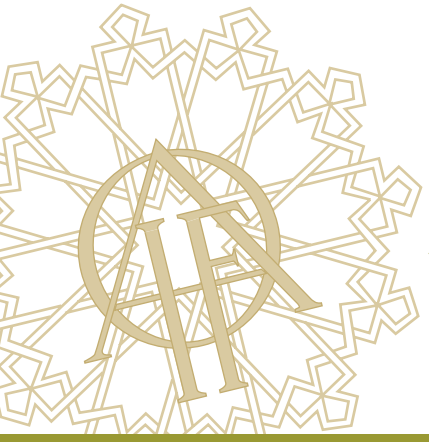

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Christina De La Puente

Slaves in Al-Andalus Through Mālikī Wathā'iq Works(4th–6th Centuries H/10th–12th Centuries CE):Marriage and Slavery as Factors of Social Categorisation.

CRISTINA DE LA PUENTE

Slaves in Al-Andalus Through Mālikī *Wathā'iq* Works (4th–6th Centuries H / 10th–12th Centuries CE)

Marriage and Slavery as Factors of Social Categorisation

INTRODUCTION
SLAVERY THROUGH LEGAL TEXTS

Legal texts—works of applied law (*furūʿ al-fiqh*), records of notaries (*kutub al-wathā'iq* or *shurūṭ*), collections of juridical opinions (*fatāwā*), and suchlike—provide rich information concerning slavery in the Islamic world, in contrast with the relative scarcity of secondary literature on the subject produced either by Western academics or Muslims themselves. Although there are some important exceptions,[1] the first group has generally been little interested in slavery in the Islamic world, despite the fact that many pages are devoted to it in existing sources. Muslims, on the other hand, have approached the question of slavery in an apologetic fashion, in texts that insist on the favourable treatment shown by Islam to slaves

1. Slavery has been studied for different times and regions in Islam and with reference to historical as well as social aspects, for example in B. Lewis, *Race and Slavery in Islam*, Oxford, 1990; M. Gordon, *Slavery in the Arab World*. New York, 1989; H. Müller, *Die Kunst des Sklavenkaufs nach arabischen, persischen und türkischen Ratgebern*, Freiburg, 1980; H. Gili-Elewy, "Soziale Aspekte frühislamischer Sklaverei", in *Der Islam* 77, 2000, 116–168; I. Schneider, "Narrativität und Authentizität: Die Geschichte vom weisen Propheten, dem dreisten Dieb und dem koranfesten Gläubiger", *Der Islam* 77, 2000, 84–115; I. Schneider, *Kinderverkauf und Schuldknechtschaft*, Wiesbaden, 1999; C. Meillassoux (ed.), *L'esclavage en Afrique précoloniale*, Paris, 1975; M. Ennaji, *Serving the Master*, New York, 1999; E. Toledano, *Slavery and Abolition in the Ottoman Middle East*, Seattle, London 1998; H. J. Fisher, *Slavery in the History of Muslim Black Africa*, London, 1988; W.G. Clarence-Smith, *Islam and the Abolition of Slavery*, London, 2006. A section has just appeared in *al-Qanṭara* 28, 2007, under the title "Slavery and Islam", including the contributions of Irene Schneider, Khalil ʿAthamina, Shaun Marmon, François Soyer, Ana Echevarría Arsuaga and myself.

and on the differences between slavery in the Muslim World and slavery under the Romans or, later, the North Americans. Although some scholarly studies have been published over recent years, it can still be observed the weight of certain taboos when it comes to tackling the subject.

The need to increase research in this area, coupled with a certain confusion arising from translations of Arab texts, where terms applied to slaves are frequently difficult to define and identify, has led to the circulation of various clichés and mistaken ideas with regard to slavery in the Islamic world. On other occasions confusion springs from a propensity to consider slaves to have been the same in all places, cultures and periods. What is more, attention is not always paid to the complexity and precision of Islamic law when defining the juridical personality of individuals and, therefore, their rights and obligations, which determine their ability to act within the public and private sphere. This has sometimes led to a tendency to simplify in both translations and research, creating the erroneous impression that in the Middle Ages there were fundamentally two kinds of individuals: those who were free and those who were slaves, with absolutely different statuses, possessors of two completely antagonistic qualities, freedom and slavery. However, a careful reading of the legal works available informs us that nothing could be further from the truth.

It is a society where a multitude of possibilities are to be encountered in the condition of an individual, ranging from full freedom to full slavery; where the future freedom of the individual, for instance, provides him or her with a new status, with new rights and duties; or where the former slave condition of individuals limits their power to act. I consider it important to distinguish between "juridical capacity" and "capacity to act". The latter term refers to the individual's ability to carry out juridical acts, to exercise rights and to assume obligations. Even though legal capacity in Islamic law is inherent to the person, capacity to act is not equal for all individuals at all times and may vary according to numerous factors, some of which are innate such as gender, while others are either inherent or acquired, such as religion, marriage or the status of being a free individual or a slave.[2] The capacity of individuals to act determines their civil status and, consequently, the manner in which a person belongs to the community. It determines the social categories individuals can form and, perhaps more importantly, the mobility of individuals within different groups.

My goal in this article is to evaluate the personal status of slaves and relationships between different social strata, through the study of records kept by notaries (*wathā'iq*) between the 10th and the 12th century in al-Andalus.[3] These works are Ibn al-ʿAṭṭār (d. 399/1008), *al-Wathā'iq*

2. De la Puente, "Juridical Sources for the Study of Women", p. 96–98.

3. This article falls within the framework of the research project "Geographical and social mobility of the Muslim population on the Iberian peninsula (11th to 13th centuries)" (HUM2006–08644/FILO). It forms part of a more ambitious writing project I have been working on for some time and which is intended to materialise as a comprehensive book dealing with slavery under Mālikī law.

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wa-l-sijillāt,[4] Ibn Mugīth (d. 459/1067), *al-Muqniʿ fī ʿilm al-shurūṭ*,[5] Abū Isḥāq al-Ġarnāṭī (d. 579/1183), *al-Wathāʾiq al-muḫtaṣara*,[6] and al-Ǧazīrī (d. 585/1189), *Al-Maqṣad al-maḥmūd fī talḫīṣ al-ʿuqūd*.[7] Consequently, they cover more than two centuries and their authors come from very different places: respectively, Cordoba, Toledo, Granada and, in the case of al-Ǧazīrī, Fez, although he eventually settled and worked as a jurist in Algeciras.[8]

Legal books reflect conflicts between individuals and reveal how jurists attempted to resolve those conflicts in different historical periods, putting limits on rights and imposing restrictions and obligations. Notarial forms also attempt to establish models that can act as a guide for notaries when drawing up documents and, therefore, have a direct application in the society which they are addressing.[9] The structure of these texts is eloquent regarding their practical use, because, in the act of composition, the authors start out from the need they themselves have felt as notaries to know not only contract models, but also the theoretical jurisprudence upon which they stand. Their intention is to provide their colleagues with such a service, so they structure each model into two or three sections: firstly, the form; then, under the rubric of "jurisprudence", they offer the theoretical explanation of the legal act that is recorded; and, lastly, a "section" (*faṣl*) is sometimes included in which they endeavour to warn the jurist about possible ambiguities or technicalities that would render a contract null or, at least, useless in practice. While the content of these works is, in consequence, apparently theoretical, they are aimed at immediate practical application, which is why they offer a precise idea of the nature of the exercise of law in a precise time and place. They allow us to form a picture of custom in certain places and of how Mālikī doctrine was applied in such a milieu. Ferreras, for instance, has pointed to the rich "day-to-day" vocabulary contained in these sources, since the models take in all spheres of daily life and provide information not only for social but also for linguistic history.[10]

The purpose of these documents is to record all possible legal transactions, both public and private.[11] On the one hand, all subjects of law in the chapters of *muʿāmalāt* are present in the

4. Edited by P. Chalmeta and F. Corriente, IHAC, Madrid, 1983. Translation into Spanish and study by P. Chalmeta and M. Marugán in *Formulario Notarial Hispanoárabe*. Marugán's translation was taken into account in this work.

