

**IBN RUŠD AL-ĠADD (1058–1126):
FATWĀS ABOUT MARRIAGE AND MARRIED LIFE**

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In the following paper I try to shed light on marital relations in Mediaeval Andalusia, and at the same time on marital relations in the Mediaeval Arab world in general. We know much about the jurisdiction of the Islamic law on marriage and the prescriptions of the married life through the vast legal literature, but we cannot get an insight into the courts' judgements on the same field – as a matter of fact, on no fields. The nearest possible way to comprehend how the judicial system works in solving the different problems which arise during family life, seems to be given by the answers to legal questions, the *fatwās* of the *mufīīs*. There is one important difference between the *fatwā* of the *mufīī* and the court's judgement (*qaḍā'*): the *mufīī* has no possibility to verify the data presented to him, so he has to decide the case assuming that he was given the relevant facts without intention to deceive. That is why so many *fatwās* begin with the expression: "If that is the case".¹

The first *fatwā* collection in the territories of al-Maġrib and al-Andalus was that of Ibn Rušd al-Ġadd at the turn of the 11th and 12th centuries, in the Almoravid era.² Abū l-Walīd Muḥammad ibn Aḥmad ibn Aḥmad Ibn Rušd al-Ġadd (December 1058 – 8 December 1126),³ known as Ibn Rušd al-Ġadd, the grandfather of the famous philosopher Ibn Rušd al-Ḥafīd, the Grandson (Averroes), was one of the most famous *mālikī* jurists of his age. In 1117 he was appointed the highest judicial post in Córdoba, *qāḍī l-ġamā'a* ('judge of the community'), which he held for four years until his resignation, because he wanted to dedicate his life to writing books.

The work, which bears the title *Fatāwā Ibn Rušd*, contains 666 *fatwās* collected by the editor from different manuscript sources.⁴ The number of *fatwās* dealing with

¹ *iḍā kāna l-amr 'alā mā ḍukira*.

² All of these *fatwās* naturally are given within the legal school (*madḥab*) of the Medinese Mālik b. Anas, since the Muslims living in this territory have always followed, almost without exception, this school. Even today the constitution of Morocco states that the religion of the country is *sunnī mālikī* Islam.

³ See Maḥlūf, *Ṭabaqāt al-mālikīyya* I, 129, no. 376.

⁴ *Fatāwā Ibn Rušd*, in three volumes, edited by al-Muḥtār b. aṭ-Ṭāhir at-Talīlī, Beirut: Dār al-ġarb al-Islāmī, 1987. I used the page numbering from an edition which combined the three

the so-called ‘family law’ cases, or ‘personal status law’ (*qānūn al-aḥwāl aš-šahṣiyya*) in modern terms, is only 76. I chose to present 25 *fatwās* in my paper which deal exclusively with the questions of marriage. The other themes in this field are divorce: 29 cases of which two are also bound to marriage, so I dealt with them, and everyday problems in the family life: 22 cases deal with problems between father and his sons or daughters, mother and her daughter, and finally the discussions and debates between husband and wife.

I attempted to present the *fatwās* in a thematic order. First, I cited two cases of marriage in general, then three cases of guardianship, two cases of dower problems, five cases connected with marriage contract, five cases in connection with the support of the wife, three cases of divorce and following remarriage, a general question on the drunkenness of the husband, and finally four cases of invalid marriages.

I arranged the discussion of the 25 chosen *fatwās* in the following way: the Roman numerals are my notation, which indicates my thematic arrangement. It is followed by the number the editor gave to the *fatwā*, then a short denomination given by me, and a short summary of the case given by the editor. After these preliminaries I translated both the question and the answer word by word, and finally I added my remarks on the answer of Ibn Rušd, which I named ‘Comment’. In the footnotes I tried to give the data of some later *fatwā*-collections, if I found one, where the given *fatwā* is mentioned or perhaps dealt with in a certain extent different way.

I. no. 455: *Marriage of a young girl (bikr)* (Ibn Rušd, *Fatāwā* 1308, 1320)

About a man who married a young girl (bikr) but did not stipulate her virginity, however, it is generally held by the people that a young girl is virgin.

Question

About husbands who married in our time on the condition that a young girl is virgin but did not stipulate (in the marriage contract) that she should be virgin. A young girl, however, is generally considered virgin in the eye of the people, contrary to what the jurists believe in this matter. If this is what the husbands believe and they suppose about a woman that she is (as a young girl) virgin, and they found her having already had sexual intercourse and this fact became proved as it is obligatory, then can the husband say anything? And if he has, what is the rule in this matter if a legal action is taken, if God wills.

Answer:

In this question, the public opinion ignores that the term ‘young girl’ (*bikr*) only means that she was not married before. Legal scholars have always had different

volumes in one. There is a new edition, too, from 2020, published by the Dār al-Kutub al-‘Ilmiyya, Beirut, which I, however, could not acquire.

views on this question. Aṣḥab⁵, for instance, would not give the husband an excuse for his ignorance, since he was negligent in his cause and neglected to ascertain virginity. The question is whether, if he was ignorant, he can make use of this (generally accepted) condition or not? The husband cannot make use of the opinion of the condition except when he stipulated the necessity of the virginity (in the contract) or there is a clearly expressed condition, e.g.: if I did not find her virgin, I would send her back (to her family). This is the teaching of Saḥnūn⁶. He said about an ignorant Bedouin man who halted in the market to bargain for a slave and asked the trader whether there is a fault in him? The trader replied that the slave was ‘*qā’im bil-’aynayn*’ and the Bedouin bought him under this condition and brought him home. Later, however, he found the price high and asked about the meaning of the words of the trader and was told that it means ‘one who cannot see by his eyes’ and although it is a fault, he cannot gain from his ignorance since the sale was legally binding for him. The transmitter said: I came back many times (with the same question), but he always made the same ruling. But others said that the husband can be excused for his ignorance in this question, and he may send her back to her family if he did not find her a virgin. It becomes obvious from what Aṣḥab said. This corresponds to the opinion of Ibn al-Qāsim⁷ about a man who bought a piece of ruby believing that it was a ruby, but later it turned out that it was not a ruby. He held that the buyer had the right to return the goods, contrary to what Aṣḥab transmitted from Mālik. This (latter) is the most evident and preferable of the two opinions, but God knows best.

Comment: There are two important points in this *fatwā*: (i) If the common use of a word differs from the legal interpretation, which of the two will be decisive if a case arises, (ii) does the ignorance of the husband or buyer, since they are one and the same in the eye of law, help him in demanding back the dower⁸ or price? The jurists, as in other cases, also differ in these questions, but the majority says that the buyer has not the right to return the goods based on his ignorance.⁹

⁵ Aṣḥab b. ‘Abd al-‘Azīz, an Egyptian *mālikī* jurist, d. 819.

⁶ Muḥammad b. Saḥnūn, died 870, was a *mālikī* jurist of Qayrawān.

⁷ ‘Abd ar-Raḥmān Ibn al-Qāsim al-‘Utaqī, died 806, was an Egyptian *mālikī* jurist.

⁸ Although the relevant literature in English language unexceptionally uses the word ‘dowry’ for *ṣadāq* or *mahr*, I consider this usage unacceptable. According to the English dictionaries “A dowry is a payment, such as property or money, paid by the bride’s family to the groom or his family at the time of marriage. Dowry contrasts with the related concepts of bride price and dower.”

⁹ See this case in Burzulī, *Fatāwā* II, 201–202. Abū l-Qāsim b. Aḥmad al-Burzulī, died ca. 1440, was a Qayrawānī jurist. Also mentioned by Wanṣarīsī, *Mi’yār* III, 385–6. Abū l-‘Abbās Aḥmad al-Wanṣarīsī, died 1508 in Fez, was a maḡribī *mālikī* jurist. Also mentioned by al-Mahdī al-Wazzānī (died 1923, a Moroccan *mālikī* jurist), *Nawāzil* III, 261–2, under the chapter „Cases of defects, choice and damage”, and also by Ibn Salmān (Abū Muḥammad ‘Abdallāh Ibn Salmān al-Kinānī, died 1340, a *mālikī* jurist of Granada), *Iqd* I, 151.

II. no. 607: *Woman claiming marriage* (Ibn Rušd, *Fatāwā* 1596)

About a woman who claimed that she married a man and she could prove it.

Question

Qāḍī 'Iyāḍ asked Ibn Rušd about a woman who claimed that she had married a man which she could prove and also that he had cohabited with her and that he had gone with her into solitude after which she had become pregnant with his child. The husband also appeared (before the judge) and admitted all this except for the pregnancy. He said: I did not copulate with her at all, although he admitted being in solitude with her. But the authorised representative (*wakīl*) of the woman argued against him saying that he had witnessed against himself in the separation contract¹⁰ confessing that he had copulated with his wife (*binā' bihā*). The husband answered that he had not known the meaning of the words *binā' wa-btinā'* (sexual copulation) since he was not one of the religious scholars (*ahl aṭ-ṭalab*). (The question is) whether he may utter the oath (of condemnation of her wife, *li'ān*) not contradicting his denial of the copulation, or whether he may utter the oath contradicting his acknowledgement of the copulation as someone who calumniated (that is, saying that the child was the offspring of another an), but did not claim that he had abstained from sexual intercourse (*istibrā'*)¹¹ with his wife.

