Republished in D.S. Powers, The Development of Islamic Law and Society in the Maghrib (2011)

V

Women and Divorce in the Islamic West: Three Cases*

ABSTRACT

I examine here three short *fatwās* that were issued in the Islamic West in connection with divorce disputes. The first two cases took place in the sixth/twelfth century, one in Lisbon, the other in the vicinity of Ceuta; the third case took place in Bijāya in the ninth/fifteenth century. In all three cases, the female protagonist finds herself in an unwanted marriage. In the ensuing litigation, each woman uses her own knowledge of the law or knowledge acquired from a male relative or acquaintance to work the system in an effort to extricate herself from an undesirable situation. In order to overcome the asymmetry of the laws of divorce and to achieve her objective, each woman is compelled to engage in some form of deceit and/or prevarication.

During the last decade of the ninth/fifteenth century Aḥmad al-Wansharīsī compiled the massive collection of judicial opinions, or *fatwās*, to which he gave the name *Kitāb al-Miʿyār*.[1] Anyone who has taken a dip into this seemingly bottomless ocean of legal opinions cannot fail to have noticed that women are ubiquitous. In the litigations that gave rise to the *fatwās*, women – young and old, minors and majors – buy and sell property, make and receive gifts, leave and receive bequests, inherit property and are inherited from, establish endowments and are beneficiaries thereof, appear as slave owners and as slaves, serve as testamentary guardians of minor children and are themselves subject to interdiction. In court cases women appear as plaintiffs, defendants, and, occasionally, as witnesses or experts. **[p. 30]**

First published in *Hawwa* 1 (Leiden: Brill, 2003).

* I wish to thank Maria Pia di Bella for her comments and suggestions on an earlier draft of this essay.

[1] The full title of the text is *al-Miʿyār al-Muʿrib wa'l-jāmiʿ al-mughrib ʿan fatāwā ʿulamā' Ifrīqiyā wa'l-Andalus wa'l-Maghrib*, lithograph, 12 vols. (Fez, 1314–15/1897–98); new edition, 13 vols. (Rabat: Ministry of Culture and Religious Affairs, 1401–03/1981–83).

One feature of the *Miʿyār* that sets it apart from other collections of judicial opinions is that it includes a number of *fatwās* in which one finds transcriptions of documents specifying the names of the litigants, the locations of transactions, and the dates of legal events. These documents – precious artifacts of Islamic court practice of which little evidence has survived for the period prior to the Ottomans – include a variety of legal instruments relating to women, e.g., marriage contracts, dower agreements, and divorce agreements. The presence of these documents in the *Miʿyār* gives researchers access to the lives of women who lived in the Maghrib and al-Andalus in the period between the twelfth and fifteenth centuries CE.[2] I propose to examine here three short *fatwās* that were issued in connection with divorce disputes. Each *fatwā* contains a transcription of a document that makes it possible to situate the case in time and place. The first two cases to be examined took place in the sixth/twelfth century, one in Lisbon, the other in or near Ceuta; the third case took place in Bijāya in the ninth/fifteenth century.

It is generally acknowledged that the rules of divorce are asymmetrical, favoring men over women: a woman requires a marriage guardian, or *walīy*, in order to marry; she may be beaten by her husband if she is disobedient; and she may not unilaterally initiate a divorce.[3] A Muslim woman who found herself in a loveless or unwanted marriage and wanted to extricate herself from it had to work with, and around, these rules. This required some knowledge of the law. What is especially noteworthy about the three cases to be examined here is the manner in which the female protagonist in each instance used her knowledge of the law to advance her personal goals and interests. These three women, whose voices, motives and emotions I shall attempt to highlight, were strong characters who played an active role in the divorce proceedings. One objective of the present investigation is to call into question the popular stereotype of the Muslim wife as a passive agent who is dominated and controlled by her husband. **[p. 31]**

[2] See now David S. Powers, *Law, Society, and Culture in the Maghrib, 1300–1500* (Cambridge University Press, 2002).

[3] See, for example, Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998).

Case I. Wife Abuse[4]

Facts of the Case

At an unspecified date prior to the year 512/1118, a woman by the name of Ruʿyā was married to ʿUbaydallāh b. Muḥammad b. Aḥmad b. Ukāmin al-Azdī. The marriage took place in Lisbon, the administrative capital of western al-Andalus. Negotiations on behalf of Ruʿyā were carried out by her father, Abū al-Walīd Yūnis b. ʿAbd al-Razzāq, acting in his capacity as his daughter's *walīy*, or marriage guardian. Abū al-Walīd, it should be noted, was a jurist.

