Justice and Leadership in Early Islamic Courts

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Chapter Nine

Judicial Procedure and Legal Practice on *Liʿān* (Imprecatory Oath) in al-Andalus: The Evidence from Model *Shurūṭ* Collections, 11th–12th Centuries*

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In the last decade, the Islamic institution of *liʿān*[1] has raised a considerable level of interest among students of Islamic law given contemporary Muslim jurists' debates on how the availability of DNA fingerprinting is affecting the traditional ways to disavow paternity.[2] This has given way

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1 The *liʿān* procedure consists of five oaths to be sworn both by a man and his wife if he wishes to accuse her of adultery in the absence of sufficient evidence and/or to deny the paternity of her child. Swearing an oath exempts him from liability for defamation for claims of sexual impropriety (*qadhf*) and her from liability for adultery or sexual impropriety (*zinā*). Refusal to swear on her part amounts to admission to having committed *zinā* and triggers the corresponding punishment once she gives birth to her child. The completion of the procedure entails definitive and irrevocable divorce of the spouses, and the severance of filiation between the man and his ex-wife's child.

2 See, e.g., Ron Shaham, *The Expert Witness in Islamic Courts: Medicine and Crafts in the Service of Law* (Chicago: University of Chicago Press, 2010), 154–87; Ayman Shabana, "Paternity between Law and Biology: The Reconstruction of the Islamic Law of Paternity in the Wake of DNA Testing," *Zygon* 47, no. 1 (2012): 214−39; Ayman Shabana, "Negation of Paternity in Islamic Law between *Liʿān* and DNA Fingerprinting," *Islamic Law and Society* 20, no. 3 (2013): 157–201; and Ayman Shabana, "Law and Ethics in Islamic Bioethics: Nonmaleficence in Islamic Paternity Regulations,"

to thorough treatments of classical Islamic doctrines on *liʿān.*[3] In fact, the prevalence of *liʿān* in contemporary Muslim majority legal systems provides one of the best illustrations at hand of the tensions brought about in Islamic procedural and evidentiary law by both modern changes in legal and commercial culture and technological advance.[4] Although all those questions trespass on the temporal focus of this paper, the idea to look back and explore legal practice on *liʿān* in a pre-modern context like al-Andalus has been partially inspired by contemporary views regarding the institution and by reading the scholarship addressing those views.[5]

Available research on the history of Islamic law is not particularly rich in information on the means by which paternity was denied in practice; or on jurists' and judges' involvement and what they did to strike a balance between parties, avoid injustice and extreme hardship, and to prevent excessive literalism and disregard for socio-economic factors from causing harm. We thus need to observe the medieval jurists' strategies to accommodate changing circumstances, curb abuses of legal tools at people's disposal, or encourage people to use these tools to their benefit. We need to reconstruct the contents of the "*liʿān* enforcement package" from a time in which those who had the monopoly over—if not administering then at least interpreting *sharīʿa*—were the same people to whom the task used to be entrusted to construct the *liʿān* procedure. They were also the ones who would oversee the procedure and ensure its effects at a time when reaching scientific truth regarding conflicting genealogical claims was impossible and thus had to be addressed by means of legal presumptions. Ultimately, our purpose is to observe how the law was implemented to settle a man's wish to disavow his wife's child, and to reveal the role procedure played toward that goal. Justice was to correspond to that goal, a concept related, with all due precaution, to the modern concept of the rule of law.[6]

Zygon 48, no. 3 (2013): 709–31.

3 See Shabana, "Paternity between Law and Biology," and his "Negation of Paternity in Islamic Law."

4 See Mohammed Fadel and Jonathan C. Brown, "Procedure and Proof," in *The Encyclopedia of Islam and Law,* Oxford Studies Online (last accessed December 6, 2016), esp. the section on "Modern Changes in Evidentiary Standards;" Björn Bentlage, "Legislating for the Benefit of Children Born Out of Wedlock," *Die Welt des Islams* 55 (2015): 378–412, esp. 384; and Thomas Eich, "Constructing Kinship in Sunnī Islamic Legal Texts," in Marcia C. Inhorn and Soraya Tremayne, eds., *Islam and Assisted Reproductive Technologies: Sunnī and Shia Perspectives* (New York: Berghahn Books, 2012), 27–52, esp. 46–48. Both the article by Bentlage and the article by Fadel and Brown draw on Shabana's work on *liʿān.*

5 The impact of scientific means on traditional ways to establish and deny paternity in contemporary Mālikī contexts is addressed in my "*Fiqh*, Biomedicine, and Mālikī-Inspired Family Legislation: The Use of DNA Tests to Establish the Paternity of Children Born out of Wedlock" (in progress).

6 On the association between *sharīʿa* and the modern concept of the rule of law, see Noah

In what follows, I ask these questions in the context of Mālikī al-Andalus. Reconstructing legal practice on a matter like *liʿān* in al-Andalus, where the relevant legal doctrine led to extremely high levels of elaboration and refinement by the local jurists, is hampered by the well-known lack of actual legal documents and judicial archives. In the abundant *fatwā* literature of advisory opinions illustrating legal interpretation in the area, practice can at best be gleaned and reconstructed—occasionally with the help of historical chronicles and biographical dictionaries—up to the moment in which the husband must choose to either undergo the *liʿān* procedure or withdraw his accusation. For this reason, I use information about actual cases from other regions of Mālikī influence like Ifrīqiya and the central Maghrib—which were either fundamental for the development of the school doctrine in al-Andalus or were, subsequent to the fall of al-Andalus to Christian hands, projections of its legal tradition—as a complement whenever available.

LEGAL PRACTICE ON *LIʿĀN* IN ANDALUS

In her seminal work on women in al-Andalus, Manuela Marín refers to a number of Andalusī men who, according to chronicles and biographical dictionaries, resorted to swearing the *liʿān* oath to accuse their wives of adultery and/or to deny the paternity of their children.[7] Marín notes the rejection those cases produced in the authors who reported them, an attitude in line with Sunnī scholars' well-known tendency to favor concealment over publicity when the moral order was at stake. She concludes that the implementation of the *liʿān* procedure in practice must have been very scarce.

However, the attitude of one of the authorities mentioned by Marín in support of her assessment is problematic. In his famous biographical lexicon on Mālikī jurists, Qāḍī ʿIyāḍ b. Mūsā (d. 544/1149) disapproved of

Feldman, "Does *Shariah* Mean the Rule of Law?," *New York Times*, March 16, 2008. On compliance with the rule of law in classical Islamic *fiqh* see, for example, Mohammad Fadel, "Rules, Judicial Discretion and the Rule of Law in Naṣrid Granada: An Analysis of *al-Ḥadīqa al-mustaqilla al-naḍra fī al-fatāwā al-ṣādira ʿan ʿulamāʾ al-ḥaḍra*," in *Islamic Law: Theory and Practice*, ed. Robert Gleave and Eugenia Kermeli (London: I.B. Tauris, 2001), 49–86; and Chibli Mallat, "Introduction: On Islam and Democracy," in Chibli Mallat ed., *Islam and Public Law: Classical and Contemporary Studies* (London: Graham and Trotman, 1993), 1–11. On related notions of *sharīʿa* and constitutionalism in the pre-modern period see also Frank Vogel, "Tracing Nuance in Māwardī's *al-Aḥkām al-Sulṭāniyyah*: Implicit Framing of Constitutional Authority," in Kevin Reinhart and Robert Gleave, eds., *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss* (Leiden and Boston: Brill, 2014), 331–59; and Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996).

