SHARĪʿA AND CUSTOM IN LIBYAN TRIBAL SOCIETY

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SHARĪʿA AND CUSTOM IN LIBYAN TRIBAL SOCIETY

An Annotated Translation of Decisions from the Sharīʿa *Courts of Adjābiya and Kufra*

BY

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WITH A LINGUISTIC ESSAY BY ALEXANDER BORG

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PREFACE

The present work is a sequel to my previous book, *Legal Documents on Libyan Tribal Society in Process of Sedentarization* (Wiesbaden, 1998), whose object was to present an edition of 72 court decisions together with a critical apparatus, a glossary of Arabic legal terms, a bibliography, and facsimile reproductions of the original documents.[1]

The purpose of this companion volume is to make available an English translation of the Arabic texts together with a detailed commentary, an English glossary of Islamic and customary legal terms and phrases pertinent to the documents under study, an integrated bibliography relating to both volumes, and an index arranged according to subject matter.

The facsimile reproductions of the original Arabic legal documents presented here were kindly made available to the author by Prof. John Davis of Oxford University who photographed the originals in the course of anthropological field research in Libya.[2] They contain a selection of judgments addressing such matters as personal status, succession, homicide and bodily injury, property, obligations and contracts, etc. The judgments were handed down by the Sharīʿa Courts of Ajdābiya and Kufra during the period from the early 1930s to the early 1970s.

The significance of the *sijill* (record) of the *sharīʿa* court as a source for legal and social history has already been discussed in detail in the Introduction to the first volume. Suffice it to mention here the crucial fact that the *sharīʿa* court is the locus where normative Islam, as represented by the *qāḍī* (rather than the *muftī*), comes face to face with social reality as reflected in the norms of tribal customary law. The nature and extent of this interaction between the two juridical systems, i.e., the *sharʿī* (in its Mālikī version) and the customary,[3] and the concomitant differences noted in their respective *Weltanschauungen* as they emerge from the court cases, constitute the main thrust of this research.

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[1] See Layish, *Legal Documents*.

[2] For details, see Layish, *Legal Documents*, Preface.

[3] Though it is sometimes admittedly difficult to distinguish between them in the documents. See Layish, *Divorce*, 2–4.

It may be that the Libyan Bedouin, the object of this study, identify their day-to-day legal practice indiscriminately with the *sharīʿa*[4]—a perception that is, of course, anthropologically significant; but the historian of Islamic law cannot simply accept this assumption. A clear distinction exists between orthodox *sharīʿa* and tribal customary law,[5] and when the Bedouin are following custom, the scholar must point this out.

Each of these legal systems embodies the outcome of a distinct historical process. In exploring them in a methodical fashion, the analyst is able to show how legal experts, as opposed to laymen, conceptualize the law, thereby revealing the line separating everyday perceptions of the law from the knowledge of legal specialists. It should be borne in mind that, whatever may be the layman's viewpoint on the relationship between *sharīʿa* and tribal custom, such a distinction exists in classical Islamic law whose proponents, including the Mālikī *fuqahāʾ*, do not, broadly speaking, recognize custom as an official source of law.[6]

There is ample evidence that the Libyan *qāḍī*s themselves are fully aware, in their judicial practice, of the distinction between *sharīʿa*, custom (*ʿāda*) and statutory law (*qānūn*).[7] They often make substantial concessions to custom by meeting it half way at the expense of the *sharīʿa* with a view to bringing the Bedouin closer to normative Islam.[8]

The Bedouin of the Awlād ʿAlī in the Western Desert are also aware of the differences between tribal customary law and *sharīʿa*;[9]

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[4] See Evans-Pritchard, 63 (the Bedouin of Cyrenaica "assume that their customs are Muslim customs").

[5] Cf. Gellner, *Saints*, 68, 105ff., 129ff., 135; Rosen, 194–97, 201, 206; Davis, *Social Perspective*, 12. On methodological problems pertaining to the distinction between *sharīʿa* and custom, see Layish, *Legal Documents*, 3.

[6] See Schacht, *Introduction*, 62. For further details, see Introduction below, pp. 1–10.

[7] Glossary, s.v. *ʿāda; ʿurf; qānūn*. See, e.g., doc. 1; Layish, *Tajdīda*; idem, *Divorce*, 175–76, 185–91.

[8] See, e.g., Layish, *Divorce*, 170–208; idem, *Dār ʿadl*; idem, *khulʿ*; idem, *The Qāḍī's Role*; idem, *Blood money*.

[9] Obermeyer notes that the Awlād ʿAlī in the Western Desert make a very clear distinction between the *sharīʿa* which "was given by God, and . . . guides man concerning what is good and what is bad," and the *ʿawāʾid* (tribal customs) that are made by human being for the benefit of Bedouin; they claim that the *ʿawāʾid* are in harmony with the *sharīʿa*, though not in everything for it does not originate from the *sharīʿa* (Obermeyer, 193, 214, 270). Murray notes that prior to the establishment of *sharīʿa* courts, the Awlād ʿAlī used to adjudicate cases related to marriage, divorce, inheritance, wills, and gifts before special courts, that is, tribal courts in which tribal customs were applied; since then, however, they resort to the *sharīʿa* courts and readily accept their decisions (Murray, 328).

one of main reasons for their resort to the *sharīʿa* court is the factor of equality of all parties before the *sharīʿa* court, regardless of tribal affiliation, origin, legal position, or social status.[10]

During the period of Italian rule in Cyrenaica (1932–42), they retained the dual (religious and secular) judicial system dating back to the late Ottoman period, and maintained the judicial and organizational autonomy of the *sharīʿa* courts. This was carried out within the Italian policy of Direct Rule, one of whose goals was the preservation of Islamic law and local customs.[11] A judiciary of three instances of *sharīʿa* courts headed by a supreme court for appeals was established. A Judicial Board (*hayʾa qaḍāʾiyya*) consisting of six members—four Mālikīs, one Ibāḍī, and one Ḥanafī—was set up, and *muftī*s, including the chief Muftī of the state, were nominated. The *qāḍī*s were also engaged as judges of civil courts and members of *waqf* and district administrative boards. In day-to-day reality the Sharīʿa Court of Kufra dealt not only with matters of personal status, succession, and *waqf*, but also with civil claims, contracts and property, homicide, assault, and other issues—matters that theoretically came under the jurisdiction of the civil courts. This may have been a carryover from the period preceding the Ottoman reform of the judicial system in 1860s.[12]

The dual judicial system survived in Libya after its independence in 1952. The *sharīʿa* courts retained sole jurisdiction in matters of personal status, succession and *waqf*. A judgment of a *sharīʿa* court of first instance was subject to appeal to the Supreme Court (*al-maḥkama al-ʿulyā*), which was established in 1929 with a view to replacing the two supreme *sharīʿa* appeal tribunals—in Tripoli and Benghazi—established in the early 1920s. In 1973 the *sharīʿa* courts were abolished and their powers transferred to the civil courts. Until Qadhdhāfī's coup in 1969, no codification of *sharʿī* law pertaing to personal status, succession and *waqf* had been attempted. *Qāḍī*s seeking guidance in religious law, turned to the treatises on Islamic law compiled by Mālikī jurists.[13]

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[10] See Layish, *Legal Documents*, 1–3, and the Inroduction to this volume below.

[11] For further details, see Cicchitti, 485; Evans-Pritchard, 200–3, 209; cf. Layish, *Divorce*, 5.

[12] See Del Boca, vol. 2, 22; Ibn Mūsā, 251–56. For further details on the Sharīʿa Court of Kufra, see Layish, *Blood Money*. Cf. Agmon, *The Family in Court*.

[13] The Ottoman failed to establish the Ḥanafī school in Libyan *sharīʿa* courts. See Ibn Mūsā, 66; Layish, *The Qāḍī's Role*, 84–86. The Libyan Civil Code provides

Most of the documents in this volume are judgments (*ḥukm*) in which the *qāḍī* hands down decision in disputes between the parties. Some of the documents are official orders of a declarative nature issued by the *qāḍī*, such as validation of marriage contract, order of succession, endorsement of power of attorney.[14] Some of of the documents bear the title "attestation of the conveyance of evidence" (*shahādat naql*), a kind of official statement of fact pertaining to matters such as conjugal rights, succession, and property issued by the *qāḍī*. A copy of the authenticated testimony is given to the claimant to be used for any practical purpose in future.[15] Two of the documents were issued by the *qāḍī* in the form of a legal opinion (*fatwā*)—theoretically not binding on the parties—not in his capacity as a judicial authority, but rather as a *muftī* competent to hand down decisions relating to religious law.[16]

Four kinds of witnesses have been distinguished in the documents: (1) witnesses required to identify (*taʿrīf*) the claimant or the primary witnesses; (2) primary witnesses enlisted by the claimant for the purpose of corroborating his contention; their testimonies are expected to be based upon their knowledge of the facts; (3) witnesses required to ascertain the primary witnesses' credibility (*tazkiya*); and (4) court notaries (*shuhūd al-ḥāl, ʿudūl*) whose task is to witness the entire proceedings as they transpired in court.[17] In one case, the *qāḍī* admitted a collective testimony of twelve witnesses on the ground that a large number of witnesses safeguards against fabrication of false evidence.[18]

The legal documents issued by the Sharīʿa Court of Ajdābiya display several characteristic features in the matter of structure and style. They typically start with an introductory formula, the most common being an invocation and a prayer for the soul of the Prophet, his family and companions, intended to bring divine guidance to bear in the processes of justice and to reinforce the validity and binding character of the *qāḍī*'s legal pronouncements.[19] Tribute is

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that in cases of lacuna the *sharīʿa* in its Mālikī version should be applied. See Khayrallāh, 203–4. Fore further details, see Layish, *Legal Documents*, 14–20.

[14] See, e.g., docs. 2, 45, 47, 51. In Palestine and Israel such orders were registered in a special *sijill* of legal documents (*ḥujaj*). See Layish, *Women*, 339; cf. Agmon, *Recording Procedures*.

[15] See docs. 4, 14, 48, 54, 57, 61, 67; Layish, *Shahādat naql*.

[16] See docs. 71–72.

[17] For further details, see Layish, *Shahādat naql*.

[18] See doc. 69.

[19] Cf. Messick, 227–28.

also paid to the temporal power of Muḥammad Idrīs al-Mahdī al-Sanūsī the Emir of Barqa (Cyrenaica), and subsequently king of Libya (1951–1969).

The introductory formulas are followed by a definition of the document's subject matter, a reference to the page and number of the protocol in the court minutes (*maḥḍar, ḍabṭ*),[20] the location of the Sharīʿa Court, and the name of the *qāḍī* or *nā'ib*[21] presiding over the particular case.

Next the document provides details that identify the claimant, usually by means of witnesses, in accordance with the *sharʿī* procedure of identification (*taʿrīf*), specifying his lineage (*ʿā'ila*), tribal affiliation (*qabīla*), place of birth, and residence.[22] Then the claimant's case is set out followed by his request to summon his witnesses to the court room to present their testimony. Quite often, the claim is stated in a subjective, personal style, in the first person. This stylistic trait confers on the documents many advantages since it provides the reader with a clear notion of the customary legal terms and phrases used in daily life without monitoring by the *qāḍī* and the *sharīʿa*. Next, the defendant is requested by the *qāḍī* to respond to the claimant's allegations and to present his own version of the case which he does in analogous fashion. Usually, however, the *qāḍī* sums up the plaintiff's allegations and the defendant's response in concise legal terms totally detached from the usage of popular phraseology. This practice, while facilitating the reader's orientation in the subject matter, takes place at the price of blurring a vital part of the judicial reality in court. Usually, the *qāḍī* tries to reconcile the parties and settle the dispute by mutual agreement; if he fails or is of the opinion that the issue is too serious to allow compromise, he invites the claimant to produce his witnesses who will corroborate the latter's allegations. The primary witnesses are expected in their testimony to draw on their personal knowledge; they testify to a fact or event that they have themselves witnessed or with which they are personally acquainted. Occasionally, however, witnesses testify on the basis of hearsay.[23] The primary witnesses' credibility may be tested, publicly and *in camera*,

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[20] On *ḍabṭ*, see Agmon, *Recording Procedures*.
[21] On *nā'ib*, see Agmon, *The Family in Court*, 56, fn. 3; idem, *Recording Procedures*.
[22] Fof further details, see Layish, *Shahādat naql*.
[23] See Glossary, s.v. *shahādat samāʿ*.

by special witnesses.[24] These may be public figures, such as the *imām* and *mukhtār* of the witnesses' home town, or a *shaykh* of the same tribe. The witnesses use formulas calculated to enhance their credibility and they conclude their testimony with a pious invocation.

At this point, the *qāḍī* hands down his decision, signs it, and has the professional witnesses (*shuhūd al-ḥāl, ʿudūl*),[25] that is, the notaries present in court, testify to it. Their task is to witness to the regularity of the entire proceedings as they transpired in court.[26] Their names and court functions are mentioned at the bottom of the decision. Their signatures are followed by the *qāḍī*'s endorsement of the legal validity of the proceedings. Finally, the *qāḍī* instructs that his decision be registered in the *sijill*.[27]

The decisions of the Sharīʿa Court of Kufra display totally different features. In most judgments, especially those from the 1930s, there are no intoductory formulas; the relevant legal findings are presented in a very concise manner; the *qāḍī*, and more often the *nāʾīb*, sums up the claim in simple and practical terms. Though witnesses are resorted to, in most cases their names are not mentioned and there is no indication that the identification procedure (*taʿrīf*) or the credibilty test (*tazkiya*) has been conducted. The judgment too is phrased rather briefly. The name of the *qāḍī* or *nāʾib* appears at the end of the document. In almost no case, is mention made of the presence of notaries in the court during the proceedings.

Decisions dating back to the early 1930s contain detailed abstracts of the judgment in Italian, followed by the remark: "Visto per l'esecuzione!" (Approved for implementation!) and the signature of the Military Governor of the Kufra Areas. This indicates that a written official confirmation was required for the execution of the judgment.[28] This practice was inspired by Italian public policy embodying an explicit intention to impose on Libya normative control in accordance with European values.[29]

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[24] See Glossary, s.v. *tazkiya*.

[25] On *shuhūd al-ḥāl*, see Agmon, *Recording Procedures*.

[26] Cf. Messick, 230. Occasionally the judgment is phrased in the notaries' direct speech and in first-person statements (*ashhadanā al-qāḍī . . .*) as if it was dictated by them, rather than by the *qāḍī*; see, e.g., doc. 31 line 30, doc. 33 line 15, doc. 35 line 11.

[27] Cf. Messick, 222–23.

[28] Cf. Black, s.v. "Exequatur," 572.

[29] For further details, see Layish, *Legal Documents*, 14–15; Cicchitti, 478 (Universal morality and public order was the basic principle of the League of Nations).

The judgments handed down by the judicial functionaries in Kufra seem to be less sophisticated than those of the *qāḍī*s of the Sharīʿa Court of Ajdābiya; thus I have come across no single case in Kufra in which a legal Mālikī treatise is referred to. The remoteness of Kufra from the political and administrative centres of the country as well as its location in the midst of a tribal society not yet completely Islamized, may perhaps account for the somewhat modest *sharʿī* education and background of the judicial functionaries there. Indeed, some of them were promoted to their judicial position from the ranks of court functionaries of the standing of a *kātib al-maḥkama* (scribe of the court) or notary.[30]

Until the establishment of a regular *sharīʿa* court in Kufra presided over by a *qāḍī*, the *sharʿī* judiciary was run by the *nāʾib*, *masʾūl* and the *kātib*.[31] There is some evidence in the *sijill* that *sharʿī* adjudication was incorporated as a chamber within the local civil District Court, a fact that may indicate its status in the official judicial hierarchy.[32]

A few remarks on technical points arising in the documents may be useful. The translation of each document starts with an introduction providing the reader with some orientation as to the main legal issues discussed in the case under review, the decision handed down by the Qāḍī and its rationale, with special reference to the interaction between *sharīʿa* and custom. Each document has been analyzed on its own with a view to addressing its legal and social aspects. No attempt has been made to draw comprehensive conclusions; a separate publication based on an examination of the entire corpus of the documents available is planned to follow in due course.[33]

Usually, the decisions handed down by the *qāḍī*s are worded in a highly stereotyped phraseology and formulaic language, that is, they are phrased in strict legal terms and formularies with a view to tackling specific legal problems brought forward by the litigants. Only in rare cases do *qāḍī*s, in the Sharīʿa Court of Ajdābiya, corroborate their decisions by references to legal treatises which may facilitate the correct reading and interpretation of the decisions.

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[30] See Name Index of Qāḍīs, Nāʾibs and Other Judicial Clerks. On the qualifications required from the *kātib*, cf. Messick, 209.

[31] See Glossary; Name Index of Qāḍīs, Nāʾibs and Other Judicial Clerks.

[32] See, e.g., docs. 15, 18, 22, 27; Layish, *Legal Documents*, 14–16.

[33] On some findings and tentative conclusions that may be drawn from the documents in the present volume, see Layish, *Legal Documents*, 4–6, and the Introduction to this volume below, pp. 6–8.

An attempt has here been made to translate the legal texts as faithfully as possible with a view to conveying their original style, discourse structure, and spirit in the translation. This is no easy task given the peculiar character of Arabic legal discourse with its admixture of literary and spoken Arabic (such as vernacular rhymed phrases and legal maxims) and abrupt alternation between direct and indirect speech and minimal resort to discourse markers.[34] Some departures from this policy were required whenever presentation of legally significant matters seemed to be indispensable for accurate interpretation of the text.

With a view to reflecting authentic linguistic usage as implemented in the courtroom, where vernacular Arabic elements constantly obtrude in legal discourse,[35] Bedouin private names, names of lineages, clans and tribes have been transliterated as they are pronounced in the vernacular dialect. The names of the *qāḍī*s, *nā'ib*s and other court functionaries, however, have been transliterated in literary Arabic.

Minor additions to the text, clarifying a legal term or situation, have sometimes been inserted in square brackets [ ] in the English translation. Extensive additions are given in the footnotes. It goes without saying that the English translation reflects my own reading and interpretation of the legal text. Whenever the Arabic text suggests more than one reading, an alternative rendering is provided in the footnotes.

Numbers of lines in square brackets [ ] have been introduced in the English translation in order to facilitate comparison with the printed Arabic documents. For obvious reasons the numbers in the English translation are not always identical with those in the Arabic documents.

In each document, Arabic legal (Islamic and customary) terms and phrases are given in a literary transliteration in order to facilitate their identification in dictionaries and professional literature. The terms and phrases are followed by an English translation and the reader is referred to legal treatises, scholarly literature, and the Glossary of Arabic legal terms and phrases at the end of the book.

Siblings of different blood relationship are denoted by the expressions "full brother/sister," "paternal half-brother/sister," "maternal

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[34] See, e.g. docs. 1, 5, 6, 60. Cf. Borg, *Orality*, 318, 322ff., 330.
[35] Cf. Borg, *Orality*, 327ff., 332.

half-brother/sister" even when they appear in the context of apportionment of the estate, instead of the common legal terms (germane, consanguine and uterine brothers and sisters, respectively). However, in order to identify their location in professional legal literature, the reader is advised to consult the legal terms.

Regarding the lineage and tribal affiliation of the parties to the cases dealt with in the documents, and their geographical location, the reader is referred to the basic study in Italian by De Agostini. Occasionally, some general information on the physical conditions, such as land tenure, collected from anthropological and other literature, whenever such data is available, is brought in the introduction to the documents. This information does not necessarily relate to the specific conditions pertaining to the document under review, but it may facilitate the reader's orientation. The social analysis of the documents presented in this study has not been pursued as an end in itself; it is meant to provide a background to the legal analysis and, especially, throw light on the interaction between *sharīʿa* and custom.

The object of the footnotes is to expand the analysis, on the basis of the legal and scholarly literature, of juridical issues arising from the court decisions. The footnotes give only abbreviated titles of the sources quoted; a list of the full titles of the Islamic legal treatises, anthropological literature, and other secondary sources referred to, in alphabetical order of the authors' names, appears at the end of the book.

For the purpose of presenting the Mālikī doctrine on the great variety of subjects arising in the legal documents, I have concentrated first and foremost on the legal treatises resorted to by the Libyan *qāḍī*s themselves, that is, those written by Ibn ʿĀṣim, ʿIllaysh and al-Ṣāwī (see Bibliography). Of special importance for this study is *al-ʿĀṣimiyya* or *Tuḥfat al-ḥukkām* by Ibn ʿĀṣim (d. 829/1427), the renowned Mālikī jurist and the Qāḍī al-Jamāʿa in Granada, who incorporated the Andalusian judicial practice (*ʿamal*) in his aforementioned treatise.[36] In medieval times, Mālikī judicial practice was instrumental in accommodating the *sharīʿa*, in particular in the realm

[36] See Berque, *ʿAmal*; for further details on Ibn ʿĀṣim, commentaries on and translations of his treatise, see Toledano, 13. For some details on the other jurists, see Layish, *Legal Documents*, 18, fn. 26. Cf. Serrano, 206–11.

of family law, to changing needs and conditions.[37] It is interesting to note that the Libyan documents in this volume contain some evidence of the impact of the Mālikī judicial practice on day-to-day reality.[38]

For the purpose of clarifying the customary norm pertaining to the variety of subjects dealt with in this study I have consulted the anthropological literature, especially on the Awlād ʿAlī in the Western Desert. Occasional comparisons have been made with Middle Eastern tribal law.[39] The Bedouin of Cyrenaica speak a type of Arabic that is recognizably Bedouin (rather than urban). Most of the Cyrenaican Bedouin are probably descendants of Arabs who arrived in North Africa as part of the Hilalian invasion.[40] No doubt these invaders brought with them a heritage of Bedouin customary law. Naturally, due to the impact of local circumstances, there emerged over the years some differences between the Cyrenaican and the Middle Eastern versions of Bedouin customary law. Moreover, Arab customs (*darā'ib*), even within Cyrenaica itself, differ between one tribe and another;[41] the influence of non-Arab local customary laws, in particular Berber tribal law (there is reason to believe that the Cyrenaican Bedouin are, genetically, at least, in part Berbers), cannot be ruled out.[42] Yet, the substantive law is much the same in the Western Desert and Cyrenaica as it is in much of the Mashriq (though the procedures in East and West are entirely different).[43]

The Libyan documents, a selection of which is included in the present study, have been the primary source materials for several

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[37] Toledano, 46–47. For further details on the Mālikī *ʿamal*, see Introduction below, pp. 8–9.

[38] See e.g., docs. 65, 69. Cf. Layish, *Shahādat naql*. References in this study to formularies of Andalusī-Maghribī legal practice collected in *Kītāb al-wathā'iq wa'l-sijillāt* by Ibn al-ʿAṭṭār (d. 399/1008) (see Bibliography) are intended to indicate possible sources of inspiration to the Libyan judicial practice.

[39] See Bibliography; Stewart, *Tribal Law*, 482–83.

[40] See De Agostini, *Cirenàica*, 17 {the main body ("contingente essenziale") of the Cyrenaican Arabs comes from the B. Hilāl/Sulaym invaders}; cf. Idris, 385–86; Lecker, 817–18.

[41] See Colucci, *Tribù*, 25–26; cf. Mohsen, 18, 83; Albergoni, *Droit coutumier*, 119; idem, *Écrire la coutume*, 28. Customary norms can be identified by field research, private codifications and legal documents, such as decisions handed down by tribal arbitrators. See Milliot, 159–60; Hart, *Rgaybat*, 47; Layish & Shmueli, 30–31.

[42] As in the case of "dormant embryo" (*ḥaml nā'im*). See doc. 39 and the references indicated in the footnotes.

[43] See Stewart, *ʿUrf*, 889; Colucci, *Tribù*, 35.

works which I have published over the last decade. Each of these works focused on a specific issue: marriage, divorce, paternity, blood money, and written evidence. The common denominator of all these publications is the interaction between *sharīʿa* and tribal custom, and the *qāḍī*'s role in this fusional process (see Bibliography). The aforementioned publications are complementary to each other and should be treated as one entity. References to these studies have been made throughout the present work; the reader is advised to consult them and the scholarly literature indicated there in order to deal with specific documents in a comprehensive manner.

I trust that this study on the Libyan legal documents will prove a useful contribution to the literature on processes that bring tribal societies within the orbit of normative Islam. I have endeavoured to maintain a reasonable balance between legal discussion and social analysis so as to render this study accessible to scholars from various disciplines: Orientalists, Islamologists, social scientists, and lawyers interested in Islamic and comparative law.

ACKNOWLEDGEMENTS

The present volume, like my preceding one, *Legal Documents on Libyan Tribal Society in Process of Sedentarization*, Part 1 (Wiesbaden, 1998), to which it is a sequel, owes its existence to the anthropologist, Professor John Davis of Oxford University, who kindly introduced me to a rich collection of legal documents from the *sijill*s of the Sharīʿa Courts of Ajdābiya and Kufra, which he had assembled and photographed in the course of field research in Libya.

I first learned of the existence of these documents through a note published by him in the *Bulletin of the British Society for Middle Eastern Studies*.[1] When I expressed interest in this material, Davis invited me to work on them at Eliot College, University of Kent in Canterbury, and graciously placed them at my disposal unreservedly. My books, *Divorce in the Libyan Family*, the aforementioned *Legal Documents*, as well as a number of articles relating to Libyan society[2] have also been entirely based on these documents. I am profoundly indebted to Davis for this rare generosity.

During my sabbatical at Eliot College, in 1986–87, we made a selection of some 160 court decisions in Arabic from the records of the Sharīʿa Courts of Kufra and Ajdābiya.[3] The present set of 72 court decisions comprises what appear to me, from legal and sociological standpoints, the most revealing documents in that collection.

Davis has also been deeply involved at the early stages in the preparation of this volume, tendering valuable professional advice and guidance, for which I here express my sincere gratitude. On two separate visits to Oxford, I was able to exchange ideas with Davis concerning matters pertaining to this material. On my second visit, lasting from April to September 1993, I spent my sabbatical leave as Davis' Associate guest scholar at the Institute of Social and Cultural Anthropology, where we devoted many hours to reading

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[1] Davis, *Note*.

[2] Layish, *Divorce*; idem, *Legal Documents*; idem, *Khulʿ*; idem, *Dār ʿadl*; idem, *Tajdīda*; idem, *The Qāḍī's Role*; idem, *Shahādat naql*, idem, *Blood Money* (see Bibliography).

[3] Layish & Davis.

together the documents and their annotated translations, and discussing issues of mutual interest as they arose. This close acquaintance with Professor Davis provided me a rare opportunity to acquire valuable anthropological insights into the material under study from a scholar who has devoted many years to research on Libyan society.

In the spirit of our collaboration, this volume was originally intended as an interdisciplinary project undertaken by an Islamist with several years' experience exploring records of the *sharīʿa* as crucial source material for the social and legal history of Muslim societies, and an anthropologist with a background of intensive field research in Libya. On the face of it, it could have turned out to be an ideal common endeavour, combining the merits and the perspectives of our respective disciplines in a complementary fashion. In the event, our exchanges revealed sharp differences of opinion between us concerning the interpretation of the documents. Since our respective positions have already been stated in explicit fashion in the introduction to *Legal Documents*, there is no need here to expatiate on the grounds of our disagreement; I will merely reiterate that, in the best tradition of Islamic legal history, differences of opinion are a potential source of blessing (*ikhtilāf al-umma raḥma min allāh*)!

During my stay in Oxford, I was elected Israeli Senior Visiting Fellow at St. Antony's College for Trinity Term 1993. This enabled me to devote myself entirely to research on the Libyan documents. I am most grateful to the College authorities and to the Institute of Social and Cultural Anthropology for the warm hospitality extended to me.

I am indebted to my colleague and friend, Frank Stewart, who was very helpful in various ways at all stages of the present research. Stewart read the Preface and Introduction and some of the documents and offered important suggestions for the improvement of the annotated translation of the documents as well as suggestions pertaining to anthropological literature on tribal customary law. Stewart's advice has been available to me for almost twenty-five years since I was first exposed to the fascinating process of interaction between *sharīʿa* and tribal law. I take this opportunity to thank him for his collegiality and unstinting help.

My colleague Simon Hopkins took the time to thoroughly examine almost all the documents and their annotated translation in the two volumes and offered valuable suggestions and comments. David

Powers read all the documents pertaining to inheritance and *waqf* as well as almost all the articles based on the Libyan legal documents, and offered substantive as well as editorial comments and suggestions for which I am most grateful.

My teacher and colleague Pessah Shinar, Emeritus Professor of Islamic Civilization, a world authority on contemporary Maghribī Islam, earned my lasting gratitude by providing much assistance, inspiration and intellectual support over the years.

Since the early 1990s, I have used the Libyan legal documents in a seminar attended by advanced students on "The Status of Islam in Tribal Society in Process of Sedentarization" held at the Institute of Asian and African Studies of the Hebrew University of Jerusalem. The annotated translation of these documents was originally prepared in Hebrew for this seminar and many problems were solved by the combined efforts of the participants in this seminar. I have learnt a great deal from my students, and I feel particularly indebted to Muḥammad Ṭāṭūr for his perceptive readings and interpretations of some complicated texts and for his technical assistance.

The English version of the annotated translation was undertaken from the aforementioned Hebrew text by the Arabist, Alexander Borg of Ben Gurion University of the Negev (Be'er Sheva). Whenever necessary for the clarification of linguistic aspects, he consulted the Arabic documents, both the printed version and the facsimile reproductions of the original documents in *Legal Documents*. Throughout this research, Borg has also greatly assisted me in coping with linguistic problems relating to colloquial Arabic elements occurring in the documents. Borg has also contributed a linguistic essay to this volume in which he addresses linguistic and cultural aspects presented by the factor of orality in the Libyan documents, for instance, the interaction between literary Arabic and indigenous dialects as reflected in the legal documents. Needless to say, the study of this interaction, which parallels that obtain between the *sharīʿa* and customary law in sedentary tribal society—the focus of the present work—adds a vital dimension to this research. I am most grateful to Alexander Borg for his contribution to this volume.

Special thanks are due to Ruud Peters from the Department of Arabic and Islamic Studies at the University of Amsterdam, who thoroughly read the Preface and Introduction as well as a selection of the documents, and offered valuable suggestions.

All the above-mentioned scholars share the merits of this study; it goes without saying that the ultimate responsibility for any defects remaining in the present work is entirely my own.

I am especially indebted to Anna Baldinetti for her help in obtaining important literature in Arabic from Libya.

At the institutional level, it gives me great pleasure to acknowledge the support of the Foundation of the Muslim Waqf at the Prime Minister's Office, and the Research Committee of the Faculty of Humanities at the Hebrew University. This work was also supported by a grant from the Israel Science Foundation.

I here acknowledge with gratitude the dedication and expertise of Ms. Trudy Kamperveen of Brill at all stages in the preparation of this book and, in particular, her consideration and tact in handling the special problems arising from the legal nature of the ms. I also thank Ms. Tanja Cowall for her efficient and patient collaboration in technical aspects relating to the production of this book.

I commenced my research on the legal documents from Libya in Canterbury, England, some fifteen years ago accompanied by Bilha, my wife. On the completion of the present work, I would like to take the opportunity of thanking her profoundly for much patient understanding, moral support, and encouragement throughout this prolonged period.

INTRODUCTION: *SHARĪʿA* AND CUSTOM IN TRIBAL SOCIETY

The interaction between *sharīʿa* and custom in Libyan tribal society as reflected in the selection of documents contained in this volume constitutes the core of this study with a view to placing this interaction within a theoretical and historical framework. It is intended to draw the main features and trends, rather than comprehensive conclusions, of the encounter between *sharīʿa* and custom with special reference to the *qāḍī*'s vital role in this process; occasionally illustrations of specific cases were brought with references to the documents where they were dealt with in detail.[1]

Sharīʿa and customary law are two profoundly different kinds of legal systems. Broadly speaking, *sharīʿa* is revealed law as interpreted by its authoritative exponents and imposed on society, whereas custom (*darība* pl. *darāʾib*) is unwritten law shaped by the praxis and collective experience of ordinary people, their acceptance of its norms over a long period of time having crystallized into a binding legal norm (imposing sanctions on violators) with respect to the place and subject matter to which it relates.[2] Unlike the *sharīʿa*, customary law is not vested with supernatural authority;[3] hence a tribe can modify its laws usually through a consensus reached at a gathering of its leading men.[4]

The co-existence of these two discrete legal systems dates back to the early ʿAbbāsid period, when the *sharīʿa* emerged as a full-fledged and crystallized system. The *sharīʿa* encoded the idealized religious norm, whereas customary law reflected the law of the tribes. The two systems co-existed side by side, not always in a perfectly harmonious manner; for all that, customary law was to play a vital role

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[1] For further discussion of this encounter, see Layish, *Divorce*, 170–208; idem, *The Qāḍī's Role*, 84–93; idem, *Legal Documents*, 1–6, 14–17; idem, *Sharīʿa and Custom*.

[2] Colucci, *Tribù*, 24; cf. Black, s.v. "Custom and Usage," 385.

[3] Though it can convey odour of sanctity deriving from popular religion; see Colucci, *Tribù*, 24.

[4] See Stewart, *ʿUrf*, 891.

in moulding the *sharīʿa*. The subsequent process of intensive interaction and mutual fertilization of the two systems lasted for centuries, and the *sharīʿa*, with its authoritative commentaries, displayed remarkable assimilative power culminating in far-reaching integration and Islamization of the norms of customary law.[5] From the formal standpoint, however, the Islamic legal methodology (*uṣūl al-fiqh*) did not recognize custom as a source of law. The Mālikī school also ignored it as an official source of law, even though in the course of its later development in the West, it took account of local custom. As a matter of principle, *sharīʿa* exponents maintained its absolute sovereignty in any legal domain, including those that had long been assigned to the sphere of customary law. In day-to-day practical reality, however, a compromise was maintained between theory and practice.[6]

In the contemporary Islamic world, customary law still enjoys varying degrees of autonomy alongside the *sharīʿa*, especially in regions with tribal communities; in some places, tribal courts and arbitrators continue to apply customary law with little if any interference by the central government. Furthermore, one should bear in mind that the mere application of Islamic law by *sharīʿa* courts does not in itself imply that their decisions are carried out in practice, particularly where the *sharʿī* norm is incompatible with custom.[7] For instance, a *sharʿī* succession order initiated by Qurʾānic heirs may be frustrated by the heirs who have actual possession of the estate.

In North Africa, tribal law seems in the long run destined to yield to the *sharīʿa*; thus the sedentarized tribal population of Cyrenaica habitually seeks *sharʿī* jurisdiction, and the *qāḍī*s consistently endeavour to bring the Bedouin closer to normative Islam. For the time being, however, a kind of peaceful coexistence of customary law and the *sharīʿa* is maintained in the sense that each legal system confines itself to a particular domain.[8]

Normative Islam, with its system of beliefs, institutions, and laws, has a limited impact on nomadic society in Cyrenaica, where folk religion, including the cult of saints and intercession, are still pre-

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[5] With respect to North African custom, see Albergoni, *Droit coutumier*, 111, 121–22; idem, *Écrire la coutume*, 29 (*qabīla musharriʿa*), 30, 40, 42.

[6] See Schacht, *Introduction*, 62, 76ff., 84; Santillana, vol. 1, 48–50; Libson, *Custom*, 133ff.; idem, *ʿUrf*, 887.

[7] Cf. Bousque, *ʿĀda*, 170–71.

[8] Stewart, *ʿUrf*, 891; cf. Layish, *Blood Money*; doc. 55.

dominant.[9] The hold of the Sanūsiyya, a Ṣūfī order adapted to the structure of a tribal society, over Cyrenaican tribal society started to disintegrate after the Italian invasion in 1911.[10]

The absorption of Islamic law in Cyrenaica has been slow and is still incomplete. The Bedouin regard the *sharīʿa* as an auxiliary source of law and resort to it only in cases of lacuna in custom or when two customs contradict each other.[11] Customary law has survived even in areas where its followers nominally adopted Islam. Thus Bedouin in various parts of the Muslim world consider themselves Muslims regardless of the state of their knowledge and practice of Islamic doctrine, worship, ethical and legal norms. This also applies to the Cyrenaican Bedouin, irrespective of the establishment of the Sanūsī revivalist movement in their midst.[12] At all events, it is clear from the documents under study that customary law still enjoys a great measure of autonomy in its encounter with Islamic law. Understandably, the Bedouin are not fully aware of this and identify themselves as Muslims, believing in Allāh and resorting to him in various circumstances.[13] They regard tribal law as part of their Islamic heritage, although some of their customs are inconsistent with normative Islam.[14]

Sedentarization of the Bedouin in modern times brings them under the control of the central government, one aspect of which is the *sharīʿa* court. Under Italian rule the Bedouin of Cyrenaica applied to the *sharīʿa* courts only to a limited extent, preferring to settle their affairs according to tribal custom.[15] In the early 1970s their recourse

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[9] See Ibn Mūsā, 46–48 (pilgrimage to holy men's tombs); Khayrallāh, 267 (taking an oath on a holy man's tomb); cf. Evans-Pritchard, 62–65; Gellner, *Saints*, 8ff., 135–36; idem, *Doctor*, 23–24, 30; Levtzion, *Islamization*, 20; idem, *Sharīʿa and Custom*, 79; Shaham, *Woman's Place*, 192–93.

[10] Evans-Pritchard, 104ff.; Davis, *Libyan Politics*, 110 n. 15.

[11] Colucci, *Tribù*, 24–25. Cf. Levtzion, *Islamization*, 7, 19–20; idem, *Sharīʿa and Custom*, 78.

[12] Evans-Pritchard, 62–64; Albergoni, *Droit coutumier*, 122, 128; idem, *Écrire la coutume*, 40, 44.

[13] For details, see Layish & Shmueli, 41–42.

[14] For details, see Layish, *Divorce*, 170–71; Evans-Pritchard, 62; Henninger, 125ff.; Colucci, *Tribù*, 24; Milliot, 157, 166; Gellner, *Saints*, 47; idem, *Muslim Society*, 100; idem, *Doctor*, 38; Layish & Shmueli, 31; al-ʿAbbādī, *al-Qaḍāʾ*, 163, 179–83, 198–99, 406–7 (based on Oweidi, 121, 134–37, 149, 321–22); Coulson, *History*, 135–36; Laoust, *Ibn Taymiyya*, 519ff.; idem, *Les schismes*, 323, 324; Smith, 48ff.; Goldziher, 238ff.; Baer, *Population*, 132; idem, *Egypt*, 13, 14.

[15] Cf. Gellner, *Saints*, 105ff.; Lewis, 153.

to the *sharīʿa* courts increased although they did not cease to apply concurrently to the tribal courts.[16]

Several explanations have been suggested for the Bedouin's application to the *sharīʿa* courts:[17]

1. Geographical proximity to urban, religious, administrative, and economic centres.

2. Administrative, civil and economic exigencies in a modern state. Thus, for example, confirmation of marriage by a *qāḍī* or a *sharʿī* solemnizer is required to ensure that no impediments to marriage exist between the parties that may render the marriage null and void (*bāṭil*).[18] Registration of changes in marital status by the *sharīʿa* court is also required to secure social benefits, education and medical care for children, and a *sharʿī* order of succession is required to effect property rights and transactions in the land registers.

3. The spread of religious education and modern means of communication which accelerates a religious transformation among the Bedouin and strengthens their Islamic identity.[19]

4. The imposition of *sharʿī* jurisdiction on the Bedouin along with the abolition of statutory tribal jurisdiction (as in the case of Jordan),[20]

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[16] On the merits of tribal arbitration, see Khayrallāh, 169–70.

[17] For further details, see Davis, *Libyan Politics*, 223–25, 228; Layish, *Divorce*, 127, 182–83; idem, *Islamization*, 39–40. Cf. Levtzion, *Islamization*, 21; idem, *ʿUlamāʾ*; idem, *Sharīʿa and Custom*, 79.

[18] The Mālikī school makes no distinction as to the legal consequences between irregular (*fāsid*) and void; in both cases the act is null and void; see Glossary, s.v. *fāsid; bāṭil*.

[19] There is evidence that already in the nomadic period Bedouin of the Judean Desert would visit the al-Aqṣā Mosque and the Dome of the Rock on Fridays. Layish, *Challenges*, 220; idem, *Fatwā*, 276 and the source indicated in n. 25. On the performance of religious obligations among the Bedouin of central Sinai, see Stewart, *Texts 1*, 7, 17, 44, 53n., 194; idem, *Narrative*, 53; Lewis, 152–53. I have found no evidence in the Libyan *sijill*s (court records) to the effect that the Bedouin resort to the *sharīʿa* court is inspired by their desire to belong to the Islamic body politic; such a possibility, however, cannot be ruled out.

[20] Jordanian law still applies in the West Bank. The statutes pertaining to the establishment of tribal courts, including the Tribal Court of Appeal of 1936, were abolished in 1976. See al-ʿAbbādī, *al-Qaḍāʾ*, 114ff., 445. Under the British Mandate of Palestine, tribal courts were established in the Negev (see Marx, 32–33). The courts ceased to function in Israel and the Bedouin have been amenable since then to *sharʿī* and civil courts. I have found no indication in the *sijill*s of the Libyan *sharīʿa* courts of the existence of statutory tribal courts, but there is ample evidence that matters were settled outside of *sharīʿa* courts in accordance with tribal law, most probably by tribal arbitrators on a voluntary basis and with the consent of the parties. Tribal arbitrators (with no formal status) in the Judean Desert deal with issues

with a view to strengthening the Muslim establishment as a means to consolidate the government's position in tribal society. From the point of view of the central government, it is easier to rule through its control of institutionalized normative Islam rather than by trying to control popular religion and customs that vary from one place to another and are dominated by indigenous leaders competing among themselves for power.

5. Equality of all parties, regardless of their tribe, origin, colour, or legal position before the *sharīʿa* court. Thus there is evidence of the rights of manumitted slaves being protected there.[21] True, the position of women and cognates under the *sharīʿa* is not equal to that of men and agnates, respectively. However, their position under the *sharīʿa* is much better than under tribal customary law.[22] Indeed, some evidence suggests that the *sharīʿa* court is preferred especially by people whose position in traditional society is weak and who therefore cannot get what they want under the tribal customary system. Thus the *sharīʿa* court is resorted to by divorced women who have been denied their *sharʿī* financial rights or by heirs deprived of their *sharʿī* share in the estate under customary law. The applicants expect the *sharīʿa* court to determine their rights in accordance with the *sharīʿa*.[23]

6. The executive power of the *sharīʿa* court provides legal security for the realization of legal and financial rights between the parties.

Nevertheless, in modern times, the ability of the *sharīʿa* court to bring the Bedouin closer to normative Islam has declined. This is ascribable in part to the codification of the *sharīʿa* (though not in Libya during the period under review), but also to the competition of civil courts and to the process of secularization.[24]

From the *sijill*s of the *sharīʿa* courts, it is possible to infer that the Bedouin come closer to normative Islam which gradually becomes a more binding lifestyle as regards worship, religious duties, and law in those domains with respect to which the Bedouin resort to the

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pertaining to matters of personal status and succession (in competition with the *sharīʿa* courts), homicide and bodily injury, property, obligations and contracts (in competiton with the civil courts).

[21] See doc. 62 below.

[22] Cf. Layish, *Collapse of the Patrilineal Family*.

[23] Cf. Shahar, 24–25; Kressel, *Descent*, 94–95, 166, 184.

[24] Cf. Layish, *Islamization*, 55–56; idem, *Challenges*, 221 and the references indicated there; Shaham, *Woman's Place*; Shahar.

shar'ī judicial system and the exponents of the *sharī'a*.[25] This process seems to be facilitated by official policy of sedentarization vis-à-vis the Bedouin.[26]

The relationship between *sharī'a* and customary law in tribal society is of two kinds. The first entails a situation in which tribal customary law reigns supreme and makes only minor concessions to the *sharī'a*. Typically, under such a system, one notes the practice of "gift" (*'aṭā'*) marriages[27] that do not meet the *shar'ī* requirements for contractual validity (offer and acceptance, etc.), and other residual traces of customary marriage according to which a woman is not a party to the marriage contract, such as the marrying off of a woman who is not a virgin (*thayyib*) by her guardian (*walī*) against her will (*wilāyat ijbār*), contrary to Mālikī doctrine.[28] Customary legal maxims are often couched in rhyming formulae encoding strictures relative to deferred dower payable upon divorce or death of one of the spouses;[29] *khul'* ("divestiture," divorce by agreement, by which the wife redeems herself from the marriage for a consideration), in which a promissory note (*quṣṣa*) to the amount of the dower is drawn up and made payable to the divorcing husband upon the marriage of the divorced wife to another man.[30] Other cases in this category are divorce by means of the archaic *ẓihār* oath, which renders the wife a blood relative within the forbidden degrees for marriage[31] and regulation of homicide and bodily injury by pure customary law.[32]

The second kind prominently displays the impact of the *sharī'a* on custom. The *qāḍī*s here play a decisive role in bringing a Bedouin population within the orbit of the *sharī'a*. Unlike the *muftī*, the *qāḍī* is directly and constantly confronted by the task of coping with the Bedouin; his ability to maintain a tolerant posture *vis-à-vis* custom and compromise with it is crucial in the endeavour to actively promote its absorption into the *sharī'a* via the creation of a favourable climate in which a custom-bound population will spontaneously resort to a *shar'ī* judicial authority. An uncompromising *qāḍī* who enforces

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[25] Cf. Levtzion, *Sharī'a and Custom*, 78.
[26] Albergoni, *Droit coutumier*, 23; idem, *Écrire la coutume*, 25, 42.
[27] For further details, see Layish, *Tajdīda*; cf. Nāṭūr; Lewis, 145–46, 152–54.
[28] See doc. 1, fn. 29.
[29] See docs. 5–6.
[30] See docs. 25–27. Cf. Layish & Shmueli, 37–38.
[31] See doc. 15.
[32] See docs. 55–56; cf. Layish, *Challenges*, 211.

the *sharīʿa* in letter and spirit regardless of the Bedouin's rudimentary exposure to Islam may ultimately turn the Bedouin population away from its jurisdiction. It has been observed in various parts of the Islamic world that nomads accept the *sharʿī qāḍī*s' decisions only insofar as they are compatible with the customary norm.[33]

On the other hand, mere submission to the tribal custom would be tantamount to abuse of the *qāḍī*'s role as an exponent of the *sharīʿa*. Another alternative is to seek a *via media* between the two and meeting custom half way. Naturally, much depends on the education and professional training of the *qāḍī*, his religious and social backgound, and his personal motivation. Unfortunately, no such information regarding Libyan *qāḍī*s is available to me.[34]

Several tendencies can be discerned in the Libyan judicial practice: the *qāḍī*s' reconciliation with custom (as with regard to customary *khulʿ*)[35] and enforcement of the *sharīʿa* while rejecting custom completely (for instance, regarding the legal consequences of divorce).[36] *Dār ʿadl*, a tribal arbitrator who has been incorporated in the *sharīʿa* court to the extent that he is treated by the *qāḍī* as a *sharʿī* notary (*ʿadl*) of the court, is a unique example of the symbiosis of custom and *sharīʿa* to which the *qāḍī* makes a vital contribution. This institution, which provides a mechanism for handling marital disputes, falls within the gray zone between custom and *sharīʿa*.[37]

The *qāḍī* plays an active role in solving disputes brought before the court. Thus he offers his services as an arbitrator in matrimonial disputes with a view to bringing about reconciliation between the spouses and imparts to the reconciliation the validity of a *sharʿī* sentence.[38] The *qāḍī* also sanctions agreements reached out of court on the basis of tribal customary law. Thus in one case, he endorsed a blood money agreement in accordance with "Tibbāwī tribal customary law."[39] In another case relating to customary division of tribal

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[33] For additional details, see Layish, *Divorce*, 185–86; cf. idem, *Challenges*, 218, 221; idem, *Women*, 334; idem, *Sharīʿa and Custom*, 407ff.; al-ʿAbbādī, *al-Qaḍāʾ*, 123–25; Oweidi, 88–89.

[34] See Name Index of Qāḍīs, Nāʾibs and Other Judicial Clerks.

[35] See docs. 24–27.

[36] For further details, see Layish, *Divorce*, 172ff.; cf. Layish & Shmueli, 37ff.

[37] For further details, see Layish, *Dār ʿadl*; doc. 9.

[38] See, e.g., docs. 11, 20.

[39] See doc. 55; For further details, see Layish, *Blood Money*. See also doc. 56 (relating to broken teeth).

land among the clans by means of lottery (*qurʿa*), the *qāḍī* had it registered—more than 30 years after it had been reached out of court—in its original version without any attempt on his part to intervene with respect to its form and substance.[40] Moreover, the *qāḍī* does not hesitate to act as an arbitrator under tribal customary, rather than *sharʿī*, law with a view to reaching settlement (*ṣulḥ*) between the disputed parties and sanctions it as a *sharʿī* sentence (*ḥukm*). Thus in a dispute relating to violation of the sanctity of the home, which is a pure tribal customary institution (*dakhl al-bayt*), the *qāḍī* offered his good offices to the disputing parties in settling the issue under tribal customary law and required the husband to take his oath on a copy of the Qurʾān in order to promote the conciliation.[41]

The *qāḍī*s' tendency to reconcile *sharīʿa* with custom may bring about deviations from orthodox *sharīʿa*, as in the case of a customary *khulʿ* agreement in which it is stipulated that the divorced wife is prohibited from re-marrying until her ex-husband has been compensated by the future husband. The *qāḍī* endorsed the agreement and was instrumental in its implementation even though it entailed an infraction of the *sharīʿa*.[42]

We noted earlier that Islamic legal methodology does not recognize custom (*ʿāda*, *ʿurf*) as a formal source of law. Yet custom has a solid basis in the Mālikī corpus of law due to the fact that Medinese practices (*ʿamal*) were incorporated into that school and granted the status of Prophetic *sunna*. In other words, custom has been absorbed into the oral traditions; consequently its status as an official source of law has ceased to be relevant.[43] This may explain why the Mālikī school applicable in Libya is more inclined than any other school to compromise with custom. The eclecticism of the Mālikī school found, since the fifteenth century, sophisticated expression in the judicial practice (*ʿamal*) of the *sharīʿa* courts in North Africa. This seems to be a single instance of the "realist" form of Islamic jurisprudence intended to bring custom within the orbit of Mālikī law. Its significance from the viewpoint of legal theory is, however, disputed by scholars.[44]

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[40] See doc. 63.
[41] See doc. 60.
[42] See doc. 26; also docs. 23–25. For further details, see Layish, *Divorce*, 186–99; idem, *Khulʿ*.
[43] Libson, *Custom*, 133–37.
[44] Milliot, 156–69, 167–78; Berque, *ʿAmal*; Coulson, *History*, 143ff.; Schacht, *Introduction*, 61–62; Serrano, 206–11.

Ibn ʿĀṣim incorporated in his *al-ʿĀṣimiyya* or *Tuḥfat al-ḥukkām* (see Bibliography) the Andalusian judicial practice. The Libyan documents contain some evidence of the impact of the Mālikī judicial practice on day-to-day reality.[45]

The Libyan documents do not evidence a sophisticated, systematic approach on the part of the *qāḍī*s aimed at absorbing custom in the *sharīʿa* or at accommodating the *sharīʿa* to custom; thus they make no significant use of their discretion to invoke the doctrine of *maṣlaḥa* (public interest), to say nothing of *ijtihād* or even of *ijtihād fī 'l-madhhab*, with a view to bridging the gap between *sharīʿa* and custom.[46] There is no indication in their decisions that they were influenced or inspired by the legal methodology of Muḥammad b. ʿAlī al-Sanūsī (d. 1859). Although al-Sanūsī belonged to the Mālikī school, he felt free to deviate from it with respect to some issues. Moreover, under the influence of Ibn Taymiyya, he did not regard himself as bound by *taqlīd*, adherence to the established body of law, of the Mālikī school, and claimed for himself some freedom to exercise personal *ijtihād*.[47]

There is no significant evidence in our documents of *qāḍī*s' recourse to religious-legal literature.[48] This may imply unwillingness on their part to invoke the *fuqahā'*, who are charged with the task of adapting the *sharīʿa* to changing social conditions by means of expert legal opinions (*fatwā*s). On the other hand, some evidence in Libya suggests that the *qāḍī* is occasionally approached in his capacity not as a judicial authority but rather as a *muftī* competent to issue a legal opinion (*jawāb*) in such matters as divorce, succession,[49] loans (made in foreign currency), and partnership.[50] When acting in his capacity as a *muftī* the *qāḍī* functions by virtue not of his nomination by the ruler but rather of his reputation as an independent *faqīh*.

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[45] See, e.g., doc. 65 (*musāqāt*), doc. 69 (*shahādat al-lafīf*); Layish, *Shahādat naql*.

[46] See Layish, *Divorce*, 204, 206–7.

[47] On the legal methodology of Muḥammad b. ʿAlī al-Sanūsī with special reference to *ijtihād* and *ijtihād fī 'l-madhhab*, see Vikør, *Ijtihād*; idem, *The Shaykh as Mujtahid*; idem, *Sufi and Scholar*, Glossary, s.v. *Ijtihād*. See also Layish, *Divorce*, 204 and the sources indicated there.

[48] See docs. 1, 31, 50; Layish *Divorce*, 145–46.

[49] See Layish & Davis, p. 122 doc. no. 156, p. 123 doc. no. 157.

[50] See docs. 71 and 72.

*Qāḍī*s' decisions in Libya are generally characterized by a formalistic approach.[51] Occasionally, however, while imposing the religious-legal consequences derived from any given act, they may reproach a party to a dispute who has violated a religious-legal norm. Thus in one case, in which a husband divorced his wife by five repudiations at one session, the *qāḍī* ruled that the first three exhausted the husband's *sharʿī* quota and the rest made a mockery of the Qur'ānic verses.[52] This style of the *qāḍī* was meant to heighten awareness of the *sharīʿa* in a custom-bound population applying to the *sharīʿa* court out of practical considerations. Some of the *qāḍī*s regard themselves rather as representatives of the Muslim community at large by virtue of their commission to apply the *sharīʿa*. Their moral integrity and inner conviction of fulfilling a public mission is in the best tradition of the *muḥtasib*, the Islamic inspector of the market, anchored in the religious command: "to promote good and discourage evil" (*al-amr bi'l-maʿrūf wa'l-nahy ʿan al-munkar*). In other words, the *qāḍī* regards himself as responsible for enforcing Islamic morals and behaviour in the Muslim community. Such a function is incumbent on any individual who seeks to gain religious merit by his zeal for the *sharīʿa*, due to the limited role of the public authority in Muslim society.[53]

To sum up, the *qāḍī* plays a decisive role in shaping the consequences of the encounter between the *sharīʿa* and tribal custom and thus contributes subsantially to the Islamization of tribal society.

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[51] Cf. Layish, *Divorce*, 206–7.
[52] See doc. 36.
[53] See Schacht, *Introduction*, 52, 207; Cahen & Talbi, 485ff.

THE DOCUMENTS IN ENGLISH TRANSLATION AND ANNOTATION

SECTION ONE

PERSONAL STATUS AND SUCCESSION

Document 1

Introduction

A man claimed to have asked for a woman's hand in marriage and to have actually contracted marriage with her in consideration of a specified dower and gifts to her parents. He also stated that he had begun to pay for her maintenance and that of her family. While he was in the process of securing the means for defraying the prompt dower, the woman was wedded to another man who consummated the marriage with her.

In the proceedings, the woman's father denied having given his daughter in marriage to the claimant and maintained that a mere verbal exchange, devoid of binding character, had actually transpired between them. The claimant's witnesses testified that the parties had negotiated a genuine marriage contract and a specified dower—comprising a prompt and a deferred dower—the latter being payable partly at some specified date in the course of the marriage and partly on termination of the marriage either through divorce or the husband's death or desertion. When the claimant delayed settlement of the prompt dower, the father gave his daughter in marriage to someone else.

In the event, the Nā'ib ruled, on the basis of Mālikī literature, that only an engagement had taken place and that, in the absence of the woman's consent to the marriage (she was no longer a virgin) or her power of attorney authorizing another person to give her in marriage, the conditions mandatory for the validity of a *sharʿī* marriage contract had not been fulfilled. He therefore instructed the father to return any wedding presents he may have received from the claimant.

The Nā'ib's verdict attests to the prevalence of customary legal practice in matters relating to marriage and dower, and to the Deputy's determination to impose *sharʿī* norms in preference to customary law.[1]

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[1] For a full analysis of this document, see Layish, *Tajdīda*.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[2]

[2] In the reign of his Excellency *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī, Emir of Barqa [Cyrenaica].[3]

[3] DECISION (*ḤUKM*) CONCERNING ʿABDALLĀH AL-BASYŪNĪ'S CASE REGARDING TAJDĪDA DAUGHTER OF ʿABD AL-ḤAMĪD B. MUFTĀḤ AL-WURFALLĪ

Entered in register no. 340, p. 211

[4] In the Sharīʿa Court of Ajdābiya, presided over by Muḥammad al-Mabrūk Abī Jāziya, the Sharʿī Deputy in Charge of the Affairs (*al-mukallaf bi-aʿmāl*) of his Grace the Qāḍī.[4]

ʿAbdallāh b. Mḥammad al-Basyūnī, known [personally to the Nā'ib] by name (*al-maʿrūf al-dhāt*),[5] appeared as plaintiff and stated:

> I asked for the hand in marriage (*khaṭabtu*)[6] of the non-virgin [i.e., previously married in consummated marriage] (*thayyib*), called Tajdīda, daughter of ʿAbd [5] al-Ḥamīd b. Muftāḥ al-Wurfallī from her father. He betrothed (*rakana*)[7] her to me and subsequently gave her to me

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[2] The insertion of an invocation and a prayer for the soul of the Prophet, his family and Companions at the head of a patently secular legal document here is presumably meant to enlist a religious sanction in the administration of justice and to enhance the validity and binding character of the Deputy's legal pronouncements.

[3] The title *sayyid* refers to Muḥammad Idrīs al-Mahdī al-Sanūsī in his capacity as a *sharīf*, that is, a descendant of the Prophet Muḥammad through the line of al-Ḥasan, the eldest of his grandsons (Vikør, *Sufi and Scholar*, 23; Evans-Pritchard, 83, 117). Al-Sanūsī proclaimed himself Emir of Barqa, the region of Eastern Libya (known in the West as Cyrenaica), on May 31, 1949 and established some kind of autonomous government. On December 24, 1951 he was proclaimed king of independent Libya. In 1969 he was deposed through the *coup d'état* headed by Muʿammar Qadhdhāfī (Anderson, *Libya*, xxiii–xxiv, 254–56; Albergoni, *Écrire la coutume*, 25).

[4] The institution of *nā'ib* seems to be a residue from Ottoman rule when Ḥanafī *qāḍī*s were appointed from Istanbul and Mālikī deputies locally. See Layish, *Divorce*, 4–5.

[5] Alternatively, the reference may be to the *sharʿī* procedure of identification by witnesses. (see Glossary, s.v. *taʿrīf*) although no mention is made here of witnesses for the purpose of identification.

[6] Cf. Stewart, *Texts 2*, Glossary, s.v. *xṭb*. It is possible to infer from the rest of the document that ʿAbdallāh genuinely believed Tajdīda to have been given to him in customary gift (*ʿaṭā'*) marriage. It may well be that the term *khaṭabtu* was introduced by the Deputy and not by ʿAbdallāh. See fn. 37 below.

[7] See *murākana*, line 21 and fns. 32 and 37 below. Another possible translation

(*aʿṭāhā lī*)[8] in return for a dower (*ṣadāq*)[9] to the value of 15 pounds, together with a bracelet and clothing intended for her, a suit and a pair of trousers for her father, and a robe for her mother.[10] I accepted (*qabiltu*)[11] [her] from him on this condition, [6] on the first day of the month of Rajab 1370 in the presence of a group of Muslims comprising Shaykh Mḥammad al-Shwēkh al-Barʿaṣī, Mḥammad Aḥmad Jaʿfar, al-Mahdī b. al-Zuwwām al-Wurfallī, Ghayth b. Mḥammad al-Shārif al-Wurfallī, and Aḥmad b. Aḥmad al-Sāḥlī. I began to support (*unfiq*)[12] [7] her and her family[13] from that date, while at the same time endeavouring to secure the prompt (*muʿajjal*) dower in order to transfer it to her father[14] and to consummate the marriage (*adkhul bihā*).[15]

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for *rakana* is: "well disposed [to the marriage of Tajdīda to ʿAbdallāh]. See Qurʾān, 11:113, 17:74. On betrothal, see Colucci, *Tribù*, 26.

[8] The correct identification of *aʿṭāhā* in the court's decision is of crucial importance in the case under review. See fn. 2 to the Arabic text in Layish, *Legal Documents*, 24. Cf. Abū Salīm, *Manshūrāt al-Imām al-Mahdī*, vol. 3, 52 {someome's wife was "given" [in marriage] (*iʿṭāʾ*) to someone else}; Kressel, *Descent*, 91 (*ʿaṭiyya*).

[9] Some Mālikī jurists acknowledge the validity of a marriage contract concluded by means of terms such as *wahaba* and *aʿṭā* (instead of ones derived explicitly from *zawāj* or *nikāḥ*) provided payment of dower has been mentioned (see ʿIllaysh, vol. 1, 420f.; Shalabī, 84). However, within the context of the document under review, the phrasing *wa-aʿṭāhā ʿalā ṣadāq* lends support to the assumption that we are here dealing with customary marriage in which a woman is not a party to the marriage contract. See fn. 28 below; Layish, *Divorce*, 4.

[10] Cf. Peters, *Family*, 130–31 (a couple of weeks after the conclusion of the marriage contract the husband was requested "to take gifts to the mother-in-law in recognition of the fact that she [had] nourished his wife as an infant"), 148 {"right of milk," (*ḥaqq al-ḥalīb*) to the mother-in-law}; Hart, *The Ait ʿAtta*, 91 (presents to the bride's mother under Berber customary law).

[11] For the validity of a *sharʿī* marriage, both offer (*ījāb*) and acceptance (*qabūl*) are required (see fn. 28 below). In the case under review, *ʿaṭāʾ* replaces offer. See Glossary, s.v. *ījāb wa-qabūl*.

[12] The verb signifies provision of maintenance (*nafaqa*) which, under Islamic law, is incumbent on the husband towards his wife, not her family (see Linant de Bellefonds, *Traité*, vol. 2, 256–57, 268–69; Peters, *Marriage*, § 0.1.3.3). It may well be that the verb *unfiq* in the present case does not constitute a technical legal term but relates simply to "expenditure." See lines 18–19 below.

[13] Cf. Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. 118, no. 118 of January 9, 1944 {the husband undertakes to provide maintenance (*nafaqa*) to his mother-in-law}.

[14] Cf. Peters, *Bridewealth*, 146. Under Islamic law, the dower belongs to the wife and not to her father or any other agnate. However, under the Mālikī school, if the bride is a virgin, the dower may also be paid to the coercive guardian. See Linant de Bellefonds, *Traité*, vol. 2, 233; Peters, *Marriage*, § 0.1.3.2.1.

[15] This phrasing reflects the conception, under both Islamic and customary law, that the *raison d'être* of the dower is to ensure legitimate marital relations within wedlock. Under Islamic law, non-payment of the prompt dower, provided the marriage has not been consummated, is a valid ground for disobedience on the part of the wife in the matrimonial dwelling (*maskan sharʿī*) (Peters, *Marriage*, § 0.1.3.3). ʿAbdallāh expected to consummate the marriage and to assume responsibility for maintaining Tajdīda. He seems to have assumed that a marriage had already been concluded

> Such was the situation until a few days ago, when I went down to Benghazi and obtained [8] the clothing stipulated [as a gift] to the woman whose hand I sought in marriage.[16] On my way back, she chanced upon me in the the village of Gmīnis[17] accompanied by another husband (*zawj*).[18] He had married her (*ʿaqada ʿalayhā*) in my absence,[19] promptly consummating the marriage, and had moved away with her. I request the honourable court [9] to examine this matter as required by the noble *sharʿa*, and to determine my rights before the law.[20]

When the father of the woman whose hand had been sought in marriage, the aforementioned ʿAbd al-Ḥamīd al-Muftāḥ, was questioned about the matter, he denied having given his aforementioned daughter in marriage to the plaintiff, and maintained that what had actually transpired between them had been [10] a mere verbal exchange that did not amount to a *sharʿī* marriage contract (*ʿaqd*), and that this had taken place in the presence of Shaykh Mḥammad al-Shwēkh al-Barʿaṣī. Subsequently, the father's testimony was heard:

> If it is proved that I gave my aforementioned daughter in marriage to the plaintiff, I shall not call in question (*fa-lā maqāl lī*) whatever the noble *sharīʿa* prescribes in this matter.[21]

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and that only his delay in paying the prompt dower stood in the way of its consummation. The popular custom of presenting gifts to a woman's relatives, however, is normal practice at betrothals and carries no legal implication of marriage.

[16] Cf. Mohsen, 96.

[17] A small town between Ajdābiya and Benghazi. For details, see De Agostini, *Cirenàica*, 442 (Ghemìnes).

[18] From the plaintiff's point of view, the most natural reading of "*zawj*" is "husband," giving substance to his allegation that he was the first husband. Cf. doc. 40 line 15: "*tazawwajat bi'l-zawj al-akhīr*."

[19] Cf. Obermeyer, 120 (the younger brother who wanted desperately to marry his *bint ʿamm* went away to the Nile valley to earn enough money to pay the high brideprice. In the meantime his cousin paid the elder brother for the permission to marry the girl); Layish, *Mahdī's Methodology and Adaptation*, 231; M. Yazbak, 401.

[20] ʿAbdallāh did not specify his request. There is, however, good reason to assume that he expected the court to annul the marriage with the other man since a woman cannot be married to two husbands simultaneously. This seems to have been his expectation also in the case that a mere betrothal had taken place between him and Tajdīda, since annulment of the *sharʿī* marriage would have enabled him to marry her. The possibility that ʿAbdallāh expected to be compensated for the annulment of his own marriage or breach of betrothal cannot, however, be ruled out (see fn. 33 below). Cf. D'Emilia, 35 (the husband sued his wife and her second husband; he claimed that his wife refused to return to the conjugal dwelling and married another husband while still married to him. The second husband denied the allegation saying that the marriage took place after she had been divorced by her first husband).

[21] Cf. Glossary, s.v. *maqāl*. One wonders whether the contention that no *sharʿī*

[11] The plaintiff was required to produce his witnesses, and he brought forward each of the aforementioned Mḥammad Aḥmad Jaʿfar, Aḥmad b. ʿAlī al-Sāḥlī, al-Mahdī b. Zuwwām, and Ghēth b. Mḥammad al-Shārif, as well as Mḥammad Bū al-Shwēkh al-Barʿaṣī. On being requested to testify, [12] the four of them, that is, Mḥammad Jaʿfar, Ghēth, al-Mahdī, and Aḥmad b. ʿAlī, gave testimony corroborating the plaintiff's claims. [They further testified that] the verbal exchange had involved only the aforementioned father of the woman sought in marriage and the aforementioned ʿAbdallāh. As for the woman herself, she had neither been asked [whether she consented to marry the plaintiff], nor had her father obtained (*lā ḥaṣala*) power of attorney (*tawkīl*)[22] [to give her in marriage].

Mḥammad al-Shwēkh, whom [13] both parties to the dispute mentioned in their statements, and whose testimony they had accepted,[23] testified as follows:

> One day, I was at the home of ʿAbdallāh al-Basyūnī with Mḥammad al-Maṣdūr. ʿAbd al-Ḥamīd al-Wurfallī was also present.[24] ʿAbdallāh mentioned that he [14] wanted ʿAbd al-Ḥamīd to give him in marriage (*an yunkiḥahu*) his daughter Tajdīda, a woman who had been married before. I took it upon myself to help them reach an agreement, and through my mediation it was settled that they would become related by marriage (*yataṣāharā*) on the basis of a dower to the value of 20 pounds; ʿAbdallāh [15] al-Basyūnī was to pay ten pounds of this sum by way of a prompt dower (*muʿajjalāt*), five pounds at the end of the month of Muḥarram 1371H. [1951],[25] and five pounds as deferred

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marriage had taken place was phrased by the Nā'ib, since it is very likely that neither party was fully aware of this aspect during the negotiation concerning Tajdīda's marriage to ʿAbdallāh. Cf. Ibn al-ʿAṭṭār, 528ff. (a woman denied the plaintiff's allegation that he had married her and paid her dower).

[22] See Glossary, s.v. *wakāla.*

[23] It may well be that the procedure of *tazkiya* (see Glossary) is intended here.

[24] Since ʿAbdallāh's four witnesses are not mentioned here, he may be referring to another meeting between ʿAbdallāh and Tajdīda's father. It is not clear from the text whether this meeting took place before the one referred to by ʿAbdallāh in line 4ff. above or subsequently.

[25] The Mālikī school, unlike other Sunnī schools, maintains that the dower is a constituent element (*rukn*) and hence a precondition to the validity of the marriage contract rather than its effect, and therefore a stipulation in the marriage contract that no dower will be paid invalidates the marriage contract {under other schools, the marriage contract remains intact but a proper dower (*mahr al-mithl*) must be paid}. Dower may not be delayed beyond the consummation of the marriage; a stipulation in the marriage contract to the effect that the husband may delay any part of the dower is null and void. However, in actual fact, in regions where the

dower (*mu'ajjalāt*) in the case of shame or absence (*ʿalā ʿayb aw ghayb*).[26] When the father of the woman sought in marriage heard this, he replied: "If he pays me the prompt dower (*muqaddamāt*) of ten pounds [16] forthwith,[27] I will give him my daughter in marriage." This was how things stood when we left ʿAbdallāh's residence. But ʿAbdallāh did not pay the ten pounds, and so failed to conclude a *sharʿī* marriage contract (*ʿaqd*).[28] When the father of the woman sought in marriage had waited a considerable time, [17] and another suitor (*khāṭib*) appeared and asked for her hand in marriage, he gave her to him. This is what I know and I testify thereto.

The witness was asked whether, during that meeting, the aforementioned woman sought in marriage had been asked for her con-

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Mālikī school is prevalent, it is quite common to pay part of the dower at the conclusion of the marriage (*mahr muʿajjal*, prompt dower) and part after a delay, which may even last years in the course of the marriage (*mahr ma'ajjal*, deferred dower); the husband's decease, but not divorce, terminates the period of delay. See Linant de Bellefonds, *Traité*, vol. 2, 202–3, 218–19; Peters, *Marriage*, § 0.1.3.2; Shalabī, 369; Anderson, *Africa*, 369. Cf. Toledano, 115–17; D'Emilia, 36–37, 43–45 (according to judicial practice, however, divorce terminates the period of delay: *al-mu'ajjal yaḥull bi'l-ṭalāq*); Article 46 of the Jordanian Law of Personal Status, 1976 in al-Ẓāhir, 113. E.L. Peters has found that the prompt dower is not transferred until the wife is pregnant, or preferably after childbirth (Peters, *Bridewealth*, 147). Among the Awlād ʿAlī in the Western Desert, payment of dower signifies completion of the marriage contract (Mohsen, 97). Cf. Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. 85, no. 84 (prompt dower was paid to the bride's father prior to consummation).

[26] This is a term from customary law signifying termination of delay of payment of "deferred" dower on dissolution of the marriage either by divorce (on the grounds of the wife's adultery) or the husband's absence through either death or desertion. For further details and analogous expressions in customary law, see Layish, *Divorce*, 49, fn. 25 (the reference to Peters, *Bridewealth*, 145–46). Non-provision of maintenance by an absent husband and fear for the wife's adultery in his absence are common grounds for judicial divorce in Cyrenaica. See Layish, *Divorce*, 86–92. On *ʿayb* (shame, disgrace), see Stewart, *Honor*, 102, 129; Kressel, *Descent*, 198–99 (*ʿayb* in the sense of *ʿirḍ*, sexual misdemeanour).

[27] This statement reflects a customary approach to the institution of marriage, in which a woman in not a party to a marriage contract, and the dower is the property of her guardian, that is, her agnate. See fn. 14 above.

[28] Marriage in Islamic law is a contract concluded by mutual consent of the parties or their representatives in the presence of two witnesses. The dominant view in the Mālikī school, unlike other schools, maintains that witnesses are required not to validate the marriage but for the purpose of its publicity. The marriage is concluded by offer (*ījāb*) and acceptance (*qabūl*) in one session (*majlis*). According to the Mālikī (and Ḥanafī), but not the other two schools, explicit references to marriage, such as derivatives of *zawāj* or *nikāḥ* are not required; expressions signifying transfer of property between persons with some indication of intent to marry, such as the combination of gift (*hiba*) and dower (*ṣadāq*), are sufficient. Linant de Bellefonds, *Traité*, vol. 2, 39, 43ff., 75–76; Peters, *Marriage*, § 0.1.1., 0.1.2.2; Shalabī, 84. Cf. D'Emilia, 23–24.

sent [to the marriage], [18] and whether she had granted her father permission [to marry her off].[29] He was also asked if, while waiting, the plaintiff ʿAbdallāh had supported (*yunfiq*)[30] the woman sought in marriage and her family, as he had claimed. To this he answered [19] that he knew nothing whatsoever concerning the matter of maintenance (*infāq*);[31] and as to requesting the woman's permission he said: "The idea had not even occurred to us at that [20] meeting, and we never considered the possibility."

Hence, given the state of affairs indicated [above] on the basis of the statements made by the plaintiff and the defendant, both of whom accept the testimony [21] of Mḥammad al-Shwēkh, and the fact that his testimony and that of the others do not indicate that a *sharʿī* marriage (*ʿaqd*) had taken place, but indicate rather that what occurred between them was merely a betrothal (*murākana*),[32] [22] contingent on the aforementioned plaintiff suitor paying the prompt dower forthwith, which he did not do;[33] and given, moreover, that

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[29] In Mālikī law, the power of "matrimonial coercion" (*jabr, ijbār*) is vested in a marriage guardian (*walī*)—the father or his appointed executor (*waṣī mukhtār*)—who may validly give away his ward in marriage, compulsorily, at his discretion and regardless of the ward's wishes in the matter. However, while in Ḥanafī doctrine only minor wards are subject to matrimonial coercion, in Mālikī (and other schools) the power of the marriage guardian may be exercised over any woman regardless of her age provided she is a virgin (*bikr*), that is, not previously married, at least as long as she is of child-bearing age although it is recommended that an adult be asked for permission. In other words, even an adult woman has no legal capacity to contract her own marriage; the marriage guardian must conclude the marriage on her behalf. Any marriage contracted otherwise is null and void. If the woman is not a virgin (*thayyib*), her consent to the marriage is indispensable. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 54, lines 360ff.; Coulson, *Succession*, 11–12; Linant de Bellefonds, *Traité*, vol. 2, 48–49, 61, 64ff.; Peters, *Marriage*, § 0.1.2.1; Anderson, *Africa*, 366.

[30] See fn. 12 above and line 19 below.

[31] See fn. 12 above and line 18 above.

[32] This seems to be a common expression for betrothal in North African Arabic. See Wehr, s.v. *murākana*, 359. See also *rakana*, line 7 above. For a strong support for the version of betrothal, see Layish, *Tajdīda*, 497–98.

[33] A *sharʿī* legal right to dower is acquired only through a marriage contract (especially after consummation), not betrothal (Linant de Bellefonds, *Traité*, vol. 2, 35; Peters, *Marriage*, § 0.1.3.2.3), which may imply that the object of the validity was not betrothal but rather the customary gift (*ʿaṭā'*) marriage allegedly contracted by ʿAbdallāh. According to the customs (*ʿawā'id*) of the Awlād ʿAlī in the Western Desert, payment of dower signifies the completion of the marriage contract {Mohsen, 97; al-Jawharī, 200 (*baʿd ḥuṣūl muqaddamāt al-riḍā wa'l-qabūl*, after obtaining the prompt dower on account of consent and acceptance, of the parties and their relatives)}.

However, payment of dower at the stage of betrothal, prior to the conclusion of a marriage contract, seems to be a common practice. Thus, in one case, a man

the woman sought in marriage had previously been married,[34] and that she neither gave her father permission to marry her off [23] to the plaintiff, nor grant him or anyone else power of attorney [to do so] (*wa-lā wakkalathu*),[35] [there was no *sharʿī* marriage]. Since one of the conditions for the validity (*ṣiḥḥa*) of the marriage contract of a woman previously married is that she explicitly (*ṣarāḥatan*) give her consent or power of attorney [quoting:]

> The consent of a woman no longer a virgin is signalled by means of an open declaration (*ifṣāḥ*), while with regard to a virgin, her silence (*ṣamt*) is tantamount to consent to marriage;[36]

but nothing of the kind had transpired. [24] It was therefore legally established before the aforementioned Nā'ib that the aforementioned plaintiff ʿAbdallāh had not concluded a *sharʿī* marriage contract (*ʿaqd*) with the aforementioned woman sought in marriage. [25] For this reason, the Nā'ib decided to reject his claim concerning the woman.[37] He also decreed that the woman's father should return to the plaintiff whatever he had received from him, the amount having yet to be assessed (*taqdīr*), should it be proved that he had indeed received [anything] from him.[38] [26] The Nā'ib clarified all these points to

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who had asked for a woman's hand in marriage, claimed in court that betrothal had taken place "against a dower (*ʿalā ṣadāq*)" which he had already paid to the woman's father, "although no *sharʿī* contract of marriage between us has been concluded." See Davis, *Archive*, Sharīʿa Court of Ajdābiya, 162, no. 283 (January 6, 1953). The terms signifying betrothal (*rakana*, *murākana*) may have been introduced by the Nā'ib anxious to resolve Tajdīda's embarrassing complication. See fn. 6 above and fn. 37 below.

[34] Tajdīda was presumably either a divorcee or a widow.

[35] See Glossary, s.v. *wakāla*.

[36] This quotation is taken from Ibn ʿĀṣim, *al-ʿĀṣimiyya*. See Layish, *Legal Documents*, 25, fn. 13. Cf. Toledano, 81.

[37] However, as indicated earlier, the Nā'ib ruled that a betrothal (*murākana*) had occurred between ʿAbdallāh and Tajdīda (see line 21, above). The Supreme Sharīʿa Court under the Italian administration decided that engagement was tantamount to a promise of marriage, that such a promise was an obligation that could not be effectuated, and that the coercive guardian (*walī mujbir*) could not marry off a woman no longer a virgin against her will. See D'Emilia, 18ff. According to the Mālikī jurist ʿIllaysh, the marriage of a woman who has been betrothed to someone else should be dissolved prior to its consummation; if consummated, the marriage cannot be dissolved (ʿIllaysh, vol. 1, 425. Cf. Peters, *Marriage*, § 0.1.1.2). In the case under review, the marriage had been consummated (see line 8, above). In a similar case, the Sudanese Mahdī ruled that a marriage with a woman betrothed to someone else should be dissolved and the bride's marriage guardian should be flogged and imprisoned (Layish, *Mahdī's Methodology and Adaptation*, 231).

[38] This seems to indicate that a separate civil claim relating to the gifts should

both parties and had the undersigned witnesses testify to this effect and gave instructions that his decision be recorded under the date of the 17th day of Dhū ’l-Qaʿda 1371 [corresponding to] August 19, 1951.

[27] Witnesses to the proceedings (*shuhūd al-ḥāl*)

Court Usher (*mubāshir*)

[29] Imām al-Sharqiyya ʿAbdallāh Mūsā al-Majbarī

[30–31] Mḥammad ʿAbd al-Salām[39]

[28–31] The matter being as indicated above
Muḥammad al-Mabrūk Abī Jāziya
The Deputy in Charge of the Affairs
of his Grace the Sharʿī Qāḍī of Ajdābiya

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be brought to court by ʿAbdallāh. In the case of breach of betrothal, once it is established that the fiancé’s gifts were given to the fiancée in advance as part of the dower, they must be restored to him. If they are not part of the dower, Mālikī law follows the locally prevailing custom (*ʿurf*) which regulates the issue of engagement gifts. In its absence, the fiancée may keep the gifts if the fiancé is guilty for the breach. If, on the other hand, the fiancée is at fault, she must restore the gifts (see Linant de Bellefonds, *Traité*, vol. 2, 34–36). Among the Awlād ʿAlī, if someone breaks off an engagement without sufficient reason, he may be liable to pay a fine (*kabāra*) for insulting the prospective groom and his family, and to return the engagement gifts (see Mohsen, 86–87, 96). Cf. D’Emilia, 18 (the Supreme Sharīʿa Court ruled that the gifts must be returned to the suitor).

[39] Mḥammad ʿAbd al-Salām seems to be acting in two capacities: as a court usher and notary. See Name Index of Qāḍīs, Nā’ibs and Other Judicial Clerks (*ʿudūl*); Tyan, *ʿAdl*, 209–10; Glossary, s.v. *ʿadl*.

Document 2

Introduction

This document relates to a marriage contracted before a *qāḍī* in conformity with *sharʿī* formalities, i.e., entailing a dower, an offer and acceptance, the presence of witnesses, together with a concern to confer on the proceedings a religious character through recitation of the *Fātiḥa* (the opening chapter of the Qur'ān), and other religious embellishments.

Nevertheless, one cannot help noting in the document residual traces of customary marriage, according to which, for instance, a woman is not a party to the marriage contract.

Text

[1] In the name of Allāh, the Merciful, the Compassionate.

[2] Praise be to Allāh, who established marriage (*nikāḥ*) and made plain the laws concerning it, enjoining payment of a dower (*ṣadāq*) without restricting its amount.[1] Peace and blessings to our Lord Muḥammad, [3] Seal of the prophets, and Foremost Emissary [of Allāh].[2]

And now to proceed with the matter at hand.

Aḥmad b. Mḥammad al-Qaṭʿī wedded (*tazawwaja*) a woman, no longer a virgin (*thayyib*), but free from *sharʿī* impediments [to marriage] (*mawāniʿ*)[3] and from marital [4] bonds, called Sālma bint Mḥammad al-ʿAraydī. He [the husband] undertook to pay the dower specified (*sammāhu*)[4] for her, and by its means acquired matrimonial authority over her (*yamliku ʿiṣmatahā*).[5] [The dower comprises] three

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[1] No school of law has ever fixed the upper limit of the amount payable as dower. The Mālikī school stipulates a minimum dower of three dirhams. See Linant de Bellefonds, *Traité*, vol. 2, 207–8; Peters, *Marriage*, § 0.1.3.2.2.

[2] See doc. 1, fn. 2.

[3] On permanent and temporary impediments, see Glossary, s.v. *mawāniʿ sharʿiyya*.

[4] The specified dower (*mahr musammā*) is the amount of dower agreed upon between the parties mentioned in the marriage contract, to be distinguished from the proper dower (*mahr al-mithl*) due to a woman of comparable qualities in terms of descent, as well as physical and moral qualities. See Peters, *Marriage*, § 0.1.3.2.2.

[5] See Glossary, s.v. *ʿiṣma*. It is plausible to interpret this expression as a residual

silver bracelets [5] valued at 4 pounds each, and a cotton dress. The deferred (*mu'ajjal*) dower,[6] still owing [out of the entire dower] amounts to the sum of 8 pounds; this financial liability (*dhimma*) is to be settled [6] by the husband five years hence [i.e., from the present session]. The entire dower and the clothing (*kiswa*) amount to 18 pounds.[7]

[7] The offer and acceptance (*ījāb wa-qabūl*)[8] took place during the session at which the marriage contract (*ʿaqd*) between the wife's proxy (*wakīl*)[9] and the husband was concluded, in the presence and within hearing distance of the undersigned witnesses (*shuhūd*). [8] The *Fātiḥa* from the Qur'ān was read out to confer a blessing (*tabarrukan*) on the proceedings.[10] This transpired on the 18th day of Rajab 1371, [9] corresponding to May 5, 1950.

The bride's proxy Ṣāliḥ Muftāḥ [whose power of attorney is endorsed] by the testimony of:

Khālid Ṣāliḥ

al-Mahdī al-Hamal [al-Hadmī ?]

[10] The husband in person

Witnesses to the marriage contract (*shuhūd al-ʿaqd*)

[11] The signatures of:

ʿUmar al-Zwayyī

ʿAbdallāh Mūsā

Mḥammad ʿAlī al-Ashhab

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trace of pre-Islamic customary marriage, according to which a woman is not a party to a marriage contract. Cf. Linant de Bellefonds, *Traité*, col. 2, 200–1.

[6] On the deferred (*mu'ajjal*) dower, see above, doc. 1, fn. 25; Glossary, s.v. *mahr mu'ajjal*.

[7] On rates of dower, see Peters, *Bridewealth*, 151.

[8] See Glossary; doc. 1, fn. 28.

[9] A woman who is no longer a virgin (*thayyib*), and who lost her virginity in marriage, i.e., a divorcee or widow, does not require a *walī mujbir* (coercive guardian) in order to contract marriage. As we shall see below, in order to neutralize this freedom, it sometimes happens that a woman is constrained to grant power of attorney (see Glossary, s.v. *wakāla*) in her name to an agnate.

[10] The recitation of the *Fātiḥa* is not required for the validity of a marriage contract, since this is a purely civil, consensual contract devoid of any religious significance. This ritual practice, also quite common among the Bedouin, is meant to render a marriage contract or any other agreement binding by enlisting religious sanction. See Linant de Bellefonds, *Traité*, vol. 2, 40; Peters, *Marriage*, § 0.1.2; Layish, *Divorce*, Index, s.v. *al-Fātiḥa*; al-Jawharī, 200 (in accordance with the Awlād ʿAlī's customs in the Western Desert); Obermeyer, 122; Peters, *Bridewealth*, 143; Mohsen, 104; Evans-Pritchard, 6, 68; cf. al-Qusūs, 90–91; Abū Ḥassān, 315; Layish & Shmueli, 41–42; Ginat, 143.

[12] The contents of this document have been endorsed (*maʿrifa*) by the witnesses thereto.
[13] The Qāḍī of Ajdābiya
[14] Muḥammad ʿĀbid [ʿĀyid ?] ʿAbd al-Fattāḥ

Document 3

Introduction

The wife demands that the portion of dower still owing to her be registered in her name so as to prevent her husband from appropriating it. In so doing, the wife shows awareness of her right to the dower under the *sharīʿa*. The Qāḍī, in his turn, helps her attain her rights. The case under review suggests that the *sharīʿa* court is resorted to by women whose position with respect to property rights under tribal customary law is weak compared to that under the *sharīʿa*.[1]

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[2]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him.[3]

[3] REGISTRATION OF THE RESIDUAL DOWER (*ṢADĀQ*) IN THE NAME OF RAJʿA BINT ʿABD AL-QĀDIR AL-ʿARĒBĪ
Entered in register no. 397, p. 468.

[4] In the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him!

[5] Rajʿa bint ʿAbd al-Qādir b. Ṣāliḥ from the Khanāfsa [lineage (*ʿā'ila*)] of the ʿArēbāt[4] appeared in court and after her identification (*maʿrifa*),[5] in conformity with *sharʿī* procedure, by her husband Ḥamad b. Ḥamad [6] al-Ṣubḥī and by her paternal cousin ʿAbd al-Ghanī b. Ibrāhīm, stated in the presence of both of them that she owned

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[1] See Layish, *Legal Documents*, 3; Davis, *Libyan Politics*, 223.
[2] See doc. 1, fn. 2.
[3] See doc. 1, fn. 3.
[4] A group within the Maghārba tribe. See De Agostini, *Cirenáica*, 327–28.
[5] See Glossary, s.v. *taʿrīf*.

ten fat goats and three young bulls[6] together with the offspring of the aforementioned goats [7] to be expected in the course of the present year; [she also said that] they bore the distinctive tribal brand (*wasm*)[7] and that they had passed into her possession by way of residual dower (*ṣadāq*) from her husband Ḥamad here present at this court session (*majlis*). She requests [8] the noble Sharīʿa Court to register them [in her name] and to prevent her husband from taking illegal possession (*iʿtidāʿ*) of them at some future time.[8] After her husband confirmed what she had said [concerning her ownership of the livestock], he pledged [9] not to infringe on her aforementioned right without her freely given consent.[9]

In accordance with the agreement reached between the parties, while they were both in a state of legal competence (*ḥāla jā'iza*) in *sharʿī* terms [10] as duly certified (*thubūt*) by the aforementioned judge (*ḥākim*), the latter endorsed (*ajāza*) the registration of the residual dower belonging to the aforementioned Rajʿa, appended his signature thereto, had the undersigned persons testify to this effect, [11] and authorized its registration [in the *sijill*]. The authorization was entered on the 3rd day of Shaʿbān 1373, corresponding to April 6, 1954.

The signatures are in the deposition (*ḍabṭ*).

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[6] Dozy, vol. 2, 98: *ʿajamiyy*, pl. *ʿajāmah* "taureau, jeune taureau d'environ deux (ou trois) veau."

[7] The *wasm* is meant to prove ownership rights over livestock in case of theft, loss, or sale to a third party (Colucci, *Tribù*, 27). Cf. Peters, *Bridewealth*, 147; Kennett, 80.

[8] Islamic law does not recognize the notion of community property between spouses; there is a complete separation of property between them. The wife is entitled to the dower from the very moment that the marriage contract is concluded. She is entitled to dispose of the dower and of her portion in the estate with complete freedom without requiring her husband's permission or that of any of her agnates. However, under the Mālikī doctrine, if the bride is a virgin, the dower may also be paid to the coercive guardian. See Linant de Bellefonds, *Traité*, vol. 2, 232–33, and 236–37; Peters, *Marriage*, § 0.1.3.2.1.

[9] Cf. Davis, *Archive*, Sharīʿa Court of Adābiya, p. 140, no. 249 of October 28, 1952 {the husband undertakes to repay his debt (*dayn*)—five ewes—to his wife when he is better off}; Peters, *Bridewealth*, 141 (the wife branded her flock with her brother's tribal mark to distinguish them from those of her husband).

[12] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[13] ʿImrān ʿĪsā
al-Lāfī Muftāḥ
Mḥammad ʿAbd al-Salām[10]

The matter being as indicated above
The Qāḍī of Aǰdābiya
[14] Ḥusayn Muḥammad al-Aḥlāfī

[10] The first and the last witnesses seem to be professional witnesses or notaries. See Glossary, s.v. *ʿudūl*.

Document 4

Introduction

In the Western Desert, the patrimony remains undivided even after the family head dies. Land tenure rights are held jointly by his surviving sons who keep the estate intact and work it as a unit. Any debt incurred, including the dower of any son of the deceased, has to be defrayed out of the estate.[1] The co-operative farm usually breaks up after the sons marry; each establishing a unit of his own. As a result, there usually ensues some division of property and labor among surviving sons.[2] Once the estate is divided between them, the family collective is not liable anymore for personal debts; each son must settle his own debts, including the dower for his marriage.[3]

In the case under review, two brothers cultivating jointly owned land settle a dispute relating to debts incumbent on them. They reach an agreement to the effect that the sums required for their respective marriage dowers should not be drawn on the family property, but are to be procured privately and independently by each of them.

The position taken here reflects structural changes relating to family and estate among Bedouin in the process of sedentarization.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[4]

[2] In the reign of King Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him! Amen.[5]

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[1] Obermeyer, 59, 63, 119; Colucci, *Tribù*, 27; cf. docs. 46 and 52 below.

[2] Peters, *Bridewealth*, 154; Obermeyer, 61, 198; cf. Rosenfeld, *Change*.

[3] Among the Awlād ʿAlī, when a creditor claims payment from a debtor, and the latter refuses, and his relatives cannot make him settle the debt, then the creditor is free to plunder anything that the debtor may possess. Murray, 328.

[4] See doc. 1, fn. 2.

[5] See doc. 1, fn. 3.

[3] ATTESTATION OF THE CONVEYANCE OF EVIDENCE (*SHAHĀDAT NAQL*)[6] ON BEHALF OF ʿABDALLĀH B. SAʿD [SAʿĪD] B. RWĒS
Entered in register no. 162/6, p. 101

[4] In the Sharīʿa Court of Ajdābiya presided over by the Qāḍī Shaykh Muḥammad al-Sanūsī al-Ghazzālī al-Khaṭṭābī on the date [indicated below]. May Allāh the Exalted prosper him! Amen.