ʿUbaydallāh's father was a wealthy man and his family relinquished valuable economic resources in order to "acquire" the bride. At the time of the marriage, ʿUbaydallāh gave Ruʿyā certain valuable properties as her immediate dower: (1) houses and gardens in the western zone of Lisbon; lands in the villages surrounding the city; (2) and clothes, as specified in an itemized list that is not preserved in our source. ʿUbaydallāh also promised to pay Ruʿyā a specified sum of money as deferred dower, in the event of divorce or his death.

The marriage was unsuccessful. Subsequent witness testimony characterizes relations between husband and wife as "difficult" and refers to "differences in outlook", without further specification.[5] Ruʿyā was desperate to extricate herself from the unwanted union, for reasons to be discussed below. Fortunately, her father was a jurist and she no doubt consulted with him about the legal strategy to be pursued.

Acting on behalf of his daughter, Abū al-Walīd negotiated a *khulʿ*-divorce, that is, a divorce in which the wife agrees to compensate her husband for granting her a release by renouncing all financial claims that she may have against him.[6] According to the **[p. 32]** terms of the

[4] *Miʿyār*, vol. 4, 5–6; this *fatwā* also may be found in Ibn Rushd al-Qurṭubī, *Fatāwā*, 3 vols. (Beirut: Dār al-Gharb al-Islāmī, 1987), vol. 2, 952–5, no. 271. This case is summarized, with a translation of the document, in Amalia Zomeño, *Dote y matrimonio en al-Andalus y el norte de África: Estudio sobre la jurisprudencia islámica medieval* (Madrid: Consejo Superior de Investigaciones científicas, 2000), 256–8.

[5] *Miʿyār*, vol. 4, 5, l. 16.

[6] A *khulʿ* divorce is regarded as definite and irrevocable (*bāʾin*): in a divorce of this type, the husband cannot take back his wife during her waiting-period; and once the waiting-period has expired, a new marriage is necessary if the former husband and wife wish to return to each other. For further details, see Ibn Rushd, *The Distinguished Jurist's Primer*, trans. Imran Ahsan Khan Nyazee and Muhammad Abdul Rauf, 2 vols. (Reading, UK:

agreement, ʿUbaydallāh would release Ruʿyā from the marital bond on the condition that she return all of the real estate that he had given her as her immediate dower and that she also relinquish her claim to the deferred dower. Ruʿyā would retain possession of the clothes that her husband had given her. Both parties renounced any future claims against one another, a point of significance to which we shall return. Each party summoned one man who served as a witness to the divorce. ʿUbaydallāh released Ruʿyā from the marriage, and she observed the legal waiting-period, or *ʿidda*. The divorce was finalized and executed on 25 Shaʿbān 512/11 December 1118.

Wife Abuse: The True Reason for the Divorce?

The preceding narrative summary is based on the divorce document drawn up on 25 Shaʿbān 512.[7] But that document tells only part of the story. A second document, also transcribed in our source, sheds light on Ruʿyā's motivation for seeking a *khulʿ* divorce on highly unfavorable terms. Let us now reconsider the events leading up to, and immediately following, the marriage.

The marriage between ʿUbaydallāh and Ruʿyā surely was the result of extended negotiations between the two families and, as noted, ʿUbayallāh's family had committed valuable economic resources to the union. However, Ruʿyā may have been a reluctant partner in these negotiations; be that as it may, when she did not live up to the expectations of ʿUbayallāh or, perhaps, those of his family, he became determined to get rid of her. The simplest and no doubt the most common way for a Muslim man to dissolve a marriage is to pronounce the triple *ṭalāq*. But exercising this option would have carried a heavy transaction cost: Ruʿyā would retain her immediate dower and ʿUbaydallāh would be **[p. 33]** required to pay the deferred dower. A second alternative was to encourage Ruʿyā to ransom herself from her husband by renouncing all financial claims that she may have had against him. If Ruʿyā could be motivated to ask for a *khulʿ* divorce, ʿUbaydallāh might rid himself of an unwanted wife and recover possession of valuable familial properties. But why would Ruʿyā

Garnet Publishing, 1996), vol. 1, 79–83. Cf. *Chapters on Marriage and Divorce: Responses of Ibn Ḥanbal and Ibn Rāhwayh*, tr. with introduction and notes by Susan A. Spectorsky (Austin: University of Texas Press, 1993), 27–59, esp. 50–52.

7 Ibn Rushd, *Fatāwā*, vol. 2, 952–5.

want to renounce the valuable economic resources that she had acquired at the time of her marriage?

The answer to this question is critical to a proper understanding of the case. Apparently, ʿUbaydallāh began to beat Ruʿyā in an effort to make her life so miserable that she would be willing to request a *khulʿ* divorce and renounce all financial claims against him. The beatings continued until Ruʿyā was desperate and willing to sue for a divorce. Although she wanted to extricate herself from the marriage, she no doubt was reluctant to return the houses, gardens, and agricultural plots that she had acquired as dower.