7 Manuela Marín, "Mujeres en al-Andalus," in *Estudios Onomástico-Biográficos de al-Andalus*, 11:471–75.

the attitude of Ibn al-Hindī (d. 399/1009), a jurist who is reported to have pronounced the *liʿān* oath against his wife by order of Cordoba's chief of police—instead of the *qāḍī*. The biographer declares this instance to have been the last occasion in which such a case occurred not only in al-Andalus but in the history of Islam as a whole.[8] Yet, as Marín observes, the sources mention two other cases in which, subsequent to Ibn al-Hindī's death, Andalusī jurists instructed any man denying the paternity of a child expected by his wife to pronounce the *liʿān* oath. The latter of these cases had to be dealt with by precisely the aforementioned Qāḍī ʿIyāḍ b. Mūsā, this time in his capacity as *qāḍī* of his native Ceuta. In that case, a woman reported to him that her husband denied being the father of the child she was expecting and the Cordoban *muftī*s he consulted before issuing his judgment advised him to give the husband the option to either pronounce the *liʿān* oath or admit to the paternity of his wife's unborn child if he wanted to avoid the charge of slander.[9]

To the list of Andalusī cases provided by Marín, we might add another case presented to the Tunisian *qāḍī* ʿAbd Allāh b. Ṭālib (d. 275/880). This judge twice postponed a process concerning the daughter of his friend ʿAbd al-Raḥmān b. Muḥammad in order to avoid her husband's pronouncement of *liʿān* against her. But in the end, the *qāḍī* could not prevent that oath.[10]

That *liʿān* occurred more often than the jurists would have liked is confirmed by the Tunisian jurist al-Burzulī (d. 841/1438), who preferred to describe the social practice of his time realistically rather than overindulging in wishful thinking.[11] His treatment of *liʿān* makes clear that Ibn al-Hindī's case, which Burzulī transmits from Ibn ʿĀt's (d. 609/1212) *al-Ṭurar,* became paradigmatic of how blameworthy it was to use the law against others just

8 See Marín, *Mujeres en al-Andalus*, 473, quoting Qāḍī ʿIyāḍ b. Mūsā, *Tartīb al-madārik wa-taqrīb al-masālik li-maʿrifat aʿlām madhhab Mālik*, ed. Muhammad Bencherifa (Rabat: Wizārat al-Awqāf waʾl-Shuʾūn al-Islāmiyya, 1403/1983), 7:146–47: *bi-ḥukm ṣāḥib al-shurṭa Ibn al-Sharafī*. Qāḍī ʿIyāḍ's bold statement is reproduced without apparent objection by Wansharīsī (d. 914/1509) in *al-Miʿyār al-muʿrib waʾl-jāmiʿ al-mughrib ʿan fatāwā ahl Ifrīqiya waʾl-Andalus waʾl-Maghrib,* ed. Muḥammad Ḥajjī et al. (Rabat: Wizārat al-Awqāf waʾl-Shuʾūn al-Islāmiyya, 1401/1981), 4:76–77. On the assignment to governmental agents like the *ṣāḥib al-shurṭa* of judicial competences that were in theory exclusive to *qāḍī*s in eleventh-century al-Andalus see Christian Müller, *Gerichtspraxis im Stadtstaat Córdoba: zum Recht der Gesellschaft in einer malikitish-islamischen Rechtstradition des 5./11. Jahrhunderts* (Leiden: Brill, 1999), 247–310, esp. 289–94.

9 See Marín, *Mujeres en al-Andalus*, 473, quoting Ibn ʿIyāḍ, *Madhāhib al-ḥukkām fī nawāzil al-aḥkām,* (Beirut: Dār al-Gharb al-Islāmī, 1989), 299–300; and the Spanish translation by Delfina Serrano Ruano, *La actuación de los jueces en los procesos judiciales*, (Madrid: CSIC-AECI, 1998), 485–86.

10 See Nejmeddine Hentati, "Mais le cadi tranche-t-il?," *Islamic Law and Society* 14 (2007): 180–203, esp. 190, quoting *Fatāwā Ibn Abī Zayd al-Qayrawānī*, collected by H.M. Lahmar (Beirut: Dār al-Gharb al-Islāmī, 2004), 221.

11 See Burzulī, *Fatāwā al-Burzulī,* ed. Muḥammad al-Ḥīla (Beirut: Dār al-Gharb al-Islāmī, 2002), 2:469–72.

for the sake of legalism.[12] When asked about the reason for pronouncing *liʿān* against his wife, Ibn al-Hindī replied that he "wanted to revive a dying *Sunna*: *aradtu iḥyāʾ sunna qad datharat*," and that it was only when he was reproached for having taken such an initiative and lost the reputation of being a sound religious scholar, that he stopped boasting about it.[13] Direct reproach and ostracization—and, more importantly, condemnation by one's peers—was the kind of treatment awaiting those who took interpretation of the law too freely or too literally. Another question, not mentioned by Burzulī, is whether Ibn al-Hindī would have been allowed to pronounce *liʿān* had a *qāḍī* presided over the court that ruled on his case rather than the chief of police.[14]

Subsequently, Burzulī reports that in Emir Yaḥyā's time the procedure was administered in the Zaytūna Mosque and that a similar case later occurred.[15] Unfortunately Burzulī does not provide further details about these cases. Yet he declares that he is not surprised that "factors motivating such events continue to arise given the proliferation of vicious conduct (*kathrat al-mafāsid*) in our days," whereby he seems to put the blame on married women.[16]

In Tlemcen, roughly around the same time, the grandson of Sīdī Muḥammad al-ʿUqbānī was consulted by al-Maghīlī al-Māzūnī (d. 883/1473) about the following case: A man married a woman who gave birth to a child whom he refused to recognize as his. The man had children from another wife so he ignored and rejected the newborn (*fa-ahmala hadhā al-walad wa-ramāh min nafsih*). However, all his sons died and when confronted by his solitude, he called the formerly repudiated son and told to him: "You are my son, may God forgive me for what I told you in the past." After the man's death, he left his brother and this son as the only legal heirs. Then the man's brother told the son, that is, his nephew, "You are not my brother's son," and had a document drafted collecting witnesses' testimony that the deceased did marry the boy's mother but that she gave birth to him less than six months afterwards (*wa-athbata rasm*^{an} *taḍammana anna*

12 Another, still unedited, link in the rich Andalusī tradition of model *shurūṭ* works is Ibn ʿĀt's *al-Ṭurar al-mawḍūʿa ʿalā al-wathāʾiq al-majmūʿa* of which several manuscripts are extant. See the HATA [Online], an initiative directed by Maribel Fierro, section on *fiqh*. Ibn ʿĀt is one of the main sources of Ibn Salmūn's *ʿIqd*, itself one of our main references in this paper, as will be shown below. See Pedro Cano, "Algunos datos del tratado notarial de Abū al-Qāsim Ibn Salmūn (d. 767/1366)," *Philologia Hispalensis* 5, no. 1 (1990): 233–44, esp. 240.

13 See Burzulī, *Fatāwā al-Burzulī*, 2:471.

14 See above, note 8, on the assignment of government agents.

15 He may be referring to the Ḥafṣid emir, Abū Zakariyāʾ Yaḥyā, founder of the dynasty who ruled between 627/1230 and 647/1249, or to Yaḥyā (II) al-Wāthiq who ruled between 675/1277 and 678/1279.

16 See Burzulī, *Fatāwā al-Burzulī*, 2:471.

al-mayyit tazawwaja umm hadhā al-walad wa-atat bih li-aqall min sittat ashhur). However, the witnesses did not specify whether they referred to the day of the conclusion of the marriage contract or to the day the marriage was consummated, and it was difficult to ask them to clarify the issue (*wa-taʿadhdhara istifsārahum*). Is it possible then to assume, the petitioner asked, that they referred to the date the marriage contract was concluded, having taken into account that the most practiced custom in our land (*al-ʿāda al-jāriya bi-waṭaninā al-akthariyya*) is that the man consummates the marriage with his wife the night that the contract is concluded or the next day. This typically occurs by order of the bride's parents, to the point that if the husband does not respect this custom, he may be considered to have brought dishonor (*maʿarra*) to his wife and the contempt of her peers (*ḥaqrat bayna aqrānihā*)? For this reason, this custom is widespread (*muṭarrada*) and the occasions on which it is not practiced are rare. Is the boy to be deprived of the inheritance by virtue of the document, as it has been mentioned, and of the custom prevailing in practice for those cases, given the vagueness of the testimony (*ibhām al-shahāda*)?[17]

In his reply, the jurisconsult (*muftī)* stated that if the man who claimed the paternity of the boy after having rejected him did not marry his mother while she was observing the waiting period (*ʿidda*), the son must be declared legally affiliated to him (*fa'l-walad lāḥiq bih ḥukm*^{an}) and cannot be disavowed except by means of *liʿān* or satisfactory evidence that she gave birth to him before six months had elapsed since the marriage contract was concluded. This is because her children become lawful from the very moment the marriage contract is concluded (*li-annahā bi-mujarrad al-ʿaqd ṣārat firāsh*^{an}).[18] The *muftī* implied that the testimony presented by the deceased's brother was not satisfactory (*marḍiyya*). He did not show any interest in finding out whether withdrawal of the rejection had any of the consequences I examine below (namely, payment of the maintenance rights corresponding to the child and his mother, or liability for slander), let alone in warning the man about these consequences even if with a mere pedagogical intention. The petitioner of the *fatwā*, by contrast, did not leave any doubts about the moral regard he held for the man's action. He presented the man as cruel, selfish, and frivolous in his attempt to escape the consequences of his misconduct by merely asking God for forgiveness.

