Fatwā* as the legal opinion issued by the muftī

The *fatwā* (pl. *fatāwā*) is an advisory legal opinion delivered by a mufti (*muftī*), a jurisconsult, in response to a specific query - received from a petitioner - that might be about any subject regarding the Islamic way of life.³⁸⁹ The petitioner may be the ruler, the judge or another magistrate. But the *fatwā* is also a nonbinding legal opinion issued by an Islamic expert-jurist in reply to a question posed by a layman.³⁹⁰ The *fatāwā* are thus similar to the responses provided by experts in Roman law attained in the process of *jus respondi*, or elucidations provided by experts in Jewish law in *responsas*.³⁹¹ However, even though the response is not binding, it has persuasive authority.

In the Qur'an, the term *fatwā* is used in two verbal forms, meaning "asking for a definitive answer," and "giving a definitive answer" (4:127, 176),³⁹² even though neither passage has a binding clause.³⁹³ Also, the premodern traces of the activity of issuing *fatāwā* can be linked back to Qur'an, which presented a series of instructions relating to social behavior and relations particularly regarding marriage, divorce, punishment, commerce, inheritance and slavery. Questions about the relationship between new practices and local custom were

³⁸⁹ Judith Tucker, "And God knows best': The *fatwā* as a source for the history of gender in the Arab world", in *Beyond the exotic: Women's histories in Islamic societies*, edited by Amira El-Azhary Sonbol. Syracuse: Syracuse University Press, 2005, p. 165; Francisco Vidal Castro, "El muftí y la fetua en el derecho islámico: Notas para un estudio institucional", *Al-Andalus-Magreb* VI (1998), pp. 289- 322. Other terms used are *nawāzil* (legal cases) and *masā'il* (legal questions), sometimes employed interchangeably.

³⁹⁰ Juan Martos Quesada, "Características del muftí en al-Andalus: contribución al estudio de una institución jurídica hispanomusulmana", *Anaquel de Estudios Arabes* 7 (1996), pp. 127-144; Delfina Serrano Ruano, "Qadis and muftis: Judicial authority and the social practice of Islamic law", in *Routledge Handbook of Islamic law*, edited by Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan. New York: Routledge, 2019, p. 136.

³⁹¹ Selma Zecevic, "Missing husbands, waiting wives, Bosnian muftis: *Fatwā* texts and interpretation of gendered presences and absence in late Ottoman Bosnia", in *Women in Ottoman Balkans: Gender, culture and history*, edited by Amila Buturovic and Irvin Cemil Schick. London: Tauris, 2007, p. 340.

³⁹² Al-Nisā: 127, <https://tanzil.net/#trans/en.arberry/4:127>

Al-Nisā: 176, <https://tanzil.net/#trans/en.arberry/4:176>

³⁹³ Muhammad Khalid Masud, Joseph A. Kéchichian, Brinkley Messick, Ahmad S. Dallal and Jocelyn Hendrickson, "Fatwā", in *The Oxford Encyclopedia of the Islamic World*. Oxford Islamic Studies Online. Accessed May 16, 2021 <http://www.oxfordislamicstudies.com/article/opr/t236/e0243>

raised by members of the new community of believers. They approached to Prophet Muḥammad and asked him to elucidate a new practice.³⁹⁴

During the first Islamic century, legal activity seems to have revolved around the question and answer format (of which the *fatwā* is part), a phenomenon that makes sense in the context of a nascent religion which heavily relied on the advice of the experts who best knew the law.³⁹⁵ Later, *fatāwā* played a remarkable role in the growth and gradual change of Islamic substantive law.³⁹⁶ *Fatāwā* issued by the major jurists were often gathered and published in compilations. Wael Hallaq, a leading scholar in the study of Islamic law and its evolution, argues that the *fatāwā* found in the extant compilations may be classified into two categories: the first category (primary *fatāwā*) are those questions and answers that are preserved more or less in their original form and content; the second are those questions and answers that have undergone systematic alterations.³⁹⁷ Most primary *fatāwā* appeared as a result of a particular social reality involving real people with real problems.³⁹⁸ The contributions by Francisco Vidal Castro,³⁹⁹ David Powers,⁴⁰⁰ Juan Martos⁴⁰¹

³⁹⁴ David Powers, "Fatwā, premodern", in *Encyclopaedia of Islam, THREE*, edited by Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas and Everett Rowson. Accessed May 10, 2021 http://dx.doi.org/10.1163/1573-3912_ei3_COM_27048

³⁹⁵ Émile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*. Leiden: Brill, 1960, p. 220; R.W. Bulliet, *Islam. The view from the edge*. New York: Columbia University Press, 1994.

³⁹⁶ Wael B. Hallaq, "From *fatwā* to *furū'*: Growth and change in Islamic substantive law", *Islamic Law and Society* 1 No.1 (1994), p. 62.

³⁹⁷ Wael B. Hallaq, "Murder in Cordoba: *Ijtihād*, *iftā'* and the evolution of substantive law in Medieval Islam", *Acta Orientalia* 55 (1994), pp. 55-83; id., *Authority, continuity and change in Islamic law*. Cambridge: Cambridge University, 2001; id., *The origins and evolution of Islamic law*. Cambridge: Cambridge University Press, 2005; id., *An Introduction to Islamic law*. Cambridge: Cambridge University Press, 2009; id., *Sharī'a: Theory, practice, transformations*. Cambridge: Cambridge University Press, 2009.

³⁹⁸ Hallaq, "From *fatwā* to *furū'*: Growth and change in Islamic substantive law", p. 32.

³⁹⁹ Francisco Vidal Castro, "El muftí y la fetua en el derecho islámico: Notas para un estudio institucional"; id., "Las obras de Aḥmad al-Wanšarīsī (m. 914/ 1508): Inventario analítico", *Anaquel de Estudios Árabes* 3 (1992), pp. 73-112; id., "El *Mi'yār* de al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones", *Miscelánea de Estudios Árabes y Hebraicos* 42 (1994), pp. 317-362.

⁴⁰⁰ David Powers, "Legal consultation (*ḥuṭyā*) in Medieval Spain and North Africa", id., "Women and divorce in the Islamic West: Three cases"; id., M. Khalid

among other scholars, on the muftis, *fatāwā*, and the legal doctrines and practices in Islam enhance our understanding of both substantial and methodological aspects of the Islamic legal system and its general development, particularly in Western Islam. In a book devoted to the study of *fatāwā* from the Islamic West, -particularly family law cases involving legal minority, guardianship, divorce, inheritance, inheritance and endowments- Powers argues that, contrary to certain perceptions, the cases studied indicate that qadis and muftis placed a high value on reasoned thought and were sensitive to the manner in which law, society and culture interacted with and shaped each other.⁴⁰² On her part, Élise Voguet has focused on *fatāwā* produced in the medieval central Maghreb, analyzing how the cases reflect the role of the jurists in managing everyday social life and in mediating between rural communities and the urban, political center. ⁴⁰³ Maribel Fierro offers a comprehensive overview of the *fatāwā* compilations produced in the Islamic West from the 3rd/9th-9th/15th centuries where the interested reader can find the relevant references (see also below, section 2).⁴⁰⁴

a. Legal procedures of request

Masud; Rudolph Peters, "Qadis and their courts: An Historical survey"; id., *The development of Islamic law and society in the Maghrib: Qāḍīs, muftīs and family law*.

⁴⁰¹ Martos Quesada, "Características del muftí en al-Andalus".

⁴⁰² Powers, *Law, society, and culture in the Maghrib, 1300-1500*, p. 1. See also Castro, "El muftí y la fetua en el derecho islámico: Notas para un estudio institucional", p. 290.

⁴⁰³ Élise Voguet, *Le monde rural du Maghreb Central (XIVe-XVe siècles): Réalités sociales et constructions juridiques d'après les Nawāzil Māzūna*. Paris: Publications de la Sorbonne, 2014, p. 32 ; Delfina Serrano, "Élise Voguet, *Le monde rural du Maghreb Central (XIVe-XVe siècles): Réalités sociales et constructions juridiques d'après les Nawāzil Māzūna*, Paris: Publications de la Sorbonne, 2014", *Der Islam* 95 No.1 (2018), p. 258.

⁴⁰⁴ Maribel Fierro, "Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)", *Jerusalem Studies in Arabic and Islam* 50 (2020), pp. 43-100.

As mentioned, a *fatwā* is the response of a mufti or learned jurist to a request posed by an individual Muslim.⁴⁰⁵ The person who poses the question is called *mustaftī* and most frequently he/she is a layman asking about some aspect that is relevant for his/her daily affairs. The question might also be posed by a qadi who seeks the advice of learned experts, particularly in cases dealing with unconventional issues related to jurisprudence or legal doctrine.⁴⁰⁶ In brief, the text presents a recorded dialogue between the *mustaftī* and the mufti.⁴⁰⁷ Nevertheless, this dialogue as preserved in the texts available to us is not a spontaneous and oral process. Evidence in fact demonstrates that in the process of writing down the *fatāwā* - especially in judicial contexts- the oral exchange between the parties involved - if any - was subject to redaction and therefore to changes and adaptation to the new context.⁴⁰⁸

When a qadi was the *mustaftī*, he generally formulated his request for a *fatwā* with a written summary of the facts of the case shaped according to the abstract, impersonal and objective language of law.⁴⁰⁹ Although the names of muftis who issued the *fatāwā* are generally mentioned, the same does not hold for the people who specifically asked questions nor for the protagonists of the case, who were modified by abstractions such as “the woman” and “the man”, or by common names like ‘*Amr* or *Zayd* in the case of males.⁴¹⁰ Hence, the queries acquired a hypothetical and abstract character.

The questions have varied forms and styles but they often share a similar internal structure including several parts. A *fatwā* generally begins with phrases like: “A question was written to Fulān on” or “Fulān was asked about”. Secondly, the legal problem is mentioned by the *mustaftī*, sometimes in detail

⁴⁰⁵ Castro, “El muftí y la fetua en el derecho islámico: Notas para un estudio institucional”; Hallaq, “From *fatwā* to *furū*’: Growth and change in Islamic substantive law”, p. 34.

⁴⁰⁶ Powers, “Four cases relating to women and divorce in al-Andalus and the Maghrib, 1100-1500”, p. 382.

⁴⁰⁷ Powers, “Legal consultation (*futyā*) in Medieval Spain and North Africa”, p. 86.

⁴⁰⁸ Amalia Zomeño, “The Stories in the *fatwās* and the *fatwās* in history”, in *Narratives of truth in Islamic law*, edited by Baudouin Dupret, Barbara Drieskens and Annelies Moors. London: I.B. Tauris, 2008, p. 27.

⁴⁰⁹ Powers, “Four cases relating to women and divorce in al-Andalus and the Maghrib, 1100-1500”, p. 384.

⁴¹⁰ Zomeño, *Dote y matrimonio en al-Andalus y el-norte de África: Estudio sobre la jurisprudencia islámica medieval*, p. 34.

and with mention of all the circumstances of the case, but other times only very brief information is given.⁴¹¹ Then the mufti proceeds to give his solution to the problem.⁴¹² A *fatwā* is especially useful for legal studies historically grounded when the *mustaftī* offers as many details as possible, providing the mufti with an accurate and objective account, for example, transcribing full documents, dialogues between parties and the specific context of the case; this is how it should be like in theory. Sometimes, questions were sent from one locality to another to obtain the legal advice of a jurist who had a high reputation and was considered especially authoritative.⁴¹³ The questioner should ask a direct, clear and exact question, so as to give the mufti the necessary information regarding the specificity of the case, ending with formulas such as “Please answer this”, “Explain this to us” or “God willing”.⁴¹⁴

The style of the narrative is affected by the content of the story. It can be classified in three categories: judicial, semi-judicial and non-judicial.⁴¹⁵ The first category refers to legal cases affecting individuals that are brought to the judge's court; the *mustaftī* particularly requests information regarding the way individuals should follow the legal procedures, interpret legal documents or find witnesses. The second category refers to individuals versus individuals, that is, questions about litigations between two individuals. The *mustaftī* should try to be objective and provide the different versions given by both parties as well as their contrasting interests. The last category refers to individuals versus society, that is, the questions are about problems that individuals have with the community where they live. Generally, the problems are related to the local

⁴¹¹ Powers in his book, *Law, society and culture in the Maghrib, 1300-1550*, collected very detailed *fatāwā* recorded by al-Wansharī's *al-Mi'yār al-mu'rib* and that included not only names and localities, but also dates. This made possible a close historical readings of such cases.

⁴¹² The muftis quoted are almost universally males.

⁴¹³ This was the case with Ibn Rushd al-Jadd in Almoravid times, as shown by Delfina Serrano, “Ibn Rushd al-Jadd (d. 520/1126)”, in *Islamic legal thought: A compendium of Muslim jurists*, edited by Oussama Arabi, David Powers and Susan Spector. Leiden: Brill, 2013, pp. 295-322.

⁴¹⁴ Zomeño, “The Stories in the *fatwās* and the *fatwās* in history”, p. 28.

⁴¹⁵ M. Fadel, “Rules, judicial discretion and the rule of law in Nasrid Granada: An analysis of *al-Ḥadīqa al-mustaḥilla al-naḍra fī al-fatāwā al-ṣādira 'an 'ulamā' al-Ḥadra*”, in *Islamic law: Theory and practice*, edited by Robert Gleave and E. Kermeli. London: I.B. Tauris, 1997, p. 52.

customs and ways of doing things inside their communities. The *istiftā'* frequently explains a custom among the people of a specific place and how a single individual has acted in transgression of such custom.⁴¹⁶

The words of the *mustaftī* display a high degree of knowledge of the law. An uneducated questioner confronts an obvious difficulty in assessing how the information should be formulated according to legal and scholarly credentials, which means that the *mustaftī*'s intervention has often been subject to a redaction process by the mufti to adapt it and make it comprehensible within a legal framework.⁴¹⁷ A mufti is not expected to formulate his decision like a jurist, that is, he does not have to write in his answer words or phrases of the type "there are two opinions on this matter".⁴¹⁸ Many answers usually consist of a short answer which reads either "yes" (it is permitted) or "no" (it is not permitted) because the main goal is to give a clear guide and a practical answer. A mufti should use uncomplicated language; while he can quote a relevant Quranic verse or a *ḥadīth*, he should avoid an argument based on *qiyās* and on *ijtihād* in order to prevent any confusion in the unlearned reader. However, if the *fatwā* was prepared for a qadi instead of a layman, it was acceptable to mention the method of *ijtihād*.⁴¹⁹

The request should deal with a real issue; thus, if a layman asks about something that has not taken place or is invented, a reply is not necessary in this situation.⁴²⁰ The request needs to be framed in such a way as to raise convenient points of law, and the reply should zoom in such points, peruse them in light of the surrounding circumstances, with the mufti consulting germane texts including other *fatāwā*, so as to attain an opinion based on the mufti's

⁴¹⁶ Zomeño, "The Stories in the *fatwās* and the *fatwās* in history", p. 29.

⁴¹⁷ M. Khalid Masud, Brinkley Messick and S. David Powers, "Muftis, fatwas, and Islamic legal interpretation", in *Islamic legal Interpretations: Muftis and their fatwas*, edited by M. Khalid Masud, Brinkley Messick and S. David Powers. Massachusetts: Harvard University Press, 1996, p. 21.

⁴¹⁸ Fadel, "Rules, judicial discretion and the rule of law in Nasrid Granada: An analysis of *al-Ḥadīqa al-mustaqilla al-naḍra fī al-fatāwā al-ṣādira 'an 'ulamā' al-Ḥadra*", p. 50.

⁴¹⁹ Tucker, "'And God knows best': The *fatwā* as a source for the history of gender in the Arab world", p. 169.

⁴²⁰ Norman Calder, *Islamic jurisprudence in the classical era*, edited by Colin Imber and Robert Gleave. Cambridge: Cambridge University Press, 2014, p. 14.

understanding of the judicial tradition and its application to the specific set of circumstances. While the question and the reply are inevitable elements of the *fatwā* text, they were occasionally accompanied by the jurist's declaration of the rationale behind his judgment, as well as by a sign of which authoritative texts he has taken into consideration in the process of evaluating the case in query.⁴²¹ The listing of authoritative sources and the declaration of the reasoning behind a certain ruling allow the analysis of the complicated interpretative process required in the issuing of an expert-opinion on any given matter. In such cases, the reader of a *fatwā* text that includes all the above-mentioned information is capable of seeing the various stages of the procedures, from the mufti's re-reading of picked authoritative texts, through his comments on the case at hand, to the last stage leading to the issue of his specific ruling that may take the form of a short reply.⁴²²

In the case of judicial *fatāwā*, the *istiftā'* and the *jawāb* are manifestations of the intimate and reciprocal relationship between the mufti and the qadi. As mentioned, the *istiftā'* may include a transcription of one or more legal documents relating to the specific cases, like documents of dower agreement or marriage contracts.⁴²³ The mufti's knowledge of the doctrine according to his law school is reflected in the *jawāb*. The *istiftā'* illuminates the workings of the qadi and his court, while the *jawāb* externalizes the modes of legal reasoning employed by muftis. The unification of the *jawāb* and the *istiftā'* marks the meeting point between the work of the mufti and the qadi, the legal doctrine and legal practice. Analyses that consist of merely focusing on qadi courts are not sufficient to understand how the law works in society, while combining such analyses with an examination of the *fatāwā* leads to a better understanding of the activity of the qadi and his court.⁴²⁴

⁴²¹ Rachid el Hour, "El cadiazgo de Jaén en época almoravide: Una propuesta de interpretación", in *Cadies y cadiazgo en al-Andalus y el Magreb Medieval*, edited by Rachid el Hour and Rafael Mayor. Madrid: CSIC, 2012, p. 168.

⁴²² Zecevic, "Missing husbands, waiting wives, Bosnian muftis: *Fatwā* texts and interpretation of gendered presences and absence in late Ottoman Bosnia", p. 340.

⁴²³ Powers, "Four cases relating to women and divorce in al-Andalus and the Maghrib, 1100-1500", p. 382.

⁴²⁴ Ibid, p. 385.

b. The functions of the mufti

The mufti's role affected both the public and private spheres, as his activity could be limited to advice on religious matters that concerned individuals (for example, advising them on how to conduct their lives as Muslims) but also had to do with legal matters, including dealing with legal theory and reaching solutions for practical cases that came up in the courts.⁴²⁵ Muftis worked as legal consultants for judges and issued *fatāwā* at the request of provincial administrators during the Umayyad period (41-132/661-750). Some muftis became part of the judicial administration and the activity of *iftā'* acquired a public and official nature.⁴²⁶ The mufti - in addition to giving advice to the judge in the court - was also usually involved in teaching and in discussing legal issues with other jurists.⁴²⁷ Furthermore, the muftis' training had to be extensive and deep as their activities required a good general knowledge of law: when dealing with a specific case, the answers they gave had to take into account the relations between the universality of the law and the locality of the case.⁴²⁸ Their personal piety was also an important characteristic as it gave them religious authority and reputation.

Muftis were thus a fundamental part of the legal system. The first muftis were pious men who acted in a private capacity, providing authoritative solutions for Muslims who were unclear about what constituted convenient Islamic behavior or who were unaccustomed with the exhaustive provisions of the Qur'an, *ḥadīth* and Islamic law.⁴²⁹ Over time, muftis continuously received questions on legal issues from the qadis acting in their capacity as *muftis* and once they received the muftis' answers they based on them their legal rulings. Even though the qadi did not generally prepare a written explanation of the

⁴²⁵ Brinkley Messick, "The mufti, the text and the world: Legal interpretation in Yemen", *Man* 21 No.1 (1986), p. 105. For the Andalusī context see Martos Quesada, ""Características del muftí en al-Andalus".

⁴²⁶ Powers, "Fatwā, premodern", Accessed May 10, 2021 http://dx.doi.org/10.1163/1573-3912_ei3_COM_27048

⁴²⁷ Francisco Vidal Castro, "El muftí y la fetua en el derecho islámico: Notas para un estudio institucional", p. 293.

⁴²⁸ Zomeño, "The stories in the *fatwās* and the *fatwās* in history", p. 38.

⁴²⁹ Hallaq, "From *fatwā* to *furū'*: Growth and change in Islamic substantive law", p. 31.

reasons for his judgment, it was informed by the *fatwās* issued by the muftis he had consulted and thus based on the legal tradition of the school he adhered to.⁴³⁰ When the *istiftā'* includes a transcription of legal documents, it offers a significant trace or echo of the work of the qadi.

The mufti was expected to be a model jurist. Those who violated the norms of the mufti's profession put in danger their reputation and hence their authority. In other words, the mufti was imagined to be a moral and ethical individual, whose attitude incarnated the values considered exemplary, values like humility, magnanimity, independency, generosity and abstention of forbidden acts. Since the first/seventh century, the issuing of *fatāwā* became a common activity in Muslim societies as explained by Richard Bulliet.⁴³¹ In the case of Maliki al-Andalus and the Maghrib, the muftis attached to the qadi's court were the *fuqahā' mushāwarūn* (consultant jurists). When the qadi faced difficult, uncommon or politically sensitive cases, he could supplement the authority of his personal advisors by requesting a *fatwā* from another selected local mufti or one living elsewhere.⁴³² Furthermore, judges were supposed to consult in difficult cases one or several muftis, although the final opinion of a mufti was never considered binding.⁴³³

c. The potentials and limitations of *fatāwā* in legal and historical analysis

The *fatāwā* have become an important subject of study during the last decades on the part of scholars interested not only in the theoretical aspects of Islamic law but also in the study of Islamic social reality - including the situation of women - in a particular historical period.⁴³⁴ Scholars have made great headway in making good use of other legal sources, most notably the records of the Islamic court system for those periods and regions in which they have been

⁴³⁰ El Hour, "El cadiazgo de Jaén en época almorávide: una propuesta de interpretación", p. 170.

⁴³¹ Bulliet, *Islam: The view from the edge*, p. 18.

⁴³² Manuela Marín, "*Šūrā* et *ahl al-šūrā*" dans al-Andalus", *Studia Islamica* 62 (1985), p. 22; Martos Quesada, "'Características del muftí en al-Andalus". See also David Peláez Portales, "La *šūrā* en al-Andalus", *Anaquel de Estudios Árabes* 9 (1999), pp. 129-150; Powers, "Legal consultation (*futyā*) in Medieval Spain and North Africa", pp. 85-106.

⁴³³ Zomeño, "The stories in the *fatwās* and the *fatwās* in history", p. 39.

⁴³⁴ Tucker, *Women, family and gender in Islamic law*, p. 14.

preserved.⁴³⁵ The difference between a court judgment and a *fatwā* is of relevance here. When a qadi delivered a judgment that was based on his understanding of what the law required in the particular instance he was dealing with, the judgment he issued was binding between the parties involved in the case. This means that the parties would be obliged to accept his ruling, and any compensation or restitution he determined. In contrast to the qadi, the task of the mufti was not to establish the facts of the case and provide with a ruling, but rather explain how the *sharīʿa* should be evaluated to suit the facts as given.⁴³⁶

Pre-Ottoman Islamic legal practice is mostly studied on the basis of collections of legal responses (*fatāwā*) and legal cases (pl. *nawāzil*, sing. *nāzila*) because - as mentioned above - few if any court records have survived from the period prior to the rise of the Ottomans. The study on these sources thus is essential to determine the extent to which legal doctrine was applied in daily life - including the most diverse issues from gender to economy⁴³⁷ -, to track the operation of courts and the behavior of qadis and legal experts.⁴³⁸ In sum, *fatāwā* provide valuable information about how leading Muslim thinkers approached and understood Islamic law and its application to their respective societies.⁴³⁹ Some scholars have considered that the *fatwā* is situated somewhere between the real and the ideal.⁴⁴⁰ A *fatwā* is ideal because the mufti expresses and looks for a universal rule, but at the same time it is “real” because it is “the empirical manifestation of his opinion and it emerges from a unique set of empirical facts” according to Fadel.⁴⁴¹ As already indicated, the character of the *fatwā* is even more complex because it reflects constructed narratives that went through long

⁴³⁵ Tucker, “‘And God knows best’: The *fatwā* as a source for the history of gender in the Arab world”, p. 165.

⁴³⁶ Ibid, p. 167.

⁴³⁷ Pierre Guichard and Vincent Lagardère, “La vie sociale et économique de l’Espagne musulmane aux XIe-XIIe siècles à travers les *fatwā*/s du *Mi’yār* d’al-Wanšarīšī”, *Mélanges de la Casa de Velázquez* XXVI No.1 (1990), pp. 197-236.

⁴³⁸ Delfina Serrano, “Legal practice in an Andalusī-Maghribī source from the Twelfth Century CE: The *Maḍāhib al-ḥukkām fī nawāzil al-aḥkām*”, *Islamic Law and Society* 7 No.2 (2000), p. 187.

⁴³⁹ Tucker, *In the house of the law: Gender and Islamic law in Ottoman Syria and Palestine*, p. 15.

⁴⁴⁰ Zomeño, “The stories in the *fatwās* and the *fatwās* in history”, p. 25.

⁴⁴¹ Muhammad Fadel, “Fatwās and social history”, *al-ʿUsur al-Wusta: The Bulletin of Middle East Medievalists* 8 No.2 (1996), p. 32.

processes of redaction. The *fatāwā* preserved in compilations as well as in the manuals of substantive law suffered various modifications in their narratives. David Powers has described three stages in the construction of the narrative in the writing of the *istiftā'* when a judicial authority is involved. The first stage is "the events as they happened, to which we have no direct access" and the second stage is "the same events as related to a local authority, frequently a qadi, either directly or with the assistance of a legal agent who translated the litigants' oral accounts of what happened into the language of the law".⁴⁴² However, according to Amalia Zomeño; "for the second level we have no direct access either, so we cannot know whether there was a negotiation between the parties and the authority in such a way as to set an agreement on what facts and events are relevant for the case".⁴⁴³ The last stage is "the summary re-presentation of these narratives by the qadi, acting in his capacity as a *mustaftī*".⁴⁴⁴ This is what we find in the text of the query that has reached us. In other words, scholars depend on the job of the *mustaftī* who, in principle, should be objective and supply to the mufti correct information on the case being dealt with. Thus, in the *fatwā* it is recorded what is supposed to be a specific event but hiding it in an anonymous and partially hypothetical tone. The narrative related to what happened was intentionally molded to suit legal goals. The details of speech and action were chosen with an eye to how they related to different points of law. Hence, the *fatwā* as has reached us is not a mirror of reality nor a photograph of cases that actually took place. It is a record of how a legal thinker perceived the interaction between the legal tradition in which he operated and social trends. The *fatwā* is a text that includes a number of contextual elements that it is necessary to evaluate in their historical context.⁴⁴⁵ *Fatāwā* that included prescriptive and didactic elements were also created with an eye to the legal points and the general case rather than as a narrative of concrete cases that could be established in a specific time and location. They provide us rich information how the community comprehended, for example, the relationship between definitions of gender roles as prescribed in the *sharī'a* and their implementations in society.

⁴⁴² Powers, *Law, society, and culture in the Maghrib, 1300-1500*, p. 21.

⁴⁴³ Zomeño, "The stories in the *fatwās* and the *fatwās* in history", 27.

⁴⁴⁴ Powers, *Law, society, and culture in the Maghrib, 1300-1500*, p. 21.

⁴⁴⁵ Ibid, p. 20.

The reciprocal relationships between law and life makes the *fatwā* a precious source for writing of gender and women history.⁴⁴⁶

In any case, we must always bear in mind that only a small fraction of the *fatāwā* from premodern times has reached us. During the process of compilation, which were the criteria for selection? How was it decided which *fatāwā* to copy and thus to preserve?⁴⁴⁷ Therefore, when we evaluate a *fatwā* as a historical or legal source, all the mentioned dynamics, situations and relations should be taken into consideration. In brief, a *fatwā* may not be a clear mirror of reality, but it gives us a lot of significant information in specific legal and historical contexts. As the *fatāwā* allow approaching the study of legal practice with all the qualifications that have been detailed above, they have huge potential for historical research on gender.

2. *Fatwā* literature in fourth/tenth century al-Andalus

The principal goal of a *fatwā* is to find a solution for a legal problem, at least, to enable some guidelines to find an agreement for the parties and thus they could provide precedents to later generations (who could agree or disagree) and this may have ensured their preservation.

a. *Fatwā* compilations in al-Andalus

Fatāwā were collected in compilations that form a specific genre in legal literature, called *kutub al-fatāwā* or *kutub al-nawāzil*. These compilations were abundant in the Islamic West and more specifically in al-Andalus.⁴⁴⁸ They were generally gathered for the aims of future education and reference. They can include thousands of opinions on all aspects of Islamic law with inclusion of ritual practices, claims and contracts, and penal matters.⁴⁴⁹ The task of the

⁴⁴⁶ Tucker, “‘And God knows best’: The *fatwā* as a source for the history of gender in the Arab world”, p. 179.

⁴⁴⁷ Zomeño, “The stories in the *fatwās* and the *fatwās* in history”, p. 43.

⁴⁴⁸ David Powers, “Aḥmad al-Wansharīsi (d. 914/1509)”, in *Islamic legal thought: A compendium of Muslim jurists*, edited by Oussama Arabi, David S. Powers and Susan A. Spector. Leiden: Brill, 2013, p. 379; Fierro, “Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)”.

⁴⁴⁹ Tucker, “‘And God knows best’: The *fatwā* as a source for the history of gender in the Arab world”, p. 166.

compiler involved establishing an order in the materials compiled. The compilations were usually organized by the legal subject so that the cases were easier to find and consult in order to administer justice. This ordering means that the compiler gathered similar stories sharing particular aspects of both the legal theory or the application of the law, and tracing similar procedures. The connection between the cases is not continually mentioned by the compiler and does not answer to social criteria but to legal criteria.⁴⁵⁰

In the early fourth/tenth century, the *fatāwā* given in the context of the qadi's court began to be collected in al-Andalus as it will be explained in the next section. The first preserved compilation was carried out by the Cordovan *faqīh* Abū al-Aṣḥagh 'Īsā b. Sahl b. 'Abd Allāh al-Asadī (d. 486/1093).⁴⁵¹ Ibn Sahl performed several judicial functions; in the years before 442-443/1051-52, he was judge of Baeza, Shumuntan and Tíscar around Jaén, between 449-450/1058-59 and 456-457/1064-65 he worked as a secretary to the qadi of Toledo and in the years before 468/1075 to the qadi of Cordova. The Berber Suqūṭ al-Barghawāṭī (r. 453/1061-475/1083) appointed him to the head of the local jurists when he moved to Ceuta in the year 468/1075.⁴⁵² Also, he worked in Tangiers, Meknes and Granada.⁴⁵³ Given the relevance of Ibn Sahl's compilation for locating *fatāwā* from the fourth/tenth century, I will deal with it more extensively in the next section.

⁴⁵⁰ Zomeño, "The stories in the *fatwās* and the *fatwās* in history", p. 45.

⁴⁵¹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=7262 Accessed June 17, 2021; F.J. Aguirre Sábada, "Ibn Sahl al-Asadī, Abū al-Aṣḥagh", in *Biblioteca de al-Andalus*, (7 vols. + 2 appendixes. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2004-2013), vol. 5: *De Ibn Sa'āda a Ibn Wuhayb*, edited by Jorge Lirola Delgado. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2007, pp. 94-104, n°1056; Manuela Marín, "Law and piety: A Cordovan *fatwā*", *British Society for Middle Eastern Studies Bulletin* 17 No.12 (1990), p. 129; Samir Kaddouri, "Al-Faqīh al-qāḍī 'Īsā b. Sahl al-Asadī al-Jayyānī (t 486 h.)", *Majallat al-Ta'rīkh al-'Arabī* 37 (2006), pp. 307-332.

⁴⁵² Fierro, "Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)", p. 47.

⁴⁵³ Delfina Serrano, "Ibn Sahl", in *Christian-Muslim relations. A Bibliographical history (1050-1200)*, 15 vols., edited by D. Thomas and A. Mallett. Leiden: Brill, 2011, vol. 3/210.

The *Kitāb al-Aḥkām* by qadi Abū l-Muṭarrif 'Abd al-Raḥmān b. Qāsim al-Sha'bī al-Mālaqī (d. 497/1004)⁴⁵⁴ is another fundamental *fatāwā* collection in al-Andalus that is extant.⁴⁵⁵ *Al-Aḥkām* basically deals with legal consultations, legal opinions and judicial cases related to sales, blood crimes and their penalties, marriage, divorce and emancipation of slaves.⁴⁵⁶ The author gathered previous and contemporary *fatāwā* which are not only limited to the Andalus but also encompass the legal practice of Maliki qadis in general, from the East and the Islamic West.⁴⁵⁷ Al-Sha'bī had worked as qadi of Malaga under the Zīrids for almost sixty years, even though he refused to continue as judge under the Almoravids when the Granadan Ṭā'ifa kingdom was occupied by them. He was consulted by their new qadi and the new rulers respected him a lot.⁴⁵⁸

Abū l-Walīd Muḥammad b. Aḥmad b. Muḥammad b. Rushd al-Faqīh al-Mālikī (d. 520/1126)⁴⁵⁹ was the grandfather of the philosopher Averroes and one of the most famous jurists in the history of al-Andalus. His legal opinions were gathered by one of his students under the title *Fatāwā Ibn Rushd*.⁴⁶⁰ He worked as a qadi, mufti and teacher during the rule of the North African Berber dynasty of the Almoravids (last quarter of the 11th, first half of the 12th century). He was consulted by the Almoravid emir and by lesser authorities on most significant legal issues given his reputation as a distinguished scholar

⁴⁵⁴ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=4484 Accessed June 12, 2021; Rachid El Hour, "Al-Ša'bī, Abū l-Muṭarrif", in *Biblioteca de al-Andalus*, vol. 7: *De al-Qabrīrī a Zumurrud*, edited by J. Lirola Delgado. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2012, pp. 223-227, n^o 1675.

⁴⁵⁵ Ibn Qāsim al-Sha'bī, *Al-Aḥkām*, edited by al-Šādiq al-Ḥalawī.

⁴⁵⁶ Fierro, "Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)", p. 49.

⁴⁵⁷ Abboud-Haggar, "La fiscalidad en al-Andalus entre los siglos VIII y XII a través de las recopilaciones de sentencias de Ibn Sahl y de Ibn Qāsim al-Ša'bī", p. 26.

⁴⁵⁸ Fierro, "Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)", p. 49.

⁴⁵⁹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=8086 Accessed June 15, 2021; Delfina Serrano, "Ibn Rušd al-Ŷadd, Abū l-Walīd", in *Biblioteca de al-Andalus*, vol. 4: *De Ibn al-Labbāna a Ibn al-Ruyūlī*, edited by J. Lirola Delgado. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2006, pp. 617-626, n^o 1007.

⁴⁶⁰ Two editions have been published: Ibn Rushd al-Jadd, *Fatāwā Ibn Rushd: li-Abī al-Walīd Muḥammad b. Aḥmad b. Aḥmad b. Rushd al-Qurṭubī al-Mālikī*, 3 vols., edited by Al-Mukhtār b. al-Ṭāhir al-Talīlī; id., *Masā'il Abī al-Walīd b. Rushd al-Jadd*, 2 vols., edited by Muḥammad al-Ḥabīb al-Tajkānī.

responsible for updating the doctrine and practices in the Maliki legal school.⁴⁶¹ Through these activities, he acquired a remarkable degree of political and social influence.⁴⁶² The contribution of Ibn Rushd al-Jadd to the legal history of Malikism relies on having carried out systematic re-examination of early Maliki jurisprudence by Saḥnūn and the Cordovan Muḥammad al-‘Utbī, as reflected in his *Muqaddamāt*, a commentary on Saḥnūn's *Mudawwana*, and *al-Bayān wa-l-taḥṣīl*⁴⁶³, a commentary on the *‘Utbīyya*.⁴⁶⁴

There are many significant works that are based on the *fatāwā* of Ibn Rushd al-Jadd.⁴⁶⁵ His *fatāwā* were the vehicle for the transmission of his intellectual achievements in the *Bayān* and the *Muqaddamāt* to the domain of

⁴⁶¹ Fierro, “Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)”, p. 51.

⁴⁶² Serrano, “Ibn Rushd al-Jadd (d. 520/1126)”, p. 301; Fernández Félix, *Cuestiones legales del Islam temprano: la ‘Utbīyya y el proceso de formación de la sociedad Islámica Andalusí*, p. 121.

⁴⁶³ *Al-Bayān wa-l-taḥṣīl wa-l-sharḥ wa-l-tawjīh wa-l-ta’līl fī masā’il al-‘Utbīyya or Kitāb al-Bayān wa-l-taḥṣīl li-mā fī Mustakhraja min al-tawjīh wa-l-ta’līl*; Ibn Rushd al-Jadd, *Al-Bayān wa-l-taḥṣīl wa-l-sharḥ wa-l-tawjīh wa-l-ta’līl fī masā’il al-Mustakhraja*, Second edition, edited by Muḥammad Ḥajjī and Aḥmad al-Sharqāwī Iqbāl. Beirut: Dār al-Gharb al-Islamī, 1988.

⁴⁶⁴ Fernández Félix, *Cuestiones legales del Islam temprano: la ‘Utbīyya y el proceso de formación de la sociedad Islámica Andalusí*, p. 121.

⁴⁶⁵ Some studies that refer to *fatāwā* of Ibn Rushd al-Jadd: A. Carmona, “La expropiación forzosa por ampliación de mezquita en tres fetuas medievales”, in *L’Urbanisme dans l’Occident Musulman au Moyen Âge: Aspects juridiques*, edited by P. Cressier, M. Fierro and J. P. van Stævel. Madrid: CSIC, 2000, pp. 141-51; Camilo Gómez Rivas, *Urban transformation and the development of Islamic legal institutions under the Almoravids: The Fatwās of Ibn Rushd al-Jadd to the far Maghrib*. Leiden: Brill, 2014; Delfina Serrano, “La lapidación como castigo de las relaciones sexuales no legales (*zinā*) en el seno de la escuela Malikí: Doctrina, práctica legal y actitudes individuales frente al delito (ss. XI y XII)”, *Al-Qanṭara* XXVI (2005), pp. 449-73; id., “Why did the scholars of al-Andalus distrust al-Ghazālī? Ibn Rushd al-Jadd’s *fatwā* on *awliyā’ Allāh*”, *Der Islam* 83 (2006), pp. 137-56; id., “Claim (*da’wā*) or complaint (*shakwa*)? Ibn Ḥazm and Qāḍī ‘Iyāḍ’s doctrines on accusations of rape”, in *Ibn Ḥazm of Cordoba: The life and works of a controversial thinker*, edited by C. Adang, M. Fierro and S. Schmidtke. Leiden: Brill, 2012, pp. 179-203; M. Marín, “¿Quién lo hizo? Datos sobre la investigación de delitos de sangre en al-Andalus”, *Al-Qanṭara* XXVI (2005), pp. 405-24; Maribel Fierro, “El espacio de los muertos: Fetuas andalusíes sobre tumbas y cementerios”, in *L’Urbanisme dans l’Occident Musulman au Moyen Âge: Aspects juridiques*, edited by P. Cressier, M. Fierro and J. P. van Stævel. Madrid: CSIC, 2000, pp. 153-89.

practice and for their application in existing legal disputes.⁴⁶⁶ These *fatāwā* can be seen prototypes of their genre, manifesting both Ibn Rushd's theoretical and practical command of law. They were written in clear Arabic and organized in a systematic way as in the *Bayān* and the *Muqaddamāt*. They comprised an investigation of the textual and rational evidence for a specific legal subject and an examination of the causes for juristic dispute about this issue. These features certainly distinguish Ibn Rushd from most of his contemporaries and predecessors. The relevance of the problems presented to his consideration demonstrates both the authority and respect with which he was held. Hence, these *fatāwā* were extremely valuable for later jurists' generations.⁴⁶⁷

Also active in Almoravid times, the judge and jurist al-Qādī Abū al-Faḍl 'Iyāḍ b. Mūsā b. 'Iyāḍ al-Yaḥṣubī al-Sabtī (d. 544/1149) excelled in the fields of prophetic tradition and Islamic jurisprudence.⁴⁶⁸ His son, Ibn 'Iyāḍ (d. 575/1179) who lived in al-Andalus during the transition period between the Almoravids (1090-1148) and the Almohads (1146-1248), compiled a collection of legal cases (*nawāzil*) in which his father had intervened and that referred to actual legal disputes in Ceuta and other towns and villages of al-Andalus and the Far Maghrib.⁴⁶⁹ Hence, al-Qādī 'Iyāḍ can be seen as essential link in the flow of knowledge from al-Andalus to the Far Maghrib.⁴⁷⁰ The collection is known by the title *Madhāhib al-ḥukkām fī nawāzil al-aḥkām* (The procedures of judges in judicial practices).⁴⁷¹ The collection deals with a broad range of judicial activities

⁴⁶⁶ V. Lagardère, "Une théologie dogmatique de frontière en al-Andalus aux XIe et XIIe siècles: l'aś'arisme", *Anaquel de Estudios Arabes* V (1994), p. 72.

⁴⁶⁷ Serrano, "Ibn Rushd al-Jadd (d. 520/1126)", p. 312.

⁴⁶⁸ Delfina Serrano, "Al-Qādī 'Iyāḍ", in *Christian-Muslim Relations 600-1500*, edited by David Thomas. Accessed June 15, 2021 https://referenceworks.brillonline.com/entries/christian-muslim-relations-i/al-qadi-iyad-COM_23366

⁴⁶⁹ Delfina Serrano, "Los Banū 'Iyāḍ (de la caída del imperio almorávid a la instauración de la dinastía nazarí)", in *Estudios onomástico biográficos de al-Andalus (EOBA)* IX, edited by M. Luisa Ávila and Maribel Fierro. Madrid-Granada, CSIC, 1999, p. 351.

⁴⁷⁰ M. José Hermosilla Llisterri, "En torno al-Qādī 'Iyāḍ I: Datos biográficos", *Miscelánea de Estudios Árabes y Hebraicos* 27-28 (1978-79), p. 152.

⁴⁷¹ Muḥammad b. 'Iyāḍ and 'Iyāḍ b. Mūsā, *Madhāhib al-ḥukkām fī nawāzil al-aḥkām*, *Second edition*, edited by M. Bencherifa. Beirut: Dār al-Gharb al-Islāmī, 1997; Muḥammad b. 'Iyāḍ, *Maḍāhib al-ḥukkām fī nawāzil al-aḥkām: La actuación de los jueces en los procesos judiciales*, translated and edited by Delfina Serrano.

such as the court practice of Ceuta (*‘amal*), the ruling of qadis, judicial review, the consequences of court activity in the form of *fatāwā* and decisions, the unfolding of a litigations and the use of law by legist and laymen, particularly during the Almoravid period.⁴⁷² Also, it preserves a wealth of legal-historical and socio-historical information particularly regarding the nature of the cases, and the qualities of witnesses.⁴⁷³ “The text suggests a distinction among three types of *fatāwā*: (1) a *fatwā* requested by a qadi, before issuing his judgment, from a mufti not belonging to his council of advisors (*majlis al-shūrā*); (2) a *fatwā* issued by a mufti at the request of a private individual; and (3) a *fatwā* issued by the qadi’s *majlis al-shūrā*, which was virtually binding although contestable by a legal authority not related to the litigation.”⁴⁷⁴ This work provides significant information about the practice and contemporary impact of ‘Iyād’s legal work and thought.⁴⁷⁵ Furthermore, the quotations from Ibn Sahl’s and al-Sha’bī’s *Aḥkām*, and from *Nawāzil al-qarawīyyīn* do not only take part in the *Madhāhib al-ḥukkām* but also there are many references to the legal opinions of jurists such as Ibn Rushd al-Jadd.⁴⁷⁶

Additionally, larger collections that gathered together *fatāwā* issued by different muftis in a specific region or city, in an effort to enable a executive view of the legal tradition in that area, started to be compiled beginning in the ninth/fifteenth century.

An example is the *fatāwā* compiled by Abū al-Qāsim al-Burzulī (d. 841/1438).⁴⁷⁷ Al-Burzulī was a teacher of Islamic law in Tunis and worked as a

⁴⁷² Serrano, "Legal practice in an Andalusī-Maghribī source from the Twelfth Century CE: The *Maḍāhib al-ḥukkām fī nawāzil al-aḥkām*", p. 187.

⁴⁷³ Camilo Gomez-Rivas, "Qāḍī ‘Iyād (d. 544/1149)", in *Islamic legal thought: A compendium of Muslim jurists*, edited by Qussama Arabi, David Powers and Susan A. Spector. Leiden: Brill, 2013, p. 323.

⁴⁷⁴ Serrano, "Legal practice in an Andalusī-Maghribī source from the Twelfth Century CE: The *Maḍāhib al-ḥukkām fī nawāzil al-aḥkām*", p. 189.

⁴⁷⁵ Gomez-Rivas, "Qāḍī ‘Iyād (d. 544/1149)", p. 330.

⁴⁷⁶ Fierro, "Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)", p. 53.

⁴⁷⁷ F. Vidal-Castro, "Al-Burzulī", in *Encyclopedia of Islam, THREE*, edited by Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas and Everett Rowson. Accessed October 10, 2021 https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-3/al-burzuli-COM_24368

imām at the Zaytūna mosque.⁴⁷⁸ He had travelled to Egypt and dealt with debates regarding certain traces of Almohad practices among the Tunisian scholars.⁴⁷⁹ He collected the *Jāmi' masā'il al-aḥkām li-mā nazala min al-qaḍāyā bi-l-muftīn wa-l-ḥukkām*.⁴⁸⁰ His *Nawāzīl* is a compilation of a very large number of *fatāwā* issued by the jurists of the Maghrib and Ifrīqiya during his times and also includes materials from Andalusī works such as *Aḥkām* of Al-Sha'bī and *Nawāzīl* of Ibn Rushd. The short preface of al-Burzulī is followed by a long chapter explaining the activity of giving legal opinions, as in the case of Ibn Sahl.⁴⁸¹ His contemporary Abū Zakariyā Yaḥyā b. Mūsā b. 'Īsā al-Maghīlī (d. 883/1478), a student of al-Wansharīsī, compiled *al-Durar al-maknūnā fī nawāzil Māzūna*.⁴⁸²

The best well known compilation is the *Kitāb al-Mi'yār*⁴⁸³ by Abū al 'Abbās Aḥmad al-Wansharīsī (d. 914/1509) as it has been the object of study for

⁴⁷⁸ H.R. Idris, "Al-Burzulī", in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Accessed August 27, 2021 https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/al-burzulī-SIM_1558?s.num=183&s.start=180

⁴⁷⁹ Fierro, "Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)", p. 59. See also Jean-Pierre Van Staëvel, "Almohades et Mālikites de Tunis. Réflexions sur les relations entre élites civiles et gouvernants dans l'Ifrīqiya des 6e/XIIe-8e/XIVe siècles", in *Los Almohades: problemas y perspectivas*, edited by M. Fierro and L. Molina. Madrid: CSIC, 2005, pp. 937-973.

⁴⁸⁰ Abū al-Qāsim b. Aḥmad al-Burzulī, *Fatāwā al-Burzulī: Jāmi' masā'il al-aḥkām li-mā nazala min al-qaḍāyā bi-l-muftīn wa-l-ḥukkām*, edited by Muḥammad al-Ḥabīb Hīlah. Beirut: Dār al-Gharb al-Islāmī, 2002.

⁴⁸¹ Fierro, "Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)", p. 60.

⁴⁸² Abū Zakariyā Yaḥyā b. Mūsā b. 'Īsā al-Maghīlī, *al-Durar al-maknūnā fī nawāzil Māzūna*, 2 vols., edited by Ḥassānī Mukhtār. Algeria: Makhbar al-Makhtūṭāt, Jāmi'at al-Jazā'ir, 2004; Élise Voguet, "Dissidence affirmée ou rejet codifié de la Umma: Badawī et 'arab dans les *Nawāzil Māzūna*", *Alfa Maghreb et Sciences Sociales* (2006), pp. 147-157; id., "De la déposition orale au cas d'espèce, reconstitution d'une pratique de la traduction à travers les *Nawāzil Māzūna* (XV siècle)", in *Le Maghreb, al-Andalus et la Méditerranée occidentale (VIIIe-XIIIe siècles)*, edited by Philippe Sénac. Toulouse: CNRS-Université Toulouse-Le Mirail, 2007, pp. 317-326; id., *Le monde rural du Maghreb Central (XIVe-XVe siècles): Réalités sociales et constructions juridiques d'après les Nawāzil Māzūna*; Powers, "Aḥmad al-Wansharīsī (d. 914/1509)", p. 379.

⁴⁸³ Aḥmad al-Wansharīsī, *Al-Mi'yār al-mu'rib wa-l-jāmi' al-mughrib 'an fatāwā ahl Ifrīqiya wa-l-Andalus wa-l-Maghrib*, 13 vols; Vincent Lagardère, *Histoire et société en Occident Musulman au Moyen Âge: Analyse du Mi'yār d'al-Wansharīsī*. Madrid: Casa de Velázquez, 1995.

a long time.⁴⁸⁴ It includes thousands of *fatāwā* issued by hundreds of muftis who lived in cities of Ifrīqiya, the Maghrib and al-Andalus between 391/1000 and 902/1496.⁴⁸⁵ Al-Wansharīsī began working on this source in 890/1485 using several manuscripts.⁴⁸⁶ He completed the text in 901/1496 but he continued to make corrections and revisions and to add new material until his death.⁴⁸⁷ It became a massive crucial corpus for scholars who work on the social, economic, religious and legal history of the Islamic West.⁴⁸⁸

The *Mi'yār* informs us about the qadi workings and his court and the manner in which law, society and culture interacted with each other.⁴⁸⁹ In some of the cases compiled, al-Wansharīsī or the compilers of earlier collections that he was using sometimes transcribed more or less full descriptions of documents that were presented to the court by the litigants, such as endowment deeds, deposits, marriage contracts, inheritance and judicial certifications. Thus, al-Wansharīsī's compilation contains many details and transcription of documents, even judicial decisions, something that is rare in the older ones. How al-Wansharīsī carried out the selection from previous collections is not always clear.⁴⁹⁰

b. *Fatāwā* issued in Ibn Abī Zamanīn's times

None of the compilations quoted in the previous section was made during Ibn Abī Zamanīn's times. But this does not imply that we cannot have access to fourth/tenth century *fatāwā*.

⁴⁸⁴ As shown by Francisco Vidal Castro in his seminal study "Abd al-Wāḥid al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones", p. 318.

⁴⁸⁵ Ibid, p. 320

⁴⁸⁶ David S. Powers; Etty Terem, "From the *Mi'yār* of al-Wansharīsī to the new *Mi'yār* of al-Wazzānī: Continuity and change", *Jerusalem Studies in Arabic and Islam* 33 (2007), p. 237.

⁴⁸⁷ Powers, "Aḥmad al-Wansharīsī (d. 914/1509)", p. 380.

⁴⁸⁸ Powers, "Fatwā, premodern", p. 66; Delfina Serrano, "La escuela de alfaquíes toledanos a través del *Mi'yār* de al-Wansarisi", *Revista del Instituto Egipcio de Estudios Islámicos* 30 (1998), p. 146.

⁴⁸⁹ Powers, "Four cases relating to women and divorce in al-Andalus and the Maghrib, 1100-1500", p. 385.

⁴⁹⁰ Zomeño, "The stories in the *fatwās* and the *fatwās* in history", p. 43.

A scholar who lived in that century, Muḥammad b. Ḥārith al-Khushanī (d. 361/971),⁴⁹¹ wrote on the theoretical aspect of *iftā'*, the emission of *fatāwā*. He was from Tunisia and worked as a jurist in various places like Ceuta, Cordova and Pechina.⁴⁹² Also, he was appointed as qadi by al-Ḥakam II (r. 350-366/961-976), to deal with inheritance issues in Pechina.⁴⁹³ He moved from Ifrīqiya to al-Andalus, most probably escaping the Fāṭimīs. He is the author of *Uṣūl al-futyā fi-l-fiqh 'alā madhab al-imām Mālik*⁴⁹⁴ (The principles of verdict according to *Mālik*'s school).⁴⁹⁵ It gives precious information on how the activity of the mufti was conceptualized at the time and the characteristics that the mufti had to have.

The compilers of *fatāwā* had indirect access to certain cases through earlier collections, where other compilers might already have made some changes in the narratives, while they also had direct access to cases from contemporary jurists, where he is the one who made changes for the first time for the elaboration of his work. We can see this process in the case of Ibn Sahl who lived during the Taifa period and witnessed the change of power from the Zirids to the Almoravids in 1090. His compilation is entitled *al-Aḥkām al-kubrā*

⁴⁹¹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=8774 Accessed June 12, 2021. He is the author of the *Historia de los jueces de Córdoba*, edited by Julián Ribera. Madrid: Imprenta Ibérica, 1914.

⁴⁹² María Luisa Ávila, "Ibn Ḥārith al-Khushanī", in *Encyclopaedia of Islam, THREE*, edited by Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas and Everett Rowson. Accessed June 12, 2021. https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-3/al-khushani-ibn-harith-COM_35571; Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 182.

⁴⁹³ Ahmet Özel, "Muhammed b. Ḥāris Huṣenī", in *TDV İslam ansiklopedisi*, 44 vols. Istanbul: TDV İslâm Araştırmaları Merkezi, 2000. Accessed June 23, 2021 <https://islamansiklopedisi.org.tr/huseni-muhammed-b-haris>

⁴⁹⁴ Muḥammad b. Ḥārith al-Khushanī, *Uṣūl al-futyā fi-l-fiqh 'alā madhhab al-imām Mālik*, edited by Muḥammad Majdūb. Tunisia: al-Dār al-'Arabiya li'l-Kitāb, 1985; Manuela Marín, "Al-Juṣanī, Muḥammad b. Ḥārith, *Uṣūl al-futyā fi-l-fiqh 'alā madhab al-imām Mālik*", *Al-Qanṭara* VII (1986), p. 487; Fierro, "Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)", p. 47. See also Jean-Pierre van Staëvel, "Institution judiciaire et production de la norme en al-Andalus aux IXe et Xe siècles", in *Regards sur al-Andalus (VIIIe. XVe siècle)*, edited by François Géral. Madrid: Casa de Velázquez, 2007, pp. 47-80.

⁴⁹⁵ Alejandro García Sanjuán, *Till God inherits the earth: Islamic pious endowments in al-Andalus (9-15th centuries)*. Leiden: Brill, 2007, p. 10.

(Major legal judgments)⁴⁹⁶ and was designed to serve as a textbook for the training of judges and muftis.⁴⁹⁷ It has been preserved in a number of manuscripts and edited.⁴⁹⁸ Ibn Sahl's compilation is remarkable because it includes summaries of the court proceedings that led to the issuance of the *fatāwā* themselves.⁴⁹⁹ Hence, the collection could be seen as a direct witness to what Andalusī judicial records may have looked like. Ibn Sahl in fact made extensive use of an earlier lost collection of legal cases entitled *al-Aḥkām* by al-Ḥabīb Aḥmad b. Muḥammad b. Ziyād (d. 312/924),⁵⁰⁰ qadi in Cordova in 291/904, who made it obligatory for the muftis of his times to put in writing their *fatāwā*.⁵⁰¹ Thanks to this, the judicial archive preserved such materials and it was from such archival record that he extracted what he included in his work. This means that through Ibn Sahl's compilation we can recover the early judicial practice in al-Andalus. Moreover, another important source for *al-Aḥkām al-*

⁴⁹⁶ Scholars refer to this book with various names such as *Kitāb nawāzil al-aḥkām*, *Kitāb fīl bi-nawāzil al-aḥkām*, *Dīwān al-Aḥkām al-kubrā* and *Kitāb al-lām bi-nawāzil al-quḍāt wa-l-ḥukkām*.

⁴⁹⁷ Christian Müller, "Judging with God's law on earth: Judicial powers of the qadi al-jamā'a of Cordoba in the Fifth/Eleventh century", *Islamic Law and Society* 7 No.2 (2000), p. 159.

⁴⁹⁸ The edition I have consulted is Abū al-Aṣḥagh 'Īsā b. Sahl, *Dīwān al-aḥkām al-kubrā*, 2 vols., edited by R. Al-Nu'aymī. Riyad: al-Safahāt al-Dhahabiyya, 1997. The Chapters VII, VIII and IX are about marriage, marriage conflicts, custody, matrimonial maintenance, financial conflicts of spouses and divorce (pp. 371-543). On Ibn Sahl's *al-Aḥkām al-kubrā*, see Rocío Daga Portillo, "Aproximación a la obra Al-Aḥkām al-kubrā del cadí 'Īsā Ibn Sahl", *Miscelánea de Estudios Árabes y Hebraicos* 36 (1987), pp. 237-249; Christine Mazzoli-Guintard, *Vivre à Cordoue au Moyen Âge: Solidarités citadines en terre d'Islam aux Xème-XIème siècles*. Rennes: Presses Universitaires de Rennes, 2003.

⁴⁹⁹ Delfina Serrano, "Al-Aḥkām al-kubrā", in *Christian-Muslim Relations 600-1500*, edited by David Thomas. Accessed May 19, 2021 https://referenceworks.brillonline.com/entries/christian-muslim-relations-i/al-ahkam-al-kubra-COM_23377

⁵⁰⁰ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=1742 Accessed June 12, 2021; Maribel Fierro, "Tres familias andalusíes" de época omeya apodadas Banū Ziyād", in *Estudios Onomástico-Biográficos de al-Andalus* V, edited by M. Marín and J. Zanón. Madrid: CSIC, 1992, pp. 85-142.

⁵⁰¹ Manuela Marín, "Learning at mosques in al-Andalus", in *Islamic legal Interpretations: Muftis and their fatwas*, edited by M. Khalid Masud, Brinkley Messick and S. David Powers. Massachusetts: Harvard University Press, 1996, p. 48; Miklos Murayni, "Das Kitāb *al-Aḥkām Ibn Ziyād*. Über die identifizierung eines fragmentes in Qairawān (Qairawāner Miszellen V.)", *Zeitschrift der Deutschen Morgenländischen Gesellschaft* 148 (1998), pp. 241-260.

kubrā are the *Masā'il* by Abū Bakr Muḥammad b. Yabqā b. Zarb (d. 381/991)⁵⁰² who was qadi in Cordova since 397/977,⁵⁰³ and a contemporary of Ibn Abī Zamanīn.⁵⁰⁴

Al-Aḥkām al-kubrā thus combined an entire series of legal cases arising in Ibn Sahl's own time as well as in the 3rd/9th and 4th/10th centuries, all of which had been submitted for opinions to the most prominent jurisprudence of each of these periods.⁵⁰⁵ This fundamental work makes possible to work on the legal and social history of the Umayyad and Taifa periods,⁵⁰⁶ offering important data to recover both the continuity and change in dealing with certain problems which were present in Andalusī society from early times.⁵⁰⁷

Later compilations such as those by al-Burzulī and al-Wansharīsī also include early *fatāwā* materials some of which can be dated in the fourth/tenth century, including *fatāwā* from Ibn Abī Zamanīn himself. For instance, in the part devoted to marriage in the *Mi'yār*, there are various early *fatāwā* examples by Yaḥyā b. 'Umar (d. 289/902),⁵⁰⁸ Abū Ṣāliḥ Ayyūb b. Sulaymān (d. 302/914),⁵⁰⁹ Ibn Lubāba (d. 314/926),⁵¹⁰ al-Lu'lu'ī (d. 348/959),⁵¹¹ Ibn Zarb (d. 381/991),⁵¹² Ibn Abī Zayd (d. 386/996), Ibn al-Hindī (d. 388/998), Ibn al-Makwī (d.

⁵⁰² https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=10665
Accessed June 15, 2021.

⁵⁰³ García Sanjuán, *Till God inherits the earth: Islamic pious endowments in al-Andalus (9-15th centuries)*, p. 10.

⁵⁰⁴ A legal work by Ibn Zarb, his *al-Khiṣāl*, has been preserved, edited by 'Abd al-Ḥamīd 'Alamī. Rabat: Wizārat al-awqāf wa-l-shu'ūn al-islāmiyya, 1426/2005, but I have been unable to consult it.

⁵⁰⁵ Rachid El Hour, "Una reflexión acerca de Ibn Sahl y su obra jurídica *Dīwān al-aḥkām al-kubrā*", *Studi Magrebini Nuova serie* IX (2011), p. 143.

⁵⁰⁶ Marín, "Law and piety: A Cordovan *fatwā*", p. 129.

⁵⁰⁷ Serrano, "La escuela de alfaquíes toledanos a través del *Mi'yār* de al-Wansarisi", p. 139.

⁵⁰⁸ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=11621
Accessed June 15, 2021.

⁵⁰⁹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=2620
Accessed June 15, 2021.

⁵¹⁰ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=10149
Accessed June 15, 2021.

⁵¹¹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=1200
Accessed June 15, 2021.

⁵¹² https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=10665
Accessed June 15, 2021.

401/1010),⁵¹³ Abū Ja'far al-Dāwūdī (d. 402/1011) and Ibn Kawthar (d. 403/1012).⁵¹⁴

c. The *Muntakab al-aḥkām* and fourth/tenth century *fatāwā*

The *Muntakab al-aḥkām* by Ibn Abī Zamanīn was aimed at judges who did not have enough time to make scholarly research to deal with the cases presented in their courts. The author did not intend to write an encyclopaedic work on legal procedure taking up numerous volumes, but an accessible manual. The target were judges who when dealing with various issues on a daily basis were not concerned with detailed argumentation based on this or that.⁵¹⁵

Ibn Abī Zamanīn began his book saying: "This is a book in which I have gathered a number of important issues related to rulings and verdicts which I drew out of the core books of the school (*al-ummahāt*) which I selected because of their outstanding excellence. By this I wanted to help Muslim judges who have been appointed and have been kept busy from studying, reading and referring to books of law so that what I have selected may allow them -if they know it- to dispense with consultation every time an issue which appears in [this book] arises."⁵¹⁶ This seems to imply that his book would allow the judges to carry out their task without necessarily having to consult with the muftis. It could be seen as an attempt to diminish the influence of the *fuqahā' mushāwarūn* and give more independence to the judge. But it could just have aimed at improving the legal knowledge of the judges who often were not properly trained as jurists (hence their reliance on the muftis), and it may also reflect a trend for systematization and 'codification' of legal theory and practice. How the

⁵¹³ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=1312
Accessed June 15, 2021.

⁵¹⁴ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=1024
Accessed June 15, 2021.

⁵¹⁵ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 232. On the judicial context of the period see Juan Martos Quesada, "Poder central omeya y poder judicial en al-Andalus: nombramiento y destitución de cadíes", in *Cadíes y cadiazgo en al-Andalus y el Magreb Medieval, Estudios Onomástico-Biográficos de al-Andalus XVIII*, edited by Rachid El Hour and Rafael Mayor. Madrid: CSIC, 2012, pp. 121-146.

⁵¹⁶ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 234.

parameters of legal religious consensus were imposed by men of legal religious authority and political influence can be deduced from the biographical dictionaries of Andalusī *fuqahā'*. If someone asserted his independence in the formulation of legal opinions, he could find himself subject to pressure to conform or face dismissal from office or worse.⁵¹⁷

The *Muntakab al-aḥkām* consist of ten chapters⁵¹⁸:

- The Book of Legal Proceedings
- The Book of Judging
- The Book of Preemption
- The Book of Ownership
- The Book of Marriage
- The Book of Divorce
- The Book of Sales
- The Book of Hire
- The Book of Various Issues

The Chapter of divorce includes 202 legal *masā'il*. The structure of legal *masā'il* is close to that of the *fatāwā*, including a query and an answer, but both the setting in which they are formulated and their aim is different. Legal *masā'il* are the product of the pedagogical process in which a teacher explains and clarifies the content of the law and are collected to help in the training of jurists and in their activities as such. As a cultural artifact they also reflect as the *fatāwā* the frequently complex and dynamic interplay between the legal and social values of the society in which they are created, and they present similarities with the *fatāwā*. In the case of the *masā'il* - contrary to some *fatāwā* as we have seen - the abstract and hypothetical character of the situation envisaged prevails, even if in the background there was a real case, as well as prevails the aim to formulate theoretical regulations that follow the principles of the Maliki legal doctrine.

⁵¹⁷ Janina M. Safran, *Defining boundaries in al-Andalus: Muslims, Christians and Jews in Islamic Iberia*. New York: Cornell University Press, 2013, p. 48.

⁵¹⁸ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, 2 vols., edited by M. Ḥammād, vol. 1/105.

The sixth chapter of the *Muntakab al-aḥkām* regarding divorce presents - as we have already seen in Chapter IV - discussions about various situations that come into being due to dissolution of marriage. A comparison with *fatāwā* issued by Ibn Abī Zamanīn's contemporaries dealing with similar topics shows many aspects in common. However, their responses are not always the same.

For instance, Ibn Abī Zamanīn and his contemporary the Ifriqyan jurist Ibn Abī Zayd al-Qayrawānī (d. 386/996) held divergent views regarding the topic of the little girl's waiting period. Ibn Abī Zamanīn discussed the case of a little girl whose peers do not have sexual intercourse: if the husband of a little girl had sexual intercourse with her and then divorced her, she does not have to undergo a waiting period because getting pregnant is not possible for her under these circumstances.⁵¹⁹ However, Ibn Abī Zayd al-Qayrawānī does not agree with him, as this issue is explained in his *Risāla* in a different way: "The 'idda for a free woman who is widowed is four months and ten nights, whether a child or adult, whether the marriage has been consummated or not, whether Muslim or one of the People of the Book. For a slave-girl, who is partially free, it is two months and five days, except in the case of an older woman whose period delayed. Then she waits until the doubt is removed. As for the one who does not menstruate because of youth or old age, and her marriage was consummated, she may not marry until three months after the death of the husband."⁵²⁰ When Ibn Abī Zamanīn discussed this issue, he primarily took account of whether the girl menstruates or not, but Ibn Abī Zayd al-Qayrawānī took into consideration whether her marriage was consummated or not.

Many scholars in the Maliki school gave importance to the dower issue that is specified in marriage contracts and that is paid by a husband to his wife. Aḥmad al-Wansharīsī mentioned this issue in the *Kitāb al-mi'yār*. He mentioned the *fatwā* by Ibn al-Makwī (Abū 'Umar Aḥmad b. 'Abd al-Mālik b. Hāshim al-Ishbīlī, d. 401/1010),⁵²¹ regarding a woman who claimed that her husband gave

⁵¹⁹ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, 2 vols., edited by M. Ḥammād, vol. 2/725. For detailed information see Part II, question 107.

⁵²⁰ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, 2018, p. 114.

⁵²¹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=1312

his all property to her and then, when they divorce, he asks her to deduct from her dowry what she has received, but she declares that there is nothing left.⁵²² Ibn Abī Zamanīn paid attention to this issue and claimed that the type of the divorce determines the situation. If the couple divorces with a *ṭalāq* divorce, the husband should pay the dower to her. He explains the situation in this way: “One of the things that explains this issue is that if he had given her the dower in cash, and subsequently she had invited him to leave her or to make *mubāraʿa*, and he had done so, then she is (required) to give back to him all that she took from him. She is fact *ḥarām* for him and thus she is not entitled to anything from the dower⁵²³ in the case that she had taken possession of it. In the case that she had not taken the dower, she cannot demand it from him. If the woman had said to him before having sexual intercourse: ‘Divorce me, I will give you a determined amount of my dower’, he is to take what she gives and she is entitled to receive half of the remaining part of the dower in the case that he had not paid it in cash to her” (Question 47).⁵²⁴ The details in the case of the *Kitāb al-miʿyār* is limited particularly the type of divorce is not determined but it changes the situation between couples as Ibn Abī Zamanīn said. The questions under the same title are a continuation of each other in the *Muntakab al-aḥkām* so opinions about a topic in various situations can be seen. Nonetheless, in the *Kitāb al-miʿyār*, the *fatāwā* belong to different scholars even through they are collected under the same title. This situation provides to examine a topic in the *Muntakab al-aḥkām* more deeply than the *Kitāb al-miʿyār*’s.

Breastfeeding is another important issue that was mentioned in legal questions frequently. Ibn Kawthar (Abū ʿUmar Aḥmad b. Saʿīd b. Kawthar al-Anṣārī, d. 403/1012), ⁵²⁵ paid attention to this issue, for example, dealing with the case of a poor father who owed his wife a quarter of a dinar as breastfeeding

⁵²² Aḥmad b. Yaḥyā al-Wansharīsī, *Al-miʿyār al-muʿrib wa-l-jāmiʿ al-mughrib ʿan fatāwā ʿulamāʾ Ifrīqiya wa-l-Andalus wa-l-Maghrib*, edited by M. Ḥajjī et al., 12 vols, vol. 3/240.

⁵²³ In other words, by accepting her statement that she will ransom herself with part of her dower, even if he had not given it to her, the man is obliged to take what she gives him and to pay her the remaining part of the agreed upon dower.

⁵²⁴ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/698.

⁵²⁵ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=1024

fee and monthly maintenance. He should provide flour, oil, wood, clothes, two linen shirts, a comforter, a blanket, half a sheet, a wool mattress, a cradle, a piece of leather, and a pillow for her. Providing all these things depends on the fortune of the father. According to one opinion, whoever repudiates a woman who is nursing, owes to her the wages of the breastfeeding and clothing of the newborn, not oil and other things. There is no divergence on this point.⁵²⁶ Ibn Abī Zamanīn paid attention to this issue and argued “Saḥnūn asked Ibn al-Qāsim: What if a man divorced his wife while he was poor - can she demand the rent of her dwelling? Ibn al-Qāsim answered: No. Mālik was asked regarding a woman whose husband divorced her while she was pregnant and the man was poor - should he pay her maintenance? Mālik answered: No. However, if the man has financial means during her pregnancy, she takes the maintenance until she gives birth (Question 133).⁵²⁷ Both cases regarding what the husband is obliged to provide his ex-wife display that the financial situation of the father is a determinative factor.

3. *Wathā'iq* works (Notarial records) in al-Andalus

The *fatāwā* compilations are not the only source that can be consulted to assess the extent to which Ibn Abī Zamanīn was reflecting both contemporary legal theory and practice. The works that collect notarial documents (*wathā'iq*) are also relevant for this inquiry.

The practice of recording in writing the legal transactions between individuals appeared in relatively early times in Islamic history.⁵²⁸ The Qur'an recommends the writing of contracts to forestall misapprehension and further litigations between parties.⁵²⁹ The principal duty of the notary (*muwaththiq*), that is, the specialist in the science of legal contracts (*'ilm al-shurūṭ*),⁵³⁰ was to record the details of agreements between individuals. Their services were

⁵²⁶ Al-Wansharīsī, *Al-mī'yār al-mu'rib wa-l-jāmi' al-mughrib 'an fatāwā 'ulamā' Ifrīqiya wa-l-Andalus wa-l-Maghrib*, edited by M. Ḥajjī et al., vol. 3/236.

⁵²⁷ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/737.

⁵²⁸ López Ortiz, “Formularios notariales de la España musulmana”, p. 265.

⁵²⁹ Émile Tyan, *Le notariat et le régime de la preuve par écrit dans la pratique du droit Musulman*, 2 vols. Lyon: Université de Lyon, 1945, vol. 2/110.

⁵³⁰ Aḥmad b. Mughīth al-Ṭulayṭulī, *Al-Muqni' fī 'ilm al-shurūṭ*, edited by Francisco Javier Aguirre Sádaba. Madrid: CSIC, 1994, p. 11.

sought by individuals who asked them to write down documents recording agreements or other types of transactions as well as underwriting a contract.⁵³¹ The term *wathā'iq* (sing. *wathīqa*) is used to designate a “certificate document.” The *wathā'iq* works are manuals for notaries, displaying how legal documents should be formulated.⁵³²

Many were the *wathā'iq* works written in al-Andalus, some of which have survived.⁵³³ Here they are listed by their authors' death date:

- Muḥammad b. Aḥmad b. al-‘Aṭṭār (d. 399/1008),⁵³⁴ *al-Wathā'iq wa-l-sijillāt*.⁵³⁵
- Aḥmad b. Mughīth al-Ṭulayṭulī (d. 459/1067),⁵³⁶ *al-Muqni' fī 'ilm al-shurūṭ*.⁵³⁷
- ‘Abd Allāh b. Fatūḥ b. ‘Abd al-Wāḥid al-Fihri al-Buntī (d. 462/1070),⁵³⁸ *al-Wathā'iq wa-l-masā'il al-majmū'a*.⁵³⁹

⁵³¹ Pedro Cano Ávila, “El notario musulmán andalusí”, *Actas del II Coloquio Hispano-Marroquí de Ciencias Históricas, Historia, Ciencia y Sociedad* (Granada, 6-10 November, 1989). Madrid: AECL, 1992, p. 93.

⁵³² Zomeño, “The Islamic marriage contract in al-Andalus (10th-16th centuries)”, p. 138

⁵³³ Ibn Mughīth, *Al-Muqni' fī 'ilm al-shurūṭ*, edited by Francisco Javier Aguirre Sádaba, p. 12.

⁵³⁴ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=8270 Accessed June 2, 2021; Pedro Chalmeta, “Ibn al-‘Aṭṭār”, in *Biblioteca de al-Andalus*, vol. 2: *De Ibn Adhā a Ibn Bušrā*, edited by J. Lirola and J. M. Puerta Vílchez. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2009, pp. 434-42, n^o342.

⁵³⁵ Ibn al-‘Aṭṭār, *Al-Wathā'iq wa-l-sijillāt: Formulario notarial y judicial Andalusí del alfaquí y notario Cordobés m. 399/1009*, edited by Pedro Chalmeta, Federico Corriente. As noted above, there is a Spanish translation.

⁵³⁶ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=2000 Accessed June 2, 2021; Javier Aguirre Sádaba, “Ibn Mughīth”, in *Biblioteca de al-Andalus*, vol. 4: *De Ibn al-Labbāna a Ibn al-Ruyūlī*, edited by J. Lirola Delgado. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2006, pp. 224-231, n^o838.

⁵³⁷ Ibn Mughīth, *Al-Muqni' fī 'ilm al-shurūṭ*, edited by Francisco Javier Aguirre Sádaba.

⁵³⁸ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=5305 Accessed June 2, 2021; F. Aguirre Sádaba, “Al-Būntī, Abū Muḥammad”, in *Biblioteca de al-Andalus*, vol. 1: *De al-‘Abbādīya a Ibn Abyaḍ*, edited by J. Lirola Delgado. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2012, pp. 286-288, n^o 86.

⁵³⁹ M. García Arenal, “Algunos manuscritos de *fiqh* Andalusies y Norteafricanos pertenecientes a la Real Biblioteca de El Escorial”, *Al-Qanṭara: Revista de Estudios*

- Khalaf b. Muḥammad b. Khalaf b. Fathūn (d. 505/1111),⁵⁴⁰ *al-Wathā'iq*.
- Abū l-Ḥasan 'Alī b. 'Abd Allāh al-Matīṭī (d. 570/1174),⁵⁴¹ *Kitāb al-nihāya wa-l-tamām fī ma'rifat al-wathā'iq wa-l-aḥkām*.⁵⁴²
- Abū Ishāq Ibrāhīm b. al-Hājī al-Gharnāṭī (d. 579/1183),⁵⁴³ *al-Wathā'iq al-muḥtaṣara*.⁵⁴⁴
- 'Alī b. Yaḥyā b. al-Qāsim al-Ṣinhājī al-Jazīrī (d. 585/1189),⁵⁴⁵ *al-Maqṣad al-maḥmūd fī talkhīṣ al-'uqūd*.⁵⁴⁶
- Abū Muḥammad 'Abd Allāh b. 'Abd Allāh b. 'Alī b. Salmūn al-Kinānī (d. 767/1365),⁵⁴⁷ *al-'Iqd al-munazzam li-l-ḥukkām*.⁵⁴⁸

Árabes 1 (1980), p. 13. It has been edited but attributed to 'Abd al-Wāḥid al-Marrākushī, with the title *Wathā'iq al-murābiṭīn wa-l-muwaḥḥidīn al-iqtisādiyya wa-l-ijtimā'iyya*, edited by Hussain Monés. Cairo: Maktabat al-thaqāfa al-dīniyya, 1997: Muḥammad al-'Alamī, "*al-Wathā'iq al-majmū'a* li-bn Fattūḥ, tuṣḍar mansūba li-'Abd al-Wāḥid al-Marrākushī bi-sm musta'ār?", *Majallat al-Iḥyā'* (Morocco) 12 (1998), pp. 227-33; El Hour in *Qurṭuba* 6 (2001), pp. 386-9; P. Chalmeta, "Compte-rendu de al-Marrākushī, *Waṭā'iq al-murābiṭīn wa-l-muwaḥḥidīn*, éd. Ḥusayn Mu'nīs, Le Caire, 1997", *Bulletin Critique Annales Islamologiques* 18 (2002), pp. 91-2.

⁵⁴⁰ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=3119

Accessed June 2, 2021; Rachid El Hour, "Ibn Fathūn", in *Biblioteca de al-Andalus*, vol. 3: *De Ibn al-Dabbāg a Ibn Kurz*, edited by J. Lirola Delgado. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2004, pp. 164-165, n°474.

⁵⁴¹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=8057

Accessed June 2, 2021; V.C. Navarro Oltra, "Al-Matīṭī", in *Biblioteca de al-Andalus*, vol. 5: *De Ibn Sa'āda a Ibn Wuhayb*, edited by J. Lirola Delgado. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2007, p. 523, n° 1539.

⁵⁴² Unpublished.

⁵⁴³ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=11782

Accessed June 2, 2021.

⁵⁴⁴ Abū Ishāq al-Gharnāṭī, *Al-Wathā'iq al-mukhtaṣara*, edited by Muṣṭafā Nājī. Rabat: Markaz Iḥyā' al-Turāth al-Maghribī, 1987.

