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Classical juristic opinions in service of contemporary family law reform in the Hashemite Kingdom of Jordan

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Chapter one: Introduction

In modern majority-Muslim states, the bodies of laws governing domestic relations, inheritance and legal competence are referred to as personal status laws. Matters of personal status are typically the only area of law where parallel legal codes apply to the affairs of Muslim and non-Muslim inhabitants. Muslim personal status codes are thought of as Islamic in nature, and, to varying degrees, the rules contained therein are based on the opinions of Muslim scholars as they are expressed in the *furūʿ* works of the Islamic schools of jurisprudence.[1]

This study is an attempt at mapping the reforms pertaining to marriage and its dissolution in Jordanian Muslim family law from the adoption of the 1917 Ottoman Law of Family Rights to the ratification of the presently operative personal status law in 2019, and providing analogous rulings to these reforms, if any is to be found, from Islamic *furūʿ al-fiqh*.

Article 324 of the operative 2019 Personal Status Law states that for the interpretation of specific sections of the law and the supplementation of the provisions contained therein, the school of jurisprudence they are derived from is to be consulted.[2] At the time of my writing, the Jordanian judiciary has not yet released an official commentary or explanatory memorandum that would clearly indicate where each section is derived from. Along with scholarly articles, several unofficial commentaries have been written in Arabic since the issuance of the 2010 temporary personal status law.[3] Upon review, I have found that these only sporadically provide parallel opinions from Islamic jurisprudence. In 2019, Dr. Dörthe Engelcke released a monograph on Moroccan and Jordanian family law, providing an exhaustive analysis on the political and social context of both.[4] As her book was written with a fundamentally different approach, this study is not meant to

[1] „Furūʿ" meaning branches in Arabic, *furūʿ al-fiqh* works elaborate the rules in the areas of life that Islamic law governs.

[2] Article 324: Texts of this law are applied to all questions they deal with in word or in meaning. For their interpretation and the supplementing of their provisions, the school of Islamic jurisprudence each one is derived from is to be consulted.

[3] Muḥammad Ḫalaf Banī Salāma, *Šarḥ qānūn al-aḥwāl al-šaḫṣiyya al-Urdunī*, Ammad, Dār Wāʾil 2016.
ʿUmar Sulaymān ʿAbd Allāh al-Ašqar, al-Wāḍiḥ fī šarḥ qānūn *al-aḥwāl al-šaḫṣiyya al-Urdunī*, Amman, Dār al-Nafāʾis 2015.
In addition, Maḥmūd ʿAlī al-Sarṭāwī wrote a commentary on the 1976 personal status law: Maḥmūd ʿAlī al-Sarṭāwī, *Šarḥ qānūn al-aḥwāl al-šaḫṣiyya*. Amman, Dār al-Fikr 2013.

[4] Dörthe Engelcke, *Reforming Family Law: Social and Political Change in Jordan and Morocco,* Cambridge University Press 2019.

challenge her findings, but to provide an additional layer of background knowledge useful for understanding lawmaking processes in Jordan.

With the above in mind, I consider identifying the probable antecedents of Jordanian family law reform a worthwhile task in itself.

In addition, I will argue that the utilization of *furūʿ* texts and the high level of adherence to juristic opinions expressed in classical Islamic law makes the Jordanian Personal Status Law a *fiqh* manual.

I consider this statement to be polemical in nature. In contemporary scholarship, and especially in the works of Western researchers, it is not a generally accepted notion that personal status laws are a product of Islamic jurisprudence, or a continuation of the Islamic legal tradition. This is partly due to a perceived irreconcilability between positive legal codes and the multitudes of opinions expressed in *fiqh* works.

One of the most widely recognized features of Islamic law is that it is *Richterjustiz*: several distinct schools of jurisprudence exist, and even within those schools, individual jurists may hold conflicting opinions regarding a given legal dilemma. In absence of uniformly enforced legal codes, it is up to the judge to select the most appropriate juristic opinion according to which to rule. Needless to say, personal status codes laid down in a positive manner deprive judges of the possibility to select a ruling.

In modern scholarship, this diversity of applicable opinions has been characterized as a fundamental characteristic of Islamic law:

> „*Codified law cannot, by definition, be flexible and fluid law. Legal codes no longer offer a variety of possible interpretations; rather, they work to standardize cases and minimize the element of judicial subjectivity. Today, one interpretation on any point of Islamic law is made the only interpretation that can be considered and applied by muftis and courts. Modern states have promulgated various codes of Islamic law in the interests of fairness and rationality, in the understanding that law should not be primarily a process of negotiation and judicial discretion, but rather should establish clear standards that apply equally to all. Whether or not such codification actually violates the Islamic legal tradition to such an extent as to rob it of fundamental coherence is a question, however important,*

that lies beyond the scope of the present study. But as far as the debate on Islamic law and gender is concerned, contemporary codifications raise some serious questions."[5]

"This so-called mecelle became valid in 1877, and partially remained the law in the successor states of the Ottoman Empire up to the Second World War. This meant a standardization that conformed to all modern requirements. However, it is obvious that such a codification of Islamic law totally misses its essence. What a perversion of Islamic law the mecelle represents can be seen in the fact that, for the first time in the Islamic world, Jews and Christians were also subject to Islamic prescriptions of the civil code."[6]

At the same time, modern research into Islamic law has recognized that uniformization efforts within the various schools of Islamic jurisprudence have far predated the enactment of the first modern personal status codes, and that this unifirmization took place at least partly independently from state codification efforts.[7] Nonetheless, it might be worth recounting a few of the reasons why canonization ought not to be viewed as contradictory to the workings of Islamic jurisprudence. To start with, Muslim jurists did not claim that a single, correct solution to all legal dilemmas did not exist. *Šarīʿa* as an abstract ideal leaves no room for contradictions, it is only due to the limitations of human comprehension of it that contradictory opinions are permitted to co-exist in *šarīʿa*'s applied form, *fiqh*. The earliest treatise on the principles of Islamic jurisprudence, the *al-Risāla* of Muḥammad ibn Idrīs al-Šāfiʿī (d. 820) plainly states that if two men, utilizing individual reasoning as Muslim jurists do, come to different conclusions regarding the same question, then at least one of them is necessarily wrong:

"Since you are saying that they have a difference of opinion, no doubt you can see that one of them is in error."

[5] Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine*. Berkeley, University of California 1998, 184-185.

[6] Thomas Bauer, *A Culture of Ambiguity: An Alternative History of Islam*. New York Chichester, West Sussex, Columbia University Press, 2021, 120-121.

[7] Rudolph Peters, „What does it mean to be an official madhhab? Hanafism and the Ottoman empire". In P. Bearman, R. Peters, & F. E. Vogel (Eds.), *The Islamic school of law: evolution, devolution, and progress* (Harvard University Press, 2005), 157-158.

"Indeed." [8]

Muslims perform prayers while facing the direction of the Kaʿba in Mecca. When Muslims pray at a locale where this direction is not indicated, they are left to determine it based on their geographical knowledge. Al-Šāfiʿī explains the necessity for individual reasoning despite the inherent potential for error through the parable of two men who disagree on the direction of the Kaʿba:

> *"If I were to tell them that they may not pray until they have reached certitude – and they never reach certitude of the uncertain – then either they abandon prayer, or the duty to turn towards the qibla is forfeit and they pray in whatever direction they want. But I say neither of those things. Rather, I will certainly tell them that each one should pray the way he thinks is correct, and they are not required to do otherwise."*[9]

Authors of comprehensive – in the sense that they incorporated a chapter on every issue discussed in law – *fiqh* manuals compiled juristic opinions in their works through a conscious selection process. Upon having finished his concise manual which he titled *Bidāyat al-mubtadī*, the twelfth century Ḥanafī Burhān al-Dīn al-Marġīnānī resolved to write an accompanying long commentary incorporating opinions from the Mālikī and the Šāfiʿi schools, as well as an exhaustive listing of *nawāzil* (legal opinions arisen through the issuance of fatwas). Finding the nearly finished text too lengthy, he set out to write a brand new commentary, leaving out opinions he considered less worthy of consideration for the sake of brevity:

> "*I have turned my attention to another commentary which I have called al-Hidāya, and, with God Almighty's grace, I have compiled in it the most excellent narrations with the most approachable texts, leaving out the excess in each chapter.*"[10]

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[8] Muḥammad b. Idrīs al-Šāfiʿī, *al-Risāla*. ʿAbd al-Raḥmān b. Mahdī ed. Cairo, Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī wa Awlādihi bi-Miṣr 1938, 487-490.

[9] id.

[10] Burhān al-Dīn al-Marġīnānī, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d, vol. I, 14.

While al-Marġīnānī's stated intention with the omission was to create an approachable text, the popularity of the finished *al-Hidāya* all but ensured that some positions held by his peers would fall out of favor. In the following centuries, the doctrine of the prevailing opinion (*mā ʿalayhi al-fatwā, mā ʿalayhi al-ʿamal, al-aṣaḥḥ, al-arğaḥ*) emerged in the four *sunnī* schools of jurisprudence. Jurists who lacked the qualifications to perform independent *iğtihād* were bound to apply the prevailing opinion in their judgments. Intended for use as a textbook by jurists of the Ottoman Empire, the author's preface to the sixteenth century *Multaqā al-Abḥur* makes it clear that it was written as an attempt to consolidate a Ḥanafī canon:

> "*I clearly indicated the controversies among our Imams and [with regard to each issue] I have first mentioned the most preferable opinion [al-arğaḥ] among those held by them, and then the other opinions. However, in some places I have specifically connected them [the opinions not mentioned first] with words expressing preference [al-tarğīḥ].*"[11]

The emergence of a prevailing opinion is not a formal process, and unlike *iğmāʿ*, rules for which have been laid out in works on the principles of jurisprudence, it does not depend on unanimity. Prevailing opinions within the schools change over time according to the perceived change in the particularities of everyday life.[12] Positive laws are only enforced until they are repealed. If this is so, a positive personal status article, adopting an opinion from Islamic jurisprudence could be construed as the preferred opinion of jurists in a certain time and locale.

Whether Muslim juristic argumentative discourse plays a part in the formulation of these laws is also disputed by modern scholarship. It is often alleged that the claimed "Islamicity" of laws is no more than a superficial claim meant to appease more rigidly religious demographic groups. In the words of Baudouin Dupret, when a politician lobbies for a law based on religious precepts be passed, he may do so less out of genuine conviction and more out of concern for the expectations of the public opinion.[13] In the assessment of Rudolph Peters, in modern lawmaking, *fiqh* is sidelined as a legislative tool, and *fiqh*-based evaluation of law is limited to academic discourse.

[11] Translation by Rudolph Peters. Rudolph Peters, „What does it mean to be an official madhhab? Hanafism and the Ottoman empire". In P. Bearman, R. Peters, & F. E. Vogel (Eds.), *The Islamic school of law: evolution, devolution, and progress* (Harvard University Press, 2005), 151. Translation by Rudolph Peters. See also the original preface in Ibrāhīm b. Muḥammad b. Ibrāhīm al-Ḥalabī, *Multaqā al-abḥur*. Beirut, Dār al-Bayrūtī 2005, 16.

[12] See for example the Ḥanafī shift in opinion on the wife's funerary expenses in chapter five.

[13] Baudouin Dupret, *La Charia*. La Découverte, 2014, 95. https://shs.hal.science/halshs-01573110.

Megváltozott a mezőkód

Unlike the other researchers quoted above, he seems less eager to dispute the *šarʿī* nature of codified laws based on Islamic legal opinions, but only out of conviction that it is not the place of non-Muslim scholars to contest what is, in his view, a generally accepted notion in the Muslim world:

> *"Of course, the doctrine of the fiqh regarding those topics that have been codified still exists. But only as an academic doctrine, a doctrine that by state legislation has been blocked from actual enforcement by the judiciary.*
> *This led some, mainly Western, non-Muslim scholars to question whether this legislation can still be regarded as Shariʿa and as Islamic. Raising this question is, I believe, not very relevant and betrays a certain polemical point of view. By arguing that codified Shariʿa is not Shariʿa and not Islamic anymore, they want to demonstrate that the re-Islamization of the law that was introduced in some countries, was not a real re-introduction of the Shariʿa. In my opinion, outsiders are not competent to determine for Muslims what Islam and the Shariʿa is. The only correct answer would be that if Muslims hold that it is Islamic and a legitimate (albeit perhaps not the only) interpretation of the Shariʿa, which most Muslims do, there are no good arguments to view it differently."*[14]

In the following chapters, an effort will be made to demonstrate that the overwhelming majority of the Jordanian personal status law's reform articles are in conformity with, if not outright adopted from opinions expressed in *fiqh* manuals, and juristic opinions regarding certain legal dilemmas were revisited between the various stages of the code's development. If this aim is achieved, I would consider that demonstrable proof that Jordanian personal status law is a product of *fiqh*, and that a high level of adherence to the boundaries set by opinions expressed in Islamic was a priority concern during the formulation of the law.

Structure and methods

[14] Rudolph Peters, "Chapter 28: From Jurists' Law to Statute Law or What Happens When the Shariʿa is Codified". In *Shariʿa, Justice and Legal Order*, (Leiden, The Netherlands: Brill, 2020), 543.

The study is composed of chapters on reforms enacted in the areas of the marriage contract, repudiation, judicial separation, alimony and child custody. Articles related to these subjects make up a little more than half of the current personal status law. References to other areas covered by the law, such as provisions on inheritance and missing persons, will be limited to where they are relevant to the issues above. While length constraints set for the doctoral dissertation was a factor in the decision to limit the scope of the study, these subjects form an interconnected whole as they are all related to marriage. The scope thus chosen also happens to coincide with the areas regulated by the first Ottoman Law of Family Rights. The laws mandating the registration of marriage contracts and privately performed repudiations will not be discussed separately. Upon review of related instances in furūʿ texts, I have found that classical jurists tend to obligate the consultation of a *qāḍī* rather casually, thus the obligation to register private legal acts ought not to be seen as particularly problematic from the point of view of Islamic jurisprudence.

Article 325 lends itself as a convenient basis for establishing which articles will be considered as containing reforms. According to it, regarding areas not covered by the law, the preponderant Ḥanafī opinion is to be consulted first.[15] While the Jordanian personal status law is not claimed to adhere to Ḥanafī doctrine, it stands to reason that where the law deviates from the preponderant Ḥanafī opinion, lawmakers acted on a perceived need for reform. One of the main goals of this study, then, is establishing whether articles deviating from the Ḥanafī doctrine conform to opinions from elsewhere in classical jurisprudence. A second type of reforms is comprised of articles introducing rulings on matters previously not regulated by law. As the subsequent chapters will show, these articles are mostly derived from Ḥanafī doctrine.

Each chapter is prefaced with a summary of the subject according to classical Islamic jurisprudence. While referencing the relevant articles of Brill's Encyclopaedia of Islam would have been sufficient to establish the basic facts on the subject, issues relevant to the Jordanian reforms are not always touched upon in the Encyclopaedia of Islam. For this reason, I have found the inclusion of these introductions necessary. In addition, the summaries are meant to indicate when Jordanian law is harmonious with the Ḥanafī opinion.

To each issue, the relevant articles of the operative Jordanian law are presented in the translation of the dissertation's author. This is followed by the presentation of the positions of the sunnī schools

[15] Article 325: In matters not mentioned in this law, the predoponderant opinion of the Ḥanafī school of jurisprudence is consulted. If none is found, the court will judge according to the provisions of Islamic jurisprudence that stand in conformity with the text of this law the most.

of jurisprudence on the issue, including, if one is found, the position most closely resembling the contents of the Jordanian law. The findings related to each issue are then treated in a separate conclusion.

Utilization of classical sources

Throughout the study, the phrase *classical sunnī jurisprudence* will be used to refer to the totality of Islamic legal works from the emergence of the four *maḏhabs* to the issuance of positive personal status codes. It is not meant to allude to a more specific time period.

When identifying the majority position of a specific school, I endeavored to reference the earliest comprehensive manual where the opinion is present. For this purpose, four *muḫtaṣars*, those of al-Qudūrī, al-Ḫiraqī, al-Muzanī and the somewhat later *Muḫtaṣar Ḫalīl* were chosen. Later works are quoted when the issue is not discussed in these works, or the position of the school has shifted in later times. Wherever I have been able to cross-reference it with a print edition, the edition included in the *al-Maktaba al-šāmila* program will be referenced. These books will be marked as such in the bibliography.

Regarding the prevailing opinion of the Ḥanafī school, I will defer to the counsel of the judges of the Supreme Judge Department. Upon being asked whether the *qawl rāǧiḥ* of the Ḥanafī school referenced in the law can be understood to ~~reference~~ allude to any specific work, they advised me to consult the *al-Hidāya* of al-Marġīnānī and its commentary *Fatḥ al-Qadīr* by Ibn Humām, the *Radd al-Muḥtār* of Ibn ʿĀbidīn, and Muḥammad Zayd al-Ibyānī's commentary on the Muḥammad Qadrī bāšā's *al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya ʿalā maḏhab Abī Ḥanfīa al-Nuʿmān*. [16]

Note on translations

Unless otherwise indicated, the translations of quotes from Arabic language texts, including articles of the law, are the author's. For most Arabic *termini technici*, an approximate English equivalent will be used. The corresponding Arabic word will be indicated next to the first occurrence of the term. Instead of adhering to the translations suggested by any single Arabic-English legal dictionary, or unofficial translations of similar laws from other, Arabic speaking countries, the

[16] Personal meeting with several members of the Supreme Judge Department, 2018. 04.

terms commonly found in English language academic works will be used. The transliteration scheme conforms to the transliterations used in Hungarian academic works, which itself is largely identical to the one suggested by the Deutsche Morgenländische Gesellschaft.

Overview of the history of Jordanian family laws

Jordanian šarʿī courts (*maḥākim šarʿiyya*) rule on personal status matters between Muslims and between Muslims and non-Muslims. Unlike civil courts, which are overseen by the Ministry of Justice, they belong under the jurisdiction of the Dāʾirat Qāḍī al-Quḍāt (Supreme Judge Dempartment). Judges presiding over šarʿī courts are required to have formal training in Islamic jurisprudence.[17] According to the law on their establishment, šarʿī courts administer rulings according to the preponderant opinion (*al-qawl al-rāğiḥ*) of the Ḥanafī school unless a state law on the matter exists.[18]

Prior to the establishment of the Emirate of Transjordan, the predecessor to the independent Hashemite Kingdom of Jordan of today, the region was under Ottoman rule. In 1917, the Ottomans were the first majority-Muslim state to introduce a positive personal status code. Called *Qarār ḥuqūq al-ʿāʾila* in Arabic that it was written in, and most often referred to as the Ottoman Law of Family Rights in English literature, it is mostly comprised of opinions derived from the Ḥanafī and Mālikī schools.

The 1928 constitution of the Emirate of Transjordan recognized the 1917 Ottoman family code as the applicable family law until new laws were enacted.[19] This came about in 1947, when a law called *Qānūn ḥuqūq al-ʿāʾila*, still largely fashioned after the Ottoman code, was promulgated.[20] This law was then replaced in 1951, but apart from the introduction of marriage age and the inclusion of articles on the alimony of relatives, the new law remained mostly consistent with Ottoman family law.[21] As subsequent chapters of this study will show, significant reforms were first enacted in 1976 personal status law.[22] The code was put into effect as a temporary law, without prior ratification from the Parliament. This was made possible by Article 94 of the

[17] Engelcke 67.
[18] Art. 4 of Law 41 of 1951, corresponding to Article 22 of Law 19 of 1972 that superseded it.
[19] Amira El-Azhary-Sonbol, *Women of Jordan: Islam, Labor, and the Law*. Syracuse University Press 2003, 35.
[20] Law 26 of 1947.
[21] Law 92 of 1951.
[22] Law 61 of 1976.

Jordanian constitution, which permits the council of ministers (*Mağlis al-Wuzarāʾ*), in times when the parliament is dissolved, to pass temporary laws with approval from the King without ratification of the Parliament.

In 2001, the 1976 law was amended on several issues: marriage age was raised, an obligation to inform wives of the husband's new marriage was introduced, visitation rights were established for relatives other than the parents, and rules on bride money and alimony were amended.[23]

A new personal status code, drawn up entirely by the Supreme Judge Department, came into effect in 2010.[24] Once again, the law was enacted without prior approval from the national assembly. After a few revisions, the temporary law was finally promulgated as Law 15 in the year 2019.[25]

[23] Law 82 of 2001.

[24] Dörthe Engelcke, *Reforming Family Law: Social and Political Change in Jordan and Morocco,* Cambridge University Press 2019. 124-125.

[25] Revisions include the admissability of DNA tests in the establishment of fatherhood, equality of the two sexes among distant kindred (*ḏawī al-arḥām*) in inheritance, the establishment of the right to overnight stays with the child as part of parental rights, and the repealing of a law on the forfeiture of the custody of a non-Muslim mother when the child reaches the age of seven.

Chapter two: The marriage contract (ʿaqd al-nikāḥ)

Overview

Islamic marriage is formulated as a contract between husband and wife. For the contract to be valid, a formal proposal, the stated acceptance of the other party, and the presence of no less than two witnesses are required. With the exception of the Ḥanafīs, jurists also agree that a marriage guardian for the wife is also pre-requisite.

The witnesses are sane adult male Muslims, or one man and two women.[1] In case of a marriage between a Muslim husband and a non-Muslim monotheist wife, non-Muslim witnesses are accepted.[2] According to the Mālikī opinion, witnesses can be substituted with a public announcement of the marriage as long it precedes consummation.[3]

A husband may keep up to four wives at a time and is permitted to marry Muslim or monotheist non-Muslim (*kitābī*) women. Muslim women may only marry Muslim men. A man may not marry his own mother, daughters or sisters, including mothers and daughters of the above. Marrying aunts is also prohibited, but marrying an aunt's daughters (meaning the husband's first cousins) is not.

To prevent the coupling (*ǧamʿ*) of blood-related women under the same husband, a man may not marry a woman that her wife would be forbidden from marrying if she was a man (i. e. the wife's mother, sisters or daughters), but the forbidden relation is only established once he's consummated his marriage with his wife. In the case of a wife's sisters, the prohibition is only temporary, once the husband's marriage to one of them is terminated, he will be permitted to marry the other.[4] Similarly to the above, one is permanently prohibited from marrying the former wives of one's father, grandfathers or sons. Foster-sisters, mothers and daughters are prohibited as if they were

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[1] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 145.

[2] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 145.

[3] Abū ʿUmar Yūsuf b. ʿAbd Allāh b. Muḥammad b. ʿAbd al-Birr b. ʿĀṣim al-Nimrī, *al-Kāfī fī fiqh ahl al-Madīna*. Muḥammad Muḥammad Uḥayd Walad Mādīk al-Mūrītānī ed. Al Riyadh, Maktabat al-Riyāḍ al-Ḥadīṯa 1980, vol. II, 520.

[4] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 145.

biological relatives. Unlawful sexual contact establishes the same prohibitions as a valid marriage.[5] If the suitor or the betrothed lack the capacity to represent themselves in a marriage contract, he or she is represented by a marriage guardian (*walī*). In general terms, guardianship (*wilāya*) grants legal authority to a person to initiate legal transactions on behalf of a someone else who lacks the capacity to do so. This authority is thought to be limited to the specific actions that the ward is in need of being tended to. Accordingly, Islamic law differentiates between guardianship over personal (wilāyat ʿalā al-nafs), financial (ʿalā al-māl) and marriage guardianship (wilāyat al-nikāḥ), although the former two only appear as technical terms in modern jurisprudence.[6] For men, marriage capacity coincides with the capacity to conclude legal transactions, meaning that all sane, biological adult (bāliġ) men may enter a marriage contract on their own. Women's capacity to represent themselves in marriage is more limited according to all sunnī schools of jurisprudence, with the majority opinion of Šāfiʿīs, Mālikīs and Ḥanbalīs being that a marriage contract is not valid without a guardian on the wife's side. Ḥanafīs considered all sane adults competent to conclude a marriage contract ~~without a guardian~~, so unlike the other three schools, they permitted adult women to ~~to~~ conclude marriage contracts without a guardian. If the guardian is the father or the grandfather of the ward, he possesses the right to marry him or her off without his or her consent (and even despite her protest), other relatives do not possess this right according to Ḥanafīs. For freemen, the guardian is the closest viable male agnatic relative, such as the father or a brother. The requirements of guardianship aren't overly demanding, *mukallaf* (a person sane and old enough to be obligated to observe religious duties) freemen following the same religion as the ward are accepted.

The contract entitles the wife to *mahr*, the so-called dower or bride money, intended to help the her if she finds herself without the husband's financial support due to the latter's death or a separation. As jurists regarded it as a payment in exchange for making herself available for marriage, it belongs to the wife alone. The amount is subject to agreement between the marrying parties or their guardians. Providing the wife with a dower is obligatory, however, specifying a sum is not required for the ~~validity of the contract~~contract to be valid. ~~In general, a dower can by anything as long as~~

[5] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 145.

[6] Dien, Mawil Y. Izzi, and Walker, P.E. 'Wilāya'. In Encyclopaedia of Islam, Second Edition, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs, P.J. Bearman (Volumes X, XI, XII), Th. Bianquis (Volumes X, XI, XII), et al. Accessed March 1, 2024. doi:http://dx.doi.org/10.1163/1573-3912_islam_COM_1349.

~~it holds financial value and Muslims are permitted to trade in it.~~

The parties may agree to split the bride money into an immediately payable (*muʿaǧǧal*) and a deferred (*mūʾaǧǧal*) portion. The immediate portion is payable at the very latest before the consummation of the marriage. As long as the immediate portion is not paid, the wife has the right to deny her husband's advances and she is under no obligation to cohabit with him.[7] The husband may agree to pay the deferred part on a specific date or upon the termination of the marriage through death or separation, whichever comes first. The wife may not demand the deferred portion before the agreed upon time or the termination of the marriage.[8]

While it is prohibited to marry a woman without providing her with a dower even if she would agree to it, a contract that does not specify the amount of the bride money is valid according to all schools. If the dower is not specified in the contract, or the contract claims that no dower is to be paid, or the object offered as dower is not valid, the wife is entitled to an amount that is usually paid to a woman of similar desirability in her family (determined by factors such as her age, beauty, lineage, her father's profession and social standing), this is called the fair dower (*mahr al-miṯl*).

As the value of the dower is subject to agreement by the marrying parties, not all jurists insisted on a minimum, and those who did found a token gift equivalent to a few dirhams to be satisfactory. In general, a dower can by anything as long as it holds financial value and Muslims are permitted to trade in it. Opinions vary on the validity of non-fungible dowers. Šāfiʿīs consider offerings to teach ḥadīṯ or verses of the Qurʾān to a Muslim wife as viable, but only as long as the tuition extends to more than just a symbolic amount and the wife does not already possess that knowledge.[9] According to Ḥanbalīs, the teaching of a craft to the wife or one of her servants is a suitable dower, but the teaching of the Qurʾān is not.[10] Ḥanafīs hold that a freeman may not offer his servitude to the woman as a dower, slaves, on the other hand, are permitted to do the same.

If the husband terminates the marriage before its consummation, the wife is only entitled to half the dower. In addition to actual sexual contact, any occasion where the couple are left *tête-à-tête* and are in sufficient health will be counted as consummation, this is called seclusion (*ḫalwa ṣaḥīḥa*).

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[7] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 632. (= shamela I, 602)

[8] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. X, 115.

[9] Abū Zakariyyā Maḥmūd b. Šaraf al-Nawawī: *Rawḍat al-ṭālibīn*. Beirut, al-Maktab al-Islāmī 1991, vol. V, 304-305.

[10] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. X, 103.

One the other hand, if the wife initiates separation before consummation, or the husband does so due to an ailment of the wife that was not apparent during the conclusion of the contract, the wife does not receive a dower.[11]

The husband has the right to increase the dower after the conclusion of the contract, and the wife has the right to reduce it.[12] Dower is inheritable. If the wife dies before the termination of the marriage, the as-yet-unpaid portion is inherited by her heirs. A man on his deathbed may offer a fair dower at most, if he offered more, the part exceeding the fair dower will be counted as testation, which cannot exceed the third of his estate.[13]

The husband must be a suitable match (*kuf*ʾ) for the wife. Most commonly, the propositor's religiousness, descent, wealth, profession and health were considered relevant to suitability (*kafāʾa*). Šāfiʿīs and some Ḥanbalīs thought that suitability of her husband is the wife's right, enabling her and her guardian to petition for separation if the husband somehow deceived them, but they may choose to accept a suitor who is not the wife's match.[14] In Ḥanafī doctrine, suitability must be enforced in all cases, but their criteria were far less stringent than those of the other schools. Al-Qudūrī's *al-Muḫtaṣar* lists religiousness, descent and wealth as factors to be considered, adding that financial suitability is no more than the ability to pay the dower and the wife's maintenance.[15] Of late ḥanafīs, Muḥammad Qadrī bāšā thought that while suitability of descent is to be taken into consideration, knowledge supplants descent.[16] Mālikīs equivocally rejected discrimination based on descent, the *al-Mudawwana* permitted non-Arab men to marry Arab women, and the school's majority opinion did not budge on the issue since.[17] A guardian may not reject a suitable match offering a fair dower, although the solutions proposed to resolving the conflict arising from the refusal of the guardian varied greatly between the schools. Ḥanafīs held that implicit consent of the

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[11] Šams al-Aʾimma al-Saraḫsī: al-Mabsūṭ. Dār al-Maʿrifa, 1993, vol. V, 95.

[12] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 147.

[13] Burhān al-Dīn al-Marġīnānī, no date, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d, vol. III, 186.

[14] Muḥyī al-Dīn Abū Zakariyyā Yaḥyā b. Šaraf al-Nawawī, *Minhāǧ al-ṭālibīn wa ʿumdat al-mutqīn*. ʿAwaḍ Qāsim Aḥmad ʿAwaḍ ed, Bei
rut, Dār al-Fikr 2005, 208.

[15] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 146

[16] Muḥammad Qadrī Bāšā, Muḥammad Zayd al-Ibyānī, *Al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya*. Cairo, Dār al-Salām 2009, vol. I, 171,180.

[17] Saḥnūn b. Saʿīd al-Tanūḫī, *al-Mudawwana al-Kubrā*. Beirut, Dār al-Kutub al-ʿIlmiyya 1994, vol. II, 107.

guardian is as good as an explicit one.[18]

The conclusion of the contract cannot be made dependent on the fulfilment of a condition, it is concluded immediately upon the acceptance of the the proposal.[19] The addition of stipulations to the marriage contract, however, is accepted by all schools, as their validity is affirmed by a Prophetic tradition.[20] Delegation of repudiation to the wife, forbidding the husband from taking another wife and agreeing not to move from the home region of one of the spouses are the most commonly mentioned valid stipulations.[21] An invalid stipulation is null but it does not void the contract according to Ḥanafīs.[22] If a valid condition is broken, the spouse setting it may petition for the annulment of the contract. If the husband was the one to break the stipulation, the wife is still entitled to all her marital rights as if she was irrevocably repudiated.[23]

Marriages must not be kept secret according to all schools except the Ḥanbalīs, who thought that as long as two witnesses and the wife's guardian are present, asking them to keep silent about the marriage is discouraged but permitted.[24] A polygamous husband must divide his time equally between wives, though a wife may relinquish her right in favor of another wife. The obligation to split time between wives equally (*qasāma*) is a broadly accepted principle in classical fiqh, only the Šāfiʿīs objected against it.[25]

Marriage guardianship

[18] Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḥtār šarḥ Tanwīr al-abṣār*. Beirut, Dār al-Fikr 1966 (reprint of the Muṣtafā al-Bābī al-Ḥalabī edition), vol. III, 58.

[19] Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḥtār šarḥ Tanwīr al-abṣār*. Beirut, Dār al-Fikr 1966 (reprint of the Muṣtafā al-Bābī al-Ḥalabī edition), vol. III, 14, 54.

[20] Abū ʿAbd Allāh Muḥammad b. Ismāʿīl al-Buḫārī, *Ṣaḥīḥ al-Buḫārī*. Muṣtafā Dīb al-Baġā ed. Damascus, Dār Ibn Kaṯīr 1993. (6 vols) **[Sh]** Vol. V, p. 1978.

[21] Abū Qāsim ʿUmar al-Ḥusayn al-Ḫiraqī, *Muḫtaṣar al-Ḫiraqī*. ed. Muḥammad Zuhayr al-Šāwīš. Damascus, Dār al-Salām li-l-Ṭibāʿa wa al-Našr 1958, 137.

[22] al-Šaybānī, Abū ʿAbd Allāh Muḥammad n. al-Ḥasan, *al-Ḥuǧǧa ʿalā ahl al-Madīna*. al-Sayyid Mahdī Ḥasan al-Kīlānī al-Qādirī ed. Beirut, ʿĀlam al-Kutub 1982, vol. III, 214.

[23] al-Qudūrī, Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 148.

[24] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. IX, 469.

[25] Rudaynā Ibrāhīm al-Rifāʿī, ʼ al-Qism bayna al-zawǧāt fī mabīt: aḥkāmuhu wa masqiṭātuhuʼ, *al-Maǧalla al-Urduniyya fī al-dirāsāt al-islāmiyya* 8, no. 1 (2012): 17

14. The guardian in marriage is a residuary in his own right according to the order of precedence defined by the preponderant opinion of Abū Ḥanīfa's *maḏhab*.

15. The guardian is required to be of a sound mind and legal age, and to be a Muslim if the proposed is Muslim.

16. The consent of one guardian ~~overrides~~ invalidates the objection of another if they are on he same level of relationship with the proposed, and a more distant relative's consent overrides the objection of a closer relative if the closer relative is not present. The guardian's implicit consent is as valid as his explicit consent.

17. If the nearest guardian is absent and the waiting negatively affects the prospects of the proposed, the right of guardianship is transferred to the next person in line. If it proves difficult to receive the opinion of the next closest guardian or none exists, the right of guardianship is transferred to the judge.

18. Keeping in line with Article 10 of this law, after a request, the judge will authorize the marriage of a maiden older than 16 solar years of age to a suitable man in case of the guardian's objection, if his objection lacks a legal basis.

19. The guardian's consent is not required for the marriage of a sane divorcée of at least eighteen years of age.

20. The judge will authorize the marriage in accordance with Article 18 of this law on the condition that the dower is no less than what is customary.

297. There are three types of residuaries:

a) The following parties are residuaries in their own right, presented here in order of preference:

1) Sonhood, which includes sons' sons how-low-so-ever.

2) Fatherhood, which includes the father and the paternal grandfather how-high-so-ever.

3) Brotherhood, which includes full and paternal brothers and their sons how-low-so-ever.

4) Unclehood, which includes the deceased's uncles from the father's or both parents' side, the uncles of the father, the uncles of the paternal grandfather how-high-so-ever, both paternal and full, and sons of the uncles, both paternal and full, how-low-so-ever.

Eligible guardians

As in Ḥanafī fiqh, Article 14) stipulates that the marriage guardian is the most closely related viable residuary in his own right. The same rule was utilized in the Ottoman family law and the 1976 Jordanian personal status law.[26] While the article refers to the preponderant opinion of the Ḥanafī school when defining residuaries in their own right, the law on inheritance lists them as well. In accordance with article 297. a), these include a woman's male agnatic relatives: the father, fathers of the father, sons and their sons, as well as her brothers and paternal uncles, along with their sons. Attributing this opinion to Abū Ḥanīfa, Aḥmad b. Muḥammad al-Qudūrī (d. 1037) held that in the absence of viable residuaries, maternal relatives, including women such as the wife's mothers, sisters or maternal aunts may also act as marriage guardians.[27] The school's majority position eventually shifted towards the opinions of Abū Yūsuf and Muḥammad al-Šaybānī, who, at odds with Abū Ḥanīfa's position on the matter, held that of the wive's relatives, only male agnates may act as her marriage guardians, after them, marriage guardianship falls to the imām or the ḥākim.[28] In the *Bidāyat al-mubtadī*, which itself is heavily based on al-Qudūrī's compendium, Burhān al-Dīn al-Marġīnānī (d. 1197) defers to Abū Ḥanīfa's opinion, but he omits al-Qudūrī's remark that women may also act as guardians as non-residuary relatives. In his own commentary on al-Hidāya, he presents the position of Abū Yūsuf and al-Šaybānī's opinion as well, without indicating a preference for either.[29] Even later Ḥanafīs omit Abū Ḥanīfa's position altogether, naming residuaries in their own right as the only relatives eligible to represent a woman in a marriage. This puts the Jordanian law in line with the position of such jurists as al-Nasafī, al-Timirtāšī, and Muḥammad Qadrī bāšā.[30]

[26] Articles 11 and 9 of the Ottoman family law and the 1976 Jordanian personal status law, respectively.

[27] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997,146.

[28] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 604. = sāmila I, 194-195.

[29] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 604= sāmila I, 194-195.

[30] Abū al-Barakāt ʿAbd Allāh b. Aḥmad al-Nasafī, *Kanz al-Daqāʾiq*. ed. Sāʿid Bakdāš. Dar al-Sirāǧ, Medina, Saudi Arabia, no date, 254. cf: Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār*. Beirut, Dār al-Fikr 1966 (reprint of the Muṣṭafā al-Bābī al-Ḥalabī edition) III,76; Muḥammad Qadrī Bāšā, Muḥammad Zayd al-Ibyānī, *Al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya*. Cairo, Dār al-Salām 2009 I, 120.

The contract of the adult divorcée

Jordanian marriage contracts mandate the permission of the marriage guardian for all marrying women except the adult divorcée.[31] This position is not analogous to the opinion of any of the sunnī schools of jurisprudence. Mālikīs[32], Šāfiʿīs[33] and Ḥanbalīs[34] all hold that the permission of the wife's guardian is an essential element (*rukn*) of the marriage contract. Mandating a guardian for the wife is predominantly based on a tradition found in several of the six ṣaḥīḥ collections, according to which the Prophet said:

> *"There is no marriage without a guardian"*[35]

In line with the school's overall insistence on protecting personal autonomy, Ḥanafīs, on the other hand, held that sane, adult women do not need a guardian's permission, be they maidens or divorcées.[36] Muḥammad al-Šaybānī is reported to have initially thought that a marriage without a guardian is suspended upon the guardian's consent, but later retracted his opinion in favor of Abū Ḥanīfa's and Abū Yūsuf's.[37] The school's preponderant position on the issue did not change in the subsequent centuries, the XXth century Muḥammad Zayd al-Ibyānī (d. 1936) only added that if a woman was to marry with a dower lower than the fair amount, an agnatic guardian has the right to contest the marriage contract until the amount is supplemented to match the fair amount or the

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[31] Hereafter, the term divorcée will be used to refer to the woman who has consummated a prior, valid marriage, widows included. Fiqh manuals do not have an analogous term. Instead, the category of women that divorcée refers to in this text are usually described as a *ṯayyib* (non-virgin) who did not lose her virginity to physical strain or fornication. For an example, see Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, 1997, *Muḫtaṣar al-Qudūrī*. ed. Kāmil Muḥammad Muḥammad ʿUwayḍa. Beirut, Dār al-Kutub al-ʿIlmiyya. p. 146.
The Jordanian law uses *ṯayyib* in the same meaning as divorcée will be used in this study, as, in the law's context, only the consummation of a prior, valid marriage is relevant, physiological changes are not.

[32] bidāyat al-muǧtahid (dār ibn al-ǧawzī) II, 11.

[33] Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, Muḫtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya, 220.

[34] al-Ḫiraqī, Abū Qāsim ʿUmar al-Ḥusayn, *Muḫtaṣar al-Ḫiraqī*. ed. Muḥammad Zuhayr al-Šāwīš. Damascus, Dār al-Salām li-l-Ṭibāʿa wa al-Našr 1958, 134.

[35] Abū Dāwud Sulaymān b. al-Aš'aṯ b. Isḥāq b. Bašīr b. Šaddād b. ʿAmrū, Sunan Abī Dāwud. Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd ed. Sidon, al-Maktaba al-ʿAṣriyya, n. d. (4 vols), **[Sh],** vol. II, 229.

[36] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 146.

[37] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 595.

marriage is annulled in court.[38] This notwithstanding, the school has always held that a contract is valid if the adult wife did not seek her guardian's permission.

With regards to the necessity of the guardian's permission, the Jordanian law is identical to the classical Twelver šīʿī position, which also holds that the permission is obligatory in all cases except that of the adult divorcée.[39] Muṭahhar al-Ḥillī (d. 1325), an Iraqi twelver jurist well known to sunnīs due to his work on uṣūl al-fiqh, writes that there is no contention among šīʿī jurists regarding the adult divorcée's right to marry without a guardian, while he thought the permission of the guardian necessary in all other cases.[40]

However, the three schools that did not permit adult women to marry without a guardian did grant other privileges to the adult divorcée. While they held that a guardian does not need to secure a maiden's consent to marry her off even if she was an adult, they all agreed that an adult divorcée cannot be married off without her express consent.

This position is also supported by a Prophetic tradition:

> *The widow has more right to herself than the guardian*.[41]

Al-Šāfiʿī further argues that the adult divorcée is to be awarded this privilege on account of being a sane adult as well as her familiarity with marital affairs.

While Ḥanafīs held that neither the maiden nor the divorcée may be married off by the guardian without her permission, they granted other privileges to the latter. Owing to the assumption that, upon listening to a marriage offer, the maiden may be so overwhelmed with emotion that she becomes unable to reply, her silence, smile or quiet crying can all be taken as a sign of consent, and only explicit refusal or obvious distress are to be interpreted as a rejection. Meanwhile, only

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[38] Muḥammad Qadrī Bāšā, Muḥammad Zayd al-Ibyānī, *Al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya*. Cairo, Dār al-Salām 2009, vol. I, 119.

[39] Ǧamāl al-Dīn b. al-Ḥusayn b. Yūsuf b. ʿAlī b. Muṭahhar al-Ḥillī: *Taḏkirat al-fuqahāʾ*. Tehran, Al-Maktaba al-Murtaḍawiyya li-Iḥyā al-ʾĀṯār al-Ǧaʿfariyya 1968. (2 vols). vol. II, 587.

[40] As an example, the palace library of of the Ottoman sultan Bayazid II held twelve books from al-Ḥillī. While not cream of the crop, this definitely made him one of the more popular of the library's over one thousand authors. See Lánczky István, Quantitative Analysis of Bayazit II's Library In: Miklós, Maróth; István, Lánczky; Gyöngyi, Oroszi (szerk.) Catalog of Bayazit II's Library : Studies and Indices, Volume IV Piliscsaba, Magyarország : Avicenna Institut of Middle Eastern Studies (2022), 974.

[41] Abū ʿĪsā Muḥammad b. ʿĪsā al-Tirmiḏī, al-Ǧāmiʿ al-kabīr. Baššār ʿAwwād Maʿrūf ed. Beirut, Dār al-Ġarb al-Islāmī 1996. (6 vols), **[Sh],** vol. II, 401.

the explicit approval of the divorcée may be interpreted as acceptance.[42]

The Jordanian position that permits an adult divorcée to conclude her marriage contract without a guardian can therefore be interpreted either as a direct adoption of šīʿī doctrine, or an expansion of the rights afforded to her by classical sunnī jurisprudence.

Article 27 of the 1917 Ottoman family law permitted an adult maiden to get married without her guardian as long as she claims she does not have one. If a guardian does turn up after the conclusion of the contract, he may only petition for an annulment if the husband was not suitable (*kufʾ*). This exception was not preserved in Jordanian law.

Transferal of guardianship from one guardian to the next

Marriage guardianship is transferred to the next viable relative in Ḥanafī jurisprudence if the most closely related one is absent. Al-Qudūrī permitted the transferal of guardianship if the most closely related guardian is not available for consultation. According to his reckoning, this only occurs if the guardian resides in a location distant enough that caravans only reach it once a year.[43] Al-Marġīnānī on the other hand thought that in any situation where the wait for the nearest guardian's approval could cost the ward a viable suitor, the approval of a more distant relative is sufficient.[44] Article 17 conforms to al-Marġīnānī's opinion.

Article 16 permits the contract to be concluded with the approval of one guardian against the protest of others at the same degree of relatedness to the ward. A handful of Ḥanafī jurists shared this position. It is present in the versified manual of Abū al-Barakāt al-Nasafī (d. 1310), who writes, without further elucidation, that the consent of some of the guardians is the same as unanimous consent.[45] His commentators had the opinion that this principle is only applicable if the guardians belong to the same degree of relatedness.[46] Al-Nasafī mentions this principle in relation to the

[42] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 597-598.

[43] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 146.

[44] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 605.

[45] Abū al-Barakāt ʿAbd Allāh b. Aḥmad al-Nasafī, *Kanz al-Daqāʾiq*. ed. Sāʿid Bakdāš. Dar al-Sirāǧ, Medina, Saudi Arabia, no date, 256.

[46] Faḫr al-Dīn ʿUṯmān b. ʿAlī al-Zaylaʿī, Tabyīn al-ḥaqāʾiq šarḥ Kanz al-Daqāʾiq. Cairo, Maktabat al-Kubrā al-Amīriyya 1895. (6 vols.) vol. II, 128.

guardians' right to petition for the dissolution of the marriage due to the suitor's unsuitability, which makes it uncertain whether he permitted ~~the~~ it during the conclusion of the contract, but al-Ḥaskafī (d. 1677), whose commentary Ibn ʿĀbidīn's well regarded gloss is written on, clarifies that a single guardian's consent is adequate both during and after the conclusion of the contract.[47]

Ibn ʿĀbidīn rejected the two opinions that Article 16 and 17 are based on. Deferring to Ibn Humām's position, he reminds that if the marriage was concluded with the approval of a distant relative, a more closely related one still has the right to contest it.[48] As for permitting the contract against the disapproval of other guardians on the same level, he considers it a misunderstanding, speculating that al-Ḥaṣkafī erroneously applied the rule to the conclusion of the contract, whereas according to the school's preponderant opinion, the consent of a minority of the guardians is only sufficient against a petition for dissolution due to unsuitability.[49]

The above articles of the Jordanian law therefore introduced a greater degree of lenience by restoring a rule that the Ḥanafī school at some point ~~discarded~~abandoned.

Transferal of guardianship to the judge

Articles 18 and 20 are novelties introduced in the 2010 law, the rest of the articles on guardianship are identical to 1976 family law. According to Article 18, the judge may validate a marriage contract against the marriage guardian's protest if the protest is not made on legal grounds. In such cases, Article 20 stipulates that the bride money cannot be ~~no~~ less than~~t~~ the fair dower.

All classical jurists agree that a guardian may not refuse a suitable suitor who offers a dower equal to the fair amount, such behavior on the guardian's part is commonly referred to *ʿaḍl* (a refusal to marry someone off).[50] Based on a Prophetic tradition, it was also agreed upon that if the guardian refuses, the ḥākim (a person possessing executive power) may permit the marriage in his stead:

[47] Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār*. Beirut, Dār al-Fikr 1966 (reprint of the Muṣtafā al-Bābī al-Ḥalabī edition), vol. III, 57.
[48] Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār*. Beirut, Dār al-Fikr 1966 (reprint of the Muṣtafā al-Bābī al-Ḥalabī edition) vol. III, 58.
[49] Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār*. Beirut, Dār al-Fikr 1966 (reprint of the Muṣtafā al-Bābī al-Ḥalabī edition) vol. III, 57.
[50] Abū al-Walīd Muḥammad b. Aḥmad Ibn Rušd al-Qurṭubī, Bidāyat al-Muğtahid wa nihāyat al-muqtaṣid, Cairo, Dār al-Ḥadīṯ 2004, vol. III, 42.

> *Any woman who is not married off by a guardian: her marriage is invalid, her marriage is invalid, her marriage is invalid. And if he took her for himself, she gets a dower for what he had done to her. And if they quarreled, the ruler will be the guardian of those who do not have one.*[51]

However, most jurists only permitted this as a last resort. Ḥanbalīs hold that if the nearest guardian in relatedness refuses, guardianship is transferred to the more distant relatives first, and the ḥākim may only permit the marriage if no related guardian is willing to do so.[52]

As Ḥanafīs do not mandate the guardian's permission for adult women, discussion of the issue is less prominent in their works. Al-Qudūrī, al-Marġīnānī and most of his commentators do not mention it. It is found, however, in the writings of al-Kāsānī, al-Saraḫsī and Ibn ʿĀbidīn, who adopted the same position that Ḥanbalīs did.[53] To this, the author of the al-Durr al-muḫtār, the commentary upon which Ibn ʿĀbidīn wrote his super-commentary, adds that the judge may only do so if the *sulṭān* authorized him in a decree, and a judge's notaries may only do so with the judge's authorization, although Ibn ʿĀbidīn disagrees. Šāfiʿīs thought that guardianship is only transferred from one guardian to the next if he refuses three times, making an intervention by a judge even less likely.[54]

The Egyptian Mālikī Aḥmad al-Dardīr (d. 1786) was the first to suggest that in the case of the guardian's refusal, guardianship should be transferred directly to the *ḥākim*, although he recommended that the judge first order the guardian to validate the contract, and only do so himself if the guardian will not relent.[55] Commentators on the šayḫ al-Dardīr's work remark that this is in

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[51] Abū ʿAbd Allāh Muḥammad b. Yazīd b. Māğa al-Qazwīnī, al-Sunan. Šuʿayb al-Arnaʾūṭ ed. Beirut, Mūʾassasat al-Risāla 2009. (5 vols) **[Sh]**, vol. III, 77.

[52] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. IX, 383.

[53] ʿAlā al-Dīn Abū Bakr b. Masʿūd al-Kāsāni, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*. Beirut, Dār al-Kurub al-ʿIlmiyya 1986, vol. II, 251 cf.
Šams al-Aʾimma al-Saraḫsī: al-Mabsūṭ. Dār al-Maʿrifa, 1993, vol. IV, 221 cf.
Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār*. Beirut, Dār al-Fikr 1966, vol. III, 79.

[54] *Al-Mawsūʿa al-fiqhiyya*. Kuwait, Wizārat al-awqāf wa-l-šuūn al-islāmiyya 2005, vol.~~al-mawsūʿa al-kuwaytiyyya sámila~~ XXX, 145.

[55] Abū ʿAbbās Aḥmad b. Muḥammad al-Ḫalwatī, Abū al-Barakāt Aḥmad b. Muḥammad b. Aḥmad al-Dardīr, *al-Šarḥ al-Ṣaġīr ʿalā Aqrab al-Masālik ilā maḏhab imām Mālik wa bi-l-hāmiš Ḥāšiyyat al-ʿallāma al-šayḫ Aḥmad b.*

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formázott: Nem Kiemelt

contradiction to the earlier Mālikī doctrine dictated by ʿIzz al-Dīn b. ʿAbd al-Salām al-Sulamī (d. 1262), but approve of al-Dardīr's opinion nonetheless.[56]

Article 20 is in line with Ibn ʿĀbidīn's opinion, which states that a guardian is right to block a marriage contract if the offered dower is less than the fair amount, since if a fair dower was offered, the court would have no reason to permit the marriage in the guardian's place.[57]

Marriage age

Relevant articles:

10. a) Competence for marriage requires that the propositor and the proposed be of sound mind and that both of them have reached the age of eighteen solar years.

b) Despite what was laid down in paragraph a) of this article, in special cases, it is permitted for the judge with authorization from the Qāḍī al-Quḍāt to permit the marriage of those who reached the age of sixteen solar years after verifying their consent and free choice, if their marriage addresses a necessity that their interest demands according to the directives released by the Qāḍī al-Quḍāt for this purpose. Those who marry in the above manner acquire full legal capacity in matters related to marriage, separation and their consequences.