17 The Arabic text of this *fatwā* has been edited and translated into French by Elise Voguet, *Le monde rural du Maghreb central (XIVe-XVe siècles): Réalités sociales et constructions juridiques d'aprés les* Nawāzil Māzūna (Paris: Publications de la Sorbonne, 2014), 126–27.

18 See Voguet, *Le monde rural du Maghreb central (XIVe-XVe siècles)*, 127. The English translation is mine. Denial of the paternity of a child born less than six months after marriage does not require the *liʿān* procedure. See Shabana, "Negation of Paternity in Islamic Law," 179.

LEGAL PRACTICE AND PROCEDURE ON *LIʿĀN* IN THREE ANDALUSĪ MODEL *SHURŪṬ* COLLECTIONS

The existence of model legal forms specific to denial of paternity and *liʿān* was already observed by Manuela Marín.[19] Here, I will explore these forms to approach the judicial practice and procedure followed by *qāḍī*s when having to deal with denial of paternity, a scenario which, *a priori,* they are presumed to have confronted only exceptionally. In this way, I hope to expand our present knowledge on judicial practice and procedure in al-Andalus. The combined study of model *shurūṭ*, *fatwā*s, and legal cases (*nawāzil*), along with doctrinal elaborations and historical sources from the chronicles and biographical literature, allows us to approach the actual operation of *sharīʿa* courts from the closest vantage point possible, absent judicial archives and legal documents.[20]

This paper also considers the extent to which legal doctrine on *liʿān,* and the kind of documents to which the relevant judicial procedure gave rise, were a response to a pressing need for local *qāḍī* courts to address the issue efficiently, and their involvement would provide a deterrent to violating the legal canon "*al-walad lil-firāsh*: any offspring belongs to the marital bed." This study will therefore help reveal what was meant by medieval Muslim jurists and historians who asserted that *liʿān* was hardly ever put into practice.

A number of collections of model *shurūṭ* produced in al-Andalus has been preserved and edited. In what follows I concentrate on three such collections: that of Aḥmad b. Mughīth al-Ṭulayṭulī (d. 459/1067), from Toledo, *al-Muqniʿ fī ʿilm al-shurūṭ*; that of ʿAlī b. Yaḥyā al-Jazīrī (d. 585/1189), from Algeciras, *al-Maqṣad al-maḥmūd fī talkhīṣ al-ʿuqūd*; and that of Abū al-Qāsim Salmūn b. Alī b. ʿAbd Allāh Ibn Salmūn al-Kinānī (d. 767/1366), from Granada, *al-ʿIqd al-munaẓẓam lil-ḥukkām*.[21]

These jurists cover Mālikī judicial practice over a span of three centuries, during which time important political changes took place. Some resulted from the collapse of the Umayyad caliphate of Cordoba, which led to the political fragmentation of al-Andalus into petty kingdoms (*mulūk al-*

19 See Marín, *Mujeres en al-Andalus*, 474.

20 See Wael Hallaq, "Model *Shurūṭ* Works and the Dialectic of Doctrine and Practice," *Islamic Law and Society* 2, no. 2 (1995): 109–34.

21 Aḥmad b. Mughīth al-Ṭulayṭulī (d. 459/1067), *al-Muqniʿ fī ʿilm al-shurūṭ,* ed. Francisco Javier Aguirre Sádaba (Madrid: CSIC-ICMA, 1994), 121–24; ʿAlī b. Yaḥyā al-Jazīrī, *al-Maqṣad al-maḥmūd fī talkhīṣ al-ʿuqūd*, ed. Asunción Ferreras (Madrid: CSIC-AECI, 1998), 97–103; and Ibn Salmūn, *al-ʿIqd al-munaẓẓam lil-ḥukkām fī-mā yajrī bayna aydīhim min al-ʿuqūd waʾl-aḥkām,* on the margins of Ibrāhīm b. ʿAlī Ibn Farḥūn (d. 799/1397), *Tabṣirat al-ḥukkām fī uṣūl al-aqḍiya wa-manāhij al-aḥkām* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1883), 154–58. Jazīrī came from the Rif region in northern Morocco and settled in Algeciras, where he served as a *qāḍī.* Ibn Salmūn belonged to an important family of jurists and served as a chief *qāḍī* of Granada for several months.

ṭawā'if), followed by military invasions from the other side of the Straits of Gibraltar led by the Almoravids and the Almohads. After the drastic territorial setback experienced by Andalusī Islam at the hands of northern Iberian Christians from the first quarter of the thirteenth century onwards, only the Nasrids of Granada were able to maintain power for another two centuries, though on an increasingly precarious balance with the Christians on the one hand and with the North African Banū Marīn dynasty on the other. Given the origins of their authors, the comparison between the *Muqniʿ*, the *Maqṣad*, and the *ʿIqd* allows us to observe not only temporal but also internal variations within Andalusī legal practice, that is, between Toledo, Algeciras, and Granada.[22] The relevant sections in all three collections also shed light on women's agency in an institutional context in which the Mālikī legal school viewed pregnancy outside of wedlock as valid evidence of *zinā.* As the Ẓāhirī jurist Ibn Ḥazm noted, this put women, especially the divorced and the widowed, in a situation of extreme vulnerability.[23]

al-Muqniʿ fī ʿilm al-shurūṭ by Aḥmad Ibn Mughīth from Toledo (d. 459/1067)

The material relevant to our subject in Ibn Mughīth's collection is headed by a template, or a model legal document for "denying the paternity of a fetus: *wathīqat nafy ḥaml*." The contents describe how to proceed in such an event: First, the marital bond between the involved spouses has to be established by the wife in the presence of the *qāḍī* and professional witnesses.[24] If she succeeds in demonstrating that bond, the *qāḍī* then summons the husband and inquires about his rejection of the paternity of the child she is expecting and the accusation of *zinā* against her that the denial may imply. If the man insists on accusing her and she insists on rejecting his claim, their assertions must be noted in the presence of two witnesses and dated.[25]

22 On Cordoban legal practice as reflected in model legal form collections, and how it should be compared with other Andalusī samples of the genre, see below, note 27.

23 Ibn Ḥazm's doctrine on *zinā* and *liʿān* differs from that of the Mālikīs on a number of key issues. These differences are presented by Ibn Ḥazm in the form of sharp criticisms that are instrumental to reconstructing a certain "counter-mentality" to the prevailing Mālikī point of view legitimizing Andalusī *fiqh*. See Delfina Serrano Ruano, "Paternity and Filiation According to the Jurists of Andalus: Legal Doctrines on Transgression of the Islamic Social Order," *Imago Temporis. Medium Aevum* 7 (2013): 59–75.

24 The prerequisite of establishing the existence of marriage in disputes involving paternity is mandatory because marriage is the *ratio legis* of paternity, in order to prevent "the mixing of genealogies" (*ikhtilāṭ al-ansāb*). Marriage and *firāsh* are considered the ideal ways to form a family, and family, in its turn, the ideal unit of a solidly structured society. See Shabana, "Law and Ethics in Islamic Bioethics," 713–15, 719.