⁵⁴⁵ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=6899

Accessed June 2, 2021; A. Ferreras Sánchez, "Al-Jazīrī", in *Biblioteca de al-Andalus*, vol. 7: *De al-Qabrīrī a Zumurrud*, edited by J. Lirola Delgado. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2013, pp. 641-645, n° 1856.

⁵⁴⁶ 'Alī b. Yaḥyā al-Jazīrī, *Al-Maqṣad al-maḥmūd fī talkhīṣ al-'uqūd*, edited by Asunción Ferreras. Madrid: CSIC, 1998.

⁵⁴⁷ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=3700

Accessed June 3, 2021; Pedro Cano Avila, "Ibn Salmūn", in *Biblioteca de al-Andalus*, vol. 5: *De Ibn Sa'āda a Ibn Wuhayb*, edited by J. Lirola Delgado. Almería: Fundación Ibn Tufayl de Estudios Árabes, 2007, pp. 216-221, n° 1101.

The authors of Andalusī *wathā'iq* works came from various places like Cordova, Toledo, Granada and Fez.⁵⁴⁹ Hence, these sources took into account various and particular cases from different places.⁵⁵⁰ They worked in the administration of justice as notaries or as qadi's advisors. Their knowledge in the field of Islamic law is obvious from the information given in their biographies. In their explanations of the models they collected in their works, they incorporated materials from previous legal works,⁵⁵¹ for example, Ibn Salmūn (d. 767/1365), in 8th/14th century Granada, followed very nearly and quoted very constantly the formulary of the 5th/11th century Toledan author Ibn Mughīth.⁵⁵² This shows continuity, but cases of change can also be detected given the need to address the changing necessities of society through time. If a legal ruling and the corresponding formulary was felt to have expired or to be out of the circulation, it was eliminated. Hence, the function of model *shurūṭ* works was not only to offer ready to use formularies and to make sure that these formularies were legally watertight, but also to update the legal doctrine by recording that that prevailed in the author's times and erasing what had become obsolete, and to set up which doctrine or formula was juridically the strongest.⁵⁵³

a. The structure and function of *wathā'iq* works

First of all, the notaries had to write the document requested from them, listening to the requests made by the contracting parties and preparing the necessary legal forms. They had to draw up the document in the most

⁵⁴⁸ Ibn Salmūn al- Kinānī, *Al-'Iqd al-munazzam li-l-ḥukkām*, edited in the margins of Ibn Farḥūn, *Tabṣirat al-ḥukkām*, 2 vols. Cairo: al-Maṭba'a al-'Amīra al-Sarafiyya, 1884; id., *Al-'Iqd al-munazzam li-l-ḥukkām*, translated partially by José López Ortiz, "Algunos capitulos del formulario notarial de Aben Salmūn de Granada", *Anuario de Historia de Derecho Español* 4 (1927), pp. 319-323.

⁵⁴⁹ Al-Jazīrī came from Fez, but he settled and worked as a jurist in Algeciras.

⁵⁵⁰ De la Puente, "Slaves in al-Andalus through Mālikī *wathā'iq* works (4th-6th H/10th-12th Centuries CE): Marriage and slavery as factors of social categorization", p. 189.

⁵⁵¹ Hallaq, "From *fatwā* to *furū'*: Growth and change in Islamic substantive law", p. 30.

⁵⁵² López Ortiz, "Algunos capítulos del formulario notarial de Aben Salmūn de Granada", p. 323.

⁵⁵³ Wael B. Hallaq, "Model *shurūṭ* works and the dialectic of doctrine and practice", *Islamic Law and Society* 2 (1995), p. 132.

appropriate possible manner, trying to choose the adequate technical terms so that the intentions and claims of the contracting parties were clearly represented. Clarity and precision in the redaction of these documents were crucial to prevent judicial controversy that might emerge from the reading of the document and to make sure its validity in the qadi's court. Secondly, the notaries were the first witnesses to the document created by them and they had to verify the identity and the legal capacity of the parties involved.⁵⁵⁴ The notary was expected to record all the details that were needed for the accurate identification of the contracting parties (personal names, names of family, professions and place of residence). Moreover, the notary had to inform both parties about the legal importance of the contract that they were signing and the outcomes of any actions they might take thereafter. The notary would consult works of *wathā'iq* looking for the appropriate model as well as for possible clarifications and diversities which could be enclosed therein.⁵⁵⁵

Once the notary had found the convenient model in the manual, he rewrote it, "filling in the blanks", that is, what had been omitted by the manual's author who recorded only the generic form to be completed with the name of each one of the contracting parties. The notary had also to adapt the content included within the model with the necessities of both contracting parties, providing that his adaptation was not in contradiction with the general norms of Islamic law and the spirit which the law confers on such a contract. The document prepared by the notary was then signed by the specific witnesses. Also, every model or form was supported with reference to Islamic legal doctrine (*fiqh*).⁵⁵⁶

The aim of these documents was to record all possible legal private and public transactions. All subjects of law in the chapters of *mu'āmalāt* are present in the notarial forms: family law, through contracts of marriage and divorce, commercial law, sales, lettings etc., and criminal law, register of harm inflicted on

⁵⁵⁴ Zomeño, "Notaries and their formulas: The legacies from the University Library of Granada", p. 60.

⁵⁵⁵ Zomeño, "Abandoned wives and possibilities for divorce in al-Andalus: The evidence of the *wathā'iq* works", p. 111.

⁵⁵⁶ Zomeño, "The Islamic marriage contract in al-Andalus (10th-16th centuries)", p. 138.

third parties and payment of blood price.⁵⁵⁷ But it is important to stress that such forms are not archive documents and specific cases are not cited, mentioning the names of the parties, their ages, the place where the judicial act happens, the date and so forth.⁵⁵⁸ They only mention general expressions such as *fulān ibn fulān* (so-and-so, son of so-and so), *fulāna bint fulān* (such-and-such, daughter of so-and-so), *kadha wa-kadha dināran darāhīm* (so many dinars in dirhems), which the notary substituted for the real names or for the amounts of money agreed upon.⁵⁵⁹

b. The potentials and limitations of *wathā'iq* works as legal sources

The structure of the notarial records and particularly the theoretical explanations that the compilers offered in these collections make the *kutub al-wathā'iq* very valuable as a source for historical analyses regarding Islamic law as these documents display how Islamic legal doctrine was used to clarify the daily practice of law in the qadi's court and how documents were used in specific judicial procedures.⁵⁶⁰ In other words, the notarial records enable to comprehend how the qadi acted in his application of justice, the relationship between individuals, the position of the qadi in the judicial system as well as the judicial process in specific cases.⁵⁶¹ Hence, we are fortunate to have such works to better understand the relation between legal thought and the strategies that individuals pursued when involved in legal and judicial cases. The notarial records have proved to be an important source for the investigation of the possibilities individuals - including women - had when they faced the machinery of justice and how they could defend their rights in the qadi's court. The authors

⁵⁵⁷ De la Puente, "Slaves in al-Andalus through Mālikī *wathā'iq* works (4th-6th H/10th-12th centuries CE): Marriage and slavery as factors of social categorization", p. 190.

⁵⁵⁸ F. Javier Aguirre Sádaba, "Notas acerca de la proyección de los *kutub al-wathā'iq* en el estudio social y económico de al-Andalus", *Miscelánea de Estudios Árabes y Hebraicos Sección Árabe-Islam* 49 (2000), p. 7.

⁵⁵⁹ De la Puente, "Slaves in al-Andalus through Mālikī *wathā'iq* works (4th-6th H/10th-12th centuries CE): Marriage and slavery as factors of social categorization", p. 191.

⁵⁶⁰ Zomeño, "Notaries and their formulas: The legacies from the University Library of Granada", p. 62.

⁵⁶¹ Zomeño, "Abandoned wives and possibilities for divorce in al-Andalus: The evidence of the *wathā'iq* works", p. 113.

of such manuals reflect which were the areas of conflict between individuals and how jurists attempted to solve those conflicts in different historical periods, setting limits on rights and determining restrictions and obligations, thus opening a window to the dynamics of interaction between the scholarly legal discourse and the experience of Muslims.⁵⁶² More importantly, they formulate models that can act as guide for notaries when drawing up documents.⁵⁶³ Their structure is related to their practical use, because the authors of such manuals start out from the needs they themselves experienced as notaries to know not only contract models, but also the theoretical jurisprudence upon which they were based.

c. Ibn al-‘Aṭṭār’s *al-Wathā’iq wa-l-sijillāt*⁵⁶⁴

The genre of *kutub al-wathā’iq* had become well-established in al-Andalus by the 4th/10th century. Authors well-versed in Maliki legal thought devoted themselves to it, but the only text from this early period that seems to have survived (in incomplete form) is the work of Ibn al-‘Aṭṭār.⁵⁶⁵

According to the editors of the book, Pedro Chalmeta and Federico Corriente, Ibn al-‘Aṭṭār completed the book in two stages: a first draft was written before going on pilgrimage in 371/980 and the final draft was written after returning between 383/993 and 392/1101.⁵⁶⁶ The manuscript from the National Library of Torino appears to have existed in almost complete form, but in 1904, it was lost in the fire suffered by the library, so the edition by Chalmeta and Corriente is an amalgamation of different manuscripts.⁵⁶⁷ The editors found only a partial manuscript of the first draft of the work in Maktabat al-Qarawiyyīn, numbered 470/2 and dated 928/1522. It was written over 500 years after the

⁵⁶² Ibid, p. 122.

⁵⁶³ Jeanette A. Wakin (ed.), *The function of documents in Islamic law: The chapters on sales from Ṭaḥāwī’s kitāb al-shurūt al-kabīr*. New York: State University of New York Press, 1972, p. 152.

⁵⁶⁴ Ibn al-‘Aṭṭār, *Al-Wathā’iq wa-l-sijillāt: Formulario notarial y judicial Andalusi del alfaquí y notario Cordobés m. 399/1009*, edited by Pedro Chalmeta, Federico Corriente.

⁵⁶⁵ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 247.

⁵⁶⁶ Ibid, p. xxx.

⁵⁶⁷ Ibid, p. xxi.

author's death and because of this late date, the editors have preferred to rely on the numerous transmissions from Ibn al-'Aṭṭār found in *al-Wathā'iq wa-l-masā'il al-majmū'a* by Ibn Fatūḥ al-Buntī.⁵⁶⁸ Ibn Fatūḥ (d. 462/1070) is a good witness to Ibn al-'Aṭṭār's work because he lived shortly after him. The general ability of Ibn Fatūḥ in transmitting Ibn al-'Aṭṭār's contracts made the editors feel so confident that they even transmit contracts attributed to Ibn al-'Aṭṭār in the work of Ibn Fatūḥ but not found in the manuscript of al-Qarawiyyīn. Vazquez-Paluch argues that this may be a debatable practice but it does not have influence on the overall picture emerging from the text.⁵⁶⁹

Ibn al-'Aṭṭār *al-Wathā'iq wa-l-sijillāt* records issues regarding family law similar to those found in contemporary legal books. The issues regarding divorce are listed below:⁵⁷⁰

- The guardianship by a father for his virgin daughter and his little daughter
- The guardianship for an orphan before reaching puberty and an orphan who reaches puberty
- The procuration given by the father to marry his virgin daughter
- The marriage of an orphan with the permission of his/her guardian
- The marriage of an orphan who is virgin, immature and dependent
- The marriage between deaf and dumb
- The guardianship in marriage by an owner for his slave *mudabbara* and *mukātaba*
- The marriage between a male and female slave by guardianship of their owner
- The marriage contract, *tafwīd* (without specifying the amount of the dower)
- Release, *mubāra'a*
- Resignation by a husband of his right of divorce
- Divorce after having sexual intercourse

⁵⁶⁸ See above note 526.

⁵⁶⁹ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 246.

⁵⁷⁰ Pedro Chalmeta, "El matrimonio según *el Kitāb al-waṭā'iq* de Ibn al-'Aṭṭār (s. X) Análisis y observaciones", *Anaquel de Estudios Árabes* 6 (1995), p. 33.

- Common divorce in our lands
- Release by the father before having sexual intercourse
- Divorce in exchange for proving the child's custody by the mother
- Divorce in exchange for proving maintenance of the common child by the mother
- *Ṭalāq al-sunna*
- Divorce by the woman's request (*tamlīk*)
- Divorce exercised by the wife (*takhyīr*)
- Divorce exercised by the slave upon obtaining the manumission
- Delivery of the payment of alimentation and maintenance of the child from the husband to his wife in exchange of the custody of their common child
- Declaration by a father regarding the accidental loss of his daughter's virginity

4. A comparison between the *Muntakhab al-aḥkām* and *al-Wathā'iq wa-l-sijillāt* regarding legal issues on divorce

Discussions about gender issues in legal works can be found, not surprisingly, in those parts dealing with marriage and divorce. Besides, there are other areas that contain gender information, especially those parts related to legal matters such as witnessing, agency, guardianship, coercion and compensation as well as crimes and misdemeanors. I have chosen for analysis four legal *masā'il* from the divorce chapter of the *Muntakhab al-aḥkām* and four notarial records from the *Wathā'iq wa-l-sijillāt*.

a. Technical differences and similarities between them

Al-Wathā'iq wa-l-sijillāt has a very simple format: a formula for a contract is given, followed by an elucidation of complicated issues found in the text if required. Some contracts are short, some of them are long. Some contracts have very detailed explanations, some of them have no explanation. Moreover, there is little variation in the format. Ibn al-'Aṭṭār generally does not give much legal commentary using his own name. Nevertheless, there are sufficient samples

where he does to make a sketch of his legal thought possible.⁵⁷¹ In this regard, this work is very similar to the *Muntakhab al-aḥkām* because Ibn Abī Zamanīn presents his own opinion in an explicit way very rarely.

A good grounding in legal literature was required of notaries. However, as many of those working as notaries were not able to write notarial documents by themselves, writing guides to contract writing became necessary.⁵⁷² The judges also used these works as they offered commentaries of the contracts clarifying the import of clauses and the context in which they should be used.⁵⁷³ The *Muntakhab al-aḥkām* was used for the same purpose as well. *Al-Wathā'iq wa-l-sijillāt* and the *Muntakhab al-aḥkām* differ because of their genres. When *al-Wathā'iq wa-l-sijillāt* indicates actual experiences of people, the *Muntakhab al-aḥkām* points out to possible experiences.

Ibn al-ʿAṭṭār used the Qurʾān as a source of authority more frequently than *ḥadīth*. He only quoted *ḥadīth* 23 times while the Qurʾān is quoted 44 times as an authority. Mālik is the most dominant personality: he is cited as a source of authority 86 times while Ibn al-Qāsim is cited half of that, 43 times. On the contrary, Ibn al-Qāsim is the most cited scholar in *Muntakhab al-aḥkām*, and the second is Mālik.⁵⁷⁴ Ibn al-ʿAṭṭār quoted local practice as an evidence at least 19 times. Although generally local custom was ignored by most other scholars of the period, Ibn Abī Zamanīn was one of the scholar who took into account local custom like Ibn al-ʿAṭṭār.⁵⁷⁵

Also, both works referred to other important scholars such as ʿĪsā b. Dīnār, Ibn Ḥabīb, Saḥnūn, Aṣbagh and Ashhab. Nonetheless, yet this is a far cry from *Muntakhab al-aḥkām* because there are 557 appearances by authorities in a 270-page book while in the *Wathā'iq wa-l-sijillāt* there are 287 appearances by authorities in a 637-page book (importantly, smaller print). It might be related to the different nature of both works. Vazquez-Paluch argues that the big difference

⁵⁷¹ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 246.

⁵⁷² Cano Ávila, “El notario musulmán andalusí”, p. 94.

⁵⁷³ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 247.

⁵⁷⁴ See p. 27.

⁵⁷⁵ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 255.

between both works is that “Ibn al-‘Aṭṭār is not an invisible character who links up statement from various authors, but a very visible author who is nearly always the only authority, giving flashes of flair and erudition.”⁵⁷⁶

b. Similarities and differences between divorce cases in the *Wathā’iq wa-l-sijillāt* and the *Muntakab al-aḥkām*

Even though the genres of the *Wathā’iq wa-l-sijillāt* and the *Muntakab al-aḥkām* are different, their common target is the legal and judicial practice, as this applies to topics such as guardianship, divorce of slaves, custody, *nafaqa*, *khul’*, *mubāra’a*, and *ṭalāq*.

Ibn al-‘Aṭṭār - who as mentioned quoted local practice in the *Wathā’iq wa-l-sijillāt* - includes an interesting example regarding the issue of a woman claiming her husband has divorced her: “The maintenance during the whole period of the dispute is the obligation of the husband because he is denying [the claim] of divorce and arguing that she is his wife, and her claim does not cause her to lose her maintenance if God so wills. If the woman claims divorce from her husband and he denies it, she must be able to confirm her claim by providing two witnesses of good reputation, because God the Mighty and Exalted says: ‘Or separate from them in a good way, and get people of good reputation to witness [to it].’ (Q 65:2) And if she is only able to provide one witness of good reputation to testify to her claim for her, her husband is required to take an oath. If he takes an oath it cancels out the witness’ testimony, and if he refuses [to take an oath], it is narrated from Mālik - may God cover him in mercy - that the divorce is confirmed there and then, and his refusal [to take an oath] is like a second witness, and that is what is narrated from the Prophet - may God bless him and grant him peace. Still, he is imprisoned [if he refuses to take an oath], and if his imprisonment lasts a long time he is freed and they are not divorced.”⁵⁷⁷

According to this case, there is a dispute between a couple about the dissolution of their marital bonds. The man claims that they did not divorce so he

⁵⁷⁶ Ibid, p. 249.

⁵⁷⁷ Ibid, p. 256, quoted from Ibn al-‘Aṭṭār, *Al-Wathā’iq wa-l-sijillāt: Formulario notarial y judicial Andalusi del alfaquí y notario Cordobés m. 399/1009*, edited by Pedro Chalmeta, Federico Corriente, p. 527.

has to continue to provide the matrimonial maintenance for his wife. But if the woman claims that they are divorced and her husband did not accept that, she should bring two witnesses to prove it. If she finds only one witness, her husband should take an oath. If he refuses it, he is imprisoned for a long time and they are not divorced. Thus, two main issues should be taken into consideration: maintenance during the dispute period and their claims.

The issue of matrimonial maintenance is mentioned frequently in the *Muntakhab al-aḥkām*. Ibn Abī Zamanīn and Ibn al-‘Aṭṭār are in agreement about providing matrimonial maintenance by a husband to his wife. Ibn Abī Zamanīn stated that a husband should provide matrimonial maintenance to his wife during marriage and her waiting period. “The women who are not divorced by irrevocable *ṭalāq* are provided dwelling, maintenance and dress by their husbands, this regardless of whether they are pregnant or not. The issue of legacy occurs between them during the waiting period” (Question 127).⁵⁷⁸ Ibn al-‘Aṭṭār explained that maintenance is the duty of the husband and he should provide it until it becomes established that he is not married to his wife anymore. His argument regarding the procedure for the claim is based on a *ḥadīth*. He almost quoted this *ḥadīth* word for word. “The Prophet said: “If a woman claims that her husband has divorced her, and she brings a witness of good character (to testify) to that, her husband should be asked to swear an oath. If he swears, that will invalidate the testimony of the witness, but if he refuses then that will be equivalent to a second witness, and the divorce will take effect.”⁵⁷⁹ However, the imprisonment issue is not mentioned in this *ḥadīth* that contradicts the dominant opinion of the school. Ibn Abī Zayd al-Qayrawānī talked about the same issue in his *Nawādir*: “If someone provides one witness regarding manumission, divorce or punishable crime and the defendant refuses to take an oath, Mālik says he is found guilty. Ashhab said it also, but then Mālik said [that] he is imprisoned until he takes an oath and this is what Ibn al-Qāsim and most of our scholars chose. If his imprisonment lasts a long time he is left.

⁵⁷⁸ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/734.

⁵⁷⁹ Ibn Mājah, *Sunnan Ibn Mājah*, translated by Naṣiruddīn Al-Khaṭṭāb and Hāfiz Abū Ṭāhir Zubair ‘Alī Za’i, 5 vols. Riyadh: Darussalam Publishing, 2007, vol. 3/166.

Ibn al-Qāsim said: The longest he may be imprisoned is a year. But Ibn Saḥnūn held to Mālik's opinion that he is imprisoned forever until he takes the oath."⁵⁸⁰

This example displays that Ibn al-'Aṭṭār's explanation is based on the *ḥadīth* but the *ḥadīth* does not talk about the imprisonment issue. It only covers the issue of witness for divorce. Ibn al-'Aṭṭār agrees with the dominant opinion of Maliki school except of the imprisonment issue. Ibn al-'Aṭṭār had tried to change the dominant opinion being opposed to Mālik's view and he presented it as anonymous in this example, even though his argument is based on the *ḥadīth*. Hence, there is an important difference between Ibn al-'Aṭṭār's and Ibn Abī Zamanīn's approaches. Ibn al-'Aṭṭār sometimes preferred not to indicate his own view using own name, when he talks about his own opinion regarding an issue. However, if Ibn Abī Zamanīn was willing to express his own opinion in the *Muntakhab al-aḥkām* or his opinion is different than the dominant opinion of the school, he says: "Muḥammad said".

On the other hand, both paid attention to the issue of *mubāra'a*, that is, the type of divorce in which the woman comes before a judge and forsakes all her financial rights in return for the dissolution of marriage. Ibn Abī Zamanīn mentioned this issue in the *Muntakhab al-aḥkām*: "Mālik was asked about a man who had married a woman paying her a specified dower, then the woman gave ten *dīnārs* to him as a ransom before having sexual intercourse with him and subsequently she wanted to add half of the dower to the ransom. Mālik said: "she is not entitled to do that." Ibn al-Qāsim heard from al-Layth that he said the same thing on this issue. In my opinion (Ibn Abī Zamanīn), as regards this issue, it is the same whether the dower has been paid in cash or not. One of the things that explains this issue is that if he had given her the dower in cash, and subsequently she had invited him to leave her or to make *mubāra'a*, and he had done so, then she is (required) to give back to him all that she took from him. She is fact *ḥarām* for him and thus she is not entitled to anything from the dower in the case that she had taken possession of it. In the case that she had not taken the dower, she cannot demand it from him. If the woman had said to him before having sexual intercourse: 'Divorce me, I will give you a determined amount of my dower', he is

⁵⁸⁰ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 257.

to take what she gives and she is entitled to receive half of the remaining part of the dower in the case that he had not paid it in cash to her” (Question 47).⁵⁸¹

Ibn al-‘Aṭṭār mentioned the same issue in the *Wathā’iq wa-l-sijillāt*. He includes a notarial document dealing with a woman who made *mubāra’a* with her husband. The sentence begins with a witness stating: “I testify this woman and this man made *mubāra’a*.” A husband and a wife made *mubāra’a* in return of the dower that should be paid to the wife by the husband, but then they had a disagreement about this issue. The wife claimed that her husband had kissed her and that *khalwa*⁵⁸² had taken place between them. This situation has effects on whether the dower should pay or not. They went to the qadi to solve the problem. The qadi mentioned the relevant verse and offered an agreement to them. They came to an agreement and the problem was solved.⁵⁸³ In the Maliki school, a woman who wants to make *mubāra’a* should have given up all her financial rights. Also, if a couple divorces, then *khalwa* takes place between them, it means return. In other words, they would have given up on divorce. Ibn al-‘Aṭṭār and Ibn Abī Zamanīn have the same argument in their books. The case mentioned in the *Muntakhab al-aḥkām* demonstrates that when a woman asks for divorce before having sexual intercourse, she has no right over the dower anymore. Ibn Abī Zamanīn expressed his own view very clearly in the sentence beginning with “In my opinion”. Moreover, both argued that if *khalwa* comes out between them, the husband can return to his wife.⁵⁸⁴

Another significant issue that both underlined in their books is *khiyār* which points to the execution of divorce causing the ending of the nuptial connection. A wife who wants to divorce her husband can do that in this way as explained in the *Muntakhab al-aḥkām*: “Saḥnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a man who told his wife with whom he had sexual intercourse: “Choose yourself”. Then, she said: “I have chosen myself”, but the man then refused (divorcing her). Ibn al-Qāsim said: His denial is not

⁵⁸¹ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/698.

⁵⁸² [kh l w]: [khalwa]: being alone with a non *maḥram*, *Mu’jam lughat al-fuqahā’*, edited by Hāmid Sādiq Qanībi and Qutb Mustafa Sanū, p. 178; Ibid, vol. 2/735.

⁵⁸³ Ibn al-‘Aṭṭār, *Al-Wathā’iq wa-l-sijillāt: Formulario notarial y judicial Andalusi del alfaquí y notario Cordobés m. 399/1009*, edited by Pedro Chalmeta, Federico Corriente, p. 434.

⁵⁸⁴ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/743.

important/his refusal is of no benefit for him. It means three *ṭalāqs*. Saḥnūn asked: What if the man did not have sexual intercourse with the woman and he refused? Ibn al-Qāsim answered: "Then I am in favour of considering just one *ṭalāq* even if the woman said: I chose myself and I am divorced with three *ṭalāqs*." Ibn al-Qāsim said: What obliges is what the man says, so that he can contradict her if his intention - when he offered her the possibility of choosing - was just one or two *ṭalāqs* given that a single *ṭalāq* is what is to be expected if the man did not have sexual intercourse with her. If the man did not have any intention, it is three *ṭalāqs* and he cannot contradict the woman. Mālik said the same about the man who gave *khiyār* to his wife" (Question 95).⁵⁸⁵ The wife who is offered the possibility of *khiyār* only has the right to choose her husband or opt for irrevocable separation from him through the pronouncement of three repudiations, according to the explanation recorded by Ibn Abī Zamanīn. Ibn al-ʿAṭṭār elucidated this issue in a very similar way. He argued that *khiyār* refers to irrevocable separation and a woman who is divorced by means of *khiyār* should marry another man if she wants to return to her husband. His explanation is however presented as based on *sunna* of the Prophet.⁵⁸⁶ As mentioned above, *ḥadīth* plays a more important role in Ibn al-ʿAṭṭār's work than in Ibn Abī Zamanīn's and this example underlines this difference. However, it is unclear if this reflects the original text by Ibn al-ʿAṭṭār or its later recension as cautioned by Vazquez-Paluch.

⁵⁸⁵ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, edited by M. Ḥammād, vol. 2/719.

⁵⁸⁶ Ibn al-ʿAṭṭār, *Al-Wathāʾiq wa-l-sijillāt: Formulario notarial y judicial Andalusi del alfaquí y notario Cordobés m. 399/1009*, edited by Pedro Chalmeta, Federico Corriente, p. 18.

CONCLUSION

Given the crucial role that matrimonial unions play in society, their dissolution is also of fundamental relevance. High divorce rates, which are frequently thought to be a modern and 'Western' phenomenon, were also common in Islamic societies during the Middle Ages. The main goal of this study was to give an overview and to analyze the norms and practices related to the dissolution of marriage in al-Andalus up to the 4th/10th century, as an indispensable element to further comprehend the characteristics that made up the family in this particular society. Maliki law was prevalent and therefore it necessarily had to constitute the focus of a study dealing with the resolution of marital conflicts in al-Andalus. The study of the materials on this topic recorded in the legal work by the Maliki scholar Ibn Abī Zamanīn entitled *Muntakhab al-aḥkām* has proven to be especially adapted to fulfill this goal as his aim in writing such book was to provide judges and other magistrates with the basic outline of Maliki doctrines regarding divorce so that in their court and legal activities they could find what they were looking for without having to do extensive research or consulting. One of the contributions of this dissertation is to offer an annotated translation of the section on divorce of this seminal early Maliki text.

In my study of the Islamic legal regulations, practices and patterns, as well as social conceptions regarding the marital bond and its dissolution that are reflected in Ibn Abī Zamanīn's *Muntakhab al-aḥkām*, the relationships between the spouses have been found to have a high degree of complexity, as Islamic (and more specifically Maliki) law addresses a wide variety of possible situations affecting the husband, the wife and the children involved, and correspondingly offers different solutions adapted to each case. The materials recorded in Ibn Abī Zamanīn's *Muntakhab al-aḥkām* have been analyzed taking into account those found in other legal genres such as *fatwā* collections and notarial records highlighting the many similarities but also some differences. The analysis of the strategies carried out by husband and wife when their union broke shows that women could resort to and benefit from some legal means vis-à-vis matrimonial matters such as alimony and matrimonial maintenance, dower values, ransom for divorce, and childcare issues. One of the main sources of a husband's

authority over his wife resided in the fundamental inequality of Islamic law, which allowed a husband to divorce his wife at will. The pinnacle of patriarchal control was the husbands' total right to end the marriage at will, just like a master's absolute right to manumit his slave. However, divorces were rarely one-sided and the examined cases demonstrate that women in al-Andalus were very visible actors in the divorce process. Thus, the resulting picture highlights that - within the limitations imposed by the fact that the male was endowed with a larger field of action than that of the wife in Islamic (Maliki) law - women were still given some degree of agency and autonomy, and that their needs and those of their children were addressed. Women could resort to legal procedures aiming to get them declared divorced and being thus able to remarry, especially if appropriately advised and able to provide witnesses in relation to their plight. Nonetheless, not all women had the same position according to Islamic law, with differences established according to age, social status, absence of freedom and other reasons. It has moreover been shown that cases related to marital relations brought up for legal discussion had generally an economic dimension, as most of them were mainly related to alimony and child support, payment for nursing children, providing matrimonial maintenance, and dowry payments.

As stated in the Introduction, this dissertation had four main objectives that have been carried out in Part I of this dissertation: to offer an overview of the legal doctrines related to the dissolution of marriage in al-Andalus in the 4th/10th century, to analyze the specificities of female agency in the pursuit of justice regarding their marital rights, to approach the Maliki legal culture through the specific case of the divorce regulations, and to contribute to the history of women in al-Andalus. On the strength of what has been already achieved - in spite of the unforeseen difficulties provoked by the COVID pandemic - I intend in my post-doctoral research to develop further the analysis of legal female agency and how divorce affected the social life of women in al-Andalus.

PART TWO

ANNOTATED TRANSLATION OF THE SECTION OF DIVORCE IN IBN ABĪ ZAMANĪN'S *MUNTAKHAB AL-AḤKĀM*⁵⁸⁷

⁵⁸⁷ Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, 2 vols., edited by M. Ḥammād.

Introduction

The sixth chapter (*al-kitāb al-sādis*) of the *Muntakhab al-aḥkām* deals with divorce issues (*masā'il al-ṭalāq*). Ibn Abī Zamanīn begins with the questions that deal with *iḥṣān* and completes it with the questions that deal with maintenance. All the questions recorded in this section do not necessarily deal directly with divorce issues but all of them have a relation to divorce. In his selection, the author was probably guided by his interest in presenting miscellaneous questions, debates and arguments about divorce.

The *Muntakhab al-aḥkām* has eight manuscripts, which are explained in the Part 1. This section will be based on the edition by Muḥammad Ḥammād.⁵⁸⁸ The structure of this Part consists of 204 legal questions dealing with different aspects related to the issue of divorce as I mentioned. Each legal question is numbered. The Arabic text is reproduced, then the English translation is offered followed by a Commentary in which the contents of the legal question is explained and Qur'anic, translation of Arthur John Arberry, and other references from Maliki legal literature are given when appropriate. I will also apply to *Kur'an Yolu Türkçe Meal ve Tefsir*,⁵⁸⁹ which includes the text, translation and *tafsir* of Qur'an, by Hayreddin Karaman, İbrahim Kafi Dönmez, Mustafa Çağrıçı and Sadrettin Gümüş⁵⁹⁰ when I explain Qur'anic verses. They are quoted in italics.

The scholars and works mentioned are identified in an Appendix, with indication of the legal questions where their names and titles appear.

There are footnotes numbers in the Arabic version of the *Muntakhab al-aḥkām* because it was impossible to erase them. The important ones are explained in the footnote of the translation with new numbers.

⁵⁸⁸ For detailed information about editions and manuscripts of the *Muntakhab al-aḥkām*, see p. 30.

⁵⁸⁹ Hayreddin Karaman, İbrahim Kafi Dönmez, Mustafa Çağrıçı and Sadrettin Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*. İstanbul: Diyanet İşleri Başkanlığı Yayınları, 2020.

⁵⁹⁰ Hayreddin Karaman, İbrahim Kafi Dönmez, Mustafa Çağrıçı and Sadrettin Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*. İstanbul: Diyanet İşleri Başkanlığı Yayınları, 2020.

The works that have been consulted for the Commentary in this section are in the first place those that are among the sources used by Ibn Abī Zamanīn and that have been preserved:

- Mālik's *Muwaṭṭa'*, (d. 179/795). When quotations have been identified they are indicated in the footnotes.
- Saḥnūn's *Mudawwana*, (d. 240/854), which is the main source of Ibn Abī Zamanīn. When quotations have been identified they are indicated in the footnotes.
- al-'Utbī's *Mustakhraja*, (d. 254/868), as preserved in Ibn Rushd al-Jadd's *Kitāb al-bayān wa-l-taḥṣīl*, (d. 520/1126). When quotations have been identified they are indicated in the footnotes.

Also, I have consulted later works such as:

- Ibn Abī Zayd al-Qayrawānī's *Risāla*, (d. 386/996)
- al-Sha'bī al-Mālaqī, *Al-Aḥkām*, (d. 497/1004)
- Ibn Rushd al-Ḥafīd's *Bidāyat al-mujtahid*, (d. 595/1198)
- 'Alī b. Khalīl Ṭarāblusī⁵⁹¹, *Mu'īn al-Ḥukkām*, (d. 849/1445)

Finally, I have also consulted David Santillana's⁵⁹² (d. 1931) *Istituzioni di diritto Musulmano malichita con riguardo anche al sistema sciafiita*.

⁵⁹¹ 'Alī b. Khalīl Ṭarāblusī who was a jurist in Jerusalem wrote the *Mu'īn al-Ḥukkām* that is a handbook of Islamic law procedure. It covers everyday matters, such as the jurisdiction of judges, their status, and compensation for their various services. Also, the author cites many legal decisions, often with no theoretical discussion, and similar and different doctrines from Hanafi, Maliki and Shafi school.

⁵⁹² David Santillana is an expert on Islamic law, particularly Maliki school, who was born in Ottoman Tunisia in 1855. He had multifaceted career as a scholar and legal practitioner in North Africa and Europe. He has played important role in the creation of the Tunisian Code of Obligations and Contracts. Also, he is the editor of the second volume of Khalīl b. Ishāq al-Jundī's *Mukhtaṣar*.

Question: 1

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Arabic text:

باب في الإحصان والإحلال

قال سحنون: قلت لابن القاسم: هل يحصن الأمة واليهودية⁽¹⁾ والنصرانية الحر في قول مالك؟ قال: نعم. إذا كان نكاحها⁽²⁾ صحيحا.

Translation:

Chapter of *iḥṣān*⁵⁹³ and *iḥlāl*⁵⁹⁴

Saḥnūn⁵⁹⁵ said: I asked Ibn al-Qāsim⁵⁹⁶: According to Mālik⁵⁹⁷, do a (Muslim) free man grant *iḥṣān* to a slave woman and a Jewish and Christian⁵⁹⁸ woman?

Yes, if the marriage is valid.

Commentary

Iḥlāl is being lawful for a legal marriage. *Iḥṣān* in its basic meaning is doing what is beautiful. As a technical religious term, “it refers to a deepened understanding and experience that allow one to worship God as if one sees Him.”⁵⁹⁹ *Muḥṣan/a* is chaste.⁶⁰⁰ As a legal concept it refers “to the personal status of an individual who

⁵⁹³ [ḥ ṣ n]: [iḥṣān]: integrity, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 26. For the technical meaning see below commentary.

⁵⁹⁴ [ḥ l l]: [iḥlāl]: permission, ibid, p. 26. For the technical meaning see below commentary.

⁵⁹⁵ The biography and works of the scholars mentioned are found in *Appendix1: Scholars mentioned by Ibn Abī Zamanīn*.

⁵⁹⁶ See *Appendix 1: Scholars mentioned by Ibn Abī Zamanīn*.

⁵⁹⁷ Ibid.

⁵⁹⁸ In the mss. from Rabat (ḥā'), (bā') and (ṭā'): a Christian female slave, but in the *Mudawwana* as written in the question above. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/288.

⁵⁹⁹ Esposito, “*Iḥṣān*”, in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed March 10, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e981>

⁶⁰⁰ *Muḥṣan*: One who is in protection from adultery (wedded man or woman), chaste, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 381.

is free (not a slave) and who either has never committed an act of illicit intercourse or has consummated a lawful marriage to a free partner.”⁶⁰¹

The term *muḥṣan* in the Qur’an has metaphorical meaning that means protection of the honour. The Quran talks about *muḥṣan* (pl. *muḥṣanāt*) in this verse: “*Today the good things are permitted you, and the food of those who were given the Book is permitted to you, and permitted to them is your food. Likewise believing women in wedlock, and in wedlock women of them who were given the Book before you if you give them their wages, in wedlock and not in licence, or as taking lovers. Whoso disbelieves in the faith, his work has failed, and in the world to come he shall be among the losers.*”⁶⁰² In this verse, ‘*muḥṣanāt*’ refers to married, chaste and free women. A man makes *muḥṣana* a woman or a woman makes *muḥṣan* a man under various specific circumstances.⁶⁰³ This issue is examined in detail in the *Muwaṭṭa’*: “Mālik said: ‘When a slave-girl is married to a free man and then he separates from her before she is set free, his marriage to her does not make her *muḥṣana*. She is not *muḥṣana* until she has married after she has been set free and she has had intercourse with her husband. That gives her *iḥṣān*. If she is the wife of a freeman and then she is set free while she is his wife before he separates from her, the man makes her *muḥṣana* if he has intercourse with her after she has been set free. Mālik said: ‘The Christian and Jewish free women and the Muslim slave-girl all make a Muslim free man *muḥṣan* when he marries one of them and has intercourse with her.’”⁶⁰⁴

Question: 2

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Arabic text:

⁶⁰¹ Esposito, "Muḥṣan", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed March 10, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e1587>

⁶⁰² I will follow the translation of the Qur’an by Arthur John Arberry.

Al-Mā’ida: 5, <https://tanzil.net/#trans/en.arberry/5:5>

⁶⁰³ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 984.

⁶⁰⁴ Mālik b. Anas, *Al-Muwaṭṭa’ of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 217.

قلت: [أفيحصن]⁽³⁾ المسلم النصرانية إذا وطئها ثم طلقها أو مات عنها ثم زنت قبل أن تسلم؟ فقال: قال مالك: لا تكون محصنة حتى تسلم ويجمعها زوجها بعد إسلامها⁽⁴⁾.

Translation:

Saḥnūn asked: Does a (Muslim) man make *muḥṣana* a Christian woman if the consummation occurs, then he divorces or dies, and the woman commits adultery before being Muslim? Ibn al- Qāsim said: Mālik said: she doesn't become *muḥṣana* until converting to Islam⁶⁰⁵ and after conversion, the husband has to have sexual intercourse with her.

Commentary:

Marriage between a Muslim man and a Christian woman is permissible, but consummation of the marriage is not sufficient condition for rendering *muḥṣana* a non-Muslim free woman; she has previously to convert to Islam and then consummation has to take place. If the consummation does not exist before divorce or death, the marriage becomes uncompleted.⁶⁰⁶

The Qur'an underlines that adultery is forbidden not only for men but also for all Muslims with these verses: "*And approach not fornication; surely it is an indecency, and evil as a way*"⁶⁰⁷ and "*The fornicator shall marry none but a fornicatress or an idolatress, and the fornicatress -- none shall marry her but a fornicator or an idolator; that is forbidden to the believers.*"⁶⁰⁸

A Muslim man cannot marry a Christian woman who has committed fornication. If a Christian woman whose husband is Muslim fornicates after divorce, she cannot become *muḥṣana* unless she converts to Islam and has sexual relation with her husband.⁶⁰⁹ If this woman commits adultery after the death of her husband before converting to Islam, she does not become *muḥṣana* even after

⁶⁰⁵ In the mss. from Zagora (zayn) and Rabat (ḥā'): after released her. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/288.

⁶⁰⁶ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 2027.

⁶⁰⁷ Al-Isrā': 32, <https://tanzil.net/#trans/en.arberry/17:32>

⁶⁰⁸ Al-Nūr: 3, <https://tanzil.net/#trans/en.arberry/24:3>

⁶⁰⁹ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 2357.

being Muslim, because she should have had sexual intercourse with her husband before his death⁶¹⁰.

Question: 3

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Arabic text:

قلت له: أرأيت الصغيرة التي / تطيق الرجل⁽⁵⁾ إلا أنها لم تحض، إذا تزوجها رجل وجامعها أتحصنه في قول مالك؟ قال: نعم؛ ولا يحصنها.

Translation:

Saḥnūn asked Ibn al-Qāsim: What about a little girl who is able to have sexual intercourse with a man⁶¹¹ but does not yet menstruate, if she marries and the consummation occurs, does she make *muḥṣan* her husband according to the opinion of Mālik? Ibn al-Qāsim said: Yes, but the husband does not make her *muḥṣana*.

Commentary:

The Qur'an does not specify the limitations regarding the age of marriage, referring vaguely to the 'age of the marriage': "*Test well the orphans, until they reach the age of marrying; then, if you perceive in them right judgment...*"⁶¹² Menstruation is not necessary for a girl being married, because the Qur'an says: "*As for your women who have despaired of further menstruating, if you are in doubt, their period shall be three months; and those who have not menstruated as yet...*"⁶¹³ However, consummation of marriage is necessary to complete the marriage. Unless the consummation takes place, a girl who has not reached puberty cannot make *muḥṣan* her husband. After the consummation, she does make him *muḥṣan* even if she does not menstruate yet. However, her husband

⁶¹⁰ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/286.

⁶¹¹ In the ms. from Tunisia (tā'): *taṭīq al-jimā'* means a woman who is able to have sexual relation.

⁶¹² Al-Nisā': 6, <https://tanzil.net/#trans/en.arberry/4:6>

⁶¹³ Al-Ṭalāq: 4, <https://tanzil.net/#trans/en.arberry/65:4>

cannot make her *muḥṣana* even after consummation because she does not menstruate.⁶¹⁴

Question: 4

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Arabic text:

قلت: فالصبي إذا لم يحتلم فتزوج امرأة فجامعها أيجب عليها؟ قال: لا. وهو قول مالك. وإن صالحها أبوه أو وصيه فلا عدة عليها ولا يجب لها [بجماعه]⁽⁶⁾ المهر⁽⁷⁾.

Translation:

Saḥnūn asked: What about a little boy who has not started ejaculation yet and marries a woman with whom the consummation occurs, does he make her *muḥṣana*? Ibn al-Qāsim said: No. This is the opinion of Mālik. If his father or guardian separates them, the *‘idda* (waiting period) is not necessary for her and she cannot take *mahr* (dower)⁶¹⁵ for the sexual intercourse⁶¹⁶ that has taken place.

Commentary:

A boy who has not reached puberty does not make *muḥṣana* his wife because he is still child. The authority for taking decisions regarding marriage and divorce still belongs to his father or his guardian. Under regular circumstances, a woman after divorce should have a waiting period before re-marriage and she should take her total dower if the marriage is consummated. However, under the conditions explained in the text, it is not possible to take total dower and she

⁶¹⁴ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 984.

⁶¹⁵ There is no dower or waiting period for a wife of a little boy who has not started ejaculation yet. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 2/286.

⁶¹⁶ In the main ms. and mss from Rabat (bā'), (ṭā') and Algeria (jīm): *biḥamliḥā* (with her pregnancy), in the mss. from Rabat (ḥā'), Zagora (zayn) and Tunisia (tā'): *bijimā'ihā* (with having sexual intercourse with her). The latter is more accurate because there is no pregnancy issue here. If the woman is pregnant, she gets dower and should observe her waiting period.

does not have to wait to remarry because the consummation that takes place between the boy and the woman is not accepted as a regular consummation.⁶¹⁷

Question: 5

Page: 685

Arabic text:

قلت له: فالعبد هل يحصن المرأة الحرة؟ قال: نعم. قلت له: رأيت رجلا تزوج امرأة ودخل بها فوطئها وهي حائض أيجلها ذلك لزوج كان طلقها البتة؟ فقال: لا. وهو قول مالك، وكذلك لو تزوجها في رمضان ووطئها نهارا، أو تزوجها وهي محرمة

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أو وهو محرم فوطئها فلا يكونان بهذا الوطء محصنين⁽¹⁾، ولا يجلها لزوج كان قد طلقها البتة.

Translation:

Saḥnūn asked Ibn al-Qāsim: Does a slave (Muslim) man make *muḥṣana* a free woman? Ibn al-Qāsim said: Yes. Saḥnūn asked Ibn al-Qāsim: What about a man who marries and the consummation occurs during (his wife's) menstruation period, can she return to her previous husband who divorced her by an irrevocable divorce (*al-batta*)? Ibn al-Qāsim said: No, this is the opinion of Mālik. It is the same as if he had married during *ramaḍān* and the consummation had taken place during the day or as if he had married when she was *muḥrima*⁶¹⁸ or he was *muḥrim* and the consummation had taken place. Such consummation does not make them *muḥṣan* and in the case of having been divorced by an irrevocable divorce, such consummation does not make her licit to her previous husband.

Commentary:

⁶¹⁷ *Wilāyah 'āmmah*: guardianship. Santillana, *Istituzioni di diritto Musulmano malichita con riguardo anche al sistema sciafiita*, p. 160.

⁶¹⁸ [ḥ r m]: [muḥrima]: who has entered the state of ritual consecration, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 381. For the detailed information, see below commentary.

Various versions of being *muḥṣan* or *muḥṣana* are discussed in the *Muwaṭṭaʾ*. To illustrate: “Yaḥyā related to me from Mālik from Ibn Shihāb, and he had heard from al-Qāsim b. Muḥammad that they said: ‘When a free man marries a slave girl and consummates the marriage, she makes him *muḥṣan*’. Mālik said: ‘A slave makes a free woman *muḥṣana* when he consummates marriage with her, while a free woman only makes a slave *muḥṣan* when he is freed, he is her husband and has had sexual relations with her after he has been set free. If he parts from her before he is free, he is not a *muḥṣan* unless he marries her after having been set free and he consummates the marriage.’”⁶¹⁹ A slave Muslim man makes *muḥṣana* a free woman when consummation occurs but if this happens during the menstruation period, she cannot return to her husband who divorced her irrevocable divorce. Under regular conditions, if a couple divorce by an irrevocable *ṭalāq* (*al-batta*), the woman should marry another man before being allowed to remarry her previous husband, and the consummation has to take place. However, sexual intercourse is forbidden during menstruation period, so that consummation should take place out of that period. In the Qurʾan, sexual intercourse during menstruation period is mentioned in the following verse: *“They ask thee concerning women’s courses. Say: They are a hurt and a pollution: So keep away from women in their courses, and do not approach them until they are clean. But when they have purified themselves, ye may approach them in any manner, time, or place ordained for you by Allah. For Allah loves those who turn to Him constantly and He loves those who keep themselves pure and clean.”*⁶²⁰

In the second part of the question, the consummation is said to have occurred during an illicit period because of the woman's menstruation. Hence, even though this woman had married another man and they had sexual intercourse, she cannot remarry her previous husband. The answer shows that sexual intercourse during illicit periods (during menstruation, daylight of *ramaḍān* and having *iḥrām*) does not make it possible the return to the previous husband.

Muḥrima is a person who wants to perform hajj or *ʿumrah*, she has to enter the state of *iḥrām* that involves various significant regulations like prohibition of

⁶¹⁹ Mālik b. Anas, *Al-Muwaṭṭaʾ of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 216.

⁶²⁰ Al-Baqara: 222, <http://tanzil.net/#trans/en.arberry/2:222>

killing animals, using profane language, quarrelling or fighting, and taking oaths.⁶²¹ One of these prohibitions is having sexual intercourse. This prohibition is specified in the Qur'an with this verse: *"The Pilgrimage is in months well-known; whoso undertakes the duty of Pilgrimage in them shall not go in to his womenfolk nor indulge in ungodliness and disputing in the Pilgrimage. Whatever good you do, God knows it. And take provision; but the best provision is godfearing, so fear you Me, men possessed of minds!"*⁶²² Also, having sexual relation during daylight of *ramadān* is forbidden with this verse: *"Permitted to you, upon the night of the Fast, is to go in to your wives; -- they are a vestment for you, and you are a vestment for them. God knows that you have been betraying yourselves, and has turned to you and pardoned you. So now lie with them, and seek what God has prescribed for you. And eat and drink, until the white thread shows clearly to you from the black thread at the dawn; then complete the Fast unto the night, and do not lie with them while you cleave to the mosques. Those are God's bounds; keep well within them. So God makes clear His signs to men; haply they will be godfearing."*⁶²³

Question: 6

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Arabic text:

وكذلك كل وطء لا يحل؛ مثل وطء المعتكفة، وكل نكاح [لا تكون]⁽²⁾ به المرأة⁽³⁾ محصنة فلا يحلها ذلك النكاح، وكل نكاح حرام، ودخل بها ووطئها لم يكن ذلك الوطء إحصانا ولا يحلها لزوج كان طلقها البتة، وكذلك كل نكاح يكون فيه الخيار إلى أحد الزوجين⁽⁴⁾، إن شاء أجازته وإن شاء رده، فإن وطئها قبل أن يميز الذي إليه الإجازة فإنه لا يكونان به محصنين ولا يحلها لزوج كان [طلقها]⁽⁵⁾ قبله⁽⁶⁾.

Translation:

⁶²¹ Esposito, "Ihrām", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed March 11, 2021

<http://www.oxfordislamicstudies.com/article/opr/t125/e980>

⁶²² Al-Baqara: 197, <http://tanzil.net/#trans/en.arberry/2:197>

⁶²³ Al-Baqara: 187, <https://tanzil.net/#trans/en.arberry/2:187>

All sexual intercourse that is not lawful similarly (does not produce *iḥṣān*). Such is the case of having sexual intercourse with a *mu'takifa*⁶²⁴. Every marriage that does not make⁶²⁵ *muḥṣana* a woman⁶²⁶ does not make her lawful (for her previous husband). Thus any later marriage is forbidden, even if the husband has had sexual intercourse with her, as such sexual intercourse did not produce *iḥṣān* and the woman cannot return to the husband who divorced her by irrevocable divorce. Similarly, regarding every marriage that includes *khiyār* for one of the spouses – so that the man can approve or reject it as he wants -, if he has sexual intercourse before the approval having been formulated by whom has the right to do it, that sexual intercourse does not make them *muḥṣan* and does not make lawful the woman for her previous⁶²⁷ husband who divorced⁶²⁸ her.

Commentary:

One of the conditions for being *muḥṣana* for a woman is having sexual intercourse with her husband after marriage, but such sexual intercourse does not provide *iḥṣān* if it takes place during forbidden time. For instance, if a woman prays in seclusion (*mu'takifa*), having sexual intercourse is forbidden for her so consummation of marriage in that period does not make her *muḥṣana* as in *khiyār*.⁶²⁹

Khiyār in its basic meaning is making a choice. As a technical religious term, it refers to the woman being given the choice for divorce by her husband. If she does not make a choice, this right returns to the husband. *Khiyār* is different from *tamlīk* which refers to the fact that the wife is given the right of divorce by her husband. If the woman chooses to divorce, *ṭalāq* occurs; if she does not choose,

⁶²⁴ [‘ k f]: [mu'takifa]: a person who prays in seclusion/retirement, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 309.

⁶²⁵ In the main ms.: *lā yakūnāni* (it does not make both of them), in the remaining mss.: *lā takūnu* (it does not make her). This is the accurate reading because the conditions for a woman to be *muḥṣana* are discussed here.

⁶²⁶ In the ms. from Tunisia (tā'): *al-ḥurratun* refers to a free woman.

⁶²⁷ Having sexual intercourse is not licit for the woman with her first husband. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/292.

⁶²⁸ Additionally in the ms. from Zagora (zayn): *ṭallaqahā* means that divorced her. It is probably added to emphasize the previous husband.

⁶²⁹ [kh y r]: [khiyār]: option, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 180. For the detailed information, see below commentary.

the possibility of *khiyār* does not apply any longer. On the other hand, *khiyār* implies the execution of divorce leading to the termination of the nuptial tie. The husband says to his wife: “choose for yourself, single repudiation or two repudiations.” In that situation, she has only the right to choose her husband or opt for irrevocable divorce through the pronouncement of three repudiations. If she prefers to divorce, she must marry another man and have sexual intercourse with him in order to be able to return to her previous husband. But if the consummation of marriage takes place before the approval having been formulated by he who has the right to do it, this sexual intercourse does not provide the possibility to return to her previous husband. Moreover, it does not make her *muḥṣana*.⁶³⁰

Question: 7

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Arabic text:

قلت له: فلو أن نصرانية تحت مسلم طلقها البتة، فتزوجها نصراني ثم مات عنها، أو طلقها البتة هل يحلها لزوجها الأول؟ قال: لا. وهو قول مالك. وإن أسلم وهي نصرانية فوطئها بعد أن أسلم ثم مات عنها أو طلقها كان لزوجها الأول أن يردّها⁽⁷⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: If a Christian woman who is married to a Muslim man is divorced by an irrevocable divorce (*al-batta*) and then a Christian man marries her and he dies or divorces her by irrevocable divorce, has this second marriage made her licit for her first husband? Ibn al-Qāsim said: No, this is the opinion of Mālik. But if the (Christian) man converts to Islam and she continues being Christian, and the consummation takes place after he converted to Islam and he dies or divorces her, she can return to her first husband.⁶³¹

⁶³⁰ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/85.

⁶³¹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/293.

Commentary:

A Muslim man can marry a Christian woman.⁶³² If they divorce irrevocably, the regular procedure for a Muslim divorced woman must be carried out. Then, if the woman married a Christian man and they separate irrevocably or the man dies, this woman is not *ḥalāl* (licit) for her first husband because her second husband is not Muslim and because having sexual intercourse with a Christian man does not make her *muḥṣana*. Nonetheless, if the second husband converted to Islam and the consummation of marriage takes place after that, she can return to her previous husband.

Question: 8

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Arabic text:

قلت: فلو أن صبية تزوجها رجل فطلقها ثلاثاً، ثم تزوجها آخر وذلك قبل أن
تحيض ومثلها توطأ فوطئها الثاني ثم طلقها أو مات عنها أيحلها ذلك لزوجها الأول؟
قال: نعم. وهو قول مالك⁽⁸⁾.

Translation:

Saḥnūn asked: A man marries a little girl and then he divorces her by three *ṭalāqs*⁶³³, then another man marries this girl – and all this takes place before she menstruates but her peers are able to consummate – and the second husband has sexual intercourse with her and divorces her or he dies, is she licit for the first husband? Ibn al-Qāsim said: Yes, it is the opinion of Mālik.⁶³⁴

Commentary:

⁶³² Al-Mā'ida: 5, <https://tanzil.net/#trans/en.arberry/5:5>

⁶³³ [ṭ l q]: [ṭalāq]: divorce, repudiation *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 262. Also see, "Ṭalāq", in *The Oxford Encyclopedia of the Islamic World*. Oxford Islamic Studies Online. Accessed May 16, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e2321>

⁶³⁴ Under these conditions, the woman becomes licit for her first husband. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/291.

A girl had sexual intercourse with her second husband. Even though she has not yet menstruated, she becomes licit for her previous husband due to sexual intercourse: having sexual intercourse with another husband is sufficient to return to her previous husband whether she menstruates or not. To return to him, she should wait 3 months, because in the Qur'an it is determined with following verse: *"Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three months, and for those who have no courses (it is the same): for those who carry (life within their wombs), their period is until they deliver their burdens: and for those who fear Allah, He will make their path easy."*⁶³⁵

Question: 9

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Arabic text:

قلت: أرأيت لو أن امرأة طلقها زوجها البتة قبل البناء بها فتزوجها غيره ولم يدخل بها حتى مات عنها، فادعت أنه جامعها أتحل لزوجها الأول؟ وهل تكون محصنة بهذا القول؟ فقال: لا. ولها طرح ما ذكرت إلا أن يكون الدخول يعرف⁽¹⁾.

Translation:

Saḥnūn asked: What about a woman who has been divorced by her husband with irrevocable *ṭalāq* before the consummation of marriage and then marries another man with whom marriage is also not consummated, this man dies and the woman claims that consummation of marriage had taken place, is she *ḥalāl* (licit) for her first husband? Does the woman become *muḥṣana* through what she said? Ibn al-Qāsim said: No. The words of woman are rejected unless the consummation is known⁶³⁶ to have taken place.

Commentary:

In the Qur'an, the issue of remarriage of a divorced couple is explained with this verse: *"So if a husband divorces his wife (irrevocably), he cannot, after that, re-marry her until after she has married another husband and he has divorced her. In*

⁶³⁵ Al-Ṭalāq: 4 <http://tanzil.net/#trans/en.arberry/65:4>

⁶³⁶ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/290.

this case there is no blame on either of them if they re-unite, provided they feel that they can keep the limits ordained by Allah. Such are the limits ordained by Allah, which He makes plain to those who understand.” ⁶³⁷ In this case, the consummation of marriage between the woman and her second husband is suspected. Hence, she cannot return to the first husband until the true state of affairs is ascertained. The claim of the woman is not taken into consideration.⁶³⁸

Question: 10

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Arabic text:

قلت: فإن دخل بها وبات معها ثم مات من الغد فقالت: قد جامعني أيجلها ذلك
لزوجها الأول؟ قال: أرى أن تدين المرأة في ذلك، واليوم في ذلك وما زاد على اليوم
سواء إذا كان رجلاً يظاً، والقول قول المرأة إذا لم يعلم من الميت إنكار لو طئها، ولا يحال
بين الأول وبين نكاحها⁽²⁾.

Translation:

Ṣaḥnūn asked: What happens if the consummation of marriage takes place and they stay overnight together, then the man dies the following day and the woman says: the consummation did take place - is she *ḥalāl* for the first husband? Ibn al-Qāsim said: My opinion is that the word of woman is considered in this issue; a day and more than a day are the same if the consummation had taken place. The word of the woman is considered if the man is not known to have denied the consummation before he died, but marriage is not *ḥalāl* (licit) between the woman and her first husband.⁶³⁹

Commentary:

In the *Muwatṭaʿ*, Mālik said: "That is what is done among us, and when a man marries a woman who has been married before, and he has not had intercourse with her, she is treated as a virgin - one pronouncement separates her and three

⁶³⁷ Al-Baqara: 230, <http://tanzil.net/#trans/en.arberry/2:230>

⁶³⁸ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 346.

⁶³⁹ Ṣaḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/322.

make her ḥarām until she has married another husband."⁶⁴⁰ If irrevocable divorce has taken place between a couple, marriage to another man is necessary but not sufficient to return to the first husband. Sexual intercourse is decisive because if it is known to have taken place, she can return to her previous husband. That the marriage has lasted only a day or more time is not relevant, because the important thing is whether sexual intercourse has taken place between the couple or not. If there is no doubt or disagreement about this issue, the word of the woman is determinative, i.e., what she says is accepted.

Question: 11

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Arabic text:

وفي كتاب ابن مزين قال: وسألت عيسى عن قول رسول الله ﷺ حين ذكر نكاح المحلل فقال: لا، حتى تذوق العسيلة⁽³⁾ ما أراد بذلك؟ فقال: يقول: لا تحل لك حتى يطأها زوجها الناكح بعد ذلك، وذلك مس الختان الختان، وهو مغيب الحشفة كان مع ذلك إنزال أو لم يكن.

قال محمد: العسيلة كناية عن حلاوة الجماع، وكل من جامع حتى يجاوز الختان الختان فقد ذاق العسيلة، وقال بعض أهل اللغة: العسيلة تصغير العسل وإنما صغره بالهاء لأن العسل يؤنث ويذكر والأغلب عليه التأنيث.

Translation:

In the book of Ibn Muzayn⁶⁴¹: He said: I asked 'Īsā⁶⁴² about the opinion of the Prophet when he mentioned *nikāḥ al-muḥallal*⁶⁴³ and he said: No (she cannot remarry her former husband), until he (the new husband) enjoys the sexual relation (*tadhūq al-'usayla*)⁶⁴⁴. What did the Prophet mean with this expression?

⁶⁴⁰ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 232.

⁶⁴¹ See Appendix 1: Scholars mentioned by Ibn Abī Zamanīn.

⁶⁴² Ibid.

⁶⁴³ *Al-muḥallal* is he who marries a divorced woman in order to make it possible for the first husband to marry her again, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 383.

⁶⁴⁴ Orgasm, *ibid*, p. 281. For more information, see below the commentary.

ʿĪsā said: what the Prophet meant was that the woman is not lawful for you until consummation of marriage has taken place with the (new) husband who married her, and this implies that (the following has to take place): the touching of sexual organs one with the other, and that sexual relation occurs by penetration, i.e. intercourse, even if he does not ejaculate.

Muḥammad⁶⁴⁵ said: the 'little honey' (*al-'usayla*) is a metaphorical way of expressing the sweetness of the sexual intercourse. Whoever penetrates a woman (with at least the glans penis, i.e. the head of his penis), he has enjoyed sexual intercourse with her (*qad dhāqa al-'usayla*). Some lexicographers said: "*usaylah* is the diminutive of honey (*al-'asal*)", and indeed it is the diminutive of *al-'asal* because honey is accepted as feminine and masculine word, but what is the prevalent view is to consider it a feminine word.

Commentary

Nikāḥ al-muḥallal is made to remove an illicit situation between a divorced couple. There are some requirements for remarriage to previous husband. A woman who was divorced irrevocably should have the waiting period and then she should marry another man with valid nuptials (in order to remarry her former husband). The consummation should take place and then she should be divorced or her (second) husband should be dead. In other words, the (second) marriage has to be finished. After completing her waiting period, she can remarry her previous husband.⁶⁴⁶ The term 'sweetness of intercourse' refers to consummation of marriage and without consummation, remarriage to previous husband is not possible.

In the *Muwattaʿa*, this issue is explained in a similar way: "Yaḥyā related to me from Mālik from al-Miswār b. Rifā'a al-Qurashī from al-Zubayr b. 'Abd al-raḥman b. al-Zubayr that Rifā'a b. Samaw'al divorced his wife, Tamīm bint Wahb, in the time of the Messenger of Allah, may Allah bless him and grant him peace, three times. Then she married 'Abd al-raḥman b. al-Zubayr and he turned from her

⁶⁴⁵ Muḥammad refers to Ibn Abī Zamanīn who rarely spoke in his own voice. This sentence is one of them.

⁶⁴⁶ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/106.

and could not consummate the marriage and so he parted from her. Rifā'a wanted to marry her again and it was mentioned to the Messenger of Allah, may Allah bless him and grant him peace, and he forbade him to marry her. He said: 'She is not *ḥalāl* for you until she has tasted the sweetness of intercourse.'⁶⁴⁷

Question: 12

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Arabic text:

الباب الجامع في الطلاق

قال سحنون: قلت لابن القاسم: فمن تزوج امرأة ونظر إلى شعرها أو إلى صدرها أو إلى شيء من محاسنها ونظر إليها متلذذا، أو قبل أو باشر ثم طلق، أو ماتت إلا أنه لم يجامعها، أتحل له ابنتها وقد قال الله ﷻ: ﴿وَرَبَّيْكُمُ اللَّاتِي فِي حُجُورِكُم مِّن نِّسَائِكُمُ اللَّاتِي دَخَلْتُم بِهِنَّ فَإِن لَّمْ تَكُونُوا دَخَلْتُم بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ﴾⁽¹⁾ قال: إذا نظر إلى شيء منها تلذذا لم يصلح له أن يتزوج ابنتها، وكذلك الخادم إذا / نظر إلى ساقها أو معصمها تلذذا لم تحل له ابنتها أبدا، ولا تحل لابنه الخادم أيضا ولا لأبيه أبدا⁽²⁾.

Translation:

Miscellaneous chapter about *ṭalāq*

Sahnūn said: I asked Ibn al-Qāsim: When a man marries a woman and he looks at her hair or her chest or something from her beauty sensually or he kisses her or he touches her, then he divorces her or she dies without him having had sexual intercourse with her, is her daughter *ḥalāl* for him? And Allah the Blessed says: *Your stepdaughters who are in your care being born of your wives you have been in to -- but if you have not yet been in to them it is no fault in you.*⁶⁴⁸ Ibn al-Qāsim said: If he had looked at something from her sensually, marriage with her daughter is not licit and his man servant is like that.⁶⁴⁹ If he looks at her legs or

⁶⁴⁷ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 212.

⁶⁴⁸ Al-Nisā': 23, <http://tanzil.net/#trans/en.arberry/4:23>

⁶⁴⁹ The man and his servant are in the same position about this issue so both of them cannot marry a daughter of the woman whom they look sensually at

her arm sensually, her daughter is not licit for him forever, and she is not licit for the servant's son and father forever in the same way.⁶⁵⁰

Commentary:

In this case, the situation of a daughter whose mother has not had sexual intercourse with her husband yet but the husband had looked at her sensually is mentioned. The daughter becomes *ḥalāl* for the husband because the nuptial provides that, not sexual intercourse.⁶⁵¹ In the Qur'an, the topic of being *ḥalāl* for relatives thanks to marriage is specified with this verse: *"And say to the believing women, that they cast down their eyes' and guard their private parts, and reveal not their adornment save such as is outward; and let them cast their veils over their bosoms, and not reveal their adornment save to their husbands, or their fathers, or their husbands' fathers, or their sons, or their husbands' sons, or their brothers, or their brothers' sons, or their sisters' sons, or their women, or what their right hands own, or such men as attend them, not having sexual desire, or children who have not yet attained knowledge of women's private parts; nor let them stamp their feet, so that their hidden ornament may be known. And turn all together to God, you believers; haply so you will prosper."*⁶⁵²

Question: 13

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Arabic text:

قلت له: أيصلح للرجل أن يتزوج امرأة في عدة أختها منه من طلاق بائن؟ قال:
نعم. وكذلك من كان تحته أربع فطلق إحداهن طلاقا بائنا فله أن يتزوج أخرى قبل أن
ينقضي عدة المطلقة⁽³⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: Is it appropriate for a man to marry a woman during the waiting period of her sister whom he has divorced by irrevocable *ṭalāq*? Ibn

something from her beauty such as her hair and chest. It is a *ḥadīth* that was narrated by Ibn Wahb. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/275.

⁶⁵⁰ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/275.

⁶⁵¹ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 2357.

⁶⁵² Al-Nūr, 3 <http://tanzil.net/#trans/en.arberry/24:3>

al-Qāsim said: Yes. This is similar to the case of the man who has four wives and divorces one of them with irrevocable divorce: he can marry another woman before the waiting period of the woman divorced irrevocably ends.⁶⁵³

Commentary:

Marriage with two sisters at the same time is forbidden in the Qur'an.⁶⁵⁴ This issue is explained with a similar example in the *Muwaṭṭa'*: "Mālik said that if a man had sexual relations with a female slave that he owned, and then he wanted to also have relations with her sister, the sister was not *ḥalāl* for a man until intercourse with the slave-girl had been made *ḥarām* for him by marriage, setting free, *kitāba*, or the like of that - for instance, if he had married her to his slave or someone other than his slave."⁶⁵⁵ If one of the sisters dies, the husband can marry the sister of his wife. Also, there is another option recorded in this case. A man can marry the sister of his wife when he divorces her by irrevocable *ṭalāq* and this, even during the waiting period of his wife because it is not possible for her to return to him.

Question: 14

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Arabic text:

قلت: فرجل زوج ابنه والابن ساكت فلما فرغ من عقد النكاح أنكر فعل أبيه
وقال: إنما سكتُ لأنني علمت أن ذلك لا يلزمني إذا لم أمره. فقال: يحلف ويكون
القول قوله⁽⁴⁾.

Translation:

⁶⁵³ If a man divorces his wife irrevocably, he does not have to wait for a while to marry another woman unlike his divorced wife. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/283.

⁶⁵⁴ Al-Nisā': 23, <http://tanzil.net/#trans/en.arberry/4:23>

⁶⁵⁵ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 216.

Saḥnūn asked: A man married off his son and the son remained silent, then when the wedding was done, he rejected the act of his father. And he said (the son): I did this - kept silent - because I knew that the act will not oblige me if I had not consented to it. And Ibn al-Qāsim said: The son has to take an oath [saying that that was the case] and his word is accepted.⁶⁵⁶

Commentary:

The son keeps silent because he does not agree with the marriage. Presumably he does not want to openly confront his father, but he knows that if he does not explicitly consent to it, the marriage is invalid.

The situation would be different in the case of a virgin woman married by her father, according to the following transmission by Mālik: "Mālik related to me from 'Abdullāh b. al-Fadl from Nāfi' ibn Jubayr ibn Muṭ'im from 'Abdullāh b. 'Abbās that the Messenger of Allāh, may Allāh bless him and grant him peace, said: 'A woman who has been previously married is more entitled to her person than her guardian, and a virgin must be asked for her consent and her silence is her consent.'"⁶⁵⁷ That is, in this case, that of the virgin woman who keeps silent, silence implies consent.

Question: 15

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Arabic text:

قلت له: فمن زنا بامرأة يصلح له أن يتزوجها؟ قال: قال مالك: نعم. بعد أن يستبرأ من مائه الفاسد⁽⁵⁾.

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قال محمد: ويستبرأ بثلاث حيض وهو من أصل قولهم.

Translation:

⁶⁵⁶ The word of the child is taken into consideration because he was unaware of the situation. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/173.

⁶⁵⁷ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 209.

Saḥnūn asked Ibn al-Qāsim: Someone commits adultery with a woman, is marriage appropriate with her? Ibn al-Qāsim said: Mālik said: Yes. After a period (*istibrā'*)⁶⁵⁸ for cleansing from the water of perversity.⁶⁵⁹

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Muḥammad⁶⁶⁰ said: She becomes clean after three menstruations period, this derives from the root of what they said.

Commentary:

In the Qur'an fornicators are dealt with in this verse: *"The fornicator shall marry none but a fornicatress or an idolatress, and the fornicatress -- none shall marry her but a fornicator or an idolator; that is forbidden to the believers."*⁶⁶¹

In this case, both of them committed adultery so they can marry, but they should wait for a while. There is discrepancy about the duration of the waiting period as we saw above. Mālik argues that after menstruation they can marry, but Muḥammad claims that three menstruations should be finished before marriage.

Question: 16

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Arabic text:

⁶⁵⁸ [b r ']: [*istibrā'*]: purification of the womb, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 37. This 'cleaning of a woman' means not having sexual intercourse with her until she has menstruation.

"Istibrā' means to make sure of the "freedom", that is the "emptiness", of the womb", Y. Linant de Bellefonds, "Istibrā'", in *Encyclopaedia of Islam*, Second edition, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs and P.J. Bearman, Accessed April 20, 2021

https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/istibra-COM_0394

⁶⁵⁹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/249.

⁶⁶⁰ Muḥammad refers Ibn Abī Zamanīn.

⁶⁶¹ Al-Nūr, 3, <http://tanzil.net/#trans/en.arberry/24:3>

قلت له: أرأيت الصبي إذا تزوج المرأة ولم يجامعها أو جامعها هل تحل لأبائه أو لأجداده أو لولد أولاده؟ قال: لا، لأن الله عَزَّوَجَلَّ يقول في كتابه: ﴿وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ﴾⁽¹⁾ فلا تحل زوجة الابن على حال؛ دخل بها أو لم يدخل، وكذلك إذا عقد الأب نكاح امرأة حرة على ولده وإن لم يدخل بها بعقد النكاح، تقع الحرمة هاهنا ليس بالجماع إلا في الربيبة فإن الحرمة لا تقع بعقد نكاح أمها، وإنما [تقع]⁽²⁾ بجماع الأم⁽³⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: What is your opinion regarding a boy who had married a woman - having sexual intercourse with her or not -: is she *ḥalāl* for his father, his grandfathers or grandsons? He said: no, because Allah, the blessed, said in His book: *And the spouses of your sons who are of your loins.*⁶⁶² The wife of a son is not *ḥalāl* in all situations, regardless of whether sexual intercourse exists or not. It is the same if a father makes a nuptials agreement between a free woman and his son, and the son does not have sexual intercourse with her: the prohibited character of the woman (*al-ḥurma*)⁶⁶³ here comes into being with nuptials, not with sexual intercourse. The exception is in the case of the stepdaughter (*al-rabība*): then the *ḥurma* does not come into being with nuptials for her mother, as for it to happen, ⁶⁶⁴ intercourse with the mother is necessary.⁶⁶⁵

Question: 17

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Arabic text:

⁶⁶² Al-Nisā': 23, <http://tanzil.net/#trans/en.arberry/4:23>

⁶⁶³ [ḥ r m]: [al-ḥurma]: sacredness, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 26. For more detailed information, see below commentary.

⁶⁶⁴ In some mss.: *yaqa'u* instead of *taqa'u*.

⁶⁶⁵ Sahnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 4/278.

قال محمد: ومن قول مالك أن الأجداد من قبل الأم في هذا بمنزلة الأجداد من قبل الأب، لا يحل للرجل أن يتزوج امرأة جده لأمه كما لا يحل له أن يتزوج امرأة جده لأبيه.

Translation:

Muḥammad said: it is the doctrine of Mālik that grandfathers on the part of the mother and grandfathers on the part of the father are the same in this situation: it is not *ḥalāl* for a man to marry the wife of his grandfather on the part of his mother in the same way that it is not *ḥalāl* to marry the wife of his grandfather on the part of his father.

Commentary of Questions 16&17:

Al-ḥurma is unlawfulness to marry someone because of marriage relationship. In other words, it refers to “women’s quarters that are forbidden to any males except relatives and husbands.”⁶⁶⁶ Nuptials is sufficient ground for *ḥurma* to take place between a father, a grandfather, a grandson and the wife of a son. Also, the mother of a wife is not licit for a man to marry even if he had sexual intercourse with his wife. In the *Muwaṭṭa’*, it is recorded: “Yaḥyā related to me from Mālik from Yaḥyā b. Sa’īd that Zayd b. Thābit asked whether it was *ḥalāl* for a man who married a woman and then separated from her before he had cohabited with her, to marry her mother. Zayd b. Thābit said: no. The mother is prohibited unconditionally. There are conditions, however about foster-mothers.”⁶⁶⁷ However, this situation is not valid for stepdaughters. Marriage should be consummated to exist *ḥurma* for them. Otherwise, a daughter in law is *ḥalāl* because if the man divorces the woman before the consummation of the marriage, this man can marry the daughter of his previous wife.⁶⁶⁸ The Qur’an allows that with the following verse: “Forbidden to you are your mothers and daughters, your sisters, your aunts paternal and maternal, your brother’s daughters, your sister’s daughters, your mothers who have given suck to you, your

⁶⁶⁶ Esposito, *The Oxford dictionary of Islam*, p. 109.

⁶⁶⁷ Mālik b. Anas, *Al-Muwaṭṭa’ of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 213.

⁶⁶⁸ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur’an Yolu Türkçe Meal ve Tefsir*, p. 796.

suckling sisters, your wives' mothers, your stepdaughters who are in your care being born of your wives you have been in to -- but if you have not yet been in to them it is no fault in you - and the spouses of your sons who are of your loins, and that you should take to you two sisters together, unless it be a thing of the past; God is All-forgiving, All-compassionate."⁶⁶⁹

Question: 18

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Arabic text:

وفي كتاب ابن مزين قال: وسألت عيسى عن قول عثمان في إصابة الأختين من ملك اليمين أحلتها آية وحرمتها آية، أي آية يريد؟ قال: أما آية التحريم فهي بينة [لقول]⁽⁴⁾ الله ﷻ: ﴿وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ﴾⁽⁵⁾ قال: وأما التي أحلتها فقوله: ﴿فَأَنْكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَتَى وَتِلْكَ وَرُبَعَ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَلِكَ أَدْنَىٰ أَلَّا تَعُولُوا﴾⁽⁶⁾. فأحل الله ملك

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اليمين كله في هذه الآية، ولم يستثن فيها الجمع بين الأختين كما نهى عنها في هذه الآية الأخرى.

Translation:

And in the book of Ibn Muzayn, he said: I asked 'Īsā about the opinion of 'Uthmān regarding marrying two sisters from among the slave-concubines. A Koranic verse forbids it, a Koranic verse permits it, which verse should be taken into account? 'Īsā said: the verse which makes this marriage illicit is obvious according to what ⁶⁷⁰ Allah, the Blessed said: *and that you should take to you two sisters together, unless it be a thing of the past.*⁶⁷¹ He said: as for the verse that makes it *ḥalāl* it is *Marry such women as seem good to you, two, three, four; but if you fear you will not be equitable, then only one, or what your right hands own; so it is likelier you will not be partial.*⁶⁷²

⁶⁶⁹ Al-Nisā': 23, <https://tanzil.net/#trans/en.arberry/4:23>

⁶⁷⁰ It means according to his opinion.

⁶⁷¹ Al-Nisā': 23, <http://tanzil.net/#trans/en.arberry/4:23>

⁶⁷² Al-Nisā': 3, <http://tanzil.net/#trans/en.arberry/4:3>

In this verse, what Allah made *ḥalāl* were the slave-concubines, and did not explicitly exempt to combine two sisters, while He explicitly forbade it in the other verse.