When the jurist Abū al-Walīd Yūnis learned that his son-in-law was beating his daughter, he devised a plan that might make it possible for Ruʿyā to extricate herself from the marriage at the least possible cost – indeed, perhaps with a substantial gain. As a jurist, he knew that it is illegal and un-Islamic for a husband to beat his wife without cause; and that a *khulʿ* divorce that is extorted from a woman against her will is null and void. Abū al-Walīd Yūnis also knew that he would have to provide evidence of the beatings in the form of witness testimony and that he would have to keep the resulting documentation close to his chest until after the divorce had been finalized. The plan required legal acumen, nerves of steel, patience, and the ability to keep a secret.

Some time during the month of Dhū al-Ḥijja 511/March-April 1117, that is, approximately twenty months prior to the issuance of the above-mentioned *khulʿ* divorce, Abū al-Walīd Yūnis summoned two professional witnesses and asked them to record the testimony of several men and women whom he had invited to give testimony regarding the beatings that Ruʿyā was receiving from her husband. Our source does not specify the identity or number of the men and women who presented themselves for this purpose, although it does mention that some of them were family servants (who may have been eyewitnesses to the beatings), others were neighbors (who may have seen or heard the beatings from a **[p. 34]** distance), and others were mere passers-by or incidental witnesses. The witnesses testified that it was widely known that ʿUbaydallāh "has been abusing (*yaḍurru*) his wife, Ruʿyā, . . . on her body in a manner that is unbearable to Muslims; that he is harassing her in order that she ransom herself from him; and that he has done this to her repeatedly, time after

time, without desisting . . ." The testimony of the witnesses was recorded in writing in a memorial document, or *rasm istirʿā'*.[8]

Abū al-Walīd Yūnis held on to this document and kept its contents a secret for the next twenty months; it is possible that the beatings continued during this period, although our source is silent on this point. Finally, in the month of Shaʿbān 512/December 1118, he negotiated the *khulʿ* divorce on behalf of his daughter. On 25 Shaʿbān 512/11 December 1118, the divorce became final.

No sooner was the ink on the divorce document dry than Ruʿyā's **[p. 35]** father approached the *qāḍī* who had certified the divorce and showed him the *rasm istirʿā'*. He asked the *qāḍī* to issue a judgment calling upon ʿUbaydallāh to return the properties that Ruʿyā had given to her former husband as part of the divorce settlement. If the *qāḍī* agreed, Ruʿyā would be free of her abusive husband and would retain possession of her valuable dower properties.

[8] Mālikī law accords probative value to a document known as a *rasm istirʿā'*, or memorial document. This is a document in which professional witnesses record the testimony of one or more individuals who have knowledge of a certain topic that may have legal relevance. Such a document is drawn up in anticipation of a subsequent litigation. Its contents remain secret until it is needed, at which time it may be presented to the judge who has been asked to resolve a dispute. The judge's decision to accept or reject the document is conditioned by his assessment of the integrity of the professional witnesses who recorded the testimony.

Istirʿā' testimony appears to have been specific to the Mālikīs. See *Miʿyār*, vol. 10, 199–200; Ibn Farḥūn, *Tabṣirat al-ḥukkām fī uṣūl al-aqḍiya wa-manāhij al-aḥkām*. 2 vols. (n.p.: n.p., 1986), vol. 1, 314, 452–7; David Santillana, *Istituzioni di Diritto Musulmano Malichita con riguardo anche al sistema sciafiita*, 2 vols. (Roma: Istituto per l'Oriente, 1925–1938), vol. 1, 348; vol. 2, 219, 722 ("atto segreto con cui l'attore protesta mediante notari, facendo prendere atto della causa che gli impedisce di agire"); Christian Müller, *"Ṣahāda* und *kitāb al-istirʿā'* in der Rechtspraxis: Zur Rolle von Zeugen und Notaren in Gerichtsprozessen des 5./11. Jahrhunderts," in *Tagungsband des XXVII. Deutschen Orientalistentag*, Bonn (1998), (Würzburg: Ergon-Verlag, 2001), 387–99; Leon Buskens, *Islamitisch Recht en familiebetrekkingen in Marokko* (Amsterdam: Bulaaq, 1999), 208–10. For models of *istirʿā'* documents, see Ibn al-ʿAṭṭār, *Formulario Notarial Hispano-Árabe por el alfaquí y notario cordobés Ibn al-ʿAṭṭār (s. X)*, ed. P. Chalmeta and F. Corriente (Madrid: Academia Matritense del Notariado, 1983), 230, 234–5, 281, 319–28, 336, 342, 355, 361, 364–8, 371, 376, 378–9, 438. For additional examples, see *Miʿyār*, vol. 13, index, 35–6. This type of document is also frequently attested for seventeenth-century Morocco. See Jacques Berque, *Ulémas, fondateurs, insurgés du Maghreb, xvii^e siècle* (Paris: Sindbad, 1982), 210, 217, 222. In certain respects the *rasm istirʿā'* is similar in function to the testimony of secondary witnesses (*shahāda ʿalā shahāda*). On the latter, see Jeanette Wakin, *The Function of Documents in Islamic Law* (Albany: State University of New York Press, 1972), 68–71.