25 If the man denies the woman's claim, she can still compel him to swear the *liʿān* oath by presenting two witnesses verifying her husband's accusation against her. Otherwise, she must face the consequences of slander. See Shabana, "Negation of Paternity in Islamic Law," 175–76.

In the section on *fiqh* that immediately follows the text of the template, Ibn Mughīth specifies that in the aforementioned case "the *qāḍī* has to summon the spouses in the presence of Muslim professional witnesses (*ʿudūl min al-muslimīn*) and of the *fuqahāʾ* of his advisory council" so that they can both pronounce *liʿān*. Subsequently, he describes how to pronounce the five oaths that constitute *liʿān*, conveying the seriousness of the act and the severe repercussions for perjury. As for the wife, he remarks that when swearing the fifth and final oath, she must invoke the wrath (*biʾl-ghaḍab*) of God upon herself if it turns out that her husband is actually telling the truth. The completion of the oaths entails irrevocable and irreversible dissolution of the marital bond (*ṭalāq bāʾin*).

Next, Ibn Mughīth addresses the issue of internal divergence of opinions between Saḥnūn, according to whom separation of the spouses is inherent to *liʿān* itself, and Ibn al-Qāsim, for whom separation is not inherent but must be pronounced immediately afterward by the *qāḍī* (*illā bi-ḥukm al-qāḍī fī-dhālik*).[26] Ibn Mughīth observes that Ibn al-Qāsim's argument (*ḥujja*) relies on a prophetic report (*ḥadīth*) transmitted by Aṣbagh as recorded in Abū ʿAbd Allāh Muḥammad al-ʿUtbī's (d. 255/869) *ʿUtbiyya* (a compilation of Mālikī legal opinions also known as the *Mustakhraja*). The *fiqh* section ends with the statement: "Take it into account" (*fa-ʿrifhu*), that is, the fact that there are two opinions, one of which is based on an identifiable Prophetic report. Whether Toledan practice on *liʿān* differed from its Cordoban analog is difficult to ascertain, because the chapters concerning marriage and repudiation are missing from the preserved manuscripts of the well-known earlier *shurūṭ* collection of the Cordoban Ibn al-ʿAṭṭār (d. 339/1009).[27]

The following template relates to a man's recognition of the child

26 Saḥnūn b. Saʿīd al-Tanūkhī (d. 240/855), from Qayrawān, was the compiler of one of the most authoritative early manuals of Mālikī doctrine, *al-Mudawwana al-kubrā*, including the answers given by Mālik b. Anas to questions posed to him by his disciples on the authority of one them, the Egyptian Ibn al-Qāsim (d. 191/806). In al-Andalus, cases of divergence—or divergent transmissions—of opinions among Mālik's disciples used to be decided in favor of Ibn al-Qāsim.

27 Ibn al-ʿAṭṭār, *Kitāb al-waṯāʾiq waʾl-siỳillāt*, ed. Pedro Chalmeta and Federico Corriente (Madrid: Fundación Matritense del Notariado e Instituto Hispano-Árabe de Cultura, 1983). Ibn al-ʿAṭṭār is said to have drawn on a series of Near Eastern sources, among which was Abū Jaʿfar Aḥmad b. Muḥammad al-Ṭaḥāwī's (d. 321/933) *Kitāb al-shurūṭ al-kabīr*, a collection that included a long chapter on marriage and repudiation. See Jeanette A. Wakin, *The Function of Documents in Islamic Law: The Chapters on Sales from Ṭaḥāwī's Kitāb al-shurūṭ al-kabīr* (Albany: State University of New York Press, 1972), 24–26. No templates relevant to *liʿān* appear in Abū Isḥāq al-Gharnāṭī's (d. 579/1183) *al-Wathāʾiq al-mukhtaṣara*, ed. Muṣṭafā Nājī (Rabat: Markaz Iḥyāʾ al-Turāth al-Maghribī, 1988), notwithstanding its inclusion of a short section on marriage and divorce; nor in ʿAbd al-Wāḥid al-Marrākushī's (d. ca. 669/1270) *Wathāʾiq al-Murābiṭīn waʾl-Muwaḥḥidīn*, ed. Ḥusayn Muʾnis (Ẓāhir: Maktabat al-Thaqāfa al-Dīniyya, 1997), which includes no section on marriage or divorce. The model *shurūṭ* collections by Abū Muḥammad al-Buntī (d. 462/1070) and ʿAlī b. ʿAbd Allāh al-Maṭṭīṭī (d. 570/1175) have not yet been edited.

expected by his wife (*wathīqat fī iqrār al-rajul bi-ḥaml jawzatih*). At first sight, this approach seems surprising because normally any child born to a man's wife is automatically attributed to him. Only the children of slaves needed the explicit recognition of their fathers. The circumstances explaining the need to produce a certification of this kind are not specified by Ibn Mughīth. In the *fiqh* section following the template, he simply remarks that making an explicit recognition like this exempts a man from producing further evidence of the paternity of the child, should the need arise in the future.

For the wife, conversely, the document is said to be useless to free her from the obligation of swearing the *liʿān* oath should her husband accuse her of adultery, although Ibn Mughīth specifies that the husband would need to present evidence contradicting the testimonies from the first acknowledgment. Otherwise, paternity would be attributed to him; and, if denial of paternity were grounded on an accusation of adultery against her, he would also incur liability for defamation. According to the legal opinions transmitted by Ibn Abī Zamanīn (d. 399/1009) in his *Muntakhab al-aḥkām,* negation of paternity of a fetus after having implicitly or explicitly recognized it was only possible if a man claimed that he had seen (*ruʾya*) his wife commit *zinā* with another man and if the child was born more than six months after the accusation.[28]

It is thus not clear whether Ibn Mughīth's remark—that rejection of a previously accepted fetus on the grounds of *zinā* amounted to slander—is a departure from the position represented by the *Muntakhab al-aḥkām*. My impression is that Ibn Mughīth's mention of the need to provide counter-evidence refers to witnesses who might testify that she had committed *zinā* or to a confession by the accused, not to the mere accusation. Interestingly, Ibn Mughīth says that this opinion—namely, that counter-evidence invalidating the first testimony of acknowledgment of the fetus is required—was held "by more than one scholar" and that it was followed in local judicial practice (*wa-bih al-ʿamal*). As a result, Ibn Mughīth's lack of precision seems to hint at a recent development less fixed in Toledan court practice than he suggests. Again it is regrettable that we cannot turn to Ibn al-ʿAṭṭār for clarification. Nevertheless, by imposing upon the husband the heavy burden of finding counter-evidence to cancel a former recognition of paternity, and leaving the interpretation of the exact meaning of that requirement for the *qāḍī*, a template that might look redundant at first sight takes a turn clearly in favor of foresighted women.

Also noteworthy is the inclusion of a template for recovering the

28 Ibn Abī Zamanīn, *Muntakhab al-aḥkām*, ed. Muḥammad Ḥammād (Rabat: Markaz al-Dirāsāt waʾl-Abḥāth wa-Iḥyāʾ al-Turāth al-Rābiṭa al-Muḥammadiyya lil-ʿUlamāʾ, 2009), 2:760–65.

paternity of a fetus or a child previously denied through *liʿān* (*wathīqat bi-istilḥāq al-mulāʿin li-mā intafā minh*).[29] In the *fiqh* section of the work, Ibn Mughīth states that such a retraction prompts the payment of maintenance for both the child and the mother from the moment she was repudiated until the moment she gave birth. Because the mother has the option to prosecute for defamation, this kind of template could be understood to have sanctioned agreements between the former spouses, so that the ex-husband could clear his conscience by admitting his mistake and redressing its consequences on condition that his ex-wife waive her right against him. Ibn Mughīth hints at the recent introduction of these practices by specifying that these *fiqh* provisions were subscribed to by "more than one jurist" and followed when issuing relevant *fatwā*s.