Commentary:

‘Uthmān b. ‘Affān (d. 35/656) was a Companion of the Prophet Muḥammad and third Rightly guided caliph. He belonged to the powerful Umayyad clan. Despite his family's initial opposition to Muḥammad, ‘Uthmān was among the first converts and married two daughters of Muḥammad, first Ruqayyah and then Umm Kulthūm. ‘Uthmān was elected caliph by a committee appointed by his predecessor, ‘Umar, on his deathbed.⁶⁷³ He was consulted about an issue that involved two apparently contradictory verses of the Qur'an. But in fact, while the verse 4:3 allowed to marry up to four wives and to have an indefinite number of slave-concubines, the verse 4: 23 explicitly forbade marriage to two sisters at the same time. A possible exception seems to be made at the end of the verse when it says that to marry two sisters together is forbidden "unless it be a thing of the past". The exegetes (*mufasssīrūn*) have understood this to mean that marriage to two sisters at the same time is forbidden but if it happened in pre-Islamic times, it is licit.⁶⁷⁴

Question: 19

Arabic text:

قال ابن مزين: وسألت عيسى عن تفسير قول الله ﷻ: ﴿وَالْمُحْصَنَاتُ مِنَ النِّسَاءِ إِلَّا مَا مَلَكَتْ أَيْمَانُكُمْ﴾ ⁽¹⁾ فقال: [قال] ⁽²⁾ ابن القاسم: هي [السبية] ⁽³⁾ التي تسبي ولها زوج بأرضها، لا بأس بأن توطأ بالملك بعد أن تستبرأ بحیضة، وإن كانت حاملاً فبعد أن تضع حملها.

⁶⁷³ Esposito, ‘Uthmān b. ‘Affān in *The Oxford dictionary of Islam*, Oxford Islamic Studies Online, Accessed March 14, 2021

<http://www.oxfordislamicstudies.com/article/opr/t125/e2449>

⁶⁷⁴ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, pp. 41-42.

Translation:

Ibn Muzayn said: I asked 'Īsā about the exegesis (*tafsīr*) of the words of Allah, the Blessed: *and wedded women, save what your right hands own*.⁶⁷⁵ He said: Ibn al-Qāsim (said)⁶⁷⁶: What is meant are women taken captive (prisoners of war)⁶⁷⁷ who were captured when they had husbands in their lands. There is no problem having sexual relations with them after a menstruation period is over, and if the woman is pregnant, after she gave birth.

Commentary:

Tafsīr is Quranic exegesis, that is, elucidation, explanation, interpretation, and commentary carried out in order to understand the Qur'an and its commandments. Muḥammad is considered the most authoritative interpreter of the Qur'an, but Qur'anic interpretation through reports from acknowledged Companions of the Prophet or by their successors is also considered authoritative. *Tafsīr* is carried out in linguistic, juristic, and theological fields".⁶⁷⁸

In this case, the *tafsīr* required regards the explanation of the verse 4:23.

Scholars discussed the situation of women who are prisoners of war. Sexual intercourse with them is appropriate after they had menstruation or gave birth if they were pregnant. The Qur'an talked about these women in this verse: "... *and wedded women, save what your right hands own. So God prescribes for you. Lawful for you, beyond all that, is that you may seek, using your wealth, in wedlock and not in licence. Such wives as you enjoy thereby, give them their wages apportionate; it is no fault in you in your agreeing together, after the due apportionate. God is All-knowing, All-wise*."⁶⁷⁹

⁶⁷⁵ Al-Nisā': 24, <http://tanzil.net/#trans/en.arberry/4:24>

⁶⁷⁶ An additional word that does not exist in the other manuscripts.

⁶⁷⁷ In the main ms.: *al-sayyiatun* and in others: *al-mushbitun*, this is accurate. *Al-sabiyyatun*: *al-sabī* and *wa al-sabā'*: the captive, *al-sabī*: the captive of war and purchased slave or servant, *al-sabiyya*: the woman captured in war, Ibn Manẓūr, *Lisān al-'Arab*. Beirut: Dār ṣādir, 2000, vol. 6/166.

⁶⁷⁸ Esposito, "Tafsīr", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed March 20, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e2298>

⁶⁷⁹ Al-Nisā': 24, <https://tanzil.net/#trans/en.arberry/4:24>

Marriage with a woman whose husband is alive is forbidden but if the woman is prisoner of war, this constitutes an exception.⁶⁸⁰

Question: 20

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Arabic text:

وفي كتاب ابن مزين قال: وسألت عيسى عن رجل خطب على خطبة أخيه بعد أن ركنت إليه واتفقا على صداق معلوم، فمالت إليه المرأة ووليها فتزوجها ثم ندم كيف يصنع؟ قال: سألت ابن القاسم عن ذلك فقال: نرى أن يتوب إلى الله عز وجل من ما صنع ويستغفر ويسأل الذي خطب على خطبته أن يحلله من دخوله عليه [فيها]⁽⁴⁾ فإن حللها رجوت أن يكون ذلك مجزيا له، وإن لم يحلله فلا شيء عليه.

Translation:

And in the book of Ibn Muzayn he said: I asked 'Īsā about a man who proposed marriage to a woman who had been proposed marriage by his brother already, after she had intention to marry him and they had determined the dower. But then the woman and her guardian felt inclined to him (the man who proposed marriage later) and they were married. Afterwards, he regretted, what does he do? He said: I asked Ibn al-Qāsim about this issue and he said: My opinion is that he should show his repentance to God because of his behavior and he should ask for forgiveness and ask the first man to forgive him because of what happened between them⁶⁸¹. If he forgives him, he acquires merit. If he does not forgive him, nothing is necessary.

Commentary:

In the *Muwatta'*, this issue is explained in a similar example: "Yaḥyā related to me from Mālik from Nāfi' from 'Abdullāh b. 'Umar that the Messenger of Allah, may Allah bless him and grant him peace, said: "Do not ask for a woman in marriage when another Muslim has already done so." Mālik said: "The

⁶⁸⁰ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 797.

⁶⁸¹ Additionally from the mss. from Tunisia (tā'), Algeria (jīm), Rabat (ḥā') and Zagora (zayn).

explanation of the statement of the Messenger of Allah, may Allah bless him and grant him peace, according to what we think - and Allah knows best - is that 'Do not ask for a woman in marriage when another Muslim has already done so' means that when a man has asked for a woman in marriage, and she has inclined to him and they have agreed on a bride-price, which she has suggested and with which they are mutually satisfied, it is forbidden for another man to ask for that woman in marriage. It does not mean that when a man has asked for a woman in marriage, and his suit does not agree with her and she does not incline to him that no one else can ask for her in marriage. That is a door to misery for people."⁶⁸²

Moreover, making a contract about marriage secretly is not appropriate. In the Qur'an, it is specified with the following verse: *"There is no fault in you touching the proposal to women you offer, or hide in your hearts; God knows that you will be mindful of them; but do not make troth with them secretly without you speak honorable words. And do not resolve on the knot of marriage until the book has reached its term; and know that God knows what is in your hearts, so be fearful of Him; and know that God is All forgiving, All-clement."*⁶⁸³

Question: 21

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Arabic text:

قال ابن مزين: قال لي يحيى بن يحيى عن ابن نافع: إذا خطبها في الحين الذي يكره له فأرى أن يفسخ قبل الدخول، فإن فات بالدخول فلا أرى أن يفسخ.

Translation:

Ibn Muzayn said: Yahyā b. Yahyā⁶⁸⁴ said from Ibn Nāfi':⁶⁸⁵ If he proposed marriage during a period of time in which it is legally reprehensible doing it, my opinion is that its cancellation is necessary before consummation, and if the

⁶⁸² Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 209.

⁶⁸³ Al-Baqara, <http://tanzil.net/#trans/en.arberry/2:235>

⁶⁸⁴ See Appendix 1: Scholars mentioned by Ibn Abī Zamanīn.

⁶⁸⁵ Ibid.

consummation had occurred, my opinion is that marriage should not be cancelled.

Commentary:

Marriage during an unacceptable period of time should be cancelled. To illustrate what is meant here, marriage is forbidden during *iḥrām*.⁶⁸⁶ In the *Muwaṭṭa'* we find the following passage: "Yahyā related to me from Mālik, from Nāfi', from Nubayh b. Wahb, who was from the tribe of Banū 'Abd al-Dār, that 'Umar b. 'Ubaydullāh sent a message to Abān b. 'Uthmān (who was amir of the hajj at the time), while both of them were in *iḥrām*, saying: 'I want to marry bint Shayba b. Zubayr to Ṭalḥa b. 'Umar and I want you to be present.' Abān told him that he should not do that and said: 'I heard 'Uthmān b. 'Affān say that the Messenger of Allah, may Allah bless him and grant him peace, said: 'A man in *iḥrām* should not marry, or give in marriage, or get betrothed.'"⁶⁸⁷

Question: 22

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Arabic text:

وفي سماع ابن القاسم: سئل مالك عن نكاح السكران، فقال: لا أراه جائزاً وطلاقه⁽⁵⁾ جائز عليه⁽⁶⁾. وسئل سحنون عن ذلك فقال: أرى نكاحه لا يجوز منه شيء

Translation:

In the *samā'* (audition) of Ibn al-Qāsim: Mālik was asked about the nuptials of a drunkard, and he said: no, I do not think that it is valid, but his *ṭalāq* ⁶⁸⁸ is valid for him.⁶⁸⁹ Saḥnūn was asked about this issue and he said: My opinion is that nothing in his nuptials is valid and this applies to his marrying his daughters as well as to his own marriage.

⁶⁸⁶ As explained above, *iḥrām* is to enter into state of ritual consecration during the ceremonies of 'umrah and hajj, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 25.

⁶⁸⁷ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 213.

⁶⁸⁸ In the ms. from Rabat (ḥā'): *ṭalāq* is valid, nuptials of drunkard is not valid.

⁶⁸⁹ This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 4/257.

Commentary:

The nuptials of a drunkard is not valid because there are four main rules to make a valid marriage contract. "The jurists agreed about the stipulation of the consent and acceptance of men who had attained puberty, were free and were in charge of their own affairs."⁶⁹⁰ The drunkard is not able to comprehend a marriage contract clearly, so his marriage is not acceptable. However, if a drunkard divorces his wife, it is valid because when a man uses the term *ṭalāq*, he should take it seriously. This word brings some responsibilities and necessities.

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Arabic text:

وإنكاحه بناته بمنزلة إنكاحه نفسه. وسئل مالك عن الرجل تكون عنده المرأة لا يعرفها أحد غيره، مثل بنت الأخ وشبهها وهو يريد أن يزوجه ولا يعرفها أحد من الناس كيف يشهد عليها؟ قال: يدخل عليها من لا تحتشم منه ثم يشهد على رؤيتها، ثم يزوجه.

قال عيسى: قال ابن القاسم: قال مالك: وإن لم يعرفها/ الشاهدان. وقال أصبغ في رواية ابن مزين: وهذا الأمر لا يجد الناس منه بدا، ومن الناس من لا ترى وليته حتى تبلغ مبلغ النكاح، فالأمر فيه على ما قال مالك. قال: ويتم هذا النكاح ويجب [الميراث]⁽¹⁾ بينهما، وهذا أمر قد عمل به قديما.

فأما في الحقوق من البيوع والوكالات والهبات ونحو ذلك وهو لا يعرفها فليس كذلك، [ولا]⁽²⁾ أرى أن يشهد عليها في مثل هذا إلا من عرفها بعينها واسمها ونسبها.

Translation:

Mālik was asked about a man in whose house a woman was living whose identity was unknown to everybody except to him, as if she was his niece or someone

⁶⁹⁰ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/4.

similar. He wanted to marry her off, but nobody knew who she was. How could anybody act as witness for her? He said: Somebody who does not put her to shame enters in her presence, then this person witnesses that he/she saw her, then the man (in whose house she lives) can marry her.

‘Īsā said: Ibn al-Qāsim said: Mālik said: (It does not matter in this case) if there are not two witnesses who can ascertain her identity. And Aṣḥab⁶⁹¹ said in Ibn Muzayn's transmission (*riwāya*): This is a situation inevitable; there are women who have not seen their guardian until reaching the nuptials age. The judgment in this issue is like Mālik said. He said: Nuptials is completed and (inheritance) becomes necessary between them. This is how the legal practice has been since old times.

On the other hand, as regards the rights having to do with sales, proxies, donations and similar things, if the person who has to deal with her does not know her, then it is not like this. My opinion is that no one can act as witness on her behalf unless he/she has known her in person, her name and family.

Commentary:

In the *Muwaṭṭa’* we find the following: “Yahyā related to me from Mālik that he had heard that Sa’īd b. al-Musayyab had said that ‘Umar b. al-Khaṭṭāb said: ‘A woman is only married with the consent of her guardian, someone of her family with sound judgment or the Sultan.’”⁶⁹²

However, a woman may not see her guardian until reaching puberty and everybody does not have to know him. The girl can marry in this situation and also, it is a very common situation which seems to indicate that women could grow up in a different place from her guardian. This rule is only valid for the marriage. It is not possible for legal situations involving business, proxies, donations and similar things.

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⁶⁹¹ See *Appendix 1: Scholars mentioned by Ibn Abī Zamanīn*.

⁶⁹² Mālik b. Anas, *Al-Muwaṭṭa’ of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 209.

Arabic text:

قال ابن مزين: وسألت أصبغ عن البكر اليتيمة إذا بلغت مبلغ الحيض ولم تحض
أيزوجها وليها عند ذلك برضاها؟ قال أصبغ: إذا بلغت مبلغا لا يبلغه أحد من النساء
إلا حاضت أو صارت عند النساء ممن لا تحيض زوجت.

Translation:

Ibn Muzayn said: I asked Aṣḡagh about a virgin orphan girl who does not menstruate although she has reached the menstruation age - can her guardian marry her off with her consent? Aṣḡagh said: If all her peers menstruate or her situation turned into that she cannot menstruate according to the opinion of women, she can marry.

Commentary:

The girl might not menstruate, so women - i.e. those who know about such cases - are consulted about her situation. If they agree that the girl already passed the age of menstruation and she still does not menstruate, she can marry.

Female expertise is extremely important to make a correct decision in these issues and midwives as authoritative experts on gynecology and obstetrics played important role. As Avner Giladi has explained: "Medical treatises and legal discussions in compilations of positive law (*furū'al-fiqh*) and responsa (*fatāwā*) throughout the classical and medieval periods give a clear impression that midwifery, at least in the central and western areas of the Islamic world, was regarded as a professional occupation grounded in expertise and experience long before the fourteenth century."⁶⁹³

Question: 25

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Arabic text:

⁶⁹³ Avner Giladi, *Muslim midwives: The craft of birthing in premodern Middle East*. Cambridge: Cambridge University Press, 2014, p. 61.

قلت: فهل إنبات الشعر عندكم في هذا حد تحدونه وتزوج إليه؟ قال: قد ذكر ذلك
ذكرا ضعيفا، وأحب إلي أن لا تعجل في هذا حتى تبلغ الحد الذي وصفت لك.

قال: ولو زوجها بعد إنبات الشعر لفسخته، إلا أن يكون ذلك بعد أن بلغت أقصى
سن الحيض فلم تحض.

Translation:

Ibn Muzayn asked: Is pubescence⁶⁹⁴ accepted as a limit for marriage according to your opinion? He said: This has been mentioned but it is a weak position. What I consider preferable is that she is not hurried to marry until she reaches the situation that I described to you.

He said: If her guardian marries off this woman after pubescence, her nuptials is cancelled, except if she has reached puberty age and (for some reason) she has not yet menstruated.

Commentary:

Pubescence is one of the first steps for becoming adult, so a pubescent boy or girl is not accepted as an adult. The term *bāligh*⁶⁹⁵ is used for someone who has attained the age of puberty (*bulūgh*). The age of *bulūgh* depends on the actual physical puberty of the individual concerned, and may start at twelve for a boy and even lower for a girl.⁶⁹⁶ Menstruation is the thing that determines the time of being adult for a woman, so the nuptials that is based on the condition of the pubescence is not valid. Pubescence that is the part of the process of becoming adult occurs before menstruation. The process begins with it but it is completed with menstruation. If a woman does not menstruate although her peers

⁶⁹⁴ Pubescence is one of the first stages in life when children are developing from children into adults. It does not refer to menstruation. Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/4.

⁶⁹⁵ [b l gh]: [bāligh]: arrival of age adult, maturity, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 90.

⁶⁹⁶ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/4.

menstruate, her situation will be examined specifically and separately from others.

Question: 26

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Arabic text:

وفي سماع علي بن زياد: وسئل مالك عن رجل أنكح أولاد له، وأعطى كل واحد منهم من ماله في إنكاحه شيئاً معلوماً، وأشهد أن [لمن]⁽¹⁾ بقي من ولده الصغار ممن لم ينكح في ماله مثل ما أعطى من أنكح، ثم مات الأب على ذلك، قال: [إن أبرز]⁽²⁾ لهم شيئاً من ماله وأشهد عليه جاز، وإلا فلا شيء لهم.

Translation:

In the *samā'* audition of 'Alī b. Ziyād:⁶⁹⁷ Mālik was asked about a man who married off some of his children and gave a specific thing to each of them when they married. It was testified that he had said to his small children yet unmarried that⁶⁹⁸ he would give them the same thing he had given to those who had married. Then the father died after having made that promise. He said: If it was made manifest⁶⁹⁹ that they were entitled to something from the property of the father and it is has been testified, this is considered licit. But if not, they are not entitled to anything.

Commentary:

If a father determines that he will give specific things to his children as a marriage gift and he dies, and if this is known by others, the children are entitled to take such things (from their father's inheritance). The Qur'an underlines that a testament will cannot be changed after the person dies in the following verse: "Then if any man changes it after hearing it, the sin shall rest upon those who

⁶⁹⁷ See Appendix: Scholars mentioned by Ibn Abī Zamanīn.

⁶⁹⁸ In the main ms. and the ms. from Rabat (bā'): *an lam*. This is the most appropriate reading, not found in the other mss.

⁶⁹⁹ In the main ms: *ibrāzahum* (I made manifest to them), in the ms. from Rabat (ḥā'): *baraza* (it became manifested), and in others: *abraza* (it was made manifest). This is the most appropriate reading.

change it; surely God is All-hearing, All-knowing.”⁷⁰⁰ Hence, the children can take their father’s gift when they get married even if their father has died.⁷⁰¹

Question: 27

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Arabic text:

وفي سماعه أيضا: وسئل مالك عن المرأة يغيب عنها زوجها فتكح رجلا جاهلا
بمغيب زوجها، وتزعم له أنها أيم ليس لها زوج، ثم يأتي زوجها، ألها من الآخر صداق
وقد غرته ودلسته له؟ فقال: إنه ليس من امرأة تصاب بشبهة إلا ولها الصداق. قال: ولو
أقرت أنها تزوجت وهي تعلم أن زوجها حي لرجمت، ولكن لا تجدها تقرر، ولا نجدها
تقول إلا نعي⁽³⁾ لي زوجي.

Translation:

In the same *samā’* audition: Mālik was asked about a woman whose husband is missing and she married a man who did not know her husband was missing, as the woman claimed that she did not have a husband. Then her husband reappeared. Does the second husband pay dower to her although she tricked him and hid this situation from him? He said: She is not a woman who has been married with doubt, so there is dower for her. He said: If she confesses that she was married and she knew that her husband was alive, she should be punished with stoning (*rajm*)⁷⁰². But (in this case) you do not find that she confessed and also we do not find that she said 'the news of my husband’s death⁷⁰³ reached me'.

Commentary:

⁷⁰⁰ Al-Baqara: 181, <https://tanzil.net/#trans/en.arberry/2:181>

⁷⁰¹ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 1412.

⁷⁰² [r j m]: [rajm]: stoning (to death): *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 196. For more detailed information, see below commentary.

⁷⁰³ *Al-na'īya*: to give news of death, *wa na'iytu al-mayta na'iyā*: I gave his death's news, Ibn Manẓūr, *Lisān al-'Arab*, vol. 14/216.

Normally, if a husband is missing and the woman does not know where he is, she should wait four years, then she waits four months for her *idda*⁷⁰⁴ and subsequently she can marry another person. But the case here dealt with is complicated because the woman claims her husband disappeared but after a while, he reappeared. She may have lied or not. If she had lied and confesses, her penalty is *rajm*, one of the *ḥadd* punishments. "A punishment fixed in the Qur'an and *ḥadīth* for crimes considered to be against the rights of God. The six crimes for which punishments are fixed are theft (amputation of the hand), illicit sexual relations (death by stoning or one hundred lashes), making unproven accusations of illicit sex (eighty lashes), drinking intoxicants (eighty lashes), apostasy (death or banishment), and highway robbery (death). Strict requirements for evidence (including eyewitnesses) have severely limited the application of hudud penalties. Punishment for all other crimes is left to the discretion of the court."⁷⁰⁵ In this case, the woman does not know really where her husband is, so she is entitled to take the dower from her second husband because she claims that news of her husband's death reached her.

Question: 28

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Arabic text:

باب فيمن طلق امرأته فاختلفا في الميسر⁽⁴⁾

وفي المدونة: قال ابن القاسم: قال مالك في رجل تزوج امرأة وخلا بها وأرخصي
الستر عليها ثم طلقها وقال: لم أمسها. وقالت: قد مسني، أن القول قول المرأة وعليها

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العدة ولها الصداق كاملاً⁽¹⁾ إذا كان دخوله عليها دخول بناء، وسواء في هذا دخل
عليها في بيتها أو في بيته⁽²⁾.

Translation:

⁷⁰⁴ Santillana, *Istituzioni di diritto Musulmano malichita con riguardo anche al sistema sciafiita*, p. 209.

⁷⁰⁵ Esposito, "Hadd", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed March 20, 2021
<http://www.oxfordislamicstudies.com/article/opr/t125/e757>

Chapter about a man who divorced his wife and their dispute about sexual intercourse⁷⁰⁶

In the *Mudawwana*: Ibn al-Qāsim said: Mālik said about a man who had married a woman and stayed alone with her, then he divorced her and he said: "I did not have sexual intercourse with her", but she said: "He had sexual intercourse with me", that the word of the woman is taken into consideration so that a waiting period

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is necessary for her and the total⁷⁰⁷ dower should be paid to her if he went to her in order to have sexual intercourse with her. This regardless of whether he had sexual intercourse in her or his house.⁷⁰⁸

Commentary:

There is a fundamental difference between *al-masīs*⁷⁰⁹ and *jīmā'*.⁷¹⁰ When *al-masīs* occurs between spouses, it means that sexual intercourse by penetration has not taken place. The consummation of the marriage does not come into being because *al-masīs* merely implies touching. On the other hand, *jīmā'* refers to having sexual intercourse by penetration. It is accepted that the marriage is consummated. In this case, a couple married and stayed alone. There was no witness with them, so the word of one of them should be taken into consideration for the judgment because they have a dispute about whether they had sexual intercourse or not. According to Maliki doctrine, the woman's word is

⁷⁰⁶ [m s s]: [masīs]: touching: *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 399. For the technical meaning see below commentary.

⁷⁰⁷ The woman takes total dower and performs the waiting period. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/320.

⁷⁰⁸ It is like that: if the woman has sexual intercourse and the man denies it but she had stayed alone with her husband for sexual intercourse in the man's house, the word of the adult woman is taken into consideration, even if the woman is insane and regardless of whether consummation of marriage occurs in her house or not. Divorce comes into being, total dower is necessary for her, and he cannot return to her because of his denial of sexual intercourse. 'Alī b. Khalīl Ṭarāblusī, *Mu'in al-Ḥukkām*. Damascus: Dār al-Qalam, 2018, vol. 1/293.

⁷⁰⁹ See above note 706.

⁷¹⁰ [j m ']: [jīmā']: sexual intercourse: *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 145.

reliable under these circumstances. The consummation of marriage is accepted. Hence, dower and waiting period are necessary for the woman. It is clearly determined in the *Muwatta'*: "Yaḥyā related to me from Mālik from Yaḥyā b. Sa'īd from Sa'īd b. al-Musayyab that 'Umar b. al-Khaṭṭāb decided about the woman who was married by a man and the marriage had been consummated, that the bride-price was obligatory."⁷¹¹

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Arabic text:

قلت له: فإن كان بنى بها ودخل عليها نهارا في رمضان [أو هي]⁽³⁾ صائمة صيام نذر أو كفارة أو تطوع ثم طلقها من يومه، أو كانت محرمة أو حائضا فطلقها قبل أن تحل من إحرامها، أو قبل أن تغتسل من حيضتها وتناكرا في المسيس. فقال: سئل مالك عن رجل دخل بامرأته وهي حائض ثم اختلفا. فقال الزوج: لم أمسها. وقالت المرأة: بلى قد مسني. فقال: القول قول المرأة إذا أرخيت عليهما الستور، وأنا أرى أن كل من خلى بامرأته فادعت أنه قد مسها فالقول قولها إذا كانت خلوة بناء وإن كانت حين خلا بها في حالة لا ينبغي أن يجامعها فيها. قلت له: فإن كان إنما طلقها واحدة أيملك رجعتها؟ قال: لا. وهو قول مالك⁽⁴⁾.

قال محمد: لإقراره إنه لم يمسه.

Translation:

Ibn al-Qāsim asked Mālik: What if the man had sexual intercourse with her during daylight of *ramadān*⁷¹², (or when she) was fasting - either a fast out of a vow, or out of expiation or a voluntary fast-, then he divorced her during that day, or what [if the man had sexual intercourse with her] when she was

⁷¹¹ Mālik b. Anas, *Al-Muwatta'* of Imam Mālik ibn Anas, translated by Aisha Abdurrahman Bewley, p. 211.

⁷¹² "Ramadān in ninth month of the lunar calendar, during which fasting is required." Esposito, "Ramadān", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed March 15, 2021

<http://www.oxfordislamicstudies.com/article/opr/t125/e1976>

*muḥrima*⁷¹³ or had her menstruation and he divorced her before she was out of her *iḥrām*, or before she had been purified from her menstruation. [In all these cases] they had different things to say regarding whether they had sexual intercourse. Ibn al-Qāsim said: Mālik was asked about a man who stayed alone with his wife when she had her menstruation period, and they held divergent views [about what had happened]. The husband said: "I did not have sexual intercourse with her". The woman said: "On the contrary, he had sexual intercourse with me". (Mālik) said: "The word of the woman is valid if the curtains were closed upon them. My opinion is that whoever stays alone with a woman who claims that he had sexual intercourse with her, what she says is what is taken into consideration if they were in a private space for sexual intercourse even if he retired to be with her when she was in a state that was not adequate for sexual intercourse. Ibn al-Qāsim said to him: If the man divorced her by single *ṭalāq*, can he return to her? He said: No. This is the doctrine of Mālik.⁷¹⁴

Muḥammad said: [This is so] because he denied that he had sexual intercourse with her.

Commentary:

The man denied having sexual intercourse with the woman and divorced her by single *ṭalāq*. Under regular circumstances, a man can return to his wife if he divorces her with single *ṭalāq*, but the couple held divergent views about what happened exactly between them. Hence, it is considered irrevocable divorce. They divorced before consummation of marriage according to the man's argument. Therefore, returning to the woman for the man is not possible unless she marries another man.

On the other hand, "The jurists agreed that the person divorcing his wife, with whom he has consummated the marriage, through *ṭalāq al-sunna* is one who

⁷¹³ See above note 618.

⁷¹⁴ When a man divorces his wife by single irrevocable *ṭalāq*, he cannot return to her. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/321-322.

divorces her through a single pronouncement during a period of her purity (from menstruation) in which he has not had intercourse with her.”⁷¹⁵

Question: 30

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Arabic text:

قلت: فلو صدقته المرأة أنه لم يمسه؛ فقال: قال مالك: لها نصف الصداق وعليها العدة، إلا أن يكون طال مكثه معها يتلذذ بها فيكون عليه حيثن الصداق كاملاً⁽⁵⁾.

Translation:

Sahnūn asked: What if the woman certifies what he said that he had not touched her? Ibn al-Qāsim said: Mālik said: It is necessary to give her half of her dower and the waiting period is obligatory for her, but if he stayed with her for a long time taking pleasure with her, then he has to give her the total dower.⁷¹⁶

Commentary:

When the couple stays alone, the duration is highly important because if being alone lasts for a long time it is assumed that they must have had sexual intercourse and therefore the man should pay the total dower. If they have opposite versions of what happened such as it was recorded in the first case, namely if the man denied having had sexual intercourse with her, he should pay the total dower. However, when the woman claims not having had sexual intercourse, the man pays half of it. It is specified in the Qur'an with the following verse⁷¹⁷: “*And if you divorce them before you have touched them, and you have already appointed for them a marriage-portion, then one-half of what you have appointed, unless it be they make remission, or he makes remission in whose hand*

⁷¹⁵ Ibn Rushd (al-Ḥafid), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/75.

⁷¹⁶ When a man stays alone with the woman and sits closely with her, then he left, the woman takes the half dower and there is no waiting period for her. Sahnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/320.

⁷¹⁷ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 355.

is the knot of marriage; yet that you should remit is nearer to godfearing. Forget not to be bountiful one towards another. Surely God sees the things you do.”⁷¹⁸

Question: 31

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Arabic text:

قال ابن القاسم: وإذا تصادقا على ترك المسيس، وقال الزوج: قد جامعتهما بين فخذيهما فليس عليه أيضا إلا نصف الصداق، إلا أن يكون قد طال مكثه معها.

Translation:

Ibn al-Qāsim said: When they agree that there was no touching, but the husband said: I had sexual intercourse with her between her two shanks, he is only obliged to give her half dower except if he stayed with her for a long time.

Commentary:

After spouses agreed that they did not have sexual intercourse, the man claims that he had sexual intercourse with the woman but this sexual relation does not refer a sexual relation that occurs by penetration because he underlined that he had sexual intercourse with her between her two shanks. They may have approached and touched each other. The consummation of the marriage does not come into being under these conditions. Hence, the husband does not have to pay her the total dower. On the other hand, if they spent together a long time, the judgment changes because in this situation the consummation of marriage is considered to have taken place.

Question: 32

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Arabic text:

قلت: فإن طلقها قبل البناء بها إلا أنه قد كان خلى بها/ في بيت أهلها أو في غير بيت أهلها، وقالت: قد مسني وأنكر الزوج ذلك. قال: القول قول الزوج.

Translation:

⁷¹⁸ Al-Baqara: 237, <https://tanzil.net/#trans/en.arberry/2:237>

Ibn al-Qāsim asked: What if a man divorces a woman before having sexual intercourse (*al-binā'*) with her, although he had stayed alone with her in the house of her family or in another house. She said: "He had sexual intercourse (*qad massanī*) with me", but the husband denied it. Mālik said: The word of the husband is taken into consideration.

Commentary:

There is a significant difference between *al-masīs*⁷¹⁹ and *al-binā'*⁷²⁰. As explained in Question 28, *al-masīs* refers to touch so consummation of marriage may not be taken place in this situation. Sexual intercourse by penetration should have taken place to accept that the consummation of the marriage has been completed. If the term *al-binā'* is used, it means that marriage is consummated.

Question: 33

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Arabic text:

قلت: أف يكون عليها عدة؟ فقال: إن كان خلا بها وليس معها أحد⁽¹⁾ فعليها العدة، وإن كان إنما دخل عليها ومعها نساء ففقد وقبل ثم انصرف فلا عدة عليها.

Translation:

Ibn al-Qāsim said: Is the waiting period necessary for her? Mālik answered: If he stayed alone with her and there was not another⁷²¹ person with them, the waiting period is necessary for her. But in the case he entered into her presence and there were women with her and he stayed and kissed her, then he left, there is no waiting period for her.

Commentary:

If there is a disagreement between a couple regarding having had sexual intercourse and they stay alone, the woman should observe her waiting period.

⁷¹⁹ See above note 709.

⁷²⁰ [b n ']: [binā']: sexual intercourse: *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībī and Quṭb Muṣṭafā Sanū, p. 145.

⁷²¹ In the ms. from Tunisia (tā'): *wa amkana minhā*, that is, "and he had the possibility for the sexual intercourse".

However, if there is a witness with them, i.e., they were not alone, the waiting period is not necessary for the woman. In this case, the man stayed with his wife and kissed her, but they were not alone, so the woman does not have to observe the waiting period.⁷²² In the Qur'an, this issue is explained with following verse: *"O believers, when you marry believing women and then divorce them before you touch them, you have no period to reckon against them; so make provision for them, and set them free with kindness."*⁷²³

Question: 34

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Arabic text:

قلت: فإن قال: قد جامعته. وقالت: ما جامعني، أيكون عليها عدة؟ فقال: إن كان خلا بها وأمكن منها فعلها العدة ولا رجعة له عليها إن أراد ارتجاعها، وإن لم يعرف أنه خلا بها فلا عدة عليها، ويقال لها: قد أقر لك بالصدّاق كاملاً فأنت بالخيار في أخذه كله أو أخذ نصفه⁽²⁾.

Translation:

Ibn al-Qāsim asked: if a man said: "I had sexual intercourse with the woman", but she said: "He did not have sexual intercourse with me", is the waiting period necessary for her? Mālik answered: if he stayed alone with her and she allowed that to happen (to be alone), then the waiting period is necessary for her and he cannot return to her if he wants to return. But if the fact that he stayed alone with her is not known, then the waiting period is not necessary for her and she is told: if he granted you a complete dower, then you have the option of taking all of it or only half⁷²⁴ of it.

Commentary:

If the spouses do not agree on whether they had sexual intercourse or not, the duration and the situation of being alone are taken into consideration. If the

⁷²² Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 2708.

⁷²³ Al-Ahzāb: 49, <https://tanzil.net/#trans/en.arberry/33:49>

⁷²⁴ Cf. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/320-321.

woman allowed to be alone with the man, she should observe her waiting period. She had two options. If she takes the total dower, she is accepting that she had sexual intercourse with the man, so she has to perform the waiting period. If she denies to have had sexual intercourse with him, she can only take half dower and she does not have to perform the waiting period. The amount of the dower and performing the waiting period are determined by having had sexual intercourse.

Question: 35

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Arabic text:

قال محمد: قول سعيد بن المسيب: إذا دخل عليها في بيتها يعني دخول الزيارة، وقوله: إذا دخلت عليه في بيته يعني به البناء، كذلك فسر العتبي.

قال محمد: وسواء في هذا الأصل كانت المرأة صغيرة أو كبيرة، بكرًا أو ثيبًا، يتيمة أو ذات أب، ممن يولى عليها أو لا يولى عليها، حرة أو أمة، مسلمة أو نصرانية، فالقول في ذلك قولها، لها وعليها، وإن لم تبلغ الصغيرة المحيض إذا بلغت [الوطء]⁽³⁾ فلا كلام للأب في ذلك ولا للواطئ؛ لأن هذا مما لا يعرف تصديقه أو تكذيبه إلا بقولهن، فهن فيه مأمونات مقبول قولهن، كما هن مأمونات على الحيض والعدة والسقط والولادة،

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فقد جعل الله ذلك إليهن في قوله ﷺ: «وَلَا تَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ إِنْ كُنَّ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ»⁽¹⁾. كذلك قال ابن حبيب في جميع هذا.

Translation:

Muḥammad said: the doctrine of Sa'īd b. al-Musayyab⁷²⁵ is: If a man enters in the presence of a woman in her house, it means that he is visiting her. His doctrine is also: If the woman enters in the presence of a man in his house, this means that sexual intercourse took place. Al-'Utbi's⁷²⁶ interpretation was the same.

Muḥammad said: Regarding this issue it is the same whether the woman is young or adult, virgin or widow, orphan or not, has a guardian or not, is free or concubine, Christian or Muslim, in all situations her words are accepted whether

⁷²⁵ See Appendix 1: Scholars mentioned by Ibn Abī Zamanīn.

⁷²⁶ Ibid.

they are against to her or in favor of her, and whether she does not menstruate but she is able to have sexual intercourse.⁷²⁷ What the father or the person who had sexual relation with her may say is not accepted, because this belongs to the category of things whose accuracy or inaccuracy is exclusively determined by what women say. Women are reliable in these issues and what they say has to be accepted, in the same way that they are reliable in the issues of menstruation, the waiting period, miscarriage and giving birth,

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because Allah the Blessed made them reliable with this verse: *And it is not lawful for them to hide what God has created in their wombs; if they believe in God and the Last Day.*⁷²⁸ Ibn Ḥabīb⁷²⁹ said the same regarding all this.

Commentary:

There is a difference regarding who enters a house, a man or a woman. When a man enters the house of the woman, this action is understood as visiting. However, when a woman enters the house of the man, it points out that her purpose is having sexual intercourse. On the other hand, women's words are relied upon regarding the issue of sexual intercourse having taken place or not, because they know their periods and bodies better than men. Hence, men's words are not relied upon regarding these issues.

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⁷²⁷ In the main ms. and the ms. from Rabat (bā'): *al-maḥiḍ* (menstruation) in the mss. from Tunisia (tā'), Algeria (jīm), Rabat (ḥā') and Zagora (zayn): *al-waṭi'* (sexual intercourse). This last reading is the valid one.

⁷²⁸ Al-Baqara: 226, <http://tanzil.net/#trans/en.arberry/2:226>

⁷²⁹ See Appendix 1: Scholars mentioned by Ibn Abī Zamanīn.

باب في الخلع⁽²⁾ وما يحل من الخلع⁽³⁾ عليه ويلزم من الطلاق فيه ومن
خالع بغير شيء يأخذه

قال سحنون: قلت لابن القاسم: أيجل للزوج أن يأخذ من المرأة ما أعطته على الخلع
؟ قال: نعم. إذا لم يكن على إضرار منه بها. وقد قال مالك: ما رأيت أحدا ممن يقتدى به
يكره أن تفتدي المرأة بأكثر من صداقها⁽⁴⁾.

وهذا إذا لم يكن على إضرار من الزوج بها، ولا تضيق عليها، وهو معنى قول
الله ﷻ ﴿فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ﴾⁽⁵⁾. قال مالك: وإن علم أنه أضر بها
لزمه الطلاق ورد عليها ما أخذ منها.

Translation:

Chapter about *khul'*⁷³⁰, licit things for him from *khul'*, what is mandatory on him from *khul'* and about nonreciprocal *mukhāla'a*

Sahnūn said: I asked Ibn al-Qāsim: is permissible for the husband to take what her wife offers to give him in order to obtain *khul'*? Ibn al-Qāsim answered: Yes, if the woman will not be harmed because of that. Mālik said: I've never seen a person who disapproves of a woman ransoming herself with the major part of her dowry⁷³¹.

It is that⁷³² if the demand of the husband does not harm the woman, and he cannot push her. This is the meaning of this verse of Allah the Blessed: *It is no fault in them for her to redeem herself*.⁷³³ Mālik said: If it is known that the husband has caused her harm, *ṭalāq* is necessary for him and he has to give her back what he took from her.

Commentary:

⁷³⁰ [kh l ']: [khul']: taking off, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 177. In legal terminology, it is a type of exchange agreement thanks to which a woman obtains her freedom and in return the man obtains compensation. For more detailed information, see below commentary.

⁷³¹ The same explanation in Sahnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/341.

⁷³² The circumstances that are approved by Mālik for *khul'*.

⁷³³ Al-Baqara: 226 <http://tanzil.net/#trans/en.arberry/2:226>

Khul' in its basic meaning is removal. As a technical religious term, it points to a "divorce procedure under Islamic law whereby a woman may obtain a divorce without showing cause by returning her dowry or conceding other financial obligations to her husband. This divorce procedure is initiated by the wife and is usually not revocable within the waiting period prescribed for women before remarriage is allowed. Muslim legal sources disagree as to whether the consent of the husband is necessary for this procedure to take effect."⁷³⁴ Ibn Abī Zayd al-Qayrawānī explained *khul'* in his *Risāla* in this way: "Khul' is a type of divorce which precludes any possibility of remarriage, even though it is not technically called a divorce, and it takes place when the husband accepts something from his wife in return for her release."⁷³⁵

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Arabic text:

قال محمد: وفي سماع ابن القاسم: سئل مالك عن رجل اطلع على امرأته على زنى هل له أن يضربها حتى تفتدي منه؟ قال: لا أرى ذلك يصلح له⁽⁶⁾.

Translation:

Muḥammad said: in the audition (*samā'*) of Ibn al-Qāsim, Mālik was asked about a man who saw his wife while doing adultery - is it allowed for him to beat her until she redeems herself from him? Mālik said: I don't think it is appropriate for him.⁷³⁶

Commentary:

The punishment of adultery is specified in this Qur'anic verse: "*The fornicatress and the fornicator -- scourge each one of them ahundred stripes, and in the matter*

⁷³⁴ Esposito, "Khul'", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed March 20, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e1301>

⁷³⁵ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley. Bradford: Diwan Press, 2018, p. 110.

⁷³⁶ This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 5/233.

of God's religion let no tenderness for them seize you if you believe in God and the Last Day; and let a party of the believers witness their chastisement."⁷³⁷

The husband has seen his wife fornicating, but he has not the required procedural evidence to bring her to court to be sentenced. He would like to get free from her without paying anything to her, which he has to do if he would divorce her. Then, he starts causing her harm so that it would be the wife who would ask for divorce (*khul'*) in which case she offers to pay him to get free. The ransom only can be taken by an agreement, beating the woman to take the ransom is forbidden.⁷³⁸

Question: 38

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Arabic text:

قال ابن القاسم: وإذا تخالع الزوجان كان خلعهما تطليقة بائنة⁽¹⁾ لا رجعة له فيها، وعلى المرأة أن تعتد عدة المطلقة، وإن أراد أن يتراجعا قبل انقضاء العدة كان ذلك لهما؛ لأن الماء ماؤه بوطء حلال إن لم يكن كان طلقها قبل ذلك تطليقتين إن كان حراً، أو كان تطليقة واحدة إن كان عبداً.

Translation:

Ibn al-Qāsim said: When a couple agrees on a *khul'* divorce (*mukhāla'a*), this becomes an irrevocable⁷³⁹ *ṭalāq*, so that there is no return to the woman for the man, and the woman should have a waiting period as the divorced woman by *ṭalāq* has. But if both of them want to return within the waiting period, this is permissible for them; because his semen would be *ḥalāl* semen, produced in a legal intercourse, if he had not divorced her with double *ṭalāq* in the case of the free man or in one time *ṭalāq* in the case of a slave.

Commentary:

⁷³⁷ Al-Nūr: 2, <http://tanzil.net/#trans/en.arberry/24:2>

⁷³⁸ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 2355.

⁷³⁹ The woman leaves the man (*bā'ina*), and it is irrevocable: she divorces by *ṭalāq*, Ibn Manẓūr, *Lisān al-'Arab*, vol. 1/560.

Mukhāla'a is divorce at the instance of the wife who pays compensation to the husband. They cannot reunite unless both of them want to return. The woman who makes *mukhāla'a* should have a waiting period like the divorced woman by *ṭalāq*. It is mentioned various times in *Muwaṭṭa'*: "Yaḥyā related to me from Mālik from Nāfi' that Rubayyi bint Mu'awwidh b. 'Afrā came with her paternal uncle to 'Abdullāh b. 'Umar and told him that she had divorced her husband for a compensation in the time of 'Uthmān b. 'Affān, and he heard about it and did not disapprove. 'Abdullāh b. 'Umar said: 'Her *idda*' is the *idda*' of a divorced woman'. The '*idda* of the woman with a *khul'* divorce is three periods."⁷⁴⁰

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Arabic text:

قال ابن القاسم: وكل من خالع⁽²⁾ بشيء ولم يسم طلاقاً مثل أن يأخذ منها [وينقلها]⁽³⁾ ويقول ذلك بذلك فهو طلاق الخلع، وإذا سمى طلاقاً مضى ما سمى من الطلاق مثل أن يقول لها: أخالعك على أن تكون طالقة تطليقة أو تطليقتين. قلت: فإن خالعها وهو ينوي بالخلع ثلاثاً. قال: يلزمه الثلاث في قول مالك⁽⁴⁾.

Translation:

Ibn al-Qāsim said: Whoever takes something for *khul'*⁷⁴¹ and *ṭalāq* is not mentioned, this is similar to the case of taking something from her (denied that)⁷⁴² and they said 'this thing for this other thing,' it is *ṭalāq al-khul'*. But if he mentions *ṭalāq*, the thing which is mentioned from *ṭalāq* implements. This is similar to the case of the man who says to his wife: I am doing *mukhāla'a* with you by single or double *ṭalāq*. Saḥnūn said: if he did *mukhāla'a* and he says three repudiations. Ibn al-Qāsim said: according to the doctrine of Mālik, it is necessary to say three times.⁷⁴³

⁷⁴⁰ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 228.

⁷⁴¹ In the ms. from Zagora (zayn): *wa kullu min ṭalāq* (all of them are types of divorce).

⁷⁴² This is added in the mss. from Zagora (zayn), Tunisia (tā'), Rabat (ḥā').

⁷⁴³ The same explanation in Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/343.

Commentary:

The rules and requirements of the divorce by *ṭalāq* and *khul'* are different from each other. If a couple mentions *ṭalāq al-khul'*, *khul'* divorce comes into being. If the marriage has been consummated, this is accepted as a triple divorce. If the marriage has not been consummated, the husband is asked to specify his intention.⁷⁴⁴ On the other hand, if they talk about divorce by *ṭalāq*, revocable or irrevocable *ṭalāq* divorce come into being. Hence, the words should be chosen very carefully during the divorce process.

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Arabic text:

قال ابن القاسم: ومن أتبع [الخلع]⁽⁵⁾ طلاقاً مثل أن يقول لها بعد فراغها من الخلع: أنت طالق، فإنه إن لم يكن بين ذلك سكوت ولا كلام يكون قطعاً بين الخلع والطلاق الذي تكلم به فالطلاق لازم، وإن كان بينهما سكوت أو كلام يكون قطعاً لذلك فإن طلاقه لا يقع عليها⁽⁶⁾.

Translation:

Ibn al-Qāsim said: Regarding the case of the husband who adds *ṭalāq* to *khul'*⁷⁴⁵ - for example, by telling his wife after having separated from her with *khul'*: "You are divorced"-, if there was no silence nor conversation for a while between the *khul'* and the *ṭalāq* formula that he uttered, then *ṭalāq* becomes obligatory [instead of *khul'*]. But if there was silence between them or a word was said to interrupt it, then his *ṭalāq* is not valid for the woman.⁷⁴⁶

Commentary:

The specific words such as *ṭalāq*, *khul'* and *mubāra'a* are fundamental for divorce because they determine its conditions and situation.⁷⁴⁷ If a man says *ṭalāq*, then

⁷⁴⁴ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 110.

⁷⁴⁵ Additionally in the mss. from Algeria (jīm), Zagora (zayn), Tunisia (tā'), Rabat (ḥā').

⁷⁴⁶ The same in Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/346.

⁷⁴⁷ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan and Mohammad Abdul Rauf, vol. 2/70.

divorce occurs by *ṭalāq*, but if he says *ṭalāq* and *khul'* together as in this case, then how he said such words should be considered in order to decide whether *ṭalāq* or *khul'* takes place. For example, Mālik said: "If, when a woman offers to compensate her husband, he divorces her straightaway, then that compensation is confirmed for him. If he makes no response, and then at a later date, does divorce her, he is not entitled to that compensation."⁷⁴⁸

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Arabic text:

قال محمد: ولا بن القاسم في سماع عيسى أنه قال: إذا/ صالح الرجل امرأته أو خالعتها فقال لها: أنت طالق، كانت تطليقتين [طلقة للخلع وطلقة لما طلق، وإن قال: لم

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أرد طلاق الخلع لم يُنَوَّ في ذلك وكانت تطليقتين⁽¹⁾، ولو قال لها: أنت طالق طلاق الخلع لم يلزمه إلا واحدة⁽²⁾.

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Translation:

Muḥammad said: Ibn al-Qāsim was asked in the audition (*samā'*) of 'Īsā: If the man made *muṣālaḥa*⁷⁴⁹ with his wife or *mukhāla'a*, but he said to her: "You are divorced", then two *ṭalāq* come into being (a *ṭalāq* is for *khul'* and a *ṭalāq* is for *ṭalāq*)⁷⁵⁰. If the man says:

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"I did not want *ṭalāq al-khul'* and my intention was not that", two *ṭalāq* occur. If he says to her: "You are divorced with *ṭalāq al-khul'*"⁷⁵¹, then only a single *ṭalāq* is necessary for him.

⁷⁴⁸ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 229.

⁷⁴⁹ For this term see commentary below.

⁷⁵⁰ The sentence between square brackets is an addition from the mss. of Zagora (zayn), Algeria (jīm) and Tunisia (tā'). This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 5/277.

⁷⁵¹ Ibid, vol. 5/216.

Commentary:

As explained by Ibn Rushd (al-Ḥafīd), “The terms *khul'*, *fidya*, *ṣulḥ* and *mubāra'a* all refer to the same meaning, which is ‘(a transaction in which) compensation is paid by the wife for obtaining her divorce’. The term *khul'*, however, in the opinion of the jurists is confined to her paying him all that he spent on her, the term *ṣulḥ* refers to paying a part of it, *fidya* to paying more than it, and *mubāra'a* to her writing off a claim that she had against to him. The discussion of the principles of this mode of separations split into four sections. First, the permissibility of its occurrence (legal effectiveness). Second, the conditions for its proper occurrence, that is, its valid occurrence. Third, about its nature, whether it is divorce or rescission. Fourth, about the *aḥkām* related to it.”⁷⁵²

Question: 42**Page:** 697**Arabic text:**

قال محمد: ومالك في سماع ابن القاسم أنه سئل عن المرأة تختلع من زوجها على أن يسلم إليها متاعها وتسلم إليه متاعه ويفترقا على ذلك. قال: هذا خلع بين⁽³⁾.

Translation:

Muḥammad said: Mālik was asked in the audition (*samā'*) of Ibn al-Qāsim about a woman who made *khul'* with her husband agreeing that he would allow her to keep her things and he will keep his own things, and they separated after that. He said: it is clearly *khul'*.⁷⁵³

Commentary:

The most important condition of the *khul'* divorce is that the wife offers a ransom to her husband in order to get the dissolution of marriage. In this case, the couple

⁷⁵² Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan and Mohammad Abdul Rauf, vol. 2/79.

⁷⁵³ In the mss. from Tunisia (tā'), Algeria (jīm), Zagora (zayn): *bā'inun* (irrevocable divorce); in the ms. from Rabat (ḥā'): *jā'izun* (licit). This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 5/306.

prefers to keep their own goods in their hands. They do not demand something from each other. This is also accepted as *khul'* divorce because under regular conditions, the husband should pay the dower to the woman. In this case, the woman gives up her financial rights.

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Arabic text:

[قال سحنون]⁽⁴⁾: قال ابن القاسم: قال مالك: ولا بأس أن يتاركا على ألا يعطيها شيئاً ولا يأخذ منها وتكون تطليقة بائة⁽⁵⁾.

Translation:

(Saḥnūn said): Ibn al-Qāsim said: Mālik said: There is no problem if they separate from each other and he does not give something to her and he does not take something from her. Then an irrevocable *ṭalāq* occurs.⁷⁵⁴

Commentary:

Khul' is a type of mutual agreement. The ransom which is taken by the husband from his wife to divorce her should not harm the woman. It is clearly explained in Mālik's *Muwaṭṭa'*: "Yaḥyā related to me from Mālik from Nāfi' from a *mawlā* of Ṣāfiyya bint Abī 'Ubayd that she gave all that she possessed to her husband as compensation for her divorce from him, and 'Abdullāh b. 'Umar did not disapprove of that. Mālik said: "Divorce was ratified for a woman who ransomed herself from her husband, when it was known that her husband was detrimental to her and was oppressive for her, and it was known that he wronged her, and he had to return her property to her. He added: 'This is what I have heard, and it is what is done among us'. Mālik said: 'There is no harm if a woman ransoms herself from her husband for more than what he gave her'."⁷⁵⁵

⁷⁵⁴ This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 5/306.

⁷⁵⁵ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 229.

In this case, the parties do not harm each other and they just demanded their own stuff. This situation makes valid their *khul'* and an irrevocable divorce occurs between them.

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Arabic text:

وفي سماع يحيى: قال ابن القاسم فيمن قال لزوجته: أنت طالق طلاق الخلع أنها واحدة بائنة، ولو قال لها: أنت طالق واحدة بائنة لكانت البتة.

Translation:

In the audition (*samā'*) of Yaḥyā: Ibn al-Qāsim said about the man who said to his wife: "You are divorced by *ṭalāq al-khul'*", that an irrevocable *ṭalāq* comes into being. But if he says to her: "You are divorced by an irrevocable *ṭalāq*", she is divorced by three *ṭalāq*.

Commentary:

There are differences between *ṭalāq al-khul'* and *ṭalāq*. *Khul'* refers to an irrevocable *ṭalāq*, there is no return for the couple. An irrevocable *ṭalāq* corresponds to three *ṭalāqs* because there is no return. Nonetheless, their conditions are different because an agreement between the couple is required for *ṭalāq al-khul'*. Also, the woman should pay something to her husband to get him to divorce her.⁷⁵⁶

Question: 45

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Arabic text:

⁷⁵⁶ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/80.

قال العتبي: وسئل أصبغ عن رجل قال لامرأته: أنت طالق طلاق الصلح، أو قال لها: قد صالحتك وأشهد⁽⁶⁾ رجالاً أنه صالحها، والمرأة غائبة أو حاضرة، راضية أو كارهة، علمت أو لم تعلم. فقال: هذا سواء وهي تطليقة بئنة، أخذ منها شيئاً أو لم يأخذه، وكذلك إن قال لها: قد طلقك طلاق [المبارأة]⁽⁷⁾، أو قد بارئتك⁽⁸⁾، أو قال

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لقوم: قد بارئتها رضيت بذلك أو لم ترض فهي طالق طلاق المبارأة، ولو قال لها: أنت طالق طليقة بئنة لكان كقوله أنت بئنة⁽¹⁾.

Translation:

Al-'Utbī said: Aṣḡbagh was asked about a man who said to his wife: "You are divorced by *ṭalāq al-ṣulḥ*" or he said to her: "I did *muṣālaḥa* with you" - and there were men [at least three] who bore witness⁷⁵⁷ that he had done that, and this regardless of whether the woman was absent or present, had consented or not, had been informed or not. His answer was: All these cases are the same and they imply an irrevocable divorce, regardless of whether he took something from her or he did not. This is similar to the case when he says to her: "I have divorced you by *ṭalāq (al-mubāra'a)*"⁷⁵⁸, or "I am dissociated from you (*bāra'tu-ka*)"⁷⁵⁹, or he said to some people: "I dissociated from her", whether she is satisfied or not, she is divorced by *ṭalāq al-mubāra'a*. If he says to her: "You are divorced by irrevocable *ṭalāq*", this is the same as saying: "You are certainly divorced" (*anti bā'ina*).⁷⁶⁰

Commentary:

⁷⁵⁷ In the ms. from Algeria (jīm): *aw ashadu*. This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 5/306.

⁷⁵⁸ In the main ms.: *al-khiyāratun*, and in the mss. from Rabat (bā') and (ṭā'): *al-khiyārun*, in the mss. from Tunisia (tā'), Algeria (jīm), Zagora (zayn) and Rabat (ḥā'): *al-mubāra'a*, and it is valid.

⁷⁵⁹ *Bār' al-mar'atun*: a man made an agreement with the woman on separation. Ibn Manẓūr, *Lisān al-'Arab*, 1/356; Muḥammad b. Ya'qūb al-Fayrūzābādī, *Al-Qāmūs al-Muḥīṭ*. Beirut: Al-Resalah Publishing, 2015, p. 42.

⁷⁶⁰ This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 5/306.

"*Mubāra'a* is a form of divorce in which the wife comes before a judge and forsakes all her financial rights in return for divorce. The financial rights may include the dowry she has already received from her husband and the delayed dowry that she would have expected at the time of his death or if he divorced her. It could also include part of the financial support he gave her during their marriage as well as financial compensation over and above what she has received from him. Such a divorce is always a *baynūnati ṣughrā*, which does not prevent the couple from remarrying if they so wish. However, if the *mubāra'a* divorce is the third time the couple has divorced, then it is *baynūnati kubrā*, which prevents their remarriage without an intervening marriage between the wife and a third party. In a *baynūnati ṣughrā*, the divorce is irrevocable, so the husband cannot take back his wife unless she has agreed, a new marriage contract is signed, and a dowry is paid to her."⁷⁶¹ As regards Mālik's doctrine, he said in *al-Muwaṭṭa'*: "Yaḥyā related to me from Mālik that he heard Ibn Shihāb say that if a man said to his wife, "You are free of me, and I am free of you, " it counted as three pronouncements of divorce as if it were an 'irrevocable' divorce. Mālik said that if a man made any strong statement such as these to his wife, it counted as three pronouncements of divorce for a woman whose marriage had been consummated, or it was written as one of three for a woman whose marriage had not been consummated, whichever the man wished. If he said he intended only one divorce he swore to it and he became one of the suitors because, whereas a woman whose marriage had been consummated was made inaccessible by three pronouncements of divorce, the woman whose marriage had not been consummated was made inaccessible by only one pronouncement."⁷⁶²

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Arabic text:

⁷⁶¹ Esposito, "Mubāra'a", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed March 20, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e1567>

⁷⁶² Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 223.

باب في خلع غير المدخول بها

قال سحنون: قلت لابن القاسم: أرأيت لو أن رجلاً تزوج امرأة بمائة دينار ودفعها إليها، ثم خالعتة قبل البناء على أن دفعت إليه غلامها، هل يرجع عليها بشيء أم لا؟ قال: أرى أن ترد المائة إليه كلها.

Translation:

Chapter about *khul'* of a woman who did not have sexual intercourse

Sahnūn said: I asked Ibn al-Qāsim: "What is your opinion regarding a man who married a woman with a hundred *dīnār* that he paid to her and then she made *mukhāla'a* before having sexual intercourse with him in return for giving her male slave to him? Can he ask her to return him part [of what he paid] or not?"

Ibn al-Qāsim said: "My opinion is that she should give back all hundred *dīnār* to him."

Commentary:

In the Qur'an, the topic of dower is specified in this verse: *"And if you divorce them before you have touched them, and you have already appointed for them a marriage-portion, then one-half of what you have appointed, unless it be they make remission, or he makes remission in whose hand is the knot of marriage; yet that you should remit is nearer to godfearing. Forget not to be bountiful one towards another. Surely God sees the things you do."*⁷⁶³

If *mukhāla'a* had not taken place and if the man had been the one who wanted to divorce (*ṭalāq*), then the woman would have taken half of the dower (50 *dīnār*) because of the fact that they did not have sexual intercourse before the divorce. But in this case, according to Ibn al-Qāsim, the man is entitled to take back the one hundred *dīnārs* that he had paid as dower because *mukhāla'a* took place before sexual intercourse. The fact that the woman had given her male slave to him does not detract from the one hundred *dīnārs*, as it is understood as ransom for *mukhāla'a*, i.e., it is the price the woman had to pay for her husband to agree to their divorce.⁷⁶⁴

⁷⁶³ Al-Bakara: 237, <http://tanzil.net/#trans/en.arberry/2:237>

⁷⁶⁴ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 354.

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Arabic text:

وقد سئل مالك عن رجل تزوج امرأة بمهر مسمى فافتدت منه بعشرة دنانير قبل البناء، ثم أرادت أن تتبعه بنصف المهر. فقال: ليس ذلك لها. وسمعت الليث⁽²⁾ يقول مثله، وسواء في هذا عندي نقدها ما كان أصدقها أو لا. ومما يبين ذلك أنه لو كان نقدها ثم دعت إلى أن يتاركها أو يبارئها ففعل، [لوجب]⁽³⁾ عليها أن ترد جميع ما أخذت منه، فهي حرام أي لا تمسك من المهر⁽⁴⁾ شيئا إن كانت قبضته، وإن كانت لم تقبضه لم تتبعه بشيء أيضا، ولو أنها سألته قبل الدخول أن يطلقها على أن تعطيه عدة معلومة من صداقها لكان له ما أعطته، وترجع عليه بنصف ما بقي إن كان لم ينقدها، وإن كان قد

Translation:

Mālik was asked about a man who had married a woman paying her a specified dower, then the woman gave ten *dīnārs* to him as a ransom before having sexual intercourse with him and subsequently she wanted to add half of the dower to the ransom. Mālik said: "she is not entitled to do that." Ibn al-Qāsim heard from al-Layth⁷⁶⁵ that he said the same thing on this issue. In my opinion (Ibn Abī Zamanīn), as regards this issue, it is the same whether the dower has been paid in cash or not. One of the things that explains this issue is that if he had given her the dower in cash, and subsequently she had invited him to leave her or to make *mubāra'a*, and he had done so, then she is (required)⁷⁶⁶ to give back to him all that she took from him. She is fact *ḥarām* for him and thus she is not entitled to anything from the dower⁷⁶⁷ in the case that she had taken possession of it. In the

⁷⁶⁵ See Appendix 1: Scholars mentioned by Ibn Abī Zamanīn.

⁷⁶⁶ In the main ms. and those from Algeria (jīm), Rabat (ḥā') and Zargan (zayn) the reading is *aw wajaba* (or it is necessary); in the mss. from Tunisia (tā') and Rabat (bā' and ṭā'), *la-wajaba* (it is necessary). The editor has opted for this second reading as more accurate. This opinion seems true because *aw wajaba* means that the woman might give back all that she took from him. But given that they made *mubāra'a* before sexual intercourse, she should give back to him all that she took from him.

⁷⁶⁷ In other words, by accepting her statement that she will ransom herself with part of her dower, even if he had not given it to her, the man is obliged to take what she gives him and to pay her the remaining part of the agreed upon dower.

case that she had not taken the dower, she cannot demand it from him. If the woman had said to him before having sexual intercourse: 'Divorce me, I will give you a determined amount of my dower', he is to take what she gives and she is entitled to receive half of the remaining part of the dower in the case that he had not paid it in cash to her.

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نقدھا رجع علیھا بنصف ما بقی بعد الذی أعطته، ولو کان الذی أعطته لیس من صداقھا، مثل أن تقول: طلقني ولك عشرة دنانير، لكان [لھا]⁽¹⁾ أن تتبعه بنصف المهر وإن كان لم ينقدھا إياه، ويتبعھا بنصیبھ⁽²⁾ إن كان نقدھا سوى الذی أخذ منها؛ لأنها إنما اشترت منه طلاقھا، وكذلك لو قالت له: طلقني قبل أن يدخل بها وفعل فإن لھا أن تتبعه بنصف الصداق إن كانت لم تقبض منه شیئا، وإن كانت قبضته كله ردت نصفه⁽³⁾.

Translation:

But if he had paid the dower in cash, he takes half of the part of the dower that remains after subtracting what she gave to him. If what the woman gave to him is not from her dower - for example by saying: "Divorce me in exchange for ten *dīnār*"⁷⁶⁸ then she has to give him half of the dower even if he did not give it in cash to her. The man has to give her the *naṣīb*⁷⁶⁹ if he had paid the dower subtracting the amount that he had received from her. This is so because she is in fact purchasing her *ṭalāq* from him. This is similar to the case when she says: "Divorce me before having sexual intercourse" and he agrees: she can take half of the dower if she did not take something from him, but if she took the total dower, she refunds half of it.⁷⁷⁰

⁷⁶⁸ The difference with the previous case is that in it the woman had said: 'Divorce me, I will give a determined amount of my dower to you', whereas now the woman does not specify where the money comes from, i.e., there is no direct reference to the dower.

⁷⁶⁹ In the ms. from Rabat (ḥā'), Zagora (zayn) and Algeria (jīm): *binisfihi* which means half. In this case, it points to half of the dower. It should be *niṣf*, that means half, not *naṣīb* because *naṣīb* means fate or destiny.

⁷⁷⁰ Saḥnūn, *Al-Mudawwana al-kubrā*, vol. 5/339-340. The doctrine of Mālik is like this because divorce came into being before sexual intercourse.

Commentary:

In this issue, the woman wanted to add half of the dower to her ransom - which was ten *dīnār* - but it is not possible because of not having had sexual intercourse with him. In other words, she has no right over the dower because she asked for divorce before having sexual intercourse.

The situation varies according to the circumstances. In the responses to the question, different possibilities are taken into account according to whether the dower had been paid or not (an aspect that had not been specified in the original question).

If a couple has disagreement about the amount of compensation upon which *khul'* has been transacted and if there is no testimony about what had been agreed, the statement of the man is to be accepted, according to Mālik.⁷⁷¹

Question: 48

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Arabic text:

باب ما يجوز في الخلع وما لا يجوز

قال سحنون: قلت له: أفيجوز الخلع والمبارأة عند غير السلطان؟ قال: نعم. وهو قول مالك⁽⁴⁾.

Translation:

Chapter about licit and illicit things in *khul'*

Ṣaḥnūn said: I asked Ibn al-Qāsim: "Is it licit to do *mubāra'a* and *khul'* without (the intervention) of the representative of political authority (*al-sultān*)?" Ibn al-Qāsim said: "Yes. It is the doctrine of Mālik."

Commentary:

In this question, *al-sultān* refers to the political authority, the ruler, or his representative (the governor, for example, or the judge). The issue is whether a couple can resort to *mubāra'a* and *khul'* without the intervention of an authority

⁷⁷¹ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/84.

such as the judge (who is named by the ruler). According to the doctrine of Mālik, it is possible. Nonetheless, she cannot marry without the consent of her guardian: "Yaḥyā related to me from Mālik from Yaḥyā b. Sa'īd from Sa'īd b. al-Musayyab who reported that 'Umar b. al-Khaṭṭāb said: "A woman is only married with the consent of her guardian, someone of her family with sound judgment or the sultan."⁷⁷²

Question: 49

Page: 699

Arabic text:

قلت: أرأيت لو أن امرأة خالعت زوجها بعبد لها [لم تصفه ولا رآه الزوج قبل ذلك، أيجوز هذا الخلع؟ قال: نعم. إنما ذلك بمنزلة ما لو خالعتها بعبد]⁽⁵⁾ أبقى أو بيعير شارد أو ثمرة لم يبد صلاحها أو جنين في بطن أمه، فالخلع بذلك لازم ويكون له ما خالعتها به⁽⁶⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: "What is your opinion regarding a woman who makes *mukhāla'a* with her husband in return for a slave of hers whom she has not described nor has her husband ever seen him before? Is this *khul'* licit?" Ibn al-Qāsim said: "Yes. This issue falls into the same category as performing *mukhāla'a* in return for an escaped slave, an escaped camel, unripe fruit or an unborn baby. *Khul'* is valid in all these cases, and to the man belongs the thing determined for *mukhāla'a* by the woman".⁷⁷³

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Arabic text:

قال سحنون: وقال غيره: وإنما جاز ذلك لأنه أرسل من يده الطلاق، وجائز له أن يرسل⁽¹⁾ من يده بالغر⁽²⁾ ولا يأخذ بالغر بخلاف النكاح.

⁷⁷² Mālik b. Anas, *Al-Muwatṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 211.

⁷⁷³ *Khul'* is licit in these situations. Saḥnūn, *Al-Mudawwana al-kubrā*, vol. 4/154 and 5/353.

Translation:

Saḥnūn and others apart from him said: "All of them are valid because the man releases *ṭalāq* from his hand, and the release of *ṭalāq* from his hand entailing danger of loss, harm or failure (*bi'l-gharar*)⁷⁷⁴ is licit. One should not act with *gharar* to go against marriage.

Commentary:

A couple who wants to do *mukhāla'a* should determine a ransom and it can be various things that belong to the woman. Release of *ṭalāq* with uncertainty (*gharar*) is possible. For this reason, one should be careful that the features of the compensation are clearly specified, because if it includes uncertain elements - such as an escaped slave, unripe fruit or an unborn baby (the fruit might go bad pre-harvest or the unborn baby may die before or after birth) -, the man who has accepted the compensation is bound by his acceptance. *Khul'* is licit even if it takes place including an element of uncertainty. As stated by Ibn Rushd (al-Ḥafīd), "Mālik permits it even when it is uncertain as to existence, amount and availability, like a runaway slave, lost camel, and fruit that has not yet begun to ripen or a slave whose description is not provided."⁷⁷⁵ Also, Ibn Abī Zayd al-Qayrawānī talked about this issue in his *Risāla*: "Marriage during a woman's *'idda* period is also forbidden as in any marriage involving uncertainty (*gharar*) either in the terms of the contract or the amount of the dowry, or any marriage in which the dowry includes anything whose sale is forbidden."⁷⁷⁶

Question: 50

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Arabic text:

⁷⁷⁴ [gh r r]: [*gharar*]: risk, uncertainty, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 298; The term *gharar* means uncertainty, risk, jeopardy, hazard and it is usually a negative condition in *fiqh*, Ibn Manẓūr, *Lisān al-'Arab*, vol. 10/41.

⁷⁷⁵ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/80.

⁷⁷⁶ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 105.

قلت له: فإن خالعهما على أن يكون أولاده منها عند الأب⁽³⁾. فقال: قال مالك: هذا شرط جائز إلا أن يكون/ ذلك يضر بالصبي، مثل أن يكون يرضع وقد علق أمه، فيخاف عليه إن نزع منها أن يكون ذلك مضرة عليه، فإن كان كذلك لم يكن للأب أن يأخذه.

قال ابن القاسم: وأنا أرى أنه إذا خرج الولد من حد الإضرار به أن للأب أن يأخذه بشرطه.

Translation:

Saḥnūn asked Ibn al-Qāsim: "What if a woman obtains *mukhāla'a* in return for accepting that the children she had with her husband stay with their father?" Ibn al-Qāsim said: Mālik said: "This condition is valid unless it entails harm to the child, as in the case of the suckling baby who is dependent on the mother, so that it is feared that if the baby is separated from the mother, it may harm him. If this is the case, it is not licit for the father to keep the baby".

Ibn al-Qāsim said: My opinion is that when the child has gone beyond the limit (of age) that may entail harm for him, the father may keep the child according to the (agreed) condition.

Commentary:

A couple can agree on *mukhāla'a* in return for the father having the children's custody, but this condition is only admissible if the children will not suffer because of the changing conditions. If they are hurt because of the circumstances entailed by *mukhāla'a*, it is not acceptable and the children should be given back to their mothers. For instance, a baby might not want to suck milk from a foster mother. However, if the conditions that are harmful for the children disappear - namely, when the children's dependence on the mother ends-, the father can take them.

Question: 51

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Arabic text:

قلت: فإن اختلعت منه على أنها⁽⁴⁾ لا سكنى على الزوج. قال: إن كان إنما شرط عليها كراء المسكن الذي تعتد فيه فذلك جائز، مثل أن يكون في مسكن يكرى، وكذلك إن كانت [تسكن في]⁽⁵⁾ مسكن الزوج فاشترط أن عليها كذا وكذا درهما في كراء المسكن فذلك جائز أيضا، وإن كان إنما شرط عليها أن تخرج من المسكن الذي تعتد فيه فهذا لا يجوز في قول مالك، وتسكن بغير شرط والخلع ماض⁽⁶⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: "What if a woman does *mukhāla'a* with her husband on the condition that she will not cohabit with him (during the waiting period)?" Ibn al-Qāsim said: "If the man stipulates that he will pay the rent of the place where the woman will be staying, it is licit. This is similar to being in a dwelling that is rented. In the same way, if the woman stays in the house of her husband and he stipulates that she will pay a certain sum for the rent of the dwelling, this is licit as well. If he stipulates for her to leave from the place where she lives at that moment, this is not licit according to doctrine of Mālik. Thus she can stay there without being affected by the condition and the *khul'* becomes valid."⁷⁷⁷

Commentary:

Suknā in its basic meaning is dwelling.⁷⁷⁸ As a technical religious term, it points to the provision of a place by the husband for his divorced wife during the waiting period. This situation is explained in the Qur'an: "*Lodge them where you are lodging, according to your means, and do not press them, so as to straiten their circumstances. If they are with child, expend upon them until they bring forth their burden. If they suckle for you, give them their wages, and consult together honourably. If you both make difficulties, another woman shall suckle for him.*"⁷⁷⁹ In this case, the couple performs *mukhāla'a* and the woman waives this right as a ransom, so that her husband does not provide a place for her during the waiting period. Also, if the husband provides a place for her to stay after they agreed on

⁷⁷⁷ Sahnūn, *Al-Mudawwana al-kubrā*, vol. 5/343-344.

⁷⁷⁸ [s k n]: [suknā]: dwelling, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 221.

⁷⁷⁹ Al-Ṭalāq: 6, <http://tanzil.net/#trans/en.arberry/65:6>

mukhāla'a in return for dwelling during the waiting period, she should pay the rent of the place.⁷⁸⁰

Question: 52

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Arabic text:

قلت له: فإن اختلعت منه على أن نفقة الزوج ونفقة الولد عليها. فقال: سمعت مالكا يقول: إذا اختلعت المرأة من زوجها على أن ترضع ولده وتنفق عليه إلى فطامه إن

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ذلك جائز، وإن ماتت كان الرضاع والنفقة في مالها. وإن اشترط عليها نفقة الولد بعد الحولين أو إلى أجل ضربه فذلك باطل لا يلزم المرأة منه شيء⁽¹⁾. فمسألتك التي سألت عنها حين خالعتها على شرط أن [تنفق]⁽²⁾ على زوجها سنة أو سنتين مثل هذا.

Translation:

Sahnūn asked Ibn al-Qāsim: "What if a woman does *mukhāla'a* with her husband agreeing that she will provide maintenance for her husband and her child?" Ibn al-Qāsim said: I heard that Mālik said: "If she does *mukhāla'a* with her husband agreeing that she will breastfeed their child and provide maintenance for him until weaning, this is licit. If the woman dies, the breastfeeding and maintenance are paid for from her possessions (*māl*). If the man stipulates on her that she will have to continue the maintenance of their child after those two conditions⁷⁸¹ or until the child reaches maturity, this is invalid (*bāṭil*) and she does not have to do it⁷⁸². Regarding to your question on the case of a woman who does *mukhāla'a*

⁷⁸⁰ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 3482.

⁷⁸¹ That is, after breastfeeding and weaning.

⁷⁸² If a husband said "I will provide the maintenance during breastfeeding or until weaning", when his wife makes *khul'* with him. Then, she is asked. If her answer is one or two years, she does not have to do it. Sahnūn, *Al-Mudawwana al-kubrā*, vol. 5/345.

with the condition that she will provide⁷⁸³ maintenance for her husband during a year or two years, this is a similar case (i.e., it is invalid).

Arabic text:

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قال سحنون: وقد قال المخزومي وغيره: ما بعد الحولين غرر، ونفقة الزوج غرر، وللزوج أن يخالع بالغرر ويجوز أخذه، فالخلع لازم وللزوج أن يأخذها بما اشترط عليها من الغرر.

Translation:

Sahnūn said: al-Makhzūmī⁷⁸⁴ and others said: "There is uncertainty (*gharar*) after those two conditions are over, and the maintenance of the husband also entails *gharar*. The husband can do *mukhāla'a* that entails uncertainty and it is licit to accept it. The *khul'* is then obligatory and he can take whatever he stipulated for releasing her even if it entails uncertainty.

Commentary:

In the Qur'an, the points related to maintenance and breastfeeding are underlined: *"Mothers shall suckle their children two years completely, for such as desire to fulfill the suckling. It is for the father to provide them and clothe them honorably. No soul is charged save to its capacity; a mother shall not be pressed for her child, neither a father for his child. The heir has a like duty. But if the couple desire by mutual consent and consultation to wean, then it is no fault in them. And if you desire to seek nursing for your children, it is no fault in you provide you hand over what you have given honorably; and fear God, and know that God sees the things you do."*⁷⁸⁵

A father should provide the maintenance of his children and his children's mothers during the suckling period as stated in this verse. But he can also do

⁷⁸³ In the main ms. *yanfaqu* (he pays out), here corrected to the third person feminine because the text clearly reflects a situation in which the woman does *mukhāla'a* and stipulates as her ransom that she will be the one providing maintenance for her husband.

⁷⁸⁴ See Appendix 1: Scholars mentioned by Ibn Abī Zamanīn.

⁷⁸⁵ Al-Baqara: 233, <http://tanzil.net/#trans/en.arberry/2:233>

mukhāla'a agreeing that she provides maintenance for her husband and her child. The man cannot stipulate regarding the period during which the woman will provide the maintenance.⁷⁸⁶ On the other hand, if he does *mukhāla'a* involving uncertainty (*gharar*), it becomes valid because even though nuptials are not valid if they involve uncertainty, divorce is valid as reflected in Question 49 according to Saḥnūn. However, Mālik argues that it is not appropriate.

Question: 53

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Arabic text:

قال ابن القاسم: قلت لمالك: فإن مات الولد قبل الحولين أكون للزوج على المرأة شيء؟ فقال: [ما رأيت]⁽³⁾ أحدا طلب ذلك؛ وكأنه ذهب إلى أنها إنما أبرأته من رضاع ابنه حتى [تفطمه]⁽⁴⁾ وإن ذهب قبل ذلك لم يكن للزوج عليها شيء⁽⁵⁾.

Translation:

Ibn al-Qāsim said: I asked Mālik: "What if the child dies before breastfeeding or weaning, can he request something from the woman?" Mālik said: "I have never seen a person who requested anything [in such circumstances]. The death of the child is equivalent to her having wiped off her stipulated debt, i.e. maintenance of sucking until (weaning). If the child dies before it, the husband is not entitled to anything from her".⁷⁸⁷

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Arabic text:

قال محمد: ولو أعدمتم المرأة فرجعت نفقة الصبي على أبيه ثم أيسرت الأم لكان للأب أن يرجع عليها، كذلك روى يحيى عن ابن القاسم.

Translation:

Muḥammad said: If the woman becomes impoverished, the maintenance of the child returns to the father. But if she prospers again, he can claim from the

⁷⁸⁶ Karaman, Dönmez, Çağrııcı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 351.

