Int J Semiot Law (2016) 29:425–453
DOI 10.1007/s11196-016-9458-9

The Legal Thought of an Early Andalusian Jurist: ʿĪsā b. Dīnār

Daniel Vazquez-Paluch[1]

Published online: 11 May 2016

Abstract By looking at the legal thought of an early Andalusian jurist, this paper argues for the early use of the Muwatta as a source of law and for Malik as the eponym of a rapidly emerging Maliki school.

Keywords Islamic law · Legal thought · History · Andalus · Isa b. Dinar · Abd al-Rahman b. al-Qasim · Malik · Muwatta · Mustakhraja · Utbiyya · Ibn Muzayn · Legal schools · Madhhab

1 Introduction

Much research regarding the early development of Islamic law and its legal schools is based on biographical dictionaries and the anecdotal evidence supplied therein, whereas early legal books are normally analysed as representative of a genre rather than as a source of analysis for individual scholars' thought. However, analysing the legal opinions of early jurists may be a useful way of understanding how legal thinking developed. ʿĪsā b. Dīnār, known as *faqīh al-andalus* (the jurist of al-Andalus), is a key scholar of early Malikism, and generally considered the most important Andalusian jurist of his generation. By looking at his treatment of *ḥadīth*, his transmission and discussion of Mālik and Ibn al-Qāsim's legal views, and his own personal responses to questions he was asked, an image of the development of early Mālikism can be developed, which itself assists in understanding the emergence of *madhhab*s.

ʿĪsā b. Dīnar's life is marked by two significant factors. Locally, his life coincided with a period of relative stability in al-Andalus. On the one hand, the arrival of the Umayyads and their consolidation on power unified the country. Then, the

✉ Daniel Vazquez-Paluch
dvazp@hotmail.com

[1] House of Wisdom, London, UK

attempted overthrow of al-Ḥakam in 189/805 (and again in 190/806 and 202/818) made al-Ḥakam include the scholars in the state apparatus, giving them a central role in state and society [54, p. 94].

The other major factor were the important steps taken by Islamic scholarship in the field of law. From ad hoc judgments and opinions by charismatic individuals, Islamic law was slowly moving to a comprehensive system of law, and at the centre of this development was Mālik's *Muwaṭṭa'*, which may have been the first comprehensive manual of Islamic law. Combining *ḥadīth*, authority statements from Madinan authorities and legal dicta, it was immensely popular, with students coming from the world over to study it, amongst them a significant number of Andalusians.

Unlike the Eastern regions of the Muslim world where the Iraqi legal tradition had spread, North Africa and al-Andalus were relative backwaters [5, pp. 306–315], making them a suitable place for students of the *Muwaṭṭa'* to become de facto leaders of the local scholarly community [79, pp. 59–63]. Thus it is that in al-Andalus, Mālik's Andalusian students became leaders of the scholarly community and study of the *Muwaṭṭa'* became the basis of legal studies.

1.1 ʿĪsā b. Dīnār's Generation Development: Fixing a shared mill

ʿĪsā is one of the three main figures of the early Andalusian Mālikī tradition. Ibn Lubāba (d. 314/926), who died a century after ʿĪsā, described Yaḥyā b. Yaḥyā as the '*ʿāqil* (intelligent) of al-Andalus', Ibn Ḥabīb as the '*ʿālim* (scholar) of al-Andalus' and ʿĪsā as the '*faqīh* (jurist) of al-Andalus' [52, p. 272; 33, I/374]. This appears a pretty accurate description of their various strengths. Nowadays Yaḥyā b. Yaḥyā al-Laythī (234/848) is most famous as the transmitter of the *Muwaṭṭa'*, but in his time he was a respected jurist and a shrewd man of considerable political influence [18, pp. 289–338]. Ibn Ḥabīb (238/853) was a prolific author who wrote about a vast array of topics, such as law (*al-Wāḍiḥa*), eschatology (*Waṣf al-firdaws*), lexicology (*Tafsīr gharīb al-Muwaṭṭa'*), astronomy (*Maʿrifat al-nujūm*), moral education (*Adab al-nisā'* and *al-Waraʿ*) medicine (*Mukhtaṣar al-ṭibb*) and history (*al-Ta'rīkh*). He is also reported to have written a commentary of the Qur'ān, a number of other works on *ḥadīth*, inheritance, law, history and biographies, including a biography of Mālik b. Anas [46, IV/127–128]. Meanwhile, ʿĪsā was known almost exclusively as a jurist. He was neither a prolific author nor an influential political figure, and perhaps because of this he has been to a large extent ignored by contemporary scholarship, whether in the West or in the Muslim world, and it appears that the only research regarding him is a short biography by Hussain Monés in the Encyclopaedia of Islam [60, IV/87].

1.2 Biography

ʿĪsā b. Dīnār b. Wāqid al-Ghāfiqī (d. 212/827) is often described as having been from Toledo and to have begun his studies there but there appear to be problems with this account [52, p. 270; 33, I/373]. To begin with, his father Dīnār b. Wāqid is said to have "arrived in al-Andalus and settled in the village of the Ghāfiqīs" [20,

I/472]. According to Ibn Ḥazm, the Ghāfiqīs settled north of Cordoba [36, 328], which seems to coincide with Yāqūt who says that Ghāfiq was a fort in the district of Faḥṣ al-Ballūṭ, in the Sierra Morena north of Cordoba [81, IV/183]. Furthermore, ʿĪsā is credited with a Cordoban teacher, ʿĀmir al-Muʿallim, whereas his elder brother, ʿAbd al-Raḥmān, is credited with two Cordoban teachers, Muḥammad b. Yaḥyā al-Sibā'ī and Dāwūd b. Jaʿfar b. Ṣaghīr [46, IV/105]. This all raises questions regarding his being born in Toledo, unless we assume his family migrated from Ghāfiq to Toledo before moving to Cordoba.

1.3 ʿĪsā's Teachers

Wherever he was born, Monés thinks it would have been around 155/771 [60, IV/87]. Furthermore, it is safe to assume that he studied from an early age as he came from a learned family.

1. His father Dīnār b. Ghāfiq was, according to al-Rāzī, "a scholar and an ascetic" [46, IV/104], and Ibn al-Abbār adds "jurist" [20, I/257]. Although it is not mentioned that his father taught him, one would expect that if his father was a scholar he would have given some instruction to his son.
2. His elder brother ʿAbd al-Raḥmān b. Dīnār (d. 201/816) was well-known as a legal expert. Most sources mention him as ʿĪsā's only Andalusian teacher. He studied with two of Mālik's Andalusian students:
   (a) Muḥammad b. Yaḥyā al-Sibā'ī who studied the *Muwaṭṭa'* with Mālik and narrated some *masā'il* (legal cuestions) from him [52, pp. 112–113; 33, I/4–5; 46, III/345].
   (b) Dāwūd b. Jaʿfar al-Ṣaghīr who studied with Mālik, Ibn ʿUyayna, al-Darāwardī, Ibn Wahb and Muʿāwiya b. Ṣāliḥ. He leaned towards the *ahl al-ḥadīth* [52, p. 87; 33, I/169–170; 46, III/346].
   He then travelled to Madina where he studied with Muḥammad b. Ibrāhīm b. Dīnār (d. 182/798) and possibly Ibn al-Qāsim. He brought back from his trip a collection of *masā'il* known as *al-Madaniyya*, which he taught ʿĪsā [33, I/299; 46, IV/105, 107]. ʿIyāḍ quotes someone as saying "Most of his legal knowledge was [gained] in al-Andalus before his trip from his brother ʿAbd al-Raḥmān" [46, IV/107].
3. ʿĀmir al-Muʿallim is a relative unknown from Cordoba. Ibn al-Faraḍī describes him as having transmitted from Mālik (*yuḥkī an Mālik*) and that ʿĪsā b. Dīnār narrated from him. Al-Aʿnāqī said, "This ʿĀmir was with us in Cordoba as a teacher; ʿĪsā b. Dīnār narrated from him" [33, I/248].
4. ʿAmr al-Muktib, "from one of the border towns of al-Andalus" and student of the Madinan Ibn Nāfiʿ. Ibn Muzayn quoted him in his commentary of the *Muwaṭṭa'* via ʿĪsā b. Dīnār [33, I/363].

