

## APPLICATION OF MAINTENANCE DURING THE WAITING PERIOD (*'IDDA'*): A PERSPECTIVE FROM OTTOMAN AND TURKISH CIVIL LAW

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### ABSTRACT

This study examines the Islamic perspective on alimony or maintenance during *'idda*, which is the waiting time a divorced woman must observe before remarrying. The study will also evaluate Ottoman law's application to a divorced woman's maintenance during the waiting time by analysing court records from its six-century history. Finally, the study will explain how poverty alimony practices are handled in Turkish law. This study used a mixed-methods research design involving qualitative and quantitative data collection and analysis techniques. The study will begin with a literature review of Islamic, Ottoman, and Turkish law to establish a theoretical framework for the research. The literature review will also provide an overview of the existing scholarship on the topic, identify gaps in the literature, and inform the research questions. The study used a purposive sampling technique to select court records from the Ottoman era relevant to the research questions. The chosen court records will be analysed using content analysis to identify the legal principles that guided the court's decision-making on alimony or maintenance during the *'idda*. The study aims to comprehensively analyse the Islamic perspective on alimony or maintenance during the *'idda* period and evaluate the Ottoman law's application to a divorced woman's maintenance during the waiting time. The study also explains how poverty alimony practices are handled in Turkish law. The study's findings will contribute to the existing literature on Islamic law, Ottoman law, and Turkish law and provide insights for policymakers, legal experts, and women who have gone through the divorce process in Turkey.

**Keywords:** Islamic Law, Ottoman Law, Turkish Law, Court Records, *'Idda* Alimony, Poverty Alimony.

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## PEMAKAIAN NAFKAH SEWAKTU TEMPOH MENUNGGU ('IDDAH'): SUATU PERSPEKTIF DARI UNDANG-UNDANG UTHMANIYYAH DAN SIVIL TURKI

### ABSTRAK

Kajian ini mengkaji perspektif Islam mengenai nafkah atau penyelenggaraan semasa iddah, iaitu tempoh menunggu bagi seorang wanita bercerai yang mesti diperhati sebelum berkahwin semula. Kajian ini juga akan menilai pemakaian undang-undang Uthmaniyyah atas nafkah wanita yang bercerai semasa waktu menunggu dengan menganalisis rekod mahkamah daripada sejarah enam abadnya. Akhirnya, kajian ini akan menjelaskan bagaimana amalan nafkah kemiskinan ditangani dalam undang-undang Turki. Kajian ini menggunakan reka bentuk penyelidikan kaedah campuran yang melibatkan teknik pengumpulan dan analisis data kualitatif dan kuantitatif. Kajian ini didahului dengan kajian literatur undang-undang Islam, Uthmaniyyah, dan Turki untuk mewujudkan rangka kerja teori untuk penyelidikan. Kajian literatur juga memberikan gambaran keseluruhan ilmu sedia ada mengenai topik ini, mengenal pasti jurang dalam kesusasteraan, dan memaklumkan soalan penyelidikan. Kajian ini menggunakan teknik persampelan yang bertujuan untuk memilih rekod mahkamah dari era Uthmaniyyah yang berkaitan dengan soalan penyelidikan. Rekod mahkamah yang dipilih akan dianalisis menggunakan analisis kandungan untuk mengenal pasti prinsip undang-undang yang membimbing pengambilan keputusan mahkamah mengenai nafkah atau penyelenggaraan semasa iddah. Kajian ini bertujuan untuk menganalisis secara komprehensif perspektif Islam mengenai nafkah atau penyelenggaraan semasa tempoh iddah dan menilai penerapan undang-undang Uthmaniyyah kepada penyelenggaraan wanita yang bercerai sewaktu tempoh menunggu. Kajian ini juga akan menjelaskan bagaimana amalan kemiskinan nafkah ditangani dalam undang-undang Turki. Penemuan kajian ini akan menyumbang kepada kesusasteraan sedia ada mengenai undang-undang Islam, Undang-undang Uthmaniyyah, dan undang-undang Turki dan memberikan pandangan kepada pembuat dasar, pakar undang-undang, dan wanita yang telah melalui proses perceraian di Turki.

**Kata Kunci:** Undang-Undang Islam, Undang-Undang Uthmaniyyah, Undang-Undang Turki, Rekod Mahkamah, Nafkah Iddah, Nafkah Kemiskinan.

## INTRODUCTION

Like other religions, Islam encourages marriage and accepts it as the only legitimate way to continue a generation. Based on the principle of love and compassion for the continuation of the marriage union, Islam wants the spouses to be tolerant and understanding towards each other. In the case of the impossibility of continuing the marriage, it also legitimises some solutions, especially *ṭalāq* (divorce).<sup>1</sup>

Besides, the marriage ends with the death of one of the spouses, the most common way of ending the marriage bond is by way of a divorce, which the husband performs with a unilateral declaration of will called *ṭalāq*. In addition, ending the marriage with the husband's agreement with his wife in return for a specific price (*Mukhāla or khul'*) or by a judge's decision (*tafrīq/separation*) is also seen within the scope of *ṭalāq* in the broad sense.<sup>2</sup> There are some consequences of ending the marriage bond somehow. One of them is the waiting period known as *'idda*. *'idda* is when a woman has to wait before she can marry another man for the reason that ends the marriage bond, such as *ṭalāq*, annulment, and death. Waiting for *'idda* serves several purposes, such as determining if the woman is pregnant, showing respect to the deceased husband, and providing time for the wife to reconsider returning to her husband in case of revocable divorce (*ṭalāq al-rāj'ī*).

All the cultural elements of society, such as customs, traditions, history, and beliefs, and the characterisation of "Islamic law" for Ottoman law, which consists of a six-century-old application of Islamic law, are the result of an application wholly based on Islamic law.<sup>3</sup> The court records are an important source and the best way to determine the harmonise relationship between Ottoman law and Islamic law. The roots of Ottoman law and the extent to which Islamic law was enforced are apparent in these courts' documents.<sup>4</sup> Nevertheless, the misconception that prompted certain scholars like Coşkun Üçök and

<sup>1</sup> Esposito J. L, *Muslim Family Law in Egypt and Pakistan: A Critical Analysis of Legal Reform, its sources and Methodological Problems* (Temple University, 1973), p,69.

<sup>2</sup> Abdullah Çolak, *İslam Aile Hukuku* (Ensar Neşriyat, 2021), 242.

<sup>3</sup> Mehmet Akif Aydın, *Kadı Sicillerinde İstanbul* (İstanbul: İSAM, 2010), 25.

<sup>4</sup> Ahmet Akgündüz, "İslam Hukukunun Osmanlı Devleti'nde Tatbiki: Şer'iyye Mahkemeleri ve Şer'iyye Sicilleri", *İslam Hukuku Araştırmaları Dergisi* 14 (2009), 13-48.

Ahmet Mumcu, as Fethi cited in his work, to argue that Ottoman law contradicted Islamic law stemmed from their omission of religious records in their investigations. Similarly, he added that the Western researchers asserted that Islamic law was not practiced during the Ottoman era; instead, they viewed it merely as a theoretical concept from books, overlooking the significance of historical records as source material for their research.<sup>5</sup>

The Republic of Turkey, the successor of the Ottoman Sultanate, has made radical changes in family law and many other fields. Inspired by the Swiss Civil Code regulating marriage, divorce, and related matters, the first Civil Code came into force in 1926. This law was repealed in 2001, and a new Civil Code was adopted. The inclusion of waiting for *'idda* among the permanent marriage hurdles in both legislation has been said to violate men's and women's equality. It has been argued that the waiting period delays the right to marry, a fundamental human right. In the background of these criticisms, it is seen that there are objections to the fact that women's waiting period for *'idda* is taken from Islamic law.<sup>6</sup> We included the regulations on the subject in the Turkish Civil Code in our analysis as a result of these and other concerns.