⁷⁸⁷ Saḥnūn, *Al-Mudawwana al-kubrā*, vol. 5/345.

woman (the money that he spent when she was poor). This was transmitted by Yaḥyā from Ibn al-Qāsim.

Commentary:

Ibn Abī Zayd al-Qayrawānī talked about nursing the child in his *Risāla*: "A woman should nurse her child in the marriage unless someone of her status should not do so. A divorced woman can nurse the child for the father and she can take a fee for nursing if she wishes."⁷⁸⁸ The couple can do *mukhāla'a* agreeing that the woman will pay the maintenance of the child, but the child's death eliminates the debt. Also, the financial situation of the woman affects what has been stipulated because if she becomes impoverished, the man has to provide the maintenance of the child until the woman's financial situation improves.

Question: 54

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Arabic text:

قال سحنون: قال ابن القاسم: وإن كان لأحد الزوجين على صاحبه دين إلى أجل فتخالعا⁽⁶⁾ على أن يعجل الذي عليه الدين للمدين قبل محله فالخلع جائز، والدين جائز إلى أجله، وهو قول مالك.

Translation:

Saḥnūn said: Ibn al-Qāsim said: "If one of the spouses has a term debt (*dayn*) with the other, and they do *mukhāla'a* agreeing that the debtor will pay his/her debt ahead of the stipulated term, the *khul'* is valid and the debt should be paid on time. This is the doctrine of Mālik.

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Arabic text:

⁷⁸⁸ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 116.

قال سحنون: وقد قيل: إن الدين إذا كان لها عليه فليس بخلع، وإنما هو رجل أعطى وطلق فالطَّلقة فيه واحدة يملك فيه الرجعة، وهذا إذا كان الدين عينا، وأما إن كان عرضا أو طعاما أو غير ذلك مما لا يجوز للرجل أن يتعجله إلا برضى المرأة، ولا تستطيع المرأة قبضه إلا برضاء الزوج، فهذا الذي يكون بتعجيله [خلعا]⁽¹⁾ ويرد إلى أجله ويمضي الطلاق. وكذلك لو طلقها على أن تسلفه سلفا ففعل [فإن]⁽²⁾ الطلاق يلزمه ويرد السلف لنهى رسول الله ﷺ عن سلف جر منفعة⁽³⁾.

Translation:

Sahnūn said: "It is said that if it is the woman who owes the debt to her husband, this situation is not conducive to *khul'*, as he is a man who when he gets back (what is his) pronounces a *ṭalāq*, this being a single divorce that entails him the possibility of re-marrying her. This is so regardless if the debt is money, land, food or something different, among those goods that are not permissible for the man to receive back instantly without the consent of the woman and that the woman cannot keep except if the man agrees to. In the case that the debt is paid (by the woman) before the stipulated term, then *khul'* comes into being, but if the debt is paid on the stipulated term, then *ṭalāq* comes into being. It is similar to the case when the man divorces her in return for advance to borrow: if he did this, *ṭalāq* comes into being and the advance is returned, because the Messenger of God denounced benefit from advance.

Commentary:

If a woman owes to her husband, she can make *mukhāla'a* agreeing that she will pay the debt, but she is not obliged to pay before the stipulated term. If he requests the debt before the stipulated term, this entails revocable *ṭalāq* divorce.

Question: 55

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Arabic text:

قلت له: فلو خالع على أن تعطيه عبدا بعينه إلى أجل. قال: الخلع جائز والأجل باطل، ويأخذ العبد حالا⁽⁴⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: "What if a man does *mukhāla'a* in return for her wife to give him a slave with certain specifications at a specified time?" Ibn al-Qāsim said: "The *khul'* is valid, but the term imposed is not valid, so that he can take the slave immediately".⁷⁸⁹

Commentary:

That the women who wanted *mukhāla'a* would give their husbands a slave as ransom was common and considered valid, as we have seen in preceding questions. But if they established as condition to give the slave at a certain term and not immediately, that was not considered valid. Also, on the contrary, a man can give a slave to his wife as compensation. There is an example in the *Muwatta'* regarding this issue: "Yaḥyā related from Mālik that he had heard that 'Abd al-Raḥman b. 'Awf divorced his wife, and he gave her compensation in the form of a slave-girl."⁷⁹⁰

Question: 56

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Arabic text:

**باب في اختلاف الزوجين في الخلع
والمختلعة تقوم في استرجاع ما اختلعت به**

قال سحنون: قلت لابن القاسم: فلو أن رجلاً قالت [له]⁽⁵⁾ امرأته: قد كنت طلقته على ألف درهم وكنت قبلت ذلك. وقال لها الزوج: بلى. ولكنك لم [تقبلي]⁽⁶⁾. قال: القول للمرأة⁽⁷⁾؛ لأنه أقر لها بالتمليك ويزعم أنها لم تقض⁽⁸⁾.

Translation:

Chapter about the disagreement of the couple in *khul'* and about a woman who wants back what she gave in order to make *khul'*

⁷⁸⁹ He does not have to wait because he is entitled to take the slave immediately. Sahnūn, *Al-Mudawwana al-kubrā*, vol. 5/355.

⁷⁹⁰ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 210.

Saḥnūn said: I asked Ibn al-Qāsim: "What if a wife says to her husband: 'You were to divorce me in return for a thousand *dirhams* and I accepted it.' But the husband says to her: 'On the contrary, you did not accept it'." ⁷⁹¹ Ibn al-Qāsim said: "What the woman ⁷⁹² says is taken into consideration, because he gave *tamlīk* to her while claiming that she did not pay it." ⁷⁹³

Commentary:

Tamlīk in its basic meaning is possession. ⁷⁹⁴ As a legal concept it means "granting possession of the right". ⁷⁹⁵ According to Mālik, *tamlīk* is the granting of the right to pronounce divorce for a woman, so there is an important difference between *tamlīk* and *takhyīr*. *Tamlīk* can be interpreted as one repudiation or more, so the husband can deny her right to more than one repudiation. However, *khiyār* refers the execution of divorce causing the ending of the nuptial connection. In the situation of *khiyār*, the woman only has the right to choose her husband or opt for irrevocable separation from him through the pronouncement of three repudiations when the husband says to her: "choose for yourself, a single or two repudiations." Mālik is said to have held two opinions about *tamlīk*. One of them is that *tamlīk* is not annulled even if it is not exercised by the authorized woman for a long time or until they leave from the session. Another is that the right under *tamlīk* stay with the woman until she cancels it or puts into effect it throughout the repudiations. ⁷⁹⁶

⁷⁹¹ There is a difference between the mss: *taqabbal* (you, he have/has not accepted) is what is found in those from Rabat (bā' and ṭā') and Tunisia (tā'); *taqabbalī* (you, she have/has not accepted) in the mss from Zargan (zayn), Algeria (jīm) and Rabat (ḥā'). The editor has chosen the latter as the most accurate. This opinion seems correct because if there is disagreement between the couple, the woman would not have accepted the agreement.

⁷⁹² The word of the woman is taken into consideration. Saḥnūn, *Al-Mudawwana al-kubrā*, vol. 5/348.

⁷⁹³ There are differences between the mss; in the ms. from Rabat (bā'): *lam taqtaḍ* (you have not done), in the ms. from Rabat (ṭā'): *lam tarḍa* (you have not consented), in the mss from Algeria (jīm) and Rabat (ḥā'): *lam taqbal* (you have not accept). All of them mean almost the same.

⁷⁹⁴ [m l k]: [tamlīk]: possession, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībī and Quṭb Muṣṭafā Sanū, p. 126.

⁷⁹⁵ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/84.

⁷⁹⁶ Ibid, vol. 2/85.

In the above case, a couple engaged in *mukhāla'a* and divorce came into being in return for a thousand *dirham*. However, if the husband wants to revoke it, what the woman claims is considered valid because of the fact that he already gave *tamlīk* to her.

Question: 57

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Arabic text:

قلت/ له: فإن اختلفا فقالت المرأة: خلعتني بهذه الجارية. وقال الزوج: بل بهذه الدار وهذه الجارية. فقال: الخلع جائز لازم ولا يكون للزوج إلا ما أقرت به المرأة مع يمينها على ذلك. وقد قال مالك في رجل صالحته امرأته فيما بينه وبينها على شيء أعطته ووجب ذلك بينهما، فخرج ليأتي بشهود فجحدت المرأة الصلح، أن المرأة تحلف ويثبت الخلع ولا يكون له من المال شيء⁽¹⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: "What if they are in disagreement and the woman says: 'You did *khul'* with me in return for this concubine'. The husband replies: 'No, I did that in return for this house and this concubine.' Ibn al-Qāsim said: "*Khul'* is valid and binding, there is no way for the husband [to have his claim prosper] against what the woman said together with her vow. Mālik was asked about a man who had done a *muṣālaḥa* with his wife - regarding something that had happened between them - in return for something that was given to him by the woman, which made the *muṣālaḥa* between them obligatory, but then, he left to bring witnesses who denied that the woman had made that agreement. Mālik said that if the woman swore (that the situation was as she has described it), *khul'* became valid and the man cannot demand something from her."⁷⁹⁷

Commentary:

A couple did *mukhāla'a* agreeing that the woman gives a specific concubine to her husband according to her claim. However, the husband claims that she

⁷⁹⁷ If the woman tells the truth, the husband cannot take something from her and divorce comes into being. Sahnūn, *Al-Mudawwana al-kubrā*, vol. 5/348.

promised to give him much more than she did. That is, he did not deny that *khul'* had taken place, but he wanted more ransom than what he had taken to divorce the woman. He demanded not only the concubine but also the house. If the woman swears that what she claims is true, the man cannot demand more ransom nor can he cancel the agreement because he already accepted to make *mukhāla'a* with his wife.

Question: 58

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Arabic text:

قال محمد: ومالك في سماع ابن القاسم أنه قال فيمن أقر أن امرأته اختلعت منه على أن [تعطيه شيئاً من مالها وأنكرت ذلك ولا بينة بينهما، إنه إن أقر أن الخلع قد ثبت فقد وقع عليه⁽²⁾ الطلاق، وتحلف المرأة أنها ما أعطته شيئاً من مالها. وإن قال إنما كان بيني وبينها على أن⁽³⁾ [تعطيني كذا وإن لم تعطيني قال: لم يكن بيني وبينها خلع، وأحلف على ذلك وكانت امرأته. قال أصبغ: وإنما يقبل من الزوج ما ادعى من ذلك إذا كانت دعواه متصلة بإقراره بالصلح [نسقا واحداً، فأما إن أقر بالصلح]⁽⁴⁾ ثم قال بعد ذلك: إنما أردت أنها إن أعطتني ما سمت⁽⁵⁾ وإلا فلا صلح بيني وبينها فلا يقبل قوله ويمضي الصلح⁽⁶⁾.

Translation:

Muḥammad said: Mālik said in the audition (*samā'*) of Ibn al-Qāsim: "A man confirms that his wife obtained *mukhāla'a* in return for giving him something from her goods but the woman denied it, and there is no proof of what happened between them. If the man confirms that *khul'* has taken place, *ṭalāq* is on him."⁷⁹⁸ The woman swears that she did not agree in giving him anything from her possessions. If the man says: 'What we had agreed was that she would give me such an amount from her money, thus if she does not give it to me, there is no *khul'* between us', and he takes an oath on this and that she is his wife." Aṣḡagh said: "His claim is accepted, if he had made his claim immediately after

⁷⁹⁸ In the ms. from Zargan (zayn): *baynahumā* (between us), *ṭalāq* comes into being between them.

confirming their agreement in just one temporal sequence. But if he confirmed the agreement, and then afterwards he said: "I had wanted that she gave to me what I named, and if not, then there will be no agreement between us", what he says is not taken into consideration and the agreement becomes valid.⁷⁹⁹

Commentary:

The doctrines of Mālik and Aṣḥab explain this case in which the time sequence is very important. That is, the acceptance of the woman's petition for *khul'* must go together with the specification of what she will give to him, because after a while or after parting from the meeting, the parties involved cannot demand something from each other. They have to give voice to their requests during the meeting. In this case, the couple has disagreement about *khul'* because the woman did not accept that they had done *khul'*, which means that if the man claims the opposite, *ṭalāq* comes into being (and thus the woman does not have to give him any compensation). If the man claims that they did not agree on *khul'* as well, nothing is necessary and they are still married. If the man accepts that they had agreed on *khul'* but wants more than she gave, it is not accepted from him and *khul'* takes place.

Question: 59

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Arabic text:

قلت له: فلو أن امرأة اختلعت من زوجها بألف درهم دفعتهإليه، ثم إنها أقامت
ببينة أن زوجها قد كان طلقها قبل ذلك ثلاثا البتة قال: فلها أن ترجع وتأخذ ما أعطته،

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⁷⁹⁹ This transmission was compiled by al-‘Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa’l-taḥṣīl*, vol. 5/211.

وقد بلغني أن مالكا سئل عن امرأة دعت زوجها إلى أن يصالحها، فحلف بطلاقها البتة إن صالحها، ثم صالحها بعد ذلك. فقال: قد بانت منه ويرد إليها ما أخذ منها، وكذلك لو خالعا ثم انكشف أنها أخته من الرضاعة، أو تزوجها وهو محرم، أو مثل هذا مما لا يقر [نكاحه]⁽¹⁾ عليها، فلها أن ترجع عليه بها أخذ منها؛ لأنه لم يرسل من يده شيئا بما أخذ منها.

Translation:

Sahnūn asked Ibn al-Qāsim: "What if a woman agrees *khul'* with her husband in return for a thousand *dirham* that she gave to him, then the woman produces proof to claim that her husband had divorced her by irrevocable divorce before that?" Ibn al-Qāsim said: "The woman can request to have back whatever she gave to him.

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It has reached me that Mālik was asked about a woman who requested *muṣālaḥa* from her husband, and the man swore that if he made *muṣālaḥa* with her, she will be divorced by triple *ṭalāq*. Then he made *muṣālaḥa* with her after this conversation. Mālik said: Irrevocable *ṭalāq* is valid and he gives back whatever he took from her. It is the same if they did *mukhāla'a*, then they find out that they are milk brothers, or that he had married her even though she was unmarriageable for him or something like this that makes marriage unacceptable. In these situations, the woman can take back whatever the man took from her, because he was not entitled to what he took from her.

Commentary:

In this situation, the husband tried to take ransom from the woman, even if he had already divorced her by irrevocable *ṭalāq*. Nonetheless, a husband cannot demand anything from his wife after divorce came into being. If there is proof regarding that they already divorced, the woman can take the ransom back from him. In the response, Mālik lines up the conditions that make nuptials invalid. He argues that this situation is similar to the invalid nuptials because if *ṭalāq* occurs, the nuptial is annulled and *khul'* is not possible after that.

Question: 60

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Arabic text:

قلت له: فإن انكشف لها أن بالزوج جنونا أو جذاما. قال: لا يكون له من الخلع شيء لأنه لم يرسل من يده شيئا بما أخذ إلا وهي كانت أملك به منه، وليس هذا بمنزلة ما لو انكشف أن بها جنونا أو جذاما؛ لأنه هاهنا إن شاء أن بقي على النكاح كان ذلك له⁽²⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: "What if the woman discovers that the man is insane or has leprosy?" Ibn al-Qāsim said: "*Khul'* does not require for him that he can take something from her because he cannot release from his hand anything that he took unless the woman had received *tamlīk* from him. It is different from disclosure that she is insane or has leprosy, because in this situation if the husband wants to stay married, he is entitled to it."⁸⁰⁰

Commentary:

In this case, if the man is insane or has leprosy, his wife can seek divorce. It is in fact different from divorce in return for a ransom by the woman because without giving something, she can divorce him under these conditions.⁸⁰¹ However, if she obtained something from her husband and their nuptial is still valid, whatever she obtained belongs to the man. In the opposite situation, what happens? Mālik was recorded as follows: "Yaḥyā related to me from Mālik from Yaḥyā b. Sa'īd from Sa'īd b. al-Musayyab that 'Umar b. al-Khaṭṭāb said: 'If a man marries a woman who is insane, or has leprosy or white leprosy, without being told of her condition by her guardian, and he has sexual relations with her, she keeps her bride-price in its entirety. Her husband can present damages against her guardian.' Mālik said: 'The husband can present damages against her guardian when the guardian is her father, brother, or one who is deemed to have knowledge of her condition. If the guardian who gives her in marriage is a nephew, a client (*mawlā*) or a member of her tribe who is not deemed to have

⁸⁰⁰ Sahnūn, *Al-Mudawwana al-kubrā*, vol. 5/347.

⁸⁰¹ Santillana, *Istituzioni di diritto Musulmano malichita con riguardo anche al sistema sciafiita*, p. 218.

knowledge of her condition, there are no damages against him, and the woman returns what she has taken of her bride-price, and the husband leaves her whatever amount is thought to be fair."⁸⁰²

Question: 61

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Arabic text:

قلت له: فالتى تتزوج بغير ولي إن هي اختلعت منه قبل أن يجيز [الولي]⁽³⁾ النكاح ثم قامت تطلبه بالمال الذي اختلعت به منه. فقال: ما أخذ منها فهو له، لأن طلاقه وقع عليها بما أخذ منها⁽⁴⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: "What happens if a woman who married without consent of her guardian did *mukhāla'a* before taking the consent, and then she requested the goods that she gave in return for *mukhāla'a* to the man?" Ibn al-Qāsim said: "Whatever he took from her belongs to him because his *ṭalāq* came into being with whatever he took from her."⁸⁰³

Commentary:

Ibn Abī Zayd al-Qayrawānī dealt with the consent of the guardian in his *Risāla*: "Marriage is not legally without a guardian (*walī*), a dowry, and two legally acceptable witness... A woman can only be married if she has the consent of her guardian or someone suitably qualified from among her people, such as one of her male relations, or the governor."⁸⁰⁴ In this case, the woman married without consent of her guardian, then she wanted to obtain *mukhāla'a* and later demanded the ransom that she gave to her husband in order to divorce, presumably arguing that the marriage was not valid and therefore there was no

⁸⁰² Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 210.

⁸⁰³ *Khul'* divorce came into being so the ransom which is given by the woman to the husband, belongs to him so he does not give back to her. Saḥnūn, *Al-Mudawwana al-kubrā*, vol. 4/182.

⁸⁰⁴ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 104.

need for *mukhāla'a*. But they had already divorced and after parting, voicing regrets or claiming something is useless.

Question: 62

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Arabic text:

قلت: فإن كان إنما تزوجها بتمر لم يبد صلاحه، فاختلعت منه قبل البناء ثم قامت عليه. فقال: ما أخذ منها فهو له. قال سحنون: وقد كان قال لي قبل ذلك: كل نكاح يغلبان على فسخه فالخلع فيه مردود⁽⁵⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: "What if a couple marries (with a dower) consisting of unripe date, then they made *khul'* before sexual intercourse and she starts a court procedure against him? Ibn al-Qāsim said: "Whatever he took from her belongs to the man." Saḥnūn said: Ibn al-Qāsim had said previously to me: Every nuptials for which the couple demand a judicial dissolution (*faskh*), *khul'* is inadmissible in this situation.⁸⁰⁵

Commentary:

Mālik permits compensation for a *khul'* procedure even if it is uncertain as regards its existence, amount and availability (lost camel, runaway slave, unripe fruit or slave who is not described).⁸⁰⁶ In this case, the couple has determined unripe date as a dower and they made *khul'* before the consummation. If they divorce by *ṭalāq*, the woman would take half of the dower because divorce came into being before having sexual intercourse. The unripe date that has been determined as a dower is not acceptable because its future is unpredictable. The nuptial with uncertainty is not valid although divorce is valid.

Question: 63

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⁸⁰⁵ Saḥnūn, *Al-Mudawwana al-kubrā*, vol. 4/244-245.

⁸⁰⁶ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/80. See also above Questions 49 and 52.

Arabic text:

باب الخلع في المرض

قال سحنون: قلت له: أرأيت إن اختلعت امرأة من زوجها وهو مريض ثم مات [من مرضه] ⁽¹⁾ ذلك أثره؟ قال: نعم ⁽²⁾. وإن ماتت هي قبله لم يرثها. وكذلك إن جعل أمرها بيدها فطلقت نفسها.

وقد قال مالك: كل طلاق وقع في المرض بأي وجه كان فإن الزوج إن مات من مرضه ذلك ورثت المرأة حقها فيه.

Translation:

Chapter about *khul'* in illness

Saḥnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a woman who made *khul'* with her husband while he was sick, then he died because of his illness - does she inherit from him? Ibn al-Qāsim said: Yes. If she dies before the man, he cannot be heir to her. It is similar to the case of a man who gave *tamlīk* to his wife and she divorced herself.

Mālik said: Regarding all *ṭalāq* that comes into being during illness in whatever situation, if a husband died because of his illness, his wife is heir to him regarding her own right.

Commentary:

As noted above (Question 59), *tamlīk* as a legal concept refers to granting a woman possession of the right to pronounce divorce. In this case, *tamlīk* is given to his wife by a sick man and it is valid because a sick man can make *khul'* and divorce his wife with *ṭalāq* as well. A very similar example is found in the *Muwaṭṭa'*: "Yaḥyā related to me from Mālik that he heard Rabī'a b. Abī 'Abd al-Raḥman say, 'I heard that the wife of 'Abd al-Raḥman b. 'Awf asked him to divorce her. He said: 'When you have menstruated and are pure, then come to me.' She did not menstruate until 'Abd al-Raḥman b. 'Awf was ill. When she was purified, she told him and he divorced her irrevocably or made a pronouncement of divorce which was all that he had left over her. 'Abd al-Raḥman b. 'Awf was terminally ill at the time, so 'Uthmān b. 'Affān made her one of the heirs after the

end of her 'idda."⁸⁰⁷ Both cases show us that when women make *khul'* while their husbands are ill they become heir to them.

Question: 64

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Arabic text:

قلت له: فإن اختلعت منه في مرضها وماتت أيرثها؟ قال: لا. وهو قول مالك. قال ابن القاسم: وأنا أرى أنه إن كان صالحها على أكثر من ميراثه منها أن ذلك غير جائز، وإن صالحها على مثل ميراثه منها أو أقل فذلك جائز. وروى ابن نافع عن مالك أنه قال: ويكون المال موقوفا حتى تصح أو تموت ويمضي الطلاق عليه، فإن مات لم يكن له من المال إلا قدر ميراثه⁽³⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: What if a woman made *mukhāla'a* with her husband while she was sick and then she died - does he inherit from her? Ibn al-Qāsim said: No. This is the doctrine of Mālik. Ibn al-Qāsim said: My opinion regarding the situation of the man is that if he made *muṣālaḥa* with his wife in return for more than her legacy, this is not permissible, but if he made *muṣālaḥa* with her in return for as much as her inheritance or for less, this is permissible. Ibn Nāfi' has narrated that Mālik said: The goods that she left are not touched until she heals or dies, thus *ṭalāq* comes into being, but if she died, there are no goods for him except her legacy.⁸⁰⁸

Commentary:

In the Qur'an, the topic of inheritance is specified with this verse: "*And for you a half of what your wives leave, if they have no children; but if they have children, then for you of what they leave a fourth, after any bequest they may bequeath, or any debt. And for them a fourth of what you leave, if you have no children; but if you have children, then for them of what you leave an eighth, after any bequest you*

⁸⁰⁷ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 232.

⁸⁰⁸ After the death of the woman, the husband is only entitled to take the legacy. Sahnūn, *Al-Mudawwana al-kubrā*, vol. 5/351-352.

may bequeath, or any debt. If a man or a woman have no heir direct, but have a brother or a sister, to each of the two a sixth; but if they are more numerous than that, they share equally a third, after any bequest he may bequeath, or any debt not prejudicial; a charge from God. God is All-knowing, All-clement. This is the procedure that should be followed after one of the couple died.”⁸⁰⁹

In the case here considered, the man cannot be heir to his wife if he made *mukhālaʿa* with her while she was sick. There is no information about children and relatives. Ibn al-Qāsim then nuances Mālik's negative answer. According to him, if the woman dies and the man had made *muṣālaḥa* with her in exchange of more than her legacy (*mīrāth*),⁸¹⁰ he cannot claim that which exceeds the *mīrāth*. The man only can take her legacy as compensation if the amount of the compensation is equivalent to her legacy or less than it.

Question: 65

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Arabic text:

باب فيما يجوز من مخالعة الأب والوصي والبكر غير المولى عليها
وما لا يجوز ومخالعة العبيد/

⁸⁰⁹ Al-Nisā': 12, <https://tanzil.net/#trans/en.arberry/4:12>

⁸¹⁰ "Islamic law on inheritance (*mīrāth*), based on the Qur'an, requires that Muslim women receive specifically regulated inheritance shares and permits inheritance to pass through the female line. The Qur'an contains more extensive and specific rules on inheritance than on any other subject, although Sunni and Shii law diverge on interpretations and applications of these rules. Sunni inheritance law holds that the Qur'an reformed the existing system of inheritance in western Arabia under which males inherited, and Sunnis reconcile the Quranic injunctions for fixed inheritance portions with the claims of the male relatives. Shiis believe that the Quranic system was designed to supplant the pre-Islamic system; they keep more of the inheritance within the nuclear family and often place the daughters of the deceased in a more favorable position than under Sunni law." Esposito, "Mīrāth", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed April 10, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e1525>

قال سحنون: قال ابن القاسم: قال مالك: ولا يجوز للأب أن يطلق على ابنه الصغير
بغير شيء يأخذه له، وجائز له أن يصلح عنه بشيء يأخذه له منها مما له فيه الغبطة
والنظر، وتكون تطليقة بائنة⁽¹⁾.

والوصي على الصبي الصغير، وخليفة السلطان على النظر له في المصالحة عنه، بمنزلة
الأب، وهذا ما لم يبلغ الحلم، فإذا بلغ وهو سفيه فليس للأب ولا للوصي أن يصلحا
عنه بغير أمره؛ لأن الصلح لا يكون إلا بطلاق وإذا بلغ الصبي كان الطلاق بيده.

Translation:

**Chapter about what is permissible and what is not permissible regarding
the *mukhāla'a* by a father and a guardian, and that of the single who has not
a guardian, and about the *mukhāla'a* of a slave**

Sahnūn said: Ibn al-Qāsim said: Mālik said: It is not permissible for a father to
divorce his little son without taking something for him. To make *muṣālaḥa* by a
father for his little son is permissible if it involves taking compensation from the
woman for his son, the ransom that is taken from the woman must be
considerable and something that makes happy his son, then he divorces her with
irrevocable *ṭalāq*.⁸¹¹

The guardian of a little boy, and the delegate of the political authority (*khalīfat al-
sulṭān*) who has been put in charge to make *muṣālaḥa* on his behalf, are like the
father of the little boy, if the boy has not reached puberty. If he has reached
puberty and he is weak-minded (*safīh*),⁸¹² his father and his guardian cannot
make *muṣālaḥa* for him without his permission, because *muṣālaḥa* comes into
being with *ṭalāq* and when the boy reaches puberty, *ṭalāq* is in his hand.

Commentary:

Boys who have not reached puberty yet are divorced and married by their
guardians, so making agreement for divorce between them and their wives by

⁸¹¹ When they made *mukhāla'a*, irrevocable divorce comes into being. Sahnūn, *Al-Mudawwana al-kubrā*, vol. 5/349.

⁸¹² [s f h]: [safīh]: incompetent, *Mu'jam lughat al-fuqahā'*, edited by Ḥamid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 219.

their guardians is appropriate.⁸¹³ However, the guardians should protect their rights which means that making *muṣālaḥa* without taking something for them is not suitable. When these boys reach puberty, they are able to make their own decisions. Even if a weak-minded boy reached puberty, his guardian cannot divorce him without his consent.

Question: 66

Page: 706

Arabic text:

قلت له: أفيجوز للأب أن يخالع على ابنته الصغيرة؟ قال: نعم. وهو قول مالك: ولا يجوز لأحد أن يخلع الصغيرة التي لم تبلغ من زوجها إلا الأب وحده، كما لا يجوز لأحد أن ينكحها قبل البلوغ إلا الأب وحده⁽²⁾.

قال سحنون: وقد روى ابن نافع عن مالك أنه قال: لا أرى بأساً أن يباري الخليفة على الصغيرة زوجها إذا كان أبوها [هو]⁽³⁾ الذي أنكحها، إذا كان ذلك منه على وجه النظر والاجتهاد، وليس للصغيرة إذا بلغت أن تنزع عن ذلك.

Translation:

Saḥnūn asked Ibn al-Qāsim: Is making *mukhāla'a* by a father for his little daughter permissible? Ibn al-Qāsim said: Yes. It is the doctrine of Mālik. It is not permissible for anyone to make *mukhāla'a* for a little girl who does not reach puberty, with the exception of her father, in the same way that nobody can marry off the little girl who does not reach puberty, with the exception of her father.⁸¹⁴ Saḥnūn said: Ibn Nāfi' has narrated that Mālik said: I do not find objectionable to make *mubāra'a* by the delegate for a little girl who does not reach puberty and was married by him because he is like her father who married off her. If the delegate acted according to right reflection and interpretative effort, the little girl cannot object to that, when she reaches puberty.

⁸¹³ Santillana, *Istituzioni di diritto Musulmano malichita con riguardo anche al sistema sciafiita*, p. 216.

⁸¹⁴ A little girl who does not reach puberty can only be married or divorced by making *mukhāla'a* by her father. Saḥnūn, *Al-Mudawwana al-kubrā*, vol. 5/350.

Commentary:

As discussed above (see Question 44), “the terms *khul'*, *fidya*, *ṣulḥ* and *mubāra'a* all refer to the same meaning, which is (a transaction in which) compensation is paid by the wife for obtaining her divorce”.⁸¹⁵ In this case it is related to making *mukhāla'a* by a father for his daughter who has not reached puberty yet. There are various opinions about this topic. Ibn al-Qāsim argues that the father is the only person who is able to make *mukhāla'a* for his little daughter. On the other hand, Ibn Nāfi' claimed that the delegate of the *sulṭān* is also able to make *mubāra'a* for this girl according to doctrine of Mālik.

Question: 67**Page: 706****Arabic text:**

قال مالك: وإذا بلغت اليتيمة فزوجها وصيها لم يجوز له أن يباري عليها إلا برضاها، كما لا يجوز له أن يزوجه إلا برضاها وهي في هذا بخلاف اليتيم.

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قال محمد: وقد اختلف أصحاب مالك في اليتيمة التي لا أب لها ولا وصي ولا ناظر من قبل السلطان تباري زوجها، فروى يحيى عن ابن القاسم أن ذلك جائز قبل بلوغها أو بعده إذا كان [ما]⁽¹⁾ صالحها عليه صلح مثلها، وقال سحنون مثله.

Translation:

Mālik said: When an orphan girl reaches puberty and her guardian marries her off, he cannot make *mubāra'a* without her consent, in the same way that it is not permissible to marry her off without her consent. In this her situation is different from that of a boy.

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Muḥammad said: The companions of Mālik are in conflict regarding the topic of making *mubāra'a* of an orphan girl who does not have a father, a guardian or a protector/overseer provided by the political authority (*al-sulṭān*). Yaḥyā has

⁸¹⁵ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/79.

narrated from Ibn al-Qāsim: It is permissible before puberty or after but only if her *muṣālaḥa* is similar to her peers. Saḥnūn said the same.

Commentary:

In the Qur'an, the topic of orphan and guardianship is explained the following verse: *"Test well the orphans, until they reach the age of marrying; then, if you perceive in them right judgment, deliver to them their property; consume it not wastefully and hastily ere they are grown. If any man is rich, let him be abstinent; if poor, let him consume in reason. And when you deliver to them their property, take witnesses over them; God suffices for a reckoner."*⁸¹⁶

When orphans reach puberty, they can make their own decisions according to this verse, and their properties are delivered to them. At the same time, without their consent, making *mubāra'a* for them is not appropriate according to the doctrine of Mālik.

Question: 68

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Arabic text:

قال سحنون: قلت له: أيجوز للسيد أن يصالح على عبده امرأته وهو كاره؟ قال: لا؛ لأن الطلاق بيد العبد. قلت له: فإن كان العبد صغيراً لم يبلغ فزوجه سيده ثم أراد أن يطلق عليه. فقال: ليس ذلك له إلا بشيء يأخذه له فيكون خلعا⁽²⁾.

Translation:

Saḥnūn said: I asked Ibn al-Qāsim: Is licit for a master/owner making *muṣālaḥa* between his slave's wife and his slave when he is unwilling? Ibn al-Qāsim said: No (i.e., it is not licit), because *ṭalāq* is in the hand of the slave. Saḥnūn asked Ibn al-Qāsim: What if the slave is young without having reached puberty, and he was married by his master, then he wants to divorce him? Ibn al-Qāsim said: He cannot do it unless he takes something for him, then *khul'* comes into being.⁸¹⁷

⁸¹⁶ Al-Nisā': 6, <https://tanzil.net/#trans/en.arberry/4:6>

⁸¹⁷ The master cannot divorce them without taking a ransom for the man. Saḥnūn, *Al-Mudawwana al-kubrā*, vol. 5/349.

Commentary:

This case is related to the topic of slave divorce. When a male slave does not want to divorce, his master cannot separate him. This issue is explained in the *Muwaṭṭa'*: "Yaḥyā related to me from Mālik from Nāfi' that 'Abdullāh b. 'Umar said: 'If a man gives his slave permission to marry, the divorce is in the hand of the slave, and nobody else has any power over his divorce. Nothing is held against a man who takes the slave-girl of his male slave or the slave-girl of his female-slave'."⁸¹⁸ However, if the slave has not reached puberty, his master can divorce him taking a compensation for him.

Question: 69**Page:** 707**Arabic text:**

وقد روى ابن نافع عن مالك في رجل زوج [وصيفه وصيفته]⁽³⁾ قبل أن يبلغا ثم أراد أن يفرق بينهما على وجه النظر والاجتهاد فذلك جائز، وأن الفرقة والاجتماع إليه ما كانا صغيرين، وقال ابن نافع: لا يجوز من ذلك إلا ما كان على وجه الخلع.

Translation:

Ibn Nāfi' has narrated from Mālik what he said regarding a man who married a little boy and little girl off before they reached puberty, then he wanted to separate them with a valid reason (*'alā wajh al-naẓar wa-l-ijtihād*),⁸¹⁹ that it is permissible, because separating and joining them is licit for him as long as they are young (i.e. did not reach puberty). Ibn Nāfi' said: It is not permissible, but if done according to *khul'* it is acceptable.

Commentary:

In this case, the guardian has a valid reason to separate the little boy and the little girl. It is permissible until they reach puberty because after puberty they

⁸¹⁸ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 235.

⁸¹⁹ The same expression has appeared before. See question 66.

can make their own decisions. Ibn Nāfi' argues that only the guardian can divorce them via *khul'* in order to protect the rights of the little girl.

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Arabic text:

باب في طلاق السنة ومن طلق حائضا أو نفساء

قال سحنون: قال ابن القاسم: كان مالك رحمه الله يكره أن يطلق الرجل امرأته ثلاث تطليقات في مجلس واحد، وكان يقول: [طلاق]⁽⁴⁾ السنة أن يطلق الرجل امرأته تطليقة واحدة طاهرا من غير جماع، ثم يتركها حتى يمضي لها ثلاثة قروء وهو يملك رجعتها ما لم تحض ثلاث حيض، فإذا دخلت في الدم من الحيضة الثالثة حلت للأزواج وبانت من زوجها الذي طلقها. قلت له: فإن طلقها ثلاثا أو عند كل طهر واحد حتى

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طلق ثلاث تطليقات، أيلزمه في قول مالك؟ قال: نعم. وكان مالك رحمه الله يكره له أن يطلقها في طهر قد جامعها فيه، ويقول: إن طلقها فيه [لزمه]⁽¹⁾ وتعتد بذلك الطهر ولو لم يبق منه إلا يوم واحد، ولا يؤمر برجعته، كما يؤمر أن يطلقها وهي حائض⁽²⁾.

Translation:

Chapter about *ṭalāq al-sunnah* and *ṭalāq* of a woman during menstruation period or childbed

Saḥnūn said: Ibn al-Qāsim reported: Mālik considered reprehensible that a husband divorces his wife pronouncing three *ṭalāq* in one time. Mālik said: *ṭalāq al-sunnah* is that a man divorces her wife with one *ṭalāq* without having sexual intercourse with her while she is out of the menstruation period, then he leaves the woman until a three menstruations period has passed. In this case he can return to her unless she has had three menstruations period. When she sees menstrual blood for the third time, she becomes licit for marriage and separated irrevocably from her husband who divorced her. Saḥnūn asked Ibn al-Qāsim: What if he divorces her by triple *ṭalāq* in

one time or divorces three times separately after each menstrual period, is this valid according to the doctrine of Mālik in such cases? Ibn al-Qāsim said: Yes. Mālik considered reprehensible that a husband divorces his wife after having had sexual intercourse with her in her cleansing time. Mālik said: If he divorces her in that period, divorce comes into being, because the woman had the waiting period in the cleansing time even if this period takes a day. Returning to the woman for the man is not commanded, while it is commanded to divorce her while the woman is in her menstrual period.⁸²⁰

Commentary:

A man can divorce his wife pronouncing three *ṭalāqs* in one time. Although it is acceptable, it is not the most appropriate way to divorce. The most suitable method of divorce is *ṭalāq al-sunnah*. “The jurists agreed that the person divorcing his wife, with whom he has consummated the marriage, through *ṭalāq al-sunnah* is the one who divorces her through a single pronouncement during a period of her purity (from menstruation) in which he has not had intercourse with her. The person divorcing in a period of menstruation or in a period of purity during which he has had intercourse with her is not abiding by the *sunnah* form (of divorce).”⁸²¹ This method provides the possibility to return (i.e. of marrying her again), but if a man divorced his wife by triple *ṭalāqs* in a single time or three times separately after each menstrual period, then it is irrevocable divorce.

⁸²⁰ Saḥnūn b. Sa’īd, *Al-Mudawwana al-kubrā*, vol. 5/419. After that, additionally in the copy from Zargan (zayn): If the man wants to return to her and the woman says to him: “My waiting period ended”, this issue is taken into consideration; if it is possible to menstruate her three menstruation times during this period, she is approved, the man cannot return to her without woman’s and her guardian’s consent and dower. If the time regarding her cleaning did not pass, she is not approved and the man can return to her whether she likes or not. People rarely divorce with *ṭalāq al-sunnah*. According to this explanation, the menstruation periods are taken into consideration. If a duration that provides to complete her waiting period passed, return is not possible, the woman becomes licit for another marriage.

⁸²¹ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist’s primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/75.

Question: 71

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Arabic text:

قلت له: فالحامل إذا أراد زوجها أن يطلقها ثلاثا كيف يطلقها؟ قال: قال مالك: لا يطلقها ثلاثا، ولكن يطلقها واحدة متى ما شاء، ويمهلها حتى تضع جميع ما في بطنها، ثم تحل للأزواج ولزوجها المطلق عليها الرجعة ما لم تضع جميع ما في بطنها، فإن طلقها ثلاثا لزمه ما طلق⁽³⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What about a pregnant woman whose husband wants to divorce her three times, how does he divorce her? Ibn al-Qāsim said: Mālik said: He cannot divorce her three times, but he can divorce her with a single *ṭalāq* when he wants. He then gives time to her until she gives birth and marriage becomes licit for her, her husband can return to her until she gives birth. If he had divorced her with three *ṭalāqs*, *ṭalāq* came into being.⁸²²

Commentary:

A man has different options to divorce his pregnant wife. He can divorce her with a single *ṭalāq* but he cannot divorce her three different times. If he divorces her with a single *ṭalāq*, the woman waits until giving birth. However, if he chose to divorce her by triple *ṭalāq* in a one time, return is not possible for him. Even if he cannot return to the woman, he has some responsibilities.⁸²³ They are clearly explained in the Qur'an: "*Lodge them where you are lodging, according to your means, and do not press them, so as to straiten their circumstances. If they are with child, expend upon them until they bring forth their burden. If they suckle for you, give them their wages, and consult together honourably. If you both make difficulties, another woman shall suckle for him.*"⁸²⁴

⁸²² If they divorced with three *ṭalāqs*, there is no return for them. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/420-421.

⁸²³ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 3492.

⁸²⁴ Al-Ṭalāq: 6, <https://tanzil.net/#trans/en.arberry/65:6>

Question: 72

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Arabic text:

قلت له: فالتى لم تبلغ الحيض متى يطلقها زوجها؟ قال: متى شاء، وكذلك التى
يئست من الحيض والمستحاضة⁽⁴⁾، وإن عرف للمستحاضة قرء تحرى زوجها ذلك
فيطلقها عنده.

Translation:

Saḥnūn asked Ibn al-Qāsim: If a woman does not menstruate, when can her husband divorce her? Ibn al-Qāsim said: Whenever he wants, this is similar to the case of the woman who does not menstruate anymore and the *mustaḥāḍa*.⁸²⁵ If the cleansing period of woman who is *mustaḥāḍa*⁸²⁶ is known because her husband has investigated it, he can divorce her during this period.

Commentary:

If the woman does not menstruate anymore, her husband can divorce her anytime. In the case of the woman who is *mustaḥāḍa*, i.e. menstruating out of the menstruation period, her situation should be followed by her husband because such woman does not menstruate properly. The waiting period of a *mustaḥāḍa* woman is different. This issue is explained in *Muwattaʿa* with following example: "Yaḥyā related to me from Mālik from Yaḥyā b. Saʿīd and from Yazīd b. ʿAbdullāh b. Qusayt al-Laythī that Saʿīd b. al-Musayyab said: 'Umar b. al-Khaṭṭāb said: 'If a woman is divorced and has one or two periods and then stops menstruating, she must wait nine months. If it is clear that she is pregnant, that is that. If not, she must do an *ʿidda* of three months after the nine, and then she is free to marry'."⁸²⁷

⁸²⁵ [ḥ y ḍ]: [mustaḥāḍa], menstruating out of the menstruation period, *Muʿjam lughat al-fuqahāʾ*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 390. It will be explained in detail in the part devoted to the *mustaḥāḍa*, see note 908.

⁸²⁶ Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/422.

⁸²⁷ Mālik b. Anas, *Al-Muwattaʿa of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 238.

Question: 73

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Arabic text:

وقال مالك: / ومن طلق امرأته وهي حائض أو نفساء أجبر على رجعتها، إلا أن يكون غير مدخول بها فلا بأس بطلاقها وإن كانت حائضا⁽⁵⁾. وإذا أجبر على رجعتها أمهلها حتى تطهر من دم حيضتها أو نفاسها ثم تحيض ثم تطهر ثم يطلقها إن أراد،

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ويحسب عليها التطليقة التي طلقها في دم النفاس أو دم الحيض، فإن طلقها في الدم فلم يرجعها حتى انقضت العدة فلا سبيل له عليها، وإن طلقها في دم الحيض وأجبر على رجعتها فلما طهرت جهل فطلقها الثانية في طهرها قبل أن تحيض الثانية لم يجبر على رجعتها، ولو لم يعلم بطلاقها حتى حاضت حيضتين وطهرت فإنه يجبر على رجعتها ما لم تنقض عدتها.

Translation:

Mālik said: A man who divorces his wife while she in her menstruation period or childbed period, is forced to return to the woman, except if he never had any sexual relation with her: in this case there is no objection to divorce her even if she is in her menstruation period.⁸²⁸ When the man is forced to return to her, a duration of time is given to the woman until she cleanses from her menstruation or childbed, then she menstruates, then she cleanses and at this point he can divorce her if he wants.

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The divorce is calculated on the basis of the time that he divorced her during menstruation or childbed period. If he divorced her in her menstruation period, he cannot return to her until the waiting period is completed, there is no way for the man to return to her. If he divorced her during menstruation period and he was forced to return to her, and then when she was cleansed he did not know it, so that he divorced her a second time during her cleansing period before her

⁸²⁸ Divorce during menstruation period is acceptable if the couple did not have sexual intercourse. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/422.

second menstruation, in this case he is not forced to return to her. If the divorce is not known until she has two menstrual period and she is cleansed, he is forced to return to her once her waiting period is completed.

Commentary:

Divorce during the menstruation period or childbed period is not appropriate if the woman is not virgin. The most appropriate time for divorce is during the cleansing period. If the man divorces his wife during her menstruation period, he is forced to return to his wife as in this case of the *Muwatta'*: "Yaḥyā related to me from Mālik from Nāfi' that 'Abdullāh b. 'Umar divorced his wife while she was menstruating in the time of the Messenger of Allah, may Allah bless him and grant him peace, 'Umar b. al- Khaṭṭāb asked the Messenger of Allah, may Allah bless him and grant him peace, about it. The Messenger of Allah, may Allah bless him and grant him peace, said: 'Go and tell him to take her back and keep her until she is purified and then has a period and then is purified. Then if he wishes, he can keep her, and if he wishes he should divorce her before he has intercourse with her. That is the *'idda* which Allah has commanded for women who are divorced'."829

Question: 74

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Arabic text:

قلت له: فإذا طهرت من حيضتها ولم تغتسل بعد؛ ألزوجها أن يطلقها قبل أن تغتسل؟ قال: لا. وإن رأت القصة البيضاء ولا ينبغي له أن يطلقها إلا وهو يقدر على جماعها⁽¹⁾.

Translation:

Ṣaḥnūn asked Ibn al-Qāsim: When a woman was cleansed from her menstruation but she did not take a bath after that, can her husband divorce her before she takes a bath? Ibn al-Qāsim said: No. If the woman sees a bit of whiteness, it is not

⁸²⁹ Mālik b. Anas, *Al-Muwatta'* of Imam Mālik ibn Anas, translated by Aisha Abdurrahman Bewley, p. 235.

appropriate to divorce her, unless he is able to have sexual intercourse with her.⁸³⁰

Commentary:

Divorce during menstruation period is not appropriate so even if the menstruation period ends, the cleansing period does not come into being without taking a complete bath, because the man should be able to have sexual intercourse with the woman to divorce her. He cannot have sexual intercourse with her unless she is cleansed.⁸³¹ In the Qur'an, this issue is specified in the following verse: "They will question three concerning the monthly course. Say: 'It is hurt; so go apart from women during the monthly course, and do not approach them till they are clean. When they have cleansed themselves, then come unto them as God has commanded you.' Truly, God loves those who repent, and He loves those who cleanse themselves."⁸³²

Question: 75

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Arabic text:

قال ابن القاسم: وسمعت مالكا يقول في الذي لا يجد ما ينفق ويضرب له أجل فحل وهي حائض أنها لا تطلق عليه حتى تطهر، وكذلك الذي لا يقدر على مسيس امرأته لا يفرق السلطان بينهما وهي حائض.

قال سحنون: واختلف قول مالك في المولى⁽²⁾، فمرة قال: إذا وقفه السلطان وهي حائض فلم يفىء طلق عليه، ومرة قال: إنه لا تطلق عليه في الحيض⁽³⁾.

قال محمد: وفي كتاب المسائل لابن مزين قال أصبغ: وإذا كانت الحرة تحيض في كل عام مرة أو أكثر من ذلك حيضة قد عرفت ذلك من نفسها ثم تطلق أنه لا بد لها من الحيض.

⁸³⁰ The man divorces the woman during cleaning period. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/423.

⁸³¹ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 332.

⁸³² Al-Baqara: 222, <https://tanzil.net/#trans/en.arberry/2:222>

Translation:

Ibn al-Qāsim said: I heard from Mālik regarding a man who cannot provide means of support (in case he divorces his wife)⁸³³ and a delay/deadline was given to him, then it expired, and his wife was menstruating during this period, - in such case divorce does not come into being until she cleanses. This is similar to the case of a man who has sexual impotence, the political authority (*al-sulṭān*) cannot separate them while she is menstruating.

Saḥnūn said: Mālik holds divergent views in the topic of the client (*mawlā*). He said one time: If the political authority (*al-sulṭān*) separates a couple while the woman is menstruating, such *ṭalāq* cannot be annulled. But another time he said: Divorce during the menstruation period is not valid.⁸³⁴

Muḥammad said: In the *Kitāb al-Masā'il* by Ibn Muzayn, Aṣḥab said: When a free woman menstruates only one time in every year or something more than a menstruation, having acknowledged this regarding herself, and she is divorced, without doubt she should menstruate.

Commentary:

Nafaqah “constitutes the financial obligation of a husband toward his wife during marriage and for a time after he divorces her. While married, a husband is expected to pay for housing, food, and his wife's clothes according to her social class or their agreement at the time the marriage was contracted. He generally is also expected to pay for all her medical expenses, although schools of legal thought differ on this point. Depending on social class and agreement, *nafaqah* could also include servants and a standard of living consistent with that of the wife's peers. If divorce takes place, the husband is expected to pay her the same financial support for the first three months following the divorce, a period known as *iddah*, during which the wife continues to live in her home and may not remarry; this is to ascertain that there is no pregnancy and to allow for a period in which the couple could reconcile. *Nafaqah* can also include support for

⁸³³ [n f q]: [*nafaqah*]: maintenance, *Mu'jam lughat al-fuqahā'*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 402. For the technical meaning see below commentary.

⁸³⁴ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/120.

family members such as father, mother, sisters, brothers, and children if they cannot support themselves.”⁸³⁵

Even if a man does not have anything to offer her wife or has sexual impotence, divorce during the menstruation period is not appropriate according to Mālik. Divorce should occur during the cleansing period. If a couple wants to divorce, they should wait until the cleansing period.

Question: 76

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Arabic text

باب في البتة⁽¹⁾ والخلية⁽²⁾ والبرية والبائنة

قال سحنون: قال ابن القاسم: ومن قال لامرأته: أنت طالق البتة. وقال: والله ما أردت إلا واحدة إلا أن لساني زل فقلت: البتة، فهي [ثلاث]⁽³⁾ وهو قول مالك⁽⁴⁾. قلت له: فإن قال لها: أنا منك بات. فقال: هي ثلاث دخل بها أو لم يدخل ولا ينوي في ذلك، إلا إن كان قبل ذلك كلام يعلم أن هذا القول جواب له فكان الكلام من غير الطلاق، فالقول قول الزوج إذا قال: لم أرد الطلاق.

Translation:

Chapter about *al-batta*, *al-khaliyya*⁸³⁶, *al-bariyya* and *al-bā'ina*

Saḥnūn said: Ibn al-Qāsim said: Whoever says to his wife: '*anta ṭāliq al-batta* (you are divorced definitely) but later the man said: 'By God! I meant only one *ṭalāq* but I stumbled through and [inadvertently] said *al-batta*', she is divorced three times and this is the doctrine of Mālik.⁸³⁷

Saḥnūn asked Ibn al-Qāsim: what if the man told his wife: '*ana minka bāttun*'? Ibn al-Qāsim said: It means three *ṭalāqs* whether they had sexual intercourse or

⁸³⁵ Esposito, "Nafaqah", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed April 11, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e1688>

⁸³⁶ *Al-khaliyya*: it refers to the expression "*anta bariyya wa khaliyya*" that when pronounced results in divorcing the wife, Ibn Manẓūr, *Lisān al-'Arab*, vol. 4/208.

⁸³⁷ The same explanation takes part in the *Mudawwana*. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/400.

not, even if he had no intention. But if they had a conversation before and it is known that '*ana minka bāttun*' is his response to the woman in a conversation that had nothing to do with *ṭalāq*, the word of the man is taken into consideration if he says: I did not mean *ṭalāq*.

Commentary:

The expressions of *al-batta*, *al-khaliyya*, *al-bariyya* and *al-bā'ina* are used for irrevocable divorce. When a man divorces his wife with these expressions or a woman uses one of these expressions when she has the right of divorce, they become divorced irrevocably.⁸³⁸ The following example from the *Muwaṭṭa'* provides to explain the issue: "Yaḥyā related to me from Mālik that he heard Ibn Shihāb say that if a man said to his wife: 'You are free of me, and I am free of you', it counted as three pronouncements of divorce as if it were an 'irrevocable' divorce. Mālik said that if a man made any strong statement such as these to his wife, it counted as three pronouncements of divorce for a woman whose marriage had been consummated, or it was written as one of three for a woman whose marriage had not been consummated, whichever the man wished. If he said he intended only one divorce he swore to it and he became one of the suitors because, whereas a woman whose marriage had been consummated was made inaccessible by three pronouncements of divorce, the woman whose marriage had not been consummated was made inaccessible by only one pronouncement. Mālik said: 'That is the best of what I have heard'."⁸³⁹

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Arabic text

⁸³⁸ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 110.

⁸³⁹ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 223.

قال ابن القاسم: قال مالك: ومن قال لامرأته المدخول بها: أنت خلية أو برية أو بائنة إنها ثلاث لا ينوى فيها، وإن كان غير مدخول بها فهي ثلاث تطليقات [أيضا]⁽⁵⁾، إلا أن يكون نوى واحدة أو اثنين، قلت له: فإن قالت امرأة لزوجها: قد والله ضقت من صحبتك فلَوَدِدْتُ أن الله قد فرج لي منك. فقال لها: أنت بائن أو خلية أو برية أو بائنة، أو قال: أنا منك خلي أو بري أو بائن أو بات، ثم قال: لم أرد الطلاق وإنما أردت

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أنها بائن بيني وبينها فرجة ولست بلاصق بها. فقال: أراها طالقاً في هذا كله ولا ينوى، لأنها [لما]⁽¹⁾ تكلمت كانت في كلامها كمن طلبت الطلاق⁽²⁾.

Translation:

Ibn al-Qāsim said: Mālik said: Whoever says to his wife with whom he had sexual intercourse: *'anta khaliyya or bariyya or bā'ina'*, this involves three *ṭalāqs* regardless of his intention. If he had not sexual intercourse with her, three *ṭalāqs* also come into being unless he intended one or two *ṭalāqs*. Ibn al-Qāsim asked Mālik: What happens if a woman tells her husband: "By God! I am tired of your company and I wish that God would put distance between you and me", and the husband retorts to her: "You are divorced" using the expressions *'anta bā'in or khaliyya or bariyya or bā'ina'*, or if he told her: "I am divorced from you" using the expressions *'ana minka khalī or barī or bā'in or bāt'*, but later the husband told: "I did not want an irrevocable

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divorce, what I meant by saying "*'annahā bā'in*" was that a distance existed between us and that I was not closed to her", Mālik said: "My opinion is that she is divorced whatever the expression he used regardless of the intention because when she spoke, her words were equivalent of asking for a divorce".⁸⁴⁰

Commentary:

A woman demanded a distance from her husband. This distance might refer to divorce or to a temporary separation. Her husband accepted that and he used

⁸⁴⁰ The same in Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/396.

expressions that mean irrevocable divorce. Then, he claimed that he just only aimed for revocable divorce or separation for a while. His claim is not accepted because his intention is not important in this issue. He divorced her irrevocably.

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Arabic text

باب في من قال لامرأته أنت علي حرام

قال سحنون: قلت له: أرأيت إن قال رجل لامرأته: أنت علي حرام؟ فقال هي ثلاث البتة إن كان دخل [بها]⁽³⁾، ولا ينوي في شيء، وإن كان لم يدخل⁽⁴⁾ فقال: نويت تطليقة أو تطليقتين فذلك له؛ لأن الواحدة والاثنين تحرم التي لم يدخل بها. قلت: فإن قال: أردت بقولي أنت علي حرام الظهار⁽⁵⁾؟ قال: لا ينوي في ذلك⁽⁶⁾.

قلت له: فإن قال كل حل علي حرام، [فقال]⁽⁷⁾: لا يكون عليه شيء لا كفارة يمين ولا غير ذلك، ولا يحرم عليه إلا / امرأته وحدها، فإنها تحرم عليه إلا أن يحاشيها بقلبه⁽⁸⁾. وهو قول مالك⁽⁹⁾.

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قال محمد: ومن قال لامرأته: كلامك علي حرام أو شعرك لم يلزمه لذلك شيء، هذا مذهب سحنون ذكره بعض الرواة، وفيه تنازع.

قلت له: فإن قال لها: أنت علي كالميتة أو كلحم الخنزير، وقال: لم أنو الطلاق، فقال: هي البتة وإن لم ينو بها قال الطلاق⁽¹⁾.

Translation:

Chapter about a husband who tells his wife: "you are illicit for me"

Sahnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a man who told his wife: "You are illicit for me"? Ibn al-Qāsim said: It is equivalent to three irrevocable *ṭalāqs* if he had sexual intercourse with her regardless of the intention he had. If he had not sexual intercourse with her⁸⁴¹ and the man said:

⁸⁴¹ Ibn al-Qāsim said: Whoever says to his wife: "You are like my mother" with the intention of *ṭalāq*, it means three *ṭalāqs*, intention is not taken into consideration even if he meant one or two.

“My intention was just one or two *ṭalāqs*”, his intention comes into being because one or two *ṭalāqs* make illicit to him the woman with whom he did not have sexual intercourse. Saḥnūn asked: If he said: What I meant by saying “You are illicit for me” was *ṣihār*?⁸⁴² Ibn al-Qāsim: The intention is not taken into consideration in this issue.⁸⁴³

Saḥnūn asked Ibn al-Qāsim: What if the man says 'all licit things became illicit to me'? Ibn al-Qāsim answered: There is nothing for him, including atonement for an oath, and nothing becomes illicit for him except his wife. She becomes illicit for him unless he made an exception for her in his heart. It is the doctrine of Mālik.⁸⁴⁴

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Muḥammad said: Whoever says to his wife: “Your word becomes illicit for me or your hair becomes illicit for me”, nothing becomes illicit with these words. This is the doctrine of Saḥnūn according to what was mentioned by some scholars, but there is dispute in this topic.

Saḥnūn asked Ibn al-Qāsim: What if he says to his wife “You are like carrion for me or pork”, then he said “I did not mean *ṭalāq* by saying these words”. Ibn al-Qāsim answered: He would be divorced by *ṭalāq al-batta* regardless that his intention was not *ṭalāq*.⁸⁴⁵

Commentary:

The term *ṣihār* means that a man says to his wife: “You are like my mother” or “You are like my licit relatives”.⁸⁴⁶ Ibn Abī Zayd al-Qayrawānī explained this issue in his *Risāla*: “If someone pronounces a *ṣihār* (a statement that sex with his wife is tantamount to incest) then he may not have intercourse with her until he expiates that by freeing a believing slave who is free of faults, who is not partially

⁸⁴² [ṣ h r]: [*ṣihār*]: injurious assimilation (of wife to mother), *Muʿjam lughat al-fuqahāʾ*, edited by Ḥāmid Ṣādiq Qanībi and Quṭb Muṣṭafā Sanū, p. 267. For more information, see below commentary.

⁸⁴³ The same in Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/393.

⁸⁴⁴ Ibid, vol. 5/393-394.

⁸⁴⁵ After a husband told his wife: “You are like carrion for me or pork”, his intention is not important and irrevocable divorce comes into being. Ibid, vol. 5/395.

⁸⁴⁶ Santillana, *Istituzioni di diritto Musulmano malichita con riguardo anche al sistema sciafiita*, p. 214.

owned by others or in the process of obtaining freedom. If he cannot do that, then he must fast two consecutive months. If he is unable to do that, he should feed sixty poor two *mudds* each. He may not have intercourse with her night or day until the end of the expiation. If he does so, he must repent to Allah Almighty. If he has intercourse after doing part of the expiation by feeding or fasting, he must start it over again. There is no harm in freeing a one-eyed slave or a bastard for the *ḡihār*. A child is sufficient, but we think it better to free someone who fasts and prays.”⁸⁴⁷

This issue is explained in the *Muwaṭṭaʿ* as well: “Yaḥyā related to me from Mālik that he had heard that ‘Alī b. Abī Ṭālib used to say that if a man said to his wife: ‘You are *ḡarām* for me’, it counted as three pronouncements of divorce. Mālik said: ‘That is the best of what I have heard on the subject’.”⁸⁴⁸ After saying this word, there is no return and he becomes divorced with this word. However, if he says: “Everything becomes illicit for me except my wife”, it does not mean divorce. It is the same if he makes illicit his wife’s hair or word. Nevertheless, if he says: “You are like carrion for me or pork”, irrevocable divorce comes into being.

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Arabic text

باب جامع الطلاق

قال سحنون: قلت لابن القاسم: فمن قال لامرأته: أنت طالق إن شئت، فقال: ذلك في يديها، فإن قامت من مجلسها قبل أن تقضي فأرى أن توقف فيما أن تقضي وإما أن تترك ما جعل إليها من ذلك، إلا أن تمكنه من نفسها قبل أن تقضي فيبطل ما بيدها، وإنما قلت لك ذلك لأنه كأنه تفويض [فوضه] ⁽²⁾ إليها ⁽³⁾.

Translation:

Miscellaneous chapter about ṭalāq

⁸⁴⁷ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 112.

⁸⁴⁸ Mālik b. Anas, *Al-Muwaṭṭaʿ of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 223.

Saḥnūn said: I asked Ibn al-Qāsim: What about someone who says to his wife: "You are divorced if you want". Ibn al-Qāsim answered: The matter is in her hand. If the woman leaves before stating what her decision is, my opinion is that her situation remains in suspense, she may decide to divorce or she may give up the right of deciding. But if she allows him to have sexual intercourse with her before taking a decision, her right of deciding is cancelled. Ibn al-Qāsim told Saḥnūn: This is the *tafwīḍ*⁸⁴⁹ is given to the wife by the husband.⁸⁵⁰

Commentary:

Tafwīḍ means in Islamic theology "relegation of matters to God (*tafwīḍ al-amr li Allah*). In law, delegation of power, authorization of an act, or issuance of a warrant for arrest. Often indicates a delegation of power in a procurement contract. It also indicates a type of legal partnership (*sharikat mufawadah*) in which the partners make an equal investment and share an equal interest in the profits and decision-making power. Also used to describe a type of divorce (*ṭalāq al- tafwīḍ* or *tafwīḍ al-ṭalāq*) in which the husband delegates a power of divorce (*‘iṣmah*) to his wife. The delegation may be made at the time the marriage is contracted, or upon the occurrence of certain circumstances, or at any time during the marriage. For instance, the parties may specify that if the husband takes a second wife, the first wife will automatically have the power to initiate a divorce, or that the wife has the power to initiate a divorce at any time without reason. Classical Muslim jurists debate the various types of delegations and the validity of each. Most Muslim countries permit this type of divorce in one form or another."⁸⁵¹ In the case dealt with here, *tamlīk* is given to the woman by her husband and until she takes a decision her situation is unclear. But if she has sexual intercourse with the man, this is understood to mean that she has decided to stay with him and she loses her right to choose what to do. If she wants

⁸⁴⁹ [f w ḍ]: [tafwīḍ]: authorization, *Mu‘jam lughat al-fuqahā’*, edited by Hāmid Sādiq Qanībi and Qutb Mustafa Sanū, p. 119. For the technical meaning see below commentary.

⁸⁵⁰ When a man says his wife: 'The matter is in her hand'. It means *tafwīḍ*. Saḥnūn b. Sa‘īd, *Al-Mudawwana al-kubrā*, vol. 5/395.

⁸⁵¹ Esposito, *The Oxford dictionary of Islam*, p. 310.

separation, she is not entitled to choose a single or two repudiations. She has only the choice to return or divorce irrevocably.⁸⁵²

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Arabic text

قلت: فإن قال لها: طلقني نفسك، [فقلت: قد اخترت] ⁽⁴⁾ نفسي، أو حرمت نفسي، أو قد أبنت نفسي، أو بريت منك، أو أنا بائمة منك، قال: أراها ثلاث تطليقات إن لم ينكرها الزوج في مجلسه، وإن نكرها حلف على بينة، وقد سمعت مالكا يقول في المرأة يقول لها زوجها: طلاقك في يدك، فتطلق نفسها [ثلاثا] ⁽⁵⁾، فيقول الزوج: إنما أردت واحدة، فقال: إن ذلك بمنزلة التمليك وعليه اليمين ⁽⁶⁾.

Translation:

Saḥnūn said: What if a man told his wife: "Divorce yourself (*ṭalliqnī nafsuka*)", then she told: "I am divorced from you" (five different expressions are recorded: *qad ikhtartu nafsī, ḥarramtū nafsī, qad 'abantu nafsī, bariytū minka* or *ana bā'inatun minka*). Ibn al-Qāsim answered: My opinion is that it means three *ṭalāqs* if the man did not disapprove what she had said during their meeting. In case he disapproved, he is sworn on witness. Ibn al-Qāsim heard from Mālik regarding a woman whose husband told her: "Your *ṭalāq* is in your hand", then she divorced herself by triple *ṭalāqs*, then the husband said: "I meant only a single *ṭalāq*", that Mālik said: This is a *tamlīk* issue and an oath is necessary for the man.⁸⁵³

Commentary:

When a man says to his wife: "Your *ṭalāq* is in your hand", it means giving *tamlīk* to the woman. After giving *tamlīk* to her, she can only choose her husband or opt for irrevocable separation from him, she cannot choose a single repudiation.⁸⁵⁴

⁸⁵² Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/85.

⁸⁵³ The same in Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/380-388.

⁸⁵⁴ Santillana, *Istituzioni di diritto Musulmano malichita con riguardo anche al sistema sciafiita*, p. 216.

The expressions mentioned in this case mean "I chose myself, I am illicit for you, I separate myself from you, I am far away from you". All of them involve irrevocable divorce. If the woman chooses by herself, she can use these expressions because she cannot divorce herself revocably. Nevertheless, if her husband makes an objection to her, he should swear.

Question: 81

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Arabic text

قلت له: فإن قال لها: أنت طالق كلما شئت، فقال: قال مالك: لها أن تقضي مرة بعد مرة ما لم يجامعها ويوقفها عنها، فإن جامعها فلا قضاء لها. ولو أنه حين قال لها: أنت طالق كلما شئت. ردت ذلك وتركته ثم أرادت أن تقضي بعد ذلك لم يكن لها ذلك، [بمنزلة ما قال مالك فيمن قال لها زوجها أمرك بيدك إلى سنة وتركت ذلك]⁽¹⁾ أنه لا قضاء لها بعد ذلك، وسواء تركت ذلك عند سلطان أو غيره⁽²⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: What if a man told his wife: "Whenever you want, you are divorced". Ibn al-Qāsim answered: Mālik said: The woman has the right to divorce herself several times unless they have sexual intercourse and he puts a stop to her. If he has sexual intercourse with her, she cannot decide any longer. If when the man told his wife: "You are divorced whenever you want," the woman did not accept it and she left, then she wants to do it after that, she is not entitled to do this anymore. This is so because of what Mālik said regarding a man who told his wife: "Your matter is in your hand for a year", and she renounced that. She is not entitled to do anything after a year has passed, it does not matter whether she made her renouncing with a political authority or with any other.⁸⁵⁵

Commentary:

⁸⁵⁵ Political authority and others are not important, if a year passed after *tamlīk* was given. Sahnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/389.

The man gave *tamlīk* to his wife telling her that she was divorced whenever she wanted or that the matter was in her hand until a year had passed. When the woman leaves from the place where the *tamlīk* was given to her without accepting the offer, she is not entitled to divorce herself anymore. However, Mālik has two narrations about this topic: the *tamlīk* is not cancelled even if it is not exercised by the woman for a long period of time or that it is when she leaves from the session.⁸⁵⁶

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Arabic text

قلت له: فإن قال لها: أنت طالق تطليقة [ينوي تطليقة]⁽³⁾ لا رجعة له فيها، فقال: قال مالك: إن لم يكن أراد بقوله الثلاث، فهي واحدة ويملك رجعتها، وقوله لا رجعة لي عليك، ونيته باطلة⁽⁴⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What if a man told his wife: "You are divorced with *ṭalāq*", but he intended irrevocable single *ṭalāq*. Ibn al-Qāsim said: Mālik said: If he did not mean three *ṭalāqs* with his words, it is single and revocable, his word is not taken into consideration and his intention is false.⁸⁵⁷

Commentary:

One of the most important things related to divorce is choosing the appropriate words because sometimes there is no chance to change after saying a word regarding divorce even though, sometimes, the intention is asked. In this case, the man divorced his wife with a single *ṭalāq*. There are two options here: if his intention is single revocable *ṭalāq*, he can return to his wife. If his intention is irrevocable single *ṭalāq*, he cannot return to her. If his intention is three *ṭalāqs*, asking his intention is not necessary after that because he cannot change it and he cannot return to his wife.

⁸⁵⁶ Ibn Rushd (al-Ḥafid), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/85.

⁸⁵⁷ The word of the man is not taken into consideration. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/400-401.

Question: 83

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Arabic text

قال ابن القاسم: وسئل مالك عن رجل كانت له امرأتان فصالح إحداهما، فقالت له الثانية: إنك ستراجعها، فقال: هي طالق أبدا، فسأل مالك الرجل عن نيته، فقال: لم تكن لي نية، وإنما خرجت هي مستحلة، فقال: أرى إن [تزوجها]⁽⁵⁾ أنها طالق مرة واحدة⁽⁶⁾.

قال محمد: وفي مختصر ابن عبد الحكم، ومن قال لأهل امرأته: شأنكم بها وقد كان بنى بها فهي ثلاث، إلا أن ينوي واحدة، وإن كان لم ينو [بها]⁽⁷⁾ [ثلاثا]⁽⁸⁾ فهي واحدة.

Translation:

Ibn al-Qāsim said: Mālik was asked regarding a man who has two wives and he made *muṣālaḥa* with one of them. The second wife told him: "You will return to her", but the man said: "She is divorced forever". Mālik asked the man about his intention. He answered: "I don't have any intention, when she left, she was licit." Mālik said: My opinion is that if he was married to her, she was divorced with single *ṭalāq*.⁸⁵⁸

Muḥammad said: In the *Mukhtaṣar* by Ibn 'Abd al-Ḥakam whoever says to the family of his wife: "Your situation is with her", having had sexual intercourse with her, it means three *ṭalāqs*, unless his intention was a single divorce. If he did not intend three *ṭalāqs*, then it is single.

Commentary:

In this case, the man's intention determines the situation, so he has to be asked what he meant by his sentence of divorce. It might be single or three *ṭalāqs*. When *tamlīk* is given, it means irrevocable *ṭalāq*. However, the man's intention can change that. If his intention is single, he cannot return to her unless she marries and has sexual intercourse with another man.

Question: 84

⁸⁵⁸ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/380-388.

Arabic text

قال ابن القاسم: وسئل مالك عن رجل كان بينه وبين آخر شر، وكان لأحد الرجلين أخ، فلقي الذي نازع أخاه [وقال]⁽¹⁾: وقد بلغني الذي كان بينك وبين أخي أمس وامرأته طالق البتة لو كنت حاضرا لفقت عينيك. فقال مالك: أراه حانثا لأنه حلف على شيء لا يبر فيه⁽²⁾.

Translation:

Ibn al-Qāsim said: Mālik was asked regarding a man who had trouble with another man. One of them had a brother. The other man encountered the brother of the man with whom he had discussed and the brother told him: "It had reached me what happened between you and my brother yesterday. May his wife be divorced with irrevocable *ṭalāq* if had I been there, I would have gouged out your eyes". Mālik said: My opinion is that he broke his vow because he swore on profitless thing.⁸⁵⁹

Commentary:

This case is related to a vow made by someone regarding a past event. He sworn that his brother's wife will be divorced if he - having witnessed the conflict between his brother and another man - would not have gouged the eyes of the man out. However, what he swore on is useless so his oath is not taken into consideration. Divorce does not come into being because of it. If he had sworn on a useful thing, its consequences would be different. He would divorce his wife.

Question: 85

Arabic text

قال ابن القاسم: وسئل مالك عن رجل تزوج امرأة على امرأة أخرى فحلف للأولى بطلاق الثانية إن أثر الثانية عليها، ثم إنه طلق الأولى البتة. فقال: تطلق عليه الثانية أيضا؛ لأنه حين طلق الأولى فقد أثر الثانية عليها.

⁸⁵⁹ The same in Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/6.

Translation:

Ibn al-Qāsim said: Mālik was asked regarding a man who, already married to a woman, married another woman, and he had sworn to the first wife to divorce the second if he would show preference to her. Then he divorced his first wife irrevocably. Mālik said: He has also divorced the second, because the man when he divorced the first had shown preference for the second.

Commentary:

A man married with two wives had promised the first not to show preference for the second. But then he divorced his first wife after having shown preference for his second wife. Hence, his second wife also became divorced because of his previous oath.

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Arabic text

وفي سماع عيسى سئل ابن القاسم عن رجل أدخلت عليه زوجته فقال: هي طالق البتة إن لم افترعها⁽³⁾ الليلة، فوطئها فإذا هي ثيب. فقال: لا شيء عليه إنها حلف وهو يظن أنها عذبة. قال أصبغ: وإن علم قبل الوطء أنها ثيب فترك وطأها في تلك الليلة رأيت حاشا.

Translation:

In the audition (*samā'*) of 'Īsā, Ibn al-Qāsim was asked regarding a man whose wife was given entrance to his house and he said: "She is divorced irrevocably if I won't deflower her in the wedding night". He had sexual intercourse with her but he noticed that she was not virgin. Ibn al-Qāsim said: He is not obliged to anything because when he sworn, he assumed that she was virgin. Aṣḡagh said: If he knew that she was widow before the sexual intercourse and he left to have sexual intercourse with her in the wedding night, my opinion is that his oath is broken.

Commentary:

A man swore that if his newly married wife were not virgin, he will divorce her. During the wedding night, it was revealed that she had already sexual intercourse with another man. His oath is invalid, he could not divorce with his oath because he had no idea about the situation of the woman before the marriage. He married her thinking she was virgin.

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Arabic text

وفي سماع ابن القاسم سئل مالك عن رجل كان بينه وبين امرأته شر، وكانت قد استأذنته إلى بيت أهلها، فقال لها: أنت حرام إن لم تبيتني معي في هذه الليلة فوجدت المرأة حراً فخرجت إلى دكان/ عند باب البيت فباتت عليه. فقال الرجل: إنما كان أصل يميني على ألا تذهب تبيت عند أهلها. فقال مالك: أرى أن يحلف بالله ما أردت بيمينني ألا تخرج من البيت وإنما أردت ألا تذهب تبيت عند أهلها، فإن حلف فلا شيء عليه.

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وفي سماع أشهب: وسئل مالك عن رجل حلف بالطلاق على أمر ألا يفعله ولم يستثن إلا أن يقضي على السلطان، فقضى عليه أترى أن يلزمه الحنث؟ فقال: نعم. إلا أن يقول: لم أرد مغالبة السلطان ويحلف على ذلك⁽¹⁾.

Translation:

In the audition (*samā'*) of Ibn al-Qāsim, Mālik was asked regarding a man who was going through a bad moment with his wife. She asked for permission to go to the house of her family, the man told her: "You are illicit for me if you don't stay with me tonight". Then she felt warm, went to a shop near the gate of the house and spent the night there. The man said: "My oath meant not going to her family". Mālik said: My opinion is that he should swear by God: "I did not mean with my vow that she could not go out of the house, what I meant was that she could not leave to spend the night with her family". If he swears, there is nothing for him.

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In the audition (*samā'*) of Ashhab: Mālik was asked regarding a man who swore with *ṭalāq* on something he would not do, making no exception including being forced by the political authority and then he was forced. Do you think that he was entitled to break his oath? Mālik said: Yes, but he has to say: 'I did not mean compulsion from the political authority' and he has to swear on it.⁸⁶⁰

Commentary:

According to Mālik, "If a man swears, 'I will not eat this food or wear these clothes or enter this house,' that is all in one oath, and he is only obliged to do one *kaffāra*. It is the same for a man who says to his wife: "You are divorced if I clothe you in this garment or let you go to the mosque" and it is one entire statement in the normal pattern of speech. If he breaks any part of that oath, divorce is necessary, and there is no breaking of oath after that in whatever he does. There is only one oath to be broken in that."⁸⁶¹ In this case, a man makes illicit his wife with an oath he had pronounced saying that if his wife did not spend the night with him, she would be illicit for him. The man claimed that he only intended the possibility of her going to her family's house. The woman spent the night in a place that was near her house. The intention of the man is asked and his word is taken into consideration. However, if the woman went to her family's house, divorce would have taken place.

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Arabic text

⁸⁶⁰ This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 6/107.

⁸⁶¹ Mālik b. Anas, *Al-Muwatṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 192.

وفي سماع يحيى: سئل ابن القاسم عن رجل حلف بطلاق امرأته ليعين غلامه إلا ألا يجد [به]⁽²⁾ عشرين دينار، فيعرضه [ويجتهد]⁽³⁾ ولا يجد به عشرين ديناراً. فقال: يكف عن مسيس امرأته حتى يعرضه مجتهداً في البيع أياماً، ويستأنى حتى يعلم الله اجتهاده، فإن باع في ذلك وإلا حبس عنده ووطئ امرأته، ولا شيء عليه حتى تحول الأسواق بزيادة يرتجي بها بيعه بعشرين ديناراً فيعود إلى العرض والاجتهاد في البيع وليس عليه أن يمسك عن الوطء إلا [المرة]⁽⁴⁾ الأولى، إلا أن يجد عشرين ديناراً فيكره⁽⁵⁾ البيع فإن وجد ذلك لزمه الكف عن المسيس حتى يبيع، وإن مسك عن امرأته وهو قادر على بيعه بعشرين ديناراً [إمسكه عنها]⁽⁶⁾ ضرب له أجل المولي؛ فإن باع وإلا طلق عليه.

Translation:

In the audition (*samā'*) of Yahyā, Ibn al-Qāsim was asked regarding a man who swore that he will divorce his wife if he was not able to sell his slave for more than twenty dīnārs, then he put on sale the slave and tried to sell him, but he could not find a person who gave twenty dīnārs. Ibn al-Qāsim said: It is enough for him not to touch his wife during a period of three days in which he will make the effort to sell his slave, so that God witnesses his effort. If the man does not sell him, the slave is kept in his house, then he can have sexual intercourse with his wife. Nothing more is necessary for him until the market situation changes and the value of the slave increases more than twenty dīnārs. He then begins to present the slave in the market again to sell him, and it is not necessary to stay away from his wife for sexual intercourse. But if he finds a person who offers twenty dīnārs for the slave and he does not want to sell him, he cannot touch his wife until selling the slave. If he stays away from his wife even though he is able to sell the slave for twenty dīnārs, because of that staying away from his wife he is given a delay as much as a person who makes *ilā'*.⁸⁶² If he does not sell the slave, he is divorced from her.