It is safe to assume that ʿĪsā studied the *Muwaṭṭa'* and legal questions in Spain before travelling to Egypt where he studied with some of Mālik's most important students:

5. ʿAbd al-Raḥmān b. al-Qāsim al-ʿUtaqī (191/806) [52, p. 270] was Mālik's most important student in law. His relationship with ʿĪsā b. Dīnār appears to have been quite close, with Ibn al-Faraḍī saying that ʿĪsā b. Dīnār "accompanied him and relied on him" [33, I/374; 46, IV/105]. Furthermore numerous anecdotes showing the high esteem in which Ibn al-Qāsim held him have been preserved in various sources [52, pp. 270–271; 46, IV/105–109]. It is said that ʿĪsā took the *Madaniyya* he had studied with his brother and showed it to Ibn al-Qāsim who edited it [52, p. 239].
6. Ashhab b. ʿAbd al-ʿAzīz (d. 204/819) [52, p. 270] was also a senior student of Mālik who specialised in law. He is said to have written a legal work which may have been a reworking of the *Asadiyya* including textual evidences for the different legal issues [52, p. 260] and parts of his *Samāʿ* are preserved in the *Mustakhraja*. From the *Mustakhraja*, it is clear that ʿĪsā studied legal issues with him.
7. ʿAbd Allāh b. ʿAbd al-Ḥakam (d. 220/835) [52, p. 270] wrote numerous works including his three *mukhtaṣar*s, a book on commercial law, another on construction law and another on pilgrimage [21, p. 99; 46, III/365–366]. His legal thought may have been more systematic than that of his contemporaries as evidenced by his *Mukhtaṣar*s.
8. ʿAbd Allāh b. Wahb (d. 197/812) [52, p. 270] was primarily a *ḥadīth* scholar as well as a respected jurist. He is the main source of narrations for Saḥnūn's *Mudawwana* and the author of various narration-centric books such as his *Muwaṭṭa'*, his *al-Jāmiʿ*, a commentary of Mālik's *Muwaṭṭa'* and a book of *Maghāzi* [46, II/242].
9. Sufyān b. ʿUyayna (198/814) was the leading jurist and *ḥadīth* specialist of Makka of his time. Although ʿĪsā's biographies do not mention Ibn ʿUyayna, al-Qunāziʿī [67, II/526], Ibn Baṭṭāl [32, I/370], Ibn ʿAbd al-Barr [22, III/75] and al-Bājī [8, VI/8] all quote ʿĪsā transmitting legal positions or *ḥadīth* explanations from him.

ʿĪsā's studies, both in al-Andalus and Egypt, primarily focused on law. It is therefore not that surprising that ʿĪsā was a widely respected jurist.

When the rebellion against al-Ḥakam (which took place c. 189/805–202/818) took place he was exiled from Cordoba and stayed in Jaén until he was allowed to return to Cordoba. He had at least four sons [33, I/31, I/302; 20, II/8, III/258], so it is safe to assume that he was married. After the failed rebellion against al-Ḥakam he appears to have kept out of politics and concentrated on worship and teaching [52, p. 270]. At some point ʿĪsā was made judge of Toledo and he eventually died there in 212/827. If Monés is right in dating his birth around 155/771, this would mean that he died aged approximately 57.

1.4 ʿĪsā b. Dīnār Within the Andalusian Scholarly Context

ʿĪsā b. Dīnār appears as the most important Andalusian jurist of his generation and was highly praised by Ibn al-Qāsim. ʿIyāḍ mentions that Ibn al-Qāsim said, "'Īsā came to us and asked us a scholar's questions" [46, IV/107]. Al-Khushanī states that when Saḥnūn wrote the *Mudawwana* ʿĪsā wrote to Ibn al-Qāsim asking him to clarify those issues on which his opinion had changed. Ibn al-Qāsim is said to have written back saying

> You have read your book and understood it, so submit what you have written from me to your reasoning and your knowledge: what you see as being correct you may carry out, and what you see as being incorrect you may leave [52, pp. 270–271].

Another anecdote describes that when ʿĪsā left Egypt Ibn al-Qāsim accompanied him for three *farāsikh* (approximately 24 km.) and when questioned he said, "How can I not bid farewell to someone who did not leave behind him someone more knowledgeable or God-fearing than himself?" [52, p. 270].

The respect Ibn al-Qāsim had for ʿĪsā extended to al-Andalus where ʿĪsā was likewise held in high esteem. According to Ibn Ayman, ʿĪsā "taught the people of our country legal issues (*masā'il*)" [33, I/374], whereas Ibn al-Faraḍī said, "Verdicts (*futyā*) revolved around him and nobody took precedence over him in his time" [33, I/374]. His piety ensured even greater popularity, with one anecdote stating that once when he and Yaḥyā b. Yaḥyā attended a funeral service the people gathered around ʿĪsā, and Yaḥyā said to him, "By Allah, O ʿĪsā, Allah the Exalted and Mighty does not put this love for you in the hearts of people unless Allah himself—may His mention be exalted- loves you" [52, p. 270]. In fact, it was only after ʿĪsā's death that Yaḥyā was considered the most prestigious scholar of al-Andalus [52, p. 348; 33, I/176].

ʿĪsā's scholarly prestige was based on his legal expertise. Evidence of this is that in al-ʿUtbī's *Mustakhraja* there are 1763 legal issues (*masā'il*) from ʿĪsā's *Samāʿ* compared to 463 from Yaḥyā's *Samāʿ*. Furthermore the *Mustakhraja* includes 28 issues which ʿĪsā was asked about (*nawāzil*) and no issues about which Yaḥyā was asked. Outside of al-Andalus ʿĪsā also seems to have been seen as a more important authority than Yaḥyā. In Ibn Abī Zayd al-Qayrawānī's fourteen-volume *al-Nawādir wa'l-ziyādāt*, for example, ʿĪsā appears on 1265 pages whereas Yaḥyā appears on only 367 pages. Ibn Abī Zayd further includes ʿĪsā b. Dīnār amongst the 'critical minds' (*min nuqqādihim*) of the school alongside Saḥnūn and Aṣbagh b. al-Faraj [26, I/11–12]. In comparison, he says about Ibn Ḥabīb, "Ibn Ḥabīb in his preferences or in the strength of his narrations does not reach the level of those mentioned" [26, I/12]. Yaḥyā b. Yaḥyā is not even mentioned.

In spite of ʿĪsā's prestige as an outstanding jurist he was not a prolific author and only three works are attributed to him:

1. A *Samāʿ* from Ibn al-Qāsim in twenty books [46, IV/109]. Large parts of it are preserved in the *Mustakhraja*. This *samāʿ* may include others apart from Ibn al-

Qāsim, as in the *Mustakhraja* ʿĪsā also transmits the views of Ashhab and Ibn Wahb.

2. *al-Hidya*. Ibn al-Mājishūn was impressed when ʿAbd al-Raḥmān b. Ibrāhīm (d. 258/872) showed it to him [46, IV/106] and the notoriously anti-Mālikī Ibn Ḥazm spoke highly of it [18, p. 319]. So far no trace of *al-Hidya* has been found so it is not possible to arrive at any conclusions about this book.
3. *al-Jidār*, of which a few short quotes are preserved in Ibn Abī Zamanīn's (d. 399/1009) *Muntakhab al-aḥkām*. It appears to be a collection of *nawāzil* and *masā'il* relating to construction [25, pp. 158, 171, 225, 260, 264].

As well as transmitting his *Samāʿ* ʿĪsā gave legal verdicts and was one of Ibn Muzayn's primary sources for his commentary of the *Muwaṭṭa'* [62, 187–188]. The *Madaniyya* which he studied with his brother does not appear in any of the well-known Andalusian *fahāris* such as those by Ibn Khayr, Ibn ʿAṭiyya, al-Lablī or ʿIyāḍ. Similarly, Ibn Abī Zayd's *Nawādir* and other Mālikī texts, and it is possible that ʿĪsā incorporated it into his own *Samāʿ*.

What is most surprising about ʿĪsā is that in spite of his prestige as a jurist he is not as famous as his Andalusian contemporaries Yaḥyā b. Yaḥyā or Ibn Ḥabīb. While it is true that Yaḥyā owes his fame in large part to his transmission of the *Muwaṭṭa'* and Ibn Ḥabīb to his books, another possible reason is that ʿĪsā died relatively young and did not build up a large enough body of students to compete with Yaḥyā b. Yaḥyā or Ibn Ḥabīb.

2 ʿĪsā and the *Muwaṭṭa*

Although ʿĪsā's legal discussions and rulings give some idea of his juristic thought, there is a gap which it is tempting to ignore. Most of ʿĪsā's juristic material is *masā'il*-based with no reference to Qur'an, *ḥadīth*, or statements from pre-Mālik authorities. Likewise, there is no mention of him having studied the *Muwaṭṭa* in the biographical sources and he was even described as "having few hadith" [14, X/439]. Nevertheless, there is plenty of evidence to show he studied it and taught it. To begin with, ʿĪsā was one of the main sources for Ibn Muzayn's (259/873) commentary of the *Muwaṭṭa*, and from the various extant quotes preserved in other books, it can be seen that he commented on the language, theology, law and even biographies of characters in the *Muwaṭṭa*.