This study will discuss the alimony payment during the woman's waiting period and briefly touch on the opinions of Islamic jurists on the subject. Then, the applications of the Ottoman legal system, which inherited the ways of Islamic law and revealed a unique legal system with its original interpretations, will be presented. The research will show that Ottoman law is almost the same as Islamic law, especially in areas related to private law, such as family, inheritance, property, debts, and commercial and judicial law. As a result of Aydın's crucial research on the Ottoman legal system, he emphasised that Islamic law could be used in place of Ottoman law due to these parallels and similarities.<sup>7</sup>

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<sup>5</sup> Fethi Gedikli, "Osmanlı Hukuk Tarihi Kaynağı Olarak Şer'iyye Sicilleri", *Türkiye Araştırmaları Literatür Dergisi* 3/5 (2005), 187-213.

<sup>6</sup> Mehmet Akif Aydın, *Osmanlı Aile Hukuku* (İstanbul: Klasik, 2017), p, 12.

<sup>7</sup> Aydın, *Osmanlı Aile Hukuku*, 2017, p,23.

## THE MECHANISM OF `IDDA IN ISLAMIC LAW BRIEFLY

The Arabic word '*idda*' is referred to as "counting the quantity of what is tallied, menstruation" according to the *al-Miṣbāḥ al-munīr* dictionary,<sup>8</sup> it indicates the period that a woman needs to wait as to be permitted to remarry in the case of the marriage ending for any reason falling under the Islamic Law. In other words, '*idda* is the period where a woman must wait before being allowed to remarry in case, her marriage ends for any reason. This topic has received more attention in the Qur'an and Ḥadīth as compared to other aspects of family law, and the classical fiqh literature specifically mentions this phenomenon as one of the effects of ending a marriage.<sup>9</sup> When a marriage ends, or suspicion arises, according to 'Abd al-Ghanī al-Ghunaymī al-Maydānī, an early Ḥanafī scholar, the '*idda* is required for women.<sup>10</sup> The period of waiting is known as three menstrual cycles if she menstruates or three months if she does not menstruate, so what is meant is that wisdom is not just the innocence of the womb.<sup>11</sup>

The '*idda* begins in the event after the separations take place between spouses, such as divorce, *khul'* or *stripped off khul'*, which is based on traditional *fiqh* and is mentioned in the Qur'an and Ḥadīth, permits a woman to divorce her husband)<sup>12</sup>, *faskh* (annulment), or death. Women were not ordered to perform the '*idda* in vain but rather for a great purpose: to preserve the woman's dignity and free her womb from the child according to Islamic law.<sup>13</sup>

The '*idda* of women between 15 and 55 who have never menstruated or irregularly menstruating is controversial.<sup>14</sup> When in

<sup>8</sup> Aḥmad ibn Muḥammad ibn 'Alī al-Fayyūmī al-Muqri', *al-Miṣbāḥ al-munīr fī Gharīb al-sharḥ al-kabīr*, 1987.

<sup>9</sup> Ishāq ibn Bashīr al-Azdī al-Sijistānī, Abū Dāwūd, *Sunan Abī Dāwūd* (Riyāḍ: Dār al-Risālah al-Ālamīyah, 2009), 2/324.

<sup>10</sup> Abdulḡanī b. Ṭālib b. Ḥammāde Meydānī el-Guneymī Ed-Dīmaşķī and Muḥammed Muḥyiddin el-'Abdulḡamid, el-Lübāb fī şerḥi'l-Kitāb, vol. 3 (Beyrut: Dāru'l-Kütübi'l-İlmiyye, n.d.), 80.

<sup>11</sup> Abdulḡanī b. Ṭālib b. Ḥammāde Meydānī el-Guneymī Ed-Dīmaşķī and Muḥammed Muḥyiddin el-'Abdulḡamid, el-Lübāb fī şerḥi'l-Kitāb, vol. 3 (Beyrut: Dāru'l-Kütübi'l-İlmiyye, n.d.), 80.

<sup>12</sup> Jamal J Nasir, *The Status of Women Under Islamic Law and Modern Islamic Legislation* (Brill, 2009), 129.

<sup>13</sup> *Al-aḥwāl al-shakhşīyah fī al- Sharī'ah al-Islāmīyah*, 336. H.

<sup>14</sup> Abdullah Çolak, *İslam Aile Hukuku* (Ensar Neşriyat, 2021), 242.

doubt, the woman waits until she is 55 years old and remains for three months, according to both Ḥanafīs and Shāfi‘is jurists. During this period, the women's alimony belonged to their husbands. According to Mālikīs and Ḥanbalīs, a woman in this position waits for nine months, the gestation period. As a precaution, she will remain for another three months due to an uncertain situation. Thus, she waits for a total of one year of *'idda*. Since the first ijtihād had no practice, the Family Law Decree enacted the *'idda* of women in this position as nine months.<sup>15</sup> In the case of a divorced-pregnant woman, or her husband dies, she has to wait until she gives birth. However, if such a woman has a miscarriage, and the cause of the miscarriage is clear, and her organs are evident, the *'idda* ends. Another situation is if she is divorced, she waits for three months *'idda*.<sup>16</sup>

As Islamic Law explains in a broader sense about financing and sustenance, it is an obligation to maintain one's own maintenance. Still, it may also be mandatory for others for marriage, kinship, and property. Spousal alimony means that the husband spends what is sufficient for the wife, with certain conditions, restrictions, and limits; this type of principle is given.<sup>17</sup> In Islamic law, and from the religious perspective, the husband must pay for the wife's maintenance. In the circumstances, the husband refuses to pay it without an excuse and is sinning with *Allah* Almighty in the hereafter. He raises his order to the judge to receive his punishment in this world for violating one of his legal duties imposed by marriage.<sup>18</sup> The Qur'an, Sunnah, consensus (*Ijma*), and analogical deduction (*qiyaās*) all support the husband's responsibility to spend on his wife.<sup>19</sup>

However, maintenance in different cases, like the *'idda* of a revocable divorce (*talāq raj'ī*), the husband is obligated to provide her

<sup>15</sup> Orhan Çeker, *Osmanlı Hukuk-ı Aile Kararnamesi* (Konya: Mehir vakfı yayımları, 2016), 60.

<sup>16</sup> Mehmet Selim Aslan, *İslām Aile Hukuku* (Bursa: Emin Yayınları, 2015), 262-263.

<sup>17</sup> Özcan Ruhi, “İslam Hukukunda Karı Koca Nafaka Mükellefiyeti” (Basılmamış Doktora Tezi, Erzurum, Atatürk Üniversitesi İslami İlimler Fakültesi, 1976),; Mehmet Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü* (İstanbul: Rağbet Yayınları, 2019), 359.

<sup>18</sup> Saffet Köse, *Aile Hukuku* (Ankara: Grafiker Yayınları, 2018), 358.