11. It is prohibited to conclude the contract of a woman whose propositor is more than twenty years older than her before the judge verifies her consent and free choice.

Classical Islamic law did not prescribe a lower age limit for marriage similar to those found in modern family laws. Instead, child marriages are regulated through restrictions placed on the guardian's ability to conclude a marriage contract in the minor ward's stead. Antecedents of the restrictions on marriage age in Jordanian law are found in the 1917 Ottoman family law.

Articles 5-8 of the 1917 Ottoman family law regulated the lower age limit of the competence to represent one's self in a marriage contract, as well as provided a general minimum marriage age,

Muḥammad al-Ṣāwī al-Mālikī. Muṣṭafā Kamāl Waṣfī ed. Cairo, Dār al-Maʿārif, n. d. (4 vols.) vol. II, 376. (= sámila, ellenőrizve)

[56] see above, cf. Muḥammad b. Aḥmad b. ʿArafa al-Dasūqī al-Mālikī, *al-Šarḥ al-kabīr lil-šayḫ al-Dardīr wa ḥāšiyyat al-Dasūqī.* Maktabat Muṣṭafā Bābī al-Ḥalabī, no date. (4 vols.) vol. II, 232.

[57] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966, vol. III, 82.

under which it is not permitted to enter a marriage even if the guardian permits it. The former is eighteen years for men and seventeen for women. As for the latter, marrying off a minor is not permitted for the guardian under the age of twelve if the ward is a boy, and under the age of nine in the case of girls. An adolescent under the age of marriage competence may request an authorization to marry from the court if they claim to have attained maturity. The judge may grant this under his own discretion if the claimant's physical constitution makes it probable that the he or she has reached sexual maturity. In addition to this, girls are also required to secure their guardian's consent. Adolescence is not defined separately in the law, so the right to petition the court is hypothetically open to any male above the age of twelve and any female above the age of nine.

In the 1951 law of family rights, an adolescent under the marriage age could still be granted permission to marry as long as he or she claimed to have reached the age of fifteen and the judge has found this claim to be plausible.[58] At the same time, a provision was introduced demanding that in marriages with a twenty year age gap in the husband's favour, courts make sure of the wife's consent and the security of her interests in the marriage.[59] The 1976 personal status law set marriage age to sixteen years for males and fifteen for females, without a possibility to petition for a permission below that age.[60]

Law 82 of 2001 raised the marriage age to eighteen years for both sexes.[61] In special cases, judges were granted permission to authorize the marriage of those above the age of fifteen if such a marriage carries a benefit based on directives that the office of the Qāḍī al-Quḍāt was to release. Apart from ordering the verification of the husband's financial suitability, the consent of the parties and their guardians, the directives the Qāḍī al-Quḍāt subsequently released also made it a condition that such a marriage serves the purpose of either averting an existing harm (*mafsada*) or preventing the loss of a potential benefit (*maṣlaḥa*).[62]

In 2010, Article 11, the age gap clause introduced in 1976 was amended so the court is only obligated to verify the wife's consent, without making inquests into the preservation of her interest. While the original article was only applicable to marriages where the wife is below the age of

[58] Art. 4. of Law 92 of 1951.
[59] Art. 6. of Law 92 of 1951.
[60] Art. 5. of the 1976 Personal Status Law
[61] Art. 2 of Law Number 82 of 2001
[62] Wāṣif ʿ Abd al-Wahhāb al-Bakrī, "Taʿdīlāt Qānūn Al-Aḥwāl al-Šāḫṣiyya Allatī Tammat bi-Mūğib al-qānūn raqm 82/2001." http://www.mizangroup.jo/, n.d, 10.

eighteen, after the amendment, the rule is applicable to all marriages.

The 2019 personal status law then raised the age limit for the special cases introduced in 2001 to sixteen years.

The validity of child marriages in Islamic law is affirmed through verse four of the sūra al-Ṭalāq in the Qurʾān, which determined the waiting period of repudiated wives who have not yet attained biological maturity:

> "*As for those of your women who no longer await menstruation, if you are unsure, then their waiting period is three months, as it is for those who are yet to menstruate."*[63]

Furthermore, a ṣaḥīḥ ḥadīṯ, variants of which are preserved by al-Buḫārī, Muslim as well as al-Nasāʾī, attest to the belief that ʿĀʾiša, Muḥammad's third wife, was six years old when the Prophet married her and nine when the marriage was consummated.[64]

The only known legal opinion opposing minor marriages that precedes modern times is attributed to Ibn Šubruma, an VIIIth century Kūfan jurist of the third *ṭabaqa*, who is not known to have left behind written works. His reputation among later jurists is markedly poor: both his legal acumen and his reliability as a ḥadīṯ transmitter are brought into question.[65] An exception is Ibn Saʿd, who, while taking jabs at his eccentricities, and the small number of hadīṯs he transmitted, calls him a reliable faqīh.[66] Numerous Ḥanafīs as well as Ibn Rušd and Ibn Ḥazm report that Ibn Šubruma alone denied the father's (and, a maiore ad minus, all other guardians') right to marry off a child, therefore considering all marriages involving children void.[67] Meanwhile, Ḥanbalī and other

[63] Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 253.

[64] Abū ʿAbd Allāh Muḥammad b. Ismāʿīl al-Buḫārī, *Ṣaḥīḥ al-Buḫārī*. Muṣṭafā Dīb al-Baġā ed. Damascus, Dār Ibn Kaṯīr 1993. (6 vols) **[Sh]** Vol. V, p. 1973.

[65] Vadet, J.-C. "Ibn Shubruma". In P. Bearman (ed.), *Encyclopaedia of Islam New Edition Online (EI-2 English)*, (Brill, 2012) (=III, 938-938.)

[66] Muḥammad b. Saʿd b. Munīʿ al-Zuhayrī, *al-Ṭabaqāt al-kubrā*. ʿAlī Muḥammad ʿUmar ed. Cairo, Maktabat al-Ḫānğī 2001 (21 vols). Vol. VIII, p. 469.

[67] Šams al-Aʾimma al-Saraḫsī: *al-Mabsūṭ*. Dār al-Maʿrifa 1993, vol. IV, 212.
Abū al-Walīd Muḥammad b. Aḥmad Ibn Rušd al-Qurṭubī, Bidāyat al-Muǧtahid wa nihāyat al-muqtaṣid, Cairo, Dār al-Ḥadīṯ 2004, vol. III, 34.
Abū Muḥammad ʿAlī b. Aḥmad b. Saʿīd b. Ḥazm al-Andalusī, *al-Muḥallā bi-l-Āṯār*. ʿAbd al-Ġaffār Sulaymān al-Bandārī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 2002. (a reprint of the Dār al-Fikr edition) Vol. IX, 38.

Mālikī authors referring to Ibn Šubruma do not mention his opposition to marrying off minors, and instead attribute opinions to him that run contrary to the prohibition of minor marriages.[68]
The most detailed description of Ibn Šubruma's reported reasoning against minor marriages can be found in the al-Mabsūṭ of the Ḥanafī Šams al-Aʾimma al-Saraḫsī:

> *"The minor boy and girl are not to be married off until they come of age due to His words "until they reach a marriageable age"*[69]*. Even if marrying them off before the coming of age was to be permitted, it would serve no benefit.*
>
> *This is so because guardianship over a minor is established on the basis of the ward's need, guardianship does not extend to transactions that do not address a need, such as in the case of donations.*[70] *And the minor has no need for marriage, as the purpose of marriage is procreation and the fulfillment of desire in a permitted fashion, and juvenility precludes these.*
>
> *Moreover, this contract would be concluded for them [the minor boy and girl] due to their age, but its effects would bind them after attaining majority, and no person has the right to place such an obligation on them if they do not exercise guardianship over them after they've attained maturity."* [71]

The Ḥanafī sources that quote him deny the validity of Ibn Šubruma's position, calling it

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[68] The Mawāhib al-Ǧalīl lists Ibn Šubruma among those jurists that thought that a female orphan's guardian may marry her off:
Aḥmad b. Aḥmad al-Muḫtār al-Ǧaknī al-Šinqīṭī, *Mawāhib al-Ǧalīl min adillat al-Ḫalīl*. ʿAbd Allāh Ibrāhīm al-Anṣārī ed. Qatar, Dār Iḥyāʾ al-Turāṯ al-Islāmī 1983, vol. III, 30.
According to Ibn Qudāma, Ibn Šubruma shared Abū Ḥanīfa's opinion that while a guardian other than the father may force a minor into a marriage, this grants minors the right to have the marriage annulled once they come of age:
Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. IX, 406.

[69] al-Nisāʾ, 6

[70] A person under financial guardianship may only partake on his own in unilaterally advantageous transactions, such as accepting a gift. Purchases and sales are seen are seen as simultaneously advantageous and disadvantageous, such transactions are suspended upon the guardian's blessing, who may only authorize them if they address a necessity as mentioned in the quote. Since donating wealth is unilaterally disadvantageous, neither the ward nor the guardian may perform such transactions.
Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 95.
Šams al-Aʾimma al-Saraḫsī: al-Mabsūṭ. Dār al-Maʿrifa, 1993, vol. XII, 72.

[71] Šams al-Aʾimma al-Saraḫsī: al-Mabsūṭ. Dār al-Maʿrifa, 1993, vol. IV, 212

"anomalous" or "isolated" (šāḏḏ).[72] According to them, the Qurʾānic reference to wives who have not yet attained biological maturity in al-Ṭalāq, 4, as well as ʿĀʾiša's ḥadīṯ about her marriage to the Prophet sufficiently affirm the permissibility or minor marriages. In addition, Šams al-Aʾimma al-Saraḫsī attempted to demonstrate that marriage might fulfill necessities other than those related to procreation. To this effect, he points to a tradition according to which Qudāma b. Maʿẓūn, a man on his sickbed at the time, married the daughter of Zubayr as soon as she was born so she could inherit from him as his wife, even hinting that he would repudiate her if he were to survive.[73]

The barring of minor marriages did not appear in fiqh works written around the time of the issuance of the Ottoman family law either, so the first restrictions on marriage age did not emerge in majority Muslim countries until 1917. While, as it can be seen, an outright prohibition on minor marriages was not supported by the classical sunnī schools of jurisprudence, there stand out two noteworthy rules that reduced their usefulness and desirability from the family's point of view.

The first of these is concerning the maintenance of the minor wife. According to the majority opinion of all schools, even if she were to cohabit with him, a minor wife is not entitled to maintenance from her husband until she reaches such an age when the marriage is usually consummated.[74] Maintenance is instead incumbent on the parents if the child has no wealth of her own. Jurists disagreed on details such as the duration of the period while the parents are responsible for the maintenance, or whether the rule is applicable if the husband is a minor himself, but in all its variants, the rule disincentives the marrying off of a minor girl to an adult. The only dissenting opinion I have been able to find belongs to al-Kāsānī, who argued that as long as the minor wife is able to help out around the house, she is entitled to spousal maintenance.[75]

The second rule, formulated by Ḥanafīs, is related to one of the concerns that Ibn Šubruma raised, namely, that a minor marriage will incur obligations on the ward even after he or she has attained

[72] Apart from al-Saraḫsī's work, Ibn Šubruma's position is presented in at least two later Ḥanafī works, both of them commentaries on al-Marġīnānī's al-Hidāya:
Ḥusām al-Dīn al-Ḥusayn b. ʿAlī b.-Ḥaǧǧāǧ b. ʿAlī al-Siġnāqī al-Ḥanafī, al-Nihāya šarḥ al-Hidāya. ʿAbd al-ʿAzīz b. ʿAbd Allāh al-Wuhaybī ed. Mecca, Ummul Qura University 2016, vol. VII, 60.
Badr al-Dīn al-ʿAynī, *al-Bināya šarḥ al-Hidāya*. ed. Ayman Ṣāliḥ Šaʿbān. Beirut, Dār al-Kurub al-ʿIlmiyya 2000. (13 vols.) vol. 5, 90.

[73] Such a marriage would indeed be beneficial for the wife. As a man expecting his own death, Qudāma may only gift away up to a third of his wealth as a bequest, the rest would be divided up according to the rules of inheritance. As his wife, the infant would stat to inherit a larger portion, up to the entire estate.

[74] Abū al-Walīd Muḥammad b. Aḥmad Ibn Rušd al-Qurṭubī, Bidāyat al-Muǧtahid wa nihāyat al-muqtaṣid, Cairo, Dār al-Ḥadīṯ 2004, vol. III, 77.

[75] ʿAlā al-Dīn Abū Bakr b. Masʿūd al-Kāsāni, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*. Beirut, Dār al-Kurub al-ʿIlmiyya 1986, vol. IV, 20

the capacity to enter a marriage contract, and the grounds that permitted the guardian to marry off his ward without his or her permission are no longer present.

To address this, Ḥanafīs introduced the right of *ẖiyār al-bulūġ* (literally: the option upon attaining maturity), which gave a minor the right to have his or her marriage annulled at will upon reaching adulthood.[76] From as early as al-Marġīnānī, jurists insisted that the annulment be done in the presence of a judge.[77] The option was only accessible to minors who were married off by a guardian other than their father or paternal grandfather, as the above two were expected to hold the ward's best interest at heart due to the natural affection between them.[78]

Contemporary Islamic jurists have been more willing to consider restrictions on marriages involving minors. While Ibn Bāz (d. 1999) merely recommended not to marry minors of belonging to either sex away until they reach biological maturity, Ibn al-ʿUṯaymīn (d. 2001) argued for a prohibition on marrying off minor wives.[79] Part of his argument relies on a ḥadīṯ from al-Buḫārī's ṣaḥīḥ collection:

> "*Do not marry off a widow until after you have received an order from them, and do not marry off a maiden until after you have received her permission*!"[80]

Given that numerous other traditions attest to the existence of minor marriages among the first followers of the Prophet, the juristic consensus regarding the tradition – as Ibn ʿUṯaymīn himself admits – is that taking the maiden's permission is only required if she is an adult, and minors may be married off without their permission. He on the other hand held that since a minor is not capable of giving her permission, marrying her off is not possible until she has attained a sufficient understanding of what marriage entails. By his reckoning, this puts the lower age limit of marrying off minors to nine years.[81]

More relevant to the Jordanian reforms is the commentary on the 1976 Jordanian personal status

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[76] See Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 146 for the Mālikī, Šāfiʿī and Ḥanafī opinion. For a ḥanbalī example, see *Šarḥ Zarkašī ʿalā Muḫtaṣar al-Ḫiraqī*. ed. ʿAbd Allāh b. ʿAbd al-Raḥmān al-Ǧibrīn, Maktabat al-ʿUbaykān 1993, vol. VI, 19.

[77] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 601.

[78] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 604

[79] https://binbaz.org.sa/fatwas/14257/حكم-الزواج-المبكر-وبيان-السن-المناسب-للزواج

[80] Abū ʿAbd Allāh Muḥammad b. Ismāʿīl al-Buḫārī, *Ṣaḥīḥ al-Buḫārī*. Muṣṭafā Dīb al-Baġā ed. Damascus, Dār Ibn Kaṯīr 1993. (6 vols) **[Sh]** Vol. V, p. 1974.

[81] Muḥammad Ibn Ṣāliḥ al-ʿUṯaymīn, *al-Šarḥ al-mumtiʿ ʿalā Zād al-mustaqni*. Al Riyadh, Dār Ibn al-Ǧawzī 2007, vol. XII, 58.

law of Maḥmūd ʿAlī al-Sarṭāwī, a dean of the šarīʿa deparment of Jordan University. On the topic of marriage age, al-Sarṭāwī asserts that, while Ḥanafī jurists did not outright forbid minor marriages, later Ḥanafī fiqh implicitly prohibited consummation of the marriage with minors. To this effect, he quotes Aḥmad b. Muḥammad b. Ismāʿīl al-Ṭaḥtāwī (d. 1816), who considered sexual contact with the wife forbidden when it would cause her harm.[82]

Also commenting on Jordanian family law, Wāṣif ʿAbd al-Wahhāb al-Bakrī writes that Muḥammad's marriage to ʿĀʾiša at the age of six cannot serve as a basis for legal provisions, as their marriage took place before the revelation of the Qurʾān.[83] His second argument in favor of determining a minimum marriage age relies on the principles of Islamic governance (*siyāsa šarʿiyya*), which grants rulers the right to temporarily prohibit what šarīʿa would otherwise permit.[84]

Al-Sarṭāwī quotes the same principle in favor of the age gap clause introduced in 1976, stating that the rule has no other basis in Islamic law.[85]

Muḥarramāt

Relevant articles:

24. It is permanently forbidden for a person to marry the following persons due to the proximity of their familiar relations:
a) his direct ascendants how-high-so-ever
b) his direct descendants how-low-so-ever
c) descendants of one of his parents or both of them how-low-so-ever
d) first generation descendants of his grandmothers or grandfathers

[82] Maḥmūd ʿAlī al-Sarṭāwī, *Šarḥ qānūn al-aḥwāl al-šaḫṣiyya*. Amman, Dār al-Fikr 2013, 50.
[83] al-Bakrī, Wāṣif ʿal-Ba al-Wahhāb. "Taʿdīlāt Qānūn Al-Aḥwāl al-Šāḫṣiyya Allatī Tammat Bi-Mūğib al-Qānūn Raqm 82/2001." http://www.mizangroup.jo/, n.d., 7.
[84] al-Bakrī, Wāṣif ʿal-Ba al-Wahhāb. "Taʿdīlāt Qānūn Al-Aḥwāl al-Šāḫṣiyya Allatī Tammat Bi-Mūğib al-Qānūn Raqm 82/2001." http://www.mizangroup.jo/, n.d., 8
[85] Maḥmūd ʿAlī al-Sarṭāwī, *Šarḥ qānūn al-aḥwāl al-šaḫṣiyya*. Amman, Dār al-Fikr 2013, 84.

25. It is permanently forbidden for a person to marry the following due to relatednass establish through marriage to another:
a) the wife of one of his ascendants how-high-so-ever
b) the wife of one of his descendants how-low-so-ever
c) the ascendants of his wife how-high-so-ever
d) descendants how-low-so-ever of a wife he has consummated his marriage with

With regards to *muḥarramāt* (women that a man is forbidden from marrying due to relatedness), Articles 24-25 of the Jordanian law conforms to the Ḥanafī position established in the earliest manuals of the school.[86] The one exception is the omission of the prohibition established through fornication (zināʾ). This is owed to the fact that Jordanian penal law does not recognize fornication as a crime, therefore the category does not exist.
In general, there is little variation between the various schools of jurisprudence regarding the identity of the muḥarramāt, as the Qurʾān offers detailed instructions on the matter:

> *„Forbidden unto you [as wives] are your mothers, your daughters, your sisters, your fathers' sisters, your mothers' sisters, your brothers' daughters, your sisters' daughters, your milk-mothers and milk-sisters, the mothers of your wives, the stepdaughters in your care—born of your wives with whom you have consummated marriage, but if you have not consummated the marriage with them, then there is no blame on you—and the wives of your sons who are from your loins, and two sisters together, save for what is past. Truly God is Forgiving, Merciful."*[87]

The only point of debate Ibn Rušd mentions is whether the "*but if ye have not gone in unto them*" conditional in the verse applies to wife's daughter alone or the wife's mother as well, that is, whether marriage to the wife's mother becomes prohibited immediately upon conclusion of the marriage contract with the wife, or only through the consummation of that marriage. Here,

[86] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 145.
[87] Qurʾān 4, 23. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 379-380.

Jordanian law follows the Ḥanafī position, which holds that only the wife's daughter becomes prohibited upon consummation.

Faulty deferment of the dower

39. Dower has two types. Specified dower is agreed upon by the parties upon conclusion of the contract, regardless of the amount. Fair dower is what is customary for the wife and her peers among her paternal relatives. And if there are no such peers on her father's side, then that of her peers from her place of origin.

40. The wife is only entitled to the dower after a valid contract has been concluded.

41. All or part of the bride price may be deferred or paid immediately, as long as this is confirmed by an official document. If deferral is not explicitly agreed upon, the bride price has to be paid immediately.

42. If the deferred bride price is due on a specified date, the wife cannot request it before that date, even if repudiation has taken place. If the husband has passed away, the deferral is void. If the deferral refers to a grossly uncertain date (for example: when it's easily afforded, when it's requested, during the wedding ceremony), the deferral is not valid and the bride price has to be paid immediately. If the deferral didn't have a specific date, it is considered deferred to the event of repudiation or the death of one of the spouses.

43. If a bride price was specified in a valid contract, its whole sum has to be paid on the death of one of the spouses, even before coitus or cohabitation has taken place, and it has to be paid on repudiation after cohabitation.

44. If repudiation has taken place after the conclusion of a valid contract but before coitus or cohabitation, half of the specified bride price is due.

As the above shows, provisions regarding the amount and dueness of the dower conform to the classical rules as presented in the chapter's introduction. The Jordanian law's provision on the faulty deferment of the dower presents a novelty compared to Ḥanafī doctrine. According to the Article 42, which is identical to the corresponding article of the 1976 personal status law, if a faulty due date is specified for the deferred portion of the dower, the entire sum becomes immediately payable. Prior to the introduction of the 1976 law, the relevant section of the Ottoman family law only decreed that if the due date is not specified, the deferred part is payable on separation.[88]

While early Ḥanafī manuals recognize that it is possible to split the dower into immediately payable and deferred portions, they do not offer guidance on cases where deferment is not mentioned or a clear deadline is not set.[89] Of the Ḥanafī texts I examined, Kamāl b. Humām (d. 1457) is the first to address the question, although he simply suggests that the division in these cases should follow local custom:

> "*If they did not stipulate any immediate payment, but rather, they stayed silent regarding the dower's immediate and deferred portions, if it is customary to pay some of it immediately and defer payment of the rest to death, prosperity or repudiation, she may only withhold herself until she receives that amount.*"[90]

To this, the XIXth century Ibn ʿĀbidīn only adds that in his time, the custom in Egypt and Syria is to pay two-thirds up front and defer payment of the rest until separation.[91]

While I have found no mention of such a rule attributed to Abū Ḥanīfa in Ḥanafī texts, Ibn Qudāma al-Maqdisī purports that according to Abū Ḥanīfa and Sufyān al-Ṯawrī, the entire dower has to be paid immediately if the contract does not define a clear and valid condition upon for the fulfilment of the deferred portion. Ibn Qudāma himself only found it warranted to invalidate the deferment if it specifies an uncertain point in time, such as "when Zayd arrives" or "when the rain comes".[92]

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[88] Art. 46. of 1976 and Art. 48. of the Ottoman family law.

[89] see for example Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006 vol. II, 632.

[90] Kamāl al-Dīn Muḥammad ʿAbd al-Wāḥid al-Sīwāsī al-Skandarī (Ibn Humām), *Šarḥ fatḥ al-qadīr*. ed. ʿAbd al-Razzāq Ġālib al-Mahdī. Beirut, Dār al-Kutub al-ʿIlmiyya 2002, vol. III, 242.

[91] Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḥtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī III, 144.

[92] Ibn Qudāma al-Maqdisī, *al-Muġnī.* ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. XXI, 127.

Article 41 of the Jordanian law is reminiscent of this latter opinion.

The dower of the *mufawwaḍa* before consummation

46. If the dower was not specified in a valid contract, or the contract specifies that there is no dower, or the specified dower is invalid, or there is a dispute regarding the specified dower so it cannot be established:
a) If consummation of the marriage or cohabitation has already taken place, the customary dower is due as long as its value is no more than what the wife expected to receive and no less than what the husband expected to pay.
b) If consummation of the marriage or cohabitation has not taken place and repudiation occurs, the divorcee is entitled to half of the dower.

Another departure from preponderant Ḥanafī doctrine in the Jordanian law is the case of the *mufawwaḍa* (a woman who concluded a marriage contract without a valid dower) whom the husband repudiated before the consummation of their marriage.
Article 46, Paragraph b) of the Jordanian law prescribes half the fair dower in this case. While at first thought, granting the *mufawwaḍa* half the fair dower if she was repudiated before consummation on the analogy of women with a set dower (who receive half the agreed upon amount under the same circumstances) would appear to be a fairly ~~instinctual~~ intuitive solution, a Qurʾānic verse led the majority of classical jurists to prescribe a different compensation called *mutʿa*:

> *„There is no blame upon you if you divorce women not having touched them or not having designated a bridewealth. But provide for them (mattaʿūhunna)— the wealthy according to his means, the straitened according to his means — an honorable provision: an obligation upon the virtuous.*"[93]

[93] Qurʾān 2,236. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 230.

In congruence with the verse, Ḥanafīs defined *mutʿa* as a befitting suit of clothing consisting of three pieces.[94] Article 55. of the 1976 personal status law followed this recommendation, the departure from the majority Ḥanafī opinion was introduced in the 2010 family code. In the same situation, the 1917 Ottoman family law deemed all claims to a dower forfeit.[95]

As it will be demonstrated in the chapter on repudiations, the currently applicable Jordanian personal status law employs the concept of *mutʿa* in a different function that is closer to the Šāfiʿī opinion, which prescribes mutʿa as an additional compensation on top of the dower for wives whose marriage was dissolved through no fault of their own. It is presumable that the mufawwaḍa's compensation was changed during the 2010 revision to avoid employing two, conflicting interpretations of *mutʿa* within the same law.

Where Ḥanafī jurists make a reference to half the fair dower, they use it as the upper limit for the value of the mutʿa, with minor variations in the practical execution of the rule. Al-Saraḫsī wrote that if half the fair dower (the amount of which is dependent on the wife's peers customarily receive) has a smaller value than the mutʿa, than the wife is to receive half the fair dower, not necessarily paid in the form of clothing.[96] Ibn ʿĀbidīn on the other hand thought mutʿa is still paid in clothes, but its value cannot exceed half that of the fair dower.[97]

While Šāfiʿīs and Ḥanbalīs recommend mutʿa before consummation if the contract did not specify the dower, several manuals mention that if the object of the dower becomes invalid after the conclusion of the contract, the wife receives half the fair dower instead. The practictal example they provide is that of a non-Muslim monotheist couple who agree on a dower that would be invalid in Islam, such as wine or live swine. If the husband adopts Islam following the conclusion of the contract, the wife would receive half the fair dower in a separation prior to consummation, and a fair dower after consummation.[98]

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[94] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, 1997, *Muḫtaṣar al-Qudūrī.* ed. Kāmil Muḥammad Muḥammad ʿUwayḍa. Beirut, Dār al-Kutub al-ʿIlmiyya. p. 147. More on the development of the Ḥanafī conception of mutʿa in the section on compensation for arbitrary repudiation.

[95] Art. 51 of the 1917 Ottoman Law of Family Rights.

[96] Šams al-Aʾimma al-Saraḫsī: *al-Mabsūṭ*. Dār al-Maʿrifa, 1993, vol. V, 82.

[97] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī, vol. III, 110.

[98] al-Muzanī: Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī (1998), Muḫtaṣar al-Muzanī. ed. Muḥammad ʿAbd al-Qāhir Šāhīn. Beirut, Dār al-Kutub al-ʿIlmiyya, p. 233. cf. Abū Isḥāq Ibrāhīm b. ʿAlī b. Yūsuf al-Šīrāzī, al-Muhaḏḏab fī fiqh al-imām al-Šāfiʿī. ed. Zakariyyā ʿUmayrāt. Beirut, Dār al-Kutub al-ʿIlmiyya 1995. 3 vols. vol. II, p. 463. Abū Qāsim ʿUmar al-Ḥusayn al-Ḫiraqī, *Muḫtaṣar al-Ḫiraqī.* ed. Muḥammad Zuhayr al-Šāwīš. Damascus, Dār al-Salām

The guardian's right to receive the dower

52. If it is the father or the paternal grandfather, a maiden's guardian may take possession of her bride money even if she possesses full legal capacity, so long as she does not forbid the husband from handing it to him.

Article 52 of the Jordanian law permits a marriage guardian, within certain restrictions, to take possession of a maiden ward's dower regardless of her legal capacity. The rule was introduced in 1976, under Article 64 of the Personal Status Law, and has been in effect without alteration ever since.

The doctrine upon which Article 52 of the Jordanian law rests is invariably attributed to Abū Ḥanīfa, but has been adopted by the others schools as well. The Qurʾān decrees that a wife may relinquish her claim to a dower if she is repudiated:

> „*And if you divorce them before touching them or designating a bridewealth, then [it shall be] half of what you designated, unless they forgo it or he whose hand holds the marriage tie forgoes. And to forgo is nearer to reverence. Forget not bounteousness among yourselves. Truly God sees whatsoever you do."*[99]

Depositing it with the guardian is intended to prevent a wife from being coerced into giving up her dower. Ḥanafīs justify the right with a Prophetic tradition recorded by Ibn Māğa, even though the the ḥadīṯ describes a dispute between a father and a son:

> *"A man said: "O, Messenger of Allah, I have wealth and a son, and my father wants to take my wealth". To which he said: "You and your wealth belong to your father."*[100]

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li-l-Ṭibāʿa wa al-Našr 1958. p. 141-142. cf. Ibn Qudāma al-Maqdisī: *al-Muġnī*. ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī. Al-Riyadh, Dār ʿĀlam al-Kutub, , 1997. (15 vols) vol. X, p. 7, 39.

[99] Qurʾān 2, 237. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 232.

[100] Abū ʿAbd Allāh Muḥammad b. Yazīd b. Māğa al-Qazwīnī, al-Sunan. Šuʿayb al-Arnaʾūṭ ed. Beirut, Mūʾassasat al-Risāla 2009. (5 vols) **[Sh]**, vol. III, 391.

Al-Qudūrī (d. 1037) makes no mention of such right in his compendium, but it is found in the Badāʾiʿ al-Ṣanāʾiʿ fī tartīb al-šarāʾiʿ of al-Kāsānī (d. 1191) and al-Marġīnānī's (d. 1197) al-Hidāya, both of whom held the position that only fathers may do so, and only on the condition that their daughter did not forbid it.[101]

Šāfiʿīs adopted it as well, granting the right to take possession of the bride money to the father as well as the grandfather, even against the wife's wishes.[102] The Ḥanbalī Ibn Qudāma thought that the dower is no different from any other wealth she possesses, so the sane adult wife's dower may only be taken for safekeeping with her express permission. If the wife is not a sane adult, the husband should deposit the dower with her father, his appointed executor or the ḥākim.[103] Mālikīs permitted the guardian to take possession of the dower of a minor or a maiden against her will.[104] Of the later Ḥanafīs, Ibn ʿĀbidīn wrote that both the father and the grandfather may take possession of the dower, and they are only prohibited from doing so if their ward forbade them.[105] Finally, the Ḥanafite Muḥammad Qadrī bāšā's (d. 1888) proposed Egyptian family code forbade guardians from taking possession of the divorcée's dower without her authorization, and permitted them to do the same if the wife married as a maiden, on the condition that she did not expressly forbid it.[106]

Faulty marriages and the elimination of fosterage as a voiding factor

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[101] ʿAlā al-Dīn Abū Bakr b. Masʿūd al-Kāsāni, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*. Beirut, Dār al-Kurub al-ʿIlmiyya 1986. (7 vols, reprint of the 1910 šarikat al-maṭbūʿāt al-ʿilmiyya edition) II, 244 (sámila); al-Hidāya (sámila) I, 191 = Nyazee II, 596.

[102] Abū al-Ḥasan ʿAlī b. Muḥammad b. Ḥabīb al-Māwardī al-Baṣrī, *al-Ḥāwī al-kabīr fī fiqh maḏhab al-imām al-Šāfiʿī raḍiya Allāhu ʿanhu wa huwa šarḥ Muḫtaṣar al-Muzanī*. ʿAlī Muḥammad Muʿawwaḍ, ʿĀdil ʿAbd al-Mawǧūd eds. Beirut, Dār al-kutub al-ʿilmiyya 1994. (18 vols.) Vol. IX, p. 53.

cf. Abū Muḥammad al-Ḥusayn b Masʿūd ibn Muḥammad b. al-Farrā' al-Baghawī, *al-Taḥḏīb fī al-fiqh al-Šāfiʿī*. ʿĀdil Aḥmad ʿAbd al-Mawǧūd, ʿAlī Muḥammad Muʿawwaḍ eds. Beirut, Dār al-Kutub al-ʿIlmiyya 1997. Vol. V, 513.

[103] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. X, 168.

[104] Muḥammad b. Aḥmad b. ʿArafa al-Dasūqī al-Mālikī, *al-Šarḥ al-kabīr lil-šayḫ al-Dardīr wa ḥāšiyyat al-Dasūqī*. Maktabat Muṣṭafā Bābī al-Ḥalabī, n. d, vol. II, 327.

[105] Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī, vol. III, 161.

[106] See Art. 95 in Muḥammad Qadrī Bāšā, Muḥammad Zayd al-Ibyānī, *Al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya*. Cairo, Dār al-Salām 2009, vol. I, 245.

31. A marriage is considered faulty in the following cases:

a) A man marrying someone prohibited to him for the reason of fostering.

b) A man marrying a woman who is forbidden from being coupled with his wife.

c) A man marrying a woman beyond four wives.

d) A man marrying a woman he repudiated thrice if she hasn't yet consummated a marriage with another man.

e) A marriage without witnesses or with witnesses who do not fulfill the requirements demanded by law.

f) Pleasure marriages and temporary marriages.

g) In accordance with the provisions in clause c) of article 35 of this law, if the parties of the contract or one of them did not meet the conditions of competence at the time of its conclusion, or if they were under compulsion.

34. If a faulty contract was signed without coitus having taken place, it does not trigger any consequences. However, if coitus has taken place, it triggers bride money and the waiting period, it establishes parenthood and forbidden relationships by marriage, while it does not trigger the remaining duties like inheritance and alimony.

35.

a) Separation of a man and a woman in a faulty marriage is suspended pending the judge's decision.

b) If the cause of the separation causes the woman to be unlawful to the man, their separation is obligatory from the time of the occurrence of the prohibiting factor.

c) Litigation for separation cannot be pursued in the case of underage marriage if the wife gave birth, was pregnant or if at the time of the litigation the parties were fit for marriage.

51. If separation occurs after consummation in a faulty marriage, the contract is examined. If a bride price was specified, then the lower amount is to be paid from the specified bride price and the customary bride price. If the bride price wasn't specified or the specification is

faulty, then that customary bride price is to be paid, however much it is. If the separation occurs before consummation, no bride price is paid.

27. a) Fostering estabishes the same degree of permanent prohibition as kinship.
b) Fostering is considered prohibitive if it took place in the first two years on at least five separate occasions whence the infant stopped feeding on his own regardless of the amount drawn.

A void marriage contract does not carry legal consequences: the wife is not entitled to bride money, the paternity of children born during the marriage is not established, the wife is not entitled to alimony during the marriage and her waiting period, it precludes the spouses' right to inherit from each other, and, if the marriage was consummated, it potentially subjects them to accusations of fornication.

On the analogy of faulty sales contracts, Ḥanafī jurisprudence employed the concept of faulty marriages in order to secure some of the rights afforded by marriage to a couple whose contract includes all the basic constituents (*arkān*) of the contract, albeit in an incomplete form.[107] Accordingly, a marriage contract is void (*bāṭil*) if the reason prohibiting the marriage lies within the person of the wife, and *fāsid* (faulty or voidable) if the prohibiting condition is a circumstance lies outside of the wife.[108] Temporary marriages and marriages concluded with the goal of enabling the wife's former husband to marry her again after a triple repudiation (*nikāḥ muḥallil*) are brought up as specific examples of a faulty marriage by classical Ḥanafīs.[109]

A marriage with a faulty contract is to be dissolved if the barring circumstance is not eliminated, but the contract nevertheless carries a few consequences. If the marriage was consummated, the faulty contract entitles the wife to a dower, imposes a waiting period on her and establishes the paternity of any children born to the couple.[110] Unlike valid marriages, the wife does not receive any dower if the couple are separated before consummation. According to al-Marġīnānī, this is so

[107] Saba Habachy, The System of Nullities in Muslim Law, *The American Journal of Comparative Law*, Volume 13, Issue 1, Winter 1964, Pages 61–72. p. 69.
[108] J. N. D. Anderson. "Invalid and Void Marriages in Hanafi Law." *Bulletin of the School of Oriental and African Studies, University of London* 13, no. 2 (1950): 357–66. p. 364.
[109] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 758.
[110] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 643.

because the contract itself does not entitle her to it due to its faultiness, but the husband owes it to her as remittance for exercising his marital rights.[111] The amount of the dower is equal to the lower one out of the specified dower and the fair dower.[112] If the barring circumstance is not eliminated, the couple are separated. According to al-Marġīnānī, the separation is administered by a judge.[113]

Jordanian law introduced legislation regarding faulty marriages in 1951, there is no corresponding article in the Ottoman family law.[114] Until 2010, faulty marriages were dissolved in all cases.[115] Article 35 (identical to Art. 35 of the 2019 law quoted above) of the 2010 temporary personal status law suspended separation upon the decision of a judge, retaining the possibility to preserve the marriage if prohibitive relations between the spouses are not present.

The current definition of faulty marriages was introduced in 1976, the 2010 temporary law only amended it by classifying marriages between two individuals related by fosterage as faulty instead of inherently void. [116] At the same time, the conditions under which fosterage establishes a relation which prohibits marriage were changed.

The generally agreed upon rule among the four schools is that only breastfeeding during infancy prohibits marriage. Irrespective of the amount or drawn, breastfeeding received in the infant's first thirty months or first two years matters in this regard according to Ḥanafīs. Al-Marġīnānī and al-Kāsānī both favored two years, and the shorter span remained in favor among later adherents of the school as well.[117] Šāfiʿīs and Ḥanbalīs counted the establishment of the forbidden relations from the fifth separate breastfeeding, and ignored occasions when the infant only drew a small

[111] Burhān al-Dīn al-Marġīnānī, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d, vol. I, 205.

[112] Burhān al-Dīn al-Marġīnānī, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d, vol. I, 205.

[113] Burhān al-Dīn al-Marġīnānī, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d, vol. I, 205.

[114] Arts. 27, 37-38. of Law 92 of 1951.

[115] See Art. 43. of the 1976 Personal Status Law

[116] Art. 34. of the 1976 Personal Status Law

[117] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 664.
ʿAlā al-Dīn Abū Bakr b. Masʿūd al-Kāsāni, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*. Beirut, Dār al-Kurub al-ʿIlmiyya 1986, vol. IV, 6.; cf. Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī, vol. III, 211.

amount.[118]

Article 26. of the 1976 personal status law did not yet define the circumstances under which fosterage establishes prohibited relations, and instead considered marriages between foster relations void except for the exceptions indicated by Abū Ḥanīfa's school.

Such exceptions are numerous. Even in the brief Muḫtaṣar of al-Qudūrī, the exceptions to the above rule are set down in painstaking detail. [119] The mother of the foster sister is still marriable, as are the sisters of a foster son and a foster brother. If a child is given a blend of milk from numerous women, or milk mixed with water or milk from animal, the prohibition is only established with regards to the woman whose milk constitutes more than half of the blend. Food blended with mother's milk does not establish prohibition. Two infants feeding on the milk of the same animal are not considered foster siblings.

Forgoing the inclusion of an intricate system of exceptions in the the text of the law, the 2010 reform~~ed~~ adopted the narrowest definitions of fosterage prohibitions found in classical Ḥanafī and Šāfiʿī jurisprudence. The four sunnī schools all consider a marriage between spouses related by fosterage void. In an article comparing the personal status laws of Jordan and those of other modern majority-Muslim states, Hāyil Dāwud, an instructor in Jordan University's šarīʿa faculty and former minister of endowments and Islamic affairs, writes that he nonetheless finds merit in the Jordanian decision to classify such marriages as faulty due to the many disagreements among the sunnī schools regarding the preconditions of a prohibitive fosterage relationship.[120]

Contract stipulations

Relevant articles:

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[118] Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, Muḫtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, 299.
Abū Qāsim ʿUmar al-Ḥusayn al-Ḫiraqī, *Muḫtaṣar al-Ḫiraqī*. ed. Muḥammad Zuhayr al-Šāwīš. Damascus, Dār al-Salām li-l-Ṭibāʿa wa al-Našr 1958, 167.

[119] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 152-153.

[120] Dawood , H. (2021). The Invalid Marriage Contract between Islamic Jurisprudence and Personal Status Laws In the Arab Countries (Jordan, Syria, and the Unified Law of the Gulf Cooperation Council Countries as a Case Study): Comparative Legal Jurisprudence Study. Dirasat: Shari'a and Law Sciences, 48(1), 67–89. p. 77.

Part four: Stipulations of the marriage contract

37. If a condition that is beneficial to one of the spouses was stipulated during the signing of the contract, and it does not contradict the purpose of marriage, it does not demand anything prohibited by law and it was recorded in the contract document, then that condition is to be observed according to the following:

a) If the wife stipulated a condition on her husband that constitutes a benefit to her that is not prohibited by law and does not thread on the rights of others, such as

- stipulating that he does not force her to leave her country

- that he does not marry another while they're married

- that he cohabits with her in a specific region

- that he does not forbid her from working outside their home

- that he vests in her the right to pronounce repudiation

then these conditions are valid, and if the husband does not fulfill them, the marriage contract is terminated on request of the wife, and she may demand from him all her marital rights.

b) If the husband stipulated a condition on his wife that constitutes a benefit to him that is not prohibited by law and does not thread on the rights of others, such as

- stipulating that she does not work outside their home

- that she cohabits with him in a specific country [*balad*] he works in

then these conditions are valid and binding, and if the wife does not fulfill them, the marriage is null at the request of the husband, and she loses both the immediate and deferred portions of the dower, and the right to alimony during the waiting period.

c) If the contract stipulates a condition that contradicts its aims or imposes what is prohibited by law, such as

- stipulating that the spouses do not live together

- or that they do not enter matrimonial bonds

- or that he drinks alcohol

- or that he cuts contact with one of his parents

then the condition is void and the contract is valid.

38. a) The expression of the condition must be clear and must include the description of behavior that constitutes a failure to fulfill the condition, along with its [aḥkām] and consequences.

b) The vesting of repudiation is exempt from the requirement to define the behavior binding the husband. It is equivalent to a delegation of repudiation, and it remains valid from the point the wife has validated the contract in front of a judge. A repudiation received this way is irrevocable.

The Jordanian law on marriage stipulations integrates the opinions of multiple schools of jurisprudence.

In accordance with the Ḥanafī position, an invalid stipulation is null but it does not void the contract.[121] Mālikī law generally holds that an invalid stipulation voids the contract.[122] Perhaps owing to the school's more stringent approach to stipulations in sales contracts, Ḥanafīs seem reluctant to discuss the principles governing stipulations.[123] Specific examples of valid stipulations are similarly scarce. Aside from the right to delegate repudiation, which Ḥanafīs generally upheld, al-Qudūrī only names two valid stipulations: the wife may demand that the husband does not take another wife after her or that his husband does not move her away from her home country.[124] By contrast, Mālikīs and Ḥanbalīs hold that all stipulations are valid as long as they do not contradict the purpose of the contract or other religious rules.[125] The relevant section of Article 37. is nearly identical to the text of *al-Tāǧ wa al-Iklīl of the Mālikī al-Mawwāq*.[126]

Marriage stipulations were first regulated in the 1951 law of family rights.[127] The 1951 and 1976 laws did not yet list the wife's right to work outside the marital home among the examples of viable

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[121] Abū ʿAbd Allāh Muḥammad n. al-Ḥasan al-Šaybānī, *al-Ḥuǧǧa ʿalā ahl al-Madīna*. al-Sayyid Mahdī Ḥasan al-Kīlānī al-Qādirī ed. Beirut, ʿĀlam al-Kutub 1982, vol. III, 214.

[122] Coetsee, M., and M. al-Marakeby. "Between Sale and Worship: Consistent Inconsistencies in Classical Ḥanafī and Mālikī Rulings on Marital Annulments", *Islamic Law and Society* 29, 4 (2022): 385-424. p. 393.
For a ruling to this effect from Mālikī fiqh, see Abū ʿAbd Allāh Muḥammad b. Yūsuf al-ʿAbdarī al-Mawwāq, al-Tāǧ wal-al-iklīl li-muḫtaṣar al-Ḫalīl. Zakariyyā ʿUmayrāt ed. Riyadh, Dār ʿĀlam al-Kutub 2003, vol. V, 81

[123] Regarding sales contracts, al-Kāsānī held that a stipulation that is only beneficial for one of the parties and is not essential to the validy of the contract is invalid. see Arabi, Oussama. "Contract Stipulations (Shurūṭ) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya." *International Journal of Middle East Studies* 30, no. 1 (1998): 29–50. p. 37.

[124] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 148.

[125] Abū ʿAbd Allāh Muḥammad b. Yūsuf al-ʿAbdarī al-Mawwāq, al-Tāǧ wal-al-iklīl li-muḫtaṣar al-Ḫalīl. Zakariyyā ʿUmayrāt ed. Riyadh, Dār ʿĀlam al-Kutub 2003, vol. V, 81. cf. Arabi, Oussama. "Contract Stipulations (Shurūṭ) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya." *International Journal of Middle East Studies* 30, no. 1 (1998): 29–50. p. 43.

[126] see the previous note

[127] Art. 21. of Law 92 of 1951.

marriage stipulations, this was first included in the 2010 temporary law. [128] Classical sunnī jurisprudence does not directly address the permissibility of such a stipulation.

However, there seems to be a general agreement among Ḥanafīs that the wife has the right to leave the marital home, especially if she attends to obligations to persons other than the husband. A such, going on pilgrimage, visiting relatives or providing regular care to her elderly parents outside the marital home were not considered to be in breach of her marital obligations.[129] Ibn Nuğaym (d. 1563) even references an earlier opinion from the school, according to which the husband's protest should not prevent the wife from seeking gainful employment outside the home.[130] However, it is likely that in the school's view, working outside the home would still affect the wife's marital rights, discussion of this will follow in the chapter on alimony.

The International Islamic Fiqh Academy, a subsidiary of the Organization of Islamic Cooperation had the following to say on the question in a fatwā released five years before the issuance of the 2010 temporary law:

> One of the wife's most essential responsibilities is regard for the family, and the raising of children and care for the future generation. When the need arises, she has the right to pursue work outside the home which suits her temperament and abilities, in conformity with legally accepted practices and her own temperament and abilities, on the conditions of adherence to religious rulings and morals, and the observance of her most essential responsibility.[131]

[128] Art. 19, sections 1,2,3.

[129] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 66.
cf. Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 839.
cf. Muḥammad b. ʿAbd al-Wāḥid al-Sīwāsī al-Iskandarī Kamāl al-Dīn b. Humām, *Šarḥ Fatḥ al-qadīr ʿalā al-Hidāya šarḥ Bidāyat al-Mubtadī.* ed. ʿAbd al-Razzāq Ġālib al-Mahdī. Beirut, Dār al-Kutub al-ʿIlmiyya 2003. 10 vols. vol. IV, p. 358. (=sámila IV, 398)

[130] Abū al-Barakāt ʿAbd Allāh b. Aḥmad Maḥmūd Ḥāfiẓ al-Dīn al-Nasafī, *al-Baḥr al-rāʾiq šarḥ Kanz al-daqāʾiq*, Zakariyyā ʿUmayrāt ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, vol. I, 380.

[131] Qarārāt wa tawṣīyāt Mağmaʿ al-Fiqh al-Islāmī al-Duwalī, Mağmaʿ al-Fiqh al-Islāmī al-Duwalī 2020 (online publication). p. 473.

Conclusions

Uniquely among the four established sunnī legal schools, the preponderant Ḥanafī opinion – attributed to Abū Ḥanīfa himself – declares that sane adult women do not require a marriage guardian. Relying on the doctrine of other schools, the Jordanian law mandates marriage guardianship for all women except the adult divorcée. However, the 2010 additions to the 1976 law on guardianship – based on Mālikī opinion – ensure that a woman is no longer dependent on her family's approval when seeking marriage. Therefore, the decision to retain the requirement of marriage guardianship can no longer be seen as a limiting factor on women's choice in marriage, and is more likely aimed at making sure that marriage contracts are concluded in a way that does not expose the marrying parties to suspicions of familial conflict.

Consideration for harmony within the family and the reputation of the couple can be observed in the practical application of the law as well. Geoffrey F. Hughes describes a recent case where a Jordanian judge was reluctant to sign the marriage contract between a Jordanian man and a Syrian woman whose only male relative present at the signing was a paternal cousin. In accordance with Articles 14 and 297 a) of the law, as a residuary in his own right, the male paternal cousin is eligible to be guardian in the absence of the father and any sons, brothers or uncles. Furthermore, according to Article 16, even if said woman's father were to oppose the marriage, due to his absence, the cousin's approval would have been sufficient to provide the wife with a guardian. Despite this, the notary handling the case elected to approve the marriage contract with himself as a guardian in the name of the court, presumably thinking that this lent more credibility to the contract, and only did so after receiving a written warrant from Jordan's Ministry of Interior that no other male residuaries of the wife are present in the country.[132]

Insistence on concluding a marriage contract under the patronage of the father even when it is not mandated by law is not uncommon. In a 2002 case from the Gaza strip described by Nahda Shehada, a judge is pleading a reluctant father to act as guardian in his 21-year-old daughter's marriage. As in Jordanian family law, the judge may act as the wife's guardian both in the absence of an eligible relative and if the guardian protests the marriage on grounds that are not legitimate. Even so, the judge employs various arguments – some unrelated to the marriage – to convince him to relent:

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[132] Hughes, Geoffrey F. *Kinship, Islam, and the Politics of Marriage in Jordan: Affection and Mercy*. Indiana University Press, 2021. p. 137.

> *"Look, this is the time of utmost happiness in her life. It would not be nice for her to marry without your consent. That would be bad for both of you. It would also be bad for your daughter's image in the eyes of her in-laws. If I were you, I would go and felicitate her and say 'mabruk' [congratulations]. Believe me, it would be your victory. Let me tell you one more thing. She is 21 years old; this may be her last chance to marry. No-one looks for a woman to marry of her age. She has become old. All her age group have half a dozen children now. I am sure you don't want to see her become an 'anis [spinster]. One more tip: your positive response will help you in your custody case over the other girls, you can be sure of that."*[133]

None of the four sunnī schools of jurisprudence support a minimum age requirement for marriage. Yet, a survey of manuals shows that the argumentative discourse on minor marriages was not considered concluded, and, though to varying degree, all schools enacted measures to reduce the desirability of minor marriages. As all schools agree that a child does not possess the capacity to marry himself or herself off, the enaction of an age limit is a limitation on the marriage guardian's authority, not the institution of marriage itself, something the classical schools did not shirk from either.

As marriage contracts are drawn up by a court, the likelihood of a contract with a faulty dower being signed is low.[134] Nonetheless, the Jordanian law includes rules on faulty dowers. In the case of an invalid due date for the deferred portion of the dower, the dower is to be paid immediately. This is analogous to the position of the Ḥanbalī school. Ḥanafī law prescribes *mutʿa* as compensation for women repudiated before consummation without a specified dower. As the Jordanian law utilizes the concept of *mutʿa* elsewhere as compensation for an arbitrary repudiation, a different ~~a different~~ compensation was prescribed that is reminiscent of Ḥanbalī and Šāfiʿī rulings on invalid dowers.