The *qāḍī* was unsure of how to proceed: on the one hand, the divorce document specified that Ruʿyā had acted voluntarily, of her own free will; and that the two parties had renounced all future claims against one another. On the other hand, the *rasm istirʿā'* suggested that the *khulʿ* divorce was, in fact, a product of extortion. Which document had greater probative value? The *qāḍī* wrote to the *muftī*, Ibn Rushd (d. 520/1126),[9] asking him to study the documents and issue a *fatwā*.

Ibn Rushd responded that if the *qāḍī* determined that the witnesses were trustworthy and bore no grudge against ʿUbaydallāh, then Ruʿyā was entitled to recover the properties that she had relinquished as part of the *khulʿ* divorce settlement, on the condition that she first swear an oath in which she affirmed: (1) the veracity of the testimony given about her in the *rasm istirʿā'*; (2) that her sole motive for negotiating the *khulʿ* divorce was to extricate herself from an abusive situation; and (3) that she was not acting of her own free will when she agreed to the *khulʿ* divorce. In addition, the *muftī* instructed the *qāḍī* to have the witnesses add the following supplement to their earlier testimony: "They have no knowledge of ʿUbaydallāh's having ceased his abuse of Ruʿyā until the day on which they learned that he had separated from her."[10]

At this point, our documentation ends. We do not know the final outcome of the dispute, although, based upon the *fatwā* of Ibn Rushd, it is likely to have ended in favor of Ruʿyā. **[p. 36]**

Case 2. Menstruation and Deception[11]

Facts of the Case

Our second case, which took place in or near Ceuta at an unspecified date in the sixth/twelfth century, centers upon the figure of Fāṭima bt. Muḥammad [Ibn Najjuma; alternatively Bunajjūma], a woman who married at least two and possibly three men during her lifetime. Although we do not know anything about Fāṭima's first marriage, we do know that

[9] Ibn Farḥūn, *Kitāb al-dībāj al-mudhahhab fī maʿrifat aʿyān ʿulamā' al-madhhab* (Cairo: Dār al-Turāth, 1351/1952), 278–9; Muḥammad b. Muḥammad Makhlūf, *Shajarat al-nūr al-zakiyya fī ṭabaqāt al-mālikiyya*, 2 vols. in 1 (2nd ed. Beirut: Dār al-Kitāb al-ʿArabī), vol. 1, 129; V. Lagardère, "Abū l-Walīd b. Rushd qāḍī al-quḍāt de Cordoue," *Revue des Etudes Islamiques*, LIV (1986), 203–24.

[10] Ibn Rushd, *Fatāwā*, vol. 2, 955.

[11] *Miʿyar*, vol. 3, 401–2.

when she was divorced by her second husband, a resident of Fez by the name of ʿAlī b. Muḥammad, he claimed that she had deceived him with regard to her waiting-period, or *ʿidda*, from her previous husband.

Whatever effect this allegation may have had on Fāṭima's reputation, it did not prevent her from contracting yet a third marriage, this one to a certain Muḥammad b. Aḥmad al-Lakhmī. Familiar with Fāṭima's previous behavior, al-Lakhmī was determined not to be duped or deceived as one or more of his predecessors had been. Before consummating the marriage, he took extensive precautions to ensure that Fāṭima was familiar with the rules relating to the waiting-period and would observe them as required. Fāṭima's father, Ibn Najjūma, apparently was not alive, and her marriage guardian in the ensuing negotiations is identified as a certain Ḥājj Ḥaddūr, who was instructed to advise his ward as follows:

> Tell her to fear God the Almighty, her Master, and to wait by herself until the expiration of her waiting-period, and inform her that if she sees blood, then [wait] three cycles, and if she does not see it, then three full months. It is not lawful for her to marry or to become engaged until after [the expiration of her waiting-period or three months]. Warn her not to do anything similar to what she did with the Fāsī [man] who had asked for her hand in marriage, and she determined (*ʿazamat*) that the marriage with him would be contracted prior to the expiration of her waiting-period [viz., from her previous husband].[12] **[p. 37]**

Ḥājj Ḥaddūr did not approach Fāṭima directly but rather sent his wife, Umm al-Qāsim, to the prospective bride. Umm al-Qāsim went to see Fāṭima, unaccompanied by witnesses (a point of critical legal importance), and conveyed the groom's instructions to his prospective bride. When the two women met, Fāṭima reportedly told Umm al-Qāsim that she had seen blood three times following her divorce from her previous husband, i.e., her waiting-period had expired. Umm al-Qāsim returned to al-Lakhmī and conveyed this information to him. Her representation of this conversation was confirmed by the testimony of two male witnesses.[13]

A man apparently can never be too cautious in such matters. Before consummating the marriage, al-Lakhmī reminded Fāṭima of the requirement that she must observe three menstrual cycles prior

[12] *Ibid.*, vol. 3, 401 (l. 22) – 402 (l. 2).