<sup>19</sup> Celal Erbay, *İslām Hukukunda Evlilik ve Hısımlık Nafakası* (Turkey: Rağbet Yayınları, 1998), 24.

all the needs during the waiting period, just like the wife's maintenance as usual, for she must have food, clothing, housing, and a servant-by agreement of the jurists, without dispute. The Shāfi' is claimed that the wife has no alimony unless she is pregnant.<sup>20</sup> Whereas the Ḥanafi school claimed that she is entitled to complete maintenance from her divorced husband during the waiting period. Moreover, most jurists agreed that the *'idda* after death, whether she was pregnant or not, there was no alimony for the end of the marital bond by death. Her deceased husband was obligated to spend on her while he is alive only, and this obligation ended with his death.<sup>21</sup> According to the view of the Mālikis, Shāfi'is, and Ḥanbalis, a woman divorced from her husband with suspicious intercourse before marriage; does not have alimony due to the interruption of the effect of marriage. For instance, al-Zuḥaylī stated that most jurists agreed that the *'idda* from a corrupt or suspicious marriage has no maintenance. Since she does not have care in an immoral marriage, she does not have maintenance during the waiting period.<sup>22</sup>

#### **'IDDA ALIMONY PRACTICES IN THE OTTOMAN PERIOD**

In Islamic law, *ṭalāq* can be recognised with the unilateral declaration of the will of the man without needing any court decision and registration. If the marriage is terminated by annulment, the annulment may take place with a judge's decision in some cases or without the decision of a judge in other cases. If the reason for the termination is a situation that requires research and investigation, such as the apostasy of one of the spouses, then a judge's decision is needed.<sup>23</sup> However, if a clear situation arises between the spouses, such as a permanent marriage prohibition, the annulment takes place without a court decision. The most common type of divorce in the Ottoman period was the mutual agreement, where the husband consents to divorce the wife in exchange where she has to pay a specific price. This type of divorce does not have to be by the court or registered by the official

<sup>20</sup> Al-Shīrāzī, *Al-Muhadhdhab Fī al-Fiqh al-Imām al-Shāfi'ī*, 2000, 5:17.

<sup>21</sup> Aḥmad ibn 'Alī Abū Bakr al-Rāzī al-Jaṣṣāṣ al-Ḥanafī, *Aḥkām al-Qur'ān* (Lebanon/ Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1405), 317.

<sup>22</sup> Wahbah ibn Muṣṭafā alzuḥaylī, *Alfiqhu al'slāmyyū w'dllatuhu* (Syria: Dār al-fkr-Dimashq, 1418), 459.

<sup>23</sup> Çeker, *Osmanlı Hukuk-ı Aile Kararnamesi*, 17.

authorities.<sup>24</sup> Nevertheless, it is seen that *ṭalāq* (divorce) and *Mukḥālah* (with agreement by both sides) sometimes occur in court, and what happens outside is widely recorded in the courts, although it is unnecessary. Regardless of how the marriage union occurs, some important reasons exist for the parties to register these transactions under the *Islamic Law* registers. The foremost of these reasons is the convenience of court records in proving that the divorce has occurred. For example, when a woman wanted to remarry in the future, these records made it easier for her to obtain a marriage license. It is also seen that women whom their husbands did not divorce because the Ḥanafī scholars did not allow to terminate the marriage through separation except for certain diseases, applied to the Divan-ı Hümayun (The Imperial Council was the de facto cabinet of the Ottoman Empire), and this institution made men consent to *ṭalāq* or *Mukḥālah* or compelled them to do so; thus they were recorded in the court records.<sup>25</sup>

On the other hand, two common types of entries are recorded in the *Islamic Law* registries of the court. One of them is the expense of *Nafaqa* (Financial assistance that a husband is obligated to provide for his wife during their marriage and for the duration following their divorce) during the marriage contract, along with the debts of dowry, more clearly known as *mahr-i-muajjal*<sup>26</sup>, and the *'idda* alimony related to divorce. And the other type is in the case of *Muḥālah* when a woman claims to dissolve the marriage where she waives her rights to dowry, *'idda*, and further agreed conditions.<sup>27</sup> Now, the article will try to explain the harmony between the theory of Islamic law and the practice of Ottoman Law by taking a closer look at the *'idda* alimony, which is one of the reasons these records align with the relevant records.

The dissolution of marriage appears in three forms in the *Islamic Law* registers: Divorce (*ṭalāq al-tafwīz*) with the man's unilateral declaration of will, *Muḥālah*, which the woman recognises giving up some of her rights such as *Mahr-i mu'ajjal* and *'idda* alimony, along with the last one being the separation declared by the court known as *Tafriq*,

<sup>24</sup> Erbay, İslâm Hukukunda Evlilik ve Hısımlık Nafakası, 12.

<sup>25</sup> Aydın, İslam ve Osmanlı Hukuku Araştırmaları, 2015, 170.

<sup>26</sup> See, Ömer Nasuhi Bilmen, *Hukuk-i İslamiyye ve Istilahat-ı Fıkhiye Kamusu* (Turkey: Ravza Yayınları, 1996.), 2/371.

<sup>27</sup> Aydın Zevkliler vd., *Yeni Medenî Kamuna Göre Medenî Hukuk* (Ankara: Turhan Kitabevi, 2015), 230.



it is a divorce type, which means divorce with a judge's decision. Among them, *talāq* (divorce) usually occurs entirely at the husband's request. In contrast, the woman usually requests a divorce in the case of *Mukhālah* and *tafrīq* (segregation).<sup>28</sup>

## DETERMINATION OF DIVORCE AND 'IDDA ALIMONY PAID

One of the most important consequences of the dissolution of the marriage union is the woman's waiting period for 'idda. There are two types of 'idda, one based on death and the other on divorce. A woman whose husband has died does not have the right to receive alimony during the 'idda, as she will inherit a share of her husband's property. Although there are differences in 'idda periods, every divorced woman has to observe 'idda. If the divorced woman is pregnant, her 'idda ends with the childbirth. According to the Ḥanafis, if a non-pregnant woman is menstruating, she has to observe three menstrual periods; if she is not menstruating, she must wait for three lunar months. Regardless of the duration of the 'idda, the divorced woman has the right to receive 'idda alimony and *sukna* (residence/living expense) during the 'idda period. When the court records were examined, it was found that 'idda alimony was included for various reasons. In some of these records, there are cases of determination of the payment of 'idda alimony at the man's or woman's request and the release of the man's embezzlement.<sup>29</sup>

The case regarding an application of a woman who wanted to register with the court the facts that her husband had divorced her and accordingly received the 'idda alimony in full and also that her husband has no responsibility towards her has been recorded as follows:

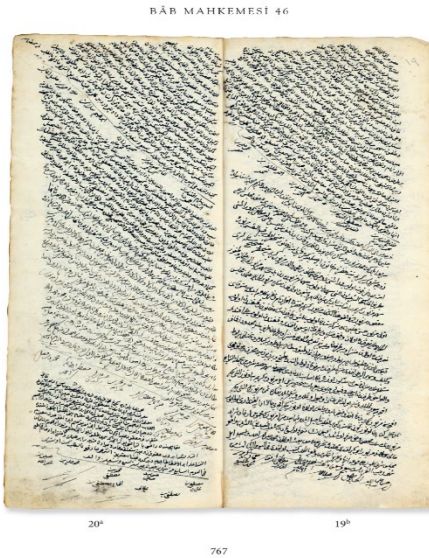
<sup>28</sup> Saadet Maydaer, "Klâsik Dönem Osmanlı Toplumunda Boşanma (Bursa Şer'iyye Sicillerine Göre)", *Uludağ Üniversitesi İlahiyat Fakültesi Dergisi* 16/1 (2007), 201-248. Miller, K.A. P, "Who says Muslim women don't have the right to divorce? A comparison Between Anglo-American Law and Islamic Law", *New York International Law Review* 22/77 (2009), 201-248.

<sup>29</sup> Hayreddin Karaman, *Mukayeseli İslam Hukuku* (İZ Yayıncılık, 2012), 1/382.