The Jordanian law on faulty marriages does not contradict Ḥanafī law. On the contrary, it is a re-introduction of Ḥanafī doctrine that offers a degree of protection to couples who – likely unintentionally – married even though it would not have been permitted for them according to the

[133] Shehada, Nahda Younis, *Applied Family Law in Islamic Courts: Shari'a Courts in Gaza*. London, Routledge 2018. p. 133.

[134] See Article 36, Paragraphs a-b of Law 15 of the Year 2019.

šarʿī rules on relations prohibiting marriage.

The law on marriage contract stipulations might be viewed as a product of *talfīq*, the integration of opinions by various schools on a single issue. It preserves the Ḥanafī principle according to which an invalid stipulation does not invalidate the entire contract, while the wide range of permissible stipulations is similar to the Mālikī and the Ḥanbalī approach.

Chapter three: Repudiation (Ṭalāq)

Overview

In classical sunnī fiqh, the husband possesses the right to unilaterally repudiate his wife, thereby initiating their separation. For the repudiation to be valid, the husband has to address his wife in words, or by hand signs or writing if he is unable to speak.

A repudiation can be revocable (raǧ~~ǧ~~ʿī) or irrevocable (bāʾin). In case of a revocable repudiation, the husband has the right to rescind his repudiation without the wife's consent. All classical jurists agree that a repudiation is revocable if the marriage has been consummated.[1] The general consensus is that the husband may ~~do so up to three times, after that, the repudiation~~revoke his repudiation up to twice, but after the third time, it becomes irrevocable. A repudiation is also considered irrevocable if it is uttered before the couple has consummated the marriage, ~~if the husband has used up his three repudiations,~~ or if ~~the repudiation~~ it was uttered in exchange for compensation offered by the wife.

As long as a husband hasn't used up his repudiations, he has the option to take back his wife during her waiting period (three menstrual cycles or three months for women who do not menstruate). He may do so without the wife having any say in it. Retaking (raǧʿa) occurs through word or action. If the wife's waiting period has passed without the husband retaking him, the marriage contract is irrevocably terminated. This is called minor irrevocability (*baynūna ṣuġrā*). At this point, the former couple have the option to immediately enter a new marriage contract, though this requires that all the conditions of marriage – including the wife's consent and a new dower – are met. If a husband has used up all his repudiations, major irrevocability (*baynūna kubrā*) occurs immediately. He may not retake or remarry his wife until she marries another man, consummates her marriage with him and is subsequently separated from him. Marrying a woman with the express purpose of making it legal for her former husband to marry him again *(nikāh muḥallil)* is considered prohibited.

If the entire dower hasn't been paid at the conclusion of the marriage contract, the husband must pay the deferred (*muʾaǧǧal*) portion upon repudiation. For the duration of the wife's

[1] Ibn Rušd al-Qurṭubī, *Bidāyat al-mujtahid*. Muḥammad Ṣubḥī Ḥasan Ḥallāq ed. Cairo, Maktabat Ibn Taymiyya, n. d, vol. III, 117.

waiting period, the husband still owes the repudiated wife alimony, and she has the right to remain in the spousal home if she so wishes.

The recommended form of repudiation is called *aḥsan al-ṭalāq*. The husband repudiates his wife once and then waits until her waiting period ends without having conjugal relations with her. *Aḥsan al-ṭalāq* results in minor irrevocability (*baynūna ṣuġrā*). Ḥanafīs considered this method of repudiation the most desirable, as it left the opportunity for a new marriage contract intact and was less demeaning for women than three consecutive repudiations.

Classical jurists considered *ṭalāq al-sunna* the most common form of repudiation. The husband pronounces one repudiaton, waits for one menstrual cycle without resuming conjugal relations with his wife or otherwise retaking her, and then repeats the process until he has no repudiations left. The wife's waiting period starts with the first repudiation. Assuming that the husband did not retake her in the meantime, ~~After~~ after the third repudiation, the wife will be irrevocably separated from her husband, and by the end of her third cycle, her waiting period will be complete as well. As such, *ṭalāq al-sunna* results in major irrevocability (*baynūna kubrā*). The Mālik b. Anas ~~ite~~ school protested the use of subsequent repudiations. According to ~~them~~him, repudiation spells harm ~~[~~for the wife~~]~~ and is thus only permitted due to necessity, but as a single repudiation is sufficient to address that necessity~~, therefore~~, a second or third repudiation in sequence is impermissible.[2]

A husband pronouncing more than one repudiation under the same breath or more than one repudiation within a single menstrual cycle is permitted, and counts for as many repudiations as the husband had intended it. Such a repudiation is commonly classified as *ṭalāq bidʿa*, bidʿa in this context meaning an innovation that runs counter to the traditionally established modes of separation in the *sunna*. A repudiation does not need to cause irrevocable separation in order for it to be called bidʿa, two repudiations pronounced on a wife whose marriage has been consummated is also considered bidʿī.[3] In the Ḥanafī school, *ṭalāq bidʿa* is synonymous repeated instances of repudiations, while other schools classified other, undesirable forms of repudiations as *bidʿī*. As an example, repudiation of a woman while she is menstruating, while binding, is also considered *ṭalāq bidʿa* by the Mālikīs, as it makes her waiting period unnecessarily long.[4]

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[2] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 675.

[3] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 676-677.

[4] Ibn Rušd al-Qurṭubī, Bidāyat al-Muğtahid wa nihāyat al-muqtaṣid. Muḥammad Ibn Ṣāliḥ al-ʿUṭaymīn ed. Riyadh, Dār Ibn al-Jawzī 2014, vol. II, part 3, p. 78.

Repudiation is uttered in word, repudiation in writing or with hand signs is generally reserved for those who lack the ability to speak. Unlike in a marriage contract, witnesses are not required. Conditional repudiations are valid as long as the condition is something that can be reasonably expected to happen.[5] Classical jurists were aware of the complications that may arise from such lax formal requirements, and they were especially concerned with the possibilities of the husband pronouncing a repudiation in the heat of a dispute with his wife, or using repudiations as a tool for coercion. It is probably for this reason that classical fiqh elaborated in great detail the differences between valid and invalid forms of repudiation. Depending on the school, the exact phrase used, the husband's age, overall or momentary mental state, his legal capacity, his state of inebriation, conditions attached to the repudiation and the medium used for conveying the repudiation may all influence its validity. Repudiations made under duress are thought to be invalid by all schools except the Ḥanafīs. Generally, it is thought that a guardian (*walī*) does not have the authority to repudiate a minor husband's wife in his ward's stead. A slave's owner does not possess the right to repudiate his slave's wife. Slaves are permitted to repudiate, albeit only twice.

An oral repudiation can be explicit or implicit, with the phrase "You are repudiated!" being the explicit repudiation, while other phrases alluding to repudiation being implicit. An explicit repudiation is binding even if it was uttered without intent, while implicit repudiations are only binding if the husband truly intended to repudiate his wife. Written repudiations and those communicated by signs also require intent to be binding.

The husband may use an authorized proxy (*wakīl*) to deliver a repudiation instead of doing so in person. The husband may also delegate his right to repudiation to his wife or even a third party. Delegation (*tafwīḍ*) can be limited to a single occasion or it can be open ended. Most jurists agree that while *tawkīl* and delegation to a third party may be retracted by the husband, while delegation to the wife cannot. The delegation can be incorporated in the marriage contract as a stipulation, essentially permitting the wife the same rights to separate as the husband.

The banning of on-the-spot triple repudiation

Relevant articles:

[5] For example, conditions such as „you are repudiated tomorrow", „you are repudiated when you enter that door" and „you are repudiated when you are in Mecca" are valid.

89. A repudiation coupled with a numeric multiplier in speech or in signs, and repudiations repeated a number of times on the same occasion only count as a single repudiation.[6]

Jordanian personal status law permits a husband to repudiate his wife thrice in the course of a single menstrual cycle, thus allowing him to perform a *ṭalāq bidʿa*, but repudiations (however many of them) uttered during the same occasion only count as a single repudiation.

The relevant article has remained unchanged since its introduction in the 1976 Personal Status Law[7]. As it relates to repudiations *coupled with a numeric multiplier*, it adopts the same wording as Article 74 of the 1917 Ottoman Family Law and Article 3 of the Egyptian Law 25 of the Year 1929 on Some Issues of Personal Status, but it was expanded upon to also cover repudiations repeated a number of times on the same occasion.

Thus, the Ottoman and the Egyptian laws may be interpreted to only apply to situations such as when the husband says "You are repudiated thrice!" or when he says "You are repudiated!" while holding up three of his fingers. Meanwhile, the Jordanian law clarifies that saying "You are repudiated! You are repudiated! You are repudiated!" also counts as a single repudiation, making it impossible for the husband to irrevocably divorce his wife on the spot as long as he has not repudiated her twice before.

In contemporary Egyptian practice, the law is reportedly interpreted to apply to all repudiations uttered in one sitting.[8] This does not seem to have been the case throughout the application of the 1929 Egyptian article. In his manual on the Ḥanafī juristic opinions applicable in Egyptian courts, ʿAbd al-Wahhāb al-Ḫallāf, a XXth century jurist who worked as a šarīʿa judge and later as a supervisor of šarʿī courts, only writes that phrases of the "You are repudiated thrice!" type count as a single repudiation, he does not mention separate repudiations uttered in one sitting.[9] He does not cite classical sources in support of the rule, he simply states that this is the currently applicable position of the Ḥanafī school (*huwa mā ʿalayhi al-ʿamal al-ān*).[10] The Jordanian law's blanket invalidation of on-the-spot irrevocable repudiations, while not supported by any Ḥanafī text, modern or classical, is analogous to the position of jurists from other branches.

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[6] Identical to Article 90 of the 1976 Law.

[7] Article 90 of the 1976 Law.

[8] Sonneveld, Nadia. "Divorce Reform in Egypt and Morocco: Men and Women Navigating Rights and Duties", *Islamic Law and Society* 26, 1-2 (2019): 149-178

[9] ʿAbd al-Wahhāb Ḫallāf, Aḥkām al-aḥwāl al-šaḫṣiyya fī al-šarīyya al-islāmiyya ʿalā wafqi maḏhab Abī Ḥanīfa wa mā ʿalayhi al-ʿamal bi-l-maḥākim, Kuwait, Dār al-Qalam, 1990. p. 136.

[10] id, 137.

To the Ḥanafī school, the question of ~~the~~ triple repudiation – as well as other forms of *ṭalāq bidʿa* – was an ethical, not a legal one. Al-Saraḫsī called the practice deplorable (*makrūh*), while al-Marġīnānī stated that by practicing it, the husband becomes a sinner (*ʿāṣī*). He protested the practice arguing that a single repudiation sufficiently meets the believer's justified need for separation, the principal reason for the permissibility of repudiation, therefore subsequent repudiations are unnecessary.[11] While in some cases, Ḥanafīs did formulate legal maxims based on ethical arguments (such as is the case of Abū Ḥanīfa's protest against the interdiction of spendthrifts), despite their moral objections, the school unanimously held that *ṭalāq bidʿa* is permitted and binding.

Mālik ibn Anas is said to have similarly loathed triple repudiations uttered in one sitting, but considered them binding.[12] The Šāfiʿīs had no objections against triple repudiations and accepted them as binding. One exception al-Nawawī (d. 1277) provides is that if the repudiation was only repeated as a means of emphasis, it counts as a single repudiation.[13] In this way, the husband is given the choice to retract his irrevocable repudiation should he realize he acted hastily, but wives aren't spared of the threat of an immediate separation.

Classical sunnī jurists who treated the question in depth only did so for the sake of legal disputation, they considered the validity of triple repudiations within sunnī fiqh an established doctrine not up ~~to~~ for further debate. Arguments presented against the validity of triple repudiation are attributed to jurists outside the four established sunnī branches. According to the Mālikī Ibn Rušd, only the Ẓāhirī school and a small minority of early jurists held that three repudiations uttered during one occasion count as a single repudiation.[14]

He presents the debate over triple repudiations as a purely theoretical one: is the irrevocability assigned to the third repudiation by the divine law (*šarʿ*) brought into effect by the person pronouncing the repudiation imposing it upon himself, or is it imposed upon him by the *šarʿ*? He presumed that those who did not consider triple repudiations irrevocable favored the former and compared ṭalāq to legal transactions that only become binding when certain formal requirements are met (such as the offer and acceptance in sales and marriage contracts).

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[11] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 676.

[12] Saḥnūn b. Saʿīd al-Tanūḫī, *al-Mudawwana al-Kubrā*. Riyadh, Wizārat al-Šuʿūn al-Islāmiyya wa al-Awqāf, n. d, vol. V, 101.

[13] Abū Zakariyyā Muḥyī al-Dīn Yaḥyā b. Šaraf al-Nawawī (2005), *Minhāğ al-ṭālibīn wa ʿumdat al-mutqīn fī al-fiqh*. ed. ʿAwaḍ Qāsim Aḥmad ʿAwaḍ. Dār al-Fikr. p. 233.

[14] Ibn Rušd al-Qurṭubī, *Bidāyat al-mAuğtahid wa nihāyat al-muqtaṣid*. Muḥammad Ibn Ṣāliḥ al-ʿUṯaymīn ed. Riyadh, Dār Ibn al-Jawzī 2014, vol. II, part 3, 75-77. (= sámila 3,84)

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Those who thought a repudiation is more akin to a vow or oath that a person takes upon himself considered them irrevocable. He mentions that the question presents an ethical dilemma as well. Those who permit on-the-spot irrevocable repudiations probably do so to prevent husbands from using it as a tool for coercion, but in doing so, they remove the chance of reconciliation, something God seemingly intended to keep open as evidenced by the last few words of verse 65,1:

> "*O Prophet! When you divorce your wives, divorce them for the waiting period and count well the waiting period, and reverence your Lord. Expel them not from their houses; nor shall they depart, unless they commit a flagrant indecency. These are the limits set by God, and whosoever transgresses the limits set by God has surely wronged himself. Thou knowest not: perhaps God will bring something new to pass thereafter.*"[15]

With the al-Muḥallā being the only extant primary source on Ẓāhirī legal opinions, Ibn Rušd's presumption about the Ẓāhirī position is difficult to prove. Based on secondary sources, it would seem that Dāwud al-Ẓāhirī, the founder of the school, considered triple repudiations not only binding, but conforming to the *sunna* as well, as long as the husband does not engage in sexual acts with his wife during the menstrual cycle when the repudiations were pronounced.[16] As for Ibn Ḥazm himself, he fervently defends triple repudiations. Without mentioning who he attributes them to, he lists four positions regarding three repudiations uttered at once: that triple repudiations are altogether invalid, that they amount to a single repudiation, that they are binding but the repudiator needs to be disciplined for performing a ṭalāq bidʿa, and that it is binding and conforming to the sunna.[17] He seems to have been aware of the arguments brought up against the validity of triple repudiations, but instead of engaging with them, he quotes a ḥadīṯ from the book on *liʿān* of Saḥīḥ Muslim, wherein a man by the name of ʿUwaymir al-ʿAğlānī triply repudiates his wife right in front of the Prophet. He argues that had the Prophet found on-the-spot triple repudiations objectionable, he surely would have protested. The absence of any mention of protest on the Prophet's part in the ḥadīṯ can therefore be taken as a sign of his approval. He then goes on to quote about a dozen further aḥādīṯ about irrevocable repudiations that were uttered in the Prophet's presence.

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[15] Qurʾān 65,1. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 2531.

[16] ʿĀrif Ḫalīl Muḥammad Abū ʿAīd, *Al-Imām Dāwud al-Ẓāhirī wa aṯaruhu fī al-fiqh al-islāmī*, Kuwait, Dār al-Arqam 1984. p. 653.

[17] Abū Muḥammad ʿAlī b. Aḥmad b. Saʿīd b. Ḥazm al-Andalusī, *al-Muḥallā bi-l-Āṯār*. ʿAbd al-Ġaffār Sulaymān al-Bandārī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 2002, vol. IX, 384.

He rejects the Ḥanafī and Mālikī suggestions that the practice should be discouraged, he is especially opposed to Ḥanafīs declaring the husband sinful (ʿāṣī), as this category is not found within the five *aḥkām* of Islamic legal theory.[18] Calling even the label *ṭalāq bidʿa* is a misnomer, he concludes that triple repudiations are permitted (mubāḥ) and in line with the Prophetic sunna. Ibn Rušd lived alongside Ẓāhirīs in twelfth century Córdoba.[19] While his attribution of the banning of triple repudiations to Ẓāhirīs is not supported by extant texts, this makes it unlikely that his claim was completely unfounded. Without knowing the specific positions taken by late followers of Ibn Ḥazm's jurisprudence, Ibn Rušd's claim at least seems to prove that the issue of triple repudiations was still actively debated at the time.

Similar to Ibn Rušd, the Ḥanafī Šams al-Aʾimma al-Saraḫsī attributed the limiting of one-the-spot irrevocable repudiations to jurists from outside the four classical sunnī branches. Although he rejected it, he presented an argument attributed to the Zaydī šīʿa against triple repudiation in his al-Mabsūṭ. Tracing the ruling's origins to a saying by ʿAlī b. Abī Ṭālib, he alleges Zaydīs held that three repudiations uttered at once only count as a single, revocable one.[20] The argument is as follows:

According to him, šīʿites only consider *ṭalāq al-sunna* valid. An authorized representative (*wakīl*) can only pronounce repudiation in the exact form the husband commanded him to. If the *wakīl* pronounces the wrong form of ṭalāq, depending on which jurist is asked, the repudiation is either invalid or the type of repudiation that the husband intended occurs. Šīʿī jurists hold that the husband is under divine commandment (*maʾmūr šarʿan*) to practice repudiation in its *ṭalāq sunna* form. If the authorized representative ~~is~~ may not pronounce the repudiation other than in the form the husband prescribed, *a minore ad maius* the husband is not allowed to repudiate his wife in ways ~~other than~~ different from what God had commanded. For classical imāmī šīʿī jurists, the question is somewhat moot: a husband cannot affect a second repudiation until he has retaken his wife or has entered into a new marriage contract with her. Therefore, classical imāmī šīʿa rejected triple repudiation altogether, considering it invalid.[21] However, I have not found any sources supporting al-Saraḫsī's assessment that Zaydī jurists considered triple repudiation equal to a single repudiation. Described by Brinkley Messick as

[18] id, vol. IX, 395-396.

[19] Adang, Camilla. " The Spread of Ẓāhirism in Post-Caliphal Al-Andalus: The Evidence from the Biographical Dictionaries". In *Ideas, Images, and Methods of Portrayal: Insights into Classical Arabic Literature and Islam* (Leiden, The Netherlands: Brill, 2005)

[20] Šams al-Aʾimma al-Saraḫsī: al-Mabsūṭ. Dār al-Maʿrifa, 1993. vol. VI, 57.

[21] Heka László A hármas Talaq (Talaq-E-Biddat) elnevezésű muszlim válási forma betiltása Indiában COMPARATIVE LAW WORKING PAPERS 3 : 2 Paper: http://oji.uszeged.hu/web2/images/stories/talaq.pdf , 15 p. (2019)

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the most important book on Zaydī jurirprudence, the Kitāb al-Azhār of al-Mahdī Yaḥyā al-Murtaḍā adopts the same approach to triple divorce as the Ḥanafī school: he condemns it as a transgression but ultimately considers it binding.[2223] In modern times, Rūh Allāh Ḫumaynī (d. 1989) revisited the issue and concluded that repeating the phrase thrice and saying "You are triply repudiated!" both result in a single repudiation.[24]

Ibn Taymiyya held that God did not ~~give~~ grant anyone the right to repudiate his wife thrice at once and therefore, a triple divorce uttered on a woman whose marriage was consummated can only count as one.[25] He was aware that his position put him at odds with the Ḥanbalī school as well as virtually all maḏhabī jurists, so instead of citing previous fiqh works, he refers to a number of the *ṣaḥāba* who he claimed had shared his opinion. In his defense, he also mentions that some Ḥanafīs hold the same opinion, althought no extant Ḥanafī text up to Ibn Taymiyya's era supports this.

The central point of Ibn Taymiyya's argument is quite similar to how Ibn Rušd described the anti-triple repudiation standpoint roughly a century before him. He explains that irrevocability in a consummated marriage only occurs with the end of the waiting period, not right at the pronouncement of the repudiation. Although he does not say this outright, his position seems to put him in the same camp with those who thought repudiation is more akin to a sale or a marriage contract than an oath one takes upon himself. He claims that repudiations are clearly intended to conserve the possibility to take the wife back and are only meant to reach irrevocability at the end of the waiting period, and this intent is clearly expressed in Qurʾān 2:231:[26]

> *And when you have divorced women and they have fulfilled their term, keep them honorably or release them honorably, and donot keep them so as to cause harm and thus transgress. Whosoever does that surely wrongs himself. And do not take God's signs in mockery, and remember*

[22] Messick, Brinkley Morris. 1996. *Calligraphic State: Textual Domination and History in a Muslim Society (Comparative studies on Muslim societies ; 16)*. University of California Press. p. 39.
[23] Eugenio Griffini: *Corpus Iuris di Zaid ibn ʿAlī.* Hoepli Editore, Milani 1919. p. 206-207.
[24] Rūḥ Allāh al-Mūsawī al-Ḫumaynī, Taḥrīr al-wasīla, Damascus, Safāra al-Ǧumhūriyya al-Islāmiyya al-Īrāniyya bi-Dimašq, 1998. 2 vols. vol. ii, 299.
[25] Maǧmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf, 2004. vol. XXXIII, 8-9.
[26] id.

God's Blessing upon you, and what He sent down to you of the Book and Wisdom, exhorting you thereby. And reverence God, and know that God is Knower of all things.[27]

~~*When ye divorce women, and they fulfil the term of their ('Iddat), either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them, (or) to take undue advantage; if any one does that, He wrongs his own soul. Do not treat Allah's Signs as a jest, but solemnly rehearse Allah's favours on you, and the fact that He sent down to you the Book and Wisdom, for your instruction. And fear Allah, and know that Allah is well acquainted with all things. (Yusuf Ali)*~~

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To further underline the importance of preserving revocability during a regular repudiation, he examines the special circumstances under which separation reaches irrevocability immediately. Repudiations before the consummation of the marriage take effect immediately. This exception was revealed in Qurʾān 33:49. Ibn Taymiyya argues that the revelation of an exception to the general rule only further enforces the notion that repudiations after consummation only to take effect at the end of the waiting period:

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"*O you who believe! If you marry believing women and then divorce them before you have touched them, there shall be no waiting period for you to reckon against them. But provide for them and release them in a fair manner*."[28]

Ḫulʿ is another type of separation that causes irrevocable separation right away.[29] Here, Ibn Taymiyya's reasoning leads to another vehemently debated, but only marginally relevant point of dispute in classical fiqh: is *ḫulʿ* a *ṭalāq* or not? He points out that many jurists who – like him – thought repudiations during a woman's menstrual period to be invalid still permitted a *ḫulʿ* to take place during menstruation. In view of this, he decided that *ḫulʿ* should not be considered a repudiation, but rather an irrevocable separation (*furqa bāʾina*).[30]

[27] Qurʾān 2,231. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 87.

[28] Qurʾān 33, 49. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 1896.

[29] Eugenio Griffini: *Corpus Iuris di Zaid ibn ʿAlī.* Hoepli Editore, Milani 1919. p. 206-207.

[29] Rūḥ Allāh al-Mūsawī al-Ḫumaynī, Taḥrīr al-wasīla, Damascus, Safāra al-Ǧumhūriyya al-Islāmiyya al-Īrāniyya bi-Dimašq, 1998. 2 vols. vol. ii, 299.

[29] Maǧmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf, 2004. vol. XXXIII, 10.

[30] Maǧmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf, 2004. vol. XXXIII, 21.

Perhaps the strongest argument against on-the-spot irrevocable repudiations is a ḥadīṯ – also quoted by Ibn Taymiyya – from Aḥmad b. Ḥanbal's *Musnad*, often referred to by jurists as "Rukāna's ḥadīṯ":

> Rukāna b. ʿAbd al-ʿAzīz, Banī Muṭṭalib's brother repudiated his wife thrice in one sitting, which made him quite aggrieved. The Prophet – swt – asked him: "*How did you repudiate her?*" He said: "*I repudiated her three times.*"
> And he said: "*In one sitting*?"
> He said: "*Yes*."
> He said: "*Then that's one, so take her back if you want to.*"
> So he took her back, and Ibn ʿAbbāṣ was on the opinion that repudiation occurs ~~[~~once~~]~~ in every menstrual cycle.[31]

As Ibn Taymiyya (along with the majority of sunnī jurists) considers repudiations binding even if there was no real intention to separate behind them, the ḥadīṯ – if accepted as authentic – can only mean that triple repudiations count as one.

He is aware of a tradition according to which Ibn ʿAbbās only permitted one repudiation during a menstrual cycle, but rejects the idea. The key to understanding the *ʿilla* (reason) of the ḥadīṯ according to him lies in the phrase *in one sitting* (*fī mağlis wāḥid)*: triple repudiations are invalid because they prevent the opportunity to retake the repudiated wife. So long as the repudiations are pronounced in separate occasions, the opportunity remains, therefore multiple repudiations during one menstrual cycle are valid.[32]

A slightly different narration of the same event, although not present in the ṣaḥīḥayn, can be found in other books of *al-Kutub al-sitta*, the six authentic ḥadīṯ collections. Notably, the narrations recorded by Abū Dāwud, al-Tirmiḏī and Ibn Māğa use the term "repudiated her completely" (ṭallaqahā al-batta) in place of "thrice in one sitting."[33] When addressing the ḥadīṯ, Ibn Ḥazm (who permitted on-the-spot irrevocable repudiations) argued that *al-batta* does not necessarily mean an on-the-spot repudiation, therefore the ḥadīṯ does not justify prohibiting on-the-spot irrevocable repudiations.[34]

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[31] ed. Šuʿayb al-Arnaʾūṭ, ʿĀdil Muršid, *Musnad al-imām Aḥmad Ibn Ḥanbal*, Beirut, Muʾassasat al-Risāla 2001. 50 vols. vol. iv, 215 (no. 2387)

[32] Mağmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf, 2004. vol. XXXIII, 14.

[33] for variations on the ḥadīṯ, see „Rukāna b. ʿAbd al-ʿAzīz". Wensynck, Leyden, Brill 1988., vol. 8, p. 83

[34] Abū Muḥammad ʿAlī b. Aḥmad b. Saʿīd b. Ḥazm al-Andalusī, *al-Muḥallā bi-l-Āṯār*. ʿAbd al-Ġaffār Sulaymān al-Bandārī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 2002, vol. IX, 444.

Ibn Taymiyya's refutation of the *al-batta* variant of the ḥadīṯ may sound counter-intuitive and downright anachronistic to modern readers. He argues that Rukāna's relatives who narrated the event were simple folks of unknown character and unfamiliar with the sciences of ḥadīṯ and fiqh, hence why ḥadīṯ collectors graded their narrations as weak. Meanwhile, Ibn Ḥanbal, being a man of letters, accepted the *in one sitting* variant as authentic, therefore it is the sound one.
Apart from the ḥadīṯ above, he refers to another report by Ibn Abbās according to which triple repudiations counted as one during the Prophet's and Abū Bakr's time, and it was only during the caliphate of ʿUmar that he permitted on-the-spot irrevocable repudiations on the insistence of his people:

> In the time of Allah's Messenger (ﷺ), Abu Bakr (RA) and the first two years of the caliphate of 'Umar (RA), the three pronouncements of divorce were regarded as one divorce. So 'Umar said, "People have made haste in an affair which they are required to take slowly. What if we execute it on them." So, he executed it on them.[35]

At the time, Ibn Taymiyya's opinion met with harsh resistance.[36] According to al-Ṣanʿānī, proclaiming that three repudiations at once only amount to a single repudiation was seen as a sign of rāfiḍī (a pejorative term for šīʿīs) inclinations.[37]
He was punished for issuing fatwās to this effect along with his student, Ibn Qayyim al-Ǧawziyya.[38] To modern readers familiar with Ibn Taymiyya's – perhaps not entirely deserved – reputation as a religious zealot, it might come as a surprise that he did in fact quote the šīʿī imāms Muḥammad al-Bāqir and Ǧaʿfar al-Ṣādiq as two early Muslim authorities who rejected triple repudiations.[39] Relying on imāms – apart from ʿAlī ibn Abī Ṭālib – for legal opinions was rare for sunnī jurists, so this might have served as the basis for the allegations against him.

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[35] Abū al-Ḥusayn Muslim b. Ḥaǧǧāǧ al-Qušayrī, *Ṣaḥīḥ Muslim*. Muḥammad Fūʾad ʿAbd al-Bāqī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1991 (4 vols, reprint of the Bābī Ḥalabī edition), **[Sh]**, vol. II, 1099.
[36] Muhammad Munir. "Triple Ṭalāq in One Session: An Analysis of the Opinions of Classical, Medieval, and Modern Muslim Jurists under Islamic Law", Arab Law Quarterly 27, 1 (2013), 47.
[37] To modern readers familiar with Ibn Taymiyya's – perhaps not entirely deserved – reputation as a takfīrī and a religious zealot, it might come as a surprise that he did in fact quote the šīʿī imāms Muḥammad al-Bāqir and Ǧaʿfar al-Ṣādiq as two early Muslim authorities who rejected triple repudiations.
[38] Muḥammad b. Ismāʿīl al-Ṣanʿānī, *Subul al-salām šarḥ Bulūġ al-Marām*. ed. Nāṣir al-Dīn al-Albānī. Ryad, Maktabat al-Maʿārif, 2006 (4 vols.) vol. IV, p.477.
[39] Maǧmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf, 2004. vol. XXXIII, 8.

All the same, Ibn Taymiyya rejected the shīʿī notion that a repudiation may only be pronounced again after a retaking or a new contract[40]

Conclusions

Islamic revealed texts make it amply obvious that repudiation is not a desirable act, and it is only due to the realities of human social life that it is permitted. This being the case, even classical jurists felt justified in their efforts to curtail its wanton application. The most aggreviating use of repudiation is on-the-spot triple repudiation, which immediately and irrevocably terminates a consummated (and thus one in which children are likely also present) marriage. Mālikī jurists remarked that the repeated use of the phrase "You are repudiated!" is demeaning and causes undue stress to the wife, making on-the-spot multiple repudiations even less desirable. The repudiation of a sane husband is binding even if unintended. Even if there were no witnesses to the repudiation and the husband later denies that it occurred, Ḥanafīs would consider it binding.[41]

Jordanian lawmakers made on-the-spot irrevocable repudiations impossible by adopting the minority opinion of a well-regarded classical jurist from outside the Ḥanafī school. Personal status laws of other majority-Muslims states have limited the husband's ability to pronounce an on-the-spot irrevocable repudiation, but did not eliminate it entirely. By comparison, the Jordanian law is more restrictive, yet it does not overstep the bounds set by classical Islamic jurisprudence. From an Islamic legal point of view, the choice to adopt Ibn Taymiyya's opinion may be classified as simple *taḥayyur*, the favoring of a legal opinion other than the up-until-ten preponderant one.

Competence to repudiate

Relevant articles:

80. The husband is competent to repudiate if he is legally capable, conscious and acts of his own accord.

[40] Maǧmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf, 2004. vol. XXXIII, 22.

[41] Colin Imber, "Why You Should Poison Your Husband: A Note on Liability in Ḥanafī Law in the Ottoman Period." *Islamic Law and Society* 1, no. 2 (1994), 214.

86. a) Repudiation does not occur if the husband is drunk, in a state of confusion, under compulsion, deranged, unconscious or asleep.
b) A confused person is one whose speech and actions are compromised by a defectiveness of a degree that falls outside his usual behavior, due to anger or other reasons.
206. a) A person is deranged if his senses are disturbed to a degree that his understanding becomes deficient, his speech is confused and his behaviour is erratic.
211. a) The minor, the insane and the deranged are interdicted in their person.
212. a) 1.) The demented fall under the same status as a discerning minor.

Islamic law generally holds that only a sane, aware adult's repudiations are valid.[42] Reflecting this, Jordanian law recognizes a number of conditions (those listed in article Article 86. a)) that render the affected husband's repudiations invalid. Of these conditions, confusion (*dahaš*) is a novelty compared to the Ottoman family law that has its origins in late Ḥanafī legal scholarship. Jordanian laws regarding the repudiations of sleeping and unconscious persons, drunks and those affected by derangement or under compulsion have largely remained unchanged since the introduction of the 1917 Ottoman Family Law, but as they present a divergence from the preponderant Ḥanafī doctrine, a brief overview of them is also justified.

The invalidity of repudiations pronounced under reduced mental capacity is supported by a Prophetic tradition narrated by al-Tirmiḏī:

> "*All repudiations are permitted except the repudiation of the insane whose reason is overcome*"[43]

Unlike the other schools, Ḥanafīs held repudiations under compulsion to be valid. The school's definition of compulsion (*ikrāh*), and especially that of Ottoman ~~are~~ Ḥanafīs, is extremely narrow, and shows that the school was opposed to declaring an act void of consequence due to outside factors. As an example, if a man kills someone under compulsion, unless the instigating party is physically present during the crime and poses a credible threat to his life, he will be liable to retribution, while the instigating party will not.[44] More importantly, according to the

[42] Abū al-Walīd Muḥammad b. Aḥmad Ibn Rušd al-Qurṭubī, Bidāyat al-Muǧtahid wa nihāyat al-muqtaṣid, Cairo, Dār al-Ḥadīṯ 2004, vol. III, 101.
[43] Abū ʿĪsā Muḥammad b. ʿĪsā al-Tirmiḏī, al-Ǧāmiʿ al-kabīr. Baššār ʿAwwād Maʿrūf ed. Beirut, Dār al-Ġarb al-Islāmī 1996. (6 vols), **[Sh],** vol. III, 481.
[44] Imber, Colin. "Why You Should Poison Your Husband: A Note on Liability in Ḥanafī Law in the Ottoman Period." *Islamic Law and Society* 1, no. 2 (1994), p. 209

school's interpretation of al-Tirmiḏī's ḥadīṯ, genuine intent is not required for a repudiation to take effect, only that the husband be in possession of his faculties and address a wife he is married to.[45]

It is for this latter reason that an overwhelming majority of jurists hold that repudiations made in jest are still binding. However, according to the Šāfiʿīs, a distinction is to be made between a repudiation pronounced without the intention to separate and one made under duress. Even if both are void of intention, a husband pronouncing a repudiation in jest still possesses a choice (*iḫtiyār*), while a husband forced to repudiate does not. Ḥanafīs do not recognize this difference. Paraphrasing al-Marġīnānī, a husband coerced into repudiating his wife chose the lesser of two evils, which itself is proof to the presence of a choice and intent on the husband's part.[46] Therefore, while it's not considered as reprehensible as pronouncing it as a joke, a coerced husband's repudiation is still binding.

There's no consensus among Šāfiʿīs as to what constitutes a compulsion that invalidates a repudiation. Some thought that only credible and immediate threats to one's life or well-being, against which the victim has no means of defending himself, should be counted.[47] ~~On the other end~~According to other Šāfiʿīs, the threat of any action that would compel a reasonable person to take precautions against it was considered compulsion, including threats to one's self, family, wealth or even non-physical threats such as the promise of public humiliation.[48] Yaḥyā b. Šaraf al-Nawawī (d. 1277) considered this latter one to be the correct opinion,

Later Ḥanafīs, such as Muḥammad Qadrī bāšā continued to consider repudiations under compulsion to be binding.[49] His commentator, Muḥammad Zayd al-Ibyānī only added that a husband made to divorce his wife in such a way should find solace in knowing that he will be spared of the otherworldly consequences of his action. Furthermore, if, rather than being compelled to pronounce a repudiation, he was made to provide a statement (*iqrār*) claiming that he previously repudiated his wife, that statement would not cause a separation, as it is based on a lie.[50] This would have, at least, made it more difficult to extort a repudiation with the threat of immediate violence, as, unlike a statement, a repudiation requires that the wife be addressed

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[45] Burhān al-Dīn al-Marġīnānī, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d, vol. I, 224.

[46] Burhān al-Dīn al-Marġīnānī, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d, vol. I, 224.

[47] Abū Zakariyyā Maḥmūd b. Šaraf al-Nawawī: *Rawḍat al-ṭālibīn*. Beirut, al-Maktab al-Islāmī 1991, vol. VIII, 58.

[48] Abū Zakariyyā Maḥmūd b. Šaraf al-Nawawī: *Rawḍat al-ṭālibīn*. Beirut, al-Maktab al-Islāmī 1991, vol. VIII, 59 .

[49] Muḥammad Qadrī Bāšā, Muḥammad Zayd al-Ibyānī, *Al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya*. Cairo, Dār al-Salām 2009, vol. II, 514.

[50] id.

directly, and an assailant would presumably be less inclined to threaten violence with potential witnesses present.

The divorce of drunks was not initially thought to be valid among Ḥanafīs, the *muḫtaṣars* of al-Ṭaḥāwī and al-Karḫī both contain opinions to this effect.[51] Subsequent Ḥanafī jurists, as well as some Šāfiʿīs, suggested that it should be considered binding as a deterrence against alcohol consumption.[52] As an exception, al-Marġīnānī added that the repudiation will not count as binding if the husband got so drunk that he had experienced subsequent headaches (*šariba fa-ṣudiʿa*).[53] In his commentary on al-Hidāya, Badr al-Dīn al-ʿAynī explains that al-Marġīnānī's expression does not mean that a mere hangover will absolve a husband from his wanton actions the previous night. Instead, *šariba fa-ṣudiʿa* should be interpreted as a loss of consciousness, as the latter would mean a complete loss of rationality which does indeed make a repudiation void.[54] In later Ḥanafī literature (such as in the Radd al-Muḥtār of XVIIth-XVIIIth century Ibn ʿĀbidīn), this opinion was refined to only include intoxication induced solely for pleasure, intoxication resulting from consuming anaesthetics and various medicines containing alcohol makes the repudiation invalid as the person consuming them did not commit a sin (*maʿṣiyya*).[55]

While this opinion pitted him agains the majority of his school's followers, Ibn Taymiyya considered a drunk's repudiations invalid without further caveats.[56] To support his position, he recounts a tradition according to which the Prophet, upon hearing one of his followers stating that he committed adultery, first had him examined to make sure that he is not drunk, as if he was drunk, his statement would be invalid. Since it is known that a statement is invalid when it lacks true intention (*qaṣd ṣaḥīḥ*), this must mean that a drunk's speech lack it as well, making his repudiations also invalid.

Unlike derangement (*ʿatah*), confusion (*dahša, dahaš*) as a legal category cannot be found elsewhere in the personal status law, its applicability is specific to repudiation. It was introduced

[51] Badr al-Dīn al-ʿAynī, *al-Bināya šarḥ al-Hidāya*. ed. Ayman Ṣāliḥ Šaʿbān. Beirut, Dār al-Kurub al-ʿIlmiyya 2000. (13 vols.) vol. V, p. 301.

[52] Burhān al-Dīn al-Marġīnānī, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d, vol. I, 224.

[53] Burhān al-Dīn al-Marġīnānī, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d, vol. I, 224.

[54] Badr al-Dīn al-ʿAynī, *al-Bināya šarḥ al-Hidāya*. ed. Ayman Ṣāliḥ Šaʿbān. Beirut, Dār al-Kurub al-ʿIlmiyya 2000. (13 vols.) vol. V, p. 302.

[55] Muḥammad ʿAlā al-Dīn Afandī, Takmilat Ḥāšiyat Ibn ʿĀbidīn = Qurat ʿUyūn al-Aḫyār Takmilat Radd al-Muḥtār (šāmila) Beirut, Dār al-Fikr 1995 (8 vols). vol. VIII, p. 323.

[56] Maǧmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf, 2004. vol. XXXIII, 102-103.

to Jordanian law in 1951, albeit without a definition of the condition.[57] Article 88. b) of the 1976 personal status law defines confusion as a state in which a person lost his ability to discern and does not comprehend what he is saying due to anger or agitation. The 2010 law gave the term an even broader definition, considering a person confused not only if he appears to have lost his discernment, but also if he appears agitated enough due to anger that his speech and actions fall outside his usual behavior. From 2010 and onwards, loss of discernment is considered and indicator of derangement instead, as seen in Article 206 a). The current personal status law of the Syrian Arab Republic also deals with the state of confusion, however, similarly to the 1976 Jordanian law, it defines *dahaš* as a loss of discernment severe enough that the husband does not know what he is saying.[58]

In classical fiqh, *dahaš* is discussed by Ḥanafīs exclusively. Its intended meaning in the legal context is not self-explanatory. In its literary use, it describes amazement at another's actions that does not imply agitation or a reduction of mental faculties.[59] Since the feeling of amazement is hardly relevant to a person's capacity to pronounce a repudiation, it should be assumed that *dahaš* held a specific agreed upon meaning as a legal technical term. The earliest *šarʿī* use of the term is found in the *Tanwīr al-abṣār* of al-Ḫaṭīb al-Timirtāšī (1597), who mentions the *madhūš* (the confused person), without providing a definition, among the classes of people whose repudiation does not take effect.[60]

Ḫayr al-Dīn al-Ramlī (d. 1671) issued three *fatwā*s regarding the invalidity of the repudiation of a confused (madḥūš) person that were referenced by several later authors.[61] Al-Ramlī defines *dahaš* as loss of rationality induced by *ḏahl* (confusion due to fright) or *walah* (confusion due to fear or grief).[62]

The third fatwā, written in verse, recounts the tale of a notable local who, upon enduring underserved verbal abuse from his wife, became so irate that he sought out a judge to triply repudiate his wife in his presence. Having later regretted it, he turns to al-Ramlī for opinion.[63]

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[57] Art. 68, Law 92 of 1951.

[58] art. 89 of the Syrian personal status law.

[59] (see for example closing stanza of the qaṣīda ~~bābay~~ Bābay al-šumūs by al-Mutanabbī: fa-laqad dahištu li-mā faʿalta wa dūnahu / mā yudhišu al-malaka al-hafīza al-kātibā.)

[60] Tanwīr al-abṣār 66. Apart from the *madhūš*, the insane (*al-maǧnūn*) and the deranged (*al-maʿtūh*), the list also includes minors and those unconscious or sleepwalking. As such, the meaning of dahaš cannot be inferred from the context.

[61] al-Ṭawrī, Ibn Humām, Ibn ʿĀbidīn

[62] Ḫayr al-Dīn al-Ramli, *al-Fatāwā al-Ḫayriyya li-nafʿ al-birriyya ʿalā maḏhab al-imām al-aʿẓam Abī Ḥanīfa al-Nuʿmān*. Cairo, Maṭbaʿat Būlāq 1882. Vol. I, 40.

[63] Ḫayr al-Dīn al-Ramli, *al-Fatāwā al-Ḫayriyya li-nafʿ al-birriyya ʿalā maḏhab al-imām al-aʿẓam Abī Ḥanīfa al-Nuʿmān*. Cairo, Maṭbaʿat Būlāq 1882. Vol. I, 41-42.

Al-Ramlī rules that as *dahaš* causes a loss of wits (*faqd al-ḥiğāʾ*), it should be counted as insanity and therefore it invalidated the repudiations. However, in the second and the third fatwā, he insists that if the husband was not previously known for such behavior, he is required to provide proof of his condition. If he has previously undergone such a state, his sworn oath is sufficient.

In the last volume of al-Baḥr al-rāʾiq, finished after the original author's death, Muḥammad al-Ṭawrī al-Qādirī (d. 1726) writes that while the definition of the *madhūš* is still debated in his time, it is probably best described as a person who exhibits limited understanding and erratic behavior but is not physically aggressive the way the insane are.[64] This definition, however, is identical to Ḫayr al-Dīn al-Ramlī's definition of derangement from his first fatwā concerning confusion, meaning that al-Ṭawrī considered the two terms synonymous:

> *"If his comprehension is reduced and he acts in a confused or faulty manner but does not strike or abuse others, then he is deranged (maʿtūh), but all he same his repudiations are not binding during that time."* [65]

As the above shows, from its introduction to fiqh until the XVIIIth century, *dahaš* was understood to be a recurring or persistent condition that invalidates repudiaton due to a reduction in the victim's capacity for rational thought equivalent to *ğunūn* (insanity). In the only case where it is brought up, anger only serves as an indicator of a recurring~~–~~ but temporary loss of discernment~~state of insanity~~.

The idea that the state of angriness on its own invalidates the husband's capacity to repudiate comes from the Ḥanbalī Ibn Qayyim al-Ğawziyya (d. 1350), who dedicated a treatise to the topic.[66] He argues that if anger was to be interpreted as analogous to insanity, only two categories of it could be distinguished. One, in which the angered person only exhibits the beginnings of anger and his intellect remains unaffected, and thus his legal transactions remain binding, and a second wherein a person loses his capacity for rational thought, is unaware of what he is doing and does not act according to his own will, making him unambiguously insane and his transactions void. Based on his empirical observations, he therefore posits that a third category with legal relevance should be distinguished, one in which a person's state of mind is

[64] Muḥammad b. Ḥusayn b. ʿAlī al-Ṭawrī al-Qādirī, *Takmilat al-Baḥr al-rāʾiq šarḥ Kanz al-Daqāʾiq*. ed. Zakariyyā ʿAmīrāt. Beirut, Dār al-Kutub al-ʿIlmiyya 1997. (9 vols) Vol. 8, 143..

[65] Ḫayr al-Dīn al-Ramli, *al-Fatāwā al-Ḫayriyya li-nafʿ al-birriyya ʿalā maḏhab al-imām al-aʿẓam Abī Ḥanīfa al-Nuʿmān*. Cairo, Maṭbaʿat Būlāq 1882. Vol. I, 37.

[66] Abū ʿAbd Allāh Muḥammad b. Abū Bakr b. Ayyūb b. Qayyim al-Ğawziyya, *Iġāṯat al-lafhān fī ḥukm ṭalāq al-ġaḍbān*. ʿAbd al-Raḥmān b. Ḥusayn b. Qāʾid ed. n.d., Dār ʿĀlam al-Fawāʾid.

affected by anger but he has not yet reached the limits of insanity.[67] As compulsion invalidates repudiation in Ḥanbalī jurisprudence, most of the treatise's chapters are dedicated to proving that this third category constitutes a sort of compulsion. Ibn Qayyim presents twenty-four arguments against the validity of repudiation uttered in anger. Here, I will only present the ones that are relevant to the later Ḥanafī interpretation of *dahaš*.

Ibn Qayyim found the main supporting argument for the invalidity of an angered person's repudiation in a tradition transmitted through ʿĀʾiša:

> *"No repudiation and no manumission in a state of being closed off (iġlāq).*[68]

According to Ibn Qayyim, *iġlāq* in the ḥadīṯ is figurative language that should be interpreted as the "closing off" of the two components of free choice in Ḥanbalī interpretation, intent (*qaṣd*) and irāda (*will*).[69]

Likely referring to the commonly recognized phenomenon that swearing acts as a mechanism for relieving distress, he observes that an angry person will often say things that are uncharacteristic of him in order to calm his anger. According to Ibn Qayyim, such behavior does not only mean that an angry person's utterances are devoid of intention (or rather, that their sole intention is relieving stress), but also that he acts under a sort of compulsion, as he seeks to rid himself of a condition that he knows is harmful for him.[70]

He recounts Aḥmad b. Ḥanbal's description of the sort of drunkenness that invalidates repudiation, which also falls short of a complete loss of discernment.[71] According to this, a repudiating husband is considered drunk if he talks confusedly (*yaḫliṭu fī kalāmihi*) or if he confuses the clothes and shoes of others with his own.[72]

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[67] Abū ʿAbd Allāh Muḥammad b. Abū Bakr b. Ayyūb b. Qayyim al-Ǧawziyya, *Iġāṯat al-lafhān fī ḥukm ṭalāq al-ġaḍbān*. ʿAbd al-Raḥmān b. Ḥusayn b. Qāʾid ed. n.d., Dār ʿĀlam al-Fawāʾd, p.21.

[68] Abū ʿAbd Allāh Muḥammad b. Yazīd b. Māǧa al-Qazwīnī, al-Sunan. Šuʿayb al-Arnaʾūṭ ed. Beirut, Mūʾassasat al-Risāla 2009. (5 vols) **[Sh]**, vol. III, 201.
Abū Dāwud Sulaymān b. al-Aš'aṯ b. Isḥāq b. Bašīr b. Šaddād b. ʿAmrū, Sunan Abī Dāwud. Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd ed. Sidon, al-Maktaba al-ʿAṣriyya, n. d. (4 vols), **[Sh],** vol. II, 257. (Reported by Aḥmad, Abū Dāwud and Ibn Māǧa)

[69] Abū ʿAbd Allāh Muḥammad b. Abū Bakr b. Ayyūb b. Qayyim al-Ǧawziyya, *Iġāṯat al-lafhān fī ḥukm ṭalāq al-ġaḍbān*. ʿAbd al-Raḥmān b. Ḥusayn b. Qāʾid ed. n.d., Dār ʿĀlam al-Fawāʾd, p.18-19.

[70] Abū ʿAbd Allāh Muḥammad b. Abū Bakr b. Ayyūb b. Qayyim al-Ǧawziyya, *Iġāṯat al-lafhān fī ḥukm ṭalāq al-ġaḍbān*. ʿAbd al-Raḥmān b. Ḥusayn b. Qāʾid ed. n.d., Dār ʿĀlam al-Fawāʾd, p.34.

[71] Abū ʿAbd Allāh Muḥammad b. Abū Bakr b. Ayyūb b. Qayyim al-Ǧawziyya, *Iġāṯat al-lafhān fī ḥukm ṭalāq al-ġaḍbān*. ʿAbd al-Raḥmān b. Ḥusayn b. Qāʾid ed. n.d., Dār ʿĀlam al-Fawāʾd, p.46.

[72] The edition of Iġāṯat al-lafhān referenced here talks about clothes and actions (radāʾahu wa fiʿalahu) rather than clothes and shoes (radāʾahu wa naʿlahu), this is likely a corruption in the manuscript it was based on. For an earlier reference to Aḥmad b. Ḥanbal's saying, see Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. X, 348.

The Ḥanafī Ibn ʿĀbidīn was familiar with Ibn Qayyim's treatise and relied on it to prove that *dahaš* makes repudiation void. To accentuate the connection between anger and *dahaš*, instead of *madhūš*, he uses the term *muġtāẓ madhūš* (overcome with anger and confusion) for the confused person. [73] Still being somewhat reluctant to positively claim that *dahaš* is the same angered state Ibn Qayyim describes, he also provides a dictionary's definition, according to which *dahaš* is a momentary lapse of reason due to embarrassment or fear.[74]

He adopts the three categories of anger suggested by Ibn Qayyim, and agrees that the third category of severity represents a mental state that is distinct from and less severe than insanity but nonetheless affects a person's capacity to make decisions. However, as Ḥanafī jurisprudence recognizes repudiations under compulsion as valid, his reasoning is somewhat different. Instead of attempting to prove that anger is analogous to compulsion, he points out that Ḥanafī jurisprudence already recognizes a number of states in which a person loses his capacity to repudiate despite not having reached the limits of insanity, such as in the case of minors and the deranged. If one is to accept that confusion causes a loss of faculties, and that a reduction in mental faculties is sufficient grounds for invalidation (as opposed to the complete loss of reason that the state insanity represents), then all that is left to establish is the observable signs that prove the repudiating husband underwent this state.