Thus in regards to Ibn ʿUmar's statement that men and women used to do ablutions together [55, I/24], ʿĪsā explains, "it means that men and women made ablutions from the same container both putting their hands in" [67, I/136]. Regarding the ḥadīth of going to Friday prayers early [55, I/101], he narrates Mālik's view that this is a specific time [67, I/169]. When Mālik explains ʿUmar b. ʿAbd al-ʿAzīz's removal of an imām as being because his father was unknown [55, I/134], ʿĪsā says "In this I do not take Mālik's opinion if he is good in himself, because the only thing that counts is the person's own religiosity" [67, I/191]. In explaining the *ḥadīth* of the poor woman who was buried without a funeral and who

the Prophet prayed over [55, I/227] and Mālik's statement that it is not acted upon, ʿĪsā says that he should pray and bases it on the opinion of the famous Madinan jurist ʿAbd al-ʿAzīz b. Abī Salama [67, I/191]. Regarding the ḥadīth that every child is born upon a natural state (*fiṭra*) [55, I/241] ʿĪsā explains that he is born in the natural state of knowing God [67, I/312]. Elsewhere, ʿĪsā explains that Mālik's general rule on the skin of carrion was from ʿĀ'isha's ḥadīth to "benefit from the skin of carrion if it is tanned" [55, II/498], except for clothes and prayer [67, I/340]. ʿĪsā explains that the *dajjāl* is called *masīḥ* [55, II/920] because one of his eyes has been wiped off (*li-annahu mamsūḥu iḥdā'l-ʿaynayn*), whereas Jesus is called *masīḥ* because of his travelling around the world (*min ajli siyāḥatihi fī'l-arḍ*) [8, I/358; 45, I/519]. He is used to confirm Mālik's interpretation of the Prophet's saying *taribat yamīnuk* [55, I/51] which he interprets as "may you have no need" [45, II/147]. He considers the use of Madina's pre-Islamic name Yathrib to be sinful because the Prophet says, "They call it Yathrib and it is Madina" [55, II/887; 45, IV/501]. ʿIyāḍ likewise supports ʿĪsā's interpretation of *ḥattā idhā thuwwiba bi'l-ṣalāt* [55, I/68–69] as referring to the *iqāma* [45, II/258]. ʿĪsā also explains how to pour water on oneself to be relieved from fever based on the *ḥadīth* of Asmā' [55, II/945; 45, VII/121–122]. Regarding the *ḥadīth* of the poor person who invalidated a fast of Ramadan [55, I/269–270], ʿĪsā states that he has to pay expiation when he stops being poor [32, IV/74]. Elsewhere he explains that Saʿd b. Khawla did not migrate from Makka and died there [55, II/763; 45, V/367]. He also gives one of the two accepted interpretations of Ibn Shihāb's verdict on imprecation (*liʿān*) [55, II/567; 45, V/83].

There are many more statements from ʿĪsā explaining passages from the *Muwaṭṭa*, which leaves no doubt as to ʿĪsā's knowledge of the *Muwaṭṭa*. This should not be a surprise, as during Mālik's own lifetime it had became extremely popular, with ʿIyāḍ naming at least 57 people who narrated the *Muwaṭṭa* from Mālik, but acknowledging that those who studied it with him would have been far greater in number [46, II/86–89]. Muḥammad al-Shaybānī read it with him and later complained that Kufans only attended his classes when he narrated it [21, pp. 57–58]. Al-Shāfiʿī described it as the "most correct book after the book of God" [23, I/12]. Aḥmad used to recommend to people to memorize Mālik's ḥadīth and his *ra'y* (jurisprudence) [23, I/16]. Ibn Wahb said, "Whoever writes Mālik's *Muwaṭṭa* will not need to write anything else regarding the permissible and the forbidden" [22, I/167].

Put in its historical context, it is easy to understand why the *Muwaṭṭa* was so lavishly praised. As the pace of conquest slowed down, the need for stability and rule of law increased. The *Muwaṭṭa*'s comprehensive exposition of law, both ritual and worldly, according to the school of Madina—where the Prophet had lived and died—was always likely to garner attention. That Mālik was a highly respected *ḥadīth* narrator and a notable jurist only added to the appeal.

The significance of the *Muwaṭṭa* was not lost on later Muslim scholars. Ibn al-ʿArabī (543/1148) described the *Muwaṭṭa* as the first foundation in books of *ḥadīth*, with al-Bukhārī's *Ṣaḥīḥ* as the second, "and everybody built upon them, like [Muslim] al-Qushayrī, al-Tirmidhī and others" [28, I/5].

Around one thousand years after Mālik, Shāh Waliyullah (d. 1176/1762) noted that "Shāfiʿī's school is in reality just an expansion of the *Muwaṭṭa*, and the capital of imām Muḥammad's *Mabsūṭ* is that too" [80, I/22].

ʿĪsā's understanding of and ability to explain the *Muwaṭṭa* in detail, whether its theology, its law or its history, indicates that it was an important text in any scholar's training. It also indicates that the *Muwaṭṭa'* was a consistent text, as ʿĪsā's comments coincide closely with the text of Yaḥyā's *Muwaṭṭa'*, in spite of the fact that ʿĪsā would have studied an older recension of the *Muwaṭṭa'* than Yaḥyā's.

This is further confirmed by the fact that just in al-Andalus five books had been written about the *Muwaṭṭa* within less than a hundred years of Mālik's death:

1. Yaḥyā b. Yaḥyā. Ibn ʿAbd al-Barr (d. 463/1071) said in ʿAbd Allāh b. Nāfiʿ's biography: "Yaḥyā b. Yaḥyā al-Andalusī asked him to explain the meaning of something that Mālik said in the *Muwaṭṭa* and he took it from him. I wrote it from three of my teachers" [21, p. 104].
2. Ibn Ḥabīb (d. 238/853) wrote a linguistic commentary of the *Muwaṭṭa*, *Tafsīr gharīb al-Muwaṭṭa*, which is not based on Yaḥyā's *Muwaṭṭa'* and where he even criticises Yaḥyā's recension for perceived innacuracies, as has been analysed elsewhere [34, I/151–165; 79, pp. 131–137].
3. Ibn Muzayn (d. 259/873) composed three works on the *Muwaṭṭa*: (i) one commentary which he based on the statements of ʿĪsā b. Dīnār and others, which is partly preserved in an early Qayrawān manuscript; (ii) a biographical dictionary of the narrators in the *Muwaṭṭa*; and (iii) a book on the defective ḥadīth of the *Muwaṭṭa* entitled *al-Mustaqṣiya* [52, p. 371; 33, II/78].

This all confirms the centrality of the *Muwaṭṭa* in the spread of the Mālikī school and the development of Islamic law, supporting what Brockopp asserted in his analysis of Ibn ʿAbd al-Ḥakam's (d. 214/829) *Mukhtaṣar*, namely that the *Muwaṭṭa'* was a central text from a very early period [10, p. 100]. It simultaneously challenges Calder's dating of the *Muwaṭṭa* and his theory of organic texts [12, pp.20–38], for if the text of the *Muwaṭṭa'* had only become fixed after the writing of the *Mudawwana*, it would be difficult to explain how scholars who died before the *Mudawwana* was completed would be so familiar with the content of the—supposedly—later *Muwaṭṭa*. This evidence should be added to numerous other arguments made by Motzki [61], Muranyi [9, p. 397], Jackson [47], Hallaq [19], Fierro [18, p. 309] and others that seriously undermine Calder's theory of organic texts. For this reason, Calder's conclusions, which are based on unproven assumptions, should be replaced on the basis of more considered arguments using the available manuscript evidence, as well as the close study of textual content.

3 ʿĪsā and Narrations Outside of the *Muwaṭṭa*

Although ʿĪsā was very familiar with the *Muwaṭṭa*, he knew more than just the narrations found in the *Muwaṭṭa*. For example, al-Qunāziʿī quotes ʿĪsā describing how during ablution Ibn ʿUmar only wetted his index fingers and with them wiped the inside and outside of his ears [67, I/147–148]. Ibn Abī Shayba narrates this by way of ʿUbayd Allāh b. ʿUmar [24, I/296], who was one of Ibn ʿUyayna's teachers [59, V/54–55].

In relation to non-prescribed punishments (*taʿzīr*), ʿĪsā explains it is based on the *ijtihād* of the ruler and mentions that ʿUmar wrote to Abū Mūsā saying to not exceed thirty lashes [67, II/730], which Ibn Abī Shayba narrates from Ibn ʿUyayna [24, XIV/560]. He also says "it is better for the *imām* to be mistaken in his pardon than to exceed in punishment", which is an almost word-for-word rendition of a *ḥadīth* in al-Tirmidhī [77, III/252–253].