⁸⁶² [i l ']: [ilā']: abandonment (for his swearing), *Mu'jam lughat al-fuqahā'*, edited by Hāmid Sādiq Qanībi and Qutb Mustafa Sanū, p. 79. For more information, see below commentary.

Commentary:

Īlā' is a vow whereby the husband swears to refrain from sexual relations with his wife for at least four months. If he breaks it, divorce does not come into being; if the oath is realized, divorce occurs.⁸⁶³ In the Qur'an, this issue is specified with this verse: *"For those who forswear their women a wait of four months; if they revert, God is All-forgiving, All-compassionate; but if they resolve on divorce, surely God is All-hearing, All-knowing."*⁸⁶⁴

In this case, a man claims that he will sell his slave for more than twenty dīnār. If he cannot succeed doing that, he will divorce his wife. However, the slave was not sold despite of his efforts. He does not have sexual intercourse with his wife for at least three days but when he tries to sell the slave again, he can have sexual intercourse with her. If he finds a person to sell the slave and he does not sell, he cannot have sexual intercourse with her and *īlā'* comes into being. If he cannot sell the slave, divorce occurs.

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Arabic text

قلت: فلو قال رجل لامرأته: أنت طالق أنت طالق أنت طالق، قال: يدين، فإن قال: أردت بالمرتين الأخيرتين التطليقة الأولى فله نيته، وإن لم يكن له نية فهي ثلاث.

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قلت له: فإن قال لها: أنت طالق وأنت طالق وأنت طالق يوم أتزوجك ثم تزوجها. فقال: سألت مالكا عمن قال هذا لامرأته فوقف عنها وكأنه ذهب إلى أنه لا ينوي في ذلك وأنها ثلاثة، وهو رأيي⁽¹⁾.

قلت لمالك: فإن قال لها: أنت طالق ثم أنت طالق ثم أنت طالق. فقال: هذه بينة ولا ينوي وهي ثلاث البتة⁽²⁾.

Translation:

⁸⁶³ Natana J. DeLong-Bas (ed.), *The Oxford encyclopedia of Islam and women*. Oxford: Oxford University Press, 2013, p. 324.

⁸⁶⁴ Al-Baqara: 226, <https://tanzil.net/#trans/en.arberry/2:226>

Saḥnūn asked Ibn al-Qāsim: What if a man told his wife: "You are divorced" using the expression *anta ṭāliqun* three times. Ibn al-Qāsim said: *ṭalāq* is approved.

If he says: "I just wanted to emphasize what I said first by repeating the divorce formula once and again", his intention is taken into consideration. But if he did not have any intention, he is divorced by three *ṭalāqs*.

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Saḥnūn asked Ibn al-Qāsim: What if a man said to a woman: "You are divorced in the day that I marry you", using the expression *anta ṭāliqun* three times, then he married her. Ibn al-Qāsim said: I asked Mālik regarding the man who told a woman that, (and he said) he is held from her. This issue is similar to the case that he did not intend to do that but it is three *ṭalāqs*, this is the doctrine of Mālik.⁸⁶⁵

Ibn al-Qāsim asked Mālik: What if a man told his wife: "You are divorced, then you are divorced, then you are divorced" using the expression *anta ṭāliqun*. Mālik said: This is obvious, intention is not taken into consideration in this case. It means three *ṭalāqs*.⁸⁶⁶

Commentary:

In divorce cases, expressions and intentions are extremely important. In the first part, the man divorced his wife with using one expression, *anta ṭāliqun*, but he repeated the same word three times. He claimed that his intention was only a single *ṭalāq*, the reason that he repeated the formula two more times was to emphasize it. In the second part, the man divorced his wife using the same expression, *anta ṭāliqun wa anta ṭāliqun wa anta ṭāliqun*, but adding the word 'and'. This means three *ṭalāqs*. After divorcing with three *ṭalāqs*, return is not possible. According to Mālik, a man who told his wife that she is divorced when they marry, is senseless so he should be stopped because he becomes divorced with these words. His intention is not taken into consideration.

⁸⁶⁵ The same in Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 6/9.

⁸⁶⁶ Ibid, vol. 6/10.

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Arabic text

قلت: رأيت رجلا قال: كل امرأة أتزوجها فهي طالق. فقال: قال مالك: لا شيء عليه⁽³⁾. قلت: فلو قال: كل امرأة أتزوجها إلى أربعين سنة أو ثلاثين فهي طالق. فقال: إذا ضرب أجلا يعلم أنه لا يعيش إلى مثله، فهو كمن عمر النساء، وإن ضرب أجلا يمكن أن يعيش إلى مثله تلزمه اليمين، وإن تزوج طلقت عليه، إلا أن يخاف على نفسه العنت ولا يكون له مال يتسرربه، فإن كان كذلك فله أن يتزوج كذلك قال مالك⁽⁴⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a man who says: "All the women whom I will marry are divorced"? Ibn al-Qāsim said: Mālik said: There is nothing for him.⁸⁶⁷ Saḥnūn said: What if he says: "All women whom I will marry for the next 40 or 30 years are divorced"? Ibn al-Qāsim said: If the man specifies a duration of time that is known he will not be able to live as much, he is similar to the man who makes women illicit for himself forever. If he specifies a duration of time that his peers can live, an oath is necessary for him. If he marries, the woman is divorced from him. But if he expects hardship because of this situation and he does not have any money to buy a concubine, if the situation is like that, he can marry. This is what Mālik said.⁸⁶⁸

Commentary:

The same question is asked in the *Muwattaʿa*: "Yaḥyā related to me from Mālik that he had heard that ʿAbdullāh b. Masʿūd said that there was nothing binding on someone who said: 'Every woman I marry is divorced,' if he did not name a specific tribe or woman."⁸⁶⁹ The above case is related to a man who wants to divorce when he marries whatever the woman. In every situation, he wants to divorce her or he determines a time such as 30 or 40 years. He should swear but if he would have a trouble like committing adultery, his marriage is permitted

⁸⁶⁷ Ibid, vol. 6/17.

⁸⁶⁸ Ibid, vol. 6/18-19.

⁸⁶⁹ Mālik b. Anas, *Al-Muwattaʿa of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 239.

according to Mālik. In the Qur'an, adultery is forbidden and it is specified with following verse: "And approach not fornication; surely it is an indecency, and evil as a way."⁸⁷⁰

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Arabic text

قلت له: أرأيت إن طلق المريض امرأته قبل البناء بها ثم مات من مرضه ذلك، قال: قال مالك: لها نصف الصداق ولها الميراث ولا عدة عليها، وإن كانت مدخولا بها [والطلاق بائن]⁽⁵⁾ كان لها الميراث [وجميع الصداق]⁽⁶⁾ واعتدت عدة الطلاق، وإن كان

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طلاقا يملك فيه رجعتها فمات وهي في عدتها انتقلت إلى عدة الوفاة، وإن انقضت عدتها من الطلاق قبل أن يهلك ثم هلك فلا عدة عليها ولها الميراث⁽¹⁾.

قلت: فإن قال وهو مريض: قد كنت طلقته في صحتي، فقال: قال مالك: ترثه وعليها العدة⁽²⁾ عدة الطلاق من يوم أقر به إذا أقر بطلاق بائن، فإن أقر بطلاق يملك فيه الرجعة فمات قبل انقضاء العدة انقلبت إلى عدة الوفاة وورثته. وإن انقضت عدتها من يوم أقر بها فلها الميراث ولا عدة عليها. قلت له: فمن قُرب لضرب حد أو لقطع يد أو رجل فطلق امرأته، فضرب أو قطع فمات من ذلك. فقال: أرى ما كان من ذلك يخاف عليه منه الموت فهو بمنزلة المريض، وقد قال مالك/ فيمن حضر الزحف أو حبس إلى القتل أن ما صنع في تلك الحال فهو بمنزلة المريض⁽³⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a sick man who divorced her wife before having sexual intercourse with her, then he died because of his illness? Ibn al-Qāsim said: Mālik said: She is entitled to half of the dower and the inheritance that corresponds to her, and the waiting period is not necessary for her. But if she had sexual intercourse with him, irrevocable *ṭalāq* comes into being, she is entitled to take her inheritance and the dower in its totality, and she has to do the waiting period established for *ṭalāq*.

⁸⁷⁰ Al-Isrā': 32, <https://tanzil.net/#trans/en.arberry/17:32>

If he divorced her with a revocable *ṭalāq* and he died while the woman was in the waiting period, her *‘idda* turns to be *‘iddat al-wafāt*.⁸⁷¹ But if her waiting period that occurred because of *ṭalāq* ended before his death, there is no waiting period for her and she is entitled to her inheritance.⁸⁷²

Saḥnūn said: What if a sick man said: “I divorced her when I was healthy”? Ibn al-Qāsim said: Mālik said: She is entitled to inherit from him and she has to carry out the waiting period attached to divorce from the day the man pronounced his irrevocable divorce. If what he pronounced was revocable divorce and he died before the waiting period was completed, her waiting period turns to be *‘iddat al-wafāt* and she is entitled to inherit. If her waiting period ended from the day that the man pronounced the divorce, she is entitled to her inheritance but she does not have to perform the waiting period.

Saḥnūn asked Ibn al-Qāsim: What happens if a man subject to a *ḥadd* punishment⁸⁷³ or to the cutting of his hand or foot, divorced his wife, then he died because of having been subject to the *ḥadd* punishment or to the amputation? Ibn al-Qāsim said: My opinion is that if it is feared that he will die, his case is similar to the case of sick man. Mālik had said: Whoever is participating in battle or is jailed until his execution, whatever he does because of such situation is equivalent to the case of a sick man.⁸⁷⁴

Commentary:

As it is determined in Question 63, when a sick man divorced his wife and died because of his illness, the woman inherits from him and she has to perform the

⁸⁷¹ The *‘iddat al-wafāt* is the waiting period because of death of a husband.

⁸⁷² The woman can take the inheritance and she does not perform the waiting period. Saḥnūn b. Sa‘īd, *Al-Mudawwana al-kubrā*, vol. 6/34.

⁸⁷³ [ḥ d d]: [ḥadd]: punishment stipulated in the Qur’an, *Mu‘jam lughat al-fuqahā’*, edited by Hāmid Sādiq Qanībi and Qutb Mustafa Sanū, p. 104.

Ḥadd: “The six crimes for which punishments are fixed are theft (amputation of the hand), illicit sexual relations (death by stoning or one hundred lashes), making unproven accusations of illicit sex (eighty lashes), drinking intoxicants (eighty lashes), apostasy (death or banishment), and highway robbery (death).” Esposito, “Ḥadd”, in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed April 12, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e757>

⁸⁷⁴ Saḥnūn b. Sa‘īd, *Al-Mudawwana al-kubrā*, vol. 6/35-36.

waiting period. It is like that if they had sexual intercourse. In the Qur'an, the issue of waiting period is specified in this verse: *"And those of you who die, leaving wives, they shall wait by themselves for four months and ten nights; when they have reached their term then it is no fault in you what they may do with themselves honourably. God is aware of the things you do."*⁸⁷⁵ However, if a man died before having sexual intercourse with the woman, she does not have to perform the waiting period and takes half dower.⁸⁷⁶ It is determined in the Qur'an: *"O believers, when you marry believing women and then divorce them before you touch them, you have no period to reckon against them; so make provision for them, and set them free with kindness."*⁸⁷⁷

If irrevocable *ṭalāq* occurs after sexual intercourse and the man died during the waiting period, the duration of *'idda* changes. She now has to perform a waiting period because of the death of her husband. In other words, she has *'iddat al-wafāt*.⁸⁷⁸ She waits three months according to this verse: *"O Prophet, when you divorce women, divorce them when they have reached their period. Count the period, and fear God your Lord. Do not expel them from their houses, nor let them go forth, except when they commit a flagrant indecency. Those are God's bounds; whosoever trespasses the bounds of God has done wrong to himself. Thou knowest not, perchance after that God will bring something new to pass."*⁸⁷⁹

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Arabic text

قلت له: أ رأيت إن قال رجل لامرأته: إذا قدم فلان فأنت طالق. فقال: لا يقع عليه الطلاق حتى يقدم فلان⁽⁴⁾. وكل من طلق امرأته إلى أجل هو آت فهي طالق [حين]⁽⁵⁾ تكلم بالطلاق.

Translation:

⁸⁷⁵ Al-Baqara: 2, <http://tanzil.net/#trans/en.arberry/2:234>

⁸⁷⁶ Karaman, Dönmez, Çağrııcı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 2709.

⁸⁷⁷ Al-Ahzāb: 49, <http://tanzil.net/#trans/en.arberry/33:49>

⁸⁷⁸ Karaman, Dönmez, Çağrııcı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 3479.

⁸⁷⁹ Al-Ṭalāq: 1, <http://tanzil.net/#trans/en.arberry/65:1>

Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a man who told his wife: "If so and so come, you are divorced"? Ibn al-Qāsim said: *Ṭalāq* does not come into being until the person named comes⁸⁸⁰. Whoever divorces his wife having determined a deadline in the future, she becomes divorced instantly when he mention *ṭalāq*.

Commentary:

A man stipulated that if a person comes, his wife will be divorced. The husband may know whether this person will come or not. On the contrary, he may not have any idea about the situation of this person. If he does not know when this person comes, divorce comes into being because of the fact that he stipulated something from the future. If he has an idea about the situation of the person, divorce does not take place until he or she comes.

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Arabic text

قلت له: فمن قال: إن لم تمطر السماء في يوم كذا من شهر كذا فامرأته طالق. فقال: قال مالك: تطلق عليه الساعة فإن وقع المطر في اليوم الذي سمى لم ترد عليه⁽⁶⁾.

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وكذلك لو قال لها: إن لم يكن في بطنك غلام فأنت طالق أنها تطلق [عليه]⁽¹⁾ مكانها وإن ولدت بعد ذلك غلاما لم ترد إليه⁽²⁾.

قال محمد: فإن غفل عن الذي قال إن لم تمطر السماء في وقت كذا فامرأتي طالق ولم يرفع إلى السلطان حتى وقع المطر في اليوم الذي سمى لم تطلق عليه، وكذلك قال أصبغ. قال: ومن قال: إن مطرت السماء غدا فامرأتي طالق لم يعجل عليه بالطلاق حتى ينظر أتمطر السماء أم لا؟

Translation:

⁸⁸⁰ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/375.

Saḥnūn asked Ibn al-Qāsim: What about the man who says that if it does not rain in such and such day of such and such month, his wife is divorced? Mālik said: She is divorced instantly, and even if it rains the day he established, her return is not possible.⁸⁸¹

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It is similar to the case of someone who told his wife: "If the child in your belly is not a male, you are divorced". In this case *ṭalāq* comes into being immediately, and even if the baby born is a male, return is not possible.

Muḥammad said: If the man who said "If it does not rain at such and such time, my wife will be divorced" forgot what he had done and his case was not brought to the political authority (*al-sultān*), when rain fell on the day he mentioned the *ṭalāq* does not come into being. Aṣḡagh had the same doctrine. He said: "Whoever says: 'If it rains tomorrow, my wife will be divorced', he is not rushed for *ṭalāq* until it is checked whether it rains or not.

Commentary:

A man claims that he will divorce his wife according to a specific weather condition (rain) at a specific time. Divorce comes into being immediately because of this unknown stipulation. This is regardless whether it rains or not on such a day. This issue is like the case of someone pronouncing divorce dependent on guessing the sex of the child that is still in the mother's womb. These are opinions of Mālik. Muḥammad and Aṣḡagh argued the opposite, i.e. the conditional divorce depends on whether the stipulation made comes true or not.

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Arabic text

قيل للمالك: فلو أن رجلاً قال: إن لم يقدم أبي في يوم كذا وكذا فامرأتي طالق. فقال:
قال مالك: هذا لا يشبه المطر، لأن هذا يدعي أن الخبر قد جاءه والكتاب بأن والده
يقدم، فليس هو كمن حلف على الغيب⁽³⁾.

⁸⁸¹ Irrevocable divorce comes into being. Ibid, vol. 6/7.

قال سحنون: قلت لابن القاسم: رأيت من قال لامرأته: أنت طالق يوم أدخل دار فلان فدخلها ليلاً أيقع عليه الطلاق؟ قال: نعم. إلا أن يكون أراد بقوله يوم أدخل النهار دون الليل، فإن أراد ذلك فالقول قوله وينوى، وكذلك لو قال: ليلة أدخل دار فلان فأنت طالق فدخلها نهاراً فهو مثل ما وصفت لك⁽⁴⁾.

Translation:

Mālik was asked: What if a man said: "If my father won't come in such a day, my wife will be divorced"? Ibn al-Qāsim said: Mālik said: This is not like the issue of rain, because here it is to be assumed that the man is making such a claim because of news that had reached him or a letter stating that his father would come. This is not similar to the case of a man who swears on unknown circumstances (*al-ghayb*).⁸⁸²

Saḥnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a man who told his wife: "You are divorced in the day (*yawm*) that I will enter the house of such a man", but then he enters that house at night. Does *ṭalāq* come into being? Ibn al-Qāsim said: Yes, except in the case that his intention when saying *yawm* was to refer to the daylight (*nahār*) excluding the night (*layl*). If his intention was like that, his word and intention are taken into consideration. It is similar to the case of the man who said: "You are divorced on the night that I will enter the house of such person", and then he entered in daytime. This is what I (Ibn al-Qāsim) explained to you (Saḥnūn).⁸⁸³

Commentary:

A man claims that he will divorce his wife according to something his father will do. In this case, he is not making a stipulation on something unknown because most probably he knows when his father will come. Then a case is discussed in which how the term *yawm* (inclusive or exclusive of the night) is understood determines whether divorce takes place or not.

⁸⁸² This issue is predictable so the judgement is different from the case that has unknown circumstances. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/7.

⁸⁸³ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/12.

باب جامع التخيير

قال سحنون: قلت لابن القاسم: رأيت إن قال رجل لامرأته المدخول بها: [اختاري]⁽¹⁾ نفسك. فقالت: قد اخترت نفسي فناكر الزوج. فقال: لا تنفعه المناكرة. وهي ثلاث تطليقات⁽²⁾.

قلت: فإن كانت غير مدخول بها فناكرها وقال: لم أرد إلا واحدة، وقالت: قد اخترت نفسي فأنا طالق ثلاثا. فقال: القول قول الزوج وله أن يناكرها إذا نوى حين خيرها واحدة أو اثنين من قبل أن الواحدة تبينها⁽³⁾ إذا كانت غير مدخول بها، وإن لم ينو شيئا فهي ثلاث وليس له أن يناكرها، وكذلك قال مالك فيمن خير امرأته. قلت له: فإن قالت حين قال لها اختاري نفسك فقالت: قد فعلت؛ أتسأل عن نيتها وما أرادت بقولها قد فعلت؟ [قال: نعم]⁽⁴⁾. وهو قول مالك.

Translation:

Miscellaneous chapter about *takhyīr*⁸⁸⁴

Saḥnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a man who told his wife with whom he had sexual intercourse: "Choose yourself". Then, she said: "I have chosen myself", but the man then refused (divorcing her). Ibn al-Qāsim said: His denial is not important/his refusal is of no benefit for him. It means three *ṭalāqs*.⁸⁸⁵

Saḥnūn asked: What if the man did not have sexual intercourse with the woman and he refused? Ibn al-Qāsim answered: "Then I am in favour of considering just one *ṭalāq* even if the woman said: I chose myself and I am divorced with three *ṭalāqs*." Ibn al-Qāsim said: What obliges is what the man says, so that he can contradict her if his intention - when he offered her the possibility of choosing - was just one or two *ṭalāqs* given that a single *ṭalāq* is what is to be expected if the

⁸⁸⁴ [kh y r]: [takhyīr]: selection: *Mu'jam lughat al-fuqahā'*, edited by Hāmid Sādiq Qanībi and Qutb Mustafa Sanū, p. 105. For the technical meaning see below commentary. Also see Question 6.

⁸⁸⁵ The same in Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/373.

man did not have sexual intercourse with her. If the man did not have any intention, it is three *ṭalāqs* and he cannot contradict the woman. Mālik said the same about the man who gave *khiyār* to his wife.

Saḥnūn asked Ibn al-Qāsim: What if the man told his wife: “Choose yourself” and then, she said: “I did”, should she be asked what her intention was by saying “I did”? Ibn al-Qāsim answered: Yes, it is the doctrine of Mālik.

Commentary:

As a legal concept, *takhyīr* involves “granting a choice”. According to Mālik, *takhyīr* refers to the ending of the nuptial connection, namely, a woman has the right to choose her husband or opt for an irrevocable separation from him when her husband says to her: “choose for yourself”.⁸⁸⁶ When a husband gives *khiyār* to his wife, she can divorce herself. Whether they had sexual intercourse or not is what determines the divorce process. After having sexual intercourse, the man’s refusal regarding *khiyār* is not decisive.

Question: 96

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Arabic text

قلت: فإن قال لها: اختاري. فقالت: قد [فعلت] ⁽⁵⁾أمري، أو قالت: قد قبلت أمري، ولم [تقل] ⁽⁶⁾أمري. قال: تسأل عما أرادت، فإن قالت: أردت أني قبلت ما جعل لي من الخيار ولم أطلق بعد، قيل لها: فطلقني الآن إن أردت أو ردي، فإن طلقت ثلاثاً لم يكن للزوج أن ينكارها، فإن طلقت واحدة أو اثنتين لم يلزم الزوج من ذلك شيء، وإنما لها إذا خيرها أن تطلق نفسها ثلاثاً أو ترد ذلك.

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⁸⁸⁶ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist’s primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/84.

قلت: فإن قالت: أردت بقولي قد قبلت أمري: الطلاق. قال: تسأل عما أرادت، فإن قالت: أرادت ثلاثاً لزم الزوج ولم يكن له أن يناكرها، وإن قالت أرادت واحدة أو اثنين لم يلزم منها شيء⁽¹⁾.

قال ابن القاسم: وكل كلام تتكلم به المرأة لا يستدل به على ما تريد إلا بقولها، لأن له وجوهاً في تصارييف الكلام، فإن المرأة تسأل عما أرادت [بذلك]⁽²⁾ وهو أيضاً في التمليك⁽³⁾.

Translation:

Sahnūn asked: What if the man told his wife: "Choose", and then she said: "I made my decision", or she said: "I accepted my matter", and what if she does not say the word 'my matter' (*amrī*)? Ibn al-Qāsim said: She is then asked about what she wanted. If she says: "My intention was accepting what the *khiyār* allows me to get, but I did not get the divorce", then she is told: "If you wish, now divorce yourself or reject it". If the woman divorces herself with three *ṭalāqs*, the man cannot refused it to her. If the woman divorces herself with a single or two *ṭalāq*, the man is not obliged because of it, because when *khiyār* is given to her this means either to divorce herself with three *ṭalāqs* or to refuse it.

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Sahnūn asked: What if the woman says: "When I said that I accepted my matter I meant *ṭalāq*." Ibn al-Qāsim said: Her intention is asked regarding *ṭalāq*. If she says: "I meant three *ṭalāqs*", the man cannot refuse that. If the woman says: "My intention was single or two *ṭalāq*", the man is not obliged to it.⁸⁸⁷

Ibn al-Qāsim said: All what the woman said does not necessarily indicate what exactly she intended and for this she has to be asked about her intention. Words have various meanings when they are used. Thus, the woman is asked about what her intention was with the words she used. It is the same in *tamlīk*.⁸⁸⁸

Commentary:

Tamlīk and *takhyīr* are explained in Question 56. A woman who is given *khiyār* by her husband cannot divorce herself with revocable *ṭalāq*, she can only divorce

⁸⁸⁷ Sahnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/373.

⁸⁸⁸ Ibid, vol. 5/379.

herself with three *ṭalāqs* or she can reject it. In the cases discussed here, the woman claimed that her response was for accepting *khiyār*, not for approving divorce so her intention is asked. In other words, it is necessary to ascertain what exactly she was accepting and the divorce situation is determined according to her intention.

Question: 97

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Arabic text

قلت له: فإن قال: اختاري. فقالت: قد خليت سبيلك وهي مدخول بها. فقال: تسأل عن نيّتها، فإن قالت: أردت/ ثلاثا فهي ثلاث، وهي في هذا بمنزلة الزوج، ولو قال [لها]⁽⁴⁾ ابتداء منه: قد خليت سبيلك ولا نية له أنها ثلاث⁽⁵⁾.

وإن كانت أرادت واحدة أو اثنتين لم يقع عليها منها شيء، [لأن مالكا قال]⁽⁶⁾ [فيمن خير امرأته المدخول بها فقصت بواحدة أو اثنتين لم يقع عليها منه شيء]⁽⁷⁾، لأنه إنما خيرها في الثلاث ولم يخيرها في الواحدة ولا في الاثنتين⁽⁸⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: What if the man said: "Choose yourself", and then she said: "I am free of your way", with the man having had sexual intercourse with her. Ibn al-Qāsim answered: Her intention is asked. If she said: "My intention was three *ṭalāqs*", then she is divorced three times. The woman is in the place of her husband in this situation, unless the man told her at the beginning: "I am free of your way" without intending three *ṭalāqs*.⁸⁸⁹

If the intention of the woman is one or two *ṭalāqs*, this does not bring about anything. This is so because Mālik said regarding the man who gave *khiyār* to his wife with whom he had sexual intercourse that if the woman decided for one or two *ṭalāqs* this does not bring about anything, because the man gave *khiyār* to her for three *ṭalāqs*. He did not give *khiyār* to her for one or two *ṭalāqs*.

⁸⁸⁹ Ibid, vol. 5/376.

Commentary:

Divorce situations are highly dependent on intention. But in the case of *khiyār* given to the woman by her husband who had sexual intercourse with her, it is not possible to divorce herself one or two *ṭalāqs*, because *khiyār* only offers the possibility of three *ṭalāqs* or not accepting divorce. After saying “I am free of your way”, the intention of the woman does not apply, as divorce by three *ṭalāqs* came into being with these words.

Question: 98**Page: 721****Arabic text**

قلت: فإن قال لها: اختاري وهي [غير]⁽¹⁾ مدخول بها، فقالت: قد خليت سبيلك، فقال: تسأل أيضا عن نيتها، فإن قالت: أرادت الثلاث فهي ثلاث، إلا أن يناكرها وادعى نية⁽²⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What if the man told his wife with whom she did not have sexual intercourse: “Choose herself”, and she said: “I am free from your way”. Ibn al-Qāsim answered: In this case, her intention is also asked. If she answers: “My intention was three”, it means three *ṭalāqs*, unless the man contradicts her and claims that he had another intention.

Commentary:

After being given *khiyār*, if the woman chooses to divorce herself, she can divorce and her husband cannot refuse the irrevocable divorce to her. When the woman says “I am free from your way”, it refers to irrevocable divorce, but the man should confirm that he gave that right to the woman.

Question: 99**Page: 721****Arabic text**

قلت له: فإن قال لها: اختاري اليوم كله فمضى ذلك اليوم ولم تختري. فقال: ليس لها أن تختار بعد ذلك⁽³⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: What if the man told his wife: "Choose yourself today" and that day passed and she did not choose herself? Ibn al-Qāsim answered: She cannot choose after that day.⁸⁹⁰

Commentary:

As explained in Question 81, after being given *khiyār* on a specific day, the woman should decide then, because the specified time becomes an obligatory requirement.

Question: 100

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Arabic text

قلت له: فإن قال رجل لرجل: خير امرأتي؛ وامرأته تسمع. فقالت امرأته: قد اخترت نفسي قبل أن يقول لها الزوج اختاري. فقال: القضاء ما قضت، إلا أن يكون الزوج إنما أراد أن يجعل ذلك [إلى]⁽⁴⁾ الرجل، مثل أن يقول له: خيرها إن شئت، أو يكون قبل ذلك كلام يستدل به على أن الزوج إنما أراد أن يجعل ذلك إليه، وإن كان إنما أرسله بذلك إلى المرأة فهو بمنزلة ما لو قال له: أعلم امرأتي أي قد خيرتها، فعلمت بذلك فاختارت، فالقضاء ما قضت⁽⁵⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: What if a man said to another man: "Give *khiyār* to my wife", and she heard that. Then she said: "I choose myself" before her husband told her to choose. Ibn al-Qāsim answered: What the woman decided is taken into consideration, unless the husband left it to the intention of the other man. That is, it is similar to the case when the husband told the man: "Give *khiyār* to her, if you wish", or when before he said that, the man had told the other man something that indicated that he really wanted to give him that right [the right of

⁸⁹⁰ Ibid, vol. 5/375.

giving *khiyār*]. For example, if the husband sends the man to his wife for that, it is similar to the case of the husband saying to the man: “Say to my wife, I gave *khiyār* to her”, and she acknowledges it and chooses. Her decision is then taken into consideration.⁸⁹¹

Commentary:

In this case, the husband charged another person to give *khiyār* to his wife. The woman then divorced herself without hearing it directly from her husband, because she had been informed through a proxy. The intention of the proxy is important because he has the power for divorce. If the husband did not specify the amount of repudiation, the intention of the proxy is taken into consideration in both situations.

Question: 101

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Arabic text

باب في جامع التمليك

قال سحنون: قلت له: فإن قال لها: أمرك بيدك، فقالت: قد اخترت نفسي. قال: هي ثلاث تطليقات إلا أن يرد عليها الزوج مكانه، فيحلف أنه لم يرد إلا واحدة أو اثنين أيها زعم⁽⁶⁾.

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قلت له: فإن ملكها ولا نية له. فقالت: قد حرمت نفسي، أو قالت: قد أبنت نفسي [أوبشتت نفسي]⁽¹⁾. فقال: هي ثلاث عند مالك⁽²⁾.

قال محمد: ولمالك في سماع ابن القاسم أنه سئل عن رجل قال لامرأته: أمرك بيدك. فقالت: قد قبلت، ثم سئلت بعد ذلك ما الذي أرادت، فقالت: واحدة أفيحلف على ذلك. فقال: لا يستحلف النساء في التمليك⁽³⁾.

Translation:

Miscellaneous Chapter About *Tamlīk*

⁸⁹¹ If the woman chooses herself via proxy, her word is taken into consideration. Ibid, vol. 5/381.

Saḥnūn said: I asked Ibn al-Qāsim: What if a man told his wife: “Your matter is in your hand”, and she said: “I chose myself”. Ibn al-Qāsim answered: It is divorce with three *ṭalāqs*, unless the husband contradicts her regarding his position, swearing that he only intended one or two *ṭalāqs*.⁸⁹²

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Saḥnūn asked Ibn al-Qāsim: What if a husband gives *tamlīk* to his wife without intention, and then she said: “I make illicit myself or I separated myself”. Ibn al-Qāsim said: It is three *ṭalāqs* according to the doctrine of Mālik.⁸⁹³

Muḥammad said: In the audition (*samāʿ*) of Ibn al-Qāsim, Mālik was asked regarding a man who told his wife: “Your matter is in your hand”, then she said: “I have accepted”, then she was asked what her intention was with these words, and she said: “My intention was one *ṭalāq*”. Should she be sworn for that? Mālik answered: Women are not sworn on *tamlīk*.⁸⁹⁴

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قلت له: فإن ملك امرأته أمرها ولا نية له⁽⁴⁾ في واحدة ولا في اثنين ولا في ثلاث فطلقت نفسها ثلاثا فناكرها⁽⁵⁾. فقال: يلزمه الثلاث ولا ينفعه المناكرة حين لم تكن له نية إذا ملكها، والمدخول بها وغير المدخول في هذا سواء عندي، ليس له أن يناكرها إذا لم تكن له نية⁽⁶⁾.

قلت: فإن ملكها أمرها، فقالت: قد قبلت نفسي أو اخترت نفسي، ثم قالت بعد ذلك: أردت واحدة. قال: لا يقبل قولها⁽⁷⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What if a husband gave *tamlīk* to his wife without having a clear intention of which type *ṭalāq* (one, two or three *ṭalāqs*), then she divorced herself with three *ṭalāqs* and the husband did not accept it? Ibn al-Qāsim answered: Three *ṭalāqs* are obligatory and he cannot benefit from rejecting it, because he did not have any intention when he was giving *tamlīk*,

⁸⁹² Ibid, vol. 5/383.

⁸⁹³ Ibid, vol. 5/386.

⁸⁹⁴ This transmission was compiled by al-ʿUtbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān waʾl-taḥṣīl*, vol. 5/223.

this regardless of whether he had sexual intercourse with her or not. The man has no right to refuse her decision if he did not have any intention.⁸⁹⁵

Saḥnūn asked: What if he gave *tamlīk* to her, then she said: "I have accepted or I chose myself", but afterwards she said: "My intention was a single *ṭalāq*"? Ibn al-Qāsim answered: Her word is not taken into consideration.⁸⁹⁶

Commentary:

Tamlīk (granting possession of the right) and *takhyīr* (grating a choice) refer to different things. A woman who is given *tamlīk* by her husband can divorce herself with multiple options like one or more *ṭalāqs*, unlike the case of *khiyār* that always implies three *ṭalāqs*.⁸⁹⁷ Hence, intentions and oaths are very important to determine of the situation.

Question: 102

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Arabic text

قلت له: فمن ملك امرأته أمرها فطلقت نفسها واحدة أيملك رجعتها؟ قال: نعم.
قلت: فإن قال لها: أمرك بيدك وأراد ثلاثا فطلقت نفسها واحدة أيلزمه⁽¹⁾ ذلك؟ قال:
نعم. ويكون أملك بها⁽²⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: Whoever gives *tamlīk* to his wife and she divorces herself with a single *ṭalāq*, can he return to her? Ibn al-Qāsim answered: Yes. Saḥnūn asked: What if the man says to his wife: "Your matter is in your hand", and his intention was three *ṭalāqs*, but she divorced herself with a single *ṭalāq*, does divorce take place? Ibn al-Qāsim answered: Yes, but he can return to her.⁸⁹⁸

⁸⁹⁵ If the man does not have intention, he should accept the intention of the woman. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/377.

⁸⁹⁶ Her intention regarding a single *ṭalāq* is not valid. Ibid, vol. 5/384 and 'Alī b. Khalīl Ṭarāblusī, *Mu'īn al-Ḥukkām*, vol. 1/324-325.

⁸⁹⁷ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/85.

⁸⁹⁸ Revocable divorce comes into being. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/383.

Commentary:

In this case, a man gave power of divorce to his wife. She divorced herself with a revocable *ṭalāq* but he claimed that he gave her the power in order to divorce with irrevocable divorce. However, she did not divorce herself with irrevocable *ṭalāq*. In this case, he can return to her.

Question: 103

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Arabic text

قلت: فإن قال لها: أمرك بيدك فقالت: قد خليت سبيلك. فقال: أرى أن تسأل عن نيته، فإن قالت: نويت واحدة فهي واحدة، وإن قالت: أردت اثنين أو ثلاثا فالقول قولها، إلا أن يناكرها ويكون له نية فيحلف، وإن قالت: لم أنو شيئا كانت البتة إن⁽³⁾ لم تكن للزوج نية حين ملكها، والمدخول بها وغير المدخول بها في هذا سواء⁽⁴⁾.

Translation:

Saḥnūn asked: What if a husband said to his wife: "Your matter is in your hand" and she said: "I am free from your way"? Ibn al-Qāsim answered: My opinion is that she has to be asked about her intention. If she says: "My intention was one," then a single *ṭalāq* occurs. If she says: "My intention was two or three," her word is valid, unless the husband refuses because he had an intention and he swears about it. If the woman says: "I did not have any intention", and her husband gave *tamlīk* to her without any intention, she becomes divorced with irrevocable *ṭalāq*, this regardless of whether he had sexual intercourse with her or not.⁸⁹⁹

Commentary:

When a man gives power of divorce to his wife and both of them do not have any intention, irrevocable divorce comes into being. It is explained in the *Muwattaʿa*: "Yaḥyā related to me from Mālik from Nāfi' that 'Abdullāh b. 'Umar said that statements like 'I cut myself off from you', or 'You are abandoned', were

⁸⁹⁹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/386-387.

considered as three pronouncements of divorce. Mālik said that any strong statements such as these or others were considered as three pronouncements of divorce for a woman whose marriage had been consummated. In the case of a woman whose marriage had not been consummated, the man was asked to make an oath on his deen, as to whether he had intended one or three pronouncements of divorce. If he had intended one pronouncement, he was asked to make an oath by Allah to confirm it, and he became a suitor among other suitors, because a woman whose marriage had been consummated, required three pronouncements of divorce to make her inaccessible for the husband, whilst only one pronouncement was needed to make a woman whose marriage had not been consummated inaccessible. Mālik added: "That is the best of what I have heard about the matter."⁹⁰⁰

Question: 104

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Arabic text

قلت: فإن قال لها: أمرك بيدك، أو قال لرجل: أمر امرأتي بيدك، ثم قال بعد ذلك: قد بدالي أيكون ذلك له أم لا؟ قال: لا. وهو قول مالك.

قلت: فإن قامت⁽⁵⁾ من مجلسها⁽⁶⁾ ذلك قبل أن تقضي المرأة شيئاً أولاً يقضي⁽⁷⁾ الرجل الذي جعل الزوج ذلك إليه، أيكون له أو لها من الطلاق شيء بعد القيام؟ فقال: كان مالك مرة يقول: إذا قام الذي جعل [له]⁽⁸⁾ الزوج ذلك في يده من مجلسه فلا شيء له/ بعد ذلك⁽⁹⁾.

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⁹⁰⁰ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 223.

قلت: فإن ملكها أمرها فتطاول المجلس بهما يوما أو أكثر من ذلك أيكون لها أن تقضي؟ فقال: سئل مالك عن طول المجلس وقيل له: ربما قال الرجل ذلك لامرأته ثم يقطع ذلك عنها ويسكنان ويأخذان في الحديث إلى غير ذلك. فقال: أما ما كان هكذا من طول المجلس وذهاب عامة النهار فيه حتى يعلم أنهما⁽¹⁾ فأخرجما كما كانا فيه إلى غيره وتركاه، ثم أرادت أن تقضي فلا أرى ذلك لها⁽²⁾.

Translation:

Saḥnūn asked: What if a husband told his wife: "Your matter is in your hand" or he said to another man: "The matter of my wife is in your hand", and after that the husband said: It has come upon me, can the man do that or not? Ibn al-Qāsim answered: No. It is the doctrine of Mālik.

Saḥnūn asked: What if the woman leaves the session without implementing the *tamlīk* or the man who is commissioned by the husband leaves without implementing the *tamlīk*, does *ṭalāq* occur for him or her after the departure? Ibn al-Qāsim answered: Mālik once said: If a deputy who is commissioned by the husband for *tamlīk* leaves the place, nothing occurs for the husband after that.⁹⁰¹

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Saḥnūn asked: What if a man gives *tamlīk* to his wife, but the session (in which their situation is discussed) is prolonged for a day or a few days, can she still act accordingly to the *tamlīk*? Ibn al-Qāsim answered: Mālik was asked regarding the length of the process being told: Sometimes the man gives *tamlīk* to his wife, then he withdraws it from her and they continue living together and acting in the present contrary to what was intended initially. Mālik said: If the situation is like that, i.e. the session is delayed and the day turned into night, and both of them know that their situations changed and that they had abandoned their previous position, then if the woman requests to act according to the *tamlīk*, I do not find appropriate that she does it.⁹⁰²

Commentary:

⁹⁰¹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/391.

⁹⁰² After the session has ended, the woman cannot demand to act according to the *tamlīk*. Ibid, vol. 390-391.

Giving *tamlīk* to the wife or to a deputy involves for the husband the loss of power to divorce. After that, only the person who has been given *tamlīk* by the husband can put in effect the divorce. According to Mālik's doctrine, *tamlīk* is not annulled even if it is not exercised by the woman for a long time after being granted it or until they part from the session.⁹⁰³ However, there are cases in which the *tamlīk* is not acted upon immediately because the parties involved continue living together as husband and wife, and if this is the case, Mālik thought that it was not appropriate for her to act according to the *tamlīk* because she is aware that the situation that gave rise to it has changed.

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Arabic text

قلت له: فإن قال لها: أمرك بيدك ثم وثب فارا يريد أن يقطع [بذلك عنها ما جعل لها من التمليك. فقال: لا يقطع]⁽³⁾ ذلك عنها قيامه. قيل لمالك: فما حده عندك؟ قال: إذا قعد معها قدر ما يرى الناس أنها تختار في [مثله]⁽⁴⁾ وإن فراقه لها لم يرد به فرارا فلا خيار لها في ذلك⁽⁵⁾.

قال ابن القاسم: [وهذا]⁽⁶⁾ الذي أعلمتك به هو كله على قول مالك الأول، وهو أحب قوليه إلي. قلت: فإن ملكها نفسها ثم جامعها قبل أن تقضي. فقال: إن أمكنته من نفسها ولم يغلبها على نفسها بطل ما كان بيدها من ذلك⁽⁷⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: What if a man told his wife: "Your matter is in your hand", then the husband left immediately with the intention to prevent that his wife could act according to the *tamlīk*. Ibn al-Qāsim said: The departure of the man in this way does not prevent the woman. Mālik was asked: What is your opinion regarding that? Mālik said: If the man stays with his wife during a while

⁹⁰³ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/86.

so that she can make a choice, even if he left without intention of getaway, the woman cannot make a choice anymore.⁹⁰⁴

Ibn al-Qāsim said: This that I have informed you about is all according to the doctrine that Mālik had initially formulated, and this first doctrine is what I prefer. Saḥnūn asked: What if the woman was given *tamlīk*, then she had sexual intercourse with her husband before having taken a decision? Ibn al-Qāsim said: If the woman allows that without being pressured by the man, the *tamlīk* becomes invalid for the woman.⁹⁰⁵

Commentary:

In the case here considered, the husband after giving *tamlīk* tried to obstruct the woman from implementing it. When the woman has been given a while to think and take a decision, if she does not do it, her right is cancelled. However, in the case here she did not have enough time to decide. On the other hand, if she has sexual intercourse with her husband before taking any decision according to the *tamlīk* given to her, it means that she has returned to him, this regardless of whether she tells him or not.

Question: 106

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Arabic text

وفي سماع عيسى: سئل ابن القاسم عن رجل جعل [أمر]⁽⁸⁾ امرأته بيد أبيها إن غاب عنها سنة، فغاب عنها فلما انقضت السنة أراد الأب أن يفرق بينهما، وقالت المرأة: لا
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أريد ذلك وأنا أرضى أن أبقى مع زوجي، إن ذلك لها ويخير الإمام الأب على أن لا يفرق بينهما، وهو قول مالك. قال ابن القاسم: وإن طلق قبل أن يمنعه السلطان مضي الطلاق، وإن طلق بعدما منع السلطان لم يجز طلاقه⁽¹⁾.

Translation:

⁹⁰⁴ The woman is not entitled to act according to the *tamlīk* after a while passed. Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/378.

⁹⁰⁵ Sexual intercourse means return if there is no pressure by the man on the woman. Ibid, vol. 5/384.

In the audition (*samā'*) of 'Īsā: Ibn al-Qāsim was asked regarding a man who gives the matter of his wife to her father in case he is absent from her during a year. Then he left and a year passed. The father requested to separate them, but the woman said: "I do

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not want it and I'm willing to stay this way with my husband." In such a case the *imām* [the leader of the community or one of his delegates such as the judge] can commission the father to not separate them. This is the doctrine of Mālik. Ibn al-Qāsim said: If the father divorced her daughter before the political authority (*al-sultān*) forbade him to do that, divorce comes into being, but if he divorces her after being forbidden to do that by the political authority, her *ṭalāq* is not affirmed.⁹⁰⁶

Commentary:

After the husband has given *tamlīk* to someone, the judgment regarding divorce belongs to the person to whom *tamlīk* was given as explained in the previous cases. Hence, in this case, the father of the woman is entitled to divorce his daughter because he was given *tamlīk* by his daughter's husband and the condition given has taken place (absence of the husband for a year). The father can separate them even if the woman does not want the separation. But if the political authority forbids him to do so (presumably because the woman asked it to intervene as she did not want to be separated), then he is not entitled any longer to do it.

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Arabic text

⁹⁰⁶ This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 5/252.

باب في عدة التي لا تحيض والمرتابة⁽²⁾
والمستحاضة⁽³⁾ من الطلاق

قلت له: أرأيت الصغيرة التي لا يوطأ مثلها إذا دخل بها زوجها ثم طلقها هل عليها عدة؟ قال: لا. وهو قول مالك.

Translation:

Chapter about the waiting period of a woman who does not menstruate, *murtāba*⁹⁰⁷ and *mustahāḍa*⁹⁰⁸ because of *ṭalāq*

Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a little girl whose peers do not have sexual intercourse: her husband had sexual intercourse with her and then divorced her, is the waiting period necessary for her? Ibn al-Qāsim said: No, this is the doctrine of Mālik.

Commentary:

In this case, a man had sexual intercourse with his wife who is so young that she had not yet menstruated. After the husband divorced her, she does not have to undergo a waiting period because getting pregnant is not possible for her unless she menstruates. On the other hand, according to Ibn Abī Zayd al-Qayrawānī, if her *‘idda* is because of her husband's death, she may not remarry without performing the *‘idda* period. Ibn Abī Zayd al-Qayrawānī explains this issue in his *Risālah*: “The *‘idda* for a free woman who is widowed is four months and ten nights, whether a child or adult, whether the marriage has been consummated or not, whether Muslim or one of the People of the Book. For a slave-girl, who is partially free, it is two months and five days, except in the case of an older woman whose period delayed. Then she waits until the doubt removed. As for the one who does not menstruate because of youth or old age, and her marriage

⁹⁰⁷ *Al-murtāba*: A woman whose menstruation disappears without any reason (for example, because of suckling or an illness). Ibn Juzayy al-Kalbī, *Al-Qawānīn al-Fiqhiyya: The judgements of fiqh*, translated by Asadullah Yate. Norwich: Diwan Press, 2019, p. 156.

⁹⁰⁸ *Al-mustahāḍa*: It means that the blood continues out of menstruation period, that is, *mustahāḍa* is the woman whose menstruation blood does not stop and this blood is not because of menstruation but because of a vessel called *al-‘ādhl*. Ibn Manẓūr, *Lisān al-‘Arab*, vol. 3/419.

was consummated, she may not marry until three months after the death of the husband.”⁹⁰⁹

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Arabic text

قلت له: فالمرأة إذا طلقها زوجها وهي ابنة عشرين سنة⁽⁴⁾ أو أقل من ذلك أو أكثر وهي لم تحض قط. فقال: تعتد بالشهور. قلت: فإن اعتدت شهرين ثم حاضت. قال: [تلغي]⁽⁵⁾ الشهور وتعتد بالحيض. قلت: فإن ارتفع الحيض عنها. فقال: تنتقل إلى عدة السنة من يوم ارتفع الدم عنها تسعة أشهر منها استبراء والثلاثة عدة، وكل [عدة في]⁽⁶⁾ طلاق فإنما هي بعد [الريبة]⁽⁷⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What if a husband divorces his wife who is 20 years old or around that age - older or younger - and has never menstruated? Ibn al-Qāsim said: She waits three months. Saḥnūn asked: What if she waited two months and then menstruated? Ibn al-Qāsim said: Her waiting process is cancelled and she has only to wait during the menstruation period. Saḥnūn asked: What if her menstruation stopped? Ibn al-Qāsim said: She has to wait during a year from the day that her menstruation stopped, nine months is *istibrā'* and three months is *'idda*. Every *'idda* that occurs because of *ṭalāq* comes after suspicion (of the woman being pregnant).⁹¹⁰

Commentary:

In this case regarding a woman who has not yet menstruated, no information is given regarding whether she had sexual intercourse or not with her husband. If she is divorced, she has to wait during three months. If she menstruates before completing this period, she waits until she completes it. If her menstruation

⁹⁰⁹ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, 2018, p. 114.

⁹¹⁰ In the main ms. and mss. from Rabat (bā') and (ṭā'): *al-ratbah* (the old age), in the mss. from Rabat (ḥā'), Algeria (jīm), Zagora (zayn) and Tunisia (tā'): *al-raybah* (the suspicion). This is the correct reading that coincides with that found in the *Mudawwana*. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/425-426.

disappears, she has to wait during a year, until the suspicion that she may be pregnant disappears. Then, she becomes available to remarry another man.

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Arabic

text

قلت: فإن كانت قد يئست من المحيض فطلقها، فلما اعتدت شهرين حاضت. قال: قال مالك: يسأل عنها النساء، فإن كان مثلها تحيض رجعت إلى الحيض، وإن كان مثلها لا تحيض مضت على الشهور. قلت: فإن [طلقها]⁽¹⁾ ومثلها تحيض فارتفعت حيضتها. فقال: تجلس سنة من يوم طلقها، فإذا مضت السنة فقد حلت للأزواج. قلت له: فإن رأت الدم بعد عشرة أشهر. قال: ترجع إلى الحيض. قلت: فإن انقطع عنها الدم. قال: ترجع إلى عدة السنة من يوم انقطع الدم عنها دم الحيضة التي قطعت عليها عدة السنة.

قلت: فإن رأت الدم [أيضا]⁽²⁾ قبل استكمال السنة. قال: ترجع إلى الحيض. قلت: فإن انقطع الدم عنها. قال: ترجع إلى السنة.

Translation:

Saḥnūn asked Ibn al-Qāsim: What if a woman does not menstruate anymore and her husband divorced her, then after two months she menstruates? Mālik said: Then women are asked about her case, that is, whether her peers menstruate or not. If they menstruate, her *'idda* lasts a menstruation period, but if they don't menstruate, the woman waits during months. Saḥnūn asked: What if a man divorced his wife whose peers menstruate but her menstruation stopped? Ibn al-Qāsim answered: She waits during a year since divorce day, and after the year has passed, she becomes licit for marriage.

Saḥnūn asked Ibn al-Qāsim: What if the woman saw blood after ten months? Ibn al-Qāsim said: She has to wait a menstruation period. Saḥnūn asked: What if her blood stopped again? Ibn al-Qāsim said: Her *'idda* lasts a year since the day that her blood stopped, that is, the menstruation blood that stopped the *'idda* of a year.

Saḥnūn asked Ibn al-Qāsim: What if the woman saw blood before the year is completed? Ibn al-Qāsim: Then she has to wait a menstruation period. Saḥnūn

said: What if the blood stopped again? Ibn al-Qāsim: Then she has to go back to the waiting period of a year.

Arabic text

قلت: فإن رأت الدم قبل استكمال السنة، فقال: قد انقضت عدتها لأنها قد حاضت ثلاث حيض، وإن لم تر الدم في [المرة]⁽³⁾ الثانية حتى استكملت السنة فإن عدتها أيضا تنقضي باستكمال السنة⁽⁴⁾.

قال محمد: ومن طلق امرأته وهي ترضع [فرفعت]⁽⁵⁾ حيضتها فعدتها سنة من يوم تفتطم ولدها، إلا أن تحيض قبل ذلك ثلاث حيض، كذلك روى عيسى عن ابن Page: 727

القاسم. / ومن طلق امرأته فمرضت [فرفعت]⁽¹⁾ حيضتها فلا بد لها من ثلاث حيض بعد أن تصح إلا أن تحيض قبل ذلك.

قال محمد: إن عادت⁽²⁾ إليها حيضتها وإلا اعتدت سنة من يوم تصح.

Translation:

Saḥnūn asked Ibn al-Qāsim: What if the woman saw blood before the year is completed? Ibn al-Qāsim answered: Her 'idda is completed with three menstruation periods. If she did not see blood during the second period⁹¹¹ until a year is completed, her 'idda finishes at the end of the year in the same way.⁹¹² Muḥammad said: Whoever divorces his wife while she is breastfeeding and her menstruation finished, her 'idda is a year since the day that she weaned her child, except if she had three menstruation periods before that. This is also what 'Īsā has narrated from Ibn al-Qāsim.

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Whoever divorces his wife, if she gets sick and her menstruation disappeared because of that, she should wait during three menstruation periods after getting well unless she has menstruated before that.

⁹¹¹ In the main ms. *al-mar'ati* (the woman), in the remaining mss. *al-marrati* (the period). This is the correct.

⁹¹² Saḥnūn b. Sa'id, *Al-Mudawwana al-kubrā*, vol. 5/426-427.

Muḥammad said: If she menstruates again, it is like that, but if she does not menstruate, she waits during a year since the day that she got well.

Commentary:

If there is a suspicious situation regarding especially the menstruation of a woman, the opinion of female expertise is frequently applied. The importance of women's expertise to give advice on legal matters pertaining to other women is mentioned in Question 24, reflecting, according to Avner Giladi: "... the rise of a qualified medical profession processes that started in the Islamic Middle East, North Africa, and Al-Andalus in the eighth century, about three hundred years earlier than in Europe." ⁹¹³ With this sentence, Giladi emphasized the developments in the field of health started long ago and people began to specialize in the field of health.

In this case, a woman does not menstruate anymore and waits during a year until the suspicion of being pregnant disappears. In this situation, if she menstruates after ten months, she turns to a menstruation period. Her waiting period lasts a year since the day that her blood stopped, if her blood stopped again. If she menstruates before the year is completed, her waiting period turns to be a menstruation period. If her blood stopped again, her waiting period turns to be a whole year. If she menstruates before the year is completed, her waiting period is completed with three menstruation periods. If she did not menstruate during her second menstruation period in a year, her waiting period lasts to the end of the year.

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Arabic text

⁹¹³ Giladi, *Muslim midwives: The craft of birthing in premodern Middle East*, p. 60.

ولابن القاسم في سماع عيسى أنه سئل عن الرجل يطلق امرأته وهي ترضع أو لا ترضع فيموت زوجها وهي لم تحض⁽³⁾ فتطلب الميراث. قال: أما التي لا ترضع فهي مصدقة حتى يأتي عليها سنة، ذكرت ذلك أو لم تذكره، وعليها اليمين إلا أن يكون قد سمع منها أنها حاضت ثلاث حيض، وأما التي ترضع فهي مصدقة حتى تطفم ولدها وبعد إقطاعه بسنة⁽⁴⁾.

Translation:

In the audition (*samā'*) of 'Īsā: Ibn al-Qāsim was asked regarding a man who divorced his wife while she was breastfeeding or not breastfeeding, then he died and she did not menstruate. In this situation, she demanded her inheritance. Ibn al-Qāsim said: The woman who divorced without breastfeeding is taken at her word (that she did not menstruate) until a year has passed, this regardless of whether she said that or not, and she has to take an oath unless it has been heard that she had three menstruation periods. Regarding the woman who is breastfeeding she is taken at her word (that she did not menstruate) until after a year that she weaned her child.⁹¹⁴

Commentary:

In this case, a man died and his wife - who demanded inheritance - did not menstruate. If the woman is breastfeeding, she is confirmed until after a year the weaning. The issue of suckling is explained with the following verse in the Qur'an: *"Mothers shall suckle their children two years completely, for such as desire to fulfill the suckling. It is for the father to provide them and clothe them honourably. No soul is charged save to its capacity; a mother shall not be pressed for her child, neither a father for his child. The heir has a like duty. But if the couple desire by mutual consent and consultation to wean, then it is no fault in them. And if you desire to seek nursing for your children, it is no fault in you provide you hand over what you have given honourably; and fear God, and know that God sees the*

⁹¹⁴ This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 4/401-402.

things you do.”⁹¹⁵ If the woman is not breastfeeding, she is taken an oath regarding her menstruation.

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Arabic text

باب في عدة امرأة الصبي، والخصي، والمجبوب من الطلاق

وفي المدونة قال سحنون: قلت له⁽⁵⁾: أرأيت الصبي الذي لا يحمل لمثله ومثله يقوى على الجماع إذا دخل بامرأته ثم صالح عنه أبوه أو وصيه أعليها عدة؟ فقال: لا، ولا يكون لها من الصداق شيء. قلت له: فإن ظهر بها حمل، قال: لا يلزمه⁽⁶⁾.

Translation:

‘Idda of a divorced woman whose husband is a boy, castrated man and man who has no sexual organ

In the *Mudawwana*: Saḥnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a boy whose peers cannot make women pregnant but they are able to have sexual intercourse, and whose father or guardian makes *muṣālaḥa*⁹¹⁶ for him - is the ‘idda necessary for his wife? Ibn al-Qāsim said: No, and she is not entitled to anything of her dower. Saḥnūn asked Ibn al-Qāsim: What if the woman gets pregnant? Ibn al-Qāsim said: No, it is not applied to his case.⁹¹⁷

Commentary:

Muṣālaḥa in its basic meaning is making peace. As a technical legal term, it refers to the compensation paid by the wife for obtaining her divorce. The term *ṣulh* implies making an agreement to pay a part of it.⁹¹⁸ In this case, a married boy who is not able to make his wife pregnant is mentioned. His wife does not have a

⁹¹⁵ Al-Baqara: 233, <http://tanzil.net/#trans/en.arberry/2:233>

⁹¹⁶ [ṣ l ḥ]: [muṣālaḥa]: compromise, *Mu‘jam lughat al-fuqahā’*, edited by Hāmid Sādiq Qanībi and Qutb Mustafa Sanū, p. 402. For the technical meaning see below commentary.

⁹¹⁷ This issue is not valid for this case because the boy cannot make a woman pregnant. Saḥnūn b. Sa‘īd, *Al-Mudawwana al-kubrā*, vol. 5/444.

⁹¹⁸ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist’s primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/79.

waiting period because there is no possibility that she will have a child from this man after divorce. If the woman has a child, under these circumstances, this child does not belong to the man because of the fact that he is not able to make pregnant a woman, thus, he does not have to provide her maintenance. Already, his guardian or his father made *muṣālaḥa* for him with his wife so he does not have to pay dower either.

Question: 112

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Arabic text

قلت له: فامرأة الخصي إذا طلقها أعليها عدة؟ فقال: نعم. قال أشهب: لأنه يصيب بما بقي من ذكره وهو يحصن امرأته وتحصنه. قلت لابن القاسم: فامرأة المجبوب إذا

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طلقها أعليها عدة؟ قال: إن كان لا يطاء فلا عدة عليها⁽¹⁾. قلت: فإن كان مجبوب الذكر قائم الخصا. فقال: إن كان مثله يولد له فعليها العدة⁽²⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What about a castrated man who divorces his wife, is *'idda* necessary for his wife? Ibn al-Qāsim said: Yes. Ashhab: said: This is so because he can reach the woman with the remaining part of his sexual organ, thus he makes her *muḥṣana* and she makes him *muḥṣan*. Saḥnūn asked Ibn al-Qāsim: What about the wife of a man who has no sexual organ, if he divorces her, is *'idda* necessary for his wife?

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Ibn al-Qāsim said: If the husband does not have sexual intercourse, *'idda* is not necessary for the woman.⁹¹⁹ Saḥnūn said: What if the man has two testicles without penis? Ibn al-Qāsim said: If his peers have been able to impregnate a woman, *'idda* is necessary for the woman.⁹²⁰

Commentary:

⁹¹⁹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/458-475.

⁹²⁰ Ibid, vol. 4/213.

Pregnancy determines the conditions of the waiting period, thus there is no waiting period for a woman whose husband cannot get her pregnant. The woman can remarry without performing the waiting period. However, if the husband can make her pregnant, she should have the waiting period after divorce.

Question: 113

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Arabic text

قلت: فإن جاءت امرأة الخصى أو المجهول بولد أيلزمه؟ فقال: سئل مالك عن الخصى هل يلزمه الولد؟ فقال: أرى أن يسأل أهل المعرفة بذلك فإن كان يولد لمثله لزمه الولد وإلا لم يلزمه⁽³⁾.

قال محمد: إذا كان مقطوع الخصا والعسيب [ممسوحاً]⁽⁴⁾ فلا عدة عليها من طلاقه، وهي داخلة في قول الله ﷻ: ﴿إِذَا نَكَحْتُمُ الْمُؤْمِنَاتِ ثُمَّ طَلَقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ فَمَا لَكُمْ عَلَيْهِنَّ مِنْ عِدَّةٍ تَعْتَدُونَهَا﴾⁽⁵⁾ وإن جاءت بولد لم يلحق به، وعلى المرأة الحد، وأما إذا بقي معه أنثى أو اليسرى منها أو بقي معه من عسيبه بعضه فالولد لاحق به، إلا أن ينفيه باللعان وعليها العدة، كذلك فسره عبد الملك بن حبيب.

Translation:

Sahnūn asked Ibn al-Qāsim: What if the woman, whose husband is castrated or does not have the sexual organ, gives birth to a child, does it belong to the man? Ibn al-Qāsim said: Mālik was asked regarding the castrated man whether the child belongs to the man or not. Mālik said: My opinion is that people who have expert information about this issue should be consulted. If they say that his peers can make women pregnant, the child belongs to him, but if they say that his peers cannot make women pregnant, the child does not belong to him.⁹²¹

Muḥammad said: When a man was cut the two testicles and the sexual organ completely, the 'idda is not necessary for the woman because of him divorcing her. This is based on this verse of God: "*When you marry believing women and then divorce them before you touch them, you have no period to reckon against*

⁹²¹ Ibid, vol. 5/445.

them".⁹²² If the woman gives birth to a child, the child does not belong to the man, and *ḥadd* punishment is given to her. If he has two testicles or the left testicle or a part of his sexual organ, the child belongs to him. But if they make *li'ān*,⁹²³ the *'idda* is necessary for her. 'Abd al-Malik b. Ḥabīb has explained the above mentioned Qur'anic verse in this way.

Commentary:

If a woman marries a man who was castrated and gives birth to a child, people who have expert information on castration are consulted about the specific case. If he cannot make pregnant a woman, the child does not belong to him and the woman is thus subject to an accusation of fornication and to the application of the corresponding divine sanction (*ḥadd*). In the opposite situation, the child belongs to him.

Question: 114

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Arabic text

باب في عدة الحرة من الوفاة

قال سحنون: قلت لابن القاسم: فكم عدة الحرة من وفاة زوجها؟ قال: أربعة أشهر وعشرا. قلت: فإن استبرأت نفسها. قال: تنتظر حتى تذهب الرية عنها، فإذا ذهبت حلت والعدة الشهور الأربعة الأول والعشرة أيام. قال مالك: وكل عدة في وفاة فهي قبل الرية بخلاف عدة الطلاق⁽⁶⁾.

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قال: والحامل المتوفى عنها زوجها تنقضي عدتها إذا [وضعت حملها وإن]⁽¹⁾ وضعت ساعة وفاته.

Translation:

⁹²² Al-Aḥzāb: 49, <http://tanzil.net/#trans/en.arberry/33:49>

⁹²³ [l ' n]: [li'ān]: oath of condemnation, disavowal of paternity by mutual oath of both spouses, *Mu'jam lughat al-fuqahā'*, edited by Hāmid Sādiq Qanībi and Qutb Mustafā Sanū, p. 321.

Chapter about waiting period of a woman because of decease

Saḥnūn asked Ibn al-Qāsim: How long is the duration of the *'idda* of a free woman because of her husband's death? Ibn al-Qāsim said: Four month and ten days. Saḥnūn asked: What about her *istibrā'*?⁹²⁴ Ibn al-Qāsim said: She waits until any doubt [of her being pregnant] disappears. If the doubt disappears, she becomes licit for marriage. The *'idda* is four months and ten days. Malik said: All *'idda* because of decease is before the doubt is removed. This is contrary to the *'idda* because of divorce.⁹²⁵

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Malik said: The *'idda* of the pregnant woman whose husband died ends when she gives birth, even if she gives birth while her husband is dying.

Commentary:

The issue of the waiting period is specified with following verse in the Qur'an: *"And those of you who die, leaving wives, they shall wait by themselves for four months and ten nights; when they have reached their term then it is no fault in you what they may do with themselves honourably. God is aware of the things you do."*⁹²⁶

Ibn Abī Zayd al-Qayrawānī explained this issue in his *Risāla*: "The *'idda* for a free woman is three periods (*qurū'*), whether she is Muslim or one of the People of the Book. For a slave or partial slave, it is two periods. It does not matter whether the husband is free or slave. A 'period (*qur'*)' means the period of purity between two menstruations. If the woman is not menstruating or has ceased menstruation, then it is three months for a woman, free or slave. The *'idda* for a divorced woman with constant bleeding is one year, slave or free. The *'idda* for a pregnant woman who is widowed or divorced is when she gives birth, whether free or slave or one of the People of the Book. A divorced woman whose marriage has not been consummated has no *'idda*."⁹²⁷

Question: 115

⁹²⁴ See note 658.

⁹²⁵ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/427.

⁹²⁶ Al-Baqara: 234, <http://tanzil.net/#trans/en.arberry/2:234>

⁹²⁷ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 114.

ولابن القاسم في سماع عيسى أنه قال في الحرة يموت عنها زوجها فترتفع عنها
حيضتها أو تستحاض أنه يقال لها: انتظره⁽²⁾ حتى يمر بك أقصى الرية وذلك تسعة
أشهر من حين يهلك عنها زوجها، إلا أن ترتاب بعد ذلك فتقيم حتى تخرج من الرية،
إلا أن ترتفع حيضتها لعذر، مثل أن تكون ترضع أو لا تكون تحيض في السنة إلا مرة
واحدة أو في ستة أشهر مرة، أو غير ذلك من العذر، فلها أن تتزوج حتى تنقضي عدتها
إن لم يكن [بها]⁽³⁾ من الرية شيء⁽⁴⁾.

ولمالك في سماع ابن القاسم أنه قال في التي تحيض في كل ستة أشهر / مرة ذلك شأنها
فيموت زوجها، أنها إذا اعتدت أربعة أشهر وعشرا نظر إليها من النساء من يعرف
الحمل، فإن رآين أن ليس بها شيء كان لها أن تنكح⁽⁵⁾.

Translation:

Ibn al-Qāsim was asked in the audition (*samā'*) of 'Īsā about a free woman whose husband died and her menstruation disappeared suspiciously or she menstruated all the time to the point that she had to be told: Wait the *'idda* until the doubt disappears. This is nine months since her husband died. But if the woman is still under doubt after that, she waits until the doubt disappears. In case her menstruation disappeared because of a reason, it is similar to the case of a woman who breastfeeds or menstruates once in a year or once in six months or because of any other reason. She can marry when her *'idda* ends if there is no doubt.⁹²⁸

Mālik said in the audition (*samā'*) of Ibn al-Qāsim: "The woman who menstruates once every six months and her husband died waits four month and ten days. Then the women who have expert information about pregnancy are asked. If they think that she has no evidence of pregnancy, she can marry.

⁹²⁸ This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 4/401.

ولمالك في سماع أشهب: أن ابن كنانة سأله عن الحرة المتوفى عنها زوجها وهي ممن تحيض، تعتد أربعة أشهر وعشرا ولم تحض في ذلك وذلك حالها أنها لا تحيض إلا في ستة أشهر وإن لم [تسترب] ⁽⁶⁾ أتزوج؟ فقال: لا، حتى تحيض.

Translation:

Mālik was asked in the audition (*samā'*) of Ashhab: Ibn Kināna was asked regarding a woman whose husband died and she was counted among those women who menstruate if she had to wait four months and ten days. If she does not menstruate during this period and her condition is that she only menstruates once every six months, if there is no doubt⁹²⁹ about that, can she marry? Mālik said: No, until she menstruates.

Commentary:

This issue is explained in the *Muwatta'*: "Yaḥyā related to me from Mālik from Ibn Shihāb that Sa'īd b. al-Musayyab who said: "The *'idda* of the woman who bleeds constantly is a year." Mālik said: "What is done among us about a divorced woman whose periods stops when her husband divorces her is that she waits nine months. If she has not had a period in them, she has an *'idda* of three months. If she has a period before the end of the three months, she accepts the period (her period is counted and she menstruated). If another nine months pass without her having a period, she does an *'idda* of three months. If she has a second period before the end of those three months, (her period is counted and accepted). If nine months then pass without a period, she does an *'idda* three months. If she has a third period, the *'idda* of the period is complete. If she does not have a period, she waits three months, and then she is free to marry. Her husband can return to her before she becomes free to marry unless he made her divorce irrevocable."⁹³⁰

Question: 116

⁹²⁹ In the main ms. and mss. from Rabat (bā') and (tā'): *tashribu* (she drinks), in the mss. from Algeria (jīm), Rabat (ḥā'), Zagora (zayn) and Tunisia (tā'): *tastaribu* (she has a doubt). The is the correct meaning according to text.

⁹³⁰ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 239.

قال سحنون: قلت لابن القاسم: أرأيت المرأة إذا بلغتها وفاة زوجها من أين تعتد؟ فقال: قال مالك: من يوم مات زوجها. قلت: فإن لم يبلغها حتى انقضت عدتها. فقال: لا شيء عليها لا إحداد ولا غيره⁽¹⁾. قلت له: فامرأة الخصى أو المجبوب أعليها عدة الوفاة؟ قال: نعم⁽²⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a woman who is informed about her husband's death, when will she begin to wait? Ibn al-Qāsim said: Mālik said: She waits from the day that her husband died. Saḥnūn asked: What if the news (of his death) reached her when her waiting period had finished? Ibn al-Qāsim answered: Nothing is necessary for her, neither mourning nor anything else.⁹³¹ Saḥnūn asked Ibn al-Qāsim: What if her husband did not have testicles or the sexual organ partly/totally, does she have 'idda because of his death? Ibn al-Qāsim said: Yes.⁹³²

Commentary:

In the *Muwatta'*, the waiting period of a woman whose husband died is explained with this example: "Yaḥyā related to me from Mālik from Ibn Shihāb from Sa'īd b. al-Musayyab that 'Umar b. al-Khaṭṭāb said: "The woman who loses her husband and does not know where he is, waits for four years, then she does 'idda for four months, and then she is free to marry."⁹³³ If the woman completed her waiting period, she can remarry.

Question: 117

⁹³¹ After the waiting period ends Is this what you mean?, she does not have to continue to wait. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/429.

⁹³² The same in Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/457-458.

⁹³³ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 234.

قلت له: فامرأة الصبي أعليها عدة الوفاة؟ قال: نعم. قلت: فإن ولدت بعد موته إلى شهر أتتقضي عدتها بذلك؟ قال: لا، إلا بعد أربعة أشهر وعشرا من يوم مات الصبي. قلت: ويقام عليها فيه الحد قال: نعم. إذا كان لا يولد لمثله⁽³⁾. قلت: فالصغيرة أعليها عدة الوفاة؟ قال: نعم⁽⁴⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What about a woman whose husband is a little boy, does she have 'idda because of his death? Ibn al-Qāsim said: Yes. Saḥnūn asked: What if she gives birth after a month had passed since her husband died, does her 'idda end? Ibn al-Qāsim said: No, it ends when four months and ten days have passed after the death of the boy. Saḥnūn asked: Does she have ḥadd punishment? Ibn al-Qāsim said: Yes, if his peers belong to those who cannot make a woman pregnant.⁹³⁴ Saḥnūn said: Does a little girl have 'idda because of the death (of her husband)? Ibn al-Qāsim said: Yes.⁹³⁵

Commentary:

A woman whose husband died has a waiting period, this regardless whether if she is little or not. This issue is specified with this Qur'anic verse: "As for your women who have despaired of further menstruating, if you are in doubt, their period shall be three months; and those who have not menstruated as yet. And those who are with child, their term is when they bring forth their burden. Whoso fears God, God will appoint for him, of His command, easiness."⁹³⁶ In this case, the woman married a little boy and he died. When the woman gives birth, her 'idda ends. However, if she is pregnant or gives birth and her husband's peers cannot yet make women pregnant, she takes ḥadd punishment because she is thus subject to an accusation of fornication.⁹³⁷

⁹³⁴ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/444.

⁹³⁵ Ibid, vol. 5/458.

⁹³⁶ Al-Ṭalāq: 4, <http://tanzil.net/#trans/en.arberry/65:4>

⁹³⁷ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 3489.

باب في جامع العدة

قال سحنون: قلت لابن القاسم: أرأيت إذا كان النكاح فاسدا فدخل بها زوجها ثم فرق بينهما وتصادقا على ترك المسيس أعليها عدة؟ قال: نعم، كالعدة من النكاح الصحيح ولا يصدق على العدة، ألا ترى أنها لو جاءت بولد لثبت نسبه إلا أن يُتبعه بلعان، ولا صداق لها لأنها لم تدعه⁽⁵⁾.

Translation:

Miscellaneous chapter about the waiting period

Sahnūn asked Ibn al-Qāsim: What is your opinion regarding a nuptial that is considered invalid, in the case that the husband had sexual intercourse with his wife, then they separated and they agreed that they won't touch each other, is the waiting period necessary for her? Ibn al-Qāsim said: Yes, *'idda* takes place as in the valid nuptial, something against *'idda* is not accepted. Don't you see that if she gives birth to a child, the family of the child is fixed, but if they make *li'ān*, it does not become fixed. She is not entitled to her dower because nothing happens to require it.⁹³⁸

Commentary:

In this case, the waiting period is necessary for the woman because they had sexual intercourse although their nuptial was not valid. The woman might give birth to a child who is considered the child of the man. But if they did *li'ān*, the child does not belong to this man. Also, she cannot take the dower because her marriage is not valid. If the marriage was valid, she would take total dower because of having had sexual intercourse. If they divorced before the sexual intercourse, she would only take the half of the dower. Under these circumstances, there is no dower for her.

⁹³⁸ Ibid, vol. 5/448.

Question: 119

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Arabic text

قلت له: فالمرأة يموت زوجها ثم يعلم أن نكاحها كان فاسدا كأخته من الرضاعة أو ما حرم الله عليه هل عليها عدة وفاة؟ فقال: لا، وعليها أن تستبرئ رحمها بثلاث
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حيض⁽¹⁾. وإن علم ذلك قبل موت زوجها وفرق بينهما فعليها العدة، وسيلها فيها سبيل النكاح الصحيح في السكنى والنفقة، كذلك قال مالك.

Translation:

Sahnūn asked Ibn al-Qāsim: What about a woman whose husband died and it is known that her nuptial was invalid because of the fact that they were milk siblings or they were in a situation forbidden by God - does she have a waiting period because of his death? Ibn al-Qāsim said: No, she should cleanse her womb during three menstruation periods.⁹³⁹

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If this situation is known before the death of the husband and they were separated, the waiting period is necessary for her, whatever is necessary in a licit marriage should be done here as well. Dwelling and maintenance should be provided. This is the doctrine of Mālik.

Commentary:

A woman whose husband died has a waiting period because of his death, this regardless whether they are milk siblings or not. Her pregnancy situation should be clarified in this way. If their situation was known, irrevocable divorce would have been necessary for them because marriage between milk siblings are forbidden with the following verse, *"Forbidden to you are your mothers and daughters, your sisters, your aunts paternal and maternal, your brother's daughters, your sister's daughters, your mothers who have given suck to you, your suckling sisters..."*⁹⁴⁰. On the other hand, if they divorce or are separated, the man

⁹³⁹ Ibid, vol. 5/458.

⁹⁴⁰ Al-Nisā': 23, <https://tanzil.net/#trans/en.arberry/4:23>

should provide her with dwelling and maintenance during the waiting period. If she was pregnant, he should provide her with them until she gives birth.

Question: 120

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Arabic text

قلت له: فالرجل يكون في سفر فيقدم ويزعم أنه طلق امرأة واحدة أو اثنين منذ سنة. فقال: قال مالك: لا يقبل قوله في العدة إلا أن يكون على أصل ذلك عدول، وعليها أن تعتد من يوم أقر [على نفسه]⁽²⁾ وإن مات ورثته وإن مات لم يرثها إذا كانت قد حاضت ثلاث حيض من يوم أقر على نفسه ولا رجعة له عليها، [وإن]⁽³⁾ أقر بالبتة لم يصدق في العدة ولم يتوارثا⁽⁴⁾، وما أنفقت من ماله يوم طلقها قبل أن تعلم فلا غرم عليها فيه لأنه فرط.

Translation:

Ṣaḥnūn asked Ibn al-Qāsim: What about a man who was on a travel and he returned, claiming that he had divorced his wife once or twice since a year? Ibn al-Qāsim said: Mālik said: What he claims is not accepted regarding the waiting period, unless there are witnesses regarding this matter. The woman waits from the day that her husband told her. If the man dies during that time, the woman inherits from him. If she dies, he does not inherit from her. If the woman had three menstruation periods from the day that he divorced her, she does not inherit from him and he cannot return to her. If⁹⁴¹ the man said: "I divorced her irrevocably", his word regarding the waiting period is not taken into consideration and they cannot inherit each other.⁹⁴² What the woman took for her maintenance from his money since he divorced her - without her knowing that a divorce had taken place - is not considered a debt on her part because it exceeded.

Commentary:

⁹⁴¹ In main ms. and mss. from Rabat (bā') and (ṭā'): *illā in 'aqqarra* (but he said). In the mss. from Zagora (zayn), Rabat (ḥā'), Algeria (jīm) and Tunisia (tā'): *wa in 'aqqarra* (if he said). This is the correct reading.

⁹⁴² Ṣaḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/446.

In this case, a man travelled and claimed that he divorced his wife a year ago but he cannot prove it because there is no witness regarding this issue. The woman should count her waiting period from the moment the news of the divorce had reached her. After three menstruation periods, her waiting period is completed but she has already been divorced for a year. She completes her waiting period in that way.