[5] ʿAbdallāh b. Saʿīd b. ʿAlī b. Rwēs, aged 35, from the lineage (*ʿā'ila*) of Ibn al-Rwēs of the Gabāyil tribe (*qabīla*),[7] born and resident in Ajdābiya [6] made the following statement:

> My brother ʿAbd al-Qādir and I own [in common] livestock and other movable property (*manqūlāt*). We have today dissociated ourselves from each other [with respect to the common property] (*tafāṣalnā*)[8] before the witnesses (*shuhūd*) present: Shaykh Saʿīd Shalabī, [7] our paternal uncle Shaykh Ḥamad Ḥamad b. al-Rwēs, and Shaykh Mḥammad Yūnus Imshād. I call upon the honourable Sharīʿa Court to register their testimony.

The aforementioned Shaykh Saʿīd, [8] Shaykh Ḥamad, and Shaykh Mḥammad, known (*maʿrūfīn*)[9] by person and name, stated:

> A misunderstanding arose between the brothers ʿAbd al-Qādir and ʿAbdallāh, [9] the sons of Saʿīd Ibn al-Rwēs. [We, i.e., the witnesses] appeared today in court together with them [i.e., the brothers] so that they might reach a mutual settlement (*taḥāsabā*) before us, and it was established that the aforementioned ʿAbdallāh owns a she-camel and half [the quantity of] seeds (*zarʿ*)[10] [bought for the cultivation of a field] which they sowed[11] jointly this year. [10] In view of the fact that ʿAbdallāh spent nothing on the purchase of the seeds whereas his brother ʿAbd al-Qādir bought them [with his own money], it was established that ʿAbdallāh should pay the sum of 15 pounds [11] to his brother ʿAbd al-Qādir at the end of the harvest period this year.[12]

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[6] This term designates written testimony registered in court (see line 7 below) for practical purposes that may arise in future. See Glossary, *shahādat naql*. For a full discussion of this procedure, see Layish, *Shahādat Naql*. The Bedouin resort to written evidence for reasons of legal security. Cf. Preface to this volume, x; Layish, *Legal Documents*, 2–3.

[7] See De Agostini, *Cirenáica*, 405f. (el-Gabàil); Davis, *Libyan Politics*, 97.

[8] Cf. Lane, 2406ii.

[9] On the *sharʿī* procedure of identification, see Glossary, s.v. *taʿrīf*.

[10] This translation gains support from line 10 below and from the term *manqūlāt* (movable property) mentioned in line 6 above.

[11] For *ḥaratha* in the sense of *zaraʿa*, see Qur'ān, 56:63–64.

[12] It appears that the two brothers cultivated the land in their joint ownership

> Further to what has been stated, there remained no other [claims] between the brothers except for debts (*duyūn*) incumbent on both of them.[13] [12] The aforementioned ʿAbd al-Qādir had borne the responsibility for all their outstanding debts, except for that relating to the dower (*ṣadāq*), [concerning which an agreement had already been reached to the effect that]: Each of them would pay his own dower [13] for his respective wife.[14] We have borne witness to this effect; let Allāh be [our] pledge [lit. agent] (*wakīl*) to our words.[15]

All this transpired in the presence of the witnesses (*shuhūd*) whose names are appended below.

On the basis of what has been established through the testimony of the aforementioned witnesses [14] while they were in a state of legal competence (*ḥāla jā'iza*) in *sharʿī* terms, as duly certified (*thubūt*) before the aforementioned judge, the latter endorsed (*ajāza*) this testimony given on their responsibility [i.e., of both witnesses]; and [15] had the undersigned witnesses testify to this effect and registered their testimony. It was entered on the 13th day of Jumādā 'l-Ūlā 1372, corresponding to January 29, 1952.

[16] Witness's signature

Witnesses to the proceedings (*shuhūd al-ḥāl*)
[17] Shaykh Saʿīd al-Shalabī
Mḥammad Yūnus Imshād
Ḥamad ʿAlī b. Rwēs

[18] The matter being as indicated above
The Qāḍī of Ajdābiya
[19] Muḥammad al-Sanūsī al-Ghazzālī [al-Khaṭṭābī]

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with the understanding that they would share the expenses involved (in the purchase of seeds and renting of equipment required for cultivation) on an equal basis.

[13] Such as for the equipment rented for cultivation.

[14] In other words, the dower is not to be paid out of the jointly owned family estate, and is not incumbent on this property, but rather the private matter of each of the brothers. It is plausible to interpret this as a shift away from a jointly owned co-operative farm to a privately owned one in the context of the family's disintegration following the death of its head. See Introduction.

[15] This religious formula also shows up in sentences pronounced by arbitrators in the Judean Desert, and it can be interpreted as an attempt at extending the *sharīʿa*'s domain. Cf. Layish & Shmueli, 41.

Document 5

Introduction

This is a marriage permit issued by a *qāḍī*. Its main interest resides in the latter's enlistment of the Qurʾān and the Prophetic *sunna* for the purpose of enhancing the solemnity of the marriage bond. It therefore attests to the power exercized by the *sharīʿa* over the legality of marriage in Libyan society.

On the other hand, alongside implementation of the *sharʿī* conditions required for the validity of the marriage bond, e.g., the offer and acceptance, the presence of witnesses, etc., one also notes a certain tolerance towards practices associated with customary law, such as the deferred dower—here typically couched in rhyme, like a legal maxim[1]—which has no basis in the *sharīʿa*.

Text

[1] In the Sharīʿa Court of the town of Ajdābiya, presided over by the Qāḍī Shaykh Aḥmad Muḥammad al-Zintānī. May Allāh grant him success! Amen.

[2] On the basis of information (*ʿilm, khabar*)[2] presented to this court to the effect that 20-year-old Rajʿa bint ʿAbd al-Ḥafīẓ from Misurata, daughter of [3] Shwēkha bint Slēmān[3] belonging to the

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[1] On the function of legal maxims in Islamic law, see Schacht, *Introduction*, 39.

[2] Cf. Davis, *Archive*, Sharīʿa Court of Kufra, no. 29 of April 3, 1939 (*iʿṭā' ʿilm wa-khabar*); no. 42 of May 13, 1939 (*ʿilm wa-khabar*). Not to be mixed with "judicial knowledge" (*ʿilm qaḍā'ī*). See Glossary, s.v. *ʿilm*.

[3] Inclusion of the names of the parties' mothers and the names of their lineages and tribes is quite common in the North African Bedouin society. One technical explanation is that the inclusion of these names is intended to ensure correct identification of the parties in marriages to different women, such as in polygamous marriages; cf. Mohsen (19) who quotes Peters, *Proliferation* (the reference to female ancestors is explained in terms of patrilineal descent and polygamy); Davis, *Archive*, Sharīʿa Court of Kufra, p. 37 no. 70 of April 20, 1960. The inclusion of cognates may also attest to their social standing in Bedouin society in North Africa; see Obermeyer, 124ff. ("A man will add the name of his mother's tribe to identify himelf with the tribe and to symbolize tribal links, as an appendage to his own full name"). In one case, the court ruled that the father should deliver his divorced daughter's dower to her mother, and that upon her remarriage the dower should be divided equally between the mother and the father (Sharīʿa Court of Kufra, no. 25 of July 4, 1933). Concerning *khāl*, maternal uncle, see Layish, *Divorce*, 64; Peters, *Family*, 134–35, 137 (the mother's brother's daughter "is sweeter than milk"); Sharīʿa

[4] al-Ṭyūr lineage (*ʿā'ila*) of the Tarhūna tribe (*qabīla*), and residing on the outskirts of Bishr, is free from *sharʿī* impediments [to marriage][4] as well as from marital ties, and that her hand was requested [5] by 30-year-old Sālim b. Abī al-Qāsim born in Ajdābiya to Sharīfa bint ʿImrān,[5] [6] and belonging to the al-Gayṣa lineage of the Jawāzī tribe. [Sālim is] a resident of Bishr and a farmer by profession. *Sharʿī* permission was granted [7] by his Honour, the aforementioned Qāḍī, to the aforementioned Rajʿa and Sālim to enter into a marriage contract (*ʿaqd nikāḥ*), and by virtue of this permit, [8] the marriage between them was concluded against payment of a dower (*ṣadāq*) consisting of a she-camel whose first tooth has just appeared,[6] six fat sheep, [9] a silver bracelet weighing 16 *ūqiyya*s, a silver earring weighing 14 *ūqiyya*s, [10] and a dress [to be delivered, regardless of the stipulations below concerning the division of the dower], in the event of grave mishaps to her household or her person (*wa-baytuhā wa-mā lamma wa-raʾsuhā wa-mā ḍamma*), that is to say, if aversion (*zuhād*) on the part of the husband [towards his wife] were to become evident [and hence induce the husband to divorce his wife],[7] or in the event of his death.[8] The prompt [dower] (*muʿajjal*) [11] out of all these items, includes the she-camel, the six sheep, the ring, and the bracelet. The deferred [dower] (*muʾajjal*) includes the dress to be given her at her husband's convenience (*ʿalā 'l-maysara*).[9] This is a valid contract

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Court of Ajdābiya, p. 166 no. [289] of January 29, 1953, and p. 192 no. 327 of March 24, 1953 (the wife left the conjugal dwelling due to non-payment of dower and went to her *khāl*'s home, and to her mother's home, respectively); Obermeyer, 126ff. (the role of the mother's brother, *khāl*, becomes a significant symbol for the maintenance of the external kinship ties); cf. Oweidi, 107–8; Kressel, *Descent*, 94 n. 4 {"the maternal kin (*ikhwān*) are affectionate"}.

[4] See Glossary, s.v. *mawāniʿ sharʿiyya*.

[5] See fn. 3 above.

[6] This happens at the age of six. Personal communication to Muḥammad Ṭāṭūr from Shaykh Mūsā al-Aʿsam in the Negev, March 3, 1999.

[7] *Zāhida* has become a customary technical term for divorce in the Libyan *sijill*. See Layish, *Divorce*, 9–10, 21; Glossary, s.v. *zuhād*. Cf. "the averse woman" (*al-marʾa al-kāriha*) in context of *khulʿ* divorce in the Mahdist state (Abū Salīm, *Manshūrāt al-mahdiyya*, 209, 307).

[8] See Glossary, s.v. *bayt*.

[9] That is, when he has the means (but in any case not later than a divorce or the husband's eventual death, as stipulated in line 10 above). According to the Mālikī school, a stipulation to the effect that payment of the deferred dower is to be delayed indefinitely until some unspecified time in the course of the marriage—as in the present document—is null and void, and the entire amount of the dower is accounted as prompt dower payable immediately. See Peters, *Marriage*, § 0.1.3.2.3. For further details, see doc. 1, fns. 25–26 above. The case under review reflects

(*ʿaqd ṣaḥīḥ*) [12] and a *sharʿī* marriage according to the Book of Allāh [the Qurʾān] and His Messenger's *sunna* (*ʿalā kitāb allāh wa-sunnat rasūlihi*),[10] entailing the *sharʿī* offer and acceptance (*īǰāb wa-qabūl*)[11] between the wife's proxy (*wakīl*)[12] [13]—one of her relatives—and the husband's proxy, in the presence of witnesses of good reputation (*shuhūd ʿudūl*) and with the agreement of the parties.

Registered and ratified [14] on the 23rd day of Shaʿbān 1362 in the Hijrī calendar, corresponding to August 24, 1943 in the Christian calendar.

[15] Wife's proxy: one of her relatives: ʿAgīla b. Khalī
Husband's proxy: ʿAbd al-Raḥmān b. Abī al-Gāsim
[16] Testimony (*shahāda*) of:
Shaykh ʿUmar b. ʿAbd al-Jalīl and al-Sharīf b. Saʿd al-Bīsāg

[17] Witnesses to the marriage contract (*shuhūd al-ʿaqd*):
[18] Shaykh Faraj Ḥbyl
Ṣāliḥ b. Yūsuf
Shaykh Mḥammad Mūsā
and Abī Sīg [?] Taysig [Taysīr ?], Administrator of Ajdābiya

[19] The Clerk (*kātib*)
Muḥammad Ibn al-Ḥājj Aḥmad al-Dārisī

The matter being as indicated above
The Qāḍī of Ajdābiya
[20] Aḥmad Muḥammad al-Zintānī[13]

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the influence of local custom. Cf. Glossary, s.v. *maysara; ʿalā 'l-maysara li-ʿādat ahl al-balad* in Sharīʿa Court of Ajdābiya, decision of January 22, 1944.

[10] The Qurʾān and the Prophetic *sunna* resorted to here to lend a religious aura to the proceedings are not required for the validity of the marriage. Cf. Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. 76 no. 76 of August 24, 1943). This practice has been also noted among the Bedouin of the Judaean desert, in the Negev, and elsewhere. See Layish & Shmueli, 32–33 and the sources cited there in the footnotes; Abū Ḥassān, 315.

[11] See Glossary, s.v. *īǰāb wa-qabūl.*

[12] See Glossary, s.v. *wakāla.*

[13] The document displays the stamp and signature of the Assistant to the Officer for Civil Affairs of the British Military Administration in Ajdābiya; these are apparently needed to provide legal ratification of the document. See Layish, *Divorce*, 4ff.

Document 6

Introduction

In this document, the *sharʿī* clerk of the court, deputizing for the Qāḍī grants a marriage permit and, while following to the letter the niceties of religious law, brings to bear the sanction of the Qurʾān and the Prophetic *sunna* in order to lend a sacred character to the marriage bond. He displays a certain flexibility with respect to the deferred dower—here couched in the form of a rhymed legal maxim[1]—though it is anchored explicitly in tribal customary law.

Text

[1] In the Sharīʿa court of Ajdābiya, presided over by the *sharʿī* clerk (*kātib*) of the court, Muḥammad al-Ḥājj Aḥmad al-Dārisī, acting on the authorization (*muwakkal*)[2] of his Honour the Qāḍī [2] Shaykh Aḥmad Muḥammad al-Zintānī. May Allāh grant him success! Amen.

On the basis of information (*ʿilm, khabar*)[3] presented to this court by the *imām* [3] and the two *mukhtār*s of this locality, to the effect that the virgin (*bikr*) called Fāṭma bint [4] Mḥammad, daughter of Rābḥa bint Yūsuf,[4] born in Ajdābiya and [now] 18 years old, [5] belonging to the al-Gadgād lineage of the Gbāylī tribe,[5] and resident of Ajdābiya, [is] free from *sharʿī* marriage impediments[6] [6] as well as from marriage ties, and has been requested in marriage by ʿAbd al-Wahhāb [7] b. Saʿd, son of Khadīja bint Mḥammad,[7] born in Ajdābiya and [now] 20 years old, [8] from the al-Gadgād lineage of the Gbāylī tribe. [ʿAbd al-Wahhāb] is a resident of Ajdābiya, and a farmer by profession. [9] A *sharʿī* permission (*idhn*) has been granted by the aforementioned *sharʿī* clerk of the court for the conclusion of a marriage contract (*ʿaqd nikāḥ*) between [10] the aforementioned ʿAbd al-Wahhāb and Fāṭma and, by virtue of this contract, the mar-

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[1] See doc. 5, fn. 1.
[2] See Glossary, s.v. *wakāla.*
[3] See doc. 5, fn. 2; Glossary, s.v. *ʿilm.*
[4] See doc. 5, fn. 3 above.
[5] See De Agostini, *Cirenáica*, 405–6 (el-Gadgàd, el-Gabàil).
[6] See Glossary, s.v. *mawāniʿ sharʿiyya.*
[7] See doc. 5, fn. 3 above.

riage between them was concluded on payment of a dower (*ṣadāq*) [11] consisting of 10 *ḥawāʾij*,[8] each valued at 1000 francs, that is, two Egyptian pounds, [12] a silver bracelet weighing 14 *ūqiyya*s, an outfit consisting of a silk robe [13] and a blouse, silver rods weighing 5 *ūqiyya*s, a dress, and bedclothes. [14] The prompt [*muʿajjal*] [dower] out of this entire amount comprises six *ḥawāʾij*, a silver bracelet, the aforementioned outfit, and the [15] silver rods, while the deferred (*muʾajjal*) [dower][9] comprises [the following] two *ḥawāʾij*, [given] in the event of absence or shame (*ʿalā ghayb aw ʿayb*)[10] as is their custom (*ʿādatahum*);[11] two *ḥawāʾij* [16] payable at the rate of one a year, and the dress and bedclothes, transferable at the husband's convenience (*ʿalā ʾl-maysara*)[12] or in the event of grave mishaps to her household or her person (*wa-baytuhā* [17] *wa-mā lamma wa-raʾsuhā wa-mā ḍamma*).[13] The total value of the dower is 30 Egyptian pounds.

[18] [The contract has been] concluded by way of valid (*ṣaḥīḥ*) contract (*ʿaqd*) and *sharʿī* marriage on the Book of Allāh [the Qurʾān] and the *sunna* of His Messenger[14] by means of a *sharʿī* offer and acceptance[15] [19] between the wife's proxy (*wakīl*)[16] and that of her husband, in the presence of witnesses of good character (*ʿudūl*),[17] and

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[8] See Glossary, s.v. *ḥāja.*

[9] See Glossary, s.v. *ṣadāq muʾajjal; ṣadāq muʿajjal.*

[10] For an explanation of this customary phrase see doc. 1, fn. 26 above; Glossary, s.v. *ʿayb* and *ghayb*.

[11] This is a very clear indication that we are here dealing with a tribal customary norm. Cf. doc. 5, fn. 9; Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. 6 no. 6 of May 28, 1942; p. 22, no. 22 of September 2, 1942 {part of the deferred dower is due "in accordance with the custom of the inhabitants of the village" (*li-ʿādat ahl al-balad*)}; p. 111, no. 111 of December 10, 1943; p. 135 no. 135 of February 27, 1944 {part of the deferred dower is due "in the event of death or abandonment [i.e., absence of the husband] as is their custom" (*ʿalā mawt aw fawt ka-ʿādatihim*)}.

[12] Cf. doc. 5, fn. 9; Glossary, s.v. *maysara.*

[13] Cf. doc. 5, line 10, fn. 7; Glossary, s.v. *bayt.* In other words, part of the deferred dower is paid in the event of divorce on grounds of the husband's absence or the wife's adultery, part is paid on specified dates, and part at the husband's convenience in the course of the marriage. The entire amount of the deferred dower is due, however, immediately in the eventuality of divorce or death, regardless of the aforementioned stipulations.

[14] This is a clear instance of the imposition of Islamic religious norms; for further details, see doc. 5, line 12, fn. 10.

[15] See Glossary, s.v. *ījāb wa-qabūl.*

[16] The wife, who has attained the age of puberty, is represented by her brother as a proxy (see line 21 below) rather than by her marriage guardian (*walī*).

[17] *ʿUdūl* may well be professional witnesses or notaries (see Glossary). It is interesting to note that one of the witnesses is a *faqīh.*

with the consent [20] of both parties. Entered and endorsed on November 16, 1943 corresponding to the 18th day of Dhū 'l-Qa'da, 1362.

[21] The wife's proxy: her brother 'Izz al-Dīn b. Mḥammad al-Gbāylī

The husband's proxy: 'Umar b. Shgēb

[22] The testimonies of Sālim al-Gbāylī and Muftāḥ Mḥammad

[23] Witnesses to the marriage contract (*shuhūd al-'aqd*):

[24] Mḥammad Bey Abū Hadma

and the *faqīh* al-Sanūsī al-Tītlī

The *shar'ī* clerk of the court (*kātib*)

[25] Muḥammad al-Ḥājj Aḥmad al-Dārisī

authorized by his Honour the Qāḍī

[Shaykh Aḥmad Muḥammad al-Zintānī]

[26] The matter being as indicated above

The Qāḍī of Ajdābiya

[27] Rāfi' 'Abd al-Raḥmān al-Qāḍī[18]

[18] Lines 26–27 seem to have been added at a later stage, probably by mistake. The Qāḍī mentioned in line 27 did not preside over the session of the case under review (see facsimile). The document displays the stamp of the Assistant to the Civil Affairs Officer of the British Military Administration in Ajdābiya. For further details, see doc. 5, fn. 13.

Document 7

Introduction

A married woman, deeply hurt by her husband's second marriage, demands that he exercise justice and impartiality in his personal relationships with both wives or, alternatively, that he grant her divorce by *khulʿ* in return for the renunciation of her financial rights and of her son's maintenance. The couple are reconciled after the husband undertakes to be more equitable in his dealings with both spouses, and the wife, for her part, promises to obey her husband in the conjugal dwelling.

The Qāḍī formulates the wife's demand in Qurʾānic terms, and confers *sharʿī* validity on the conciliation agreement, while binding the parties to observe it.

This is another instance of women whose position in tribal society is weak and hence prefer to resort to the *sharīʿa* court with the expectation of securing rights under the *sharīʿa*.[1] In the case under review, the woman appeared in court alone without an agnate or authorized representative (*wakīl*).

The rate of polygamous marriages in Ajdābiya in 1966 was 7 percent. In a few cases men were married to three or four wives simultaneously.[2]

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[3]

[2] In the reign of His Highness King Idrīs I, Sovereign of the United Kingdom of Libya.[4]

[3] SENTENCE (*ḤUKM*) RELATING TO THE CONCILIATION (*MUṢĀLAḤA*) BETWEEN MḤAMMAD SĀLIM AND HIS WIFE KĀMLA KHALĪFA

Entered in register no. 67, p. 42

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[1] Cf. Layish, *Legal Documents*, 3; Davis, *Libyan Politics*, 223.
[2] Ibn Mūsā, 169; cf. al-Zuwayyī, *al-Bādiya*, 243; Davis, *Marriage*, *passim*.
[3] See doc. 1, fn. 2.
[4] See doc. 1, fn. 3.

[4] In the Sharīʿa Court of Ajdābiya, presided over by his Honour the Qāḍī, Shaykh Muḥammad al-Sanūsī al-Ghazzālī al-Khaṭṭābī. May Allāh grant him success!

[5] The married couple, Kāmla bint Khalīfa b. Mḥammad from the Bū Salāma lineage (*ʿā'ila*) of the Gharyān tribe (*qabīla*), born in the town of Gharyān,[5] and her husband Mḥammad Sālim [6] b. Gharbī, aged 28, from the Bū Thwēba lineage of the Saʿēṭ[6] tribe on the outskirts of al-Abyār, and now residing [7] with his wife in Ajdābiya. On their appearance [in court], the wife made the following statement in her husband's presence:

> [8] This [man], my husband Mḥammad Sālim, recently wedded (*tazawwaja*) another woman, and I began to feel uncomfortable [living] with the other wife (*ḍarra*) and with [9] the rest of his relatives. Indeed I can no longer disguise my uneasiness. I therefore demand that [my husband] either release me by *khulʿ* (*yakhlaʿunī*)[7] from him in return for my renunciation of all my [financial] rights and of maintenance for his 7 month-old son, our baby, ʿAbd Rabbihi, [10] or undertake to attend to my welfare and act justly and equitably (*yaʿdil*)[8] [in his dealings] with me and with his new wife.

When the husband was questioned, he replied: [11] "This [woman], my wife Kāmla [present here] always leaves [the conjugal dwelling] without my instruction [that is, permission]." After a discussion, the aforementioned husband Mḥammad Sālim undertook [12] to show the aforementioned Kāmla greater consideration, and to exercise justice and impartiality (*yaʿdil*) in his dealings with the two wives, the

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[5] Cf. Evans-Pritchard, 147, 153.

[6] See De Agostini, *Cirenáica*, 385ff.

[7] On *khulʿ* divorce, see docs. 22–27 below.

[8] The verb *ʿadala* in the meaning of equal and just treatment of the wives in a polygamous marriage, that is, in matters relating to maintenance, including separate conjugal dwelling for each wife, and the apportionment (*qasm*) of the husband's time among the wives, occurs in the Qur'ān (4:3, 129). See al-Ṣāwī, vol. 1, 405f.; Shalabī, 235ff.; Linant de Bellefonds, *Traité*, vol. 2, 284–86; Peters, *Marriage*, § 0.1.3.3 and 0.1.3.4; Glossary, s.v. *ʿadl*. It is doubtful that the illiterate wife (her fingerprint appears in line 17) used derivatives of *ʿadala*. It seems rather that the Qāḍī phrased her contentions in Qur'ānic terms. Obermeyer (108–9), in contrast, maintains that "The Bedouins [in the Western Desert] are conscientious in practicing justice and impartiality on the basis of the Qur'ānic provisions . . . [and that] Conflict between co-wives is lessened by the fact that a man will have separate tents, or rooms in case of a house, for each wife."

first and the new one. [The wife, for her part] undertook [13] to obey (*ṭāʿa*) her husband as she is required to do, and to avoid leaving [the conjugal dwelling] except when he instructs [that is, permits] her to do so.[9] On the basis of this [understanding], the couple, being satisfied and at ease, were conciliated (*iṣṭalaḥa*) and gladly and contentedly undertook to maintain a congenial relationship in their marital life. [14] This transpired in the presence of the undersigned witnesses.[10]

On the basis [of the agreement] reached by the couple [15] while both were in a state of legal competence (*ḥāla jāʾiza*) in *sharʿī* terms, as duly certified (*thubūt*) by the aforementioned Qāḍī, the latter endorsed (*ajāza*) this conciliation (*muṣālaḥa*) and obligated the parties to carry out what they had pledged themselves to do [16] therein. He explained to both of them the implications of their [commitments] during the court session, and instructed that [the conciliation] be registered.[11] It was entered on the 15th day of Dhū ʾl-Qaʿda 1371, corresponding to August 6, 1952.

[17] The wife's fingerprint (*baṣma*) and the husband's signature.

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[9] See Glossary, s.v. *ṭāʿa*. Under tribal customary law, if the woman receives contradictory orders from husband and guardian, she usually obeys the guardian (see Stewart, *ʿUrf*, 890).

[10] The Libyan *sijill* contains many instances of reconciliation between the spouses after the husband undertakes "to act impartially towards her and the other wife [i.e., not to discriminate between them] as is required under the *sharīʿa*," (*an yaʿdila baynahā wa-bayna ḍarratihā kamā huwa al-maṭlūb sharʿan*). See Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. 328 no. 558 of June 2, 1954; p. 29 no. 56 of September 18, 1951; p. 312 no. 526 of April 9, 1954; p. 316 no. 534 of April 19, 1954. Among the Awlād ʿAlī in the Western Desert, the older wife may object to a particular choice of her husband on the grounds that the potential wife is hard to get along with or that there is animosity between the wife's family and that of her future *ḍarra*. Inequality between co-wives may result in divorce (see Mohsen, 85–86, 119, 113–14). Colucci has found that polygamy causes the disintegration of the family and of the agnatic groups (see Colucci, *Tribū*, 27). Cf. Marx, 139–40; Kennett, 102–4.

[11] The fact that the spouses were conciliated in court (rather than out of court) may indicate that the Qāḍī was instrumental in this process. In any case, once conciliation has been reached the Qāḍī confers on it *sharʿī* validity. On the Libyan *qāḍīs*' tendency to solve marital disputes by means of mutual agreement between the parties, see Layish, *Divorce*, 186–91.

[18] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[19] al-Sayyid ʿAbdallāh Mūsā
Mḥammad al-Ṭālib al-Hammālī
Mḥammad ʿAbd al-Salām[12]

The matter being as indicated above
The Qāḍī of Ajdābiya
Muḥammad al-Sanūsī al-Ghazzālī [al-Khaṭṭābī]

[12] Since these witnesses appear quite often in court they would seem to be notaries. See Glossary, s.v. *ʿudūl*.

Document 8

Introduction

A woman was having difficulty in securing payment of the remainder of her prompt dower, which was long overdue. She consequently left the conjugal dwelling and refused to return to her husband until he paid her the rest of the dower or, alternatively, granted her *khulʿ* divorce. She also claimed from her husband payment of her maintenance for as long as he failed to meet either of these conditions. The husband alleged that he was unable to fulfil the first condition, and refused to accept the second.

In the event, the Qāḍī granted *sharʿī* maintenance to the wife who refused to obey her husband, although part of the prompt dower had already been paid and the marriage had been consummated.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] During the reign of his Highness *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī, Emir of Barqa [Cyrenaica].[2]

[3] SENTENCE (*ḤUKM*) RELATING TO THE PAYMENT OF MAINTENANCE (*NAFAQA*) TO KHADIJA BINT AḤMAD ĀDAM AL-FĀKHRĪ BY HER HUSBAND YŪNUS MARĀJIʿ
Entered in register no. 311/5, p. 312/2

[4] In the Sharīʿa Court of Ajdābiya, presided over by Shaykh Muḥammad al-Mabrūk Abī Jāziya, Deputy in Charge of the Affairs (*al-qāʾim bi-aʿmāl*) of his Honour the *sharʿī* Qāḍī. May Allāh the Exalted grant him success!

Following a dispute (*nizāʿ*) arising between the spouses [5] Yūnus b. Marājiʿ al-Fākhrī and Khadīja bint Aḥmad Ādam al-Fākhrī, both from the Abī ʿAwaḍ tribe (*qabīla*), in connection with their strained

[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

marital relations and their respective rights pertaining thereto, [6] the husband acknowledged his financial liability (*dhimma*)[3] towards his aforementioned wife with respect to the amount of 10 pounds out of her dower (*ṣadāq*) that he still owed her.[4] She, for her part, refused to resume marital relations (*muʿāshara*) with him unless he paid her [this amount] or [alternatively] divorced her by *ṭalāq* in which case she would renounce [the 10 pounds he owed her].[5] And for as long as [7] he failed to comply with either of these alternatives, she demanded that he bear the cost of her maintenance (*nafaqa*).[6]

Since [her husband] declared himself unable to pay on account of his straitened circumstances (*ʿusr*) and incapacity (*ʿajz*) and refused to repudiate her by means of *khulʿ* [in return for her waiving dower due to her] and since, furthermore, the wife's claim is justifiable (*sāʾigh*) from the *sharʿī* standpoint, [8] the aforementioned Nāʾib imposed on her husband the payment of maintenance to the amount of 6 *qurūsh* every day until he paid the prompt (*muʿajjal*) dower he owed her, or [alternatively] until he agreed to divorce her by *khulʿ* and repudiate her.[7] [9] [The Nāʾib] explained this to the husband and

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[3] See Glossary, s.v. *dhimma*.

[4] This seems to refer to the prompt dower payable on conclusion of the marriage or before its consummation, not the deferred dower payment of which had been delayed until a specified date in the course of the marriage. For details, see doc.1, fn. 25; Glossary, s.v. *ṣadāq muʿajjal*, *ṣadāq muʾajjal*.

[5] On *khulʿ* divorce, see docs. 22–27 below. All the schools of law (except the Ḥanafī) allow a woman to demand the dissolution of a marriage *before* (but not after) its consummation, if the husband has failed to pay the dower. In the Mālikī school such a dissolution is considered irrevocable. If the husband lacks the means for defraying the dower, the Qāḍī allows him a respite of three weeks followed, if necessary, by an indefinite period of grace at his discretion before the marriage is finally dissolved. See Linant de Bellefonds, *Traité*, vol. 2, 239–40; Layish, *Divorce*, 83; Glossary, s.v. *khulʿ*.

[6] Under the *sharīʿa*, non-payment of the prompt dower is a valid ground for leaving the conjugal dwelling without prejudicing the wife's right to maintenance provided the marriage has not been consummated. See Peters, *Marriage*, § 0.1.3.3.

[7] Since part of the dower had already been paid, and the marriage had been consummated (see line 6 above), the woman had no right to withhold her obedience (cf. Obermeyer, 107). The Qāḍī's decision notwithstanding to grant her maintenance may be due to the fact that no formal step to declare her recalcitrant had been initiated by the husband. In a similar case, the wife agreed to obey her husband in the conjugal dwelling after the latter paid her the residue of the dower (see Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. 166 no. [289] of January 29, 1953). In the case under review, it seems that the imposition of maintenance on the husband was intended to exert pressure on him to pay the dower or to divorce the woman of his own free will. In order to ensure payment of the dower, a guarantor could be appointed at the time of the marriage (see Linant de Bellefonds, vol. 2, *Traité*, 240–1).

had the undersigned persons testify to this effect. He [then] instructed that the sentence be entered on the 19th day of Dhū ’l-Qaʿda in the year 1371, corresponding to August 21, 1951.

[10] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[11] Court Usher (*mubāshir*) of his Honour [the Nā’ib]
[12] ʿImrān Manṣūr al-Marghī
Court Usher (*mubāshir*)
Mḥammad ʿAbd al-Salām[8]

The matter being as indicated above
[13] Muḥammad al-Mabrūk Abī Jāziya,
The Sharʿī Nā’ib
in Charge of the Qāḍī’s Affairs

[8] Mḥammad ʿAbd al-Salām appears quite often as a court witness and may therefore be a notary. See Glossary, s.v. *ʿudūl*; Name Index of Qāḍīs, Nā’ibs and Other Judicial Clerks.

Document 9

Introduction[1]

Dār ʿadl is a legal procedure resorted to by the *sharīʿa* court for handling marital disputes. The *ʿadl*'s function is to observe closely the behaviour of the couple committed to his charge and protection for a specified period, and to provide the court with the necessary information on the nature of the dispute and the party responsible for it, thus assisting the *qāḍī* in reaching an appropriate solution.

Al-Jawharī observed the institution of *dār ʿadl* among the Bedouin of the Western Desert. In the case of a dispute between the couples, where it is impossible to decide who is to blame, the *ʿadl* is appointed to adjudicate between the couples (*al-ḥukm baynahumā*). To this end, the couples's "tent is moved (*naql bayt*) and set up next to the that of a virtuous person who will observe them closely in order to be a witness in their regard. His sole testimony is taken into account [for any decision] (*wa-inzālihim maʿa bayt aw najʿ rajul ṭayyib muṭṭaliʿan ʿalā kull mā yaḥṣul baynahumā wa-yakūn shāhidan ʿalayhimā wa-shahādatuhu hiya allatī yaʿmal bihā*)."[2] Obermeyer has also observed the application of *dār ʿadl* in cases of ill-treatment of the wife by her husband. He maintains that the rationale for this procedure is to enable the *ʿadl* to dissuade the husband against such behaviour, or to provide the wife with witnesses to support her petition for divorce should the husband continue to ill-treat her.[3]

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[1] Unless otherwise indicated, the introduction to this document is based on Layish, *Dār ʿAdl*, 198, 201–9.

[2] Al-Jawharī, 201.

[3] Obermeyer, 108. Cf. Fierro, *Dos Árbitros*; idem, *Women*. The same institution, albeit with minor variations, has been reported among the Bedouin in Jordan. In the case of a dispute between the spouses they should move in a Bedouin "tent of hair" (*bayt al-shaʿr*) constructed specially for them near (*qurba, ʿinda*) or under the protection (*jiwār*) of an arbitrator (*ḥakam*) agreed upon by the parties "so that he can observe their marital behaviour and act as conciliator" (*li-yakūna mushrifan ʿalā-taṣarrufāt al-zawjayn wa-li-yaqūma bi-iṣlāḥ dhāt al-bayn*). He will inspect the parties at different times, day and night. The arbitrator and his wife are informed about the situation by the husband and the rebellious wife, respectively. To qualify for the task, the man must be of age (*bāligh*), sane (*ʿāqil*), trustworthy (*amīn*), etc. He acts as an arbitrator (*ḥakam*) in the spirit of the Qur'ānic verse pertaining to arbitration (4:35). If the arbitrator fails to reconcile the parties, he will dissolve the marriage by means of repudiation (*ṭalāq*), and his ruling is irrevocable. This customary institution survived in Jordan until the early 1970s before it began to decline. See al-

The institution of *dār ʿadl* lies in the ill-defined zone between custom and *sharīʿa* or, more precisely, it is a tribal institution which became incorporated, in the process of judicial practice, in a synthesis with *sharʿī* elements. The mechanism of a protection-granting person of social standing, originally a tribal arbitrator handling disputes between the spouses, is harnessed by the *sharīʿa* court; the arbitrator is replaced by the *ʿadl*, a professional witness, a notary, who now acts as an agent of the *qāḍī*, and no longer on his own initiative.

The *sharʿī qāḍī* makes a decisive contribution to this synthesis in his efforts to bring tribal society within the orbit of normative Islam. The term *ʿadl* has a normative Islamic connotation: the informant reporting to the court is essentially an eye witness and is therefore expected, like a professional witness attached to the court, to possess integrity.

This document relates to a protracted dispute between a husband and his wife that required their frequent recourse to the law court even after conciliation. The wife complained that the husband's attitude towards her had deteriorated for no adequate *sharʿī* reason, while the husband accused his wife of refusing to have sexual relations with him.

In order to find a way out of their problem, the couple agreed to take up living quarters under the protection of a *faqīh*, who would closely observe their marital relations (*dār ʿadl*), and then report to the court on his findings.

One striking feature of the present document lies in the fact that the Qāḍī here confers on the agreement reached the validity and binding power of a *sharʿī* sentence despite the fact that, strictly speaking, the solution it enjoins on the couple falls within the no-man's land between *sharīʿa* and custom. There is, moreover, an explicit *ḥadīth* to the effect that a person catching another intruding on the privacy of his home is entitled to pull out the intruder's eye with impunity.[4]

ʿAbbādī, *al-Ǧarāʾim*, 83. Cf. al-Qusūs, 57–58. On the ancient *ǧiwār* in the sense of protection accorded by Bedouin to strangers, see Pellat, *ʿĀr*, 79.

[4] See Wensinck, vol. I, 385i (". . . *fa-faqaʾta ʿaynahu mā kāna ʿalayka min junāḥin*"). On Islamic notion of privacy in the Qurʾān, see 2:189, 24:27. On privacy in early Islamic thought, see Alshech.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![5]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him![6]

[3] SENTENCE [RESOLVING A DISPUTE BETWEEN] ʿABDALLĀH ʿALĪ RAJAB AND ḤAWWĀʾ ʿABD AL-KARĪM [BY INSTRUCTING THEM TO RESIDE NEAR] THE "HOUSE OF A VIRTUOUS PERSON" (*DĀR ʿADL*)

Entered in register no. 6/181, p. 120

[4] In the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī Shaykh Muḥammmad al-Sanūsī al-Ghazzālī al-Khaṭṭābī. May Allāh prosper him! Amen.

[5] The couple ʿAbdallāh b. ʿAlī b. Rajab from the Sdēdī lineage (*ʿāʾila*) of the Zwayya[7] tribe (*qabīla*), born in the al-Kufra oasis, [6] now 30 years of age, and Ḥawwāʾ bint ʿAbd al-Karīm b. Saʿūd from the aforementioned lineage and tribe, born in the al-Kufra oasis, [7] now 20 years old; both live in Ajdābiya and have been identified (*maʿrūfān*) by person and name.[8] The aforementioned wife Ḥawwāʾ stated:

> [8] ʿAbdallāh present here wedded (*tazawwajanī*) me by means of a *sharʿī* marriage contract (*ʿaqd*), registered in this court a year and two months ago, and consummated the marriage (*dakhala bī*) at the conclusion of the contract against payment to me of part of a specified dower (*ṣadāq maʿlūm*).[9] [9] However, our marital relations (*muʿāsharat al-azwāj*) have not been harmonious, and our incompatibility made it necessary for us to resort to [10] this law court. On January 28, 1953 we went through a conciliation (*iṣṭalaḥnā*) (file no. 4/288), but he per-

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[5] See doc. 1, fn. 2.

[6] See doc. 1, fn. 3.

[7] In fact, the Sdēdī is a branch rather than a lineage of the Zwayya tribe. See De Agostini, *Cirenáica*, 407ff.

[8] See Glossary, s.v. *taʿrīf*.

[9] The rest of the specified dower was deferred by agreement to some later stage in the course of the marriage; see doc. 1, fns. 25–26 above; Glossary, *s.v. ṣadāq muʿajjal, muʾajjal* and *musammā*. The connection (*ʿalā*) made here between consummation of the marriage and payment of the dower seems to be a remnant of the customary concept of marriage in which the wife is not a party to the marriage contract; cf. Linant de Bellefonds, vol. 2, *Traité*, 200–1, 233.

sisted in his misconduct towards me, and quarreled with me on no justifiable [11] grounds recognized by the *sharīʿa*.

Her husband, the aforementioned ʿAbdallāh, endorsed everything she said concerning the marriage, the dower, and their marital intimacy, but denied having ill-treated her, [12] and held her responsible for the deterioration in their relations, adding: "She did not have sexual relations with me as required between spouses by the *sharīʿa*."[10] [13] After a discussion relating to the matrimonial rights of the married couple and appurtenances relating to dower (*tawābiʿ*), the upshot was that the parties agreed on dwelling (*suknā*) [14] under the protection (*jiwār*)[11] of a certain individual called the *faqīh*[12] Bū Bakr b. ʿAtīga al-Gbāylī, in order that [his house] should become *dār ʿadl*, that is, the house of a virtuous person [appointed] to testify [to the court] concerning their [the couple's] conduct on the basis of his personal observation. The couple agreed [15] to this [arrangement] serenely and with good grace. All this transpired in the presence of the witnesses (*shuhūd*) mentioned below.

On the basis of the agreement reached by the spouses [16] while they were both in a state of legal competence (*ḥāla jāʾiza*) in *sharʿī* terms as duly certified (*thubūt*) by the aforementioned judge (*ḥākim*), the latter ruled that the aforementioned spouses, ʿAbdallāh and Ḥawwāʾ, [17] should reside in the vicinity (*ṭaraf*) of the *faqīh* Abū Bakr b. ʿAtīga al-Gbāylī, in order that [his house should serve as] *dār ʿadl* in their regard, in accordance with the agreement reached between the two of them. [The judge] explained this to them at the court session.

[18] [Issued as a] *sharʿī* sentence. The judge signed and endorsed it, and had the undersigned [witnesses] testify to this effect. This

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[10] Cohabitation, when no *sharʿī* inhibition exists, pertains to the wife's duty of obedience towards her husband. According to the *sharīʿa*, cohabitation is the *raison d'être* of marriage, and all the schools excepting the Ḥanafī claim that the wife's refusal to have intercourse with her husband deprives her of her right to maintenance even when she does not leave the conjugal dwelling. See Linant de Bellefonds, *Traité*, vol. 2, 289–90; Anderson, *Africa*, Glossary, s.v. *ṭāʿa*; Peters, *Marriage*, § 0.1, 0.1.3.4; Glossary, s.v. *istimtāʿ*.

[11] "Protection" rather than "neighbourhood." For details, see Layish, *Dār ʿAdl*, 206–8 and the references mentioned in the footnotes.

[12] *Faqīh*—in the popular, rather than orthodox, sense of the term. Cf. Layish, *Dār ʿAdl*, 204 (the *ʿadl* is well acquainted with saint worship), 209; Obermeyer, 108 ("holy man"); Hart, *The Ait ʿAtta*, 91. Cf. a dialect-form of *faqīh* in the Sudan, *fakī*, used of a religious teacher propagating Islam (Holt, 18).

transpired on the 19th day of Jumādā al-Thānī 1372, [19] corresponding to March 5, 1953.

Husband's signature Wife's fingerprint[13]

[20] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[21] Bū Bakr ʿAbd al-Karīm
Mḥammad ʿAbd al-Salām
Mḥammad al-Ṭālib al-Hammālī[14]

The matter being as indicated above
The Qāḍī of Ajdābiya
Muḥammad al-Sanūsī al-Ghazzālī [al-Khaṭṭābī]

[13] The husband's signature and the wife's fingerprint do not appear on the Arabic text.

[14] Intended here are professional witnesses, notaries. See Tyan, *ʿAdl*, 209–10; Glossary, s.v. *ʿudūl*; Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks.

Document 10

Introduction

Following a dispute between a married couple, the wife left the conjugal dwelling and adamantly refused to return to it despite all inducements. The Qāḍī declared the wife recalcitrant and denied her the right to maintenance until such time as she resumed obedience to her husband. Apparently, this sanction, combined with the husband's refusal to grant her a divorce, had the desired effect, and she returned to the conjugal dwelling. The conciliation agreement between the spouses was meant to regulate financial arrangements in the case of an eventual divorce, according to the relative responsibility incurred by the respective parties *vis-à-vis* the dissolution of the marriage bond.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family, and Companions, and grant them peace![1]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya, and Emir of Barqa [Cyrenaica]. May Allāh the Exalted preserve him![2]

[3] SENTENCE (*ḤUKM*) RELATING TO THE CHARGE OF RECALCITRANCE (*NUSHŪZ*) BROUGHT AGAINST RGAYYA BINT ʿABDALLĀH BŪ BAKR
Entered in register no. 478, pp. 319, 324

[4] At the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted preserve him! Amen.

[5] Following a dispute between the married couple al-Fītūrī b. Abī Bakr b. Yaʿqūb, and Rgayya bint ʿAbdallāh Abī Bakr, both from the Zwayya[3] tribe (*qabīla*), identified (*maʿrūfān*)[4] [6] by their persons and names, in the presence of their two children, Saʿīda and

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.
[3] See De Agostini, *Cirenáica*, 338, 407ff. (ez-Zuèia).
[4] See Glossary, s.v. *taʿrīf*.

Ṣāliḥ. Following an argument that arose between them, the wife refused to obey her husband's *sharʿī* instructions, and persisted in her recalcitrance (*nushūz*), refusing to return [7] to her husband's conjugal dwelling and to obey him,[5] despite the advice given her [to this effect].[6] The husband refused to divorce her, [insisting instead] on her submission.

On the basis of what had been agreed upon by the two parties, [8] while both were in a state of legal competence (*ḥāla jā'iza*) in *sharʿī* terms, as duly certified (*thubūt*) by the aforementioned judge (*ḥākim*), the latter declared the aforementioned Rgayya bint ʿAbdallāh recalcitrant [for her insubordination to her husband] until she resumed her obedience (*ṭāʿa*) to her husband [9] the aforementioned al-Fītūrī, and ruled that she forfeited her right to maintenance (*nafaqa*) until such time as she resumed obedience to her husband's *sharʿī* instructions. [The judge] explained his ruling to the parties at the [court] session.[7]

[Issued as a] *sharʿī* sentence. [The judge] signed the verdict, [10] had the undersigned witnesses testify to this effect and instructed that it [the sentence] be recorded.

Entered on the 6th day of Dhū 'l-Ḥijja 1373, corresponding to August 5, 1954.

The signatures are in the protocol (*ḍabṭ*).

Fingerprints of al-Fītūrī and Rgayya

[11] Witnesses to the proceedings (*shuhūd al-ḥāl*)

[12] ʿImrān ʿĪsā

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[5] A wife declared recalcitrant (*nāshiza*) by court is deprived of her right to maintenance from her husband (Peters, *Marriage*, § 0.1.3.3; Anderson, *Africa*, 371, 376). Court decisions to this effect seem to be common practice. In most cases the wife persists in her disobedience and even requests repudiation. See, e.g., Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. 5 no. 10 of July 28, 1951; p. 7 no. 13 of July 30, 1951; p. 18 no. 36 of August 22, 1951; p. 356 no. 609 of August 5, 1954; Supreme Sharīʿa Court, D'Emilia, 29. Cf. Abū Salīm, *Manshūrāt al-mahdiyya*, 307 {the husband divorced the recalcitrant and averse (*kāriha*) wife in return for the dower}.

[6] Attempts to reconcile the parties are quite often futile since the wife's duty to obey her husband is subject to her father's authority (see Mohsen, 98–99, 102–7). In the present case, the wife appears in court alone, not represented by an agnate or by a proxy (*wakīl*).

[7] In one case, the wife's father appealed against a verdict of recalcitrance to the police officer of the Kufra district. See doc. 70 below.

Mḥammad ʿAbd al-Salām
Mḥammad {al-Ṭālib} al-Hammālī[8]

The matter being as indicated above
The Qāḍī of Ajdābiya
[13] Ḥusayn Muḥammad al-Aḥlāfī

[14] On August 1, 1957, Rgayya bint ʿAbdallāh [15] Saʿīd appeared in court, accompanied by her husband al-Fītūrī Bū Bakr, and stated that she would return to her husband's home.[9] Afterwards, her husband stated:

> [In the case of an eventual divorce] I hereby renounce in her favour the entire [prompt] dower (*ṣadāq*) [already transferred to her] previously due to me from her[10] [16] with the exception of 14 pounds [out of this sum], which were his [mine], owed to him [me] by her (*lahu bi-dhimmatihā*). In the event that the guilt (*khaṭa'*) [for the dissolution of the marriage] is imputable to her, she will be required to pay him [me] these 14 pounds; but if [the guilt] should be his [mine], [17] he [I] will have no claim against her [concerning the remainder of the dower] under any circumstances.[11]

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[8] Intended here are professional witnesses, notaries. See Name Index of Qāḍīs, Nā'ibs and Other Judical Clerks; Tyan, *ʿAdl*, 209–10; Glossary, s.v. *ʿudūl*.

[9] When the wife resumes her obedience to her husband in the conjugal dwelling, the Qāḍī cancels the ruling of recalcitrance and the wife regains her entitlement to maintenance. See, e.g., Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. 26 no. 50 of September 4, 1951. Cf. D'Emilia, 29–30, 40; Bousquet, *Coutumes*, 69–70.

[10] The reference is to *khulʿ* divorce on the wife's initiative, whereby the wife normally returns the prompt dower to the husband divorcing her. See docs. 22ff. below.

[11] It seems that the wife was not impressed by the economic sanction (deprivation of her right to maintenance), presumably because she moved to her father's or some other agnate's home. Once the court failed in its effort to reconcile the spouses, these resorted to tribal mediation. Three years elapsed before they resorted once again to the Sharīʿa Court, this time with a view to conferring a *sharʿī* sanction on a tribal conciliation on the following terms: The wife undertook to resume her obedience to her husband in the conjugal dwelling; in the event of a further deterioration of the marital relations the marriage bond would be dissolved, and each party would bear the financial burden of the divorce in accordance with his or her respective responsibility in the affair.

Document 11

Introduction

A woman left her husband's conjugal dwelling on account of his bad treatment of her, and went to live with her brother. The husband urged her to return to him and, through her brother's mediation, she agreed to do so on condition that he (i.e., the husband) bought her a gold bracelet, agreed to refrain from drinking wine and to stop ill-treating her. The husband accepted all these conditions. He gave her a certain date palm, as a pledge of security, until such time as he would be able to purchase the gold bracelet for her. He repented of his misdemeanours and promised to refrain therefrom.

The Qāḍī was instrumental in bringing about the man's repentance, and imparted to the conciliation between the spouses the validity of a *shar'ī* sentence legally binding on the husband.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord [Muḥammad], his family and Companions, and grant them peace.[1]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him![2]

[3] CONCILIATION (*MUṢĀLAḤA*) BETWEEN AḤMAD B. ʿAWAḌ FANNŪSH AND HIS WIFE RĀBḤA BINT YŪNUS FANNŪSH
Entered in register no. 6/138, p. 85

[4] In the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī Shaykh Muḥammad al-Sanūsī al-Ghazzālī al-Khaṭṭābī. May Allāh grant him success! Amen.

[5] Aḥmad b. ʿAwaḍ b. Aḥmad Fannūsh, aged 30, and his brother-in-law,[3] Ḥājj[4] Jābir b. Yūnus b. Mḥammad Fannūsh were both born

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.
[3] It is standard procedure in an agnatic society for a woman to be represented by a brother in her negotations with her husband.
[4] See Glossary, s.v. *ḥājj*. This title is another clear manifestation of the impact

[6] in Jālū but reside in Ajdābiya, and belong to the Rwēlāt lineage (*ʿā'ila*) of the Majābra[5] tribe (*qabīla*); they have been identified (*maʿrūfān*)[6] by person and name. The aforementioned Aḥmad b. ʿAwaḍ made the following [7] statement:

> I am wedded by *sharʿī* marriage contract (*ʿaqd*) to Rābḥa bint Yūnus, sister of Ḥājj Jābir present here. The marriage contract was recorded at the Sharīʿa Court of Jālū [8] 13 years ago, and I consummated the marriage at the conclusion of the marriage contract against payment of a specified dower (*ṣadāq maʿlūm*),[7] part of which I transferred to her. A daughter called Gubūl, now 5 years old, was born to me of my union with her.[9] One month and a half ago, [my wife] left my home and went to live with her brother. [10] When I demanded her to return [to the conjugal dwelling], she made [her return] conditional on my buying her a golden bracelet weighing 6 *ūqiyya*s. I accepted [11] this condition, but am unable to purchase it at the present time. [Instead] I have given her a [specific] date palm well-known to both of us located south of Jāmiʿ[8] [12] al-Fannūsh, which is hers by way of security (*rahn*),[9] [and] which I shall not dispose of in any way until I purchase the aforementioned gold bracelet for her.[10] [13] She agreed [to my offer].

His brother-in-law, the aforementioned Ḥājj Jābir, corroborated all that was said in relation to the marriage of his sister Rābḥa, their matrimonial relations, [14] the dower, the daughter, and of the wife's return [to her husband's conjugal dwelling] conditional on the aforementioned date palm. He also added: "My sister Rābḥa requests from him [15] another condition, namely that he refrain from wine drinking (*shurb al-khamr*)[11] and reprehensible deeds." I [i.e., the Qāḍī]

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of Islam on Libyan Bedouin. Cf. Peters, *Paucity*, 214; Marx, 190; Kressel, *Ascendancy*, 167; Ginat, 83.

[5] See De Agostini, *Cirenáica*, 336ff.

[6] The reference is to the *sharʿī* procedure of identification through witnesses (see Glossary, s.v. *taʿrīf*).

[7] See Glossary, s.v. *ṣadāq musammā*.

[8] The construction of mosques is another manifestation of the impact of normative Islam on tribal society. Cf. Evans-Pritchard, 70ff.

[9] See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 36, line 230ff.

[10] In a way, the delay in the purchase of gold bracelet may be regarded as a loan and the date palm as a pledge to ensure the return of the debt (see Schacht, *Introduction*, 138ff.). Within this context, the wife's entitlement to the usufruct of the date palm is tantamount to taking usury (*ribā*) (see Schacht, *Introduction*, 79). The Qāḍī, however, did not address this aspect of the transaction.

[11] Drinking wine is forbidden in the Qurʾān (5:90); it entails a punishment of 80 lashes (Peters, *Criminal Law*, § 0.1.2.5).

then questioned[12] the aforementioned Aḥmad ʿAwaḍ [16] concerning the demands that his wife had made on him through her brother Ḥājj Jābir. On this point he said:

> I have repented (*tāʾib*) to Allāh the Exalted;[13] I shall never [17] drink wine again or ill-treat her. I request Allāh to grant me success and to guide me along the right path.

[18] This occurred in the presence of the undersigned witnesses.

On the basis of the agreement reached [19] between the two parties, while both were in a state of legal competence (*ḥāla jāʾiza*) in *sharʿī* terms, as duly certified (*thubūt*) by the aforementioned judge (*ḥākim*), [20] the latter endorsed (*ajāza*) their conciliation (*ṣulḥ*), bound the husband to fulfill his commitments, explained the matter to him during the court session, [21] and passed a valid (*ṣaḥīḥ*) *sharʿī* sentence (*ḥukm*). [The judge] signed and endorsed it, and made it binding. [22] He had the undersigned witnesses testify thereto, and instructed that it be recorded. The sentence was entered on the 6th day of Rabīʿ al-Thānī 1372, [23] corresponding to December 23, 1952.

The signatures of the husband and of the aforementioned wife's brother.

[24] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[25] Mḥammad ʿAbd al-Salām[14]
Ḥamad Fannūsh
The *sharʿī* Nāʾib
Muḥammad al-Ṭālib al-Hammālī[15]

The matter being as indicated above
The Qāḍī of Ajdābiya
[26] [Muḥammad] al-Sanūsī al-Ghazzālī [al-Kkaṭṭābī]

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[12] The Qāḍī's intervention in this matter does not derive from his judicial authority, but rather from his capacity as guardian of public morals (*muḥtasib*). Cf. Layish, *The Qāḍī's Role*, 93.

[13] On repentance within the context of Qurʾānic punishments (*ḥudūd*), see Schacht, *Introduction*, 176; Peters, *Criminal Law*, § 0.1.2.6. See Glossary, s.v. *tawba*.

[14] This is a professional witness. See Glossary, s.v. *ʿadl*.

[15] This person seems to act in two capacities: as a court usher and notary. See Tyan, *ʿAdl*, 209–10; Glossary, s.v. *ʿadl*; Name Index of Qāḍīs, Nāʾibs and Other Judicial Clerks.

Document 12

Introduction

Once the wife's adultery was established on the husband's initiative, the Qāḍī deemed the dissolution of the marriage unavoidable due to the disgrace caused (though this implicates the wife's, rather than the husband's, agnates). The wife was denied all her financial claims *vis-à-vis* her husband on account of her deviant behaviour.

The husband divorced the woman by a triple repudiation, and the Qāḍī took care to clarify to the couple the legal consequences of this divorce in the light of the *sharīʿa*.

Text

[1] In the Sharīʿa Court of Kufra, presided over by the Qāḍī Shaykh Muḥammad Ṣāliḥ al-Bakrī. May Allāh the Exalted grant him success!

[2] A man called ʿAbd al-Raḥmān b. Ḥasan al-Masraba from the Abū Zahwa lineage (*ʿā'ila*)[1] of the Zwayya tribe (*qabīla*) appeared [in court] [3] and stated that he was wedded to a woman called Salīma bint Ghēth Bū Gandīl of the Lajha lineage of the Zwayya tribe, [4] and that she was adulterous and depraved (*ʿāhir ghayr maḍbūṭa*).[2] All of the husband's allegations [against his wife] were established, and this [i.e., the aforementioned adultery] was the gist of his allegations.

[5] In order to conceal (*sitran li-*) [the disgrace], the Qāḍī ruled against [the woman] to the effect that she should be divorced and denied all [financial] claims (*ḥaqq*) [in her husband's regard], since her immoral behaviour (*fasād*) had been established.[3] [6] The husband,

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[1] The lineage belongs to the branch of Sdēdī. See De Agostini, *Cirenáica*, 407–8.

[2] The reference seems to be to the Prophetic *ḥadīth: "al-walad li'l-firāsh wa-li'l-ʿāhir al-ḥajr"* (the child belongs to conjugal bed and the adulterer is liable to stoning); see Wensinck, vol. V, 109ii, line 51. Cf. Appeals, File 48/88 in Abū Ghūsh, 199 which cites this *ḥadīth* in the context of denial of paternity. The phrase reflects a value judgment on the Qāḍī's part. Under tribal customay law, adultery is an offence against the *ʿirḍ*, honour, of the woman's guardian. In a number of places an adulterous woman is in real danger of being killed by her agnates (Stewart, *ʿUrf*, 890). On confession of adultery by the wife as a device to obtain divorce in order to be able to marry her lover, see Anderson, *Africa*, 168.

[3] Under the *sharīʿa*, adultery (*zinā*) entails a punishment of lapidation provided the culprit is *muḥṣan*, that is, has experienced sexual relations within wedlock prior

the aforementioned ʿAbd al-Raḥmān, divorced her by triple repudiation (*ṭallaqahā bi'l-thalātha*) uttered in one single statement, and she thus became divorced from him by a [major] irrevocable divorce (*mabtūta*) [7] and legally not permitted to him [in marriage] unless she first contracted marriage with another man.[4] No legal claims, demands, financial liabilities pertaining to [8] marital rights (*ḥuqūq zawjiyya*) remained between them. The spouses were divorced (*iftaraqā*) on the 22nd day of Dhū-'l-Ḥijja 1360, [corresponding to] January 10, 1942.

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to the crime (Peters, *Criminal Law*, § 0.1.2.3; Glossary, s.v. *zinā*). The Qāḍī does not apply the *sharʿī* criminal law in the case under review, presumably because the subject matter is, properly speaking, outside his legal jurisdiction. However, he displays a normative (and pragmatic) attitude towards the wife's deportment by ruling that the matter is grave enough (*fasād*) to require dissolution of the marital bond by repudiation and to deny the wife any kind of financial claim. His normative attitude is analogous to that of the *muḥtasib*; cf. doc. 14 fn. 5 below; Layish, *The Qāḍī's Role*, 93. On the grave consequences of adultery under tribal customary law, see Kressel, *Descent*, 166 n. 12, 175, 190; Ginat, 96.

[4] On triple repudiation and its legal consequences, see Layish, *Divorce*, 99–100 (and the references mentioned in fn. 1), 106–9; Peters, *Marriage*, § 0.1.5.1.6. See also Glossary, s.v. *ṭalāq bi'l-thalāth*. Under tribal customary law, in case of divorce on grounds of the wife's adultery, her father is required to return to the husband the dower and all the expenses of the marriage ceremony incurred by him, as well as the gifts the husband presented during the engagement period. See Mohsen, 111.

Document 13

Introduction

In the course of a dispute arising between a husband and his wife, apparently in connexion with the payment of deferred dower, the man claimed to have divorced the latter on the date when the deferred dower was due, thus implying that the dower had been paid at the termination of the marriage. The alleged claim of the divorce was probably also intended to release the husband from the obligation of paying the arrears maintenance due to his wife since the beginning of the dispute. The wife on her part denied her husband's allegations pertaining to the dower and the divorce. The husband failed to prove his allegations and consequently proceeded to divorce his wife in the presence of the Nā'ib.

The Nā'ib ruled that the wife was divorced by a single repudiation (thus ignoring the alleged first divorce), and that she was entitled to receive (i) the deferred dower, payment of which had become overdue in the course of the marriage, (ii) the arrears maintenance due to her for the entire period of the marriage until the day of her divorce in court, and (iii) the maintenance due to her for the duration of the waiting period after the divorce became effective. He then instructed the wife to strictly observe her waiting period as prescribed by the *sharīʿa*.

Text

[1] In the name of Allāh, the Compassionate, the Merciful. May Allāh bless our Lord Muḥammad, his family and his Companions, and grant them peace![1]

In the reign of his Highness *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī, Emir of Barqa [Cyrenaica].[2]

[2] SENTENCE CONCERNING THE DIVORCE (*ṬALĀQ*) OF RAJʿA BINT AḤMAD FAKRŪN AL-ZWAYYĪ BY ʿABD RABBIHI B. ʿABD RABBIHI ABĪ ZAYN
Entered in register no. 315, p. 5/315

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

[3] In the Sharīʿa Court of Ajdābiya, presided over by Shaykh Muḥammad al-Mabrūk Abī Jāziya, Deputy in Charge of the Affairs (*al-qāʾim bi-aʿmāl*) of his Honour the *sharʿī* Qāḍī. May Allāh the Exalted grant him success!

[4] A dispute (*nizāʿ*) arose between the spouses ʿAbd Rabbihi b. ʿAbd Rabbihi b. ʿAbd Rabbihi b. Abī Zayd of the al-Gṣērī lineage (*ʿāʾila*), and Rajʿa bint Aḥmad Fakrūn of the Abī Shawg lineage, [5] both belonging to the al-Sdēdī [branch] of the Zwayya tribe (*qabīla*).[3] After [the court] heard the testimonies (*aqwāl*) of both parties, it became clear that the husband owed the wife—and he acknowledged his liability (*dhimma*)—three [6] *ḥawāʾij*[4] and clothing (*kiswa*) for her, this being the deferred (*muʾajjal*) dower, owing to her over a period of ten years [since the conclusion of the marriage contract, and apparently still overdue] because he [i.e., the husband alleged that he] had divorced her (*muṭalliquhā*)[5] since that date.[6] [The wife], however, denied this and claimed [7] that she was still under his matrimonial authority (*ʿiṣma*)[7] [i.e., married to him] until the day of her appearance [in court].

Since the man failed to establish by means of witnesses (*bayyina*) that he had paid her the deferred dower [8] and that the divorce had transpired on the date [alleged by him], it has been established in a *sharʿī* manner to the satisfaction of his Honour, the aforementioned Nāʾib, that the marriage bond (*zawjiyya*) is still in force at the present date, and that the wife's deferred dower, [9] comprising three *ḥawāʾij* and clothing, are still owing to her, and that the man divorced his wife only now [i.e., on the date of the court session].

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[3] See De Agostini, *Cirenáica*, 408.

[4] See Glossary, s.v. *ḥāja*.

[5] The active participle here refers to a past event.

[6] At issue here is the deferred dower, payment of which was delayed for ten years of married life. Beyond that, the chronology of events referred to in this document is not entirely clear. One plausible interpretation is that the expression "since that date" refers to the day on which payment of the deferred dower was due. According to this version, the husband claimed that on that date he had already divorced his wife, thus implying that the deferred dower had in effect been paid at the termination of the marriage. According to the Mālikī school, a stipulation in the marriage contract to the effect that dower may be delayed beyond the consummation of the marriage, is null and void. Nevertheless, it is common practice to delay part of the dower to some specified date while the marriage is still in force; the husband's decease, but not divorce, terminates the delay (see doc. 1, fns. 25–26).

[7] See Glossary, s.v. *ʿiṣma*.

[The Nā'ib] ruled that the husband had divorced his wife [10] by means of one repudiation (*ṭalqa*) coinciding with that of his second [i.e., alleged previous] divorce,[8] and that he owed (*bi-ʿimārat dhimmatihi*) her three *ḥawā'ij* and clothing, besides her right to receive from him neglect maintenance (*nafaqat ihmāl*) [i.e., the arrears maintenance dues up to the time of his divorce];[9] [11] [his obligation to pay her] maintenance will be effective since he ceased to call upon her [i.e., have marital relations with her]. [The arrears maintenance] was valued at 5.5 pounds. The Nā'ib instructed her to start observing the waiting period (*iʿtidād*)[10] starting on the morrow of the date stated below, and he ruled in her favour that she was entitled to maintenance [12] for the duration of the waiting period (*ʿidda*),[11] i.e., the monthly sum of l.5 pounds. [Issued as a] sentence (*ḥukm*) by way of *sharʿī* injunction (*farḍ*) and order (*amr*). He had the undersigned witnesses testify (*ashhada*) to this effect, and instructed that it be recorded on the [13] 21st day of Dhū 'l-Qaʿda 1371, corresponding to August 23, 1951.

[14] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[15] The Court Usher (*mubāshir*)
[16] Mḥammad ʿAbd al-Salām[12]

The matter being as indicated above
[17] Muḥammad al-Mabrūk Abī Jāziya
The *sharʿī* Nā'ib in Charge of the Affairs
of the Qāḍī of Ajdābiya

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[8] The Nā'ib considered the two divorces as one, which means, in actual fact, that he adopted the wife's version, not the husband's. Cf. Layish, *Divorce*, 153–54.

[9] Under the Mālikī (unlike the Ḥanafī) school, if the husband fails to provide maintenance, the wife can claim arrears (Peters, *Marriage*, § 0.1.3.3).

[10] On waiting-period maintenance, see Layish, *Divorce*, 110–15.

[11] On the waiting period (*ʿidda*), see Layish, *Divorce*, 100–1. According to the Western Desert customary law, a divorced woman is not entitled to waiting period maintenance unless she is pregnant in which case, the husband is obliged to pay her maintenance until she delivers the child; the child is entitled to maintenance until he is delivered to his father; see al-Jawharī, 201.

[12] This person seems to act in two capacities: as a court usher and notary. See Tyan, *ʿAdl*, 209–10; Glossary, s.v. *ʿadl*; Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks.

Document 14

Introduction

A woman claimed in court that her husband (actually, her paternal cousin) had divorced her ten months previously. She brought with her a number of persons who could testify to this effect, and requested that their testimony be taken down, and that she be granted permission to marry on the grounds that her young age would expose her to temptations of illicit intercourse, and that remarriage would consequently safeguard her honour. After her witnesses corroborated her claim regarding the divorce, the Qāḍī endorsed their testimony and instructed that it be recorded, so that it would serve her interests in the case of her eventual remarriage.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions and grant them peace![1]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him![2]

[3] ATTESTATION TO THE CONVEYANCE OF TESTIMONY (*SHAHĀDAT NAQL*)[3] ON BEHALF OF SĀLMA BINT ṢĀLIḤ B. SĀLIM AL-ʿAJĒLĪ
Entered in register no. 6/322, pp. 218, 245, and 248.

[4] In the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him! Amen.

[5] Sālma bint Ṣāliḥ b. Sālim from the al-Harash lineage (*ʿā'ila*) of the ʿAjēlāt tribe (*qabīla*) appeared in court, and after her identification (*maʿrifa*)[4] according to *sharʿī* procedure, she stated [6] the following claim on her own behalf.

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.
[3] See Glossary, s.v. *shahādat naql*. For more details, see Layish, *Shahādat naql*.
[4] See Glossary, s.v. *taʿrīf*.

> A paternal cousin of mine called Maḥmūd al-Harash married me (*taza-wwajanī*) and [subsequently] divorced me (*ṭallaqanī*) about 10 months ago. [7] I have brought witnesses (*shuhūd*) with me who will testify to what I have stated concerning the divorce from my aforementioned husband. They are: Mḥammad b. Manṣūr b. Ramaḍān, ʿUmar [8] b. Abī Zayd b. ʿUmar and ʿAlī b. ʿAbēd b. al-Rūkālī—all belonging to the ʿAjēlāt tribe. I ask the honourable Sharīʿa Court (*al-sharʿ*) [9] to question them, to record their testimony, and to grant me permission (*idhn*) to marry and thus safeguard my honour (*karāma, sharaf*), since I am young and still a minor (*ṣaghīra*), and I am afraid [10] of falling into temptation (*ʿanat*).[5]

When the aforementioned witnesses were questioned, the first two said:

> We met with [11] ʿAlī al-Kōnī, the Shaykh of our tribe (*qabīla*), who told us: "I have heard Maḥmūd al-Harash say he had divorced his aforementioned wife Sālma [12] bint Sāliḥ."

ʿAlī b. ʿAbēd b. al-Rūkālī gave testimony (*shahāda*), regarding which he had no doubt whatsoever, that he had definitely met the aforementioned Maḥmūd [13] al-Harash in the town of al-ʿAjēlāt, where the latter had told him: "I have divorced my wife Sālma bint Ṣāliḥ," and this meeting [14] with Maḥmūd occurred in the month of Muḥarram 1373. Afterwards, all [the witnesses] said: "This is what we know (*fī ʿilminā*)[6] and testify to; let Allāh be pledge [lit. agent] (*wakīl*) to our words!"[7] Then the credibility procedure (*tazkiya*)[8] of the aforementioned witnesses was conducted by each of the following: the Imām of this town, Mr. Rwēfiʿ b. Idrīs and its Mukhtār, Mr. ʿAbd al-Raḥmān Ḥammūda, and they stated that the witnesses were agreeable and trustworthy (*ʿudūl*), and that their testimony was acceptable (*maqbūl*).

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[5] Cf. D'Emilia, 25 (*yaḥshā ʿalayhā al-fasād*); Mohsen, 116–19; Powers, *Women*, [2.0]. The woman's honour here should be interpreted in terms of her good name (*ʿirḍ*), as understood by an agnatic society. The sanctions against illicit intercourse (*zinā*) are very stringent, both in customary law and *sharīʿa*; see Kressel, *Sororicide*; Abū Ḥassān, 242; doc. 12, fn. 3 above, and Glossary, *s.v. zinā, ʿirḍ*. The wife's fear of committing adultery is a common grounds for divorce on her initiative in Libyan judicial practice. See Layish, *Divorce*, 91–92 (note there the similar phrasing "for fear of falling into temptation").

[6] See Glossary, s.v. *ʿilm*.

[7] See doc. 4, fn. 15.

[8] See Glossary, s.v. *tazkiya*.

On the basis [15] of the facts established by the aforementioned witnesses, while they were in a state of legal competence (*ḥāla jā'iza*) in *shar'ī* terms as duly certified (*thubūt*) by the aforementioned judge (*ḥākim*), the latter endorsed (*ajāza*) this testimony [16] on the responsibility of the witnesses, signed it, had the undersigned witnesses testify to this effect, and instructed that it be recorded. [The testimony] was entered on the 7th day of Jumādā al-Ākhira [17] 1373, corresponding to February 7, 1954.

The signatures are in the protocol (*ḍabṭ*).

[18] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[19] ʿImrān ʿĪsā[9]

The matter is as indicated above
The Qāḍī of Ajdābiya
[20] Ḥusayn Muḥammad al-Aḥlāfī

[9] Professional witness. See Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks.

Document 15

Introduction

A couple, both freed slaves from the Sudan, agreed to divorce by mutual consent after the wife renounced her right to her entire dower in return for her release from the marriage contract (*khulʿ*). The husband divorced her by a triple repudiation, employing the archaic customary *ẓihār* oath, which rendered the woman a blood relative within the degrees forbidden for marriage.

The court endorsed the agreement and ruled that the divorced woman was not legally permitted to her former husband until after the conclusion of an intermediate marriage.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[1]

[2] In the reign of his Majesty Muḥammad Idrīs al-Sanūsī I, Sovereign of the United Kingdom of Libya and Emir of Barqa [Cyrenaica]. May Allāh preserve him! Amen.[2]

[3] DIVORCE (*ṬALĀQ*) OF ḌULL[3] AL-SAYYID BY JĀBIR, BOTH FROM SUDAN

[4] In the Chamber (*dāʾira*) of the noble Sharʿī [Division of the Civil District Court of Kufra], presided over by his honour the Inspector (*mufattish*)[4] Shaykh Muḥammad Ṣāliḥ al-Bakrī. May Allāh the Exalted grant him success!

[5] A Sudanese man by the name of Jābir, a freed slave (*ʿatīq*)[5]

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[1] See doc. 1, fn. 2.

[2] See doc. 1, fn. 3.

[3] *ḍull* or *ḍill* has the connotation of "unknown." In practice it has become a proper name; see Lane, s.v. *ḍull*, 1797iii. Cf. Borg, *Orality*, 335, fn. 33.

[4] See Layish, *Legal Documents*, 15.

[5] On emancipation of slaves under the *sharīʿa*, see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 192, line 1309ff.; on emancipated slaves in Libya, see Davis, *Libyan Politics*, 111; idem, *Social Perspective*, 7; and docs. 61–62 below.

of the Bāzāma lineage (*ʿā'ila*) of the Majābra[6] tribe (*qabīla*) appeared [in court] together with his Sudanese wife called [6] Ḍull al-Sayyid, a freed female slave (*ʿatīqa*) of Maḥmūd b. Wardugūh al-Tibbāwī,[7] both of whom were legally identified (*maʿrūfayn*)[8] by person and by name. An agreement was reached [7] between them with a view to dissolving (*firāq*) their marriage—though not on account of a dispute (*nizāʿ*)—after the woman acknowledged that she had redeemed herself (*khālaʿat*)[9] from him in return for her entire dower (*ṣadāq*), [8] and also renounced all claims in his regard. The husband divorced her by a triple repudiation (*ṭallaqahā . . . bi'l-thalātha*) in a single word [uttered at one time]:

> You are divorced from me by a triple repudiation, [9] and you are forbidden to me as if you were my mother (*wa-ḥarām ʿalayya kayfa ummī*).[10]

The woman is thus divorced from him by a [major] irrevocable (*mabtūta*) repudiation; she is not legally permitted to him from now on until she has contracted marriage to another man;[11] no mutual claims between them remained [10] nor any [financial] demands or dues pertaining to matrimonial rights (*ḥuqūq zawjiyya*).

The aforementioned Inspector ruled to this effect and then recorded and signed it. This transpired in the precincts where the Inspector's Chamber is officially located. [11] [The two spouses] separated

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[6] See De Agostini, *Cirenáica*, 316ff.; Evans-Pritchard, map facing p. 35.

[7] On the Tibbāwī tribe in Kufra, see doc. 55 below.

[8] See Glossary, s.v. *taʿrīf*.

[9] Another possible reading: *khāliṣa minhu*—"[she] is freed, liberated from him [i.e., her husband in return for her dower]." Cf. doc. 18, line 6 below; Layish & Davis, 52, line 18 (. . . *khalaṣtu minhu fī ṣadāqī wa-khālaʿtuhu bi-dhālika wa-sallamtu lahu fīhi*). This seems to be a colloquial formula of the *khulʿ* procedure. On *khulʿ*, see Layish, *Divorce*, 54–58 and Glossary, s.v. *khulʿ*; Peters, *Marriage*, § 0.1.5.2. See docs. 22–27 below.

[10] Cf. Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 74–76 lines 495–501 and the French translation; Hawting; Peters, *Marriage*, § 0.1.5.4; Layish, *Divorce*, Glossary; Lane, s.v. *zihār*, 1927i–ii.

[11] See Peters, *Marriage*, § 0.1.5.1.3; Layish, *Divorce*, 99–100, 106–9. In fact, we have to do here with a combination of *khulʿ* and *ẓihār* coupled with triple repudiation which implies irrevocability. There still remains a way to rehabilitate the marriage bond between the spouses by intermediate marriage of the divorcee with a third party concluded in good faith, consummated and dissolved in good faith. However, since the Mālikī, unlike the Ḥanafī, school attaches importance to the element of intent (*niyya*) (Layish, *Divorce*, Glossary, s.v. *taḥlīl*), the intermediate marriage might constitute a real barrier to reinstating a triply divorced wife (see docs. 35–36 below). According to Maghribī judicial practice (*ʿamal*), if a man declares his wife divorced by *ḥarām* without intending a triple repudiation, he is bound by one irrevocable repudiation (*ṭalāq bā'in*); see Toledano, 41.

(*iftaraqā*) on the 4th day of Jumādā Thānī 1380, [corresponding to] November 23, 1960.

Everything stated above has been duly certified (*thubūt*)
The Administrative Inspector (*mufattish idārī*)
at the [District] Court of al-Kufra
[12] Muḥammad Ṣāliḥ al-Bakrī

Document 16

Introduction

Following a dispute arising between spouses, apparently in the context of a problematic polygamous marriage, it was agreed that the wife should be freed of her marriage contract in return for renunciation of her dower and maintenance. The husband divorced his wife and at the same time they agreed that in the event of her reinstatement, his second wife would be divorced by means of what amounts to suspended repudiation, that is, a divorce becoming operative on the eventual occurrence of a specific event in the future.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions and grant them peace![1]

[2] In the name of the King, *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī I, Sovereign of the United Kingdom of Libya, and Emir of Barqa [Cyrenaica]. [3] May Allāh preserve him! Amen.[2]

[4] RECORD (*MAḤḌAR*) OF DIVORCE (*ṬALĀQ*)

[5] At a court session held on Sunday, the 24th of Muḥarram, the first Islamic month, 1382, corresponding to June 27, 1962, [6] in the precincts of the Sharīʿa Court of al-Kufra presided over by the "the official responsible" (*masʾūl*),[3] Ḥamīda al-Tuwātī and the court clerk (*kātib*) Manṣūr al-Faḍīlī.

A man [7] called Ibrāhīm b. al-Sayyid ʿAbdallāh al-Twātī appeared in court together with his wife, Maryam bint Mullā al-Tibbāwī[4] [8]—both legally identified (*maʿrūfān*)[5] in person. Many disputes (*shiqāq*) arose between them, in which each party held the other responsible for the deterioration of their marital relations (*ʿishra*). [9] The conjugal

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.
[3] See Layish, *Legal Documents*, 15.
[4] On the Tibbāwī tribe, see doc. 55 below.
[5] See Glossary, s.v. *taʿrīf*.

community between the spouses required by the *sharīʿa* and custom (*ʿāda*)[6] had not returned to normal. An agreement was concluded between them enjoining the dissolution of their marriage (*firāq*), and the redemption (*khulʿ*)[7] [of the wife] in return for her specified (*maʿlūm*)[8] dower (*ṣadāq*), [10] and maintenance (*nafaqa*) for her [waiting period] amounting to a total sum of four and a half pounds. [The husband] divorced (*ṭallaqa*) her by a single repudiation whereby she obtained from him control over her person (*malakat amr nafsihā minhu*).[9] [11] Consequently, if he should reinstate her (*rajaʿūhā*) [by a new marriage contract], his [second] wife Sālma bint Mḥammad Jwayyil would be [automatically] divorced[10] on restitution of her dower [from her husband]. [12] The husband agreed to all the above conditions on June 27, 1962.

[13] Husband's signature — Signature of wife's father
[14] Ibrāhīm ʿAbdallāh al-Twātī — Yūnus Badr Muṣṭafā Mḥammad

Witnesses to the divorce (*shuhūd al-ṭalāq*)
Mḥammad ʿAbdallāh al-Twātī
Ḥājj Bāshā al-Khaḍrī

[15] The Clerk (*kātib*)
[16] Manṣūr al-Faḍīlī

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[6] This wording reveals an awareness on the Qāḍī's part of the distinction obtaining between these two legal norms, the purpose of which is to clarify the fact that there was no prospect of effecting a reconciliation between the spouses.

[7] On *khulʿ*, see Layish, *Divorce*, 54–58 and Glossary, s.v. *khulʿ*; Peters, *Marriage*, § 0.1.5.2.

[8] See Glossary, s.v. *ṣadāq musammā*.

[9] This phrase implies irrevocable divorce. See Layish, *Divorce*, 98–99.

[10] Actually, this amounts to a suspended repudiation even though it is not worded in the first person. Women in Tunisia insert a stipulation in the marriage contract to the effect that if the husband takes another wife, his first wife will be divorced ("the clause of the city of Kairouan"). See Bousquet, *Islamic Law*, 4. Cf. Anderson, *Africa*, 25–29, 29, 72. Suspended repudiation by way of oath is common practice among the Bedouin in the Western Desert. And since Bedouin oaths are very fragile, many wives are divorced on this account; see Murray, 225. For a similar case phrased in explicit terms of suspended repudiation, see Layish, *Women*, 157. See also Peters, *Marriage*, § 0.1.5.1.4; Glossary, s.v. *taʿlīq al-ṭalāq*. Section 38 of the Ottoman Family Rights Law, 1917 provides that a wife may validly stipulate in the marriage contract that her husband may not take an additional wife and that if he does, either she or her rival shall be divorced. It seems that the polygamous marriage was the issue of the dispute in the case under review. Cf. doc. 7 above.

Document 17

Introduction

In consequence of a dispute arising between a couple, the wife left the conjugal dwelling after the husband hit her without legal justification. In his attempt at effecting a reconciliation, the husband promised her a gift of various pieces of jewelry over and above the specified dower. He moreover delegated her with the power to divorce herself from him in his name should he hit her once again. The wife agreed to return to the conjugal dwelling under these conditions, and the Qāḍī endorsed the conciliation agreement, imparting to it the validity of a binding sentence.

The case under study exemplifies a sophisticated expedient, rarely resorted to in daily practice, by which the husband confers on his wife, either in the marriage contract or in the course of their marriage following a dispute, as in the case under review, the power to repudiate herself. The delegation may be absolute or conditional upon the occurrence of a certain event, such as ill-treatment of the wife. Formally, the wife repudiates herself in her husband's name but, in actual fact, it may be insightfully construed as a device enabling the wife to secure her release on her own terms.[1]

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![2]

[2] In the reign of his Highness *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī, the Emir of Barqa [Cyrenaica].[3]

[3] SENTENCE OF CONCILIATION (*ḤUKM MUṢĀLAḤA*) BETWEEN SĀLIM YŪNUS GHARBĪ AL-ḤAMDĀN **[?]** AND HIS WIFE FĀṬMA BINT ʿABDALLĀH

Entered in register no. 5/295, p. 5/201

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[1] On delegated repudiation (*tafwīḍ al-ṭalāq*), see Peters, *Marriage*, § 0.1.5.1.5; Layish, *Divorce*, 36–37; cf. idem, *Women*, 153–56; Shaham, *Family*, 106–7.

[2] See doc. 1, fn. 2.

[3] See doc. 1, fn. 3.

[4] At the Sharīʿa Court of Ajdābiya, presided over by his honour the Qāḍī, Shaykh Muḥammad Faraj Abī Ḥulayqa. May Allāh the Exalted grant him success!

In consequence of a dispute arising between the spouses Sālim b. Yūnus Bū Ṣāliḥ [5] from the Ḥamdī lineage (*ʿā'ila*) of al-Maghārba[4] [tribe] and Fāṭma bint ʿAbdallāh Ibn Ḥājj ʿAlī from the lineage of Abū Zahwa belonging to the al-Sdēdī [branch] of the Zwayya [tribe], in connection with their deteriorating [6] marital relations (*muʿāshara*), the aforementioned husband admitted that he had wrongfully (*ẓulman*) hit his aforementioned wife. He requested her to return [to the conjugal dwelling] and [promised] to buy her a silver bracelet twenty [7] days from the [present] date. [He also agreed that] the necklace he had previously given her in order to do her justice (*anṣafahā bihi*)[5] [i.e., compensate her for injustice done to her] is safeguarded for her as part of the dower.[6] This applied also to the bracelet due to be given her, [8] which he would not be entitled to dispose of. He also stipulated that if he hit her again,

> her divorce would be totally within her control; [thus] if she so wishes, she would be free to divorce herself (*yakūn ṭalāquhā bi-yadihā in shā'at tuṭalliq nafsahā*).[7]

The aforementioned woman agreed [9] to the husband's commitment, and she resumed her marital life [with him] forthwith.

His Honour, the aforementioned Qāḍī, endorsed (*ajāza*) this conciliation (*ṣulḥ*), appended his signature thereto, instructed that it be recorded and dated [as indicated below], and had the undersigned witnesses [10] testify to it on the 3rd day of Dhū 'l-Qaʿda 1371, [corresponding to] August 6, 1951.

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[4] See De Agostini, *Cirenáica*, 316ff.; Evans-Pritchard, map facing p. 35.

[5] Cf. Layish & Davis, 22, lines 11–12, 14: The wife agreed to return to the conjugal dwelling on condition that her husband renounce certain ornaments which were at her disposal "as compensation [with a view] to doing her justice [and the husband complied] (*naṣafuhu . . . ka-naṣafihi*)."

[6] Another possible reading: ". . . will be considered as a paid [debt] and part of her dower."

[7] See fn. 1 above. According to the Maghribī judicial practice (*ʿamal*), if the delegated repudiation is inserted in the marriage contract as a stipulatory clause, the wife may pronounce an irrevocable repudiation; if it is made as a voluntary promise after the conclusion of the marriage contract (as in the present case), the wife may pronouce only one revocable repudiation (Toledano, 128–31). Cf. Powers, *Women*, [3.0].

[11] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[13] The *sharʿī* Nā'ib
Muḥammad al-Mabrūk Abī Jāziya
The Court Usher (*mubāshir*)
Mḥammad ʿAbd al-Salām[8]

[12] The matter is as indicated above
[13] The Qāḍī of Ajdābiya
[14] Muḥammad Faraj Abī Ḥulayqa

[8] These persons act concurrently or intermittently in two capacities: those of *nā'ib* and court usher, respectively, and as professional witnesses. See Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks.

Document 18

Introduction

In this document, the husband, who was in the Sudan, authorized his agent to recommend that his wives join him there, and placed a camel at their disposal for this purpose. In the event of their refusal, the agent was instructed to free them from their marriage contracts by granting them *khulʿ* divorce in return for a renunciation, on their part, of all their claims to financial rights and to household effects.

One of the wives appeared in court accompanied by a paternal cousin representing the interests of the lineage vis-à-vis the husband. Her husband's letter was read out to her in court but the wife refused to join her husband. She transferred to her husband's proxy her entire dower and undertook to restore all household effects into his keeping. The latter then divorced the wife in her husband's name, and the divorce was entered into the court records.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the reign of his Majesty Idrīs al-Sanūsī I, Sovereign of the United Kingdom of Libya and Emir of Barqa [Cyrenaica]. May Allāh preserve him! Amen.[2]

[3] DIVORCE OF HĀDYA BINT ʿABD AL-HĀDĪ BY ḤMĒDA ABŪ BAKR

[4] In the Chamber (*dāʾira*) of the noble Sharʿī [Division of the Civil District Court of Kufra], presided over by his honour the Inspector (*mufattish*),[3] Shaykh Muḥammad Ṣāliḥ al-Bakrī. May Allāh the Exalted grant him success!

[5] A man by the name of Muṣṭafā b. Mjēḥīd, from the Jdayyid lineage (*ʿāʾila*) [of the Sdēdī branch] of the Zwayya[4] tribe (*qabīla*)

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.
[3] See Layish, *Legal Documents*, 15.
[4] See De Agostini, *Cirenáica*, 407–8; Evans-Pritchard, map facing p. 35.

appeared in court in the capacity of proxy (*wakīl*) representing Ḥmēda b. Abū Bakr Bū [6] Sāsya from the Jdayyid lineage [of the Sdēdī branch] of the Zwayya tribe, currently living in the Sudan. The gist of the power of attorney (*wakāla*)[5] is as follows:

> Redeem (*khalliṣūhunna*)[6] my wives [from me][7] in return for a renunciation, on their part, of all their [financial] rights. Buy or hire a camel for them and send them to me in the Sudan. If either of them demurs [8] and refuses to travel, she must transfer all her [financial] rights and all the household effects (*athāth*) belonging to me, now in her possession. [9] [Having done this], divorce her on my behalf (*ṭalliqhā bi'l-niyāba ʿannī*).[7] And as for my children, send them to school.[8]

In the latter's presence, there also appeared Hādya bint Ṣāliḥ [10] b. ʿAbd al-Hādī Bū Wḥēda, wife of the aforementioned Ḥmēda b. Abū Bakr, and I read to her her husband's letter dated [11] the 26th day of Rabīʿ Thānī 1379, and explained its contents to her. She was accompanied by her paternal cousin Mḥammad Ṣāliḥ b. Yūnus Bū Rizg Allāh, deputed (*muqaddam*) [12] by their lineage.[9] The wife demurred and refused to travel. She transferred to him all her dower (*ṣadāq*), and undertook to restitute to him all [13] the household effects in her possession belonging to him. She has a daughter by him called Rajʿa, for whose maintenance [she requested the proxy] to pay (*yunfiq*)[10] one pound a month. The proxy concurred [14] with this and divorced her by saying to her:

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[5] See Glossary, s.v. *wakāla*.

[6] Cf. Stewart, *Texts 2*, 32.126; doc. 15, line 7 and fn. 9 above. According to this version, the implementation of the husband's instructions requires reordering: to begin with, the wives should be given the option to join their husband in the Sudan without affecting their marital status; if they decline to accept the invitation, the proxy should offer them the option to redeem themselves by *khulʿ* in return for various matrimonial rights.

Another possible translation of *khalliṣūhunna*: "Be done with my wives [that is, give them] their entire matrimonial rights [such as dower and maintenance in order to encourage them to join their husband]." These matrimonial rights may well be the cause of the matrimonial dispute and disobedience. If they nevertheless decline to join their husband, only then should the proxy offer them the option of redeeming themselves by *khulʿ*.

[7] On divorce by proxy, see Layish, *Divorce*, 37–40; Peters, *Marriage*, § 0.1.5.1.5. Cf. D'Emilia, 32–33 (a man appointed his brother as a proxy for divorce), and 48.

[8] This may imply that the husband either intends to deprive his wives of their right to custody, or to interfere in the matter of the children's education in his capacity as a natural guardian. On custody and guardianship, see docs. 40 (fn. 8), 43–44 below.

[9] The wife's agnate represents the interests of the lineage vis-à-vis the husband.

[10] Under Mālikī law, minor sons are entitled to maintenance from their parents

You are divorced (*ṭāliqa*) by one repudiation on behalf of (*bi'l-niyāba ʿan*) your husband Ḥmēda [15] b. Abū Bakr Bū Sāsya.

And by means [of this irrevocable repudiation] she acquired from him control over her person (*malakat bihi amr nafsihā minhu*)[11] on the 15th day of Dhū 'l-Qaʿda 1379, [corresponding to] May 12, 1960.

On [16] payment of all court fees [by the proxy], the divorce was entered on the 9th day of Ṣafar 1380, [corresponding to] August 2, 1960.[12]

[17] Everything indicated above has been duly certified (*thubūt*)
Inspector (*mufattish*) at the [Chamber of the Sharīʿa] Court of al-Kufra[13]
[18] Muḥammad Ṣāliḥ al-Bakrī

until they reach puberty, and minor daughters, until the consummation of the marriage. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 90, line 594.