Answer

The child belongs to him, unless he denies (that the child is his) by the oath of condemnation (*li'ān*).¹²

Comment: As Qāḍī 'Iyāḍ, the famous historian and jurist¹³, was one of the prominent pupils of Ibn Rušd, it is exceptionally important that he turned to his previous master for advice. The abbreviation of a long case to the essentials and stripping it from all the other factors led Ibn Rušd to the conclusion that the crucial element of this question is the status of the child. It is also regarded one of the first legal maxims. That 'the child belongs to the marriage bed' (*al-walad lil-firāš*).¹⁴ The

¹⁰ A separation contract (*'aqd al-mubārāt*) means that the husband compounded, or made a compromise, with his wife for their mutual separation. It must be confirmed with a witness certification (*išhād*), in this case it was the testimony of the husband.

¹¹ The legal term *istibrā'* is used in many different contexts. Here it refers to the sexual intercourse and means „freeing himself from the copulation”, i.e., that he did not deny it. For the use of this term in the *mālikī* school, see al-Hawwārī (died 1348), *Tanbīh aṭ-ṭālib* VII, 125.

¹² For the divorce by *li'ān* in the *mālikī* school, see Hawwārī, *Tanbīh aṭ-ṭālib* VI, 486ff.

¹³ Abū l-Faḍl 'Iyāḍ b. 'Amr b. Mūsā al-Yaḥṣubī as-Sabtī, known as Qāḍī 'Iyāḍ, died in 1149, was an Andalusian jurist and historian, not only the pupil of Ibn Rušd al-Ġadd, but also the teacher of Ibn Rušd al-Ḥafīd (Averroes).

¹⁴ See, e.g., Schacht 1982:29, where he gives an explanation for the initial cause of this maxim.

basis of the decision lies in the legal (and common) supposition that having been in seclusion with one's wife means having copulated with her. Another interesting curiosity of the text of the question is what the husband said that he had not been aware of the meaning of the two legal expressions for copulation, *binā' wa-btinā'*, which could have been true.¹⁵

III. no. 51: *Mother as a legal guardian* (Ibn Rušd, *Fatāwā* 283–84)

About a widow mother who, appointed by the judge as legal guardian of her daughter, married her without the presence of the guardians of the girl. What happens if the guardians want to annul the marriage since they thought that the husband was not suitable?

Question

About a man who died and left behind a wife and daughters, and the judge of the territory appointed the mother as legal guardian of the girls. The mother then married and after her marriage she gave one of her daughters in marriage appointing her brother, the maternal uncle of the aforementioned girl to conclude the marriage contract. The girl, however, has paternal cousins who were not present at the marriage contract and were not notified of it, being absent from the city within two days. Nevertheless, when they had become aware of the marriage contract, they wanted its annulment on the basis that the mother was incompetent, and the husband was not suitable¹⁶ for the girl. Explain to us the requirement of the *sunna* in this case, if God wills.

Answer

The marriage is valid and lawful, and its annulment is only possible if the guardians (i.e., the cousins) can prove by just evidence that the husband is not suitable for the girl and giving her in marriage to him causes harm to her, and her interest was not taken into consideration. But the mother and the husband would be excused from guilt, and they would not be repelled (from among their relatives).

Comment: While the question raises three arguments for the annulment of the marriage: the paternal cousins, the customary guardians, were absent from the marriage, the mother was incompetent, and the husband was unsuitable. The answer accepts only one of them: the marriage can only be annulled if the husband proves

¹⁵ There is a similar case in Wanšārīsī, *Mi'yār* IV, 73, presented as a *fatwā* of Ibn al-Ḥāğğ. Here the question is shorter, restricted only the fact that the husband, in spite of his having spent with his wife a long term, refused to admit that his wife had become pregnant from him. The *fatwā* contains several possible answers to this question by different *mālikī* jurists, starting from Mālik in the 8th century till the 11th century. All of them held that if the husband lived with his wife all along he should have seen her pregnancy and he was not justified to denounce her after the birth of the child.

¹⁶ I.e., he was not equal in status, *ğayr kaf*.

to be unsuitable, unequal to the wife, but only on the basis of clear evidence, that is, the mere opinion of the cousins is not sufficient. The question also shows the general hostility of the society against the ‘legal guardians’ designated by the judge.¹⁷

IV. no. 273: *Guardianship* (Ibn Rušd, *Fatāwā* 958)

About the question of the marriage of an orphan (girl) under guardianship.

A letter was written to Ibn Rušd from the district of Ronda asking about one of the questions of the marriage. It runs as follows: We ask for your answer about a (fatherless) orphan (girl) who is in legal guardianship under the control of her mother. She trusted a man to draw up the marriage contract for the orphan. He then contracted the orphan girl’s marriage, with which he was entrusted, to his son, a deprived man who had no property either visibly (*zāhīran*) or latently (*bāṭinan*), nor had his daughter. Although the (marriage with the) above-mentioned orphan had been desired by the notables and the rich men with the dower paid in advance (*mu’ağğal*) and delayed (*mu’ağğal*). The marriage contract contained that the dower paid in advance is so much and so much *miṭqāl* (of gold), which is due to be delivered at the copulation. As for the delayed dower, it is due after such and such period. Please, think over whether this marriage is valid for the above-mentioned orphan, since it is devoid of consideration for the orphan, the proper settlement and benefit for her, regarding that both the wife (i.e., the orphan) and her mother are poor. The marriage contract also speaks about the money (for the trousseau) saying: It will be due at the copulation. But the (period when the) copulation will take place (after the contract) may be different in this city, so the contract has made the fulfilment (of the paying) of the money dependent on an unknown period. Does all this, in your opinion, weaken the strength of the marriage contract and by this invalidate the marriage, or invalidate it because it is devoid of consideration for the orphan, the proper settlement, and benefit – or may the marriage be accomplished in the ways mentioned in the question or not?

Answer

If his marriage to the orphan girl was with dower at least similar (to what her paternal relatives would demand), then it is a valid marriage.

Comment: It is another example of Ibn Rušd’s method of selecting the decisive and essential element of a question and neglecting all the other ones. The dower being the fundamental requirement of a valid marriage in Islam, its existence in an adequate measure validates this marriage in spite of the opposition of legally not interested parties. Another important requirement, not mentioned but implied in the answer, was also met in this case, that is, the equality (*kaḫā’a*) of the bride and the

¹⁷ Cf. Wanšārīsī, *Mi’yār* III, 377.

groom, since both were lacking in material resources, as it was also emphasised in the question.¹⁸

V. no. 415: *Guardianship* (Ibn Rušd, *Fatāwā* 1263)

About someone who had been under guardianship (walāya) and married without the permission of his legal guardian (waṣī), then he died. After his death, his wife began to demand the dower and the inheritance.

Question

About someone who having been under the guardianship of a legal guardian and the supervision of a supervisor (*mušrif*), married a woman and a dower contract became effected by this between them, but the guardian and the supervisor had not been called for witnessing his signature, then the husband died. Will the dower and the inheritance be judged for the wife or only one of them, or neither of them? What are the different opinions regarding this? And does the knowledge of the guardian and the supervisor about the marriage replace their witnessing in person his signature? Or is it so that their knowledge of the marriage is not sufficient as witnessing his signature? Explain to us what the obligation is in this matter.

Answer

The opinions about this question have always been different in our legal school to a large extent. Eight opinions can be obtained concerning this question. The one I have chosen to tell my opinion about it and formulate my *fatwā* on it is the following: we should examine the marriage if the guardian did not permit it on the order of the supervisor. But if the marriage was a state of happiness (*ḡabṭa*) and had the guardian looked at it and allowed it, then the wife is entitled to the dower and the inheritance. If, however, the marriage was not of this type (mentioned above), she is not entitled for either of the dower or the inheritance, unless the husband had copulated with her, since in that case the wife is entitled to everything that is lawful for her. If the guardian had not been present at the writing of the marriage contract and he only came to know about it after the incompetent (*saḡīḥ*) husband had entered into the contract without his order, so he could not have decided in this marriage by either refusing or permitting it until the incompetent man died, then this case is similar to the one in which the guardian had not been informed about the marriage until the death of the husband, unless he (the guardian) became aware of it accidentally, since this would mean permission from him. But only God can give success.

¹⁸ This case cannot be found in any of the later *fatwā* collections. The equality (*kaḡā'a*) in marriage according to the mālikī school means "similarity and approximate equivalence in respect of religion and state, that is, flawlessness which is obligatory for the choice (of the husband)." *Mawsū'a* XXXIV, 266.

Comment: The *fatwā* reflects two characteristics of the jurisdiction around the turn of the 12th century: First, the wide range of different opinions even within one legal school regarding a given question, second, the heavy reliance of the jurists of this age on the opinions of the first two centuries of the Islamic legal thinking, that is, the 2nd and 3rd centuries of the *hiğra*. Even such famous and outstanding jurist of his age and homeland as Ibn Rušd refrained to form his own decision if there had been acknowledged previous answers for the questions which were asked from him.¹⁹

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¹⁹ This question and answer is quoted word by word in Wanšarīsī, *Mi'yār* IX, 410–411, among the cases of legal guardians (*wašāyā*). In modern times this case has been incorporated into a large compilation of legal cases: Mahdī, *Nawāzil* VI, 284, in the chapter on the limitation of legal competence (*al-ğagr*).

