Chief Qadi (Qadi l-Jama‘a), Non-Qadi Judges, Almoravid Rulers and the Limits of Adjudication in Matters of Hudud Punishments

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I. Introduction
II. The Judiciary in al-Andalus with Special Emphasis in the Almoravid Period (Last Quarter of the 11th Century-Second Half of the 12th Century)
III. A Case Study on the Judiciary in the Almoravid Period: Maliki Legal Doctrine on Stoning to Death as a Punishment for Zinā
IV. Conclusion
I. Introduction

In a paper on stoning to death as punishment for *zinà* (illicit sexual intercourse) in classical Maliki doctrine [Serrano Ruano 2005], I dealt with Muslim jurists’ alleged ambivalence towards *zinà*, i.e. they held that *zinà* deserved to be treated with the greatest possible severity whereas they shaped the relevant legal doctrine in a fashion to render the implementation of the established punishments almost impossible. Focusing on the doctrine of the Andalusi jurist Ibn Rushd al-Jadd (d. 1126), I concluded that a useful consideration to approach that apparent contradiction was *qadis’* actual position in the Islamic judicial hierarchy *vis a vis* non-*qadi* judges and political authorities.

According to a study published recently, it is the need to counterbalance the non-negotiable character assigned to *hudud* punishments by Islamic legal doctrine
what seems to explain the introduction of a series of exceptions that prevent their actual translation into practice [Gleave 2009: 257](1). Regarding the violence inherent to these penalties and state involvement therein, the author points to Muslim jurists’ ritualistic approach and to its having served a series of religious and political ends [Gleave 2009: 272]. Both Imami Shi‘i and Sunni jurists appear to have made the implementation (iqama) of hudud punishments like stoning for zinà conditional on the presence of a legitimate political authority and on respect for the established judicial procedure [Gleave 2009: 261, 272]. However, while the Imami Shi‘is stressed the former requirement and used discussion on iqamat al-hudud to explore state legitimacy and challenge existing conceptions, the Sunnis are said to have focused on procedure, “rather than the more fundamental issue of the legal powers of the judge, or more broadly, the state” [Gleave 2009: 256]. These conclusions are drawn from a series of texts including Sahnun b. Sa‘id al-Tanukhi’s al-Mudawwana al-kubrà, which has been selected to represent the Maliki position [Gleave 2009: 259].

In what follows, I return to the sources used in the former paper [i.e. Serrano Ruano 2005] to explore further the interconnection among doctrinal development, judicial organization and the religious justification of political authority in Almoravid al-Andalus(2). Ultimately, the relevance of context is shown as well as the need to nuance the above described positions regarding the relationship between legitimacy to carry out hudud punishments and judicial competences.

II. The Judiciary in al-Andalus with Special Emphasis in the Almoravid Period (Last Quarter of the 11th Century-Second Half of the 12th Century)(3)

1. Qadis and Rulers in al-Andalus

According to classical Islamic legal doctrine, qadis occupy the highest rank in the hierarchy of judicial authorities in charge of imparting justice in an Islamic state. Due to their many competences, they often had to rely on deputies and subaltern judges to represent them in localities far away from the center of their territorial jurisdiction, or to solve conflicts regarding specific legal matters such as marriage, the division of inheritances, irrigation rights etc.... However, in al-Andalus—like elsewhere—, qadis had to share the dispensation of justice with other judges,
appointed by the ruler specially to deal with crimes and torts [Vikør 2005]. In theory, these judges were not bound to apply the shari‘a as qadis were. In nominating these judges, rulers retained the capacity to interfere in their handlings at any moment. Beyond that, both the composition of the judiciary and the distribution of competences among its members were subject to considerable variation along the lines with the political development of al-Andalus(4) and more specifically with the ruler’s need to draw legitimation from the religious scholars. We can thus state that the more a ruler depended on the ‘ulama’ to exert power with sufficient religious legitimacy, the stronger the position of qadis vis a vis other magistrates. In the history of al-Andalus, the occasion to shift the balance in favor of the ‘ulama’ in a manner to empower them improve qadis’ actual position, was given by the Almoravid conquest.

2. Qadis in al-Andalus: Nomination, Rank and Competences

The Andalusi chief qadi differed from his oriental counterpart in that he used to be given the title of qadi l-jama‘a rather than that of qadi l-qudat. The singularity of such a denomination appears to reflect a significant restriction in his powers with respect to his oriental counterpart, since the former, unlike the qadi l-qudat, was not inherently entitled to nominate provincial qadis. Emile Tyan was right when he pointed out that the expression ‘qadi l-jama‘a’ referred to a judge that exerted legal and religious authority beyond the limits of his territorial jurisdiction and over all the Muslim subjects of the territory governed by the nominating authority [Tyan 1960: 185–191, Calero 2000: 375–381]. The superiority of the qadi l-jama‘a over provincial qadis and other magistrates was grounded in his being the judge of the capital and on his special relationship with the ruler, for whom he used to perform as advisor and ambassador. Apart from imparting justice within his territorial jurisdiction, the qadi l-jama‘a was also in charge of adjudicating legal matters of political relevance [Lagardère 1986: 136]. However the determining factor of that relationship was another distinct characteristic of the Andalusi chief qadi with respect to his Muslim counterparts of elsewhere, namely that the qadi l-jama‘a used to combine the judicial activity with the direction of the Friday prayer and the pronunciation of the khutba in the capital’s main mosque [Lagardère 1986: 135–136; Calero 2000: 381, 409]. The political relevance of the khutba is well known given that it was issued in the name of the ruler who received religious sanction through this procedure so that omitting his name amounted to a declaration of rebellion or independence [Wensinck 1998].
The political relevance of the charge of qadi l-jama‘a became manifest also in the ceremony of swearing allegiance to the new ruler (bay‘a) in which he took part as witness to the ensuing document in his quality of highest judicial authority of the land [Calero 2000: 371]. Due to his ties with the main mosque, the qadi l-jam‘a was also in charge of its administration and of the management of its properties and rents [Lagardère 1986: 135].