5. Edited by F. J. Aguirre Sádaba, CSIC (Colección Fuentes Arábico-Hispanas 5), Madrid, 1994. Another notarial form by a contemporary of Ibn Mugīth, al-Buntī (d. 462/1070), *Wathāʾiq maǧmūʿa*, is conserved, but is as yet unpublished. We consulted the chapters on marriage in Ibn Mugīth's form in their translation into Spanish by S. Vila, "Abenmoguit. Formulario notarial. Capítulo del matrimonio".

6. Edited by Muṣṭafā Nāǧī, Markaz Iḥyāʾ al-turāth al-Magribī, Rabat, 1988.

7. Edited by A. Ferreras, CSIC (Colección Fuentes Arábico-Hispanas 23), Madrid, 1998.

8. No previous Andalusian form has been conserved. An important though much later work exists: Ibn Salmūn (d. 741/1340). See the studies mentioned in the bibliography by Pedro Cano Ávila and José López Ortiz, "Algunos capítulos del Fomulario Notarial de Abensalmún".

9. Tyan, Emile, *Histoire de l'organisation judiciaire en pays d'islam*; *id.*, *Le notariat et le régime de la preuve par écrit*; Wakin, Jeanette, *The Function of Documents in Islamic Law*; Hallaq, "Model *Shurūṭ* Works".

10. *Maqṣad*, introduction by Asunción Ferreras, p. 9–10.

11. Concerning Andalusian *kutub al-wathāʾiq*, López Ortiz, "Formularios notariales de la España musulmana", *La ciudad de Dios*, p. 145, 1926, 260–273; see also the description of these texts provided by Chalmeta, "El matrimonio", p. 29–32; and Zomeño, "Abandoned Wives and their Possibilities for Divorce in al-Andalus", p. 111–113.

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notarial forms: family law, for example—through marriage and divorce contracts—; commercial law—sales, lettings, boat freight, etc.; and even criminal law-register of harm inflicted on third parties, register of payment of blood price, etc. On the other hand, the notary seeks precision above all else, which means that these texts are illustrative with regard to other *furūʿ al-fiqh* works, in that not only do they show us what the procedural application of those works was, but their authors also develop specific jurisprudence concerning such procedures.[12]

Despite the richness of these sources, which we have already referred to, and their unquestionable usefulness for scholars of social history, some caution should be exercised in relation to the conclusions reached from studying them. The forms are not archive documents or minutes,[13] but models, and, therefore, specific cases are not cited, with mention of the names of the parties concerned, their ages, the location where the juridical act takes place, the date, and so forth.[14] They only employ general expressions such as *fulān ibn fulān* (So-and-so, son of So-and-so), *fulāna bint fulān* (Such-and-such, daughter of So-and-so), *kadha wa-kadha dināran darāhīm* (so many dinars in dirhems), which the notary substituted for the precise names or for the amounts of money agreed.

Similarly, although the author, in the jurisprudential analysis or in the actual structure of the form, reflects exceptions and concrete problems, his mission is to find a useful stereotype, in which there is not always room for all the possible nuances or all the exceptions. The interest of this jurisprudential analysis lies in the fact that it shows us the way in which Mālikī law was directly applied to practical juridical acts and, although the authors often cite their sources and point to discrepancies among jurists from the same school, they do not always do so systematically or with the precision employed in other legal genres, in which the task is precisely to do this.[15]

In addition, the authors of these works belong to a cultured urban milieu,[16] making it impossible to specify the reach of the practical application of their works. It is quite clear, due to the diffusion they received and the necessity expressed by jurists themselves that they should

12. Lohlker, Rüdiger, *Islamisches Familienrecht*, p. 135–149, where the author analyses "legal incapacitation" (*tasfīh*) using the Andalusian forms of Ibn al-ʿAṭṭār, Ibn Mugīth and al-Ǧazīrī.

13. Regarding the lack of documents that have been conserved from the Andalusian period (XV c), see Zomeño, "Del escritorio al tribunal", particularly p. 82–86, where the function of notaries in Nazarian Granada is described.

14. Concerning judicial practice in Cordoba in the XI c, see the analysis by Müller, Christian, *Gerichtspraxis*; and the book by Peláez Portales, David, *El proceso judicial en la España Musulmana (ss. VIII–XII) con especial referencia a la ciudad de Córdoba*, Madrid – Cordoba, 2000. Both studies are based on the work by Ibn Sahl, *Nawāzil*, an author originally from Jaen who was however a secretary for years in Cordoba. Of all the texts conserved from al-Andalus, his work comes closest to what might have been archive documentation.

15. The study of forms should be completed by the study of other works of applied law, so I shall attempt to offer references to some passages of what are termed *ummahāt*, from the school in which the same legal question is dealt with.

16. See their biographies: "Ibn al-ʿAṭṭār" by Amalia Zomeño in *Enciclopedia de al-Andalus (DAOA)* 1, p. 522–527; "Ibn Mugīth" by Francisco J. Aguirre Sádaba in *Biblioteca de al-Andalus* 4, p. 224–231; "al-Ġarnāṭī" by Alfonso Carmona in *Enciclopedia de al-Andalus (DAOA)* 1, p. 217–219; and "al-Yazīrī" by Asunción Ferreras in *Biblioteca de al-Andalus*, in press.

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be written and used, that they must have been utilised a great deal by the moneyed classes in the towns, but we are unaware of how they were applied, if indeed they were, within the rural environment or on the social margins of those towns. Lastly, because of the very conception of these documents as manuals, one has to be very cautious about stating that in a particular place or period a particular custom existed. Each author copies models from previous sources and takes an interest in issues that do not always bear a relationship with his environment. From the broad and often late geographical dissemination of these texts, we know that their importance transcended temporary local use, as was the expressed desire of their authors.[17]

SLAVES IN THE FAMILY GROUP ACCORDING TO NOTARIAL FORMS

The study of slavery in these juridical sources can be tackled from very different perspectives. Slaves, as occurs in all other legal works, are not only mentioned in chapters on manumission, that is, what is commonly termed "slavery law",[18] but their presence is also relevant in all the other sections of the works. In notarial forms slaves can be active parties in the contract, they can be the object of the transaction or be mentioned collaterally or anecdotally. Likewise, authors often refer to them in jurisprudence to offer an example or to establish an analogy with the model being discussed.

In this article we will look at the way slaves are present and intervene in the marriage chapters of the *kutub al-wathā'iq* mentioned. The choice is not a random one: on the one hand, most of the chapters in notarial forms are devoted to civil law and family law occupies a vital position in them; on the other, marriage is one of the main causes of social mobility and, consequently, these pacts provide us with relevant information and precise ideas as to the real capacity to act of each individual, as well as the way in which some social groups could interfere in or penetrate others.[19] A slave's capacity to form part of the Islamic family depends on the degree of slavery he possesses and on the function he performs in it, but, in addition, it depends on the ties he may acquire through marriage.

In order to make this analysis with regard to slaves, we must take into account what kind of slaves they are, for there are numerous categories, and they are not in themselves static. Each slave's ability to act, that is to say, his/her limitations and rights, varies in accordance with their legal status and the role played in the marriage contract. The omnipresent factor of

17. See the introductions to the editions of these works, where the edited manuscripts are described, as it is striking to see both where they come from—most of them are North African—as well as the dates of the copies—e.g. one of the copies is from a Moorish environment in the XV c, when al-Andalus no longer existed as a territory with a military and administrative identity—, cf. Chalmeta, introduction to Ibn al-ʿAṭṭār, p. xxviii; Aguirre, introduction to the form by Ibn Mugīth, p. 37; or Ferreras, introduction to the form by al-Ǧazīrī, p. 12.

18. Regarding this chapter in law treatises, see Heffening, "Zum Aufbau der islamischen Rechtswerke", p. 102–103.

19. Concerning family law, according to the Sunni Ḥanafī and the *Shīʿa* schools, see Rauscher, Thomas, *Sharīʿa Islamisches Familienrecht*.