Elsewhere, ʿĪsā and Yaḥyā b. Yaḥyā are both attributed the opinion that during prayers, "the one who does not remember God in his bowing nor in prostration must repeat the prayer under any circumstances" [45, II/397]. This is based on a ḥadīth narrated by Muslim and others by way of Ibn ʿUyayna: "In bowing, glorify the Lord, mighty and exalted; and in prostration, make effort in supplication" [63, II/48].

It is not only in preserved extracts from *ḥadīth* commentaries that ʿĪsā's knowledge of narrations is apparent, but even in the books of legal questions. For example, ʿĪsā said,

> I asked Ibn al-Qāsim about the *ḥadīth* "charity (*ṣadaqa*) is not permissible for Muḥammad's family" [55, II/1000]. He said, "That refers only to *zakāt*, not to voluntary [charity]." I said, "What about their *mawālī*?" He said, "I do not think that they are included in that, and I do not see that there is a problem if they are given from *zakāt*." So I argued based on the *ḥadīth* "the *mawlā* of a people is of them" [3, p. 131; 6, VI/10; 24, VII/49–50; 41, IV/74], but he said, "But there is another *ḥadīth*—"the son of the sister of a people is of them" [11, p. 1166; 13, II/693; 42, IV/74; 6, III/172, 173, 222, 275, 276; 63, III/106]—which weakens the *ḥadīth* of the *mawālī*" [78, II/381–382].

Three ḥadīth are mentioned in this short discussion, of which only the first is in the *Muwaṭṭa*. It is also noteworthy that the two *ḥadīth* not in the *Muwaṭṭa*—the *ḥadīth* of the *mawlā* and of the son of the sister—have Iraqi chains.

Although ʿĪsā's biographers make virtually no mention of his having studied *ḥadīth*, it can be seen that he was not only familiar with the *Muwaṭṭa*, but with a wider corpus of *ḥadīth* and traditions, including those from Iraq.

Thus, the assumption that jurists were largely ignorant of Prophetic or Companion traditions, or that they did not consider them important, confuses knowledge of *ḥadīth* as spoken of by *ḥadīth* specialists, with knowing *ḥadīth*. What ʿĪsā's awareness of traditions shows is that non-*ḥadīth* specialists also knew *ḥadīth*. As Spectorsky previously noted when looking at Kawsaj's questions to Ibn Rāhuwayhi,

> In compiling his responses, al-Kawsaj was not trying to establish a coherent body of doctrine but to check on particular points. He was a scholar querying other scholars, and thus a large body of knowledge is assumed [75, p. 409].

Similarly, the fact that ʿĪsā and his teachers did not quote traditions for every point they discussed does not imply that they were not aware of the relevant traditions.

4 ʿĪsā in the *Mustakhraja*

In spite of ʿĪsā's knowledge of traditions, he is primarily remembered as a jurist, and the vast majority of materials from him are legal in nature. Al-ʿUtbī's *Mustakhraja* is the main source for these legal questions. This work, by the Cordovan Muḥammad b. Aḥmad al-ʿUtbī (d. 255/869), has been subject of a detailed study by Fernández Félix, who convincingly argued against Calder's late dating of the text [17, 319–332]. The *Mustakhraja* is considered one of the four key sources of the Mālikī school, alongside Saḥnūn's (d. 240/854) *Mudawwana*, Ibn Ḥabīb's (d. 238/853) *Wāḍiḥa*, and Ibn al-Mawwāz's (269/883) *Mawwāziyya* [31, pp. 44–59]. It has a strange structure, as it is organized by overarching topics (purification, prayer, fasting, alms, etc.) but within each topic the legal questions are organized by *samāʿs* (for example, ʿĪsā's *Samāʿ* from Ibn al-Qāsim, Saḥnūn's *Samāʿ* from Ashhab, etc.). But these *samāʿs* which were al-ʿUtbī's sources had their own order, and al-ʿUtbī often takes from different sections of the original *Samāʿ* where issues relating to the topic at hand are found. Thus the Book of Purification in the *Mustakhraja* contains —amongst other *samāʿs*—the *Samāʿ* of Ashhab and Ibn Nāfiʿ. However, al-ʿUtbī doesn't just include the legal questions from the section on purification of Ashhab and Ibn Nāfiʿs Samāʿ, but instead selects legal issues related to purification scattered from different parts of the *Samāʿ*—from the book of funeral prayers, the book of prayer, the book of oaths and the book of slaughtering animals [17, pp. 135–198].

ʿĪsā's *Samāʿ* is one of the more important *samāʿs* in the work. Also important, although less so, is the *samāʿ* of ʿĪsā's contemporary Yaḥyā b Yaḥyā. In the *Mustakhraja*, Yaḥyā is almost exclusively a transmitter from authorities greater than himself, whereas ʿĪsā often goes beyond simply narrating other's views, sometimes explaining his teachers' views or even giving his own authority statements. These preserved sources are complex legal issues which are the result of legal branching out, but a close look shows ʿĪsā's methodical consistence and reliance on precedent.

1763 *masā'il* from ʿĪsā's *Samāʿ* are preserved in the *Mustakhraja*. Going through this vast number of *masā'il* is beyond the scope of this investigation, but a sample of 476 *masā'il* from the first 16 books of the *Mustakhraja* have been selected to produce a quantitative analysis that will provide insight into ʿĪsā's legal thought.

4.1 ʿĪsā's Use of Mālik as an Authority

Mālik plays a very important role in ʿĪsā's *Samāʿ*, not only by the amount of times he appears, but also by ʿĪsā's attitude towards his statements. For example, ʿĪsā often quotes Mālik directly in spite of not having studied with him. Thus in the first twenty issues where Mālik is quoted he is quoted directly thirteen times. This is one example:

> He said: Mālik said: Whoever moves from a voluntary prayer to an obligatory prayer without interrupting [the voluntary prayer] should interrupt the obligatory prayer as soon as he realizes and start again. But if he remembers that he had in fact interrupted [the voluntary prayer] without completing it

> properly he should continue with the obligatory prayer and there is nothing on him for defects in the voluntary prayer [78, II/32].

Here ʿĪsā omits his source from Mālik and quotes Mālik, the eponym of the school, directly. This is an extremely common feature of ʿĪsā's *Samāʿ* in the *Mustakhraja* and is indicative of his perception of Mālik as an authority in himself.

Further evidence of this can be seen in his response when he was asked

> About a mill shared between a group of people which becomes dilapidated and in need of repair. One of [the owners] calls to work on it and some of them refuse.
> He said: It is said to those of them who refuse to work on it 'You either work on it with him or you sell [your share] to someone who is working with him.' They are forced to do it and that is what Mālik said [78, X/270–271].

The only justification that ʿĪsā gives for this view is that it is Mālik's view.

4.2 ʿĪsā's Attitude Towards Mālik's Legal Views

ʿĪsā tends to use Mālik as an authority, and this reliance on Mālik as an authority translates into subordination to his views. Thus throughout his *Samāʿ* he differs from Ibn al-Qāsim on a number of issues but differs only twice from Mālik. When ʿĪsā does comment on Mālik's statements he tends to explain any ambiguity in Mālik's statement, restrict its application or further develop a legal point.

4.2.1 Explaining Ambiguity: Ribā

Often ʿĪsā restricts himself to explaining Mālik's statement. In the following issue, for example,

> Mālik said: If a man sells food for cash or on credit (*ilā ajal*) it is not a problem if he buys oil with it before they separate, irrespective of whether it is with cash or on credit. But if they have separated there is no good in it, irrespective of whether it was with cash or on credit.

One would be forgiven for being confused by Mālik's statement for Mālik gives no indication as to his basis for arriving at such a conclusion. ʿĪsā is thus called upon to explain:

> It becomes as if he has sold him food for food [as if it was] with cash, and the mention of the price is ineffectual [78, VII/137–138].

Although ʿĪsā's explanation may not provide much clarification for the average reader, he was alluding to the selling of food for food which is intrinsically related to the issue of *ribā* as based on the *ḥadīth* "Gold for gold, silver for silver, wheat for wheat, barley for barley, date for date, salt for salt, same for same, handful for handful" [1, VIII/34; 6, V/320; 63, V/43; 2, IX/141–142; 64, VII/276]. Ibn Rushd explains that Mālik's reasoning is that buying the oil after the separation gives the impression of trying to find a loophole around the prohibition of selling food for

food, but if it is done in the same sitting it indicates that there is no attempt to find a loophole [38, VII/138].

4.2.2 Development: Fixing a Shared Mill

The aforementioned issue where ʿĪsā was asked about a shared mill which needed to be fixed and some partners refused to do their share has a further development. After ʿĪsā explained:

> It is said to those of them who refuse to work on it 'You either work on it with him or you sell [your share] to someone who is working with him.' They are forced to do it and that is what Mālik said [78, X/270–271].

al-ʿUtbī asked if the partner who refused to work can pay half the cost and keep his share. ʿĪsā replied:

> He may do that and he has his portion of the fixed building [78, X/270–271].