Also specific of al-Andalus was the use of the term sahib al-suq to refer to the market inspector instead of that of muhtasib employed in the rest of the Islamic world [Müller 2000a: 60]. Beyond these specificities, the most discernable pattern with respect to the distribution of judicial competences in al-Andalus was their total submission to the ruler’s will. Regardless of his legitimacy, the ruler appointed and dismissed judges, both religious and non-religious, at his will, although in the actual performance of their function and at least in theory, qadis, unlike non religious magistrates, were independent from political interference [Müller 2000b: 186]. Apart from the ruler, the governors of the provinces (wulat, sing. wali) were, at times, endowed with the capacity to nominate judges [Ibn ‘Iyad 1410/1990: 35–37].

A judge’s competences were determined by the nominating authority and were thus inherent to the nominee’s person and not to the definition of his judicial title as it might be found in Islamic legal literature. Therefore, we may find chief qadis entitled by the ruler to nominate “regular” qadis, deputies and non-qadi judges, but others might be not entitled to do so. This capacity, therefore, must not be generalized to all chief qadis nor considered exclusive of them, since “regular” qadis might nominate other qadis as well, e.g. Ibn Hamdin, qadi l-jama‘a of Cordoba, appointed Muhammad b. Ibrahim Ibn al-Sanna’ (d. 508/1114) qadi of several districts of his jurisdiction (ba‘d kuwari-ha, i.e. Cordoba); Abu Bakr Ibn al-‘Arabi, qadi of Seville, designated Khalaf b. ‘Abd al-Wahhab b. Muhammad al-Tujibi was appointed qadi of Liria in 546/1151 by the qadi of Murcia, Ziyadat Allah b. Muhammad Ibn al-Hallal [Ibn al-Abbar 1887-1889: 146, 156, Rodríguez Mediano 1997: 176]; ‘Abd al-Wahhab b. Muhammad al-Tujibi appointed qadi of Xativa and Orihuela [Ibn al-Abbar 1955: 1:72, Rodríguez Mediano 1997: 181]; the qadi of Granada, ‘Abd Allah Ibn Samajun, appointed qadi of Almuñécar his relative ‘Abd Allah b. Muhammad Ibn Jala’ (d. 526) [Ibn al-Zubayr 1993: I, 95; Rodríguez Mediano 1997: 180]. The case
of Muhammad b. Bashir, qadi l-jama‘a of Cordoba, who appointed Judi b. Asbat qadi of Elvira, a town close to Granada [Ibn al-Abbar 1887–1889: 8; Rodríguez Mediano 1997: 180], suggests that occasionally, chief qadis might be entitled to appoint qadis outside their territorial jurisdiction, although it is difficult to establish this assumption with more accuracy given the oscillations in the judicial and administrative division of al-Andalus, which still remains an unresolved question for students of its history [Calero 2000: 377, 387].

We can imagine Andalusi qadis standing in hierarchical superiority to the magistrates—be they hukkams or qudat—the ruler entitled them to nominate. However, beyond his personal religious and scholarly authority, as it has already been pointed out, a judge bearing the title of qadi l-jama‘a did not stand at the head of any centralized judicial body made up of provincial qadis. Moreover, during the Taifa period and as a consequence of the fragmentation of the central authority that far exerted by the Umayyads, there was more than a chief qadi in office simultaneously. Some of these magistrates were then given the title of qadi l-qudat. The Almoravids, for their part, maintained this latter denomination for the qadis of large territorial and administrative units, e.g. the qadi al-qudat of the eastern region (qadi qudat al-Sharq), of the western region (qadi qudat al-Gharb) and of the central region (qadi qudat al-Muwassata), and of their African provinces (al-Maghrib)(5). They also appointed a chief qadi l-jama‘a in Cordoba and another one in Marrakech. Whatever the relationship among all these high rank judges, Almoravids did not institute a magistrate to cover the whole of their empire and ranking higher than the rest; rather, as we have seen, they appointed a chief qadi for important administrative divisions and cities of al-Andalus and the Maghrib [Lagardère 1986: 138].

3. Non-Qadi Judges and the Curtailment of Qadis’ Competences

Together with qadis and their deputies (nuwwab, sing. na‘ib), during the caliphal and the Taifa periods (i.e. 10th and 11th centuries c.e.), a series of state agents enjoyed judicial powers, e.g. the market inspector (sahib al-suq or sahib al-shurta wa-l-suq), the magistrate in charge of the city (sahib al-madina), the magistrate in charge of “injustices” (sahib al-mazalim), the magistrate in charge of receiving cases that could not be adjudicated in first instance (sahib al-radd) and the chief of police (sahib al-shurta) [Müller 2000a: 60–68]. The distribution of competences among them was extremely complex as has been disclosed by Ch. Müller [1999: 203–362].
Drawing on Ibn Sahl’s collection of legal cases known as *al-Ahkam al-kubrā* [Ibn Sahl 1411/1991, 1417/1997, 2007], Müller has provided a series of keys to fare in the highly intricate history of Andalusi judicial organization of the taifa period and beyond, e.g. in 5th/11th century al-Andalus, the administration of penal justice was not exclusive of the *sahib al-shurta*; the *sahib al-madina* dealt with capital crime within the city, and the repression of crimes and torts was also entrusted to the *sahib al-suq*, to the *qadi* and to the governor [Müller 2000a: 63]. The *radd* and *mazalim* jurisdictions were not instances of judicial review [Müller 1999: 333–362]. Most importantly, secular magistrates and non-*qadi* judges followed the rules of *fiqh*, although they were not bound by them in the same way *qadis* were, and used to consult with *muftis* and legal experts before issuing their judgments [Müller 1999: 103–174].

In the Arabic sources that cover the history of the Almoravid period, specifically biographical dictionaries, references to the aforementioned secular judges become only sporadic. Among the few scholars known to have performed these functions in Almoravid al-Andalus stand ʻAbd Allah b. ʻAbd al-Rahman b. Jahhaf, who performed the *juttat al-radd wa-l-mazalim* in Valencia, apparently at the same time; Muhammad b. Asbagh b. Muhammad Ibn al-Munasif al-Azdi (d. 536/1141) who assumed the *khuttat ahkam al-mazalim* in Cordoba before being promoted to chief *qadi* of the city [Ibn al-Abbar 1887–1889: 455; Ibn Bashkuwal 1966: 554, Ibn al-Qattan 1990: 150, Rodríguez Mediano, 1997: 175]. The charge of *sahib al-shurta* disappears almost completely from the sources of that period [Rodríguez Mediano 1997: 176]; according to J. Bosch Vilá, the tasks assigned to this magistrate were assumed by the *sahib al-madina* [Bosch Vilá 1988: 130; Calero 2000: 410].