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manumission influences those limitations and is at the same time responsible for the existence of numerous categories of slaves. Manumission determines an individual's degree of slavery, even when s/he has not yet been liberated, since the law takes into account the "potential of freedom" or "potential of servitude" of each human being, so as to be able to regulate the obligations and rights corresponding to them in the present.[20]

Slaves as Parties to the Marriage Contract

Slaves perhaps constitute one of the best examples of the different positions that a particular individual can hold in a society, depending upon the circumstance in which s/he acts within it, since they can be treated as subjects of law or be treated as objects. The law considers slaves to be almost fully capable individuals in some cases; in others they are compared with a woman or a minor of age because of the great limitations inherent in that capacity;[21] and in others they are put on a par with cattle, because the circumstance in which they may be sold or hired is similar. In marriage agreements the different kinds of slaves can occupy all these positions, and within the same contract two slaves belonging to the same category can be active or passive subjects in the pact and the same individual may be party to one contract and the object of transaction in another.

Slaves who Interfere in the Marriage Contract

Slaves can be the leading parties in a contract but their regular presence in the domestic environment is also a cause of interference by them in various ways in the relationship between two free spouses: because of an affective or legal bond with one of them, because they are witness to what they see in the home, and so on. Below we shall see some of these possible interferences:

The Impediment of Concubinage

One of the main functions of female slaves was that of concubinage, a relationship between the slave and her owner sanctioned and governed by the Koran and, consequently, by all the Islamic juridical schools.[22] Nevertheless, and in spite of the fact that concubinage was very widespread, notarial forms show that free women did not look kindly on their husbands taking a concubine without their consent.

Of all the notarial models mentioned, those devoted to marriage include various conditions that the wife imposes on her husband when contracting marriage.[23] In addition to the condition

20. De la Puente, "Entre la esclavitud y la libertad", p. 342–344.

21. *Id.*, "¿Protección o control?", p. 238.

22. *Id.*, "Límites legales del concubinato", p. 409–433.

23. Concerning these clauses, see Carmona, Alfonso, "Aportación al estudio del contrato matrimonial", p. 59; and Marín, *Mujeres*, p. 410 and following; and p. 448–452 (with regard to the monogamy and polygamy clause in al-Andalus). The different genres studied by Marín lead her to conclude that monogamy was far more frequent than polygamy in al-Andalus.

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relating to concubinage, which is the first one, notaries add the rider that the husband not be absent from home for more than a specified length of time, that he should not force her to move to another locality and not prevent her visiting her relatives, as the law permits.

"So-and-so, son of So-and-so, voluntarily and generously undertakes, before his wife Such-and-such, in order to win her love and satisfy her:

– not to marry another, not to cohabit with a slave (*surriyya*), nor to keep a concubine-mother (*umm walad*). If he should do so, the wife would be fully entitled to determine the action to take, [being able to opt] between continuing to be married or demanding repudiation. [In the first case], the concubine-mother would be free *intuitu dei*.[24] The situation of the slave would be left to the discretion of the wife, as to whether to sell her, keep her or manumit her ;

– not to absent himself..."[25]

Ibn Mugīth actually explains what the terms *surriyya* and *umm walad* refer to: "When we say: 'nor will he take a concubine whilst he has her', we refer to the slave assigned for cohabitation. The objective of the condition, 'nor will he take a slave who has had a child with the master', is that the wife may have the right to act, in the event that this slave becomes pregnant and makes her concubinage with the master public".[26] This comment makes it clear that the husband might *de facto* break the marriage agreement and have relations with one of his slaves, which is why the possibility of this slave becoming pregnant is provided for, for in such a case nothing could prevent her acquiring the status of concubine-mother, thus providing her with a set of inalienable rights. Whilst the wife who has been aggrieved by the breaking of the conditions she imposed has the right to act as she wishes vis-à-vis her husband's concubine, this is not the case with the *umm walad*, because the rights inherent to her juridical personality prevent this from occurring.

Al-Ǧazīrī goes further in his jurisprudential explanation and collects the discrepancies of jurists in respect of the concubine-mother in this circumstance: "Concerning the *umm walad* there are differences, because Ibn al-Qāsim said: 'lying with her[27] once involves the risk of pregnancy'. Ashhab and Ibn Māǧishūn disagreed with him because they granted permission to lie with her whilst there was no pregnancy, if divorce from his wife were subject only to the condition that he should not take an *umm walad*. Nevertheless, for Ibn al-Qāsim there is divorce even though he only lies with her once; and, for Aṣbag and Ashhab, if she fell

24. *Umm walad* or *umm al-walad* is the concubine who has conceived a child by the owner and the latter acknowledges his paternity. From the point at which the pregnancy becomes evident, she acquires a series of rights, amongst them that of the right to manumission on the death of the owner. For this inalienable right to be met it is forbidden (or considered to be highly reprehensible) to hire or sell her, and it is even recommended that she not be allowed to work outside the home; with regard to how this juridical status is acquired see Blanc, Lourde, "Les conditions juridiques", p. 163–165; and concerning the rights and status of the concubine already declared *umm walad*, see De la Puente, "Entre la esclavitud y la libertad", esp. p. 344–348.

25. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 7; Ibn Mugīth, *Muqniʿ*, p. 21; al-Ġarnāṭī, *al-Wathā'iq*, p. 17; and al-Ǧazīrī, *Maqṣad*, p. 14.

26. Ibn Mugīth, *Muqniʿ*, p. 25.

27. The reference is to a concubine, as any concubine may become *umm walad* once she is pregnant.

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pregnant, and in that case "the sultan orders divorce from the wife and the manumission of the concubine and of the *umm walad* and the wife may not choose".[28]

Notaries know that the wife's capacity to appeal in the event of conditions not being met may be limited by technicalities, in addition to her capacity to act in consequence, so they pursue the greatest possible clarity when clauses are drawn up and even insist on linguistic details: "If on agreeing the terms of the condition that he would not take a concubine you recorded: "if the wife wishes, she can sell", but you did not say: "if the wife wishes, she can manumit", she is not thereby authorised to sell, because her powers are like those of the agent (*wakīl*): the husband will be able to revoke them when he wants to".[29]

Likewise, a model is included in case the wife decides to renounce the right acquired within the marriage contract and to let her husband take a concubine, going back on what had previously been agreed.[30] It is significant that in this case an affidavit has to be prepared to authorise him to take a concubine, because if the authorisation were only oral she could later refuse consent and show the marriage document in which the condition imposed by her is recorded and thereby demand a divorce.

The condition against the husband taking a concubine cannot always have been either easy or cost-free for the woman who imposed it, since mention is also made of a wife writing off the deferred payment of dowry (*kāli'*) in exchange for the husband making a commitment not to marry again or take a concubine.[31] Such cases must not have been infrequent, for it is possible to imagine the situation of a couple who get married without the conditions mentioned above and, at a particular point, the husband informs his wife that he wishes to take a new partner, either through marriage or by means of concubinage. In such a case, the wife might prefer to lose the *kāli'* in return for having her husband to herself.

Some studies have concentrated on the conditions the wife imposes and have tried to find parallels in other contracts of similar kinds and to determine their origin, especially the one that is termed a "monogamy" clause by the secondary literature, but there is no agreement as to whether we are dealing with a custom that is alien to the Arab-Islamic world or that is, on the contrary, inherent to Islam.[32] These conditions could be the result of a desire to anticipate the usual conflicts that a married woman might be faced with and, therefore, to mitigate situations that often ended up in divorce or in her having recourse to the law to resolve her case.[33] Concubines and slave mothers not only must have aroused the jealousy of wives as a second wife might, but we know, furthermore, that the status that the *umm walad* acquired was in practice very similar to that of the free woman, so that the economic rights of the latter could be undermined, in the sharing of maintenance, inheritance, and suchlike.[34] In addition, the

28. Al-Ğazīrī, *Maqṣad*, p. 22–23.
29. Ibn Mugīth, *Muqniʿ*, p. 28.
30. *Ibid.*, p. 72.
31. *Ibid.*, p. 71.
32. Chalmeta, Pedro, "El matrimonio", p. 52–54, where the author inclines towards the purely Islamic origin of the marriage conditions.
33. Marín, *Mujeres*, p. 410.
34. On the maintenance of slaves, see Abū Ghosh, *Das islamische Unterhaltsrecht nach al-Kasani*.