Al-ʿUtbī then asked further questions and each time ʿĪsā's responded with an answer that developed the legal point further.

4.3 Differing from Mālik

In the issues looked at so far ʿĪsā does not oppose Mālik. But there are two instances where ʿĪsā openly disagrees with Mālik.

4.3.1 Repossessing Stolen Food

In one instance Mālik said that if A entrusted or loaned wheat to B and then A found B in another town with his wheat, A is not allowed to take his wheat back from B. He also applied this to the thief saying,

> If [the thief] steals food in Madina and [the owner] catches him in Egypt, [the owner] cannot take it except in Madina, even if he finds the exact food in [the thief's] hand.

However,

> ʿĪsā said: If the food is the actual food of the person from whom it was stolen he may take it when he catches [the thief] if he so wishes [78, XV/297].

Mālik's view on this issue was also narrated by Saḥnūn [78, XI/271] and Ibn al-Mawwāz [26, XIV/441] and it is also the opinion of Ibn al-Qāsim [26, XIV/441]. Ashhab, however, held the same view as ʿĪsā.

Ibn Rushd explains that there are three opinions in the school:

1. The first is that he only repossesses the wheat in the place it was stolen from. This is Ibn al-Qāsim's narration from Mālik.
2. The second is that he can repossess the wheat. This is the view of Ashhab.

3. The third is Aṣbagh's view that he can repossess the wheat if he finds it near to where it was stolen, and that he cannot take it if he finds it far from where it was stolen [38, XV/297].

According to al-Qarāfī, the reason why Mālik did not allow the person to take his wheat is because the cost of transporting it back home is a harm (*ḍarar*) for the owner, and that is why he made it a general rule for wheat taken in trusts and loans [65, IX/154]. However, ʿĪsā prefers Ashhab's view when it comes to stolen wheat, possibly because he views it as more practical [49, p. 271; 35, p. 483; 57, VII/292].

4.3.2 Conditional Charity and Gifts

The second issue in which ʿĪsā differs from Mālik deals with someone who gives charity or a gift on the condition that what is given as charity is not sold or given away.

> He said: and Mālik said if a man gives charity or gives a gift [to someone] on the condition that he will not sell it or give it away, he said: This is not allowed and it is said to the one who gives in charity: Either he can use it any way he wants or you may take back your charity.
> Mālik said: Unless he is underage or incapable in which case that condition may be made, at least until the incapable person improves and the underage child grows up whereupon it is up to them to do what they want [with it]. In this context it is permissible.
> ʿĪsā said: I dislike that charity occur in this way but if it occurs it is valid: it is not returned and it is according to that condition [78, XIII/440].

Here again ʿĪsā openly contradicts Mālik's view. According to Ibn Rushd the grandfather, ʿĪsā's view is the correct one "because a man can do as he wishes with his wealth" [38, XIII/441].

In these two instances ʿĪsā felt it was acceptable to differ from Mālik without justifying his view. Yet these two instances make up only 0.01 % of ʿĪsā's preserved *Samāʿ* and approximately 0.4 % of those issues in which Mālik's view was transmitted. This further reinforces how rarely ʿĪsā was willing to differ from Mālik.

4.4 ʿĪsā's and Mālik's Associates

But ʿĪsā was not only deferential towards Mālik. He appears to have thought of Mālik's students as a collective and to them he was also deferential.

4.4.1 The Guardian of the safīh

In one instance he concisely and clearly presents the different views amongst early Mālikī authorities in a manner reminiscent of later legal texts. The issue at hand is the wealth of someone considered incapable (*safīh*):

> ʿĪsā was asked about someone incapable for whom a guardian has not been named, is his buying transaction valid?
> He said: Ibn Kināna, Ibn Nāfiʿ and all of Mālik's associates say that his buying transaction before having a guardian appointed to him is valid. Except Ibn al-Qāsim, for he says that his buying transaction and his use of his own wealth before having a guardian appointed to him are not allowed, for he is considered to be under guardianship since he was born, even if he has no guardian, as the ruler is the guardian of the one with no guardian. Thus if he is under the guardianship of the ruler until the ruler appoints a guardian to protect him and care for him [the incapable person] has the same duties towards [the ruler] as [the ruler] towards him [78, X/471–472].

Here Mālik's associates are a group of jurists linked by their relationship with Mālik and ʿĪsā makes a concerted effort to point this out. In fact, this is very much presented as an intra-*madhhab* discussion.

4.4.2 Witnessing for the Witnesses

ʿĪsā is not only aware of this community of scholars associated to Mālik, but is also scrupulous in his loyalty to that community. This can be seen in his reply to the question

> about two men who make a claim over something and each one of them brings valid witnesses (*bayyina*) unknown to the judge unless he ascertains [their] uprightness, so he ascertains it. Does he judge, based on this, in favour of the one who has the most upright referee (*aʿdal al-muʿadillīn*), as in the case of witnesses if some are more upright than others?
>
> He replied: I know of this only in relation to witnesses, and I do not see it [as valid] for referees [78, X/71; 25, p. 116; 26, IX/35].

According to what Ibn al-Qāsim and Ibn Wahb narrate from Mālik, when both sides in a case provide witnesses, Mālik gives precedence to the witnesses' reliability over their number [69, IV/97; 26, IX/34]. However, according to Muṭarrif and Ibn al-Mājishūn,

> If one of the two [parties] brings two superior witnesses, and the other four or ten reliable people, we lean to the larger number, and it is what Mālik said [26, IX/34].

Because of the different views from early Mālikī authorities, Ibn al-Ḥājib says "Preference is based on various aspects: superiority in reliability; and regarding increment [in number], there are two opinions" [35, p. 487].

Although the standing of referees is not quite the same as the standing of the witness, there is a clear parallel. However, ʿĪsā is unwilling to do an analogy and looks at them as different matters, and Ibn Ḥabīb transmits the same from Ibn al-Mājishūn [26, IX/35]. And although Muṭarrif narrates the opposite from Mālik [26, IX/35], the *mashhūr* of school is ʿĪsā's opinion (erroneously attributed to Ibn al-Qāsim) [50, VII/230; 16, IV/338].

4.5 ʿĪsā and Ibn al-Qāsim

The strong relationship between ʿĪsā and Ibn al-Qāsim has already been alluded to, and this is confirmed by looking at ʿĪsā's *Samāʿ* in which he took almost exclusively from Ibn al-Qāsim. But ʿĪsā did not revere Ibn al-Qāsim's views quite as much as he did Mālik's and there are a number of instances where he differed from Ibn al-Qāsim. Just as interesting, however, are those instances where he developed Ibn al-Qāsim's views.

4.5.1 Restricting: Selling Skins of Carrion

According to the mainstream Madinan and Egyptian view it is forbidden to sell skins of carrion and only Ibn Wahb allows selling the tanned skins of carrion [78, II/156; 69, III/218, 401; 26, IV/375–376; 53, IX/4253; 44, XII/762]. Consequently, the one who has built his wealth from selling tanned leather from carrion has built his wealth on that which is forbidden. With this in mind:

> [Ibn al-Qāsim] was asked about a man who tanned skins of carrion, sold them and with their value bought cattle which multiplied and bred. He then wishes to repent for what he did.
> He said: He gives in charity the value of the skins he sold, not the cattle he bought.
> ʿĪsā said: If he finds the one to whom he sold the skins, or his descendants if [that person] has died, he gives it to him or to them. But if he does not find him or his descendants he gives it in charity. But if [the person to whom the skins were sold] comes after that, he may choose between charity and the value, just as with lost property [78, VII/444–445; 26, VI/184].

Here ʿĪsā does not consider Ibn al-Qāsim's view invalid but simply places it as a final option after one has sought out the one who unwittingly bought the forbidden goods. In this way ʿĪsā restricts Ibn al-Qāsim's view without challenging his authority.

4.5.2 Development: Dowries of Converts

Just as ʿĪsā developed Mālik's legal dicta, he did the same with Ibn al-Qāsim. This particular example shows ʿĪsā's concern with looking at things in terms of general categories. He asked Ibn al-Qāsim:

> What about the Christian woman who becomes Muslim and who has taken possession of a dowry which includes alcohol and pork, and her husband becomes Muslim before consummating the marriage? Do you think he may consummate the marriage with that dowry, or should he give her that which makes her permissible for him?
> He (Ibn al-Qāsim) said: The marriage is confirmed, although I prefer that he give her that which makes her permissible for him.