Here, Ibn ʿĀbidīn was likely influenced by Ibn Qayyim's description of the out of character cursing of the angered husband. Instead of establishing discrete boundaries, he suggests that the degree of deviation from one's established behavior should be considered:

> *"In the case of the confused and the like, the judgment needs to be conditional on the compromise of his speech and actions by a defectiveness of a degree that falls outside his usual behavior."*[75]

The phrasing of article 86.b) of the Jordanian law is nearly identical to Ibn ʿĀbidīn's, leaving little doubts of its origins. The only practical difference to Ibn ʿĀbidīn's position is that the Jordanian article identifies anger as the cause of *dahaš*.

Where the subject of a repudiation pronounced in anger is discussed in classical Ḥanafī jurisprudence, it is not thought to influence the validity of the repudiation. The *Fatāwā*

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[73] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 244.

[74] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 243.

[75] Ḫayr al-Dīn al-Ramlī, *al-Fatāwā al-Ḫayriyya li-nafʿ al-birriyya ʿalā maḏhab al-imām al-aʿẓam Abī Ḥanīfa al-Nuʿmān*. Cairo, Maṭbaʿat Būlāq 1882. Vol. I, 37.

Tatārḫāniyya and the *Fatāwā Walwālğiyya* both describe a case wherein a man, having repudiated his wife in anger, relied on the testimony of two witnesses to confirm that he actually did so. The fatwā in this case was that if both testimonies are positive, a valid repudiation has taken place. To this, Ibn ʿĀbidīn says that the husband's anger in the described case must not have reached the severity that invalidates repudiation, it is simply that the husband could not recall whether he had uttered the correct phrase.[76]

Later Ḥanbalīs rejected the position presented Ibn Qayyim's treatise on the invalidity of a repudiation pronounced in anger, along with the invalidation of a drunk husband's repudiation.[77]

The topic is only treated in the late scholarship of the other two schools, likely as a reaction to Ibn Qayyim's treatise. Late Mālikīs thought that anger does not invalidate a repudiation, even if it is particularly severe. [78] The repudiation of an angered husband could only be considered invalid due to the presence of insanity, which, by their definition, means that he was unaware of what he is saying.

Šāfiʿīs were aware of Ibn Qayyim's opinion, as evidenced by a comment Ibn Ḥağar al-Haytamī (d. 1566) made in his commentary on the school's seminal Minhāğ al-Ṭālibīn. He explains that adherents of the school were forbidden from interpreting the phrase *in a state of iġlāq* (in the ḥadīṯ of ʿĀʾiša quoted above) as referring to anger.[79] Instead, the school's preponderant opinion was that iġlāq refers to compulsion exclusively. Consequently, Šāfiʿīs agreed that the angered husband's repudiation is binding. A contemporary of al-Haytamī's, Zayn al-Dīn al-Maʿbarī (d. 1579) even adds that the repudiation remains valid despite the husband's claim of a complete loss of his senses due to anger.[80]

Repudiation on the deathbed

[76] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol III, 244.

[77] Marʿī b. Yūsuf al-Kiramī al-Ḥanbalī, *Ġāyat al-muntahā fī ğamʿ al-Iqnāʿ wa-l-Muntahā*. Yāsir Ibrāhīm al Mazrūʿī, Rāʾid Yūsuf al-Rūmī eds. Kuwait, Mūʾassasat Ġarrās 2007. (2 vols.) Vol. II, p. 266.

[78] Abū ʿAbbās Aḥmad b. Muḥammad al-Ḫalwatī, Abū al-Barakāt Aḥmad b. Muḥammad b. Aḥmad al-Dardīr, *al-Šarḥ al-Ṣaġīr ʿalā Aqrab al-Masālik ilā maḏhab imām Mālik wa bi-l-hāmiš Ḥāšiyyat al-ʿallāma al-šayḫ Aḥmad b. Muḥammad al-Ṣāwī al-Mālikī.* Muṣtafā Kamāl Waṣfī ed. Cairo, Dār al-Maʿārif, n. d. (4 vols.) vol. II, 542.

[79] Aḥmad b. Muḥammad b. ʿAlī b. Ḥağar al-Haytamī, *Tuḥfat al-muḥtāğ fī šarḥ al-Minhāğ*. Cairo, al-Maktaba al-Tiğāriyya al-Kubrā 1938, vol. VIII, 32.

[80] Aḥmad b. ʿAbd al-ʿAzīz b. Zayn al-Dīn b. ʿAlī b. Aḥmad al-Maʿbarī al-Mālībārī al-Hindī, *Fatḥ al-muʿīn bi-šarḥ Qurat al-ʿAyn bi-muhimmāt al-dīn*. Bassām ʿAbd al-Wahhāb al-Ǧābī ed. Beirut, Dār Ibn Ḥazm 2004. p. 507.

A revocably repudiated wife inherits from her husband if he dies while she is in her waiting period. Under usual circumstances, an irrevocably repudiated wife loses her right to inherit right away. To prevent a dying husband's wife from being disowned, Ḥanafī doctrine holds that, while a repudiation uttered on the husband's deathbed is binding, the repudiated wife is still entitled to her share of the inheritance if the husband dies while she is in her waiting period.[81]
The exception only applies to wives who were repudiated against their wish, if they bought their separation through ḫulʿ or repudiated themselves upon the husband's authorization, they lose their right to inherit. This rule has been applied by Ḥanafī jurists since as early as Muḥammad al-Šaybānī (d. 805), who attributed its introduction to Abū Ḥanīfa.[82]
As on-the-spot irrevocable repudiations have been made impossible under Jordanian law, the new personal status code has no further provisions against repudiations on the husband's deathbed.

Conclusion

One of the distinctive characteristics of repudiation is its immediate effect, wherein the mere oral pronunciation by the husband instantaneously dissolves the marital bond, without necessitating procedural preparations or the presence of witnesses. This inherently carries the risk that a husband may hastily and impetuously pronounce ṭalāq without a genuine intent to sever the marital ties.
While classical jurists established that the husband's loss of discernment could be used as grounds on which to invalidate a repudiation, this required the establishment of the fact that the husband is suffering from a recurring condition that affects more than just his capacity to repudiate. The associated administrative hurdles, harm to reputation and effect on other rights made it so that a husband was likely reluctant to invoke these exceptions to annul an anwanted repudiation.
Post-classical Ḥanafiyya introduced a novel invalidating factor known as *dahaš* or confusion, used in fatwās as an alternative avenue for nullifying a hastily pronounced repudiation. However, the original interpretation of confusion still required proof of a recurring reduction in mental capacity, obviating any substantial advantage for the husband seeking the annulment of the repudiation on these grounds. In a parallel development, the Ḥanbalī Ibn Qayyim dedicated

[81] al-Qudūrī 158, Nyazee II 739
[82] Yanagihashi Hiroyuki. "The Doctrinal Development of "Maraḍ Al-Mawt" in the Formative Period of Islamic Law", *Islamic Law and Society* 5, 3 (1998): 326-358. p. 356.

a treatise to the proposition that an angered husband's repudiation is also inherently invalid. He posited that an angered person, while not being afflicted by true insanity, is still in a state wherein his ability to freely choose his actions is limited.

Building upon Ibn Qayyim's perspective, the Ḥanafī scholar Ibn ʿĀbidīn reinterpreted the Hanafī concept of confusion, contending that a confused state did not necessitate the existence of a recurring behavior or reaching the threshold of insanity; rather, it was sufficient ~~if~~ that the husband's words and actions deviated from his usual behavior.

Jordanian law largely adopted Ibn ʿĀbidīn's position. Among contemporary laws based on the šarʿī concept of *dahaš*, it is unique in that it avoids all references to impaired cognition, thus permitting the invalidation of the repudiation without requiring a supporting expert opinion on the husband's mental state.

While the school gradually introduced a number of exceptions to the basic rule, Ḥanafīs up to modern times remained insistent that a drunk's repudiation should be binding as a sort of deterrent against over-indulgence. In contrast, Jordanian law counts drunkenness as an invalidating factor regardless of circumstance. This, however, coincides with the Ḥanbalī Ibn Taymiyya's opinion.

Ḥanafīs remained steadfast in their position that a repudiation made under compulsion is binding. The 1917 Ottoman family law, which the Jordanian law follows in this regard, invalidated repudiations under compulsion based on the positions of the other three schools.

Compensation for arbitrary repudiation

155. If the husband repudiated his wife arbitrarily, such as if he repudiated him for no rational reason, and she demands compensation, compensation that is not less than one year's worth of alimony but does not exceed three years' worth will be granted to her for the repudiation. When determining the amount, the husband's status as wealthy or impoverished will be taken into account, paying one lump sum if he is wealthy or installments if he is impoverished. This does not influence any of the wife's other rights.

A Jordanian divorcée is entitled to up to three years of alimony if it is established that her husband repudiated her without a rational reason, this is called a *compensation for an arbitrary repudiation (taʿwīḍ ʿan al-ṭalāq al-taʿassufī)*. The measure was originally introduced in Article

134 of the 1976 personal status law, and it was fashioned after a similar statute in the personal status law of the Syrian Republic from 1953.[83]

Article 6 of the 2001 amendment to the personal status law significantly extended the amount of awardable compensation. Article 134 of the 1976 law set the amount as "what is considered appropriate but no more than a year's worth of her alimony". Article 155 of the 2019 law sets it as at least a year's worth but no more than three years' worth of alimony. Furthermore, while the 1976 law set the highest amount of the compensation to one year's worth of the *wife's alimony*, the 2000 amendment defines it as *one to three years' worth of alimony* without making a reference to the amount the wife received during the marriage. This change in meaning was made necessary by Article 79, which prescribes that all wives married to the same man receive the same amount of alimony.

The article presents a departure from classical sunnī jurisprudence in two respects. It questions the husband's unconstrained right to pronounce a repudiation, and it utilizes a mechanism established in classical jurisprudence – namely, *mutʿa* – in a function it has not been used before. At a cursory glance, penalizing the husband for a repudiation seems to run counter to the rights established by classical concept of *ṭalāq*. According to the contemporary definition of repudiation provided by the *Encyclopaedia of Fiqh*, the majority opinion is that repudiation is principally permitted, independent of any conditions or stipulations.[84] The husband should not even be asked about the reason for the repudiation. This is seen as necessary in order to preserve the dignity of the parties involved. Furthermore, it is thought that establishing facts regarding the private life of a couple, of which, generally, they are the only two witnesses, is prohibitively difficult.[85] Modern Western descriptions also tend to emphasize that no grounds are required for the pronouncement of a repudiation.[86]

In opposition to this approach, a minority of classical jurists debated the absolute nature of the rights afforded by repudiation. They instead argued that repudiation is a prohibited act that is only made permitted by the arising of certain conditions it is supposed to address. Consequently, pronouncing a repudiation for any reason other than the arising of these conditions, or no reason at all, is not permitted. The idea originates from Ibn Taymiyya. According to his fatwā on the

[83] Law 117 of 1953. see Maḥmūd ʿAlī al-Sarṭāwī, *Šarḥ qānūn al-aḥwāl al-šaḫṣiyya*. Amman, Dār al-Fikr 2013. p. 178, who identifies it as article 127.

[84] *Al-Mawsūʿa al-fiqhiyya*. Kuwait, Wizārat al-awqāf wa-l-šuūn al-islāmiyya 2005, vol. ~~*al-Mawsūʿa al-fiqhiyya*~~ XXIX, 12.

[85] In the Jordanian family law, this latter argument comes into play to the wife's benefit, as it will be seen in the chapter on judicial separations.

[86] Rohe: *Islamic Law Past and Present*, 117.

formázott: Betűtípus: (Alapérték) +Szövegtörzs (Calibri), 10 pt

formázott: Betűtípus: (Alapérték) +Szövegtörzs (Calibri), 10 pt

formázott: Nem Kiemelt

matter, the essentially prohibited nature of repudiation helps explain why a man is only allowed to repudiate his wife thrice before he marries another:

> "*The governing principle in repudiation is that of prohibition. Some of it was permitted proportional to necessity [al-ḥāǧa], and this necessity may arise three times.* "[87]

It is also due to this principle that a triple repudiation in a single sitting cannot count as three.[88] It might be argued that the necessity (*ḥāǧa*) Ibn Taymiyya mentions cannot arise without a valid reason (*sabab*), but Ibn Taymiyya himself did not outright claim that a valid reason is necessary in order for a repudiation to become permitted. Rather, it would seem that he thought the limited number of permitted repudiations acts as a safeguard against pronouncing a repudiation without real necessity. Before Ibn Taymiyya, another Ḥanbalī jurist, Ibn Qudāma al-Maqdisī categorized repudiations pronounced without a real necessity as reprehensible (*makrūh*). He mentions two conflicting opinions attributed to Ibn Ḥanbal, one considering them prohibited and one permitting them. He chose the latter opinion as the more likely correct one, as there are numerous aḥādīṯ attesting to the permitted (*ḥalāl*) nature of repudiations in general, such as the oft quoted "*Of all the lawful acts the most detestable to Allah is divorce*.[89]" [90]

The idea of the essentially prohibited nature of repudiation eventually made its way to Ḥanafī fiqh as well. The earliest Ḥanafī proponent of the position is Kamāl Ibn Humām (d. 1457), who wrote about it in the preface of the chapter on repudiation in his commentary on Burḥān al-Dīn al-Marġīnānī's *al-Hidāya*. Unlike Ibn Taymiyya, he explicitly says that repudiation is prohibited except for those times when the necessity for it arises, and even gives specific examples as to what constitutes a necessity.[91] He found it problematic that the Prophetic traditions offer little detail on the circumstances of repudiations that took place with the Prophet's knowledge. Based on ḥadīṯ alone, he only knew for certain that the wife's old age (and inability to bear children) and suspicion of adultery are valid grounds for a repudiation. To this, he added that fear that one might break God's commandments if forced to stay married

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[87] Maǧmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf, 2004. vol. 32. p. 293.

[88] Maǧmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf, 2004. vol. 33. p. 81.

[89] Abū Dāwud Sulaymān b. al-Aš'aṯ b. Isḥāq b. Bašīr b. Šaddād b. ʿAmrū, Sunan Abī Dāwud. Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd ed. Sidon, al-Maktaba al-ʿAṣriyya, n. d. (4 vols), **[Sh],** vol. II, 255.

[90] Ibn Qudāma al-Maqdisī: *al-Muġnī*. ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī. Al-Riyadh, Dār ʿĀlam al-Kutub, , 1997. (15 vols) vol. 10. p. 323.

[91] Kamāl al-Dīn Muḥammad ʿAbd al-Wāḥid al-Sīwāsī al-Skandarī (Ibn Humām), *Šarḥ fatḥ al-qadīr*. ed. ʿAbd al-Razzāq Ġālib al-Mahdī. Beirut, Dār al-Kutub al-ʿIlmiyya 2002 (10 vols). Vol. III, 445-446.

also creates a valid necessity for repudiation. Ibn Humām calls prohibition the preponderant (*al-aṣaḥḥ*) opinion of the school, but where al-Ḫaṭīb al-Timirtāšī (1597) quotes him on the subject in his manual titled *Tanwīr al-abṣār*, he cautiously adds that it is merely said to be the preponderant opinion (*wa qīla al-aṣaḥḥ ḥuẓruhu*), indicating that he did not consider the matter resolved.[92]

Tanwīr al-abṣār would later become the core text (*matn*) of the most widely regarded work of late Ḥanafī jurisprudence, the tripartite compendium *Ḥāšiyyat Ibn ʿĀbidīn*. Bearing the full title *Radd al-Muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār*, it is composed of al-Timirtāšī's own text, ʿAlāʾ al-Dīn al-Ḥaṣkafī's (1677) commentary on it and Muḥammad Amīn Ibn ʿĀbidīn's (1836) glosses on the two.

In the second layer of *Ḥāšiyyat Ibn ʿĀbidīn*, al-Ḥaṣkafī denies that the doctrine of repudiation's essential forbiddenness is the preponderant position of the school. Instead, he suggested that the opinion of Ibn Nuğaym (1563) should be followed. Ibn Nuğaym only briefly treated the topic in his commentary on al-Nawawī's *Kanz al-daqāʾiq*, saying that prohibiting repudiation except for when a need arises is an adoption of a weak tradition and should not be considered Ḥanafī doctrine.[93]

In turn, Ibn ʿĀbidīn, accepts the principle of prohibition without reservation. Despite the *Radd al-Muḥtār* being a commentary, Ibn ʿĀbidīn didn't solely rely on the writings of his Ḥanafī predecessors, and he quotes Ibn Taymiyya word for word on the matter of the essential prohibitedness of repudiation:

> "*As for repudiation, the governing principle in it is that of prohibition, meaning it is prohibited except for the presence of an impediment that makes it permissible. This is what was meant by their saying that the governing principle in it is that of of prohibition, and permissibility is due to the necessity for deliverance. If it occurred without any reason, there is no necessity in it for deliverance, rather, it is folly and misguided opinion, the rejection of blessing and the causing of harm to one's wife, her family and her children. This is why they said: Its reason is the need for deliverance when such conflicts in disposition or displays of hatefulness arise that would bring forth transgressions against the almighty God's commandments. Thus, the need is not limited*

[92] al-Timirtāšī, Šams al-Dīn Muḥammad b. ʿAbd Allāh b. Šihāb al-Dīn Aḥmad b. Timirtāš al-Ḥanafī, *Matn Tanwīr al-abṣār wa ğāmiʿ al-biḥār*. Cairo, al-Maktaba al-Nabawiyya, n. d, 66.

[93] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 227.

to old age and suspicion of adultery as some suggested, but it is broader as was chosen in Al-Fatḥ. Therefore, whenever it lacks the necessity that wouould make it permissible, the original prohibition for ṭalāq remains."[94]

Ibn ʿĀbidīn's assertion that the essential forbiddenness of repudiation is the preponderant Ḥanafī position would remain unchallenged. *Ḥāšiyyat Ibn ʿĀbidīn* is the most recent comprehensive *furūʿ* manual to gain universal recognition within the school. Muḥammad Zayd al-Ibyānī's 1903 commentary on Muḥammad Qadrī basha's proposed Egyptian personal status code, written some seventy years after the completion of *Ḥāšiyyat Ibn ʿĀbidīn*, is considered to be another important reference work for Ḥanafī scholarship. In his preface to the chapter on repudiation, al-Ibyānī identifies Ibn ʿĀbidīn's position as the correct one.[95] In absence of opposing opinions, it could therefore be said that by the nineteenth century at the very latest, essential prohibitedness became the predominant opinion on repudiation among Ḥanafī jurists. Meanwhile, Ottoman judicial practice continued to view repudiations as an oath that takes effect regardless of the husband's intent.[96] It is probably due to this influence that the first positive family codes – among them the 1917 Ottoman family code, which served as the direct antecedent to the personal status law of independent Jordan – did not adopt the principle. This gap in continuity somewhat obfuscates the connection between Ḥanafī doctrine and the late twentieth century positive laws on arbitrary repudiation, and even lead to an assumption that these laws are an imitation of Western alimony practices without a basis in šarīʿa. However, if we were to view laws on arbitrary repudiation as an implementation of the principle of the essential prohibitedness or repudiation, it sufficiently explains – within the boundaries set by preponderant Ḥanafī thought, no less – the limitations placed on a husband's right to repudiate.

The Ḥanbalīs and Ḥanafīs quoted here did not claim that a repudiation pronounced without a reason does not take effect. To Ḥanafīs, the case is similar to how repudiations should not be pronounced during the wife's menstrual period: it counts as ṭalāq bidʿa, but is nonetheless binding. Ibn Taymiyya dedicates a few pages to examining whether prohibited forms of repudiation should be considered binding. He presents arguments both in favor of and against,

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[94] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 228.

[95] Muḥammad Qadrī bāšā, Muḥammad Zayd al-Ibyānī, *al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya wa šarḥuhu*. Muḥammad Aḥmad Sirāǧ, ʿAlī Ǧumʿa Muḥammad eds. Cairo, Dār al-Salām 2009. 4 vols. vol. II, p. 503-504.

[96] Colin Imber, *Ebu's-Su'ud*: *The Islamic Legal Tradition*. Edinburgh University Press, 1997. ps. 197, 204.

but ultimately contends that there is no proof of a blanket invalidation of prohibited repudiations in the Prophetic tradition in the same equivocal fashion as other practices, such as the re-marrying of a thrice-repudiated wife were banned. Instead, he suggests that pronouncing prohibited repudiations should be punished if abuse of the practice becomes commonplace.[97]
Surprisingly enough, contemporary secondary literature on arbitrary repudiation makes no mention of the principle of prohibition. Instead, scholarly works present the payable compensation as a form of *mutʿa*, which is a Qurʾānic term for a type of compensation to be paid to repudiated women.[98] In his commentary on the 1976 family law, a contemporary Jordanian jurist from Jordan University, Maḥmūd ʿAlī al-Sarṭāwī also recongnizes the similarities between *mutʿa* and compensation for arbitrary repudiation, but criticizes the latter in rather blunt fashion, calling it a man-made creation, prone to predilection and instituted in place of, rather than originating from the šarīʿa:

> *"I'm of the view that if the husband acted arbitrarily in his repudiation, then also arbitrary are the laws adapting the principle of taʿwīḍ compensation and its method for determining the amount, as this legislation was laid down by humans based on their own intellect.*
> *For this reason I consider it appropriate to turn away from the principle of compensation, which is determined by human minds mired by differences of opinion and influenced by the desire for gain, and instead turn to the mutʿa system which was established by the Islamic Šarīʿa.*" [99]

Mutʿa is based on two Qurʾānic verses revealed in sūrat al-Bakara, verse 2,236 and verse 2,241:

> "*There is no blame upon you if you divorce women not having touched them or not having designated a bridewealth. But provide for them (mattaʿūhunna) — the wealthy according to his means, the straitened according to his means — an honorable provision: an obligation upon the virtuous.*"[100]

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[97] Maǧmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf, 2004. vol. 33. p. 91.
[98] "Mutʿa Al-Ṭalāq Wa ʿalāqatuhā Bi-l-Taʿwīḍ ʿan al-Ṭalāq al-Taʿassufī." *Maǧallat Jāmiʿa Al-Šāriqa Li-l-ʿulūm Al-Šarʿiyya Wa-l-Dirāsāt Al-Islāmiyya* 9, no. 2 (June 2012): 131–58. p. 145.
[99] Maḥmūd ʿAlī al-Sarṭāwī, *Šarḥ qānūn al-aḥwāl al-šaḫṣiyya*. Amman, Dār al-Fikr 2013. 180.
[100] Qurʾān 2,236. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 230.

"*And for divorced women an honorable provision (matāʿ) — an obligation upon the reverent.*"[101]

There are few similarities in the functions the different sunnī schools of jurisprudence assigned to mutʿa. For this reason, discussing it as a generic Islamic concept proves difficult, and examining the specific approaches by each sunnī school of jurisprudence might shed more light on its relation to arbitrary repudiation. All jurists seem to agree that the "*matāʿ*" mentioned in these verses is not merely a generic term for the various forms of compensation awardable to the repudiated wife, and that a specific form of compensation called *mutʿa* exists. There also seems to be an agreement that difference in religion, the wife's age or status as a slave do not affect her right to receiving *mut'a*. However, only some jurists considered providing *mut'a* an obligation, and opinions varied on what specific cases make it obligatory. In the Mālikī opinion, *mutʿa* is recommended to be given to all women after a regular repudiation except manumitted slaves. It is a voluntary gift to repudiated women to comfort them and ease the pain caused by the repudiation. Wives accused of adultery and those that acquired their repudiation through *ẖulʿ* are not entitled to it.[102] As it is a parting gift of sorts, revocably repudiated women only receive it once their waiting period has passed. Its value is based on the husband's wealth.[103]

formázott: Betűtípus: Dőlt

According to the classical Ḥanafī opinion, *mutʿa* is compensation paid to a repudiated woman who is not entitled to a dower. It is equal to a suit of clothing comprising of three pieces, befitting her status in quality. As long as a dower is specified – which is the preferred method of concluding marriage contracts – a woman is entitled to half her dower if her husband repudiates her before the consummation of the marriage. *Mutʿa* is incumbent when no dower was specified in the marriage contract, or if the contract states she is to be wed without a dower.[104] As such, its applicability is limited to fringe cases. Ḥanafīs and Ḥanbalīs refer to it

[101] Qurʾān 2,241. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 233.

[102] Ḫalīl b. Isḥāq al-Ǧundī al-Mālikī, *al-Tawḍīḥ fī šarḥ al-muḫtaṣar al-farʿī li-Ibn al-Ḥāǧib*. ed. Aḥmad b. ʿAbd al-Karīm Naǧīb. Dublin, Markaz Naǧībawayh 2008. (8 vols) vol. IV, 244.

[103] Ḫalīl b. Isḥāq al-Ǧundī al-Mālikī, *al-Tawḍīḥ fī šarḥ al-muḫtaṣar al-farʿī li-Ibn al-Ḥāǧib*. ed. Aḥmad b. ʿAbd al-Karīm Naǧīb. Dublin, Markaz Naǧībawayh 2008. (8 vols) vol. IV, 246.

[104] Such a stipulation would be invalid. The ḥanafī view on contracts is that an invalid stipulation does not make the entire contract void. If the contract does not mention a dower, stipulates that there is no dower or the object of the dower invalid, such as wine or the promise of services rendered (other schools considered this acceptable), the wife is entitled to a fair dower.

as the case of the *mufawwaḍa*, a woman who has authorized a man to marry her under whatever conditions he chooses.[105]

According to al-Qudūrī, *mutaʿa* is only obligatory for women whose marriage has not been consummated in line with what's prescribed in verse 2,236, but it is recommended (*mustaḥabb*) to be given to all repudiated women.[106]

Sometime after al-Qudūrī, who wrote the first comprehensive manual on the school's positions, the method of determining the amount of the *mutʿa* became a subject of debate within the Ḥanafī school. While according to al-Qudūrī, the compensation should befit the wife's status, later Ḥanafīs thought that the husband's financial state should serve as basis. In al-Marġīnānī's example, *mutʿa* is still composed of a suit of clothing but its quality and materials depend on the husband's wealth.[107] Al-Kāsānī (d. 1191) and Badr al-Dīn al-ʿAynī (d. 1451) both report that some jurists recommend taking the status of both parties into account, but they consider al-Marġīnānī's opinion more appropriate.[108] [109] Even later, al-Timirtāšī unambiguously stated that the value is determined by the status of both parties, and this opinion was conserved by Ibn ʿĀbidīn as well, seemingly becoming the preponderant Ḥanafī opinion.[110] The change is noteworthy because the compensation generally awarded to repudiated wives (that is, fair dower or the deferred portion of the negotiated dower) is based on the wife's status exclusively in the opinions of all legal schools. If *mutʿa* is a suit of clothing tied in value to the status of both parties, it technically becomes more similar to an alimony payment than a dower. In turn, this makes the relation between mutʿa and compensation for arbitrary repudiation more evident, as compensation in the Jordanian law is equal to a time period's worth of alimony.

Šāfiʿīs consider *mutʿa* recommended for all repudiated wives.[111] In addition, they defined two distinct categories of separated wives to whom payment is obligatory. If the marriage was not consummated, wives who did not have a specified dower are entitled to it. If the marriage was

formázott: Betűtípus: Dőlt

[105] For a definition of mufawwaḍa, see Ḥusayn ibn ʿAlī al-Suġnākī al-Ḥanafī, *al-Nihāya fī šarḥ al-Hidāya*. Mecca, Ǧāmiʿat Umm al-Qurā 2021, vol. VII, 97.

[106] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, 1997, *Muḫtaṣar al-Qudūrī*. ed. Kāmil Muḥammad Muḥammad ʿUwayḍa. Beirut, Dār al-Kutub al-ʿIlmiyya. 147.

[107] Burhān al-Dīn al-Marġīnānī, no date, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. ed. Ṭalāl Yūsuf. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī. vol. I199.

[108] ʿAlā al-Dīn Abū Bakr b. Masʿūd al-Kāsāni, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*. Beirut, Dār al-Kurub al-ʿIlmiyya 1986. (7 vols. reprint of the 1910 šarikat al-maṭbūʿāt al-ʿilmiyya edition) vol. II, 304.

[109] Badr al-Dīn al-ʿAynī, *al-Bināya šarḥ al-Hidāya*. ed. Ayman Ṣāliḥ Šaʿbān. Beirut, Dār al-Kurub al-ʿIlmiyya 2000. (13 vols.) vol. 5, 144.

[110] Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlāʾ-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār*, Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 111.

[111] التعسفي عن الطلاق وعلاقتها بالتعويض (2012). متعة الطلاق وعلاقتها بالتعويض عن الطلاق التعسفي. العساف، تمام عودة عبدالله. *مجلة جامعة الشارقة للعلوم الشرعية والقانونية، مج9, ع2* ، 131 - 158. مسترجع من http://search.mandumah.com/Record/808701 . p137.

Megváltozott a mezőkód

consummated, *mutʿa* is incumbent as long as the reason for the separation lies with someone other than the wife herself.[112] Most commonly, this means a repudiation by the husband that he performed of his own accord. It also includes separations due to the husband's religion (such as if he, having a Muslim wife, apostatizes, or if he, being a non-Muslim married to a pagan woman, accepts Islam), due to *liʿān* ~~(imprecation)~~, to the husband's admission about having more than four wives, and the establishment of a prohibited degree between husband and wife by the way of fosterage or sexual relations (such as if the husband's father or son has sexual relations with the wife before him, or if the husband's mother or daughter fosters his minor wife).[113] There was no consensus on cases where the motivator for the separation was the infertility or some other health defect of one of the spouses.[114] As an example, in the case of an impotent husband whose wife sought separation, it is unclear whether the fault lies with the husband and his condition, making him liable to pay *mutʿa*, or it should be considered the wife's own choice, as if she wanted to, she could have stayed with him despite his impotence.

From the above, it follows that the Šāfiʿī *mutʿa* might be awarded on top of the dower, it is not merely a substitute for when the husband is under no obligation to pay a dower. Imām al-Ḥaramayn al-Ǧuwaynī (d. 1085) explains that *mutʿa* and the dower are due to the wife on different grounds: dower is paid in return for making herself sexually available throughout the marriage, while *mutʿa* is given as a compensation for the repudiation. [115]

The school had no consensus regarding the method for determining the precise amount. It could have been based on the husband's wealth, the wife's status or their shared status as a couple. Yet others preferred to leave it to the judge's discretion entirely.[116] They leaned towards modest compensations, Šāfiʿī jurists only recommended that it be no less than thirty dirhams.[117] Like the Ḥanafīs, Ḥanbalīs made *mutʿa* obligatory for the *mufawwaḍa*, a woman wed without a valid dower and repudiated before the marriage was consummated. They also recommended

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[112] Abū Isḥāq Ibrāhīm b. ʿAlī b. Yūsuf al-Šīrāzī, *al-Muhaḏḏab fī fiqh al-imām al-Šāfiʿī*. ed. Zakariyyā ʿUmayrāt. Beirut, Dār al-Kutub al-ʿIlmiyya 1995, vol. II, 475-476.

[113] Abū Zakariyyā Maḥmūd b. Šaraf al-Nawawī: *Rawḍat al-ṭālibīn*. Zuhayr al-Šāwīš ed. Beirut, al-Maktab al-Islāmī, 1991. (12 vols) vol. VII, 321.

[114] al-Muzanī: Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī (1998), *Muḫtaṣar al-Muzanī*. ed. Muḥammad ʿAbd al-Qāhir Šāhīn. Beirut, Dār al-Kutub al-ʿIlmiyya. p. 245

[115] Abū al-Maʿālī ʿAbd al-Malik b. ʿAbd Allāh b. Yūsuf b. Muḥammad al-Ǧuwaynī, *Nihāyat al-maṭlab fī dirāyat al-maḏhab*. ʿAbd al-ʿAẓīm Maḥmūd al-Dīb ed. Jeddah, Dār al-Minhāǧ 2007. (20 vols) vol. XIII, 181. (sámila, ellenőrizve)

[116] Abū al-Maʿālī ʿAbd al-Malik b. ʿAbd Allāh b. Yūsuf b. Muḥammad al-Ǧuwaynī, *Nihāyat al-maṭlab fī dirāyat al-maḏhab*. ʿAbd al-ʿAẓīm Maḥmūd al-Dīb ed. Jeddah, Dār al-Minhāǧ 2007. (20 vols) vol. XIII, 184. (sámila, ellenőrizve)

[117] Muḥyī al-Dīn Abū Zakariyyā b. Šaraf al-Nawawī, *Minhāǧ al-ṭālibīn wa ʿumdat al-mutqīn*. Muḥammad Muḥammad Ṭāhir Šaʿbān ed. Jeddah, Dār al-Minhāǧ 2005. 401-402.

providing ~~mutʿa~~ it to all other repudiated women if the marriage has been consummated.[118] An alternate opinion attributed to Aḥmad Ibn Ḥanbal, according to which all repudiated women are entitled to ~~mutʿa~~it, is mentioned by several authors, but none of them consider it the applicable in practice.[119]

From at least as early as the school's first muḫtaṣar (al-Ḫiraqī's, who died in 945), all Ḥanbalīs agreed that the value of *mutʿa* is dependent on the husband's financial status, as verse 2,236,

[118] Ibn Qudāma al-Maqdisī: *al-Muġnī*. ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī. Al-Riyadh, Dār ʿĀlam al-Kutub, , 1997. vol. 10. p. 140.

[119] For a source other than Ibn Qudāma, see Šams al-Dīn Muḥammad b. ʿAbd Allāh al-Zarkašī al-Miṣrī al-Ḥanbalī,*Šarḥ al-Zarkašī ʿalā Muḫtaṣar al-Ḫiraqī*. ed. ʿAbd Allāh b. ʿAbd al-Raḥmān b. ʿAbd Allāh b. Ǧibrīn. Al-Riyadh, Maktabat al-ʿUbaykān 1993 (7 vols). Vol. V, 306.

leaves explicit instructions to this effect [("i.e. *the rich according to his means*...]."[120] ... ")."[121] Al-Ḫiraqī and Ibn Qudāma both wrote that the wealthy should present the repudiated wife with a servant, while the poor should at least give a suit of clothing consisting of three pieces, suitable for performing prayer. [122] Measured in tens of gold dinars rather than dirhams according to sources near contemporaneous to Ibn Qudāma, the price of a slave is significantly higher than anything the Ḥḥanafīs, the mālikīs Mālikīs or the Ššāfiʿīs prescribed.[123] To demonstrate that this prescription should not be seen as excessive, Ibn Qudāma recalls the story of an unnamed woman who, upon receiving ten thousand dirhams as *mutʿa* from Ḥasan b. ʿAlī, the Prophet's grandson, recites the following in her disappointment:

"*A meager compensation from a departing lover*."[124]

Ibn Qudāma also cites a saying attributed to Ibn ʿAbbās, according to which *mutʿa* should be a servant or failing that, a payment of alimony, or, failing even that, a suit of clothing.[125] This does not only support the Ḥanbalī opinion on the comparatively high value of *mutʿa*, it also confirms that it should be determined according to the husband's wealth, as alimony, too, depends on the husband's means.

According to the most common opinion among the four sunnī branches, the general commandment to provide divorced women with *mutʿa* as it is outlined in Qurʾān 2,241 is fulfilled by the payment of the dower, and therefore *mutʿa* is only incumbent where a dower is not, the specific case described in 2, 236. Ibn Ḥazm, on the other hand, takes note of the fact that verse 2, 241 was revealed later, and concludes that the earlier verse is abrogated and the commandment relating to a specific case contained therein is replaced by a general command to provide all repudiated women with *mutʿa* regardless of circumstance.[126] While the Ššāfiʿī al-Ǧuwaynī explained that *mutʿa* and dower serve different purposes and therefore receiving one has no effect on the obligation to pay the other, this makes Ibn Ḥazm the only classical jurist to prescribe *mutʿa* for all women, those repudiated before consummation and receiving a dower included.

His *tafsīr* of verse 2, 241 is unique in that in that the word *al-muttaqīn* (*for those who word off evil*) at the end of the verse is generally interpreted to signify that the provision of *mutʿa* is not an obligatory, but rather a voluntary virtuous deed that would fall into the category of commendable (*mustaḥabb* or *mandūb*) acts. This is not so according to Ibn Ḥazm. He argues that the term is no different from terms like "Muslims" or "believers" found elsewhere in the Qurʾān.[127] Women who initiated their own divorce through *ḫulʿ* are also entitled to it, but it is

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not incumbent if the marriage contract was dissolved through other means. If a husband is hesitant to pay, a court should force him to do so.[128]

Mutʿa's value is dependent on the husband's wealth. For the richest, it is a black slave or its equivalent in value according to the recipient's preference. A higher compensation is commendable but according to Ibn Ḥazm, no one, no matter how rich, can be compelled to pay more. For the common man and the poor, there's a lower limit equaling to thirty dirhams, as this is the lowest sum referenced by any of the ṣaḥāba.[129] Those facing financial difficulties are not required to pay right away, the sum is instead transformed into a loan. Those who can't afford more than their own daily sustenance, if even that, are expected to at least treat the repudiated wife to a meal as soon they are able.

Conclusions

Article 155 of the Jordanian personal status law prescribes a dower for all wives in a valid marriage contract, even where classical Ḥanafī doctrine would not. In the case of the *mufawwaḍa* (that is, women to whom classical Ḥanafī jurists awarded *mutʿa* as compensation in absence of a dower), article 46 b) sets the payable amount as one half of the fair dower. Therefore, the Ḥanafī concept of *mutʿa* – being a compensation for women not entitled to a dower – no longer serves a purpose in the Jordanian law. If compensation for arbitrary repudiation is to be interpreted as a practical application of *mutʿa* as contemporary scholarship on the subject suggests, it is not a straightforward adoption of the doctrine of a single maḏhab or scholar. However, individual elements of the law all correspond to the opinion of one or more schools of jurisprudence. The principle of the essential prohibitedness establishes that repudiations without a rational reason are not permitted, and following Ibn Taymiyya's suggestion, husbands can be compelled to recompense if they do so. This establishes that a compensation is obligatory in all cases where the repudiation took place without an acceptable reason. Similar to the Šāfiʿī opinion, wives are entitled to *mutʿa* if they were repudiated on the husband's initiative, although the law adds the further condition that the repudiation had to have happened without a rational reason. As with Ibn Ḥazm, wives are entitled to it even if the marriage hasn't been consummated, and reception of *mutʿa* does not interfere with their right to receive a dower. As with the Ḥanafīs and the Ḥanbalīs, the amount is dependent on the

[128] Abū Muḥammad ʿAlī b. Aḥmad b. Saʿīd b. Ḥazm al-Andalusī, *al-Muḥallā bi-l-Āṯār*. ʿAbd al-Ġaffār Sulaymān al-Bandārī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 2002, vol. X, 8.

[129] Abū Muḥammad ʿAlī b. Aḥmad b. Saʿīd b. Ḥazm al-Andalusī, *al-Muḥallā bi-l-Āṯār*. ʿAbd al-Ġaffār Sulaymān al-Bandārī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 2002, vol. X, 11.

husband's financial status. Similar to Ibn Ḥazm, impoverished husbands are granted the option to pay in instalments. Compared to the up to three years' worth of alimony awarded in Jordanian law, the single suit of clothing classical Ḥanafī jurists prescribed seems little more than token compensation. It instead is much closer to the the price of a slave Ibn Ḥazm deemed appropriate. Thus, compensation for arbitrary repudiation may be framed as a *talfīq* consisting of the opinions of multiple schools of jurisprudence and based upon the principle of the essential prohibitedness of repudiation formulated by Ibn Taymiyya.

Chapter four: Judicial separation and Ḫulʿ

Overview

The repudiation of classical Islamic law is a private act that a husband can perform unilaterally, without requiring the involvement of a judge. Even most modern personal status laws – and Jordanian family law is one of these – only demand the post-fact registration of a repudiation. Wives do not possess such a unilateral right. If a wife wishes to initiate the dissolution of her marriage, she has to rely on outside assistance. As the first option, she can attempt to secure a repudiation from her husband by way of *ḫulʿ*, by simply asking him to perform a repudiation, or by getting him to delegate the right of repudiation to her (this latter option can be stipulated in the marriage contract itself). All three of these methods however rely on securing the husband's consent at some point. If the husband is unwilling to repudiate her, a wife's other option is to turn to a court and secure a separation from a judge, this is what the Jordanian personal status law refers to as judicial separation (*tafrīq qaḍāʾī*).

Judicial separation is actually two distinct legal mechanisms by which a marriage is dissolved. *Taṭlīq* is a repudiation that the court pronounces in the husband's stead, and as such, it carries the same consequences as if the husband had uttered it. *Fasaḫ* is the annulment of the marriage contract. Depending on the outcome of the separation procedure, the wife might retain her claim to her bride price and maintenance for the waiting period, or the separation might stipulate that all financial claims between the spouses are considered settled. In fringe cases, it might also be possible that, similar to a ḫulʿ, a husband may be awarded more compensation than what he had spent on the wife's bride price, but most classical jurists prohibited or at least strongly condemned such ~~conduct~~practices. In short, *fasaḫ* has the potential to put the wife in financial disadvantage, while *taṭlīq* does not. Conversely, a *fasaḫ* might be more desirable for a wife who initiated separation, as it is always irrevocable, while a *taṭlīq* might be revocable or irrevocable. Of the separation methods offered by Jordanian law, separation due to nonprovision of alimony, separation due to marital discord and separation due to īlāʾ and ẓihār count as *taṭlīq*. Redeemed separation, separation due to absence, imprisonment, ailments, non-payment of the dower, apostasy and separation from a missing person all count as *fasaḫ*.

While the other schools permit it, *taṭlīq* is completely absent from Ḥanafī jurisprudence. This may be explained by the Ḥanafī view that construed repudiation as a vow that a person takes

upon himself.[1] Coercive measures inflicted upon the husband with the intention to get him to repudiate were thought to be permitted by various Ḥanafīs, but ultimately, the repudiation always remains the husband's in the school's view.

Judicial separation requires a valid ground upon which the marriage is dissolved. What constitutes a valid reason for separation was another point of difference between the sunnī schools. In this regard, Ḥanafī fiqh is again by far the most restrictive, they are generally reluctant to pronounce a judicial separation after the consummation of the marriage. According to the school's doctrine, irrevocable separation of a married couple introduces permanent harm to the rights of the spouses in order to remove temporary harm afflicting the rights of one of them, which they held is against the Islamic principle on the prohibition of averting a minor harm by causing a greater one.

As it might be anticipated from the above, the forms of judicial separation permitted in Jordanian family law will show similarity to the doctrines of other schools. Although it is based on mutual agreement of the spouses, ẖulʿ (called consensual ẖulʿ in the Jordanian law) will be discussed in this chapter as well, as its compensatory nature served as a template for other methods of separation.

Consensual ẖulʿ

102. Consensual ẖulʿ is the husband's repudiation of his wife in exchange for mutually agreed upon compensation, concluded by uttering the phrases ẖulʿ or ṭalāq or mubāraʾa or terms towards this meaning.

103. a) For the ẖulʿ to be valid, the husband must be competent to pronounce repudiation, the woman must be marriable to him and she must have the capacity to be mandated to provide compensation according to the provisions of this law.

b) If the compensation in ẖulʿ is invalid, the repudiation is revocable unless it completes three repudiations or if it occurs before consummation, in which cases it becomes irrevocable.

104. Both parties may retract their acceptance of the separation before the other party accepts.

[1] See Note 92 in the chapter on repudiation.

105. Everything that is legally enforceable can be compensation in ẖulʿ.

106. If ẖulʿ is performed in return for property other than the bride price, that exchange becomes obligatory and both parties are cleared of all obligations related to bride price and spousal maintenance.

107. If nothing was specified at the time of the ẖulʿ, both of them are cleared of all obligations towards the other that are related to bride price and spousal maintenance.

108. If the performing parties expressly declined compensation at the time of the ẖulʿ, the ẖulʿ has the effect of a mere repudiation, and it causes a revocable repudiation unless it completes a triple repudiation. If it occurs before coitus has taken place, it is irrevocable.

109. Maintenance during the waiting period is not forfeit unless this is expressly confirmed in the ẖulʿ.

110. a)– If the ẖulʿ stipulates that the mother must foster the child, take custody of him without compensation or provide maintenance for him for a determined duration and she fails to do so, the husband may demand the equivalent of child's maintenance, the costs of his fostering or his custody for the remaining time. If the child dies, the father may not demand the remaining costs from the time of the child's death.
b) If the mother separated by ẖulʿ is facing financial difficulties at the time of the ẖulʿ or after, the father is forced to provide maintenance to the child, and the mother will owe these costs as a debt to him.

111. If the man stipulates during ẖulʿ that he takes his child with him for the duration of the custody period, the ẖulʿ is valid and the condition is void. Only in these cases may the woman taking custody of the child demand the child's maintenance costs.

112. Child maintenance payable by the father and the custodian's debt to the father do not offset each other.

113. Ḫulʿ and ṭalāq for money cause irrevocable repudiation.

Ḫulʿ is a repudiation that the husband pronounces on the wife's request, in exchange for a mutually agreed upon compensation (*ʿiwaḍ*).[2] The concept of ḫulʿ changed very little since the establishment of the four sunnī schools, and the opinions of the schools generally do not contradict each other.[3] The compensation can take any form Muslims are permitted to trade in. As a rule ~~of thumb~~, whatever may be offered as a dower may also be offered as compensation for ḫulʿ.[4] Unless otherwise specified, ḫulʿ frees both parties of all pre-existing financial obligations toward the other.

The amount of the compensation is subject to mutual agreement, there is no determined lower or upper limit. Jurists nonetheless discouraged the husband from demanding more than he had paid as dower. Ḥanafīs in addition recommended that if the wife requested the ḫulʿ due to the husband's failure to see to his duties toward her, ~~they~~ he should repudiate her without asking compensation.[5] If the spouses both accept after agreeing on a compensation, the ḫulʿ becomes an irrevocable repudiation. If they failed to agree on a compensation or if the agreed upon compensation is void, ḫulʿ only causes a single, revocable repudiation.

As ḫulʿ is understood to be a repudiation and not an annulment, it can be performed without the presence of a judge.[6] The spouse that offered the possibility of ḫulʿ may retract it before the other accepts.[7]

In the original opinion of the Ḥanafī school, if the ḫulʿ was performed in exchange for compensation, it extinguishes all rights and claims attained through the marriage contract against the other spouse.[8] A few jurists mention that according to Muḥammad al-Šaybānī, only the rights that the spouses specifically name and agree on are voided, as contracts of exchange

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[2] I elected not to translate the term ḫulʿ, as it does not have an easily recognizable parallel in English legal terminology, and its purported Qurʾānic etimology, which likens divorce to the stripping of clothes, does not lend itself to a convenient translation.

[3] Early jurists debated the applicability of ḫulʿ and the permissability of accepting compensation. Eventually, the position that ḫulʿ is permissible in all cases if the spouses agree to it and that any amount of compensation is permissible with mutual consent became the accepted doctrine of the four sunnī schools. For details on early objections against ḫulʿ, see Bidāyat al-Muǧtahid šāmila III, 89-90.

[4] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 163.

[5] id.

[6] Ḫalīl b. Isḥāq al-Ǧundī, *Muḫtaṣar al-ʿallāma al-Ḫalīl*. Cairo, Dār al-Ḥadīṯ 2005, 112.

[7] Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlāʾ-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 442

[8] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 164.

in general ought to be limited to the items named within the contract, but this is not recommended in practice.[9] Later Ḥanafīs (the earliest being Faḫr al-Dīn al-Zaylaʿī, d. 1342) thought that the husband is still obligated to provide alimony for the waiting period.[10] This does not necessarily contradict the earlier Ḥanafī opinion, as the obligation to provide alimony for the waiting period is brought about by the repudiation, not the marriage itself. To this, al-Timirtāšī (d. 1595) added that alimony for the waiting period may be waived if the spouses agree on it, which is the position Article 109. of the Jordanian law settled on.[11] In the doctrine of the other schools, the wife is only entitled to alimony after a ḫulʿ if she is pregnant, similar to a pregnant disobedient wife, who receives alimony from the husband on account of the fetus that the father is obligated to provide for.[12] Jordanian law otherwise conforms to the rules of ḫulʿ laid down in the earliest Ḥanafī works.

The currently applicable articles were introduced as part of Temporary Law number 36 of the Year 2010, where ḫulʿ is called consensual ḫulʿ (*ḫul riḍāʾī*) or repudiation for money (*ṭalāq ʿalā māl*). Prior to the 2010 law, ḫulʿ was governed by the functionally identical articles 102-111. of the 1976 personal status law.– Law 82 o~~i~~f the Year 2001 amended the 1976 law on *ḫulʿ* by introducing "judicial ḫulʿ" (*ḫulʿ qaḍāʾī*). The name "consensual ḫulʿ" was intended to distinguish the two methods of separation. Discussion of judicial ḫulʿ and the reasons behind its renaming ~~to~~ will follow in the section on redeemed separation.

Redeemed separation (Tafrīq li-l-iftidāʾ)

Relevant articles:

114.a) If the wife requests separation before coitus has taken place and deposited what she received from her bride price, and what gifts and maintenance she received from the

[9] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 774.

[10] Faḫr al-Dīn ʿUṯmān b. ʿAlī al-Zaylaʿī, Tabyīn al-ḥaqāʾiq šarḥ Kanz al-Daqāʾiq. Cairo, Maktabat al-Kubrā al-Amīriyya 1895, vol. II, 272.

[11] Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlāʾ-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār*, Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 453.

[12] Abū ʿAbd Allāh Muḥammad ~~n~~b. al-Ḥasan al-Šaybānī, *al-Ḥuǧǧa ʿalā ahl al-Madīna*. al-Sayyid Mahdī Ḥasan al-Kīlānī al-Qādirī ed. Beirut, ʿĀlam al-Kutub 1982, II, 593;
cf. Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. X, 314;
Abū Zakariyyā Maḥmūd b. Šaraf al-Nawawī: *Rawḍat al-ṭālibīn*. Beirut, al-Maktab al-Islāmī 1991, vol. IX, 66.

husband towards the marriage and the husband refused them, the court will make a substantial effort to mediate between them. If they do not reconcile, two arbitrators will be appointed for thirty days to aid with the reconciliation effort, and if reconciliation was not achieved: -

1) The court will pronounce the annulment of the marriage contract between the spouses after the return of what the wife received from her bride price and as gifts, and what maintenance she received from the husband towards the marriage.

2) If there is dispute between the spouses regarding the amount ~~[value]~~ of the maintenance and the gifts, it falls on the arbitrators to determine the amount.

b) If the wife files a suit after coitus or cohabitation ~~[~~has taken place~~]~~, requesting separation from her husband, clearly stating that she despises life with him, that there is no way for the continuation of marital life between them, that she fears she may not be able to observe God's ordinances because of this stated disdain, that she redeems herself by surrendering all her rights as a wife, and that she has returned to her husband what she received as bride money, the court will attempt to mediate between the spouses. If it is unsuccessful, two arbitrators will be dispatched to aid with the reconciliation effort between them for a period that does not exceed thirty days. If they do not reconcile, the court will pronounce the annulment of the marriage contract between them.