Question: 121

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Arabic text

قلت له: أرأيت من طلق امرأته وهو صحيح أو مريض واحدة أو اثنتين ثم مات وهي في العدة أتنقل إلى عدة الوفاة؟ قال: نعم. ولها الميراث⁽⁵⁾.

قلت: فإن طلقها ثلاثاً في مرضه ثم مات وهي في العدة. قال: قال مالك: ليس عليها أن تعد عدة الوفاة ولها الميراث⁽⁶⁾.

Translation:

Ṣaḥnūn asked Ibn al-Qāsim: What is your opinion regarding a man who was healthy or sick and divorced his wife with one or two *ṭalāq*, then he died while she was in her waiting period - does her *‘idda* turn into an *‘idda* of death? Ibn al-Qāsim: Yes. She is entitled to inherit from him.⁹⁴³

Ṣaḥnūn asked Ibn al-Qāsim: What if a man divorced his wife with three *ṭalāqs* while he was sick, then he died while she was in her waiting period? Mālik said: She does not have the *‘idda* of death and she inherits from him.⁹⁴⁴

Commentary:

According to Qur’an: “Divorced women shall wait by themselves for three periods; and it is not lawful for them to hide what God has created in their wombs; if they believe in God and the Last Day. In such time their mates have better right to restore them, if they desire to set things right. Women have such honourable rights as obligations, but their men have a degree above them; God is All-mighty, All-

⁹⁴³ Ibid, vol. 5/429.

⁹⁴⁴ Ibid, vol. 5/428-429.

wise.”⁹⁴⁵ In the case here considered, the husband died when his wife was in waiting period, so she begins the ‘idda of death. This point is specified with this Qur’anic verse: “And those of you who die, leaving wives, they shall wait by themselves for four months and ten nights; when they have reached their term then it is no fault in you what they may do with themselves honourably. God is aware of the things you do.”⁹⁴⁶

Question: 122

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Arabic text

وفي سماع أبي زيد قلت له: أرأيت الأمة والمكاتبة والمدبرة إذا مات عنهن أزواجهن كم عدتهن؟ قال: على النصف من عدة الحرائر وذلك شهران وخمس ليال.

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قال محمد: وإذا كانت الأمة قد يئست من الحيض أو كانت ممن لا تحيض وقد بلغت الوطء فإنها إذا اعتدت عدة الوفاة أقامت ثلاثة أشهر من يوم توفي عنها زوجها، وكذلك تنكح وهو قول مالك.

قلت له: فكم عدة أم الولد إذا مات عنها زوجها؟ قال: مثل عدة الأمة. قلت: فكم عدتها إذا هلك عنها سيدها؟ قال: حيضة وهو قول مالك. وقد قلت لمالك: فإن هلك وهي في دم حيضها. قال: لا يجزئها ذلك إلا بحيضة أخرى.

Translation:

In the audition (*samā’*) of Abū Zayd, Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a female slave, *mukātaba*⁹⁴⁷ and *mudabbara*⁹⁴⁸, when their husbands die, how long are their waiting periods? Ibn al-Qāsim answered: It is half of the free woman’s ‘idda, that is, two months and five nights.

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⁹⁴⁵ Al-Baqara: 228, <http://tanzil.net/#trans/en.arberry/2:228>

⁹⁴⁶ Al-Baqara: 235, <http://tanzil.net/#trans/en.arberry/2:235>

⁹⁴⁷ [k t b]: [mukātaba]: The slave who has a contract of manumission, *Mu’jam lughat al-fuqahā’*, edited by Hāmid Sādiq Qanībi and Qutb Mustafa Sanū, p. 424.

⁹⁴⁸ [d b r]: [mudabbara]: A slave who has been freed at the death of her master, *ibid*, p. 387.

Muḥammad said: When a female slave has menopause or never menstruates but she is able to have sexual intercourse, she waits three months since the day that her husband died. Then she can marry, it is the doctrine of Mālik.

Saḥnūn asked Ibn al-Qāsim: How long is the *'idda* of the *umm walad*⁹⁴⁹? Ibn al-Qāsim answered: It is like the *'idda* of the female slave. Saḥnūn asked: How long is her *'idda* when her master died? Ibn al-Qāsim answered: A menstruation period, it is the doctrine of Mālik. Ibn al-Qāsim asked Mālik: What if she was menstruating when her master died? Mālik said: This menstruation is not enough, one more menstruation is necessary for her.

Commentary:

The situations of widowed slaves are explained in the *Muwaṭṭa'*: "Mālik said: 'A slave-girl mourns her husband when he dies for two months and five nights like her *'idda*'. Mālik said: 'An *umm walad* does not have to mourn when her master dies, and a slave-girl does not have to mourn when her master dies. Mourning is for those with husbands'."⁹⁵⁰ Also, their waiting period is half of that of a free woman as explained in his *Risāla* by Ibn Abī Zayd al-Qayrawānī: "The *'idda* for a slave girl, who is partially free, it is two months and five days, except in the case of an older woman whose period is delayed. Then she waits until the doubt is removed."⁹⁵¹

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Arabic text

قلت لمالك: فلو كان غاب عنها [زوجها]⁽¹⁾ زمانا ثم حاضت / حضا كثيرا ثم هلك في غيبته. فقال: لا يجزئها ما حاضت قبل وفاته⁽²⁾.

Translation:

⁹⁴⁹ *Umm walad*: A mother who is pregnant from her master's child; neither she nor her child may be sold. Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 194.

⁹⁵⁰ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 245.

⁹⁵¹ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 114.

Ibn al-Qāsim asked Mālik: What if a husband was missing for a while, then his wife menstruated a lot, then her husband died while he was missing. Mālik said: The menstruations before his death is not sufficient for her.⁹⁵²

Commentary:

In this case, a man was missing and died. His wife cannot remarry without having the waiting period, this regardless whether she has menstruated or not. She should have the waiting period because of his death, that is, 4 months and 10 days.

Question: 124

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Arabic text

قلت له: فكم عدتها إذا كانت لا تحيض فأعتقها سيدها⁽³⁾ أو أعتقها هل يكون لها في عدتها السكنى؟ قال: نعم. وكذلك إذا أعتقها وهي حامل منه فعليه نفقتها⁽⁴⁾.
ولمالك في سماع ابن القاسم في أم الولد يتوفى عنها سيدها وهي حامل أنها لا نفقة لها، لا من جملة المال ولا من حصة الولد، وهي في هذا كالحرّة.

Translation:

Ibn al-Qāsim asked Mālik: What about the waiting period of a woman who does not menstruate if her master⁹⁵³ sets her free or she was set free by another person - is dwelling provided during her 'idda period? Mālik said: Yes. If she was set free and she was pregnant, he should provide her maintenance.

Mālik said in the audition (*samā'*) of Ibn al-Qāsim regarding an *umm walad* whose master died and she was pregnant that there is no maintenance for her, neither she has share of the whole property nor the child's property, she is in this like the free woman.

Commentary:

⁹⁵² The woman should perform the waiting period. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/436.

⁹⁵³ As an addition in the *Mudawwana*: or when the husband dies, how long she waits? Ibn al-Qāsim said: Three months, this is the doctrine of Mālik. I say so too. Ibid, vol. 5/437.

When a slave is set free, her position changes and she becomes a free woman. Hence, if she is set free before divorce, her maintenance is provided if she is pregnant. However, if her husband died when she is pregnant, there is no maintenance for her.

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Arabic text

قلت له: أرأيت لو أن امرأة [نعي]⁽⁵⁾ لها زوجها فتزوجت ودخل بها زوجها ثم قدم الأول. قال: قال مالك: ترد إلى زوجها الأول ولا خيار لها في ذلك، ولا يقر بها حتى تحيض ثلاث حيض، إلا أن تكون حاملا فحتى تضع حملها، وإن كانت قد يئست من

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المحيض فثلاثة أشهر. قال مالك: وليس هذه بمنزلة امرأة المفقود وذلك أنها كذبت وجهلت ولم يكن إعدار من تربص ولا تفريق إمام⁽¹⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a woman who was informed about the death of her husband, then she married another person and they had sexual intercourse, then her first husband appeared. Ibn al-Qāsim said: Mālik said: She is returned to the first husband and she does not have right of choice, she cannot stay with the first husband before three menstruation periods have passed. But if she is pregnant, she waits until she gives birth. If she has menopause, she waits three months.⁹⁵⁴

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Mālik said: This issue is not similar to the case of the woman whose husband is missing. In this issue she was told a lie and she did not know that was the case. There is no excuse for her waiting, and separation carried out by the authority (*imām*) is not necessary.

Commentary:

⁹⁵⁴ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/447.

In this case, the woman was informed about the death of her husband and she married another person with whom she had sexual intercourse before her first husband reappeared. After having the waiting period, she has to return to the first husband. If she is pregnant, this period is not three months.

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Arabic text

قال ابن القاسم: قال مالك: وأكره أن يواعد الرجل الرجل في وليته أو ابنته⁽²⁾ أن يزوجه إياه وهي في عدة من طلاق أو وفاة. قال ابن وهب: قال مالك في الرجل يخطب المرأة في عدتها جاهلا بذلك ويسمي [لها]⁽³⁾ الصداق ويواعدها. قال: فراقها أحب إلي دخل بها أو لم يدخل وتكون تطليقة بها، ثم يدعها حتى تحيض ثم يخطبها بعد مثل الخطاب⁽⁴⁾.

قال سحنون: قيل لغير ابن القاسم: أرأيت من تزوج في عدة وأصاب في غير العدة. فقال: هو بمنزلة من تزوج في العدة ومس في العدة⁽⁵⁾.

Translation:

Ibn al-Qāsim said: Mālik said: I do not find appropriate that guardians make a deal on a boy or a girl for marriage promise if the woman is in her waiting period because of *ṭalāq* or death. Ibn Wahb said: Mālik was asked regarding a man who proposed marriage to a woman who was in her waiting period without him knowing that and who specified the amount of the dower to marry. Mālik said that the most appropriate thing is to separate them, this regardless of whether they had sexual intercourse or not. This is one *ṭalāq*. Then the man has to release her until she has a menstruation period, then he can propose marriage to her again.⁹⁵⁵

Ṣaḥnūn said: Another jurist apart from Ibn al-Qāsim was asked: What is your opinion regarding a woman who married during her waiting period and who had sexual intercourse out of the waiting period. He said: This issue is similar to the

⁹⁵⁵ Ṣaḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/439.

case of someone who marries during the waiting period and has sexual contact during that period.⁹⁵⁶

قال سحنون: وقد قال المخزومي: لا يكون يدعا⁽⁶⁾ إلا بالوطء في العدة. قال سحنون: وقد قيل لغير ابن القاسم: فرجل توفي عن أم ولده ورجل أعتق أم ولده أو أعتق جاريته وكان يصيها، فتزوجن قبل أن تنقضي الحيضة فأصبنا بذلك النكاح. قال: يسلك بهن مسلك التزويج في عدة إذا أصاب وإذا لم يصب. قيل له: فلو أن رجلا زوج

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عبده أمتة أو غيرها ثم طلقها الزوج وقد كان دخل بها فأصابها سيدها في عدتها، هل يكون كالناكح في عدة؟ قال: نعم. وهو قول مالك⁽¹⁾.

Sahnūn said: al-Makhzūmī said: They do not abandon each other unless they had sexual intercourse during the waiting period. Sahnūn said: Another jurist apart from Ibn al-Qāsim was asked about a man who had an *umm walad* and died, a man who set free his *umm walad* or his female slave with whom he had sexual intercourse. All these women married before having finished their menstruation periods and they had sexual intercourse thanks to the nuptials. Ibn al-Qāsim said: Their issues are similar to the case of a woman who married during her waiting period, regardless of whether they had sexual intercourse or not. Ibn al-Qāsim was asked: What if a man married off his slave with his

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female slave or someone else's slave, then the male slave divorced her after having sexual intercourse and his master had sexual intercourse with her during her waiting period - is it like nuptials during the waiting period? Ibn al-Qāsim answered: Yes. This is the doctrine of Mālik.⁹⁵⁷

Commentary:

A woman after being divorced should have a waiting period with the exception of some according to a variety of cases here discussed. Marriage during the

⁹⁵⁶ Ibid, vol. 5/439.

⁹⁵⁷ Ibid, vol. 5/441.

waiting period is forbidden, this regardless of having had sexual intercourse out of the waiting period or not. Marriage should come into being after the waiting period has been completed. Hence, making promise of marriage during the waiting period is not appropriate.

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Arabic text

**باب فيما يجب للمعتدة من طلاق في النفقة والسكنى
وما يجوز لها فعله وما لا يجوز**

قال سحنون: قلت لابن القاسم⁽²⁾: هل للمختلعة نفقة؟ فقال: لا، إلا أن تكون حاملا وكذلك المبتوتة لا نفقة لها إلا أن تكون حاملا لقول الله ﷻ: ﴿وَإِنْ كُنَّ أُولَاتٍ حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ﴾⁽³⁾. فجعل للحوامل اللاتي قد برئن من أزواجهن السكنى والنفقة، فأما من لم يبين منهن فلازم لزوجها أن يسكنها وينفق عليها ويكسوها حاملا كانت أو غير حامل، والميراث بينها وبين زوجها ما كانت في عدتها.

قال ابن نافع: وقال مالك: ليس عندنا في نفقة الحامل المطلقة شيء معلوم على غني أو فقير لا في المدائن ولا في القرى ولا لغلاء سعر ولا لرخصه، إنما ذلك على قدر يسره وعسره، وإن كان زوجها يتسع [لخدمتها]⁽⁴⁾ أخدمها.

قال مالك: وإن مات زوجها وقد كان طلقها أو اختلعت منه وهي حامل لم يكن يبرأ من نفقة حملها انقطعت النفقة عنها⁽⁵⁾.

Translation:

Chapter about the obligatory things for a woman who is in waiting period because of *ṭalāq* regarding dwelling and maintenance and licit and illicit things for her

Sahnūn asked Ibn al-Qāsim: Is there a matrimonial maintenance for a woman who makes *khul*? Ibn al-Qāsim said: No, except if she is pregnant. It is the same for the woman who is divorced by irrevocable *ṭalāq*, there is no matrimonial maintenance for her. But if she is pregnant, then God says: "If they are with child,

expend upon them until they bring forth their burden."⁹⁵⁸ God makes possible the right of dwelling and matrimonial maintenance for pregnant women. The women who are not divorced by irrevocable *ṭalāq* are provided dwelling, maintenance and dress by their husbands, this regardless of whether they are pregnant or not. The issue of legacy occurs between them during the waiting period.

Ibn Nāfi' said: Mālik said: According to our doctrines, there is no specific standard for the pregnant woman's matrimonial maintenance by rich or poor, in city or village, for top or bottom level. The husband gives it according to his financial situation. If the husband's financial situation improves, he can hire a servant.

Mālik said: If the husband of a woman died, and they had divorced or made *khul'* while she was pregnant, the maintenance continues to be paid to her because of her pregnancy. After giving birth, the maintenance is not paid to her anymore.⁹⁵⁹

Commentary:

When a woman makes *khul'* with her husband, she is not entitled to take maintenance from him as in the case of irrevocable divorce if she is not pregnant, this regardless of whether her financial situation is good or bad.⁹⁶⁰ This point is specified with this Qur'anic verse: *"Mothers shall suckle their children two years completely, for such as desire to fulfill the suckling. It is for the father to provide them and clothe them honourably. No soul is charged save to its capacity; a mother shall not be pressed for her child, neither a father for his child. The heir has a like duty. But if the couple desire by mutual consent and consultation to wean, then it is no fault in them. And if you desire to seek nursing for your children, it is no fault in you provide you hand over what you have given honourably; and fear God, and know that God sees the things you do."*⁹⁶¹

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⁹⁵⁸ Al-Ṭalāq: 6, <http://tanzil.net/#trans/en.arberry/65:6>

⁹⁵⁹ During the pregnancy, the maintenance should be provided by the man. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/338.

⁹⁶⁰ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 351.

⁹⁶¹ Al-Baqara: 233, <http://tanzil.net/#trans/en.arberry/2:233>

قلت له: فالصبية التي يجامع مثلها إذا دخل بها زوجها ثم طلقها وقد جامعها أو لم يجامعها أيلزمه السكنى لها؟ قال: إذا لزمت الجارية العدة لمكان الخلوة/ بها لزم الزوج السكنى.

قلت⁽¹⁾: فإن خلى [بها]⁽²⁾ في بيت أهلها ولم يرئها ثم طلقها وقال: لم أجامعها وصدقته الجارية أكون عليها عدة؟ قال: نعم. ولا سكنى على الزوج، وكذلك لو قالت: قد جامعني وهو منكر ذلك فالقول فيه [قوله]⁽³⁾ ولا سكنى عليه. [قلت]⁽⁴⁾: فإن كانت صغيرة لا يجامع مثلها دخل بها وطلقها البتة، أكون لها السكنى؟ فقال: لا؛ لأنها لا عدة عليها. قلت: فإن مات عنها وقد دخل بها وهي لا يجامع مثلها ألها السكنى؟ فقال: نعم؛ لأن عليها العدة، وإن لم يكن دخل بها فلا سكنى لها وتعتد في موضعها، إلا أن يكون قد اكرى لها منزلاً تكون فيه فأدى الكراء ومات عنها وهي في ذلك الموضع فهي أحق بذلك المسكن، والصغيرة والكبيرة في هذا سواء⁽⁵⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: What about a little girl whose peers are able to have sexual intercourse, then her husband divorced her and he may have had sexual intercourse with her or not - is providing dwelling necessary for her? Ibn al-Qāsim said: A waiting period is necessary for the female slave in the place where they had sex (*khalwa*)⁹⁶² and providing dwelling is necessary for the husband.

Sahnūn asked Ibn al-Qāsim: What if they had *khalwa* in the house of the woman's family before divorcing her, then he divorced her and the husband said: "I did not have sexual intercourse with her", and the woman agreed with what he said - is the waiting period necessary for her? Ibn al-Qāsim answered: Yes. Providing dwelling is not necessary for the man, it is similar to the case in which the woman says "He had sexual intercourse with me", but he denies it. The word of the man is taken into consideration in this issue, and providing dwelling is not necessary for him. Sahnūn asked: What about a little girl whose peers do not have sexual intercourse, the man had sexual intercourse with her and then he divorced her with three *ṭalāqs* - is providing dwelling necessary for her? Ibn al-

⁹⁶² See page 134.

Qāsim answered: No, because a waiting period is not necessary for her. Saḥnūn asked: What if the man died, he had sexual intercourse with her and her peers are not able to have sexual intercourse - is providing dwelling necessary for her? Ibn al-Qāsim answered: Yes, because a waiting period is necessary for her. If he did not have sexual intercourse with her, providing dwelling is not necessary for her, she waits the *'idda* where she had been in, but if the man rented a house to stay for her and paid the rent in cash, and then he died, the woman is more entitled to this property than others. This regardless of whether she is a little girl or a woman, they are equal in this issue.⁹⁶³

Commentary:

In this case, the dwelling issue is discussed under different circumstances. A man who divorces his wife whose peers are able to have sexual intercourse, should provide dwelling for her during the waiting period.⁹⁶⁴ This issue specified with this Qur'anic verse: *"Lodge them where you are lodging, according to your means, and do not press them, so as to straiten their circumstances. If they are with child, expend upon them until they bring forth their burden. If they suckle for you, give them their wages, and consult together honourably. If you both make difficulties, another woman shall suckle for him"*.⁹⁶⁵ However, under some specific conditions, he does not have to provide dwelling for his wife. If she is little girl whose peers are able to have sexual intercourse and the spouses agreed that they did not have sexual intercourse, the girl performs the waiting period, but dwelling is not provided for her. If the couple has a disagreement about having sexual intercourse, the man claims that they did not have sexual intercourse and the girl claims opposite, his word is taken into consideration. Dwelling is not provided for her. On the other hand, if the girl belongs to those whose peers do not have sexual intercourse and she had sexual intercourse with her husband and was divorced irrevocably, dwelling and waiting period are not necessary for her. However, if the man died and they had sexual intercourse, she has to perform the

⁹⁶³ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/471-472.

⁹⁶⁴ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 3491.

⁹⁶⁵ Al-Ṭalāq: 6, <http://tanzil.net/#trans/en.arberry/65:6>

waiting period because of the death and dwelling must be provided for her. If they did not have sexual intercourse, there is no dwelling for her.

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Arabic text

ولمالك في سماع ابن القاسم: سئل عن الرجل يطلق امرأته فيريد سفرا فتدعي حملا وتقول: ضع لي نفقتي. فقال: ليس ذلك لها، وهو في هذا كالمقيم، ولكن يستأن بها فإن استمر بها [حمل]⁽⁶⁾ [لها]⁽⁷⁾ ذلك كله فيدفع إليها ولا يمنع⁽⁸⁾ [من سفره]⁽⁹⁾.

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قال مالك: وإن أنفق عليها طائعا ثم تبين أنه ليس بها حمل لم يكن عليها غرم، فإن أنفق عليها بقضاء من السلطان غرمت ما أنفق عليها.

قال محمد: ولا بن القاسم في سماع يحيى أنه قال في المطلقة المبتوتة وهي حامل تطلب الكسوة، أنها إن كانت في أول الحمل فلها الكسوة، وإن كان لم يبق من أجل الحمل إلا ثلاث أشهر ونحوها قوم لها ما كان يصير لتلك الأشهر من الكسوة، ولو كسيت في أول الحمل ثم أعطيت تلك القيمة دراهم⁽¹⁾.

Translation:

In the audition (*samā'*) of Ibn al-Qāsim, Mālik said: It was asked regarding a man who divorced his wife, then he wanted to go on a journey. The woman claimed that she was pregnant and told him: "Ensure the maintenance for me". Mālik answered: There is no maintenance for her, the man in this situation is like the man who continues to live in his place, but he has to stay with her to check if the pregnancy continues with her, in which case maintenance is collected for the woman and given to her. Then the man is not refrained⁹⁶⁶ from his journey.

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⁹⁶⁶ This transmission was compiled by al-'Utbi and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 4/335.

Mālik said: If the man pays out his wife voluntarily, then he learns that she is not pregnant, she does not owe anything to him. If the man pays out his wife on the orders of the political authority (*al-sultān*), then she owes him.

Muḥammad said: In the audition (*samā'*) of Yaḥyā, Ibn al-Qāsim said: If a woman who is pregnant and who is divorced with irrevocable *ṭalāq* demands clothes, if she is in the early period of the pregnancy, her husband should provide her clothes. If only three months remains and less for birth taking place, the necessary things during this period are provided to her. If clothes were provided for her in the early period of the pregnancy, then the remaining part is given to her in cash.⁹⁶⁷

Commentary:

In the first case, the divorced woman claimed that she was pregnant and demanded maintenance. Her husband wanted to travel and according to Mālik, he cannot be detained from travelling. However, he should check whether she is pregnant or not before leaving. If the woman tells the truth, her maintenance is provided by the man before the journey. If the woman lies about her pregnancy and the man already paid her maintenance, she does not have to pay it back to him unless they divorced by the order of the political authority. On the other hand, if they divorced irrevocably and the woman is pregnant, providing her clothes by the man depends on the duration of the pregnancy.

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Arabic text

قال سحنون: [قلت لابن]⁽²⁾ القاسم: رأيت من طلق امرأته طلاقاً بائناً أو ثلاثاً فكانت في سكنى الزوج. فقال: هذه مخالفة للمتوفى عنها؛ لأنه حق قد وجب لها على الزوج في حياته وليس موته بالذي يضع [عنه]⁽³⁾ حقا قد كان وجب عليه وكذلك بلغني عن مالك⁽⁴⁾.

⁹⁶⁷ Ibid, vol. 4/439-440.

وفي سماع ابن القاسم أن مالكا قال: إن الحامل إذا اختلعت من زوجها وطلقها طلاقا بائنا فلزمت نفقتها ثم مات عنها قبل أن تضع حملها إن النفقة تسقط عنه بموته⁽⁵⁾.
قال محمد: تدبر تفريق ابن القاسم بين السكنى والنفقة ففيه نظر وفي الذي قاله تنازع⁽⁶⁾.

Translation:

Saḥnūn said: I asked Ibn al-Qāsim:⁹⁶⁸ What is your opinion regarding a man who divorced his wife irrevocably or with three *ṭalāqs* and the woman was living in the house of the man. Ibn al-Qāsim answered: This case is different from that of the woman whose husband died, because in this case he has acted according to what he is obliged to provide for her while he is alive, and his death would not detract the right that he has acted according to [i.e. providing a dwelling]. This is what has reached me from Mālik.⁹⁶⁹

Mālik asked in the audition (*samā'*) of Ibn al-Qāsim regarding a pregnant woman who made *mukhāla'a* with her husband, he divorced her with irrevocable *ṭalāq* so the man had to pay her maintenance. Then he died while he was not living with her and before she gave birth. Has the maintenance expired with his death?⁹⁷⁰

Muḥammad answered: Ibn al-Qāsim separated dwelling and maintenance; there is here room for speculation. There is controversy regarding his doctrine.⁹⁷¹

Commentary:

Ibn al-Qāsim's doctrines on the issues here discusses gave rise to controversy. When irrevocable divorce comes into being between spouses, providing dwelling by the husband is not necessary. The right of dwelling for the wife is not cancelled because of death, but it disappears with irrevocable divorce. On the

⁹⁶⁸ In the main ms.: *Qultu li Ibn* but the correct word: *Qala* (He said), as in the ms. from Rabat (ṭā') and the *Mudawwana*. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/475.

⁹⁶⁹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/475-476.

⁹⁷⁰ Ibid, vol. 5/338.

⁹⁷¹ Ibid, vol. 5/475-476.

other hand, providing matrimonial maintenance is cancelled with the death of the husband, but providing dwelling is not cancelled.

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Arabic text

قال ابن القاسم: ومن طلق امرأته البتة وهي في بيت بكراء فأفلس قبل أن تنقضي عدتها فأهل الدار أحق بمسكنهم وتخرج المرأة منه.
قلت: فالمطلقة والمتوفى عنها زوجها حتى تنقطع سكنها إذا قالت: لم تنقض [العدة].
قال: حتى تنقضي الريبة.

Translation:

Ibn al-Qāsim said: Whoever divorces his wife with irrevocable *ṭalāq* while the woman lives in a rented house, if the man becomes bankrupt before the waiting period ends, the house owners are more entitled to the house, which means that the woman has to vacate the house.

Ṣaḥnūn asked: What about a divorced woman whose husband died and her dwelling period ended, and the woman says: "My waiting period has not finished yet". Ibn al-Qāsim answered: Until doubt disappears.

Commentary:

When a couple divorces with irrevocable *ṭalāq*, the man does not have to provide dwelling. Hence, the owners of the house where the woman lives in are more entitled to stay there. However, if the woman claims that her waiting period did not finish yet, they should wait until it finishes and it is revealed whether she is pregnant or not.

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Arabic text

قلت له: فلو أن امرأة كانت في مسكن أكرته من مالها فطلقها زوجها⁽¹⁾ فلم [تطلبه]⁽²⁾ بالسكنى حتى انقضت عدتها ثم طلبته. قال: ذلك لها، وكذلك إن كان لم يفارقها وطلبت منه كراء مسكن الدار بغير انقضاء السكنى فذلك لها أيضا إن كان موسرا أيام [سكنت]⁽³⁾.

قال محمد: قال بعض أهل النظر معنى هذه المسألة على أنها إنها أكرت المسكن بعد ما تزوجها، وأما إن تزوجها وهي في بيت بكراء فقد قال في كراء الدور: الإكراء على الزوج إلا أن [يكون]⁽⁴⁾ له بيت له أنها إنما تسكن بكراء.

Translation:

Saḥnūn asked Ibn al-Qāsim: What about a woman who lived in a rented house that she paid for and her husband divorced her. The woman did not demand a dwelling from him, her waiting period ends, then she demanded that. Ibn al-Qāsim answered: She is entitled to it, this is similar to the case of spouses who did not separate, and the woman demands the rent of the place before her waiting period ends: she is entitled to that, if the man has the financial means during these days.⁹⁷²

Muḥammad said: Some of the people of speculative reasoning said that the meaning of the issue regarding this woman is that if she rented the dwelling after marriage, it is like that, but if the man married her while she was in her own rented house, they said regarding the renting of houses: Paying rent is responsibility of the man but if he has a house, she can live there paying him rent.

Commentary:

In this case, a woman stayed in the dwelling she rented with her own money after divorce. She did not demand a dwelling from her husband to stay during her waiting period, but she demanded it later. The man should provide a

⁹⁷² In the main ms. *sakata* (making silent), in the mss. from Rabat (ḥā') and (ṭā'): *sakanat* (dwelling) as in the *Mudawwana*. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/477-478.

dwelling for her. If the man has a different house, she can stay there. If he does not have another house, they can stay in the same house.⁹⁷³

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Arabic text

قلت له: فإن طلقها وهو عديم أيكون لها أن [تتبعه]⁽⁵⁾ بكراء المسكن؟ قال: لا. وقد سئل مالك عن امرأة طلقها زوجها وهي حامل وهو معسر أعليه نفقتها؟ قال: لا. إلا أن يوسر في حملها [فتأخذه]⁽⁶⁾ بما بقي من أيام حملها⁽⁷⁾.

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قلت: فالمستحاضة⁽¹⁾ إذا طلقها زوجها [والعنين]⁽²⁾ إذا فرق السلطان بينهما أيكون/لها [السكنى]⁽³⁾ ما دامت في العدة؟ قال: نعم⁽⁴⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What if a man divorced his wife while he was poor - can she demand the rent of her dwelling? Ibn al-Qāsim answered: No. Mālik was asked regarding a woman whose husband divorced her while she was pregnant and the man was poor - should he pay her maintenance? Mālik answered: No. However, if the man has financial means during her pregnancy, she takes the maintenance until she gives birth.⁹⁷⁴

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Saḥnūn asked: What about the *mustaḥāḍa* woman whose husband divorced her and about the woman who is separated from her impotent husband by the political authority (*al-sultān*) - is providing dwelling during the waiting period necessary for both of them? Ibn al-Qāsim answered: Yes.⁹⁷⁵

Commentary:

This issue is explained in the *Muwattaʿa*: “Yaḥyā related to me from Mālik from Ibn Shihāb who said: ‘The woman who is absolutely divorced does not leave her

⁹⁷³ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/111.

⁹⁷⁴ Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/478.

⁹⁷⁵ Ibid, vol. 5/479.

house until she is free to remarry. She has no maintenance unless she is pregnant. In that circumstance the husband spends on her until she gives birth.' Mālik said: 'This is what is done among us'.⁹⁷⁶ On the other hand, if the husband is not able to provide dwelling and maintenance, he is not forced to do that. He should provide the maintenance of the woman during her pregnancy only if he has the financial means. If his financial situation allows him, he should provide for them, even if he was divorced because of sexual impotency and the woman is *mustahāda*.

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Arabic text:

قلت له: فهل على المطلقة إحداث؟ قال: لا. مبتوتة كانت أو غير مبتوتة⁽⁵⁾. قلت: فهل لها أن تتحول في عدتها؟ فقال: إذا خافت سقوط المنزل فلها أن تتحول، وكذلك إن كانت في موضع يخاف عليها فيه اللصوص وما أشبه ذلك، وإن انتقلت إلى موضع لضرورة اعتدت فيه⁽⁶⁾.

قال ابن القاسم: ولو أن معتدة مطلقة خرجت فسكنت موضعا غير بيتها ثم طلبت من زوجها كراء البيت الذي اعتدت فيه لم يكن ذلك لها. قال: وإذا خرجت من بيتها الذي يلزمها أن تعتد فيه من غير ضرورة أجبرها السلطان على الرجوع⁽⁷⁾. قال ابن القاسم: ومن طلق امرأته تطليقة يملك [فيها]⁽⁸⁾ الرجعة فليس له أن يسافر بها إلا من بعد أن يراجعها⁽⁹⁾.

قال ابن القاسم: وللمعتدة من طلاق أو وفاة أن تبيت في أسطوانها وفي غير البيت الذي فيه متاعها وحيث ما أرادت من حوزها الذي تغلق عليه باب حجرتها⁽¹⁰⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: Is mourning necessary for a divorced woman? Ibn al-Qāsim answered: No. This regardless of whether she was divorced by

⁹⁷⁶ Mālik b. Anas, *Al-Muwattaʿaʾ of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 237.

irrevocable *ṭalāq*, or revocable *ṭalāq*.⁹⁷⁷ Saḥnūn asked: Can she move to another house during her waiting period? Ibn al-Qāsim said: If she is afraid that the house could collapse, she can move, also if the house is in a location where she is afraid of thieves, she can move and also because of similar issues. In sum, if she moved to a new dwelling because of a necessity, she can continue her waiting period in the new place.⁹⁷⁸

Ibn al-Qāsim said: If a divorced woman left the place where she was having her waiting period and stayed in another place, then she demanded from her husband the rent of the new place where she had the waiting period, she cannot do that. Saḥnūn asked: If the woman left the place where she was supposed to wait without an excuse, the political authority (*al-sulṭān*) should force her to return to that place.⁹⁷⁹

Ibn al-Qāsim said: Whoever divorces his wife with revocable *ṭalāq*, he can go back to her and is not obligatory for him to travel with her until he has returned to her.⁹⁸⁰

Ibn al-Qāsim said: A woman who had the waiting period because of *ṭalāq* or death has to pass the waiting period in her house or in another place in which her stuff is, she can wait in any place in which she can lock the door of her rooms.⁹⁸¹

Commentary:

The issue of dwelling is specified in the Qur'an: "*And those of you who die, leaving wives, let them make testament for their wives, provision for a year without expulsion; but if they go forth, there is no fault in you what they may do with themselves honourably; God is All-mighty, All-wise.*"⁹⁸² According to this verse, the most appropriate behavior for a mourning woman is not to change her dwelling. However, if there is a necessity to change the place – such as in the fear of the house would collapse or theft - she can change it. If the woman changed her place

⁹⁷⁷ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/430.

⁹⁷⁸ Ibid, vol. 5/458.

⁹⁷⁹ Ibid, vol. 5/459-460.

⁹⁸⁰ Ibid, vol. 5/464.

⁹⁸¹ Ibid, vol. 5/465.

⁹⁸² Al-Baqara: 240, <http://tanzil.net/#trans/en.arberry/2:240>

without any reason and demanded from the man the rent of the new place, she is returned to her previous place.⁹⁸³

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Arabic text

قلت: فمن طلق امرأته تطليقة يملك الرجعة فيها فهل تتزين له وتتشوف؟ قال: لا يدخل عليها ولا يرى شعرها ولا يأكل معها حتى يراجعها.

قلت: فهل يسع له أن ينظر إليها وإلى شيء من محاسنها تلذذا وهو يريد رجعتها؟ فقال: لا. حتى يراجعها وإن كان معها فلينتقل عنها وهو قول مالك⁽¹⁾.

قلت: فإن طلقها طلاقاً باتاً أو بائناً أو طلاقاً يملك فيه الرجعة وليس [لها]⁽²⁾ إلا بيت واحد الذي كانا فيه. فقال: قال مالك: يخرج عنها ولا يكون معها في حجرة تغلق عليها. قال: وإذا كانت داراً جامعة فلا بأس أن يكون معها في دار [تكون]⁽³⁾ هي في بيت وهو في بيت⁽⁴⁾.

Translation:

Saḥnūn asked: When a man divorced his wife with revocable *ṭalāq*, can she adorn herself and look forward to him? Ibn al-Qāsim answered: No, he cannot go near by her, he cannot look at her hair, he cannot eat together with her before returning to her.

Saḥnūn asked: Can he look at her or at any part of her beauty lasciviously if he wants to return to her? Ibn al-Qāsim answered: No, until he returns to her. If he is with her, he should depart from her. This is the doctrine of Mālik.⁹⁸⁴

Saḥnūn asked: What if a man divorces his wife with *bā'ina* or *bātta* or revocable *ṭalāq*, and they do not have but a house in which they can stay. Ibn al-Qāsim answered: Mālik said: He goes away and he does not stay with her in the same

⁹⁸³ Karaman, Dönmez, Çağrı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 358.

⁹⁸⁴ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/424.

lockable room. Ibn al-Qāsim said: When they are in a compound house, there is no problem to stay in it together but they should be in different rooms.⁹⁸⁵

Commentary:

In this case, a man divorced his wife revocably so he cannot return to her unless the woman marries another man and has sexual intercourse with him. This is specified in the Qur'an: *"If he divorces her finally, she shall not be lawful to him after that, until she marries another husband. If he divorces her, then it is no fault in them to return to each other, if they suppose that they will maintain God's bounds. Those are God's bounds; He makes them clear unto a people that have knowledge."*⁹⁸⁶ The man cannot look at the beauty of the women before returning to her. On the other hand, even if they do not have another house to stay, they cannot stay in the same room. They only can stay in the same house if the house is big and has various independent parts.⁹⁸⁷

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Arabic text

قلت له: أرأيت الأمة إذا طلقها زوجها فأبت طلاقها، أكون لها السكنى على زوجها أم لا؟ فقال: قال مالك: تعتد في بيت زوجها إذا كانت تبيت عنده. قال ابن القاسم: وإن كانت تبيت عند أهلها فلا سكنى لها عليه. قال ابن القاسم: وسئل مالك عن العبد يطلق [امرأته]⁽⁵⁾ وهي حرة أو أمة وهي حامل [منه]⁽⁶⁾ أعليه لها نفقتها؟ فقال: لا. إلا أن يعتق وهي حامل فينفق على الحرة ولا ينفق على الأمة، إلا أن يعتق الأمة بعد ما أعتق وهي حامل، فينفق عليها في حملها لأن الولد ولده⁽⁷⁾.

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⁹⁸⁵ Ibid, vol. 5/465-466.

⁹⁸⁶ Al-Baqara: 230, <http://tanzil.net/#trans/en.arberry/2:230>

⁹⁸⁷ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 346.

قال سحنون: وهذا في الطلاق البائن. وقال ابن القاسم: وإذا كانت الأمة تحت الحر فطلقها البتة وهي حامل فلا نفقة لها عليه، وإن أعتقت قبل أن تضع فعليه أن ينفق عليها حتى تضع حملها لأنه إنما ينفق على ولده⁽¹⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a female slave whose husband divorced her, then she refused divorce, is providing dwelling necessary for her? Ibn al-Qāsim answered: Mālik said: She waits in the house of her husband if she used to spend the night there. Ibn al-Qāsim said: If she used to spend the night in the house of her family, he does not have to provide a dwelling for her. Ibn al-Qāsim said: Mālik was asked regarding a slave who divorced his pregnant wife who was free or slave - is matrimonial maintenance necessary for her? Mālik answered: No. However, if the male slave is set free and his wife is pregnant, he pays the maintenance but if his wife is slave, he does not pay it. If both of them are set free then she gets pregnant, he pays her out during her pregnancy because the child is his child.⁹⁸⁸

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Saḥnūn said: This in case of irrevocable divorce. Ibn al-Qāsim said: If a female slave is married to a free man, then he divorced her with three *ṭalāqs* while she is pregnant, there is no matrimonial maintenance for the woman. If she is released before giving birth, her husband should pay out until she gives birth because he pays out to his child.⁹⁸⁹

Commentary:

When a man divorces his wife, he should provide her maintenance during the waiting period. However, it is not the same for a female slave. If she was not set free, her maintenance does not belong to him. Mālik said: "Neither a free man nor a slave who divorces a slave-girl nor a slave who divorces a free woman, in an

⁹⁸⁸ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/473.

⁹⁸⁹ Ibid, vol. 5/477.

irrevocable divorce, is obliged to pay maintenance even if she is pregnant, and he cannot return to her."⁹⁹⁰

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Arabic text

باب في المراجعة وتصديق المرأة على العدة

ومن جاءت بولد بعد العدة

قال سحنون: قلت لابن القاسم: رأيت من طلق امرأته تطليقة أو تطليقتين ثم قال لها وهي في العدة: قد راجعتك. فقالت مجيبة: قد انقضت عدتي. فقال: هي مصدقة فيما قالت إذا كان من كلامها سببا بكلامه، وقد مضى من عدد الأيام من يوم طلقها إلى اليوم الذي قالت فيه قد انقضت عدتي ما تنقضي فيه⁽²⁾ عدة بعض النساء، إذا كان ادعاؤها ذلك من حيض، وأما إن كان قالت: قد استسقطت فهي مصدقة، وإن كان من بعد ما طلقت بيوم أو أقل. قال سحنون: / قال أشهب: ومن الدليل على أنها تصدق في انقضاء العدة قول الله ﷻ: ﴿وَلَا تَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ﴾⁽³⁾ يعني من الحيضة والحمل، فجعل العدة إليهن لما حرم عليهن من كتمانهن⁽⁴⁾.

قلت لابن القاسم: فإن سكنت حين أشهد على رجعتها ثم قالت بعد ذلك بيوم أو بيومين: إنك حين أشهدت علي [وراجعتني]⁽¹⁾ قد كانت عدتي انقضت. قال: لا تصدق⁽²⁾.

Translation:

Chapter about the return of a husband to his wife and affirmation of a woman regarding the waiting period and giving birth to a child after the waiting period

⁹⁹⁰ Mālik b. Anas, *Al-Muwattaʿaʾ of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 235.

Saḥnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a man who divorced his wife with one or two *ṭalāqs*, then he told her during the waiting period: “I have returned to you”. She answered: “My waiting period has ended”. Ibn al-Qāsim answered: What she says has to be considered the truth if her words were in answer to him and if as much time has passed as that corresponding to the waiting periods of ordinary women to be completed, from the day she was divorced until she said those words. If she menstruates during the waiting period and if she said: “I miscarried”, her word is taken into consideration even if she was divorced for a day or less. Saḥnūn said: Ashhab said: The evidence that confirms that the woman is to be believed regarding the end of the waiting period is that God said: “*It is not lawful for them to hide what God has created in their wombs*”⁹⁹¹. It means menstruation and pregnancy. The waiting period was imposed on women because it was forbidden to them to hide menstruation and pregnancy.⁹⁹²

Saḥnūn asked Ibn al-Qāsim: What if the woman kept silent when the man brought a witness in order to return to her, then after one or two days she said: “When you brought the witness and returned to me, my waiting period had already ended”. Ibn al-Qāsim answered: No, her word is not taken into consideration.⁹⁹³

Commentary:

The return to his divorced wife by the husband after she had completed the waiting period is not accepted and the claim of the woman regarding this issue is accepted. If she claims that her waiting period has already ended or she has miscarried, her words are trusted because hiding her pregnancy is forbidden as specified in the Qur’an. She should say the truth. On the other hand, if she did not answer when her husband wanted to return to her and brought a witness, her word is not trusted because she should have said that her waiting period ended when the witness came. After some time has passed, her claim becomes invalid.

⁹⁹¹ Al-Baqara: 228, <http://tanzil.net/#trans/en.arberry/2:228>

⁹⁹² Saḥnūn b. Sa’īd, *Al-Mudawwana al-kubrā*, vol. 5/328.

⁹⁹³ Ibid, vol. 5/327-328.

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Arabic text

قلت لابن القاسم: فإن كذبها الزوج في قولها قد أسقطت أعلينا اليمين؟ قال: ليس في هذا يمين، وأو أنها رجعت وصدقت الزوج لم يقبل قولها ولم يكن له عليها رجعة.

قلت: فإن أسقطت سقطاً لم يتبين خلقه. فقال: قال مالك: ما استبين النساء من مضغة أو علقه أو شيء أنه ولد فالعدة تنقضي له، وتكون الأمة به أم ولد.

Translation:

Sahnūn asked Ibn al-Qāsim: What if the man denied her claim that she miscarried - is an oath necessary for her? Ibn al-Qāsim answered: There is no oath for that issue, if she returned and approved him, her word is not accepted, there is no return for her.

Sahnūn asked: What if the woman miscarried without being fully aware that this is what happened? Ibn al-Qāsim answered: Mālik said: Women should have expert information regarding whether what happened was an embryo or a blood clot or something else that may look like a child. The waiting period ends for her, and the female slave becomes *umm walad*.

Commentary:

As explained in the previous cases, when a woman miscarries, she is not sworn. However, if she is not sure whether she miscarried or not, women who have expert information about this issue should be consulted. After their declarations, her waiting period ends or continues. If the woman is a slave, her position changes, she becomes *umm walad*.

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Arabic text

قلت: فإن زعمت أنها حاضت ثلاث حيض في شهر. فقال: قال مالك: يسأل النساء عن ذلك فإن كن يحضن كذلك ويظهرن⁽³⁾ [له، كانت فيه مصدقة. قلت: فإن قالت في مقدار ما تحيض فيه ثلاث حيض: قد دخلت في الدم]⁽⁴⁾ من الحيضة الثالثة والزوج يسمعها، ثم قالت: بعد ذلك مكانها أنها كاذبة ونظر النساء إليها فوجدنها غير حائض أ يكون للزوج أن يرتجعها؟ قال: لا. إلا بنكاح جديد ولا ينظر في هذا إلى نظر النساء⁽⁵⁾.

Translation:

Saḥnūn asked: What if the woman claims that she had three menstruations in a month? Ibn al-Qāsim answered: Mālik said: This issue should be consulted with women who have expert information, if it is possible that she menstruated like that she needs to be cleansed,⁹⁹⁴ and the woman is considered to have said the truth. Saḥnūn asked: What if she said regarding the quantity of her three menstruations period: "When my third menstruation was starting, my husband heard that", then she changed her declaration after that. She is to be considered a liar. The women who have expert information about that have to look at her case, if they realize that she is not menstruating, can she return to her husband? Ibn al-Qāsim said: No, new nuptials are necessary and the opinion of the women who have expert information is not taken into consideration.⁹⁹⁵

Commentary:

In this case, a woman claimed that she menstruated three times in a month. The women who have expert information are consulted about this possibility. If it is possible, she is trusted. On the other hand, if she claims something regarding her menstruation, then she changed her claims, she is not to be trusted. In this situation, she cannot return to her husband and the opinions of women who have expert information are not important, because in this issue only the word of the woman is taken into consideration.

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⁹⁹⁴ Ibid, vol. 5/330.

⁹⁹⁵ Ibid, vol. 5/329.

قال سحنون: قلت لأشهب: أرأيت إن قالت: قد حضت ثلاث حيض في شهرين. وقال الزوج: قد أخبرتني أمس أنك لم [تحضي]⁽¹⁾ فصدقته المرأة، أتصدق في قولها الثاني؟ قال: لا. ولو أقام الرجل بينة على ما زعم أنها قالت بالأمس أو قبل ذلك من الأيام لمثل ما لا تحيض فيه ثلاث حيض إلى هذا اليوم لم تصدق بما ادعت من الحيض، وكان للزوج عليها الرجعة ما [بينه وبين أن يمضي]⁽²⁾ من الأيام ما تحيض في مثله ثلاث حيض من اليوم الذي قالت فيه إني [لم]⁽³⁾ أحض شيئاً⁽⁴⁾.

Translation:

Saḥnūn said: I asked Ashhab: What is your opinion regarding a woman who says: "I menstruated three times in two months", but her husband said: "You told me that yesterday you did not menstruate", and the woman confirmed it - is her second statement accepted? Ashhab said: No. If the man brings a witness about what the woman said yesterday or about the impossibility of three menstruations before that day until this time, her claim regarding menstruation is not accepted. He can then return to her between the day that her peers have three menstruation periods and the day that she told she did ⁹⁹⁶ not menstruate.⁹⁹⁷

Commentary:

In this case, a woman firstly claimed her waiting period had ended, then claimed its opposite. If her husband brings a witness and proves that, he can return to her unless her waiting period is completed. The duration of her waiting period is accepted as that of her peers who have three menstruation periods. If her waiting period ended and the man could not bring a witness, divorce comes into being. Remarriage is not possible between them unless the woman has a new nuptial with another man.

⁹⁹⁶ There is no 'lam' in the passage of the *Mudawwana* quoted here: Ibid, vol. 5/331.

⁹⁹⁷ Ibid, vol. 5/330-331.

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Arabic text

وفي رواية ابن وهب أن علي بن حسين⁽⁵⁾ طلق امرأته من أهل العراق تركها خمسة وأربعين ليلة ثم أراد أن يرجعها. فقالت: قد حضت ثلاث حيض وأنا اليوم حائض لم أظهر من الثالثة بعد، فاخصمنا إلى أبان بن عثمان⁽⁶⁾ فاستحلفها ولم يردّها إليه. قال سحنون: وليس عليه العمل على أن تستحلف إذا كان ما ادعت تحيض في مثله⁽⁷⁾.

Translation:

According to the transmission of Ibn Wahb: 'Alī b. Ḥusayn divorced his wife who was from Iraq, he left her 45 nights, then he wanted to return to her. The woman said: "I menstruated three times and today I am menstruating, I have not been cleansed yet from the third period". They consulted 'Abān b. 'Uthmān, he took an oath from her and he did not send her to him. Saḥnūn said: There is no oath for what the woman has done if her claim regarding menstruation is what is to be expected with her peers.⁹⁹⁸

Commentary:

After divorce, 45 nights have passed. The woman claimed that she menstruated three times and she was in her third period when her husband returned. According to Saḥnūn, an oath is not necessary for the woman, but in the *Muwaṭṭa'* we find: "Yaḥyā related to me from Mālik from Nāfi' that 'Abdullāh b. 'Umar said: "When a man divorces his wife and she begins her third period, she is free from him and he is free from her." Mālik said: "This is how things are done among us."⁹⁹⁹

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Arabic text

⁹⁹⁸ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/330.

⁹⁹⁹ Mālik b. Anas, *Al-Muwaṭṭa'* of Imam Mālik ibn Anas, translated by Aisha Abdurrahman Bewley, p. 235.

قلت له: أرأيت إن طلق رجل امرأته تطليقة ملك [بها]⁽⁸⁾ الرجعة، ثم جامعها في عدتها في الفرج أو غيره أو قبلها أو جردها أو نظر إليها، أتكون هذه رجعة؟ فقال: قال

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مالك: إن وطئها في العدة وهو يريد بذلك الرجعة وإن يشهد فهي رجعة، وإلا فليست برجعة.

قلت: فإن قال لها: قد راجعتك ولم يشهد. قال: هي رجعة وليشهد. وقد سئل مالك عن مطلقة ارتجعها زوجها ولم يشهد فمنعته أن يدخل عليها حتى يشهد. فقال: قد أحسنت وأصاب، قلت: فإن قال: قد ارتجعتك، ثم قال: لم أرد رجعة [وعلى]⁽¹⁾ قوله بينة. فقال: الرجعة عليه ثابتة إذا كان ذلك قبل انقضاء عدتها.

Translation:

Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a man who divorced his wife with revocable *ṭalāq*, then he had sexual intercourse with her during the waiting period by sexual organ or not or he kissed her or stripped her or looked at her - is this equivalent to a return to her? Ibn al-Qāsim answered: Mālik said: If he had

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sexual intercourse with her during the waiting period and the purpose of this behavior is return, if he brings a witness, it is considered to be a return. But if he does not bring a witness, this is not return.

Saḥnūn asked: What if he told her: "I returned to you without witnesses". Ibn al-Qāsim answered: This is return because there is a witness. Mālik was asked regarding a divorced woman whose husband returned to her, but he did not find a witness and the woman rejected having sexual intercourse with him until he found a witness. Mālik said: She made a wise point and she was right. Ibn al-Qāsim said: What if he said: "I returned to you", then he said: "I did not intend to return" and he has a witness.¹⁰⁰⁰ Mālik said: The return has been established for him if he did that before the end of her waiting period.

¹⁰⁰⁰ In the main ms.: *wa 'alā*, the correct version: *wa lā 'alā* takes part in the mss. from Tunisia (tā'), Zagora (zayn), Rabat (ḥā'), Algeria (jīm) and the *Mudawwana*. Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/324.

Commentary:

If a man who divorced his wife wants to return to her, having sexual intercourse with her means return. On the other hand, if the man mentioned to his wife his intention of return, his wife can dismiss him so he should find a witness to return to her. After bringing a witness, the woman cannot reject him. Even if the man has no intention to return, when he says "I returned to you", it means return, if the woman did not complete her waiting period.

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Arabic text

قلت: فإن قال: قد كنت راجعتك أمس وهي في عدتها بعد أيصدق؟ قال: نعم. ولو كانت العدة قد انقضت لم يصدق. قلت: فلو قال بعد انقضاء العدة: قد كنت راجعتك في العدة. فقال: لا يصدق إلا ببينة، وسواء في هذا صدقته المرأة أو كذبتة، إلا أن يكون كان يبيت عندها أو يدخل عليها في العدة، فإن كان كذلك كان مصدقا أنه قد كان راجعها، وإن أكذبتة في ذلك.

قلت: فإن أقام بينة بعد انقضاء العدة أنه كان يقر بجماعها قبل انقضاء العدة. قال: إذا ادعى أن وطأها إياها كان أراد/ به الرجعة فهي رجعة⁽²⁾.

Translation:

Saḥnūn asked: What if he said "I returned to you yesterday" while she was in the waiting period - is the man confirmed? Ibn al-Qāsim said: Yes. However, if her waiting period ended, he is not confirmed. Saḥnūn said: What if he said "I had returned to you during the waiting period" when the waiting period finished? Ibn al-Qāsim said: He is confirmed with a witness, this regardless of whether she approves or rejects him, except if he spent the night in her house or he had *khalwa* with her during the waiting period. If the situation is like that, the man is approved in his returning, even if the woman rejects him in this issue.

Saḥnūn asked: What if the man brings a witness after the end of the waiting period regarding that he had sexual intercourse with her before the end of the

waiting period? Ibn al-Qāsim said: If he claims that he had sexual intercourse with the woman and his intention was to return, it is a return.¹⁰⁰¹

Commentary:

If a couple does not divorce with irrevocable *ṭalāq*, the man can return to the woman during her waiting period. Bringing a witness is not necessary in this situation, except if he claimed that he returned to her when she was in her waiting period and her waiting period is already completed. He should bring a witness to prove that. If he had sexual intercourse with her during the waiting period, it means that he has returned to her. Also, if they spent the night together in the house of the woman or they had *khalwa*, he can return to her whether she approves that or not.

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Arabic text

قال سحنون: قلت لأشهب: أ رأيت رجلا قال لامرأة طلقها وهي في عدة منه بعد:
إذا كان هذا فقد راجعتك، أتكون هذه رجعة؟ قال: لا تكون رجعة، وهو قول مالك.

Translation:

Saḥnūn said: I asked Ashhab: What is your opinion regarding a man who told his divorced wife while she is in her waiting period: "If the situation is like you said, I return to you", does it mean return? Ashhab said: No, it does not mean return. This is the doctrine of Mālik.

Commentary:

In this case, a man stipulates something to his wife to return to her so it is not accepted. If he would say that he returned to her or he had sexual intercourse with her, he would return to her, but under these circumstances his return is not acceptable.

¹⁰⁰¹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/324.

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Arabic text

قال سحنون: قال أشهب: ومن طلق امرأته واحدة أو اثنتين فله عليها الرجعة ما لم تحض الحيضة الثالثة، فإن رأت أول قطرة من الحيضة الثالثة فقد تمت عدتها وسقطت

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الرجعة عنها وحلت للأزواج، إلا أنه يستحب⁽¹⁾ ألا تعجل بالنكاح حتى تتبين أن الدم الذي رأت حيضة؛ لأن المرأة ربما رأت الدم الساعة والساعتين واليوم ثم ينقطع ذلك عنها، فيعلم أن ذلك ليس بحيض فيكون عليها أن تبقى في البيت الذي كانت تعتد فيه، فيكون فيه لزوجها عليها الرجعة حتى تعود إليها الحيضة صحيحة مستقيمة⁽²⁾.

Translation:

Saḥnūn said: Ashhab said: A man divorced his wife with one or two *ṭalāq*, then he is able to return to her until she has the third menstruation period, but if she sees the first drop of her third menstruation, her waiting period ends

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and there is no return to her for the man. She is thus able to marry another man. But it is preferable not to hurry in contracting a marriage until she can ascertain that her blood is caused by menstruation. This is so because a woman can see blood during an hour or two hours or during a day, and then her blood can disappear, and in this case it is known that it is not menstruation. She should complete her remaining days of the waiting period at home where she waits. The man can return to her when she menstruates correctly.¹⁰⁰²

Commentary:

The completion of the waiting period is explained in the *Muwattaʿ*: “Yaḥyā related to me from Mālik that he had heard that Abī Bakr b. ‘Abd al-Raḥman and Sulaymān b. Yasār and Ibn Shihāb used to say: ‘When the divorced woman enters the beginning of her third period, she is clearly separated from her husband and

¹⁰⁰² Ibid, vol. 5/326.

there is no inheritance between them and he has no access to her'."1003 However, sometimes a woman can see blood not caused by menstruation, thus, a divorced woman should not be rushed for a new marriage. She should ensure that her third menstruation period lasts.

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Arabic text

قال محمد: ولا بن القاسم في سماع عيسى أنه قال: إذا صالح الرجل امرأته وهي حامل ثم أراد أن يتزوجها قبل أن تضع فذلك له، إلا أن تكون قد أثقلت فلا تجوز مراجعتها حتى تضع؛ لأنه مرض من الأمراض، وللمرأة ألا تتزوج وهي مريضة.

Translation:

Muḥammad said: In the audition (*samā'*) of 'Īsā, Ibn al-Qāsim said: If a man made *muṣālaḥa* with his wife and she was pregnant, then he wanted to marry her before giving birth, he is entitled to do that. But if she has a difficult pregnancy, he cannot return to her until giving birth because a pregnancy situation is counted among the illnesses, she is entitled to not marry when she is sick.

Commentary:

In this case, a man divorced his wife with revocable *ṭalāq* so return is possible for him. But if the woman is pregnant, she can refuse him because pregnancy is accepted as an illness.

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Arabic text

¹⁰⁰³ Mālik b. Anas, *Al-Muwatṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 235.

قال سحنون: قلت لابن القاسم: فلو أن امرأة طلقها زوجها وعلمت بالطلاق، ثم غاب عنها وراجعها وهي في العدة، فلم تعلم بالرجعة حتى انقضت عدتها وتزوجت، ثم قدم زوجها الأول فاختلف قول مالك فيها، فكان يقول: إذا تزوجت فلا سبيل لزوجها الأول إليها وإن لم يدخل بها الآخر ثم رجع فقال: زوجها الأول أحق بها، وأنا أرى أنه إن أدركها قبل أن يدخل بها الآخر فالأول أحق بها، وإن أدركها وقد دخل بها فالآخر أحق [بها]⁽³⁾.

Translation:

Saḥnūn said: I asked Ibn al-Qāsim: If a woman is divorced by her husband and she knows that *ṭalāq* has taken place, then her husband disappears and returns to her while she is in the waiting period, but she did not know about his return until her waiting period ended and she married another person, then her first husband came, in this case Mālik had various opinions. Mālik said on one occasion: If the woman had married another man, there is no way that the first husband can return to her. In the case the first husband came before she had sexual intercourse with the second husband, Mālik said: The first husband is more entitled for the woman. Ibn al-Qāsim said: My opinion is that if the first husband came before she had sexual intercourse with the second husband, the first husband is more entitled for her. In the case that the first husband came after the second husband had sexual intercourse with her, the second husband is more entitled for her.¹⁰⁰⁴

Commentary:

In this case, the man returned to the woman, but she did not know that he was going to do that and she had married another man. Then the first husband came. There are various opinions regarding this case depending on whether the woman had sexual intercourse with the second husband or not. In the *Muwattaʿ*; Mālik said: "If she marries after her *ʿidda* is over, regardless of whether the new

¹⁰⁰⁴ In the main ms.: *la hu*, in the mss. from Rabat (ḥāʾ) and Tunisia (tāʾ): *wa fī*, in the mss. from Algeria (jīm), Zagora (zayn), Rabat (bāʾ) and (ṭāʾ): *bi hā*, the last one is the same in Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/448-449.

husband has consummated the marriage or not, her first husband has no means of access to her."¹⁰⁰⁵

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Arabic text

قلت له: أرأيت إن توفي رجل عن امرأته فتزوجت في عدتها وظهر بها حمل. فقال: قال مالك: إن كان دخل بها قبل أن تحيض فالولد للأول، وإن كان بعد حيضة أو حيضتين فالولد للآخر إذا ولدته لتمام ستة أشهر من يوم دخل [بها]⁽⁴⁾. قال ابن

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القاسم: وأرى أنه إن كان دخل بها قبل أن تحيض حيضة أو حيضتين فالعدة وضع الحمل كان لأقل من أربعة أشهر وعشرا فأكثر؛ لأن الولد للأول، وإن كان بعد حيضتين أو حيضة وقد ولدته لسته أشهر من يوم دخل بها الآخر كان للآخر⁽¹⁾.

Translation:

Sahnūn asked Ibn al-Qāsim: What is your opinion regarding a woman whose husband died and she married during her waiting period, and it turned out that she is pregnant? Ibn al-Qāsim answered: Mālik said: If the second husband had sexual intercourse with her before her having menstruation, the child belongs to the first husband. If the second husband had sexual intercourse after one or two menstruations, the child belongs to the second husband if the child was born six months after having sexual intercourse with the second husband.

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Ibn al-Qāsim said: My opinion is that if the second husband had sexual intercourse before she had one or two menstruations, the waiting period that has to take place until giving birth becomes less than 4 month 10 days because the child belongs to the first husband. If she had one or two menstruation periods and six months had passed after her having sexual intercourse with the second husband, the child belongs to the second husband.¹⁰⁰⁶

¹⁰⁰⁵ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 234.

¹⁰⁰⁶ Sahnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/446-447.

Commentary:

When a woman divorces, she should have a waiting period and without completing this period she cannot remarry. It is specified in this Qur'anic verse: *"O Prophet, when you divorce women, divorce them when they have reached their period. Count the period, and fear God your Lord. Do not expel them from their houses, nor let them go forth, except when they commit a flagrant indecency. Those are God's bounds; whosoever trespasses the bounds of God has done wrong to himself. Thou knowest not, perchance after that God will bring something new to pass."*¹⁰⁰⁷ In this case, the woman married during her waiting period and gave birth to a child. If she was pregnant when she married, she would not have menstruated. The calculation of her menstruation periods helps ascertaining who is the father of the child. Six months is considered minimum time for the birth of a baby.

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Arabic text

قلت له: فلو أن امرأة طلقها زوجها طلاقاً بائناً أو طلاقاً يملك الرجعة، فلم تقرر بانقضاء العدة حتى مضى لها ما تلد لمثله، فتزوجت ولم تقرر بانقضاء العدة، أيجوز النكاح لها أم لا. فقال: إن كانت إنما تزوجت بعد انقضاء العدة [فالقول]⁽²⁾ قولها، إلا أنها إن استرأبت [لم ينبغ]⁽³⁾ لها أن تنكح حتى تنقضي الرية أو يمضي لها من الأجل، فتزوجت أقصى ما [تلد له]⁽⁴⁾ النساء.

قلت: فإن مضى لها من الأجل ما تلد لمثله النساء إلا أربعة أشهر فتزوجت فجاءت بولد إلى خمسة أشهر، لمن يكون الولد؟ قال: أرى ألا يلزم واحداً من الزوجين؛ لأنها وضعته لأكثر ما يلده له النساء من يوم طلقها زوجها الأول، ووضعته لخمس أشهر من يوم تزوجها الآخر، ويفرق بينهما؛ لأنه تزوجها حاملاً ويقام عليها الحد.

Translation:

Ṣaḥnūn asked Ibn al-Qāsim: What if a man divorced his wife with irrevocable or revocable *ṭalāq* and she did not declare that her waiting period had ended

¹⁰⁰⁷ Al-Ṭalāq: 1, <http://tanzil.net/#trans/en.arberry/65:1>

according to the duration for her peers to give birth, and then she married another man without saying her waiting period had ended - is marriage permissible for her? Ibn al-Qāsim answered: If she married after her waiting period ended, her word is taken into consideration, but if she has a doubt about her cleansing, she cannot marry until the doubt disappears or a specific time duration has passed. She can marry after the time has passed according to which her peers give birth.

Ṣaḥnūn asked Ibn al-Qāsim: What if the time according to which her peers give birth passed, or more than 4 months passed, then she married and she gave birth to a child after 5 months - to whom does the child belong? Ibn al-Qāsim said: My opinion is that it does not belong to any of them, because she gave birth in more time than her peers give birth. From the day that her first husband divorced her, she gave birth after 5 months from the day that she married the second husband. They have to be separated, because she married while she was pregnant, so she gets *ḥadd* punishment.

Commentary:

In this case, a woman married before declaring that her waiting period ended. However, sufficient time to complete her waiting period has passed. After 5 months from the time of the divorce, she gave birth to a child. If the child belonged to the first husband, she would have given birth before. If the child belonged to the second husband, she would have given birth later. Under these circumstances the child might belong to another man or have been conceived out of marriage with any of the two men, so that *ḥadd* punishment is given to her.

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Arabic text

قلت: فلو أن رجلين تزوجا امرأة وطئها أحدهما بعد صاحبه في طهر واحد وهو
يجهل أن هما زوجا فجاءت بولد⁽⁵⁾. فقال: هو مثل ما وصفت لك في التزويج⁽⁶⁾ في

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عدتها من وفاة زوجها، ويدخل بها قبل أن تحيض أو بعد ما حاضت حيضة أو
حيضتين، وكذلك/ [لو طلقها زوجها الأول]⁽¹⁾ ثم تزوجت في عدتها قبل أن تحيض أو
بعد ما حاضت ودخل بها ثم [ظهر بها حمل]⁽²⁾ الأمر في ذلك كله واحد.

وروى عيسى عن ابن القاسم في المدنية أنه إنما ينظر إلى [الشهر]⁽³⁾ السادس فإن
وضعت قبل الخمسة لتمام ثلاثين أو تسعة وعشرين فقد تمت ستة أشهر.

وروى ابن مزين عن أصبغ أنه قال في الولد تنتظر به ستة أشهر إن ولدته لأيام باقية
من الشهر السادس وقد كانت الأشهر الأول بالأهلة، إنما ينظر إلى تلك الأيام التي
نقصت من الشهر السادس فإن كانت مقدار نقصان تلك الأشهر الأولى فالولد للأول.

Translation:

Sahnūn asked Ibn al-Qāsim: What if two men married a woman, one of them had sexual intercourse with her just after his friend during one cleansing period with the second man not knowing that she had married another husband, then she gave birth?¹⁰⁰⁸ Ibn al-Qāsim said: This issue is similar to:

- the case of the woman who

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married after the death of her husband during her waiting period, and

- to the case of having sexual intercourse before menstruation or after having one or two menstruations

- to the case of the woman whose first husband divorced her, then she married during her waiting period before or after having menstruation, and the second husband had sexual intercourse with her, then her pregnancy comes out.

The judgment is the same for all these cases.

‘Īsā has narrated from Ibn al-Qāsim in Madīna, in these cases sixth months are taken into consideration, if she gave birth before five months that last 29 or 30 days, six months are completed.

Ibn Muzayn has narrated from Aṣḡagh: It is said for the child born after six months, if the woman gave birth during the sixth month but before it was completed, the first months are counted observing the moon, and the remaining

¹⁰⁰⁸ Sahnūn b. Sa‘īd, *Al-Mudawwana al-kubrā*, vol. 5/445.

days of the sixth month are taken into consideration. If incomplete days are from first months, the child belongs to the first husband.

Commentary:

In this case, a woman had sexual intercourse in the same cleansing period with two men who both assume they are her husbands. Then the woman gave birth. A calculation is made to ascertain to which of the two men the child belongs to. Six months are accepted as the minimum time required to give birth. If six months did not pass after the marriage of the woman and she gave birth, the child belongs to the first man.

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Arabic text

قال سحنون: قلت له: أرأيت إن طلق رجل امرأته ثلاثاً أو طلاقاً يملك الرجعة فجاءت بولد لأكثر من سنتين أيلزم الزوج الأول؟ فقال: نعم. إذا جاءت به ما بينهما وبين خمسة أعوام، وكان مالك يقول: إذا جاءت به لمثل ما يلد له النساء. قلت: فإن قالت: قد انقضت عدتي ثم جاءت بولد لتمام أربع سنين من يوم طلقها، فقالت: حضت ثلاث حيض بعد ما طلقني وأنا حامل ولا علم لي بالحمل. فقال: الولد لازم للزوج إلا أن ينفيه بلعان. قلت: فإن جاءت به لست سنين. فقال: هذا حمل حادث ولا يلزم الزوج على حال، ويقام عليها الحد؛ لأن مالكا قال: إذا جاءت بالولد لأكثر ما يلد له النساء لم يلحق به الولد، وسواء في هذا كانت أقرت بانقضاء العدة أو لم تقر.

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قلت: فإن هلك رجل عن امرأته فاعتدت أربعة أشهر وعشراً ثم جاءت بولد لأكثر من ستة أشهر فيما بينها وبين ما يلد لمثله النساء من يوم هلك زوجها. قال: الولد للزوج، وسواء في هذا أيضاً كانت قد أقرت بانقضاء العدة أم لا⁽¹⁾.

Translation:

Sahnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a man who divorced his wife with three or revocable *ṭalāq*, she gave birth to a child after

two years - does the child belong to the first man? Ibn al-Qāsim said: Yes, if she gave birth in the period between those two years and five years. Mālik used to say: As long as she gives birth according to the duration that is usual among her peers. Saḥnūn said: What if she said: "My waiting period finished", then she gave birth four years after the man divorced her and the woman explained: "I had three menstruation periods after you divorced me while I was pregnant and I did not know about my pregnancy". Ibn al-Qāsim said: The child belongs to the man unless he denies his paternity with *li'ān*. Saḥnūn said: What if the woman gives birth to the child after six years? Ibn al-Qāsim said: In this case, the pregnancy came into being subsequently and the man has no connection with this issue in no way, thus she gets *ḥadd* punishment, because Mālik said: If the woman gives birth to a child after a time longer than what is usual among her peers, the child does not belong to this man, this regardless of whether she said that the waiting period was completed or not.

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Saḥnūn said: What if a married man died, and his wife waited 4 months and 10 days, then she gave birth in a duration of more than six months, between the day her husband died and the time that her peers can give birth. Ibn al-Qāsim answered: The child belongs to the man, this regardless of whether she declared that the waiting period had been completed or not.¹⁰⁰⁹

Commentary:

Five years are accepted as maximum time to carry a child belonging to a husband by his divorced wife. If she carries the child during five years, the man should accept the child. However, if the woman had given birth to the child after more than five years had passed and she did not marry in the meantime, the *ḥadd* punishment is given to her. If the couple divorced with *li'ān*, the child does not belong to the man. On the other hand, if the woman gives birth to a child in an acceptable time after her husband died, the child belongs to the man. This time should coincide with the time that is usual for her peers to give birth.

¹⁰⁰⁹ Ibid, vol. 5/442-444.

**باب فيما يجب⁽²⁾ للمعتدة من الوفاة في النفقة
والسكن وما يجوز لها فعله وما لا يجوز**

قال سحنون: قلت لابن القاسم: فالتوفي عنها زوجها أكون لها النفقة والسكنى في العدة؟ فقال: قال مالك: لا نفقة لها في مال الميت ولها السكنى إن كانت الدار للميت، وإن كان عليه دين كانت أحق بالسكنى من الغرماء، وتباع الدار لهم، ويشترط السكنى على المشتري وهو قول مالك⁽³⁾.

قال محمد: وسواء كانت المتوفى عنها حاملا أو غير حامل لا نفقة لها، لا من جملة المال ولا من حصة الولد، كذلك قال [مالك في سماع]⁽⁴⁾ ابن القاسم.

قال محمد: وفي سماع أبي زيد بن أبي الغمر قيل لابن القاسم: رأيت⁽⁵⁾ إن ارتابت أها السكنى حتى تخرج من الرية؟ قال: نعم. قال سحنون: ذلك لها وإن تمادت الرية إلى خمس أعوام⁽⁶⁾.

Translation:

Chapter about matrimonial maintenance and dwelling of a woman who has waiting period because of death, and the licit and illicit things for her

Sahnūn said: I asked Ibn al-Qāsim: Does a woman whose husband died, have the right of matrimonial maintenance and dwelling during the waiting period? Ibn al-Qāsim said: Mālik said: No, there is no maintenance for her from the possessions of the dead. If a house belonged to the man, she has right of dwelling. If the man was in debt, the woman is much more entitled to the house than the debtors; if the house is sold for the debtors, the right of dwelling for the wife is stipulated for the buyer. This is the doctrine of Mālik.¹⁰¹⁰

Muḥammad said: This regardless whether the woman is pregnant or not. There is no maintenance for her from all the possessions or share of the child. This is what Mālik said in the audition (*samā'*) of Ibn al-Qāsim.

¹⁰¹⁰ Ibid, vol. 5/475; 'Alī b. Khalīl Ṭarāblusī, *Mu'īn al-Ḥukkām*, vol. 1/374.

Muḥammad said: in the audition (*samā'*) of Abū Zayd b. Abī Ghamr: It was asked to Ibn al-Qāsim: what is your opinion regarding a woman who has doubt about the completion of the waiting period, does she still have right of dwelling? Ibn al-Qāsim said: Yes. Saḥnūn said: She is entitled for it even if her doubt continues during five years.¹⁰¹¹

Commentary:

As explained in previous cases, when a man divorces his wife and the woman has the waiting period, her dwelling and maintenance are provided by the man during this period. However, when a man dies, there is no maintenance for her. If the husband has a house, the woman is entitled to dwell in there, even if the man was in debt. On the other hand, the woman cannot take a share of the legacy but the dwelling is provided for her, even if the woman is not sure about whether her waiting period lasts or not during five years.

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Arabic text

قال سحنون: قال ابن القاسم: وإن كانت في دار بكراء فنقد الزوج الكراء فهي أحق بالسكنى، وكذلك إن كان على الميت دين فهي أيضا أحق بالسكنى من الغرماء، وهو قول مالك⁽¹⁾، وإن كان لم ينقد فلا سكنى لها في مال الميت⁽²⁾.

قلت: فإذا لم يجعل لها سكنى أكون لها أن تخرج؟ فقال: لا، إذا رضي أهل الدار بالكراء، وعليها أن تكتري من مالها لا أن يكروها كراء لا يشبه، وإن خرجت واكترت مسكنا فلا تبين إلا فيه حتى تنقضي عدتها، وهو قول مالك، وكذلك أيضا إن خرجت إلى مسكن ثالث فلا تبين إلا فيه⁽³⁾.

Translation:

Saḥnūn said: I asked Ibn al-Qāsim: If a woman stays in a rented house and her husband pays the rent, she is more entitled to dwell in there. This is similar to

¹⁰¹¹ This transmission was compiled by al-ʿUtbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 5/474-475.

the case of a dead man who was in a debt: his wife is much more entitled than debtors to stay in there. This is the doctrine of Mālik.¹⁰¹² But if the man did not pay the rent, she does not have the right of her dwelling being paid from his goods.¹⁰¹³

Sahnūn said: When she does not have the right of dwelling, can she be obliged to leave? Ibn al-Qāsim said: No, if the house owner accepts the rent, she should rent it with her own money, the renting of the house with paying different price is not necessary for her. If the woman leaves [her former dwelling] and she rents another place to stay, she has to spend [the corresponding] nights in this place until her waiting period ends. This is the doctrine of Mālik. Equally, if she leaves for a third place, she has to spend [the corresponding] nights there.¹⁰¹⁴

Commentary:

This issue is explained in the *Muwattaʿa*: “Yaḥyā related to me from Mālik from Yaḥyā b. Saʿīd that Saʿīd b. al-Musayyab was asked who was obliged to pay the rent for a woman whose husband divorced her while she was in a leased house. Saʿīd b. al-Musayyab said: ‘Her husband is obliged to pay it’. Someone asked, ‘what if her husband does not have it?’ He said: ‘Then she must pay it.’ Someone asked: ‘And if she does not have it?’ He said: ‘Then the Amir must pay it’.”¹⁰¹⁵

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Arabic text

قال ابن القاسم: وإذا كانت المعتدة/ [في مسكن فانتقلت عنه لضرورة فأرادت أن تسكن في موضع ودعا الزوج إلى غيره، فإن كان لا ضرر على الزوج فيما دعت إليه في كثرة كراء فلها أن]⁽⁴⁾ تسكن حيث تريد، ابن وهب⁽⁵⁾.

¹⁰¹² ‘Alī b. Khalīl Ṭarāblusī, *Muʿīn al-Ḥukkām*, vol. 374.

¹⁰¹³ Sahnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/475-476.

¹⁰¹⁴ Ibid, vol. 5/475.

¹⁰¹⁵ Mālik b. Anas, *Al-Muwattaʿaʾ of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 236.

[وقال مالك: في] ⁽⁶⁾ [البدوي] ⁽⁷⁾ يموت أن امرأته تنتوي مع أهلها وليس تنتوي مع أهل زوجها ⁽⁸⁾.

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وإذا كانت في قرار فانتوى [أهلها] ⁽¹⁾ لم تنتو معهم، وكذلك الأمة إذا انتقل أهلها انتقلت معهم وتستكمل [بقية] ⁽²⁾ عدتها في الموضع الذي تنتقل إليه.

قال مالك: وللمتوفى عنها زوجها أن تخرج في حوائج نفسها قرب الفجر وتأتي بعد المغرب ما بينها وبين العشاء. والمتوفى عنهن أزواجهن والمطلقات المبتوتات وغير المبتوتات في الخروج بالنهار والمبيت بالليل في بيوتهن سواء ⁽³⁾.

Translation:

Ibn al-Qāsim said: What if a woman who was in the waiting period had to leave her dwelling there because of a necessity, and she wanted to stay in a [specific] place but her husband wanted her to stay in another place? If the place where the woman requested to stay does not harm the man by increasing the rent, she can stay where she wants. Ibn Wahb said that.¹⁰¹⁶

Mālik said regarding a Bedouin who died and his wife wanted to live with her own family, not with his family:¹⁰¹⁷

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If the woman was staying [with his family] and her family migrated, she does not go with them. The situation of a female slave is similar: if her family goes, she goes with them and she completes the rest of her waiting period where she moved to.