*“A woman named Hatice bint. Abdullah, who is known for introducing people named Mustafa bin Osman and Aziz Çelebi, who are among the residents of the Karabaş neighbourhood near Yenibahçe in Istanbul and who are known for her knowledge of religious issues, confessed in court as follows: My husband,*

*the defendant Ibrahim bin Ahmed, divorced me fifteen days before this petition was written. I took all of the previously agreed-upon eight hundred coins (mehr-i müeccel) and the hundred akçes (in total, nine hundred akçes/coins), the amount of indebtedness alimony from the defendant Ibrahim, which was embezzled as a debt. Thus, I released the embezzlement of the defendant Ibrahim from all my rights regarding the marriage law. The woman's*

*confession ended the case, and the court recorded the dispute upon her request (7 Rajab'l-mucerreb 1097).”*

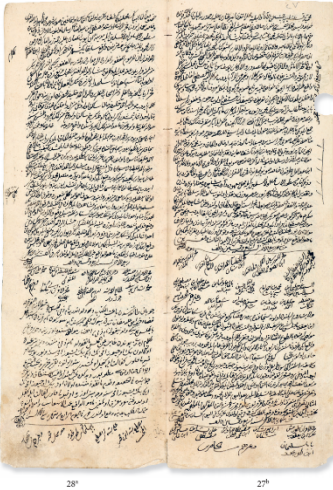


In the case mentioned above, Hatice bint. Abdullah, who lives in the Karabaş neighbourhood near Yenibahçe in Istanbul, said that her husband, İbrahim, divorced her fifteen days ago and declared that she received a total of 900 Akçe (Silver coin), including 800 Akçe *Mahr-i mu'ajjal* (deferred dowry) and 100 Akçe independence alimony, declaring that she was deprived of all rights related to marriage law. She demands that her husband acquit her possessions. The court found the request appropriate and recorded this situation between the spouses.

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<sup>30</sup> İstanbul Kadı Sicilleri Bab Mahkemesi 46 Numaralı Sicil (H. 1096-1097 / M. 1685-1686), ed. Coşkun Yılmaz vd., Türkiye Diyanet Vakfı İslâm Araştırmaları Merkezi (İSAM), İstanbul 2010, V. 19, p. 172, Hüküm no: 144.

Another situation is where a man who divorced his wife and applied for a court decision that he has fulfilled all his responsibilities towards his wife, especially *'idda* alimony which the court accepted, was recorded as follows:



*“The person named Cuma bin Mehmed, who lived in the İdrisköşkü neighbourhood, one of the districts of Ebu Eyüp el-Ensari (r.a.) town, and filed the lawsuit, paid the three hundred akce (coin) as a payment of Mahr and fifty akçes of iddah alimony in the court where his divorced wife Saliha bint. Abdullah was present. The defendant said that he divorced Saliha with three talaqs and that there was no dispute regarding the marriage law. The defendant, Saliha, also admitted that she had received all her receivables in the amount mentioned, so there was no dispute between them. Then, he said, “If*

*a lawsuit is filed directly or by proxy regarding the law of marriage, I will request the Supreme Court not to accept this lawsuit.” These conversations between the parties were recorded in writing. (27 Rabi al-Ahir 1054).”*

In the subsequent lawsuit, Juma bin Mehmed, who lived in the İdrisköşkü neighbourhood and applied the divorce be recorded, informed that he had paid 300 Akçe Mehr-i müecceli and 150 Akçe *'idda* alimony and divorced his wife Saliha bint. Abdullah, with three *Ṭalāq*, thus had fulfilled all his responsibilities towards his wife. The court accepted his application and the parties' confessions and recorded them. The wife accepted that she had obtained her rights and that there was no further conflict between her and her husband.<sup>31</sup>

What can be extracted from the two cases above is that the *dhimma*/responsibilities of the husband are released from the obligations such as *mahr* and *'idda* alimony after the marriage union ends with a divorce. However, although it is not obligatory to register a divorce in Islamic law, such a request can be made by the man or

<sup>31</sup> Eyüb Mahkemesi (Havass-ı Refia) 49 Numaralı Sicil (H. 1054 / M. 1644), V. 26, p. 149, Hüküm no: 146.

woman; it brings to mind the possibility of such divorces being *'muḥālah*. For a woman whose husband refused to divorce her but she still desired a divorce may have to sacrifice some of her rights, such as *'idda* alimony and *Mahr-i mu'ajjal*, where the husband may have requested registration to finalise the divorce because he wanted to ensure she will surrender her rights. Alternatively, it could request separation from her to ensure that her husband is in question without wanting it to be received or fulfilled after the divorce. The woman who confirms the registration process also creates the legitimate ground for a new marriage opportunity for herself.<sup>32</sup>

The man's request for registration, on the other hand, indicates that he wanted a record from the court that he had fulfilled all his responsibilities towards his divorced wife to prevent future disputes. In addition, these records can also be interpreted as the possibility of an agreement based on a secret agreement between the spouses that the man will divorce her in return for the woman waiving some of her rights. However, the absence of expressions such as *Mukḥālah* or *khul'* in the said records obliges us to accept that these records are a kind of possession release.

### **'IDDA ALIMONY FOR A DIVORCED PREGNANT WOMAN**

The most common causes related to *'idda* alimony in Islamic law registration are those associated with maintaining a pregnant woman separated from her husband. In the records, what is meant by *nafaka-i haml* is alimony, which is the right of the woman to receive from her estranged husband until the *'idda* period ends with childbirth in the event of the divorce occurring after the woman becomes pregnant. The

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<sup>32</sup> Meriwether, and J. E. Tucker. "A Social History of Women and Gender in the Modern Middle East," 1st ed., New York: Routledge, 1999, 141–76.

‘*idda* alimony of a pregnant woman whose husband divorced *bain talāq*, her request was recorded in the court records as follows:



“*Hatice bint. Abdullah, who lived in the Molla Hüsrev District of Istanbul, made the following claim against her ex-husband İsmail bin Mustafa before the court: My husband, the defendant İsmail, divorced me before. However, from my marriage to him, my pregnancy was revealed. Until my pregnancy ends, I demand that the defendant pay alimony in the amount determined by the Sharia. Thereupon, the judge ruled that the defendant İsmail should pay the plaintiff, Hatice, four akçes (coin) per day from the day of the lawsuit, and this provision was recorded in writing upon request. 15 Rajab'l-fard 1102.*”

In the case mentioned above, Hatice bint. Abdullah, residing in the Molla Hüsrev residential area in Istanbul, demanded from the court that her husband, İsmail, be ordered to pay ‘*idda* alimony in the amount required by law until the end of her pregnancy when it was discovered that she was pregnant after her divorce with ‘*bain talāq*’. From the day of the hearing, the court has also determined alimony to be 4 Akçe per day and has recorded this decision.<sup>33</sup> As in this case, the issue has been brought to the court numerous times and indicates that divorce during pregnancy happens very often, and pregnancy is one of the grounds for divorce.

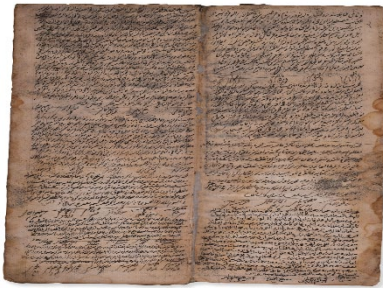
### ‘*İDDA* ALIMONY IN DIVORCES THROUGH MUḤĀLAH

In Islamic law, the authority to divorce is given to the husband. However, a woman who does not want to continue her marriage due to severe incompatibility<sup>34</sup>, the main reason of which is expressed as

<sup>33</sup> Bab Mahkemesi 54 Numaralı Sicil (H. 1102 / M. 1691), V. 20, p. 109, Hüküm no: 87.