[13] *Ibid.*, vol. 3, 402, ll. 2ff.

to re-marriage. He asked her several times about her menstruation. He did not consummate the marriage until she told him that she had menstruated three times subsequent to her previous marriage. Satisfied that the requisite legal requirements had been performed, al-Lakhmī consummated the marriage. Shortly thereafter, Fāṭima informed him that she had menstruated only twice. Horrified and angry, al-Lakhmī withdrew from his wife. Had he committed fornication? Was the marriage valid? Could he demand return of the dower? What should he do?

The first action taken by al-Lakhmī was to consult with a "trusted" jurist. The jurist issued a *fatwā* in which he counseled al-Lakhmī that Fāṭima was not lawfully permitted to him and that he should divorce her. Acting in accordance with this opinion, al-Lakhmī divorced Fāṭima and demanded return of the immediate dower. However – as the reader may have anticipated, Fāṭima remained steadfast and adamant, refusing to return anything.[14]

In the Qāḍī's Court

Armed with the *fatwā*, al-Lakhmī presented himself to *qāḍī* of Ceuta, Abū al-Faḍl ʿIyāḍ b. Mūsā (d. 544/1149), the well-known Qāḍī ʿIyāḍ.[15] **[p. 38]**

Al-Lakhmī demanded the return of the dower. In support of his claim, he brought forward Umm al-Qāsim and the two witnesses who had testified regarding her statement that she had informed Fāṭima of her legal obligation to wait three menstrual cycles. (The witnesses added that they had explained this same requirement to Fāṭima at the time of her divorce from her previous husband.)

Qāḍī ʿIyāḍ summoned Fāṭima to his court. Upon her arrival,[16] Fāṭima rebutted Umm al-Qāsim's testimony on behalf of al-Lakhmī. Claiming ignorance of the law, she refused to return the dower to al-Lakhmī.

[14] *Ibid*, vol. 3, l. 17. A *qāḍī* may annul (*fasakha*) a marriage if it manifests certain defects that make it impossible to realize the purposes of marriage.

[15] A well-known Maghribī jurist of great erudition and the author of numerous works on different subjects. See Makhlūf, *Shajara*, vol. 1, 140, no. 411; H. Toledano, *Judicial Practice and Family Law in Morocco: The Chapter on Marriage from Sijilmāsī's al-ʿAmal al-Muṭlaq* (Boulder, CO: Social Science Monographs, 1981), 104, note 44.

[16] Our source gives the date of the court appearance as Sunday the 23 of an unspecified month and year. See *Miʿyār*, vol. 3, 401, ll. 19–20.

Thus, Qāḍī ʿIyāḍ was called upon to weigh the evidentiary value of two conflicting testimonies: Umm al-Qāsim's statement – credible but uncorroborated by direct, eyewitness testimony – that Fāṭima had told her that she had in fact observed the waiting period, as required; and Fāṭima's assertion, no doubt disingenuous, that she had experienced only two menstrual cycles and was ignorant of the law.

Consultation with a Muftī

Qāḍī ʿIyāḍ consulted with a *muftī*, who responded as follows:

Umm al-Qāsim's testimony regarding Fāṭima's assertion that she had experienced three menstrual cycles requires confirmation. In the absence of such confirmation, Fāṭima's word should be accepted at face-value, on the condition that she first swear an oath in which she states: (1) that she did not know that the waiting-period is three menstrual flows; (2) that nobody informed her of her legal obligation to wait three waiting-periods; and (3) that when she married Muḥammad b. Aḥmad, she was acting on the presumption that her waiting-period from her previous husband had expired.

If Fāṭima were to swear this oath, she would be under no obligation to return any part of the dower to Muḥammad; if she refused to swear, then she must return the entirety of the dower, except **[p. 39]** for an amount that is considered to be the monetary equivalent of her husband's use of her vulva.

At this point our documentation comes to an end. Once again, we do not know the outcome of the dispute although, judging from what we do know about Fāṭima, it is more than likely that she swore the oath and retained the dower.