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VII. no. 352: *Dower* (Ibn Rušd, *Fatāwā* 1137)

Who subtracted from the husband of his daughter a part of the dower before copulation.

Ibn Rušd was asked about a man who subtracted from the husband of his daughter a part of the dower before the copulation, then the husband copulated with her, and she remained in matrimonial ties with him for years. Then the wife died, and the husband inherited her bequest; then after her death the husband also died. Their daughter then wanted to get into possession of the part of the dower that was subtracted by her grandfather from her father. This is the text of the question: We ask the excellent jurist for the following question. There is a certain Maryam bint Muḥammad b. ‘Īsā, whose grandfather was ‘Abd ar-Raḥmān b. Bazī’, the father of her mother, who subtracted from her father, the husband of her mother, Muḥammad b. ‘Īsā a part of the money, forty miṭqāl (of gold), of her mother, ‘Azīza bint ‘Abd ar-Raḥmān, when he wanted to copulate with her, as a sign of kindness and beneficence for his (the father of the wife) sake, then the husband copulated with her while she was a virgin, then she died and the husband inherited from her, and after that he also died. Now her daughter, Maryam, wanted to get into possession of the part of the dower that was subtracted by her grandfather from her father, since she believed that it had been an invalid act to the debit of her mother. The question is whether this deduction mentioned above was valid or invalid against her mother. Since her father (the husband of her mother) did not mention divorce from her mother at the time of his copulation with her, and her grandfather did not mention in her dower contract at the time of the deduction more than “as a sign of kindness and beneficence for his sake”, and did not mention that what he had done was because he found difficulty in (the payment of) the dower or because he was afraid that the husband would divorce from his daughter. He only said the words which we quoted before. Explain this to us, May God make your reward greater.

²⁰ Cf. Wanšārīsī, *Mi’yār* IX, 410–411, and also Maḥdī, *Nawāzil* VI, 284.

Answer

The father was entitled to take away,²¹ at the expense of his daughter, a part of her dower given to her by the husband when he copulated with her, because the concern of the father in this matter is related to his responsibility for her until nothing is known contrary to this. (The explanation of this decision) is that had the father married her to this husband in the beginning by what remained from her dower after the deposit, it would have been a valid marriage. By the Sublime God, who has no partner, we succeed.

Comment: The *mufī* did not address the side issue in this question whether the granddaughter had been entitled to demand the deposit mentioned in the question from her grandfather, the father of her mother, or not. Since the taking away of a part of the dower had been legitim, this part of the question became irrelevant. This is another remarkable example of the *mufī*'s method of clarifying the question and giving a simple and clear answer.²²

VIII. no. 185: *Absence of the husband* (Ibn Rušd, *Fatāwā* 785)

About a woman who had imposed on her husband as a condition (in the marriage contract) that he would not stay away from her for more than six months. He, however, was absent for eight months and so he caused a delay (talawwum) (in her support). After the husband arrived, she wanted to enforce her condition. Is (the judgement) in favour of her or not?

Question

What is your answer about a man who married a woman, and he accepted the condition in her dower contract that he should not stay away from her more than six months, and if he would make this term longer, she can take her affairs into her hands, and she may demand compensation for his delay as much as she likes? Then the husband stayed away from his wife for eight months, and it is proved. When he came home after eight months, she prevented him from entering the house, and she wanted to enforce her condition. We ask you to explain to us whether she had the right to do this or not. It became a judicial case, and the opinions differed in it. Some of the scholars said that she had the right to enforce her condition. He argued with the case of Ašbağ in his auditioning session (*samā'*) from the Book of Marriage: If the woman whom her husband married as a second wife had died or he had left her before she (the first wife) might have known it, then she knew it and then she can take her affairs into her hands. It may have been found in the documents of al-Bāğī²³

²¹ To take away as a deposit: *waḍa'a waḍī'atan*.

²² Cf. Wanšarīsī, *Mi'yār* III, 383–4.

²³ Abū l-Walīd Sulaymān b. Halaf al-Bāğī (d. 1081) famous Andalusian *mālikī* scholar and poet from Beja (now in Portugal).

that she could take her affairs into her hands in a similar case. Among Ibn Zarb's²⁴ and Ibn al-'Aṭṭār's²⁵ *fatwās* there are also similar cases. In contrast, one of the other jurists said: She has no right to enforce her condition since no text can be invoked in this case. We ask you to explain which of the two opinions is preferable and better.

Answer

The opinion of some scholars, that she has the right to enforce her condition, although the husband was present (*ḥaḍara*) after his arrival from his absence, is not right, because when he (the husband) had arrived, the (operative) cause ('*illa*) by which she had the right to take her affairs into her hand, has been eliminated.²⁶ This is clear for the condition. However, she has the right (to demand compensation) for the delay (in support) to the extent that she was living (alone) waiting for him. But her (being the victim of the) delay, her waiting (for the delayed support) does not make her (aforementioned) condition binding, since the effectuation (of the condition), made possible for her by the advent of the deadline, will be invalidated by the arrival of the husband, and this takes out from her hand (her affairs) even if her waiting period was long before his arrival.

This question does not resemble the problem heard in the auditioning session of Aṣḥāb to which you referred in your question, since the effectuation (of the condition) obligatory for the sake of the wife in that problem relates to the second marriage of the husband, even if the second wife died or the husband divorced from her. The cause of this is that the first wife feared that the second marriage would induce him to abstain from her and would awaken desire in him for other than her and so her right would not be invalidated by the death or by the divorce of the second wife.

In the case in question, the effectuation (of the condition) with the expiration of the deadline means obligation for her only in connection with the absence of the husband, since the absence of the husband from his wife does not induce him to abstain from her if he eventually arrived to her, on the contrary, his arrival awakens his desire for her and increases his wish for her. This case resembles only the case of the emancipated (ex) slave woman with a (still) slave husband who does not exercise her power of choice (in divorce, *ḥiyār*), as long as her husband was not

²⁴ Muḥammad b. Yabqā Ibn Zarb (d. 991), an Andalusian *mālikī* jurist from Córdoba.

²⁵ Muḥammad b. Aḥmad b. 'Ubaydallāh Ibn al-'Aṭṭār (d. 1008) an Andalusian *mālikī* jurist from Córdoba.

²⁶ *al-Mawsū'a* defines '*illa* in the following way, XXX, 287: "The '*illa* ('operative cause') is one of the most important main part (*rukn*) of the analogy (*qiyās*), while analogy is considered by most jurists one of the sources of the Islamic jurisdiction. Therefore, if reason cannot grasp a cause for the original case (based on an accepted text) which was resolved using a judgement, or ruling (*ḥukm al-aṣl*), the analogy would be impossible, because of the lack of its most important chief element."

emancipated, too.²⁷ It was said in her case: there may not be a choice for her (in divorce) if her husband was not emancipated before her choice was made. Therefore, just as the emancipated wife of a slave husband does not deserve the choice to divorce if her husband had been emancipated before she made the choice due to the disappearance of the cause (*'illa*) inducing the choice, which is that the husband is still a slave, similarly the wife does not deserve the effectuation (of her condition) if the husband arrived before she would have effectuated it, due to the disappearance of the cause inducing it, which was the absence of her husband from her. This is the text of what Ibn Nāfi²⁸ said in the *Mudawwana*: She does not deserve the right of decision (in her affairs) if her husband had arrived before she would effectuate her condition, this according to the opinion I saw at some of our companions, and not taking into consideration the opinion of al-Bāḡī in his documents or everybody else from the later generation of jurists in contradiction of this. The basic principles (*uṣūl*) of the early generation of jurists were according to which we explained them. By God we succeed.

Comment: The case under investigation shows the importance of the right choice of the basis of the analogy, which is why the muftī refused the reference to the case of Aṣbaḡ. The way of interpretation of the cause (*'illa*) by which the woman could take her affairs into her hands²⁹ is even more interesting. Ibn Ruṣd, following the convention of Islamic law, refused the literal interpretation of the contract, but instead sought the cause of the right of free choice of the wife and found that it was not the period of absence of the husband, ‘no more than six months’, but only the fact of his absence. Therefore, the cause ceased with his arrival, even if he was late.³⁰

IX. no. 201: *Marriage contract* (Ibn Ruṣd, *Fatāwā* 835, 844)

Testimony of the suitor in the marriage contract

Question

Whoever witnessed in a contract of marriage in which he had been a suitor is his testimony valid or not?

Answer:

The answer to this question is yes, his testimony is valid since there is no kind of blaming suspicions (*tuhma qādiḥa*) in it. The success is by God the Exalted, who has no associate.

²⁷ See Ibn ‘Abd al-Barr (*mālikī* jurist of Andalusia, died 1071), *Kāfī* 592.

²⁸ ‘Abdallāh Ibn Nāfi’ aṣ-Ṣā’ig, a companion of Mālik, died 821.

²⁹ The expression is *al-aḥḍ bi-ṣarṭihā*, ‘to enforce her condition’ which means logically that she would be free to act on her own.

³⁰ Cf. Wanṣārīsī, *Mi’yār* III, 387–8. See also Burzulī, *Fatāwā* II, 129.