[11] On irrevocable divorce, see Peters, *Marriage*, § 0.1.5.1.6.2; Layish, *Divorce*, 103–6. Cf. Powers, *Women*, [5.1].

[12] Another wife was divorced on the preceding day. See Davis, *Archive*, Sharīʿa Court of Kufra, p. 52 no. 100, August 1, 1960.

[13] In the margin of the document there is an official stamp indicating that the court is for minor claims (*juz'iyya*).

Document 19

Introduction

A man divorced his wife by means of a letter sent from his place of residence in Tazarbu to some of his acquaintances in Kufra. The letter stated that if his wife repaid him all the money made over to her, apparently in the form of a dower, she would obtain her divorce at once. The court requested the woman's presence and the letter was read out to her. The woman paid the requested sum of money and was declared instantly divorced by the Qāḍī. In this case, suspended repudiation by means of letter is coupled with *khulʿ*: the compensation of the husband by the wife makes the divorce operative.[1]

Text

[1] On the 21st day of Shawwāl 1361, [corresponding to] November 1, 1942, on the basis of information (*ʿilm, khabar*) sent from the town of Tazarbu to the Sharīʿa Court of al-Kufra, [2] then presided over by the Qāḍī Shaykh Muḥammad Ṣāliḥ al-Bakrī. May Allāh the Exalted grant him success!

[The court] has been informed, through the agency of Mḥammad b. ʿAbd al-ʿĀṭī al-Ḥalīf, ʿAbd al-ʿĀlī b. Yūsuf [3] and ʿAbd al-Ṣamad b. Sālim on the 15th day of Glorious Ramaḍān 1361, that Mḥammad b. Bū Bakr Maḍīga divorced (*firāq*) his wife Mansiyya [4] bint Yūnus al-Ṭarbān by means of a letter (*jawāb*)[2] which the husband had sent to the aforementioned [individuals] stating:

> If (*idhā*) my wife Mansiyya [5] pays me back all the money she received from me [i.e., the dower], she will thereby be divorced (*fa-hiya muṭallaqa*).[3]

After I [i.e., the Qāḍī] read the letter out to her, [6] she paid out all the money he had demanded from her and thereupon became divorced from him by means of one [irrevocable] repudiation, whereby she obtained from him control over her person (*malakat bihā amr naf-*

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[1] On divorce by letter, see Layish, *Divorce*, 40–42.

[2] See Glossary, s.v. *jawāb*.

[3] This is a clear case of suspended repudiation coupled with *khulʿ*. In other words, by compensating the husband the divorce becomes operative. On suspended *khulʿ*, see Layish, *Divorce*, 32–33. On suspended repudiation, see doc. 16 above.

sihā).[4] [7] The marriage bond (*ʿuqdat al-nikāḥ*) between them was thus dissolved (*infaṣalat*), and there remained between them no mutual claims, demands, or matrimonial [i.e., financial] rights.

[8] In order to [impart a binding character] to what had transpired between them in the presence of the aforementioned witnesses (*shuhūd*), the Qāḍī pronounced a sentence [endorsing] her repudiation from him, [9] appended his signature [thereto], and instructed that it be entered. This transpired in the precincts where the Qāḍī is officially located.

[4] This phrase indicates irrevocable repudiation. See doc. 18, line 15 above. Cf. Powers, *Women*, [5.1].

Document 20

Introduction

The wife left her husband's conjugal dwelling after a prolonged dispute with him. The court tried unsuccessfully to bring about a reconciliation between the spouses. The husband rejected the court's offer to pacify the woman and secure her return to the conjugal dwelling, or, alternatively, to leave her to her own devices at her father's house for the duration of a few months, in the meantime paying her maintenance, in the hope that time would bring about the desired result. The husband and the woman's father agreed to dissolve the marriage bond. The husband renounced his right to the prompt dower that had been paid to the woman's father, probably at the conclusion of the marriage contract; he also transferred to him the rest of it, that is, the deferred dower.

The court granted the wife an irrevocable divorce that ruled out a later rehabilitation of the marriage except by means of a new contract and dower. The court ruled that this was the first of three repudiations, and instructed the wife to initiate the waiting period.

Text

[1] In the name of King Muḥammad Idrīs al-Mahdī al-Sanūsī I, Sovereign of the United Kingdom of Libya and Emir of Barqa [Cyrenaica]. May Allāh preserve him. Amen![1]

[2] RECORD OF DIVORCE (*MAḤḌAR ṬALĀQ*)

[3] In the court session held on Tuesday, the 1st day of the blessed month of Ṣafar 1382H, corresponding to July 24, 1962 of the Christian calender.

[4] In the precincts of the Sharīʿa Court of Kufra presided over by Ḥamīda al-Tuwātī and the clerk (*kātib*) Manṣūr al-Faḍīlī. Both parties appeared in court: the husband [5] Ḥmēda b. ʿAlī al-Habdī [al-Hablī ?] and the father of the wife Khwēra bint ʿAbd al-Rasūl,

[1] See doc. 1, fn. 3. For some reason, the invocation and the prayer for the soul of the Prophet, his family and Companions is missing. See doc. 1, fn. 2.

and after the procedure of identification (*taʿrīf*)[2] by [the Qāḍī] [6] it was established that the husband Ḥmēda b. ʿAlī al-Habdī was not compatible with his wife. He frequently resorted to the court, and the marital discord (*shiqāq*) between them became more frequent. [7] The court discussed with the couple the matter of the well-being [of the wife and advised the husband] to take her back [into the conjugal dwelling] and attempt to pacify her or, alternatively, to leave her to her own devices [8] at her father's house for the duration of four months, pay her expenses,[3] and bide his time to find out what Allāh had ordained for him.[4] [The husband] refused and all agreed on her divorce (*firāq*) [9] and mutual separation. None of the parties contested the fact that Ḥmēda b. ʿAlī had paid his wife's father [at the conclusion of the marriage contract] six pounds as part of the dower (*ṣadāq*). [10] The wife's father had already renounced (*qad sāmaḥa*) his [daughter's] right to those six pounds in favour of the husband Ḥmēda b.ʿAlī. [Moreover], the wife's father renounced [in favour of the husband] the rest of the daughter's dower.[5] [11] The wife claimed her sheep [probably on the ground that it was her private property rather than part of the dower] from him [her husband], but ʿAlī Ḥmēda [Ḥmēda ʿAlī] denied her right to the sheep and insisted on taking an oath (*yamīn*)[6] to the effect that she did not own [12] it. Afterwards, the wife's father renounced the sheep and no mutual [financial] claims or demands between them remained.

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[2] See Glossary, s.v. *taʿrīf*.

[3] In other words, the husband is advised to grant the wife maintenance (*nafaqa*) even though she is expected not to submit to his authority in the conjugal dwelling for a couple of months. Under the *sharīʿa*, a disobedient wife normally forfeits her right to maintenance (see Glossary, s.v. *nāshiza*; doc. 10 above). This, however, is not the case in the document under review.

[4] The assumption here is that time would eventually heal the differences between the spouses.

[5] The six pounds referred to here would seem to constitute the prompt dower (*muʿajjal*) and the rest of the dower, i.e., the deferred dower (*muʾajjal*) which is supposed to be paid in the course of the marriage or—according to local custom—in the event of termination of the marriage by divorce or death (see doc. 1, fns. 25–26 above). The payment of the prompt dower to the woman's father reflects a perception in customary law, according to which, the woman is not a party to the marriage contract. See Linant de Bellefonds, *Traité*, vol. 2, 200–1; Anderson, *Africa*, Glossary, s.v. *mahr*, 369. See doc. 1, fns. 14, 27 above.

[6] According to the *sharʿī* rules of procedure, only if the claimant fails to produce evidence by means of witnesses, does the *qāḍī* order the defendant, on the plaintiff's request, to take an oath relating to facts only. See Schacht, *Introduction*, 190; Glossary, s.v. *yamīn*.

The woman released herself by way of *khulʿ* (*inkhalaʿat*)[7] from him by means of a single [13] [irrevocable] repudiation (*ṭalqa*) by which she acquired control over her person (*malakat bihā amr nafsihā*).[8] This was the husband's first divorce and she was not legally permitted to him except by means of a new marriage contract (*ʿaqd*) and a new dower.[9] [14] The court instructed the woman to observe the waiting period (*iʿtidād*)[10] starting on the [following] day. [The sentence was pronounced] in the presence of the undersigned [witnesses].

[15] The husband's signature The signature of the wife's father
[16] Ḥmēda ʿAlī b. al-Habdī ʿUmar ʿAbd al-Rasūl

[17] The witnesses

[18] The Clerk (*kātib*)
Manṣūr al-Faḍīlī

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[7] See Glossary, s.v. *khulʿ*.

[8] The phrase indicates irrevocable repudiation. See docs. 18–19 above. Cf. Powers, *Women*, [5.1].

[9] This is the first out of three repudiations, the completion of which requires an intermediate marriage. See Layish, *Divorce*, 98–100, 103ff.; Peters, *Marriage*, § 0.1.5.1.6; Glossary, s.v. *taḥlīl*. The reference to the number of repudiations here exemplifies the imposition of the *sharʿī* norm on the part of the Qāḍī. Cf. Layish, *Divorce*, 153–54, 196.

[10] See Layish, *Divorce*, 109–10; Glossary, s.v. *ʿidda*. Concerning the enforcement of the *sharʿī* norm in this respect, see Layish, *Divorce*, 158, 196.

Document 21

Introduction

The husband stated in the Sharīʿa Court of Ajdābiya that in consequence of a dispute that had emerged a year and a half previously between him and his wife, he had divorced her in the Sharīʿa Court of Kufra by an irrevocable repudiation, both parties having renounced all financial matrimonial claims in each other's regard. The wife's father endorsed the contents of the statement in the presence of the Qāḍī and accepted the liability—in the absence of his daughter from the court—to indemnify the husband if the daughter should, at some time in the future, make any claim upon her husband. The father's liability implies that the wife was not a party to the divorce agreement.

The father's financial liability may well be a result of the Qāḍī's sensitivity to the wife's matrimonial rights under the *sharīʿa*.

Text

[1] In the name of Allāh the Merciful, the Compassionate.[1]

[2] In the Sharīʿa Court of Ajdābiya, presided over by his Honour the Qāḍī Shaykh Rāfiʿ ʿAbd al-Raḥmān [3] al-Qāḍī. May Allāh the Exalted grant him success!

Mḥammad b. Abī Bakr b. Khalīfa al-Zwayyī from the ʿAffūn lineage (*ʿā'ila*) of the al-Sdēdī [branch of the Zwayya tribe][2] [4] was identified (*muʿarraf*) by Shaykh Mḥammad Ṣāliḥ al-Jarma al-Zwayyī,[3] and immediately upon the appearance [5] of his wife's father[4] ʿAbdallāh b. Ṣāliḥ b. Mīlād al-Nazzāl al-Zwayyī from the ʿAffūn [lineage] of the al-Sdēdī [branch of the Zwayya tribe] [6] made the following statement:

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[1] See doc. 1, fn. 2.

[2] See De Agostini, *Cirenáica*, 407–8; Evans-Pritchard, map facing p. 35.

[3] Two men are ordinarily required for the identification process (see Glossary, s.v. *taʿrīf*), but the Qāḍī seems to be fully satisfied with the identification by "the Shaykh of the tribe (*qabīla*)" (see line 14 below) who is presumably expected to be well informed.

[4] The wife is absent from court. We have no information as to whether the father represented her as her proxy; in any case, there is no mention of the court asking the father to produce a power of attorney.

> A year and a half ago, a dispute (*nizāʿ*) arose between me and [7] my wife ʿĀysha, daughter of the aforementioned ʿAbdallāh b. Ṣāliḥ). This caused me to divorce her (*fāraqtuhā*) by one [irrevocable] repudiation [8] in the Sharīʿa Court of Kufra in return for her renunciation of all her *sharʿī* [matrimonial] claims [in my regard. By means of this divorce] she acquired [9] control over her person (*malakat bihā amr nafsihā*)[5] and the marriage contract (*ʿuqdat al-nikāḥ*) between us was broken off (*infaṣamat*). I make no claims [10] in her regard, and she likewise claims nothing from me;[6] I [hereby] adduce my testimony thereto.

[11] Then the woman's father, the aforementioned ʿAbdallāh, testified to the veracity of his statement, [12] approved it and expressed satisfaction, declaring himself liable [to indemnify the husband], in the event of a subsequent claim made by his daughter,[7] [13] both to the Sharīʿa Court (*al-sharʿ*) and to the civil court (*qānūn*).[8]

On the basis of the authentication [of the agreement] by both parties (*taṣāduqihimā*)[9] [14] and of their identification (*taʿrīf*) by the aforementioned shaykh of the tribe, the aforementioned judge endorsed (*ajāza*) [15] this [i.e., the husband's] statement, formulated [in a legal manner] (*sawwagha*) and sanctioned (*irtaḍā*) it, [16] and ordered the statement to be carried out accordingly.[10] The sentence was issued

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[5] The phrase implies irrevocable repudiation. See Glossary, s.v. *ṭalāq bāʾin*, and docs. 18–20 above. Cf. Powers, *Women*, [5.1].

[6] On divorce by mutual renunciation of matrimonial rights, see Layish, *Divorce*, 53; Glossary, s.v. *mubāraʾa*.

[7] The father's undertaking to indemnify the husband in the event of possible financial claims made at some future date by his daughter would seem to indicate that the wife may not have been a party to the divorce agreement; this is in conformity with the customary concept of the institution of marriage, according to which, the wife is not a party to the marriage contract (see Linant de Bellefonds, *Traité*, vol. 2, 200–1). However, the mere fact that the father considered the possibility that his daughter would not respect the renunciation agreement indicates that she might be fully aware of her *sharʿī* matrimonial rights. Alternatively, it is possible that the Qāḍī himself drew the father's attention to the wife's matrimonial rights under the *sharīʿa*.

[8] Literally it should read: *sharīʿa* and statute (or state law), respectively. However, it seems that the reference here is to the court jurisdiction applying these laws. This indicates that the Bedouin—at this stage of sedentarization—resort to both *sharʿī* and civil courts.

[9] Another plausible translation: "compatibility between the statements of both parties."

[10] The Qāḍī seems to have been aware of the possibility that the wife was not a party to the divorce agreement and, for this reason, granted binding power to the father's undertaking to indemnify the husband in case the daughter would decline to comply with the agreement.

on the first day of Dhū 'l-Qa'da 1366, [17] [corresponding to] September 16, 1947.

[18] Witnesses to the proceedings (*shuhūd al-ḥāl*)[11]

[11] The names of the witnesses to the document are not available.

Document 22

Introduction

In consequence of a dispute arising between a married couple, the spouses agreed to a compensation divorce. A decision to this effect was handed down by a local *sharʿī* marriage solemnizer. The decision was brought to court for endorsement and registration. The wife's father declared himself ready to return the dower to her husband since the dissolution of the marriage had been initiated by his daughter. The husband divorced the wife by an irrevocable repudiation after the dower had been returned to him, and the divorce was registered.[1]

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![2]

[2] In the name of King Muḥammad Idrīs al-Mahdī al-Sanūsī I, Sovereign of the United Kingdom of Libya, and Emir of Barqa [Cyrenaica]. May Allāh preserve him! Amen.[3]

[3] RECORD OF DIVORCE (*MAḤḌAR ṬALĀQ*)

[4] [Divorce of] Umm al-Hanāʾ bint Mḥammad Abū Shūfa al-Wurfallī, by virtue of a sentence (*qarār*) issued by his Honour, the authorized *sharʿī* marriage solemnizer (*maʾdhūn*) in the oasis of Tazarbu, [5] Mr. Aḥmad ʿAbdallāh Bū ʿAzīza. [The sentence] reached the Chamber (*dāʾira*) of the Sharīʿa [within the civil district court][4] in the town of Kufra.

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[1] On compensation divorce (*khulʿ*) on the wife's initiative, see Peters, *Marriage*, § 0.1.5.2; Layish, *Divorce*, 54–58, 60–63.

[2] See doc. 1, fn. 2.

[3] See doc. 1, fn. 3.

[4] See Layish, *Legal Documents*, 15; Glossary, s.v. *dāʾirat al-sharʿ al-sharīf*.

A man called Aḥmad Mḥammad Dāwūd [6] of the Gṣērī [lineage of the Sdēdī section belonging to] the Zwayya[5] [tribe] appeared in court in the presence of his wife Umm al-Hanāʾ bint Mḥammad Abū Shūfa al-Wurfallī. After [their] formal identification (*taʿrīf*)[6] [7] in accordance with *sharʿī* procedure [it became clear] that discord (*shiqāq*) had repeatedly broken out between them, and that their conjugal life (*ʿishra*) had not been harmonious as required between spouses [8] by the *sharīʿa* and custom (*ʿāda*),[7] and that they had, in fact, already agreed to a dissolution (*firāq*) [of their marriage. The husband] claimed that he had given her by way of dower (*ṣadāq*) 19 [9] pounds, and the wife acknowledged this. Her father Mḥammad Bū Shūfa was prepared to reimburse [the husband],[8] she being the abstinent one (*zāhida*).[9] [10] [Her husband] received the money[10] and divorced her by one [irrevocable] repudiation by means of which [the woman] acquired from him control over her person (*malakat bihā amr nafsihā*);[11] and no mutual claims or demands [11] relating to matrimonial [financial] rights (*ḥuqūq zawjiyya*) remained. The spouses were divorced on the aforementioned date.

[12] The witnesses (*shuhūd*)
Mḥammad al-Shāfʿī
Zyāda Ṣāliḥ al-Wurfallī
Sālim Ṣāliḥ al-Khāldī

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[5] See De Agostini, *Cirenáica*, 407–8; Evans-Pritchard, map facing p. 35.

[6] See Glossary, s.v. *taʿrīf*.

[7] The distinction made here by the Qāḍī between *sharīʿa* and custom is significant; it was intended to establish the fact that there was no chance of bringing about a reconciliation.

[8] This may indicate that it was the father and not the woman that had actually received the dower, as is common, according to custom. See doc. 21 above.

[9] That is, she initiated the dissolution. See Glossary, s.v. *zuhād*. According to customary law in the Western Desert, a woman who experiences extreme aversion (*karh*) towards her husband is entitled to repudiation on condition that she refund her husband the value of the dower paid to her and the expenses paid to her relatives in full as well as the losses (*khasāʾir*) caused to her husband by the marriage (al-Jawharī, 200). Among the Awlād ʿAlī in the Western Desert, no stigma is associated with the state of a divorced woman; she usually has no difficulty in finding another husband (Mohsen, 120).

[10] Cf. Murray, 226 (if a woman insists on separation from her husband, the latter rarely refuses to divorce her in return for the dower). The principle involved here is that the person initiating the dissolution of the marriage contract must also bear its financial consequences.

[11] See Glossary, s.v. *ṭalāq bāʾin*; docs. 18–21 above. Cf. Powers, *Women*, [5.1].

[13] On payment (*ʿinda wuṣūlihi*) [of the court fees (*rasm*)[12] the divorce] was recorded[13] on November 7, 1961.

[12] Cf. doc. 18 lines 16–17 above.

[13] The registration of the divorce is not a necessary condition for its *sharʿī* validity. It is required in order to clarify the marital position of the parties thus facilitating procedures entailed in an eventual new marriage. The husband utilizes the sanction of registration in order to ensure reimbursement of the dower.

Document 23

Introduction

The husband and his mother-in-law, here acting by virtue of her daughter's power of attorney, stated in court that the relationship between the spouses was unsatisfactory. The mother-in-law initiated the dissolution of the marriage by *khulʿ* and undertook that should her daughter, once informed of the dissolution, make any financial claims whatsoever, either personally or through the agency of another, in her husband's regard at some future time, she, the mother, would be responsible for indemnifying the husband in full. On the basis of this commitment, the husband divorced his wife in court while stating that this was his first repudiation.

The Qāḍī, in his turn, endorsed the repudiation, and instructed the mother to request her daughter to initiate her waiting period.

Text

[1] In the name of Allāh, the Merciful, the Compassionate.[1]

[2] At the Sharīʿa Court of the town of Ajdābiya presided over by his Honour the Qāḍī Shaykh Rāfiʿ ʿAbd [3] al-Raḥmān al-Qāḍī. May Allāh the Exalted grant him success!

Aḥmad b. Ramaḍān Ibn ʿAṭāʾ [4] Allāh al-Marghinī appeared [in court] on his own behalf, with Munā bint Saʿūd [Masʿūd?] b. Maʿyūf al-Marghinī [5] representative (*nāʾiba*) of her daughter[2] Fāṭma bint Aḥmad b. Maʿyūf al-Marghinī. Both of them—[the husband] acting on his own account, and [the mother-in-law] acting by virtue of guardianship (*wilāya*)[3]—stated [6] that the marital life of the spouses

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[1] See doc. 1, fn. 2.

[2] Since a woman is not a natural guardian (see fn. 3 below), she seems to have managed to obtain nomination as a proxy. The granting of a daughter's proxy to a mother is not typical in an agnatic society, but it may attest to the social standing of cognates in Bedouin society in North Africa; see doc. 5 fn. 3 above.

[3] Under the *sharīʿa*, only the father is the natural guardian of his children, that is, by virtue of blood relationship; other agnates may be nominated as "appointed guardian" (*waṣī mukhtār*) by the natural guardian {see docs. 40 (fn. 8), 43 and 44 below}. A woman is not a natural guardian of her children, though under Mālikī school, the mother has the right of custody over her daughter until consummation

had not been harmonious, and that matters had got to a point [7] at which Munā initiated, in the name of her daughter Fāṭma, redemptive divorce (*khāla*ʿ*at*)[4] by means of [the following] statement:

> From the moment that I inform my daughter Fāṭma [8] of the redemptive divorce (*ṭalāq khul*ʿ*ī*) from her aforementioned husband Aḥmad, any financial claims or [9] demands addressed to him by herself or by anyone else acting on her behalf[5] will become my responsibility and obligation (*malzūma*), [and I shall defray them] [10] in their entirety.[6]

After he paid the divorce fee of his own good will and gave her [i.e., his mother-in-law] one pound from his own private money [11] to enable her to get to her present place of residence, the aforementioned husband Aḥmad uttered [12]—on this basis [i.e., his mother-in-law's undertaking]—one repudiation of his wife by way of redemption (*ṭalāq khul*ʿ*ī*) and stated that this was his first repudiation[7] [13] of her.

[The professional witnesses testified to the legal proceedings by stating:]

> On the basis of what the parties had undertaken of their own free will at the court session (*majlis*), [14] his Honour the Qāḍī had us testify (*ashhadanā*) to the validity (*ṣiḥḥa*) of the divorce proceedings by *khul*ʿ [15] and the husband's first repudiation of his wife. He [also] instructed the wife's mother on her daughter's behalf (*bi'l-niyāba*)[16] to inform her [i.e., the daughter] regarding her obligation to [start] observing the waiting period (*i*ʿ*tidād*)[8] from the morrow [of the present court session].

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of the marriage (Linant de Bellefonds, *Traité*, vol. 2, 171). See Glossary, s.v. *wilāya*, *waṣī mukhtār*. It seems that the Qāḍī was referring to the mother's position as representative (*nā'iba*) of her daughter (see line 5 above and line 15 below). There is, however, no mention of a power of attorney being presented to the court.

[4] See Layish, *Divorce*, 64; Glossary, s.v. *khul*ʿ.

[5] This may refer to the wife's father (or some other agnate) who objects to the *khul*ʿ initiative.

[6] The mother's undertaking to indemnify the husband suggests the possibility that her daughter (i.e., the wife) was not a party to the divorce agreement entailing renunciation of financial rights in accordance with local custom, though formally the mother was acting as her daughter's representative, that is, within the ambit of the *sharīʿa*. Cf. doc. 21 above.

[7] The Qāḍī seems to have put words into the husband's mouth guided by his desire to impose the *sharʿī* norm. For further detail, see Layish, *Divorce*, 153–54, 196.

[8] See Glossary, s.v. *ʿidda*. Concern over the waiting period also attests to the Qāḍī's care to promote the *sharʿī* norm in all that relates to the legal consequences of divorce. Cf. Layish, *Divorce*, 158–59, 196–97.

[Issued as] valid *shar'ī* sentence (*ḥukm*) and order (*amr*). [17] [The Qāḍī] explained to both of them the significance of this ruling. This transpired in the precincts where [the Qāḍī] is officially located. [18] He instructed that [the sentence] be registered on the 13th day of Ṣafar 1366, [corresponding to] January 6, 1947.

[19] The mother of the divorced woman — The husband granting the divorce

[20] Munā bint Mas'ūd — Aḥmad b. Ramaḍān

[21] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[22] 'Abd al-Bāsiṭ Sālim
Maḥmūd 'Abd al-Salām
Yūsuf Aḥmad

[23] The matter being as indicated above
[24] The Qāḍī of Ajdābiya
[25] Rāfi' 'Abd al-Raḥmān al-Qāḍī

Document 24

Introduction

The couple had entered into a *sharʿī* marriage contract in court two years previously and their marriage was consummated. Eventually, on account of their mutual incompatibility, they decided that a divorce was inevitable.

In return for her *khulʿ* divorce, the woman undertook to pay her husband a specified sum of money (his dower to her) on her marriage to someone else, i.e., to transfer the dower from her second husband to the first. Although under the *sharīʿa* there can be no legal connexion between the two marriages, in customary context (as will become apparent from other documents below), a connexion between the two husbands is implied. In the document under review, the woman further undertook to forego maintenance for the duration of the waiting period. The husband agreed to these conditions and granted the woman her divorce.

The Qāḍī conferred the validity of the *sharīʿa* on the customary *khulʿ* (to which the wife was a party) and instructed the woman to initiate the waiting period.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him![2]

[3] DIVORCE (*ṬALĀQ*) OF ʿĀYSHA BINT MUFTĀḤ ḤSĒN BY ABŪ SĒF B. ʿAYYĀD

Entered in register no. 6/134, p. 83.

[4] In the Sharīʿa Court of Ajdābiya presided over by its Qāḍī Shaykh Muḥammad al-Sanūsī al-Ghazzālī al-Khaṭṭābī. May Allāh prosper him! Amen.

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

[5] Both spouses appeared in court: Abū Sēf b. ʿAyyād b. al-Bghīḍ, aged 27, from the Sdēdī [section] of the Zwayya tribe (*qabīla*), and his wife, [6] ʿĀysha bint Muftāḥ b. Ḥsēn, aged 20, from the Ḥabbāra lineage (*ʿā'ila*) of the Sarāta tribe. Both were born in the oasis of Kufra [7] and reside in Ajdābiya. Subsequently, the husband, the aforementioned Bū Sēf, said:

> Two years ago I married by means of a [8] *sharʿī* marriage contract (*tazawwajtu . . . bi-ʿaqd sharʿī*) ʿĀysha, here present in this court session (*majlis*), and consummated the marriage (*dakhaltu bihā*) at the time of the contract in return for a specified dower (*ṣadāq maʿlūm*),[3] part of which was delivered to her. However, our marital relations were not harmonious.

[9] His wife, the aforementioned ʿĀysha, corroborated everything he said about the marriage, the dower, and the incompatibility that characterized [10] their marital relations. After the two parties debated about the financial matrimonial rights and the relevant appurtenances (*tawābiʿ*),[4] the upshot was that [11] the wife, the aforementioned ʿĀysha, undertook to pay 25 pounds to her husband, the aforementioned Abū Sēf, [12] on her eventual marriage (*ʿinda iqtirānihā*) to another man,[5] in order to obtain her divorce for that sum. She [also] undertook to provide her own maintenance (*infāq*) for the duration of the waiting period (*ʿidda*).[6] Whereupon [13] her husband, the aforementioned Abū Sēf, complied with her request and consented to it. During the court session, [he stood] facing her, and addressed her saying: "My wife ʿĀysha [14] bint Muftāḥ, here [present], is divorced from me by this one repudiation (*ṭalāq*)." He notified [the court] that this was his first repudiation of her.[7] The matrimonial bond and the marital intimacy between the aforementioned spouses were both dissolved (*infaṣalat*). [15] This transpired in the presence of the witnesses (*shuhūd*) mentioned below.

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[3] See Glossary, s.v. *ṣadāq musammā*.

[4] See Glossary, s.v. *tawābiʿ*.

[5] In other words, the woman will exact her dower from her second husband and transfer it to her first by way of returning his dower to him. More precisely, the future husband is expected to pay the present husband the dower before marrying her. See docs. 25–27 below; Layish & Davis, 49 lines 7–8; 62 lines 7–8; Mohsen, 117–18. For further details concerning customary *khulʿ*, see Layish, *Divorce*, 65ff.

[6] In other words, she renounced maintenance for the duration of the waiting period. See Glossary, s.v. *nafaqat al-ʿidda*.

[7] Cf. doc. 23, fn. 7 above.

[16] In accordance with the settlement reached by the two parties, while both were in a state of legal competence (*ḥāla jā'iza*) [17] in *sharʿī* terms, as duly certified (*thubūt*) by the aforementioned judge (*ḥākim*), the latter decreed that the aforementioned Abū Sēf [18] had divorced his wife, the aforementioned ʿĀysha, irrevocably (*bā'in*),[8] thereby obligating her to discharge her commitment [19] to provide her own maintenance for the duration of the waiting period (*ʿidda*) and pay 25 pounds. He instructed her [20] to pay this amount [25 pounds] on her eventual marriage to another man,[9] and also to observe the waiting period (*iʿtidād*)[10] as from the following day.

[21] [Issued] by way of *sharʿī* sentence (*ḥukm*) and injunction (*amr*). [The Qāḍī] signed and sanctioned (*irtaḍā*) both of them and enjoined that it be carried out in conformity with the sentence and the injunction. [22] He had the undersigned persons testify (*ashhada*) to this effect, instructing that [the sentence] be recorded. [The sentence] was recorded on the 25th day of Rabīʿ al-Awwal 1372, corresponding to December 13, 1952.

[23] Fingerprints of the husband and wife.

[24] Witnesses to the proceedings (*shuhūd al-ḥāl*):
[25] Mḥammad Saʿd b. ʿAbdallāh
Mḥammad ʿAbd al-Salām
The Sharʿī Nā'ib
Muḥammad al-Ṭālib al-Hammālī[11]

The matter being as indicated above
The Qāḍī of Ajdābiya
Muḥammad al-Sanūsī al-Ghazzālī [al-Khaṭṭābī]

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[8] See Glossary, s.v. *ṭalāq bā'in*.

[9] The Qāḍī here confers the sanction of the *sharīʿa* on customary *khulʿ*. For further details, see Layish, *Divorce*, 133ff.

[10] See Glossary, s.v. *ʿidda*; doc. 23, fn. 8 above.

[11] This person acts concurrently or intermittently in two capacities: as a the Sharʿī Nā'ib and as a notary or professional witness. See Name Index of Qāḍīs, Nā'ibs and Other Official Clerks. Cf. doc. 17, fn. 8 above.

Document 25

Introduction

A woman, apparently divorced by *khulʿ*, had been required by the court to refund her former husband a certain sum of money (probably the prompt dower), but had failed to do so. As a result, a dispute arose between her father and her former husband, and they resorted to court proceedings. The woman's father undertook to repay his former son-in-law his daughter's debt on her remarriage to another man. Furthermore, even if she were to marry without his permission and settle for a dower lower than the debt owing to her first husband, he undertook to pay the entire amount without delay. The former husband was satisfied with this arrangement, and a conciliation between the sides was reached.

The Qāḍī endorsed the conciliation agreement conferring on it the validity of a *sharʿī* sentence notwithstanding its customary norms violating *sharʿī* matrimonial law.

Text

[1] In the name of Allāh, the Compassionate the Merciful. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him![2]

[3] RECONCILIATION (*MUṢĀLAḤA*) BETWEEN MḤAMMAD B. ABĪ BAKR AL-BGHĪḌ AND IDRĪS B. AL-ŌJALĪ
Entered in register no. 427, p. 286

[4] At the Sharīʿa Court of Ajdābiya presided over by the Qāḍī Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted grant him success! Amen.

[5] 55-year-old Mḥammad b. Abī Bakr b. al-Bghīḍ and Idrīs b. al-Ōjalī b. Manṣūr—both from the Muftāḥ lineage (*ʿā'ila*) [of the

[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

Shwāgir branch] of the Zwayya[3] tribe (*qabīla*)—appeared [in court] [6] and were identified (*maʿrūfān*)[4] by name and person. The aforementioned Mḥammad made the following statement:

> Idrīs here present claims from my daughter Fāṭma the sum of 25 pounds by virtue of the divorce (*ṭalāq*) sentence (*ḥukm*) [7] passed on May 26, 1954 at this court[5] under the number 4/550. Accordingly, I undertake to pay this amount [8] in person to the aforementioned Idrīs on my daughter's remarriage (*ʿinda iqtirān*) to another man.[6] Likewise, should she stray from under my control by marrying (*tazawwajat*) without my permission [9] for a dower smaller than this amount, I shall take it upon myself to pay in person the sum in its entirety without objection or delay.[7]

The aforementioned Idrīs [the husband] endorsed [10] what he said concerning the divorce of his [Mḥammad's] daughter, the aforementioned Fāṭma, and concerning the aforementioned sum and was satisfied with the commitment that Mḥammad had taken upon himself. They became reconciled (*iṣṭalaḥā*) and so [11] the dispute (*shiqāq*) between them was resolved.

On the basis of what had been agreed upon by the parties, while both were in a state of legal competence (*ḥāla jāʾiza*) in *sharʿī* terms

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[3] See De Agostini, *Cirenáica*, 407, 409; Evans-Pritchard, map facing p. 35.

[4] See Glossary, s.v. *taʿrīf*.

[5] That is, three days previously. It seems that we are here dealing with a *khulʿ* divorce whereby the wife undertook to indemnify her husband (see Glossary, s.v. *khulʿ*) but failed to do so. In the following the father assumes upon himself the responsibility for the daughter's debt.

[6] In other words, the father will require the dower from the second husband and transfer it to the first (cf. doc. 24 above and docs. 26 and 27 below; Layish, *Khulʿ*). This procedure is an infringement of the *sharīʿa*, and reflects the perspective of customary law according to which the dower is the father's property, and the woman is not a party to the marriage contract. See Glossary, s.v. *ṣadāq; ʿaqd*; Layish, *Divorce*, 65–76.

[7] Mḥammad had two causes for concern: 1. A divorcee who is no longer a virgin is entitled to marry without the mediation of a marriage-guardian, and there was thus the possibility that Fāṭma would remarry without her father's permission and without refunding her first husband; 2. the dower for a divorcee of a consummated marriage may be lower than that of a virgin (see Glossary, s.v. *thayyib*). The father's commitment here to make good the debt out of his own pocket was intended to cover all eventualities. In effect, this case represents a retreat from *sharʿī khulʿ* to customary *khulʿ* in the sense that the woman is not a party to the agreement (see Layish, *Khulʿ*). According to Maghribī judicial practice (*ʿamal*), it is not legally permissible for a sick father, after his daughter's marriage has been consummated, to guarantee her dower since this is tantamount to a bequest in favour of a legal heir in contradiction to the *ultra vires* doctrine (Toledano, 97; Coulson, *Succession*, 239ff.)

as duly certified (*thubūt*) by the [12] aforementioned judge (*ḥākim*), the latter endorsed (*ajāza*) this amicable settlement (*ṣulḥ*),[8] signed it, had the undersigned witnesses testify (*ashhada*) to it, and instructed that it be recorded. [The amicable settlement] was recorded on the 26th day of Ramaḍān [13] 1373, corresponding to May 29, 1954.

The signatures are in the protocol (*ḍabṭ*)

[14] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[15] al-Mahdī b. Ṣāliḥ
ʿUthmān b. Mḥammad
ʿAbd Rabbihi ʿAlī Manṣūr
ʿImrān ʿĪsā[9]

The matter being as indicated above
The Qāḍī of Ajdābiya
[16] Ḥusayn Muḥammad al-Aḥlāfī

[8] In actual fact, the Qāḍī did not interfere in the substance of the conciliation, but imparted to it the validity of a sentence, despite its infraction of the *sharīʿa*. Thus, according to the latter, the father is not a party to the settlement of claims brought forward by his former son-in-law against his daughter, but he does have a standing in such claims under customary law. For further detail, see Layish, *Divorce*, 133–37. Cf. docs. 26 and 27 below.

[9] A professional witness. See Name Index of Qāḍīs, Nā'ibs and Other Official Clerks.

Document 26

Introduction

After a prolonged dispute the spouses reached an agreement granting the wife *khulʿ* divorce in return for her entire dower. A kind of customary promissory note to the amount of the dower was drawn up over the wife's locks of hair (*quṣṣa*) and made payable on the day when a suitor would come forward and ask for her hand. The latter would be expected to deposit the amount at the court before contracting marriage. And if she is married off without payment of this sum, the person who concludes the marriage is liable for the debt, or—according to another version—is accounted as someone who commits an injustice (*ẓālim*), under customary law, against the husband and is obliged to pay the amount out of his own pocket.

The husband divorced the wife, and the Qāḍī agreed to co-operate in the implementation of this customary agreement even though it entailed an infraction of the *sharīʿa*. The Qāḍī endorsed the customary *khulʿ* but also instructed the wife to start observing the *sharʿī* waiting period. It is most likely that the terms of the agreement of the *khulʿ* had been shaped by experts on customary law out of court and that the parties resorted to the court with the expectation that the Qāḍī would sanction the agreement and be instrumental in its implementation.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the name of the King, *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī I, Sovereign of the United Kingdom of Libya, and Emir of Barqa [Cyrenaica]. May Allāh preserve him! [3] Amen.[2]

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

[3] RECORD OF DIVORCE (*MAḤḌAR ṬALĀQ*)

[4] At the Sharīʿa Court of Kufra presided over by the official responsible (*masʾūl*),[3] Ḥamīda al-Tuwātī, and the court clerk (*kātib*) Manṣūr al-Faḍīlī.

[5] The man Masʿūd b. Ḥmēd al-Jalūlī, a resident of al-Hawwārī[4] appeared in court together with his wife Marzūga bint Ṣāliḥ [6] Ḥasan Shū in the company of a group of people. Frequent discord (*shiqāq*) existed between them, and each held the other responsible for the deterioration of their married life, [7] and their marital relations (*ʿishra*) were not harmonious as required by the *sharīʿa* and custom (*ʿāda*).[5] An agreement was reached [8] between them regarding dissolution of the marriage (*firāq*), and the wife redeemed herself from him (*khālaʿathu*) in return [for renouncing] the entire dower (*ṣadāq*) which was [still] his liability (*dhimma*) towards her [i.e., due to her from her husband].[6] [9] The sum of money registered over her lock of hair (*quṣṣa*)[7] amounted to 40 (forty) pounds. In the event that a suitor (*khāṭib*) came forward asking for her hand in marriage,[8] he would [be requested to] deposit this amount [10] at the Sharīʿa Court.[9] [However], if the *Fātiḥa* is recited for her [i.e., she enters

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[3] See Layish, *Legal Documents*, 15.

[4] In the region of Kufra. See Evans-Pritchard, 24–25.

[5] This is an indication that the Qāḍī distinguishes between the two legal norms. The distinction in the case under review is intended to show that dissolution of the marriage was unavoidable.

[6] This seems to refer to the deferred dower due to be paid after a delay which may last years while the marriage persists. See doc. 1, fn. 25 above; Glossary, s.v. *ṣadāq muʾajjal.*

[7] *Quṣṣat al-marʾa*—a metaphoric expression for a customary promissory note drawn up in *khulʿ* agreement to ensure payment of the debt to the divorcing husband. Cf. Layish & Davis, 51, line 8 (*kutibat ʿalayhā fī quṣṣatihā*). There is evidence in the *ḥadīth* of the practice of keeping notes and messages over women's locks of hairs (*ʿiqāṣ*) and of connecting the *khulʿ* divorce with women's hair. Hair in this context is something of unique importance that should be respected and valued more than any other asset. Thus, a woman may redeem herself from her husband in return for renouncing "the entire of her property with the exception of her hair (*shaʿr*)." See Wensinck, vol. V, 395ii (*wa-fī yadihi quṣṣa min shaʿr*); Dozy, vol. 2, 360; Ibn Manẓūr, *Lisān*, vol. 7, 56ii; Ibn Hishām, vol. 4, 169. I owe the last reference to my student Mr. Muḥammad Ṭāṭūr. It is interesting to note in this connexion that, according to the Maghribī judicial practice (*ʿamal*), a woman may undertake to pay her husband some compensation in return for her release at some later date, and produce a guarantor for this compensation (Toledano, 45). Cf. docs. 24 and 25 above, and doc. 27 below.

[8] Cf. doc. 1 line 17 above.

[9] The court was instrumental in implementing a customary *khulʿ* agreement, its

into a marriage contract] while this amount is still unpaid [to the divorcing husband], the person reciting the *Fātiḥa* [11] will become liable [for the debt] (*qā'im*)[10] and will be obliged to pay this sum.[11]

[The agreement was concluded] in the presence of the group of undersigned persons. [The husband] uttered [12] one [minor] irrevocable (*bā'in*) divorce [entailing] a short intermediate period of separation (*baynūna ṣughrā*),[12] and [the Qāḍī ruled that] she was not legally permitted (*taḥill*) to him except through a new contract [of marriage] (*ʿaqd*) and a new dower. [The court] instructed the wife to observe the waiting period (*ʿidād*).[13] [13] [Issued] on May 9, 1965.

The witnesses (*shuhūd*)
Ḥājj ʿAlī Jābir
Maḥmūd Bū Ṣāgiʿ

[14] The husband's signature — Signature of the wife's proxy (*wakīl*)[14]

[15] Masʿūd Ḥmēd — Ṣāliḥ Ḥasan Shū

The Court Clerk (*kātib*)
Manṣūr al-Faḍīlī

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function being that of ensuring fulfilment of the conditions laid down in the promissory note (*quṣṣa*). Cf. doc. 25 above, and doc. 27 below. For further details, see Layish, *Divorce*, 71–73, 133, and 136.

[10] Alternatively: ". . . will be accounted [under customary law] as someome who commits an injustice (*ḍālim*) [*zālim*]." See Stewart, *Texts 2*, 45.40; idem, *Texts 1*, 45 § 4.

[11] Any marriage solemnizer knowing of this judgement who "recites the *al-Fātiḥa*," that is, performs a marriage contract (though the recitation is not required for the validity of the contract; see doc. 2, fn. 10 above), before Marzūga has paid her debt to Masʿūd, becomes—according to customary law—liable for the debt himself even if he is a court official and not a party to the dispute, and even though nonpayment of the debt cannot under any circumstances be an impediment from the *sharʿī* point of view to such a marriage. Cf. Q. 2:232: "And when ye have divorced women and they reach their term [i.e., waiting period], place not difficulties in the way of their marrying their husbands. . . ." If *ẓālim* is the right reading, then a ground for a judicial claim under customary law is created against the man who has committed injustice by depriving Masʿūd of his right to the dower.

[12] See Glossary, s.v. *ṭalāq bā'in; baynūna ṣughrā*.

[13] See Glossary, s.v. *ʿidda*. Alongside his readiness to compromise with customary *khulʿ*, the official responsible requests the imposition of the *sharʿī* norm in so far as the matters in question relate to the legal consequences of the divorce. See Layish, *Divorce*, 158–60, and 196–97.

[14] The signature of the wife's *wakīl* (her father) while her own signature is miss-

Document 27

Introduction

In this document, a woman required her present husband to transfer into her possession a number of she-camels, probably owing to her as prompt dower, in order to enable her keep her side of her customary *khulʿ* agreement with her former husband.[1] Her present husband alleged that he had already settled part of the debt. The woman failed to prove her claim and the present husband gave evidence corroborating his version and undertook to transfer the remaining part of the debt to her in instalments.

The Nā'ib nevertheless allowed the wife the option of proving her case by resorting to her former husband's witnesses at some time in the future and establishing that he had not recovered the debt, and this despite the absence, from a *sharʿī* point of view, of any direct legal connexion between the two men. It seems that the parties resorted to the Sharīʿa Court to resolve a dispute emerging out of a customary agreement after their attempts to this end by means of tribal arbitrators had failed.

Text

[1] A woman called Saʿīda bint Abī al-Gāsim, [2] the former wife of Ṣāliḥ al-Jarma, brought a claim against Ibrāhīm al-Ḍabiʿ [her present husband] stating [3] that her aforementioned husband [Ṣāliḥ] "claims from you, O Ibrāhīm, a sum of money equivalent to eight camels."[2] [4]

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ing, may indicate that the wife was not an active party to the proceedings of the customary *khulʿ*.

[1] On the customary *khulʿ*, see docs. 24–26 above; Layish, *Divorce*, 65–76, 133–37; idem, *Khulʿ*.

[2] This appears to be a dispute over the implementation of a customary *khulʿ* agreement though this supposition can be corroborated only by circumstantial, rather than direct, evidence. The issue under discussion is presented in court by the woman in the form of a financial dispute between Ṣāliḥ, her former husband, and Ibrāhīm, the present one, and not between the two spouses as one would expect in a matrimonial dispute. According to this supposition, the first husband (Ṣāliḥ) claims from the second (Ibrāhīm) the dower which Saʿīda had undertaken to return to him upon her marriage to someone else, but for some reason failed to do. However, since the first husband lacks the right of standing in court (*locus standi*) in the matter of his claim to the dower payable by the second husband, the woman acts as

The aforementioned defendant answered her that his debt amounted to 82.5 [5] Arab Majīdī riyals.[3]

[The wife] was required to prove her allegation (*daʿwā*) by means of witnesses (*bayyina*).[4] [6] However, she found herself unable to provide the proof. The defendant accomplished [the procedure required] of giving testimony (*qawl*)[5] [concerning his debt] [7] and he established what had been admitted by him. He undertook to pay the woman [the debt] in deferred [instalments payable] over three [8] [harvest] seasons,[6] comprising the sugar cane harvest in the first and second season, and the barley harvest in the following season (*baʿd al-nātij*).[7]

[9] On this basis, the sentence (*ḥukm*) was issued, and the agreement between the two parties was reached. [For the time being], the woman has no evidence (*ḥujja*) against him [her present husband concerning the debt] [10] unless she brings decisive equitable evidence [at some time in the future] produced by Ṣāliḥ [her first husband] that will invalidate [11] the [facts of the] situation [as established

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his mouthpiece. According to an alternative supposition, Saʿīda sues Ibrāhīm (a stranger) for a debt due to her husband. However, one should bear in mind that the *sharīʿa* does not recognize community property between the spouses and there is no evidence in the document to the effect that Saʿīda was acting as a representative of her husband Ṣāliḥ.

The term "camels" here translates vernacular *zawāzil* "gelded camels" (glossed in Dozy, vol. 1, 614 under *zwzl*, "châtrer un chameau," *zūzāl*, "châtré (chameau);" cf. Wehr, 311ii, s.v. *dhulul* (sg. *dhalūl*), "female riding camels." Cf. Murray, 204 (*dhalul*, riding camel). The Italian paraphrase of the original Arabic made for the benefit of the military governor (cf. fn. 9) specifies simply "camels."

[3] In the present context, this amount seems to be less than the price for the eight camels.

[4] See Glossary, s.v. *bayyina.*

[5] According to the *sharʿī* rules of procedure, only if the claimant fails to produce evidence, does the *qāḍī* order the defendant, on the plaintiff's request, to take an oath. See doc. 20, fn. 6 above; Glossary, s.v. *yamīn.*

[6] Cf. doc.1, fn. 25 above; Glossary, s.v. *ṣadāq muʾajjal.*

[7] In case *baʿd al-taʾrīkh* (rather than *baʿd al-nātij*) is the right reading, the translation should be: "[. . .] the season reckoned from the date [of the present session]."

at the present time, i.e., Ibrāhīm's version].[8] For the sake of clarifying the matter, the registration took place on July 4, 1932.

[12] The Qāḍī's Nā'ib of the Kufra District (*markaz*)[9]
Aḥmad al-Khaḍrī

[8] The court's concession to the former husband of an opportunity to prove by means of witnesses that the debt owing to him had not been paid by his ex-wife's present husband attests to a wide degree of tolerance on the Nā'ib's part with regard to customary *khulʿ*, even though the wife, not the former husband, is, according to the *sharīʿa*, the party to the legal proceedings and the debt is owed to her rather than to her former husband. Customary *khulʿ* is a common practice in the Sudan, especially among the cattle-rearing tribes. The refund of the dower by the divorced woman to her first husband on her marriage to someone else is enforced by the Native Courts (Anderson, *Africa*, 320).

[9] In the margins of the document there is an Italian summary of the sentence accompanied by the signature of the Military Governor of the Territory of Kufra, endorsing the sentence and instructing that it be implemented. The Military Governor's endorsement was required for the purpose of normative control (public policy). See Layish, *Legal Documents*, 15; Preface to this volume, xii.

Document 28

Introduction

A woman claimed that two years previously her husband had travelled to the Sudan without leaving or sending her maintenance. Since his whereabouts were unknown to her, she regarded him technically as an absent (*ghāʾib*) husband. She thus found herself constrained to support her minor children herself with the result that their situation deteriorated considerably. Since her husband had held, prior to his departure, a 50 per cent share in a *sāniya* (garden; irrigated plot)[1] with a partner, she requested the court's permission to sell her husband's share to the partner thus enabling her to secure her maintenance. Her witnesses upheld her claim, and the Qāḍī granted her request, endorsing the sale according to *sharʿī* procedure.

The sale of an absent husband's property for the purposes of securing maintenance constitutes, according to Mālikī doctrine, a last resort prior to dissolution of a marriage.

Text

[1] At the Sharīʿa Court of Kufra, presided over by the Qāḍī Shaykh Muḥammad Ṣāliḥ al-Bakrī. May Allāh the Exalted grant him success!

[2] On the 28th day of Rajab 1359, [corresponding to] September 2, 1940, a woman called ʿĀysha bint Ḥājj[2] ʿAlī Garjīla al-Majbarī, wife of Mḥammad [3] b. Yūnus Ajwēlī al-Majbarī claimed upon her appearance in the Sharīʿa Court that, two years previously, her husband Mḥammad b. Yūnus Ajwēlī had travelled [4] from here to the Sudan without leaving or sending her the means of subsistence.[3] She had minor children by him, [5] whom she provided with maintenance (*tunfiq*); their names are Ghazāla, Sālma, and Ḥasan. Under

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[1] See Glossary, s.v. *sāniya*.

[2] See Glossary, s.v. *ḥājj*. This is a significant indication of on-going Islamization of the Bedouin.

[3] In other words, her husband both absented himself (see Glossary, s.v. *ghayb*) and left her no property by means of which she could support herself and her children; moreover, he also failed to send her maintenance. Both absence of the husband and non-provision of maintenance are independent grounds for judicial dissolution under the Mālikī school. See docs. 29–30 below.

the circumstances [of her husband's absence], their welfare was being prejudiced[4] on account of lack of food (*muʾna*) and clothing (*kiswa*). He [her husband] shared a 50 per cent partnership (*shirka*)[5] in a *sāniya* [6] with Khayrallāh b. ʿAlī al-Yaḥyā.

> I request from the noble Sharīʿa Court (*al-sharʿ*) [permission] to sell it to him [i.e., the husband's share to his partner].[6]

The Qāḍī required her to produce evidence through witnesses (*bayyina*) who could testify to the validity (*ṣiḥḥa*) of her claim (*daʿwā*). [7] For the purpose of testimony (*shahāda*), she brought ʿAbd al-Raḥmān b. Yūnus Ḥmēd and Ḥamd b. Mḥammad Fannūsh, [both] identified (*maʿrūfayn*)[7] in the presence of the Qāḍī, by person and descent (*nasab*). Their respective testimonies corroborated [8] the woman's claim.

On the basis of what has been said above after due certification (*thubūt*) of the woman's claim, the Qāḍī endorsed (*ajāza*) the sale of the half-share in the aforementioned *sāniya*. She [the woman] made known [9] immediately upon her appearance [in court] her intention of testifying (*bi-qaṣd al-ishhād*) in person voluntarily and of her own free choice, while she was in a state of legal competence (*ḥāla jāʾiza*) with respect to her mental maturity (*rushd*), health (*ṣiḥḥa*), and free will (*ikhtiyār*). She stated saying [10] that she had already sold (*qad bāʿat*)[8] by means of a definite sale[9] the half-share in the *sāniya* called Magṭaʿ al-Ṭīn [situated] east of the road to the Ghēth Quarter and the Mbārak Quarter [11] to the partner Khayrallāh b. ʿAlī al-Yaḥyā. The *sāniya* [thus] became incumbent and established right (*bārida*)[10] for the sum of 300 francs which she collected after the

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[4] See Glossary, s.v. *ḍarar*.

[5] See Glossary, s.v. *shirka*.

[6] The Mālikī school permits the sale of an absent husband's property if his whereabouts are unknown, or if his place of residence is too remote to extract the payment of maintenance from him. See Layish, *Divorce*, 82.

[7] See Glossary, s.v. *taʿrīf*.

[8] On the face of it, this implies that that she is here asking permission for a sale *ex post facto*. However, it is highly likely that the sentence reflects the situation during its registration two years later (see lines 14–15 and fn. 14 below), and that in fact the sale took place only after its endorsement by the court.

[9] A plausible reading could be *bi-batt* (instead of *bi-dhālika*) *al-bayʿ*. Cf. Layish & Davis, p. 104 no. 141, line 4; p. 106 no. 143, line 4. On sale, see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 102, line 678ff.; Coulson, *Commercial Law*, 19–20; Schacht, *Introduction*, 152.

[10] See Lane, vol. 1, 183iii. Another possible translation of *bārida* suggested by my colleague Professor Simon Hopkins (March 31, 1994): "an easy acquisition," i.e., without haggling for a good price. Cf. doc. 62 line 6 below.

process of inspection [of the *sāniya* had been accomplished] [12] during the session [of the transaction] (*muʿāyana bi'l-majlis*)[11] and subsequently, the [transaction] became a valid (*ṣaḥīḥ*), completed (*nājiz*) *sharʿī* sale, [the *sāniya*] becoming thereby the buyer's property (*milk*) such that he is entitled to dispose of it (*yataṣarraf*) at will. The [sale] entails an offer and acceptance (*ījāb wa-qabūl*)[12] [13] while each of the parties enjoyed [at the time of the transaction] full possession of their faculties (*awṣāf*) from the *sharʿī* standpoint. After her acknowledgment (*iqrār*) of what has been stated above, and due certification (*thubūt*) of her claim through the testimony (*shahāda*) of the aforementioned witnesses, [14] the Qāḍī endorsed (*ajāza*) the sale,[13] and signed it. This transpired in the precincts where [the Qāḍī] is officially located. On payment of the required fee, [the Qāḍī] instructed that it be registered [15] on the 16th day of Shaʿbān 1361, [corresponding to] August 29, 1942.[14]

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[11] The buyer has the right to rescind the sale at the time of the inspection of the object of sale. He has also the "option to rescind the sale for [latent] defect" (*khiyār al-ʿayb*). See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 132, lines 894ff.; cf. *khiyār al-ruʾya* in Coulson, *Commercial Law*, 65; Schacht, *Introduction*, 152.

[12] See Glossary, s.v. *ījāb wa-qabūl.*

[13] Cf. Ibn al-ʿAṭṭār, 531ff. (the wife claimed that her husband had been absent for many years. The Qāḍī's investigation (*kashf*) could not disclose his whereabouts. Hence he ruled that if the missing (*mafqūd*) husband did not appear within four years of his disappearance he would be presumed dead and his wife would be permitted to remarry after having observed the waiting period. If the first husband appeared before consummation, the second marriage would be dissolved in order to restore the first marriage. In the meantime, the wife was permitted to collect maintenance for herself and the children out of her husband's property). Cf. Anderson, *Africa*, 211.

[14] The registration of the sale in the *sijill* took place two years after the woman's recourse to the court; see fn. 8 above.

Document 29

Introduction

A woman claimed that some months previously her husband had killed a Tibbāwī man[1] in the region of Kufra, and fled to a remote place in fear of blood revenge against him. She had consequently been left without maintenance; moreover, her husband had left behind no property out of which she could secure maintenance for herself.

After she took an oath on the Qurʾān corroborating the truth of her statement, the Qāḍī allowed her to divorce herself despite the fact that dissolution of a marriage bond on the grounds of failure to provide maintenance lay (according to the Mālikī school) solely within a *qāḍī*'s competence (judicial divorce).

The woman divorced herself by the last of three repudiations, and the Qāḍī enjoined on her the *sharʿī* norm by specifying that she was not legally permitted to her husband except after an intermediate marriage to someone else.

Text

[1] At the Sharīʿa Court of Kufra, presided over by the Qāḍī Shaykh Muḥammad Ṣāliḥ al-Bakrī. May Allāh the Exalted grant him success!

[2] The woman called Fāṭma bint Mḥammad b. ʿWēsha al-Majbarī appeared [in court] and claimed that appoximately four months previously her husband, [3] ʿAbdallāh b. ʿĪsā of the Gawābil tribe (*qabīla*), had killed a Tibbāwī man from the inhabitants of [4] Rabyāna,[2] and then took his [the dead man's] camel and fled to his kinsfolk in the Western District (al-Jiha al-Gharbiyya).[3] [She further claimed

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[1] For details on the Tibbū tribe, see Layish, *Blood Money*; doc. 55 below.

[2] In the region of Kufra. See Davis, *Libyan Politics*, 6 (map).

[3] The reference is probably to Fazzān. The man fled because under tribal customary law he was exposed to an act of vengeance by the victim's blood avengers (*awliyāʾ al-dam*). In a similar case, a murder was committed in the tribal territory of the Tibbū. After the perpetrator stayed a couple of years in exile, the dispute was resolved by payment of blood money in accordance with the "prevailing Tibbāwī tribal customary law." See doc. 55 below and the sources mentioned there. See Glossary, s.v. *thaʾr; qiṣāṣ*; and *nazāla*; cf. al-Qusūs, 75–77; Kressel, *Ascendancy*, 62 n. 2 (*jalāʾ*).

that] this affair was genuine and had really occurred. [5] She likewise claimed that he had left her no [maintenance], and that he owned no possessions that could be sold, [enabling her to secure her maintenance].[4]

The Qāḍī administered to her an oath to this effect [namely, that she was telling the truth], and she swore [6] in the wording (*naṣṣ*) [of *yamīn al-qaḍā'*], as required [under the *sharʿī* procedure]:

> [I swear] by Allāh, beside whom there is no God, and by the truth (*ḥaqq*) of the noble Qur'ān (*maṣḥaf*), that my husband ʿAbdallāh [7] ʿĪsā left me nothing, and that he owns nothing that can be sold [to provide maintenance].[5]

The Qāḍī permitted her to divorce herself (*taṭlīq nafsihā*) from him. She divorced herself [8] from him by saying: "I [hereby] divorce myself (*ṭallaqtu nafsī*) from my husband ʿAbdallāh ʿĪsā,"[6] and the

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[4] In other words, the wife is here asking the court to dissolve the marriage on the grounds of non-provision of maintenance by an absent husband in a remote place who, moreover, had not left her any property out of which she could provide for herself. See Layish, *Divorce*, 82–83; D'Emilia, 42–43, 49.

[5] This oath is known as *yamīn al-qaḍā'* (oath of judgment) or *yamīn al-istizhār* (oath of disclosure). The wife must swear that her husband has not left or sent her any maintenance, that she is not rebellious (and therefore deprived of the right to maintenance), and that to the best of her knowledge she has not yet been divorced. Only then will the court grant dissolution *ex parte*. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 34, lines 215ff.; Anderson, *Africa*, 379; Layish, *Divorce*, 138–39; D'Emilia, 43 n. 4; Glossary, s.v. *yamīn al-istizhār*, and *yamīn al-qaḍā'*. Cf. Abū Salīm, *Manshūrāt al-mahdiyya*, 205, 209 {the Qāḍī al-Islām in the Mahdist state issues a *fatwā* to the effect that wives of absent husbands are entitled to dissolution of the marriage on grounds of injury (*ḍarar*) provided they establish in court, by means of witnesses (*bayyina*), that their husbands had disappeared over seven months earlier, that they had neither left behind property out of which maintenance could be secured, nor appointed proxies (*wakīl*) to provide maintenance on their behalf, and that the wives had not given up their right for maintenance}.

[6] The competence to dissolve a marriage bond on the grounds of failure to provide maintenance properly pertains to a *qāḍī*, who—according to the Mālikī view—steps into the husband's shoes, and divorces the wife on his behalf (see Glossary, s.v. *taṭlīq al-ḥākim*). It is not clear on what grounds the Qāḍī transferred this competence to the wife, although this procedure is commonly attested in Libyan *sijill*s (see doc. 30 below). It is conceivable that we here have a case of judicial divorce combined with delegated repudiation (see Layish, *Divorce*, 140–41, 148, 199–200). The combination with delegated repudiation gains support from Maghribī judicial practice (*ʿamal*) (see Toledano, 131–33). It is interesting to note, in this connexion, that in the Aden protectorate, whenever the husband's whereabouts were wholly unknown, and he could not therefore be contacted, people used to rely on the *fatwā*s of a well-known liberal (Shāfiʿī) *ʿālim* according to which the wife, in the aforementioned circumstances, exercises delegated repudiation. The *qāḍī*s, however, opposed these *fatwā*s and would not recognize such a dissolution even if, in the

divorce coincided with the third repudiation. [The woman] became [9] divorced from him by a [major], irrevocable (*mabtūta*) divorce, and henceforth, she was not legally permitted (*taḥill*) to him unless she married someone else;[7] the marriage bond (*ʿuqdat al-nikāḥ*) was dissolved (*infaṣalat*), and there remained between them no claim, [10] demand, or right (*ḥaqq*) relating to matrimonial [financial] rights (*ḥuqūq zawjiyya*).

[Issued] on the 21st day of Shawwāl 1361, [corresponding to] November 1, 1942.

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meantime, the wife had remarried. Anderson notes that in Africa, *tafwīḍ al-ṭalāq* is resorted to in order to protect a wife against ill-usage, desertion, etc. (see Anderson, *Africa*, 29, 377).

[7] See Glossary, s.v. *taḥlīl*. Regarding the imposition of the *sharʿī* norm vis-à-vis the legal consequences of divorce, see Layish, *Divorce*, 153–54.

Document 30

Introduction

A woman claimed that six years previously her husband travelled to the Sudan without her consent and left her with their little children while she was expecting another child. Several letters had been sent to him requesting his return, but to no avail. The woman now felt that, in view of her youth, she would not be able to resist the allurements that might come her way during her husband's absence, and she therefore asked the court to dissolve her marriage. At the Qāḍī's request, she took an oath confirming the truth of her statement and had witnesses testify to this effect. The Qāḍī adjourned the case for an entire month in the hope that, in the meantime, her husband would show up. When he did not, the woman again asked to have her marriage dissolved after taking a second oath corroborating the truth of her claim.

The Qāḍī presented her with two alternatives: either to await her husband's return, or to divorce herself by one revocable divorce, thus allowing her husband the possibility of reinstating her without the need for a new marriage contract if he returned during her waiting period and paid her maintenance. In the Mālikī school, the authority to dissolve a marriage in these circumstances pertains solely to the *qāḍī* (judicial divorce). Moreover, although the wife requested the dissolution of the marriage on the explicit grounds of her husband's prolonged absence—and a divorce on these grounds entails irrevocable divorce—the Qāḍī based his permission for divorce on the grounds of the husband's failure to provide maintenance, which entails revocable divorce. The woman opted for the second alternative and divorced herself. The Qāḍī nevertheless ruled that she was repudiated by irrevocable divorce and instructed her to start observing her waiting period.

Text

[1] In the name of Allāh, the Merciful, the Compassionate.[1]

[2] In the name of King Muḥammad Idrīs al-Mahdī al-Sanūsī,

[1] See doc. 1, fn. 2.

Sovereign of the United Kingdom of Libya and Emir of Barqa [Cyrenaica]. May Allāh preserve him! Amen.[2]

[3] A woman called Saʿīda bint ʿAlī Ambīwa of the Bū Zahwa tribe (*qabīla*) [sublineage of Awlād Amīra lineage belonging to the Sdēdī section of the Zwayya tribe][3] appeared [in court] and claimed that she had a husband called Ṣāliḥ b. al-Sanūsī [4] Bū Ambīwa from the Bū Zahwa lineage (*ʿā'ila*), who six years previously had travelled to the Sudan in a carriage (*bi'l-karrozī*).[4]

> . . . and I did not grant him my permission [5] to go away, but he abandoned me while I was pregnant with my daughter—I also have [other] children by him, all of them are now attending school. They wrote him a number of letters (*ajwiba*)[5] but he did not come. [6] I am a young woman and the devil is wily (*al-shayṭān shāṭir*),[6] so I am afraid of falling into temptation (*ʿanat*). After six or seven years [of absence] [7] I find [my situation] intolerable; this is the limit of my endurance. I [therefore] ask the noble Sharīʿa Court (*al-sharʿ*) to grant me a divorce (*ṭalāq*) from him,[7] and I place the matter before you.[8]
>
> [8] Saʿīda bint ʿAlī Ambīwa
> [fingerprint]

[9] Her request was granted and she was obliged [by the court] to take the "oath of judgment" (*yamīn al-qāḍī*)[9] testifying to the validity

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[2] See doc. 1, fn. 3.

[3] See De Agostini, *Cirenáica*, 407–8.

[4] This seems to derive from Italian *carrozzino* (small carriage). Cf. Borg, *Orality*, 332.

[5] See Glossary, s.v. *jawāb*.

[6] Cf. Stewart, *Texts 2*, Glossary, s.v. *shṭr*.

[7] Cf. Davis, *Archive*, Sharīʿa Court of Kufra, p. 40 no. 104 of February 13, 1942 (the husband was absent for three years and the wife was accused of adultery though the charge was not proved. The husband's brother, probably acting as his proxy, repudiated her and the husband's father provided her maintenance until the arrival of her father); D'Emilia, 25 (*yukhshā ʿalayhā al-fasād*); Anderson, *Africa*, 212. Cf. Powers, *Women*, [2.2.1].

[8] The husband's absence is in itself a sufficient ground for judicial dissolution even if he continues to provide maintenance. Reliance on this ground is subject to three conditions: (1) the wife must affirm that the husband's prolonged absence is "a danger to her moral behaviour;" (2) that the period of absence is long enough to harm the wife; and (3) that the husband's whereabouts must be unknown; if they are known, the *qāḍī* must call upon him to return to the wife or to invite her to join him. Dissolution on the ground of the husband's absence is considered irrevocable divorce (for details, see Layish, *Divorce*, 81, 91–92). The case under review was presented in court as clearly falling within this category.

[9] This probably refers to *yamīn al-qaḍā'*. See doc. 29, line 5 and fn. 5 above; Glossary, s.v. *yamīn al-qaḍā'*.

(*ṣiḥḥa*) of her claim. [10] Saʿīda bint ʿAlī Ambīwa brought forward as witnesses Mr. Bū Nkhēla Ḥāmid, Mr. Aḥmad al-Sanūsī, Mr. Yūnus Slēmān Bū Ḥabal [11] and Mr. Ḥāmid Mḥammad, and their testimony corroborated her claim equally [i.e., in every point]. [12] [The witnesses went through the process of] identification (*maʿrūfīn*)[10] by his honour the Qāḍī and were approved as witnesses of good reputation and agreeable disposition (*ʿudūl riḍā*), among the best in their age group whose testimony can be accepted (*maqbūlīn shahādatuhum*).

On the basis [13] of what has been stated above, his honour the Qāḍī—to meet her [request]—adjourned [the hearing] for the duration of one full month in the hope of the absent husband's [return], and for the purpose of transmitting (*iblāgh*) a communication to him concerning the procedure of *ʿdhār* [before pronouncing judgment].[11] [14] When the aforementioned period of adjournment elapsed, the woman called Saʿīda bint ʿAlī Bū Ambīwa appeared [in court] and asked the Qāḍī to give due attention to her claim. [15] [The Qāḍī responded] by giving the matter due attention which [in turn] required [the woman] to take an oath [affirming the truth] of what has been stated above, and she took the oath in the wording (*naṣṣ*) [of *yamīn al-qaḍā'*], as required, and said:

> [I swear] by Allāh, [16] beside whom there is no God, and by the truth (*ḥaqq*) of the noble Qur'ān (*maṣḥaf*), I did not give my husband ʿAlī Ṣāliḥ al-Sanūsī Bū Ambīwa permission [17] to travel, but he went away and has been absent for a long time. I yearn for his return. We wrote him several letters (*ajwiba*) but he did not return; [18] neither has there been a letter (*jawāb*) [from him], nor has he himself come back. I am a wretched woman. [I am] young and lack the strength to bear [his absence] after this [long] period [of waiting], and I am afraid [19] of falling into temptation.[12]

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[10] See Glossary, s.v. *taʿrīf*. Another possible reading: "[The witnesses] were identified personally by his honour the Qāḍī due to their reputation as a witnesses of good character and agreeable disposition. . . ."

[11] The procedure of *ʿdhār* is intended to provide the defendant with the last chance to defend himself before decision is handed down by the court. If he has nothing to say in his defence he is convicted on the spot. He may, however, ask for a delay in order to provide a valid proof in support of his allegation; if he fails to provide such a proof before the expiry of the delay, he is convicted. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 12–15, lines 79–84 and notes by L. Bercher; Ibn al-ʿAṭṭār, 252–53. Cf. Fierro, *Zandaqa*, n. 15 and the reference there to Santillana; Powers, *Women* [2.2.1.].

[12] See doc. 29, fn. 5 above; Glossary, s.v. *yamīn al-qaḍā'*.

After the Qāḍī administered the oath to her, he presented her with the choice (*khayyarhā*) of either awaiting her husband's [return] or of divorcing [herself];[13] she opted for divorce. [The Qāḍī] granted her permission [20] [to repudiate herself by] one [revocable] divorce, thus allowing her husband the option of taking her back (*raǰ'a*) if he returned prosperous (*mūsir*) [enough to provide her maintenance] during her waiting period.[14] The woman said: "I divorce myself from my husband Ṣāliḥ [21] al-Sanūsī." And by means of [this utterance] she acquired from him control over her person (*malakat bihā amr nafsihā minhu*)[15] and the marriage bond between them was dissolved.

In order to [impart a binding character] to what had transpired [between them] (*li-ḥuṣūl*)[16] as has been indicated above, and duly certify (*thubūt*) [22] her claim, his honour the Qāḍī, before whom the claim had been laid, ruled her divorce from him [the husband]. This transpired in the precincts where [the Qāḍī] is officially located. [The Qāḍī] instructed her [23] to start observing her waiting period (*i'tidād*) on the day following the registration of the [divorce][17] on October 27, 1962.

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[13] The Qāḍī's decision to grant the wife the option of divorcing herself is distinctly odd unless this is a case of delegated repudiation. Cf. doc. 29, fn. 6 above. It is interesting to note in this connexion that 'Illaysh maintains that if a foreign woman coming from a distant place claims that she is afraid of falling into temptation (*'anat*) because her husband has died or divorced her, or because she has never been married before, even though she cannot provide evidence for her contention, the *sultān* will marry her off after consulting virtuous people who have accompanied her to the city. See 'Illaysh, vol. 1, 404.

[14] See Glossary, s.v. *ṭalāq raǰ'ī*. Although the wife requested dissolution of the marriage on the explicit grounds of fear for her moral behaviour due to her husband's prolonged absence—and a divorce on these grounds entails irrevocable divorce (see fn. 8 above; Glossary, s.v. *ṭalāq bā'in*)—it seems that the Qāḍī inexplicably based his permission for divorce on the grounds of the husband's failure to provide maintenance, which entails revocable divorce (see Layish, *Divorce*, 82–83). It may well be, however, that the Qāḍī was motivated by a humane consideration, namely the desire to facilitate—in case the husband returned before the expiry of the waiting period—the reinstatement of the wife without resorting to a new marriage contract and dower.

[15] Cf. docs. 18–22 above. Since this expression implies irrevocable divorce, its use in this context may be due to a wrong formulation (see Layish, *Divorce*, 149–50). On the other hand, it is also possible that the legal consequences of the divorce are based on the grounds of fear for the wife's immoral behaviour. See fn. 8 above.

[16] *li-ḥuḍūr* should be replaced by *li-ḥuṣūl*. Cf. doc. 19 line 8 above.

[17] On the imposition of the *shar'ī* norm in respect to the legal consequences of divorce, see Layish, *Divorce*, 158–60, and 196–97.

All the above statements have been duly certified
[24] The Court Clerk
Ḥamīda al-Tuwātī

[25–26] Signature of Bū Nkhēla [fingerprint]
Signature of [27] Slēmān Yūnus Bū Ḥabal
[28] Signature of Ḥāmid [29] Mḥammad [fingerprint]
Signature of [30] Aḥmad al-Sanūsī [fingerprint]

Document 31

Introduction

The wife's father, acting as her proxy, claimed that his son-in-law had brutalized his daughter, hitting her repeatedly with a cudgel, with the result that she had to be hospitalized, and he had been sent to prison. Since leaving hospital, the daughter had stayed at her father's home, and her husband had not paid her maintenance. The father requested the court to dissolve the marriage bond on the grounds of injury, which entails irrevocable repudiation, rather than on grounds of non-provision of maintenance, which entails revocable repudiation. The husband admitted having beaten his wife violently, and the court instructed him to divorce her; this he refused to do until his father-in-law paid back the dower he had received from him.

The court acted on the basis of Mālikī literature to the effect that beating a wife to the point of causing her grievous bodily harm constituted legal grounds for judicial dissolution at the wife's initiative. In the event that the husband withholds his consent to divorce the wife, the court itself dissolves the marriage on his behalf.

Thus, the Qāḍī dissolved the marriage by one irrevocable repudiation, and obligated the husband to pay his divorced wife the deferred dower still owing to her, as well as the arrears maintenance due to her for the entire period during which she had lived away from his home.

Text

[1] In the name of Allāh the Compassionate, the Merciful. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya and Emir of Barqa [Cyrenaica]. May Allāh the Exalted preserve him![2]

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

[3] SENTENCE (*ḤUKM*) RELATING TO DIVORCE (*ṬALĀQ*) OF KHADĪJA BINT IBRĀHĪM ABĪ SĒF BY HER HUSBAND MUFTĀḤ DĀWŪD

Entered in register no. [. . .], p. [. . .]

[4] In the Sharīʿa court of Ajdābiya presided over by the Qāḍī Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him! Amen.

[5] Ibrāhīm b. Abī Sēf b. Ḥamdī al-Shēkhī al-Maghribī al-Ṣubḥī appeared [in court] acting as *sharʿī* proxy (*wakīl*) of his daughter Khadīja—by virtue of power of attorney (*wakāla*)[3] no. 77 [6] registered in this court under the date, July 8, 1954, in volume 4—and was identified (*maʿrūf*)[4] by person and name. In the claim against his son-in-law Muftāḥ b. Dāwūd [7] Ibn Saʿīd al-Shēkhī, husband of his aforementioned daughter Khadīja, he stated:

> Muftāḥ present here at this court session (*majlis*) married (*tazawwaja*) my daughter [8] Khadīja five years ago by means of a *sharʿī* marriage contract (*ʿaqd*) [concluded] outside this court in return for a specified dower (*ṣadāq muʿayyan*),[5] a part of which he has already given her, and lived with her in matrimony (*ʿāsharahā*) from [9] that time. But [then] he embittered [their] matrimonial life (*muʿāshara*) by hitting her violently (*ḍarban mubarriḥan*) with a cudgel on her arm and shoulders. [After that] she stayed at my home for seven months. [10] Subsequently I took her back to him, and once again he hit her over the head with a cudgel. [Then], a year and a half ago he brought her to my house. When her ailment began to deteriorate as a result of the wounds inflicted [11] by the blow, I moved her to hospital, and on seeing [the marks of] the blow [on her body], the doctor informed the police, who took legal steps [12] against the aforementioned husband Muftāḥ. After [my daughter] had lain in hospital for fifteen days, I took her back into my house, and she is still there to this day. [13] From the day [on which she left her husband's home] she has been neglected (*muhmala*) [by him] and without maintenance (*nafaqa*).[6] I request this noble Sharīʿa Court (*al-sharʿ*) to see to my daughter's well-being and enable her to attain [14] her *sharʿī* rights (*ḥuqūq*).

His statement was entered [in the court records]. Afterwards, the defendant, the aforementioned Muftāḥ, was interrogated, and after acknowledging the existence of the marriage and marital relations,

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[3] See Glossary, s.v. *wakāla.*
[4] See Glossary, s.v. *taʿrīf.*
[5] See Glossary, s.v. *ṣadāq musammā.*
[6] See Glossary, s.v. *nafaqat ihmāl.*

[15] he admitted that he had hit her on the first occasion with a cudgel, and that she had then lived at her father's house for five or six months until he brought her back [to the conjugal dwelling]. He then also admitted having hit her [once again] [16] with a cudgel which caused a wound in the middle of her head[7] about one and a half years previously, and had then himself brought her to her father's house. She was then taken to hospital and the police requested his appearance [at the police station in order to interrogate him] [17] about her. [The police] took down his confession (*iqrār*) and he spent 40 days in prison. And from that day on until the present day—during which time she has been at her father's house—he has not provided her with maintenance (*lam yunfiq*) in any form. [18] His confession was taken down, and [the Qāḍī] had the undersigned witnesses testify (*ashhada*) to this effect on the 11th of Dhū 'l-Qa'da, 1373, corresponding to July 11, 1954.

signature

[19] After the confirmations (*iqrār*) of the two sides were registered, the wife's father [acting as] her *shar'ī* proxy demanded the wife's divorce [by legal proceedings] (*taṭlīq*) from her aforementioned husband Muftāḥ due to the injury (*ḍarar*) the latter caused her[8] [20] twice by dealing her severe blows (*ḍarban mubarriḥan*). Then the husband was ordered to divorce (*taṭlīq*) his wife, the aforementioned Khadīja. [The latter] refused to do this before the wife's father returned to him what he had paid him [21] out of the dower (*ṣadāq*),[9] and [only] then [i.e., on receipt of the dower] would he divorce his daughter.[10]

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[7] Cf. Mohsen, 113, 123; Stewart, *Texts 1*, 12, 15, 16.

[8] In the Mālikī school, injury (*ḍarar*) constitutes independent grounds for judicial dissolution (see Layish, *Divorce*, 83–86, 92–94). For obvious reasons, the wife's father preferred dissolution on grounds of injury rather than judicial divorce on grounds of non-provision of maintenance, which entails revocable repudiation (ibid., 82). See fn. 17 below. Cf. Shaham, *Family*, 124ff., 129ff.; Naveh.

[9] The payment of the dower to the wife's father here reflects a customary perception of matrimony, according to which the woman is not a party to the marriage contract. See, Linant de Bellefonds, *Traité*, vol. 2, 200–1; cf. doc. 1, lines 15–16 above.

[10] In other words, the husband meant *khul'* divorce. According to the Maghribī judicial practice (*'amal*), if a woman initiates *khul'* and subsequently proves that she had been ill-treated by her husband, she does not have to pay any compensation (see Toledano, 45).

On the basis of what the parties affirmed above while they were in a state of legal competence (*ḥāla jā'iza*) in *sharʿī* terms, and [on the basis of] the claim for divorce (*ṭalāq*) advanced by the wife's proxy [22] and, [likewise, on the basis] of the husband's refusal [to divorce her of his own accord] despite his avowal to having struck her severe blows (*ḍarban mubarriḥan*), and also on the basis of what is written in the first part of *Ḥāshiyat* [23] *al-Ṣāwī ʿalā al-Sharḥ al-ṣaghīr* (p. 407)[11] verbatim [starting with]:

> It is not permissible to strike severe blows (*lā yajūz al-ḍarb al-mubarriḥ*),

to [the place in the same text] that says:

> and if it transpires,[12] he is [24] to be accounted a delinquent (*jānin*), and she [the wife] is then entitled to a divorce (*taṭlīq*) and to retaliation (*qiṣāṣ*).[13]

On p. 408 [of al-Ṣāwī, vol. 1] there is the following statement:

> She [the wife] is entitled to a divorce (*taṭlīq*) on the grounds of assault (*taʿaddin*) [by the husband], provided that this be proven, even if [the assault] does not recur (*lam yatakarrar*).[14]

[25] Ibn ʿĀṣim says:

> Whenever the wife is able to establish by proof that injury (*ḍarar*) has been caused her and [even if] there is no stipulation regarding it [the injury] in her favour [i.e., in the marriage contract or in the course of the marriage], then, according to one opinion (*qīla*), she is entitled to divorce as if under obligation [i.e., as if such a stipulation existed], and according to another opinion, [she is entitled to a divorce only]

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[11] See al-Ṣāwī, vol. 1, 407.

[12] What is meant here is that the husband had dealt the wife violent blows, that is, to the point of causing bone fracture or injuring limbs beyond repair (see *ibid.*).

[13] On account of the physical harm that had been caused her. Physical harm falls under the *sharʿī* category of private law. See Peters, *Criminal Law*, § 0.1.3. Under tribal customary law, the woman's guardian, but not her husband, can beat her and even kill her, at least when she is not married, with impunity (see Stewart, *ʿUrf*, 890).

[14] Assault here means hitting the wife without *sharʿī* justification, or cursing her. Assault is proved in court by means of witnesses (*bayyina*) or confession (*iqrār*). Ibn ʿĀṣim (in his *al-ʿĀṣimiyya*) and Khalīl (in his *Mukhtaṣar*) share this view, but there are other views. In a similar case, the Court of Appeal ruled that the wife had the option (*khiyār*) either to dissolve the marriage or maintain the marriage contract intact; the wife opted for divorce. For details, see D'Emilia, 40–42 and notes 9 and 13.

> after [her husband] has been summoned to court (*baʿda rafʿihi li'l-ḥukm*), and been reproved by the *qāḍī* at his discretion, who [will proceed] to dissolve the marriage [26] if he [the husband] relapses [into his crime].[15]

And on the basis of what is said on p. 305, in the section dealing with *tawallā*[16]

> The divorce (*ṭalāq*) is entrusted to the judge, and he is in charge of effecting it (*yatawallā īqāʿahu*) if the wife demands it [27] and the husband declines.[17]

On the basis of all this, the aforementioned judge took upon himself the implementation of the judicial divorce (*taṭlīq*) of Khadīja bint Ibrāhīm [28] Abī Sēf from her husband Muftāḥ b. Dāwūd, and he [the judge] divorced her by one irrevocable (*bā'in*) repudiation [entailing] a short period of separation (*baynūna ṣughrā*); she is legally permitted (*taḥill*) to him [only by means of] a new dower (*mahr*) and a new marriage contract (*ʿaqd*).[18] [29] He likewise ruled that the aforementioned Muftāḥ is required to pay the deferred dower (*mu'akhkhar ṣadāq*)[19] and the [arrears] maintenance (*nafaqa*) due to her for the period of 18 months during which he had neglected her.[20] It was [also] decreed that he is required to pay [30] one pound a month.

[The professional witnesses testified to the legal proceedings by stating:]

> [The Qāḍī] made us testify (*ashhadanā*) to this effect and instructed that [the sentence] be registered.

It was registered. He [the Qāḍī] appended his signature to it and sanctioned it (*irtaḍāhu*). This transpired in the precincts where the [Qāḍī] is officially located on [31] the 12th day of Dhū 'l-Qaʿda 1373, corresponding to July 12, 1954.

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[15] This quotation was not photographed in its entirety in the original copy; it has here been reconstructed on the basis of Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 68–69, lines 448–50; and Ibn ʿĀṣim, *Tuḥfa*, 228–29, lines 444–46. The Qāḍī seems to have adopted the second view.

[16] The text reads *j l tawallā*, which I interpret as *juz' li-*"*tawallā*."

[17] This is tantamount to the Mālikī judicial divorce where the *qāḍī* exercises the husband's power to repudiate the wife on the latter's behalf by *ṭalāq* rather than by judicial dissolution. See Peters, *Marriage*, § 0.1.5.3; Layish, *Divorce*, 80–81; Glossary, s.v. *taṭlīq al-ḥākim*. I have not been able to identify the quotation in the legal literature on the basis of the reference in the document.

[18] See Layish, *Divorce*, 146; Glossary, s.v. *ṭalāq bā'in* and *baynūna ṣughrā*.

[19] See Glossary, s.v. *ṣadāq mu'ajjal*.

[20] See Glossary, s.v. *nafaqat ihmāl*.

The signature is in the protocol (*ḍabṭ*)
[32] Witnesses to the proceedings (*shuhūd al-ḥāl*)[21]
[33] ʿImrān ʿIsā
Mḥammad ʿAbd al-Salām
Mḥammad al-Ṭālib al-Hammālī

The matter being as indicated above
The Qāḍī of Ajdābiya
[34] Ḥusayn Muḥammad al-Aḥlāfī

[21] In this case, professional witnesses or notaries are intended. Cf. docs. 6, 13, 24 above and docs., 48, 58 below; Glossary, s.v. *ʿadl.*

Document 32

Introduction

A father gave his twelve-year-old daughter in marriage, but registered her as a seventeen-year-old at the time of her actual marriage. In the event, the daughter proved not to be physically mature enough to consummate the marriage, and a dispute arose out of this situation between the husband's father, who felt himself cheated, and the girl's father. The latter requested a period of grace allowing the girl the time necessary for her to attain sexual maturity, but his plea was turned down and the fathers resorted to the law-court.

When it was revealed to the Qāḍī that the girl was in fact 12 years old, he decided that there was no alternative but to impose dissolution of the marriage, despite the fact that the wife's age at the time of her marriage is not a legal ground, from the *sharīʿa* standpoint, for a dissolution. Thus, on the Qāḍī's instructions, the husband's father, acting as his son's proxy, divorced the bride by means of one irrevocable repudiation and the divorce was effectuated by the parties' mutual consent.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the name of the King, *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī I, Sovereign of the United Kingdom of Libya, and Emir of Barqa [Cyrenaica]. [3] May Allāh preserve him! Amen.[2]

[3] record (*maḥḍar*) of divorce (*ṭalāq*)

[4] In the precincts of the Sharīʿa Court of Kufra, presided over by the official responsible (*masʾūl*)[3] Ḥamīda al-Tuwātī, and the clerk (*kātib*) of the court Manṣūr al-Faḍīlī.

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.
[3] See Glossary, s.v. *masʾūl.*

Each of the parties [in this dispute] [5] Ḥājj ʿAlī Raḥīl, father of the wife Rābḥa, daughter of the aforementioned ʿAlī, and ʿAbd al-Ḥamīd Ḥāmid, father of the husband Ṣāliḥ [6] ʿAbd al-Ḥamīd,[4] appeared [in court]. They resorted to the court because of dissension (*shiqāq*) between Ṣāliḥ, the son of ʿAbd al-Ḥamīd Ḥāmid, and the daughter of Ḥājj ʿAlī Raḥīl, [7] arising from the lack of harmonious marital relations between them [as ordained] for a married couple by the *sharīʿa* and custom (*ʿāda*).[5] The cause of dissension is [8] that the husband married (*tazawwaja*) a 12-year-old girl who was registered in court as being 17, [9] and who was unable to consummate the marriage (*mā qadarat ʿalā al-zawāj*).[6] The parties came to the court to litigate (*mutakhāṣimayn*) this matter. [The girl's father] said:

> My daughter could not [10] consummate the marriage; I said to them [i.e., the husband and his father]: "If you allow her a period of grace [she will attain physical maturity, and become capable of consummating the marriage];" but they did not agree to allow her a period of grace, and were bent [on settling the dispute] in court.

After the court was apprised [11] that the daughter was indeed twelve years old, it imposed [on all concerned] mandatory separation of the spouses (*fāraqathā [. . .] jabran*).[7] [The husband's father] uttered

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[4] Among the Awlād ʿAlī in the Western Desert, if both parties are under age, the marriage is concluded by proxies on their behalf. See Mohsen, 84.

[5] This indicates that the Qāḍī distinguishes between the two legal norms; the distinction here serves to underscore the inevitability of the divorce.

[6] It would appear that the dispute here does not concern the bride's age, which is quite irrelevant to the uncodified Islamic law (there being no minimum age for marriage), but rather her inability to consummate the marriage. (In statutory law, a minimal age for marriage was enacted only in 1972; see Schacht, *Nikāḥ*, 28; Layish, *Legal Documents*, 19 and fn. 32). The groom's father naturally felt himself cheated since her registration as a seventeen-year-old was clearly intended to convey the false impression that she was physically mature. Among the Awlād ʿAlī, cheating or deception (*ghishsh*) by one party to the marriage contract provides a ground for dissolving the contract by the aggrieved party (Mohsen, 88). There is no information on the husband's age but since he is represented by his father, the assumption is that he is quite young. Among the Bedouin of the Negev, if a minor girl has been given in *ʿaṭā'* marriage, her father's guarantor (*kafīl*) should see to it that she is delivered to her husband when she becomes of age, i.e., mature to consummate the marriage. See al-ʿĀrif, 93, section 16.

[7] The Qāḍī imposed the dissolution of the marriage on the parties in order to put an end to the dissension, but did not dissolve the marriage himself, since the wife's young age does not in itself constitute legal grounds for judicial divorce. See Layish, *Divorce*, 147–48. The Court of Appeal ruled in one case that it was forbidden to give in marriage an orphaned girl under age (*bulūgh*) unless immorality (*fasād*) was feared. D'Emilia, 30–31.

[12] one [irrevocable] repudiation (*ṭalqa*) in her regard, by which means she acquired control over her person [and released herself] from him (*malakat bihā amr nafsihā minhu*),[8] and no claim, demand, or right (*ḥaqq*) [13] relating to matrimonial [financial] liabilities[9] remained between them. The spouses became separated from each other (*iftaraqā*) on February 9, 1965, [corresponding to] the 7th day of Shawwāl 1384 H. [14] The husband's father, by virtue of his official power of attorney (*wakāla*) on behalf of his son Ṣāliḥ ʿAbd al-Ḥamīd, divorced her (*ṭallaqahā*) with the consent of both parties.

[15] Signature of the husband's father — Signature of the wife's father

[16] ʿAbd al-Ḥamīd Ḥāmid — ʿAlī b. Raḥīl

[17] Court Clerk (*kātib*)
Manṣūr al-Faḍīlī

[8] This phrase indicates irrevocable repudiation. See docs. 19–22 above.

[9] In case of divorce prior to consummation of the marriage, the wife is entitled to half the dower and is exempted from observing a waiting period. See Layish, *Divorce*, 111, 118–19; Glossary, s.v. *ṣadāq*, *ʿidda*. In the special circumstances of the case, it seems that the wife's father renounced her right to the second half of the dower. It is conceivable that he returned the prompt dower to the husband.

Document 33

Introduction

Following a marital dispute, the husband divorced his pregnant wife by means of one revocable repudiation while undertaking to pay the specified dower agreed to between them, and to provide maintenance for the duration of the waiting period. The Qāḍī declared the woman divorced by one revocable divorce and ruled that she remained his wife for the length of the waiting period. In the event that a child was born of the union, the husband would be obliged to pay for its upkeep.

Text

[1] In the name of Allāh the Merciful, the Compassionate.[1]

[2] At the Sharīʿa Court of the town of Ajdābiya, presided over by his Honour the Qāḍī, Shaykh Rāfiʿ [3] ʿAbd al-Raḥmān al-Qāḍī. May Allāh the Exalted grant him success!