Case 3. A Conditional Divorce[17]

Facts of the Case

Our third case took place during the last quarter of the ninth/fifteenth century in Bijāya, where a woman by the name of Umm al-ʿIzz bt. Saʿīd al-Bijāʾī was married to Muḥammad b. ʿAlī [b.] al-Ḥasan. Our source provides no details about the nature of relations between husband and

[17] *Miʿyar*, vol. 4, 484–6.

wife, although, as we shall see, there is good reason to believe that Umm al-ʿIzz, like Ruʿyā in the first case examined here, was a reluctant partner in the marriage.

Muḥammad was a merchant who was away from home for long periods of time. At the beginning of Dhū al-Ḥijja 889/December 1485, Muḥammad was about to embark on an extended journey. As the wife of a merchant, Umm al-ʿIzz was surely concerned about the dangers associated with long-distance travel: piracy, illness, injury, shipwreck, and/or abandonment. If her husband died while traveling, and there were no witnesses to his death, the law required that she wait a minimum of four years before re-marrying. To assuage his wife's fear and anxiety, Muḥammad accompanied her to the local mosque, where he engaged the services of a notary who drew up a *tamlīk* or delegated divorce document. In this document, Muḥammad stipulated that if he were to be away from Umm al-ʿIzz for more than six months, he empowered her to release herself from their marriage. Perhaps at the prodding of his wife, Muḥammad added a seemingly innocuous clause to the document, a clause that he subsequently would come to regret: He stipulated that any statement made by Umm al-ʿIzz with regard to his absence was to be accepted as true (*taṣdīq*), without corroborating testimony, on the condition that she proceed to the Great **[p. 40]** Mosque and swear an oath regarding his absence. It would not be necessary for Umm al-ʿIzz to produce testimonial evidence establishing his absence; nor would it be necessary for her to consult with a *qāḍī* or anyone else. Finally, Muḥammad specified that Umm al-ʿIzz was not required to exercise her right to divorce immediately, but might choose to hold off for an indefinite period of time without jeopardizing the *tamlīk*. The document spelling out the details of the delegated divorce agreement was drawn up in the presence of two witnesses, unidentified in our source.

Five months and a few days passed. Muḥammad was still away. Umm al-ʿIzz, who seems to have read the *tamlīk*-document carefully, saw an opportunity to release herself from what appears to have been an unhappy or unwanted marriage (again, our source provides no details). Had not her husband stipulated that any statement that she might make regarding his absence was to be accepted at its face-value without it being necessary for her to establish that he had in fact been absent for six months? On 1 Jumādā I 890/16 May 1485, Umm al-ʿIzz summoned the two men who had served as witnesses to the *tamlīk* document and proceeded to the Great Mosque, where she swore the following oath: "In

[the name of] God – there is no God but God. Her aforementioned husband has been away from her for more than six months, the aforementioned time-period." The witnesses confirmed that Umm al-ʿIzz had sworn the oath completely, in the required place, in the required manner, and in the required words. (Our source does not indicate whether or not they said anything about the discrepancy between the stipulated time-period and the actual length of Muḥammad's absence.) After the oath had been sworn, Umm al-ʿIzz immediately chose to exercise her power to divorce herself from her husband.

In the Qāḍī*'s Court*

A few weeks later, prior to the expiration of the six-month time period, Muḥammad returned home, only to discover that Umm al-ʿIzz was no longer his wife and that, according to the law, he might not resume sexual relations with her until she had married another man, consummated that marriage, and been divorced, a legal procedure known as *taḥlīl*.[18] No doubt angry and embarrassed, **[p. 41]** Muḥammad approached the local *qāḍī*, insisting that he had been deceived by Umm al-ʿIzz and divorced against his will. Umm al-ʿIzz had sworn falsely. He had been away for less than six months, as his witnesses were prepared to testify. Muḥammad demanded that the *qāḍī* nullify the divorce and order Umm al-ʿIzz to return to him as his wife.

The act of deception perpetrated by Umm al-ʿIzz applied not only to her husband but also to the *qāḍī*, whose reputation no doubt would have suffered if the ruse was allowed to succeed. After examining the *tamlīk* document, the oath and other facts relating to the case, the *qāḍī* determined that the primary legal issue was not the length of Muḥammad's absence, but the force of his statement attributing credence (*taṣdīq*) to any assertion that Umm al-ʿIzz might make regarding his absence. In the *tamlīk* document, Muḥammad had specified that his wife's word was to be accepted as true no matter what she said. But what if Umm al-ʿIzz's sworn oath was a patent lie and fabrication? Should it still be accepted? Does his statement attributing credence to anything she might say prevail over her actual mendacity, or does her mendacity prevail over his statement of credence?

[18] On *taḥlīl*, see Ibn Rushd, *The Distinguished Jurist's Primer*, vol. 2, 103–5; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 164; Spectorsky (tr. and ed.), *Chapters on Marriage and Divorce*, 28ff; *EI*^{2}, s.v. *Muḥallil*.