The last type of template relating to denial of paternity in Ibn Mughīth's collection addresses the case of the slave's child (*mamlūka*), whose paternity a man can deny before witnesses during pregnancy or after the child is born. Here the slave is not required to appear before the *qāḍī* and resort to the *liʿān* procedure, nor to swear an ordinary oath, to support the claim. In the *fiqh* section of the work, Ibn Mughīth specifies that the man can retract his denial at any moment without incurring fixed-penal liability (*ḥadd*).[30] Ibn Mughīth observes again that "more than one *faqīh* held this very same opinion," and recommends spreading knowledge about it.

al-Maqṣad al-maḥmūd fī talkhīṣ al-ʿuqūd by ʿAlī b. Yaḥyā from Algeciras (d. 585/1189)

Jazīrī's treatment of *liʿān* is much more elaborate and detailed than that of Ibn Mughīth. It thereby shows the process of growth that Mālikī legal doctrine underwent during the century that separates the two collections.[31]

In Jazīrī's *Maqṣad*, the legal practices that his Toledan predecessor

29 See Ibn Mughīth, *Muqniʿ*, 121–24.

30 In this case, the template for *istilḥāq* could be used. See Ibn Mughīth, *Muqniʿ*, 358–60. The *fiqh* section includes interesting details about the work of the physiognomist (*qāʾif*).

31 Mallat, *Introduction to Middle Eastern Law*, 98–99, echoes Abū Isḥāq al-Gharnāṭī's call for at least one expert in drafting legal documents in each city. Both Gharnāṭī and Jazīrī lived during the Almohad period, which saw a significant increase in the documented number of experts and works on model *shurūṭ* documents. Jesús Zanón associates this development with changes in state structures brought about by the Almohad conquest. See Jesús Zanón, "La actividad intellectual: las ramas del saber: Centros y métodos de conocimiento," in María Jesús Viguera Molíns ed., *El retroceso territorial de al-Andalus: Almorávides y almohades* (Madrid: Espasa Calpe, 1997), 551–84, 566. Maribel Fierro further qualifies Zanón's remark with reference to the development of administrative procedure, fostered by ruling dynasties with the aim of conveying to their subjects the extension of their power and the lawfulness with which they exercised it. See Maribel Fierro, "Ulemas en las ciudades andalusíes: Religión, política y prácticas sociales," in V. Martínez Enamorado, ed., *Congreso Internacional Escenarios Urbanos de al-Andalus y el Occidente musulmán, 1º. 2010 Vélez-Málaga* (Málaga: Iniciativa Urbana 'De Toda La Villa', 2011), 137–67, esp. 144 n. 25.

had tried to shape are connected to specific legal authorities or textual sources of authority, in order to present them as in accordance with sound legal methodology. The group of relevant templates in Jazīrī's collection is preceded by an introduction to the fundamentals of Mālikī doctrine outlining the judicial procedure of *liʿān*. This text is rather specific as to the circumstances that trigger denial of paternity: either the man accuses his wife of *zinā* and claims to have seen her commit the crime with another man; or he denies the paternity of her fetus because pregnancy has become evident while she was observing the waiting period (*istibrāʾ*) or because of the absence of physical contact between them. Jazīrī also provides more detail on how to demonstrate the existence of a marital bond than did Ibn Mughīth. Regarding the treatment of the mutual allegations of sexual impropriety, Jazīrī places more emphasis on the need to repeat them several times: when presenting the claim for the first time before the *qāḍī*, after the first summons, and then, once again, before professional witnesses—something which no doubt discouraged the party with the least to lose from withdrawing.

Jazīrī's description of the *liʿān* oath-swearing procedure adds other interesting details, such as the following: The husband is required to point to his wife at the moment of swearing the oath. The right time to take the oaths is fixed at the end of the afternoon prayer (*dubr ṣalāt al-ʿaṣr*). Filiation between the man and the woman's fetus is considered broken as a consequence of the fifth oath, not before—a remark appearing to show that Saḥnūn's aforementioned opinion came to prevail over Ibn al-Qāsim's, not only in Mālikī doctrine but also in the judicial practice of *liʿān* procedures. Once the *liʿān* procedure has been completed, the *qāḍī* is to summon the ex-spouses to state any final allegations. In the absence of further arguments in their defense (*madfaʿ*), the *qāḍī* signs (*imḍāʾ*) the resulting document and makes it effective (*al-ḥukm bih*). He must include witnesses to his signature and to the veracity of the facts mentioned in the document. An additional witness is expected to attest that the *qāḍī* has followed the aforementioned instructions in the presence of witnesses on a specified date.[32] Three copies of this document are to be produced, one for each party and another for the *qāḍī*'s register.[33] The irrevocability and perpetuity of the ensuing divorce

32 This abstract description of the requisite attestation of the judicial process by witnesses can be compared to an historical example (though related to legal matters different from *liʿān*) from fourteenth-century Jerusalem in Christian Müller, "Écrire pour établir la preuve orale en Islam: la pratique d'un tribunal à Jérusalem au XIVe siècle," in *Les outils de la pensé. Étude historique et comparative des "textes,"* ed. Akira Saito and Yusuke Nakamura (Paris: Maison des Sciences de l'Homme, 2010), 63–97.

33 On judicial archives, see Wael Hallaq, "The *Qāḍī*'s *Dīwān* (*Sijill*) before the Ottomans," *Bulletin of the School of Oriental and African Studies* 61, no. 3 (1998): 415–36.

is said to be in conformity with what is "established by the *Sunna*."[34] The above-described procedure is therefore a meticulously notarized one involving close record keeping by the *qāḍī*.[35]

The introduction is followed by a template entitled "Document of Mutual Imprecation: *wathīqat al-talāʿun*." The first striking feature in this section is the shift in roles between husband and wife within the introduction. Here, it is the wife who initiates the procedure and seeks protection with the *qāḍī* (*wa-saʾalathu al-naẓar lahā*) against her husband for having falsely accused her of *zinā* (in private, it seems) or for having denied being the father of the child she is expecting. The latter sequence of events matches those described in the above-mentioned case that had come before Qāḍī ʿIyāḍ and may explain why the burden of establishing the marital bond fell to the woman rather than to her accuser. On a formal level, while Ibn Mughīth had described the steps for swearing the *liʿān* oath in his *fiqh* section, Jazīrī makes those steps part of the template itself and grounds the practice of having the husband swear in the first instance in the text of the Qurʾān.[36]

Next comes a template for the acknowledgement (*iʿtirāf*) of a child previously rejected through *liʿān*, similar to that of Ibn Mughīth's collection. Jazīrī adds the requirement that the parties must specify in the document whether the man is in his right mind (*fī jawāz amr*). The acknowledgment may take place even after the child has been born (without mention of any age limit)—in which case, the child's presence is required.

Another template consists of an attestation of a man's acknowledgment of paternity of the fetus carried by his wife. This model bears two interesting differences from the corresponding model in Ibn Mughīth's collection. First, Jazīrī refers to the form as "a document of precaution or guardedness (*istirʿāʾ*)."[37] As a precaution, witnesses declare that, on a certain date, they heard the man acknowledge his wife's

34 ʿAlī b. Yaḥyā al-Jazīrī, *al-Maqṣad al-maḥmūd fī talkhīṣ al-ʿuqūd*, 97–103.

35 On *sharīʿa* court as "a place of paperwork" and documentary practice, see Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993), 209–10.

36 See Q. 24:2–14. For a critical reading of the traditional explanation of this passage and supporting *ḥadīth*s provided by jurists, see Amira Sonbol, "Jewish and Islamic Legal Traditions: Diffusions of Law," in Firoozeh Kashani-Sabet and Beth S. Wenger, eds., *Gender in Judaism and Islam: Common Lives, Uncommon Heritage* (New York: New York University Press, 2015), 46–67, 58–61. Sonbol stresses the seriousness of *liʿān* oaths.