The spouses ʿAlī b. Jibrīl [4] b. Muṣṭafā al-Sūdānī and ʿĀysha bint ʿAbd al-Karīm al-Sūdānī appeared [in court] on account [5] of the absence of normal marital intimacy (*muʿāshara*) [between them]. Following an argument [that arose between them], the husband made the following statement:

> [6] I wedded (*tazawwajtu*) ʿĀysha present here by a *sharʿī* marriage contract (*ʿaqd*) registered at the Sharīʿa Court of Ajdābiya, [7] dated May 10, 1947 (vol. 3, no. 150) in consideration of a dower (*ṣadāq*) to the amount of [8] two rotls (*raṭl*) of silver,[2] and until the present time the [dower] continues to be my financial liability (*dhimma*);[3] I hereby undertake [9] to pay her [a sum] equivalent to the aforementioned two rotls of silver in monthly instalments of one Egyptian pound, and also [to pay her] maintenance [10] for the duration of the waiting period: 50 Egyptian piasters (*qirsh ṣāgh*) a month. And under these conditions, my wife [11] the aforementioned ʿĀysha is divorced by one revocable repudiation (*talqa rajʿiyya*).

The wife then endorsed [12] the facts relating to their marriage, the dower, and also the husband's statement concerning [her] mainte-

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[1] See doc. no. 1, fn. 2.
[2] See Glossary, s.v. *ṣadāq musammā*.
[3] In other words, the dower had not yet been paid.

nance [for the duration of the waiting period] and acknowledged [13] that she had become pregnant (*ḥāmil*) by him some two months previously; accordingly, the husband undertook [14] to implement all the aforementioned commitments.

[The professional witnesses testified to the legal proceedings by stating:]

> By virtue of what transpired between the aforementioned spouses [15] acting freely (*ṭawʿ*) and with their full consent (*riḍāʾ*) at the court session (*majlis*), His Honour the Qāḍī made us testify (*ashhadanā*) [to the effect] [16] that he had passed sentence (*ḥakama*) against the husband by issuing the aforementioned revocable (*rajʿī*) divorce in the manner indicated above, [17] and that [his wife] remained under his matrimonial authority (*yamlik bihā ʿiṣmatahu*)[4] for the duration of the waiting period (*ʿidda*);[5] and that in the event of the birth of a living child [18] his payments for her maintenance would be continued to provide suckling wages (*riḍāʿ*).

[The Qāḍī] pronounced this sentence on the 24th day of Ramaḍān 1366, [19] [corresponding to] August 11, 1947.

[20] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[21] Faraj b. Mḥammad al-Zwayyī
Yūsuf Aḥmad[6]

[22] The matter being as indicated above
[23] The Qāḍī of Ajdābiya
[24] Rāfiʿ ʿAbd al-Raḥmān [25] al-Qāḍī

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[4] The text here should read: *yamlik bihi ʿiṣmatahā*—"[The husband] acquired [by means of the revocable divorce] matrimonial authority over her." Cf. doc. 2, line 4 above.

[5] This implies that during the waiting period the husband is entitled to reinstate the woman as his wife either by an explicit expression to this effect or by an appropriate course of action without being required to go through the proceedings of a new marriage contract and payment of dower. The length of the waiting period is equivalent to the duration of a woman's pregnancy, i.e., until she either gives birth or aborts (see Layish, *Divorce*, 149–50). On the basis of evidence gained from the *sijill*, one might conclude that revocable divorce is quite rare in Cyrenaica. There is, however, good reason to believe that this kind of divorce is more widely resorted to than is reflected in the *sijill*. It is quite possible that when the spouses are not interested in divorcing and all the complications involved, they can just ignore the divorce, or the husband reinstates the wife within the waiting period without reporting the event to the court. Indeed, the *qāḍī*s find it difficult to keep track of divorces (Layish, *Divorce*, 101–3, 148–51; cf. idem, *The Druze*, 183–87).

[6] He seems to be in charge of collecting the divorce fee. See Layish, *Legal Documents*, fn. 2.

Document 34

Introduction

A woman was given in marriage for a specified dower, received a part of it, and the marriage was consummated on the same day. In the present document the woman claims that a few days after the marriage the husband divorced her, and her guardian renounced the rest of the dower due to her without prior consent on her part. She here asks the court to recover for her the amount still due to her from the relative, the defendant, responsible for renouncing it, or—alternatively—to demand her husband to pay her the remaining portion of the dower. The guardian maintains that the renunciation had been made with her consent, and the court requires the parties to prove their respective claims by resorting to witnesses.

In the subsequent court session, the husband was also present, and it was unanimously decided to reinstate the wife to her husband by means of what seems to be a new marriage contract and a specified dower—both prompt and deferred—equivalent to the amounts stipulated in the first contract. The marriage contract was concluded in the presence of the guardian, and the *Fātiḥa* was recited to impart to the proceedings a religious aura.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the reign of our Lord *sayyid* Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him![2]

[3] REINSTATEMENT (*TARǦĪʿ*) OF SĀLMA BINT MḤAMMAD AL-ʿARBAWĪ TO HER HUSBAND KHALĪFA ʿIMRĀN

Entered in register no. 6/124, p. 75

[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

[4] At the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī Shaykh Muḥammad al-Sanūsī al-Ghazzālī al-Khaṭṭābī. May Allāh prosper him! Amen.

[5] Each of Sālma bint Mḥammad al-ʿArbawī and Mḥammad b. Saʿd al-Majbarī, both living in Ajdābiya and identified (*maʿrūfān*)[3] by person and by name, appeared in court. The aforementioned Sālma, acting on her own behalf (*ḥaqq*) [6] made the following statement:

> I wedded (*tazawwajtu*) Khalīfa b. ʿImrān by means of a *sharʿī* marriage contract (*ʿaqd*) registered at this court 20 days ago, and he consummated the marriage (*dakhala bī*) on the same day that the marriage was concluded, against partial payment of a specified dower (*ṣadāq maʿlūm*).[4] [7] Subsequently, after about four days, he divorced me (*ṭallaqanī*) in the presence of my relative[5] Mḥammad Saʿd here [present in the court], and this aforementioned relative renounced (*tanāzala*) payment of the remaining portion of my dower without [8] obtaining my own renunciation. I ask the honourable Sharīʿa Court (*al-sharʿ*) to see to it that I secure my [financial] rights (*ḥuqūq*) pertaining to two silver bracelets, either from this relative of mine [9] or from the man who divorced me, the aforementioned Khalīfa b. ʿImrān.[6]

Her relative, the aforementioned Mḥammad, endorsed everything she said concerning her marriage (*zawjiyya*) to the aforementioned Khalīfa b. [10] ʿImrān, their marital intimacy (*muʿāshara*), her dower, and his renunciation of it, and he further claimed that he only renounced the dower after obtaining her consent thereto. Afterwards, the two of them [11] left [the court] in order to bring witnesses (*bayyina*). They both appeared in court on the following day, together with the husband, the aforementioned Khalīfa b. ʿImrān. They agreed unanimously [12] on reinstating (*tarjīʿ*)[7] the wife to marital intimacy

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[3] See Glossary, s.v. *taʿrīf*.

[4] See Glossary, s.v. *ṣadāq musammā*.

[5] This relative—no doubt an agnate—is her guardian (*walī*). See line 15 below.

[6] We here see two opposing perceptions of the law in open collision: customary law, here represented by agnation, and the *sharīʿa* represented by the wife as a full party to the marriage contract, and owner of the dower. The wife's claim against her relative and alternatively against her husband is intended to sustain her rights under the *sharīʿa*. On remission of part of the prompt dower by the wife's father in the Maghribī judicial practice (*ʿamal*), see Toledano, 139–40.

[7] On the face of it, the technical terms *tarjīʿ* and *rujūʿ* (see line 15 below) suggest that we are here dealing with a revocable repudiation. However, there are some indications in the text to the effect that the woman's reinstatement here implies rehabilitation of the marriage through a new contract and a new dower the amount

(*muʿāshara*) with her husband on the basis of the [specified] dower set down in this [court] [13] on October 28, 1952, bearing the number 6/44: [including] both the prompt (*muqaddam*) and deferred (*muʾakhkhar*) [portions], that is, exactly as laid down [in the original marriage contract].[8]

By virtue of the agreement reached [14] between the parties, while they both were in a state of legal competence (*ḥāla jāʾiza*) in *sharʿī* terms, as duly certified (*thubūt*) by the aforementioned Qāḍī, the latter ruled [15] that the aforementioned Sālma be returned (*rujūʿ*) to the matrimonial authority (*ʿiṣma*) of her husband, the aforementioned Khalīfa ʿImrān in the presence of her guardian (*walī*),[9] the aforementioned Mḥammad Saʿd, [16] and the aforementioned witnesses. The *Fātiḥa* of The Book [the Qurʾān] was [then] recited in order to confer a blessing (*liʾl-tabarruk*) [on the marriage proceedings].[10] [Issued] by way of *sharʿī* sentence (*ḥukm*). [The Qāḍī] appended his signature to it, [17] and had the undersigned [witnesses] testify (*ashhada*) to it. Held on the 2nd day of Rabīʿ al-Awwal, corresponding [18] to November 19, 1952.

The fingerprints of the wife, her guardian, and her husband.

[19–20] Witnesses to the proceedings (*shuhūd al-ḥāl*)[11]
Mr. ʿAbdallāh Mūsā
The Sharʿī Nāʾib
Muḥammad al-Ṭālib al-Hammālī[12]

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of which is equivalent to that stipulated in the previous marriage contract concluded twenty days earlier. The *khulʿ* divorce (which implies irrevocable repudiation), the presence of witnesses, and the recitation of the *Fātiḥa* (see below) probably provide additional support to the latter possibility.

[8] The same phenomenon has been observed in Maghribī judicial practice (see Toledano, 136–37).

[9] It is not clear whether the guardian's function here is restricted to mere presence (*bi-ḥuḍūr*) or whether the divorcee is given away in marriage by him.

[10] The recitation of the *Fātiḥa* is intended to give a religious tone to the proceedings. See doc. 2, fn. 10 above. The divorcee is not required to observe a waiting period after an irrevocable repudiation because she is remarrying her former husband. See Glossary, s.v. *ʿidda*; Layish, *Divorce*, 160.

[11] Professional witnesses or notaries are intended here. See Glossary, s.v. *ʿadl*.

[12] He is here acting concurrently or intermittently in two capacities: as a Sharʿī Nāʾib and as a notary or professional witness. See Name Index of Qāḍīs, Nāʾibs and Other Judicial Clerks. Cf. doc. 17, fn. 8.

The Court Usher (*mubāshir*)
Mḥammad ʿAbd al-Salām

The matter being as indicated above
The Qāḍī of Ajdābiya
Muḥammad al-Sanūsī al-Ghazzālī [al-Khaṭṭābī]

Document 35

Introduction

A woman claimed that her husband had divorced her by means of a triple and not a double repudiation, as had been specified in the court sentence pronounced on the basis of her husband's acknowledgment. At the time when the divorce was registered, i.e., a month previously, the Nā'ib's attention had been directed to this point, but the wife's claim had not been registered. Two witnesses now came forward and supported her version.

The Qāḍī cancelled the previous sentence, and ruled that she was divorced by a triple repudiation, and that she was not legally permitted to her former husband until she contracted an intermediate marriage to someone else. The Qāḍī also obligated the husband to pay the children's maintenance retroactively from the moment that the divorce came into force, and he instructed the wife to start observing the waiting period.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya and Emir of Barqa [Cyrenaica]. May Allāh the Exalted preserve him![2]

[3] At the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī, Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him! Amen.

[4] Khēriyya bint ʿUmar b. Ibrāhīm al-Turkī, identified (*maʿrūfa*)[3] by person and name, stated that her husband ʿIzz al-Dīn b. Mḥammad al-Gbāylī[4] divorced her (*ṭallaqahā*) [5] by means of a triple repudiation (*thalāthan*), and not by means of a double repudiation, as he had

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.
[3] See Glossary, s.v. *taʿrīf*.
[4] That is, belonging to the Gbāyil tribe. See De Agostini, *Cirenáica*, 405–6.

[previously] alleged. She had drawn the Sharʿī Nā'ib's attention thereto when he registered the divorce (*ṭalāq*) on July 2, 1954 [6] (vol. 4, sentence no. 600), but he had not registered her statement.[5] [She further said:]

> And since the aforementioned ʿIzz al-Dīn divorced me in the presence of Mḥammad b. Mīlād [7] b. ʿUmar Marghinī and Ḍaww b. Mḥammad b. ʿAbd al-Salām al-Shēkhī, I brought both of them forward in order to have them testify (*shahāda*) [to this effect].

Then the two aforementioned witnesses (*shāhid*) were brought [8] and each of them was questioned separately. Both agreed that ʿIzz al-Dīn divorced her by means of a triple [repudiation] in their presence one night while he [9] was sitting on a metal can [or drum][6] in front of his father's house.[7] Their testimony was registered.

[The undersigned professional witnesses testified as follows:]

> On the basis of the claimant's above statement, [10] and in view of the fact that the testimony of both witnesses accorded well with her contention (*daʿwā*), as duly certified (*thubūt*) by the aforementioned judge (*ḥākim*), and that [after a triple repudiation] [11] a woman's chastity (*furūj*) calls for protection in such cases, but not in others,[8] [the Qāḍī] had us testify (*ashhadanā*) to his ruling[9] that the aforementioned Khēriyya was separated (*bānat*) from the aforementioned ʿIzz al-Dīn [12] for a major period of separation (*baynūna kubrā*), and that she was not legally permitted (*taḥill*) to him until she married (*tankaḥ*) someone else.[10]

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[5] It is not clear if the Nā'ib's oversight of the wife's claim occurred in good faith or whether it was influenced by his desire to mitigate the legal consequences of the divorce. In the Mālikī school, the element of intent (*niyya*) on the husband's part allows the Qāḍī the option of mitigating the legal consequences of a divorce or even to ignore it altogether. See Layish, *Divorce*, 155–56.

[6] See Layish, *Legal Documents*, 54, doc. 35, fn. 1. Cf. Borg, *Orality*, 332.

[7] Among the Bedouin in Cyrenaica, the triple repudiation is common practice being often resorted to as a *façon de parler* to exercise pressure on someone, to let off steam, or by way of a threat that has nothing to do with the wife (Peters, *Bridewealth*, 133). The ʿAlēgāt in Sinai consider the reinstatement of a triply divorced wife as the worst of all sins (Murray, 226).

[8] In other words, a triply divorced woman, unlike a woman divorced by double repudiation, is not legally permitted to her husband unless an intermediate marriage has been concluded (see line 12 below). Negligence of this ruling may create a ground for the charge of illicit intercourse (*zinā*). The phrasing of this ruling in terms of chastity reflects a moral attitude on the Qāḍī's part.

[9] See line 14 below.

[10] Since the wife insisted on her version and her witnesses endorsed it, the Qāḍī had no choice but to draw the binding legal consequences. Cf. Ibn al-ʿAṭṭār, 524ff. (the wife insisted that she had been divorced by triple repudiation; the husband denied the allegation. His witnesses testified that there was animosity between the

> Likewise he [the Qāḍī] ruled that he [the husband] was bound to pay her three pounds [13] a month as maintenance dues (*nafaqa*) for his three children, mentioned in sentence no. 600 (vol. 4). [The payments are to be reckoned] from the date of the divorce (*ṭalāq*), that is, from July 2, 1954, and he [the Qāḍī] also decreed the preceding sentence null and void (*mulghan*) and ineffective.[11] [14] He instructed the divorced woman to start observing her waiting period (*taʿtadd*)[12] on the day following the divorce.

[Issued] as *sharʿī* sentence (*ḥukm*). [The Qāḍī] appended his signature to it, endorsed it, had the undersigned witnesses [i.e., the professional witnesses] testify (*ashhada*) to it, [15] and instructed that it be registered. Entered on the 23rd day of Dhū 'l-Ḥijja 1373, corresponding to August 22, 1954.

The signatures are in the protocol (*ḍabṭ*)

[16] Witnesses to the proceedings (*shuhūd al-ḥāl*)[13]
[17] ʿImrān ʿĪsā
Mḥammad ʿAbd al-Salām

The matter being as indicated above
The Qāḍī of Ajdābiya
[18] Ḥusayn Muḥammad al-Aḥlāfī

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husband and the wife's witnesses who endorsed her version). See Glossary, s.v. *taḥlīl*. The Sudanese Mahdī did not take account of divorces that occurred prior to the manifestation of the Mahdiyya. Moreover, he reinstated his triply divorced wife without resorting to intermediate marriage; see Layish, *The Mahdī's Legal Methodology*, 47–65.

[11] In fact, the Qāḍī acted as a court of appeal. Cf. Powers, *Judicial Review*.

[12] See Glossary, s.v. *ʿidda*. Concerning the imposition of the *sharʿī* norm in this case, see Layish, *Divorce*, 158–60, 196–97.

[13] In this case, professional witnesses or notaries are intended. See Glossary, s.v. *ʿadl*.

Document 36

Introduction

After the spouses agreed to a *khulʿ* divorce, the husband divorced his wife by a single repudiation and proceeded to utter four additional repudiations. The Qāḍī ruled that the wife was divorced by five repudiations at one session: the first three exhausted the man's *sharʿī* quota, the rest made a mockery of the Qurʾānic verses. The Qāḍī then instructed the wife to observe her waiting period.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and his Companions and grant them peace![1]

[2] In the reign of his Highness the Emir, *sayyid* Muḥammad Idrīs al-Maḥdī) al-Sanūsī, the Exalted Emir of Barqa [Cyrenaica].[2]

[3] In the Sharīʿa Court of Ajdābiya presided over by the Qāḍī, Shaykh Muḥammad Faraj Abī Ḥulayqa. May Allāh the Exalted grant him success!

The spouses ʿAbd al-Salām b. Ramaḍān [4] al-Marghanī and Magbūla bint Slēmān b. Ḥamad al-Saʿēṭī appeared [in court]. After completion of the identification procedure (*taʿrīf*)[3] and the establishment of their marriage (*zawjiyya*), [5] the woman redeemed herself (*khālaʿat*) from her aforementioned husband in return for everything that she claimed from him—the dower (*ṣadāq*), clothing (*kiswa*), maintenance for the duration of the waiting period (*ʿidda*), and negligence [arrears] maintenance (*nafaqat ihmāl*) [due to her during the period of the marriage] so that he would divorce her (*li-yuṭalliqahā*). [6] Her husband, the aforementioned ʿAbd al-Salām, responded by agreeing to her request. After [7] defraying the required governmental fees, he undertook to pay her taxi fare back to Benghazi, and uttered [8] one repudiation (*ṭalqa wāḥida*) in her regard. He afterwards proceeded

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.
[3] See Glossary, s.v. *taʿrīf*.

to repeat [this repudiation] by saying: "She is divorced"—that is to say, his wife, the aforementioned Magbūla—"by four repudiations."[4]

By virtue of [9] this, after due certification (*thubūt*), and consideration of the fact that the divorcer had combined four repudiations to the initial one without allowing an intervening break, [10] the aforementioned Qāḍī ruled (*ḥakama*) that the divorce of the aforementioned Magbūla by the aforementioned ʿAbd al-Salām entailed five repudiations [11] at one session, three of which were debited to his account [thereby exhausting his *sharʿī* quota], and the two [remaining] repudiations made mockery of the Qurʾānic verses[5] and cleared (*ibrāʾ*) the divorcee,[6] [12] the aforementioned Magbūla, from all blame [in this respect].[7] [The Qāḍī] instructed her to observe the waiting period (*ʿidda*)[8] as from the following day. [Issued] as valid *sharʿī* sentence (*ḥukm*) and order (*amr*); [The Qāḍī] signed and endorsed them, [13] and had the undersigned [witnesses] testify (*ashhada*) to this effect. He [then] instructed that they be entered on the 7th day of Dhū 'l-Ḥijja 1370, corresponding to September 9, 1951.

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[4] This statement is typical of a popular speech style indicating the husband's determination to divorce his wife by an irrevocable divorce ruling out the possibility of a subsequent rehabilitation of the marriage bond. In similar cases noted in the *sijill*, the husband divorced the wife by means of a sevenfold or even a hundredfold repudiation. See Layish & Davis, p. 67 no. 88 (Sharīʿa Court of Kufra, p. 136 no. 301, October 14, 1962), and p. 68 no. 94 (Sharīʿa Court of Kufra, p. 37 no. 71, April 24, 1960). This phenomenon has also been noted among the Bedouin of the Judean desert; see Layish, *Divorce*, 108.

[5] This may be regarded as an attempt on the part of the Qāḍī to cope with popular practice by threatening the transgressor on the Qurʾān with a religious sanction. See Layish, *Divorce*, 157–58.

[6] In other words, the husband alone bears the responsibility for his mockery of the Qurʾān. The Qāḍī appears to be making a value judgment concerning the practice of triple divorce. See Glossary, s.v. *taḥlīl, ṭalāq al-bidʿa.*

[7] Another possible translation of *wabi-ṣiḥḥat ibrāʾ al-muṭallaqa*: "[the Qāḍī] also ruled that the divorcee's renunciation [of the aforementioned matrimonial rights in return for release] was valid."

[8] However, the Qāḍī does not mention explicitly, as one would expect, that the woman is not legally permitted to her former husband unless an intermediate marriage has been concluded. See Glossary, s.v. *ʿidda; taḥlīl.* Concerning the imposition of a *sharʿī* norm *vis-à-vis* this phenomenon, see Layish, *Divorce*, 158–60, 196–97.

[14] Witnesses to the proceedings (*shuhūd al-ḥāl*)[9]
[15] Mḥammad ʿAbd al-Salām
Muḥammad al-Mabrūk Abī Jāziya[10]

The matter being as indicated above
[16] The Qāḍī of Ajdābiya
[17] Muḥammad Faraj Abī Ḥulayqa

[9] See Glossary, s.v. *ʿadl.*

[10] This court functionary acts concurrently or intermittently in two capacities: as a Sharʿī Nā'ib and as a notary or professional witness. See Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks. Cf. doc. 17, fn. 8 above.

Document 37

Introduction

The couple agreed to a dissolution of the marriage two months after they had contracted it on account of the husband's failure to consummate it for an unspecified reason, though apparently through no inhibition on the wife's part. They reached an agreement regarding the amount of the dower owed the wife by the husband. The husband then divorced the wife in the Qāḍī's presence by means of the first of three repudiations. The latter endorsed the divorce, obligated the husband to pay the rest of the dower, and, since the marriage had not been consummated, exempted the wife from the need to observe the waiting period.

Text

[1] In the name of Allāh the Compassionate, the Merciful. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the reign of King Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him! Amen.[2]

[3] SENTENCE (*ḤUKM*) RELATING TO DIVORCE (*ṬALĀQ*) OF MAṢYŪNA BINT ABĪ AL-ʿĪD AND HER RIGHTS (*ḤUQŪQ*)
Entered in register no. 6/164, p. 102

[4] In the Sharīʿa Court of Ajdābiya presided over on the date [of this sentence] by the Qāḍī Shaykh Muḥammad al-Sanūsī al-Ghazzālī al-Khaṭṭābī. May Allāh the Exalted prosper him! Amen.

[5] On account of some reason (*dāʿin*) [or dispute (*nizāʿ*)] arising between the spouses Mīlād b. Ghēth b. Muftāḥ al-Tāwarghī and Maṣyūna bint Abī al-ʿĪd b. Mṭēr al-Tāwarghī, the aforementioned Maṣyūna stated that the aforementioned Mīlād [6] wedded (*tazawwaja*) her by a *sharʿī* marriage contract (*ʿaqd*) registered at this court on December 3, 1952 (bearing the number 53) and that she invited

[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

him to consummate (*dukhūl*) the marriage but he did not do so.[3] [7] Her husband, the aforementioned Mīlād, corroborated all that she said about their marriage and contract, and its non-consummation, and added that he had given her 8 pounds as part of her dower but she rejected [8] his contention concerning the dower. The husband brought forward witnesses whose testimonies (*shahāda*), however, contradicted each other. Afterwards the aforementioned Mīlād and Maṣyūna appeared [in court] and agreed that [9] the aforementioned Mīlād was to pay 6.5 pounds only.[4] The aforementioned Mīlād [then] uttered in the direction of his aforementioned wife Maṣyūna at the [court] session (*majlis*) while facing her: "My wife [10] Maṣyūna present here is divorced from me by one repudiation." He announced that this was his first repudiation of her.[5] [As a consequence], the marriage bond and marital intimacy between them were dissolved (*infaṣalat*). [11] All this transpired in the presence of the witnesses (*shuhūd*) mentioned below.

By virtue of the agreement reached by the parties while they were in a state of legal competence (*ḥāla jā'iza*) in *shar'ī* terms, as duly certified (*thubūt*) by the aforementioned judge (*ḥākim*), [12] [the latter] ruled that the aforementioned Mīlād b. Ghēth had divorced his wife Maṣyūna bint Abī al-'Īd; he also ruled that he should immediately pay 6.5 pounds [13] to his divorced wife, the aforementioned Maṣyūna, and that she was not required to observe the waiting period since both parties admitted that the marriage had not been consummated and that her husband had not engaged in marital intimacy (*lam yabni*).[6]

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[3] Sexual impotence on the part of the husband may well be implied here. The plausibility of this assumption would seem to be corroborated by the financial consequences accompanying the granting of the divorce (see below). Cf. Peters, *Bridewealth*, 145 (impotence is a ground for divorce on the wife's initiative).

[4] Apparently the rest of the dower is intended here. Since the wife had not objected to consummation of the marriage, it may be inferred here that part of the dower had been given her. The wife is entitled to half the dower in the event of a divorce prior to consummation. See Layish, *Divorce*, 118–19; cf. Obermayer, 135–36 (the allegedly impotent husband divorced his wife and paid her the deferred dower); Glossary, s.v. *ṣadāq*; doc. 38 below.

[5] Specification of the number of the divorce, apparently at the Qāḍī's initiative, is meant to enforce the imposition of the *shar'ī* norm. See Layish, *Divorce*, 153–54, and 196.

[6] In the event of non-consummation of a marriage, the wife is exempted from observing the waiting period. See Layish, *Divorce*, 100–1; Glossary, s.v. *'idda*.

[Issued as] a valid *shar'ī* sentence. [14] [The Qāḍī] signed and endorsed it, made it binding in conformity with this sentence, called the undersigned witnesses to testify to it, and instructed that it be registered. It was entered on the 19th day of Jumādā al-Ūlā [15] of the year 1372 corresponding to February 4, 1953.

The divorcer's signature, the divorcee's fingerprints and those of her father.

[16] Witness to the proceedings (*shuhūd al-ḥāl*)[7]
[17] ʿAbdallāh Mūsā
Mḥammad ʿAbd al-Salām
Mḥammad al-Ṭālib al-Hammālī
Muṣṭafā al-ʿAffān [?]

The matter being as indicated above
The Qāḍī of Ajdābiya
Muḥammad al-Sanūsī al-Ghazzālī [al-Khaṭṭābī]

[7] Professional witnesses or notaries are intended here. See Glossary, s.v. *ʿadl*.

Document 38[1]

Introduction

A man stated in court that he had divorced his wife without consummating the marriage, and the Qāḍī ruled *ex parte* that in these circumstances the divorced wife was entitled to half the specified dower agreed between them.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![2]

[2] In the reign of his Excellency *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī, Emir of Barqa [Cyrenaica].[3]

[3] sentence (*ḤUKM*) of divorce (*ṬALĀQ*) of ḤAWWĀʾ bint DĀWŪD al-GAṬAFĀNĪ by al-FAḌĪL b. MḤAMMAD al-BGHĪḌ al-ZWAYYĪ

Entered in register no. 5/308, p. 5/210

[4] In the Sharīʿa Court of Ajdābiya presided over by his honour the Qāḍī Shaykh Muḥammad Faraj Abī Ḥulayqa. May Allāh the Exalted grant him success!

Al-Faḍīl b. Mḥammad Bū al-Bghīḍ from the al-Sdēdī [branch] of the Zwayya tribe,[4] [5] identified (*maʿrūf*)[5] in person, appeared [in court] and stated:

> To this day I have not consummated (*lam abni*) the marriage with my wife Ḥawwāʾ bint Dāwūd al-Gaṭafānī, which I contracted (*ʿaqd*) in this court. [6] I have come to the court to testify to the fact that I divorced her (*ṭallaqtuhā*) by one repudiation without consummation (*bināʾ*).[6]

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[1] This document appears in Layish, *Legal Documents* (the documents in Arabic) under 39.

[2] See doc. 1, fn. 2.

[3] See doc. 1, fn. 3.

[4] See De Agostini, *Cirenáica*, 407–8.

[5] See Glossary, s.v. *taʿrīf*.

[6] No reason was given for the non-consummation of the marriage. Since the initiative to the dissolution came from the husband, rather than the wife (who was not present in court), impotence does not seem to be plausible. It may well be that

By virtue of his [i.e., the husband's] statement, made while he was in a state [of legal competence] [7] from the *sharʿī* standpoint, his honour the aforementioned Qāḍī ruled to the effect that the aforementioned wife was divorced from him by one repudiation prior to consummation, and that she had thereby obtained from him control over her person (*malakat bihā amr nafsihā*).[7] He [the Qāḍī] explained to him [8] [the meaning of the verdict], and the fact that she was entitled to half the amount of the specified [dower] (*musammā*) if it were proved that he had not consummated the marriage (*lam yadkhul bihā*).[8] He [The Qāḍī] had the undersigned witnesses testify to this effect and required that [the sentence] be entered [9] on the 14th day of Dhū 'l-Qaʿda 1371, [corresponding to] August 16, 1951.

[10] Witnesses to the proceedings (*shuhūd al-ḥāl*)

[11] The Sharʿī Nā'ib — The Court Usher (*mubāshir*)

[12] Muḥammad al-Mabrūk Abī Jāziya[9] — Mḥammad ʿAbd al-Salām[10]

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the wife did not move into the conjugal dwelling because of some dispute between the spouses or their families.

[7] The divorce of a wife prior to consummation of the marriage is considered irrevocable. See Glossary, s.v. *ṭalāq bā'in*; Layish, *Divorce*, 98. Cf. docs. 18–22 below.

[8] The sentence was given *ex parte* though it was pending some proof (probably by the wife) that no consummation took place. According to the *sharīʿa*, a woman divorced prior to consummation of a marriage is entitled to half the specified dower. See Layish, *Divorce*, 118–19. For the same reason, the Qāḍī does not instruct the wife to observe the waiting period. See doc. 37 above.

[9] He acts concurrently or intermittently in two capacities: as a Sharʿī Nā'ib and as a notary or professional witness. See Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks. Cf. doc. 17, fn. 8 above.

[10] Mḥammad ʿAbd al-Salām seems to act in two capacities: as a court usher and notary. See Name Index of Qāḍīs, Nā'ibs, and Other Judicial Clerks; Tyan, *ʿAdl*, 209–10; Glossary, s.v. *ʿadl*.

Document 39[1]

Introduction

A woman claimed that at the time that her divorce took place she was pregnant with a "dormant embryo." A couple of months later, as a result of some disturbance, the embryo within her "had awakened and begun to move." She accordingly asked the court to obligate her divorcer to pay her maintenance until she gave birth, which under Islamic law, signals the termination of a pregnant woman's waiting period. Her ex-husband endorsed her claim concerning the "dormant embryo" and did not object to paying maintenance for the embryo.

The Qāḍī made him liable to pay maintenance for the embryo until she gave birth as well as arrears maintenance accruing since the woman's divorce.

Text

[1] In the name of Allāh the Compassionate, the Merciful. May Allāh bless our Lord Muḥammad, his family and Companions, and grant him peace![2]

[2] In the reign of His Highness *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī Emīr of Barqa [Cyrenaica].[3]

[3] sentence (*ḥukm*) relating to maintenance due to ʿatīga bint manṣūr from aḥmad abī jrēda
Entered in register no. 5/289, p. 5/198

[4] At the Sharīʿa Court of Ajdābiya presided over by his honour the Qāḍī Shaykh Muḥammad Faraj Abī Ḥulayqa. May Allāh the Exalted grant him success!

The woman called ʿAtīga bint Manṣūr [5] Abī Zāwī al-Drūgī al-Shēkhī claimed the following:

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[1] This document appears in Layish, *Legal Documents* (the documents in Arabic) under 38.

[2] See doc. 1, fn. 2.

[3] See doc. 1, fn. 3.

> When my husband Aḥmad b. Mḥammad Abī Jrēda al-Ḥammādī [?] divorced me—my divorce (*ṭalāq*) was registered in court on the date [. . .] [6] no. [. . .]—I was pregnant by him with a "dormant embryo" (*ḥaml nāʾim*).[4] About a month ago I suffered some disturbance in consequence of which the embryo awoke and began to move. I request the noble [7] Sharīʿa Court (*al-sharʿ*) to obligate him to pay me maintenance (*nafaqa*) on the terms it will determine until I am delivered of the aforementioned embryo.[5]

When asked [about this point] the defendant admitted that at the time he divorced her

> [8] she was pregnant by me with a "dormant embryo," and since it awoke I have no contention (*maqāl*) regarding paying her for the upkeep of her embryo [at the court's discretion].[6]

This being the case, [9] the aforementioned Qāḍī required him to pay 1.5 pounds as monthly maintenance for the embryo starting on the date of her divorce. Also [the Qāḍī] ordered him to pay her cumulative (*mutajammid*) [maintenance, i.e., arrears] due and to continue making [10] regular payments promptly from its [i.e., the divorce sentence] issuance (*li-ḥuṣūlihi*).[7] He explained [the sentence]

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[4] This institution is supported by the Mālikī view regarding the period of prolonged pregnancy (between 4–5 years). Its aim is apparently to secure the child's right to paternity, maintenance and inheritance from his biological father and to protect his mother from the threat presented to her by the grave sanctions attending unlawful intercourse (*zinā*). See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 92, line 616; Linant de Bellefonds, *Traité*, vol. 3, 36; Verberkmoes & Kruk; Coulson, *Succession*, 23–24; Peters, *Marriage*, § 0.1.2.2.3; idem, *Criminal Law*, § 0.1.1.3; Bousquet & Jahier; Colin; Anderson, *Africa*, 363; Gellner, *Saints* (a picture of someone's wife claiming to be pregnant by her former husband). The institution of "sleeping child" or *amgun* has been noted in Berber Morocco and in the Middle and Central Atlas Berber tribes. Under Berber customary law there is no time limit for pregnancy. The *amgun* too serves as device to cover up adultery (Hart, *The Ait ʿAtta*, 89–90; idem, *The Aith Waryaghar*, 151). The sentence in the case under review gives no information regarding the date of the divorce, and consequently the precise duration of her pregnancy is not known.

[5] In other words, she requests the prolongation of her waiting period until her delivery and the entitlement to receive maintenance for this entire period. In the Western Desert, a divorced woman, provided she is pregnant, is entitled to waiting period maintenance until she delivers the child (al-Jawharī, 201).

[6] The ex-husband admits the existence of the "dormant embryo" and is ready to pay maintenance for the embryo for as long as he is required to, and to spare his ex-wife the inconvenient status of adulteress, apparently so that the paternity of the child is ascribed to him.

[7] The institution of "dormant embryo" is consequently also recognised by the court on the basis of the parties' agreement. The Italian administration refused to carry out court decisions pertaining to maximal period of gestation anchored in

to both of them while requiring the undersigned witnesses to testify to it, and instructed that it be entered on the 28th day of Shawwāl [?] 1371, [corresponding] to October 1, 1951.

[11] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[12] The Sharʿī Nā'ib — The Court Usher (*mubāshir*)
[13] Muḥammad al-Mabrūk — Mḥammad ʿAbd al-Salām Abī Jāziya

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Mālikī doctrine, which implies recognition of the institution of "dormant embryo" for reasons of universal morality and public policy (see Cicchitti, 447–78; D'Emilia, 16 n. 2; Layish, *Divorce*, 161–62 and the sources cited there). The arrears maintenance dues in this case apparently cover the waiting period up to the issuing of the present sentence, and regular payments relate to the future up to delivery of the child.

Document 40

Introduction

Against the backgound of transmission of a deceased man's estate to his widow and children by her and by another wife, one of the latter's sons requested the widow to acknowledge the paternity of the deceased over a son born to her after her remarriage to another man; in other words, to acknowledge him as the claimant's paternal half-brother. The deceased man's widow rejected the claimant's contention that she had admitted, on the day of her first husband's death, being pregnant by him. She further maintained that though a rumour or gossip to this effect was widespread among the women of the tribe (*ḥayy*), it was completely baseless.

Though, on the face of it, not completely alien to the Mālikī school, which recognizes a prolonged pregnancy, the Qāḍī disqualified the claim regarding paternity having established the fact that the widow had remained in her deceased husband's home for a period of eight and a half months—a period of time long enough for her to give birth if she had indeed been pregnant. She had then married her second husband and given birth to her son, the object of the claim, only after more than 14 months had elapsed. In the Qāḍī's opinion, this was long enough for the woman to become pregnant by her second husband and give birth.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[1]

[2] In the reign of his Highness the *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī Emir of Barqa [Cyrenaica].[2]

[3] VERDICT (*ḤUKM*) ON THE CLAIM ADVANCED BY AL-ḤSĒN B. SAʿŪD ʿABĒD AL-ʿURFĪ AGAINST HIS FATHER'S WIFE ḤAMMĀLA BINT ʿAGĪLA AL-ʿARĪSHĪ CONCERNING HER SON'S [FILIATION]

Entered in register no. 318, p. 217

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

[4] In the Sharīʿa Court of Ajdābiya, presided over by Muḥammad al-Mabrūk Abī Jāziya, the Nāʾib in charge of the affairs (*al-qāʾim bi-aʿmāl*) of his honour the Sharʿī Qāḍī. May Allāh the Exalted grant him success.

Al-Ḥsēn [5] b. Saʿūd b. ʿAbēd al-Nkhēlī al-Ṭarshī al-ʿUrfī made the following claim:

> My aforementioned father passed away in the month of Muḥarram 1369 and left his inheritance (*munḥaṣir al-wirātha*) to his wife [6] Ḥammāla bint ʿAgīla Abī Miḥrāth al-ʿArīshī and to his children by her: ʿAbēd, ʿAlī, and Ṣālḥa [and to his children by another] wife: myself, the claimant, al-Mabrūk, Manṣūra, Saʿīda, [7] Fāṭma, and Umm al-ʿIzz. On the day of his death, his aforementioned wife Ḥammāla indicated that she was bearing an embryo (*ḥaml*) [i.e., she was pregnant] by him.[3] Soon after my father's death, [8] she stayed in her house in our neighbourhood (*jiwārinā*)[4] until the middle of the month of Ramaḍān, 1369 for about eight or nine months without giving birth to the embryo she had mentioned. Afterwards, [9] in the middle of the month of Ramaḍān, she married a man by the name of Faraj b. Makhlūf al-Saʿēṭī and lived with him until the 20th day of Dhū 'l-Qaʿda, 1370, [10] and then gave birth to a male child. I claim that this son is the embryo that she attributed to my father on the day of his death. [11] I ask the noble Sharīʿa Court (*al-sharʿ*) to look into this matter with due attention and issue the required judgment (*ḥukm*) in conformity with the prescriptions of the noble *sharīʿa*.[5]

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[3] Two years passed from the death of the praepositus to the birth of the son. However, the notion of affiliating the minor child to the deceased man is not alien since the Mālikī school recognizes a prolonged pregnancy period—four to five years—as well as the concept of a "dormant embryo." See doc. 39, fn. 4 above; Glossary, s.v. *ḥaml nāʾim*. The attempt to affiliate the child to the praepositus seems to have been motivated by the desire to strengthen the agnatic cohesion of the claimant's family despite the fact that the claimant himself is economically affected by this relationship since his own share in his father's estate is diminished by the inclusion of the child among the legal heirs (but see fn. 8 below). The widow's portion, on the contrary, one-eighth of the total estate regardless of the number of the heirs, remains unaffected. See docs. 44ff. below.

[4] An alternative translation: "under our protection." It is possible that we have here a hint of control over the widow's moral behaviour. Cf. doc. 9 above. On *jiwār*, see Layish, *Dār ʿAdl*. Levirate marriage may be an institutional solution in such circumstances. Among the Negev Bedouin, a widow who wishes to stay with her [minor] children remains in her late husband's dwelling and thus becomes dependent on his agnates who provide her with maintenance. When she marries someone from another clan she leaves her children behind. See Marx, 185.

[5] This implies that Ḥammāla should be separated from her second husband, Faraj, due to the irregularity of the marriage contract (she allegedly married him while she was pregnant by the claimant's father), and the minor child be affiliated to her late husband.

Then [12] the following question was addressed to the claimant:

> Did you raise any objection at the time of her [i.e., Ḥammāla's] marriage and did you explain to the [second] husband Faraj Makhlūf that Ḥammāla was your father's widow?[6]

[13] He answered that he talked [to Faraj concerning this matter] only after she had given birth on the other husband's [conjugal] bed (*firāsh*). When the defendant appeared in court and was formally identified (*maʿrifa*),[7] she was questioned [about this point] and she answered:

> [14] I did not indicate [on the day of my husband's death] that I was pregnant by him; this [rumour] was, however, spread by the women of the tribe [or lineage] (*ḥayy*).

She corroborated the fact that she had stayed at her children's [house] from the month of Muḥarram 1369 to the middle of the month of Ramaḍān [15] and [insisted] that she was not pregnant [at the time]; all she had wanted was to be with her children;[8] and when she prolonged her stay [there], she married the other husband Faraj, and the son [16] she bore was from him, not from her first husband, the claimant's father.

On the basis of the above statements made by the claimant and the defendant, [17] their corroboration of the date of the first's husband's decease, the claimant's father, and of the date of the defendant's marriage to her second husband and of her son's birth, [18] it was established and verified by the aforementioned Deputy that after her husband's death, the claimant's father, the defendant waited for eight and a half months, and only afterwards contracted marriage and lived with her second husband [19] for 14 months and five days before she gave birth to her son, the object of this claim,

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[6] In other words, the Nā'ib aims at clarifying whether the claimant opposed to the marriage of Ḥammāla to Faraj, prior to its contraction, on the grounds that she was pregnant by her deceased husband. See fn. 10 below.

[7] See Glossary, s.v. *taʿrīf*.

[8] Although the mother has the right to custody of her minor children, the children remain under the tutelage of their father who is their natural guardian. Other agnates may be nominated as "appointed guardian" (*waṣī mukhtār*) by the natural guardian (see docs. 43 and 44 below). Had it been established that the minor belongs to the conjugal bed of the claimant's father, the claimant could have effective control of the minor's property and portions in the estate by virtue of his status as the minor's closest agnate or proxy (*wakīl*).

which period of time is deemed sufficient for her to become pregnant by him [Faraj] and to give birth.[9] Likewise [20] the period of time during which she waited after her first husband's death was sufficient for her to give birth if she had indeed been pregnant by him.[10] This being the case, the [Deputy] dismissed the aforementioned claimant's allegation (*daʿwā*) [21] and ruled that the son belonged to the second husband, Faraj Makhlūf. [Issued] as *sharʿī* sentence. [The Deputy] had the undersigned [witnesses] testify to this effect and instructed that it be entered on the 25th day of Dhū 'l-Ḥijja 1371, [22] corresponding to September 22, 1951.

Witnesses to the proceedings (*shuhūd al-ḥāl*)
[23–24] Shaykh ʿĪsā al-Fākhrī
The Imām ʿAbdallāh Mūsā
The Court Usher (*mubāshir*)
ʿUmar ʿAbd al-Salām[11]

[24–25] The matter being as indicated above
Muḥammad al-Mabrūk Abī Jāziya
The Nā'ib in charge of the affairs of the Qāḍī of Ajdābiya

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[9] A child is deemed legitimate, i.e., "belongs to the conjugal bed," if born at least six months after the contraction of the marriage (see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 92, line 616; Linant de Bellefonds, *Traité*, vol. 3, 31; Coulson, *Succession*, 23–24). The widow's re-marriage, in addition to her denial of the contention that she was pregnant on the day of the praepositus' death, cut the ground from under the claimant's feet regarding her prolonged pregnancy by her first husband.

[10] See fn. 3; doc. 39 above. It would seem that the Qāḍī attributed much importance to the woman's denial that she was pregnant at the moment when she was widowed, as well as to the fact that the claimant neither opposed her marriage to Faraj on its contraction nor drew the attention of the future husband to her alleged pregnancy at the time of their marriage.

[11] This court functionary acts in two capacities: as a court usher and notary. See Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks below; Tyan, *ʿAdl*, 209–10; Glossary, s.v. *ʿadl*.

Document 41

Introduction

After a series of disputes between the spouses culminating in the wife leaving her husband's house and moving to her father's as "an angry woman" (*mughtāḍa*) [*mughtāza*], the court instructed the spouses to take up living quarters close to a certain tribal notary (*dār ʿadl*)[1] so that the latter might observe their behaviour and report to the court. After some time, it became clear that the woman was pregnant, but her husband denied paternity of the child. The woman initially stated that she was pregnant by a stranger. Later, however, she claimed that her husband had intimidated her into making this confession. She explained that while she had been "an angry woman" in her father's house, prior to moving to the *dār ʿadl*, her husband frequently visited her clandestinely and engaged in sexual relations with her. Moreover, when her pregnancy became apparent, he had admitted to her having caused her pregnancy and, later on, while under the protection of the *ʿadl*, they had lived together in complete harmony until her father-in-law showed up and incited her husband against her.

The *ʿadl* confirmed in court that the couple's mutual relations had been normal until her father-in-law appeared on the scene, after which the husband began to deny his part in the pregnancy. When the wife insisted—probably under pressure from her husband—that she was pregnant by a stranger, the *ʿadl* summoned her and, pointing at a saint's tomb, enjoined her to tell the truth. Recourse to the sanction of the holy man's tomb had its effect: the woman withdrew her first version and attributed her pregnancy to her husband. The latter, however, persisted in denying paternity.

The Qāḍī rejected the husband's denial, apparently on the grounds that the *liʿān* procedure had not taken place. According to this procedure, in cases of unproven charges of adultery against the wife, the marriage can be dissolved through a process of mutual imprecation; while paternity is denied, the parties are not subject to the Qurʾānic sanctions prescribed for unlawful intercourse (*zinā*) and unproven charges of unlawful intercourse (*qadhf*). The Qāḍī attributed paternity to the husband and enjoined him to return the wife

[1] For details on *dār ʿadl*, see doc. 9 above.

to his house, to treat her well, restore her dower, her trousseau, and her jewelry, and pay her maintenance retroactively for the period during which he had neglected to do so.

The case under review illustrates the Qāḍī's ability to bring tribal society within the orbit of normative Islam by means of *dār ʿadl* which is located in an ill-defined zone between tribal custom and *sharīʿa*.[2]

Text

[1] [. . .][3] [the wife had claimed in court that she] was supporting herself (*tunfiq*) on gleanings from the harvest (*ḥaṣīda*) of a field[4] from the [season] that preceded the date,[5] because [her husband] had lodged her in a desolate dwelling (*istawḥadahā*)[6] and unlawfully seized [her belongings] (*ghaṣabahā*).[7] [2] When she expressed to her father her unwillingness to support herself (*nafaqa*) on the harvest, he expressed reservations.[8] [3] Then, the court instructed the aforementioned Mr. Brīk to return the wife [from the conjugal dwelling] to his own private home[9] [4] and to re-examine the case on her father's return

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[2] For a full analysis of this document, see Layish, *The Qāḍī's Role*, 93–102, 106–7.

[3] The missing opening of the document seems to include some details on the dispute between the spouses, a reference to a previous court meeting in which the wife acknowledged that she was pregnant by a stranger, the Qāḍī's appointment of Shaykh Brīk as a notary (*ʿadl*) to examine the issue, and the Qāḍī's instruction that the spouses stay with this notary. See lines 7–8, 11–12, 15ff. below.

[4] On harvesting (*ḥiṣād*) as part of a wife's duties in a family's household, see al-Zuwayyī, *Ajdābiya*, 255.

[5] The reference is probably to the date on which she proclaimed herself "an angry woman" and moved to her father's house. See line 10 below.

[6] Instead of lodging her "in the neighbourhood of virtuous persons" (*bi-jiwār qawm ṣāliḥīn*) or "among virtuous, trustworthy neighbours" (*wasṭ jīrān ṣāliḥīn maʾmūnīn*) within the meaning of "legal conjugal dwelling" (*maskan sharʿī*); see Layish, *Dār ʿAdl*, 205–6 and Shalabī, 436, respectively. "Virtuous neighbours" are needed so that the wife does not feel lonely (*lā tastawḥish*) and lose her mental balance; see Meron, 210–11. Another possible translation of *istawḥadahā*: "sought to isolate her" or "sought to be alone with her."

[7] See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 218, lines 1498ff. Cf. lines 5–6 below. *Ghaṣabahā* means also "raped her," but this denotation does not fit the present context.

[8] In other words, the woman wished to leave the conjugal dwelling but her father discouraged her from doing so. Among the Awlād ʿAlī, a woman may complain to her father if her husband does not provide for her food and clothing, or if he beats her without good reason or continually threathens to do so. Obermeyer, 107.

[9] It appears that the couple had already stayed with the same *ʿadl*, whose function is to observe the couple's behaviour and submit his report to the court. See Layish, *Dār ʿAdl*. Cf. *dār amīn* in Fierro, *Dos Árbitros*, 86ff.

from Kufra. Afterwards, the [Qāḍī] addressed a question to the husband [5] who responded by denying the pregnancy [paternity] (*ḥaml*),[10] and admitting that he and his brother ʿAbd al-Rāziq had taken away her dress from her, [6] [as well as] her apron, and a bracelet by force (*salabā*). Subsequently, on February 11, 1948, corresponding to the 30th of Rabīʿ Awwal 1367, [7] the court summoned the two spouses and the aforementioned Mr. Brīk, and both [spouses] were asked:

> Do you want to make statements (*aqwāl*) [8] that contradict what you have previously stated [in court]?[11]

To this, the wife answered that her first statement was null and void (*bāṭil*) [9] because it had been given under pressure (*ḍaghṭ*) and intimidation from her husband, and that in reality, he had made her pregnant. [10] She entertained no doubt concerning that fact because he had remained in contact with her during the time when she was "an angry woman" (*mughtāḍa*)[12] in her father's [11] house, and did

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[10] Denial of paternity, as in the case under review, is tantamount to an accusation of adultery (*zinā*). The offence can be established either by the wife's admission (four admissions are required) or by the testimony of four eye-witnesses to the act of sexual intercourse. Once the offence has been established, the wife is liable to Qur'ānic punishment (*ḥadd*), that is, lapidation (*rajm*)—provided she is *muḥṣana*, that is, that the marriage has been consummated. If, however, the husband fails to establish the offence, he is liable to the Qur'ānic punishment for unfounded accusation of adultery (*qadhf*): eighty lashes and removal of the right to testify until he repents. For references to Islamic legal treatises, see Layish, *The Qāḍī's Role*, 94 fn. 68. Cf. Peters, *The Role of the Qāḍī*, 87–88 {Following a dispute between the spouses, the wife left the conjugal dwelling and moved to her father's house as "an angry woman." After a while, the husband came to his father-in-law's house in order to settle the dispute with his wife and take her back home. When the father reproached him for not paying due attention to his pregnant wife, the husband angrily denied paternity. Whereupon the wife sued him in court on grounds of unproven charge of unlawful intercourse (*qadhf*) and the *qāḍī* sentenced him to *ḥadd* punishment of 80 lashes}. On denial of paternity and the procedure of *liʿān*, see Linant de Bellefonds, *Traité*, vol. 3, 44–47. As we shall see later, this is a case of a pregnancy begun while the woman was "angry" living in her father's house before moving to the *dār ʿadl*.

[11] This seems to refer to the wife's first admission that she was pregnant by a stranger.

[12] According to the customary law of the Awlād ʿAlī, a *mughtāza*, a wife whose husband unlawfully beats her finds refuge in the dwelling of one of her agnates; she "throws herself" (*rāmiya*), i.e., lodges (*nāzila*) in his dwelling seeking his protection (*ḥimāya*) and intervention in securing her rights and solving the dispute with her husband; the husband is obliged to pay a fine (*kabāra*) of ten pounds to the owner of the dwelling by way of a disciplinary punishment (*taʾdīban lahu*); Maḥjūb, 333, section 38; cf. Stewart, *ʿUrf*, 890. The status of "an angry woman" seems to be common practice in Cyrenaica. See, e.g., Davis, *Archive*, Sharīʿa Court of Ajdābiya,

not cease having sexual relations (*mukhālaṭa*) with her whenever the occasion presented itself; indeed, even after her first appearance [12] [in court] and her preceding statement, he visited her at night in her [13] bedroom and had sexual relations with her (*khālaṭahā*). [She also said that] her husband was aware of her pregnancy and acknowledged it [14] and that he had lived in harmonious intimacy (*muʿāshara*) with her [after moving to the *dār ʿadl*] until his father's visit and their long meeting [i.e., of her father-in-law and her husband; that was] when [15] his behaviour towards her changed.[13]

The aforementioned Mr. Brīk was asked [to report on] what he knew [concerning the relations] between the aforementioned couple. [16] He answered:

> A few days after they resumed conjugal relations (*murājaʿatihimā*) under my protection (*jiwār*),[14] I decided to go [17] to Ajdābiya, and I asked each of them separately concerning their conjugal life (*muʿāsharatihimā*), since there was a possibility that I might call at [18] the Sharīʿa Court in order to make a report (*ikhbār*) [concerning the spouses under his protection]. Their replies indicated that there was complete harmony between them. [19] However, on my return from Ajdābiya I found the two of them in an opposite frame of mind, [20] and I was informed that in my absence the husband's father had called at the pasturage. Subsequently, the husband came to me [21] to inform me that his wife was evidently pregnant, and that she attributed this to another man.

Mr. [22] Brīk continued:

> I brought the wife to my home and, pointing to the tomb (*ḍarīḥ*) of Sīdī Jibrīl, [23] I exhorted her to state nothing but the truth.[15] However,

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p. 176 no. 172 of October 30, 1947 (*mughāḍaba*); p. 27 no. 52 (date not available to me); Mohsen, 114. Cf. Layish, *Women*, 98 n. 66 and the references indicated there; Kressel, *Descent*, 108, 204.

[13] Seeing that intimate relations between the spouses (transpiring while the wife was living in her father's house) were kept secret, the father may have convinced his son that the wife's pregnancy could be attributed to a stranger and that it was appropriate for his son, to safeguard family reputation and honour, to deny paternity. Had it not been for the woman's status of "an angry woman" the presumption would have been that "the child belongs to the matrimonial bed" (*al-walad li'l-firāsh*). See Coulson, *Succession*, 23; Peters, *Bridewealth*, 126–27, 145.

[14] For further details on *jiwār*, see Layish, *Dār ʿAdl*, 206–8.

[15] The Bedouin believe that holy men and their tombs are sources of *baraka*, divine blessing. The *ʿadl* here enlists the sanction of the local Ṣūfī saint's tomb as a means of deterring the wife from lying about her pregnancy; the expedient proved successful. Cf. doc. 54, line 15 (Sīdī ʿAbd al-Salām al-Asmar [al-Fītūrī]) below;

> she left my house without uttering a word. [24] Three days later, her husband came to me and informed me that his wife confessed (*iʿtirāf*) [that her pregnancy was by him]. I accompanied him home [25] and the wife confirmed what she had previously confessed [that she had been made pregnant by her husband]. To this her husband responded by insisting on what he had previously maintained [i.e., that he had not caused the pregnancy].

[26] He [i.e., the husband] denied [in court] that his father had come to visit him while under Mr. Brīk's protection (*jiwār*). [He persisted in denying (*nafy*) [his responsibility] for the pregnancy stating:

> [27] When my wife left my home last year [and moved to her father's house as "an angry woman"] she was still having her menses (*ḥāʾiḍ*). After that [28] I had no contact with her until [we placed ourselves] under Mr. Brīk's protection (*jīra*).[16]

Afterwards, on the 12th of the month of February of the current [year], [29] the two aforementioned proxies (*wakīlān*)[17] appeared [in court], and were asked if they had [anything to say] that contradicted previous statements. They answered negatively. [30] Mr. Brīk was ordered to transfer (*taslīm*) her protection (*ḥāmiyatihā*) <*ḥimāyatihā*>[18] to her father and the latter was ordered to accept (*istilām*) it [i.e., the protection].[19]

Albergoni, *Droit coutumier*, 126–28; idem, *Écrire la coutume*, 39, 43–44; Layish, *Dār ʿAdl*, 204 and the references indicated there. According to the customs (*ʿawāʾid*) of the Awlād ʿAlī, the oath is administered either at the tomb of a "holy man" or at the mosque in Marsā Maṭrūḥ, and always on Friday; see Obermeyer, 211ff.; 223–24 (following a case of wounding and subsequent reconciliation of the parties, an oath was taken on Friday at the shrine of Sīdī Yūnis al-Jarayra); 229ff. ("By the truth of the owner of this tomb;" the oath took place on Friday at the shrine of Sīdī ʿAwwām [?]); Mohsen, 57–59 (among the Awlād ʿAlī in the Western Desert, if the defendant refuses to take an oath at the saint's tomb, he loses his case in favour of the claimant), 131; Ibn Mūsā, 46–48 (pilgrimage to the tombs of holy men); Khayrallāh, 267 (an oath was taken at the tomb of Sīdī Rāfiʿ al-Ansārī in al-Bayḍāʾ in the course of a dispute on wells); Davis, *Libyan Politics*, 146–47; al-Sūrī, 395–96; Gellner, *Saints*, 9ff.; idem, *Doctor*, 28; Evans-Pritchard, 8–9, 65, 82–83, 117; Murray, 430–31; Levtzion, *Islamization*, 17–18; Hart, *Murder*, 360; Morsy, 49; cf. Ibn al-ʿAṭṭār, 526 (the Qāḍī instructed the defendant to take an oath at the *masjid jāmiʿ*, the central mosque where the public prayer is performed on Fridays); Ginat, 84, 120 (Abraham's cave in Hebron).

[16] See *jiwār*, lines 16, 28 above; Layish, *Dār ʿadl*, 207–8; cf. al-Qusūs, 57.

[17] Their identity may have been mentioned in the opening of the document, regrettably missing.

[18] Cf. al-Qusūs, 57.

[19] The *ʿadl*'s function ends after he has reported to the Qāḍī concerning the

[31] On the basis of what had been said in the preceding depositions (*maḥāḍir*) and with due regard to the certification (*thubūt*) of the marriage contract, the spouses' intimate association, [32] their sexual intercourse (*khulṭa*), [and also with due regard to the fact that] the *sharīʿa* established a procedure (*ḥaddadat . . . taḥdīdan*) for the denial of pregnancy [paternity] (*nafy al-ḥaml*)—no proof of which had been produced [i.e., showing that this procedure had been carried out][20] in these [33] depositions—his honour the Qāḍī ruled that the pregnancy [paternity] should be attributed (*ilḥāq*) to the husband,[21] and obligated the latter to restore [34] to his wife everything he had taken away from her: her dower, her clothing and her jewelry, in other words, her aforementioned garments, her apron, and her bracelet. [35] He likewise obligated him to provide [arrears] maintenance from the time that he had neglected to pay it (*nafaqat ihmālihā*). This was valued [36] at two and a half pounds for a period of five months until February 1948. [He also obliged him] to take his wife back [37] and to treat her well. He duly handed down [the verdict], instructed that it be entered, and had [the witnesses] testify (*ishhād*) to it on February 16, 1948.

[38] Witnesses to the proceedings (*shuhūd al-ḥāl*).

[39] The matter being as indicated above[22]
{[40] The Qāḍī of Ajdābiya
[41] Rāfiʿ ʿAbd al-Raḥmān al-Qāḍī}

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essence of the dispute between the spouses and their respective responsibilities vis-à-vis the dispute. The wife returns to her father's house before the Qāḍī's verdict is effected.

[20] It appears that the Qāḍī here is referring to the procedure of *liʿān*. On the mechanism of this procedure and analysis of the Qāḍī's decision, see Layish, *The Qāḍī's Role*, 94–97.

[21] Cf. Davis, *Archive*, Sharīʿa Court of Kufra, no. 23 of April 14, 1933 (the Qāḍī attributed the pregnancy of a divorced woman to her ex-husband on the basis of the testimony of witnesses); no. 28 of July 18, 1933 (A woman claimed to have been raped by a stranger; the Qāḍī refused to attribute her pregnancy to this stranger because she had failed to notify anyone of the rape immediately after its alleged occurrence).

[22] The conclusion of this document is not available to me.

Document 42

Introduction

A man stated that he was very old, destitute, and physically unable to support himself by working. He requested the court to oblige his four sons to grant him maintenance. One of the sons agreed to pay his father one-third of his maintenance on the understanding that the other sons would contribute the rest.

The Qāḍī then conferred on the agreement the validity of a *shar'ī* judgement. This case provides another illustration of a weak individual in tribal society resorting to the *sharī'a* court to ensure his rights under the *sharī'a.*[1]

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family, and Companions, and grant them peace.[2]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him![3]

[3] SENTENCE (*ḤUKM*) RELATING TO MAINTENANCE (*NAFAQA*) IMPOSED ON A SON IN FAVOUR OF HIS FATHER 'UMAR B. AL-MIDHIM
Entered in register no. 405, pp. 273, 277

[4] In the Sharī'a Court of Ajdābiya presided over by the Qāḍī Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him. Amen!

[5] 'Umar b. 'Abdallāh b. al-Midhim aged 80, from the R'ēḍāt [subtribe] of the Maghārba[4] tribe [*qabīla*], appeared [in court], and after identification (*ma'rifa*) in accordance with the *shar'ī* procedure[5] made the following statement:

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[1] See Layish, *Legal Documents*, 3; Davis, *Libyan Politics*, 223.
[2] See doc. 1, fn. 2.
[3] See doc. 1, fn. 3.
[4] See De Agostini, *Cirenáica*, 325; Evans-Pritchard, map facing p. 35.
[5] See Glossary, s.v. *ta'rif.*

> [6] I am very old and advanced in years, I lack the strength to work, and I own no material goods; I have become physically too feeble (*ʿājiz*) [7] for gainful employment and earning (*kasb*) a living, and my state is one of utter destitution (*faqr*). I have children called Ḥasan, ʿAbdallāh, Abū Bakr, and Mḥammad; the [first] three live on the outskirts of Benghazi, and Mḥammad lives [8] on the outskirts of Ajdābiya. I ask that the noble Sharīʿa Court (*al-sharʿ*) impose on them the obligation of providing me with maintenance (*nafaqa*).[6]

When his aforementioned son Mḥammad appeared [in court], he confirmed everything his aforementioned father ʿUmar had said [9] concerning his paternity (*ubuwwa*) and his abject poverty. After Mḥammad discussed [the situation], he obligated (*alzama*) himself to pay his father maintenance to the amount of 60 *qurūsh* every month beginning on the date [of this verdict], [10] this sum being one-third of the [entire amount] of the maintenance; [the rest is to be paid] by his other aforementioned brothers. He undertook to pay this maintenance until his aforementioned father enjoyed easy circumstances.

By virtue of the agreement reached by the parties while they [11] were in a state of legal competence (*ḥāla jāʾiza*) in *sharʿī* terms, as duly certified (*thubūt*) by the aforementioned judge (*ḥākim*), the latter ruled that the aforementioned Mḥammad should pay a third of his father's maintenance; [the rest being payable] by his other brothers,[7] to the amount of 60 *qurūsh* a month [12] starting on the date [of the sentence]. Three pounds out of this amount have already been paid [to the father] as part of this [agreement].[8] [Issued] as *sharʿī* sentence. [The Qāḍī] signed it, had the undersigned [witnesses] testify

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[6] The guiding principle in the Mālikī school is that needy parents are entitled to maintenance from their children (of both sexes) when the latter have the necessary means (see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 90, line 593; Linant de Bellefonds, *Traité*, vol. 3, 86–88; Anderson, *Africa*, 371). According to the customs of the Bedouin in the Western Desert, a son must respect and obey his father; and when he begins to earn money, he must contribute generously towards his support (Obermeyer, 103). The Qāḍī here seems to have worded the father's request in *sharʿī* terms (e.g., *faqr*) making it mandatory on the part of his sons to pay him maintenance.

[7] The Qāḍī's intervention here is limited to granting the validity of a court ruling to an agreement reached by the parties themselves. This ruling is also binding on the other sons who were not present at this session, and the amount of whose contribution had not been determined. In other cases too, maintenance for the parents was imposed with the consent of their sons. See, e.g., Davis, *Archive*, Sharīʿa Court of Ajdābiya, pp. 219–20 no. [365] of July 7, 1953 (maintenance for both parents); pp. 207–8 no. 348 of June [?], 1953 (maintenance for the mother).

[8] It may well be that the three pounds were paid by way of arrears maintenance.

to its contents (*ashhada ʿalayhi*) and instructed that it be registered. [The sentence] was entered [13] on the 21st day of Shaʿbān 1373, corresponding to April 25, 1954.

The signatures are in the protocol (*ḍabṭ*)

[14] Witnesses to the proceedings (*shuhūd al-ḥāl*)[9]
[15] ʿImrān ʿĪsā
Mḥammad al-Ṭālib al-Hammālī
Mḥammad ʿAbd al-Salām

The matter being as indicated above
The Qāḍī of Ajdābiya
[16] Ḥusayn Muḥammad al-Aḥlāfī

[9] What is intended here is the use of professional notaries as witnesses of the entire proceedings. See Glossary, s.v. *ʿadl.*

Document 43

Introduction

A man died about seven years prior to this court session and left behind a widow (Rābḥa) and a minor son (ʿAbdallāh) as well as sons by another woman. Two years later, Rābḥa remarried and moved with her minor son to the conjugal dwelling of her new husband. During all this time the son was in the widow's custody, which continued a full year after her son attained puberty (*iḥtilām*)—at which point the *sharʿī* period of custody (according to the Mālikī doctrine) expires. Ibrāhīm, one of the minor's paternal half-brothers,[1] acted as his proxy and seems to have enjoyed full control of the patrimony. About eight months prior to the present court session a succession order with respect to this estate was issued by the Sharīʿa Court, probably on the widow's initiative. One week prior to the session, Ibrāhīm took ʿAbdallāh away from her and Rābḥa lodged a claim against Ibrāhīm asking that the court instruct him to return her son into her custody and, at the same time, sought permission to keep under her supervision (*murāqaba*) her son's share of his father's estate, consisting of rent due on a house that had also been in Ibrāhīm's possession.

The defendant, Ibrāhīm, stated that, at the time of Rābḥa's marriage to her new husband, an agreement had been reached between the two of them to the effect that the defendant would pay ʿAbdallāh's maintenance from the date of the latter's transfer to the new conjugal dwelling out of ʿAbdallāh's share of the revenue accruing from the rent. Since Rābḥa's present husband had not claimed arrears maintenance for that period—despite the aforementioned agreement—the defendant was ready, as a good will gesture, to restore ʿAbdallāh to his mother's custody on condition that the boy would not stay with her longer than one year. The mother refused to accept any time limit and insisted on her previous claim.

The Qāḍī ruled that because ʿAbdallāh's paternal half-brothers had tacitly agreed to granting Rābḥa custody over her son for over a year after the expiry of the *sharʿī* period of custody, their right to claim ʿAbdallāh ceased, and since Rābḥa had not given up custody

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[1] See Glossary, s.v. *akh li-ab*.

of her son, her right in this matter remained intact. The Qāḍī obligated the defendant to transfer to the mother ʿAbdallāh's portion of the revenue accruing from the rent of the house for the period during which Ibrāhīm had occupied it, and also required him to pay ʿAbdallāh's portion of the rent due for his own occupancy of the house starting from the day of the litigation.

It seems that the main issue in the case under review was the paternal half-brother's wish to control the minor's share in their father's estate rather than the question of the mother's right of custody. This objective had been fully achieved as long as the defendant acted as the minor's proxy. The mother's remarriage and the issuing of a *sharʿī* succession order with respect to the patrimony threatened to undermine the defendant's effective control over his paternal half-brother's share in the estate.

The case under study illustrates a trend on the part of women as weak members in tribal society to resort to the *sharīʿa* court with a view to protecting their rights under the *sharīʿa*.[2] The Qāḍī, for his part, fully realized these expectations.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[3]

[2] In the reign of the glorious Sovereign, *sayyid* Muḥammad Idrīs I, King of the United Kingdom of Libya. May Allāh the Exalted preserve him![4]

[3] SENTENCE (*ḤUKM*) GRANTING RĀBḤA BINT AḤMAD CUSTODY (*ḤAḌĀNA*) OF HER MINOR SON ʿABDALLĀH ʿABD AL-QĀDIR BĀZĀMA, AND ESTABLISHING THE SON'S RIGHT TO THE RENT DUE TO HIM FROM HIS FATHER'S HOUSE.

Entered in [register] no. 4/119, p. 73

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[2] See Introduction to this volume, p. 5; Layish, *Legal Documents*, 3; Davis, *Libyan Politics*, 223.

[3] See doc. 1, fn. 2.

[4] See doc. 1, fn. 3.

[4] In the Sharīʿa Court of Ajdābiya presided over by the Qāḍī Shaykh Muḥammad al-Sanūsī al-Ghazzālī al-Khaṭṭābī. May Allāh prosper him. Amen!

[5] A woman called Rābḥa bint Aḥmad al-Majbarī from the Bāzāma lineage (*ʿā'ila*) [of the Majābra tribe],[5] born in Kufra and residing in Ajdābiya, aged 40, [6] identified (*maʿrūfa*)[6] by person and name, stated [with regard to] her son ʿAbdallāh b. ʿAbd al-Qādir Bāzāma, who was seven years old:

> [7] His father the aforementioned [ʿAbd al-Qādir Bāzāma] died and I remarried two years after his decease, and my son the aforementioned ʿAbdallāh remained with me.[7] A week ago [8] from the date of [the present court session], his paternal half-brother (*akhūhu li-abīhi*), called Ibrāhīm, took him away and has not returned him [to me] since.[8] I ask the noble Sharīʿa Court to instruct the aforementioned Ibrāhīm [9] to restore my son to me. I likewise ask that his [the son's] share of his father's house be transferred into my possession.[9]

When Ibrāhīm was questioned on this matter [10] he confirmed what his aforementioned father's wife had stated. He said:

> Since Mr. ʿAbdallāh al-Ḥabīb [Rābḥa's second husband] does not claim the maintenance [from the defendant Ibrāhīm] [11] due for the period that has elapsed [that is, since the transfer of the child to the new conjugal dwelling] (*nafaqa māḍiya*), [the maintenance which] had

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[5] See De Agostini, *Cirenáica*, 336ff.

[6] See Glossary, s.v. *taʿrīf*.

[7] The mother's right to custody is anchored in the *sharīʿa* which, however, does not recognize the minor's best interest as a principle. According to the most dominant opinion in the Mālikī school, the period of custody expires with respect to a boy with the appearance of the first manifestations of puberty (*iḥtilām*), and with respect to a girl—on the consumption of her marriage (see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 98f., lines 657–58; Linant de Bellefonds, *Traité*, vol. 1, 171). According to customary law in the Western Desert, a divorced woman is entitled to the custody of her minor children, and the divorcing husband must provide for their maintenance. The children are transferred to their father immediately after termination of weaning (*fiṭām*) unless he freely renounces his right, in which case he must proceed with the payment of maintenance. If he is unable to provide maintenance, his agnates should do this in his stead (al-Jawharī, 200–1). Rābḥa kept her son in her custody for over a year after he attained puberty (see lines 15–16 below).

[8] The reason for this would seem the paternal half-brother's wish to control ʿAbdallāh's share in the estate; the formal expiry of the mother's right to custody was used as a pretext to this end (see below).

[9] She here means that she wishes to receive the minor's share of the revenues due as rent on the house (which his paternal half-brother had appropriated for his own use) so as to provide her son's maintenance (see below).

> been stipulated [from Ibrāhīm] on the day of the marriage to the aforementioned wife of my father,[10] I am ready to return my brother ʿAbdallāh [12] to his aforementioned mother at the earliest occasion on condition that he stays with her for a period not exceeding one year.

I [the Qāḍī] summoned the aforementioned Rābḥa [to court] [13] and read before her the response of the aforementioned Ibrāhīm, and she declared her unwillingness to accept any condition whatsoever with regard to the custody (*ḥaḍāna*) [14] of her son. She repeatedly demanded her right to custody of her son ʿAbdallāh, as well as control (*murāqaba*) over his share (*sahm*) [of his father's estate] now in the possession of his brother Ibrāhīm. Her request was granted; the aforementioned judge appointed a committee that estimated the extent [of the rent] due on the house as six pounds a year.

[15] Since the claimant Rābḥa did not give up custody of her son ʿAbdallāh, who had lived with her for over a year, [16] after the lapse (*suqūṭ*) of her right of custody over him with his brothers' tacit acceptance—and their silence testifies to their consent and suffices to annul their right [over the child]—, and considering the fact that [17] the aforementioned Rābḥa did not renounce (*lam tatanāzal*) her right to custody over her son ʿAbdallāh,[11] and that Ibrāhīm had

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[10] It would seem that on the day of her remarriage to her present husband, Rābḥa had entered into an agreement with the defendant Ibrāhīm that the latter would pay ʿAbdallāh's maintenance from the date of the latter's transfer to the new conjugal dwelling out of his share of the rent due on the house. The agreement had not been fulfilled and the new husband had supported ʿAbdallāh himself without advancing any claims against the defendant. There is some evidence in the Libyan *sijill* to the effect that a husband undertakes to provide maintenance to his wife's children by a previous husband. See Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. 85 no. 85 of September 13, 1943; p. 119 no. 119 of January 9, 1944. Occasionally, however, the second husband insists that maintenance for the minor be paid by the minor's father. See Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. 27 no. 52 of September 8, 1951. For arrangements concerning the question of custody by mutual agreement between the remarried mother and the children's agnates, see Anderson, *Africa*, 215.

[11] In other words, the mother's right to custody of the child had expired upon his attaining puberty. Nevertheless, she continued to keep the child well over one year after that date with his paternal half-brothers' tacit consent. The Mālikī school does not recognize guardianship over the person (*wilāya ʿalā 'l-nafs*), and even with respect to guardianship over property (*wilāya ʿalā 'l-māl*)—this position is reserved to the minor's father (but not other agnates) or the latter's testamentary guardian (*waṣī*) and, in their absence, to the *qāḍī* (see Linant de Bellefonds, *Traité*, vol. 3, 180–83). In the Qāḍī's view, the brothers' tacit consent deprived them of their right to the child (the nature of which is not specified; Ibrāhīm was the minor's proxy,

admitted that he had lived [18] in the house since his father's death without contributing anything to his brother ʿAbdallāh's maintenance out of [the latter's] share [of the rent] of the house, and that [furthermore] the witnesses had testified [19] that the house was the property (*milk*) of the deceased ʿAbd al-Qādir Bāzāma to which ʿAbdallāh, the aforementioned minor, had the right of inheritance together with the rest of the legal heirs (*waratha*), [in short] on the basis of [20] the foregoing [facts], [the professional witnesses made the following statement:]

> the aforementioned judge made us testify (*ashhadanā*) to his ruling that the aforementioned Rābḥa had the right of custody over her son, the aforementioned ʿAbdallāh, [21] and he likewise ruled that Ibrāhīm b. ʿAbd al-Qādir is henceforth obliged to pay one and a half pounds a year as rent for his occupancy of the house. [22] He also ruled that he [Ibrāhīm] was to pay the minor ʿAbdallāh's share [out of the revenues] accruing from the rent [of the house] for the period during which he had occupied it, that is, for seven [23] years while acting as the minor's proxy (*nāba*), the sum of ten and a half pounds, this being the [minor's] share [of the revenues from the rent] on the aforementioned house [24] according to the *sharʿī* prescribed rules of inheritance (*farīḍa*); [the succession order was] issued by the court on April 2, 1952 (order no. 4/135).[12]

[25] [Issued] as a valid *sharʿī* sentence. [The Qāḍī] signed and confirmed it and instructed that it be carried out as required. This was done in the precincts where the Qāḍī is officially located. [26] He had the undersigned witnesses testify to this effect and instructed that it be entered. The sentence was entered on the 18th day of Rabīʿ al-Awwal 1372 [27] corresponding to December 6, 1952.

The claimant's fingerprint and the defendant's signature

[28] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[29] Mr. ʿAbdallāh Mūsā
Mr. ʿAbd al-Rahmān Ḥamūda
Mr. ʿUmar Ādam

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see line 23 below) and extended the woman's own right of custody (for unspecified period), which she had not renounced.

[12] It may well be that the order of succession had been initiated by Rābḥa with a view to obtaining possession of her son ʿAbdallāh's share of the estate. This initiative seems to have provided Ibrāhīm, the paternal half-brother with the immediate incentive of depriving Rābḥa of custody.

Mr. ʿAbd al-Ḥalīm Dawla
Mr. Mḥammad ʿAbd al-Salām
[30] The Sharʿī Nā'ib
Muḥammad Ṭālib al-Hammālī[13]

The matter being as indicated above
The Qāḍī of Ajdābiya
[31] Muḥammad al-Sanūsī al-Ghazzālī [al-Khaṭṭābī]

[13] He acts concurrently or intermittently in two capacities: as a Sharʿī Nā'ib and as a notary or professional witness. See Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks. Cf. doc. 17, fn. 8 below.

Document 44

Introduction

A woman brought a claim against her elder son, who had taken possession of property (livestock, land, and merchandise) belonging to her younger son, a minor, then still in her custody. This property apparently constituted the latter's share of his father's estate. The court appointed her, with the consent of her elder son, guardian of her minor son's property, until the expiry of the latter's period of custody, and instructed the elder son to transfer into her possession all the younger son's property, and to refrain from attempting to encroach upon it unlawfully in the future.

The dispute between the mother and her elder son over the minor son's property reflects the conflict between the *sharʿī* norm granting women the competence to dispose of property and the customary norm favouring the minor's agnates. In this case the Qāḍī endeavours to impose the *sharʿī* norm.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions and grant them peace.[1]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya, and Emir of Barqa [Cyrenaica]. May Allāh the Exalted preserve him![2]

[3] APPOINTMENT OF SAʿĪDA BINT SAʿĪD ʿABĒD AS GUARDIAN OVER HER MINOR SON MḤAMMAD

Entered in register no. 452, p. 301

[4] At the Sharīʿa court of Ajdābiya, presided over by the Qāḍī, Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him! Amen.

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

[5] On the basis of what has been reported by Saʿīda bint Saʿīd b. ʿAbēd from the Nkhēlāt [sublineage of the Mūmin branch of the subtribe al-Ṭarsh] belonging to the ʿUrfa[3] tribe [*qabīla*] and her son Masʿūd b. Ḥasan b. ʿAskar from the ʿAlī [lineage] of the Maghārba[4] tribe, [both having been] identified (*maʿrūfayn*)[5] [6] by person and name in register no. 452, on July 4, 1954, it was proved to the satisfaction of the aforementioned judge (*ḥākim*) that her minor (*qāṣir*) son owned a she-camel the value of which is equivalent[6] [7] to *ibn ʿashār*,[7] another camel which this year became a *qaʿūd*,[8] [another] camel (*jamal*), eight sheep, four yearling ewe lambs (*ḥawliyyāt*),[9] one male yearling lamb, nine goats, eight heads of cattle (*ʿajmiyyāt*)[10] [8] eight four-year-old goats (*rubāʿiyyāt*),[11] two male goats, four young nanny-goats, a portion equivalent to a third of a *sāniya*[12] on a vineyard located in Shahwān, identified by them, three [9] and one-third *ṣīwān*[13] of barley (*shaʿīr*) from the previous year, and six and a half *ṣīwān* of new barley [i.e., this year's crop].

After her son Masʿūd gave his consent, the aforementioned judge ruled [10] the appointment (*naṣb*) of the aforementioned Saʿīda as *sharʿī* guardian (*muqaddama*)[14] over [the property of] her aforementioned son Maḥmūd for the period of the *sharʿī* custody (*ḥaḍāna*),[15]

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[3] See De Agostini, *Cirenáica*, 231ff., 240, 242, 244; Evans-Pritchard, map facing p. 35.

[4] See De Agostini, *Cirenáica*, 316–21; Evans-Pritchard, map facing p. 35.

[5] See Glossary, s.v. *taʿrīf*.

[6] If *taḥtahā* is the right reading, then the translation should be: "[. . .] a she-camel accompanied by [. . .]."

[7] Kurpershoek (412) cites *ʿašār* "she camels whose young have become *ḥašuw*, about ten months old."

[8] Cf. *gīʿūd* (pl. *gīʿdān*), "young male camels for the first six years, until their eye-teeth, *nībān*, become fully developed" (Musil, 334).

[9] Cf. *ḥaulī*, "mouton" (Dozy, vol. 1, 341).

[10] Cf. *ʿjamiyy* (pl. *ʿajāma*), "taureau, jeune taureau d'environ deux (ou trois) ans, veau" (Dozy, vol. 2, 98).

[11] See Lane, 1018ii. Hava (238) gives *rabāʿiyyāt*, "toothless (beast)."

[12] Irrigated plot of land. See Glossary.

[13] *ṣāʿ* (pl. *āṣuʿ*, *aṣwuʿ*), "mesure variable de quarante à cinquante livres" (Dozy, vol. 1, 853).

[14] In the absence of the minor's father or the latter's testamentary guardian (*waṣī*), the *qāḍī* may appoint a guardian (*muqaddam*) over the minor's property. See Linant de Bellefonds, *Traité*, vol. 3, 183; Glossary, s.v. *muqaddam*.

[15] What is intended here is no doubt the minor son's portion of his father's estate, which had been taken over by the elder son. The latter consented to the mother's appointment on condition that it be only temporary, that is, lasting until the minor attained puberty which signifies the expiry of the period of *ḥaḍāna*. Under Mālikī

and obligated her to look after [11] his property. Any carelessness on her part in carrying out her function, or loss of the property [incurred] would render her liable (*malzūma*) to make good the loss. He also bound her to present this court with a report [12] every six months starting from the date [of the present ruling].[16] He likewise bound her son, the aforementioned Masʿūd, to deliver into her keeping everything in his possession belonging to his aforementioned minor brother [13] and to refrain from seizing unlawfully (*yataʿaddā*) the aforementioned brother's property in the future. [Issued] as *sharʿī* sentence (*ḥukm*). [The Qāḍī] appended his signature to it, confirmed it, had the undersigned witnesses testify (*ashhada*) to its contents [14] and instructed that it be registered. [The sentence] was entered on the 3rd day of Dhū 'l-Qaʿda 1373 corresponding to July 4, 1954.

The signatures are included in the court protocol (*ḍabṭ*).

[15] Witnesses to the proceedings (*shuhūd al-ḥāl*)[17]
[16] ʿImrān ʿĪsā
Mḥammad ʿAbd al-Salām
Mḥammad al-Ṭālib al-Hammālī

The matter being as stated above
The Qāḍī of Ajdābiya
[17] Ḥusayn Muḥammad al-Aḥlāfī

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doctrine, the minor's agnates (with the exception of the father) are not natural guardians, but Masʿūd, the minor's elder brother, may gain control over the minor's share of the estate by being appointed as his proxy (see doc. 43 above) or guardian by the court. In other cases, the court appointed the paternal uncle (*ʿamm*) as a guardian over the minors' shares in their father's estate "by virtue of strength of relationship" (*li-quwwat al-qarāba*). See Davis, *Archive*, Sharīʿa Court of Ajdābiyya, p. 111 no. [?] of January [?], 1947; p. 186 no. 183 of February [?], 1948 {The full brother (*shaqīq*) of the deceased claimed in court that, as the minor's paternal uncle, he was "the most appropriate and qualified person" for nomination as guardian. The maternal grandfather was appointed as supervisor (*nāẓir*) alongside the guardian}. Cf. Bousquet, *Islamic Law*, 4–5; Marx, 185; Layish, *Women*, 270–71.

[16] The mother's appointment, on her own initiative, as guardian of the minor's property attests to her competence—under the *sharīʿa*—to dispose of property. In effect, the Qāḍī's appointment of the mother as legal guardian constitutes an imposition of a *sharʿī* norm at the expense of custom.

[17] Professional witnesses and notaries are intended. See Glossary, s.v. *ʿadl*.

Document 45

Introduction

This introduction is relevant to all the documents pertaining to inheritance (docs. 45–54). The data provided below may give some general notion with respect to the apportionment of estates in various regions of Cyrenaica, particularly among the Awlād ʿAlī in the Western Desert.

Al-Jawharī maintains that as a rule the Bedouin in the Western Desert apportion their estates in accordance with the *sharʿī* rules of inheritance.[1] Mohsen too confirms that among the Awlād ʿAlī in the same region, the daughter's right of inheritance under the *sharīʿa* is recognized. In practice, however, only sons inherit. Daughters renounce their shares of the estate in return for some compensation and for protection based on blood kinship; if they insist on receiving their shares in their fathers' estates they have to forfeit their right to protection.[2] E.L. Peters has also noted that females are as a rule disinherited by males in order to avoid the alienation of their shares in the patrimony through their marriage outside the agnatic family.[3] Obermeyer confirms that as a rule, inheritance in the Western Desert is determined through the patrilineal lineage principle; a daughter may inherit only in exceptional cases, such as when the praepositus leaves no sons or male agnates behind; she refrains from claiming her right in the estate in the presence of sons out of respect for her brothers.[4]

The agnates are concerned with the preservation of the patrimony intact, daughters realizing their prescribed portions under the *sharīʿa* actually transfer these portions outside the family and the lineage through their marriage to strangers thus causing the fragmentation of the patrimony.

On the face of it, there is ample evidence in the Libyan *sijill* that women enjoy their *sharʿi* capacity to own and dispose of property

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[1] Al-Jawharī, 202; cf. doc. 55.
[2] Mohsen, 120–23.
[3] Peters, *Bridewealth*, 128, 153. Cf. Behnke, 117–18; Colucci, *Tribù*, 29.
[4] Obermeyer, 61–62, 109. The same applies to Bedouin in the Middle East; see al-Qusūs, 43–44; Abū Ḥassān, 280, 316; al-ʿAbbādī, *al-Qaḍāʾ*, 71–74; Marx, 185; Layish, *Women*, 290ff.

though, in all these cases, one gains the impression that special circumstances made possible the application of the *sharʿī* rules of inheritance. It goes without saying that the picture gained from the *sharʿī* orders of succession does not necessarily reflect reality outside the *sharīʿa* courts; the order of succession in itself does not prove that it was carried out in actual fact, given the potential opposition on the part of the male agnates.[5] It stands to reason that females resort to the *sharīʿa* court precisely because they are deprived of their *sharʿī* rights of inheritance under customary law.

The Mālikī law of inheritance, unlike other schools of law, makes substantial concessions to customary law at the expense of *sharʿī* norms. Thus it does not recognize the *sharʿī* category of *dhawū al-arḥām*, cognatic heirs and, in the absence of Qurʾānic heirs (*dhawū al-farāʾiḍ*) and agnatic heirs (*ʿaṣaba*),[6] it assigns their portions to *bayt al-māl*, the Treasury. Similarly, the Mālikī school does not recognize the doctrine of the *radd*, the reversion of the residue to the Qurʾānic heirs when their prescribed portions do not exhaust the estate and when there are no male agnates; in these circumstances, it assigns the residue again to *bayt al-māl*. According to all the other schools, only spouses are denied the *radd*. And finally, the Mālikī school prohibits disposal of more than one-third of an heirless estate by will. According to other schools, the testator is not subject to the *ultra vires* doctrine and may thus dispose of the entire heirless estate. It is no wonder then, that the Bedouin of al-Qasr in the Western Desert strongly regard depriving females (and presumably also cognates) of their rights of inheritance to be in the best tradition of Islamic law.[7]

In the case under review, a daughter initiates a succession order relating to her mother's estate. At the time of the latter's death some years previously, the heirs included three daughters and a son. Prior to this initiative, the son and one of the daughters passed away leaving their portions of the inheritance to their spouses and their children, that is, to the praepositus' grandchildren. The Qāḍī assigned the estate in accordance with *sharʿī* apportionment. The son converted the daughters from Qurʾānic into agnatic heirs each entitled

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[5] See, e.g., doc. 53 below.

[6] On comparison between the tribal *ʿaṣaba* and the agnatic heirs under Islamic law, see Colucci, *Tribù*, 29.

[7] See Layish, *Mālikī Waqf*, 1–2; cf. Obermeyer, 194ff. On absolute freedom of testation among the Bedouin of the Judean Desert, see Layish, *Fatwā*.

to one-half of his own portion. Because the son and the daughter had died after the praepositus, they are allotted a share of the inheritance alongside the living daughters. Their heirs then step into their shoes and take the portions they would have been entitled to had they lived. The deceased children's spouses take their Qurʾānic portions in the estate, and the grandsons are given a portion twice as large as that of the granddaughters in the two branches of the family.

The fact that no succession order was issued in the son's lifetime perhaps indicates that he was in full control of the property. The daughter's initiative in issuing a succession order on her mother's estate implies that women enjoy capacity to own and dispose of property. The fact that a mother's estate was at issue apparently facilitated the apportionment of the property, since no agnatic considerations relating to the integrity of the family property arose.

Text

[1] In the name of Allāh the Compassionate, the Merciful. May Allāh bless our Lord Muḥammad, his family and Companions and grant them peace![8]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya and Emir of Barqa [Cyrenaica]. May Allāh the Exalted preserve him![9]

[3] *SHARʿĪ* APPORTIONMENT (*FARĪḌA*) CONCERNING THE ESTATE OF THE DECEASED PERSONS MABRŪKA, RĀBḤA, ĀDAM, AND ḤSĒN
Entered in register no. 443, p. 296

[4] At the Sharīʿa court of Ajdābiya, presided over by the Qāḍī Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him! Amen.

[5] Maryam bint Iḥsēn b. ʿAlī Abī Fanna from the Sdēdī[10] [section] of the Zwayya tribe (*qabīla*), aged 55, born and resident in Ajdābiya, appeared [in court]. After her identification (*taʿrīf*)[11] [6] according

[8] See doc. 1, fn. 2.
[9] See doc. 1, fn. 3.
[10] See De Agostini, *Cirenáica*, 407–8.
[11] See Glossary, s.v. *taʿrīf*.

to *sharʿī* procedure by two persons of good reputation [functioning] as notaries at this court (*ʿadlay hādhihi al-maḥkama*),[12] [Maryam] stated that her mother Mabrūka bint Wḥēda al-Darsī died seven years previously leaving her estate, by intestate succession (*munḥaṣira*), [7] to the claimant, her daughter, to her son Ādam b. Ḥsēn, and to her two daughters Fiḍḍa and Rābḥa. There were no other heirs. Two years after her mother's death, the aforementioned Rābḥa died; [8] leaving her [portion of the] estate to her husband Aḥmad al-Sharīf, her son Faraj, and her two daughters Umm al-Khēr and Mastūra. Afterwards, the aforementioned Ādam died, and the [order of] *sharʿī* apportionment of the estate (*farīḍa*) was registered at this court [9] under no. 4/556.[13] Both [Rābḥa and Ādam] have [portions in their mother's] estate (*tarika*).[14] She requests the noble Sharīʿa Court (*al-sharʿ*) to register the deaths and to issue [an order of] *sharʿī* apportionment. Her statement was registered. [10] She was required to substantiate her claim and she brought forward for [purposes of] testimony (*shahāda*) the following [witnesses]: Aḥmad b. ʿAgīla b. Dāwūd al-Gṣērī and Ṣāliḥ b. ʿAbdallāh b. Mūsā, [11] both from the Gṣērī [sublineage of the Awlād Mnāyaʿ which belongs to the Sdēdī branch] of the Zwayya[15] tribe. Both of them testified that they were

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[12] This is an explicit indicator that professional witnesses or court notaries are intended here. The notaries are usually required to testify to the entire legal proceeding that takes place in court in their presence; they are not required to identify the claimant or the primary witnesses (see Preface to this volume, x above; Layish, *Shahādat naql*). In this particular case, the notaries seem to have known the claimant personally. See Glossary, s.v. *ʿadl.*

[13] The succession order was issued with respect to Ādam's own estate rather than with respect to his portion in his mother's estate.