The Fatwā

Confronted with this paradox, the *qāḍī* solicited the opinion of a distinguished Fāsī jurist, Abū Mahdī ʿĪsā al-Māwāsī,[19] who issued an opinion in which he held in favor of Muḥammad. The *muftī* reasoned that when a *qāḍī* issues a judgment, he must base that judgment upon certain knowledge. The statement of credence, or *taṣdīq*, involved an uncertainty: Umm al-ʿIzz might have been telling the truth or she might have been lying. If she had lied, then her oath properly might not serve as the basis of a judgment – notwithstanding the husband's statement of credence (*taṣdīq*). In support of **[p. 42]** his argument, al-Māwāsī cited two cases that had been decided by the distinguished Cordoban jurist Ibn Rushd.[20] Once again, our documentation ends without our knowing the outcome of the dispute, although, in this case, it would appear that the husband prevailed over his wife.

Conclusion

Like the women who appear in Ziba Mir Hosseini's documentary film, "Divorce: Iranian Style," the three women examined here were bold, brash, and brainy.

In Case 1, ʿUbaydallāh tried to set a trap for his wife, Ruʿyā by subjecting her to physical abuse so that she would seek to ransom herself from their

[19] Abū Mahdī Īsā b. Aḥmad b. Mahdī al-Māwāsī al-Baṭṭīwī al-Fāsī (d. 11 Rajab 896/20 May 1491), a Mālikī jurist and *muftī*, who reportedly served as the *khaṭīb* in New Fez for approximately sixty years. Aḥmad Bābā al-Tunbuktī, *Nayl al-ibtihāj bi-taṭrīz al-dībāj* (Cairo: 1351/1952), 194; al-Qarāfī, *Tawshīḥ al-dībāj wa-ḥilyat al-ibtihāj* (Beirut: Dār al-Gharb al-Islāmī, 1403/1983), 270, no. 323.

[20] The first case involved a man who purchased a leather receptacle containing some oil. The merchant stated that the receptacle contained 10 *qisṭ* of oil, but he did not measure the oil or weigh the container. The buyer gave credence to his statement (*muṣaddiq*) but later discovered that he had been shortchanged. Ibn Rushd classified the sale as "disapproved." In the second case, a man purchased some food, lending credence (*ʿalā taṣdīq*) to the seller's assertion regarding the quantity of food sold. Before taking leave of the seller, the buyer weighed the food and discovered the deficiency. According to an early authority the buyer "can recover the price that he paid." From this statement, Ibn Rushd deduced that if one person places credence in another, but later establishes that the person in whom he has placed his credence lied, the evidence of mendacity prevails over the statement of credence. On Ibn Rushd, see Ibn Farḥūn, *Dībāj*, 278–9; Makhlūf, *Shajara*, 129; Lagardère, "Abū l-Walīd b. Rušd qāḍī al-quḍāt de Cordoue," 203–24.

marriage. But Ruʿyā, with the assistance of her father, the jurist Abū al-Walīd, succeeded in turning the tables on her former husband, setting a trap of her own.[21] Father and daughter collected evidence of the husband's abuse and kept that evidence secret for twenty months, until the divorce had been finalized. They then approached a *qāḍī* and demanded the return of the dower on the ground that Ruʿyā had not sought the divorce of her own free will, but only as a result of her husband's abuse. The strategy appears to have worked.

Case 2 differs from case 1 in that Fāṭima seems to have been acting on her own, without the assistance of any close male relative. Clearly knowledgeable about the rules of marriage and divorce, **[p. 43]** Fāṭima manipulated these rules, apparently for the purpose of lining her pockets with dīnārs and dirhams.[22] She used her knowledge of the law to deceive not one but two husbands, in succession. Ironically, she defended her actions with the claim – surely disingenuous – that she was ignorant of the law. The strategy appears to have worked.

In Case 3, Umm al-ʿIzz, like Fāṭima, appears to have acted on her own, without the assistance of any male figure (with the possible exception of the witnesses to the *tamlīk* divorce). Demonstrating a keen knowledge of the subtleties of Islamic legal reasoning and judicial practice, Umm al-ʿIzz persuaded her husband to issue what amounted to a blank check that would make it possible for her release herself from what appears to have been an unhappy or unwanted marriage. Taking advantage of her husband's stipulation that any statement that she might make about his absence was to be accepted as true, without the need for verification, she told a bald lie. In this manner she deceived both her husband and the *qāḍī* who handled the case. The *qāḍī* reacted by soliciting a *fatwā* in which the *muftī* held that a false oath might not serve as the basis of a valid legal judgment. In the end, Umm al-ʿIzz's strategy appears to have failed.