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umm walad's children are free and equal in law to those of a free woman, which was an issue that must have stirred up rivalry between different mothers.[35]

Domestic Service as a Condition

A woman accustomed to having domestic service in the parental home has the right to demand similar support from her husband, and this figures expressly in the marriage contract to prevent a later dispute from culminating in breakup for this reason. In this case, what would spark off conflict would be the absence of one or more female slaves to help her:

"And if the wife is of the kind to have servants, you will say: 'So-and-so knows that his wife, Such-and-such, is of the kind who will not serve themselves but, owing to her rank and lineage, has servants; and declares that he is able to provide her with service and that his private means allow him to do so; he accordingly gives his consent to the foregoing, knowing the importance and reach of the commitment he is making. And he marries…'[36] This is, therefore, a parity clause between the spouses that responds to social and not juridical uses (*vide infra* 2.5.2.). As Ibn Mugīth himself makes explicit, the service must be negotiated beforehand, unless she is of high social standing, in which case this will be deemed a right inherent to her social position, because if the clause were not imposed in the contract she would have no right to demand this later. This jurist explains that this is so because of "the customary practice in our country [al-Andalus], for it is the normal custom here and the custom constitutes a practice that is valid for the whole country." He makes it clear that the custom is held to because unanimous opinion does not exist among Mālikī jurists as to how to act in the event of her being rich, for some, such as Ibn Māǧishūn or Aṣbag, were of the opinion that she could in that case face some of the expenses.[37]

Slaves Witnessing Married Life

There is a third way in which slaves can interfere in married life. The presence of slaves in households becomes clear on some occasions in these texts where they are mentioned as "witnesses" to what has happened in a home. Although they are not official witnesses,[38] their comments, or rumours that they spread, are mentioned along with remarks made by other members of the family-women, for instance. Statements made by the official witnesses can, precisely, be backed up by what they recount. For instance, in the confidential statement

35. Al-Ǧazīrī, *Maqṣad*, p. 307 records a model of "a man recognising that possession of the trousseau corresponds to his wife or his concubine-mother", which shows that it was often necessary to certify what possessions belonged to which women, so as to prevent disputes over the question of inheritances.

36. Ibn Mugīth, *Muqniʿ*, p. 22. On the demanding of domestic service through Mālikī sources, see al-Hintātī, "Maʿāyīr taṣnīf al-nisā'", p. 55 (this article analyzes some methods of classification of women as they were dealt by Mālikī scholars, see p. 53–56).

37. Ibn Mugīth, *Muqniʿ*, p. 29.

38. Slaves cannot testify because all the juridical schools, except the Ẓāhirī, deny them the necessary probity, Mālik b. Anas, *Muwaṭṭa'*, (*K. al-ʿatāqa wal-walā'*), 663, no. 2; Ibn Abī Ẓayd, *Risāla*, p. 262/3 and Ibn Rushd, *Bidāya* II, p. 462; concerning the probity of slaves according to the Ẓāhirī school, see *Bidāya* II, p. 463.

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(*istirʿā'*) that a wife submits concerning ill treatment meted out on her by her husband, we read: "The witnesses… testify to the fact that they know So-and-so, son of So-and-so, who was the husband of Such-and-such until he separated from her by mutual agreement, and that they know him perfectly by sight and by name. That they had heard the rumour (*lafīf*) from the women, slaves and others that he harmed his wife Such-and-such, that he ill-treated her and made cohabitation impossible…"[39]

Slaves who Contract Marriage

Slaves can also be the central figures in a marriage contract. It is a well-known fact that slaves can marry in accordance with all the schools of law, although they must comply with the restriction of gaining permission from the owner, without which the marriage is null.[40] Mālikī law does not restrict the number of wives a male slave may have, the limit being four, as is the case with a free man, as against the other schools who establish a limit of two. The female slave, in addition to having to comply with the restriction that demands the owner's permission because of her condition as a slave, is subject to all the limitations imposed on free women due to their condition as females, which means that, among other things, she also needs the legal complement of the *walī* (marriage guardian) in order to be able to marry.[41]

Marriage among Slaves

A man may marry off his male or female slave against their will, so long as they meet the basic requirements of the marital union: dowry, testimony and announcement. Likewise, he can forcibly marry a *mudabbar* or *mudabbara* provided that manumission is not foreseen within a period of a year.[42] In this case Ibn al-ʿAṭṭār might use the term *mudabbar* to refer to the male slave who is going to be manumitted within a specific time period, since, if he were a slave who would be manumitted after his owner's death, which is what *mudabbar* actually means, we would have to ask ourselves how the parties are to know when the death of his owner is going to be produced, bringing about the end of slavery for the slave concerned.

The same kind of marriage cannot be imposed on the *mukātaba*, because slaves who have agreed to a contract of manumission need to perform paid work in order to economically meet the instalments established for their liberation and such work for a woman is deemed to be an impediment to married life.[43] What stands out is that the author does not refer to

39. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 327–328; al-Ǧazīrī, *Maqṣad*, p. 115 (instead of "others" he says "neighbours").

40. "There are five kinds of people who are married without their consent: a father can marry off his virgin daughter, a son who is minor of age, and his slave; and a *wasī* (executor) can marry off a virgin orphan girl before she reaches majority of age, and a male orphan (if the father authorises him to do so)", Ibn Mugīth, *Muqniʿ*, p. 31.

41. De la Puente, Cristina, "Esclavitud y matrimonio en la *Mudawwana*".

42. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 15; Ibn Mugīth, *Muqniʿ*, p. 39, who explains that the man has the right to marry off his slave without her consent, in accordance with the Koran, IV, 25, where it states: "Marry them with the permission of their owners".

43. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 16.

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the *mukātab*, an omission which helps us to imagine what family social structures were like. Implicitly, it is considered that the male slave who is the subject of a contract of manumission could marry without this constituting an impediment to continuing with his normal life and, consequently, meet the payments outstanding to his owner. The female slave, on the other hand, owes obedience to the owner, but after marriage also then owes obedience to her husband, as a result of her condition as a woman, not because of her status as a female slave, and both obediences might interfere with one another. So, for example, if the husband were to stop her leaving the home, she might not be able to perform the work required for her to achieve manumission.[44] Even without such a prohibition, pregnancy or maternity might simply prevent her from carrying out such work, thereby rendering the contract of manumission incomplete. The owner has no right to place impediments in the way of slaves with whom he has, by mutual agreement, negotiated a *kitāba*, that would stop them bringing the clauses regarding their liberation to a successful conclusion.

Marriage of a Slave and a Free Woman

Despite the fact that marriage between a male slave and a free woman is sanctioned by the Koran itself (IV, 25), it was considered to be reprehensible by Mālik in the *Muwaṭṭa'*, although he does not explain the reasons nor expressly prohibits it. Whilst a special chapter is not devoted to this in the *Mudawwana* either, Saḥnūn states that Ibn al-Qāsim had considered it to be valid.[45] Ibn Rushd also finds it valid and says that the only impediment, as in the case of a union the other way around (female slave and free man), is if the male slave were the property of the free woman, that is, an object belonging to his own wife.[46] Consequently, the absence of legal, theoretical prohibition in this regard makes notaries take it into account, at least in their jurisprudential analysis, and they stipulate, in the event of such a union taking place, how it ought to be handled.

These texts add the condition that, should a woman be married to a slave, she must give her spoken consent and in presence of witnesses, because, unlike what occurs if she takes a free husband, her silence is not binding. The reason is that slavery in this case is considered to be a defect (*ʿayb*) and a woman, although she is a virgin and under her father's legal authority, cannot be forced to marry a slave without her consent. In any case, her consent is necessary but not sufficient, for if she wished to marry a slave and the marriage guardian refused permission, the marriage could not be brought about.[47] From the legal argumentation pursued in these sources, I dare to conclude that the wife's oral consent does not appear to be a matter of an already existing custom in al-Andalus, but was introduced by the notaries to prevent the marriage from having a redhibitory defect.

44. De la Puente, "Juridical Sources for the Study of Women", p. 102 ss.
45. *Id.*, "Esclavitud y matrimonio", p. 314–315.
46. Ibn Rushd, *Bidāya* II, p. 43.
47. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 15–16.