[14] Because the daughter and son died *after* the praepositus, they are entitled to a portion of the estate by virtue of the principle known in Jewish law under the name of "inheriting in the grave and transmitting [one's share to one's own heirs]," i.e., someone may leave property to which he himself was entitled as heir but which he never actually received because he died before the succession order was issued. Cf. Ibn al-ʿAṭṭār, 565–66; *al-Munjid*, s.v. *tanāsukh*, 805ii; Layish, *The Druze*, 350. Had they died before the praepositus, their issue—the orphaned grandchildren—would have been excluded from the succession according to the rule that the nearer in degree to the praepositus excludes the more remote. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 240, lines 1651ff.; Coulson, *Succession*, 33–34, 143–44. The concept of "inheriting in the grave . . ." is recognized in Jordanian tribal cutomary law: a dead man may inherit from a living man as if it were *vice versa.* It is presumed that a "general [i.e., natural] bequest" (*waṣiyya ʿāmma*) needs no formalities, such as publication, witnesses or guarantors in order to be effective. See al-ʿAbbādī, *al-Jarāʾim*, 85.

[15] See De Agostini, *Cirenáica*, 407–8.

closely acquainted with the persons mentioned above by the claimant, and that they were aware that Mabrūka [12] had died leaving her estate to her three daughters and to her aforementioned son, Ādam. After that, Rābḥa died leaving her [portion of the] estate to her aforementioned heirs. Then Ādam died [13] leaving his [portion of the] estate to his aforementioned heirs by means [of an order] of *sharʿī* apportionment bearing the number specified above. Both of their testimonies were registered. The test of their credibility (*tazkiya*)[16] was carried out by [14] Shaykh Mḥammad b. al-Bghīḍ and ʿĀmir Abū Gshāriyya, both from the Zwayya tribe. When they were required to, they testified that they were closely acquainted (*maʿrifa*) with the aforementioned two witnesses (*shāhidayn*) [15] and that they were satisfactory notaries (*ʿadlān riḍā*) and that their testimony was acceptable (*maqbūlā al-shahāda*).

On the basis of this testimony, which concurred with [Maryam's] claim and which was established in accordance with [16] *sharʿī* procedure free from defamation (*ṭaʿn; tajrīḥ*), the death of all the aforementioned deceased persons as well as the transfer [17] of their estate to the aforementioned heirs and their entitlement to the entire estate was legally established to [the satisfaction of] the aforementioned judge (*ḥākim*). After [the heirs] assumed the places of the deceased (*munāsakha*),[17] the valid *sharʿī* apportionment of the estate (*ṣaḥḥat al-farīḍa*)—[18] consisting of 240 portions—is as follows:

To Maryam daughter of the aforementioned Mabrūka—48 portions;[18] to Fiḍḍa daughter of Mabrūka—also 48 portions; to Aḥmad al-Sharīf [19] husband of the aforementioned Rābḥa—12 portions;[19] to Faraj her [i.e., Rābḥa's] son—18 portions; to each of her two daughters Umm al-Khēr and Mastūra—9 portions; [20] to Mabrūka, wife of the aforementioned Ādam—12 portions;[20] to ʿAbdallāh, son

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[16] See Glossary, s.v. *tazkiya.*

[17] The heirs of the son and daughter jointly take the shares that would have gone to their respective parents had the latter been alive at the time of the praepositus' death. See Wehr, s.v. *nasakh.*

[18] The daughter takes a share half in size to that of the son, by virtue of the principle of *taʿṣīb*; in the presence of a son she is converted from a Qurʾānic heir into an agnatic or residuary heir. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 244, lines 1681ff.; Coulson, *Succession*, 41–42.

[19] This represents one-fourth, the husband's Qurʾānic portion in the presence of issue. See Coulson, *Succession*, 41.

[20] This represents one-eighth, the wife's Qurʾānic portion in the presence of issue. See *ibid.*

of the aforementioned Ādam—also 28 portions; to each of the four daughters [21] of Ādam: ʿĀysha, Fāṭma, Lazam and Mnājī mentioned in *sharʿī* apportionment [succession order] no. 4/556—14 portions. Such is the apportionment (*taqsīm*) of the entire estate. [22] [This succession order has been issued] exactly in accordance with *sharʿī* apportionment and duly certified (*thubūt*).[21] The Qāḍī signed it, had the undersigned witnesses testify to this effect, and had it registered on the 22nd day of Shawwāl 1373, corresponding to June 23, 1954.

The signatures are in the protocol (*ḍabṭ*)

[23] Witnesses to the proceedings (*shuhūd al-ḥāl*)[22]
[24] ʿImrān ʿĪsā
Mḥammad ʿAbd al-Salām
Mḥammad al-Ṭālib al-Hammālī

The matter is as indicated above
The Qāḍī of Ajdābiya
[25] Ḥusayn b. Muḥammad al-Aḥlāfī

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[21] The evidence of the *sijill* indicates that women of various degrees of relationship to the deceased frequently initiated the issuing of succession orders and were allotted shares in the estate in accordance with *sharʿī* apportionment. See, e.g., Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. [165] no. [159] of September 7, 1947 (a woman inherits in two capacities—as a widow [1/8] and as mother in the absence of a lineal descendant or of collaterals [1/3]; see Coulson, *Succession*, 43f.); p. 140 no. 248 of October 27, 1952 (a widow initiated a succession order and takes her *sharʿī* share [1/8] alongside two sons of the deceased by different wives); p. 156 no. [275] of January 10, 1953 (a widow initiates and takes her share alongside the mother, son, and daughter of the deceased). Cf. Colucci, *Tribù*, 30 (Women and fathers inherit real estate or movable estate even in the presence of sons); Kennett, 104–6. Note: according to Mālikī law, a woman does not acquire the legal capacity to dispose of her property until she has consummated her marriage, and seven years have elapsed since the conclusion of the marriage, and two witnesses have testified that she is a prudent person capable of managing her own affairs. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 196 lines 1337–1338; Coulson, *Succession*, 247.

[22] Professional witnesses are intended here. See fn. 12 above.

Document 46

Introduction

A dispute arose between the widow of a praepositus and the other heirs concerning ownership of a specified *sāniya* (garden, an irrigated plot of land) in his estate. The widow claimed that the *sāniya* had been made over to her by her husband to compensate her for the residue of dower she had not received from him and for his appropriation and slaughter of some of her sheep for his own requirements. In other words, the *sāniya* is, in her view, a debt due on this estate—one that had to be settled before the estate was divided. The other heirs denied that it had been awarded her and claimed that the *sāniya* constituted a part of the estate and consequently had to be divided among them. The widow proved by means of witnesses, including her husband's brother, that the *sāniya* had indeed been made over to her.

The Qāḍī dismissed the claims of the other heirs and ruled that except for an olive tree and two palm trees belonging to the son of the praepositus, the *sāniya* was the widow's property.

From the document one can infer that the woman insists on the realization of her right to the dower in fulfilment of the conditions set by the marriage contract or by way of compensation in the event that the dower has been withheld from her. It is also possible to infer that despite the *sharʿī* principle enforcing separation of property between spouses, in practice, the husband can dispose of the wife's private property. Nevertheless even then, she is able to realize her right to own and dispose of property, including immovable property.[1]

Text

[1] A woman called Ḥawwāʾ bint ʿAlī of the al-Nākra [lineage][2] claimed that, in his lifetime, her husband Ghēth [2] Bū Gandīl had given her (*aʿṭāhā*) the well-known Sāniyat al-Bayt[3] [3] in lieu of cer-

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[1] See Introduction to docs. 4 and 45 above.
[2] Cf. doc. 52, line 6.
[3] This *sāniya* is mentioned in doc. 52, line 5 below.

tain *ḥawāyij*[4] from her dower[5] and a number of heads of sheep belonging to her, which he had consumed.[6] [4] This was her claim. The other heirs (*waratha*) denied her claim stating [5] that it was false. I [the Qāḍī] requested her [to supply] proof by means of witnesses (*bayyina*)[7] corroborating her claim. She brought forward [6] witnesses, and these bore out her [contention]. Their names [are given] after [7] the date.

I have ruled that [the *sāniya*] belongs to her and thus the heirs' claim has been invalidated [8] and [she] has no partner in it [the *sāniya*] but Allāh, may He be praised and exalted.[8] [9] Not included in the aforementioned *sāniya* are the olive tree and the two palm

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[4] See doc. 6, line 11 above; Glossary, s.v. *ḥāja*.

[5] In other words, the *sāniya* was given her by way of compensation in lieu of the *ḥawāyij*, which he had failed to give her as part of the specified dower. This implies that we are not dealing here with *hiba*, gift *inter vivos*, which signifies the transfer of ownership of a thing with no consideration payable by the donee (On *hiba* in Māliki doctrine, see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 176–78; Linant de Bellefonds, *Traité*, vol. 3, 322–23; idem, *hiba*, 350). On the same day this widow denied the claim advanced by the manumitted concubine of her deceased husband that she had been given a specified piece of land as a donation, and further claimed that this property too had been made over to her on a previous occasion as part of her dower (see doc. 62 below). Twenty years previously, Ghēth Bū Gandīl and his brother Ḥamad Bū Gandīl had divided between the two of them the family property and designated one of the *sāniya*s as dower for their brides. See doc. 52 below. Cf. Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. [225] no. [374] of July 19, 1953 {a widow claimed that three years prior to her husband's death he "gave me (*aʿṭānī*) a house in return for the rest of the dower due to me from him [. . .] and I obtained possession of it [. . .] during his liftime." One of the witnesses corroborated her version. The other witness testified that the house was given to the wife by means of a written document}; p. 330 no. 362 of 13 Muḥarram 1360 [June 1954] {a widow claimed, on the basis of a "regular document" (*wathīqa ʿādiya*), various kinds of property of her husband's estate "in return (*muqābil*) for her dower"}. In both cases, the reference seems to be to a will. See doc. 54 below; Obermeyer, 109 (the Bedouins in the Western Desert maintain that the deferred dower should be paid before division of the estate among the heirs; the widow is entitled to stay in her husband's house until her death provided she does not remarry, and the eldest son must look after her); Ibn al-ʿAṭṭār, 419ff., 421 {"the deferred [dower] is considered a debt [on the estate]" (*al-kāliʾ min al-duyūn*)}, 425ff. (the widow insists on taking her *sharʿī* portion in all categories of the estate).

[6] In other words, the husband appropriated the sheep that constituted her private property and slaughtered them for his own use in spite of the doctrine of separation of the spouses' property obtaining in Islamic law. The Sāniya is a kind of compensation for this specific deed of his. Cf. Obermeyer, 63 (concerning a woman who received 13 camels of her husband at the time of the wedding).

[7] See Glossary, s.v. *bayyina*.

[8] This is merely for the purposes of religious embellishment. The widow is, therefore, sole owner of the *sāniya*.

trees [that were given] to Nājī, the son of Ghēth [the praepositus]; [10] Ḥawwā' has no [right] with respect to these [trees]. Thus has it been set down and registered.

[11] September 22, 1932.

[12] The Nā'ib of the Sharī'a Court
[13] Aḥmad al-Khaḍrī

[14] The aforementioned witnesses
[15–16] 'Abdallāh Bū Shāmikh
'Abd al-Nabī Bū Ikrīm
Mḥammad Bū Gandīl

[17] On the 18th day of Dhū 'l-Qa'da 1360, [corresponding to] December 8, 1941, [18] 'Abd al-Nabī Bū Krīm and Mḥammad Bū Gandīl appeared [in court] [19] and took an oath on the noble Qur'ān (*al-maṣḥaf*) saying:

> By Allāh, [20]—there is no God but Allāh—,[9] Ghēth Bū Gandīl gave (*a'ṭā*) [21] the *sāniya* to his wife Ḥawwā' bint 'Alī from the al-Nākra [lineage] [22] in lieu of her residual dower and the heads of sheep which he consumed.[10]

[23] This [document] has been registered to this effect.[11]

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[9] The oath taken on the Qur'ān in addition to the *shahāda* (see Glossary) is intended to enlist religious sanction to enhance the credibility of the witness.

[10] This testimony, given about nine years after the Qāḍī ruled in the widow's favour, witnesses to the fact that the dispute between the heirs was not really over.

[11] Along the margins of the document there is an Italian summary of this document's contents, with a note by the Governor of the subdistrict of Kufra to the effect that the judgment recorded here had been approved for implementation. This exemplifies normative control exercised by the Italian administration over the Qāḍī's judgments. See Preface above.

Document 47

Introduction

The praepositus' widow and their daughter appoint the widow's son by another husband, i.e., the daughter's maternal brother[1]—at the time residing in the Sudan—as their proxy, in order to secure their respective *sharʿī* portions of the estate which was located in the Sudan. He was given authorization to represent the heirs in an official capacity in all the related negotiations and before the recognized authorities and the *sharʿī* or civil courts, for the purpose of enabling them to realize their rights. The Qāḍī granted him the required power of attorney. As a stranger, he does not inherit anything from his mother's husband, nor is he involved in considerations whereby the agnates would want to prevent the fragmentation of the patrimony by excluding women from the inheritance.[2] On the other hand, it is in his interest to ensure that his mother secures her rights vis-à-vis the inheritance since he is entitled to inherit from her.

Text

[1] In the Sharīʿa court of Kufra presided over by the Qāḍī Shaykh Muḥammad Ṣāliḥ al-Bakrī. May Allāh the Exalted grant him success!

[2] Gbūl bint al-Ḥājj Mḥammad Ḥēfān and her daughter Ḥawwāʾ bint Ḥājj Jibrīl b. Faraj Ḥēfān from al-Ṭwāleb [sublineage] [3] of the Majābra[3] tribe, [identified[4] by] Jābir b. Maghrib al-Grēd[5] and Aḥmad b. Mḥammad Laylā, made a statement at the time of their appearance [4] [in court] willingly (*ṭāʾiʿāt*) and voluntarily (*mukhtārāt*) for the purpose of giving testimony (*bi-qaṣd al-ishhād*) about themselves, while they were in a state of legal competence (*ḥāla jāʾiza*) in

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[1] See Glossary, s.v. *akh li-umm*.

[2] In one case, a widow appointed her deceased husband's brother as her proxy in order to ensure her rights of the estate and the dower (Davis, *Archive*, the Sharīʿa Court of Kufra, p. 63 no. 160 of June 20, 1942). It stands to reason that these rights may not be in harmony with the rights pertaining to the agnates of the deceased. Cf. Introduction to doc. 45.

[3] See De Agostini, *Cirenáica*, 336–37.

[4] See Glossary, s.v. *taʿrīf*.

[5] See doc. 64, line 2 below.

terms of prudent judgment to dispose of property (*rushd*), health (*ṣiḥḥa*), and free will (*ikhtiyār*), [5] stating that they had empowered (*wakkalā*)[6] and appointed as their representative (*anābā*) the son of the former [6] and the latter's maternal brother, the man called Ḥājj ʿAbdallāh b. Ismāʿīl Bū Rubawī[7] from the al-Ṭwāleb [sublineage] of the Majābra tribe [7], now residing in the Sudan. The power of attorney is [given him] for the specified purpose (*wakāla khuṣūṣiyya*)[8] of securing their share in the legacy (*mukhallafāt*) of the aforementioned late Ḥājj [8] Jibrīl b. Faraj Ḥēfān—i.e., the entire portion designated for them in the *sharʿī* legacy[9] pertaining to every kind of property [9] owned by him in the Sudan. He has been granted delegation of authority (*tafwīḍ*)[10] in regard to [this legacy, in order to represent the heirs] in every litigation (*mukhāṣama*) or legal proceedings (*murāfaʿa*) in which he may be required to act in this connexion, [10] and on any occasion in which there might arise the matter of the realization of their rights (*ḥaqq*) to anything by any [available] means, to seek proofs [by means of witnesses] (*bayyināt*),[11] for the refutation (*taʿn*) [11] of testimonies (*shahādāt*), for the acknowledgment (*iqrār*), denial (*inkār*), settlement (*ṣulḥ*) and remission (*ibrāʾ*) [of debts], for declaring [a witness's testimony] as unreliable (*al-taʿdīl wa'l-tajrīḥ*),[12] and for the fulfilment (*istīfāʾ*) of offer (*ījāb*) or its reversal (*qalbihā*).[13] [12] He is entitled to resort to the official departments, the *sharʿī* and civil courts of law. He is entitled to appoint, at his own discretion, a proxy to act on his behalf with regard to the same matter over which he himself has been appointed proxy [by the heirs]. [13] [Issued] by way of valid (*ṣaḥīḥ*) and *sharʿī* power of attorney (*tawkīl*).

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[6] See Glossary, s.v. *rushd; wakīl; wakāla.*

[7] From his name it is possible to infer that he is not the son of the praepositus, but rather the widow's son by another man.

[8] See Glossary, s.v. *wakāla khuṣūṣiyya.*

[9] The widow's portion of the estate in the absence of a child or agnatic issue amounts to one-quarter, and that of a daughter in the absence of a son, one-half. See Coulson, *Succession*, 41–42.

[10] See Glossary, s.v. *tafwīḍ.*

[11] See Glossary, s.v. *bayyina.*

[12] Cf. the procedure of *al-jarḥ wa'l-taʿdīl* in the context of the *ḥadīth* ("disparaging and declaring a transmitter of *ḥadīth*s as untrustworthy"); see Robson, *al-Djarḥ wa'l-taʿdīl*, 462.

[13] This is the correct reading of the Arabic text.

After their due acknowledgment (*iqrār*) of what has been stated above, the Qāḍī endorsed (*ajāza*) the power of attorney on their behalf, had [the witnesses] testify (*ashhada*) to this effect, [14] affixed his signature to it, and instructed that it be entered on the 22nd of Jumādā al-Awwal 1360, [corresponding to] June 18, 1941.

Document 48

Introduction

A husband acts as his wife's proxy in court concerning her deceased father's estate. He claims that the father-in-law and his brother kept the patrimony without dividing it among them before their death. The proxy requests the court to question his witness, to register his testimony and to give him a copy of the written testimony (*shahādat naql*) to be used as the need arises.[1] The witness testifies to the truth of his claim, and the Qāḍī instructs that his testimony be registered so as to facilitate, in due course, the issue of a succession order enabling the proxy's wife to secure her share of her father's estate.

The joint ownership by the two brothers of an undivided estate constitutes a cooperative household, itself a transitional stage in which a family comprising several generations undergoes fragmentation into nuclear units. The representation of a married daughter by her husband here hints at the possibility that pressures are being exerted on her by her agnates to prevent the division of patrimony. Being an outsider, the husband is not guided by considerations relating to the integrity of the agnatic patrimony.[2]

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[3]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United kingdom of Libya, and Emir of Barqa [Cyrenaica]. May Allāh the Exalted preserve him.[4]

[3] ATTESTATION OF THE CONVEYANCE OF EVIDENCE (*SHAHĀDAT NAQL*)[5] IN FAVOUR OF ʿABD AL-KARĪM MGHĪB

Entered in register no. 487, p. 325

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[1] See Glossary, s.v. *Shahādat naql*; for a full analysis of this institution, see Layish, *Shahādat naql*.

[2] See Introduction to doc. 45.

[3] See doc. 1, fn. 2.

[4] See doc. 1, fn. 3.

[5] See doc. 4, fn. 6.

[4] In the Sharīʿa Court of Ajdābiya presided over by the Qāḍī Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him, Amen!

[5] ʿAbd al-Karīm b. Mghīb b. ʿAlī appeared [in court] as *sharʿī* proxy (*wakīl*) on behalf of his wife,[6] Balāyil bint Ḥasan b. Rḥīm—by virtue of a power of attorney (*wakāla*) issued by [6] this Court under no. 22 on August 16, 1953—from the Zwayya tribe (*qabīla*), identified (*maʿrūf*)[7] by person and name. He made the following statement:

> The [property of the] late Ḥasan, father of [7] Balāyil, whom I am representing, and of his brother Mḥammad b. Rḥīm concerning everything within their [joint] ownership, be it immovable property (*ʿaqār*), livestock, merchandise convertible into cash (*tijāra naqdiyya*) [8] and [other] goods (*ʿarḍ*), was not divided (*qisma*)[8] between the two before their successive deaths. They [continued] to own the entire [patrimony] that they left behind (*khallafā*) in al-Kufra and al-Jikharra[9] oases and in Maṭrūḥ in equal shares (*inṣāfan*) until [9] the present.[10] I have brought with me a witness who will testify regarding what I have said; he is ʿAbdallāh b. Ṣāliḥ b. al-Mabrūk Ḥabbāna. I ask [10] the noble Sharīʿa Court to question him, to register his testimony, and to transfer it to me [so that it will be available to me] when the need arises (*ʿinda al-luzūm*).[11]

When the aforementioned witness ʿAbdallāh was questioned, [11] he gave testimony (*shahāda*) concerning which he was completely certain that he was closely acquainted with both of the deceased, the aforementioned Ḥasan b. Rḥīm and his brother Mḥammad; [12] [and] that neither of them had apportioned anything of the property

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[6] In his wife's lifetime, the husband had no standing in her father's estate. There is no indication as to whether the husband exercised pressure over his wife to obtain her power of attorney and to act as her representative (*wakīl*) in order to secure her share in the estate. Being an outsider to the agnatic group he is not motivated by the desire to prevent the fragmentation of the patrimony.

[7] See Glossary, s.v. *taʿrīf*.

[8] On the mechanisms for allotment (*qisma*) of immovable and other property in Mālikī law, see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 140–46.

[9] See Evans-Pritchard, map facing p. 35.

[10] In other words, no succession order was issued in regard to the estate that was inherited by the two brothers. Instead of dividing it between them as required by *sharʿī* apportionment, they chose to retain their joint ownership—a kind of family *mushāʿ* (see Glossary)—and to administer the household on a cooperative basis. See Introduction to doc. 4.

[11] I.e. when a succession order is issued in which his wife's *sharʿī* share in her father's estate will be secured. For further details, see Layish, *Shahādat naql*, Case 2.

in their [joint] ownership until this day [i.e., during their lifetime]; and that the entire [patrimony] that they left behind [after their death] still belonged to them in equal shares until the present time. He afterwards stated: "This is what I testify [13] and let Allāh be our pledge [lit. agent] (*wakīl*) to our words."[12]

On the basis of what was reported by the aforementioned witness while he was in a state of legal competence (*ḥāla jā'iza*) in *shar'ī* terms, and duly certified (*thubūt*) [14] in the presence of the aforementioned judge (*ḥākim*), the latter endorsed (*ajāza*) this testimony on the responsibility of the witness, affixed his signature thereto, had [15] the undersigned [professional witnesses] testify to this effect, and instructed that it be registered.[13] [The testimony] was entered on the 5th day of Dhū 'l-Ḥijja 1373, corresponding to August 4, 1954.

The signatories are in the protocol (*ḍabṭ*).

[16] Witnesses to the proceedings (*shuhūd al-ḥāl*)[14]
[17] 'Imrān 'Īsā
Mḥammad 'Abd al-Salām
Mḥammad al-Ṭālib al-Hammālī

The matter being as indicated above
The Qāḍī of Ajdābiya
[18] Ḥusayn Muḥammad al-Aḥlāfī

[12] This is a manner of speaking intended to enhance the credibility of the witness. See doc. 4, fn. 15 above; Glossary, s.v. *wakīl.*

[13] The registered testimony is intended to secure the daughter's *shar'ī* share in the estate at the moment when the succession order is issued.

[14] Professional witnesses or notaries are intended here. See Glossary, s.v. *'adl.*

Document 49

Introduction

A *faqīh* claims his wife's portion of her father's estate. The text does not specify whether the daughter was alive or dead at the time her husband sought a succession order, although some circumstantial evidence supports the second possibility (see fn. 3 below). In any case, it seems that prior to the *faqīh*'s initiative, the praepositus' daughter failed to obtain her portion, apparently because of pressure exercised by her agnates. The other heirs to the father's estate are represented by a proxy.

This is not a regular succession order that specifies each heir's *sharʿī* portion of the estate. Rather, we have here an agreement between the relevant parties concerning the manner in which the estate is to be divided, in an effort to prevent the disintegration of the patrimony through the marriage of the daughter to someone outside the agnatic group. The parties agree that the daughter alone should take the *entire* sum of money left by her father as well as "her share of the real estate," which the Qāḍī fails to specify. This suggests that the *faqīh* renounced part of his wife's right to the immovable property. The division of the estate was reached by agreement between the parties (rather than by succession order, as required by the *sharīʿa*), and the Qāḍī accorded the agreement the validity of a *sharʿī* judgment.[1]

Text

[1] The *faqīh*[2] Mḥammad Abū Faraj appeared [in court], accompanied by Mḥammad al-Mabrūk. [2] The situation is as follows: the *faqīh* claims his wife's portion (*sahm*) of the estate (*mukhallafāt*) left by her father, [3] Abū al-Gāsim Bū Rḥīm.[3] It was legally established

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[1] See Introduction to doc. 45 above; and doc. 55 below.

[2] *Faqīh*—in the popular, rather than formal, sense of the term. Cf. Layish, *Dār ʿadl*, 209. See doc. 9, line 14 above.

[3] Since there is no indication in the text that the husband is acting as proxy for his wife, it appears that the wife is deceased, and that he is now claiming her share of the estate. During her lifetime, the praepositus' daughter was prevented from exercising her rights vis-à-vis the estate, apparently as a result of pressure exerted by her agnates (see Introduction to doc. 45 above). After her death, these constraints disappeared and her husband insisted on the implementation of her *sharʿī* rights in regard to the estate. It is not specified who the other heirs are, although

(*thabata*) that he [the praepositus] owned 45 *arab majīdī riyāl*s.[4] [4] [The parties agreed that] these belong exclusively to the *faqīh*'s wife, who [in addition] is also entitled to her [unspecified] share [of the estate] (*naṣīb*) out of the real estate (*milk*).[5]

[5] [This division of the estate] was sanctioned by a judgment (*ḥukm*) and an agreement (*ittifāq*) [between all the parties concerned] reached to the satisfaction (*riḍā*) of the proxy (*wakīl*),[6] [6] Mḥammad al-Mabrūk, and the claimant (*ṭālib*), the *faqīh* Mḥammad, and [thus] no further claim (*daʿwā*) or demand remained between them.

July 5, 1932.

The Qāḍī Aḥmad al-Khaḍrī[7]

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there is some indication of their existence (see fn. 5 below). Alongside a child or agnatic issue, the husband is entitled to his Qur'ānic portion of the estate, that is, one-quarter, and, in the absence of agnatic heirs, one-half. The husband is not entitled to the *radd*, i.e., the residue of the estate remaining after the other Qur'ānic heirs have received their portions without the estate being exhausted and provided no male agnates (*ʿaṣaba*) exist. The doctrine of *radd* is not recognized by the Mālikī school. See Coulson, *Succession*, 41, 50–51.

[4] See Glossary, s.v. *riyāl majīdī ʿarab*.

[5] The fact that the *faqīh*'s wife, i.e., the praepositus' daughter, is entitled to a *portion* of the immovable property indicates that other heirs were also involved. According to the *sharʿī* rules of inheritance, in the absence of a son, the daughter, as a Qur'ānic heir, is entitled to one-half of the estate, and alongside a son—half the son's share, in accordance with the principle of *taʿṣīb*. (see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 244, line 1681; Coulson, *Succession*, 41–42). The fact that the Qāḍī does not specify the extent of "her share" (*naṣībuhā*) suggests that it was decided by agreement between the parties rather than by the *sharʿī* rules of inheritance. See line 6 below.

[6] It appears that the *wakīl* represents the remaining heirs. In order to be effective, a *sharʿī* succession order does not require the parties' consent, and one may assume that the *faqīh* was fully aware of this. What is probably meant here is voluntary agreement between the parties concerning the actual division of the estate. Thus the daughter receives the *entire* amount of money belonging to her father's estate (rather than her *sharʿī* portion). This is a practical expedient whereby the *wakīl* compensates her husband for his partial renunciation of his wife's right to the immovable property. For this purpose, an agreement among the parties was mandatory. The *wakīl*'s function was to prevent the transfer of patrimony to heirs outside the agnatic group as a result of the daughter's marriage to an outsider. The Qāḍī accorded the customary agreement between the parties the validity of a *sharʿī* judgment, and he avoided—probably intentionally—any mention of the *sharʿī* portion due to her, having regard to the specific situation obtaining vis-à-vis the other heirs. This procedure exemplifies a court ruling in which custom prevails over the *sharīʿa*.

[7] On the margins of the document there is a summary of its contents in Italian bearing the signature of the Military Governor of the sub-district of Kufra; this is an instance of the Italian administrator's normative supervision of the Qāḍī's verdicts. See Layish, *Legal Documents*, 15; Preface to this volume, xii; cf. docs. 27 and 46 above, and docs. 62, 65, 66, 68, and 72 below.

Document 50

Introduction

After a succession order over a deceased wife's legacy had been issued by the Sharīʿa Court, a dispute arose between the woman's father and her husband concerning payment by the latter of the dower and his share in his wife's estate. The Qāḍī ruled that the deceased wife's father should transfer one-half of his daughter's estate to her husband on the grounds that this constituted the *sharʿī* portion of her estate (probably in the absence of children), as had been specified in the order of succession. To this end the Qāḍī resorted to the Mālikī legal literature.

On the other hand, the Qāḍī rejected the husband's claim that he had paid the entire dower to his father-in-law (in itself a customary norm according to which the woman is not a party to the marriage contract) in his wife's lifetime. He ruled that the husband should transfer to the late wife's parents one-half of the dower. This seems to be the residue of the deceased woman's estate after the husband had received his *sharʿī* portion as a Qurʾānic heir (i.e., one-half).

In this matter the Qāḍī endeavoured to impose the *sharʿī* norm without compromising with the customary practice.[1]

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and his Companions, and grant them peace![2]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him![3]

[3] In the Sharīʿa Court of Ajdābiya presided over by the Qāḍī Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him, Amen!

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[1] See Introduction to doc. 45.
[2] See doc. 1, fn. 2.
[3] See doc. 1, fn. 3.

[4] On the basis of what has been claimed by Mḥammad b. ʿAbd al-ʿAzīz b. Jumʿa al-Fākhrī of the Bū ʿAwaḍ lineage (*ʿā'ila*) in claim no. 351, entered in register (*ḍabṭ*) vol. VI, [5] on pages 236, 246, and 252, on January 24, 1954, against Ḥājj Māzig b. ʿĪsā al-ʿAnānī, and on the basis of what the aforementioned defendant [6] and his proxy (*wakīl*) have claimed in the presence of the undersigned [professional] witnesses, and in virtue of what has been said in the *sharʿī* prescribed apportionment (*farīḍa*) no. 480, entered in the fourth register of sentences (*aḥkām*) on [7] January 23, 1954, and [having regard to] the certification (*thubūt*) of all this by the aforementioned judge (*ḥākim*)—the following sentence was handed down:

First, it was decreed that the aforementioned Mḥammad ʿAbd al-ʿAzīz should return [i.e., transfer] half [8] the [specified] dower (*ṣadāq*), which he acknowledged, to the parents of his deceased wife, the aforementioned Fāṭma. The claim advanced by the aforementioned Mḥammad ʿAbd al-ʿAzīz to the effect that he had paid the dower to his wife's father[4] [9] five years previously in her lifetime was rejected.[5] Secondly, it was decreed that the aforementioned Ḥājj Māzig should return [i.e., transfer] one-half of the entire legacy (*tarika*) belonging to his daughter, [10] the aforementioned Fāṭma, to her husband, the aforementioned Mḥammad ʿAbd al-ʿAzīz, this being his *sharʿī* portion of [his wife's] estate (*mīrāth*) as specified in the aforementioned *sharʿī* prescribed apportionment (*farīḍa*).[6] [11] [This decision] is founded on a legal opinion (*mā aftā bihi*) issued by Shaykh ʿIllaysh in the first part of his *fatwā*s on page 413, [in the paragraph] "Concerning a Bedouin [12] who married off his daughter etc."[7]

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[4] This claim reflects a customary norm. According to the *sharīʿa*, the wife is a party to the marriage contract, and the dower is her own private property (see Glossary, s.v. *ʿaqd; ṣadāq*; doc. 1, fn. 14 above).

[5] In other words, the dower is treated by the Qāḍī as part of Fāṭma's estate. From the succession order (see lines 9–10 below) it may be inferred that the deceased wife left no surviving child. Under these circumstances the husband takes one-half of his wife's estate, and the parents exhaust the residue of the estate: the mother inherits one-sixth in the presence of the collaterals of the deceased, and one-third in their absence; the father inherits as the nearest male agnate (residuary heir) in the absence of any lineal descendant (see fn. 6 below). See Coulson, *Succession*, 41, 43ff.

[6] From the succession order specifying that the husband acquires half his wife's inheritance one can infer that the couple had no children.

[7] In the case referred to in the document, a Bedouin illegally seized his daughter's dower (camels) and disposed of it at will apparently with her tacit consent. When her husband died, the Bedouin married her off to another man. After her

[Issued] by way of valid (*ṣaḥīḥ*) *sharʿī* sentence (*ḥukm*). [The Qāḍī] signed and endorsed it. This transpired in the precincts where the Qāḍī is officially located. [13] [The Qāḍī] instructed that it be registered. [The sentence] was registered on the 15th day of Rajab al-Fard[8] 1373, corresponding to March 20, 1954.

[14] Witnesses to the proceedings (*shuhūd al-ḥāl*)[9]
[15] ʿImrān ʿĪsā
Mḥammad ʿAbd al-Salām

The matter being as indicated above
The Qāḍī of the District of Ajdābiya
[16] Ḥusayn Muḥammad al-Aḥlāfī

death, her second husband claimed his portion of the dower paid by the first husband as part of her estate. ʿIllaysh ruled in his *fatwā* that the daughter's right to the dower nevertheless remained intact and that the Bedouin should transfer to the surviving husband and their common children their portions of the prompt dower due to the deceased daughter from her father. See ʿIllaysh, vol. 1, 413–14. The Qāḍī resorted to the Mālikī legal literature in order to defend the husband's *sharʿī* right to a portion of his wife's inheritance. Cf. Layish, *Legal Documents*, 18 fn. 26; idem, *Divorce*, 146, 200, 207.

[8] Epithet of the month of Rajab.

[9] Professional witnesses or notaries are intended. See Glossary, s.v. *ʿadl*.

Document 51

Introduction

A man initiates the issue of a succession order on the estate of his maternal half-brother [uterine brother]. The heirs are as follows: the praepositus' mother, his widow, two maternal half-brothers, two full [germane] brothers and a full sister. The Qāḍī apportions the estate according to the *sharʿī* law of intestate succession. First of all, the Qur'ānic heirs—the mother, the widow and the two maternal half-brothers—are allotted their prescribed portions. The remainder is divided among the agnatic heirs—the full brothers and full sister. The two maternal half-brothers almost exhaust the estate and, contrary to what one would expect in an agnatic society, they are allotted greater portions than those reserved for the full brothers. This may explain why the succession order was issued on the maternal half-brother's initiative.

The case under review suggests that the *sharīʿa* court is resorted to by cognates whose position with respect to property rights under tribal customary law is weak compared to their rights under the *sharīʿa*.[1]

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[2]

[2] In the reign of His Highness *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī Emir of Barqa [Cyrenaica].[3]

[3] *SHARʿĪ* APPORTIONMENT (*FARĪḌA*) [OF THE ESTATE OF] MARBAḌ B. AL-ṢIDDĪG MARBAḌ AL-SAʿĒṬĪ

Entered in register no. 338, pp. 5/234 and 235

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[1] See Introduction to doc. 45 above; Layish, *Legal Documents*, 3; Davis, *Libyan Politics*, 223; cf. doc. 3 above.

[2] See doc. 1, fn. 2.

[3] See doc. 1, fn. 3.

[4] In the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī Shaykh Muḥammad Faraj Abī Ḥulayqa. May Allāh the Exalted grant him success.

A man called Mgāwī b. ʿAbdallāh Abī Ḥrēʿīd [5] al-Saʿēṭī, identified (*muʿarraf*) by person according to the *sharʿī* procedure (*manhaj*)[4] made the following statement:

> I had a maternal half-brother (*akh li-umm*) called Marbaḍ b. al-Ṣiddīg b. Marbaḍ al-Saʿēṭī. He died leaving [6] his intestate succession (*munḥaṣir al-wirātha*) to his mother Fāṭma bint Rkhīṣ, his wife Taʿwīḍa bint ʿAwaḍ, his[5] full brothers (*ashiqqā'*) Aḥmad, Mūsā, and Maryam, and to his maternal half-brothers Shhādī, [7] and myself [both of us] the sons of ʿAbdallāh Abī Ḥrēʿīd. I ask that the noble Sharīʿa Court hear my [evidence, presented by means of] witnesses (*bayyina*),[6] [and have them testify] to my statement, and to issue a ruling on the matter.

His request was granted and he was required to substantiate his claim (*daʿwā*). [8] He brought forward—for the purpose of testifying to the above—all of the following persons: Ḥasan b. Saʿīd ʿAbd al-ʿUrfī and al-Lāfī b. Yaḥyā b. Salmān al-Gaṭafānī. After their identification (*maʿrifa*),[7] was verified (*taḥaqquq*), they were called to witness (*al-istishhād fīhimā*), [and] they gave testimony [9] concerning which they were in no doubt whatsoever. They said:

> We were closely acquainted with Marbaḍ b. al-Ṣiddīg in his lifetime. We further (*wa-maʿahā*),[8] testify that he died after having left his intestate succession to his mother [10] Fāṭma bint Rkhīṣ, and to his two [maternal half-] brothers Mgāwī and Shhādī, sons of ʿAbdallāh Abī Ḥrēʿīd, to his wife Taʿwīḍa bint ʿAwaḍ, and to his full brothers [and full sister] Aḥmad, Mūsā, and Maryam [11], and that he had no heir other than these.

Subsequently, a credibility test (*tazkiya*)[9] was conducted by both [the *faqīh* ʿAṭiyya][10] b. Ibrāhīm al-Mhashhish and Sayf b. Ibrāhīm Jamīl al-Gbēlī, both identified in person; these said: "[12] We testify that

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[4] See Glossary, s.v. *taʿrīf*.
[5] The original Arabic text should read *ashiqqā'ihi*.
[6] See Glossary, s.v. *bayyina*.
[7] See Glossary, s.v. *taʿrīf*.
[8] This is an instance of anacoluthon. I am grateful to Professor Moshe Piamenta from the Hebrew University of Jerusalem for drawing my attention to this phenomenon.
[9] See Glossary, s.v. *tazkiya*.
[10] See Layish, *Legal Documents*, 68, doc. 51, fn. 2.

both of them are persons with an honourable and satisfactory record (*ʿadlān riḍā*)." Afterwards Shaykh ʿAṭiyya al-Mhashhish was appointed by the court as a proxy (*wakīl musakhkhar*) on behalf of the heirs [not present in court].[11] [The Qāḍī, before pronouncing judgment] granted him a delay (*uʿdhira lahu*)[12] for the purpose of providing evidence through witnesses (*bayyina*) [that would refute the evidence given by the witnesses produced by the initiator of the succession order]. He [the proxy] accepted (*sallama*) [on the spot] the evidence of the two witnesses [of the initiator].[13]

On the basis of [13] this evidence which passed the test of credibility (*muzakkāt*) without any challenge (*ṭaʿn*) regarding the procedure of *ʿdhār*, it was legally established (*thabata*) to the aforementioned Qāḍī's satisfaction that the aforementioned Marbaḍ had died, that his intestate succession had been left to [14] his aforementioned mother, wife, maternal half-brothers, and full brothers [and full sister], and that they were entitled to the estate (*tarika*) according to the *sharʿī* prescribed apportionment (*farīḍa*). The correct (*ṣaḥḥat*) [apportionment of the estate—consisting of] 60 shares (*sahm*)—is as follows:

[15] To each of the following persons, i.e., Fāṭma the mother, and the [two] maternal half-brothers Mgāwī and Shhādī—10 [shares]; to the wife Taʿwīḍa bint ʿAwaḍ—15 [shares]; to each of the two full brothers Aḥmad and Mūsā—6 [shares]; to Maryam the full sister [16]—3 shares.[14] [This apportionment] has been duly certified

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[11] The appointed proxy is expected to represent the heirs in case any of them fails to appear in court after having been summoned. Cf. *Mejelle*, Article 1791; Rogan, 47; Agmon, *The Family in Court*.

[12] See Glossary, s.v. *ʿdhār*. Cf. doc. 30, line 13 above. For further instances in the Libyan *sijill*, see Layish & Davis, 82, line 12 (*uʿdhira lahu fī 'l-bayyina*); 97, line 5 (*lam yuthbit daʿwāhu raghm al-ʿdhār thalāth marrāt*).

[13] This implies that he renounced the option of bringing his own witnesses. The *faqīh* seems to have acted in a dual capacity: first he participated in the procedure of the credibility test (*tazkiya*), and afterwards he was appointed by the court as proxy.

[14] The mother is allocated one-sixth of the estate in the presence of the praepositus' collaterals, that is, full brothers, a full sister, and maternal half-brothers. The two maternal half-brothers are allocated a collective portion of one-third of the estate; in the absence of a child or agnatic grandchild, father or agnatic grandfather, no matter how high soever, none of the existing heirs exclude them from the succession. The wife is granted one-fourth of the estate in the absence of a child or agnatic issue. The full sister takes one-sixth as a Qurʾānic heir in the absence of a daughter or agnatic granddaughter; in the presence of a full brother she takes one-half of his share by virtue of the doctrine of *taʿṣīb*. The full brothers are residuary heirs, i.e., they are given whatever remains after the Qurʾānic heirs

(*thubūt*) in *sharʿī* terms. [The Qāḍī] issued a *sharʿī* ruling to this effect, had the undersigned [professional] witnesses testify (*ashhada*) thereto, and instructed that it be entered on the 24th day of Dhū [17] 'l-Ḥijja 1371, corresponding to September 25, 1951.

Witnesses to the proceedings (*shuhūd al-ḥāl*)
[18–20] The Sharʿī Nā'ib
Muḥammad al-Mabrūk Abī Jāziya[15]
The Court Usher (*mubāshir*)
Mḥammad ʿAbd al-Salām[16]

The matter being as indicated above
The Qāḍī of Ajdābiya
Muḥammad Faraj Abī Ḥulayqa

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have received their shares. Contrary to expectations in an agnatic society, the shares of the Qur'ānic heirs, in the case under review, are larger than those of the agnates though not to the point that agnates are excluded from the estate. To some extent this case resembles the *Ḥimāriyya* rule ("The Case of the Donkey"), whereby the shares of the Qur'ānic heirs totally exhausted the estate and nothing was left to the full brothers. ʿUmar revised his original decision and ruled that the residue of the estate should be distributed in equal shares among the full brothers and the maternal half-brothers. The Mālikī school adopted this rule only where full brothers as residuary heirs would be *totally* excluded from succession owing to the presence of maternal half-brothers (which is not the case here). See Coulson, *Succession*, 41–44, 67–69, 73–77; idem, *History*, 24–25.

[15] He acts concurrently or intermittently in two capacities: as a Sharʿī Nā'ib and as a notary or professional witness. See Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks. Cf. doc. 17, fn. 8 and doc. 24, fn. 11 above.

[16] He acts concurrently or intermittently in two capacities: as a court usher and as a professional witness. See Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks.

Document 52

Introduction

This is a copy of a legal document originally drawn up outside the *sharīʿa* court by customary arbitrators. It deals with the division of a patrimony owned jointly by two brothers. The document was copied into the *sijill* for reasons of legal security. The property in question, consisting of immovables, slaves,[1] and livestock, was transferred to the brothers—at least in part—through intestate succession, and was jointly managed by them until it was decided by the parties concerned out of court to divide it equally between the two of them, in order that each one might establish a separate household as a full owner. One of the *sāniyas*[2] is to be divided equally between them, and another is to be allotted to two different families as dower for the brothers' respective brides. In other words, the financial outlay of the two brothers' marriages is to be covered by the patrimony prior to its division. It was also agreed between the parties that if at some future time it should become clear that the property is burdened with debts, these too are to be jointly settled by the two brothers in an equitable manner.

The division of a patrimony between the two brothers is based on customary practice, rather than a *sharʿī* succession order. It is possible that *sharʿī* legal heirs were thereby deprived of their rights in the estate by means of this procedure. By allowing the registration of the document without interfering in its contents, the court sanctioned the customary norm at the expense of the *sharīʿa*.[3]

Text

[1] In the name of Allāh the Merciful, the Compassionate.[4]
[2] On the 30th day of Dhū 'l-Qaʿda 1340 [1921]

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[1] For details on slaves in Kufra, see Hassanein, 179–80.
[2] See Glossary, s.v. *sāniya*.
[3] See Intoduction to doc. 45.
[4] See doc. 1, fn. 2. The utterance of the *basmala* is a common practice among the Bedouin. Cf. Layish & Shmueli, 41.

[3] [The document] was copied verbatim from the original[5] because it had faded, due to age and poor preservation.[6]

[4] The two most honourable gentlemen, Shaykh Ghēth Bū Gandīl, and his brother, Ḥamad Bū Gandīl, appeared before us. [5] We divided (*qasamnā*)[7] between them [the following patrimony]: the Sāniyat al-Bayt[8] which passes into their possession and is divided equally (*inṣāf*) [between them]. [6] The Sāniyat al-Mradda [?] is to be given as dower (*ṣadāq*) to the Muṣbāḥ lineage (*ʿēla*) and to the al-Nākra lineage.[9] [7] The aforementioned *sāniya*, which was assigned to Shaykh Ghēth,[10] [extends] to the boundaries of the unirrigated land; [8] it is adjacent, on its eastern side, to the *sāniya* belonging to Ḥsēn Ḥēfān, on its southern side (*qiblatan*), to the *sāniya* [9] of [a place known as] Sayaḥ al-Sanā [?], and on its western side, to the *shādūf*[11] of Mḥammad al-Shēkh. [Similarly, they obtain possession of] the slave [10] Nūrīn[12]

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[5] The original document was probably drawn up by a customary arbitrator outside the *sharīʿa* court (his name appears on lines 21–22 below) and later copied into the *sijill*.

[6] The document was drawn up for the purpose of clarifying the legal situation in the event that one of the parties failed to abide by the agreement concerning the division of property. A written document has no legal force in customary law and is not recognized in Islamic legal theory. Both recognize only the testimony of eyewitnesses for determining the validity of any legal process. However, especially in relation to transactions and land, pragmatism prevails over theory, and Islamic law has found a way of adopting the written document. Cf. Brunschvig, *Bayyina*, 1150–51; Schacht, *Introduction*, 193; Coulson, *History*, 125, 173; Wakin, Pt. I; Layish, *Shahādat naql* and the sources mentioned there. The increasing attachment of sedentarized Bedouin to land has brought about increasing dependence on written documents for the purposes of legal security. Cf. Layish & Shmueli, 30–31 and the sources mentioned there; Kressel, Ben David and Abū Rabīʿa, 52ff.

[7] On the division of property in Mālikī law, see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 140ff. On the division of joint ownership (*mushāʿ*) in tribal society, see al-ʿAbbādī, *al-Ǯarāʾim*, 74–75.

[8] This *sāniya* is mentioned in doc. 46, line 2 above.

[9] It appears that what was meant here was that a specific *sāniya* should provide the dowers for the two brothers' brides belonging to different lineages. In other words, in this case, the dower is paid off out of the patrimony prior to its division (cf., however, doc. 4 above). Concerning a dispute between the widow of one of these two brothers and the rest of the heirs in connexion with Sāniyat al-Bayt given to her as a dower, see doc. 46 above.

[10] Since his brother, Ḥamad, is not mentioned, it seems that the document refers to another *sāniya* assigned exclusively to Ghēth.

[11] See Glossary, s.v. *shādūf*.

[12] On the sale of slaves in Mālikī law, see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 110ff. For additional evidence concerning the institution of slavery, see docs. 61 and 62 below.

and two head of cattle. If someone [i.e., a legal heir or a testamentary legatee] appears [unexpectedly], or if it becomes evident that there is a debt (*dayn*) [on the patrimony] [11] Shaykh Ghēth and his brother Ḥamad will be liable for the default in ownership (*marjūʿ al-darak*).[13] [12] If anyone presents a legal instrument pertaining to debt [due from the joint household, the debt] shall be paid [by the two brothers] in an equitable fashion.[14]

[13] [In this manner] the claim regarding the *sāniya*s, the slaves [14] and the livestock was settled, with no mutual claims or obligations remaining between the brothers with regard to the matters mentioned above, [15] and if anyone should advance such a claim, his claim is null and void (*bāṭila*), [16] and his plea (*ḥujja*) is invalid (*dāḥiḍa*).[15]

[The eye-witnesses to the agreement made the following statement:] We have given testimony thereto, Allāh is the best of all witnesses (*khayr al-shāhidīn*).[16]

[17] The Court Scribe (*kātib*) [who copied the document]
Hāshim b. ʿAbdallāh al-Shākir
[Copied] in the presence of witnesses to the proceedings (*shuhūd al-ḥāl*)[17]
[18] Slēmān Bū Mjēḥīd
Ṣāliḥ b. Mḥammad al-Kidwa
ʿUmar Bū Gharīb
[19] Mḥammad Bū Gandīl

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[13] A debt constitutes a default in ownership, and hence a creditor must approach the two brothers for restitution of the debt. See Glossary, s.v. *darak*. According to the dominant Mālikī view, in each of the cases mentioned in line 10, the apportionment of the estate should be canceled unless the legal heirs honour the debt. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 146, lines 985–86; Wakin, 33.

[14] Debts due on jointly owned property should be paid by the brothers, as in the case of debts due on estate prior to its division among the heirs.

[15] It seems that the aim here is to prevent a possible circumvention of the agreement through resort to courts other than arbitrators, i.e., a *sharʿī* or civil court. Paradoxically, in order to prevent this from happening, the document was copied into a court *sijill* in the hope of enlisting *sharʿī* sanction to this end. The resort of tribal arbitrators to *sharīʿa* courts has also been noted in the Judean Desert (Layish & Shmueli, 44).

[16] This manner of speaking seeks to enlist piety to enhance the credibility of a witness. This expedient has also been noted in documents pertaining to tribal arbitrators in the Judean Desert (See Layish & Shmueli, 41).

[17] The names below seem to refer to the eye-witnesses to the agreement rather than to professional witnesses.

[20] [The contents of the document] are faultless (*ṣaḥḥa*)
I am, Ghēth Bū Gandīl
[21] I am, Ḥamad Bū Gandīl
Mḥammad Ṣāliḥ [22] al-Bakrī drew up (*qayyada*)
[the original document outside the Sharīʿa Court]
[23] May Allāh forgive him! Amen.[18]

[18] This indicates that he was not alive when the document was copied in court.

Document 53

Introduction

The head of a family died and was survived by his widow and their minor son, as well as by children by another wife. He left behind a small estate consisting of a few date palms. A succession order on the estate was issued but the estate was not divided among the heirs. Against this background, a dispute arose between the widow and one of the second woman's sons, who appears to have been in control of the estate.[1] The widow claimed to be poor and to have no property which could provide her with the maintenance necessary for her destitute son, still a minor. She requested the defendant to assist her financially out of his own good will with the maintenance of her son since he was his paternal half-brother. The defendant acceded to her request and offered to allocate a certain amount of money both as a benevolent gesture and on account of the brothers' blood relationship. The dispute was settled, the parties were reconciled, and the Deputy Qāḍī endorsed the agreement.

It is possible to construe the paternal half-brother's gesture as a case of maintenance out of the estate by virtue of customary law, since this institution lacks a basis in religious law. In other words, whereas formally speaking the minor is deprived of his share in the estate, in actual fact, he receives maintenance from his paternal half-brother, who in practice controls the estate. The Deputy Qāḍī here grants *shar'ī* legitimation to a voluntary maintenance settlement anchored in custom.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[2]

[2] In the reign of King Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him! Amen.[3]

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[1] See Introduction to doc. 45 above.
[2] See doc. 1, fn. 2.
[3] See doc. 1, fn. 3.

[3] VOLUNTARY GIFT (*TABARRUʿ*) AND CONCILIATION (*ṢULḤ*) BETWEEN KULTHŪM MḤAMMAD AND ḤAMAD B. MḤAMMAD

Entered in register 6/212, p. 144

[4] In the [Sharīʿa] Court of Ajdābiya, presided over by Muḥammad al-Ṭālib al-Hammālī, the Deputy (*nāʾib*) of his honour the *sharʿī* Qāḍī in Charge of his Affairs (*al-qāʾim bi-aʿmāl*). May Allāh prosper him!

[5] Kulthūm bint Mḥammad b. Shafīʿ b. Ḥsēn from the Jlūlāt lineage (*ʿāʾila*) [branch rather than lineage] of the Zwayya[4] tribe (*qabīla*), born in the al-Kufra oasis, aged [6] 50, and Ḥamad b. Mḥammad b. Rābiḥ of the Sdēdī lineage [branch] of the Zwayya tribe, born in the oasis of al-Jikharra, aged 50, [7] currently residing in Ajdābiya both identified (*maʿrūfān*)[5] by person and name, appeared [in court]. Kulthūm made a statement and said:

> The late Mḥammad b. Rābiḥ, the father of Ḥamad here present, married me (*tazawwajanī*) and subsequently I gave birth [8] to the boy here present called Jibrīl, aged 8. His father passed away leaving him and the other heirs (*wurāth*) behind, as the matter [9] has been registered at this court by virtue of a *sharʿī* prescribed apportionment (*farīḍa*) concerning the estate of the aforementioned Mḥammad Rābiḥ on May 29, 1952 under no. 6/22. His only estate (*mukhallafāt*) [10] included a number of date palms located in the Jikharra and al-Kufra oases which have not to date been apportioned among the heirs.[6] Since I am very poor (*faqīra*) and own nothing [11] that could yield maintenance (*unfiquhu*) for my son, now reduced to a desperate condition of hunger and nakedness, I request the assistance of the orphan's brother [12] solely out of compassion and on account of their blood relationship (*ṣilat al-raḥm*).[7]

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[4] See De Agostini, *Cirenáica*, 407–9; Evans-Pritchard, map facing p. 35.

[5] See Glossary, *taʿrīf*.

[6] It would seem that the defendant, the minor's paternal half-brother, was a native of the place where the estate was located, and that he alone disposed of the property. Naturally, he was in no hurry to apportion the estate among the heirs, including his father's widow (but not his mother) and her son. The *sharīʿa* assigns the widow one-eighth of the estate while her minor son is entitled to a share equal to the defendant's.

[7] The widow's request is not a formal claim to maintenance from the defendant to her son, his paternal half-brother. She appeals to his compassion and agnatic solidarity. Theoretically, she had the option of claiming the apportionment of the estate among all the heirs, but given the weakness of her position vis-à-vis the advantage enjoyed by the agnatic claimant, and possibly on account of the modest value of the estate, she chose the more profitable expedient. Thus by renouncing

Ḥamad b. Mḥammad, the paternal half-brother of the aforementioned boy, acknowledged everything she had said [13] concerning her marriage to his late father, the non-existence of estates left by the latter with the exception of the date palms located in the Jikharra and al-Kufra oases, which [14] had not until that time been apportioned among the heirs. [He further confirmed that] the boy Jibrīl was his paternal half-brother and that dire indigence had befallen Kulthūm and her orphaned son. [15] Subsequently the aforementioned Ḥamad offered to contribute (*tabarraʿa*) one pound and gave it to his paternal half-brother, the aforementioned orphan Jibrīl, out of compassion [16] and on account of their blood relationship.[8] Kulthūm and the aforementioned Ḥamad were reconciled (*iṣṭalaḥa*) and the dispute between them was settled. All of this transpired in the presence of [17] the undersigned witnesses.

On the basis of the agreement reached between the parties while they both were in a state of legal competence (*ḥāla jā'iza*) in *sharʿī* terms as duly certified (*thubūt*) [18] in the presence of the aforementioned Nā'ib, the latter endorsed (*ajāza*) this conciliation (*ṣulḥ*), appended his signature thereto, approved it,[9] [19] and had the undersigned witnesses testify (*ashhada*) to this effect. [All] this occurred on the 25th day of Shaʿbān 1372H [20] corresponding to May 9, 1953.

Fingerprints of the claimant and the defendant

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the realization of her own and her son's rights to the estate she was able to secure concrete financial support for her son.

[8] The widow obtained her request and the defendant offered to contribute a sum of money for the support of his paternal half-brother. This may well be a case of maintenance out of the estate—an institution with no basis in Islamic law. It derives its validity solely by virtue of voluntary agreement. In one case, the deceased husband's father claimed that his daughter-in-law should provide the minor child with maintenance from the date of her husband's death, and the Qāḍī decided that the maintenace be taken out of the estate (see Davis, *Archive*, Sharīʿa Court of Kufra, no. 22 of March 3, 1932). According to Berber customary law, since women do not inherit and have no means for subsistence the heirs must provide them with maintenance out of the estate (Bousquet, *Coutumes*, 106). Cf. Layish, *Family Waqf*, 380–82; idem, *Mālikī waqf*, 26; idem, *Women*, 104, 281–82, 317.

[9] The Nā'ib does not interfere in the substantive provisions of the agreement, but simply endorses it, thus granting it the validity of a *sharʿī* judgment. In other words, he sanctions the institution of maintenance out of the estate anchored in custom.

[21] Witnesses to the proceedings (*shuhūd al-ḥāl*)[10]
Mr. ʿImrān ʿĪsā
Mḥammad ʿAbd al-Salām

The matter being as [22] indicated above
[23] Muḥammad al-Ṭālib al-Hammālī
The Qāḍī's Deputy in Charge of the Court's Affairs[11]

[10] Professional witnesses or notaries are intended here; see Glossary, s.v. *ʿadl*.

[11] He acts concurrently or intermittently in two capacities: as a Sharʿī Nā'ib and as a notary or professional witness. See Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks. Cf. doc. 17, fn. 8; and doc. 24, fn. 11 above.

Document 54

Introduction

Shar'ī wills within one-third of the estate seem to have been common practice among the Bedouin. Occasionally, however, they encounter opposition in tribes where absorption of Islamic law was far from being completed. Charity and *waqf* were initiated among the tribes by the Sanūsī order.[1]

In the case under review, an old and ailing woman bequeathed, from her sickbed, a third of her estate as testamentary *waqf*—in conformity with the *ultra vires* doctrine—in favour of Zāwiyat Sīdī 'Abd al-Salām (a Ṣūfī saint) in Ajdābiya. In her will, she also instructed that after her death, two of her goats be slaughtered, and that their meat be divided among the poor, presumably to ensure the exaltation of her soul. The shaykh and administrator of the Zāwiya then asked the court to have the witnesses to the will testify to its validity, so that the management of the dedicated property could be transferred to him. The written testimony was required to prevent any attempt in the future to invalidate the testamentary *waqf* on some legal grounds, such as incompetence, on the part of the testatrix, to engage in transactions or that her property was subject to debts. The Qāḍī granted his request and issued an "attestation of the conveyance of evidence" (*shahādat naql*).[2]

Text

[1] In the name of Allāh the Compassionate, the Merciful. May Allāh bless our Lord Muḥammad and his family.[3]

[2] In the reign of his Royal Highness King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya.[4]

[3] ATTESTATION OF THE CONVEYANCE OF EVIDENCE (*SHAHĀDAT NAQL*)[5] IN FAVOUR OF THE ZĀWIYA OF SHAYKH 'ABD AL-SALĀM IN AJDĀBIYA

Entered in register no. 6 [. . .] p. [. . .]

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[1] Colucci, *Tribu*, 30–31.
[2] See Glossary, s.v. *shahādat naql*; Layish, *Shahādat naql*, Case 5.
[3] See doc. 1, fn. 2.
[4] See doc. 1, fn. 3.
[5] See fn. 2 above.

[4] In the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī on the date [of the present document], the *sayyid*[6] Muḥammad al-Sanūsī al-Ghazzālī al-Khaṭṭābī. May Allāh the Exalted prosper him!

[5] Shaykh ʿAbdallāh b. al-Jīlānī b. ʿAlī from the lineage (*ʿā'ila*) of Ben Gharīb of the Maṣwāna tribe (*qabīla*), born in Benghazi, aged 35, [6] now residing in Ajdābiya appeared in court and stated as follows:

> In my capacity as *muqaddam*[7] of the Zāwiya[8] known as Zāwiyat Sīdī ʿAbd al-Salām in Ajdābiya, [I have been informed] that the woman [7] called Mabrūka bint ʿUthmān bequeathed (*awṣat*) one-third[9] of her immovable property (*ʿaqār*) in the presence of a group of Muslim witnesses, and subsequently died. I ask the noble Sharīʿa Court [8] to hear the testimony of the following witnesses: Shaykh ʿAbdallāh Mūsā, Fatḥallāh b. Aḥmad b. ʿAlī, Mḥammad b. ʿAlī b. Mḥammad, ʿAbd al-Ḥamīd b. [9] ʿĪsā b. al-Ḥsēn, and Aḥmad b. Jāballāh b. Ṣāliḥ Gashsha, and register [their respective testimonies] in favour of the aforementioned Zāwiya.

His request was granted. We [the Qāḍī] questioned each [10] of the five aforementioned witnesses, who concurred that

> the aforementioned woman called Mabrūka bint ʿUthmān al-Dīj̈āwī summoned us to her house, where [11] she held a session from her bed, and had tea served to us and drank with us. Subsequently she said:
>
> I am very ill and apprehensive concerning my health. You are my witnesses that I have no claim [12] against anyone; nor does anyone have a claim against me.[10] I own two goats, and I would like to have

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[6] See Glossary, s.v. *sayyid*; doc. 1, fn. 3 above.

[7] A senior rank in *ṭarīqa* hierarchy. Cf. O'Fahey, Glossary, s.v. *muqaddam.*

[8] The shaykh of the *zāwiya* fulfills both a spiritual-ritual function and an administrative one (Mohsen, 73–74). Sometimes the founder of the *waqf* stipulates that the shaykh should also act as the *mutawallī* of the *waqf*. See Layish, *Waqf in Jerusalem*, 161–62.

[9] Testamentary *waqf* is subject to the *ultra vires* doctrine which is meant to safeguard the legal heirs' rights to the estate; it is not legally permissible to bequeath by will more than one-third of one's estate. Mālikī law prescribes that this third should be assessed at the moment in which the act of the will is completed and binding; in other words, when the legatee agrees to accept it. The remaining two-thirds of the estate are apportioned among the legal heirs according to *sharʿī* inheritance rules (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 202, lines 1374, 1381; Coulson, *Succession*, 235–36). The establishment of a *waqf* by will (testamentary *waqf*), rather than by *waqf* deed, is very common in North Africa; Layish, *Mālikī Waqf*, 2ff.

[10] In Mālikī law, a testamentary disposition within the limits of one-third of the estate is valid regardless of whether the testator is in good health or in a state of

them slaughtered [for the funeral feast] and given away as charity (*ṣadaqa*) [to the poor] after my death.[11] I have a house bordering on its southern side the house [13] of Mḥammad b. Zrēdī, on its eastern side the house of Mḥammad ʿAlī Fantarī, on its northern side the house of Zaynab bint Masʿūd, and on the western side the road [called] Sīdī ʿAbd al-Salām [14], on which the gate of the complex stands. The complex is located in the eastern quarter of Ajdābiya. It comprises a roofed house, a[nother unroofed] house surrounded by a yard, and a hut (*barāka*).[12] [15] The dividing wall on the eastern side is the property of Mḥammad ʿAlī Fantarī, and I own no part of it [i.e., it is not included in the testamentary *waqf*]. I have established [by means of a testamentary disposition] one-third[13] of my building complex as *waqf* (*awqaftu*) in favour of Zāwiyat[14] Sīdī ʿAbd al-Salām,[15] currently presided over by Shaykh ʿAbdallāh al-Jīlānī. The chest (*ṣundūq*) in the house is the private property (*milk*) of my husband Abī Bakr.[16]

"death-sickness" (*maraḍ al-mawt*); see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 202, line 1374; Zaydān, vol. 10, 383, § 11195. Similarly, a [testamentary?] *waqf* in death sickness is valid provided it is within one-third of the estate and not in favour of a legal heir; see Zaydān, vol. 10, 457–58, § 11403). In contrast, a charitable gift made in death-sickness or where the object of the gift is subject to heavy debts—is not valid; see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 176, line 1191; Zaydān, vol. 10, 369, § 11159; cf. Coulson, *Succession*, 269. There is no information here as to whether the testamentary *waqf* and the charitable gift were made in death-sickness. There is, however, a clear statement to the effect that the woman's property was not subject to debts.

[11] This pious gesture seems to be performed by the testatrix in order to ensure the exaltation of her soul; cf. Layish, *Waqf in Jerusalem*, 147; Reiter, 109. Sacrifice is practiced among the Bedouin of Cyrenaica. See Peters, *Paucity*, 214; cf. Stewart, *Texts 1*, Index, s.v. sacrifice.

[12] The term *barāka* is presumably derived from Italian *barracca*, "hut," "lodge." Cf. Borg, *Orality*, 332.

[13] See fn. 9 above.

[14] The establishment of a *waqf* in favour of a *zāwiya* reflects the founder's inclination towards Ṣūfī spirituality; see Baer, *Waqf*, 266–71; Reiter, 107. It seems that in Muslim society this form of pious activity is particularly common among women. Muslim women are well represented as founders of *waqf* for charity and welfare, including *zāwiya*s; see Layish, *Waqf in Jerusalem*, 156; Baer & Layish, 21. In Cyrenaica, the propensity for founding *waqf* in favour of *zāwiya*s was no doubt intensified on account of the special status enjoyed there by the Sanūsī order; see Introduction to this document; Layish, *Divorce*, 5, 12, 16–17, 204–5, and the sources indicated there.

[15] The reference is to Sīdī ʿAbd al-Salām al-Asmar al-Fītūrī from Zliten; see Albergoni, *Droit coutumier*, 128; idem, *Écrire la coutume*, 44; Ibn Mūsā, 293; cf. doc. 41, fn. 15; Layish, *The Qāḍī's Role*, 107 fn. 87 and the sources indicated there concerning the veneration of saints; al-Sūrī, 395–96; doc. 41 above.

[16] The document refers to a chest "belonging to my husband," without explicitly including or excluding the chest from the woman's testamentary *waqf*. Two alternative interpretations of this point are possible: (a) that the chest is her husband's private property, and is therefore excluded from the provisions of the will; or (b) that the woman bequeathes the chest to her husband. If the chest in question is the husband's private property, no problem exists from the *sharʿī* standpoint;

[16] This is her testimony and bequest (*awṣat*) undertaken of her own free will (*ṭā'iʿa*) and choice (*mukhtāra*) and without coercion (*jabr*) or compulsion (*ikrāh*). Though sick in body she was mentally in a state of full legal capacity (*salīmat al-ʿaql*).[17] Let Allāh be our [17] pledge [lit. agent] (*wakīl*) to our words.[18]

On the basis of the testimony of the five witnesses free of any hint of collusion (*tawāṭu'*) among them, and while they were in a state of legal competence (*ḥāla jā'iza*) in *sharʿī* terms, as duly certified (*thubūt*) [18] in the presence of the aforementioned Qāḍī, the latter endorsed (*ajāza*) the witnesses' testimony concerning the fact that the late Mabrūka bint ʿUthmān al-Dījāwī bequeathed one-third of her building complex [19] as a *waqf* in favour of the Zāwiya named after the Initiate (*ʿārif*) [of the gnostic knowledge] of Allāh,[19] Sīdī ʿAbd al-Salām al-Asmar, in Ajdābiya. [Issued] by way of *sharʿī* certification (*thubūt*) [of the testamentary *waqf*. The Qāḍī] signed and endorsed it, had the [20] undersigned witnesses testify thereto and instructed

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if however the second alternative obtains, an explanation is called for. According to the *ultra vires* doctrine, it is not legally permissible to bequeath in favour of a legal heir unless the consent thereto of the other heirs has been secured after the testator's death. Mālikī doctrine considers null and void any will which deviates from this norm. According to this view, the consent of the legal heirs to this deviation is perceived as a donation and not as a renunciation of their right to the inheritance, as is the case in other schools (see Coulson, *Succession*, 239ff., 244ff.). In any case, the document provides no hint whatsoever that the consent of the other heirs was sought or obtained. Assuming that alternative (b) is applicable here, it is striking that none of the parties involved (the woman, the witnesses, the shaykh of the Zāwiya, and even the Qāḍī; see fn. 20 below) showed awareness of this deviation. There is some evidence in the Libyan *sijill* of wills being made in favour of legal heirs though occasionally the distinction between a will and a donation is blurred. See Davis, *Archive*, Sharīʿa Court of Ajdābiya, p. [225] no. [374] of July 19, 1953 {One of the witnesses testified that "since death comes upon every human being unexpectedly . . ." (*wa-inna al-mawt mudrika li-kull insān*, a phrase usually serving as preamble to a will), the husband instructed him to "write the house" in favour of his wife. The other witness testified that the husband said: "I have donated (*aʿṭaytu*) the house" to my wife}; p. 330 no. 562 of Muḥarram 13, 1360 [1954] {A woman claimed that her deceased husband had "left behind the common document (*taraka al-wathīqa al-ʿādiya*)" in which he had given her half of a *ḥawsh* (an enclosure for cattle) in return for a part of the dower due from him}. Cf. Colucci, *Tribù*, 30; D'Emilia, 43; Peters, *Family*, 128. Customary wills which are not subject to the *ultra vires* doctrine, that is, beyond one-third of the estate or in favour of legal heir, are common practice among the Bedouin of the Judean Desert. See Layish & Shmueli, 40–41.

[17] On the testator's legal capacity, see Coulson, *Succession*, 216–17.

[18] This pious formula is intended to enhance the credibility of the witness. Cf. doc. 4, fn. 15 above.

[19] See Trimingham, Glossary, s.v. *ʿārif*.

that it be registered.[20] [Entered] on the 25th day of Muḥarram 1372, corresponding to October 15, 1952.

Petitioner's (*al-mustadʿī*) signature
[21] ʿAbdallāh al-Jīlānī

Witnesses to the will (*al-shuhūd ʿalā 'l-waṣiyya*)
[22] ʿAbdallāh Mūsā
Fatḥallāh Aḥmad
Mḥammad ʿAlī
ʿAbd al-Ḥamīd ʿĪsā
Aḥmad Jāballāh

[23] Witness (*shāhid*)
[24] Mḥammad ʿAbd al-Salām[21]

The matter being as indicated above
The Qāḍī of Adjābiya
Muḥammad al-Sanūsī al-Ghazzālī [al-Khaṭṭābī]

[20] If alternative (b) (see fn. 16 above) is applicable, one must assume that the Qāḍī totally ignored the *ultra vires* doctrine. According to the Mālikī school, endorsement of the witnesses' testimony to the will is required in the absence of a will written by the testator himself or at least bearing his known signature. See Coulson, *Succession*, 215–16. The endorsed will makes possible the transfer of the dedicated property in favour of the Zāwiya to the shaykh.

[21] A professional witness or notary is intended here. See Glossary, s.v. *ʿadl*.

SECTION TWO

HOMICIDE, BODILY INJURY AND DEFAMATION OF WOMEN'S REPUTATION

Document 55

Introduction[1]

The Tibbū, a small group in Kufra,[2] claim to be descendants of the original inhabitants of the central Saharan oases. Their origins go back to a time before the Arab conquest, when Kufra was part of Chad and Niger. They have genealogical and political links to other Tibbū in Chad and in the Tibesti area of S.W. Libya. Some of them are nomads, others sedentaries. They maintain their own social organization, culture, and identity, and do not assimilate into the Zwayya, the dominant Arabic-speaking marabout tribe in Kufra.[3] In the past, they are said to have been frequently involved in reprisals with the Zwayya.[4]

Nominally the Tibbū are Muslims, but until late in the nineteenth century they did not observe strictly some of the precepts of Islam. After the emergence of the Sanūsiyya, the Tibbū's Islamic identity was strengthened. Among the Tedda branch of the Tibbū in the Tibesti area attempts were made to codify tribal customs with a view to bringing the tribe closer to normative Islam. Within the framework of this legal reform the Tibbū in Kufra adopted Islamic law concerning family, succession, and blood money (*diya*). The adoption of Islamic law relating to blood money was intended to break the chain of vengeance between and among various Tibbū groups.[5] The

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[1] For a full analysis of this document against the background of the interaction between tribal customary law and the *sharīʿa*, see Layish, *Blood Money*.

[2] Unless otherwise indicated, the data on Kufra and Tibbū are based on De Agostini, *Cufra*, 45–6, passim; Davis, *Libyan Politics*, 108, 111–12, 150–2; idem, *Koufra*, 547–8, 551–5, 561–3; idem, *Social Perspective*, 7; Chapelle, 5; Evans-Pritchard, 21–2; Barion, *La contestation*, 159–60.

[3] De Agostini, *Cirenáica*, 407–9; Evans-Pritchard, 52–53, 65–69; al-Ḥabbūnī, 201–7; Davis, *Libyan Politics*, 96.

[4] Barion, *Anarchie*, 74, 89, 140, 386–9; Hassanein, 129, 139–40, 151, 175; De Agostini, *Cufra*, 42.

[5] See Triaud, vol. 2, 771.

sharʿī norms were mitigated by some concessions to custom. Thus *sharʿī* rates of *diya* were introduced (100 camels for a male and 50 for a female),[6] but the killer had to spend 3–4 years in exile before he might initiate the procedure for settling the dispute by compensation, provided, of course, that no retaliation had taken place in the meantime. The settlement of disputes by means of *diya* was nevertheless quite rare among the Tibbū.[7]

In the case under review, a Tibbāwī was killed in the tribal territory. The name of the killer (Warduqūh b. Būrī) suggests that he too was a Tibbāwī. The dispute was resolved by payment of blood money in accordance with the "prevailing Tibbāwī tribal customary law (*ʿurf*)."

The case exemplifies the interplay between the Tibbāwī tribal law and Islamic law: After having spent several years in exile, the perpetrator returned to the area, and acknowledged his responsibility for the killing in the Sharīʿa Court of Kufra. An agreement was made between the killer and some of the victim's agnates. The perpetrator undertook to compensate the victim's agnates—a brother, two sisters, and paternal cousins—with camels, livestock, and money. The parties also agreed that any person causing death or physical injury to one of the perpetrator's kin would be personally liable for his act and would not be defended by his agnates. Subsequently another member of the Tibbū tribe, probably a maternal half-brother of the victim, appeared and claimed his share of the blood money. The victim's paternal brother and sisters renounced one-sixth of the blood money paid to them in favour of the new claimant. This is the maternal half-brother's (or sister's) portion allotted to a Qurʾānic heir.

In the period under review, homicide and bodily harm were formally subject to the jurisdiction of the Libyan civil courts. In practice, however, such claims were mostly either settled out of court by tribal arbitrators, by the *sharīʿa* court or (as in this case) by a combination of the two.[8] The *sharīʿa* court seems to have been used by the parties in order to secure the implementation of settlements based on tribal customary law mitigated by *sharʿī* norms.

The Qāḍī endorsed the blood money agreement and granted it the validity of a *sharʿī* judgment. Although the judgment was handed

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[6] Cf. Colucci, *Tribù*, 31; Murray, 232, 314.
[7] Chapelle, 89–92, 320 n. 16, 323–28; Cf. Obermeyer, 157.
[8] See Layish, *Legal Documents*, 14–15.

down in accordance with "Tibbāwī tribal customary law" (see line 5 of the translated decision below), several indicators suggest that the apportionment of the blood money (which is part of the victim's estate) among his relatives reflects a compromise between tribal and *sharʿī* law.[9] It may well be that this compromise was reached outside the Sharīʿa Court on the basis of the Tibbāwī tribal law of succession and blood money, a law which had absorbed vital *sharʿī* elements (see below).

Text

[1] In the Sharīʿa Court of Kufra, presided over by the Qāḍī Shaykh Muḥammad Ṣāliḥ al-Bakrī. May Allāh the Exalted grant him success!

[2] A man called Bū Kinnī b. Madī [Maduw?] from the Mādhina lineage (*ʿā'ila*) of the Tibbū tribe (*qabīla*) appeared [in court] together with his paternal cousins,[10] ʿAbdallāh b. Jibrīl and al-Sanūsī b. [3] Ḥasan and Madī [?] b. Ajī and Ibrāhīm Arduqūh and Qalamī b. Ūshi', and Ḥasan b. Haranjī. The aforementioned Abū Kinnī claimed that Warduqūh b. Būrī [4] killed (*qatala*)[11] my brother[12] Ṣāliḥ in the

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[9] Colucci, *Tribù*, 31 (the *diya* is divided among the victim's heirs).

[10] In Tibbāwī practice, vengeance is carried out generally by the victim's brothers or sons, and in their absence, by cousins (Chapelle, 323; cf. al-Qusūs, 84).

[11] The agreement between the parties does not make the distinction, essential in Islamic law, between deliberate (*ʿamd*) and accidental (*khaṭa'*) homicide. Under Tibbāwī tribal law, a dispute may be settled, in both deliberate and accidental homicide, by vengeance (*tha'r*) rather than compensation (Chapelle, 323; cf. Colucci, *Istituti*, 266; Albergoni, *Écrire la coutume*, 40). The Awlād ʿAlī Bedouin of the Western Desert are aware of the distinction between deliberate and accidental homicide though not necessarily in terms of the perpetrator's intentions, but rather in physical terms, e.g., in terms of the kind of instrument used to cause the homicide (Murray, 314; Maḥjūb, 313–14; al-Ḥabbūnī, 29–30; Mohsen, 125ff., 140ff.; Obermeyer, 201). Awareness of the the distinction is due to the influence of the *sharīʿa* (cf. al-Jawharī, 183, 185ff.; Colucci, *Tribù*, 33–34; Albergoni, *Droit coutumier*, 111–12; idem, *Écrire la coutume*, 29, 30, 40 n. 32, 42). Under both systems, customary and the *sharʿī*, homicide is a matter of private claim or prosecution (Obermeyer, 216ff.; Murray, 229; Peters, *Criminal Law*, 0.1.3). The Mālikī school adopted the broadest definition of deliberate homicide, a definition that absorbs the category of quasi-deliberate (*shibh ʿamd*) homicide. With respect to retribution (*qiṣāṣ*) this definition is close to the tribal customary conception of homicide, according to which the victim's agnates have the option of vengeance. See Anderson, *Homicide*, 820ff.; Peters, *Criminal Law*, § 0.1.3; cf. al-Qusūs, 47; Abū Ḥassān, 211, 213; Salḥūt, 71ff.

[12] They share at least the same father (Madī [?] al-Tibbāwī). See lines 16–17 below.

territory (*diyār*) of the Tibbū tribe a few years ago and has now appeared in the town of al-Kufra.[13]

Warduqūh b. Būrī was accompanied by b. [5] Mḥammad Bū Bakr b. al-Mamī [?] and his son Aḥmad. Warduqū acknowledged (*aqarra*) that he was the killer (*qātil*) of Ṣāliḥ. They agreed among themselves on the payment of blood money (*diya*) in accordance with the Tibbāwī tribal customary law (*ʿurf*) prevailing among them.[14] [6] He obligated (*alzama*) himself[15] to pay the blood money that is customary (*maʿrūfa*) among them, that is, four male camels, two *ḥawāyij*[16] of sheep and donkeys, and four *ḥawāyij* in cash (*darāhim*). The slain man (*maqtūl*) [7] has two sisters[17] in Tibbū territory (*diyār*), and it was agreed that [the perpetrator] would pay them [out of the aforementioned blood money] two camels, one *ḥāja* of livestock, and one *ḥāja* in cash.[18] He will [also] pay one *ḥāja* [8] in cash to the victim's

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[13] See Chapelle, 327. On refuge (*nazāla*) among the Awlād ʿAlī, see Maḥjūb, 190–91, 313; al-Jawharī, 191–92; al-Ḥabbūnī, 35–36; Obermeyer, 201ff.; Murray, 205, 212, 313, 315; Stewart, *ʿUrf*, 890–91; cf. Peters, *Paucity*, 194–95; al-Qusūs, 75; Abū Ḥassān, 30, 195ff.; al-ʿĀrif, 75ff. In this case, the perpetrator seems to have accomplished the term of exile required before settlement of the dispute by blood money could take place. In a similar case, a woman claimed in court that her husband of the Gawābil [Gabāyil] tribe (De Agostini, *Cirenáica*, 405–6, index, s.v. Gabàil, refers to several different Mrābṭīn groups) had killed a Tibbāwī man from Rabiana, took his camel and fled to his kinsfolk in the Western District, probably fearing blood revenge; see doc. 29 above.

[14] The reference is probably to the codified version of the law; see Chapelle, 324ff.; cf. al-Ḥabbūnī, 32; Mohsen, 126; Obermeyer, 156; Colucci, *Tribù*, 32. The terms *ʿurf* and *maʿrūfa* (lines 5–6) refer to customary blood money obtaining in the Tibbū tribe, but it may well be that the reference here is to the Islamic version of blood money as adopted by the Tibbū (see below, the apportionment of blood money). It is impossible to determine whether these terms were used by the litigants or by the Qāḍī; in the latter case, it would reflect his awareness of the distinction between custom and *sharīʿa*.

[15] According to Tibbāwī tribal law, a full blood money for a male (100 camels or oxen) is paid collectively by the killer's agnates (Chapelle, 327; cf. Peters, *Criminal Law*, § 0.1.3.3.1; al-Qusūs, 83).

[16] See Glossary, s.v. *ḥāja*.

[17] They must be either full sisters or paternal half-sisters. Note the apportionment of blood money as stated below.

[18] Each of the sisters takes one-half of the share due to the victim's paternal brother with respect to the camels and livestock (but one-eighth with respect to the money). This proportion tallies with the doctrine of *taʿṣīb* pertaining to paternal sisters and brothers, that is, either full brothers and sisters or paternal half-brothers and paternal half-sisters, under the *sharʿī* inheritance rules (Coulson, *Succession*, 34–35, 41–42, 69–70). According to the *sharīʿa*, the blood money for homicide is part of the victim's estate and hence is apportioned among the victim's relatives in accordance with the *sharʿī* rules of inheritance; (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 230, line 1575; Ibn al-ʿAṭṭār, 452ff.; Peters, *Criminal Law*, § 0.1.3.3); the Mālikī law, however, does

male paternal cousins[19] [living] in the Tibbū tribal territory. He has now transferred one camel here [at this court session, as blood money] to Bū Kinnī, who received it from him. [He will also pay] one camel and two *ḥawāyij* in cash (*darāhim*) [9] and one *ḥāja* of livestock [viz., the remainder due to Bū Kinnī][20] which he [i.e., Warduqūh] will bring here and deliver to Bū Kinnī and [with this] the dispute between them will be settled. Whoever kills or assaults [in future] [10] a member [of the killer's agnatic group] will make only himself liable (*yulzim*)[21] [to vengeance] and he [alone] will be responsible (*masʾūl*) [for the consequences of his action].[22]

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not acknowledge the doctrine of *radd*, that is, in the absence of male agnates, the Qurʾānic heirs do not take the residue of the estate if their prescribed portions do not exhaust the estate (Coulson, *Succession*, 49). Payment of blood money to the victim's female kin was probably not provided for by Tibbū customary law, but the Tibbū tribe adopted the Islamic law of inheritance and blood money with some concessions to tribal law (see below; Mohsen, 26, 126; Obermeyer, 173–74; al-Jawharī, 202; Peters, *Proliferation*, 368; Colucci, *Istituti*, 266–69; cf. al-Qusūs, 83–84).

[19] Under *sharʿī* rules of inheritance, paternal uncles (and their male issue) are excluded from the deceased's estate by the paternal brothers because the latter belong to a higher class or parentela (*ṭabaqa*) of male agnates (on the class rule, see *ṭabaqa*; Coulson, *Succession*, 33). Here, however, one *ḥāja* of *darāhim* is apportioned equally between the cousins, presumably in accordance with Tibbāwī custom. According to the provisions of a tribal document approved by the "sages" of the al-Fwākhir tribe in Cyrenaica, one-half of the blood money is to be apportioned among the victim's heirs, presumably in conformity with the *sharʿī* rules of inheritance, and the other half among the rest of the tribe, that is, the male agnates, though not necessarily equally between the *ʿumarāʾ al-dam*, the members of the solidarity group for the purpose of vengeance and blood money; one option is to apportion the money in accordance with the economic position of the members of the solidarity group. See Albergoni, *Droit coutumier*, 112, 119, 121; idem, *Écrire la coutume*, 31–32, 40. On *ʿumarāʾ al-dam*, see Albergoni, *Droit coutumier*, 110, 116ff.; idem, *Écrire la coutume*, 28, 30–31, 36–37.

[20] As the closest male agnatic heir of the victim, and probably in the absence of issue, Bū Kinnī takes one-half of the entire amount of the blood money. Under the *sharīʿa*, he was entitled to the residue of the blood money after the Qurʾānic heirs had received their prescribed portions.

[21] The Arabic original here has *yalūm* where *yulzim* would have been more appropriate (cf. *wa-alzama nafsahu* in line 6 above; al-Ḥabbūnī, 33, 35). This may well be a copyist's error. If *yalūm* is intended, the translation would read "will expose only himself to blame."

[22] In other words, should one of the victim's relatives commit a violent act against the killer's relatives in disregard of the terms of the settlement, then the former will be held personally responsible for the consequences of his act, that is, though the former's agnates would normally defend him, in this case, he will not enjoy their protection; whoever kills him will not be the object of legitimate revenge by the victim's kin. For *barāwa*, tribal detachment from any responsibility for the actions of a particular person, among the Awlād ʿAlī, see Maḥjūb, 207–8; Obermeyer, 181ff.; Murray, 315–16; Mohsen, 63; cf. Albergoni, *Droit coutumier*, 118; idem, *Écrire la coutume*, 31 n. 17; Khayrallāh, 288–89; Stewart, *Texts 2*, Glossary, s.v. *ṭulūʿ*.

[The Qāḍī ruled] that no further claim or demand existed between them, except for the aforementioned payment due as blood money. [11] Any person [from the victim's kin] who commits homicide hereafter is thereby inflicting death on himself (*qatala nafsahu*).[23] This agreement was entered into voluntarily by all parties concerned. The Qāḍī gave it the force of a judgment[24] and signed [the document in which the agreement is recorded]. [12] This was done in the precincts where the Qāḍī's court is officially located on the 12th day of Rajab 1361, [corresponding to] July 26, 1942.

[13] The scribe (*kātib*) of the Sharīʿa Court

The Qāḍī of Kufra
Muḥammad Ṣāliḥ al-Bakrī

[14] Witnesses
[15] ʿAbdallāh b. Ūsī [Ūshī' ?]
Slēmān Imrī [?] b. Lāmīn
al-Sanūsī Tūbī [?] b. Bakr [?]

[16] Aḥmad Rajab al-Tibbāwī appeared [in court] and claimed that he was entitled to one-sixth of the blood money due for Ṣāliḥ b. Madī [?] al-Tibbāwī). [17] He was paid [an amount equivalent

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[23] In other words, he is held personally responsible for the consequences of his acts, including liability for blood vengeance, with no protection from his agnates. Cf. Albergoni, *Droit coutumier*, 119; idem, *Écrire la coutume*, 32 (he will not be *maʿṣūm*, inviolable). See note 22 above.

[24] The Qāḍī granted the validity of *sharʿī* judgment to an agreement relating to blood money obtained on the basis of what seems to be a mixture of tribal custom (see line 5 above) and the *sharīʿa* in its Mālikī version (see fn. 18 above). The extent of the Qāḍī's involvement in securing the agreement is not clear. It is very likely that the agreement was initially reached out of court (for such agreements among Awlād ʿAlī in the Western Desert, see Obermeyer, 221, 223) in accordance with the Tibbāwī law mitigated by *sharʿī* norms, to be drawn up later in the *sharīʿa* court. In validating the apportionment of the blood money the Qāḍī was certainly fully aware of the *sharʿī* norm, although there is no explicit indication in the document to this effect. For another example of compromise between the *sharʿī* and tribal customary law of inheritance, see Colucci, *Istituti*, 269 (in one case, the *diya* of a married woman was divided in the following way: the agnates, presumably of various degrees of relationship to the victim, took three-quarters of the blood money and the husband took the residue). According to the *sharʿī* rules of inheritance, the husband is the first to receive his Qur'ānic portion, which is one-quarter of the estate in the presence of descendants or one-half in their absence, after which the closest agnatic heir to the victim is entitled to the residue, depriving the rest of the agnates.

to] one-half of this sixth in al-Kufra, which he received from Bū Kinnī b. [18] Madī [?]. He is to receive [the other] half of the sixth from his sisters in the Tibbū tribal territory (*dār*). One-half of the sixth which [19] they have already received will be paid to him.[25]

This [document] has been issued for this purpose on the date [20] of the 7th day of Dhū 'l-Qaʿda, [corresponding to] October 24, 1944.

[25] It seems safe to conclude that Aḥmad is a maternal half-brother of the victim. Had he been a paternal brother of the same blood relationship he would have been entitled to the same share as Bū Kinnī. This may be inferred from the fact that the Qur'ānic portion of a maternal half-brother [uterine] under the *sharʿī* rules of inheritance amounts to one-sixth.

The victim's paternal brother and sisters compensate the maternal half-brother out of the portion of the blood money received by them two years previously. This seems to be another instance of a compromise between the *sharīʿa* in its Mālikī version and tribal law at the expense of the latter; under *sharʿī* rules of inheritance, the Qur'ānic heirs take their portions first, leaving the residue to the agnatic heirs. It is interesting to note in this connexion that among the matrilineal Akan in the Gold Coast, the Obuasi Native Court would allocate, in cases of Muslims, two-thirds of the estate to the customary successor, that is, to a cognate, and one-third to the eldest son or sons of different mothers, that is, to agnates (Anderson, *Africa*, 275–76).

Document 56

Introduction

A youth broke the teeth of an infant girl from another tribe, apparently unintentionally. A private claim was presented before the Sharīʿa Court by the District Governor. The fathers of the two children appeared in court and made it known that they had reached, out of court, a reconciliation based on an agreement whereby the youth's father undertook to pay the girl's father a specific sum of money compensating him for the physical injury to his offspring.

The Qāḍī endorsed the agreement conferring on it the validity of a *sharʿī* ruling.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions and grant them peace.[1]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him.[2]

[3] CONCILIATION (*ṢULḤ*) AND AGREEMENT (*ITTIFĀQ*) BETWEEN AL-SANŪSĪ ʿAMŪRA AL-ŌJALĪ AND AL-MABRŪK B. ʿALĪ AL-MABRŪK
Entered in register no. 6/365, p. 249

[4] In the Sharīʿa Court of Ajdābiya, presided over by Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him! Amen.

[5] On the basis of lawsuit (*qaḍiyya*) no. 218 dated January 11, 1954 brought before this court by the District Governor[3] of Ajdābiya

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[1] See doc. 1, fn. 2.

[2] See doc.1, fn. 3.

[3] Davis notes that in Kufra where there was no lay court or magistrate, the police seemed to encourage wherever possible the settlement of disputes out of court by tribal arbitrators. In Ajdābiya, too, the police intervened in civil wrongs only as a last resort. Davis, *Libyan Politics*, 223. Cf. Mohsen, 16. It is highly likely that the District Governor was requested to settle the dispute relating to bodily assault as an arbitrator, probably in accordance with tribal law. Cf. al-ʿAbbādī, *al-Ǧarāʾim*, 214 (appointment of tribal guarantees on both sides for the settlement of the dispute by a governmental agency). The District Governor in our case, however,

[6] concerning the youth ʿAbd al-Laṭīf b. al-Sanūsī from the Awājla[4] tribe [*qabīla*], who broke two teeth[5] of the infant Fāṭma bint [7] al-Mabrūk b. ʿAlī from the ʿAlī lineage (*ʿā'ila*) of the Maghārba[6] tribe. When their parents [fathers], the aforementioned al-Sanūsī b. ʿAmūra and al-Mabrūk b. ʿAlī appeared [8] they stated the following:

> We have reached a conciliation (*iṣṭalaḥnā*) and an agreement to the effect that al-Sanūsī, father of the aforementioned child ʿAbd al-Laṭīf, will pay four pounds to [9] to al-Mabrūk, father of the aforementioned baby girl. No [further] financial right (*ḥaqq*) or the remainder of such a right between the sides remains.[7]

On the basis of the [agreement] reached [10] between the sides while both were in a state of legal competence (*ḥāla jā'iza*) in *sharʿī* terms as duly certified (*thubūt*) in the presence of the aforementioned judge, the latter endorsed (*ajāza*) this agreement,[8] signed it, had the undersigned witnesses testify [11] thereto and instructed that it be registered. The [agreement] was entered on the 4th day of Jumādā al-Ākhira 1373, corresponding to February 8, 1951.