ʿĪsā, however, was not satisfied with this answer and attempted to create broader categories:

> ʿĪsā said: What I hold regarding this [issue]—and there is difference of opinion relating to it—is the view that [i] if he gives that [dowry] to her and then becomes Muslim before the consummation, he must give her a quarter of a *dīnār* and the marriage is confirmed. But [ii] if he does not give her that [dowry] until he becomes Muslim he should give her the dowry of someone of her equivalent status (*ṣadāq mithlihā*) and the marriage is definite. [iii] If he has given her [the dowry] and consummated the marriage and then become Muslim there is nothing upon him. But [iv] if he has consummated the marriage, has not given that [dowry] to her and becomes Muslim he should give her the dowry of someone of her equivalent status [78, IV/185].

The four categories that ʿĪsā sets out are:

1. The couple finalises the marriage contract, the man gives the woman a dowry which contravenes Islamic law, and then becomes Muslim before consummation. In this case he has to give her the minimum dowry, which is a quarter of a *dīnār* [55, II/528]. This is the same as Ibn al-Qāsim's case, except that ʿĪsā has set the minimum dowry.
2. The couple finalises the marriage contract, the man does not give her the dowry, and then becomes Muslim before consummation. In this case he cancels the original dowry and he has to give her the equivalent of dowry of someone of her status (*ṣadāq mithlihā*).
3. The couple finalises the marriage contract, the man gives her the dowry, the marriage is consummated, and after that he becomes Muslim. The marriage is valid and there is no sin.
4. The couple finalises the marriage contract, the marriage is consummated but the man has not given her the dowry, and after that he becomes Muslim. In this case he must give her the dowry of someone of her equivalent status.

Ibn Rushd (the grandfather) accepts ʿĪsā's categories but changes the questions to deal with his concern, which is the status of the marriage in each case:

1. For the first case he notes that Ibn al-Qāsim in the *Mudawwana* says that the man either gives her the dowry of someone of her equivalent status or the marriage is annulled [69, II/311].
2. In the second case, Ibn Rushd notes that there is agreement within the school that they can fulfil the marriage if he gives her the dowry of someone of her equivalent status or they can withdraw from the marriage.
3. In the third case, Ibn Rushd states that the marriage is confirmed and there is no sin.
4. In the fourth case, Ibn Rushd indicates states that Ibn al-Qāsim says he must give her the dowry of someone of her equivalent status, whereas Saḥnūn says that there is no obligation in the marriage [38, IV/185–186].

ʿĪsā, again, confirms Ibn al-Qāsim's statement and develops it further.

4.6 Differing from Ibn al-Qāsim

The preserved instances when ʿĪsā did differ from Ibn al-Qāsim are more common than those where he differed from Mālik. This larger sample makes it possible to select examples where one can see why ʿĪsā differed from his teacher.

4.6.1 Separating Children

In the first example ʿĪsā said,

> I asked him (i.e., Ibn al-Qāsim) when children should be separated in sleeping arrangements. Ibn al-Qāsim said: When they grow adult teeth, just like the separation in sales.
> ʿĪsā said: Ibn Wahb narrated to me that the Messenger of God—may God bless him and grant him peace—said, "If children reach 7 years of age command them to pray and if they reach 10 years of age smack them for [not praying] and separate them in the beds" [69, I/99–100; 6, II/180; 2, II/114–115]. And this is what I take [78, II/50].

Ibn al-Qāsim was drawing a parallel between separating children in bed and separating the child from its slave mother. According to Ibn al-Qāsim's narration from Mālik in the *Mudawwana*, mother and child may be separated once the child grows adult teeth [69, I/246]. Ibn al-Qāsim wanted to draw an analogy between the two issues, with the common link being the assumption that in both cases the children have reached a certain level of maturity where they (i) may be growing sexually aware and (ii) do not have such a strong need for motherly love. According to classical legal theory this analogy is weak because (i) it contradicts a text that deals specifically with the matter and (ii) the common link (*ʿilla*) between the two issues is not clear [73, p. 353].

ʿĪsā—perhaps because he saw the weakness of the analogy–preferred the *ḥadīth* narrated by Ibn Wahb to Ibn al-Qāsim's personal opinion regarding the separation of children in sleeping, and it appears that ʿĪsā's view became dominant within the Mālikī school [38, II/50; 57, II/57; 15, I/297; 16, I/297].

But the *ḥadīth* also contains another injunction: that children should be made to pray at the age of seven. If ʿĪsā adopted this injunction he may have, knowingly or unknowingly, been going against Mālik's view that "when a child grows adult teeth he should be told to pray, he should be disciplined for it, but should not be hit hard" [78, I/493, 26, I/269; 65, II/406–407]. Interestingly enough, in this issue also the view based on the *ḥadīth* has become normative in the Mālikī school [49, p. 23].

4.6.2 Interrupting the Voluntary Prayer Upon Hearing the iqāma

The awareness of *ḥadīth* implicit in ʿĪsā's views can also be seen in the following issue. Ibn al-Qāsim was asked about someone who begins a voluntary prayer and the beginning of the obligatory prayer is announced (*iqāma*). Should he interrupt his

prayer (by doing *taslīm*) whilst sitting down or while standing up? Ibn al-Qāsim replied that he should break it standing up. ʿĪsā, however, said,

> I prefer (*aḥabbu ilayya*) that he prays two *rakʿas* if he has hope of finishing before the *imām* bows in the first *rakʿa*. If he does not see any possibility of that he should finish it (do *taslīm*) any way he wants [78, I/504].

ʿĪsā's view was not new, going back to the Kufan Ibrāhīm al-Nakhaʿī and the Makkan ʿAṭā' b. Abī Rabāḥ [1, II/437]. In the *Mudawwana* Mālik likewise stated that if someone begins a voluntary prayer and the *iqāma* is called one should look into the situation. If the person is able to finish his prayer quickly, before the *imām* bows, he should complete his prayer. If, on the other hand, he is slow and heavy it would be better for him to interrupt his voluntary prayer right away [69, I/97]. This preoccupation with whether one should finish the voluntary prayer, however, can only make sense if one is aware of the *ḥadīth* 'If the announcement (*iqāma*) for the prayer is made there is no prayer except the obligatory [prayer]' [6, II/331, 63, II/153–154; 13, I/359–360; 2, IV/101], as well as narrations from Companions and Successors where they did not act according to the *ḥadīth* [24, III/547–548]. ʿĪsā, like other scholars before him, was trying to make sense of the relationship between the Prophet's command and the Companion's apparent disregard for this command.

4.6.3 Stolen ʿId Sacrifices

ʿĪsā was concerned with finding practical rulings whilst keeping away from ambiguous issues and at times this led him to differ from his teacher. Thus Ibn al-Qāsim felt that if someone's *ʿId* sacrifice had been stolen the victim had the right to take the value of the sacrifice from the thief, although he thought it was preferable to not take it. ʿĪsā on the other hand said, "I prefer that he takes the value from the thief and gives it as charity" [78, III/359].

There are four views within the school, with the key issue being whether claiming compensation is a form of sale, because it is not permissible to sell the meat of sacrifice. Thus Saḥnūn held that compensation is a form of sale and consequently the thief is not obliged to compensate for what he stole. Ibn Ḥabīb, on the other hand, held that the two transactions are essentially different and so one may take compensation and do what he wishes with it. Ibn al-Qāsim seemed to consider the issue to be rather ambiguous and although he did not see accepting compensation as wrong he thought it was wiser to leave it as a form of precaution. ʿĪsā's view, according to Ibn Rushd, was problematic:

> (ʿĪsā's) view in this issue has no basis, for if taking compensation from the thief is not a sale there is no reason for recommending giving it in charity. And if it is a sale it is not permissible [to take it] and he may not give it in charity [38, III/359].

Yet ʿĪsā seemed to be developing Ibn al-Qāsim's view. On the one hand the idea that the thief does not have to compensate his victim seems grossly unfair, but on the other hand there is a possibility that accepting compensation is forbidden. Trying to find a middle ground he sought an option that punishes the thief (who pays

compensation to the victim) and rewards the victim (who earns the reward of giving in charity).

4.7 ʿĪsā's Nawāzil

There are a number of instances where ʿĪsā appears to have given his own verdicts without basing himself on precedent, and in those ʿĪsā showed himself to be a cautious, thoughtful scholar.

4.7.1 The Sanctity of Freeing Slaves

As mentioned earlier, ʿĪsā showed an interest in categorising, as when he was asked:

> A man sells a house and a slave in an impermissible sale, then the seller finds out that the sale is invalid, so he makes a claim from the buyer, asking for the annulment of the sale before it has been passed on. But the buyer passes on the house by giving it in charity, or selling it, or selling the slave, or by freeing him once the seller has made a claim.
> He (ʿĪsā) said: As regards the charity and the sale, I do not think he can do that once the seller has made a claim for invalidating the sale. But as regards the freeing [of the slave], I see it as being different to the sale and charity, and I see it as having been passed on. I think that the freeing of the slave should be accepted and he should not be returned, for the freeing [of a slave] is sacred [78, VII/455–456].