Mālik said: The woman whose husband died can leave [the house] to attend her needs from sunrise, but she should come back in the evening, between the evening and the night (probably between morning and evening prayers). The same applies to the women whose husbands died, be they divorced irrevocably or with revocable *ṭalāq*: they can leave during day and spend the night at home.¹⁰¹⁸

¹⁰¹⁶ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/459.

¹⁰¹⁷ Ibid, vol. 5/462.

¹⁰¹⁸ Ibid, vol. 5/463-564.

Commentary:

When a woman is in the waiting period, she should wait in the same place where she used to leave. Leaving this place is not appropriate for her unless there is a necessity. She should spend night in the place where she waits. This regardless whether she was divorced with revocable or irrevocable *ṭalāq*, because her pregnancy should be revealed during this period.

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Arabic text

قال ابن القاسم: وسألت مالكا عن المرأة يخرج بها زوجها إلى السواحل من الفسطاط مرابطا ومن نيته أن يقيم الخمسة الأشهر والستة ثم يرجع ويخرج إلى الريف أيام الحصاد فإذا فرغ منها انصرف، أو يكون [مسكنه]⁽⁴⁾ [في]⁽⁵⁾ الريف فيدخل الفسطاط بأهله في حاجة يقيم بها أشهراً ثم ينصرف فمات. فقال: ترجع المرأة إلى مسكنها ولا تقيم حيث توفي. قال ابن القاسم: وإذا خرج رجل بامرأته منتقلا إلى موضع فمات قبل أن يبلغ فلزوجته أن تعتد حيث شاءت⁽⁶⁾، لأنها لا منزل لها إلا أن تريد أن تذهب إلى موضع بعيد فلا يكون ذلك لها.

Translation:

Ibn al-Qāsim said: I asked Mālik regarding a woman whose husband left her to go to the borders in Fustat as a *murābiṭ* (i.e. to perform ascetic and military life), his intention was to stay there five and six months. Then he returned and went to the countryside during harvest days, and when he finished he left, or his dwelling was in the countryside, then he went to Fustat with his family because of something he needed to do that involved staying there some months, then he left and died. Mālik said: The woman is returned to her dwelling, she does not wait in the place where he died. Ibn al-Qāsim said: If the man left with his wife in order to go somewhere and he dies before reaching there, she can wait her waiting period where she wants¹⁰¹⁹, because there is no domicile for her. But if the woman wants to go far away, she cannot do that.

¹⁰¹⁹ Ibid, vol 5/466.

Commentary:

In this case, a husband went away and after being absent for some time, he died. His wife should have the waiting period because of his death. She should wait 4 months 10 days as specified in Qur'an.¹⁰²⁰ She waits in the dwelling where she was when her husband left, not in another place. Going away or waiting in another place is not appropriate for her.

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Arabic text

قال ابن القاسم: قلت ⁽¹⁾ لمالك ⁽²⁾: هل تلبس الحاد الثياب المصبوغة بغير الورس والزعفران والعصفر؟ قال: لا، ولا أن تلبس شيئاً من المصبوغ كتانا كله وصوفاً أو غير ذلك، إلا أن تضطر إلى ذلك ⁽³⁾.

قال ابن القاسم: وإذا لم تجد الحاد إلا ثوباً مصبوغاً وكانت في موضع تقدر على استبدال به لم أر لها أن تلبسه ⁽⁴⁾.

قلت له: فهل كان مالك يرى عصب اليمن بمنزلة هذه الثياب المصبوغة؟ فقال: رقيق عصب اليمن بمنزلة هذه الثياب المصبوغة، وأما غليظ عصب اليمن فإن مالكا وسع فيها. قال [ابن القاسم] ⁽⁵⁾: والصبية الصغيرة وأم الولد والمكاتبة والمدبرة في الإحداد مثل الحرة سواء، و[هو] ⁽⁶⁾ قول مالك.

Translation:

Ibn al-Qāsim said: I asked Mālik: Can the mourning woman wear clothes colored with dyes that are not derived from *wars* [a yellow dye from a plant called *wars*], saffron and safflower? Mālik answered: No, she cannot dress something colored even if all of them are from linen, wool or something else, except if she cannot do otherwise.¹⁰²¹

¹⁰²⁰ Al-Baqara: 235, <http://tanzil.net/#trans/en.arberry/2:235>

¹⁰²¹ Ṣaḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/431.

Ibn al-Qāsim said: When the mourning woman cannot find but a colored dress but she is in a place where she can change that dress, I do not find appropriate that she wears it.¹⁰²²

Saḥnūn asked Ibn al-Qāsim: Did Mālik have the same opinion about the scarf of Yemen as regarding the colored dress? Ibn al-Qāsim said: The transparent scarf of Yemen is equivalent to colored dress, but as regards the thick scarf of Yemen, Mālik was more open about it. Ibn al-Qāsim said: A little girl, an *umm walad*, *mukātaba* and *mudabbara* are equal to the free women in the case of mourning. This is the doctrine of Mālik.

قال مالك: ولا تلبس الحاد خزا مصبوغا ولا حريرا⁽⁷⁾، ولا بأس أن تلبس الحرير الأبيض ومن الثياب البيض كلها ما شاءت رقيقها وغليظها، ولا تلبس من الحلبي شيئا لا خاتما ولا غيره.

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قال مالك: ولا تدهن الحاد إلا بالشيرق⁽¹⁾ أو بالزيت، ولا تدهن بشيء من الأدهان المزينة ولا تمتشط⁽²⁾ بشيء مما يختمر في رأسها مثل الحناء والكتم، ولا بأس أن تمتشط بالسدر وما أشبهه مما لا يختمر في رأسها.

قال مالك: ولا تكتحل الحاد إلا أن تضطر إلى ذلك، فإن اضطرت فلا بأس بذلك وإن كان فيه طيب ودين الله يسر⁽³⁾.

قال محمد وروى [البرقي]⁽⁴⁾ عن أشهب أنه قال: ولا تدخل الحاد الحمام ولا تطلي بالنورة ولا بأس أن تستحم⁽⁵⁾.

ولمالك في سماع ابن القاسم أنه سئل عن المتوفى عنها زوجها تؤذن⁽⁶⁾ إلى العرس أخرج إليه؟ قال: نعم. ولا تبث إلا في بيتها ولا تنهأ بشيء مما ينهأ [به]⁽⁷⁾.

Translation:

Mālik said: The mourning woman cannot wear silk colored cloth and pure silk. There is no objection if she wears white silk and white dresses, regardless of their being thin or thick. She cannot wear any type of jewelry, including a ring or something else.

¹⁰²² Ibid, vol. 5/433.

Mālik said: The mourning woman cannot anoint herself with oil except with olive or sesame oil. She cannot anoint herself with embellishing oils and she cannot comb her hair with something that colors of reddish color her head such as henna and *katam*¹⁰²³, there is no objection if she combs it with *sidr*¹⁰²⁴ or something else that does color with read her head.

Mālik said: The mourning woman cannot use kohl unless she needs to do it. If she has to do it, there is no objection for her, even if it has smell. God's religion is ease.¹⁰²⁵

Muḥammad said: al-Barqī has narrated from Ashhab: the mourning woman cannot go to the hammam and wax, but there is no objection to take a shower.

In the audition (*samā'*) of Ibn al-Qāsim, Mālik was asked regarding a woman whose husband died and she was invited to a wedding, can she go to there?

Mālik said: Yes. However, she has to spend the night in her house, she cannot make a special preparation for the wedding.

Commentary:

There are some restrictions for a woman whose husband died. Some of them is examined in the *Muwatta'*: "Yaḥyā related to me from Mālik that he had heard that Sālim b. 'Abdullāh and Sulaymān b. Yasār said that if a woman whose husband had died feared that an inflammation of her eyes might affect her sight or that some complaint might befall her, she should put kohl on and seek a remedy with kohl or some other cure even if it had perfume in it. Mālik said: 'If there is a necessity, the deen of Allah is ease'."

"Yaḥyā related to me from Mālik from Nāfi' that Ṣāfiyya bint Abī 'Ubayd suffered from an eye-complaint while she was in mourning for her husband, 'Abdullāh b. 'Umar. She did not apply kohl until her eyes almost had *ramas* (a dry white secretion in the corners of the eye)."

Mālik said: "A woman whose husband has died should anoint her eyes with olive oil and sesame oil and the like of that since there is no perfume in it."

¹⁰²³ Leaf of indigo, *Mu'jam lughat al-fuqahā'*, edited by Hāmid Sādiq Qanībi and Qutb Mustafa Sanū, p. 345.

¹⁰²⁴ Nabk tree, lotus tree, *ibid*, p. 216.

¹⁰²⁵ Saḥnūn b. Sa'id, *Al-Mudawwana al-kubrā*, vol. 5/431-433.

"Mālik said: "A woman in mourning for her husband should not put on any jewellery - rings, anklets, or such-like, neither should she dress in any sort of colourful, striped garment unless it is coarse. She should not wear any cloth dyed with anything except black, and she should only dress her hair with things like lotus-tree leaves which do not dye the hair."

"Yaḥyā related to me from Mālik that he had heard that Umm Salama, the wife of the Prophet, may Allah bless him and grant him peace, said: 'A mourning woman can rub her head with lotus leaves and olive oil'."¹⁰²⁶

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Arabic text

قلت: فالأمة أعليها إحداد في قول مالك؟ قال: نعم. وليس لمواليها أن يمنعوها من
الأحداد على الميت في الموضع الذي تعتد فيه. وإن باعوها فلا يبيعوها إلا لمن لا يخرجها
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منه. قلت: فإن أراد أهلها إلى أن يزينوها للبيع. فقال: ليس لهم أن يصنعوا بها ما لا
يجوز للحداد أن تصنعه بنفسها⁽¹⁾ / .

Translation:

Saḥnūn asked Ibn al-Qāsim: What about the female slave, can she mourn according to Mālik's doctrine? Ibn al-Qāsim: Yes, her owners cannot forbid her to mourn for her husband in the place that she has the waiting period. If they sell her, her purchasers cannot get her out of this place. Saḥnūn asked: What if her owners embellish her in order to sell her? Ibn al-Qāsim said: It is not licit that they do with her what is illicit for the mourning woman to do.¹⁰²⁷

Commentary:

In the *Muwattaʿa*, this issue is presented differently. "Mālik said: 'A slave-girl mourns her husband when he dies for two months and five nights like her *'idda*.' Mālik said: 'An *umm walad* does not have to mourn when her master dies, and a

¹⁰²⁶ Mālik b. Anas, *Al-Muwattaʿa* of Imam Mālik ibn Anas, translated by Aisha Abdurrahman Bewley, p. 244.

¹⁰²⁷ Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/430-431.

slave-girl does not have to mourn when her master dies. Mourning is for those with husbands’.”¹⁰²⁸ Thus, the doctrine that Ibn al-Qāsim attributes to Mālik diverges from that recorded in the *Muwattaʿ*.

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Arabic text

[⁽²⁾ باب في الزوجين إذا تشاجرا وساءت عشرتهما]

قال محمد: قال سحنون: قال ابن القاسم: [قال مالك]⁽³⁾: وإذا قبح⁽⁴⁾ ما بين الزوجين ولا استطاع التخلص إلى معرفة ما بينهما، فإن الوالي يبعث رجلا من أهل المرأة ورجلا من أهل الزوج عدلين فينظران في أمرهما ويجهدان، فإن استطاعا الصلح بينهما أصلحا وإلا فرقا بينهما، ثم تجوز فرقتهما دون الوالي، فإن رأيا أن يأخذا من مالهما حتى يكون طلاقها خلعا فعلا⁽⁵⁾. ولا ينبغي أن يأخذا من الزوج ويطلقا عليه. وإذا لم يكن في الأهل أحد يوصف بما يستحق به التحكيم أو كانا ممن لا أهل لهما فليبعث الوالي إليهما عدلين من المسلمين⁽⁶⁾.

Translation:

Chapter about spouses who argue and fight

Muḥammad said: Saḥnūn said: Ibn al-Qāsim said: Mālik said: When two spouses have a disagreement ¹⁰²⁹ and they are not able to make peace between themselves, the person in authority sends a man from her family and a man from his family who must be trustworthy. They inquire about what has happened between them and they decide accordingly. If they are able to make peace between them, they make peace, but if they cannot make it, they separate them. Their separation without the intervention of the person in authority is licit. If they think that it is appropriate to take something from their goods in order to

¹⁰²⁸ Mālik b. Anas, *Al-Muwattaʿ of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 245.

¹⁰²⁹ In the *Mudawwana: fataḥa* (to open and breaking), Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/367.

divorce them via *khul'* they do it.¹⁰³⁰ It is not appropriate that they take (the right) from the husband and pronounce divorce against him. If there are no persons from their families with what is necessary for arbitration or there are such people but not from their families, the person in authority can send two trustworthy Muslims to stay with them.¹⁰³¹

Commentary:

In the Qur'an, the topic is specified with this verse "*And if you fear a breach between the two, bring forth an arbiter from his people and from her people an arbiter, if they desire to set things right; God will compose their differences; surely God is All-knowing, All-aware.*"¹⁰³²

In this case, firstly, the person in authority sends two trustworthy men from their families for the inquiry of the spouses who have a disagreement. The two arbiters try to reconcile the couple but if they do not succeed that, they separate them. They can make *khul'* between them, taking compensation from the woman. Maribel Fierro examined ill-treated women seeking divorce in al-Andalus in her article; "Of the four Sunni *madhāhib* or schools of law, only the Malikis allow a wife to request a judicial divorce on the grounds of harm. The doctrinal lawbooks indicate that Maliki jurist understood Qur'an 4:35 as referring to those cases in which a woman who had been physically abused by her husband sought to be divorced from him. However, other sources suggest that the judicial *practice* in al-Andalus and the Maghrib disregarded the Quranic institution of arbitration and followed instead an institution known as *dār amīn* (alternatively, *dār 'adl* or *dār al-thiqa*). According to this judicial practice, a woman who had been physically abused by her husband would be sent to live with a trustworthy person, whose main function was to inform the judge of circumstances surrounding her abuse." ¹⁰³³ The issue of the *dār amīn* is mentioned by Ibn Abī Zamanīn in Questions 160 and 161 under the expression *rajul ṣāliḥ*.

¹⁰³⁰ Ibid, vol. 5/367-368.

¹⁰³¹ Ibid, vol. 368-369.

¹⁰³² Al-Nisā': 34, <http://tanzil.net/#trans/en.arberry/4:34>

¹⁰³³ Maribel Fierro, "Ill-treated women seeking divorce: the Qur'anic two arbiters and judicial practice among the Malikis in al-Andalus and North Africa", in

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Arabic text

وفي كتاب ابن حبيب: قال عبد الملك: سألت مطرفا عن المرأة تشكو إلى السلطان ضرر زوجها وهي في البادية تسأله أن يسكنها معه في الحاضرة. قال: ليس ذلك لها، ولكن السلطان ينهاء عن ضررها فإن عادت بالشكوى وتظاهر ذلك منها نظرا، فإن

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كان معه في قريته من يجوز قوله وشهادته أمرهم فيتفقوا ما تشتكي من ضرره، فإن ظهر لهم أنه ظالم لها رفعوا ذلك إلى السلطان فزجره وعاقبه بما يرى، وإن لم يتبين لهم أنه ظالم لها زجرها عن شكواها وردها إلى زوجها صاغرة.

Translation:

In the book of Ibn Ḥabīb: ‘Abd al-Mālik said: I asked Muṭarrif regarding a woman who complained because of her husband’s harm to the political authority (*al-sultān*), she lived in countryside and she had requested to live in the city with him. Muṭarrif said: She is not entitled to do this, but the political authority (*al-sultān*) should forbid her husband to harm her. What if the woman complains again, and her harm becomes obvious, her situation is taken into consideration.

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If there are persons who are reliable and can testify about what has happened between them in his village, the political authority (*al-sultān*) gives order to them to investigate her complaint because of her husband’s harm. If they realize that the man behaved violently with the woman, they inform the political authority (*al-sultān*) who rebukes and punishes the husband properly. If these people realized nothing regarding the complains of the woman, she is returned to her husband abjectly.

قال: وإن لم يكن في جوارهم رجال يقبل قولهم في مثل هذا، قال السلطان للزوج: إنه لا بد من أن تسكن بها جوار ناس يوقف بهم على حقيقة أمركم، فانظر أين تريد السكنى بها، وוכל جيرانه بمثل ما وصفت لك أولا، وليس عليه أن يضمه إلى الحاضرة إلا أن لا يجد في من حوله من البادية من يضمه إليهم ويسكنها عندهم⁽¹⁾، وكذلك إن كان مسكنهما طرفا من الحاضرة وليس حولهم ناس يرضى قولهم، أو يكون منفردا فإنه يضمه أيضا إلى موضع ناس يتبين فيه ما شكت، وقد تكون أيضا منفردة من الجماعة فتشتكي الوحدة، فإن لم تشتكي الضرر فيلزمه [أن يدخل بها]⁽²⁾ إلى الموضع المأنوس، إلا أن تكون نكحته على ذلك من حاله وعرفته به فلا تنتقل عما رضيت به. قال عبد الملك: وسألت أصبغ عن هذا فقال لي فيه مثل قول مطرف.

Translation:

Muṭarrif said: If in the vicinity of the spouses there is no such a man who is reliable in what he will report about them, the political authority (*al-sultān*) tells the husband: "It is necessary to accommodate her in the vicinity of people who are able to ascertain your situation. Consider where you want to reside with her". The political authority (*al-sultān*) appoints as a proxy his neighbors to comprehend her situation as I described before. It is not necessary to bring him to the urban center unless there is nobody who joins him in the village and take her to live with them. The same happens if their dwelling is part of the city and there is nobody who belongs to those whose word is taken into consideration or there is only one. The man is sent to a place where there are people who get an insight into what the woman complained about, especially if the woman is alone in a community and she complains about that. If she does not complain because of the harm inflicted to her, it is necessary to accommodate her in a friendly place. This unless the woman married him knowing the circumstances, the woman is not accommodated where she approves. 'Abd al-Mālik said: I asked Aṣḡagh regarding this issue, he told me: "This issue is as Muṭarrif said".

Commentary:

In this case, a man harms his wife according to the claim made by the woman. If there are no neighbors who can shed light about what happened between them,

she has to be sent by the political authority (the emir or the judge) to a place where their situation can be investigated by others and a decision can be made.

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Arabic text

وفي كتاب الجدار وسئل عيسى بن دينار عن المرأة تسكن مع زوجها البادية فتشتكي إلى السلطان ضرر [زوجها]⁽³⁾ وتسأله أن يسكنها الحاضرة في قرب السلطان وعند من يثق به ويأبى ذلك زوجها. فقال: إذا تبين ضرره بها أسكنها مع زوجها حيث أراد الزوج عند رجل صالح يأمره بتفقدتها والنظر لها.

Translation:

In the *Kitāb al-jidār*, 'Īsā b. Dīnār was asked regarding a woman who lived in a village with her husband and she complained about the harm caused to her by her husband to the political authority (*al-sultān*). She petitioned him to take her to live in the city near the political authority (*al-sultān*) and in the house of trustworthy people and her husband rejected that. 'Īsā b. Dīnār said: If his harm to her is revealed, she is accommodated with her husband wherever her husband wants near a reliable man who is ordered to investigate the situation and express an opinion about what is more appropriate for her.

Commentary:

In this case, a woman who lived in the countryside said that her husband had caused harm to her. The woman requested to be moved to the urban center where the political authority resided and to be accommodated in a place where someone trustworthy could investigate their issue in order to solve their problem. However, her request was not accepted by her husband. The solution is to take both of them to live with a reliable man who can then investigate what is the problem between them.

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Arabic text

وفي كتاب محمد بن سحنون [أن أباه سحنون]⁽¹⁾ سئل عن المرأة تأتي إلى الحاكم فتدعي الضرر من زوجها ويدعي الزوج إضرارها به وسوء صحبتها، ولا يعرف ذلك إلا بقولهما. فقال: إذا لم يظهر ما ادعيا فإن للحكم أن يختبر ذلك بأن يجعل معها أو يجعلهما مع من يتبين له أمرهما، ثم يعمل على ما تبين له.

Translation:

In the book of Muḥammad b. Saḥnūn it is reported that his father Saḥnūn was asked regarding a woman who went to a magistrate and claimed that her husband harmed her. On his part, the husband claimed that his wife harmed him and that her companionship was bad. Their situation is unknown except from their declarations [that contradict each other]. Saḥnūn said: When their claims are not obvious, the judge should start an inquiry about them by making someone live with both of them or make both of them live with someone who can later inform the magistrate about what the matter is with them. Then the judge gives a judgment according to what has been found out.

Commentary:

This case is recorded in the book of Muḥammad b. Saḥnūn, the son of Saḥnūn. It is very similar to the previous case. A woman complained regarding her husband to a magistrate who received contradictory evidence from the spouses. In order to understand what the real situation is, the magistrate sends someone to live with them or puts them in the house of someone reliable to can find out what the problem is. Once this has been ascertained, the magistrate can make a decision.

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Arabic text

باب في الأمة تعتق تحت العبد أو الحر

قال محمد: قال سحنون: قلت لابن القاسم: أ رأيت لو أن أمة أعتقت وهي تحت حر أو مملوك أ يكون لها خيار في نفسها؟ فقال: إن أعتقت تحت حر فلا خيار لها، وإن كانت تحت العبد فلها الخيار⁽²⁾.

قلت: وإن اختارت فراقه أ يكون فسخا أو طلاقا؟ فقال: [قال]⁽³⁾ مالك: إن طلقت نفسها واحدة فهي واحدة بائنة. وإن طلقت نفسها اثنتين كان ذلك لها وتحرم عليه حتى تنكح زوجا غيره؛ لأن ذلك جميع طلاق العبد. قال سحنون: وقول أكثر الرواة أنه ليس لها أن تطلق نفسها إلا واحدة.

Translation:

Chapter about a female slave who married a slave or a free man

Muḥammad said: Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a female slave who was manumitted while she was married to a free man or a slave, can she have *khiyār*? Ibn al-Qāsim said: If she is manumitted while she is married to a free man, she does not have *khiyār*. If she is married to a slave, there is *khiyār* for her.¹⁰³⁴

Saḥnūn asked Ibn al-Qāsim said: If she chooses divorce, does it refer to cancellation (*faskh*) or one *ṭalāq*? Ibn al-Qāsim said: Mālik said: If the woman divorces herself with one *ṭalāq*, irrevocable divorce comes into being. If she divorces herself with two *ṭalāqs*, she becomes illicit for her husband unless she marries another man, because *ṭalāq* of a female slave is that. Saḥnūn said: According to most of the transmitters, the woman can only divorce herself with one *ṭalāq*.

¹⁰³⁴ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/30. When a female slave who is married to a male slave is set free, this regardless whether she has sexual intercourse or not, she has *khiyār*. If she had sexual intercourse and chose separation from her husband, dower is necessary for her. She can take it such as taking other goods unless her master makes an exception, this is similar to the case when she did not have sexual intercourse, if she wants to stay, she takes the total dower, except that if her master takes the dower or stipulates to her husband, the dower belongs to the master. 'Alī b. Khalīl Ṭarāblusī, *Mu'īn al-Hukkām*, vol. 1/257.

Commentary:

This issue is related to the *khiyār* of a female slave. She was set free, but if she was married to a free man, not a slave, there is no possibility for *khiyār*. However, if her husband is a slave, she can do that. She can divorce herself with irrevocable divorce because she cannot divorce with revocable *ṭalāq* via *khiyār*.

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قلت: فإن قالت حين عتقت: قد اخترت نفسي. قال: إن لم تكن لها نية فهي واحدة بائة، وإن نوت أكثر من واحدة كان ذلك لها. قلت له: أفيجوز [لها]⁽¹⁾ أن تختار عند غير السلطان؟ قال: نعم⁽²⁾.

قلت: فإن لم تختار حتى عتق زوجها. قال: فلا خيار لها، ولها أن تمنعه نفسها حتى تختار وتستشير، فإن وطئها بعد علمها بالعتق فقد انقطع خيارها، ولا ينفعها إن قالت: لم أعلم أن لي الخيار⁽³⁾.

قال ابن القاسم: وقد سألنا مالكا عن الأمة يطلقها العبد تطليقة ثم تعتق فتختار نفسها. قال: فهما تطليقتان، ولا تحل له حتى تنكح زوجا غيره⁽⁴⁾.

قلت له: فإن أعتق بعضها أيكون لها الخيار؟ قال: لا.

Translation:

Saḥnūn said: What if she told, when she was manumitted: "I chose myself"? Ibn al-Qāsim said: If she had no intention, it becomes one irrevocable *ṭalāq*; if her intention was more than one *ṭalāq*, her intention is valid. Saḥnūn asked Ibn al-Qāsim: Is doing that without the intervention of the political authority (*al-sultān*) licit for her? Ibn al-Qāsim said: Yes.¹⁰³⁵

Saḥnūn asked: What if she did not choose herself until her husband is manumitted? Ibn al-Qāsim said: There is no *khiyār* for her, she can prohibit herself for him until she chooses herself and she consults; if she had sexual intercourse with him after being informed of the manumission, her right to

¹⁰³⁵ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/31-32.

choose is cancelled. It does not work if she says: "I did not know that I had *khiyār*".¹⁰³⁶

Ibn al-Qāsim said: We asked Mālik regarding a female slave who was divorced with one *ṭalāq* by her slave husband, then she was manumitted and chose herself. Mālik said: Both of them are two *ṭalāqs*. The woman does not become licit for him until she marries another man.¹⁰³⁷ Saḥnūn asked Ibn al-Qāsim: What if a part of the woman is manumitted, can she have *khiyār*? Ibn al-Qāsim said: No.

Commentary:

In the *Muwaṭṭa'*: "Yaḥyā related to me from Mālik from Nāfi' that 'Abdullāh b. 'Umar said that a female slave who was the wife of a slave and then was set free, had the right of choice as long as he did not have intercourse with her. Mālik said: 'If her husband has intercourse with her and she claims that she did not know, she still has the right of choice. If she is suspect and one does not believe her claim of ignorance, then she has no choice after he has had intercourse with her'".¹⁰³⁸ On the other hand, a female slave might belong to different people, if one of them manumits her, she does not have the right of making a choice unless her other master manumits her as well.

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باب جامع القول في الحضانة⁽⁵⁾

قال محمد: قال سحنون: قلت لابن القاسم: أرأيت إن طلق الرجل امرأته أو مات عنها وله منها أولاد صغار، إلى كم يتركون في حضانتها؟ فقال: قال مالك: إن كانوا غلماناً فحتى يحتلموا، وإن كن [جوارى]⁽⁶⁾ فحتى يبلغن النكاح⁽⁷⁾، فإذا بلغن النكاح

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¹⁰³⁶ Ibid, vol. 6/32-33.

¹⁰³⁷ Ibid, vol. 6/32.

¹⁰³⁸ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 228.

نظر فإن كانت الأم في حرز ومنعة كانت أحق بهن أبدا حتى تنكح الجارية، وإن بلغت ثلاثين سنة أو أربعين مادامت بكرا إلا أن تنكح الأم، أو يخاف على الابنة في موضع الأم إذا لم تكن في تحصين ومنعة، أو تكون أم لعلها ليست بمرضية في حالها، فيكون أبو الجارية حينئذ وأولياؤها أحق بها إذا ضمت إلى كفاية وحرز⁽¹⁾.

قال ابن القاسم: ويجبر الأب على أن يدفع نفقة أولاده إلى أمهم إذا طلقها وكانت مصلحة.

Translation:

Miscellaneous chapter about child care¹⁰³⁹

Muḥammad said: Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding a man who divorces his wife or dies and they have little children, for how long will the children stay with the woman for their care? Ibn al-Qāsim said: Mālik answered: If they are boys, they stay until reaching puberty, if they are girls, they stay until reaching the age of marriage.¹⁰⁴⁰

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The situation is examined, if the mother is mighty and in safe, she is more entitled to take care of them forever unless the girl gets married, even if she reaches the age of 30 or 40 years, as long as she is single, unless her mother gets married. If it is feared that the place of the mother is not safe and protected or if it is assumed that the mother is not satisfied from the situation they are in at that moment, the father or the guardians are more entitled to take care of the girl if they provide appropriate circumstances.¹⁰⁴¹

Ibn al-Qāsim said: The father is forced to give maintenance of his children to their mother. If the man divorces her, he pays the maintenance.

¹⁰³⁹ [ḥ ḍ n]: [ḥaḍāna]: Custody (of infant): *Mu'jam lughat al-fuqahā'*, edited by Hāmid Sādiq Qanībi and Qutb Mustafa Sanū, p. 160.

Al-ḥaḍāna: bringing up of a child, the person who raises the child is called *ḥaḍāna* namely educator, *ḥaḍīn* or *ḥaḍāna*: both of them become proxy to the child, they protect and train it. Ibn Manẓūr, *Lisān al-'Arab*, vol. 3/220. As a technical term, it means protecting of the child regarding dressing, helping nutrition, providing dwelling and body cleaning.

¹⁰⁴⁰ *Ḥaḍāna* is necessary for a mother who has little sons or single daughters, who is divorced by her husband and marries another man, unless she has sexual intercourse with him. 'Alī b. Khalīl Ṭarāblusī, *Mu'īn al-Ḥukkām*, vol. 1/348.

¹⁰⁴¹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/356.

Commentary:

The term *ḥaḍāna* means “care of a child by the mother. Custody of a child belongs to the mother or other women relatives until the child no longer needs a woman's care, that is, the child can drink and eat unassisted, can learn about other bodily functions, and can perform ablutions or purification unassisted. For a boy this is estimated at seven years of age. A girl remains under the custody of women relatives until she reaches puberty, when she must move to the protection of men; this is estimated to be from nine to eleven years of age, in the opinion of various legal authorities. When boys reach seven and girls nine to eleven, they are handed over to their father (or the closest male relative, according to their order of inheritance) to begin the second stage of custody, known as *damm*. This is according to the Hanafi code applied in most Islamic countries today. Other schools of law differ; for example, the Malikis allow a boy to remain with his mother until he reaches puberty and a girl to remain with her mother until she is married. The *ḥaḍāna* belongs primarily to the mother, but if she remarries, she loses custody over her daughter unless the court decides otherwise. If a mother loses *ḥaḍāna*, the child moves to the maternal grandmother; if that is not possible, then to the paternal grandmother, the maternal aunts, the paternal aunts or sisters, and so on. *Damm*, care of a child by relatives, belongs to male relatives: first the father, then the grandfather, uncle, and so on. *Damm*, which is enforced by the authorities if the mother refuses to surrender her children, is rationalized on the basis of a boy's need for male discipline and a girl's need for male protection at a vulnerable age before her marriage.”¹⁰⁴²

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¹⁰⁴² Esposito, “Ḥaḍāna”, in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed April 20, 2021

<http://www.oxfordislamicstudies.com/article/opr/t125/e756>

قلت: فإن تزوجت وابنه منها صغير فأخذه أبوه أو أولياؤه، ثم مات عنها زوجها أو طلقها أيرد إلى أمه؟ قال: لا. إذا أسلمته مرة فلا حظ لها فيه، وهو قول مالك. قلت: فمتى يؤخذ منها؟ قال: إذا دخل بها زوجها ولا يؤخذ منها قبل ذلك⁽²⁾.

Translation:

Saḥnūn asked Ibn al-Qāsim: What if the woman married while her little boy stayed with her, if his father or guardians took him then her second husband died or divorced her, is the child given back to her? Ibn al-Qāsim said: No, if she gives him, she is not entitled any longer to him, this is the doctrine of Mālik. Saḥnūn said: When is the child taken from her? Ibn al-Qāsim said: When her husband has sexual intercourse with her, the child is not taken from her before that.¹⁰⁴³

Commentary:

“A woman should nurse her child in the marriage unless someone of her status should not do so. A divorced woman can nurse the child for the father and she can take a fee for nursing if she wishes.”¹⁰⁴⁴ In this case, a woman divorced her husband having had a child with him, then she married another man. Until having sexual intercourse with the second husband, the child can stay with her, but after that he should be taken by his father or guardian. If he is taken, the woman is not entitled to him anymore.¹⁰⁴⁵

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¹⁰⁴³ Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/365.

¹⁰⁴⁴ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 116.

¹⁰⁴⁵ Santillana, *Istituzioni di diritto Musulmano malichita con riguardo anche al sistema sciafiita*, p. 230

قال ابن القاسم: قلت لمالك: فإن تزوجت الأم أو ماتت من أولى بحضانة الأولاد؟ فقال: الجدة أم الأم أولى من الأب وإن لم تكن أمّ أمّ وكانت أم أب فهي أيضا أولى من الأب. فقلت: جدة الأم أهي أولى من أم الأب⁽³⁾؟ قال: جدة الأب⁽⁴⁾ أولى إذا لم يكن بينها وبين الصبيان أم أقعد بالصبيان منها.

قلت: فمن أولى الأب أم الخالة؟ فقال: قال مالك: الخالة أولى بالأولاد من أبيهم. قلت فمن أولى العمة أم الأب؟ فقال: الأب. وليس بعد الخالة والجدة للأم والجدة للأب [أحد]⁽⁵⁾ أحق من الأب. قال ابن القاسم: والذي سمعت من قول مالك وبلغني

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أن الجدة أم الأم أولى من الخالة، والخالة من الجدة للأب، والجدة للأب أولى من الأخت، والأخت أولى من العمة، والعمة [بعد]⁽¹⁾ هؤلاء أولى من غيرهم.

قلت: فمن أولى العصبية أو الجدة للأب؟ قال: الجدة، وكذلك الأخت والعمة وابنة الأخ هن أولى من العصبية. ومن الجد والعم والأخ وابن الأخ⁽²⁾.

Translation:

Ibn al-Qāsim asked Mālik: What if the mother marries or dies, who is the most entitled for taking custody of the children? Mālik said: The maternal grandmother is much more entitled than the father. If there is no maternal grandmother and if there is a paternal grandmother, she is much more entitled than the father. Ibn al-Qāsim said: Is the maternal grandmother more entitled than paternal grandmother? Mālik said: The paternal grandmother is the more entitled if there is not between her and the children someone who is closer to the mother.

Saḥnūn asked Ibn al-Qāsim: Who is more entitled for custody, the father or maternal aunt? Ibn al-Qāsim said: Mālik said: The maternal aunt is more entitled to the custody of the children than the father. Saḥnūn asked: Who is more entitled, the father or the paternal aunt? Ibn al-Qāsim said: The father. After the maternal aunt, the maternal grandmother and the paternal grandmother, there is no person more entitled than the father. Ibn al-Qāsim said: I heard from Mālik and it reached to

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me that the maternal grandmother is more entitled than the maternal aunt, the maternal aunt is more entitled than the paternal grandmother, the paternal grandmother is more entitled than the sister, the sister is more entitled than the paternal aunt, the paternal aunt is the more entitled after all of them.

Saḥnūn asked Ibn al-Qāsim: Who is more entitled for custody, the male relatives of the father or the paternal grandmother? Ibn al-Qāsim: The paternal grandmother. A sister, aunt and niece are like that, all of them are more entitled than male relatives of the father such as grandfather, uncle, brother and nephew.¹⁰⁴⁶

Commentary:

In this case, a detailed explanation is given of who is more entitled to take care of the custody of children after the marriage or death of a mother. When a mother marries after divorce, she loses the custody of her child. Maternal grandmothers, paternal grandmothers and maternal aunts are more entitled than fathers to take care to the child. However, fathers are more entitled than paternal aunts. Also, female relatives such as sisters, aunts and nieces are more entitled than grandfathers, uncles, brothers and nephews.

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Arabic text

قلت له: فإن تزوجت الأم ولا جدة للأولاد من قبلها، أو لهم جدة من قبلها لها زوج أجنبي، من أحق بهم، وقد اجتمع النساء جدات مختلفات، وأخوات مختلفات، وعمات مختلفات، وبنات إخوة مختلفات؟ قال: أولاهن بالأولاد أقعدهن بالأم إذا كانت ذات محرم من الصبيان ولا زوج لها، وإنما ينظر في هذا إلى الأقعد فالأقعد بالأم منهن. قلت: أرأيت مولى النعمة⁽³⁾ أيكون من الأولياء؟ قال: نعم. وكذلك مولى العتاقة، وهو قول مالك. قال مالك: وإذا تزوجت الأم ولا أب للصبيان ولهم عصة فهم أحق بالصبيان، وكذلك الوصي⁽⁴⁾.

¹⁰⁴⁶ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/358-359.

Translation:

Saḥnūn asked Ibn al-Qāsim: What if the mother married and the children do not have a maternal grandmother or they have a maternal grandmother who has a foreign husband - who is more entitled to take care of them? This is a case in which there are a numerous options involving the various grandmothers, sisters, aunts, and brothers' daughters. Ibn al-Qāsim said: The person who is closest to the mother is the more entitled to take care of them, but only if there is no prohibited kinship with the children and if she is unmarried. In this issue, the nearest side is looked for and the closest person to the mother among them. Saḥnūn asked: What is your opinion regarding the patron (*mawla al-ni'ma*), can that person be the guardian of the children? Ibn al-Qāsim said: Yes. The same applies to the patron through manumission (*mawla al-'itāqa*), this is the doctrine of Mālik. Mālik said: When the woman marries and the children do not have a father but they have male relatives by the father, they are more entitled to them, and guardians are in the same position.¹⁰⁴⁷

Commentary:

In this case, a woman married and cannot keep her children, who have no maternal or paternal grandmothers. There are several candidates among their female relatives. The woman who is the closest to the mother is more entitled to have the custody of the children than the others. The issue of whether patrons - patronage being a type of kinship - are also entitled for custody of their clients' children is also discussed. This person should be unmarried and prohibited kinship should not be between them.¹⁰⁴⁸ The people who are licit are specified in Qur'an with the following verse: *"Forbidden to you are your mothers and daughters, your sisters, your aunts paternal and maternal, your brother's daughters, your sister's daughters, your mothers who have given suckling to you, your suckling sisters, your wives' mothers, your stepdaughters who are in your care being born of your wives you have been in to -- but if you have not yet been in to them it is no fault in you - and the spouses of your sons who are of your loins, and*

¹⁰⁴⁷ Ibid, vol. 5/360.

¹⁰⁴⁸ Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 796.

that you should take to you two sisters together, unless it be a thing of the past; God is All-forgiving, All-compassionate;"¹⁰⁴⁹ Even though, all these people are licit for the children, they are not in the same distance in the issue of nursing them.

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Arabic text

قال سحنون: قلت لابن القاسم: فإن احتاج الأب إلى تأديب ولده. فقال: قال مالك: يؤدبه بالنهار ويبعثه إلى الكتاب وينطلق بالليل إلى أمه ما لم تتزوج⁽⁵⁾.

قال ابن القاسم: وجميع ما ذكرت لك مما يكون [فيه]⁽⁶⁾ بعضهم أولى من بعض، إنما ذلك إذا كان من يضم إليه الأولاد يكونون [عنده]⁽⁷⁾ في حرز وتحصين ونفقتهم على أبيهم وهو قول مالك.

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قلت: فإن كان الأولاد لابد لهم من الخدمة لضعفهم عن أنفسهم. فقال: الخدمة بمنزلة النفقة إذا قوي على ذلك الأب أخذ به⁽¹⁾.

قلت: فإن طلق رجل امرأته ولها منه أولاد صغار [فتزوجت]⁽²⁾ وجدتهم لأهمهم في بعض البلدان وجدتهم لأبيهم مع الصبيان في مصر واحد، أو عمتهم أو خالتهم من أحق بهم؟ فقال: إذا كانت الجدة للأم غائبة فلا حق لها في الصبيان وهي بمنزلة من مات⁽³⁾.

Translation:

Sahnūn said: I asked Ibn al-Qāsim: Is the father required to educate his child? Mālik said: He educates his child during the day and sends him to school. Then the child goes to the mother at night as long as she remains unmarried.¹⁰⁵⁰

Ibn al-Qāsim said: Everything that I told you regarding the persons who are entitled to custody applies unless the children are safe and protected with their father because if that is the case the custody belongs to their fathers. This is the doctrine of Mālik.

¹⁰⁴⁹ Al-Nisā': 23, <http://tanzil.net/#trans/en.arberry/4:23>

¹⁰⁵⁰ Ibid, vol. 5/356.

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Saḥnūn said: What if the children need a servant because of their fragility? Ibn al-Qāsim said: The issue of the servant is similar to the case of the custody. If the father is able to provide that, it is obligatory for him.¹⁰⁵¹

Saḥnūn said: What if a man divorces his wife and he has little children from her and the woman marries another man, their maternal grandmother lives somewhere else while their paternal grandmother or their paternal aunt or maternal aunt is with them in the city - who is more entitled to their custody? Ibn al-Qāsim said: If the maternal grandmother is missing, she is not entitled to their custody; she is similar to a dead person.¹⁰⁵²

Commentary:

As explained in the previous cases, a mother can stay with her child after her divorce until remarriage, if her place is safe and she is able to protect the child. If the father of the child wants to educate the child or teach him/her something, they can spend time together during the day but the child stays with the mother at night. The father keeps providing maintenance for them. Moreover, if the child needs help of another person like a servant because of a necessity, the father provides it for the child as well if he has the means. On the other hand, if the mother of the child married and the maternal grandmother is missing, another person should take care of the child, as the maternal grandmother is not entitled any longer to the child.

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Arabic text

¹⁰⁵¹ Ibid, vol. 6/360.

¹⁰⁵² Ibid, vol. 5/357.

قلت: فإن أراد الأب أن يرتحل إلى بعض البلدان ويأخذ أولاده من غير أمهم وهما جميعا من أهل تلك البلدة التي تزوجها فيها وطلقها. قال: قال مالك: للأب أن يأخذهم إذا أراد السكنى في البلد الذي يرتحل إليه. قال مالك: وكذلك الأولياء هم في هذا بمنزلة الأب لهم أن يرتحلوا بالصبيان حيثما ارتحلوا تزوجت الأم أو لم تتزوج إذا كان الأولاد مع أبيهم أو مع أوليائهم في كفاية. ويقال للأم: اتبعهم إن شئت. قال مالك: وليس للأم أن تنقلهم عن الموضع الذي فيه والدهم وأولياؤهم إلا أن [يكون]⁽⁴⁾ ذلك إلى الموضع القريب؛ البريد ونحوه⁽⁵⁾.

Translation:

Sahnūn said: What if the father wants to go somewhere and takes with him the children from someone else than their mother and both of them are from the place where they married and divorced? Ibn al-Qāsim said: Mālik said: If the intention of the father is to settle in the place where is moving, he can take the children. Mālik said: The guardians of the children in this case are similar to the father, they can move with them wherever they want, regardless if their mother married or not, as long as the children stay with their father or their guardian in suitability. The mother is told: "Join them, if you wish". Mālik said: It is not necessary for her to go to the place that the children went with their father and guardian, except if the place is close such as at post distance or like that.¹⁰⁵³

Commentary:

In this case, there is a couple who divorced but they still live in the same city. However, the man wants to move to another place to settle there and take the children with him. He can take the children wherever he wants. If the new place is not so far from the place of the mother, she does not go with them. Fathers and guardians are in the same situation in this issue.

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Arabic text

¹⁰⁵³ Ibid, vol. 5/358.

قلت: وإن كانت الأم نصرانية أو يهودية فطلقها زوجها وهو مسلم أتكون بمنزلة المسلمة في حضانة أولادها؟ قال: نعم. إذا كانوا عندها في حرز، فإن خيف [عليهم]⁽⁶⁾

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أن تسقيهم الخمر وتغذيهم بلحوم الخنازير ضمت إلى ناس من المسلمين ومنعت من ذلك، ولا ينزع الولد منها. قلت: فإن كانت مجوسية أسلم زوجها ومعها أولاد صغار وأبت أن تسلم. قال: هي في الحضانة بمنزلة المسلمة⁽¹⁾.

Translation:

Saḥnūn said: What if the mother is Christian or Jewish and her Muslim husband divorced her, is she in the same situation as a Muslim woman regarding custody? Ibn al-Qāsim said: Yes, if the children are safe with her. However, if it is feared that

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that she will make them drink wine or eat pork, she has to be joined with Muslims and forbidden to allow such things to happen, but the child is not taken from her. Saḥnūn said: What if the woman is Zoroastrian, her husband converted to Islam, with her there are little children and she did not accept to convert. Ibn al-Qāsim said: She is in the same situation as the Muslim woman regarding custody.¹⁰⁵⁴

Commentary:

A father should provide maintenance when his divorced wife takes care of his child. In the Qur'an, maintenance is explained: *"Let the man of plenty expend out of his plenty. As for him whose provision is stinted to him, let him expend of what God has given him. God charges no soul save with what He has given him. God will assuredly appoint, after difficulty, easiness."*¹⁰⁵⁵ This is regardless whether the mother of the child is Christian, Jewish or Zoroastrian. However, the child should be safe and it has to be ensured that he will be raised as a Muslim and kept away from Christian customs such as eating pork or drinking wine.

¹⁰⁵⁴ Ibid, vol. 5/359.

¹⁰⁵⁵ Al-Ṭalāq: 7, <http://tanzil.net/#trans/en.arberry/65:7>

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Arabic text

قال محمد: وفي سماع عيسى قيل لابن القاسم: فإن تزوجت الأم ولها أخت نصرانية. فقال: الأب أحق بينيه من خالتهم، وقد أنكر سحنون هذا الجواب، وقال: جدتهم [أو خالتهم]⁽²⁾ أحق وهما في ذلك كالمسلمات، وقول سحنون أعدل عند أهل النظر.

قلت لابن القاسم: فلو أسلمت نصرانية تحت نصراني ولهما أولاد صغار. فقال: قال مالك: يتركون مع أمهم [تحضنهم]⁽³⁾ ما داموا صغارا وهم على دين أبيهم، وكذلك إن أسلمت وهي حامل ثم ولدت⁽⁴⁾.

Translation:

Muḥammad said: in the audition (*samāʿ*) of ʿĪsā, Ibn al-Qāsim was asked: What if the mother marries and she has a Christian sister? Ibn al-Qāsim said: The father is more entitled to take care of the children than their maternal aunt, but Saḥnūn rejected this response and said: A maternal grandmother and a maternal aunt are more entitled and both of them are like Muslim women in this regard. The doctrine of Saḥnūn is more righteous according to the people of reflection (*ahl al-naẓar*).

Saḥnūn asked Ibn al-Qāsim: What if a Christian woman who is married to Christian man converted to Islam and they have little children? Ibn al-Qāsim said: Mālik said: They are left with their mother who takes care of them as long as they are children and their religion is the religion of their father. The same happens if the woman who converted to Islam while she was pregnant and then she gave birth.¹⁰⁵⁶

Commentary:

When a divorced woman remarries, another person may take care of her children. If the maternal aunt of the children is Christian, the father takes care of them according to Ibn al-Qāsim. However, there are various arguments

¹⁰⁵⁶ Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 4/307.

regarding this issue. Saḥnūn argued that maternal aunts are more entitled than others to custody, regardless of their religion. Also, if a Christian couple has children and the man accepted Islam, the children can live with their mother but their religion is Islam, not Christianity. But if the Christian woman converted and the man did not, the children can stay with the mother but their religion is the religion of the father.

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Arabic text

قلت: فإن كانت الأم أمة وزوجها حر وأولاده منها أحرار فطلقها. فقال: هي أحق بحضانة الأولاد إلا أن تباع فيظعن بها، وكذلك بلغني عن مالك، والعبد في ولده ليس بمنزلة الحر؛ لأن العبد لا مسكن له ولا قرار، ولا يفرق بين الولد وأمه حرة كانت أو أمة إذا كان الأب عبداً⁽⁵⁾.

قال محمد: إلا أن يكون العبد متمكناً من سيده. كالعبد التاجر أو القائم بأمر سيده فهو أحق بولده إلا أن يباع ويخرج عن البلد، كذلك قال ابن القاسم.

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قلت له: أرأيت أم الولد إذا أعتقت ولها أولاد صغار، أهي في ولدها بمنزلة الحرة المطلقة في قول مالك؟ قال: نعم⁽¹⁾.

قال محمد: ولا بن القاسم في / سماع عيسى أنه قال فيمن أعتق أم ولده على أن تسلم له ولده الصغار منها، [أنهم]⁽²⁾ يردون إليها وليس ذلك بمنزلة الحرة تصالح زوجها على أن تسلم إليه أولاده.

Translation:

Saḥnūn asked Ibn al-Qāsim: What if the mother is a slave, her husband is a free man and their children are free, then the man divorced her. Ibn al-Qāsim answered: The woman is more entitled for custody of the children, except in the case that she is sold and she is taken away. The same was Mālik's doctrine. The slave regarding his/her child is not in the same position as a free person, because the slave does not have a place of his/her own to stay and cannot decide. The

mother and the child are not separated, regardless of whether she is free or slave, when the father is a slave.¹⁰⁵⁷

Muḥammad said: Unless the male slave has been empowered by his master, like the slave who is a trader or is in charge of the business of his master, because in this case, he is more entitled to the custody of his child, except if he is sold and has to leave the place where he lives. Ibn al-Qāsim said the same.

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Saḥnūn asked Ibn al-Qāsim: What is your opinion regarding an *umm walad*, when she is set free and she has a child - is she in the same position as a divorced woman according to the doctrine of Mālik? Ibn al-Qāsim answered: Yes.¹⁰⁵⁸

Muḥammad said: in the audition (*samā'*) of 'Īsā, Ibn al-Qāsim said regarding the *umm walad* who was set free agreeing that her little children are surrendered to the father, they have to be returned to her. This is so because she is not like a free woman who makes *muṣālaḥa* with her husband in return of giving the children to him.

Commentary:

A female slave is more entitled for custody than the father of her children even if he is a free man, except in the case that she is sold and taken to another place, then the father gets the custody. In the case of an *umm walad*, her situation is the same as that of a free woman because she cannot be sold or moved by force. She keeps the custody of her children even in the case that she was manumitted on condition that she will give her children to the father, because such condition was not valid. Also, she is not able to make *muṣālaḥa* with her husband on the custody of the children.

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Arabic text

¹⁰⁵⁷ Ibid, vol. 5/359.

¹⁰⁵⁸ Ibid, vol. 362/5.

ولمالك في سماع أشهب أنه سئل عن امرأة توفي زوجها عنها فتركت أولادها⁽³⁾ سبعة أشهر فقامت وقالت: قيل لي: إنني أحق بهم ما لم أنكح، ولم أعلم بها أترى لها في ذلك متكلما؟ فقال: نعم. الشأن في هذا قريب وقد تجهل السنة.

Translation:

In the audition (*samā'*) of Ashhab: Mālik was asked regarding a woman whose husband died while she was away, she left her children during 7 months, then she came back and said: "I have been told that I was the most entitled to have the custody of the children as long as I did not marry, but I was not aware of this." Ashhab asked: do you think that she is right in what she said? Mālik answered: Yes. What to do in this issue is simple because she was not aware of the *sunna*.

Commentary:

In this case, a man died while his wife was away and she did not take care of the children for seven months, then she came back and asked for their custody saying that she was entitled to it and that she did not know that by marrying again she would lose the custody. She can take them because she acted out of ignorance.

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Arabic text

باب في صفة اللعان والوجوه التي

بها يجب واجتماع الإمام والناس لذلك⁽⁴⁾

قال سحنون: قلت لابن القاسم: أرايت لو أن رجلا قال: وجدت مع امرأتي رجلا في لحافها عريانة مع عريان، أو قال: وجدت بها قد تجردت لرجل عريانة مع عريان، أيلتعن أم لا في قول مالك؟ قال: لم أسمع [من مالك]⁽⁵⁾ في هذا شيئا، إلا أنه لا لعان بين الزوج وبين امرأته إلا أن يرميها بالزنا برؤية أو ينفي حملها، فإن رماها بالزنا ولم يدع

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رؤية ولم يرد أن ينفي حملا فعليه الحد، [وأرى]⁽¹⁾ في مسألتك إن لم تكن له بينة على ما ذكر، فعليه الأدب ولا حد عليه.

Translation:

Chapter about the description of *li'ān* and the necessary requisites for it, and the consensus of the *imām* and the people regarding it

Sahnūn asked Ibn al-Qāsim: What is your opinion regarding a man who says: "I saw my wife with a man under her cover and both of them were naked" or the man said: "I saw her, she had undressed for a man and they were both naked", can he make *li'ān* according to the doctrine of Mālik? Ibn al-Qāsim answered: I did not hear anything from Mālik regarding this issue, but for him there was no *li'ān* between a husband and his wife except in the case that he saw her with his own eyes committing adultery or by refusing her pregnancy, if the man claims that she committed adultery

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without having seen her with his own eyes and he does not refuse her pregnancy, *ḥadd* is necessary for him. My opinion regarding your question is that if the man does not have clear proof (involving witnesses) for his claim, he is punished, but not with *ḥadd*.

قال سحنون: وقال المخزومي وابن دينار وأكثر رواية مالك: أن اللعان لا يكون إلا بأحد وجهين، إما برؤية لا ميسر بعدها، وإما بنفي حمل يدعي قبله استبراء، وإما قاذف لا يدعي هذا فإنه يحد، وهو قول ابن القاسم. وقد قال ابن القاسم أيضا [غير]⁽²⁾ هذا أنه إذا قذف أو نفى حملا لم يكن [به]⁽³⁾ مقرا لأعن ولم يسأل عن شيء، وقاله معه ابن نافع⁽⁴⁾.

قال محمد: والرؤية التي توجب اللعان أن يدعي أنه رآها تزني كالمرود في المكحلة، كذلك قال أصبغ. والاستبراء⁽⁵⁾ أن يقول: استبرأتها بحيضة، هذا قول مالك في رواية ابن القاسم، وروى ابن الماجشون عن مالك أن الاستبراء لا يكون إلا بثلاث حيض.

قال ابن القاسم: ويبتدأ بالرجل في اللعان فإن لآعنها برؤية قال أربع مرات: أشهد بالله لقد رأيته تزني، ويقول في الخامسة: لعنة الله علي إن كنت من الكاذبين. وتقول المرأة أربع مرات: أشهد بالله ما رأيته تزني، وتقول في الخامسة: غضب الله عليها⁽⁶⁾ إن كان من الصادقين⁽⁷⁾.

Translation:

Saḥnūn said: Al-Makhzūmī, Ibn Dīnār and most of those who transmitted from Mālik narrated: *li'ān* only applies in two situations:

- adultery has been seen directly and they do not have sexual intercourse after that
- denial of the pregnancy she claims that she was cleansed before sexual intercourse

The man becomes a slanderer unless he does not claim them and he is subject to the *ḥadd* punishment. This is the doctrine of Ibn al-Qāsim. Ibn al-Qāsim said another thing: If the man slanders her regarding adultery or refuses her pregnancy saying that is not related to himself, they make *li'ān* and nothing is asked. Ibn Nāfi' said the same.¹⁰⁵⁹

Muḥammad said: Seeing that makes necessary *li'ān* comes into being when a man claims that he saw his wife committing adultery with the man penetrating her as the kohl stick when it goes into its case. Aṣḥab said the same. About cleansing (*istibrā'*), the man said: "I did *istibrā'* with her with a menstruation", this is Mālik's doctrine according to what was transmitted from Ibn al-Qāsim. Ibn Mājjishūn has transmitted from Mālik that *istibrā'* comes into being with three menstruations.

Ibn al-Qāsim said: *Li'ān* starts with the man stating that he saw her committing adultery and saying four times: "God is my witness that I saw her while she was committing adultery", and then his fifth saying is: "God will damn me if I lie". The woman says four times: "God is my witness that he did not see me committing adultery", and then her fifth saying is: "The torment of the God is on me, if he tells the truth".¹⁰⁶⁰

¹⁰⁵⁹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/114.

¹⁰⁶⁰ Ibid, vol. 6/105.

Commentary:

"*Li'ān* is a Quranic institution governing cases in which a husband accuses his wife of adultery without supplying witnesses. Qur'an 24:6-9 explicitly instructs the husband to swear four times that his accusation is true, followed by a fifth oath in which he invokes the wrath of God upon himself if he is lying. The wife may then neutralize this claim by responding with four oaths of her own, the fifth of which calls upon her the wrath of God if her husband is telling the truth. If she refuses to take the oath, she is presumed guilty and subject to the punishment for adultery. If she takes the oath, she is declared innocent and permanently divorced from her husband. Her husband, in turn, forfeits any paternity claims over children born subsequent to their sworn oaths."¹⁰⁶¹

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Arabic text

قال ابن القاسم: وإن لاعنها بحمل انتفى منه قال: أشهد بالله لزنت، يقول ذلك أربع مرات، ويقول في الخامسة: لعنة الله علي إن كنت من الكاذبين. وتقول المرأة: أشهد بالله ما زنت، تقول ذلك أربع مرات، وتقول في الخامسة: غضب الله علي إن كان من الصادقين.

قال محمد: كان سحنون يقول: إذا تبرأ من الحمل قال: أشهد بالله لزنت⁽¹⁾، وما هذا الحمل مني.

Translation:

Ibn al-Qāsim said: If a man makes *li'ān* refusing pregnancy, he says four times: "God is my witness that she committed adultery", and then his fifth saying is: "God will damn me if I lie". The woman says four times: "God is my witness, I did not commit adultery", and then her fifth saying is: "The torment of God is on me, if he tells the truth".

¹⁰⁶¹ Esposito, "Li'ān", in *The Oxford dictionary of Islam*. Oxford Islamic Studies Online. Accessed April 22, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e1345>

Muḥammad said: Saḥnūn said: When the man refuses the pregnancy, he says: "God is my witness, she committed adultery,¹⁰⁶² her child is not from me".

Commentary:

Ibn Abī Zayd al-Qayrawānī explained *li'ān* in his *Risāla*: "The *li'ān* (divorce) between a couple is when the man denies paternity, provided that he claims that he has been apart from his wife since her last menstrual period, or by actually witnessing adultery, like a kohl stick in its case. There is disagreement about whether *li'ān* in the case of slander is allowed. If a couple divorces by *li'ān*, they can never remarry. The husband begins the *li'ān* by testifying four times by Allah and then the fifth time he curses himself. Then she does the same four times and the fifth invokes Allah's anger, as Allah Almighty has mentioned in the Qur'an (24:6-9). If the wife refuses to testify, she is stoned if she is free and *muḥṣanah* by virtue of intercourse with her husband or another husband. Otherwise, she receives a hundred lashes. If the husband refuses to testify, he is flogged eighty lashes for slander and the child is considered to be his."¹⁰⁶³

In this case, a man did not accept the pregnancy of his wife so he made *li'ān*. He did not see his wife committing adultery, but by denying that her child is his, he claims that his wife might have committed adultery. Hence, he swore on his claim. In response to this, the woman swore. The process of *li'ān* is explained in the Qur'an with the following verses: "*And those who cast it up on their wives having no witnesses except themselves, the testimony of one of them shall be to testify by God four times that he is of the truthful, (6) and a fifth time, that the curse of God shall be upon him, if he should be of the liars. (7) It shall avert from her the chastisement if she testify by God four times that he is of the liars, (8) and a fifth time, that the wrath of God shall be upon her, if he should be of the truthful.*"¹⁰⁶⁴

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Arabic text

¹⁰⁶² Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/105.

¹⁰⁶³ Ibn Abī Zayd al-Qayrawānī, *The Risālah*, translated by Aisha Bewley, p. 112.

¹⁰⁶⁴ Al-Nūr: 6, <http://tanzil.net/#trans/en.arberry/24:6>

وفي سماع أصبغ قال ابن القاسم: ويقول الرجل في الرؤية: أشهد بالله إني لمن الصادقين لرأيتهما تزني، في الأربع جميعا. وتقول المرأة: أشهد بالله إنه لمن الكاذبين ما رأي، ثم ترد ذلك في الأربع جميعا. قال ابن القاسم: ويقول الرجل في الحمل إذا أنكره: أشهد بالله إني لمن الصادقين وما هذا الحمل مني [في] (2) الأربع جميعا. وتقول المرأة: أشهد بالله أنه لمن الكاذبين وما زني في الأربع جميعا. قال ابن القاسم: ويلتعن في المسجد في دبر الصلوات بمحضر الإمام والناس، وهو قول مالك. قال مالك: والسنة في المتلاعنين أنهما لا يتناكحان أبدا (3) .

Translation:

In the audition (*samā'*) of Aṣḡagh, Ibn al-Qāsim said: The man says regarding *li'ān* on seeing: "God is my witness, I tell the truth, I saw her while she was committing adultery", he says this four times. The woman says: "God is my witness, he lied, he did not see me", then she repeats that four times. Ibn al-Qāsim said: The man says for refusing the pregnancy: "God is my witness, I tell the truth, this child is not from me", he says this four times. The woman says: "God is my witness, he lies and I did not commit adultery", four times in total. Ibn al-Qāsim said: They do *li'ān* in the mosque after the prayers in the presence of the imam and the people. This is the doctrine of Mālik. Mālik said: The *sunna* regarding two people who make *li'ān* is that they cannot ever marry.¹⁰⁶⁵

Commentary:

Remarriage after *li'ān* is explained in the *Muwatṭa'*: "Mālik said: The *sunna* with us is that those who curse each other are never to be remarried. If the man calls himself a liar, (i.e. takes back his accusation), he is flogged with the *ḥadd* punishment, and the child is given to him, and his wife can never return to him. There is no doubt or dispute about this *sunna* among us."¹⁰⁶⁶

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¹⁰⁶⁵ Ṣaḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/107

¹⁰⁶⁶ Mālik b. Anas, *Al-Muwatṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 230.

باب في لعان التي لم يدخل بها ولعان الأخرس
والأعمى والصبي ومن أنكر لون ولده

قال سحنون: قلت لابن القاسم: فلو أن رجلاً تزوج امرأة فلم يبين بها حتى جاءت بولد وادعت أنه منه وأنكر الزوج ذلك أيلاعنها؟ قال: نعم. إذا قالت: كان يغشاها

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وكان الذي قالت يمكن، وجاءت بولد لسته أشهر فأكثر من يوم تزوجها، لها نصف الصداق ولا سكنى عليه ولا متعة، وهو قول مالك.

قلت لابن القاسم: وكذلك إن طلقها قبل البناء بها فجاءت بولد لمثل ما يلده النساء. فقال: قال مالك: يلزمه الولد [إلا أن يلاعن]⁽¹⁾ إذا كان ما ادعت من إتيانه إياها يمكن⁽²⁾.

Translation:

Chapter about the *li'ān* of a woman with whom the man did not have sexual intercourse and *li'ān* of a mute, a blind, a boy and a person who refuses the color of his child

Saḥnūn asked Ibn al-Qāsim said: What if a man married a woman and he did not have sexual intercourse with her even if she gave birth to a child, claiming that the child was from him while the man denied it - does it involve that he makes *li'ān*? Ibn al-Qāsim said: Yes. If the woman said that he had sexual intercourse with her

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and that he did that is possible and she gave birth to a child in six months or in more time from her wedding day, half dower is necessary for her, there is no dwelling and no gift for her. This is the doctrine of Mālik.

Saḥnūn asked Ibn al-Qāsim said: Is it the same if the man divorced her before having sexual intercourse with her and she gave birth to a child during time that her peers give birth? Ibn al-Qāsim answered: Mālik said: The child belongs to

him, except if they performed *li'ān*, when her claim regarding the child is possible.¹⁰⁶⁷

Commentary:

In this case, a man claimed that he had never had sexual intercourse with his wife, but the woman gave birth to a child and she claimed that the child belonged to the man. If the man did not do *li'ān* to refuse the child before she gave birth and the woman gave birth during the time that is usual among her peers, he has to accept the child. He should have denied it while she was pregnant.¹⁰⁶⁸

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Arabic text

قال محمد: ولا بن القاسم في سماع عيسى أنه سئل عن الرجل ينفي حمل المرأة التي لم يدخل بها ويلتعن، وتأبى هي أن تلتعن. فقال: تضرب مائة إذا نكلت عن اللعان أو صدقته بالإقرار، وتقيم تحته كما كانت ويبرأ من الحمل ولكن لا يقرُّها حتى تضع حملها. وكذلك النصرانية تكون تحت المسلم فينتفي من حملها ويلتعن وتأبى هي أن تلتعن فإنه يبرأ من الحمل⁽³⁾. وتكون بحالها ولكن لا حد عليها.

Translation:

Muḥammad said: In the audition (*samā'*) of 'Īsā, Ibn al-Qāsim was asked regarding a man who refused the pregnancy of the woman with whom he did not have sexual intercourse, the man made *li'ān* but the woman rejected that. Ibn al-Qāsim said: The woman is subject to 100 lashes if she does not want to perform *li'ān* or if she confirms what the man said with a confession. She stays married to him as she was, her pregnancy is completed but the man does not approach her until she gives birth. In a similar situation with the Christian woman who is married to a Muslim man, if the man refuses her pregnancy and performs *li'ān*, but the woman refuses to do the same, he is not considered responsible for her

¹⁰⁶⁷ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/118.

¹⁰⁶⁸ Ibn Rushd (al-Ḥafīd), *The Distinguished jurist's primer*, translated and edited by Imran Ahsan Khan Nyazee and Mohammad Abdul Rauf, vol. 2/142.

pregnancy.¹⁰⁶⁹ She continues in the same way but no *ḥadd* punishment is given to her.

Commentary:

In this case, a man claimed that his wife was pregnant from another person because he did not have sexual intercourse with her. Then he performed *li'ān* but his wife did not accept that. When she lies or does not want to make *li'ān*, her adultery is considered proven and she is given 100 lashes. However, if the woman is Christian, she does not take this punishment.

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Arabic text

قلت: فالأخرس هل يلتعن إذا قذف بالإشارة أو بالكتاب؟ قال: نعم. إذا [فقه]⁽⁴⁾
ما يقال له أو ما يقول⁽⁵⁾.

قلت: فالأعمى إذا قذف امرأته أيلتعن في قول مالك؟ قال: نعم؛ لأنه من الأزواج،
وقد قال الله تبارك وتعالى: ﴿وَالَّذِينَ يَرْمُونَ أَزْوَاجَهُمْ﴾⁽⁶⁾ قال مالك: ويحمل ذلك في
دينه، وسواء في هذا قذفها أو انتفى من حملها⁽⁷⁾.

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[قلت]⁽¹⁾: والصبي إذا قذف امرأته وهي كبيرة أيلاعنها؟ قال: لا. ولا حد عليه
للقذف ولا يلحقه الولد إذا جاءت امرأته بولد، ابن وهب⁽²⁾.
قال مالك: ومن أنكر لون ولده أنه لا يكون في ذلك لعان⁽³⁾.

Translation:

Sahnūn asked: What about a speechless person, can he make *li'ān* using signs or writing? Ibn al-Qāsim said: Yes, if what he is told or what he says is understandable.¹⁰⁷⁰

¹⁰⁶⁹ This transmission was compiled by al-'Utbī and can be found *apud* Ibn Rushd al-Jadd, *Al-Bayān wa'l-taḥṣīl*, vol. 6/412.

¹⁰⁷⁰ Sahnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/117.

Saḥnūn asked: What about a blind person, when he blames his wife for adultery, does he make *li'ān* according to Mālik's doctrine? Ibn al-Qāsim said: Yes, because he is a husband, and God says: "*And those who cast it up on their wives*".¹⁰⁷¹ Mālik said: This forms part of his religion, regardless of whether he blames her for adultery or refuses her pregnancy.¹⁰⁷²

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Saḥnūn asked: What about a little boy when he claims that his wife who is older than himself performed adultery - does *li'ān* come into being? Ibn al-Qāsim said: No, no *ḥadd* punishment is given to him because of his claim and the child does not belong to him when the woman gives birth. This is the doctrine of Ibn Wahb.¹⁰⁷³

Mālik said: Whoever denies the color of the child, there is no *li'ān* in this case.¹⁰⁷⁴

Commentary:

Kristina L. Richardson argues that the category of blightedness certainly encompasses disability. The term disability refers to physical and cognitive performance and productivity.¹⁰⁷⁵ According to this case, a person who cannot see can make *li'ān* as well because he can explain himself speaking. A person who cannot speak, can make *li'ān*, because he can explain the situation using signs or writing. However, a little boy married to a woman who is older than him cannot make *li'ān*. When his wife gives birth, the child does not belong to him.

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Arabic text

¹⁰⁷¹ Al-Nūr: 6, <http://tanzil.net/#trans/en.arberry/24:6>

¹⁰⁷² Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 6/116-117.

¹⁰⁷³ Ibid, vol. 6/108.

¹⁰⁷⁴ Ibid, vol. 6/116.

¹⁰⁷⁵ Kristina L. Richardson, *Difference and Disability in the Medieval Islamic World: Blighted Bodies*. Edinburgh: Edinburgh University Press, 2012, p. 36.

باب فيمن نظر إلى امرأته وهي حامل فسكت أو أقر بوطئها إلى أن قال رأيته تزني

قال سحنون: قلت لابن القاسم: فلو أن رجلا نظر إلى امرأته حاملا وهي مسلمة حرة أو نصرانية أو [أمة]⁽⁴⁾ فسكت ولم ينتف من الحمل ولا ادعاه فلما وضعت انتفى منه. قال: قال مالك: إذا رأى الحمل فسكت حتى وضعت فليس له أن ينتفي منه فإن انتفى منه حين تلده جلد الحد إن كانت زوجته [حرة]⁽⁵⁾ مسلمة، ولا حد عليه في الكافرة ولا الأمة، لأن قاذفهما لا يحد⁽⁶⁾. قلت: فإن رأى الحمل فسكت يوما أو يومين أو أكثر من ذلك ثم انتفى منه بعد ذلك. قال: إذا شهدت البينة أنه قد رآه فلم ينكر أو أقر ثم جاء بعد ذلك ينكر لم يكن ذلك [له]⁽⁷⁾.

Translation:

Chapter about a man who sees his wife who is pregnant and remains silent or approves having sexual intercourse with her until he says that he saw her committing adultery

Sahnūn asked Ibn al-Qāsim: What about a man who saw that his wife was pregnant - she could have been a Muslim free woman or Christian or slave- and he remained silent and did not reject her pregnancy, he did not claim that the child did not belong to him when she gave birth. Mālik said: If the man saw the pregnancy and he kept quiet until she gave birth, he cannot refuse the child. If he refused that while she was giving birth, a *ḥadd* punishment is given to the man if his wife is Muslim. There is no *ḥadd* for him if she is non Muslim or slave because there is no *ḥadd* for slandering them.¹⁰⁷⁶ Sahnūn said: What if the man saw her pregnancy and remained silent throughout a day or two days or more, and after that he refused the child. Ibn al-Qāsim said: If the woman brings a witness that the man saw the pregnancy and did not refused that or he approved the pregnancy then he refused, he cannot deny it.

¹⁰⁷⁶ Abū 'Umar al-Ishbīlī advised in that way; whoever approves having sexual intercourse but rejects the child and does not claim *istibrā'* is jailed until approving the child. Ibn Qāsim al-Sha'bī, *Al-Aḥkām*, edited by al-Ṣādiq al-Ḥalawī, p. 387.

Commentary:

As explained in the previous cases, if a man wants to refuse the pregnancy of his wife, he should do that before she gives birth because after the birth, refusing the child is not possible for him. Also, if the man did not refuse her pregnancy during a few days then he changed his mind and began to refuse it, there is no chance to accept it for him. He cannot reject it.

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Arabic text

قلت: فإن قال رأيته تزني الساعة ولم أجامعها بعد ذلك إلا أنني قد كنت جامعته
من قبل أن رآها⁽¹⁾. فقال: قال مالك: يلتعن ولا يلزمه الولد.

Translation:

Ṣaḥnūn said: What if the man says: "I saw her while she committed adultery, after that I did not have sexual intercourse with her but I used to have sexual intercourse with her before seeing her". Ibn al-Qāsim said: Mālik said: *Li'ān* comes into being and the child does not belong to the man.

Commentary:

In this case, a husband had sexual intercourse with his wife but he saw that she had sexual intercourse with another man so he had no sexual intercourse with her after that time. Thus, he can make *li'ān* and he is allowed not to accept the child.¹⁰⁷⁷

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Arabic text

¹⁰⁷⁷ Santillana, *Istituzioni di diritto Musulmano malichita con riguardo anche al sistema sciafiita*, p. 221.

قلت: فإن جاءت بولد لأقل من ستة أشهر من بعد ما التعن أيلزمه؟ قال: نعم؛ لأن الحمل قد كان من قبل أن رآها تزني، وقد اختلف قول مالك في هذه المسألة، فمرة [قال]⁽²⁾: يلزمه الولد، ومرة لم يلزمه إياه، ومرة قال: ينفيه وإن كانت حاملاً، وأحب ما فيه إلي أنه إذا رآها تزني وبها حمل ظاهر لا يشك فيه أنه يلحق به الولد إذا التعن على الرؤية⁽³⁾.

Translation:

Sahnūn said: What if the woman gave birth to a child less than six months after *li'ān*, does the child belong to the man? Ibn al-Qāsim said: Yes, because the pregnancy came into being before seeing adultery. There are various doctrines of Mālik on this issue. Once Mālik said: 'The child belongs to him', and once he said: 'The child does not belong to him'. Once Mālik said: The man refuses her if she is pregnant. For me what is preferable is that when he saw her while she was committing adultery and her pregnancy was obvious, there is no doubt that the child belongs to him if the man made *li'ān* because of seeing adultery.¹⁰⁷⁸

Commentary:

In this case, a couple made *li'ān*, then the woman gave birth before six months. If the child was born before adultery, it belongs to her husband. If her pregnancy becomes visible after committing adultery, in that situation the child might belong to another man. On the other hand, this adultery might not be the first for her. The man can make *li'ān* for adultery or pregnancy.

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Arabic text

¹⁰⁷⁸ Sahnūn b. Sa'id, *Al-Mudawwana al-kubrā*, vol. 6/109-110.

باب ما يلزم المرأة من رضاع ولدها وما لا يلزم

قال ابن القاسم: وسألنا مالكا عن المرأة ذات الزوج أيلزمها رضاع ولدها؟ قال: نعم. ولا أجرة لها إلا أن [تكون]⁽⁴⁾ ذات شرف ونسل كبير ليس مثلها يرضع ويعالج الصبيان، وإن كانت كذلك كان الرضاع على الأب/.
قلت لمالك: فإن كانت الأم ليست في الموضع الذي ذكرت، وهي ممن يلزمها رضاع ولدها أينقطع لبنها لمرض أصابها أو لغير ذلك؟ قال: فالرضاع على الأب يستأجر لولده من يرضعه، وليس عليها من الأجرة شيء.

Translation:

Chapter about necessary and unnecessary things for a woman regarding breast-feeding

Ibn al-Qāsim said: I asked Mālik regarding a woman who has a husband, is breastfeeding of her child necessary for her? Mālik said: Yes. There is no wage for her but if the woman belongs to a noble family with a huge progeny and her peers do not breastfeed and look after the child, if it is like that, the father is responsible for providing the breastfeeding of the child.

Ibn al-Qāsim asked Mālik: If the mother is not like as we mentioned and the breastfeeding of the child is necessary for her, what happens if her milk stops because of an illness or something like that? Mālik said: The father is responsible for providing the breastfeeding of the child, he rents a person who breastfeeds his child and there is no wage for her.

Commentary:

This issue specified in Qur'an: *"Mothers shall suckle their children two years completely, for such as desire to fulfill the suckling. It is for the father to provide them and clothe them honourably. No soul is charged save to its capacity; a mother shall not be pressed for her child, neither a father for his child. The heir has a like duty. But if the couple desire by mutual consent and consultation to wean, then it is no fault in them. And if you desire to seek nursing for your children, it is no fault in*

you provide you hand over what you have given honourably; and fear God, and know that God sees the things you do."¹⁰⁷⁹

According to this verse, mothers shall suckle their children two years completely but according to the specific case: the social status of the women is determinative of the issue. If their social status is high or they belong to a noble family, they do not have to do that. However, if such is not their status, they should suckle their children and they do not take a wage.¹⁰⁸⁰

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Arabic text

قال سحنون: قلت لابن القاسم: فإن مات الأب والأم ترضع ولدها وكانت ممن يلزمها ذلك، أيسقط عنها ما كان يلزمها من رضاع ولدها؟ فقال: إن كان له مال وإلا

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أرضعته، [لأن]⁽¹⁾ ذلك لازم لها في الرضاع بخلاف النفقة، وقد أعلمتك أن النفقة لا تلزم للمرأة على ولدها⁽²⁾.

قال ابن القاسم: وإن مات الأب وكان للابن مال وأبت أمه من رضاعه فذلك لها، ويستأجر للابن من ماله من يرضعه، إلا أن يخاف عليه ألا [يقبل]⁽³⁾ غيرها فتجبر على رضاعه وتعطى أجرة الرضاع، وهو قول مالك.

Translation:

Sahnūn said: I asked Ibn al-Qāsim: What if the father died and the mother is breastfeeding her child and she is responsible for it, does the necessity of breastfeeding the child disappear for her? Ibn al-Qāsim said: If the child has

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financial means, it is like that, but if the child has no financial means, she breastfeeds the child because breastfeeding is necessary for her due to

¹⁰⁷⁹ Al-Baqara: 233, <https://tanzil.net/#trans/en.arberry/2:233>

¹⁰⁸⁰ Karaman, Dönmez, Çağrııcı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 352.

matrimonial maintenance. Ibn al-Qāsim told Saḥnūn: The maintenance of the child is not responsibility of the woman.¹⁰⁸¹

Ibn al-Qāsim said: If the father died and the child has financial means and the mother refuses the breastfeeding of the child, she can do that. She then rents a foster mother with the financial means of the child, but if it is feared that the child will not accept someone else, the mother is forced to breastfeed the child and a fee is paid to her. This is the doctrine of Mālik.