Redeemed separation, in its consequences, is a ḫulʿ that is pronounced by a judge instead of the husband, based on fixed terms as determined by the law. It is only available to the wife, who will offer financial compensation in exchange for the termination of the marriage.

If such separation is requested before the marriage is consummated, the wife merely has to deposit the wealth she received from her husband to initiate the conciliation procedure. If it is requested after consummation, she has to take two additional steps. She is to leave a statement claiming that she has grown to resent life with her husband and that she fears her resentment will cause her to offend against God's commandments. Second, she must state that she waives all her spousal rights. In both cases, the separation is postponed for a period not exceeding thirty days, giving the opportunity to two appointed arbitrators to help the spouses reconcile if possible. The function of the arbitrators is purely advisory. Unless the wife withdraws her claim, the judge will pronounce the annulment of the marriage at the and of the conciliation process.

The name used for this type of separation in the Jordanian law (*iftidāʾ*) is derived from verse 229 of sūrat al-Baqara of the Qurʾān:

„*It is not lawful for you to take aught from what you have given [your wives], except that the two should fear that they would not uphold the limits set by God. So if you fear that they will not uphold the limits set by God, there is no blame upon the two in what she may give in ransom (taftadī).*"[13]

Of the four sunnī schools, only Mālikīs and some Ḥanbalīs permitted a judge to separate a couple through ḫulʿ on the wife's request.[14] The Mālikīs called this separation due to injury (*taṭlīq li-l-ḍarar*) and it required the wife to provide proof of having suffered harm from the husband.[15] Refusing to talk to or look at the wife, and hitting her painfully were considered adequate grounds, but taking on another wife, verbal disciplining and preventing her from partaking in activities outside the home were not.[16]

Just as the Jordanian law does, the Mālikīs prescribe a conciliation period led by two arbitrators. If the husband is found to be solely at fault, the wife is separated without compensation, while if the wife is found to be at fault to a degree, the separation will be a ḫulʿ, with compensation dependent of the suggestion of the arbitrators.[17] The key difference between the Jordanian redeemed separation and a Mālikī separation due to injury ending with a ḫulʿ, then, is that the Jordanian law does not demand the establishment of the fact of the injury.

As the Jordanian law does, Ḥanbalīs require the wife to state that she detests living with her husband. This requirement has already been present in the school's earliest compendium, al-Ḫiraqī's (d. 945).[18] In his commentary on al-Ḫiraqī's compendium titled al-Muġnī, Ibn Qudāma al-Maqdisī presents a prophetic tradition as the basis upon which ḫulʿ is permitted:

[13] Qurʾān 2, 229. Qurʾān 2,241. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 225.

[14] Ibn Rušd notes that according to the Ismāʿīlī Qāḍī al-Nuʿmān, *fadāʾ* or *ḫulʿ* was granted to women as something roughly equivalent to the right of repudiation that men possess. Just as repudiation was granted to men in case they grow to loathe their wives, so did Allah grant ḫulʿ for women, should the come loathe their husbands: Abū al-Walīd Muḥammad b. Aḥmad Ibn Rušd al-Qurṭubī, Bidāyat al-Muǧtahid wa nihāyat al-muqtaṣid, Cairo, Dār al-Ḥadīṯ 2004, vol. III, 90.

[15] Muḥammad ʿIlīš, *Šarḥ Minaḥ al-Ǧalīl ʿalā Muḫtaṣar al-ʿallāma al-Ḫalīl*. Beirut, Dār al-Fikr 1984, 111.

[16] Abū ʿAbd Allāh Muḥammad al-Ḫarašī, *Šarḥ al-Ḫarašī ʿāl Muḫtaṣar Ḫalīl*. Cairo, Maṭbaʿat Būlāq 1899 (8 vols). vol. IV, p. 9.

[17] Abū ʿAbd Allāh Muḥammad al-Ḫarašī, *Šarḥ al-Ḫarašī ʿāl Muḫtaṣar Ḫalīl*. Cairo, Maṭbaʿat Būlāq 1899 (8 vols). vol. IV, p. 9.

[18] Abū Qāsim ʿUmar al-Ḥusayn al-Ḫiraqī, *Muḫtaṣar al-Ḫiraqī*. ed. Muḥammad Zuhayr al-Šāwīš. Damascus, Dār al-Salām li-l-Ṭibāʿa wa al-Našr 1958, 151.

> "*The woman of Ṯābiṭ b. Qays came to the Prophet and said: O, Messenger of Allah, I find no fault in the religiosity or character of Ṯābit b. Qays, but I resent disbelief against Islam. The messenger of Allah said: Will you return his garden to him? She said: Yes. So the messenger of Allah said [to Ṯābiṭ]: Accept your garden, and repudiate her once!*"[19]

Based on the ḥadīṯ alone, the matter seems fairly straightforward: Ṯābit's wife petitions the Prophet for a judicial decision, who orders a repudiation in return for the dower. Later jurists did not seem to think so. Muḥammad ibn Ismāʿīl al-Ṣanʿānī (d. 1768) and Muḥammad al-Šawkānī both regarded the Prophet's command as mere counsel and not a binding judgment.[20] In the subsequent parts of the *al-Muġnī* on ḫulʿ, Ibn Qudāma writes that ḫulʿ does not depend on the ḥākim's approval as it is the consensual termination of a contract similar to *iqāla*.[21] While he never explicitly states that the husband cannot be compelled to accept a wife's ḫulʿ, this casts some doubt on whether he thought *iftidāʾ* can be performed against the husband's intentions. It is worth noting, however, that Ibn Qudāma only uses the term *iftidāʾ* with regards to the separation described in the ḥadīṯ of Ṯābit's wife, in the rest of *al-Muġnī*, he refers to consensual separations consistently as *ḫulʿ*. [22]

If Ibn Qudāma did not think that a judge has the right to perform *iftidāʾ* at the wife's request, more tangible proof can be found that Ibn Taymiyya (d. 1328) did so. Ibn Mufliḥ (d. 1362), one of Ibn Taymiyya's (d. 1328) pupils and a renowned jurist in his own right, reported that Ibn Taymiyya offered conflicting opinions regarding the legal status (*ḥukm*) of accepting the wife's request for ḫulʿ, considering it obligatory (*wāǧib*) at times and merely recommended (*mustaḥabb*) on other occasions.[23] ʿAlāʾ al-Dīn al-Mardāwī (d. 1480), who aimed to establish the preponderant opinion of the Ḥanbalī school on contentious issues based on some 150 written works, also attests to Ibn Taymiyya's indecision on the matter. However, he also notes that judges of the distinguished Syrian al-Maqdisī dynasty also consider acceptance of a ḫulʿ

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[19] Abū ʿAbd Allāh Muḥammad b. Ismāʿīl al-Buḫārī, *Ṣaḥīḥ al-Buḫārī*. Muṣtafā Dīb al-Baġā ed. Damascus, Dār Ibn Kaṯīr 1993. (6 vols) **[Sh],** vol. V, 2021.

[20] Muḥammad b. Ismāʿīl al-Ṣanʿānī, *Subul al-salām šarḥ Bulūġ al-Marām*. ed. Nāṣir al-Dīn al-Albānī. Ryad, Maktabat al-Maʿārif, 2006 (4 vols.) vol. IV, p.454.
cf. al-Bakrī, Wāṣif ʿ Abd al-Wahhāb. "Taʿdīlāt Qānūn Al-Aḥwāl al-Šāḫṣiyya Allatī Tammat Bi-Mūǧib al-Qānūn Raqm 82/2001." http://www.mizangroup.jo/, n.d. , 24.

[21] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. X, 268-269.

[22] id.

[23] Sāmī b. Muḥammad b. Ǧād Allāh, *al-Iḫtiyārāt al-fiqhiyya li-šayḫ al-islām Ibn Taymiyya laday talāmīḏihi*. Beirut, Dār Ibn Ḥazm 2019 (II vols). vol. II, 758.

obligatory for the husband.[24] Al-Mardāwī no doubt refers to the family of Ibn Qudāma al-Maqdisī, who, after Ibn Qudāma's migration to the city from Jerusalem, served as jurists in Damascus at least until the early 1500s.[25]

More recently, Muḥammad b. Ṣāliḥ al-ʿUṯaymīn (d. 2001) weighed in on the relevance of the ḥadīṯ of Ṯābit's wife. He argues that commands of the Prophets are to be interpreted as obligations first and foremost, and since the Prophet commanded the repudiation in the ḥadīṯ, as long as a wife offers her dower as compensation as Ṯābit's wife did, the husband is obligated to accept. Ibn al-ʿUṯaymīn stated this position in his supercommentary on the *Zād al-mustaqniʿ* written by al-Ḥağğāwī *al-Maqdisī* (d. 1560), which itself is a commentary on Ibn Qudāma al-Maqdisī's al-Muġnī.[26]

As for the wife's obligation to return gifts she received if she requests redeemed separation before consumment, the Jordanian law mirrors the Ḥanabalī position here as well. Here, al-Mardāwī elucidates that if a gift was presented to the wife under the assumption that the marriage will last, the husband has the right to reclaim them during a separation.[27]

Redeemed separation was originally introduced in 2001 under the name *judicial ḫulʿ (ḫulʿ qaḍāʾī)* as part of an amendment to the 1976 personal status law, along with reforms to the law on marriage age, polygamous marriages, dower, and alimony. The amendment was passed as a royal decree while the Parliament was suspended.[28] The changes introduced to ḫulʿ were met with harsh public criticism, not the least because it was thought that performing ḫulʿ without the husband's consent goes against the established principles of Islamic law. As a solution, the 2010 temporary law, which was drafted entirely by the Dāʾirat Qāḍī al-Quḍā, retained judicial ḫulʿ but renamed it to *tafrīq li-l-iftidāʾ* (redeemed separation). [29]

At the same time, the office of the Qāḍī al-Quḍāṯ introduced several changes two the law. In a separation before consummation, Article 6, paragraph b) of the 2001 amendment entitled the husband to choose between retaking the dower and alimony as they were provided to the wife,

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[24] ʿAlāʾ al-Dīn Abū al-Ḥasan ʿAlī b. Sulaymān b. Aḥmad al-Mardāwī, *al-Inṣāf fī maʿrifat al-rāğiḥ min al-ḫilāf*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Hağar li-l-Tibāʿa wa al-našr 1995 (30 vols). vol. XXII, 6-7.

[25] For a late Damascene scion of Ibn Qudāma, see Ibn al-Mibrad (d. 1503), who himself bore the kunya al-Maqdisī: Yūsuf b. al-Ḥasan b. ʿAbd al-Hādī al-Dimašqī al-Ṣālihī, *al-Ǧawhar al-munaḍḍad fī ṭabaqāt mutaʾaḫḫirī aṣḥāb Aḥmad*. ʿAbd al-Raḥmān b. Sulaymān al-ʿUṯaymīn ed. al-Riyadh, Maktabat al-ʿUbaykān 2000. p. 12.

[26] Muḥammad Ibn Ṣāliḥ al-ʿUṯaymīn, *al-Šarḥ al-mumtiʿ ʿalā Zād al-mustaqni*. Al Riyadh, Dār Ibn al-Ǧawzī 2007 (15 vols). vol. XII, p. 453-454.

[27] ʿAlāʾ al-Dīn Abū al-Ḥasan ʿAlī b. Sulaymān b. Aḥmad al-Mardāwī, *al-Inṣāf fī maʿrifat al-rāğiḥ min al-ḫilāf*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Hağar li-l-Tibāʿa wa al-našr 1995 (30 vols). vol. XXI, 249.

[28] Dörthe Engelcke, *Reforming Family Law: Social and Political Change in Jordan and Morocco,* Cambridge University Press, 2019, 117.

[29] Dörthe Engelcke, *Reforming Family Law: Social and Political Change in Jordan and Morocco,* Cambridge University Press, 2019 165.

or demand their value in money.[30] The 2010 law did away with the husband's right to choose, making a redeemed separation less burdensome to the wife financially. Gifts were added to the category of valuables the husband has the right to reclaim, but only if the court finds that they were given in exchange for the marriage.

The 2001 amendment defined judicial ḫulʿ after consummation of the marriage as an irrevocable *taṭlīq*, even though the amendment demanded that the wife surrenders all her marital rights (including, for example, the right to alimony during the waiting period, which a woman separated by *taṭlīq* might retain).[31] To better reflect the intended effect of the law, the type of separation achieved was changed to annulment.

Even though the 2001 amendment came from outside the Dāʾirat Qāḍī al-Quḍāt, the text of the article is not detached from classical Islamic legal tradition. As it was demonstrated, a minority of Ḥanbalī jurists native to the Levantine region held that the acceptance of an offer of ḫulʿ is obligatory for the husband. References to the wife's resentment of life with his husband and her fear of offending against religious commandments, which the 2001 article already incorporated, are also reminiscent of the Ḥanbalī definition of the conditions that permit the performance of ḫulʿ.[32] Including gifts im the list of items the husband may reclaim in return for the separation also conforms to the Hanbalī opinion.

Separation due to marital discord (tafrīq li-l-šiqāq wa al-nizāʿ)

Relevant articles:

126. Either of the spouses may request separation due to marital conflict, if he or she claims to have suffered injury in his or her rights from the other party that makes it difficult to continue marital life. This injury may be directly perceptible (*ḥissī*) such as abuse by words or actions, or moral (*maʿnawī*). Moral injury is any disgraceful or improper behaviour or manner of conduct that offends against good morals that inflicts

[30] Wāṣif ʿ Abd al-Wahhāb al-Bakrī, "Taʿdīlāt Qānūn Al-Aḥwāl al-Šāḫṣiyya Allatī Tammat bi-Mūǧib al-qānūn raqm 82/2001." http://www.mizangroup.jo/, n.d., 16.

[31] Article 6, Paragraph c) of the Law Number 82 of the Year 2001.

[32] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. X, 259. Another definition of ḫulʿ which makes references to the wife's resentment and her fear of offending against God's commandment can be found in Wahbat b. Muṣtafā al-Zuḥaylī, *al-Fiqh al-islāmī wa adillatuhu*. Damascus, Dār al-Fikr 2014 (10 vols). Vol. IX, 7009.

any kind of harm against the other party. Likewise, if the other party persists is violating the spousal rights and duties detailed in part three, chapter three of this law as follows:

a) **If the request for separation came from the wife's half and the judge has confirmed her claims, the court will make an effort to reconciliate between them. If reconciliation was not successful, the judge will warn the husband to mend his ways and postpone the proceedings for a period of no less than one month. If reconciliation was not achieved and the wife maintains her claim, the judge forwards the case to two arbitrators.**
b) **If the claimant was the husband and the presence of a marital conflict has been established, the court will make an effort to reconciliate between them. If reconciliation was not successful. the judge will postpone the proceedings for a period of no less than one month in the hopes of reconciliation. If reconciliation was not achieved after the conclusion of that period and the husband maintains his claim, the judge forwards the case to two arbitrators.**
c) **The two arbitrators must be fair and be capable of managing the reconciliation. One of them must be from the wife's family and the other from the husband's if possible. If this proves difficult to arrange, the judge will appoint two experienced and fair persons who are capable of managing the reconciliation.**
d) **The two arbitrators will seek out the causes of the conflict between the spouses or with any other person the arbitrators feel worth investigating. They must record their findings in a signed report. If they see the're a satisfying way to reconcile, they must acknowledge it and record it in the report submitted to the court.**
e) **If the arbitrators fail to achieve reconciliation and find that the wife is at fault entirely, they will decide on a separation for compensation between them. The husband receives a compensation that they deem sufficient, on the condition that it does not exceed the value of the dower and its supplements. And if the abuse is the husband's fault entirely, they will decide on an irrevocable repudiation betweem them with the condition that the wife may demand the maintenance for her waiting period and whatever part of her bride money and its supplements that she hasn't yet taken possession of.**
f) **If the arbitrators find that both spouses are at fault, they will decide on a separation between the spouses, dividing up the dower based on the proportion of the abuse. ~~[in ğahila al-ḥāl]~~ If it is not possible to determine the proportions of the abuse, they will**

decide on a separation for compensation with a compensation they deem appraopriate for either of the spouses, on the condition that it does not exceed the dower and its supplements.

g) **If wife has been ordered to pay compensation and she was the one requesting the separation, she must deposit his payment before the decision of the arbitrators unless the husband consented to deferment of the payment. If the husband consented to the deferment, the arbitrators will decide its rate and the judge will rule accordingly. If the husband requested the separation and the arbitrators decided that the wife pays compensation, the judge will pronounce the separation and the compensation is set according to the arbitrators' decision.**

h) **If the arbitrators cannot agree, the judge will appoint others in their stead or appoint a third one who breaks the impasse. As a last resort, the majority's decision will be accepted.**

i) **The arbitrators must submit their report to the judge with the results they've concluded, and the judge must rule according to it if it conforms the provisions of this article.**

Originally introduced in the 1976 family law, Article 126 of the Jordanian personal status law permits either spouse to request separation due to marital discord (*šiqāq wa nizāʿ*).[33] The separation achieved in this way is an irrevocable *taṭlīq* in all outcomes.

formázott: Betűtípus: Dőlt

Separation due to discord is decided by the two arbitrators, but is pronounced by the judge. The appointment of arbitrators in case of marital discord is a Qurʾānic command:

> „*And if you fear a breach between the two, then appoint an arbiter from his people and an arbiter from her people. If they desire reconciliation, God will bring about agreement between them. Truly God is Knowing, Aware.*"[34]

As can be seen, the Qurʾān does not offer explicit instructions for the case when the arbitrators fail to help the spouses to reconcile. This could, of course, be for the reason that the arbitrators

[33] Art. 132. of the 1976 Personal Status Law.

[34] Qurʾān 4, 35. Qurʾān 2,241. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 381.

possess no mandate beyond attempting to mediate between the spouses, and this is all the Qurʾānic verse is meant to convey.

Those who opined that the title of arbiter imparts an executive function thought that the arbiters can, with unanimous decision, end the marriage between the spouses if they see no way for the couple to continue a harmonious marital life. Since this sort of separation comes in consequence of misconduct by at least one of the spouses, they also held that the arbiters are authorized to uncover the causes of the discord and prescribe a compensation to be paid by one spouse to the other.

The Ḥanafīs seemed to favor the former position. Mentions of the Qurʾānic verse in the school's literature is sparse, indicating that they did not attribute much legal significance to it.

One possible function that arbitrators might fulfill according to the schools's doctrine is described by ʿAlāʾ al-Dīn al-Kāsānī (d. 1191), but this is unrelated to separation. If the disobedient wife (nāšiza) refuses to mend her ways despite the husband's efforts to discipline her through the methods permitted by the Qurʾān, he recommends assigning arbitrators in order to mediate between the spouses.[35] The opinion apparently originates from Abū Bakr al-Ǧaṣṣāṣ al-Rāzī's exegesis on verse 4,35.

The Egyptian Kamāl ibn Humām (d. 1457) presents the school's position on separation via arbitrators in his commentary on al-Marġīnānī's *al-Hidāya* titled *Fatḥ al-qadīr*. According to him, without explicit authorization from the spouses to perform a repudiation, the arbitrators have no mandate to separate the ~~spouses~~m or to compel them to pay a compensation. He further adds that even the *ḥākim* (as the possessor of executive power) possesses no right to do this, so even if the arbiters' mandate were to come from him, they had no right to perform a separation.[36] He seems to only mention this in response to the Mālikī position he is aware of, which holds that once appointed, the arbiters may decide on a~~f~~ separation without a specific authorization. Even in works as late as Muḥammad Qadrī bāšā's *al-Aḥkām al-šarʿiyya*, the possibility of separation via arbiters does not come up.

Šāfiʿīs thought that ~~the arbitrator~~arbitrators functions identically to an authorized representative (*wakīl*), meaning that they cannot perform any legal transaction without specific authorization from the party they represent. Short of an authorization, their function is limited to counseling.[37]

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[35] ʿAlāʾ al-Dīn al-Kāsānī: Badāʾiʿ al-Ṣanāʾiʿ fī tartīb al-šarāʾiʿ. ed. ʿAlī Muḥammad Muʿawwaḍ., ʿĀdil Aḥmad ʿAbd al-Mawǧūd eds. Beirut, Dār al-Kutub al-ʿIlmiyya 2003. vol. III. p. 614.

[36] Muḥammad b. ʿAbd al-Wāḥid al-Sīwāsī al-Iskandarī Kamāl al-Dīn b. Humām, *Šarḥ Fatḥ al-qadīr ʿalā al-Hidāya šarḥ Bidāyat al-Mubtadī.* ed. ʿAbd al-Razzāq Ġālib al-Mahdī. Beirut, Dār al-Kutub al-ʿIlmiyya 2003, vol. IV, p. 244.

[37] Abū Zakariyyā Maḥmūd b. Šaraf al-Nawawī: *Rawḍat al-ṭālibīn*. Beirut, al-Maktab al-Islāmī, 1991. p. vol. 7. p. 371.

The Ḥanbalī al-Ḫiraqī similarly thought that arbitrators may only come to a binding decision regarding the separation or reunification of the couple with their authorization:

> *"If enmity arises between the spouses and it is feared that this will lead them into disobedience, the sovereign will send a trustworthy arbitrator from his family and one from her family with the consent of the spouses and their authorization [tawkīl] so that they can reunite, or if they so see fit, separate them, and whichever way they decide is obligatory."*[38]

The prevailing Ḥanbalī position on arbitrators was challenged by Ibn Qudāma al-Maqdisī, who argued in detail in favour of the arbitrators' right to pronounce a separation in his legal compendium titled al-Muġnī. He mentions that two, conflicting opinions are attributed to Aḥmad b. Ḥanbal regarding the function of the arbitrators. According to the first one, similar to the opinion opinion the Šāfiʿī and the Ḥanafī maḏhab adopted, the arbitrators are authorized representatives. As Ibn Qudāma argues, this presents harm to the rights of the spouses, as it is possible for a person to be unable to appoint a wakīl, such as in the case of the insane. If one of the spouses were to become insane during the arbitration process, his or her appointment would also become invalid. In these cases, the couple would be barred from reaching a resolution through arbitrators, even though a Qurʾānic command to that effect exists.

According to the second opinion Ibn Qudāma attributes to Ibn Ḥanbal, the arbitrator is a *ḥākim* (judge) possessing executive power. They may decide to keep the couple together or to separate them, they may prescribe a compensation if they deem it necessary, and, once appointed, they do not need the couple's authorization to do so.[39] According to proponents of this second view, the „*if they wish for peace*" phrase in al-Nisāʾ, 35 (see the quote above) refers to the arbitrators, not the spouses. This is not a creative re-interpretation of the Qurʾān by late jurists. At the very least, Abū Ǧaʿfar al-Ṭabarī (d. 923) on his part supported this reading in *Ǧāmiʿ al-bayān*, his seminal tafsīr work.[40]

Of relevance are the conditions that the arbitrators have to fulfill in order to be eligible. Jurists who demanded that the arbitrators meet certain qualifications – including al-Šāfiʿī – thought

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[38] Abū Qāsim ʿUmar al-Ḥusayn al-Ḫiraqī, *Muḫtaṣar al-Ḫiraqī*. ed. Muḥammad Zuhayr al-Šāwīš. Damascus, Dār al-Salām li-l-Ṭibāʿa wa al-Našr 1958, 150.

[39] Ibn Qudāma al-Maqdisī: al-Muġnī. ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī. Al-Riyadh, Dār ʿĀlam al-Kutub, , 1997. vol. X, 264.

[40] Abū Ǧaʿfar al-Ṭabarī: Tafsīr al-Ṭabarī . ed. Baššār ʿAwwād Maʿrūf. Beirut, Mūʾassasat al-Risāla, 1994. vol. 2. p. 457-458.

that the arbitrators need to be freemen. Ibn Qudāma points out that if the arbitrators were mere authorized representatives, this condition would be unnecessary, as slaves can – and indeed, often did – work as their master's representatives, in cases as simple as selling or purchasing wares at a market.[41] Needless to say, Ibn Qudāma held the second opinion attributed to Ibn Ḥanbal to be correct.

Breakdown of the possible outcomes of the arbitrators' decision can be found in Mālikī manuals. Similar to paragraphs e-f) of the law, Abū al-Ḥasan al-Laḫmī (d. 1085) considers it most appropriate to allow the wife to retain all the rights acquired through a repudiation if the husband is found to be at fault. If the separation if the wife's fault, the husband may be awarded up to the entire dower as compensation. Al-Laḫmī mentions a minority opinion according to which the compensation may exceed the value of the entire dower. If the arbitrators find that both spouses are at fault, the dower is divided between them, either into halves or proportionally to the injury suffered.[42]

The 2010 temporary law introduces several revisions to the original as 1976 text of the article on separation due to discord. These revisions were preserved in the 2019 ratification.

Article 126 broadens the definition of harm, which the 1976 law defined as harm caused either by words or actions that makes it impossible to continue marital life. In addition to verbal and physical abuse, the 2010 introduces the concept of moral harm and adds that neglecting spousal duties and infringing on the other spouse's spousal rights also constitutes valid grounds upon which a separation may be requested.

Paragraph c) of Article 126. permits women to act as arbitrators, whereas the 1976 original only permitted men to be appointed. Not all classical fiqh works stipulate qualifications for marriage arbitrators, but those that do tend to insist that they be men. The Mālikī Abū al-Ḥasan al-Laḫmī (d. 1085) wrote that a man (*raǧul*) should be appointed from the wife's and the husband's family each.[43] However, in the chapter on *adab al-qāḍī* (court procedures and rules of conduct for dudges) of his *al-Tabṣira*, he notes that a minority of Mālikīs permitted female arbitrators.[44] The Šāfiʿī al-Māwardī more explicitly stipulated that women cannot act as arbitrators, only a

[41] Ibn Qudāma al-Maqdisī: al-Muġnī. ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī. Al-Riyadh, Dār ʿĀlam al-Kutub, , 1997. vol. 10. p. 265.

[42] Abū al-Ḥasan ʿAlī b. Muḥammad al-Laḫmī, *al-Tabṣira*. Aḥmad ʿAbd al-Karīm Naǧīb ed. Doha, Wizārat al-awqāf wa al-šuʾūn al-islāmiyya 2011, vol. VI, 2592.

[43] Abū al-Ḥasan ʿAlī b. Muḥammad al-Laḫmī, *al-Tabṣira*. Aḥmad ʿAbd al-Karīm Naǧīb ed. Doha, Wizārat al-awqāf wa al-šuʾūn al-islāmiyya 2011. p. 2589.

[44] Abū al-Ḥasan ʿAlī b. Muḥammad al-Laḫmī, *al-Tabṣira*. Aḥmad ʿAbd al-Karīm Naǧīb ed. Doha, Wizārat al-awqāf wa al-šuʾūn al-islāmiyya 2011. p. 5341.

free, just man may be appointed.[45] Ibn Qudāma similarly thought that women are not suited to be appointed as arbitrators. [46] Marital discord isn't the only area of Islamic law where arbitrators may be employed. As such, even though Ḥanafīs did not permit arbitrators to rule in cases related to marital discord, they did formulate rules regarding arbitration, and their rules tend to be less exclusionary than those of the other *maḏhabs*. Ḥanafīs permit women to sit as judges in all cases not involving *ḥadd* or *qiṣāṣ*. [47] *A fortiori*, arbitration by women was also permitted. According to the 19th century Ibn ʿĀbidīn, the school's majority position allows the appointment of women and persons not meeting the requirements of righteousness (*ʿadāla*). Referring to an earlier opinion by Ibn Nuğaym, he rejects the latter, but finds the former not only permissible but desirable.[48] The 2010 Jordanian introduction of female arbitrators, then, is one of the rare cases where a return to Ḥanafī practice led to a more permissive law.

Classical jurists generally agreed that if suitable candidates are not found among the families of the spouses, it is up to a judge to appoint persons of appropriate character and experience from outside the family as arbitrators.[49] Article 126. c) thus presents no deviation from classical jurisprudence in this regard.

The 1917 Ottoman family law already incorporated a method of separation via arbitrators, although this was only available to the wife after her petition for a Mālikī-style *taṭlīq li-l-ḍarar* was rejected. Once her initial claim was rejected and the court's attempt to reconcile the spouses failed, the wife had to petition the court again. Then the court would again attempt to establish the fact of the injury, and only dispatch arbitrators if that attempt failed.

Thate article was possibly fashioned after the opinion of the Mālikī ʿAlī b. ʿAbd al-Salām al-Tasūlī (d. 1842), who similarly demanded that the wife's petition and the inquest into the her claims be repeated before the case if forwarded to the two arbitrators.[50] Another similarity between the Ottoman law and al-Tasūlī's opinion is that both made separation via arbitrators

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[45] Abū al-Ḥasan ʿAlī b. Muḥammad b. Ḥabīb al-Māwardī al-Baṣrī, *al-Ḥāwī al-kabīr fī fiqh maḏhab al-imām al-Šāfiʿī raḍiya Allāhu ʿanhu wa huwa šarḥ Muḫtaṣar al-Muzanī.* ʿAlī Muḥammad Muʿawwaḍ, ʿĀdil ʿAbd al-Mawǧūd eds. Beirut, Dār al-kutub al-ʿilmiyya 1994, vol. IX, 604.

[46] Ibn Qudāma al-Maqdisī: al-Muġnī. ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī. Al-Riyadh, Dār ʿĀlam al-Kutub, , 1997. vol. X, 265.

[47] Burhān al-Dīn al-Marġīnānī, *al-Hidāya fī šarḥ Bidāyat al-mubtadī.* Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d, vol. III, 106.

[48] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. V, 428.

[49] Abū al-Walīd Muḥammad b. Aḥmad Ibn Rušd al-Qurṭubī, Bidāyat al-Muǧtahid wa nihāyat al-muqtaṣid, Cairo, Dār al-Ḥadīṯ 2004, vol. III, 117.

[50] Abū al-Ḥasan ʿAlī b- ʿAbd al-Salām b. ʿAlī al-Tasūlī: al-Bahǧa fī šarḥ al-tuḥfa. Beirut, Dār al-Kutub al-ʿIlmiyya, 1998. (2 vols) Vol. I, 489.

dependent on the wife's petition. Such a limitation was not present in the works other jurists permitting separation via arbitrators reviewed in this chapter (Ibn Rušd, Ibn Qudāma and al-Laḫmī).

What the Jordanian law defines as a moral injury might not be considered injury according to classical jurisprudence. Instead, it is more reminiscent of Ibn Qudāma's opinion, who held that any conduct by one of the spouses that causes the other to fear that he or she might commit an act of disobedience is reason enough to initiate the arbitration.[51]

Admissibility of hearsay testimonies

Relevant articles:

127. a) In accordance with Paragraph a), article 126 of this law, the existence of a marital conflict and harm are established based on the testimony of two men or a man and two women, and a hearsay testimony based on the reputed family life of the spouses suffices.

b) A verdict pronouncing judicial separation due to marital conflict includes an irrevocable repudiation.

The 1976 family law made it the judge's responsibility to establish the fact of marital discord before appointing arbitrators.[52] Conventionally, this would require the claimant to present eye-witnesses. Bearing in mind the difficulty of presenting witnesses to the private life of a couple, article 127. a) of the 2010 law facilitated the establishment of the fact by admitting testimonies based on the reputed family life of the couple, meaning that the witnesses do not need to have witnessed marital discord personally. This is in line with the Mālikī majority opinion on proof of injury suffered within a marriage.[53] In his versification of Mālikī rulings, Ibn ʿĀṣim al-Andalusī (d. 1429.) considers some twenty-odd cases where hearsay testimony (*šahādat al-samāʿ*) is admissible, one of these is the cases of a spouse causing harm to the other (*ḍarar al-zawǧayn*).[54] A later commentary on Ibn ʿĀṣim's versification elaborates the Mālikī position,

formázott: Betűtípus: Dőlt

[51] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. X, 263.

[52] See Paragraphs a) and b) of article 132. of the 1976 law, or Paragraphs a) and b), article 126. of the 2010 law

[53] ʿUmar Sulaymān al-Ašqar, *al-Wāḍiḥ fī šarḥ qānūn al-aḥwāl al-šaḫṣiyya al-Urdunī*. Amman, Dār al-Nafāʾis 2015, 282.

[54] Abū Bakr b. Muḥammad b. Muḥammad b. Muḥammad b. ʿĀṣim al-Andalusī, *Tuḥfat al-ḥukkām fī maʿrifat al-ʿuqūd wa al-aḥkām*. ed. Muḥammad ʿAbd al-Salām Muḥammad. Cairo, Dār al-Āfāq, 2011. p. 27.

adding that if the husband caused the harm leading to the claim, she may be granted a separation, while if the wife is at fault, the husband may reclaim the bride money he has paid.[55]
The admission of hearsay testimony in Jordanian family courts is a fairly unique development. As recently as 2000 and 2001, the Egyptian Court of Cassation has ruled that hearsay testimony is not admissible in cases pertaining to repudiation and harm inflicted by one of the spouses upon the other.[56]

Separation due to ailments

49. If separation occurs on the wife's request because of an ailment or a medical condition present in the husband, or if the guardian requests separation because of the husband's unsuitability and this happens before consummation of the marriage or cohabitation, the entire dower is void.

128. If a woman is free from defects and her husband was unable to have coitus with her, she may consult a judge and demand separation between her and her husband if she has learned that he has a defect that prevents him from consummating their marriage, such as aphallia, impotence and anorchia. A woman's petition will not be heard if she has a defect that prevents coitus with her, such as vaginal atresia and outgrowths preventing penetration.

129. If the wife learned about her husband's defects that prevent him from having coitus with her before the signing of the marriage contract, or if she has expressly or implicitly ~~[tacitly]~~ accepted his husband's defects after the conclusion of the contract will lose her right to a judicial separation, except in the case of impotence. ~~[~~In cases of impotence,~~]~~ ~~I~~if she herself is free of defects, she will not lose her right for separation if she knew of it before the conclusion of the marriage contract.

[55] ʿAlī b- ʿAbd al-Salām b. ʿAlī al-Tasūlī, al-Bahğa fī šarḥ al-tuḥfa. Beirut, Dār al-Kutub al-ʿIlmiyya, 1998, vol. I. 218.
[56] Appeal number 509 of judicial year 65, dated June 2000. https://manshurat.org/node/33910 Accessed: 2022.09.23.
Appeal number 649 of judicial year 65, dated January 2001. https://manshurat.org/node/32595 Accessed: 2022.09.23.

Megváltozott a mezőkód

Megváltozott a mezőkód

130. If the wife consults a judge and demands separation because of the presence of a defect in the husband, he will be examined. If the nature of the ailment makes it impossible to have conjugal relations, the judge will separate them immediately. If it is possible to terminate it - such as in the case of impotence ~~[erectile dysfunction?]~~ – the husband is given one year from the day the wife was made available to him, or from the day of his recovery if his was ill at the time. If, during this period, one of the spouses goes ill in a way that prevents him from penetrating her during the year, or if the wife is absent, the time spent in this way does not count towards the oneyear period. However, days of the husband's absence and days of the wife's menstruation count toward this period. If the defect does not go away at the end of this period, or if the husband does not wish to repudiate and the wife persists in her demand, the judge will pronounce the separation between them. If, at the beginning or the end of the proceedings, he claims that he did in fact have sexual relations with her her, the claim will be examined. If the woman is a divorcée, the husband's sworn oath will be accepted, if she is a maiden, her sworn oath will be accepted.

131. If it became apparent to the wife before or after consummation that the husband is afflicted with a defect or an illness that makes cohabitation with him impossible without causing harm, such as if leprosy, tuberculosis, syphilis, HIV or a similar defect or illness manifested itself, she may return to the judge and request separation. The judge will consider her request after consulting relevant experts. If it appears more likely that the husband's condition is beyond recovery, he will separate the husband and the wife immediately. If it appears more likely that the husband may recover or that his condition will go away on its own, the separation is delayed by one year. If the condition does not go away during this period and the husband does not wish to repudiate and the wife persists in her demand, the judge will pronounce the separation between them. However, ailments such as blindness and physical disability in the husband do not necessitate separation.

132. The husband may request the annulment of the marriage contract if such a sexual defect was found in his wife that prevents sexual relations with her, such as vaginal atresia, vaginal outgrowths that prevent penetration, or an illness that is so repugnant that it makes cohabitation with her impossible without causing harm, on the condition that the husband did not know about said condition before the conclusion of the contract and did not expressly or implicitly agree to it.

133. Petitions made on the ground of defects that afflict the wife after the husband has had coitus with her will not be heard.

134. Whether a defect prevents coitus is established by the report of a specialized doctor, supported by his testimony.

135. If the husband ~~goes~~ becomes insane after the conclusion of the marriage contract and the wife requests separation from a judge, if there's a medical report stating that his insanity is permanent, the judge will separate the spouses immediately. If there is a chance that ~~it~~ the condition will go away, the separation is postponed by one year. If the insanity does not go away in this period and the wife insists in her demand, the judge will pronounce the separation.

136. A childless wife capable of conception, and no older than forty-five years may petition the annulment of her marriage contract if a medical report supported by the doctor's testimony established the husband's sterility as well as the wife's ability to conceive, but only after five years have passed since the husband consummated their marriage with her.

137. If the parties renewed their marriage contract after they were separated due to defects or ailments, neither of them may demand their separation for the same reason again.

138. Separation due to ailments is considered an annulment.

With two exceptions, Jordanian personal status law on separation due to ailments follows the Ḥanafī position very closely. An ailment (*ʿīb*) is a detrimental physical or mental condition that affects the other spouse's rights within the marriage. Ailments are relevant to marital rights for one of two reasons. Either they prevent sexual intercourse, which the other spouse is entitled to, or they present a threat to his or her health.

The husband's inability to consummate the marriage is valid grounds for separation, but only if the wife herself does not suffer from an ailment that prevents her from having sexual relations. Only the wife herself can request the separation, her guardian or other relatives cannot. If the wife agreed to the marriage knowing about the husband's inability to have sexual intercourse, she may not petition for a separation later. ʿUnna (*the inability to achieve an erection*) is an

exception to this rule, as the wife might consent to the marriage in the hopes that the ailment would eventually go away.[57] If the husband's ailment is such that it makes it inconceivable that the he would ever be able to have sexual relations, such as if his penis or testes are missing, separation can be pronounced right away. If there are no outwardly visible signs to the cause of the husband's inability to have coitus, separation only occurs in a year after the wife's request, if they were unable to consummate their marriage in the meantime.[58]

Petitions regarding the husband's impotence are not heard after the marriage has been consummated. If husband and wife disagree whether the marriage has been consummated and the wife is a divorcée, the husband's claim will be accepted on his sworn oath. If the wife married as a maiden, early Ḥanafīs suggested that her virginity be examined.[59] Later Ḥanafīs considered the wife's sworn oath sufficient.[60]

Ailments that do not affect a husband's ability to have intercourse are only considered if they make cohabitation with him harmful for the wife, such as in the case of insanity and communicable diseases.[61] This, too, coincides with the classical Ḥanafī opinion, which did not consider blindness, the loss of limbs and other conditions reducing the husband's capacity for work as a valid basis for a petition. In these cases, the wife may request separation at any time during the marriage, as the ailments themselves may manifest at any time. If a spouse chooses to remain in the marriage despite having learned of an ailment in the other, he or she is not given the option to petition for a separation for the same reason again.[62]

According to Ḥanafī doctrine, the husband may not request a separation ~~request a separation~~ due to ailments.[63] Other schools, most notably Šāfiʿīs, held that if the wife is revealed to suffer from leprosy or deformations to her sexual organ that prevent penetration, the husband is entitled to separation, and he may demand back the dower before consummation.[64] The

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[57] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 495.

[58] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 800.

[59] id.

[60] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 500.

[61] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 802.

[62] id, 801.

[63] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ğaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 150.

[64] Abū ʿAbd Allāh Muḥammad b. Idrīs al-Šāfiʿī, *al-Umm maʿa Muḫtaṣar al-Muzanī.* Beirut, Dār al-Fikr 1990. (8 vols) Vol. V, p. 91. The specific ailments listed by the al-Umm are vaginal atresia (*rataq*), a purported condition

Jordanian law thus defers to Ḥanafī doctrine regarding petitions by the husband after the consummation of the marriage, and to the position of the other three schools prior to it.

The other significant departure from the preponderant Ḥanafī opinion regarding ailments is Article 136, which presents the wife with the right to petition for separation due to the husband's inability to conceive a child with her. The article was originally introduced in the 2010 temporary personal status law, the 1976 personal status law or the Ottoman family law had no such provisions. The original 2010 article permitted a wife no older than fifty years to petition for an annulment, this upper age limit was lowered to forty-five years before the 2019 ratification.

Classical jurisprudence is generally quite adamant on forbidding annulments due to infertility. It was generally accepted that separation due impotence is permissible due to deprivation from sexual intercourse, which both spouses possess a right to. However, due to the uncertainties involved, having children was not considered a right, and therefore not having children cannot be considered the kind of harm that would warrant a separation.

Muḥammad b. Idrīs Al-Šāfiʿī held that the husband's sterility cannot be used as grounds for separation even if he was to admit it. According to him, empirical observation shows that a man who is unable to sire children in his youth might still be able to do so as an older man, and as such, a man's infertility would not be established as a certain fact until the day of his death.

of abnormal vaginal outgrowths called *qarn*, and *ǧuḏām* and *baraṣ*, which modern scholarship tends to identify as different stages and severities of the same bacterial infection.

Aal-Māwardī similarly argued that infertility does not warrant a separation as there is a chance that the condition may pass.[65] Mālikīs rejected separation due to infertility mostly due to the difficulty of proving establishing which one of the spouses is unable to conceive. In additionDue to the arguments presented by above, Šāfiʿīs, they stressed that even if a man was to have multiple wives and has no children with any of them, his infertility still could still not be considered established.[66]

In the Ḥanbalī Ibn Qudāma al-Maqdisī's assertion, jurists unanimously agree that only conditions preventing coitus serve as a valid basis for a separation. The only exception he is familiar with is a saying attributed to Ḥasan b. ʿAlī, according to which if either spouse finds the other to be infertile, he or she is given the option for annulment. He notes that Aḥmad b. Ḥanbal was familiar with the saying, but argued that if it was genuine, it can only pertain to the beginnings of the marriage, as otherwise a menopausal wife's marriage contract could be annulled at any point. Regardless, Ibn Qudāma did not find an annulment justified.[67] Later Ḥanbalīs expressly forbid separations due to infertility, citing the previously quoted reason that the marriage contract entitles spouses to sexual contact, not to the creation of offspring.[68]

Against this backdrop, Ibn Taymiyya (d. 1328) declared that a wife has a right to children, which entitles to the righther to petition for separation if her husband appears to be infertile.[69] The modern Ḥanbalī Ibn ʿUṯaymīn held that as procreation is one of the three aims of the marriage (along with sexual enjoyment and providing household labor to each other), both spouses ought to granted a separation on the grounds of the infertility of the other. [70]

Separation due to nonprovision of alimony

Relevant articles

[65] Abū al-Ḥasan ʿAlī b. Muḥammad b. Ḥabīb al-Māwardī al-Baṣrī, *al-Ḥāwī al-kabīr fī fiqh maḏhab al-imām al-Šāfiʿī raḍiya Allāhu ʿanhu wa huwa šarḥ Muḫtaṣar al-Muzanī*. ʿAlī Muḥammad Muʿawwaḍ, ʿĀdil ʿAbd al-Mawǧūd eds. Beirut, Dār al-kutub al-ʿilmiyya 1994, vol. IX,341

[66] Aḥmad b. Aḥmad al-Muḫtār al-Ǧaknī al-Šinqīṭī, *Mawāhib al-Ǧalīl min adillat al-Ḫalīl*. ʿAbd Allāh Ibrāhīm al-Anṣārī ed. Qatar, Dār Iḥyāʾ al-Turāṯ al-Islāmī 1983, vol. III, 404.

[67] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. X, 59.

[68] Marʿī b. Yūsuf al-Kiramī al-Ḥanbalī, *Ġāyat al-muntahā fī ǧamʿ al-Iqnāʿ wa-l-Muntahā*. Yāsir Ibrāhīm al Mazrūʿī, Rāʾid Yūsuf al-Rūmī eds. Kuwait, Mūʾassasat Ġarrās 2007. vol. II, p. 201.

[69] Taqī al-Dīn b. Taymiyya, *al-Fatāwā al-Kubrā*. ʿAbd al-Qādir ʿAṭṭā ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1987, vol. V, 464.

[70] Muḥammad Ibn Ṣāliḥ al-ʿUṯaymīn, *al-Šarḥ al-mumtiʿ ʿalā Zād al-mustaqniʿ*. Al Riyadh, Dār Ibn al-Ǧawzī 2007, vol. XII, 220.

115. If the husband fails to provide maintenance to his wife after he was ordered to do so, and he has sufficient funds to provide the maintenance he was ordered to, the order to provide maintenance will be executed from his estate. It the present husband does not have sufficient funds to execute the order to provide maintenance from, the wife may request separation. If he maintains that he is prosperous and persists in refusing to provide maintenance, the judge will ~~[summarily]~~ perform repudiation at once. If he claims to be impoverished and incapable, and he cannot prove it, repudiation is performed summarily. If he proves it, he will be granted a period of no less than one but no more than three months from the date the separation suit was filed to pay the ordered maintenance and present a guarantor ~~[bondsman]~~ for future payments, and if he does not do this, repudiation will be performed after the assigned date.

116. If the wife claims that the husband is unable or lacks the funds to pay her maintenance after he was ordered to pay hers, and it is unlikely it can be collected ~~[ta'aḏḏara taḥṣīluhā]~~, the wife may request separation. If the claim is confirmed or the husband claims he has the funds to pay but cannot confirm it, he is granted a period of no less than one but no more than three months from the date the separation suit was filed to pay the ordered maintenance and present a guarantor [bondsman] for future payments, and if he does not do this, repudiation is performed. If it is confirmed that he has the funds, he is charged with paying six months' worth of the accumulated maintenance and presenting a guarantor for future maintenance. If he does not do this, the judge will perform repudiation at once.

117. If the husband is absent and he owns estate from which it is possible to execute a maintenance order, the maintenance order is executed from his estate, and if he does not own estate from which it is possible to execute the maintenance order, the wife may request separation:
a) If his place of residence is known and it is possible to send messages to him, the judge will warn him and set a deadline for him. If he does not send the maintenance for his wife or appear himself to look after her, the judge will perform repudiation after the deadline.
b) If his place of residence is unknown or it proves difficult to send him messages and the claimant confirms her claim, the judge will perform repudiation without warning or the setting of a deadline.

c) The provisions of this article apply to imprisoned men with a difficulty in paying maintenance.

118. a) The judge's separation on grounds of nonprovision of alimony is revocable if it occurred after consummation and it did not complete triple repudiation. If it occurred before consummation, it is irrevocable.
b) If the repudiation was revocable, the husband may take his wife back during the waiting period. The retaking is judged as valid if he took her back during the waiting period and paid three months' worth of the accumulated maintenance and presented a guarantor for future maintenance. If he does not pay the maintenance or does not present a guarantor, it [the rajʿa] is not valid.
c) Receipt of the maintenance according to article 321 of this law does not bar the wife from filing a suit requesting separation in accordance with articles 115, 116 and 117 of this law.

321. a) At the Supreme Judge Department, a fund named Alimony Credit Fund enjoying legal personage and financial and administrative independence is established with the aim of providing an advance on the alimony awarded by a court and to lend to the judgment creditor the alimony granted by the court that was not possible for him to collect.
b) The Fund is authorized the take the place of the judgment creditor with regards to the financial rights to acquire the sums it lent in addition to expenses, and it has the right to file a claim in the relevant courts to recover its property from the judgment creditor or the judgment debtor as the situation demands.
c) The management of the Fund, its operational apparatus, its methods of crediting and payments, the origin of its funds, such as fees, grants, donations, aid or any other source, are defined by an ordinance issued with this purpose.
d) All operations, legal actions and properties of the Fund are exempt from taxes, local and government fees and duty stamps of all kinds.

Ḥanafī fiqh does not permit the judicial dissolution of the marriage on the grounds of non-payment of spousal alimony, as this was considered a permanent solution to a temporary issue. As al-Marġīnānī puts it,

[with separation] his rights are voided, while [by being denied of her alimony] her rights merely suffer a delay, so the former presents a greater harm.[71]

When the husband fails to pay the alimony of the wife, Ḥanafī fiqh obligates the first available person from among her successors to provide for her. Alimony paid in this way is considered a loan that the husband has to return,

Jordan has permitted wives to file for separation for nonprovision of alimony since the promulgation of the 1917 Ottoman family law. Articles 92 and 93 of that law are already quite similar to the current Jordanian one. If the husband refuses to provide spousal alimony despite possessing the means to, the judge may perform a *taṭlīq* at the wife's request right away. If he claims that he failed to provide alimony due to his inability to do so, the decision is postponed for a period at the judge's discretion, allowing him a chance to secure the alimony. Article 127 of the 1976 then set the limits of the grace period as one month at least and three months at most. The 2010 temporary law in addition demands that the husband ~~present~~presents a guarantor, but ~~also~~ clarifies that the husband may retake the wife during her waiting period after additional assurances.

The Jordanian provisions are most consistent with the preponderant Mālikī doctrine, which Ibn ʿAbd al-Barr (d. 1071) sums up as follows: If the husband fails to provide alimony for the wife, she may request separation from a judge which, if granted, will be a single revocable *taṭlīq* if it was pronounced after the consummation of the marriage. Ibn ʿAbd al-Barr is familiar with an opinion attributed to Mālik b. Anas, according to which the separation ought to be revocable before consummation as well, but considers it erroneous, as separations before consummation are irrevocable in general. The judge may postpone the decision if he sees a benefit to this. The duration of the postponement is left up to the judge. One month and two months are quoted as standard for the school, but Ibn ʿAbd al-Birr urges to judges taking the wife's needs into account and decide on a case by case basis. If the wife's basic physical needs are not met, she may be separated immediately.~~–~~ If a revocable separation occurred, the husband still has the right to take his wife back during the waiting period if his financial situation improved. [72]

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[71] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 835.

[72] Abū ʿUmar Yūsuf b. ʿAbd Allāh b. Muḥammad b. ʿAbd al-Birr b. ʿĀṣim al-Nimrī, *al-Kāfī fī fiqh ahl al-Madīna*. Muḥammad Muḥammad Uḥayd Walad Mādīk al-Mūrītānī ed. Al Riyadh, Maktabat al-Riyāḍ al-Ḥadīṯa 1980. 2 vols. Vol. II, 560-561.

Abū al-Ḥasan al-Laḫmī (d. 1085) in addition states that as long as the husband is able to procure sufficient alimony for base subsistence, the couple ought not to be separated. [73] Given that the school determines the amount of the alimony based on the statuses of both the husband and the wife, this was a point of debate within the school, with some jurists suggesting that if the wife is not granted living standards comparable to that of her peers, she may petition for a separation.[74] As alimony is determined based on the husband's income in line with Šāfiʿī practice, the issue in Jordanian law is moot.

The 2010 establishment of the Alimony Credit Fund guarantees that the husband's failure to provide alimony does not threaten the wife's wellbeing on the short term. The Fund's existence therefore permitted Jordanian lawmakers to determine a more standardized and more generous grace period for the husband.