The signature appears in the protocol (*ḍabṭ*).

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decided to transfer the case to the Sharīʿa Court to be treated as a civil claim. By doing so he was instrumental in promoting the process of Islamization of tribal society.

[4] See De Agostini, *Cirenáica*, 331ff.; Evans-Pritchard, map facing p. 35.

[5] Causing injury, such as breaking of teeth in the case under review, creates an option for retribution under the *sharīʿa* or vengeance under tribal law (*qiṣāṣ* or *tha'r*, respectively) provided the injury was caused deliberately (*ʿamdan*); the Mālikī school does not recognize the category of quasi-deliberate (*shibh ʿamd*). Unintentional injury creates financial liability. A private claim for blood money (*diya*) may be advanced within the framework of both tribal and *sharʿī* law. See al-Jawharī, 191; Mohsen, 150; Obermeyer, 203–4; al-Ḥabbūnī, 34; cf. al-Qusūs, 51–52, 69–70; Abū Ḥassān, 229–30; Ghayth, 136–37; Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 232, lines 1597ff.; Peters, *Criminal Law*, § 0.1.3. The case under review was settled out of court presumably under tribal customary law.

[6] See De Agostini, *Cirenáica*, 336ff.; Evans-Pritchard, map facing p. 35.

[7] It appears that the agreement concerning the compensation was reached according to the norms of tribal law outside the court. For the *diya* payable for broken teeth according to the Awlād ʿAlī customary law, see Murray, 326. For a description of settlement disputes, see Davis, *Libyan Politics*, 190–98; 223–28. For instances of injury entailing broken teeth, see Kennett, 116 (appointment of tribal assessors of bodily injuries), 124; cf. Hart, *Penal Code*, 59.

[8] The Qāḍī does not interfere in the content of the agreement which is entirely based on customary law and confers on it the validity of a *sharʿī* ruling even though the *sharīʿa* is equipped to deal with cases of this kind.

[12] Witnesses to the proceedings (*shuhūd al-ḥāl*)[9]
[13] Mḥammad al-Farāḥ[al-Faraj?] al-Ōjalī
Sālim Yūsuf [Yūnus?] al-Maghribī
[14] ʿImrān ʿĪsā
Mḥammad al-Ṭālib al-Hammālī

The matter being as indicated above
The Qāḍī of Ajdābiya
Ḥusayn Muḥammad al-Aḥlāfī

[9] It seems that at least the two last mentioned witnesses are professional witnesses or notaries. See Glossary, s.v. *ʿadl*.

Document 57

Introduction

The use of motor cars among the Bedouin in modern times has proliferated cases of homicide and bodily injuries caused by accidents.[1] Since these are not deliberate (*ʿamd*), but rather unintentional (*khaṭaʾ*), the Bedouin regard them as a matter of fate (*qaḍāʾ*) and predestination (*qadar*), and hence they tend to renounce (*tasāmuḥ*) the option of vengeance (*thaʾr*) out of generosity (*karam*) and dignity (*nakhwa*).[2] However, the unintentional nature of car accidents does not exempt the perpetrator from the financial liability for the homicide or injury.[3]

In the case under review, a small boy was run over by a car and as a result his right leg was seriously incapacitated. The injury caused a highly visible physical disability. A date was set for a meeting, at the Sharīʿa Court of Benghazi, of the boy's agnates and the driver involved in the accident in order to determine the amount of financial compensation. Since the boy's father could not travel there, he asked the Sharīʿa Court of Ajdābiya to hear the testimony of his witnesses, who were tribal assessors of bodily injury, so that their testimony could provide a factual basis for the court in Benghazi to award appropriate compensation.

The Nāʾib granted his request and after ascertaining the witnesses' credibility according to *sharʿī* procedures, ordered the assessors to testify regarding the state of the injured leg. Their assessment appears to have been based on criteria pertaining exclusively to tribal customary law. The Nāʾib—without interfering with the principles underlying the assessors' procedures—gave the boy's father a certified copy of the testimony for his use at any eventual legal proceedings in Benghazi.

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[1] The codification of the customary law of homicide and bodily harm of the Fwākhir tribe in Cyrenaica deals also with car accidents. See Albergoni, *Écrire la coutume*, 31–34; cf. Khayrallāh, 281.

[2] Abū Ḥassān, 213; also *ibid.*, 171; Ghayth, 126–27.

[3] Khayrallāh (286), on the other hand, reports that the general trend among all the tribes is to renounce *diya* in cases of unintentional homicide.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions and grant them peace.[4]

[2] In the reign of his Excellency *sayyid* Muḥammad Idrīs al-Mahdī al-Sanūsī, Emir of Barqa [Cyrenaica].[5]

[3] ATTESTATION OF THE CONVEYANCE OF EVIDENCE (*SHAHĀDAT NAQL*)[6] IN FAVOUR OF SHAYKH AL-LĀFĪ AL-MUFTĀḤ AL-ṢUBḤĪ

Entered in register no. 5/314, p. 5/214

[4] In the [Sharīʿa] Court of Ajdābiya, presided over by Muḥammad al-Mabrūk Abī Jāziya, the Deputy (*nāʾib*) in Charge of the Affairs (*al-qāʾim bi-aʿmāl*) of his honour the *sharʿī* Qāḍī. May Allāh the Exalted grant him success.

[5] Shaykh al-Lāfī b. Muftāḥ from the al-Shēkhī [lineage] of the Ṣubḥ [subtribe][7] belonging to Maghārba tribe (*qabīla*),[8] identified (*maʿrūf*)[9] by person appeared [in court] accompanied by his son Ismāʿīl, [6] who is about ten years old, and made the following statement:

> Fifteen months ago, my son Ismāʿīl, present here, was run over by a car that crushed his right leg. [7] After [the bones] were set and medically treated, [the leg technically] healed but a highly visible physical defect due to permanent mutilation (*ʿadam*)[10] remained which reduced [the leg] to the state of utter disability; [8] [the leg] ceased to function as a healthy limb. Since a date has been fixed for a meeting

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[4] See doc. 1, fn. 2.

[5] See doc. 1, fn. 3.

[6] See Layish, *Legal Documents*, 21, fn. 2; idem, *Shahādat naql*, Case 1; Glossary, s.v. *shahādat naql*. Attestation of conveyance of evidence to another *qāḍī* is not admitted in Islamic criminal procedure (Schacht, *Introduction*, 198); however, homicide and bodily injury are considered, under both *sharʿī* and tribal law, as instances of claims within the domain of private law rather than offences in the domain of public criminal law.

[7] See De Agostini, *Cirenáica*, 323–24.

[8] See ibid., 316ff.

[9] See Glossary, s.v. *taʿrīf*.

[10] In determining the amount of compensation due for bodily injury tribal law among the Awlād ʿAlī makes a distinction between wounds that heal (*al-ḍarb al-salīm*) and wounds that cause permanent mutilation (*al-ḍarb al-ʿadīm*). The case under review belongs to the second category. See al-Ḥabbūnī, 31, 34; al-Jawharī, 187ff.; Maḥjūb, 183, 200, 314–15, 318 (definition of *ʿadam*); Mohsen, 149; Murray, 205; Stewart, *ʿUrf*, 890–91; cf. Abū Ḥassān, 230; Ghayth, 137; Glossary, s.v. *qaṣṣāṣ*.

between me and the perpetrator (*jānin*)[11] concerning my son and his kinsmen[12] before the Qāḍī of Benghazi, and since I am unable [9] to travel there with the child, I ask [the court] to hear the testimony (*shahāda*) of the witnesses [present here] who are fully qualified[13] to testify to the fact that my son's leg has been reduced to a state [10] of disability.

His request was granted and he was permitted to produce his witnesses. He brought Shaykh Mḥammad Bū al-Bghīḍ al-Zwayyī, al-Sdēdī[14] and Ḥājj[15] [11] Yūnus b. Ṣāliḥ al-ʿĪdiyya of the aforementioned [Zwayya] tribe, both of whom were identified by person. Each of them gave testimony on his own account (*shahāda masʾūla minhumā*), corroborating his claim, [12] after due examination of the boy's leg, on the basis of their expertise. Subsequently, Shaykh Saʿīd b. Yūnus Shalabī and Shaykh [13] ʿAlī b. al-Fūl, both from the Hayba lineage (*ʿāʾila*) of the Naṣr [subtribe] belonging to the al-Maghārba[16] [tribe] were summoned for the purpose of ascertaining [the assessor's] credibility.[17] They both testified that the aforementioned witnesses were persons of good reputation (*ʿadlān riḍā*) and that their

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[11] The unintentional nature of the motor accident does not exempt the perpetrator from the financial liability for the injury caused. The absence of the element of intention in the accident may well have facilitated the settlement of the dispute through financial compensation, while at the same time excluding the option of vengeance under tribal law on the part of the victim's agnates. See Stewart, *Thaʾr*, 443; Glossary, s.v. *thaʾr*. Davis notes that the victim's agnates in road accidents receive double compensation: i.e., both from the state insurance company, and from the driver involved in the accident and his kinsmen in conformity with tribal law. This phenomenon has also been observed in Jerusalem. See Davis, *Libyan Politics*, 176, 223–24; Zilberman, 70. On several occasions I have been asked by Israeli insurance companies to provide them with legal opinions to the effect that settlement of financial claims for homicide and bodily injury (*ṣulḥ*), that is, by payment of blood money (*diya*) or compensation (*taʿwīḍ*), precludes any additional financial claims of any kind in the future.

[12] The injured boy and his solidarity group (*ʿāqila*), i.e., male agnates up to a certain degree of relationship, share the financial compensation paid for the injury caused to him. Cf. al-Qusūs, 83–84; Glossary, s.v. *ʿāqila; diya*.

[13] Tribal assessors or physicians (*ṭabīb al-ʿarab* called *naḍḍār* or *nazzār*) for bodily injuries are intended here. See al-Jawharī, 190; Mohsen, 51, 54; 148ff. 151; Maḥjūb, 314 (*ṭabīb sharʿī muʿtād ʿinda al-ʿarab*); Obermeyer, 203–4 (*nazāra*); Murray, 229, 234–25, 321–22; cf. Stewart, *Texts 1*, 19, 83–85, 110–11 (*qaṣṣāṣ*), Index, s.v. injury assessors; idem, *Texts 2*, Glossary, s.v. *gaṣṣāṣ*; Kressel, *Ascendancy*, 79 (*qaṣṣāṣīn al-dam*); Glossary, s.v. *qaṣṣāṣ*.

[14] In other words, he belongs to the Sdēdī branch of the Zwayya tribe. See De Agostini, *Cirenáica*, 407.

[15] Honorific title of one who has performed the pilgrimage to Mecca.

[16] See De Agostini, *Cirenáica*, 316, 323.

[17] See Glossary, s.v. *tazkiya*.

testimony [14] completely corroborated the established facts. All this transpired and was registered on the date stated below, and upon his [i.e., the claimant's] request [the court] gave him a copy [of this document][18] bearing the date of the 21st day of Dhū [15] 'l-Qa'da 1370 corrresponding to August 23, 1951.

[16] Witnesses to the proceedings (*shuhūd al-ḥāl*)[19]
[17] The Court ushers (*mubāshir*)
[20] 'Imrān Manṣūr al-Maghrī[20]
Mḥammad 'Abd al-Salām

[17] The matter being as indicated above
[21] Muḥammad al-Mabrūk Abī Jāziya
[18–19] The Shar'ī Nā'ib
in Charge of the Affairs of the Qāḍī of Ajdābiya

[18] The Qāḍī's role is here reduced to the hearing and registration of the assessors' testimonies without interfering with the principles of tribal law underlying the assessors' procedures. Under the *sharī'a*, the *qāḍī* may settle disputes of blood money (*diya*) in cases of unintentional injuries (*jirāḥ al-khaṭa'*). See Ibn 'Āṣim, *al-'Āṣimiyya*, 232f.; Glossary, s.v. *diya*, *jarḥ*. Nonetheless, it is worth noting that the test of the assessors' credibility was carried out in accordance with *shar'ī* procedures. The Qāḍī's supervision of the *shar'ī* procedures relating to the credibility test ensures token sovereignty of the *sharī'a* in a court case that had been conducted practically almost exclusively in accordance with tribal law. The registration of testimonies is intended to serve the interests of the boy's kinsmen at eventual proceedings pertaining to damages in Benghazi. Though written testimony is not counted under the *sharī'a*, the procedure of *shahādat naql* reflects a pragmatic approach on the part of the *shar'ī* Qāḍī.

[19] Professional witnesses and notaries are intended. See Glossary, s.v. *'adl*.

[20] See doc. 8, line 12. He acts concurrently or intermittently in two capacities: as a court usher and as a notary or professional witness. See Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks. Cf. doc. 17, fn. 8; and doc. 24, fn. 11 above.

Document 58

Introduction

Loss of virginity out of wedlock is tantamount to illicit intercourse, which under customary law implies disgrace to the bride's agnates and may entail severe sanctions. Bedouin would stipulate in the marriage contract that the bride should be a virgin. If on the day of the marriage the virginity test (*kashf*) conducted by women shows that the bride is not a virgin the marriage may be canceled or (if concluded) revoked and the bride (or her father) be requested to return the prompt dower. Dissolution of the marriage under such circumstances seriously diminishes the woman's chances to remarry. Moreover, due to the disgrace occasioned to the bride's agnates, she may be exposed to death threats.[1] Among the Bedouin in the Western Desert, if the bride is not a virgin, the wedding celebration is cut short, and the girl is sent away or killed by her father; the Bedouin maintain that a father may rightfully put his daughter to death when she is found guilty of pre-marital intercourse, or if it is proved that she engaged in any extra-marital sexual activity.[2] The *sharīʿa* takes a more lenient attitude in this matter.[3]

In the case under review, a man claimed that his daughter aged 8, while playing with her sister at home, fell on the sharp handle of a handmill breaking her hymen. A woman, probably a practitioner of popular medicine, examined the girl immediately after the accident, while she was still bleeding, and confirmed the girl's loss of virginity as a result of the accident. The girl's father requested that the facts be registered in the court's minutes and that a *sharʿī* document be issued to him for any occasion that might arise. More precisely, the document would testify, at the time of her marriage, that the injury did not occur in circumstances liable to disgrace the family.

The Nā'ib concurred taking the father's predicament into account. He had the father testify to his version in the presence of witnesses

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[1] See Peters, *Family*, 121–22 (a detailed description of the virginity test), 129.

[2] Obermeyer, 105, 122–23; Mohsen, 107–8; D'Emilia, 39 (If virginity is stipulated in the marriage contract, then lack of viriginty is a cause for dissolution of the marriage on grounds of *khiyār al-ʿayb*, option of defect); cf. Abū Ḥassān, 241–42; Glossary, s.v. *ʿār*.

[3] See Glossary, s.v. *zinā*; Peters, *The Role of the Qāḍī*, 81 (illegal defloration was regarded in nineteenth century Egypt as a case of bodily harm entailing damages).

and produced a declaratory judgment confirming the circumstances in which the girl broke her hymen. The Nā'ib did not proceed to hear the testimony of the practitioner who examined the girl immediately after the accident. The expert's report may be regarded as circumstantial evidence. Formally, we have here a judicial decision (*ḥukm*); in practical terms, however, the procedure is intended to achieve the same goal as that of *shahādat naql*.[4]

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[5]

[2] In the reign of his royal Highness Muḥammad Idrīs I Sovereign of the United Kingdom of Libya.[6]

[3] SENTENCE (*ḤUKM*) CONFIRMING THE RUPTURE OF THE HYMEN OF FAWZIYYA BINT AL-SĀʿDĪ ʿABD-AL-RASŪL
Entered in register no. 6/89, p. 56

[4] In the Sharīʿa Court of Ajdābiya, presided over by Muḥammad al-Ṭālib al-Hammālī, the Deputy (*nā'ib*) in Charge of the Affairs (*al-qā'im bi-aʿmāl*) of his honour the *sharʿī* Qāḍī. May Allāh dispose him to his obedience! Amen.

[5] Al-Sāʿdī b. ʿAbd al-Rasūl aged 40 from the Jlūlāt [branch] of the Zwayya[7] tribe (*qabīla*), born and residing in Ajdābiya identified (*maʿrūf*)[8] in my presence (*ladaynā*) in name and [6] person, appeared [in court] and made the following statement voluntarily (*mukhtāran*) and willingly (*ṭā'iʿan*) with the intention of testifying (*bi-qaṣd al-ishhād*):

> A few days ago, my daughter Fawziyya aged 8, [7] born to me by my wife Sālma bint ʿAlī Manṣūr was playing at home with her sister Ṣafiyya. [8] While chasing her aforementioned sister, she fell on the

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[4] See Layish, *Shahādat naql*, Case 8; docs. 4, 14, 48, 54, and 57 above, and 61, and 67 below.
[5] See doc. 1, fn. 2.
[6] See doc. 1, fn. 3.
[7] See De Agostini, *Cirenáica*, 408–9.
[8] See Glossary, s.v. *taʿrīf*.

sharp handle of a handmill and cut herself, and this caused the rapture of her hymen. And when [9] we saw her bleeding we brought her to a woman called Shanz [Kanz[9]] al-Zarfiyya [al-Zwayiyya?[10]] who examined my daughter, the aforementioned Fawziyya aged [10] 8. She discovered that her virginity was lost when she fell on [lit. hit] the handle of the handmill. And since this accident has been ordained [11] by Allāh the Exalted, I ask that it be registered at the Sharīʿa Court so that I may resort to [the document] whenever the need arises and to testify to its contents.[11]

All this occurred [12] in the presence of the [professional] witnesses listed below.

On the basis of what has been established by the aforementioned al-Sāʿdī ʿAbd al-Rasūl while he was in a state of legal competence (*ḥāla jāʾiza*) in *sharʿī* terms, as duly certified (*thubūt*) [13] in the presence of the aforementioned Nāʾib, the latter issued a judgment pertaining to what has been stated above, and had the undersigned [witnesses] testify to it. He then signed and endorsed it [14] and had it registered [in the *sijill*][12] on the 21st day of Dhū ʾl-Ḥijja 1371 corresponding to September 11, 1952.

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[9] This name appears in Layish & Davis, 21, line 8. Another possible reading: "Inez," which sounds as a foreign non-Muslim name. This reading may gain support from D'Emilia who reports that during the Italian rule *sharīʿa* courts would solicit medical opinions from Italian physicians regardless of their religious or ethnic affiliation, and that Islamic law acknowledges the eligibility of a non-Muslim (Christian or a Jewish) expert witness (D'Emilia, 38, fn. 3).

[10] Probably a practitioner of popular medicine or a midwife. Cf. *ʿārifa*, a woman knowledgeable in matters relating to females. See Rosen, 202.

[11] The girl's father was fully aware of the consequences under customary law of loss of virginity and this may well be the reason why he presented the case as an accident attributable to an irrevocable "act of God." In his distress he resorted to the Sharīʿa Court, rather than to tribal proceedings, to obtain a document certifiying that the girl had broken her hymen in circumstances that did not imply disgrace to her agnates. The resort to the Sharīʿa Court rather than to tribal justice may have been prompted also by considerations of discreetness. This document would presumably serve to forestall misunderstandings with a future husband and the resort to severe sanctions on the part of the girl's agnates. The document serves the same purposes of *shahādat naql*. See Glossary. Cf. Powers, *Women*, § 1.0.

[12] Fully cognizant of the father's delicate predicament, the Nāʾib is prepared to assist by enlisting the *sharʿī* sanction in favour of his sentence in the form of a declaratory document. The Nāʾib accepts the father's version *in limine*, that is, without even requiring the testimony of the woman who examined the daughter.

The signature[13] of al-Sāʿdī ʿAbd al-Rasūl
[15] the girl's father, the initiator of the statement

The witnesses to the proceedings (*shuhūd al-ḥāl*)[14]
[16] ʿUmar ʿAbd al-Rasūl
Mḥammad al-Bghīḍ
Mḥammad ʿAbd al-Salām

Muḥammad al-Ṭālib al-Hammālī
The Deputy in Charge of the Qāḍī's Affairs

[13] It may well be a fingerprint (*baṣma*).
[14] Of the witnesses called to testify, at least the last mentioned, is a professional witness. See Glossary, s.v. *ʿadl*; Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks.

Document 59

Introduction

A married couple brought forward a claim against a man who impugned the woman's reputation by using defamatory language regarding her moral behaviour.

The Qāḍī initiated a peaceful conciliation to settle the dispute by enlisting his religious authority for this purpose. He instructed the defendant to ask the couple's forgiveness, to compensate the woman with a gift of jewellery, and to refrain in the future from using defamatory language against her on pain of incurring the sanctions of Allāh on himself.

Text

[1] In the name of Allāh, the Merciful, the Compassionate.[1]

RECORD (*MAḤḌAR*) OF RECONCILIATION (*ṢULḤ*)

[2] In the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī Rāfiʿ ʿAbd al-Raḥmān al-Qāḍī. [3] May Allāh the Exalted grant him success!

[The two parties:] Ḥājj[2] Mḥammad b. ʿUmar Abī Udhun al-Miṣurātī, the first party, [4] and al-Bashīr b. Mḥammad al-Hādī together with his wife Fāṭma bint [5] Ibrāhīm al-Būrī, the second party[3]—[both parties] having been identified (*maʿrūfīn*)[4] in name and person, appeared [in court]. On requesting explanations (*istifsār*) [6] and responses (*jawāb*) from both parties, they responded [in a manner] not to be heeded or taken into account—[7] [the terms used] being prohibited by the *sharīʿa*, custom (*ʿāda*), and statute (*qānūn*).[5]

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[1] See doc. 1, fn. 2.

[2] See Glossary, s.v. *ḥājj*.

[3] In other words, the couple were the claimants and the latter the defendant.

[4] See Glossary, s.v. *taʿrīf*.

[5] It appears that the parties used expressions offensive to a woman's moral behaviour and inadmissible by any legal norm. The mention of the *sharīʿa*, custom, and statute, while indicating that the Qāḍī was fully aware of the distinction between them, was meant to highlight the reprehensible nature of the expressions under any circumstances.

However, for the sake of protecting the woman's good name [8] and sacred honour (*ʿirḍ*),[6] his honour the Qāḍī obliged them [to settle the dispute] by conciliation (*ṣulḥ*) which, in the eyes of Allāh, is a virtuous deed.[7] [9] [The Qāḍī] instructed the defendant, the aforementioned Ḥājj Mḥammad to appease the couple and to ask their [10] forgiveness and pardon for what had happened. The defendant complied and asked their [pardon], which they granted. [11] [The Qāḍī] also instructed the defendant Ḥājj Mḥammad to buy a [12] silver bracelet for the wife[8] and to restrain his tongue from resorting to such [defamatory] language [13] which is prohibited by the *sharīʿa*, and to refrain from [obscenities offensive] to the chastity (*ʿawrāt*)[9] of Muslim women, [14] because whoever defames Muslim women [exposes] his own women's good name to God's [retaliation], [15] and whoever draws [retaliation] on his women's reputation brings shame upon his own kin. [16] May Allāh grant success to all those [present here] for [the conciliation] will surely propitiate Allāh and his Prophet. [Allāh] is almighty [17] and worthy of all merit.[10]

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[6] See Glossary, s.v. *ʿirḍ*.

[7] The reference is to the Qur'ānic verse: 4:128. See also Layish & Davis, 72 lines 7–8, and 87 line 14; cf. Layish & Warburg, 189–90, 195–96.

[8] Compensation of the woman by means of a bracelet seems to be rooted in custom. See Colucci, *Tribù*, 33; Mohsen, 110ff. According to the customary law of Awlād ʿAlī, if someone causes a woman to abandon her husband, he must compensate the husband by payment of 100 Rial as *kabāra*, fine; in addition, he is prohibited from marrying this woman; Maḥjūb, 328; al-Jawharī, 204 (sexual offences). cf. Abū Ḥassān, 242–43 {if the husband defames his wife's moral behaviour without proving his allegation by evidence, her agnates may sue him under tribal law and he will be liable to pay compensation for causing damage to his wife's honour (*ʿirḍ*)}, 274, 276 (in a case where a woman impugned her daughter-in-law's reputation by accusing her of illicit intercourse, a tribal *qāḍī* ruled that the woman's tongue should be cut out but allowed her the option of redeeming it by payment of several camels or a certain amount of money); al-ʿAbbādī, *al-Ǧarā'im*, 244–45 (defamation of a woman's reputation implies defamation of the reputation of her entire tribe), 248–49 (a woman sued her husband under tribal law for using defamatory language towards her in the street thus causing damage to her reputation); Peters, *The Role of the Qāḍī*, 81–82 (defamation in nineteenth-century Egypt as a *ḥadd* offence entailed eighty lashes).

[9] *ʿawra*, lit. *pudendum* of female; a metaphor for female's chastity. See Glossary. Concerning *ʿawrāt*, see Qur'ān, 24:31, 58. For the customary connotation of the term, see Kressel & Bar Zvi, 28–29, 33, fn. 13 (the negative connotation of *ʿawra* in customary law). For a modern connotation, see Lombardi, 110, fn. 100.

[10] It seems that the defamation of the woman's virtue transpired in a moment of anger and was not intended to insinuate adultery on her part. The failure to prove such an allegation—for which four male eyewitnesses to the act of adultery would be required—entails a Qur'ānic sanction of 80 lashes (see Glossary, s.v. *zinā*;

Accordingly, a conciliatory (*ṣulḥī*) session[11] was convened [18] and all agreed thereto. The undersigned [19] [witnesses] testifed [to the procedings] on the date of October 23, 194[6], [corresponding to] the 27th day of Dhū 'l-Qa'da [20] 1365.

Witnesses to the proceedings (*shuhūd al-ḥāl*)
Mukhtār b. Ḥājj Mḥammad al-Turkī
Mḥammad 'Abd al-Salām[12]

[21] The matter being as indicated above
The Qāḍī of Ajdābiyya
[22] Rāfi' 'Abd al-Raḥmān al-Qāḍī

qadhf). Given the circumstances, the Qāḍī sought to rehabilitate the woman's honour (*'ird*) by conciliating the claimants. For this purpose, the Qāḍī acted in two capacities: as an arbitrator (*majlis ṣulḥī*—see line 17 below)—in the best tradition of the tribal judge (cf. Abū Ḥassān, 75)—and as a religious authority entitled to interpret the will of Allāh and to enlist his support. In his religious capacity the Qāḍī acts as a guardian of public morals.

[11] To be distinguished from a judicial session in which a sentence is handed down.

[12] A professional witness is intended here. See Glossary, s.v. *'adl*.

Document 60

Introduction

The document concerns a settlement, in the Sharīʿa Court, of a dispute relating to violation of the sanctity of the home under tribal customary law. A couple had quarreled over non-payment of residual dower due to the wife. The wife left the conjugal dwelling without the husband's permission and took refuge in her father's home. The husband followed her in order to discipline her and to bring her back to his home. He entered the house in the absence of her father and brothers, thus seriously violating the sanctity of the home and furnishing grounds for a legal claim under tribal customary law.[1]

The *sharʿī* Qāḍī offered his good offices to the disputing parties in settling the issue under tribal customary law. The woman's father demanded that the husband take an oath to the effect that he had no evil intent on entering the former's house and the latter complied. The Qāḍī required the husband to take his oath on a copy of the Qurʾān in order to promote the conciliation by enlisting a religious sanction. At this stage, one of the woman's brothers intervened before the oath-taking had been completed and stated that the dispute would not be settled unless the husband paid the entire amounts of the prompt and deferred dowers. After the husband had committed himself to doing so, the parties were reconciled and the Qāḍī had them sign the protocol for reasons of legal security.

Text

[1] In the name of Allāh, the Compassionate, the Merciful.[2]

[2] In the Sharīʿa Court [of Kufra], presided over by the Qāḍī Shaykh Muḥammad Ṣāliḥ al-Bakrī.[3] May Allāh the Exalted grant him success [and guide him towards] every righteous solution!

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[1] On violation of the sanctity of a home, see Glossary, s.v. *dakhl al-bayt*. On privacy in Islam, see Alshech.

[2] See doc. 1, fn. 2.

[3] Qāḍī of the Sharīʿa Cort of Kufra; see Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks.

[3] Shaykh Imjēḥīd of the Mnāyaʿ [lineage from the Sdēdī branch] of the Zwayya [tribe][4] and Shaykh ʿAlī al-ʿĒḍa of the Mnāyaʿ of the Zwayya [tribe], his son-in-law, appeared and presented their claim.[5] After examination [of the case] the Qāḍī urged them [saying]: [4] "God willing (*in shāʾa allāh*),[6] tomorrow you will attend court."[7] [Eventually] the aforementioned ʿAlī, Hēba b. Imjēḥīd and his brother Muṣṭafā appeared [in court] and a long dispute ensued between them. After a session that lasted [5] two hours, Hēba—on behalf of his father [Imjēḥīd]—demanded that the aforementioned ʿAlī take an oath (*yamīn*)[8] in order to appease him [i.e., his father] and to advance their interests (*ʿalā maṣāliḥihim*).[9] ʿAlī responded by asking: "Is the oath requested [6] from me intended to be a proof (*bayyina*) [that I had no evil intent]?."[10] Hēba answered him [as follows]:

> [The purpose of the oath is to prove us that] you came to our [father's] home for the sole purpose of consulting my father and to settle peacefully[11] the question of your wife, my sister.

ʿAlī answered him [as follows]:

> It's only fair to say that this oath [7] you oblige me to swear—I will take purely for your sake. I never caused your father or your brother harm [even] in trivial matters nor was there any encroachment (*taʿaddin*) on their right to a legal suit (*ḥaqq*) [on my part]. I did not bring accusations against them [for instigating] my wife [against me]. [8] [I entered] my father-in-law's home merely because I wanted to admonish (*tarbiya*)[12] my wife for disobeying me by going out without my permission and taking my daughter and bracelets belonging to me. I did not accuse[13] her [of a fault or vice]; but, [on the other hand], I

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[4] See De Agostini, *Cirenáica*, 407–8.

[5] The disputing parties are the woman's father and her husband.

[6] I.e., it is to be hoped. Cf. Stewart, *Texts 2*, Glossary.

[7] The Qāḍī invites them to settle in the Sharīʿa Court the dispute concerning the violation of the sanctity of a home (*dakhl al-bayt*) under tribal law.

[8] Cf. Stewart, *Texts 2*, 61 passim.

[9] If *maṣāliḥihim* is replaced by *muṣālaḥatihim*, the translation runs: "so that he [i.e., Imjēḥīd] joined their conciliation." The oath was intended to establish that the husband had entered the home in the absence of male kin thus violating—unintentionally, from his point of view—the sanctity of the home.

[10] Alternative translation: ʿAlī agreed to take the requested oath [6] as a proof (*bayyina*) [that he had no evil intent].

[11] Cf. Lane, 1766i (*ḍabaʿū ilā 'l-ṣulḥ*); *al-Munjid*, 445iii.

[12] Under both customary and *sharʿī* law, the husband is entitled to disciplining a disobedient wife.

[13] *lāʿiba* should be replaced by *lā ʿibtu*.

> reproached her [on her behaviour]. [9] As for the women[14] who want to destroy my house and hurt me by causing me injury (*ḍarar*) [by instigating my wife against me], I [admit having] talked with them [when I entered her father's home. However], as far as your sister is concerned, I neither hate nor detest her. [My entrance into her father's home was prompted by nothing] other than my earnest concern (*ghayra*) [for my wife's welfare]. [10] If she had been supportive I would have been glad and there would have been no hatred between me and the master of my joy (*ṣāḥib al-faraḥ*) [i.e., my father-in-law].[15] The first time I permitted her [to leave the conjugal dwelling], but the second time [11] I forbade her [to do so]. However, she responded with hatred and disobeyed me.[16]

Hēba replied:

> I wish you only luck and peace of mind. The news [relating to this dispute] reached me only today. I shall contact my father [in order to update him with your version], [12] and I shall inform you [of his response. However, frankly speaking], nothing could be graver than your entering our home in our [i.e., male agnates'] absence.[17] As far as I am concerned, this matter is the worst source of anxiety.

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[14] The wife's female relatives are intended here. As mentioned below, after she had taken refuge in her father's home, her husband entered the house in the absence of her agnates, thus exposing himself face to face to those women who probably accused him for violating the sanctity of the home.

[15] Cf. "tent of joy" (*bayt al-faraḥ*) in Kressel, *Descent*, 200. If *al-faraḥ* is replaced by *al-farj* (*pudendum* of female, a metaphor for female's chastity)—in which case the word *illā* could be spared—then the translation would be:

> [10] If she had been supportive [by obeying me in the conjugal home], I would not have seen the women (*al-farj*) [in her father's home] and there would have been no hatred between me and the master of the women (*ṣāḥib al-farj*) [i.e., my father-in-law].

[16] Cf. Peters, *The Role of the Qāḍī*, 93–4, 101 (the husband entered his father-in-law home in order to settle the dispute with his "angry" wife who had earlier left the conjugal dwelling); for further details, see doc. 41 fn. 12 above.

[17] The husband's entry into his father-in-law's home in the absence of male kin is considered a violation of the sanctity of the home. According to the customary law of the Awlād ʿAlī, if a person enters somebody's home (*dakhala . . . bayt*) in the absence of its owner, or during the night, with the intention to violate the sanctity of the home or to commmit an act of adultery with his wife (*bi-niyyat khiyāna li-ḥarīmihi*), he shall be liable to *kabāra*, fine, of 150 Rial (Maḥjūb, 328); if the owner of the home kills the violator while in the act of adultery, he shall pay a *diya* for unintentional homicide after deducting the prompt dower and the sum of 50 L.S. as damages for trespass on his tent (Murray, 317). In one case, a girl who refused to marry her paternal cousin, sought refuge with a "holy man." One night the cousin entered secretly the room where she was sleeping; she jumped from her bed and while running, fell and suffered rupture. The "holy man" sued the cousin in accordance with tribal customary law; he requested to punish him for violating his right for privacy, and the *ʿawāqil* imposed on the cousin a *kabāra* of 1000 L.E.

[ʿAlī] replied:

> This matter is not alien to me [i.e., I am fully aware of your concern. [13] However], I did not approach your home with evil intent.

When ʿAlī decided to take an oath [on his version], he [Hēba] excused him [i.e., ʿAlī from taking the oath], and transferred the matter to his father since he [Hēba] was his [father's] proxy (*wakīl*), and then they [Hēba and ʿAlī] both left [14] the courthouse.[18] Subsequently, Muṣṭafā Mjēḥīd, Ḥmēda Sāsya,[19] and the aforementioned ʿAlī returned [to the courthouse]. Muṣṭafā demanded that [ʿAlī] take his oath in order to appease them and satisfy [15] their father. Ḥmēda Sāsya [speaking for ʿAlī] replied: "We have not caused Mjēḥīd any delay [in settling the dispute] except in the matter of the oath which Hēba demanded."[20] ʿAlī responded:

> The oath is first and foremost; [16] if you agree to a final settlement of the issue[21] [i.e., relating to violation of the sanctity of the home], I shall take an oath [to prove my innocence] as I have already indicated [to Hēba].[22] If anyone is ill-disposed towards me with no provocation on my part, I trust that with God's help [17] [one's evil designs] will be directed towards him.

Muṣṭafā replied by demanding the oath which [ʿAlī] had undertaken. [ʿAlī] responded by asking him: "Will you regard the issue [of violation of the sanctity of the home] settled [after my oath]?." [ʿAlī] struck [18] his chest and said:

> Let us put an end [to the dispute], I agree [to settle the matter and proceed with the oath] and even a dog will not be able to stop it [the procedure].

The Qāḍī held out the noble Qur'ān and ordered ʿAlī to stand before him [19] and take an oath. When he [the Qāḍī] pointed to

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(Obermeyer, 234ff.); cf. Hart, *Penal Code*, 60; Salḥūt, 67 (the *masāḥa* that is considered *ḥurma* of the *bayt*); Glossary, s.v. *dakhl al-bayt*.

[18] In other words, the settlement of the dispute was left to Mjēḥīd's discretion.

[19] On another occasion, Muṣṭāfā acted as Ḥmēda's authorized agent in an effort to persuade the latter's wives to join their husband in the Sudan or, in the event of their refusal, to grant them *khulʿ* divorce. See doc. 18 above.

[20] Another possible translation: Ḥmēda Sāsya [speaking for Hēba] added: "Mjēḥīd did not grant us a mandate [to settle the dispute] unless [ʿAlī] swears the oath which Hēba demanded."

[21] Cf. Stewart, *Texts* 2, Glossary, 248ii (*mawādd al-rijāl*, lawful behaviour).

[22] See lines 5–6 above.

the noble Qurʾān.[23] Muṣṭafā stopped him [i.e., the procedure] and said:

> [Assume that] we have accepted your oath.[24] [However], in order to settle the dispute with my sister you [must meet] [20] the [financial] obligations incumbent on you, that is, the prompt (*muqaddam*) and deferred (*muʾakhkhar*) [dower].[25]

[ʿAlī] replied:

> I have already expressed my view on this matter. I have undertaken [to pay] the prompt [dower], out of which, one pound is overdue [21] and four [pounds] due as deferred (*muʾajjalāt*) [dower intended] to settle [the debt, the payment of which] will [be postponed . . .][26] until a date when I am in easy circumstances.[27] This applies also to the clothing (*kiswa*), which I cannot [. . .] afford [now]; this too I shall settle [22] according to the local custom (*ka-sāyir al-balad*).[28]

Both sides came to terms without coercion and left the court.

[The Qāḍī]:

> But for the help [of Allāh which enabled me to settle the question relating to violation] of the sanctity [23] of the home [. . ., I would not have succeeded in alleviating] his father-in-law's concern with respect to [violation] of the sanctity of his home. [And in this manner Allāh desired] to inform you [of his wisdom by means of the court

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[23] Taking an oath on the Qurʾān is intended to enhance the integrity of the witness and to deter him from taking a false oath. It also lends to the proceedings a religious character (see al-Ḥabbūnī, 34; Colucci, *Tribù*, 36–37; Layish, *Divorce*, 197–98; Hart, *Rgaybat*, 50; Abū Ḥassān, 228). The Bedouin in Jordan have a custom of requiring witnesses to take an oath on saints' tombs (al-Qusūs, 38). In the Judean Desert, arbitral awards frequently quote verses from the Qurʾān in support of the justice meted out by the arbitrators (see Layish & Shmueli, 41). Concerning an oath on the Qurʾān, see doc. 70 below.

[24] In other words, the defendant is exempted from taking the oath (cf. al-Qusūs, 38). The forestalling of the oath-taking here is tantamount to an acceptance of the husband's version as to his entering his father-in-law's home with no evil intent. Presumably the real motive behind this act was his concern to secure financial claims that were, in his view, of greater import than the oath. See line 20 below.

[25] The prompt dower is usually paid prior to the consummation of the marriage, and the deferred dower is paid in the course of the marriage. See Glossary, s.v. *ṣadāq muʿajjal* and *muʾajjal*.

[26] Three dots here and below stand for unreadable parts of the text due to ink stains.

[27] Cf. doc. 5, line 11 (*ʿalā ʾl-maysara*) and fn. 9.

[28] This is a clear indication to the effect that settlement of deferred dower payable in the course of the marriage is bound by local custom. See Glossary, s.v. *ṣadāq muʾajjal*.

case] that was assigned to me.[29] Let [Allāh] [24] be our pledge [lit. agent] (*wakīl*) to what I have said.[30]

Date: The 8th day of Qaʿda 1347 [25] [corresponding to] December 2, 1928.

[26–28] Al-Mudīr: Muṣṭafā Ḥsēn

[29–30] Ḥmēda Sāsya

[31] ʿAlī ʿAbdallāh

Muṣṭafā Imjēḥīd

[29] In other words, the Qāḍī indicates that this is not a usual case since he is not expected to deal with offences under tribal law. It seems that the parties resorted to the Sharīʿa Court because of the issue of non-payment of the dower, the issue of violation of the sanctity of the home emerging during the proceedings. For some reason the Qāḍī decided to proceed with the matter rather than to refer the parties to the tribal court. An alternative reading of line 23 compatible with this context is: . . . *wa-innamā ʿurfukum* (instead of *ʿarrafakum*) *mā taʿarraḍtu lahu*—". . . rather, it was your customary law that I was exposed to." Though one may find support for the institution of the sanctity of a home in the Qurʾān (24:27–28), there can be no doubt that the Qāḍī was referring to the institution in its tribal connotation.

[30] The Qāḍī here displays his piety by attributing all the wisdom in his judgment to Allāh. Cf. Glossary, s.v. *wakīl*.

SECTION THREE

SLAVES AND MANUMITTED SLAVES

Document 61

Introduction

A man claimed that 50 years previously his late mother had purchased a female slave[1] from an individual belonging to the same tribe in return for a camel owned by her. He requested the court to hear his witnesses testify to this effect and to issue a document recording their testimony. The witnesses endorsed the man's version, and the Qāḍī sanctioned their testimony, instructed that it be registered and issued an attestation of the conveyance of evidence (*shahādat naql*)[2] in favour of the plaintiff.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace.[3]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya. May Allāh the Exalted preserve him![4]

[3] ATTESTATION OF THE CONVEYANCE OF EVIDENCE (*SHAHĀDAT NAQL*)[5]
IN FAVOUR OF ʿALĪ B. FARAJ KADĀD
Entered in register no. 343, p. 272

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[1] For details on slaves in Kufra, see Hassanein, 179–81.
[2] See Glossary, s.v. *shahādat naql.*
[3] See doc. 1, fn. 2.
[4] See doc. 1, fn. 3.
[5] The practical significance of this procedure is the replacement of oral witnesses required by the *sharʿī* rules of evidence by written testimonies produced by the *sharīʿa* courts. Written documents are indispensable in commercial law and transactions. See Schacht, *Introduction*, 82f.; Layish & Shmueli, 30f.; Layish, *Shahādat naql*, Case 6.

[4] In the Sharīʿa Court of Ajdābiya, presided over by the Qāḍī Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him! Amen.

[5] ʿAlī b. Faraj b. Mūsā of the Shwāghir [branch] of the Zwayya[6] tribe [*qabīla*], identified (*maʿrūf*)[7] in person and name, appeared [in court] and made a statement claiming the following:

> About 50 years ago, while she was still alive, my late mother Fṭēma [6] bint Shalash b. Mḥammad al-Zwayyī purchased from ʿAlī [7] b. Masʿūd Abī Faṭra al-Zwayyī a slave girl (*ama*) called Mrēsla [?] for a camel owned by her.[8] I have brought with me two witnesses (*shāhidān*) called al-Dhīb b. ʿAbd al-Sayyid b. al-Dhīb and ʿUmar b. Yūnus b. Rḥīm, both [8] from the Zwayya tribe. I [hereby] request that the noble Sharīʿa Court question them [on this matter], register their testimony and give me [a document pertaining to] their testimony [that I can use] as the need arises.[9]

When the aforementioned witnesses, identified in person and name, were questioned, [9] they both gave testimony [whose truthfulness the witnesses deemed to be] beyond any shadow of doubt, corroborating in letter and spirit the statement of the aforementioned ʿAlī b. Faraj. [10] Both [witnesses] stated: "This is what we testify to. Let Allāh be our pledge [lit. agent] (*wakīl*) to what we have said."[10]

On the basis of [the statement] endorsed by the aforementioned witnesses, while both [11] were in a state of legal competence (*ḥāla jāʾiza*) in *sharʿī* terms, as duly certified (*thubūt*) before the aforementioned judge (*ḥākim*), the latter endorsed (*ajāza*) this testimony given

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[6] See De Agostini, *Cirenáica*, 407, 409.

[7] See Glossary, s.v. *taʿrīf*.

[8] Under *sharīʿa* law a slave is considered as property (*māl*) that can be disposed of in a legal transaction provided that the owner's rights over the slave are not restricted in any way. See Glossary, s.v. *ʿabd*. On sale of slaves in Mālikī law, see Ibn ʿĀṣim, *al-ʿÂṣimiyya*, 110, lines 737ff.; Ibn ʿAṭṭār, 33ff.; on slaves in Libya, see Davis, *Libyan Politics*, 111; idem, *Koufra*, 553; cf. Abū Ḥassān, 255–56 (aggressors are liable to pay slaves as fine). Cf. Abū Salīm, *Manshūrāt al-mahdiyya*, 209 {the Mahdī ruled in one case that if a slave had been donated to the wife after the conclusion of the marriage contract, the donation should be considered as a gift (*hiba*); if, however, the slave had been stipulated in the marriage contract, the donation should be considered as part of the dower}.

[9] Having inherited the slave girl from his mother, the initiator of these proceedings requires a document stating that the girl is his property. Such a document would be necessary in the event that he chose to sell her.

[10] This is a pious expression calculated to enhance the credibility of the witness. See Glossary, s.v. *wakīl*.

on the responsibility of both witnesses, signed it, and had the undersigned [professional witnesses] testify (*ashhada*) [12] to it, and instructed that it be registered.[11] [The testimony] was registered on the 14th day of Shaʿbān 1373 corresponding to April 17, 1954.

Signatures to the protocol (*ḍabṭ*).

[13] Witnesses to the proceedings (*shuhūd al-ḥāl*)
[14] ʿImrān ʿĪsā
Mḥammad ʿAbd al-Salām[12]
The Nā'ib Muḥammad [al-Ṭālib] al-Hammālī[13]

The matter being as indicated above
The Qāḍī of Ajdābiya
[15] Ḥusayn Muḥammad al-Aḥlāfī

[11] The Qāḍī issues a declaratory judgment acknowledging the acquisition of the slave girl by the man's mother 50 years previously. The reference to the witnesses' responsibility here is meant to underscore the fact that the Qāḍī is completely dependent on their integrity, particularly since no test of their credibility (*tazkiya*) appears to have been administered. The system governing rules of evidence in Islamic law is completely based on witnesses' integrity. See Glossary, s.v. *tazkiya*.

[12] These witnesses seem to be notaries. See Glossary, s.v. *ʿadl*.

[13] The Nā'ib seems to function here as a notary. Cf. Peters, *Shāhid*, 208; see Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks.

Document 62

Introduction

A manumitted slave girl[1] claimed after her patron's death, at the time of the apportionment of his estate, that he had during his lifetime made her a gift of a portion of a date palm. The patron's widow, who had apparently taken possession of the property, denied the manumitted slave girl's version claiming that the date palm had been given to her, probably as part of her dower. The other heirs endorsed the manumitted slave girl's version and the Nā'ib handed down the sentence in the latter's favour.

Text

[1] Fāṭma, the manumitted slave girl (*ʿatīqa*) of Ghēth Bū Gandīl, claimed that her patron, [2] the aforementioned Ghēth, had made over to her [as a gift] (*aʿṭāhā*) a date palm called "al-Sakra."[2] [3] Ḥawwā', Ghēth's wife [i.e., widow] denied his having given it to her [i.e., Fāṭma] on the grounds that he had previously given (*ʿaṭiyya*) [4] it to herself [i.e., Ḥawwā' as part of the dower].[3] I asked [the

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[1] For details on manumitted slaves in Kufra, see Hassanein, 180–81.

[2] The document does not reveal under what circumstances the slave girl was manumitted. However, since a slave lacks the capacity of disposing of property, and since it is indicated that the date palm was given to her in his lifetime, it would seem that her manumission occurred before his death. This would further seem to imply that we are not dealing here with a case of *umm walad*, i.e., one in which a slave girl gives birth to offspring that is acknowledged by her patron, in which circumstance the slave is automatically manumitted upon the patron's death. The document also fails to reveal under what circumstances the date palm was made over to her; it nevertheless reflects the intimate nature of the relationship between the patron and the slave girl. In view of the fact that a manumitted slave is not entitled to inherit from a patron, the making of a gift is one way in which the patron can transfer in his lifetime estate to a manumitted slave. Other ways of circumventing the law of inheritance are *waqf* and the making of a will. See Glossary, s.v. *ʿabd*, *ʿaṭīqa*, *umm walad*; Baer, *Waqf*, 275–79; Layish, *Mālikī Waqf*, 28ff.; idem, *Family Waqf*, 354–56, 384ff.; cf. doc. 15 (Maḥmūd b. Warduqūh al-Tibbāwī, patron of a freed female slave) above.

[3] On this very day, the widow Ḥawwā' was involved in a further dispute with other heirs concerning a certain *sāniya* on her husband's estate (see doc. 46 above). In this case, however, she succeeded in proving that the *sāniya* had been given to her by her husband in return for residual dower, and the Qāḍī ruled that, excluding certain portions of it belonging to the praepositus' son, the *sāniya* was her rightful property.

legal heirs] if [Ghēth] had made it over to Fāṭma on a previous occasion. [5] The heirs (*waratha*) endorsed [Fāṭma's claim].

[The Nā'ib ruled that] Fāṭma's ownership of the date palm and the land attached to it [6] was established (*bārida mubarrada*).[4] It was for the purpose of recording this [ruling] [7] that this [document] has been issued and registered[5] on September 22, 1932.

[8] Nā'ib al-Qaḍā'[6]
[9] Aḥmad al-Khaḍrī

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[4] Cf. Lane, 183iii, *barada*: "It (a right, or due) became incumbent, or obligatory, and established," as in the example *barada lī ḥaqqī ʿalā fulānin*—"My right, or due, became incumbent, or obligatory, on such a one, and established against him;" Barthélemy, 35, *barrad ḥaqqī*: 3. "devenir propriétaire d'(un immeuble) par des chicanes . . .;" 4. "établir (son droit): *barradt ʿandak miyye wxamsīn qrš*—"J'ai arrêté notre compte qui se solde par cent cinquante piastres à ton débit;" Ibn Manẓūr, *Lisān*, s.v. *bārida*; Glossary, *bārida*. In colloquial Arabic the phrase means: "easily, with no trouble, with no bargaining;" personal communication from Mr. Muḥammad Ṭāṭūr (Galilee). Cf. docs. 5:10, and 6:16–17 where customary deferred dower is couched in a rhymed legal maxim. The Italian summary at the end of the document fails to provide a translation for this phrase.

[5] The declaratory judgment concerning the validity of the gift was issued within the framework of the apportionment of her patron's estate. It seems that the praepositus' widow took possession of the date palm in dispute owned by the manumitted slave. Thus the judgment was required in order to exclude the widow from the property. It is noteworthy that the initiator of legal proceedings here is the manumitted female slave herself. Given her weak standing within the agnatic family, the *sharīʿa* court is her only resort; cf. Introduction to this volume, p. 5; Layish, *Legal Documents*, 3; Davis, *Libyan Politics*, 223.

[6] The Italian summary (see fn. 4) displaying the official stamp and signature of the Military Governor states that the Nā'ib's sentence had been examined and endorsed, and that it was to be executed. This constitutes a further example of the Italian administration's attempt to implement public policy through normative supervision of the sentences issued by the *sharīʿa* courts. See Preface to this volume, xii; Layish, *Divorce*, 6.

SECTION FOUR

PROPERTY, OBLIGATIONS AND CONTRACTS

Document 63

Introduction

The document deals with division of land in Tazarbu held by a section of the Zuwayya tribe.[1] This settlement consists of a group of oases situated about 200 kilometres north-west of Kufra. No information on land tenure in this particular area is available to me beyond the fact that the land is held by fractions of the Sdēdī and Jlūlāt sections of the Zwayya tribe.[2] Evans Pritchard reports that "[a]ncient rights [the essence of which he does not specify] in the lands of Cyrenaica rested with the Saʿadī tribes . . .,"[3] and that disputes about land ownership were settled either by war or by negotiation between the parties. The state attempted to put the reformist 1858 Ottoman Land Code defining specific categories of land—land in private ownership (*mulk*), state land with rights of usufruct (*taṣarruf*) reserved to individuals (*mīrī*), etc.—into effect in Cyrenaica. An official committee earmarked the lands around Benghazi and Darna for the use of their inhabitants and the rest of the country (with some important reservations, such as barren hills and deserts) for the use of tribes holding it. In actual fact, however, the new land code did not apply to land held by Bedouin which continued to be regulated under customary land law. Individual tribesmen were not requested to acquire titles to land by participating in the official land settlement. The State nevertheless claimed the entire land held by tribes by reason of their legal classification in the *mīrī* category. In other words, the State acknowledged the tribes' rights of usufruct (rather than ownership) *vis-à-vis* the land. The tribal boundaries were fixed by a special

[1] Bertarelli, 515; Davis, *Libyan Politics*, 6 (map), 107.
[2] De Agostini, *Cufra*, 35; idem, *Cirenáica*, 407–9; see document, line 3 below.
[3] See p. 221; no reference to his sources is provided.

governmental committee. The Italian Land Registry followed the Ottoman practice: it classified lands held by tribes as *mīrī* while acknowledging the occupiers' rights of usufruct, and allowed tribal disputes to be settled by tribal custom. In 1923 the Land Registry took the first steps towards an assessment of lands held by tribes.[4]

According to Ibn Mūsā, there is evidence dating back to late Ottoman rule in Cyrenaica (prior to the land code of 1858), that the land was held by the tribesmen through collective, rather than individual, ownership (*mulkiyya jamāʿiyya*), that is, *mushāʿ*.[5] The shaykh and the leading personalities (*aʿyān*) of the tribe would parcel out the land among the clans (*ʿā'ilāt*) in accordance with their size. In order to prevent a potential claim, on the part of any clan, to permanent possession (or ownership) of any specified plot of land, the division was made on a basis of yearly rotation (*tatadāwal*). The Fwākhir in Cyrenaica also claim the tribal territory (*waṭan*) as belonging to the entire tribe collectively (the members of the tribe being partners, *shurakāʾ*), and maintain that the land held by the tribes is possessed and cultivated in common and should be defended by the tribe as a whole.[6]

In the Western Desert, the land as a whole belongs to the state (Egypt); possession (to be distinguished from ownership) of land and water is considered under the law as a right of usufruct. The Awlād ʿAlī, however, claim ownership of the land on the ground that the clan-owned land, with few exceptions, was parceled out (*taḥdīd al-arḍ*) to them a long time previously. The reference here seems to be to prescriptive titles, that is, acquisition of right of ownership by individuals by virtue of uninterrupted disposition, cultivation, and reclamation of land for a specified number of years. Land held by the tribe is divided according to "regions of possession" (*manāṭiq al-ḥawz*)

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[4] Evans-Pritchard, 221–23; Colucci, *Tribù*, 27.

[5] Ibn Mūsā, 108 (no source is provided to support this assertion); Colucci (*Tribù*, 29), on the other hand, maintains that involved here are collective rights of cultivation (rather than ownership) within the framework of the clan's agnatic group (*bayt*) up to a maximum of four generations. Cf. Pellat, *Mushāʿ*, 667. On *mushāʿ* in Islamic law, see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 140–41, line 951; cf. Ibn al-ʿAṭṭār, 188 (*ishāʿa*); on *mushāʿ* in the Middle East, see al-ʿAbbādī, al-*Ǧarāʾim*, 74–76; Baer, *Agrarian Relations*, 67ff.; idem, *Population*, 148–49; Gerber; Kressel, *Descent*, 127; Nadan.

[6] Ibn Mūsā, 108; Albergoni, *Droit coutumier*, 111, 113, 119, 126, 130–1; idem, *Écrire la coutume*, 30, 32, 41, 43; al-Zuwayyī, *al-Bādiya*, 262; Khayrallāh, 33; Colucci, *Tribù*, 29.

and each clan (*ʿēla*) has its own territory. Traditionally, no clan could use the pasturage or water of the tribe without some agreement, usually of long standing, made beforehand. These agreements were made between clan representatives. In cases where encroachment or trespassing on the territory of another lineage occurred, the dispute was brought before a special tribal court which decided the matter by administering oaths.[7] This procedure may perhaps throw some light on the case under review.

The document addresses a case in which a section of a tribe in Tazarbu divided land among the clans by means of lottery (*qurʿa*); this procedure suggests that we are dealing here with Bedouin who are settled or in the process of sedentarization. Representatives of various clans (*ʿā'ila*s, *ʿēla*s, *ʿayth*s)[8] assembled at the home of one of the *shaykh*s in order to make procedural arrangements to this end to come into effect the following year. The area in question comprises various types of land, mostly uncultivated. According to customary law, the division is expected to be carried out as equitably as possible; in other words, each clan is expected to receive its proper share of each of the various types of land available.

The land division is implemented on the basis of the proportional (though unspecified) share (*sahm, khazz* in Mālikī literature) in the entire holding to which each clan is entitled. Shares are measured by units of land of similar type, size, or value (*lijām*; pl. *lujum, aljima*) with a view to ensuring equality (*musāwā*) as far as possible between all the units. There is no indication in the document as to the criterion for the distribution of the *lijām*s among the clans. The number of *lijām*s to be assigned to each of the clans may be decided on the basis of the number of married men in the clan, or according to the number of ploughs.[9] In order to attain an equitable (*ʿadl*) parcellation among the clans, each of them receives its proportional share, in *lijām*s, by lottery in each of the various types of land.

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[7] See Maḥjūb, 265, 320–21; Obermeyer, 59, 226–27; Murray, 328; Colucci, *Tribù*, 29.

[8] *ʿAyth* is a Berber equivalent for *ʿā'ila*.

[9] Cf. Albergoni, *Droit coutumier*, 130–1 (division of land titles to each of the heads of the clans "en fonction de sa position dans la généalogie"); idem, *Écrire la coutume*, 34, 46 (*ashum*, proportional portions of the land calculated on the basis of the genealogy of each clan's head; "genealogy" in this context seems to refer to the number of men in the clan); Colucci, *Tribù*, 29 (the land is divided according to the number of ploughs).

According to the agreement reached between the heads of the clans, no transaction relating to the plots in question is permitted without the unanimous consent of the parties; any transaction effected without such a consent is considered null and void, and the proceeds of the sale is returned to the buyer.

Regardless of the customary character of this agreement, the Qāḍī had it registered—more than 30 years after it had been reached out of court—in its original version without any attempt on his part to intervene with respect to its form and substance. This procedure was presumably intended to impart *sharʿī* sanction to the agreement.

Division of jointly-owned property (*mushāʿ*) by lottery is, however, recognized also by the *sharīʿa*. According to the Mālikī jurist Ibn ʿĀṣim, when the property is not of the same type and cannot be measured, as in the case of immovables of different kinds, it has to be divided into units—each unit resembling (*tamāthul*), that is, equalizing in terms of value the other units. The division should be made on the basis of an estimation (*taqwīm*), probably in monetary or equivalent terms, of each type of property. Only then will the units be allocated by lottery to the owners of the property. Such a lottery is deemed valid under the *sharīʿa* and may be imposed on anyone who refuses to take part in it.[10] It may well be that the *sharʿī* procedure of *qurʿa* described by Ibn ʿĀṣim reflects in fact Mālikī judicial practice (*ʿamal*).[11]

Text

[1] In the name of Allāh the Merciful, the Compassionate. [2] Praise be to Allāh alone![12]

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[10] See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 140–41, lines 950–51, note 721. Ibn al-ʿAṭṭār (188–91) provides a "document of division by lottery" (*kitāb qasm qurʿa*) which may give a clear notion of the application of lottery in practice: A jointly-owned property consisted of two portions—a paved courtyard (*qāʿa*) that could be measured by units of *dharʿ*, and a building that could be estimated (*taqwīm*). The two portions were found to be of equal value (*iʿtadalat*) and only then were they divided by lottery to each of the co-owners; ʿIllaysh, vol. 2, 106; Mohsen, 39; cf. al-ʿAbbādī, *al-Ǧarā'im*, 172, 392, 411–13; Abū Ḥassān, 278; Kressel, Ben David & Abū Rabīʿa, 60 (division of land held under the system of share-cropping, i.e., lease of land in exchange for a part of the crops, regulated by lottery among the Negev Bedouin); Baer, *Agrarian Relations*, 100ff.; idem, *Population*, 147f.; Nadan, 337.

[11] Berque, *ʿAmal*, 429 (contracts pertaining to land tenure); doc. 65 below; Layish, *Shahādat naql*.

[12] Cf. doc. 1, fn. 2.

Sīdī[13] Sālim Bū Yaʿqūb appeared before me in order to confer about the division (*qasāma*) of uncultivated land [3] in Tazarbu. He addressed the Ḥwēj lineage (*ʿā'ila*) [one of two sections of the Jāballāh clan of the Jlūlāt section of the Zwayya tribe][14] and they [subsequently] convened at the home of Shaykh Bū al-Shanāf al-Ghadāmī [4] together with the al-Bāba lineage [the other section the Jāballāh clan]. They convened a gathering at an appointed time (*mīʿād*)[15] in order to divide [the land] among themselves the following year,[16] God willing, [5] [on the basis of] the 34 *lijām*s[17] constituting the entire land [in question]. [The division is to be carried out as follows:] the Ḥwēj lineage [is entitled to] 20 *lijām*s, [6] the al-Bāba lineage—to 18 *lijām*s;[18] eight [out of the *lijām*s belonging to these two lineages] are to be excluded [from the *lijām*s assigned to the aforementioned lineages], as follows: four belonging to the al-Bāba lineage [to be reassigned in the following manner:] four [7] belonging to the ʿArēq lineage and the Ḥsēn lineage, i.e., two *lijām*s each. Out of the total [number of *lijām*s] due to the Ḥwēj *ʿayth*, [8] four [out of 20] *lijām*s are to be excluded from the lottery (*yakhrujna min qurʿa*) in order to be reassigned—two *lijām*s each—to the ʿAgēla [*ʿayth*] and the Duggān *ʿayth*.[19] All the land owned by them [in Tazarbu] [9] will be divided

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[13] Here in the sense of Mister rather than the honorific that usually precedes the names of Muslim saints.

[14] See De Agostini, *Cirenáica*, 407–9.

[15] Tribal meeting or council for discussing disputes between individuals and vengeance groups (*ʿumarā' al-dam*), or for taking a decision of detachment from any responsibility for the action of a particular person (*brāwa*), or settling the terms of *ṣulḥ* agreement. Every lineage (*ʿā'ila*) has its own *mīʿād*. If the parties belong to different lineags, they will attend a *mīʿād* of neutral lineage. See Maḥjūb, 206; Albergoni, *Droit coutumier*, 118; idem, *Écrire la coutume*, 31 n.17; Colucci, *Tribù*, 31–32, 35–36; idem, *Istituti*, 263; Mohsen, 2, 44, 99ff., 129, 132–33, 136, 154–55; cf. Stewart, *ʿUrf*, 889; idem, *Texts 2*, Glossary, under *wʿd*; Abū Ḥassān, 78 (*mawʿid*).

[16] In the Marmàrica area, the land is being divided during the sowing for one agricultural season); Colucci, *Tribù*, 29.

[17] I have no source that explains the meaning of the term. From the context of the document, I infer that we are here dealig with units of land of similar type, size, or value for the purpose of conducting a lottery among the clans. See the Introduction of this document; see Glossary, s.v. *lijām*.

[18] The combination of the two numbers is 38 *lijām*s, rather than 34 as mentioned above. However, four *lijām*s are to be excluded from this lottery; see below.

[19] It may well be that these four *lijam*s will be reassigned to the latter two *ʿā'ila*s by another lottery. The Mālikī jurist Ibn Qāsim (d. 191/806), while applying the *qurʿa* procedure, takes into consideration the desire to secure the integrity of the agnatic patrimony. Thus in the presence of a widow the estate consisting of different types of property is divided into eight equal units. The widow takes one unit which

among each of them on the basis of the number (*ʿalā ʿadad*) of *lijām*s [due to each lineage. After having divided the entire uncultivated lands by means of lottery], and no other [uncultivated] lands are available [for division], [10] the Jāballāh clan[20] has the option (*takhyīr*) [to effect the division of land] even with respect to cultivated land (*arḍ mazrūʿa*), in which case the division (*qasāma*) will be carried out among [the lineages] in the same way [i.e., by lottery, as in the case of the uncultivated land] (*wa-mithluhā*).

Any [outside] person who buys [land] without the general consent (*amr*) [of the members of the tribe] [11] will have his money returned to him after reduction of the expenses (*taʿb*) [incurred in the reclamation of the soil].[21]

[This agreement was reached] in the presence of all the [lineages and persons, as follows]: the Ḥwēj *ʿayth*, the al-Bāba *ʿā'ila*, Shaykh [12] Bū Shanāf al-Ghadāmī, ʿAgēla b. Dā'ūd, Bū Bakr Ḥamad, Bū Maghrib, Saʿd b. Ḥamad al-Bāba, Mḥammad b. [13] ʿUmar, Mḥammad b. Dakhīl, Mūsā Bū Gharbī and the entire Jāballāh *ʿā'ila*.

The writer (*kātib*) of this [document] is Ṣāliḥ al-Bāba.

[14] [Drawn up] on the 25th day of Rabīʿ Thānī 1343[H corresponding to November 23, 1924].

All immovable property including cultivated land (*ʿamār*) in our possession shall be divided equitably (*inṣāf*) among us as was done in al-Kufra or [15] al-Ṭlēlīb.[22]

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is her *sharʿī* share in the estate; however, the lottery with respect to her unit is confined to units located on the edges of the estate (rather than in the midst of a building or a plot of land). The rest of the units are divided by lottery among the other [agnatic?] heirs. See Ibn al-ʿAṭṭār, 189.

[20] As noted above (lines 3–4), the Ḥwēj lineage and the al-Bāba lineage are two sections of the Jāballāh clan.

[21] Cf. *khasāra*, loss, in terms of investment in a *sāniya* within the context of division of land between two tribes (Layish & Davis, 103, no. 146, lines 15–16). The land, or the rights of usufruct, belong to the entire tribal segment and not to the private individual, so that no land transaction outside the group can be validly made without the latter's unanimous consent. Cf. Peters, *Bridewealth*, 153; Mohsen, 9. The sale of land outside the lineage may be regarded as an encroachment on the lineage's rights (see Introduction to this document above). The prohibition of land transaction outside the group corresponds with the customary tribal pre-emption (*shufʿa*) granting preference to the member of the tribe over the stranger in the matter of land purchase. The right of pre-emption survives even after the division of land between the heirs and its conversion into private ownership; Colucci, *Tribù*, 29. Cf. al-ʿĀrif, 238.

[22] See De Agostini, *Cirenáica*, 407.

I, Ḥamad b. Maghrib Ḥwēj, [hereby declare] that [the above statements] attributed to me are valid (*ṣaḥḥa*).

The 25th day of Rabīʿ Thānī 1343[H corresponding to November 23, 1924].

[This document] has been copied [in court] [16] from the original [agreement reached out of court] in the presence of the late Ṣāliḥ al-Bāba, may Allāh rest his soul Amen, on the 7th day of Ṣafar, 1377 [corresponding to] September 2, 1957.[23]

[17] [These proceedings transpired] before the Qāḍī [at the Sharīʿa Court of al-Kufra][24] Sīdī Muḥammad Ṣāliḥ al-Bakrī. May Allāh pardon him, Amen.

[18] This document is an exact copy [of the original].

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[23] In other words, 33 years elapsed between the date when this agreement was reached out of court and its registration in court. The reason for the registration of the agreement seems to be the desire to enlist the *sharʿī* sanction of the Qāḍī in order to avoid disputes with respect to the division of the land held by the tribe between the lineages for the purpose of cultivation. The records of the Libyan *sharīʿa* courts offer many examples of disputes caused by sedentary Bedouin taking possession of land and cultivating them. See Ibn Mūsā, 108–9.

[24] The agreement was drawn up out of court according to pure custom (cf. Stewart, *Texts 1*, 128) and was after a prolonged interval copied in the Sharīʿa Court with the aim of imparting *sharʿī* sanction to its contents. The Qāḍī co-operates in this process without any attempt on his part to intervene in any way in the content of the tribal agreement. As noted earlier, division of jointly-owned property by lottery is recognized under Mālikī doctrine and this may account for the Qāḍī's co-operation.

Document 64

Introduction

Two men testified in court that by virtue of the power of attorney conferred on them by the legal heirs of a praepositus, they had sold to a third party, not present at the court proceedings, property belonging to the deceased person. The sellers obligated themselves to honour any financial claim that might arise with regard to the object of the sale. The entire price of the property was paid to the sellers, and the Qāḍī endorsed by declaratory judgment the validity of the sale.

Text

[1] In the Sharīʿa Court of Kufra, presided over by Shaykh Muḥammad Ṣāliḥ al-Bakrī. May Allāh the Exalted grant him success!

[2] Jābir b. Maghrib al-Grēd and Ḥamd b. Mḥammad Fannūsh, identified (*maʿrūfān*) in person and by descent (*nasab*) before the Qāḍī,[1] appeared and testified [3] in the Sharīʿa Court, willingly (*ṭāʾiʿān*) and voluntarily (*mukhtārān*), with the intent of testifying (*bi-qaṣd al-ishhād*) about themselves [4] while both were in a state of legal competence (*ḥāla jāʾiza*), in terms of normal prudent judgment to dispose of property (*rushd*),[2] physical health, and freedom of choice (*ikhtiyār*). They claimed in their statement that they had sold (*bāʿā*)[3] [5] Mḥammad b. ʿAbd al-Qādir Abū Ṭwāgī al-Musmārī the house of the late Yūnus b. ʿAbd al-Raḥmān Ḥmēd located in the town of [6] Kufra, by virtue of a power of attorney (*wakāla*)[4] sent to them by the heirs (*wurathāʾ*) of the deceased residing in Jalu. [The house sold] was located on a site in al-Zāwiya and comprised two lodgings (*dār*), [7] and the space [around the walls of the house] (*khilālī*),[5] a courtyard,

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[1] See Glossary, s.v. *taʿrīf*.

[2] See Glossary, s.v. *rushd*.

[3] On sale of immovable property under Mālikī law, see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 102, lines 678ff. Cf. Schacht, *Bayʿ*; Glossary, s.v. *bayʿ, ījāb wa-qabūl*. Since the buyer was not present at the court proceedings, it seems reasonable to conclude that the sale was accomplished out of court, in which case the Qāḍī was requested to hand down a declaratory judgment concerning its validity.

[4] See Glossary, s.v. *wakāla*.

[5] See Lane, s.v. *khilāl al-dār*, 780ii.

and a toilet. Included in the sale is [another] courtyard located to the east of the house (*bayt*), whose breadth is equivalent to [8] that of the building belonging to ʿAlī Shīlū's heirs, and whose length is equivalent to that of the house sold. [The property for sale] does not include the well[6] and its sacred ground (*ḥaram*).[7] [The house] has a pathway (*shāriʿ*) [possibly an open water channel] [9] which encloses [each of the components of the entire property] and is intended to provide drinking water for everyone. The gate [of the house] opens on its eastern side. [10] On its eastern side it [the house] borders on the portion (*ḥiṣṣa*) [in the estate] belonging to Ḥawwāʾ bint Ḥmēda Garjīla, the wife of the aforementioned Yūnus,[8] and on the pathway for pedestrians which divides [11] [the house] from the slaughter house. On its southern side [it borders on] the house of ʿAlī Garjīla's heirs, and on its western side, [12] on the house of ʿAbdallāh Ṭbūlī, and on its northern side [it borders on] the desert. The sellers committed themselves to honour any claim

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[6] According to Awlād ʿAlī customary law, it is prohibited to sell the water of Roman wells because they are considered tribal property; only members belonging to the tribal vengeance group are entitled to use its water; an outsider is prohibited from using the water unless he has permission to the contrary; see Maḥjūb, 205–6; Mohsen, 8; cf. Albergoni, *Droit coutumier*, 114 (in the tribal territory of al-Fwākhir in Cyrenaica, cisterns and irrigated gardens are regarded as the collective property of the tribe; hence, it is prohibited to sell them outside the tribe); idem, *Écrire la coutume*, 33 (alienation of cisterns and irrigated gardens outside the tribe is null and void; it is also prohibited to cause any change in the boundaries of the tribal land without prior consent and provided it has been established that the transaction serves the general interest of the tribe); Evans-Pritchard, 36, 55 (wells and cisterns belong to the entire tribe); Khayrallāh, 208 (Law No. 9 of 1959 provides that special committees should be established for resolving tribal disputes in matters pertaining to land ownership and tribal wells), 271 (wells are regarded as tribal *mushāʿ*). Under the *sharīʿa* the well is prohibited for sale because of the uncertainty (*gharar*) involved with respect to quantities of water obtainable from the well. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 102, line 688 and note 539; Schacht, *Bayʿ*, 1111ii, 1112ii.

[7] Among the Bedouin in Jordan it is customary to keep a plot of one to three dunams around the well as indivisible part of the private ownership of the well. This ground, which is called by way of metaphor "*ḥaram li'l-biʾr*," is meant to serve as a gathering place for the camels arriving at the well to drink water (*wurūd*) and as a plane for collecting water flowing into the well during winter; see al-ʿAbbādī, *al-Ǧarāʾim*, 392; cf. Peters, *Paucity*, 192; Hakim & Ahmed, [10 ("The *harim* also refers to a space surrounding a well that protects it from damage, maintains the well's integrity, and prevents the pollution of its water."), 45–46]; O'Fahey & Radtke, 75 (*ḥaram*, land belonging to the tribe, alienated and made "inviolable" in the sense of "sanctuary" for a specifically religious purpose); doc. 60 above.

[8] This would seem to indicate that the widow of the praepositus actually received her *sharʿī* portion in her dead husband's estate.

that might be presented in the future by any claimant (*qā'im*) concerning the restitution of the object of the sale in case of defect (*darak*),[9] [13] and absolved the buyer of any liability to further payments.[10] Any outlay on the part of [the buyer] will be reimbursed to him.[11] [14] [Should any claim arise], the presence of [either seller] suffices in the absence of the other.[12] [The sale was concluded] for the price of 11 Egyptian pounds, and [the sellers] collected [this amount] in full from [the buyer].

Since [15] no further payment or residue of payment out of this amount is due (*ḥaqq*) to them, the sale was rendered valid (*ṣaḥīḥ*)[13] under the *sharīʿa*, [the house] becoming valid private property (*milk*) [16] and an integral part of the buyer's domain to be disposed (*yataṣarraf*) of at will. Each of them [the parties] is in full possession of all the faculties required [17] by the *sharīʿa*. The Qāḍī ruled to this effect [i.e., endorsed the sale], and signed it. This transpired in the precincts where the Qāḍī is officially located. [The Qāḍī] instructed that it be registered on the 6th day of Jumād Awwal 1362, [corresponding to] May 11, 1943.[14]

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[9] See Glossary, s.v. *darak*. Cf. doc. 52, fn. 13 above.

[10] The sellers committed themselves to honour out of the estate any justified financial claim relating to the object of the sale, such as debt on the estate, that might arise after the conclusion of the contract of sale. For his part, the buyer, who purchased the object of sale in good faith, could not be held liable to settle any claim whatsoever.

[11] See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 134, line 898. Cf. Goitein & Ben Shemesh, 183.

[12] In other words, the presence of one of the sellers is sufficient for the settlement of any claim that might be made in the future against the sellers.

[13] It is worth noting in this connexion that payment of the entire amount due for the object of sale is not a necessary precondition for the validity of the transaction. It is possible to defer payment to a later date after the sale has been validated; see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 102–3, line 679.

[14] Four months later, on September 17, 1943, the buyer sold the same house for the price of 15 Egyptian pounds; see Layish & Davis, 106, no. 143.

Document 65

Introduction

A dispute arose between a woman, Sāmya, and her brother-in-law, Yūnus, concering a *sāniya*[1] originally held by her husband, Mḥammad. It is not entirely clear on what basis Mḥammad held the *sāniya.* Was he its owner ("*sāniyat* Muḥammad," line 3 of the document below) and did he transmit his right in the *sāniya* to his widow through inheritance? An ostensible indication to this effect may be found in that Yūnus, after his brother's death, took possession of a certain plot within the *sāniya* and cultivated it "without obtaining permission from its owner" (*bi-dūn amr min ṣāḥibatihā*) (line 5), that is, Sāmya, Mḥammad's widow. There is, however, good reason to doubt Sāmya's position as the proprietress of the *sāniya.* Thus the document reports that after Mḥammad's death, the *sāniya* "was given to her [i.e., Sāmya]" (*aʿṭāhā*) by a person identified as "Signor Capitano" (lines 3–4) presumably an officer from the Italian military administration, apparently for the purpose of cultivation. Had she been the owner (in the full legal sense of the term) of the plot seized and cultivated by Yūnus without her permission, there would have been no need for the Signor Capitano to give her the plot for any purpose whatsoever. Furthermore, following the woman's complaint to the Italian officer, the latter decided—in addition to a sanction imposed on Yūnus for his encroachment on the plot—that at the end of the harvesting season the plot was to be returned to Sāmya, and that in the eventuality that she failed to cultivate it, she would be obliged "to sell it [the plot] (*an tabīʿahā*) to Yūnus" (line 11) at the price that he had previously paid her (according to his version). Such a stipulation cannot be reconciled with the presumption that Sāmya was the owner of the plot since an owner may dispose of his property at will, and in any case, failure to cultivate the plot should by no means affect the owner's position vis-à-vis his property.

Hence one must conclude that the rights of Sāmya in the plot were those of a lessee, rather than proprietress. The Signor Capitano, the officer from the Italian military administration, presumably was

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[1] See Glossary, s.v. *sāniya.* Cf. Albergoni, *Droit coutumier*, 113; idem, *Écrire la coutume*, 31; al-Zuwayyī, *Ajdābiya*, 131.

in charge of leasing the colony's lands in the area.[2] The plot seems to have been originally leased to Mḥammad presumably on the basis of a *musāqāt, kirā'*, or some other contract of lease (see fn. 3 below). When Mḥammad died, his wife Sāmya either inherited his rights in the plot, that is, the rights in the share-cropping contract (rather than ownership's rights) or renewed the contract of lease with the Captain. Support for such an assumption may be adduced from the Captain's decision to penalize Yūnus for his encroachment on Sāmya's "rights" in the plot by allocating one-half of the harvest gathered from the plot under cultivation as charity to the poor, and by stipulating that should Sāmya fail to cultivate the plot she would be obliged to sell her "rights" in the plot to Yūnus. The sanction and the stipulation seem to be relevant in the context of agricultural partnership; non-cultivation of the plot may be regarded as violation of the contract of lease and hence results in its cancellation, or (as in the case under review) in compulsory sale of the rights in the plot to her brother-in-law.

The Nā'ib registered the Italian officer's decision which had been handed down out of court, thus conferring on it the validity of a *shar'ī* judgment. The parties' resort to the Nā'ib seems to have been prompted by a desire to secure the implementation of the officer's decision.

The case under review is indicative of a widow's limited capacity to dispose of agricultural property against the background of attempts made by her deceased husband's agnate to dominate it.

Text

[1] The purpose for which [this document] has been drawn up (*sabab taḥrīrihi*).

Sāmya the widow of Mḥammad Bū Ḥsēn appeared [in court] [2] together with Yūnus Bū Ḥsēn [Sāmya's brother-in-law] litigating [3]

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[2] Following the Royal Decree of December 22, 1930, the Head of the Italian Cyrenaican Land Registry was instructed to register the properties of the Sanūsī Order in the name of the Colony. The lands included the date-palms and gardens of the Order in the Oases. By the end of 1932 the Land Registry had registered in the name of the colony 121,000 hectares, a large part of which was planned for colonial settlement. (Evans-Pritchard, 194–95, 199, 217–19, 222). We have no information as to the location of the plot and its relation to the Sanūsī order, but the fact that the dispute was brought to the Shar'ī Nā'ib of Kufra and that one of the notaries belonged to the al-Ōjalī tribe (line 17), may give some indication as to the area under review.

over the matter of the *sāniya* of the aforementiond Mḥammad, which was given to her (*aʿṭāhā*) [Sāmya] by the Sinyōr [4] Qubṭān.[3] Yūnus cultivated a plot [5] of land within it [the *sāniya*] from the edge of the entrance [to the *sāniya*] as marked out by the *mudīr*[4] ʿAwaḍ, by virtue of an order issued by the Sinyōr Qubṭān,[5] without the authorization (*amr*) of the holder [rather than proprietress of the plot] (*ṣāḥibatihā*) [i.e., Sāmya].[6] [The latter] brought the matter [6] before the Sinyōr Qubṭān, who ruled (*ḥakama*) that one-half of the harvest should be made over [7] to Yūnus, and that the other half should be distributed among the poor people of the quarter [8] [called] ʿAffūn, because [Yūnus] had encroached (*taʿaddā*) [on her plot] and had cultivated it without her permission. And this constitutes [9] his penalty (*jazāʾ*).[7] [He further decided that] on the expiration of the

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[3] This may well be a *musāqāt* contract, that is, a lease of an irrigated plantation (*sāniya*) for one crop period with profit-sharing (agricultural partnership), between the Signor Capitano representing the Italian administration as owner of the colonial lands, and the husbandman (*ʿāmil*), Mḥammad (cf. Obermeyer, 58; Maḥjūb, 206; Introduction to doc. 63 above). The death of the husbandman seems to have canceled the contract (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 162ff.; Ibn al-ʿAṭṭār, 83ff.; Young, 658ii; Juynboll, 320). This may explain why the Captain "gave her" [Sāmya] the *sāniya* after her husband's death. Alternatively, it may be a contract of *kirāʾ*, that is, leasing or hiring out of things. Such a contract is not dissolved by the death of either of the two contracting parties; the heirs have the power to re-negotiate the contract (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 150ff.; Ibn al-ʿAṭṭār, 58ff.; Delcambre, *Kirāʾ*, 126–27). Mḥammad seems to have held the original right to the *sāniya* on the basis of *musāqāt, kirāʾ* or some other contract of lease, and this right passed to his widow Sāmya upon his death either through renewing the contract (in the first case) or through inheritance (in the second case). See Mohsen, 128; Colucci, *Tribù*, 30; Bousquet, *Islamic Law*, 4; cf. Marx, 75–76, 91–94, 197 fn. 1. *Musāqāt* was admitted in Mālikī doctrine by means of judicial practice (see Berque, *ʿAmal*, 429; cf. Toledano, 17ff.). On agricultural partnership in the Sudan under the Mahdī, see Abū Salīm, *al-Āthār,* vol. 3 (1991), 46.

[4] Lit. "manager." He may have been some kind of minor native administrative officer, charged with carrying out the Captain's order.

[5] It is not clear from the document whether the order issued by the Captain referred to the marking of the borders of the *sāniya* or to the authorization given to Yūnus to cultivate the plot. If the latter is the correct reading, it may be an allusion to an earlier decision by the Captain based on the wrong presumption (see below) that Sāmya had sold her rights in the plot to Yūnus. The authorization, however, was canceled by the Captain's present decision (see below).

[6] As will be seen below (lines 11–12), at some point, Yūnus offered Sāmya 320 francs for her rights in the plot, but apparently, she did not accept the money. Yūnus, nevertheless, took possession of the plot and cultivated it without Sāmya's permission. This seems to have been the source of the conflict between the two parties.

[7] Yūnus is penalized for encroaching on Sāmya's rights by the allocation of one-half of the harvest gathered from the plot under cultivation as charity to the poor. This is obviously a discretionary punishment on the part of a military officer that

first season of the stalks of the cereal grasses (*qaṣab*) [10] Sāmya would cultivate the plot and, if unable to cultivate it or if she fell behind [with the work] [11] she would be obliged to sell it [i.e., her rights in the plot] to Yūnus[8] at the price which he had given [12] her previously, i.e., 320 francs.[9]

[13] [The Nā'ib ruled that] this was the decision reached [by the Signor Capitano] in their regard and, subsequently, issued and registered[10] [14] on June 11, 1933.

Nā'ib al-Qaḍā'
[15] Aḥmad al-Khaḍrī[11]

[16] Witnesses (*shuhūd*)
[17] Shaglūf al-Ōjalī
Imjēḥīd Bū Ḥamad
Shaykh al-Ghazāl Bū Janāb

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has nothing to do with the *sharī'a*. Cf. Ibn Mūsā, 109 (The Ottoman Wālī of Tripoli issued in 1895 a decree to the effect that if a person took possession of land belonging to someone else and cultivated it without the latter's permission he had to compensate the owner by one-half of the harvest gathered from the plot).

[8] From the location of the plot as marked by the *mudīr* one may infer that Yūnus was cultivating adjacent land in addition to the disputed plot of the *sāniya* (see fn. 9 below; cf. docs. 4, 52 above).

[9] Sāmya was given the option of continuing to cultivate the plot; if she failed to avail herself of this opportunity she would be obliged to transfer her rights in the plot to Yūnus for the same amount of money that he claimed to have had paid her previously. There is no evidence, however, that a formal contract or agreement had materialized between them. As already noted, failure to cultivate the plot may result in cancellation of the contract of lease on grounds of violation of essential stipulations of the contract. Sāmya could have avoided this mishap by selling her rights as specified from the contract to a third party. It may well be that Yūnus insisted on buying her rights on ground of pre-emption (*shuf'a*) (Ibn 'Āṣim, *al-'Āṣimiyya*, 136, § 908ff.). Cf. Abū Salīm, *al-Āthār*, vol. 3, 225 {in the Mahdist state in the Sudan, weak farmers who fell behind in the irrigation of their lands (*aṭyān*), used to lease the lands to "rich people" (*aghniyā'*), probably because these could afford hiring labourers to do the heavy work, in return for part of the crop or cash money. The reference here seems to be to a *musāqāt* contract}.

[10] The Nā'ib endorsed the Signor Capitano's decision and registered it in the *sijill*, in the presence of witnesses, presumably in order to confer *shar'ī* validity on the decision.

[11] There is a summary of the text in Italian in the margin of the document, at the end of which the Governor of the sub-district of Kufra added a remark to the effect that the decision had been examined and that it was to be implemented. This is a clear manifestation of normative control on the part of the Italian administration over the *shar'ī* jurisprudence. See Layish, *Legal Documents*, 15; and the Preface to this volume, xii.

Document 66

Introduction

A woman claimed that her son had sold one of the she-camels which she had deposited in his trust to a stranger without obtaining her consent. Her witnesses could not establish whether the initiative for the sale of the camel was hers or her son's. At the Nā'ib's request, the woman took an oath to the effect that the camel still belonged to her and that she had not authorized the sale. She further testified that she had only deposited the camel in his custody as a voluntary trustee. The Nā'ib ruled that the camel should be returned to the woman and that the buyer was entitled to claim its price from the son, who bore the liability for his unlawful sale.

The document is indicative of the woman's capacity to own and dispose of moveable property and of separation of property between the spouses. The woman initiated the resort to the Sharīʿa Court with a view to ensuring her property rights under the *sharīʿa*. The Nā'ib did not let her down. She was also backed by the Governor of the sub-district of Kufra who instructed that the Nā'ib's decision be implemented.

Text

[1] A woman called Maḥbūba, wife to Mḥammad Bū ʿAbdallāh[1] put forward a claim concerning a she-camel then in the possession [2] of ʿAṭiyya Bū al-Sākir to the effect that her son Mḥammad Bū Ḥamad had sold it to [the aforementioned] ʿAṭiyya in the district (*markaz*) [3] of Ajdābiya without her consent.[2] I requested her to provide evidence through witnesses (*bayyina*) supporting her claim. She brought forward [4] witnesses who testified that

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[1] It is interesting to note that, contrary to the usual practice in agnatic society, the woman is here identified through her relationship to her husband rather than to her father. Cf. doc. 5 (identifying the parties by the names of their mothers and their lineages).

[2] The very fact of her being able to present a claim against her son testifies that the woman enjoyed the capacity to own property and to dispose of it. Since the document does not indicate in any way that the woman was a widow, it may further testify to the separation of property between the spouses.

> the she-camel belongs to her and we have no idea whatsoever whether or not she had instructed her son [5] to make the sale.

I requested her to take an oath (*yamīn*) stating the following:

> In the name of Allāh, etc. [6] I did not make a gift (*lā aʿṭaytuhā*)[3] [of the she-camel] to my son, nor did I exchange it[4] or instruct him to sell it; [the she-camel] is still [7] my property (*milk*) to this very day since I deposited it (*wadaʿtuhā*) with him as a trust (*amāna*) for the sake of Allāh and of his messenger.[5]

[8] After she had taken the oath, [the Nāʾib ruled that Maḥbūba] was entitled to receive her she-camel back while the buyer could sue the seller.[6] This was [9] the gist (*wajh*) of the sentence (*ḥukm*) pertaining to this question. To this end this [sentence] was handed down (*ḥurrira*) and registered on November 23, 1932, [10] corresponding to the 24th day of Rajab [1]351.

[11] Nāʾib of the Sharīʿa Court
[in the Kufra District][7]
[12] Aḥmad al-Khaḍrī

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[3] What the woman means here is that she had not transferred the she-camel to her son as a gift with no consideration. See Glossary, s.v. *hiba*.

[4] In other words, the she-camel had not been exchanged for something that had passed into her ownership, which is in itself a kind of transaction.

[5] This places the son in the position of the camel's trustee (*amīn*) and makes him liable in the case of infringement of legal rules applicable to this status. His liability vis-à-vis the property entrusted to him extends to losses incurred by reason of illegal acts on his part contrary to the obligations incumbent on a trustee, such as his sale of the camel without the owner's consent. See Glossary, s.v. *wadīʿa; amāna; taʿaddin*.

[6] The trustee bears the liability for any loss or neglect caused to the property entrusted to him; see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 190, line 1289; Ibn al-ʿAṭṭār, 124ff.; Colucci, *Tribù*, 30. According to the Awlād ʿAlī customary law in the Western Desert, a deposit (*wadīʿa*) is a trust (*amāna*); whoever causes loss of or neglect to the deposit is liable in person for it; there is no co-liability of the agnatic group (Maḥjūb, 334, section 43; al-Jawharī, 204).

[7] See doc. 65, fn. 11 above.

Document 67

Introduction

A dispute arose concerning the estate of a deceased woman. The parties to the dispute were the daughter of the deceased woman and the latter's daughter-in-law through her deceased son. The daughter-in-law denied the daughter's assertion of entitlement to inherit a certain she-camel belonging to her mother since, according to her [i.e., the daughter-in-law], the mother had, in her lifetime, made a gift of this same camel to her son, the claimant's deceased husband. In her version, the she-camel and its issue had, since the time of the gift, been in the husband's ownership and possession, and on the death of her husband, the camel had become part of his estate. This latter circumstance provides the legal basis of her contention.

The daughter-in-law's witnesses testified that according to rumours that had reached them, the aforementioned camel had been transferred by gift rather than by intestate succession to the claimant's late husband. The Qāḍī endorsed their testimony and instructed that it be registered in favour of the claimant so that the latter could avail herself of the "attestation of the conveyance of evidence" (*shahādat naql*) as the need arose.[1]

The document exemplifies use of the gift (*hiba*) as an instrument for circumventing the *sharʿī* rules of inheritance.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![2]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya and Emir of Barqa [Cyrenaica]. May Allāh the Exalted preserve him![3]

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[1] For an analysis of this document within the context of written evidence, see Layish, *Shahādat naql*, Case 7.

[2] See doc. 1, fn. 2.

[3] See doc. 1, fn. 3.

[3] ATTESTATION OF THE CONVEYANCE OF EVIDENCE (*SHAHĀDAT NAQL*)[4] IN FAVOUR OF MABRŪKA BINT ʿALĪ KURBĀJ

Entered in register no. 456, p. 304

[4] In the Sharīʿa Court of Ajdābiya, presided over by its Qāḍī, Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him, Amen!