<sup>34</sup> Saim Savaş, “Fetva ve Şer’iyye Sicillerine göre Ailenin Teşekkülü ve Dağılması” (T.C. Başbakanlık Aile Araştırma Kurumu, Ankara: Sosyo-Kültürel Değişme Sürecinde Türk Ailesi, 1992), 2/530.

"good-humoured behaviour" and dislike for her husband, can request a divorce from her husband in return for a price.<sup>35</sup> This practice, called *muḥālah*, is usually realised with the woman's request and paying the price, taking its source from the Qur'an (al Baqarah:229). *Muḥālah* is the separation between the husband and wife by mutual agreement, which is the most common form of ending the marriage in the Islamic Law registers.<sup>36</sup> The most important thing about the *muḥālah* is that the husband discards his obligation upon divorce, such as the rights of 'idda alimony, providing accommodation, food, etc., due to the fact of giving up uprights such as *mahr*, violence is realised, which will begin to be '*muḥālah*.'<sup>37</sup> In the event that this situation is not recorded in the future, there is a possibility that the woman will deny the *Muḥālah* and demand 'idda alimony<sup>38</sup> and *Mahr-i mu'ajjal* (differed dowry). At the same time, the man will be freed from responsibilities such as dowry, alimony, and *sukna* (accommodation) and entitles some of the woman's property by claiming that it is the price of *muḥālah*.<sup>39</sup> However, the court records will be evidence that will eliminate all these possibilities.



The case in which the woman demanded divorce through *Muḥālah* in return for the waiver of her 'idda alimony, *Mahr-i mu'ajjal*, and her right to *Sukná* (accommodation) was recorded as follows: "A woman named *Aise bint. Mehmed*, who lives in the *Seferikoz* district of *Istanbul*, said, "We have agreed (*muḥala*) with *Abdünnebi bin Yusuf*, who divorced me, in return for my differed dowry

(*mahr muaccel*), *iddah alimony*, and my right to *sukna*. For this reason, we do

<sup>35</sup> İbrahim Acar, "‘İddet’", *DİA* (İstanbul: DİA, 2000), XXI/467.

<sup>36</sup> Maydaer, "Klâsik Dönem Osmanlı Toplumunda Boşanma (Bursa Şer’iyye Sicillerine Göre)", 311.

<sup>37</sup> See. Bab Mahkemesi 3 Numaralı Sicil (H. 1077 / M. 1666 - 1667), V. 17, p. 721, Hüküm no: 931.

<sup>38</sup> See. Üsküdar Mahkemesi 531 Numaralı Sicil (H. 1204-1207 / M. 1790-1793), V. 81, p. 924, Hüküm no: 1579.

<sup>39</sup> See. Bab Mahkemesi 54 Numaralı Sicil (H. 1102 / M. 1691), V. 20, p. 415, Hüküm no: 509.

not have any debts to each other arising from the law of marriage that may be the subject of a lawsuit. Therefore, if a lawsuit is filed against this decision after today, I request that the court not accept the case. Thereupon, the defendant Abdünnebi confessed that he had divorced his wife through agreement (*khul*), as was said, and demanded that his rights be released from the debts in question. The decision made by the court in line with the demands of the parties was written down and recorded. 17 Rajab'l-mucerreb 1063.

In the case mentioned above, the woman named Aişe bint. Mehmed, who lives in the Seferikoz District of Istanbul, requested an opinion in return for waiving the right of 'idda, *Mahr-i mu'ajjal*, and *sukna* (accommodation), which her husband Abdünnebi had misused, and that the court decided in line with her request and deprived the woman of all her rights. It is stated that her husband has been acquitted of his inappropriate action.<sup>40</sup>

Some divorce records state that the case of a woman renouncing her rights such as mahr and 'idda alimony, although there is no objection. It is understood that such divorces are also implicitly *muḥālah*. For example, Babacık bin Musa gave up his half share in two sacks, a rug, a rope, twenty cubits of cloth, eight bundles of yarn, and chicken. At the same time, his wife Shahzade bint. Cevher renounced the five hundred akçe *mahr-i muajjal* (a deferred payment) and 'idda alimony; as a result, his divorce with 'bā'in *ṭalāq*' can be given as an example.

### **'IDDA ALIMONY IN DIVORCES THROUGH APOSTASY**

It has been stated above that one of the issues that terminates the marriage union in Islamic law is annulment (*faskh*). As in the case below, if the reason for the *faskh* is a situation that requires investigation, such as the apostasy of one of the spouses, the marriage union is terminated by the judge's decision. As a result of this divorce, which has the characteristics of 'bā'in *ṭalāq*, the man pays the *Mahr-i mu'ajjal* and 'idda alimony. He provides the woman with the opportunity of *Sukná* (accommodation). A case involving all these matters is recorded in the record as follows:

<sup>40</sup> Ahi Çelebi Mahkemesi 1 Numaralı Sicil (H. 1063-1064 / M. 1652-1653), V. 49, p. 58, Hüküm no: 14.

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“Meryem binte Mahmud from the Koruk Mahmud District of Istanbul claimed in front of the Davudpaşa Court that she was divorced from her husband Ibrahim within the confines of the bain talaq because he insulted her religion after only six days of marriage. Therefore, she demanded the court to pay her the previously agreed 33 kuruş (cents) mahr mueccel

(differed mahr), maintenance, and right to get accommodation. Defendant İbrahim also denied all other allegations, admitting he had intercourse with Meryem bint. Mahmud and that she had the right to 25 kuruş mahr to get only. The court also demanded that the plaintiff bring evidence for the eight cents in excess, as she claimed. Since the allegation of insulting the religion was impossible to prove, the court asked İbrahim to swear that he did not it. Defendant İbrahim refrained from taking the oath. Thereupon, the court decided that the claimant woman was divorced with the bain talaq, that the defendant İbrahim was advised to renew his faith, and that twenty-five kuruş mahr should be given to Meryem. In addition, it was reported to the parties before the court that the plaintiff Meryem consented to the five cents that the defendant İbrahim would give for the iddah alimony and the right to sustenance. Therefore this decision had to be complied with. 6 Cemaziyelevvel 1197.

Related to the case mentioned above, a woman named Meryem bint. Mahmud, who blasphemed her religion, applied to the court with the allegation that her husband divorced her with ‘*bā’in talāq*’ and demanded the remaining 33 kuruş (coin) *Mahr-i mu’ajjal*, ‘*idda* alimony and the right to *Sukná* (accommodation). When her husband İbrahim accepted that he owed his wife 25 kuruş (coin) as *Mahr-i mu’ajjal*, the court ended the marriage union and decided to fulfill the woman's demands.<sup>41</sup>

<sup>41</sup> Davud Paşa Mahkemesi 1 Numaralı Sicil (H. 1196-1197 / M. 1782-1783), V. 79, p. 564, Hüküm no: 713.