Comment: The *mufī* in this case separated the primary characteristics of the testimony, lack of suspicion or partiality, from any secondary circumstances, that the witness mentioned in the question he may have been an opposite party in the marriage.³¹

X. no. 40: Marriage contract (Ibn Rušd, *Fatāwā* 224)

About someone who married in such a way that he gave to his wife half of a determined plot of ground under the condition that he would erect a building on it as they described it to each other, and this building would be a common property between them. In this question, the following questions are also incorporated: contract of the selling and renting in the same contract, the hiring of an estate for the next year, although he has crops in this year, too. Half of the plot of ground was sold on the condition that it would not be divided and sold.

Question

A question was asked from Ibn Rušd, from the city of Šilb (Silves, nowadays in Portugal) about someone who married in such a way that he gave to his wife half of a determined plot of ground (*buq'a*) on the condition that he would erect a building on it as they described it, and this building would be a common property between them.

Answer

This kind of marriage is valid according to the opinion of Ibn al-Qāsim since he permits the sale and the rent in one and the same sale contract if its way of egression can be known (in advance). Therefore, if it is possible in his teaching (*maḏhab*) that a man can sell a plot of ground on the condition that the buyer will erect a building on it and that a woman will marry in this way, it is possible for the man to marry her for a half of the above mentioned plot of ground on the condition that he will erect a building on this plot as they described it to one another, because the interdiction (*taḥḡīr*), when it is not prescribed to the buyer in the sold item,³² is also possible according to his teaching. The question found in “The book of the hiring of the estates” (*Kitāb kirā' al-araḡīn*)” of the *Mudawwana* resembles it. This is the appropriate answer for the permissibility in this case, not the answer of who said: ‘It is permissible exclusively because he only gave half of this plot with a building as a dower, although the plot had not been built in at the time of the dower.’ I had been

³¹ Cf. Wanšarīsī, *Mi 'yār* X, 218, where he attributed this *fatwā* with the same text to a certain Šalab whose name I could not find in the *mālikī* biographies. It is also interesting to note that he put this *fatwā* in the “Book of the testimony” instead of the “Book of the marriage”. This also support the view of Ibn Rušd that in this question the testimony means the essential part not the marriage or the former endeavour of the witness for betrothal.

³² *idā lam yakun fī š-šay' al-mabī' 'alā l-mubtā'*

asked the same question earlier by one of your companions and I had answered it the same way.

Comment: This answer, among other similar *fatwās*, shows well that the marriage contracts belong to the wider circle of trade transactions (*kitāb al-bay'*) and that these latter had always caused more problems and claimed detailed answers, which consequently could be applied to the matrimonial questions as well. The end of the *fatwā* seems to reflect the muftī's indignation that he is disturbed by the same question twice from the same circle of local jurists from Šilb.³³

XI. no. 136: *Marriage contract* (Ibn Rušd, *Fatāwā* 604)

Question

About someone who married a woman on the condition that he would build a courtyard, which he called a building which was agreed upon and which would be divided into two halves between them.

Answer

As for the question of a man who married a woman on the condition that he would build a courtyard which he called a building which was agreed upon and which would be divided into two halves between them, it is essentially the same question found in the *Kitāb al-ḡu'l wal-iḡāra* (The Book of the Wages and the Rent) of the *Mudawwana*, what I looked at. I found in it, too, that the rent in terms of something by which the marriage took place is allowed according to the teaching ('*alā maḏhab*') of Ibn al-Qāsim, because he allows the sale and the rent to be included in the same contract when the way of egression is known or the repetition possible in it. So if it is permitted in his school that a man may sell his plot of ground on the condition that the seller would erect a building on it and that he would marry a woman on the same contract, it is also permissible that the woman should marry receiving the half of the plot on the condition that her husband may erect on it a building according to their agreement and it will be the property of both of them.

Comment: This case resembles basically the one in no. 40, therefore, the answer is also based on the same analogy of two trade transactions in one and the same contract allowed by Ibn al-Qāsim. It is interesting to observe the difference in the usage of the two Arabic particles *fī* ('in') and '*alā*' ('according to'). Ibn al-Qāsim, in the *mālikī* school (*fī l-maḏhab al-mālikī*), represents a particular way of teaching, which is expressed by the term '*alā maḏhabihi*'.³⁴

³³ See Burzulī, *Fatāwā* II, 206. Cf. Wanšarīsī, *Mi'yār* III, 390.

³⁴ Cf. Wanšarīsī, *Mi'yār* III, 392.

XII. no. 140: *Marriage contract* (Ibn Rušd, *Fatāwā* 608)

Question

About someone who married a woman with a defined number of sheep living on a defined land (as a dower) known by her.

Answer

As for the man who married a woman, with a defined number of sheep living on a land defined (in the marriage contract as a dower), about which the woman had knowledge, on the condition that if he could not fulfil his obligation (from this land), he would complement the rest from another land of his, which the woman also knew, and she had become acquainted with it. If the two lands were different in (good) quality, or were in places separate from each other, then the marriage is invalid because of the ignorance of what the other land would yield for her or whether the other land would yield for her anything at all. The cause (of the invalidity) is not, as some jurists mentioned, the obscurity (*mağhala*) of the term (of fulfilment), since it was not mentioned (in the contract) when the completion (of the number of sheep) should be made. The judgment in this case is related to the location (*hulūl*) (of the second land) and not the obscurity of the term. Had the lack of expression of the time of complementing caused obscurity in the term, the marriage, on the power of (*'alā dar' min*) such and such place or such and such named condition (in the contract) would not have been possible. Similarly, the purchase of a certain named (but not exactly defined) measure from a pile (of goods) would also not have been possible. (All this is true) unless the time is mentioned (in the contract), in which she had the power to validate her right from the land, or (as in the similar example) his measure from a pile was measured out for him. There is a consensus among jurists that this is possible. If, however, the two places (of the lands) were equal in proximity (to the house) and quality, there is no question that the marriage was valid contrary to the opinion of Ibn al-Qāsim and others in the question of rent of the lands mentioned in the *Mudawwana*.

Comment: The answer sheds light on how jurists must differentiate between the relevant and irrelevant issues in a question. The obscurity of the term of the fulfilment, considered by many as the main issue, cannot be the cause of the invalidity of the contract since it is not mentioned in it. It also shows that the differences in the decisions of the jurists are essentially not based on opinions, but on the right choice of the important elements in a case, roughly speaking on the knowledge of the fundamentals of the Islamic law.³⁵

³⁵ Cf. Wanšārīsī, *Mi'yār* III, 392. See also Burzulī, *Fatāwā* II, 208.

XIII. no. 564: *Clothing support* (Ibn Rušd, *Fatāwā* 1550)

When the wife was brought (in solemn procession) to (the house of the) husband and he ensured her the clothing, then it vanished.

Question

About a wife who had been brought to her husband and he had protected (*ḍamina*) the clothing that she had provided to him, then it vanished. Is he committed to what he committed himself to, or does it belong to the chapter (of the law) called: “Whoever committed himself to protect a property (*māl*) that disappeared from him (*yugāb ‘alayhi*) on loan”, or “He who waived his right of pre-emption (*šaf’a*) before it became incumbent on him” or “Is this question similar to the question of the man who said I am protecting your pawn and there will be no damage (*naqṣ*) in your right?”

Answer

The approach to this question is that (first) we investigate why the safeguarding of the clothing emerged in the first place. First, if it was due to the wife's fear of her clothes, the husband is not obliged to protect them, if one assumes that the evidence proved that their disappearance was not the result of his actions. Second, if it was due to the husband's fear of it, he is not responsible for it, if one assumes that the evidence proved that their disappearance was not the result of his actions. But he is obliged to safeguard it in any case if it was not found, and he claimed that it had vanished, but it was not known except from his saying so.

Comment: Ibn Rušd limited his answer in this case, as is his custom as a *muftī*, to the question of testimony, because one witness, especially if it is one of the interested parties, is insufficient, therefore, the obligation of the husband is beyond debate.³⁶

XIV. no. 568: *Clothing problem* (Ibn Rušd, *Fatāwā* 1558)

The claim of the wife or her guardian that part of the clothing was loaned (‘āriya).

Question

About a wife or her guardian who took out what had been for the husband in the clothing (that is, which she had brought into the house), like a headcloth, a quilted cloak,³⁷ a shirt, trousers. Perhaps the husband had worn these clothes, after he had copulated with his wife, for a few days or for several days, but possibly he had not worn them. Then the wife or her guardian went to take these clothes, claiming that

³⁶ Cf. Wanšarīsī, *Mi’yār* III, 379–380. See also Burzulī, *Fatāwā* II, 221–222, where he quotes similar cases.

³⁷ It was a special cloth in Andalusia, *maḥšū*. Cf. Corriente 1997:128: *maḥšuwuwun*, *maḥāšī*, *maḥšū*, *maḥšuwwa*, “quilted cloak”.

they had been on loan (*'āriya*) and had only been for embellishment and not for gift. Are you deciding this case in favour of the husband or not?

Answer

If there was a customary practice (*'urf*) in this community, considering these dresses that were taken from the clothing (pile), according to which the case had been handled (by the wife or her guardian) and this custom is still valid, then their act has to be judged on this basis. But even if this custom has not been well known (in the community), the testimonies of the wife and her guardian, claiming that the clothes had been on loan and only in the way of embellishment, should be accepted. But only God can give success.