Separation of absent and missing persons

Relevant articles:

119. If the absence of the husband for more than a year has been confirmed and his place of residence is known, the wife is permitted to request the annulment of their marriage contract from a judge if she suffers harm from his absence, even if he possesses estate allowing him to provide maintenance for her.

120. If it is possible to send messages to the absent husband, the judge will set a deadline for him and call upon him to return and co-habit with her, take her with himself or repudiate her. If he doesn't do so until the expiration of the deadline or it seems that the warning wasn't received, the judge will annul their marriage contract after taking her sworn oath.

121. If the absent husband resides in a known location and it isn't possible to send messages to him, or his place of residence is unknown, and the wife supports her claim with proof and swears under oath during her litigation, the judge will separate them by

[73] Abū al-Ḥasan ʿAlī b. Muḥammad al-Laḫmī, *al-Tabṣira*. Aḥmad ʿAbd al-Karīm Naǧīb ed. Doha, Wizārat al-awqāf wa al-šuʾūn al-islāmiyya 2011, vol. V, 2034.
[74] id, 2035.

annulling the marriage contract without calling upon the husband to correct his behavior. The judge will also set a deadline for the wife, and if she fails to provide supporting evidence or refrains from swearing under oath, the judge will dismiss the litigation.

122. If it has been established that the husband has been unavailable to his wife in the marital home for one year or longer and she requests the annulment of the marriage contract, the judge will grant the husband a grace period of no less than one month to allow him to return to his wife or repudiate her. If he fails to do so or fails to submit a valid excuse, the judge will separate them via annulment of the marriage contract.

125. The wife may request the annulment of her marriage contract with a husband who was sentenced to a binding custodial sentence with a duration of at least three years after the passing of one year from his sentence, even if he has sufficient wealth to cover her alimony. If he was released before the issuance of the annulment, the request will be rejected.

143. If it is unknown whether a missing husband is alive or dead, his wife may request the annulment of their marriage contract from a judge based on the harm his absence causes to her even if he left her sufficient alimony to support herself with. When it is unknown whether he is alive or dead after searching and inquiring after him, under safe conditions and barring disasters, the case is postponed for four years from the time of his disappearance. If it was not possible to receive news about the husband and the wife persists in her demand, their marriage contract is annulled. If he disappeared under circumstances that make his passing more likely than his survival, such as if he disappeared in battle, during an air strike, an earthquake or cases similar to these, the judge may annul their marriage contract after a period of no less than one year from the time of his disappearance, but only after searching and inquiring after him.

144. In cases where the wife is given the right to choose separation, she may postpone or abandon her case after her initial request.

245: A person is absent if his residence or place of stay is unknown and this has prevented him from managing his financial affairs personally or through an authorized

representative for a year or more, and this poses a hindrance to his interests or the interests of others, and a court ruling has been released to this effect.

246. A person is missing if it unknown whether he is dead or alive and a court ruling has been released to this effect.

247. a) The judge will appoint a caretaker to manage the property of the absent and the missing.
b) The absent or missing person's property is tallied upon the caretaker's appointment and it is managed in the same way as a minor's property.

248. Missing status ends:
a) When the missing person is confirmed either to be alive or dead.
b) If it is ruled that the missing person is to be declared dead.

249. A missing person is declared dead if the location of his disappearance is known and his death is considered most likely after the passage of four years from the date of his disappearance. If he disappeared during a disaster such as an earthquake, an airstrike, a disruption in the state of security, events of unrest and the like, he will be declared dead after a year following his disappearance.

250. If he disappeared in an unknown location and his demise is not overwhelmingly likely, the judge is charged with determining the period after which his death will be pronounced, on the condition that this period is sufficient for the death of the missing person to be considered overwhelmingly likely. An effort must be made to seek him out using means that the judge means sufficient for ascertaining whether he is dead or alive.

251. The date when a missing person is declared dead is to be considered the date of his death.

252. When a missing person is declared dead, it results in the following:
a) His wife begins her waiting period as if his husband had died on the date of the court's decision.
b) His estate is divided among the heirs who were alive at the time of the decision.

253. If a missing person is declared dead and he is found to be alive afterwards:
a) He may reclaim his estate from his heirs except for what they've already consumed.
b) His wife returns into their marital bond unless she married again and the marriage has been consummated.

As Islamic law recognizes the wife's right to enjoy the companionship of her husband, his prolonged absence is considered injurious to her even if her alimony is taken care of.
Separation from a husband, who – for whatever reason – will not cohabit with his wife should, at least, put an end to the injury suffered by the wife, but as classical jurists strove to maintain the possibility of the resumption of normal marital life and had to reserve consideration for the rights of the husband acquired through the marriage, it was only granted under certain conditions. Separation due to the husband's absence is also one of the rare areas of Islamic law that isn't addressed in divinely revealed sources.[75] As such, it was up to the discretion of Muslim jurists to determine applicable rules. Predictably, this means that compared to other areas of the law, differences between the positions of schools and the opinions of individual jurists are more pronounced.
The Jordanian law makes a distinction between absent (*ġāʾib*) and missing (*mafqūd*) husbands. A missing husband may be declared dead, leading to the division of his estate and the automatic separation of his wives, while an absent one may very well be alive and available for contact, he merely does not co-habit with his wife. The four sunnī schools all agreed that a missing person may be declared dead in his absence. As only Mālikīs permitted separation on the basis of absence alone, a separate category for absent persons is not present in the jurisprudence of the other three schools.
When weighing between the interests ~~of the interests~~ of the absent husband and his wife, Ḥanafīs ruled overwhelmingly in favor of the former. According to the school's position, the wife may not be separated from her husband due to his absence as long as he is presumed to be alive, and, in absence of proof of death, no person is declared dead until he has reached the end of his natural lifespan. According to al-Qudūrī, this cannot occur any sooner than the one

[75] I have been able to find one ḥadīṯ according to which a wife cannot be granted separation in absence of certain proof of the husband's death, but even the author of the collection (the Šāfiʿī Ibn Ḥağar al-ʿAsqalānī, d. 1448) graded it as *ḍaʿīf* (weak) and references to it fiqh works are sparse. See Aḥmad b. ʿAlī b. Ḥağar al-ʿAskalānī, *Bulūġ al-marām min adillat al-aḥkām*. Māhir Yāsīn al-Faḥl ed. Al Riyadh, Dār al-Qabs 2014, [Sh], 474.

hundred and twentieth birthday of the missing person.[76] Later Ḥanafīs settled for ninety years, but the guiding principle remained the same.[77] The 19th century Ibn ʿĀbidīn notes that Šams al-Dīn al-Quhastānī, a 16th century jurist from Bukhara, found it acceptable to grant separation after four years similar to what Mālikīs prescribed, though he does not condone this personally.[78]

Šāfiʿīs tend to note that in the old doctrine of the school's ~~school~~founder, separation was permitted four years after a man's disappearance, but even in the early compendium of al-Muzanī, the preferred position is the same as that of the Ḥanafīs.[79]

In the opinion of Ḥanbalīs, the marriage contract of an absent husband is not dissolved as long as long as the wife receives alimony from his wealth.[80] In the Ḥanbalī opinion, if circumstances overwhelmingly suggest that a missing person died, such as if he has gone missing in battle or if he left for a short errand and never returned, he may be declared dead after four years. If circumstances do not overwhelmingly suggest his death, he is declared dead sixty years after the disappearance.[81]

According to Ibn Rušd, the Mālikīs distinguish between missing persons based on the circumstances of their disappearance.[82] If a Muslim man went missing in Muslim lands in peacetime, his wife may petition for separation from a judge, even if circumstances do not make his death likely. The judge makes an effort to uncover the fate of the missing person, and if this is unsuccessful, the wife may begin her waiting period as a widow after the passage of four years from the day of the disappearance. –The estate, however, is not divided until enough time passes that the natural death of the missing person becomes likely, which is determined by various Mālikīs to be between the ages of seventy and ninety.

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[76] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 138.

[77] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 1212.

[78] Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār*, Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. IV, 295.
cf. Šams al-Dīn Muḥammad al-Ḫūrāsānī al-Quhastānī, *Ǧāmiʿ al-rumūz fī Šarḥ Muḫtaṣar al-Wiqāya al-Musammā bi-l-Niqāya*. Kabīr al-Dīn Aḥmad ed. Calcutta 1858, n. p, p. 574.

[79] Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, Muḫtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, 297.

[80] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. XI, 247.

[81] id, 186-187.

[82] Abū al-Walīd Muḥammad b. Aḥmad Ibn Rušd al-Qurṭubī, Bidāyat al-Muǧtahid wa nihāyat al-muqtaṣid, Cairo, Dār al-Ḥadīṯ 2004, III, 75.

In wartime, a man's death is considered more likely if he went missing on Muslim lands. In this case, if the war was fought between Muslims, Mālikī jurists declared a person dead immediately upon request or after a delay of no more than one year, enabling separation and the division of the estate. If the war was fought between Muslims and disbelievers, he would be declared dead after one year. If the war was fought on foreign lands, the missing person would be considered a captive by some Mālikīs, prohibiting separation and the division of his estate, while others permitted separation after four years as if he had gone missing in peacetime.

Regarding the absent husband, a relevant section can be found already in the *al-Mudawwana*, under the chapter on *īlāʾ* (oath of abstention from the wife). According to this, Mālik b. Anas thought that if a healthy man abandoned having intercourse with her wife without an excuse, the couple may be separated.[83] More specific rules regarding an absent but live husband were not laid down until the 18th century Egyptian Aḥmad al-Dardīr. While he mentions that some judges ~~consider~~ treat such cases identically to an *īlāʾ*, in his view, separation can only be granted to the wife under three conditions. First and second, the duration of the absence must exceed one year, and the wife must state that she fears that her husband's absence might drive her to commit adultery. Finally, an effort must be made to contact the husband and inform him that if he refuses to return to his wife or take her with him or repudiate her, the separation will be pronounced.[84] Regarding the missing husband, al-Dardīr repeats the opinions listed by Ibn Rušd, only adding that if the husband is considered to be a captive, the wife may still petition for separation if she fears she might commit adultery otherwise.[85]

The current Jordanian rules on separation from an absent husband and the declaration of the death of a missing person are essentially the same as the ones laid down in the 1917 Ottoman family law, which itself is fashioned after Mālikī law.[86]

If the missing person's death is not overwhelmingly likely, declaration of death is left to the judge's discretion unlike Mālikī law, which permits declaration of death when the missing person reaches the age of seventy at the earliest.

In line with the law's overarching effort to preserve the marriage as long as the wife wants to remain in it, Article 144, a novelty in the 2010 temporary personal status law, specifies that the option for judicial separation remains open to the wife. While I have not been able to locate an

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[83] Saḥnūn b. Saʿīd al-Tanūḫī, *al-Mudawwana al-Kubrā*. Beirut, Dār al-Kutub al-ʿIlmiyya 1994, vol. II, 348.

[84] Muḥammad b. Aḥmad b. ʿArafa al-Dasūqī al-Mālikī, *al-Šarḥ al-kabīr lil-šayḫ al-Dardīr wa ḥāšiyyat al-Dasūqī*. Maktabat Muṣṭafā Bābī al-Ḥalabī, no date. (4 vols.) vol. II, 431.

[85] id, vol. II, 483.

[86] See Articles 94-96. of the Ottoman family law on missing and incarcerated husbands, and Article 119. on the declaration of death.

analogous ruling, open options for separation do exist elsewhere in Ḥanafī literature, such as in the option for separation upon reaching maturity in the case of minor marriages.[87]

Separation due to īlāʾ and ẓihār

123. a) If the husband swears an oath to the effect of having abandoned marital relations with his wife for four months (or without specifying a duration but he upholds his oath until four months have passed), upon the wife's request, the judge will pronounce a repudiation between them that will be revocable unless it is a third repudiation or if it occurred before consummation.

b) If the husband is willing to retract his oath before the repudiation, the judge will set a deadline not exceeding one month for him, and if the husband doesn't retract his oath, he will pronounce a repudiation that is revocable unless it completes a triple repudiation.

c) Revocability of a separation due to abandonment is only valid if the retraction actually occurs during the waiting period unless an excuse is presented, in which case an oral retraction is valid.

124. If the husband spurns his wife and does not expiate his oath, and his wife requests separation for his refusal to expiate his, the judge will issue him a warning to expiate within four months from receipt of the warning. If he refuses to do so without a valid excuse, the judge will pronounce a repudiation that is revocable unless it completes a triple repudiation.

Īlāʾ and ẓihār are purported pre-Islamic divorce practices wherein a husband swears to abstain from having sexual relations with his wife, thereby divorcing her.[88] Separation due to īlāʾ or ẓihār was introduced to Jordanian law in the 2010 temporary personal status law, the 1976 family law or the 1917 Ottoman Family Law did not have similar provisions.

[87] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 602-603.

[88] As with ḥulʿ, I elected not to translate the terms and use the transcribed Arabic words as technical terms instead.

As both methods of separation are addressed in the Qurʾān directly, classical legal compendia generally dedicate a chapter to them, regulating their effects in the Islamic context.[89] While their presumed pre-Islamic function makes them out to be similar to a husband's unilateral repudiation, in Islam, they have no such effect. Instead, the couple face separation due to the injury caused to the wife, at least in the opinion of jurists who permitted judicial separations on these grounds.

In īlāʾ, a husband forswears sexual relations with his wife for a fixed or undetermined time period with a sworn oath. Īlāʾ and ẓihār are only considered as carrying a legal effect if the husband formulates his vow as an oath on God (*ḥilf bi-l-yamīn*), and the marriage only becomes subject to dissolution if the husband stands by his vow for a duration longer than four months, due to the proscription in al-Baqara, 226:

> „*Those who forswear their wives shall wait four months. And if they return, God is Forgiving, Merciful.*"[90]

If the husband breaks his vow before four months or if the vow specified a duration shorter than four months, the couple may resume marital relations, only the husband is obligated to expiate his vow if he broke it.

Ḥanafīs and the other sunnī schools disagreed on the effect of an īlāʾ that exceeds four months. According to al-Marġīnānī, the separation caused by īlāʾ is a single, irrevocable repudiation.[91] As his commentator, Akmal al-Dīn al-Bābartī puts it, an īlāʾ is a conditional repudiation wherein one tells his wife the following: "if four months pass without me having intercourse with you, you are repudiated with a single irrevocable repudiation." [92] Thus, in the school's classical opinion, the four months subsequent to the īlāʾ count towards the wife's waiting period, after which the wife is separated without the need for further action from anyone. Retaking the wife is only possible during the four months subsequent to the oath, after that, husband and wife must agree on a new marriage contract if they wish to continue living together. According to

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[89] Hawting, Gerald. "An Ascetic Vow and an Unseemly Oath?: 'Īlā' and 'Ẓihār' in Muslim Law." *Bulletin of the School of Oriental and African Studies, University of London* 57, no. 1 (1994): 113–25. p. 116.

[90] Qurʾān 2, 226. Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015, p. 223.

[91] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 761

[92] Badr al-Dīn al-ʿAynī, *al-Bināya šarḥ al-Hidāya*. ed. Ayman Ṣāliḥ Šaʿbān. Beirut, Dār al-Kurub al-ʿIlmiyya 2000, vol. V, 490-491.

Ibn Rušd, the Ḥanafī doctrine likely rose out of an intention to prevent the husband from retaking his wife in word only and continuing to refuse to touch her until the couple are eventually separated, extending a situation that is injurious for the wife.[93] Thus, those who considered the wife's interests to be of supreme importance considered the separation irrevocable, while the majority stood by the general principle that all repudiations are revocable unless otherwise specified.

The other three schools held that if the husband refrains from retaking her wife for a period of at least four months after his vow, it is up to the *sulṭān* to apprehend the husband and call upon him to either retake his wife or repudiate her. Unlike *raǧʿa*, the regular retaking following a revocable repudiation which the husband can perform by simply expressing his intention to resume the marriage, retaking after an īlāʾ only occurs with actual intercourse. This act is called *fayʾ* in fiqh. If illness, physical distance or the state of *iḥrām* prevents him from having sexual relations, the four month period may be extended.[94] Similar to paragraph b) of Article 92, the Mālikī Ibn ʿAbd al-Barr (d. 1071) counted the time limit set by the judge for the retaking separately from the four months determined by the Qurʾānic verse.[95] The duration of this time limit was left to the judge's discretion.

Šāfiʿīs and Mālikīs stress that a court can only intervene on the wife's request, a slave woman's master or a freewoman's guardian may not petition in her place.[96] Muḥammad b. Idrīs al-al-The two schools further agree that if the wife does not petition a court, the husband's oath has no effect on her or him. [97]

[93] Ibn Rušd al-Qurṭubī, Bidāyat al-Muǧtahid wa nihāyat al-muqtaṣid. Muḥammad Ibn Ṣāliḥ al-ʿUṯaymīn ed. Riyadh, Dār Ibn al-Jawzī 2014, vol. III, 122.

[94] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 765;
cf. Abū Qāsim ʿUmar al-Ḥusayn al-Ḫiraqī, *Muḫtaṣar al-Ḫiraqī*. ed. Muḥammad Zuhayr al-Šāwīš. Damascus, Dār al-Salām li-l-Ṭibāʿa wa al-Našr 1958, 159.

[95] Abū ʿUmar Yūsuf b. ʿAbd Allāh b. Muḥammad b. ʿAbd al-Birr b. ʿĀṣim al-Nimrī, *al-Kāfī fī fiqh ahl al-Madīna*. Muḥammad Muḥammad Uḥayd Walad Mādīk al-Mūrītānī ed. Al Riyadh, Maktabat al-Riyāḍ al-Ḥadīṯa 1980. 2 vols. Vol. II, 599.

[96] Abū ʿUmar Yūsuf b. ʿAbd Allāh b. Muḥammad b. ʿAbd al-Birr b. ʿĀṣim al-Nimrī al-Qurṭubī, *al-Kāfī fī fiqh ahl al-Madīna*. Muḥammad Muḥammad Uḥayd Walad Mādīk al-Mūrītānī ed, Ryadh, Maktabat al-Riyāḍ al-Ḥadīṯa 1980m vol. II, p 598.
cf. Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, Muḫtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, 265.

[97] Muḥammad b. Idrīs al-Šāfiʿī, *al-Umm*, Rifʿat Fawrī ʿAbd al-Muṭṭalib ed. Mansoura, ~~(d~~Dār al-wafāʾ) 2001. vol. VI, 680.
Abū ʿUmar Yūsuf b. ʿAbd Allāh b. Muḥammad b. ʿAbd al-Birr b. ʿĀṣim al-Namrī (?) al-Qurṭubī, *al-Kāfī fī fiqh ahl al-Madīna*. Muḥammad Muḥammad Uḥayd Walad Mādīk al-Mūrītānī ed, Ryadh, Maktabat al-Riyāḍ al-Ḥadīṯa 1980. vol. II, 598.

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If the husband refuses to perform fayʾ or repudiate her wife, a judge pronounces a taṭlīq in his stead.[98] Whether this separation by the judge is revocable is another point of dispute among jurists. The Ḥanbalī al-Ḫiraqī thought the judge may pronounce up to three repudiations, making the separation irrevocable.[99] Mālikīs on the other hand considered it to be a single, revocable repudiaton.[100]

The opinion of later Ḥanafīs was closer to that of the other schools. According to the *Tanwīr al-~~Abṣār~~absār*, the wife is not repudiated immediately upon the end of the four-month period and it is up to a court, pursuing the wife's complaint, to call upon the husband to repudiate his wife or expiate and retake her. According to al-Ḥaṣkafī, the judge may even detain him and have him beaten if he refuses to choose, but he may not pronounce the repudiation in the husband's stead. To this, Ibn ʿĀbidīn writes that since then, the school has accepted the position that a person cannot be compelled to expiate.[101]

In ẓihār, a husband makes a sworn oath proclaiming that he considers his wife's female parts as though they were his mother's. Insult to the wife's dignity aside, such association implies that the husband considers her wife to be permanently forbidden to him by a degree of relatedness prohibiting marriage. Such an oath, if kept, would irreversibly deprive the woman of her right to enjoy marital relations, opening up the possibility of a separation. The Qurʾān condemns the practice, seemingly because it involves taking an oath involving God's name on an obvious impossibility, but does not prohibit it. Instead, it prescribes a penance for those who would like to go back on their vows:

> *"Those among you who commit zihār against their wives [by saying they are as their mothers], those are not their mothers. None are their mothers save those who gave birth to them. Truly they speak indecent words and calumny. And truly God is Pardoning, Forgiving.*

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[98] Abū Qāsim ʿUmar al-Ḥusayn al-Ḫiraqī, *Muḫtaṣar al-Ḫiraqī*. ed. Muḥammad Zuhayr al-Šāwīš. Damascus, Dār al-Salām li-l-Ṭibāʿa wa al-Našr 1958, 159.

[99] id.

[100] Abū al-Ḥasan ʿAlī b. Muḥammad al-Laḫmī, *al-Tabṣira*. Aḥmad ʿAbd al-Karīm Naǧīb ed. Doha, Wizārat al-awqāf wa al-šuʾūn al-islāmiyya 2011, 2315;
cf. Ḫalīl b. Isḥāq al-Ǧundī, *Muḫtaṣar al-ʿallāma al-Ḫalīl*. Cairo, Dār al-Ḥadīṯ 2005, 124;
Abū ʿAbd Allāh Muḥammad n. al-Ḥasan al-Šaybānī, *al-Ḥuǧǧa ʿalā ahl al-Madīna*. al-Sayyid Mahdī Ḥasan al-Kīlānī al-Qādirī ed. Beirut, ʿĀlam al-Kutub 1982, 599.

[101] Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 469.

As for those who commit zihār against their wives and then go back on what they have said, let them free a slave before they touch one another; to that are you counseled. And God is Aware of whatsoever you do.

And whosoever finds not [the means], let him fast two consecutive months before they touch one another. And whosoever is unable, let him feed sixty indigent people. That is so that you may believe in God and His Messenger. These are the limits set by God, and the disbelievers shall have a painful punishment."[102]

~~*„Such of you as put away your wives (by saying they are as their mothers) - They are not their mothers; none are their mothers except those who gave them birth - they indeed utter an ill word and a lie. And lo! Allah is Forgiving, Merciful.*~~

~~*Those who put away their wives (by saying they are as their mothers) and afterward would go back on that which they have said, (the penalty) in that case (is) the freeing of a slave before they touch one another. Unto this ye are exhorted; and Allah is Informed of what ye do.*~~

~~*And he who findeth not (the wherewithal), let him fast for two successive months before they touch one another; and for him who is unable to do so (the penance is) the feeding of sixty needy ones. This, that ye may put trust in Allah and His messenger. Such are the limits (imposed by Allah); and for disbelievers is a painful doom.*" (58, 2-4 Pickthall~~

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In fiqh, this penance is called *kaffāra* (expiation from here on out). The husband is not free to choose his method of atonement. As long as the possibility for this is present, he has to free a Muslim slave, fasting – or feeding the poor if his health does not permit that – is only available as an alternative if freeing a slave is not possible either due to the husband's financial state or lack of candidates for manumission. Although expiation in the Qurʾān is put forward specifically as a solution to an unintended ẓihār, jurists have prescribed it as a sort of penance in the case of īlāʾ, and for those who intentionally broken their Ramaḍān fast without a valid excuse.

According to the majority of classical jurists, ẓihār bears little practical consequence beyond obligating penance for the husband, should he wish to return to his wife. While it is unanimously agreed upon that the husband uttering ẓihār is forbidden from having sexual intercourse with his wife before expiation, doing so despite the vow does not make him or the wife fornicators, as even the Qurʾān establishes that the oath does not truly make the couple forbidden to each

[102] al-Qurʾān 58, 2-4. Nasr, Seyyed Hossein, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015.

formázott: Betűtípus: (Alapérték) +Szövegtörzs (Calibri), 10 pt

other. Breaking the oath does not accrue additional penance, the husband merely has to perform one of the methods prescribed for expiation in the first place. The marital bond is not broken either, not matter how much time passes after the husband's oath.[103] Ibn Rušd states that according to Sufyān al-Ṯawrī, the wife is separated after four months ~~the ẓihār~~ regardless of the husband's intents or whether the wife petitioned a judge, but this opinion this opinion is not relied on by other jurists.[104]

Ḥanbalīs consider limiting ẓihār for a specified length of time to be a valid option. Should the husband proclaim that his wife is forbidden to him for a month the same way his mother is, the couple may resume marital relations without the husband offering expiations.[105] Other schools consider ẓihār to be permanent until expiated.

The husband cannot do away with the obligation to expiate by repudiating his wife. Even if he repudiates his wife with major irrevocability, she marries another man and then remarries his former husband, he may not consummate the marriage until he completes the expiation.[106] If he takes a vow of ẓihār with regards to more than one of his wives, he is liable to perform a separate expiation for each one of them according to the majority opinion of the Ḥanafīs.[107] Mālikīs and Ḥanbalīs were more lenient in this regard and considered a single expiation to be sufficient as long as he vowed to abstain from each of them in a single oath.

Of the classical jurists, only some Mālikīs thought that ẓihār permits the wife to request separation from a court. In the *al-Mudawwana* of Mālik ibn Anas, it is mentioned that ẓihār carries with it the same effect as an īylāʾ if it constitutes and injury to the wife's rights.[108] This would mean that if a ẓihār is judged to be injurious, the wife has the right to petition a judge to force his husband to either expiate or repudiate her, and the judge may separate them if he refuses to do either. However, the al-Mudawwana does not specify the defitinion of injurious ẓihār or the length of time the husband is given to choose.

The injurious nature of ẓihār is discussed more in depth by Abū al-Ḥasan al-Laḫmī (d. 1085). According to him, ẓihār is deliberately injurious if the husband is capable of expiating his oath but refuses to do so, or if he pronounces ẓihār knowing that he is incapable of expiating his oath.

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[103] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 777.

[104] Ibn Rušd al-Qurṭubī, Bidāyat al-Muǧtahid wa nihāyat al-muqtaṣid. Muḥammad Ibn Ṣāliḥ al-ʿUṯaymīn ed. Riyadh, Dār Ibn al-Jawzī 2014, vol. II, 132.

[105] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. XI, 70.

[106] id, vol. XIII, 71.

[107] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 781.

[108] Saḥnūn b. Saʿīd al-Tanūḫī, *al-Mudawwana al-Kubrā*. Beirut, Dār al-Kutub al-ʿIlmiyya 1994, vol. II, 316-317.

If his conditions change so that he becomes unable to expiate after pronouncing ẓihār, it will only be considered injurious if he hesitates.[109] In this case, he is called upon by a court to do expiate, and if he refuses to do so until the expiry of four months, the court repudiates his wife in his stead.

While al-Laḫmī favors counting the four months from the date of vow in order to avoid lengthening a situation that is injurious to the wife, he mentions that others in the school counted it from the date the wife brought the issue to court.[110] Article 124 of the Jordanian law opted for the latter.

Conclusions

While the Ottoman family law, which was applied in Jordanian šarīʿa courts, already incorporated a mechanism for separation in cases of marital discord, this was based on Mālikī law and demanded proof of injury in the form of neglect or abuse. The solution introduced by the 2010 temporary personal status law is more reminiscent of the position of the Ḥanbalī Ibn Qudāma al-Maqdisī in that a spouse's unbecoming conduct, not specifically targeting the other spouse but making marital life burdensome, is considered injurious as well. Supplementing the law with the Mālikī rule on hearsay testimony simplified the establishing of the fact of the injury, and it could be regarded as an effort to preserve the privacy of the affected parties as well. The 2010 revision of the law abolished the requirement that the arbitrators must be men. This should not be viewed as a deviation from classical fiqh, as Ḥanafīs accepted arbitration by women.

Redeemed separation offers the quickest and most straightforward method for a wife to get a divorce. In effect, she foregoes the procedure required to prove the existence of marital discord, and if she rejects reconciliation, she will be granted a separation as if she'd been found solely responsible in a marital discord suit. A distinct separation method called redeemed separation cannot be found in fiqh manuals. Instead, the Jordanian law permitting it is analogous to the practice of Damascene Ḥanbalī jurists, who held that if the wife offers her entire dower as compensation for a *ḫul*ʿ, the husband can be obligated to accept. Whether intentional or not, the law could be seen as the revival of a juristic practice endemic to the Levantine region.

[109] Abū al-Ḥasan ʿAlī b. Muḥammad al-Laḫmī, *al-Tabṣira*. Aḥmad ʿAbd al-Karīm Nağīb ed. Doha, Wizārat al-awqāf wa al-šuʾūn al-islāmiyya 2011, vol. V, 2313-2314.

[110] id.

The laws governing separation from a missing husband and the declaration of a missing person's death demonstrate that adherence to classical Islamic jurisprudence was a crucial objective during the formulation of the code. Unlike, for example, the Egyptian constitution, the constitution of the Hashemite Kingdom of Jordan offers no guarantee that its laws will be based on Islamic *šarīʿa*.[111] The 2010 law of personal status law only declares that its articles are to be understood and interpreted according to the principles of Islamic jurisprudence, but this in itself does not guarantee that the articles themselves will be derived from Islamic jurisprudence.[112] Even if the authors of the law took it upon themselves to enforce a broadly interpreted compliance to Islamic norms, the Qurʾān and the Prophetic traditions do not contain commandments regarding the status of missing persons. As such, any law on missing persons could be claimed to be compliant with Islamic principles. Despite this, the authors of the law elected to retain the Ottoman law that codified the preponderant rules of the Mālikī school of jurisprudence.

In absence of specific regulation – as was the case in Jordan prior to 2010 – the only legal recourse for a wife whose husband swore an oath of abstention but refuses to pronounce a repudiation would be to request a separation due to marital discord, on the grounds of the injury committed against her marital rights. However, such a separation would be irrevocable, while the wife – considering that the oath was sworn by the husband and not her – might prefer a resolution that brings an end to the injury caused by an unretracted *īlāʾ* or *ẓihār* without terminating the marriage itself. While the majority of Mālikī jurists considered a swift separation to be most beneficial to the wife in the case of an unretracted *ẓihār*, in the Jordanian law, this is already guaranteed through other means of separation, so ~~they~~ a minority opinion that retains the possibility for reunion as far into the litigation as possible was codified instead.

[111] Article 2 of the constitution of the Arab Republic of Egypt states that šarīʿa is the principle source of legislation.
[112] Article 323: „For understanding the text of the articles of this law and its interpretations, explanations and its meaning, the principles of Islamic jurisprudence are to be consulted."

Chapter five: Spousal Alimony

Overview

The generally agreed upon Islamic concept of alimony (*nafaqa*) can be summed up as follows: every man must cover his own basic needs from the wealth he owns regardless of age, sex or legal capacity. If a child owns inherited wealth, for example, his family may spend that money to look after him instead of spending their own wealth. People with no wealth of their own are looked after by their heirs (*waraṯa*), covering a portion of the alimony proportionate to the shares they would receive upon the person's death.

Wives are the only exception to this rule, as their husbands must provide alimony for them for the duration of their marriage – and the waiting period following its dissolution – regardless of the wife's financial status. As Muslims and non-Muslims do not inherit from each other, providing alimony to an impoverished relative is only obligatory if the follow the same religion.[1] Spousal alimony presents an exception in this regard as well, as the husband is responsible for the wife's alimony even if she is a non-Muslim.[2]

Alimony covers food, clothing and a place to live. Payment in money instead of provisions is acceptable, providing tradeable items or raw materials the wife cannot readily make use of generally isn't.[3] If the alimony is received in coins, the recipient may spend it as she wishes. If the husband can afford it, he is obligated in addition to provide alimony for one servant of the wife's according to most.

What standards of living a wife is entitled to was a point of contention among jurists. It could either be proportional to the husband's wealth or the living standards the wife has gotten used to in her maiden home, yet other jurists thought that both factors are to be taken in to consideration.

In the preponderant Ḥanafī view, the wife is entitled to her own household. Articles formulated on the basis of thise Ḥanafī position were introduced in the 2010 temporary personal status law,

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[1] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 847.

[2] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 172.

[3] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. XI, 350-351.

and were ratified without further change in 2019. Identically to the rules laid down in Articles 72-79, Ḥanafī jurists held that multiple wives cannot be forced to share a household, each one is entitled to separate quarters.[4] Similarly, they have the right to refuse living with the husband's relatives. Exception can be made for husbands of average means if they are forced to look after a relative, but wives can only ever be housed together with their consent.[5] In turn, unless she is the owner of the home, the wife may not let her relatives stay in the home without the husband's consent.[6] Classical jurists tend to point out that this does not entitle the husband to forbid short visits or meetings outside the home, as absolute prohibitions on seeing the wife's relatives are unaccepted due to a Qurʾānic prohibition against breaking the ties of kinship.[7]

A wife is considered disobedient (a *nāšiza*) if she refuses to cohabit with the husband. Mālikīs, Šāfiʿīs and Ḥanbalīs in addition consider the wife to be disobedient if she withholds physical contact from the husband for an extended period of time. Disobedience suspends the wife's right to alimony while it persists. A wife is not obligated to cohabit with her husband if she hasn't yet received the immediate portion of her dower, therefore she is entitled to alimony even if she continues staying with her family.[8]

A repudiated wife is entitled to alimony during her waiting period, that is, during the roughly three months following the separation from her husband while she is prohibited from marrying again. In the Ḥanafī opinion, revocability of the separation makes no difference in this regard.[9]

If the husband fails to provide alimony, the wife is permitted to take up a loan on the husband's credit. Classical jurists left it up to the wife to secure a loan.[10] To facilitate the wife's access to a loan, the 2010 personal status law ordered the establishment of the so-called Alimony Credit Fund, which would provide an advance on alimony to those who require it.

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[4] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 838. In al-Marġīnānī's phrasing, a separate quarter (*bayt*) withing the same building (*dār*) would be considered sufficient.

[5] Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 601.

[6] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 839.

[7] Qurʾān 47,22.

[8] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 832.

[9] id, vol. II, 841.

[10] Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 591.

Jordanian personal status law extends the wife's alimony to general medical care, the costs associated with childbirth and the costs associated with the wife's funeral. These all present separate issues in Islamic jurisprudence.

Relevant articles:

Part two: Spousal alimony

59. a) The alimony of every human is covered from his or her own estate except for the wife, and her alimony is covered by the husband, even if she is wealthy.
b) Spousal alimony includes food, clothing, accommodation, and medical treatment to a reasonable extent, as well as servants for those wives whose peers have servants.
c) The husband will be obligated to pay alimony to her wife if he refrains from reimbursing her, or if it has been established that a lower amount was paid.

60. Alimony is incumbent – even if the religion of the spouses differs – from the conclusion of a valid contract, even if she resides in her family home. If the husband requests that she moves to the spousal home and she refuses without legal grounds, she is not entitled to alimony. She has the right to refuse if he hasn't paid the immediate portion of her bride price, or if he hasn't provided her with the accommodation she's legally entitled to.

61. a) The wife who works outside of her home is entitled to alimony under two conditions:
1. That the work is legal.
2. That the husband implicitly or explicitly agrees to the work.
b) The husband may only revoke his approval of his wife's work on legal grounds, and without inflicting harm on her.

62. If the wife is disobedient, she's not entitled to alimony unless she's pregnant, in which case she's entitled to it due to the pregnancy. The disobedient wife is one who has left the spousal home without legal justification, or prevented the husband from entering her home before it has been requested that she moves to another home. The following are considered legal justifications for leaving her abode: abuse by the husband, poor coexistence, lack of a guarantee for the safety of herself and her property.

63. The wife who is imprisoned due to a legally binding criminal conviction is not entitled to alimony from the date of her imprisonment.

64. Alimony is prescribed according to the husband's situation both in prosperity and poverty, and it is permitted to increase or decrease it according to his situation, on the condition that it is no less than the lower limit of what is necessary from foodstuffs, clothing, accommodation and medical treatment. If a specific amount was determined by consensual agreement between the spouses or the decision of a judge, it is obligatory, but it is void for the interval that preceded the agreement or the appeal to the judge.

65. If a present husband refrains from disbursing his wife and the wife has requested the alimony, the judge will rule the alimony to be paid from the day of the request.

66. If the husband is unable to disburse his wife and the wife has requested her alimony, the judge will rule that the alimony will be his debt from the day of request. The judge also authorizes the wife to cover her alimony from her own wealth, or to take a loan on the husband's credit.

67. If the judge ordered alimony for the wife from her husband but it cannot be collected from him, her alimony is incumbent on the person who would be appointed in absence of the husband, but he has the right to demand it back from the husband.

68. If the husband is absent and left his wife without alimony, or he travelled to a location, be it nearby or afar, or he is missing, the judge will rule based on the evidence the wife has presented in support of the existence of marriage between them, after making her swear an oath that his husband didn't leave him maintenance, she isn't disobedient, and she has no knowledge of having been repudiated and having completed her waiting period.

69. The judge will prescribe from the time of a request the alimony of an absent or missing husband's wife from his property or that of his debtors or consignees, or anyone who falls under the same status regardless of whether they've admitted to or denied owning property or having the prerequisite marital relations. This happens after the recorded denial of the parties involved and wife's statement under oath to the conditions described in Article (68) of this law.

70. The wages of the midwife and the medical professionals procured for the delivery of a newborn when necessary, the cost of treatment, hospital bills and expenses required for or necessitated by childbirth are charged on the husband to the appropriate degree according to his financial status, regardless of whether the marriage currently exists.

71. The husband pays for the preparations and the enshrouding of her wife after her death.

Part three: Accommodation and cohabitation

72. The husband provides a domicile that includes all the legally prescribed necessities according to his financial state at the place of his residence or his work. After taking possession of the immediately payable portion of her dower, the wife must follow her husband and co-habit with him. She must move with him wherever he wants her to, even outside the Kingdom, on the condition that her security is guaranteed, and that her marriage contract did not stipulate anything to the contrary, and if she refuses to comply, she loses her right to maintenance.

73. The domicile has to accommodate the wife's the religious and material needs, and ensure the safety of herself and her property.

74. The husband cannot board his family and relatives within the same domicile that he provided for his wife without her consent, and she may withdraw her consent regarding this. The husband's minor sons and daughters and his impoverished parents are an exception if it is not possible to look after them in a separate location, and it is necessary to house them in his own domicile. This is on the condition that it does not harm the wife and that their presence does not interfere with marital life.

75. The husband may not house another one of his wives in the same domicile with his wife without her consent.

76. The wife may not house her children from another husband or her relatives without her husband's consent if the domicile was provided by him, but if the domicile is hers, she may house her children and parents.

77. Both the husband and the wife must co-exist with the other in a good manner, treat them soundly, be faithful to them, be mutually respectful, affectionate, kind and be mindful of the family's interests.

78. The husband must not prevent the wife from visiting her ascendants, descendants, and siblings in a proper manner, and the wife must obey his husband in all permissible matters.

79. Those with more than one wife must treat them equitably in matters such as maintenance and time spent together.

151. The husband must provide alimony to her wife while she spends her waiting period after a repudiation or the annulment of their marriage, in accordance with chapter two, part two of this law.

321. a) At the Supreme Judge Department, a fund named Alimony Credit Fund enjoying legal personage and financial and administrative independence is established with the aim of providing an advance on the alimony awarded by a court and to lend to the judgment creditor the alimony granted by the court that was not possible for him to collect.
b) The Fund is authorized the take the place of the judgment creditor with regards to the financial rights to acquire the sums it lent in addition to expenses, and it has the right to file a claim in the relevant courts to recover its property from the judgment creditor or the judgment debtor as the situation demands.
c) The management of the Fund, its operational apparatus, its methods of crediting and payments, the origin of its funds, such as fees, grants, donations, aid or any other source, are defined by an ordinance issued with this purpose.
d) All operations, legal actions and properties of the Fund are exempt from taxes, local and government fees and duty stamps of all kinds.
d) All operations, legal actions and properties of the Fund are exempt from taxes, local and government fees and duty stamps of all kinds.

The amount of the alimony

As per Article 64 of the Jordanian law, the financial state of the husband alone determines the amount of the wife's alimony. This is a departure from Ḥanafī doctrine, and a minority position in classical sunnī jurisprudence overall. Ḥanafīs, along with Mālikīs, took the wealth of the husband as well as the financial status of the wife's family into account.[11] Some Ḥanbalīs shared the Ḥanafī and Mālikī opinion, differentiating between affluent, average and modest couples, while Ibn Qudāma al-Maqdisī (d. 1223) believed that only the wife's status is considered, and only what is considered minimally sufficient according to that is obligatory.[12]

The Šāfiʿī al-Muzanī (d. 878) held that one of two alimonies is incumbent at a given time depending on what the husband can afford, the alimony of the prosperous (*nafaqat al-muwassiʿ*) or the alimony of the austere (*nafaqat al-muqattir*).[13] He provides a list of specific items the wife is entitled to and the quantity she will receive under austere and prosperous alimony.

His fellow Šāfiʿī Yaḥyā b. Šaraf al-Nawawī further stressed that the only husband's wealth determines the alimony, the wife's piousness, attractiveness, social standing or honor (*šaraf*) are not to be taken into account. Muslim and non-Muslim wives are entitled to the same amount. The payable amount could be revised regularly, even daily if need be.[14] He does not consider the specific amounts listed by earlier Šāfiʿīs to be binding in all cases. Instead, determining the amount of alimony owed is left to the judge.[15]

The Šāfiʿī position is often referenced in Ḥanafī works, with Burhān al-Dīn al-Marġīnānī even mentioning that Abū al-Ḥasan al-Karẖī (d. 952) held the same view, but none of the later Ḥanafīs followed his opinion. [16]

[11] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muẖtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 172;
cf. Ḫalīl b. Isḥāq al-Ǧundī, *Muẖtaṣar al-ʿallāma al-Ḫalīl*. Cairo, Dār al-Ḥadīṯ 2005, 136.

[12] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. XI, 348-349.

[13] Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, Muẖtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, 304-305.

[14] Abū Zakariyyā Maḥmūd b. Šaraf al-Nawawī: *Rawḍat al-ṭālibīn*. Beirut, al-Maktab al-Islāmī 1991, vol. IX, 40-41.

[15] id, vol. IX, 42.

[16] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 832.

In Jordanian law, alimony was tied to the husband's financial state in 1951.[17] Prior to that, alimony was subject to agreement between the spouses or the decision of a judge, which is a position unknown in classical fiqh.[18]

Determining the amount of the alimony according to the husband's wealth was necessary in Jordanian law not the least because Article 79 obligates a polygamous husband to treat his wives equally with regards to alimony and time spent together. The obligation to split time between wives equally (*qasāma*) is a broadly accepted principle in classical fiqh, only the Šāfiʿīs objected to it.[19] While Šāfiʿī doctrine already presupposes equal alimony for the wives, the position has found supporters among non-Šāfiʿī scholars as well. As an example, in his exegesis on verse 4,3 of the Qurʾān, the Tunisian Mālikī Ibn ʿĀšūr (d. 1973) explained that equitable treatment of wives encompasses equal alimony as well as time spent together.[20]

The wife's medical treatment

In Jordan, medical treatment for the wife was first included in spousal alimony in the 1976 personal status law.[21] Identically to Article 59 of the current law, Article 66 of that law ruled that spousal alimony entails food, clothing, a place to stay, medical treatment to a reasonable extent and servants for wives whose peers are used to having them.

Classical sunnī jurists were overwhelmingly against compelling the husband to pay for medical treatment in case of the wife's illness. The general agreement is that alimony covers food, clothing and shelter, and the husband is under no obligation to provide her wife with anything beyond that. In addition, some of the best regarded Mālikī and Šāfiʿī manuals explicitly state that the husband is under no obligation to provide medicine or medical treatment to the wife.[22]

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[17] Art. 56 of the 1951 Law of Family Rights

[18] Art. 57. of the 1917 Ottoman family law. The article also states that alimony may be adjusted according to price fluctuations or changes in the husband's fortune, but this does not prevent a husband from getting his wife to agree to an amount of alimony that is lower than what she would be entitled to if his financial status was taken into consideration.

[19] Rudaynā Ibrāhīm al-Rifāʿī ,"al-Qism bayna al-zawǧāt fī mabīt aḥkāmuhu wa masqiṭātuhu", *al-Maǧalla al-Urduniyya fī al-dirāsāt al-islāmiyya* 8, no. 1 (2012): 17

[20] Muḥammad Ṭāhir Ibn ʿĀšūr, 1984, *Tafsīr al-taḥrīr wa al-tanwīr*, Tunis, al-Dār al-Tūnisiyya li-l-Našr. Vol. IV, 226.

[21] Identically to Article 59 of the 2019 law, Article 66 of that law ruled that spousal alimony entails food, clothing, a place to stay, medical treatment to a reasonable extent and servants for wives whose peers are used to having them.

[22] Ḫalīl b. Isḥāq al-Ǧundī, *Muḫtaṣar al-ʿallāma al-Ḫalīl*. Cairo, Dār al-Ḥadīṯ 2005, 136;
Minhāǧ (sámila): Abū Zakariyyā Muḥyī al-Dīn Yaḥyā b. Šaraf al-Nawawī, *Minhāǧ al-ṭālibīn wa ʿumdat al-mutqīn fī al-fiqh*. ʿAwaḍ Qāsim Aḥmad ʿAwaḍ ed. Beirut, Dār al-Fikr 2005, 263;

Where the topic of the ailing wife is brought up in Ḥanafī works, discussion is mostly limited to whether she is entitled to alimony in general. The preponderant opinion is that as long as she stays in the marital home, she is, given that alimony in the school's view is considered compensation for cohabitation, not for the husband's conjugal rights, which might suffer during the wife's illness.[23] Of the Ḥanafī works reviewed for this study, only al-Kāsānī and Ibn ʿĀbidīn addressed the question; they are in agreement that the wife is responsible for her own treatment.[24]

As to why alimony should not cover medical expenses, the Ḥanbalī Ibn Qudāma provided the most detailed reasoning. According to him, marriage is analogous to the renting of real estate. Just as a tenant is under obligation to clean the house he's renting, so must a husband provide his wife with combs, oils and scented cosmetics to clean herself with. This only applies to hygienic products, products the sole function of which is to provide enjoyment are not covered. The wife's medical treatment isn't incumbent on the husband either. In this, he is similar to the tenant, who is responsible for maintenance, but is under no obligation to perform repair work on a rented house.[25]

Only the Mālikī Ḫalīl b. Isḥāq al-Ǧundī recommended an opposing viewpoint for consideration: in the *al-Tawḍīḥ*, he notes that the Almohad Ibn Zarqūn (d. 1190) made husbands pay for their wives' medical treatment.[26] Mention of this position is absent from most Mālikī works, it is next referenced by the 19th century Muḥammad ʿIlīš (d. 1882) in his commentary on the *Muḫtaṣar al-Ḫalīl*.[27]

In more recent times, the Syrian scholar Wahbat al-Zuḥaylī (d. 2015) attributes the classical opposition to mandating medical treatment not to any juristic principle, but to the fact that

Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, *Muḫtaṣar al-Muzanī*. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, 305.

Abū Isḥāq Ibrāhīm b. ʿAlī b. Yūsuf al-Šīrāzī, *al-Muhaḏḏab fī fiqh al-imām al-Šāfiʿī*. ed. Zakariyyā ʿUmayrāt. Beirut, Dār al-Kutub al-ʿIlmiyya 1995. (3 vols). Vol III, 151.

[23] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 833.

[24] ʿAlā al-Dīn Abū Bakr b. Masʿūd al-Kāsāni, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*. Beirut, Dār al-Kurub al-ʿIlmiyya 1986. (7 vols. reprint of the 1910 šarikat al-maṭbūʿāt al-ʿilmiyya edition) vol. IV, 20.

Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlāʾ-ad-Dīn al-Haṣkafī, *Ḥāšiyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 575.

[25] Ibn Qudāma al-Maqdisī: *al-Muġnī*. ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī. Al-Riyadh, Dār ʿĀlam al-Kutub, , 1997. vol. XI, 353-354.

[26] Ḫalīl b. Isḥāq al-Ǧundī al-Mālikī, *al-Tawḍīḥ fī šarḥ al-muḫtaṣar al-farʿī li-Ibn al-Ḥāǧib*. Aḥmad b. ʿAbd al-Karīm Naǧīb ed. Dublin, Markaz Naǧībawayh, 2008. Vol. V, p. 132.

[27] Muḥammad ʿIlīš, *Šarḥ Minaḥ al-Ǧalīl ʿalā Muḫtaṣar al-ʿallāma al-Ḫalīl*. Beirut, Dār al-Fikr 1984 (9 vols.) vol. IV, 392.

allopathic medicine simply wasn't seen as a tried and true method of dealing with illness.[28] He considers medicine a basic necessity that ought to be included in alimony.

While he does not reference any particular jurist in support of his views, Islamic jurisprudence's shifting attitudes towards allopathic medicine can be observed, for example, in the commentary of Muḥammad Ṣiddīq Ḥān (d. 1890) on the fiqh compendium of Muḥammad al-Šawkānī (d. 1834). Al-Šawkānī dedicates a short section to the permissibility of medicine in general, in which he only begrudgingly rules that consumption of medicine is permitted, and recommends perseverance without turning to medicine to anyone who can endure it. Commenting on his opinion, Ṣiddīq Ḥān wrote that since medicine is grounded in the physical realities of life and its practice does not carry disbelief, Muslims should feel free to turn to it.[29] Consequently, Ṣiddīq Ḥān considers it obligatory for the husband to provide medical treatment to his wife.[30]

Making the husband pay the costs associated with childbirth – as Article 70 of the currently applicable law does – is a lot less problematic from the standpoint of classical Islamic jurisprudence.[31] While Ḥanafīs were opposed to it, with even the 19th century Ibn ʿĀbidīn proclaiming that the wages of the midwife are to be paid by the one who hired her, Mālikīs unanimously consider it to be the husband's responsibility.[32] The position was supported by Šāfiʿīs as well.[33] The Jordanian law clarifies that the husband pays for the costs of childbirth if the pregnancy is brought to term after the separation of the couple, but even this position is supported by the Mālikī Aḥmad al-Dardīr (d. 1786).[34]

The wife's funeral

[28] Wahbat b. Muṣṭafā al-Zuḥaylī, *al-Fiqh al-islāmī wa adillatuhu*. Damascus, Dār al-Fikr 2014 (10 vols). X, 7381.

[29] Muḥammad Ṣiddīq Ḥān al-Qannawǧī al-Buḫārī, *al-Rawḍa al-nadiyya šarḥ al-Durar al-bahiyya*. Muḥammad Ṣabǧī Ḥusayn Ḥallāq ed. Birmingham, Dār al-Arqam 1993 (2 vols). Vol II, p. 489.

[30] id, p. 161.

[31] Article 70 of Law 15 of the Year 2019 is identical to Article 78 of the 1976 personal status law.

[32] Ḫalīl b. Isḥāq al-Ǧundī, *Muḫtaṣar al-ʿallāma al-Ḫalīl*. Cairo, Dār al-Ḥadīṯ 2005, 137;
Ḫalīl b. Isḥāq al-Ǧundī al-Mālikī, *al-Tawḍīḥ fī šarḥ al-muḫtaṣar al-farʿī li-Ibn al-Ḥāǧib*. Aḥmad b. ʿAbd al-Karīm Naǧīb ed. Dublin, Markaz Naǧībawayh, 2008. Vol. V, p. 132;
Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḫtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 579.