In the question there are no distinct categories, just particulars, but ʿĪsā divides the issue into categories, of which there are three: (i) goods which are sold, (ii) goods which are given in charity and (iii) the slave who is freed. The first two categories are general, applying to all types of goods, which could include slaves. The third is specific to slaves, for it is only they who may be freed.

The general rule is that once the seller has made a claim the buyer may not dispose of the goods being claimed, but the freeing of the slave is an exception to this general rule. ʿĪsā explains this exception as being based on *ḥurma*. This word, translated as sanctity, is described by Ibn al-Athīr as that which cannot be violated [29, p. 202]. Ibn Rushd describes it as a form of *istiḥsān*, and then says, "This is the purpose of *istiḥsān*—to leave the true sense of analogy in a particular case because of something specific to that case" [38, VII/456].

What is specific to this case is that the freeing of a slave is irreversible. There is a *ḥadīth* going back to the Prophet narrated by the Egyptian Ibn Lahīʿa (d. 174/790), Ibn Wahb's teacher, which says, "Joking is not permissible in three: divorce, marriage and freeing of slaves. Whoever says them has made them obligatory" [66, I/226–227] There are likewise similar reports from various Companions and Successors [1, VI/133–135]. Consequently, in the *Mudawwana* Saḥnūn asks Ibn al-Qāsim:

> What do you think if I said, "If I buy so-and-so he is free" and then I buy him in an invalid sale? He said: Mālik said: If someone buys a slave in a sale and

> frees him, his freedom is complete. Likewise, this [slave] is freed. The value is returned, they go back to the value and he (the buyer) owes the value of the slave [68, II/360].

ʿĪsā seems to thus differentiate between the freeing of the slave and selling/giving in charity based on this precedent within the Mālikī tradition which is based on *ḥadīth*.

4.7.2 Father and Son Owing Money

ʿĪsā also appears to have been quite consistent in the application of general rules. When asked about a father and a son who both owe money to a creditor, with the son paying his father's debt but the creditor claiming the son was paying his own debt, ʿĪsā said,

> The accepted testimony is that of the creditor with an oath, unless the son can bring proof which testifies to his having said "This is what my father owes you."

Al-ʿUtbī then asked,

> What about if he proves that his father ordered him to pay that for him? He (ʿĪsā) said: That is no use to him until he can prove [that] for the payment, regardless of whether there is an evidence for [his father having told him to do it] or not. ʿĪsā said: Unless it can be proved that that which he used to pay the debt belongs to his father [78, X/469; 26, X/83].

Here ʿĪsā ruled in favour of the creditor unless the borrower can adduce evidence. There appears to be no known precedent for this specific issue, but according to Ibn Rushd, "the son is claiming—according to what is mentioned—that he settled his father's debt" [38, X/469], and thus ʿĪsā based his response on the well-known maxim that the burden of proof is upon the claimant and the oath is for the defendant [69, IV/92–93; 74, pp. 382–387; 71, VI/198; 70, p. 207; 82, IV/96].

4.7.3 Building a Water Mill on Other People's Land

Like Yaḥyā before him, ʿĪsā was concerned with what is best for the people involved. When ʿĪsā was asked about a man (*x*) who builds a water mill and wishes to place part of the dam on other people's (*y*) property in exchange for allowing them to exploit the mill a set number of days a week he responded saying that this was valid only when certain conditions were fulfilled:

1. That they are all partners in the water mill once completed, receiving a share of the profits in proportion to the number of days they work the mill during the month;
2. That *x*'s job is well-defined;
3. That *y* are bound to repair the mill if it is damaged in proportion to the set days they work the mill.

He then said, "If, however, they (*y*) are only allowed to exploit it on those days but have no actual share in the water mill, there is no good in it" [78, X/282].

The arrangement between *x* and *y* which ʿĪsā was asked about can only be one of rent or partnership, and in this case it is neither. This matter concerns the hazards of partnerships which Mālik did not allow unless investment was proportionate to division of profits [69, IV/29] for he considered it hazardous [55, II/707]. Likewise, in this issue, ʿĪsā appeared to fear that the agreement between the two parties was hazardous. If the exploitation of the mill for a few days a month is a form of rent, the income generated for *y* is variable, depending not only on such things as the harvesting season, but also on the milling and commercial abilities of both parties. Thus ʿĪsā judges that partnership is the ruling most beneficial to both parties and states the conditions needed for such a partnership to be valid. Crucial here is ʿĪsā's concern with hazard in partnership for which Mālik showed so much concern.

4.7.4 Conclusion

Looking at a large sample of ʿĪsā's legal questions in the *Mustakhraja*, it can be seen that ʿĪsā differed from Mālik in 0.4 % of his transmissions from Mālik, and from Ibn al-Qāsim in approximately 3.5 % of the issues he narrated from him. While the disparity is noticeable, what is more noticeable is that in 99.6 % of cases for Mālik, and 96.5 % for Ibn al-Qāsim, ʿĪsā accepted their views and transmitted them as authoritative. This loyalty to Mālik and Ibn al-Qāsim, however, did not prevent ʿĪsā from thinking creatively and exercising his legal acumen.

5 ʿĪsā Outside of the *Mustakhraja*

Ibn Abī Zamanīn (399/1008) cites a long passage from ʿĪsā b. Dīnār in his *Muntakhab al-aḥkām* on the witnesses needed for declaring someone of age (*tarshīd*). Ibn Muzayn (260/874) is his source, and it is likely to be from his commentary of the *Muwaṭṭa'* [55, II/525]. It makes interesting reading for, unlike ʿĪsā's *Samāʿ* in the *Mustakhraja* where he is primarily a transmitter, ʿĪsā here develops his own line of thought in relative detail.

The text deals with three issues. The first is the meaning of probity (*ṣalāḥ*); the second is how the female who has parents may leave custody; the third, although starting off as being only about females without parents, ends up being general to both males and females in custody and how they may gain control over their wealth. But before looking at each issue in depth, it is worth getting a brief idea of the rules governing legal competence within the Mālikī school.

5.1 Legal Competence in the Mālikī School

According to Ibn Rushd, the conditions for becoming of age (and thus legally competent) are (i) puberty, (ii) freedom, (iii) full mental faculties and (iv) capability of looking after one's wealth, with some considering religiosity to be a part of capability. Ibn Rushd goes on to divide people into four categories:

1. Those who are generally incapable and are judged to be incapable even when capable. These include all children and, according to one opinion, unmarried females who have not become spinsters.
2. Those who are generally capable and are judged to be capable even when incapable. No examples are given.
3. Those who are more likely to be incapable and are judged to be incapable until proven otherwise. According to one opinion these are males who reach puberty and whose father is still alive as well as married females.
4. Those who are more likely to be capable and are judged to be capable until proven otherwise. According to another opinion these are males who reach puberty and whose father is still alive. Spinsters also belong to this category.

In more detail, the male who has a father is considered incapable until puberty. Upon reaching puberty he may (i) be known to be capable, (ii) be known to be incapable or (iii) have unknown status. If he is capable he reaches majority automatically. If he is incapable he does not reach majority. There are two opinions if his status is unknown, as has been mentioned. If he has no father and is placed in custody, however, he does not reach majority unless he is explicitly released from custody, although there is difference of opinion on this issue. If, on the other hand, he has no father but is not placed in custody he is considered capable upon reaching puberty. This is the school's well-known opinion, although there are other views.

The female with a father is also considered incapable until puberty. But there is difference of opinion as to when she reaches majority. According to Ibn Ziyād's narration from Mālik, she is like her male counterpart. According to the *Muwaṭṭa'* and the *Mudawwana* she is considered incapable until she marries and her capability is known, or until she becomes a spinster. The final view is that she is considered incapable until between 2 and 7 years after her marriage. If, on the other hand, she has no father and is placed under custody she is like her male counterpart. If she is not placed under custody she is like her male counterpart according to one narration. In another narration, however, she is considered incapable until she either becomes a spinster or marries [39, II/344–355].

5.2 Ibn Muzayn's Text

With this in mind one may begin to look at Ibn Abī Zamanīn's text. The chapter reads as follows:

> And in Ibn Muzayn's book: I said to ʿĪsā: [1] What is the probity (*ṣalāḥ*) of the one placed in custody (*al-muwallā ʿalayhi*) by which he has the right to control his wealth? Is it that he be capable of managing his property, his religiosity being unimportant, or is it that he be both [capable and religious]?
> [ʿĪsā] replied: Ibn al-Qāsim says: That is based on his ability to handle his property and invest it fruitfully, and no attention is paid to his religiosity, even if he drinks alcohol.