A singular exception to the former remark was the *sahib al-ahkam*. Magistrates bearing this title become quite abundant in that period [El Hour 2000–2001: 55]. In some cases they were appointed by a *qadi*, e.g. ʻAbd Allah b. Talha Ibn ʻAtiyya appointed *sahib al-ahkam* of Almeria by his relative and *qadi* of the city, ʻAbd al-Haqq Ibn ʻAtiyya, or Abu ʻAbd Allah Muhammad b. Saʿid, appointed by the *qadi* of Granada ʻAbd Allah b. Munʿim b. Samajun [Ibn al-Zubayr 1993: I,127; Rodríguez Mediano 1997: 180]. *Qadis’* entitlement to appoint this kind of magistrates included the capacity to supervise their handlings and to remove them if they saw it fit [El Hour 2000–2001: 59]. The Almoravid *sahib al-ahkam* might combine his functions with that of the *khutba*, like Abu ʻAbd Allah Muhammad b. ʻAbd Allah b. ʻAli b. Ahmad al-Saʿdi, *sahib al-ahkam* and *khatib* of Alcalá [El Hour 2000–2001: 61–62].

The charge survived well into the Almohad period, e.g. Abd Allah b. Yahyà b. Hani’ al-Lakhmi (d. 605/1208) who was qadi in some districts of Granada and sahib al-ahkam in the capital [Ibn Bashkuwal 1966: 539, Rodríguez Mediano 1997: 179]. We also know of Muhammad b. ʻAbd Allah Ibn Hawt Allah al-Harithi (d. 607/1210), sahib al-ahkam in Cordoba and Murcia, who had been appointed by his father, qadi in several cities of al-Andalus and the Maghrib [Ibn al-Abbar 1887–1889: 296, Rodríguez Mediano, 1997: 180].

According to Ibn Saʻid al-Maghribi (d. 1275 or 1286), a hakim was the qadi of an important city while that of a small town was called musaddad [Al-Maqqari 1968: 218; Ibn al-Khatib 1973–1977: 255; Calero 2000: 381]. However, there is no fixed rule to establish the territorial jurisdiction of these magistrates, be they called hakim or sahib al-ahkam. As we have seen, they might be attached to a capital in which there was a qadi as well, to some districts under a qadi’s jurisdiction, or to a town or area apparently independent from a qadi’s jurisdiction.

The functions of the sahib al-ahkam have not been fully clarified either. According to Ch. Müller, from the end of the 5th/11th through the 6th/12th century, the term hakim was increasingly applied to the same persons as were called sahib al-ahkam [Müller 2000a: 67, 70]. Some of the cases heard by the sahib al-ahkam in
5th/11th century Cordoba were closely connected to the markets [Müller 2000a: 76]. As to the Almoravid period, the assumption that the sahib al-ahkam was in charge of implementing the judgements issued by qadis is not backed by any source [El Hour 2000–2001: 51–53]. Some fatwâs issued by Ibn Rushd al-Jadd indicate that a sahib al-ahkam appointed by a qadi might perform as an arbiter to solve neighborhood disputes and marital conflicts [Ibn Rushd al-Jadd 1992: II, 171–172 number 22 and 27; El Hour 2000–2001: 60]. These tasks are the same Ibn Abdun (Sevilla, d. 530/1135) advised qadis to entrust to the hakim. In his well known treatise on hisba, Ibn Abdun remarked that qadis should designate a hakim to help them handle legal cases of secondary relevance arisen among the lower classes. Hukkam, according to Ibn ‘Abdun, should perform as arbiters rather than as real judges and by no means should they be allowed to oversee the awqaf funds and the properties of the orphans nor to intervene when state agents and matters of political relevance were concerned [Ibn ‘Abdun 1949: 52–53, 59; Rodríguez Mediano 1997: 175; Ibn ‘Abd al-Barr 1987: 499; Müller 2000a: 70]. However, the emphasis put in the hakim’s complete subordination to the qadi, should be considered to reflect rather the ideal judicial administration Ibn Abdun sought to promote than a faithful description of actual practice as we will see below.

The available data on Almohads’ judicial policy is very scarce in part due to their having banned the composition of works of applied law (furu’ al-fiqh) [A’rab 1985]. According to the historian Ibn ‘Idhari al-Marrakushi, the Caliph Abu Yusuf Ya’qub performed his judicial prerogatives—which were normally delegated to qadis—personally [Ibn ‘Idhari 1985: 173–174; Fierro 1999: 233 and ff]. Yet it is unclear whether this happened on a constant basis or only sporadically and whether it was the Caliph who pronounced the judgment or entrusted a qadi to adjudicate the matter, like Almoravid emirs used to do after having received complaints from their subjects [Serrano Ruano 2000b: 215–216]. There are mentions to the shurta in this period, although some of them suggest that the agents of this body performed as personal guard of the Caliphs [Ibn ‘Idhari 1985: 300].

From the Almohad period onwards, the ruler interfered also in qadis’ competence to supervise the administration of the pious fondations (ahbas or awqaf)—or to appoint an inspector to perform this task in their name [al-Bunnahi 1948: 112–115; Calero 1999: 71]—, a practice at odds with previous Andalusian judicial custom [Müller 2000b: 181–182] and which did not disappear completely with the Nasrids’
restoration of Malikism as official legal doctrine [Calero 2000: 406]. As to these latters, biographical dictionaries and legal responsa indicate that their qadi i-jama‘a, whose seat was Granada, the capital of the Nasrid kingdom, was not invested with the authority to appoint provincial qadis. This function was assumed by the sultan himself as well as the inspection and control of the activities of judges and jurists, which he occasionally delegated to the chief qadi [Calero 2000: 375, 381]. With respect to other magistrates, the terms hakim—applied to a non-qadi judge—, sahib al-ahkam, sahib al-radd and sahib al-mazalim are not mentioned in the sources relative to this period [Calero 2000: 375, 381] contrary to the sahib al-suq and the sahib al-shurta [Calero 2000: 411–413].