Comment: Ibn Rušd emphasises in this *fatwā* two aspects of the case: first, the obligatory character of the customary practice of a given community, which is an outstandingly important feature of the *mālikī* legal school, and second, the importance of two testimonies in a legal case against one.³⁸

XV. no. 651: *Support* (Ibn Rušd, *Fatāwā* 1636)

About someone who married a woman and paid her the money (for the trousseau) and gave her gifts, but when he copulated with her and remained with her a month or more, it was demanded from him to give her a garment before the end of the (first) year (of their marriage), otherwise she would use the gift (i.e., the embellished garment) for ordinary occasions.

Question

Ibn al-Ḥāğğ was asked about a man who married a woman and paid her the (demanded) money (*naqd*) and the (necessary) gift (*hadiyya*). But when he copulated with her and remained with her for a month or more in this way, he was demanded to buy for her a (new) garment before the end of the first year (of their marriage); otherwise, she would use the gift (the embellished garment) for ordinary occasions.

Answers

Ibn al-Ḥāğğ answered: If the dower (*ṣadāq*) was comprehensive, he is not obliged to buy another garment in one year. But if the dower was poor, then he is obliged to buy a new garment. She should not use the gift (the embellished garment) for

³⁸ See Wanšarīsī, *Mi'yār* III, 122 with the same text. Muwāq (Muḥammad b. Yūsuf al-ʿAbdarī Abū ʿAbdallāh al-Muwāq, died 1492, was a *mālikī* jurist of Granada.) deals with this question in more detail in his *at-Tāğ*, III, 416, where he quotes not only the answer of Ibn Rušd, but also that of Ibn al-Ḥāğğ and Aşbağ. For the use of local customs in the Mağrib, see Schacht, *Introduction* 61–62, stating that the *mālikī* jurists from the 10th century on frequently applied principles greatly different from the earlier representatives of the *mālikī* school.

ordinary occasions, although she has the right to do so. But she should smarten up for him from time to time (in this garment).

Ibn Rušd said: If part of the money (given to the wife) remained after she purchased from her trousseau (*ġihāz*) what she cannot dispense with, then the (purchase of the new) garment is close to her. But if (he spent) much in supporting her with the garment and the indispensable things of the trousseau, then she does not deserve the (new) garment until the period does not pass, when he is obliged to buy a new garment, had she (other) clothes (from the gift) or had she not.

Comment: The difference of the two *fatwās* on the same question illustrates well the difference in attitudes of the two scholars. Ibn al-Ḥāḡḡ always approached the questions in a more pragmatic way, not only in his *fatwās*, but also in his vast Introduction,³⁹ while Ibn Rušd adhered to the strictly legal issues which he explained in detail.⁴⁰

XVI. no. 540: *Support* (Ibn Rušd, *Fatāwā* 1473–74)

About whom volunteers to give the support to the wife of another man after contraction of the marriage, then the volunteer dies. What happens if this was a condition in the original contract document? And what is the solution if the parties differ in that?

Question

A letter was written to Ibn Rušd from the capital city of Almariya (Almeria) asking about a man who married his slave man and obliged himself after the contraction of the marriage willingly, volunteering, that he would take care of the support of the wife as long as the marriage (*al-’iṣma*) existed between them, then he died. Is the support to be paid from his property and the suspension (*tawaqquf*) of his heritage (*tarikā*) for the sake of this (support)? What happens if this was a condition in the original document of the contract, but the parties disagreed on that?

Answer

If the master died, the wife (of the slave man) had no right to take from the property the sum with what the master volunteered after the contraction of the marriage to take care of her support as long as the matrimonial ties existed between them. The cause of this is that this (promise) counts only as a gift which cannot be taken into possession, since it is invalidated by death. Even if this would have been a condition in the marriage contract, it had become null and void (*fasada*) by the death. The marriage should have been dissolved before the copulation and it is fixed after it, but the condition would be invalidated, and the provision of the support would fall back

³⁹ Ibn al-Ḥāḡḡ, died 1336/7, was a *mālikī* jurist from Fez, who lived in the last 40 years of his life in Cairo. His work written there is the *Madḥal aš-šar’ aš-šarīf ‘alā l-maḍāhib*.

⁴⁰ Cf. Burzulī, *Fatāwā* II, 220–221.

to the slave husband. Then the wife has the right to a 'similar' dower (*ṣadāq miṭliḥā*, to what her paternal relatives would demand).

It was said earlier: It is not to be invalidated before the copulation if the wife accepts that the condition would fall, and the husband would be obliged to provide the support for her. The way of incorrection in this case derives from the (objectionable) risk (*ḡarar*) since the master may die before the extinction of the matrimonial relationship and so the wife remains without support. But if the condition had been formulated so that if the master had died before the extinction of the matrimonial relationship between them, the provision of the support would fall back to the slave husband, this would be valid. But if the two parties disagreed in what kind was the master's obligation to her support, (the question arises) was it a condition of the original contract or only volunteering after the contract was written? The correct answer is who claimed that this was a condition in the original contract due to the testimony of the custom (*'urf*) in this case. This is what I may say in what you asked for on the path of Mālik and his legal school, in the correctness of which we believe. By God we can succeed.

Comment: Ibn Ruṣd first chose the suitable cause (*'illa*) of the consequences of the volunteering of the master and found that it can be regarded as a gift and not as an obligation.⁴¹

XVII. 156: *Support* (Ibn Ruṣd, *Fatāwā* 671)

Question

Ibn Ruṣd was asked about a man who married a woman who had a son from a previous marriage. He consented (*ṭā'*) to oblige himself to provide support for the boy during the period of the extent of the matrimonial relationship (*zawḡiyya*). Then he divorced from her with one divorce. After her waiting period (*'idda*) had ended, he married her again. The question is whether the support of the boy will be due (*ya'ūdu 'alayhi*) in this second marriage, also, although this time the husband did not consent to it? And is he bound by any previous obligation while the divorce did not become final (*mā baqiya min ṭalāq dālika l-mulk*)⁴² or does not? Is the clothes (*kiswa*) attached (obligatorily) to the support or is it not, even before the divorce of the first marriage, since he consented only to the support? Explain this to us, and you will be rewarded and thanked for it, if God wills.

⁴¹ It was the opinion of Ibn Ḥabīb, d. 853, Abū Marwān 'Abd al-Malik Ibn Ḥabīb al-Mardāsī as-Sulamī, Andalusian *mālikī* jurist, see Ḥaṭṭāb (d. 1547) *Taḥrīr*, 91–2.

⁴² The term *mulk* here means authority of the husband, which means favours, as well as obligations.

Answer

The support to which he obliged himself until the end of the matrimonial relationship is compelling for him as long as the divorce did not become final (by thrice divorce). since the term of the matrimonial relationship and the term of the bond of marriage (when the divorce did not become final) are one and the same, and that requires the fulfillment of all the obligations in the opinion of Mālik and all of his companions. As for clothes, I do not think that it would be obligatory for him after he had sworn in deciding the truth (*maqṭa' al-ḥaqq*) that he only wanted the support from the food and not the clothes. However, Ibn Zarb and other jurists demand that clothing should also be compulsory together with food. They argue, in consensus with scholars of law, that the support should contain clothes, too, for the pregnant woman because of the saying of God⁴³: “And if they are pregnant bear their expenses until they bring forth their burden. However, I do not share this opinion, since the support, even if it belongs to the ordinary vocabulary, in spite of that most people understand on it only the food, without the clothes. By God we may succeed and by His power.

Comment: The most interesting element in the answer is the explanation of the legal term *mulk*, that is, the rights and obligations of the husband in case he divorced from his wife only twice. The other essential fact is the consideration of the oath of the husband that he did not mean the clothes when he undertook the support of the son of his wife.⁴⁴

XVIII. no. 626: *Divorce and remarriage* (Ibn Rušd, *Fatāwā* 1612)

About someone who married a woman whom he knew that she was not allowed (to copulate with)

Question

About someone who married a woman with whom he knew she was not allowed (to copulate with) before her cleansing (*istibrā'*)⁴⁵. It went on for a time, then he divorced from her, then he took her back, then he divorced from her, then he took her back again. After all this, he blamed himself for entering in this state. The question is whether, after her cleansing period, he may renew other than the first marriage (*tağdīd nikāḥ ḡayri l-awwal*), or he may not?

Answer

Aṣḡaḡ answered this question in the following way: If the takeback of the wife happened after she was cleansed by three menstruation periods, it was valid. If the

⁴³ *The Qur'ān*, XIV. The Divorce 6.

⁴⁴ Cf. Waṣārīsī, *Mi'yār* III, 19–20. See Maḥdī, *Nawāzil* IV, 225 in the chapter of *ḥul'* divorce and repeats it among the cases of support (*naḥaqa*), IV, 336.

⁴⁵ *istibrā'* means here a certain cleansing period after menstruation.

takeback of the wife happened before the cleansing period ended, then he must depart from her until he became cleansed by three menstrual periods. If he married her after this, it would be a valid marriage. Both Ibn al-Ḥāḡḡ and Ibn Rušd passed the same judgement.