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The slave must pay for the maintenance (*nafaqa*) and clothes (*kiswa*) of his free wife with the earnings from his work, although his owner will always have priority where these earnings are concerned. He would not be obliged, though, to take responsibility for maintaining the children from the marriage, but rather either the public purse would be required to keep them, as occurred with other poor people if nobody wished to take care of such costs, or they would have to beg for their subsistence.[48]

Should the deadline for delivering the deferred amount of the dowry (*kāli'*) to the bride have been reached, the slave could pay it to her if the money came from an extraordinary commercial operation or from a donation, but the money could not be his owner's nor the result of his own work.[49] On this occasion, the purpose of this norm is evident: it is to safeguard the economic interests of the owner before those of the wife, because priority is given to the slave's obligations to his owner, above the husband's responsibilities to his wife. We must suppose, therefore, that marriage between a male slave and a free woman must have been a very rare occurrence, as when a palace slave married upwards, for example, for we know some of them managed to become very rich and powerful.[50]

Conditions Imposed by a Slave or Free Woman on her Slave Husband

A notarial model is specifically devoted to the marriage contract made by a slave—a common slave, *mukātab* or *mudabbar*—with his owner's permission in favour of the wife. In the "jurisprudence" of this model, attention is paid to what happens when, in a marriage in which the husband is a slave, the usual conditions of marriages between free individuals are imposed, including the condition, analysed in the previous section, that he will not take a concubine or keep an *umm walad* (*vide supra*, § "Slaves who Interfere in the Marriage Contract"). The recommendation is that the contract not be drawn up as follows:

"Ibn al-ʿAṭṭār said: "the slave's marriage does not have to be registered imposing the manumission of the concubine mother, nor of the concubine, the absence clause, nor of the dwelling, since he is not obliged to do so. But he is obliged to be repudiated if it is stipulated that the wife has been married with a clause in which it is said that she can opt for repudiation, as happens when what is said, [after enunciation of a voluntary self-renunciation, is: 'If I breach this clause] she will be fully entitled to determine the action to take'. If she had imposed as a condition that, at the time of her manumission, he should have to manumit the concubine and the *umm walad*, he would be obliged to do so; and the same would happen in the case of the *mukātab* and of the *mudabbar*".[51]

This is not, however, a question of a prohibition against acting in this fashion, because the notary then goes on to stipulate what has to be done if a choice is made not to follow this advice, making sure the contract does not have pernicious consequences in the future:

48. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 16. On poverty and mendicancy in al-Andalus, see Carballeira, Ana María, "Pobres y caridad en al-Andalus".

49. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 16.

50. Meouak, *Ṣaqāliba, eunuques et esclaves à la conquête du pouvoir*, introduction.

51. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 14–15; see the same opinion in al-Ġarnāṭī, *al-Wathā'iq*, p. 18.

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"[In this case] the contract must be drawn up stipulating that: the husband voluntarily and generously gives his undertaking to her that he will not take a wife, cohabit with a slave, or keep an *umm walad*. If he did something of this nature, the wife would be fully entitled to determine the action to take, being able to choose to stay married or demand repudiation; the situation of the female slave, when So-and-so, *mukātab* or *mudabbar*, obtains his freedom, would be left to the discretion of the wife, Such-and-such, whether that means selling her, manumitting her or keeping her; the *umm walad* would be free *intuitu dei*". Once this has been concluded, this must be said: "Her marriage guardian Somebody-or-other gives her in marriage, she being a virgin, legally of age, unmarried and not bound by a legal waiting period (*ʿidda*). She has delegated him to celebrate her marriage and has accepted So-and-so, a slave, *mukātab* o *mudabbar*, as her husband, and the Muslim dowry he offers her. This is her solemn word in the presence of So-and-so, son of So-and-so, and So-and-so, son of So-and-so, who know her by sight and by name".[52] As he is a male slave, at the end of the document the testimony of the slave is recorded along with that of his owner.

Marriage of a Free Man to a Slave

This appears to pose fewer problems than marriage between a slave and a free woman, due to the social and juridical logic whereby the male must keep his wife, and his children, give the dowry, etc., because a free adult male is supposed to have full capacity to act and it will be easier for him to form a family and maintain it. In addition, the marriage will not be affected by the problem of the wife being free and having more capacity to act than her slave husband in some matters of law, while at the same time being a woman and having less capacity for other things than her husband because of his condition as a male, the legal consequences of which are very complex.

Ibn al-ʿAṭṭār states, firstly, that "if the owner had not shown her to the husband, and had not prepared a room next to him, the husband would not have to take charge of supporting her".[53] This author might be alluding to the fact that the owner is responsible for the marriage because he is encouraging him to take that step.[54]

In second place, the owner of the slave must pay for maintaining her, as well as the children she has in the marriage. Only the *mukātaba* slave is obliged by the contract of manumission that she endorsed to take care, through her work, of the costs her children produce.[55]

Although the marriage union of a free man with a woman slave is apparently socially easier, it is also limited by various legal determinants, because the slave will always belong to another owner. A free man cannot marry a woman who belongs to him, as we shall see below (*vide infra*, § "Liberation to Contract Marriage").

These kinds of marriages must frequently have led to conflicts involving the free man's relatives, because there are numerous references to the fact that they were not socially well-regarded.

52. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 15.
53. *Ibid.*, p. 16.
54. Saḥnūn, *Mudawwana* IV, p. 106 holds that the master never has to foot the bill for maintenance of the slave's wife, unless he does this voluntarily.
55. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 16–17.

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In a *fatwā* by Cordoban Ibn Zarb (d. 381/991), there is mention of a marriage between a man and a female slave, which so wounded the pride of a member of his family (*anifa baʿd ahli-hi min dhālika*) that the aggrieved relative proposed that if the man would divorce her, he would sign a promissory note for one hundred dinars which would come into effect when he took another wife.[56]

In other kinds of sources the authors are less critical of these unions, but they nearly always add important nuances or raise some kind of objection. Although in most of the cases recounted manumission is produced before marriage, they are perceived to be very unequal marriages in which the male faces dishonour. A significant example is the case of the marriage of judge Abū l-Qāsim ibn Abī Ǧamra (d. 530/1136) to a freedwoman,[57] where it must be emphasised that Ibn Abī Ǧamra's biographers justify the marriage of a man of such high social status to a woman who had been a slave, on the grounds of her extraordinary cultural level and qualities. This leads us to think that criticism would have been much greater if she had been an unfreed slave, and greater still if we bear in mind that it was always unlikely that this slave would be freed because she belonged to another owner.

The Slave as Object in the Marriage Contract

Slaves are not only subjects capable of contracting marriage, but, depending on the context of the notarial document, they are also objects, as animals are, and can therefore be sold, bought or used in legal exchanges. With regard to marriage, the use of slaves as 'currency' for the payment of marriage transfers (*naqd*, *siyāqa*, *hiba*, *waṣiyya* or *kāli'*) must be stressed.[58] The paradox may occur whereby a slave who is entering a marriage contract gives a slave of his own property as dowry or a nuptial present.

Slaves can make up part, or the whole of the dowry, even when the characteristics of the slave are not specified in detail.[59] Where the slave has not been duly described, the authors of the forms attempt to determine how to act in consequence: "a marriage whose dowry consists of an unspecified slave, unspecified cattle, or an unspecified trousseau for the house, is licit, the woman having the right, in such a case, to slaves, cattle or trousseaus of medium quality, according to the rank she enjoys among city or nomad women, there being no room for applying sales precepts to this marriage, because the principle governing sales is the *mukāyasa*..."[60] or "if various slaves made up the dowry, mentioning the number, but without specifying if

56. Al-Wansharīsī, *al-Miʿyār* III, p. 404; Lagardère, *Histoire et societé*, p. 99–100, no. 141.

57. Marín, *Mujeres*, p. 397.

58. Concerning these marriage transfers according to Mālikī law in the Islamic West, see Zomeño, Amalia, *Dote y matrimonio en al-Andalus*.

59. Al-Ǧazīrī, *Maqṣad*, p. 58–61, who includes the question in the "jurisprudence" of a model entitled, precisely, "Marriage agreement in exchange for cattle or goods".

60. Ibn Mugīth, *Muqniʿ*, p. 73 and al-Ǧazīrī, *Maqṣad*, p. 59. The authors state that the marriage would not be annulled as a sale is, because in the sale it is compulsory to exchange two objects of identical quality and value.