The scarcity of mentions to the magistrates in charge of the radd and the mazalim jurisdictions in the Almoravid period runs parallel to evidence from a contemporary collection of fatwas according to which legal scholars challenged the practice of entrusting non-qadis judges with functions which theoretically were exclusive to qadis®. This fatwa reveals the mustafti’s interest in having competences fixed to titles rather than to single persons. The petitioner was also concerned with establishing which titles implied the capacity to issue judgment and which not, whether nomination by a governor rather than by the ruler affected the validity of the decisions adopted by the judge or not and whether a governor’s own judgments were binding or not [Ibn ‘Iyad 1410/1990: 35–37 and 178–180; al-Wansharisi 1401/1981: X, 100; Lagardère 1986: 139].

4. Qadis and Non-Qadi Judges under the Rule of the Almoravids

The Maliki jurists of Almoravid al-Andalus had sound reasons to revive an old debate [Ibn Sahl 2007: 27–32; al-Wansharisi 1401/1981: X, 77–78; al-Bunnahi 1948: 5] with the intention to claim that the actual extension of qadis’ competences and independence be more in accordance with the theoretical definitions of the charge and less submitted to political ups and downs. Support to the Maliki school of law—with an emphasis in the need to abolish unlawful taxes and un-Islamic practices—and the exercise of jihad against the Christians to the north of the Iberian peninsula were in fact two key driving forces in the emergence and expansion of the Berber dynasty of the Almoravids. Quite cautiously, their successive rulers adopted the title of amir al-muslimin—rather than that of amir al-mu’minin commonly adopted by Caliphs—and payed formal allegiance to the Abbasid Caliph in Bagdad [Fierro 1997: 437–442].
The collaboration of the Maliki fuqaha’ of al-Andalus was thus essential for the local population to accept dominance by an alien power and to fill the gap in Almoravids’ religious legitimacy. Indeed, Maliki jurists are said to have reached an unprecedented degree of social and political power in this period, specially under the emir ‘Ali b. Yusuf b. Tashufin (r. 500/1106–538/1143) [Ibn ‘Abd al-Wahid al-Marrakushi 1968: 122–124, 1994: 150–152].

When they conquered al-Andalus, the Almoravids tried to promote Maghribi scholars of their trust to the post of qadi in the most important cities, especially in Granada which they considered their political capital in Iberia. However, these attempts proved unsuccessful and detrimental to social stability. After the first decades of Almoravid domination, local elites came to monopolize the charge, as they had done before the conquest [Rodríguez Mediano 1997: 176–179]. Eventually, when Almoravid power collapsed in al-Andalus, a significant number of qadis assumed political leadership in their cities [Fierro 1994]. The proliferation of these qadi-rulers at this particular moment of the history of al-Andalus may be not an accidental coincidence.

Almoravids’ dependence upon Maliki fuqaha’ invites to understand the practical disappearance of mentions to the sahib al-radd and that of al-mazalim in the sources of the Almoravid period in the sense of qadis’ recovery of the formers’ competences. In fact this assumption is confirmed, or at least not contradicted, by contemporary fatwà collections. Qadis’ recovery of the radd and mazalim jurisdictions under the Almoravids must not necessarily mean direct adjudication of matters falling under those rubrics. It meant rather that qadis became entitled to nominate the relevant magistrate and to supervise his handlings, e.g. Muhammad b. Asbah al-Azdi (d. 536/1141) was appointed sahib ahkam al-mazalim by his master, the qadi l-jama’a of Cordoba Abu l-Walid Ibn Rushd al-Jadd [Ibn Bashkuwal 1966: 554; Rodríguez Mediano 1997: 180](9), the main protagonist of section 2, below. In other cases, as it has been already pointed out, Almoravid rulers performed the mazalim jurisdiction personally although after having received the complaints of their subjects, entrusted one of their qadis to adjudicate the case.

There is also textual evidence suggesting that Almoravid qadis performed competences that had been earlier assumed by the market inspector. This means not only that the qadi may perform those competences personally but that he may become entitled to appoint and supervise the handlings of the magistrate in charge,
e.g. Muhammad b. Marwan Ibn al-Adib (d. 542/1147) who was appointed to the *ahkam al-suq* by the qadi of Valencia, Marwan Ibn ‘Abd al-‘Aziz [Ibn al-Abbar 1887–1889: 187; Rodríguez Mediano 1997: 179]. The rise of Ibn Abdun’s *hisba* treatise, which differs from its precedents in its very significant title of *Kitab al-qada’ wa-l-hisba*, for the first time joining together the *hisba* and the *qada’*, was in fact meant to provide textual support to the submission of the former to the latter’s jurisdictim. The qadi’s direct assumption of legal issues affecting morals and public interest (*maslaha*) finds additional reflection in contemporary *fatwà* literature through the inclusion of a chapter on *nafi al-darar* (“Avoiding harm”) [Serrano Ruano 2000a](10). Another salient feature of this development is the emergence of the figure of the *muhtasib*. He may refer to the market inspector previously called *sahib al-suq*, to an official appointed by the *qadi* or to a volunteer who informs the *qadi* of transgressions to morals, proper behaviour and public interest [Müller 2000a: 72]. Ch. Müller has observed that from the second half of the 5th/11th century the term *hisba* replaced gradually that of *suq* in the title of the market inspector. He also warns against viewing the terms *hisba* and *ihtisab* that appear in the sources relevant to that period as synonyms, since the latter did not necessarily refer to the supervision of the markets nor was it restricted to a specific judicial authority. He also points to the difficulty of distinguishing between the office of *hakim* and that of *muhtasib* in Andalusi biographical literature [Müller 2000a: 72–73](11).

In view of the aforementioned facts, it is thus reasonable to conclude that during the Almoravid period qadiship was reinforced with respect to non-qadi and governmental magistrates as a consequence of legal scholars’ support to the ruling dynasty. However, as I am going to show subsequently, if this was true, it did not mean the removal of the tension between *qadis* and non-*qadi* judges.