[5] Mabrūka bint ʿAlī b. ʿAbd al-Raḥmān from the Sdēdī [branch] of the Zwayya[5] tribe (*qabīla*), identified (*maʿrūfa*)[6] by person and name, appeared [in court] and made the following statement by way of claim (*daʿwa*):

> I have been informed [6] that Maryam bint Ḥsēn claimed [ownership] to a grey (*khaḍrāʾ*)[7] she-camel, on the grounds that it belonged to her [late] mother Mabrūka,[8] but the truth disagrees with her contention. This same she-camel [7] had been made as a gift (*wahabathā*) by the late Mabrūka to my late husband Ādam[9] some time ago and he proceeded to dispose (*yataṣarraf*) of it and of its issue, so that they passed into his property (*milk*).[10] After the death of his mother[11] and of her son [Ādam], [8] [the camel and its issue] became part of his [Ādam's] estate (*tarika*) [by virtue of the gift].[12] [The she-camel] and its issue are called the *al-hablāʾ* [foolish] family (*ʿāʾila*). I have produced witnesses to testify [to the truth] of my statement, and they are Abū Bakr [9] Ibn Ḥuṭma al-Kāsiḥ, his full brother (*shaqīq*) Mūsā, and Maḥmūd b. Yūnus Māmī. I ask that the noble Sharīʿa Court (*al-sharʿ*) interrogate them and register their testimonies.

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[4] See Glossary, s.v. *shahādat naql*.

[5] See De Agostini, *Cirenáica*, 407.

[6] See Glossary, s.v. *taʿrīf*.

[7] Concerning this striking lexical usage relating to the colour of camels, see Borg, *Color*, 130–31.

[8] In other words, the camel was transmitted by intestate succession from mother to daughter.

[9] If the she-camel had indeed been presented as a gift to her husband, the son of the praepositus while the latter was still alive (see Glossary, s.v. *hiba*), this implies that the camel is not an integral part of her estate, and hence her daughter had no legal ground to claim the camel.

[10] On gifts and other means for circumventing the *sharʿī* rules of inheritance, see Layish, *Mālikī Waqf*; idem, *Family Waqf*; Powers, *Law, Society and Culture*, 206–28.

[11] Mention of the mother's death weakens the claimant's contention that the camel had been presented as a gift by the mother while still alive. In the case of a gift the mother's death is irrelevant, since gifts *inter vivos* become absolute and effective during liftime of donor and donee; hence, the camel in our case does not constitute part of her estate. See fn. 15 below.

[12] The daughter-in-law bases her claim to the she-camel on her right to her husband's estate.

[10] After the aforementioned witnesses had been requested [to testify], they did so in turn, and [the veracity of] their testimony is beyond any shadow of doubt. They had heard of a widespread rumour (*samāʿ*) [11] to the effect that the grey she-camel, which has been ten months pregnant (*ʿusharāʾ*)[13] and whose whereabouts are known, is the issue of a she-camel after her first delivery (*bakra*)[14] called *al-hablāʾ*, which had become part of the late Ādam's estate (*matrūka*) [by virtue of the gift rather than intestate succession],[15] "and this is what [12] we testify; let Allāh be proxy [guardian] (*wakīl*) to what we have said."[16]

On the basis of what has been ascertained by the aforementioned witnesses while they were in a state of legal competence (*ḥāla jāʾiza*) in *sharʿī* terms as duly certified (*thubūt*) by the aforementioned judge (*ḥākim*), [13] the latter endorsed (*ajāza*) this testimony on the responsibility of her witnesses,[17] signed it, and had the undersigned [witnesses] testify (*ashhada*) to it, and instructed that it be registered.[18] [The testimony] was registered [14] on the 4th day of Dhū 'l-Qaʿda 1373, corresponding to July 5, 1954. The signatures appear in the protocol (*ḍabṭ*).

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[13] See Lane, 2052ii; Ibn Manẓūr, *Lisān*, vol. 4, 572ii.

[14] Ordinarily, *bakra* means "a young she-camel of 2–4 years old that has not yet borne young" (Kurpershoek, 335).

[15] Hearsay evidence (*shahādat al-samāʿ*) is admissible in court in litigations relating to inheritance. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 28–29, lines 177ff.; Peters, *Shāhid*, 208. Literal translation of *matrūka* suggests that the witnesses testified that the she-camel had been transmitted by intestate succession to the son of the praepositus, the claimant's husband. The expression *matrūka*, the key-word in this context, is my reconstruction of the text which is unclear at this point. This reconstruction would seem to be borne out by the claimant's version (see fn. 11 above). If this reading is correct, the testimony does not bear out the claimant's contention that the camel had been presented as a gift. The literal translation, however, does not make sense in the case under review, since the witnesses were produced to testify that the she-camel had been presented as a gift. My translation of *matrūka* in the text was suggested by line 8 above (cf. *tarika*) and is corroborated by the Qāḍī's decision (see below).

[16] The invocation of Allāh here is presumably intended to enhance the witnesses' credibility. See Glossary, s.v. *wakīl*.

[17] The Qāḍī endorses hearsay evidence in support of the daughter-in-law's version. The transfer of responsibility to the witnesses here reflects the Qāḍī's dependence on their integrity.

[18] The written testimony is here intended to assist the claimant in securing her rights to the she-camel during the apportionment of her mother-in-law's estate.

[15] Witnesses to the proceedings (*shuhūd al-ḥāl*)[19]
[16] ʿImrān ʿĪsā
Mḥammad ʿAbd al-Salām
Mḥammad al-Ṭālib al-Hammālī

The matter being as indicated above
The Qāḍī of Ajdābiya
[17] Ḥusayn Muḥammad al-Aḥlāfī

[19] Professional witnesses or notaries are intended here. See Glossary, s.v. *ʿadl*.

Document 68

Introduction

The claimant accused the defendant of taking away a she-camel from his herd. While tending his herd in another place, the claimant identified the missing camel in the possession of a third party. The defendant finally admitted taking the camel from the claimant and selling it to the third party.

Although it seems that we have here a clear case of theft, though not one entailing Qur'ānic punishment of amputation (see fn. 2), the Nā'ib treated the matter as if it were a case of usurpation, and ruled that the camel should be returned to its owner and rendered the sale null and void while the buyer was entitled to a reimbursement by the defendant of the sum paid for the camel.

The Nā'ib's *shar'ī* decision was conceivably inspired by tribal customary law pertaining to theft. According to the law prevailing in the Western Desert, theft is a matter of damage within the domain of private law which entails no criminal sanction: the thief is required to return to the owner twice the amount stolen, and in case of repeated theft—four times the amount stolen; if he is a poor man, he will pay three times the value of the stolen object and the remaining fourth will be paid by his lineage. If the thief removes a camel from its pasture or place of domicile to another place with evil intent, he is required to return the camel and pay its price. If someone identifies the stolen property in the possession of a third party who claims to have bought it from the thief (as in the case under review), the tribal judge will rule that the stolen object be returned to its owner, and that the buyer be reimbursed by the thief. In addition, the thief is liable to a heavy fine (*gharāma*).[1]

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[1] See Mohsen, 111; al-Ḥabbūnī, 41; al-Jawharī, 193–94, 223; Maḥjūb, 325, 330–31; Obermeyer, 206; Murray, 327; Colucci, *Tribù*, 27, 32; cf. Chapelle, 232; Hart, *Penal Code*, 64; Abū Ḥassān, 76, 249, 268ff.; al-'Ārif, 107–8; al-'Abbādī, *al-Jarā'im*, 126ff.; Salḥūt, 65).

Text

[1] Mḥammad Bū ʿAbdallāh appeared [in court] accompanied by Slēmān al-Fāliḥ. [2] The upshot was that Mḥammad claimed that a she-camel belonging to him had been taken (*akhadhahā*) [3] by the aforementioned Slēmān, a resident of the district (*markaz*) of Fāy. After prolonged wrangling [4] Slēmān admitted to having taken it [from the herd] of camels belonging to Mḥammad Bū ʿAbdallāh[2] [5] and to having sold it to Shaykh Bū Shanna before the arrival of ʿAbdallāh's lineage (*ʿā'ila*) [6] from the direction of Marqa.[3]

[The Nā'ib ruled as follows:] As a matter of legal right (*bi-wajh al-ḥaqq*), Mḥammad [7] is the [rightful] owner of his camel and, since it [8] is still available, he is entitled to take possession of it by virtue of his [right].[4] [At the same time] Bū Shanna may claim (*yarjiʿ*) restitution [of its price] from the aforementioned Slēmān.[5] [9] This

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[2] Though this seems to be a clear case of theft, it apparently does not fall under the strict *sharʿī* definition of theft entailing Qur'ānic punishment (*sariqa ḥaddiyya*). Assuming that there were no questions of *niṣāb*, the minimal value of the stolen object, and *shubhat milk*, doubt as to ownership, and that the she-camel had been taken clandestinely from the claimant's private herd, still a shepherd guarding the herd in the open pasture cannot be regarded as equivalent to "safe keeping" (*ḥirz*) of a watchman, which is another precondition for theft in the strict sense of the *sharīʿa*. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 224, lines 1538ff.; Heffening, 62; Peters, *Criminal Law*, § 0.1.2.1. Cf. Abū Salīm, *Manshūrāt al-mahdiyya*, 207 (Qāḍī al-Islām Aḥmad ʿAlī in the Mahdist state issued a *fatwā* to the effect that *ḥirz* is a precondition for theft entailing Qur'ānic punishment).

[3] The stolen she-camel was sold to a third party in another place. Cf. Christelow (the theft of a billy goat).

[4] Under the Mālikī school, if the stolen object still exists, as in the case under review, the thief is obliged to restore it to its rightful owner (see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 226, line 1546). If the thief returns the stolen object before the Qāḍī hands down his sentence, the former cannot be convicted for theft (Peters, *Criminal Law*, § 0.1.2.1). There is no indication whatsoever in the document that this was the case. Moreover, it took the offender some time before he was ready to admit to having committed the offence, and even then he was unable to return the she-camel because he had sold it to a third party. The Nā'ib treated the matter as a case of *ghaṣb*, usurpation of the property of another, where the usurper is required to restore the property to its rightful owner; in addition, he is liable to discretionary punishment. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 218–19, lines 1498–99; cf. Schacht, *Introduction*, 160. See Glossary, s.v. *ghaṣb*.

[5] In other words, the sale is rendered null and void on the grounds that the dealer did not own the object sold. In view of the circumstance that the buyer purchased the camel in good faith, he is entitled to claim its price from the dealer. Lack of good faith on his part would have rendered him a party to the extortion.

is the *sharīʿa* ruling concerning the case of [this] camel.[6] Hence the [decision] had been issued [10] in [. . .] August 1932.

Nāʾib of the Sharīʿa Court
in the Kufra District[7]
[11] Aḥmad al-Khaḍrī

[6] The Nāʾib was presumably referring to the *sharʿī* rules relating to unlawful seizure (*ghaṣb*) and sale (*bayʿ*). The legal outcome endorses this assumption. In case of usurpation, the owner is entitled to demand from the offender the return of the usurped object either in the locality where it had been removed or in the place where it had been found (see Glossary, s.v. *ghaṣb*). This may be the reason why the Nāʾib took the trouble of specifying the place where the offence had occurred as well as the place where the owner had identified the camel. It is interesting to note that the Qāḍī's decision corresponds to the tribal customary law of theft (see Introduction above), and it is possible that the Nāʾib was inspired by tribal law.

[7] In the margin of the document there is an Italian summary of its contents including the observation by the Military Governor of the sub-district of Kufra to the effect that the sentence had been examined by him. This seems to indicate a degree of normative control of *sharʿī* jurisprudence by the Italian colonial administration. See Layish, *Legal Documents*, 15; Preface to this volume, xii.

SECTION FIVE

EVIDENCE AND COURT PROCEDURE

Document 69

Introduction

A woman stated in court that her husband had died a couple of months previously in Sudan. She and her paternal uncle provided twelve witnesses from their tribe to corroborate her statement.

The Qāḍī admitted this testimonial procedure on the ground that a large number of witnesses safeguards against fabrication of false evidence. This practice may be based on the tradition inspired by the Maghribī *ʿamal* (judicial practice) of *shahādat al-lafīf*, or by the desire to make a gesture towards the Bedouin by admitting tribal law of evidence in a *sharīʿa* court (see fn. 4 below). On the basis of the collective testimony, the Qāḍī issued a declaratory judgment endorsing the woman's statement regarding her husband's death.

The Qaḍī further instructed the woman to start observing the *sharʿī* waiting period prescribed for widows reckoned from approximately one month after her husband's death with a view to imposing *sharʿī* norms regarding the legal consequences of death.

Text

[1] In the name of Allāh the Merciful, the Compassionate. May Allāh bless our lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the reign of King Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya and Emir of Barqa [Cyrenaica]. May Allāh the Exalted preserve him![2]

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[1] See doc. 1, fn. 2.
[2] See doc. 1, fn. 3.

[3] In the Sharīʿa Court of Ajdābiya, presided over by its Qāḍī, Shaykh Ḥusayn b. Muḥammad al-Aḥlāfī. May Allāh the Exalted prosper him! Amen.

[4] On the basis of the statement in record (*maḥḍar*) no. 414 entered on pp. 278, 279, 307, and 328 in volume 6 of register of protocols (*ḍabṭ*) [5] made by the claimant (*muddaʿiya*) al-Ṣābra bint Mḥammad b. ʿUmar b. ʿAbd al-Karīm al-Ḥlīf and by her paternal uncle (*ʿamm*),[3] Shaykh Maḥmūd b. ʿUmar, [and on the basis] of the testimony provided [6] by twelve members of their tribe (*qabīla*), a group whose large number excludes the possibility of connivance (*tawāṭuʾ*) to misrepresent the truth,[4] it was established (*thabata*) [7] to the satisfaction

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[3] The paternal uncle was probably her nearest agnate. The confirmation of the husband's death was probably required in connexion with the conclusion of a marriage contract, which is of immediate concern to the agnatic family. This may account for the paternal uncle's presence in court.

[4] The *sharīʿa* normally requires that the plaintiff provide two witnesses to prove his allegation; for the purpose of securing information, one witness is enough, though greater weight is attached to two witnesses. The presence of a number larger than two does not add any further weight to the testimony (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 22–23, lines 139ff.). However, in North Africa during the later Middle Ages, judicial practice (*ʿamal*) admitted the innovation of *shahādat al-lafīf*, i.e., collective testimony of at least twelve men, who need not be *ʿadl* (of good character) nor professional witnesses; more important here is the inherent integrity of the "groop" (*jamāʿa*). This practice was justified by the doctrine of necessity (*ḍarūra*) resulting from the absence of *ʿudūl* (see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 226, line 1552; Berque, *ʿAmal*, 428; Santillana, vol. 2, 603; Milliot, 737; Toledano, 18, 22; Peters, *Shāhid*, 208i; Abū Ḥāmid (I am indebted to Léon Buskens for providing me with a copy of this treatise).

In the present case, the Qāḍī applies the procedure of *shahādat al-lafīf* without referring to the technical term. He justifies this practice on the ground that a large number of witnesses safeguards against fabrication of false evidence. The integrity of witnesses lies at the basis of the rules of evidence as practiced in both Islamic and tribal law. The taking of an accusatory oath by as many as 50 men is recognised under certain circumstances of homicide, and derives from the aforementioned perception of integrity (Glossary, s.v. *Qasāma*; Anderson, *Africa*, 372; cf. Layish & Warburg, Glossary).

It may well be that in resorting to twelve witnesses, the Qāḍī was making a gesture towards the Bedouin by admitting the tribal law of evidence in a *sharīʿa* court. See Peters, *Qasāma*; Maḥjūb, 200ff., 315ff. {according to the customary law of the Awlād ʿAlī, in a case of homicide, innocence (*barāʾa*) must be proved by 55 witnesses enlisted from *ʿumarāʾ al-dam*, members of the vengeance (*thaʾr*) group}; Obermeyer, 210–11 (50 men are required in a case of homicide or wounding; 25 in a case involving ownership of land or wells), 229–31 (accusatory oath by 24 members of the *ʿumarāʾ al-dam*); Colucci, *Tribù*, 36 (collective oath of 50–55 members of the same tribe is required in offences of blood); Khayrallāh, 290–91 (accusatory or compurgative oath by 55 members is required in cases of homicide and an oath by 12 witnesses to prove ownership of well); Mohsen, 131–32; al-Ḥabbūnī, 40.; cf. Murray, 200–2, 231–32 (in blood-money cases in Sinai, oath of compurgation by 50–55), 316; Kennett, 40–41; Stewart, *Texts 1*, Index, s.v. Oath; Berque, *Structures*,

of the aforementioned judge (*ḥākim*) that the claimant's husband Rizq Allāh b. ʿAbd al-Raḥmān b. Wḥēda from the Sdēdī [branch] of the Zwayya [tribe] had died in Fāyā [8] in Sudan last Ramaḍān this year. He [the Qāḍī] instructed the widow al-Ṣābra to observe the waiting period prescribed in the case of death, starting [9] on the first day of Shawwāl, 1373,[5] and issued a *sharʿī* judgment to this effect, signed it, sanctioned it (*irtaḍāhu*), had the undersigned [witnesses] testify (*ashhada*) to it [10] and instructed that it be registered. [The judgment] was entered on the 16th day of Dhū 'l-Ḥijja 1373, corresponding to August 15, 1954.

The signatures are in the protocol (*ḍabṭ*).

[11] Witnesses to the proceedings (*shuhūd al-ḥāl*)[6]
[12] ʿImrān ʿĪsā
Mḥammad ʿAbd al-Salām

The matter being as indicated above
The Qāḍī of Ajdābiya
[13] Ḥusayn Muḥammad al-Aḥlāfī

334–35; Hart, *The Aith Waryaghar*, 309–12; idem, *Rgaybat*, 50; idem, *Collective Oath*, 48–83; idem, *Penal Code*, 50; idem, *Dadda ʿAtta*, 158ff. (the collective oath in Berber Morocco is known as *tagallit*); Rosen, 196–97.

[5] The prescribed length of a widow's waiting period before she is legally permitted to remarry is four lunar months and ten days or, in the event of pregnancy, until she gives birth. The beginning of the waiting period in the case under review is not reckoned from the date of the absent husband's death but presumably from the date on which his death became established. See Shalabī, 638f., 651; Glossary, s.v. *ʿidda* (of a widow). The Qāḍī's instruction relating to the observance of the waiting period reflects an attempt on his part to impose *sharʿī* norms with regard to the legal consequences of death (cf. Layish, *Divorce*, 158–60, 196–97).

[6] Professional witnesses or notaries are intended here. See Glossary, s.v. *ʿadl*.

Document 70

Introduction

The Sharīʿa Court issued a sentence of recalcitrance against a woman who had left her husband's conjugal dwelling. Her father was dissatisfied with this sentence and complained to the police officer of the Kufra district, though the latter lacked the statutory jurisdiction as a court of appeal. The officer appointed a committee of tribal representatives under his presiding authority. The committee settled the dispute by persuading the husband to divorce his wife. This solution had presumably been advanced by the wife's father, and the committee perceived it as the only practical solution. The husband agreed to divorce his wife provided that she took an oath on the Qur'ān to the effect that she was breaking off the marriage of her own free will and not at the instigation of her parents. The wife took the oath as requested and the husband repudiated her by irrevocable divorce. The wife renounced the financial rights that a divorcee is entitled to.

The committee, which functioned in effect on the basis of administrative arbitration, endorsed the divorce and the Inspector [of the Sharʿī Chamber of the Civil District] Court of Kufra conferred on it the validity of a *sharʿī* judgment.

Text

[1] In the name of Allāh, the Merciful, the Compassionate. May Allāh bless our Lord Muḥammad, his family and Companions, and grant them peace![1]

[2] In the reign of his exalted majesty Muḥammad Idrīs I, Sovereign of the United Kingdom of Libya, and Emir of Barqa [Cyrenaica]. May Allāh preserve him! Amen.[2]

[3] His honour the officer (*ḍābiṭ*) of the Kufra district (*markaz*) police, Mr. ʿAbdallāh al-Sūsī, issued a decision (*qarār*) concerning the repudiation (*ṭalāq*)[3] [4] of Mulzim bint ʿAbdallāh b. Slēmān of the

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[1] See doc. 1, fn. 2.

[2] See doc. 1, fn. 3.

[3] The decision taken by the police officer is of a purely administrative nature since he lacks the status of a judicial court.

Jāballāh [fraction] from the al-Mnāyaʿ lineage (*ʿāʾila*) [of the Sdēdī branch] belonging to the Zwayya[4] tribe (*qabīla*), by her husband Aḥmad b. Mḥammad [5] al-Sarrār. Previously [to this decision], his honour the Qāḍī Shaykh Muḥammad b. ʿAbd al-Salām al-Ḥāmī had issued a sentence of recalcitrance (*nushūz*) [against Mulzim]. The wife's father [6] complained [about this verdict] to his honour the [police] officer. His honour the officer appointed a committee under his presiding authority consisting of Mr. ʿAbd al-Raḥmān b. Mḥammad [7] al-Twātī and Mr. Mḥammad b. ʿAbdallāh Swēḥil.[5] They appeared [at the home of] Aḥmad al-Sarrār and [the police officer] asked the latter concerning the settlement [8] of the dispute (*qaṭʿ al-nizāʿ*) between him and his wife, the aforementioned Mulzim. Aḥmad al-Sarrār answered as follows:

> If the wife takes an oath [9] on the noble Qurʾān (*al-muṣḥaf*)[6] that the reason for her alienation (*nufūr*) [from me] and her reluctance to return to my conjugal home is her own personal aversion (*zāhida*)[7] for him [me] and not [10] the instigation of her father or mother "Leave your husband Aḥmad al-Sarrār and do not return to him!" and if [she takes an oath] [11] that she has not been compelled to demand a divorce.[8]

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[4] See De Agostini, *Cirenáica*, 407–8.

[5] It is not possible to appeal against a judgment handed down by a *sharīʿa* court before any official or administrative body. The father, who had no legal standing in the matter, in the absence of a power of attorney from his daughter, attempted to circumvent the *sharīʿa* court by resorting to the police officer in the expectation of resolving the dispute on the basis of arbitration. The officer appointed a committee of tribal representatives attuned to the practice of customary law, and the committee functioned as an *ad hoc* body of arbitrators not anchored in law. Cf. Davis, *Koufra*, 558 (police intervention in matters pertaining to legal and administrative authority is necessary when one party is a stranger to Kufra and has no resources of solidarity); Obermeyer, 163, 221, 231 (the police enters tribal conflicts in the Western Desert with the tacit approval of the Bedouin in circumstances where the Awlād ʿAlī customary law fails to cope with the problems). In Jordan too, following the abolition of the tribal courts in 1976, Bedouin who are dissatisfied with the jurisprudence of the *sharīʿa* (or civil) courts circumvent them by resorting to the *muḥāfiz* (district governor) who resolves disputes administratively (*hall idārī*) on the basis of tribal law. See Oweidi, 88. Cf. doc. 65 above.

[6] The oath on the Qurʾān is intended to enlist religious sanction in order to deter the swearer from taking a false oath. Cf. doc. 60, fn. 23 above.

[7] Aversion may cause a woman to initiate dissolution of the marriage in return for her financial rights. See doc. 22 above; Glossary, s.v. *zuhād*.

[8] The missing apodosis (*jawāb*) of the conditional sentence is presumably "I agree to divorcing her."

The aforementioned gentlemen went to the al-Ṭallāb[9] oasis and appeared [12] at [the home] of Mulzim and clarified to her the statement of Aḥmad al-Sarrār and his request that she take an oath. She took the oath on [13] the noble Qurʾān and said:

> By Allāh,—there is no God but He!—, and by the truth (*ḥaqq*) of the noble Qurʾān, I have a personal aversion (*zāhida*) [14] for my husband Aḥmad al-Sarrār. Ever since I left his conjugal dwelling I have not intended to return to him. I have not been instigated either by my father [15] or by my mother; neither have they sent me anyone to tell me: "Demand a divorce!" or prevented me from returning to his [conjugal dwelling]. [16] I have a very strong aversion for him (*zāhida fīhi zuhād*) [and] I shall never return to him for the rest of my life.

The aforementioned gentlemen returned [17] from the al-Ṭallāb oasis, appeared at [the home] of Aḥmad al-Sarrār and clarified to him that she had taken the oath as requested, to the effect that she had a personal aversion [for him] and [18] would never return to him. [They further clarified] that no one had attempted [to instigate her] against him. Aḥmad al-Sarrār repudiated her (*ṭallaqahā*) by saying "My wife Mulzim is repudiated (*muṭallaqa*) by one [irrevocable] repudiation (*ṭalqa*)." [19] Hence, she acquired [by this divorce] control over her person (*malakat bihā amr nafsihā minhu*)[10] and no claim (*daʿwā*), request (*ṭalab*), or right (*ḥaqq*) pertaining to conjugal [financial] rights (*ḥuqūq zawjiyya*)[11] [20] remained between them. They separated (*iftaraqā*) on September 1, 1960. She has by him an unweaned baby (*tarḍaʿ*) daughter whom he maintained (*yunfiq*) by paying 40 *qurūsh* a month. [21] For the months of September and October 1960 he was unable (*qāṣir*)[12] [to pay maintenance].

In order to implement (*li-ḥuṣūl*) what has been mentioned, the honourable [22] Inspector (*mufattish*)[13] referred to [below] handed down his decision to this effect (*ḥakama bihi*). And upon the arrival of the [administrative committee's judgment to the Sharīʿa Court of

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[9] See De Agostini, *Cirenáica*, 408.

[10] This expression implies irrevocable divorce. See Layish, *Divorce*, 151–52; docs. 18–22, 30, 39 above.

[11] This implies that the woman renounced her financial rights.

[12] At this point the original text is somewhat illegible. Another possible reading replacing *qāṣir* by *qāḍin* is the following: "[The payment of maintenance by the husband] for the months of September and October 1960 has already been ruled [by the *mufattish*]."

[13] See Layish, *Legal Documents*, 15; Glossary, s.v. *mufattish*.

Kufra], he [the Inspector] instructed that it be registered[14] on the 19th day of Rabīʿ Awwal 1380, [corresponding to] September 10, 1960.

[23] Everything mentioned above has been proven (*sāra thubūtuhu*)
The Inspector (*mufattish*)
of the [Sharʿī Division of the Civil District] Court of al-Kufra[15]
[24] Muḥammad Ṣāliḥ al-Bakri

[14] The *sharīʿa* court confers the validity of *sharʿī* judgment to the decision of an administrative arbitration committee concerning the divorce. Cf. Layish & Shmueli, 44.

[15] Cf. doc. 15, lines 4, 11 above; Layish, *Blood Money*.

SECTION SIX

QĀDĪS' LEGAL OPINIONS

Document 71

Introduction

In this document, the Qāḍī is being approached not in the capacity of a judicial authority but rather as a *muftī* competent to hand down decisions relating to religious law. In this particular case, the Qāḍī is requested to give his legal opinion concerning the validity of a loan made in a certain currency on condition that it be repaid in another at a specified exchange rate. The Qāḍī-Muftī expressed the opinion that the stipulation regarding the exchange of currency was irregular (*fāsid*)[1] since the exchange was tantamount to usury. He instructed the borrower to return the loan to the creditor in the same currency and not to exceed the nominal amount that had been borrowed.

Text

[1] What is your opinion regarding (*mā qawlukum fī*)[2] a man who made a loan to another man of a [specified] amount of French *riyāl*s

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[1] The Mālikī doctrine does not distinguish between *fāsid* and *bāṭil*; in both cases the act is null and void; see Glossary, *fāsid*.

[2] This is a commonly used formula for requesting from a *muftī* a legal opinion (see Layish, *Fatwā*, 273; Masud, Messick & Powers, Glossary, *Islamic Legal Interpretation*, s.v. *fatwā*). Although the *fatwā* fails to indicate either the identity of the *mustaftī*, the person who requests the legal opinion, or his function, from the mere fact that the document was entered in the *sijill* one may infer that the approach was made to a *qāḍī*. Additional support may be obtained from the *fatwā* in doc. 72 below. Under the *sharīʿa*, *qāḍī*s are prohibited from issuing legal opinons on matters falling within their judicial jurisdiction, but not otherwise (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 8–9, line 4 and n. 27). In modern Egypt, too, prior to the abolition of the *sharīʿa* courts, *qāḍī*s were prohibited by law from issuing *fatwā*s in matters which fell under their jurisdiction,

[2] on condition that the [borrower] pay him back [the amount] in *qurūsh* [at the rate of] [3] 16 *qurūsh* a *riyāl*?[3] Is this stipulation [4] an irregular (*fāsid*) one requiring repayment of the same amount in French [*riyāl*s]?[4]

[5] LEGAL OPINION (*JAWĀB*)[5]

[6] Since the stipulation (*sharṭ*) at the moment in which [the loan] was made, required that the borrower [7] repay [it] in *qurūsh* instead of French *riyāl*s—whether at a rate of 16 *qurūsh* [8] a *riyāl*, or less or more than that, [9] it is irregular (*fāsid*), because this is tantamount [10] to usury (*ribā*) on [the exchange] of currency. Moreover, it is obligatory to repay [the loan] in French [*riyāl*s] [11] to the same amount and no other [as requested] under that stipulation. And if the same borrower has already repaid [the creditor] part of the amount [12] in *qurūsh* for instance, [the *qurūsh*] will be returned to

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but not otherwise (see Shaham, *Shopping*, pt. 3). The *fatwā* under review deals with a civil matter which formally fell outside the jurisdiction of the *sharīʿa* courts (see Layish, *Legal Documents*, 15). In Israel, too, *qāḍī*s occasionally issue legal opinions on various matters, such as *waqf* and cemeteries even though these fall within their jurisdiction (personal knowledge). I have not come across a single case where a *sharʿī qāḍī* resorted to a *muftī* for a legal opinion on matters brought before him before handing down his own decision although such a possibility cannot be ruled out. There is evidence that during the late Ottoman period *qāḍī*s would apply to *mufti*s. There were two official *muftī*s in the *wilāya*, a Ḥanafī and a Mālikī (Ibn Mūsā, 256), but since the *qāḍī*s of the *sharīʿa* courts were bound exclusively by the Mālikī school (the Ottomans failed to establish Ḥanafī courts; ibid., 66), it stands to reason that the Mālikī *muftī* was resorted to by the *qāḍī*s. Individuals had the option of choosing any of the two *muftī*s. Among the Awlād ʿAlī in the Western Desert, the *mardī*, tribal *qāḍī*, resorts occasionally to a legal opinion (*futyā*) of tribal experts; see Maḥjūb, 199.

[3] According to a circular issued by the Ottoman Wālī of Tripoli in 1888, one French Gold Lira was valued at 106 Ottoman *qurūsh*. In 1904, one French Frank was worth 4.40 Ottoman *qurūsh* (Ibn Mūsā, 107–8). This case seems to involve more than a mere exchange of currencies by a money changer; it is more likely to constitute a loan (see fn. 4 below) made in foreign currency to be paid back in local currency linked to a fixed exchange rate.

[4] A loan is equivalent to a binding contract unless it entails irregular stipulation. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 170, line 1150. See fn. 5 below.

[5] See Layish, *Fatwā*, 275; Toledano, 14; Glossary, s.v. *fatwā*. For another connotation of *jawāb* (response on the claimant's *maqāl*, written contention), see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 10 and note 34.

him and he will be obliged [13] to repay [the loan] in French [*riyāl*s] to the same amount given him [by the creditor].[6]

[15] End [of the *fatwā*].

[6] Usury on loans is prohibited by the *sharīʿa*. In its broadest meaning, usury also includes unjustified profit or enrichment as well as an element of risk. See Glossary, s.v. *ribā; gharar*. The *ʿālim* ruled that the loan should be paid back in the same currency in which it was made and to the exact nominal amount, neither more nor less. The exchange of currency which, in the nature of things, is subject to market fluctuations entailing an element of risk (*gharar*), is liable to cause profit or loss to one of the two parties (cf. Hallaq, *Ibn ʿĀbidīn*, 49). It is this factor which renders the stipulation in our document irregular in the eyes of the Qāḍī. The Qāḍī's *fatwā* may well be an attempt at imposing the strict *sharʿī* norm with respect to usury. Cf. the case of the Indian merchant Lālīt Rātinlāl Shāh who was convicted by a Sudanese court of making money-changing and banking transactions worth millions in foreign currency and of lending money at an exorbitant usury rate, and who was sentenced to imprisonment, flogging and confiscation of profits from the usury (see Layish & Warburg, 174–76, 243ff.; Mallat).

Document 72

Introduction

Contracts of hire were common practice in Libya during the late Ottoman rule. Usually the herder would receive a flock of some 100–150 sheep or goats in the beginning of the spring or summer for the duration of one year in return for an agreed payment in livestock, grain and cash, in addition to his share in the wool.[1] Expulsion of Bedouin from their lands by the Italian authorities and the need for access to water-supplies and grazing-grounds, were the main reasons that forced the Bedouin to cross the plateau in the area of Italian colonization. Corridors running north and south across the plateau were marked out to facilitate the transit of Bedouin flocks and herds from one region to another.[2] The duty payable at the border seems to be a carryover from late Ottoman rule in Libya.[3]

This is a case relating to partnership (*shirāka*) in camel-raising defined in customary terms (see below). A camel herder who was hired on an annual contract had a dispute with his employer with regard to payment of duty liable at the crossing of borders.[4] The herder claimed that in his capacity as hireling he was exempt from payment of duty which, in his view, was incumbent on his employer. The latter, on the other hand, maintained that each of the parties had to pay his own share of the duty.

The Nā'ib ruled that if the herder was hired on the basis of a fixed wage he was entitled to receive it in its entirety. On the other hand, any financial outlay not specified in the contract, such as duty payable at border crossings, was his sole responsibility rather than that of his employer.

The decision was inexplicably issued in the form of a legal opinion which is theoretically not binding on the parties. However, the fact that it was issued by a nominated *qāḍī* seems to have provided the necessary authority for enforcing the legal opinion.

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[1] Ibn Mūsā, 136–37.
[2] For further details, see Evans-Pritchard, 223, 225.
[3] Ibn Mūsā, 240.
[4] Cf. De Agostini, *Cufra*, 51; Davis, *Koufra*, 548 (payment of transit *ḍarība*, tax).

Text

[1] Shammāt al-Shwērif together with Masʿūd [2] Bū Zrēq appeared [in court]. The case is as follows: Masʿūd hired (*ajjara*) Shammāt [3] al-Shwērif as a camel herder for an entire year [4] at the rate of 40 *Majīdī riyāl*s.[5] Subsequently, after they reached Fāy [5] he was required by the French authorities [to pay] the customary duty (*ʿawāyid*) [6] existing in the country [at the rate of] ten *riyāl*s per capita.[6] [7] The aforementioned Shammāt claimed: "I am [only] a [hired] herder; I am not expected to pay for myself." [8] The proxy (*wakīl*) of Masʿūd said: "Every man is liable to pay this [duty]; there is no evading it. [9] Let each man pay for himself."[7]

End [of the paragraph].

[10] HERE IS THE LEGAL OPINION (*NAʿAM AL-ǰAWĀB*)[8]

If the herder [has been hired] to tend [camels] for a fixed wage (*ujra maqṭūʿa*), [11] his employer (*muʿallim*)[9] is enjoined to pay him his wage in its entirety, and if [12] a financial liability (*jazāʾ*)[10] arises, a fiscal tax (*mīrī*) like the present one [i.e., duty payable at the border or at the crossing from one region to another within Libya], or a theft (*saraq*) [from the herd], [13] the financial liability is solely incumbent on him; the employer is not implicated at all.[11] This is the

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[5] The present case relates to an employee (*ajīr khāṣṣ*) whose services are hired by the employer for carrying out a specific task for a specified period in return for a fixed payment stipulated in the contract of hire. See Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 158f., lines 1079ff.; Schacht, *Introduction*, 154–55; Evans-Pritchard, 36; Mohsen, 123, 128, 135; Colucci, *Tribù*, 27, 29; cf. Abū Ḥassān, 319–20; Glossary, s.v. *ijāra*.

[6] The payment in question seems to be a per capita levy payable at the border for each of the camels.

[7] The hireling was of the opinion that the duty was incumbent on the employer, presumably on the assumption that this expenditure was incurred in the fulfillment of his obligations, while the employer's proxy thought that payment of the duty was the hireling's personal affair.

[8] The decision was issued in the form of a legal opinion although there was no formal request for such an opinion. The parties to the dispute—the hireling and the employer's proxy—appeared in court, and awaited the court's decision. Note, on the other hand, the case described in doc. 71, where there is an explicit request for a legal opinion.

[9] Cf. the terms *ujra maqṭūʿa* and *muʿallim* in Abū Ḥassān, 285–86.

[10] Cf. al-ʿAbbādī, *al-ǰarāʾim*, 394; Ḥasanayn, 200–1.

[11] The Nāʾib made a clear distinction between the employer's duty to pay the hireling the fixed payment in its entirety and personal obligations incumbent on the hireling that, in his view, had no connexion whatsoever to the contract of hire,

guiding principle [14] of the [*muftī*'s] decision [i.e., legal opinion] (*ḥukm*) on this matter.[12]

[15] [Issued on] the 5th day of R. A.[13] [1]351, [corresponding to] August [?], 1932.

The Nā'ib of the Sharīʿa Court in the Kufra District
[16] Aḥmad al-Khaḍrī[14]

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such as border levies or losses caused to the herd as a result of a theft (see doc. 68 above) while carrying out his obligations towards the employer. According to the customary law of the Awlād ʿAlī too, the herdsman is liable for any loss of camels (*ḍāmin lahā*) in the pasture unless he drove the camel away from the pasture fearing a thief; see Maḥjūb, 330; cf. Murray, 327.

[12] The concluding sentence employed here is typical of a legal opinion rather than of a judicial decision, although no request for a legal opinion had been made to the Nā'ib. He had been requested by both parties present in court to decide in the matter of a common civil dispute. A *muftī*'s legal opinion, unlike a *qāḍī*'s decision, has no binding validity and cannot be executed. Anyone requesting a legal opinion may accept or reject it (see Masud, Messick & Powers, *Muftis*, 18; Layish, *fatwā*, 270). It may well be that the blurring of the distinction between a judicial decision (the Nā'ib's title appears in the margin of the document) and a legal opinion in this document reflects the confusion prevailing during the period of transition from the Ottoman rule until the consolidation of the Italian administration (see Layish, *Divorce*, 4–6).

[13] The initials R.A. stand for Rabīʿ al-Awwal.

[14] There is an Italian summary of the document in the margin concluding with an observation made by the Governor of the sub-district of Kufra to the effect that the judgment had been examined. This reflects the policy of normative control of *sharʿī* jurisprudence adopted by the Italian administration (see Layish, *Legal Documents*, 6; Preface to this volume, xii).

APPENDICES

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The listing presents, in alphabetical order, the bibliographical abbreviations used in the book and the Notes. The article *al* in Arabic has been disregarded in the alphabetical arrangement.

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GLOSSARY OF ARABIC LEGAL TERMS AND PHRASES

Note

This glossary is intended for readers unfamiliar with Islamic and customary legal terms and phrases in the Arabic documents. Readers capable of perusing the terms and phrases in Arabic are referred to the glossary supplied in the first part of this study.[1]

The glossary includes basic legal and sociological terms indispensable for an adequate understanding of the documents, as well as terms that either have more than one meaning or are not to be found in ordinary dictionaries. In order to facilitate their identification, entries in the glossary have been given in a transliteration of the literary Arabic form. Orthographical and grammatical errors in the original documents have been ignored.

Some technical legal terms or phrases included in the glossary do not occur explicitly in the documents; these have been included in the introductions and footnotes of each of the documents with references to legal and scholarly literature and to dictionaries. This was done in order to clarify the meaning of closely related concepts occurring in the texts, e.g., the concept of *ẓihār*, which has been adduced by way of clarifying the *ḥarām* oath. See also, for instance, *tafwīḍ al-ṭalāq*, *liʿān* and *zaʿlāna*. Similarly, etymological derivatives, such as *tawba, ḥalf, ʿadl, ʿaṭāʾ, ghaṣb, firāq*, noun forms related to verbs attested in the text, also appear in the glossary.

Priority is given to the Mālikī doctrine as presented in Ibn ʿĀṣim, *al-ʿĀṣimiyya* which seems to be the preferred manual of Libyan *qāḍī*s. Commonplace legal terms are treated briefly in the glossary (without further references to the literature) for the convenience of uninitiated readers. Layish, *Divorce*, which is based exclusively on Libyan legal documents (in fact, an integral part of this study), is also frequently resorted to in the glossary; the reader is advised to consult the literature indicated there.

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[1] Layish, *Legal Documents*, 89–97.

The headword (in *italics*) is followed by a literal translation and, when necessary, a brief explanation. Distinct meanings for one headword are separated by a semicolon. Comments meant to facilitate understanding of the terms in their specific occurrences are given with references to the sources wherever necessary in addition to the sources indicated in the footnotes to the documents.

Each entry has been listed under the most familiar noun form of the legal concept in question and followed by derivatives of legal terms, such as verbs (here cited in the 3rd person masc. sg. form of the past tense).

Plurals of nouns are generally given only when they occur in the documents. When the headword appears in the plural, the singular form (also in *italics*) is given in parentheses. Cross references to other entries are given in *italics*.

Entries have been listed in Latin (rather than Arabic) alphabetical order. Diacritics (*ḍ, ṭ, ẓ*), long vowels (*ā, ē, ī, ō, ū*), the consonants ʿ and ʾ, the article *al*, conjunctions, and prepositions have been disregarded in the alphabetical sequence.

The occurrence of the terms in the texts is indicated by the number of the document and that of the line in its English translation,[2] separated by a colon. A comma separates references to different lines of a single document, and a semicolon references to different documents. Thus, 25:17, 30; 64:5 refers to lines 17 and 30 of document no. 25, and line 5 of document no. 64. The occurrence of the entries in the introductions and footnotes accompanying the documents is indicated by reference to the introduction and the number of the footnote within each of the documents (rather than the page number). Thus, 20: intro., fn. 8 refers to the intro. and fn. 8 of document no. 20. Document number in bold style indicates that the entire document deals with one main term. The occurrence of the terms in the Introduction to this volume is indicated by the page number (in Roman) preceded by p. (to be distinguished from the entries in the documents).

Phrases cited in context in the glossary have been entered under their key words; see, for instance, *ʿayb* and *bayt*.

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[2] For obvious reasons the number of the line in the English translations is not always identical with that in the original Arabic documents.

ʿabd (pl. *ʿabīd*) slave (Brunschvig, *ʿAbd*) 52:13; 62:fn. 1

ʿāda custom, tribal customary law p. 8; 6:15; 16:9; 22:8; 26:7; 32:7; 59:6; also *ʿurf*; Index, custom

ʿadam permanent mutilation caused by bodily injury in connexion with payment of blood money 57:7, fn. 10

ʿadl husband's justice, impartiality towards his co-wives 7:10, 12, fn. 8, 10; also Index, polygamy

ʿadl (pl. *ʿudūl*) witness of good character and integrity; notary, professional witness; juristic adjunct assigned to a *qāḍī* (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 16, line 101; Tyan, *Organisation*, 239–41; idem, *ʿAdl*, 209–10; Wakin, 7; Peters, *Shāhid*, 207; Powers, *Law, Society and Culture*, Subject Index: Notary, Witnesses; cf. Stewart, *Texts 2*, Glossary) 6:19, fn. 17; 30:12; 41:fn. 3; 45:6, 15; 57:13; also *shuhūd ʿudūl*

ʿadl riḍā "satisfactory witness" in the sense that he has successfully undergone the test of credibility (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 18, line 111; Santillana, vol. 2, 600); also *tazkiya*

ʿāhir ghayr maḍbūṭa adulterous and depraved woman 12:4

ʿā'ila, ʿayla, ʿēla "family," lineage usually consisting, among the Awlād ʿAlī in the Western Desert, of five generations; the most important political unit, constitutes the vengeance group liable to payment of blood money (Mohsen, 26–27) 4:5; 5:3, 6; 7:5–6; 9:5–6; 11:6; 12:2–3; 13:4; 14:5; 15:5; 17:5; 18:5–6; 21:3; 24:6; 25:5; 30:4; 43:5; 50:4; 52:6; 53:6; 54:5; 55:2; 56:7; 57:13; 63:3–7, 9, 11; 68:5; 70:4; also *ʿayth*

ajīr khāṣṣ employee 71:fn. 3

akh (or *ukht*) *li-ab* paternal half-brother (or sister), consanguine brother (or sister); the brother is an agnatic heir who receives (when entitled to inherit) the residue of the estate after the Qur'ānic heirs have been assigned their prescribed portions; and the sister (when entitled) may either inherit as a Qur'ānic heir, or be converted into residuary heir by a consanguine brother, or inherit as "accompanying residuary" (Coulson, *Succession*, 68ff.)

akh (or *ukht*) *li-umm* maternal half-brother (or sister), uterine brother (or sister); both brother and sister inherit always (when entitled) as Qur'ānic heirs (Coulson, *Succession*, 67)

ama a slave girl (Powers, *Law, Society and Culture*, Subject Index: Slaves, females) 61:6; also *ʿatīq*; Index: Slavery

ʿamal judicial practice of medieval *sharīʿa* courts (Berque, *ʿamal*, 427–28) p. 8; 15:fn. 11

amāna fiduciary relationship in trust (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 190, line 1289; cf. Stewart, *Texts 2*, Glossary, *amīn*) 15:fn. 11; 29:fn. 6; 34:fn. 6; 66:7, fn. 6; 69:fn. 4

ʿamār al-dam vengeance and blood-money group usually consisting of male agnates (among the Bedouin of Cyrenaica and the Western Desert of Egypt; Stewart, *Tha'r*, 442); also *awliyā' al-dam; ʿumarā' al-dam*

ʿamd deliberate homicide or bodily injury caused by any weapon or means liable to kill or injure (Anderson, *Homicide*, 819; Peters, *Criminal Law*, § 0.1.3.1) 55:fn. 11; 56:fn. 5; 57:intro.

amīn trustee 66:fn. 5

ʿamm paternal uncle 44:fn. 15

ʿanat hardship, often referring to sexual temptation (Layish, *Divorce*, Glossary) 14:9–10 (*akhāf ʿalā nafsī al-ʿanat* "I am afraid of falling into sexual temptation"); 30:6 {"I am a young woman and the devil is wily (*wa'l-shayṭān shāṭir*)"}, 10–11, fn. 13; also *fitna*

ʿaqd marriage contract (the essential elements consisting of dower, formula of pronouncing marriage, marriage-guardian, and witnesses; Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 52, line 333ff.) 1:21, 23, 24, fn. 28 (definition); 2:7; 5:7; 6:9

ʿāqil sane

ʿāqila (pl. *ʿawāqil*) the offender's or the victim's male agnates collectively responsible for the vengeance (or retribution) and blood money of the respective groups (under tribal and Mālikī law) (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 230, line 1582); *shaykh* or elder, authorized representative of a corporate entity such as the blood-money group and the tribe (in the Western Desert; Stewart, *ʿUrf*, 891) 57:fn. 12; 60:fn. 17

ʿār shame, opprobrium, dishonour (Pellat, 78; cf. Kressel, *Ascendancy*, 165); also *ʿayb*

ʿārifa a woman knowledgeable in matters relating to females 58:fn. 10

ʿaṣaba agnates, relatives through males; agnatic heirs 45:intro., p. 163

ʿaṭā' customary "gift" bond, marriage (Layish, *Tajdīda*) p. 6; 1:5, fn. 6–9, 33; 32:fn. 6; also *hiba*

ʿathāth household effects (Layish, *Divorce*, Glossary)

ʿatīq (*ʿitq*) freed manumitted slave (manumission) (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 192f., lines 1309ff.; Powers, *Law, Society and Culture*, Subject Index: Slaves, manumission) 15:5–6; also *ama*; Index, slavery; Layish, *Divorce*, Glossary

awliyā' (sg. *walī*) *al-dam* blood avengers 29:fn. 3; *ʿamār al-dam; ʿumarā' al-dam*

ʿawrāt (sg. *ʿawra*) lit. "*pudendum* of female;" a metaphor for female's chastity, modesty (on *ʿawra* as a legal term, see Alshech, fn. 54) 59:13, fn. 9

ʿayb shameful, disgrace (cf. Stewart, *Texts 2*, Glossary); *ʿalā ʿayb aw ghayb*, "in the case of shame [for behaviour] or absence," a customary phrase signifying the termination of delay of payment of deferred dower on dissolution of the marriage either on grounds of the wife's adultery or the husband's absence (Layish, *Divorce*, 49) 1:15. fn. 26; 6:15; also *ʿār*

ʿayth lineage, the North African Berber equivalent for *ʿā'ila* 67:7–8, 11, fn. 8

bāligh, bulugh of age, majority

barā'a innocence in a case of homicide (in tribal law) 69:fn. 4

baraka lit. "blessing," saintly power (Powers, *Law, Society and Culture*, Subject Index)

barāwa tribal detachment from any responsibility for the action of a particular person 55:fn. 22; 63: fn. 15

bārida (*bārida mubarrada*) established right (Lane, 183iii); easy acquisition, i.e., without haggling 28:11; 62:6

baṣma fingerprint 7:17

basmala the utterance of the invocation "In the name of God, the Merciful, the Compassionate" (Layish, *Divorce*, 198) 1:fn. 2

bāṭil invalid, null and void. The Mālikī doctrine does not distinguish between *fāsid* and *bāṭil*; failure to observe either a fundamental condition (*aṣl*) or an attribute (*waṣf*) of an act entails no legal effect and binds no one (Linant de Bellefonds, *Fāsid wa-Bāṭil*, 831; Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 56f. lines 371ff. with respect to marriage) p. 4; 41:8; 52:15; 71:fn. 1; also *fāsid*

al-battata divorce formula suggesting irrevocable repudiation (Layish, *Divorce*, Glossary); also *ṭalāq bā'in*

bayʿ (and its etymological derivatives: *bāʿa, bā'iʿ*) sale (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 100ff. lines 670ff.; Powers, *Law, Society and Culture*, Subject Index, Sale; cf. Coulson, *Commercial Law*, 19ff.) 28:10, 12, 14; 64:7, 12, 15; 65:1; 66:2, 5, 6; 68:5

baynūna kubrā major intermediate period of separation during which a triply divorced woman is not allowed to re-marry her ex-husband (Layish, *Divorce*, Glossary) 35:11–12; also *ṭalāq bā'in; ṭalāq bi'l-thalāth*; Index: divorce, legal consequences

—— *ṣughrā* a short intermediate period of separation after a first or second minor irrevocable repudiation; the husband may reinstate the wife, during or after the waiting period, by means of a new marriage and dower (Layish, *Divorce*, Glossary) 26:11–12; 31:28; also *ṭalāq bā'in*; Index: divorce, legal consequences

bayt, wa-baytuhā wa-mā lamma wa-ra'suhā wa-mā ḍamma "[a security against] possible mishaps affecting her house or her person," a popular phrase meaning: in case of divorce or death of the woman's husband 5:10; 6:16–17

bayt al-māl the Treasury 45:intro., p. 163
bayt al-shanāʿa lit. "the house of repulsiveness," tribal procedure for proving impotence (Layish, *Divorce*, 23)
bayt al-ṭāʿa lit. "house of obedience," a legally enforceable judgment of obedience (Layish, *Divorce*, 46)
bayyina (pl. *bayyināt*) a proof by means of witnesses (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 4, line 25; Brunschvig, *Bayyina*; Santillana, Subject Index and Glossary) 13:7; 27:5–6; 28:6; 29:fn. 5; 31:fn. 14; 34:11; 46:5; 47:10; 51:13; 60:6; 66:3
bikr virgin 1:23, fn. 29; 6:3; also *jabr*
bināʾ (and its etymological derivatives, such as *banā*) consummation of the marriage (Layish, *Divorce*, Glossary) 1:8; 37:13; 39:5; 39:6–7; also *dukhūl*

ḍabṭ detailed protocol of legal proceedings (Agmon, *Family in Court*, *passim*); deposition xi; 3:11
dāʾirat al-sharʿ al-sharīf Sharʿī Chamber within the Civil District Court [of Kufra] (Layish, *Blood Money*) 15:4; 18:4; 22:5
dakhl al-bayt violation of the sanctity of the home; illegal entry into the home {cf. Stewart, *Texts 1*, 15ff.; idem, *Individual and Group*, 9–11; al-Qusūs, 59–61; Abū Ḥassān, 253–57 (*ṣiyānat al-bayt*)} p. 8; 60:22–23, fn. 7, 17
dār ʿadl lit. "the house of a virtuous person," an institution originating in tribal law for handling marital disputes adopted by the *sharīʿa* court (Layish, *Dār ʿadl*; Fierro, *Dos Árbitros*; idem, *Women*) p. 7; 9:3, 14, 17, fn. 12; 41:intro.; also *ʿadl*
darāʾib (sg. *darība*) tribal customs (Layish, *Divorce*, 179) xvi; p. 1; also *ʿāda; ʿurf*
darak default in ownership; restitution of the object of a sale in case of defect; indemnification for debt (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 134, lines 897ff.; Ibn al-ʿAṭṭār, 70; Schacht, *Bayʿ*, 1112ii; idem, *Introduction*, 139; Lane, 874) 52:11; 64:12
ḍarar Mālikī concept of prejudice; injury (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 214ff. lines 1467ff.; cf. Coulson, *History*, 187–88, 207; Layish, *Divorce*, Glossary) 28:5 (*mutaḍarrar*); 29:fn. 5; 31:19, 25, fn. 8; 60:9
al-ḍarb al-ʿadīm wounds that cause permanent mutilation in connexion of blood money 57:fn. 10
al-ḍarb al-salīm wounds that heal in connexion of blood money 57:fn. 10
ḍarīḥ tomb of a Muslim saint 41:22
ḍarra wife other than the first of a plural marriage 7:7, 8, 10
ḍarūra doctrine of necessity intended to dispense the individual from observing strict rules of the *sharīʿa* (Linant de Bellefonds, *Ḍarūra*; Schacht, *Introduction*, 84; Hallaq, *Authority*, 212; idem, *Legal Theories*, 110) 69:fn. 4; also *maṣlaḥa*
dayn (pl. *duyūn*) debt, claim (Delcambre, *Dayn*; Schacht, *Introduction*, 144–45) 4:fn. 9; 52:10, 11
dhawū ʾl-arḥām cognates, relatives through females; relatives entitled to inherit when there are no *ʿaṣaba* or *dhawū al-farāʾiḍ*; under Mālikī law they are replaced by *bayt al-māl* (Coulson, *Succession*, 30–31, 91) 45:intro., p. 163
dhawū al-farāʾiḍ Qurʾānic heirs 45:intro.
dhimma financial obligation; liability (Layish, *Divorce*, Glossary) 2:5; 8:6; 10:16; 13:5, 10; 26:8; 33:8
diya blood-money for homicide and bodily harm (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 229ff., lines 1574ff.; Anderson. *Africa*, 360; Peters, *Criminal Law*, § 0.1.3.3.2; cf. Layish & Warburg, Glossary; Layish, *Blood-Money*) 55:5–6, 10, 16, intro.; 56:fn. 5; 57:fn. 11, 18
dukhūl consummation of the marriage (Layish, *Divorce*, Glossary) 1:7; 9:8; 11:8; 24:8; 34:6; 37:6, 7, 13; 39:8; also *bināʾ*

faqīh (pl. *fuqahāʾ*) (in popular usage) reciter of the Qurʾān; elementary school teacher (Wehr, 723; Layish, *Divorce*, Glossary) 6:24, fn. 17; 9:14, 17, fn. 12; 49:1, 2, 4, 6, intro., fn. 2, 6; 51:11–12

al-farīḍa al-sharʿiyya distributive shares in succession according to *sharʿī* rules of inheritance 43:24; 45:3, 8–9, 13, 17, 21; 50:6, 10; 51:3, 14; 53:9
farj pudendum of female, a metaphor for female chastity 60:fn. 15
fasād lit. "corruption," immorality; illicit intercourse (Layish, *Divorce*, Glossary) 12:fn. 3; 32:fn. 7
fāsid defective or irregular; a defect in an attribute (*waṣf*) of an act; the Mālikī doctrine does not distinguish between *fāsid* and *bāṭil*; in both cases the act is null and void (Linant de Bellefonds, *Fāsid wa-Bāṭil*, 831; Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 56f. lines 371ff. with respect to marriage) 71:9, fn. 1; also *bāṭil*
faskh dissolution of marriage by legal proceedings (Layish, *Divorce*, 80, 100)
al-Fātiḥa [*sūra*] opening chapter of the Qurʾān (Layish, *Divorce*, Index)
fatwā, futyā legal opinion of *muftī* (Masud, Messick & Powers, *Islamic Legal Interpretation*, Glossary; Powers, *Law, Society and Culture*, Subject Index, *Istiftāʾ*; Layish, *Divorce*, Glossary) x; p. 9; 50:11 (*aftā*); **71–72**; also *jawāb; qawl*
fiqh the science of Islamic law
firāq (and derivatives: *fāraqa, iftaraqā*) lit. "separation," dissolution of marriage (Layish, *Divorce*, Glossary) 8:12; 15:7, 11; 16:9; 19:3; 20:8; 21:7; 22:8; 26:8; 32:11, 13
firāsh matrimonial bed; wedlock 12:fn. 2 (*al-walad liʾl-firāsh*) 40:12
fiṭām (and its derivative *infiṭām*) weaning (Layish, *Divorce*, Glossary) 43:fn. 7
fitna sexual temptation (Layish, *Divorce*, 92, 144); also *ʿanat*
fuqahāʾ (sg. *faqīh*) jurists, experts in Islamic law

gaṣṣāṣ injury payment assessor (cf. Stewart, *Texts 2*, Glossary); also *qaṣṣāṣ*
gharāma fine, amends, penalty (cf. Stewart, *Texts 2*, Glossary); also *kabāra*
gharar lit. "hazard," uncertainty, risk and speculation in obligations undertaken by the parties to a contract of sale that are subject to the prohibition of usury (for definitions in Mālikī law, see Saleh, 51–52) 64:fn. 6; 71:fn. 6; also *ribā*
ghaṣb unlawful appropriation of someone's property or an encroachment on its use (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 218, lines 1498ff.; cf. Johansen, 144; Powers, *Law, Society and Culture*, 28) 41:1; 68:fn. 6
ghayb (and its etymological derivatives, such as *ghāʾib; ghayba; ghiyāb*) absence of husband as ground for divorce (Layish, *Divorce*, Glossary) 1:15; 6:15; 28:intro.; also *ʿayb*
ghishsh deception 32:fn. 6

ḥabs—see *waqf*
ḥaḍāna custody of minor children, the mother having priority (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 98ff., lines 953ff.; cf. Layish, *Divorce*, Glossary; Index, custody) 43:3, 13, 15, 17, 20
ḥadd (pl. *ḥudūd*) Qurʾānic punishment prescribed for specific crimes (Anderson, *Africa*, 362; Powers, *Law, Society and Culture*, Subject Index) 41:fn. 10
ḥadīth formal tradition deriving from the Prophet; an account of what the Prophet said or did, or of his tacit approval of something said or done in his presence (Robson, *Ḥadīth*, 23ff.; Powers, *Law, Society and Culture*, Subject Index)
ḥagg (in customary law) judgment; award, due, amends; justice, legal process (Stewart, *Texts 2*, Glossary)
ḥāʾiḍ menstruating 41:27
ḥāja (pl. *ḥawāʾij*) appears, on the basis of these documents, to constitute an undefined standard unit specifying payments of dower and blood money in kind (livestock, utensils, clothes, personal effects), or in cash (*darāhim*) (cf. de Premare, III, 264–65; Dozy, I, 333) 6:11, 14–15; 13:6, 9, 10; 46:2–3, fn. 5; 55:6, 7–9
ḥajj pilgrimage to holy places of Islam in Hijāz (cf. Stewart, *Texts 2*, 7.43)
ḥājj honorific title of pilgrim to Mecca
ḥakam arbitrator 9:fn. 3

ḥākim judge, *qāḍī* 3:10
ḥalf (and its etymological derivatives, such as *ḥalafa*) swearing, oath (for different kinds of oaths, see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 34, lines 313ff.) 46:18; 60:7, 16; 70:8–9, 12, 17; also *yamīn*
ḥaly jewelry (Layish, *Divorce*, 30, 119)
ḥaml pregnancy 40:7, 8, 10, 14, 15, 19, 20; 41:5, 9, 13, 21, 26, 32, 33
—— *nāʾim* lit. "dormant embryo," a claim of extended period of pregnancy as a defence against a charge of illicit intercourse (Layish, *Divorce*, Glossary) 39:6–8, fn. 3
ḥaqq private claim or right; also *ḥagg*
ḥarām forbidden, unlawful; oath of abstention from wife as if one's mother (Anderson, *Africa*, 362–63; Layish, *Divorce*, Glossary) 15:9; also *ẓihār*
ḥaram sacred ground around the well considered as tribal property and hence not salable; forbidden to outsiders without permission 64:8; fn. 6–7
ḥayy tribe; quarter 40:14; intro.
hiba (and its derivatives, such as *wahaba*) donation, gift *inter vivos* (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 172 lines 1162ff., 176 lines 1191ff.; Linant de Bellefonds, *Hiba*); "gift" marriage (Layish, *Tajdīda*); 1:fn. 28, 33; 46:fn. 5; 61:fn. 8; 67:7; also *ʿaṭāʾ*
ḥijjih (pl. *ḥijjāt*) pleading (in customary law; Stewart, *Texts 2*, Glossary); also *ḥujja*
ḥimāya protection (in customary law) 41:30, fn. 12; also *jiwār; jīra*
ḥirz safe keeping of a private object by a watchman (precondition for theft entailing amputation) 68:fn. 2
ḥujja (pl. *ḥujaj*) proof, evidence; plea; certificate (Layish, *Divorce*, Glossary; cf. Masud, Messick & Powers, *Islamic Legal Interpretation*, Glossary) 27:10; 52:16; also *ḥijjih*
ḥukm court decision p. 8; 1:3; 7:3; 8:3
ḥuqūq (sg. *ḥaqq*) *zawjiyya* conjugal rights (Layish, *Divorce*, Glossary); also *ḥaqq*
ḥurma woman, wife (Stewart, *Texts 2*, Glossary); sanctity (Powers, *Law, Society and Culture*, Subject Index)

iblāgh transmitting a communication concerning the procedure of *iʿdhār* 30:13
ibrāʾ remission of rights or debts 47:11; also *mubāraʾa*
ʿidda woman's legally prescribed waiting period after termination of marriage during which she may not remarry. Under Mālikī law, in the case of divorce, it usually lasts three periods of legal purity or until delivery if the woman is pregnant. In the case of widowhood, it lasts four lunar months and ten days or until delivery (Anderson, *Africa*, 363; Layish, *Divorce*, Glossary) 30:20; 33:17; 37:13; 69:8 (widowhood); also *iʿtidād*
iʿdhār a procedure enabling the defendant to produce, within a respite granted by court, two witnesses of good reputation, to support his allegation, failing which, he is convicted (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 12f., line 80ff.; Powers, *Law, Society and Culture*, Subject Index) 30:13, fn. 11 (for description of the procedure) 51:12, 13
idhn permission (for marriage) 5:6–7; 6:9
iftidāʾ redemption (Layish, *Divorce*, 45–46); also *khulʿ*
iḥtilām a boy's attainment of puberty 43:fn. 7
ījāb wa-qabūl offer and acceptance concluded in one session (*majlis*) required for the validity of a *sharʿī* contract of marriage or sale (Anderson, *Africa*, 364; Peters, *Marriage*, § 0.1.2.1) 1:5, fn. 11, 28; 2:7; 5:12; 6:18; 28:12; 47:11; also *ʿaqd*.
ijāra contract of hire of services 72:fn. 3
ijbār—see *jabr*
ijmāʿ lit. "consensus," one of the four sources of law in Islamic legal methodology, representing the ultimate sanctioning authority which guarantee the infallibility of those legal rulings and methodological principles that are universally agreed upon by Sunnī scholars (Hallaq, *Legal Theories*, 75–81)
ijtihād lit. "exertion," creative legal reasoning; the classical mechanism for deriving

law from the textual sources of the Qurʾān and *ḥadīth* by means of analogy (*qiyās*) and consensus (*ijmāʿ*) (Hallaq, *Legal Theories*, 117–21; cf. Powers, *Law, Society and Culture*, Subject Index) p. 9

—— *fī ʾl-madhhab* deriving law by means of interpretation within any given school of law

īlāʾ dissolution of marriage by husband's oath to abstain from marital relations (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 74, line 490ff.; cf. Layish, *Divorce*, Glossary) p. 9

ʿilm information, knowledge; a *qāḍī*'s personal knowledge; legal knowledge, formal agreement (cf. D'Emilia, 24, 32; Stewart, *Texts 2*, Glossary; idem, *Boundaries*, 41) 5:2; 6:2

ilzām coercion

imām a prayer leader (cf. Masud, Messick & Powers, *Islamic Legal Interpretation*, Glossary) 1:29; 6:2; 14:4; 40:22

iqrār acknowledgment, admission, confession (Linant de Bellefonds, *Iḳrār*)

iqtirān marriage, wedding 24:12, 20; 25:8

ʿirḍ honour; good repute; chastity (Stewart, *Honor*; idem, *Texts 2*, Glossary; Kressel, *Descent*, 91, 126, 182; idem, *Ascendancy*, 14 fn. 15; Ginat, 151ff.) 12:fn. 2; 59:8, fn. 8

irth—see *wirātha*

ʿishra conjugal relations; also *muʿāshara*

iṣlāḥ reconciliation; also *ṣulḥ; muṣālaḥa*

ʿiṣma matrimonial authority of husband over wife; the bond of marriage (Layish, *Divorce*, Glossary) 2:4; 13:7; 33:17; 34:15

istibrāʾ waiting period required from a woman in order to menstruate and become purified before consummating her second marriage (Layish, *Divorce*, 160; cf. Anderson, *Africa*, 365f.); oath regarding absence of pregnancy or paternity (Powers, *Law, Society and Culture*, 28)

istiftāʾ request for a legal opinion; also *fatwā; jawāb*

istimtāʿ use of matrimonial right by the husband

iʿtidād observing the waiting period 13:11; 20:14; 23:16; 24:20; 26:12; 30:23; 36:12; also *ʿidda*

ʿiwaḍ compensation, indemnity

jabr coercive power of guardian to marry off his ward (Layish, *Divorce*, Glossary) p. 6; 1:fn. 29; also *walī mujbir*

jalāʾ migration, departure from a place (out of fear of an act of vengeance or retaliation) 29:fn. 3; also *nazāla*

jarḥ bodily harm, injury 56:fn. 5

al-jarḥ wa'l-taʿdīl disparaging and declaring a transmitter of *ḥadīth*s as untrustworthy 47:fn.12

jawāb response to a request of a *fatwā*; legal opinion (Layish, *Divorce*, 184, 201; Powers, *Law, Society and Culture*, 10, 21–22); the defendant's response on the plaintiff's claim (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 10 line 56, n. 34) p. 9; 71:5; 72:10; also *fatwā; istiftāʾ; qawl; maqāl*

jihād holy war

jīra protection 41:28; also *jiwār; ḥimāya*

jiwār protection (in customary law) 9:14, fn. 3; 40:8; 41:16, 26; also *jīra; ḥimāya*

juzʾiyya minor claims (court of) 18:fn. 13

kabāra amends for offences against honour (in the Western Desert; Stewart, *ʿUrf*, 890) 1:fn. 38; 41:fn. 12; 59:fn. 8; 60:fn. 17; also *gharāma*

kafāʾa principle requiring husband to be wife's equal in descent (*nasab*), financial standing (*māl*), etc.; lack of *kafāʾa* as impediment for marriage in Mālikī doctrine (Santillana, vol. 1, 206–8)

kafāla guarantee, suretyship (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 42ff. lines 274ff; cf. Stewart, *Texts 2*, Glossary under *kfl*; Layish, *Divorce*, Glossary); also *kafīl*

kaffāra religious expiation in the case of non-fulfilment of an obligation under oath (Schacht, *Introduction*, 159)

kafīl guarantor 32:fn. 6; also *kafāla*

kashf test (of virginity) 58:intro.

kātib scribe, clerk of the *sharīʿa* court xiii; 6:1, 24; 52:17; 55:13; also Name Index of Qāḍīs, Nā'ibs and Other Judicial Clerks

khādima maidservant

khāl maternal uncle 5:fn. 3

khalāṣ divorce (popular usage) (Layish, *Divorce*, 27; Stewart, *Texts 2*, Glossary under *xlṣ*) 18:6

khalwa privacy of husband and wife technically enabling them to have undisturbed marital relations (Layish, *Divorce*, Glossary)

khasā'ir (sg. *khasāra*) losses 22:fn. 9; 63:fn. 21

khaṭa' accidental homicide or bodily injury where neither the target nor the result were intended (Peters, *Criminal Law*, § 0.1.3.1; Anderson, *Homicide*, 821) 55:fn. 11; 56:fn. 5; 57:intro.

khāṭib (and its derivatives, such as *khaṭaba*) suitor, someone asking for the hand of a woman in marriage (Stewart, *Texts 2*, Glossary under *xṭb*) 1:4, 17, 22, fn. 6; 26:9

khazz proportional (though unspecified) share in the entire jointly-owned property used for the purpose of its division among those entitled (in Mālikī literature) 63:intro., p. 235

khiyār al-ʿayb lit. "the option [on discovery] of a defect," defect extant at time of contract, making it rescindable (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 132ff., lines 894ff.; cf. Schacht, *Introduction*, Glossary; Coulson, *Commercial Law*, 65ff.) 28:fn. 11; 58:fn. 2

khulʿ lit. "divestiture," divorce by agreement by which wife redeems herself from marriage for a consideration (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 80 lines 531ff.; Layish, *Divorce*, Glossary; idem, *Khulʿ*; Powers, *Law, Society and Culture*, Subject Index: Divorce) pp. 6–7; 7:9, intro.; 8:7–8, intro.; 15:7; 16:9; 20:13; 23:7–8, 12, 14; 26:8; 36:5

khulṭa (and its derivatives such as *mukhālaṭa*) sexual relations 41:11, 13, 32

kināya implicit (declaration) (Layish, *Divorce*, Glossary)

kirā' contract of leasing or hiring out of things (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 150ff.; Ibn al-ʿAṭṭār, 58ff.; Delcambre, *Kirā'*, 126–27) 65:fn. 3

kiswa clothing (Layish, *Divorce*, Glossary)

kitāb, ʿalā kitāb allāhi wa-sunnat rasūlihi "[a *sharʿī* marriage concluded] according to the Book of Allāh [the Qur'ān] and his Messenger's *sunna*" 5:12; 6:8; also *naṣṣ*

kulfa maintenance; also *nafaqa*

liʿān dissolution of marriage through process of mutual imprecation in case of unproven charges of adultery against wife (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 76–77, lines 502ff.; Layish, *Divorce*, Glossary) 41:intro., fn. 20

lijām (pl. *lujum, aljima*) apparently, a concept employed in dividing land held by the tribe into units equitably among the clans for purposes such as seasonal cultivation; units are required to be equal in value with respect to either size or quality. In this meaning, the term *lijām* is not given in the standard dictionaries (literary or dialectal) **63**; also *sahm, khazz*

mabtūta major irrevocably divorced woman (after a third or triple repudiation) 12:6; 15:9 (after *ḥarām* oath); also *ḥarām*

ma'dhūn authorized *sharʿī* marriage solemnizer or notary (Layish, *Divorce*, Glossary)

mafqūd missing (husband) 28:fn. 13

maḥḍar (pl. *maḥāḍir*) minutes of court proceedings (cf. Wakin, 11–12; Agmon, *Family in Court*) xi

mahr dower (in Mālikī law) 1:fn. 25; 31:28; also *ṣadāq*
—— *al-mithl* proper, fair dower 1:fn. 25; 2:fn. 4 (for definition)
—— *muʾajjal* deferred dower, payment of which is delayed beyond the consummation of the marriage until a specified date or event in the course of the marriage; the husband's decease, but not divorce, terminates the delay 1:fn. 25
—— *muʿajjal* prompt dower, payable at the conclusion of the marriage and in any case, prior to its consummation 1:fn. 25
—— *musammā* specified dower agreed between the parties and stipulated in the marriage contract 2:fn. 4
maḥram degree of kinship forbidden for marriage
makhṭūba a woman whose hand is requested in marriage 1:8, 9, 12, 15–17, 19, 22, 24
manqūlāt movables 4:6
maqāl contention; the plaintiff's claims presented to the court in writing (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 10, line 60, n. 34) 1:10, fn. 21; 39:8; 71:fn. 5; also *jawāb*
maraḍ al-mawt death-sickness (in connexion with testamentary disposition) 54:fn. 10
maʿrifa approval, endorsement; identification 2:12; 3:5; also *taʿrīf*
al-maʿrūf al-dhāt (*dhātan wa-isman*) identified by person and name 1:4; 4:8; 9:7; 10:5–6; 11:6; 15:6; 16:8; 21:4; 25:6; 28:7 (identified by descent); 31:6; 34:5; 35:4; 39:5; 43:6; 44:5–6; 45:5; 51:5, 9, 11; 57:5, 11; 58:5–6 (identified by the *qāḍī*); 59:5; 61:5; 64:2 (identified by person and descent by the *qāḍī*); 67:5; also *taʿrīf*
maṣārīf al-marʾa expenses incurred by husband in consequence of marriage (Layish, *Divorce*, 52–53)
mashhūr dominant legal opinion among the jurists of the same school (Hallaq, *Legal Theories*, 163; Coulson, *History*, 145); also *ʿamal*
maskan ʿadl lit. "fair (legal) conjugal dwelling" (Layish, *Divorce*, 197); also *maskan sharʿī*
maskan sharʿī lit. "legal [conjugal] dwelling" as part of maintenance due to the wife from her husband 1:fn. 15; 41:fn. 6
maṣlaḥa preference of the public interest over the strict application of analogy (Schacht, *Introduction*, 60–61; cf. Hallaq, *Legal Theories*, 89, 112–13; Layish, *Divorce*, Glossary; Powers, *Law, Society and Culture*, Subject Index) p. 9; also *ḍarūra*
masʾūl lit. "[the official] responsible," in charge of the *sharīʿa* court (in Kufra) (Layish, *Legal Documents*, 15; Name Index of Qāḍīs, Nāʾibs and Other judicial Clerks) 16:6
maʿṣūm inviolable (in blood vengeance) 55:fn. 23
maʿtūq liberated slave; also *ʿatīq; ʿabd*
maʾūna (and its derivatives such as *muʾna*) board, food (Layish, *Divorce*, Glossary)
mawāniʿ sharʿiyya impediments to marriage: permanent, such as consanguinity (*nasab*), affinity (*muṣāhara*) and fosterage (*riḍāʿ*); and temporary, such as unlawful conjunction (*jamʿ*), and three repudiations (Peters, *Marriage*, § 0.1.2.2.3) 2:3; 5:4; 6:5
maysara, *ʿalā ʾl-maysara* "[part of the dower will be paid] at the [husband's] convenience [some time in the course of the marriage]" 5:11; 6:16; also *ṣadāq muʾajjal*
mīʿād popular phrase among the Bedouin for a time fixed for a tribal hearing etc.; a gathering of all interested parties in which an agreement is announced (Stewart, *ʿUrf*, 889) 63:4, fn. 15
mīrī state land with rights of usufruct (*taṣarruf*) reserved to individuals 63:intro.; also *taṣarruf*
muʿāshara (and its derivatives such as *ʿishra*, *ʿāshara*) intimate association; conjugal community 7:13; 8:5–6; 9:12–13; 11:13; 16:8–9; 17:6, 9; 20:7; 22:7; 26:6–7; 31:8–9, 14; 32:7; 33:5; 34:10–12; 41:14, 16, 31, 35
muʿāyana inspection of the object of sale 28:11–12; fn. 11
mubāraʾa divorce by consent with mutual waiving of any financial obligations (Layish, *Divorce*, Glossary)
mubāshir court usher 1:27; 8:11–12
mufattish lit. "inspector," presides over the Chamber (*dāʾira*) of the Sharʿī Division

of the Civil District Court of Kufra 15:4, 10, 11 (administrative inspector) (Layish, *Blood-Money*) 70:22–23

muftī jurisconsult, specialist in Islamic law; a *mujtahid* capable of issuing authoritative legal opinions (Hallaq, *Legal Theories*, 117, 123–24; Masud, Messick & Powers, *Muftis*; Powers, *Law, Society and Culture*, Subject Index) x; p. 9; also *mujtahid*

mughtāza lit. "angry wife," popular phrase among the Bedouin (Layish, *Divorce*, 34) 41:10, fn. 12 (*mughtāḍa*); also *zaʿlāna* (for definition)

muḥallil min al-ṭalāq a man who marries a triply-divorced woman by intermediate marriage so as to render her lawfully permissible to her former husband (Layish, *Divorce*, 28); also *taḥlīl*

muḥṣan someone who has experienced sexual relations within wedlock (in connexion with adultery), is liable to lapidation 12:fn. 3; 41:fn. 10

muḥtasib inspector of the market p. 10; 12:fn. 3

al-mukallaf bi-aʿmāl al-qāḍī "[the deputy] in charge of the *qāḍī*'s affairs" 1:4; also *al-qāʾim bi-aʿmāl*

mukhbirūn specialists or experts for assessing the amount of maintenance (Layish, *Divorce*, 166)

mukhtār lit. "elected," quarter chief 6:3

mulk land in private ownership 63:intro.

munāsakha replacement of the deceased heirs by their own heirs prior to apportionment of the estate 45:17; fn. 16 (for definition)

muqaddam guardian; representative (cf. Eickelman, Glossary) 44:3, 10; senior rank in *ṭarīqa* hierarchy (cf. O'Fahey, Glossary) 44:fn. 14; 54:6

murākana betrothal 1:5 (*rakana*), 21, fns. 7, 32, 37

muṣālaḥa (and its derivative such as *iṣṭalaḥā*) conciliation 7:3, 13, 15

musāqāt contract of lease of plantation (see Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 162ff.; Ibn al-ʿAṭṭār, 83ff.; Young, 658ii) 65:fn. 3

mushāʿ joint ownership (or possession) 48:fn. 10; 52:fn. 7; 63:intro., pp. 234–35, fn. 5; 64:fn. 6 (wells)

mutʿa temporary marriage; indemnity payable to wife in case of divorce before consummation (Layish, *Divorce*, Glossary)

nafaqa (and its derivatives such as *infāq*, *anfaqa*) maintenance (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 90, line 592ff.; Layish, *Divorce*, Glossary) 1:6–7 (for a woman whose hand has been asked in marriage and for her kin), 19, fn. 12; 8:3, 7, 8; 10:9; 16:10; 24:12 (a woman undertakes to provide maintenance for herself), 19; 31:13, 17, 29; 35:13; 43:18

—— *ʿalā awlād* maintenance due to children (sons—until the age of majority; daughters—until consummation of their marriage) from parents (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 90, line 593ff.) 18:13; 28:5; **42**; 53:11; 70:20

—— *ʿalā ʾl-wālidayn* maintenance due to parents (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 90, line 593ff.) 42:3ff., fn. 6

—— *al-ʿidda* waiting-period maintenance 13:11–12; 33:9, 12, 18; 36:5; 38:3, 7, 9 (during pregnancy); also *ʿidda*

—— *ihmāl* (or *mutajammid*) arrears maintenance (Layish, *Divorce*, 50, 108) 13:10; 36:5; 38:9; 41:2, 35; 43:11–12

nāfidh (and its derivative *nafādh*) operative, legally effective (Schacht, *Introduction*, 121; Layish, *Divorce*, 8, 133)

nāʾib, nāʾib al-qāḍī deputy *qāḍī*, a residue from Ottoman rule when Ḥanafī *qāḍī*s were appointed from Istanbul and Mālikī deputies locally xiii; 1:4, 24–26, 29, fn. 4; 8:4, 8, 12; 40:4, 23; also Name Index of Qāḍīs, Nāʾibs and Other Judicial Clerks

nājiz completed, accomplished; executed (act) 28:12

nāshiza; nushūz rebellious wife, and rebelliousness, respectively; a wife declared by

court recalcitrant is deprived of her right to maintenance 10:3, 6, 8, fn. 5; 70:5; also *ṭāʿa*

naṣṣ textual provision of Qurʾān or *ḥadīth* 29:6; 30:15

nazāla taking refuge in a distant place out of fear of an act of vengeance 55:fn. 13; also *jalāʾ*

nazzār, *naḍḍār* tribal assessor for bodily injuries 57:fn. 13

nikāḥ marriage (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 50, lines 331ff.; cf. Schacht, *Introduction*, 161ff.) 1:fn. 25; 2:2

niṣāb the minimum value of a stolen object entailing *ḥadd* punishment (amputation) 68:fn. 2

niyya intent (in connexion with the validity of legal acts) (Schacht, *Introduction*, 116ff.; Layish, *Divorce*, Glossary) 35:fn. 5

nizāʿ wa-shiqāq dispute and discord, *sharʿī* grounds for dissolution (Layish, *Divorce*, Glossary) 8:4

qabīla tribe xi, 3:5; 4:5; 5:3, 6; 6:5, 8; 7:5–6; 8:5; 9:5, 6; 10:5; 11:6; 12:2, 3; 13:5; 14:5, 8, 11; 15:5; 18:5, 6; 24:5, 6; 25:5; 29:3; 30:3; 42:5; 44:5; 45:5, 11, 14; 47:3, 6; 48:6; 53:5, 6; 54:5; 55:2; 56:6–7; 57:5, 11; 58:5; 61:5, 8; 67:5; 69:6; 70:4

qabūl (and its derivative *qabila*) acceptance (as a constitutive element of a contract; for definition, see *ījāb wa-qabūl*) 1:5, fn. 11

qaḍāʾ fate 57:intro.

qadar predestination 57:intro.

qadhf false accusation of illicit intercourse entailing punishment of eighty lashes (Anderson, *Africa*, 371, 380; Peters, *Criminal Law*, § 0.1.2.4; cf. Layish & Warburg, Glossary) 41:fn. 10; 59:fn. 10; also *zinā*

qāḍī Muslim religious judge of *sharīʿa* court; also Name Index of Qāḍīs, Nāʾibs and Other Judicial Clerks

al-qāʾim bi-aʿmāl "[deputy] in charge [of the *qāḍī*'s] affairs" 8:4, 12; also *al-mukallaf bi-aʿmāl*

qānūn statutory law, statute

qarāba blood relationship

qarḍ loan of fungible commodities, that is, goods which may be estimated and replaced according to weight, measure or number (Saleh, 35ff.) 71:fn. 3

qasāma Mālikī procedure of fifty accusatory oaths taken by the victim's avengers in the case of intentional homicide to corroborate a strong suspicion (*lawth*) as to the murderer's identity (Anderson, *Africa*, 372; Peters, *Criminal Law*, § 0.1.1.3) 69:fn. 4

qāṣir legally minor 43:23; 44:3, 6

qaṣṣāṣ tribal assessor for bodily injuries 57:fn. 8; also *gaṣṣāṣ*

qatl homicide (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 226ff., lines 1549ff.; Anderson, *Africa*, Glossary, *ʿamd*; cf. Layish & Warburg, Glossary) 29:3; 55:4, 5, 10, 11, fn. 5

qawl (pl. *aqwāl*) testimony, statement; legal opinion; a request of a *fatwā* (*istiftāʾ*) 41:7; 71:1 (*mā qawlukum fī*); also *fatwā; jawāb*

qiṣāṣ retaliation, retribution for homicide or bodily injury (Anderson, *Africa*, 372–73; cf. Layish & Warburg, Glossary) 31:24; 55:fn. 11; 56:fn. 5

qiyās analogical reasoning applicable to the Qurʾān, *ḥadīth*, and consensus for deriving new legal rules; one of the four sources of law in Islamic legal methodology (Hallaq, *Legal Theories*, 104–7; Coulson, *History*, 59–60; Anderson, *Africa*, 373); also *ijtihād*

qurʿa division of land by lottery for purposes such as cultivation p. 8; 63:8, intro., fn. 9–10

quṣṣa, *quṣṣat al-marʾa* lit. "wife's lock of hair," popular expression describing customary promissory note drawn up in *khulʿ* agreement to guard against the unexpected (Layish, *Divorce*, Glossary) p. 6; 26:9, fn. 7, 9; also *khulʿ*

rabība ward (Layish, *Divorce*, Glossary)
radd lit. "return," the reversion of the residue to the Qurʾānic heirs when their prescribed portions do not exhaust the estate and when there are no male agnates. Mālikī law does not recognize this doctrine; in the absence of male agnates *bayt al-māl* is the residuary heir (Coulson, *Succession*, 49–51) 45:intro., p. 163; 48:fn. 3; 49:fn. 3; 55:fn. 18
raḍwa propitiation, gift to wife when reinstated after revocable repudiation, or when a second wife is taken (Layish, *Divorce*, 103)
rahn security, pledge (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 36ff., lines 230ff.) 11:12, fn. 9
raǧm lapidation 41:fn. 10
raṭl variable measure of weight (ranging from one to five pounds) 33:8
ribā usury, interest; unlawful gain or advantage (for definition, see Saleh, 13–14; cf. Layish & Warburg, Glossary) 71:10, fn. 5
riḍāʿ suckling; fosterage (Layish, *Divorce*, Glossary) 33:18
riyāl maǧīdī ʿarab Arabic (late) Ottoman riyal (cf. Holt, 211, 257, 263) 27:5; 49:3–4; 72:4, 6
rushd normal prudent judgment required for disposing of property and engaging in transactions (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 194, line 1318; Coulson, *Succession*, 216–17, 245) 47:4; 64:4

ṣāʿ (pl. *ṣiʿān*) saa, a cubic measure of varying magnitude (from forty to fifty pounds; Dozy, vol. 1, 853; Wehr, 530) 44:9
ṣadāq dower 1:5, 14, fn. 33; 2:3–6; 3:7, 10; 3:3; 4:12; 5:8; 6:10; 8:6; 9:8, 11; 10:15; 11:8, 14; 15:7; 16:9, 12; 18:12; 20:9, 10, 13; 22:8; 24:8, 9; 26:8, 12; 31:8, 21; 33:7, 12; 34:6, 7, 10, 12; 36:5; 37:7–8; 41:34; 46:3, 21; 50:8; 52:6; also *mahr*
—— *muaʾajjal* (pl. *muʾajjalāt*), *muʾakhkhar al-ṣadāq* deferred dower, payable after consummation, in the course of the marriage 1:15; 2:5; 5:11; 6:15; 13:6–8; 27:7; 31:29; 34:13; 60:20, 21; also *mahr muʾajjal*
—— *muʿajjal* (pl. *muʿajjalāt*), *muqaddam* (pl. *muqaddamāt*) prompt dower, payable immediately upon marriage or prior to consummation 1:7, 15, 22; 5:10; 6:14 (*al-ʿajl*); 8:8; 34:13; 60:20; also *mahr muʿajjal*
—— *musammā* (and its derivative *sammā*) specified dower 1:4; 9:8 (*ṣadāq maʿlūm*); 11:8 (*maʿlūm*); 24:8 (*maʿlūm*); 31:8 (*muʿayyan*); 34:6; 39:8; also *mahr musammā*
ṣadaqa charitable gift, treated as a donation, except that it cannot be revoked (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 176, line 1192; cf. Schacht, *Introduction*, 158) 54:12
ṣaḥīḥ valid, legally effective in both its substance (*aṣl*) and tribute (*wasf*) (transaction; contract of marriage) (cf. Schacht, *Introduction*, 121) 5:11; 6:18; also *ṣiḥḥa*
sahm proportional (though unspecified) share in the entire holding of the tribe to which each clan is entitled in the land division 63:intro., p. 235
sāʾigh justifiable 8:9
sāniya (pl. *sawānin*) garden (Fagnan, 82); a plot of land irrigated by water drawn from a deep well (Lane, 1450i); a privately-owned well based on ground waters (*miyāh jawfiyya*) (Maḥjūb, 206); irrigated plots of land (Albergoni, *Droit coutumier*, 113); water scoop (Wehr, 436) 28:5, 8–11; 46:2, 9, 20, intro.; 52:5, 6–8, 13; 65:3
ṣarīḥ lit. "explicit," declaration made in formal terms (Schacht, *Introduction*, 116)
sariqa theft 68:fn. 4 (Mālikī law)
sayyid a descendant of the Prophet Muḥammad through the line of the eldest of his grandsons, al-Ḥasan; refers to Muḥammad Idrīs al-Mahdī al-Sanūsī 1:2; fn. 3; also *sharīf*
shadhdh anomalous legal opinion (Layish, *Divorce*, 206, fn. 51); also *ʿamal*
shādūf leather bucket for pulling out water from wells (al-Zuwayyī, *Ajdābiya*, 132); counterpoised sweep for raising irrigation water for cultivation (Wehr, 460; cf. Powers, *Law, Society, and Culture*, 118) 52:9 (*shāzūf*)
shahāha testimony, evidence of witnesses

—— *al-lafīf* collective testimony of twelve men, who need not be of good character; justified by the doctrine of necessity (*ḍarūra*) (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 226, line 1552; Berque, *ʿAmal*, 428; Santillana, vol. 1, 603; Milliot, 737; Toledano, 18, 22; Peters, *Shāhid*, 208i; Abū Ḥāmid) 69:fn. 4

—— *naql* attestation of the conveyance of evidence (Layish, *Shahādat naql*; idem, *Legal Documents*, 21 fn. 2; cf. *shahāda ʿalā 'l-ḥaṭṭ* in Hallaq, *Documentary Evidence*; *rasm istirʿā'* in Powers, *Law, Society, and Culture*, Subject Index, Documents; idem, *A Court Case*, 245 and fn. 97) x; 4:3; 14:3; 48:3, intro.; 53:3; 57:3; 61:3; 67:3

—— *al-samāʿ* hearsay evidence, public knowledge (Powers, *Law, Society and Culture*, Subject Index, *Samāʿ*) 67:fn. 15

shaqīq (or *shaqīqa*) full brother (or sister), germane brother (or sister); the brother is an agnatic heir who receives (when entitled to inherit) the residue of the estate after the Qurʾānic heirs have taken their prescribed portions; and the sister (when entitled) may either inherit as a Qurʾānic heir, or be converted into residuary heir by a germane brother, or inherit as "accompanying residuary" (Coulson, *Succession*, 68ff.)

sharaf honour (Powers, *Law, Society and Culture*, Subject Index)

sharīf (pl. *ashrāf*) title of the descendants of the Prophet Muḥammad 1:1, fn. 3; also *sayyid*

sharīk partner to association in property (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 168, line 1144; cf. Schacht, *Introduction*, 138–39) 28:11; also *shirka*

shaykh al-qabīla the shaykh of the tribe 14:11; 21:14; also *qabīla*

shibh ʿamd lit. "quasi-deliberate" homicide or bodily injury caused unintentionally, i.e., by a weapon or means liable to kill; Mālikī law absorbs this category within *ʿamd* (Anderson, *Homicide*, 819–20; Peters, *Criminal Law*, § 0.1.3.1) 55:fn. 11; 56:fn. 5; also *ʿamd*

shiqāq discord, dispute; also *nizāʿ wa-shiqāq*

shirka (and its derivatives *sharika*, *shirāka*) partnership; association in property (*fī māl*) (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 168, lines 1140) 28:5; 72:intro.; also *sharīk*

shubhat milk lit. "doubt as to ownership" of the stolen object that averts amputation (Peters, *Criminal Law*, § 0.1.2.1); Anderson, *Africa*, 375) 68:fn. 2

shufʿa pre-emption (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 136–40, lines 908ff.); tribal pre-emption, granting preference to the member of the tribe over the stranger in the matter of land purchase 63:fn. 21; 65:fn. 8–9

shuhūd (sg. *shāhid*)

—— *al-ʿaqd* witnesses to the marriage contract 2:10; 5:17; 6:23

—— *al-ḥāl* lit. "witnesses for the state of affairs," witnesses to the proceedings; professional witnesses, notaries (Peters, *Shāhid*, 208; Agmon, *Recording Procedures*); firsthand witnesses (Stewart, *Texts 2*, 61.62) x, xii; 1:27; 2:13; 4:16; 7:18; 8:10; 9:20; 10:11; 11:24; 13:14; 14:18; 17:11; 21:18; 23:21; 24:24; 25:14; 31:32; 33:20; 34:19; 36:14; 37:16; 38:11; 39:10; 40:22; 41:38; 42:14; 43:28; 44:15; 45:23; 48:16; 50:14; 51:17; 52:17; 53:20; 56:12; 57:16; 58:15; 59:20; 61:13; 65:16; 67:15; 69:11

—— *ʿalā al-ṭalāq* witnesses to the divorce proceedings 16:14

—— *ʿudūl* witnesses of good character, integrity xii; p. 7; 5:13; 6:19; also *ʿadl*

—— *al-waṣiyya* witnesses to the will 54:21

shurb al-khamr wine-drinking fordidden in the Qurʾān (5:90), a crime which entails a *ḥadd* punishment (based on a *ḥadīth*) of 80 lashes (Peters, *Criminal Law*, § 0.1.2.5; cf. Layish & Warburg, Glossary) 11:15, 17

ṣiḥḥa validity 47:4; 64:4; also *ṣaḥīḥ*

sinyūr qabuṭān Signore Capitano, presumably an Italian military administrator in charge of the colony's lands 65:3–6

sīdī honorific title before the name of Muslim saints

sijill records of *sharīʿa* court p. 5

ṣulḥ settlement (of dispute); reconciliation (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 48, line 309; Powers, *Law, Society and Culture*, Subject Index; cf. Layish, *Divorce*, Glossary) p. 8; 7:3, 13, 15; 9:10; 11:3; 17:3; 25:3, 10; 47:11; 53:3; 56:3; 57:fn. 11; 59:1, 7, 17 (*majlis ṣulḥī*); also *muṣālaḥa; iṣlāḥ*

—— *ʿashā'irī* tribal settlement

sunna exemplary behaviour of the Prophet Muḥammad in the *ḥadīth* as legal source for deriving law (Coulson, *History*, 56–59; Schacht, *Introduction*, 59–60) 5:12, intro. (*sunnat rasūlihi*); 6:18, intro.