37 This note does not mean that the *istirʿāʾ* document, also known as a "memorial document," is absent from Ibn Mughīth's *Muqniʿ*. See, for example, his *Muqniʿ*, 187, 356. The terminology difference between Ibn Mughīth and Jazīrī implies that the former was concerned with establishing the practice of *liʿān* procedures, whereas the latter was operating in a context in which practice was well-established but compliance with sound legal methodology had to be stressed.

pregnancy in her presence, "and that this happened before he rejected being the father."[38] The application of the technicality of *istirʿā'* to this kind of document seems to stress the use of documentary practices to protect pregnant wives, not only by deterring husbands from negating the paternity of an unborn child, but also by anticipating that very event. That the form here is designed exclusively for the latter purpose, and not merely for men to anticipate contesting paternity, is clear from the specification that "acknowledgment of paternity took place before negating it."

The above model is followed by another one specific to denial of paternity of a slave's child (*ibn al-mamlūka*), which must occur in the presence of the child and before witnesses. The reasons for summoning the child are not explained here. Jazīrī takes it for granted that there is absolute freedom to retract this decision, provided the father declares that he has verified beyond doubt that it is his child and that he, therefore, recognizes being the father. In this case, the presence of the child is also required.

In the long *fiqh* section that closes Jazīrī's series of templates related to the *liʿān* procedure and denial of paternity, he reiterates the basic principles governing the subject. He emphasizes the conditions required for the applicability of the *liʿān* oath and, especially, the divergence of opinions regarding them.

So far, I have not been able to identify Jazīrī's sources, though, by the time he collected his templates, *liʿān* had received quite elaborate treatment in the works of other Mālikī jurists such as Ibn Abī Zamanīn, Bājī, Ibn Rushd al-Jadd, Qāḍī ʿIyāḍ, and Ibn Rushd al-Ḥafīd or Averroës (d. 595/1182), as well as in the works of the Ẓāhirī jurist Ibn Ḥazm.[39] In Jazīrī's case, he fails to establish which, among the divergent opinions regarding *liʿān* adopted by Mālikī jurists, was to be favored in practice on the grounds of its being a majority or minority opinion, or of its being the most sound.

The fact that minority views are quoted without qualification may give the impression that, despite the many restrictions outlined in the legal

38 This kind of testimony, consisting of a witness-declaration that they heard someone else say something, appears to correspond to an Islamic "hearsay" evidence (*shahādat al-khabar*—or, in the Mālikī tradition, *shahādat al-samʿ*), on the grounds of which facts pertaining to marriage, paternity, manumission, and death can be verified without requiring the originator of the statement to have been present at the moment of the testimony's production or documentation. In the latter scenario, a witness may testify to the authenticity of the document only if he or she was present when it was drawn up. See Muhammad Khalid Masud, Rudolph Peters, and David S. Powers, "Qadis and their Courts: An Historical Survey," in *Dispensing Justice in Islam: Qadis and their Judgments*, ed. Muhammad Khalid Masud, Rudolph Peters, and David S. Powers (Leiden: Brill, 2006), 1–44, esp. 25, 26; and David S. Powers, *Law, Society and Culture in the Maghrib, 1300-1500* (Cambridge: Cambridge University Press, 2002), 30–36 and n. 35.

39 Apart from the eponymous founder of the Mālikī school, the list of authorities mentioned by Jazīrī also includes Ibn al-Qāsim, Ibn Nāfiʿ, Ashhab, Ibn ʿAbd al-Ḥakam, ʿAbd al-Mālik b. Ḥabīb, Ibn Waḍḍāḥ, and Abū Isḥāq al-Baghdādī.

doctrine, men enjoyed an almost unlimited right to accuse their wives of adultery and to reject the paternity of their unborn children through the *liʿān* procedure. Yet the equal value awarded to the variant opinions—occasionally in open contradiction to each other—also means that the final decision rested with the *qāḍī* and that it could not be easily predicted. Deterrence is thus sought through uncertainty about the chances of escaping the risk of being accused of defamation.[40] Jazīrī only hints at the *liʿān* oath's capacity to restore women's social standing and good reputation, whereas the Granadan jurist Abū al-Qāsim Muḥammad b. Ahmad Ibn Juzayy al-Kalbī (d. 741/1340) asserts it quite clearly when referring to the non-Muslim (*dhimmī*) woman who is not obliged to swear the *liʿān* oath in the same circumstances as a Muslim woman, but does so nevertheless to "lift the shame from herself: *li-rafʿ al-ʿār ʿanhā*."[41]

al-ʿIqd al-munaẓẓam lil-ḥukkām by Ibn Salmūn from Granada (d. 767/1366)

In contrast to the preceding models, which, as we have seen, concentrate on the art of drafting documents designed for particular cases of *liʿān* oath procedures, Ibn Salmūn's treatise emphasizes notarization of the whole process. That is to say, he focuses on describing how to produce a written record of the process. The chapter on *liʿān* in Ibn Salmūn's *ʿIqd* is presented not as a sequence of templates preceded by an introduction and including a section on *fiqh* at the end of each template, but as a continuous narrative of the process into which different templates are inserted as the different stages of the process unfold. It traces the procedures from the moment the initiating party decides to report the facts to the *qāḍī* until the latter divorces the couple irrevocably. Excluding the calls of attention to points of doctrine affected by divergences of Mālikī opinions, Ibn Salmūn's narrative looks like a template for a complete judicial record of the *liʿān* procedure. The terminology relative to the notarization of the process is quite simple, a trait the *ʿIqd* shares with its precedents.

Again the first scenario assumed by the author is a woman taking the initiative to report her husband to the authorities for defamation and/or his negation of the paternity of her child. Worthy of mention are also some expressions qualifying the steps followed by the *qāḍī* that lend additional

40 The mere accusation of defamation on claims of sexual impropriety, without final conviction, was no minor thing, because the accusation alone could affect judgments regarding a person's integrity, potentially preventing that person from qualifying as a valid witness. See Masud, Peters, and Powers, "Qadis and their Courts," 26.

41 Ibn Juzayy, *al-Qawānīn al-fiqhiyya fī talkhīṣ madhhab al-mālikiyya* (Libya: al-Dar al-ʿArabiyya lil-Kitāb, 1982), 388–90. On the reparatory effect of *liʿān* at the social level see also Shabana, "Negation of Paternity in Islamic Law," 159.

relevance and solemnity to the procedure: "Once the declarations of the spouses and the marital bond between them (*jawziyyatuhumā*) was duly established before him, it was required, by virtue of the *qāḍī*'s discretion (*fa-iqtaḍā naẓarah*) to summon the parties to his tribunal (*majlis ḥukmih*)." The venue for swearing oaths is referred to as the place representing his [that is, the *qāḍī*'s] justice in the main congregational mosque (*mawḍiʿ ḥukmih fī al-masjid al-jāmiʿ*)."[42] The final ruling declaring the couple to be separated irrevocably after the due completion of the oath-swearing is said to be in accordance with the dictates of the *Sunna* (*ʿalā mā aḥkamathu al-Sunna*) and to have been preceded by the judge having given the parties the opportunity to present closing arguments as required (*baʿda an aʿdhara ilā wāḥid minhumā bimā awjaba an yuʿdhirah ilayh*).

When addressing questions subject to divergence of opinions, such as denial of paternity without *ruʾya* (a claim of having seen the crime with his own eyes) or *istirʿāʾ* (an assertion that the waiting period has been observed), Ibn Salmūn incorporates the views of late scholars. Those scholars include Ibn Mughīth, Bājī, Ibn Rushd al-Jadd, ʿAbd al-Ḥaqq [al-Ṣiqillī or Ibn ʿAṭiyya], and Ibn al-Jallāb. He introduces two important nuances: one is that a husband's denial of paternity with *ruʾya* can only be accepted as grounds to start the *liʿān* procedure when the claim is accompanied by a declaration made before the pregnancy has become evident not to have touched his wife. The other nuance regards a foreign couple, allowing their marriage to be established simply through the parties' acknowledgment to it. This procedure was contrary to the requirements of locals, who were to provide evidence of their marriage with witness testimony, unless their marriage was a well-known, public fact (*fāshiy*^{an}). Conversely, pregnancy of the foreign woman was to be verified by two female witnesses, but such verification was not required for a local woman.