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they are white or black,[61] she has the right to slaves of medium quality and of the kind that is most frequent in the country; if in that country one of the two kinds does not predominate, the average quality of the whites and the average quality of the blacks will be selected, and she will be given half of each kind, based on the price that such slaves fetch on the day that the marriage is verified".[62]

As occurs with other objects, jurisprudence takes into account, in addition, the way to act if the slave delivered possesses a defect or suffers some damage. Likewise, consideration is given to the possibility of the slave not being present, but being in a location that is distant from the spot where the marriage contract takes place.

Slaves and Divorce

All individuals can marry and divorce according to Islamic law. Their legal status, however, will determine some differences in the procedure.

If a free man has given permission to a slave to contract marriage, he cannot then divorce him if the slave does not so desire because forced divorce is null. The inviolability of marriage, in this case, stands above the owner's will or the rights he has over his slaves as his property. Whilst the free man can take a slave, as a concubine or as a domestic slave, who has belonged to a male or female slave of his,[63] he is forbidden to lie with the slave's wife.[64] The owner cannot separate the slave from his wife, even less when he himself had to give his consent in this marriage. If he does so, he can receive, according to the imam's criterion, a prison sentence or lashes.[65]

Nor is a slave's divorce permitted without the owner's permission. Al-Ġarnāṭī even declares that the *ḫulʿ* divorce (i.e. divorce that the wife obtains in return for renouncing deferred payment of the dowry) of a female slave authorised for trade[66] or who is *mukātaba*, is not permitted without her owner's consent.[67] The example of these two categories of female slaves is unquestionably provided because, through having paid work, they enjoyed greater independence from their owner. The jurist's warning, in this case, must have been necessary because these slaves, in practice, lived with some freedom and possessed rights which other slaves lacked and, therefore, they might have begun to believe that, using the right of a free woman, they could decide their *ḫulʿ* divorce.

One question that attracts one's attention is that, in spite of the fact that nothing is said against the divorce of slaves, there is no model in the forms analysed that is devoted specifically

61. On the perception of race, see Braude, "Cham et Noé", p. 95–108; and the classical work by Lewis, *Race and Slavery in Islam*.
62. Ibn Mugīth, *Muqniʿ*, p. 73–74.
63. Mālik b. Anas, *Muwaṭṭaʾ*, (*K. al-ṭalāq*), 477, no. 42.
64. Al-Ġarnāṭī, *al-Wathāʾiq*, p. 20, specifies that the man cannot marry his own slave (even though he only possesses a fragment of her), his son's slave or his slave's slave.
65. Mālik b. Anas, *Muwaṭṭaʾ*, (Al-Shaybanī), 188, chap. 4.
66. This is a specific class of slave (*al-maʾdhūn fi-l-tiğāra*) authorised by Mālikī law.
67. Al-Ġarnāṭī, *al-Wathāʾiq*, p. 22.

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to the divorce of a slave. There may be two reasons for this absence: on the one hand, that the divorce of slaves was infrequent; and, on the other, that there was no difference in the procedure adopted for free persons that would make it necessary to create a different model. Then again, the voluntary marriage of slaves must have been very infrequent, so it must have been unusual for them to be able to freely opt for divorce in practice. On the other hand, divorce often takes place to make room for another marriage, even in Islamic society, which is theoretically polygamous,[68] and this case had to be unusual among slaves, because they would have had to surmount numerous obstacles to arrive at a first marriage, let alone to imagine the possibility of a second.

Freedom and Marriage

It has been insistently stressed in this contribution that future freedom is a factor that determines a slave's condition, because when the manumission or liberation of a slave is produced it always involves changes in relations or agreements that had come into being prior to liberation.

Right of Option to End a Marriage

Ibn al-ʿAṭṭār and al-Ǧazīrī specifically devote a form to the female slave married to a slave who, after obtaining her freedom for whatever reason, can choose between remaining married with him in an unequal marriage or be definitively repudiated.[69] In the latter instance, the husband may not refuse the divorce, because she herself is the one who pronounces the formula of self-repudiation three times.[70] This principle is based on a tradition that tells how Barīra, a freed slave of ʿĀ'isha, opted for repudiation on being set free, setting a precedent that all Islamic juridical schools have accepted and that is mentioned in the same form.[71]

In the "jurisprudence" section the authors of these forms explain some questions relating to the situation in which the freedwoman who has opted for divorce finds herself.[72] The female slave will only have this right of option until her husband is manumitted, because if such a situation occurs, she will no longer be able to demand repudiation when he also becomes free,

68. Marín has documented that polygamy was only a common practice in al-Andalus in the families of the sovereigns, whilst the information available to us from other social strata seem to indicate that monogamy was far more frequent, even among groups of Ulemas, *Mujeres*, p. 452.

69. The freedwoman's right of option to remain with her slave husband or get divorced is argued in Mālik b. Anas, *Muwaṭṭa'* (*K. al-ṭalāq*), p. 466–467, no. 25; Ibn Abī Zayd, *Risāla*, 192/3; Ibn Rushd, *Bidāya* II, p. 53.

70. Al-Ǧazīrī, *Maqṣad*, p. 120 adds "*ʿalay-hi ṭalqa wāḥida malakat bi-hā amra-hā*", that is, that he considers that it is a simple and not a double repudiation, which is what is required for the male slave's marriage to be dissolved.

71. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 18 and al-Ǧazīrī, *Maqṣad*, p. 120. Chalmeta, "El matrimonio", p. 67, draws attention to the fact that Ibn Mugīth, who devotes a third of his work to marriage contracts, does not dedicate a model to this case.

72. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 19 and al-Ǧazīrī, *Maqṣad*, p. 120–121.

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just as she would not be able to do so if both of them had been manumitted at the same time or if she had been married to a free man. Nor could she opt for repudiation if she belonged to two or more owners and only one of them had manumitted his part, because she would not then be completely free and possession of total freedom without conditions is the basic principle upon which stands the capacity of action of, in this case, the freedwoman. Should manumission occur before she cohabits with her husband and she decides not to go ahead with the marriage, he would neither have to pay her dowry nor have any other responsibility towards her, since the marriage would not have existed because it had not been consummated.

Similarly, if the husband's manumission were to be produced during the legal waiting period (*ʿidda*) that she has to observe after the divorce, she could return to his side and the marriage would remain in force.[73] If, on the other hand, manumission were produced afterwards, she would have to marry another man beforehand in order to remarry the first husband, as the law stipulates in the case of any definitive repudiation.

If the female slave chooses repudiation, she loses the right to a dwelling or to being provided one by her husband, unless they live together in the same house, which would mean he would have to provide her with a new dwelling. This comment is of interest because the author seems to be of the view that slave couples did not always live in the same house. We must imagine that this would be normal when they were slaves of different owners and that the circumstance cannot have been unusual when the notary decided to record it.

Lastly, another supposition is documented: that the freed woman slave has sexual relations with her husband after he has repudiated her, where it is considered that ignorance is no excuse and that, consequently, the wife's right of option is invalidated.

Concubine-Mothers

The case of the concubine-mother does not affect the marriage directly but indirectly, but a choice has been made to deal with it on this occasion, because it concerns family structures, which are, in short, the object of study of this article. The *umm walad* is potentially free, because she will become so on the death of her owner and that is why it is deemed to be highly reprehensible for her to be sold, hired or married off.

There is no record of recognition of a female slave's new status of *umm walad*, but the opposite case exists, that of the denial of paternity of a female slave's child. The reason that no notarial model exists to vouch for the fact that a female slave has become *umm walad* is clear, because that status is not granted by law or by the drawing up of a possible document, but is conferred by the very nature of the pregnancy and recognition (which may be oral or tacit) of the paternity by the owner. Negation of such paternity and, therefore, of the rights an *umm walad* acquires, do need a document that not only bears witness to the owner's testimony,

73. In this case Al-Ǧazīrī allows the wife to return to her husband because the repudiation was only simple and not triple, cf. Chalmeta, Pedro, "El matrimonio", p. 67–68. Ibn Rushd considered that the formula of triple repudiation should not be simplified into a single formula, because that contravened the principle of permitting the husband to regret the decision taken, *Bidāya* II, p. 62–63.