## DURATION, PAYMENT METHOD AND AMOUNT OF 'IDDA ALIMONY

Although 'idda alimony is primarily recorded in Islamic Law registries concerning the conditions mentioned above, these records also contain vital information such as the duration, the mode of payment, and the amount of alimony. Contrary to the Turkish Civil Code, in the Hanafi interpretation of Islamic law and Ottoman law, the alimony payment period is limited to the 'idda period of the woman. The alimony period for divorced women continues until the end of pregnancy if the woman is pregnant, three menstrual periods if she is menstruating, and three lunar months if her menstruation has stopped. With the expiration of the said periods, the man's responsibility for 'idda alimony also ends. It is seen that the duration of alimony is included in the records with expressions such as "until the end of 'idda,<sup>42</sup>" "until the end of *inkizâ*, (until the end of her 'idda)<sup>43</sup>" and "until 'idda-i haml *munkaziye*, (until the 'idda of pregnancy ends)<sup>44</sup>" and thus, alimony is limited to the 'idda period only.

The amount of 'idda alimony is left to the discretion of the judge. In this case, the amount of maintenance is either directly or indirectly defined by expressions such as "*yevmî râyicü'l-tume three akçe*, (Three akçe per day according to the conditions of the time),<sup>45</sup>" "*nafaka-i 'idda-i mu'ayyene-i ma'lûmem* (certain known 'idda alimony)<sup>46</sup>" and "two hundred and fifty akçe denominated for my alimony.<sup>47</sup>" It was also included in the records that it was determined according to the conditions of the period or the practice in the society.

Paying alimony in person is the most common form of payment, as in the expressions "*Yedinden bi't-Tamam ahz u kabz eyledim*" (I

<sup>42</sup> Rumeli Sadareti Mahkemesi 21 Numaralı Sicil (H. 1002-1003/M. 1594-1595), V. 12, p. 151, Hüküm no: 136.

<sup>43</sup> Rumeli Sadareti Mahkemesi 21 Numaralı Sicil (H. 1002-1003/M. 1594-1595), V. 12, p. 213, Hüküm no: 223.

<sup>44</sup> See. Bab Mahkemesi 54 Numaralı Sicil (H. 1102 / M. 1691), V. 20, p. 109, Hüküm no: 87.

<sup>45</sup> See. Rumeli Sadareti Mahkemesi 80 Numaralı Sicil (H. 1057-1059/M. 1647-1649), V. 15, p. 123, Hüküm no: 114.

<sup>46</sup> Bab Mahkemesi 11 Numaralı Sicil (H. 1081 / M. 1670-1671), V. 53, p. 428, Hüküm no: 524.

<sup>47</sup> Ahi Çelebi Mahkemesi 1 Numaralı Sicil (H. 1063-1064 / M. 1652-1653), V. 49, p. 84, Hüküm no: 63.

personally have taken it all)<sup>48</sup>" and "*bana teslîm ben dahi ahz u kabz'* (It was delivered to me, and I received it),<sup>49</sup> '*ve tesellîim eyledim*' (I have received)." Sometimes, the payments are recorded with expressions such as "due to my power of attorney,<sup>50</sup>" where the payments are paid by power of attorney (*vekâleti hasebiyle*) in some cases,<sup>51</sup> and the record "on account of my custody." In rare cases, it was recorded with statements such as "Ali bin Abdullah is the guarantor of the amount mentioned above until Friday," where a deadline is given for the alimony payment on the condition that he presents a guarantor.<sup>52</sup>

After looking at the records mentioned above, it is possible to say that all of the decisions regarding '*idda* alimony are fully compatible with the Ḥanafî interpretation of Islamic law. On the other hand, it is seen that Ottoman law differs entirely from Turkish Civil Law based on the records related to the duration of alimony. To make this comparison more sound, it is necessary to examine how the subject is regulated in the Turkish Civil Code.

### **'*İDDA* PERIOD AND POVERTY ALIMONY IN THE TURKISH CIVIL CODE**

It is essential to point out that the wisdom and benefits of '*idda*, which aims to end the effects of the previous marriage ultimately and to make the woman ready for a new marriage, allows the husband to think once more in '*bâ'in talâq*', to understand whether the woman is pregnant, to respect the memory of the deceased husband. For this reason, '*idda* refers to the period that every woman whose marriage has ended must wait in any case. While the period of '*idda*, which is seen to be transferred from Islamic Law to Civil Law and stipulated for women in divorce, is determined as three menstrual cycles/purity

<sup>48</sup> Ahi Çelebi Mahkemesi 1 Numaralı Sicil (H. 1063-1064 / M. 1652-1653), V. 49, p. 84, Hüküm no: 63.

<sup>49</sup> Bab Mahkemesi 46 Numaralı Sicil (H. 1096- 1097 / M. 1685- 1686), V. 19, p. 464  
Hüküm no: 552.

<sup>50</sup> Ahi Çelebi Mahkemesi 1 Numaralı Sicil (H. 1063-1064 / M. 1652-1653), V. 49, p. 284, Hüküm no: 405.

<sup>51</sup> See. Bab Mahkemesi 3 Numaralı Sicil (H. 1077 / M. 1666- 1667), V. 17, p. 321, Hüküm no: 363; Ahi Çelebi Mahkemesi 1 Numaralı Sicil (H. 1063-1064 / M. 1652-1653), V. 45, p. 59, Hüküm no: 15.

<sup>52</sup> Rumeli Sadareti Mahkemesi, V. 12, p. 213.

periods in Islamic law, except for some exceptional cases, this period is defined as 300 days in the Turkish Civil Code.

Article 132 of the Turkish Civil Code does not impose any restrictions on the man if the marriage has ended. It only gives re-marriage permission to the woman 300 days after the end of the marriage. Nevertheless, the waiting period, or " *idda* period," ends only when the woman gives birth. Apart from childbirth, there are two ways for a woman to remarry before the end of 300 days: first, she wants to remarry with her divorced spouse, and second when she finds out from her divorced spouse that she is not pregnant. In both cases, the court should lift the waiting period.<sup>53</sup>

The waiting period specified in the law is still referred to as the period of *idda* in doctrine and practice. The reason for accepting this period is that within the 300 days that meet the most prolonged gestation period, it is clear whether the woman is pregnant from her previous marriage or not. Thus, the mixing of lineages can be prevented.<sup>54</sup> In Article 2 (i) of the Marriage Regulation, the legal waiting period is defined as the three-hundred-day waiting period required for remarrying the woman whose marriage has ended to prevent lineage mixing.<sup>55</sup> Since there is no possibility of mixing lineage, the relevant law stipulates this. Accordingly, if a woman wishes to remarry with her divorced husband, there is no need to wait for the *idda* period to expire or to abolish this period by a court decision. Some lawyers explain that even if divorced spouses want to marry each other again, obliging women to apply to the court to remove the waiting period is to prevent abuse of divorce.<sup>56</sup> On the other hand, if a woman wants to marry another man before the *idda* period expires, she should apply to the court with a medical report stating that she is not pregnant and demand that the court abolish the *idda* period.<sup>57</sup>

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<sup>53</sup> "Türk Medeni Kanunu (TMK)," Pub. L. No. 24607, 4721 Kanun No: 4721 (2001).

<sup>54</sup> Aydın Zevkliler et al., *Yeni Medenî Kanuna Göre Medenî Hukuk* (Ankara: Turhan Kitabevi, 2015), 230.

<sup>55</sup> "Evlendirme Yönetmeliği, m. 2/i," Resmî Gazete, November 7, 1985.

<sup>56</sup> Esat Arsebük, *Medenî Hukuk II* (Ankara: Recep Ulusoglu Basımevi, 1940), 622-623.

<sup>57</sup> Seda Gayretli Aydın, "Kadın ve Kanuni Bekleme Süresi", *Türkiye Barolar Birliği Dergisi* 136 (2018), 266.