[33] Aḥmad b. Muḥammad b. ʿAlī b. Ḥaǧar al-Haytamī, *Tuḥfat al-muḥtāǧ fī šarḥ al-Minhāǧ*. Cairo, al-Maktaba al-Tiǧāriyya al-Kubrā 1938, Vol. VI, 161.

[34] Muḥammad b. Aḥmad b. ʿArafa al-Dasūqī al-Mālikī, *al-Šarḥ al-kabīr lil-šayḫ al-Dardīr wa ḥāšiyyat al-Dasūqī*. Maktabat Muṣṭafā Bābī al-Ḥalabī, no date. (4 vols.) vol. II, 510.

The personal status law of 1976 shifted the costs of the wife's funeral on the husband.[35]

Islamic ritual law specifies several constant elements for the funeral. The deceased is washed by a relative, preferably of the same sex. The body is then covered in a funeral shroud made of white cloth, consisting of five pieces for women and three pieces for men. –The funeral bier is carried to the grave site on foot. The body is then placed into a smaller niche within the grave facing the *qibla*. The funeral prayer is led by a relative. The service should be prompt and reserved, and it should be limited to its essential elements.–[36]

Since the procurement of the funeral shroud will likely incur an expenditure, classical jurists had to specify the person who would be responsible for covering its costs. According to the Islamic scheme of inheritance, the funeral shroud ought to be paid for from the wealth the deceased left behind. It is the very first item to be subtracted from the estate, it is given precedence over the settling of debts, the execution of the will and the allotment of shares to natural heirs.[37] According to Mālikīs, even property stolen by the deceased may be used to this end.[38] Further expenses may only be covered from the estate with the consent of all the heirs.[39]

Early jurists typically only obligated next of kin to pay for the funeral ~~i~~if the deceased did not leave behind sufficient wealth. Mālikīs and Ḥanafīs insisted that in such an eventuality, the costs of a wife's funeral are borne by her kin and not her husband. The rationale behind this position is that spousal alimony was thought to be paid in return for the wife's availability for the husband's sexual enjoyment.[40]

Furthermore, husbands have no waiting period similar to wives, they may marry a new wife immediately upon the death of one of them even if they had the highest permitted number of four wives. From this, it could be inferred that the marital bond is severed immediately upon the~~d~~ death of the wife, liberating the husband from financial responsibilities toward the wife

[35] Art. 82 of the Personal Status Law of 1976, corresponding to Art. 71. of Law 15 of 2019.

[36] Tritton, A.S. 'Djanāza'. In Encyclopaedia of Islam, Second Edition, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs, P.J. Bearman (Volumes X, XI, XII), Th. Bianquis (Volumes X, XI, XII), et al. Accessed October 29, 2022. doi:http://dx.doi.org/10.1163/1573-3912_islam_SIM_1985.

[37] Jamal J. Nasir, *The Islamic Law of Personal Status*. The Hague Kluwer law international 2002, 202;
cf. Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, Muḫtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, 56;
Ḫalīl b. Isḥāq al-Ǧundī, *Muḫtaṣar al-ʿallāma al-Ḫalīl*. Cairo, Dār al-Ḥadīṯ 2005, 49;
ʿAlāʾ al-Dīn al-Samarqandī, *Tuḥfat al-fuqahāʾ*, Beirut, Dār al-Kutub al-ʿIlmiyya 1984, vol. I, 242.

[38] Ḫalīl b. Isḥāq al-Ǧundī, *Muḫtaṣar al-ʿallāma al-Ḫalīl*. Cairo, Dār al-Ḥadīṯ 2005, 49.

[39] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḫtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966, Vol. II, 206.

[40] A wife was not entitled to alimony from her husband if she went on a pilgrimage, left the family home without the husband's permission, was incarcerated or if she was unavailable for intercourse due to her young age. The case of a sick wife – and that of the minor wife according to the minority of jurists who held that she is entitled to it – were treated as exceptions.

ʿAlāʾ al-Dīn al-Kāsānī (d. 1191) mentions that according to Abū Yūsuf, one of Abū Ḥanīfa's pupils, the husband is responsible for a penniless wife's funeral, but during his time, his school favored placing the costs on the wife's family.[41]

Despite the position of the Šāfiʿīs preceding him, Abū Zakariyyā Yaḥyā ibn Šaraf al-Nawawī (d. 1277) thought that the husband is responsible for the costs of the wife's funeral in all cases, although this opinion is only expressed in his *Rawḍat al-ṭālibīn*, and abridgment of an earlier work.[42] In the *Minhāǧ al-ṭālibīn*, of which he is the sole author, he only considers the husband responsible for the costs if the wife did not leave sufficient wealth.[43]

Two later Ḥanafīs, Badr al-Dīn al-ʿAynī (d. 1451) and Ḫayr al-Dīn al-Ramlī (d. 1671) reported that by their time, a plethora of conflicting opinions arose within the school. These include shifting the costs to the family to the exclusion of the husband according to al-Šaybānī's alleged opinion, taking the necessary funds from the third of the estate reserved for bequests, charging the husband if the wife died penniless, and finally, charging the husband in all cases. Both jurists favored the latter solution.[44]

Ibn ʿĀbidīn's (d. 1836) interpretation of the issue is more open-ended. He considers Abū Yūsuf's reported position to be ambiguous. Since the school treats the obligation to cover the funeral costs analogous to the obligation of marital alimony, he concludes that the pivotal question to be answered is whether the wife's death presents the sort of impediment that releases the husband from his obligation. While he, too, writes that the current practice of the school is to compel the husband to pay for the enshrouding, he left the theoretical dilemma unanswered.[45]

The Jordanian law, then, is comparable to a minority position prescribed by some Šāfiʿīs and Ḥanafīs, who obligated the husband to pay for the wife's funeral under all circumstances.

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[41] ʿAlā al-Dīn Abū Bakr b. Masʿūd al-Kāsāni, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*. Beirut, Dār al-Kurub al-ʿIlmiyya 1986, vol. I, 308.

[42] Abū Zakariyyā Maḥmūd b. Šaraf al-Nawawī: *Rawḍat al-ṭālibīn*. Beirut, al-Maktab al-Islāmī 1991, II, 111;
cf. Abū Ḥāmid Muḥammad b. Muḥammad b. Muḥammad al-Ġazzālī, *al-Waǧīz fī fiqh al-Imām al-Šāfiʿī*. ʿAlī Muʿawwaḍ, ʿĀdil ʿAbd al-Mawǧūd eds. Beirut, Dār al-Arqam 1997, vol. I, 207. In the *al-Waǧīz* which *Rawḍat al-ṭālibīn* is based on, al-Ġazzālī only states that the his school keeps track of two conflicting opinions regarding the husband's obligation to his deceased wife.

[43] Abū Zakariyyā Muḥyī al-Dīn Yaḥyā b. Šaraf al-Nawawī, *Minhāǧ al-ṭālibīn wa ʿumdat al-mutqīn fī al-fiqh*. ʿAwaḍ Qāsim Aḥmad ʿAwaḍ ed. Beirut, Dār al-Fikr 2005, 58.

[44] Badr al-Dīn al-ʿAynī, *al-Bināya šarḥ al-Hidāya*. ed. Ayman Ṣāliḥ Šaʿbān. Beirut, Dār al-Kurub al-ʿIlmiyya 2000, vol. III, 205,
cf. Ḫayr al-Dīn al-Ramli, *al-Fatāwā al-Ḫayriyya li-nafʿ al-birriyya ʿalā maḏhab al-imām al-aʿẓam Abī Ḥanīfa al-Nuʿmān*. Cairo, Maṭbaʿat Būlāq 1882. Vol. I, 14.

[45] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. II, 206.

The working wife's right to alimony:

Within certain conditions, Jordanian wives are guaranteed alimony even if they are gainfully employed outside the marital home. Article 61 of the current law was first enacted as an amendment to the 1976 personal status law in 2001.[46] The article it replaced only stated that the wife is not entitled to alimony unless the husband agreed to her work.[47] The amended law defined the husband's agreement as either explicit and implicit, and gave him limited possibility to revoke his agreement.

Ḥanafī authors are generally supportive of the wife's choice to pursue work outside the marital home. Early manuals of the school proclaim that the wife may set out on ~~a~~ pilgrimage on her own, and she may visit her parents regularly. [48] According to Kamāl Ibn Humām, should her elderly parents require it, the wife may leave the home to care for them despite her husband forbidding her from doing so.[49] More pertinently, Ibn Nuğaym (d. 1563) writes that according to the *al-Ḫulāṣa*, if the wife works as a midwife or a laundress, she may leave the house with or without the husband's consent.[50]

With that being said, the wife's absence from the marital home was still regarded ~~the~~ to be detrimental to the husband's rights. As al-Marġīnānī explains, alimony is not compensation for the husband's sexual enjoyment, rather, it is the wife's confinement (*iḥtibās*) in the marital home that entitles her to it.[51] If the wife leaves the home through no fault of her own, she is not entitled to alimony for the time of her absence. The only exception al-Marġīnānī mentions is a

[46] Art. 5, Law 82 of 2001.

[47] Art 68 of the 1976 Personal Status Law.

[48] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 66; Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 839.

[49] Muḥammad b. ʿAbd al-Wāḥid al-Sīwāsī al-Iskandarī Kamāl al-Dīn b. Humām, *Šarḥ Fatḥ al-qadīr ʿalā al-Hidāya šarḥ Bidāyat al-Mubtadī.* ed. ʿAbd al-Razzāq Ġālib al-Mahdī. Beirut, Dār al-Kutub al-ʿIlmiyya 2003, vol. IV, p. 358. (=sámila IV, 398)

[50] Abū al-Barakāt ʿAbd Allāh b. Aḥmad Maḥmūd Ḥāfiẓ al-Dīn al-Nasafī, *al-Baḥr al-rāʾiq šarḥ Kanz al-daqāʾiq*, Zakariyyā ʿUmayrāt ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, vol. I, 380.
The *al-Ḫulāṣa* Ibn Nuğaym is referring to is the *Ḫulāṣat al-fatāwā* of Iftiḫār al-Dīn Ṭāhir b. Aḥmad al-Buḫārī (1147). See GAL I, 462.

[51] Al-Marġīnānī saw it necessary to make this distinction as it justifies mandating alimony to a wife who resides in the marital home but is unavailable for the husband's sexual enjoyment, such as a wife who fell ill.
Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. 832-833.

minority opinion attributed to Abū Yūsuf, according to whom the wife's alimony during her pilgrimage is incumbent on the husband, but only because she is fulfilling a religious duty.[52]

Later Ḥanafīs stood by the opinion that loss of confinement voids the wife's right to alimony. According to ʿAlāʾ al-Dīn al-Ḫaskafī (d. 1677), if the wife pursues a profession for her own benefit, she is not entitled to alimony at all.[53] Commenting on al-Ḫaskafī's *al-Durr al-Muḫtār*, Ibn ʿĀbidīn wrote that a working wife should only be provided alimony for the time she spends at home, on the analogy of a slave woman who works for her master during the day, and only spends the nights with her husband.[54]

The other schools held similar positions. In the Šāfiʿī opinion, for example, when the wife leaves the home to tend to her own needs, she is not entitled to alimony even if she does so with the husband's permission.[55]

Fatāwā affirming the working wife's right to alimony have only started emerging in modern times. One such was issued by the council of the International Islamic Fiqh Academy of Jeddah, a subsidiary of the Organization of Islamic Cooperation in 2005:

> "*Work outside the home does not void her right to the spousal maintenance that was granted to her by law in accordance with the provisions of the šarīʿa, as long as her work outside does not carry with it disobedience that would invalidate her right to maintenance*." [56]

The support for this position, however, is not unanimous. In one of the unofficial commentaries on the Jordanian law, ʿUmar Sulaymān al-Ašqar remarks that the correct opinion is that a working wife is not entitled to alimony, as it is provided in exchange for the complete devotion of the wife's time to her husband, the management of their shared household and the care for their children.[57]

Alimony of the pregnant *nāšiza*

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[52] id.

[53] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 577.

[54] id.

[55] Šihāb al-Dīn Abū al-ʿAbbās Aḥmad b. Naqīb al-Miṣrī, *ʿUmdat al-sālik wa ʿuddat al-nāsik*. ʿAbd Allāh . Ibrāhīm al-Anṣārī ed. Qatar, Wizārat al-Šuʾūn al-Dīniyya 1982, 213.

[56] Qarārāt wa tawṣīyāt Maǧmaʿ al-Fiqh al-Islāmī al-Duwalī, Maǧmaʿ al-Fiqh al-Islāmī al-Duwalī 2020 (online publication). p. 473.

[57] ʿUmar Sulaymān al-Ašqar, *al-Wāḍiḥ fī šarḥ qānūn al-aḥwāl al-šaḫṣiyya al-Urdunī*. Amman, Dār al-Nafāʾis 2015, 196.

A disobedient (*nāšiz*) wife does not receive spousal alimony according to the Article 62 of the operative Jordanian law unless she is pregnant. The exception came into effect in 2010, the current article is otherwise identical to Article 69 of the 1976 personal status law.

The law's definition of disobedience comes from Ḥanafī law.[58] In the view of Mālikīs, Šāfiʿīs and Ḥanbalīs, disobedience meant preventing the husband from enjoying his conjugal rights first and foremost.[59] In addition, refusing to pray, leaving the house without the husband's permission or betraying his trust were also thought to constitute disobedience. By contrast, the Ḥanafī definition is much more restrictive: refusing cohabitation with the husband without proper grounds, either by leaving the marital home or denying the husband entry to the wife's residence is the only type of behavior Ḥanafīs recognized as disobedience.[60] It is the stated position of the school that rejection of the husband's sexual advances is not disobedience, as the husband's right to intercourse was considered secure regardless of the wife's consent as long as she was present in the home.[61]

Mālikīs and the Ḥanbalī Ibn Qudāma held the position that alimony may not be withheld from a pregnant disobedient wife. [62] Mālikīs present this opinion without explanation. According to Ibn Qudāma's reasoning, a pregnant wife is entitled to alimony not only for her own sake, but also for the fetus, who is entitled to it regardless of the mother's conduct.[63] As a fetus does not possess wealth until he or she is born, it falls on the father to tend to his or her needs.

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[58] This was already the case in the Ottoman family law, Article 66 of which defined disobedience as the wife's leaving of the husband's home, or her refusal to let the husband enter her home without requesting to be taken to a different house first.

[59] Muḥammad b. Aḥmad b. ʿArafa al-Dasūqī al-Mālikī, *al-Šarḥ al-kabīr lil-šayḫ al-Dardīr wa ḥāšiyyat al-Dasūqī*. Maktabat Muṣṭafā Bābī al-Ḥalabī, no date. (4 vols.) vol. II, 343.

cf. Abū Zakariyyā Maḥmūd b. Šaraf al-Nawawī: *Rawḍat al-ṭālibīn*. Beirut, al-Maktab al-Islāmī, 1991. p. vol. VII, p. 346;

Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. X, 168.

Abū ʿAbbās Aḥmad b. Muḥammad al-Ḫalwatī, Abū al-Barakāt Aḥmad b. Muḥammad b. Aḥmad al-Dardīr, *al-Šarḥ al-Ṣaġīr ʿalā Aqrab al-Masālik ilā maḏhab imām Mālik wa bi-l-hāmiš Ḥāšiyyat al-ʿallāma al-šayḫ Aḥmad b. Muḥammad al-Ṣāwī al-Mālikī*. Muṣṭafā Kamāl Waṣfī ed. Cairo, Dār al-Maʿārif, n. dm vol. II, 511.

[60] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 172.

[61] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 832.

[62] Abū ʿUmar Yūsuf b. ʿAbd Allāh b. Muḥammad b. ʿAbd al-Birr b. ʿĀṣim al-Nimrī, *al-Kāfī fī fiqh ahl al-Madīna*. Muḥammad Muḥammad Uḥayd Walad Mādīk al-Mūrītānī ed. Al Riyadh, Maktabat al-Riyāḍ al-Ḥadīṯa 1980. 2 vols. Vol. II, 559.

cf. Abū ʿAbd Allāh Muḥammad b. Yūsuf al-ʿAbdarī al-Mawwāq, al-Tāǧ wal-al-iklīl li-Muḫtaṣar al-Ḫalīl. Zakariyyā ʿUmayrāt ed. Riyadh, Dār ʿĀlam al-Kutub 2003. (8 vols) vol. V, p. 551.

[63] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. XI, 405-406.

Conclusions

Most provisions on alimony that diverge from the preponderant Ḥanafī doctrine were enacted before 2010. Corresponding to the doctrine of the Šāfiʿī school of jurisprudence, the amount of spousal alimony is determined based on the husband's financial state. As the previously applied relevant section of the Ottoman family law was not based on an opinion derived from classical fiqh, the introduction of a law based on Šāfiʿī doctrine may be viewed as an effort to bring the law in conformity with Islamic jurisprudence. Adoption of the Šāfiʿī view, specifically, was made necessary by the prescription of equal alimony to wives in polygamous marriages.

The 1917 Ottoman family law codified an interpretation of spousal alimony that reduced it to its barest essentials: food, clothing and shelter. While the four sunnī schools supported such a view, contemporaneous scholars of Islamic jurisprudence have already moved towards a more inclusive interpretation by mandating the provision of medical treatment as part of the spousal alimony. Charging the costs of childbirth on the father as the person responsible for the child's alimony, as it was done in 1976, corresponds with the established Mālikī doctrine. The issue of the costs of the wife's funeral was addressed in the same year, when a position corresponding to late Ḥanafī opinion, also supported by the Šāfiʿī al-Nawawī, was adopted.

An exception among the reforms instituted in Jordanian family law, the working wife's right to a full alimony is not supported by classical sunnī jurisprudence. While contemporary fatwas supporting this right do exist, the issue is still subject to debate among Islamic scholars.[64]

While the article on the disobedient wife's loss of right to alimony is harmonious with the Ḥanafī concept of disobedience (*nušūz*), the exception made in favor of pregnant wives, added in 2010, is supported by Mālikī and Ḥanbalī rather than Ḥanafī jurists.

Of the sunnī legal manuals, only those written by Ḥanafīs dedicate a separate subchapter to the living arrangements of the wife.[65] Chapter Three, Part Three of the Jordanian law, consisting of articles 72-79, precisely follows the partition and the rulings contained in these manuals.

By reaching back to Ḥanafī jurisprudence almost a hundred years after the first codification of family law in the region, the 2010 inclusion of this chapter on living arrangements in the

[64] For a dissenting opinion, see for example ʿUmar Sulaymān al-Ašqar, *al-Wāḍiḥ fī šarḥ qānūn al-aḥwāl al-šaḫṣiyya al-Urdunī.* Amman, Dār al-Nafāʾis 2015. p. 196.

[65] See for example Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 838-841;
Ibn-ʻĀbidīn Muḥammad Amīn Ibn-ʻUmar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-ʻAbdallāh Ibn-Šihāb-ad-Dīn, ʻAlā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol. III, 599-602.

personal status law afforded a wide range of rights to the wife that were not guaranteed by law beforehand.

Chapter six: Child custody (ḥaḍāna)

Overview

When a marriage is terminated, children born in that marriage and no longer requiring fosterage are assigned a custodian (ḥāḍin or ḥāḍina).[1]

The custodian is appointed from among the child's relatives according to an order of precedence. Custody is granted to the first suitable, willing person in the order.– Joint custody of children from a terminated marriage as it is recognized in some modern legal systems does not exist, custody is possessed by a sole custodian to the exclusion of others.

All jurists agree that the mother is the first in line for the custody of her children. If the mother remarries, custody is transferred to the next person in the order of precedence, as her new husband is not expected to hold the child's best interests at heart. The above two maxims are supported by a Prophetic tradition:

> *A woman said: Messenger of Allah, my womb is a vessel to this son of mine, my breasts, a water-skin for him, and my lap a guard for him, yet his father has divorced me, and wants to take him away from me. The Messenger of Allah (□) said: You have more right to him as long as you do not marry.*[2]

Ḥaḍāna is not mentioned in the Qurʾān. While the above ḥadīṯ is universally accepted as authentic and relevant to the rules of custody, the topic is barely touched upon elsewhere in the Prophetic tradition, leaving jurists to seek analogous rulings from other areas of the law. The orders of precedence laid down by the various schools are therefore quite similar to the rules on inheritance and providing alimony to an impoverished relative, only female custodians are favored over male ones, and maternal relatives over paternal ones. Early Ḥanbalīs are an exception here, as they favor female relatives of the father's over those of the mother.[3] The most common order of precedence puts the mother first, followed by grandmothers, sisters and finally, aunts. Most jurists only consider male custodians if there are no eligible females.

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[1] Ḥanafīs and Mālikīs, especially early ones, sometimes refer to custody as kafāla rather than ḥaḍāna.

[2] Abū Dāwud Sulaymān b. al-Aš'aṯ b. Isḥāq b. Bašīr b. Šaddād b. ʿAmrū, Sunan Abī Dāwud. Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd ed. Sidon, al-Maktaba al-ʿAṣriyya, n. d. (4 vols), **[Sh],** vol. II, 283.

[3] Abū Qāsim ʿUmar al-Ḥusayn al-Ḫiraqī, *Muḫtaṣar al-Ḫiraqī*. ed. Muḥammad Zuhayr al-Šāwīš. Damascus, Dār al-Salām li-l-Ṭibāʿa wa al-Našr 1958. p. 172.

The custodian must be a sane adult and must not be a fāsiq (a person known to possess bad morals). Here, the sunnī schools – with the exception of Ḥanbalīs – make an exception for the mother, who is granted custody even if she is a *fāsiq*, as she is the one expected to show the most affection towards her children.[4] The custodian must also prove that he or she is able to provide safety and adequate sustenance for the child. –Slave women are not eligible until their manumission. Custodianship is considered voluntary, even for the mother.[5]

If a custonian becomes ineligible, custody is transferred to the next eligible person in the order of precedence. If the disqualifying condition – be it marriage, insanity or the custodian's lack of living standards – ceases, custody is returned.

Exemptions were introduced on the prohibition of the custody of married women as well. Early Ḥanafīs held that as long as the grandmother is married to the child's grandfather, she is eligible for custody.[6] Later, the principle was applied to other prospective custodians as well: as long as the female custodian marries a man whom the child would be prohibited from marrying if she were a girl, the mother retains custody.[7] Similarly, men are only eligible as custodians if they are prohibited from marrying the child due to familial relations. Some Mālikīs also demanded that a woman capable of child rearing be found in the male custodian's house, who could be his wife, a servant or a hired caretaker.[8]

The Šāfiʿī and Ḥanbalī schools categorically reject granting custodianship to non-Muslims, only some Mālikīs and Ḥanafīs make exceptions for the mother, and only under the condition that the child's morals and religious upbringing do not suffer from it.[9]

The custodian is not expected to spend his or her wealth on upkeep of the child, as the usual rules for alimony apply: if the child possesses wealth, alimony can be paid from that, if not, it is incumbent on the father or the child's other relatives according to the rules of inheritance. In addition, the custodian is entitled to a wage, to be paid by the same person or persons

[4] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḥtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. 2nd ed. Miṣr: al-Bābī al-Ḥalabī. Vol III, 556.
cf. al-Muġnī ed. Turkī XI, 412.

[5] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 825.

[6] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 174.

[7] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 827.

[8] *Al-Mawsūʿa al-fiqhiyya*. Kuwait, Wizārat al-awqāf wa-l-šuūn al-islāmiyya 2005, vol.~~al-Mawsūʿa al-fiqiyya~~ XVI, 307.

[9] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. XI, 413.

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responsible for the child's maintenance. [10] If the custodian is the mother, she is not entitled to wages as long as she receives alimony from the husband.[11] Whether the custodian is entitled to lodgings was subject to dispute.

The mother's custody only lasts a few years into childhood, afterwards, the children are expected to be transferred into the father's (or whoever else is under obligation to provide them with alimony) care until maturity. –Most jurists do not consider this period under the father's care to be *ḥaḍāna*, it is rather called *ḍamm* (joint~~g~~ living). Ḥanafīs discriminate between the sexes, prescribing that a boy should be sent to his father as soon as he is able to eat, dress and clean himself independently, generally meaning the age of seven, while girls stay with their mothers until puberty.[12] In the opinion of Mālikīs, boys stay with their mothers until the onset of puberty, while girls will stay with their mothers until marriage. [13] This sex-based discrimination is not supported by revealed texts, it stands on purely rationalistic grounds: as boys were expected to learn letters or the trade of their father, it was seen as necessary to put them under their father's care as early as possible, while it was thought that girls benefit more from staying in a woman's care.

According to Ḥanbalīs, a boy may choose whom to live with when he reaches seven, while a girl is transferred to the father at the same age without being presented a choice.[14] –Should they choose to live with their mother, boys are still expected to spend the daytime with their fathers in order to learn crafts. Šāfiʿīs hold that both boys and girls get to choose which parent to live with when they are seven years old. Afterwards, the child is permitted to change whom to live with as often as he or she likes.[15] Ḥanafīs deny the child's the right to choose, as they are likely to favor whoever is more lenient and tolerant of their playing around, which is not considered conducive to a successful upbringing.[16]

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[10] Jamal J. Nasir, *The Islamic Law of Personal Status*. The Hague, Kluwer law international 2002, 166.

[11] ʿAlā al-Dīn Abū Bakr b. Masʿūd al-Kāsāni, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*. Beirut, Dār al-Kurub al-ʿIlmiyya 1986, vol. IV, 40-41.

[12] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 827-828.

[13] Muḥammad b. Yūsuf b. Abī al-Qāsim b. Yūsuf al-ʿAbdarī al-Ġarnāṭī, *Al-Tāğ wa al-Iklīl li-Muḫtaṣar Ḫalīl*. Beirut, Dār al-Kutub al-ʿIlmiyya 1994, vol. V, 593.
cf. Abū al-Ḥasan ʿAlī b. Muḥammad al-Laḫmī, *al-Tabṣira*. Aḥmad ʿAbd al-Karīm Naǧīb ed. Doha, Wizārat al-awqāf wa al-šuʾūn al-islāmiyya 2011, vol. VI, 2572-2573.

[14] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. XI, 415, 418.

[15] Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, Muḫtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, 309.

[16] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 829.

Only the Šāfiʿīs and the Ḥanbalīs discussed the possibility of a pubescent child living separately from his or her family. The practice is generally discouraged but permitted for boys, while girls, according to the Ḥanbalīs, may be prohibited by their parents from doing the same if they deem it unsafe.[17] Šāfiʿīs grant the same right to boys and girls in this regard.[18]

Duration of the custody

Relevant articles:

173. a) The mother's custody will continue until the child reaches fifteen years of age, and until the child reaches ten years of age if the custodian is someone other than the mother.
b) After the child reaches the age determined in clause a) of this artice, he is given the right to choose to stay with the custodian mother until he reaches maturity.
c) A woman's custody is extended if the child has an illness that forces him rely on the woman's care as long unless his interests demand otherwise.

Since 2010, the mother's custody over her children lasts until the age of fifteen, at which point they are given the choice to either stay with her or live with their father. The same choice is given to children under the custody of someone other than the mother at the age of ten. Under the 1976 personal status law, children stayed with the mother until reaching majority. In case of a custodian who is not the mother, boys were granted a choice at the age of nine and girls at the age of eleven.[19]

According to Ḥanbalīs, Šāfiʿīs and Ḥanafīs, the mother's custody lasts only until the age of seven, with some exceptions applicable to girls. At that age, Ḥanafīs recommend transferring custody to the father without further deliberation, while Šāfiʿīs and Ḥanbalīs recommend granting the child the option to choose between his or her parents. Seven years marks the age of discernment (*sinn al-tamyīz*) or age of independence (*istiġnāʾ*) in children, when they are expected to be able to look after their basic physical needs (eating, getting dressed, getting cleaned) without assistance from an adult.

[17] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, XI, 414.
[18] Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, Muḫtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, 409.
[19] Articles 162 and 161 of the 1976 Personal Status law, respectively.

The current Jordanian age limit of fifteen years has no parallel in classic fiqh, but it coincides with another milepost in individual development according to Ḥanafīs, that is biological maturity (*bulūġ*). Maturity may be established based on physical evidence from the age of twelve for boys and nine for girls, but if physical evidence of maturity is not observed before that time, both sexes are to be treated as mature when they reach fifteen.[20]

The Jordanian distinction between the custody of the mother and custodians other than her also has its precedents in classical law. Although this is only applied to girls, al-Marġīnānī thought that the mother's and the grandmother's custody over a girl should last until she begins menstruating, while custodians other than those two should only look after her until she reaches the age of discernment.[21]

The *dhimmī* mother's right to custody

Relevant articles:

172. The right of custody is forfeit in the following circumstances:

[R~~r~~epealed:]~~:~~ ~~b) If the child has exceeded seven years of age and he was in the custody of a non-Muslim woman.~~

172. The right of custody is forfeit in the following circumstances:

a) If one of the conditions of custodianship is no longer present in the person entitled to the custody.

b) If the child has exceeded seven years of age and he was in the custody of a non-Muslim woman.

c) If the new custodian lives with the person who lost custody due to his behavior, his apostasy or being stricken with a communicable disease.

173. a) The mother's custody will continue until the child reaches fifteen years of age, and until the child reaches ten years of age if the custodian is someone other than the mother.

b) After the child reaches the age determined in clause a) of this article, he is given the right to choose to stay with the custodian mother until he reaches maturity.

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[20] Burhān al-Dīn al-Marġīnānī, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*, ed. Ṭalāl Yūsuf, Dār Iḥyā al-Turāṯ al-ʿArabī, Beirut. vol. III, 281.

[21] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 328.

c) A woman's custody is extended if the child has an illness that forces him rely on the woman's care as long unless his interests demand otherwise.

In 2010, the new temporary personal status law of Jordan introduced Article 172 b), according to which the custody of a non-Muslim custodian over a Muslim child ends when the child reaches the age of seven. The article was struck down during the 2019 ratification of the personal status code.

The 2010 article adopted a position that was identical to classical Ḥanafī doctrine, which holds that since being in their mother's care is in the children's best interest, a ḏimmī mother may retain custody until such a time that they can comprehend religion, but it is transferred to the father or another, Muslim custodian to prevent the children being exposed to non-Muslim religious influence.[22] The time at which children begin to comprehend religion is generally thought to coincide with the age of discernment, seven years according to Ḥanafīs.

Classical opinions on the matter vary between total prohibition and a lack of restrictions. Šāfiʿīs and Ḥanbalīs categorically reject granting a non-Muslim custody of over a Muslim. Šāfiʿīs do so without dwelling on the topic at any length.[23] The Ḥanbalī Ibn Qudāma is familiar with opposing views, but argues that since ~~that~~ a *fāsiq* divorcée cannot claim custody over her children, *a minore ad maius* the unbeliever mother should not be allowed to either.[24]

The Mālikī Ibn al-Ḥāǧib asserts that Islamic faith is not a prequisite for eligibility for custody, therefore the divorced Kitābī wife of a Muslim man has the same right to custody as a Muslim ex-wife. However, he describes an alternate scenario in which a Zoroastrian (therefore non-Kitābī) husband adopts Islam while his wife refuses to do the same. Muslim men being forbidden from marrying non-Muslims other than Kitābī women, this naturally leads to their separation, but whether such separation would cause the mother to lose her right to custody is not immediately apparent. Ibn al-Ḥāǧib, on his part, sees it necessary that the child is given to a Muslim custodian.[25] Commenting on this section of Ibn al-Ḥāǧib's compendium, Ḫalīl b. Isḥāq al-Ǧundī (d. 1365) writes that while, if taken literally, Ibn al-Ḥāǧib's text means the child should be taken from the non-Kitābī wife, the al-Mudawwana only states that the non-Muslim and the Muslim mother are equal with regards to custody. Therefore non-Muslim mothers

[22] id.

[23] Muḥyī al-Dīn Abū Zakariyyā b. Šaraf al-Nawawī, *Minhāǧ al-ṭālibīn wa ʿumdat al-mutqīn*. Muḥammad Muḥammad Ṭāhir Šaʿbān ed. Jeddah, Dār al-Minhāǧ 2005, p. 465.

[24] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, vol. XI, 412-413.

[25] Ǧamāl al Dīn b. ʿUmrān al-Ḥāǧib al-Mālikī, *Ǧāmiʿ al-ummahāt* Abū ʿAbd al-Raḥmān al-Aḫḍar al-Aḫḍarī ed. Beirut, al-Yamāma 1998. p. 335-336.

should only have their children taken from them if it is feared that the child is forced to partake in forbidden acts, such as eating pork and drinking wine.[26] This latter opinion became the preferred one in later Mālikī scholarship, with recent works affirming the non-Muslim mothers' right to custody without reservations.[27]

Later Ḥanafī legal scholarship also gradually moved away from the original position of the school which demanded the termination of custody in case of a disparity in religion. Ḥanafī texts only ever mention the custody of the *ḏimmī* mother, the custody of non-Muslims other than the mother is not discussed. The author of *Tabyīn al-Ḥaqāʾiq*, Faḫr al-Dīn al-Zaylaʿī upheld a distinction between the ḏimmī and the apostate mother, with the former being eligible for custody up to the age of discernment and the latter being denied custody altogether.[28]

In his al-Hidāya, al-Marġīnānī recommends terminating the non-Muslim mother's custody preventively, due to the expectation that the child's Muslim religious upbringing will suffer under the influence of a non-believing custodian:

> *„The ḏimmī woman is most entitled to her Muslim child until he does not yet comprehend religions […] and this is due to the child's interests before that age and due to the possibility of harm afterwards."*[29]

This prohibition was upheld by al-Marġīnānī's commentators as well.[30] While commenting on the proposed personal status code of Muḥammad Qadrī bāšā, al-Ibyānī writes that difference in religion does not influence the right to custody. Parity of religion need not be enforced, as custody is built on the natural affection of the custodian toward the child, which is unaffected by a difference in religion.[31]

Of the classical legal opinions prohibiting the custody of ḏimmīs over Muslim children, the Ḥanafī made little practical difference, since custody – in the case of boys, at least – of Muslim

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[26] Ḫalīl b. Isḥāq al-Ǧundī al-Mālikī, *al-Tawḍīḥ fī šarḥ al-muḫtaṣar al-farʿī li-Ibn al-Ḥāǧib*. ed. Aḥmad b. ʿAbd al-Karīm Naǧīb. Dublin, Markaz Naǧībawayh 2008, vol. V, 178.

[27] ʿAlī b- ʿAbd al-Salām b. ʿAlī al-Tasūlī: al-Bahǧa fī šarḥ al-tuḥfa. Beirut, Dār al-Kutub al-ʿIlmiyya, 1998, Vol. I, 651.

[28] ʿUṯmān b. ʿAlī al-Zaylaʿī al-Ḥanafī, *Tabyīn al-ḥaqāʾiq šarḥ Kanz al-daqāʾiq wa Ḥāšiyyat al-Šulbī*, Cairo, Maṭbaʿat Būlāq 1896, vol III, 49.

[29] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 828.

[30] Badr al-Dīn al-ʿAynī, *al-Bināya šarḥ al-Hidāya*. ed. Ayman Ṣāliḥ Šaʿbān. Beirut, Dār al-Kurub al-ʿIlmiyya 2000. (13 vols.), vol, 5, 651.
cf. Muḥammad b. ʿAbd al-Wāḥid al-Sīwāsī al-Iskandarī Kamāl al-Dīn b. Humām, *Šarḥ Fatḥ al-qadīr ʿalā al-Hidāya šarḥ Bidāyat al-Mubtadī.* ʿAbd al-Razzāq Ġālib al-Mahdī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 2003, vol. IV, 335.

[31] Muḥammad Qadrī Bāšā, Muḥammad Zayd al-Ibyānī, *Al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya*. Cairo, Dār al-Salām 2009, vol. II, 956.

mothers ends roughly at the same time due to the children reaching the age of discernment. With the mother's custody raised to the age of fifteen in general, a novel situation emerged in Jordanian law wherein a non-Muslim mother was under threat of losing custody over her children prematurely. Prior to 2010, Jordanian codes contained no such provision. Article 183 of the 1976 personal status law made it so any issue not addressed by the law was to be judged based on the preponderant Ḥanafī opinion. However, even the works that judges of the Supreme Judge Department consider to be sources of the preponderant Ḥanafī opinion do not unanimously claim that parity of religion is a requisite of custody. Furthermore, prior to the issuance of the 2010 temporary law, the Jordanian Court of Cassation (Maḥkamat al-Tamyīz) issued a decision affirming that Christian mothers of Muslim children retain custody under the same conditions that Muslim mothers do (under the operative law of the time, this meant the age of nine for boys and the age of eleven for girls).[32]

The father's custody

170. The blood-related mother is the most entitled to the custody of his child and his upbringing during the existence of the marriage and after its dissolution. After the mother, the right is transferred to her mother, then to the father's mother, then to the father, then it is up to the court to nominate the relative who is best able to provide a proper upbringing to the child based on available evidence.

Since 2010, Jordanian personal status law makes the father the next person eligible for custody after the the mother and the grandmothers how-high-so-ever. Article 154 of the 1976 personal status law, which article 170 of 2010 replaced, assigned custody according to the Ḥanafī order of precedence. Ḥanafīs, along with the majority of early jurists from other schools, only assigned custody to men if no suitable female candidate is found among the child's relatives. The specific order employed by the Ḥanafī school has remained unchanged since al-Qudūrī. If the mother is unavailable, custody is transferred to her mother, then the father's mother, then to full sisters, then to uterine sisters, then to agnate sisters, then to maternal aunts, then to paternal aunts; male custodians are only considered if a suitable candidate is not found among the above.[33] Some jurists, such as the XIXth century Muḥammed Qadrī bāšā suggested that the

[32] https://www.achrs.org/84/

[33] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, 1997, *Muḫtaṣar al-Qudūrī*. ed. Kāmil Muḥammad Muḥammad ʿUwayḍa. Beirut, Dār al-Kutub al-ʿIlmiyya. p 173-174.

list of prospective custodians be extended even further, including the child's cousins and aunts of the parents as well, making it even less likely that the father be given custody.[34]

Ḥanafīs explain the absolute priority of the mother with her natural affection toward her children, but they make no attempt to explain the priority given to women over men in general, women being better suited to look after children below the age of discernment is treated as self-evident. Šāfiʿīs on the other hand explicitly say that they consider women more adept at looking after children, and therefore, similar to Ḥanafīs, they only consider the custody of a male when a female relative is available.[35]

Classical Mālikīs keep track of several, conflicting accounts regarding Mālik b. Anas' opinion on the father's position in the order of precedence. According to one, similar to the Ḥanafī order of precedence, the father only comes after all prospective female relatives. According to the second, the father comes third after the mother and the mother's mother, preceding his own mother. The third account, which Ḫalīl b. Isḥāq al-Ǧundī considers to be the correct one, holds that the father comes after the two grandmothers, preceding sisters and aunts.[36] However, opinions within the school remained split on the custody of fathers. ʿAlī b. ʿAbd al-Salām al-Tasūlī (d. 1842): women should be favored in general due to their superior empathy and patience.[37]

The earliest Ḥanbalī compendium, al-Ḫiraqī's (d. 945) al-Muḫtaṣar, employs the same mother–grandmothers–sisters–aunts order of precedence that early Mālikīs and Ḥanafīs followed, but on each level of consanguinity, it favors agnatic female relatives over uterine ones. The precedence of paternal female relatives over maternal ones was also supported by Ibn Taymiyya. He has found it reasonable to favor female custodians over male ones due to their nurturing nature and expected better aptitude to child-rearing, but he saw no rational grounds or support in the Prophetic tradition for the favoring of uterine relatives over agnatic ones.[38]

Meanwhile, the XIIIth century Ibn Qudāma established an order of precedence quite different from al-Ḫiraqī's that made it more likely for the father to acquire custody of his minor children.

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[34] Muḥammad Qadrī Bāšā, Muḥammad Zayd al-Ibyānī, *Al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya*. Cairo, Dār al-Salām 2009, vol. II, p. 959-960.

[35] Muḥyī al-Dīn Abū Zakariyyā b. Šaraf al-Nawawī, *Minhāǧ al-ṭālibīn wa ʿumdat al-mutqīn*. Muḥammad Muḥammad Ṭāhir Šaʿbān ed. Jeddah, Dār al-Minhāǧ 2005, p. 464 = Minhāǧ: Abū Zakarīyā Muḥyī al-Dīn Yaḥyā b. Šaraf al-Nawawī (2005), *Minhāǧ al-ṭālibīn wa ʿumdat al-mutqīn fī al-fiqh*. ed. ʿAwaḍ Qāsim Aḥmad ʿAwaḍ. Dār al-Fikr. p. 622

[36] Ḫalīl b. Isḥāq al-Ǧundī al-Mālikī, *al-Tawḍīḥ fī šarḥ al-muḫtaṣar al-farʿī li-Ibn al-Ḥāǧib*. ed. Aḥmad b. ʿAbd al-Karīm Naǧīb. Dublin, Markaz Naǧībawayh 2008, vol. V, 169.

[37] ʿAlī b. ʿAbd al-Salām b. ʿAlī al-Tasūlī, al-Bahǧa fī šarḥ al-tuḥfa. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, vol. I, 647.

[38] Badr al-Dīn Abū ʿAbd Allāh Muḥammad b. ʿAlī al-Ḥanbalī al-Baʿlī, *Muḫtaṣar al-fatāqā al-miṣriyya li-Ibn Taymiyya*. ʿAbd al-Maǧīd Salīm ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1985, 623.

He put the maternal grandmother (how high so-ever) in the second place, followed by the father, then the paternal grandmothers, finally followed by the grandfathers, maternal first and paternal next.[39] This latter order is what the Ḥanbalī school adheres to this day, as evidenced by the opinion of the contemporary Saudi Ḥanbalī scholar ʿAbd Allāh Ṣāliḥ Fawzān (born 1933).[40]
The Ẓāhirī Ibn Ḥazm was also in favor of granting the father custody before more distant female relatives. Like most other sunnī jurists, he favors uterine relations over agnatic ones of the same degree of relation. However, he does not discriminate based on the sex of the potential custodian. For example, a full brother and a full sister, both being related to the child by way of both of their parents, are equally as likely to gain custody. All other circumstances being the same, the mother and the grandmothers come first, followed by the father and the grandfathers, then by brothers and sisters, finally followed by all other relatives in no particular order.[41]

The custodian's right to accommodation

178. a) Wage of the custody is paid by the person charged with the child's alimony and it is determined based on what is customary for the custodian, on the condition that it does not exceed the capabilities of the person paying the alimony. It is payable from the date it was requested and it will continue to last until the child reaches eighteen years of age.
b) The custodian is entitled to residence during the custody of the child, to be provided by the person charged with his alimony as long as she or the minor has no residence where it would be possible for them to live.
c) The mother is not entitled to wages for custodianship during the marriage or the waiting period after a revocable repudiation.

179. The rent for the custodian's residence is prescribed based on the ability of the person responsible for paying it, be him wealthy or impoverished. It is payable from the date it is requested.

[39] Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997, XI, 426.
[40] ʿAbd Allāh b. Ṣāliḥ Fawzān, Fiqh al-Dalīl šarḥ al-Tashīl. al-Riyadh, Maktabat al-Rušd 2008, vol. V, 33-35.

[41] Abū Muḥammad ʿAlī b. Aḥmad b. Saʿīd b. Ḥazm al-Andalusī, *al-Muḥallā bi-l-Āṯār*. ʿAbd al-Ġaffār Sulaymān al-Bandārī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 2002, vol. X, 143.

According to the Jordanian personal status law, the custodian is entitled to reimbursement for providing care for the child, to be paid by the person under obligation to provide the child's alimony. Article 178. b), introduced in 2010 and left unchanged during the 2019 ratification of the law, also prescribes that the custodian is entitled to lodgings if he or she or the child does not already possess a suitable place to live. The previously applied law only prescribed wages, without mentioning a right to accommodation.[42]

As the father (or whoever else this falls on in absence of the father) is already responsible for the maintenance of his children if they do not possess wealth, the sunnī schools of jurisprudence agree that the children's living expenses are to be covered by the father even while they are in the custody of someone else.[43] That the custodian is also entitled to wages is less obvious, but the Ḥanafī al-Kāsānī affirms it, finding that the custodian is entitled to wages on the analogy of the wet nurse, on the condition that she does not receive alimony from the father.[44]

The dissolution of a marriage creates a situation where the newly divorced wife, who is most entitled to become the custodian of any minor children born in that marriage, is very likely to be left without a permanent home and is forced to look for lodgings not only for herself, but also for her children. While it is unanimously agreed upon that the children are entitled to accommodation from the person responsible for their alimony in this case, classical jurists were hesitant to extend the same right to their custodian.

The Mālikī Ḫalīl b. Ishāq al-Ǧundī wrote that the custodian is entitled to accommodations according to the *iǧtihād* of the school.[45] Aḥmad al-Dardīr (d. 1786) on the other hand suggested that living costs should be divided between the custodian and the person responsible for the children's alimony according to a division prescribed by a judge, and Aḥmad al-Ṣāwī (d. 1825) adopted this latter opinion as well.[46] The Ḥanafī position shifted in the opposite direction. Earlier Ḥanafīs argued that since the compensation that the custodian receives is a wage, not alimony, access to housing is not necessarily included in it. In Ibn ʿĀbidīn's opinion, the obligation to provide housing is not based on the custodian's right to a wage, but on the

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[42] Art. 159 of the 1976 Personal Status Law

[43] Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, Muḫtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998;
Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 825;
Ḫalīl b. Isḥāq al-Ǧundī, *Muḫtaṣar al-ʿallāma al-Ḫalīl*. Cairo, Dār al-Ḥadīṯ 2005, 139.

[44] ʿAlā al-Dīn Abū Bakr b. Masʿūd al-Kāsāni, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*. Beirut, Dār al-Kurub al-ʿIlmiyya 1986, vol. IV, 40-41.

[45] Ḫalīl b. Isḥāq al-Ǧundī, *Muḫtaṣar al-ʿallāma al-Ḫalīl*. Cairo, Dār al-Ḥadīṯ 2005, 139.

[46] Abū ʿAbbās Aḥmad b. Muḥammad al-Ḫalwatī, Abū al-Barakāt Aḥmad b. Muḥammad b. Aḥmad al-Dardīr, *al-Šarḥ al-Ṣaġīr ʿalā Aqrab al-Masālik ilā maḏhab imām Mālik wa bi-l-hāmiš Ḥāšiyyat al-ʿallāma al-šayḫ Aḥmad b. Muḥammad al-Ṣāwī al-Mālikī*. Muṣtafā Kamāl Waṣfī ed. Cairo, Dār al-Maʿārif, n. d, vol. II, 764.

children's right to alimony, therefore as long as the custodian requires it and the child does not own a suitable property, provision of accommodation for the custodian is the responsibility of the person providing alimony to the children.[47]

Travel and parental visitation

175. A guardian's or custodian's travel ~~[journey]~~ with the child to a different region within the Kingdom does not affect his right to guardianship or custodianship as long as the travel does not present a clear detriment to the child's interests. If it has been established that traveling affects the child's interests, he is forbidden from doing so and his custody is temporarily transferred to the nearest person entitled to his custody.

176. If the child carries Jordanian citizenship, his custodian may not settle with him outside the Kingdom and may not travel with him with the intent of settling down outside the Kingdom, unless the child's guardian agrees to this and it has been confirmed that the child's interests remain secure.

181. a) Both the father and the mother have the right to spend with a child who has reached the age of seven five separate or consecutive overnight stays a month. As for the child who has not yet reached the age of seven, both the mother and the father (or the paternal grandfather, in the absence of the father) have the right to visit the child once a week, or to get in touch with him via the available modern means of communication while he spends time at one of them or the person entitled to his custody. The grandfathers and grandmothers have the right to visit the child once a month. All of the above are applicable if the applicants and the child both reside within the Kingdom.
b) If the child and the guardian taking his custody reside outside the Kingdom, the court may determine or settle the location, the date and the method of viewing, visitation, or taking along the child at least once a year. All of this will be ~~established [~~recorded~~]~~, taking into consideration the age and the condition of the child and the interests of the child and the parties involved, on the condition that the ruling ~~issues~~ issued in this case will not

[47] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḥtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966, vol. III, 562.

prohibit those entitled to viewing, visit visitation or taking the child along will not be denied from doing so in the child's place of residence.

c) If the child's place of residence is within the Kingdom while the person entitled to viewing, visitation or taking the child along reside outside of it, upon his presence at the Kingdom the court may determine or settle the location, the date and the method of viewing, visitation, or taking along –the child for a duration that it deems appropriate, taking into consideration the age and the condition of the child and the interests of the child and the applicants.

d) The person requesting the viewing, the visitation, the taking along and the communication with the child may agree directly with the custodian on the time, the date and the method ~~[~~of contact~~]~~. If they did not reach an agreement, the judge may prescribe to the parties, or to the present party, the time, the location and the method of the contact after listening to the accounts of the parties or the present party on this topic, and establish ~~[record, yuḥaddid]~~ all of the above by taking into consideration the age and the condition of the child and the interests of the child and the parties involved.

e) The ruling on viewing, visiting and taking the child along includes an obligation to return the child to his custodian after the prescribed time period has passed. Based on the custodian's request, the court must prohibit the child from traveling as a guarantee of his rights.

f) The person requesting to visit must pay the alimony the court has determined in order to perform the visitation when the custodian requests it, except for the cost of bringing the child to the Kingdom.

~~[repealed~~Repealed:~~]~~ ~~d) In the circumstances described in clauses b) and c) of this article, the court may authorize that the child stays overnight with the holder of the visitation right for a duration that it deems appropriate according to the regulations detailed therein.~~

While the right of the non-custodian parent to visit his or her children is not mentioned explicitly, Ḥanafī fiqh ensures this right by putting stringent limitations on a divorced mother's choice of residence. While she is in custody of her children, she is not permitted to move from the father's city (*miṣr*), as this presents and injury to the father's rights.

Al-Qudūrī only permitted a small concession to mothers in this matter, and only because of a Prophetic tradition on an unrelated matter that he has found to be relevant. A person visiting

the place where he or she got wed counts as a resident there, and therefore is no longer allowed to shorten prayers to two *rakʿas* as if on the road.[48]

> "*Whoever gets married in a city becomes one of them and must pray four.*"[49]

Accordingly, if the husband married his wife in her home town – which is a likely outcome, given the necessity of concluding the contract in the guardian's presence, who is most often the wife's father – that town counts as the husband's home town and upon becoming custodian, the ex-wife is permitted to move there with her children. According to al-Marġīnānī, whose opinion was later adopted by most Ḥanafīs, the limitations set by al-Qudūrī only apply if there is considerable distance between the domiciles of the custodial and the non-custodial parent. The mother is free to move to any place that lies close enough to the father that it's possible for him to visit the child and then return the same day to spend the night in his own home.[50] Taking the size of the Kingdom and the available means of transportation into account, permitting the custodian to move to any location within Jordan with the child could be interpreted as a direct application of al-Marġīnānī's opinion.