More importantly, the capacity of the *liʿān* procedure to deter men and exonerate their wives is visibly reinforced here by mention of the requirement to imprison the husband until the moment of swearing the *liʿān* oath. It is as if the author is trying to prevent the possibility that the husband might escape at the very last moment, leaving his wife alone with the burden of bringing up a child about whom suspicion has been raised by the accusation. Ibn Salmūn bases his presentation of imprisonment as an option on the opinions of Bājī and Abū ʿUmar b. ʿAbd al-Malik, who argued that "he [the husband] is a slanderer."[43] A century later, another relevant Granadan jurist, Muḥammad b. Muḥammad Ibn ʿĀṣim (d.

42 Ibn Salmūn, *al-ʿIqd al-munaẓẓam,* 155.

43 I wonder whether the Abū ʿUmar Ibn ʿAbd al-Mālik referred by Ibn Salmūn, and whom I cannot identify, is not confused with Abū ʿUmar Ibn ʿAbd al-Barr.

829/1426) reiterated the prison requirement without leaving any scope for interpretation, saying that the husband *must* be imprisoned until he swears the oath. This assertion is made in a work considered to be a distillation of Granadan judicial practice, with which the author was well acquainted, largely through his experience as chief *qāḍī* of the Nasrid capital.[44]

In the past, imprisonment had been reserved for the man who refused the paternity of his wife's child but acknowledged that he had intercourse with her without having observed the waiting period. In the latter case, imprisonment was conceived of as a coercive measure to move the father to acknowledge the child, "lest corruption spread among the people."[45] Imprisonment had also been mentioned by Ibn Rushd al-Ḥafīd, or Averroës, in connection to a woman refusing to neutralize her husband's accusation by swearing in turn. Coercing her to swear the *liʿān* oath in this way, Averroës claimed, was better than punishing her for *zinā* absent full proof of her having committed the crime. Ḥanafīs held the position that her punishment in such circumstances was to be waived, a position that Averroës preferred, seeing it as "closer to the truth than the contrary—say, the Mālikī—position." Justifying his statement further, he added:

> Abū Ḥanīfa drew on the Prophet[']s practice] when he said that "the blood of a Muslim can be shed only for having committed *zinā*, which applies only to the *muḥṣan,* for persisting in unbelief after having believed and as retaliation for killing somebody without legitimate reason." Moreover, shedding someone's blood for refusing to swear an oath goes against the principles of [Islamic] legal rulings. If a significant number of jurists does not impose financial liability when [the defendant] refuses to swear an oath [to rebuke the mere claim], it would be suitable not to impose the shedding of blood for that very same reason either. The basis of the ruling should be shedding someone's blood only when full proof or confession exist…. Indeed, Abū al-Maʿālī al-Juwaynī, notwithstanding the fact that he was a Shāfiʿī, was also convinced by Abū Ḥanīfa's persuasive argument, as stated in his *Burhān*.[46]

44 Ibn ʿĀṣim, *Matn al-ʿĀṣimiyya al-musammā bi-Tuḥfat al-ḥukkām fī nukat al-ʿuqūd waʾl-aḥkām*, ed. M. Amīn ʿImrān (Cairo: Maṭbaʿa Muṣṭafā al-Bābī al-Ḥalabī, 1930), 34.

45 Burzulī, *Nawāzil*, 3:469, quoting ʿAbd al-Raḥmān b. Qāsim al-Shaʿbī (d. 499/1106), who had it from al-Ishbīlī, in *al-Aḥkām* (Beirut: Dār al-Gharb al-Islāmī, 1992), 34. See Delfina Serrano Ruano, "La lapidación como castigo legal de las relaciones sexuales no legales (*zinā*) en el seno de la escuela malikí: doctrina, práctica legal y actitudes individuales frente al delito (ss. XI y XII)," *Al-Qanṭara* 26, no. 2 (2005): 449–73, at 463. See also Wansharīsī, *Miʿyār*, 4:72–73.

46 Ibn Rushd, *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid*, 6th ed. (Beirut: Dār al-Maʿrifa, 1982), 2:119–20; and Imran Ahsan Khan Nyazee, trans., *The Distinguished Jurist's Primer: A Translation of Bidāyat al-mujtahid* (London: Centre for Muslim Contribution to Civilization-Garnet Publishing Limited, 1996), 2:146–47.

Borrowing from divergent opinions (*talfīq*, or *murāʿāt al-khilāf*) is adopted here on the grounds of logic, cogency, and ethics, as well as for the benefit of the weakest party toward avoiding shedding her blood by locking her up temporarily if need be. Averroës, whose many scholarly specializations included medicine,[47] further alludes to the opinion of some Muslim jurists that denial of paternity is possible only during the waiting period, and that subsequent to it, rejection of her child is tantamount to defamation.[48] Moreover, Averroës notes that Mālik stipulated that paternity could be denied only during pregnancy, not after the child was born.[49]

Another remarkable piece of doctrine collected by Ibn Salmūn refers to a husband who claims to have seen his wife commit *zinā* with another man, but resumes marital relations with her subsequently. It is the husband who is to be punished with a *ḥadd* penalty and assigned the paternity of the child, obviously on the assumption that no man in his right mind would want to touch his wife after having seen her commit *zinā* with another man, or that men without good reputations must take responsibility for children born to their wives irrespective of their biological origins.

Ibn Salmūn also extended the right to have a child's paternity explicitly recognized before or after its birth to the slave mother. As in the cases mentioned above, this rule served as an impediment to the negation of paternity in the future without a valid excuse. Ibn Salmūn's predecessors likely would not have disagreed with this protection, but they do not appear to have felt the need to mention it explicitly.

FINAL CONSIDERATIONS AND CONCLUSIONS

Closer scrutiny of the templates relevant to *liʿān* procedures from select Andalusī model *shurūṭ* collections invites reconsideration of the idea that the *liʿān* procedure was hardly ever put into practice. The very facts of special templates designed to address the contingencies of *liʿān* oaths, the gradual design of a sophisticated procedure, the *qāḍī*'s role in following and monitoring it, and the solemnity associated with the act of swearing the oaths is telling. These facts show that publicity was better

47 A fact adding to his prestige in the eyes of contemporary Muslim scholars like Yūsuf al-Qaraḍāwī. See Mohammed Ghaly, "Biomedical Scientists as Co-Muftis: Their Contribution to Contemporary Islamic Bioethics," *Die Welt des Islams* 55 (2015): 286–311, 302.

48 Shabana, "Negation of Paternity in Islamic Law," 178 and n. 57. This opinion seems to be in line with what Ibn Salmūn attributed to Bājī and "Ibn ʿAbd al-Mālik," with some doubt (on which, see above, note 43). It is pertinent to remember that Hina Azam has found that, in contrast to mainstream Mālikī doctrine, Bājī and Ibn ʿAbd al-Barr were reluctant to accept pregnancy as valid evidence of *zinā.* See Hina Azam, *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure* (Cambridge: Cambridge University Press, 2015), 141–42.

49 Shabana, "Negation of Paternity in Islamic Law," 180, n. 62.

than concealment when the latter threatened to end in honor crimes, violent extra-judicial outcomes, and injustice being done to women and their offspring. Indeed, we can assume that the occasions on which *liʿān* oaths were actually pronounced were very rare. This fact may have been the result of the high level of sophistication reached by the relevant legal doctrines and procedures, both designed to limit the procedure to those absolutely convinced of their righteousness. Thus, the relevance of the *liʿān* procedure should not be assessed on the basis of the frequency with which the procedure was actually enacted, but rather on the basis of the procedure's effectiveness at preventing initial accusations, which must have been relatively frequent, from ending up in the mosque-court.