It may take a long time for the woman to present a report that she is not pregnant, for the court to decide to cancel the waiting order and for this decision to become final. For this reason, it must be possible that if the woman remarries before the end of the waiting period, which does not prevent a marriage, her second marriage is not considered invalid. This situation is regulated in the TMK (Türk Medeni Kanunu/ Turkish Civil Code) as follows: "Marriage of a woman before the waiting period ends does not necessitate the nullity of marriage."<sup>58</sup> However, suppose the woman marries during the waiting period and gives birth to a child. In that case, the child's lineage relationship with the father is regulated in TMK 290 as follows:

*"If the child is born within three hundred days of the end of the marriage and the mother remarries, in the meantime, the husband in the second marriage is considered the father. If this presumption is disapproved, the husband in the first marriage is considered the father."*

When the relevant laws and regulations are evaluated together, it is understood that the three-hundred-day waiting period for the woman who wants to remarry is not a necessity but only a temporary prevention to a marriage and a measure to protect lineage.<sup>59</sup> It is more appropriate to keep the *'idda* period to prevent the possibility of mixing the lineage and preserve the child's family's rights. Therefore, the marriage that took place before the expiry of the period is considered legally valid.

On the other hand, it can be said that the regulations regarding the definition and justification of *'idda* in Turkish Law are in parallel with Islamic Law, and both legal systems aim to protect the lineage depending on whether the woman is pregnant or not. However, some secular approaches that ignore the physiological, psychological, cultural, and moral wisdom and benefits of *'idda* argue that the waiting period should be abolished immediately. According to these approaches, it is stated that pregnancy and lineage can be easily detected with today's medical technology.<sup>60</sup>

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<sup>58</sup> Türk Medeni Kanunu (TMK), 154.

<sup>59</sup> Hüseyin Hatemi - Burcu Kalkan Oğuztürk, *Aile Hukuku* (İstanbul: Vedat Kitapçılık, 2016), 58.

<sup>60</sup> Zevkliler et al., *Yeni Medenî Kanuna Göre Medenî Hukuk*, 197.

Therefore, the justification for the waiting period in Article 132 of the TMK has lost its validity. The waiting period is only for women constitutes a violation of equality between men and women and also prevents the right to marry, which is one of the fundamental human rights recognised by Article 12 of the Universal Declaration of Human Rights. For these and similar reasons, it is claimed that the waiting period violates Article 10 of the Constitution, the principle of equality between men and women regulated in the Turkish Civil Code, and international treaties to which Turkey is a party.<sup>61</sup>

The following points have been overlooked in all these criticisms. In the context of the protection of lineage, women, and family, *'idda* has preserved its existence under the influence of religious, cultural, and social factors; except for the differences in the duration, it has gained a universal quality in terms of purpose and scope.<sup>62</sup> *'idda* appears to be a precaution to determine whether the woman is pregnant from her husband and to prevent lineage confusion. It also allows the husband to think once more in *'raj'ī ṭalāq*' and the husband and wife in *'bā'in ṭalāq*'. Moreover, it also has essential purposes and wisdom, such as symbolising respect for the husband and loyalty to the home if the marriage ends with the husband's death, protecting the woman against difficult situations, and preparing her for the new life she will establish.<sup>63</sup>

The claim that the waiting period is a limitation of entitlement for women also lacks any scientific basis because women naturally have different physiological characteristics. As a result, the 300-day waiting period, starting from the end of the marriage, for the woman whose marriage has ended to remarry is a rule derived from the civil law, and it is not possible to accept this rule as a limitation of legal capacity. In the same way, perceiving it as a limitation on legal capacity due to her innate biological characteristics, such as being a mother,

<sup>61</sup> Odabaşı et al., “Medeni Kanunun Bekleme Süresi İddet Müddeti İle İlgili 132. Maddesinin Kadın Hakları Ve Modern Tıptaki Gelişmeler Işığında Değerlendirilmesi.” *Fe Dergi: Feminist Eleştiri* 10, no. 1 (2018): 111–19.

<sup>62</sup> Vildan Sali Duman, “İslâm ve Türk (TMK) Aile Hukukunda İddetin Hamilelik ile İlişkilendirilmesi”, *Kilis 7 Aralık Üniversitesi İlahiyat Fakültesi Dergisi* 8/2 (2021), 698.

<sup>63</sup> Halil İbrahim Acar, *Anahatlarıyla İslâm Aile Hukuku* (Bursa: Emin Yayınları, 2014), 375.

means ignoring all aspects of women. Therefore, this situation cannot be perceived as disrupting equality between men and women.<sup>64</sup>

In the context of protecting lineage, women, and family, *'idda* has gained a universal quality in terms of purpose and scope and has taken place in many legal systems, except for the differences in durations. Although the waiting period, which is also included in the Turkish Civil Code, is similar to the period of *'idda* in Islamic Law in terms of purpose, there are some essential differences. While the TMK limits the waiting period to 300 days for divorce and, accordingly, for all women, the duration of *'idda* varies according to the reason for the dissolution of the marriage and the particular circumstances of the woman in Islamic Law. In Islamic law, a woman whose husband dies also expects *'idda* apart from divorce. It is the same in both legal systems, where the waiting period ends when the woman gives birth.

On the other hand, unlike the TMK, there are cases in Islamic Law where the waiting period for remarriage is also valid for men. For example, a man cannot marry his wife's sister or aunt unless the *'idda* of the woman he divorced ends. A man who has divorced one of his four wives cannot marry a fifth woman before the *'idda* of his divorced wife ends. A man who divorces his wife with three *ṭalāqs* cannot marry her unless the woman he divorced marries someone else, then divorces him and fulfils her *'idda*.<sup>65</sup>

## POVERTY ALIMONY IN THE TURKISH CIVIL CODE

In the Turkish Civil Code, expenses given after the divorce are called alimony and are regulated as follows:

*“The party who will fall into poverty due to the divorce may ask for alimony indefinitely in proportion to his financial strength from the other side for his livelihood, provided that his fault is not more severe.”*<sup>66</sup>

<sup>64</sup> Uyanık, Memet Zeki. “İslâm Aile Hukukunda Evlilik ve Boşanma Nafakası Bağlamında Süresiz Nafaka Yasası.” Necmettin Erbakan Üniversitesi İlahiyat Fakültesi Dergisi, no. 47 (2019): 57–87.

<sup>65</sup> Duman, “İslâm ve Türk (TMK) Aile Hukukunda İddetin Hamilelik ile İlişkilendirilmesi”, 701.

<sup>66</sup> Türk Medeni Kanunu (TMK), 175.

The purpose of poverty alimony is to be supported financially by the other spouse so that the spouse who will fall into poverty due to divorce and unable to support himself can continue his life and make a living. In addition, the spouse seeking alimony must have fallen or will fall into poverty at the time of the divorce. Poverty alimony cannot be requested because of falling into poverty later on.<sup>67</sup>

Although articles 175 and 176 of the TMK, which regulate the poverty alimony, are regulated in which cases the poverty alimony should be ruled, the concept of poverty has yet to be defined. However, the amount of alimony has been determined by putting various criteria regarding the idea of poverty in the doctrine, e.g. poverty is expressed as the state of not being able to earn a living with their financial means. It is stated that spouses who cannot meet their pressing needs with their income will fall into poverty after divorce.<sup>68</sup> This shows that the judge will determine the poverty criterion in alimony cases by using his discretion within the framework of the specifics of the concrete case and the principle of equity.<sup>69</sup>

The amount of alimony should be proportional to the financial power of the alimony obligor; in Article 175 of the TMK, it is regulated with the expression "... In proportion to its financial power...". In this case, if the alimony obligor cannot pay financially, that is, if his financial strength is sufficient to meet his minimum living expenses, alimony will not be awarded.<sup>70</sup>

Another issue regarding alimony in the Turkish Civil Code is the demand for maintenance and the non-discrimination of gender regarding this right to demand. In other words, the woman can also be responsible for the divorce alimony. Despite this, when judicial decisions are examined, it is seen that poverty alimony is mainly ruled in favour of women and rarely in favour of men.<sup>71</sup> Another issue related to the alimony in the TMK is that alimony does not have a specific

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<sup>67</sup> Turgut Akıntürk- Derya Ateş, *Türk Medeni Hukuku-Aile Hukuku I* (İstanbul: Beta Yayınları, 2016), 176.