R. El Hour has shown that, according to some model nomination documents dating from the Almoravid period, a non-*qadi* judge like the *sahib al-ahkam* might be appointed directly by the emir, or by the local governor. Further, some of the documents studied by El Hour testify to the relevance of the charge which is described as *rutba ‘aliyya* [El Hour 2000–2001: 55–64](12). It seems, therefore, that Almoravid political authorities were interested in keeping the aforementioned tension between religious and governmental magistrates. The very fact that the Almoravid chancellery had to produce model nomination documents to deal with the specificities of the *sahib al-ahkam* is eloquent of the latter’s importance for the Almoravid judicial
administration. The documents are also illustrative of the tasks that used to be assigned to these magistrates, namely the fight against torts and corruption [El Hour 2000–2001: 57–59]. These competences add consistency to Ch. Müller’s aforementioned remarks as to the undistinguished employment of the terms hakim and sahib al-ahkam on the one hand, and muhtasib and hakim on the other hand. The sahib al-ahkam studied by El Hour was entitled to issue judgments and to implement punishments concerning the matters under his jurisdiction. In one of the documents, however, the nominee is instructed to submit serious offences to the qadi or to the sahib al-madina [El Hour 2000–2001: 57–59].

III. A Case Study on the Judiciary in the Almoravid Period: Maliki Legal Doctrine on Stoning to Death as a Punishment for Zinà

1. Islamic Legal Doctrine on Zinà

Muslim jurists qualify as zinà sexual relations between a man and a woman outside of marriage or legal concubinage. This conduct is considered to be a crime of hadd, that is, an act that infringes the “rights of God”—or, to put it another way, that exceeds the limits established by the Legislator—and that has been prohibited or sanctioned with punishments specified in the Koran or in the prophetic Tradition, i.e. banditry, apostasy, theft, fornication, calumny and wine consumption [Carra de Vaux and Schacht 1986; Coulson 1979: 64]. Punishment of zinà consists of stoning for the accused if they are muhsan (i.e. a free, Muslim adult who has enjoyed licit sexual relations within marriage), of one hundred lashes and exile for a year for those who are non-muhsan and of fifty lashes and six months exile for slaves(13). For the punishment to be applied the accused must have acted of their own will, which means that there is no punishment for someone who has been raped. Stoning as a punishment for zinà is not mentioned in the Koran, but in the sunna [Ibn Abi Zayd al-Qayrawani 1999: XIV, 231–232, Burton, 1993: 269–284]. This circumstance has never ceased to produce divergent opinions concerning the legitimacy of that punishment, until the present day [Coulson 1979: 64–65; A.E. Mayer 1979, Peters 2005: 159].

2. A Fatwà by Ibn Rushd al-Jadd

As we have seen, in order to claim the competences assigned to qadīs by
Islamic legal doctrine and to stress their independence from the ruler, Muslim legal scholars co-opted their capacity to lend religious sanction to the rulers in place. Through legal literature, they also stressed the need to apply the shari‘a for a ruler to be legitimate. One of the most salient markers of a rulers’ commitment to implement shari‘a was the fulfillment of the rules concerning statutory crimes (hudud) [Ibn ‘Iyad 1410/1990: 37, Peters, 1994, cfr. Gleave 2009: 261]. The implementation of these rules, however, presented a series of difficulties (on which see below) that could best be handled by experts. Jurists’ instructions were thus essential to an efficient implementation of the shari‘a. In consequence, the Islamic legal doctrine on hudud became particularly instrumental for jurists’ to negotiate the position of qadís within the Islamic judicial system and their relationship with those in power.

In what follows, I will illustrate the second strategy drawing on a fatwà issued by Ibn Rushd al-Jadd (Cordoba, 450/1048–520/1126), “the grandfather” of the famous philosopher, physician and legal scholar Ibn Rushd al-Hafid, better known in the Latin west as Averroes.

Ibn Rushd al-Jadd was not only one of the most important jurists of his time but also a central figure in the history of Malikism at a whole. Ibn Rushwal was appointed chief qadi of Cordoba by the Almoravid emir ‘Ali b. Yusuf in 511/1117 and asked to be relieved from this responsibility four years afterwards allegedly in order to devote himself completely to teaching, and to writing his books. The fact that he continued to assume the Friday sermon in Cordoba’s main mosque after resigning from qadiship testifies to his scholarly and religious authority. He combined this task with membership of the advisory board of jurists in the city (shurà)(14). With the Almoravids he acted on a number of occasions as a kind of official mufti [Fernández Félix 2003: 258–274; Sarrano Ruano 2006a].

From the many fatwas he issued during his life, I have selected one concerning stoning to death for illicit sexual intercourse (zinà) [Ibn Rushd al-Jadd 1987: III, 1394–1395, 1399; Ibn Rushd 1992: II, 1241, 1243, 1246; al-Wansharisi 1401/1981, IV: 252, 253]. The fatwà is relevant for two reasons. First it shows a non-qadi Almoravid judge in the exercise of his functions. Second, at a simple glance, Ibn Rushd’s answer has one presage an almost certain sentence of stoning for the accused. The fatwà reads as follows:

A certain judge from the area of Almeria (ba‘d al-hukkam bi-jihat al-Mariyya) sought the opinion of Ibn Rushd al-Jadd concerning the case of a woman who had
been denounced before that judge for having twice become pregnant as a consequence of an illicit sexual relation (min zinā) and for having killed the new-born babies. “And when she was brought before my presence (rufī’at ilayya)”, remarks the petitioning judge (mustaffī), “she was evidently pregnant and I asked her: Are you pregnant? to which she replied: Yes, I am pregnant, and [the child I am expecting] is so-and-so’s. I then asked her: And how did you become pregnant by him? She replied that he had not stopped following her and chasing after her until he raped her (akraha-ha)”. Before going on with the exposition of the facts, the petitioner paused to ask Ibn Rushd: “Can she use this allegation (da‘wā) in her defence?” “When she gave birth”, the judge adds, “she called witnesses to testify to the birth of the newly-born, recognising that she was its mother. And she was a muhsana woman.” Assuming that the woman was lying and that her allegation was a calumny (qadhf) against the man she had accused of having raped her, the judge asked Ibn Rushd: “If the slandered party (al-maqdhuf bi-hi) renounces his right [that she] be punished with the statutory sanction (hadd) [for calumny], is the sentence then to be annulled?”