What is striking about these three cases is the manner in which each of the three women whose lives we have examined appears to have used expert knowledge of the law in an attempt either to extricate herself from an unwanted marriage or to advance her personal interests. Now it is unlikely – although not impossible – that these women were themselves

[21] Cf. Maria Pia di Bella, "Mythe et histoire dans l'élaboration du fait divers: le cas Franca Viola," in *Annales: économies, sociétés, civilisations* (1983), 827–42.

[22] Of course, Fāṭima may have had other motives, e.g., to extricate herself from a marriage that had been forced upon her by her marriage guardian, fear of pregnancy, or hatred of men.

experts in the details of Mālikī divorce law and judicial procedure. In case 1, it was surely Ruʿyā's father, the jurist Abū al-Walīd, who provided her with the legal advice required to accomplish her objective. In cases 2 and 3, on the other hand, the requisite legal knowledge may have been provided by a litigation master or litigation expert, known in other legal cultures, who provided his client with the information necessary to achieve her objective.[23] This suggestion deserves further investigation. **[p. 44]**

Whatever the case may be, once they had acquired the expert legal knowledge, Ruʿyā, Fāṭima, and Umm al-ʿIzz all manifested a pattern of behavior that the Greeks called mètis, i.e., cunning intelligence that involves the practical ability to strategize, cheat, and escape danger, a weapon commonly associated with women and the weak.[24] The attribution of cunning intelligence to these three women is in no way intended as an insult. Living in a world in which the law favored husbands over wives, these three remarkable women drew upon their wits, savvy and determination to advance their own interests, whether to escape an abusive husband, to line her own pockets, or extricate herself from an unwanted marriage.

The behavior pattern identified here suggests that Muslim women had only limited room to maneuver in working out issues of marital discord between themselves and their husbands. The laws of marriage and divorce were gendered and asymmetrical. If a woman wanted to get out of an unwanted marriage, her chances for success increased if she had a knowledgeable and powerful male patron. A woman who did not have such a patron had only limited options: She might suffer in silence; feign ignorance of the law; or engage in prevarication, manipulation and deceit.[25] Based upon the three examples that we have examined here, it would appear that the more brazen a woman's behavior, the less likely were her chances of success. But this initial conclusion requires confirmation in the study of additional cases.

[23] On litigation masters in late imperial China, see Melissa Ann Macauley, *Social Power and legal culture: litigation masters in late imperial China* (Stanford: Stanford University Press, 1998); cf. Philip C. Huang, *Civil justice in China: representation and practice in the Qing* (Stanford: Stanford University Press, 1996). I am grateful to Bogac Ergene for these references.

[24] See *Les Ruses de l'intelligence. La mètis des Grecs*, ed. Marcel Detienne et Jean-Pierre Vernant (Paris: Flammarion, 1974), cited in Macauley, *Social Power and legal culture*, 50–53.

[25] Cf. Susan F. Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: University of Chicago Press, 1998).

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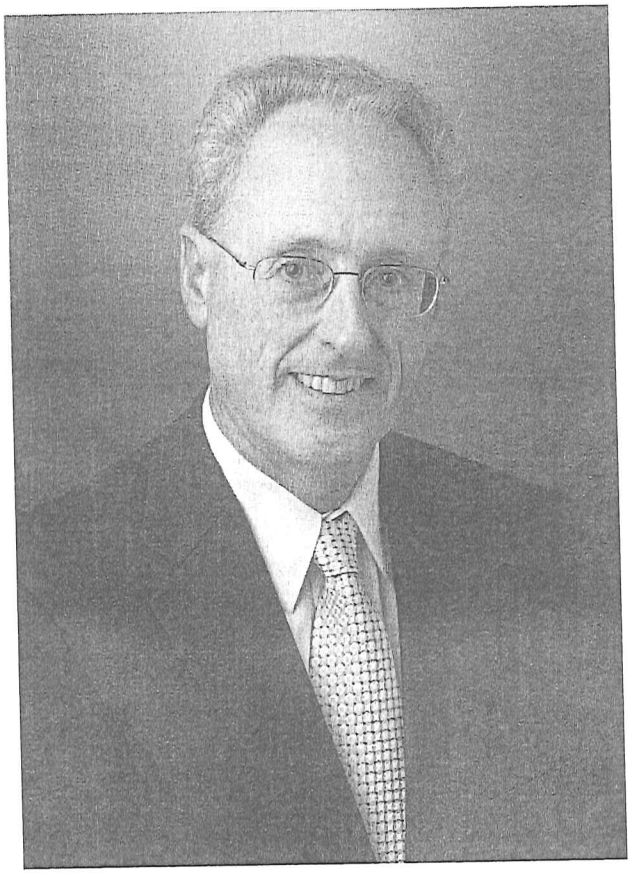

David S. Powers

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*Qāḍī*s, *Muftī*s and Family Law

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