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but includes the way in which the negation of paternity is argued. In the case of the models included by Ibn Mugīth and al-Ǧazīrī to this purpose, the argument is that the owner has not maintained sexual relations that would make paternity possible: "he denies paternity of So-and-so, son of his slave Such-and-such, as he is not his son, assuming that this slave has observed legal *istibrā'*, after which he has not had relations with her again, whilst her pregnancy came after this *istibrā'*; which he makes public due to it not being licit to be silent on this point, since, if he did so, someone who is not his heir would inherit from him."[74] There is evidence in the form, therefore, that a mere denial of paternity that left the slave defenceless is not sufficient.

Liberation to Contract Marriage

As has been made clear so far, a free person cannot marry a slave who belongs to him either partially or fully. For such a marriage to take place, the owner must manumit the slave, a case which cannot have been infrequent, because the forms include a model, via which the master manumits his female slave and proceeds to contract marriage with her.[75] This model contains some interesting points, in the way it is drawn up, that support the doctrine of the school:

Firstly, there is specification of the kinds of slaves that can be manumitted by their owner so that he can get married to them: the common slave, the *umm walad* and the *mudabbara*. There is no mention, as was to be expected, of the *mukātaba* (the slave who is subject to a manumission contract), and I consider the factors determining this omission to be of a social and not a legal order. Manumission of the *mukātaba* to contract marriage with her would also be legally possible, as, with the slave's liberation, the debt that must be met with manumission payments would be automatically cancelled, but, nevertheless, slaves of this kind had to maintain a certain independence from the owner's home, which allowed them to have a paid profession. The vast amount of jurisprudence dedicated to collective manumission contracts, meaning that they were drawn up for a family group—a married couple, a father and his children, a mother and her children, an entire family, etc.—leads one to assume that they enjoyed some independence.

In second place, although the manumission and marriage process are recorded in a single document, this specifies the right of the slave to choose not to marry during the time period (which may be a matter of seconds) that separates manumission and the nuptial contract, because freedom precedes marriage: "… once this manumission has occurred and the wife is elevated to a *sui juris* condition and is aware of the right she possesses to marry whoever she wants to and to do with her person whatever she wishes, So-and-so, her master, asks to marry

74. Ibn Mugīth, *Muqniᶜ*, p. 124 and Al-Ǧazīrī, *Maqṣad*, p. 100. *Istibrā'* is the legal period of sexual abstinence that a female slave must observe after she has been sold, the aim being to be able to determine the paternity of her child in the event of her being pregnant.

75. Ibn Mugīth, *Muqniᶜ*, p. 67–68. The absence of a reverse model in which a woman manumits her male slave in order to marry him supports the idea expressed above that such marriages were exceptional.

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her himself, she being satisfied to take him as husband provided that he offers her the same dowry, whose *naqd* is of such great importance, that Such-and-such receives, the husband remaining free of any more payments, and whose *kāli'* amounts to so much, deferred until such-and-such a date."[76]

Lastly, as can be read in the afore-mentioned paragraph, the marriage is celebrated with the handing over of the corresponding dowry, as would occur in the case of any wife. Nevertheless, in the jurisprudence devoted to this model Ibn Mugīth echoes the debate existing among jurists as to whether manumission in itself could be considered to be the dowry: "Most *ʿulamā'* consider it reprehensible to make manumission the dowry, and there is jurisprudence to support this; but some consider it to be valid, furnishing as proof the fact that the Messenger of Allah (peace be upon him) married Ṣafiyya making manumission her dowry, as al-Buḫārī, among others, tells."[77] Most jurists must unquestionably have regarded it as an abuse for a husband to suppress the dowry because he considers the liberation already to be a precious good for the freedwoman. The minority who disagreed would probably tend to think that freedom and marriage were preferable, despite the renunciation of the dowry, since they would be of the opinion that manumission is a more valuable good than that constituted by the dowry. It is worth pointing out that Mālikī doctrine tends to give priority to the slave's capacity for survival after manumission over and above freedom in itself, because the jurists from this school consider that liberating a slave who does not have the necessary resources is equivalent to abandonment and, therefore, is to do harm and not carry out an act of mercy, which is how Islam, in essence, understands manumission.[78]

Value and Description of Slaves and How This Relates to Parity Between Spouses

It must be stressed that the marriage of free individuals with slaves is permitted and that this is why the pertinent models are included, but the authors are not happy with this marriage. Ibn al-ʿAṭṭār remarks that "Mālik already considered it a burden".[79] While this question is dealt with somewhat coldly in works of legal doctrine, numerous references to the problems that could be triggered off by such unions are found in the forms, as we saw above. To this we must add the focus in these texts on describing inequalities, sometimes with a mere comment that might pass by unnoticed, but which proves illustrative of the feelings of the notaries who drew up and ratified the documents.[80]

76. Ibn Mugīth, *Muqniʿ*, p. 67.
77. *Ibid.*, p. 68.
78. De la Puente, "Entre la libertad y la esclavitud", p. 358.
79. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 15.
80. *Ibid.*, p. 378 shows a reserve document about someone who denied another man's lineage or insulted him and what stands out is that he considers it an insult to call someone a client (*mawlā*), that is to say, freedman or descendent of a freedman, when he is not one.

Descriptions and Categories

In the juridical treatises of all the schools there is a huge amount of information specifically devoted to slaves or in which they are mentioned. The legal texts furnish precise details for their legal classification: *mukātabūn*, *mudabbarūn*, *ummahāt al-awlād*, for instance, as well as nuances that other sources omit, because most of them restrict themselves to referring to them simply as slaves or servants—chronicles, biographical dictionaries, literary texts, poetry, etc.—, while, however, most of the legal genres, by their very nature, do not describe these slaves physically or psychologically. Notarial forms are exceptional in this sense (as also are the collections of juridical opinions, though they do not offer such systematised information), because the notary feels, on the one hand, a need to make clear in the record exactly which slave is getting married, is being manumitted, has committed a crime, and so forth, through his description; on the other, they must ratify the legality or legitimacy of the act and, in doing so, they record the way in which factors foreign to the actual doctrine of the school intervene in the legal act, as is expressed in other sources. Spaces are often left in the models so that they can be replaced by a detailed description of the slaves and of other goods that are bought, inherited, transfer, hire, etc.: "… a farm in a certain hamlet in a certain region, a female slave called by a certain name with a certain address, another female slave with a certain name and a certain address, a Slavic or *Ğillīqī*[81] slave with a certain name and a certain address, another slave called So-and-so and with such and such an address, edible cereals…"[82]

Slaves do not usually have a *nisba* and we know from other sources that their onomastic identity tends to repeat itself. Moreover, slaves used to change name when their owner changed, so that one might be led to think that the same slave who intervenes in different processes at different moments in his life, is two different people.[83] These must have been some of the reasons why notaries needed to attach a clear description of the origins, name, appearance, and other such details in relation to the slave mentioned in the record. With this purpose in mind, they determine which characteristics must be highlighted and offer some examples.

There is a model concerning an agreement about a debt that has not yet fallen due, *kāli'* or of another kind, owed by a husband to his wife, which I consider particularly significant because not only does it classify slaves in a way that does not occur in other *furūʿ* works, but because in the jurisprudence the author adds another piece of highly relevant information about local custom and practice vis-à-vis the sexual abstinence that a female slave must observe after the sale (*istibrā'*):

"If, through the agreement, she receives from him a male slave or a female slave of the common classes, or a man should receive this as a result of a lawsuit [he has filed] against another, you must say: 'in return for Such-and-such delivering her a male slave with a certain

81. Carballeira, *Galicia y los gallegos en las fuentes árabes*. Regarding (Christian) *Rumiyyāt* or *Ğilliqīyyāt* slaves that are mentioned in the forms, see Marín, *Mujeres*, p. 129–131.

82. Example taken from the deed of agreement (*muṣālaḥa*) between the heirs and the wife concerning the inheritance, Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 420.