Ibn Rushd responded: “It is compulsory that the woman who is guilty of what you have mentioned, be stoned (al-rajm). But only the chief qadi (qadi l-jama‘a) can issue a sentence of that kind. Therefore, submit the case to him so that he decides (yahkum) what sentence has to be applied, because provincial judges (hukkam al-kuwar) have no jurisdiction in matters of statutory punishments (hudud) that involve the death of the accused.”

3. Local and Temporal Coordinates of the Fatwā

It is difficult to specify the dates on which the consultation took place. It does not seem likely that Ibn Rushd occupied the post of chief qadi in Cordoba at the time of being consulted, because in the request for fatwā this point is not mentioned, contrary to other petitions that were addressed to him and in which he was specifically referred at as chief qadi of Cordoba [Ibn Rushd al-Jadd 1992: II, 1284, 1303]. Concerning the petitioner, the terminology employed in the fatwā (ba‘d hukkam jihat al-mariyya and hukkam al-kuwar) shows that he was a provincial judge and that his apelative as hakim was not used generically. This fact is confirmed by other petitions addressed to Ibn Rushd in which a distinction is made between qadi and hakim on the one hand, and between the province of Almeria (jiha, kura) and the capital of that province (al-hadra)⁴⁶. As to which area of the province of Almeria in
particular the term *jiha* employed in the *fatwà* might refer, it is difficult to be more precise. All we know is that during the Almoravid period, when the aforementioned Abu ʿAbd ʿAllah Ibn Hamdin (d. 514/1120) occupied the position of chief *qadi* in Cordoba, he nominated the *qadi* of Almeria, who consequently was accountable to Cordoba [El Hour 2006: 86]. However, ʿAbd al-Haqq Ibn ʿAtiyya, who also occupied the post of *qadi* in Almeria in 529/1134, was appointed directly by the Almoravid emir ʿAli b. Yusuf. Indeed, he is given the title of *qadi l-jamaʿa* in the inscription that, seemingly, commemorates the construction of a basin for ablutions in the city’s main mosque [Fórneas 1977: 33–34](17). Apart from the capital, Almeria, the only judicial headquarters documented in the homonym province was Berja, where Abu Ishaq Ibrahim b. Muhammad b. Ismaʿil b. Furtis exercised as *qadi*—and not as *hakim*—until his death in 531/1136–1137 [El Hour 2000].

The *fatwà* does not provide any indication to establish the identity of the accusers, whether they were neighbours or relatives of the woman(18), individuals who were acting out of private interest, whether they formed part of a kind of voluntary police body for enforcing customs or whether they performed the vigilance of customs and morals by appointment of the authorities.

### 4. The *Fatwà* in the Context of Ibn Rushd’s Doctrine on *Zinà*

The mufti established that the case was a matter of stoning to death (*rajm*) which was totally consequent with Maliki doctrine on *zinà* provided that the woman recognised that the man who had made her pregnant was not her husband, and that she was a *muhsana*. However, that impression tends to vanish when the *fatwà* is put in the broader context of Ibn Rushd’s doctrine on *zinà*, as he presented it in two of his works: *al-Bayan wa-l-tahsil*, a voluminous commentary to an earlier Andalusi compilation of Maliki jurisprudence known as *al-ʿUtbiyya* or as *al-Mustakhrajja* and written by al-ʿUtbi (d. 868 c.e.) [Ibn Rushd al-Jadd 1984: IV, 428–429, V, 30–31, VI, 413–414, 417, 421, 425–426, XV, 470, XVI, 317–318, 323–325, 335–336, 347–350, 356] as well as in his *al-Muqaddamat*, a commentary to the famous *Mudawwana* of Sahnun (d. 854-855 c.e.) [Ibn Rushd al-Jadd 1988: III, 239–250].

From these sources we learn that for Ibn Rushd the offence of *zinà* deserved to be treated with the greatest possible severity, on the basis of Maliki doctrine. However, followed strictly, Maliki doctrine on *zinà* considerably reduced the chances that a *qadi* might sentence someone to stoning to death in several ways:
1) Strong restrictions are imposed where means of proof are concerned; four upright male witnesses or the confession of the accused are required to demonstrate the crime and the witnesses’ declarations must not contradict one another. Circumstantial evidence of zinà is not admitted, with the exception of Malikis who admit pregnancy as circumstantial evidence of zinà. The Malikis, however, accept the doctrine of al-walad li-l-firash (literally, “the offspring belongs to wedlock”) which counterbalances their admission of pregnancy. According to the doctrine of al-walad li-l-firash, the husband of the mother or the master of the concubine is considered to be the legitimate father of the child she has borne, the legal duration of the pregnancy being established for a period of between six months and up to five years. This doctrine enters in force immediately after the conclusion of the marriage contract between the parties and applies even to a pregnant woman whose husband claims to have repudiated her before having consummated marriage with her, unless it is clear that the woman is lying, or the husband pronounces the li’an oath in order to reject paternity. Li’an is an oath which, in the absence of legal proof, grants the husband an opportunity to accuse his wife of adultery and to reject paternity of the child she is expecting or she has given birth to, without committing a crime of calumny by doing so. To avoid the punishment of zinà, the wife has to pronounce the oath too. At the end of this process, the marriage is dissolved without the man being able to take the woman back as his wife.

2) Those who are ready to give testimony of zinà against someone are dissuaded of doing so with the threat of penalties for calumny in case their declaration is deemed false. If someone provides evidence of zinà and retracts once a sentence of stoning is applied against the accused, he will have to pay half of the victim’s blood price.

3) The accused can withdraw their confession at any moment even if part of the sentence has already been applied. Except in crimes of calumny, a recommendation is made to qadis that they suggest the accused withdraw their confession, and it is considered more meritorious to conceal offences that may be punished with hadd than to reveal them. Last but not least, hudud must be averted in case of doubt (shubha) [Malik b. Anas, Ibn Abi Zayd al-Qayrawani 1999: X, 265, XIV, 231–232, 248, 260, 368–371; Ibn
Ibn Rushd was very strict about presenting false allegations to rebuke an accusation of zinà [Ibn Rushd al-Jadd 1984: VI, 413–414]. However he not only endorsed all the aforementioned restrictions to the implementation of stoning for zinà but, as we have seen, added a jurisdictional limitation according to which only chief qadis can issue a sentence to stoning to death. Also, he excluded accusations of zinà from the spectrum of admitted voluntary performances of the principle of commanding right and forbidding wrong, with the exception of rape [Ibn Rushd al-Jadd 1984: III, 1627, XVI, 335–336]. As to the performance of the principle under the ruler’s command, he found it permissible but not commendable [compare with Cook 2000: 363–365]. Further, he showed a remarkable degree of compassion in his definition of the term shubha or doubt to the point of asserting that “if a man sells his woman to another man because he is hungry, the hunger constitutes “doubt” (shubha), because “what shubha is stronger than hunger, due to which God permitted the eating of carrion, blood (cattle not slaughtered as is established) and pork!” [Ibn Rushd al-Jadd 1984: XVI, 324–325; 1987: III, 1462–1464 and 1475–1479(19); al-Wansharisi 1401/1981: IX, 573; Ibn Abi Zayd al-Qayrawani; 1999: X, 265].