Comment: The answer means that the first marriage and the subsequent divorce were not valid.⁴⁶

XIX. no. 27: *Divorce and remarriage* (Ibn Rušd, *Fatāwā* 198)

About a man who wanted to take back his wife after she decisively divorced from him thrice and she married after it. How can it be judged if he had taken her back before the second husband copulation with her was proved, even if the second husband stated this, or a reliable witness (šāhid 'adl) or a group (lafīf) of (unconnected) men and women testified, although their honesty was not acknowledged?

Question

Ibn Rušd was asked about a man who had a wife, who divorced from her definitely, and the wife observed the 'idda after the divorce. After (her divorce) she remained (without marriage), then she married another man, who copulated with her and spent with her a certain time, then (the second husband) made her free and she observed the 'idda after this divorce, too. Then the first husband remarried her. After this, a man looked after him who called for the reverse (of this marriage) and started a legal action against them at the magistrate (*šāhib al-aḥkām*), who said to (the first husband): Prove in front of me that your wife had married another husband after you, who copulated with her. The first husband then proved that her dower was documented by the marriage contract between her and her second husband, and the second husband affirmed the matrimony and that he copulated with her, and the wife also affirmed that. The magistrate, however, charged him with proving the copulation with her. The second husband brought five witnesses who lived together with them in the same house. But the magistrate said to him: I cannot make distinction among them. Explain what is necessary in this case. Is the marriage of the first husband asserted as valid after the (divorce of the) second husband in the way as he interpreted it, or is it not? May God reward you (for your answer) if He wishes.

Answer

What she said in connection with her first husband is not sufficiently established (as true), so his re-marriage with her is not asserted as valid as long as the copulation of

⁴⁶ Cf. Muwāq, *Tāḡ* III, 416, who quotes the above *fatwā* of Aṣḡaḡ, as well as that of Ibn al-Ḥāḡḡ.

the second husband with her was not asserted as valid by the testimony of two reliable witnesses, or his copulation with her has become a well-known matter which has been spread by hearsay among a group of (unconnected) men and women, even if their reliability has not been proved. By God we may succeed.

Comment: This case concerns two things: (i) The remarriage of a divorced wife by her previous husband without sufficient evidence that her second husband was not only a *muḥallil*, who helped the first husband retake his wife.⁴⁷ (ii) The invalidity of the testimonies of two (or more) related witnesses, because ‘it is not possible to differentiate between them’. Even if something is ‘widely known’ (*mašhūr*) is better than related witnesses.⁴⁸

XX. no. 15: *Divorce and remarriage* (Ibn Rušd, *Fatāwā* 178)

About a woman who had been divorced by her absent husband, then he arrived and both of them had agreed upon maintaining the marriage and they stayed together for exactly six months. Then the husband disappeared and the father married his daughter to another man.

Question

Ibn Rušd was asked about a man who had married his virgin daughter in his custody to a man with a dower partly paid in advance and partly delayed. Then the husband disappeared before he had copulated with her. Her father proved his disappearance in front of the magistrate of the district, so the magistrate (legally) divorced her from her husband. And [he was also asked] about the arrival of the husband afterward and that the two of them (husband and wife) agreed on maintaining the marriage. The father donated the husband a plot (*mawḍiʿ*), which the husband obligated himself to give the woman as dower (*ʿalā waḡh as-siyāqa*) and on the condition that he (the father) gave him (the husband) a delay of six months to unite with his daughter and copulating with her. The two of them departed (from the magistrate) and witnessed together this (agreement). Then the husband went away for his business, and he (later on) reclaimed his support (given to the wife)⁴⁹, for the reason of the delay which the father obliged him. Although his absence was only short, the father gave his daughter to another man in marriage. But the first husband arrived and wanted to copulate

⁴⁷ It is impermissible for a husband who has irrevocably divorced his wife to seek a *muḥallil*, a man who marries an irrevocably divorced woman with the intention of divorcing her without copulation so that she can remarry her ex-husband. This has always been a widespread profession in the Islamic world, to make the remarriage lawful after an ill-considered divorce, in return for payment.

⁴⁸ Cf. Wanšarīsī, *Miʿyār* III, 393.

⁴⁹ It is expressed by the term *al-maʿāṣ*, the time in which one seeks support.

with his wife. Thus, please explain to us the answer in this case. May God make your reward great!

Answer

If they two (the first husband and his wife) did not renew the marriage contract after the divorce was declared by the magistrate, and they only agreed upon the maintenance of the first marriage as it is mentioned in the question, then it is invalid, and the second marriage is asserted as valid.

Comment: Ibn Rušd cut the answer short, selecting the first essential factor in the question whether the agreement between the wife and the husband to maintain, or rather restart, their marriage is sufficient legally or not. The answer is not, the renewal of the marriage contract is the essential point in the question.⁵⁰

XXI. no. 237: *Drunkness* (Ibn Rušd, *Fatāwā* 913)

Marriage and divorce of the drunken.

Question

Is marriage and divorce allowed for a drunk man?

Answer

The divorce is allowed, but the marriage is not allowed. Concerning the latter, however, there is a difference of opinion.

Comment: al-Māziri⁵¹ adds that if he can differentiate between a coming and going person, his divorce is incumbent upon him; there is no difference of opinion. Moreover, if the drunkenness is immersed in his senses that he cannot differentiate between them, and accordingly he cannot differentiate between his close relatives (*maḥārim*) and others, according to many earlier decisions, his divorce holds valid even in this case. Mālik says⁵²: If the drunk divorced, his divorce is valid. (*in ṭallaqa (as-sakrān) ḡāza ṭalāquhu.*) but he did not speak about the marriage of the drunk.⁵³ al-Burzulī quotes the same decision, but using the term ‘binding’ (*lāzim*) in connection with the divorce.⁵⁴ There is a basic difference between marriage and divorce: while marriage belongs to a bunch of people, among them the relatives of both the groom and the bride, divorce is considered as belonging first of all to the jurisdiction of the husband, and his right to divorce is indisputable.

⁵⁰ Cf. Wanšarīsī, Mi’yār III, 378–9 and Burzulī *Fatāwā* II, 197.

⁵¹ Muḥammad b. ‘Alī b. ‘Umar b. Muḥammad at-Tamīmī al-Māziri, died in 1141, was an important *mālikī* jurist who lived in Mahdiyya, Ifrīqiyya (now in Tunisia).

⁵² Mālik, (*imām al-mālikiyya*, died 795) *Mudawwana* VI, 29.

⁵³ See Ibn Rušd, *Masā’il*, 817, no. 187, with the same text.

⁵⁴ See Burzulī, *Fatāwā* II, 200.

XXII. no. 50: *Invalid marriages*⁵⁵ (i) (Ibn Rušd, *Fatāwā* 279, 283)

Question

He was asked a question about marriage regarding which the jurists of Sevilla held different opinions. “What is your answer concerning a man who married a woman for whom he was *maḥram*⁵⁶, or he married her with *šigār* marriage⁵⁷, or his marriage happened to be invalid with respect to the marriage contract, but valid for the dower (*šadāq*). But there are further questions: What if the divorce happens, or the inheritance becomes due before this marriage is annulled – because there is a difference of opinion in these cases? What happens if the marriage is annulled before the first cohabitation or after it, or because the contract was invalid. Is a dower necessary in this marriage if either the husband or the wife died before the annulment? Or would both the marriage and the dower be annulled together? Or is it (the dower) considered only as compensation for the (lost enjoyment of the) vulva (*buḍʿ*)⁵⁸ in this kind of marriage? The answer in this question seems for us rewarding, if God wills.”

Answer

I read your question and have learnt it. Invalid marriages can be divided into two kinds: marriage with invalid dower and marriage with invalid contract. When the dower is regarded invalid, the texts of the masters of our school unequivocally state that the wife has right to it only if the cohabitation occurred. It was transmitted from Ašbağ⁵⁹ that he had said: “Whoever married with risk⁶⁰, then died before cohabitation, his wife is entitled to a 'similar' dower (*šadāq miṭliḥā*)⁶¹. But if he divorced from her, she is not entitled to any part of the dower. However, Ašbağ maintained the invalid agreement (added to the contract) and at the same time made it a marriage of compensation following those who are of the opinion that the death (of the husband) necessitates a compensatory ‘similar’ dower. However, this (opinion) is not (generally) acknowledged (*maʿrūf*) in our legal school.

As for the invalid contracts, they are divided into two kinds: marriage concerning the invalidity of which there is general agreement, and marriage concerning the invalidity of which there is difference of opinions. Examples of the first category

⁵⁵ *al-ankiḥa al-fāsida*

⁵⁶ I.e., prohibited blood, in-law and milk-suckling relatives.

⁵⁷ It means that a man gives his daughter or sister in marriage on the condition that the other gives him his daughter or sister in marriage under the condition that there is no dower.

⁵⁸ It would mean a compensation of the woman who was not copulated in spite of her being married. This is not a generally accepted notion.

⁵⁹ Ašbağ b. Farağ, died 840, *muftī mālikī* in Egypt.

⁶⁰ Marrying a woman with risk (*ğarar*) means not knowing the possible faults of his would be wife.