An accusation of adultery against a woman did not have to be proved when the accuser was her husband. Refusing to swear an oath on her part was considered tantamount to confession of the crime. Further, her child could be rejected with the argument that he or she was born less than six months after she got married, based on the difference between the date of the marriage contract and the day the union was consummated. These facts minimized the weight of the legal canon stipulating that "any offspring belongs to the marital bed: *al-walad lil-firāsh*," and inclined the balance towards its sequel, "and for the adulterer is the stone: *wa-lil-ʿāhir al-ḥajar*." Jurists were well aware of the gap and strived to fill it by elaborating and refining the relevant judicial procedure and documentary practice. Accordingly, they encouraged women to take advantage of the earliest opportunity to obtain explicit recognition of their pregnancy from their husbands before witnesses. Should problems arise, they were then encouraged to report them to the *qāḍī*. Should the husband resist all the pressure of the legal and social systems and still decide to reject his paternity, jurists offered the possibility of withdrawing his decision with quite satisfactory terms to all the concerned parties.

The social practice visible through these templates on *liʿān* procedures does not suggest vulnerable men, torn between assuming the paternity of unwanted children and facing rejection from their social milieu. Nor does it suggest men who were threatened with being deprived of the children born to their wives by their former husbands as was and continues to be frequent in tribal societies.[50]

Rather, the concerns revealed by the templates have more to do with *de facto* situations which may have never reached the *qāḍī*'s court or experts in the art of drafting legal documents: men rejecting their children with whatever pretense, such as claims that the child had been born less

50 For a recent illustration of this practice see Aref Abu-Rabia, "Paternity Suits in Tribal Society in the Middle East," *US-China Law Review* 9, no. 29 (2012): 29–44.

than six months after the conclusion of the marriage—a very handy excuse except when it had to be proved before the *qāḍī*—or that the mother was an adulterer. Should a man see fit to recognize the son he had previously rejected, he could do so without responding to claims of defamation of the mother. Even when a case was reported to the authorities, many men seem to have managed to escape the *liʿān* proper, such as by fleeing away to the frontier, or to postpone it *sine die,* on the basis of taking a long trip. If this were not the case, Granadan jurists would not have introduced the requirement to imprison men until the date fixed for the swearing. Moreover, even as they preserved *liʿān* procedure as a means to deal with a very sensitive issue challenging patriarchy in the family institution, some of the most influential jurists reached the point of almost criminalizing rejection of paternity because, even though the man always kept the option of escaping punishment by swearing a *liʿān* oath, from an ethical point of view he was seen as a slanderer. The other jurists did not question a man's right to reject his wife's child but strived to make its exercise increasingly risky and difficult, even when the mother was a slave.

Through documentary practice on the *liʿān* procedure, the relevance of both *qāḍī* courts and judicial procedure for the fulfillment of the ideal of justice in Islamic law and the protection of individual rights is also made evident. This aspect of the study of model *shurūṭ* collections is all the more interesting given that the role played by procedure in bringing about the rule of law, though assumed, is not particularly well elaborated in Islamic legal studies on procedure and evidence.[51]

Classical Islamic law can be said to uphold the requisite of representation by counsel at court hearings inasmuch as litigants are allowed to seek the advice of a *muftī*. But Islamic courts were not held responsible for providing that service, which was rather left up to the parties' own initiative. Queries on whether everyone in al-Andalus—man or woman, rich or poor, urban settler or rural inhabitant—had equal access to documents and courts of justice, and whether justice reached all corners of the territory under a ruler's control, are questions to which no conclusive answer can be given with the present state of research.[52] However, the sources well document sensitivity to each question on the part of both the

51 This shortcoming finds parallel in western legal philosophy where the need to consider the relationship between procedure and the rule of law has been emphasized only recently. See Jeremy Waldron, "The Rule of Law and the Importance of Procedure," in James E. Fleming, *Getting to the Rule of Law* (New York: New York University Press, 2011), 3–31; and Jeremy Waldron, "The Rule of Law," *Stanford Encyclopedia of Philosophy* [Online] (last accessed December 13, 2016), esp. section 5.2 on "Procedural Aspects."

52 On representation by counsel and generality as procedural requisites, see Waldron, "The Rule of Law," sections 5.2 and 9; and Waldron, "The Rule of Law and the Importance of Procedure," 5–7.

jurists and the executive authorities from the period under study, together with their overall readiness to solve it.[53] Certainly men belonging to the upper social and economic levels are those best represented in the legal sources at our disposal. Women, whether upper class, slaves, peasants, cattle breeders, or the practitioners of "métiers viles," are less conspicuous. The occasions on which we can observe them interacting with some form of Islamic justice have to be dug out from the sources with much effort and methodological subtlety, and, even so, they are found in no representative proportions. But they are not totally absent.

When the claim is made that *sharīʿa* in the pre-modern period represented an ideal that may be compared to the modern concept of the rule of law,[54] it cannot be thus taken to refer to an earthly paradise of widespread respect for the law by both ordinary people and judges. In practice, people did not behave according to manuals of legal doctrine and ethical standards reflected therein. But that fact does not mean that the corresponding rules and norms were not enforced by the courts. A *qāḍī* or any other authority over the subjects of the law may have been corrupt, acted unprofessionally, or have been appointed by an unjust ruler. Still, this does not mean that Islamic law was not efficient in regulating social relationships. Moreover, the ruler or legal authorities committing unlawful acts had many risks as deterrents, such as the withdrawal of popular or military support, loss of political legitimacy, rebellion, dismissal, ostracization, or condemnation to perpetual ignominy in literary and historical works.

Thus, although the hand that drafted them was not female, the templates relevant to *liʿān* procedures examined here transmit the echo of the voices of a particular group in society. They provide a platform for voices of married women and concubine mothers under threat of being abandoned in the care of their children, and for their expressions of fear and concern, complaints of vulnerability while being blamed for societal ills, and their demands for justice and balance. We do not only glimpse the jurists' readiness to put a series of legal instruments in their hands but also the women's agency and readiness to use the tools provided by the templates if need be, especially for situations wherein a *qāḍī* was within reach.

The templates show unique relationships between justice and

53 On the increase of judicial seats during the Almohad period, see Mustafa Benouis, "L'Organisation du *Qaḍā'* sous les Almohades," in Patrice Cressier, Maribel Fierro, Luis Molina, eds., *Los almohades: problemas y perspectivas* (Madrid: Consejo Superior de Investigaciones Científicas, 2005), 1:505–24. On the increase in the number of experts in the art of drafting legal documents registered during the same period, see above, note 31, where sources there echo Abū Isḥāq al-Gharnāṭī's call for at least one expert in drafting legal documents in each city.

54 See above, note 6, on the association between *sharīʿa* and the rule of law.

procedure. Within the *qāḍī*'s jurisdiction, the templates show that justice was administered by means of a sophisticated procedure that safeguarded the parties' rights at the same time that it encouraged them to reflect on and reconsider their initial claims in view of severe repercussions in this life and the next. Another, more novel, relationship between procedure and justice revealed by the templates consists of the need for a written record of the procedure duly attested to by professional witnesses, to be stored in an archive under the *qāḍī*'s custody and to be handed to the parties. This aspect highlights provisions for the rule of law by enhancing the enforceability of a final decision according to the principle of *res judicata* (claim preclusion), reviewability, and accountability of judicial agents. These agents could be held accountable through the acquisition of written documents and through procedural notarization.

The need for *qāḍī* courts for the application of procedures for *liʿān* described with so much detail in the relevant legal literature does not necessarily mean that the procedure became useless in the absence of that kind of court. Warnings by means of advisory opinions (*fatwās*) were also a powerful regulator of social conduct.

The authors of model *shurūṭ* collections cited divergent opinions on *liʿān* procedures, often without qualification. This practice was designed to assist the litigants, the authorities in charge of deciding their disputes, and the legal "profession" as a whole. The practice was a reflection of the author's erudition but also a pointer to possible strategies, leaving Andalusī *qāḍī*s wide scope for flexibility in their reasoning. Apparently minor or isolated opinions echo alternative states of mind that may not have shaped mainstream legal doctrine but that give us an idea of the pressures for coherence within a certain legal school or system. These pressures could end with new opinions making their way into judicial practice and creating new forms of consensus. Explicit recognition within the legal literature may have taken longer, but the history of *liʿān* procedures shows that neither the doctrine nor the system lost its distinctiveness of identity and integrity through judicial practice.