Commentary:

Providing breastfeeding for a child is responsibility of the father, so after his death, the mother can refuse breastfeeding of the child. Fathers should provide the maintenance of the mother during breastfeeding process. In the Qur'an: *"If they are with child, expend upon them until they bring forth their burden. If they suckle for you, give them their wages, and consult together honourably. If you both make difficulties, another woman shall suckle for him."*¹⁰⁸² If the woman refuses breastfeeding, she can find a foster mother and pay her wage with the financial means of the child. If the child does not accept the foster mother, the woman is forced to breastfeed him in exchange of a payment.

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Arabic text

قلت لابن القاسم: فمن طلق امرأته وله منها ولد ترضعه فعلى من رضاعه؟ فقال:
إن كان طلقها طلاقاً يملك فيه الرجعة فالرضاع عليها إذا كانت ممن ترضع مادامت
النفقة تلزم الزوج، فإذا سقطت النفقة عن الزوج كان رضاع ابنه عليه، وإن كان طلقها
البتة كان الرضاع على الأب.

¹⁰⁸¹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/416.

¹⁰⁸² Al- Ṭalāq: 6, <http://tanzil.net/#trans/en.arberry/65:6>

قلت: فإن اختلفا في أجره الرضاع فقالت الأم: لا أرضعه إلا بأجرة كذا، والزوج يجد من يرضع له بأقل من تلك العدة. فقال: قال مالك: إن أبت [أن]⁽⁴⁾ ترضعه بما ترضعه به الأجنبية فلا حق لها فيه، وإن أرادت أن ترضعه بما ترضعه به الأجنبية فذلك لها، وليس للأب أن يفرق بينهما وبينه، وإن كان الصبي لا يقبل المراضع وخيف عليه فإنها أحق به وتعطى أجره رضاع مثلها وتجبر على ذلك إن أبت منه.

Translation:

Sahnūn asked Ibn al-Qāsim: When a man divorces his wife who has a suckling child of whom he is the father, who is responsible for breastfeeding the child? Ibn al-Qāsim said: If he divorced her with revocable *ṭalāq*, the woman is responsible if her peers breastfeed their children, as long as matrimonial maintenance is paid by the husband. If the matrimonial maintenance provided by the husband disappears, the man becomes responsible to breastfeed the child. If he divorced her irrevocably, the man is responsible for breastfeeding the child. Sahnūn said: What if they have disagreement about the wage of the breastfeeding? The mother says: "I can breastfeed the child in return of such a wage", and the husband finds a foster mother to breastfeed the child in return of a lesser wage than that asked by the mother. Mālik said: If the mother does not accept the wage that is offered to an unfamiliar woman, she is not entitled to do that. If the mother requests the same wage that would be paid to an unfamiliar woman, she can do that. The father is not entitled to separate the mother and the child. If the child does not accept a foster mother and it is feared that the child may be affected, the mother is more entitled and the money is paid to her. If she does not accept, she is forced to do that.

Commentary:

When a couple divorces with revocable *ṭalāq*, the woman breastfeeds the child because this responsibility belongs to her and the man provides her maintenance during this process. However, if they divorce with irrevocable *ṭalāq*, there is no return for them. Hence, the man should take care of the breastfeeding of the child. If the woman requests a wage, this should be according to the regular price. It cannot be more than others requested. If her demand corresponds to that other women ask, she is more entitled to breastfeed her child than others.

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Arabic text

قال ابن القاسم: قلت⁽⁵⁾ لمالك: لو أن رجلا طلق امرأته البتة وهو عديم لاشيء له، وله منها ابن يرضع، ووجد من دون [أمه من]⁽⁶⁾ قرابته من يرضعه بغير أجر. فقال:

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يقال لأمه: إما أن ترضعه باطلا، وإما أن تسلمه إليه، وكذلك إذا كان الأب قليل ذات اليد لا يقوى من الرضاع إلا بالشيء اليسير فطلبت الأم أجر رضاع مثلها والأب يجد من يرضعه بدون ذلك، فإنه يقال للأم: إما أن ترضعيه بها وجد الأب وإما أن تسلمه إليه. وإن كان الأب موسرا ووجد من يرضعه باطلا لم يكن له أن يأخذه منها وعليه أن يدفع إلى الأم من الأجرة مثل الذي ترضعه بها غيرها ويجبر على ذلك⁽¹⁾.

Translation:

Ibn al-Qāsim said: I asked Mālik: What about a poor man who divorced his wife with irrevocable *ṭalāq*, his wife has a suckling child with him and the man found a woman, who was not the mother, who would breastfeed the child without money. Mālik answered:

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The mother is told: "Breastfeed the child unpaid or hand over the child to the father". It is similar to the case when the father's financial situation is not good. If he is able to give a little thing to breastfeed the child and the woman requests as much money as her peers, then the father finds another person for breastfeeding, at this point the mother is told: "Accept the same price that the other person asked or hand over the child to the father". If the father is rich and he finds a woman who breastfeeds the child unpaid, he is not entitled to take the child from the mother. He should pay to the mother the amount that would be found satisfactory by others, he is forced to do that.¹⁰⁸³

¹⁰⁸³ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/417-418.

Commentary:

In this case, a couple has a child who is breastfeeding from the mother. They divorce irrevocably and the man is not able to provide the maintenance of the woman during the breastfeeding process of the child. Then, the man found a woman willing to breastfeed the child for nothing. The mother has two choices in that situation. She can accept to breastfeed the child without receiving any money or she can give in the child to the woman who has accepted to breastfeed the child. On the other hand, if the father is able to pay the amount that is accepted by the peers of the woman, he has to pay it to the mother. He cannot separate her from the child.

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Arabic text

باب في الرضاعة في الحولين وبعدها

قال سحنون: قلت لابن القاسم: أرأيت الصبي إذا فصل فأرضعته امرأة بلبنها بعدما فصل أكون ذلك رضاعاً أم لا؟⁽²⁾ فقال: ما كان من رضاع بعد الحولين بالأيام اليسيرة التي لم يستقر فيها بالطعام عن الرضاع فهو رضاع، وإن كان قد قام بعد الحولين أياماً كثيرة مفطوماً واستغنى عن اللبن وعاش بالطعام والشراب فهذا لا يكون رضاعاً؛ لأن عيشه قد تحول عن اللبن وصار في الطعام⁽³⁾.

Translation:

Chapter about breastfeeding during two years and after that

Sahnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a little child who was weaned and a woman breastfed the child after weaning? Is this considered breastfeeding or not?¹⁰⁸⁴ Ibn al-Qāsim answered: If only a few days have passed after the two years and if the child is not fully accustomed to eating, it is accepted as breastfeeding. If after two years, many days have passed since the child was weaned, the child manages without milk and was fed by eating and

¹⁰⁸⁴ Ibid, vol. 5/407.

drinking, it is not accepted as breastfeeding because the feeding of the child turned from milk to food.¹⁰⁸⁵

Commentary:

As explained in Question 182, mothers should suckle their children two years completely. It is specified in the Qur'an so when children reach the age of two, they can suckle only more few days to adapt eating completely. If they continue to suckle, it is not breastfeeding because they can eat and drink at this age. Suckling is not necessity for them. It is explained in the *Muwatta'*: "Yaḥyā said that he had heard Mālik say, 'Suckling, however little or much when it is in the first two years, makes *ḥarām*. As for what is after the first two years, little or much, it does not make anything *ḥarām*. It is like food'."¹⁰⁸⁶

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Arabic text

قلت: فإن كانت أمه لم تفصله واتصل رضاعه ثلاث سنين، فإن رضعته امرأة بعد ثلاث سنين وأمه لم تفصله بعد. فقال: قال مالك: لا يكون رضاعا وإنما الرضاع في الحولين والشهر والشهرين بعدهما⁽⁴⁾.

قلت: فإن فصلته قبل الحولين ثم أتت امرأة أجنبية فأرضعته قبل تمام الحولين. فقال: إن كان انقطعت رضاعته واستغنى عنها فلا يكون ما أرضع بعد ذلك رضاعا⁽⁵⁾.

Translation:

Saḥnūn said: What if the mother did not wean the child and the breastfeeding continued for 3 years, and what if a woman breastfed this child for 3 years and the mother did not wean the child? Ibn al-Qāsim answered: Mālik said: It is not considered breastfeeding, milk brotherhood comes into being 2 years and few months after that.¹⁰⁸⁷

¹⁰⁸⁵ Ibid, vol. 5/408.

¹⁰⁸⁶ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 216.

¹⁰⁸⁷ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/407.

Saḥnūn said: What if the mother weaned the child before two years, then a woman who did not belong to the family breastfed the child before the two years had been completed? Ibn al-Qāsim answered: If the mother stops breastfeeding and does not want to breastfeed the child, she cannot breastfeed the child anymore.¹⁰⁸⁸

Commentary:

In the *Muwaṭṭa'*: "Yaḥyā related to me from Mālik from Yaḥyā b. Sa'īd that Ibrāhīm b. 'Uqba asked Sa'īd b. al-Musayyab about suckling. Sa'īd said: "All that occurs in the first two years, even if it is only a drop, produces a *ḥarām* (relationship). Whatever is after two years, is only food that is eaten. Ibrāhīm b. 'Uqba said: "Then I asked 'Urwa b. az-Zubayr and he told me the same as what Sa'īd b. al-Musayyab said."¹⁰⁸⁹

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Arabic text

باب في اللبن من قبل الفحل⁽¹⁾

قال سحنون: قلت له: أ رأيت امرأة رجل ولدت منه فأرضعت ابنه عامين ثم فطمته ثم أرضعت بلبنها بعد/ الفصل صبيًا، أيكون هذا الصبي ابن الزوج؟ وحتى متى يكون اللبن للفحل من بعد الفصل؟ قال: أرى لبنها للفحل الذي [درّت]⁽²⁾ لولده.

Translation:

Chapter about the milk of a woman who is fertilized by a man¹⁰⁹⁰

¹⁰⁸⁸ Ibid, vol. 5/408.

¹⁰⁸⁹ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 248.

¹⁰⁹⁰ [f ḥ l]: [faḥl]: the male: *Mu'jam lughat al-fuqahā'*, edited by Hāmid Sādiq Qanībī and Qutb Mustafā Sanū, p. 309.

al-faḥl: A woman has a son from a man and she has milk due to this reason, everybody who is breastfed with that milk is illicit for this man, his sisters, her children from this woman or others because this milk is created due to this man, this child belongs to this man. Ibn Manẓūr, *Lisān al-'Arab*, vol. 10/194-195.

Saḥnūn said: I asked Ibn al-Qāsim: What is your opinion regarding the wife of a man who gave birth from him, she breastfed the child during two years, then she weaned the child, then she breastfed another child - does the (second) child become the son of the husband? Until when is milk produced by fertilization of the man after the weaning? Ibn al-Qāsim answered: My opinion is that her milk was created by fertilization of the man and that breastfeeding makes the child son of the man.

Commentary:

In this case, a man got pregnant his wife and she gave birth and breastfed the child. Then, she weaned the child after two years and breastfed another child as her milk continued being produced. This milk is created by her husband's fertilization. Hence, these children are milk brothers. They cannot marry each other.

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Arabic text

قلت: فإن كانت ترضع ولدها من زوج قد طلقها، ثم تزوجت غيره بعد انقضاء عدتها ثم حملت من الثاني فأرضعت صبيا لمن يكون اللبن؟ فقال: للزوجين جميعا إذا كان اللبن لم ينقطع من الأول.

Translation:

Saḥnūn said: What if the woman breastfed the child she had from her husband who divorced her, then she married another man after her waiting period was completed, then she got pregnant from the second husband and she breastfed another child - to whom does the milk belong? Ibn al-Qāsim said: It belongs to both of them if the milk did not stop since the first child.

Commentary:

In this case, a couple has a child and the man divorced the woman. She married another man after the waiting period, she got pregnant by the second husband and she had milk again. Then, she breastfed another child. There are two options

for this case. Her milk might not finish until her second pregnancy or it finished and started again by the fertilization of the second man. This point is taken into consideration. If the milk continues during the first and second fertilization, it provides kinship so it belongs to the two men.

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Arabic text

قلت: فلو أن امرأة تزوجها رجل فحملت منه فأرضعت صبيا وهي حامل أيكون اللبن للفحل؟ قال: نعم. هو للفحل منه تحمل، وكذلك لو درت على [صبي]⁽³⁾ وهي غير حامل ولا حملت قط فأرضعته وهي تحت الزوج [أن]⁽⁴⁾ اللبن للزوج⁽⁵⁾.

Translation:

Saḥnūn said: What if a woman married a man, she got pregnant and breastfed a child while she was pregnant - was the milk produced by the fertilization?

Ibn al-Qāsim answered: Yes. She got pregnant by him. This is similar to the case of the woman who breastfed a child when she was not pregnant, she did not get pregnant after that when she was breastfeeding the child and because she was married, the milk belongs to the husband.¹⁰⁹¹

Commentary:

In this case, a man got pregnant a woman and she had milk by this fertilization. She breastfed another child before giving birth. Thus, these children become milk brothers because the milk that fed them was created by the fertilization of the same man. The conditions that come into being with milk brotherhood occur between them. They cannot marry. It is explained in the *Muwaṭṭa'*: "Yaḥyā related to me from Mālik from 'Abdullāh b. Dīnār from Sulaymān b. Yasār and from 'Urwa b. az-Zubayr from 'Ā'isha, that the Messenger of Allah, may Allah bless him and grant him peace, said, "What is *ḥarām* by birth is *ḥarām* by suckling."¹⁰⁹²

¹⁰⁹¹ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/406-407.

¹⁰⁹² Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 248.

باب في⁽¹⁾ جامع الرضاع

قال سحنون: قلت لابن القاسم: رأيت الوجور والسعوط⁽²⁾ بلبن المرأة أيجرمان؟ فقال: أما الوجور فيحرم، وأما السعوط فأرى إن كان قد وصل إلى جوف الصبي فإنه يحرم⁽³⁾.

قال محمد: الوجور - بنصب الواو- وهو ما ينصب في وسط الفم، واللدود ما يصب في إحدى جانب⁽⁴⁾ الفم، مأخوذ من لذيدي الوادي وهما جانباه. وفي رواية ابن وهب عن عطاء الخراساني⁽⁵⁾ أنه سئل عن لبن المرأة يكتحل به الصبي. فقال: لا، لا يحرم. قال محمد: وروى ابن حبيب عن ابن الماجشون⁽⁶⁾ أنه قال: إذا كحل الصبي بكحل خلط بلبن المرأة فإنه إن كان الكحل من العقاقير التي تخرق إلى الجوف، مثل الصبر، والمرو، والعنزروت، والحبة السوداء، وما أشبه ذلك مما يجري في عروق العين حتى يصل إلى الحلق فهو يحرم لأنه يصل إلى الجوف، وإن كان الكحل من العقاقير التي تبرد⁽⁷⁾ في العين ولا تصل إلى الجوف كالأثمد وشبهه فلا يحرم.

قلت له: فالبكر التي لم تنكح قط إن درت على صبي فأرضعته، أتقع الحرمة بينهما بذلك؟ قال: نعم. وهو قول مالك.

قلت: فالمرأة التي كبرت وأسنت إن درت على صبي صغير فأرضعته أتكون أمه بذلك؟ قال: نعم. وهو قول مالك⁽¹⁾.

Translation:

Miscellaneous Chapter About Suckling

Sahnūn said: I asked Ibn al-Qāsim: What is your opinion regarding *al-wajūr*¹⁰⁹³ and *al-sa'ūt*¹⁰⁹⁴? Does this milk make illicit the woman? Ibn al-Qāsim answered:

¹⁰⁹³ [w j r]: [wajūr]: drench, *Mu'jam lughat al-fuqahā'*, edited by Hāmid Sādiq Qanībi and Qutb Mustafa Sanū, p. 218. Pouring breast milk in the middle of the mouth.

Al-wajūr makes her illicit. My opinion for *al-sa'ūt* is that if the milk reaches the stomach of the child, the child becomes illicit for her.¹⁰⁹⁵

Muḥammad said: *Al-wajūr* means pouring the milk in the middle of the mouth, *al-ladūd* means pouring the milk on one of the two sides of the mouth; it is literally taken from both sides of the valley. Ibn Wahb has narrated from 'Aṭā' al-Khurāsānī that he was asked regarding the milk of a woman which is used as an eyeliner for a child. He said: No, it does not make her illicit.

Muḥammad said: Ibn Wahb has narrated from Ibn al-Mājjishūn: If a little child is given *kuhl* as an eyeliner mixed with the milk of a woman, if this eyeliner is one of the medicines that reaches the stomach like agave, *al-mirwa*, *'anzarūt*, black cumin or something similar that passes from the vessels of the eyes and reaches the throat, it makes her illicit because it goes to the stomach from there. If the eyeliner remains on the eye and does not reach the stomach, like in the case of antimony and such kind of things, it does not make her illicit.

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Saḥnūn asked Ibn al-Qāsim: What about a virgin girl who did not marry and who breastfed a child, does *al-ḥurma* exist between them? Ibn al-Qāsim said: Yes. It is the doctrine of Mālik.

Saḥnūn asked Ibn al-Qāsim: What about an old woman who breastfeeds a child, does she become his mother in that way? Ibn al-Qāsim said: Yes. It is the doctrine of Mālik.¹⁰⁹⁶

Commentary:

In this case, the issues of *al-wajūr* - which means pouring the milk in the middle of the mouth - and *al-sa'ūt* - which means pouring the milk in the nose - are dealt with. Both of them can result in milk brotherhood because the milk reaches the stomach of the child. If the child is sick and these methods are used as medicine, milk brotherhood does not exist unless it reaches the stomach. One drop of the milk is enough to make illicit the child and breastfeeding mother to each other. This regardless whether the woman who breastfeeds the child is virgin or old.

¹⁰⁹⁴ [s ' ṭ]: [sa'ūt]: snuff, ibid, p. 370. Snuff breast milk, Al-Fayrūzābādī, *Al-Qāmūs al-Muḥīt*, p. 865.

¹⁰⁹⁵ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/405.

¹⁰⁹⁶ Ibid, vol. 5/410.

Kinship by suckling comes into being in that way. This issue is explained in the *Muwaṭṭa'*: "Yaḥyā related to me from Mālik from Ibn Shihāb that he said: 'Suckling however little or much, makes *ḥarām*. Kinship by suckling makes men *maḥrām*.'" ¹⁰⁹⁷

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Arabic text

قال محمد⁽²⁾: في كتاب ابن حبيب أن ابن عباس رضي الله عنه سئل عن رجل كانت له امرأتان فأرضعت إحداهما جارية والأخرى غلاما، أيحبل للغلام أن يتزوج [الجارية]⁽³⁾؟ قال: لا. لأن اللقاح واحد⁽⁴⁾، يعني أن اللبن لزوجة المرأتين والغلام والجارية أخوان للأب.

قال محمد: اللقاح بفتح اللام هو ماء الرجل، كذلك قال الخليل.

قال محمد: وكل صبي رضع امرأة فلا يحل له أن ينكح بنتا من بنات تلك المرأة، ولا بأس أن يتزوج بنوا تلك المرأة أخوات ذلك الصبي، وكل صبية رضعت امرأة فلا تحل لأحد من ولادها الذين ولدوا قبل رضاعها إياها ولا الذين ولدوا بعد ذلك، ولا بأس أن يتزوج بنوا تلك المرأة [أخوات]⁽⁵⁾ تلك الجارية، ولا بأس أن يتزوج إخوة تلك الجارية

Translation:

Muḥammad said: In the book of Ibn Ḥabīb, Ibn 'Abbās was asked regarding a man who has two wives, one of them breastfed a baby girl, his other wife breastfed a baby boy, can this boy and this girl marry each other? Ibn 'Abbās said: No, because the fertilization is the same, the milk belongs to the husband of the two women and the girl and boy are siblings due to their common father.

Muḥammad said: *Al-liqāḥ* with *fathā* refers to the water of the man, Khalīl b. Aḥmad said that.

Muḥammad said: Regarding every little boy who is breastfed by a woman, marriage with one of that woman's daughters is illicit for him. There is no obstacle to marry the sons of that woman with his sisters. Regarding every little

¹⁰⁹⁷ Mālik b. Anas, *Al-Muwaṭṭa' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 216.

girl who is breastfed by a woman, this girl is not licit for her children who were born before and after she breastfed her. There is no obstacle to marry the sons of that woman with the sisters of this girl. There is no obstacle to marry brothers of this girl with

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بنات تلك المرأة وذلك إذا لم يكن أم الصبي أرضعت أحدا من ولد تلك المرأة إلا الصبية، ولم تكن أم الصبية أرضعت أحدا من ولد [أبي]⁽¹⁾ الصبي غير ذلك الصبي وحده، ولا بأس أن ينكح الرجل رضيعة ابنه لصلبه إذا أرضعتها امرأة سوى امرأته، وينكح المدرة⁽²⁾ إن شاء، ولا بأس أن ينكح أخت أخيه من الرضاعة، وأم أخيه من الرضاعة، وكل هذا على مذهب مالك رَضِيَ اللَّهُ عَنْهُ وَأَصْحَابِهِ رَحِمَهُمُ اللَّهُ.

Translation:

that woman's daughters. This is so when the real mother of the little girl did not breastfeed one of the children of that woman except the little girl. The mother of the girl should not breastfeed one of the sons of the boy's father with the exception of that boy. There is no obstacle to marry the man with the milk sister of his son when that sister was breastfed by a woman who was not his wife. He can marry the foster mother of his child if he wants. He can marry the milk sister of his brother and the foster mother of his brother. All these issues are based on the school of Mālik and his followers, the God bless them.

Commentary:

This case focuses on a man whose two wives: one of them breastfed a boy and one of them breastfed a girl. However, the source of their milk is the fertilization of the same man and for this reason the boy and the girl cannot marry each other.¹⁰⁹⁸ The Qur'an specified this issue with this verse; *"Forbidden to you are your mothers and daughters, your sisters, your aunts paternal and maternal, your brother's daughters, your sister's daughters, your mothers who have given suck to*

¹⁰⁹⁸ Karaman, Dönmez, Çağrııcı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 796.

you, your suckling sisters, your wives' mothers, your stepdaughters who are in your care being born of your wives you have been in to -- but if you have not yet been in to them it is no fault in you - and the spouses of your sons who are of your loins, and that you should take to you two sisters together, unless it be a thing of the past; God is All-forgiving, All-compassionate"¹⁰⁹⁹

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Arabic text

قلت له: فرجل تزوج امرأة فزعمت أنها أرضعته التي تزوج أيفرق بينهما بقولها؟ قال: لا. وهو قول مالك، ويقال للزوج: تنزه عنها إن كنت تنو تناسبها.

قلت/ له: فلو شهدت بذلك امرأتان فقال: قال مالك: يفرق بينهما إذا كان ذلك قد فشا وعرف من قولهما قبل النكاح عند الأهلين والجيران. قلت: فإن كانت المرأة الواحدة قد عرفت ذلك من قولها قبل النكاح، أيفرق السلطان بينهما [بقولها]⁽³⁾؟ قال: لا.

Translation:

Saḥnūn asked Ibn al-Qāsim: What about a man who married a woman and she claimed that she had breastfed him - do they separate according to what the woman said? Ibn al-Qāsim: No. This is the doctrine of Mālik. The man is told: "Go far away from her if you thought that you were related to her".

Saḥnūn asked Ibn al-Qāsim: What if two women witnessed that? Ibn al-Qāsim answered: Mālik said: They are separated if this issue was known by their families and neighbors before the marriage took place because of things they said. Saḥnūn said: What if only one woman knows that before marriage, does the political authority (*al-sulṭān*) separate them with her word? Ibn al-Qāsim answered: No.

Commentary:

In the Qur'an, marriage between a man and his foster mother is forbidden. The Qur'an specifies: "*Now We had forbidden to him aforetime to be suckled by any foster-mother; therefore she said, 'Shall I direct you to the people of a household*

¹⁰⁹⁹ Al-Nisā': 23, <http://tanzil.net/#trans/en.arberry/4:23>

who will take charge of him for you and look after him?"¹¹⁰⁰ In this case, there is suspicion regarding the issue of the woman being the man's foster mother. The woman claimed to have breastfed her husband. If others know this issue as well, they are separated before the marriage. If only one woman claims that, they stay married.

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Arabic text

قلت: فلو أن رجلا قال في امرأته: هذه أختي من الرضاعة، ثم قال بعد ذلك: كنت كاذبا أو لاعبا أو قال: توهمت شيئا. فقال: سئل مالك عما يقر به الرجل على نفسه من الرضاعة أو يقر به الأب في ابنه الصغير أو ابنته ثم يقول بعد ذلك: كنت كاذبا. فقال: لا أرى أن يتزوجها ولا أرى للوالد أن يزوج ابنه [الصغير ولا ابنته]⁽⁴⁾ الصغيرة منه. قلت: فإن تزوجها أيفرق السلطان بينهما؟ قال: نعم. ويؤخذ بإقراره الأول. قلت: فلو أن امرأة أقرت أن هذا الرجل أخوها من الرضاعة وشهد عليها بذلك شهود، ثم أنكرت ذلك فتزوجته والزوج لا يعلم ما كانت أقرت به. قال: لا أرى أن

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يقر هذا النكاح بينهما، وليس قول المرأة: هذا أخي وقول الرجل: [هذه]⁽¹⁾ أختي كقول الأجنبي فيهما، وأرى إقرارهما على أنفسهما بمنزلة البينة القاطعة⁽²⁾.

قال محمد: والشهادة على السماع في الرضاع جائزة. وقد روى حسين عن ابن القاسم أنه قال: إذا شهد العدول على القرابة والجيران والأهلين وإن لم يكونوا عدولا مثل النساء والخدم أنهم سمعوا أن فلانة أرضعت فلانا وفلانة فهي شهادة تامة.

Translation:

Saḥnūn said: What if a man told regarding his wife: "She is my milk sister," then he told: "I lied or I spoke jokingly" or he said: "It was a delusion". Ibn al-Qāsim said: Mālik was asked regarding a man who confirmed that the woman was his milk sister or a father confirmed that for his little son or daughter, then he said: "I lied". Mālik said: I do not find appropriate their marriage and I do not find appropriate that the father marries off his little boy with a little girl. Saḥnūn said:

¹¹⁰⁰ Al-Qaṣaṣ: 12, <http://tanzil.net/#trans/en.arberry/28:12>

What if he marries that woman, does the political authority (*al-sultān*) separate them? Ibn al-Qāsim said: Yes. The first claim of the man is taken into consideration.

Saḥnūn said: What if a woman claimed that the man is her milk brother and there are some witnesses regarding that, then she denied that and married him, and the husband did not know her claim? Ibn al-Qāsim said: I do not find appropriate

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to approve the nuptial between them. The fact that a woman claims that a man is her sibling and that a man claims the same regarding a woman is not the same as the claim of a stranger. My opinion is that their claims regarding themselves are like definitive evidence.¹¹⁰¹

Muḥammad said: Being witness via hearing is valid in the issue of breastfeeding. Ḥusayn b. ʿĀsim transmitted from Ibn al-Qāsim: When reliable witnesses (*al-ʿudūl*) testify regarding kinship, neighbors and kinship - or even if they are not reliable like women and servants but heard that some woman breastfed both the girl and the boy - this is certain testimony.

Commentary:

In this case, a man lied when he claimed that his wife was his milk sister, which means that a separation between them became necessary because joking with these issues is not appropriate. Also, when a woman claims that the man is her milk brother and afterwards she denied that, their nuptial is not appropriate as well because their situation has become suspicious. Their claims about their relationship are taken into consideration.

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Arabic text

¹¹⁰¹ Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, vol. 5/411-412.

باب في ما يلزم الأباء من النفقة على أبنائهم وما لا يلزم

قال سحنون: قلت له: إلى متى يلزم الرجل أن ينفق على ولده؟ فقال: إذا كانوا ذكورا فحتى يحتلموا، وإن كن إناثا فحتى يدخل بهن الزوج. ومن طلقت منهن بعد البناء أو مات عنها زوجها فلا نفقة لها على أبيها، فإن طلقت أو مات عنها زوجها قبل البناء بها فهي على نفقتها. قلت⁽³⁾: فولد الولد. قال: لا نفقة لهم على جدهم، وكذلك لا تلزمهم النفقة عليه⁽⁴⁾.

Translation:

Chapter about necessary and unnecessary things for a father about maintenance of his children

Saḥnūn said: I asked Ibn al-Qāsim: For how long does a man provide maintenance for his children? Ibn al-Qāsim answered: If they are boys, he provides it until they reach puberty. If they are girls, he provides it until they have sexual intercourse with their husbands. When the girls are divorced after having sexual intercourse or their husbands died after having sexual intercourse, there is no maintenance for them by their father. If they were divorced before having sexual intercourse or if their husbands died before having sexual intercourse with them, their father provides their maintenances. Saḥnūn said: What about the grandchild? Ibn al-Qāsim said: There is no maintenance for the grandchildren by their grandfathers and similarly they do not provide maintenances for their grandfather.¹¹⁰²

Commentary:

A man is responsible for providing maintenance for his children. This is regardless whether he divorces his wife or not. However, there is a difference between boys and girls. He provides the maintenances of the boys until the age of puberty, but he provides the maintenances of the girls until they have sexual intercourse with their husbands. ¹¹⁰³ Having sexual intercourse with the husbands for the girls is determinative in this issue because if they divorce or

¹¹⁰² Ibid, vol. 5/366.

¹¹⁰³ Esposito, "Ḥaḍāna", in *The Oxford Dictionary of Islam*. Accessed April 26, 2021 <http://www.oxfordislamicstudies.com/article/opr/t125/e756>

their husbands died before having the sexual intercourse, their fathers continue to provide their maintenance. On the other hand, grandchildren and grandfathers are not responsible to each other in terms of the maintenance.

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Arabic text

قلت: أرأيت الزمنا والمجانين من الولد إذا احتلموا وهم بهذه الحالة أتسقط نفقتهم عن الأب؟ فقال⁽⁵⁾: إذا كانت زمانتهم تمنعهم من أن يقوموا على أنفسهم [نفقتهم على أبيهم]⁽⁶⁾، وكذلك المغلوب على عقله والأعمى. قلت: فإن كانوا قد بلغوا أصحاء ثم

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أزمنوا أو جنوا بعد ذلك. فقال: لا شيء لهم على الأب⁽¹⁾، وإنما يلزم الأب الإنفاق على أولاده إذا لم يكن لهم كسب يستغنون به عنه، أو مال ينفق عليهم منه.

قلت: فإن كان الأب معسرا والأم موسرة [أتجبر]⁽²⁾ الأم على نفقة ولدها وهم صغار؟ فقال: لا. ولا يجبر أحد على نفقتهم إلا الأب وحده إذا كان يقر على ذلك.

قلت: فإن أسلم الأبوان وفي حجره بنات له قد [حضن]⁽³⁾ واخترن الكفر على الإسلام أيجبر على ذلك الأب على [نفقتهن]⁽⁴⁾؟ قال: نعم. ويجبر الكافر على نفقة المسلم والمسلم على نفقة الكافر إذا كانوا آباء وأبناء⁽⁵⁾.

Translation:

Saḥnūn said: What is your opinion regarding crippled and mad children who reached puberty and they are still dependent? Is the father allowed to stop paying their maintenances? Ibn al-Qāsim answered¹¹⁰⁴: If their disablement prevents them to live independent lives, their fathers have to pay their maintenance. Retarded and blind children are in the same situation. Saḥnūn said: What if they reached puberty being healthy, then

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¹¹⁰⁶ Ibid, vol. 5/365.

they became crippled or mad after that? Ibn al-Qāsim answered: They cannot claim anything from their father.¹¹⁰⁵ But the father is obliged to provide for his children if they do not have any earnings that make them independent from him or some financial means that does make necessary their father's maintenance.

Saḥnūn said: What if the father does not have much money and the mother is rich, does she have to pay maintenance of her little child? Ibn al-Qāsim answered: No. Nobody is obliged to pay the maintenance except the father, if he has accepted that he is the father of the child.

Saḥnūn asked: What if the fathers converted to Islam and their daughters did not accept Islam, should the father pay their maintenances? Ibn al-Qāsim said: Yes. He is forced to pay it. The non Muslim father is obliged to pay the maintenance of his Muslim children and the Muslim father is forced to pay the maintenance of his non-Muslim children if they are fathers and sons.¹¹⁰⁶

Commentary:

When boys reach puberty if they can live independently, they cannot claim maintenance, but if they are still dependent financially, their fathers continue to provide their maintenance. If the father is poor and the mother is rich, she does not have to provide maintenance for their children, because providing maintenance of the children is the sole responsibility of the father. The religion of the children is not important. They might be non-Muslim and their father might be Muslim. This issue is his responsibility.

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Arabic text

قلت: فالجارية التي لا بد لها من خادم يخدمها أيلزم الأب نفقة خادمها إذا ورثتها عن أمها وهي بكر في حجر أبيها؟ قال: لا. ويقال للأب: إما أن تنفق عليها وإما أن تبعتها⁽⁶⁾.

¹¹⁰⁵ Ibid, vol. 5/363.

¹¹⁰⁶ Ibid, vol. 5/365.

قلت: فهل يلزم العبد والمكاتب والمدبر وأمهات الأولاد نفقة على أبنائهم؟ قال: لا، أحرارا كان الأولاد أو عبيدا⁽⁷⁾.

Translation:

Sahnūn asked: What if a girl needs a servant, is paying the maintenance of the servant necessary for the father in case the servant is a legacy from her mother and the girl is virgin and lives with her father? Ibn al-Qāsim answered: No. The father is told: "Provide maintenance to the servant or sell her".¹¹⁰⁷

Sahnūn said: Is providing maintenance for their children necessary for the manumitted slave - be *mukātab*, *mudabbar* and *umm walad*? Ibn al-Qāsim said: No, this regardless whether the children are free or slave.¹¹⁰⁸

Commentary:

The maintenances of girls are provided by their fathers, but a father is not obliged to provide for the maintenance of his daughter's servant. Fathers only should provide the maintenance of their daughters. Girls are responsible to provide the maintenance of their servants or if they cannot provide that, they should sell their servants. A mother does not have to provide the maintenance of her daughters. This is regardless whether she is *mukātab*, *mudabbar* or *umm walad*.

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Arabic text

قال محمد: ولمالك في سماع ابن القاسم أنه سئل عن الرجل يموت ولده وقد كان للولد مال فتقوم جدته أو أمه⁽⁸⁾ تطلب ميراثها في ذلك فيقول الأب: قد أنفقته عليه في

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كذا وكذا أترى عليه يمينا؟ قال: إن كان رجلا مأمونا⁽¹⁾ فلا / أرى ذلك عليه وإن كان غنيا فأرى أن يحلف، فإن على الأباء أن ينفقوا على أبنائهم وإن كانت لهم أموال.

¹¹⁰⁷ Ibid, vol. 5/366.

¹¹⁰⁸ Ibid, vol. 4/256.

وسئل مالك عن رجل كان يأخذ لابنه عطاء فهلك الأب فقال الآخرون: قد أنفق ذلك الأب عليه وأرادوا محاسبته وكان الابن في حجر أبيه. فقال: أرى أن يحسب ذلك على قدر السنين التي مضت على حال أسعارها، فإن وجد في ذلك فضل كان للابن فسل أبيك.

Translation:

Muhammad said: Mālik was asked in the audition (*samā'*) of Ibn al-Qāsim regarding a man whose child died. This child had a property and the mother and grandmother demanded the legacy. The father answered: "I have already spent it for

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his sake in this way". Is it appropriate to make him swear? Mālik said: If he is reliable and poor, it is not necessary. If he is rich, it is necessary, because fathers should provide maintenance for their children even if their children have money. Mālik was asked regarding a man who was taking for his child a salary (*'aṭā'*) and the father died, and the others said: "The father provided his maintenance" and they demanded a calculation to be made. The child lived with his father. Mālik said: My opinion is that the costs should be calculated according to the years that have passed and if they find that something is left, it belongs to the child.

Commentary:

The inheritance issue is explained in the *Muwaṭṭa'*: "The inheritance of a mother from her child, if her son or daughter dies and leaves children or male or female grandchildren through a son, or leaves two or more full or half siblings is a sixth. If the deceased does not leave any children or grandchildren through a son, or two or more siblings, the mother has a whole third except in two cases. One of them is if a man dies and leaves a wife and both parents. The wife has a fourth, the mother a third of what remains, (which is a fourth of the capital). The other is if a wife dies and leaves a husband and both parents. The husband gets half, and the mother a third of what remains, (which is a sixth of the capital). That is because Allah, the Blessed, the Exalted, says in His Book, 'His two parents each have a sixth of what he leaves if he has children. If he does not have children, and

his parents inherit from him, his mother has a third. If he has siblings, the mother has a sixth.' (4:11). The *sunnah* is that the siblings be two or more."¹¹⁰⁹

After the death of the child, the mother can demand legacy, but if the father is poor, she is entitled to nothing. If he is rich, he should give her share to her because he was providing the maintenance of the child. He cannot spend the money of the child for himself. After the death, it should be calculated.

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Arabic text

وسئل مالك عن رجل أنفق على ولده، ولهم مال قد ورثوه عن أمهم، وكتب ما أنفق عليهم، فلما هلك أراد سائر الورثة أن يحاسبوا الولد. فقال: إن كان ما لهم عنده موضوعا فليس عليهم غرم ما أنفق عليهم إذا لم يقل ذلك عند موته، لأن من أمر الناس أن ينفق الرجل على ولده ولهم المال، وإن كان ما لهم عروضا أو حيوانا رأيت أن يحاسبهم به لأنه كسب.

ولابن القاسم في سماع عيسى أنه قيل له: رأيت⁽²⁾ إن كان مال الابن عرضا فلما حضرت الأب الوفاة قال: لا تحاسبوا ابني بما أنفقت عليه. قال: إذا يجوز قوله. قيل له: أما ترى هذا وصية لو ارث؟ قال: لا، وهو شيء صنعه في الصحة. قال محمد: هذا جواب ضعيف عند أهل النظر وهي وصية لو ارث.

Translation:

Mālik was asked regarding a man who provided the maintenance of his children, they had financial assets from the legacy of their mother and the father kept a register of what he gave to them. When he died, other heirs demanded the accounts of the children. Mālik said: If the financial assets of the children were in the hands of the father, subsequently there is no payment in return for their father having provided their maintenance, if this was not specified when he was dying. This is so because it is a regular practice among people that the father uses his children's money to provide them maintenance. If the children have

¹¹⁰⁹ Mālik b. Anas, *Al-Muwatta' of Imam Mālik ibn Anas*, translated by Aisha Abdurrahman Bewley, p. 198.

lands and animals, my opinion is that the amount taken by the father is calculated.

Ibn al-Qāsim was asked in the audition (*samā'*) of 'Isā: What is your opinion if the financial assets of the child are lands and while the father was dying, he said: "Do not calculate the things that I gave to him"? Ibn al-Qāsim said: If his word is licit, he should have been asked: "Is the testament for a heir? He said: No, this was something he did while healthy.

Muḥammad said: This is a weak answer according to the people of reflection, it is the testament for a heir.

Commentary:

In this case, a mother died leaving her children their legacy and their father made the list of what he had spent for them. Then, the father died and the remaining heirs wanted to see the accounts of what he had spent. The father provided their maintenance before his death. However, if he spent from their goods, it is not appropriate because the father should provide the maintenance from his own financial assets even if the children were rich.

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Arabic text

باب ما يلزم الأبناء من نفقة آبائهم

قال سحنون: قلت له: رأيت الصبي إذا كان له مال وأبواه معسران أينفق عليهما من مال هذا الابن؟ فقال: قال مالك: ينفق عليهما من مال الولد صغيرا كان أو كبيرا،

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ذكرا كان أو أنثى، متزوجة كانت الابنة أو غير متزوجة. قلت: فإن كان للأب امرأة غير أم أولاده أيلزم الأولاد النفقة عليهما؟ قال: نعم⁽¹⁾.

Translation:

Chapter about necessary things for the children regarding maintenance from their fathers

Saḥnūn said: I asked Ibn al-Qāsim: What is your opinion regarding a little child who has money and his parents do not have enough money, can they take their maintenance from the child's financial assets? Ibn al-Qāsim answered: Mālik said: The property of the child is given to them whether the child is young or old,

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girl or boy, married girl or single girl. Saḥnūn said: If the father has a wife who is not the children's mother, should they provide maintenance for them? Ibn al-Qāsim said: Yes.¹¹¹⁰

Commentary:

The importance of kinship especially parenthood is explained with various verses in the Qur'an. *"They will question thee concerning what they should expend. Say: Whatsoever good you expend is for parents and kinsmen, orphans, the needy, and the traveller; and whatever good you may do, God has knowledge of it."*¹¹¹¹ When parents have financial difficulties and their child has financial assets, they can use them for themselves.¹¹¹²

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Arabic text

قلت: فهل يلزم الولد أن ينفق على خادم امرأة أبيه؟ قال: نعم. لأنه لو لم يكن لها خادم للزم الابن أن يخدم أباه⁽²⁾ إذا كان يقدر على ذلك وليس يلزم الابن إن كان للأب زوجتان أو أكثر أن ينفق إلا على واحدة.

قلت له: فمن كان له من الآباء خادم ومسكن أتفرض نفقته على ولده؟ قال: إن كانت دارا ليس في ثمنها ما يبتاع به مسكنا يسكنه وفضلة يعيش فيها فأرى أن تعطى نفقته ولا تباع عليه، وكذلك الخادم.

Translation:

¹¹¹⁰ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/363.

¹¹¹¹ Al-Baqara: 215, <http://tanzil.net/#trans/en.arberry/2:215>

¹¹¹² Karaman, Dönmez, Çağrıçı and Gümüş, *Kur'an Yolu Türkçe Meal ve Tefsir*, p. 314.

Saḥnūn said: Does the child provide maintenance for the stepmother's servant? Ibn al-Qāsim said: Yes. Because if the woman does not have a servant, finding a servant for her is necessary for the father if he is able to do that.¹¹¹³ Providing maintenance is not necessary for him if his father has two or more wives, he provides maintenance only for one wife.

Saḥnūn asked Ibn al-Qāsim: If the father has a servant and a house, should the child pay his maintenance? Ibn al-Qāsim said: If the value of the house is not sufficient to buy a house and remaining money is not enough to live there, my opinion is that paying his maintenance is appropriate, it is not sold and the servant is in the same situation.

Commentary:

A father may marry more than two women. His child should provide maintenance for the stepmother's servant but not all of them. Providing only one of them is sufficient. Also, if the father is in a difficult financial situation, the child provides his maintenance as well.

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Arabic text

قلت: فالوالدان إذا [كانا]⁽³⁾ معسران والولد غائب وله مال حاضر عرض أو فرض⁽⁴⁾ أيعدا لهما على ماله؟ قال: نعم.

قلت: فإن كان مال الولد إنما هو شيء تصدق به عليهم، أو وهب لهم أي فرض فيه لأبائهم إذا كانا معسرين؟ قال: نعم. قلت: فما أنفق على الوالدين من مال الولد أيتبعان به ويكون دينا عليهما إن أيسرا؟ قال: لا⁽⁵⁾.

قلت: فالمرأة يكون لها زوج [معسر]⁽⁶⁾ وابن موسر أيلزم الابن النفقة على أمه؟ قال: نعم. ولا حجة له في أن يقول: هي تحت زوج⁽⁷⁾، كذلك [قال مالك]⁽⁸⁾.

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¹¹¹³ Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, vol. 5/364.

قال محمد: وفي كتاب الجدار قال عيسى: يلزم نفقة الأبوين جميعا أولادهما من الرجال والنساء أو الأصاغر أو الأكابر [بالسواء تفاضلوا]⁽¹⁾ في الغنى أو استووا فيه، وليس على المعدمين منهم شيء.

قال محمد: ولا بن القاسم في سماع أصبغ أنه قال: فإن غاب الابن ولم يكن له مال حاضر فأراد الأبوان أن يتدائنا عليه ويقضى لهما بذلك فرأيته أن ذلك لا يكون لهما وفعل في هذا بخلاف الزوجة.

قال محمد: وقد مضى في الثاني من النكاح غير ما رواه أصبغ في الفرض [للزوجة الغائب]⁽²⁾.

Translation:

Saḥnūn said: If the parents are poor and the child is missing, but his financial assets are land that is present or a reserved amount, can they take from such financial assets? Ibn al-Qāsim said: Yes.

Saḥnūn said: What if the child has goods that is only enough for the parents or gave it to them, is giving that necessary to them as long as they need? Ibn al-Qāsim said: Yes. Saḥnūn said: Do the financial assets that were given from the property of the child to the parents add and become a debt for them, if they become rich? Ibn al-Qāsim said: No.¹¹¹⁴

Saḥnūn said: What about a woman who has a poor husband and a rich son, should the son provide her maintenance? Ibn al-Qāsim said: Yes. The fact that the mother is married is not a proof for him.¹¹¹⁵ This is the doctrine of Mālik.

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Muḥammad said: In the *Kitāb al-jidār*, 'Īsā said: The maintenance of the parents is necessary for their children, this regardless whether they are female or male, old or young, rich or equal, except for the very poor.

Muḥammad said: In the audition (*samā'*) of Aṣḥab, Ibn al-Qāsim said: What if the child is missing and he does not have present goods and his parent wants to charge him? My opinion is that they are not entitled to do that, in this issue something opposite is done to the case of the woman whose husband is missing.

¹¹¹⁴ Ibid, vol. 5/364.

¹¹¹⁵ Ibid, vol. 5/364.

Muḥammad said: In the second part of the marriage is mentioned something different from the transmission of Aṣḥbagh.

Commentary:

In this case, the child is rich and missing, but the parents are poor. In that situation, they can use the land or money of the child. If the parents need money and the child has money, they can use that money because they have some responsibilities to each other. Hence, what is provided by the child is not debt for them. However, when the child is missing and does not have money, the parents cannot borrow on behalf of the child. On the other hand, if the mother has a poor husband and the child is rich, her maintenance is provided by the child.

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Arabic text

قال محمد: / وإذا قام الأب على الابن يطالبه بالنفقة وقال: إنه معسر، وقال الابن: بل موسر؛ أن السلطان يكلف الأب إثبات العدم، فإذا أثبتته حلف مع ذلك وحكم له السلطان على الابن بالنفقة، وفي اليمين اختلاف؛ كان بعض مشايخنا يقول: إن اليمين هاهنا استبراء من الحكم فيما يحكم به، وقال بعضهم: بل هي للابن ولا ينبغي له أن يحلف أباه.

Translation:

Muḥammad said: What about a father who requested maintenance from his child and he said: "I am poor", but the child said: "On the contrary, he is rich"? The political authority (*al-sulṭān*) requires the evidence which proves his poverty. If he proves that, he is sworn and the political authority (*al-sulṭān*) gives a judgment regarding the maintenance in favor of the father. There is discrepancy regarding this issue of the oath. Some of our scholars said: The oath in this issue is cleansing from the judgment. Some of them said: On the contrary, the oath is necessary for the son, not for the father.

Commentary:

In this case, there is a disagreement between a father and his child regarding the financial situation of the father. The father claimed that he is poor but the child claimed the opposite. He should prove his financial situation because if he can do that, his child should help him.

Appendix 1:

Scholars mentioned by Ibn Abī Zamanīn

The scholars mentioned by Ibn Abī Zamanīn are listed by their death date:

- **‘Uthmān b. ‘Affān b. Abī ‘l-‘Āṣ b. Umayyah, Abū ‘Amr (d. 35/656)**

He was a Companion of the Prophet Muḥammad and third Rightly guided caliph. ‘Uthmān b. ‘Affān who belonged to the powerful Umayyad clan, despite his family's initial opposition to Muḥammad, was among the first converts. He married two daughters of Muḥammad, first Ruqayyah and then Umm Kulthūm.¹¹¹⁶

- **Al-Ḥusayn b. ‘Alī b. Abī Ṭālib, Abū ‘Abd Allāh (d. 61/680)¹¹¹⁷**

He was the grandson of the Prophet and son of Fāṭima. His revolt ended tragically at Karbalā on 10 Muḥarram.

- **‘Abd Allāh b. ‘Abbās b. ‘Abd al-Muṭṭalib al-Qurayshī, Abū ‘l-‘Abbās (d. 68/688)¹¹¹⁸**

He was a companion of the prophet Muḥammad, one of the greatest scholars of early Islam, and the first exegete of the Qur’an.¹¹¹⁹ He transmitted many *ḥadīths* some of them directly from the prophet.

¹¹¹⁶ Esposito, ‘Uthmān b. ‘Affān in *The Oxford dictionary of Islam*, Oxford Islamic Studies Online. Accessed March 14, 2021

<http://www.oxfordislamicstudies.com/article/opr/t125/e2449>

¹¹¹⁷ L. Veccia Vaglieri, “(al-) Ḥusayn b. ‘Alī b. Abī Ṭālib”, in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Accessed November 1, 2021

https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/al-husayn-b-ali-b-abi-talib-COM_0304

¹¹¹⁸ İsmail Lütfü Çakan, Muhammed Eroğlu, “‘Abd Allāh b. ‘Abbās”, in *TDV İslâm Ansiklopedisi*. Accessed November 10, 2021

<https://islamansiklopedisi.org.tr/abdullah-b-abbas>

¹¹¹⁹ Jonathan E. Brockopp, *Muhammad’s heirs: The rise of Muslim scholarly communities, 622-950*. Cambridge: Cambridge University Press, 2017, p. 43.

- **Sa'īd b. al-Musayyab b. Ḥazn al-Qurayshī al-Makhzūmī, Abū Muḥammad (d. 94/713)¹¹²⁰**

Al-Makhzūmī, born in Madinah, was among the foremost authorities in jurisprudence. He was the most influential Medinese jurist prior to Mālik and principal instructor of Mālik's teacher al-Zuhrī. Also, he spent much time and effort traveling from region to region in search of uncollected *ḥadīths*.¹¹²¹

- **'Aṭā' b. Muslim al-Khurāsānī, Abū Ayyūb (d. 135/752)¹¹²²**

He was a Persian jurist (*faqīh*) and exegete (*mufasssīr*) of the Qur'an as well as a 'follower of the Followers' (*tābi' al-tābi'in*).¹¹²³

- **Al-Layth b. Sa'd b. 'Abd al-Raḥmān al-Fahmī al-Miṣrī, Abū 'l-Ḥārith (d. 175/791)¹¹²⁴**

Al-Layth b. Sa'd - who was born and died in Egypt - was traditionist and jurisconsult who belonged to the class of the great *tābi'ūn*.¹¹²⁵ He was the leading Egyptian scholar of his time in both *ḥadīth* and jurisprudence. He studied with important scholars, including Ibn al-Qāsim al-'Utaqī and Ashhab al-Qaysī.¹¹²⁶ He

¹¹²⁰ M. Yaşar Kandemir, "Sa'īd b. Müseyyeb", in *TDV İslâm Ansiklopedisi*. Accessed November 5, 2021 <https://islamansiklopedisi.org.tr/said-b-museyyeb>

¹¹²¹ Wymann-Landgraf, *Mālik and Medina: Islamic legal reasoning in the formative period*, p. 40.

¹¹²² Hakkı Dursun Yıldız, "Ebū Müslim-i Horasān", in *TDV İslâm Ansiklopedisi*. Accessed November 1, 2021 <https://islamansiklopedisi.org.tr/ebu-muslim-i-horasani>

¹¹²³ Ahmad Pakatchi and Farzin Negahban, "'Aṭā' al-Khurāsānī", in *Encyclopaedia Islamica*, edited by Wilferd Madelung and Farhad Daftary. Accessed November 1, 2021 https://referenceworks.brillonline.com/entries/encyclopaedia-islamica/ata-al-khurasani-COM_0314

¹¹²⁴ Şükrü Özen, "Leys b. Sa'd", in *TDV İslâm Ansiklopedisi*. Accessed November 5, 2021 <https://islamansiklopedisi.org.tr/leys-b-sad>

¹¹²⁵ A. Merad, "Al-Layth b. Sa'd" in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Accessed November 1, 2021 https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/al-layth-b-sad-SIM_4656

¹¹²⁶ Mahmud Ali Makki, "Egypt and the origins of Arabic Spanish historiography: A contribution to the study of the earliest sources for the history of Islamic Spain", in *The Formation al-Andalus, Part 2: Language, religion, culture and*

narrated *ḥadīth* from the Madinan Nāfi'. The Egyptians Ibn al-Qāsim, Ibn Wahb and Ibn Lahī'a narrated *ḥadīth* from him.

- **Khalīl b. Aḥmad al-Farāhīdī al-Azdī, Abū 'Abd al-Raḥmān (d. 175/791)**

He was born in Oman, then he moved to Basra, Iraq. He is the Arab philologist who compiled the first Arabic dictionary, *Kitāb al-'Ayn*, and is credited with the formulation of the rules of Arabic prosody.¹¹²⁷

- **Mālik b. Anas b. al-Ḥārith al-Aṣḥabī, Abū 'Abd Allāh (d. 179/795)¹¹²⁸**

Mālik b. Anas was the founder of Maliki school, a Muslim legist who played a significant role in formulating early Islamic legal doctrines. His major book is the *Muwatṭa'*¹¹²⁹ which is the oldest surviving compendium of Islamic law that presents years of thoughtful revision and Mālik's mastery of *ḥadīth* and law.¹¹³⁰ Also, the *Muwatṭa'* is not only a teaching text for students but also a valuable reference for advanced scholars.¹¹³¹ Mālik's teachings are also preserved in the *Mudawwana*,¹¹³² a work that generally encompasses legal interpretations for difficult and unprecedented questions that go beyond scope and aim of the *Muwatṭa'*.

sciences, edited by Maribel Fierro and Julio Samsó. New York: Routledge, 1998, p. 196.

¹¹²⁷ R. Sellheim, "al-Khalīl b. Aḥmad", in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Accessed November 3, 2021
https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/al-khalil-b-ahmad-SIM_4161?lang=en

¹¹²⁸ For detailed information about Mālik b. Anas see Brockopp, "Mālik b. Anas (d. 179/795)", pp. 27-42; Crone; Hinds, *God's caliph: Religious authority in the first centuries of Islam*; Wymann-Landgraf, *Mālik and Medina: Islamic legal reasoning in the formative period*.

¹¹²⁹ *Al-Muwatṭa' bi-riwāyātihi (Yaḥyá al-Laythī, al-Qa'nabī, Abī Muṣ'ab al-Zuhrī, al-Ḥadathānī, Ibn Bakīr, Ibn al-Qāsim, Ibn Ziyād) bi-ziyādātihā wa-zawā'idihā, wa-ikhtilāf al-fāzihā*, edited by Abū Usāmah Salīm b. 'Īd al-Hilālī al-Salafī, 5 vols.

¹¹³⁰ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 33.

¹¹³¹ For detailed information about *Muwatṭa'* see Chapter I.

¹¹³² Saḥnūn b. Sa'īd, *Al-Mudawwana al-kubrā*, 8 vols.

- **'Alī b. Ziyād al-'Absī al-Tūnisī, Abū 'l-Ḥasan (d. 183/799)¹¹³³**

Ibn Ziyād, born in Tripoli, was a significant early scholar of the Maliki school of Islamic jurisprudence. He was responsible for bringing the *Muwaṭṭa'* to Ifriqiya. A unique manuscript, preserved in Qayrawan which includes a small portion of his transmission, has been edited and published.¹¹³⁴

- **'Abd al-Raḥmān b. al-Qāsim b. Khālīd al-'Utaqī al-Miṣrī, Abū 'Abd Allāh (d. 191/806)¹¹³⁵**

Ibn al-Qāsim, born in Egypt, travelled to Madinah and met Mālik b. Anas. He kept the company of Mālik, learned *fiqh* and became the teacher of a whole generation of legal scholars of North Africa and al-Andalus. His transmission of the *Muwaṭṭa'* is considered to be the soundest transmission. Also, he was the source for Saḥnūn in his *Mudawwana*, in which he recorded Mālik's teachings. He is considered the main transmitter of Maliki *fiqh*.¹¹³⁶

- **'Abd Allāh b. Wahb b. Muslim al-Fihri al-Qurashī al-Miṣrī, Abū Muḥammad (d. 197/813)¹¹³⁷**

Known as Ibn Wahb, he was a significant Egyptian early jurist in Maliki school and expert traditionist. He was in some aspects even more renowned than Ibn al-Qāsim. He had a huge influence in spreading the Maliki school in Egypt and the Maghreb. He wrote a number of works: his own *Muwaṭṭa'* which is different from Mālik's, *al-Jāmi'* which is commentary of the

¹¹³³ Cengiz Kallek, "Ibn Ziyād al-'Absī", in *TDV İslâm Ansiklopedisi*. Accessed November 1, 2021 <https://islamansiklopedisi.org.tr/ibn-ziyad-el-absi>

¹¹³⁴ Yasin Dutton, *Early Islam in Medina: Mālik and his Muwaṭṭa'*. London: Bloomsbury Publishing PLC, 2021, p. 138.

¹¹³⁵ Brockopp, *Early Mālikī law: Ibn 'Abd al- Ḥakam and his major compendium of jurisprudence*, p. 69.

¹¹³⁶ Miklos Muranyi, "A Unique manuscript from Kairouan in the British Library: The *Samā'*-work of Ibn al-Qāsim al-'Utaqī and issues of methodology", in *Method and theory in the study of Islamic origins*, edited by Herbert Berg. Leiden: Brill, 2003, pp. 325-68.

¹¹³⁷ Brockopp, *Early Mālikī law: Ibn 'Abd al- Ḥakam and his major compendium of jurisprudence*, p. 68.

Muwatta' (only parts have been preserved), *al-Maghāzi* and others.¹¹³⁸ He had more than thirty works based on Mālik.¹¹³⁹

- **Ashhab b. 'Abd al-Azīz b. Dāwūd b. Ibrāhīm al-Qaysī al-Ma'āfirī al-
'Āmirī al-Ja'dī, Abū 'Amr (d. 204/820)**¹¹⁴⁰

He is another important jurist of Egypt and crucial source for later Maliki scholars. His status was primarily as a jurist. Ashhab wrote a book on law that appears to have been a reworking of the *Asadiyya*, having textual evidences for the various legal issues. He may have also had a *Samā'* of which parts existed in the *'Utbiyya*.¹¹⁴¹

- **'Abd Allāh b. Nāfi' al-Sāigh al-Makhzūmī, Abū Muḥammad (d. 206/822)**¹¹⁴²

He was born in Madinah and studied with Mālik. He played an important role in the transmission of Mālik's doctrines with many transmissions recorded in the *Mudawwana*. Ashhab transmitted from him.

¹¹³⁸ Vazquez-Paluch, "The Legal thought of an early Andalusian jurist: 'Īsā b. Dīnār", p. 48.

¹¹³⁹ J. David-Weill, "Ibn Wahb", in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Accessed November 5, 2021

https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/ibn-wahb-SIM_3403

¹¹⁴⁰ Jonathan Brockopp, "Ashhab", in *Encyclopedia of Islam, THREE*, edited by Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas and Everett Rowson. Accessed November 1, 2021

https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-3/ashhab-COM_22904

¹¹⁴¹ Vazquez-Paluch, "The Legal thought of an early Andalusian jurist: 'Īsā b. Dīnār", p. 49.

¹¹⁴² Ali Bardakoğlu, "'Abdullah b. Nāfi'", in *TDV İslâm Ansiklopedisi*. Accessed November 1, 2021 <https://islamansiklopedisi.org.tr/abdullah-b-nafi>

- **‘Īsā b. Dīnār b. Wāqīd al-Ghāfiqī al-Qurṭubī, Abū Muḥammad (d. 212/827)¹¹⁴³**

‘Īsā b. Dīnār, known as *faqīh al-Andalus* (the jurist of al-Andalus), is one of the key scholar of early Malikism. He was born in Toledo. He traveled to Madinah to study with Mālik b. Anas, then to Fustāṭ where he studied under ‘Abd al-Raḥmān b. al-Qāsim. His studies both in al-Andalus and Egypt mainly focused on law.¹¹⁴⁴ He is the first Andalusī to write a legal work, *Kitāb al-Hidya*, which is lost now even though there are quotations in later works. He collected a *samā’* from Ibn al-Qāsim, Ibn Wahb, Ibn ‘Abd al-Ḥakam and others, of which many parts are preserved in al-Uṭbī’s *Mustakhraja*. Quotations from his book *Kitāb al-jidār* (The Book of Walls) are preserved in Ibn Abī Zamanīn’s *Muntakhab al-aḥkām*.¹¹⁴⁵

- **‘Abd al-‘Azīz b. ‘Abd Allāh b. Abī Salama al-Mājishūn, Abū ‘Abd Allāh (d. 212/827)¹¹⁴⁶**

He was the son of Ibn Abī Salama (d. 164/780), a famous contemporary of Mālik. He was a great authority on the views of Mālik and was the mufti of the Madinans in his time. He had a large *samā’* and a book on law that includes a short text on faith, destiny and the controversial topic of the createdness of the Qur’an. Also, he was one of the most important teachers of Ibn Ḥabīb.¹¹⁴⁷

¹¹⁴³ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=7252 Accessed November 1, 2021; Monés, “‘Īsā b. Dīnār”, in *Encyclopedia of Islam, Second Edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Accessed November 2, 2021 http://dx.doi.org/10.1163/1573-3912_islam_SIM_3598

¹¹⁴⁴ Vazquez-Paluch, “The Legal thought of an early Andalusian jurist: ‘Īsā b. Dīnār”, p. 427.

¹¹⁴⁵ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 93.

¹¹⁴⁶ Miklos Muranyi, “Ibn al-Mājishūn”, in *Encyclopedia of Islam, THREE*, edited by Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas and Everett Rowson. Accessed November 7 2021 https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-3/al-majishun-COM_22884

¹¹⁴⁷ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 122.

- ‘Abd al-Raḥman b. ‘Abd Allāh b. ‘Abd al-Ḥakam, Abū ‘l-Qāsim (d. 220/835)¹¹⁴⁸

He was the student of Mālik and wrote numerous works including his three *Mukhtaṣars*. Taking into consideration what is preserved of such works, his legal thought appears more systematic than that of his contemporaries.

- Aṣḥab b. al-Faraj b. Sa‘īd al-Umawī al-Miṣrī, Abū ‘Abd Allāh (d. 225/840)¹¹⁴⁹

He was born in Egypt and studied *fiqh* and *ḥadīth*. He was the student of Ibn al-Qāsim, Ibn Wahb, Ashhab and teacher of Ibn Muzayn, Ibn Ḥabīb and others. He is the writer of *Kitāb al-Uṣūl* regarding the methodology of the Maliki school. Also, he transmitted *ḥadīths* and narrations in *al-Wāḍiḥa* by Ibn Ḥabīb.

- Yaḥyā b. Yaḥyā b. Kathīr b. Abī ‘Īsā al-Laythī, Abū Muḥammad (d. 234/848)¹¹⁵⁰

Yaḥyā b. Yaḥyā al-Laythī, born in Algeciras, belonged to the Banū Abī ‘Īsā and was the first member of the family to devote himself to religious knowledge.¹¹⁵¹ He was able to transmit from Mālik his *Muwaṭṭa’*. The Egyptian Ibn al-Qāsim was

¹¹⁴⁸ Ibid, p. 91.

¹¹⁴⁹ Mehmet Ali Sönmez, “Asbağ b. Ferec”, in *TDV İslam ansiklopedisi*, 44 vols. Istanbul: TDV İslâm Araştırmaları Merkezi, 2000, vol.3/463.

¹¹⁵⁰ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=11714
Accessed November 7, 2021

¹¹⁵¹ Fierro, “El alfaquí beréber Yaḥyā b. Yaḥyā, ‘el inteligente de al-Andalus’”, 269; id., “Yaḥyā b. Yaḥyā al-Laythī”, in *Encyclopaedia of Islam, Second edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Accessed November 3, 2021
https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/yahya-b-yahya-al-laythi-SIM_7955?s.num=0; Manuela Marin and Maribel Fierro, *Sabios y santos Musulmanes de Algeciras*. Algeciras: Ayuntamiento de Algeciras, 2004.

his most important teacher. ¹¹⁵² Yaḥyā b. Yaḥyā al-Laythī is known for the transmission of his *samāʿ* that he gathered in the *ʿAsharat Yaḥyā* and of which a part is preserved in the *Mustakhraja*.¹¹⁵³

- **ʿAbd al-Mālik b. Ḥabīb al Sulamī, Abū Marwān (d. 238/853)**¹¹⁵⁴

He was born in Elvira, then he moved to Cordoba to continue his studies. He studied the Maliki school of *fiqh* in Madinah and Egypt. A number of his many works have been preserved, and this makes possible to study his teachings directly. His most important books were *Kitāb al-Wāḍiḥa* (Compendium of Maliki Law), preserved only partially but with quotations in later sources such as Ibn Abī Zamanīn's work,¹¹⁵⁵ and *Tafsīr gharīb al-Muwattaʿa*.¹¹⁵⁶ The extant fragments of the *Wāḍiḥa* show that reference to Mālik as an authority is limited.¹¹⁵⁷

- **ʿAbd al-Salām b. Saʿīd b. Ḥabīb al-Tanūkhī, Abū Saʿīd (d. 240/854)**¹¹⁵⁸

He was known as Saḥnūn b. Saʿīd. Born in Kairouan, he is the author of the *Mudawwana*¹¹⁵⁹ which is considered second in importance only to Mālik's

¹¹⁵² Fierro, "El alfaquí beréber Yaḥyā b. Yaḥyā, 'el inteligente de al-Andalus'", p. 270; Manuela Marin, "Una familia de ulemas Cordobeses: Los Banū Abī ʿĪsā", *Al-Qanṭara: Revista de Estudios Arabes* 6 (1985), p. 294.

¹¹⁵³ Fierro, "Proto-Malikis, Malikis and reformed Malikis in al-Andalus", p. 64.

¹¹⁵⁴ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=5739 Accessed November 7, 2021; López Ortiz, "La recepcion de la escuela Malequi en España", pp. 1-167; Mahmud Ali Makki, "Ensayo sobre las aportaciones orientales en la España Musulmana, y su influencia en la formación de la cultura Hispano-Arabe", pp. 7-140; Manuela Marin, "Nomina de sabios de al-Andalus (93-350/711-961)", in *Estudios onomástico-biográficos de al-Andalus I*, edited by Manuela Marin. Madrid: CSIC, 1988, pp. 23-182; Monés, "Le rôle des hommes de religion dans l'Espagne musulmane jusqu'à la fin du Califat", p. 47.

¹¹⁵⁵ Ibn Ḥabīb, 'Abd al-Mālik. *Das 'K. al- Wāḍiḥa' des 'Abd al-Malik b. Ḥabīb, Edition und kommentar zu Ms. Qarawiyyīn 809/40 (abwāb al- ṭahāra)*, edited partially by B. Ossendorf-Conrad; id., *Kitāb al- Wāḍiḥa (tratado jurídico), Fragmentos extraídos del Muntajab al-aḥkām de Ibn Abī Zamanīn (m. 399/1008)*, edited by María Arcas Campoy; id., *Al-Wāḍiḥa: kutub al-ṣalāt wa-kutub al-ḥayy, riwāyat Yūsuf b. Yaḥyā al-Maghāmī wa-ghayri-hī'an Ibn Ḥabīb*, edited partially by M. Muranyi.

¹¹⁵⁶ Ibn Ḥabīb, *Tafsīr gharīb al-Muwattaʿa*, edited by 'Abd al-Raḥmān b. Sulaymān al-'Uthaymīn, 2 vols. Riyadh: Maktabat al-'Ubayqān, 1421/2001.

¹¹⁵⁷ Fierro, "Proto-Malikis, Malikis and reformed Malikis in al-Andalus", p. 65.

¹¹⁵⁸ Brockopp, "Saḥnūn b. Saʿīd (d. 240/854)", p. 65.

Muwattaʿ.¹¹⁶⁰ He was a pivotal figure in the spread of Maliki law. The most significant influence on him was his Egyptian teacher Ibn al-Qāsim. Saḥnūn followed Ibn al-Qāsim and Ashhab in *fiqh*, but took *ḥadīth* from Ibn Wahb and Sufyān b. ʿUyayna (d. 196/811). Also, he transmitted many books to his students such as the *Samāʿ* of Ibn al-Qāsim, Ibn Wahb's works and Ibn Ziyād's version of the *Muwattaʿ*.¹¹⁶¹

- **Muḥammad b. Aḥmad b. ʿAbd al-ʿAzīz b. ʿUtba al-ʿUtbī al-Qurṭubī, Abū ʿAbd Allāh (d. 255/869)**¹¹⁶²

He was the author of an important work of Maliki law, *al-Mustakhraja min al-asmīʿa mim mā laysa fī l-Mudawwana* or *al-Utbiyya*.¹¹⁶³ This book consists of *masāʾil* (legal issues) which al-ʿUtbī gathered from various *samāʿ*'s. His role was fundamental in bringing the works of Saḥnūn to his hometown of Cordoba.¹¹⁶⁴

- **Muḥammad b. ʿAbd al-Salām b. Saḥnūn, Abū ʿAbd Allāh (d. 256/870)**

He was the son of Saḥnūn b. Saʿīd, the author of the *Mudawwana*. He took education from his father. Among his books: *Kitāb ādāb al-muʿallimīn*¹¹⁶⁵, *al-Risāla Saḥnūniyya*, *al-Nawāzil* and *Masāʾil al-jihād*.¹¹⁶⁶

¹¹⁵⁹ Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, 8 vols.

¹¹⁶⁰ J.M. Fórneas, "Datos Para un Estudio de la *Mudawwana* de Saḥnūn en al-Andalus", in *Actas del IV coloquio Hispano-Tunicino*, edited by Manuela Marin. Madrid: Instituto hispano-árabe de cultura, 1983, pp. 93-118.

¹¹⁶¹ Brockopp, "Saḥnūn b. Saʿīd (d. 240/854)", p. 77.

¹¹⁶² https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=8223 Accessed November 5, 2021; Fernández Félix, *Cuestiones legales del Islam temprano: la ʿUtbiyya y el proceso de formación de la sociedad Islámica Andalusí*; id., "Al-ʿUtbī", Accessed November 9, 2021 http://dx.doi.org/10.1163/1573-3912_islam_SIM_7770; López Ortiz, "La recepción de la escuela Malequí en España", pp. 143-152.

¹¹⁶³ Muḥammad b. Aḥmad al-ʿUtbī, *al-Mustakhraja min al-asmīʿa mim mā laysa fī l-Mudawwana (al-Utbiyya)* in Ibn Rushd, *al-Bayān waʾl-taḥṣīl*, edited by Muḥammad Ḥajjī.

¹¹⁶⁴ Fernández Félix, "Biografías de alfaquíes: la generación de al-ʿUtbī", p. 142.

¹¹⁶⁵ Muḥammad b. ʿAbd al-Salām b. Saḥnūn, *Kitāb ādāb al-muʿallimīn*, edited by Ḥasan Ḥusnī ʿAbd al-Wahhāb. Tunisia: Matbaʾāt al-ʿArab, 1931.

¹¹⁶⁶ Ali Bakkal, "Ibn Saḥnūn", in *TDV İslam ansiklopedisi*, 44 vols., vol. 20/300.

- **Yahyā b. Ibrāhīm b. Muzayn, mawlā Ramla bint ‘Uṭmān b. ‘Affān, Abū Zakariyyā’ (d. 259/873)¹¹⁶⁷**

He studied with important scholars like Yahyā b. Yahyā al-Laythī and ‘Īsā b. Dīnār. He was particularly interested in the *Muwaṭṭa’* and wrote three books on it. The first one collected questions he put to Yahyā al-Laythī, ‘Īsā b. Dīnār and Aṣḥab b. al-Faraj related to the meaning of difficult sections in the *Muwaṭṭa’*. A biographical dictionary of the narrators in the *Muwaṭṭa’* is the second book. The last book, *al-Mustaḥṣiya*, dealt with the defective *isnāds* of the *Muwaṭṭa’*.¹¹⁶⁸

- **Yahyā b. ‘Umar b. Yūsuf b. ‘Āmir al-Kinānī mawlā Banī Umayya, Abū Zakariyyā’ (d. 289/902)¹¹⁶⁹**

He was born in Jaen, but raised in Cordoba. As a teacher, he had a large following and produced several books. He studied with students of Mālik and had a seminal role in the spread of the *Muwaṭṭa’* and *Mudawwana* in the Maghreb.¹¹⁷⁰

- **‘Abd Allāh b. Ḥusayn b. Ibrāhīm b. Ḥusayn b. ‘Āsim, Abū Bakr (d. 403/1012)¹¹⁷¹**

He was born in Cordoba and is also known as Ibn al-Qarbālī.¹¹⁷² He was interested in astronomy, geography and science,¹¹⁷³ and one of his books was *Kitāb al-anwā’ wa-l-azmina*.¹¹⁷⁴

¹¹⁶⁷ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=11453
Accessed November 5, 2021; Ibn Ḥajar al-‘Asqalānī, *Tadhīb al-tadhīb*, 4 vols.
Beirut: Dār al-Iḥyā’ al-Turāth al-‘Arabī, 1993, vol. 1/88.

¹¹⁶⁸ Vazquez-Paluch, *The Establishment of the Maliki school in Muslim Spain*, p. 156.

¹¹⁶⁹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=11621
Accessed November 5, 2021

¹¹⁷⁰ Ahmet Özel, “Kināna, Yahyā b. ‘Umar”, in *TDV İslam ansiklopedisi*, 44 vols., vol. 26/33.

¹¹⁷¹ https://www.eea.csic.es/pua/personaje/consulta_personaje.php?id=5075
Accessed November 10, 2021

¹¹⁷² Juan Vernet and Julio Samsó, “The Development of Arabic Science in Andalusia”, in *Encyclopedia of the History of Arabic Science*, edited by Roshdi Rashed. New York: Routledge, 1996, p. 257; Maribel Fierro, “Los Banū ‘Āsim al-Taqaḥī, antepasados de Ibn al-Zubayr”, *Al-Qanṭara* VII (1986), p. 53.

GLOSSARY

Terms commonly used in this Dissertation

- *ʿamal*: jurisprudence, judicial practice
- *faskh*: annulment of marriage
- *fatwā* (pl. *fatāwā*): opinion on a point of law
- *faqīh* (pl. *fuqahāʾ*): jurist, a specialist in Islamic law
- *fiqh*: the science of religious law
- *furūʾ*: legal casuistry
- *fuqahāʾ mushāwarūn*: consultant jurists
- *ḥadīth*: report of the words and deeds of the Prophet
- *ʿibādat*: ritual
- *ʿidda*: period of waiting during which a woman cannot remarry after being widowed or divorced
- *ijtihād*: independent legal reasoning
- *ilāʾ*: a husband swears to abstain from sexual intercourse with his wife
- *istiḥsān*: discretion
- *ḥadd*: punishment applied under specific circumstances
- *ḥaḍāna*: childcare (nurturing, nursing and raising)
- *ḥukm*: decision
- *khiyār*: the execution of divorce causing the ending of the nuptial connection
- *khulʾ*: a type of divorce in which a woman must offer her husband some property or an amount of money in order to obtain the dissolution of their marriage
- *liʾān*: an oath which gives a husband the possibility of accusing his wife of adultery without presenting any legal proof and without his becoming

¹¹⁷³ Rafael Muñoz, "Problemas lexicográficos en la obra de Ibn ʿĀsim al-Garbālī", *Revista del Instituto Egipcio de estudios Islámicos en Madrid* XXV (1991-92), p. 97.

¹¹⁷⁴ Miguel Forcada Nogues, *Kitāb al-anwāʾ wa-l-azmina: Al-qawl fī l-ṣuhūr* (Tratado sobre los anwāʾ y los tiempos – capítulo sobre los meses). Madrid: CSIC, 1993.

liable to the punishment prescribed for this absence, and the possibility of denying the paternity of a child borne by the wife

- *maṣāliḥ al-mursala*: unstated good
- *mahr*: dower
- *mudabbara*: a female slave who has a contract of manumission
- *masā'il*: questions explained by a teacher regarding the content of the law and collected to help in the training of jurists and in their activities
- *mufti*: a jurisconsult in response to a specific query
- *mukātaba*: a female slave who has been freed at the death of her master
- *mukhāla'a*, *muṣālaḥa* and *mubāra'a*: when a ransom is paid by the wife to obtain her divorce
- *mustaftī*: the person who poses a legal question to the *muftī*
- *nafaqa*: matrimonial maintenance
- *nāzila* (pl. *nawāzil*): legal case
- *ra'y*: individual opinion
- *riwāya*: recension
- *samā'* (pl. *samā'āt* / *asmi'a*): audition
- *sulṭān*: political power, those who are in charge of it
- *takhyīr*: granting a choice for divorce
- *tamlīk*: granting possession of the right for divorce
- *tawkīl*: granting of the power of attorney to a wife
- *ṭalāq*: divorce achieved through unilateral repudiation by the husband
- *qadi*: a judge in an Islamic court
- *sadd al-dharā'i'*: preclusion
- *tafsīr*: commentary of the Qur'an
- *umm walad*: a concubine who gets pregnant and gives birth to a child
- *uṣūl*: roots, the foundations of the law
- *'urf*: local customary law
- *wilāya*: child's upbringing, supervision and providing the maintenance of the child
- *ḡihār*: an oath of divorce in which a man swears against his wife by comparing her to his mother's back

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