⁶¹ Similar to what her paternal relatives would demand. Cf. Hawwārī, *Tanbīh*, 678ff.

are: invalid marriage with a prohibited family member (*mahram*), or marriage with a woman in her waiting period (*'idda*), or marriage with her mother, daughter, sister, maternal and paternal aunt, and the like. There is no difference of opinion that in the above cases the dower is not prescribed in case of death, not its half in case of divorce, because there is no inheritance in this kind of invalid marriages, and besides dower is (always) connected with cohabitation (and in these cases there is no cohabitation if they became public in time).

There are two different kinds of invalid marriage contract: First, in which the invalidity of the marriage contract does not influence the dower, and second, in which it influences the dower. The first kind contains the marriage of prohibited relatives (*maḥārim*), marriage of a woman without her guardian (*walī*), and the like. Some view that there is no divorce and no inheritance in this (marriage), and its annulment (*fash*) cannot be considered divorce, while others, on the contrary, say that there is divorce and inheritance in it, too, in observance of their difference (in the matters of marriage). But whoever preserves this different opinion and accepts the divorce and inheritance in this kind of marriage, he must also, according to his principle, prescribe the dower in case of the death (of the husband), and its half in divorce before the cohabitation, since no one may differentiate between inheritance and the obligatory dower, prescribing one and dropping the other, not being preference between the two. God sent to us a text (*naṣṣ*) making the dower obligatory for the husband in the interest of the wife and the obligation of the inheritance between them. The community of Muslims has a consensus (*iğmā'*) that there is no controversy among scholars regarding the agreed-upon obligation of the dower (*aṣ-ṣadāq al-musammā*) for the woman, half of it at divorce and the whole at death, even if he (the husband) did not copulate (*daḥala bihā*) with his wife. Similarly, there is also no difference among jurists regarding the obligation of inheritance. If, however, the (invalidity of this) marriage had become public before the cohabitation happened and therefore it had been annulled, I do not know any difference (among the jurists) in that she has no right for the dower or for a part of it, even if the annulment meant divorce. For in the valid (*ṣaḥīḥ*) marriage when the husband and wife are separated before cohabitation through no known fault on behalf of the husband, like her bodily violation or causing her illness, then she deserves no part of the dower as earlier scholars said (in our legal school), even if she would like to remain in the matrimonial abode, even more so if neither of the spouses desires this. As for the influence of the invalidity of the marriage on the dower in cases like making the remarriage (illegally) lawful (*muḥallal*)⁶², marrying a slave girl on the condition that her son will be free, a marriage on the condition that there will be no inheritance between the spouses, and the like, the opinions differ concerning the rights of the wife if her husband omitted the copulation. One (of the jurists) said that she deserves (only) the 'similar dower' because the invalidity influences

⁶² See fn. 43.

the dower. Another said that she deserves the dower agreed upon in the marriage contract because it is the contract, which is invalid, not the dower. About this kind of invalid marriages, it is mentioned in our texts that the wife deserves no part of the dower agreed-upon (in the contract) if one of the spouses died before the copulation. This becomes obvious from the opinion of those who prescribe in this marriage the 'similar' dower except for what we told about the opinion of Aşbağ. He said that if a husband married with risk (*ğarar*) and died before copulation, his wife deserves the 'similar' dower. But for those who prescribe that the wife only gets the agreed-upon dower (in the contract) after the copulation, the decision is supposable (*al-amr muḥtamal*), so it is quite clear that the wife may have a part of the dower only if the copulation happened and, as I said earlier, the dower cannot serve as a compensation for the vulva even if (as is known) the private parts (of the wife) are only made lawful (*yustabāḥ*) by the copulation. It (the copulation) is nothing more than a (free) gift (*naḥla*) from God which He imposed on the wives for the sake of their husbands, not as a compensation for the enjoyment since she enjoys by him as he enjoys by her. So, he is affected through it as she is since they sleep (*mubāḍa 'a*) together during it. As God says: 'Give women their dowers as a (free) gift' (Qur'ān IV/4). A (free) gift means that no compensation can be taken for it. Whenever the inheritance is made obligatory, the dower agreed-upon is also made obligatory, even if the marriage contract had been invalid. But it is (only) God who can grant success by His power.

Comment: It is a general question regarding different types of invalid or even unlawful marriages that caused problems for the jurists of Sevilla. The answer even widens the circle of invalid marriages that were asked, explaining in detail the agreements and the differences of the jurists. The primary significance of the dower appears to be evident from the answer.⁶³

XXIII. no. 57: *Invalid marriages (ii)* (Ibn Ruşd, *Fatāwā* 294)

'His opinion was asked about a man who married a 15-year-old orphan girl, assuming that she was mature (bāliġ), but after the husband copulated with her, the man who gave her in marriage to him denied her maturity and mentioned that he was not really her guardian.'

Question:

About a man who married a 15-year-old orphan girl whom an uncle of her gave in marriage to him, saying that he was her guardian and no one else was her guardian, and her mother was alive who corroborated this statement. The husband assumed that she was mature, but when he copulated with her and spent with her for more than a month, she hated him and fled from him. Then the alleged uncle said that he was not her uncle, and the mother said the same, also saying that she was not mature

⁶³ Cf. Burzulī, *Fatāwā* II, 194ff., where it is not mentioned that the question was put by the jurists of Işbiliyya.

(sexually). The question is whether the marriage becomes annulled because of this and who will have her dower in that case? or will the marriage be not annulled? Please, clarify for us that, God willing.

Answer:

I looked at your question and studied it. It is obligatory to send back the wife to her husband and to complete the marriage, since it happens to be right formally. There is no way to annul it for what the uncle and the mother said and their (false) allegation. God will give us success.

Comment: Ibn Rušd in his *fatwā* cleaned the issue from the superfluent details: the maturity of the girl, the guardianship of the alleged uncle, his confession which was corroborated by the mother. He concentrated on the main issue: It is a valid marriage, so the disobedient (*nāšiza*) wife must return to her lawful husband. The most important element in the question is the copulation, which decides the fate of the wife. The other circumstances are irrelevant with respect to the marriage.⁶⁴

XXIV. no. 295: *Marriage with a woman with whom he fornicated (zinā)* (Ibn Rušd, *Fatāwā* 1015)

Question

It was put by a Berber from the valley of Córdoba: A man and a woman fornicated together, then contracted marriage without (waiting) the cleansing (period) from the immoral (sexual) fluid (of the fornication).⁶⁵ They had children and then they became separated by divorce. Later they returned to each other after the divorce, then they became separated again by divorce. Then both accused each other and blamed each other for their (sinful) act. They asked about their actions the *mufītīs* in their location who decided against both for their immoral acts, stating that these acts were not correct, and their children were not trueborn (*rašda*). Then the man, the husband of the above-mentioned woman, died during this all, and the children did not inherit from him, nothing at all. The bequest of the dead man was taken and given to the poor. May God ensure you success, give us a *fatwā* first on their doings marrying after their fornication without cleansing (period), then on their divorce and their return (to their marriage) after the divorce, and so on, and finally on the question of inheritance of the bequest of the father by their children. Should they inherit or not?

⁶⁴ The question and answer are also quoted by Wanšarīsī, *Mi'yār* III, 378, with a slight difference: the wife, not her mother, said that she had not been mature at the time of the marriage. See also Burzulī, *Fatāwā* II, 197, where he adds that the puberty is handled similarly to the maturity in the relevant legal literature. Another difference in the text is that not the uncle, but one of the paternal cousins marries the girl. Then al-Burzulī adds his own opinion that the age of the girl of 15 year is the definitive factor in the marriage not her maturity.

⁶⁵ *bi-ḡayr al-istibrā' min al-mā' al-fāsid*

Elucidate this for us and explain all this, since it will be rewarding. If they deserve the inheritance, are the *mufītīs* obliged to reimburse the damage they cause or are they not? These spouses divorced three times in the above-mentioned way. Tell us whether the judgement will be over them the same as in the case of the rightful marriage, i.e., that they can only return to the matrimonial state only after a husband (married the woman and divorced her)? Or will the judgement be different in their case? Explain all this, too, and be successful and assisted in this by God.

Answer:

I looked at your question and studied it. The first marriage the contract of which was made before the cleansing (period) from the immoral fornication could not be followed by divorce, so his departure from her is only annulment without divorce. But the second marriage is rightful and could be followed by divorce. If the divorce had happened before the copulation, she deserved half of the dower, but she had no right to the inheritance. If the divorce had happened after the copulation, she deserved the whole dower and the inheritance, supposing that the husband had died before the waiting period (*'idda*) of the wife ended and the form of the divorce, by which he divorced from her, was irrevocable. As for the children, they are affected by the valid divorce, so they deserve the inheritance in any case. Those who reached the (false) conclusion and believed in (the previous *fatwā*) are obliged to guarantee (the return of the dispersed inheritance). As for *mufītīs*, they are not liable to guarantee it, since they did not more than they made deception by their words. The guarantee falls on those who asked their *fatwā* and took their inheritance based on this *fatwā* and believed in it without proving its rightness. Nothing is obligatory by any means. By God the success is granted.