> [ʿĪsā] said: And I heard (Ibn al-Qāsim) say: How many sinners in religion are good earners in their worldly affairs, capable of pursuing them and with insight into them?
> [ʿĪsā] said: The Madinans, Ibn Kināna and others say: Maturity is what God mentioned—ability to handle property and probity in religion, because God the Mighty and Exalted says: 'And if you sense in them maturity give them their wealth.' (Q4: 6) And drinking alcohol is not maturity.

After mentioning Aṣbagh's view, Ibn Muzayn returns to ʿĪsā:

> I said to ʿĪsā: [4] What is the meaning of Mālik's statement: 'The virgin may not control her own wealth until she enters her own house and it is known from her situation'? [55, II/525] And how can she be tested so that her situation may be known?
> He replied: It is that sound people with experience testify that she is of sound mind, competent with her wealth, capable of looking after it, its safekeeping upon her person. And this is not simply with two witnesses, but with a large number of people testifying, so that it is known and notorious.
> I said: So if this known from her and she is still young and her marriage has been consummated, may she take control [of her wealth] a year or less after the marriage has been consummated?
> He replied: Yes.
> I said to him: [2] [What about] the unmarried woman? When may she control her wealth once she has reached puberty?
> He replied: If she is witnessed to be as I described to you—that she be able to take care of her wealth and of herself, she is given control over her wealth after waiting for her to grow up a bit and move beyond childhood.
> I said: As regards the witnesses for her to leave custody, is it permissible for there to be only one man and two women, or women without men?
> He said: I do not like the judge to give her or the [male] in custody [control over] their property and that he take them out of the custody of the one who takes care of them until—in regards to their status by which they have the right to control their property—a group of men and women, or men and no women, testify, and their situation is widespread and well-known. Women's testimony without that of men is not accepted, and I do not see it as sufficient for only two male [witnesses] until, along with that, there is a widespread awareness and it is known that they both have a good understanding and ability to take care of their wealth [25, pp. 149–151].

Here again we are presented with motifs clearly showing a 'Mālikī' identity: the concern with understanding Mālik's view, the reference to the *Muwaṭṭa'*, the concern with Mālik's students and intra-*madhhab* discussions.

5.3 Issue 1: The Meaning of Probity

The first question is immediately noteworthy for it implies not only an awareness of the Qur'ānic verse,

Put orphans to the test until they reach *nikāḥ*,
and if you sense in them maturity give them their wealth [Q4: 6].

but also an understanding of the legal discussions surrounding the meaning of majority (*rushd*). The verse explicitly refers to orphans, those who have no father [37, XII/645; 27, I/154], and who are consequently placed under custody—thus the use of the term *al-muwallā ʿalayhi*. But Ibn Muzayn asks about *ṣalāḥ*, probity, which is not mentioned in the verse. Yet if one looks at al-Ṭabarī's *tafsīr* one finds the use of *ṣalāḥ* to describe *rushd* being attributed to Ibn ʿAbbās and a number of Successors [76, IV/252–253], and both ʿĪsā and Ibn Muzayn would have been aware of this.

ʿĪsā's answer is also interesting for he decides to give both variant opinions and justify them. Thus the justification for Ibn al-Qāsim's view is that lack of probity in religion in no way implies incompetence in financial matters. The justification for the Madinan view is that the Qur'ān's use of *rushd* in the verse is linguistic, i.e., *rushd* means what is right, "the opposite of error [37, III/175]." ʿĪsā gives both opinions but does not state his preference.

5.4 Issue 2: Women's Majority

The second issue regards the issue of the unmarried woman and her majority. Ibn Muzayn asks ʿĪsā to explain a particular statement of Mālik's *Muwaṭṭa'* [55, II/525; 56, I/570]. The perfect reproduction of Mālik's wording from the *Muwaṭṭa'* in accordance with Yaḥyā's recension shows both scholars familiarity with the text and its importance as a legal textbook.

As previously mentioned, the dominant opinion of the school is that a female may not reach majority until she marries and proves her capability. But there is something of interest, particularly within the Andalusian context. As can be seen, ʿĪsā appears to not have a problem with a female being granted majority within the first year of her marriage, although what was customary in al-Andalus is that the female not be granted majority until 7 years after her marriage [7, p. 234; 30, pp. 339–340; 48, p. 409; 43, I/36; 72, pp. 229–230].

5.5 Issue 3: Independent Women

ʿĪsā then goes on to talk about the female being granted majority before marriage. ʿĪsā says that all she needs is to provide witnesses who will testify to her capability, thus placing her in the same category as the one put in custody. In reply to the more specific question of what type of witnesses she needs, ʿĪsā explicitly draws a parallel to the one in custody, saying that both need a large group of witnesses amongst whom some should be male.

This differs sharply from Mālik's view that women should not be considered capable until they were married. According to al-Bājī, Mālik's reasoning was that, "It is known that unmarried women are uncomfortable having to deal with people and have direct contact with them, which necessitates that they are unaware of how to take care of their wealth, benefit from it, invest it well and preserve it" [8, III/273;

27, I/321]. Ibn Rushd (the grandson) further continued: "Malik's argument is that certainty (*īnās*) regarding her discretion cannot be ascertained until she has gained experience in dealing with men" [40, IV/1446]. Thus Mālik's assumption was that a woman would only gain this worldly experience once she was married, and this may have certainly been the case in Mālik's Madina. ʿĪsā, acting in a very different cultural setting may have felt that Mālik's view was culturally bound. If this is the reason why ʿĪsā differed from Mālik, it shows a keen awareness of the difference between law based on religious sources and law based on considerations of public interest, practicality and custom [51, p. 427].

The school as a whole reached a middle point between Mālik and ʿĪsā. Khalīl said, "the father can declare her capable before her marriage, likewise the legal guardian" [49, p. 207] and his commentators agreed that only the father or the appointed guardian could declare her capable before marriage [50, V/296, II/744; 15, III/460; 16, III/460; 68, V/337]. As evidence for this view, al-Mawwāq presented ʿĪsā's view—erroneously attributed to Mālik. He says,

> Ibn Muzayn from Mālik's view: If it is witnessed for the unmarried woman that she is capable with her wealth and she has come of age she is given control of her wealth after she has grown up a bit and moved beyond childhood [57, VI/648].

Not only is the attribution incorrect, but the interpretation is questionable too, as there is no mention of the father in ʿĪsā. Interestingly enough, in a later Andalusian book of contracts, the contract of *tarshīd* (granting capability) is not gender specific and there is no mention of the father.

Here, where ʿĪsā was exercising his own legal judgment, he based himself on a precedent within the Mālikī canon, further implying a loyalty to the idea of a Mālikī school.

6 Conclusion

Although Melchert argued that when it came to the formation of the schools, "the Mālikıyah of the West played a catch-up game, gradually modifying their forms to agree with developments in the East" [58, p. xxvii], the evidence presented here challenges this assertion. Melchert's assumptions have been criticised elsewhere, [79, pp. 12–17], but it is his lack of interest in looking at how jurists actually derived law that is perhaps his greatest methodological weakness.

In looking at ʿĪsā b. Dīnār, it can be seen that he was not only a respected jurist but was also well-read in traditions and a teacher of the *Muwaṭṭa*, adept at explaining legal points made by Mālik and expounding on them. This provides us an important insight into education at the time, for it shows that the *Muwaṭṭa* was already widely taught, and not just as a *ḥadīth* collection, but as a book of law. The fact that ʿĪsā was familiar with traditions outside of the *Muwaṭṭa*, even Iraqi traditions, futher shows that jurists were interested in studying traditions even if they never sat down to teach them in the way of the *ḥadīth* experts.

Nevertheless, ʿĪsā was primarily remembered as a jurist, and his methodical approach within the boundaries of the views of Mālik and his students, in particular Ibn al-Qāsim, show why he was held in high regard. More significantly, in ʿĪsā's legal methodology it is possible to see the contours forming of a school with a legal canon built around the views of Mālik. It is therefore not surprising that a century later when the school had established itself in al-Andalus, a jurist of the rank of Ibn Lubāba described him as the 'jurist of al-Andalus', which he indeed was.

This analysis of ʿĪsā's explanations of *ḥadīth* and pronouncements on law demonstrates how scholars immediately after Mālik already considered his views as authoritative, and his book on law—the *Muwaṭṭa'*—was widely studied. It also confirms the centrality of Ibn al-Qāsim as a privileged interpreter of Mālik's legal views. Although ʿĪsā b. Dīnār was only one scholar, familiarity with early Andalusian scholarship—and indeed early Mālikī scholarship as a whole—appears to confirm most of these patterns. Thus it is hoped that this avenue of research will open up new horizons that will assist in developing more accurate theories about early Islamic law, legal texts and the development of the schools.

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