<sup>68</sup> Mecit Demir, *Türk Medeni Hukuk Öğreti ve Uygulamasında Yoksulluk Nafakası* (İstanbul: Seçkin Yayıncılık, 2018), 17.

<sup>69</sup> Bilge Öztan, *Aile Hukuku* (Ankara: Turhan Kitabevi, 2004), 502.

<sup>70</sup> Büşra Odabaşı, "Yoksulluk Nafakasında Süre Sorunu", *İstanbul Barosu Dergisi* 94/2 (2020), 44-82.

<sup>71</sup> Odabaşı, "Yoksulluk Nafakasında Süre Sorunu", 49.

duration. The basis of this regulation is the "principle of solidarity after marriage," which is found in the Swiss legal doctrine, which is the source of the TMK.<sup>72</sup> According to this principle, even if all the obligations arising from marriage have been removed with the finalisation of the divorce decision, the party who cannot make a living on his own should be given the right to demand alimony.<sup>73</sup> Due to this recognised right, although there is no legal bond between them, the spouse who becomes impoverished can receive alimony from his/her divorced spouse for a certain period of life.

The everlasting nature of alimony can cause many problems. First, this situation makes it difficult for both parties to establish a family by entering a new marriage after the divorce. Whether the divorced man's financial situation is below the expected level compared to a well-earning person, despite knowing this fact, continues to pay alimony for infinite numbers of years soon after his divorce, when he marries, alienates him from marriage. In the same way, the person has a negative attitude towards a new marriage after the divorce. Therefore, the everlasting nature of alimony benefits the poorer of the divorced spouse and causes financial and morale problems for the ex-spouse, which is incompatible with the principles of justice and equity.<sup>74</sup>

Islamic law protect women's rights before marriage and assigned them dowry, residence, and alimony. Even if the woman is at fault during the *'idda* after divorce, the husband is always responsible for alimony. However, this man's responsibility was limited to the period of *'idda* of the woman, and thus the uncertainty about the maintenance was prevented.<sup>75</sup> Contrary to the TMK, even if the woman is rich, she

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<sup>72</sup> Türk Medeni Kanunu (TMK), 175.

<sup>73</sup> Gediz Kocabaş, "Evlilik Sonrası Dayanışma İlkesi ve Bu İlkenin Sınırı Olarak Clean Break İlkesi Doğrultusunda Yoksulluk Nafakası Belirleyici Ölçütler", *Marmara Üniversitesi Hukuk Fakültesi Dergisi* 19/1 (2013), 360.

<sup>74</sup> Memet Zeki Uyanık, "İslâm Aile Hukukunda Evlilik ve Boşanma Nafakası Bağlamında Süresiz Nafaka Yasası", *Necmettin Erbakan Üniversitesi İlahiyat Fakültesi Dergisi* 47 (2019), 82. Emine Gümüş Böke, "İslâm Hukuku Açısından Kadının İddet Nafakası", *Düzce Üniversitesi İlahiyat Fakültesi Dergisi* 4/2 (2020), 93-112.

<sup>75</sup> Uyanık, "İslâm Aile Hukukunda Evlilik ve Boşanma Nafakası Bağlamında Süresiz Nafaka Yasası", 73.



is entitled to alimony at the time of the divorce without the need to make any demands. The amount of maintenance is expressed with the concept of "*ma'ruf*" (equitableness) in al Quran, Chapter al Baqarah: 233 and the scholars of each age can adapt to their own conditions. In this respect, Islamic law is similar to the Turkish legal doctrine. Under the Turkish legal system, the amount of alimony is determined at the judge's discretion. Alimony is automatically paid in the case of one of the parties' deaths and the alimony creditor's remarriage, according to Article 176/3 of the TMK. If the creditor lives out of wedlock, leads a disgraceful life, and his poverty fades, it dissolves with a court ruling. However, under Islamic law, the obligation of alimony is limited to the period of *'idda* and ends only when the period of *'idda* expires. In this respect, it is seen that the time limit in Islamic law is tied to more objective criteria.

## CONCLUSION

The marriage contract, established soundly in terms of its origin and qualification, obliges the man to pay alimony to his wife. Regardless of the financial situation of the husband and wife, the alimony obligation, which continues as long as the marriage union continues, ends with the end of the marriage as a rule.

There are some consequences of ending the marriage bond. One of them is that the woman waits for the *'idda* for a time determined by the religion according to the situation that terminates the marriage. One of the consequences of the termination of marriage is the payment of alimony to the woman waiting for *'idda*. According to the Ḥanafī jurists, the alimony of a woman waiting for both *'raj'ī*, *bain*, and termination *'idda* belongs to her husband. The Mālikis and Shāfi'ī jurists, on the other hand, do not consider *'idda* alimony necessary for a woman who is not pregnant and divorced by '*Bain Ṭalāq*.' There is a consensus that the woman awaiting the '*'idda* of death will receive a particular share of her husband's inheritance and will not need additional alimony. The Ḥanafīs differ from other schools in that the right of alimony will continue to be maintained by a woman who only waits for *bain Ṭalāq 'idda*. In the same way, there is an agreement that the right of alimony of a woman who completes her *'idda* due to termination and divorce will also end. There is also an agreement that the man who divorces his wife with '*raj'ī ṭalāq*' is responsible for alimony during the *'idda* period.

It has been seen that the cases regarding the *'idda* alimony, which are the subject of divorces made through *Mukḥālah* in the *Islamic Law* registers, have been concluded entirely according to the Ḥanafī interpretation of Islamic Law. Therefore, it supports the claim that the Ottoman legal order was shaped according to the Ḥanafī interpretation of Islamic Law, as in many private law fields. The Turkish Civil Code, which determines the duration of *'idda* as three hundred days in all cases and allows it to be terminated by a court decision when necessary, differs entirely from Islamic law in this respect.

Another difference is that the spouse, who will fall into poverty due to divorce and cannot provide for himself, will pay the alimony. According to this regulation, the woman can also be responsible for the divorce alimony. Although this is the case in theory, when judicial decisions are examined, it is seen that poverty alimony is mainly ruled in favour of women. In addition, Islamic and Ottoman law, which limited the *'idda* alimony with the duration of *'idda*, differs from the Turkish Civil Code, which does not set a time limit on poverty alimony. It is understood that all these differences do not consist of simple regulations but arise from the philosophical foundations on which the legal systems are based. Because Islamic and Ottoman law establishes the rights and obligations between men and women on the marriage bond, terminates the commitments with the disappearance of this bond.

In Turkish Law, the continuation of the alimony obligation under any name after the termination of the marriage union is not based on a factual legal basis. Also, it opens the door to abuse and long-lasting hostilities. In this case, it is fairer to limit the rights and obligations of spouses to each other to the existence of a marriage bond, as stipulated by Islamic and Ottoman Law. Otherwise, such a practice devoid of legal basis will lead to unjust gain, avoidance of marriage, and show marriages.