A striking feature of the fatwà is Ibn Rushd’s reluctance to be pedagogical with the mustafti, leaving the latters’ questions unanswered: “Is it of any use for her to claim that she had been raped? If the victim of slander pardons the slanderer, does that mean the corresponding hadd is overturned?” The mufti did not provide the judge from Almería with any kind of argument that might encourage him to act of his own accord. Rather, he kept to the essential, creating the expectation that the woman was going to be condemned to the maximum penalty—a sentence more severe than that which the judge and the people who had denounced the woman might have foreseen. In my view, the fatwà was issued to ensure, not so much that the woman should receive the punishment that corresponded to the offence she had supposedly committed, but rather that the case be judged by the chief qadi and not by the
magistrate from Almería.

Ibn Rushd’s answer suggests also that he was not certain that the judge would take notice of his directive, likely because the latter could not be forced to doing so. We know of Almoravid hukkams who were instructed to submit serious offenses to higher judicial authorities but we are not certain that this one in particular had received similar orders in his nomination. Otherwise, whence the need to consult with a mufti? And why didn’t Ibn Rushd simply advice him to report the case to the qadi of Almería or to the sahib al-madina? On the other hand, Ibn Rushd does not say that a hakim is not entitled to adjudicate hudud crimes. Rather, he only excludes hudud punishments involving the death of the accused from a hakim’s jurisdiction. These considerations give ground to think that the hakim who addressed Ibn Rushd did not depend on a qadi and that he thought he was entitled to decide the case of the woman denounced before him. Qadis’ inability to control the administration of hudud(20) as betrayed by the fatwà, could hardly have pleased Ibn Rushd. However, all he could do was to use the obligation to consult with muftis, and not to neglect the opinions of prestigious ones like himself, to convince his petitioner to send the case to the chief qadi. At the same time, Ibn Rushd subtly disabled his petitioner to adjudicate the case himself by refusing to provide him with the necessary legal advice. Ibn Rushd’s short but substantive answer is thus much more than a claim to exclusivity over a given legal matter. It co-opts legal consultation to invest chief qadis’ hierarchical superiority with formal content, and to stress their independence from political authority.

Certainly, qadis and non-qadi judges were recruited from among the same pool of legal scholars. In fact, as we have seen, performance of governmental magistracies enhanced eligibility for qadiship, which appeared to represent the summit in the career of a legal scholar. However, as is reflected by the fatwà, once appointed, hukkam tried to act with as much independence as possible. The tension revealed by the fatwà, indicates that Almoravids’ designation of these magistrates was a sophisticated strategy aimed at divesting power from the qadis, who had become powerful enough to build a serious challenge to Almoravid authority in al-Andalus. Second, it introduced a factor of division among the fuqaha’ in order to deactivate their social influence. At the same time, by offering governmental magistracies to the fuqaha’ and not to lay state officials, the Almoravids kept alive their claim to religious legitimacy on the grounds of supporting the adherents of the Maliki school.

The doctrine on hudud or statutory crimes and their corresponding punishments
combined with legal consultation emerges thus as a tool to sharpen the distinction between religious and governmental justice and to remind rulers that neglect of qadis’ instructions to implement hudud efficiently might compromise rulers’ religious legitimacy.

Qadis’ expertise to administer hudud crimes was imperative given the intricacies of the relevant legal doctrine and its many exceptions. Some legal sources of the Almoravid period show that the application of the rules governing the legal procedure in matters of statutory sanctions posed for them a number of doubts due to the difference between the former rules and those of the “civil” procedure. The existence of divergent and equally valid legal opinions applying to those rules added complexity to the adjudication of hudud cases [Serrano Ruano 2006b]. However, the condition of mastering the legal doctrine on hudud was sufficiently met by Almoravid qadis and muftis. Experienced fuqaha’ occupied qadiship in the most important urban centers of the Almoravid empire like Cordoba, Seville, Granada, Malaga, Murcia, Almería, Ceuta, Marrakech, etc., or were members of their advisory boards. As to less learned qadis, they could solve their doubts as they went along, by asking the jurists belonging to their advisory board (shurà) or other muftis. Indeed, the fatwà analyzed in this paper shows that the practice of legal consultation was followed also by non-qadi judges of small towns and rural areas [El Hour 2000–2001: 54].

III. Conclusion

Alignment with the Maliki school of law was essential to provide internal cohesion to the Almoravid movement and to their rise as the first Berber empire in Islamic political history, covering a highly islamized and urbanized region like al-Andalus. Almoravids’ attachment to Malikism—which by that time was prevalent in al-Andalus, in the north of the Magrib and in Ifriqiya—granted them the support of the legal scholars. In al-Andalus, jurists’ support to the conquerors translated into a reinforcement of qadiship in the sense to recover some of the competences that albeit acknowledged to them theoretically, had gone lost for them under previous rulers. The idyll, however, was far from being perfect. Almoravids retained their capacity to control legal scholars through the dispensation of appointments and dismissals and through the creation of a new governmental magistracy. The novelty of this
initiative resided in their combining the functions of a provincial qadi and those of a muhtasib rather than in the titles given to these judges. Almoravids’ interference in the administration of justice was also effected through their direct exercise of mazalim and through entitling the sahib al-madina and the governor to perform judicial functions. Almoravids’ attempts to weaken Andalusi qadis, however, did not suffice to prevent them from gaining an unprecedented level of influence, which eventually catapulted a number of them to seize full control of their localities when Almoravids’ power started to collapse by the middle of the 6th/12th century.