The right of parental visitation is not a regularly recurring subject in fiqh works. Overnight visits are not discussed at all, instead, a distinction is made between the non-custodian parent's visit at the custodian's house, and the taking of the child to the non-custodian parent's home. Of the four compendia examined for this study, only the Šāfiʿī al-Muzanī's mentions visitation. According to him, visitation at the custodian's home is permitted at any age, and the non-custodian parent is entitled to bring the child home once he or she reaches seven. As an exception, a custodian father is only obligated to bring his daughter to the mother in case of illness.[51] The Ḥanbalī al-Ḥaǧǧāwī (d. 1560) adopted al-Muzanī's opinion, while adding that visits to the non-custodian parent's home can occur as often as customary. He personally recommends one day every week.[52] Without going into such specifics, the Mālikī Ibn ʿArafa

[48] Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar al-Qudūrī, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, 174.

[49] Badr al-Dīn al-ʿAynī, *Nuḫab al-afkār fī tanqīḥ mabānī al-aḫbār fī šarḥ Maʿānī al-ʾĀṯār*. Abū Tamīm Yāsir b. Ibrāhīm ed. Kuwait, Dār al-Nawādir 2008, vol. VI, 401.

[50] Burhān al-Dīn al-Farġānī al-Marġīnānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006, vol. II, 830.

[51] Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, Muḫtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, 309.

[52] Mariam Alkandari. 2020. "Custody Provisions: A Comparative Study Between Maliki Jurisprudence and Kuwaiti Law". *Dirasat: Shari'a and Law Sciences 47* (4):221-31. p. 228, 229. https://dsr.ju.edu.jo/djournals/index.php/Law/article/view/3269.

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(d. 1401) warns that the custodian must not prevent the father from meeting his children. This is justified by the importance of the role the father plays in the child's education in matters of morals, manners and religion.[53] Later Mālikī authors extended this right to both grandfathers as well.[54] In recent times, ʿAlī Ğumʿa, former Grand Mufti of Egypt released a fatwā regarding the custodian's obligation to enable the grandparents to visit their grandchild as well.[55]
Overnight stays with the non-custodian parent were first guaranteed in Law 15 of 2019. Prior to that, the 2010 law granted the right to visit once a week, regardless of the age of the child, to the mother and the father or the paternal grandfather his absence. Article 181 had an additional paragraph – then named Paragraph d) – in the 2010 temporary personal status law, which entitled relatives other than the parents of children living abroad to have the child spend overnight stays with them pending on a court authorization. This paragraph was repealed during the ratification of the law in 2019.

The mother's obligation to take custody

Relevant article:

186. The mother is obligated to accept custody if she is appointed. If she was not appointed and her children's custody was refused by others, the judge will obligate the most appropriate person from among those entitled to it.

Custody is treated as a collective duty, meaning that no single person can be compelled to undertake it as long as another, eligible person accepts it.[56] As a result, classical jurisprudence insists that no prospective custodian may be compelled to accept custody of the children.[57]
Article 186 of the Jordanian personal status law, originally introduced in 2010, on the other hand states that the mother – or whoever else is most suitable – can be obligated to take custody of the children.

[53] Muḥammad b. ʿArafa al-Warraġmī al-Tūnisī, *al-Muḫtaṣar al-fiqhī*. Ḥāfiẓ ʿAbd al-Raḥmān Muḥammad al-Ḫayr ed. Dubai, Masǧid wa Markaz al-Fārūq ʿUmar b. al-Ḫaṭṭāb, 2014, vol. V, 49.
[54] Mariam Alkandari. 2020. "Custody Provisions: A Comparative Study Between Maliki Jurisprudence and Kuwaiti Law". *Dirasat: Shari'a and Law Sciences 47* (4):221-31. p. 228, 229. https://dsr.ju.edu.jo/djournals/index.php/Law/article/view/3269.
[55] https://www.dar-alifta.org/ar/fatawa/13108/حق-اقارب-الطرف-غير-الحاضن-في-رؤية-المحضون
[56] *Al-Mawsūʿa al-fiqhiyya*. Kuwait, Wizārat al-awqāf wa-l-šuūn al-islāmiyya 2005, vol. ~~al-Mawsūʿa al-fiqhiyya,~~ XVII, 400.
[57] Ibrāhīm b. Muḥammad b. Ibrāhīm al-Ḥalabī, *Multaqā al-abḥur*. Beirut, Dār al-Bayrūtī 2005, 280.

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The specific wording employed by the article (if she is appointed; *iḏā taʿayyanat lahā*) can be traced back to al-Timirtāšī's *Tanwīr al-abṣār*:

> *[Custody is] established as the mother's right […] and she will not be compelled to do it except if she is appointed.*[58]

Subsequent commentaries on the text explain that appointment, a phrase not used anywhere else in the context of custody, is to be interpreted on the analogy of fostering.[59] While the mother is under no obligation to breastfeed under standard circumstances, if the infant does accept suckling from anyone else, she can be compelled to do so. Similarly, if there are no willing, eligible uterine relative other than the mother to take custody of the children, the mother is obligated by a judge to take up custody, and this letter act is what al-Timirtāšī refers to as appointment. In the *Tanwīr*'s text, the phrase *if she is appointed* might be interpreted as referring to the mother exclusively, as the preceding section talks about the mother's priority right to custody. Here, the commentary *al-Durr al-muḫtār* clarifies that appointment is applicable to all potential custodians.[60]

Conclusions

In 2010, Jordanian law introduced children's right to choose between living with their father or their mother after a separation. The previous law granted the mother the sole right to custody as long as she is eligible, a position not supported by the four sunnī schools. Identically to Šāfiʿī doctrine, both boys and girls are presented with the choice, and at the same age. However, while Šāfiʿīs presented the children with the choice at the age of discernment (*sinn al-tamyīz*), the Jordanian law postponed it until the age of majority (*sinn al-bulūġ*) according to the Ḥanafī definition.

A non-Muslim mother's right to custody past the age of discernment is supported by the majority Mālikī opinion as well as some Ḥanafīs.

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[58] Tanwīr al-abṣār, 83

[59] Dāmād Afandī, ʿAbd al-Raḥmān b. Muḥammad b. Sulaymān al-Kālībūlī, *Maǧmaʿ al-anhur fī šarḥ Multaqā al-abḥur*. Ḫalīl ʿImrān al-Manṣūr ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998, vol. II, 170.

[60] Ibn-'Ābidīn Muḥammad Amīn Ibn-'Umar Aḥmad at-Timirtāšī Šams-ad-Dīn Muḥammad Ibn-'Abdallāh Ibn-Šihāb-ad-Dīn, 'Alā'-ad-Dīn al-Haṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966, vol. III, 559.

According to the preponderant Ḥanafī opinion, which the 1976 personal status law invoked on the matter, the father may only take custody of his children if no female relative is eligible. The father is assigned a higher priority in the opinion of various jurists from other schools. The order of precedence among custodians adopted in 2010 is identical to the minority opinion of the Mālikī Ḫalīl b. Isḥāq al-Ǧundī.

Since 2010, a Jordanian mother can be ordered by the court to take custody of her children. This shows a greater insistence than in classical Islamic jurisprudence on making sure that a mother and her minor children are not separated. However, this approach requires greater commitment to ensuring that the material conditions of the mother's custody are met. On its own, re-introducing the Ḥanafī position that obligates the mother to take custody would not achieve the aim of keeping the children in the mother's custody whenever possible, this was solved by also implementing a rule from classical jurisprudence which obligates the provision of accommodations to the custodian if required.

Little is written about visitation rights in classical jurisprudence, but what is there to be found correlates with the Jordanian law on several points: the non-custodian parent is guaranteed the right to visit at the custodian's home, and once the children reach the age of seven, the custodian must ~~not~~ enable non-custodian parents to take the child to their own home for up to five days a month. The grandparents' right to visit is also affirmed.

Summary of findings

Of the thirty-seven revisions to the Jordanian law presented in this study, three could be said not to have been derived from opinions found in classical Islamic jurisprudence.

Jordanian marriage age coincides with the age of legal adulthood, and thus limits the guardian's capacity to marry off a minor ward to special cases. Only one early jurist was known to deny the guardian's right to conclude a marriage contract in a minor ward's name, and his opinion is unanimously rejected in *fiqh* works. While certain limitations against minor marriages were supported by classical jurists, a prohibition applying to most cases was not. Modern Islamic scholars speaking in favor of marriage age laws point to the ruler's right to temporarily prohibit what is otherwise permitted instead, and idea rooted in a Muslim theory of governance.

Jordanian law handles faulty marriage contracts according to the Ḥanafī doctrine. However, Ḥanafīs considered marriages between a man and a woman related by fosterage to be utterly void. To ease the severity of the ruling, Ḥanafīs worked out a list of exemptions, some based on the precise relation between the spouses, others on the circumstances of the fosterage and the regularity with which it occurred. Jordanian law instead declares all marriages between foster relations to be faulty, leaving the ultimate decision to the judge's discretion.

The question of the working wife's alimony was not discussed in *fiqh* explicitly until the seventeenth century AD. Rulings on the matter are built upon the assumption that the wife is not entitled to alimony for the time she spends away from the marital home, regardless of whether she leaves with the husband's permission. Accordingly, even Ibn ʿĀbidīn's opinion, which was the most favorable towards the wife, only entitles her to alimony for the part of the day she spends at home. Even if this~~it~~ is taken to mean that the greater share of the alimony (a place to live, clothes, food consumed at home) is to be provided by the husband, the ruling still leaves room for dispute between the spouses. *Fatāwā* supporting the working wife's right to the full amount of the alimony were only issued in the past few decades.

In a few cases, established classical rulings are ignored because the pertaining issue is moot in Jordanian law. While classical Islamic jurisprudence considers repudiations on the deathbed to be invalid, Jordanian law contains no such provision, as on-the-spot irrevocable repudiations are invalid as a whole, and, as a result, the husband is unable to disinherit his wife in such a way.

Jordanian law does not recognize fornication (zināʾ) as a legal category, so provisions that establish a prohibitive degree of relatedness between two individuals based on fornication are similarly absent.

Reforms articles that present a divergence from the preponderant Ḥanafī opinion may be grouped based on the school of jurisprudence they are derived from.

A few of the reform articles are analogous to minority opinions within the Ḥanafī school. Mothers can be obligated to take custody of their children in accordance with the opinion of the late Ḥanafī al-Timirtāšī. The banning of on-the-spot irrevocable repudiations and compensation for arbitrary repudiations both rest on the principle of the essential prohibitedness of repudiation, a position that the XXth century Muḥammad Zayd al-Ibyānī accepted as a guiding principle, whereas in the earlier doctrine of the school, a sane, willing husband's right to pronounce a repudiation was seen as unrestricted. Of particular interest are issues where Jordanian law initially adopted a position from which Ḥanafī law has already moved away. Prior to 2019, a non-Muslim mother stood to lose custody of her children once they reached the age of discernment.– The 2019 personal status law, identically to al-Ibyānī's opinion, affirmed a non-Muslim's mother's right to custody, even past the age of adolescence. The custodian's right to accommodation, first introduced to Jordanian law in 2010, is a late development in Ḥanafī fiqh first mentioned by the XIXth century Ibn ʿĀbidīn. Since the law itself claims adherence to classical juristic opinions, the re-visiting of fiqh texts becomes a necessary part of statute law revision, further entrenching the role of *fiqh*-based evaluation of the law as part of the modern lawmaking process.

Other articles are analogous to a specific opinion formulated outside the Ḥanafī school. Examples are abound from the Mālikī school (the husband's obligation to take care of the costs of the wife's medical treatment and the cost of childbirth, the admissibility of hearsay testimony in judicial separation, the father's right to custody of small children), while reliance on Šāfiʿī (the amount of the spousal alimony, the husband's obligation to pay for the wife's funeral) and Ḥanbalī (the disobedient wife's right to spousal alimony, the wife's right to judicial separation in case of the husband's infertility) opinions is a little less common.

The conformity of yet other articles to classical Islamic jurisprudence could only be proven if they are assumed to be a product of *talfīq*, the synthesis of opinions from several different schools on a single issue. This might make the suggested antecedents seem more thant a little speculative, but

Article 324 shows that the law was written with the possibility of incorporating rules formulated through *talfīq* in mind:

. "*Provisions (nuṣūṣ) of this law are applied to all questions they deal with in word or in meaning. For their interpretation and supplementation of the rulings contained therein, the school of Islamic jurisprudence each one is derived from is to be consulted.*"

It is not claimed that any article or chapter of the law conforms to the doctrine of a single school in its entirety. Rather, any single provision (*naṣṣ*) within an article may be derived from the opinion of a different *maḏhab*. Rules on the transferal of marriage guardianship, the husband's right to petition for separation due to ailments before consummation of the marriage (according to Šāfiʿī opinion) but not after it (similar to the mainline Ḥanafī doctrine), and the prescription of mutʿa as a compensation for arbitrary repudiation belong in this category.

Examining the amended articles side by side, a few unspoken goals of Jordanian family law reform become apparent. The most explicit of these is the effort to preserve a possibility for the continuation of the marriage, unless the wife initiated the separation due to the deterioration of the marital relationship.

Following Ibn Taymiyya's position, combined repudiations were made to count as a single repudiation. Faulty marriages may be declared valid by a judge as long as the basic elements (*arkān*) of the valid marriage contract are present. Marriages between foster siblings, considered inherently void by Ḥanafīs, were re-classified as faulty. With the adoption of Ibn Qayyim's ruling on the legal capacity of a person overtaken with anger, a repudiation may be judged invalid due to a lack of competence even if the husband is not proven to suffer from an impairment of faculties.

After a judicial separation due to non-provision of alimony, the husband may retake the wife, provided that he guarantees future payments. Rules regarding īlāʾ and ẓihār were not codified until recently. Given the obscurity of these methods of separation, it is quite probable that the sole intention behind the recent introduction of the laws was to ensure that the separation pronounced by the judge after īlāʾ and ẓihār remains revocable in accordance with the Mālikī opinion. In separations requested due to the absence or disappearance of the husband, the wife is not forced to immediately choose between separation or the abandoning of her case. Instead, she is given the option to postpone her decision in the hope that the husband returns.

With the exception of the law on on-the-spot irrevocable repudiations, all of the above changes were introduced in 2010. Such an insistence on keeping the possibility for the resumption of the marriage open is not without precedent in classical Islamic jurisprudence. While a minority opinion during his time, Ibn Taymiyya held that irrevocable repudiations should be treated as an exception, permissible only when a revealed source supports this.

And while an effort was taken to preserve marriages as long as the chance for the restoration of harmonious marital life is present, the wife's ability to initiate a separation was also broadened to the extent that classical Islamic jurisprudence permits it.

The law on marriage contract stipulations enables the delegation of repudiation to the wife, and specifies several stipulations the breach of which results in an irrevocable separation. Separation due to injury (*taṭlīq li-ḍarar)*, fashioned after Mālikī law, was replaced with separation due to marital discord (*tafrīq li-l-šiqāq wa al-nizāʿ*). The former required the establishment of an injury suffered by the wife according to its definition in classical Islamic law. Separation due to discord, similar to Ibn Qudāma's position, enables separation if the offending spouse's conduct is detrimental to the other party without specifically targeting him or her. To facilitate the validation of the occurrence of abusive behavior, the admissibility of hearsay testimonies, a staple of Mālikī law, was introduced.

Judicial *ḫulʿ*, enacted by royal decree as an amendment to the 1976 personal status law, was preserved in the 2010 temporary personal status law drafted by the Supreme Judge Department. The law, renamed to redeemed separation, even offers some additional relief to a wife seeking a unilateral separation.~~,~~ Unlike in the original 2001 amendment, the husband may not demand that the compensation be paid in money if the dower was originally provided to the wife in the form of other valuables.

Jordanian law is more insistent on the involving of guardians in the marriage contract than some classical jurists were. The function of marriage guardianship in Mālikī, Šāfiʿī and Ḥanbalī law is two-fold: it is meant to ensure that the suitability of the future husband is verified, and it grants the guardian a significant degree of control over a woman's choice in marriage. Jordanian law preserved the former function while getting rid of the latter. Adoption of the Ḥanafī position, which permits all legal adults to marry without a guardian, would have been insufficient for the fulfilment of this objective. Instead of doing away with marriage guardianship over adult women altogether, the Jordanian law retains it while striving to make sure that a marrying couple do not suffer any

delays due to an unwilling guardian. While all sunnī schools hold that the guardian's protest to a marriage is to be ignored if it lacks sufficient grounds, the transferal of guardianship to a relative supporting the marriage is a cumbersome process according to the majority position of each school. As a solution, Jordanian law selectively applies the more permissive opinions of several schools. The pool of eligible guardians is restricted to residuary heirs, to the exclusion of female guardians. The objection of one present residuary is overridden by the consent of another from the same degree of relatedness. A present distant relative is eligible to act as marriage guardian if a more closely related one is absent. As per the minority Ḥanafī view, a guardian is considered absent if his failure to appear for the conclusion of the contract would cause any delay to the marriage. Finally, following a late Mālikī opinion, if requested, guardianship may be transferred directly to the court following the objection of one guardian.

There is something to be said about the preference given to different schools of jurisprudence during the course of the law's development as well. Reforms preceding the 2010 personal status code are mainly supported by Mālikī and Šāfiʿī works, with the only Ḥanbalī opinion being the banning of triple repudiations, the ruling which notably landed Ibn Taymiyya in jail. Meanwhile, more than half of the reforms enacted in 2010 can be traced back one way or another to one of three Damascene Ḥanbalī jurists, Ibn Qudāma al-Maqdisī, Ibn Taymiyya and Ibn Qayyim al-Ǧawziyya. Given that the father of modern Ḥanafī doctrine, the Syrian Ibn ʿĀbidīn is also known to have relied on the opinions of these jurists, it is perhaps not so far-fetched an idea to view the combining of Ḥanafī and Ḥanbalī views as the cultivation of a regional legal tradition.[1]

Through incremental changes, the law interprets a few basic concepts of Islamic law in a way that is quite far removed from their use in classical Islamic jurisprudence.

Exercising repudiation is the husband's unconstrained right in Ḥanafī law. Its effect is potentially immediate and irreversible, even if uttered without genuine intent. In its current Jordanian use, it requires a valid reason, and its first use is always revocable in a consummated marriage. It can be declared null even if the husband was *compos mentis* at the time of its uttering. Classical spousal alimony is best defined as a wage for services rendered, while the Jordanian law considers it an obligation on the husband while the couple cohabits. While the classical definition of *ḥadāna* limits

[1] Ibn ʿĀbidīn's ruling on the validity of repudiation in a state of anger, based on a treatise by Ibn Qayyim and adopted by the Jordanian law is one specific example presented in this study.

itself to securing a safe and proper upbringing for the children, the Jordanian law places an emphasis on preserving the bonds between children and parents and grandparents after a separation. These changes are readily apparent to anyone who compares the law with a fiqh manual. This study further demonstrates that the overwhelming majority of the changes were brought about without departing from framework established by the full range of classical Islamic juristic opinions.

classical, religious legal tradition is only one, conformity to fiqh is a stated and – as this study intended to show – successfully realized objective of Jordanian personal status law. Therefore, ignoring considerations for fiqh conformity can only lead to a flawed understanding of lawmaking processes in modern majority Muslim states.

Bibliography[2]

Abū Dāwud Sulaymān b. al-Aśʿaṯ b. Isḥāq b. Bašīr b. Šaddād b. ʿAmrū, *Sunan Abī Dāwud*. Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd ed. Sidon, al-Maktaba al-ʿAṣriyya, n. d. (4 vols), **[Sh]**

Abū ʿĪd, ʿĀrif Ḫalīl Muḥammad, *Al-Imām Dāwud al-Ẓāhirī wa aṯaruhu fī al-fiqh al-islāmī*. Kuwait, Dār al-Arqam 1984.

Abū Zahra, Muḥammad, *Šarḥ Qānūn al-Waṣiyya*. Cairo, The Anglo-Egyptian Bookshop, 1950.

Adang, Camilla. " The Spread of Ẓāhirism in Post-Caliphal Al-Andalus: The Evidence from the Biographical Dictionaries". In *Ideas, Images, and Methods of Portrayal: Insights into Classical Arabic Literature and Islam* (Leiden, The Netherlands: Brill, 2005)

ʿAlā al-Dīn Afandī, Muḥammad, *Takmilat Ḥāšiyat Ibn ʿĀbidīn = Ǫurat ʿUyūn al-Aḫyār Takmilat Radd al-Muḥtār*. Beirut, Dār al-Fikr 1995 (8 vols) **[Sh]**

ʿAlāʾ al-Dīn al-Samarqandī, *Tuḥfat al-fuqahāʾ*, Beirut, Dār al-Kutub al-ʿIlmiyya 1984. (3 vols) **[Sh]**

Alkandari, Mariam. 2020. "Custody Provisions: A Comparative Study Between Maliki Jurisprudence and Kuwaiti Law". *Dirasat: Shari'a and Law Sciences 47* (4): 221-31.

al-Arnaʾūṭ, Šuʿayb,ʿĀdil Muršid eds, *Musnad al-imām Aḥmad Ibn Ḥanbal*, Beirut, Mūʾassasat al-Risāla 2001. (50 vols)

al-Ašqar, ʿUmar Sulaymān ʿAbd Allāh, *al-Wāḍiḥ fī šarḥ qānūn al-aḥwāl al-šaḫṣiyya al-Urdunī*, Amman, Dār al-Nafāʾis 2015.

al-ʿAssāf, Tamām ʿAwda ʿAbd Allāh. „Mutʿa al-ṭalāq wa ʿalāqatuhā bi-l-taʿwīḍ ʿan al-ṭalāq al-taʿassufī." *Maǧallat Jāmiʿa Al-Šāriqa Li-l-ʿulūm al-Šarʿiyya wa-l-Dirāsāt al-Islāmiyya* 9, no. 2 (June 2012): 131–158.

al-Bābartī, Akmal al-Dīn, *al-ʿInāya šarḥ al-Hidāya*, Dār al-Fikr, Damascus, n. d. (10 vols)

[2] Entries marked with [Sh] correspond to the edition included in the al-Maktaba al-Šāmila program.

Badr al-Dīn al-ʿAynī, *Nuḫab al-afkār fī tanqīḥ mabānī al-aḫbār fī šarḥ Maʿānī al-ʾĀṯār*. Abū Tamīm Yāsir b. Ibrāhīm ed. Kuwait, Dār al-Nawādir 2008 (16 vols). **[Sh]**

Badr al-Dīn al-ʿAynī, *al-Bināya šarḥ al-Hidāya*. Ayman Ṣāliḥ Šaʿbān ed. Beirut, Dār al-Kurub al-ʿIlmiyya 2000. (13 vols) **[Sh]**

al-Baġawī, Abū Muḥammad al-Ḥusayn b Masʿūd ibn Muḥammad b. al-Farrā', *al-Tahḏīb fī al-fiqh al-Šāfiʿī*. ʿĀdil Aḥmad ʿAbd al-Mawǧūd, ʿAlī Muḥammad Muʿawwaḍ eds. Beirut, Dār al-Kutub al-ʿIlmiyya 1997. (8 vols.) **[Sh]**

al-Bakrī, Wāṣif ʿAbd al-Wahhāb, "Taʿdīlāt Qānūn Al-Aḥwāl al-Šāḫṣiyya Allatī Tammat bi-Mūǧib al-qānūn raqm 82/2001." http://www.mizangroup.jo/, n.d.

al-Baʿlī, Badr al-Dīn Abū ʿAbd Allāh Muḥammad b. ʿAlī al-Ḥanbalī, *Muḫtaṣar al-fatāqā al-miṣriyya li-Ibn Taymiyya*. ʿAbd al-Maǧīd Salīm ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1985. **[Sh]**

Banī Salāma, Muḥammad Ḫalaf, *Šarḥ qānūn al-aḥwāl al-šaḫṣiyya al-Urdunī*, Ammad, Dār Wāʾil 2016.

al-Buḫārī, Abū ʿAbd Allāh Muḥammad b. Ismāʿīl, *Ṣaḥīḥ al-Buḫārī*. Muṣṭafā Dīb al-Baġā ed. Damascus, Dār Ibn Kaṯīr 1993. (6 vols) **[Sh]**

Carroll, Lucy: Orphaned grandchildren in Islamic law of succession: Reform and islamization in Pakistan. Islamic Law and Society, vol.5, no. (1998), 410-411.

Coulson, Noel J, *Succession in the Muslim* Family. Cambridge University Press, London 1971.

Dāmād Afandī, ʿAbd al-Raḥmān b. Muḥammad b. Sulaymān al-Kālībūlī, *Maǧmaʿ al-anhur fī šarḥ Multaqā al-abḥur*. Ḫalīl ʿImrān al-Manṣūr ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998. (4 vols)

Encyclopaedia of Islam, Second Edition, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs, P.J. Bearman (Volumes X, XI, XII), Th. Bianquis (Volumes X, XI, XII), et al. Accessed July 23, 2022. doi:http://dx.doi.org/10.1163/1573-3912_islam_COM_1159.

Engelcke, Dörthe. *Reforming Family Law: Social and Political Change in Jordan and Morocco*, Cambridge University Press, 2019.

Dāmād Afandī, ʿAbd al-Raḥmān b. Muḥammad b. Sulaymān al-Kālībūlī, *Maǧmaʿ al-anhur fī šarḥ Multaqā al-abḥur*. Ḫalīl ʿImrān al-Manṣūr ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998. (4 vols)

al-Dasūqī, Muḥammad b. Aḥmad b. ʿArafa al-Mālikī, *al-Šarḥ al-kabīr lil-šayḫ al-Dardīr wa ḥāšiyyat al-Dasūqī*. Maktabat Muṣṭafā Bābī al-Ḥalabī, no date. (4 vols.) **[Sh]**

Faḫr al-Dīn al-Rāzī, *Mafātīḥ al-Ġayb*, Dār Iḥyā al-Turāṯ al-ʿArabī, Beirut, 2000. (32 vols)

Faruki, Kemal: Orphaned grandchildren in Islamic succession law: A comparison of modern Muslim colutions. *Islamic Studies* (1965).

Ǧād Allāh, Sāmī b. Muḥammad, *al-Iḫtiyārāt al-fiqhiyya li-šayḫ al-islām Ibn Taymiyya laday talāmīḏihi*. Beirut, Dār Ibn Ḥazm 2019 (2 vols).

al-Ġazzālī, Abū Ḥāmid Muḥammad b. Muḥammad b. Muḥammad, *al-Wağīz fī fiqh al-Imām al-Šāfiʿī*. ʿAlī Muʿawwaḍ, ʿĀdil ʿAbd al-Mawǧūd eds. Beirut, Dār al-Arqam 1997. (2 vols)

Griffini, Eugenio: *Corpus Iuris di Zaid ibn ʿAlī*. Milan,Hoepli Editore 1919.

al-Ǧuwaynī, Abū al-Maʿālī ʿAbd al-Malik b. ʿAbd Allāh b. Yūsuf b. Muḥammad, *Nihāyat al-maṭlab fī dirāyat al-maḏhab*. ʿAbd al-ʿAẓīm Maḥmūd al-Dīb ed. Jeddah, Dār al-Minhāǧ 2007. (20 vols) **[Sh]**

Ibrāhīm al-Ḥalabī, Ibrāhīm b. Muḥammad, *Multaqā al-abḥur*. Beirut, Dār al-Bayrūtī 2005.

Habachy, Saba, The System of Nullities in Muslim Law, *The American Journal of Comparative Law*, Volume 13, Issue 1, Winter 1964, Pages 61–72

Ḫalīl b. Isḥāq al-Ǧundī, *Muḫtaṣar al-ʿallāma al-Ḫalīl*. Cairo, Dār al-Ḥadīṯ 2005.

Ḫalīl b. Isḥāq al-Ǧundī al-Mālikī, *al-Tawḍīḥ fī šarḥ al-muḫtaṣar al-farʿī li-Ibn al-Ḥāǧib*. Aḥmad b. ʿAbd al-Karīm Naǧīb ed. Dublin, Markaz Naǧībawayh 2008. (8 vols) **[Sh]**

Ḫallāf , ʿAbd al-Wahhāb, *Aḥkām al-aḥwāl al-šaḫṣiyya fī al-šarīyya al-islāmiyya ʿalā wafqi maḏhab Abī Ḥanīfa wa mā ʿalayhi al-ʿamal bi-l-maḥākim*. Kuwait, Dār al-Qalam, 1990.

al-Ḥalwatī, Abū ʿAbbās Aḥmad b. Muḥammad, Abū al-Barakāt Aḥmad b. Muḥammad b. Aḥmad al-Dardīr, *al-Šarḥ al-Ṣaġīr ʿalā Aqrab al-Masālik ilā maḏhab imām Mālik wa bi-l-hāmiš Ḥāšiyyat al-ʿallāma al-šayḫ Aḥmad b. Muḥammad al-Ṣāwī al-Mālikī.* Muṣṭafā Kamāl Waṣfī ed. Cairo, Dār al-Maʿārif, n. d. (4 vols.) **[Sh]**

al-Ḫarašī, Abū ʿAbd Allāh Muḥammad, *Šarḥ al-Ḫarašī ʿāl Muḫtaṣar Ḫalīl*. Cairo, Maṭbaʿat Būlāq 1899 (8 vols).

Hawting, Gerald. "An Ascetic Vow and an Unseemly Oath?: 'Īlā' and 'Ẓihār' in Muslim Law." *Bulletin of the School of Oriental and African Studies, University of London* 57, no. 1 (1994)

Heka László, „A hármas Talaq (Talaq-E-Biddat) elnevezésű muszlim válási forma betiltása Indiában". *Comparative Law Working Papers*. (2019) http://oji.uszeged.hu/web2/images/stories/talaq.pdf

al-Hindī, Aḥmad b. ʿAbd al-ʿAzīz b. Zayn al-Dīn b. ʿAlī b. Aḥmad al-Maʿbarī al-Mālībārī, *Fatḥ al-muʿīn bi-šarḥ Qurat al-ʿAyn bi-muhimmāt al-dīn*. Bassām ʿAbd al-Wahhāb al-Ǧābī ed. Beirut, Dār Ibn Ḥazm 2004. **[Sh]**

al-Ḫiraqī, Abū Qāsim ʿUmar al-Ḥusayn, *Muḫtaṣar al-Ḫiraqī*. ed. Muḥammad Zuhayr al-Šāwīš. Damascus, Dār al-Salām li-l-Ṭibāʿa wa al-Našr 1958.

al-Ḫumaynī, Rūḥ Allāh al-Mūsawī, *Taḥrīr al-wasīla*. Damascus, Safāra al-Ǧumhūriyya al-Islāmiyya al-Īrāniyya bi-Dimašq, 1998. (2 vols)

Ibn ʿAbd al-Birr, Abū ʿUmar Yūsuf b. ʿAbd Allāh b. Muḥammad b. ʿĀṣim al-Nimrī, *al-Kāfī fī fiqh ahl al-Madīna*. Muḥammad Muḥammad Uḥayd Walad Mādīk al-Mūrītānī ed. Al Riyadh, Maktabat al-Riyāḍ al-Ḥadīṯa 1980. (2 vols) **[Sh]**

Ibn ʿAbd al-Salām, Abū al-Ḥasan ʿAlī b. ʿAlī al-Tasūlī, *al-Bahǧa fī šarḥ al-tuḥfa*. Beirut, Dār al-Kutub al-ʿIlmiyya 1998. (2 vols)

Ibn ʿĀbidīn, Muḥammad Amīn Ibn ʿUmar Aḥmad al-Timirtāšī Šams al-Dīn Muḥammad Ibn ʿAbd Allāh Ibn Šihāb al-Dīn, ʿAlāʾ al-Dīn al-Ḥaṣkafī, *Ḥāšiyyyat Radd al-muḥtār ʿalā al-Durr al-muḫtār šarḥ Tanwīr al-abṣār,* Beirut, Dār al-Fikr 1966. (6 vols, reprint of the Muṣtafā al-Bābī al-Ḥalabī edition). **[Sh]**

Ibn ʿĀṣim al-Andalusī, Abū Bakr b. Muḥammad b. Muḥammad b. Muḥammad, *Tuḥfat al-ḥukkām fī maʿrifat al-ʿuqūd wa al-aḥkām*. Muḥammad ʿAbd al-Salām Muḥammad ed. Cairo, Dār al-Āfāq 2011.

Ibn ʿĀšūr, Muḥammad Ṭāhir, *Tafsīr al-taḥrīr wa al-tanwīr*, Tunis, al-Dār al-Tūnisiyya li-l-Našr 1984.

Ibn Ḥaǧar al-Haytamī, Aḥmad b. Muḥammad b. ʿAlī, *Tuḥfat al-muḥtāǧ fī šarḥ al-Minhāǧ*. Cairo, al-Maktaba al-Tiǧāriyya al-Kubrā 1938. (10 vols) **[Sh]**

Ibn Ḥaǧar al-ʿAskalānī, Aḥmad b. ʿAlī, *Bulūġ al-marām min adillat al-aḥkām*. Māhir Yāsīn al-Faḥl ed. Al Riyadh, Dār al-Qabs 2014, **[Sh]**

Ibn al-Ḥāǧib, Ǧamāl al Dīn b. ʿUmrān al-Mālikī, *Ǧāmiʿ al-ummahāt= Muḫtaṣar Ibn al-Ḥāǧib* Abū ʿAbd al-Raḥmān al-Aḫḍar al-Aḫḍarī ed. Beirut, al-Yamāma, n. d.

Ibn Ḥazm al-Andalusī, Abū Muḥammad ʿAlī b. Aḥmad b. Saʿīd, *al-Muḥallā bi-l-Āṯār*. ʿAbd al-Ġaffār Sulaymān al-Bandārī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 2002. (reprint of the Dār al-Fikr edition) **[Sh]**

Ibn Ḥaẓm al-Andalusī, *al-Muḥallā fī šarḥ al-Muǧallā bi-l-ḫuǧaǧ wa al-āṯār*, ed. Muḥammad Munīr al-Dimašqī, Dār Ibn al-Ǧawzī, Cairo, 2015.

Ibn Humām, Muḥammad b. ʿAbd al-Wāḥid al-Sīwāsī al-Iskandarī Kamāl al-Dīn, *Šarḥ Fatḥ al-qadīr ʿalā al-Hidāya šarḥ Bidāyat al-Mubtadī*. ʿAbd al-Razzāq Ġālib al-Mahdī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 2003. (10 vols)
Ibn Kaṯīr, al-Imām Abū al-Fadāʾ al-Ḥāfiẓ al-Maqdisī: *Tafsīr al-Qurʾān al-ʿAẓīm*. Ḥusayn b. Ibrāhīm Zahrān ed. Beirut, Dār al-Kutub al-ʿIlmiyya, n. d.

Ibn Māǧa, Abū ʿAbd Allāh Muḥammad b. Yazīd al-Qazwīnī, *al-Sunan*. Šuʿayb al-Arnaʾūṭ ed. Beirut, Mūʾassasat al-Risāla 2009. (5 vols) **[Sh]**

Ibn Naqīb al-Miṣrī, Šihāb al-Dīn Abū al-ʿAbbās Aḥmad, *ʿUmdat al-sālik wa ʿuddat al-nāsik*. ʿAbd Allāh . Ibrāhīm al-Anṣārī ed. Qatar, Wizārat al-Šuʾūn al-Dīniyya 1982. **[Sh]**

Ibn Qayyim al-Ǧawziyya, Abū ʿAbd Allāh Muḥammad b. Abū Bakr b. Ayyūb, *Iġāṯat al-lafhān fī ḥukm ṭalāq al-ġaḍbān*. ʿAbd al-Raḥmān b. Ḥusayn b. Qāʾid ed. Dār ʿĀlam al-Fawāʾid, n. d.

Ibn Qudāma al-Maqdisī, *al-Muġnī*. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī ed. Al-Riyadh, Dār ʿĀlam al-Kutub 1997. (15 vols)

Ibn Rušd al-Qurṭubī, Abū al-Walīd Muḥammad b. Aḥmad, *Bidāyat al-Muǧtahid wa nihāyat al-muqtaṣid*. Cairo, Dār al-Ḥadīṯ 2004. (4 vols) **[Sh]**

Ibn Rušd al-Qurṭubī, *Bidāyat al-Muǧtahid wa nihāyat al-muqtaṣid*. Muḥammad Ibn Ṣāliḥ al-ʿUṯaymīn ed. Riyadh, Dār Ibn al-Jawzī 2014.

Ibn Taymiyya, *Maǧmūʿ Fatāwā Šayḫ al-Islām Aḥmad b. Taymiyya*. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim, Muḥammad b. Qāsim eds. Medina, Wizārat al-Awqāf 2004.

ʿIlīš, Muḥammad, *Šarḥ Minaḥ al-Ǧalīl ʿalā Muḫtaṣar al-ʿallāma al-Ḫalīl*. Beirut, Dār al-Fikr 1984. (9 vols) **[Sh]**

Imber, Colin. “Why You Should Poison Your Husband: A Note on Liability in Ḥanafī Law in the Ottoman Period.” *Islamic Law and Society* 1, no. 2 (1994).

al-Kāsānī , ʿAlāʾ al-Dīn Abū Bakr b. Masʿūd, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*. Beirut, Dār al-Kurub al-ʿIlmiyya 1986. (7 vols, reprint of the 1910 Šarikat al-Maṭbūʿāt al-ʿIlmiyya edition) **[Sh]**

al-Kāsānī , ʿAlāʾ al-Dīn: Badāʾiʿ al-Ṣanāʾiʿ fī tartīb al-šarāʾiʿ. ʿAlī Muḥammad Muʿawwaḍ., ʿĀdil Aḥmad ʿAbd al-Mawǧūd eds. Beirut, Dār al-Kutub al-ʿIlmiyya 2003.

Khan, Hamid, *The Islamic Law of Inheritance*. Karachi, Oxford university Press 2007.

al-Laḫmī, Abū al-Ḥasan ʿAlī b. Muḥammad, *al-Tabṣira*. Aḥmad ʿAbd al-Karīm Naǧīb ed. Doha, Wizārat al-awqāf wa al-šuʾūn al-islāmiyya 2011. **[Sh]**

al-Marġīnānī, Burhān al-Dīn, *al-Hidāya fī šarḥ Bidāyat al-mubtadī*. Ṭalāl Yūsuf ed. Beirut, Dār Iḥyā al-Turāṯ al-ʿArabī, n. d. **[Sh]**

al-Marġīnānī, Burhān al-Dīn al-Farġānī, *Al-Hidāyah: The Guidance*. Imran Ihsan Khan Nyazee trans. Islamabad, Center For Excellence in Research 2006. (2 vols)

Marʿī b. Yūsuf al-Kiramī al-Ḥanbalī, *Ġāyat al-muntahā fī ǧamʿ al-Iqnāʿ wa-l-Muntahā*. Yāsir Ibrāhīm al Mazrūʿī, Rāʾid Yūsuf al-Rūmī eds. Kuwait, Mūʾassasat Ġarrās 2007. (2 vols.)

al-Māwardī, Abū al-Ḥasan ʿAlī b. Muḥammad b. Ḥabīb al-Baṣrī, *al-Ḥāwī al-kabīr fī fiqh maḏhab al-imām al-Šāfiʿī raḍiya Allāhu ʿanhu wa huwa šarḥ Muḫtaṣar al-Muzanī*. ʿAlī Muḥammad Muʿawwaḍ, ʿĀdil ʿAbd al-Mawǧūd eds. Beirut, Dār al-kutub al-ʿilmiyya 1994. (18 vols.)

al-Mawṣilī, ʿAbd Allāh b. Maḥmūd b. Mawdūd al-Ḥanafī, *al-Iḫtiyār fī šarḥ al-muḫtār*. Beirut, Dār al-Kutub al-ʿIlmiyya, n. d.

Al-Mawsūʿa al-fiqhiyya. Kuwait, Wizārat al-awqāf wa-l-šuūn al-islāmiyya 2005. (45 vols) **[Sh]**
~~*al-Mawsūʿa al-fiqhiyya* XXIX, 12.~~

al-Mawwāq, Abū ʿAbd Allāh Muḥammad b. Yūsuf al-ʿAbdarī, *al-Tāǧ wal-al-iklīl li-Muḫtaṣar al-Ḫalīl*. Zakariyyā ʿUmayrāt ed. Riyadh, Dār ʿĀlam al-Kutub 2003. (8 vols)

Messick, Brinkley Morris. 1996. *Calligraphic State: Textual Domination and History in a Muslim Society (Comparative studies on Muslim societies; 16)*. University of California Press.

Muḥammad Qadrī bāšā, *Al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya ʿalā maḏhab Abī Ḥanīfa al-Nuʿmān.* Cairo, Maṭbaʿat Laǧna al-Taʾlīf wa al-tarǧama wa al-našr 1895.

Muḥammad Qadrī Bāšā, Muḥammad Zayd al-Ibyānī, *Al-Aḥkām al-šarʿiyya fī al-aḥwāl al-šaḫṣiyya wa šarḥuhu li-Muḥammad Zayd al-Ibyānī*. Cairo, Dār al-Salām 2009. (4 vols.)

Munir, Muhammad. "Triple Ṭalāq in One Session: An Analysis of the Opinions of Classical, Medieval, and Modern Muslim Jurists under Islamic Law", Arab Law Quarterly 27, 1 (2013): 29-49.

Muslim b. Ḥaǧǧāǧ, Abū al-Ḥusayn al-Qušayrī, *Ṣaḥīḥ Muslim*. Muḥammad Fūʾad ʿAbd al-Bāqī ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1991 (4 vols, reprint of the Bābī Ḥalabī edition) **[Sh]**

Muṭahhar al-Ḥillī, Ǧamāl al-Dīn b. al-Ḥusayn b. Yūsuf b. ʿAlī , *Taḏkirat al-fuqahāʾ*. Tehran, Al-Maktaba al-Murtaḍawiyya li-Iḥyā al-ʾĀṯār al-Ǧaʿfariyya 1968

al-Muzanī, Abū Ibrāhīm Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī, Muḫtaṣar al-Muzanī. Muḥammad ʿAbd al-Qāhir Šāhīn ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1998.

al-Nasafī, Abū al-Barakāt ʿAbd Allāh b. Aḥmad Maḥmūd Ḥāfiẓ al-Dīn, *al-Baḥr al-rāʾiq šarḥ Kanz al-daqāʾiq*. Zakariyyā ʿUmayrāt ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997. (8 vols) **[Sh]**

al-Nasafī, Abū al-Barakāt ʿAbd Allāh b. Aḥmad, *Kanz al-Daqāʾiq*. Sāʾid Bakdāš ed. Dār al-Sirāǧ, Medina, Saudi Arabia, no date, p. **[Sh]**

Nasir, Jamal J, *The Islamic Law of Personal Status*. The Hague, Kluwer law International 2002.

al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn Yaḥyā b. Šaraf, *Minhāǧ al-ṭālibīn wa ʿumdat al-mutqīn fī al-fiqh*. ʿAwaḍ Qāsim Aḥmad ʿAwaḍ ed. Beirut, Dār al-Fikr 2005. **[Sh]**

al-Nawawī, Muḥyī al-Dīn Abū Zakariyyā b. Šaraf, *Minhāǧ al-ṭālibīn wa ʿumdat al-mutqīn*. Muḥammad Muḥammad Ṭāhir Šaʿbān ed. Jeddah, Dār al-Minhāǧ 2005.

Nasr, Seyyed Hossein, Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard, and Mohammed Rustom, *The Study Quran: A New Translation and Commentary*. New York, HarperOne 2015.

al-Nawawī, Abū Zakariyyā Maḥmūd b. Šaraf: *Rawḍat al-ṭālibīn*. Beirut, al-Maktab al-Islāmī 1991. (12 vols)

Qawānīn wa tašrīʿāt al-aḥwāl al-šaḫṣiyya wa al-usra. Cairo, Dār al-ʿArabī 2016.

al-Qudūrī, Abū al-Ḥasan Aḥmad b. Muḥammad b. Aḥmad b. Ǧaʿfar, *Muḫtaṣar al-Qudūrī*. Kāmil Muḥammad Muḥammad ʿUwayḍa ed. Beirut, Dār al-Kutub al-ʿIlmiyya 1997, **[Sh]**

al-Quhastānī , Šams al-Dīn Muḥammad al-Ḫūrāsānī, *Ǧāmiʿ al-rumūz fī Šarḥ Muḫtaṣar al-Wiqāya al-Musammā bi-l-Niqāya*. Kabīr al-Dīn Aḥmad ed. Calcutta, n. p, 1858.

al-Ramlī, Ḫayr al-Dīn, *al-Fatāwā al-Ḫayriyya li-nafʿ al-birriyya ʿalā maḏhab al-imām al-aʿẓam Abī Ḥanīfa al-Nuʿmān*. Cairo, Maṭbaʿat Būlāq 1882.

al-Šāfiʿī, Abū ʿAbd Allāh Muḥammad b. Idrīs, *al-Umm maʿa Muḫtaṣar al-Muzanī*. Beirut, Dār al-Fikr 1990. (8 vols) **[Sh]**

al-Sarṭāwī, Maḥmūd ʿAlī, *Šarḥ qānūn al-aḥwāl al-šaḫṣiyya*. Amman, Dār al-Fikr 2013. p. 180.

al-Rifāʿī, Rudaynā Ibrāhīm, "al-Qism bayna al-zawǧāt fī mabīt aḥkāmuhu wa masqiṭātuhu", *al-Maǧalla al-Urduniyya fī al-dirāsāt al-islāmiyya* 8, no. 1 (2012).

Saḥnūn b. Saʿīd al-Tanūḫī, *al-Mudawwana al-Kubrā*. Riyadh, Wizārat al-Šuʿūn al-Islāmiyya wa al-Awqāf, n. d. (16 vols)

Saḥnūn b. Saʿīd al-Tanūḫī, *al-Mudawwana al-Kubrā*. Beirut, Dār al-Kutub al-ʿIlmiyya 1994. (5 vols) **[Sh]**

al-Ṣālihī , Yūsuf b. al-Ḥasan b. ʿAbd al-Hādī al-Dimašqī, *al-Ǧawhar al-munaḍḍad fī ṭabaqāt mutaʾaḫḫirī aṣḥāb Aḥmad*. ʿAbd al-Raḥmān b. Sulaymān al-ʿUṭaymīn ed. al-Riyadh, Maktabat al-ʿUbaykān 2000.

al-Ṣanʿānī, Muḥammad b. Ismāʿīl, *Subul al-salām šarḥ Bulūġ al-Marām*. ed. Nāṣir al-Dīn al-Albānī. Ryad, Maktabat al-Maʿārif, 2006 (4 vols.)

al-Saraḫsī, Šams al-Aʾimma: *al-Mabsūṭ*. Beirut, Dār al-Maʿrifa, 1993. **[Sh]**

al-Šaybānī, Abū ʿAbd Allāh Muḥammad n. al-Ḥasan, *al-Ḥuǧǧa ʿalā ahl al-Madīna*. al-Sayyid Mahdī Ḥasan al-Kīlānī al-Qādirī ed. Beirut, ʿĀlam al-Kutub 1982 (4 vols.) **[Sh]**

al-Siġnāqī, Ḥusām al-Dīn al-Ḥusayn b. ʿAlī b.-Ḥaǧǧāǧ b. ʿAlī al-Ḥanafī, *al-Nihāya šarḥ al-Hidāya*. ʿAbd al-ʿAzīz b. ʿAbd Allāh al-Wuhaybī ed. Mecca, Ummul Qura University 2016.

al-Šinqīṭī, Aḥmad b. Aḥmad al-Muḫtār al-Ǧaknī, *Mawāhib al-Ǧalīl min adillat al-Ḫalīl*. ʿAbd Allāh Ibrāhīm al-Anṣārī ed. Qatar, Dār Iḥyāʾ al-Turāṯ al-Islāmī 1983. (4 vols) **[Sh]**

al-Šīrāzī, Abū Isḥāq Ibrāhīm b. ʿAlī b. Yūsuf, *al-Muhaḏḏab fī fiqh al-imām al-Šāfiʿī*. ed. Zakariyyā ʿUmayrāt. Beirut, Dār al-Kutub al-ʿIlmiyya 1995. 3 vols. **[Sh]**

al-Ṭabarī, Abū Ǧaʿfar, *Tafsīr al-Ṭabarī*. Baššār ʿAwwād Maʿrūf ed. Beirut, Mūʾassasat al-Risāla 1994.

al-Timirtāšī, Šams al-Dīn Muḥammad b. ʿAbd Allāh b. Šihāb al-Dīn Aḥmad b. Timirtāš al-Ḥanafī, *Matn Tanwīr al-abṣār wa ǧāmiʿ al-biḥār*. Cairo, al-Maktaba al-Nabawiyya, n. d.

al-Tirmiḏī, Abū ʿĪsā Muḥammad b. ʿĪsā, *al-Ǧāmiʿ al-kabīr*. Baššār ʿAwwād Maʿrūf ed. Beirut, Dār al-Ġarb al-Islāmī 1996. (6 vols), **[Sh]**

Tucker, Judith E, *In the House of the Law : Gender and Islamic Law in Ottoman Syria and Palestine*. Berkeley, University of California 1998.

al-ʿUṯaymīn, Muḥammad Ibn Ṣāliḥ, *al-Šarḥ al-mumtiʿ ʿalā Zād al-mustaqni*. Al Riyadh, Dār Ibn al-Ǧawzī 2007 (15 vols). **[Sh]**

Wensynck, Leyden, Brill 1988., vol. 8, p. 83

Yanagihashi Hiroyuki. "The Doctrinal Development of “Maraḍ Al-Mawt” in the Formative Period of Islamic Law", *Islamic Law and Society* 5, 3 (1998): 326-358.

al-Zarkašī, Šams al-Dīn Muḥammad b. ʿAbd Allāh al-Miṣrī al-Ḥanbalī, *Šarḥ al-Zarkašī ʿalā Muḫtaṣar al-Ḫiraqī*. Abd Allāh b. ʿAbd al-Raḥmān b. ʿAbd Allāh b. Ǧibrīn ed. Al-Riyadh, Maktabat al-ʿUbaykān 1993 (7 vols) **[Sh]**

al-Zaylaʿī, Faḫr al-Dīn ʿUṯmān b. ʿAlī, *Tabyīn al-ḥaqāʾiq šarḥ Kanz al-Daqāʾiq*. Cairo, Maktabat al-Kubrā al-Amīriyya 1895. (6 vols.) vol. II, 128.

al-Zuḥaylī, Wahbat b. Muṣṭafā, *al-Fiqh al-islāmī wa adillatuhu*. Damascus, Dār al-Fikr 2014 (10 vols) **[Sh]**

al-Zuhayrī, Muḥammad b. Saʿd b. Munīʿ, *al-Ṭabaqāt al-kubrā*. ʿAlī Muḥammad ʿUmar ed. Cairo, Maktabat al-Ḫānǧī 2001 (21 vols). Vol. VIII, p. 469. **[Sh]**

Appeal number 509 of judicial year 65, dated June 2000. https://manshurat.org/node/33910 Accessed: 2022.09.23.

Appeal number 649 of judicial year 65, dated January 2001. https://manshurat.org/node/32595 Accessed: 2022.09.23.

https://www.dar-alifta.org/ar/fatawa/13108/حق-اقارب-الطرف-غير-الحاضن-في-رؤية-المحضون

Qarārāt wa tawṣīyāt Maǧmaʿ al-Fiqh al-Islāmī al-Duwalī, Maǧmaʿ al-Fiqh al-Islāmī al-Duwalī 2020. https://iifa-aifi.org/