ṭāʿa wife's obedience to husband (Shalabī, 328ff.; Peters, *Marriage*, § 0.1.3.3) 7:13; 10:8; also *nāshiza; nushūz*

taʿaddin illicit act against someone's property or right (cf. Powers, *Law, Society and Culture*, Subject Index) 44:13

ṭabaqa a class of male agnates sharing the same parent (hence parentela), and their issue. The classes in Islamic rules of inheritance, according to order of priority, are: 1. the praepositus' son and his issue; 2. his father and brothers; 3. his paternal grandfather and uncles. Any member of a higher class totally excludes any member of a lower class (Coulson, *Succession*, 33) 55:fn. 19

tabāruk blessing 2:8 (reading of *al-Fātiḥa*), fn. 10

tafwīḍ delegation of authority 47:9 (to secure rights in inheritance)

—— *al-ṭalāq* lit. "delegated repudiation," delegation to wife of power to divorce herself (Layish, *Divorce*, Glossary; Powers, *Law, Society and Culture*, Subject Index, *tamlīk*) 17:8 (*yakūn ṭalāquhā bi-yadihā*)

tagallit collective oath in Berber Morocco 69:fn. 4

taḥlīl intermediate marriage designed to render triply-divorced wife lawfully permissible to her former husband (Layish, *Divorce*, Glossary; Powers, *Law, Society and Culture*, Subject Index, divorce); also *muḥallil min al-ṭalāq*

tajrīḥ invalidating a testimony 47:11, fn. 13

takhayyur eclectic expedient in statutory legislation designed to select a doctrine from the dominant school or other schools or from any jurist provided this doctrine conforms with the objective of the legislator; also *talfīq*

ṭalāq (and its derivatives such as *ṭallaqa, taṭlīq*) unilateral repudiation (Layish, *Divorce*, Glossary) 8:6–8; 10:7; 5:12; 13:2, 6–10; 14:6–7, 11, 13; 15:3; 16:4, 10–11; 17:8; 18:3, 9, 14–15; 19:8; 20:3, 12–13; 22:3, 10; 23:8–15; 24:3, 12, 14, 18; 25:7, 10; 26:3, 11; 29:7, 8; 30:7, 19, 20, 22; 31:3, 19–28; 32:3, 14; 34:7, 9; 35:5–6, 13–14; 36:5, 8–11; 37:10–15; 38:3–9; 39:3, 6–7; 70:3, 11, 15, 18

—— *bā'in* irrevocable divorce, becomes operative immediately with all attendant legal effects (Layish, *Divorce*, Glossary) 24:18; 26:11–12; 31:28; 35:11–12; 39:7 (*ṭalqa . . . qabla al-binā' malakat bihā amra nafsihā*)

—— *al-bidʿā* disappoved forms of divorce, such as triple repudiation in one word or single irrevocable repudiation (Layish, *Divorce*, Glossary)

—— *rajʿī* revocable repudiation, enables the husband, during the waiting period, to reinstate his wife without the conclusion of a new marriage contract; the divorce becomes irrevocable only after the expiry of the waiting period (Layish, *Divorce*, 97; Powers, *Law, Society and Culture*, Subject Index, divorce) 30:20; 33:11, 12, 15; also *ʿidda*

—— *bi'l-thalāth* triple repudiation in one word, entails intermediate marriage before the divorced wife is legally permissible to her former husband 12:6; 15:8; 29:8; 35:4–5; 36:8–9 (four repudiations), 10 (five repudiations); also *baynūna kubrā*

talfīq lit. "patching," sophisticated version of *takhayyur*: legal doctrines culled from different schools or scholars contradicting each other brought together in a set of statutory provisions dealing with one specific topic (Hallaq, *Legal Theories*, 210; cf. Layish & Warburg, Glossary); also *takhayyur*

taʿlīq al-ṭalāq suspended repudiation (Layish, *Divorce*, 31–35) 17:8, fn. 7

ṭalqa wāḥida one repudiation, enabling the husband to reinstate his revocably divorced wife within the waiting period without the conclusion of a new marriage contract, or reinstate his irrevocably divorced wife by a new marriage contract both during or after the expiry of the waiting period 13:10; 16:10; 18:14–15; 19:6; 21:8–9; 22:10; 30:20; 32:12; 33:11; 36:8; 37:10; 39:6; 70:18–19; also *ṭalāq bāʾin; ṭalāq rajʿī; baynūna ṣughrā*

taqlīd lit. "imitation," adherence to authoritative opinions of *mujtahid*s (Hallaq, *Legal Theories*, 121–23) p. 9

taqsīm apportionment of the estate between legal heirs 45:21; 48:7 (*qisma*), 12; 52:5; 63:10 (*qasāma*)

tarbiya the husband's right to disciplining his disobedient wife 60:8

taʿrīf identification procedure by witnesses in court (cf. Layish, *Shahādat naql*) x–xii; 1:fn. 5; 20:5; 21:14; 22:6; 36:4

tarika estate 45:9, 17; 50:9; 51:14; 67:8; also *wirātha*

ṭarīqa Ṣūfī order 54:fn. 8

taṣarruf usufruct 63:intro.

taʿṣīb a principle according to which agnatic female relatives inheriting as Qurʾānic heirs are always converted into *ʿaṣaba*, or residuaries by a male relative of the same class, degree and strength of blood-tie. Thus a son converts a daughter, and a full brother converts a full sister (Coulson. *Succession*, 41–42, 52–53) 45:fn. 18; 49:fn. 5; 51:fn. 14; 55:fn. 18

taslīm delivery; transfer of ownership by transfer of possession

taṭlīq al-ḥākim judicial divorce (in Mālikī school) where *qāḍī* exercises husband's power to divorce (Layish, *Divorce*, Glossary)

tawābiʿ (sg. *tābiʿa*) appurtenances to dower due to a wife 9:13; 24:10

tawba (and its derivatives, such as *tāba*) repentance to God (cf. Layish & Warburg, Glossary) 11:16

taʿwīḍ compensation 57:fn. 11

tawkīl investment with power of attorney 1:23; also *wakāla*

tazkiya credibility test of witness, by secret and public inquiry, initiated by the *qāḍī*, before the former is allowed to testify (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 18, line 111; Peters, *Shāhid*, 207; Fierro, *Zandaqa*, n. 4 and the reference there to Santillana) x, xii; 1:fn. 23; 14:14; 45:13; 51:11, 13; 57:12; 61:fn. 11

thaʾr vengeance under tribal law on the part of the victim's male agnates 29:fn. 3; 55:fn. 11; 56:fn. 5; 57:intro.; 69:fn. 4

thayyib non-virgin p. 6; 1:4, 23, fn. 29; 2:3, fn. 9; also *jabr*

ṭulūʿ disaffiliation (under tribal law; Stewart, *Texts* 2, Glossary; idem, *Texts 1*, Index, blood-money groups) 55:9–10

ʿudūl—see *ʿadl*

ʿulamāʾ (sg. *ʿālim)* religious scholars of Islam; also *fuqahāʾ*

ʿumarāʾ al-dam members of the solidrity group for the purpose of vengeance and blood money 55:fn. 19; 63:fn. 15; 69:fn. 4; also *ʿamār al-dam; awliyāʾ al-dam*

ʿumda shaykh elected by village notables (Layish, *Divorce*, 75)

umm walad a female slave who has borne a child to her master, the child being acknowledged by the master, becomes free on the latter's death (Schacht, *Introduction*, 129; Powers, *Law, Society and Culture*, Subject Index) 62:fn. 2

ūqiyya ounce, a measure of weight of varying magnitude (Eg. = 37.44 g; Wehr, 34) 5:9; 6:13

ʿurf tribal custom, customary law (Stewart, *ʿUrf*; idem, *Texts 2*, Glossary; Libson, *ʿUrf*) p. 8; 1:fn. 38; 55:5, 6 (*maʿrūfa*), intro.; also *ʿāda*

uṣūl al-fiqh Islamic legal methodology or legal theory p. 2

wadīʿa deposit (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 188ff.) 66:7, fn. 6
wakāla, wikāla procuration, agency, proxy, conferring a power of attorney on another (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 42–49)
—— *khuṣūṣiyya* power of attorney for specific purpose 47:7
wakīl proxy (cf. Layish, *Divorce*, Glossary; Powers, *Law, Society and Culture*, Subject Index) 2:7, 9; 4:13 (*wa-allāhu ʿalā mā naqūl wakīl*, "let Allāh be pledge [lit. agent] to our words"); 5:12–13, 15; 6:1 (*muwakkal*) 19, 21; 7:intro.; 14:14
—— *musakhkhar* an *ad hoc* proxy appointed by court where the court had summoned the defendant and the latter failed to appear (cf. *Mejelle*, art. 1791; Rogan, 47) 51:12
walī marriage guardian (Powers, *Law, Society and Culture*, Subject Index) p. 6; 1:fn. 29; also *jabr*; holy man, saint (in popular Islam)
—— *mujbir* guardian authorized to marry off ward compulsorily 1:fn. 37; 2:fn. 9; also *jabr*
walīmat al-farḥ wedding festivities (cf. Layish, *Divorce*, 52)
waqf religious endowment (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 172, 1162ff.) 54:15, 18–19 (testamentary disposition), intro.; fn. 8, 9–10 (testamentary disposition), 14
waṣī mukhtār appointed executor, testamentary guardian 1:fn. 29; 23:fn. 3; 43:fn. 11
waṣiyya (and its derivative *awṣā*) will, bequest, testamentary disposition 45:fn. 14; 54:6–7, 16, 18
wasm tribal brand 3:7, fn. 7
waṭan tribal territory 63:intro., p. 234
wilāya guardianship (Powers, *Law, Society and Culture*, 209, 219) 23:6; 34:15; 43:fn. 11 (Mālikī law)
—— *ʿalā al-māl* guardianship over property 43:fn. 11
wirātha inheritance (Powers, *Law, Society and Culture*, Subject Index, inheritance) 40:5; 43:19; **45**; 46:4, 7; 47:8 (*irth*); 50:10 (*mīrāth*); 51:5–6, 9, 13; also *tarika*

yamīn oath (Peters, *Shāhid*, 207; cf. Stewart, *Texts 2*, 61 passim) 20:11; 60:5, 7, 13–19; 66:5, 8; 70:12; also *ḥalf*
—— *al-istiẓhār* lit. "oath of disclosure," part of procedure granting dissolution in husband's absence (Layish, *Divorce*, Glossary); also *yamīn al-qāḍī* [*al-qāḍā'*] 29:fn. 5
—— *al-qāḍī* [*al-qāḍā'*] lit. "the oath of judgment," is taken by the wife initiating divorce, to the effect that her absent husband did not leave her maintenance or divorce her and that she is not rebellious. Only then will the court grant dissolution *ex parte* (Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 34, lines 215ff.; Anderson, *Africa*, 379; Layish, *Divorce*, 138–39) 29:fn. 5 (definition); 30:9, fn. 9; also *yamīn al-istiẓhār*
—— *zand* forced oath; cf. *bi-zandihi*, "par force, de vive force" (Beaussier, 442) 60:6

zakāt alms tax
zaʿlāna lit. "an angry wife" (under customary law); designation for a wife who leaves her husband by way of protesting against ill-treatment, and returns to her agnates until the dispute is settled (Layish, *Divorce*, 189); also *mughtāẓa*
ẓālim transgressor against someone's right; someome who commits injustice (*zulm*) (cf. Stewart, *Texts 2*, 45.40; idem, *Texts 1*, 45 § 4; Layish, *Divorce*, Glossary) 26:10–11, fn. 10, 11
zawāj (and derivatives thereof) explicit expression of marriage 1:fn. 28; 2:3 (*tazawwaja*); 7:8 (*tazawwaja*); also *ṣarīḥ*
zāwiya a small domed mosque erected over a tomb of a Muslim saint, with teaching facilities, and a hospice attached to it, usually belonging to a Ṣūfī order (Wehr, 387) 54:3, 6, 9, 15, 19; 64:6
zifāf the nuptial procession (Layish, *Divorce*, 132)
ẓihār an archaic form of divorce where the husband swears that his wife is forbidden to him, comparing her to a kinswoman of a prohibited degree for marriage

(Ibn ʿĀṣim, *al-ʿĀṣimiyya*, 74, line 495ff.; cf. Layish, *Divorce*, Glossary) p. 6; 15:9 (*wa-ḥarām ʿalayya kayfa ummī*), intro., fn. 11; also *ḥarām*

zinā illicit sexual intercourse entailing Qur'ānic punishments (Anderson, *Africa*, 380; Powers, *Law, Society and Culture*, Subject Index; cf. Layish & Warburg, Glossary); also *qadhf*

zuhād (and its derivative *zāhida*) abstinence between spouses 5:10, fn. 7; 22:9; 35:fn. 8; 70:9, 14–17

NAME INDEX OF *QĀḌĪ*S, *NĀ'IB*S AND OTHER JUDICIAL CLERKS

GENERAL INDEX

Note

As noted earlier in the Preface, no attempt has been made to draw comprehensive conclusions from this study; a separate study based on an examination of the entire corpus of the documents available will hopefully follow in due course. However, in order to enable the reader to draw some tentative general conclusions, an analytical integrative index, according to the relevant subject matter, is appended.

In order to facilitate the location of the entries in the documents, their occurrence is indicated by the number of the document and the line in the English translation,[1] separated by a colon. A comma separates references to different lines, and a semicolon separates references to different documents. Thus, 25:17, 30; 64:5 refers to lines 17 and 30 of document no. 25, and line 5 of document no. 64. The occurrence of the entries in the introductions and footnotes accompanying the documents is indicated by reference to the intro. and the number of the fn. within each of the documents. Thus, 20:intro., fn. 8 refers to the introduction and fn. 8 of document no. 20. Document number in bold style indicates that the entire document deals with one main topic. The occurrence of the entries in the Introduction to this volume is indicated by the page number (in Roman) preceded by p. (to be distinguished from the entries in the documents).

To facilitate orientation, main entries and sub-entries are indicated in caps and bold type, respectively.

Unless otherwise indicated, all references to Arabic and technical terms appear in the Glossary.

The reader is advised to consult the index of Layish, *Divorce*, which is an integral part of this study.

[1] For obvious reasons the number of the line in the English translations is not always identical with that in the original Arabic documents.

ORALITY, LANGUAGE AND CULTURE IN ARABIC JURIDICAL DISCOURSE[1]

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1. *Preliminaries*

The thesis underlying the main body of the present work propounds the view that the juridical system of the Bedouin in Cyrenaica (E. Libya)—here exemplified in a selection of 72 documents issued by the *sharīʿa* courts of Ajdābiya and Kufra over a period of approximately forty years (1930s–1970s)—is the outcome of interaction and an ongoing synthesis between tribal customary law and the *sharīʿa*. Layish, *Legal Documents*, 1 noted:

> The importance of the *sijill* as a source for both legal and social research is evident. The court is the meeting-place of normative Islam, represented by the *qāḍī*, and social reality formed by the norms of tribal customary law. The competition between the two norms, the *sharīʿa* and the customary, is well reflected in the documents.

Systemic interaction between these two profoundly distinct legal traditions in Bedouin societies undergoing sedentarization ordinarily marks a highly significant juncture in an acculturation process whereby these nomads acquire sedentary societal norms concurrently with progressive Islamization.

A salient new development marking this cultural stage in Bedouin societies on the way to sedentarization is the use of legal documents, most often, to conclude and ratify land transactions. Ultimately, the emergence of the document as a juridical instrument in a patrilineal milieu of Arab pastoral nomads is a noteworthy by-product of a radical shift in power politics accompanying their evolution from

[1] For their comments on an earlier draft, I am indebted to Prof. Aharon Layish and Prof. Simon Hopkins. They are, of course, absolved of all responsibility for opinions expressed and methods employed in this essay.

tribalism to a more complex society.[2] In essence, the legal document constitutes a formal indication of a crucial change in the individual's legal standing whereby he/she is guaranteed a court hearing and sentence whose outcome is not predicated—as under customary law—by reference to group interests anchored in agnatic family structures.

A striking concomitant of the change from customary law (*ʿurf*) to Islamic religious law (*sharīʿa*) is a parallel shift in the linguistic medium of juridical discourse, i.e., from exclusive use of vernacular Arabic in the former[3] to that of some variety of literary Arabic in legal documents emanating from the Muslim court.

The use of literary Arabic has here distinctly cultural (rather than purely sociolinguistic) undertones since what is entailed is not mere 'translation' of a stable discursive content from a Low linguistic register into a High one[4] but rather a profound restructuring of the Bedouins' juridical *Weltanschauung* concomitant with transition from nomadism to sedentary life, in the course of which, both the substance of legal discourse and the formal framework in which it is conducted also undergo significant change. Hence in this sociocultural context, Bedouin Arabic can be said to encapsulate and mediate a cultural stance and not merely a Low language register.

All traditional 'literary' forms of expression among Arab nomads are oral;[5] thus legal documents constitute—for settled Bedouin still dominated by the unwritten norms of tribal customary law—the first and, sometimes, only exemplars of literary production. Layish/Shmueli, *Custom*, 31 state:

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[2] Societal complexity here results from the proliferation of new patterns of social interaction and power relations entailed, for instance, in land-ownership, specialization and new division of labour, etc., against the background of gradual weakening of the inner tribal kinship coalition (*ʿaṣabiyya*).

[3] See the transcripts of Sinai Bedouin court cases with detailed commentary in Stewart, *Texts*.

[4] Cf. the notion of diglossia in Marçais, *La diglossie* and, especially, C.A. Ferguson's programmatic 1959 paper of that name, where the term designates "a relatively stable language situation in which, in addition to the primary dialects of the language (which may include a standard or regional standards), there is a very divergent, highly codified (often grammatically more complex) superposed variety, the vehicle of a large and respected body of written literature and is used for most written and formal spoken purposes but is not used by any sector of the community for ordinary conversation"; cf. also Ferguson, *Diglossia revisited*.

[5] Intended here are several types of oral literature transmitted via collective memory: elements of tribal history, genealogy, poetry, and 'wisdom literature,' i.e., proverbs, popular sayings and rhymes), which traditionally fall entirely within the domain of colloquial Arabic usage.

> It seems that in Bedouin society the document is very rare but its frequency increases with the progress of sedentarization. The principal factors in this connexion are closer contacts with the settled population in economic relations and land transactions; the transition from collective ownership (*mushāʿ*) to individual ownership; the influence of *sharʿī* (and civil) justice; the exigencies of modern administration; the spread of literacy, . . .

The legal document is an ancient literary institution in the cultural history of the Near East,[6] in effect, a paradigmatic case of the spread of literacy in the service of administration.[7] Consequently, it may be useful here to integrate a perception of literate culture emerging from an entirely different discipline in the work of the British social thinker and *littérateur* Raymond Williams (1921–1988):

> Williams insisted that culture be understood through 'the analysis of all forms of signification . . . within the actual means and conditions of their production' (Williams, *Culture*, 64–65). . . . The shared meanings of culture are not 'out there' waiting for us to grasp them. Rather, they are the product of signifying practices, most notably those of language. Language constitutes material objects and social practices as meaningful and intelligible, it structures which meanings can or cannot be deployed under determinate circumstances by speaking subjects. (Barker/Galasinski, *Cultural Studies*, 3)

Since juridical formulations and provisions also take within their ambit the social behaviour, beliefs, and expectations of ordinary people, it is meaningful to scan legal texts for traces of formal or symbolic configurations in language use encoding cultural meanings. The study of Arabic court protocols as literary products provides the analyst with a framework for characterizing these official documents as a species of 'literary genre.'

Once issued, court protocols have a *Nachleben* becoming, in practice, cultural instruments whereby the *qāḍī* not only mirrors the behavioural and ethical norms of his social entourage but, in a very real sense, creatively constructs and legitimizes them. Thus the language

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[6] The categories of data presented in the standard schema of the present legal documents and their categories are probably also very old; they recall, in some respects, ancient formularies such as that exemplified in Aramaic papyri from Elephantine (c. 500 B.C.; cf. Yaron, *Aramaic Papyri*, 7–8); see also Khan, *Background*.

[7] Thus the resort to documents among sedentarizing Bedouin invites comparison with an ancient situation where the distinction between literary and official compositions was immaterial (cf. Vantisphout, *Memory and Literacy*, 2191).

of a legal document implements *inter alia* the discursive function of canonizing juridical wisdom enunciated therein conferring on it the stamp of authority underpinning a Muslim 'textual polity' (Messick, *Calligraphic State*, 1). Oddly, despite their extensive use in Muslim courts, legal documents lack a doctrinal basis granting them evidential value under the *sharīʿa* (Messick, *op. cit.*, 203).

The admission of written documents in the legal practice of Libyan Bedouin probably harks back to some time in the 19th century with the establishment in Cyrenaica of the Sufi order of the Sanūsiyya—the Grand Sanūsī founded his first fraternity (*zāwiya*) in 1843, Evans-Pritchard, *Cyrenaica*, 1. Certain features in the language and style of these legal documents may therefore continue a tradition of written Arabic cultivated within circles of Muslim jurists (a species of Muslim chancery) *before* the revival of modern literary Arabic in the late nineteenth century (Hartmann, *Orient*, 9). Continuity with older legal traditions is also suggested by the content of certain documents in the corpus under study. Suffice it to mention, in this regard, doc. 54 dealing with bequest of property as testamentary *waqf*. Of particular interest here is the manner whereby the location of the estate is specified:

> I have a house bordering on its southern side the house of Mḥammad b. Zrēdī, on its eastern side the house of Mḥammad ʿAlī Fantarī, on its northern side the house of Zaynab bint Masʿūd, and on the western side the road [called] Sīdī ʿAbd al-Salām, . . . (54, 12–14).

This method of marking the boundaries of a property was presumably mediated to Libyan law via the Ottoman land system[8] (elaborated in 1858).[9]

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[8] In Palestine of the late Ottoman period, one notes its use in the so-called 'old Ottoman system' (cf. intro. to doc. 63) which remained in force until the Mandate period when it was replaced by the British method of registering land in units of 'blocks' and 'parcels.'

[9] In actual fact, it is great deal older. It is interesting to note that Yadin *et al.*, *Documents*, [7] exemplify it in a Nabatean-Aramaic sale agreement (lines 4–5) and state: "A persistent Near Eastern convention amply evident in the Naḥal Ḥever papyri, is the delimiting of real estate parcels by reference to abutting properties on all sides, in directional sequences. . . . Looking beyond the corpus of Judean Desert documents, one discovers that the delimiting of real estate parcels by abutters is a widespread ancient tradition well attested in Aramaic and Greek records persisting into Medieval Arabic legal documents . . . Khan (1993:31–32), in his editions of Arabic texts from the Cairo Genizah, illustrates the currency of this practice in Medieval Egypt."

The plausibility of continuity mooted here with medieval usage in the language of the present legal corpus underscores the potential significance of this 'literary genre' to research on traditionally distinctive features of Muslim Arabic. Also worth mentioning in this connection, is the fact that—as in the ancient Akkadian bureaucracy (cf. von Soden, *op. cit.*, 134)—the clerk in a Muslim court was, in many cases, a future judge; this factor may, in the long run, have contributed to some degree of conservatism in norms of language and style.

The aim of the present research is to delineate salient aspects of the interface of law, language, and culture in a society of sedentarizing Cyrenaican Bedouin as reflected in the Libyan legal documents under study.[10] Two specific parameters of orality in the legal texts will be examined: (a) subclassical (mostly vernacular) formal traits in their language, and (b) the cultural significance of anthroponyms in the legal documents as exponents of folk religion.

2. *Linguistic notes*

Unlike court records in the West, for instance in America, where "the law requires a verbatim trial record" (Walker, *Verbatim record*, 205), court protocols issued by *sharīʿa* courts are, in most cases, concise statements[11] drafted by a clerk (*kātib*) at the improvised dictation of a *qāḍī* or his deputy (*nāʾib*) summing up—rather than reporting in detail—verbal exchanges in a trial. As noted in Layish, *Legal Documents*, 2,

> . . . the legal documents are not transcriptions of legal proceedings that took place in court. Usually, the documents are very concise. Only issues relevant from the legal point of view are recorded, and these are phrased in general terms that do not convey to the outside observer an accurate insight into the parties' states of mind, their specific motives, and the backgound to the events in question.

[10] The Libyan *sharīʿa* courts were abolished by Muammar Qadhdhafi in 1973.

[11] An idea of the conciseness of some of these documents can be obtained by noting the quantity of additional insertions necessary in a fully explicit translation of these Arabic texts into a foreign language.

A legal document ordinarily comprises a ritual opening,[12] the specification of purpose, statements or depositions by litigants, claimants, and witnesses—often incorporating fragments of narrativity—and the summing up and sentence of the presiding *qāḍī*. In the documents from Ajdābiya, the latter's intervention can entail a certain degree of intertextuality, i.e., (usually unidentified) allusions to treatises on Muslim law.

A systematic analysis of the language of these documents is beyond the scope of the present preliminary study. The following remarks address a few representative instantiations of subclassical usage observed in the legal documents with the aim of exemplifying, in tentative fashion, the stylistic range typifying legal discourse in a Libyan *shar*ʿ*ī* setting. Significantly, a similar linguistic mixture appears to characterize legal documents from other parts of the Arab world, e.g., Arabia ("The cases . . . are written in a mixture of colloquial and classical Arabic"; Sergeant, *Law cases*, 33).

The subclassical traits addressed here are, to be sure, not special to the language of the legal documents under study but would seem, nonetheless, to merit attention inasmuch as they pertain to an institutionalized norm of written Arabic evidently current in the former day-to-day usage of Libyan Muslim (*sharīʿa*) courts until their abolition. In the interests of brevity, I shall present the following linguistic comments in note form:

(i) From the perspective of orality adopted in the present paper, a revealing formal feature at the level of discourse attested in the language of the documents relates to the treatment of reported speech. Despite the already noted relative marginality of verbatim records typifying Muslim court protocols, several documents in the present corpus nonetheless display a fair amount of reported discourse in direct, indirect, and mixed speech modes (e.g., docs. 1, 4, 7, 9, 11, 12, 21, 25, 60, etc.).

Indirect speech is a highly grammaticalized mode of expression requiring a degree of reflection on the part of the speaker together with adoption of psychological distance from the reported events. Facility in negotiating a self-distancing posture here may well be culturally conditioned.

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[12] The function and meaning of the ritual opening in Arabic legal documents is commented on in the following section dealing with the significance of Islamic symbols in these legal texts.

A statement in indirect speech presents a grammatically more complex sentence structure than its direct counterpart since it entails embedding of the reported statement into a larger syntactic form. In its turn, subordination involves several formal shifts: adoption of 3rd person pronouns instead of the original 1st and 2nd person forms, switching of deictics, temporal adjustments in the verb, etc. Consequently, the category of 'indirect speech mode' can be said to pertain, in principle, to a more evolved discourse type constrained by a set of consciously applied rules requiring facility on the speaker's part in handling abstract grammatical representations.[13] It is therefore understandable that, in informal registers, speakers may opt for the grammatically less encumbered direct speech mode.

In fact, the most frequent mode of reported speech occurring in the legal documents is direct:

> (a) *wa-ḥalafat bi-naṣṣihi kamā yajib qā'ilatan bi-llāhi lladhī lā ilāha illā huwa . . . anna*[14] *zawjī ʿAbdallāh ʿĪsā lā taraka lī shay'an wa-lā lahu shay'an yubāʿ* 'and she swore in the wording (*naṣṣ*) [of *yamīn al-qaḍā'*], as required [under the *sharʿī* procedure]: [I swear] by Allah, beside whom there is no God . . . that my husband ʿAbdallāh ʿĪsā left me nothing, and that he owns nothing that can be sold [to provide maintenance]' (29, 5–7); (b) *ḥaḍara Ibrāhīm . . . qarrara muddaʿiyan ʿalā ṣihrihi Muftāḥ . . . zawj ibnatihi Khadīja al-madhkūra qā'ilan fī daʿwāhu anna*[15] *Muftāḥan hādhā l-ḥāḍir bi l-majlis tazawwaja bi-bnatī Khadīja mundhu xamsat aʿwām* 'Ibrāhīm appeared [in court] . . . In the claim against his son-in-law Muftāḥ . . . husband of his aforementioned daughter Khadīja, he stated: Muftāḥ present here at this court session married my daughter Khadīja five years ago' (31, 5–8).

The court protocol being essentially a textual record of an oral event, it invites comparison with other written texts of oral literature, where a high incidence of the direct speech mode has also been noted (cf. Bauer, *Indirect speech*, 92).[16]

As can be inferred from the aforecited examples, use of direct speech in the documents can also occur after an introductory particle as in Classical Arabic:

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[13] In this connection, it is not trivial to note that the structure of sentences in indirect speech is sometimes subject to conflicting interpretations (e.g., of the sequence of tenses in English; van der Wurff, *Sequence*, 264f.).

[14] For Classical Arabic *qā'ilatan . . . inna*.

[15] For Classical Arabic *qā'ilan . . . inna*.

[16] Direct speech is also widely exemplified in Cyrenaican narrative styles; see the texts in Panetta, *Bengasi* I, *passim*.

> *nādūhu* ***an*** *axbirnā bi ra'yika* 'sie riefen ihnen zu: Tue uns deine Meinung kund!'; *baʿatha rasūlan ilā Ibrāhīm* ***an*** *lā taḍaʿ kitābī min yadika* 'er schickte einen Boten an Ibrāhīm: Lege meinen Brief nicht aus deiner Hand!' (Reckendorf, *Die syntaktischen Verhältnisse*, 575); *katabtu ilayhi* ***bi-an*** *qum* 'I wrote to him, Stand; i.e. I wrote him the command to stand' (Lane 104).

Significantly, the systemically unmarked option for reported discourse obtaining in certain Arabic colloquials also appears to be direct speech, sometimes with minimal grammaticalization, as in Cairene:

> In der lebhaften Sprechweise der Araber werden die Ausdrücke für "sagen" vor Einführung der directen Rede häufig ausgelassen, und wird dieselbe entweder ohne alle Copula oder auch mit *we* direct in den Satz eingeführt. Beispiele: *xabaṭet ʿalbāb ṭiʾʾet imrāt elxawāga mīn* "sie klopfte an die Thür; da kam die Frau des Kaufmannes heraus (und sagte): wer (ist da)?" Ebenso *qālet laha yaxtī ana xaltik fulāne ahlan wesahlan sallimū ʿala baʿḍŭhum* "sie sprach zu ihr: "meine Schwester, ich bin deine Tante so und so". (Die andere sagte:) "willkommen!" Sie begrüssten einander."[17] (Spitta, *Grammatik*, 389)

Of particular interest, in the documents under study, is a tendency to shift from a direct to an indirect speech mode within the boundaries of the same utterance. A well-known instance of this option in many languages is the usage known in French as "style indirect libre" typically exemplified as a literary device aiming at spontaneity and naturalness in *belles lettres*:

> Flowers? Yes, flowers, since he did not trust his taste in gold . . . (Virginia Woolf, *Mrs Dalloway*, 124).

Mixing of direct and indirect speech in the documents, however, takes a somewhat different form. In the following examples, a main clause displaying a *verbum dicendi* (*qāla, qarrara, iddaʿā*, etc.) is syndetically joined to a statement in conventional indirect speech; the latter then undergoes a sudden shift to direct speech, the change being explicitly marked by a switch of pronominal deictics:

> (a) *ḥaḍarat Khēriyya . . . wa-qarrarat anna zawjahā ʿIzz al-Dīn . . . ṭallaqahā thalāthan lā ṭalāqayn kamā zaʿama. . . . wa-ḥaythu anna ʿIzz al-Dīn al-madhkūr ṭallaqanī bi-ḥuḍūr kull min Mḥammad . . .* 'Khēriyya stated in court that her husband 'Izz al-Dīn divorced her by means of a triple repu-

[17] For omission of *qāla* introducing direct speech in certain narrative contexts in Modern Standard Arabic, cf. Blau, *Syntactic Trends*, 214.

> diation and not by means of a double repudiation, as he had [previously] alleged . . . "and since the aforementioned ʿIzz al-Dīn divorced me in the presence of each of [the following]: Muḥammad . . ."' (35, 4–8); (b) *iddaʿat al-ḥurma al-musammāt Saʿīda . . . zawjat Ṣāliḥ al-Ǧarma sābiqan ʿalā Ibrāhīm al-Ḍabiʿ wa-qālat fī duʿāhā anna*[18] *zawjahā al-madhkūr yaṭlub minnak yā Ibrāhīm mablagh thaman*[19] *zawāzil* 'a woman called Saʿīda . . . the former wife of Ṣāliḥ al-Jarma . . . brought a claim against Ibrāhīm al-Ḍabiʿ [her present husband] stating that her aforementioned husband Ṣāliḥ "claims from you, O Ibrāhīm, a sum equivalent to eight camels"' (27, 1).

Shifts of speech mode in these Arabic legal documents are presumably a by-product of courtroom pragmatics whereby, in certain contexts, citation of the speaker's *ipsissima verba* enhances the document's evidential weight.[20]

Mixing of direct and indirect speech modes in Semitic and other languages has been insightfully examined in Goldenberg, *Direct Speech*, 91–92 where the author concluded:

> The formation and status of direct-speech constructions, the problem of differentiating between direct and indirect, the possible combinations of direct and indirect elements, . . . do not leave much sense in sticking to the simplistic description of two categories, the one of a direct-literal-asyndetic quotation and the other of an indirect, deictically switched and syntactically-transposed embedding, even if these are supplemented with a third category of "semi-indirect", half-switched and asyndetic veiled speech.

Significantly, mixed speech modes in some of the legal documents under study entail a degree of degrammaticalization exemplified by a certain degree of inconsistency in the implementation of pronominal deixis:

> (a) *fa-ajābahum Aḥmad as-Sarrār: idhā l-zawja ḥalafat ʿalā l-muṣḥaf al-sharīf anna sabab nufūrihā wa-ʿadam rujūʿihā ilā baytī anna zāhida fīhi* . . . ʿAḥmad as-Sarrār answered them as follows: "If the wife takes an oath on the noble Qurʾān that the reason for her alienation from me and her reluctance to return to my conjugal home is her own personal aversion

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[18] For Classical Arabic *qālat . . . inna.*

[19] The form *ʿaman* 'eight' with a short vowel in the second syllable here probably reflects a vernacular pronunciation as in Cairene *tämän* (Spitta, *Grammatik*, 158). Panetta, *Bengasi*, 159 cites only the equivalent with the etymological long vowel *tmān awrāg* 'otto foglie.'

[20] On use and non-use of dialect in reported speech integrated in Arabic journalistic discourse, see Fakhri, *Reported Speech*, 176f.

> for him [me] . . .”’ (70, 8–9); (b) *qarrara l-zawj anna kāffat mā lī ʿalayhā min ṣadāq sābiqan tanāzalt lahā ʿanhu maʿa ʿadā arbaʿata ʿashara junayhan lahu bi-dhimmatihi idhā ṣār al-khaṭaʾ minhā tadfaʿ lahu* . . . ‘her husband stated: “[In the case of an eventual divorce] I hereby renounce in her favour the entire [prompt] dower previously due to me from her with the exception of 14 pounds, which were his [mine], owed to him [me] by her. In the event that the guilt [for the dissolution of the marriage] is imputable to her, she will be required to pay him [me], etc.”’ (10, 15–17).

In the examples cited here, the reported statement begins in direct speech (cf. *baytī*) and then shifts abruptly to the indirect mode (cf. *fīhi*). Inconsistent pronominal deixis in this context invites comparison with instances of degrammaticalization concomitant with orality reported in other languages. Thus Fleischman, *Philology*, 21 observes that Old French, “very much a spoken language, the communicative instrument of a fundamentally oral culture adapted to writing” displays “tense usage to defy grammatical logic with jarring alternations between the past and the present. . . .”[21]

(ii) In the realm of syntax, recurring deviations from normative usage show up in numerical expressions. Classical Arabic ordinarily places definite numerals *after* the quantified noun: *al-ashkhāṣu l-thalāthata ʿashara*, though placement of the defined numeral first before an undefined noun (e.g., *al-thalāthata ʿashara shakhṣan*) is also current but technically incorrect (Krahl/Reuschel, *Lehrbuch*, 214). Our documents frequently resort to the latter option: *idhā dafaʿa lī l-ʿashrata gunayhāt* (1, 16), presumably under the impact of colloquial usage.

The rule of gender polarity between a noun and its qualifying numeral is not always observed: *thalāthu asāwira min al-fiḍḍa* ‘three silver bracelets’ (2, 3) for *thalāthatu asāwira*, the rule of concord being based on the gender of the singular form of the noun: *siwār* (m); *banātuhā l-thalātha* ‘her three daughters’ (45, 12) for *banātuhā l-thalāth* ‘her three daughters,’ *biḍʿatu sinīn* ‘a few years’ (55, 4) for *biḍʿu sinīn*, etc. Analogous departures from the norm show up in numerals from 11 to 20: *wa-siwār min al-fiḍḍa zinatuhu sittata ʿashara ūqiyyatan* ‘and a silver bracelet weighing 16 uqiyyas’ (5, 9) for *sitta ʿashrata ūqiyyatan*; *arbaʿata ʿashara ūqiyyatan* ‘14 uqiyyas’ for *arbaʿa ʿashrata ūqiyyatan* (5, 9); *sabʿata ʿashrata sanatan* ‘17 years’ (32, 8) for *sabʿa ʿashrata sanatan*, etc.

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[21] The topic of orality and law has been extensively investigated in relation to legal texts in European languages; cf. Claassen, *Recht und Schrift*, Vollrath, *Gesetzgebung*, and Schmidt-Wiegand, *Stammesrecht*.

Discrepancies of this kind in the use of literary Arabic numerals are not surprising since the archaic and grammatically complex rule of gender polarity obtaining in several Semitic languages has been discarded in Arabic colloquials spoken outside Arabia, Mörth, *Kardinalzahlwörter*, 162f.

(iii) Another clearly vernacular feature in the documents relates to a special semantic function of the preposition *li* 'to, for' with a 3rd pers. masc. sg. proclitic pronoun (i.e., *lahu*) conveying roughly the meaning 'ago, previously':

> (a) *wa-ddaʿā Abū Kinnī l-madhkūr anna Wardugūh b. Būrī qatala akhī Ṣāliḥ fī l-diyār l-Tibbāwiyya* ***lahu*** *biḍʿat sinīn* 'The aforementioned Abū Kinnī claimed that Wardugūh b. Būrī killed my brother Ṣāliḥ in the territory of the Tibbū tribe a few years ago' (55, 3–4).

This special use of literary Arabic *li* seems to be modelled on the expression *l-ah* in the Cyrenaican Arabic vernacular, as can be inferred from the following example:

> *hū ménṭereš l-ah šhar* 'egli è divenuto sordo da (lett.: a lui—e—) un mese' (Panetta, *Bengasi* I, 284).

Some dialects, such as Palestinian Arabic and Maltese, have evolved a closely comparable temporal use of a directional preposition with an enclitic pronoun which—as in Libyan Arabic—also refers back to the sentential subject: Palest. Ar. *ʾili sēʿtēn bastanna* 'I've been waiting for two hours' and Maltese ‹ili sagħtejn nistenna› (same meaning).

(iv) A highly interesting trait in the language of the documents relates to the use of the expression *lā zāla* as in the following sentence:

> *wa-lā zāla l-ḥāl mustamirran ilā mā qabla l-tārīx bi-biḍʿat ayyām* 'Such was the situation until a few days ago' (1, 7).

Blau, *Syntactic Trends*, 174 has commented on the diffusion of this expression—instead of the expected *mā zāla*—in certain forms of Middle Arabic and stressed the difficulty of explaining

> . . . why this hyper-correct usage of *lā* contrary to both Classical Arabic and Neo-Arabic, has arisen especially in Middle Arabic *lā ziltu*, etc. Fleischer, I, 447, speaks of a composite *mā zāla*, which does not, however, explain why *lā* is used more before *zāla* than before other perfects . . .

This odd usage in the language of the legal texts under consideration is clearly not of dialectal origin since Benghazi colloquial Arabic, like other dialects, here shows *mā-zāl* 'ancora' (Panetta, *Bengasi* 1, 308):

mā-zāl mā yākelš 'non mangia ancora'; *mā-zāl gāʿad* '(egli) c'è ancora' (*op. cit.*, 272).[22]

Panetta's hyphenation of dialectal *mā-zāl* intimates that this expression has undergone lexicalization with loss of sublexical complexity and concomitant grammaticalization—hence it never shows the discontinuous negative adjunct {-š} that is normal with ordinary verbs in many Arabic dialects.

The negative particle *lā* in *lā-zāla* occurring in the legal texts has been transferred from the Imperfect form *lā-yazālu* 'still, yet,' as in MSA *lā-yazālu fī ḥāja ilayhi* 'he still needs it' (Wehr, *Dictionary*, 449). Analogical syntactic transfer of this particle to *lā-zāla* was presumably triggered off by the function of the Imperfect form *lā-yazālu* as a marker of durative aspect. The temporally neutral character of aspectual markers presumably facilitated the integration of the lexicalized negative particle *lā* in a perfective context.

(v) In both Classical and vernacular Arabic, relative clauses referring back to a definite antecedent require a relative pronoun sometimes omitted in our documents: *Rajʿa bnatu l-Ḥafīẓ ummuhā Shwēkha* 'Rajʿa, the daughter of al-Ḥafīẓ, whose mother is [called] Shwēkha' (5, 3); *al-rajul al-madʿuww Sālim b. Abī l-Qāsim ummuhu Sharīfa* 'the man called Sālim b. A.Q. whose mother is [called] Sharīfa' (5, 5); *Fāṭma bint Mḥammad ummuhā Rābḥa* 'Fāṭma, Mḥammad's daughter, whose mother is [called] Rābḥa' (6, 3).

(vi) In the morphological sphere, a significant but unsystematic trait imbibed from spoken Arabic is the *n-kt-b* Imperfect: marking of the 1st pers. sg. of the verb with the prefix *n-* (indicated in bold print in the examples cited below) replacing Old Arabic *ʾa-*. This formal trait can occur, as in the example just cited, juxtaposed to a genuine classical 1st pers. sg. form. Understandably, it occurs mostly in verbal lexemes that are common coin in Libyan colloquial Arabic, e.g., derivatives of *ṭlb*, *byʿ*, *wṣl*, *shhd*, *rjʿ*, etc.:

(a) ***naṭlub*** *min jānib al-sharʿ al-sharīf [an]* ***nabīʿahā*** *lahu* 'I request from the noble Sharīʿa Court [permission] to sell it to him [i.e., the husband's share of the irrigated plot to his partner]' (28, 6); (b) *wa-baʿda dhālika lam* ***nattaṣil*** *bihā* 'after that, I had no contact with her' (41, 28); (c) *hādhā mā* ***nashhad*** *bihi* 'this is what I testify' (48, 12); (d) *wa-ḥaythu anna al-ḥādith qadarahu allāh taʿālā* ***naṭlub*** *tasjīlahu bi l-maḥkama*

[22] For the inflection of dialectal *mā-zāl*, cf. Owens, *Libyan Arabic*, 159.

l-sharʿiyya 'and since this accident has been ordained by Allah the Exalted, I ask that it be registered in the Sharī'a Court' (58, 10–11).

This morphological trait is a well-known shibboleth of Maghribī Arabic (cf. Cyrenaican colloquial *nimsik, nagbal, niktib, nākil*, etc., Owens, *Libyan Arabic*, 218, 224), and can be heard in parts of Egypt and westwards in all the dialects of N. African Arabic (Blanc, *Imperfect*); it is also characteristic of Andalusī Arabic (Corriente, *Grammatical Sketch*, 100), Sicilian Arabic, and Maltese.

(vii) In the inflection of the dual in nouns, the oblique form, the source of the colloquial dual (cf. Blanc, *Dual*), appears in place of the nominative and vice versa:

(a) *fa-innī mustaʿidd bi-an nadfaʿa lahā qīmata l-raṭlān al-madhkūrān* . . . 'I hereby undertake to pay her [a sum] equivalent to the aforementioned two rotls of silver' (33, 8) for *al-raṭlayn al-madhkūrayn*.

Actually, deviations with regard to case inflection also occur in more general fashion in the documents:

wa-yadfaʿ ḥāja min al-darāhim li-banū ʿamm al-maqtūl 'and he will pay one *ḥāja* in cash to the victim's male paternal cousins' (55, 7–8) (for *li-banī ʿamm al-maqtūl*).

(viii) In the realm of phonology, one notes a trend towards elision of short vowels in open unstressed syllables familiar from many varieties of vernacular Arabic. In the documents, it is signalled by insertion of secondary prosthetic *alif* (here indicated by zero) before ensuing word-initial consonant clusters. Whereas vocalic elision is fairly systematic in the varieties of colloquial Arabic where it occurs, the documents examined here display it exclusively in names: ‹ømḥmd› (1, 11) (= *Mḥammad*), ‹øbryk› (= *Brīk*), ‹øjdyd› (18, 6) (= *Ǯdayyid*), ‹mrym bnt øḥsyn› (45, 5) (= *Maryam bint Ḥsēn*), ‹øjlwlāt› (58, 5) (= *Ǯlūlāt*), ‹zwjt mḥmd bw øḥsyn . . . ywns bw øḥsyn› (65, 1) (= *zawjat Mḥammad bū Ḥsēn . . . Ɣūnus bū Ḥsēn*), etc. The toponym *Ajdābiya* is cited throughout the documents both with and without prosthetic *alif*, e.g., ‹jdābyh› (1, 4; 13, 3). The recognition tendered here to spoken renditions of frequently used names gives a rough idea of the 'code-switching' between formal and informal linguistic registers characterizing verbal exchanges in the Libyan courtroom. Dialectal influence is also evident in *faʿālil* plurals with a weak third consonant position, where the documents show dialectal /y/ rather than *hamza: ḥawāyij, bahāyim*, etc., and in morphophonemic restructuring of verbs with final

hamza as finally weak, e.g., *qara'a* 'he read': *fa-baʿd mā qaraynā* (for *qara'nā) ʿalayhā al-jawāb* . . . 'After I read out the letter to her . . .' (19, 5); note also hypercorrect ‹'› in ‹bana'› (1, 8) for ‹banā› 'he built' and elision of the glottal catch yielding a new diphthong in *ʿayla* 'clan' (63, 9) continuing dialectal *ʿēla* < OA *ʿā'ila*.

An intriguing phonetic oddity in the documents is the orthographic variant ‹jyblh› (63, 10) for the clan name *Ǧāballāh* which de Agostini, *Popolazioni*, 408–9, transcribes both as *Giabàlla* and *Gebàlla* (54, 22). The variant with the fronted reflex ‹ī› < OA *ā* would seem to be a rare occurrence in these documents of the so-called *imāla* shift reported in some varieties of Cyrenaican Arabic affecting the low, central, long vowel in certain fronting consonantal environments: *šieri* 'buying' < **šārī*, *giddiem* 'in front of' < **quddām* (Mitchell, *Language*, 36, 66). The *imāla* reflex—realised [ē]—also typifies the Bedouin dialect spoken by the ʿAwlād ʿAli encamped in Sāḥil Maryūṭ in the Western Egyptian desert (cf. Maṭar, *Lahjat al-badw*, 51–70).

(ix) The impact of orality on the documents also pervades the lexical domain which has integrated several traditional legal concepts pertaining to customary law (*ʿurf*): *mughtāẓa* 'an angry wife,' *dār ʿadl* (doc. 9) 'tribal institution for handling marital disputes,' and rhyming expressions enshrining dictates of legal lore: *ʿalā ʿayb aw ghayb* (1,15)—lit. 'in the case of shame or absence'—that is, in the event of the wife's adultery or the husband's absence through death or desertion (cf. Glossary, 288, *s.v. ʿayb*); *wa-baytuhā wa-mā lamma wara'suhā wa-mā ḍamma* (5, 10) (referring to the event of divorce or the husband's decease; Glossary, *ibid.*, *s.v. bayt*), etc.

The aforementioned concept *dār ʿadl* is, within the scope of this paper, of paramount interest since its referent is essentially the customary law institution designated by the vernacular Arabic term *bayt ish-shanāʿa*, lit. 'the house of repulsiveness' in the juridical traditions of the Cyrenaican Bedouin (for details, see Glossary, 287, 289 and Layish, *Dār ʿadl*, 205f.). Relexification of this customary legal concept by means of a literary Arabic equivalent underscores the postulated formal iconicity of the diglossic gradient vis-à-vis the dichotomy obtaining between *ʿurf* and *sharīʿa*. Paradoxically, this innovative lexification legitimizes an institution that runs counter to the letter and spirit of Muslim law which safeguards by means of heavy sanctions the privacy of the individual's home (cf. doc. 9).

(x) Highly noteworthy in the realm of lexical and semantic creativity bridging the conceptual domains of *ʿāda* and *sharīʿa* are two

technical terms in the documents deriving from well-known Arabic lexemes but conveying meaning patterns apparently unattested in the standard dictionaries, literary or dialectal: *ḥāja* and *lijām*. The term *ḥāja* here designates a standardized unit specifying a variety of possible referents ranging from cash to clothing or personal effects:

> *wa-alzama nafsahu bi-dafʿ al-diya al-maʿrūfa ʿindahum arbaʿat jimāl min dhukūr al-ibil wa-ḥājatayn ghanam wa-ḥamīr wa-arbaʿat ḥawāyij*[23] *darāhim. wa-lil-maqtūl uxtayn*[24] *fī diyār Tibbū. ittafaqū yadfaʿ lahunna jamalayn wa-ḥāja min al-bahāyim wa-ḥāja min al-darāhim wa-yadfaʿ ḥāja min al-darāhim li-banū ʿamm al-maqtūl* . . . 'He obligated himself to pay the blood money that is customary (*maʿrūf*) among them, that is, four male camels, two *ḥawāyij* of sheep and donkeys, and four *ḥawāyij* in cash (*darāhim*). The slain man (*maqtūl*) has two sisters in Tibbū territory (*diyār*), and it was agreed that [the perpetrator] would pay them [out of the aforementioned blood money] two camels, one *ḥāja* of livestock, and one *ḥāja* in cash. He will [also] pay one *ḥāja* in cash to the victim's male paternal cousins . . .' (55, 6–9).[25]

The aforementioned semantic continuum pertaining to the lexeme *ḥāja* probably derives by back-formation from the meaning of the plural equivalent *ḥawāyij* (= Lit. Ar. *ḥawā'ij*) 'everyday objects, effects, clothes, etc.' (Wehr, *Dictionary*, 246). The singular ordinarily means 'need, thing' in most North African vernaculars, and 'necessity, requirement, prerequisite; natural, bodily need, necessary article, thing, object' (Wehr, *loc. cit.*) in literary Arabic.

According to Fraenkel, *Fremdwörter*, 100 the Arabic term *lijām* continues Syriac *ləgōmō* 'bridle, bit' (J. Payne Smith, *Dictionary*, 235); the same meaning is retained in both literary and vernacular Arabic. In the documents, the term is restricted to doc. 63 where it does not have this meaning; rather it specifies a unit of immovable property and usually occurs in the context of land requiring to be equitably divided among members of a clan in the execution of a will (for details, see Glossary, *s.v. ljm*):[26]

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[23] For *arbaʿ ḥawā'ij*.

[24] Normative Arabic usage here requires *uxtān*.

[25] For other occurrences of this lexeme, cf. docs. 6, 11–15; 13, 6–10; 46, 2–3; and 55, 6–9.

[26] The equivalent term in the Negev Bedouin vernacular is *miʿnāh*, pl. *maʿāni* (Mr. Sasson Bar Zvi, p.c.).

> They convened a gathering at an appointed time (*mīʿād*) in order to divide [the land] among themselves the following year, God willing, on the basis of the 35 *lijām*s constituting the entire land in question. [The division is to be carried out as follows:] the Ḥwēj lineage [is entitled to] 20 *lijām*s, the al-Bābā lineage to 18 *lijām*s; etc. (63, 4–5)

This semantic innovation in the language of the legal documents derives from the verb *lajama* 'to restrain, curb' (Wehr, *op. cit.*, 1007), hence 'to limit, set the boundaries,' for instance, of a piece of land. Also worth mentioning here, are the cognates *lajam*, pl. *aljām* 'terra mediocris inter asperam et aequalem' (Freytag, *Lexicon*, IV, 88), 'average ground' (Hava, 679), and the unit of measure *muljam* 'term for a standardized measure of capacity' (Ullmann, *Wörterbuch*, 254), 'mesure dont on se servait à Baçra; . . . elle contenait 21/2 *ṣāʿ* = 10 *modd*,' Dozy II, 525). In Jewish Yemenite Arabic, *lijām* means 'barrage constructed at the mouth of a main channel' (Piamenta, *Dictionary*, II, 445).

(xi) Finally, the documents display borrowings from colloquial Arabic designating material realia: *kiswa* 'woman's dress,' *fūṭa* 'apron,' *ʿshār* 'she-camels,' *ʿajamiyy* 'young bull,' *zawāzil* 'gelded camels' (27, 2), *ḥawli* 'yearling ewe-lamb.' The colour term in *al-nāqa al-khaḍrāʾ*—lit. 'the green she-camel'—probably denotes a greyish white camel (cf. Borg, *Color*, 131).

Vernacular influence on the language of the documents sometimes percolates the realm of phraseology:

> . . . *wa-yanqaṭiʿ baynahum al-nizāʿ wa-lladhī yataʿaddā ʿalā aḥad bi-qatl aw ḍarb mā yulzim illā nafsahu wa-huwa l-masʾūl* '. . . and the dispute will be settled. Whoever kills or assaults [in future] a member [of the killer's agnatic group] will make only himself liable [to vengeance] and he alone will be responsible [for the consequences of the action]' (55, 9–10).

The expression *huwa l-masʾūl* here renders in a matter-of-fact colloquial register a Higher literary formulation such as *wa-huwa sa-yataḥammal masʾūliyyata dhālik*.

(xii) Foreign words in the documents, conceivably imbibed from the urban Libyan vernaculars, are mostly loans from colonial Italian: ‹krzy› [= *karrōzī] (30, 4) 'carriage' < *carrozzino* 'small horse-drawn carriage' (cf. Maltese ‹karożżin›); ‹bīdūnī› (35, 9) 'can, drum' < *bidone*, ‹brākh› [= *barrakka] (54, 14) 'hut' < *barracca*; ‹sinyūr qbṭān› [= ? *sinyōr qabuṭān/qubṭān] (65, 6) < *signore capitano*. The rendition of the name of the month September as ‹stmbr› (28, 2) reflects the native pronunciation of It. *Settembre*.

3. *Interpreting anthroponyms in the legal texts*

Wolfram von Soden (1985:126) has observed that in ancient Near Eastern societies, "im strengen Sinn gibt es kein weltliches Recht, sondern nur ein religiöses." It has rarely been noted that, from the perspective of Semitic legal history, the customary law of the Bedouin presents, in this regard, a striking exception in that it derives its mandate essentially from tribal authority rather than by evoking otherworldly, religious sanctions. By the same token, the adoption of Sanūsī Sufism by the Cyrenaican Bedouin entailed a radical transformation of their secular law and animistic religious orientation since both agnatic authority and the sanction of a more classical form of religion became concentrated in the hands of their tribal leaders.[27]

Geertz, *Cultures*, 126 has stressed that

> Religion is never merely metaphysics. For all peoples, the forms, the vehicles, and objects of worship are suffused with an aura of deep moral seriousness.

Legal documents issued by *sharīʿa* courts explicitly propagate the religious symbols of Islam. The *shahāda* with its invocation to Allah and the Prophet Muhammad (*bismillāhi l-raḥmāni l-raḥīm—wa-ṣallā llāhu ʿalā sayyidinā Muḥammadin wa-ālihi wa-ṣaḥbihi wa-sallam*) is such a symbol.

Blessings at the head of protocols lend a religious dimension to the text[28] and ordinarily comprise an invocation of Allah, a prayer for the Prophet, his family and companions, and a blessing for the then ruling monarch Muḥammad Idris. This last practice was presumably inspired by the blessing invoked on the head of state during the Friday prayer service;[29] though it is also worth noting that the Libyan monarch enjoyed the status of *sharīf* or descendant of the Prophet and of head of the Sanūsiyya order.[30]

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[27] In practical terms then, this pattern of religious conversion with sedentarization amounted, in effect, to a shrewd political strategy enabling Bedouin to appropriate the power symbols conferring on them control over the settled community. On Bedouin seeking interaction with neighbouring states, see Kressel, *Shepherding*, Ch. 1.

[28] Beyond the immediate objective of creating a religious aura around court proceedings, the blessings conceivably fulfill the more general aim of bringing all mundane matters within the boundaries of religious space in conformity with a spiritual viewpoint shared with other Semitic religious systems, e.g., Judaism and Christianity.

[29] Note also, in this connection, the Arabic term *āmīn* (< Hebrew *āmēn* 'certainly') at the end of the blessing formula (cf. Lane, *Manners*, 89).

[30] This Libyan ruler's state functions as Amir—and (later) king—were vested with

Interestingly, doc. 2, ratifying a marriage contract states its contents in the form of a blessing: *al-ḥamdu lillāhi lladhī aḥalla l-nikāḥ wa-bayyana aḥkāmahu* "Praise be to Allah who established marriage and made plain the laws concerning it!"

Trimingham, *op. cit.*, 28 observed that "Power symbolism in Islam is . . . primarily based on words." The juxtaposition and close association of *Allāh* and *Muḥammad* ("le plus saint des noms musulmans, après celui d'Allah"; Chebel, *L'immaginaire*, 118) at the head of legal documents conveys to the Muslim perusing these texts something more than a mere pious gesture. It is here suggested that these names are iconically as inseparably linked as are the three persons of the trinity in the Christian *Basmala* (*bismillāhi wa-l-ibni wa-l-rūḥi l-qudus* 'in the name of God, the Son, and the Holy Spirit'), where the conjoined linguistic tokens for divinity and humanity intimate theological equivalence. There are signs—specifically, in anthroponymic usage reflected in the texts—indicating that, at the level of unreflective thought, the metaphysical boundary between *Allāh* and *Muḥammad* is, at the very least, blurred in some minds. Thus alongside classic *ʿAbd*-names, which Muslim tradition set aside as an exclusively theophoric name-set (i.e., pertaining to the so-called *asmāʾ ḥusnā* 'beautiful names' evoking the deity), such as

> *ʿAbdallah, ʿAbd al-Ḥamīd, ʿAbd al-Salām, ʿAbd al-Qādir, ʿAbd al-Ḥafīẓ, ʿAbd al-Raḥmān, ʿAbd al-Jalīl, ʿAbd al-Wahhāb, ʿAbd al-Karīm, ʿAbd al-ʿAzīz, ʿAbd al-Salām, ʿAbd al-Laṭīf, ʿAbd al-ʿAliyy, ʿAbd al-Ṣamad*, etc.,

the name pool in our documents shows the unconventional combinations *ʿAbd al-Rasūl* 'the servant of [Allah's] Messenger' (20, 5; 58, 3), and *ʿAbd al-Nabiyy* 'the servant of the Prophet' (46, 15–16) evoking the Prophet Muḥammad.[31] These same *ʿAbd*-names referring to the Prophet have also been noted among the Negev Bedouin (personal observation).[32]

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temporal authority modelled on western notions of government and would therefore seem to be intrinsically devoid of religious sanction in Islam (cf. Ayalon, *Malik*). On the historical context around the creation of the Amirate of Libya, see Evans-Pritchard, *Cyrenaica*, 105–106.

[31] It appears that orthodox Muslims at the present time disapprove of their use; one source designates them *al-asmāʾ al-muḥarrama wa-l-makrūha wa-l-manhiyy ʿanhā* 'the forbidden and loathsome names [whose use is to be] prohibited' (an internet article entitled *xidmat asmāʾi l-mawālīd* from *Lahā*-online dated March 2003).

[32] Note also the name *ʿAbd Muḥammad* recorded for Palestinian fallāḥīn in Macalister/Masterman, *Personal names*. For unconventional uses of the name component *ʿAbd*,

Earlier work on Islamic names—for instance, Hammer-Purgstall, *Ueber die Namen der Araber* (1852), Garcin De Tassy, *Mémoire* (1854), and Sir T.E. Colebrooke, *Proper Names* (1879)—recognized the existence of *ʿAbd*-names evoking the Prophet but, to my knowledge, no serious attempt has been made to account for them. Remarking on the incidence of the name *Abd an nebi* along with orthodox *ʿAbd*-names in Hammer-Purgstall's study, Colebrooke, *op. cit.*, 183, observed:

> It is not easy to understand how 'the servant of the prophet' finds a place in a collection appropriated to attributes of God. Reverence for Mahomet, Aly and his sons Hasan and Husain, finds expression in some proper names is use among Persians and Turks as well as Arabs. Thus we have:—
>
> *Abd ar rasúl*, servant of the sent, i.e. the prophet; *Gholam-i-Mahommed*, servant of Mahomed; *Bandah-i-Aly*, and *Aly Kuli*, servant of Aly; *Murteza Kuli*, servant of the approved, i.e. Aly; . . .

De Tassy, *op. cit.*, 443 also records the name *ʿAbd ussayyid* referring, no doubt, to the Prophet, designated *sayyid* in the Muslim *Basmala*. In the documents, this name occurs in a genealogical sequence recorded in doc. 61, 7: *al-Dhīb b. ʿAbd al-Sayyid b. al-Dhīb*. In doc. 15, 6, the unusual name *Ḍull al-Sayyid*[33] pertains to a freed Sudanese woman slave; from a paradigmatic standpoint, this name may also belong to the *ʿAbd* name set, the component *ʿAbd* being presumably limited to men's names. There is also one occurrence of the name component *al-Sayyid* (16, 7) appearing alone.

It is probably not far off the mark to interpret the inclusion of the Prophetic name in a formally theophoric name paradigm as indicative of its bearer's deification in the popular mind. Incidentally, Sufism went a long way towards justifying such unorthodox views, for instance, by attributing to the Prophet "pre-existence before creation" (Trimingham, *Sufi Orders*, 161), which, in the words of Nicholson, *Studies*, 87, "brings Mohammed in some respects very near to the Christ of the Fourth Gospel and the Pauline Epistles."

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note its playful use in the odd nickname *ʿAbd el-Aʿraj* 'servant of the lame one' (*ibid.*, 152).

[33] The term *ḍull* seems to be an altogether rare lexeme; Lane 1797 notes "its usage in the manner of a proper name in the saying": *huwa ḍullun bnu ḍullin* 'he is the unknown, the son of the unknown.' Its application to a female here may either reflect a prophylactic strategy or selection of a demeaning name such as is not infrequently given to females in Arab families (cf. Borg/Kressel, *Names*).

Conferral of the Prophetic name on one's sons is more than a token of reverence for its namesake since religious personal names in a Muslim ambience traditionally mediate links with the supernatural (Kister, *Call yourselves*, 3). In Borg, *The enigma*, I adduced another instance of an intriguing linguistic token in colloquial Arabic that plausibly mirrors a popular perception ascribing divine status to the Prophet: the pronunciation of the Prophet's name with velarization (*tafkhīm*) among the Sinai Bedouin: *Mhaṃṃad* (Stewart, *Texts,* 291), presumably by analogy with the velarized pronunciation of *Allāh.*[34] I there suggested that this phonological treatment of the Prophet's name would seem to signal, at the level of folk religion, a restructuring of the boundary between the *Allāh* and the Prophet in this group's construction of the numinous. Arresting explicit evidence of this perception in the Negev Bedouin's religious consciousness is referred to in Aref el-Aref, *Bedouin Love*, 41:

> Veneration for Mohammed is very deep. Mohammed stands head and shoulders above the rest of the prophets. Indeed, in some of their minds, there is doubt whether they should place Allah or Mohammed first. I have been asked more than once by the Badu whether Mohammed is greater than Allah.

The perception at the level of popular Islam of the Prophet's superhuman dimensions has been characterized in Peters (1996:338):

> Between the historical Muhammad, the man who was born in Mecca and died in Medina in 632 C.E., and the Muhammad of history who grew up in his wake stand the dynamics of Muslim piety so strikingly described by Tor Andrae at the beginning of this century and Annemarie Schimmel in more recent times. The Muhammad of history has in fact become far more than a mere mortal in a variety of ways, but one transformation in particular has complicated the historian's task. Early on, early enough, at any rate, to infect the Muslim sources, a veneration of Muhammad grew into the dogma of the impeccability of the Prophet. Like the virginity of Mary in Christianity, the impeccability of the Prophet expanded *ante, inter* and *post* his call to Prophethood. The Muhammad who worshipped the gods and goddesses of Mecca well into his adulthood has all but disappeared behind the doctrine of *ʿiṣma*, impeccability.

The viewpoint that the iconic transfer implemented in the aforecited deviant *ʿAbd*-names encodes a folk Islam finds support in Becker,

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[34] On the component of velarization in Allāh, cf. A. Fischer, *Zur Aussprache* and Ambros, *Zur Entstehung.*

Islamstudien, 37 commenting on the proliferation of names bestowed on the Prophet by posterity:

> Den schönen Namen Allahs sind dann die schönen Namen Muhammeds nachgebildet, die auch ihrerseits wieder magische Bedeutung erlangt haben.

This echoes Tor Andrae's statement:

> Einige sūfi's lehrten, so berichtet Abu Bekr ibn al-ʿArabī (gest. 545), dass Gott tausend Namen und Muhammed ebenfalls tausend hatte. Musste nicht für den einfachen frommen . . . der unterschied zwischen den *asmaʾ al-ḥusnā* und den *asmāʾ al-šarīfa* unmerklich verwischt werden (*Die Person*, 276).

The dissemination among Bedouin of a folk-version of Islam is in itself not surprising given their physical distance from the centres of religious observance. A closely comparable situation exists among the Bedouin in the Judaean desert (Layish/Shmueli, *Custom*, 31), in Sinai and in the Negev. On the brand of Islam practised by the Cyrenaican Bedouin, Evans-Pritchard, *Cyrenaica*, 62–3 writes:

> Though the Bedouin professed Islam before the Grand Sanusi influenced them by his teaching, they were almost totally ignorant of its doctrinal content, rites, or ritual and moral duties, and it is safe to assume that that they did not obey its precepts. It is safe to assume this because even today, after a century of Sanusiya instruction, the Bedouin perform their religious duties in a perfunctory way, if at all, and when Muslim law is at variance with tribal custom they follow tribal custom. . . . I very much doubt whether many of the Bedouins know how to pray in the prescribed manner . . . Nevertheless, however lax they may be in other things, all Cyrenaican Bedouin keep the fast of Ramadan, and in this annual fast is summed up for them, more than in anything else, the obligations and privileges of Islam and its unity and strength.

De Tassy characterized the use of non-theophoric *ʿAbd*-names as peculiar to Persian and Turkish Muslims. A noteworthy feature of the data furnished by De Tassy is the parallel treatment of the names of *Allāh* and *Muḥammad* with that of *ʿAlī*, the Prophet's son-in-law (cited in the author's transcription), yielding a species of trinitarian configuration:[35]

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[35] Cf. also the Yemenite saying: *ʿād fīnī ʾan-nabī wa-ʿalī* 'Ich habe noch den Propheten und Ali in mir' cited in Goitein, *Jemen*, 107.

> *Abd Allâh* «Serviteur de Dieu», *Abd un-nabī, Abd urraçûl* «Serviteur du Prophète», *Banda-i-Alī, Alī Cûlī, Gulâm-i Haïdar* «Esclave d'Ali», . . . *Lutf Allâh* «la Bonté de Dieu», *Lutf-i Muhammad* «la Bonté de Mahomet», *Lutf Alī* «la Bonté de Alī» (*Mémoire*, 464–5).

Whereas the tendency to deify *ʿAlī* among extremist groups within the *Shīʿa*—e.g., the *Nuṣayrī*s—is well known (Bar-Asher/Kofsky, *Nusayri Doctrine*, 258), the deification of Muhammad at the level of popular religion is rarely discussed.

It is tempting to interpret the use of *ʿAbd*-names in relation to holy men in Islam as ultimately the outcome of Christian influence since the issue of Jesus' divinity and humanity had dominated the religious and political scene of the Near East in the centuries preceding the emergence of Islam, yielding a subtle and philosophically defensible theological notion of the God-man in the domain of Christology. The analogy between Jesus and Muhammad at the level of folk religion can be seen at work in a medieval popular institution—anathema to the orthodox—i.e., the feast of *mawlid al-nabiyy* 'the Prophet's birthday' (12th of *Rabīʿ al-Awwal*) which almost certainly developed under Christian influence on the model of Christmas since the celebration of birthdays is not customary in Arab society. G.E. von Grunebaum, *Festivals*, 73 notes:

> According to the Sunnite historians and theologians, the first *maulid* celebration is that arranged by Muzaffar ad-Din Kökbürü, a brother-in-law of the famed Saladin, which took place in Arbela, southeast of Mosul in Upper Mesopotamia, in the year 1207. *In this festival those Sūfi and Christian influences are prominent* which, together with the tendencies represented by the Shīʿa, have done so much toward the development of the veneration of the Prophet and the saints. [emphasis added]

Thus the aforecited *ʿAbd*-names may be insightfully interpreted as popular religious tokens legitimized by a "drama in custom" not unlike that surrounding the celebration of Christmas itself (Frankenberg, *Community studies*, 146).[36]

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[36] On Jesus in early Islam, see Bashear.

The lexeme *ʿAbd* and its plural *ʿibād* were common coin in the religious terminology used by the Arabic-speaking Christians of Ḥīra in the Pre-Islamic period. Trimingham, *Christianity*, 156 notes:

> The principal element in Ḥīra after it developed into a permanent trading and dynastic capital came to be known as *al-ʿIbād*. This was a grouping of mixed tribal elements united by allegiance to Christianity. The word *ʿibād* is clearly an abbreviation of the phrase *ʿIbād ar-Rabb*, "Slaves of the Lord"' or *ʿIbād al-Masīḥ*, "Slaves of Christ". In early Muslim Arabic literature the word specifically means 'Christians of al-Ḥīra and district", but sometimes it took on the general sense of "Christians", as in the expression *al-ʿIbādiyyūn min Tamīm*, "the Christians among the Tamīm", although in fact all the settled northern Tamīm were Christian.

A fairly common modern anthroponym among Christian Arabs is *ʿAbd al-Masīḥ* 'Servant of the Messiah,' which is presumably calqued on some such Aramaic form as **ʿAbd ʾīshōʿ* (cf. the modern Neo-Aramaic name *ʿOdīsho*).[37] The sharing of religious symbols and pertinent linguistic tokens between Christians and Muslims no doubt occurred in large part in the context of culture contact in the religious realm such as that visualized for tenth-century Islam in Mez, *Renaissance*, 418:

> The festivals show how thin was the Islamic varnish over the popular life. The Muslims celebrated all the Christian festivals—most of which were nothing more or less than rivals of much older practices.

So much for anthroponyms of Islamic or other religious inspiration.

Not surprisingly, the legal documents under study also display a set of traditional, pre-Islamic anthroponyms known from other Bedouin communities. In Borg/Kressel, *Names*, we studied the anthroponymic composition of recent genealogies of Negev and Sinai Bedouin—a marginal and, in some respects, highly conservative area of the Arab-speaking world—with the aim of discovering patterns of name conferral ascribable to a Bedouin *Weltanschauung*. The bottom line of our research was that traditional Bedouin names constitute an in-language implementing a species of Whorfian template. The following points merit notice:

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[37] *ʿAbd* names are well attested in Syriac: *ʿbd-šmš* 'Servant of Shamash,' *ʿbd-nbw* 'Servant of Nebo (Nabu),' *ʿb(d)-ṣlm*' 'Servant of *ṣlm*',' etc. (see Harrak, *Christian Onomastica, passim*). Note also the Neo-Aramaic toponym Ṭūr ʿAbdīn in S.E. Anatolia.

(a) Bedouin naming patterns represent a well-established structural element in their agnatic genealogies, and entail the use of a relatively close-ended inventory of anthroponymic root morphemes along with a tendency to exploit their derivational potential, sometimes in fairly elaborate fashion (cf. *Sālim, Salīm, Salāma, Msallam*, etc., Borg/Kressel, *op. cit.*);

(b) the frequency of Pre-Islamic personal names encoding an element of animistic religion around an ancestral eschatology, which has tended to militate against the use of classic Muslim names—with the notable exception of the Prophetic name and its derivatives: *Muḥammad, Aḥmad*, etc.; thus Burckhardt, *Bedouins*, 97 noted:

> Except Mohammed, which is not uncommon, true Muselman names, such as Hassan, Aly, Mustafa, Fátme, or Aysha, are seldom found among the Bedouins.

(Closely analogous statements occur in Hess, *Beduinennamen*, 6 and Musil, *Rwala*, 8–9).

(c) the resort to typically Bedouin semantic themes (*dakhīl* 'one who places himself under the protection of s.o.' > *Dakhaḷaḷḷah*), *Ḥarb* 'war,' etc., and to life in the desert.

This last anthroponymic type undoubtedly continues an ancient lexemic stratum. Kister, *Call yourselves*, 9, states that in Pre-Islamic Arabia, Bedouin generally gave their sons disagreeable names; pleasant ones were reserved for women and slaves; this custom echoes the saying in Ibn Duraid's *Kītāb al-Ishtiqāq*, 4:

> *sammat abnāʾahā li-aʿdāʾihā wa-sammat ʿabīdahā li-anfusihā* 'they named their sons with their enemies in mind, and their slaves for their own gratification' (my trans.).

Their sons were often given names evoking wild animals, and their daughters names of herd animals.[38] In his observations on Arabian Bedouin, Doughty, *Arabia*, 329 noted the custom of conferring apotropaic names:

> if a child be sickly, of infirm understanding, or his brethren have died before, they will put on him a wild beast's name, especially wolf, leopard, wolverine—that their human fragility may take on as it were a temper of the kind of those animals.

[38] Cf. also male Hebrew names like *Zəʾēv* 'wolf,' as opposed to women's names like *Leʾāh* 'ibex,' *Rāḥēl* 'ewe' (cf. OA *rikhl/rakhil* 'female lamb,' pl. *arkhul/rikhāl*, Hava 246).

Similarly, Musil's records relating to Northern Najd mention the fact that the Bedouin there name their children after their natural environment:

> They affect names recalling the various animals of the desert, or herbs, wells, elements of natural scenery, customs, and the like. (Musil, *Northern Neǧd*, 9)

Thematic names referring to the natural world also show up in the name pool attested in the documents: e.g., *ʿGāb* 'eagle,' *Ṣagr* 'falcon,' *Dhīb* 'wolf,' *Dhyāb* 'wolves,' *Fakrūn* 'tortoise' (< Berber, Dozy I, 283), *Khnēfis* 'small dung-beetles.'

The lexemic inventory of an authentic Bedouin name pool can be highly distinctive; observe, by way of example, the following set of 70 names for males from the Negev:

> *B(a)khīt, Bkhēt, Mbārak, Baṭīn, Miʿib, Ǧāzi, Ǧdēʿ, Ǧaddūʿ, Ǧumʿa, Ǧmaʿēn, Ǧmēʿān, Ǧaffāl, Ḥābis, Ḥarb, Ḥsēn, Ḥusni, Mḥammad, Mḥimmid, Ḥammād, Ḥmūd, Ḥmēd, Ḥmēdih, Ḥāmid, Ḥamīd, Ḥamd, Ḥamdah, Khatām/Khitām, Khrēnig, Khlayṣ, Mukhluṣ, Khamīs, Khmayyis, Dakhalallah, Darb, Drēwīsh, Dhīb, Dhyāb, Marzūg, Rwēʿi, Rhaydin, Zbēd, Zāyid, Ziyād, Zayyād, Zīdān, Sbētān, Sbēti, Sallūṭ, Saʿad, Asʿad, Suʿūd, Masʿad, Masʿūd, Msāʿid, Msāʿad, Siʿdi, Saʿiyyid, Saʿdān, Ítēwi, Ṣubḥi, Ṣābir, Ṣabri, Ṣābrīn, Ṣāliḥ, Ṣwēliḥ, Ṣlayyiḥ, Ṣallūḥ, Ṣagr*, etc.

Feature (b) above is of particular significance vis-à-vis the factor of Islamization. In Borg/Kressel, *Names*, we endeavoured to account for the thoroughly non-Islamic provenance of the core component in the personal name inventory of the Negev and Sinai Bedouin:

> If we regard Muslim personal names as religious tokens of individual salvation and a promise of personal apotheosis in the world to come, this principled avoidance of Islamic anthroponyms among Bedouin takes on an ideological slant: adherence to a low-key, ancestral eschatology in preference to a grandiose Islamic one (p. 62).

An important Bedouin folk custom that finds expression in the documents is that of papponymy, whereby a child is given a grandparent's name: *Aḥmad b. ʿAwaḍ b. Aḥmad Fannūsh* (11, 5); *Sālma bint Ṣāliḥ b. Sālim* (14, 3), *Mḥammad b. ʿAlī b. Mḥammad* (54, 8), etc.

Particulary striking, in this respect, are the genealogical name chains *ʿAbd Rabbihi b. ʿAbd Rabbihi b. ʿAbd Rabbihi b. Abī Zayd* (13, 4), *Aḥmad b. Aḥmad* (1, 7), and *Ḥamad b. Ḥamad al-Ṣubḥī* (3, 5), *Ḥamad b. Ḥamad b. al-Rwēs* (4, 5), where at least four sons have received their fathers' names. In Middle Eastern Arab communities, a child

is not normally given its parent's name in the latter's lifetime since this is popularly perceived as liable to shorten the namesake's life span. Thus in her exemplary study of Muslim names used by the inhabitants of the Palestinian village of Arṭās, Grandqvist, *Child Problems*, 14 points out that a child receives his father's personal name only in the eventuality of the latter's decease during the mother's pregnancy.

A highly significant differential factor with regard to Arabic personal names is that of gender. Women's names in the documents are quite frequently secular in tone, i.e., of non-Islamic provenance, and their referential content is more varied and explicit than that of men's names:

> *Tajdīda, Taʿwīḍa, Sālma, Shwēkha, Rābḥa, Kāmla, Ragayya, Rajʿa, Ḥmēda, Mansiyya, Khwēra, Umm al-Hanā', Marzūga, ʿWēsha, Khēriyya, Magbūla, Masyūna, ʿAtīga, Ḥammāla, Mabrūka, Umm al-Khēr, Gbūl, Maḥbūba, Mastūra, Fṭēma.*

I have referred to the iconic function of personal names mapping out the agnatic structure of Bedouin genealogies. In this connexion, it is worth noting two cases of names for females 'echoing' the father's name: *Taʿwīḍa bint ʿAwaḍ, Hādya bint ʿAbd al-Hādī* (51, 6, 16). It would be interesting to determine to what extent the distribution of agnatically significant anthroponyms among Libyan Bedouin extended to women. Among the Negev and Sinai Bedouin, conferral of agnatically coloured names for women typically characterize brother/sister pairs like *Silmi/Silmiyyih*, where the female acts as a foil to her brother. There is probably more than mere aesthetics behind this name distribution; it may encode the special 'affective' relationship obtaining between a Bedouin youth and his sister, since the latter is liable to participate in an exchange (*badal*) marriage to secure a wife for him.

A few names in the legal documents merit individual comment. The personal name *Maʿyūf* 'repulsive' (23, 4) is striking. In my Negev materials, the feminine form *Maʿyūfa* occurs as a statement expressing displeasure at the arrival of a baby girl. In the present case, the conferral of this name on a male child is conceivably a ploy against the evil eye. The same applies to names like *Bghīḍ* (58, 6) < *baghīḍ* 'hateful,' *Rxīṣ* < *raxīṣ* 'cheap.' The name *Mghīb* < *maghīb* 'absence' conceivably recalls a departed family member.

The name *al-Lāfī* (docs. 51, 8; 57, 5) pertains to a traditional Bedouin name pool; it occurs among the Negev Bedouin and was

also recorded by Alois Musil for the Rwala with the gloss 'the one who arrives' (Musil, *Arabia* III, 215–6; *Rwala Bedouin*).[39]

Another important name type attested in the documents is the *slm*-paradigm which appears to have played a central role in the name inventories of Bedouin in Arabia and other parts of the Middle East, e.g., the Negev and Sinai. In Borg, *Enigma*, I endeavoured to trace its ultimate source in Akkadian cultural influence on Pre-Islamic peninsular Arabic. In the Libyan documents, this name type is only marginally attested: *Sālma bint Mḥammad al-ʿArēdī* (2, 4), *Sālim al-Gbēlī* (2, 6), *Mḥammad Sālim* (7, 3), *Sālma bint Mḥammad Ǯwayyil* (16, 11).

The preceding remarks have drawn attention to the social significance of personal names occurring in the legal documents. More folkloristic aspects, also invite attention, such as semantic aspects of names and nicknames. Use of the diminutive, which tends to be very productive in Arabic dialects spoken by Bedouin, frequently shows up in names: *Shwēkh, Shwēkha, Fṭēma, Khwēra, Bū Nkhēla*, etc. Granqvist, *Child Problems*, 49 noted for Palestinian counterparts, that resort to the diminutive is here not merely a matter of aesthetic partiality for hypocoristic forms, but almost certainly a strategy for averting the attentions of the evil eye by belittling one's offspring. Another trait vestigially represented here is the incidence of colour terms in the nickname inventory: *al-Midhim* 'the Dark One,' *al-Maghrī* 'the Ruddy One,' *al-Khaḍrī* 'the Dark One' (cf. OA *adham* 'black or dark green,' *amghar* 'ruddy,' *akhḍar* 'green, black-coloured,' etc.; Hava, 219, 729, 172).

Finally, a formal trait of some interest relates to names showing a reflex of the definite article: *al-Ḥafīẓ* (5, 3), *Lāmīn* (55, 15), *al-Dhīb*, *al-Lāfī* (57, 5), etc. Commenting on its use in Palestinian Arabic, Macalister/Masterman, *Personal Names*, 152, note:

> Among the Muslim fellāḥīn one of the commonest types of names is the compound of *ʿAbd*, "servant," with the name of the Deity as a periphrasis, as *ʿAbd er-Raḥmān*, "the servant of the merciful." These names, being clumsy, are abbreviated to *ʿAbd* . . . in addressing a person, *El-ʿAbd* in speaking of him.

[39] Cf. Central Arabian *lifa* 'to come to; go to, head for; arrive at' (Kurpershoek, *Oral Poetry*, 457).

4. *Synopsis and conclusion*

The legal documents from the Cyrenaican *sharīʿa* courts of Ajdābiya and Kufra exemplify the day-to-day juridical practice of Muslim law in a society of settling Bedouin and, consequently, represent valuable source material for social, anthropological, and linguistic research on the phenomenon of acculturation among Arab nomads.

The present paper focused on the factor of orality as exemplified by two parameters in the language of these texts: (i) subclassical usage—entailing mostly interferences from colloquial Arabic—and (ii) the cultural code underlying traditional name conferral among the Libyan Bedouin.

Vernacular Arabic traits adumbrated in the legal documents examined here reflect the workings of what is often presented as a sociolinguistic dichotomy in the Arabic-speaking world commonly referred to as diglossia, a notion implying a linguistic gradient extending from lower to higher registers correlating with informal vs. formal discourse contexts, respectively. The notion of orality adopted in the present paper transcends the mere factor of formality in language use (i.e., the distribution of features along this gradient) and attempts to restate the colloquial/literary dichotomy in cultural terms since, for Bedouin communities, their native Arabic vernacular defines the semantic content and outer boundaries of a distinctive, quintessentially nomadic *Weltanschauung*[40] extending across several cultural domains transmitted via collective memory.[41]

Actually, the formal blend of normative and subclassical Arabic usage exemplified in legal documents issued by *sharīʿa* courts is noteworthy inasmuch as the ultimate standards of correctness in Classical Arabic are, at least theoretically, traditionally guaged by reference to the language of the Qurān, the central scriptural pillar of the Muslim religious establishment. Significantly, previous work (e.g., Burton, *Errors*; Fück, *Arabīya*, 39) has underscored the tolerance of

[40] This statement can be easily empirically substantiated in the semantic domain, for instance, in relation to Bedouin colour categories (cf. Borg 1999).

[41] This applies *a fortiori* to the legal categories pertaining to their traditional juridical process which, in the absence of anything resembling a centralized political authority, furnished the Bedouin with a principle of tribal cohesion and survival. Cf. Stewart, *ʿUrf*, 889: "In the communities where customary law is important, public authority is generally weak or non-existent."

Muslim attitudes towards standards of grammatical correctness in literary Arabic; this circumstance would seem to invite more systematic and detailed descriptive work on the language norms of Muslim literary genres falling outside the strict realm of *adab*.

Significantly, Blau, *Syntactic trends*, 173 has underscored the multiple strands of linguistic traditions of written Arabic transmitted since the Middle Ages:

> The myth of C[lassical] A[rabic] being the only linguistic tool of Arabic literature has to some extent obscured important issues in the analysis of M[odern] S[tandard] A[rabic] as well. It does not always suffice to contrast MSA with CA alone. Many a MSA feature continues phenomena of Middle Standard Arabic, as exhibited, e.g., in the bulk of philosophical and scientific literature, sometimes also Middle Substandard Arabic, as contained in popular tales like the Arabian Nights and in popular romances called *siyar* or, especially in the case of Christian writers, as mirrored in Christian Arabic literature (particularly in Bible translations). Only a linguistic analysis of all these kinds of Middle Arabic, aimed at finding the linguistic traits common to Middle Arabic and MSA, will do full justice to the connections joining these layers of Arabic.

Above all, the background to the subclassical linguistic norms in Arabic usage, such as those discussed in this paper, may simply be the outcome of a native perception in which a sharp dichotomy between High and Low varieties of Arabic is more fictional than real. This means, in practice, that the differential formal balance reached between typically vernacular and literary trends in various texts are to some extent the outcome of local variation concomitant with recodification.

In his survey of Muslim law, Schacht, *Fiqh*, 890 highlighted "the tension between theory and practice (*ʿāda, ʿurf*) between jurisprudence and customary law which existed in Islamic law from its very beginnings." Given the linguistic expression of this cultural divide as exemplified in the foregoing paragraphs, together with the well-documented age and stability of the High/Low linguistic polarization in the evolution of the Arabic language (cf. Hopkins, *Early Arabic*, xlvii), it would seem reasonable to infer that the fusion of colloquial and literary linguistic traits in legal documents also has a long history, and that formal features typifying the language of this textual genre merit individual attention from the perspective of a literary in-language created by Muslim jurists.

The probe conducted in the second part of the paper into the cultural code underpinning personal names of Libyan Bedouin—necessarily tentative, given the limited corpus to hand—addresses the function of anthroponyms as exponents of religious rhetoric and foregrounds yet another dichotomy parallel to that of customary law and the *sharīʿa*: that between popular religion and orthodox Islam. The fairly detailed analysis presented here of this cultural code etches the metaphysical framework spanning the middle ground between their version of Islam and popular religion.[42] In Borg/Kressel, *Names*, we showed that analogous trends in name-giving with their supporting belief structures typify other semi-sedentarized Bedouin groups, for instance, in Sinai and the Negev.

A more comprehensive analysis of the factor of orality in the interface of language and Arabic juridical discourse might extend its ambit to an inquiry into the cultural sources of linguistic creativity in the formulation of legal strictures. A deconstruction of folk elements in the conceptual heritage of law would do well to address the realm of the fictitious. In customary law, the traditional resort to the *bishʿa/bashʿa* 'trial by ordeal' formerly practised in several parts of the Arab world is a notorious instance of this phenomenon, given its complete unreliability as a lie detector (Chelhod, *Droit*, 191: "Peu de gens ajoutent foi aux résultats de cette épreuve . . .").[43]

Here also pertain terminological subterfuges broadening the scope of extenuating circumstances admissible in the Muslim courtroom, for instance, terminological fictions instrumental in veiling adultery. In the ancient Roman lawcourts, matrons who gave birth to mulatto children often attributed it to maternal impression. The orator

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[42] Note, for instance, their cult of saints evidenced in the qadi's resort to an oath at a holy man's grave in doc. 41. On oaths taken at saints' tombs, see Landberg, *Arabica* V, 142–45. Evans-Pritchard, *Cyrenaica*, 65 states: "The Bedouin the Grand Sanusi found in Cyrenaica were not only Muslims but also inveterate devotees of saints, the *Marabtin* (sg. *Marabat*) or Marabouts, as they are called in the European accounts of North Africa, . . ."

[43] The trial by ordeal has been described and commented on time and again (cf. von Maltzan, *Reise*, 294–5; ʿĀrif al-ʿĀrif, *Qaḍā'*, 95–6; Musil, *Arabia* III, 210, Sergeant, *Yāfiʿ, Zaydīs*, etc.; note also the sources cited in Landberg, *Glossaire*, 172–3). The ordeal is probably more meaningfully interpreted as a deterrent or as a purifying ritual. Interestingly, Chelhod pointedly notes its ritual character, i.e., the fact that in some places it was traditionally administered by a member of a religious confraternity, "ce qui semble normal dans une épreuve de ce genre" (*loc. cit.*). Schmidt/Kahle, *Volkserzählungen*, I:16, fn. 6 see a direct link here with Isaiah 6, 8.

Quintilian argued this viewpoint so persuasively that one woman was actually freed on a charge of adultery. In the legal discourse of certain Bedouin communities, a female's infringement of sexual ethics is ordinarily perceived as inflicting serious damage on her agnates' honour (*ʿirḍ*) and can therefore be attended by severe sanctions. The Bedouin of Cyrenaica here traditionally practise leniency by resorting to the juridical fiction of 'a dormant embryo' (*ḥaml nāʾim*)—sometimes implying a pregnancy lasting a number of years (see doc. 38, 6; Layish, *Legal Documents*, 15)—as a legal ploy circumventing capital sanctions against women guilty of illicit intercourse.

Similarly, in the realm of business transactions, linguistic fiction plays a role in disguising exaction of usury (*ribā*)—forbidden under Islam—via recourse to the notion of *bayʿ bi l-wafāʾ* 'sale of real property with right of redemption.'

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