Legal scholars resorted to fatwās and doctrinal revisions to question their extreme dependence upon the ruler. Focusing on the political symbolism of hudud, they reminded those in power that doing without legal experts or neglecting their exclusive right to administer hudud might affect rulers’ legitimacy. In this respect, Ibn Rushd went the opposite direction than the Shi‘i jurists mentioned at the beginning of this paper. While the latter stressed that for a ruler to be entitled to implement hudud he had to be legitimate, the former stressed that for a regime to be legitimate the ruler had to delegate the implementation of hudud to qadis. In both tendencies, however, Islamic legal doctrine on hudud is instrumentalized to negotiate their proponents’ position in the judicial and political organization of the Islamic state, the concern to have transgressors actually punished with hudud being, consciously or unconsciously, relegated to a subsidiary role.

Notes

(1) On these caveats or restrictions see below, part III, Section 1.
(2) This paper collects results of the Research Project “Cruelty and Compassion in Arabic and Islamic Literature: a Contribution to the History of Emotions”, funded by the Spanish Ministry of Science and Technology (HUM2006–04475/FILO).
(3) On the history of the Almoravid period see Viguera [1997b]. On qadiship during this period see Lagardère [1986], Rodríguez Mediano [1997] and El Hour [2006].
(4) The history of al-Andalus can be roughly divided into the following political periods: emiral (2th/8th–3th/9th centuries c.e), caliphal (4th/10th century c.e.), taifa (5th/11th century c.e.), Almoravid (last quarter of the 5th/11th and first half of the 6th/12th centuries c.e.), Almohad (second half of the 6th/12th and first decades of the 7th/13th centuries), second Taifa and Nasrid periods (7th/13th to 8th/15th centuries c.e.).

229 Chief Qadi (Qadi - Jama'a), Non-Qadi Judges, Almoravid Rulers and the Limits of Adjudication in Matters of Hudud Punishments (Ruano)
(5) The Almoravid empire extended to both sides of the straits of Gibraltar, from the Niger river in the south to Zaragoza in the north, with their main political capital in Marrakech, and Granada and Cordoba as the military and religious capitals of al-Andalus respectively.

(6) He was Abu l-Asbagh ‘Isa b. Sahl b. ‘Abd Allah al-Asadi al-Jayyani, known as Ibn Sahl (Jaen, 413/1022-3-Granada, 486/1093).

(7) The Nasrid sultans of Granada also used to organize weekly sessions to hear their subject’s complaints [Calero 2000: 412].


(9) Al-Azdi was subsequently promoted chief qadi of Cordoba, replacing Ibn Rushd al-Jadd.

(10) Further on the jurisdiction of the market inspector [Müller 2000a: 74–84].


(12) Shafi’is consider that dhimmis can also be muhsan; Hanafis and Hanbalis demand that both the accused parties be muhsan for stoning to take place; Hanafis do not impose exile in addition to the one hundred lashes as punishment for ziná. Among the Shi’is the concept of ziná covers a broader spectrum of sexual behaviours and that of muhsan is restricted to a person who, at the time the offence is committed, is married, thus excluding the divorced and widowed [Peters 2004]. Malik was in favour of exiling the man but not the woman or the slave even though the opposite was also transmitted, that is to say, that exile would take place independently of gender and of condition, whether free or slave. Also, he held that the exiled be imprisoned in the place he was exiled to [Ibn ‘Abd al-Barr 1993: 53–54].

(13) In al-Andalus and the Maghrib, where the Maliki school prevailed, qadis were required to consult with an advisory council of jurists (shurà), which became a fundamental institution of the judicial administration. On shurà in al-Andalus see Marín [1985] and Müller [1999: 151–154].

(14) Concerning Almeria, the most important commercial port of al-Andalus in the Almoravid period, see Molina [1997: 283–287].

(15) For instance, al-Wansharisi records a fatwà by al-Qabisi concerning a girl who went away for three days and, when she reappeared, it was her sister who took her before the judge [al-Wansharisi 1401/1981: IX, 573].

(16) This latter fatwà shows a remarkable readiness on the part of Ibn Rushd to apply the principle of shubha to actual accusations of ziná and to avert their consequences.

(17) In this latter connection, it is pertinent to remind that in Cordoba, during the taifa period — more precisely during the rulership of Ibn Jahwar (between 435/1043–461/1069) — hadd sentences...
involving the death of the accused might be issued at the request of a non religious judge like the sahib al-madina, or pronounced by the ruler himself [Müller 2005: 432, 436, 438, 441–442]. This reality was familiar to Ibn Rushd al-Jadd, who was born in Cordoba precisely in that period. Yet, rulers’ involvement in issuing death sentences against culprits of hadd crimes, e.g. heresy (zandaqa), was by then a long established practice dating back to the emiral period [e.g. Fierro 1987: 57–63].

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ABSTRACT
Delfina Serrano Ruano
Chief Qadi (Qadi l-Jama′a), Non-Qadi Judges, Almoravid Rulers and the Limits of Adjudication in Matters of Hudud Punishments

This paper deals with the relationship between qadis and non qadi judges in al-Andalus during the Almoravid period (last quarter of the 11th century-second half of the 12th century). The topic deserves attention given the widespread assumption that under the Almoravids, qadis and Maliki jurists in general reached an unprecedented advantageous position in exchange for support to the ruling dynasty. Yet the practice of entrusting non-qadi judges with competences that were theoretically under qadis’ exclusive purview did not disappear, and this was not with the latters’ acquiescence.

Focus is put on a series of legal texts about zinà (illegal sexual intercourse) produced by Ibn Rushd al-Jadd (Cordoba, 450/1048–520/1126)—“the grandfather” of the famous philosopher, physician and legal scholar Ibn Rushd al-Hafid, better known in the Latin west as Averroes. A careful examination of these texts and a reconstruction of their context show that the specificities of the legal doctrine on hudud (statutory crimes) and the mastering of the art of legal opinion were instrumental for Ibn Rushd to stress the distinction between religious and governmental justice and to remind rulers that neglect of qadis’ instructions to implement hudud efficiently might compromise their claim to legitimacy grounded on the fulfilment of shariʿa in their domains.

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