Comment: Ibn Rušd's *fatwā* was based on the illegitimacy of the first marriage, so the divorce had also been null and void. Then he concluded that because of this the second marriage and divorce had been valid, and the children had been justified to receive the inheritance. Perhaps the most interesting ascertainment refers to the role of *mufītī*, who is not responsible for the consequences of his decision, since a *fatwā* is not an official judgement, but only an opinion that is not obliging. An opposing view is contained in the book of al-Burzulī in discussing this *fatwā*. He quotes aš-Ša'bī⁶⁶ who said that the *mufītī* is indeed responsible for his decision because, in his opinion, the judge is only his deputy who follows his rulings. al-Burzulī summarises his opinion saying that the controversy about the responsibility of the *mufītī* relates to the controversy concerning the different opinions about the faults of the *muğtahid*.

⁶⁶ Burzulī, *Fatāwā* II, 200–201.

XXV. no. 557: *Mut‘a marriage* (Ibn Rušd, *Fatāwā* 1535)

The enjoyment (temporary) marriage and the opinion of the later jurists about it.

A question about marriage from the town of Badajoz (Baṭalyaws). It was asked from Imām Qāḍī Abū l-Walīd about a man of right knowledge and scholarship who married a woman by enjoyment marriage for an appointed time without guardian and without a proper dower, only for half a dirhem from these *qīrāṭs* of Yūsuf b. Tašfīn (Almoravid *amīr*, 1072–1106). The man confessed before the ruler that he copulated with the woman and took the trouble to produce evidence for what he claimed concerning this marriage. He presented two witnesses with no good reputation. A member of the council said to him: Actually, enough of that, you had married by an enjoyment marriage which is prohibited, and made it without guardian and dower, so you are nothing else than an adulterer. Then the husband said: I do not deny the prohibition of enjoyment marriage, but I adhered to what I was told about the difference of opinions in this question, beginning with Ibn ‘Abbās and others. The cause of this marriage was that I was fond of her, but I could not afford to be her rightful husband fearing that my father would not let me (marry) since she was not (considered) a proper (wife) for the like of me. Thus, I considered the adherence to this difference of opinions better than fornication. As for your blame that the marriage had been without (proper) dower, I found that those who had stated permissibility of the enjoyment marriage had not set up a minimum limit for the dower. And for your saying that I had no witnesses with good reputation, I could reveal the marriage only to them. Therefore, I thought that I would do all this (that is, enjoyment marriage) rather than fornication. Perhaps God will accept my excuse. Therefore, I wish to put this question to the discretion of the jurist for an answer.

Answer

The Prophet forbade enjoyment marriage, and the jurists have also been in consensus on its prohibition, except for those who held separate views and whose opinions have not been taken into consideration. The opinion of the jurists is that if the man marries a woman for an appointed time with guardian, (acceptable) dower, and two witnesses with good reputation, then all the matrimonial affairs are maintained between them for that period with the exception of inheritance. If a man agreed with a woman that he would copulate with her and enjoy her for a definite period of time on the condition that he would spend his money on her, it is not enjoyment marriage, but only fornication. The obligation is that this man about whom the question was put should be punished with the punishment of fornication. That means stoning if she was protected (by marriage) and whipping if she was a (young) unmarried girl because of his having confessed to copulate with the woman with whom he was found together. This is because he falsely thought that he married her with enjoyment marriage, since the way he mentioned (about this marriage) means a judicial error which excludes from the definition (of the enjoyment marriage). This marriage was

not witnessed for him, whose testimony is permissible, so his copulation with her was not according to the mode of marriage which he had believed widespread, prevailing, and fixed. Therefore, it is necessary that if she was an unmarried girl, he be beaten after the legal punishment (*ḥadd*) of painful beating had been announced for him, followed by long-term detention in prison for his disdain for religion and his deception of Muslims. What was mentioned of his knowledge and his quest for evidence supporting his case imposes upon him disgrace in this world and in the afterlife and lowers him to the worst position, since he knew the truth but opposed to it, (knew) he right way but defied it, and (knew) what is forbidden but boldly challenged it, fabricating lies against God and despising His laws, making fun of His religion. It is recited that the religious scholar who does not use his knowledge well has the worst position at God of all people on the day of resurrection. How could it be otherwise with one to whom his knowledge did harm and sought to attack the forbidden things and to defy the legal scholars? It is God that I ask for protection and success.

Comment: It can be stated that this question may have been put to the *mufī* in his relative youth, before the age of 28, since the city of Badajoz had been invaded by Christian rulers in 1086 and it did not return to Muslim rule until 1146. Perhaps his youth, perhaps his hard anti-*šī*'ite feelings explains his unusual moral and religious indignation in the case of the temporary (*mut'a*) marriage, prohibited in *sunnī* Islam.⁶⁷ It is especially interesting how he, in the spirit of *sunnī* law, differentiates between lawful marriage with an appointed time limit, which can be conceived as a promise of divorce at a definite point of time, and the prohibited *mut'a* regarded simply as fornication.⁶⁸

Summary

Although these 25 *fatwās* form a mere drop in the ocean of similar *fatwās*, some general conclusions can be drawn concerning the way the *mufī* works even from such a small number of cases.

(i) The jurists had almost always different views in judging most of the questions put before them, but the *mufī* tries to follow “what the majority says” in his school. That means mainly the forefathers of the school. This is obvious in every case, seeing of the heavy reliance of the jurists of this age on the opinions of the first two centuries of the Islamic legal thinking, that is, the 2nd and 3rd centuries of the *hiġra*. Sometimes, however, if a famous early *mālikī* jurist represents a particular way of teaching it is

⁶⁷ On the *mut'a* marriage see Hermanto 2016. See also Fōḍa 1992. On the *šī*'i views concerning the abrogation of the Qur'ānic verse which permitted the *mut'a* marriage, see Ḥū'ī 1981. As it will also be evident from the answer, during the first centuries of the Islam even some *sunnī* scholars could accept the *mut'a* or at least accept that it had been once permitted. For this see Burton 1977:179–180.

⁶⁸ See Burzulī, *Fatāwā* II, 198–200. Cf. Wanšarīsī, *Mi'yār* III, 393ff.

expressed by the term '*alā madhabihī* 'according to his school'. In this age the *ḥadīṭ*, attributed to the Prophet, "difference of opinion in my community is (a result of divine) favour" (*iḥtilāf ummatī rahma*) meant a real and live tradition. Even so, the wide range of different opinions even within one legal school regarding a given question is astonishing, especially in our days when the representatives of the '*islām bilā madāhib*' promote the imaginary ideal of a (never existed) uniform Islamic law.

(ii) The answers of Ibn Rušd prove well that the first and most important task of the *mufīṭ* consists of the right selection of the decisive element from the facts and arguments presented to him in the question and the choice of the most important and essential factor from the sometimes disturbingly confused description of the given case and neglecting all the other ones. So, the reader of the *fatwā* may be disappointed if he wanted to know the answer to all issues found in the question, but the *mufīṭ* does not address the side issues in the questions which reflects his remarkable method of clarifying the question and giving a simple and clear answer. The abbreviation of a long case to the essentials and stripping it from all other factors led Ibn Rušd to find the crucial element of a question.

(iii) In addition, the importance of the right choice of the decisive element is that it leads the *mufīṭ* to find the right *qiyās* (analogy) on the basis of which he can decide correctly. It also shows that the differences in the decisions of the jurists are essentially not based on opinions, but on the right choice of the important elements in a case, roughly speaking on the knowledge of the fundamentals of the Islamic law

(iv) Ibn Rušd, following the convention of Islamic law, refused the literal interpretation of the arguments presented to him, but he sought instead the suitable cause (*'illa*) of the case. An example of how the analogy works and what is the significance of finding the right cause of a case is the answer to the question concerning the *mut'a* marriage. The *mut'a*, as a temporary form of marriage is refused by the *sunnī* law, but a marriage with an appointed time limit, which can be conceived as a promise of divorce at a definite point of time, is acceptable, because it is analogue to a commercial contract with future fulfilment.

(v) This last comment leads us to the generally accepted analogy between the commercial contract and the marriage contract, which becomes clear from many *fatwas*.

(vi) In connection with an unfortunate *fatwā*, which wrongfully deprived the children from their lawful inheritance, an interesting difference of opinions unfolds before our eyes in a very important question, that is, the responsibility of the *mufīṭ* for the consequences of his possibly wrong *fatwā*. This debate also shows the significance of the independent judgement of a jurist based on his individual efforts (*iğtihād*) in good faith.

(vii) There are several cases where one can see the importance of the witnesses, who form the basis of the Islamic legislation, and the significance of their appropriateness for judging the case. As it was expressed in a case "Even if something is 'widely known' (*mašhūr*) is better than related (that is, inappropriate) witnesses". At the

same time, the acceptance of the public opinion and public knowledge as testimony reflects well the flexibility of the *mālikī* legal system.

(viii) It must be emphasised how important is the consideration of the common usage of a given territory or town especially for the *mālikī* legislation. Since Ibn Rušd could not know the usage of every town in Andalusia, he added, in several occasions in the whole collection of his *fatwās*, the words “if it is still in usage in your town” or “if the usage of your town differs from what I said, your common usage would be valid.”

(ix) Finally, it may be apparent even from this small segment of the collection what an interesting picture we can receive through the *fatwās* about the everyday life of Andalusia in the Middle Ages in the field of family life and the husband-wife relationship. What is conspicuous is that the wives not only had their own material interests independently of their husband but also that they had many ways of defending them.

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