83. Concerning the onomastics of female slaves, Marín, M., *Mujeres*, p. 57.

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address, known by a certain individual and of a certain ethnic group, or a *Ǧillīqiyya*, female slave, known by a certain individual and without legal warranty, she [So-and-so] receives the [female slave] or [male slave] from him'…"[84] In his analysis, Ibn al-ʿAṭṭār adds some reasons for which the agreement would be null, among them: "…The deal is also rescinded if she took a piece of cloth and did not receive another in its place, or a male slave, or a female slave of the common classes without mentioning that she is without legal warranty (*lam tadhkur al-barā' fi-hā min al-ʿuhda*). All these cases are considered as payment of one debt with another. If she receives, in exchange for the debt she is owed by the other, a female slave of a higher class, who she must put away so as to meet the legal period of retreat (*istibrā'*), or a female slave of the common classes with whom the seller has lain, the agreement would not be permitted, since it is not licit to sell with exoneration of liability. Take good notice of the above-said because it is a fundamental principle."[85] The author's last warning seems to indicate that valuable slaves were isolated during the period of retreat to prevent possible sexual relations with the old or new owner, while the same respect was not shown towards those who were described as "common slaves", despite the fact that doctrine does not distinguish between the two categories. The notary states, nonetheless, that in both cases payment of the debt would be null because it would be vitiated.

Parity Between Spouses (kafā'a)

Mālikī doctrine, in general, considers *kafā'a* or equality between spouses to be based principally on religion, as well as on the moral qualities deriving from it, and relegates economic and physical questions to a background position. In the forms it is manifest, however, that in practice the social, economic and physical equality of the bride and bridegroom was also taken into account and they provide written proof of it, both in the model itself, and in the jurisprudential explanations.[86]

The forms are explicit about the differences between individuals and make clear their reservations regarding unequal marriages. In this connection Ibn al-ʿAṭṭār's form offers the least information, perhaps because most of the models referring to marriage have been lost.[87] There is no concealing his aversion to the inequality of lineage or economic imbalance between spouses, which doubtless constituted a great impediment for marriage to be arranged between a free person and a slave: "He [the Prophet] (peace be upon him) also warned: "Guard against the lovely woman who is ill-bred"; and since they asked him: "Oh, Messenger of Allah, who is the lovely woman who is ill-bred?" He answered: "The lovely woman of vile progeny", that

84. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 441.

85. *Ibid.*, p. 442.

86. Zomeño, Amalia, "Kafā'a in the Mālikī School", p. 92 (see the diagram the author makes showing the precedence of criteria for *kafā'a* according to different Mālikī jurists). In other juridical schools freedom is the cause of inequality and, therefore, is taken into account for *kafā'a*, Spectorsky, (translation with introduction and notes), *Chapters on Marriage and Divorce*, p. 14.

87. Al-Ġarnāṭī, *al-Wathā'iq*, p. 20, despite the brevity of this form also specifies that in *kafa'a* goods are taken into account (*al-zawǧ kuf' la-hā fī l-ḥāl wa-l-māl*).

is to say a woman whose parents are of lower condition, even though she be lovely. He said (peace be upon him): "One of the rights of the father over his son is that his descendant should honour his condition by marrying honourably, in order so to be illustrious."[88]

Al-Ǧazīrī includes among the chapters devoted to sales one concerning "descriptions of slaves", which specifies what kind of facial features there may be—eyes, nose, mouth, face—; the body—neck, hands, chest, legs and feet; and then the possible skin colours are described.[89] This section, where the exact vocabulary for each physiognomy is given, must have served as a guide for the notary when detailing the characteristics of a slave in contracts involving marriage, buying and selling, renting, etc.,[90] and, of even greater significance, in order to determine the defects that constituted a flaw in a contract or, on the contrary, that could not be considered to be flaws.[91]

Conclusions

The notarial forms studied in these pages are the reflection of the desire of Andalusian Mālikī jurists to regulate legal acts in a period when this juridical doctrine is already dominant in al-Andalus and in which they constitute an elite that assumes the right to decide what is in keeping with Islamic law and is, therefore, in agreement with the message of Divine Revelation. Their works are conditioned by the fact that their authors belong to a social milieu with an intellectual background as *ʿulamā'* and jurists and, therefore, reflect the efforts of dominant groups to control and homogenise a society that, by nature, is heterogeneous. In my consideration their greatest interest for social history lies precisely in that, through these efforts, their authors clearly show which kinds of people, in their opinion, could be parties to a legal act, and feel the need to describe and classify them and envisage what relations and conflicts might arise between them, concentrating on what must have been frequent in their social world.

It can be said that the forms reflect certain kinds of information that other legal genres remain silent about because they are not considered to be of interest for their objectives or, more importantly, because they sometimes feel they might contradict legal doctrine. For example, in these texts the jurists' concern about social inequality between bride and bridegroom—as

88. Ibn Mugīth, *Muqniʿ*, p. 20. This notary from Toledo classifies husbands within three categories: the uniform husband, who is equal to the bride; the husband of rank, the noble; and the dowry husband (*zawǧ mahr*), which means that he is not noble and needs the dowry to ascend the social scale, p. 41.

89. Al-Ǧazīrī, *Maqṣad*, p. 184–187.

90. Andalusian jurists showed an early interest in descriptions of slaves as a way to avoid fraud. In the VI/XII or VII/XIII c. al-Saqaṭī, in his treatise on the functioning of the market (*adab al-hiṣba*) partially copied the work by Baghdadian Ibn Buṭlān (d. 458/1066) entitled *Risāla fī shirā' al-raqīq wataqlīb al-ʿabīd*, see Coello, "Las actividades de las esclavas", p. 202. In this text the qualities and defects of female slaves are described according to their geographical and ethnic origin.

91. See Yūsuf Rāġib's analysis of the defects of slaves in Egyptian sales deeds translated and studied by him, in *Actes de vente d'esclaves et d'animaux* 2, p. 68–92; and Ghersetti, "De l'achat des esclaves".

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well as in economic, physical and other terms—is made clear, while the so-called *ummahāt* of the Mālikī school focus principally on religious and moral inequality which is, according to the doctrine, the main reason why the principle of equality between spouses is not satisfied. As we have seen throughout this article, in addition to differences in status between slaves that are determined by law, and as well as the equality Muslim believers are assumed to enjoy, the notaries also list differences between them that are of a physical or temperamental kind; of an ethnic nature; in terms of their geographical origin, physical makeup or beauty; and of their ability to perform specific kinds of work, and suchlike, which in other *furūʿ al-fiqh* works are not mentioned in such detail.

Consequently, notarial forms offer information that is not found in the same way in other works, nor in non-juridical genres. Even when the authors of these texts are not so richly expressive in their descriptions, they nevertheless provide information that, despite its brevity, reveals to us what cases occurred most frequently in al-Andalus. So, when in reference to a female slave they describe her as "Galician" (*Ǧillīqiyya*), we must suppose that it must have been very frequent for slaves on the Peninsula to come from the northeast, which is indeed a detail that other sources confirm.

The forms possess another characteristic that has an influence on information obtained about slavery as compared with other legal sources: they leave out whatever has no practical utility and, accordingly, slaves are not mentioned in processes in which they presumably did not generally intervene, because the authors feel no need to create a model for these hypothetical situations. Although this article has not been given over to study of all the legal acts in the forms, but only those devoted to marriage law, there is a notable absence of slaves in some matters of law in which they actually are mentioned in other Mālikī legal sources, where their authors speculate about the greatest possible number of legal situations and are eager to go to extremes of thoroughness in developing doctrine. As has been described, there are no divorce models in which slaves are mentioned.

One of the final conclusions must be that not everything is permitted where slaves are concerned, and rather that jurisprudence regulates their acts in order to protect not only the rights of their owners, but those of the slaves too.[92] Slaves form part of the medieval Islamic family and, from the abundance of information provided by juridical texts, we must assume that their presence in family groups was very common. The possibilities for mixing with one another and with free people were very varied and, as has been seen, depended on a multiplicity of factors. Slaves who arrived at a household as part of a dowry or of an inheritance, along with other "things", could manage to acquire a new status that drew them nearer to the condition of a free man or woman than that of a slave, through motherhood, marriage, or acceptance of a contract of manumission.

92. Ibn al-ʿAṭṭār, *al-Wathā'iq*, p. 488, in jurisprudence in respect of the procedural recognition of a slave, actually warns that a female slave be protected from being led by someone who is not trustworthy.

These conclusions obtained from the study of juridical texts concerning the diversity and complexity of the categories of slaves should be taken into account when approaching other genres of studies, particularly those of a historical nature, where their authors often talk of "slaves" in general. On numerous occasions the result would be different if we asked ourselves questions like: which slaves, in what circumstance, in relation to whom? …

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